

SUPERIOR COURT of NEW JERSEY

Appellate Division

Docket No. A-002223-24

<p>SUSANNE LLC,</p> <p>Plaintiff-Respondent,</p> <p>v.</p> <p>1 HOWE STREET BAY HEAD,</p> <p>Defendant-Appellant.</p>	<p><u>Civil Action</u></p> <p>On Appeal From Orders Of The Superior Court of New Jersey, Chancery Division, Ocean County</p> <p>Docket No. OCN-C-228-22</p> <p>Sat Below: Therese A. Cunningham, P.J.Ch.</p>
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DEFENDANT-APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

This appeal challenges, and seeks to secure a reversal of, a Final Judgment that granted a mandatory injunction. The Judgment was issued by the Chancery Court, after a bench trial, which exclusively addressed the appropriate remedy for a borderline encroachment. (The parties own adjoining beach-front residences in Bay Head.)

The Court had granted partial summary judgment that a retaining wall constructed by the Defendant-Appellant (“1 Howe”) encroached over the common boundary line and onto Plaintiff-Respondent’s (“Susanne”) property by a matter of inches. Two (2) minor air right encroachments by a garage soffit and gutter were also identified.

Susanne sought an award of punitive damages and a mandatory injunction compelling the demolition and removal of the *de minimis* encroachments. [Susanne’s proofs contended the wall encroachment encompassed a triangular sliver over fifty-four (54) feet of the eighty (80) foot wall. The encroachment is approximately thirteen (13) inches at its widest point and gets smaller over the fifty-four (54) feet. The wall encroachment encompasses fifty-nine (59) square feet of land or .004436% of this thirteen thousand three hundred (13,000) square foot lot.]

The Final Judgment, which is the subject of this appeal, mandates the removal of the encroachments within ninety (90) days. [The claim for punitive damages was

involuntarily dismissed for want of proof at the end of Susanne's Case.] No provision was made for how the mandated injunctive relief would be implemented or supervised.

This injunctive relief was granted without any proof that Susanne was being harmed – much less irreparably harmed – by the encroachments. Susanne did not claim, nor did it establish a basis for, compensatory damages. It was established that the retaining wall encroachment was in an area of Susanne's property that was overgrown with dune vegetation and never accessed by Susanne or its invitees. Susanne's appraiser, whose opinions were accepted by the Court, concluded the wall encroachment had no deleterious impact upon the utility of the lot or its value. Succinctly, the wall encroachment is benign and undetectable without a survey.

Susanne's appraiser opined that a one-time payment of \$13,700 would be appropriate for an easement to permit the wall to remain. Nevertheless, the Court imposed the mandatory injunction without Susanne providing any proof this was reasonable and despite Susanne's concession that a modest payment for an easement was a viable remedy for the encroachment. [No proofs were presented to address any harm or inconvenience caused by the soffit and gutter overhangs or any value for an easement; but, the Court nevertheless mandated their removal.]

PROCEDURAL HISTORY¹

- Plaintiff's Complaint was filed on October 20, 2022. (Da003)
- Defendant filed an Answer on January 11, 2023. (Da008)
- Plaintiff filed an Amended Complaint on June 4, 2024. (Da011)
- Defendant filed an Answer to Amended Complaint on June 10, 2024.
(Da018)
- Plaintiff filed a Motion for Summary Judgment on July 15, 2024.
(Da024)
- An Order partially granting the Motion for Summary Judgment was entered on September 6, 2024. (Da027)
- The Trial was conducted on December 3, 2024 and December 4, 2024.
- The Judge issued an Oral Decision on February 25, 2025. (5T)
- A Final Judgment was entered on February 25, 2025. (Da001)
- Defendant filed a Notice of Appeal on March 27, 2025. (Da032)
- Defendant filed a Motion for Stay with the Chancery Court on March 6, 2025. (Da036)

¹ "1T" refers to the August 23, 2024 Transcript. "2T" refers to the September 6, 2024 Transcript. "3T" refers to the December 3, 2024 Transcript. "4T" refers to the December 4, 2024 Transcript. "5T" refers to the February 25, 2025 Transcript. "6T" refers to the March 28, 2025 Transcript.

- The Chancery Judge issued an Oral Decision Denying the Stay on March 28, 2025. (6T)
- An Order Denying the Stay was entered on March 28, 2025. (Da040)
- Defendant filed a Motion for Stay with the Appellate Division on April 11, 2025. (Da041)
- An Order Denying the Stay was issued by the Appellate Division on April 24, 2025. (Da047)
- Defendant filed a Motion to Extend Time for Performance of Post-Judgment Relief with the Chancery Court on May 30, 2025. (Da049)
- Defendant filed a Motion for Stay with the Supreme Court on June 3, 2025. (Da058)

FACTS

PARTIAL SUMMARY JUDGMENT

On September 6, 2024, the Judge issued an oral decision granting partial summary judgment that the retaining wall, soffit and gutter constitute trespasses. (2T12:18-13:8)

It was found that portions of the wall encroach a triangular sliver of land by approximately 13 inches and less, the soffit encroaches by approximately 4 inches and the gutter encroaches by approximately 9 inches. (2T7:10-18) In so holding, the Court relied upon Barberi v. Bochinsky, 483 N.J. Super. 186, 191 (App. Div. 1956); Ross v. Lowitz, 222 N.J. 494, 510 (2015) (2T11:1-25) Further, a mistake or negligence is not a defense. LaBruno v. Lawrence, 64 N.J. Super. 570, 576 (App. Div. 1960) (Id.)

