SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-001529-23

MICHAEL MILLER AND JANICE MILLER, Plaintiffs-Respondents, vs. ERNEST ZAGRANICHNY AND YELENA KONONCHUK, Defendants-Appellants.	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY ATLANTIC COUNTY CHANCERY DIVISION DOCKET NO.: ATL-C-45-21 Sat below: Honorable M. Susan Sheppard, P.J.Ch.

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS ERNEST ZAGRANICHNY AND YELENA KONONCHUK

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I. Preliminary Statement

The trial court erred in granting summary judgment for Plaintiffs in this case. The trial court erroneously concluded the parties agreed there were no genuine issues of material fact, when in fact Defendant had directed the Court to both an expert opinion and factual certifications directly challenging the reasonableness of the purported "notice." Even if the matter were "ripe" for summary judgment, the court erred in ordering reformation of five recorded documents, including a recorded subdivision, based upon an entirely new legal theory that the mere existence of a prior subdivision is inquiry notice which compels a buyer to recalculate his lot frontage using pre-subdivision deeds, tax maps of adjacent parcels, and private agreements not found in the public record.

Plaintiffs Michael and Janice Miller ("Miller") and Defendants Ernest Zagranichny and Yelena Kononchuk ("Zagranichny") own adjacent, beach-block properties in Brigantine, New Jersey. Their block contains three lots, beachfront Lot 1, not a party to this case; middle Lot 2, owned by Miller, and; corner Lot 3, owned by Zagranichny. Prior to 2015, Brian Musto ("Musto") owned Lots 2 and 3. In September 2015, Musto sold middle Lot 2 to Miller and applied to subdivide corner Lot 3 into two lots. The subdivision plans and application showed proposed Lots 2 and 3 as having a combined 186.3' of frontage.

Miller objected to Musto's application, as Miller did not want a fourth house built on the block. The objection was settled by a private, unrecorded agreement whereby Musto transferred a portion of Lot 3 to Miller. This was accomplished through an approved subdivision with a recorded subdivision map and confirming deeds, each of which show the new, smaller Lot 3 as 66.3' wide.

Zagranichny purchased new Lot 3 from Musto in March 2017. There is NO deed or map anywhere in the record which shows Lot 3 to be 65' wide at any time. Every document of record related to the subdivision shows Lot 3 as 66.3' wide. Unbeknownst to Zagranichny, the Musto-Miller agreement intended for Musto to transfer enough land to Miller so that Miller could subdivide Lot 2 by-right, which would require 120', but Miller's new lot was actually only 118.7' wide. Miller wants to cure his error by taking 1.3' of frontage from Zagranichny.

The parties agree on the determinative issue in this case. In order to take Zagranichny's land, Miller must prove Zagranichny knew or should have known of the 2015 Musto-Miller error. Miller's problem, of course, is he is completely unable to prove Zagranichny had notice, constructive or otherwise, that his lot was different from the recorded subdivision map, the confirmatory deeds for the subdivision, his deed from Musto and the survey he obtained for closing.

The fact that notice (actual, constructive or otherwise) does not exist in the record is self-proving. The Court need only look at the very long list of

people and professionals, including the Millers and Musto themselves, to see it is unreasonable and inappropriate to conclude, as a matter of law, that Zagranichny had "inquiry" or "record" notice that his lot was not 66.3' wide.

The trial court erred in declaring that since there had been a subdivision, as a matter of law, the buyer could not rely on the recorded subdivision, four deeds and his own survey, but instead (unlike the two surveyors, five attorneys, numerous municipal officials and the Millers themselves), he should have (1) noticed a pre-subdivision deed showed former Lot 3 as 105' wide, (2) examined a microscopic tax map inserted in the recorded subdivision map showing former Lot 2 as 80' wide, (3) added the width of old Lots 2 and 3 together to determine they were a combined 185' wide before the subdivision, (4) somehow known Lot 2 was supposed to be 120' wide based on the unrecorded private agreement and (5) concluded new Lot 3 was "clearly and obviously" 65' and not 66.3' as indicated on the two most recent surveys.

This tortured line of reasoning is not "notice" in any case cited by any party. The burden placed on Zagranichny as a "searcher" is not reasonable, and the reasoning behind it essentially calls upon equity to assist the party who was in the best position to avoid the error in the first place. Judgment should be reversed and entered in favor of Zagranichny.

II. Statement of Facts

The Millers purchased Lot 2, Block 1801 from Brian Musto by deed dated September 29, 2015. 107a. Miller then learned Musto had applied to subdivide adjacent Lot 3, which was 105' wide, into two lots. 594a. Miller objected to Musto's subdivision application (which would have created four homes on their block, just as Miller will do if given Zagranichny's land). 601a-602a. In order to "settle" the objection before the planning board, Musto and Miller entered into a private, unrecorded agreement which involved subdividing Musto's adjacent Lot 3, transferring a portion of Lot 3 to Miller and attaching it to Miller's Lot 2, thereby leaving Lot 3 with 66.3' of frontage and Lot 2 with 120' of frontage. 116a; 151a; 601a.

Paragraph 1 of the Musto-Miller private Agreement of Sale (the "Agreement") makes clear Musto and the Miller knew, even at the time of its creation, that the new, enlarged Lot 2 might not actually be 120' wide. The Agreement states, "in the event additional land is required as a result of minor surveying discrepancies, Seller agrees to convey. . . the exact amount of land needed to ensure that Buyers. . . purchase 120'. . ." 116a. Despite this foreshadowing of potential "surveying discrepancies," Miller purchased a portion of Lot 3 and filed a Deed of Consolidation such that a portion of Lot 3 was subsumed into Lot 2, consistent with an approved, recorded subdivision

map. 116a-182a. Each of these documents show Lot 3 as having 66.3' of frontage.

The Zagranichny family purchased Lot 3 from Musto in March 2017. 179a. At closing, Zagranichny and his counsel were presented with (1) the approved, recorded 2015 subdivision map, prepared by a professional surveyor and reviewed and approved by land use board professionals; (2) the recorded Confirmatory Deed establishing Lot 3, and; (3) a professionally prepared survey obtained for Zagranichny's purchase of Lot 3, all of which identify Lot 3 as having 66.3' of frontage. 562a. There was no deed of record, either before or after the subdivision, in which Lot 3 was 65' wide, and no deed following the subdivision listing anything other than 66.3' wide. 562a.

A physical inspection of Lot 3 at the time of closing would simply have confirmed Lot 3 was 66.3' wide because Miller and Musto had installed a fence at the 66.3' line, not the 65' line. 562a.

No reasonable person or attorney would rely on a tax map measurement of lot width where a modern survey and metes and bound description provides otherwise. 562a. In fact, tax maps are notoriously inaccurate for metes and bounds measurements. 562a. There is no reason to believe a modern survey and metes and bounds description, prepared for closing and based upon an approved subdivision, would be inaccurate or less accurate than any older

attempt to measure the size of a lot. 562a. Zagranichny's title company, having a "gold standard" current survey, would not have identified a small deviation in lot size or width buried in the municipal files of older metes and bounds descriptions because lot dimensions are not a matter of title, but of survey. 562a.

For these reasons, a reasonably prudent buyer, whether represented or not, would not have constructive or inquiry notice that Lot 3 was anything other than 66.3' wide at its frontage. 562a.

III. Procedural History

On August 6, 2021, Miller filed the initial Complaint in this matter requesting quiet title to the disputed tract and reform five recorded instruments, alleging ejectment, trespass and nuisance against Zagranichny and requesting a declaratory judgment. 1a. Zagranichny filed an Answer, Affirmative Defenses and Counterclaim on March 9, 2022. 188a. Defendants' pleadings were subsequently amended and an amended responsive pleading was filed. 213a, 237a.

On February 27, 2023, Miller filed a Motion for Partial Summary Judgment asking the trial court to rule Zagranichny was not a bona fide purchaser as a matter of law. 251a. Zagranichny opposed the Motion and filed a Cross-Motion for Partial Summary Judgment, supported by the expert report of Avery Teitler, Esquire, who concluded, based upon his experience, the

property record and the sale transaction, that a reasonably prudent buyer would not have constructive or inquiry notice that Lot 3 was less than 66.3' wide. 561a-562a. Miller opposed the Cross-Motion but did not serve a responsive expert report. 684a.

On June 23, 2023, following oral argument, the trial court entered summary judgment in favor of Miller, including reformation of five recorded instruments designating Zagranichny's lot as 66.3' wide. 700a. All remaining claims were transferred to the Law Division. 722a. As set forth below, the trial court erred in concluding there were no genuine issues of material fact precluding judgment for Miller, (709a), and erred in finding Zagranichny was not a bona fide purchaser without knowledge of the Miller-Musto "errors."

IV. Legal Argument

A. Standard of Review (715a)

New Jersey Court Rule 4:46-2 provides summary judgment is only appropriate when, "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." A genuine issue of material fact is defined as, "[h]aving substance; not imaginary, unreal, or apparent only;

true, solid, real," or, "having real existence. . . firmly based, a substantial argument." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 529 (1995).

In Brill, the New Jersey Supreme Court also explained that when considering summary judgment motions, trial courts are required to engage in the same type of analysis as required by Rule 4:37-2(b) governing directed verdicts:

> If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46–2. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment.

Id. at 540 (citations omitted). The Supreme Court continued, "[t]he thrust of today's decision is to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Id. at 541.

Although Courts should view the "evidential materials. . . in the light most favorable to the non-moving party," bare allegations without factual support in the record cannot defeat a meritorious summary judgment motion. Baran v. Clouse Trucking, Inc., 225 N.J. Super. 230, 234 (App. Div. 1988). Thus, once the movant has demonstrated that there is no genuine issue of fact, the burden of producing evidence of such an issue shifts to the non-movant, who must show controverting facts, not merely self-serving representations or allegations in

pleadings without evidentiary support. See Triffin v. Somerset Valley Bank, 343 N.J. Super. 73, 87 (App. Div. 2001).

The movant bears the burden to exclude any reasonable doubt as to an existence of a genuine issue of material fact. Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74 (1954). All inferences are drawn against the moving party and in favor of the opponent of the motion. Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994). "The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated." Judson, 17 N.J. at 74. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). "Credibility determinations will continue to be made by a jury and not the judge." Id. If there is the slightest doubt as to the existence of a material issue of fact, the litigant has a right to trial and the motion should be denied. Ruvolo v. American Cas. Co., 39 N.J. 490, 499 (1963). Where the movant bears the burden of proof, its initial summary judgment burden is somewhat higher in that it must demonstrate the record contains evidence satisfying the burden and the evidence is so powerful that no reasonable jury would be free to disbelieve it. Id. (citations omitted).

B. Disputed Issues of Fact Precluded Entry of Summary Judgment in Favor of Plaintiffs (709a; 717a-718a)

The trial court erroneously believed the parties conceded there were no disputed issues of fact as to Plaintiffs' Motion. 709a. This was not the case, as there were material issues of fact as to whether Zagranichny was a bona fide purchaser without notice of the error at the time of his purchase, and whether a reasonably prudent buyer would have, or should have, recognized the error. Zagranichny did NOT agree the matter could be concluded in Plaintiff's favor on the issue of notice as a matter of law, and instead stated:

> COURT: And Mr. King, you agree as well that this is ripe for a summary judgment determination?
>
> MR. KING: I think that you can conclude that Zagranichny didn't have a legal obligation to know or should have known based on the facts before you. I am not so certain that you can conclude that he did know or should have known given the fact that you have ten people who didn't notice and the expert report that says that a reasonable person at a real estate closing wouldn't know or should know. So respectfully, I think we can win on summary judgment, but I don't see how we can lose.

T1, 67:23-68:9[1].

This was perhaps a mixed question of law and fact, but the trial court certainly should have heard from the expert title searcher/attorney who offered

[1] T1 refers to the transcript of the May 4, 2023 hearing on both parties' summary judgment motions before Honorable M. Susan Sheppard, P.J.Ch.

an expert opinion regarding what a reasonable title searcher could be expected to concluded from the record. See Palamarg Realty Co. v. Rehac, 80 N.J. 446, 458 (1979) (remanding decision on record, constructive notice and holding, "final decision on this point should await the taking of expert proofs on remand."). The trial court also should have considered testimony of the numerous individuals who participated in the subdivision and sale transactions but did NOT come to a "clear and obvious" conclusion that Lot 3 was actually 65' wide. This included Zagranichny's own attorney, as well as the attorneys for Miller and Musto, and all the other individuals involved in the subdivision and land transaction who, in fact, did NOT notice this "clear and obvious" error.

A bona fide purchaser for value is "someone who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title." Black's Law Dictionary 1491 (11th ed. 2019). A bona fide purchaser is chargeable only with what appears in the record or within a "reasonable" title search. Island Venture v. N.J. Dep't of Envtl. Prot., 359 N.J. Super. 391, 397 (App. Div. 2003). There is no evidence Zagranichny had actual notice of the error in his deed, and there is a question of material fact as to whether he had constructive notice, essentially, whether a reasonably prudent person would know or should have known of the error.

This position is supported by the expert report of Avery Teitler, Esquire, a 23-year New Jersey title attorney and 20-year owner of Freedom Title Company, who opined, "a reasonably prudent buyer, whether represented by counsel or not represented by counsel, would not have constructive or inquiry notice that Lot 3 was less than 66.3' wide at its frontage. 562a. Mr. Teitler further explained:

> [T]ax maps are notoriously inaccurate for metes and bounds, and no reasonable person or attorney would question a 1.3 foot differential between a tax map and a metes and bounds description based on a professionally prepared survey. There is also no reason to believe the more modern survey and metes and bounds description in the 2015 and 2016 documents, prepared for and based upon a Land Use Board Approved Subdivision, would be inaccurate or less accurate than any older attempts to measure the size of the lots.

562a. It was error for the trial court to conclude there was inquiry/constructive notice as a matter of law without having considered the expert's opinion on the issue, particularly given the convoluted manner in which the court expected Zagranichny to calculate his lot size to be different than that which appeared on a recorded municipally approved subdivision, several deeds, and his own survey. Palamarg Realty Co., 80 N.J. at 458.

The accuracy of Zagranichny's assessment is proven by the long list of individuals and professionals who had the same (or more) information as he did, and an equal or greater opportunity to discover the error, but did not, including:

- Brian Musto, developer, subdivision applicant and former owner of Lot 3. 116a, 156a, 161a, 179a.

- Plaintiff Miller, objectors to Musto's subdivision, owners of Lot 2, ultimate buyers of a portion of Lot 3, and the individuals who should have been most vigilant regarding the accuracy of the subdivision and lot sizes at the time of their creation. 116a, 156a, 161a, 179a.

- Kristopher Facenda, Esquire, professional advocate for Miller's subdivision application and drafter of the deeds at issue. 138a, 142a, 156a, 161a.

- Eric Goldstein, Esquire, Millers' counsel during their objection to Musto's attempted subdivision of former Lot 3 and purchaser of a portion of Lot 3. 142a, 167a.

- Hance Jacquette, Esquire, planning board attorney who oversaw and prepared resolutions approving the subdivision map. 150a, 613a.

- Cormac Morrissey PE, PP, CME of Dixon Associates, planning board engineer who prepared reports for the board to analyze the subdivision map and signed the final plat for recording. 574a.

- Lance Landgraf, PP, AICP, professional planner for the planning board who reviewed and reported on the subdivision map. 581a, 613a.

- Brigantine Planning Board Members, including an attorney, builder, real estate agent and architect, who unanimously approved the application, and the membership included an attorney, a builder, a real estate agent and an architect. 150a, 588a.

- Old Republic Title Insurance Company, issued title insurance policies to Miller for original Lot 2 (105' from the corner), and enlarged Lot 2 (66.3'
- from the corner). 627a.

- Shore Title, closing agents for Miller's purchase of a portion of Lot 3 from Musto. 613a.

Of course, none of these people or institutions recognized the error or questioned the length of combined Lots 2 and 3 based upon a modern-day survey of the

properties. This is especially true of Zagranichny, who had no part in the subdivision, and no interest in the size or width of Lot 2 whatsoever.

The trial court erred in deciding this fact in Millers' favor on summary judgment. If it were not decided in Zagranichny's favor, based on the facts and evidence in the record, the court should have taken testimony from the parties, witnesses and experts and opined as to whether a Zagranichny had made a "reasonable" inspection of the public record.

C. The Trial Court Erred in Denying Defendants' Cross-Motion for Summary Judgment (717-718)

The Millers' Summary Judgment Motion asked the Court to reform five recorded documents, all of which were unchallenged and unquestioned when the Zagranichny family purchased their property without notice of any defect in their deed. The black letter law is clear that the deed of a bona fide purchaser without notice cannot be reformed:

> An error, ambiguity, or uncertainty in the description of land in a deed may often be rectified by a judicial reformation action against one of the parties to the instrument, or even against a subsequent purchaser who acquired his rights with notice of the mistake, ambiguity, or uncertainty. The statute of frauds is no bar to the inclusion of additional land in the description by means of reformation, **but the equitable right to have an instrument reformed, like other equitable rights, is cut off by a transfer of the interest of the party who benefited from the mistake to a bona fide purchaser for value.**

29 N.J. Prac., Law of Mortgages § 5.10 (2d ed.) (emphasis added). One who pays valuable consideration to acquire title to a property is "presumed to be a bona fide purchaser for value without notice until the contrary appears, and the burden of showing to the contrary rests upon the party alleging that title was acquired by the purchaser with notice of an outstanding equity or claim." Venetsky v. West Essex Bldg. Supply Co., 28 N.J. Super. 178, 187 (App. Div. 1953).

New Jersey law reflects a longstanding policy that bona fide purchasers for value should be able to rely on the public record for the integrity of their title. The New Jersey Supreme Court described the underlying purpose of the New Jersey Recording Act as, "to compel the recording of instruments affecting title, for the ultimate purpose of permitting purchasers to rely upon the record title and to purchase and hold title. . . with confidence." Palamarg Realty Co., 80 N.J. at 453. To this end, purchasers are chargeable only with what appears in the record or within a "reasonable" title search. Island Venture, 359 N.J. Super. at 397. "A purchaser is not required to go back through his chain of title and inquire of each owner as to whether or not the premises are restricted." Hammett v. Rosensohn, 46 N.J. Super. 527, 535 (App. Div. 1957).

"A purchaser or mortgagee for value without notice, actual or constructive, acquires a title or lien interest free from all latent equities existing

in favor of third persons." Howard v. Diolosa, 241 N.J. Super. 222, 232 (App. Div. 1990). "Generally speaking, and absent any unusual equity, a court should decide a question of title . . . in the way that will best support and maintain the integrity of the recording system." Id. at 453.

At the time of Zagranichny's purchase of Lot 3 from Musto, all recorded documents made clear Lot 3 was 66.3' wide. The recorded subdivision map (148a), "Confirmatory Deed" (161a), and the Musto-Zagranichny Deed (179a), all describe Lot 3 as 66.3' wide, as does the 2017 Ponzio Survey (695a). The private Musto-Miller Agreement of Sale, where the Millers' expectations (and doubts) are expressed, could have been, but was not, recorded. 116a. The Zagranichny family was entitled to rely upon the public record regarding the boundaries and size of the lot they were purchasing, and did so, when they relied upon the recorded subdivision map (scrutinized by the municipality and its professionals prior to recording), as well as the deeds showing Lot 3 to be 66.3' in width. Of course, this was also consistent with the survey they obtained as part of their purchase, which confirmed the accuracy of the aforementioned subdivision and deeds.

Based on the record before it, the trial court could have found Zagranichny had no notice of any discrepancy arising from the documents related to the 2015 subdivision or within his chain of title. The Plaintiff had the burden of proof,

but cited no law and no expert testimony in support of its contention that a reasonably prudent purchaser would have identified the discrepancy, or concluded the lot size was other than as appeared on the modern surveys and recently recorded subdivision.

Yet the trial court accepted Plaintiffs' position that a tiny tax map imbedded in the subdivision map was a place where Zagranichny should have noticed a mathematical "error," though no other attorney or professional, including the many involved in the prior sale and subdivision, made this "discovery" or did the mathematical gymnastics that the trial court found was Zagranichny's duty. No authority required Zagranichny to review historical deeds to mathematically determine that, at some point in time, the overall combined lot size of Lots 2 and 3 was identified as 185' instead of the 186.3' determined by modern surveys, and it was is not reasonable to require him to do so. And, of course, Zagranichny was only buying Lot 3, and no deed anywhere in the universe said Lot 3 was ever 65' wide. Yet somehow, the buyer of Lot 3, who had the MOST evidence before him indicating the lot was firmly established to be 66.3' wide, is the person the trial court found should have notice of an error missed by Musto, Miller, their multiple attorneys, the city attorney, the city engineer, the city planner, a national title insurance underwriter, two surveyors and Millers' title company.

The trial court's decision is not only unreasonable, it upends settled law on the obligations of purchasers and creates a new and dangerous standard for title searchers throughout the state. A small, blurry tax map on a recorded subdivision plan, plus convoluted mathematics involving former lots not being transferred, should not usurp reasonable reliance on a recorded subdivision and multiple recorded deeds—especially not for the purpose of enforcing the apparent intent of an unrecorded private Agreement to which the buyer was not even a party. This decision negatively impacts our state's recording system and reliance on the documents recorded in that system. See Palamarg Realty Co., 80 N.J. at 453 ("absent any unusual equity, a court should decide a question of title…in the way that will best support and maintain the integrity of the recording system.").

Under the applicable law and facts, the trial court erred in finding Zagranichny had constructive notice of the error, erred in holding he was not a bona fide purchaser and erred in denying his Cross-Motion for Summary Judgment. The decision should be reversed and judgment entered in favor of Zagranichny.

D. The Equities Do Not Favor Miller Over Zagranichny, Nor Do They Compel Reformation as the Appropriate Remedy (719a-7201a)

The trial court viewed this case as "correcting an error," but the real question is whether the error must be corrected by taking Zagranichny's land and giving it to Miller.

It was Miller and Musto who arranged the subdivision and accepted the measurements, long before Zagranichny became involved. 116a-173a. If Miller now feels he did not get what he bargained for from Musto, he may take action against Musto for damages, or against the professionals who failed to notice such a "clear and obvious" error.

The trial court also seemed to believe it was a matter of "equity" that Miller be able to obtain 1.3' so he could create his subdivision. But the benefit of an additional 1.3' to Miller is no greater "equitably" than the detriment to Zagranichny of losing 1.3' of land. The "error" arose in the context of Millers' objection to Musto's zoning application to subdivide Lot 3. Miller did not want the beach block four lots instead of three. 601a-602a. Miller and Musto settled the objection by creating a new subdivision, including a new, 66.3' wide Lot 3.

Zagranichny also wants to have only 3 houses on his block, and has an even greater reason to object, since Miller's subdivision will make Zagranichny the fourth house from the beach instead of the third, impacting his property value

and view of the ocean. Zagranichny understands that if his lot stays at 66.3', he will be more likely to remain the third house from the beach, and wants to keep his land. This is his right as a landowner. He does not believe Miller should be able to take his land simply because Miller wants to have enough land to subdivide.

The parties are in the same place "equitably," it is just that Miller paid Musto for something he MAY not get. This is not a reason to take Zagranichny's land and reform five recorded documents. Miller still owns a perfectly fine, newly-constructed beach house and his lot. It is, of course, an oversized lot, and if a nice house on an oversized lot is worth less than a nice house on a smaller lot plus a vacant lot, then his damage claim against Musto (or the professionals who made the error) is clearly calculated.

Even without reformation, the Millers are not left without a remedy or means to obtain a subdivision. They may still apply for a variance to subdivide their lot or obtain 1.3' of land from the oceanward, oversized Lot 1.

The Zagranichny family is the least culpable party in this scenario. They have no obligation to make themselves the fourth home from the beach instead of the third house in order to correct someone else's error, and there is no reason they should be forced to give a portion of their land to Miller. They are bona fide purchasers without notice and are entitled to judgement as a matter of law.

V. Conclusion

For the reasons set forth above, this Court should reverse the judgment of the trial court and enter summary judgement in favor of Zagranichny, or remand the matter to properly consider the expert and factual testimony on the reasonableness of search and calculations demanded of a reasonably prudent buyer on the issues or record/constructive notice.

Respectfully submitted,

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MICHAEL MILLER AND JANICE MILLER, Plaintiffs/Respondents, v. ERNEST ZAGRANICHNY AND YELENA KONONCHUK, Defendants/Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-001529-23 On Appeal from Superior Court of New Jersey Atlantic County, Chancery Division Docket No.: ATL-C-45-21 Sat Below: Hon. M. Susan Sheppard, P.J.Ch.

BRIEF ON BEHALF OF PLAINTIFFS-RESPONDENTS MICHAEL MILLER AND JANICE MILLER

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Preliminary Statement

This case is about Defendants' continued efforts to take advantage of an obvious metes and bounds error and turn it into a land grab.

In 2016, Plaintiffs, Michael and Janice Miller ("Plaintiffs"), who owned an 80' wide parcel, purchased an adjacent 40' wide parcel from then-neighbor and Defendants' predecessor, Brian Musto, with the expressly stated purpose of making Plaintiffs' lot 120' wide and therefore subdividable by right. The transaction and its intended purpose are reflected in numerous publicly available documents, dated and recorded in 2015 and 2016. Defendants thereafter purchased, from Musto in 2017, what remained of the lot next to Plaintiffs'.

The dispute arises because certain documents contained a 1.33' error, stretching the parties' lots from a combined 185' wide to a combined 186.33' wide. To be clear – land doesn't stretch. And most importantly, the mathematical error is apparent on its face. Defendants purchased their lot with significant and substantial notice of the error and Plaintiffs' title or claim.

Shortly after acquiring their property and recognizing the error, Defendants, through then-counsel, expressed to Plaintiffs the intention to correct the documents to reflect the parties' true ownership interests: "The back deeds list the total distance as 185' (65' for [Defendants'] lot, 120' for your lot) . . . we are in need of refiling the subdivision plan, which would show [Defendants'] lot

having a distance of 65' and your lot having 120'. We obviously want to preserve your right to have a confirming subdivision if and when you decide to do so."

Consistent with their understanding, Defendants built their home to conform to the setbacks based on the true metes and bounds and not those containing the error. All seemed well until June 2021, when Defendants used a backhoe to tear up landscaping installed by Plaintiffs on Plaintiffs' edge of the true property line. Defendants, without explanation, thereby renounced their plan to file corrective documents and claimed ownership of Plaintiffs' land.

The disputed 1.33' has significant value to Plaintiffs. It determines whether Plaintiffs have a lot subdividable by right, for which they specifically bargained and paid consideration. On the other hand, the value of 1.33' feet is *de minimis* to Defendants, as Defendants' newly-built home complies with required setbacks consistent with their admission as to the correct property line.

Given that Defendants acknowledged the error and offered to correct it, then renounced that position without explanation, logic dictates that Defendants are now seeking to use this plain error to extract tribute. The law does not permit such opportunism. Instead, the law charges Defendants with knowledge of the error when they acquired the remainder of the parcel originally owned by Musto.

The trial court, sitting in equity, reviewed a full array of recorded documents in Defendants' chain of title, other recorded and public documents,

and the complete history of relevant transactions, conveyances, post-conveyance activity, and the deposition transcript of Defendant Zagranichny. Considering those materials, the trial court granted summary judgment, accompanied by a fulsome written opinion, finding: (1) Defendants had constructive notice of the error and of Plaintiffs' claim or title, and were thus not bona fide purchasers; (2) Defendants were equitably estopped from challenging Plaintiffs' title and the reformation due to their acknowledgment of the error and indication of intention to correct it; and (3) reformation was appropriate on the equities and the merits.

Defendants fail to challenge the trial court's finding that equitable estoppel bars their merits defense or their challenge to reformation. That alone should end this appeal.

In seeking reversal of the trial courts' determinations that Defendants had constructive notice and reformation was appropriate, Defendants fail to raise any genuine disputes of material fact and also fail to appreciate the discretion of the trial court to apply equitable doctrines and fashion equitable remedies.

The trial court properly found there were no genuine disputes of material fact, that Defendants had constructive notice based on the contents of recorded documents *in their own chain of title* as well as based on their duty of inquiry, and that the equities weighed in favor of granting reformation to Plaintiffs. This Court must affirm.

Procedural History

Plaintiffs adopt Defendants' Procedural History, Db6-7, excepting the arguments set forth therein, but clarify the following procedural matters:

Plaintiffs' Complaint set forth seven causes of action: Count I, Quiet Title; Count II, Ejectment and Determination of Title; Count III, Quia Timet; Count IV, Reformation of Deeds and Instruments for Mistake; Count V, Declaratory Judgment; Count VI, Trespass to Real Property; Count VII, Private Nuisance. Ja18-26. Summary judgment was granted in Plaintiffs' favor on Counts I through V. Ja700. Counts VI and VII were not subject to the Order on appeal and were voluntarily dismissed by Plaintiff after the matter was transferred to the Law Division under Docket No. ATL-L-1211-23. Ja723.

The record does not support that Plaintiffs did not serve an expert report. Db7. Plaintiffs did serve an expert report but did not find it necessary to support their Motion for Partial Summary Judgment.

Statement of Facts

Plaintiffs own 405 21st Street South, Brigantine, New Jersey, designated as Lot 2, Block 1801 on the Tax Map of Brigantine (hereinafter referred to as "Lot 2"). Ja272, Ja710. Defendants own the adjacent lot, 2004 Ocean Avenue, Brigantine, New Jersey, designated as Lot 3, Block 1801 on the Tax Map of Brigantine (hereinafter referred to as "Lot 3"). Ja291, Ja712. Based on an

inaccurate subdivision plan and subsequent deeds that contained the same error, Defendants claim approximately 1.33' of frontage on one side of Lot 2 (along 21st Street South) and 1.37' of frontage on the other side of Lot 2 (along the public alley parallel to 21st Street South) (hereinafter referred to as the "Disputed Area").[1]/[2]

The deed records dating back approximately 100 years reflect a combined frontage of Lots 2 and 3 of 185' along 21st Street South and a combined 190.69' along the parallel public alley. Ja29-68. The same deeds, dating back approximately 100 years, reflect Lot 2 as having 80' of frontage along 21st Street South and along the public alley, and Lot 3 having 105' of frontage along 21st Street South and 110.69' of frontage along the public alley. Ja29-68. The Brigantine Tax Maps from 1986 and 1996, which are referenced in the deeds that have existed since those dates, reflect the same measurements. Ja303, Ja306. Similarly, the deeds for Lot 1, Block 1801, which sits on the other side of Lot 2, from 1990-2021 show Lot 1 begins 185' along 21st Street South from the beginning of Lot 3. Ja70-102.

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[1] For ease of reference, we occasionally discuss the 1.33' discrepancy without referencing the 1.37' discrepancy along the public alleyway, but the errors go hand in hand.

[2] Plaintiffs kindly direct the Court to Ja303 and Ja306 for a visual representation of Lots 2 and 3 prior to relevant subdivision.

Plaintiffs' Acquisition of Lot 2 and Part of Lot 3

In September 2015, Plaintiffs' purchased Lot 2 with 80' of frontage along 21st Street South, consistent with the historical deeds.[3] Ja107, Ja710. Thereafter, Musto, then owner of Lot 3, offered to sell a 40'-wide portion of Lot 3 to Plaintiffs, and on November 13, 2015, Plaintiffs and Musto entered an agreement to that effect (hereinafter the "Musto-Miller Agreement"). Ja116, Ja710. The purpose of the Musto-Miller Agreement was that Plaintiffs would acquire a 40' by 90' portion of Lot 3, to consolidate that portion with Lot 2 and create a parcel with enough frontage (i.e., 120') such that it is subdividable by right. Ja116, Ja710. The Musto-Miller Agreement reads, in pertinent part:

> By this Agreement, there is being sold and bought a 40' x 90' **portion** of the real estate known as Block 1801, Lot 3 and commonly referred to as 2004 Ocean Avenue. The 40' x 90' portion of Block 1801, Lot 3 is 40' of Lot 3 immediately adjacent to the 90' property line of Buyer's Lot 2 in Block 1801 and is hereinafter referred to as the "Property" . . .
>
> Buyers recently purchased Lot 2 immediately adjacent to the Property. Buyers understand that Buyer's Lot 2 is approximately 80' x 90' or 7,200 sq. ft. in size as shown on the survey attached hereto as Exhibit "A". Based upon this information, the Property, which is a total of 3,600 sq. ft. in size, when combined with Buyers' Lot 2, should result in Buyers having a total of 10,800 sq. ft. of land. The intention of the Parties is to convey exactly enough land to

[3] In describing the parcels and parties, the trial court and Defendants mistakenly recite that Plaintiffs acquired Lot 2 from Musto. Ja710, Db4. This is an immaterial error and was not otherwise referenced by the trial court or Defendants; there has never been any dispute that Plaintiffs acquired Lot 2 from 405 21st Street LLC. Ja6, Ja109.

> Buyers so that Buyers have a total of 10,800 sq. ft. of land with frontage along 21st Street South and the rear Public Alley of 120', no more, no less . . .
> Ja116.

Pursuant to the Musto-Miller Agreement, a subdivision plan (the "Subdivision Plan") prepared by Arthur W. Ponzio Co. & Assoc., Inc. was submitted to the City of Brigantine Planning and Zoning Board (the "Board") for approval. Ja148, Ja273, Ja711. On November 18, 2015, the Board held a hearing on the subdivision application. Ja273-74, Ja711. The Board granted approval of the Subdivision Plan, and evidenced such approval in a Resolution dated December 9, 2015, which reads, in pertinent part: [4]

> . . . Mr. Musto and Mr. Miller have entered into an agreement whereby Musto will subdivide off a 40' x 90' portion of his property and convey it to Miller…. [T]he Miller lot, will have a lot area of 10,800sf where 5400sf is required, lot frontage of 120' where 60' is required, and lot depth of 90' where 90' is required
> Ja151.

By deed recorded March 25, 2016 (the "Subdivision Deed"), Brian Musto conveyed the 40' x 90' portion of Lot 3 to Plaintiffs. Ja156, Ja711. Brian Musto conveyed the remaining portion of Lot 3 to himself by a deed recorded on March 15, 2016 (the "Musto Confirmatory Deed"). Ja161, Ja711. Then, by deed recorded on April 15, 2016 (the "Miller Consolidation Deed"), Plaintiffs

[4] Musto was the applicant in the November 2015 subdivision process before the Brigantine Planning Board.

consolidated the new 40' x 90' portion of land with their then-existing Lot 2 to create a new Lot 2 with 120' of frontage along 21st Street South. Ja167, Ja711. This frontage made Plaintiffs' property subdividable by right. Ja274, Ja710.

However, the Subdivision Plan, the Subdivision Deed, and the subsequent Musto Confirmatory Deed, and Miller Consolidation Deed contained two errors: (1) the combined 21st Street South frontage of Lots 2 and 3 was shown as 186.33' rather than 185.00', providing an additional 1.33' to Lot 3 on that side; and (2) the combined public alley frontage of Lots 2 and 3 was shown as 192.06' rather than 190.69', providing an additional 1.37' to Lot 3 on that side. Ja148, Ja156-82, Ja.161-63, Ja711. While the deeds and plan reference the transfer and consolidation of a 40' by 90' parcel, following the written metes and bounds results in Lot 3 being pushed 1.33' onto Lot 2, and Lot 2 being pushed 1.33' onto Lot 1, which was not involved in these transactions, by the discrepant amounts. Ja156-82, Ja.161-63, Ja711.

Defendants' Acquisition of the Remainder of Lot 3

By deed recorded on April 10, 2017 (the "Defendants' Deed"), Defendants purchased the remaining portion of Lot 3 from Brian Musto. Ja179, Ja712. Defendants' Deed, being derivative of the Musto Confirmatory Deed, contained the same metes and bounds error discussed above. Ja291, Ja712. However, the evidence demonstrates that Defendants had actual or constructive notice of the

error and the correct property dimensions, or, at minimum, sufficient information to require further inquiry.

Defendants' Deed

Defendants' Deed expressly references the Subdivision Plan and states that the "Property" that is the subject of Defendants' Deed is Lot 3 in the Subdivision Plan, and the Subdivision Plan is further identified in Defendants' Deed by date, by project number, and by plan preparer. Ja179-80. Defendants' Deed also references the 2010 deed by which Musto originally took Lot 3 (the "2010 Musto Acquisition Deed"), and the Musto Confirmatory Deed. Ja179-80, Ja717. Defendants' Deed also states the "Property" is that which was "Block 1801, Lot 3 as shown on the Official Tax Map of Brigantine." Ja179-80. The Defendants' Deed also notes that it is "UNDER AND SUBJECT to any and all covenants, conditions, rights, restrictions, and easements of record, if any." Ja180. The import of each of these references is addressed below. Defendants' sale contract references the block and lot number, which at the time still showed 105' for Lot 3 and 80' for Lot 2. Ja332. The Modification of Defendants' sale contract, signed the same day as the sale contract, specifically references the Subdivision Plan. Ja345.

The Subdivision Plan

A review of the Subdivision Plan, which again is referenced prominently

in Defendants' Deed, and which is a document on file with Brigantine and recorded with the Atlantic County Clerk, is revealing. Ja148. Perhaps most importantly, the Subdivision Plan makes clear that it was prepared in relation to a transaction between Musto (i.e. Defendants' predecessor in interest) and Plaintiffs related to Lot 3. Ja148. The Subdivision Plan further shows that Defendants were not buying all of the Lot 3 purchased by Musto, but instead were getting the portion of Lot 3 that was left-over after 40' of frontage was taken away and added to Lot 2.[5] In addition, an inset on the Subdivision Plan references and shows the then-existing Brigantine tax map for the block, which shows the correct combined 21st Street frontage of 185' and correct pre-subdivision widths for each lot (105' and 80'), contradicting the measurements on the prepared subdivision. Ja148.

The 2010 Musto Acquisition Deed

The 2010 Musto Acquisition Deed (by which Musto originally acquired Lot 3) clearly states that Lot 3 originally had frontage of only 105' along 21st Street South, *resulting in frontage of 65' when reduced by the 40' by 90' subdivision identified on the Subdivision Plan*. Ja67, Ja712. The 2010 Musto Acquisition Deed also identifies the predecessor deed thereto, which would

[5] The Subdivision Plan specifically states that Lot 2 is acquiring a "40FT x 90FT PORTION OF LAND TO BE ACQUIRED AND TO BECOME P/O LOT [2]" and shows that Lot 2 will ultimately have 120' of frontage. Ja148.

further confirm the appropriate measurements. Ja60, Ja67.

The Musto Confirmatory Deed

The Musto Confirmatory Deed references that a "**Portion** of Lot 3" and a "**part/portion**" of the parcel transferred via the 2010 Musto Acquisition Deed was all that was left of Lot 3. Ja161 (emphasis in original). The Musto Confirmatory Deed also makes express references to the 2010 Musto Acquisition Deed and the Subdivision Plan. Ja161-63.

The Tax Maps

The Brigantine Tax Maps, which are referenced in all of the deeds described herein, from 1986 and 1996 reflect the same 185' measurements (and the Lot 3 and Lot 2 measurements of 105' and 80' respectively) along 21st Street South. Ja303, Ja306, Ja712. Indeed, the Brigantine Tax Maps were not updated to reflect the erroneous Lot 2 and Lot 3 frontages until at least January 1, 2018. Ja311-12. Thus, as of the date of Defendants' Deed, Brigantine's Tax Map would have reflected the accurate historical frontages from Lots 2 (80') and Lot 3 (105') with a combined total of 185' of frontage along 21st Street.

The Subdivision Deed, Miller Consolidation Deed, Historical Deeds and Planning Board Resolution

The Subdivision Deed and Miller Consolidation Deed both expressly reference the transfer of 40' by 90'. Ja156, Ja167-68. The historical deeds for Lots 1, 2 and 3, all recorded, further demonstrate the frontage of 105' for Lot 3,

frontage of 80' for Lot 2, and the combined frontage of 185'. Ja29-102. Finally, the publicly available Planning Board resolution approving the subdivision demonstrates the nature and purpose of Plaintiffs' acquisition of a portion of Lot 3, including the quantity of property transferred, the new frontage of Lot 2, and that the purpose was to allow Plaintiffs to subdivide by right. Ja151-52.

Defendants' Appointment of an Attorney-in-Fact & Acquisition of Title Work

Leading up to their purchase of the remainder of Lot 3, Defendants appointed Ralph "Paul" Busco, Esq. as attorney-in-fact to act on their behalf in the transaction to purchase the remainder of Lot 3. Ja314. Pursuant to this power, Mr. Busco, if not Defendants, possessed and had the opportunity to review the title work documents completed in advance of Defendants' purchase. Ja314. Indeed, Defendant Zagranichny insisted on using his own choice of title company, and e-mails show a "deep title search" was performed. Ja352, Ja472, Ja712. The title work demonstrates that this was not just a failure to investigate and review relevant materials of record, but a failure to review documents in the possession of Defendants and their proxy. That documentation included:

- Three copies of the tax maps showing the accurate combined and individual parcel widths. Ja316, Ja712.
- A copy of the erroneous Subdivision Plan showing the 40' by 90' transfer and the accurate tax map inset. Ja320, Ja712.

- The 2010 Musto Acquisition Deed (i.e., the deed by which Musto took Lot 3, showing Lot 3 had frontage of only 105' along 21st Street South and 110.69' along the public alley before the subdivision). Ja322, Ja712.

- Title reviewer notes making express reference to the 40' by 90' transfer and the recording information for the Subdivision Deed. Ja327, Ja712.

Defendants' Acknowledgment of the Error & Their Plan to Correct

Defendants, through counsel and attorney-in-fact, Mr. Busco, initially acknowledged the error and offered to correct it. After Defendants' acquisition of the remainder of Lot 3, Mr. Busco wrote:

> [T]here was a 1.33' discrepancy in terms of the distance running along 21st street south. The back deeds list the total distance as 185' (65' for [Defendants'] lot, 120' for your lot) . . . we are in need of refiling the subdivision plan, which would show [Defendants'] lot having a distance of 65' and your lot having 120'. We obviously want to preserve your right to have a confirming subdivision . . . Ja183, Ja275, Ja712.

Despite stating they would, Defendants never re-filed the subdivision plan. Ja275, Ja720. Rather than re-file, Defendants adjusted their construction plans to ensure the structure would comply with the minimum side-yard setback of 10.00' based on a 65.00' frontage. Ja275; Ja354; Ja373. Three years later in 2021, Defendants made a claim that they owned the Disputed Area. Ja276. Then, in June 2021, Defendants entered the Disputed Area with a back-hoe and tore out Plaintiffs' bushes and dug a trench. Ja276; Ja375. Plaintiffs protested,

reminding Defendants that the Disputed Area belonged to Plaintiffs at which point Defendants temporarily ceased their activity in the Disputed Area. Ja276. But in August 2021, Defendants resumed their activity in the Disputed Area and installed trees, shrubs, and other landscaping. Ja276. Further, Defendants' counsel wrote to the planning officials for the City of Brigantine claiming ownership of the Disputed Area and asserting Plaintiffs could not subdivide by right. Ja186, Ja276. Defendants are fully aware Plaintiffs own the Disputed Area, yet they continued to claim ownership of same. Ja275-76, Ja375.

Ultimately, in August 2021, Plaintiffs determined that legal action was necessary to vindicate their legal rights, and they filed suit. Ja1.

Legal Argument

I. Defendants' Statement of the Standard of Review Fails to Account for Defendants' Burdens in Opposing Summary Judgment and the Discretion Afforded Trial Courts Applying Equitable Doctrines. (Ja715)

Defendants' largely set forth an accurate statement of the general standard applicable to a trial court's consideration of summary judgment, but Defendants fail to account for their burden under that standard and the discretion this Court must apply in reviewing the trial court's decision on equity matters. Db7.

A summary judgment motion "cannot be defeated if the non-moving party does not offer any concrete evidence from which a reasonable [finder of fact]

could return a verdict in [their] favor." Housel v. Theodoridis, 314 N.J. Super. 597, 604 (App. Div. 1998) (internal quotations and citations omitted). The non-movant must "do more than point to any fact in dispute[,] as "disputes on minor points do not" preclude summary judgment. Gilbert v. Stewart, 247 N.J. 421, 442 (2021) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016) and J.H. v. R&M Tagliareni, LLC, 239 N.J. 198, 210 (2019)) (each quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529-30 (1995)); see also Brill, 142 N.J. at 544 ("A party cannot defeat a motion for summary judgment merely by submitting an expert's report in his or her favor. In order for such a report to have any bearing on the appropriateness of summary judgment, it must create a genuine issue of material fact.") (internal citation omitted).

This Court's standard of review is modified when considering matters within the equity jurisdiction of the trial court. See Fulton Bank of New Jersey v. Casa Eleganza, LLC, 473 N.J. Super. 387, 395 (App. Div. 2022). A "trial court's application of an equitable doctrine is reviewed for abuse of discretion." Id. "Under this standard, [the Appellate Division] do[es] not reverse in the absence of a 'clear abuse of discretion.'" Id. (quoting Ocwen Loan Servs., LLC v. Quinn, 450 N.J. Super. 393, 397 (App. Div. 2016)); see also Customers Bank v. Reitnour Inv. Properties, LP, 453 N.J. Super. 338, 348 (App. Div. 2018) ("Because equitable remedies are largely left to the judgment of the court, which

has to balance the equities and fashion a remedy, such a decision will be reversed only for an abuse of discretion." (citing Sears Mortgage Corp. v. Rose, 134 N.J. 326, 353-54 (1993) (evaluating whether the trial court abused its discretion in applying an equitable remedy)); Kaye v. Rosefielde, 223 N.J. 218, 231 (2015) (describing the broad equitable powers and discretion of the Chancery judge). While this Court generally applies the same summary judgment standard as the trial court and does not defer to the trial court on conclusions of law, Henry v. New Jersey Dep't of Human Servs., 204 N.J. 320, 330 (2010), the deference to trial court's sitting in equity applies even on summary judgment motions,

> The trial judge granted summary judgment to the [defendants] under the principle of equitable subrogation. [D]ecisions concerning [the application of an equitable doctrine] ordinarily are left to the sound discretion of the trial court. 'An appellate court should not substitute its judgment for that of the trial judge unless there is a showing of clear abuse of that discretion.'" Kurzke v. Nissan Motor Corp. in U.S.A., 164 N.J. 159, 165 (2000) (quoting Civic S. Factors Corp. v. Bonat, 65 N.J. 329, 333 (1974))

Feigenbaum v. Guaracini, 402 N.J. Super. 7, 18 (App. Div. 2008) (alternations in original); see also Ocwen, 450 N.J. Super. at 397 (on review of a grant and denial of summary judgment, "Our scope of review is limited. Decisions as to the application of an equitable doctrine are left to the sound discretion of the trial judge, and we will not substitute our judgment for that of the trial judge in the absence of a clear abuse of discretion." (citing Kurzke, 164 N.J. at 165)); N.Y. Mortgage Tr. 2005-3 Mortgage-Backed Notes, U.S. Bank Nat'l Ass'n as

Tr. v. Deely, 466 N.J. Super. 387, 397 (App. Div. 2021) (same, citing Kurzke, 164 N.J. at 165 and Ocwen, 450 N.J. Super. at 397).

Here, Plaintiffs' claims, and the relief sought thereunder, are almost exclusively equitable in nature: quiet title seeking reformation and injunctive relief; quia timet seeking reformation and injunctive relief; reformation of deeds and instruments for mistake; declaratory judgment seeking injunctive relief and reformation. Ja18-24; Ja700. See Allstate New Jersey Ins. Co. v. Lajara, 222 N.J. 129, 146 (2015) (quiet title matters are equitable); De Hanne v. Bryant, 61 N.J. Eq. 141, 142 (Ch. 1901) (a quiet title actions is within a court's equitable jurisdiction); Hendrickson v. Wallace's Ex'r, 31 N.J. Eq. 604, 607 (Ch. 1879) (reformation of deeds to correct mistakes is an ancient equitable power); Dugan Const. Co. v. New Jersey Tpk. Auth., 398 N.J. Super. 229, 242-43 (App. Div. 2008) (reformation and correction of mistake are equitable in nature); Phoenix Pinelands Corp. v. Davidoff, 467 N.J. Super. 532, 614 (App. Div. 2021) ("[Q]uia timet is an equitable proceeding . . ."); In re Envtl. Ins. Declaratory Judgment Actions, 149 N.J. 278, 292-93 (1997) (declaratory judgment actions are equitable when indicated by the "historical basis" of the action and the relief sought). Thus, this Court's review of the trial court's determination below is limited to evaluating the trial court's legal conclusions de novo and then determining whether the trial clearly abused its discretion in reaching the

ultimate outcome. See Feigenbaum, 402 N.J. Super. at 17; Ocwen, 450 N.J. Super. at 397; N.Y. Mortgage Tr., 466 N.J. Super. at 397.

II. Regardless of the Standard of Review to be Applied, Defendants' Appeal Should be Denied Because Defendants Fail to Challenge the Trial Court's Alternative Basis for Summary Judgment, Which is That Defendants Are Equitably Estopped from Challenging Plaintiffs' Ownership of the Disputed Area. (Ja720)

It is axiomatic that the trial court was permitted to provide an alternative basis for its summary judgment ruling. See State in Interest of J.F., 446 N.J. Super. 39, 42 n.3 (App. Div. 2016) (affirming on an "alternate basis" and noting that, "[i]t is a well-settled principle that a court may provide several bases in reaching its ultimate conclusion"). It is likewise axiomatic that a defendant's failure to address each alternative basis waives the issue. Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived."); Francavilla v. Absolute Resolutions VI, LLC, 478 N.J. Super. 171, 183 (App. Div. 2024) ("Although plaintiff also appealed the April 9, 2020 Law Division order denying her motion to grant class certification, plaintiff did not address this issue in her merits brief. Thus, that portion of plaintiff's appeal is deemed abandoned."); Matter of Gloria T. Mann Revocable Tr., 468 N.J. Super. 160, 180 (App. Div. 2021) ("Plaintiff waived any challenge to the fee award by failing to adequately brief that issue."), certif. den., 251 N.J. 380 (2022); Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2

(2025) ("It is, of course, clear than an issue not briefed is deemed waived.").

Further, the failure to brief the issue cannot be cured by a defendant in a reply brief. Bacon v. New Jersey State Dep't of Educ., 443 N.J. Super. 24, 38 (App. Div. 2015) ("We generally decline to consider arguments raised for the first time in a reply brief. By failing to raise their original jurisdiction argument in their initial brief, plaintiffs have waived this contention.") (internal citations omitted), certif. den., 224 N.J. 281 (2016); Bouie v. New Jersey Dep't of Cmty. Affairs, 407 N.J. Super. 518, 525 n.1 (App. Div. 2009) ("In any event, a party may not advance a new argument in a reply brief . . . Therefore, any claim that appellant may have had under 42 U.S.C.A. § 1983 was abandoned.") (internal citations omitted); Selective Ins. Co. of Am. v. Hojnoski, 317 N.J. Super. 331, 335 (App. Div. 1998) ("In its reply brief, Selective argues for the first time that Rider violated the PAIP, specifically N.J.A.C. 11:3–2.7. This argument is improperly raised. It is well settled that we will not consider an issue not raised below unless it goes to the jurisdiction of the trial court or concerns a matter of substantial public interest."); Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 2:6-5 (2025) (citing cases regarding the impropriety of using reply to brief additional issues).

Here, the trial court found, as an additional basis for Plaintiffs prevailing, that Defendants were equitably estopped from denying Plaintiffs' ownership of

the Disputed Area by the admission of Defendants' counsel and his statement of intention to correct:

> Lastly, this court suggests that in addition to the reasons set forth above, Defendants are estopped from denying that Plaintiffs are the rightful owners of the disputed land . . .
>
> . . .
>
> Defendants' former counsel admits that Defendants did, at some point, discover the true intent of the parties. By way of email correspondence in 2018, Defendants' former counsel admits that Defendants discovered the error during the zoning and permitting process, "[t]he back deeds list the total distance as 185' (65' for [Defendants] lot, 120' for [Plaintiffs] lot.)" . . . Defendants' former counsel goes even further, explaining to Plaintiffs that Defendants wish to rectify the matter:
>
> > . . . However, as [sic] this juncture, we are in need of refiling the subdivision plan, **which would show [Defendants] lot having a distance of 65' and [Plaintiffs] lot having 120'. We obviously want to preserve your right to have a confirming [sic] subdivision** if and when you decide to do so.
> >
> > [citation to Ja183] [emphasis original to trial court].
>
> Evidently, Defendants at some point had a change of heart. Counsel now states that he never told his clients about the email. Nonetheless, "it is the clear policy of our courts to recognize acts by . . . attorneys . . . as valid and presumptively authorized . . ." . . . Defendants' counsel at the time represented to Plaintiffs that they would resolve the issue in Plaintiffs' favor, that the land belonged to Plaintiffs, and that Plaintiffs should have their "by right" subdivision. Plaintiffs took no legal action and relied upon this state for several years. Consequently, principles of equity weigh in favor of a determination that Plaintiffs are the sole legal and equitable owners of the disputed 1.33 feet, and deed reformations to reflect that determination by this court.

