
RED ROSE INVESTORS LLC	:	SUPERIOR COURT OF NEW JERSEY
D/B/A TOTOWA INVESTORS	:	APPELLATE DIVISION
LLC,	:	DOCKET NO.: A-002104-24
Plaintiff-Appellant,	:	
	:	
V.	:	On Appeal From:
	:	SUPERIOR COURT OF NEW JERSEY
MC-FAM PROPERTY RTE. 3,	:	PASSAIC COUNTY
LLC,	:	CHANCERY DIVISION
Defendant-Respondent.	:	DOCKET NO.: PAS-C-79-23
	:	
AND	:	Sat Below:
	:	HONORABLE
MC-FAM PROPERTY RTE. 3,	:	FRANK COVELLO, J.S.C.
LLC,	:	
Defendant-Respondent,	:	
	:	
V.	:	
	:	
JF-TOTOWA DONUTS, INC.	:	
D/B/A DUNKIN' DONUTS	:	
	:	
Third-Party Defendant-	:	
Appellant.	:	

**BRIEF ON BEHALF OF APPELLANT,
RED ROSE INVESTORS LLC D/B/A TOTOWA INVESTORS LLC**

On the Brief:
Russell M. Finestein, Esq. (Attorney ID# 014191981)
Michael D. Malloy, Esq. (Attorney ID# 025721980)
Daniel L. Finestein, Esq. (Attorney ID# 011792009)

FINESTEIN & MALLOY, L.L.C.
50 Cardinal Drive - Suite 203
Westfield, New Jersey 07090
(973) 635-4500
Attorneys for Plaintiff-Appellant
Red Rose Investors LLC d/b/a
Totowa Investors LLC

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
TABLE OF JUDGMENTS, ORDERS AND RULINGS	iii
STATEMENT OF ITEMS SUBMITTED TO COURT IN SUMMARY JUDGMENT MOTIONS	iv
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY	2
STATEMENT OF FACTS.....	5
LEGAL ARGUMENT.....	8
<u>POINT I</u>	8
THE EASEMENT FOR THE DRIVE-THROUGH SHOULD BE DETERMINED TO BE CONTINUING WHILE A DUNKIN’ DONUTS IS BEING OPERATED (1T:33-8)	
<u>POINT II</u>	12
THE TRIAL COURT SHOULD HAVE APPLIED THE DOCTRINE OF RELATIVE HARDSHIP TO PERMIT CONTINUED USE OF THE DRIVE-THROUGH (2T:5-7)	
CONCLUSION	22

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<u>Gilpin v. Jacob Ellis Realties, Inc.</u> , 47 N.J. Super. 26 (App. Div. 1957)	13, 16, 17
<u>Hyland v. Fonda</u> , 44 N.J. Super. 180, 129 A.2d 899 (App. Div. 1957)	8
<u>Khalil v. Motwani</u> , 376 N.J. Super. 496, 871 A.2d 96 (App. Div. 2005)	8, 9
<u>Ostrem v. Alyeska Pipeline Service Co.</u> , 648 P.2d 986, 989 (Alaska 1982)	14
<u>Poblette v. Towne of Historic Smithville Cmty. Ass'n, Inc.</u> , 355 N.J. Super. 55, 809 A.2d 178 (App. Div. 2002)	8
<u>Rosen v. Keeler</u> , 411 N.J. Super. 439 (App. Div. 2010)	8, 11
<u>Stuttgart Elec. Co., Inc. v. Riceland Seed Co.</u> , 802 S.W.2d 484 (Ark. App. 1991)	13, 14
<u>Szymczak v. LaFerrara</u> , 280 N.J. Super. 223 (App. Div. 1995)	12, 13, 14, 15, 16
 <u>Other Authorities</u>	
<u>D. Dobbs, Handbook of the Law of Remedies § 5.6</u> , at 355-57 (1973); Annot., 28 A.L.R.2d 679 (1953)	14
<u>Restatement (Third) of Property: Servitudes § 2.6 comment c</u> (2000)	9
<u>Restatement (Second) of Torts §941 and comments a-c</u> (1977)	12, 14

TABLE OF JUDGMENTS, ORDERS AND RULINGS

	<u>Page(s)</u>
Order denying Plaintiff’s Motion for Summary Judgment, Entered September 13, 2024	Pa408
Order granting MC-FAM’s Motion for Summary Judgment as to Count I of the Complaint, entered September 13, 2024	Pa410
Trial Court’s Opinion on entry of Summary Judgment as to Count I	1T:33-8
Order granting Plaintiff’s Motion for Summary Judgment as to Count II of the Complaint, entered September 26, 2024	Pa412
Trial Court’s Opinion on entry of Summary Judgment as to Count II	2T:5-7
Order for Judgment after Trial and Decision of the Court as to the Counterclaim, entered February 3, 2025	Pa413

STATEMENT OF ITEMS SUBMITTED TO COURT
IN SUMMARY JUDGMENT MOTIONS

<u>Document Description</u>	<u>Page(s)</u>
MC-FAM’s Notice of Motion for Summary Judgment Filed on August 9, 2024	
(a) MC-FAM’s Notice of Motion	Pa377
(b) Statement of Material Facts	Pa379
(c) Certification of Counsel	Pa374
Red Rose’s Notice of Cross-Motion for Summary Judgment filed on August 28, 2024	
(a) Red Rose’s Notice of Cross-Motion	Pa385
(b) Responding Statement of Material Facts	Pa387
(c) Certification of Russell M. Finestein	Pa060
(d) Certification of Kenneth Friedman	Pa369
JF-Totowa Donuts, Inc.’s Opposition to MC-FAM’s Notice of Motion for Summary Judgment filed on September 5, 2024	
(a) Certification of Ashwin Prajapati	Pa343

PRELIMINARY STATEMENT

This action involves a dispute between two commercial property owners over whether the term of an easement for a drive-through attached to a Dunkin' Donuts should be extended. Plaintiff, Red Rose Investors LLC d/b/a Totowa Investors LLC ("Red Rose"), asserts that based on the intention of the parties to the original grant and the doctrine of relative hardship, the Appellate Division should declare that the easement should remain in effect for so long as the Dunkin' Donuts is being operated, provided Red Rose or its tenant, third-party defendant, JF-Totowa Donuts, Inc. ("Dunkin' Donuts"), pays to MC-FAM the fair market rent for the easement area. Defendant, MC-FAM Property Rte. 3, LLC ("MC-FAM"), asserts that the term of the easement is limited to the period for which the annual fees were established by original parties to the Deed of Easement over 30 years ago. The Trial Court agreed with MC-FAM and failed to consider at all the equities and hardships as required by the doctrine of relative hardship. Had it done so, it would have been clear that Red Rose was entitled to a determination that Red Rose and its tenant could remain in possession of the drive-through, provided it pays monetary damages in the form of fair market rent.

PROCEDURAL HISTORY

On July 12, 2023, Red Rose filed a Complaint containing two counts, the First Count asserting that it was the intention of the parties that a drive-through easement remain in effect if a lease for a Dunkin Donuts was in effect, provided that a fair market rental was paid for use of the easement. (Pa001) In the Second Count, Red Rose asserts that the continued use of the easement area is essential in operating the Dunkin Donuts and that the inability to use the easement would require Red Rose to remove a portion of the building and result in a disproportionate remodeling expense and rental loss and that pursuant to the doctrine of relative hardship, the Court should declare the easement to remain in effect upon payment of a fair market rent. (Pa001) On September 18, 2023, MC-FAM Property Rte. 3, LLC filed a Contesting Answer, Counterclaim and Third-Party Complaint asserting that the Deed of Easement should not be extended and further seeking damages based on the fair market rental of the easement area since July 2023, when MC-FAM asserts that the easement expired. (Pa006) An Answer to the Third-Party Complaint was filed by Dunkin Donuts, with a Cross-Claim asserted against Red Rose. (Pa031) The Cross-Claim was ultimately dismissed without prejudice. (Pa058) Subsequently, as a result of a successful motion to amend, Red Rose amended the Complaint to add

a count for a prescriptive easement over a certain rear driveway opening that connected to the MC-FAM property and permitted ingress and egress to Route 46. (Pa044) Cross-motions for summary judgment were filed. (Pa377, Pa385) On September 13, 2024, the Court granted summary judgment in favor of MC-FAM dismissing the First Count of the Complaint and denied Red Rose's cross-motion for summary judgment.¹ (Pa408) Thereafter, during a Pretrial Conference held on September 26, 2024, the Trial Court granted the motion of MC-FAM to dismiss the Second Count of the Complaint, which concerned the doctrine of relative hardship. The Trial Court stated it would modify the Orders to reflect the dismissal of the Second Count, but same was not entered until recently per Order of the Appellate Division. (Pa412)

The claim for prescriptive easement was dismissed by the Trial Court at the end of Red Rose's case at trial, which took place on September 30, 2024.² During the trial, The Trial Court heard testimony from the parties' respective appraisal experts as to their opinion on the appropriate fair market rental. The

¹ Reference to "1T" refers to the transcript of the hearing held before the Trial Court on September 13, 2024. Reference to "2T" refers to the transcript of the Pre-Trial Conference/Hearing held before the Trial Court on September 26, 2024. Reference to "3T" refers to the transcript of the trial held before the Trial Court on September 30, 2024.

² Red Rose is not appealing the Trial Court's decision declaring a prescriptive easement does not exist.

Trial Court entered a Final Judgment on February 3, 2025 (Pa413), requiring Dunkin' Donuts to vacate the easement area by May 1, 2025, awarding damages in the amount of \$1,048.33 per month from August 2023 through April 30, 2025 for use of the easement area after July 31, 2023, and canceling the Deed of Easement of record.

Red Rose sought a stay of the Final Judgment pending appeal from the Trial Court and was denied. Thereafter, Red Rose renewed its application for a stay and an Order granting the stay was entered by the Appellate Division on April 30, 2025.

STATEMENT OF FACTS

D.D. Toto, L.P. was a tenant of the property commonly known as 580 Route 46 East, Totowa, New Jersey and designated as Tax Lot 5 in Block 172 (“Lot 5”) by virtue of Lease Agreement with Carmine Curcio dated July 1, 1993. (Pa063) Lot 5 has been operated as a Dunkin’ Donuts since 1993. (Pa063, Pa081) At that time, i.e. 1993, Dunkin’ Donuts Incorporated required drive-through windows for new franchises. (Pa370)

In 1993, D.D. Toto, L.P. negotiated a Deed of Easement with Madeline Freda, the owner of 578 Route 46, Totowa, New Jersey and designated as Lot 4 in Block 172 (“Lot 4”), which permitted a drive-through lane on the side of the Dunkin’ Donuts building that was to be located on Lot 4. (Pa075) The Deed of Easement provided that the term of the Easement Agreement shall run concurrently with a Lease between Carmine Curcio and D.D. Toto, L.P., and shall be binding on the heirs, successors, transferees and assignees of the parties, and provided for an annual fee for the easement interest for the period through July 31, 2023, but did not contain any express provision as to the annual fee after July 31, 2023. (Pa075) It was understood by D.D. Toto, L.P. that as long as a Dunkin’ Donuts was being operated, Dunkin’ Donuts would have an easement for the drive-through. (Pa369) Carmine Curcio, D.D. Toto, L.P. and

Dunkin' Donuts Incorporated are parties to a Notice of a Dunkin' Donuts Lease Option Agreement dated October 1, 1993. (Pa081)

MC-FAM Property Rte. 3, LLC ("MC-FAM") acquired title to Lot 4 by virtue of deed dated September 3, 2008. (Pa087) MC-FAM was aware of the Deed of Easement when it acquired title to Lot 4. (Pa189)

By Lease Agreement dated November 21, 2013, Curcio entered into a new lease with Red Rose, which had a term of ten (10) years commencing on December 1, 2013, with two five-year options to extend the term. (Pa097) This lease was amended by First Amendment to Lease Agreement to provide for three ten-year option periods. (Pa097)

JF-Totowa Donuts, Inc. d/b/a Dunkin' Donuts is the successor operator of the Dunkin' Donuts. (Pa122, Pa314) Red Rose and Dunkin' Donuts are parties to a Sublease dated July 29, 2015 for Lot 5, as amended by First Amendment to Sublease dated July 31, 2015. (Pa122, Pa155)

The Deed of Easement was assigned by Dunkin' Donuts to Red Rose by Assignment recorded on January 27, 2016. (Pa117)

If the easement for the existing drive-through is terminated, the existing Dunkin' Donuts building, which recently underwent a \$1 million renovation, cannot be modified to incorporate a drive-through. (Pa277, Pa296 and Pa345) The loss of the driveway would have substantial economic impact on the

Dunkin' Donuts and be a great hardship to the business (Pa277, Pa296), creating dangerous traffic conditions and severely impacting the existing business of the Dunkin' Donuts. (Pa277, Pa296 and Pa316) In contrast, continuation of the drive-through would have little to no impact on MC-FAM and Lot 4 (Pa277, Pa296), and MC-FAM admitted it would extend the term of the Easement if a fair market rental was paid. (Pa189) The Trial Court found the fair market rental for the period from August 1, 2023 through April 30, 2025 was \$1,048.33 per month. (Pa413)

LEGAL ARGUMENT

POINT I

THE EASEMENT FOR THE DRIVE-THROUGH SHOULD BE DETERMINED TO BE CONTINUING WHILE A DUNKIN' DONUTS IS BEING OPERATED. (1T:33-8)

The Appellate Division, in Rosen v. Keeler, 411 N.J. Super. 439, 451 (App. Div. 2010), summarized the rules of construction for easements as follows:

Questions concerning the extent of the rights conveyed by an easement require a determination of the intent of the parties as expressed through the instrument creating the easement, read as a whole and in light of the surrounding circumstances. *Poblette v. Towne of Historic Smithville Cmty. Ass'n, Inc.*, 355 N.J. Super. 55, 63, 809 A.2d 178 (App. Div. 2002); *Hyland v. Fonda*, 44 N.J. Super. 180, 187, 129 A.2d 899 (App. Div. 1957). “[W]hen the intent of the parties is evident from an examination of the instrument, and the language is unambiguous, the terms of the instrument govern.” *Hyland, supra*, 44 N.J. Super. at 187, 129 A.2d 899.

