

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. RE-08-98
TDW - CUM - 5/8/2012

ROBERT FLAHERTY, et al,

Plaintiffs

v.

HELEN MUTHER, et al,

Defendants

ORDER

STATE OF MAINE
Cumberland, ss, Clerk's Office

MAY 08 2012

RECEIVED

On March 22, 2011 the Law Court issued a decision affirming in part and vacating in part a decision by the Superior Court (Crowley, J.) adjudicating the rights of certain landowners, known in this case as the J-Lot owners, with respect to a right-of-way that provides access to a small beach known as Secret Beach in Cape Elizabeth. See 2011 ME 32, 17 A.3d 640. In that decision the Law Court remanded one major issue for further determination by the trial court. That issue involves the reasonableness of certain video surveillance cameras that had been placed by defendants Helen Muther and Paul Woods on the right-of-way. See 2011 ME 32 ¶ 72.¹

¹ In its decision the Law Court also vacated the trial court's award of costs to allow reconsideration of whether the J-Lot owners were still the prevailing parties in light of the disposition of the appeal and because the award of costs had been entered after Muther and Woods had filed a notice of appeal. 2011 ME 32 ¶¶ 89-90. On a separate appeal in this case, the Law Court also remanded the issue of whether certain J-Lot owners were entitled to attorney fees based on denials of certain requests for admission addressed to Muther and Woods. 2011 ME 34. This court has deferred the award of costs and Rule 37(c) attorney fees until the entry of a final judgment on the merits.

1. Background

In lieu of reciting the extensive procedural and factual background, the court will rely on the exposition contained in the Law Court's decision at 2011 ME 32 ¶¶ 4-27. In that decision the Law Court affirmed the trial court's ruling that the J-Lot owners were not bound by a prior settlement agreement with the Broad Cove Shore Association.² 2011 ME 32 ¶ 36. It affirmed the trial court's rejection of the third party indemnification claims brought by Muther and Woods against the Broad Cove Shore Association. 2011 ME 32 ¶¶ 43, 47, 52. In addition, it affirmed the trial court's determinations as to the scope of the easement possessed by the J-Lot owners over the right-of-way and the permitted uses of that easement. 2011 ME 32 ¶¶ 54-61.³

In the portion of its decision that is relevant here, the Law Court addressed the trial court's determinations that the placement of an access gate and video surveillance cameras on the easement placed an unreasonable burden on the j-Lot owners' use of the easement. With respect to the access gate, the Law Court reversed the trial court's decision and concluded that, as a matter of law, an access gate does not unreasonably interfere with the J-Lot owners' use of the easement. 2011 ME 32 ¶ 71. With respect to the surveillance cameras, the Law Court remanded that issue for reconsideration by the trial court with the direction to review that issue "in conjunction with Muther and Woods's obligations under the [Broad Cove Shore Association] settlement agreement." 2011 ME 32 ¶ 72.

² That settlement agreement had been the subject of a prior appeal in Muther v. Broad Cove Shore Association, 2009 ME 37, 968 A.2d 539.

³ The Law Court also affirmed the trial court's determination that use of the easement by J-Lot owners to access upland property owned by a non-party (William Holt) would overburden the easement and its determination that J-Lot owners had not established prescriptive rights over the upland portion of the property owned by Muther and Woods. 2011 ME 32 ¶¶ 76, 85.

2. Proceedings Subsequent to Remand

On the surveillance camera issue, the Law Court specified that this court could decide the issue based on the existing record or receive additional evidence. 2011 ME 32 ¶ 72 n.13. The parties did not seek to offer additional evidence on this issue but instead chose to rest on the existing record and submitted memoranda setting forth their respective positions.

The proceedings on remand have been conducted simultaneously with further proceedings in the companion case of Muther v. Broad Cove Shore Association, RE-05-179. Although the resolution of both cases has been delayed by the recusal in late 2011 of the trial justice to whom the cases had originally been reassigned upon remand (Justice Crowley having retired in the meantime), the court has now reviewed the portions of the existing record and the trial exhibits relied upon by the parties in their submissions on the surveillance camera issue. It has also reviewed the trial court's prior findings, portions of the transcript from the eight-day bench trial upon which those findings were based, and the settlement conference transcript and portions of the record relating to the settlement agreement in RE-05-169. The latter evidence is pertinent because the Law Court ruled that Justice Crowley had erroneously excluded evidence relating to the settlement and the J-Lot owners' awareness of its terms, 2011 ME 32 ¶ 69, and the Law Court specifically directed that upon remand, the settlement agreement should be considered in connection with the surveillance camera issue. 2011 ME 32 ¶ 72.

