IN THE MATTER OF THE ESTATE OF FRANK D. CARONE	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000858-24 Submission Date: February 28, 2025 CIVIL ACTION On Appeal From a Final Judgment of the Superior Court of New Jersey, Passaic County, Chancery Division – Probate Part dated October 15, 2024 Sat below: Honorable Frank Covello, P.J. Ch. Trial Court Docket No. P228307

BRIEF OF APPELLANTS ANTON MAYER AND FRANCISCO MAYER

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PRELIMINARY STATEMENT

Plaintiffs-Appellants Anton Mayer Jr. ("Anton Jr.") and Francisco Mayer ("Francisco") are the grandsons of Decedents Frank D. Carone ("Frank") and Roseann Carone ("Roseann"). They are challenging the December 22, 2021, Wills of both Decedents (the "2021 Wills"), and Frank's August 4, 2022, Will (the "2022 Will") as the product of undue influence exerted by Defendants-Appellees Genoveffa and Anton Mayer ("Jeanie" and "Anton Sr."), who are Decedents' daughter and son-in-law, and Plaintiffs' parents. The 2021 and 2022 Wills disinherit Plaintiffs. The 2021 and 2022 Wills have also been presumptively invalidated as the product of undue influence. The Trial Court found at the summary judgment stage that the suspicious circumstances surrounding their execution warranted shifting the burden—by clear and convincing evidence, no less—to Defendants to disprove undue influence.

The central issue on this appeal is whether Plaintiffs have standing to pursue their claim of undue influence. They do. Following a limited-issue trial on the standing issue, the Trial Court determined that Decedents executed wills in 2007 and 2011 (the "2011 Wills") benefitting Plaintiffs. Although the 2011 Wills are not signed by Decedents, the Trial Court's determination that the 2011 Wills were executed means that these Wills could be admitted to probate under

N.J.S.A. 3B:3-3 if the 2021 and 2022 Wills are invalidated. Under black-letter New Jersey law, Plaintiffs, as beneficiaries of prior wills, have standing.

The Trial Court reached a different conclusion based on an erroneous application of estoppel principles. Plaintiffs argued throughout this case that they had standing under wills executed by Decedents in 2006 (the "2006 Wills"). Although the originals of the 2006 Wills could not be located, the law firm that prepared them provided conformed copies bearing Decedents' signatures on the cover page to indicate that they had received the originals. Defendants argued that the 2006 Wills had been revoked by wills executed by Decedents in 2007, 2011, 2013, 2014, 2015, and 2017 (the "Draft Wills"), and thus could not confer standing. No executed versions of any of the Draft Wills exist, and they bear no indicia on their face of having been signed. Moreover, the scrivener of the Draft Wills, Michael Zimmerman is also Defendants' estate planning attorney and the tax attorney for Defendants' business interests. Plaintiffs were justifiably skeptical that the Draft Wills had, in fact, been executed.

Indeed, the Trial Court seemed to share at least some of that skepticism. It declined to rule on summary judgment that the Draft Wills were executed by Decedents, necessitating the aforementioned limited-issue trial. At that trial, the Court determined that the Draft Wills from 2007 and 2011 were executed. The Court then dismissed the case for lack of standing, relying on a pre-trial ruling

that Plaintiffs were estopped from asserting standing under any wills besides the 2006 Wills. Against the uncertain backdrop of which of the Draft Wills (if any) had been executed by Decedents, the Trial Court punished Plaintiffs for basing their standing on the 2006 Wills, the only wills bearing Decedents' signature.

The Trial Court's dismissal of this case—despite Plaintiffs' clear standing to pursue their claims—on the basis of estoppel constitutes reversible error and mandates a remand. No basis for estoppel exists in this case. Equitable estoppel cannot apply because Defendants cannot show they detrimentally relied on anything Plaintiffs said or did. Defendants have steadfastly maintained the 2021 and 2022 Wills are valid. Moreover, at least one of Plaintiffs has standing under every single one of the Draft Wills, as both Plaintiffs are named in the 2007, 2011, 2013, and 2014 Draft Wills and Francisco only is named in the 2015 and 2017 Draft Wills. Judicial estoppel also does not apply, because Plaintiffs' argument that they still have standing under the 2011 Wills is entirely permissible alternative argument.

The Trial Court's judgment following trial dismissing this case on the basis of estoppel should be reversed to prevent an absurd and inequitable result in which the 2021 and 2022 Wills are presumptively invalid, but Plaintiffs are stripped of their standing to challenge them notwithstanding that Plaintiffs are plainly beneficiaries of a prior, probatable will.

PROCEDURAL HISTORY

Plaintiffs brought this action in early January 2022, seeking to invalidate the 2021 and 2022 Wills. (See generally Pa0226-Pa0245.) On June 21, 2023, Plaintiffs filed their Consolidated Amended Verified Complaint ("AVC").[1] Plaintiffs alleged that their parents, the Defendants, unduly influenced Decedents to remove Plaintiffs from the 2021 and 2022 Wills. (Pa0306-Pa0309.) Broadly, Plaintiffs alleged that Defendants sought to ostracize Anton Jr.[2] from the family and cut him off from the family's wealth (derived from a family restaurant supply business), beginning in 2015, apparently over a dispute between Anton Jr. and his sister concerning wedding dates. (Pa0297-Pa0301.) In 2019, Defendants did the same to Francisco, seemingly because, after four years of estrangement, he sought to rekindle his relationship with his brother. (Id.) Because the family business and real estate (located on the Bowery in New York City) were held by Decedents, the only way for Defendants to

[1] While the probate matters of Frank and Roseann Carone were never formally consolidated, from this point forward they were addressed by the Trial Court as though they were consolidated matters; *e.g.*, the final judgment in this case disposes of both matters. As this Court is aware, there are two appeals pending (Docket Nos. 000858-24 and 000860-24). A substantively identical copy of the brief and appendix submitted in connection with this matter is being filed in the related matter.

[2] Because the Plaintiffs and Defendants have the same last name, they are identified by their first names throughout for ease of reference.

meaningfully cut Plaintiffs off from family wealth was to ensure Decedents disinherited them, which they did in their 2021 and 2022 Wills. (Id.; Pa0301-Pa0306.) Defendants also executed wills in early 2020 disinheriting their sons. (Pa0300.)

In their original Verified Complaint and the AVC, Plaintiffs asserted that their grandparents had discussed with Plaintiffs that they would be receiving 10% of their estate, and that Anton Jr. had seen a prior version of a will reflecting this distribution. (Pa0230; Pa0251; Pa0294.) Plaintiffs, however, were not in possession of a signed will in which they were named as beneficiaries. (See generally Pa0226-Pa0265.) Defendants responded to the Complaint by moving to dismiss on the basis that Plaintiffs lacked standing. (Pa0266-Pa0268; Pa0274-Pa0276.) In response, the Trial Court ordered a limited period of standing discovery so that Plaintiffs could locate a prior will of Decedents in which they were named. (Pa0286.)

In connection with Defendants' motion to dismiss, Jeanie submitted a certification in which she indicated that she had never spoken to her parents about their estate planning specifically. (Pa0272-Pa0273; Pa0280-Pa0281.) The attorney who drafted the 2021 and 2022 Wills, Michael Zimmerman, also submitted a certification in which he indicated that he had "*drafted*" wills in the past for Decedents, but carefully elided whether any of these wills had been

executed or whether Decedents had any prior, executed wills of which he was aware. (Pa0282-Pa0285.) Plaintiffs learned, however, that an attorney named Neil Kilstein had prepared wills for Decedents. (Pa0836-Pa0837.) Although Neil Kilstein had since passed away, his son (also an attorney) was running his practice and was able to provide conformed copies of wills executed by Decedents on December 31, 2006, under which Plaintiffs each received 10% of Decedents' estate. (Id.; Pa0360-Pa0401.) Notably, the conformed copies are signed on the first page by Decedents, to indicate that Decedents received the originals. (Pa0361; Pa0382.)

While this was going on, Plaintiffs had also served a subpoena on Mr. Zimmerman, as the scrivener of the 2021 and 2022 Wills. (Pa0287.) In addition to his role as Decedents' estate planning attorney, Mr. Zimmerman had also drafted the above-mentioned wills for Defendants in 2020, disinheriting Plaintiffs, and was representing Defendant Jeanie Mayer as Executor of her parents' estates. (Pa0446.)[3] Almost immediately after Plaintiffs produced the 2006 Wills to Defendants, Mr. Zimmerman produced the contents of his estate planning file, which contained the Draft Wills. (Pa0001-Pa0225.)

[3] Where Defendants affirmatively asserted facts as undisputed at the summary judgment stage, Plaintiffs cite to Defendants' statements in their Statement of Undisputed Material Facts.

The parties then submitted additional briefing on the standing issue and the Trial Court held a hearing on the motion to dismiss. Ultimately, the Trial Court concluded Plaintiffs had standing. Plaintiffs quote at length from the Trial Court's statement of reasons, rendered on the record, as it relates to the issue of estoppel:

> I think that you know what my thought process was on this that [Plaintiffs] needed to show me that there is . . . some place where they would take under the estate of these individuals and they've done that. There's a 2006 will *and there are potentially wills that followed 2006 that . . . there's some evidence . . . that demonstrate there [were] some other wills that were signed. And from what I understand the facts to be, the grandchildren were included as beneficiaries under those wills up until 2015.* So that kind of bears out what the allegations of the complaint are. And the only thing I'm deciding today is whether or not they actually have standing to be able to pursue those claims.
>
> Are they going to win? I don't know. It's – it's a very, very difficult road that they will have. But I think they have standing. So I mean on that basis, I think the motion to dismiss for lack of standing is denied.

(Pa1237 at 24:25-25:23 (emphasis added).) As the above illustrates, the Trial Court determined Plaintiffs had standing on the basis of both the 2006 Wills and potentially under the Draft Wills if the evidence ultimately supported that they were signed. (Id.)

The parties proceeded to discovery. Throughout discovery, Plaintiffs were careful to preserve the right to assert standing under the 2006 Wills *or* one of the Draft Wills, as the Trial Court had seemingly suggested they could do.

For example, Defendants propounded the following interrogatory (with a variation for Roseann as well):

> State whether you are requesting as relief in this action that the Court probate a Will of Frank other than the 2022 Will or the 2021 Will executed by Frank. If the answer to this interrogatory is "yes," identify the date of said Will and produce a copy of it. If the answer to this interrogatory is "no," state what relief you are seeking in this action.

(Pa0785-Pa0786; Pa0814-Pa0815.)

Both Plaintiffs responded in similar fashion:

> *Plaintiffs object to this Interrogatory as premature because it seeks information that can only be developed through discovery in this litigation, and/or involve facts and/or claims as to which no factual record has been developed.* Anton Mayer, therefore, reserves his right to supplement his responses to this Interrogatory. Subject to and without waiving the foregoing objections, Anton Mayer states that Plaintiffs request the Court admit to probate the January 31, 2006 will of Frank D. Carone.

(Pa0815; see also Pa0785-Pa0786.)[4]

Through this answer, Plaintiffs did not abandon the door left open by the Trial Court that one of the Draft Wills might be a basis for standing, even if their principal contention remained that the 2006 Wills should confer standing and be admitted to probate. And Defendants clearly understood that Plaintiffs' standing

[4] Plaintiffs note that this interrogatory and response, which Defendants pointed to on summary judgment, is directed to the relief sought by Plaintiffs, not the basis for their standing.

and ultimate recovery in this case might be predicated on either the 2006 Wills or one of the Draft Wills. Lead counsel for Defendants acknowledged as much when questioning Francisco at his deposition:

> Q. And if – do you have any agreement or arrangement with your brother Anton as to what would happen if a court were to determine that the 2017 or 2015 Wills [*i.e.*, the Draft Wills that named Francisco as a beneficiary but not Anton Jr.] should be probated? . . .
>
> A. I don't recall any type of agreement that I have with my brother. . . .
>
> Q. You understand that in attempting to invalidate the 2021 Wills, in theory a court could determine that the next Will is 2017 [*i.e.*, the 2017 Draft Will], right?
>
> A. I can't predict what the courts will determine.
>
> Q. Do you understand that is a possibility?
>
> A. I understand there is a lot of possibilities with the court.

(Pa1240-Pa1241 at 176:18-177:10.) Thus, it was Defendants themselves who explicitly raised the possibility during discovery that wills other than the 2006 Wills could be admitted to probate and confer standing.

The parties then cross-moved for summary judgment. Defendants sought summary judgment dismissing the case on several grounds, including that Plaintiffs lacked standing, because the 2006 Wills had been revoked by the Draft Wills. (Pa0422-Pa0426.) Plaintiffs opposed Defendants' summary judgment, and in particular, the standing argument, by pointing out that if the Draft Wills

were valid, then one of the Draft Wills could be admitted to probate. (1T5, 9.) Plaintiffs also cross-moved for a summary judgment order shifting the burden of disproving undue influence to Defendants by clear and convincing evidence, or, at a minimum, a preponderance of the evidence. (Pa0842-0847.)

The Trial Court issued its ruling on summary judgment on the record across two hearings on August 23, 2024 (another matter was heard in between). (1T; 2T.)[5] In view of the suspicious circumstances surrounding the execution of the 2021 and 2022 Wills, the Trial Court ruled that the burden would be shifted to Defendants to disprove undue influence by clear and convincing evidence. (1T16:7-15; 1T21-9-10; 3T4:1-6.) *Thus, the 2021 and 2022 Wills are presumptively invalid.* The Trial Court also denied Defendants' motion seeking dismissal of this case, but determined it would hold a limited-issue trial on the issue of whether any of the Draft Wills were executed, thereby revoking the 2006 Wills. (1T2-3.)

The Trial Court had already scheduled a pre-trial conference on September 16, 2024, prior to the filing of the summary judgment motions. In

[5] "1T" refers to the transcript of the August 23, 2024, first hearing on the parties' motions for summary judgment. "2T" refers to the transcript of the August 23, 2024, second hearing on the parties' motions for summary judgment. "3T" refers to the transcript of the September 16, 2024, pretrial conference hearing. "4T" refers to the transcript of the October 15, 2024, trial.

advance of the pre-trial conference, both parties submitted letters to the Court regarding the scope and procedure for the Trial. Plaintiffs specifically raised the issue of what benefit the limited-issue trial would provide. (Pa1231-Pa1234.) If the Court determined that some or all of the Draft Wills were signed (the ostensible purpose of the Trial), at least one of the Plaintiffs would still have standing. (Id.) Plaintiffs referenced the above-quoted deposition transcript to show that the parties had clearly contemplated the possibility that one of the Draft Wills could be admitted to probate and thus serve as a source of standing. (Pa1233; Pa1238-Pa1242.) Defendants responded that Plaintiffs should not be permitted to assert standing under any will besides the 2006 Wills, relying on a comment the Trial Court had made during the hearings on the summary judgment motion. (Pa1243-Pa1245.)[6]

At the pre-trial Conference, the Court made the estoppel ruling at the heart of this appeal. Responding to the argument made by Defendants' counsel, the Trial Court stated:

> Okay. I agree. That is what I had previously determined [referring to the summary judgment hearings]. I still stand by that because I don't think you really have the ability to take a position that there's

[6] The Trial Court's comment at the summary judgment hearing, in turn, seemingly stemmed from an argument that Defendants first raised on reply in their summary judgment papers that Plaintiffs were equitably estopped from asserting standing under the Draft Wills.

> only one Will that you're seeking to have probated and then come back and say well let's try all of them.
>
> So, we're going to stick with the 2006 Will and we'll go from there. So the October 15th hearing will be on that.

(3T7.) Plaintiffs' counsel noted its objection, and to clarify the record, asked:

> And can I just ask for clarity for the record, is Your Honor making a finding that [P]laintiffs are estopped from arguing that any Will other than the 2006 Will is – gives the [P]laintiffs standing?

(Id.) The Court responded, "Yes." (Id.)

The Court held the limited issue trial on October 15, 2024. Mr. Zimmerman was the only witness. Following his testimony, the Trial Court concluded that two of the Draft Wills – from 2007 and 2011 – had been signed, thereby defeating Plaintiffs' standing, solely based on the Trial Court's earlier estoppel ruling. (4T165:21-167:6.) The Trial Court did not find that any subsequent Draft Wills had been signed: "There are errors in the 2013 [Draft] Wills that I think carried forward into subsequent Wills. The testimony is that those Wills were executed as well. Maybe they were, maybe they weren't, but it doesn't matter. The 2006 Will was absolutely clearly revoked." (Id. at 167:2-6.)

Because both Plaintiffs are plainly named as beneficiaries in the 2007 and 2011 Wills, Plaintiffs moved for reconsideration at the close of trial, arguing they should not be estopped from asserting standing based upon Wills under

which they would clearly inherit. (Id. at 167:8-22.) The Trial Court denied that motion in the following exchange:

> MR. MARINO: Understood, Your Honor, and in light of the fact that you're crediting [Mr. Zimmerman's] testimony that this 2007 Will was signed, plaintiffs are plainly beneficiaries on the document and they have standing.
>
> THE COURT: Except that that was revoked.
>
> MR. MARINO: By the 2011 Will under which they're beneficiaries.
>
> THE COURT: Which was revoked.
>
> MR. MARINO: By the 2013 Will. Under which they were beneficiaries.
>
> THE COURT: They don't have standing. I'm not reconsidering that decision.

(Id. at 168:13-24.)

The Trial Court's judgment dismissing this case has created a perplexing result. The 2021 and 2022 Wills are presumptively invalid. At least one of Plaintiffs is named in every one of the Draft Wills, and both are named in the 2007 and 2011 Wills the Trial Court determined were executed. And yet, absent appellate intervention, the Trial Court would permit the presumptively invalid 2021 and 2022 Wills to be probated, on the basis of a manifestly incorrect application of estoppel.

STATEMENT OF FACTS

Because the Trial Court ruled on summary judgment that the burden would be shifted to Defendants to disprove undue influence and Defendants have not cross-appealed that determination, the facts underlying Plaintiffs' claim of undue influence are only tangentially related to the issues on appeal. Nonetheless, Plaintiffs provide a brief overview of the salient facts presented to the Trial Court to help orient this Court to the nature of the dispute.

On January 31, 2006, Decedents each executed the 2006 Wills. (Pa0840 at ¶¶9, 12; Pa0360-Pa0401.) Plaintiffs inherit under the 2006 Wills. (Pa0370; Pa0391.) As noted above, the Trial Court determined that Decedents also executed wills in 2007 and 2011. (4T166:18-20; 4T166:22-167:1.) Plaintiffs inherit under both the 2007 and 2011 Wills. (Pa0010-Pa0013; Pa0038-Pa0041; Pa0066-Pa0069.) Thus, Plaintiffs stood to inherit under at least three wills executed by Decedents—the 2006, 2007, and 2011 Wills—before being disinherited in the 2021 Wills and Frank's 2022 Will.

Plaintiffs allege that Decedents disinherited Plaintiffs because they were unduly influenced to do so by Defendants. At the summary judgment stage, Defendants acknowledged that their relationship with Anton Jr. "deteriorated in approximately 2015 as a result of an issue relating to Anton Jr.'s sister Joy's wedding date being scheduled six weeks after Anton Jr.'s wedding." (Pa0439-

Pa0440 at ¶65.) In 2019, history repeated itself with Francisco. Again, Defendants acknowledge that just as Francisco "began to reconnect with Anton Jr." his "relationship with his parents and sister broke down." (Pa0443 at ¶84.)

Following the breakdown of their relationship with their only two sons, Defendants had Mr. Zimmerman, the longtime tax attorney for the family business, which was run by Anton Sr. following Frank's retirement (Pa0483-Pa0484 at 53:8-54:5; Pa0873), prepare wills for Defendants disinheriting Plaintiffs. Defendants signed their own wills disinheriting their sons around February 2020. (Pa0446 at ¶100-101.)

Mr. Zimmerman also prepared drafts of what would become Decedents' 2021 Wills in the fall of 2019, which excluded Anton Jr. and Francisco as beneficiaries. (Pa0449 at ¶119.) Decedents, however, did not sign these wills for approximately two years, as Defendants acknowledge. (Pa0449 at ¶120.) During the two-year period between when the 2021 Wills were drafted and signed, Decedents acknowledged they were being pressured into signing wills disinheriting Anton Jr. and Francisco. For example, Roseann told Francisco's wife Natalie at a dinner in late 2020: "Can you believe that my daughter told me to take my Frankie baby and Anton [Jr.] out of the will because your dad's a doctor so he'll be fine, he doesn't need the money?" (Pa1106 at 47:5-18.) Likewise, Anton Jr.'s wife Nicole "vividly" remembered a conversation in early

2021 in which Roseann said to Anton Jr. and Nicole: "Your mother said you're going to get enough [without being in the will] with your percentage across the street, and your in-laws will be giving your kids enough in their Will." (Pa1097 at 86:4-88:8.)

In October 2021, two months before the 2021 Wills were executed, Frank had a heart attack and was undergoing active treatment for shortness of breath through at least December 22, 2021, the day the 2021 Wills were signed. (Pa1114-Pa1115 (relying on Pa1143; Pa1145; Pa1162; Pa1200-Pa1208).) He was also suffering from dementia at the time. (Pa1114 (relying on Pa1140; Pa1159-Pa1160).) Roseann was also suffering from mild dementia by this time. (Id. (relying on Pa1150; Pa1153; Pa1154; Pa1155; Pa1156; Pa1158).) And, in October 2021, two months before the 2021 Wills were executed, Roseann fell and hurt her head and face. (Id. (relying on Pa1151).)

Almost immediately after these health setbacks, on November 1, 2021, Mr. Zimmerman re-sent to Frank and Roseann the drafts he had prepared of the 2021 Wills. (Pa0835.) Mr. Zimmerman purported to be responding to a request from Roseann, though there is no corresponding email from Roseann reflecting that she made such a request. (Id.)

On December 22, 2021, Anton Sr. drove Frank and Roseann into New York City to sign the 2021 Wills. (Pa0450 at ¶¶122-124.) Frank and Roseann

executed these wills *in the car* outside of Mr. Zimmerman's office on Third Avenue in New York City. (Id.) Anton Sr. was in the car for the entire signing. (Pa0518 at 191:8-18.)

Notably, the only witness to the 2021 Will signings besides Mr. Zimmerman, Catherine Figueroa, was outside the car the whole time, and three of the four car windows were rolled up. (Pa0450 at ¶126; Pa1036-Pa1041 at 216:221:4.) Indeed, Ms. Figueroa did not recall at her deposition anything that was said in the car, whether Mr. Zimmerman discussed provisions of the 2021 Wills, whether there was any general discussion of the Wills, what Frank looked like, what Roseann looked like, or where Frank and Roseann were sitting. (Pa0751-Pa0756 at 45:3-50:17.)

Roseann passed away in June 2022. (Pa0290.) When Frank's will was revised during July and August 2022 to incorporate a living trust, Anton Sr. and Defendants' daughter Gioiella ("Joy") controlled the process, working directly with Mr. Zimmerman, and with no ostensible involvement from Frank, to ensure that Plaintiffs remained disinherited. For example, the living trust and 2022 Will were emailed to Frank on July 27, with Joy and Anton Sr. copied. However, there is no indication that Frank ever opened the email or responded. (Pa1228.) In fact, Frank was in the hospital at the time. (Pa1200.) Mr. Zimmerman then followed up with Anton Sr. and Joy (this time not even bothering to copy Frank)

on August 2, 2022, asking if Anton Sr. and Joy had reviewed the living Trust and 2022 Will. (Pa1229.) Anton Sr. confirmed that he had reviewed the documents with Jeanie and Joy and that "everything seems to be in order." (Id.) Glaringly absent from these emails is any indication Frank had reviewed the documents. (Id.)

The 2022 Will was signed at Frank's home on August 4, 2022. (Pa0454 at ¶149.) Anton Sr. arranged for one of the witnesses and the notary to be present. (Pa0609 at 566:7-567:8; Pa0699 at 178:24-179:8.) The notary, Ms. Gallichio, testified that Anton Sr. and Jeanie were seated at the table where the signing occurred at all times, including when the 2022 Will was signed. (Pa0760-Pa0761 at 56:16-57:15; Pa0771 at 67:1-3.) The 2022 Will had substantially identical provisions as the 2021 Will, expressly disinheriting Anton Jr. and Francisco. (Pa0453 at ¶141.) The 2022 Will was thus signed with Defendants looking over Frank's shoulder (and mere days after he had been released from the hospital).

Seemingly in tacit recognition of their undue influence and the likelihood of an estate contest, Defendants did not tell Plaintiffs that Frank died in August 2022. (Pa1076-1077 at 263:22-264:9.) Defendants also pressured others not to tell Plaintiffs. On September 1, 2022, a family friend texted Francisco about Frank's passing and stated: "you didn't hear it from me. I don't want my mom

getting in trouble for anything." (Pa1230.) Defendants also did not tell Plaintiffs that Roseann died in June 2022. (Pa0303 at ¶95.)

This lawsuit followed after Roseann's 2021 Will and Frank's 2022 Will were admitted to probate.

LEGAL ARGUMENT

I. Standard of Review.

The Trial Court's application of estoppel to dismiss Plaintiffs' case following trial is subject to an abuse of discretion standard. Although the Trial Court never specified which form of estoppel applied, the only two conceivable options are equitable and judicial estoppel, and the standard of review is identical. See In re Declaratory Judgment Actions Filed by Various Mun., Cnty. of Ocean, 446 N.J. Super. 259, 291 (App. Div. 2016) (holding judicial estoppel subject to abuse of discretion standard), aff'd as modified, 227 N.J. 508 (2017); Kaye v. Rosefielde, 223 N.J. 218, 231 (2015) (holding Chancery court generally has discretion in applying "accepted" equitable principles).

A court abuses its discretion when it "makes 'findings inconsistent with or unsupported by competent evidence,' utilizes 'irrelevant or inappropriate factors,' or 'fail[s] to consider controlling legal principles.'" Satz v. Satz, 476 N.J. Super. 536, 549 (App. Div. 2023) (quoting Elrom v. Elrom, 439 N.J. Super. 424, 434 (App. Div. 2015)), cert. denied, 256 N.J. 352 (2024). An abuse of

discretion may also be predicated on a court's failure to consider all relevant factors or where it has made "a clear error in judgment." Id. (quoting State v. C.W., 449 N.J. Super. 231, 255 (App. Div. 2017)). Notably, the abuse of discretion standard does not apply to questions of law, which are always reviewed de novo. Id.

II. Absent the Erroneous Estoppel Ruling, Plaintiffs Have Standing (Pa1231-Pa1234).

The central issue on this appeal is Plaintiffs' standing. New Jersey's standing rules have always been construed liberally, "rejecting procedural frustrations in favor of 'just and expeditious determinations on the ultimate merits.'" Jen Elec., Inc. v. Cnty. of Essex, 197 N.J. 627, 645 (2009) (quoting Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107-08 (1971)).

To have standing to challenge the probate of a will, a party must be aggrieved by the probate of that will. In re Hand's Will, 95 N.J. Super. 182, 186-87 (App. Div. 1967). Beneficiaries of a prior will that could be admitted to probate have standing, since they are aggrieved by the probate of a subsequent will eliminating or reducing their inheritance. In re Maxson's Will, 90 N.J. Super. 346, 348 (App. Div. 1966). The question for standing in this case is thus whether the 2011 Wills, which the Trial Court determined were executed but are

not signed on their face, can be probated in lieu of the challenged 2021 and 2022 Wills. They can.

A will that does not meet the formalities required by N.J.S.A. 3B:3-2, which the 2011 Wills concededly do not, can still be admitted to probate under N.J.S.A. 3B:3-3 if the proponent of the will establishes, "by clear and convincing evidence, that: (1) the decedent actually reviewed the document in question; and (2) thereafter gave his or her final assent to it[;]" *i.e.*, the decedent intended the non-compliant will to be a valid will. In re Prob. of Will & Codicil of Macool, 416 N.J. Super. 298, 310 (App. Div. 2010); accord N.J.S.A. 3B:3-3. "Because N.J.S.A. 3B:3-3 is remedial in nature, it should be liberally construed." In re Est. of Ehrlich, 427 N.J. Super. 64, 72 (App. Div. 2012). And the closer a putative will hews to the requirements of N.J.S.A. 3B:3-2, the easier it is to clear the threshold of N.J.S.A. 3B:3-3. Id. at 72-74 (emphasizing application of N.J.S.A. 3B:3-3 was particularly appropriate where document sought to be admitted to probate was "clearly a professionally prepared Will and complete in every respect except for a date and its execution" (quotation marks omitted)).

Here, the 2011 Wills could be admitted to probate pursuant to N.J.S.A. 3B:3-3, providing Plaintiffs with standing. Mr. Zimmerman's testimony was clear that he went over the 2011 Wills with Decedents and that they gave their

assent to them (4T30, 56-59), the bedrock requirement under N.J.S.A. 3B:3-3. In re Macool, 416 N.J. Super. at 310. Mr. Zimmerman testified that there was no question in his mind that the Wills were signed in his office on September 22, 2011 (4T56-59) and that his standard practice would be to always meet with his clients and "go over the Will with them." (4T30.) Moreover, as in Ehrlich, these Wills were professionally prepared and complete in every respect. Mr. Zimmerman further testified that he sent Decedents an invoice for the Wills as well as a letter enclosing copies. (4T54-56.) There is no evidence in Mr. Zimmerman's file that Decedents ever responded to either the invoice or letter by repudiating the 2011 Wills. As a result of Mr. Zimmerman's testimony, the Trial Court found that the 2011 Wills were signed by Decedents, thereby revoking the 2006 Wills. (4T166:22-167:1.)

In light of the Trial Court's determination that Decedents signed the 2011 Wills, Plaintiffs would clearly have standing under the 2011 Wills were it not for the Trial Court's estoppel ruling. As described above, the 2011 Wills meet the requirements for probate under N.J.S.A. 3B:3-3—they are professionally prepared, complete in every respect except the date and signature, and were reviewed by and assented to by Decedents. In re Ehrlich, 427 N.J. Super. at 72-74. And, because the Trial Court did not determine that any of the other Draft Wills were signed, the only wills that could revoke the 2011 Wills would be the

2021 and 2022 Wills. Obviously, if those wills were the product of undue influence, they are invalid to revoke the 2011 Wills. See In re Smalley's Estate, 131 N.J. Eq. 175, 179-80 (Prerog. Ct. 1942) (holding revocation made under undue influence is ineffective). Thus, Plaintiffs have standing unless this Court affirms the Trial Court's estoppel ruling.

III. The Trial Court Erred in Ruling that Plaintiffs Were Estopped from Asserting Standing on the Basis of any of Decedents' Wills Other than the 2006 Wills (Pa1233-Pa1234).

The Trial Court's holding that Plaintiffs were estopped from asserting standing on the basis of any wills other than the 2006 Wills was an abuse of discretion whether viewed as application of equitable estoppel or judicial estoppel. The record and case law do not support the application of either doctrine. The Trial Court's cursory, oral opinion on the estoppel issue does not reflect that the Trial Court considered the applicable legal principles governing either equitable estoppel or judicial estoppel. Satz, 476 N.J. Super. at 549 (holding failure to consider controlling legal principles constitutes abuse of discretion). To the extent the Trial Court considered these principles at all, its ruling estopping Plaintiffs from asserting standing based on wills that clearly name them as beneficiaries was a "clear error in judgment," and an abuse of discretion on that basis as well. Id.

A. *To the Extent the Trial Court Applied the Doctrine of Equitable Estoppel to Dismiss Plaintiffs' Complaint, It Abused Its Discretion.*

Plaintiffs begin with the doctrine of equitable estoppel, as this was the form of estoppel raised (albeit cursorily and in a reply brief) by Defendants on summary judgment. The doctrine of equitable estoppel applies where a party: (1) engages in conduct or makes a representation; (2) "intentionally or under such circumstances that it was both natural and probable that it would induce action[;]" and (3) the party asserting estoppel relies on such conduct or representation to its detriment. Davin, L.L.C. v. Daham, 329 N.J. Super. 54, 67 (App. Div. 2000) (quotation marks omitted). In essence, equitable estoppel "prevents a party from repudiating prior conduct if such repudiation 'would not be responsive to the demands of justice and good conscience.'" Id. (quoting Carlsen v. Masters, Mates & Pilots Pension Plan Tr., 80 N.J. 334, 339 (1979)). The doctrine is invoked sparingly and only in "very compelling circumstances." Id.; see also Hoelz v. Bowers, 473 N.J. Super. 42, 53 (App. Div. 2022) (noting "exacting" showing required to establish application of equitable estoppel). Critically, the element of reliance is essential to a claim of equitable estoppel. Knorr v. Smeal, 178 N.J. 169, 178 (2003).

Defendants provided the Trial Court with no evidence, and the Trial Court did not point to any, showing that Defendants relied on anything Plaintiffs did or said, and thus application of equitable estoppel against Plaintiffs was

improper and an abuse of discretion. The absence of such reliance is obvious from the fact that Defendants' counsel asked Francisco about what would happen if the 2017 Draft Will were admitted to probate and specifically stated: "You understand that in attempting to invalidate the 2021 Wills, in theory a court could determine that the next Will is 2017 [*i.e.*, the 2017 Draft Will], right?" (Pa1241.) The notion that Defendants were blindsided by the possibility that one of the Draft Wills could be admitted to probate is thus patently false and belied by the conduct of their attorney.

Beyond that, the idea that Defendants detrimentally relied upon Plaintiffs' assertion of standing based on the 2006 Wills makes little sense in the context of this case. Defendants are alleged to have exercised undue influence over Decedents with respect to the 2021 and 2022 Wills (in fact, the Trial Court has presumptively found undue influence). Faced with this allegation, Defendants have taken the only logical position for an undue influence defendant: that they never exercised undue influence over Decedents and that the 2021 and 2022 Wills should be probated. Irrespective of which will Plaintiffs claimed as conferring standing, Defendants' position would be the same: *any* prior will cannot be probated, because Decedents intended the 2021 and 2022 Wills as their last will and testament. Tellingly, neither Defendants nor the Trial Court identified any litigation conduct of Defendants—a motion they would have filed,

a deposition they would have taken, a settlement opportunity they would have pursued—that was foregone because Plaintiffs initially relied upon the 2006 Wills (the only pre-2021 wills bearing Decedents' signature) as establishing their standing. Indeed, since at least one of Plaintiffs has standing under every one of the Draft Wills, Defendants surely would not have argued (and presumably will not argue on this appeal), that if the 2021 and 2022 Wills are invalidated, one of the Draft Wills should be probated.

In advocating for and applying equitable estoppel, both Defendants and the Trial Court appear to have confused the typically egregious circumstances giving rise to estoppel with run-of-the-mill alternative argument that is a feature of nearly all litigation. New York-Connecticut Dev. Corp. v. Blinds-To-Go (U.S.) Inc., 449 N.J. Super. 542, 557 (App. Div. 2017) (noting a party may "plead and pursue alternative, and even inconsistent, theories"); Kas Oriental Rugs, Inc. v. Ellman, 394 N.J. Super. 278, 287-88 (App. Div. 2007) (same). Indeed, at the federal level, where standing issues are more strictly addressed due to Article III concerns, parties advance alternative bases for standing all the time. E.g., Nat'l Fed'n of the Blind v. U.S. Abilityone Comm'n, 421 F. Supp. 3d 102, 116 (D. Md. 2019) (noting plaintiff "may put forth multiple theories of standing for a claim, only one of which must be sufficient for the claim to advance"); McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295, 300-305

(2d Cir. 2021) (considering two alternative theories of standing). This case law supports that it was entirely proper for Plaintiffs to assert standing under the 2006 Wills while allowing for the possibility that they might have standing under a later will if the later will named Plaintiffs as beneficiaries and was actually executed by Decedents.

Moreover, as noted, equitable estoppel is only applied where to do so would "be responsive to the demands of justice and good conscience.'" Daham, 329 N.J. Super. at 67 (quoting Carlsen, 80 N.J. at 339). As similarly framed by the Supreme Court, it "is invoked in the interests of *justice, morality and common fairness*." Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 189 (2013) (emphasis added) (quoting Knorr, 178 N.J. at 178). This fundamental concern with justice, fairness, and good conscience further underscores why application of the doctrine here was a clear abuse of discretion. The Trial Court provided no explanation as to why it would have been unfair or unjust to permit Plaintiffs to pursue their claims for undue influence.

Far from advancing justice or fairness, the Trial Court's estoppel ruling effectively immunized Defendants from the consequences of their undue influence over Decedents. The Trial Court's judgment dismissing Plaintiffs' case, if allowed to stand, results in the presumptively invalid 2021 and 2022 Wills being admitted to probate, simply because Plaintiffs reasonably asserted

standing under the only wills produced in this case actually bearing Decedents' signature before the Trial Court determined that the 2007 and 2011 Wills were also signed.

Such a result is particularly unpalatable in a probate matter, because the interest at stake is not just Plaintiffs' or Defendants', but ultimately *Decedents'*. Macool, 416 N.J. Super at 307 ("[A] court's duty in probate matters is 'to ascertain and give effect to the probable intention of the testator.'" (quoting Fid. Union Tr. v. Robert, 36 N.J. 561, 564 (1962))). The Trial Court's application of estoppel runs counter to this directive and overrides Decedents' clear intent to benefit their grandchildren before they succumbed to Defendants' undue influence, yet another reason it constitutes an abuse of discretion.

B. To the Extent the Trial Court Applied the Doctrine of Judicial Estoppel to Dismiss Plaintiffs' Complaint, It Abused Its Discretion.

To the extent the Trial Court's estoppel ruling was predicated on judicial, rather than equitable estoppel, such a result would also be unsustainable as an abuse of discretion. Broadly, the doctrine of judicial estoppel prevents a party from successfully asserting a position before the court, and then asserting a contrary position in the same or subsequent litigation. Adams v. Yang, 475 N.J. Super. 1, 8-9 (App. Div. 2023). Judicial estoppel, however, is heavily disfavored and considered an "extraordinary remedy" given the potentially

draconian consequences. Id. at 9 (quoting Kimball Int'l, Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 608 (App. Div. 2000)). As a result, judicial estoppel is only applied to significant inconsistencies that result in a "miscarriage of justice." Id. (quotation marks omitted). Ultimately, the doctrine is intended to prevent parties from playing "fast and loose" with the courts. Cummings v. Bahr, 295 N.J. Super. 374, 387 (App. Div. 1996) (quoting Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 358 (3d Cir. 1996)).

To the extent the Trial Court was relying on judicial estoppel, its ruling was an abuse of discretion because the Trial Court failed to consider any of the above principles concerning application of the doctrine, and if it had, a finding of judicial estoppel would be unsupported by any competent evidence. First, there was no inconsistency in Plaintiffs' position. As described above, any perceived inconsistency was merely permissible alternative argument. Plaintiffs initially took the position that the 2006 Wills were signed and thus gave them standing. They further took the position that as unsigned drafts, the Draft Wills did not revoke the 2006 Wills. The Trial Court subsequently determined, only after holding a full-day trial on the issue, that the 2007 Wills and 2011 Wills were signed. It is not inconsistent for Plaintiffs to assert, in the wake of that ruling (and as both parties had suggested throughout the case), that they continue

to have standing under the 2011 Wills and other Draft Wills, because they are named in those Wills as well.

Second, Plaintiffs never actually prevailed on the position that none of the Draft Wills were signed. In denying Defendants' motion to dismiss, the Trial Court found that Plaintiffs had standing because "[t]here's a 2006 will and there are potentially wills that followed 2006 that . . . demonstrate there was some other wills that were signed. And from what I understand the facts to be, the grandchildren were included as beneficiaries under those wills up until 2015." (Pa1237.) Clearly, despite Plaintiffs' position that the Draft Wills were not signed, the Trial Court determined as early as the motion to dismiss stage that at least some of the Draft Wills may have been, and that is ultimately what the Trial Court determined in ruling the 2007 and 2011 Wills had been signed.

Third, application of judicial estoppel would cause, not avoid, a miscarriage of justice, thus failing in its essential purpose. Adams, 475 N.J. Super. at 8-9. Plaintiffs asserted standing under the 2006 Wills because they were the only Wills (other than the presumptively invalid 2021 and 2022 Wills) actually bearing Decedents' signatures. That the Trial Court subsequently determined Decedents signed additional wills in 2007 and 2011 does not remotely suggest that a miscarriage of justice would occur if Plaintiffs were allowed to continue their challenge to the 2021 and 2022 Wills. To the contrary,

it only bolsters that Decedents wanted Plaintiffs to benefit from their estate until Decedents fell victim to Defendants' undue influence years later.

CONCLUSION

Plaintiffs have standing under the 2011 Wills, and in fact, Francisco has standing under all the Draft Wills. The Trial Court abused its discretion in barring Plaintiffs from asserting their standing on the basis of estoppel. As a result, this matter should be remanded for a plenary trial on the issue of undue influence.

Respectfully submitted,

DAY PITNEY LLP
Attorneys for Appellants Anton Mayer and Francisco Mayer

By: _____
PAUL R. MARINO
A Member of the Firm

Date: February 28, 2025

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IN THE MATTER OF THE ESTATE OF FRANK D. CARONE

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-000858-24

Civil Action

On Appeal From a Final Judgment of the Superior Court of New Jersey, Passaic County, Chancery Division – Probate Part dated October 15, 2024

Docket No. in The Court Below: P228307

Sat Below:
Hon. Frank Covello, P.J. Ch.

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BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS ANTON MAYER AND GENOVEFFA MAYER

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SUBMITTED: MARCH 31, 2025

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PRELIMINARY STATEMENT

Plaintiffs-Appellants Anton Mayer ("Anton Jr.") and Francisco Mayer ("Francisco") (collectively, "Plaintiffs") were grandchildren of the decedents Frank Carone ("Frank") and Roseann Carone ("Roseann") (collectively "Decedents"). They were not children, or siblings, or parents of the Decedents. They were grandchildren who sued their parents claiming that their grandparents' decision to exclude them from their Wills was not the product of a tragic family feud, but rather of undue influence.

Plaintiffs, however, lack standing to assert their claims. Indeed, as Decedents' grandchildren, were Decedents' Wills invalidated, Plaintiffs would not stand to benefit under New Jersey's intestacy statute. In an effort to maintain their claims in this action, therefore, Plaintiffs alleged that they were named in "conformed copies" of Wills purportedly signed by Frank and Roseann in 2006 (the "2006 Wills") and that those Wills should be probated. Plaintiffs' reliance on these Wills for the basis of their standing was clear and unmistakable—the Wills are attached to their Consolidated Verified Complaint and Plaintiffs reiterated their position regarding the 2006 Wills throughout discovery.

After the conclusion of discovery, Defendants moved for summary judgment on the grounds that the evidence was overwhelming and undisputed that the Decedents had revoked the 2006 Wills by the execution of subsequent

Wills, and therefore that Plaintiffs could not seek to have the 2006 Wills probated. Based upon Plaintiffs' argument that there were fact issues regarding whether the 2006 Wills had been revoked, the trial court held a trial limited to that issue. After hearing extensive testimony from the Decedents' estate-planning attorney from 2007 to 2022, the Court properly concluded that the 2006 Wills were revoked and that Plaintiffs lack standing.

Tellingly, Plaintiffs are ***not*** appealing the trial court's conclusion that Frank and Roseann did, in fact, revoke the 2006 Wills. Instead, Plaintiffs contend that the trial court erred in not concluding that they had standing to sue pursuant to a 2011 Will or other Wills that were signed by the Decedents after 2006. Plaintiffs' argument is flawed in numerous respects. First, the issue of whether Plaintiffs have standing under the 2011 Will was never properly raised to the trial court—it is being raised for the first time on this appeal. Second, there was no evidence that the 2011 Wills or any other Will purportedly signed after 2006 could be probated. In fact, Plaintiffs spent much of the case, including discovery and even at trial, arguing to the contrary. Plaintiffs seem to be claiming that because the trial court found that the 2006 Wills were revoked by subsequent Wills, that conclusion means such Wills could be admitted to probate, but that is not the law in New Jersey. The standards for revocation and probating an unsigned will are simply different.

Plaintiffs' argument that the trial court erred in concluding that Plaintiffs were estopped from relying on other Wills signed after 2006 is also meritless. As set forth above, the basis for the trial court's dismissal of Plaintiffs' claims goes well beyond estoppel. But regardless, the trial court's estoppel determination was correct and well-reasoned. Plaintiffs intentionally and strategically relied on the 2006 Wills as the basis for their standing in this case and Defendants defended the case accordingly. The trial court properly ruled that Plaintiffs could not rely on any other unsigned Will identified in discovery both because there was no evidence any such Will could be probated and because Plaintiffs were estopped from doing so.

Given Plaintiffs' course of conduct during this litigation, and Defendants' reliance on Plaintiffs' representations regarding the 2006 Wills, the trial court did not err in precluding Plaintiffs from relying on Wills other than the 2006 Wills. As such, the trial court's Order dismissing Plaintiffs' claims should be affirmed.

PROCEDURAL HISTORY[1]

On January 6, 2022, Plaintiffs filed a Verified Complaint to invalidate the Will executed by Frank on August 4, 2022 (the "2022 Will"). (Pa0226). Shortly thereafter, Plaintiffs filed a Verified Complaint commencing a separate action also seeking to invalidate the Will executed by Roseann on December 22, 2021 ("Roseann's 2021 Will"). (Pa0246). In response to both Verified Complaints, Defendants filed motions to dismiss, in part based upon Plaintiffs' lack of standing to pursue their claims in this action, as Plaintiffs were the grandchildren of Decedents and would not take under the intestacy statute if the Wills were invalidated. (*See, e.g.,* Pa0266; Pa0274; Pa0286).