When the language of the grant is ambiguous, the surrounding circumstances, including the physical conditions of the servient tenement **and the requirements of the grantee, play a significant role in the determination of the controlling intent.** *Khalil v. Motwani*, 376 N.J. Super. 496, 503, 871 A.2d 96 (App. Div. 2005). In determining what the parties intended, “there are no limits on the kinds or combinations of servitude benefits that can be created,”

and “the full range of possibilities should be kept in mind” while interpreting the language of the instrument creating the easement in light of the circumstances of its creation. *Id. at 501, 871, A.2d 96* (quoting *Restatement (Third) of Property: Servitudes § 2.6* comment c (2000)).

New Jersey courts have uniformly held that use of the word “assign” in easements appurtenant or restrictive covenants means that the parties intended the benefit to run with the land. [Emphasis Added]

In the instant case, the parties did not specifically address what would happen at the end of the initial 30-year term of the easement, i.e. amount of the annual fee. However, the recorded Deed of Easement states:

Said payments shall be made on a quarterly basis for the term of this Easement Agreement is in effect **and as long as the Lease Agreement is in effect**. [Emphasis Added]³

This agreement shall be binding on the heirs, successors, transferees and assigns of the parties. (Pa075)

As such, it was clearly contemplated that a continuation of these easement rights would extend to subsequent operators of the Dunkin’ Donuts. Otherwise, the building itself becomes non-functional. The necessity for a drive-through, and the expectation that it would continue as long as a Dunkin’ Donuts was in

³ Interestingly, Mr. McEntee never reviewed the Lease Agreement between Curcio and D.D. Toto, L.P. and was not aware of its terms. (Pa189)

operation, was confirmed by Kenneth Friedman of D.D. Toto, L.P., who negotiated the Deed of Easement:

At the time I was negotiating both the Deed of Easement and Lease Agreement, I was also in negotiation with Dunkin' Donuts in order to obtain franchise rights. At that time, Dunkin' Donuts required drive-throughs for new franchises.

While at this time I do not have a specific recollection of any discussion with the owner of the property located at 578 Route 46 East, Totowa New Jersey as to the specific terms of the Deed of Easement, including the length of the term, **it was my understanding that as long as a Dunkin' Donuts was being operated, we would have an easement for the drive-through.** Dunkin' Donuts believed, and I concurred, that drive-throughs are critical to the success of any fast-food establishment as convenience and speed enhance customer satisfaction. The idea that while the site was still an operating Dunkin' Donuts the drive-through could be shut down for lack on an easement just makes no sense. [Emphasis Added] (Pa369)

The importance of a drive-through to a fast-food establishment can scarcely be overstated. Consistent therewith, it was the understanding of the grantee, i.e. D.D. Toto, L.P., that the drive-through would remain in place as long as a Dunkin' Donuts operated at the site. The "surrounding circumstances" behind the delivery of the Deed of Easement support a finding that the parties intended that the Deed of Easement not expire, so long as a Dunkin' Donuts is in operation, provided fair market rent is paid.

The Trial Court failed to address these arguments, despite finding ambiguity in the easement document. As it stated:

There's a provision in there [the recorded easement] that talks about that it remains in effect during the term of the lease agreement.

So there's, you know, a question in my mind about what that really means and whether that contemplates covering subsequent operators of that property or not. [Emphasis Added] [1T:33:17-34:35]

Resort to evidence of the circumstances surrounding a contract is appropriate to aid the interpretation of ambiguous language. YA Global Investments, L.P. v. Cliff, 419 N.J. Super. 1, 11 (App Div. 2011) Here the Court should have examined the surrounding circumstances, including the requirements of the grantee and the site conditions, per Rosen v. Keeler, *supra*. Had it done so, the Court should have concluded that the surrounding circumstances call for the continuation of the drive-through, while a Dunkin' Donuts is being operated.

POINT II

**THE TRIAL COURT SHOULD HAVE APPLIED
THE DOCTRINE OF RELATIVE HARDSHIP TO
PERMIT CONTINUED USE OF THE DRIVE-
THROUGH. (2T:5-7)**

In its prayer for relief, MC-FAM sought to permanently enjoin Red Rose and Dunkin' Donuts from entering and using the easement area, as well as an Order requiring Red Rose and Dunkin' Donuts to remove all encroachments and improvements maintained or constructed within the easement area. (Pa006) Even if the Trial Court correctly determined that the Deed of Easement had expired, situations such as this strongly suggest application of the "relative hardship" doctrine, which "calls for a 'balancing of the equities,' even where the action is for trespass to real property, and especially **where money damages are relatively adequate.**" Szymczak v. LaFerrara, 280 N.J. Super. 223, 229-230 (App. Div. 1995). As pointed out by the Court in Szymczak, the doctrine has been applied commonly in boundary-line encroachment cases to deny an injunction where same would result in great hardship to the encroacher when money damages alone will suffice. Citing to the Restatement (Second) of Torts §941, the Court in Szymczak noted that that the "damage remedy may well be quite adequate in 'a case of dispossession of land by encroaching building' where 'there is a market that affords a standard of values, sale value or rental

value, by which to measure damages and inadequacy of the remedy does not arise from any uncertainty’.”⁴ The Szymczak court relied extensively on Gilpin v. Jacob Ellis Realties, Inc., 47 N.J. Super. 26 (App. Div. 1957), which includes a comprehensive discussion of the doctrine of relative hardship. The court there held that the doctrine should apply and the requested mandatory injunction be denied, because of a disproportionate remodeling expense and rental loss that would otherwise be inflicted on defendant. Gilpin also held that the doctrine of relative hardship is particularly applicable to a situation where **commercial**, rather than personal, interests are involved, as in the instant case.

The doctrine of relative hardship calls for a Court to determine the appropriate relief, i.e. an injunction requiring the removal of the encroaching building (a drastic remedy) or, alternatively, payment of monetary damages. The Court in Szymczak cited to Stuttgart Elec. Co., Inc. v. Riceland Seed Co., 802 S.W.2d 484 (Ark. App. 1991) for support. In Stuttgart the Court noted, in refusing to grant an injunction requiring the removal of an encroaching building,

⁴The Court specifically held:

On this record, we are convinced that the doctrine of relative hardship furnishes the fairest result. LaFerrara’s measurable damages for loss of the lot are obviously quite disproportionate in dollars or degree of harm to removal and relocation or reconstruction of the Szymczak’s family’s home.

Id. at 233

that its “decision was not based solely on a rule of law, but indicates concern with a ‘balancing of the equities’.” *Id.* at 488. The Court in Szymczak cited to Ostrem v. Alyeska Pipeline Service Co., 648 P.2d 986, 989 (Alaska 1982), where the Court discussed the circumstances under which a mandatory injunction is appropriate:

A landowner is not in all cases entitled to a mandatory injunction for the removal of an encroachment, although injunctive relief is ordinarily appropriate. A court should balance the hardships and equities in deciding whether to order removal of the encroachment. See Restatement (Second) of Torts § 941 and comments a-c (1977); D. Dobbs, Handbook of the Law of Remedies § 5.6, at 355-57 (1973); Annot., 28 A.L.R.2d 679 (1953). In the factual setting of the present case, the relevant factors to be considered are the defendant’s state of mind and the relative hardship to the parties if removal is compelled or refused. Accordingly, Ostrem is entitled to injunctive relief unless Alyeska can establish that (a) it acted in good faith and (b) the cost or practicability of removing the valve facility is *wholly out of proportion* to the extent of the trespass. [Emphasis Added.]

The Court in Szymczak was similarly called upon to balance the equities and concluded that:

On this record, we are convinced that the doctrine of relative hardship furnishes the fairest result. LaFerrara’s measurable damages for loss of the lot are

obviously *quite disproportionate in dollars or degree of harm* to removal and relocation or reconstruction of the Szymczak's family's home. Id. at 233. [Emphasis Added.]

MC-FAM erroneously asserted that the doctrine of relative hardship should not be applied, because based on the decision made by the Trial Court on Count One, the legal rights of the parties are clear. The Trial Court erred by agreeing with MC-FAM and disregarding Szymczak:

We've got a completely different situation here, and that case doesn't apply. So, in order for me to make a decision and - - and look at the relative hardship and - - and rule on this case by looking at the hardships between the parties - - well, the hardship to Dunkin Donuts is that, if they can't use this easement anymore, they may lose their drive-thru. And, the hardship to the adjacent property owner is - - is arguably they're - - they have other uses for that strip of property and that they're missing out on that.

But, the bottom line is this. There is a clear agreement that was entered into between the parties that had an expiration date. The parties were represented by counsel at the time that the agreement was entered into. And, for me to look at this case and - - and apply the rationale of Szymczak, I would have to rewrite the agreement. And, I'm not going to do that.

The agreement is what the agreement is. That - - is - - it expires on a date certain. Everybody was represented by counsel. There were things that happened in the interim where I guess, for whatever reason, that date was ignored. But, that's the date. That's the expiration date for whatever this is, whether

it's a license, whether it's an easement. Easements can have an expiration date. It expired.

The doctrine of relative hardships does not apply to this case, and I will modify the orders that I entered to accomplish that. [Emphasis Added.] [2T:5-7]

Simply put, the Trial Court misapplied the doctrine of relative hardship. A decision in favor of MC-FAM on Count One did not dictate the same decision by the Trial Court on Count Two, because the ruling on the legal rights of the parties did not bar application of the equitable doctrine of relative hardship based on the legal authority discussed above. In fact, the doctrine is usually applied when the legal rights of the parties are clear. Many of the cases applying the doctrine involve building encroachments, and the underlying reasoning is applicable here. In those cases, the parties did not dispute that there was an encroachment. It was for this reason that the party seeking application of the doctrine sought equitable relief to allow the encroachment, notwithstanding the fact that it lacked title to the encroached-upon property. Szymczak v. LaFerrara, 280 N.J. Super. 223, 229-230 (App. Div. 1995). Gilpin v. Jacob Ellis Realities, Inc., 47 N.J. Super. 26 (App. Div. 1957).

We submit that the expert reports of Kenneth Karle (Pa277, 296) and the Certification of Ashwin Prajapati (Pa343), the operator of Dunkin' Donuts, and the Certification of Kenneth Friedman, the prior operator (Pa369), submitted at

the time of the filing of Red Rose's Motion for Summary Judgment,⁵ evidenced the parties' reasonable belief that the easement would continue as long as a Dunkin' Donuts was being operated, given the substantial and disproportionate hardship that would be inflicted if Dunkin' Donuts was enjoined from using the drive-through easement area. Accordingly, and as noted by the Court in Gilpin:

Plaintiff, it is to be observed, is not then left without any redress; she is given what plaintiffs are given in many types of cases – relief measured, so far as the court reasonably may do so, *in damages*.

The Trial Court found that it could not apply the doctrine of relative hardship because it found the Deed of Easement clear on its face. This was an error, based upon the flawed assumption that the validation of MC-FAM's legal right disabled the Court from considering the equities. The Trial Court should have balanced the equities in applying the doctrine of relative hardship and permitted the encroaching drive-through lane to continue, provided monetary damages are paid.

Here, the hardship to the operator of the Dunkin' Donuts is manifest, as revenues from the drive-through generate approximately 65% of all revenues.

⁵ Red Rose was prepared to have Kenneth Karle and Paul Beisser testify at trial as to the relative hardships of the parties.

(Pa316, Pa343) Indeed, it is altogether possible that a termination of the easement to utilize the drive-through will cause the Dunkin' Donuts to have to close. As noted by Red Rose's engineering and land use expert, Kenneth Karle, the building, which recently underwent a \$1 million renovation, cannot be retrofitted to provide for a drive-through due to the size and unique shape of the lot. Indeed, the entire building would have to be demolished to even construct a drive-up kiosk facility. Mr. Karle further opines as follows:

It is our opinion, within a reasonable degree of engineering and land use planning certainty, that the loss of the drive-thru and loss of egress rights over the property to the east would cause a major hardship, would create dangerous traffic conditions and would severely impact the existing business causing harm to its viability both physically and economically to the extent of having to close. (Pa277)

Mr. Karle also opined specifically as to the lack of impact to the MC-FAM property if the driveway were to continue in operation, even if its property were to be redeveloped. He specifically opined:

1. Closing the Dunkin' Donuts drive-thru lane would not provide any improvement to the use of the MC-FAM property, increase the number of parking spaces, or improve the flow of traffic on the MC-FAM property in its present configuration.
2. If the MC-FAM property were redeveloped (i.e. from scratch) the zoning requirements for at least one 20' side yard setback can be met by allowing the

drive-thru lane to remain along the west side of the MC-FAM property.

