

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

**ENTRY ORDER**

VERMONT SUPREME COURT  
FILED IN CLERK'S OFFICE

SUPREME COURT DOCKET NO. 2009-166

NOV 18 2009

NOVEMBER TERM, 2009

Joyce Tenney	}	APPEALED FROM:
	}	
	}	
v.	}	Windham Superior Court
	}	
	}	
Town of Athens, et al.	}	DOCKET NO. 395-8-06 Wmcv

Trial Judge: David Suntag

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

Plaintiff appeals the superior court's order denying her motion for summary judgment, which claimed an easement of necessity across defendants' land, and granting defendants summary judgment. On appeal, plaintiff argues that the court's decision is erroneous because it is contrary to public policy and unsupported by the evidence. We affirm.

The following facts are undisputed. Plaintiff owns property in Athens adjacent to defendants Scott Hitchcock and Daniel Taylor. Plaintiff's lot is landlocked, and there is no recorded public or private right-of-way linking her lot to a public highway. Plaintiff contends that she has a way of necessity across the lands of defendants Hitchcock and Taylor. As evidence, she alleges that her land and defendants' property were once commonly owned by the original proprietors of Athens.

Plaintiff filed a motion for summary judgment, and defendants followed with their own summary judgment motion. The trial court concluded that, even accepting plaintiff's facts that her parcel and defendants' lands were commonly owned by the original proprietors of the town, plaintiff was missing a key piece of evidence. Plaintiff failed to demonstrate that her lot became landlocked when it was separated from defendants' parcels. Thus, the court granted defendants summary judgment. Plaintiff appeals.

Summary judgment is appropriate when there are no genuine issues of material fact and any party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). This Court reviews a grant of summary judgment de novo using the same standard as the trial court. Myers v. LaCasse, 2003 VT 86A, ¶ 15, 176 Vt. 29. Where opposing parties seek summary judgment, each is entitled to the benefit of all reasonable doubts and inferences when evaluating the opposing party's motion. Toys, Inc. v. F.M. Burlington Co., 155 Vt. 44, 48 (1990).

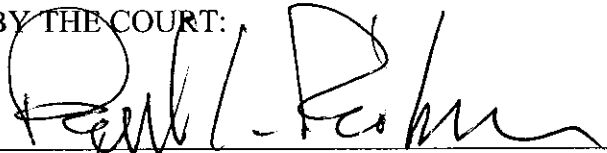
On appeal, plaintiff argues that the court's decision is contrary to public policy and fails to recognize that original land grants are sufficient to convey easements by necessity. While we agree with plaintiff that, generally, public policy favors access to land, we conclude that in this case plaintiff failed to produce sufficient evidence to demonstrate that she has an easement by

necessity across defendants' lands. See Traders, Inc. v. Bartholomew, 142 Vt. 486, 491 (1983) (explaining the public policy importance of easements by necessity).

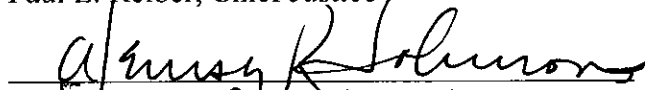
"To obtain a way of necessity, one must show that (1) there was a division of commonly owned land, and (2) the division resulted in creating a landlocked parcel." Okemo Mountain, Inc. v. Town of Ludlow, 171 Vt. 201, 206 (2000). Plaintiff asserts that both portions of the test are met in her case because (1) the original proprietors of the Town of Athens owned her parcel and defendants' lands as tenants in common, and (2) her land is currently land-locked. We agree with the trial court that plaintiff has failed to meet a crucial element of the test because there is no evidence that the division of commonly owned land "resulted in creating a landlocked parcel." Id. While we accept that plaintiff's and defendants' properties were once commonly owned and that plaintiff's land currently has no road access, there is no evidence of the conveyance that rendered her lot landlocked, nor that it was the severance of these two parcels that resulted in plaintiff's land being without access to a public road. In fact, defendants asserted in their statement of undisputed facts that plaintiff did not produce any evidence to demonstrate that her lot was ever in common ownership with a larger tract, which had access to a public road, or that her lot became landlocked as a result of its severance from defendants' land. Plaintiff failed to controvert this statement, and the trial court accepted it as true. See Gallipo v. City of Rutland, 2005 VT 83, ¶ 33, 178 Vt. 244 (holding that it was within trial court's discretion to deem as admitted facts in defendant's statement of material facts where plaintiff did not controvert them as provided in the rule). Given plaintiff's admission, we conclude that the court properly granted defendants summary judgment.

Affirmed.

BY THE COURT:



Paul L. Reiber, Chief Justice



Denise R. Johnson, Associate Justice



Marilyn S. Skoglund, Associate Justice