State of New Hampshire
Supreme Court

NO. 2016-0491

2017 TERM

JANUARY SESSION

Barbara O'Malley and Helen O'Malley

v.

Aaron Little and Maryann Little

RULE 7 APPEAL OF FINAL DECISION OF THE
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF DEFENDANTS/APPELLANTS AARON AND MARYANN LITTLE

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II. Was there insufficient evidence to prove adverse possession, given that the record owners both ousted the claimants and gave their permission for the claimants' use, prior to the expiration of the 20 year limitations period, as demonstrated by, among other things, communications by phone, email, and in person on the disputed property?

Preserved: *Hearing on Motion for Summary Judgment* (Jan. 19, 2016) at 13-16, 35; MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (Aug. 28, 2015); TRIAL MEMORANDUM ON BEHALF OF RESPONDENTS AARON AND MARYANN LITTLE (July 15, 2016); *Trial, passim*.

STATEMENT OF FACTS

I. Hampton Beach Neighborhood

In Hampton Beach, on the north side of town a few blocks from the ocean, lies a neighborhood squeezed between Route 101 – the main road away from the beach – and a saltmarsh conservation area. The existing house lots were subdivided from long narrow tracts, and are very small. *Day 2* at 254, 267-68. Zoning setbacks in the neighborhood are 7 feet, ZBA MINUTES (Jan. 15, 2009) at 3, Exh. A, *Appx*. at 174, and fence disputes among neighbors are common. *Day 2* at 255.[1]

[1] *Day 1* refers to the transcript of trial day 1, held on June 29, 2016; *Day 2* refers to the transcript of trial day 2, held on June 20, 2016.

In addition, one of the defendants' witnesses, Leonnie Ayer, moved out of state before the trial, and was twice deposed; the transcripts of both depositions were accepted as exhibits by the parties and the court. The first deposition, conducted April 21, 2016, was trial exhibit Z-1, and is cited herein as *Depo 1*, and is included in the appendix hereto. The second, conducted on June 23, 2016, was exhibit Z, and is also included in the appendix.

II. Francis Street

Francis Street, four blocks from the beach, runs roughly parallel to the shoreline, beginning on Route 101 and dead-ending at the saltmarsh. Number 6 Francis Street has been owned since 2008 by the defendants, Aaron Little and Maryann Little. It is generally rectangular, has about 40 feet fronting on the street and wider in back, and is about 75 feet deep. QUITCLAIM DEED (Dec. 1, 2008), Exh. 9; WARRANTY DEED (Feb. 2, 2009), Exh. 10 & Exh. E, *Appx*. at 168. For the convenience of this court, a colorized map showing the relevant features is included in this brief at page 9.[2]

The existing structure, which along with the driveway and back parking area cover nearly the entire lot, has long been a multi-family dwelling occupied year-round by owners and tenants. *Day 1* at 42, 160, 181; *Day 2* at 194, 387-88; ZBA MINUTES at 2, 3; PICTURE OF SIGN (date unknown), Exh. X, *Appx*. at 293. While it is possible for a tenant to fit two cars in the back parking area (shown in beige on the map), it is too narrow to be practical: "I don't know how he'd get out of his car, but – he must crawl to the side window." *Day 1* 180-81; *Day 2* at 290, 377.

Between the back parking area and the house behind, there is a chainlink fence, a maple tree, a rosebush, and a grassy area onto which the Littles and their tenants throw snow in the winter. *Day 2* at 295-96, 315-18; *Depo 1* at 19, 23, 24, 118-19.

For many years the property was in poor condition, ZBA MINUTES at 2, and the house was occupied by tenants the neighbors considered boisterous. *Day 1* at 42, 112. It was upgraded in the 1990s, however, and again in 2009 after the Littles acquired it. *Day 1* at 44, 158-61; *Day 2* at 201-02; ZBA MINUTES at 2.

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[2]The map included on page 9 of this brief is a colorized version of the "Johnson Plan," the accuracy of which was (except for the colorization) stipulated by the parties and accepted by the court. *See* ORDER ON QUIET TITLE at 2, n. 2. The red line encircling the Little's lot, however, appears in the original. The fence-line is shown in pink. The disputed strip is shown in dark green.

III. McKay Avenue

McKay Avenue parallels Francis Street, one block closer to the beach, also dead-ending on the saltmarsh. TAX MAP (Jan. 13, 2014), Exh. F, *Appx*. at 198. Number 7 McKay Avenue has been owned by the plaintiffs, members of the O'Malley family, since 1963. In 1996 Barbara O'Malley added one of her daughters Helen O'Malley to the deed. WARRANTY DEED (Aug. 8, 1996), Exh. 2, *Appx*. at 164. The O'Malley lot is almost square, 50 feet wide by 43 feet deep; a single-family cottage, along with its deck and parking area beside the deck, nearly covers it. The O'Malleys are not year-round occupants – they use the cottage during the summer for vacations and weekends. ORDER ON QUIET TITLE (Aug. 11, 2016) at 1, *Appx*. at 150.

Around back, the house has a door with a set of stairs, and an outdoor shower stall accessible from the cottage via the stairs. PHOTO, Exh. 17, *Appx*. at 276 (showing back of O'Malley house, clothesline, outdoor shower enclosure, stairs, strip of lawn, maple leaves, and chainlink fence); PHOTO, Exh. 18, *Appx*. at 278 (same, from opposite angle). The stairs and shower (shown in brown on the colorized map) are entirely on the O'Malley's deeded lot. It is understood, however, that as presently configured, a person entering the shower enclosure, need not necessarily, but might momentarily, cross over the Little's lot-line.

