

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No.: A-001653-24

IN THE MATTER OF THE ESTATE
OF DAVID BUCCAFUSCA,
DECEASED

Plaintiff/Appellant

CIVIL ACTION

On Appeal from the Morris County
Superior Court

Sat Below: The Honorable Frank
DeAngelis, P.J. Ch.

Docket No.: MRS-P-1307-2018

BRIEF FILED ON BEHALF OF
PLAINTIFF/Appellant

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TABLE OF CONTENTS

TABLE OF CONTENTS OF APPENDIX..... 4
TABLE OF JUDGMENTS, ORDERS AND RULINGS 9
TABLE OF AUTHORITIES 10
PRELIMINARY STATEMENT..... 11
PROCEDURAL HISTORY 14
STATEMENT OF FACTS 15
LEGAL ARGUMENT 15

POINT I

**THE TRIAL COURT ERRED IN NOT DEEMING
PLAINTIFF’S STATEMENT OF UNCONTESTED
MATERIAL FACTS AS BEING ADMITTED BASED
UPON THE DEFENSE FAILURE TO SUBMIT A
RESPONDING STATEMENT PRIOR TO ORAL
ARGUMENT ON THE SUMMARY JUDGMENT MOTION (13a) 15**

POINT II

**THE TRIAL COURT ERRED IN FAILING TO APPLY THE
CLEAR AND CONVINCING EVIDENCE STANDARD
CONTAINED WITHIN THE “DEAD MAN'S ACT”, AND ALSO
ERRED IN FINDING THAT THE DEED AT ISSUE IN
THIS LITIGATION COULD PROVIDE A WRITING WHICH
WOULD NEGATE THE APPLICABILITY OF THE ACT (15a) 18**

POINT III

AN INTER VIVOS GIFT OF REAL PROPERTY FROM AN UNREPRESENTED, CANCER STRICKEN, PHYSICALLY AND COGNITIVELY IMPAIRED GRANTOR ON HOSPICE CARE ALLEGEDY EXECUTED THE DAY BEFORE HIS PASSING TRANSFERRING THE PROPERTY TO THE CO-OWNERS SHOULD BE VOIDED WHERE THE GRANTEE ARRANGED THE TRANSACTION AND THERE WAS NO INDICATION THE GRANTOR UNDERSTOOD THE NATURE AND EFFECT OF THE SIGNING OF THE SUBJECT DEED (17a)..... 24

POINT IV

THE TRIAL COURT ERRED WHEN IT REJECTED THE TESTIMONY OF THE ADVANCE PRACTICE NURSE CONCERNING THE EXTREME INFIRMITY AND COMPLETE DEPENDENCE OF THE DECEDENT ON HIS CARETAKERS AND AS A CONSEQUENCE THE TRIAL COURT FAILED TO FIND UNDUE INFLUENCE AND/OR LACK OF CAPACITY (24a).... 28

POINT V

THE TRIAL COURT ERRED IN ACCEPTING THE DECEDENT'S SIGNATURE ON THE DEED AS HIS OWN WITHOUT EVER ANALYZING THE APPEARANCE OF THE KNOWN SIGNATURE OF THE DECEDENT AS AGAINST THE SIGNATURE ON THE DEED AND ALSO CONSIDERING THE OTHER FACTS PRESENTED BY PLAINTIFF TO SUGGEST THE DECEDENT WAS INCAPABLE OF SIGNING HIS NAME LESS THAN TWENTY-FOUR HOURS BEFORE HIS DEATH (9)..... 30

CONCLUSION 32

TABLE OF CONTENTS OF APPENDIX

Notice of Appeal 1a

Order on Plaintiff’s Summary Judgment application entered on
01/13/2025 and Statement of Reasons..... 4a

Order on Defendants’ Cross-Motion for Summary Judgment entered on
01/13/2025 and Statement of Reasons..... 32a

Rule 2:6-1(A)(1) Statement Of All Items Submitted to the Trial Court
On The **Plaintiff’s** Summary Judgment Motion 59a

Rule 2:6-1(A)(1) Statement Of All Items Submitted to the Trial Court
On The **Defendants’** Opposition To Plaintiff’s Summary Judgment
Motion and Notice Of Motion For Defendants’ Counter and
Cross-Motion For Summary Judgment, Sanctions, Attorney’s
Fees And Costs..... 64a

Plaintiff’s Verified Petition..... 68a

Defendants’ Jose Mesia and Rocio Mesia’s Answer..... 101a

Plaintiff’s Notice Of Motion For Summary Judgment 111a

Plaintiff’s Statement of Uncontested Material
Facts In Support of Motion For Summary Judgment 113a

Certification of Counsel In Support of Motion For Summary Judgment ... 144a

 Exhibit A, Death Certificate for David Buccafusca 150a

 Exhibit B, Letters of Administration
 (abridged from document as not relevant to any
 appeal issue)..... 152a

 Exhibit C, Plaintiff’s Verified Petition (abridged from document as
 redundant to the same document found at 68a)..... 153a

Exhibit D, March 25, 2016 Deed for Wharton Property (abridged from document as redundant to the same document found at 88a)..... 154a

Exhibit E, May 4, 2018 Purported Deed for Wharton Property (abridged from document as redundant to the same document is found at 95a) 155a

Exhibit F, Interrogatories Served upon Defendant Jose Mesia 157a

Exhibit G, Interrogatories Served upon Defendant Rocio Mesia 172a

Exhibit H, Demand for Admissions served upon Jose Mesia 187a

Exhibit I, Demand for Admissions served upon Rocio Mesia (Note: The exhibits which had been attached to this were abridged insofar as they are the same exhibits attached to the preceding document at Exhibit H) 228a

Exhibit J, Correspondence to T. Downs, November 6, 2023 235a

Exhibit K, Transcript of Nancy Wagner, Esq. 237a

Exhibit L, Transcript of Daniel Buccafusca..... 247a

Exhibit M, Transcript of Lori Buccafusca 259a

Exhibit N, Transcript of Karen Cook 266a

Exhibit O, Transcript of Blanca Moore 287a

Exhibit P, Transcript of Sonia Calvay 299a

Exhibit Q, Response by Jose Mesia to Plaintiff’s Demand For The Production of Documents..... 320a

Exhibit R, Response by Rocio Mesia to Plaintiff’s Demand For The Production of Documents (Note: The exhibits which had been attached to this were abridged insofar as they are the same exhibits attached to the preceding document

at Exhibit Q)	332a
Exhibit S, Mortgage dated May 11, 2016 (abridged from document as redundant to the same document found at 92a).....	92a
Exhibit T, Lenders File (Redacted and Abridged)	338a
Exhibit U, Medical Records of David Buccafusca, Memorial Sloan-Kettering Cancer Center CONFIDENTIAL APPENDIX	343a
Exhibit V, Medical Records of David Buccafusca, Compassionate Care Hospice CONFIDENTIAL APPENDIX	359a
Exhibit W, American Home Lender Subpoena Response	367a
Exhibit X, Nancy Wagner, Esq. Subpoena Response.....	373a
Exhibit Y, Garden State MLS Report (abridged from document as not relevant to any appeal issue)	395a
Exhibit Z, Last Will and Testament of David Buccafusca	396a
Exhibit AA, Power of Attorney of David Buccafusca.....	405a
Exhibit BB, Transmittal Letter from Decedent’s former counsel	408a
Exhibit CC, Order dated January 10, 2019	410a
Exhibit DD, Simplicity Title Response to Subpoena (First).....	416a
Exhibit EE, Simplicity Title Response to Subpoena (Second)	430a
Exhibit FF, Simplicity Title Response to Subpoena (Third)	438a
Exhibit GG, Letter from Howard Wasserman, Esq. with documents.....	440a
Exhibit HH, Jimmy Parra Response to Subpoena	449a

Exhibit II, Astrid Ramirez Response to Subpoena.....	455a
Exhibit JJ, James Porfido, Esq. Response to Subpoena.....	464a
Exhibit KK, Certification of Michelle Murray.....	491a
Exhibit LL, <i>Lis Pendens</i> filed September 24, 2018 (abridged from document as not relevant to any appeal issue)	494a
Certification of Plaintiff’s Counsel in Reply to the Respondent’s Opposition to Plaintiff’s Motion for Summary Judgment and In Opposition to Defendants’ Cross Motion for Summary Judgment	495a
Exhibit A, Certification of James M. Porfido, Esq. Dated September 24, 2024	498a
Exhibit B, Certification of James M. Porfido, Esq. Dated October 2, 2024	506a
Plaintiff’s Response to the Defendants’ Statement of Undisputed Material Facts	511a
Plaintiff’s Reply Brief (abridged to include only argument raised below that is germane to the appeal – <u>R.</u> 2:6-1(a)(2))	536a
Defendant’s Notice Of Opposition to Plaintiff’s Motion For Summary Judgment and Notice of Motion for Defendant’s Counter and Cross- Motion for Summary Judgment.....	542a
Defendants’ Statement of Undisputed Material Facts In Support of Motion For Summary Judgment	545a
Certification of Defense Counsel dated 9/29/24 In Support of Motion For Summary Judgment	559a
Exhibit A, Certification of Jose Mesia	562a
Exhibit B, Certification of Rosio Mesia	565a

Exhibit C, Certification of James M. Porfido, Esq. dated 9/24/24 (abridged from document as redundant to the same document found at 498a)	498a
Exhibit D, Certification of Jimmy Parra.....	569a
Exhibit E, Certification of Glen Guzzi	572a
Exhibit F, Deposition of Sonia Calvay <i>See</i>	299a
Exhibit G, Deposition of Nancy Wagner Deposition, <i>See</i>	237a
Exhibit H, Deposition of Karen Cook, <i>See</i>	266a
Exhibit I, Deposition of Blanca Moore <i>See</i>	287a
Exhibit J, Deposition of Daniel Buccafusca <i>See</i>	247a
Exhibit K, In re Estate of Theckston Superior Court of New Jersey, Appellate Division	581a
Exhibit L, Defense demand that Plaintiff Withdraw Motion for Summary Judgment – dated September 5, 2024 (Document abridged as irrelevant to issues on appeal)	585a
Exhibit M, Certification of M. Seeburger, Esq. – dated February 6, 2023 (Document abridged as irrelevant to issues on appeal).....	586a
Defense Counsel letter to Judge DeAngelis – dated October 2, 2024 regarding revised defense submissions	587a
Revised Certification of James M. Porfido, Esq. Dated October 2, 2024 (abridged from document as redundant to the same document found at 506a).....	506a
Defendants’ Letter to Hon. Frank DeAngelis, P.J., Ch. dated December 23, 2024 submitting a defense response to plaintiff’s Statement of Uncontested Material Facts after oral argument on the	

Summary Judgment motions had been held..... 589a

Defendants’ “Refutation of Petitioner’s Facts” – submitted on
December 23, 2024 (Undated) 592a

Certification of Defendants’ Counsel dated December 22, 2024
Submitting what defense counsel’s transmittal letter refers to as
“Updated Statement of Undisputed Facts” 619a

Exhibit A, Certification of Jose Mesia *See* 562a

Exhibit B, Certification of Rosio Mesia *See* 565a

Exhibit C, Revised Certification of James M. Porfido, Esq.
Dated October 2, 2024 (abridged from document as
redundant to the same document found at 506a) *See* 506a

Exhibit D, Certification of Jimmy Parra *See*..... 569a

Exhibit E, Certification of Glen Guzzi *See* 572a

Exhibit F, Deposition of Sonia Calvay, *See* 299a

Exhibit G, Deposition of Nancy Wagner, *See* 237a

Exhibit H, Deposition of Karen Cook, *See* 266a

Exhibit I, Deposition of Blanca Moore, *See* 287a

Exhibit J, Deposition of Daniel Buccafusca, *See* 247a

TABLE OF JUDGMENTS, ORDERS AND RULINGS

January 13, 2025 Order Denying Plaintiff’s Motion for Summary
Judgment4a

January 13, 2025 Order Granting Defendant’s Motion for Summary
Judgment32a

TABLE OF AUTHORITIES

JUDICIAL OPINIONS

Chance v. McCann,
405 N.J. Super. 547 (App. Div. 2009)18, 19, 20, 21, 22

Czoch v. Freeman,
317 N.J. Super. 273 (App. Div. 1999)..... 24

Dencer v. Erb,
142 N.J. Eq. 422 (Ch. 1948)..... 31

Farris v. Farris Engineering Corp., 7 N.J. 487 (1951)
7 N.J. 487 (1951)..... 25

Haynes v. First Nat’l Bank of N.J.,
87 N.J. 163, 176 (1981) 23, 24

In the Matter of Geraldine R. Dodge,
50 N.J. 192 (1967)25, 26, 27

Moran v. Estate of Pellegrino,
90 N.J. Super. 122 (App. Div. 1966) 23

Polzo v. County of Essex,
196 N.J. 569 (2008) 17

NEW JERSEY STATUTES CITED

N.J.S.A 2A:81-2 26

NEW JERSEY COURT RULES CITED

N.J. Court Rule 4:46-2(a) 16

N.J. Court Rule 4:46-2(b) 16, 18

N.J. Rule of Evidence 701 30

N.J. Rule of Evidence 803(c)(6)..... 29

PRELIMINARY STATEMENT

This is an appeal from two summary judgment orders, one denying the plaintiff's application for summary judgment and the other granting defendants. It is respectfully suggested that the trial court was completely incorrect in its decisions. There are five principal issues being raised in this appeal. They are presented in no particular order of importance.