3. Revenue from leasing the egress rights for the continued use of the drive-thru lane is a better use for this strip of land as compared to regaining it as a side yard that produces no revenue.
4. Reopening the Dunkin' Donuts rear driveway exit through the MC-FAM property causes no hardship to that property. The MC-FAM property has sufficient parking spaces and traffic aisles to easily accommodate the long existing rear egress pattern. (Pa296)

Red Rose's appraisal expert, Paul Beisser, similarly testified at the trial:

I also took a look at whether the removal of the easement would in any way damage the MC-FAM property and found that it wouldn't. The MC-FAM property - - the 2700 square feet is already being used, part of it for parking for the MC-FAM property.

And, with or without the 2700 square foot easement piece, the existing building and the remainder of the site have exactly the same utility as they do without the 2700 square feet.

It's not - - it's only 20-foot wide and 135-foot deep. So, it's not as though a new parking lane could be installed on the MC-FAM property. It's just simply not enough land to create more parking spaces, nor does it appear that they need more parking spaces based on the - - the current tenant and the usage of the property.

So, the value in it really is the underlying land. There was no damage to the overall improved MC-FAM property before or after the easement. [3T:203:1-19]

In any event, it is clear that MC-FAM can be fairly and appropriately compensated by payment of a fair market rental, which after hearing testimony from the appraisal experts, the Trial Court found to be \$1,048.33 per month. (Pa413) In fact, William McEntee, managing member of MC-FAM, admitted at his deposition that it would extend the term of the Easement if a fair market rental was paid. (Pa189)

Q. All right. Thank you. I know understand it. So would you extend the term of the drive-thru easement if you were paid what you viewed as fair market rental?

A. Would I extend?

Q. Would you extend the term of the drive-thru easement if you were paid what you view as fair market rental?

A. Yes.
[Emphasis Added.]

The bottom line is that the Trial Court misapplied the doctrine of relative hardship, failing to consider the evidence of extreme hardship to Red Rose and Dunkin' Donuts, and the minimal - - if any - - impact upon MC-FAM. The Trial Court was certainly able to determine a fair market rental for the relevant time period, and certainly, on remand, could make a determination of fair market rental on an on-going basis.

Accordingly, due to: a) the substantial hardship to Red Rose and its tenant if the drive-through easement were to be terminated, and b) the lack of impact to MC-FAM and Lot 4, the Trial Court should have applied the doctrine of relative hardship, ruling that the terms of the Deed of Easement cannot be deemed to have expired, so long as a Dunkin' Donuts continues in operation on Lot 5, provided fair market rent is paid.

CONCLUSION

For the reasons set forth above, Red Rose respectfully submits that the Trial Court's decision granting MC-FAM's Motion for Summary Judgment and denying Red Rose's Motion for Summary Judgment should be reversed, and the Court should declare that, pursuant to the doctrine of relative hardship, the drive-through can be permitted to be used by Red Rose and Dunkin' Donuts upon continued payment of fair market rental, and remand the action to the Trial Court for a determination of fair market rental.

FINESTEIN & MALLOY, L.L.C.
Attorneys for Plaintiff-Appellant,
Red Rose Investors LLC d/b/a
Totowa Investors LLC

By:  _____

Russell M. Finest

Dated: August 29, 2025

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS.....	ii
STATEMENT OF ITEMS SUBMITTED TO COURT IN SUMMARY	
JUDGMENT MOTIONS.....	iii
TABLE OF AUTHORITIES	iv
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY.....	3
STATEMENT OF FACTS	6
LEGAL ARGUMENTS.....	10
LEGAL ARGUMENT POINT I: THE COURT HERE ERRED WHEN IT GRANTED SUMMARY JUDGMENT ON COUNT I OF THE COMPLAINT AND REFUSED TO LOOK TO THE INTENT OF THE PARTIES (1T:33-8)	10
LEGAL ARGUMENT POINT II: THE TRIAL COURT ERRED WHEN IT REFUSED TO CONSIDER THE DOCTRINE OF RELATIVE HARDSHIP TO JF-TOTOWA DONUTS, INC. D/B/A DUNKIN’ DONUTS (2T:5-7)	13
CONCLUSION.....	18

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Order denying Plaintiff’s Motion for Summary Judgment
Entered September 13, 2024 Pa408

Order granting MC-FAM’s Motion for Summary Judgment
As to Count I of the Complaint, entered September 13, 2024Pa410

Trial Court’s Opinion on entry of Summary Judgment
As to Count I 1T:33-8

Order granting Plaintiff’s Motion for Summary Judgment
As to Count II of the Complaint, entered September 26, 2024 Pa412

Trial Court’s Opinion on entry of Summary Judgment
As to Count II 2T:5-7

Order for Judgment after Trial and Decision of the Court
As to the Counterclaim, entered February 3, 2025Pa413

**STATEMENT OF ITEMS SUBMITTED TO COURT IN SUMMARY
JUDGMENT MOTIONS**

<u>Document Description</u>	<u>Page</u>
MC-FAM’s Notice of Motion for Summary Judgment Filed on August 9, 2024	
(a) MC-FAM’s Notice of Motion	Pa377
(b) Statement of Material Facts.	Pa379
(c) Certification of Counsel	Pa374
Red Rose’s Notice of Cross-Motion for Summary Judgment filed on August 28, 2024	
(a) Red rose’s Notice of Cross Motion	Pa385
(b) Responding Statement of Material Facts	Pa387
(c) Certification of Russell M. Finestein	Pa060
(d) Certification of Kenneth Friedman	Pa369
JF-Totowa Donuts, Inc.’s Opposition to MC-FAM’s Notice of Motion for Summary Judgment filed on September 5, 2024	
(a) Certification of Ashwin Prajapati	Pa343

TABLE OF AUTHORITIES

Cases

<u>Hammett v. Rosensohn</u> , 26 N.J. 415, 423 (1958).....	11
<u>Pathmark Stores, Inc. v. Bernard Oster, Inc.</u> , 2009 N.J. Super. Unpub. LEXIS 2027	17
<u>Rosen v. Keeler</u> , 411 N.J. Super. 439 (App. Div. 2010)	11
<u>Scaduto v. State</u> , 474 N.J. Super. 427(App. Div. 2023)	11, 16, 17
<u>Szymczak v. Laferrara</u> , 280 N.J. Super. 223 App.Div. 1995).....	16

PRELIMINARY STATEMENT

This action involves a dispute involving the termination of an easement granted between two (2) adjoining parcels of commercial property. The easement was granted by the predecessor in title to dominant fee owner, Defendant-Respondent, MC-FAM Property Rte. 3, LLC (“MC-FAM”), in favor of the servient estate granted to the predecessor of Red Rose Investors LLC d/b/a Totowa Investors LLC (“Red Rose”). The issue before the Court focuses on whether the term of the easement for a drive-through attached to the Dunkin’ Donuts franchise restaurant should be extended. Third Party Defendant-Appellant, JF Totowa Donuts Inc. d/b/a Dunkin’ Donuts (JF-Totowa), the current tenant pursuant to a sublease with Red Rose, asserts that based on the intention of the parties to the original grant and the doctrine of relative hardship, the Appellate Division should declare that the easement should remain in effect for so long as the Dunkin’ Donuts franchise restaurant is being operated, subject to the payment of the fair market value of the easement to MC-FAM. MC-FAM asserts that the term of the easement is limited to the period for which the annual fees were established by original parties to the Deed of Easement over 30 years ago. The Trial Court agreed with MC-FAM and failed to consider all the equities and hardships as required by the doctrine of relative hardship. Had it done so, the Court would have concluded that the servient estate,

Red Rose and its tenant JF-Totowa could remain in possession of the drive-through, provided the fair market value of the easement was paid to MC-FAM.

PROCEDURAL HISTORY

NOTE: This Procedural History is intended to supplement the Statement of Facts filed by Plaintiff-Appellant, Red Rose Investors LLC, to include material facts relevant to Third Party Defendant–Appellant, JF-Totowa Donuts, Inc. d/b/a Dunkin’ Donuts.

On July 12, 2023, Red Rose filed a Complaint containing two (2) Counts. The First Count asserted that it was the intention of the parties that a drive-through easement remain in effect if a lease for a Dunkin’ Donuts was in effect, provided that a fair market rental was paid for use of the easement. (Pa001) In the Second Count, Red Rose asserted that the continued use of the easement area is essential for the continued viability of JF-Totowa to operate a Dunkin’ Donuts franchise restaurant. The termination of the easement would result in a 60% drop in gross revenue of the restaurant, and would require Red Rose or JF-Totowa to remove a portion of the building and result in a disproportionate remodeling expense and rental loss. In 2020, JF-Totowa renovated the restaurant at a cost of \$1.2 million. Both Red Rose and MC-FAM were aware of the expense incurred by JF-Totowa.

Pursuant to the doctrine of relative hardship, the Court should declare the easement to remain in effect upon payment of a fair market rental. (Pa001) On September 18, 2023, MC-FAM filed a Contesting Answer, Counterclaim and Third-Party Complaint asserting that the Deed of Easement should not be extended and

further seeking damages based on the fair market rental of the easement area since July 2023, when MC-FAM asserts that the easement expired. (Pa006) An Answer to the Third-Party Complaint was filed by JF-Totowa with a Crossclaim asserted against Red Rose. (Pa031) The Crossclaim was ultimately dismissed without prejudice. (Pa058) Subsequently, as a result of a successful Motion to Amend, Red Rose amended the Complaint to add a count for a prescriptive easement over a certain rear driveway opening that connected to the MC-FAM property and permitted ingress and egress to Route 46. (Pa044) Cross-Motions for Summary Judgment were filed. (Pa377, Pa385) On September 13, 2024, the Court granted summary judgment in favor of MC-FAM dismissing the First Count of the Complaint and denied Red Rose's Cross-Motion for Summary Judgment.¹ (Pa408) Thereafter, during a Pretrial Conference held on September 26, 2024, the Trial Court granted the Motion of MC-FAM to dismiss the Second Count of the Complaint, which concerned the doctrine of relative hardship. The Trial Court stated it would modify the Orders to reflect the dismissal of the Second Count, but same was not entered until recently per Order of the Appellate Division. (Pa412)

The claim for prescriptive easement was dismissed by the Trial Court at the end of Red Rose's case at trial, which took place on September 30, 2024. During the

¹ Reference to "1T" refers to the transcript of the hearing held before the Trial Court on September 13, 2024. Reference to "2T" refers to the transcript of the Pre-Trial Conference/hearing held before the Trial Court on September 26, 2024. Reference to "3T" refers to the transcript of the trial held before the Trial Court on September 30, 2024.

trial, The Trial Court heard testimony from the parties' respective appraisal experts as to their opinion on the appropriate fair market rental. The Trial Court entered a Final Judgment on February 3, 2025 (Pa413), requiring Dunkin' Donuts to vacate the easement area by May 1, 2025, awarding damages in the amount of \$1,048.33 per month from August 2023 through April 30, 2025 for use of the easement area after July 31, 2023, and canceling the Deed of Easement of record.

Red Rose sought a stay of the Final Judgment pending appeal from the Trial Court and was denied. Thereafter, Red Rose renewed its application for a stay and an Order granting the stay was entered by the Appellate Division on April 30, 2025.

STATEMENT OF FACTS

D.D. Toto, L.P. was a tenant of the property commonly known as 580 Route 46 East, Totowa, New Jersey and designated as Tax Lot 5 in Block 172 (“Lot 5”) by virtue of Lease Agreement with Carmine Curcio dated July 1, 1993. (Pa063) Lot 5 has been operated as a Dunkin’ Donuts franchise restaurant since 1993. (Pa063, Pa081, Pa-JF 001) At that time, in 1993, franchisor, Dunkin’ Donuts Incorporated required drive-through windows for new franchises.

On October 22, 1997, D.D. Toto, LP assigned the aforementioned lease to JF-Totowa Donuts Inc. along with its interest in other subleases with the Department of Transportation and the North Jersey District Water Supply Commission (Pa-JF 012).

In 1993, D.D. Toto, L.P. negotiated a Deed of Easement with Madeline Freda, the owner of 578 Route 46, Totowa, New Jersey and designated as Lot 4 in Block 172 (“Lot 4”), which permitted a drive-through lane on the side of the Dunkin’ Donuts building that was to be located on Lot 4. (Pa075) The Deed of Easement provided that the term of the Easement Agreement shall run concurrently with a Lease between Carmine Curcio and D.D. Toto, L.P., and shall be binding on the heirs, successors, transferees and assignees of the parties, and provided for an annual fee for the easement interest for the period through July 31, 2023, but did not contain any express provision as to the annual fee after July 31, 2023. (Pa075) It was understood by D.D. Toto, L.P. that as long as a Dunkin’ Donuts franchise restaurant

was being operated, JF-Totowa would have an easement for the drive-through. (Pa369) Carmine Curcio, D.D. Toto, L.P. and franchisor, Dunkin' Donuts Incorporated are parties to a Notice of a Dunkin' Donuts Lease Option Agreement dated October 1, 1993. (Pa081)

MC-FAM acquired title to Lot 4 by virtue of a deed dated September 3, 2008. (Pa087) MC-FAM was aware of the Deed of Easement when it acquired title to Lot 4. (Pa189)

By Lease Agreement dated November 21, 2013, Curcio entered into a new lease with Red Rose, which had a term of ten (10) years commencing on December 1, 2013, with two five-year options to extend the term. (Pa097) This lease was amended by First Amendment to Lease Agreement to provide for three ten-year option periods. (Pa097)

JF-Totowa Donuts, Inc. d/b/a Dunkin' Donuts is the assignee of the Dunkin' Donuts franchise restaurant. (Pa122, Pa314) Red Rose and JF Totowa are parties to a Sublease dated July 29, 2015, for Lot 5, as amended by First Amendment to Sublease dated July 31, 2015. (Pa122, Pa155)

The Deed of Easement was assigned by JF Totowa to Red Rose by Assignment recorded on January 27, 2016 (Pa117), along with its interest in other subleases with the Department of Transportation and the North Jersey District Water Supply Commission. (Pa-JF 002).