3. Reasonableness of Surveillance Cameras

The trial court found that since 2005 Mr. Woods has challenged J-Lot owners using their right of access across the easement and has confronted J-Lot owners who

wished to use the easement. July 30, 2009 Judgment at 8, ¶¶ 37-38. It found that Mr. Woods had informed J-Lot owners that their right to use the easement was limited, and that Mr. Woods's testimony to the contrary was not credible. *Id.* ¶ 39. It further found that from the time he moved into the property, Mr. Woods has taken photographs of individuals who were using the easement and the beach area and that Mr. Woods and Ms. Muther have been "hyper-vigilant" about monitoring the use of the easement. *Id.* ¶¶ 40 – 41. These findings are supported by the evidence, and many were reiterated by the Law Court in its decision on the appeal from the trial court's decision. 2011 ME 32 ¶ 12.

The trial court further found that some J-Lot owners were frightened by their confrontations with Mr. Woods and have limited their use of the easement as a result. July 30, 2009 Judgment at 9, ¶ 44, a finding reiterated in the Law Court decision at 2011 ME 32 ¶ 12. Most of the J-Lot owners have expressed concern about the need for a video surveillance system, and the trial court found that the presence of surveillance cameras discourages J-Lot owners from exercising the right of passage they have historically enjoyed over the easement. July 30, 2009 Judgment at 9, ¶ 54, and p. 19. *See* Law Court decision, 2011 ME 32 at ¶ 64.

Significantly, no approval or agreement with respect to surveillance cameras was included as part of the November 29, 2006 settlement in RE-05-169. The only mention of photography of any kind in the recitations comprising the settlement agreement was a statement by counsel for defendants that, as part of a mutual "nondisturbance" clause, it was anticipated that "peaceful users of the access are not gonna be photographed, approached, or questioned while they're using the easement." November 29, 2006 settlement transcript in RE-05-169 at 26-27, quoted by the Law Court at 2011 ME 32 ¶ 16. Counsel for Muther and Woods did not express any reservations, qualifications or

disagreement with this statement when it was made at the settlement conference. Nor did Mr. Woods, who was present and who spoke up to express his concerns and some cases his disagreement with counsel's recitations on other issues.⁴

Based on the deterrent effect that surveillance cameras will have on some J-Lot owners' use of the easement and based on the statement at the November 2006 Broad Cove Association settlement that peaceful users of the easement "are not gonna be photographed," the court finds that – under the specific circumstances of this case – the presence of surveillance cameras will unreasonably interfere with the J-Lot owners' use of the easement.

Unlike the access gate, surveillance cameras are not a required element of the 2006 settlement between Muther and Woods and the Broad Cove Shore Association. The Law Court's conclusion that Muther and Woods were entitled to maintain an access gate in the J-Lot owners' case was motivated in part by its conclusion that, if ordered to remove the access gate, Muther and Woods would be "placed in a position where they will be unable to comply with both judgments governing the easement." 2011 ME 32 ¶ 67. In contrast, removing surveillance cameras from the easement does not place Muther and Woods under any conflicting obligations.

While the discussion at the November 2006 settlement conference addressed the subject of photographing users of the easement in general and did not specifically address the use of surveillance cameras as part of an access system, the clear implication of the general discussion strongly disfavors the use of surveillance cameras. To the extent that J-Lot owners were aware of the details of the settlement, they would have shared that understanding.

⁴ See, e.g., November 29, 2006 settlement transcript in RE-05-169 at 12-14, 20.

The trial court found that unknown teenagers and other persons, not J-Lot owners or their families, were the source of most of the disturbances and all of the criminal activity that had occurred on the easement or on Secret Beach. July 30, 2009 Judgment at 8 ¶ 42. Those persons will be denied entry by the access gate, which will only allow entry to J-Lot owners, their families, and guests, and authorized members of the Broad Cove Shore Association. The court does not share the concern, expressed by Muther and Woods in their submittal on remand,⁵ that J-Lot owners and authorized members of the Association will circulate their cards to unauthorized users. On this record, any such concern would be speculative.⁶

The Law Court noted that there is no evidence to justify apprehension on the part of J-Lot owners that images taken by the surveillance cameras would be misused. However, prior confrontational behavior by Mr. Woods, including the taking of photographs, has been found to have frightened some J-Lot owners and deterred them from exercising their rights to use the easement. July 30, 2009 Judgment at 8 ¶¶ 37-38, 41, 43, 44, 54. Under these circumstances, the presence of surveillance cameras will likely have a deterrent effect on some J-Lot owners and their families and has not been shown to be necessary to police the access card system.

Recognizing that not just J-Lot owners but also their families, occupants, and guests are entitled to use the easement,⁷ it is the court's fervent hope that the access card system will not result in a series of challenges and inquests to determine the identity of each person who uses an access card to obtain entry. If there is future evidence of

⁵ See Defendants/Third Party Plaintiffs' Reply Memorandum Regarding Security Cameras dated July 7, 2011 at 4-5.