First is a procedural objection centered on the court's failure to treat the plaintiff's Statement of Uncontested Material Facts as true given the defendants' failure to file a responding statement either admitting or denying those facts. They failed to respond and after the court noted that failure during oral argument the defense unilaterally submitted additional pleadings after oral argument. Apparently the court accepted and considered those documents – although this is not clear from the opinions as no mention is made but the content is apparently relied upon – despite the defense failure to cite properly to the record in support of its denials and there was no opportunity for the plaintiff to object or respond.

Second, the court erred in its belief that “The Dead Man’s Statute” is not implicated simply because the challenge here is to a quit-claim deed executed by the decedent in the hours before his death. The court wrongly believes that if a document plays any role in the matter, then the heightened clear and convincing evidence standard of the statute does not apply. The point of the

statute is not simply looking at whether the claim is solely evidenced by oral testimony but it applies if a claim is supported by the act of a decedent during his lifetime or a person who is mentally incapacitated, then and in that event, the persons relying upon that act shall be required to establish the propriety of the act by clear and convincing proof. The trial court ignored the statute's plain reading believing the alleged execution of the quit-claim deed in and of itself without further inquiry established the defendants' right to relief.

Third, the court imposed an improper requirement upon plaintiff in rejecting its claim because the court opined that the matter required expert testimony of a medical doctor on David's condition. However, the plaintiff in fact had presented the testimony of an Advance Practice Nurse (APN) – a Registered Nurse for over thirty years, a dual board certified Advance Practice Nurse for twenty-three years and Advanced Oncology Practice Nurse, holding a Bachelor's and Master's degrees in Nursing – who had been treating and caring for hospice patients and in fact had cared for David in his final days and hours. The testimony of that APN clearly established that David was mentally incapacitated and/or vulnerable to undue influence at the time the defense claims he executed the subject quit-claim deed. Equally important is that defendants expressly indicated their acceptance of the medical opinions of the APN in their ultimate, albeit belated, response to plaintiff's Uncontested Material Facts.

Fourth, the court erred in finding that the decedent had a donative intent when even to this day the estate remains obligated on the note and mortgage which encumbers the subject property. The people circling the decedent as he lay upon his death bed made certain that his last act on this earth was to allegedly sign a quit-claim deed. The thing those people never did however was to remove the decedent from the loan and purchase money mortgage. To this day the estate remains obligated on that note and mortgage from the purchase of the property.

Fifth, the court erred in its analysis of the signature upon the quit-claim deed purportedly signed by the decedent. The plaintiff presented a known signature made by David upon his admission to hospice. This was prior to the date of the quit-claim deed as required by the controlling statute. It in fact does resemble the proverbial “chicken scratch” but that is to be expected of a person who is signing himself into hospice care from hospital treatment. However, the signature that is presented on the alleged quit-claim deed executed approximately 22 hours before David passed away at age fifty-two is a flowing, beautiful and perfectly formed signature in the nature of a true “John Hancock”. Not at all when common sense tell us a person described by the APN on that day as being in the process of dying and demonstrating extreme neurological problems along with an inability to interact to any degree. (111 at ¶¶ 39 – 52)

PROCEDURAL HISTORY

A Verified Complaint and Order To Show Cause were filed in early September 2018. An Order To Show Cause With Temporary Restraints was entered on October 5, 2018. Lengthy discovery followed affected in material respects by the outbreak of Covid. Ultimately the plaintiff filed a motion for Summary Judgment on August 15, 2024. The defendants filed a Cross-Motion for Summary Judgment. They had to withdraw parts of the filing and ask for forgiveness from the court (587a) and supplement their application when it became clear that a Certification signed by a former attorney for David was absolutely false in major parts. (498a) The Mesias failed to respond to the petitioner's Statement of Uncontested Material Facts and oral argument was held on December 17, 2024. Nearly two weeks later on December 23, 2024, the Mesias submitted what they termed, "Refutation of Petitioner's Facts" along with a second document entitled "Updated Statement of Undisputed Facts". (619a) The petitioner was not given any opportunity to respond to those belated submissions. The Court considered the Mesias' improperly filed pleadings. Ultimately the trial court denied petitioner's motion for summary judgment (4a) and granted defendants' cross-motion for summary judgment. (32a)

STATEMENT OF FACTS

The facts supporting plaintiff's appeal are as set forth in Plaintiff's Statement of Uncontested Material Facts Pursuant to R. 4:46-2(a). (113a) While the defendants did not oppose that filing prior to oral argument being held. The defense filed their own affirmative motion for summary judgment which was supported by a Statement of Uncontested Material Facts. (545a) The plaintiff in turn submitted an opposing pleading refuting the alleged facts advanced by the defense. (511a) Ultimately after oral argument had been held the defendants submitted what they termed, "Refutation of Petitioner's Facts" along with a second document entitled "Updated Statement of Undisputed Facts". (619a)

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN NOT DEEMING PLAINTIFF'S STATEMENT OF UNCONTESTED MATERIAL FACTS AS BEING ADMITTED BASED UPON THE DEFENSE FAILURE TO SUBMIT A RESPONDING STATEMENT PRIOR TO ORAL ARGUMENT ON THE SUMMARY JUDGMENT MOTION (13a)

New Jersey Court Rule 4:46-2(b) expressly provides that all material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion unless specifically disputed by proper citation demonstrating the existence of a genuine issue as to the fact alleged. That Rule provides as follows:

(b) Requirements in Opposition to Motion. A party opposing the motion shall file a responding statement either admitting or disputing each of the facts in the movant's statement. Subject to R. 4:46-5(a), all material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of paragraph (a) demonstrating the existence of a genuine issue as to the fact. An opposing party may also include in the responding statement additional facts that the party contends are material and as to which there exists a genuine issue. Each such fact shall be stated in separately numbered paragraphs together with citations to the motion record.

This issue was raised by the plaintiff in its reply brief after the defense failed to submit a responding statement. (536a) However this point was not analyzed by the court in its opinions. (4a, 32a) Instead, the court simply set forth the summary judgment standard and noted the requirement that a party opposing the motion must file a responding statement.

Furthermore, the defense filed multiple documents after oral argument was held and the court never permitted the plaintiff the opportunity to respond either orally or in writing which would have occurred in its reply pleadings. This is significant because the defense response to plaintiff's 138 Uncontested Material Facts is replete with denials of facts without a proper reference to the record in most instances and in others references to inapplicable points of the record. For example, the critical testimony of the APN treating David in his

final days and hours was repeatedly denied by the defense without any reference to the record. *See, e.g.* 600(a) – 604(a) To point out a few of the many examples, attention is directed to paragraphs 42, 46, 48, 51 Id. David’s ex-wife noted that for at least a week prior to the date of the signing of the quit-claim deed she observed that he was rapidly deteriorating, bedridden, blood in urine, gurgling, would not open his eyes or even converse. 600(a)¶38 To this the defense simply “rejected the characterization” without reference to any countervailing fact in the record as to his condition over that period of time.

Whether the defense failure was deliberate or negligent, the lack of a proper response should be treated as a tacit acknowledgment of their inability to demonstrate any countervailing facts creating a genuine issue of a material fact. It has long been the law of this State that a party opposing a summary judgment motion has the affirmative duty of responding in accordance with the rule. Polzo v. County of Essex, 196 N.J. 569, 586 (2008); R. 4:46-2(b) Thus, the entirety of plaintiff’s Statement of Uncontested Material Facts should have been deemed to have been admitted.

LEGAL ARGUMENT

POINT II

THE TRIAL COURT ERRED IN FAILING TO APPLY THE CLEAR AND CONVINCING EVIDENCE STANDARD CONTAINED WITHIN THE “DEAD MAN'S ACT”, AND ALSO ERRED IN FINDING THAT THE DEED AT ISSUE IN THIS LITIGATION COULD PROVIDE A WRITING WHICH WOULD NEGATE THE APPLICABILITY OF THE ACT (15a)

New Jersey Statute 2A:81-2 “Transactions with mentally incapacitated person; decedent; proof required” provides as follows:

In a civil action that is commenced or defended by a guardian on behalf of a person who is mentally incapacitated or by a personal representative on behalf of a decedent, any other party who asserts a claim or an affirmative defense against the person who is mentally incapacitated or against the personal representative, that is supported by oral testimony of a promise, statement, or act of the person who is mentally incapacitated before the onset of mental incapacity, or of the decedent, shall be required to establish the same by clear and convincing proof.

(emphasis added)

In analyzing the applicability of that statute the court relied exclusively on the opinion in Chance v. McCann, 405 N.J. Super. 547 (App. Div. 2009) in making its determination that the Dead Man’s Act does not apply to the case at bar because the decedent signed a quit-claim deed for the nominal sum of \$1.00 and that document exists. The court wrote at page nine of each of its opinions:

In this matter, the Mesias' case rests largely on a notarized deed signed by the Decedent that transferred the entirety of the Decedent's ownership in the Property to the Mesias in exchange for the nominal sum of \$1.00. Since the Mesias can make a prima facia case for the transfer by pointing to the Deed, a written document, the Dead Man's Act does not apply to the Deed. (15a)

This represents both a fundamental misreading of the applicable statute and the Chance opinion as well as a misunderstanding of, and a failure to analyze, the facts of this matter.

First as to the misunderstanding of Chance. The trial court included a quote from Chance stating "that, at remand trial, the trial judge must analyze the proofs and determine whether McCann has presented a prima facie case of breach of Chance's obligations under the partnership agreement, based on documentary evidence and without relying on oral testimony about Chance's statements or acts." Id. at 574. McCann like the plaintiff is the challenger to the document at issue.¹ Like the partnership agreement in Chance, the quit claim deed is clearly a transaction such that the statute is triggered in the first instance. Thus the direction is clear. Courts must first consider all documentary evidence not simply the disputed document itself and do it from the challenger's side. In this case that is all of the documentary evidence being presented by the plaintiff.

¹ McCann's claim was brought by way of counterclaim and the Estate herein is the plaintiff which filed the Verified Complaint.

Regardless, the trial court in the instant matter did not engage in this analysis whatsoever. There is no point in the opinions that speak to any other documentary evidence being considered. In fact, the court concluded its analysis on this point by declaring simply that “Since the Mesias can make a prima facie case for the transfer **by pointing to the Deed, a written document,** the Dead Man’s Act does not apply to the Deed.” (15a)(emphasis added) The courts result is an example of the *fait accompli* fallacy argument. That is to say, the deed cannot be challenged because it exists. It is utterly illogical and misses the point both of Chance and this litigation generally and demonstrates a misapplication and misunderstanding of Chance.

Second is the fact that there is a glaring absence from this aspect of the court’s opinion of any analysis of the other multitude of facts presented by plaintiff. There is in existence both a written note (218a) and a written mortgage (221a), which like the quit-claim deed, were also signed by the decedent and the defendants but unlike the purported deed, remain in full force and effect as against the decedent to this very day. Those documents were part of plaintiff’s Statement of Uncontested Material Facts. (218a – 223a) If nothing else the court should have looked to those two documents as canceling out any positive effect the quit-claim deed had in the Mesias’ favor. It is rather inconceivable that a person would intend to gift over his interest in a parcel of

land yet not insist on being relieved of the financial obligation associated with the acquisition of that property.²

Chance then goes on to direct that “If the trial judge concludes that McCann has presented a prima facie, case, then the jury should only be charged that it must find “clear and convincing” evidence of statements or acts attributed to Chance by the oral testimony of McCann or others, but that otherwise the preponderance of the evidence standard is applicable to the cause of action.” Id. Instead of considering the clear and convincing standard as against oral testimony the Mesias advanced, the trial court merely states that “the Mesias’ case rests **largely** on a notarized deed” without providing any further analysis

The Chance court refused to rigidly invoke the clear and convincing standard of the Dead Man’s Act “when a litigant’s case is based **primarily** on

² Recall as well that the Undisputed Material Facts stated that while the Mesias were attempting to refinance the outstanding loan at the time of David's death they had qualified for a mortgage but the title company refused to insure the property given the circumstances surrounding the execution of the quit claim deed. Undaunted, the Mesia’s next step was to apply for a loan from a new lender, attempt to obtain title insurance from a different title company and also use a new attorney. It is submitted that fraudsters would make such moves. Furthermore, this dovetails into the sideshow of attorney Porfido’s involvement in the case because he was the second attorney the Mesias retained and it was his office who the undersigned fortuitously contacted months after David’s passing seeking the old title policy on David’s Montague rental property that was being sold out of his estate and through happenstance via conversations between office staff is how we discovered the existence of the purported quit-claim deed. All of these facts were presented below.

written evidence”. Chance at 573 (emphasis added) However it had already extensively examined not only that written evidence but the surrounding oral statements and circumstances.