If the easement for the existing drive-through is terminated, the existing Dunkin' Donuts franchise restaurant, which underwent a \$1 million renovation in 2020, cannot be modified to incorporate a drive-through. (Pa277, Pa296 and Pa345) The loss of the drive-through easement will have substantial economic impact on the JF-Totowa and be a great hardship to the business (Pa277, Pa296). The loss of the drive-through easement will create dangerous traffic conditions for vehicles exiting and entering Route 46.

The economic effect of the easement closure will cause severe hardship to JF-Totowa and Ashwin Prajapati. The gross revenue from the drive-through register constitutes approximately 62% of the gross revenue of JF-Totowa. It operates that in 8 – 10% profit margin depending upon monthly sales. The loss of this revenue will destroy the business model. There will not be enough income from sales to pay rent, franchise fees, fixed overhead expenses, employee salaries remedy fees to management. If JF-Totowa cannot survive, it will be forced to terminate ten (10) of its eighteen (18) employees. Ashwin Prajapati has personally guaranteed the two (2) loans necessary to renovate the structure totaling over \$1 million. This obligation will remain if JF-Totowa ceases doing business or cannot pay its debts (Pa343). The business model of the leasehold will be severely impacted. (Pa277, Pa296 and Pa316)

Conversely, continuation of the drive-through would have little to no impact on MC-FAM and Lot 4 (Pa277, Pa296). MC-FAM cannot use the 20-foot easement for any purpose which it admitted in depositions; the parcel is tenanted by a long-term tenant. MC-FAM admitted it would extend the term of the Easement if a fair market rental was paid. (Pa189) MC-FAM is appealing the decision of the Trial Court which determined the fair market rental value to be \$1,048.33 per month. (Pa413)

LEGAL ARGUMENTS

LEGAL ARGUMENT POINT I: THE COURT HERE ERRED WHEN IT GRANTED SUMMARY JUDGMENT ON COUNT I OF THE COMPLAINT AND REFUSED TO LOOK TO THE INTENT OF THE PARTIES (1T:33-8)

The trial court improperly focused on the year 2023 as the termination date of the easement rather than viewing the language of the Deed of Easement to determine the intent of the parties (Pa075). When it granted summary judgment to MC-FAM dismissing the First Count of the Complaint, it ignored the readily discernible intent of the parties. It is clear that the term of the easement was to run concurrently with the then existing lease between Curcio and DD Toto LP (Pa063). At the time, the parties knew that a Dunkin' Donuts franchise restaurant was to be constructed and operated on the site with a drive-through window.

There is nothing in the Easement Agreement which states that it cannot be extended to conform with the continuation of the Dunkin' Donuts restaurant. In fact, in all likelihood, the parties intended to extend the easement with a new fee depending upon circumstances which existed 30 years in the future. Kenneth Friedman's Certification (Pa369) clearly states that it was the intent of the parties at the time to continue the Easement as long as a Dunkin' Donuts franchise restaurant remained on the site. This Certification is not contradicted. In fact, MC-FAM relied exclusively on the year 2023 in its summary judgment motion. The Court had the

duty to investigate the circumstances surrounding the Easement Agreement to glean the intent of the parties which it did not do.

As set forth in Rosen v. Keeler, 411 N.J. Super. 439 (App. Div. 2010) surrounding circumstances play a significant role in interpreting easement terms, particularly when ambiguity exists. Courts consider factors such as the physical conditions of the property, the nature of the subject matter, and the purpose of the easement to ascertain the intent of the parties. Therein, the court went to great lengths to discuss and analyze the circumstances and facts which existed at the time to glean the intent of the parties. Similarly, in Scaduto v. State, 474 N.J. Super. 427(App. Div. 2023) the court agreed and quoted Hammett v. Rosensohn, 26 N.J. 415, 423 (1958), "...that the intent of the conveyor is normally determined by the language of the conveyance read as an entirety and in the light of the surrounding circumstances..." The trial court made no such effort and gave little mention of intent because it summarily found that no circumstance would extend the easement beyond July 31, 2023.

It is clear that the language in the Easement Agreement is ambiguous. It references the then existing Lease agreement, knows that a drive-through window will be due and constructed in become an integral part dominant estate, but makes no mention or probation for the continuation of the lease and the effect that it will

have should the easement be extinguished. Clearly the court had a duty to take evidence into the surrounding circumstances and intent of the parties.

The effect upon the dominant estate is minimal. MC-FAM has admitted that it cannot use the easement area for any purpose. Conversely, the effect on the servient estate is catastrophic.

LEGAL ARGUMENT POINT II: THE TRIAL COURT ERRED WHEN IT REFUSED TO CONSIDER THE DOCTRINE OF RELATIVE HARDSHIP TO JF-TOTOWA DONUTS, INC. D/B/A DUNKIN' DONUTS (2T:5-7)

The trial court refused to consider the harm to JF-Totowa Donuts, Inc. and Ashwin Prajapati when it decided to grant summary judgment to MC-FAM. At the Summary Judgment argument, the Court had before it the certifications and documentation of Prajapati (Pa 343), the expert report of LAN Associates (Pa 277, 296), excerpts from the deposition of William McEntee (MC-FAM's officer) and other evidentiary material.

Prajapati's Certification, which was unopposed, set forth the insurmountable damage which would result if the drive-through window in the easement were lost. Prajapati produced historical financial documentation demonstrating that approximately 62% to 68% of sales emanated from the drive-through window. Those sales cannot be recovered because customers seek a convenience when purchasing coffee and other products. The loss of sales will have a ripple effect costing the jobs of 8 to 10 employees (of the 19 employees employed), will make it impossible for JF-Totowa to meet its franchise obligations, its rent to Red Rose, and other financial obligations of the business. Additionally, Ashwin Prajapati personally guaranteed the \$500,000 SBA loan for the renovation of the franchise restaurant completed 2 years earlier and guaranteed \$600,000 of other loans for the

renovation of the restaurant. The loss of the easement will shift the loan repayment burden to Prajapati.

William McEntee testified that there are no plans by MC-FAM to use the 20 foot easement because the property is leased to another tenant for the next several years. MC-FAM's only concern is to generate a sufficient income stream from the easement. MC-FAM felt that it should share in the profits earned by JF-Totowa from the sales of product utilizing the drive-through window. McEntee testified in his deposition that the easement could continue to be used if MC FAM received a large percentage of the sales emanating from the drive-through window.

At the time of the summary judgment motion, the Court knew that JF-Totowa would likely go out of business if the easement were lost because its fixed expenses for rent, franchise fees, overhead, salaries and other costs greatly exceeded its gross income. With the easement, JF-Totowa was operating at an eight to ten percent (8 to 10%) profit margin. Conversely MC-FAM only wanted more money because of its superior bargaining position.

The Court was dismissive of Red Rose and JF-Totowa's request for the Court to hear testimony on the relative hardship which would be caused by the closure of the easement. The Court's decision dismissing the First Count precluded from entertaining further testimony. In granting summary judgment the Court concluded that there was an end date to the easement and all parties were represented by

counsel. Those two (2) factors outweighed the body of law directing equity courts to examine the relative hardship which befalls the servient tenant. There lies the error in this matter.

The Court refused to consider the extreme injury to JF-Totowa with the elimination of the easement because the easement was negotiated thirty (30) years earlier, and all parties were represented by counsel. The Court refused to hear testimony concerning Kenneth Friedman's statements that it was the intent of the parties that the easement would continue as long as a Dunkin' Donut's franchise restaurant existed. MC-FAM could have obtained a certification from the grantor of the easement but chose not to. The statement is uncontested. The severe damage is also uncontested. MC-FAM's demand for "a piece of the profits" as the price for a continuation of the easement also demonstrates its intent. MC-FAM cannot use this twenty (20) foot easement, yet it holds the easement hostage for a percentage of the sales from the drive-through window. Without a doubt, the Court has failed to exercise its equity jurisdiction to craft a resolution fair to all parties.

The doctrine of relative hardship provides a framework for balancing the equities between parties in disputes involving property rights, including easements. This doctrine is particularly relevant when the elimination of an easement is sought, and such elimination would cause damage to the holder of the easement. The doctrine of relative hardship is particularly relevant in cases where the elimination

of an easement would cause damage to the holder of the easement. In such cases, courts must weigh the hardship imposed on the servient estate owner against the harm caused to the easement holder. If the harm to the easement holder outweighs the hardship to the servient estate owner, the court can decline to eliminate the easement. If the hardship to the servient estate owner is significantly greater and monetary damages can adequately compensate the easement holder, the court may consider eliminating or modifying the easement. Szymczak v. Laferrara, 280 N.J. Super. 223 App.Div. 1995) and Scaduto v. State, 474 N.J. Super. 427 (App.Div. 2023) .

The doctrine of relative hardship calls for a balancing of equities, especially where both parties are personally blameless, and monetary damages are an adequate remedy. The doctrine seeks to compromise between conflicting interests, recognizing that some harms must be borne as incidents of communal life. In cases where monetary damages can adequately compensate for the harm, the remedy of damages may be preferred over injunctive relief. Szymczak v. Laferrara, *ibid.*

In the context of easements, New Jersey courts have consistently held that a landowner may not unreasonably interfere with the rights of the easement holder or change the character of the easement in a way that makes its use significantly more difficult or burdensome. This principle underscores the importance of protecting the rights of the easement holder while balancing the interests of the servient estate

owner. Scaduto v. State, *ibid.* However, courts have also recognized that justice and equity may mandate a deviation from these principles, allowing for the modification or relocation of an easement. Pathmark Stores, Inc. v. Bernard Oster, Inc., 2009 N.J. Super. Unpub. LEXIS 2027.

The trial court should have examined the relative hardship by carefully balancing of equities when determining whether to eliminate an easement. The trial Court should have considered the rights of the easement holder, the hardship to the servient estate owner, and the adequacy of monetary damages as a remedy to achieve a fair and equitable resolution that minimizes harm to all parties involved. Szymczak v. Laferrara, *ibid.* and Scaduto v. State, *ibid.*

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court reverse the trial court's decisions in granting MC-FAM Motion for Summary Judgment and in denying Red Rose's Motion for Summary Judgment. It is also respectfully requested that the Court permit the use of the drive-through by JF-Totowa upon the continued payment of fair market rental pursuant to the doctrine of relative hardship. Finally, JF-Totowa requests that the Court remand the matter to the trial court for determination of the current fair market rental.

Respectfully Submitted,

LAW OFFICES OF ALAN R ACKERMAN
*Attorney's for Third Party Defendant-
Appellant, JF-Totowa Donuts, Inc. d/b/a
Dunkin' Donuts*



BY: ALAN R. ACKERMAN, ESQ.

