State of New Hampshire
Supreme Court

NO. 2023-0418

2023 TERM

DECEMBER SESSION

Joseph & Jean Monagle

v.

Judith Taylor

RULE 7 APPEAL OF FINAL DECISION OF THE
GRAFTON COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT/APPELLANT, JUDITH TAYLOR

December 26, 2023

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QUESTIONS PRESENTED

I. Did the court err in ruling that the plaintiffs have rights to a driveway wider than that specified in the easement deed, thereby violating the deed language, creating a trespass and a nuisance, and overburdening the defendant's servient estate?

Preserved: *Prelim.Inj.Hrg*. at 38; MOTION FOR SUMMARY JUDGMENT at 5, (Dec. 9, 2022), *Appx*. at 89.

II. Did the court err in ruling that the plaintiffs have additional rights to travel over defendant's property to reach the rear of plaintiffs' property, thereby violating the deed language, creating a trespass and nuisance, and overburdening the defendant's servient estate?

Preserved: *Sum.Jt.Hrg*. at 23, 33-34; MOTION FOR SUMMARY JUDGMENT at 4, 6, (Dec. 9, 2022), *Appx*. at 89.

STATEMENT OF FACTS

I. Two Lots in Thornton, Subdivided and Improved

Route 3 in Thornton, New Hampshire, between the Pemigewasset River and Interstate 93 about two miles south of the Woodstock town line, is a busy two-lane road containing sporadic residential and commercial development. Plaintiffs Joseph and Jean Monagle own a 1-acre parcel located in a commercial zoning district, denoted Lot #1. It contains a four-unit, two-story, 4,000-square-foot, woodframe commercial building. SUBDIVISION PLAT (Dec. 19, 1988), Exh. A, *Addendum* at 31. Underneath the building on its southern gable end is a garage reached by a steep ramp. MONAGLE SURVEY (Sept. 2018), Exh. E, *Addendum* at 32.

In front of the Monagles' building, there is an open gravel parking lot that has Route 3 egress both on its northern end near its commercial signage, and also via a shared driveway on its southern side. Between the parking lot and the road is an elongated-oval-shaped grassy area. At the back of the Monagles' building is a flat open field with a shed. MONAGLE SURVEY (Sept. 2018), *Addendum* at 32; GRANIT VIEW HISTORICAL SATELLITE PICTURES (1992-2018), Exh. 1, *Appx*. at 146; GOOGLE STEET VIEW LOOKING SOUTH AT MONAGLE PARKING LOT & EGRESSES, Exh. D (Sept. 2018), *Appx*. at 138; *Prelim.Inj.Hrg*. (Jan. 28, 2023) at 10, 17, 19; *Sum.Jt.Hrg*. (Apr. 18, 2023) at 7.

Behind the Monagles' tract is defendant Judith Taylor's residence. It sits on Lot #2, comprising about 1¾ acres of fields. It has a 50-foot-wide stem, which abuts the Monagles' southern boundary, and which provides Taylor road frontage and egress. SUBDIVISION PLAT, *Addendum* at 31; GOOGLE STRET VIEW LOOKING NORTH AT INTERSECTION OF TAYLOR'S DRIVEWAY AND ROUTE 3, Exh. C (Sept. 2018), *Appx*. at 139.

II. Physical Description of Shared Driveway Easement

At the end of the stem of Lot #2 nearest the road, there is designated a 120-foot by 50-foot easement rectangle. A driveway to Taylor's house, which she maintains, runs east-west, parallel to the boundary, through the rectangle, a few feet to the south of the Monagles' boundary. *Sum.Jt.Hrg*. at 23, 33-34; PHOTO OF ROW OF ROCKS BORDERING DRIVEWAY, Exh 6. (Jan. 2022), *Appx*. at 141. Access to the Monagles' property from the driveway is by a spur over that few feet, turning north from the driveway. MONAGLE SURVEY, (Sept. 2018) *Addendum* at 32.

It is apparent that most of the traffic over the easement associated with the Monagles' property goes into and out of the Monagles' parking lot. Historical satellite photos show the worn tracks turn immediately into the parking lot. *See* GRANIT VIEW HISTORICAL SATELLITE PICTURES (2011, red shaded) (2015, green shaded), Exh. 1 (1992-2018), *Appx*. at 146.

The Monagles claim that the driveway on the easement is intended to give them access not only to their parking lot, but also to their underground garage, which is farther along the easement than the parking lot, and, in addition, to their backyard, which is yet even farther along the easement. *Prelim.Inj.Hrg*. at 11, 40; *Sum.Jt.Hrg*. at 22-23, 28-29; MONAGLE REPLY TO OBJECTION TO SUMMARY JUDGMENT (Dec. 29, 2022), *Appx*. at 99. Taylor insists the Monagles have the use of only a single 22-foot-wide drive. *Sum.Jt.Hrg*. at 33-34.

