

STATE OF MAINE  
SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT

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LAW COURT DOCKET NO. KNO-25-534

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H. PRESCOTT SMITH, ET AL.

Plaintiffs-Appellees

v.

PHILIP L. SMITH, II, ET AL.

Defendants-Appellants

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On Appeal from Knox County Superior Court  
Docket No. RE-2021-10

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**BRIEF OF APPELLANTS**  
**PHILIP L. SMITH, II, STEPHEN G. SMITH, DONALD E. MEKLIN AND**  
**SONS EXCAVATING, LLC, AND HERITAGE BUILDERS, INC.**

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*Appellants Philip L. Smith, II, Stephen G.  
Smith, Donald E. Meklin and Sons  
Excavating, LLC, and Heritage Builders,  
Inc.*

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## Introduction

The Appellants are Philip L. Smith, II (sometimes referred to as “Flip”) and his brother, Stephen G. Smith (sometimes referred to as “Steve”). Each own real estate that had been originally owned by their grandfather. In 1958 the Smith family compound on the shores of Tenant’s Harbor was divided into separate lots for each cottage and building then existing. By this appeal, they challenge the conclusion of law that the easement burdening Flip’s property for a “roadway” extends for a width of 15 feet into his property even where there is no evidence that a roadway that wide existed at the time of the grant and after and where no deed calls for an easement of 15 feet. They further appeal the conclusion of law awarding H. Prescott Smith (sometimes referred to as “Prescott”) damages under the timber trespass statute where there was no dispute that no tree was cut down or destroyed and no dispute that the three branches cut on one tree had impeded access over their deeded easement which cutting occurred during the construction of an addition to Flip’s family home.<sup>1</sup> Prescott does not own any of the land burdened by the deeded easement. A. 91, 95-97.

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<sup>1</sup> The Second Amended Complaint also sought Trespass Damages related to the same construction activity. A. 57-59 (Count IV). Judgment was entered in favor of all Defendants on those claims. A. 49.

Heritage Builders, Inc. and Donald E. Meklin & Sons Excavating, Inc. join in the appeal of the timber trespass judgment entered against them under 14 M.R.S. § 7552 related to the cutting of those same three branches.<sup>2</sup>

The judgment entered in this matter also affirmed that Stephen and Flip's properties are benefited by easements over the circular road and to the shore over the so-called Boathouse property and include access for all purposes, including utilities, to the granite dock they own with others. A. 33-38. Finally, the judgment confirms that no spite fence has been erected by virtue of Philip L. Smith II planting three weeping willow trees on his property. A. 38-44, 49. Stephen Smith and Philip L. Smith II do not appeal those decisions.

## **Statement of Facts**

### **A. Factual Background**

The principal parties are all cousins. A. 17, 19; Tr. 137:15. They each own an interest in a common granite dock that extends into Tenant's Harbor. A. 17. They also each own family cottages that have been handed down to them. A. 18-19. The Hart House, Boathouse, Willows, and Goose Cottage parcels were created by deeds from a common plan of development by Munasca, Inc. A. 18-19, 95-103.; A. 112-114, 116 (Tr. 40:12-21; Tr. 54:13-23; Tr. 63:1- 64:21; Tr. 91:3-12). A depiction of

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<sup>2</sup> Steven Lorentzen d/b/a Concrete Services, Inc. was also named as a Defendant. Judgment was entered in his favor on all counts and he takes no part in this Appeal. A. 24.

the family properties and the roadways, paths, and dock supporting them is shown on the Plaintiffs/Appellees Boundary Survey. A. 91.<sup>3</sup>

H. Webster Smith was Flip and Stephen Smith's father. He acquired property located off Harts Neck Road consisting of 3 lots of land, the Hart House (Lot A); Vacant Land (Lot B); and Lot C (Island Cottage so-called) by deed dated December 29, 1958. *See* A. 98-100; A. 18-19. Flip now owns Hart House A. 20. The Hart House property is burdened by a roadway which the witnesses described variably as one wheelbase wide; width of a car; about 6 feet wide; and two-mowers wide. A. 28 (Decision, n. 8), A. 131 (T. 882:21-883:1).<sup>4</sup> These properties are benefited by easements over the roadways on the face of the earth as described in the deed.

