State of New Hampshire
Supreme Court

NO. 2023-0418

2024 TERM

MARCH SESSION

Joseph & Jean Monagle

v.

Judith Taylor

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

REPLY BRIEF

March 11, 2024

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ARGUMENT

The positions argued in the Monagles' brief are based on a misconception that they have rights to something more than the use and maintenance of a single 22-foot-wide driveway on the easement area. That they do not is based on a straightforward reading of the unambiguous deed, and the unambiguous map referenced in the deed. The remainder of the Monagles' brief quibbles with factual and procedural details that are of no consequence.

I. Monagles Have Rights to One 22-Foot-Wide Driveway on the Easement Area

The "interpretation of a deed is a question of law." *Lynn v. Wentworth By The Sea*, 169 N.H. 77, 84 (2016).

> If the language of the deed is clear and unambiguous, we will interpret the intended meaning from the deed itself without resort to extrinsic evidence. If, however, the language of the deed is ambiguous, extrinsic evidence of the parties' intentions and the circumstances surrounding the conveyance may be used to clarify its terms.

Id. at 84.

A. Unambiguous Deed and Plan Control Parties' Rights

The Monagles concede that the 2000 deed in Taylor's chain of title – quoted in Taylor's opening brief – controls this case. MONAGLEBRF. at 11, 44; TAYLORBRF. at 10 (column on right); *see* DEED, HELGERSON → SYMER (Mar. 8, 2000) *MonagleAppx*. at 50-51.

The deed first incorporates the recorded "Plan 6108," and then reserves:

> [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. The owners of Lot #1 shall have the right to construct and improve a traveled surface up to 22 feet in width. Said right of way may be used in connection with a commercial use of Lot #1.

DEED, SYMER → TAYLOR (Sept. 1, 2020), *MonagleAppx*. at 47-48. The referenced plan has an arrow pointing to the "Easement Area" with the label, "Easement Is For Driveway Only." SUBDIVISION PLAT (Dec. 19, 1988), *MonagleAppx*. at 53.

Neither the deed nor the plan are ambiguous. Together they provide that the Monagles have rights to use and maintain "a traveled surface up to 22 feet in width" within the easement area. Insofar as the Monagles claim something greater, MONAGLEBRF. at 12, 22, 31-33, 41, 43, it is not supported by the controlling documents.

B. Driveway's Location Within Easement Determined by Prior Choices

The deed language did not specify the location of the driveway, so it could have been placed anywhere in the easement area. However, it appears the Monagles' predecessor-in-title chose the path to the parking lot – rather than the garage or backyard – and they are now stuck with it. *Stowell v. Andrews*, 171 N.H. 289, 301-02 (2018). The Monagles' effort to redefine this as a claim of "improper location," MONAGLEBRF. at 35, 36, or something else, *id.* at 37, 40 n. 15, is unsupported.

The Monagles assert they have a right to access their property along the "entire length" of the easement, *id.* at 36 n. 11, 41-43, because that would be a "perfect solution," "to ensure access to all critical portions" of the lot. *Id.* at 34, 35, 39. But the "bold line" they denote is *120 feet long*, and therefore does not comport with the deed's 22-foot limitation.

Nothing can be inferred from the fact that the driveway runs past the garage and backyard, *id.* at 33-34, as that is the only possible path to Taylor's house. Also, nothing in the record suggests the Monagles' access to their garage is "nearly impossible," *id.* at 40, from their parking lot, to which it is obviously connected. *Id.* at 34.

The trial court erroneously ruled the Monagles have access to their backyard from the driveway. ORDER ON SUMMARY JUDGMENT, *MonagleAppx*. at 186, 192. This court should reverse.

C. Monagles Concede They Cannot Plow Parking Lot Onto Easement

The Monagles' brief consistently discusses "plowing of the driveway," MONAGLEBRF. at 12, 13, 14, 16, but is silent on plowing the parking lot. Thus, they have conceded that placing snow from the parking lot onto the easement is beyond their rights.

The lower court did not grant rights to plow from the parking lot:

> [T]he plaintiffs have a right to maintain the Driveway without obstruction by boulders or other barriers that impede the plaintiffs' ability to plow and deposit snow or any other debris and clear a 22-foot-wide path. This rule applies even if the defendant does not physically block the Driveway because, as stated in the plain language of the deeded easement, the plaintiffs have a right to a 22-foot-wide traveled surface.

ORDER ON SUMMARY JUDGMENT (June 5, 2023), *MonagleAppx*. at 186, 191 (citations omitted).

