State of New Hampshire
Supreme Court

NO. 2012-0598

2013 TERM

APRIL SESSION

Evelyn & Kenneth Doerr

v.

Dawn & Philip Tuomala

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

ANSWERING BRIEF OF PLAINTIFFS-APPELLANTS

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SUMMARY OF ARGUMENT

Evelyn and Kenneth Doerr answer the Tuomalas' argument that the easements are their driveway because that is how they have been used, by pointing out that is a self-fulfilling condition. The Doerrs answer the Tuomalas' argument that the easements are their driveway because they were not on the 1978 plan, by pointing out that the plan was drawn by the Tuomalas and that the roads were either inadvertently omitted or were undrawn with an intent to deceive. The Doerrs then answer the allegation that one of their arguments was not preserved, by showing that is was.

The Doerrs answer the allegation that they engaged in speculation by noting that easements must be construed with regard to circumstances at the time of creation, which requires inferences.

On the Tuomalas' cross-appeal argument that the Doerrs' land is not a dominant estate with regard to the easements, the Doerrs show that the original deed creating the easements intended some non-contiguous parcels to be dominant estates, and thus the Doerrs enjoy the easements.

ARGUMENT

I. Easement C is Not Merely a Driveway

The cardinal rule in interpreting deeds is to fathom the intent of the parties at the time of the conveyance. "Defining the rights of the parties to an expressly deeded easement requires determining the parties' intent in light of circumstances at the time the easement was granted." *Dumont v. Town of Wolfeboro*, 137 N.H. 1, 5 (1993); *Soukup v. Brooks*, 159 N.H. 9, 16 (2009).

The Tuomalas make two arguments to support the trial court's conclusion that Easement C was intended to provide access to the Tuomala's cottage, and thus constitute their "driveway."

A. Self-Fulfilling Condition

The Tuomalas first argument is that because Easement C has long been used as a driveway, it is therefore a driveway. Citing the trial court's ruling, the Tuomalas's argue: "Easement C has been utilized in the same manner for as long as it has existed, such that its purpose today is the same as it was in 1978." TUOMALA OPPOSING BRF. at 14.

It is true that its purpose has not changed, and it is true its users have been few others than the Tuomalas. This is because, however, the Tuomalas erected a gate at one end and a no-trespassing sign at the other. They have physically and personally warned away everyone they have encountered, just as they treated Evelyn and Kenneth Doerr, who were merely passing through. It is thus no surprise that Easement C is infrequently populated. That is merely post-conveyance behavior, however, not disclosing or illuminating the "circumstances *at the time* the easement was granted." *See LeBaron v. Wight*, 156 N.H. 583 (2007) ("A subsequent grantee's interpretation of language in a deed … has no bearing upon [this Court's] interpretation, which focuses upon the intention of the parties at the time of the conveyance.").

Thus the fact that nobody goes there is nothing more than a self-fulling condition. While

it may be helpful to the Tuomalas if the court someday reaches an adverse possession claim, it is not an aid in the interpretation of the deed.

B. Roads Not on 1978 Plan

The Tuomala's second argument is that because Easement C was not shown on the Bush Farm map in 1978, it is therefore a driveway. TUOMALA OPPOSING BRF. at 13-14.

The Tuomalas twice conceded, and the record supports, that "the way over which the Doerrs now claim to hold a right-of-way easement existed when Mr. Bush subdivided the John Bush Farm in 1978," and at that time they existed "as travel ways." TUOMALA OPPOSING BRF. at 6, 10.

The Tuomalas do not offer an explanation for the failure to depict Easement C on the 1978 plan. The Wilton Planning Board demanded that the subdivision map "designate all private roads as such." WILTON PLANNING BOARD MINUTES (Aug. 17, 1978), Exh. K, *Appx.* at 43. Despite that directive, Mr. Tuomala, who helped draft the plat, did not draw on it the private roads, and thus made the implicit representation to the Planning Board that they did not exist. In their opening brief the Doerrs charitably quoted Mr. Tuomala's testimony that the failure was because the map was done hurriedly for a Planning Board deadline. *Trn.* at 47; see DOERR OPENING BRF. at 7. Insofar as the Tuomalas now deny the failure to depict was accidental, TUOMALA OPPOSING BRF. at 6, n. 8, it is equally plausible that, anticipating a claim such as the Doerrs', he intentionally neglected to draw them with a purpose to deceive.