Dated: September 2, 2025

RED ROSE INVESTORS LLC	:	SUPERIOR COURT OF NEW JERSEY
D/B/A TOTOWA INVESTORS	:	APPELLATE DIVISION
LCC,	:	DOCKET NO. : A-002104-24
	:	
Plaintiff-Appellant,	:	On Appeal From:
	:	SUPERIOR COURT OF NEW JERSEY
vs.	:	PASSAIC COUNTY
	:	CHANCERY DIVISION
MC-FAM PROPERTY RTE. 3,	:	DOCKET NO. : PAS-C-79-23
LLC,	:	
	:	
Defendant-Respondent.	:	
	:	Sat Below:
and	:	HONORABLE FRANK COVELLO, J.S.C.
	:	
MC-FAM PROPERTY RTE 3,	:	
LLC,	:	
	:	
Defendant-Respondent,	:	
	:	
vs.	:	
	:	
JF- TOTOWA DONUTS, INC.	:	
D/B/A DUNKIN' DONUTS	:	
	:	
Third Party Defendant-	:	
Appellant	:	

**BRIEF ON BEHALF OF DEFENDANT-RESPONDENT,
MC-FAM PROPERTY RTE. 3, LLC**

On the Brief:
Diana Powell McGovern, Esq.
(Attorney ID# 025671984)
E-Mail: dmcgovern@gpmlegal.com

GACCIONE POMACO, P.C.
1 Boland Drive – Suite 102
West Orange, NJ 07052
(973) 759-2807
Attorneys for Defendant-Respondent,
MC-FAM Property Rte. 3, LLC

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
TABLE OF JUDGMENTS, ORDERS AND RULINGS.....	iii
STATEMENT OF ITEMS SUBMITTED TO COURT IN SUMMARY JUDGMENT MOTIONS.....	iv
PRELIMINARY STATEMENT.....	1
PROCEDURAL HISTORY.....	3
STATEMENT OF FACTS.....	6
LEGAL ARGUMENT	
POINT I THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE FIRST COUNT OF THE COMPLAINT AS THE EASEMENT WAS “EXPIRED” (1T:33-8).....	14
POINT II THE DOCTRINE OF RELATIVE HARDSHIP DOES NOT APPLY TO THIS CASE (2T:5-7).....	18
POINT III THE TRIAL COURT’S AWARD OF DAMAGES WAS NOT FAIR MARKET RENT (Da006).....	22
CONCLUSION.....	24

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<u>Princeton v. Mercer County</u> , 333 <u>N.J. Super.</u> 310, 324-25 (App. Div. 2000), aff'd, 169 <u>N.J.</u> 135 (2001).....	14
<u>Tide-Water Pipe Co. v. Blair Holding Co., Inc.</u> , 42 <u>N.J.</u> 591, 604 (1964).....	14
<u>Barila v. Bd. Of Educ. Of Cliffside Park</u> , 241 <u>N.J.</u> 595, 615-16 (2020).....	15
<u>Quinn v. Quinn</u> , 225 <u>N.J.</u> 34, 45 (2016).....	15
1 <u>Graziano v. Grant</u> , 326 <u>N.J. Super.</u> 328, 342 (App. Div. 1999).....	16
<u>Rosen v. Keeler</u> , 411 <u>N.J. Super.</u> 439, 451, 986 <u>A.2d</u> 731 (App. Div. 2010).....	16
<u>Poblette v. Towne of Historic Smithville Cmty. Ass'n, Inc.</u> , 355 <u>N.J. Super.</u> 55, 63, 809 <u>A.2d</u> 178 (App. Div. 2002).....	16
<u>Hyland v. Fonda</u> , 44 <u>N.J. Super.</u> 180, 187, 129 <u>A.2d</u> 899 (App. Div. 1957).....	16
<u>Szymczak v. LaFerrera</u> , 280 <u>N.J. Super.</u> 223 (App. Div. 1995).....	18
<u>Gilpin v. Jacob Ellis Realities, Inc.</u> , 47 <u>N.J. Super.</u> 26, 34 (App. Div. 1957).....	19
 <u>Other Authorities</u>	
<u>Restatement (Third) of the Law of Property</u> , §4.1, Introductory Note (2000).....	14

TABLE OF JUDGMENTS, ORDERS AND RULINGS

	<u>Page(s)</u>
Order denying Plaintiff’s Motion for Summary Judgment entered September 13, 2024.....	Pa408
Order granting MC-FAM’s Motion for Summary Judgment as to Count 1 of the Complaint, entered September 13, 2024.....	Pa410
Trial Court’s Opinion on entry of Summary Judgment as to Count I.....	1T:33-8
Order granting Plaintiff’s Motion for Summary Judgment as to Count II of the Complaint, entered September 26, 2024.....	Pa412
Trial Court’s Opinion on entry of Summary Judgment as to Count II.....	2T:5-7
Order for Judgment after Trial and Decision of the Court as to Counterclaim, entered February 3, 2025.....	Pa413
Trial Court’s Order Denying Stay Pending Appeal and Statement of Reasons.....	Da001

**STATEMENT OF ITEMS SUBMITTED BY COURT
IN SUMMARY JUDGMENT MOTIONS**

<u>Document Description</u>	<u>Page(s)</u>
MC-FAM’s Notice of Motion for Summary Judgment filed on August 9, 2024	
(a) MC-FAM’s Notice of Motion.....	Pa377
(b) Statement of Material Facts.....	Pa379
(c) Certification of Counsel.....	Pa374
Red Rose’s Notice of Cross-Motion for Summary Judgment filed on August 28, 2024	
(a) Red Rose’s Notice of Cross-Motion.....	Pa385
(b) Responding Statement of Material Facts.....	Pa387
(c) Certification of Russell M. Finestein.....	Pa060
(d) Certification of Kenneth Friedman.....	Pa369
JF-Totowa Donuts, Inc.’s Opposition to MC-FAM’s Notice of Motion for Summary Judgment filed on September 5, 2024	
(a) Certification of Ashwin Prajapati.....	Pa343

PRELIMINARY STATEMENT

In 1993, the owners of 578 Route 46 East (Lot 4) and the tenants of 580 Route 46 East (Lot 5) in Totowa, New Jersey entered into an agreement to lease a 20-foot strip of land on Lot 4 to be used by the tenant on Lot 5 for its Dunkin Donuts business. (It is on that 20-foot strip of property that Dunkin Donuts operates a drive-through.) That agreement was titled “Deed of Easement” and had clear terms for yearly payments (effectively a ground lease for the 20 feet of property). Most importantly for purposes of this litigation, the Deed of Easement had a specific end date of July 31, 2023.

Of note is that the Deed of Easement makes specific reference to a Lease between Carmine Curcio (owner of 580 Route 46 East, Lot 5) and D.D. Toto, L.P. (the Dunkin Donuts tenant) and term set forth in that lease. The Deed of Easement and the Lease between Dunkin Donuts and its landlord both had an end date of July 31, 2023.

The parties to the Deed of Easement were represented by counsel, and all the leases that transpired subsequently with respect to the Dunkin Donuts business on Lot 5, were prepared by counsel. The Deed of Easement between the owners of Lot 5 (in 1993 that was Madeline Freda and now it is defendant MC-FAM) and the tenants of Lot 4 (D.D. Toto, L.P. the predecessor to J.F.-

Totowa), is the only document that mentions the drive-through area (but not the use of the area as a drive-through) and there are no other documents or other agreements evidencing an intent to extend the lease/easement period by the owner of Lot 5 (MC-FAM) for the 20 foot strip of property which is utilized as a drive-through.

Red Rose and its tenant, JF-Totowa, now seek to overturn the trial court's orders of summary judgment on the basis that they claim it was the intention of the parties that the lease for the drive-through space should continue as long as a Dunkin Donuts is being operated.

PROCEDURAL HISTORY

On July 12, 2023, Plaintiff, Red Rose Investors LLC (hereinafter “Red Rose”), filed a Complaint in the Superior Court of New Jersey, County of Passaic, Chancery Division against Defendant, MC-FAM Property Rte. 3, LLC (hereinafter “MC-FAM”). (Pa 001)

On September 18, 2023, Defendant, MC-FAM, filed an Answer to Plaintiff’s Complaint with a Counterclaim against Red Rose and Third Party Complaint against JF-Totowa Donuts Inc. d/b/a Dunkin Donuts (hereinafter “JF-Totowa”). (Pa 006)

On October 16, 2023, Red Rose filed an Answer to the Counterclaim. (Pa 026)

On November 30, 2023, JF-Totowa filed an Answer to the Third-Party Complaint and a Crossclaim against Red Rose. (Pa 031). JF-Totowa did not file any counterclaim or claim against MC-FAM.

On February 16, 2024, plaintiff, Red Rose, filed an Amended Complaint that included a third count related to an opening that exited in the rear of the properties that was blocked by defendant, which is unrelated to the drive through property at issue in the first count of the Complaint. (Pa 044) The third count of the plaintiff’s Complaint was dismissed by the trial court at the end of plaintiff’s case at trial and is not part of the appeal herein. (Pa 397)

On July 12, 2024, plaintiff Red Rose and third-party defendant JF-Totowa filed a stipulation of dismissal without prejudice as to the crossclaims asserted by JF-Totowa against Red Rose. (Pa 058)

Defendant, MC-FAM filed a Motion for Summary Judgment to dismiss the First Count of Plaintiff's Complaint (which was a claim that the deed of easement signed in 1993, and which expired by its terms on July 31, 2023, should remain in effect for the term of a new and separate ground lease between Red Rose and the fee title owner, Carmine and Rosemarie Curcio, that commenced on December 1, 2013 and ran through 2033 "and possibly through 2063." Pa 110) The Court granted Defendant MC-FAM's motion for Summary Judgment and entered an Order dismissing the First Count of the Complaint on September 13, 2024. (Pa 410)

Plaintiff filed a Cross-Motion for Summary Judgment on the Second and Third Counts of the Complaint (Third Count is not at issue in this appeal) and the motion was denied on September 13, 2024. (Pa 408) The Court entertained a Motion for Summary Judgment of the second count of the Complaint (by mutual agreement of the parties) at the pre-trial conference on September 26, 2024, at which time the Court granted Defendant MC-FAM's motion for Summary Judgment on the second count of the Complaint (a claim that the

easement should continue based upon the doctrine of relative hardship). (Pa 412)

A trial of the remaining issues (third count of the Complaint and defendant's counterclaim) was held on September 30, 2024 and the trial court issued its Final Judgment on February 3, 2025 which required Dunkin Donuts to vacate the easement area by May 1, 2025, awarding Defendant MC-FAM damages in the amount of \$1,048.33 per month from August 1, 2023 to April 30, 2025 and canceling the deed of easement. (Pa 413)

On March 31, 2025, Defendant MC-FAM filed a cross-appeal challenging the valuation of damages awarded by the Trial Court. (Pa 402) Plaintiff filed a motion for a stay pending appeal with the Trial Court which was denied as set forth in the Order dated April 11, 2025, with an attached statement of reasons. (Da 001)

STATEMENT OF FACTS

Plaintiff, Red Rose, leased the land located at 580 Route 46 East in Totowa, New Jersey (designated as Lot 5, Block 172) from Carmine Curcio and Rosemarie Curcio by virtue of a lease agreement dated November 21, 2013 and as amended by a First Amendment to Lease Agreement dated October 30, 2014. (Pa 001)

Defendant, MC-FAM, owns 578 Route 46 East in Totowa, New Jersey (designated as Lot 4, Block 172). (Pa 001)

In 1993, DD Toto L.P. (hereinafter “DD Toto,” not a party to the within litigation), was a tenant of Lot 5 (580 Route 46 West) as per a lease agreement with Carmine Curcio. (Pa 001) In 1993, Madeline Freda (not a party to the within litigation) was the owner of Lot 4 (578 Route 46 West). (Pa 001)

Madeline Freda executed a “deed of easement” dated September 29, 1993, to DD Toto, L.P. (Pa 020) The “easement” granted a 20-foot-wide strip of property located on Lot 4 (578 Route 46 West) to be used for “ingress and egress” at the Dunkin Donuts operated at the time by DD Toto. (Pa 020)

The “Grantor” of the easement was “Mrs. Madeline Freda,” owner (at the time) of Lot 4 Block 172, and the “Grantee” of the easement was “D.D.

Toto.” (Pa 020) The easement is specific in its terms and sets forth the following:

1. Grantor hereby grants and conveys to Grantee an easement over and across the aforesaid property for the purpose of ingress and egress. The Grantee, its agents, invitees and licensees, shall have the right to pass and repass over the Easement by vehicle on foot or otherwise.
2. Grantee hereby agrees to pay Grantor an annual fee for the easement interest conveyed herein and for the right to utilize said property in accordance with this agreement in the following amounts:

<u>Year</u>	<u>Annual Fee</u>
Commencement Date, 1993-July 31, 1996	\$3,000.00
August 1, 1996-July 31, 2003	\$3,450.00
August 1, 2003-July 31, 2008	\$3,864.00
August 1, 2008-July 31, 2013	\$4,327.68
August 1, 2013-July 31, 2018	\$4,847.00
August 1, 2018 – July 31, 2023	\$5,42.64

Said payments shall be made on a quarterly basis for the term of this Easement Agreement is in effect and as long as the Lease Agreement is in effect.

3. The term of this Easement Agreement shall run concurrently with a Lease between Carmine Curcio and D.D. Toto, L.P. and shall be for twenty (20) years, with two (2) five year options, subject to the following contingency:

- A. Grantor shall have the right to cancel this Agreement upon sixty (60)-days’ notice at the expiration of the current Lease term of Grantor’s tenant (Knapp Shoes), in the event that the subsequent tenant obtains municipal approval and

all required permits to expand, and constructs an addition which encroaches upon the land contained in this Easement. If Grantee provides additional parking required by the Borough of Totowa as a result of the building expansion, then the Easement shall remain in effect as set forth below. In the event that Grantee cannot provide additional parking to Grantor's tenant, which may be required due to expansion of the subject premises, then this Easement Agreement shall be deemed null and void and of no further effect.

B. In the event that Grantor's tenant does not expand the structure on the subject premises, the Easement Agreement shall remain in full force and effect as set forth below and Grantor shall not have the right to cancel this agreement.