The second part of the trial court’s holding is based upon the belief that “the Mesias can make a prima facia case for the transfer by pointing to the Deed, a written document . . .”. (15a) The Mesias and their agent/settled co-defendant Blanca Moore hastily arranged for an unrepresented, dying man with hours left to live to allegedly be presented with a quit-claim deed. There was no evidence presented whatsoever that David – or his son and sole heir for that matter – were ever aware that the Mesias’ countryman and friend the notary was appearing to take his signature.³ Moreover, one has to ask why was it necessary for David to sign the quit-claim deed on his death bed. Why could the Mesias not wait for the estate representative to be in place and then simply have that fiduciary sign the deed. The answer is obvious – they needed an unwitting dupe to sign. What is left to support the Mesias’ claims are only the purported oral statements made

³ Recall as well the facts that the notary was caught in a lie at her deposition when she attempted to claim that it was the Mesias who provided her with the quit-claim deed to be signed by David only to be confronted with the proofs that settled co-defendant Blanca Moore – realtor and agent for the Mesias and final caregiver for David – had received the document via email from her friend Jimmy Parra the loan broker for the Mesias after 4 PM on May 4th. See ¶¶ 74 – 77 of Plaintiff’s Statement of Uncontested Material Facts.

by the decedent as recounted by the Mesias to the effect that he did not want any equity interest in the property and this explained why he made the transfer.

It is also important to consider that the Chance opinion acknowledges but then rejects the holding of an earlier Appellate Division opinion which held that the clear and convincing evidence standard of the Dead Man's Act should apply whenever oral statements of the decedent are used to support a claim, even if there are also writings that support it. Moran v. Estate of Pellegrino, 90 N.J. Super. 122, 124-25 (App. Div. 1966) The trial court in the instant matter never reveals why it chose the Chance approach over that expressed in Moran. Regardless, there is a split of authority on the subject in this State. Yet there should not be.

The Moran opinion was cited favorably in Haynes v. First Nat'l Bank of N.J., 87 N.J. 163, 183 (1981). That citation was at a point where the Court analogized the Will action before it where the clear and convincing evidence standard was being employed despite the existence of a writing – that being the Last Will and Testament itself – to the rationale for that higher burden as found in the Dead Man's Statute. The Court went wrote:

Although not directly applicable in this case because the claim is founded upon a writing, namely, the will, the validity of that written document depends upon the oral statements of the decedent; and it is the decedent's oral statements, as testified to by the very witnesses who were accused, presumptively, of undue influence,

that constitute the evidence needed to demonstrate that there was no undue influence. Thus, the policy reflected in this statute is germane to a will controversy involving charges of undue influence.

Id.

The same logic should apply to the case at bar. It was the Mesias who put in motion the creation of the quit-claim deed and it is the Mesias who claim that David never wanted an equity interest in the property. The Court in Haynes cited with approval to Moran and its discussion of the reasons and application of the Dead Man's Statute and its heightened standard when a document is to be proven by the very testimony of the people who initiated its creation. It is respectfully submitted that this is the more logical argument and frankly that which should control given the Court's express approval.

POINT III

AN INTER VIVOS GIFT OF REAL PROPERTY FROM AN UNREPRESENTED, CANCER STRICKEN, PHYSICALLY AND COGNITIVELY IMPAIRED GRANTOR ON HOSPICE CARE ALLEGEDY EXECUTED THE DAY BEFORE HIS PASSING TRANSFERRING THE PROPERTY TO THE CO-OWNERS SHOULD BE VOIDED WHERE THE GRANTEE ARRANGED THE TRANSACTION AND THERE WAS NO INDICATION THE GRANTOR UNDERSTOOD THE NATURE AND EFFECT OF THE SIGNING OF THE SUBJECT DEED (17a)

The party seeking to establish a gift *inter vivos* received from a person now deceased has the burden of proof on that claim by clear and convincing evidence. Czoch v. Freeman, 317 N.J. Super. 273, 283-284 (App. Div. 1999)

certification denied 161 N.J. 149 (1999) It is respectfully suggested that the Mesias cannot meet their burden and summary judgment was wrongfully denied to the plaintiff and granted to the defense.

To establish donative intent the requisite elements of an *inter vivos* gift are: (i) an unequivocal donative intent on the part of the donor; (ii) an actual or symbolic delivery of the subject matter of the gift; and, (iii) an absolute and irrevocable relinquishment by the donor of ownership and dominion over the subject matter of the gift, at least to the extent practicable or possible, considering the nature of the articles to be given. In the Matter of Geraldine R. Dodge, 50 N.J. 192, 216 (1967) citing Farris v. Farris Engineering Corp., 7 N.J. 487, 500-501 (1951)

As an initial matter it is important to keep in mind here the fact that the note and mortgage on the subject property were never taken out of the decedent's name. As stated, *supra*, it is nonsensical to argue that a person would transfer title ownership to another without the concomitant extinguishing of all financial obligations vis-à-vis that real property.

Rather than look to the trial court's voluminous recitation of legal encyclopedias, the court need look no further than In the Matter of Geraldine R. Dodge, 50 N.J. 192, 216 (1967) for the law applicable to challenges to *inter*

vivos gifts in New Jersey. For unknown reasons the trial court overlooked this seminal Supreme Court opinion on the subject.

In Dodge a wealthy woman was victimized by three sophisticated businessmen, College Trustees, who feigned friendship in order to wrongly induce her into signing a letter transferring her \$1.7 Million art collection. While David Buccafusca suffered from the ravages of advanced cancer and was receiving hospice care, Mrs. Dodge suffered from the consequences of advanced age although at the same time she presented in a socially acceptable way. Similar to David, who had no counsel of his own and the attorney for the title company retained by the Mesia respondents drafted the Deed and related documents, in Dodge, the Trustees had their counsel draft the gift letter, and Mrs. Dodge was not independently advised. As the Dodge Court observed in discussing the state of the law prior to the passage of N.J.S.A. 2A:81-2:

. . . the common law has always imposed a heavy burden of proof in most instances of claimed *inter vivos* gifts, even where the donor is not shown to have been mentally incompetent at the time of the transaction. The principle has been expressed frequently that in all transactions between persons occupying relations, whether legal, natural, or conventional in their origin, in which confidence is naturally inspired, is presumed, or, in fact reasonably exists, the burden of proof is thrown upon the person in whom the confidence is reposed and who has acquired an advantage, to show affirmatively not only that no deception was practiced therein, no undue influence used, and that all was fair, open and voluntary, but that it was well understood.

Dodge at 227.

The standard of proof that thus needs to be offered by the Mesia's is that of clear and convincing evidence.

The operative portions of the statute in this case is that this is a civil action commenced by a personal representative on behalf of a decedent against the Mesias, who in turn have asserted as their affirmative defense BOTH that David's act in signing the deed on his death bed AND his earlier oral promises that he actually did not want any equity interest in the property support their right to the property. No portion of that statute bears on the issue of whether David was mentally incapacitated at the time he executed the deed or made the earlier promises. The trial court – while we believe is staggeringly wrong vis-à-vis David's mental capacity when he signed the deed less than twenty-four hours before his death – inappropriately read into this statute a requirement of some absolute proof of mental incapacity. This simply is not how this statute operates.

Frankly it seems people often confuse and conflate the legal inquiry concerning undue influence in the making of a Will and undue influence in the making of *inter-vivos* transfers. Here the trial court fell into the same trap.

POINT IV

THE TRIAL COURT ERRED WHEN IT REJECTED THE TESTIMONY OF THE ADVANCE PRACTICE NURSE CONCERNING THE EXTREME INFIRMITY AND COMPLETE DEPENDENCE OF DAVID BUCCAFUSA ON HIS CARETAKERS AND AS A CONSEQUENCE THE TRIAL COURT FAILED TO FIND UNDUE INFLUENCE AND/OR LACK OF CAPACITY (24a)

The plaintiff supported its application for summary judgment on the testimony and opinions of an APN with decades of experience in hospice care. However, the trial court rejected both the direct observations and impressions of the APN vis-à-vis David's condition and abilities along with her opinions on related medical issues. The court did this without ever actually even discussing the APN's qualifications, experience, and ability to make the observations, opinions and impressions she testified to in her deposition. Instead the court spent multiple pages of the opinion reciting treatises akin to a law review note. Resort to such research is unnecessary when New Jersey jurisprudence has thoroughly addressed the issues put before the court. In the end the court – without explanation – determined that the APN was a “lay witness” and thus not qualified to render even a basic opinion on the very subject matter of her expertise.

Additionally, note that the trial court also failed to consider any of the certified medical records which had also been submitted in support of the

plaintiff's summary judgment application. Those records establish quite clearly David's physical condition as well as his mental state. Furthermore, those documents go into evidence as they are certified records of medical treatment. N.J.R.E. 803(c)(6)

It must also be noted that the defense themselves accepted the Advance Practice Nurse' medical opinions as to David's condition. This was demonstrated in their response to plaintiff's Statement of Uncontested Material Facts. *See, e.g.* 600(a) – 604(a) To point out a few of the many examples, attention is directed to the following paragraphs: 39 (“The credentials and role of [APN Cook] are not in dispute”), 40 (David's hospice case was challenging), 42 (“on May 3, 2018, [David] was very lethargic, not able to participate much”), 43 (former co-defendant “Moore asking David be given IV hydration to ‘perk him up’ so he could sign a legal document”), 44, (“On May 3, 2018, David had begun the dying process and IV hydration could have caused negative effects. David exhibited signs of intracranial pressure”), 45 (“on May 3, 2018 Nurse Cook advised [hospital] at 3:07 PM that David was declining and believed he would pass away soon”), 47 (“Nurse Cook testified her May 4th exam of David was prior to 4 PM and . . . David was going in and out of consciousness. His headache was an eight out of ten in severity, and he was having trouble seeing” to which the defense responded “medical observations are not disputed”), 49,

“Cook testified the increased intracranial pressure was caused by disease advancement . . .” to which the defense responded “The medical opinion on intracranial pressure is accepted as accurate”), 50 (“In her May 4th notes, Cook described David as a 52 year-old male esophageal cancer metastasized to his brain and [central nervous system], with a worsening condition” to which the defense responded “The medical condition is not disputed”), 52 (Cook made a performance status assessment of ‘PPS 20’ meaning David was in bed unable to do anything on his own. “Exceptionally bad” to which the defense responded “The physical assessment is not disputed”).

The trial court should have considered all of the evidence in the form of opinion offered by the APN on matters rationally related to her perception and the opinion would have assisted in understanding the witness’s testimony and determining a fact in issue. N.J.R.E. 701

POINT V

THE TRIAL COURT ERRED IN ACCEPTING THE DECEDENT’S SIGNATURE ON THE DEED AS HIS OWN WITHOUT EVER ANALYZING THE APPEARANCE OF THE KNOWN SIGNATURE OF THE DECEDENT AS AGAINST THE SIGNATURE ON THE DEED AND ALSO CONSIDERING THE OTHER FACTS PRESENTED BY PLAINTIFF TO SUGGEST THE DECEDENT WAS INCAPABLE OF SIGNING HIS NAME LESS THAN TWENTY-FOUR HOURS BEFORE HIS DEATH (9)

In the case at bar the plaintiff was presented in the Statement of Uncontested Material Facts with a known signature of the decedent which was

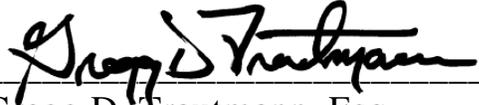
contained within his certified medical records and made less than two weeks prior to his passing. (345a) That signature, it is respectfully submitted, is completely and utterly inconsistent with the signature that appears upon the subject quit claim deed. (100a) The court offers no explanation for failing to actually view and compare the two signatures as part of its analysis. The court merely places the plaintiff's arguments in quotes then cites and relies upon a presumption of validity because it was witnessed by a Notary Public. Dencer v. Erb, 142 N.J. Eq. 422 (Ch. 1948) In doing so, the trial court also completely ignores all of the facts presented by the plaintiff supporting its case of undue influence and chicanery by the defendants, the Notary Public whom they personally retained, and their agent/codefendant Blanca Moore who arranged for the preparation of the quit-claim deed.

It is respectfully submitted that the presumption of validity the court adopted could in fact be affected by comparison of the very signature under attack. That in combination with the other facts presented by the plaintiff surely should overcome the presumption. It is a presumption allegedly not an absolute.

CONCLUSION

Based upon the forgoing, it is respectfully requested that the Court reverse the decisions of the trial both in the denial of summary judgment as to the plaintiff and the grant of summary judgment to the defendants. Alternatively, the matter should be remanded for trial.

Respectfully submitted,
TRAUTMANN & ASSOCIATES, LLC



Gregg D. Trautmann, Esq.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No.: A-001653-24

IN THE MATTER OF THE
ESTATE OF DAVID
BUCCAFUSCA, DECEASED

Plaintiff/Appellant

CIVIL ACTION

On Appeal from the Morris
County Superior Court

Sat Below: The Honorable
Frank DeAngelis, P.J. Ch.