III. Deed Description of Shared Driveway Easement

Before 1988, the whole property was owned by the Helgerson family. FIDUCIARY DEED, STEEL → HELGERSON (July 5, 1988), *Appx*. at 130. The Helgersons subdivided into two lots, created an easement in favor of Lot #1 on the stem connecting Lot #2 to Route 3, and built both Taylor's house and the Monagles' commercial building. SUBDIVISION PLAT, *Addendum* at 31; MONAGLE STATEMENT OF MATERIAL FACTS ¶7 (Nov. 9, 2022), *Appx*. at 163. The Helgerson family subsequently deeded the lots among themselves, resulting in merger and unity of title. WARRANTY DEED, HELGERSON → HELGERSON (Feb. 7, 1989), *Appx*. at 132; QUITCLAIM DEED, HELGERSON → HELGERSON (June 14, 1989), *Appx*. at 134; QUITCLAIM DEED HELGERSON → HELGERSON (Nov. 8, 1999), *Appx*. at 136.

In 2000, the residential Lot #2 was conveyed out of the Helgerson family when it was sold to Symer and then to defendant Taylor. WARRANTY DEED, HELGERSON → SYMER (Mar. 8, 2000), *Addendum* at 33; WARRANTY DEED, SYMER → TAYLOR (Sept. 1, 2020), *Addendum* at 35. In 2002, the commercial Lot #1 was conveyed out of the Helgerson family when it was sold to McDonough and then to plaintiffs Monagles. WARRANTY DEED, HELGERSON → MCDONOUGH (Dec. 20, 2002), *Addendum* at 37; WARRANTY DEED, MCDONOUGH → MONAGLE (Feb. 16, 2016), *Addendum* at 40.

While the intra-Helgerson deeds contained the easement (more fully described below), the parties agree that for purposes of this matter, due to merger while within the Helgerson family, the easement language at issue in this case is found in the 2000 deed to Symer (and then to Taylor) and the 2002 deed to McDonough (and then to Monagle). *Sum.Jt.Hrg*. at 7-9.

Those deeds describe an easement over Taylor's Lot #2 which benefits the Monagles' Lot #1. The easement rectangle is entirely on Taylor's property. At issue here is interpretation of those deeds and the extent to which the

Monagles may use the easement.

The descriptions of the easement in Taylor's deed and the Monagles' deed are similar, but not identical. Below they are presented side-by-side for comparison, with the clauses labeled A through E for convenience of discussion. Each easement description can be accurately read straight through, ignoring the spacing and separation of discrete clauses. Taylor's Lot #2 deed (the earlier of the two) is presented on the right; the Monagles' Lot #1 deed is on the left. For ease of reference, specific differences in the deeds are indicated using differing textual highlighting.

ID	Lot #1, Plaintiff Monagle 2002 Deed	Lot #2, Defendant Taylor 2000 Deed
A	Also granting	Excepting and reserving
B	a right of way, in common with the owners of Lot #2, to use that portion of the common driveway that is located within the limits of the first 120 feet of the 50 foot strip extending westerly from US Route 3 as shown on aforementioned plan,	a right of way in favor of Lot #1 as depicted on the above-referenced plan. Lot #1 may use that portion of the common drive located within the first 120 feet of the 50' strip leading westerly from U.S. Route 3.
C	including the right to construct, improve and maintain a traveled surface up to 22 feet in width,	The owners of Lot #1 shall have the right to construct and improve a traveled surface up to 22 feet in width.
D	which may be used in connection with a commercial use of Lot #1*; for viatic purposes and for the construction and maintenance of utility lines*.	Said right of way may be used in connection with a commercial use of Lot #1.
E	The owners of Lot #1 shall pay one half (½) the cost of maintaining that portion of the driveway that they share with the owners of Lot #2.	The owners of Lot #1 shall pay one-half (½) the cost of maintaining that portion of the driveway they share.

Both deeds incorporate the same "above-referenced" or "aforementioned" subdivision plan, which is included in the addendum to this brief. SUBDIVISION PLAT (Dec. 19, 1988), Exh. A, *Addendum* at 31. Important to this matter is a notation on the plan, which has an arrow pointing to the easement area with the label, "Easement Is For Driveway Only." *Id.* (highlighting in original).

In the earlier 2000 Taylor deed, Clause A is "excepting and reserving," while in the Monagles' later 2002 deed, Clause A is "also granting."

The right-of-way Clauses B, indicated with dotted underlining, *supra,*

are similar but not identical. Taylor's deed allows the Monagles to "use that portion of the common drive located within the first 120 feet of the 50' strip." The Monagles' deed provides they may "use that portion of the common driveway that is located within the limits of the first 120 feet of the 50 foot strip."

Clause C in Taylor's deed grants the Monagles a right to "construct and improve a traveled surface up to 22 feet in width," while the Monagles' deed claims a right to "construct, improve and maintain a traveled surface up to 22 feet in width." The difference is indicated with a wavy underline, *supra.*

Clause D in Taylor's deed allows that the "right of way may be used in connection with a commercial use of Lot #1," whereas the later Monagle deed adds "for viatic purposes and for the construction and maintenance of utility lines." The difference is indicated in italics, *supra.*

The maintenance Clauses E are identical.

The parties do not dispute that the deeds reference the same 1988 subdivision plan, and that the easement area, while not a perfect rectangle, is roughly 120 feet by 50 feet, as shown on the plan. *Sum.Jt.Hrg*. at 18-19; MONAGLE SURVEY (Sept. 2018), *Addendum* at 32. They do not dispute that the easement area, while otherwise generally grassy, contains utility poles and a graveled traveled surface. *Prelim.Inj.Hrg*. at 18, 39; *Sum.Jt.Hrg*. at 30; SUBDIVISION PLAT, , *Addendum* at 31; MONAGLE SURVEY (Sept. 2018), *Addendum* at 32; PHOTO OF DRIVEWAY, Exh 6. (Jan. 2022), *Appx*. at 141.