A few feet behind the shower, where the O'Malleys abut the Littles, are the features already mentioned: chainlink fence, maple tree, rosebush, and grassy area. The O'Malleys have used the grassy area for a clothesline, grill, access to the shower, gardening to the extent of planting three bushes over the years, maintenance to the extent of mowing the grass, and occasionally for parking. ORDER ON QUIET TITLE at 2, 4.

IV. Fence and Strip Between Abutters

On or about October 8, 1993, the O'Malleys built a four-foot tall chainlink fence between the back of their house and the Little's back parking area,[3] to stop Francis Street tenants from using the passage as a shortcut to the beach.[4] AFFIDAVIT OF BARBARA O'MALLEY ¶6 (Sept. 24, 2015), *Appx*. at 96; *Day 1* at 20, 75, 112; ORDER ON QUIET TITLE at 2, n. 1. The fence-line is shown in pink on the map.

The O'Malleys readily acknowledge that the line on which they erected the fence was not the deeded boundary, that they knew so at the time they built the fence, that the fence was positioned to match a side-neighbor's enclosure, and that by erecting the fence they were knowingly seizing a strip of the Little's land to augment their backyard. *Day 1* at 82, 93, 145-46. It appears that around the time they built the fence there was an intra-family debate about how much of the Little's lot the fence should seize. *Day 1* at 47-48 (Mike O'Malley), 74-75, 86 (Mary O'Malley), 116 (Helen O'Malley).

The as-built fence-line is about 3 to 5 feet beyond the deeded lot-line, and runs the length of the common Little/O'Malley backyard boundary, about 35 feet. ORDER ON QUIET TITLE at 2. That rectangular strip is the land disputed in this appeal, and is shaded dark green on the accompanying map. Records indicate the Littles have been paying taxes and insurance on the strip. *Day 2* at 340-42.

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[3]There was conflicting evidence on when the fence was built; the court resolved it for the purposes of its order, finding that "[o]n October 8, 1993, Barbara O'Malley contracted for the installation of a chainlink fence between the two properties." ORDER ON QUIET TITLE at 2. The Littles decline to contest the matter in the context of this appeal, but do not otherwise concede the date. In addition, although they argued for an earlier date below, the O'Malleys did not appeal the court's finding that the limitations period commenced upon the erection of the fence.

[4]There is a narrow gap in the fence, the nature and use of which occupied much of the trial, but is not of further relevance here.

When they bought their property in 2008, the Littles assumed the fence was their back boundary. *Day 2* at 346; ORDER ON QUIET TITLE at 3. In 2010, however, a neighbor informed them of the discrepancy, prompting them to explore town and registry records, and confirm with a tape measure that their deeded boundary was several feet beyond the fence. *Day 1* at 163-68; *Day 2* at 323, 347; ORDER ON QUIET TITLE at 3.

V. 2010 Phone Call and Fence Walk

On April 15, 2010, Aaron Little phoned Barbara O'Malley to talk about the abutting boundary. She put him in touch with one of her daughters, Mary O'Malley, a lawyer in Massachusetts, who returned his call the next day. *Day 1* at 80-81, 89-90, 167-70; VERIZON BILL (May 21, 2010), Exh. H, *Appx*. at 180. According to Mary, Aaron said of the fence, "it's on my property, it has to be moved." *Day 1* at 81.

A few weeks later, Aaron saw someone at the O'Malley house, and knocked. He spoke to Helen O'Malley, the daughter added to the 1996 deed. *Day 1* at 127; *Day 2* at 357, 381-19, 394-95. Together they went for a cordial walk along the fence-line. Aaron pointed out to Helen the deeded boundary, and the O'Malley's encroachment. *Day 1* at 172-75; *Day 2* at 358, 362, 394-95. Helen testified that, "[w]e walked along the fence and [Aaron] said … a couple of feet of this land is mine," *Day 1* at 145, and that, "he wanted the fence moved." *Day 1* at 127-28.

Aaron recalls telling both Mary and Helen that the Littles understood the O'Malley's desire to access their outdoor shower, that because no tenants had yet complained the existing situation was fine for the time being, that he was explicit about granting permission for the on-going trespass, but that at some point the problem would have to be fixed. *Day 1* at 170-71, 173-74; *Day 2* at 356-57, 359, 362. While their testimony was largely in accord with Aaron's recollection, both Mary and Helen deny he gave explicit permission. *Day 1* at 82, 128. There was also talk about the possibility of the Littles granting the O'Malleys a licence or an easement, but no agreement was reached.[5] In any event, in 2010 the O'Malleys refused to move the fence. ORDER ON QUIET TITLE at 3-4.

[5]The Littles were willing to grant the O'Malleys a revocable license of use for 10 years, to ensure the O'Malleys had access to their shower. *Day 1* at 177, 185; Day 2 at 378-79, 386. The O'Malleys did not want to accept anything less than a permanent easement, *Day 1* at 80-81, 89-90, 96-97, 178, to which the Littles were not amenable, because they needed the space for parking and could not afford to affect their title. *Day 2* at 398-99.