Prescott's house is called Goose Cottage. A. 18. It is situated on Hart's Neck Road, on the crest of a hill overlooking the Willows, a cottage owned by Andrew S. Love, and the Hart House. A. 18-20, 91. The original deed for Goose Cottage is from Munasca, Inc., the Smith family-controlled entity, to Philip W. Smith, Prescott's grandfather, dated December 27, 1958. A. 18, 95-97. As shown on Gartley & Dorsky's Boundary Survey, Prescott owns no land underlying any of the roadways

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<sup>3</sup> Plaintiffs' expert witness was James Dorsky of Gartley & Dorsky. Tr. 15-116. Defendants relied on Mark Ingraham of Ingraham Land Consultants. Tr. 425-490. Both surveyors agreed that the deeds did not expressly define the width of the roadways; that Prescott Smith did not own any of the earth under the roadways; and that the Munasca, Inc. deeds were created to memorialize and divide family-owned properties, not to create future divisions. A. 25; *see also* A. 36 ("it is important to remember that the four Smith children were major shareholders in Munasca. They were, in effect conveying to themselves.")(quoting Ex# J-14, p.10).

<sup>4</sup>The Referee also noted the narrow nature of the road in characterizing it as a "one way road." A. 20.

referred to in his deed. A. 91-94. His boundary is “the easterly side of a private roadway leading to the shore,” now known as Farr Away Lane. Similarly, his northerly boundary is the “southerly side of another private road.” A. 95-97. That is the road described as a wheelbase wide by the witnesses burdening the Hart House property and Willows property. *See supra*. Thus, the Goose Cottage lot owns none of the land over which the “private roads” or “roadways” traverse.

The expert surveyors confirmed that Munasca, Inc. had not conveyed the land lying easterly of the centerline of Farr Away Lane and westerly of the westerly boundary of Goose Cottage. A. 93-94. Further, both confirmed that Munasca, Inc. had not conveyed the land between the centerline of the roadway burdening the Willows Cottage property and the northerly bound of the Goose Cottage property. *See* Tr. 189:19-191:8; *see also* A. 94. It is this area over which construction vehicles temporarily passed which Prescott claimed had been trespassed upon. He does not own it.

The driveway into Hart House is a track of dirt with grass in the center, about as wide as the wheelbase of a car. A. 110. It has always appeared that way from the junction with Harts Neck Road and the driveway. A. 121 (Tr. 581:21-24). The roadway burdening the Hart House property does not extend beyond the wheelbase of a car as testified by the users of the roadway. *See* A. 122 (Tr. 585:3-8); *see also* A. 91 (which shows the grass path which is the roadway burdening the Hart House

property). There is a concrete wellhouse and a large maple tree which lies to the north of the roadway. A. 91-92, 94, 104, 108.<sup>5</sup> The dirt track failed to exist when Flip and Steve Smith's mother died except in the location of the driveway. A. 122, 129 (Tr. 584:23-586:9, 717:10-21).

In very recent years, Prescott and his wife, Sarah, mowed the portion of Hart House property lying beyond the Goose Cottage despite Flip's request that they not do so. Sarah<sup>6</sup> acknowledged that the width of the path she mowed was that of "two mowers' worth," or the width of a car. A. 127, (Tr. 638:7-639:13), 131 (Tr. 882:21-883:1).

An issue in this matter is the width of the easement which burdens the properties. The deeds creating the easement are express that the easement is "over the above-mentioned roadways." Those roadways are the private road to the shore and the private road lying northeasterly of the Goose Cottage boundary.

An unrecorded survey referred to as the Coffin Plan is referenced in only one of the division deeds, the deed for the Goose Cottage. A. 18, 90, 95-103. That deed identifies the Coffin Plan in referring to the metes and bounds of the Goose Cottage parcel. The division deeds for the family cottages do not call for the Coffin Plan in describing the roads. A. 95-103. The deeds do not identify by words or numbers the

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<sup>5</sup>Some of the exhibits showed parking by Flip and Steve's family and guests northeasterly of the concrete wellhouse. Plaintiffs did not claim the parking area is within the limits of the private road. *See* Ex. #J-102.

<sup>6</sup> Sarah Smith is referred to in the transcript as Sarah Robertson. That is in error.

width of the roads. A. 95-103. No deed, including the Goose Cottage deed, describes the roadways “as being shown on the Coffin Plan” or words of incorporation such as that. A. 95-103. The Coffin Plan gives no width or metes and bounds of the outer limits of the roadways. A. 90.