IV. Taylor Plows the Driveway

The deeds require that Taylor plow the common driveway, and that the Monagles reimburse her. The court found, and there is no dispute, that Taylor consistently plows, and the Monagles consistently pay. LETTER FROM TAYLOR TO MONAGLE WITH APRIL PLOWING INVOICE (May 19, 2022), *Appx*. at 160; *Prelim.Inj.Hrg*. at 23, 27, 38, 44, 46; *Sum.Jt.Hrg*. at 23-24, 34; PHOTO OF DRIVEWAY AFTER PLOWING, Exh. E (Jan. 2023), *Appx*. at 143.

The Monagles nonetheless quibble with the manner in which Taylor plows. Observing that Taylor's contractor plows from east to west and deposits the snow well down Taylor's driveway, *Sum.Jt.Hrg*. at 24, they assert a snowbank is created, which must be eliminated. *Sum.Jt.Hrg*. at 11, 26. While a snowbank may be created, Taylor attests that her contractor attempts to plow away a 22-foot-wide portion of it, which is the spur providing access to the parking lot, and also that she has not tried to inhibit the Monagles from removing that snowbank if it remains. *Sum.Jt.Hrg*. at 17, 34.

In any event, photographs show that the alleged snowbank was not present after plowing, PHOTO SHOWING OPENING IN SNOWBANK AT ENTRANCE TO PARKING LOT AT NIGHT, Exh. E (Jan. 2023), *Appx*. at 143; PHOTO SHOWING OPENING IN SNOWBANK AT ENTRANCE TO PARKING LOT IN DAYTIME, Exh. 8 (Jan. 2023) *Appx*. at 144, and Taylor suggests that any problems regarding the alleged snowbank are mere speculation because the Monagles' ability to get in and out over the spur has never actually been frustrated. *Sum.Jt.Hrg*. at 25.

V. Monagles Plow Snow Onto the Easement From the Entire Parking Lot

Beginning in fall 2020, Taylor noticed that the Monagles were plowing snow, along with its accumulated salt, sand, and debris, from their parking lot, onto the easement immediately south of the traveled driveway. *Prelim.Inj.Hrg*. at 6-7, 24; *Sum.Jt.Hrg*. at 16.

The Monagles concede they push snow from their parking lot onto the easement, *Prelim.Inj.Hrg*. at 9, 18, but justify it on the grounds that the easement is nearby and convenient, *Prelim.Inj.Hrg*. at 9, 12; *Sum.Jt.Hrg*. at 3, 10, 12, 22, 30, and not visible to Taylor from her house. *Prelim.Inj.Hrg*. at 39. They also concede they clear snow from the easement in an expanse wider than 22 feet. *Prelim.Inj.Hrg*. at 11; *Sum.Jt.Hrg*. at 32.

The Monagles have at least three other places available for depositing snow plowed from their parking lot. *Prelim.Inj.Hrg*. at 49.

The court found, and the Monagles concede, that they can and do deposit snow to the north of the parking lot, where there is plenty of room. *Prelim.Inj.Hrg*. at 19, 24, 33, 37, 44, 49; *Sum.Jt.Hrg*. at 12. Photographs corroborate that they plow snow to that location. PHOTO FROM TAYLOR'S WINDOW OF SNOW PILED NORTH OF MONAGLES' PARKING LOT, Exh. F (Dec. 12, 2021), *Appx*. at 140; PHOTO OF SNOW PLOWED NEAR MONAGLES' COMMERCIAL SIGN NORTH OF PARKING LOT, Exh. G (Jan. 19, 2022), *Appx*. at 142.

The court likewise found, and the Monagles concede, that they can and do deposit snow plowed from their parking lot both east, onto the strip between the parking lot and Route 3, *Prelim.Inj.Hrg*. at 17-19, 49, and also west, behind their house near the shed. *Prelim.Inj.Hrg*. at 18, 21, 32-33, 48-49.

At the preliminary injunction hearing, the parties agreed that Taylor would remove one boulder she had placed which potentially hindered plowing near the shed, and the court ordered her to do that. *Prelim.Inj.Hrg*. at 31, 35, 37,

42, 49; ORDER (granting preliminary injunction) (Jan. 28, 2022), *Appx*. at 48; PHOTO OF DRIVEWAY BEFORE REMOVAL OF ROCK NEAR SHED, Exh 6. (Jan. 2022), *Appx*. at 141. That rock has been removed. *Sum.Jt.Hrg*. at 20-21.

