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November 19, 2010

Dianne Hill, Clerk
York County Courthouse
45 Kennebunk Road
P. O. Box 160
Alfred, Maine 04002-0160

RE: Robert F. Almeder, et al. v. Town of Kennebunkport, et al.
Docket No. RE-09-111

Dear Ms. Hill:

Enclosed for filing in the above referenced case, please find the following:

1. Plaintiffs' Motion to Strike "Answer, Defenses and Cross Complaint" of Defendants Linda W. Burford and Kendall Burford with Incorporated Memorandum of Law; and
2. Proposed Order.

Copies of the enclosed were served via U. S. Mail post-prepaid and addressed to counsel and *pro se* parties noted below.

Thank you for your assistance.

Sincerely,



Sidney St. F. Thaxter

SST/jvl

Enclosures

Copy to (w/encls):

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Alan J. Clark, Trustee of the Allan J. Clark Revocable Trust, *pro se*
Barbara Young, *pro se*
Thomas Ramsey, *pro se*
Kristen Mulvihill, *pro se*
Mary Jane and Jason Mulvihill, *pro se*
Kendall and Linda Burford, *pro se*
Robert M. and Lois W. Baylis, Trustees, *pro se*
Allison W. Phinney, Jr., *pro se*
Barbara Russell, *pro se*
William Joel, II, *pro se*
Michael L. and Donna G. Kelly, *pro se*
Robert F. Almeder
Jack Fleming
Barbara Rencurrel

STATE OF MAINE
YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-09-111

ROBERT F. ALMEDER et al.,)	
)	
Plaintiffs,)	PLAINTIFFS' MOTION TO STRIKE
)	"ANSWER, DEFENSES AND CROSS
v.)	COMPLAINT" OF DEFENDANTS
)	LINDA W. BURFORD AND KENDALL
TOWN OF KENNEBUNKPORT)	BURFORD WITH INCORPORATED
et al.,)	MEMORANDUM OF LAW
)	
Defendants.)	(Title to Real Estate Involved)

Plaintiffs Robert F. Almeder et al. move this court to strike the "Answer, Defenses and Cross Complaint" filed in this action by Linda W. Burford and Kendall Burford (the "Burfords") on October 26, 2010 (the "Burfords' Second Answer").

I. Procedural Background.

On or about May 3, 2010, Linda W. Burford and Kendall Burford filed an "Answer, Defenses and Counterclaims" (the "Burfords' First Answer") in this action which was substantively identical to the Burfords' Second Answer. In the Burfords' First Answer, the Burfords alleged that they "have achieved an Easement by Prescription by using the Intertidal Area and Dry Sand area for over 20 years." Burford's First Answer ¶ 49. In response, plaintiffs filed a Motion to Strike the Burfords' First Answer. The court granted plaintiffs' motion to strike the Burfords' First Answer and stated, "[the Burfords] have failed to show any individualized interest in the beach necessary to acquire standing." See Order, Brennan, J., dated August 17, 2010 (the "August 17 Order"). In discussing another group of individuals' motion to intervene which was denied for the same reasons as the Burfords' First Answer, the court stated

that “[w]hile the concept of standing may be somewhat amorphous, it generally requires that a party have an interest in a controversy ‘that is “in fact distinct from the interest of the public at large.”’” August 17 Order at 5 (quoting Nergaard v. Town of Westport Island, 2009 ME 56, ¶ 18, 973 A.2d 735, 740).

Subsequent to the August 17 Order, on August 30, 2010, the court ordered plaintiffs to republish service to “unascertained persons,” a category in which the Burfords allegedly fall because they do not own beachfront property. See Order for Service of Process and Service by Publication, Brennan, J. dated August 30, 2010 at 2. Although the Burfords clearly had actual notice of plaintiffs’ Complaint because they responded in Burfords’ First Answer, they apparently have taken the opportunity occasioned by the new published notice to refile their responsive pleading that was stricken with some adjustments.

II. Argument.

For the following reasons the Burfords’ Second Answer should be stricken.

A. Under the law of the case the Burfords’ Second Answer must be stricken for the same reasons the Burfords’ First Answer was stricken.

“The doctrine of the law of the case ‘requires that, absent a showing of essentially different facts, [our decision . . . on a given issue is to be followed.]’” [sic.] Office of Pub. Advocate v. PUC, 2005 ME 15, ¶ 40; 866 A.2d 851, 862 (quoting Raymond v. Raymond, 480 A.2d 718, 722 (Me. 1984)). The Burfords’ Second Answer does not raise any new issue or facts than that of the Burfords’ First Answer. It simply restates with added detail the claim that the Burfords have acquired a prescriptive easement because they have been using the beach in a recreational manner for longer than the prescriptive period. In the Burfords’ First Answer, the Burfords alleged that they have “achieved an Easement by Prescription by using the Intertidal Area and Dry Sand for over 20 years.” Burfords’ First Answer ¶ 49. They further alleged that

“the use of Goose Rocks Beach has been public since the late 1800’s or at least 100 years.”