Nothing on the Coffin Plan itself makes a representation that it has located the roadways. A. 90. To the contrary, the side of the “private road” burdening the Hart House property is shown only by a dashed line, a surveyor’s technique for confirming the limits or width have *not* been located. *See* A. 120 (Tr. 452:22-453:17). The Coffin Plan had only one purpose, namely to identify the boundaries of the P.W. Smith parcel. It is only a “Plan of Philip W. Smith Property.” A. 90. It shows the metes and bounds description of the land which became Prescott’s. A. 90. The deeds reserve no right to widen or modify the roadways A. 95-103.

Plaintiffs’ surveyor, James Dorsky, created no survey which reconstructs the width of the track of the existing roadway as of 1958. Instead, he acknowledged that the traveled ways, including the “grass path” as labeled on his survey were very narrow, showing the widest portion of the tracks to be at the intersection of the circle with Farr Away Lane. *See* A. 91. The historic photos and the credible testimony of the witnesses was that the track was only one wheelbase wide at its widest point along the Hart House property. A. 28, n. 8.

The division of this larger commonly held property into four lots for four related families reinforced that the grant of easements were for roads that the parties had used and would continue to use. No expressions of reservations for development of expanded roads are expressed. A. 95-103. The lots were created to confirm the layout of the family-owned houses and the means of getting there, over the existing roadway, not inviting invasions into the yards and homes of one another. A. 115 (Tr. 75:23-76:1); *see also* A. 36.

In 2016, Flip and his family decided to modify and renovate the Hart House. A. 21. Construction began after the summer season of 2016 to accommodate the summer enjoyment of the Hart House and the surrounding properties. *See* Tr. 753:3-12. Construction vehicles accessed Flip's property and Hart House via Farr Away Lane onto the easement northerly of the Goose Cottage property and onto Flip's property. *See* A. 130 (Tr. 748:6-749:13). The large maple tree on Flip's land, with its large root expanse, and the very narrow entry to the dirt driveway into the Hart House property warranted the use of the Farr Away Lane access in 2016. *See* A. 126 (Tr. 620:16-20), *see also* Tr. 674:7-675:9.

Any evidence of construction activity in 2016 was removed and the land including the grass track to the north of the Goose Cottage parcel was restored. A. 120 (Tr. 748:20 to 749:24).

Five years later, in 2021, Flip, with the input of his family, especially his son's, Philip's family, decided to expand Hart House to the west.

Prescott challenged that building permit. *See* A. 125-126 (Tr. 618:21-620:6). He was not successful, the addition which was the subject of the 2021 application was built, and the evidence was that Prescott was prosecuting an 80B appeal to challenge the issuance of the permit, having been unsuccessful at the municipal level to stop Flip and his family enlarging their home in accordance with the ordinances.<sup>7</sup> A. 118 (Tr. 397:4-399:9); A. 119 (Tr. 401:8-402:1), Tr. 365:15-366:13. Prescott acknowledged that the within litigation was a mechanism to try to avoid the adverse rulings he has experienced in his challenge to the addition through municipal appeals, where the municipal boards rejected his argument on the width of the roadways under his deed. *See* A. 118-119 (Tr. 397:21-399:9). The town issued no stop work orders and work proceeded to substantial completion in the spring of 2022. A. 125-126 (T. 619:18-620:6)

Heritage Builders, Inc. was the general contractor. A. 21. Donald E. Meklin & Sons Excavating, LLC did discrete tasks associated with concrete and excavation. *Id.* A few large trucks necessary used Farr Away Lane and the roadway northerly of the Goose Cottage property for access to Hart House. *Id.* Flip expressly

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<sup>7</sup>As shown by the site plan, the addition which bothers Prescott does not touch upon the easement. A. 92.

and specifically told Andrew Love that when the 2021 construction was completed the grass and roads would be restored. *See* Tr. 652:25; 675:15.

When Meklin brought trucks over the land northerly of the Goose Cottage property, a branch overhanging that roadway was damaged. A. 21-22. To protect the tree from further unintended harm and the vehicles using the right of way, two other overhanging branches were removed. A. 22. The tree itself was not cut, carried away, or destroyed.<sup>8</sup> Four years later, Plaintiffs' arborist observed "nothing out of the ordinary" concerning that living tree. *See* Tr. 266:12-13.