> Ja720-21 (modifications original to trial court, excluding substitution of appendix citation).

In short, the trial court found, separate and apart from the issue of Defendants' bona fide purchaser status and the appropriateness of reformation as a result thereof, that Defendants were equitably estopped from disputing Plaintiffs ownership and the propriety of reformation.

Defendants never address this determination in their merits brief. Thus, the trial court's determination on this equitable estoppel issue should stand, and the remainder of the appeal should be denied as moot. J.F., 446 N.J. Super. at 42 n.3; Greenfield v. New Jersey Dep't of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006) ("An issue is moot when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy.") (internal quotation and citation omitted); Int'l Bhd. of Elec. Workers Local 400 v. Borough of Tinton Falls, 468 N.J. Super. 214, 224 (App. Div. 2021) ("As a general matter, our courts normally will not entertain cases when a controversy no longer exists and the disputed issues have become moot. An issue is moot when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy.") (internal quotations and citations omitted).

III. Regardless of the Standard of Review to be Applied, the Trial Court Properly Entered Summary Judgment Because, Under the Uncontroverted Material Facts, Defendants Had Constructive Notice of the Error by Virtue of the Recorded Documents in Their Chain of Title. (Ja716)

Excepting the equitable estoppel issue that Defendants failed to brief, see supra, Defendants are essentially correct in acknowledging that, "The parties agree on the determinative issue in this case … [Plaintiffs] must prove [Defendants] knew or should have known of the 2015 Musto-Miller error." Db2.[6]

Defendants assert that the mistake in the various deeds and the subdivision plan could only be ferreted out by an unreasonable search of public records and performance of complex mathematical equations. Db3. That assertion is false. As the trial court properly found, Defendants had constructive notice of the mistake because it was evident in the recent chain of title from the deed by which Musto acquired title through the deed by which Defendants acquired title, meaning that this chain of title consists at the very least of the Musto 2010 Acquisition Deed, the Subdivision Plan, the Musto Confirmatory Deed, and Defendants' Deed. Ja717-18. Stated differently, there is no genuine dispute

[6] In the parlance of the case law, Defendants are not bona fide purchasers if they have actual or constructive knowledge of another's outstanding title or claim. Here that follows from actual or constructive knowledge of the potential error.

whether a reasonable and diligent search would have uncovered the recorded documents revealing the mistake.

a. Constructive notice exists where a reasonable and diligent inquiry would put a purchaser on notice of a competing claim.

The trial court properly recognized the law applicable to determining whether a buyer was a bona fide purchaser or chargeable with notice. Ja716-17.

It has long been established in New Jersey that a "purchaser is chargeable with notice of every matter affecting his estate, which appears on the face of any deed forming an essential link in the chain of title; and also notice of whatever matters he would have learned by any inquiry which the recitals in those instruments made it his duty to pursue." Matter of Elin, 20 B.R. 1012, 1019 (D.N.J. 1982), aff'd sub nom., 707 F.2d 1400 (3d Cir.), 707 F.2d 1400 (3d Cir. 1983) (quoting Roll v. Rea, 50 N.J.L. 264, 268 (N.J. 1888) (internal quotations omitted)); Cox v. RKA Corporation, 164 N.J. 487, 496 (2000) (whenever a deed has been properly recorded, New Jersey's recording act charges subsequent purchasers with "notice . . . of the ***deed or instrument*** so recorded ***and the contents thereof***.") (emphasis supplied). This is critical, because a purchaser with constructive or inquiry notice, or where "the facts were such as to put him upon inquiry," cannot maintain bona fide purchaser status and cannot avoid reformation. Scult v. Bergen Val. Builders, Inc., 76 N.J. Super. 124, 132 (Ch. Div. 1962), aff'd sub nom., Scult v. Bergen Val. Builders, Inc., 82 N.J. Super.

378 (App. Div. 1964); Schnakenberg v. Gibraltar Sav. & Loan Ass'n, 37 N.J. Super. 150, 157-58 (App. Div. 1955). In title cases, a purchaser is charged with knowledge of the matters as to which his attorney and other agents had notice. Colegrove v. Behrle, 63 N.J. Super. 356, 364 (App. Div. 1960); Dickerson v. Bowers, 42 N.J. Eq. 295, 297 (Ch. 1886) ("Were it not so, in every case, in order to avoid the effect of notice, the party has only to put forward his agent.").

Thus, it is further paramount for a potential purchaser to examine how his or her predecessors took title as well as their significant acts of record during ownership. See Palamarg Realty Co. v. Rehac, 80 N.J. 446, 456 (1979) (explaining that a prospective purchaser examines a chain of title "search[ing] the records to discover conveyances or other significant acts of an owner [listed in the chain of title] from the date the deed into that person was recorded until the date he relinquishes record title"); Garden of Memories, Inc. v. Forest Lawn Mem'l Park Ass'n, 109 N.J. Super. 523, 533 (App. Div. 1970) ("[I]t is unquestionably the duty of the purchaser to search the grantor and other pertinent recording indexes for ***each holder of record title*** for the period during which he held such title") (emphasis added). The chain of title is the "ownership history of a piece of land, from its first owner to the present one." CHAIN OF TITLE, Black's Law Dictionary (11th ed. 2019). As explained in the New Jersey Practice Series treatise:

> The chain of title is the name given to the successive conveyances and other forms of alienation affecting a parcel of land, arranged consecutively, from the government or original source of title down to the present holder. Title to all New Jersey land is derived from Charles II of England . . .
>
> Generally, in New Jersey, it is the custom not to trace title back to the original grantor but to run the search instead for a period of 60 years which is the period of the statute of limitations for woodlands and uncultivated tracts.

3B N.J. Prac., Real Estate Law and Practice § 35:15 (3d ed.). In reviewing the chain of title:

> [t]he searcher beginning his chain of title uses as a starting point the name of the present owner. By the use of the grantee index, the examiner can ascertain from whom he received the land. This process is repeated until the owner by deed, 60 or more years back, is found. The chain is then considered complete.

13B N.J. Prac., Real Estate Law and Practice § 35:16 (3d ed.). Indeed, our courts have universally indicated that prospective purchasers have constructive or inquiry notice of conveyances and restrictions within the chain of title, including ***the acquisition by their immediate predecessor (here Musto) and the significant subsequent acts by that immediate predecessor affecting title***. See, e.g., Olson v. Jantausch, 44 N.J. Super. 380, 388 (App. Div. 1957) (The 1954 purchasers "acquired title with full notice of the covenant; its presence in the chain of title [in 1928]—not to mention the title search and title policy—charged them with notice."); Pearson v. DMH 2 Ltd. Liab. Co., 449 N.J. Super. 30, 50-51 (Ch. Div. 2016) (a purchaser is on notice of matters of record in a chain of

title beyond a 60-year search); Donovan v. Bachstadt, 91 N.J. 434, 442-43 (1982) (noting a 60-year title search is standard); Palamarg, 80 N.J. at 456 (requiring review "to discover conveyances or other significant acts of an owner").

b. Defendants had constructive notice because the recorded documents in the chain of title, from their immediate predecessor's acquisition forward (i.e., the 2010 Musto Acquisition Deed, the Subdivision Plan, the Confirmatory Deed, and Defendants' Deed) demonstrate the mistake and Plaintiffs' title or claim.

The trial court properly recognized that, if Defendants had simply looked at their chain of title from Musto's acquisition of Lot 3 forward, they would have seen the mistake. Ja717.[7] "In the context of the race notice statute, constructive notice arises from the obligation of a claimant of a property interest to make reasonable and diligent inquiry as to existing claims or rights in and to real estate." Friendship Manor, Inc. v. Greiman, 244 N.J. Super. 104, 108 (App.Div.1990), certif. denied, 126 N.J. 321 (1991); Palamarg, 80 N.J. at 456 (requiring reasonable search of chain of title). Defendants admit that they relied only on documents that came into creation as part of, or after, the subdivision, and did not consider the 2010 Musto Acquisition Deed. Db16 (explaining their

[7] That is not to say Defendants were not required to engage in further inquiry; they were. Defendants had constructive notice by their inquiry obligation even without reviewing the 2010 Musto Acquisition Deed.

reliance the Subdivision Plan, Confirmatory Deed, the Subdivision Deed, and the Miller Consolidation Deed); Ja679 (Busco stating same).[8]/[9]

Here, however, the chain of title includes at least the 2010 Musto Acquisition Deed, the Subdivision Plan (which is in the chain of title because it represents a "significant act" of Musto in relation to Lot 3, see Palamarg, 80 N.J. at 456), the Musto Confirmatory Deed, and the Defendants' Deed (which specifically references all of these items). There is not a single case in this state holding that a search was reasonable or diligent where it failed to consider the deed by which an immediate predecessor acquired ownership along with the subsequent recorded activities of that predecessor. Indeed, as described above, the cases generally require far more than that.

A review of the recorded documents in Defendants' chain of title from when Musto took title to Lot 3 forward unequivocally demonstrates:

(1) Musto acquired Lot 3 by the 2010 Musto Acquisition Deed, then including 105' of frontage on 21st Street South and 110.69' of frontage on the public alley, Ja65-67;

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[8] As discussed infra, appropriate review of these documents ***would*** have given notice or at least required Defendants to engage in further inquiry.

[9] The Defendants also reference an additional survey by Ponzio, but it is derivative of the Subdivision Plan, even utilizing the same project number. Ja148, Ja695.

(2) Musto subdivided and deeded to Plaintiffs a 40' x 90' portion of Lot 3 as set forth in the recorded Subdivision Plan, Ja148;

(3) Musto confirmed by the Musto Confirmatory Deed the occurrence of the subdivision under the Subdivision Plan and his ownership of only a "**part/portion of**" of what he had acquired by the 2010 Musto Acquisition Deed, Ja161 (emphasis original); and finally,

(4) Defendants' Deed specifically references all of these documents (the 2010 Musto Acquisition Deed, the Subdivision Plan, the Musto Confirmatory Deed) and specifically states that it is only transferring to Defendants that "***part of the same premises***" Musto acquired by the 2010 Musto Acquisition Deed left over after the subdivision and Musto Confirmatory Deed, i.e. the 105' frontage less 40'. Ja179-80 (emphasis added).

Applying the appropriate case law, the trial court found that the information revealed by those documents was sufficient to constitute constructive notice in Defendants. Ja716-18.

Defendants have repeatedly asserted that Plaintiffs' position required Defendants to engage in "mathematical gymnastics" or "convoluted mathematics." Db17-18. That assertion is meritless, especially when the 2010 Musto Acquisition Deed (not to mention a plethora of other documents) makes clear reference to 105' of frontage, the Subdivision Plan boldly and clearly

indicates that a 40' x 90' portion, including 40' of frontage, is being cut from Lot 3, and the Musto Confirmatory Deed and Defendants' Deed both indicate 66.33' of frontage.[10] As the trial court noted: "A cursory review of the math associated with the subdivision instruments illustrates . . . error . . . If Plaintiffs were given 40 feet of frontage from Lot 3, Lot 3 could not possibly have 66.3 feet of frontage remaining (105 – 40 = 65; not 66.33)." Ja718

Two additional points not relied on by the trial court are worth noting. Ja717-18. First, the Subdivision Plan, which was prominently referenced in the Musto Confirmatory Deed and in Defendants' Deed, contains a tax map inset showing then-existing Lot 3 as 105' and Lot 2 as 80' and combined frontage as 185'. Ja148. Thus, the Subdivision Plan shows that the appropriate Lot 3 frontage along 21st Street South was 65' after subdivision (105' – 40'). Ja148.[11] Second, under Palamarg, 80 N.J. at 456, the Subdivision Deed likely constitutes

[10] Similarly, the 2010 Musto Acquisition Deed references 110.69' of frontage along the public alley, the Subdivision Plan indicates the transfer of 40', and the Musto Confirmatory Deed and Defendants' Deed both indicate 72.06', rather than 70.69' of frontage along the public alley.

[11] Defendants' assertion that the trial court relied on "a small, blurry tax map on a recorded subdivision plan" to reach its conclusion, Db18, is patently false. The trial court did not reference the tax maps anywhere in its analysis. Ja717-18. Moreover, as explained on pages 42, 43, infra, the inset tax map is legible. Further, the tax map itself is a public document, was independently referenced in Defendants' Deed, and is very clear. Ja179-80, Ja311-12.

part of Defendants' chain of title, being a "significant act" of Musto in relation to Lot 3. Adding the Subdivision Deed to the above list of documents shows (or should have shown) Defendants:

(5) Musto transferred a "a 40' x 90' **part/portion**" of Lot 3 after subdivision by the Subdivision Plan to Plaintiffs, Ja156, Ja159 (emphasis original). Like Defendants' Deed, the Subdivision Deed referenced the 2010 Musto Acquisition Deed and the Subdivision Plan. Ja156, Ja159.

Therefore, standing alone, the documents in Defendants' chain of title, from Musto's acquisition, by the 2010 Musto Acquisition Deed, forward, demonstrate the error in the description of Lot 3 and Plaintiffs' title or claim.

c. The asserted factual issues raised by Defendant do not create a genuine issue of material fact.

In asserting that factual disputes precluded summary judgment, Defendants improperly treat the parties' and the trial court's disagreement about the materiality of facts as disputed facts. Defendants' wishy-washy, "not so certain" position on whether there were any genuine disputes of material fact notwithstanding, T1 67:23-68:9, Db10, the trial court was correct that there was no genuine dispute of material fact and that the parties conceded same. Ja715.

This is illuminated by Defendants position that they were entitled to summary judgment based on the underlying facts, Db14, and their argument below that "on this record, the evidence is clear that at the time of closing there

is not a record from which you can conclude that [Defendants] knew or should have known of that latent mistake that those other gentlemen made." T1 61:17-24. The disconnect is that Defendants are attempting to couch their disagreement with well-settled law as a factual dispute.

Defendants acknowledge that, "the determinative issue in this case . . . [is that Plaintiffs] must prove [Defendants] knew or should have known of the 2015 Musto-Miller error."[12] Thus, any dispute of fact must be both genuine and material to the issue of Defendants' actual or constructive knowledge of Plaintiffs' outstanding title or claim following from the potential error.

Defendants incorrectly point to two primary sources of "factual dispute:" (1) that others missed the mistake; and (2) Defendants' expert opined that "a reasonably prudent buyer . . . would not have constructive or inquiry notice that Lot 3 was less than 66.3 feet wide at its frontage." Db12; Ja562.

As to others missing the mistake, Defendants point to the fact that various people in a range of contexts (including land use board members and land use board professionals) did not identify the error. Db11. At least for purposes of

[12] Below, Defendants made vague suggestions that perhaps the 66.33' was not a mistake. T1 76:8-11. However, as acknowledged by the trial court, the record is clear that there was a mistake; Defendant Zagranichny even admitted in his deposition that there was a mistake, Ja449-50; and critically, Defendants have admitted repeatedly on appeal that there was a mistake. Db 2, 11, 13 (repeatedly referring to the "error").

summary judgment, that point was not disputed. What is disputed is whether that fact is material to Defendants' obligation to conduct a reasonable and diligent inquiry of the recorded documents. The failure of others to identify the error does not excuse Defendants' failure to review, ***at minimum***, Defendants' Deed and the 2010 Musto Acquisition Deed and the subsequent recorded activities of Musto regarding the lot. See Palamarg, 80 N.J. at 456; Garden of Memories, 109 N.J. Super. at 533. Defendants were chargeable with the knowledge of the contents of those documents, and the contents of those documents definitively demonstrated the error. Cox, 164 N.J. at 496; Scult, 76 N.J. Super. at 132. The law is clear that parties seeking reformation are entitled to relief regardless of whether they contributed to or did not initially identify the mistake. Wallace v. Summerhill Nursing Home, 380 N.J. Super. 507, 510 (App. Div. 2005) ("A party's negligent failure to know or to discover the facts that resulted in the mutual mistake does not preclude the rescission or reformation of the contract.") (internal citations omitted); Edgerton v. Edgerton, 203 N.J. Super. 160, 173 (App. Div. 1985) ("In this State even a negligent failure to know or discover the facts about which both parties are mistaken, need not preclude rescission or reformation.") (internal citations omitted). Thus, on the one hand, and as the trial court acknowledged, Ja719, the remedy of reformation presumes the occurrence of a mistake and permits reformation even where the seeker of relief

failed to identify, if not contributed to, that mistake. On the other hand, it is the later buyers' obligation to be diligent about what they are purchasing.

As to Defendants' "expert report," it adds nothing to this matter other than the proposed expert's improper and incorrect opinion on what the law is and how it applies. In sum, it opined that "a reasonably prudent buyer . . . would not have constructive or inquiry notice that Lot 3 was less than 66.3 feet wide at its frontage." Db12; Ja562; see also Db10-11. But that is simply an opinion on what *the law* should require in connection with a buyer's obligation to review a chain of title and recitals therein, and pure legal opinions of this sort are not proper for consideration. See Hassan v. Williams, 467 N.J. Super. 190, 204 (App. Div. 2021) (a court may bar an expert witness from offering a purely legal conclusion); Boddy v. Cigna Prop. & Cas. Companies, 334 N.J. Super. 649, 659 (App. Div. 2000) (finding the trial court properly excluded expert testimony involving a question of law where the expert opined that a "policy exclusion was poorly drafted and 'creates a material and substantive ambiguity in the mind of the…average named insured who purchases the policy.'"); Kamienski v. State, Dep't of Treasury, 451 N.J. Super. 499, 518 (App. Div. 2017) (finding an expert opinion from an English professor entitled to no deference, as an "expert's opinion on a question of law is neither appropriate nor probative."). Further, the legal opinion provided is simply incorrect. To be clear, the law does not require

a determination of whether a "reasonably prudent buyer" would be able to identify the exact nature of the error or whether it was in fact an error. Instead, the law charges buyers with knowledge of the contents of those recorded documents and what would be further disclosed in a reasonable and diligent inquiry. Here, the contents of those documents and what would have been disclosed in such an inquiry is obvious, and Defendants' expert offers no opinion on this (nor could it). Ja562; Palamarg, 80 N.J. at 456; Garden of Memories, 109 N.J. Super. at 533; see also Brill, 142 N.J. at 544 ("A party cannot defeat a motion for summary judgment merely by submitting an expert's report in his or her favor. In order for such a report to have any bearing on the appropriateness of summary judgment, it must create a genuine issue of material fact.").

Additionally, Defendants reliance on Palamarg is harmful to their cause, not helpful. There, in 1979, the court analyzed a split in title that occurred in 1913, when a landowner conveyed a parcel to an affiliate on February 12, 1913, by deed recorded February 18, 1913, and then the original landowner conveyed a portion of same parcel to a third party on February 15, 1913, by deed recorded April 25, 1913. Palamarg, 80 N.J. at 450-51. What followed was a tangled web of conveyances over the next sixty years until the defendant acquired ownership in November 1973. Id. at 450. Reviewing the record, the Court actually determined that there was no record notice, but it remanded for consideration of

actual notice and under the separate doctrine of estoppel by deed. Id. at 457-59. In that light the Court invited expert evidence on the appropriateness of a 60-year title search and how that might impact the case outcome. Id. at 460-61. That has no relevance to a case in which Defendants failed to review their own deed as well as the less-than-decade-old conveyance to their immediate predecessor in interest.

For purposes of summary judgment, neither Plaintiffs nor Defendants disputed the existence and contents of the recorded documents, the transaction documents, the additional public records, the history of important events leading to the mistake, or the circumstances leading to and after Defendants' acquisition of Lot 3. Db10-14.[13] The ultimate questions are: (1) whether Defendants are charged with notice of the contents of those documents: they are; and (2) whether the contents of those documents demonstrate the presence of a competing claim or title: they do.

d. Permitting Defendants to rely exclusively on Musto's actions after Musto had already acquired title to Lot 3 does not serve the purposes of the recording scheme.

Plaintiffs agree with Defendants that the integrity of the recording system

[13] In responding to Plaintiffs' Statement of Material Facts in support of Summary Judgment, Defendants did not include a single citation. Ja565-68. The trial court could have properly treated all of Plaintiffs' proffered facts as admitted under R. 4:46-2. That impropriety notwithstanding, the lack of asserted factual disputes is made plain by Defendants' brief.

is an important consideration. Island Venture Associates v. New Jersey Dep't of Envtl. Prot., 179 N.J. 485, 492 (2004). The system is designed to provide assurance to purchasers by providing public access to the historical instruments affecting title. See Cox, 164 N.J. at 496-97; Burnett v. Cty. of Bergen, 198 N.J. 408, 429 (2009) ("The very purpose of recording and filing [documents with the county clerk] is to place the world on notice of their contents.") (internal quotation omitted).

However, contrary to Defendants' position, the system is not furthered by allowing a purchaser to search title only for what their seller did ***after*** the seller acquired title. Db15. That undermines the very concept of "chain of title." While a purchaser can still identify errors and potential competing titles or claims in the exercise of reasonable and diligent inquiry, the greatest clarity comes from tracing the title taken by seller in its acquisition deed through and including any subsequent activities and the proposed conveyance to purchaser. Moreover, without reviewing a seller's acquisition deed, a purchaser cannot confirm with certainty the impact of the seller's subsequent conveyances. Indeed, in circumstances where the seller had not previously conveyed, subdivided, or encumbered any aspect of the property, and the instrument of conveyance contained no recitals, there would be no documents to review under Defendants' theory. In such a circumstance, each buyer would be entitled to rely entirely on

the deed prepared for its own transaction and on the representation of seller as to what they owned at the time. That would entirely undermine the purpose of the recording scheme.

In short, even the shallowest dive into Defendants' chain of title, starting with Musto, their immediate predecessor, obtaining title by the 2010 Musto Acquisition Deed, would have revealed the error and Plaintiffs' title or claim. Thus, the trial court correctly determined that Defendants were on constructive notice and were not bona fide purchasers.

IV. The Trial Court Properly Entered Summary Judgment Because, Under the Uncontroverted Material Facts, Defendants Had Constructive Notice by Virtue of other Recorded Documents and Public Records as to Which They Were Bound to Inquire. (Ja717)

Even if the recorded documents in Defendants' chain of title from their immediate predecessor forward were insufficient to establish constructive notice (and they were not insufficient), the trial court properly found that further inquiry by Defendants was required based on their content and other knowledge possessed by Defendants. Ja717-18. The trial court also properly found that such further inquiry into the chain of title and related recorded documents would have demonstrated the mistake. Ja717-18.

a. Constructive notice exists where a reasonable and diligent inquiry would indicate the need for further investigation and such investigation would reveal the competing claim.

The common rule is that party is not "an innocent purchaser if there were circumstances sufficient to put him on inquiry." 76 C.J.S. Reformation of Instruments § 74. If there were circumstances which, in the exercise of common reason and prudence, ought to put the party on particular inquiry, he or she will be presumed to have made that inquiry, and will be charged with notice of every fact which that inquiry would have given him or her." Id. This state is in accord: a purchaser "will be charged with knowledge of whatever [a reasonable and diligent] inquiry would uncover where facts are brought to his attention, 'sufficient to apprise him of the existence of an outstanding title or claim . . .'" Friendship Manor, 244 N.J. Super. at 108 (quoting Scult, 76 N.J. Super. at 135); Garden of Memories, 109 N.J. Super. at 535 ("A purchaser who is placed on inquiry is chargeable with notice of such facts as might be ascertained by a reasonable inquiry.") (citing McCrea v. Newman, 46 N.J.Eq. 473, 474 (Ch. 1890)).

"It is well recognized that a record which affords record notice of the transfer therein made may contain a statement or recital which does not of itself give either record notice or actual notice but which does place on inquiry one who is affected by the record." Garden of Memories, 109 N.J. Super. at 535

(citing 4 Am. Law of Property, s 17.28, at 608—609 (1952)); McCrea, 46 N.J.Eq. at 474 ("The real force of the statement or recital in such cases is to give to the purchaser notice of an actually existing incumbrance, and the principle ***upon which recitals of this meager and incomplete sort are held to be notice*** of such incumbrance is that they are sufficient to put the purchaser upon inquiry, and that he is chargeable with notice of such facts, and such only, as might be ascertained by a reasonable inquiry.") (emphasis added); Camp Clearwater, Inc. v. Plock, 52 N.J. Super. 583, 598–99 (Ch. Div. 1958) ("A purchaser is chargeable with notice of every matter affecting the estate, which appears on the face of any deed forming an essential link in the chain of instruments through which he derived his title, and also with notice of whatever matters he would have learned by any inquiry which the recitals in these instruments made it his duty to pursue.") (internal quotations and citations omitted), aff'd, 59 N.J. Super. 1 (App. Div. 1959).

b. Defendants had constructive notice because recorded documents in the chain of title beyond Defendants' immediate predecessor and related recorded documents and public records demonstrate the mistake and Plaintiffs' claim or title.

Here, the documents described in the prior Argument section, supra at pages 28, 30, even excluding 2010 Must Acquisition Deed as a document to be reviewed in the first instance, should have put Defendants on notice to inquire further. As the trial court found, "Defendants' Deed itself notes the property was

initially purchased by [Musto] by [the 2010 Musto Acquisition Deed which] described [Lot 3] as having 105 feet of frontage along 21st Street." Ja717. Moreover, the trial court pointed out that Defendants' Deed "explicitly informed" Defendants "that their lot was the subject of a prior subdivision, obtained approximately two years before Defendants purchased the lot" and that "placed [Defendants] and their professionals on notice of the necessity of performing a thorough title search [as the] recording of a subdivision shortly before the conveyance suggest that a third party may have an outstanding title or claim to portions of the subject property." Ja717-18. See Garden of Memories, 109 N.J. Super. at 535 (recitals provide notice to inquire further); McCrea, 46 N.J.Eq. at 474; Hammett v. Rosensohn, 46 N.J. Super. 527, 535 (App. Div. 1957) (a purchaser is "bound to look to his own deed").

Defendants actually acknowledged that necessity and obtained an additional title search from North American Title, Ja352, Ja472, which provided, in addition to the documents Defendants claim to rely on: the 2010 Musto Acquisition Deed; tax maps depicting Lot 3 as 105' on 21st Street South and 110.69' along the public alley; and reviewer notes specifically referencing the 40' x 90' transfer. Ja494; Ja504-11, Ja551. However, none of those materials were reviewed or relied on by Defendants. Db16; Ja679**.** Had they been, as Defendant Zagranichny acknowledged in his deposition, the mistake would have

been seen. Ja463-66.

To add to the materials the trial court specifically referenced in finding constructive notice based on Defendants' obligation to inquire further, and to the content of the documents described in the prior Argument section, supra at pages 28, 30, which already demonstrate the error and Plaintiffs' title or claim with clarity, Plaintiffs note the following to demonstrate the overwhelming indicators that further investigation by Defendants was necessary and such investigation would have revealed with remarkable clarity of record that the subdivision contained a mistake:

- Defendants' pre-subdivision chain of title going back to at least 1972 repeatedly references 105' of frontage along 21st Street South and 110.69' along the public alley. Ja29, Ja60, Ja67.
- The historical pre-subdivision deeds for Lot 2 going back to 1979 reveal the pre-subdivision frontage for Lot 2 of 80' along 21st Street South and 80' along the public alley. Ja32, Ja36, Ja41, Ja48, Ja57.
- The historical deeds for Lot 1 going back to 1990 reveal the proper combined frontage for Lots 2 and 3 as 185' along 21st Street South. Ja70-102.
- Defendants' Deed notes that it is "UNDER AND SUBJECT to any and all covenants, conditions, rights, restrictions, and easements of record, if any." Ja180.

- Defendants' Deed expressly references the recording information for the 2010 Musto Acquisition Deed and identifies the Subdivision Plan by date, project number, and plan preparer. Ja179-80.

- Defendants' Deed also states the "Property" is that which is "Block 1801, Lot 3 as shown on the Official Tax Map of Brigantine." Ja179.

- An inset on the Subdivision Plan shows a tax map with the correct 21st Street frontage of 185' and correct pre-subdivision widths for each lot (105' and 80'), contradicting the measurements on the prepared subdivision. Ja148. The inset measurements are visible, and a full-size or electronic version could have been obtained from Ponzio, who Defendants hired before closing. Moreover, the full-size Subdivision Plan is recorded with the Atlantic County Clerk as Instrument #2016005538, and even on a certified copy, it is clear the measurements in the tax map do not match Ponzio's. N.J.S.A. 40:55D-47(d); Ja320; Ja693.

- The Brigantine Tax Maps, which are referenced in all the deeds described herein, from 1986 until 2018, reflect the same 185' measurements (and the Lot 3 and Lot 2 measurements of 105' and 80' respectively) along 21st Street. Ja303, Ja306.

- The Brigantine Tax Maps were not updated to reflect the erroneous Lot 2 and Lot 3 frontages until at least January 1, 2018. Ja311-12. Thus, as of the date

of Defendants' Deed, the Brigantine Tax Maps would have reflected the accurate historical frontages from Lots 2 (80') and Lot 3 (105') with a combined total of 185' of frontage along 21st Street South.

In sum, Defendants did less than the bare minimum required of a prospective purchaser of property. A proper review of their chain of title would have demonstrated to Defendants the presence of the mistake and Plaintiffs' claim or title. At the very least it was replete within information and recitations that would have indicated the need to inquire further. That inquiry would have resoundingly revealed that "105 – 40 = 65; not 66.33." Ja718. The trial court did not err in so finding.

c. Defendants' obligation to inquire provide a further demonstration that there is no genuine dispute of material fact.

The immateriality of other individuals' failures to identify the error and Defendants' "expert opinion" is amplified in light of the clear record demonstrating that Defendants had an obligation to further inquire, that there was a mistake, and that the mistake was readily identifiable. See Gilbert, 247 N.J. at 442 ("disputes on minor points do not" preclude summary judgment); Brill, 1452 N.J. at 540 ("[W]hen the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment.") (internal quotations and citation omitted).

d. That Defendants' position is inconsistent with the purposes of the recording scheme is further demonstrated by their obligation to inquire.

The depth of the record further supports that Defendants' position is not consistent with furthering the recording scheme. One of the recording scheme's strengths, as amply demonstrated by this case, is its longevity and the clarity it can provide about the historical character of parcels over a significant time. See e.g. Pearson, 499 N.J. Super. at 37 (working through a parcel's history from 1890 forward). Here, while the mistake and Plaintiffs' title or claim are clearly demonstrated by the recorded documents occurring within ten years of Defendants' acquisition, Ja54-65, reviewing further back in time provides unequivocal support for the long history of consistent frontage leading up to the subdivision, Ja29-48, Ja70-86.

Defendants argued that it was sufficient for them to rely exclusively on documents coming into existence less than two years prior to their own purchase. Db16; Ja679. That view casts aside the strength and clarity emanating from the recording scheme's longevity. Cf. Pearson, 449 N.J. Super. at 51 (2012 buyer had constructive notice of specific restrictions in chain of title even though they had not appeared in a deed since 1923); Palamarg, 80 N.J. at 457-58 (noting that a recital in a 1924 deed may have given constructive notice of a prior conveyance, even without recording information, had the recital identified the

correct grantor); Olson, 44 N.J. Super. at 388 (defendant was bound by restriction not contained in its deed where it appeared in the chain of title more twenty-five years prior).

Therefore, Defendants' obligation to conduct a reasonable and diligent inquiry would have put them on notice, and the trial court correctly determined that Defendants were on constructive notice and were not bona fide purchasers.

V. The Trial Court Properly Granted Reformation Because the Equities Support Granting Correction of an Undisputable Mistake of Which Defendants Had Constructive Notice. (Ja718)

In addition to challenging the trial court's determination that Defendants were on constructive notice, Defendants challenge the reformation remedy chosen by the trial court. Db19. As discussed in Argument Section I, supra at pages 16-18, a trial court's discretion is paramount in applying equitable doctrines, including the selection of remedies. See Customers Bank, 453 N.J. Super. at 348 ("Because equitable remedies are largely left to the judgment of the court, which has to balance the equities and fashion a remedy, such a decision will be reversed only for an abuse of discretion.") (citing Sears Mortgage Corp. v. Rose, 134 N.J. 326, 353-54 (1993) (evaluating whether the trial court abused its discretion in applying an equitable remedy). This Court should only reverse the trial court's determination of equitable remedies for a "clear abuse of discretion." Fulton Bank, 473 N.J. Super. at 395 (quoting Ocwen,

450 N.J. Super. at 397). "Courts exercising their equitable powers are charged with formulating fair and practical remedies appropriate to the specific dispute." Kaye, 223 N.J. at 231. That is precisely what the trial court did.

The trial court evaluated the equities, noting that the "law plainly favors a remedy for those seeking to correct reasonably discoverable mistakes[, and] Plaintiffs are not seeking to take advantage of the mistake – just to correct it." Ja718. See Central State Bank v. Hudik-Ross Co., 164 N.J. Super. 317, 323-24 (App. Div. 1978) (Reformation for mutual mistake is "well settled in our jurisdiction."); St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden, 88 N.J. 571, 579 (1982) (Reformation of deeds based on mutual mistake simply requires that the contract parties share actual intent and agreement that the deeds fail to accurately capture that intent.). Indeed, the trial court suggested that it was Defendants that were "actually trying to take advantage of the mistake," Ja718, specifically noting Defendants "evidently" had a "change of heart" after their counsel had acknowledged the error and indicated the intention to correct it, Ja720-21.

In arguing that the trial court erred in granting reformation, Defendants focus primarily on the merits, describing the Disputed Area as "Zagranichny's land" and stating that the "Zagranichny family is the least culpable party in this scenario." Db19-20. It is plain that Defendants cannot presuppose the merits in

their favor in considering whether the trial court's remedy, granted after reaching the contrary conclusion, was appropriate.

Defendants additionally rely on their desire to preclude a subdivision, that the mistake was Plaintiffs' fault, at least in part, and that Plaintiffs themselves sought to preclude Musto from subdividing Lot 3. Db19. These arguments ignore critical law and important facts.

First, Defendants' desire to preclude subdivision cannot sway any of the equities because, based on the documents they claim to rely on, they would have understood Lot 2 to have 120' of frontage based on the Subdivision Plan and thus be subdividable by right. Ja148, Ja679, Db16. In other words, it is not possible that Defendants believed Lot 2 was 120' yet not subdividable by right. If Defendants' thought Lot 2 was not subdividable by right, it was because they understood the deeds and Subdivision Plan were in error. Moreover, Defendants adjusted their construction plans to ensure their structure would comply with the minimum side-yard setback of 10.00' based on a 65.00' frontage. Ja275; Ja354; Ja373. Second, reformation is not precluded by a party's contribution to the mistake. See Wallace, 380 N.J. Super. at 510 ("A party's negligent failure to know or to discover the facts that resulted in the mutual mistake does not preclude the rescission or reformation of the contract."); Edgerton, 203 N.J. Super. at 173 (even a negligent mistake does not preclude reformation). Third,

while it is true that Plaintiffs objected to subdivision by Musto, the issue arose shortly after they purchased Lot 2, and they felt compelled to prevent the construction of two or three single-family homes on undersized lots, which is entirely different from a subdivision that creates two conforming lots. Ja601-02.

In addition to the factors discussed above, the trial court explained its rationale for granting reformation:

> There are several entities who believed they properly created a subdivision "by right." Defendants should have discovered the mistake through the exercise of reasonable diligence. Defendants were put on constructive notice of the subdivision and that Plaintiffs purchased the extra land from the Grantor for the sole purpose of having a lot that could be subdivided "by right" without a variance.[14] Plaintiffs paid valuable consideration for the footage. Plaintiffs deserve to receive the benefit of their bargain. But for a scrivener's error, Defendants would have had an "opportunity" to claim ownership because the disputed property was already sold. This court should not allow the property to be resold to Defendants from the same Grantor. Defendants' assertion that the land can be secured from taking from the neighbor on the other side is purse speculation, and not realistic or viable. Plaintiffs acquired the land from [L]ot 3 for a specific negotiated purpose. But for the scrivener's error, this case would not exist. Plaintiffs are the rightful owners.
> Ja719.

Defendants cannot demonstrate that the trial court was in error, let alone that it

[14] For this reason, "splitting the baby" would have not have been an equitable solution. Plaintiffs needed all 1.33' of the Disputed Area for Lot 2 to have 120' of frontage and to be subdividable by right. Having "only" 65' of frontage has no material impact on the Defendants. See, supra at pages 14 and 48, discussing Defendants' construction of their new dwelling.

clearly abused its discretion.

VI. The Trial Court Properly Denied Summary Judgment in Favor of Defendants. (Ja721)

In contrast to arguing that summary judgment in favor of Plaintiffs was not appropriate due to genuine disputes of material fact, Defendants argue that summary judgment should have been granted in their favor. Db14-18. The arguments on which Defendants rely in this regard are fully addressed by reference to the preceding Argument sections. For those reasons, the trial court properly denied summary judgment to Defendants.

Conclusion

Defendants fail to challenge the trial court's finding that equitable estoppel bars their merits defense or their challenge to reformation. On that basis, the trial court should be affirmed and costs granted to Plaintiffs pursuant to R. 2:11-5.

As to the matters addressed by Defendants, the trial court properly found there were no genuine disputes of material fact, that Defendants had constructive notice based on the contents of recorded documents in their chain of title as well as based on their duty of inquiry, and that the equities weighed in favor of granting reformation to Plaintiffs. On that alternative basis, the trial court should be affirmed and costs granted to Plaintiffs pursuant to R. 2:11-5.

RESPECTFULL SUBMITTED,

/s/ John F. Palladino
John F. Palladino, Esq.
Evan M. Labov, Esq.
Counsel for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-001529-23

MICHAEL MILLER AND JANICE MILLER, Plaintiffs-Respondents, vs. ERNEST ZAGRANICHNY AND YELENA KONONCHUK, Defendants-Appellants.	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY ATLANTIC COUNTY CHANCERY DIVISION DOCKET NO.: ATL-C-45-21 Sat below: Honorable M. Susan Sheppard, P.J.Ch.

REPLY BRIEF OF DEFENDANTS-APPELLANTS ERNEST ZAGRANICHNY AND YELENA KONONCHUK

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Re: Michael and Janice Miller v. Ernest Zagranichny and Yelena Kononchuk
DEFENDANTS-APPELLANTS REPLY BRIEF
Appellate Division Docket No.: A-001529-23

Dear Mr. Orlando:

Please accept this letter brief as Defendants-Appellants Ernest Zagranichny and Yelena Kononchuck's Reply to Plaintiffs-Appellees Michael and Janice Miller's Responding Brief pursuant to Rule 2:6-2(b). The issues raised in Respondents' brief are addressed in the order presented.

I. Legal Argument

A. Standard of Review (715a)

Plaintiffs' brief attempts to blend the summary judgment standard with the scope of review applied to a trial court's decision to apply an equitable doctrine. To be clear, the trial court's grant of summary judgment is reviewed

de novo. Conley v. Guerrero, 228 N.J. 339, 346 (2017). When deciding a motion for summary judgment, the determination of whether a genuine issue of material fact exists requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party under the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). Summary judgment should only be granted if there is no genuine issue of material fact and "the moving party is entitled to a judgment or order as a matter of law." Conley, 228 N.J. at 346 (quoting R. 4:46-2(c)).

While "a trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference," "the decision to apply [an equitable] doctrine, as an equitable principle, 'is left to judicial discretion.'" Francavilla v. Absolute Resols. VI LLC, 478 N.J. Super. 171, 178 (App. Div. 2024) (quoting 700 Highway 33 LLC v. Pollio, 421 N.J. Super. 231, 238 (App. Div. 2011)). Appellate Courts will, nonetheless, reverse a trial court's exercise of discretionary authority that is "manifestly unjust" under the circumstances. Ibid. (quoting Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011)).

The summary judgment standard is not "modified" by the nature of the relief granted. The trial court was required to determine whether the competent evidence, viewed in the light most favorable to Defendants, could permit a rational factfinder to find Defendants were bona-fide purchasers without notice. But the trial court erred in finding constructive or inquiry notice, as a matter of law, without considering and weighing the information and testimony of those most informed about the actual and customary scope of title review, including that of the Plaintiffs, who were in the best and most interested position to find this allegedly "obvious and substantial" error, but apparently missed it (as did their title company).

B. Defendants' Brief Addresses the Trial Court's Alternative, Equitable Basis for Its Decision (719a-720a)

Defendants' brief does address the trial court's "suggestion" that an alternate, equitable basis supports its decision. Section "D" of Defendants' legal argument explains, as a matter of equity, Defendants are the least knowledgeable and least culpable party in all the subdivision transactions, and in reality, the parties are on even ground with regard to the respective equities. Yet Defendants are charged with the Miller-Musto error, which is actually of significant (not *de minimis*) consequence, as Defendants do not want there to be

a subdivision, just as the Plaintiffs objected to Musto's subdivision when Musto owned Lot 3 and Plaintiffs were his neighbors. (150a). Ironically, Plaintiffs did not like the subdivision when Musto was doing it (Plaintiffs resolved their objection to Musto's application by becoming the subdivider themselves), but now that Plaintiffs will personally profit from the subdivision, they cast Defendants as the "bad guys" for preferring not to lose their land to give someone else a subdivision.

To the extent the "equitable" suggestion relates to closing attorney Busco's email, sent long after closing, it is clearly inappropriate to charge equitable estoppel, as a matter of law, on the present record. Mr. Busco handled the real estate transaction, and when he was contacted long afterward, he responded without speaking to Defendants, while he was unclear of the true circumstances. On a motion for summary judgment, the following testimony of Mr. Busco must be accepted as true:

> 22. In their motion, the Millers rely heavily upon an email I sent to Michael Miller on July 30, 2018, over a year after Mr. Zagranichny purchased Lot 3, to suggest he knew or should have known of the alleged discrepancies in dimensions of Lot 3 or that he should be bound by or punished for that email in some way.

23. I did not discuss this email, the opinion in this email, or the contents of this email with Mr. Zagranichny before it was sent; Mr. Zagranichny was not even copied on this email.

24. The purpose of the email was not to indicate a subdivision would be filed, but rather it was to ascertain the Millers' position on the issue; I did not want to get involved and have Mr. Zagranichny spend thousands without first discussing the "discrepancy" with Mr. Miller.

25. My email makes it clear there was a substantial question as to whether the "deficiency" actually existed and if so, whether it was on the Zagranichny Lot or Miller Lot. The email expressly states, "No one is really sure in reality on whose lot the deficiency exists."

26. I later learned Mr. Zagranichny was not willing to file any subdivision relating to the property, he wanted to keep his 66.3 feet, and I did not pursue the issue past my initial email.

(678a).

Further, there was no evidence any action was taken in reliance on Mr. Busco's comment, nor that it prejudiced Plaintiffs in any way. If the trial court's comment and suggestion regarding his email was a "finding of fact and conclusion of law," and was truly an independent basis for the granting of summary judgment to the Plaintiffs, then it was clear error and cannot stand.

C. The Trial Court Erred in Granting Summary Judgment to Plaintiffs and Denying Summary Judgment to Defendants (716a-720a)

Based on the record below, the trial court should have found, as a matter of law, Defendants were bona fide purchasers without notice of Miller-Musto error at the time of their purchase.

At this point, both the trial court and Plaintiffs have conceded Defendants did not have actual notice or knowledge of the Miller-Musto error at the time of their purchase.[1] Plaintiffs now rely on In re Elin, 20 B.R. 1012 (D.N.J. 1982) for the proposition that Defendants had constructive notice of the Musto-Miller error. In that case, the plaintiff-wife and defendant-husband executed a deed intended to transfer husband's interest in a marital property to wife as part of a divorce settlement. The deed recited, "[t]he purpose of this deed is to relinquish the curtesy rights of the grantor pursuant to statute." Id. at 1013. Years later, the wife learned the deed transferred nothing because she and her husband had owned the property as tenants by the entirety, such that each would inherit upon

[1] See Respondent's Brief at 1 ("Shortly after acquiring their property and recognizing the error. . ."); Trial Court Opinion at 720a ("Defendants' former counsel admits that Defendants discovered the error during the zoning and permitting process").

the other's death, and no such rights existed. Id. at 1014. With regard to constructive notice of a subsequent purchaser, the District Court explained:

> The record of an incorrect instrument does not constitute notice of such inaccuracy to a purchaser or encumbrancer, thereby depriving him of any right to protection as against reformation, unless the nature of the inaccuracy is such as to put him upon notice or require him to make inquiry with regard thereto
>
> . . . .
>
> The question which ultimately must be addressed in the present case is whether a prospective purchaser . . . would have had ***'[clues]' which were 'so easily followed that to have failed to do so charges [the prospective purchaser] with [his] own neglect'***. If there were such 'clews' a purchaser of a tenancy in common interest from the debtor could not have become a bona fide purchaser who would take as against plaintiff.

Id. (quoting Garden of Mem., Inc. v. Forest Lawn Mem. Pk. Assn., 109 N.J. Super. 523, 535 (App. Div. 1970)) (emphasis added). Plaintiffs also rely on Olson v. Jantausch, a case in which "a title search made at the time [of defendants' purchase] ***fully revealed the restrictions, as did a policy of title insurance covering the property.***" 44 N.J. Super. 380, 385 (1957) (emphasis added).

Once again, the Plaintiffs point to no case where a purchaser is charged with notice of a prior boundary or lot width based on an old tax map or the size and shape of a prior/adjacent lot from which a subdivision is carved. Certainly,

an easement or restriction in an old deed could bind a buyer even if a deed or two skipped over it in 60 years, but no case cited involves a buyer rejecting a recorded subdivision, three deeds and a current survey in favor of performing math equations on adjacent lots to figure out one of them is 1.3' narrower than a tax map inset.

There is no deed in the chain of title which "fully reveals" the Musto-Miller error, and certainly no "clues so easy to follow" that no one could miss them. These points are demonstrated and confirmed by the extensive list of people and professionals who failed to notice the error Plaintiffs claim was in plain sight. In reality, the error was buried in old, pre-subdivision documents, planning board records and tax maps. Every recorded instrument at the time of Defendants' purchase indicated new Lot 3 was 66.3' wide. The Musto-Miller agreement explaining the purpose of the subdivision, to permit Plaintiffs to subdivide Lot 2, was not recorded. Furthermore, the fence between the properties was installed at the 66.3' line consistent with the recorded subdivision documents.

Plaintiffs now assert Defendants had notice of the purpose of the subdivision because "the publicly available Planning Board resolution approving the subdivision demonstrates the nature and purpose of Plaintiffs'

acquisition of a portion of Lot 3. . . and that the purpose was to allow Plaintiffs to subdivide by right." (Respondent's Brief at 12). This proposition is also unreasonable and unsupported by the actual law, which provides, "planning board and board of adjustment resolutions are not title matters, are not part of the public land records and do not impart constructive notice to purchasers, they are not searched by title insurers and they are excluded from coverage in title insurance policies." Aldrich v. Hawrylo, 281 N.J. Super. 201, 211 (App. Div. 1995). Even if one looked at those documents, it would appear Plaintiffs have 120' of frontage, which is exactly what they need.

Plaintiffs also fail to provide an authority or expert opinion which requires a reasonably prudent purchaser to identify a mathematical discrepancy between a decade-old, pre-subdivision deed or tax map and a modern survey, subdivision map and grant deeds. Plaintiffs' unsupported assertations are a poor substitute for legal precedent and a poor foundation for the creation of a new legal obligation for purchasers of land.

Even if there was "inquiry" notice, no one has stated what that inquiry should have been, or shown that Defendants did not conduct a diligent inquiry. Even if Defendants were somehow the first people to notice a 1.3' discrepancy between an old tax map, old deeds and the modern, approved and recorded

subdivision, they actually conducted the gold standard of inquiry on the issue of the size and location of boundaries—THEY OBTAINED A SURVEY FOR THIS VERY TRANSACTION. Their survey confirmed their lot was 66.3' wide. Is it so very hard to accept that the four deeds and the subdivision were correct, and the old deeds and tax maps were perhaps off by 1.3' over 185' (less than 1%), given modern advances in surveying and geolocation?

Unlike the Plaintiffs, the Defendants did provide evidence of what a reasonable and diligent inquiry looks like in a real estate transaction. It is true a judge could perhaps determine, as a matter of law, if an easement is actually in the chain of title, then a reasonable person would be on inquiry if there is an undisputed indicator in the record before the court.

However, where there is NO legal authority presented in which an old tax map, or a pre-subdivision recalculation of lots, was held to be evidence of "constructive" or "inquiry notice" of a 0.7% discrepancy in lot width. It would seem the trial court should have at least considered the expert opinion of a land title professional, if not the clear evidence that this "notice" was "unnoticed" by the Plaintiffs, two surveyors, a land use board, the board professionals, three attorneys and two title companies.

The court simply disregarded the expert report of Avery Teitler, Esquire, who explained:

> It is my opinion that a reasonably prudent buyer, whether represented by counsel or not represented by counsel, would not have constructive or inquiry notice that Lot 3 was less than 66.3 feet wide at its frontage. I do appreciate, if one were to review in detail older tax maps (in many instances requiring a magnifying glass to read) and certain metes and bounds descriptions in older deeds in the chain of title, one could mathematically or otherwise determine that perhaps someone at some point thought the overall size of the combined parcels was 185 feet. However, the Buyer and his attorney were presented at closing with an approved and recorded 2015 subdivision map (which was prepared by a professional surveyor and had been the subject of land use board professional review), as well as a recorded Confirmatory Deed in 2016, and a professionally prepared survey in 2017, all of which identify the property with 66.3 feet at its frontage. The tax maps are notoriously inaccurate for metes and bounds, and no reasonable person or attorney would question a 1.3 foot differential between a tax map and a metes and bounds description based on a professionally prepared survey. There is also no reason to believe the more modern survey and metes and bounds description in the 2015 and 2016 documents, prepared for and based upon a Land Use Board Approved Subdivision, would be inaccurate or less accurate than any older attempts to measure the size of the lots.
>
> It also does not appear the Buyer's title company identified any defect in the description of the lot. This is likely because the Recording Act, and the search of documents of record, is not intended to resolve or call into question small deviations in lot size or lot width, particularly when the Buyer acquires the "gold standard" for determining the dimensions of a property—a current survey. This was obtained by the Buyer in this instance, and the presence of matters buried in the municipal files or older metes and bounds descriptions in the public record is not consistent with the

> purpose and intent of the Recording System. . . The purpose of the Recording Act, and the documents recorded, is to focus on matters of TITLE, and not dimensions of property. To the extent dimensions are gleaned from the public record, it is surveyors, no[t] the searchers, who translate and present such information in meaningful detail to potential buyers.
>
> (562a).

Mr. Teitler's opinion is also consistent with the holding of Palamarg Realty Co. v. Rehac, in which the New Jersey Supreme Court remanded the issue of notice to the trial court, instructing as follows:

> On remand to the trial court, expert testimony should be offered and received as to the customs and usages of the conveyancing bar and title companies with respect to what has been discussed above. It might be helpful to invite the New Jersey Land Title Insurance Association to appear and participate as amicus curiae. The trial judge is to make findings of fact and conclusions of law with respect to the issues before him.
>
> 80 N.J. 446, 461 (1979).

Defendants maintain, on the facts in the record and the applicable law and standard, the trial court could have accepted the unrebutted expert report of Avery Teitler, Esquire and found they did not have constructive or inquiry notice of the Musto-Miller error. Even if there was "inquiry" notice, there was no evidence or finding that the Defendant-Buyers acquisition of a survey was an inadequate inquiry. For these reasons, the trial court erred in concluding there

were no disputed issues of material fact such that Plaintiffs were entitled to judgment as a matter of law.

II. Conclusion

As set forth above, and explained fully in Defendants' initial brief, this Court should reverse the judgment of the trial court and enter summary judgement in favor of Defendants, or remand the matter to the trial court to properly consider expert and factual testimony on the reasonable search required of a buyer and the adequacy of the inquiry conducted by the Defendants, and to make a determination of exactly what the Defendants should have done other than engage a professional surveyor to confirm the five recorded documents were accurate, and his lot was 66.3 feet wide.

Respectfully submitted,

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