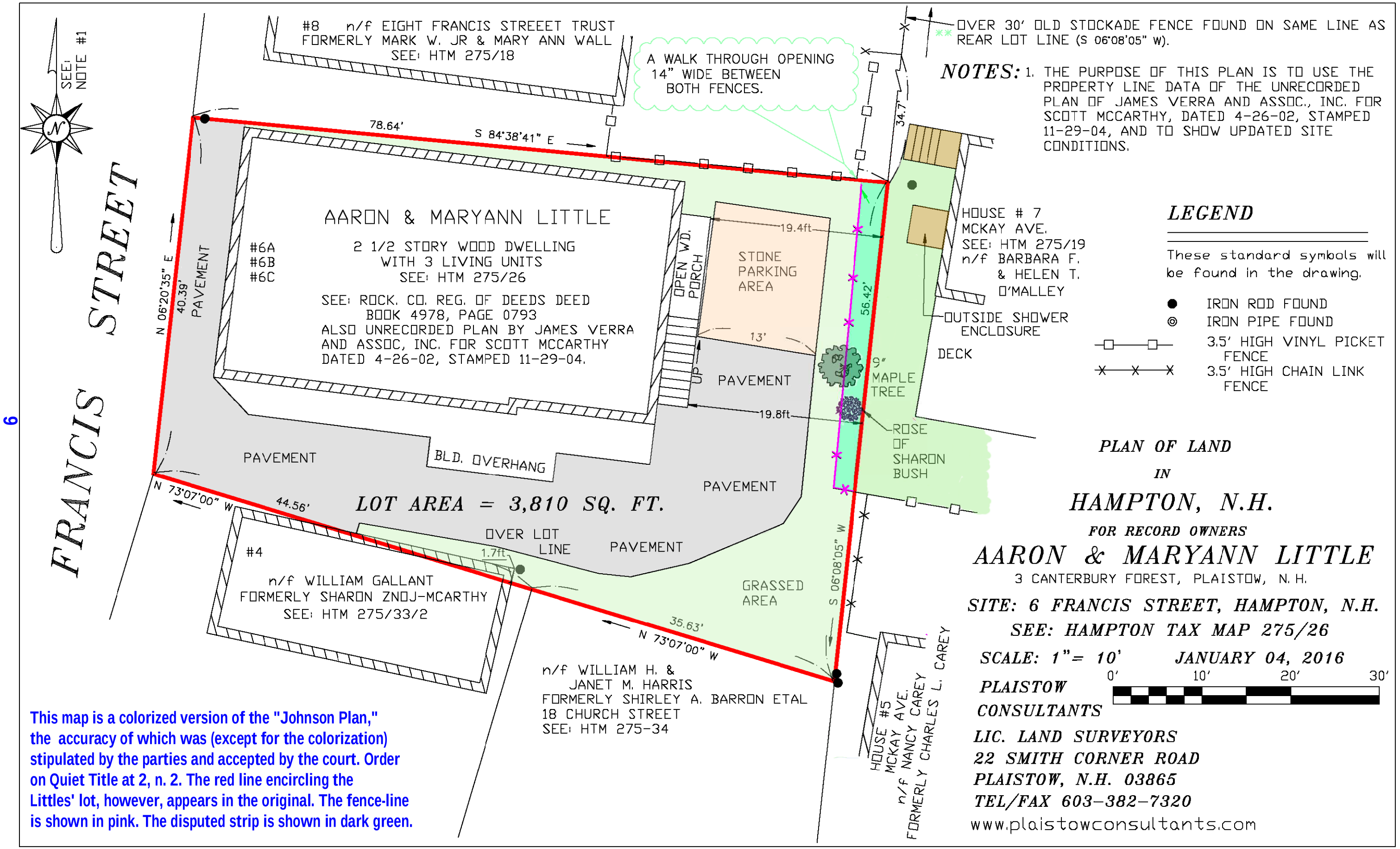
VI. 2013 Demand to Remove the Fence

In Fall 2013 one of the Little's tenants became pregnant, and a wider parking area became necessary. *Day 2* at 337-38, 376-77, 408-09. The Littles thus felt compelled to restore to their lot the three-foot strip blocked by the O'Malley's fence. *Day 1* at 176; *Day 2* at 357, 409-10.

Aaron Little called Mary O'Malley (because he had spoken to her before), and told her the fence needed to be removed, and that if it was not removed by the end of the year, he would remove it himself. *Day 1* at 83 (Mary); *Day 1* at 128-29, 146-47, 176-77, 182-83 (Aaron); ORDER ON QUIET TITLE at 4.

There were follow-up emails. On October 3, 2013, Mary wrote to Aaron, acknowledging that the Littles had asserted their "claim regarding this land," hoping for resolution by easement, and suggesting the fence not be moved until the matter is resolved. EMAIL FROM MARY TO AARON (Oct. 3, 2013), Exh. B & 26, *Appx*. at 295. On November 7, Aaron wrote back,[6] rejecting an easement, and reiterating the Little's demand that the fence be removed by December 31. EMAIL FROM AARON TO MARY (Nov. 7, 2013), Exh. K, *Appx*. at 196; ORDER ON QUIET TITLE at 4.

[6]Because this final November 7 email was after the 20-year period, the court disregarded its existence. ORDER ON QUIET TITLE at 13.



This map is a colorized version of the "Johnson Plan," the accuracy of which was (except for the colorization) stipulated by the parties and accepted by the court. Order on Quiet Title at 2, n. 2. The red line encircling the Littles' lot, however, appears in the original. The fence-line is shown in pink. The disputed strip is shown in dark green.

COLORIZED VERSION OF THE "JOHNSON PLAN"

STATEMENT OF THE CASE

A month after the emails, on December 12, 2013, the O'Malleys filed a petition to quiet title to the strip of land between the Little's record boundary and the O'Malley's fence-line, alleging it had become theirs by adverse possession. PETITION TO QUIET TITLE AND FOR TEMPORARY AND PERMANENT INJUNCTIVE RELIEF (Dec. 12, 2013), *Appx*. at 1. The petition was filed 20 years plus 2 months after the fence was built, but 3 weeks before the date the Littles indicated they would remove the fence by self-help. *Id.*; *Day 1* at 103 (Mary O'Malley: "Mr. Little told us he was going to take down our fence. At that point we had to take some action to stop him from doing that."). The court granted an injunction against removing the fence pending litigation. ORDER ON REQUEST FOR TEMPORARY HEARING, (Mar. 12, 2014), *Appx*. at 14.

The Littles "produced the usual evidence of title," *Cilley v. Bartlett*, 19 N.H. 312, 316 (1849), and requested summary judgment, to which the O'Malleys objected. MOTION FOR SUMMARY JUDGMENT (Aug. 28, 2015) (omitted from appendix); MEMO IN SUPPORT OF SUMMARY JUDGMENT (Aug. 28, 2015), *Appx*. at 47; OBJECTION TO MOTION FOR SUMMARY JUDGMENT (Sept. 25, 2015), *Appx*. at 89. The court denied summary judgment on the grounds that there was a dispute regarding the nature of the parties' communications: it held that if the Littles were not clear enough about permission in 2010 and 2013, the specifics of those communications would be material. ORDER (Jan. 25, 2016) at 4-5, *Appx*. at 102.

The court took a view of the premises and held a two-day bench trial in June 2016, and entertained post-trial memoranda. O'MALLEY'S TRIAL MEMO (July 13, 2016), *Appx*. at 109; LITTLE'S TRIAL MEMO (July 15, 2016), *Appx*. at 121.

In its order, the Rockingham County Superior Court (*David A. Anderson*, J.), first noted the O'Malley's lengthy ownership and continuous use, ORDER ON QUIET TITLE (Aug. 11, 2016)

at 1, 8, and determined that any adverse possession period commenced in October 1993 when it found the fence was built. *Id.* at 5-6, n. 3. The trial court also determined the O'Malley's possession was essentially exclusive despite sporadic passage through a gap in the fence by tenants and neighbors. *Id.* at 9-11.

After finding that no explicit permission was given by the Littles to the O'Malleys during the phone calls, in-person conversations, fence-walk, and emails in 2010 and 2013, *id.* at 7, the trial court turned to whether actions by the Littles nonetheless interrupted the O'Malley's possession.

Citing a Kentucky intermediate appellate panel, the trial court set a high bar for ouster of an adverse possessor by the record owner. It then held that the Littles informing the O'Malleys that the fence must be moved did not meet this bar, because it:

> would not put a reasonably prudent person on notice that they had actually been ousted. Telling an adverse possessor that their fence was on the owner's property only underscores the adversity of the possession; it does not show clear intent to retake the property.

ORDER ON QUIET TITLE at 12.

Similarly, citing an Oklahoma intermediate appellate panel, the trial court also set a high bar for what constitutes an act of ouster, and held that neither phone calls, in-person conversations, a fence-walk, nor emails "show clear intent to retake possession of the property nor … put a reasonable person on notice that they had actually been ousted." *Id.* at 12-13.

Accordingly, the trial court found that the O'Malleys had established adverse possession, and had neither been granted permission nor been ousted. It thus granted the O'Malleys title to the strip, *id.* at 14, and the Littles appealed.

SUMMARY OF ARGUMENT

The O'Malleys knowingly occupied a portion of the Little's lot by building a fence beyond their lot-line. In 2010 and again in 2013, before the expiration of the 20-year limitations period, the Littles cordially confronted the O'Malleys, asserted their title, and requested the fence be removed. The Littles argue that their assertion of title interrupted the 20-year period, that their assertion of title and request to remove the fence was an ouster of the O'Malleys, and that forbearance from removing the fence themselves was implicit permission.

Consequently, the Littles argue that the trial court should have either granted summary judgment, or after trial declared the Littles the rightful owners of the disputed strip.

ARGUMENT

I. The Law Favors Record Title Over a Squatter Possessing in Derogation of Record Title

"[T]he law presume[s] every entry by a stranger upon the land of another, without written evidence of title, to be in subordination to the title of the owner." *Cilley v. Bartlett*, 19 N.H. 312, 316 (1849). "The common-law doctrine of adverse possession developed from the statutes of limitation on actions for the recovery of land." *Hewes v. Bruno*, 121 N.H. 32, 33 (1981); *Atherton v. Johnson*, 2 N.H. 31, 35 (1819); RSA 508:2 ("No action for the recovery of real estate shall be brought after 20 years from the time the right to recover first accrued.").

The first comprehensive statement of the doctrine in New Hampshire explained:

> [I]n order to make such possession effectual to restrain a title, it must be shown to have been open, visible, exclusive and notorious; calculated to give notice to the owner, of an adverse claim, by the possessor, to the land in his possession.

Little v. Downing, 37 N.H. 355, 367 (1858). More recently, this court summarized:

> In order to obtain title by adverse possession, the adverse possessor must prove, by a balance of probabilities, twenty years of adverse, continuous, and uninterrupted use of the land claimed so as to give notice to the owner that an adverse claim is being made. In addition, adverse use is trespassory in nature, and the adverse possessor's use of the land must be exclusive.

Blagbrough Family Realty Trust v. A & T Forest Prod., Inc., 155 N.H. 29, 33 (2007).