4. The parties hereby agree that the Grantee shall pave the portion of the Grantor's parking lot between the buildings located on Lot 1, Block 172 and Lot 4, Block 172 from the driveway abutting Route 46 East, in a southerly direction to a point 60 feet beyond the structure located on said premises. Additionally, Grantee shall stripe the newly constructed pavement and shall install shoulder stone behind the structure.
5. Grantee and/or its tenant hereby agree to maintain liability and hazard insurance for said property in the amounts of \$1,000,000 for any single occurrence and \$3,000,000.00 in the aggregate. Grantor shall be a named insured under any such policy and a Certificate of Insurance evidencing same shall be provided to Grantor.
6. This agreement shall be binding on the heirs, successors, transferees and assigns of the parties. (Pa 020, emphasis added)

Plaintiff admitted in its Complaint that “The Deed of Easement provides that it is to remain in effect as long as the Lease in effect and was to run concurrently with the term of the Lease, which provided for a term of twenty (20) years with two (2) five (5)-year options to extend the term.” (Pa 001) Plaintiff further admitted in the Complaint that “if the term was so extended, the Lease would run through July 31, 2023”. (Pa 001)

Plaintiff, however, alleges that “it was the intention of the parties that the Easement remain in effect if the lease for Dunkin’ Donuts was in effect”. (Pa 001) JF-Totowa is a successor to DD Toto. (Pa 001)

Curcio (the owner of Lot 5- 580 Route 46 East), entered into a lease with Red Rose on November 21, 2013. (Pa 098) The terms of the lease between Red Rose and Curcio were for ten (10) years beginning on December 1, 2013 with two (2) five (5)-year options to extend the term. (Pa 001 and Pa 098)

The lease entered into between Curcio and Red Rose on November 21, 2013 describes the premises rented to Red Rose as “certain premises in the Borough of Totowa, County of Passaic, State of New Jersey, consisting of the land and building at 580 Route 46 East”. (Pa 098)

The lease between the parties to the easement, Carmine Curcio and D.D. Toto, L.P. was made in July of 1993 and commenced “the day that the Tenant [D.D. Toto, L.P.] receives approvals and permits from the Borough of Totowa

Board of Adjustment to conduct a ‘Dunkin Donuts’ business upon the premises”. (Pa 063) The amended commencement date of the lease between Carmine Curcio and D.D. Toto, L.P. was revised by Addendum to the 1st day of December, 1993. (Pa074)

The lease between Carmine Curcio and D.D. Toto, L.P was for twenty (20) years with an option to extend the lease for two (2) additional five (5)-year terms (or another ten (10) years) for a total of thirty (30) years. (Pa 063, specifically Pa 064-065 and Pa 071). There is no reference in the lease between Carmine Curcio and D.D. Toto, L.P to the 1993 easement for “ingress and egress” or that the Dunkin Donuts business would have a drive-through. (Pa063 to Pa 074) There is no reference in the lease between Carmine Curcio and D.D. Toto, L.P. which identifies or makes mention of the owner of Lot 4, 578 Route 46 West (Madeline Freda at the time). (Pa 063) The only approvals from the Totowa Board of Adjustment that are referenced in the 1993 lease between Curcio and D.D. Toto, L.P. are for a “Dunkin Donuts business”. (Pa 063)

In the lease between Carmine and Rosemarie Curcio and Red Rose Investors, LLC that was made some twenty years after the original lease on November 21, 2013, there is no reference to a drive-through, an easement for a

drive-through or provision for notice to the owner of Lot 4, 578 Route 46 East (MC-FAM). (Pa 098)

On July 29, 2015, Red Rose entered into a sublease with JF-Totowa “relating to the property identified as 580 Route 46 East, Borough of Totowa, County of Passaic, State of New Jersey, as described in the Prime Lease”. (Pa 123) The sublease between Red Rose and JF-Totowa, in paragraph 15.

“Assignment,” provides that as a condition of the sublease, the subtenant would transfer and assign its rights to all easements which included the Deed of Easement dated September 29, 1993 between Madeline Freda (Grantor) and D.D. Toto, L.P. (Grantee). (Pa123)

The Prime Lease referenced in the sublease between Red Rose and JF-Totowa (and attached to the sublease) is the lease between Carmine and Rosemarie Curcio and Red Rose dated November 21, 2013. (Pa 098) There is no document evidencing consent or agreement by MC-FAM (or the owners of Lot 4, 578 Route 46 East) to extend the terms of the Deed of Easement past July 31, 2023.

On September 3, 2008, Defendant, MC-FAM, purchased 578 Route 46 East, (Block 172, Lot 4) Totowa, New Jersey from Freda. (Pa 088) Bill McEntee, principal of MC-FAM testified that when MC-FAM purchased Lot 4, they were aware of the Dunkin Donuts drive-through and the easement and

that it would end on July 31, 2023. (Pa 196) Currently (and during the pendency of this case), MC-FAM has a lease with a commercial tenant that has 5-year options for renewal by the tenant. (Pa 195) Mr. McEntee testified that if the current commercial tenant does not renew its lease and their property that currently is used for the Dunkin Donuts drive-through is returned to them, they have looked into expanding the existing building while still maintaining zoning setbacks and parking requirements, thus allowing them the opportunity to increase their profits on the leasing of their property. (Pa 204).

MC-FAM also owns other commercial properties in New Jersey, including a Burger King with a drive-through, for which they receive a percentage rent based upon the approximate 65-70% of the revenue generated from that drive-through. (Pa 208) During the trial, the Court did not accept the premise that Dunkin Donuts would lose 60% of its revenue if the drive-through was closed. (Pa 416) The trial court also clarified in its opinion denying the Plaintiff's motion for a stay pending appeal, that the court's award of damages was not intended as prospective fair market rent. (Da 001)

The number suggested by the plaintiff and third party defendant as "fair market rental value" (\$1,048.33 per month) was not determined at trial as per the Trial Court's own clarification. (Da001). Moreover, the trial court incorrectly failed to include the verified damages as set forth in the testimony

of defendant's expert in appraisals that the estimated ground lease area, at \$60.00 per square foot indicates a value of \$172,100.00 plus 12% of the gross sales rent attributable to the drive-through. (T3- 122:9-13 and 123:22-25, 124:1) Defendant's expert based his calculation that fair market rent for this drive-through area was \$132,800 per year or \$11,066.67 per month. (T3-137-138, 139:1-2)

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE FIRST COUNT OF THE COMPLAINT AS THE EASEMENT WAS “EXPIRED”

The “easement” at issue here is an express easement. An express easement is a matter of contract between the parties, and it is appropriate to employ contract principles in attempting to ascertain the rights conveyed. Princeton v. Mercer County, 333 N.J. Super. 310, 324-25 (App. Div. 2000), aff’d, 169 N.J. 135 (2001); Restatement (Third) of the Law of Property, §4.1, Introductory Note (2000). A determination of the rights conferred under a grant of easement “depends on the intent of the parties as expressed in the language of the grant, viewed in the light of the nature and reasonably necessary incidents of the permitted use.” Tide-Water Pipe Co. v. Blair Holding Co., Inc. 42 N.J. 591, 604 (1964).

In this case, the easement was clearly not intended to be extended indefinitely as it had both a termination date and was expressly limited to the 30-year lease period between Carmine Curio and D.D. Toto, L.P. Of further note is the fact that the easement agreement took into consideration the possibility of the potential effects of an expansion of the building on the property at 578 Rt. 46 East (MC-FAM) and the right to cancel the easement.

Clearly, the grantor of this express easement was not willing to extend the use of its property past the stated date and always was cognizant of its own development potential that would include use of that 20-foot wide strip. Moreover, the actions of Red Rose to secure assignments of the “deed of easement” evidences that Red Rose was well aware that the twenty-foot strip of property was the subject of a lease and not an “easement” that would extend past a finite date.

Plaintiff attempts to modify the express terms of the easement contract and to link the terms of the easement to a contract between it and another party (that did not include defendant). No reasonable interpretation of the easement contract before the court could yield the result that Plaintiff contends. In interpreting a contract, courts start with the plain language. Barila v. Bd. Of Educ. Of Cliffside Park, 241 N.J. 595, 615-16 (2020). Courts enforce contracts based on the intent of the parties, the contract’s express terms, the surrounding circumstances, and the contract’s purpose. Ibid. “[W]hen the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result.” Id. 616. (quoting Quinn v. Quinn, 225 N.J. 34, 45 (2016)). In other words, courts enforce contracts as written and do no “make a better contract

for either party”. Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999).

“Questions concerning the extent of the rights conveyed by an easement require a determination of the intent of the parties as expressed through the instrument creating the easement, read as a whole in light of the surrounding circumstances.” Rosen v. Keeler, 411 N.J. Super. 439, 451, 986 A.2d 731 (App. Div. 2010) (citing Poblette v. Towne of Historic Smithville Cmty. Ass'n, Inc., 355 N.J. Super. 55, 63, 809 A.2d 178 (App. Div. 2002)). “[W]hen the intent of the parties is evident from an examination of the instrument, and the language is unambiguous, the terms of the instrument govern.” Ibid. (alteration in original) (quoting Hyland v. Fonda, 44 N.J. Super. 180, 187, 129 A.2d 899 (App. Div. 1957)).

Here, the clear intent of the agreement related to that the 20-foot strip of land was that there was a definite expiration or termination date. The agreement was born out of a negotiation where the parties were represented by counsel. The fact that Curcio entered into a lease with Red Rose in 2013 is extraneous and has no impact on the easement agreement. The fact that JF-Totowa succeeded to the rights of DD Toto, L.P. did not change the terms of the easement as the easement contemplated the right to bind “the heirs, successors, transferees and assigns of the parties.” Finally, the fact that JF-

Totowa assigned its rights under the easement agreement to Red Rose did not change the terms of the agreement but in fact strengthens the position of MC-FAM to underscore that Red Rose understood the use of that strip of property was created by a contract between the owner of that strip of property (MC-FAM) and the Dunkin Donuts. Plaintiff provided no documentation that the extension of the lease to JF-Totowa to operate a Dunkin Donuts for ten to thirty years past July of 2023 should attach to the easement agreement or compel defendants to accept those terms.

The unambiguous intent of the easement agreement was that for a maximum time period of thirty (30) years, the operators of the Dunkin Donuts could utilize the 20-foot strip of property now owned by MC-FAM as long as they paid rent as per the schedule. The Trial Court properly dismissed the First Count of the Plaintiff's Complaint and declared the Deed of Easement expired and no longer in legal force and effect.

POINT II

**THE DOCTRINE OF RELATIVE HARDSHIP
DOES NOT APPLY TO THIS CASE**

Plaintiff implores the Court to employ the Doctrine of Relative Hardship and relies on the case of Szymczak v. LaFerrera, 280 N.J. Super. 223 (App. Div. 1995).

The facts of the Szymczak case are very different from what is presented here. The Court in the Szymczak, case stated:

We conclude that the situation calls for the application of the "relative hardship" doctrine embodied in the *Restatement (Second) of Torts* § 941 (1979). This doctrine calls for a "balancing of the equities," even where the action is for trespass to real property, and especially where money damages are relatively adequate. *Id.* at § 944. The doctrine is particularly appropriate where both parties are personally blameless, an injunction works a great hardship on the encroacher, and money damages suffice for the victim. *Id.* at § 941 comments a, b, c. ... As to damages, the *Restatement* counsels that the damage remedy may well be quite adequate in "a case of dispossession of land by an encroaching building" where "there is a market that affords a standard of values, sale value or rental value, by which to measure damages and inadequacy of the remedy does not arise

from any uncertainty." Id. at § 944, comment d. (Id. 230) (emphasis added)

Both the Szymczak case and the caselaw upon which Szymczak relied, Gilpin v. Jacob Ellis Realities, Inc., 47 N.J. Super. 26, 34 (App. Div. 1957) applied the doctrine because the removal of property improvements (in Szymczak, it was the entire house that was built on the plaintiff's lot and in Gifkin, it was a building that was built several stories too high in contravention of a covenant limiting the height) would have been disproportionately damaging to the parties that had the mistaken improvements when compared to the plaintiffs claiming they suffered damages. As noted in the Gilpin case:

The doctrine of relative hardship does not call for the mere balancing of conveniences on final hearing. Thus the fact that the harm to the defendant caused by the injunction will slightly exceed the benefit the plaintiff receives therefrom does not justify a denial of injunctive relief. Id.

The application of "relative hardship" was predicated upon the fact that unknowingly significant improvements to property were made that resulted in encroachment on another innocent party's property. While the innocent party in those cases may have been inconvenienced, they were compensated for their actual loss. That is not the case here where the parties made a contract with a specific expiration date. There were no surprises here. Both parties were

represented by counsel and business decisions were made and quantified in the contract.

Here, both parties at the time of the original agreement were aware of the end date of the agreement. Moreover, the Defendant, MC-FAM, had no knowledge of the new lease agreement between Dunkin Donuts and Red Rose. MC-FAM purchased the property in 2008 understanding that as of July 31, 2023, they could reclaim that strip of property.

Third-party defendant, JF-Totowa, alleges that MC-FAM knew that it was upgrading its property; however, William McEntee testified that he had no knowledge of the renovations being undertaken until he saw them in progress and at no time did JF-Totowa give notice to MC-FAM about the impending renovations or more importantly, that they had extended their lease without the knowledge or consent of MC-FAM.

Finally, and most importantly, the parties were all aware of the agreement that the drive-through lane had an expiration date. The fact that the drive-through is profitable does not create a hardship. Whatever Mr. Friedman, the original owner of the Dunkin Donuts establishment thought would happen as of July 31, 2023 is not relevant as the current Dunkin Donuts, JF-Totowa, entered into a lease agreement for a term that continued after the

clearly established drive through expiration date. The deal between JF-Totowa and Red Rose was a choice they made which should not be thrust upon MC-FAM especially when MC-FAM had neither consented to, nor had knowledge of such an extension. Any hardship was self-created by Plaintiff and Dunkin Donuts for ignoring the terms of the clear and specific easement agreement with the owner of Lot 4.

Moreover, JF-Totowa cannot advance a claim for hardship, or any claims at all, as it assigned whatever rights it had to Red Rose and then dismissed any claims that it may have once advanced in this litigation against Red Rose. Notably, JF-Totowa never made any claims of hardship or damages directly against MC-FAM therefore, any claims of hardship by JF-Totowa are meaningless as they pertain to MC-FAM. Any claim of hardship or damages by JF Totowa is between JF-Totowa and Red Rose and that claim was dismissed voluntarily by JF-Totowa.

