Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2016-388

MAY TERM, 2017

John H. Moulton and Christina M. Myers	}	APPEALED FROM:
	}	
	}	Superior Court, Addison Unit,
v.	}	Civil Division
	}	
	}	
Barbara Ernst, Barbara Supeno, Rodney Haggart and Mary L. Haggart	}	DOCKET NO. 90-5-14 Ancv
	}	
		Trial Judge: Samuel Hoar, Jr.

In the above-entitled cause, the Clerk will enter:

This case concerns a disputed area along a common boundary between land owned by the parties. Plaintiffs filed suit, claiming an express easement or adverse or prescriptive rights to the area for access, storage, parking, and recreation. The court concluded that there was no prescriptive easement, but that plaintiffs had a deeded easement for two points of access across the disputed parcel. Defendants appeal, arguing that the court erred in its interpretation of the deed. Plaintiffs cross appeal, arguing that they obtained possessory rights through adverse or prescriptive use. We affirm.

Plaintiffs filed this suit alleging that they had acquired title to the disputed property through adverse possession or that they had acquired rights of access, storage, parking, and recreation through a prescriptive easement.[1] The court made the following factual findings following a contested hearing. The parties own abutting parcels of land on Fisher Point Road in Addison, Vermont. Plaintiffs are brother and sister and own lakefront property at 359 Fisher Point Road, with Lake Champlain bordering the west side of the lot. There are two seasonal camps on the property, one each on the northern and southern ends. The camps have existed since the late 1940s. The property was originally leased by plaintiffs' grandparents, but was purchased in 1964 from the Fisher family. The grandparents conveyed the property to plaintiffs' father in 1982, and he conveyed it to plaintiffs in 1994.

Defendants' parcel is located at 330 Fisher Point Road to the east of plaintiffs' property. This property was originally retained by the Fisher family, but was sold to Rodney Haggartt and

[1] Plaintiffs also included claims of nuisance, trespass, ejectment, and spite fence. The court found for defendants on these claims and plaintiffs have not appealed that portion of the judgment.

Mary Haggartt in 1978. In 1987, they built a year-round home on the land. They lived there until 2004 when they sold it to defendants Barbara Ernst and Barbara Supeno.

The 1964 deed created an easement over 330 Fisher Point Road for the benefit of 359 Fisher Point Road. It grants "rights of ingress and egress" to the lakefront parcel "upon the private easement or right of way as the same is now in use, and as same is shown on the said survey, leading to the public highway to the east known as Lake Road, a-k-a Lake Street." The survey depicts two roadways across the 330 parcel: one with parallel dashed lines labeled as "existing road," and one with solid lines and labeled as "new road location."[2] Neither road actually extends to the 359 parcel. The area between the existing road and the parties' property line is the disputed area.

In the spring of 2006, relations between the parties began to deteriorate and defendants had the property surveyed. Plaintiffs offered to purchase the disputed area and defendants countered with an offer high above fair market value. In 2013, defendants erected a split rail fence along the boundary between their property and the row of lakefront parcels, including plaintiffs' land. The fence leaves an opening for driveway access from the "existing road" to the southern camp, but blocks access to the northern camp. In response to this fence, plaintiffs filed this suit.

Based on these findings, the court concluded that plaintiffs failed to establish that they had acquired title to the property through adverse possession or acquired right to use the property by a prescriptive easement. The court found that plaintiffs' use was consistent with neighborly cooperation and that it was neither hostile nor under a claim of right. The court further concluded, however, that the deed provided two separate access roads across the disputed parcel: one from the northern camp to the "existing road" and one from the southern camp to the "existing road."[3] Defendants appeal and plaintiffs cross-appeal.

We first address defendants' appeal, in which they argue that the court erred in construing the deed as granting two distinct rights of way across their property.

"The interpretation of an express easement is a question of law, which we review de novo." Post & Beam Equities Grp., LLC v. Sunne Vill. Dev. Prop. Owners Ass'n, 2015 VT 60, ¶ 56, 199 Vt. 313 (quotation omitted). The overall goal in interpreting deed language is to implement the intent of the parties, therefore if the express terms of the easement are unambiguous that meaning is enforced without resort to rules of construction or extrinsic evidence. Id. If there is an ambiguity, "the interpretation of the parties' intent becomes a question of fact to be determined based on all of the evidence—not only the language of the written instrument, but also evidence concerning its subject matter, its purpose at the time it was executed, and the situation of the parties." Id.

Here, the relevant language grants "rights of ingress and egress to the parcel herein being conveyed over and upon the private easement or right of way as the same is now in use, and as

[2] The "new road" was never constructed.

[3] The court denied defendants' claim for reimbursement of the cost of several surveys, concluding that defendants had failed to show that the work was necessitated by plaintiffs' conduct.

same is shown on the said survey, leading to the public highway to the east known as Lake Road, a-k-a Lake Street." The trial court concluded that the deed granted two means of access to plaintiffs' property, finding that at the time the deed was written in 1964 there were two rights of way and therefore the right of way "now in use" as described in the deed included both easements. The court explained that this interpretation was not inconsistent with the deed language referring to "as same is shown" in the survey because there was no right of way to the parcel shown on the survey. The survey depicted an "existing road" and "new road," but did not connect those roads to the 359 Fisher Point parcel.

Defendants assert that the express language of the deed language indicates that plaintiffs' parcel is benefitted by only one right of way. Defendants rely on the deed language, which refers to a "right of way as the same is now in use," claiming that the use of the singular in that sentence suffices to demonstrate that only one point of access was granted by the deed.