As the Monagles did not appeal nor brief whether they can plow from the parking lot, the issue is waived. *Quinlan v. Dover*, 136 N.H. 226, 232 (1992).

Regarding maintenance, Taylor has made no remarkable concession as the Monagles allege, MONAGLEBRF. at 17, 23, because the law is long settled. *White v. Eagle & Phoenix Hotel*, 68 N.H. 38 (1894) ("The grantee of a defined way has the right to do whatever is necessary to make it passable or usable for the purposes named in the grant."); *Garland v. Furber*, 47 N.H. 301, 303 (1867) ("[I]t is a principle of law that nothing passes as incident to the grant of an easement but what is requisite to the fair enjoyment of the privilege.").

II. Miscellaneous Conveyances and Prior Usage Are Irrelevant

The Monagles' brief explores the "title history" of Helgerson's intra-family conveyances. MONAGLEBRF. at 8-11, 40, 43-44, 46-48. None are relevant, because the Monagles acknowledge there was "merger of title," and the easement-creating document was the 2000 Symer deed. *Id.* at 6 n. 1, 11, 44; DEED, HELGERSON → SYMER, *MonagleAppx*. at 50-51.

The Monagles nonetheless insist the Helgersons' conveyances imply an "expansive intention." MONAGLEBRF. at 9, 48. That is speculation. They point to no evidence, and ignore that the Helgersons necessarily balanced the interests of one half their family in the front (Lot #1) and another half in the back (Lot #2).

The Monagles' brief emphasizes how, and for how long, their predecessors-in-title allegedly used the easement. *Id*. at 6, 30-34, 35, 49.Such usage is irrelevant. This case does not involve an easement-by-prescription, where historical use is essential to determining scope of the easement, *O'Malley v. Little*, 170 N.H. 272 (2017), historical reliance, *Loeffler v. Bernier*, 173 N.H. 180 (2020), or necessity. *Shearer v. Raymond*, 174 N.H. 24 (2021). Thus, any evidence of prior use is merely an admission of trespass, *Ham v. Maine-New Hampshire Interstate Bridge*, 92 N.H. 268 (1943), was permissive, *Boyle v. Portsmouth*, 172 N.H. 781 (2020), or was in gross. *Lynch v. Pelham*, 167 N.H. 14 (2014). Moreover, the deed is unambiguous, making extrinsic evidence of past use immaterial. *Lynn v. Wentworth By The Sea*, 169 N.H. at 84.

The Monagles' assertion they have some history-based right greater than use and maintenance of one 22-foot-wide traveled way is speculation, extrinsic, and contrary to the deed.

III. Injunction is on Appeal

The Monagles note this appeal is from a ruling on summary judgment. MONAGLEBRF. at 20. However, Taylor's motion for summary judgment (which the court denied, ORDER ON SUMMARY JUDGMENT, *MonagleAppx*. at 186, 192), included a request for injunction:

> [S]ummary judgment should be awarded to Taylor, limiting Plaintiff's use of her property to a portion of the common drive and a 22 foot wide traveled surface connecting the drive to Plaintiff's property. *Plaintiffs should further be enjoined from use of Taylor's property in any manner inconsistent with these limited rights*.

TAYLOR MOTION FOR SUMMARY JUDGMENT (Dec. 9, 2022), *MonagleAppx*. at 72, 80 (emphasis added).

It is thus apparent this appeal comprises injunctive relief.

IV. Factual Quibbles of No Consequence

The Monagles quibble with several factual details, but none have consequence to the outcome of this appeal.

The Monagles assert a plowing invoice establishes a right to "the entire length of the 120 foot by 50 foot easement." MONAGLEBRF. at 16, 36 n. 11. The invoice does not say what area was plowed, however, and there is no data on the invoice on which to base an inference. PLOWING INVOICE (May 19, 2022), *MonagleAppx*. at 149. They also contend the invoice was not tendered nor paid, *id.* at 15-16, although evidence suggests Taylor's contractor plowed the driveway for both parties. *Prelim.Inj.Hrg*. at 38, 44, 46.

The Monagles claim it was impossible that Taylor asked the Monagles to move vehicles off the easement. MONAGLEBRF. at 14 n. 4, 31 n. 10. This quibble forgets that Taylor was a tenant before she was an owner.