In any event, the lower court's reliance on their absence from the plat is not a basis on which to find that they did not exist; or even more attenuated, that their absence says anything about the Doerrs' right to use them.

C. 50-Foot Easement

Neither of the Tuomala's arguments account for the fact that the easements are 50 feet wide. If Chalet Pearl's interest were only to ensure a personal ability to traverse the land, reserving a small easement or the current narrow 9-foot travel way would have been sufficient. Instead it insisted on a municipal standard. There is no other reasonable explanation for this, other than anticipating someday there might be a need for such uses as a wide road, increased traffic, subdivision, or municipal adoption. WILTON ROAD DESIGN SPECIFICATIONS ¶ 1.4 (Nov. 20, 1991), Exh. R, *Appx.* at 85 ("The minimum street width right-of-way shall be 50 feet.").

The wide easement is in accord with the preexisting Comvest deed that in numerous ways facilitates development and future state, county, or municipal adoption of the existing roads. DEED, BUSH→COMVEST at 3-4, *Appx.* at 10-11 (creating 50-foot rights-of-way, requiring abandonment of ownership of Jackson Drive and secession along other roads to ease adoption by public authorities, ensuring future development "not be in disharmony" with deed's restrictions and uses, giving grantee right of first refusal to buy other portions of grantor's land for development purposes).

Accordingly, construing Easement C as "driveway," "purely personal in nature," "solely for ingress to and egress from buildings," and "not for subdivision-development purposes," is contrary to both the deed language, and the manifest intent of the parties at the time of the conveyance.

D. If 2¼ Mile Length of Road Were Intended to be a Driveway, Deed Would have Said So

The Tuomalas claim that the entire 2¼ mile length of road – from the end of Jackson Drive where they put a no-trespass sign to the end of Woods Road where they put a gate – is their driveway. *Trn.* at 32, 110. This they pin on a phrase that is worded generally but does not mention that 2¼ mile length of road.

It cannot be disputed that the driveway they claim differs from the popular understanding

of what is generally regarded as a driveway. *Dolske v. Gormley*, 375 P.2d 174, 178 (Cal. 1962) (driveway ordinarily defined as "a path leading from a garage or house to the street, used especially by automobiles"); *Town of Rye v. Ciborowski*, 111 N.H. 77, 81 (1971) (words given their "popular usage" unless circumstances suggest otherwise). It goes over a bridge, crosses property boundaries, connects two public roads, is susceptible of flooding, and passes by but does not go to the Tuomalas' house.

A road going through one's land is valuable thing. Had John Bush intended the entire 2¼ mile road to be a "driveway" at the time the deeds were drawn, he would have described it specifically and not hid it in generalities. Given that the driveway parenthetical already existed in the deeds when Chalet Pearl and the Tuomalas later created their system of "easements," had they intended the entire 2¼ mile length of road to be a "driveway," they would have used the word.

It is apparent that the general phrase – "driveways which are purely personal in nature and are solely for ingress to and egress from buildings on any of the premises or are for the sole purpose of using or enjoying the woodlands, field and the like and are not for subdivision-development purposes" – means accesses to particular land features, not the road that traverses the entire property.

E. Preservation of Future Roadways

In their opening brief the Doerrs offer an alternate interpretation of the deed. Given its grammatical construction, the placement of commas, and the placement of a parenthetical,[1] it can be read to mean that the driveway exception applies to future roadways, and that the only arguable future roadway here is the driveway leading from Easement C to the Tuomalas' door. DOERR OPENING BRF. at 27.

The issue is well within the question posed in the appellant's notice of appeal – whether the "way leading past the Tuomala's house was a 'driveway … purely personal in nature'" – which is broad enough so it does not distinguish between, or limit itself to, existing or future roadways.

The issue was presented to the trial court as well.

In paragraph 12 of their motion for summary judgment, the Doerrs wrote they "have joint and unlimited rights of way over all existing roadways … as shown on the Chalet Pearl Plan (including the roadway that crosses the Tuomala Parcel), *as well as over future roadways built by Mr. Bush or Comvest Corporation and their respective … successors*." PETITIONERS' MOTION FOR SUMMARY JUDGMENT ¶ 12 (Mar. 1, 2010), *Appx.* at 130, 134 (emphasis added).

The Tuomalas directly responded, citing paragraph 12. They objected to the Doerrs' claim of "'joint and unlimited rights'" over all existing roadways, *and even future roadways*." RESPONDENTS' OBJECTION TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT ¶ 6 (Mar. 31,

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[1]THE GRANTOR AND THE GRANTEE, their respective heirs, devisees, executors, administrators, successors and assigns, shall have joint and unlimited rights of way over all existing roadways, whether public or private, and which are now the property of the GRANTOR to convey, as well as over future roadways built by the GRANTOR or the GRANTEE, their respective heirs, devisees, executors, administrators, successors and assigns (except for those driveways which are purely personal in nature and are solely for ingress to and egress from buildings on any of the premises or are for the sole purpose of using or enjoying the woodlands, field and the like and are not for subdivision-development purposes).

DEED, BUSH→COMVEST at 3 (Nov. 3, 1978), Exh. 3, *Appx*. at 8.

2010), *Appx.* at 137, 139 (emphasis added). The Tuomalas again responded in their trial memorandum, arguing that, despite the Tuomalas' having moved their driveway after 1978, "there was no evidence at trial that 'future roadways' were created following the creation of the Easement in 1978, so the court need not consider whether any future roadways are included in the Easement." RESPONDENTS' TRIAL MEMORANDUM at 3 (July 9, 2012), *Appx.* at 151, 153.

Although the court did not address the issue in its order, the parties argued over "future roadways" and whether there is one here. Preservation requires that the matter be presented to the court so it has a chance to resolve any errors. *State v. Ayer*, 150 N.H. 14, 21 (2003) ("When trial courts have an opportunity to rule on issues and to correct errors before they are presented to the appellate court, the preservation requirement is satisfied."). That the parties argued over the issue is sufficient to show the court had an "opportunity to rule," even if it declined the opportunity.

Accordingly, the issue was preserved.

II. "Speculation" Supported by Evidence

As noted, "[d]efining the rights of the parties to an expressly deeded easement requires determining the parties' intent in light of circumstances at the time the easement was granted." *Dumont v. Town of Wolfeboro*, 137 N.H. 1, 5 (1993). Thus to construe an easement, the court *must* seek to divine the parties' intent at the time of the conveyance.

There was no witness at trial present at the time of the Bush conveyance to Comvest, and no witness who could testify about Chalet Pearl's intent when it created Lot A-71-1 and the system of easements. Thus, in order to "determin[e] the parties' intent" one must necessarily infer, based on the intentions manifest in the deed language, and guided by the "light of circumstances at the time the easement was granted." In this vein, the Doerrs' opening brief offers an interpretation of the parties' interests and bargaining positions at the time, given the deed language and known circumstances.

It is nonetheless unreasonable to suggest that any owner, regardless of whether they plan to develop, would convey away the possibility of future development, and thus a significant portion of their property's value, without evidence that they had such an intent (for instance, creating a conservation easement). No such intent is present here.

Following is a list of what the Tuomalas call "speculation," TUOMALA OPPOSING BRF. at 7, n. 9, in their various footnotes, with the basis in the record for each:

- The Tuomalas say "[t]here was no evidence … that John Bush ever farmed the property," and point to photos purporting to show a "mature forest." TUOMALA OPPOSING BRF. at 2, n. 3. To the contrary, the John Bush Farm is prominently called a "farm" on many documents. While the issue is irrelevant, the photographs the Tuomalas cite do not show a "mature forest." First, the photos are confined to showing the land immediately around the pond, not the farmable area up the hill. Second, at the time of the photos, the land had not been owned by John Bush for nearly 30 years. Third, a close view of the photos does not show "mature forest," but one with closely-spaced small trees and many birches, indicating a young forest. Tom Wessels, *Forest Forensics: A Field Guide to Reading the Forested Landscape* (2010).

- That the Tuomalas' house is located on a steep bluff, TUOMALA OPPOSING BRF. at 6, n. 7, is easily discerned from the topographic lines contained in an exhibit that is part of the record. FLOOD ELEVATION PLAN (Dec. 7, 2009), Exh. A, *Appx.* at 6. That there is access to the pond over Easement B is the purpose of Easement B. DECLARATION OF EASEMENTS ¶ 2 (Apr. 26, 2000), Exh. I, *Appx.* at 38; CHALET PEARL MAP - COVER SHEET n. 13 (Oct. 26, 1999), Exh. 2, *Appx.* at 3 ("Easement 'B' is proposed for access to the pond").

- The portion of the quoted language with its comma is relevant to the Tuomalas' argument regarding the implications of the Doerrs' parcel being non-contiguous. *See* TUOMALA OPPOSING BRF. at 4, n. 5. That portion of the deed was not quoted, with or without a comma, because it did not become relevant until the Tuomalas filed their opposing brief arguing their cross-appeal issues.

- There can be little dispute that the complex system of easements contained in the deeds and covenants is "creative." DEED, CHALET PEARL→DAWN TUOMALA (Nov. 29, 2000), Exh. H, *Appx.* at 36; DECLARATION OF EASEMENTS (Apr. 26, 2000), Exh. I, *Appx.* at 38. That such a creative system of easements was designed to solve a problem is readily apparent. And easily discernable from the record is a problem that needed solving – a floodable non-lot, landlocked, without legal frontage, essentially unmarketable, uninsurable, and untaxable – as described in the Doerrs' opening brief. The Tuomalas' suggestion that there is no problem, TUOMALA OPPOSING BRF. at 9, n. 11, is not credible. The question for this Court is what was the parties' intent in light of the circumstances that gave rise to the creative solution.

- That the easement is 50 feet wide, and that the travel portion of the way currently within it is 9 feet wide, are in the record. TUOMALA OPPOSING BRF. at 9, n. 12. Given the fact that the connecting easements are the same width, and that the parties maintained that width throughout the easement system, is part of the circumstances presented to the parties at the time of the conveyance and to this Court now in its interpretation of the deeds in light of those circumstances.

- The Doerrs concede that the Tuomalas' house is known locally as the "cabin," not "cottage," TUOMALA OPPOSING BRF. at 6, n. 7, and apologize as they did not intend any aspersion.

Finally, the color composite map, to which the Tuomalas take issue but do not allege is inaccurate in any detail, TUOMALA OPPOSING BRF. at 2, n. 3, was contained in the statement of facts portion of the Doerrs' opening brief. The map plainly states it is a composite from many record sources, which are cited to the record. The map is contained in the Doerrs *statement of facts*, because it is part of the statement of facts, and not represented as an exhibit. The note on the color

composite map says that a copy is included in the appendix only to facilitate simultaneous viewing, and to not represent it as an exhibit. On the theory that a picture is worth a thousand words, and because there are between 330 and 350 words on a typical page of a brief, the Doerrs were careful to limit their opening brief to three pages less than the maximum page length.

III. Doerrs' Land Enjoys Appurtenant Easements on the John Bush Farm

A. John Bush Owned the Doerrs' Parcel at the Time he Subdivided

As discussed in both parties' briefs, John Bush owned a large parcel which he subdivided in 1978 by deed accompanied by a two-page subdivision plan. JOHN BUSH FARM MAP (Oct. 18, 1978), Exh. 1, *Tuomalas' Addendum* at 41-42.[2] The second sheet of that plan is demarcated as "Sheet No. 2 of 2," near the bottom margin on the left of the map. *Tuomalas' Addendum* at 41. That plan shows the land John Bush owned at the time. Of significance is the indication on the bottom-right of the plat, showing "other land of John Bush 31± acres." On the color composite map on page 22 of the Doerrs' opening brief, it is shown in brown, where it is also indicated "now land of Evelyn & Kenneth Doerr."

It is thus undisputed that at the time John Bush subdivided, he owned the Doerrs' parcel. TUOMALA OPPOSING BRF. at 17.

B. The Deed Language

The Bush→Comvest deed contains a long paragraph, the first half of which creates the roadway easements, specifies their width, and defines the driveway exception. The second half of the paragraph tells who are the land owners that enjoy the easements, *i.e.*, it defines the dominant estate-holders. It provides:

> Said rights of way shall not be limited to the land herein being conveyed, but shall be extended to and may be used in conjunction with other land presently owned by the Grantor (see plan of land entitled: Subdivision Plan of Land, the John Bush Farm [citation details omitted], to be recorded herewith), as well as land hereinafter acquired by the Grantor and/or the Grantee, their respective heirs, devisees, executors, administrators and assigns, in the general area, provided said lands have common boundaries with the premises presently owned by the Grantor, included those being hereby conveyed.

[2]The second page of Exhibit 1 was omitted in error from the appendix submitted with the Doerrs' brief.

DEED, BUSH→COMVEST at 3, *Appx.* at 10 (capitalization altered, citation details omitted as indicated, missing close-parenthesis inserted in grey type, missing comma inserted in grey type, underlining added). There are several errors in drafting on which the parties here probably agree:

- There is an open-parenthesis before the phrase "see plan of land," but no close-parenthesis. It is postulated that the close-parenthesis should have been after the word "herewith." For ease of reading and because probably it does not affect any meaning relevant here, the missing close-parenthesis has been added in grey type, on page 11, *supra*.

- The Tuomalas point out that there should have been a comma before the phrase "in the general area." TUOMALA OPPOSING BRF. at 17, n. 13. For ease of reading and because it is not disputed, it has been added in grey type on page 11, *supra*.

- The final phrase of the paragraph uses the word "included," whereas it should probably be "including."[3]

C. Tuomalas' Argument is Circular

Which phrase modifies which portion of the paragraph may depend upon grammar, punctuation, and possibly the fixing of the various scriveners' errors. The Tuomalas duck these issues in their brief, focusing entirely on the"common boundaries" phrase, and saying nothing about the others. Rather, they circularly argue that because the Doerrs' land is not contiguous it is not connected. TUOMALA OPPOSING BRF. at 17. They also ignore *Soukup v. Brooks*, 159 N.H. 9, 18 (2009) (easement appurtenant can exist even though servient and dominant estates non-contiguous).[4] The court perceived the textual issues and the parties' positions, and concluded the

[3]Successive deeds with this phrase recite the word as "including," not "included." *See* DEED, BUSH→TAYLOR (May 27, 1981), Exh. 4, *Appx*. at 16; DEED, TAYLOR→DOERR (July 14, 2008), Exh. 5, *Appx*. at 20.

[4]The Tuomalas appear to advance a preservation problem, erroneously suggesting the Doerrs have "claimed that the 'common boundaries' exception applies only to land acquired after the time of the Convest Deed," TUOMALA OPPOSING BRF. at 17 (emphasis in original). They cite to one of the Doerrs' pleadings which claims no such thing. Rather, what the Doerrs raised below, PETITIONERS' MOTION FOR SUMMARY JUDGMENT ¶ 11 (Mar. 1, 2010), *Appx*. at 133, and continue here, involves parsing the phrases (perhaps not at this level of exegesis, *infra*) and attempting to read the paragraph taking all the phrases into account.

Tuomalas' argument "would simply be illogical." ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT (May 19, 2011), *Appx.* at 142.

D. Parsing the Language – Easements Apply to Doerrs' Land

The operative paragraph has four phrases, which when parsed reveals a clear meaning.

1. First Phrase – Extended to and Used in Conjunction

The first phrase ("Said rights of way shall not be limited to the land herein being conveyed, but shall be extended to and may be used in conjunction with other land presently owned by the Grantor"), indicated by single underlining on page 11 *supra*, if it stood alone, clearly gives dominant estate status to other land which was then owned by John Bush. Its reference to the exhibit on which the Doerrs' parcel is drawn confirms this.

2. Second Phrase – Hereinafter Acquired

The second phrase ("as well as land hereinafter acquired by the Grantor and/or the Grantee, their respective heirs, devisees, executors, administrators and assigns, in the general area"), indicated by wavy underlining on page 11 *supra*, extends the first phrase to include any land in the area that John Bush or Comvest might thereafter acquire.

3. Third Phrase – Common Boundaries

The third phrase ("provided said lands have common boundaries with the premises presently owned by the Grantor,"), indicated by double underlining on page 11 *supra*, either modifies the entire paragraph, or modifies only the second phrase.

If it modifies the entire paragraph, it means that *all* dominant-estate holders have to be contiguous, as the Tuomalas would like.

If it modifies only the immediately-preceding phrase, it means that only future-acquired lands enjoying the easements have to be contiguous.

The second meaning is the most logical because of the third phrase's placement in the sentence. The requirement of contiguity directly contradicts the first phrase of the paragraph. If John Bush intended to require contiguity for present *and* future properties, two things would have been different: 1) the first phrase – "shall not be limited to the land herein being conveyed" – would have not been written so broadly, and 2) the contiguity requirement would have appeared earlier in the paragraph.

Moreover, requiring contiguity only for future-acquired land is rational. John Bush and Comvest both knew at the time what land John Bush owned, and could thus predict with some accuracy what parcels were becoming dominant-estate holders pursuant to the deed. It is unlikely that either John Bush as grantor, or Comvest as grantee, would risk the possibility that the day after their deal one or the other of them could acquire lots of property "in the general area" and thus unilaterally create many dominant estates that the other would be required to respect. But the number of contiguous parcels has a natural geographic limit, and thus would not open up the parties to unknown numbers of dominant estates using their easements.

For these reasons, this Court should construe the "common boundaries" requirement to apply only to "land hereinafter acquired." Because John Bush owned the Doerrs' parcel at the time, the phrase thus does not affect it, and the Doerrs have use of the John Bush easements, whatever they are construed to be.

4. Fourth Phrase – Including Those Hereby Conveyed

The fourth phrase ("included those being hereby conveyed"), indicated by bold underlining on page 11 *supra*, is not in dispute here, so any parsing is not necessary. Nonetheless, as the lower court concluded, the phrase makes clear that Bush owned *more* than the land being hereby conveyed; and that the easements necessarily applied to those other then-owned lands, of which the Doerrs'

parcel was one. ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT (May 19, 2011), *Appx.* at 142, 146.

E. Easements Appurtenant Appear in Doerrs' Deed

The deeds from Bush to Taylor, and then Taylor to Doerr, contain the same long paragraph, describing the easements over the John Bush Farm, and also the entire paragraph herein parsed defining who has rights over the easements. DEED, BUSH→TAYLOR (May 27, 1981), Exh. 4, *Appx*. at 15-16; DEED, TAYLOR→DOERR (July 14, 2008), Exh. 5, *Appx*. at 19-20.

As the lower court noted, "[t]his inclusion strongly suggests that Bush intended the rights of way established in the Bush-Comvest deed to extend to the Doerr parcel." ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT (May 19, 2011), *Appx.* at 146. There would be no reason to include these definitions in the Doerrs' deed if the easements were not part of what they own.

CONCLUSION

For the foregoing reasons, this Court should hold that the Doerrs have easements over the former John Bush Farm.

Respectfully submitted,

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CERTIFICATION

I hereby certify that on April 31, 2013, copies of the foregoing will be forwarded to Thomas J. Pappas, Esq.

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