POINT III

**THE TRIAL COURT'S AWARD OF DAMAGES
WAS NOT FAIR MARKET RENT**

The testimony of William McEntee, corporate representative of MC-FAM, demonstrated that Mr. McEntee and his partner, brother, Robert McEntee, own several commercial properties and had a business plan for how to increase the value of the property at 578 Route 46 should they regain the easement area. The testimony at deposition was that once the easement area was returned to 578 Route 46, MC-FAM could add on to their building to increase available square footage to rent and still have sufficient parking available.

During the trial, the defendant offered expert testimony that established the value of the easement area with the addition of a calculation of 12% of the gross sales established through the drive-through amounted to a fair market rental value of \$11,066.67 per month, with future fluctuations based upon the success of gross sales at the drive through.

The trial court, in its opinion denying the stay pending appeal, unequivocally stated that the decision of the court was not intended as

prospective fair market rent and therefore, the rights of defendant are not satisfied by the award of the trial court.

CONCLUSION

For the reasons set forth above, MC-FAM respectfully submits that the Trial Court properly granted the summary judgment motions dismissing Count One (the easement expired) and Count Two (Doctrine of Relative Hardship does not apply).

As to the amount of damages awarded by the Trial Court, MC-FAM respectfully submits that the amount of damages awarded was insufficient in light of the proofs submitted.

Respectfully submitted,

GACCIONE POMACO, P.C.
Attorneys for Defendant-Respondent,
MC-FAM Property Rte. 3, LLC

By: 
Diana Powell McGovern, Esq.

Dated: October 2, 2025



50 Cardinal Drive, Suite 203
Westfield, New Jersey 07090
Phone: 973-635-4500
www.fmnjlaw.com

New York Office:
11 Broadway, Suite 615
New York, New York 10004
Phone: 646-895-7652

November 5, 2025

Honorable Judges of the Appellate Division
Superior Court of New Jersey
Richard J. Hughes Justice Complex
25 West Market Street
P.O. Box 006
Trenton, New Jersey 08625-0006

LETTER BRIEF OF PLAINTIFF-APPELLANT
RED ROSE INVESTORS LLC

Re: Red Rose Investors LLC v. MC-FAM Property Rte. 3, LLC
Docket No. A-002104-24

Dear Judges:

Please accept this letter brief on behalf of plaintiff-appellant, Red Rose Investors LLC d/b/a Totowa Investors (“Red Rose”), pursuant to R. 2:6(b) and R. 2:6-5, in opposition to the legal arguments of defendant-respondent, MC-FAM Property Rte. 3, LLC (“MC-FAM”), in support of its cross-appeal, and in further support of Red Rose’s appeal from the Orders entered by the Trial Court on September 13, 2024, September 26, 2024 and February 3, 2025.

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTORY STATEMENT.....	3
 <u>LEGAL ARGUMENT</u>	
 <u>POINT I</u>	
THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE DOCTRINE OF RELATIVE HARDSHIP	3
 <u>POINT II</u>	
THE TRIAL COURT FOUND MC-FAM’S APPRAISAL EXPERT’S ANALYSIS FLAWED	7
 CONCLUSION	 11

INTRODUCTORY STATEMENT

Red Rose submits that its arguments on appeal have been fully set forth in its initial Brief filed with the Court on August 29, 2025. Accordingly, the purpose of this brief is limited as follows: (1) to address those arguments made by MC-FAM in its brief in opposition to Red Rose’s appeal that merit counter-argument or commentary beyond what was included by Red Rose in its initial brief, and (2) to address those arguments made in support of MC-FAM’s cross-appeal seeking a reversal of the amount of damages awarded by the Trial Court. Red Rose incorporates herein by reference the Statement of Facts and the Procedural History set forth in its initial brief.

LEGAL ARGUMENT

POINT I

**THE TRIAL COURT ERRED IN FAILING TO
CONSIDER THE DOCTRINE OF RELATIVE
HARDSHIP.**

The Trial Court’s analysis of the doctrine of relative hardship was flawed. Since MC-FAM was seeking a mandatory injunction, i.e. an Order compelling Red Rose and Dunkin’ Donuts to vacate the easement area, the doctrine is invoked. As stated by the Court in Gilpin v. Jacob Ellis Realties, Inc., 47 N.J. Super. 26, 29 (App. Div. 1957):

The principal question of law raised by this doctrine is whether plaintiff is entitled to a mandatory injunction. No plaintiff is entitled to such an injunction as of course, merely because of a violation of a covenant affecting real property, for which, to be sure, there is no adequate remedy at law. The allowance of injunctive relief is a discretionary matter, in that the court may be called upon to give or withhold relief depending upon variables, namely, the circumstances of the case.

The Trial Court's decision that the doctrine did not apply was based solely on its determination that the agreement was "clear" as to its expiration date. However, a ruling on the legal rights of the parties does not bar the application of the equitable doctrine of relative hardship.

The doctrine of relative hardship calls for a court to determine the appropriate relief, i.e. in this case, issuing an injunction requiring the removal of the drive-through or, alternatively, awarding the payment of monetary damages - - here, the payment of fair market rent or the fair market value of the easement area. The Trial Court failed to make this determination.

Red Rose had submitted the expert reports of Kenneth Karle and the Certifications of Kenneth Friedman, the initial owner of the first Dunkin' Donuts, and Ashwin Prajapati, the current owner of the Dunkin' Donuts, in support of its motion for summary judgment, outlining the substantial hardship to them. Same were not considered by the Trial Court.

In addition to parroting the Trial Court's position that it could not apply the doctrine of relative hardship because it found the easement agreement to be clear on its face, MC-FAM also asserts that the doctrine should not be applied because the easement agreement constituted a commercial transaction in which both parties were represented by counsel, and the parties should have considered the expiration date of the easement agreement when Dunkin' Donuts performed its improvements. These factors actually *support* application of the doctrine based on the holdings discussed below.

First, the Court in Gilpin held that the doctrine of relative hardship is particularly applicable to a situation where commercial, rather than personal, interests are involved. As stated by the Court in Gilpin:

The doctrine is, we think, particularly applicable to a case, such as this, wherein we are dealing with two commercial properties; personal interests, or the pleasure that may be secured in the enjoyment of an equitable servitude of a certain type, is in no way involved.
[Id. at 35]

The instant case involves commercial interests - - personal interests are in no way involved.

As to Dunkin' Donuts making its improvements with knowledge of the expiration date, Mr. Prajapati certified that unfortunately, the termination was "overlooked" by counsel "creating this untenable situation." (Pa344) He believed that as long as a Dunkin' Donuts was being operated "the easements would not be

an issue and would continue ensuring that the drive-through would remain in place so long as there was a Dunkin' Donuts restaurant on the site.” (Pa345) Kenneth Friedman, the initial operator of the Dunkin' Donuts, and who also negotiated the easement, similarly certified that it was his “understanding that as long as a Dunkin' Donuts was being operated, we would have an easement to the drive-through. Dunkin' Donuts believed, and I concurred, that drive-throughs are critical to the success of any fast-food establishment as convenience and speed enhance customer satisfaction. The idea that while the site was still an operating Dunkin' Donuts the drive-through could be shut down for lack of an easement just makes no sense.” (Pa370)

A mistake made as to the expiration date of the easement does not prevent the doctrine of relative hardship from being applied; rather, it *supports* the need for the Trial Court to have considered the appropriate remedy – injunction or monetary damages - - by requiring payment of fair market rental.¹ In fact, MC-FAM admitted it would be satisfied receiving fair market rental. William McEntee, managing member of MC-FAM, admitted at his deposition that it would extend the term of the Easement if a fair market rental was paid.

¹ Interestingly, in Gilpin, the Court applied the doctrine where it noted the violation of the covenant had not been “wanton in character” and the defendant had “forgotten about the covenant until after the completion of the building.” Id. at 29-30.

Q. All right. Thank you. I now understand it. So would you extend the term of the drive-thru easement if you were paid what you viewed as fair market rental?

A. Would I extend?

Q. Would you extend the term of the drive-thru easement if you were paid what you view as fair market rental?

A. Yes.

[Pa210]

The doctrine of relative hardship “calls for a ‘balancing of the equities,’ even where the action is for trespass to real property, and especially where money damages are relatively adequate.” Szymczak v. LaFerrara, 280 N.J. Super. 223, 229-230 (App. Div. 1995) In the instant case, monetary damages are admittedly adequate and the Trial Court should have balanced the equities and awarded monetary damages, rather than issue an injunction.

POINT II

THE TRIAL COURT FOUND MC-FAM’S APPRAISAL EXPERT’S ANALYSIS FLAWED.

One of the critical issues in the case was what was the appropriate fair market rental of the easement area from August 1, 2023 forward. The Trial Court determined

that the amount of \$1,048.33 per month from August, 2023 through April 30, 2025,² i.e. a total of \$22,014.93, less a credit for all sums paid during that time period per the agreement of the parties during the pendency of the action, was the proper amount of damages. MC-FAM, in its cross-appeal, asserts the damages were not intended to be a determination of fair market rental. It is unclear whether MC-FAM challenges the amount awarded for the twenty-one months in question or only challenges whether the monthly amount of \$1,048.33 is the correct fair market rental if this Court determines that the easement should remain in effect. We will address both issues.

During the trial, both Red Rose's and MC-FAM's appraisal experts testified at length. Their testimony is summarized in the Decision Of The Court dated February 3, 2025. The Trial Court found "the testimony of M. Hendricks to lack credibility" and was "largely disregarded in favor of the more reasonable, credible testimony of Plaintiff's expert, Paul Beiser." As explained by the Trial Court:

The analysis of Mr. Hendricks, who admittedly had no prior experience in valuing easements such as this, is fatally flawed. First, based upon his opinion of market value of \$172,100 for the land, the Defendant would have a 77% rate of return in the first year of a lease for the easement area (\$132,800 annual rent on a \$172,100 market value). Second, although the actual square footage value of the property according to his records was \$58.40, he utilized a \$60.00 valuation. Third, although he utilized

² Having rejected Red Rose's arguments regarding the doctrine of relative hardship, the Trial Court ordered that Red Rose and Dunkin' Donuts were required to vacate the easement area by April 30, 2025. This Order was stayed by the Appellate Division by Order entered in April 30, 2025.

a 60% drive-through revenue valuation, there was no analysis whatsoever of what the decrease in sales would be. The assumption that if the drive-through were to close, Dunkin Donuts would lose 60% of its revenue has no factual basis whatsoever and it rejected by this court. Finally, part of Mr. Hendricks' valuation was based upon an analysis that included east and west traffic on Route 46 – which is a divided highway with another Dunkin Donuts at the west bound side at the Riverview Drive exit. For these reasons, this court finds the testimony of Mr. Hendricks to lack credibility and is largely disregarded in favor of the more reasonable, credible testimony of Plaintiff's expert, Mr. Beisser. (emphasis added) (Pa420)

Mr. Hendricks also incorrectly treated the easement area as if it were a fully conforming, functional retail site, and attributed all of the gross sales generated by the drive-through window solely to the easement area. Mr. Hendricks did not take into account that in order to generate sales at the drive-through window, other building improvements are necessary; that there were employees located on site in order to make and sell the donuts; that there is a drive-in lane; and that the entire drive-through window is located on the Dunkin' Donuts site.

The Trial Court thus accepted Mr. Beisser's calculations, with a slight adjustment in the capitalization rate; i.e. from 7% to 8.5%, thus resulting in a rental value of \$1,048.33 per month.

It is "improper for the Appellate Division to engage in an independent assessment of the evidence as if it were the court of first instance." State v. Locurto, 157 N.J. 463, 471 (1999). And where the lower court has made credibility

determinations, even without specifically articulating detailed findings of credibility, where the reasons for its determination may be inferred from the record, the Appellate Division is not free to make its own credibility determination. *Id.* at 472-75; see also *Ferdinand v. Agric. Ins. Co. of Watertown, N.Y.*, 22 N.J. 482, 492 (1956) (opining that credibility is always for the factfinder to determine). The Decision Of The Court issued by the Trial Court outlines the testimony given by the parties' experts and the reasons the Trial Court found the analysis of MC-FAM's expert flawed and the analysis of Red Rose's expert credible. The Trial Court's determination of the damage award should thus be left intact.

Red Rose does not assert that the payment of \$1,048.33 per month should continue indefinitely. In fact, in the Conclusion to its appellate brief, Red Rose requested that this Court should declare that, pursuant to the doctrine of relative hardship, the drive-through can continue to be used by Red Rose and Dunkin' Donuts, and the matter should be **remanded** to the Trial Court for a determination of fair market value for the period after April 30, 2025.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in Red Rose's initial brief, Red Rose respectfully submits that the Trial Court's decision granting MC-FAM's Motion for Summary Judgment and denying Red Rose's Motion for Summary Judgment should be reversed; the Judgment setting the measure of damages determined for the period August, 2023 through April 30, 2025 should be affirmed; the Court should declare that, pursuant to the doctrine of relative hardship, the drive-through can be used by Red Rose and Dunkin' Donuts upon continued payment of fair market rental; and the action should be remanded to the Trial Court for a determination of fair market rental.

Respectfully submitted,

FINESTEIN & MALLOY, L.L.C.