While the Monagles say slight differences between the deeds in their own and Taylor's chains of title indicate the intent "was a combination of both versions," *id*. at 49-50, they also suggest the differences are immaterial. *Id*. However, their concession that the 2000 deed from Helgerson to Symer controls, *id.* at 11, 44, relieves any need for combined construction.

Regarding Taylor's interests, the Monagles point to "speculative future developments." *Id.* at 50. Taylor's concerns about her neighbor's overuse of her property merely explain why she placed the boulders.

None of these factual quibbles have any consequence to the outcome of this appeal.

V. Procedural Quibbles of No Consequence

The Monagles insist that Taylor made concessions by not rebutting three affidavits drawn by Messrs. Monagle and McDonough. MONAGLEBRF. at 15 n. 5, 19, 24-29. As explained *infra*, the affidavits do not establish any fact adverse to Taylor.

The Monagles allege that Taylor impermissibly employs extrinsic evidence to her detriment. *Id.* at 31-32, 36. She does not. Taylor derives her position solely from the plain language of the deed and its incorporated plan, which establish the Monagles have nothing greater than use and maintenance of one 22-foot-wide traveled way on the easement area. Ironically, the Monagles' argument relies on extrinsic evidence, including the Helgerson's intra-family conveyances, alleged usage by the Monagles' predecessors-in-title, and historical satellite pictures. *Id.* at 8-11, 30-34, 35, 40, 43-44, 46-48, 49.

The Monagles challenge Taylor's citation of evidence *in the record* that was submitted prior to the summary judgment hearing, and accuse Taylor of "appendix packing."[1] *Id.* at 15 n. 5, 20, 29. The transcript and order to which they refer, *id.* at 21, contain no ruling expurgating those submissions from the court's consideration. The only authority cited by the Monagles concerned "a deposition that was *not in the record*." *Flaherty v. Dixey*, 158 N.H. 385, 387 (2009) (emphasis added).

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[1]The only items in Taylor's appendix that were not attached to parties' summary judgment motions are six photographs (labeled #21, #22, #23, #25, #26, and #28 in Taylor's appendix), which were part of the injunction litigation and show the Monagles plowed snow from their parking lot, and one demand letter from the Monagles to Taylor (#33), which was attached to the Monagles' complaint.

Summary judgment comprehends the *entire* record:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

RSA 491:8-a, III; *Sabinson v. Dartmouth College*, 160 N.H. 452, 461 (2010) (trial court on summary judgment has discretion to consider additional pleadings); *see also* SUP.CT.R. 13 ("The papers and exhibits filed and considered in the proceedings in the trial court, … the transcript of proceedings, … and the docket entries of the trial court … shall be the record in all cases entered in the supreme court.").

None of these procedural quibbles have any consequence to the outcome of this appeal.

VI. Unrebutted Affidavits Do Not Contradict Taylor's Position

The Monagles' only evidence of an alleged right to use the easement greater than a 22-foot-wide traveled way is three affidavits – two by the plaintiff and one by their predecessor-in-title. *MonagleAppx*. at 38, 60, 135; *Sum.Jt.Hrg*. at 34.

The affidavits do not show any "expansive intention," "expansive interpretation," or "expansive nature." MONAGLEBRF. at 9, 45, 48. Rather, they confirm the Monagles have no more than the right to use and maintain one 22-foot-wide traveled way within the easement area.

While the level of detail below may seem excessive, because the Monagles over-emphasize the affidavits, each affidavit clause on which they base their claim is set forth, alongside an explanation as to how the clause does not contradict Taylor's position.

A. First Monagle Affidavit

Affidavit Allegation	Confirms Taylor's Position
"Those boulders … block my ability to access the back of my property via the driveway easement." ¶8.	The boulders block access to the back of the Monagles' property, which was Taylor's intent, because the Monagles have a right to only one 22-foot-wide driveway onto their property.
"After I acquired ownership of Lot 1, I consistently plowed the driveway easement in the manner I plowed it right up to the point when Taylor blocked my ability to do so with her boulders." ¶9.	Undisputed.
"My plowing method was to push the snow off the driveway and into the available spaces in the Easement Zone.…" ¶10.	This addresses *only* "snow off the driveway," and not snow from the parking lot, which Taylor does not dispute.
"[M]y plowing methods were consistent with the past practices of my predecessors in title to Lot 1." ¶11.	Insofar as the Monagles' predecessors plowed snow *from the driveway* onto the easement, this is undisputed.
"I pushed the snow off the driveway itself and stored it in the sections of the Easement Zone that were still within the 120 foot by 50 foot Easement Zone." ¶13	This addresses *only* "snow off the driveway," and not snow from the parking lot, which Taylor does not dispute.

