

**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**In Case No. 2006-0136, Gregory N. Meyer & a. v. Francis Chase & a., the court on November 28, 2007, issued the following order:**

The petitioners, Gregory N. Meyer, Karen Meyer and Ronald Larrivee, appeal the superior court's order on their petition for declaratory judgment and permanent injunctive relief. We affirm in part, reverse in part and remand.

We will reverse the trial court's findings and rulings only if they are unsupported by the evidence or are erroneous as a matter of law. See Bonardi v. Kazmirchuk, 146 N.H. 640, 643 (2001).

The petitioners first argue that the trial court erred when it terminated their use of a twenty-foot right-of-way to access their property. We agree.

The record submitted on appeal shows that the petitioners have the right to use the twenty-foot right-of-way pursuant to a 1987 easement deed. See RSA 477:26 (2001). When interpreting an easement deed, "[o]ur task is to determine the parties' intent in light of the surrounding circumstances at the time the easement was granted. We base our judgment on this question of law upon the trial court's findings of fact. Clear and unambiguous terms of a deed control how we construe the parties' intent, but the law may imply supplemental rights." Arcidi v. Town of Rye, 150 N.H. 694, 701 (2004) (citations omitted).

The 1987 easement deed gave the grantees "the right to lay, construct, reconstruct, operate, maintain, inspect, replace or remove any utility services and to pass over, across and under land and private ways as are now laid out or as may be laid out in the future" in the subdivision at issue. The 1987 easement deed further referenced the plan for the subdivision "recorded as Plan # D19742." The twenty-foot right-of-way is one of the access and utility easements referenced on this plan. Thus, pursuant to the 1987 easement deed, the petitioners had a right to use the twenty-foot right-of-way to access their property.

The trial court erred to the extent that it ruled that this easement terminated because the petitioners abandoned it. Even if we assume that the record supported the trial court's finding that the petitioners used the twenty-foot right-of-way for access only occasionally, "nonuse by itself does not terminate an easement." Duchesnaye v. Silva, 118 N.H. 728, 734 (1978); see Restatement (Third) of Property § 7.4 illustration 1, at 355 (2000).

The trial court also erred to the extent that it ruled that termination of the petitioners' easement over the twenty-foot right-of-way was required because they could access their property by way of a forty-foot right-of-way. See Thurston Enterprises, Inc. v. Baldi, 128 N.H. 760, 764-65 (1986). Plan # D19742 shows that when the twenty-foot right-of-way was created, the forty-foot right-of-way already existed. Thus, pursuant to the 1987 easement deed, the petitioners' use of the twenty-foot right-of-way was not contingent upon it being the exclusive means of access to their property.

Although a court may terminate an easement because of a material change in conditions, there is no evidence that such a change occurred in this case. See Restatement (Third) of Property, *supra* Introductory Note ch. 7, at 335. "In servitudes law, the change that triggers termination of servitude relationships is ordinarily frustration of the purpose of the servitude arrangement. When the servitude no longer serves any purpose related to those contemplated by the parties who created it, the law terminates it." *Id.* There was no evidence to support a finding that the twenty-foot easement no longer served any purpose related to those contemplated by the parties when it was created in 1987. See *id.* § 7.10(1), at 394.

The petitioners next assert that the trial court erred by ruling that the respondents, Francis and Ellen Chase, Trustees of the EMC Realty Trust, were not required to repave the twenty-foot right-of-way. There is evidence to support a finding that the twenty-foot right-of-way was not paved when it was created. The plan referenced in the 1987 easement deed refers to the forty-foot right-of-way as an existing bituminous concrete driveway. It does not refer to the twenty-foot right-of-way in the same fashion. Thus, there is evidence to support a finding that the easement granted to the petitioners did not include a right to a paved easement on the twenty-foot right-of-way.

Even if the petitioners had a right to pavement on the easement, the 1987 easement deed does not obligate the respondents to maintain it. Rather, the deed requires "Lot C-2, Lot D-1, [and] Lot E-2 [to] equally contribute a one-third share of any costs incurred to construct or maintain any pavement or roadway." It is undisputed that the respondents own Lot C-1, not Lot C-2.

The petitioners next contend that the trial court erred by granting attorney's fees to the respondents in connection with the petitioners' petition to attach. We review the trial court's award of attorney's fees under our unsustainable exercise of discretion standard. LaMontagne Builders v. Brooks, 154 N.H. 252, 259 (2006). To be reversible on appeal, the discretion must have been exercised for reasons clearly untenable or to an extent clearly unreasonable to the prejudice of the objecting party. *Id.* If there is some support in the record for the trial court's determination, we will uphold it. *Id.*

An award of attorney's fees must be grounded upon statutory authorization, a court rule, an agreement between the parties, or an established exception to the rule that each party is responsible for paying his or her own counsel fees. *Id.* An exception to this rule includes situations where litigation is instituted or unnecessarily prolonged through a party's oppressive, vexatious, arbitrary, capricious, or bad faith conduct. *Id.*

Here, the trial court found that the petitioners' petition to attach was instituted in bad faith. According to the petitioners' brief, the attachment hearing was apparently held in chambers and was not transcribed. Therefore, we must assume that the evidence supports the trial court's finding of bad faith. See *Atwood v. Owens*, 142 N.H. 396, 396-97 (1997). As the petitioners have failed to demonstrate that the trial court erred as a matter of law when it awarded attorney's fees to the respondents, we affirm this award. See *id.*

The petitioners next argue that the trial court erred by precluding them from introducing the affidavit of Alan Himmer into evidence. We review a trial court's decisions on the admissibility of evidence under an unsustainable exercise of discretion standard. *Boynton v. Figueroa*, 154 N.H. 592, 599-600 (2007).

The petitioners contend that the trial court erred when it ruled that Himmer was not an unavailable declarant within the meaning of New Hampshire Rule of Evidence 804. Even if we assume, without deciding, that the petitioners are correct on this point, they have failed to demonstrate that the trial court unsustainably exercised its discretion by not allowing them to admit the affidavit. "Unavailability alone . . . is not enough to make a hearsay statement admissible. The statement must fall within one of the exceptions listed in Rule 804(b)." *Barrows v. Bole*, 141 N.H. 382, 394 (1996). The petitioners, however, have failed to demonstrate that the affidavit fits any of these exceptions. Moreover, to the extent that they rely upon Rule 803(15), their reliance is mistaken. Rule 803(15) pertains to statements in a document purporting to establish or affect an interest in property. Himmer's affidavit does not constitute such a document.

Finally, the petitioners assert that the trial court erred when it ruled that the respondents have a right to access their property by way of the forty-foot easement. We find no error. The respondents, like the petitioners, have the right to use the forty-foot right-of-way pursuant to the 1987 easement deed. See RSA 477:26.

Affirmed in part; reversed in part; and remanded.

DUGGAN, GALWAY and HICKS, JJ., concurred.

**Eileen Fox,  
Clerk**