⁶ One disincentive to such behavior is that, if authorized users were to circulate their cards to unauthorized users, the authorized users would themselves lose access in the meantime and could not be sure when, or even if, the cards would be returned.

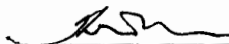
⁷ See July 30, 2009 Judgment at 16.

significant misbehavior that could be prevented or deterred by the presence of surveillance cameras, Muther and Woods can seek appropriate relief. Similarly, if there is evidence of any significant and unwarranted interference with the rights of J-Lot owners resulting from Muther and Woods's control over the issuance, activation, and deactivation of access cards, the J-Lot owners can also seek appropriate relief. See 2011 ME 32 ¶ 70 n.12.⁸

The entry shall be:

On remand, the prior judgment having been vacated in two respects, final judgment is hereby entered (1) declaring, under the circumstances of this case, that the access gate is not an unreasonable interference with the use of the easement and (2) determining, under the circumstances of this case, that the surveillance cameras do constitute an unreasonable interference with the use of the easement and shall be removed. The Clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: May 7, 2012



Thomas D. Warren
Justice, Superior Court

⁸ The court understands that under the combined effect of the judgment in this case and the judgment in RE-05-169, J-Lot owners may use the easement at all times while authorized Broad Cove Shore Association members who are not J-Lot owners are limited to access during a more limited time period (from 15 min before sunrise until sunset, with the full range of permitted recreational use only from 9 am until sunset). This may present challenges in terms of programming access cards to different schedules and in programming them to track the changing times of sunrise and sunset during the course of the year. The court expects that counsel and all parties will attempt to cooperate on these issues.

ROBERT FLAHERTY VS HELEN MUTHER

CASE #: PORSC-RE-2008-00098

SEL VD REPRESENTATION TYPE DATE

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FOR: RUSSELL PIERCE	PL	RTND	04/22/2008
FOR: SUSAN HOUSE	3RD P DEF	RTND	07/01/2008
FOR: DAVID HOUSE	3RD P DEF	RTND	07/01/2008
FOR: NIAMH COLPITTS	PL	RTND	04/22/2008
FOR: DAVID MEAGHER	3RD P DEF	RTND	07/01/2008
FOR: ELLEN MEAGHER	3RD P DEF	RTND	07/01/2008
FOR: PAULETTE YORK	PL	RTND	04/22/2008
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FOR: PETER CONNOLLY	3RD P DEF	RTND	07/07/2008
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FOR: PAUL WOODS	DEF	RTND	04/23/2008

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FOR: MERGED BROAD COVE SHORE ASSOC.	3RD P DEF	RTND	06/25/2008
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FOR: NANCY WULF	3RD P DEF	RTND	07/21/2008
FOR: ELIZABETH MCGRATH	3RD P DEF	RTND	07/21/2008
FOR: STEPHEN MCGRATH	3RD P DEF	RTND	07/21/2008
FOR: ROBERT HESS, JR	3RD P DEF	RTND	07/21/2008
FOR: PATRICIA CAMPBELL	3RD P DEF	RTND	07/21/2008
FOR: MELANIE STEWART	3RD P DEF	RTND	07/21/2008
FOR: PAUL STEWART	3RD P DEF	RTND	07/21/2008
FOR: ALISON PERKINS (TRUSTEE)	3RD P DEF	RTND	07/21/2008
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FOR: ELIZABETH MCGRATH	3RD P DEF	RTND	07/21/2008
FOR: 1962 BROAD COVE SHORE ASSOC.	3RD P DEF	RTND	06/25/2008
FOR: 2005 BROAD COVER SHORE ASSOC.	3RD P DEF	RTND	06/25/2008
FOR: NEW BROAD COVE SHORE ASSOC.	3RD P DEF	RTND	06/25/2008
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FOR: PETER CONNOLLY	3RD P DEF	RTND	01/15/2009
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CUMBERLAND, ss.

SUPERIOR COURT
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STATE OF MAINE
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In its decision at 2011 ME 32, the Law Court remanded the issue of surveillance cameras for a further determination by this court. At the same time the Law Court vacated the trial court's award of costs to allow reconsideration of whether the J-Lot owners were still the prevailing parties in light of the disposition of the appeal and because the award of costs had been entered after Muther and Woods had filed a notice of appeal. 2011 ME 32 ¶¶ 89-90.

Separately, in 2011 ME 34, the Law Court vacated and remanded a separate award of attorney fees to certain J-Lot owners, concluding that the factual basis for the trial court's Rule 37(c) award may change in light of the disposition of the appeal or upon remand. 2011 ME 34 ¶ 11.

