DONALD UNGER, Plaintiff-Appellant, v. EDWARD DWYER, SONALI DWYER, JONES DOES 1-10, and ABC CORPORATIONS 1-10, Defendants-Respondents.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002212-23 Civil Action APPEAL FROM FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, GENERAL EQUITY PART, ESSEX COUNTY Docket No.: ESX-C-000248-21 SAT BELOW: HON. LISA M. ADUBATO, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT DONALD UNGER

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TABLE OF CONTENTS

PAGE

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED iii

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 3

STATEMENT OF FACTS 4

I. DEFENDANTS' INSTALLATION OF CURBING ALONG THEIR DRIVEWAY REDIRECTED THE FLOW OF SURFACE WATER ... 4

A. Defendants installed a curb around their driveway 4

B. Plaintiff's surveyor found that a gap in the curb directed water from Defendants' property to Plaintiff's property 7

C. Plaintiff's engineer opined on the quantity of water flowing from Defendants' property to Plaintiff's property 9

II. DEFENDANT EDWARD DWYER ADMITTED THAT HE PLACED BRANCHES ON PLAINTIFF'S PLANTS 11

III. THE CHANCERY DIVISION GRANTED DEFENDANT'S MOTION AT THE SUMMARY JUDGMENT HEARING 12

A. The Chancery Division granted summary judgment on Plaintiff's nuisance claim because it found Mr. Hajjar's opinions to be unsupported 12

B. In granting summary judgment on Plaintiff's trespass claims, the Chancery Division disregarded testimony on Defendant Edward Dwyer's admissions 14

LEGAL ARGUMENT 15

I. THE STANDARD OF REVIEW IS *DE NOVO* 15

II. THE CHANCERY DIVISION ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR NUISANCE (T64:4–68:17) 16

III. THE CHANCERY DIVISION ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR TRESPASS (T60:25–64:3) 21

CONCLUSION 24

TABLE OF JUDGMENTS, ORDERS AND RULINGS BEING APPEALED

Order Granting Summary Judgment to
Defendants Edward Dwyer and Sonali Dwyer.....41a

Oral Decision *in* Transcript of Motion T60:17-68:24

TABLE OF CITATIONS OF CASES

PAGE

Cases

Armstrong v. Francis Corp.,
20 N.J. 320 (1956) 17

Balinski v. A. Capone & Sons,
1 N.J. Super. 215 (App. Div. 1949) 22

H.C. Equities, LP v. Cty. of Union,
247 N.J. 366 (2021) 15, 16

Hoffman v. Asseenontv.Com, Inc.,
404 N.J. Super. 415 (App. Div. 2009). 22

Hopler v. Morris Hills Reg'l Dist.,
45 N.J. Super. 409 (App. Div. 1957) 18, 19, 20

Huber v. Serpico,
71 N.J. Super. 329 (App. Div. 1962) 22

JPC Merger Sub LLC v. Tricon Enterprises, Inc.,
474 N.J. Super. 145 (App. Div. 2022) 15, 16

McCullough v. Hartpence,
141 N.J. Eq. 499 (Ch. 1948) 17

Nathanson v. Wagner,
118 N.J. Eq. 390, 179 A. 466 (Ch. 1935) 17

Pinkowski v. Twp. of Montclair,
299 N.J. Super. 557 (App. Div. 1997) 22

Sheppard v. Twp. of Frankford,
261 N.J. Super. 5 (App. Div. 1992) 17, 18

Other Authorities

N.J.R.E. 803(b) 23

Rule 4:46-2 15

PRELIMINARY STATEMENT

This dispute among neighbors arises from damage that Defendants Edward and Sonali Dwyer caused to Plaintiff Donald Unger's property in two separate and unrelated incidents, one giving rise to a nuisance claim and the other to a trespass claim. This appeal seeks reversal of the Chancery Division's order granting summary judgment to the Defendant on those claims.

With respect to the nuisance claim, Defendants installed a curb around their driveway that prevented the natural flow of surface water through their backyard and redirected that water through a gap at the corner of the curb onto Plaintiff's property. After a heavy rainstorm, Defendants' new drainage system caused a flood on Plaintiff's property that destroyed trees and other plants in his backyard. It is undisputed that Defendant's property slopes toward Plaintiff's property, and Plaintiff introduced unrebutted evidence from his survey expert that Defendant's curb, with gaps at its corners, materially altered the original flow path for surface water and caused flooding on Plaintiff's property. The Chancery Division disregarded that unrefuted evidence that Defendant's conduct caused the flooding of Plaintiff's property and granted summary judgment for the Defendants solely because it was unpersuaded by Plaintiff's engineering expert's opinions on the quantity of water that flowed onto Plaintiff's property. Because Plaintiff's engineering

expert's opinion was not essential to establishing Defendants' liability in nuisance, and that expert's opinion was supported by calculations from various sources of data, the Chancery Division erred in granting summary judgment on the nuisance claim.

With respect to the trespass claim, Plaintiff testified that Defendant Edward Dwyer had admitted that he had placed fallen tree branches on Plaintiff's ornamental plants that destroyed then. Defendant Edward Dwyer likewise admitted at his deposition to placing the branches in that location. The Chancery Division disregarded all testimony of Mr. Dwyer's admission and granted summary judgment based on its conclusion that the record contained insufficient evidence that Defendant caused the destruction of Plaintiff's plants. The Chancery Division's disregard of competent, admissible evidence of liability was an error.

Because the Chancery Division erroneously disregarded probative evidence of Defendants' liability for nuisance and trespass, Plaintiff is entitled to reversal of the summary judgment order and a trial on these issues.

PROCEDURAL HISTORY

Plaintiff's Complaint and Jury Demand asserts three counts for relief. [7a]. The First Count asserts a claim for nuisance based on allegations that Defendants caused rainwater to flow from their property to Plaintiff's property. [9a]. The Second Count asserts a claim for trespass based on allegations that Defendant's driveway encroaches on Plaintiff's property. [10a]. The Third Count asserts a claim for trespass based on allegations that Defendants made an unauthorized entry onto Plaintiff's land and that Defendants deposited tree branches on Plaintiff's plants, causing damage thereto. [11a]. Defendants filed an Answer, Affirmative Defenses, Counterclaims and Jury Demand, and Plaintiff answered the counterclaim. [13a–38a].

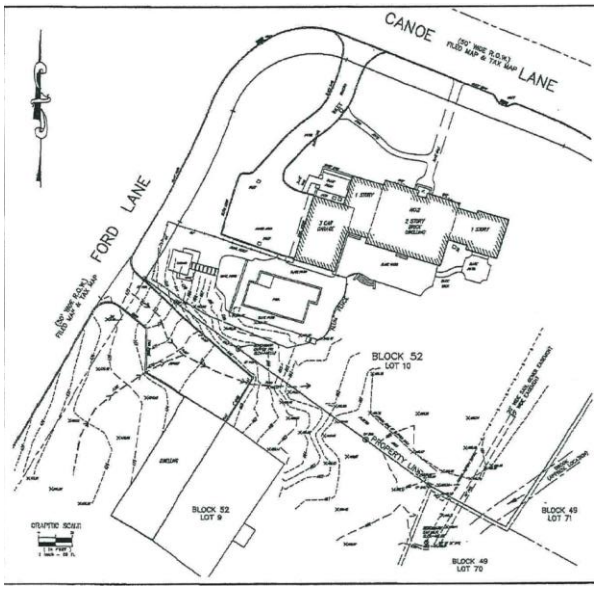
Following discovery, Defendants moved for summary judgment on all counts of Plaintiff's complaint, which Plaintiff opposed. [39a]. At the conclusion of oral argument, the Chancery Division granted Defendants' motion in its entirety and placed its oral opinion on the record. [T60:17–68:24]. It subsequently entered a written order, and the instant appeal followed. [5a, 1a]. Plaintiff's appeal challenges the Chancery Division's with respect to summary judgment on the First Count (nuisance) and Third Count (trespass).

STATEMENT OF FACTS

I. DEFENDANTS' INSTALLATION OF CURBING ALONG THEIR DRIVEWAY REDIRECTED THE FLOW OF SURFACE WATER

A. Defendants installed a curb around their driveway

The parties own adjoining properties in Roseland, New Jersey, with Plaintiff's property located at 2 Canoe Lane and the Defendants' property located at 10 Ford Lane. [41a ¶¶ 1–3]. The Defendants' driveway runs southeasterly alone the line separating the parties' properties as shown below:



[Excerpt from 234a].

At the time Defendants acquired their property, a railroad tie planter box blocked the northeast half of the rear of the driveway while the southeast half of the rear of the driveway was completely open, as depicted in the photograph below.

[Excerpt from 350a; *see* 206a at 27:5–13 (confirming D-15 (350a) depicted the appearance of the driveway at the time Defendants purchased their property)]. The Chancery Division acknowledged that the planter "was not fully covering the whole area." [T46:24–25].

As long as Defendants' driveway remained in that condition, surface water that accumulated on the driveway flowed southeasterly along Defendants' property and through their backyard until it reached Canoe Brook, which runs across the east side of both parties' properties. [340a ¶ 29; 140a at 63:19–22]. Defendant Edward Dwyer admitted that, before modifying the driveway, he had observed water flow "[f]rom the top of the street down to the back of the driveway" and "go towards the back of [his] property." [213a at 55:2–19].

In or around April 2021, Defendants had their driveway repaved, the planter removed, and a Belgium block border curb installed around the

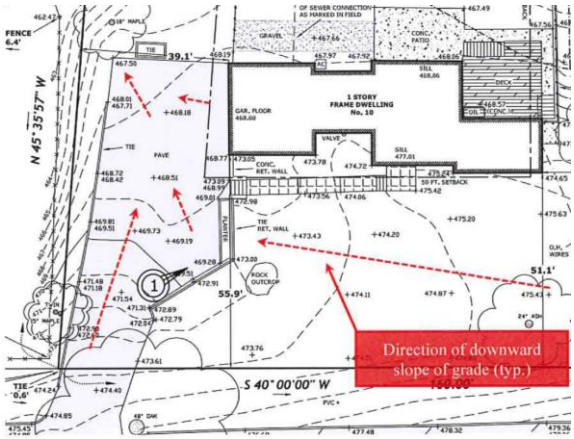
perimeter of the driveway with gaps at each rear corner. [48a ¶ 42; T45:11–19]. The photograph below depicts the curb at the rear of Defendants' driveway following these modifications:

[Excerpt from 347a; 207a at 32:23–33:1 (confirming this photograph depicts Defendants' driveway after it was paved)].

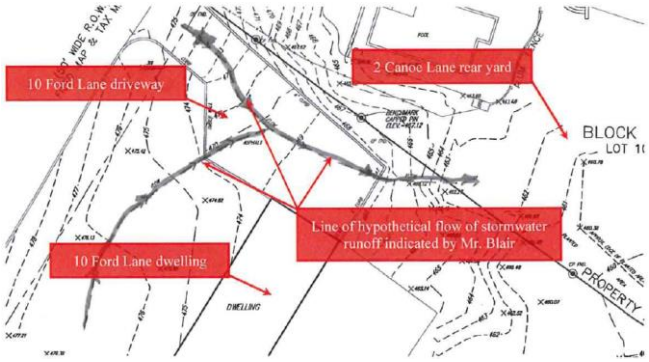
After Defendants renovated their driveway and installed the gapped curb, Plaintiff personally witnessed rainwater flow from Defendants' front yard and driveway, through the gap in the curb at the northeast rear corner of the driveway, and onto Plaintiff's property. [339a–340a (¶¶ 20–28), 147a–148a (93:14–94:4, 94:22–95:9)]. During a hurricane that hit the area, Plaintiff stepped outside and personally observed a stream of water flow from Defendants' property through that gap onto his property. [140a at 62:16–63:18].

The parties do not dispute that Defendants' driveway slopes toward the gap in the curb at the rear northeast corner, as reflected in the maps below taken from the report of Defendants' expert Jeffrey Laux. The figure on the

left shows the direction of downward slope on a survey as the properties stood before Defendants' modifications to the driveway, and the figure on the right shows the direction of downward slope on a survey as the properties stood after Defendant's modification to the driveway.



[Excerpt from 285a].



[Excerpt from 287a].

B. Plaintiff's surveyor found that a gap in the curb directed water from Defendants' property to Plaintiff's property

Bruce Blair, Plaintiffs' expert surveyor, examined the topography of the driveway area reflected on a survey conducted by Nicholas Wunner in June 2018, at a time when the planter depicted above remained at the rear of the driveway instead of a curb, and made his own survey after Defendants modified their driveway. [365a]. Comparing results from both surveys, Mr. Blair explained:

> Of particular interest in the Wunner plan, is the grading of the driveway and the lack of containment of runoff, since a few railroad ties along the easterly side and flowing off the driveway at grade on the southerly end of the driveway together with the land

> contours indicate that **most of the water ran southerly to the brook**. My survey work and observation of the Dwyer driveway show that it had been resurfaced and Belgian block curbing added as a replacement to the railroad ties. The driveway water was directed toward the Unger property. **A depressed portion of the curbing acts as a funnel directing the water toward the Unger property and blocks the water from its original course toward the brook.** . . . Because of the improvement of the driveway and the installation of the Belgian block curb with the only outlet being at the [north]east corner and directed onto the Unger property together with the filling of land along the common property line majority of the water from the front yard and the driveway is now directed on to the Unger property.

[365a–366a (emphasis added)].

As further support for his opinion that surface waters had originally continued to flow southeasterly through Defendants' property before the curb was installed, Mr. Blair personally observed "alluvial deposits of grit and so on that had run off the driveway." [254a at 40:25–41:2]. Based on his review of prior surveys and his personal observations, Mr. Blair concluded that "water would have to have flowed around the planter as it ran down the driveway as it existed" before Defendants modified their driveway. [256a at 46:14–17]. After the modification, the curb obstructed the original flow of water along the rear of Defendants' property. [255a at 45:4–9]. Mr. Blair explained that only a "small amount" of water would flow through the gap in the curb near Defendants' garage because the elevation of the driveway pitches toward Plaintiff's property. [255a at 45:10–16].

C. Plaintiff's engineer opined on the quantity of water flowing from Defendants' property to Plaintiff's property

Mr. Blair's opinions were corroborated by Antoine Hajjar, an engineering expert engaged by Plaintiff, who opined on both the direction and the quantity of the flow of surface water.

First, Mr. Hajjar noted that the gaps in the corners of the curb "allow the stormwater runoff to flow out of the driveway" and concluded: "The stormwater runoff will leave the driveway through the most easterly opening of the driveway and will flow directly to lot 10 in Block 52 [*i.e.*, Plaintiff's Property] based on the contours of the partial topographical survey." [371a]. He confirmed at his deposition that he used the topographical data collected by Mr. Blair, along with his personal observations of Defendants' driveway, to determine the direction and magnitude of the slope of Defendants' front lawn and driveway. [268a–269a (25:15–29:23), 271a (34:5–17)].

Second, Mr. Hajjar determined the volume of stormwater runoff that would flow from Defendant's Property to Plaintiff's Property under seven types of storms, and based on various data, he opined that the volume of stormwater runoff generated and conveyed from Defendant's Property to Plaintiff's Property is "substantial and significant" and that "there is a good amount of runoff generated and conveyed to [Plaintiff's Property] from [Defendant's Property] to cause erosions and inundate the landscape." [372a].

Mr. Hajjar explained that the data he used to calculate the rainfall amounts for various types of storms in Essex County was sourced from the New Jersey Department of Environmental Protection. [267a at 19:4–12]. He used that rainfall data along with topographic data collected by Mr. Blair and soil survey data on the water absorption rate for Defendant's Property to calculate the volume of stormwater runoff from Defendant's Property to Plaintiff's Property. [267a (19:13–21:19), 271a–272a (37:16–38:4, 38:12–24), 274a–275a (49:24–50:13)]. Mr. Hajjar's calculations were reflected on a spreadsheet given to Defendants, and the "end results" of his calculations appeared in his expert report. [266a–267a (17:4–18:3)]. Defendants did not submit the documents reflecting Mr. Hajjar's calculations to the Court on their motion for summary judgment, but merely submitted Mr. Hajjar's report.

When asked at his deposition for a percentage to describe the amount of runoff that flows out of the rear northeast corner of Defendants' driveway relative to the rear southeast corner, Mr. Hajjar estimated it was "between 85 and 90 percent." [273a at 42:21–43:4]. He also estimated that 60 to 70 percent of runoff had flowed to Defendants' backyard instead of onto Plaintiff's Property before Defendants installed the driveway curb. [*Id.* at 43:7–20]. Mr. Hajjar explained that he offered those roughly estimated percentages merely to clarify the opinion reflected in his report that most of

the runoff from Defendants' driveway flows through the rear northeast gap in the curb, rather than as a precise calculation of the relative flow rates. [273a–274a (44:1–45:17, 46:14–47:1, 47:19–25, 48:12–49:7)].

II. DEFENDANT EDWARD DWYER ADMITTED THAT HE PLACED BRANCHES ON PLAINTIFF'S PLANTS

Plaintiff had purchased, installed, and maintained plants including forsythia, rhododendron, and bamboo on his property near the curb abutting Ford Lane. [149a at 98:17–99:21]. At some point, tree branches had been placed on that area, destroying Plaintiff's valuable plants. [149a–152a (98:2–106:25, 108:20–109:2, 111:10–21); *see* 382a, 311a-318a]. Plaintiff testified at his deposition that Defendant Edward Dwyer had admitted that he (Edward Dwyer) caused the branches to be placed in that area, either by personally placing them there or causing his workers to place them there. [131a at 26:2–17].

At his own deposition, Defendant Edward Dwyer again admitted that he had personally placed the branches in that area. [210a (42:24–43:9, 43:17–20]. He explained that a number of branches had fallen on his property and, after multiple discussions with Plaintiff, he had decided to move his branches to the area near the Ford Lane curb where Plaintiff's plants were located. [209a-210a (41:15–43:20)].

III. THE CHANCERY DIVISION GRANTED DEFENDANT'S MOTION AT THE SUMMARY JUDGMENT HEARING

A. The Chancery Division granted summary judgment on Plaintiff's nuisance claim because it found Mr. Hajjar's opinions to be unsupported

In the First Count of his Complaint, Plaintiff asserts a claim for nuisance predicated on allegations that Defendants directed surface water onto his property, causing damage. [9a]. Plaintiff contends Defendants materially changed the direction of the flow of surface water by removing the planter at the rear of the driveway and replacing it with a curb that was open at the northeast corner.

At oral argument on the motion for summary judgment, Plaintiff's counsel clarified the claim:

> This case is about the opening of the Belgian block. This is not about slopes. This is about the fact that water would go down the driveway and into the brook, and not affect anybody's property, and by lining the back of their driveway with Belgian block with an opening towards Mr. Unger's property it funnels now 90 to 95 percent of the water onto Mr. Unger's property.
>
> . . . .
>
> [T]his is all about the installation of the Belgian block curbing, which now redirects the water . . . onto Unger's property, and diverts it away from the brook. All of this water, tens of thousands of gallons would go into the brook and wash away. The

> Dwyers made a Belgian block curbing that directs 90 percent of that now onto Mr. Unger's landscaping. That is what was unreasonable. . . . This is not about changing the slope. This is about choosing to open that opening that now funnels the water onto Mr. Unger's property.

[T38:19–39:1, T57:9–25]. Defense counsel acknowledged that Plaintiff argues "that replacing the railroad tie lining with Belgian block created this harm . . . and transports more of the water down onto plaintiff's property than previously occurred." [T34:7–13].

In articulating its decision to grant summary judgment on the nuisance claim, the Chancery Division indicated that Defendants would be entitled to summary judgment unless Plaintiff could identify a "standard that says therefore when there's this much flow it's violating this standard such that the Dwyers should be liable for that flow going onto the Ungers' property." [T41:2–5]. The Chancery Division did not consider or analyze Mr. Blair's reports on how Defendants' removal of the planter and installation of a gapped curb affected the direction of surface water flow, but rather focused exclusively on Mr. Hajjar's report. [*See* T64:24–65:7]. Notwithstanding that Defendants had not filed a motion in limine to exclude Mr. Hajjar, the Chancery Division stated it was "beyond frustrated" that Mr. Hajjar's report only included the end results of his calculations and that the documents reflecting Mr. Hajjar's calculations about which he testified in his deposition

were not submitted with the summary judgment record. [*See* T39:6–23, T48:7–49:18]. The Chancery Division granted summary judgment on Plaintiff's nuisance claim on the ground that it found the opinions expressed in Mr. Hajjar's report to be "pure speculation," without regard to other evidence in the summary judgment record establishing that the Defendants' conduct caused the redirection of surface water flow onto Plaintiff's Property. [*See* T67:20–68:12].

B. In granting summary judgment on Plaintiff's trespass claims, the Chancery Division disregarded testimony on Defendant Edward Dwyer's admissions

In the Third Count of his Complaint, Plaintiff asserts a claim for trespass predicated on allegations that Defendants caused damage to Plaintiff's plants by placing branches on them. [11a]. The Chancery Division began its statement of reasons for granting summary judgment against Plaintiff on his trespass claim by stating: "[F]or purposes of summary judgment I will accept that [the shrubbery, plantings, bamboo, rhododendron] were purchased by Mr. Unger and that he in fact planted them on the property." [T61:1–5]. Although it acknowledged Plaintiff had testified at his deposition that his party-opponent Defendant Edward Dwyer had admitted to causing branches to be placed on Plaintiff's plants, the Chancery Division held that admission was insufficient to at least create a genuine dispute of material fact that Defendant Edward

Dwyer did, indeed, place branches on and damage Plaintiff's plants. [T63:1–21].

LEGAL ARGUMENT

I. THE STANDARD OF REVIEW IS *DE NOVO*

This appeal seeks review of an order granting Defendants' motion for summary judgment, and therefore this Court should "apply the same Rule 4:46-2 standard that governs the trial court's decision." *H.C. Equities, LP v. Cty. of Union*, 247 N.J. 366, 380 (2021). It should "construe the evidence in the light most favorable to the non-moving party, and affirm the entry of summary judgment 'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.'" *Id.* (quoting *R.* 4:46-2). "[A] party opposing a motion is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact." *JPC Merger Sub LLC v. Tricon Enterprises, Inc.*, 474 N.J. Super. 145, 170 (App. Div. 2022) (quoting *Judson v. Peoples Bank & Tr. Co.*, 17 N.J. 67, 74 (1954)).

This Court's "role in reviewing a motion for summary judgment is merely to determine whether there is a genuine issue of material fact, but not

to decide it." *Id.* (quoting *Fielder v. Stonack*, 141 N.J. 101, 127 (1995)). "In that inquiry, the 'court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" *H.C. Equities LP*, 247 N.J. at 381 (quoting *McDade v. Siazon*, 208 N.J. 463, 473 (2011)). In other words, the summary judgment order is entitled to *de novo* review on appeal.

II. THE CHANCERY DIVISION ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR NUISANCE (T64:4–68:17)

In its oral statement of reasons on Defendants' motion for summary judgment on the First Count of Plaintiff complaint, which asserts a claim for nuisance, the Chancery Division concluded that Mr. Hajjar's expert opinion lacked support regarding the amount by which Defendants' modifications to the driveway increased the rainwater runoff from Defendants' Property to Plaintiff's Property. [*See* T64:24–65:7, T67:20–24]. Having determined to disregard Mr. Hajjar's opinion, the Chancery Division then concluded that the record lacked sufficient evidence that Defendants had unreasonably redirected the flow of rainwater onto Plaintiff's property and granted summary judgment on the nuisance claim. [*See* T67:20–68:10]. The Chancery Division's reasoning is fundamentally flawed in two material ways: (1) Mr. Hajjar's opinion was in fact supported and was not "pure speculation" amounting to a

net opinion; and (2) Mr. Hajjar's opinion is not essential to establish Defendants' liability.

New Jersey has adopted the "rule of reasonableness" to govern nuisance claims predicated on conduct related to surface water movement. Under that rule, a possessor of land "incurs liability when his harmful interference with the flow of waters is unreasonable" and "causes some harm to others." *Armstrong v. Francis Corp.*, 20 N.J. 320, 327 (1956). "The issue of reasonableness or unreasonableness becomes a question of fact to be determined in each case upon a consideration of all the relevant circumstances, including such factors as the amount of harm caused, the foreseeability of the harm which results, the purpose or motive with which the possessor acted, and all other relevant matter." *Id.* at 330.

A land possessor may not "alter, by artificial means, the natural discharge of the surface water from his land on that of his neighbor, by conducting it into new channels in unusual quantities to or on a particular part or parts of the latter's land, to its injury." *McCullough v. Hartpence*, 141 N.J. Eq. 499, 501 (Ch. 1948); *Nathanson v. Wagner*, 118 N.J. Eq. 390, 393, 179 A. 466, 468 (Ch. 1935), *cited in Armstrong*, 20 N.J. at 328. Thus, a party incurs liability when it has "unreasonably enhanced, accelerated, and concentrated storm water discharge onto" a neighboring plaintiff's property. *Sheppard v.*

Twp. of Frankford, 261 N.J. Super. 5, 8 (App. Div. 1992). "[L]ower land property owners have rights to relief for the unreasonable discharge onto their properties of storm water by others," as "storm water engendered by hurricanes or other inordinately heavy rainfalls is reasonably foreseeable in assessing the unreasonableness of the conduct of the dischargers." *Id.*

A party is liable for nuisance when its modification to the drainage system on its land increases the flow of stormwater runoff from a hurricane onto its neighbor's property and causes detrimental flooding thereon. Particularly applicable here is *Hopler v. Morris Hills Reg'l Dist.*, 45 N.J. Super. 409 (App. Div. 1957). There, the defendant's land had "naturally sloped downwardly toward" the land of its adjoining neighbor, the plaintiff. *Id.* at 411–12. While constructing an athletic field on its property, the defendant installed catch basins leading to a drainage outlet that discharged water onto the plaintiff's property. *Id.* at 412. During a hurricane a year later, water flowed through the plaintiff's property and damaged the foundation of the plaintiff's house. *Id.*

The plaintiff sued for damages, and the only evidence he presented on causation was his own testimony that he went outside during the hurricane to follow the flow of water to its source and personally observed it emanating from the defendant's drainage outlet. *Id.* at 412, 415. Notwithstanding that

the defendant introduced testimony from his engineering expert that its drainage system did not alter the natural flow of water, the trial court credited the plaintiff's personal observations and entered judgment in his favor, which was affirmed on appeal. *Id.* at 413, 415. The trial court had concluded that the damage to the plaintiff's property was not solely caused by the heavy rain of the hurricane, "but that a contributing cause was the collection of surface waters expelled through an artificial device." *Id.* at 416. Affirming that conclusion, the Appellate Division noted that "[i]t has long been settled that when there has been a finding of wrongdoing which is an efficient and cooperative cause of the mishap, the wrongdoer is not relieved from liability by proof that an act of God was a concurring cause." *Id.*

The case at hand is on all fours with *Hopler*, but with stronger evidence of liability. As there, it is undisputed that Defendants' driveway has a downward slope toward the northeast rear corner of Defendants' driveway. Also, as in *Hopler*, Plaintiff testified that he personally observed surface water flow from the Defendants' property onto his own through a drainage system that the Defendant's installed, in a manner that it did not previously flow, and that heavy rainfall from a hurricane followed that artificial drainage path created by Defendants' and caused flooding of Plaintiff's property.

Unlike *Hopler*, Plaintiff's personal observations of that artificial flow path in this case were corroborated by an expert surveyor. Based on prior surveys, his own survey, and his personal observations of the property, Mr. Blair opined that the planter at the northeast rear of the driveway obstructed that flow of surface water onto Plaintiff's Property and directed the flow of water toward the open space along the southeast half of the rear of the driveway, allowing water to continue to flow southeasterly along Defendants' Property. [365a–366a]. Mr. Blair further opined that Defendants' installation of a curb along the rear of Defendants' driveway blocked the that natural flow of water and instead caused it to flow through the gap in the curb at the northeast rear corner of the driveway and onto Plaintiff's Property. [*Id.*]

Defendants do not dispute that their installation of a gapped curb caused surface water to flow into Plaintiff's Property that otherwise would have flowed through Defendants' Property. Their engineering expert, Mr. Laux, focused exclusively on the topography of the land and the slope of Defendants' driveway, completely ignoring the impact of the planter and the gapped curb on the flow of surface water. [*See* 280a–293a].

Given the rebutted evidence on the summary judgment record that Defendants' conduct altered the natural flow of surface water and caused flooding of Plaintiff's property, Mr. Hajjar's report and testimony were not

essential for Plaintiff to defeat summary judgment. Mr. Hajjar's opinion regarding the quantity of water that would flow from Defendants' property to Plaintiff's property through the gap in the curb was merely additional evidence on the severity of the nuisance that Defendants created. Because Mr. Hajjar's opinion was not essential to establish Defendants' liability, Plaintiff had no obligation on the summary judgment motion to provide the Court with the additional documentation of Mr. Hajjar's calculations.

