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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-322

AUGUST TERM, 2010

Agency of Natural Resources	}	APPEALED FROM:
	}	
	}	
v.	}	Washington Superior Court
	}	
	}	
Roger Lussier and Evelyn Lussier	}	DOCKET NO. 453-6-07 Wncv
		Trial Judge: Dennis R. Pearson

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

Defendants Roger and Evelyn Lussier appeal the superior court's decision declaring the extent of their ownership of property surrounded by the Willoughby State Forest. We affirm.

Defendants own Marl Pond in Sutton, Vermont and a one-to-two-acre campsite on the south shore of the pond. The title to their property stems from an 1895 deed that conveys the pond itself, described as "supposed to contain about ninety acres," and a right-of-way around the pond for purposes of mining and carrying away lime from the pond. In 2007, plaintiff Vermont Agency of Natural Resources sued defendants for trespass after discovering that they were grading and widening old trails within the Willoughby State Forest in the vicinity of Marl Pond. Defendants claimed that they owned all of the land between the pond and the road that they had constructed. To bolster this claim, defendants hired a surveyor, who opined that the right-of-way referenced in the 1895 deed coextended with the road built by defendants.

Following an evidentiary hearing, the trial court declared that, as unambiguously stated in the 1895 deed, defendants were entitled to the pond itself, the campsite, and a right-of-way surrounding the shoreline of the pond, which the court established at a width of one hundred feet. The court recognized Marl Pond consisted of only ten-to-twelve acres and that the 1895 deed indicated that the pond was "supposed to contain about ninety acres," but further noted that essentially identical later deeds estimated the pond to be as small as thirty acres. The court found no evidence that Marl Pond had ever been formally measured or surveyed or that it had shrunk over time. The court surmised that the ninety-acre reference may have been an inaccurate carryover from an earlier deed. In any event, the court concluded that the deed unambiguously entitled defendants to the pond itself, the campsite, and a limited right-of-way around the pond shoreline. See Brown v. Cassella, 135 Vt. 62, 64 (1977) (noting that acreage "is to be regarded as the least reliable of all [deed] descriptions"). The court expressly rejected both the survey and opinion of defendants' surveyor, noting that they were entitled to no weight because they were not supported by any prior deed and came after the fact to justify defendants' road construction.

Defendants do not challenge the trial court's interpretation of the 1895 deed but rather contend that the transcript of the first hearing date contains so many "inaudibles" that it provides an insufficient basis on which this Court can determine whether the trial court's decision was

clearly erroneous. Defendants provide one example to support this argument—noting that the response of the Agency's chief land surveyor to the question of how much land he thought defendants owned was so garbled as to be incomprehensible. At the outset, we note that, to the extent there is a significant problem with the transcript, that problem is a result of defendants using a transcriber other than the court-designated transcriber—Court Reporters Associates. Moreover, defendants waived the argument by failing to seek reconstruction of the record in a timely fashion and, in any case, have failed to demonstrate how they were prejudiced by the gaps in the transcript. Under Vermont Rule of Appellate Procedure 10(c), if a transcript is unavailable, an appellant may prepare a statement of the evidence from the best available means, including the appellant's recollection. To demonstrate the denial of a fair appeal, the appellant "must show prejudice to the outcome of his case due to missing transcripts." State v. Bain, 2009 VT 34, ¶ 10, 185 Vt. 541. An appellant who does not participate in reconstruction of the record "waive[s] his right to claim error based on a deficient record." Id. ¶ 11 (citing Fournier v. Fournier, 169 Vt. 600, 602 (1999) (mem.)).

Here, defendants have made no attempt to reconstruct the record. Nor have they demonstrated any prejudice. The one example they provide demonstrates no prejudice because, as the trial court explicitly stated at trial, the court—and not the State's witness—must interpret the deeds to determine what land defendants own. As noted, defendants have failed to state any basis for challenging the trial court's interpretation of the 1895 deed. Reversal of a judgment is appropriate "where the lack of a complete record adversely affects the ability of a party to fully present an identified appeal issue," but not "because appellate counsel is deprived of the ability to comb the record to look for errors to present on appeal." Fournier, 169 Vt. at 602. In this case, we will not reverse the trial court's judgment based on defendants' tardy insufficient-record claim that fails to identify precisely how defendants were prejudiced.

Defendants also briefly argue that the right-of-way granted by the trial court runs through swampy land for which it is doubtful they could obtain a permit to build a "usable" right-of-way. This argument fails for at least two reasons. First, the right-of-way declared by the court was granted by the relevant deeds, not the court. Second, the court expressly found that the right-of-way does not grant defendants the right to erect or maintain any structures within it. The trial court also noted that in 1895 non-motorized methods were probably used to remove lime by way of the right-of-way, although the court acknowledged that the parties had not specifically litigated the limitations on the use of the right-of-way. Under these circumstances, defendants cannot demonstrate error based on their speculation that they will not be able to construct an unspecified "usable" right-of-way around the lake.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice