

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. 2019-0197

Edward E. Favart

v.

Steven M. Ouellette & a.

**APPEAL FROM THE FINAL DECISION OF THE CHESHIRE
COUNTY SUPERIOR COURT**

APPELLEES' BRIEF

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SUPPLEMENT TO APPELLANT'S STATEMENT OF FACTS

The parent tract for the lots which are the subject of the present litigation was acquired by William Anderson from Arthur Brown on June 4, 1931 by deed recorded at Volume 446, Page 414 of the Cheshire County Registry of Deeds. The master or parent tract is the 2nd parcel in Tract 9 of the deed of Susannah Anderson to the children of William Anderson recorded at Volume 684, Page 103. Since 1931, the parent tract was in the family of William Anderson until the Appellant in this matter started acquiring portions of the parent tract in 2004 (Plaintiff's Exhibit 7, App. 38). Each of the Grantors to the Appellant, Edward E. Favart, was a descendant of William Anderson. (App. 139 and App. 38)

SUMMARY OF ARGUMENT

The nature of an easement by implication arises from all the facts and circumstances surrounding the deeds. The fact that there is no written documentation is the essence of an easement by implication. The Appellant's appeal challenges the facts found by the trial court surrounding the division of the parent parcel originally owned by William Anderson then by his widow, Susannah Anderson, into four lots owned by his children. Prior to 1961, the children of William Anderson had unequal, undivided interest in the parent tract by deed of their mother, Susannah Anderson, dated June 9, 1947. The children of Susannah and William Anderson were Henry Anderson, Lillian Bellis, Selma Michelson, and Hilma Koskela. (App. 139). The evidence offered at trial together with the different plans of some or all of the subparts of the master parcel demonstrate that there were at least two easements by implication which arose when the parent tract was divided into four separate parcels in 1961.

ARGUMENT

I. The evidence submitted at trial supports the decision of the Trial Court.

The easement by implication depends upon the underlying facts and circumstances surrounding the properties in question. The Restatement (3rd) of Property (Servitudes) addresses an easement by implication. Seminal to an easement by implication is prior use of the property when in one ownership (unity) the use was made of one part for the benefit of another part. Sections 2.12, 2.15 cited in Burke v. Pierro 159 NH 504, 510 (2009). The Court below found on the facts that prior to the severance of the parcel into four (4) separate parcels, there existed a pattern of use by which different parcels benefitted from or were burdened by that pattern of use. For example, the only access to the four (4) parcels was over a lane called “Anderson Road” which went from the Old Turnpike to the cabins at Sip Pond on the master parcel. (T. William Alexander Stone 137-138; Kevin Ouellette 146, 148, 149 following; Steven Ouellette 242-244, 252-253, 260-261; Joan Michelson 282-283, 290, 293-294). The Court also found that the use made of the beach area by all cabins occurred prior to the four (4) lots created in the subdivision. This use is reflected in the Plan prepared for that purposes of that subdivision. (Exhibit 2, App. 6). Steven Ouellette, Kevin Ouellette, and Joan Michelson testified as to the use made of the beach by all the lot owners prior to Mr. Favart’s first purchase in 2004. The knowledge of these witnesses extended from 1961 (Michelson T. 281). The evidence before the Court establishes the basis for the Court’s findings in the context and circumstances when the master parcel was divided into four (4) lots that there were uses made of one of the lots benefitted the remaining three lots. There uses included the lane into the property and the beach area. The lane crossed several of the lots, not just Lot 2 from which the Ouellette parcel was created. The lane crossed Lot 1, Lot 3 and also went into Lot 4. In fact, this

lane was the only access to all the lots in 1961. (See T. 66, 107, 302.)

The trial court heard the testimony of Steven Ouellette, Kevin Ouellette and Joan Michelson. The trial court took a view. The trial court reviewed the photographs and the plans. The evidence before the trial court clearly establishes a basis for the trial court's factual findings.

It is important to note that the Plaintiff in this matter first purchased the property on Sip Pond in 2004. (Exhibit 7, App. 38-39). That purchase occurred approximately forty (40) years after the master parcel had been subdivided among the children of William Anderson. The Petitioner apparently made no inquiry of what the pattern of use and occupation was among the lots. (T. 66, 73). The Petitioner used the lane past the Ouellette property as access until he completed his own separate access over Lot 3. (T. 10, 329.) The Petitioner's surveyor made no inquiry of the parties as to the historical use on the property and did not visit and inspect the site. (T. 119.)

The context in which the master parcel is subdivided is key. Blaisdell v. Raab 132 NH 711, 716 (1990.)

The rule concerning easement by implication is that an easement is presumed to exist if 'during unity of title the owner imposes an apparent permanent and obvious servitude on one tenement in favor of another which at the time of severance of title is in use and is reasonably necessary for the fair enjoyment of the tenement to which such use is beneficial . . . ' However, since this doctrine is based on the theory of an implied grant, the circumstances surrounding the conveyance control. The question is whether or not 'the parties could reasonably have thought that the right was not granted.' At 716 (citations omitted).