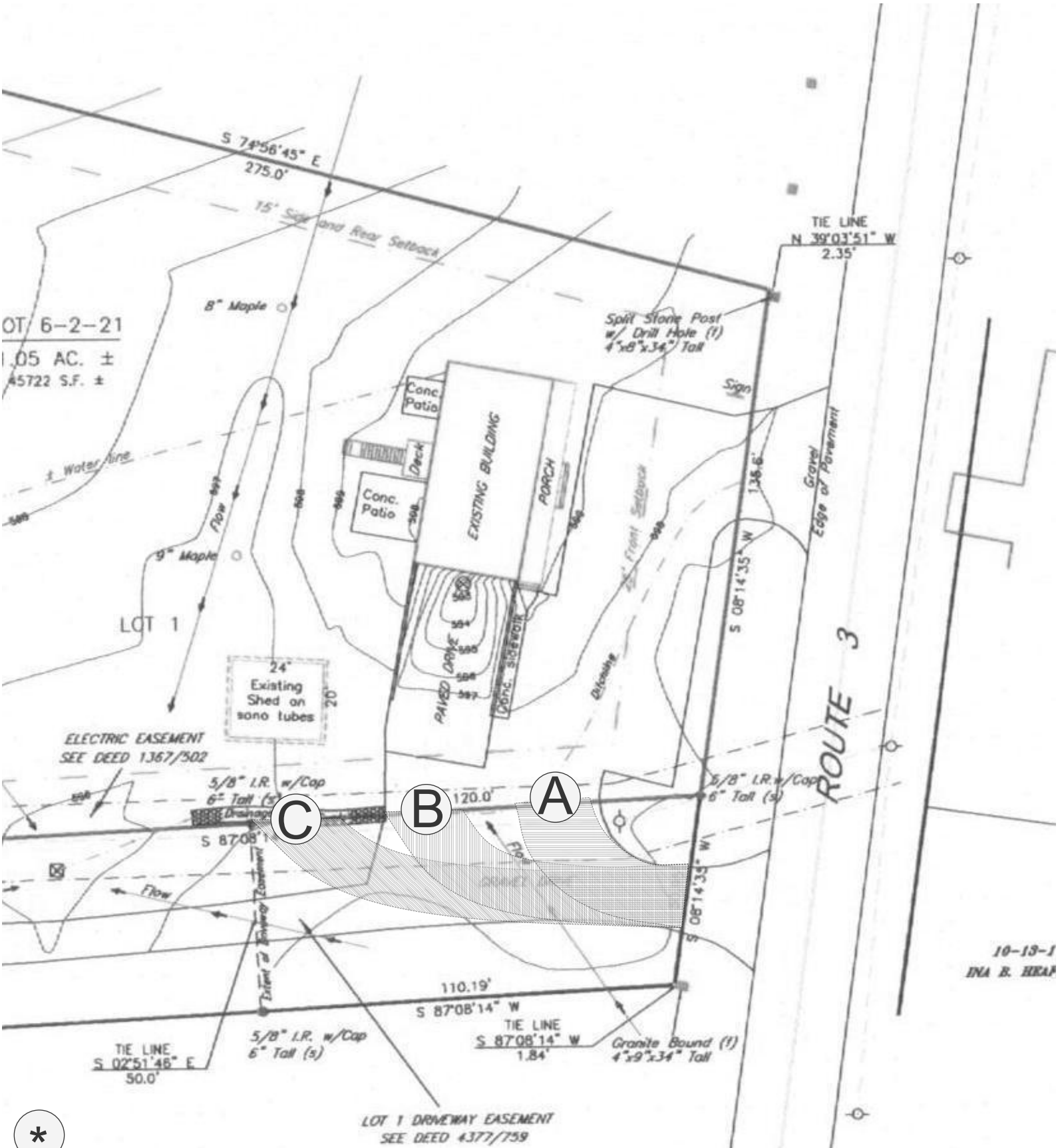
The Monagles allege that not being able to plow from the parking lot onto the easement results in a build-up of snow during the winter, which must be removed by "expensive snow removal methods." *Sum.Jt.Hrg*. at 10. However, the Monagles conceded that, depending upon the amount of snowfall, having to hire a bucket loader sometime during the winter to remove accumulated snowbanks from their commercial parking lot is normal. *Prelim.Inj.Hrg*. at 19-20.

VI. Monagles Use a Swath of the Easement Wider Than 22 Feet

Because the Monagles claim the driveway on the easement is intended to give them access to three places on their land – parking lot, underground garage, and backyard – they make use of, and plow snow from, two or three separate spurs that turn north from the driveway, which collectively are wider than 22 feet. *Sum.Jt.Hrg*. at 33-34; PHOTO OF ROW OF ROCKS BORDERING DRIVEWAY, Exh 6. (Jan. 2022), *Appx*. at 141.

In 2020, Taylor noticed that, in addition to the snow the Monagles deposited on the easement from their parking lot, they were also clearing a swath on the easement greater than 22 feet wide. *Prelim.Inj.Hrg*. at 6-9, 13; *Sum.Jt.Hrg*. at 25.

On the following page is a zoomed-in view of the southeast corner of the 2018 Monagle Survey, which is in the record. MONAGLE SURVEY (Sept. 2018), *Addendum* at 32. For the purposes of this brief, and to graphically illustrate Taylor's contention, three approximate driveway paths have been sketched onto the survey and labeled: one each leading to **A**) the parking lot; **B**) the underground garage; and **C**) the backyard. While a perfect survey scale is not attested, the sketches are intended to roughly match the width of the current traveled way, as shown on the zoomed-in view. It can be observed that if each path – **A**, **B**, and **C** – is 22 feet wide, the collective width, at the point where the spurs approach and meet the Monagles' boundary, is 44 or 66 feet or, in any event, greater than 22 feet.



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For the purpose of this brief, and to graphically illustrate Taylor's contention, this map is a zoomed-in view of the southeast corner of the 2018 Monagle Survey, which is in the record. MONAGLE SURVEY (Sept. 2018), Exh. E. Nothing has been altered on the underlying survey, except three sketches intended to approximate sample paths of entrance into three locations on Lot #1: (A) the parking lot; (B) the underground garage; and (C) the backyard. A perfect survey scale is not attested. Rather, the widths of the sample path sketches are intended to roughly match the width of the current traveled way, as shown on the survey.

VII. Taylor Placed Boulders to Protect Her Property

At some point before snowplowing became an issue, the Monagles' predecessor-in-title stored vehicles on the easement, which Taylor asked to be removed, and they were. TAYLOR'S COUNTERCLAIM ¶2 (Jan. 25, 2022), *Appx*. at 24; ANSWER TO COUNTERCLAIM ¶ 2 (Feb. 24, 2022), *Appx*. at 49. Upon seeing the Monagles depositing snow from their parking lot onto the easement in 2020, Taylor again became concerned with protecting her property against an encroaching commercial neighbor. Her first response was to ask the Monagles to refrain, but they persisted. *Prelim.Inj.Hrg*. at 6, 41.

Consequently, on December 6, 2021, Taylor placed a row of boulders along the driveway, entirely on her own property, effectively demarcating the 22-foot-wide right-of-way. *Prelim.Inj.Hrg*. at 6, 40; *Sum.Jt.Hrg*. at 19-21; PHOTO OF ROW OF ROCKS BORDERING DRIVEWAY, Exh 6. (Jan. 2022), *Appx*. at 141; TAYLOR'S ANSWER & AFFIRMATIVE DEFENSES ¶ 23 (Jan. 25, 2022), *Appx*. at 19. The rocks discourage the Monagles from placing large quantities of snow on the easement south of the traveled way. *Prelim.Inj.Hrg*. at 12, 35; *Sum.Jt.Hrg*. at 31.

Shortly thereafter, the Monagles' lawyer sent Taylor a letter demanding that she remove the boulders. LETTER FROM PRIMMER TO TAYLOR (Dec. 6, 2021), *Appx*. at 159. When she did not, the Monagles sued.

STATEMENT OF THE CASE

In December 2021, the Monagles commenced suit in the Grafton County Superior Court, alleging trespass and negligence, and seeking a declaratory judgment and injunction to remove the rocks. COMPLAINT (Dec. 21, 2021), *Appx*. at 4; MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION (Dec. 21, 2021), *Appx*. at 12. Taylor counterclaimed, alleging trespass and nuisance, and seeking a declaratory judgment and injunction to prevent the Monagles from overburdening the easement. COUNTERCLAIM (Jan. 25, 2022), *Appx*. at 24.

In 2022, both parties filed motions for summary judgment. MONAGLE MOTION FOR SUMMARY JUDGMENT (Nov. 9, 2022), *Appx*. at 75; TAYLOR MOTION FOR SUMMARY JUDGMENT (Dec. 9, 2022), *Appx*. at 89.

In January 2023, the Grafton County Superior Court (*Peter H. Bernstein*, J.), held a preliminary injunction hearing and from the bench ordered Taylor to remove the one rock near the shed on the basis that it hampered snowplowing in that direction. *Prelim.Inj.Hrg*. (Jan. 28, 2023), *passim*. In April, the court held a summary judgment hearing, *Sum.Jt.Hrg*. (Apr. 18, 2023), *passim*, and then issued an order. ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT (June 5, 2023), *Addendum* at 44. The court did not take a view.

In its order, the court canvassed the facts, and noted that while the "dispute arose when the defendant placed boulders along both sides of the 22-foot-wide strip," *id.* at 3, the issue before the court was the interpretation of the easement. *Id.* at 1. The court recited the Monagles' position that placement of the rocks has "impeded their ability to sufficiently clear the [d]riveway of snow, blocks [them] from accessing the back of their property, and impermissibly interferes with their use of the [d]riveway." *Id.* at 4. It also recounted Taylor's position that the Monagles "impermissibly expanded the scope of the easement, which constitutes trespass and creates a nuisance on her property." *Id.*

The court held that the Monagles have a "right to use and maintain" the

easement, "including in the areas just outside the [d]riveway where the boulders are currently located," *id.* at 5, a right to "deposit snow or any other debris and clear a 22-foot-wide path," *id.* at 6, and "a right to a 22-foot-wide traveled surface." *Id.* at 6. Construing the "viatic purposes" in the Monagles' deed, the court held that "any obstruction that interferes with the [Monagles'] right to access their property by way of the [d]riveway is not permitted," *id.* at 7, and concluded that Taylor "cannot block the [Monagles'] access to and use of their property by way of placing boulders or any other barrier along the 22-foot-wide [d]riveway in a manner that would interfere with their right to maintain the [d]riveway and access their property." *Id.* at 7.