We conclude that the language of the deed itself is ambiguous. A deed is unambiguous where "reasonable people could not interpret it in different ways." Post & Beam, 2016 VT 60, ¶ 56. The deed grants a right of way "as the same is now in use" and refers to a survey, but no easement is depicted on the survey. Because reasonable people could interpret this language in different ways, there is an ambiguity as to the location and extent of the easement. Therefore, we consider the "intent of the parties, as drawn from the language of the deed, the circumstances existing at the time of execution, and the object and purpose to be accomplished by the easement." Id. ¶ 59 (quotation omitted).

On appeal, defendants argue that there was no evidence to support the court's finding that a second access route was contemplated in 1964. We will affirm the court's findings as to the intent of the deed if its decision is supported by the record and will not reweigh the evidence on appeal. See DeGraff v. Burnett, 2007 VT 95, ¶ 25, 182 Vt. 314. Here, one family member testified that in 1962 there were two camps on the lot in the same location as today and there was no fence. She stated further that she remembers there were two points of access across what is now defendants' property to the two camps, although she stated that there was no exact route that was always followed. Therefore, there was adequate evidence to support the court's findings that both camps have existed on plaintiffs' lot since the late 1940s and that to access the two camps users took different routes across the disputed area between the "existing road" and plaintiffs' land and this practice was in use dating back at least until 1962. These findings in turn support the court's conclusion that the deed granted two ways to access plaintiffs' parcel.

Next, we turn to plaintiffs' cross appeal. As it relates to the express easement, plaintiffs argue that the "rights of egress and ingress" expressed in the easement includes parking rights.[4] The court properly determined that the character of the easement followed from the deed language, the circumstances in existence at the time of its execution, and the purpose of the easement. The

[4] Earlier in the litigation, both sides moved for summary judgment. Plaintiffs claimed they had an express easement that included parking rights. The court concluded that the easement granted to plaintiffs in the 1964 deed did not include parking or other rights beyond ingress and egress.

court explained that there was no evidence to show that at the time the deed was executed the intent was to also include parking. This finding is supported by the evidence.

Plaintiffs also argue that the court erred in concluding that they had failed to demonstrate that they gained possession of the property through adverse possession or a prescriptive easement. Determining whether plaintiffs obtained rights to the property through adverse possession is a mixed question of law and fact. "This Court views the factual findings of the trial court in the light most favorable to the prevailing party below, not setting aside findings unless they are clearly erroneous." First Congregational Church of Enosburg v. Manley, 2008 VT 9, ¶ 12, 183 Vt. 574 (mem.). The legal conclusions are reviewed de novo. Id. To support a claim for adverse possession or a prescriptive easement, plaintiffs needed to "show that use of the land was open, notorious, hostile and continuous throughout the statutory period of fifteen years." Id. ¶ 13 (quotation omitted); see Patch v. Baird, 140 Vt. 60, 63-64 (1981) (explaining that elements of claim of prescriptive right are like those for adverse possession). Hostile use means use that is "not based on a consensual privilege given by the owner and recognizing his right to forbid such use, but rather based on a claim of a right to use the way as a limitation on the ownership of the holder of the underlying fee and without regard to permission." Patch, 140 Vt. at 64.

The court found the following facts relevant to plaintiffs' equitable claims. Prior to 1962, there was no evidence as to how plaintiffs' predecessors-in-title used the disputed area. After 1962, for many years, plaintiffs' predecessors-in-title rented out the northern camp and retained the southern camp for family use. The renters would cut west across the lawn between the "existing road" and that camp and park west of the property line. Those reaching the southern camp would follow the path of the "new road" and park west of the property line. Occasionally, in wet weather, users of either camp would park east of the property. Occasionally plaintiffs' predecessors would mow grass in the disputed area. Other use included using the area for overflow parking, but this was not regular. Plaintiffs' family also planted trees near the property line, and one exists a few feet over the line. The area was open for use by others and the use was done with the implied permission of the various owners in a neighborly spirit. The court relied on evidence that other neighbors testified that the area was "a free-for-all," and testimony that defendants were notified when plaintiffs' family would be using the area. Plaintiffs acted as though defendants owned the property, even offering to purchase it. Based on these findings, the court concluded that plaintiffs' use was not open, notorious, or hostile, and therefore that plaintiffs had not gained possessory rights.

Plaintiffs argue that their use was more frequent and to a greater level than found by the trial court and that the evidence shows the activities were done with the intent to exclude others. Plaintiffs contend that there was evidence from several people about various uses in the disputed area including parking, picnics, games, and playing. The crux of the court's decision was based on its finding that however plaintiffs used the area it was not done in a way adverse to defendants or their predecessors-in-interest and therefore was not hostile. The court's finding that plaintiffs use was not under a claim of ownership and therefore was not hostile or adverse is supported by the evidence and this finding in turn supports the court's conclusion that there was no adverse possession. See First Congregational Church, 2008 VT 9, ¶ 17 (affirming court's conclusion that plaintiff did not demonstrate hostile use and therefore there was no adverse possession).

Plaintiffs' final argument is that the court erred in not recognizing a third right of way, which they claim was included in a 1969 deed. Plaintiffs fail to demonstrate that this issue was properly preserved for review. Plaintiffs claim they raised this issue in a motion to alter or amend the judgment. V.R.C.P. 59(e). Even if it was raised at that time, this was insufficient to preserve it for our review. See Hoffer v. Ancel, 2004 VT 38, ¶ 19, 176 Vt. 630 (mem.) (concluding plaintiff failed to preserve argument that was raised for first time in support of motion to amend).

Affirmed.

BY THE COURT:

_____
Marilyn S. Skoglund, Associate Justice

_____
Harold E. Eaton, Jr., Associate Justice

_____
Karen R. Carroll, Associate Justice