Bruce Robertson owns the Boathouse property. A. 101-103. It abuts the Willows on the easterly bound and land owned by Stephen Smith on the southerly bound. A. 91. The Boathouse property is burdened by the easements granted over the existing roads referred to in the deeds of the parties. A. 101-103. Those existing roads include the "private roadway leading to the shore" shown on the face of the earth as a circular road. *See* A. 91. There was no reasonable dispute that the circular road served all the family properties conveyed out of the family corporation, Munasca, Inc. A. 33-34.

Consistent with the evidence, the Referee confirmed that the private roadway leading to the shore includes the entirety of the circular drive in existence since

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<sup>8</sup> The Referee found that Stephen Smith was liable to Prescott Smith for damages in the amount of \$2,175 arising from the temporary removal of grade stakes that interfered with passage on the roadway. Stephen Smith does not appeal from that holding.

before the 1958 division deeds. *Id.* The circular portion of the road also served as part of the deeded access to the granite dock in which all the parties have an ownership interest.

The easements held by all parties burdening the Boathouse property include that access easement, described in the deeds as:

Dock rights being more particularly described as the right to use for all purposes the above described dock and the right of access to and egress from said dock by all means by existing ways from the Town Road; and the right to maintain, repair, replace, and improve said dock to the extent necessary or desirable to permit its enjoyment in substantially its present form.

Also conveying the right with others to launch and haul out boats in the areas adjacent to said dock as hitherto enjoyed by the grantee and others and to bring boats by land for the purpose of exercise such rights.

A. 95-103.

The parties agreed that the circular portion of the road did not touch the dock and that access from the drive was accomplished by going off the road and crossing the grass to the dock. *See* Ex. ##J-93, J-100, J-107, J-115, J-116; *see also* A. 33-35.

In the summer of 2021, in consultation with his family, in particular, his son and with professional landscapers, Flip planted three willow trees on his property 10 to 12 feet apart from one another. Philip W. Smith (Flip's son), Flip, and the landscaper sited the three trees. A. 22-23. Flip's goal was to obscure his view of the Boathouse, the outdoor shower of the Willows property, a septic system vent on the Willows property, a laundry line that had existed on the Willows property, and the

view into a bedroom of the Willows cottage. *Id.*<sup>9</sup> Philip Smith helped site the trees by standing on the patio on the seaward side of Hart House. A. 23. He directed the landscaper to shift the trees right or left to assure the trees' location served their purpose of creating privacy and aesthetic appeal for the Hart House residents. *Id.*

In the past, Japanese Knotweed which had migrated from the Willows property, had afforded the Hart House some privacy from the Willows. A. 123-124 (Tr. 611:10 to 614:4). It was cut down and leveled. *See, e.g.*, Ex. ##J-94, J-95, J-96, and J-97; A. 124 (Tr. 613:3-20). Sarah Smith acknowledged that she directed the removal without notice and took "full responsibility." Ex. #J-125. She excused her trespass by reciting the difficulty of eradicating Japanese Knotweed at her Nantucket house. *Id.*

By June of 2022, before the start of the summer season, the grass path on the roadway was restored. *See, e.g.*, A. 105, 107, Ex. ##J-121, J-122. No Plaintiff expended any funds to restore and make the path better. A. 42; 119 (Tr. 399:10-23).

As noted above, the family members who are parties to this action own a large granite dock together. The owners of the dock had brought water and electricity down to the dock through all the parties' lifetimes. *See, e.g.*, Ex. ##J-119, J-120, D-18. Andrew Love acknowledged that electricity was brought to the Dock

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<sup>9</sup>The testimony was that Andrew Love rents this house to summer renters and rarely resides there himself. When in Tenants Harbor, he usually lives on Harts Neck Road in one of his several other houses. Tr. 182:25-183:8.

from the Willows across the Boathouse property. Steve dug a conduit for electricity in 1980 with the assistance of the previous owner of the Willows. It traversed the Boathouse property. Water was carried by hose. Bruce Robertson rarely occupied the Boathouse and acknowledged, therefore, that he did not know the patterns of use of the access easement for carrying utilities to the dock over the years. A. 25-27.

