State of New Hampshire
Supreme Court

NO. 2016-0491

2017 TERM

APRIL 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

REPLY BRIEF

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ARGUMENT

I. Use of Strip Before 1993 Erection of Fence is Not Relevant to This Appeal

In their brief, the O'Malleys repeat factual allegations regarding uses to which they allegedly put the disputed strip of land before the erection of the fence in October 1993. O'MALLEY BRF. at 3-8, 15, 41-42. The court found that adverse use began with the erection of the fence, which was not appealed. Thus, the O'Malleys' lengthy statement of those alleged facts can be safely ignored.

II. O'Malleys Concede Littles Entered and Asserted Title

In their brief, the O'Malleys re-concede that the Littles entered and asserted title. They concede – based on the O'Malleys' own testimony – that Aaron Little put them on notice, before the expiration of the statute of limitations, by phone, email, and an in-person walk of the line, that he was "requesting that the fence be moved as it was on his property," "that he wanted the fence moved," and that "he was requesting that they remove their chain link fence." O'MALLEY BRF. at 9, 10, 17.

In their brief, the O'Malleys suggest that Aaron's notice was somehow deficient because when he entered and asserted title, he was not able to point to the exact demarcation of the parties' property line. O'MALLEY BRF. at 8, 9, 10. But the O'Malleys cite no requirement that for a record owner to assert title, the owner must have already conducted a survey or be able to lay a hand on the precise line. Moreover, they do not dispute that Aaron Little actually entered and asserted title, nor that the O'Malleys themselves already knew they had erected the fence beyond their boarder for the purpose of expanding their backyard.

III. Littles' Ouster Was Clear and Definite

In their brief, the O'Malleys note that "a mere casual entry for a limited purpose by the record owner is not sufficient to destroy a claim of adverse possession." O'MALLEY BRF. at 20. The Littles agree generally, and also accept the specific example provided. *Alukonis v. Kashulines*, 97 N.H. 298, 300 (1952) (entry to conduct "survey … not sufficient to establish … exercise of dominion").

But the O'Malleys then argue that entry to assert title is neither ouster nor interruption of the adverse period. They make this argument without citation, and also without addressing contrary New Hampshire authority cited by the Littles. *Locke v. Whitney*, 63 N.H. 597, 598 (1886); *Towle v. Ayer*, 8 N.H. 57 (1835); LITTLES' OPENING BRF. at 16.

Rather, they claim that the Littles' entry here is analogous to *Gallo v. Traina*, 166 N.H. 737 (2014). *See* O'MALLEY BRF. at 20-21. But as noted in the Littles' opening brief, in *Gallo* the strip of land was for a long time shared, with both parties casually entering to make iterative, incremental aesthetic improvements, such that at no time would any party reasonably be put on notice that it was ousted.

There was no sharing here, nor any iterative or incremental mutual entries. Aaron Little gave the O'Malleys clear, definite, and timely notice that they had intruded on his land, that they were no longer welcome, and that if they did not remove the fence he would. The Littles' conduct was such that "a reasonably prudent person" would be put "on notice that he or she actually has been ousted." *Gallo*, 166 N.H. at 739.

IV. To Oust, Assertion of Title Need Only be Token or Nominal

In their brief, the O'Malleys urge this court to "provide guidance to record title holders that if they want to stop a twenty year statute of limitations from running on a possible claim for adverse possession, filing suit … is the best way to proceed." O'MALLEY BRF. at 14, 22.

The O'Malleys ignore that for centuries the law in New Hampshire is that for a record owner to oust, the owner need only take nominal, or token, action. *Locke v. Whitney*, 63 N.H. 597, 598 (1886) (record owner "entered upon the lot, claim[ed] title, and informed [the squatter] that he had a good deed"); *Towle v. Ayer*, 8 N.H. 57, 62 (1835) ("[I]f 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.").