By: 

Russell M. Finestein

 **LAW OFFICES OF
ALAN R. ACKERMAN**

November 6, 2025

Honorable Judges of the Appellate Division
Superior Court of New Jersey
Richard J. Hughes Justice Complex
25 West Market Street
P.O. Box 006
Trenton, New Jersey 08625-0006

LETTER BRIEF OF PLAINTIFF-APPELLANT
JF-TOTOWA DONUTS, INC.

**Re: Red Rose Investors LLC and JF-Totowa Donuts, Inc. V. MC-
FAM Property Rte. 3, LLC
Docket No. A-002104-24**

Dear Judges:

Plaintiff-Appellant, JF Totowa Donuts Inc. (“JF Totowa”) submits its reply letter brief pursuant to R. 2:6(b) and R. 2:6-5, in opposition to the legal arguments of defendant-respondent, MC-FAM Property Rte. 3, LLC (“MC-FAM”), and in further support of its appeal from the Orders entered by the Trial Court on September 13, 2024, September 26, 2024 and February 3, 2025.

Table of Contents

INTRODUCTORY STATEMENT	3
<u>LEGAL ARGUMENT</u>	
POINT I	
THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE DOCTRINE OF RELATIVE HARDSHIP.....	3
CONCLUSION	7

INTRODUCTORY STATEMENT

JF-Totowa joins and incorporates the Reply Brief of Red Rose Investors LLC (“Red Rose”). JF-Totowa’s reply brief provides further support for the arguments concerning the doctrine of relative hardship. JF-Totowa incorporates herein by reference the Statement of Facts and the Procedural History set forth in its initial brief and the initial brief of Red Rose.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE DOCTRINE OF RELATIVE HARDSHIP.

The Order of Summary Judgment in favor of MC-FAM (Pa410) on September 4, 2024 was shortsighted and ignored the damages to the business of JF-Totowa, an innocent pawn in this dispute. The Court refused to analyze the underlying issues, choosing to focus on the date of the termination of the Easement Agreement (Pa020). It failed to perform a thorough analysis of the uncontroverted factual issues raised by JF-Totowa and Red Rose which articulated its compensable losses. Instead, it wrongfully concluded that the contracting parties, neither of whom are parties herein, were represented by counsel thirty (30) years earlier in 1993.

Had the trial court performed an analysis of the issues and the contested evidence and allowed testimony at the trial where all of the facts would be presented, without question, the court would have found in favor of appellants herein. Those

facts were all set forth in the Certification of Ashwin Prajapati (Pa 343) which was submitted to the trial court. As stated in the initial briefs, the Court ignored the material facts which it was required to analyze prior to rendering a decision. It ignored the 60% loss of sales which will be suffered by JF-Totowa when the easement is closed. It ignored the loss of employment by any of its employees. It ignored the terms of the sublease between JF-Totowa and Red Rose which requires undiminished rent regardless of the existence of the easement. These are a few of the highlights of the losses sustained by JF-Totowa. It ignored the Certification of Kenneth Friedman (Pa 369) who stated that it was the intent of all parties that the easement continue as long as a Dunkin Donuts restaurant was located at the contiguous site.

Surprisingly, it ignored the deposition testimony of MC-FAM's representative, William McEntee, who unequivocally stated that MC-FAM had no current use of the easement, and he had no objection to the continuation of the easement provided that the parties agreed to a fee. His deposition testimony provided ample opportunity for the court to exercise its equitable powers of relative hardship to fashion a resolution clearly acceptable to MC-FAM and the Appellants.

In Gilpin v. Jacob Ellis Realties, Inc., 47 N.J. Super. 26, 29 (App. Div. 1957). Therein, the court applied the doctrine of relative hardship due to the relative inequities of the parties. The Gilpin court established that granting mandatory

injunctive relief involves the exercise of sound discretion by the trial judge in light of the circumstances of the case. This discretionary analysis may involve consideration of several factors, including whether the violation of the covenant was wanton in character and whether either of the parties acted unreasonably (citing Roehrs v. Lees, 178 N.J. Super. 399, 429 A.2d 388 (Super. Ct. App. Div. 1981))

The factors herein are identical to the factors in Gilpin. It held that the doctrine of relative hardship is particularly applicable in cases where two specific conditions are met. First, MC-FAM must have an adequate alternative remedy of damages, see Roehrs v. Lees, 178 N.J. Super. 399, 429 A.2d 388 (Super. Ct. App. Div. 1981). Second, the issue cannot be based upon the "personal interests" of a property owner in the enjoyment of his land, Roehrs, *ibid*. In this matter, the future existence of JF-Totowa requires the invocation of the Doctrine. This lawsuit does not involve enhancements to property. It is grounded on the future viability of a business.

The Gilpin court recognized that in balancing the equities, a trial judge may wish to receive additional evidence, including that relevant to the cost which an injunction requiring full compliance with the covenant would impose on defendants. Roehrs v. Lees, 178 N.J. Super. 399, 429 A.2d 388 (Super. Ct. App. Div. 1981). Clearly, the relative hardship analysis requires a factual inquiry into the actual costs and benefits involved.

The key factors courts consider when applying the doctrine include the extent

of each of the parties, the financial investment made, and the lack of harm to the other party. In Sautto v. Edenboro Apartments, Inc., 84 N.J. Super. 461 (App.Div. 1964), the court employed the doctrine of relative hardship when the Plaintiff demonstrated that he would be forced to destroy improvements made before litigation was brought, along with the funds already spent and additional costs that would be required. Clearly, JF-Totowa satisfies all criteria. The court also found that the other party would suffer no discernible damage from allowing the nonconforming use to continue.

The doctrine is particularly applicable when a party is acting in good faith and has invested considerable time and resources which will be lost through no fault of their own. See Sautto, *ibid.* The successful application of the doctrine requires a showing of substantial hardship, good faith reliance, significant investment, and consideration of the relative harm to all parties involved. The key factors courts consider when applying the doctrine include the extent of construction completed, the financial investment made, and the relative harm to the parties.

Courts have emphasized that property owners must show they would be forced to destroy improvements made before litigation was brought, along with the funds already spent and additional costs that would be required. See Hill v. Bd. of Adjustment, 122 N.J. Super. 156, 162 (App. Div. 1972), *certif. denied*, 72 N.J. 466 (1976). Additionally, there is no claim that MC-FAM will suffer discernible damage

from allowing the easement to continue. It cannot use the small easement area and is holding the area hostage to exact exorbitant fee to which it is not entitled. Appellants merely ask that the Court determine a fair fee for the use of the property. JF-Totowa requests that the trial judge sitting in equity take testimony concerning the relative hardship of the parties and fashion a remedy that protects the investment of JF-Totowa and remits a reasonable fee to MC-FAM for the continued use of the easement.

CONCLUSION

For all of the foregoing reasons and in the interest of equity, JF-Totowa requests that the decision of the Trial Court Summary Judgment dismissing the First Count of the Complaint and denying Red Rose's Motion for Summary Judgment should be reversed and the use of the easement continued so long as a Dunkin Donuts restaurant is on the site. The matter should be remanded to the trial court for a hearing to determine the payment of a fee to compensate MC-FAM for the use of the easement area.

Respectfully submitted,

LAW OFFICE OF ALAN R. ACKERMAN



BY: ALAN R. ACKERMAN, ESQ.

ROBERT A. GACCIONE
FRANK POMACO
DENNIS E. GAGLIONE
ALDO DITROLIO
ANTHONY G. DEL GUERCIO

DIANA POWELL McGOVERN
WILLIAM F. HARRISON

GACCIONE POMACO

A PROFESSIONAL CORPORATION

ONE BOLAND DRIVE

SUITE 102

WEST ORANGE, NEW JERSEY 07052

(973) 759-2807

TELEFAX: (973) 759-0688

MICHAEL J. PIROMALLI
STEVEN M. AHRENDT
WILFREDO CARABALLO

Of Counsel

LESLIE W. FINCH
(1973-2000)

November 18, 2025

Honorable Judges of the Appellate Division
Superior Court of New Jersey
Richard J. Hughes Justice Complex
25 West Market Street
P.O. Box 006
Trenton, New Jersey 08625-0006

Re: Red Rose Investors LLC vs. MC-FAM Property Rte. 3, LLC, et. al.
Docket No. : A-002104-24

Dear Judges:

Please accept this letter brief on behalf of Defendant-Appellant, MC-FAM Property Rte. 3, LLC (“MC FAM”), pursuant to R. 2:6(b) and R. 2:6-5, in opposition to the legal arguments of Plaintiff-Appellant’s (Red Rose) response to Defendant’s Cross-Appeal and to third party-Appellant’s response to Defendant’s Cross-Appeal.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS..... 2

INTRODUCTORY STATEMENT..... 3

LEGAL ARGUMENT

 POINT I THE TRIAL COURT’S AWARD OF DAMAGES
 WAS NOT FAIR MARKET RENT..... 3

CONCLUSION..... 6

INTRODUCTORY STATEMENT

MC-FAM submits that its argument on appeal has been fully set forth in its initial Brief filed with the Court on October 8, 2025. The purpose of this brief is limited to addressing the opposition submitted by Red Rose and JF Totowa's opposition to MC-FAM's cross-appeal seeking a reversal of the amount of damages awarded by the Trial Court. MC-FAM incorporates herein the Statement of Facts and Procedural History submitted to the Court in its initial brief.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S AWARD OF DAMAGES WAS NOT FAIR MARKET RENT

Plaintiff argues that the trial court found Defendant MC-FAM's appraisal expert's analysis was flawed. This is an incorrect statement. Specifically, the Trial Court refused to consider that without the easement, there would be no drive-through and without the drive-through, the Dunkin Donuts would lose 60% of their revenue. The Trial Court held that it was "speculative" as to what would happen if JF Totowa that lost of the drive-through. Defendant's expert had the right to rely upon the statements of JF Totowa's representative, Ashwin Prajapati, who certified to the

Court that his business would lose the drive-through revenue if the easement area was not maintained. (PA 343-348)

The Trial Court clarified its review of the damages evidence in its opinion issued in response to the Plaintiff's post judgment motion. The Court indicated that the damage award "was not intended as prospective fair market rent, and so its rights are not adequately protected". (Da 006)

Plaintiff wants to argue that the case should be remanded for a trial on the issue of damages. Plaintiff rejected the opinion offered by Defendant's expert that the drive-through, which accounted for 60% of the JF Totowa revenue, should be factored into a percentage based rent. Meanwhile, JF Totowa, who never asserted a claim against Defendant claimed that loss of the easement area would destroy its business revenues. (See PA 343-348 Certification of JF Totowa representative, Ashin Prajapati.)

The damage calculations espoused by the Trial Court, while failing to consider the revenue generated by the drive-through, were based upon the Court's correct determination that the doctrine of relative hardship did not apply. Moreover, the Plaintiff wants to ignore that this is not the case of eminent domain (which is the formula utilized by Plaintiff's appraiser), but an attempt by private commercial parties to have the court make a better deal than the one they entered into. Where the terms of an agreement are clear, a court ordinarily will not make a better deal for

a party than that party voluntarily made for itself, particularly in a commercial, arms-length setting. For *e.g.*, Chemical Bank of New Jersey Nat'l. Ass'n v. Bailey, 296 N.J.Super. 515, 527, 687 A.2d 316 (App.Div.), *certif. denied*, 150 N.J. 28, 695 A.2d 671 (1997); Sons of Thunder, Inc. v. Borden, Inc., 285 N.J.Super. 27, 48–49, 666 A.2d 549 (App.Div.1995), *overruled on other grounds*, 148 N.J. 396, 690 A.2d 575 (1997).

JF Totowa argues that the relative hardship of the parties should factor into the determination of a “fair fee” for the use of Defendant’s property. It appears, without legal support, that Plaintiff and JF Totowa’s position is: any commercial tenant like JF Totowa who stands to lose money it invested in its business at a leased location has once that lease ends, a hardship and the lease should continue with payments based upon what that party stands to lose. Again, Plaintiff and JF Totowa chose to ignore that MC-FAM’s opportunity to use all of its property (including the easement area) as economically profitable as possible is the right of all landowners. “An owner is free to do with his property what he wills - absent criminal intent, constitutional limitations, or liability for tortious activities in connection therewith. There is a firm public policy against judicially-created rights in strangers to the ownership by way of easement or of restrictive covenants running with the land.” Annunziata v. Millar, 241 N.J. Super. 275, 289 (Ch. 1990) citing Hammett v. Rosensohn, 46 N.J.Super. 527, 535, 135 A.2d 6 (App.Div.1957)

Here, Defendant relied on the contract/lease/easement to terminate on July 31, 2023. None of the parties in this litigation are the original signers of the agreement and therefore, the parties have only the clearly worded easement agreement upon which they could rely. JF Totowa admits that someone “overlooked” the termination date. That mistake is not sufficient reason to re-write the contract. JF Totowa has other legal options for any oversight regarding the “overlooked” termination date that should not involve taking defendant’s property. Defendant is the only one that has the right to determine what fair value rental is acceptable.

CONCLUSION

For the reasons set forth above, and in the opposition previously submitted, Defendant, MC-FAM, submits that the amount of damages awarded was insufficient in light of the proofs submitted.

Respectfully submitted,

GACCIONE POMACO, P.C.
Attorneys for Defendant/Plaintiff on the
Counterclaim/Third Party Plaintiff, MC-FAM
Property Rte. 3, LLC

By: 
Diana Powell McGovern, Esq.