Based on Plaintiff's personal observations and Mr. Blair's expert opinion, and giving Plaintiff as party opposing summary judgment all reasonable inferences, Plaintiff has more than established at least a genuine issue of fact that Defendants altered by artificial means the natural discharge of surface water in a manner than unreasonably enhanced, accelerated, and concentrated the flow of water from their property to Plaintiff's property. Thus, the Chancery Division erred in granting summary judgment to the Defendants.

III. THE CHANCERY DIVISION ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR TRESPASS (T60:25–64:3)

In the Third Count of his Complaint, Plaintiff asserts a claim for trespass predicated on allegations that Defendants entered Plaintiff's land and caused damage to Plaintiff's plants by placing branches on them. [11a].

"An action for trespass arises upon the unauthorized entry onto another's property, real or personal," and is actionable "irrespective of any appreciable injury." *Pinkowski v. Twp. of Montclair*, 299 N.J. Super. 557, 571 (App. Div. 1997) (citation omitted). "[T]respass is a possessory action," and therefore "one in possession may maintain an action without showing title in the damaged property." *Balinski v. A. Capone & Sons*, 1 N.J. Super. 215, 217 (App. Div. 1949). "Sound principle and persuasive authority support the allowance to an aggrieved landowner of the fair cost of restoring his land to a reasonable approximation of its former condition, without necessary limitation to the diminution in the market value of the land, where a trespasser has destroyed shade or ornamental trees or shrubbery having peculiar value to the owner." *Huber v. Serpico*, 71 N.J. Super. 329, 345 (App. Div. 1962).

The Chancery Division erred in granting summary judgment on Plaintiff's trespass claim based on lack of evidence that Defendants' caused damage to Plaintiff's plants. [T62:25–64:3]. Notwithstanding its acknowledgment that Plaintiff had testified that Defendant Edward Dwyer had admitted that he caused the branches to be placed on Plaintiff's plants, the Chancery Division apparently sought to support its decision to disregard that testimony by misquoting and misapplying *Hoffman v. Asseenontv.Com, Inc.*, which recognized that "'conclusory and self-serving assertions' **in**

certifications without explanatory or supporting facts will not defeat a meritorious motion for summary judgment." 404 N.J. Super. 415, 426 (App. Div. 2009) (emphasis added) (quoting *Puder v. Buechel*, 183 N.J. 428, 440 (2005)).

The Chancery Division misquoted *Hoffman* as it omitted the bolded words above "in certifications." [*See* T63:9–11]. That omission is material because Plaintiff proffered evidence of Defendant Edward Dwyer's admission in the form of deposition testimony regarding a direct conversation, rather than as a conclusory certification filed in opposition to summary judgment. Plaintiff's deposition testimony that Defendant Edward Dwyer had admitted that he caused the branches to be placed on Plaintiff's plants [131a at 26:2–17] is evidence of a "party-opponent's own statement," and therefore is not excluded by the hearsay rule. N.J.R.E. 803(b). Moreover, Defendant Edward Dwyer admitted at his own deposition that he had placed the branches in that area. [210a (42:24–43:9, 43:17–20)]. Taken together, the summary judgment record leaves no doubt that Defendant Edward Dwyer made an unauthorized entry to Plaintiff's property (*i.e.*, the plants he purchased and cultivated, as well as the land on which they were cultivated) and caused damage thereto by placing branches thereon. Consequently, Defendants failed to sustain their burden of establishing entitlement to judgment as a matter of law, and the

order granting summary judgment in their favor on the trespass claim should be reversed.

CONCLUSION

For the reasons set forth above, this Court should reverse the order granting summary judgment to Defendants Edward and Sonali Dwyer and remand for further proceedings.

Dated: July 16, 2024

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DONALD UNGER, Plaintiff/Appellant, v. EDWARD DWYER and SONALI DWYER, Defendants/Respondents, And JOHN DOES 1-10 and ABC CORPORATIONS 1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-0002212-23 Civil Action **ON APPEAL FROM THE ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ENTERED IN THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, ON FEBRUARY 9, 2024** CHANCERY DIVISION DOCKET NO. ESX-C-000248-21 SAT BELOW: The Honorable Lisa M. Adubato, J.S.C.

BRIEF AND APPENDIX OF DEFENDANTS/ RESPONDENTS, EDWARD DWYER AND SONALI DWYER, IN OPPOSITION TO THE APPEAL OF PLAINTIFF/APPELLANT

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TABLE OF CONTENTS

Table of Contents of Defendants' Appendix on Appeal iv

Table of Trial Transcripts iv

Table of Authorities v

Preliminary Statement 1

Procedural History 3

Counterstatement of Facts 4

I. In the Burke Action, plaintiff alleged in part that stormwater runoff from the driveway on 10 Ford Lane damaged his property. 4

A. Plaintiff claimed that the Burkes caused stormwater runoff by extending their driveway and sloping it towards plaintiff's property. 4

B. In his two separate depositions, plaintiff testified that before the Dwyers bought their property, stormwater runoff from the driveway on 10 Ford Lane damaged his property. 5

C. Plaintiff adjudicated his property-damage suit against the Burkes through binding arbitration. 6

II. In the Dwyer Action, plaintiff alleged in part that stormwater runoff from the driveway on 10 Ford Lane damaged his property and that the Dwyers trespassed onto his property. 7

A. Plaintiff sued the Dwyers for property damage allegedly caused by water runoff and trespass 7

B. The Dwyers did not alter the grading of their front lawn. 7

C. The Dwyers did not alter the grading of their driveway. 8

D. When the Dwyers disposed of tree branches, they did not enter plaintiff's property, nor did they damage it. 8

III. Plaintiff's surveyor, Bruce Blair, P.L.S., offered no opinion on whether the amount of water runoff changed after the Dwyers repaved and relined their driveway. 10

A. Blair's initial report did not contend that the Dwyers caused or contributed to any water runoff..... 10

B. Blair's second report incorrectly stated that the Belgian block lining the Dwyers' driveway had only one outlet next to plaintiff's property for water flow, and he failed to mention the second outlet next to the Dwyers' house..... 10

C. In his deposition testimony, Mr. Blair admitted that he offered no opinion regarding whether the Dwyers caused any increase in the amount of water runoff. 11

IV. Plaintiff's Engineer, Antoine Hajjar, P.E., failed to offer any opinion on whether the Dwyers caused any increase in the amount of water runoff, and he did not base his opinions on generally-accepted engineering standards. 13

A. Hajjar's engineering report did not discuss the pre-existing property conditions, including the pre-existing water runoff. 13

B. In his deposition testimony, Hajjar conceded that he offered no opinion on whether the Dwyers caused any change in the amount of water runoff, and he offered no generally-accepted engineering standard for his opinions..... 14

C. Plaintiff's damages report from Matthew Weibel did not specify what damages he attributed to the Dwyers. 17

V. The trial court granted summary judgment to the Dwyers because plaintiff's experts offered only net opinions and because plaintiff offered no admissible evidence to support a claim of trespass..... 17

Legal Argument..... 19

I. The Standard of Review is De Novo..... 20

II. The Court should affirm the judgment below because the trial court correctly entered summary judgment in favor of the Dwyers (raised below at T60:17-68:12)..... 20

A. Plaintiff's expert testimony was inadmissible net opinion because they did not base their conclusions on generally-accepted standards of surveying or engineering..... 20

B. Plaintiff failed to establish a prima facie case of trespass arising out of the Dwyers' disposal of tree branches because the record showed that the Dwyers placed the tree branches on municipal property, not on plaintiff's land, and because plaintiff failed to show that the Dwyers damaged his property..... 26

III. The Court may also affirm the judgment below on grounds that the trial court did not reach but that the Dwyers raised below (raised below at T59:23-60:11)..... 30

A. The Court may affirm the judgment below on any ground supported by the record..... 30

B. Plaintiff failed to establish a prima facie claim of nuisance because he did not show that the Dwyers made an unreasonable use of their land by repaving their driveway and replacing the railroad ties that lined their driveway with Belgian block..... 31

C. Because plaintiff already litigated to conclusion claims for property damage caused by water runoff, the doctrines of collateral estoppel and res judicata bar him from relitigating those prior claims in his suit against the Dwyers. 34

1. Res judicata bars the relitigation of claims for stormwater runoff litigated in the Burke Action. 35

2. Collateral estoppel bars plaintiff from relitigating property damage caused by water runoff from the driveway that was at issue in the Burke Action. 36

D. Plaintiff's failure to apportion his damages between damage caused by preexisting conditions and damage allegedly caused by the Dwyers is fatal to this action. 38

Conclusion 40

TABLE OF CONTENTS OF DEFENDANTS' APPENDIX ON APPEAL

Color copies of Exhibit 22 to Certification of Timothy P. Smith, Esq. in support of defendants' motion for summary judgment, filed in the Chancery Division under TRANS ID CHC20246605 on January 5, 2024 (appended in black and white at Pa276-78) Da1-3

TABLE OF TRIAL TRANSCRIPTS

Transcript of Oral Argument of Defendants' Motion for Summary judgment, dated .....T

TABLE OF AUTHORITIES

Cases **Page(s)**

Biondi v. Citigroup, Inc.,
423 N.J. Super. 377 (App. Div. 2011) 34-36

Buckelew v. Grossbard,
87 N.J. 512 (1981) 27-28

Burke v. Briggs,
239 N.J. Super. 269 (App. Div. 1990) 32

Cortes v. Gindhart,
435 N.J. Super. 589 (App. Div. 2014) 30

Davis v. Brickman Landscaping, Ltd.,
219 N.J. 395 (2014) 22

Dawson v. Bunker Hill Plaza Assocs.,
289 N.J. Super. 309 (app. Div. 1996) 22, 25

Dunn v. Duso,
219 N.J. Super. 383 (Law Div. 1986) 39

Endre v. Arnold,
300 N.J. Super. 136 (App. Div. 1997) 25

First Union Nat'l Bank v. Penn Salem Marina, Inc.,
190 N.J. 342 (2007) 35-38

Goodman v. Fair Law Garden Assocs., Inc.,
253 N.J. Super. 299 (App. Div. 1992) 38

Hennesy v. Winslow Twp.,
183 N.J. 593 (2005) 36

Kieffer v. Best Buy,
205 N.J. 213 (2011) 21-22

Konop v. Rosen,
425 N.J. Super. 391 (App. Div. 2012) 29

Olivieri v. Y.M.F. Carpet, Inc.
186 N.J. 511 (2006) 37

Petro-Lubricant Testing Labs. v. Adelman,
447 N.J. Super. 391 (App. Div. 2016) 31

Pinkowski v. Twp. of Montclair,
299 N.J. Super. 557 (App. Div. 1997) 26

Posey v. Bordentown Sewerage Auth.,
171 N.J. 172 (2002) 32, 34

Reichert v. Vegholm,
366 N.J. Super. 209 (App. Div. 204) 36, 38, 40

Rosenberg v. Tavorath,
352 N.J. Super. 385 (App. Div. 2002) 21

Ross v. Lowitz,
222 N.J. 494 (2015) 20, 32, 34

Rutgers Cas. Ins. Co. v. Dickerson,
215 N.J. Super. 116 (App. Div. 1987) 36

Scannavino v. Walsh,
445 N.J. Super. 162 (App. Div. 2016) 31-32, 38

State v. Scott,
229 N.J. 469 (2017) 30

Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co.,
224 N.J. 189 (2016) 20

Van Horn v. Harmony Sand & Gravel, Inc.,
442 N.J. Super. 333 (App. Div. 2015) 31

Watkins v. Resorts Int' Hotel & Casino,
124 N.J. 398 (1991) 36

Wyatt v. Wyatt,
217 N.J. Super. 580 (App. Div. 1997) 21, 26

Other Authorities

N.J.R.E. 803(b)(1) 29

PRELIMINARY STATEMENT

In this appeal from a grant of summary judgment, plaintiff/appellant, Donald Unger, raises two issues. The first is whether his expert witnesses must base their opinions on generally-accepted standards applied to record evidence for their testimony to be admissible. The second is whether a party may overcome a motion for summary judgment based solely on a self-serving hearsay statement that contradicts the record evidence. The record shows that plaintiff's expert testimony was inadmissible net opinion and plaintiff's proffered hearsay testimony contradicted the record evidence. The trial court therefore correctly granted summary judgment. The Court should affirm the judgment below, because this appeal presents no basis to overturn settled law on net opinion and hearsay. In addition, the Court may also affirm the judgment below on grounds that defendants raised below but that the trial court did not need to reach, including plaintiff's failure to establish any duty of care that defendants allegedly breached, the preclusive effect of plaintiff's earlier, separate lawsuit for similar claims, and plaintiff's failure to apportion his alleged damages.

This action is the second suit that plaintiff litigated to conclusion for alleged property damage caused by water running from his neighbor's driveway onto his property. In 2009, he sued Caroline and Robert Burke (the "Burke Action"), claiming, among other things, that by altering the grade of their

property and the slope of their driveway, they created water runoff that caused him property damage. Plaintiff and the Burkes litigated the Burke Action to conclusion through binding arbitration. Defendants/respondents, Edward and Sonali Dwyer, subsequently purchased the Burkes' property. In 2021, plaintiff filed this action against the Dwyers (the "Dwyer Action"), claiming that the Dwyers altered the grade of their property and the slope of their driveway, which created water runoff that caused him property damage. However, plaintiff's experts never quantified the amount of water runoff that was allegedly attributable to the Dwyers, leaving plaintiff unable to prove his claim. Plaintiff also contended that the Dwyers trespassed onto his property when Mr. Dwyer placed tree branches near the curb of their street for municipal disposal. Yet the evidence showed that the Dwyers placed the offending branches on a municipal right-of-way in front of plaintiff's property, not on his property.

Therefore, after the close of discovery, the trial court granted summary judgment to the Dwyers. The trial court ruled that the failure of plaintiff's experts to support their opinions with any generally-accepted engineering or surveying standards rendered their testimony "pure speculation" and inadmissible net opinion. Further, even taking the record in the light most favorable to plaintiff, he failed to show that the Dwyers entered plaintiff's property or caused any damage to it when they disposed of the tree branches.

Because the trial court properly granted summary judgment to the Dwyers, this Court should affirm the judgment below.

In addition, the Court may affirm the judgment below for three reasons raised below that the trial court did not need to reach. First, plaintiff failed to establish a prima facie case of nuisance because he did not show what legal duty of care the Dwyers allegedly breached by repaving their driveway or by replacing the railroad ties that lined their driveway with Belgian block. Second, under the doctrines of res judicata and collateral estoppel, plaintiff cannot sue the Dwyers for preexisting water runoff because he litigated those claims to a final adjudication in the Burke Action. Third, plaintiff's failure to apportion his alleged damages between water runoff caused by preexisting conditions and water runoff that he sought to attribute to the Dwyers was fatal to this action. This Court should thus affirm the judgment in favor of the Dwyers, both for the reasons that the trial court relied on and for those that it did not need to reach.

PROCEDURAL HISTORY

The Dwyers supplement the procedural history contained in plaintiff's brief on appeal to note that by leave granted, Pa73-76, the Dwyers filed an amended answer to plaintiff's complaint, asserting the affirmative defenses of lack of proximate cause, res judicata, collateral estoppel, and failure to apportion damages. Pa82-83.

COUNTERSTATEMENT OF FACTS

I. In the Burke Action, plaintiff alleged in part that stormwater runoff from the driveway on 10 Ford Lane damaged his property.

In October 2008, plaintiff filed the Burke Action against Caroline and Robert Burke for property damage caused by stormwater running off 10 Ford Lane onto his property. Pa44, ¶ 19; Pa329, ¶ 19; accord Pa88. The Burkes were then the owners of the property located at 10 Ford Lane, Roseland, New Jersey. Pa44, ¶ 20; Pa329, ¶ 20; accord Pa88.

A. Plaintiff claimed that the Burkes caused stormwater runoff by extending their driveway and sloping it towards plaintiff's property.

Plaintiff alleged in part that the Burkes had extended their driveway and sloped it toward plaintiff's property, causing "significant water runoff" onto plaintiff's property. Pa44, ¶ 21; Pa330, ¶ 21; accord Pa90-91, ¶¶ 10-12. Plaintiff claimed that the Burkes had "extended the driveway beyond their house and sloped it toward [plaintiff's] Property." Pa44, ¶ 22; Pa330, ¶ 22; accord Pa91, ¶ 10. He asserted that those improvements "were directing large amounts of water onto [plaintiff's backyard], thereby destroying extensive and costly landscaping which included, without limitation, an oriental garden and specimen trees." Pa44-5, ¶ 23; Pa330, ¶ 23; accord Pa90-91, ¶ 9, ¶¶ 11-12.

B. In his two separate depositions, plaintiff testified that before the Dwyers bought their property, stormwater runoff from the driveway on 10 Ford Lane damaged his property.

When plaintiff was deposed in the Burke Action, he testified that the Burkes had extended their driveway. Pa45, ¶ 24; Pa330, ¶ 24; accord Pa112-14 at 10:4-12:3. He further contended that the extension of the Burkes' driveway was one of the conditions on the Burke's property that caused his property to flood. Pa45, ¶ 25; Pa330, ¶ 25; accord Pa117-119 at 15:21-17:1, Pa121 at 24:5-:18, Pa122 at 64:3-:16.

When plaintiff was deposed in the Dwyer Action, he reiterated that the Burkes had extended and regraded their driveway. Pa45, ¶ 27; Pa330, ¶ 27; accord Pa141 at 66:20-67:12. He admitted that part of the damages that he claimed in the Burke Action was that by extending their driveway, the Burkes caused water runoff to flow from their property onto plaintiff's property. Pa45, ¶ 28; Pa330, ¶ 28; accord Pa143 at 75:12-:16. He also contended that by adding fill to extend their driveway, the Burkes narrowed the opening for water to flow, channeling it onto his property. Pa46, ¶ 29; Pa330, ¶ 29; accord Pa143 at 77:9-:18. Last, he testified that the Burkes graded their driveway toward his property, causing water runoff to flow onto his property and damage his trees. Pa46, ¶ 30; Pa330, ¶ 30; accord Pa144 at 80:3-81:24.

C. Plaintiff adjudicated the Burke Action through binding arbitration.

Plaintiff and the Burkes submitted the Burke Action to binding arbitration before retired Judge John M. Boyle. Pa46, ¶ 31, Pa330, ¶ 31; accord Pa181. In the arbitration, plaintiff contended that the extension of the Burkes' driveway "caused water to flow toward the Unger property," causing property damage. Pa46, ¶ 32; Pa330, ¶ 32; accord Pa162-3.

In his written award, dated January 10, 2012, Judge Boyle found that plaintiff claimed that the Burkes had changed the elevation and slope of the driveway, which caused water to run off from the Burkes' property on his property. Pa46, ¶ 33; Pa330, ¶ 33; accord Pa189. Judge Boyle rejected that claim. Pa46, ¶ 34; Pa330, ¶ 34; accord Pa189. Instead, he ruled that:

> The topography is such that the [Burkes'] house itself is at a higher elevation and the driveway area looks down on the pool on [plaintiff's] property. Therefore, some natural flooding of water would necessarily occur by the height alone.
>
> However, there is a claim that the driveway was extended with a "ramp" not of structural material but rather by filling in of soil [,] effectively creating a new elevation that did not previously exist before [the Burkes] took title. [The Burkes] testified that the ramp was always there and that it was never artificially enhanced. I believe this. The existing natural swale between the properties that seems to have been created by Mother Nature and assists both properties in channeling some water to Canoe Brook.

[Pa46-47, ¶ 35 & Pa330, ¶ 35; accord Pa189.]

Judge Boyle accepted the testimony that the Burkes had altered the rear of the property, which disturbed the flow of water on Unger's property flowing to Canoe Brook. Pa47, ¶ 36; Pa330, ¶ 36; accord Pa189. However, Judge Boyle believed that plaintiff's "claims are exaggerated." Ibid.

II. In the Dwyer Action, plaintiff alleged in part that stormwater runoff from the driveway on 10 Ford Lane damaged his property and that the Dwyers trespassed onto his property.

A. Plaintiff sued the Dwyers for property damage allegedly caused by water runoff and trespass.

In the Dwyer Action, plaintiff alleges that the Dwyers repaved their driveway and regraded their property so that their yard sloped to plaintiff's property. Pa8, ¶¶ 5, 7. He contended that the Dwyers' actions "created a nuisance by directing rainwater onto plaintiff's property." Pa9, ¶ 17. He also claimed that the Dwyers "unlawfully entered Plaintiff's property to dispose of tree limbs on Plaintiff's property," which allegedly caused property damage. Pa11, ¶¶ 27-28.

B. The Dwyers did not alter the grading of their front lawn.

The Dwyers never regraded their property. Pa47, ¶ 37; Pa330, ¶ 37; accord Pa205 at 23:19-25:6, Pa208 35:25-37:1. When the Dwyers purchased their property, the house was still being renovated. Pa47, ¶ 38; Pa330, ¶ 38; accord

Pa205 at 23:5-:12. Following the completion of the renovation of their house, the Dwyers hired a contractor to place one inch of soil on the front lawn and to plant grass seed. Pa47-48, ¶ 39; Pa330, ¶ 39; accord Pa205 at 24:4-25:6. The Dwyers never hired any contractor to alter the grade of their property. Pa48, ¶ 40; Pa330, ¶ 40; accord Pa224-25 at 19:24-20:2, 31:23-32:3.

C. The Dwyers did not alter the grading of their driveway.

The Dwyers' driveway had been damaged during the renovation. Pa48, ¶ 41; Pa330, ¶ 41; accord Pa206 at 26:3-:11; Pa222 at 11:16-12:1. In April 2021, the Dwyers hired a contractor to repave their driveway and add a Belgian block border. Pa48, ¶ 42; Pa330, ¶ 42; accord Pa222 at 12:23-:25, Pa227 at 31:11-:22. They did not change the footprint or slope of the driveway. Pa48, ¶ 43; Pa331, ¶ 43; accord Pa224 at 19:11-20:2, Pa227 at 31:23-32:3. After the Dwyers had the driveway repaved, Sonali Dwyer testified that water flowed evenly out of the right and left rear openings in the Belgian block. Pa226 at 22:8-:20.

D. When the Dwyers disposed of tree branches, they did not enter plaintiff's property, nor did they damage it.

Before the Dwyers bought the property, a tree that had stood on a neighbor's property had fallen across the Dwyers' backyard and onto plaintiff's side yard. Pa49, ¶ 51; Pa331, ¶ 51; accord Pa209 at 40:23-41:9. When Edward Dwyer later removed the branches from that tree, he placed most of them in front

of his property by the curb of Ford Lane for municipal pick up. Id. at 42:8-46:9. Because he ran out of room, he placed some of the branches on the municipal right-of-way by the curb in front of plaintiff's property. Pa320, ¶¶ 2-3.

He purposefully avoided placing any branches on plaintiff's plants. Pa320, ¶ 4. The location where Mr. Dwyer placed the branches are depicted in the photographs marked D-24 and D-21 for identification. Pa50, ¶ 55; Pa331, ¶ 55; accord Pa320, ¶ 5; Pa312 (photograph marked D-24 for identification) & Pa314 (photograph marked D-21 for identification).

The Borough of Roseland removed the branches from the Dwyers' property the next morning, but plaintiff prevented the municipal workers from removing the branches that were in front of his property. Pa50, ¶ 56; Pa332, ¶ 56; accord Pa321, ¶ 6. The Borough of Roseland removed the remaining branches during the following week. Pa50, ¶ 57; Pa331, ¶ 57; accord Pa321, ¶ 7.

The condition of the municipal right-of-way after the branches were removed is depicted in the photographs marked as D-22 and D-25 for identification. Pa50, ¶ 58; Pa331, ¶ 58; accord Pa321, ¶ 8; Pa316 (photograph marked D-22 for identification) & Pa318 (photograph marked D-25 for identification). Plaintiff identified the plants that he claimed were damaged by the branches by annotating the photographs marked for identification as D-21

and D-25. Pa50, ¶ 59; Pa331, ¶ 59; accord Pa149 at 98:17-101:22; Pa314 (D-21); Pa318 (D-25).

III. Plaintiff's surveyor, Bruce Blair, P.L.S., offered no opinion on whether the amount of water runoff changed after the Dwyers repaved and relined their driveway.

A. Blair's first report did not contend that the Dwyers caused or contributed to any water runoff.

Plaintiff retained a surveyor, Bruce Blair, "to determine the path of overland water flow that passes from" the Dwyers' property to plaintiff's property. Pa51, ¶ 60; Pa331, ¶ 60; accord Pa231. In his first report, dated June 16, 2023, Mr. Blair contended that water flows down the Dwyers' driveway and that "large quantities of water have, from time to time, inundated the rear of Lot 10 [plaintiff's property] and eventually flows to Canoe Brook at the rear of the properties." Pa51, ¶ 61; Pa331, ¶ 61; accord Pa231-32. In that report, he did not contend that the Dwyers had caused or contributed to that runoff. See Pa51, ¶ 62; Pa332, ¶ 61; accord Pa231-32. He also did not compare the current elevation of the driveway to the surveys taken before the Dwyers bought the property or had the driveway repaved. Pa51, ¶ 63; Pa331, ¶ 63; accord Pa231-32.

B. Blair's second report incorrectly stated that the Belgian block lining the Dwyers' driveway had only one outlet next to plaintiff's property for water flow, and he failed to mention the second outlet next to the Dwyers' house.

In his second report, dated December 12, 2023, Mr. Blair contended that:

> Because of the improvement of the driveway and the installation of Belgian block curb with the only outlet being at the southeast corner and directed onto the Unger property together with the filling of the land along the common property line the majority of the water from the front yard and the driveway is now directed on to the Unger property.

[Pa51-2, ¶ 64; Pa331, ¶ 64; accord Pa239.]

Mr. Blair's second report did not discuss the fact that the two outlets exist in the Belgian block at the rear of the Dwyers' driveway. Pa52, ¶ 65; Pa332, ¶ 65; accord Pa239 As depicted on photographs of the Dwyers' driveway that plaintiff's engineering expert took, one outlet exists on the left side of the driveway, next to plaintiff's property, and another outlet exists on the right side of the driveway, next to the Dwyers' house. Pa52, ¶ 66; Pa332, ¶ 66; accord Da2-3. Mr. Blair's reports do not discuss the outlet next to the Dwyers' house. Pa52, ¶ 67; Pa332, ¶ 67; accord Pa231-32, Pa238-39.

C. In his deposition testimony, Mr. Blair admitted that he offered no opinion regarding whether the Dwyers caused any increase in the amount of water runoff.

In his deposition, Mr. Blair testified that the current pitch of the driveway as it runs from the Dwyers' house toward plaintiff's property is actually less than it was before the Dwyers repaved their driveway. Pa52, ¶ 68; Pa332, ¶ 68; accord Pa251 at 28:8-:25. Mr. Blair determined that the entirety of the Dwyers' driveway from the front of their house to the driveway's end lies within the 469-

foot and 468-foot topographic levels. Pa52, ¶ 69; Pa332, ¶ 69; accord Pa251 at 28:12-:16.

However, before the Dwyers repaved the driveway, the rear corner of the driveway next to plaintiff's property sloped down to the 467-foot topographic level. Pa52-3, ¶ 70; Pa332, ¶ 70; accord Pa251 at 28:17-:22. Thus, the rear corner of the driveway next to plaintiff's property lay at a lower elevation before the Dwyers repaved their driveway. Pa53, ¶ 71; Pa332, ¶ 71; accord Pa251 at 28:23-:25.

Likewise, the slope of the Dwyers' front lawn had decreased from five feet, as shown in the 2018 Wunner survey that Mr. Blair relied on, to approximately three feet, as shown in Mr. Blair's survey in 2023. Pa53, ¶ 72; Pa332, ¶ 72; accord Pa247 at 12:5-:24, Pa251 at 29:1-30:1. The downward slope of the front lawn thus existed before the Dwyers purchased the property. Pa53, ¶ 73; Pa332, ¶ 73; accord Pa252 at 30:4-:10. However, the downward slope of the front lawn was shallower in 2023 than in 2018. Pa53, ¶ 74; Pa332, ¶ 74; accord Pa252 at 30:2-:3.

Finally, Mr. Blair agreed the three-foot to four-foot drop where the Dwyers' property meets plaintiff's property existed in 2018. Pa53, ¶ 75; Pa332, ¶ 75; accord Pa252 at 30:11-:18. He did not contend that the Dwyers caused the drop-

off between their property and plaintiff's property. Pa53, ¶ 76; Pa332, ¶ 76; accord Pa254 at 39:18-40:9.