Burfords’ First Answer ¶ 51. In the Burfords’ Second Answer, the Burfords have added some additional details, alleging that Kendall Burford has established a prescriptive easement because he played football and softball, sunbathed, and took walks on the beach and that Linda Burford has “used the Dry Sand and intertidal area of the beach since 1942.” Burfords’ Second Answer ¶¶ 50, 55. They further include assertions that they now live at 1 New Biddeford Road (a parcel which is not beach front property) and that some of the use occurred in the 1960s when they did not own any property in the Goose Rocks Beach area. They also seem to generally assert (although it is not entirely clear) that their predecessors in title used the beach since 1903.

Furthermore, in the Burfords’ Second Answer, the Burfords allege that their predecessor in title, Linda Doe “claims that she has established an Easement by Prescription over the Dry Sand and the Intertidal Area by open and notorious use without permission for over 20 years believing that it was a public beach.” Clearly the Burfords are simply restating the fact that as members of the general public believing Goose Rocks to be a public beach, they have been using the beach for a number of years. Therefore, this Court’s decision that “[the Burfords] have failed to show any individualized interest in the beach necessary to acquire standing” is the law of the case and cannot be redecided in a different manner at this time.

- B. As articulated in the August 17 Order, the Burfords have failed to demonstrate a particularized interest in the case that goes beyond that of members of the general public.

Although the Burfords have incorporated additional facts into the Burfords’ Second Answer that were not alleged in the Burfords’ First Answer, they have not alleged any facts that support the claim that they were using the beach otherwise than as members of the general public. The fact that they owned property in the neighborhood of the beach but not adjacent to

Goose Rocks Beach in no way changes this fact. The fact that they have alleged additional details regarding their “use” of the beach – stating they played ball games and sunbathed – similarly does not indicate that they have used the beach otherwise than as members of the general public. Furthermore, in the Burfords’ Second Answer itself, the Burfords allege that the beach was “open to the public use” at the times when they used the beach and that “the town has established a right to use the Intertidal and Dry sand area of the beach by use consistent with and not separate from the private use by the individuals.” Burfords’ Second Answer ¶ 44.

Therefore, the Burfords’ Second Answer actually drives home the point that the Burfords have no particularized interest in Goose Rocks Beach; rather, they have an interest solely as members of the general public.

It should be noted that this Court denied intervener status to the so-called “TMF Interveners” who are property owners in the vicinity of Goose Rocks Beach but who do not own property adjacent to the beach. This Court found the “TMF Interveners’ pleadings fall short of showing the particularized injury or claim required to obtain standing.” August 17 Order at 6. The TMF Interveners sought intervention on the basis that (1) the TMF Interveners own property located in the vicinity of Goose Rocks Beach, (but not beach front property) and (2) that the TMF Interveners used the beach “openly, notoriously, adversely and exclusively under a claim of right for over 100 years” and that the use included “swimming, walking, picnicking, fishing, clamming, barbequing, campfires, sunbathing, reading, horseback riding, boating, etc.” Proposed Answer, Defenses and Counterclaims of TMF Interveners, dated June 4, 2010 at 10-33, 36. If using the beach for these seemingly extensive recreational purposes while owning property in the vicinity of the beach did not convince this court that the TMJ Interveners had standing, then certainly the additional facts alleged by Burfords that they own property in the

vicinity of the beach and have used the beach for ball games and sunbathing (similar general recreational uses) should not cause this court to find that the Burfords have standing.

C. Even if the Burfords are claiming a private prescriptive easement, they cannot prevail under the applicable law.

As stated above, this Court has ruled that unless a party has a particularized injury that is differentiated from that of the general public, he or she will not have standing. A similar theory based on similar policy and doctrinal concerns has been articulated in a different way but specifically with regard to prescriptive easements.

