State of New Hampshire
Supreme Court

NO. 2023-0148

2023 TERM

NOVEMBER SESSION

Steven P. Marshall & Erica A. Marshall

v.

Tricia L. Hicks

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

BRIEF OF PLAINTIFFS/APPELLEES

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November 3, 2023

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STATEMENT OF THE CASE

This matter arises from an easement which has existed and remained unchanged since 1861. The defendant's deliberate and intentional conduct, including failure to comply with court orders, required litigation and then protracted it.

The trial court made extensive findings regarding the defendant impeding the right-of-way, disregarding the plaintiff's property rights, and her lack of credibility. These findings are fully supported by the record, and this court should affirm.

I. Complaint and Restraining Orders

Erica and Steven Marshall sued Tricia Hicks in July 2020, seeking a declaratory judgment that they have a right-of-way, an injunction preventing Hicks from obstructing it, and attorney's fees and costs. COMPLAINT (July 17, 2020), *Appx.* I-4.[1] They simultaneously sought an *ex parte* immediate temporary restraining order, which was granted the same day. It provided Hicks:

> shall not interfere with, impede or obstruct, in any manner, the use of [the-right of-way], shall not maintain, place, install or erect any physical barrier(s), obstruction(s) or impediment(s) [on the right-of-way], [and] shall not impede, obstruct, interfere with, or harass, [p]laintiffs, or their representative or agents, to include [their] tenant[s] or … contractor[s] … in regard to their access to, or use of [the right-of-way].

EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER (July 17, 2020) (margin order), *Appx.* I-31. Hicks filed an answer and objection. ANSWER (Aug. 12, 2020), *Appx.* I-39; OBJECTION TO TEMPORARY RESTRAINING ORDER (Aug. 12, 2020), *Appx.* I-47.

[1]Citations are to the appellant's appendix, designated by volume and page. Minor filings omitted from appellant's appendix are indicated.

The Hillsborough County (North) Superior Court (*N. William Delker*, J.), held a hearing and reissued the restraining order as a preliminary injunction. INJUNCTION ORDER (Oct. 13, 2020), *Addendum* 56. Hicks requested reconsideration, which was denied. MOTION TO RECONSIDER (Oct. 26, 2020), *Appx.* I-61; OBJECTION TO RECONSIDERATION (Nov. 2, 2020) (omitted); ORDER ON RECONSIDERATION (Jan. 22, 2021) (omitted).

Ordinary discovery occurred. DISCLOSURES, *Appx.* I-72, I-156, I-172, II-88, II-90, II-99. Both parties filed proposed orders and requests for findings and rulings, on which the court did not specifically rule. PLAINTIFFS' FINDINGS & RULINGS (Sept. 19, 2022) (omitted); DEFENDANT'S FINDINGS & RULINGS (Sept. 19, 2022) (omitted); PLAINTIFFS' PROPOSED ORDER (Sept. 20, 2022) (omitted); DEFENDANT'S PROPOSED ORDER (Sept. 20, 2022), *Appx.* III-3.

A bench trial occurred over four days between September 20 and September 30, 2022, including a view of both houses and the easement between them. MOTION FOR A VIEW (Sept. 13, 2022) (omitted); *Trn.* 596. Both parties filed post-trial memoranda. PLAINTIFF'S MEMO (Oct. 17, 2022), *Appx.* III-5; DEFENDANT MEMO (Oct. 17, 2022), *Appx.* III-27.

II. Declaratory Judgment, Permanent Injunction, Attorney's Fees

On December 5, 2022, the court issued an order on the merits. It described the impediments Hicks had erected, and noted she admitted placing them. MERITS ORDER 2-12 (Dec. 5, 2022), *Addendum* 63. It commented that while the width of the easement is uncomplicated, determining its length is more involved, *id.* at 15, and found the Marshalls' surveyor expert credible. *Id.* at 19.

The court found that the easement's authors intended to ensure owners of the Marshalls' property access to the rear of their house, *id.* at 15, traffic by horses and wagons and not only pedestrians, *id.* at 17, and because "[t]he steering wheel has replaced the buggy whip," access by modern truck and trailer. *Id.* at 17-18.

The court also held that, because Hicks's "property line is mere inches from the edge of the [Marshalls'] house," the easement allows placement of ladders and scaffolding on the right-of-way itself for maintenance and renovation, providing their presence is "[t]emporary" and "transient." *Id.* at 21.

The court declared the easement is 12 feet wide. *Id*. As to length, the court ruled that the amount of room cannot be minimal because the deed says "pass conveniently." *Id.* Given the slope and long-existing infrastructure, the court found the right-of-way extends "from Concord Street to a point 38.5 feet past the southwest corner of [the Marshalls'] house." *Id.*

The court noted that Hicks interfered with the Marshalls' use of the easement, and that facts ascertained at trial impelled an injunction. *Id.* at 22. The court identified "a real and substantial risk that [Hicks] will not respect the rights of the dominant estate without a permanent injunction," observed that her "enmity" toward the Marshalls "was palpable during the trial," and found that "the risk of conflict over the [e]asement remains high." *Id.* at 23.

The court found that Hicks did not remove impediments for six months after the injunctions. *Id.* It held that her plan for a fence across the easement is

"proof that she will not respect [the Marshalls'] rights," *id.* and "is additional evidence of her crabbed view of their property rights." *Id.* at 24.

The court ruled that the Marshalls' ordinary use of the easement does not justify "self-help as [Hicks] has done here," *id.,* and thus made the preliminary injunction permanent. *Id.* at 25.

III. Hicks's Testimony Was Not Credible and Her Defense Was Frivolous

The court found that "[w]ithout detailing all of [Hicks's] testimony, … [it] did not find her credible."

> The testimony of the [the Marshalls] and their witnesses corroborated one another in terms of the nature of their interactions with [Hicks]. On the other hand [Hicks's] version was in stark contrast on many salient points from the testimony of [the Marshalls] and their witnesses. [Hicks] flat-out accused these witnesses of lying. Having observed the demeanor of all witnesses, the court found the account of events by [the Marshalls'] witnesses to be more credible. … [Hicks's] version defied common sense at points.

MERITS ORDER 10.

Hicks requested reconsideration, to which the Marshalls objected, and the court denied. MOTION FOR RECONSIDERATION (Dec. 15, 2022) (margin order, Feb. 6, 2023) (omitted); OBJECTION TO RECONSIDERATION (Dec. 27, 2022) (omitted).

Pleadings followed regarding fees and costs. The court held that Hicks's "obdurate and spiteful approach to the dispute has caused the litigation to be unnecessarily protracted." It wrote that the Marshalls:

> should never have been forced to rely on the court to remove the obstacles in the easement. Even as late as her motion to reconsider, [Hicks] continues to insist she removed the impediments in the easement before the [Marshalls] filed suit.

FEES ORDER 3-4 (Feb. 8, 2023), *Addendum* 92.

> [Hicks's] words and deeds, as detailed in the order on the merits, demonstrate that she did not accept the [the Marshalls'] right to use the [right-of-way]. Her attempt to justify her behavior up through her trial testimony was not credible and frivolous.…

> [T]he trial itself was likely days longer than it needed to be if the defendant had avoided non-frivolous issues.

Id. at 4. The court revised fees and costs downward, discounting for non-frivolous portions of the litigation. *Id.* at 4-8.

Hicks appealed.

STATEMENT OF FACTS

I. Peterborough Neighborhood, Parties' Properties, and the Easement

Concord Street in Peterborough, New Hampshire is a busy road lined with stately houses closely situated, paralleling the Contoocook River as it enters Town from the north. GOOGLE STREETVIEW OF CONCORD STREET, Exh. 4, *Appx.* II-39; PHOTO: TAPE NEAR DRIVEWAY, Exh. 7, *Appx.* II-42; BOUNDARY PLAN, Exh. 3, *Addendum* 51; *Trn.* 20, 160, 343, 366.