Mr. Blair was aware that plaintiff claimed in the Burke Action that water ran off the Burkes' driveway and onto his property. Pa53, ¶ 77; Pa332, ¶ 77; accord Pa254 at 41:8:21. He had "no idea" of how that water runoff changed, if at all, from before the Dwyers purchased their property until after they repaved their driveway. Pa54, ¶ 78; Pa332, ¶ 78; accord Pa254 at 41:22-42:3. Mr. Blair did not attempt to differentiate between the amount of water that would run off the driveway before the Dwyers bought the property and the amount that would run off the driveway after they repaved the driveway. Pa54, ¶ 79; Pa332-33, ¶ 79; accord Pa256 at 47:14-48:9. Indeed, he offered no opinion on that matter. Pa54, ¶ 80; Pa333, ¶ 80; accord Pa256 at 49:10-50:5.

IV. Plaintiff's engineer, Antoine Hajjar, P.E., failed to offer any opinion on whether the Dwyers caused any increase in the amount of water runoff, and he did not base his opinions on generally-accepted engineering standards.

A. Hajjar's engineering report did not discuss the pre-existing property conditions, including the pre-existing water runoff.

Plaintiff retained Antoine Hajjar, P.E. to prepare an engineering report. Pa54, ¶ 81; Pa333, ¶ 81; accord Pa259-60. Mr. Hajjar reviewed Mr. Blair's survey. Pa54, ¶ 82; Pa333, ¶ 82; accord Pa259. He offered the opinion that "there is a good amount of runoff generated and conveyed to 2 Canoe Lane from

10 Ford Lane to cause erosion and inundate the landscape." Pa54, ¶ 83; Pa333, ¶ 83; accord Pa260. Yet he did not discuss the fact that water runoff had occurred before the Dwyers purchased the property, nor did he discuss plaintiff's earlier prior suit for damage caused by water runoff at issue in the Burke Action. Pa54, ¶ 84; Pa333, ¶ 84; accord Pa259-60.

He did not contend that the Dwyers changed the grade of the property. Pa54, ¶ 85; Pa333, ¶ 85; accord Pa259-60. He did not compare Mr. Blair's survey to the surveys taken before the Dwyers purchased the property. Pa55, ¶ 86; Pa333, ¶ 86; accord Pa259-60.

B. In his deposition testimony, Mr. Hajjar conceded that he offered no opinion on whether the Dwyers caused any change in the amount of water runoff, and he offered no generally-accepted engineering standard for his opinions.

Mr. Hajjar testified that he did not consider the Burke Action in preparing his report or in the conclusion contained in his report. Pa55, ¶ 87; Pa333, ¶ 87; accord Pa268 at 23:14-:24. He did not calculate the amount of water runoff that took place before the Dwyers purchased the property. Pa55, ¶ 88; Pa333, ¶ 88; accord Pa268 at 24:12-:15. His report contained no opinion on whether the amount of water runoff onto plaintiff's property changed from before the Dwyers bought the property until after they repaved their driveway. Pa55, ¶ 89; Pa333, ¶ 88; accord Pa268 at 24:17-:24.

Nothing in Mr. Hajjar's report discussed the slope of the Dwyers' property before 2023. Pa55, ¶ 93; Pa334, ¶ 93; accord Pa269 at 26:11-:13. He offered no opinion on whether the grade of the property changed after the Dwyers bought it. Pa55, ¶ 94; Pa334, ¶ 94; accord Pa269 at 26:2-:20.

He based his opinion that water flows off the Dwyers' driveway through the opening in the Belgian block on the side near plaintiff's property on "the observation – again, looking at it [the driveway] from the street, the opening looks higher by the building." Pa55-56, ¶ 95; Pa334, ¶ 95; accord Pa269 at 27:8-28:8. He did not know the slope of the driveway as it runs from the Dwyers' house toward plaintiff's property. Pa56, ¶ 96; Pa334, ¶ 96; accord Pa270 at 30:7-:25.

Mr. Hajjar's report did not state that water was prevented from exiting the driveway through the opening in the Belgian block next to the Dwyers' house. Pa56, ¶ 98; Pa334, ¶ 98; accord Pa270 at 31:4-:7. His report did not allocate the amount of water that would leave the driveway through the opening in the Belgian block by plaintiff's property and the amount that would pass through the opening next to the Dwyers' house. Pa56, ¶ 99; Pa334, ¶ 99; accord Pa270 at 31:11-:12. Mr. Hajjar testified that determining how much water ran off the Dwyers' property onto plaintiff's property before the Dwyers purchased their property was not within the scope of his work. Pa270at 33:14-:18.

Mr. Hajjar's report therefore contained no allocation of the amount of water that ran off the property before the Dwyers purchased it and after they repaved their driveway. Pa270 at 33:19-:23, Pa272 at 41:21-42:1. He cannot say whether the amount of water runoff increased or decreased since the Dwyers purchased the property. Pa270-71 at 33:24-35:4, Pa273 at 42:2-:4. He also offered no opinion about whether the amount of water runoff from the driveway into plaintiff's property increased or decreased after the Dwyers repaved it. Pa271 at 34:5-:17. He had no information about how much water ran off the driveway onto plaintiff's property when the Burkes owned the property. Pa57, ¶ 104; Pa335, ¶ 104; accord Pa271 at 35:23-36:6.

During his deposition, Mr. Hajjar first offered the opinion that "anywhere between 85 and 90 percent" of water that flowed down the Dwyers' driveway would funnel from the Dwyers' driveway onto plaintiff's property. Pa273 at 42:21-43:4. That opinion was not contained in his report. Pa274 at 46:14-47:5. He admitted that his opinion that eighty-five to ninety percent of the water runoff would flow though the Belgian block opening near plaintiff's house was not supported by any calculations and was not based on any generally-accepted engineering standard. Pa273 at 44:18-45:17.

C. Plaintiff's damages report from Matthew Weibel did not specify what damages he attributed to the Dwyers.

Plaintiff retained Matthew Weibel as his damages expert. Pa57, ¶ 105; Pa335, ¶ 105; accord Pa309-10. Mr. Weibel relied on the statement in plaintiff's surveying and engineering reports that "the driveway and front yard at the adjacent (Dwyer) property was graded such that stormwater will runoff into the Unger property." Pa57, ¶ 106; Pa335, ¶ 106; accord Pa310. He offered no allocation of damages between damage that he attributed to the Dwyers' actions and damage caused by the preexisting water runoff. Pa57, ¶ 107; Pa336, ¶ 107; accord Pa310. Nor did he offer any assessment of what plants actually sustained damage or the alleged cost to replace or repair the plants at issue. Pa58, ¶ 108; Pa336, ¶ 108; accord Pa310.

V. The trial court granted summary judgment to the Dwyers because plaintiff's experts offered only net opinions and because plaintiff offered no admissible evidence to support a claim of trespass.

After hearing extensive oral argument, T1-59, the trial court ruled on the Dwyers' motion for summary judgment. T59:23-60:24. Turning to Count One of the complaint, which alleged nuisance, the court looked to whether plaintiff's expert reports could support plaintiff's contentions or whether they were net opinion. T63:22-64:18. Having reviewed the relevant case law governing net opinions, T64:24-67:19, the court ruled that:

> There is nothing in this record that the Court will be able to look to other than pure speculation on the part of these experts, because nothing is tied to anything other than their opinion. Without more, as cited in all the cases that I just put on the record, this court will not be in any position at trial to have any different of an opinion than I said right now. I understand it's summary judgment. I understand that's a high burden. But the plaintiff cannot, as I've said a number of times, create a genuine issue of facts simply by pointing to something that they said, well, the expert said it. That's just not enough. I am not going to repeat what I said already. And that's my ruling. I'm granting summary judgment on the First Count, as well.
>
> [T67:20-68:10.]

The court also granted summary judgment on Count Two of plaintiff's complaint. T33:2-3. Count Two alleged that the Dwyers' driveway encroached onto plaintiff's property. Ibid. However, plaintiff admitted that he could not establish that the Dwyers' driveway encroached onto his property. T32:15-33:3. The court therefore dismissed Count Two with prejudice. T60:17-24. Plaintiff does not appeal the dismissal of Count Two. Pb3.

Finally, with respect to Count Three, plaintiff's claim for trespass, the trial court found that the record was undisputed that the area where Ted Dwyer disposed of the tree branches was a municipal right of way, and not part of plaintiff's property. T61:6-:16. The court rejected plaintiff's certification, in which he claimed that Mr. Dwyer admitted placing the tree branches on plaintiff's property, as insufficient to create a genuine issue of fact. T62:25-63:8.

The court noted that conclusory and self-serving assertions that lacked evidentiary support were insufficient to defeat a meritorious motion for summary judgment. T63:9-:21.

LEGAL ARGUMENT

The Court should affirm the judgment below because the trial court correctly granted summary judgment to the Dwyers. As the trial court ruled, the failure of plaintiff's expert witnesses to provide any generally-accepted standards to support their opinions that the Dwyers caused water to run from their driveway onto plaintiff's property rendered their testimony inadmissible net opinion. Plaintiff also failed to raise any genuine issue of material fact to support his claim of trespass.

In addition, the Court should affirm the judgment below on three grounds that the Dwyers asserted below but that the trial court did not need to reach. First, plaintiff failed to establish a claim of nuisance, because he failed to offer any legal basis to support his claim that the Dwyers made an unreasonable use of their land that by repaving their driveway and by replacing the railroad ties that lined their driveway with Belgian block. Second, the doctrines of res judicata and collateral estoppel bar plaintiff's claims against the Dwyers for water runoff that plaintiff previously litigated in the Burke Action. Third, plaintiff's failure to apportion his damages between the preexisting water runoff

and any alleged increase in water runoff that he attributed to the Dwyers was fatal to his claim, because plaintiff cannot recover any damages from the Dwyers for preexisting conditions.

I. The Standard of Review is De Novo.

Because plaintiff appeals from a grant of summary judgment, the Court's standard of review is de novo. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016).

II. The Court should affirm the judgment below because the trial court correctly entered summary judgment in favor of the Dwyers (raised below at T60:17-68:12).

The trial court correctly entered summary judgment in favor of the Dwyers because the testimony of plaintiff's experts was inadmissible net opinion and because plaintiff failed to show that the Dwyers trespassed on his property. T60:16-68:12. The Court should affirm the judgment below on those bases.

A. Plaintiff's expert testimony was inadmissible net opinion because they did not base their conclusions on generally-accepted standards of surveying or engineering.

Plaintiff was obligated to establish the amount of any alleged increase in the amount of stormwater runoff flowing from the Dwyers' property onto plaintiff's property that the Dwyers allegedly caused. Ross v. Lowitz, 222 N.J. 494, 511 (2015) (limiting claims of nuisance to losses caused by landowner's unreasonable use of property adjoining injured party's property). Plaintiff was

obligated to do so through expert testimony because whether the Dwyers, by repaving their driveway and replacing the railroad ties that lined their driveway with Belgian block, caused an increase in stormwater runoff onto plaintiff's property is not a subject of common knowledge and experience such that a finder of fact could form a valid judgment without the aid of expert testimony. Wyatt v. Wyatt, 217 N.J. Super. 580, 591 (App. Div. 1997) (granting summary judgment on issue of whether brakes were defective because claimant presented no expert testimony to support her theory of liability). In his appeal, plaintiff relied on the law of nuisance to argue that he did not need expert testimony to establish a prima facie case of liability against the Dwyers. Pb17-20. However, the trial court focused on the issue of net opinion as the basis for its grant of summary judgment. T64:13-68:10. The court ruled that plaintiff needed to support his claim of nuisance through admissible expert testimony, T63:22-64:18, and that he failed to do so. T67:20-68:12.

For expert testimony to be admissible, the proponent must show that the expert's opinion is based on facts in the record and is supported by a proper scientific or technical foundation. Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002). If the expert offers "'bare conclusions, unsupported by factual evidence,'" the testimony is inadmissible as net opinion. Kieffer v. Best Buy, 205 N.J. 213, 220 n.4 (2011) (quoting Buckelew v. Grossbard, 87 N.J. 512,

524 (1981)). A hallmark of net opinion is the expert's failure "'to explain a causal connection between the act or incident complained of and the injury or damage allegedly' suffered." Ibid. (quoting Buckelew, 87 N.J. at 524). Likewise, an expert's failure to base the proffered opinion on a generally-accepted standard renders the testimony inadmissible net opinion. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 410 (2014). Courts exclude net opinion because without a proper factual and technical foundation, the expert's opinion is speculative and will not aid the trier of fact. Dawson v. Bunker Hill Plaza Assocs., 289 N.J. Super. 309, 323 (app. Div. 1996).

Here, the trial court heard extensive argument on whether the opinions that plaintiff's experts offered were based on record evidence applied to generally-accepted standards. T33:4-60:16. The trial court then evaluated the evidence regarding the experts' opinions. T64:13-68:12. It noted that plaintiff's engineering expert did not explain what the engineering standards for his opinion were. T64:19-65:7. The trial court therefore ruled that "[t]here is nothing in the record that the Court will be able to look to other than pure speculation on the part of these experts, because nothing is tied to anything other than their opinion." T67:21-:24. Even if the matter went to trial, the trial court, as the trier of fact in this Chancery action, would be in no better position to reach

a different conclusion in the absence of expert testimony that applied a generally-accepted standard to the record facts. T67:20-68:12.

The record supported the trial court's ruling. First, Blair, plaintiff's surveyor, admitted that he did not differentiate between the amount of stormwater that ran from the driveway onto plaintiff's property before the Dwyers bought their property and after they repaved the driveway. Pa54, ¶¶ 78-79; Pa332-33, ¶ 78-79; accord Pa254-56 at 41:22-42:3 & 48:3-:9. He did not identify any generally-accepted standard of care or duty on the part of the Dwyers to prevent such water runoff. Pa256 at 42:8-:13. He admitted that identifying such standards of care, if any existed, "were not part of the surveying requirement" and were outside the scope of his expertise. Pa256 at 42:8-15. He had "no idea" of how the water runoff changed, if it all, from before the Dwyers bought their property and after they repaved their driveway. Pa54, ¶¶ 78; Pa332, ¶ 78; accord Pa254-55 at 41:22-42:3. He therefore offered no opinion on that issue. Pa54, ¶¶ 80; Pa333, ¶ 80; accord Pa255 at 42:16-:18.