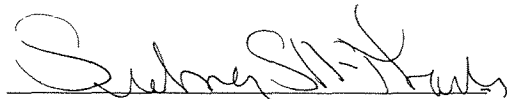
Maine law holds that “a private prescriptive easement will not arise where the use has been exercised with the public.” Hermansen & Richards, Roads and Easements § 4.5.2 (citing Hill v. Lord, 48 Me. 83, 96 (1861) (“if such custom, with any other evidence in the case, establishes any prescriptive right in the town, in its corporate capacity, for the use of the inhabitants, the plaintiff cannot recover”)). Other jurisdictions have stated the rule in more recent cases – that a private prescriptive easement cannot be obtained by a party who uses land of another in common with the general public in a manner that is not differentiated in any way from the use enjoyed by the general public. See e.g., Wadsworth Realty Co. v. Sundberg, 338 A.2d 470, 474 (Ct. 1973) (“Where the use of a right of way is in common with the public, that common use is regarded as negating a presumption of grant to any individual use. In such case the individual user must, in order to establish an independent prescriptive right, perform some act to the knowledge of the servient owner clearly indicating his individual claim of right.”); Garmond v. Kinney, 579 P.2d 178, 179 (N.M. 1978) (“this Court [has] held that an easement by prescription [cannot] be acquired by usage ‘common with and similar to that of the general public.’”).

Because the Burfords have alleged that they have used the beach in a manner similar to that of the general public and have not differentiated their use in any manner from that of the general public, their claim of a private prescriptive easement to use the beach fails under Maine law.

III. Conclusion.

Because (1) this Court has already decided the issue raised by the Burfords' Second Answer, (2) the Burfords do not have any particularized injury that is separate and distinct from that of the general public and therefore they do not have standing in this case, and (3) the Burfords claim of a private prescriptive easement for use of the beach when they have used it in common with and in the same manner as the general public fails, plaintiffs respectfully request that this Court strike the documents titled "Answer, Defenses and Cross Complaint" of Linda W. Burford and Kendall Burford.

Dated: November 19, 2010



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NOTICE

Pursuant to Rule 7 of the Maine Rules of Civil Procedure, opposition to this Motion must be filed not later than 21 days after the filing of the Motion, unless another time is provided by the Rules of Court. Failure to file a timely objection will be deemed a waiver of all objections to this Motion which may be granted without further notice or hearing.

STATE OF MAINE
YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-09-111

ROBERT F. ALMEDER et al.,)
)
)
Plaintiffs,)
)
v.)
)
TOWN OF KENNEBUNKPORT)
et al.,)
)
Defendants.)

ORDER

(Title to Real Estate Involved)

UPON CONSIDERATION of the plaintiffs' motion to strike the "Answer, Defenses and Cross Complaint" filed in this action by Linda W. Burford and Kendall Burford on October 26, 2010 ("October 26 Pleading"), WITH/WITHOUT objection, WITH/WITHOUT hearing, the court finds as follows:

On or about May 3, 2010, Linda W. Burford and Kendall Burford filed an "Answer, Defenses and Counterclaims" (the "Burfords' First Answer"). The court granted plaintiffs' motion to strike the Burfords' First Answer and stated "[the Burfords] have failed to show any individualized interest in the beach necessary to acquire standing." See Order, Brennan, J., dated August 17, 2010.

"The doctrine of the law of the case 'requires that, absent a showing of essentially different facts, [our decision . . . on a given issue is to be followed.'" [sic.] Office of Pub. Advocate v. PUC, 2005 ME 15, ¶ 40; 866 A.2d 851, 862 (quoting Raymond v. Raymond, 480 A.2d 718, 722 (Me. 1984)). The Burfords' October 26 Pleading does not raise any new issue or facts than that of the Burfords' First Answer. The Burfords have failed to demonstrate a

particularized interest in the case that goes beyond that of members of the general public, therefore, the court finds that neither Linda W. Burford and Kendall Burford have standing in this case.

Furthermore, Maine law holds that “a private prescriptive easement will not arise where the use has been exercised with the public.” Roads and Easements, § 4.5.2 (citing Hill v. Lord, 48 Me. 83, 96 (1861) (“if such custom, with any other evidence in the case, establishes any prescriptive right in the town, in its corporate capacity, for the use of the inhabitants, the plaintiff cannot recover”)). In their October 26 Pleading the Burfords have failed to differentiate their use in any manner from that of the general public, as a result, their claim of a private prescriptive easement for use of the beach when they have used it in common with and in the same manner as the general public fails.

IT IS SO ORDERED that plaintiffs’ motion to strike the Answer, Defenses and Cross Complaint of Linda W. Burford and Kendall Burford filed October 26, 2010 is granted. The clerk shall strike the Answer, Defenses and Cross Complaint of Linda W. Burford and Kendall Burford filed October 26, 2010 from the court record. The clerk is directed to incorporate this Order into the docket by reference. M. R. Civ. P. 79(a).

Dated: _____

Justice, Superior Court