The burden of proving adversity is on the party claiming adverse possession, by a balance of probabilities. *Arnold v. Williams*, 121 N.H. 333 (1981). It is question of fact, *Atherton v. Johnson*, 2 N.H. at 34, that may depend upon the character of the neighborhood.[7] *Riverwood Commercial Properties, Inc. v. Cole*, 138 N.H. 333, 335 (1994) ("What constitutes possession may vary from

[7]Any real property may be the subject of adverse possession, including small tracts and strips. *Mastroianni v. Wercinski*, 158 N.H. 380 (2009) (860 square foot parcel); *Seward v. Loranger*, 130 N.H. 570 (1988) (litoral strip); *Hemon v. Rowe Chevrolet Co.*, 108 N.H. 11 (1967) (10 foot-wide hedgerow); *Ucietowski v. Novak*, 102 N.H. 140 (1959) (4-foot wide portion of driveway).

case to case depending on the nature of the land at issue."); *Page v. Downs*, 115 N.H. 373, 374 (1975).

In a long line of cases beginning in 1835 and most recently in 2009, this court has made clear that subjective intent is irrelevant in adverse possession, and that only concrete acts matter. *Mastroianni v. Wercinski*, 158 N.H. 380 (2009); *Blagbrough Family Realty Trust*, 155 N.H. at 29 (2007); *Kellison v. McIsaac*, 131 N.H. 675, 680 (1989); *Hewes v. Bruno*, 121 N.H. at 32; *Linen v. Maxwell*, 67 N.H. 370 (1893); *Woods v. Banks*, 14 N.H. 101 (1843); *Towle v. Ayer*, 8 N.H. 57 (1835).

Because squatting is in derogation of record title, "evidence of adverse possession is always to be construed strictly." *Little v. Downing*, 37 N.H. at 367; *see also Blagbrough,* 155 N.H. at 33; *Bellows v. Jewell*, 60 N.H. 420, 422 (1880).

A. Squatter Has Burden to Prove Absence of Permission, Permission Ends Period of Adverse Possession, and Permission Need Not Be Explicit

The "absence of permission is … an essential element … the claimant must prove." *Town of Warren v. Shortt*, 139 N.H. 240, 244 (1994); *Sandford v. Town of Wolfeboro*, 143 N.H. 481, 486 (1999). While there is no need to show "overt antagonism" between the parties, *Zivic v. Place*, 122 N.H. 808, 815 (1982), when parties maintain a friendly relationship, an absence of permission may be difficult to prove. *Greenan v. Lobban*, 143 N.H. 18, 22 (1998) (where parties "maintained a friendly relationship," allowing use of beach outside of boundaries, claimant "failed to provide sufficient evidence to compel a finding that their use of the beach was not permissive").

Adverse possession is antithetical to a claimant's possession of land by consent of the true owner. *Atherton v. Johnson*, 2 N.H. at 31. Thus, a period of adversity cannot start until permission ends, *Dodge v. McClintock*, 47 N.H. 383, 387 (1867), and permission cannot ripen into adversity. *Avery v. Rancloes*, 123 N.H. 233, 238 (1983); *Ucietowski v. Novak*, 102 N.H. 140, 145 (1959); *Taylor*

v. Gerrish, 59 N.H. 569 (1880); *Smith v. Wiggin*, 52 N.H. 112 (1872); *Blaisdell v. Portsmouth, G.F. & C.R.R.*, 51 N.H. 483 (1871). Likewise, permission by the record owner terminates any period of adversity commenced previously. *Kellison v. McIsaac*, 131 N.H. at 679 ("[T]respassory use can be broken if the actual owner communicates permission to the adverse user to cross the owner's land."); *Stevens v. Dennett*, 51 N.H. 324 (1872).

Permission is determined by whether "a reasonable person would have concluded that his use was permissive" given the record of the communications between the parties. *Zivic v. Place*, 122 N.H. at 813.

Permission can of course be explicit. *Zivic*, 122 N.H. at 812-13 (record owner successfully interrupted limitations period by writing letter to the squatter demanding end to the use of a road, which included the phrase: "And naturally, you're welcome to continue using the road through my land until such time as you can have your own put in.").

But because squatting is "entry by a stranger upon the land of another" in derogation of record title, it is not necessary to show evidence of explicit permission in order to defeat a claim of adverse possession. In *Cilley v. Bartlett*, 19 N.H. 312, 323 (1849), this court held that permission obviated the period of adverse possession because the claimant "always acknowledged that [someone else] was the owner of the premises."

B. Assertion of Title and Demand to Leave Constitutes Ouster of Squatter

For the same reason – adverse possession is in derogation of record title – the record owner need not take extraordinary measures to oust a squatter; to put him out, the record owner need only show up and demand his property.

In *Gallo v. Traina*, 166 N.H. 737 (2014), neighboring property owners to some degree shared the use of a strip of land, in that both neighbors had installed decorative walls and plantings over the course of many years. This court explained:

> [T]o interrupt … adverse possession, the record owner must perform some act which constitutes an ouster of the adverse claimant. Such conduct … must be such as would put a reasonably prudent person on notice that he or she actually has been ousted. Accordingly … a mere casual entry for a limited purpose by the record owner is not necessarily sufficient to destroy adverse possession.

Gallo v. Traina, 166 N.H. at 739 (quotations and citations omitted). This court held that the decorative walls and plantings were mere casual entries, and did not constitute ouster.