Second, Hajjar, plaintiff's engineer, did not contend that the Dwyers changed the grade of their property. Pa54, ¶ 85; Pa333, ¶ 85; accord Pa259-60. He did not calculate the amount of water that ran off the Dwyers' property onto plaintiff's property before the Dwyers purchased it. Pa55, ¶ 88; Pa333, ¶ 88; Pa268 at 24:12-:15. He did not discuss the fact that the rear of plaintiff's

property lies in a flood plain. Pa272 at 41:2-:4. He did not calculate the amount of water that would flow downhill from plaintiff's property into Canoe Brook, which ran along the rear of his lot, nor did he calculate the amount of water that would naturally be absorbed into the ground. Pa272 at 41:5-:15.

In his deposition, taken after the close of discovery, cf. Pa86, ¶ 5, with Pa262, Mr. Hajjar offered a new opinion, attempting to quantify the amount of water that would flow off the driveway between the gap in the Belgian block next to plaintiff's property and the gap in the Belgian block next to the Dwyers' house. Pa273 at 42:21-43:4. However, he did not include any such opinions in his report. Pa273 at 44:1-:3. He did not know the slope of the driveway as it runs from the Dwyers' house to plaintiff's property, Pa56, ¶ 96; Pa334, ¶ 96; Pa270 at 30:7-:25. Instead, he based that new opinion on looking at a photograph of the driveway marked as D-16 for identification (appended at Pa351) that plaintiff's counsel showed him during his deposition, Pa273 at 42:21-43:22, instead of on any calculations based on generally-accepted engineering standards. Pa273 at 44:4-:45:17, Pa274 at 49:3-:9. Further, nothing in Mr. Hajjar's report stated that water would be prevented from running off the Dwyers' driveway through the opening in the Belgian block next to the Dwyers' house, and noting in his report states how much water would run off the driveway through that opening. Pa270 at 31:4-:16. Further, even though he

relied on D-16 to claim that before the Dwyers repaved their driveway, "probably 60 to 70 percent of the water would go towards the rear of the property and not to Mr. Unger's property," Pa273 at 43:7-:20, he also testified during his deposition that looking at D-16, he had no information about how water flowed off the rear of the driveway before the Dwyers purchased the property. Pa271 at 34:24-36:6. He also admitted that his report did not discuss the amount of water that would have flowed from the Dwyers' property to plaintiff's property before the Dwyers purchased it or any change in the amount of runoff after the Dwyers bought it. Pa272 at 41:21-42:5.

Because plaintiff's experts failed to support their opinions that the Dwyers caused any flooding of plaintiff's property by applying generally-accepted surveying or engineering standards to record facts, their testimony consisted merely of personal opinions. Dawson, 289 N.J. Super. at 323. The trial court therefore correctly ruled that their testimony was inadmissible net opinion. Endre v. Arnold, 300 N.J. Super. 136, 147 (App. Div. 1997) (stating that expert's testimony based on "'unfounded speculation and unquantified possibilities'" is inadmissible net opinion). Because plaintiff could not proceed to trial without expert testimony on how, if at all, the Dwyers allegedly increased the amount of stormwater runoff from their driveway onto plaintiff's property, Hopkins v. Fox & Lazo realtors, 132 N.J. 426, 450 (1993), the trial court properly granted

summary judgment to the Dwyers. Wyatt, 217 N.J. Super. at 591 (App. Div. 1997) (affirming grant of summary judgment in absence of expert testimony where expert testimony is needed to enable finder of fact to draw valid conclusions). The Court should affirm the judgment below on that ground. Ibid.

B. Plaintiff failed to establish a prima facie case of trespass arising out of the Dwyers' disposal of tree branches because the record showed that the Dwyers placed the tree branches on municipal property, not on plaintiff's land, and because plaintiff failed to show that the Dwyers damaged his property.

The trial court properly granted summary judgment to the Dwyers on plaintiff's claim of trespass arising out of the disposal of tree branches because plaintiff did not establish that the Dwyers entered his property when they disposed of those branches. T60:25-63:21. To establish a claim of trespass, plaintiff bore the burden to show that the Dwyers engaged in an unauthorized entry onto his land. Pinkowski v. Twp. of Montclair, 299 N.J. Super. 557, 571 (App. Div. 1997). However, as the trial court ruled, the record evidence showed that Edward Dwyer did not enter onto plaintiff's land, nor did he cause property damage when he disposed of tree branches by placing them in a municipal right-of-way for municipal pick up. T60:25-63:21.

First, plaintiff failed to show that the Dwyers unlawfully entered his property. The area where Edward Dwyer placed the branches for municipal disposal was shown in the photographs marked D-24 and D-21 for identification.

Pa50, ¶ 55; Pa331, ¶ 55; accord Pa312, Pa314. Those photographs show that the branches that Edward Dwyer set out for municipal disposal lay alongside the curb on Ford Lane. Pa312, Pa314. Mr. Dwyer testified that the area was municipal property and did not belong to plaintiff. Pa210 at 43:21-44:11. Mr. Blair, plaintiff's surveyor, also testified that the land shown in D-21 and D-24 was a municipal right of way and not plaintiff's property. Pa248 at 14:8-15:22 & Pa319 (Ex. Blair-5). He further testified that plaintiff's property ended about twelve feet before the curb on Ford Lane and that the twelve-foot section was a municipal right of way. Pa248 at 14:4-15:22 & Pa319 (Ex. Blair-5).

Next, Edward Dwyer testified that he did not place any branches on plaintiff's plants. Pa210 at 43:2-44:14; Pa320, ¶¶ 4-5. The photographs marked as D-21 and D-24 depict where Mr. Dwyer placed the branches, Pa50, ¶ 55; Pa331, ¶ 55; Pa320, ¶ 5, and showed that he avoided placing any of the branches on plaintiff's plants. Pa312, Pa314, Pa44:15-:18. Last, the amount of plaintiff's alleged damages from the purported trespass was $4,800. Pa342, ¶ 41.

Plaintiff thus failed to meet his burden to prove that the Dwyers proximately caused him any property damage. Buckelew v. Grossbard, 87 N.J. 512, 525 (1981). Rather than providing any basis to contradict the photographs, plaintiff simply argues on appeal that "Defendant Edward Dwyer had admitted that he caused branches to be placed on Plaintiff's plants [131a at 26:2-17]."

Pb23. He also argues that the trial court improperly characterized that statement as hearsay. Ibid. He further claims that Mr. Dwyer's purported admission is "a 'party-opponent's own statement,' and is therefore not excluded by the hearsay rule." Ibid.

However, the admissibility of a statement by a party opponent is irrelevant, because plaintiff never actually testified that Mr. Dwyer admitted that he placed tree branches on plaintiff's plants. Pa131 at 26:2-:17. Instead, plaintiff simply testified that Mr. Dwyer allegedly admitted placing branches "in that area" where plaintiff claimed, incorrectly, that his property abuts Ford Lane. Pa130-31 at 25:14-26:17. As noted, however, Mr. Blair, plaintiff's surveyor, testified that the area where Mr. Dwyer placed the branches was a municipal setback and not part of plaintiff's property. Pa248 at 14:8-15:22; Pa319 (Blair's survey, depicting distance between Unger property line and curb of Ford Lane). Thus, plaintiff's argument that Edward Dwyer's alleged statement that he placed the tree branches on plaintiff's plants is an admission by a party opponent fails because that argument turns on an inaccurate characterization of plaintiff's testimony regarding Mr. Dwyer's alleged hearsay statement. Cf. Pb23 (stating that Mr. Dwyer "admitted that he caused the branches to be placed on Plaintiff's property") with Pa130-31 at 25:14-26:17 (plaintiff's testimony that Mr. Dwyer admitted that he caused the tree branches to be placed near the curb on Ford

Lane, not on plaintiff's plants). N.J.R.E. 803(b)(1)'s exception to the hearsay rule is irrelevant here because it applies only when the proponent of the hearsay statement can show that the hearsay statement accurately reflects what the party-opponent allegedly said. Konop v. Rosen, 425 N.J. Super. 391, 407 (App. Div. 2012).

Plaintiff also argues on appeal that the trial court erred in rejecting the hearsay statement because it was contained in plaintiff's deposition transcript instead of a certification. Pb22-23. Yet the requirement that the proponent show that the party opponent actually made the statement applies whether the proponent offers the statement through a certification or, as here, through a deposition transcript. See Konop, 425 N.J. Super. at 419-20 ("The issue is purely a factual one--whether the party-opponent made the statement."). Here, plaintiff actually claimed that Mr. Dwyer admitted that he had branches placed on Ford Lane in front of plaintiff's property for pickup. Pa130-31 at 25:14-26:17. Plaintiff did not claim that Mr. Dwyer admitted trespassing onto plaintiff's property. Ibid. In the absence showing that Mr. Dwyer allegedly told plaintiff that he entered onto plaintiff's land and placed the tree branches on plaintiff's plants, T62:25-63:21, the trial court properly rejected plaintiff's hearsay statement and dismissed the claim for trespass. Konop, 425 N.J. Super. at 407.

III. The Court may also affirm the judgment below on grounds that the trial court did not reach but that the Dwyers raised below (raised below at T59:23-60:11).

Finally, the Court should affirm the judgment below based on three issues briefed below that the trial court did not reach. First, plaintiff's claim for nuisance fails because he did not show how the Dwyers made an unreasonable use of their property by repaving their driveway and replacing the old railroad ties lining their driveway with Belgian block. Second, collateral estoppel and res judicata bar this action because plaintiff litigated claims against the prior owners of the Dwyers' property for damage caused by water runoff, and he may not use this suit to relitigate those claims. Third, plaintiff's failure to apportion his alleged property damage between the preexisting water runoff and any increase in water runoff that the Dwyers allegedly caused is fatal to this action. The fact that the trial court did not need to address those issues does not prevent this Court from ruling on them. Cortes v. Gindhart, 435 N.J. Super. 589, 597-98 (App. Div. 2014).

A. The Court may affirm the judgment below on any ground supported by the record.

In deciding this matter, this Court is not limited to the trial court's reasoning. State v. Scott, 229 N.J. 469, 479 (2017) (stating that appeals are taken from judgments and not for opinions or reasons given for ultimate conclusions). This Court may therefore affirm the judgment on grounds other

than those relied on by the trial court. Van Horn v. Harmony Sand & Gravel, Inc., 442 N.J. Super. 333, 336 (App. Div. 2015). Further, an appellate court may affirm a judgment below even if it disagrees with the trial court's reasoning for entering that judgment. Petro-Lubricant Testing Labs. v. Adelman, 447 N.J. Super. 391, 401 (App. Div. 2016). Here, additional grounds for affirming the judgment below include plaintiff's failure to establish a claim of nuisance, the application of the doctrines of collateral estoppel and res judicata, and plaintiff's failure to apportion his damages, which are issues that the parties briefed below but that the trial court did not reach. T59:23-60:11.

B. Plaintiff failed to establish a prima facie claim of nuisance because he did not show that the Dwyers made an unreasonable use of their land by repaving their driveway and replacing the railroad ties that lined their driveway with Belgian block.

Plaintiff's claim for private nuisance required him to show that the Dwyers unreasonably interfered with his use and enjoyment of his property. Scannavino v. Walsh, 445 N.J. Super. 162, 167 (App. Div. 2016). A defendant, however, has no liability for property damage caused by the natural conditions of the defendant's land. Ibid. That rule stems from the fact that "'it is unfair to impose liability on a property owner for hazardous conditions of his land which he did nothing to bring about just because he happens to live there.'" Id. at 171 (quoting Deberjeois v. Schneider, 254 N.J. Super. 694, 702-03 (Law Div. 1991)).

The Dwyers therefore have no liability for the stormwater runoff caused by the preexisting slope of their driveway. Id. at 167.

Instead, to prevail on a claim of nuisance, the claimant must prove that "'the offending landowner somehow has made a negligent or unreasonable use of his land when compared with the rights of the party injured on the adjoining lands.'" Ross v. Lowitz, 222 N.J. 494, 511 (2015) (quoting Burke v. Briggs, 239 N.J. Super. 269, 274 (App. Div. 1990)). Equally important, the claimant must show that the harm alleged was a foreseeable result of the landowner's purportedly-unreasonable use of that land. Posey v. Bordentown Sewerage Auth., 171 N.J. 172, 188 (2002). In sum, adjudicating a claim of nuisance "'requires the recognition of the reciprocal rights of each owner to reasonable use, and a balancing of the conflicting interests.'" Burke, 239 N.J. Super. at 274 (quoting Sans v. Ramsey Golf & Country Club, Inc., 38 N.J. 438, 449 (1959)).

Here, plaintiff failed to show that the Dwyers made an unreasonable use of their land or foreseeably injured plaintiff by repaving their driveway and replacing the railroad ties that lined their driveway with Belgian block. Plaintiff's experts did not identify any standard of care that they claim the Dwyers violated in connection with the driveway. Pa252 at 30:19-33:16; Pa255 at 42:8-:18; Pa272-73 at 41:21-45:17. Plaintiff offered no evidence that the Dwyers violated any ordinance or code regarding their driveway. Pa252 at 31:4-

33:16; Pa265-66 at 13:23-14:14. Indeed, neither expert even reviewed Brough of Roseland municipal code on curbing. Pa252 at 32:14-:16; Pa266 at 14:8-:14.

Mr. Blair, plaintiff's surveyor, admitted that the slope of the Dwyers' driveway as it runs from the Dwyers' house toward plaintiff's property actually decreased after the Dwyers had it paved. Pa12, ¶ 68; Pa332, ¶ 68. Likewise, the downward slope of the Dwyers' front lawn was shallower in 2023, when he surveyed the property, than in 2018, when it was previously surveyed. Pa53, ¶¶ 72-74; Pa332, ¶¶ 72-74. The three- to four-foot drop between the Dwyers' property and plaintiff's property existed in 2018, and Mr. Blair agreed that the Dwyers did not cause that drop in height. Pa53, ¶¶ 75-76; Pa332, ¶¶ 75-76.

Mr. Hajjar, plaintiff's engineer, did not contend that the Dwyers changed the grade of their property. Pa54, ¶ 85, Pa333, ¶ 85. He did not consider either the preexisting water runoff or plaintiff's claims in the Burke action of water runoff from the driveway. Pa54-55, ¶¶ 84, 87, Pa333, ¶¶ 84, 87. He did not calculate the amount of water runoff that would have taken place before the Dwyers purchased their property. Pa55, ¶ 88, Pa333, ¶ 88.