On April 6, 2023, the trial court entered an Order permitting the parties to conduct limited discovery on the "issue of the plaintiffs' standing" and directing the parties to file supplemental submissions once that limited discovery was completed. (Pa0286-Pa0287). During that limited discovery period, Plaintiffs identified a prior estate planning attorney for the Decedents (himself now deceased) whose firm had "conformed copies" of the 2006 Wills purportedly

[1] The Procedural History is, to a large extent, intertwined with the facts relevant to this appeal as it involves positions taken and assertions made by Plaintiffs throughout the litigation. In accordance with Rule 2:6-2(a), we are keeping these sections separate; however, some aspects of the Procedural History discussed below will be repeated and expanded upon in the Statement of Facts.

signed by Frank and Roseann, in which both Plaintiffs were identified as beneficiaries of Decedents' Estates, which Plaintiffs argued provided standing to assert their claims challenging the 2022 Will and Roseann's 2021 Will. (*See, e.g.,* 1T 7:15-18; Pa0836). During that limited discovery period, Plaintiffs also took the deposition of Michael Zimmerman, Decedents' estate planning attorney from 2007 to 2022. (*See* Pa0470). Although Mr. Zimmerman testified that he had prepared multiple wills between 2007 and 2021 which would have revoked the 2006 Wills, as a result of the discovery of the 2006 Wills, the trial court entered Orders on June 8, 2023 denying Defendants' motions to dismiss the Verified Complaints for lack of standing. (Pa0288; Pa0289).

Thereafter, Plaintiffs filed a Consolidated Amended Verified Complaint (the "Consolidated Verified Complaint"), seeking to invalidate the 2022 Will, Roseann's 2021 Will, and a Will that Frank also signed on December 22, 2021 ("Frank's 2021 Will") (together, with Roseann's 2021 Will, the "2021 Wills"). (Pa0290).[2] The Consolidated Verified Complaint asserted claims for undue

[2] Upon the filing of the Consolidated Verified Complaint, the parties and the trial court proceeded as if Plaintiffs' two separate actions were consolidated as one, although each action retained its own docket number. As a result, the appeal filed under docket number A-000860-24 addresses the same issues on appeal as under this docket number, and Defendants have filed a substantively identical copy of this brief under that docket number, as Plaintiffs did with respect to their appellate brief.

influence, lack of capacity and forgery and attached copies of the 2006 Wills as exhibits and included multiple allegations regarding its terms, including Plaintiffs' respective percentage interest in Frank and Roseann's Estates if the 2006 Wills are admitted to probate. (*See* Pa0290-Pa0316, Pa0360-0401). Following the filing of the Consolidated Verified Complaint, Defendants filed an Answer and Separate Defenses, which reiterated, through the First Separate Defense, Defendants' position that Plaintiffs lacked standing to pursue their claims in this action. (*See* Pa0402, Pa0415).

After the parties engaged in extensive discovery, Defendants filed a motion for summary judgment based, in substantial part, on the fact that the 2006 Wills could not be probated because Frank and Roseann had revoked them, and therefore that Plaintiffs lacked standing to pursue their claims in this action, as the trial court could provide no relief to Plaintiffs even were the 2021 Wills and the 2022 Will invalidated. (*See, e.g.*, Pa0427-Pa0432). In response, Plaintiffs argued for the first time that if the 2006 Wills were revoked, there were other wills signed by the Decedents which could be probated, notwithstanding that Plaintiffs did not put in any evidence that any such subsequent Wills (which they had attacked as unsigned) could be probated or represented the Decedents' intent at the time of their passing. (*See, e.g.,* 1T 20:10-20). This is why, as Plaintiffs note in their appellate brief, that Defendants

were forced to argue on reply that (a) Plaintiffs were estopped from now relying on other wills for standing and (b) there was no evidence in the record that such other wills could be probated under *N.J.S.A.* 3B:3-3. (*See* Pb11, n.6). In addition, Plaintiffs filed a cross-motion to shift the burden of proof to Defendants to disprove that they exerted undue influence over Frank and Roseann in connection with the 2021 Wills and the 2022 Will. (Pa0842). Plaintiffs ultimately abandoned their claims of lack of capacity and forgery.

The trial court heard oral argument on Defendants' motion for summary judgment and Plaintiffs' cross-motion to shift the burden on August 23, 2024. (*See* 1T, 2T).[3] During oral argument, as to Plaintiffs' cross-motion, the trial court suggested that were the case to be tried, the burden of proof as to the issue of undue influence would shift to Defendants. (*See* 1T 21:9-10). On the issue of revocation, Plaintiffs' counsel argued that there were fact issues as to whether the 2006 Will was revoked, as there was no evidence that subsequent Wills were signed. (*See, e.g.,* 1T 12:22-13:5). The trial court determined that whether the 2006 Wills Plaintiffs were seeking to probate were revoked was a threshold issue

[3] As used herein, "1T" refers to the transcript of the first portion of the August 23, 2024 oral argument. "2T" refers to the transcript of the second portion of the August 23, 2024 oral argument. "3T" refers to the transcript of the September 16, 2024 pretrial conference. "4T" refers to the transcript of the October 15, 2024 trial.

that would determine whether Plaintiffs possessed standing to assert their claims in this action at all. (*See* 1T 25:4-10). The trial court then scheduled a trial date to address the narrow threshold issue of whether the 2006 Wills were revoked and therefore whether they could be probated. (1T 26:7-11). With respect to Plaintiffs' new argument that Plaintiffs could also have standing under other wills after 2006 which Plaintiffs had previously attempted to discredit, the Court recognized that it had been Plaintiffs' position throughout the litigation that the 2006 Wills were the Wills to be probated, and that position could not change at trial. (*See* 2T 12:11-24).

On September 16, 2024, the trial court held a pretrial conference to prepare for the October 15, 2024 trial date. (3T). During that pretrial conference, Plaintiffs again raised the new argument that they could have standing under other Wills. (3T 5:5-12). In response, the trial court concluded that because there was no evidence that any Wills after 2006 could be probated, and given Plaintiffs' prior representations, Plaintiffs could not deviate from their prior position that they sought to probate the 2006 Wills. (*See* 3T 5:13-17). Plaintiffs thereafter asked the Court if Plaintiffs were estopped from arguing that any Will other than the 2006 Wills could form the basis for Plaintiffs' standing in this action, and the Court said "Yes." (3T 7:20-24).

On October 15, 2024, the trial court conducted a trial, at which Michael Zimmerman, Frank and Roseann's long-time estate planning attorney, provided substantial testimony regarding Frank's and Roseann's respective estate planning and Will execution, including testimony regarding multiple Wills he prepared and which Frank and Roseann executed between 2007 and 2021. (4T). At the conclusion of that trial, Plaintiffs moved for a directed verdict arguing that Mr. Zimmerman was not credible and that the evidence was not sufficient that the 2006 Wills were revoked, which motion was denied by the trial court. (4T 161:21-167:7). Plaintiffs then pivoted their position and moved for reconsideration of the trial court's ruling that Plaintiffs do not possess standing if the 2006 Wills were deemed to have been revoked. (4T 167:8-11). The trial court also denied that motion, and dismissed Plaintiffs' claims. (4T 168:23-24, 169:7). Thereafter, the trial court entered an Order on October 15, 2024 dismissing Plaintiffs' claims with prejudice for lack of standing, as Frank and Roseann had revoked the 2006 Wills. (the "October 15 Order"). (Pa1256).

This appeal followed. (Pa1257, Pa1260). Notably, Plaintiffs do not challenge the trial court's conclusion that the 2006 Wills were revoked. (*See* Pb19-Pb31).

STATEMENT OF FACTS

Although Plaintiffs' appellate brief acknowledges that the "facts underlying Plaintiffs' claim of undue influence are only tangentially related to the issues on appeal" (Pb14), Plaintiffs nonetheless devote multiple pages of their Procedural History and Statement of Facts to these admittedly "tangential" "facts"—which are based primarily on Plaintiffs' interpretation of documents and deposition testimony rather than actual findings made by the trial court—with the obvious intended purpose of inserting irrelevant and mischaracterized "evidence" into this Court's analysis. (*See, e.g.,* Pb4-Pb19).[4] Needless to say, there are numerous if not overwhelming facts developed in discovery which directly undercut Plaintiffs' claims of undue influence, including Michael Zimmerman's extensive testimony that Frank and Roseann's decision to write their grandsons out of their respective Wills was independent and intentional and the result of a tragic family feud that developed when their first grandson got engaged. (*See, e.g.,* Pa0510-Pa0514, Pa0587-Pa0588, Pa0614). However,

[4] Plaintiffs' reliance on these undeniably "tangential" "facts" is inappropriate pursuant to *R.* 2:6-2(a)(5), which requires an appellant's brief to contain "[a] concise statement ***of the facts material to the issues on appeal***[.]" (emphasis added). Defendants respectfully submit that any "facts" Plaintiffs have set forth that are ***not*** material to the limited issues involved in this appeal—including the "facts" relating to the substance of Plaintiffs' undue influence allegations, which Plaintiffs themselves acknowledge are "tangential," set forth on pages 14-19 of Plaintiffs' appellate brief—should be disregarded. (*See* Pb14-Pb19).

the facts relevant to this Court's analysis are straightforward and to a large extent procedural.

A. Frank And Roseann Executed Multiple Wills Between 2007 And 2021

From the outset of this case, Defendants questioned Plaintiffs' ability, as the grandchildren of Decedents, to pursue their claims in this action, by arguing in their very first motions to dismiss that Plaintiffs lack standing because if the 2021 Wills and the 2022 Will invalidated, Plaintiffs would lack standing under the intestacy statute. (*See, e.g.,* Pa0286).

In response to Defendants' motions to dismiss, and pursuant to the trial court's direction that the parties must pursue limited discovery relating to the standing issue, Plaintiffs located the 2006 Wills, which are conformed copies—not originals or photocopies—of Wills that Frank and Roseann purportedly signed on January 31, 2006, and which bear a notation on the front page that the original Wills were given to Frank and Roseann. (*See* Pa0286, Pa0836-Pa0837, Pa0360-Pa0401).

Plaintiffs also sought the production of documents from, and the deposition of, Michael Zimmerman, who drafted the 2021 Wills and the 2022 Will. (*See* Pa0287). In its Order directing the parties to engage in limited discovery relating to Plaintiffs' alleged standing, the trial court directed Mr. Zimmerman to produce "his entire estate planning file(s) for Frank and

Roseanne [sic] Carone including, but not limited to, all communications, Wills, draft Wills, Trust Agreements, draft Trust Agreements (any such Will or Trust documents or drafts shall be produced whether prepared by Mr. Zimmerman or others), and attorney notes[.]" (*See* Pa0287). Mr. Zimmerman thereafter produced his file, which contained multiple Word versions of Wills that he had prepared for Frank and Roseann between the years 2007 to 2021. (*See, e.g.,* Pa0001-Pa0225). Each of those Word versions of Wills contained a provision stating that the testator "do[es] make, publish and declare this to be my Last Will and Testament, hereby revoking all Wills and Codicils by me at any time heretofore made." (*See* Pa0001, Pa0029, Pa0057, Pa0085, Pa0107, Pa0129, Pa0147, Pa0167, Pa0186, Pa0206). Mr. Zimmerman's file did not contain any photocopies of any signed versions of these Wills, as Mr. Zimmerman's standard practice is to destroy previously executed Wills on behalf of the client when the client signs a new Will. (*See* Pa0282). However, Mr. Zimmerman's file did include Word versions of invoices reflecting the work he conducted on behalf of Frank and Roseann, including his appearance at Will signings in which Frank and Roseann executed Wills Mr. Zimmerman had prepared. (Pa0498-Pa0499, Pa0502-Pa0505, Pa0515; 4T 56:10-57:2, 61:12-62:11, 67:18-68:12). It also included signed copies of other estate-planning documents which were executed contemporaneously with Wills in 2007. (*See* 4T 37:10-52:12). Although

Plaintiffs were included in some of the early versions of the Wills, Anton Jr. was specifically excluded in the 2015 and 2017 versions of the Wills and both Plaintiffs were excluded in a 2019 draft of the Will. (*See* Pa0512-Pa0514).

After Mr. Zimmerman produced these Word versions of Wills and other documents from his file, Plaintiffs deposed Mr. Zimmerman regarding his file and the limited issue of Plaintiffs' alleged standing. (*See* Pa0470, Pa0472). Plaintiffs aggressively questioned and challenged Mr. Zimmerman during this deposition, attempting to elicit testimony from Mr. Zimmerman that he did not have any independent recollection of Frank and Roseann signing the exact Word versions of the produced Wills, or any specific details regarding the Will signings themselves. (*See, e.g.,* Pa0494). Nonetheless, during the deposition, Mr. Zimmerman testified that Frank and Roseann executed multiple Wills between the years 2007 and 2021, including Wills dated 2007, 2011, 2013, 2014, 2015, and 2017, as these Will signings were confirmed by contemporaneous billing records contained in Mr. Zimmerman's file. (*See* Pa0515). Mr. Zimmerman also testified at his deposition that his handwritten notes reflected Frank's and Roseann's intent to exclude Anton Jr. from Wills prepared in 2015 and 2017. (*See* Pa0512, Pa0514).

B. Plaintiffs Strategically Elected To Disregard Mr. Zimmerman's Testimony Regarding The Wills Signed Between 2007 and 2021 And Instead Relied On The 2006 Wills As The Basis For Their Alleged Standing

Notwithstanding Mr. Zimmerman's testimony and evidence in his file demonstrating that Frank and Roseann had signed a number of Wills between 2007 and 2021, Plaintiffs nonetheless ultimately made the strategic decision to identify the 2006 Wills as the basis for their alleged standing, filed the Consolidated Verified Complaint, attaching conformed copies of the 2006 Wills, confirming their reliance on the 2006 Wills as the basis for their ability to assert their claims in this action. (*See* Pa0290, Pa0360-0401).

After Plaintiffs filed the Consolidated Verified Complaint relying on the 2006 Wills as the basis of their request for relief in this action, Defendants sought in discovery to confirm that Plaintiffs were, in fact, seeking to probate the 2006 Wills in place of the 2021 Wills and the 2022 Will. Specifically—***after*** Mr. Zimmerman's deposition in which he identified the multiple Wills Frank and Roseann signed after 2006—Defendants served interrogatories on both Plaintiffs and explicitly asked Plaintiffs to confirm which Wills Plaintiffs were seeking to probate in place of the 2021 Wills and the 2022 Will. (*See* Pa0785-Pa0786, Pa0814-Pa0815). Plaintiffs each unambiguously stated that "Plaintiffs request that the Court admit to probate the January 31, 2006 will of" both Frank and Roseann. (*Id.*). ***Plaintiffs never supplemented these responses***

to identify any Wills other than the 2006 Wills as the basis for the relief sought in this action, although they were aware that Frank and Roseann had signed other Wills after 2006. (*See* Pb8). Moreover, during Plaintiffs' respective depositions, Defendants questioned each Plaintiff regarding the relief they were seeking in this action and specifically which Will they were requesting that the trial court probate, and Plaintiffs confirmed they were seeking to probate the 2006 Wills.[5] (*See* Pa0428, Pa0850, Pa1242).

C. Defendants Relied On Plaintiffs' Representation That They Were Seeking To Probate The 2006 Wills

After the conclusion of fact discovery, Defendants moved for summary judgment, in part on the basis that Plaintiffs could not probate the 2006 Wills because they had been revoked by Frank and Roseann and, as such, Plaintiffs lacked standing to pursue claims in this action as Plaintiffs had not identified any relief that could be provided by the trial court in their favor even if the trial court could invalidate the 2021 Wills or the 2022 Will. (*See* 1T 3:25-5:16). During oral argument on Defendants' motion for summary judgment,

[5] Plaintiffs point to this deposition questioning to suggest that the possibility that Plaintiffs would have standing via other Wills was the subject of discovery. (Pb8-Pb9). This testimony demonstrates the opposite. Defendants diligently and repeatedly sought confirmation that the only Wills Plaintiffs were seeking to probate were the 2006 Wills so Defendants could know which claims to defend against.

Defendants emphasized to the Court that to have standing to challenge the probate of a will, Plaintiffs would need to provide evidence to prove that they could probate a will in which they were named as beneficiaries (not simply that they were named in another will). (1T 6:13-7:12). Defendants argued that Plaintiffs were unable to do so, not only because they were estopped from relying on any Wills other than the 2006 Wills, but also because Plaintiffs had not presented any evidence to suggest that any other Wills reflected Frank's or Roseann's intent—and indeed had argued that there was no evidence that any Wills post-dating 2006 were even signed. (*See* 1T 7:5-12; 1T 20:18-20 (Plaintiffs' counsel admits that Plaintiffs had taken the position that there was no evidence that the Wills dated between 2007-2021 were signed)). As a result, the trial court concluded that the parties should conduct a trial limited to the issue of whether the 2006 Wills had been revoked. (1T 26:7-11).

Recognizing that Plaintiffs had repeatedly taken the position that they were seeking to probate the 2006 Wills, the trial court reiterated:

> THE COURT: So we're not going to change that at trial and basically throw it at the wall and figure out which [Will] can be [probated]. No.
>
> Your position is the 2006 will is the will that can be probated. So that being the case, we're trying to determine whether or not that will has been revoked, and if we determine that will has been revoked, that is the thing that gives your clients standing, the 2006 will . . .

(2T 12:14-21). Defendants' counsel also argued that Defendants had "pursued discovery in this case on reliance of" Plaintiffs' assertions that they were seeking to probate the 2006 Wills, and noted that Defendants had pressed the issue of "need[ing] to know which will they're probating" since the initial motion to dismiss. (2T 19:1-8). Following the parties' arguments, the trial court again confirmed that the parties' scheduled trial date would be focused on the narrow issue of whether Frank and Roseann had revoked the 2006 Wills. (2T 22:2-7).

D. The Trial Court Rejected Plaintiffs' Efforts To Deviate From Their Attempt To Probate The 2006 Wills

Before the trial date, on September 16, 2024, the trial court held a pretrial conference to discuss the logistics of the upcoming trial. (3T). During that conference, Plaintiffs again raised the issue of whether they could try to probate some other Will in place of the 2021 Wills or the 2022 Will if the trial court were to conclude that the 2006 Wills had been revoked. (3T 5:5-12). In response, Defendants' counsel again argued that Plaintiffs had focused the case on the 2006 Wills and should not be permitted to deviate from that focus:

> MR. DERMAN: I don't know if I need to respond to that because I think Your Honor has said what the hearing is going to look like, but as we said repeatedly that we pressed on this issue, what is the Will they're seeking to probate and they testified in their answers to interrogatories it's in their complaint that they're pursuing the 2006 Will and they took the position throughout the litigation that those Wills were not in effect.

> There is no evidence of clear and convincing evidence that these other Word versions of Wills reflected their intent at the time they died. They didn't pursue that evidence. So I don't mean to argue it. I think that Your Honor ruled and is repeating today that the hearing on the 16th we'll present evidence of revocation of that 2006 Will and that'll be something for Your Honor to decide before there's a determination if there's a trial date.

(3T 6:12-24). In response, the trial court stated:

> THE COURT: Okay. I agree. That is what I had previously determined. I still stand by that because I don't think that you really have the ability to take a position that there's only one Will that you're seeking to have probated and then come back and say well, let's try all of them.
>
> So we're going to stick with the 2006 Will and we'll go from there. So the October 15th hearing will be on that.

(3T 7:5-13). Plaintiffs' counsel then asked for confirmation as to whether the trial court was making a finding that "plaintiffs are estopped from arguing that any Will other than the 2006 Will is – gives the plaintiffs standing?" to which the trial court replied, "Yes." (3T 7:20-24).

E. Following Mr. Zimmerman's Testimony At Trial, The Court Found That Frank And Roseann Had Revoked The 2006 Wills, And Plaintiffs Therefore Lack Standing To Pursue Their Claims In This Action

On October 15, 2024, the trial court conducted a trial on the issue of the revocation of the 2006 Wills. During that trial, Mr. Zimmerman provided extensive testimony regarding his preparation of multiple Wills for both Frank and Roseann after 2006. (4T). Mr. Zimmerman specifically testified that each

time Frank and Roseann executed a new Will, they intended to revoke all prior Wills, and that every Will he prepared contained a provision revoking all prior Wills. (*See* 4T 32:7-20, 41:7-22, 42:1-3). Mr. Zimmerman also testified regarding documents produced in his file, such as unsigned Word versions of Wills, invoices, correspondence with Frank and Roseann, and handwritten notes providing evidence that Frank and Roseann did, in fact, execute multiple Wills after 2006, thereby revoking the 2006 Wills. (*See, e.g.,* 4T 37:10-38:10, 40:16-25).

Following Mr. Zimmerman's testimony at trial, Plaintiffs moved for a directed verdict, arguing that the trial court needed to determine whether Decedents had actually executed Wills in 2007, 2011, 2013, 2015, or 2017, again taking the position there was insufficient evidence to demonstrate that Frank and Roseann signed Wills in these years. (4T 161:21-162:3). Plaintiffs argued that Mr. Zimmerman's testimony was not credible, and characterized the documents from Mr. Zimmerman's file as "draft Wills that are filled with mistakes that were supposedly signed." (4T 162:10-163:20). By contrast, Defendants argued that Mr. Zimmerman's testimony that Decedents signed Wills after 2006 was supported by contemporaneous records, including (at least with respect to 2007) other signed estate planning documents, such as powers of attorney. (4T 163:22-164:8).

The trial court concluded that Mr. Zimmerman's testimony regarding Frank's and Roseann's execution of Wills in 2007 was credible, particularly in light of evidence demonstrating that other estate planning documents were contemporaneously signed. (4T 166:2-21). Indeed, the trial court specifically concluded that Mr. Zimmerman presented "credible testimony that demonstrates clearly that a Will was executed in 2007 by both Frank and Roseann Carone[.]" (4T 166:18-21). The trial court also stated:

> Subsequent to that, there is a 2011 Will, there's a letter from 2011 that forwards a copy of September 22, 2011 Will – Wills. Also indicia of a 2011 Will. There's D-11 is handwritten notes that talked about what the intent was in the 2011 Wills.
>
> There are errors in the 2013 Wills that I think carried forward into subsequent Wills. The testimony is that those Wills were executed as well. Maybe they were, maybe they weren't, but it doesn't matter. The 2006 Will was absolutely clearly revoked.

(4T 166:22-167:6). The trial court then denied Plaintiffs' motion for a directed verdict. (4T 167:7).

Plaintiffs then changed course and made an oral motion for reconsideration of the trial court's ruling that "plaintiffs don't have standing if the 2006 Will is deemed to have been revoked." (4T 167:8-11). Plaintiffs' asserted basis for this motion was that if Mr. Zimmerman's testimony was deemed to be credible, then Plaintiffs would have been named as beneficiaries

in the 2007 Will. (4T 168:13-24). Of course, Plaintiffs presented no evidence that any such subsequent wills could be probated or reflected Decedents' intent at the time of their passing:

> MR. MARINO: Understood, Your Honor, and in light of the fact that you're crediting his testimony that this 2007 Will was signed, plaintiffs are plainly beneficiaries on the document and they have standing.
>
> THE COURT: Except that that was revoked.
>
> MR. MARINO: By the 2011 Will under which they're beneficiaries.
>
> THE COURT: Which was revoked.
>
> MR. MARINO: By the 2013 Will. Under which they were beneficiaries.
>
> THE COURT: They don't have standing. I'm not reconsidering that decision.

(4T 168:13-24). Notably, the trial court did not refer to Plaintiffs being estopped from arguing that the 2011 Will could form the basis of their alleged standing. (*Id.*). The trial court then dismissed Plaintiffs' claims, and thereafter entered the October 15 Order effectuating that dismissal. (4T 169:7; Pa1256). Plaintiffs thereafter filed this appeal. (Pa1257, Pa1260).

In this appeal, Plaintiffs do not challenge the determination by the trial court that the 2006 Will was revoked. Instead, they are changing arguments and positions once again. First, they challenge the trial court's ruling that Plaintiffs were estopped from pursuing the probate of any Will other than the 2006 Wills.

Plaintiffs also seek a ruling from this Court that Plaintiffs possess standing under Wills signed in 2011 because the Word versions of those Wills produced in discovery can be admitted to probate—***an issue never raised to or addressed by the trial court.*** For the reasons set forth below, Plaintiffs' arguments on this appeal should be rejected, and the trial court's October 15 Order dismissing Plaintiffs' claims should be affirmed.

STANDARD OF REVIEW

"Whether a party has standing to pursue a claim is a question of law subject to de novo review." *Matter of J.R.*, 478 N.J. Super. 1, 7 (App. Div. 2024) (quoting *Cherokee LCP Land, LLC v. City of Linden Planning Bd.*, 234 N.J. 403, 414 (2018)). However, this Court will not consider for the first time on appeal an issue not raised to the trial court. *See North Haledon Fire Co. No. 1 v. Borough of North Haledon*, 425 N.J. 615, 631 (App. Div. 2012) (citing *Brock v. Pub. Serv. Elec. & Gas Co.*, 149 N.J. 378, 391 (1997); *Soc'y Hill Condo. Ass'n v. Soc'y Hill Assocs.*, 347 N.J. Super. 163, 177-78 (App. Div. 2002)). As discussed further below, the trial court properly concluded that Plaintiffs do not possess standing to assert their claims seeking to invalidate the 2021 Wills and 2022 Will, because the 2006 Wills promulgated by Plaintiffs were revoked and Plaintiffs have failed to identify other Wills that can be probated in which Plaintiffs are named as beneficiaries. There is no evidence that the Word

versions of Wills purportedly signed in 2011 can be probated, and Plaintiffs are moreover improperly requesting that this Court consider an issue that was not properly raised to the trial court—namely, that Wills purportedly signed by Frank and Roseann in 2011 should be admitted to probate in place of the 2022 Will and the 2021 Wills—which argument should be rejected.

By contrast, this Court will review a trial court's decision to invoke either judicial or equitable estoppel under an "abuse of discretion" standard. *See Terranova v. Gen. Elec. Pension Tr.*, 457 N.J. Super. 404, 410 (App. Div. 2019) (quoting *In re Declaratory Judgment Actions Filed by Various Municipalities, Cnty. of Ocean*, 446 N.J. Super. 259, 291 (App. Div. 2016)) (addressing judicial estoppel); *Johnson v. Bradshaw*, 435 N.J. Super. 100, 114 (Ch. Div. 2014) ("It is within the discretion of the court whether to employ equitable estoppel in any given case."). For the reasons set forth below, Plaintiffs have failed to demonstrate any error committed by the trial court in its conclusion that Plaintiffs were estopped from arguing at trial that any Will other than the 2006 Wills should be probated.

Accordingly, Defendants respectfully submit that the trial court's October 15 Order dismissing Plaintiffs' claims for lack of standing should be affirmed.

LEGAL ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT PLAINTIFFS LACK STANDING TO ASSERT THEIR CLAIMS IN THIS ACTION

During the litigation, Plaintiffs alleged that they were seeking to probate the 2006 Wills in place of the 2021 Wills or the 2022 Will should the Court invalidate those Wills. This allegation resulted in Defendants' targeting discovery to focus on the issue of revocation of the 2006 Wills and filing a summary judgment motion which ultimately led to a trial on the limited issue of whether the 2006 Wills were revoked. The trial court properly concluded that the evidence disclosed that Frank and Roseann signed at least one Will after 2006 Will, which revoked the 2006 Wills, and as a result, Plaintiffs—as grandchildren—lack standing to pursue their claims in this action.

Plaintiffs now argue to this Court that they possess standing to challenge the 2021 Wills and the 2022 Will because they are named as beneficiaries in Word versions of Wills from Mr. Zimmerman's file dated 2011. (*See* Pb20-Pb23). This argument is fatally flawed because, not only is there insufficient evidence to demonstrate that these Word versions can be probated, but Plaintiffs never raised this issue with the trial court—likely because they devoted all of their energy to attempting to prove that the 2006 Wills were not revoked and should be probated. Plaintiffs' effort to raise this new, factually unsupported

issue for the first time on appeal should be rejected, and the trial court's conclusion that Plaintiffs lack standing because the 2006 Wills were revoked should be affirmed.

A. The Trial Court Correctly Concluded That Frank And Roseann Revoked The 2006 Wills And Therefore That Plaintiffs Lack Standing

The only issue at the trial held on October 15, 2024 was whether the 2006 Wills, on which Plaintiffs had focused this case, were revoked. Indeed, the trial on this limited issue was scheduled because Plaintiffs argued there were fact and credibility issues as to whether the 2006 Wills were revoked. (*See* 1T 17:22-20:17). As the 2006 Wills had formed the basis for Plaintiffs' claimed standing in this action—and Plaintiffs had never sought to amend their Complaint or alter or supplement their discovery responses to identify any other Wills they believed could properly be probated—if Frank and Roseann had revoked the 2006 Wills, Plaintiffs would have no basis on which to assert their claims in this action as they are not beneficiaries under the intestacy statute. Following Mr. Zimmerman's lengthy testimony, which the trial court found to be credible, the trial court properly concluded that Frank and Roseann had revoked the 2006 Wills, because the evidence disclosed that Decedents had signed at least one Will after 2006. As a result, the trial court properly concluded that Plaintiffs do

not possess standing to assert their claims in this action, and properly dismissed Plaintiffs' Verified Consolidated Complaint.

1. *To Possess Standing, Plaintiffs Were Required To Identify Another Will That Could Be Probated In Which They Were Named As Beneficiaries, And Plaintiffs Identified The 2006 Wills*

Standing is a threshold justiciability requirement, the absence of which "precludes a court from entertaining any of the substantive issues for determination." *New Jersey Dep't of Env. Prot. v. Exxon Mobil Corp.*, 453 N.J. Super. 272, 291 (App. Div. 2018). While Plaintiffs contend that New Jersey's standing rules "have always been construed liberally," standing "is not automatic." *See id.* Rather, the "essential purpose" of the standing requirement is to "assure that the invocation and exercise of judicial power in a given case are appropriate." *See People for Open Government v. Roberts*, 397 N.J. Super. 502, 508 (App. Div. 2008) (quoting *N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n*, 82 N.J. 57, 69 (1980)). Even the case law Plaintiffs cite in their appellate brief recognizes that "[e]ntitlement to sue requires a sufficient stake and real adverseness with respect to the subject matter of the litigation ***[and a] substantial likelihood of some harm visited upon the plaintiff*** in the event of an unfavorable decision is needed for the purposes of standing." *Jen Elec., Inc. v. County of Essex*, 197 N.J. 627, 645 (2009) (emphasis added) (quoting *In re Adoption of Baby T*, 160 N.J. 332, 340 (1999)).

Consistent with these general standards, in the specific context of probate matters, the New Jersey Court Rules explicitly identify the requisite standing necessary to challenge a decedent's will—namely, that a party must be "aggrieved" by the probate of such will in order to possess standing to challenge it. *See R.* 4:85-1 ("If a will has been probated by the Surrogate's Court or letters testamentary or of administration, guardianship or trusteeship have been issued, ***any person aggrieved by that action*** may, upon the filing of a complaint setting forth the basis for the relief sought, obtain an order requiring the personal representative, guardian or trustee to show cause why the probate should not be set aside or modified . . .") (emphasis added).