Docket No.: MRS-P-1307-2018

AMENDED BRIEF FILED ON BEHALF OF
APPELLEES/RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS OF APPENDIX..... 3

TABLE OF JUDGMENTS, ORDERS AND RULINGS..... 3

TABLE OF AUTHORITIES..... 4, 5

INTRODUCTION..... 6

PRELIMINARY STATEMENT..... 7

STATEMENT OF FACTS..... 8

PROCEDURAL HISTORY..... 13

SUMMARY OF APPELLANT’S FIVE POINTS ON APPEAL..... 16

STANDARD OF REVIEW..... 18

LEGAL ARGUMENT..... 19

POINT I
**THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION
UNDER RULES 4:46-2(b) AND 4:46-5(a) BY CONSIDERING
RESPONDENTS’ SUPPLEMENTAL FACT
STATEMENT**..... 19

POINT II
**THE DEAD MAN’S ACT DOES NOT APPLY WHERE THE DEFENSE IS
BASED ON WRITTEN EVIDENCE AND NOT A DECEDENT’S
STATEMENTS**..... 25

POINT III
**THE RECORD ESTABLISHES A VALID INTER VIVOS GIFT;
APPELLANT FAILED TO PRESENT A TRIABLE ISSUE OF DONATIVE
INTENT, CAPACITY, OR UNDUE INFLUENCE** 29

POINT IV
**APPELLANT FAILED TO RAISE A TRIABLE ISSUE OF LEGAL
INCAPACITY DUE TO THE ABSENCE OF EXPERT TESTIMONY AND
TEMPORAL PROXIMITY TO THE DEED EXECUTION** 36

POINT V
**THE NOTARIZED DEED IS PRESUMPTIVELY VALID AND
VOLUNTARY; APPELLANT FAILED TO REBUT IT WITH
COMPETENT EVIDENCE** 41

CONCLUSION AND RELIEF SOUGHT45

CERTIFICATION OF COMPLIANCE (R. 2:6-10) 46

TABLE OF CONTENTS OF APPENDIX

Certification of Timothy P. Downs, Attorney for Respondents.....Da1

Emails between Michael T. Seeburger, Esq., and Gregg Trautmann, Esq.-
Attorneys for Appellants between November and December 2023.....Da3

Exhibit M¹ Certification of Michael Seeburger, Esq. – dated February 6, 2023, part
of the “Certification of Defense Counsel In Support of Motion For Summary
Judgment” submitted on 9/29/24, and also part of the “Updated Statement of
Undisputed Facts” submitted by Defense Counsel on 12/22/2024..... Da16

Brief in Opposition to the Plaintiff's Motion for Summary Judgment filed by
Respondents on 11/5/2024..... Da145

Deposition of Blanca ‘Margie’ Moore, pages 14 to 29 and 54 to 81 which are missing
from Pa287 Da199

TABLE OF JUDGMENTS, ORDERS AND RULINGS

January 13, 2025 Order Denying Plaintiff’s Motion for Summary
Judgement..... Pa4

January 13, 2025 Order Granting Defendant’s Motion for Summary
Judgment..... Pa32

¹ Exhibit M have been abridged completely by the Appellant and is referenced to page 586a of the Appellant’s Appendix.

TABLE OF AUTHORITIES

JUDICIAL OPINIONS

Branco v. Rodriguez, 476 N.J. Super. 110 (App. Div. 2023)32

Brill v. Guardian Life Ins. Co. of Am.,
142 N.J. 520 (1995)4, 6, 8, 18, 29, 37, 41, 44, 46

Chance v. McCann, 405 N.J. Super. 547 (App. Div. 2009)12, 16, 27

Dencer v. Erb,
142 N.J. Eq. 422 (Ch. 1948) 18, 42

Haydock v. Haydock’s Ex’rs, 34 N.J. Eq. 570 (E. & A. 1881) 34

In re Dodge, 50 N.J. 192 (1967) 30, 33

Lyons v. Township of Wayne,
185 N.J. 426 (2005)19, 22, 23, 24

Mullarney v. Bd. of Review,
343 N.J. Super. 410 (App. Div. 2001) 37

Pascale v. Pascale, 113 N.J. 20 (1988) 33, 35

State, Dep’t of Treasury v. Qwest Commc’ns Int’l, Inc.,
387 N.J. Super. 469 (App. Div. 2006) 45

Templo Fuente De Vida Corp. v. Nat’l Union Fire Ins. Co.,
224 N.J. 189 (2016) 18

NEW JERSEY STATUTES CITED

N.J.S.A. 2A:81-2 (Dead Man’s Act) 13, 17, 27, 29, 30
N.J.S.A. 2A:82-1 (Acknowledgment presumption) 18, 42

NEW JERSEY COURT RULES CITED

Rule 2:6-1(a)(1) 24
Rule 2:6-216
Rule 2:6-1046
Rule 2:6-746
Rule 2:10-224
Rule 2:11-4(a) 46
Rule 4:5-8(a) 44
Rule 4:14-2(a) 22
Rule 4:46-2(b) (Summary judgment motions) 12, 19, 20, 24
Rule 4:46-5(a) (Supplemental submissions) 12, 16, 19, 20, 21, 23, 25

RULES OF EVIDENCE

N.J.R.E. 701 (Lay opinion testimony) 40

INTRODUCTION

At the heart of this appeal is a single document: a duly notarized quitclaim deed executed by David Buccafusca on May 4, 2018, transferring his interest in a jointly owned property to Respondents Jose and Rocio Mesia. David's role in the 2016 purchase had been limited to helping the Mesias qualify for financing. He did not contribute any funds, pay the mortgage, pay taxes, share expenses, pay for repairs or any capital or other improvements, or claim an ownership stake during his lifetime. The 2018 deed—executed in the presence of a neutral notary—simply formalized that longstanding understanding.

Appellant, representing David's estate, challenges the deed's validity posthumously. The claims rest on allegations of incapacity, undue influence, and forgery. But Appellant offers no expert opinion, no handwriting analysis, no medical evidence, and no indication of deception or coercion—only speculative lay opinion, much of it temporally disconnected from the execution. These claims are squarely contradicted by the sworn testimony of the independent notary who observed the signing and confirmed David's alertness, comprehension, and voluntariness.

The trial court properly rejected these arguments after a thorough review of the evidentiary record, applying the correct legal standard under *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520 (1995). Because Appellant's theories are unsupported by

competent evidence and rely on a misapplication of the Dead Man’s Act, this Court should affirm the judgment and bring closure to this long-running dispute.

Judge DeAngelis—after full discovery—denied the Estate’s motion and granted Respondents’ cross-motion, concluding Petitioner failed to overcome the statutory presumption that attaches to a duly acknowledged deed. The same record—reviewed de novo—compels affirmance.

PRELIMINARY STATEMENT

Plaintiff–Appellant challenges two orders entered on January 13, 2025: First, the denial of the Estate’s motion for summary judgment; and Second, the grant of Respondents’ cross-motion for summary judgment, which upheld the validity of a notarized quitclaim deed executed by David Buccafusca on May 4, 2018, transferring any interest he held in residential property located at 38 East Central Avenue, Wharton, New Jersey.

Every theory advanced by Appellant—whether framed as incapacity, undue influence, forgery, or procedural error—is aimed at invalidating that deed. But the trial court correctly concluded there was no admissible evidence to support such a challenge. Thus, the dispositive question before this Court is straightforward: Does the summary judgment record contain any admissible evidence creating a

genuine dispute of material fact as to the execution, delivery, or legal effect of the May 4, 2018 deed?

The trial court, applying the standard set forth in *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520 (1995), concluded that no such dispute exists. That ruling should be affirmed.

STATEMENT OF FACTS

A. David Buccafusca's Limited Role in the 2016 Purchase

In 2016, Respondents Jose and Rocio Mesia purchased a home at 38 East Central Avenue in Wharton, New Jersey. Title was taken in their names jointly with David Buccafusca for financing purposes (Pa87-90). All three also signed a purchase-money mortgage and note in favor of Absolute Home Mortgage Corporation (Pa91-93).

Realtor Blanca "Margie" Moore testified that David "offered to help [the Mesias] with his credit" (Pa287 T39-9 to 22, T41-17 to 20, T42-8 to 10) and "did not want any equity interest in the property" (Da199 T21-16 to 22, T27-7 to 9). The Estate did not produce any contrary testimony or documentary evidence to rebut Moore's account. Instead, it relies on inferences drawn from David's name on title and the existence of the quitclaim deed.

The record is devoid of evidence that David contributed to the down payment, mortgage, or closing costs. He never paid any portion of the monthly mortgage, property taxes, insurance, or maintenance from 2016 until his death. There was no written agreement reserving him an interest, and no witness testified that he ever asserted ownership during his lifetime. These facts weigh heavily against any suggestion of hidden donative intent or retained interest.

B. Execution of the May 4, 2018 Quitclaim Deed

On May 4, 2018, David Buccafusca executed a quitclaim deed transferring his record interest in the Wharton property to Respondents Jose and Rocio Mesia. The signing took place at David's residence in Rockaway, New Jersey, in the presence of Notary Public Sonia Calvay (Pa299 T22-1 to 22) and Blanca "Margie" Moore, a realtor who had a long-standing friendship and prior dating relationship with David. (Da199 T15-1 to 17).

Sonia Calvay testified that she confirmed David's identity using a driver's license provided at the residence and matched it to the person in front of her (Pa299 T 22-6 to 22, T42-5 to 15). She asked David whether he acknowledged the document and wished to sign it; he responded "yes." Calvay stated that she personally witnessed David sign the deed (Pa299 T41-4 to 12, T 49-20,21). She did not recall

which hand he used or whether someone held the clipboard, but confirmed the signature was affixed in her presence (Pa299 T52-11 to 13, T53-3).

Blanca Moore likewise testified that David was alert, responsive, and able to answer questions on May 4. She stated that she explained to David that the document was for the purpose of removing his name from the Wharton property so that the Mesias could refinance, and he appeared to understand (Pa287 T44-18 to 21, T45-1 to 4). Moore testified that she observed David sign the deed while sitting upright in his bed (Pa287 T46-1 to 8).

Calvay and Moore each denied having any financial interest in the transaction. Moore testified that she did not arrange for the notary, that David answered affirmatively that he understood what he was signing, and that she physically watched him sign the deed (Pa287 T33-12 to 22, T34-14 to 20, and Da199 T55-23 to 25, T56-1-20). Calvay did not have her notary logbook with her at the time of signing. She later recorded the entry using information from David's ID. While David's signature does not appear in the logbook, the quitclaim deed bears his signature and Calvay's notarial acknowledgment (Pa299 T44-1 to 6, T68-8 to 11).

There is no evidence in the record of coercion, fraud, or diminished capacity. Both witnesses testified that David executed the deed voluntarily, with

understanding, and consistent with his intention to transfer any remaining interest in the Wharton property (Da 199 T16-10 to 13 and Pa299 T49-20, T51-14).

C. David’s Health Status and Hospice Care

David Buccafusca was diagnosed with metastatic esophageal cancer and admitted to hospice care on April 25, 2018 (Pa359). On the morning of May 4—the date of the deed—he was evaluated at home by hospice nurse practitioner Karen Cook, APN. Cook testified that David was bedbound, lethargic, and in and out of sleep, but was more alert at the beginning of her visit and able to respond to direct questions. She stated that he “spoke in some sentences and gave some direct responses,” though he did not initiate conversation and only answered when asked how he was feeling (Pa266 T49-2 to 4, T49-12 to 16).

Cook acknowledged that her progress notes referred to verbal and nonverbal signs of discomfort, but testified that she could not recall the specifics without referring to her chart (Pa266 T42-22 to 25). She did not perform a legal capacity evaluation, and no medical expert in the record offered any opinion as to whether David lacked capacity at the time of the deed.

D. Absence of Rebuttal Evidence

The Estate presented no handwriting expert, medical expert, or contemporaneous fact witness to contradict the notary's sworn account. The Estate did not retain any forensic evaluator or expert witness on capacity, voluntariness, or signature authenticity (Pa528 and Pb529). The deed itself is facially valid and un rebutted.

Although the Estate relies on lay observations and two hospice nursing notes from prior days, these records do not demonstrate legal incapacity at the time of execution. No evidence contradicts Calvay's direct, contemporaneous observations.

E. The Estate's Litigation Posture

The Estate filed its verified complaint on September 5, 2018, initially challenging the 2016 transaction and later expanding the challenge to include the May 4, 2018 deed. The claims include theories of undue influence, incapacity, and forgery, although forgery was never properly pleaded. However, the record lacks admissible evidence to support those theories, and no expert report or forensic evaluation was ever filed.

Issues on Appeal

1. **Procedural discretion:** Did the trial court properly exercise its discretion under *Rule 4:46-2(b)* and *Rule 4:46-5(a)* by accepting Respondents'

supplemental factual submissions—particularly where Appellant had notice, responded in writing, and raised no objection at the time?

2. **Dead-Man’s Act:** Does *N.J.S.A. 2A:81-2* require Respondents to meet a heightened burden of proof where their defense rests primarily on a notarized deed—consistent with the Appellate Division’s holding in *Chance v. McCann*, 405 N.J. Super. 547 (App. Div. 2009)?
3. **Donative intent:** Did Appellant present any competent evidence to create a genuine issue of material fact as to whether David Buccafusca intended to make an inter vivos gift of his interest in the property?
4. **Undue influence and capacity:** Did Appellant offer expert testimony or admissible factual evidence sufficient to support claims of undue influence or lack of capacity at the time of execution of the May 4, 2018 deed?
5. **Forgery and authenticity:** Did Appellant provide any forensic, expert, or factual basis to challenge the validity of the notarized deed or rebut the presumptions that attach under New Jersey law?

PROCEDURAL HISTORY

1. Title Acquisition and Mortgage Execution (2016)

On March 25, 2016, David Buccafusca and Respondents Jose and Rocio Mesia acquired title to 38 East Central Avenue, Wharton, New Jersey, by warranty

deed (Pa88-90). On June 13, 2016, all three executed and recorded a purchase-money mortgage and note in favor of Absolute Home Mortgage Corporation (Pa91-93).