In late 2022/early 2023, a winter storm struck the dock. The wooden deck of the granite dock washed away and the piers suffered damage. Despite the pending litigation between the parties, the dock was important to all. Steve and Prescott worked throughout the winter and spring to get a dock design drafted; accepted by all the owners; and approved by the state. Reconstruction was completed before the summer of 2023. A. 34-38, Tr. 734:17 to 735:15. The dock design approved by all included utility chases for the electrical and water conduit along the base of the dock rather than stringing wires and hoses as had been done in the past. A. 34-38, Tr. 736:20-25.

Prior to October of 2023, the parties continued their efforts to formulate a plan for shared but separate use of the dock, devising a separate float system whereby the HWS family and the Love/Robertson families would separate from one another all aspects of shared use of the dock. In anticipation of implementation of this plan, Steve arranged to install a replacement utility conduit which would

assure separate utilities could be brought in and managed by each faction of owners. Restoration was completed within days of installation. *See* A. 35-38, Ex. J-116, J-115. This conduit was consistent with the deeded dock easement which allows access for improvements to the extent necessary or desired. A. 35-38.

## **B. Procedural Background**

The Plaintiffs commenced this action in October 2021, seeking damages arising from timber trespass for the cutting of three branches. A. 5. They also sought a declaration that the easement burdening the land between the Willows Cottage and the Goose Cottage had been abandoned and no easement was wider than 10 feet. A. 5, Initial Complaint.

They amended their Complaint to add a contractor. A. 7.<sup>10</sup>

In March. 2024, Plaintiffs again amended their complaint. A. 11, 50-64. Even though the grass strip had been fully restored by that time at no expense to them, they persisted in their claim of trespass damages. A. 57-58. They retreated from their assertion that Flip Smith had no right to use that grass strip due to abandonment. Compare original Complaint with Second Amended Complaint. Instead, they argued that the easement was not over the roadways as they existed in 1958 but rather an imagined roadway of 15 feet, limited only by the dashed line on the Coffin Plan. A. 54-55.

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<sup>10</sup> This contractor was Steven Lorentzen who was dismissed as a matter of law. A. 24.

They also added claims seeking a declaration that the dock easement did not include the right to bring in utilities. A. 55-57. They asserted this position despite the long term established use of utilities and the design of the new dock, approved by all owners, which incorporated utility chases to carry the water and electricity. A. 34-38.

Flip Smith and Stephen Smith counterclaimed, seeking declarations that the width of the easement burdening the Hart House property was only a wheelbase wide, A. 76-79 and seeking declarations regarding the right to install utilities and use the roadways without interference by the Plaintiffs. A. 76-82.

The Parties agreed to try this matter before a referee pursuant to Rule 53 of the Maine Rules of Civil Procedure. A. 11. Trial occurred over four days in December, 2024. A. 16. The Referee transmitted his Findings of Fact, Conclusions of Law, and Decision to the Court, on or about April 8, 2025. A. 16. The parties each sought amended findings. A. 11-12. By Order entered on the docket on June 18, 2025, partial amended findings were entered. A. 12, 84-86.

The Referee found, inter alia, that:

1. That the roadway burdening the Hart House property is 15 feet wide, rather than the width on the face of the earth;
2. That the Defendants were liable for timber trespass although no tree was carried away or destroyed;

3. That the “road to the shore” as expressed in the deeds included the width and extent of the circular road and the route to the boat launch, ramp, and dock;
4. That the dock rights easement includes the right to install utilities; and
5. That there was no violation of the “spite fence” statute and no other trespass. A. 48-49.

The parties jointly moved that the Findings of Fact, Conclusions of Law, and Decision be adopted as the Judgment. A. 12, 87-88. The Order appointing the Referee had reserved all rights of appeal for the parties. A. 11 (docket reference to Order dated 4/23/24), 87-88. In mid-September 2025, the parties were advised by the Court that Judgment been entered pursuant to that joint motion on July 3, 2025. For the reasons set forth in the Motion to Enlarge Deadline for Notice of Appeal pursuant to Rule 2B of the Maine Rules of Appellate Procedure, that Motion was allowed and timely Notices of Appeal were filed by Appellants and Appellees. A. 14.

### **Statement of Issues**

1. Whether the Referee erred as a matter of law in holding that the roadway burdening the Hart House Property is 15-feet wide despite the silence in all deeds in defining any width for the “roadway” and despite the agreed

testimony that the roadway was only as wide as the wheelbase of a standard vehicle.

