STATE OF VERMONT

SUPERIOR COURT **Lamoille Unit**	**CIVIL DIVISION** **Docket No. 115-5-13 LeCv**

SMUGGLERS' NOTCH MANAGEMENT COMPANY, LTD.
Plaintiff/Counter-Defendant

v.

TIMOTHY M. WHITE and RICHARD J. WHITE,
Defendants/Counter-Plaintiffs.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

NOW COME Defendants/Counter-Plaintiffs, Timothy M. White and Richard J. White (the "Whites"), by and through their counsel Murphy Sullivan Kronk, and respectfully submit the following Motion for Summary Judgment.

Factual Background

In this action, Plaintiff seeks recovery for certain expenses incurred by Plaintiff in maintaining certain common roads and areas.[1] The following material facts are undisputed. Plaintiff provided services for the maintenance, repair and replacement of roads and maintenance of common lands at Smugglers' Notch Resort (the "Resort"). *Statement of Undisputed Material Facts, ("SUMF")* ¶ *1.* Such services were provided to Defendants and others without the benefit of a contractual agreement. *SUMF* ¶ *1.* Plaintiff has allocated the expenses for such services in accordance with the parties' relative property values, using the property values set forth on the Town of Cambridge's Grand List. *SUMF* ¶ *3.*

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[1] Defendants' motion relates to the expenses noted in Paragraphs 7(d) and 7(e) of the Complaint. Defendants do not dispute the allocation of expenses for the other services noted in Paragraphs 7(a)–(c) and 7(f)–(g) and have therefore paid those undisputed portions of their bill.

STANDARD OF REVIEW

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a); see also *State v. Great Ne. Prods., Inc.*, 2008 VT 13, ¶ 5, 183 Vt. 579 (mem.) (citations omitted). "Although the nonmoving party is entitled to the benefit of all reasonable doubts and inferences," an adverse party may not rest on the allegations or denials in its pleadings, but "must set forth specific facts showing that there is a genuine issue for trial." *Greene v. Stevens Gas Serv.*, 2004 VT 67, ¶ 9, 177 Vt. 90 (citations omitted). "If the nonmoving party fails to establish an essential element of its case on which it has the burden of proof at trial, the moving party is entitled to summary judgment as a matter of law." *Washington v. Pierce*, 2005 VT 125, ¶ 17, 179 Vt. 318 (citation omitted).

Introduction

While Plaintiff and Defendants agree that Defendants' enjoyment of common road benefits is subject to the requirement to contribute "rateably" under 19 V.S.A. § 2702, the parties disagree on the meaning of "rateably" as set forth in § 2702.[2] While Plaintiff advances both statutory and common law claims, Plaintiff relies on a single allocation methodology, property tax value, and offers no underlying rationale for why such an allocation is consistent with common law or statute. Plaintiff simply claims this mode of allocation is required by the Legislature's use of the term "rateably."

Section 2702 requires a party to pay their *pro rata* share of such expenses based upon some measure of its respective use of the common roads and areas. Because property tax value has no bearing on such a *pro rata* calculation, Plaintiff's interpretation and application of § 2702

[2] Plaintiff's complaint references 27 V.S.A. § 2702, but as no such provision exists, Defendants presume Plaintiff intended to rely on 19 V.S.A. § 2702.

is arbitrary and capricious and inconsistent with common law and statutory intent. As such, Plaintiff seeks payment of a bill that is impermissible under the statute and common law. Defendants are therefore entitled to summary judgment on Count I and Count II. Because Defendants acknowledge responsibility for contributing "rateably" as to the common area and road expenses, Defendants suggest that in granting their motion for summary judgment, the Court could either dismiss Plaintiff's claims or, in the alternative, order Plaintiff to complete an accounting and propose a revised bill consistent with the statute.

ARGUMENT

The Vermont Legislature could not have been clearer in its intent in enacting 19 V.S.A. § 2702, as it expressly stated in 19 V.S.A. § 2701:

> The intent of this chapter is to state the responsibilities for the maintenance of a private road, in the absence of an express agreement or requirement governing such maintenance responsibilities, in accordance with the Vermont Supreme Court decision of Hubbard v. Bolieau, 144 Vt. 373 (1984), which draws upon established principles of Vermont law. This chapter will only apply to resolve conflicts regarding maintenance of private roads in the absence of an express agreement or requirement. The provisions of this chapter are not intended to abridge, enlarge, or modify any right provided under Hubbard and the common law of Vermont.

19 V.S.A. § 2701. The Legislature made no reference to property tax values, but rather, referred to long-standing Vermont common law as encapsulated in the *Hubbard* case.

The Hubbard court held that Vermont "has long recognized the equitable principle that when several persons enjoy a common benefit, all must contribute rateably to the discharge of the burdens incident to the existence of the benefit." *Hubbard v. Bolieau*, 144 Vt. 373, 375 (1984) (internal quotation marks omitted) (citations omitted). The Legislature used almost the exact same language when drafting § 2702 which provides that:

> In the absence of an express agreement or requirement governing maintenance of a private road, when more than one person enjoys a common benefit from a

> private road, each person shall contribute rateably to the cost of maintaining the private road, and shall have the right to bring a civil action to enforce the requirement of this section.

19 V.S.A. § 2702. As described above, this dispute turns on the meaning of the word "rateably."

The proposed legislation leading to § 2702 was introduced in the Vermont House in 2011 as H.272. As introduced, H.272 included the definitions of four terms, including "ratably," but those definitions were stricken before the bill left the House. H.272 (2011-2012 Session) (Vt. 2012). The term as used in § 2702 was also changed from "ratably" in the bill as introduced to "rateably" in § 2702. *Id.*; 19 V.S.A. § 2702.

In the end, it appears that the Vermont Legislature's intent was to strip down the legislation to its bare minimum to expressly apply the common law requirement described in *Hubbard* to situations in which there is no express agreement regarding the maintenance of a private road. The resulting limited legislation makes sense, as the primary motive was to respond to the Fannie Mae (Federal National Mortgage Association) loan requirement that a legally enforceable maintenance agreement or a state statutory provision defining private maintenance responsibilities exist for property located on a community-owned or private road. H.272 (2011-2012 Session) (Vt. 2012). Initially, however, "ratably" was understood and defined as follows: "(4) "ratably" means payment of the expenses for maintenance of a private road based on a *pro rata* share among the owners and easement holders." *Id.* (emphasis added).

There has been little court discussion of the meaning of this term following the enactment of § 2702. The Washington County Civil Division suggested rateable contribution could be based on the number of lots served, but did not suggest it had any bearing on respective property tax values of those lots.

> Thus, even if 19 V.S.A. § 2702 were the sole source of guidance, there would still be an issue as to whether "proportionate" (rateable) contributions should be

> proportionate to use or to the number of lots served or to the number of developed lots served or to some other measure.

Perkinson v. Perry, No. 607-10-13 Wncv, slip op. at 7 (Vt. Super. Ct. Dec. 19, 2014) (Teachout, J.). Therefore, the focus must be on a "proportionate" allocation, calculated using some measure of the level of use or benefit. If the statute required allocation on the basis of property tax values, the Court's speculation as to an appropriate methodology would be confusing at best.

Because the Legislature's express intent was to embody in § 2702 certain long-standing common law principles, the holdings and reasoning set forth in *Hubbard* and related cases aid the statutory interpretation. First and foremost, the common law equitable principle of sharing "rateably" in the expense of a common benefit is "to avoid unjust enrichment." *Hubbard*, 144 Vt. at 375. While measures of such benefit might reasonably vary, Defendants were unable to find a single instance where a court had allocated common expenses on the basis of property tax values. Courts have allowed allocations of expenses *pro rata* amongst all users of a common road, but have done so without any reference to property tax values. *Alpine Haven Prop. Owners Ass'n, Inc. v. Deptula*, 175 Vt. 559, 566 (2003).

A simple example can demonstrate just how flawed Plaintiff's reasoning is in this respect. If two parties share a 100-mile common road and party A owns a $200,000 house one mile down the road and party B owns a $100,000 home at the 100-mile point, under Plaintiff's construction, the owner of the $200,000 home would pay two-thirds of the maintenance expense even though they only use 1/100 of the road, clearly an inequitable outcome. This is especially true in these circumstances, where much of the Resort may be located on leased lands and, therefore, may not be subject to property taxes.

As Plaintiff's claim is in the nature of a claim for unjust enrichment, Plaintiff bears the burden of proof with respect to each element of such a claim. *DJ Painting, Inc. v. Baraw*

Enters., Inc., 172 Vt. 239, 242 (2001). "Claims for quasi-contract are based on an implied promise to pay when a party receives a benefit and the retention of the benefit would be inequitable." *Id.* (citation omitted). Plaintiff must prove sufficient facts to prove that a benefit was conferred upon Defendants, that Defendants accepted the benefit, and that it would be inequitable for Defendants not to compensate Plaintiff for its value. *Id.* Implicit in this holding is that Plaintiff must prove the value of the benefit allegedly provided. Plaintiff has not only failed to do so, but has argued it is not obligated to provide such information. *Plaintiff's Memorandum in Opposition to Motion to Compel at 2.*

Plaintiff's claims against Defendants are based solely on interpreting § 2702 as allowing for an allocation of expenses based on the respective assessed value of benefited properties. As such an allocation is inconsistent with the relevant statute and case law, Defendants are entitled to Summary Judgment on both Counts of the Complaint.

In the alternative, and as Defendants acknowledge an obligation to pay their proportionate share of the expenses, the Court could order Plaintiff, in lieu of having its claims dismissed, to develop and implement a methodology consistent with the statute and common law, provide a revised invoice and explanation to Defendants, and then allow limited discovery on those issues (in addition to the discovery sought pursuant to the Motion to Compel). This would avoid a scenario in which Plaintiff advanced a more equitable allocation for the first time at trial.

Accordingly, the Whites respectfully request that the Court:

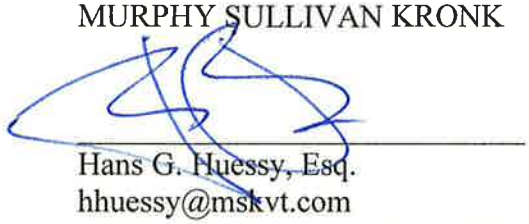
1. Grant their Motion for Summary Judgment on Counts I and II; or in the alternative,
2. Issue an Order providing that Title 19, Section 2702 does not require or permit an allocation of costs solely in accordance with property tax values and require Plaintiff

to put forth an alternative allocation mechanism consistent with the statute and case law; and

3. Grant such other and further relief as may be just and proper.

Dated at Burlington, Vermont this 18th day November, 2015.

MURPHY SULLIVAN KRONK



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