Number 32 Concord Street is a large lot for the neighborhood, containing a main house and connected barn. PHOTO: FRONT OF HICKS HOUSE & BARN, Exh. 36, *Addendum* 54; *Trn.* 467, 565, 611. In 2016, Tricia Hicks bought the property and moved in. *Trn.* 466-67.

Bordering to the north is number 34, which Erica and Steven Marshall purchased and occupied with two teenagers and two dogs in June 2018. MARSHALL WARRANTY DEED, Exh. 2 , *Appx.* II-36; *Trn.* 12, 150, 241-42. Like Hicks's, the lot fronts on Concord Street and runs several hundred feet to the river. BOUNDARY PLAN, Exh. 3. Facing the street, the house has entries, a driveway, and a small front yard. PHOTO: FRONT OF MARSHALL HOUSE, Exh. BB , *Appx.* II-30. At the front southeast corner of the building, there is a "steep drop-off" from the driveway to the grass below. *Trn.* 46, 165, 170; PHOTO: FRONT CORNER OF MARSHALL HOUSE, Exh. 10, *Appx.* II-45.

Behind the Marshalls' house is a yard with grass, trees, and a bench by the river. BOUNDARY PLAN, Exh. 3; PHOTO: BACK OF MARSHALL HOUSE, Exh. Z, *Appx.* II-28; *Trn.* 29. Behind the back southwest corner, there is long-existing infrastructure – a concrete slab, granite retaining wall, basement storage doorway, rear entrance stairway, and a short brick sidewalk leading off the property. PHOTO: MARSHALL STAIRS, RETAINING WALL, FENCE, Exh. 30, *Appx.* II-65; *Trn.* 17, 34, 106, 131, 360, 390, 562, 573-74, 607-08.

The Marshalls' one-third-acre lot is narrow, and its southern boundary is

only about a foot, or about one "person width," from their house. *Trn.* 86, 302, 474; BOUNDARY PLAN, Exh. 3. Consequently, the property has an easement on the strip of grass between it and Hicks's house. Because the easement constitutes the only exterior access to the back of the house, the Marshalls would not have purchased without it. *Trn.* 13, 242.

The easement, described in Hicks's deed, has remained in the chain of title since 1861:

> Reserving to the owners or occupants of the [Marshall property] a right of way from [Concord Street] on the North side of these granted premises as far Westerly as will enable the occupants of said [Marshall] premises to pass conveniently by the Southwest corner of the house on to the premises in rear of said [Marshall] house, and right of way never to exceed Twelve (12) feet in width.

QUITCLAIM DEED,[2] Exh. 1, *Addendum* 48; GOOGLE STREETVIEW, Exh. 4, *Appx.* II-39; *Trn.* 351-52, 383. The surveyor who prepared the boundary plan for this matter noted the right-of-way had not been adjusted or adjudicated in its 160-year existence, and was easy to research and locate on the ground. *Trn.* 352, 382, 401, 406.

The easement strip is relatively flat near the road, but between the houses it slopes down toward the river. While no elevations are in the record, the hill can be perceived in several photographs. *See* PHOTO: GATE, & EASEMENT, Exh. 28, *Appx.* II-63; PHOTO: FENCE & EASEMENT, Exh. 29, *Appx.* II-64; *Trn.* 356-57. The strip was previously only grass. *Trn.* 15, 448, 511. During the pendency of this case, Hicks paved a driveway, occupying a portion

[2]There is also a municipal easement on the same strip from the street to the river. It contains a submerged drainpipe which failed and resulted in a flooded "sinkhole," *Trn.* 151, 504, which was replaced by the Town in 2020. QUITCLAIM DEED, Exh. 1, *Addendum* 48; BOUNDARY PLAN, Exh. 3; AFFIDAVIT OF PETERBOROUGH PUBLIC WORKS, Exh. 35 (omitted).

of the easement, MARKED-UP BOUNDARY PLAN, Exh. 39, *Addendum* 52; PHOTO: REAR OF HICKS HOUSE & BARN, Exh. W, *Appx.* II-25; *Trn.* 95, 424, 467, 539, which terminates in a "30 by 30 [foot] area to turn around [and] park." *Trn.* 423.

II. Hicks Impedes Use of Easement And Ignores Court Orders

After an initial amicable meeting in 2018, Hicks began an escalating series of behaviors that culminated in this lawsuit, and her conduct continued despite court-ordered injunctions.

A. Hicks Begins Confrontations

In June or July 2018, the Marshalls first encountered their new neighbor between the houses. They discussed their respective properties, and understood renovations on both would be occurring simultaneously.

The Marshalls quickly realized their house would need more repairs than they had anticipated, *Trn.* 20, 112, 245, and hired a plumber to install a new heating system. *Trn.* 246. While there, he apparently parked partially on the easement grass, and Hicks complained. *Trn.* 23, 26, 138-39. The Marshalls subsequently asked the plumbing company to not park there, *Trn.* 24-27, 152, and it is one of only a handful of occasions when contractors allegedly encroached. *Trn.* 39, 104, 137.

While the plumber was working inside the Marshalls' house, Hicks entered uninvited and, yelling, alleged his truck was on the grass. At that moment, Erica Marshall drove up, saw Hicks hurrying out, and tried to attract her attention, but Hicks avoided acknowledgment and went home. *Trn.* 246-50, 252, 292-93, 616. Although Hicks denies the event, *Trn.* 473, 475-76, 586-87, 616-18, the court found it occurred. MERITS ORDER 15, *Addendum* 63.

In October 2018, the Marshalls hired John Wheeler, a general contractor, for their planned renovations. He worked at the Marshalls' house until July 2020 and consequently witnessed Hicks's confrontational behaviors. *Trn.* 73-74, 115, 210-11, 259. The Marshalls also hired a contractor to dismantle a chimney which was causing damage. *Trn.* 23, 255-56; PHOTO: BACK OF MARSHALL HOUSE, Exh. 5, *Appx.* II-40. The men parked near the back of the

Marshalls' house, *Trn.* 111, 130, 139, 150, 254-55, 294-95, prompting Hicks to enter the backyard and yell at them, *Trn.* 130, 318, which Hicks denies. *Trn.* 613.

Around the same time, referring to the Marshalls' contractors, Hicks alleged that "strange men [were] passing by her windows." PETERBOROUGH POLICE REPORT, Exh. JJ, *Appx.* II-72. Hicks called the police and first accused Wheeler – although he was not present that day, *Trn.* 221, 296, 614 – and then blamed the chimney contractor. *Trn.* 477-79, 552, 614. The court held that Hicks's "account of this was not credible based on the [c]ourt's view of the property and location of the windows at issue." MERITS ORDER 3; *see* PHOTO: REAR OF HICKS HOUSE & BARN, Exh. W, *Appx.* II-25; PHOTO: SIDE OF HICKS HOUSE, Exh. 28, *Appx.* II-63; PHOTO: HICKS BARN, Exh. P, *Appx.* II-18; PETERBOROUGH POLICE REPORT.

B. Hicks Irate at Marshalls' Dog Fence

In November 2018, because they had dogs and Concord Street is a busy road, the Marshalls fenced their backyard. *Trn.* 20, 28-30, 36, 132, 601. The fence is a foot or two within their property line, *Trn.* 30, 366, 392, 396, 576, 605, *see* VIEW OF PROPERTIES, Exh. 38, *Addendum* 55, and is designed to be easily removed if necessary. *Trn.* 75, 98-99, 224. It starts at the southwest corner of their house, comes to a gate about 17 feet down the hill, jogs around a tree, and continues toward the river. *Trn.* 33, 82, 558-60.

The 4-foot-wide gate is located where the slope ends, just beyond the concrete slab and retaining wall, and is positioned at the terminus of the preexisting brick sidewalk. *Trn.* 30-32, 131-32, 392. *See generally,* PHOTO: TAPE NEAR FENCE, Exh. 14, *Appx.* II-49; PHOTO: MARSHALL BACKYARD, Exh. 27, *Appx.* II-62; PHOTO: DOG, GATE, & EASEMENT, Exh. 28, *Appx.* II-63; PHOTO: FENCE JOG, Exh. 31, *Appx.* II-66; PHOTO: BACK OF MARSHALL HOUSE, GATE, & DOGS, Exh. E, *Appx.* II-8; PHOTO: GATE & MEASURING TAPE, Exh. X, *Appx.* II-26; PHOTO: MEASURING TAPE AT CORNER, Exh. Y, *Appx.* II-27.

Given that the fence is entirely on the Marshalls' property, they had no reason to consult Hicks about it. *Trn.* 106, 132. Hicks was nonetheless affronted at not being consulted, objecting to its location, although, despite considerable direct- and cross-examination, her reasons are not readily discernable. *Trn.* 574-84, 602-06, 711-12. She admitted trespassing to investigate it, and two pictures she took depict her hands measuring the fence and gate on the Marshalls' property. *Trn.* 558-60, 589; PHOTO: GATE & MEASURING TAPE, Exh. X, *Appx.* II-26; PHOTO: MEASURING TAPE AT CORNER, Exh. Y, *Appx.* II-27.

C. Hicks Escalates Confrontations

In January 2020, Wheeler once or twice allegedly parked a wheel of his truck on the grass. Hicks approached him, and Wheeler rearranged his vehicles. *Trn.* 37-38, 138, 230-31; PHOTO: BLUE TRUCK WHEEL ON LAWN, Exh. D, *Appx.* II-6. When the Marshalls heard about it, they suggested Wheeler park on the driveway. *Trn.* 314.

Once, while Wheeler was on a ladder, having parked with a tire apparently on the grass, Hicks testified:

> I came over to him and I … said John and I went – I looked – I went like this and I pointed at the car and I walked away. … I went like – exasperated, like do you not see it, you're out here.

Trn. 484.

Hicks denied this was a "confrontation," *Trn.* 489, and disclaimed concern about "petty" transgressions. *Trn.* 538-39. She nonetheless submitted a photo showing Wheeler's wheel slightly on the grass. PHOTO: BLUE TRUCK WHEEL ON LAWN, Exh. D, *Appx.* II-6.

Around the same time, Wheeler and his assistant were eating lunch in the Marshalls' kitchen. Hicks "barged in the house … right through the mudroom, in through the kitchen, and was bitching to us about parking." *Trn.* 214. When Wheeler apologized, Hicks "stormed out of the house." *Trn.* 214. "Then like two more minutes, she came ripping back in the house again, no knock, no nothing, and told us to park" elsewhere. *Trn.* 214. It made Wheeler and his assistant "very uncomfortable." *Trn.* 215. After these unpermitted entries, Wheeler went outside, and "found a tire mark maybe five inches into the grass." *Trn.* 215.

Hicks denies the incident occurred, *Trn.* 292, 473, 485, and suggested everybody else was lying. *Trn.* 587.

In early April 2020, an electrician was working in the Marshalls' house.

Because the Marshalls' driveway and front yard were occupied by Wheeler's trailer, Wheeler's blue truck, and his assistant's grey truck, the electrician parked his red van with two of his wheels on the grass, although not on the easement. *Trn.* 40-42, 104, 139, 213, 231; *see* PHOTO: RED TENNEY VAN, Exh. A, *Appx.* II-3; PHOTO: RED TENNEY VAN, *Appx.* II-4.

Hicks, again trespassing, confronted Wheeler. "She came over to the house again complaining at me, and I tried to apologize to her, and she walked away with her hands all flailing around." *Trn.* 216. When the Marshalls became aware, they reminded the electrician to not park there. *Trn.* 40.

D. Hicks Impedes the Easement

Apparently in response to the electrician's van, *Trn.* 41-43, 47, 215-16, Hicks placed wooden stakes strung with orange boundary tape on the Marshalls' property along their driveway. A sign facing the Marshalls' property hung from the tape: "Posted. No Trespassing. Keep Out." Hicks also placed stakes and strung tape *across* the easement. PHOTO: TAPE & SIGN NEAR DRIVEWAY & SIDEWALK, Exh. 7, *Appx.* II-42; PHOTO: FRONT CORNER OF MARSHALL HOUSE, STAKE & TAPE, Exh. 10, *Appx.* II-45; *Trn.* 396-97. Hicks admits she placed the stakes and tape. *Trn.* 500, 510-12, 660.

The Marshalls, and their expert at trial, regarded the stakes and tape as an impediment to using the right-of-way, and an excessive reaction. *Trn.* 48, 116, 369. The Marshalls took no action then because they hoped Hicks's conduct would de-escalate when renovations concluded. *Trn.* 261-62.

Shortly after creating the tape barrier, *Trn.* 112-13, Hicks arranged for rental and installation of a "Mi-Box" storage container on the easement between the houses, as a repository for her things. *Trn.* 19, 152, 202, 329, 421, 453, 514, 518.

While the dimensions of the storage container are not in the record, pictures demonstrate its magnitude. *See* PHOTO: CONTAINER NEAR PARKED CAR, Exh. FF, *Appx.* II-8; PHOTO: CONTAINER NEAR PARKED CAR, Exh. 12, *Appx.* II-47; PHOTO: CONTAINER NEAR CONSTRUCTION TRAILER, Exh. 11, *Appx.* II-46. It was situated closer to the Marshalls' house than to Hicks's. *See* PHOTO: CAR BETWEEN CONTAINER & HICKS HOUSE, Exh. FF, *Appx.* II-70; PHOTO: DRIVEWAY BETWEEN CONTAINER & HICKS HOUSE, Exh. 12, *Appx.* II-47; *compare, e.g.,* PHOTO: CONTAINER NEAR MARSHALL DRIVEWAY, Exh. 11, *Appx.* II-46 *with* PHOTO: PLOWED DRIVEWAY BETWEEN CONTAINER & HICKS HOUSE, Exh. P, *Appx.* II-18.

The Marshalls were able to identify other locations that would serve its

purpose. *Trn.* 288. Hicks claims no involvement with its location, although she admits she told the rental company she wanted it accessible from her kitchen door. *Trn.* 421, 447, 514, 518, 646-48.

Hicks denied the storage container was an impediment, *Trn.* 516, 705, but photographs make clear it significantly blocked the easement, and the Marshalls testified it impeded access to their backyard. PHOTO: CONTAINER ON EASEMENT, Exh. 17, *Appx.* II-52; PHOTO: CONTAINER BETWEEN HOUSES, Exh. 20, *Addendum* 53; PHOTO: CONTAINER NEAR DRIVEWAY, Exh. 22, *Appx.* II-57; PHOTO: CONTAINER IN WINTER, Exh. M, *Appx.* II-15; *Trn.* 19, 42, 107, 294, 304-05.

E. Hicks Harasses the Tenant

Steven's job had moved to Tennessee, and on April 10, 2020, the Marshalls rented their house to a close friend, Heidi Crowell. The Marshalls apprised Crowell of the right-of-way, told her the neighbor was finicky about the grass, and recommended not parking on it. *Trn.* 48-50, 77, 115, 150, 154, 161, 259, 275. While there was no formal lease, a long-term tenancy was anticipated. *Trn.* 157, 198-99.

As she was moving in, Crowell observed a wheelbarrow on the easement grass, "filled with sticks and leaves and stuff, and it ha[d] a posted no trespassing, keep out sign." *Trn.* 161-62. PHOTO: WHEELBARROW WITH SIGN, Exh. 6, *Appx.* II-41.

Crowell had two dogs. *Trn.* 164-65. The first day she lived there, before any encounter with Hicks, Crowell had arranged to meet a friend, intending to walk their dogs together. In front of Hicks's house, they observed one of Hicks's dogs on a leash, but the other appeared to be running freely. Concerned for its safety near the busy road, Crowell called out to Hicks, who collected her dog and went inside. Crowell thought no more of it. *Trn.* 159-61.

Hicks, however, regarded the event as significant and dramatic.

> She stands there with her white dog come and get your dog, come and get your dog. … And I'm like watching her. … I didn't say a word, I just picked up my dog. I got a little emotional about it because I had no idea who she was and I've never had anyone do that to me before. It was scary and disturbing.
> …
> And so I came out, picked up my dog and then I saw her meet up with her friend who she was walking by and I held my dog. And then I went back inside and I'm like, oh my god. I just was like trying to – to process what had occurred and, you

> know, calm down because it was upsetting. Like I said, I was on the verge of tears, it hurt my feelings.

Trn. 498-99. Hicks testified that Crowell's concern for the dog's safety was "not truthful." *Trn.* 629.

Crowell took one of the dogs in her car, and when she returned 45 minutes later, she found that Hicks had installed more stakes and tape, doubling the number of strands. *Trn.* 47, 52-54, 165-67, 190-92, 501. This was because, Hicks insisted, a single strand was insufficient and needed improvement. *Trn.* 651, 701; PHOTO: DOUBLE STRAND TAPE, Exh. 11, *Appx.* II-46; PHOTO: EXTENDED TAPE, Exh. 12, *Appx.* II-47.

There was also tape in new locations, including across the fence-gate, which prevented using it for access to the backyard, rear entrance, and basement storage doorway. *Trn.* 167. Due to poor health, one of Crowell's dogs needed to be carried. Unable to access the backyard with the dog in her arms, *Trn.* 52-54, 165-67, Crowell removed some of the orange tape by wrapping it around the stakes. *Trn.* 117, 187. Hicks asserted Crowell "could have easily gone through it, around it," *Trn.* 709-10, but instead "ripped the tape down," *Trn.* 500, 507, 528, which "upset" her. *Trn.* 636-37.

Hicks testified that the extra tape was a safety measure to prevent people from going near a sinkhole located past the gate toward the river. *Trn.* 501-02, 506-10. The court held that the "obvious" purpose of the tape was to "interfere with the [Marshalls'] use." MERITS ORDER 12.

F. Hicks Gets Combative

Unnerved by the augmented tape, on April 26, 2020 Crowell called Erica, who suggested writing Hicks a note. *Trn.* 167-69. The note, which Crowell put in Hicks's mailbox after getting no response to knocking on the door, said:

> Neighbor,
>
> Unfortunately I need access to the gate in the backyard. There is a right of way in the deed. I know that there were some issues in the past, but I'm hopeful we can move past them since I had nothing to do with it. I will be removing the tape + hoping you can do the same. If you have any problems + would like to discuss it with the homeowners here is [their] info: …
>
> Thank-you,
> Heidi

NOTE FROM HEIDI CROWELL TO HICKS, Exh. 33, *Appx.* II-68 (phone-numbers omitted); *Trn.* 167-69.

Hicks denied hearing the knock or receiving the note, but rather came over to the Marshalls' front porch and knocked on Crowell's door, *Trn.* 500-01, 628-41, intending to tell Crowell how "upset" she was at the removal of the tape. *Trn.* 636-37.

Crowell recalled that about 20 minutes after she delivered her note, she heard loud banging and angry screaming at her door. Realizing it was the neighbor, she went onto the porch, and phoned Erica. Hicks yelled obscenities at Crowell and accused her of trespass. At Erica's suggestion, Crowell gave the phone to Hicks, who continued yelling obscenities, this time at Erica. When Erica's attempts to calm Hicks down were unsuccessful, Crowell retrieved her phone and went in, and Hicks went home. *Trn.* 169-73, 205. Crowell testified:

> I never experienced anything like that before in my life. I've never had anyone talk to me like that. I never had anyone call me names like that. It was … pretty awful.

Trn. 173.

Erica corroborated the profane phone call. *Trn.* 266-69. When it was over, she had Steven call the police. *Trn.* 268.

Hicks admits she went to the Marshalls' house. Even though Crowell (in person) and Erica (by phone) were conciliatory, Hicks felt attacked and justified in yelling obscenities at them. *Trn.* 500-01, 636-44.

Steven overheard Hicks yelling on the phone, and called the Peterborough Police Department. *Trn.* 60-62. Crowell related that two police vehicles arrived. One talked to her, the other to Hicks, who yelled at the officer. The police came back another day to explain it was a civil matter, asked Hicks to leave Crowell alone, and suggested the Marshalls consider hiring a lawyer. *Trn.* 140, 173-65.

In late April, Crowell was in her backyard playing with her dogs. Hicks had her own dogs and also some guests on the easement, viewing items in the storage container. One of the guests called out to Crowell's dogs, and Hicks's dogs ran back and forth along the fence line on the Marshalls' property. *Trn.* 119, 163-65, 186-89, 276-77, 308. On another occasion, Hicks videotaped Crowell in her backyard with her dogs and posted it online; Erica later viewed it. *Trn.* 119, 186-89, 276-79, 308. Erica called the police because she perceived her tenant felt unsafe in the backyard, which Crowell believes put an end to the videotaping. *Trn.* 186-90, 199, 279-80.

As a result of Hicks's conduct, Erica gave Crowell permission to buy a privacy screen for the fence, which Crowell installed a few days later. *Trn.* 65, 118, 141, 179; PHOTO: FENCE & PRIVACY SCREEN, Exh. G, *Appx.* II-9. Hicks denied the screen had anything to do with her conduct. *Trn.* 545-46.

G. Hicks Places More Impediments

In May 2020, Hicks added used cabinets and appliances to the easement, near the curb. *Trn.* 107, 125, 202, 303. Hicks testified she hoped someone would take them, and denied they impeded the easement, *Trn.* 519-24, 659, but photographs show the items blocked access to the easement from the road. PHOTO: CABINETS & STOVE ON EASEMENT, Exh. 19, *Appx.* II-54; PHOTO: CABINETS ON EASEMENT, Exh. 20, *Addendum* 53.

A few days later, Hicks painted the word "enjoy" on the back of the cabinets, such that the label could be viewed, not from the road, but only from the Marshalls' house. *Trn.* 656; PHOTO: CABINETS WITH "ENJOY" AT STREET, Exh. 23, *Appx.* II-58; PHOTO: CABINETS WITH "ENJOY," Exh. 21, *Appx.* II-56; PHOTO: CABINETS WITH "ENJOY" ON EASEMENT, Exh. 25, *Appx.* II-60. Hicks admitted she wrote "enjoy," but denied it was directed at Crowell or the Marshalls. *Trn.* 657.

Hicks also added several trash bins to the street area of the easement, just behind the appliances and cabinets. *Trn.* 125, 207, 273, 304-05. Pictures show the bins further impeding the easement. PHOTO: BINS ON EASEMENT, Exh. 25, *Appx.* II-60. Hicks explained she always put them there, *Trn.* 526, but another picture at another time shows the bins placed well away. PHOTO: BINS ON HICKS'S DRIVEWAY, Exh. 24, *Appx.* II-59.

Taking the police officer's advice, the Marshalls hired an attorney. On May 8, 2020, the lawyer wrote a letter to Hicks, apprising her that the Marshalls have an easement on her land, noting she had placed artificial barriers impeding the Marshalls' use, offering hope that the matter could be amicably resolved, warning that legal action might be necessary, expressing the Marshalls' contrition for any alleged transgressions by their contractors, and requesting a response. LETTER FROM ATKINS TO HICKS, Exh. DD, *Appx.* II-32.

In July 2020, Wheeler's work required scaffolding behind the house, and

the obvious and convenient route to move it was over the easement. But to avoid Hicks's wrath, the Marshalls instructed Wheeler find another way, and despite the inconvenience, got permission from the other neighbor. *Trn.* 76-77, 123, 234, 311-12; PHOTO: BACK OF MARSHALL HOUSE & SCAFFOLDING, Exh. 13, *Appx.* II-48; PHOTO: BACK OF MARSHALL HOUSE & SCAFFOLDING, Exh. K, *Appx.* II-13.