2. Whether the Referee erred as a matter of law in holding the Defendants liable for timber trespass when no tree was cut down or carried away and where the evidence was that no tree suffered permanent harm by the removal of three branches impeding passage over the roadway.

### **Argument**

**A. The conclusion that the roadway burdening the Hart House property is 15 feet wide is an error of law, misinterpreting the deeds creating the right of way.**

#### **1. Standard of Review in Deed Interpretation**

The construction of a deed is a question of law which the Law Court reviews de novo. *Windham Land Trust v. Jeffords*, 2009 ME 29, ¶ 24, 967 A.2d 690, quoting *N. Sebago Shores, LLC v. Mazzaglia*, 2007 ME 81, ¶ 13, 926 A.2d 728, 733.

“A court construing the language of a deed . . . must first attempt to construe the language . . . by looking only within the "four corners" of the instrument. In evaluating the language of a deed, courts should give effect to the common or everyday meanings of the words in the instrument. If the deed is unambiguous, the court must construe the deed without considering extrinsic evidence; if the deed is ambiguous, however, the court may admit extrinsic evidence of the parties' intent.

*Id.* (quotation marks and internal citations omitted) (alterations in original); *see also Green v. Lawrence*, 2005 ME 90, ¶ 7, 877 A.2d 1079. Here there is no ambiguity. The easement is only over the “said” roadways, roads existing at the time of the deeds. In determining the intent of the parties to the deed, the Court will look at the instrument as a whole. *Kinney v. Cent. Me. Power Co.*, 403 A.2d 346, 349 (Me. 1979).

**2. The Coffin Plan does not, by its terms, determine the width of the roadway.**

When a deed distinctly refers to a plan, the plan is incorporated into the deed by that reference. *Sleeper v. Loring*, 2013 ME 112, ¶ 13, 83 A.3d 769. The plan is then interpreted pursuant to the same rules that govern the construction of the deed. *Chesley v. Holmes*, 40 Me.536, 546 (1855). The Hart House deed does not refer to or incorporate the Coffin Plan or any other. A. 98-100. There is no dispute that the Hart House parcel is burdened by an easement over a roadway which all parties and the photographic evidence agreed existed at the time of the creation of the parcels. Nothing in the deeds mandates incorporating an imaginary width over those existing roadways. The “above mentioned” roadways or “said roads” in the deeds are they existed for all to see and use.

The Goose Cottage deed does refer to the Coffin Plan but only in the context of the description of the metes and bounds of the parcel, not the subsequent grant of

the easement over the roadways. A. 95-97. The Court may consider extrinsic evidence in determining the parties' intent only if the deeds language is ambiguous.

In the face of these principles, the Referee put weight of the existence of a dashed line on the Coffin Plan to conclude that the roadway burdening the Hart House property is 15 feet wide. This conclusion is in error and must be reversed. Indeed, it is directly at odds with the Referee's confirmation that the deeds were essentially deeds by which family members conveyed to themselves. A. 36. There was no evidence offered to suggest that the cousins sought to increase a burden in creating access easements. Rather, the clear reference to "said" roadways emphasized an intention to grant what was there, nothing more.

While it is correct that a deed referencing a Plan must be read in conjunction with the Plan, *Bradstreet v. Bradstreet*, 158 Me. 140, 146 (1962), one has no authority to supply terms that are not set forth in the plan or deed. First, the Coffin Plan by its clear terms is express that it purports to show only the boundaries of the Goose Cottage parcel. It is titled "Plan of Philip W. Smith Property located on Hart's Neck." A. 90. It is not given that title with a further modifier such as "and roadways" or "with rights of way" or "showing easements." The Referee supplied those terms. The law does not allow him to do so.

Further, the Referee without evidence to support his supposition concluded that a "dashed" line *was intended* to communicate a width or limit of the roadway.