New Jersey courts have consistently reaffirmed that the ability to challenge a decedent's will is not open to the general public, but rather is limited to individuals whose financial interests would be harmed by the probate of such will because they stand to benefit—either through another will that could be probated in its place or through the intestacy statute—should the court invalidate the will at issue. *See In the Matter of Probate of Alleged Will of Hughes*, 244 N.J. Super. 322, 325-26 (App. Div. 1990) ("An individual who would be injured by the will is one who would be pecuniarily prejudiced by it."); *In re Estate of Johnson*, 2012 WL 11861489, at *6 (Ch. Div. June 25, 2012) ("[A]n interested party must have a direct pecuniary interest in denying probate to the will i.e. that

he would receive a greater share of the decedent's assets if the will were not probated."); *In re Lent*, 142 N.J. Eq. 21, 22 (E. & A. 1948) (noting that, historically, "a party aggrieved was defined as 'one whose personal or pecuniary interests, or property rights, have been injuriously affected by the order or decree'"); *Gaeta v. De Gise's Will*, 139 N.J. Eq. 44, 46 (Prerog. Ct. 1946); *In re Rogers' Estate*, 15 N.J. Super. 189, 200 (N.J. Cnty. Ct., Probate Div., Essex Cnty. 1951) ("Our courts have, as a general rule, defined such 'aggrieved' party as one whose pecuniary interest is directly affected by the decree, or one whose right of property may be established or divested by the decree."); *see also In re Hand's Will*, 95 N.J. Super. 182, 187 (App. Div. 1967).

As Decedents' grandchildren, to possess standing to challenge Decedents' 2021 Wills and Frank's 2022 Will, Plaintiffs were required to identify a prior will in which Plaintiffs were named as beneficiaries ***and which could be admitted to probate***, as Plaintiffs would not stand to benefit under the intestacy statute were the 2021 Wills and the 2022 Will invalidated. *See N.J.S.A.* 3B:5-4 (providing that "[a]ny part of the intestate estate not passing to the decedent's surviving spouse or domestic partner under N.J.S.3B:5-3, or the entire intestate estate if there is no surviving spouse or domestic partner, passes in the following order to the individuals designated below who survive the decedent: (a) To the decedent's descendants by representation").

Plaintiffs admit in their appellate brief that to pursue their claims in this action, they are required to identify another Will that can be probated. (*See* Pb20). During the litigation, Plaintiffs unequivocally pursued the probate of the 2006 Wills and challenged that there was any evidence to suggest that Frank and Roseann ever validly executed any Wills after 2006. (*See* 1T 20:18-20). Plaintiffs' focus on the 2006 Wills was strategic and intentional. In the initial standing discovery ordered by the Court, Mr. Zimmerman testified that Frank and Roseann signed wills in 2015 and 2017 which excluded one of the two Plaintiffs, Anton Jr., as a beneficiary—which was well before the 2021 Wills and the 2022 Will at issue in this case. (*See* Pa0512-Pa00514). If Plaintiffs acknowledged that ***any*** of the Word versions of Wills Mr. Zimmerman had produced could be admitted to probate, then they would be admitting that Anton Jr. would have no standing. In addition to this admission resulting in the dismissal of one of the Plaintiffs' claims, it would also be an acknowledgement that the Decedents knowingly and intentionally excluded one of the two Plaintiffs from the Wills—thereby undercutting Plaintiffs' theory of the case. As a result of this strategic decision, the evidence developed during the litigation focused on the 2006 Wills and whether those Wills could ultimately be probated. This is why the October 15, 2024 trial was focused on the issue of whether Frank and Roseann had revoked the 2006 Wills—which the trial court ultimately held

that they did. This conclusion was well supported by the testimony given by Michael Zimmerman at trial—which Plaintiffs apparently recognize, as they are not claiming that the trial court erred in concluding the 2006 Wills were revoked.

2. The Evidence Presented At Trial Demonstrated That Frank And Roseann Revoked The 2006 Wills And Therefore That Plaintiffs Could Not Obtain Their Requested Relief

Following Mr. Zimmerman's testimony, the trial court correctly concluded that the evidence presented at trial was sufficient to demonstrate that Frank and Roseann had executed a Will in 2007, which revoked all prior Wills, including the 2006 Wills. (*See* 4T 166:18-21 (concluding that there was "absolutely" "credible testimony that demonstrates clearly that a Will was executed in 2007 by both Frank and Roseann Carone"); 4T 167:5-6 ("The 2006 Will was absolutely clearly revoked.")). This conclusion was consistent with the applicable law governing revocation of wills.

N.J.S.A. 3B:3-13 identifies the circumstances under which a will is revoked. That statute states, in pertinent part:

> A will or any part thereof is revoked:
>
> a. By the execution of a subsequent will that revokes the previous will or part expressly or by inconsistency; or
>
> b. By the performance of a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will or part or if another individual performed the act in the testator's conscious presence and by the testator's direction. For purposes of this subsection, "revocatory act on the will" includes

> burning, tearing, canceling, obliterating or destroying the will or any part of it. A burning, tearing or canceling is a "revocatory act on the will," whether or not the burn, tear, or cancellation touched any of the words on the will.

N.J.S.A. 3B:3-13(a), (b).[6]

Once a will has been revoked, it "shall not be revived except by reexecution or by a duly executed codicil expressing an intention to revive it," with limited exceptions. *N.J.S.A.* 3B:3-15(a). Notably:

> If a subsequent will that wholly revoked a previous will is thereafter revoked by a revocatory act described in N.J.S.3B:3-13, the previous will remains revoked unless it is revived. The previous will is revived if there is ***clear and convincing evidence*** from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator intended the previous will to take effect as executed.

N.J.S.A. 3B:3-15(b) (emphasis added).

Mr. Zimmerman testified at length about the numerous Wills he prepared for Frank and Roseann over the years and provided specific testimony, which

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[6] New Jersey law case law also provides that "[a] will that cannot be found after the testatrix's death is presumed to be destroyed with the intent to revoke '[i]f such a will was last seen in the custody of the testatrix or she had access to it.'" *Matter of the Estate of Fone*, 2018 WL 1191203, at 1 (App. Div. Mar. 8, 2018) (quoting *In re Will of Davis*, 127 N.J. Eq. 55, 57 (E. & A. 1940)). Although Defendants argued in their summary judgment motion that the trial court could also apply a presumption that the 2006 Wills were revoked because they were last known to be in Frank's and Roseann's possession, the trial did not involve the consideration of this presumption and instead focused on evidence of revocation. (*See* 2T 13:6-14:8).

the trial court found to be credible, to support a conclusion that Frank and Roseann signed at least one Will after 2006 that served to revoke the 2006 Wills. (*See* 4T 166:2-21).

Critically, contrary to the implication in Plaintiffs' appellate brief, the finding by the trial court that Frank and Roseann signed at least one Will after 2006 does not equate to a finding that such subsequent Will could be admitted to probate. Indeed, for a court to conclude that a will has been revoked, it must simply conclude that a testator executed "a subsequent will that revokes the previous will or part expressly or by inconsistency." *N.J.S.A.* 3B:3-13(a). By contrast, a document that has not been executed with the requisite formalities under *N.J.S.A.* 3B:3-2—such as, for example, the Word versions of Wills Mr. Zimmerman produced—may be admitted to probate under *N.J.S.A.* 3B:3-3 ***only*** if the proponent proves "by clear and convincing evidence, that: (1) the decedent actually reviewed the document in question; and (2) thereafter gave his or her final assent to it." *In re Estate of Ehrlich*, 427 N.J. Super. 64, 72 (App. Div. 2012) (quoting *In re Probate of Will and Codicil of Macool*, 416 N.J. Super. 298, 310 (App. Div. 2010)). "Absent either one of these two elements, a trier of fact can only speculate as to whether the proposed writing accurately reflects the decedent's final testamentary wishes." *Id.*

Accordingly, the trial court's conclusion that Frank and Roseann revoked the 2006 Wills through the execution of a subsequent Will does not automatically result in Plaintiffs' ability to probate such subsequently executed Will; rather, Plaintiffs would need to prove by clear and convincing evidence that the Decedents reviewed the exact document in question and gave their final assent to that exact document—a standard that Plaintiffs did not even attempt to meet in this case.

Accordingly, the trial court properly concluded that because Frank and Roseann revoked the 2006 Wills, Plaintiffs lack standing to pursue their claims.

B. Plaintiffs Never Argued To The Trial Court That The 2011 Wills Should Be Probated And Therefore This Court Should Not Consider This Argument Raised For The First Time On Appeal

Incredibly, Plaintiffs contend in their appellate brief that "[t]he question for standing in this case is thus whether the 2011 Wills . . . can be probated in lieu of the challenged 2021 and 2022 Wills." (Pb20-21). ***However, the issue of whether the 2011 Wills could be probated was never presented to the trial court.***

It is axiomatic that this Court will not consider issues raised for the first time on appeal. *See North Haledon Fire Co. No. 1*, 425 N.J. at 631. Nonetheless, Plaintiffs apparently implore this Court to render a decision that Plaintiffs possess standing pursuant to Word versions of 2011 Wills purportedly

signed by Frank and Roseann because those Wills should be admitted to probate, irrespective of the fact that Plaintiffs never properly presented this issue to the trial court to consider. As discussed further below, the parties litigated this entire case based upon Plaintiffs' representation that they possessed standing to assert their claims because they were named in the 2006 Wills, which Wills Plaintiffs repeatedly confirmed they were seeking to probate in place of the 2021 Wills and the 2022 Will. At no time did Plaintiffs attempt to present evidence to the trial court that the Word versions of Wills Frank and Roseann purportedly signed in 2011 should be admitted to probate, nor did the trial court render a decision as to whether the 2011 Wills should or could be probated. Not surprisingly, Plaintiffs' appellate brief does not identify any citation to the record to demonstrate the trial court's consideration of this issue. (*See* Pb21-Pb23). Indeed, during oral argument on Defendants' summary judgment motion, the trial court directly stated to Plaintiffs' counsel that the parties had completed discovery, and explicitly asked Plaintiffs' counsel, "Is there another will that can be probated?" (2T 17:6-11). Plaintiffs again tried to waffle without providing a direct answer, and the trial court then asked, "Is there a will that you're aware of that meets the statutory requirements aside from the 2006 will?" (2T 17:1-18:2). In response, Plaintiffs' counsel stated, "The 2006 will meets the statutory requirements." (2T 18:3-4). Although Plaintiffs had an explicit

opportunity to make their current argument to the trial court regarding the supposed ability to probate the 2011 Will, Plaintiffs ***again*** made the strategic decision to focus on the 2006 Wills. They cannot now take positions before this Court that they have specifically disavowed to the trial court. Accordingly, this issue should not be considered for the first time on appeal.

C. Plaintiffs Presented No Evidence To The Trial Court To Demonstrate That The 2011 Word Versions Of Wills Produced In Discovery Can Be Admitted To Probate

Even were this Court to consider Plaintiffs' contention that they possess standing under the Word versions of Wills produced by Mr. Zimmerman, as set forth above, to probate an unsigned document as a will, a proponent of that Will must prove by clear and convincing evidence that the testator reviewed the document in question and gave his or her final assent to it, to ensure that the Court is only probating a document that reflects the testator's final testamentary wishes. *See In re Estate of Ehrlich*, 427 N.J. Super. at 72. Although Plaintiffs now claim that they possess standing, as they are named as beneficiaries in the Word version of a Will dated 2011, Plaintiffs identified no evidence in discovery to demonstrate that these 2011 Wills reflected Frank and Roseann's "final testamentary wishes"—because Plaintiffs made the strategic choice throughout the litigation to focus on probating only the 2006 Wills. Because Plaintiffs identified no evidence in discovery that would support a conclusion that the

2011 Word versions of Wills could be probated, they had no such evidence to present to the trial court at trial.

In fact, a review of Plaintiffs' questioning of Mr. Zimmerman at trial regarding the 2011 Wills and Plaintiffs' subsequent argument to the trial court demonstrate that, far from attempting to prove to the trial court that the Word versions of 2011 Wills should be probated, Plaintiffs actually sought to undercut Mr. Zimmerman's credibility and contradict Mr. Zimmerman's testimony that Frank and Roseann even signed Wills in 2011—let alone that the Word versions of Wills produced in discovery were copies of Wills that were actually signed. (*See, e.g.,* 4T 161:21-163:20) (Plaintiffs' argument in support of their motion for directed verdict at the end of trial refers to the Word versions of Wills produced from Mr. Zimmerman's file as "drafts" and argues that Mr. Zimmerman's testimony was not credible).

Moreover, Plaintiffs disingenuously argue to this Court that "the Trial Court found that the 2011 Wills were signed by Decedents, thereby revoking the 2006 Wills." (*See* Pb22 (citing 4T166:22-167:1)). However, as discussed above, Plaintiffs' statements to this Court incorrectly conflate the trial court's conclusion that there is evidence demonstrating that Frank and Roseann signed Wills after 2006—thereby revoking the 2006 Wills—with a conclusion that any of the Word versions of Wills dated after 2006 and produced in discovery can

actually be admitted to probate. The standards of analysis of these two issues are not identical. Indeed, the issue considered by the trial court in connection with the cited record citations was ***whether*** Frank and Roseann signed Wills after 2006—not the specific terms of any such Wills or whether any such Wills could or should be probated. This is why, in issuing its decision on Plaintiffs' motion for a directed verdict, the trial court concluded, with respect to 2011, that:

> [T]here is a 2011 Will, there's a letter from 2011 that forwards a copy of September 22nd, 2011 Will – Wills. ***Also indicia of a 2011 Will***. There's D-11 is handwritten notes that talked about what the intent was in the 2011 Wills.

(4T 166:22-167:1) (emphasis added). The trial court therefore found that there were indicia demonstrating that Frank and Roseann signed Wills in 2011; the trial court simply did ***not*** conclude that the Word versions of Wills produced in discovery were the exact Wills that Frank and Roseann signed in 2011.

Further, Plaintiffs made no effort to present evidence to the trial court that the 2011 Word versions of Wills produced in discovery could or should be admitted to probate. Rather, in moving for reconsideration of the trial court's decision denying Plaintiffs' motion for a directed verdict, Plaintiffs simply argued that they were beneficiaries under the 2011 Will:

> MR. MARINO: Understood, Your Honor, and in light of the fact that you're crediting [Mr. Zimmerman's] testimony

> that this 2007 Will was signed, plaintiffs are plainly beneficiaries on the document and they have standing.
>
> THE COURT: Except that that was revoked.
>
> MR. MARINO: By the 2011 Will under which they're beneficiaries.
>
> THE COURT: Which was revoked.
>
> MR. MARINO: By the 2013 Will. Under which they were beneficiaries.
>
> THE COURT: They don't have standing. I'm not reconsidering that decision.

(4T 168:13-24). Accordingly, Plaintiffs' argument to this Court that the 2011 Wills supposedly "meet the requirements for probate" (*see* Pb22) is based on factual contentions and a legal issue not considered by the trial court—because Plaintiffs never raised it. As a result, it is inappropriate for Plaintiffs to now raise this issue for the first time on appeal. *See North Haledon Fire Co. No. 1*, 425 N.J. at 631.

In light of the above, the trial court properly concluded that Plaintiffs lack standing to pursue their claims, as the 2006 Wills were revoked, and properly dismissed Plaintiffs' Consolidated Verified Complaint. Defendants therefore respectfully request that, for the reasons set forth above, this Court affirm the trial court's October 15 Order.