The court left several issues imprecisely addressed or undecided. It explicitly declined to "make any factual determination as to whether the particular boulders at issue unreasonably interfere with the [Monagles'] deeded easement." *Id.* at 6, n. 3. While the court mentioned Taylor's contention that the Monagles "improperly pushed snow and dirt outside of the [d]riveway," *id.* at 3, n. 2, it did not distinguish between snow deposited from the parking lot and snow from the easement itself. Although the court mentioned overburdening and expansion of the easement, *id.* at 7, it left unaddressed the Monagles' overuse by creating turn-off spurs from the driveway to three separate locations – parking lot, garage, and backyard. The court did not address either party's requests for injunctions.

The Monagles filed a motion for reconsideration urging the court to make specific findings regarding whether the rocks are an obstruction, which was denied. MONAGLE MOTION FOR PARTIAL RECONSIDERATION (June 16, 2023), *Appx*. at 119; TAYLOR OBJECTION TO RECONSIDERATION (June 26, 2023), *Appx*. at 126; ORDER (denying reconsideration) (July 7, 2023), *Appx*. at 129.

Taylor removed one of the boulders along the driveway after the preliminary injunction hearing, but the remainder are still in place. *See* PHOTO OF ROW OF ROCKS BORDERING DRIVEWAY, Exh 6. (Jan. 2022), *Appx*. at 141.

SUMMARY OF ARGUMENT

The easement over Taylor's land allows the Monagles one driveway, 22 feet wide. The Monagles claim, however, that they can use the easement area to deposit snow from their parking lot, and that they can access their property on two or three separate spurs, which collectively are greater than 22 feet wide.

Those uses are more than they are allowed. This court should order that the Monagles are allowed to use the easement only to the extent allowed by Taylor's deed, and no further.

ARGUMENT

Although snow plowing and boulders were the immediate disputes that gave rise to this case, ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT at 3 (June 5, 2023), *Addendum* at 44, Judith Taylor's interests are not merely immediate. The Monagles' property is commercial. Taylor is concerned that, while it may now constitute a low impact use, it might someday become something more expansive, such as a gas station, convenience store, or fast-food outlet. In that case, Taylor would be sharing her driveway not with a small amount of traffic, but a high-volume facility, thereby diminishing the value of her home. Taylor installed the rocks to protect her property for the future.

I. Monagles Have Rights to One 22-Foot Spur Connecting Driveway to Boundary

A. How Monagles May Use the Easement

Taylor's position is that the Monagles may travel on a single 22-foot-wide swath for the purpose of accessing Route 3. That swath must be located within the rectangular easement area.

Whether because the right is implied, *see, e.g., White v. Eagle & Phoenix Hotel Co.*, 68 N.H. 38 (1894), or because the word "maintain" appears in Clause C of the Monagles' deed, the Monagles also have the right to maintain the single 22-foot-wide driveway. Taylor understands that maintenance includes the ability to plow snow off the driveway and push it onto other parts of the easement area. Similarly, Taylor understands that the Monagles have the right to place material or equipment on the easement area, provided it is temporary and transient, if related to upkeep or repair of the single 22-foot-wide swath.

The boulders Taylor placed do not interfere with the Monagles' usage. After Taylor plows the driveway in the normal course of the parties' mutual arrangement, the quantity of snow remaining on a single 22-foot-wide swath is

minimal. This is because the spur between the northern edge of the traveled driveway and the Monagles' southern boundary is very short – at most 5 or 10 feet. MONAGLE SURVEY (Sept. 2018), *Addendum* at 32. Thus, the total square-area constituting the sliver of allegedly unremoved snowbank is not more than 22 feet by 5 or 10 feet – roughly one 22-foot-long snowbank – the clearing of which the rocks do not prevent. Moreover, the Monagles have not demonstrated that the rocks have ever prevented maintenance of the driveway. Accordingly, the boulders do no more than demarcate the traveled lane that currently exists in the easement area, entirely on Taylor's property.

Taylor's boulders do not landlock any portion of the Monagles' facility. This is because the Monagles' parking lot, the approach to their underground garage, and their backyard, are all contiguously connected within the Monagles' own property, making access available from any of those locations to any of the others, without crossing the boundary. In addition, the Monagles have an alternative primary egress to Route 3 from the northern end of their parking lot. *See* OVERHEAD VIEW OF PROPERTY WITH BLACK LINE SUGGESTING SNOW BANK, Exh. 7, *Appx*. at 155; GRANIT VIEW HISTORICAL SATELLITE PICTURES, Exh. 1 (1992-2018), *Appx*. at 146.

Accordingly, Taylor's boulders merely protect her property. The court should have issued a declaratory judgment to that effect, and should have enjoined the Monagles from any usage beyond driving on and maintaining the traveled driveway, as specified in Taylor's deed.

B. How Monagles Cannot Use the Easement

Taylor's position is that the Monagles do *not* have the right to generally use the entire rectangle comprising the easement area.

The Monagles may *not* use a swath wider than 22 feet.

Taylor's predecessor-in-title was compelled by the language of the deed to be indifferent regarding whether the single allowed spur leads to the parking lot (path **A** on the map segment presented on page 16, *supra*), the underground garage (path **B**), or the backyard (path **C**). But it cannot be more than one of those places, because then the collective width is more than 22 feet.