Yet, there was no legend on the Plan to support that guess. It was contrary to the evidence which the parties and experts agreed on: the deeds created a common scheme to preserve the properties for the families; not to invite any expansion of use and burden. All witnesses agreed that the track burdening the Hart House before and after the creation of the easements was a mere track on the ground, a wheelbase wide. The easement reverted to a grass track shortly after it was confirmed in 1958. *See* Ex. J-70, App. 20, 91. Finally, it was contrary to the testimony from Mark Ingraham that a dashed line is likely to reflect a surveyor's intention to communicate that he has not measured the limits of the roadway. A. 120 (Tr. 453:3-17). Coffin, in drawing bold solid lines for the boundaries; calling the Plan only a Plan of the Property and not easements; and incorporating no "legend" from which the meaning of a dashed line could be drawn, communicated that he made no representations or conclusions about the width of the roadways. Nor was any extrinsic evidence offered to suggest the grantor intended wider roads than those that appeared on the face of the earth. In supplying terms rather than limiting his review and conclusion to the actual words of the deeds and plan, the Referee committed an error of law. In ignoring the extrinsic evidence of the width of the roadway on the face of the earth, he committed an error of law.<sup>11</sup>

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<sup>11</sup>It is important to note that the claim that the roadway is 15 feet wide was only ever raised by any Plaintiff in the context of Prescott's challenge to the 2021 permit. Since 1958, the holders of the easement were content with a road only one wheelbase wide; they were content with the road reverting to a grass path; and in their initial complaint filed in October 2021, they insisted that the road had been abandoned. Prescott's

The judgment holding that the roadway burdening the Hart House property is more than twice as wide as it has ever actually been is an error of law. The judgment must be reversed and the matter remanded for entry of a new judgment finding the roadway to be no wider than the wheelbase of a vehicle, 4 to 6 feet wide. This is consistent with the track shown on the Gartley & Dorsky Plan, A. 91, drawn before Prescott Smith hoped to defeat the building permit granted to Flip Smith by arguing for a roadway wider than it ever actually was.

**B. The Referee erred as a matter of law in holding the Defendants liable for timber trespass when no tree was cut down or carried away and where the evidence was that no tree suffered harm by the removal of three branches impeding passage over the roadway were cut.**

**1. Standard of Review.**

The interpretation and application of a statute is a legal issue which is reviewed de novo. *Thurston v. Galvin*, 2014 ME 76, ¶ 13, 94 A.3d 16. “In interpreting a statute, we look to the plain meaning of the statute, interpreting its language to avoid absurd, illogical or inconsistent results and attempting to give all its words meaning.” *Jackson Lumber & Millwork Co., Inc. v. Rockwell Homes, LLC*, 2022 ME 4, ¶ 10, 266 A.3d 288 (internal quotation marks omitted).

**2. Where no tree was cut down or carried away, it was in error to find a violation of the statute.**

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desire to interfere with the building permit in the face of his losses at the municipal level changed his “understanding” of the width of the road.

Under 14 M.R.S. § 7552, a person is liable for timber trespass if he “cuts down, destroys, damages or carries away” a forest product without right. 14 M.R.S. § 7552(2)(A). No such action occurred in this matter. Rather, the evidence was that one damaged branch and two other branches within the limits of the roadway were removed from one tree. The tree remains, living, at the site. *See* Tr. 266:10-13 (arborist observed nothing out of the ordinary); 389:24 to 393:13 (same tree had had branches removed over time and it still lives). The photographic evidence showed the tree had not been carried away or cut down. App. 105-107. The three branches were removed in October 2021. *See* Ex. #J-33. By the time Plaintiffs’ arborist looked at the tree, three years after the removal of the impeding branches, it was indisputable that the tree was still alive. *See* Tr. 264:1-5.<sup>12</sup>

In that circumstance, it is “illogical” to apply the statute and find a violation of the timber trespass statute. There is no loss under the statute; there can no damage awarded without loss. In holding to the contrary and awarding damages, the Referee committed an error of law.

### **3. An owner of an easement may remove obstacles in the easement.**

Even if cutting a branch (or three) on a living tree implicates the timber trespass statute, the law in Maine is that an owner of an easement has the right to

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<sup>12</sup> The Referee suggested that in cutting the branches, the contractors went into the Goose Cottage property limits. Yet, the base of the tree is at the very corner of the Goose Cottage land. *See* App. 107 (showing “private property” sign at base of tree); App. 117 (Tr. 392:15-24) (Prescott posted sign to show limits of his land).

remove permanent objects belonging to the servient estate that are located within the easement. *See Kinderhaus N. LLC v. Nicolas*, 2024 ME 34, ¶¶ 32-34, 314 A.3d 300 (easement owner has right to unobstructed right to use of whole) *citing Mill Pond Condo. Ass’n, v. Manalio*, 2006 ME 135, ¶¶ 6-7, 910 A.2d 392. Indeed, that has been the law since at least 1898 when the Law Court said,

[T]he . . . owners of the easement[] have under their grant the full right to use the entire width of fifty feet including the ten [foot] strip in front of the plaintiffs' lot for purposes of passage at their discretion, and are not limited in such right to what is necessary or convenient. They hold by express grant and not by implication from necessity or convenience.

*Rotch v. Livingston*, 91 Me. 461, 472-73, 40 A. 426, 431 (1898). In light of this clear principle of law, the Defendants here in clearing the right of way of the impeding obstacle of the branches committed no violation of the timber trespass statute as a matter of law. *See Kinderhaus N. LLC v. Nicolas*, 2024 ME 34, ¶¶ 32-34, 314 A.3d 300 (holding that easement holder is an “owner” within the meaning of timber trespass statute). The evidence was without dispute that the cutting occurred in the context of the use of the right of way. Prescott placed the “Private Property” sign at the base of the tree to show the corner of his land. *See A. 117* (Tr. 392:15-24). The branches were indisputably beyond that sign extending from the tree trunk into and over the roadway. In that circumstance, there was no violation of the law.

This Court has held unequivocally that “property owners have the right to cut any part of a non-boundary tree that encroaches onto their property, regardless of

how their actions affect the tree.” *Atkins v. Adams*, 2023 ME 59, ¶ 1, 301 A.3d 802, 804. Applying this holding to the facts of this case, the Referee’s Decision was in error when it found that Prescott Smith was entitled to damages for timber trespass. With no loss of a tree and no dispute that the branches overhung the right of way, no violation of Maine’s Timber Trespass Statute, 14 M.R.S. § 7552, occurred. Indeed, even if the tree itself had died as a result of the loss of the three branches – it did not – *Atkins* makes clear that that is a permissible consequence of cutting an overhanging tree.

**4. Where Prescott Smith had no interest in the branches removed, he is not entitled to damages.**

Finally, it is clear that Prescott Smith had no ownership interest in the three branches removed from the tree to clear the way for the vehicles, including the construction vehicles. A. 107 showed the tree on which the branches had been. This photograph shows Prescott Smith’s “Private Property” sign situated the corner of his land at the base of the tree. Because he did not own the earth beyond that base over which the branches spread, he did not have any right of recovery for the value of the three branches. *See* 14 M.R.S. § 7552 (identifying the owner of the forest product destroyed as the claimant; not an abutter or neighbor). The evidence was uncontroverted that Prescott Smith owned *none* of the earth over which the easement crosses. *See* A. 91, 101-103 *see also* A. 93 (Mark Ingraham sketch showing that title

to roadbed over which branches hung remains in Munasca, Inc.). The Surveyors did not disagree about the limits of the Prescott Smith property. They did not disagree that Prescott Smith owned none of the land burdened by the road. In those circumstances, the award of damages to Prescott for the branches' removal was in error.

### **Conclusion**

The Referee's decision is in error in two respects. It wrongfully concluded that the deeds call for and create a 15-foot wide easement burdening the Hart House property, Philip L. Smith's home. No width is called for, and no interpretation of the Coffin Plan warrants that conclusion. The deeds describe the easement as being related to the "roadways." Certainly, none of the witnesses or photographic evidence supported a finding that the roadway on the Hart House property was 15 feet wide at any time. The finding must be reversed. This matter should be remanded and judgment entered that the easement which burdens the Hart House property is no wider than the wheelbase of a vehicle extending from the Goose Cottage boundary. Further, the entry of judgment against each of the Appellants under the timber trespass statute is not consistent with the statute or the law of easements. It must be reversed. In all other respects the evidence and the law supported the findings of fact and conclusions of law which should be affirmed.

Dated this 19th day of February, 2026.

Appellants,

By their attorney,

/s/ Judy A. S. Metcalf

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## CERTIFICATE OF SERVICE

I, Judy A. S. Metcalf, hereby certify that two copies of the Brief of Appellants, Philip L. Smith, II, Stephen G. Smith, Heritage Builders, Inc, and Donald E. Meklin and Sons Excavating, LLC, was served upon counsel of record at the addresses set forth below by email and first class mail, postage-prepaid on February 19, 2026:

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