THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2019-0197

EDWARD E. FAVART

v.

STEVEN M. OUELLETTE AND KEVIN F. OUELLETTE

Appeal from Lower Court Decision
(Cheshire County Superior Court)

REPLY BRIEF OF APPELLANT, EDWARD E. FAVART

Counsel for Edward E. Favart:

Gary J. Kinyon, Esquire
(New Hampshire Bar #1376)
Bradley & Faulkner, P.C.
50 Washington Street
P.O. Box 666
Keene, NH 03431
(603)352-2030

Oral Argument: Gary J. Kinyon, Esquire

TABLE OF CONTENTS

TABLE OF CONTENTS **2**
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES **3**
ARGUMENT **4**
CONCLUSION **6, 7**
CERTIFICATE OF SERVICE **7**

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

Blaisdell v. Raab, 132 N.H. 711 (1990).....4, 5

ARGUMENT

The Ouellette Brief concedes that severance of unity of title occurred in 1961. Prior to 1961, the property was owned by Susanne Anderson, and unity of ownership was severed by deeds recorded July 26, 1961, in which she conveyed the property to her four children (Hilma N. Koskola, Henry A. Anderson, Selma L. Michaelson, and Lillian E. Bellis, recorded in Book 684, Page 103; Apx. at 11) and the children, in turn, subdivided the property into four lots, conveying one lot to each sibling. Apx. at 16-24.

The Ouellette Brief concedes the lots were "separate and equal" lots, and the 1961 Plan and 1992 Plan (Apx. at 6 and 5) confirm the lots have similar road and water frontage. The 1961 Plan of the four subdivided lots and the deeds creating the four lots delineate no easement rights which benefit or burden any lot, and specifically show no servitude on the Implied Easement Area. Apx. at 16-24.

Significantly, the location of the Implied Easement Area – the beach and ledge area shown on the 1992 Plan - is a natural physical feature of the land, not something constructed (such as a road or water line) while in unitary ownership.

The Court's view of the property noted the driveway running from Turnpike Road into Lots 1 and 2 on the 1961 Plan and 1992 Plan, and the remains of cabins scattered throughout the 4 lots (footprints of some cabins are shown on the 1961 Plan). Such evidence of the general conditions at the property on and after 1961, however, does not establish evidence of an easement by implication over the Implied Easement Area.

The elements of an easement by implication set forth in *Blaisdell v. Raab*, 132 N.H. 711, 716 (1990) require:

- establishment during unity of title imposition of a "permanent and obvious servitude on one tenement in favor of another…"

- which "at the time of severance of title is in use;"

- which "is reasonably necessary for the fair enjoyment of the tenement to which such use is beneficial."

- in considering an easement by implication the "circumstances surrounding the conveyance control. The question is whether or not the parties could reasonably have thought that the right was not granted."

- an easement by implication "will not be found merely because it would be convenient to have the grant"... but "because the parties so agreed." *Blaisdell v. Raab*, 132 N.H. 711, 716 (1990) (citations and quotations omitted).

There was no testimony or evidence about establishment of a right to use the Implied Easement Area before 1961. Indeed, there was no testimony from any of the four siblings who acquired the lots in 1961 about such a use. Further, none of the 1961 deeds for the four lots includes such a servitude, the 1961 Plan does not even note the natural condition of the ledge or beach on Lot 3, and the driveway from Turnpike Road shown on the 1961 Plan does not extend into Lot 3. Apx. at 6; 16-24.

There was no evidence or testimony that prior to 1961 such a servitude was in use. The only testimony about permissive use of the Implied Easement Area related to periods after 1961. The four lots conveyed in 1961 had equal water frontage and road frontage, and contained no rights or easements on the other lots.

There was no evidence or testimony that the servitude was necessary for the fair enjoyment of any lot, including Lot 2 on the 1961 Plan, which was conveyed in 1961 to Lillian Bellis.

Neither Lillian Bellis nor Henry Anderson, the respective owners of Lot 2 and Lot 3 on the 1961 Plan, nor any other persons associated with the 1961 deeds, testified regarding any basis under which either lot owner "could reasonably have thought that the right was not granted."

After 1961, however, documents in the record make clear that these parties did not intend to create such rights. Lillian Bellis was obviously the person in the best position before and after 1961 to know of any servitude over the Implied Easement Area. The record shows, however, that she not assert the existence of any such rights in the later subdivision of her Lot 2 (from 1964-1975) into seven separate lots (creating the Ouellete Lot 7 in 1975). Apx. at 27-35.

Further, a contrary intent is shown in a deed of one of the Bellis lots, from Lillian Bellis to Robert H. Anderson (recorded September 10, 1964, and recorded in Book 725, Page 211 of the Cheshire County Registry of Deeds), being Lot 3 on the 1992 Plan, Apx. at 5, which creates and grants a right of way to her water frontage, instead of granting rights over the Implied Easement Area. Apx. at 28.

Finally, there is no evidence in the record that Lillian Bellis and Robert Anderson agreed to establish a servitude over the Implied Easement Area. The only testimony regarding use of the Implied Easement Area was permissive use after 1961, and such testimony of permissive use cannot establish an agreement by Henry Anderson to establish a servitude.

The Ouellette Brief conflates activity involving driveway access to the Bellis lots from Turnpike Road after 1961 as establishing an easement by implication to the Implied Easement Area on Henry Anderson's Lot 3. The two uses are separate and distinct, and only the latter claim is at issue in this appeal.

CONCLUSION

The Ouellette Brief cites no new evidence from the record or any law not considered by the Trial Court. At severance of unity of title in 1961 no circumstances or evidence of prior use supports an easement by implication, and

no documents recorded in the Cheshire County Registry of Deeds suggest any scheme of development or intention to create an easement.

Respectfully submitted,

Edward E. Favart
By his Attorneys:
Bradley & Faulkner, P.C.

Date: October 15, 2019

By: _____
Gary J. Kinyon, Esq.
(NH Bar ID #1376)
50 Washington Street, P.O. Box 666
Keene, NH 03431-0666
(603) 352-2030

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief contains less than 3,000 words and conforms with Supreme Court Rule 16 (3)(i) and 16(11).

_____
Gary J. Kinyon, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above pleading was emailed to Silas Little, Esq., counsel for Defendants on October 15, 2019.

_____
Gary J. Kinyon, Esq.