As the driveway has already been constructed, moreover, it cannot now be unilaterally relocated. *Stowell v. Andrews*, 171 N.H. 289, 301-02 (2018). As the appears from the historical satellite views that spur path **A** is the traveled way, the Monagles must now be satisfied with that spur.

While the Monagles' may use the easement for passage to and from Route 3 on the traveled surface, they *cannot* use it for parking or storage of personal property, whether on the lane or elsewhere on the easement area.

Taylor argued below that the Monagles had impermissibly expanded the driveway use, *Sum.Jt.Hrg*. at 23, 33-34; TAYLOR MOTION FOR SUMMARY JUDGMENT at 4-6, (Dec. 9, 2022), *Appx*. at 89; *see also* MONAGLE REPLY TO OBJECTION TO SUMMARY JUDGMENT (Dec. 29, 2022), *Appx*. at 99, but the superior court left the matter unclearly addressed in its order. ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT at 7 (June 5, 2023), *Addendum* at 44.

As to plowing snow, the Monagles do *not* have the right to put snow onto the easement area from any place other than from the 22-foot-wide swath. That is, they cannot plow snow from the parking lot onto the easement. While the Monagles have a right to use the easement area to maintain their driveway, nothing in any deed gives them a right to use the easement area to maintain the

parking lot or any other space. In addition, the Monagles have at least three other areas conveniently available to push snow. If those become full, hiring a bucket loader in heavy winters is a customary aspect of their business. This issue was raised by Taylor, *Prelim.Inj.Hrg*. at 38; TAYLOR MOTION FOR SUMMARY JUDGMENT at 5, (Dec. 9, 2022), *Appx*. at 89, but was unaddressed by the superior court.

Taylor has no interest in conspiring to "choke him out," as the Monagles have alleged. *Prelim.Inj.Hrg*. at 13; *Sum.Jt.Hrg*. at 21. However, any current usage of the easement area in any fashion beyond what the Monagles are allowed by Taylor's deed constitutes trespass and nuisance, and is an overburdening of the easement; any evidence the Monagles provided of such past usage is merely an admission of trespass. *Sum.Jt.Hrg*. at 16-17.

The right to use and maintain a driveway does not constitute a right to encroach on another's property. Accordingly, the court should have issued a declaratory judgment constraining the Monagles to the uses to which they are allowed, described *supra*, should have enjoined anything beyond that, and should have specified that there is no need to move the boulders, which are entirely on Taylor's land and merely demarcate the traveled surface.

II. Taylor's Positions Are Supported by the Language of Her Deed

Taylor's positions are supported by the language of her deed, and nothing in her deed grants the Monagles' broader claims.

A. There Can Be Only One Driveway

In Clause B of both parties' deeds, the "drive" or "driveway" is indicated with singular articles – "a" and "the." Taylor's deed says "*a* right of way" and "*the* common drive." Clause C says "*a* traveled surface." Clause E says "*the* driveway." WARRANTY DEED, SYMER → TAYLOR (Sept. 1, 2020), *Addendum* at 35 (emphases added). The Monagles' deed repeats those singular articles. WARRANTY DEED, MCDONOUGH → MONAGLE (Feb. 16, 2016), *Addendum* at 40.

The singular articles indicate *one* 22-foot traveled lane, not two or three. To the extent the superior court approved something greater, it was in error and should be reversed.

B. The Driveway Must Be Within the Easement Area

Both deeds incorporate the subdivision plan. It includes a notation, with an arrow pointing to the easement area, which says: "Easement Is For Driveway Only." SUBDIVISION PLAT (Dec. 19, 1988), Exh. A, *Addendum* at 31 (highlighting in original). The arrow points to the 120-by-50 foot rectangle. This makes clear, geographically, the location of the right-of-way.

Clause B of Taylor's deed provides that it reserves "a right-of-way in favor of [the Monagles] as depicted" on the subdivision plan. The subdivision plan accordingly depicts the easement area rectangle. The parties agree that it does not depict a driveway. MONAGLE REPLY TO OBJECTION TO SUMMARY JUDGMENT at 9 (Dec. 29, 2022), *Appx*. at 99. The deeds' provision for the Monagles to "construct" a traveled surface indicates that, at the time of the subdivision, no driveway existed. Thus, nothing about the driveway itself can be gleaned for the non-depiction. It is apparent, however, that the rectangle was

intended for a driveway to be constructed somewhere within it.

The "Easement is for Driveway Only" notation, combined with the rectangle "as depicted" on the subdivision plan, indicates that the meaning of the deeds is merely that the Monagles may enjoy a traveled surface somewhere within the easement area.

Beyond a driveway use, the easement area rectangle is not open for the Monagles or their guests. Nothing in Taylor's deed, nor in the Monagles' (leaving aside the utility provision not at issue here) grants the Monagles a greater or more general use of the easement area.

To the extent the superior court approved the Monagles plowing snow onto the easement area from their parking lot, or anywhere else other than from the driveway itself, it was in error, and should be reversed.

C. The Driveway is Limited to a Traveled Surface 22 Feet Wide

In Clause C, both deeds provide that the Monagles may use a "traveled surface," which may be "up to" 22 feet wide. No use wider than 22 feet is allowed.

"Traveled" suggests movement. The deed thus excludes uses such as storing vehicles and depositing snow from the Monagles' parking lot.