2. Probate Complaint and Temporary Restraints (2018)

On September 26, 2018, the Estate of David Buccafusca, through its administrator Daniel Buccafusca, filed a verified complaint and order to show cause in the Chancery Division, Probate Part, Morris County (Pb68-80). Among other relief, the Estate sought to void the 2016 deed and partition the property. On October 5, 2018, the trial court entered an order granting temporary restraints.

3. Discovery and Depositions (2019–2024)

Between 2019 and 2024, the parties engaged in extensive discovery, including interrogatories, document requests, and the issuance of third-party subpoenas. Depositions were taken of:

- Nancy Wagner, Esq., closing attorney (Pa237–245)
- Blanca “Margie” Moore, realtor (Pa287–297) (Da199-210)
- Karen Cook, APN, hospice nurse (Pa266-285)
- Sonia Calvay, notary public (Pa299-318)

- Daniel and Lori Buccafusca (Pa247–264)

Discovery closed on May 1, 2024.

4. Summary Judgment Motions and Supplemental Submissions (2024–2025)

On August 15, 2024, the Estate moved for summary judgment (Pa111-112). On September 29, 2024, Respondents filed a cross-motion for summary judgment, supported by a Statement of Undisputed Material Facts, legal briefing, and certifications (Pa542-586). On November 5, 2024, Respondents filed a revised brief in opposition to Plaintiff’s motion for summary judgment (Da145-198). On November 12, 2024, the Estate filed a certification opposition to cross-motion for summary judgment and in reply to defense opposition to Plaintiff’s motion for summary judgment, and a reply brief (Pa495-541).

On December 23, 2024, after oral argument, Respondents filed a letter enclosing a paragraph-by-paragraph “Refutation of Petitioner’s Facts” and an Updated Statement of Undisputed Material Facts pursuant to Rule 4:46–5(a) (Pa589-621). These were formally filed on December 23, 2024. The Estate did not file a sur-reply certification. The trial court accepted all submissions without objection from the Estate.

5. Trial Court Decision (January 2025)

On January 13, 2025, the trial court entered two orders: (1) denying the Estate's motion for summary judgment (Pa4a), and (2) granting Respondents' cross-motion, upholding the May 4, 2018, quitclaim deed (Pa32). The trial court declined to award attorney's fees or impose sanctions. Its 25-page Statement of Reasons (Pa34-58) expressly cited Respondents' supplemental filings.

6. Appeal and Current Posture

On February 6, 2025, the Estate filed a notice of appeal (Pa1). On May 7, 2025, Appellant's brief and appendix were filed. This Respondents' brief and Supplemental Appendix are timely filed pursuant to Rule 2:6-2.

SUMMARY OF APPELLANT'S FIVE POINTS ON APPEAL

Appellant's brief raises five arguments in an effort to invalidate the 4 May 2018 notarized deed. Each fails as a matter of law and under the undisputed facts in the record.

1. Procedural Challenge Under Rule 4:46-2(b)

Appellant argues that the trial court erred in accepting Respondents' supplemental factual submissions after oral argument. But the court accepted the filings under Rule 4:46-5(a), and Appellant had full notice and an opportunity to

respond—including a sur-reply; however, none was filed. No motion to strike was filed. This challenge fails.

2. Dead Man’s Act Misapplied

Appellant invokes the Dead-Man’s Act (*N.J.S.A. 2A:81-2*) to impose a heightened burden of proof. But under *Chance v. McCann*, 405 N.J. Super. 547 (App. Div. 2009), the Act does not apply where a party’s defense rests on written instruments—here, a notarized deed and mortgage—not oral statements by the decedent.

3. Lack of Donative Intent

Appellant asserts that David Buccafusca did not intend to gift his interest in the property. This claim is refuted by undisputed evidence: David contributed no funds, expressed no interest in ownership, and never paid toward the mortgage. Both the notary and the realtor testified to David’s intent to transfer. No contrary testimony was presented.

4. Undue Influence and Incapacity Claims

Appellant argues that David was either influenced or incapacitated. But no expert evidence, medical opinion, or contemporaneous evaluation supports that claim. The notary—the only eyewitness—described David as alert, responsive, and

not coerced. The hospice nurse specifically stated she could not opine on capacity. Lay speculation is not sufficient under *Brill*.²

5. Challenge to Authenticity and Forgery Theory

Appellant questions the authenticity of David’s signature, suggesting it differs from an earlier hospice document. But Appellant produced no handwriting expert, no forensic analysis, and no affidavit raising a genuine issue of forgery. The notarized deed is presumptively valid under *N.J.S.A. 2A:82-1* and *Dencer v. Erb*, 142 N.J. Eq. 422 (Ch. 1948). The presumption remains unrebutted.

STANDARD OF REVIEW

Orders granting or denying summary judgment are reviewed de novo, meaning the Appellate Division applies the same legal standard as the trial court and owes no special deference to the trial judge’s legal conclusions. *Templo Fuente De Vida Corp. v. Nat’l Union Fire Ins. Co.*, 224 N.J. 189, 199 (2016). The reviewing court must examine the motion record in the light most favorable to the non-moving party and determine whether “the evidence presents a sufficient disagreement to

² *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 540 (1995) (holding that a non-moving party must present “competent evidential material” beyond mere “speculation and suspicion” to defeat summary judgment)

require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 533 (1995).

However, summary judgment is not precluded simply because the non-moving party contests the facts. The opposing party must present competent evidence, not conjecture or unsupported assertions, that would permit a reasonable jury to find in its favor. *Brill* emphasized that trial courts—and reviewing courts—must assess whether there exists a genuine issue of material fact that is supported by admissible proof, not simply whether the opposing party disagrees with the outcome.

Where, as here, the record contains no expert opinion, no admissible factual dispute, and no rebuttal of a presumptively valid document, summary judgment is not only appropriate—it is required.

LEGAL ARGUMENT - POINT I

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION

UNDER RULES 4:46-2(b) AND 4:46-5(a) BY CONSIDERING

RESPONDENTS’ SUPPLEMENTAL FACT STATEMENT

A. The Trial Court Has Broad Discretion to Accept Late Filings in the Interest of Justice

Rule 4:46-2(b) provides that “[a]ll material facts in the movant’s statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation,” but expressly makes that deeming provision “[s]ubject to Rule 4:46-5(a).” In turn, Rule 4:46-5(a) gives the trial court clear discretion to consider “any material fact... in the interest of justice.”

The New Jersey Supreme Court confirmed this broad discretionary authority in *Lyons v. Township of Wayne*, 185 N.J. 426, 436 (2005), holding that courts may consider late-filed factual materials to resolve motions on the merits rather than on a procedural technicality—particularly when no prejudice results.

B. Respondents’ Supplemental Filing Was Submitted Post-Argument But Before Decision, and Properly Considered Under Rule 4:46-5(a)

On December 23, 2024, Respondents delivered a letter to Judge DeAngelis enclosing their Refutation of Petitioner’s Facts and an Updated Statement of Undisputed Material Facts, and explicitly requested that the court consider these documents pursuant to Rule 4:46-2(b) and Rule 4:46-5(a) (Pa619). The supplemental materials were formally filed on December 23, 2024 (Pa589).

Although filed after oral argument, Respondents’ supplemental submission was received and docketed well before the court’s January 13, 2025, decision, and

was expressly cited in the Statement of Reasons—confirming that the filing was considered as part of the original decision-making process under Rule 4:46-5(a).

These filings directly responded to the Estate’s factual assertions, tracking each of the Estate’s 138 paragraphs and citing deposition testimony (Moore, Calvay, Wagner), hospice records, interrogatory answers, and closing documents. We contested, among other things:

- Appellant’s characterization of David’s cognitive state near the time of the deed (Pa592 ¶¶52);
- Claims that David intended to retain an ownership interest (Pa592 ¶102);
- Suggestions that the Mesias or Moore orchestrated the deed execution in secret (Pa592 ¶¶138);

The court’s 25-page Statement of Reasons confirms that it considered and relied on the supplemental filings, particularly in its factual analysis at pages 12 through 14. That reliance alone demonstrates that the trial court exercised its discretion under Rule 4:46-5(a).

Appellant’s objection also overlooks the broader procedural context. As set forth in the Certification of Michael Seeburger (Da17), counsel of record for Co-Respondent Moore (Pa287), Appellant engaged in multiple procedural irregularities

during discovery, including issuing subpoenas after deadlines and unilaterally scheduling depositions without proper notice under Rule 4:14-2(a). On the morning of one such proceeding, Appellant's counsel emailed at 9:29 a.m. stating, "I am taking a statement under oath from Karen Cook, RN this morning at 10 AM," and offered a Zoom link only "if" Respondents' counsel wished to attend (Da7). Respondents immediately objected, noting that such a "statement" would not negate the need for a deposition and would not be admissible at trial (Da4). Nevertheless, Appellant proceeded to take what was in form and substance a deposition, without opposing counsel present. Given this history, the trial court acted well within its discretion under Rule 4:46-5(a) in accepting Respondents' supplemental submissions. See *Lyons v. Township of Wayne*, 185 N.J. 426, 436 (2005). That decision ensured the summary judgment motion was resolved on a full and balanced record. Respondents should not be held to a stricter procedural standard than the party whose conduct contributed to the very imbalance the court sought to correct.

C. Appellant Received Notice, Did Not File a Sur-Reply, and Waived Any Objection

Appellant received Respondents' supplemental filings on December 23, 2024 (Pa 619) and never filed a sur-reply certification. At no point did the Estate

- move to strike the submission;
- request an adjournment or extension; or
- raise any formal objection to the court's consideration of the filings.

Those omissions constitute waiver: Appellant was not denied a fair opportunity to respond and made no showing of prejudice. Appellant also listed the supplemental materials without reservation in its own Rule 2:6-1(a)(1) designation, further confirming waiver.

Appellant unilaterally proceeded with the depositions of Karen Cook, APN, and Notary Sonia Calvay despite prior objections and court warnings. Respondents' counsel were deprived of the opportunity to lodge objections or elicit clarifying testimony. This conduct compromised the integrity of the process and justified the trial court's decision to view the resulting transcripts with caution and to construe the record in Respondents' favor. Those discovery facts are documented in the Seeburger certification (Da 17) and further support the court's exercise of discretion under Rule 4:46-5(a) and *Lyons*.

D. There Was No Prejudice, and Any Deviation Was Harmless Under Rule 2:10-2

Under *Rule 2:10-2*, an appellate court will not reverse for error “unless it is reasonably satisfied that the error possessed a capacity to bring about an unjust result.” Here, the Estate cannot show prejudice. It did not respond to the supplemental materials, had access to the full record, and declined to challenge the trial court’s discretion at any point. Accordingly, any technical deviation from Rule 4:46-2(b) was, at most, harmless.

Appellant’s Rule 2:6-1(a)(1) filing confirms that the trial court record included all of Respondents’ supplemental submissions—without objection—and that Appellant cited those materials in its own designation of the appellate record.³

E. The Trial Court Reached Its Decision on a Full and Balanced Record

Far from deciding the motion on default, the trial court reviewed and considered:

- Each party’s moving and opposing certifications;
- Competing factual narratives and evidentiary citations; and
- The procedural history and record filings, including those filed post-argument.

³ See Appellant’s Rule 2:6-1(a)(1) filing, dated May 7, 2025, listing all defense filings, including the Refutation of Plaintiff’s Facts (Pa583a) and Updated SUMF (Pa610), with no objection to their inclusion.

This includes Respondents' Interrogatory Answer #18, in which they certified that David Buccafusca "never paid any portion of the mortgage, taxes, or maintenance on the property at any time" (Pa161). The record contains no evidence that David Buccafusca ever paid the mortgage, taxes, maintenance or any other cost on the Wharton property. Respondents certified to that under oath, and the Estate presented no contrary financial records or testimony to dispute it. The trial court weighed the facts under *Brill* and correctly entered judgment.

F. Conclusion

The trial court acted well within its discretion under *Rule 4:46-5(a)* and *Lyons*, and Appellant had a full and fair opportunity to respond. Because no prejudice resulted and the judge relied on a complete record, affirmance is warranted on procedural grounds alone.

LEGAL ARGUMENT - POINT II

THE DEAD MAN'S ACT DOES NOT APPLY WHERE THE DEFENSE IS

BASED ON WRITTEN EVIDENCE AND NOT A DECEDENT'S

STATEMENTS

A. The Dead Man's Act Applies Only When a Claim Rests on Oral Testimony Against a Decedent

The Dead Man’s Act, N.J.S.A. 2A:81-2, is triggered only when a party relies on the *oral* promise, statement, or act of a decedent; it does not alter the evidentiary standard for claims proved by documents. Under *Chance v. McCann*, 405 N.J. Super. 547, 573-74 (App. Div. 2008), a court must take a two-step approach: (1) determine whether the proponent can make a prima-facie case from documentary or other non-oral evidence; and, if so, (2) require clear-and-convincing proof only as to any disputed oral recollections of the decedent. Judge DeAngelis followed precisely that framework, holding that “because the Mesias’ defense rests largely on a notarized deed ... the Dead Man’s Act does not apply.” (Pa32). The deed (Pa95) and the notary’s unrebutted deposition testimony, which the court accepted as establishing proper execution (Pa299), therefore remain subject to the ordinary preponderance standard; Appellant’s reliance on lay recollections, even if considered, would merely require the higher standard for those discrete statements—none of which is outcome-determinative.