Instead of presenting evidence of a breach of any duty of care, plaintiff merely claims that the Dwyers' engineering expert, Jeffery Laux, P.E., did not rebut the claim that the gap in the Belgian block lining the Dwyers' driveway caused water to flow onto plaintiff's property. Pb20. This is false. Mr. Laux

concluded that "the Dwyers did not cause or create a stormwater runoff condition that differed from the condition that existed under prior owners. Pa290-91. Moreover, because plaintiff bears the burden to prove the elements of a claim of nuisance, he cannot fail to present a prima facie case of nuisance and then argue that the trial court improperly granted summary judgment. Ross, 222 N.J. at 505-06. Because plaintiff presented no evidence that the Dwyers made a negligent or unreasonable use of their property by repaving their driveway and replacing the railroad tie lining with Belgian block, T64:4-:12; Pa252 at 19-33:13; Pa44:9-45:17, the Court should affirm the judgment below. Ross, 222 N.J. at 511 (requiring proof that landowner made negligent or unreasonable use of property to establish claim of nuisance); Posey, 171 N.J. at 188 (requiring that harm complained of foreseeably result from alleged nuisance).

C. Because plaintiff already litigated to conclusion claims for property damage caused by water runoff, the doctrines of res judicata and collateral estoppel bar him from relitigating those prior claims in his suit against the Dwyers.

Plaintiff cannot relitigate any claims in the Dwyer Action that he previously litigated in the Burke Action. Biondi v. Citigroup, Inc., 423 N.J. Super. 377, 422 (App. Div. 2011). The doctrines of res judicata and collateral estoppel therefore bar his claims for property damage caused by conditions for

which he had sued the Burkes. Ibid. (applying res judicata); First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 252 (2007) (applying collateral estoppel).

1. Res judicata bars the relitigation of claims for stormwater runoff litigated in the Burke Action.

The doctrine of res judicata bars plaintiff's claim for property damage resulting from water runoff that plaintiff litigated to a final adjudication in the Burke Action. Res judicata applies when, first, the prior action resulted in a final judgment on the merits; second, the parties to the current claim are in privity with the parties to the earlier action; and, third, the claim in the current action involves the same occurrence as the claim in the earlier action. Biondi, 423 N.J. Super at 422. Res judicata thus bars any claim in this suit for water runoff from the Dwyers' driveway caused by preexisting conditions, because plaintiff sued for property damage caused by water runoff from the driveway on the Burke Action. Cf. Pa46-47, ¶¶ 31-36 & Pa330, ¶¶ 31-36, with Pa8, ¶¶ 5-10.

This case satisfies the elements of res judicata. First, plaintiff litigated the issue of property damage caused by water runoff from the driveway to a final adjudication in the Burke Action. Pa181-97. Because plaintiff was the claimant in both the Burke Actions and this matter, Pa7 & Pa89, and because the Dwyers purchased the property that was at issue in the Burke Action, Pa7, ¶ 4 & Pa89,

¶ 3, privity exists between the parties in the Burke Action and this matter. Rutgers Cas. Ins. Co. v. Dickerson, 215 N.J. Super. 116, 122 (App. Div. 1987). Third, both the Burke Action and the Dwyer Action involved a claim for property damage caused by water runoff from the offending driveway. Pa8, ¶¶ 5-11; Pa90-91, ¶ 9 & ¶ 10(A). Res judicata thus bars plaintiff's claim for property damage caused by water runoff from the driveway that resulted from preexisting conditions. Biondi, 423 N.J. Super. at 422. Because plaintiff cannot relitigate property-damage claims that were decided in the Burke Action, Biondi, 423 N.J. Super. at 422, plaintiff's claim for property damages was limited to damage caused by an alleged increase in the water runoff attributable to the Dwyers. Reichert, 366 N.J. Super. at 225-26.

2. Collateral estoppel bars plaintiff from relitigating property damage caused by water runoff from the driveway that was at issue in the Burke Action.

Like res judicata, the doctrine of collateral estoppel bars the relitigation of issues decided in an earlier proceeding. First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007). Unlike res judicata, however, collateral estoppel can apply even if such issues were not decided on the merits, Watkins v. Resorts Int' Hotel & Casino , 124 N.J. 398, 422 (1991), as long as the issues litigated in the prior suit are substantially similar to those litigated in the subsequent suit. Hennesy v. Winslow Twp., 183 N.J. 593, 599 (2005). An issue

is "substantially similar" if it involves a substantial overlap of evidence as the prior suit, if the legal issues are the same, if discovery in the earlier suit could have encompassed the discovery in the subsequent suit, and if the claims are closely related. First Union, 190 N.J. at 353. If those elements are met, courts will bar the subsequent ligation under collateral estoppel. Olivieri v. Y.M.F. Carpet, Inc. 186 N.J. 511, 521 (2006).

Here, in the Burke Action, plaintiff sued the Burkes for property damage allegedly caused by alterations that they made to their driveway. Pa90-91, ¶¶ 9-12. In both the Burke Action and the Dwyer Action, plaintiff asserted that the slope of the defendants' driveway caused water to run off from the driveway onto plaintiff's property. Pa8, ¶¶ 5-10; Pa90-91, ¶¶ 9-13; Pa143 at 75:1-:16 & 77:9-:18. The claim of nuisance was substantially similar in both suits, because in both suits, plaintiff alleged that the Burkes and the Dwyers altered their driveway, thereby causing rainwater to run onto plaintiff's property. Pa89-95 (Burke Action complaint); Pa7-9 (Dwyer Action complaint). The evidence was also substantially similar in both actions because both actions involved water runoff and allegations of resulting property damage. Pa43-45, ¶¶ 16 & 19-23; Pa329-330, ¶¶ 16 & 19-23; Pa143 at 75:1-:16 & 77:9-:18. Collateral estoppel therefore bars plaintiff from suing the Dwyers for water runoff caused by

preexisting conditions of the driveway that were at issue in the Burke Action. First Union, 190 N.J. at 352.

D. Plaintiff's failure to apportion his damages between damage caused by preexisting conditions and damage allegedly caused by the Dwyers is fatal to this action.

Plaintiff may not sue the Dwyers for property damage caused by water runoff resulting from conditions that existed before the Dwyers bought their property. Scannavino, 445 N.J. Super. at 167. Plaintiff therefore bore the burden to apportion his damages between the preexisting water runoff that was the subject of the Burke Action and the alleged increase in water runoff that he attributed to the Dwyers. Reichert v. Vegholm, 366 N.J. Super. 209, 225-26 (App. Div. 204). His failure to apportion his damages was an independent basis for granting summary judgment to the Dwyers on Count One. Id. at 213-14 (stating that failure to carry burden to apportion damages between prior and subsequent injuries may result in dismissal of claimant's suit).

Plaintiff bore the burden to apportion his damages between the preexisting stormwater runoff from the driveway that he alleged in the Burke Action and the stormwater runoff from the driveway that he attributed to the Dwyers, because relative to the Dwyers, plaintiff had superior knowledge of the preexisting conditions over which he sued in the Burke Action. Goodman v. Fair Law Garden Assocs., Inc., 253 N.J. Super. 299, 205-06 (App. Div. 1992). Plaintiff

must establish such an allocation through expert testimony because the factfinder will not be able to determine what increase, if any, in stormwater runoff the Dwyers allegedly caused without expert testimony. Hopkins, 132 N.J. 450. Without expert testimony, therefore, any allocation of damages by the finder of fact would be improper speculation. Dunn v. Duso, 219 N.J. Super. 383, 398 (Law Div. 1986).

The record shows that plaintiff did not allocate his damages through expert testimony. Plaintiff admitted that his surveyor, Mr. Blair, had "no idea" whether the water runoff changed, if at all, from before the Dwyers purchased their property to after they repaved their driveway. Pa54, ¶ 78; Pa332, ¶ 78; accord Pa254 at 41:22-42:3. Plaintiff's engineering expert, Mr. Hajjar, did not calculate the amount of water that had run from the driveway onto plaintiff's property before the Dwyers bought the property. Pa55, ¶ 88; Pa333, ¶ 88; accord Pa268 at 24:12-:15. Plaintiff's damages expert, Matthew Weibel, did not allocate damages caused by the preexisting water runoff and water runoff allegedly caused by the Dwyers, nor did he offer any opinion of what plants or other property allegedly sustained damage from the water runoff. Pa57-58, ¶¶ 107-08; Pa336, ¶¶ 107-08; accord Pa309-10. Because plaintiff failed to allocate his damages between those caused by preexisting conditions and those

allegedly caused by the Dwyers, the Dwyers were entitled to summary judgment on plaintiff's claim of nuisance. Reichert, 366 N.J. Super. at 225-26.

CONCLUSION

As shown above, the trial court properly granted summary judgment to the Dwyers. The Court should therefore affirm the judgment below.

Respectfully submitted,

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Dated: August 22, 2024

DONALD UNGER, Plaintiff-Appellant, v. EDWARD DWYER, SONALI DWYER, JONES DOES 1-10, and ABC CORPORATIONS 1-10, Defendants-Respondents.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002212-23 Civil Action APPEAL FROM FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, GENERAL EQUITY PART, ESSEX COUNTY Docket No.: ESX-C-000248-21 SAT BELOW: HON. LISA M. ADUBATO, J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT DONALD UNGER

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 1

I. THE RECORD CONTAINS PROBATIVE EVIDENCE ON ALL ELEMENTS OF MR. UNGER'S NUISANCE CLAIM 1

A. Defendants altered the natural flow of water and created new channels resulting in water concentrating in a different part of Mr. Unger's property 2

B. Defendants' interference with the flow of waters was unreasonable 6

C. Defendant's interference with the flow of waters caused harm 8

D. The *Burke* Action does not give rise to res judicata or collateral estoppel 10

II. DEFENDANTS PROFFER NO EVIDENCE ENTITLING THEM TO SUMMARY JUDGMENT ON THE TRESPASS CLAIM 12

A. Mr. Unger owned both the land and the plants on which Mr. Dwyer trespassed 12

B. There is no genuine dispute that Mr. Dwyer dropped the branches that killed Mr. Unger's plants 14

CONCLUSION 15

TABLE OF CITATIONS OF CASES

PAGE

Cases

Armstrong v. Francis Corp.,
20 N.J. 320 (1956) 6, 7, 8

Hopler v. Morris Hills Reg'l Dist.,
45 N.J. Super. 409 (App. Div. 1957) 4, 6, 8

Kozlowski v. Smith,
193 N.J. Super. 672 (App. Div. 1984) 11

McCullough v. Hartpence,
141 N.J. Eq. 499 (Ch. 1948)..... 2, 10

Nathanson v. Wagner,
118 N.J. Eq. 390, 179 A. 466 (Ch. 1935)..... 2

Rippon v. Smigel,
449 N.J. Super. 344 (App. Div. 2017) 11

Sheppard v. Twp. of Frankford,
261 N.J. Super. 5 (App. Div. 1992) 3

Town of Secaucus v. Hackensack Meadowlands Dev. Comm'n,
267 N.J. Super. 361 (App. Div. 1993) 11

Statutes

Borough of Roseland Municipal Code § 7-40.3..... 12

N.J.S.A. 39:5A-1 13

PRELIMINARY STATEMENT

Plaintiff-Appellant Donald Unger's principal argument on appeal is simple and straightforward: the record contains abundant evidence establishing all three elements of common-law nuisance. Unable to rebut those core elements, Defendants ignore the evidence that matters and instead argue that Mr. Unger has not proven deviations from professional standards of care, which have no place in a nuisance action. They also contend Mr. Unger needed to quantify the increase in flooding on his property, which misses the mark because Mr. Unger's property had not been flooded for nearly ten years before Defendants materially altered their driveway. On the trespass claim, Defendants do not and cannot rebut that Mr. Unger owns both the plants and the land, and they have no basis to suggest that anyone other than Mr. Dwyer destroyed Mr. Unger's plants.

ARGUMENT

I. THE RECORD CONTAINS PROBATIVE EVIDENCE ON ALL ELEMENTS OF MR. UNGER'S NUISANCE CLAIM

As Defendants accurately point out, Mr. Unger's appeal is squarely based, as it should, "on the law of nuisance to argue that he did not need expert testimony to establish a prima facie case of liability against the Dwyers." [Db21]. Defendants disregard the substantive law governing this claim and, instead, seek to confuse this Court (as they did in the Chancery Division) by

rehashing a misapplication of the net opinion rule and muddying the waters by misplacing focus on an irrelevant prior proceeding.

All of Defendants' arguments miss the mark because they are not measured up against the three elements of a claim for nuisance: (1) the defendant **altered the natural flow of water**; (2) the defendant's interference with the natural flow of water was **unreasonable**; and (3) the defendant's unreasonable interference with the natural flow of water **caused injury** to the plaintiff. As set forth below, the record contains ample probative evidence on each of these three elements to, at the very least, create a genuine dispute of material fact that warrants reversal of the Chancery Division's grant of summary judgment and remand for trial.

A. Defendants altered the natural flow of water and created new channels resulting in water concentrating in a different part of Mr. Unger's property

The first element of a water nuisance claim is that the defendant "alter[ed], by artificial means, the natural discharge of the surface water from his land on that of his neighbor, by conducting it into new channels in unusual quantities to or on a particular part or parts of the latter's land." *McCullough v. Hartpence*, 141 N.J. Eq. 499, 501 (Ch. 1948); *Nathanson v. Wagner*, 118 N.J. Eq. 390, 393, 179 A. 466, 468 (Ch. 1935), *cited in Armstrong v. Francis Corp.*, 20 N.J. 320, 328 (1956). This first element can be satisfied where the

defendant "enhanced, accelerated, and concentrated storm water discharged" onto the plaintiff's property. *Sheppard v. Twp. of Frankford*, 261 N.J. Super. 5, 8 (App. Div. 1992). The record leaves no room for dispute that this element has been satisfied.

The January 2012 arbitration award that resolved the *Burke* Action required the Burkes to pay Mr. Unger the estimated cost for "the installation of four catch basis and connection piping to the brook." [Pa193]. Mr. Unger did, in fact, install "catch basins and additional PVC piping to collect water and direct it back into Canoe Brook." [Pa339 ¶ 13]. The new drainage system worked as designed; the pooling of water on Mr. Unger's property had been abated and the plants in Mr. Unger's backyard began to flourish again. [Pa339 ¶¶ 14-18]. Water that came down Defendants' driveway would flow eastward through their property and discharge in Canoe Brook behind Defendants' house, without causing any flooding on Mr. Unger's property. [Pa340 ¶ 29]. Over the decade after that drainage system was installed, there was no pooling of water into Mr. Unger's backyard emanating from his neighbor. [*Id.* ¶¶ 20-21]. Put simply, the nuisance resulting from the Burkes' actions had been fully abated and ceased causing any harm to Mr. Unger.