Prevailing Parties

Re-evaluating the "prevailing party" issue in light of (1) the result of the original trial, (2) the Law Court's decision on appeal, and (3) the limited issue resolved on remand, the court concludes as follows:

1. As between defendants Muther and Woods and the third party defendants, the third party defendants were the prevailing parties in the original proceeding, and that judgment – that they were not liable for indemnification, fraud, or implied warranty of authority – was upheld on appeal. As far as the court is aware, however, the third party defendants never filed a bill of costs.
2. As between plaintiff J-Lot owners and defendants Muther and Woods, the J-Lot owners ultimately prevailed on the following issues: (1) whether J-Lot owners were bound by the November 2006 settlement agreement between defendants Muther and Woods and the Broad Cove Shore Association, (2) whether the easement could be used for general recreational use, (3) whether use of the easement should be limited to daylight hours, (4) whether J-Lot owners had to accompany their family members and guests in order for the latter to use the easement, (5) whether surveillance cameras would be permitted, and (6) whether the easement would be overburdened unless activity in the intertidal zone were limited to fishing, fowling, and navigation.
3. As between plaintiff J-Lot owners and defendants Muther and Woods, defendants Muther and Woods prevailed in the original proceeding on the following issues: (1) the J-Lot owners' claim to prescriptive rights over upland belonging to Muther and Woods and (2) the issue of whether the easement would be overburdened if used to access the upland belonging to William Holt. On appeal defendants Muther and Woods prevailed on another issue: (3) the access gate.
4. On the only other litigated issue (whether Muther and Woods owned only to the top of the bank or whether they owned the intertidal zone), neither set of parties prevailed because the trial court determined that the boundary was

the mean high water line, partway between the position taken by the J-Lot owners and the position taken by Woods and Muther.

5. Based on the above, the court determines that as between the J-Lot owners and defendants Muther and Woods, the J-Lot owners are the prevailing parties and are therefore entitled to costs.

Further Proceedings

1. A review of the file reveals that plaintiffs Pierce, Colpitts, House, Meagher, and York (the J-Lot owners represented by Stephen Bither Esq.) filed a bill of costs for \$ 10,087.78 and also filed a motion for attorneys fees and costs under Rule 37(c) based on Muther and Woods's failure to admit certain matters in response to a request for admissions directed to Muther and Woods under Rule 36.
2. Muther and Woods opposed certain items in the bill of costs and asked for a hearing on those items. Muther and Woods also opposed the motion for costs and attorneys fees under Rule 37(c).
3. Justice Crowley did not hold a hearing but considered the bill of costs and the objections thereto and issued an order on March 16, 2010 awarding costs in the amount of \$ 7,045.70. This represented a reduction of more than \$3,000 to the award of costs sought by the J-Lot owners.
4. Justice Crowley also considered the J-Lot owners' motion pursuant to Rule 37(c) and the objections filed thereto and on March 16, 2010 issued another order awarding attorney fees as to certain of the denials made in response to the request for admissions and denying fees as to other denials. That order established a schedule under which the J-Lot owners were to submit


affidavits supporting the attorney fees they were requesting and Muther and Woods were to submit any objections to the fee request.

5. Thereafter, affidavits and pleadings were submitted on the issue of attorney fees, and on June 24, 2010 Justice Crowley issued an order awarding \$16,440 in attorney fees to the J-Lot owners pursuant to Rule 37(c).
6. The Law Court concluded that because an appeal was pending, Justice Crowley lacked jurisdiction to act on the J-Lot owners' bill of costs, although he did have jurisdiction to act on the request for attorney fees under Rule 37(c). 2011 ME 32 ¶ 90; 2011 ME 34 ¶ 8. In light of the remands, however, both of those determinations must be revisited.
7. Within 14 days of the date of this order any parties who wish to be heard on these issues shall file letters or pleadings setting forth their positions on the issue of costs and Rule 37(c) attorney fees. Those shall include their positions on the following issues: (a) whether any new or supplemental applications for costs would be timely or warranted at this stage, (b) whether any further submissions or proceedings are necessary on the issue of costs and Rule 37(c) attorney fees or whether the court can make those determinations based on the previously filed submissions and the existing record, and (c) whether and to what extent they contend that the factual basis upon which Justice Crowley made the Rule 37(c) award has changed in light of the Law Court's decision in 2011 ME 32 or the proceedings on remand. Any party that contends that this court has misunderstood the procedural history set forth above with respect to costs should raise that issue in its submission.

The entry shall be:

The J-Lot owners are determined to be the prevailing parties for purposes of the award of costs. Procedural order entered with respect to the issue of costs and Rule 37(c) attorney fees. The Clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: May 10, 2012



Thomas D. Warren
Justice, Superior Court

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