Although Hicks disavowed objection to scaffolding or ladders, *Trn.* 609, when Wheeler had tasks directly on the south (easement) side of the Marshalls' house, continuing harassment by Hicks made him refrain, and the work was left undone. *Trn.* 218. On July 27, having completed the renovations he could, Wheeler departed. *Trn.* 74, 115, 226.

Sometime in July, the Marshalls again communicated with Hicks in an effort to resolve matters. Hicks indicated it was too late for amicable resolution, and she would be hiring a lawyer. She also informed the Marshalls she planned to erect a fence across the easement. *Trn.* 77-78, 96. Realizing that might make their impeded use permanent, the Marshalls were compelled to take action. *Trn.* 98, 121.

On July 17, the Marshalls filed a complaint in the superior court, alleging Hicks impeded their rights under the deeded easement, and requesting a declaratory judgment, temporary and permanent injunctions, and an award of fees and costs. COMPLAINT (July 17, 2020), *Appx.* II-4. On the same day, the court granted an *ex parte* temporary restraining order. *EX PARTE* MOTION FOR TEMPORARY RESTRAINING ORDER (July 17, 2020) (margin order), *Appx.* I-31.

H. Hicks Ignores Injunctions

On August 12, 2020, exasperated with living next to Hicks, Crowell gave up, found a new residence, and moved out. *Trn.* 190-92. In October, when Erica was finalizing the Marshalls' removal from the house, the stakes and tape were gone, but despite the injunctions, the storage container still impeded the right-of-way, and Erica had to move her belongings without using the easement. As she was finally leaving, Hicks came out and called, "have a nice life" along with a profanity. *Trn.* 124-25, 281-83, 525.

On October 14, after another hearing, the court issued an order reiterating its *ex parte* temporary restraining order as a preliminary injunction. INJUNCTION ORDER (Oct. 13, 2020), *Addendum* 56.

Around December, Hicks and Mathew Lambert, her renovation contractor, entered the Marshalls' property in order to measure the Marshalls' fence and gate. Hicks introduced two pictures into evidence showing her and Lambert's hands with a measuring tape. PHOTO: GATE & MEASURING TAPE, Exh. X, *Appx.* II-26; PHOTO: MEASURING TAPE AT CORNER, Exh. Y, *Appx.* II-27. Hicks admitted she trespassed to take the picture. *Trn.* 558-60, 588-89.

In January 2021, the Marshalls were finally able to re-rent the house, which had remained vacant since Crowell had left the previous August. The lease with the new tenants provides that the gate to the backyard is not available for use, and the Marshalls warned them to not park on the grass. *Trn.* 101, 262-63.

On January 31, almost seven months after the first injunction, Hicks finally moved the storage container to her front yard, afield from the easement, near another similar container already placed in front. *Trn.* 439, 443, 447; PHOTO: TWO STORAGE CONTAINERS ON HICKS FRONT LAWN, Exh. 36, *Addendum* 54. Hicks's renovation contractor testified the new location posed no problem, and it could have been placed there from the inception. *Trn.* 442-43. In February, both storage containers were removed entirely. *Trn.* 79, 134, 318.

Also in February, the parties had a mediation session in this matter. STRUCTURING ORDER ¶17 (Nov. 2, 2020), *Addendum* 60; *Trn.* 452.

Although talk of Hicks building a fence across the easement in July 2020 is what precipitated this lawsuit, *Trn.* 77-78, 96-98, 121, there was no formal plan until Lambert began designing Hicks's access to her garage, and asked Hicks about where and how a gate might cross the driveway. *Trn.* 427, 429, 444.

Hicks wanted to build a fence between the properties, and favored a location at the top of the hill, while Lambert encouraged locating it farther down. *Trn.* 432, 445, 452. Lambert did not claim any expertise in fences, did not have any particular type of fencing in mind, and did not expect any role in its construction. He offered Hicks referrals to tradespeople in the fence business. *Trn.* 427, 434-35, 452.

Lambert was, however, able to measure and draw a conceptual fence plan manifesting Hicks's wishes. *Trn.* 426-32; FENCE LAYOUT, Exh. CC, *Appx.* II-31. He drew it at the end of May 2021, months *after* mediation. *Trn.* 439, 452-53.

Lambert's drawing shows the fence coming from the side of Hicks's house and joining the Marshalls' fence, and also shows a six-foot by four-foot cut-out that would ostensibly allow the Marshalls access to their gate. *Trn.* 437, 453. The Marshalls' surveyor noted, however, that such a configuration would create a narrow passage for turning into the Marshalls' existing gate, and thus impede access. *Trn.* 370-71; BOUNDARY PLAN WITH PROPOSED DRIVEWAY & FENCE, Exh. 39, *Addendum* 52. It appears that moving Hicks's plan slightly down the hill, as Lambert had suggested, would avoid the problem. *Trn.* 445; FENCE LAYOUT, Exh. CC.

The driveway was paved later in 2021, *Trn.* 89-96, 286-87, 376-79, 411, 423-25, 449-50, 539, 684-86, and so far Hicks has not built the fence. *Trn.* 428, 438, 557-58.

III. Obstructions Impeded Occupants From Using Property

A. Traditional Uses of the Easement

Hicks testified that the former owners of the Marshalls' house used the easement to garden, maintain their house, move items in and out of the basement, and generally access the backyard for relaxation and play. They passed on foot, with lawnmowers and wheelbarrows, and on at least one occasion parked their car. *Trn.* 470-71, 608. At the outset of their occupancy, the Marshalls used it similarly, along with their dogs. *Trn.* 34-35, 86, 113, 243-44, 288-90.

B. Physical Obstructions Impeded Use

Beginning in April 2020, when Hicks began putting stakes, tapes, cabinets, appliances, and the storage box on the easement, *Trn.* 107, 113, 273-74, use became impeded. Several photographs show the totality of the blockage. PHOTO: TAPE & CONTAINER BLOCKING EASEMENT, Exh. 11, *Appx.* II-46; PHOTO: TAPE, CABINETS, & CONTAINER BLOCKING EASEMENT, Exh. 20, *Addendum* 53; PHOTO: TAPE, CABINETS, & BINS BLOCKING EASEMENT, Exh. 25, *Appx.* II-60. Some impediments remained, long after injunctions were issued, *Trn.* 78-79, 281-83, 287, 306, 317-18, which Hicks admits. *Trn.* 670, 682. She nonetheless claims the location and duration of the storage container was not her fault, *Trn.* 675-80, and the Marshalls' lawsuit was unjustified. *Trn.* 670-71.

Hick denies "absolutely," that she "ever interfered in any manner with the use of the right-of-way for the Marshalls," *Trn.* 566, "[b]ecause it was part of my property." *Trn.* 515. She figured the Marshalls could squeeze around the storage container on their side, or use the driveway on her side. *Trn.* 515.

> I just didn't think that they would mind. I mean, I just didn't think I was doing anything wrong. And I – and it certainly was not malicious, intended to

> block, absolutely not. Wouldn't even cross my mind that they would have thought that.

Trn. 515.

C. Hicks's Behavior Impeded Ordinary Uses

In addition to physical blockages, Hicks's behavior caused people to abstain from using the easement, to avoid confrontation. Erica avoided using the back entrance for any purpose, even though using the easement would have been easier. *Trn.* 309, 313.

Hicks's repeated aggression continued over months, including police intervention, *Trn.* 158, 176, making Crowell feel "like I was a hostage in the house." *Trn.* 158. She could not take her dogs out the back, and bought slings to carry them from the house. *Trn.* 187. Crowell stopped using the gate and zip-tied it shut, *Trn.* 203-04, and evaded all possible interactions with Hicks. *Trn.* 185.