Nearly ten years later, Defendants have caused a completely distinct and unrelated nuisance. Around April 2021, Defendants installed the Belgian

block curb around their driveway with drainage gaps at the rear corners. [Pa48 ¶ 42; Db8]. After Defendants installed this new drainage system for their driveway, Mr. Unger discovered an unusual accumulation and pooling of water on his property, particularly after heavy rainstorms. [Pa339 ¶ 20]. Based on his personal observations, Mr. Unger certified:

> This type of pooling of water on my property had not occurred since I installed additional drainage on my property and it began in conjunction with modification the Dwyers made to their front yard and driveway, which included repaving their driveway and the installation of Belgian block curbing with an opening on the Southerly side of their driveway near the border with my property which funnels water towards, and onto, my property. [Pa339 ¶ 21].

Mr. Unger's unrebutted personal observation—corroborated by Defendants' expert[1]—prove that water drained through the rear northeast gap in the curb around Defendants' driveway, standing alone, is competent evidence that is sufficient to establish this first element of the water nuisance claim; no expert testimony is required. *Hopler v. Morris Hills Reg'l Dist.*, 45 N.J. Super. 409, 415 (App. Div. 1957).

Furthermore, it is undisputed that Defendants' new drainage system materially altered the flow of surface water. Originally, a railroad tie planter

[1] Defendants' own expert conceded that "**the stormwater runoff was directed toward the left-rear corner of the driveway**" [Pa290] because "the driveway sloped down from the front corner of the garage toward the left-rear corner of the driveway at a slope of 2.5% over a 40 foot span" [Pa287].

box located at the rear northeast corner of the driveway had blocked the flow of water from reaching Mr. Unger's property at that location, causing the water to instead flow through Defendants' backyard into the brook at the back end of their property. [Pa340 ¶ 29]. As Mr. Blair noted, survey work revealed that "a few railroad ties along the easterly side and flowing off the driveway at grade on the southerly end of the driveway together with the land contours indicate that most of the water ran southerly to the brook." [Pa365-366; *see* Pa369 (prior survey showing original flow path)]. This fact is undisputed, as Defendant Edward Dwyer admitted that, before modifying the driveway, he had observed water flow "[f]rom the top of the street down to the back of the driveway" and "go towards the back of [his] property." [Pa213 at 55:2–19].

Defendants removed the railroad tie planter box and installed a solid curb along the rear of the driveway that collected the surface water and directed the flow of that water to the drainage gap at the northeast corner, through which the water flowed onto a different part of Mr. Unger's property. As Mr. Blair explained: "A depressed portion of the curbing acts as a funnel directing the water toward the Unger property and blocks the water from its original course toward the brook." [Pa366]. This newly-created flow path is undisputed, as Defendants' own expert conceded that he "**agrees that a portion of the stormwater deposited along the front yard and driveway of**

10 Ford Lane would follow the path indicated by Mr. Blair." [Pa293 (emphasis added)].

To summarize, because Defendants had altered the pre-existing discharge of surface water by conducting it into new channels in unusual quantities and to a different part of Mr. Unger's property, the first element of the water nuisance claim has been established.

B. Defendants' interference with the flow of waters was unreasonable

The second element of a water nuisance claim is that the defendant's "interference with the flow of waters is unreasonable." *Armstrong v. Francis Corp.*, 20 N.J. 320, 327 (1956). "The issue of reasonableness or unreasonableness becomes a question of fact to be determined in each case upon a consideration of all the relevant circumstances, including such factors as the amount of harm caused, the foreseeability of the harm which results, the purpose or motive with which the possessor acted, and all other relevant matter." *Id.* at 330; *accord Hopler*, 45 N.J. Super. at 415.

Defendants make no attempt to address any of those factors necessary under the New Jersey Supreme Court's framework for assessing reasonableness. Instead, the only argument Defendants raise against this second element of the water nuisance claim is that "Plaintiff's experts did not identify any standard of care that they claim the Dwyers violated in connection

with the driveway" such as violations of municipal ordinances or codes. [Db32-33]. In a similar vein, Defendants contend that Plaintiffs' experts Mr. Blair and Mr. Hajjar offered mere "net opinions" because their reports and testimony did not assert that Defendants deviated from "generally-accepted surveying or engineering standards." [Db25].

This argument is a red herring. Mr. Unger does not assert some engineering malpractice claim against Mr. and Ms. Dwyer that would require deviation from professional standards of care, and he does not assert a claim for negligence *per se* based on violation of some municipal ordinance. Rather, Mr. Unger asserts a common-law nuisance claim, and well-settled law establishes that Defendants' conduct is assessed purely for **reasonableness**. *Armstrong*, 20 N.J. at 330. Because reasonableness is the standard by which Defendants' conduct is measured, Mr. Unger did not need to show that Defendants deviated from "generally-accepted surveying or engineering standards" to establish nuisance liability, and the absence of such content in the reports of Plaintiffs' experts Mr. Blair and Mr. Hajjar does not render their opinions as inadmissible "net opinions," contrary to Defendants' misguided view. [Db25].

Defendants' interference with the pre-existing flow of water was clearly not some inadvertent accident; they created drainage gaps at the rear corners of

the curb for the purpose of draining surface water off their driveway. The record indisputably demonstrates that Defendants designed their drainage system to create a new channel for water to flow and accumulate on Mr. Unger's property at a point that avoids the drainage system he had installed after the *Burke* Action was resolved. The question of whether Defendants' conduct meets the New Jersey Supreme Court's test for reasonableness under the circumstances should be remanded and adjudicated at trial.

C. Defendant's interference with the flow of waters caused harm

The third and final element of a water nuisance claim is that the defendant's unreasonable interference with the flow of water caused harm to the plaintiff. *Armstrong*, 20 N.J. at 327; *Hopler*, 45 N.J. Super. at 414.

There is no dispute that the accumulation of water in Mr. Unger's backyard (which was photographed [Pa344 ¶ 8, Pa377-380]) has resulted in significant harm, such as costs to install a new drainage system and deal with the death of many trees, shrubs, and other plants. [Pa340 ¶ 31]. Matt Weibel, Plaintiff's licensed tree expert, explained how the harm to those plants resulted from the flooding of Mr. Unger's backyard. [Pa309-310]. The record reflects the costs necessary to remediate the harm attributable to the flooding of Mr. Unger's backyard, including (a) an estimated $42,000 to install a new drainage system to address the overflow originating from Defendants' property [Pa341

¶ 38, Pa386]; (b) an estimated $64,245 to re-install all the plants in Mr. Unger's backyard that were killed from the accumulation of water [Pa341 ¶ 39, Pa388, Pa390-91]; (c) $4,654.18 that Mr. Unger has already paid to replace skip laurels that had died from the flooding [Pa342 ¶ 40, Pa393]; (d) an estimated $5,920 to replaced exterior lights and electrical wiring that were damaged as a result of the flooding [Pa342 ¶ 42, Pa395]; and (e) an estimated $18,725 to remove trees and branches that had been damaged [Pa342 ¶ 43, Pa397].

In their opposition brief on appeal, Defendants do not deny that the accumulation of water has caused harm to Mr. Unger. Rather, they erroneously contend that his nuisance claim requires Plaintiff to proffer "expert testimony on how, if at all, the Dwyers allegedly increased the amount of stormwater runoff from their driveway onto plaintiff's property" [Db25] and, by the same token, contend Mr. Unger needed to "apportion his damages between the preexisting water runoff that was the subject of the *Burke* Action and the alleged increase in water runoff that he attributed to the Dwyers" [Db38].

Defendants' positions are disingenuous because **there was no flooding in Mr. Unger's over the decade preceding Defendants' new drainage system.** As set forth above, Mr. Unger used the money he was awarded in the

Burke Action to install catch basins and PVC piping that had fully cured the flooding on his property resulting from the flow of surface water originating on Defendants' property. [Pa339-340 ¶¶ 13-18, 20-21, 29]. By removing the railroad tie planter box that had previously directed the flow of water into Canoe Brook and installing a new drainage system with a curb along the rear of the driveway that collected stormwater runoff from their driveway and directed it through a gap at the rear northeast corner, Defendants had used artificial means to alter the pre-existing discharge of surface water from their land onto that of Mr. Unger "by conducting it into new channels in unusual quantities to or on a particular part or parts of the latter's land." *McCullough*, 141 N.J. Eq. at 501. Put simply, **all of the harmful flooding on Mr. Unger's property was caused by *Defendants'* conduct because the flooding caused by the *Burke's* conduct had been fully cured for a decade.** There was no need for Mr. Unger's experts to differentiate the flooding caused by Defendants' conduct from prior flooding *because the prior flooding had completely ceased.*

D. The *Burke* Action does not give rise to res judicata or collateral estoppel

Trying to fit a square peg in a round hole, Defendants' arguments to knock out Mr. Unger's nuisance claim on theories of res judicata or collateral

estoppel arising from the *Burke* Action [Db34-38] fail due to material changes in facts, issues, and evidence.

It is well-settled that when "subsequent events materially alter the facts underlying a judgment, a party is not precluded from pursuing fresh litigation" by res judicata. *Town of Secaucus v. Hackensack Meadowlands Dev. Comm'n*, 267 N.J. Super. 361, 374 (App. Div. 1993). Put differently, "res judicata does not bar claims that are predicated on events that postdate the filing of the initial complaint." *Rippon v. Smigel*, 449 N.J. Super. 344, 368 (App. Div. 2017) (citation omitted). Likewise, "[c]ollateral estoppel will not be applied 'where, after the rendition of the judgment, events or conditions arise which create a new legal situation or alter the rights of the parties.'" *Kozlowski v. Smith*, 193 N.J. Super. 672, 675 (App. Div. 1984) (quoting *Washington Twp. v. Gould*, 39 N.J. 527, 533 (1963)).

The record is undisputed that the harm resulting from the Burkes' conduct was fully abated by the relief afforded by the arbitration award. [Pa339-340 ¶¶ 13-18, 20-21, 29]. There was no unusual accumulation of water on Mr. Unger's property for the following decade. [*Id.*] Subsequent events that postdated the *Burke* Action by almost ten years caused a material alteration in the facts: Defendants' modifications to the driveway in 2021.

Because Mr. Unger's nuisance claim is predicated exclusively on harm resulting from *Defendants'* 2021 modifications to the driveway (*i.e.*, not the *Burke's* modifications many years earlier), neither res judicata nor collateral estoppel are viable defenses would prevent reversal of summary judgment.

II. DEFENDANTS PROFFER NO EVIDENCE ENTITLING THEM TO SUMMARY JUDGMENT ON THE TRESPASS CLAIM

A. Mr. Unger owned both the land and the plants on which Mr. Dwyer trespassed.

Noting that the parcel of land abutting Ford Lane on which Plaintiff's plants were located fall within a "municipal right of way," Defendants argue that this land was owned by the Borough of Roseland and, therefore, not Plaintiff. [Db26-27]. Defendants are wrong.

To start, the Borough of Roseland has made clear through the enactment of an ordinance that it is *not* the owner of Ford Lane. Borough of Roseland Municipal Code § 7-40.3 (emphasis added) states: "**In accordance with the provisions of N.J.S.A. 39:5A-1**, the regulations of Subtitle 1, Title 39 of the Revised Statutes are hereby made applicable to the properties listed below."[2] The "[e]ntire length" of Ford Lane is identified as one of those properties. *Id.* § 7-40.3(b)(1). The statute referenced by the Borough of Roseland Municipal Code provides a mechanism for making a request that Title 39 (*i.e.*, New

[2] This law is accessible at https://ecode360.com/34521717#34521815.

Jersey's motor vehicle and traffic statutes) become applicable to "semipublic or private roads." N.J.S.A. 39:5A-1. By identifying the entirety of Ford Lane as a roadway for which Title 39 applies only through the invocation of N.J.S.A. 39:5A-1, the Borough of Roseland Municipal Code establishes, as a matter of law, that Ford Lane is *not* public property owned by the Borough of Roseland. Defendants' concession that Ford Lane and the surrounding land is a "municipal right of way" is consistent with the Borough of Roseland's acknowledgement that it merely holds an *easement* in this land that is owned by someone else.

Proving the title owner of record for a parcel of land is ordinarily a simple and straightforward task accomplished through two types of evidence: (1) recorded land records showing the chain of title and (2) a title survey of the land. Defendants conspicuously omitted from their summary judgment record both types of evidence. To be clear, Mr. Blair did not produce a title survey, land records, or proffer an expert opinion on title ownership of that parcel, and Defendants' argument to the contrary is based on a misreading of Mr. Blair's survey. [Db27 (citing Pa319)]. Mr. Blair's document titled "partial topographic survey" makes this unambiguously clear with a note stating: "THIS PLAN IS NOT INTENDED TO BE A TITLE SURVEY.

INFORMATION SHOWN HEREON IS FOR TOPOGRAPHICAL USE ONLY." [Pa319].

Defendants' reliance on Mr. Dwyer's testimony that his "belief" is that this parcel is not Mr. Unger's property [Db27 (citing Pa210 at 43:21-44:11)] is misplaced because Mr. Dwyer's *ipse dixit* belief is not based on any land records or title survey. In any event, Mr. Unger testified that the parcel *is* his property [Pa130-31 at 25:14-26:1], creating, at the very least, a genuine dispute of material fact.

Furthermore, Mr. Unger's trespass claim does not depend upon his ownership of the *land* on which his plants were located. There is no dispute that the plants, themselves, were Mr. Unger's property, as he had purchased, installed, and cultivated them. [Pa149 at 98:17-99:21; T61:1-5]. Because Mr. Unger indisputably owned the chattel property (*i.e.*, the plants) that Mr. Dwyer destroyed, any dispute over the ownership of the parcel of land is irrelevant to Plaintiff's claim for trespass to his plants.

B. There is no genuine dispute that Mr. Dwyer dropped the branches that killed Mr. Unger's plants

Defendants' effort to designate as inadmissible hearsay Mr. Unger's testimony that Mr. Dwyer admitted he had been the person who dropped the branches [Db26-29] makes a mountain out of molehill. Defendants do not dispute that any statements Mr. Dwyer made to Mr. Unger are a "party-

opponent's own statement" that are not excluded by the hearsay rule. [*See* Db28]. They also do not dispute that Mr. Dwyer, and no one else, was the person who placed branches in that area. [Db27]. Any quibbling over whether Mr. Dwyer had admitted to placing branches *on the plants* or merely admitted to placing branches *on the land* presents, at the very least, a genuine dispute of material fact that should be resolved at trial.

CONCLUSION

For the reasons set forth in Mr. Unger's appellate brief and above, this Court should reverse the order granting summary judgment to Defendants Edward and Sonali Dwyer and remand for further proceedings.

Dated: September 16, 2024

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