While casual sharing is not sufficient to oust, a demand to leave is. In *Locke v. Whitney*, 63 N.H. 597, 598 (1886), the record owner "entered upon the lot, claim[ed] title, and informed [the squatter] that he had a good deed." This court wrote that "adverse possession was interrupted by the [owner's] entry upon the land and claim of title." New Hampshire appears to be the majority position in this regard. *See* 3 AM. JUR. 2d *Adverse Possession* §§ 98-99.

Moreover, the demand to quit need not be particularly forceful. In *Towle v. Ayer*, 8 N.H. 57 (1835), this court wrote:

> [A]lmost any interference with the possession of land in derogation of the rights of the owner may, if he so choose, be considered as a disseizin. Thus if a man go to a house that is locked, and taking the door in his hand claim the same in fee, although he do not enter, it will be a disseizin of the house. Such an act is in law sufficient to give possession of the house to him who makes the claim, if the owner so elect. And the owner may at his election consider any person as a disseizor who is found upon the land, and who refuses or neglects to leave it upon his request.

Towle v. Ayer, 8 N.H. at 62.

Thus, the requirements for adverse possession and ouster are not mirrored. Adverse possession seeks to overcome title, and thus a claimant must show, with evidence "construed strictly," adverse, continuous, uninterrupted, trespassory, and exclusive use for the entire period of limitations. But the law favors the record owner, as the true owner being disseized. The true owner is thus permitted to oust just by telling the squatter to leave.

II. Chronicle of the Littles Asserting Title Before Expiration of Period of Limitations

Mary O'Malley acknowledged that in 2010 Aaron Little told her the fence was encroaching on the Little's property and he wanted the O'Malleys to move it. Helen O'Malley acknowledged that, also in 2010, Aaron walked the fence-line with her, pointed out the deeded boundary, explained the O'Malley's encroachment, asserted the strip belonged to the Littles by deed, and again directed that they wanted the fence moved. *See O'Hearne v. McClammer*, 163 N.H. 430 (2012) (boundaries may be established by neighboring owners walking common border).

Mary also acknowledged that in 2013, before the end of the 20 year period, Aaron again told her the fence needed to be moved, and that if the O'Malleys did not move it by December 31, he would. In an October 3, 2013 email from Mary to Aaron – still shortly before the expiration of the 20-year period – Mary acknowledged that the Littles asserted their "claim regarding this land."

Thus, there is a record of the Littles repeatedly confronting the O'Malleys with the true boundary (in person, in writing, and by phone) before the expiration of the period of limitations, asserting their title, and expressing their wish to have the fence moved or removed. When the O'Malleys refused to respect the Little's deed, Aaron established a deadline by which he would take action, prompting the O'Malleys to sue for an injunction.

III. Assertion of Title and Demand to Move the Fence Was Both Ouster and Permission

Beyond the fact that the Littles asserted title before the expiration of the limitations period, it almost does not matter what precisely the parties said in their 2010 and 2013 communications. The fact that the Littles asserted title and demanded the fence be moved, which the O'Malleys readily concede, was sufficient to show both: (A) ouster, and, (B) permission for the (no longer adverse) possession going forward from that time. In the context of this case, ouster and permission are closely related.

A. By Asserting Title and Demanding the Fence be Moved, the Littles Ousted the O'Malleys

In New Hampshire, ouster of a squatter puts the squatter out of possession, and thus ends any then-ticking period of adverse possession. *Locke v. Whitney*, 63 N.H. at 597, 598 (1886) ("adverse possession was interrupted by the plaintiff's entry upon the land and claim of title"). As noted, to accomplish ouster, the record owner need only assert title and tell the squatter to leave.

The trial court held, however, that to interrupt the limitations period, "the record owner must perform some act which constitutes an ouster of the adverse claimant." ORDER ON QUIET TITLE at 11. Citing Kentucky and Oklahoma intermediate appellate panels, the trial court ruled that to show ouster, there must be a "clear intent to retake possession of the property," *Id.* at 12, and that definitive acts such as writing letters[8] are not sufficient acts of ouster. It held that the Little's assertion of title, rather than "show[ing] a clear intent to retake possession," instead "underscores the adversity of the possession." *Id.* at 12. The court then faulted the Littles for failing to perform an act sufficient to show their clear intent.

[8] *Zivic v. Place*, 122 N.H. 808, 813 (1982), held that writing a letter asserting title *is* sufficient to interrupt the period of adverse possession.

By this ruling the trial court erred in seven separate ways.

First, New Hampshire law is not ambiguous regarding the nearly negligible nature of the act necessary for a record owner to assert title. While "casual entry for a limited purpose" is not sufficient, *Gallo v. Traina*, 166 N.H. at 739, it does not take much. An owner merely "enter[ing] upon the lot, claiming title, and inform[ing] [the squatter] that he had a good deed," is sufficient to interrupt adverse use. *Locke v. Whitney*, 63 N.H. at 598. Or an owner merely "taking the door in his hand" and requesting the squatter quit the premises, is likewise sufficient. *Towle v. Ayer*, 8 N.H. at 57. By requiring more, the court erred.

Second, the trial court's purported statement of the law demands that the record owner show a "clear intent to retake possession." In a line of 7 cases over 175 years, cited *supra*, this court has made clear that subjective intent is not a relevant consideration in adverse possession. Accordingly, imposing a requirement that intent be shown, whether foggy or clear, is not an accurate articulation of New Hampshire law.

Third, and relatedly, the court placed on the owner the burden to show the purported "clear intent." But in New Hampshire, it is the claimant's sole burden to prove adversity. Even if there were an intent element, it would be the claimant's burden to carry.