B. *Chance v. McCann* Controls: The Act Does Not Apply Where the Defense Rests on Written Evidence

The Appellate Division’s decision in *Chance v. McCann*, 405 N.J. Super. 547 (App. Div. 2009), is controlling. There, the court held that the Dead Man’s Act does not apply where a party’s position is supported primarily by documents. Instead, the

heightened burden applies only to specific oral testimony concerning the decedent's conduct or intent.

As the court explained:

“[W]here a party’s claim or defense is based primarily on documentary evidence, the Dead Man’s Act does not require clear and convincing proof for the entire cause of action.”

Id. at 573–74.

The court also made clear that oral testimony may be used to “enhance the proofs,” but does not trigger the Act unless the case depends on such statements.

C. Respondents’ Defense Rests Entirely on Admissible Documentary Evidence

Respondents’ defense is established by a single documentary instrument: the notarized quitclaim deed executed on May 4, 2018, which Judge DeAngelis relied on exclusively in finding the Dead Man’s Act inapplicable. (Pa95-98 and Pa32). Earlier purchase documents, such as the 2016 mortgage and note (Pa92-93) are not needed to make the prima facie case, may provide contextual background, but they are unnecessary to the legal theory at issue and therefore do not trigger N.J.S.A. 2A:81-2. David made no payments, claimed no ownership, and never exercised control over the property.

Appellant attempts to impose a heightened burden merely because David is deceased. That is not the law. The documents speak for themselves, and the defense does not rest on oral testimony by or about David Buccafusca.

Even where the record includes recollections from the notary or other witnesses, such testimony does not trigger the Act. These statements are not the basis of the defense and serve as corroborative evidence of what the documents already establish.

D. The Trial Court Properly Applied the Brill Standard

The trial court properly recognized that the Dead Man's Act was not triggered and applied the Brill summary-judgment standard. It focused on the 2018 notarized deed, the sole document necessary to establish Respondents' prima-facie defense, together with the parties' sworn certifications, and concluded that Appellant offered no admissible evidence, expert or otherwise, to rebut that documentary record.

This approach precisely follows the framework set out in *Chance* and should be upheld on appeal.

E. Conclusion

Because the Respondents' defense rests entirely on written evidence, including a notarized deed, the Dead Man's Act does not apply. Appellant's

argument to the contrary reflects a fundamental misunderstanding of *Chance* and *N.J.S.A. 2A:81-2*. The trial court applied the correct standard under *Brill*, and its ruling should be affirmed.

LEGAL ARGUMENT - POINT III

THE RECORD ESTABLISHES A VALID INTER VIVOS GIFT;

APPELLANT FAILED TO PRESENT A TRIABLE ISSUE OF DONATIVE

INTENT, CAPACITY, OR UNDUE INFLUENCE

The validity of the May 4, 2018 deed hinges on whether the transfer from David Buccafusca to Respondents constituted a valid inter vivos gift. New Jersey law sets forth a three-part test, all of which are satisfied by the undisputed record in this case.

A valid inter vivos gift requires:

- (1) clear donative intent;
- (2) delivery and acceptance of the subject matter; and
- (3) an irrevocable relinquishment of control by the donor.

In re Dodge, 50 N.J. 192, 216–17 (1967).

A. Donative Intent Is Established by Sworn Testimony and Documentary Evidence

The appendix is devoid of any evidence that David Buccafusca ever paid the mortgage, real-estate taxes, insurance, or maintenance on the Wharton property. Blanca Moore testified under oath that Buccafusca “did not distribute even ten cents” toward closing costs or anything else (Da199 T21-20 to 22, and Pa287 T42-7-11, T44-9, 10), and the Estate introduced no financial records, exhibits, or contrary testimony to rebut those sworn denials.

Notary Sonia Calvay confirmed that Blanca Moore explained the nature of the deed to David, who willingly signed (Pa299 T43-2, 3). These statements are consistent with the objective documentary record, which is glaringly devoid of any evidence of financial contributions by David because he never contributed funds toward the purchase, mortgage, or maintenance, nor did he assert ownership rights at any time.

These facts are confirmed not only by undisputed payment records and closing documents, but also by the sworn certifications of Respondents Jose (Pa562) and Rocio Mesia (Pa565). Jose Mesia certified under oath that David Buccafusca did not contribute any of the funds used for the purchase of the property, never paid any portion of the monthly mortgage, and never reimbursed Respondents for “any expenses related to taxes, insurance, utilities, or repairs.” Rocio Mesia certified to the same. Both further confirmed that David never requested repayment or asserted

any ownership interest after the 2016 purchase. These sworn statements stand unrebutted in the summary judgment record.

B. Delivery and Acceptance Are Demonstrated by Notarized Execution

Although the Opposition originally stated that David handed the deed directly to Jose Mesia, the record does not support this assertion. Notary Sonia Calvay did not testify to that effect, and Moore did not describe such delivery either. Nevertheless, the deed's notarized execution and acknowledgment are facially valid and legally sufficient to establish delivery under *Branco v. Rodriguez*, 476 N.J. Super. 110, 117 (App. Div. 2023). See *id.* (“Delivery may be inferred from acknowledgment.”)

C. Irrevocable Relinquishment Is Confirmed by the Estate's Own Conduct

Since the 2016 purchase, Respondents have paid 100% of the mortgage, property taxes, and insurance (Pa546). David never requested reimbursement, and never treated the property as his own.

The totality of this post-closing conduct supports the conclusion that David had relinquished any legal or beneficial ownership long before the 2018 deed was

signed. His actions were consistent with someone who understood the property belonged to the Mesias. The record contains no evidence to the contrary.⁴

D. No Presumption of Undue Influence Applies

There is no basis in the record to apply a presumption of undue influence. Under *Pascale v. Pascale*, 113 N.J. 20, 30 (1988), such a presumption arises only where a confidential relationship exists and the donee has received a benefit. A confidential relationship exists where the donor is dependent on the donee or the donee exercises dominance or control over the donor's decision-making. Mere friendship, kindness, or closeness—without legal authority, dependency, or dominance—is insufficient. See also *In re Dodge*, 50 N.J. 192, 228 (1967).

Here, there is no evidence that David was dependent on the Mesias in any legal, financial, or personal sense. He had no illness-related guardianship, no power of attorney existed, and he maintained his independence in personal and financial matters. Respondents were not caregivers, fiduciaries, attorneys-in-fact, or legal

⁴ See *Gillman v. Bally Mfg. Corp.*, 286 N.J. Super. 523, 531 (App. Div. 1996) (“Business people do not enter into agreements to provide grist for the work of the courts. They do so to bring order and predictability to their affairs. . . . Our interest in preserving the stability of business arrangements outweighs whatever equitable purpose may be served by relieving plaintiff from the consequences of its own neglect.”). The parties to the 2016 purchase and 2018 deed—including the decedent—treated the Mesias as the true owners throughout his lifetime. That longstanding understanding should not be upended based on procedural objections or speculative posthumous claims.

representatives. David's hospice care was managed by a licensed agency, not the Mesias.

Moreover, David executed the deed in the presence of a neutral third-party notary, not in the presence of the Mesias. No one else was present, and the notary—who confirmed David's alertness and voluntariness—has no financial or relational ties to any party.

There is no evidence that David and the Mesias had a fiduciary, dependent, or confidential relationship that could give rise to a presumption of undue influence. David maintained his own legal and financial affairs. No power of attorney or dependency existed. Jose (Pa562) and Rocio Mesia (Pa565) each certified that they were not present when David executed the deed. These uncontested facts confirm that no relationship of trust or dominance existed that could give rise to a presumption of undue influence.

Because there is no confidential or fiduciary relationship in the record, the presumption of undue influence never arises. And in any event, Appellant has failed to offer any competent evidence of coercion, fraud, or manipulation that would support setting aside the deed under *Haydock v. Haydock's Ex'rs*, 34 N.J. Eq. 570, 574–75 (E. & A. 1881).

The fact that David remained on the mortgage note is legally irrelevant. A donor may remain liable on a debt while transferring legal title. See *Pascale*, 113 N.J. at 30.

Moore was David's realtor and former girlfriend; she was not his fiduciary, and the summary-judgment record contains no evidence of any confidential role (Pa32). Multiple notes indicate she cared deeply for David and was emotionally invested in his well-being. These facts support—not undermine—the presumption that she would not have allowed execution of a deed if David lacked understanding or voluntariness.

Accordingly, even if Appellant attempted to invoke a presumption of undue influence, the required elements are not satisfied. As explained in *Pascale v. Pascale*, 113 N.J. 20, 30 (1988), a presumption arises only when two conditions are met: (1) the existence of a confidential relationship between the donor and the donee, and (2) the presence of suspicious circumstances surrounding the transaction.

First, as addressed above, there is no confidential or fiduciary relationship between David and the Respondents. David managed his own affairs, lived independently, and was not legally or financially dependent on Respondents in any respect.

Second, there are no suspicious circumstances. The transaction was not rushed, hidden, or conducted in secret. The deed was executed in the presence of a neutral third-party notary, Sonia Calvay, who verified David's identity, confirmed his understanding, and observed that he was alert and acting voluntarily. Respondents were not present during the execution, and the record contains no evidence of coercion, deception, undue haste, or cognitive impairment. To the contrary, the transfer aligns with David's long-standing intent not to retain any ownership in the property. Because both required elements are absent, no presumption of undue influence arises.

E. Appellant Offered No Evidence of Fraud or Coercion

The deed was executed in the presence only of an independent notary, Sonia Calvay, who confirmed that David understood the nature of the transaction. No contrary testimony, documentation, or third-party account was presented to dispute the validity of the execution, which was facially proper and carried out under neutral conditions.

F. Appellant Offered No Competent Evidence of Incapacity

Appellant also failed to produce any medical or expert evidence that David lacked capacity to execute the deed. Hospice nurse Karen Cook, APN, did not testify that she conducted a capacity evaluation and did not state whether David did or did

not have capacity (Pa266). That lack of testimony does not meet the threshold necessary to create a genuine factual dispute.

G. Conclusion

The record establishes each element of a valid inter vivos gift. Appellant failed to raise a triable issue as to donative intent, delivery, coercion, or capacity. No presumption of undue influence applies. As a matter of law—and under *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520 (1995)—summary judgment was properly granted.

Notably, Appellant offered no admissible evidence—no expert affidavit, no forensic handwriting analysis, no treating physician testimony—to contradict the documentary record or raise a material factual dispute. Appellant’s claims rest solely on lay speculation, which is insufficient to defeat summary judgment. Affirmance is warranted.

LEGAL ARGUMENT - POINT IV

APPELLANT FAILED TO RAISE A TRIABLE ISSUE OF LEGAL INCAPACITY DUE TO THE ABSENCE OF EXPERT TESTIMONY AND TEMPORAL PROXIMITY TO THE DEED EXECUTION

A party contesting the validity of a legal instrument on the ground of mental incapacity bears the burden of presenting competent, admissible medical evidence—particularly when the capacity issue turns on medical conditions not within common knowledge. *Mullarney v. Bd. of Review*, 343 N.J. Super. 410, 418–19 (App. Div. 2001). The Estate failed to meet this burden.

A. The Estate Offered No Expert or Medical Evidence

The record demonstrates that the Estate had not retained any medical expert, treating physician, or forensic evaluator to opine on David Buccafusca’s capacity at the time of deed execution. The Estate relies entirely on lay opinion, including statements from family members and a hospice nurse.⁵

This is legally insufficient. Courts have consistently held that capacity challenges based on terminal illness, cognitive impairment, or neurological decline require expert support, and cannot be established through lay interpretation of symptoms or behavior. The Estate relies entirely on lay opinion, including

⁵ See *Brae Asset Fund, L.P. v. Newman*, 327 N.J. Super. 129, 134 (App. Div. 1999) (“Bare conclusions, unsupported by factual evidence or affidavits, are insufficient to survive summary judgment.”).

statements from family members and a hospice nurse, rather than offering competent medical proof—despite the ability to do so.⁶

Critically, David was never adjudicated incapacitated. No court proceedings were ever initiated to question his mental capacity. There is no legal or medical determination in the record finding him incompetent to understand or execute legal documents.

B. The Hospice Nurse Offered No Opinion on Capacity

On the morning of May 4, the date of the deed, David was evaluated at home by hospice nurse practitioner Karen Cook, APN. Cook testified that David was bedbound, lethargic, and in and out of sleep, but was more alert at the beginning of her visit and able to respond to direct questions. She stated that he “spoke in some sentences and gave some direct responses,” though he did not initiate conversation and only answered when asked how he was feeling (Pa266 T49-2 to 4, T49-12 to 16).

Cook acknowledged that her progress notes referred to verbal and nonverbal signs of discomfort, but testified that she could not recall the specifics without referring to her chart (Pa266 T42-22 to 25). She did not perform a legal capacity

⁶ See *Heljon Mgmt. Corp. v. Di Leo*, 55 N.J. Super. 306, 312 (App. Div. 1959) (“It is not sufficient for the party opposing the motion merely to deny the fact in issue where means are at hand to make possible an affirmative demonstration.”).

evaluation, and no medical expert in the record offered any opinion as to whether David lacked capacity at the time of the deed.. Her testimony does not support the Estate's theory.