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO CONCLUDE THAT PLAINTIFFS WERE ESTOPPED FROM ARGUING AT TRIAL THAT ANY WILLS OTHER THAN THE 2006 WILLS SHOULD BE ADMITTED TO PROBATE

Contrary to Plaintiffs' argument otherwise, the trial court properly exercised its discretion to conclude that Plaintiffs were estopped from arguing at trial that any Wills other than the 2006 Wills should be probated, under the principles of either equitable or judicial estoppel. Plaintiffs' attempts to rewrite their course of conduct to suggest that the trial court abused its discretion by refusing to allow Plaintiffs to pick and choose alternate Wills they may intend to probate depending upon the success of their original litigation strategy should be rejected and seen for what it is: a disingenuous effort to backtrack from a failed legal position at the end of the litigation. The trial court properly applied the doctrine of estoppel—whether equitable or judicial—to preclude Plaintiffs from engaging in such gamesmanship, and the trial court's ruling on this issue should be affirmed.

A. Plaintiffs Were Properly Barred Under The Doctrine Of Equitable Estoppel From Relying On Any Wills Other Than The 2006 Wills As The Basis Of Their Alleged Standing To Assert Their Claims In This Action

Plaintiffs' appellate brief seems to suggest that equitable estoppel should not apply here because Defendants were not necessarily "blindsided" by Plaintiffs' last-ditch effort to move the bar concerning the relief they are seeking

in this action. (*See* Pb25). While Plaintiffs blithely claim that there was "no evidence" that Defendants "relied on anything Plaintiffs did or said" (Pb24), Plaintiffs completely gloss over their repeated representations regarding the relief they have claimed to be seeking in this action, which guided both parties' litigation strategy and the legal issues on which the parties focused. Therefore, to the extent that the trial court's estoppel ruling was guided by principles of equitable estoppel, the trial court did not abuse its discretion. The trial court's decision should therefore be affirmed.

New Jersey courts will apply the doctrine of equitable estoppel "where the interests of justice, morality and common fairness clearly dictate that course"—in other words, "[t]he doctrine of estoppel is invoked to do equity." *Davin, L.L.C. v. Daham*, 329 N.J. Super. 54, 67 (App. Div. 2000) (internal quotation omitted). Further, "[t]he doctrine of equitable estoppel prevents a party from repudiating prior conduct if such repudiation would not be responsive to the demands of justice and good conscience." *Id.* (internal quotation omitted). Critically, the doctrine of equitable estoppel "is designed to prevent the inequitable assertion or enforcement of claims or rights which might have existed, unless prevented by the estoppel." *Id.* "Equitable estoppel 'is designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment." *Lopez v. Patel*, 407 N.J. Super.

79, 91 (App. Div. 2009) (noting that "[o]ur courts have not looked favorably upon defendants who sit on their rights and then surprise the court and the plaintiffs at the eleventh hour with an affirmative defense that disposes of plaintiffs' claims") (quoting *Knorr v. Smeal*, 178 N.J. 169, 178 (2003)).

Although Plaintiffs now claim that they simply sought to raise a "run-of-the-mill alternative argument" that they "might have standing under a later will" (Pb26-Pb27), once Plaintiffs identified the 2006 Wills as the basis for their claimed relief in this action, those Wills became the focus of Defendants' defense. Indeed, Defendants' summary judgment motion focused primarily on Plaintiffs' desire to probate the 2006 Wills, and as set forth at length in Defendants' Statement of Undisputed Material Facts in support of their summary judgment motion, Defendants sought substantial discovery to prove that the 2006 Wills had been revoked—a conclusion with which the trial court later agreed. (*See* Pa0427-Pa0432). Had Plaintiffs indicated they were, in fact, seeking to probate a different Will, discovery obviously would have taken a different course, and dispositive motion practice and trial would have looked very different.

Plaintiffs do not explain how their apparent current position—essentially that they should be entitled to "throw something at the wall and see what sticks"—is in any way equitable, especially as Defendants specifically inquired

at the outset of this case as to Plaintiffs' legal theory and claimed relief and litigated the case pursuant to Plaintiffs' representations, including Plaintiffs' contention that every Will dated between 2006 and 2021 was a "draft" and not subject to probate. (*See, e.g.,* 3T 6:12-7:4). The trial court specifically rejected Plaintiffs' last-ditch effort at the pre-trial conference of this matter to claim that they should be permitted to represent that they are seeking to probate the 2006 Wills and then simply change their minds. (*See* 3T 7:5-10) ("I still stand by that because I don't think that you really have the ability to take a position that there's only one Will that you're seeking to have probated and then come back and say well, let's try all of them."). The trial court's conclusion that Plaintiffs should be estopped from deviating from their asserted intention of probating the 2006 Wills was therefore supported by the applicable case law regarding the application of equitable estoppel, which prohibits the inequitable assertion of claims. *See Davin, L.L.C.*, 329 N.J. Super. at 67.

Finally, contrary to Plaintiffs' suggestion otherwise, Plaintiffs' course of conduct throughout this litigation demonstrates that Plaintiffs did not file this action in an effort to vindicate Decedents' testamentary intent, and Plaintiffs' effort to change course at the conclusion of the litigation is consistent with Plaintiffs' apparent goal of prolonging unsupported litigation for litigation's sake. (*See, e.g.,* Pb28). Indeed, although not an issue ultimately considered by

the trial court in light of its ruling that Plaintiffs lack standing to proceed with their claims, it is Defendants' position that the overwhelming evidence disclosed in discovery in this matter demonstrates that, at the time they passed away, Decedents intended that Plaintiffs would be excluded from their estate plan. (*See, e.g.,* Pa0439-Pa0446). Plaintiffs' disingenuous contention in this appeal that the trial court's application of equitable estoppel is "particularly unpalatable" because it "overrides Decedents' clear intent to benefit their grandchildren" and "effectively immunized Defendants from the consequences of their undue influence over Decedents" is simply unsupported by any evidence in the record—as demonstrated by Plaintiffs' lack of citations to the record. (*See* Pb27-Pb28).[7]

In short, given Plaintiffs' course of conduct during this litigation in which Plaintiffs rebuked every Will dated between 2007 and 2021 in favor of probating the 2006 Wills, the trial court properly determined that Plaintiffs should then be estopped at trial from claiming that any Wills other than the 2006 Wills should be probated. The trial court's decision should therefore be affirmed.

[7] This statement by Plaintiffs is particularly troubling considering that two of the so called "draft" Wills (2015 and 2017) that Plaintiffs intentionally did not pursue explicitly disinherited Plaintiff Anton Jr.

B. The Principles Of Judicial Estoppel Also Bar Plaintiffs' Effort To Rely On Any Wills Other Than The 2006 Wills

Similarly, the trial court also properly exercised its discretion under the doctrine of judicial estoppel to reject Plaintiffs' effort to backtrack from their reliance on the 2006 Wills. For this reason, as well, the trial court's decision should be affirmed.

"The doctrine of judicial estoppel operates to 'bar a party to a legal proceeding from arguing a position inconsistent with one previously asserted.'" *Cummings v. Bahr*, 295 N.J. Super. 374, 385 (App. Div. 1996) (quoting *N.M. v. J.G.*, 255 N.J. Super. 423, 429 (App. Div. 1992)). "Judicial estoppel looks to the connection between the litigant and the judicial system while equitable estoppel focuses on the relationship between the parties to the prior litigation." *Id.* (quoting *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir.), *cert. denied*, 488 U.S. 967 (1988)). "Although judicial estoppel most often arises when a party takes inconsistent positions in different litigation . . . it can be equally applicable where a litigant asserts inconsistent legal positions in different proceedings in the same litigation." *Id.* Notably, courts have held that the doctrine of judicial estoppel is "designed to prevent litigants from playing fast and loose with the courts." *Id.* at 387.

In furtherance of this goal, the doctrine of judicial estoppel does not bar parties from pleading in the alternative; however, it ***does*** apply to bar a party

from asserting a position contrary to one which the party succeeded in maintaining. For this reason, "[i]f a court has based a final decision, even in part, on a party's assertion, that same party is thereafter precluded from asserting a contradictory position." *Id.* at 387-388. This is because "[c]ourts have the right to demand precision from counsel when making applications to the court," and "[a] court should not be put in the position of hearing a new and contradictory theory" on a later application. *Id.* at 388.

Contrary to Plaintiffs' unsupported argument otherwise, the trial court was well within its discretion in concluding that Plaintiffs could not, at the eleventh hour, claim that any Wills other than the 2006 Wills should be submitted to probate in place of the 2021 and 2022 Wills. At the outset of this case, Plaintiffs were directed to identify Wills in which they were named as beneficiaries that they intended to seek to probate in the event the 2021 Wills and the 2022 Will were invalidated, and the trial court granted Plaintiffs limited discovery to identify such Wills. (*See* Pa0286). In response to this Order, Plaintiffs identified the 2006 Wills, and amended their pleading to include allegations relating to and to attach the 2006 Wills. (Pa0290). Plaintiffs thereafter litigated the entire case under the theory that the 2006 Wills should be probated. The trial court therefore properly exercised its discretion to conclude that Plaintiffs could not simply shift gears on the eve of trial when it

became apparent that the trial court may agree with Defendants' position that the 2006 Wills had been revoked. Plaintiffs had previously succeeded in arguing that, if the 2006 Wills could be probated, Plaintiffs possessed standing; Plaintiffs could not then retract that legal position to claim at the eleventh hour that other Wills Plaintiffs had repeatedly disclaimed should instead be probated. *See Cummings*, 295 N.J. Super. at 388.

Accordingly, Defendants respectfully submit that the trial court properly exercised its discretion, and its conclusion that Plaintiffs were estopped from relying on any Wills other than the 2006 Wills as the basis of their standing should be affirmed.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court affirm the trial court's October 15, 2024 Order dismissing Plaintiffs' claims in this matter.

Respectfully submitted,

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By */s/ Adam K. Derman* _____
ADAM K. DERMAN

Dated: March 31, 2025

IN THE MATTER OF THE ESTATE OF FRANK D. CARONE	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000858-24 Submission Date: April 14, 2025 CIVIL ACTION On Appeal From a Final Judgment of the Superior Court of New Jersey, Passaic County, Chancery Division – Probate Part dated October 15, 2024 Sat below: Honorable Frank Covello, P.J. Ch. Trial Court Docket No. P228307

REPLY BRIEF OF APPELLANTS ANTON MAYER AND FRANCISCO MAYER

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PRELIMINARY STATEMENT

The first issue before this Court is whether Plaintiffs are the beneficiaries of a will that could be probated in lieu of the challenged 2021 and 2022 Wills, such that they have standing to maintain an undue influence action. The answer is yes—at a minimum, Plaintiffs have standing under the 2011 Wills. The second issue is whether the Trial Court abused its discretion in applying estoppel to nonetheless bar Plaintiffs from asserting standing under the 2011 Wills. Again, the answer is yes—the Trial Court did not articulate any basis for its estoppel ruling and the record does not supply one.

Plaintiffs have standing under the 2011 Wills because Plaintiffs are beneficiaries of the 2011 Wills and the 2011 Wills could be admitted to probate. Decedents' estate planning attorney and the scrivener of those Wills testified at the limited-issue trial that he reviewed the 2011 Wills with Decedents and they executed those Wills, which indisputably identify Plaintiffs as beneficiaries. (4T30:2-14, 56:8-59:15.) The Trial Court credited that testimony. (4T166:22-167:1.) The Trial Court also did not find that any of the subsequent Draft Wills were executed (4T167:2-6), and thus the 2011 Wills were not revoked except by the challenged 2021 and 2022 Wills. Thus, the 2011 Wills could be admitted to probate upon a finding of undue influence under N.J.S.A. 3B:3-3. Indeed, even if the Trial Court subsequently determined that later Draft Wills were reviewed

and executed by Decedents, those wills could then be admitted to probate, and all of them name at least Francisco (the 2013 and 2014 Wills also name Anton Jr.) as a beneficiary. Thus, at least one of Plaintiffs has standing in any possible circumstance, and both Plaintiffs have standing under the 2011 Wills.

To deprive Plaintiffs of standing under the 2011 Wills, Defendants first argue that Plaintiffs never raised this argument before the Trial Court. This position is plainly controverted by the record. Defendants next argue that the Trial Court did not actually find the 2011 Wills naming Plaintiffs were executed by Decedents, just that Decedents executed some unspecified wills that year that cannot be probated because no one knows what they say. (Db37.) This is contrary to the Trial Court's ruling and Mr. Zimmerman's testimony. It is also at odds with the statute on revocation.

Lastly, Defendants ask this Court to adopt an impossible requirement for a will to be admissible to probate under N.J.S.A. 3B:3-3. Defendants contend the 2011 Wills (or any of the Draft Wills) could never be admitted to probate, because Plaintiffs cannot prove these Wills "reflected Decedents' intent at the time of their passing." (Db21; see also Db35.) This supposed requirement does not appear in N.J.S.A. 3B:3-3 or the case law construing it. If Plaintiffs had to prove, just to satisfy standing, that the 2011 Wills reflected Decedents' intent at the time they passed away, then the 2021 and 2022 Wills would necessarily be

invalid as contrary to that intent and the "threshold" standing issue would be case-dispositive. This is clearly an incorrect view of standing.

Because Plaintiffs have standing under the 2011 Wills, the next question is whether the Trial Court abused its discretion in applying estoppel to dismiss this case. It did. The Trial Court never explained the basis for its estoppel ruling on the record or even the form of estoppel it was relying upon, *i.e.*, judicial or equitable estoppel. This, in itself, is a reversible abuse of discretion.

Defendants' attempt to justify the estoppel ruling falls flat. The notion that Plaintiffs "litigated the entire case under the theory that the 2006 Wills should be probated" (Db45) is not supported by the record. Defendants also cannot establish reasonable reliance (necessary for equitable estoppel) or that a miscarriage of justice would occur if Plaintiffs were permitted to pursue their case (necessary for judicial estoppel).

LEGAL ARGUMENT

I. Plaintiffs Have Standing Under the 2011 Wills.

Defendants argue Plaintiffs lack standing under the 2011 Wills because: (1) Plaintiffs never raised the argument that they have standing under the 2011 Wills below and thus cannot do so on appeal; and (2) there are no circumstances under which the 2011 Wills could be admitted to probate under N.J.S.A. 3B:3-3. Neither of these arguments has merit, for the reasons discussed below.

A. Plaintiffs Raised this Argument Below.

An issue is preserved for appeal where the trial court is "alerted to the 'basic problem' and [has] the opportunity to consciously rule upon it." State v. Andujar, 462 N.J. Super. 537, 550 (App. Div. 2020) (quoting State v. Robinson, 200 N.J. 1, 19 (2009)), aff'd as modified, 247 N.J. 275 (2021). That requirement is clearly satisfied here.

It was the Trial Court that recognized at the outset of this case that Plaintiffs could have standing under the Draft Wills in addition to the 2006 Wills: "There's a 2006 will and there are potentially wills that followed 2006 that . . . there's some evidence . . . that demonstrate there [were] some other wills that were signed. And from what I understand the facts to be, the grandchildren were included as beneficiaries under those wills up until 2015." (Pa1237 at 24:25-25:23)

When Defendants moved for summary judgment on the basis that the 2006 Wills had been revoked, depriving Plaintiffs of standing, Plaintiffs argued—consistent with the Trial Court's motion to dismiss determination—that both Plaintiffs (or at least Francisco) had standing under the Draft Wills as well. This argument was reiterated *numerous* times by Plaintiffs' counsel throughout the hearing on the parties' summary judgment motions. (E.g., 1T8:7-9:25, 12:22-13:5; 2T8:9-25, 16:19-25.) A couple of examples suffice:

- [Defendants] can't say on the one hand the 2006 will can't be probated because it was revoked by later wills, and on the other hand say well, Court, don't worry about those later wills. All of the wills benefit the Plaintiffs. So [on] the question of whether there is standing here? The answer is yes. . . . They are aggrieved under any of these prior wills. (1T8:7-9:25.)