The issue of remedy was held over for trial.

Interestingly, during argument the Judge raised the question whether the Doctrine of Relative Hardship is a Defense or Offense. (1T50:13-15)

THE TRIAL

A. BACKGROUND EVIDENCE

The parties own beach-front residential properties in Bay Head and share a common boundary line.

Susanne's home has been owned by its principals' family for many years, is used for vacationing by its principals (2 sisters) and is rented to third-parties for two (2) Summer months each year. (3T31:18-33:23)

The orientation of the properties owned by Susanne and 1 Howe is depicted in pictures moved into evidence. [Exhibits PTX-79 (Da061)]

1 Howe installed a pool in its rear yard (3T207:23) and a masonry retaining wall along the common boundary line. (3T180:16-25) During the construction of the wall, one of the principals of Susanne was present and asked 1 Howe's principal to make a portion of the wall higher for more privacy and he accommodated this request. (3T82:20-83:6) Decorative stone was installed on the wall face on Susanne's side. (Da062) 1 Howe's principal testified this was also done to accommodate Susanne. (4T179:5-11); and Susanne's principal testified she did not recall this. (3T96:13-18)

A portion of the work on the wall construction was performed from Susanne's property. This was witnessed by Susanne's principal, who did not object. (3T96:5-12)

Susanne's rear yard is overgrown with dune vegetation up to the common boundary line with a pathway cleared down the middle of the rear yard that provides access to the ocean. (3T60:16-24; 3T69:14-70:4) This is shown in an aerial picture of the Properties. (Da061) Both principals of Susanne confirmed that nobody (not

them nor their families nor renters) access, or use, the area of the Property that is near the retaining wall. (3T60:22-61:14; 3T69:14-70:15; 3T98:1-15)

After the wall construction was completed, Susanne commissioned a survey, which disclosed encroachments by the wall, as well as a garage soffit and gutter. (Da060) 1 Howe was notified and had its surveyor review the situation; and, while the existence of encroachments was confirmed, a different conclusion was reached as to the exact location of the boundary line. (3T159:11-160:7)

Susanne presented testimony by an appraiser (Robert Gagliano) who opined:

1) The wall encroachment involves a triangular area of Susanne's property over the course of 54 feet. The area encompasses 59 square feet. (4T88:12-19)

2) He testified he did not know exactly how he calculated the area of the encroachment. He conceded he calculated the square footage as if it were a rectangle and the actual number of square feet was less than 59 square feet. (4T110:3-25)

3) He ascribed a value (one-time payment) for an easement for the wall encroachment of \$13,700. (4T101:2)

4) He also opined that a permanent six (6) foot wide easement for maintenance of the wall was required and he ascribed a value of \$92,100 to this easement. (4T90:14-16; 4T101:3-13)

5) He made this determination about the requirement for a permanent access maintenance easement despite his candid admission he does not know what

type of maintenance work would need to be done because “I don’t have any knowledge on masonry.” (4T112:4-21)

Mr. Gagliano importantly also conceded that neither easement impaired, or adversely affected, Susanne’s ability to use its property and had no adverse financial impact upon the value of the property. (4T116:21-117:10) He nevertheless ascribed a value to the easements because “you must pay something.” (4T117:14-118:11)

1 Howe presented an appraiser (Jon Brody) who opined the value of an easement for the wall encroachment was \$1.00 because it neither impaired the use or value of Susanne’s property. (4T156:24-157:7) In this regard, Mr. Brody testified that he has extensive experience in appraising beach properties in Bay Head and knows that current regulations prevent the installation of improvements in the dune area behind the home. (Id.) Thus, Mr. Brody agreed with Mr. Gagliano that the sliver of property covered by the wall was of no use; however, Mr. Brody understandably concluded this easement had no value. (4T157:16-24)

Mr. Brody also opined there was no need for a maintenance easement since he was unaware of any proof that this type of wall would require maintenance. (4T151:15-20)

Testimony was provided that, on two (2) occasions, workers in the employ of 1 Howe came over the wall to remove vegetation growing up the wall, which they said was poison ivy. (3T59:11-25; 3T101:12-102:19) After this, 1 Howe instructed

the maintenance people to exclusively pick the growth off the wall from the top and 1 Howe's principal confirmed there is no need to ever again go onto Susanne's property to eliminate the weed growth. (4T180:8-181:3)

B. CHALLENGED EVIDENCE

The Court permitted the introduction of substantial evidence concerning the pool and decking installed in 1 Howe's rear yard. This evidence was consistently the subject of objection. It was not relevant to the trial issue of what remedy was warranted for the encroachment trespasses. The Court consistently admitted the evidence, stating it was relevant to Susanne's punitive damage claim.

Susanne called 1 Howe's Engineer (Charles Lindstrom) and solicited information concerning the pool and decking/patio. An objection was lodged that these improvements were unrelated to the remedy appropriate for the trespass by the wall. (3T124:1-25) The Court permitted the testimony subject to weight and because it was represented to be related to the punitive damage claim. (3T127:1-131:7) This evidence included Mr. Lindstrom's testimony that 1 Howe was advised to not install a concrete pool deck. (3T156:1-24)

Susanne called a Planner (Peter Steck) to address the improvements installed by 1 Howe and their compliance with zoning. (4T9:2-10) 1 Howe objected that zoning was germane to the issues and the compliance of 1 Howe's rear yard improvements was not relevant. (4T10:24-11:21) The testimony was permitted as

being related to punitive damages. (4T12:12-13:2; 4T15:18-24) