STATE OF NEW HAMPSHIRE
SUPREME COURT

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SUPREME COURT
2017 SEP 14 A 10:17

Case No. 2017-0110

Janet Balise and Stanley Balise

v.

Brad Balise, Jon Carpenter and Winifred Carpenter

BRIEF OF PLAINTIFFS JANET BALISE and STANLEY BALISE

Rule 7 Appeal from Rockingham County Superior Court

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STATEMENT OF THE CASE

The Balises instituted this case as a complaint for declaratory judgment, quiet title and for damages and attorney's fees. App. at 1. They requested an order quieting their right, title and interest in and to an area defined by the former Simpson Road in Windham, New Hampshire, discontinued by the 1962 Windham Town Meeting , situated between the Carpenters'/Brad Balise's properties and abutting the Balises' Lot 21-G-600 (variously termed "the Way", the "disputed area", "the disputed strip" and "the disputed road" in pleadings and trial court orders and herein referred to as "the disputed road"); declaring that the Balises have the right to use the disputed road unobstructed by the Carpenters/Brad Balise; finding that the Carpenters/Brad Balise had trespassed on the Balises' rights of access over the disputed road and awarding damages for that trespass; and awarding the Balises' their attorney's fees. Subsequently, the Balises amended their complaint to seek a declaratory judgment that the Balises have a right to install utility lines through the disputed road to their property. App. at 29.

The Carpenters/Brad Balise filed an Answer denying the Balises' claims and objecting to all relief requested and brought a counterclaim based on adverse possession barring the Balises' access over the Carpenters'/Brad Balise' properties and requesting damages, including attorney's fees. App. at 8-16.

The Balises moved for partial summary judgment on the adverse possession and trespass claims and claim of the right to install utilities over the disputed area to service their lot. App. at 17-19 and 20-65.

The Carpenters/Brad Balise filed an objection to the Balises' partial summary judgment motion and moved for summary judgment on their claim that as a matter of law the Balises have no right to install utilities through the disputed road. App. at 66-67.

The trial court granted the Balises' Motion for Partial Summary Judgment on all claims but denied summary judgment on the question of installation of utilities and the nature of the driveway to be constructed through the disputed road, because facts were in dispute. Def. Brief ADD. at 14-28.

After a trial, the Court applied the doctrine of reasonable use to the utility and driveway issues and found that the Balises sustained their burden to prove that reasonable use of the disputed road included the right to install a gravel driveway and underground utilities to service the Balises' lot. The trial court denied the Balises' claims for damages and attorney's fees. The Carpenters'/Brad Balise' Brief ADD. at 36-45. This appeal followed.

In this appeal, the Carpenters and Brad Balise argue the trial court erred in ruling that the Balises have a right of access under RSA 231:43 III over the disputed road, because the Balises had other means of access to their lot; erred in applying the law of private easements to find that the Balises had a right to install utilities through the disputed road ; erred in rejecting their contention that because the Windham Town meeting vote to discontinue Simpson Road did not include a reservation of an easement for utilities, the Balises are prohibited from installing utilities through the disputed road; erred in granting the Balises summary judgment on the adverse possession issue, because there were material facts in dispute and the Carpenters/Brad Balise provided sufficient evidence in their summary judgment submissions which, if deemed true and all reasonable inferences therefrom are construed in their favor, would satisfy their burden of proof on the issue; and erred in ruling that the Balises did not give written consent to release their statutory right of access in signing a deed to Brad Balise which included language the Carpenters/Brad Balise claim constitutes such a release.

STATEMENT OF THE FACTS

A. In Support of the Balises' Motion for Partial Summary Judgment

The following facts are undisputed, because the Carpenters/Brad Balise acknowledged them in their depositions and affidavits, failed to dispute such facts stated in the Balises' affidavits, and/or provided no affidavits or other submissions in support of their Objection to Motion for Partial Summary Judgment sufficient to dispute the following:

The former Simpson Road in Windham, New Hampshire, a public highway, was completely

discontinued by vote of the 1962 Windham Town Meeting. App. at 12, 20. ("App." herein refers to the Carpenters/Brad Balise Appendix; The Balises have filed a brief Appendix of their own, referred to herein as "Balises' App.") The disputed road is a portion of the former Simpson Road lying between the Carpenter/Brad Balise properties. The title holder of Lot 600, the property at issue in this case, is Janet Balise, Trustee of the Janet Balise Revocable Trust; the Balises are the beneficial owners of Lot 600. App. at 20.

In 1999, the Balises sold their home at 231 Range Road in Windham which they had purchased in 1964, to their son Brad Balise; he currently resides at that home. App. at 20. Brad resided away from New Hampshire from 1991 until 1998. App. at 21.

In the 1970's, agents of the Town of Windham erected in the disputed road two posts, a board between the posts, and a no trespassing sign. App. at 21, 49. Mr. Carpenter testified at his deposition that he maintained that sign, but the Carpenters/Brad Balise provided no further details for the summary judgment record regarding such maintenance. App. at 49. Brad Balise first took steps to assert control of the disputed road in 1998, when he put up a no trespassing sign in the disputed road. Carpenters/Brad Balise Brief at 9 ("Def. Brief" hereinafter). Brad acknowledged in his deposition that there has not been a 20 year period in which the Balises have been blocked from use of the Balise half of the disputed road. App. at 21. By 2013, Brad had placed a log and at least one boulder and parked at least one vehicle at or near the location of the gate across the disputed road, blocking the Balises' access through the disputed road, because a vehicle could not be driven through or past the log, boulder(s) and vehicle to gain access to the Balises' lot. App. at 22.

Winifred Carpenter executed a document designating Jon Carpenter as her spokesperson in this case. App. at 22. Jon Carpenter testified that since the 1970's he had maintained a No Trespassing sign he assumed was put up by the Town, but provided no details for the record regarding when he did such maintenance and what he did. Balises' App. at 5. He testified that he could not recall when he posted his

own no trespassing sign in the disputed road. App. at 21. Balises' App. at 5.

According to Brad Balise's deposition, from as early as 1991, the board forming the gate barrier in the disputed road could be lifted out of its holders at the posts and removed. App. at 42. That board was still in place in 1998 when Brad returned to live in New Hampshire. App. at 42.

As part of the Balises' plan to use their lot for residential purposes, they applied for and were granted a variance for Lot 21-G-600. ("Lot 600"). App. at 22. The Windham ZBA granted the Balises' administrative appeal and authorized the issuance of a building permit to the Balises under the hardship provision in RSA 674:41, II. The Balises were required to seek relief under RSA 674:41 because that statute prohibits municipalities from issuing building permits unless the "street giving access to the lot" meets the requirements set forth in that statute- The Balises' statutory access over a discontinued road does not meet the definition of a "street giving access to the lot". Def. Brief ADD. at 19. App. at 147. The Balises signed and filed a waiver pursuant to RSA 674:41 to obtain a building permit to construct a residence on Lot 600. App. at 33.

The Balises have not provided the Town of Windham with consent to discontinue their access over the discontinued Simpson Road, including the disputed road. App. at 33.

The Balises' deed of their home at 231 Range Road to Brad Balise includes the language: "The within Grantors hereby release to said Grantees all rights of curtesy and homestead and other interest herein." App. at 126 .

B. Material Facts Established at Trial

In addition to the undisputed facts on which the trial court relied to make its summary judgment orders, the following are material facts established at trial.

The Balises' Lot 600 in Windham has no frontage on a public way, but abuts the disputed road. App. at 37. Trans. p. 25 l. 1-25, p. 26, l. 1-23. Its unpaved area is an extension of a paved public highway intersecting with Range Road, a public highway. Trans. p. 25, 1-8-21. App. at 37. The disputed road

runs perpendicular to Range Road which is a public highway. Trans. p. 25, l. 8-11.

The Balises never discussed with Brad the concept of not developing Lot 600 and they would never have sold 231 Range Road to Brad if it meant they could not develop Lot 600. App. at 37-38. Trans. p.199, l. 15- 25, p. 200, l. 1- 2. Brad conceded in his testimony that his parents might have said that they might want to sell Lot 600. App. at 38. Trans. p. 302, l. 5-9.

There are telephone poles along the road off of Range road leading to the disputed road, including one close to where the disputed road begins. App. at 38. Trans. p. 142, l. 21-25, p. 143, l. 1-2. Running utility lines underneath the disputed road would not be difficult and Mr. Tokanel has done that on other projects without encountering major problems. App. at 39. Trans. p. 131, l. 12-25, p. 132, l. 1. Based upon Mr. Tokanel's discussions with Phil Pike of Eversource, it was deemed necessary to install a single above-ground pole at the beginning of the disputed road, shorter than the existing poles. App. at 39. Trans. p. 134, l. 7-20. In the usual course of his business, Mr. Tokanel consults with Eversource and relies upon information obtained in order to develop lots and build on them. Trans. p. 126 l.13-25, p. 127 l. 1-5. The average width of a driveway in Windham is 14 feet. App. at 39. Trans. p. 142, l. 6-14.

Of the two potential methods of providing utilities through the disputed road - overground and underground utilities - underground utilities are the less obtrusive and intrusive to The Carpenters/Brad Balise' rights. They are not visible and require less maintenance, as they are not exposed to the elements, tree branches and the like. Trans. p. 127, l. 15-25, p. 128, l. 1-11. Underground utilities would have a minimal impact on The Carpenters/Brad Balise' properties while providing essential services to the Balises' lot, for which the Balises sought and obtained a variance to build a home. Trans. p. 127, l. 15-24. The trench necessary for the utilities would not be visible after completion and if there were ledge where the trench is to be dug, it could be removed by a hand tool without blasting. Trans. p. 130, l. 19-21, p. 132, l. 2-17.

Mr. Tokanel and Mr. Pike agreed that where the front of the Carpenters house and Brad Balise's

garage face the disputed road, the best location of the pole would be on Balise side of the disputed road in order to minimize the visual impact of the pole from the front of the Carpenter house. Trans. p. 135, l. 18-25, p. 136, l. 1-12, p. 86, l. 24-25, p. 87, l. 1-8.

SUMMARY OF ARGUMENT

The trial court's decision is well reasoned and well balanced. It properly granted summary judgment on issues concerning which there were undisputed material facts requiring summary judgment, but denied summary judgment on the utilities issue, because that required findings of fact.

In consideration of the Carpenters/Brad Balise' expressed concerns about losing the rustic feel of their properties, the trial court ordered underground utilities, denied the Balises' request for a paved driveway and instead ordered a gravel driveway - in a town on Route 93, one town away from the Massachusetts border, and despite the fact that the gravel driveway would be an extension of a paved road running between the Carpenters/Brad Balise's properties.

As a whole, the trial court's order represents an extremely fair and balanced one. It allows reasonable use of the Balises' property while at the same time preserving as best could be the rustic appearance of the Carpenters/Brad Balise' properties.

The trial court correctly determined that viewing the evidence in the summary judgment record in a light most favorable to the Carpenters/Brad Balise, the Carpenters/Brad Balise did not and could not satisfy their burden of proof as to the elements of adverse possession. The summary judgment record does not include disputed material issues of fact on the adverse possession issue and application of the law of adverse possession to the undisputed facts compelled the trial court's decision to grant the Balises partial summary judgment on the issue.

The trial court correctly determined that the Balises have not acted in such a way as to constitute abandonment of their statutory right of access.

The Carpenters/Brad Balise's claim that RSA 231:43 III does not afford the Balises the right of

access through the disputed road because there are other accesses to the Balises' property fails because the statute does not condition the Balises' statutory access on their having no other accesses to their property.

The Carpenters/Brad Balise's argument that the Balises provided the written consent to which RSA 231:43 III refers in the deed to their home to their son Brad is meritless because the written consent to which the statute refers is to be given the town, not private landowners and, in any event, could not be given in a deed to a different property.

The Carpenters/Brad Balise' argument that the Court incorrectly applied the rule of reason in ordering that the Balises may install utilities and a driveway in the disputed road has no support in the authority. To the contrary, this Court has consistently ruled that the rule of reason applies to private easements and statutory accesses.

In their appeal, the Carpenters/Brad Balise do not challenge the trial court's grant of summary judgment on the trespass issue or the trial court's finding of facts and application of the facts it found to the rule of reason in its decision to permit underground utilities and a gravel driveway.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT THE BALISES HAVE A RIGHT OF ACCESS UNDER RSA 231:43 III OVER THE DISCONTINUED HIGHWAY WHICH LIES BETWEEN THE CARPENTER AND BRAD BALISE PROPERTIES, REGARDLESS OF WHETHER THE BALISES HAVE OTHER MEANS OF ACCESS TO THEIR LOT 600.

The Carpenters and Brad Balise claim that the following are factual disputes which are material to the question of whether the Balises, as abutters of a discontinued highway, have a right of access under RSA 231:43 III: whether the Balises have other means of accesses to their property; whether they ever needed the disputed road as access to their property and whether they ever used the disputed road as their access: Def. Brief at 7.

Regardless of whether such facts are in dispute, they are not relevant, let alone material, facts, because the question of statutory access is a purely legal one and because, as a matter of law, mere

non-use does not prove abandonment.

The version of RSA 231:43 in effect in 1962 when the Town discontinued Simpson Road provided as follows:

> "1. **Power to Discontinue**. Any class IV, V, or VI highway, or any portion thereof, in a town may be discontinued by vote of a town; provided however, that any highway to public waters, or portion of such highway, laid out by a commission appointed by the governor and council, shall not be discontinued except with the consent of the governor and council and provided further that no owner of land shall, without his written consent, be deprived of access over such highway, at his own risk."
>
> RL 90:1 as amended by N.H. Laws 188:1 (1949)

In interpreting a statute the Court should first determine if its language is plain and unambiguous. If it is, the Court must give the language its plain and ordinary meaning and not look beyond the language in determining legislative intent. Olson v. Town of Grafton, 168 N.H. 563 (2016).

The language of the version of RSA 231:43 in effect when Simpson Road was discontinued in 1962 is clear and unambiguous: owners of land may not without their written consent be deprived of their access over a discontinued highway. It is undisputed that the Balises have not provided the Town with written consent to discontinue their access.

In its Order on Cross-Motions for Summary Judgment, the trial court correctly stated:

> "Here, the plain and ordinary meaning of the statutory language of RSA 231:43 provides that landowners abutting a discontinued highway shall have the right to access their property by that discontinued highway at their own risk. The statutory language itself does not condition the right of access on anything other than ownership of the land. Even if the statutory language was ambiguous, however, the legislative history of RSA 231:43 supports the same finding. In 1943, the statutory right of access over discontinued highways was limited to landowners who did not have other means or access to their property. Laws 1943, ch. 68 (No[town] vote [to discontinue a highway] shall in any case release the easement of the public to the extent of depriving an owner of property from using the same to gain access to his property, if no other access thereto is available.). In 1945, the legislature revised the statutory provision by eliminating any statutory right of access to owners. Laws 1945, ch. 188, pt. 8. In 1949, however, the legislature reinstated the statutory right of access over discontinued highways to landowners, but did not include the limiting language of necessity contained in the 1943 version. Laws 1949, ch. 13. The 1949 right of access language

was in effect at the time Simpson Road was discontinued. The Court, therefore, cannot add language to the statute which the legislature did not see fit to include. Thus, the Balises' right of access is not conditioned upon whether the access is necessary." Def. Brief ADD. at 18.

From the language of the 1943, 1945 and 1949 amendments to the statute, it is clear that from and after 1949, statutory access has been available to an abutter of a discontinued road, regardless of whether there are other available accesses to the abutter's property.

Support for the Court's interpretation of RSA 231:43, III, can be found in A Hard Road to Travel, New Hampshire Law of Local Highways, Streets and Trails, by Local Government Center, Inc. (2004), at p. 67:

> "Even where no plat exists, RSA 231:43, III, provides that 'no owner of land shall, without the owner's written consent, be deprived of access over such [discontinued] highway, at such owner's own risk.' On its face, this language seems to apply to *all* landowners, not merely those with no other access. An earlier version of the statute, effective from 1943 to 1945, was limited to otherwise landlocked lots. 1943 N.H. Laws Chapter 58:2. Therefore, in those cases where towns have not obtained written consent from landowners to give up the right of access, any highway discontinued since 1949 is subject to private rights of way in favor of all abutting landowners."

The Carpenters/Brad Balise argue that their contention that the Balises have not used the disputed road creates a disputed material fact on the question of whether the Carpenters/Brad Balise have lost their right to use the disputed road. However, the Carpenters/Brad Balise's claim of non-use has no relevance to the legal issue of whether the Balises have a right of access over the disputed road under RSA 231:43 III. The language of the statute does not condition an abutter's right of access over a discontinued highway upon their actual use of it. Again, the Carpenters/Brad Balise are not entitled to have a court add conditions to a statute that the Legislature chose not to.

The trial court correctly ruled that based on the summary judgment record, the Carpenters/Brad Balise had failed to provide sufficient facts to establish the Balises' abandonment of the disputed road. As the trial court stated in its Order on Cross-Motions for Summary Judgment:

> "First, as discussed in detail below, the Defendants have not established adverse possession of Plaintiffs' right of access for the prescriptive twenty years. Moreover, the

> two properties at issue have remained in the same family. Defendants point to Plaintiffs' alleged nonuse of Simpson Road to support their argument that Plaintiffs have lost their statutory right of access under RSA 231:43. Mere nonuse, however, is not enough to establish Plaintiffs' abandonment of their right of access regardless of the amount of time that has passed." Def. Brief ADD. at 20-21.

Nor is there anything in the record even suggesting that the Balises abandoned their rights to use of the disputed road through clear, unequivocal and decisive acts manifesting either a present attempt to relinquish the easement or a purpose inconsistent with its further existence. Titcomb v. Anthony, 126 N.H. 434, 437 (1985). Def. Brief ADD. at 20.

In conclusion, the Carpenters/Brad Balise have raised no material disputed issues of fact concerning the Balises' right of access over the discontinued road under RSA 231:43 III, the trial court correctly interpreted the statute, and correctly granted the Balises partial summary judgment on that issue.

II. THE TRIAL COURT CORRECTLY FOUND THAT THE LANGUAGE IN THE BALISES' DEED TO BRAD BALISE FOR THE CONVEYANCE OF 231 RANGE ROAD DID NOT CONSTITUTE THE WRITTEN CONSENT TO RELEASE THE BALISES' RIGHT OF ACCESS TO THEIR LOT 600 WHICH RSA 231:43 III CONTEMPLATES, BECAUSE SUCH CONSENT IS TO BE GIVEN THE TOWN AND RELATES ONLY TO THE PROPERTY REGARDING WHICH THE CONSENT IS GIVEN.

The Carpenters/Brad Balise argue that the Balises made a clear and unequivocal act of relinquishment of their statutory rights of access to Lot 600 in their deed to their former home to Brad Balise. First, the consent to which the statute refers means consent given to the town, not other abutters. Second, even if that were not the case and such consent could be given to other abutters, the "release [of] all other interests" language of the Balises' deed of their home to their son relates to the property at 231 Range Road, not Lot 600. As the trial court correctly stated:

> "The statutory right of access under RSA 231:43 runs with the land and attaches to all abutting lots to the discontinued road. It is undisputed that Tax Lot 21-G-600 abuts Simpson Road. The right to access Tax Lot 21-G-600 over Simpson Road, therefore, runs with the property. Thus, as owners of Tax Lot 21-G-600, Plaintiffs have a statutory right of access, which they could not have extinguished in the conveyance of Tax Lot 21-G-700 (231 Range Road)." Def. Brief ADD. at 19.

The language of the Balises' deed quoted by the Carpenters/Brad Balise is identical to the language in the statutory warranty deed form, set forth in RSA 477:27. App. at 143. The Balises executed a standard warranty deed with the language the Carpenters/Brad Balise quote, not with customized language referring to the provisions of RSA 231:43, or even including the word consent. There is nothing in the statutory warranty deed language to suggest that the Balises intended to waive their statutory grant of access over the disputed road.

The "consent" to which RSA 231:43 III applies is to be given to the entity responsible for discontinuing the highway and thereby potentially infringing on the abutter's rights of access in the highway - the town, not a private landowner. There is nothing in the statute, case law or other authority that even suggests that the consent to which RSA 231:43 III refers is to be given to an entity other than the one that discontinued the highway and created the potential access restriction.

It is undisputed that the Balises have not given written consent to the Town of Windham to extinguishment of their rights of access over the disputed road. Therefore, there is no material dispute of fact concerning the issue of "written consent" under RSA 231:43.

III. THE TRIAL COURT CORRECTLY GRANTED THE BALISES SUMMARY JUDGMENT ON THE CARPENTER/BRAD BALISE ADVERSE POSSESSION CLAIM.

The trial court correctly granted the Balises summary judgment on the Carpenters/Brad Balise's claim of adverse possession, because considering the undisputed facts, including many facts to which the Carpenters/Brad Balise testified in their depositions, the Carpenters/Brad Balise could not satisfy their burden to establish adverse possession.

In the following discussion, references to the Carpenters/Brad Balise's testimony refer to their depositions. Brad Balise testified that prior to 1998, the year he stated he began asserting control over the Balise half of the disputed road, nothing interfered with the Balises' use of their half. There is nothing in the record that indicates that Carpenter claims differently.

Brad Balise testified that he believed that the Town installed the posts holding the wooden

barrier in the disputed road, that in 1991 that when he left New Hampshire the board between the posts was set on latches, which made it removable, and that the board was still there when he returned to live in New Hampshire in 1998. There is no indication in the record that prior to 1998 the board between the posts was installed by either Brad or Carpenter.

Jon Carpenter testified that he "maintained" (the record includes no statements or other evidence about what he did regarding maintenance) a no trespassing sign in the disputed road since the 1970s, but did not claim that it was his, but that he assumed that the Town of Windham put it up. He testified that he posted a no trespassing sign of his own, but acknowledged that he could not recall when.

Both Brad Balise and Jon Carpenter stated in affidavits that Jon Carpenter constructed a fort in the disputed road in the 1970s (when he was a boy), but neither stated how long it stood, where it was in the disputed road or whether it acted as an obstruction to anyone's passage over the disputed road . App. at 78, 106.

As the trial court correctly pointed out in its Order on Cross-Motions for Summary Judgment, (p. 8; App. at 21):

> "In general, a claim for adverse possession is successfully maintained if the adverse possessor [can] prove, by a balance of probabilities, 20 years of adverse, continuous, and uninterrupted use of the land claimed so as to give notice to the owner that an adverse claim is being made. In addition, adverse use is trespatory in nature, and the adverse possessor's use of the land must be exclusive. Blagbrough Family Realty Trust v. A&T Forest Products, Inc., 155 N.H. 29, 33 (2007)(citations omitted)."

The trial court further correctly noted that under Blagbrough, the adverse possessor's entry onto and possession of the land should alert the true owner of the cause of action.

Brad Balise testified that he lived away from New Hampshire between 1991 and 1998, that he began asserting control over the Balise half of the disputed area in 1998 and that prior to that year nothing stopped the Balises from using their half of the disputed road while they owned the property

they sold to Brad in 1999. Consequently, Brad Balise could not establish that he had done anything in the disputed road for 20 consecutive years which could be considered adverse possession.

Jon Carpenter's affidavit and deposition statements show that he did even less than Brad Balise in the disputed area. His claimed actions consisted of maintaining a no trespassing sign that he assumed was put up by the Town, posting his own no trespassing sign at a time he could not recall and constructing as a child a fort in the disputed area, with no indication where and how long it stood.

In sum, the acts to which Brad Balise and Jon Carpenter testified and stated in affidavits, whether taken separately or collectively, are insufficient to establish the element of twenty years of continuous adverse use of the disputed road.

Second, it is clear from the summary judgment record the Carpenters/Brad Balise could not establish the element of notoriety. In its Order on the summary judgment motions, the trial court correctly ruled that the Carpenters/Brad Balise did not show that it was probable that their conduct satisfied the notoriety element of adverse possession.

> "In light of all the evidence in the summary judgment record, Jon Carpenter's maintenance of one 'no trespassing' sign, which he admittedly did not post himself, is insufficient to prove by a balance of the probabilities that their adverse use would alert Plaintiffs of their cause of action. As explained in the July 5, 2016 Order, Defendants admit that the wooden barrier was not erected by them and at one point was constructed so that it could be removed. Additionally, there is no evidence that Defendants posted their own 'No Trespassing' signs prior to 1998. The only evidence even suggesting any adverse use of the Plaintiffs' statutory right-of-way for the prescriptive 20-year period is Jon Carpenter's maintenance of one 'No Trespassing' sign, which he admits was posted by a third party. There is no evidence that this maintenance was uninterrupted, continuous, or exclusive. And even if these elements had been established, the maintenance of one 'No Trespassing' sign is insufficient to establish that Jon Carpenter's use was trespatory or put Plaintiffs on notice that they had a cause of action against Jon Carpenter. Accordingly, Defendants have failed to produce sufficient evidence to support their claim that they extinguished Plaintiffs' statutory right-of-way by their adverse use for the prescriptive 20-year period." (Def. Brief ADD. at 33).

As a matter of law, the Carpenters/Brad Balise may not rely upon the alleged acts of unrelated

parties to satisfy their burden to prove they committed the acts necessary to establish adverse possession. Here, the Carpenters/Brad Balise urge the Court to consider as evidence of adverse possession the fact that Mr. Carpenter maintained a sign owned by a third party. Assuming for the sake of argument he did maintain the Town's sign, as a matter of law, Mr. Carpenter's maintenance of a third party's sign is not competent evidence of his own trespatory use of the property.

Such alleged use cannot satisfy the element of notoriety, either, because a sign posted by the Town, whether maintained by Mr. Carpenter or not, was insufficient to have provided an owner of half the disputed road (the Balises until 1999) notice that they were prohibited from using their own property or any other part of the discontinued highway. There was no reason for the Balises to believe that maintenance by anyone of the Town's no trespassing sign affected their right to travel over land they owned half of until 1999 and had had a statutory right to travel over its entirety since they purchased 231 Range Road in the 1960's.

The owner of the sign, the Town, had no legal authority to prevent the owner of the fee and of the statutory right to travel over a discontinued highway from "trespassing" over it. If the contrary were true, the Carpenters themselves would have been prevented by the same no trespassing sign from using the disputed road behind the sign. Consequently, as a matter of law, the Balises were not placed on notice that their right to access over the disputed road was being threatened by that sign and they therefore had a cause of action for trespass - no matter who "maintained" it. Further, even if it mattered who was maintaining the Town's sign, the record includes no evidence or even suggestion that the Balises were on notice that Mr. Carpenter was maintaining a sign put up by the Town or that there was any reason for them to believe that someone other than the Town was maintaining it.

Next, the act of maintaining the Town's sign did not cause obstruction of the Balises' access to the disputed road and therefore did not place the Balises on notice that their right of access was being denied. As the trial court correctly found, the gate where the sign was located was constructed such that

it could be removed to permit access. In fact, Brad Balise testified that the removable gate was in place in 1991 and also when he returned to N.H. in 1998. Without more, the removability of the gate where the Town's sign was posted since at least 1991 is fatal to the Carpenters/Brad Balise's claim that Mr. Carpenter's alleged maintenance of the sign constituted sufficient proof of the Carpenters/Brad Balise's exclusive, continuous, notorious and adverse use of the disputed road for 20 years or more.

IV. THE TRIAL COURT CORRECTLY RULED THAT THE BALISES' RIGHTS REGARDING INSTALLATION OF UTILITIES ARE UNAFFECTED BY THE FACT THAT THE WARRANT ARTICLE CALLING FOR THE DISCONTINUANCE OF THE FORMER SIMPSON ROAD INCLUDED NO RESERVATION FOR UTILITIES AND CORRECTLY RULED THAT THE RULE OF REASON APPLIES TO THE QUESTION OF THE BALISES' RIGHT TO INSTALL UTILITIES AND A DRIVEWAY IN THE DISPUTED ROAD.

The Carpenters/Brad Balise's reliance upon RSA 231:46 to argue that as a matter of law the Balises have no right to install utilities in a discontinued highway is misplaced.

The Carpenters/Brad Balise argue that RSA 231:46 precludes the Balises from utilizing access over the disputed road to install utilities. The 1992 amendment to RSA 231:46 added a provision that "any permits or licenses previously established pursuant to RSA 231:159-182 shall be presumed to be reserved . . .". RSA 231:159-182 only applies to utilities erected, installed, and maintained in any public highway. The version of RSA 231:46 prior to the 1992 amendment provided:

> "**231:46 Authority to Reserve Existing Utility Easements.** When any class IV, V or VI highway, or any portion thereof, has been discontinued, the city or town may reserve existing sewer, drain, water pipe and other utility easements." (Emphasis added). N.H. Laws c. 87:1 (1981).

Both the 1992 amendment and the prior version of the statute make it clear that the utilities referenced in RSA 231:46 are those located in public roads by authority of a municipality. RSA 231:46 does not preclude, nor can it constitutionally preclude, individuals with rights of access over a discontinued highway from utilizing the access for their own private utilities, since such right to utilization is part of the bundle of rights owned by the holder of an express easement to a lot to be used for residential purposes. Arcidi v. Town of Rye, 150 N.H. 694 (2004). Consequently, a private landowner

in the Balises' location does not need a "utility easement" to have the right to install utilities through a discontinued highway to their property -- that right is incident to the statutory access itself. Landowners grant a license to a utility company to install utilities; they do not need a town's permission to do so; the town has nothing to do with it. The use of the term "utility easement" in the statute is purposeful -- it refers to an easement for utilities in a public highway, where the town, city or state can regulate utilities siting so it is safe for the public.

Bernard Waugh's March 18, 1002 letter, attached to the Balises' Response to Defendants' Sur Reply, underscores the fact that the 1992 amendment to RSA 231:46 applies to towns, cities and the state rather than private landowners:

> ". . . I have reviewed it [SB-388 the proposed amendment to RSA 231:46 law enacted into law] and do not believe it will cause any legal problems for towns and cities. Their original draft would have arguably REQUIRED towns and cities to reserve utility easements when discontinuing a road. But the wording we agreed on in the bill before you simply reverses the PRESUMPTION that utility easements are being discontinued. The town, city, or state can still discontinue those easements if they explicitly say so in the vote to discontinue the highway". (Emphasis added). **App. at 149.**

The Carpenters/Brad Balise do not argue that the trial court erred in making its factual findings upon which it based its decision to permit installation of underground utilities and a gravel driveway in the disputed road or that it erred in applying those found facts to the rule of reason to conclude that installation of a gravel driveway and underground utilities constituted reasonable use. They argue instead that as a matter of law the Balises do not have the right to install utilities in the disputed road; that in applying the "rule of reason" to its decision whether to grant the Balises permission to install utilities, the trial court improperly applied the law of private easements on the subject. Def. Brief at 10-12. Notably, the Carpenters/ Brad Balise do not suggest an alternate standard to the "rule of reason" and it is difficult to imagine a more fair and flexible standard.

First, the trial court did not need to apply this Court's precedents concerning installation of utilities through private easements in order to conclude that the rule of reason applies to the question

of installation of utilities through the Balises' statutory right of access. The trial court cited Cote v. Eldeen, 119 N.H. 491 (1979), in which the Supreme Court applied the rule of reason to easements arising from owning land abutting a discontinued public highway. Cote states that the rule of reason applies to the extent of an abutter's permissible use of a discontinued highway.

In Cote, after stating that the scope of a prescriptive easement is defined by the character and nature of the use that created it, the Court applied the rule of reason to the scope of use of the access to which abutters of discontinued highways are entitled:

> "Alternatively, if we assume that the plaintiffs' easement arose because their land abutted a discontinued public highway, the exercise of that easement would also be limited to reasonable use...." Id. at 493.

Second, even without the Cote decision, the trial court's decision to apply the rule of reason to the Balises' request to install utilities through and a driveway upon the disputed road would be justified by the Supreme Court's decisions concerning the same questions in respect to private easements. As the trial court correctly stated in its Order on Reconsideration:

> "While there may be differences between an easement and a statutory right-of-way, the overarching legal concept in both doctrines is a person's right to pass through or use another's property. *See Black's Law Dictionary* 622 & 1522 (10th ed. 2014) (defining 'easement' as '[a]n interest in land owned by another person, consisting of the right to use or control the land, or an area above or below it, for a specific limited purpose,' and defining 'right-of-way' as '[t]he right to pass through property owned by another."). Thus, looking to how New Hampshire has interpreted easement rights is, at the very least, persuasive authority on how to interpret issues regarding statutory right-of-ways. Accordingly, the Court's reliance on established law of easements is appropriate, especially in the absence of law directly addressing the issue of statutory right-of-ways in New Hampshire." Def. Brief ADD. at 34.

In King the Court stated:

> "Even if we assume that the 1977 Decree [under which the abutting land owners release their rights to use the discontinued road in exchange for a permanent right-of-way easement across a portion of the opposing party's property for access to and egress from his property] did not contemplate the installation of utility facilities, 'it is well established that an easement may be maintained for a purpose not

> contemplated when it was created.' (cites omitted). 'In this state the respective rights of dominant and servient owners...are determined by reference to the rule of reason.' (cite omitted) The use to which an easement may be put depends on what is reasonable, under all of the surrounding circumstances. (cites omitted) The application of this rule raises a question of fact to be determined by the trier of fact." Id. at 285-86.

The King case confirms that use of an easement may include more than use of the surface roadway, including installation of utilities through the easement if there is proof that that use constitutes reasonable use.

Since there are many more private easements than discontinued roads, it is not surprising that there is a more well-developed body of law in respect to the permissible scope of use of private easements. The trial court correctly analogized the two forms of rights-of-way and correctly stated that the rule of reason applies to both, as the Supreme Court has applied it to both in Cote, King, and Arcidi. Consequently, the trial court correctly found that the rule of reason applied to the question of The Balises' right to install utilities through and a driveway upon the disputed road.

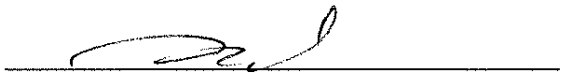
CONCLUSION

For the reasons set forth above, the Balises request that this Honorable Court affirm the Trial Court's Order in its entirety.

REQUEST FOR ORAL ARGUMENT

Should the Court order oral argument, the Balises' argument will be delivered by David W. Sayward.

Dated: September 13, 2017



David W. Sayward, Esq. (#2263)

CERTIFICATE OF SERVICE

I hereby certify that two copies of this Brief were mailed on this date to Steven A. Clark, counsel for Brad Balise, Jon Carpenter and Winifred Carpenter.

Dated: September 13, 2017

David W. Sayward, NH Bar #2263