- Plaintiff Anton Mayer is a beneficiary under every will that's been put forth in discovery up until 2015. Plaintiff Francisco Mayer is a beneficiary under every single will up until the wills that are in dispute, which is 2021 and 2022. So under no circumstances should Francisco Mayer not have standing to pursue this. (2T8:9-25.)

Plaintiffs also advanced this argument in the letter they submitted to the Court in advance of the September 16, 2024 pre-trial conference (Pa1233-1234) and at that conference itself (3T5:5-12, 7:20-8:6). And, after the Trial Court ruled at the limited-issue trial, Plaintiffs raised it *again*. (4T167:8-169:9.) Clearly, Plaintiffs alerted the Court to the "problem"—*i.e.*, that they would have standing under any pre-2021 will proffered by either party—and the Court had multiple opportunities to rule on this issue and adopt Plaintiffs' position.

To the extent Defendants are arguing that Plaintiffs did not properly raise the issue because they never rested their standing exclusively on the 2011 Wills—*i.e.*, they never asserted the 2011 Wills were the *only* wills that gave them standing—this argument misapprehends the law of standing. As noted in Plaintiffs' opening brief, a party "may put forth multiple theories of standing for a claim, only one of which must be sufficient for the claim to advance." Nat'l Fed'n of the Blind v. U.S. Abilityone Comm'n, 421 F. Supp. 3d 102, 116 (D.

Md. 2019); accord Safari Club Int'l v. Jewell, 842 F.3d 1280, 1287 (D.C. Cir. 2016) (considering alternative theories of standing). Contrary to Defendants' suggestion, Plaintiffs had no obligation to elect a single theory of standing to the exclusion of all others. Such an obligation would be at odds with the cases cited above and New Jersey's liberal standing rules. See Jen Elec., Inc. v. Cnty. of Essex, 197 N.J. 627, 645 (2009) (describing liberal treatment of standing).

B. The 2011 Wills Could Be Admitted to Probate.

As explained in Plaintiffs' opening brief, the 2011 Wills could be admitted to probate because Mr. Zimmerman testified—and the Court agreed—that Decedents reviewed and executed the 2011 Wills. (4T30:2-14, 56:8-59:15, 166:22-167:1.) And, since the Court did not find any of the later Draft Wills were executed (4T167:2-6), the 2011 Wills have not been revoked. Thus, the 2011 Wills can be admitted to probate under N.J.S.A. 3B:3-3. In re Prob. of Will & Codicil of Macool, 416 N.J. Super. 298, 310 (App. Div. 2010); see also In re Est. of Ehrlich, 427 N.J. Super. 64, 72 (App. Div. 2012) (emphasizing liberal approach to N.J.S.A. 3B:3-3). Nonetheless, Defendants argue that the 2011 Wills could never be admitted to probate for two reasons.

First, Defendants claim that while "[t]he trial court therefore found that there were indicia demonstrating that Frank and Roseann signed Wills in 2011; the trial court simply did ***not*** conclude that the Word versions of Wills produced

in discovery were the exact Wills that Frank and Roseann signed in 2011." (Db37 (emphasis in original).) According to Defendants, Decedents did not sign the 2011 Wills, only *some* wills in 2011. (Id.) This argument ignores Mr. Zimmerman's testimony and the Court's findings based on that testimony. Mr. Zimmerman testified that the actual 2011 Wills were executed by Decedents:

> Q. As you sit here today, is there any doubt in your mind that the Wills in the same or similar form to J-2 and J-3 [the 2011 Wills] were signed by Frank and Roseann Carone?
>
> A. There's no doubt in my mind that *these* Wills were signed by Frank and Roseann Carone.
>
> Q. And do these Wills contain a clause revoking all prior Wills?
>
> A. The first three lines of the Will contain that clause of each Will.

(4T58:8-18 (emphasis added).) In finding that the 2006 Wills were revoked, the Trial Court credited this testimony. (4T166:2-167:1.) Indeed, Defendants seem to acknowledge and rely upon that credibility determination at other points in their brief. (Db19-20, 25, 30-32.) Defendants' suggestion that Mr. Zimmerman's testimony on this point was inaccurate or not credible is bizarre, given they are disavowing the testimony of the individual they claim will be their key witness on undue influence. (See Db10.)[1]

[1] The strangeness of Defendants' position—that Mr. Zimmerman's credibility ends precisely when it no longer helps Defendants—underscores the no-win situation Defendants have sought to foist on Plaintiffs throughout this case.

Moreover, the argument that the Trial Court found only that some wills were signed in 2011 and not that the actual 2011 Wills were signed is unsupportable as a matter of law. Under the statute governing revocation of wills, a prior will is not automatically revoked any time a new will is executed; rather, there must be an express or implied revocation by the new will. N.J.S.A. 3B:3-13(a). If, as Defendants suggest, all the Trial Court found were that some mystery wills were signed in 2011, this would be insufficient to establish the 2006 Wills (or any prior wills) were revoked. See id. The only logical interpretation of the Trial Court's ruling is that the Trial Court found the actual 2011 Wills were executed, as these wills contain a clear revocation clause. (Pa29, 57; 4T58:15-18.)

To the extent Defendants are suggesting that the 2011 Wills could revoke prior wills but still not qualify as admissible to probate under N.J.S.A. 3B:3-3, this is incorrect. That statute governs both writings purporting to be wills and

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Defendants' argument that the 2011 Wills were not actually signed (just that some unspecified wills in 2011 were) makes clear what would have happened if Plaintiffs had tried to assert standing under any of the Draft Wills instead of the 2006 Wills at the outset of the case. Defendants would have taken the position that there is no proof that any of the Draft Wills were signed. In essence, Defendants are using the various pre-2021 Wills to play a game of three (or more accurately seven)-card monte in which Plaintiffs always lose. Defendants' flexible position regarding the Draft Wills and Mr. Zimmerman's testimony on them also undercuts the force of their estoppel argument, discussed below.

writings purporting to revoke prior wills. N.J.S.A. 3B:3-3. Thus, a writing that is sufficient to revoke is sufficient for probate.

Second, Defendants claim that the 2011 Wills, even if executed, cannot be admitted to probate because Plaintiffs do not have evidence that the 2011 Wills "represented the Decedents' intent at the time of their passing." (Db6; see also Db21, 35.) In making this argument, Defendants seek to graft a requirement onto N.J.S.A. 3B:3-3 that does not exist. The case law construing N.J.S.A. 3B:3-3 is clear. For a document that does not meet the formalities of N.J.S.A. 3B:3-2 to be treated as though formally executed—*i.e.*, to be admissible to probate—the proponent must demonstrate: "(1) the decedent actually reviewed the document in question; and (2) thereafter gave his or her final assent to it." In re Macool, 416 N.J. Super. at 310. When these requirements are met, a document purporting to be a will is treated as though executed in accordance with N.J.S.A. 3B:3-2 and may be admitted to probate. N.J.S.A. 3B:3-3.

In arguing that Plaintiffs must prove Decedents intended the 2011 Wills to be their wills at the time they passed away just to have standing, Defendants seek to fundamentally alter the nature of the standing inquiry in undue influence cases. Standing is a *threshold* requirement. N.J. Dep't of Env't Prot. v. Exxon Mobil Corp., 453 N.J. Super. 272, 291 (App. Div. 2018). If Plaintiffs had to establish Decedents' intent when they died, the standing inquiry would be

dispositive of the entire case. If Decedents' intent at the time they died was entirely consistent with the 2011 Wills, undue influence would be established, because the 2021 and 2022 Wills would necessarily be inconsistent with Decedents' testamentary intent. This is not what the standing requirement contemplates. Plaintiffs have identified the 2011 Wills, which benefit Plaintiffs and could be admitted to probate. Therefore, Plaintiffs have standing. Decedents' intent when they died and which of Decedents' wills should be admitted to probate is the ultimate issue for a plenary trial on undue influence, not a standing question.

II. Estoppel Does Not Deprive Plaintiffs of Standing.

Plaintiffs have standing under the 2011 Wills. They should not have lost that standing as a result of either equitable estoppel or judicial estoppel, because the elements of either form of estoppel are not satisfied here. Indeed, the record does not reflect that the Trial Court ever considered the factors applicable to equitable or judicial estoppel, which is itself an abuse of discretion. Satz v. Satz, 476 N.J. Super. 536, 549 (App. Div. 2023), cert. denied, 256 N.J. 352 (2024).

Defendants' efforts to bolster the Trial Court's non-existent findings on estoppel are insufficient. The thrust of Defendants' estoppel argument is that Plaintiffs built their entire case around the 2006 Wills only to suddenly change course on standing, to Defendants' claimed surprise. (E.g., Db1, 14-15, 24-25,

29, 34, 39-40.) In other words, the supposed conduct by Plaintiffs forming the predicate for application of either judicial estoppel or equitable estoppel is that Plaintiffs "litigated the entire case under the theory that the 2006 Wills should be probated." (Db45.) The record does not support this.

Defendants rely principally on their *own* efforts to take discovery concerning the 2006 Wills. (Db14-15.) That Defendants focused some of their discovery on the 2006 Wills does not support that Plaintiffs "litigated the entire case" over the 2006 Wills. To the contrary, Plaintiffs principally focused on the extraordinarily suspicious circumstances surrounding the execution of the 2021 and 2022 Wills. (See Pb16-19.) Standing was not a focus of Plaintiffs' litigation strategy, given that the issue had ostensibly been decided in connection with the motion to dismiss. (Pa1236-1237.) When standing became salient again at the summary judgment stage, Plaintiffs argued they had standing under the 2006 Wills or the Draft Wills. (See pp. 4-5, supra). Plaintiffs did not "litigate[] the entire case under the theory of that the 2006 Wills should be probated." (Db45.)

Even if Defendants could somehow overcome this fundamental misreading of the record, Defendants' estoppel argument suffers from other flaws. Specifically, Defendants cannot demonstrate the necessary element of reasonable reliance for equitable estoppel, nor that a miscarriage of justice

would result from allowing Plaintiffs to proceed with their case, as is necessary for a finding of judicial estoppel.

A. The Absence of Reasonable Reliance Defeats Any Claim of Equitable Estoppel.

Reasonable reliance is an essential component of equitable estoppel. Lesniewski v. W.B. Furze Corp., 308 N.J. Super. 270, 286 (App. Div. 1998); Foley Mach. Co. v. Amland Contractors, Inc., 209 N.J. Super. 70, 75-76 (App. Div. 1986) ("The reliance must be reasonable and justifiable."). Such reasonable reliance is absent here because—even crediting Defendants' claim that Plaintiffs litigated the case entirely on the basis of the 2006 Wills—Defendants knew that Plaintiffs might have standing under the Draft Wills, including the 2011 Wills. Defendants do not dispute that at Francisco's deposition, their counsel expressly referred to the possibility that the 2017 Draft Wills could be probated, as detailed in Plaintiffs' opening brief. (Pb9 (quoting exchange); Pa1240-Pa1241 at 176:18-177:10; Db15 n.5.) Defendants half-heartedly argue that they were seeking "confirmation that the only Wills Plaintiffs were seeking to probate were the 2006 Wills. . . ." (Db15 n.5.) As the transcript makes clear, however, that line of questioning was about whether Francisco would share any inheritance with his brother if the 2017 Draft Wills were admitted to probate—it had nothing to do with the 2006 Wills. (Pb9; Pa1240-Pa1241 at 176:18-177:10.) Indeed, even on appeal, Defendants concede

that they were "not *necessarily* 'blindsided'" by Plaintiffs' raising of alternate standing arguments. (Db39 (emphasis added).) Clearly, there was no reliance.

Moreover, any claimed reliance by Defendants was patently unreasonable. Defendants claim that "once Plaintiffs identified the 2006 Willl as the basis for their claimed relief in this action, those Wills became the focus of Defendants' defense. Indeed, Defendants' summary judgment motion focused primarily on Plaintiffs' desire to probate the 2006 Wills . . . ." (Db41.) In view of the law above that a party may pursue multiple theories of standing, which is what Plaintiffs did (see pp. 4-5, supra), this strategy was misguided and based on the erroneous notion that Plaintiffs had to "elect" a theory of standing. (E.g., Db14-15.)[2] After Plaintiffs argued on summary judgment that they could assert standing under the Draft Wills too (assuming some or all of them were executed), Defendants insisted on application of estoppel. (See 1T6:25-7:12.) But, estoppel does not save a party from a tactical decision based on a

[2] Notably, Plaintiffs identified the 2006 Wills in opposition to the motion to dismiss and referred to those wills in their Amended Complaint because they are the only wills bearing Decedents' signatures and because Mr. Zimmerman's deposition testimony that the other Draft Wills were signed was vague and unconvincing. The Trial Court acknowledged at the limited-issue trial that there were inconsistencies between Mr. Zimmerman's deposition and trial testimony, principally stemming from the fact that at the limited-issue trial, Mr. Zimmerman had the benefit of documents that had not been produced at the motion to dismiss stage, when he was first deposed. (4T167:23-168:12.) Plaintiffs should not be punished by estoppel under these circumstances.

misapprehension of law. See Palatine I v. Plan. Bd. of Twp. of Montville, 133 N.J. 546, 563-64 (1993) (holding reliance based on misapprehension of protections afforded by statute was not justified or reasonable).

B. There Is No Basis for Judicial Estoppel.

Defendants point to no evidence in the record suggesting that the Trial Court actually invoked the doctrine of judicial estoppel. Given the recognized harsh results of judicial estoppel and this Court's repeated exhortations that it should be reserved for the most egregious of circumstances, e.g., Adams v. Yang, 475 N.J. Super. 1, 8-9 (App. Div. 2023) (citing cases), this Court should not affirm a ruling of judicial estoppel that is unexplained on the record. Satz, 476 N.J. Super. at 549. There is no indication the Trial Court even considered any of the factors implicated in a ruling of judicial estoppel—*e.g.*, whether a miscarriage of justice resulted or whether Plaintiff played fast and loose with the Court, see Adams, 475 N.J. Super at 8-9—and these factors do not support that judicial estoppel should apply.

Most significantly, a miscarriage of justice will not result from trying the merits of Plaintiffs' undue influence claims. To the contrary, the miscarriage of justice would be letting Defendants' undue influence go unexamined. In their opening brief, Plaintiffs set forth the extraordinarily compelling circumstances supporting their claim of undue influence. (Pb16-19.) Indeed, the undue

influence claim was strong enough that the Court shifted the burden to Defendants to disprove undue influence by clear and convincing evidence. (1T21:9-11; 3T3:22-4:6.) The fact that Defendants ask this Court to simply ignore the facts of this case in deciding this appeal is telling on the strength of Plaintiffs' undue influence claims. (Db10 n.4.)[3] Application of judicial estoppel is unwarranted and, if uncorrected, will result in presumptively invalid wills that are the product of undue influence being admitted to probate.

CONCLUSION

Because Plaintiffs have standing under the 2011 Wills (and at least Francisco would have standing under any of the Draft Wills), the Trial Court's dismissal of this action on standing grounds should be reversed and the case remanded for a plenary trial on undue influence.

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By: _____
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[3] Indeed, while Plaintiffs described aspects of the underlying facts of this case as "tangential" to the principally legal issues presented by this appeal, they are certainly relevant to the miscarriage of justice issue.