Fourth, the trial court relied on out-of-state authorities which appear to set a high bar for the type of act necessary to assert title. In those states, the trial court wrote, even such definitive acts as writing letters are not sufficient indicia of ouster. But unlike an adverse possessor who must notoriously apprise the record owner of the adverse possession, when a New Hampshire record owner ousts, there is no "act" requirement beyond assertion of title and demand to quit. Discussing the sufficiency or overtness of the purported act, therefore, is nonsensical in the context of New Hampshire law.

Fifth, the trial court effectively misread *Gallo v. Traina*. In *Gallo*, the dispute concerned a shared use, with both neighbors having incrementally installed decorative walls and plantings over many years, at first apparently agreeably, though later not. Because the use in *Gallo* was shared and incremental, a reasonable adverse possessor would not have ever definitively known they were being ousted. In relying on *Gallo*, the trial court confused the casual and incremental nature of the record owner's entry there, with the Little's unequivocal assertion of title and demand to leave here.

Sixth, the trial court wrote that "[t]elling an adverse possessor that their fence was on the owner's property only underscores the adversity of the possession; it does not show clear intent to retake the property." This is backward. While asserting title may highlight the adverse relationship between owners or show a lack of cordiality, it definitely terminates the adverse possession period.

Seventh, it must be recalled the O'Malleys readily admitted that, at the time they erected the fence in 1993, they knew they were appropriating a strip of their abutter's backyard. Thus, in 2010 when the Littles first asserted title, pointed out the deeded line, and asked the fence be moved, it could not possibly have been a surprise. Certainly it was no surprise the second time and the third time. Accordingly, even if some particular act of ouster might be necessary in some other case or jurisdiction, given the facts here, Aaron's entry and assertion of title apprised the O'Malleys that their usurpation of a portion of the Little's lot had finally come to an end.

To oust, New Hampshire law requires only that the holder of the deed enter and assert title. Had the court enforced this rule, it would have recognized the Little's repeated assertions of ownership: in their 2010 phone call Aaron told Mary O'Malley the fence was on the Little's property and had to be moved, in their 2010 boundary-walk Aaron told Helen O'Malley the same

thing, and in their 2013 phone and email conversations Aaron again asserted to Mary the Little's record title and insisted the fence be moved.

But because the trial court erroneously set a standard too high, it was looking for particular acts and clear intent by the Littles. Thus it ruled that the phone calls, fence-walk, and emails were insufficient, and ignored the Little's repeated assertions of title that were (any one of them) sufficient to interrupt the limitations period and oust the O'Malleys from their encroachment.

B. By Asserting Title and Demanding the Fence be Moved, the Littles Gave Implicit Permission for the O'Malleys to Continue Using the Strip

In New Hampshire, permission by the landowner can be inferred without proof of an explicit grant. *Cilley v. Bartlett*, 19 N.H. at 312. As noted, once title is asserted and departure is requested, any use thereafter by the squatter is permissive, thereby ending the adverse period. *Id.*

The trial court, however, held that although both the O'Malleys and the Littles testified credibly, because there was no evidence of "formal permission" in the emails, the O'Malleys' use was not permissive. ORDER ON QUIET TITLE at 6-7. By this holding the court in three ways misconstrued the law regarding permission.

First, the court required a showing of explicit permission in writing. While it thus took cognizance of *Zivic v. Place*, where explicit permission appeared in a letter, it ignored the implicit permission permitted in *Cilley v. Bartlett*. In *Cilley,* this court allowed that explicit permission is not necessary, as long as a reasonable-person claimant would have been apprised of their trespassory use upon the record owner's entry and assertion of title.

When in 2010 Aaron asserted title but did not demand removal by a date certain, and when again in October 2013 Aaron allowed the O'Malleys a few months' grace period to move the fence before the Littles would take self-help action on December 31, the Littles were not abandoning their assertion of title. Rather, they were permissively showing consideration of their

neighbor's vacation time, and giving the O'Malleys an opportunity to make orderly arrangements for removal. A demand, followed by forbearance, is permission.

Second, the trial court flipped the burden of proof. The absence of permission is an "essential element" of adverse possession which "the claimant must prove." *Warren v. Shortt*, 139 N.H. at 244. Requiring a showing of "formal permission," however, puts the burden on the record owner to show something beyond the mere assertion of title.

The trial court appears to have derived its erroneous standard and burden from its reading of *Ucietowski* and *Blagbrough*. ORDER ON QUIET TITLE at 6. Both *Ucietowski* and *Blagbrough* are adverse possession cases, but neither addresses the scope or burden of permission, and the citations to those cases do not support the trial court's order.

Third, the trial court erroneously "construed strictly" the Little's evidence. This court has made clear that evidence of *adverse possession* is to be construed strictly. But because squatting is in derogation of ownership, there is no such requirement for evidence offered by the owner. The evidentiary scales are purposely tipped toward the record owner. Here the court refused to discern permission from Aaron Little's demand-then-grace. Instead it seems to have construed his words strictly, holding a two-day trial and performing a close textual analysis of his statements, and requiring "formal permission" in writing. But somehow it missed Aaron's meaning – the fence must move, though later is OK.

Had the trial court employed the correct standard – implicit permission is sufficient and permission must be disproved by the claimant – it would have found the O'Malleys did not meet their burden. The Littles could have removed the fence at any time. By asserting title in 2010, but not taking immediate disruptive action, the Littles implicitly permitted the O'Malley's continuing use from that day forward, and nothing in the record shows otherwise.