The four (4) children of William Anderson, the original owner, created four (4) separate and equal lots. (App. 139). Prior to that time, the four (4) children held as tenants in common unequal and undivided interests in the master parcel. (App. 11). That title had been held since 1947. From the testimony of the Respondents, the family connection remained strong until the Petitioner started

acquiring lots and the family connection was broken.

The core issue in this appeal is whether there is evidence in the record to support the Trial Court's conclusion that an easement by implication for the use of the beach by the Respondent is supported by the evidence in the record. "We will not overturn the factual findings of the Trial Court, particularly when aided by a view of the property in question, when they are supported by the evidence." Arcidi v. Town of Rye, 150 NH 694, 702 (2004). The evidence in the record clearly establishes the elements of the easement by implication. (Testimony of Kevin Ouellette, Steven Ouellette and Joan Michelson at trial and Exhibit A.)

In a sense, the Petitioner is estopped from denying such easement by implication as the Petitioner claims the benefit of use of the original lane as shown on the Piper Plan of 1961. (Exhibit 2 App. 6). (N.B. Defendant's Exhibit A clearly shows the access easement crossing Lot 3 to access Lot 4 over a bridge.) The use of the bridge and easement prior to Mr. Favart's acquisition of title were testified to by the Defendants. (Tr. 151- 155, 283 [Kevin Ouellette, Steven Ouellette, and Joan Michelson]). In the original deeds out in Petitioner's chain, there is no mention of the use of that lane, though clearly that lane was the access to all the lots at the time the unity of ownership was severed. (Exhibit 5. App. 16-25). The various cabins as shown on the original four (4) lot subdivision were all accessed by this lane, just as the beach area was all accessed and used by the now four (4) separate owners.

The testimony of Kevin Ouellette (T. 150), Steven Ouellette (T. 242-244), and Joan Michelson (T. 282-284) establishes that the different camps and cabins on the master parcel existed prior to the separation of the master parcel into four (4) lots. (App. 6 and Exhibit A). The plan done in 1961 by Roy Piper provides documentary evidence of those cabins. Joan Michelson and her sons,

Steven and Kevin Ouellette, testified as to different parties using different cabins, including the cabin now owned by Kevin and Steven Ouellette, which originally had been owned by Joan Michelson's ex-brother-in-law and apparently built sometime in 1931 based upon the newspapers found as insulation in the sidewalls. (Michelson T. 291-292). The circumstances surrounding the conveyance control. Hayes v. Ferguson 104 NH 25, 28 (1962). Would the parties have thought the easement by implication was reasonably necessary for the fair enjoyment of the tenement to which the is beneficial at the time the master parcel was severed into four (4) lots? There is only one answer to that question. That is, yeses, the use of the beach by the four (4) lots was reasonably beneficial to the four (4) lots and in fact constituted sole purpose for the ownership of those lots on Sip Pond. Viewed some sixty (60) years after the severance of unity of ownership, there can be little question that that improved beach, as shown on the Piper Plan, was reasonably necessary for the fair enjoyment of each of the lots other than the lot on which the beach was located. Certainly the evidence since the severance of common ownership was that all the families as descendants of William Anderson enjoyed the use of the beach as well as those families' friends, guests, and lessees. The issue of an implied easement is a question of fact for the trial court. In an appeal to the Supreme Court, the findings of the trial court are not disturbed if a reasonable person could have reached the same conclusion based on the evidence presented.

“The issue whether or not there was an implied easement was a question of fact for the trial court, and we will not disturb its finding if a reasonable person could have reached the same conclusion based on the evidence presented.” (Citations omitted) Blaisdell v. Raab 132 NH 711, 717 (1990).

Based on the evidence presented at trial in this matter, the Respondents respectfully urge to this court that a reasonable person could have found that the Respondents are entitled to the easement by implication.

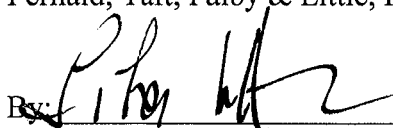
CONCLUSION

From 1947 to 2004, the descendants of William Anderson owned the parcel on Sip Pond, first as tenants in common with an undivided interest and later by separate lots and then resubdivided. The notation on the Piper Plan and common sense arrive at the conclusion that the beach is for the benefits of all the lots in the original subdivision and then flowed to the resubdivided parcels. Neither Mr. Favart nor his surveyor made any inquiry as to the pattern of use and occupancy. Neither Mr. Favart nor his surveyor were struck by the obvious implication from the Piper Plan that the deeds separating the master parcel into four separate lots failed to wholly encompass the easements benefitting and burdening four separate parcels. The Piper Plan clearly demonstrates the burdens and benefits that existed in 1961 when the common ownership of the master parcel was broken.

The Defendants respectfully submit the Court should affirm the decision below.

Respectfully submitted,
Steven M. Ouellette and Kevin F. Ouellette
By Their Attorneys
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Date: September 24, 2019

By: 

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief contains less than 9,500 words and conforms with Supreme Court Rule 16 (3)(i) and 16 (11).



Silas Little

CERTIFICATION

I hereby certify a copy of the within Defendants' Brief has this day been forwarded to Gary J. Kinyon, Esq.

Date: September 24, 2019



Silas Little