Wheeler resented that Hicks accused him of peeping in her windows. *Trn.* 221. Hicks "just made it really uncomfortable, like walking on eggshells all the time, didn't really know what was going to happen." *Trn.* 211. Even though it interfered with his work, he left the stakes and tape because he "[d]idn't want the fallout of it," *Trn.* 222, such as "[s]creaming and yelling and whatever else, who else know, what else would be put out there." *Trn.* 222-23.

Hicks denies infringement, and disavows any aggressive behavior toward the Marshalls, *Trn.* 528, 589-90, 664, 706, toward Crowell, *Trn.* 497, 528-530, 547, 584-85, toward Wheeler, *Trn.* 485, 488-89, or the chimney contractor. *Trn.* 476, 588. She blames acrimony on Erica, *Trn.* 530, on Crowell, *Trn.* 498-500, 547-48, 628, 631-32, 698-700, and on Crowell's dogs, *Trn.* 628-31, 661, and claims her relations with prior owners prove the conflict is not her fault. *Trn.* 469, 472, 530-33, 562, 608. Hicks alleges she had no ability to

communicate her concerns to the Marshalls, *Trn.* 497, despite them or their tenant living adjacent, the prolonged presence of their contractor, and the note she received from Crowell which included the Marshalls' numbers. *Trn.* 74, 152-53.

Hicks asserts she did nothing wrong because the easement was her property, *Trn.* 515, 659, and she was "abused" by the Marshalls. *Trn.* 659, 661. Hicks alleged her behavior was justified because "[y]ou gave them an inch, and they took a mile," *Trn.* 654, and asserted that by suing her, the Marshalls "made killers out of Gandhi." *Trn.* 654.[3]

As a result of physical obstructions and belligerent behavior, occupants were denied ordinary daily uses of the Marshalls' property. They could not enjoy the backyard, *Trn.* 190-92, 294, 279-80, enter or exit by the back door, *Trn.* 309, use the gate, *Trn.* 101, 203-04, or walk their dogs. *Trn.* 165, 167, 187. Because of the tape and tall step from the front of the Marshalls' driveway, *Trn.* 312, they could not move the lawnmower and snowblower to the front where they were necessary, *Trn.* 190-92, and Crowell was forced to store her kayak on the driveway rather than the backyard. *Trn.* 176-78, 190-92; PHOTO: FRONT CORNER, TALL STEP TO EASEMENT, Exh. 10, *Appx.* II-45; PHOTO: KAYAK ON DRIVEWAY, Exh. 9, *Appx.* II-44. The Marshalls were unable to fully maintain and renovate their home. *Trn.* 72-76, 112, 121, 144, 219-21, 234, 297, 311-12, 317-19; PHOTO: WORKERS NEAR FENCE, Exh. 16, *Appx.* II-51.

The Marshalls took special care to forewarn guests, *Trn.* 192-94, 227, 290-91, contractors, *Trn.* 211, 225-31, 297, 314, and tenants. *Trn.* 262-63, 298-301. Overall, the Marshalls were not able to fully use and enjoy their property. *Trn.* 144.

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[3]Ambiguities in the transcript make it difficult to discern whether Hicks comparing herself to Gandhi was stricken. *Trn.* 654.

In addition, the Marshalls lost a good tenant, and could not replace her for months. *Trn.* 77, 101, 150, 262-63. Because of the uncertainty Hicks has caused with their deed, they still cannot sell the property, which is their intent as they now live in Tennessee. *Trn.* 18.

The Marshalls testified that, given the impediments and Hicks's escalating behavior, they had no choice but to take legal action. *Trn.* 18, 52, 55, 102, 276, 286, 299.

IV. Length of the Easement

While the deed language is clear that the easement is "never to exceed [t]welve … feet in width," but says the easement goes "as far [w]esterly as will enable the occupants … to pass *conveniently* by the [s]outhwest corner of the house," QUITCLAIM DEED, Exh. 1, *Addendum* 48 (emphasis added), the primary issue is its length. The parties dispute whether it extends to just the southwest corner, some point minimally beyond the corner, the vicinity of the gate, or farther.

To help resolve the issue, the Marshalls hired Michael Ploof, a licensed surveyor, *Trn.* 344-411, who prepared a "Boundary Plan" showing Concord Street and parts of the neighborhood, as well as Hicks's house, the Marshalls' house, and the easement between them. BOUNDARY PLAN, Exh. 3, *Addendum* 51. He also prepared a detail view which shows the easement, the infrastructure behind the southwest corner of the Marshalls' house, the Marshalls' existing fence and gate, and Hicks's proposed fence. His detail plan shows color-highlighted points at which the court might discern or deem its extent. VIEW OF PROPERTIES, Exh. 38, *Addendum* 55; *Trn.* 375.

Hicks proposed that the easement end just 12 to 14 feet beyond the southwest corner of the house, *Trn.* 9, 560-61, which would prohibit the Marshalls from using the brick pavers and gate at the traditional exit point from their backyard. *Trn.* 606-07. The length Hicks proposes is indicated by pink and yellow highlights on the detail plan. VIEW OF PROPERTIES, Exh. 38, *Addendum* 55.

Ploof testified that, to discover what is convenient on the ground, he used his technical knowledge as a surveyor, occupational experience as an operator of trucks and trailers, judgment regarding what seems reasonable on the land, learning based on deed research, and the language of the deed. *Trn.* 358, 393-95, 403-08.

Ploof testified that 14 feet is not practical for several reasons. First, ingress and egress would require going over the concrete slab and retaining wall behind the southwest corner of the Marshalls' house. *Trn.* 131, 357-60. Second, the slope of the land means that a person turning in, for instance, on a riding lawnmower, would likely tip over. *Trn.* 358, 399, 406. Third, access would be unsafe or impossible with, for example, a truck and trailer for routine maintenance. *Trn.* 144, 356-58, 406. And, in his opinion, it would not be convenient. *Trn.* 360-62. The surveyor also testified it would be expensive, impractical, and inconvenient to move the existing infrastructure. *Trn.* 224, 391. A photograph in evidence, with an orange line on the snow at the 12-foot mark, graphically demonstrates Ploof's testimony. *See* PHOTO: PAINTED LINE & TAPE MEASURE NEAR FENCE, Exh. 26, *Appx.* II-61.

The Marshalls do not claim the easement gives them access along the entire property line or to the river. *Trn.* 129. Rather, the surveyor attempted to determine what point was minimally safe, and then what point comported with the "pass conveniently" language in the deed. *Trn.* 358.

Ploof estimated that 28½ feet is the "bare minimum" for safety. *Trn.* 355, 365. He took into account his understanding of nineteenth-century conveyances, which had longer wheelbases than a modern Chevrolet Suburban, which he drives. *Trn.* 356-57, 394-95. The 28½-foot spot is just beyond where the Marshalls' existing fence jogs inward around a tree, *Trn.* 354; PHOTO: FENCE JOG, Exh. 31, *Appx.* II-66, and is indicated by grey highlights on Ploof's detail plan. VIEW OF PROPERTIES, Exh. 38, *Addendum* 55.

Ploof testified that, in his opinion, each word in a deed is important, and noted the deed in this case mandates passing "conveniently" rather than merely "safely." *Trn.* 403. Without consulting a dictionary, his understating is: "It's convenient if I don't have to worry." *Trn.* 407-08. Ploof testified that his research disclosed there was probably a garage in the backyard with cars parked

there in the 1950s, and therefore uses have probably not undergone much change. *Trn.* 392, 396. He also considered the sloping terrain, *Trn.* 358, and his knowledge of the turning radii of historic and modern vehicles. *Trn.* 359, 395, 404-05, 408.