C. Whether by Ouster or Permission, the Littles Interrupted the O'Malley's Adverse Possession, Before the Expiration of the Statute of Limitations

The Littles were within their rights, at any time until the twentieth anniversary of the fence, to remove it and park their tenants' cars in the extra three feet.

Asserting title in 2010 interrupted the 20-year period, such assertion and demand for removal was ouster, and demanding removal but refraining from actually removing the fence constitutes permission. Whether by ouster or permission, the Littles interrupted the O'Malley's adverse possession in 2010 and 2013, either three years, or three months, before the expiration of the 20-year statute of limitations.

If this court upholds the trial court's standards for ouster or permission, it will effectively require record owners to take physical action to assert title, rather than, as here, entering and calmly informing the neighbor of the problem. New Hampshire law, however, wisely respects deeds, recognizes squatting is in derogation of lawful ownership, and does not encourage rash action for owners to claim what is already theirs.

CONCLUSION

I. Standards of Review

In adverse possession appeals, the Supreme Court reviews the trial court's legal rulings, and its application of law to facts, *de novo*, whether upon summary judgment, or after trial. *Marshall v. Burke*, 162 N.H. 560, 563 (2011); *Mastroianni v. Wercinski*, 158 N.H. at 382. This court defers to a trial court's findings of historical fact, where those findings are supported by evidence in the record. *Blagbrough Family Realty Trust*, 155 N.H. at 33. Summary judgment should only be granted when there is "no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law." *Marshall v. Burke*, 162 N.H. at 563.

II. Trial Court Should Have Granted Summary Judgment

Before trial the Littles requested summary judgment. They noted that in interrogatory answers, the O'Malleys admitted that long before the limitations period, Aaron had approached the O'Malleys, and told the O'Malleys that "the fence had to be moved by December 31, 2013 or he would remove it himself." MEMO IN SUPPORT OF SUMMARY JUDGMENT ¶¶ 11, 76-77.

At the summary judgment hearing, the Little's attorney argued that the concession, by itself, both terminated the adverse possession period, and constituted permission. *Hearing on Motion for Summary Judgment* (Jan. 19, 2016) at 13-16, 35.

In its order denying summary judgment, the trial court noted the O'Malley's concession: it reported that sometime before the expiration of the twenty-year period, Aaron Little informed the O'Malleys "that the fence had to be moved by December 31, 2013 'or he would remove it himself.'" ORDER (Jan. 25, 2016) at 4-5, *Appx*. at 102.

The court noted, however, that the Littles claimed their communications had also included a statement of explicit permission. The court denied summary judgment because it found "[t]his

factual dispute is material." *Id.* at 5. The court wrote:

> Considering the evidence in the light most favorable to the O'Malleys, the court will assume that Little never provided consent but rather told the O'Malleys that the fence had to be removed and ultimately gave them a December 31, 2013 deadline for doing so. *These actions do not by themselves stop the 20 years of continuous adverse possession*. By its very terms, adverse possession must be adverse, that is trespassory in nature. Accordingly, *simply telling someone that they are to stop their continuous adverse possession does not defeat the claim*; to the contrary it underscores the adverse nature of the possession. While there may be some possible action that could be taken short of filing suit that would stop the march toward the requisite 20 years, it is clear that *merely telling someone to stop trespassing is inadequate*. Defendants are not entitled to summary judgment on the basis of their argument that Little's conversation with the O'Malleys truncated the 20 year adverse possession via the fence.

ORDER (Jan. 25, 2016) at 4-5 (citation omitted, emphasis added).

The court's order, particularly the emphasized portions, misstates the law. Telling a squatter to "stop their … possession" *does* defeat the claim, "merely telling someone to stop trespassing" *is* adequate ouster, and the Littles having told the O'Malleys "that the fence had to be removed and ultimately gave them a … deadline" *does* by itself stop the 20 years of continuous adverse possession.

Because the facts admitted by the O'Malleys are sufficient to grant the Littles a judgment as a matter of law, the details of the parties' communications – whether the Littles provided explicit permission or not – is not material. Summary judgment should have been granted.

III. Supreme Court Should Reverse the Post-Trial Motion, Declare the Little's Title Controls, Quiet Title in Favor of the Littles, and Dissolve the Injunction

Even if a material fact was learned during trial, the court was still wrong as a matter of law in its post-trial order. At trial, the O'Malleys conceded the conversations, fence-walk, and email communications – during which the O'Malleys admitted the Littles told them the fence was on their land, to remove it, and if not the Littles would.

Accordingly, this court should reverse the post-trial order.

Whichever order is reversed, this court should declare that the Little's record title controls, quiet title in favor of the them, dissolve the injunction, and allow the Littles to remove the fence from their strip of land.

REQUEST FOR ORAL ARGUMENT

Aaron Little and Maryann Little request that their attorney, Joshua L. Gordon, be allowed oral argument because this case involves a question regarding the nature of the acts which constitute ouster and permission, a matter open to dispute between owners and squatters.

Respectfully submitted,

Aaron Little and Maryann Little
By their Attorney,
Law Office of Joshua L. Gordon

Dated: January 31, 2017

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief.

I further certify that on January 31, 2017, copies of the foregoing will be forwarded to Daniel Hartley, Esq.; to James Rogal, Esq.; and to Christopher L. Boldt, Esq.

Dated: January 31, 2017

Joshua L. Gordon, Esq.

ADDENDUM