Moreover, by urging that a lawsuit should be the preferred method for an owner to assert title, the O'Malleys also ignore centuries of New Hampshire law encouraging disputatious parties to find non-litigation ways to settle their differences. *See e.g., G2003B, LLC v. Town of Weare*, 153 N.H. 725, 728 (2006) ("New Hampshire's well-established principle of favoring the settlement of litigation"); *Appeal of Brown*, 143 N.H. 112, 119 (1998) ("[T]he remedial purpose of the workers' compensation law is best served by a rule that encourages claimants [to seek compensation] while discouraging unnecessary litigation."); *Seppala & Aho Const. Co. v. Elton*, 119 N.H. 634, 636 (1979) ("Under today's interpretation, the statute will continue to discourage appeals.…"); *Arouchon v. Whaland*, 119 N.H. 923, 926 (1979) (rejecting party's position because "such an attitude … fosters needless litigation and discourages out-of-court settlements"); *Osgood v. Jones*, 60 N.H. 543, 549 (1881) ("[W]e believe the result will be on the one hand to discourage unnecessary litigation, and on the other that not only public but individual rights will be fully protected."); *see also Aranson v. Schroeder*, 140 N.H. 359, 366 (1995) (explaining public policy for rule eschewing litigation).

V. Littles Do Not Assert Explicit Permission, and Implied Permission Was Preserved

In their brief, the O'Malleys argue that because there was no explicit permission, no permission was given. O'MALLEY BRF. at 16. Although there was conflicting testimony on the explicitness of permission, the court found there was no explicit permission. In light of this, and because the Littles did not appeal the issue, explicitness of permission can be ignored.

The O'Malleys then suggest that implied permission turns on the nature of the parties' relationship. O'MALLEY BRF. at 16-18. There is little doubt that cordiality or hostility may aid or frustrate a trial court's task of weighing evidence. *Compare Zivic v. Place*, 122 N.H. 808, 815 (1982) (no need to show "overt antagonism"), *with Greenan v. Lobban*, 143 N.H. 18, 22 (1998) (parties "maintained a friendly relationship"). But as noted in the Littles' opening brief, cordiality or hostility of relations between landowners is not a factor in determining whether permission was implied, and adverse possession does not turn on parties' subjective understandings.

The O'Malleys also allege that the issue of implied permission based on ouster was not preserved. Implied permission – that is, demand followed by forbearance – was argued below. In their trial memorandum, for instance, the Littles noted:

> It strains logic to accept the O'Malley's suggestion that Aaron contacted the O'Malleys in 2010 about the fence but sat idly by for three years without having given permission for it to stay, but then became hypervigilant about it being removed in 2013 for no apparent reason.

LITTLES' TRIAL MEMO (July 15, 2016), *Appx*. at 121, 143. Similarly, in their request for summary judgment, the Littles noted that beginning in 2010 they had requested the fence be moved, but understood the O'Malleys wanted to maintain access to their outdoor shower. MEMO IN SUPPORT OF SUMMARY JUDGMENT ¶¶ 64-81 (Aug. 28, 2015), *Appx*. at 47, 61-63.

VI. *Cilley v. Bartlett* is Helpful Authority Regarding Implied Permission

Finally, the Littles' opening brief cited *Cilley v. Bartlett*, 19 N.H. 312 (1849), for the proposition that "permission by the landowner can be inferred without proof of an explicit grant." LITTLES' OPENING BRF. at 21. The O'Malleys dispute that interpretation, arguing that *Cilley* instead "stands for the proposition that evidence of an acknowledgment of ownership in the record title holder can be the basis for a finding of permission." O'MALLEY BRF. at 19. While the sinuous opinion in *Cilley* can probably be interpreted for both propositions, the O'Malleys have repeatedly acknowledged that the Littles are the "record title holder" of the disputed strip. They thus cannot argue that *Cilley* does not apply here.

CONCLUSION

For the forgoing reasons, and for those stated in the Littles' opening brief, this court should declare that the Littles' record title controls, quiet title in favor of them, dissolve the injunction, and allow the Littles to remove the fence from their strip of land.

Respectfully submitted,

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

Dated: April 4, 2017

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CERTIFICATIONS

I further certify that on April 3, 2017, copies of the foregoing will be forwarded to Daniel Hartley, Esq.; to James Rogal, Esq.; and to Christopher L. Boldt, Esq.

Dated: April 4, 2017

Joshua L. Gordon, Esq.