B. Second Monagle Affidavit

Affidavit Allegation	Confirms Taylor's Position
"Taylor claims that the traveled surface can be plowed by driving down the traveled surface with 'momentum pushing the snow from the common drive into the margins outside the traveled surface.'" ¶1	Undisputed. It is further acknowledged that when Taylor plows in this fashion, it leaves a snowbank between the driveway and the Monagles' property. However, Taylor does not object to the Monagles removing 22 feet of snowbank. *Sum.Jt.Hrg.* at 17, 34.
"The bold line depicted on the attached Exhibit 7 shows where such a plowing method would create a large snow bank completely impeding our travel through the easement at issue in this case." ¶4	The bold line on Exhibit 7 is *120 feet long*, while the Monagles have no rights beyond one 22-foot-wide driveway. Taylor does not dispute the Monagles may plow 22 feet of the snowbank onto the easement area.
"Exhibit 8 is a picture of what such a snow bank would look like. This is a significant portion of the snow I need to remove and store in the designated Easement Zone." ¶5.	Which portion of the snowbank is depicted in Exhibit 8 cannot be discerned. If it shows removal of a snowbank no greater than 22 feet long, Taylor has no dispute.
Taylor has room on her land to store snow, while the Monagles' space on the driveway side of their property is limited. ¶¶6-10.	Undisputed.
"Taylor's own calculations of the reimbursement requested [for plowing] … concedes that our easement rights extend the entire length of the 120 foot by 50 foot easement because the portion of the plowing costs for which Taylor sought reimbursement were based on the full 120 foot portion of the common drive located within the Easement Zone." ¶12.	There is no information on the plowing invoice from which to calculate easement area. PLOWING INVOICE, *MonagleAppx*. at 149.

C. McDonough Affidavit

Affidavit Allegation	Confirms Taylor's Position
"Following my acquisition of the property, my agents and my tenants regularly plowed snow off of the driveway easement in order to make it passable and usable for its intended purpose." ¶3.	This addresses *only* "snow off the driveway," and not snow from the parking lot. Taylor does not dispute the Monagles may plow snow *from the driveway* onto the easement.
"As reflected in the satellite photographs in Exhibit 1, the only logical location to store snow that was plowed off the driveway easement was in the strip of land to the south of the driveway easement." ¶4.	This addresses *only* "snow off the driveway," and not snow from the parking lot. Taylor does not dispute the Monagles may plow snow *from the driveway* onto the easement.
"Monagle stores snow that he plows on the strip of land to the south of the driveway easement and has done so ever since he acquired his property from me." ¶8	To the extent this addresses *only* "snow off the driveway," and not snow from the parking lot, Taylor does not dispute the Monagles may plow snow *from the driveway* onto the easement.

The Monagles repeatedly allege that because Taylor declined to rebut these affidavits, they should win. MONAGLEBRF. at 14, 15, 16, 17, 18, 19, 24, 26, 27, 28, 48. The affidavits do not contradict Taylor's position, however, which is why she did not parry them below.

Accordingly, the Monagles' assertion – that Taylor conceded something by not answering the affidavits – is unsupported.

CONCLUSION

The superior court was correct in ruling that the Monagles are limited to "a 22-foot-wide traveled surface." ORDER ON SUMMARY JUDGMENT, *MonagleAppx*. at 186, 191. The court denied, or did not address, the Monagles' request to move boulders (beyond the one already removed), *id.* at 191 n. 3, and the Monagles did not appeal those rulings.

The court did not discuss whether the Monagles can plow from the parking lot onto the easement area. The issue was not pursued, however, and is therefore waived.

The trial court erroneously found the Monagles have access from the driveway, not only to their parking lot, but also to "the back part of their property," *id*. at 192, thus resulting in usage wider than 22 feet. This court should reverse, and enjoin the Monagles from using the driveway beyond the 22 feet they are allowed by the terms of the deed. Because the boulders do not interfere with permitted usage, this court should allow the rocks to remain.

Respectfully submitted,

Judith Taylor
By her Attorney,
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Dated: March 11, 2024

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CERTIFICATIONS

I certify that this brief contains no more than 2,977 words, exclusive of those portions which are exempted.

I further certify that on March 11, 2024, copies of the foregoing will be forwarded to Matthew J. Delude, Esq., via this court's electronic filing system.

Dated: March 11, 2024

Joshua L. Gordon, Esq.