C. No Evidence Ties Alleged Incapacity to the Moment of Execution

Cook's visit occurred in the morning; the deed was executed at approximately 4:30 p.m. Cook's observations, made several hours before the 4:30 p.m. signing, are simply too remote in time to create a triable issue as to David's mental state at the precise moment of execution. She was not present during the signing. The only witnesses Appellant relies upon—Daniel and Lori Buccafusca—testified to David's disorientation later that evening, after the deed had already been executed. Neither was present at the signing.

Sonia Calvay testified that she confirmed David's identity using a driver's license provided at the residence and matched it to the person in front of her (Pa299 T22-6 to 21; T42-5 to 9). She asked David whether he acknowledged the document and wished to sign it; he responded "yes." Calvay stated that she personally witnessed David sign the deed (Pa299 T41-6, T49-20, 21). She did not recall which hand he used or whether someone held the clipboard, but confirmed the signature was affixed in her presence (Pa299 T52-12 and T53-3).

D. Lay Opinion Is Legally Insufficient on the Question of Capacity

Although *N.J.R.E. 701* permits lay opinion based on rational perception, that rule is inapplicable where the subject matter is medically complex or legally esoteric. The Appellate Division has held that expert testimony is required “when the subject matter is so esoteric that jurors of common judgment and experience cannot form a valid judgment.” *Mullarney*, 343 N.J. Super. at 418.

Appellant’s theory of capacity relies on speculative assumptions about the cognitive effects of metastatic cancer.⁷ This is exactly the kind of issue that courts have found must be proven by medical experts, not family lay witnesses. See also *Matter of Estate of Theckston*, 2022 WL 4454481 (App. Div. Sept. 26, 2022) (unpublished) (rejecting a capacity challenge where no expert supported the claim and lay speculation predominated).

E. Conclusion

Appellant’s incapacity theory fails as a matter of law. The Estate provided no expert report, no treating physician opinion, and no admissible medical evidence to support a claim that David lacked capacity at the time he executed the deed. The

⁷ See *Fargas v. Gorham*, 276 N.J. Super. 135, 141 (Law Div. 1994) (“Self-serving assertions alone will not create a question of material fact sufficient to defeat summary judgment.”).

only contemporaneous, qualified witness—Notary Calvay—testified that David understood the deed and signed willingly. Appellant’s evidence is speculative, temporally disconnected, and legally inadequate under *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520 (1995).

Accordingly, the trial court correctly concluded that no genuine issue of material fact exists as to capacity, and summary judgment was properly granted.

LEGAL ARGUMENT - POINT V

**THE NOTARIZED DEED IS PRESUMPTIVELY VALID AND
VOLUNTARY; APPELLANT FAILED TO REBUT IT WITH
COMPETENT EVIDENCE**

A. Notarized Deeds Are Presumed Valid Under New Jersey Law

A notarized deed is entitled to a strong presumption of authenticity and voluntariness. Under *N.J.S.A. 2A:82-1*, a notarized acknowledgment serves as prima facie evidence of proper execution, even where the genuineness of the signature is challenged.

This presumption is further supported by established case law. In *Dencer v. Erb*, 142 N.J. Eq. 422, 426 (Ch. 1948), the court held:

“A certificate of acknowledgment made by a duly authorized officer is prima facie evidence that the grantors therein named executed the instrument as their voluntary act and deed. ... [To rebut it,] the proof must be clear, satisfactory, and convincing.”

The burden thus shifts to the party contesting the deed to produce compelling and credible evidence—not mere suspicion or comparison of signatures.

B. Calvay’s Testimony and Notarial Seal Establish Proper Execution

The May 4, 2018 deed includes a notarized acknowledgment by Sonia Calvay, a duly commissioned New Jersey notary. Calvay testified that she verified David’s identity using his government-issued photo ID, asked whether he was willing to sign the deed and received a “yes” response, and then observed him sign the document in her presence. She did not assess David’s legal or medical capacity and was not involved in drafting or explaining the deed (Pa299 T42-5,6; T49-20,21; T74-18 to 21). While Calvay described David as cooperative and responsive, she made no medical observations. Her testimony is unrebutted, credible, and provided by a neutral, independent witness.

C. Appellant Offered No Expert or Competent Rebuttal

Despite challenging the deed’s execution, Appellant presented no admissible or competent evidence to rebut the presumption of validity. Specifically, Appellant submitted:

- no handwriting expert;
- no medical expert;
- no affidavit challenging the notarization;
- no authentication dispute; and
- no factual or forensic report undermining the notarial acknowledgment.

Appellant instead relies solely on a visual comparison between:

- David’s signature on the May 4, 2018 quitclaim deed (Pa95 and Pa98); and
- His hospice admission signature from April 24, 2018 (Pa359).

But minor differences in appearance—especially for a terminally ill individual—do not overcome the statutory presumption. See *Dencer*, 142 N.J. Eq. at 426 (requiring “clear, satisfactory, and convincing” proof to rebut a notarized deed).

D. Lay Comparison and Speculation Are Legally Insufficient

New Jersey courts routinely hold that lay opinions and speculative visual comparisons do not suffice to raise a triable issue of forgery. *Brill v. Guardian Life*

Ins. Co., 142 N.J. 520, 540 (1995), requires the opposing party to present admissible evidence that would permit a reasonable jury to find in their favor.

Here, no witness testified that the deed was forged. There was no motion to strike the deed, no claim of fraud, and no evidence undermining the seal.

Appellant never properly pled forgery in the Verified Complaint. Nowhere does the complaint allege that any specific individual forged the deed or plead the elements of forgery as required under New Jersey law. See *State, Dep't of Treasury v. Qwest Comm. Int'l, Inc.*, 387 N.J. Super. 469, 478 (App. Div. 2006) (requiring specificity for fraud-based pleadings). The trial court did not reach the issue of forgery—and rightly so. Because Appellant failed to plead forgery with requisite specificity, he cannot now raise it on appeal.

E. Appellant Never Properly Pled Forgery

In any event, Appellant's forgery theory is procedurally barred. Forgery is a fraud-based claim and must be pleaded with particularity under Rule 4:5-8(a). Appellant did not assert an affirmative cause of action for forgery, nor did he plead its elements with the specificity required. Generalized or equivocal allegations about the authenticity of a signature do not satisfy the heightened pleading standard. See *State, Dep't of Treasury v. Qwest Commc'ns Int'l, Inc.*, 387 N.J. Super. 469, 478

(App. Div. 2006). Having failed to raise the issue properly in the trial court, Appellant may not advance it now on appeal.

F. Conclusion

The notarized deed executed on May 4, 2018, is presumptively valid. That presumption stands un rebutted. Appellant failed to offer any competent evidence—expert, forensic, or factual—to challenge its execution, authenticity, or voluntariness. As a matter of law, the deed must be upheld.

The trial court correctly relied on that presumption in granting summary judgment under *Brill* and *Dencer*. Appellant’s forgery and authenticity theories rest entirely on lay speculation and visual comparisons—not on admissible or expert evidence. Affirmance is warranted.

CONCLUSION & RELIEF SOUGHT

The trial court applied the correct legal standard under *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520 (1995) (Pa32), and entered summary judgment only after reviewing the full, voluminous record. Appellant has identified no admissible evidence—expert, forensic, or documentary—sufficient to create a genuine dispute of material fact as to execution, capacity, intent, or voluntariness.

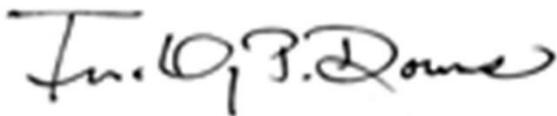
Because Appellant failed to meet its burden under *Brill* and offers no basis to disturb the presumptions that attach to a duly executed and acknowledged deed, Respondents respectfully request that the Appellate Division affirm the January 13, 2025 orders in full, and award taxable costs pursuant to *Rule 2:11-4(a)*.

To the extent this appeal delays the final administration of the estate and clouds the title to real property, affirmance will not only uphold correct legal principles but serve the interests of finality, equity, and judicial economy.

This was also an equitable proceeding. The trial court, sitting as a court of equity, reviewed the full evidentiary record and rendered a result grounded in both fairness and law. Appellant identifies no legal or equitable basis for reversal. The trial court's 25-page Statement of Reasons (Pa32) reflects a careful and comprehensive application of the correct legal standard. This Court should do the same.

CERTIFICATION OF COMPLIANCE (R. 2:6-10)

I certify that this brief complies with the formatting requirements of **Rules 2:6-7 a nd 2:6-10**, including font size, spacing, and the 65-page limit.



Timothy P. Downs, Esq.
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Date: August 4, 2025

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August 19, 2025

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Re: In the Matter of the Estate of David
Buccafusca, Deceased
Appellate Docket No: A-001653-24
Trial Court Docket No.: MRS-P-1307-2018
Sat Below: Hon. Frank DeAngelis, P.J. Ch.

Dear Judges of the Appellate Division:

The undersigned represents the plaintiff/appellant in the above reference matter. Kindly accept this letter reply brief in lieu of a more formal reply brief being submitted in response to the respondents' opposition brief.

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS	3
PRELIMINARY STATEMENT.....	3
PROCEDURAL HISTORY	3
STATEMENT OF FACTS	3
LEGAL ARGUMENT	4

POINT I: THE TRIAL COURT ERRED IN NOT DEEMING PLAINTIFF’S STATEMENT OF UNCONTESTED MATERIAL FACTS AS BEING ADMITTED BASED UPON THE DEFENSE FAILURE TO SUBMIT A RESPONDING STATEMENT PRIOR TO ORAL ARGUMENT ON THE SUMMARY JUDGMENT MOTION (13a)4

POINT II: THE TRIAL COURT ERRED IN FAILING TO APPLY THE CLEAR AND CONVINCING EVIDENCE STANDARD CONTAINED WITHIN THE “DEAD MAN'S ACT”, AND ALSO ERRED IN FINDING THAT THE DEED AT ISSUE IN THIS LITIGATION COULD PROVIDE A WRITING WHICH WOULD NEGATE THE APPLICABILITY OF THE ACT (15a).....7

POINT III: AN *INTER VIVOS* GIFT OF REAL PROPERTY FROM AN UNREPRESENTED, CANCER STRICKEN, PHYSICALLY AND COGNITIVELY IMPAIRED GRANTOR ON HOSPICE CARE ALLEGEDY EXECUTED THE DAY BEFORE HIS PASSING TRANSFERRING THE PROPERTY TO THE CO-OWNERS SHOULD BE VOIDED WHERE THE GRANTEE ARRANGED THE TRANSACTION AND THERE WAS NO INDICATION THE GRANTOR UNDERSTOOD THE NATURE AND EFFECT OF THE SIGNING OF THE SUBJECT DEED (17a)9

POINT IV: THE TRIAL COURT ERRED WHEN IT REJECTED THE TESTIMONY OF THE ADVANCE PRACTICE NURSE CONCERNING THE EXTREME INFIRMITY AND COMPLETE DEPENDENCE OF DAVID BUCCAFUSA ON HIS CARETAKERS AND AS A CONSEQUENCE THE TRIAL COURT FAILED TO FIND UNDUE INFLUENCE AND/OR LACK OF CAPACITY (24a).....11

POINT V: THE TRIAL COURT ERRED IN ACCEPTING THE DECEDENT’S SIGNATURE ON THE DEED AS HIS OWN WITHOUT EVER ANALYZING THE APPEARANCE OF THE KNOWN SIGNATURE OF THE DECEDENT AS AGAINST THE SIGNATURE ON THE DEED AND ALSO CONSIDERING THE OTHER FACTS PRESENTED BY PLAINTIFF TO SUGGEST THE DECEDENT WAS INCAPABLE OF SIGNING HIS NAME LESS THAN TWENTY-FOUR HOURS BEFORE HIS DEATH (9).....13

CONCLUSION15

TABLE OF JUDGMENTS, ORDERS AND RULINGS

January 13, 2025 Order Denying Plaintiff’s Motion for Summary
Judgment 4a

January 13, 2025 Order Granting Defendant’s Motion for Summary
Judgment 32a

PRELIMINARY STATEMENT

The appellant continues to rely upon the Preliminary Statement as set forth in its initial brief filed with the court.

PROCEDURAL HISTORY

The appellant continues to rely upon the Procedural History as set forth in its initial brief filed with the court.

STATEMENT OF FACTS

The appellant continues to rely upon the Statement of Facts submitted in its initial brief.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN NOT DEEMING PLAINTIFF'S STATEMENT OF UNCONTESTED MATERIAL FACTS AS BEING ADMITTED BASED UPON THE DEFENSE FAILURE TO SUBMIT A RESPONDING STATEMENT PRIOR TO ORAL ARGUMENT ON THE SUMMARY JUDGMENT MOTION (13a)

In opposing the appellant's Legal Argument Point I, the respondents rely entirely upon their misunderstanding of the holding of the New Jersey Supreme Court's opinion in Lyons v. Township of Wayne, 185 N.J. 426 (2005). The proposition advanced by the respondents is that Lyons is to be interpreted as permitting trial courts to consider "late-filed" materials in order to resolve motions on the merits. However, that reliance is misplaced and their interpretation of the holding of that opinion is incorrect.