While maintenance may involve transient use of the easement area larger than the 22-foot-wide swath, the deeds do not allow the Monagles to make any further use of it. They cannot, for example, push snow from their parking lot, or dictate the presence or location of rocks, trees, shrubs, guardrails, or anything else Taylor may wish to install to demarcate the driveway.

To the extent the superior court approved a use greater than a 22-foot traveled surface, or required Taylor's boulders to be removed, it was in error and should be reversed.

III. The Monagles' Use is Limited to Rights No Greater Than Those Reserved in Taylor's Deed

The Monagles appear to claim that grants in their deed expand what was excepted and reserved in Taylor's. The claim is erroneous, for several reasons.

First, Taylor's chain of title is earlier in time than the Monagles' chain of title. The easement was first set forth in the February 1989 deed in Taylor's chain. WARRANTY DEED, HELGERSON → HELGERSON (Feb. 7, 1989), *Appx*. at 132. The Monagles' chain of title arose a few months later, in June 1989. QUITCLAIM DEED, HELGERSON → HELGERSON (June 14, 1989), *Appx*. at 134. Even if those deeds became irrelevant due to the Helgersons' merger and unity-of-title, the easement was reestablished in Taylor's chain of title in 2000, WARRANTY DEED, HELGERSON → SYMER (Mar. 8, 2000), *Addendum* at 33, two years before it appeared in the Monagles' chain, in 2002. WARRANTY DEED, HELGERSON → MCDONOUGH (Dec. 20, 2002), *Addendum* at 37.

Second, *nemo dat quod non habet* – "No person can grant or charge what he has not." *Williams v. Briggs*, 11 R.I. 476, 477-78 (1877) ("[M]ortgage is ineffectual to transfer the legal title of the property subsequently acquired."); *Mitchell v. Hawley*, 83 U.S. 544, 550 (1872) ("No one in general can sell personal property and convey a valid title to it unless he is the owner."); *Mansur v. Muskopf*, 159 N.H. 216, 222 (2009) ("[T]he developer could only convey the property to which it had title at the time.").

Third, Taylor's deed commences saying it was "excepting and reserving" certain rights to the Monagles. The Monagles' deed begins with words suggesting something narrower: "also granting." To the extent the Monagles claim their deed gives them something beyond that which had before been excepted and reserved in Taylor's, such grant is invalid. This is underscored by the fact that the originating deed in Taylor's chain of title was a warranty deed, while the Monagles' was merely a quitclaim. *See Minot v. Brooks*, 16 N.H. 374,

375 (1844) ("[C]onveying by quitclaim is only evidence that he supposed his title might not be perfectly good.").

Fourth, if the Monagles had rights greater than the ability to travel over and maintain a 22-foot-wide driveway, all the language in Clauses B, C, and D, which specify limitations – location of the driveway within the easement, width of the traveled surface, connection to commercial use – would be surplusage. The Monagles have not suggested any extraordinary drafting blunder which might pare those limitations to meaninglessness. *See Pettee v. Omega Chapter of Alpha Gamma Rho*, 86 N.H. 419 (1934) (deed language may be disregarded as surplusage to rectify inconsistencies); *Brown v. Manter*, 21 N.H. 528, 535 (1850) (deed language may be disregarded as surplusage "which makes the rest unintelligible").

Finally, there are two possibly operative words in the Monagles' deed that do not appear in Taylor's – "maintenance" and "viatic" in Clauses C and D. They are limitations, not expansions. The Monagles cannot, for example, expand the driveway; they can only maintain it. They cannot, for instance, use the driveway for agricultural or industrial purposes; their only use is viatic. Any other use, such as depositing snow plowed from the Monagles' own property, is therefore disallowed.

To the extent the Monagles rely on words in their deed which do not appear in Taylor's, they are ineffectual and void. Correspondingly, to the extent the superior court allowed the Monagles rights beyond those excepted and reserved in Taylor's deed, its decision should be reversed.

CONCLUSION

Judith Taylor placed boulders on her land demarcating the traveled driveway because she is concerned that, while the Monagles' commercial facility may now be relatively small, it could someday become something more expansive, such as a gas station, convenience store, or fast-food outlet. Nothing in her deed gives the Monagles the right to use the easement to deposit snow from their driveway, nor to access their property from a driveway wider than 22 feet.

Interpretation of deeds is reviewed *de novo, Stowell v. Andrews*, 171 N.H. 289, 293 (2018), as is a trial court's grant of summary judgment. *Zannini v. Phenix Mut. Fire Ins. Co.*, 172 N.H. 730, 733 (2019).

This court should order that the Monagles may use the easement to travel to and from their property over a single spur no more than 22 feet wide, and to maintain only the driveway itself.

Respectfully submitted,

Judith Taylor
By her Attorney,
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Dated: December 26, 2023

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CERTIFICATIONS & REQUEST FOR ORAL ARGUMENT

A full oral argument is requested.

I hereby certify that the decision being appealed is addended to this brief. I further certify that this brief contains no more than 9,500 words, exclusive of those portions which are exempted.

I further certify that on December 26, 2023, copies of the foregoing will be forwarded to Matthew J. Delude, Esq., via this court's electronic filing system.

Dated: December 26, 2023

Joshua L. Gordon, Esq.

ADDENDUM