Accordingly, Ploof added 10 feet to the "bare minimum," and calculated the easement at 38½ feet in length. *Trn.* 354, 367. The 38½-foot point is indicated by green highlights on Ploof's detail plan. VIEW OF PROPERTIES, Exh. 38, *Addendum* 55. Accordingly, the Marshalls requested that the easement be deemed 38½ feet long.

Although Hicks purports to acknowledge the existence of the easement, *Trn.* 533-34, 555, her commentary during one of the police encounters was that "she shouldn't have to abide by some bullshit document that was created over 200 years ago." *Trn.* 190.

SUMMARY OF ARGUMENT

Due to the sloping terrain and the "pass conveniently" language in the deed, the court appropriately declared the easement is 38½ feet long.

Hicks demonstrated inexplicable aggression toward the Marshalls' ordinary use of the easement. The court found Hicks was vexatious and not credible, and appropriately issued an injunction and awarded attorney's fees.

ARGUMENT

I. Easement Allows Marshalls to "Pass Conveniently"

Although Hicks appears to accept that the easement is 12 feet wide, HICKS BRF. at 23, she argues that the length of the easement – which the court determined to be 38½ feet – should extend no more than 12 or 14 feet past the southwest corner of the Marshalls' house. HICKS BRF. at 19, 23, 38. She claims the court reached its determination of length erroneously based on evidence given by Michael Ploof, the Marshalls' expert surveyor, HICKS BRF. at 21-24, and that the court "overlooked conflicting testimony." *Id.* at 23.

Interpretation of deed language is a matter of law. *Village Green v. Hodges*, 167 N.H. 497, 500 (2015). The "rule of reason" is employed to interpret deed language and to determine the scope of reasonable use. *Heartz v. Concord*, 148 N.H. 325 (2002). The use of an easement "does not become crystallized at any particular moment in time," *Downing House Realty v. Hampe*, 127 N.H. 92, 96 (1985), and non-use does not forfeit easement rights. *Id.* While a architectural ornament might not impede an easement, *Law v. Streeter*, 66 N.H. 36 (1890), interference with its use does. *Carlson v. Latvian Lutheran Church,* 170 N.H. 299, 304 (2017). Neither party can unilaterally relocate an easement. *Stowell v. Andrews*, 171 N.H. 289, 303 (2018). Alleged prior uses of an easement are questions of fact. *Flanagan v. Prudhomme*, 138 N.H. 561 (1994).

The easement in this case does not merely allow the Marshalls to "pass and repass," *see, e.g., Duxbury-Fox v. Shakhnovich*, 159 N.H. 275 (2009), but to "pass conveniently." QUITCLAIM DEED, Exh. 1, *Addendum* 48. As noted by the trial court, at the time of the grant, "conveniently," meant "in a convenient manner; fitly," Joseph E. Worcester, DICTIONARY OF THE ENGLISH LANGUAGE 309 (1860), and today has similar meaning. OXFORD ENGLISH DICTIONARY (2nd ed.) at 935 (Conveniently means "In a way that affords ease or comfort, or obviates difficulty; commodiously.…With personal ease."). As

the trial court noted, the phrase was thus "intended to convey easy or advantageous access" to the Marshalls' backyard. MERITS ORDER 18.

Here, the court reasonably determined that the length of the easement is 38½ feet from the southwest corner of the Marshalls' house, based primarily on its view of the property.

If the easement were, as Hicks urges, merely a 12- or 14-foot lane immediately behind the Marshalls' house, it would require removal of significant infrastructure behind the southwest corner – including the concrete slab, granite retaining wall, and basement storage doorway. Hicks did not address whether such alterations are possible. Even if viable, removal would be expensive and *in*convenient, and thus repugnant to the language of her deed. The court noted that Hicks's proposal demonstrates "her crabbed view of [the Marshalls'] property rights." *Id.* at 24.

Hicks argues that the surveyor's opinion regarding how far "convenient" goes was unreliable because he was not a "safety expert." HICKS BRF. at 39. After its own site-visit, the court determined what was "convenient" considering the limitations of the physical environment – the existing infrastructure, where the slope levels off, turning radii of historic and modern vehicles, and the everyday experience of driving. The court wrote: "Given the slope of the yard and the retaining wall … it is not reasonably safe for a vehicle to hug the southwest corner of the house." *Id.* at 19. No expertise in safety was required. N.H. R. EVID. 701 (lay opinion based on witness's perception).

To the extent there was conflicting testimony about what was convenient, the court was free to discount Hicks's, which it found non-credible. It is also disingenuous for Hicks to suggest the Marshalls require only a 12-foot lane, when her paved access includes a "30 by 30" foot turnaround. *Trn.* 423.

This court should accordingly affirm the trial court's determination of the length of the easement.

II. Injunction Necessary Because Hicks Continually Impeded the Easement and Repeatedly Violated the Marshalls' Property Rights

Hicks argues that no equitable remedy is warranted because she was protecting the grass, because the Marshalls occasionally parked on it and thus have "unclean hands," and because the easement dispute is merely personal. HICKS BRF. at 29-31.

An injunction may issue when "there is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law." *UniFirst Corp. v. Nashua*, 130 N.H. 11, 13-14 (1987). "Because the separation between law and equity is not sharp, courts in New Hampshire have broad discretion in exercising equity jurisdiction." *Thurston Enterprises v. Baldi*, 128 N.H. 760, 764 (1986). Regarding scope of easements, this court "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. Rye*, 150 N.H. 694, 702 (2004).

The Marshalls are entitled to a permanent injunction because, as the court found, Hicks indicated through words and actions, over several years, that she had no understating of, or respect for, the Marshalls' property rights.

Hicks blocked the easement with debris, appliances, stakes and tape, and a commercial storage container. She interfered with the Marshalls', their tenants', and their contractors' everyday use of the easement – for ordinary access, for walking dogs, for moving seasonal items such as a lawnmower, snowblower, and kayak, and for routine maintenance of the property. Via direct verbal requests, a note from Crowell to Hicks, and a letter from their attorney, the Marshalls continually sought de-escalation, but were repeatedly and aggressively rebuffed.

> The evidence submitted during the preliminary injunction hearing persuasively demonstrates that the defendant has blocked use of the use of that right of way. She has put furniture along the road, parked a storage trailer in the grassy strip, and strung surveyor's tape all along the plaintiffs' driveway. Her contention that she was trying to sell the furniture at the end of the right of way is both wholly incredible and irrelevant.

INJUNCTION ORDER (Oct. 13, 2020), *Addendum* 56. After trial, the court reiterated that Hicks "has, in fact, interfered with the [Marshalls'] use" of the right-of-way. MERITS ORDER 22.

Hicks also made clear she had no intention to respect the Marshalls' property rights. Although she admitted placing the blockages, Hicks denied that her actions impeded the Marshalls' use of the easement, *Trn.* 566, 659-60, and "continued to assert she was within her rights to erect and maintain those obstacles even during her testimony," MERITS ORDER 28.

Hicks was inexplicably chagrined that the Marshalls did not consult her about their use of the easement and location of a dog fence entirely on their property. *Trn.* 567, 571, 606, 704, 712. Hicks reluctantly admitted any duty to respect the Marshalls' property rights, *Trn.* 585, complaining to the police that she should not be bound by an ancient "bullshit document." *Trn.* 190. Although she mostly denies it, the court found that Hicks repeatedly entered the Marshalls' home and property without their permission. MERITS ORDER 2, 5.

Hicks planned yet a further obstacle – installation of a fence across the easement that would prevent reasonable use of the gate to the Marshalls' backyard. The court noted Hicks's fence plans were additional "proof that she will not respect [the Marshalls'] rights." *Id.* at 23.

As the court found, Hicks "ignored the prior injunctions by refusing to remove the [storage container] from the easement for more than six months

after those orders were issued." *Id.* The court thus identified "a real and substantial risk that [Hicks] will not respect the rights of the dominant estate without a permanent injunction." *Id*. It also observed that Hicks's "enmity" toward the Marshalls "was palpable during the trial," and thus found that "the risk of conflict over the [e]asement remains high." *Id.*

Hicks tried to justify installation of the various blockages by saying the Marshalls "were abusing the easement." *Trn.* 660-61, 682. However, as the court noted, Hicks "is not entitled to use self-help to effectively block [the Marshalls] from taking advantage of their own property rights." INJUNCTION ORDER 4; MERITS ORDER 24; *see Exeter Realty v. Buck*, 104 N.H. 199, 201 (1962).

Hicks seeks to duck equity because the Marshalls have "unclean hands." But all Hicks alleged – which the court rejected as justification, MERITS ORDER 24 – was a handful of minor, negligible transgressions: a motorcycle which was promptly removed, *Trn.* 104, 328, 490-92, and a contractor who parked with two wheels on the lawn. *Trn.* 23-27, 39, 104, 137.

Accordingly, equitable relief is warranted. *New Hampshire Donuts v. Skipitaris*, 129 N.H. 774, 783 (1987) ("Where … an equitable right has been demonstrated, the court is bound to grant every kind of remedy necessary to its complete establishment, protection, and enforcement according to its essential nature.").

A permanent injunction is the appropriate remedy.

> [I]f the easement owner can demonstrate that the trespasser is interfering with the easement owner's use of the easement, the easement owner generally can maintain an action to enjoin the trespasser from further interference.

Latvian Lutheran Church, 170 N.H. at 299.

Based on its review of the facts, the trial court appropriately enjoined Hicks from interfering with the Marshalls' access to their backyard and maintenance of their property. MERITS ORDER 21. This court should affirm.

III. Video of Barking Dogs Was Immaterial and Irrelevant

Hicks claims that the court erred in not requiring the "best evidence" regarding a video she took of the incident when dogs were barking in the backyards. The Marshalls requested the video in discovery, DISCLOSURES, *Appx.* II-95, but Hicks never provided it. *Trn.* 480, 504, 542-43, 545. According to Erica, who viewed it online, Hicks's dogs were harassing Crowell's. The video would thus have been cumulative and of doubtful materiality and relevance, *Trn.* 276-79, 308; N.H. R. EVID. 401 & 403, and the court had discretion to exclude it. *101 Ocean Blvd. v. Foy Insurance*, 174 N.H. 130, 136 (2021).

Even if that were error, given the voluminous evidence demonstrating Hicks's obstruction of the easement and animosity toward the Marshalls, any error cannot have affected the outcome, and was therefore harmless. *Attorney General v. Morgan*, 132 N.H. 406, 408 (1989).

IV. Plan to Install Fence Precipitated Lawsuit

In her brief, Hicks alleges that the fence plan drawn by her renovation contractor was improperly admitted because it was a part of settlement talks. HICKS BRF. at 38. The allegation is impossible because, as her contractor testified, he drew it three months *after* the unsuccessful February 2021 mediation. Moreover, the fence plan was Hicks's own exhibit. FENCE LAYOUT, Exh. CC, *Appx.* II-31.

Even if Hicks's allegation were supportable and the court erroneously allowed her own exhibit into evidence, the error is harmless. *Morgan*, 132 N.H. at 408. Hicks had told the Marshalls about her intent to build a fence across the easement in July 2020 – the revelation that precipitated this lawsuit – confirming that the parties were aware of Hicks's plan long before it was formalized by her contractor.

V. Hicks's Vexatious Behavior Compels Attorney's Fees and Costs

The general rule is that each party bears its own attorney's fees and costs, but the court may award fees:

> when one party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, when the litigant's conduct can be characterized as unreasonably obdurate or obstinate, and when it should have been unnecessary for the successful party to have defended the action. We will not overturn the trial court's decision concerning attorney's fees absent an unsustainable exercise of discretion.

Short v. LaPlante, 174 N.H. 384, 392-93 (2021); *Frost v. New Hampshire Banking Department*, 163 N.H. 365, 378 (2012); *Harkeem v. Adams*, 117 N.H. 687, 690-91 (1977). This court defers to the trial court on attorney's fees "unless … particular facts … would render such an award inequitable." *Demers v. Widney*, 155 N.H. 658, 664 (2007).

Here, Hicks demonstrated aggressive and vexatious behavior.

> For example, [Hicks] attempted to justify why she wrote "ENJOY" on the back of both cabinets in the [right-of-way]. She claimed it was to entice members of the public to take them for free. This is patently unbelievable. The debris was placed in the [right-of-way] only after the escalating encounters with [Crowell] and the [Marshalls'] contractors. The signs were facing the [Marshalls'] house and not the road. [Hicks] did not write "Free" or other words to encourage someone to take the material. It is obvious that [she] put these items in the [right-of-way] to interfere with the use of the easement and taunt [Crowell] and the men working on the [Marshalls'] house.

MERITS ORDER 10.

> [Hicks's] attempt to claim that spray painting the work "Enjoy" on the two cabinets was intended to be an invitation to the public to take the furniture for free does not even pass the laugh test for credulity. The words were plainly intended to taunt the [Marshalls] or their tenant. They were facing the [Marshalls'] property and the furniture has been in place for months. [Hicks] could have put the items on her own front lawn rather than situated perfectly to block 12 feet of the right of way off Concord Street closest to the [Marshalls'] driveway.

INJUNCTION ORDER 3.

Hicks entered the Marshalls' house, without permission, several times. She prevaricated at trial, denying events that were corroborated by obvious and overwhelming evidence. The court noted, incredulously, that Hicks "continues to insist she removed the impediments in the easement before the [Marshalls] filed suit." FEES ORDER 4, *Addendum* 92.

Similarly, the court held that Hicks's claim that she installed stakes and tape from an "altruistic concern" about failing municipal drainpipes was inconsistent with their location and timing. MERITS ORDER 11. The court found "no justification for [Hicks] to place ribbon directly in front of the [Marshalls'] fence gate." MERITS ORDER 11-12. It held that Hicks "has created an obstacle course to block a clear path along the right of way with the furniture, survey's tape, [and] storage trailer." INJUNCTION ORDER 3. The court concluded:

> The location of the ribbon, the no trespassing signs, and positioning of the cabinets and other obstructions in the [right-of-way] all lead to the obvious conclusion that [Hicks] was attempting to interfere with the [Marshalls'] use.

MERITS ORDER 12. Hicks's "attempt to justify her behavior up through her trial testimony was not credible and frivolous." FEES ORDER 4.

While there may have been a legitimate dispute over the "narrow issue"

regarding the length of the easement, MERITS ORDER 29, the court already discounted attorney's fees related to its resolution. FEES ORDER 4.

Beyond that, in awarding attorney's fees "for this unnecessary litigation," MERITS ORDER 29, the court found that Hicks's "testimony [was] frivolous and motived by her animosity toward" the Marshalls. *Id.* at 28. It held that the Marshalls "should never have been forced to rely on the court to remove the obstacles in the easement," especially after it issued injunctions. FEES ORDER 4. The court noted "the trial itself was likely days longer than it needed to be if [Hicks] had avoided non-frivolous issues," INJUNCTION ORDER 4, and that the Marshalls "undoubtedly incurred more time and expense during the litigation than they would have if [Hicks] had stuck to the issues for which there were genuine, good faith disagreements." *Id.*

The trial court was within its discretion to award attorney's fees, and this court should affirm.

CONCLUSION

All issues raised by appellants are within the discretion of the trial court, supported by the evidence, or harmless error. This court should thus affirm.

Respectfully submitted,

Erica & Steven Marshall
By their Attorneys,

/s/ Joshua L. Gordon

Dated: November 3, 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 9,405 words, exclusive of those portions which are exempted.

I further certify that on November 3, 2023, copies of the foregoing will be forwarded to Craig S. Donais, Esq.; and to William P. Reddington, Esq.

/s/ Joshua L. Gordon

Dated: November 3, 2023

Joshua L. Gordon, Esq.

ADDENDUM