In fact Lyons establishes a critical proposition regarding summary judgment applications in New Jersey courts that is in actuality just the opposite of how the respondents seek to use its holding. Lyons established that a litigant's failure to comply with the mandatory procedural requirements of Rule 4:46-2 alone warrants denial of a summary judgment motion. Id. at 434-37. The core procedural requirement which the Court emphasized is that Rule 4:46-2(a) mandates that a motion for summary judgment must be accompanied by "a statement that sets forth, in separately numbered paragraphs, a concise statement

of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted". Id. at 435. (internal citation omitted) The Court held that "the moving party, therefore, initially is responsible for showing the absence of disputed, material facts, and failure to file the required statement alone warrants denial of the movant's motion". Id. The Court went on to hold that the party opposing the motion then must file a responding statement either admitting or disputing each of the facts in the movant's statement. Id. The Court never held – as the respondents argue – that a party is permitted to file the required responding statement post due date and post oral argument. That argument is simply incorrect.

In Lyons, the Township of Wayne failed to comply with the summary judgment procedural requirements, instead choosing to "supplement its motion for summary judgment with a thirty-five item list of documents attached to its motion as exhibits". Id. The Court noted that this failure, combined with the *pro se* plaintiffs' corresponding failure to file a responding statement under Rule 4:46-2(b), created an "inadequate record" that prevented proper determination of material facts. Id. at 435 – 37.

The decision establishes several important principles. First, the Court stated explicitly that "summary judgment requirements, however, are not

optional". The Court noted that some courts have "chosen to sanction counsel for disobeying this very rule," Id. at 435 citing Mandel v. UBS/PaineWebber, Inc., 373 N.J. Super. 55, 82-83 (App. Div. 2004). Second, the Court explained that non-compliance with Rule 4:46-2 "can result in a considerable waste of judicial time and resources when trial and appellate courts are forced to search for factual issues by sifting through voluminous and confusing records -- work that should be performed by the parties". Id. at 436. Third, that Rule 4:46-2 "plays the critical role of focusing the parties and the court's attention on the areas of actual dispute". Id. This procedural structure is designed to streamline summary judgment proceedings by requiring parties to identify precisely what facts are and are not in dispute. Finally, the Court issued a clear directive for future cases: "We expect that parties will comply with the appropriate summary judgment requirements in the future, and, if not, trial courts will consider the imposition of sanctions". Id. In the case at bar the respondents failed to comply with the Rule and that failure clearly prejudiced the appellant as it had no opportunity to respond in its reply brief and because the respondents submitted their papers after oral argument there was no chance to address the issues raised/created during oral argument.

Based upon the foregoing it is clear that the trial court erred in failing to accept the facts contained within the petitioner's Statement of Uncontested

Material Facts as being true when no opposition had been filed prior to oral argument and then accepting and considering respondents' belatedly filed – that is filed not only after the time to file had expired but actually filed after oral argument had been held – response to petitioner's Statement of Uncontested Material Facts.

LEGAL ARGUMENT

POINT II

THE TRIAL COURT ERRED IN FAILING TO APPLY THE CLEAR AND CONVINCING EVIDENCE STANDARD CONTAINED WITHIN THE "DEAD MAN'S ACT", AND ALSO ERRED IN FINDING THAT THE DEED AT ISSUE IN THIS LITIGATION COULD PROVIDE A WRITING WHICH WOULD NEGATE THE APPLICABILITY OF THE ACT (15a)

In opposing the appellant's Legal Argument Point II, the respondents fail to actually address the legal arguments raised by the petitioner and instead simply agree with the analysis of the trial court. Superficially this would seem sound practice. However it is respectfully submitted that the result of this tactic is that there is a void in response to the legal arguments advanced on appeal.

In an effort to fill that void the appellant would emphasize this point of its legal argument; Chance v. McCann, 405 N.J. Super. 547 (App. Div. 2009) specifically addressed the challenger's ability to make a prima facie case – not the proponent's ability to rely solely upon the disputed document. In the case at bar the appellant is the challenger of the quit claim deed and the respondents

August 19, 2025
Page 8 of 15

are the proponents of that document. In analyzing the issue the trial court utterly failed to consider any of the other evidence presented in support of the challenge such as the continued obligation of the decedent's estate as to the existing note and mortgage and the alleged statements attributed to the decedent by the respondents to the effect that upon the purchase of the property Mr. Buccafusca asserted that he did not wish any actual equity interest in the property. This is a quintessential trigger for the application of the Dead Man's Act. Both the trial court in its opinion or the respondents in opposition to this appeal fail to address these critical and clearly applicable factual issues and the legal issues that flow from them.

Additionally, Moran v. Estate of Pellegrino, 90 N.J. Super. 122, 124-25 (App. Div. 1966) established that "the clear and convincing evidence standard of proof applies 'in all cases where the claim against the decedent's estate depends at least in part upon the truth of oral testimony of the promises or acts of decedent, even when written evidence has also been introduced'". This approach prevents precisely the type of manipulation present in the instant matter and yet its mandate was ignored by the court and the respondents in their brief.

The Dead Man's Statute exists to prevent false claims made against an estate when the decedent cannot defend against such assertions. The trial court's

approach completely undermines this protection by allowing interested parties to create documents on a decedent's deathbed and then claim immunity from scrutiny merely because the suspect document itself exists.

LEGAL ARGUMENT

POINT III

AN INTER VIVOS GIFT OF REAL PROPERTY FROM AN UNREPRESENTED, CANCER STRICKEN, PHYSICALLY AND COGNITIVELY IMPAIRED GRANTOR ON HOSPICE CARE ALLEGEDLY EXECUTED THE DAY BEFORE HIS PASSING TRANSFERRING THE PROPERTY TO THE CO-OWNERS SHOULD BE VOIDED WHERE THE GRANTEE ARRANGED THE TRANSACTION AND THERE WAS NO INDICATION THE GRANTOR UNDERSTOOD THE NATURE AND EFFECT OF THE SIGNING OF THE SUBJECT DEED (17a)

In opposing the appellant's Legal Argument Point III, the respondents rely entirely on the fact that they expended funds on expenses such as taxes and insurance in order to live in the single family home that the decedent bought with them. They fail to address the facts raised by the appellant that the note and the mortgage have never been taken out of the decedent's name and the estate remains obligated on those legal documents to this day. They fail to address the fact that they rely solely upon the alleged oral statement made by the decedent – a person they had never met previous to engaging in the subject transaction – that he did not want anything in exchange for agreeing to buy the house with them. They claim that since he walked into Blanca Moore's office

and saw them crying because they could not purchase a home that he was compelled to buy it with these people he did not know.

The trial court failed to properly consider and apply In the Matter of Geraldine R. Dodge, 50 N.J. 192 (1967) and the respondents in their brief erroneously interpret its holding as requiring a showing of the donor being mentally incompetent. Quite simply that is not the holding of Dodge. The holding of Dodge is set out in appellant's initial brief and will not be repeated here for the mere sake of repetition.

It is interesting to note that the funds expended by the respondents to live in the house they jointly bought with the decedent is also typical of the funds one would expect to pay were they living in the residence via a life estate interest. Recall as well that the facts presented to the trial court on the summary judgment application revealed that no mention of any such agreement between the decedent and the respondents was ever revealed to the attorney who jointly represented the three purchasers. Furthermore, that attorney testified that had she been informed of any such arrangement she would have had to bring in additional counsel as a conflict of interest would have arisen. (241a – 242a)

LEGAL ARGUMENT

POINT IV

THE TRIAL COURT ERRED WHEN IT REJECTED THE TESTIMONY OF THE ADVANCE PRACTICE NURSE CONCERNING THE EXTREME INFIRMITY AND COMPLETE DEPENDENCE OF DAVID BUCCAFUSA ON HIS CARETAKERS AND AS A CONSEQUENCE THE TRIAL COURT FAILED TO FIND UNDUE INFLUENCE AND/OR LACK OF CAPACITY (24a)

Once again, in opposing the appellant's Legal Argument Point IV, the respondents merely parrot the trial court's reasoning and fail to address the issues being raised by the appellant in this appeal. Specifically, like the trial court, the respondents never address the facts contained within the certified medical records attesting to David's medical conditions which were submitted in support of the petitioner's summary judgment motion.

Similarly the respondents also fail to actually analyze the Advance Practice Nurse's personal observations. They also fail to acknowledge and even attempt to rebut the fact that they had affirmatively accepted the APN's medical opinions as to David's condition and those acknowledgments were contained within their belatedly filed response to the petitioner's Statement of Uncontested Material Facts. All of this is laid out in appellant's initial brief on appeal.

The trial court should have considered all of the evidence in the form of opinion offered by the APN on matters rationally related to her perception and

August 19, 2025
Page 12 of 15

the opinion would have assisted in understanding the witness's testimony and determining a fact in issue. N.J.R.E. 701 Instead the trial court rejected all of that medical professional's factual testimony and opinions and instead established a new standard for litigating matters of the sort presented here. That is, a medical expert – presumably a doctor – must testify as to a person's cognitive abilities even in *inter vivos* gift scenarios. Note well that not even in the Supreme Court's In the Matter of Geraldine R. Dodge, 50 N.J. 192 (1967) was this stated to be a requirement.

In Dodge the Court addressed the medical testimony concerning Mrs. Dodge's mental deterioration due to generalized arteriosclerosis affecting her cerebral vessels, which resulted in memory defects, disorientation, confusion, and progressive dementia. However, the court specifically stated:

Our motive in reviewing, at the outset of this opinion, the testimony dealing with Mrs. Dodge's mental condition is not to indicate that the proof sufficiently shows incapacity to make a gift on May 16, 1961. The purpose is to project, as a proper backdrop for the evaluation of the evidence in the case, the fact that this elderly lady ... had a gradually progressive, insidious arteriosclerosis which apparently was not affecting her physical appearance, but which was lowering her mental acuity and moving her towards incapacity to handle her very substantial affairs.

Id. at 198

This language demonstrates that the medical evidence served contextual purposes rather than establishing any evidentiary requirement for challenging

lifetime gifts. The trial court was wrong to create such a requirement in the case at bar.

LEGAL ARGUMENT

POINT V

THE TRIAL COURT ERRED IN ACCEPTING THE DECEDENT'S SIGNATURE ON THE DEED AS HIS OWN WITHOUT EVER ANALYZING THE APPEARANCE OF THE KNOWN SIGNATURE OF THE DECEDENT AS AGAINST THE SIGNATURE ON THE DEED AND ALSO CONSIDERING THE OTHER FACTS PRESENTED BY PLAINTIFF TO SUGGEST THE DECEDENT WAS INCAPABLE OF SIGNING HIS NAME LESS THAN TWENTY-FOUR HOURS BEFORE HIS DEATH (9)

In opposing the appellant's Legal Argument Point V, the respondents create an argument that the petitioner failed to raise the issue of the Quit Claim Deed being a forged document. To the contrary, at paragraph twenty-seven of the Verified Complaint the petitioner asserted: "Upon information and belief the signature of the decedent which appears on the subject Quit Claim Deed is not the signature of the decedent." (71a) The issue was thus put before the trial court and the respondents were on notice.

This newly asserted argument that the claim of forgery was not pled with sufficient particularity, was never raised previously by the respondents and should be rejected on that basis.

As for the respondents' assertion that N.J.S.A. 2A:82-1 establishes that "a notarized acknowledgment serves as prima facie evidence of proper execution,

August 19, 2025
Page 14 of 15

even when the genuineness of the signature is challenged”, that language appears nowhere in the cited statute. The citation and attribution by the respondents is false. They go on in a separate paragraph to refer to Dencer v. Erb, 142 N.J. Eq. 422 (Ch. 1948) as authority for the assertion but that decision is not binding upon this court. However, even if this court were to agree that a notarial seal upon a dispute document establishes *prima facie* evidence of its authenticity it is just that – *prima facie* evidence. It is respectfully submitted that the overwhelming evidence submitted by the appellant in opposition to the Quit Claim Deed overcomes any *prima facie* establishment of the propriety of the Quit Claim Deed at issue in this matter. This includes first and foremost the disturbingly glaring difference between the known signature of the decedent made by him while a patient at Memorial Sloan Hospital for Cancer and Allied Diseases upon his admission into hospice care mere days before his death (345a) and the flowing signature which appears on the Quit Claim Deed. (100a) The signature given to accept hospice care was witnessed by two persons associated with the hospital who gave their addresses as care of the hospital address in New York. The Quit Claim Deed was allegedly witnessed by a woman who works at the Wharton, NJ ShopRite supermarket and moonlights as a Notary who was from Peru – the same country as the respondents. (128a - 129a) Furthermore, as presented in the petitioner’s Statement of Uncontested Material Facts, the

August 19, 2025
Page 15 of 15

veracity of the Notary was firmly called into question when she was forced to recant various parts of her sworn testimony after being confronted with conflicting factual information. (129a – 132a) Furthermore, additional points of her testimony concerning Mr. Buccafusca’s physical condition and ability to interact with others on the day before his death when he is alleged to have signed the Quit Claim Deed are directly opposite to the observations of the Advance Practice Nurse. (120a – 125a)

CONCLUSION

Based upon the forgoing, it is respectfully requested that the Court reverse the decisions of the trial both in the denial of summary judgment as to the plaintiff and the grant of summary judgment to the defendants. Alternatively, the matter should be remanded for trial.

Respectfully submitted,
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