THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2009 TERM
OCTOBER SESSION

Docket No. 2009-0331

Paul McCoy and Josephine McCoy

v.

Thomas Wood; Donna Wood, David J. Prentice,
Countrywide Home Loans, Inc., and Mortgage Electronic Systems, Inc.

APPEAL FROM DECISION ON THE MERITS
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF FOR PETITIONERS-APPELLANTS
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QUESTIONS PRESENTED

I. Whether the trial court's denial of an implied easement in the form of an equitable servitude was an error as a matter of law because the facts presented at trial sufficiently showed: (1) the intent to create a general scheme of development which included Lot 23-1 and the subdivision shown on Plan D-20316; and (2) the Woods had notice of the servitude on Lot 23-1 when they purchased the property.

All issues preserved in the McCoys' Requests For Findings Of Fact and Rulings Of Law and Petitioner's Trial Memorandum – Appendix at 24, 40.

STATEMENT OF THE CASE

This appeal arises out of an Order by McHugh, J. dated March 20, 2009 denying the Petitioners' request to reform a deed and quiet and settle the title to certain real property owned by Paul and Josephine McCoy (the "McCoys"), Thomas and Donna Wood (the "Woods"), and David J. Prentice ("Prentice"). (NOA 8)[1].

On or about June 21, 2007, the McCoys filed their Petition to Reform Deed and Quiet Title in which they sought to reform the deed from Flora Audette to the Woods conveying a certain parcel of property in Raymond, New Hampshire known as Lot 23-1 (the "Wood Deed") because it did not reflect the true intent of the parties when it mistakenly referenced an older plan.

Because reformation of the Wood Deed would affect the interests of others, the McCoys also named as defendants Countrywide Home Loans, Inc. and Citizens Bank New Hampshire, holders of mortgages encumbering Lot 23-1, and Mortgage Electronic Registration Systems, holder of a mortgage encumbering Lot 23 owned by Prentice. The Petition also named Mrs. Audette's grandson, Shawn Nichols, who potentially owned an interest in the disputed property. The trial court later dismissed Citizens Bank, and Nichols was defaulted.

[1] All citations to the Petitioner's Notice of Appeal will be cited as "NOA ___"; all citations to the Petitioner's Appendix to Brief will be cited as "App ___"; and all citations to the transcript will be cited as "Tr.___."

On or about February 4, 2008, the McCoys filed a First Amended Petition to Reform Deed and Quiet Title ("Amended Petition") asserting that Lot 23-1 was subject to a public or private easement in favor of the neighboring land owned by the McCoys.

An evidentiary hearing was held on February 26 and 27, 2009. The trial court issued its Order on March 20, 2009, granting and denying certain requests for findings and rulings made by the parties and denying the McCoys' requested relief. The trial court refused to reform the Wood Deed, finding no mutual mistake; and while not expressly discussing its reasons, the trial court also denied the McCoys' requests to establish an easement over the Woods' property. This appeal followed.

STATEMENT OF FACTS

The main question on appeal is whether, based on the findings and rulings below, the court committed reversible error in failing to rule that Lot 23-1 owned by the Woods is subject to an equitable servitude creating a right-of-way for ingress and egress to the adjacent land of the McCoys.

Conveyancing History.

In July 1958, Flora H. Audette and Willis S. Audette (the "Audettes"), as joint tenants with right of survivorship, acquired a lot of approximately 84 acres in Raymond, New Hampshire, then known as Lot 23. (App. 01). In January 1981, the Audettes subdivided a portion of Lot 23 into two 5-acre lots (known as Lot 23-1 and Lot 23-2) and a third lot of approximately seventy-four (74) acres (Lot 23). The subdivision is depicted in a plan recorded at the Rockingham County Registry of Deeds (the "Registry") as Plan D-10111 ("Plan D-10111"). (App.14).

On May 12, 1988, subsequent to Mr. Audette's death, Mrs. Audette conveyed the approximately 74-acre Lot 23 shown on Plan D-10111 to Spring Road Associates, reserving Lot 23-1 for herself (the "Spring Road Deed"). (App. 02). In June 1988, Mrs. Audette entered into an agreement with the Town of Raymond (the "Town") pursuant to R.S.A. 674:41, I(d) entitled, "Agreement and Release," which permitted her to construct a home on a private road known as Audette Road (the "Road Agreement"), together with the responsibility to open and maintain a way known as Audette Road. (App.10). The Road Agreement was recorded in the Registry in June 1988 at Book 2746, Page 1737. The Town

Planning Board issued a conditional approval of a plan subdividing Lot 23 and 23-1 into twenty-seven (27) separate lots, and in 1989, Mrs. Audette built a single-family dwelling on Lot 23-1. (App. 12, 18; Tr. 35). The house and its septic system were built in anticipation of and oriented to the proposed location of Audette Road, the internal road for access to the subdivision shown on the conditionally approved plan. (App.12; Tr. 35).

In May 1990, the Planning Board granted final approval of the new subdivision of the land, and the plan was recorded at the Registry as Plan D-20316 ("Plan D-20316"). Plan D-20316 showed twenty-six (26) separate building lots known as "Audette Estates" and Lot 23-1. (App. 12). Lot 23-1 on the newer plan has different dimensions and is larger than Lot 23-1 on the older Plan D-10111. (App. 12, 15-16). The newer Plan D-20316 also includes an access road identified as "Audette Road" along the northerly lot line of Lot 23-1. (App.12, 15-16).

In May 1991, Spring Road Associates conveyed Lot 23 on Plan D-20316 to David J. Prentice and Barbara A. Rose (the "Prentice Deed"). (App. 04). In November 1991, Spring Road Associates conveyed back to Mrs. Audette the remainder of the land it obtained from her in 1998 (the "Spring Road Return Deed"). (App. 06).

Subdivision Revocation.

In the spring of 1998, the Town Planning Board considered revoking the approval of Plan D-20316 because the public portion of Audette Road, abutting the subdivision, was narrower than the minimum 50-foot width. (Tr. 018-019;

095-096; App. 12). Paul McCoy, an abutter, received notices of the revocation proceedings and made an agreement with Mrs. Audette to purchase the subdivision as shown on Plan D-20316 if the Town did not revoke the 1990 Plan. (Tr. 095-096).

Mr. McCoy and Richard Ladd, the McCoys' expert, testified that the McCoys obtained or provided the necessary additional width to the public portion of Audette Road to prevent the revocation of the subdivision approval, and the Town did not revoke the subdivision approval. (Tr. 031, 046, 095).

The Wood Deed.

In July 1998, Mrs. Audette conveyed Lot 23-1 to Thomas and Donna Wood by way of the Wood Deed. (App. 09). The Wood Deed expressly states that it is subject to the Road Agreement. (App. 09, 10). The Wood Deed described the conveyed property by reference to the older Lot 23-1 on Plan D-10111 recorded at the Registry of Deeds. (App. 09). The Woods leased Lot 23-1 from Mrs. Audette for nine (9) months prior to their purchase of the parcel and were familiar with the surrounding area. (Tr. 115-116). Lot 23-1 on Plan D-10111 includes a portion of Audette Road as depicted on Plan D-20316. Without the use of this portion of Audette Road, a means of access to the remaining lots of the Plan D-20316 subdivision could be cut off. (App. 12, 14).

The McCoy Deed.

In September 1998, following the Planning Board's decision not to revoke the approval of Plan D-20316, Mrs. Audette conveyed to the McCoys the property

she reacquired from Spring Road Associates (the "McCoy Deed"). (App. 20; Tr. 046). The McCoy Deed is dated approximately two months after the Wood Deed and references the newer Plan D-20316. (App. 9, 20). In the McCoy Deed, Mrs. Audette reserved the "right of Flora Audette and her heirs and assigns as owners of Lot 23-1, as shown on Plan D-20316 to pass over and repass over Audette Road for usual purposes." (App. 23).

Trial Testimony.

Richard Ladd, a land surveyor, testified as the McCoys' expert at trial. Mr. Ladd prepared Plan D-20316 and a septic design plan for a house later purchased by the Woods. (Tr. 016). Mr. Ladd described the dimensional differences between Lot 23-1 on Plan D-10111 and D-20316. (Tr. 24-25; App. 15-16).

Mr. Ladd also testified that he had over thirty-six years of title examination experience and that, through a title examination, he was able to determine from the records in the Registry the location of Audette Road. As mentioned above, the Wood Deed is expressly subject to the Road Agreement which imposed obligations and restrictions regarding Audette Road. Mr. Ladd conducted his search by consulting Town records, including the grantee index, the road index, plan index, and the Raymond Building Department file. (App. 18, 19; Tr. 036-037).

Scott Lapointe, Woods' expert, did not dispute Mr. Ladd's testimony that Audette Road could be located in the Registry plan index or that an examination of

the Registry grantee index would have revealed the reconveyance of Lot 23 by Spring Road Associates to Mrs. Audette and the reference therein to Plan D-20316, as well as the depiction of the revised Lot 23-1 abutting Audette Road. (Tr. 167-169). Mr. Lapointe also testified that when a title examiner encounters records that are ambiguous or require clarification, it is necessary to search outside the scope of the Registry of Deeds for clarification. (Tr. 194-196).

Trial Court's Order.

In its Order dated March 20, 2009, the trial court granted the following requests submitted by McCoy:

18. The Woods had actual knowledge of the Road Agreement, as it was referenced in the deed from Flora Audette to the Woods and was also recorded in the Rockingham County Registry of Deeds prior to their purchase of the Audette home.

20. The Road Agreement contains latent ambiguities regarding the location and status of Audette Road. (Exhibit 9). *See Flanagan v. Prudhomme*, 138 N.H. 561, 566 (1994); *Berthiaume v. McCormack*, 153 N.H. 239, 248 (2006).

21. Reasonable inquiry pursuant to the Road Agreement would require investigation of the records of the Town of Raymond.

22. Investigation of the Town of Raymond records would have revealed the existence of the following:

    a. Septic system design and approval;

    b. Public status of that portion of Audette Road formerly known as Smith Road;

    c. Approval and content of Plan D-20316 and configuration of Lot 23-1;

d. Tax Map showing lots on Plan D-20316, including 23-1. (App. 26-27).

Notwithstanding its granting the foregoing requests, the trial court held "[T]his case comes down to determining the validity or lack thereof of both plans referenced in this litigation." The trial court found that the Petitioners failed to carry their burden to prove that Plan D-10111 was not in effect at the time of the Wood Deed and that Plan D-20316 is irrelevant. (App. 66). The trial court also ruled there was insufficient evidence of mutual mistake in the Wood Deed and denied reformation. (App. 68). Following the conclusion that the Wood Deed was valid, the trial court went further to find that "the boundaries on Plan D-10111 take precedence over the property as described in the McCoy Deed wherein Plan D-20316 was referenced." (App. 68-69).

The court did not address McCoys' argument to establish an equitable servitude over Lot 23-1 other than to deny McCoys' request for a ruling on that issue. (App. 69-70).

SUMMARY OF THE ARGUMENT

Although the trial court Order denied without explanation or discussion the McCoys' request for an equitable servitude in the form of an access easement across Lot 23-1 on Plan D-10111 benefiting the McCoy property, the McCoys argue on appeal that there was sufficient and uncontroverted evidence from which the trial court should have found such an equitable servitude exists.

An equitable servitude arises where the grantor intends to create a common scheme of development affecting the granted and retained property and of which the grantee has notice.

In this case, evidence of Mrs. Audette's intention to create such a scheme of development affecting the lots shown on Plan D-20316, as well as Lot 23-1 on Plan D-10111, includes construction of her house oriented to the location of the proposed Audette Road, the express reference to the Road Agreement in the Wood Deed, Mrs. Audette's efforts to prevent revocation of Plan D-20316, her agreement to sell the subdivision to the McCoys if Plan D-20316 was not revoked, her reference to Plan D-20316 in her deed to the McCoys, and her reservation in the McCoy Deed of the rights of owners of Lot-23-1 to use Audette Road.

The notice requirement was satisfied by the trial court's findings and rulings that the Woods had constructive notice of Plan D-20316 showing access to the subdivision by way of Audette Road running through Lot 23-1 on Plan D-10111.

In the alternative, the McCoys request that, should the Court find the trial court's Order or the record require further findings or clarification, this case be remanded for further findings or rulings.

STANDARD OF REVIEW

The Court reviews the trial court's application of the law to the facts *de novo*. *Bel Air Assocs. v. N.H. Dep't of Health & Human Servs.*, 158 N.H. 104, 107 (2008). "Findings and rulings falling within the discretion of the trial court will be upheld unless they are unsupported by the evidence or are erroneous as a matter of law." *See Patch v. Arsenault*, 139 N.H. 313, 317 (1995) (quotation omitted). The Court determines whether a reasonable person could have reached the same decision as the trial court based on the evidence before it. *See id.*

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY DENIED THE MCCOYS' REQUEST TO ESTABLISH AN EQUITABLE SERVITUDE BENEFITTING THE SUBDIVISON OVER LOT 23-1

Although there were findings below and uncontroverted evidence presented at trial to support a ruling that Lot 23-1 is burdened by an implied access easement in favor of the McCoys' property, the trial court erroneously denied McCoys' request to establish that easement as an equitable servitude. Accordingly, the trial court's decision should be reversed, and this Court should rule that the McCoy property and the Wood property are benefited and burdened by an equitable servitude in the form of a right-of-way across the Wood property.

Access easements may be created by implication. 17 C. Szypszak, *New Hampshire Practice, Real Estate* § 8.02[B] at 191 (2006 & Supp. 2009). Even where easement rights are not expressly stated in a deed, a development scheme

shown on a plan can imply rights-of-way and other easements. *Regan v. Hovanian*, 115 N.H. 40, 42 (1975) (comprehensive plan showing streets leading to a public lake created implied easement rights over those streets for purchasers of subdivision lots).

Implied easements may take either of two forms, depending on whether the deed expressly states that the easement exists or whether "the representation takes place outside the four corners of the deed." *See 700 Lake Avenue Realty Co. v. Dolleman*, 121 N.H. 619, 623 (1981). Where restrictions appear on the face of the deed, they may be enforced as covenants, but if they appear outside the deed, an equitable servitude results depending on the grantee's awareness of the restrictions. *See id.*; *Arnold v. Chandler*, 121 N.H. 130, 134 (1981) (equitable servitude created because "subsequent taker acquired the land with (constructive) notice of the restrictions on it . . ."). If the use of Audette Road as a right-of-way for the benefit of the McCoy property was intended by Mrs. Audette to be a general scheme of development affecting the McCoy and Wood properties of which Wood had notice, then the Wood property would be subject to the easement as an equitable servitude.

Equitable servitudes are enforced when the Court finds the intent to benefit the land retained or sold, and restrictions and easements will be implied where (1) "a general scheme of development can be shown" and the purchaser (2) "acquired the land with notice of the [servitude] on it." *See Hanslin v. Keith*, 120 N.H. 361, 363 (1980); *Traficante v. Pope*, 115 N.H. 356, 359 & 360 (1975); *see also Arnold*,

121 N.H. at 134. The requisite intent of the grantor may be "ascertained from the language of the instruments, conduct of the parties and the surrounding circumstances". *Traficante*, 115 N.H. at 360.

A. Sufficient and Uncontested Evidence was Submitted at Trial to Establish the Requisite Intent to Create a General Scheme of Development.

When a party claims an implied easement by way of an equitable servitude, the trial court must evaluate whether there was sufficient intent to create a general scheme of development. The McCoys argued that the facts and law supported a ruling that they are entitled to a right-of-way over the Wood property as an equitable servitude. (App. 49, 82). However, the trial court denied that request without discussion. (App. 28, 70).

The following evidence found by the trial court or uncontroverted at trial establish the intent to create a general scheme of development of the McCoy and Wood properties:

1. Mrs. Audette constructed her home and its septic system on Lot 23-1 oriented to the proposed Audette Road, which leads to the subdivision then considered by the Town Planning Board. (App.18; Tr. 015-16, 35, 038).

2. The Road Agreement required the clearing and maintaining of Audette Road. (App. 10).

3. The Wood Deed, which was delivered when Mrs. Audette owned both properties and seeking to avoid revocation of Plan D-20316, expressly was subject to the Road Agreement and, by implication as argued below, Plan D-20316. (App. 9).

4. At the time the Wood Deed was delivered, Mrs. Audette and Mr. McCoy were seeking to avoid revocation of Plan D-20316. (Tr. 093-096).

5. Mrs. Audette and Mr. McCoy agreed that if the subdivision plan was not revoked, he would purchase the subdivision shown on Plan D-20316. (Tr. 095).

6. The McCoy Deed conveyed the remaining land in the subdivision with reference to Plan D-20316 and a reservation of rights of use of Audette Road by the owners of Lot 23-1. (App. 20).

The septic plan demonstrates that Mrs. Audette was aware of the planned location of Audette Road passing in front of her home. Later, when she owned both properties and conveyed Lot 23-1 to the Woods subject to the Road Agreement, it would be unreasonable to conclude she intended to convey away access to the subdivision she was undertaking to protect from revocation and ultimately sell to the McCoys. The foregoing facts clearly show Mrs. Audette had an intention to create a general scheme of development affecting both lots before she conveyed the Wood Deed, at the time she delivered the Wood Deed, and at the time she conveyed the McCoy Deed.

B. The Trial Court's Findings Establish that the Woods Had Constructive Notice of the Servitude on Lot 23-1 When They Purchased the Property.

The second element necessary to establish an equitable servitude is that the grantee acquired the land with notice of the servitude. Such notice may be actual or constructive. This Court has held that a purchaser of real estate is charged with knowledge of "what may be revealed by an examination of the record or

reasonable inquiry on the basis of all the circumstances." *See Thomas v. Finger*, 144 N.H. 500, 503 (1999) (quotation omitted). This Court recently reiterated this doctrine, stating that, "bona fide purchasers are obligated to fully investigate apparent discrepancies to determine whether title to the desired parcel is encumbered in any way." *Mansur v. Muskopf*, 159 N.H. ___, ___, 977 A.2d 1041, 1047 (2009); *cf. Amoskeag Bank v. Chagnon*, 133 N.H. 11, 15-16 (1990) (improperly recorded mortgage would obligate bona fide purchaser to investigate beyond the record to determine whether a properly executed and acknowledged mortgage actually exists). In addition, inquiry notice arises from a legal inference of some apparently extraneous fact that is sufficiently "curious" or "suspicious" according to normal human experience to suggest a genuine potential for a defect that the purchaser should, as a matter of law, engage in an investigation into it. 14 R. Powell, *Powell on Real Property*, at § 82.02[1][d][iii] at 82-38 (Michael Allen Wolf, ed., 2009).

The Wood Deed expressly was subject to the Road Agreement. (App.10). The trial court found that the Road Agreement was latently ambiguous, and as a result, the Woods were required to investigate further by reviewing the Raymond town records. (App. 22, 70). The trial court also found that an investigation into the Town Records would have revealed several documents providing the Woods with notice of the servitude burdening Lot 23-1 when they purchased the property. (App. 26-27 70).

The trial court found the Road Agreement referenced in the Wood Deed to be latently ambiguous. (App. 22, 70). The Road Agreement is ambiguous because although the subject is a private way called Audette Road, there was no road by that name shown on Plan D-10111. Given the obligations to open and maintain Audette Road imposed by the Road Agreement on the owners of the Wood property, and that the location of the road could not be ascertained from Plan D-10111, the Woods were charged with making reasonable inquiries to determine whether and how Audette Road affected their property. *See Thomas*, 144 N.H. at 503.

Recognizing the questions and uncertainties arising from the ambiguous Road Agreement, the trial court made the following findings of fact:

> 18. The Woods had actual knowledge of the Road Agreement, as it was referenced in the deed from Flora Audette to the Woods and was also recorded in the Rockingham County Registry of Deeds prior to their purchase of the Audette home.
>
> 20. The Road Agreement contains latent ambiguities regarding the location and status of Audette Road. *See Flanagan v. Prudhomme*, 138 N.H. 561, 566 (1994); *Berthiaume v. McCormack*, 153 N.H. 239, 248 (2006).
>
> 21. Reasonable inquiry pursuant to the Road Agreement would require investigation of the records of the Town of Raymond.
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> 22. Investigation of the Town of Raymond records would have revealed the existence of the following:
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> a. Septic system design and approval;
>
> b. Public status of that portion of Audette Road formerly known as Smith Road;

c. Approval and content of Plan D-20316 and configuration of Lot 23-1;

d. Tax Map showing lots on Plan D-20316, including 23-1.

(App. 22, 70).

Based on the foregoing findings, the Woods had constructive notice of the location of Audette Road as shown on Plan D-20316, as well as the reconfigured dimensions of Lot 23-1 as shown on that plan. Therefore, the Woods had notice of the common scheme of development by which a right-of-way was intended to cross Lot 23-1 to provide access to the lots shown on Plan D-20316.

The approved septic system and design plan shows that the home and septic system built on Lot 23-1 are positioned in relation to a proposed road going directly through the property. (App. 18). A letter from the New Hampshire Department of Transportation in the Town of Raymond records confirms that the right-of-way, adjacent to Lot 23-1, known as Smith Road, is a public road and, therefore, could not be the Audette Road of the Road Agreement. (App. 17). The Tax Map available in the Town records also would have depicted the lots shown on Plan D-20316 and Audette Road passing directly through Lot 23-1. (Tr. 044-045). Most importantly, the trial court found that a proper investigation would have resulted in knowledge of the recorded Plan D-20316, which shows the adjacent subdivision and that access to the subdivision by Audette Road, passing directly through “old” Lot 23-1. (App. 12).

There was sufficient evidence presented at trial to support the trial court's finding that the Woods acquired Lot 23-1 with constructive notice of the servitude for access to the subdivision via Audette Road. While the trial court failed to address clearly the issue of whether an equitable servitude was created under the circumstances, the record provides this Court with sufficient factual basis to establish an implied easement for access to the subdivision over Lot 23-1. For the foregoing reasons, the trial court's decision should be reversed.

II. IN THE ALTERNATIVE, THIS CASE SHOULD BE REMANDED SO THAT THE TRIAL COURT MAY APPLY THE FACTS TO THE LAW RELATED TO EQUITABLE SERVITUDES.

The trial court made sufficient findings of fact to establish an equitable servitude as a matter of law, so the Court may address the issue without remand in the interest of judicial economy. *Soukup v. Brooks*, 158 N.H. ___, 977A.2d 551 (2009). In the alternative, the McCoys request that this case be remanded if the record below is found to be incomplete or unclear.

CONCLUSION

For the foregoing reasons, the New Hampshire Supreme Court should reverse the trial court's ruling that the McCoys do not have an implied easement for access to their proposed subdivision from Audette Road.

Respectfully submitted,

PAUL MCCOY AND
JOSEPHINE MCCOY

By Their Attorneys,
WIGGIN & NOURIE, P.A.

Date: October 30, 2009 By: _____

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CERTIFICATE OF SERVICE

I hereby certify on this day two copies of the foregoing have been mailed, postage prepaid, to Keri Marshall, Esquire; Charles Gallagher, Esquire; and David Prentice, pro se.

_____
Steven A. Solomon, # 2398

REQUEST FOR ORAL ARGUMENT

Paul and Josephine McCoy respectfully request oral argument not to exceed fifteen minutes. Steven A. Solomon will represent Paul and Josephine McCoy at oral argument.

_____
Steven A. Solomon, #2398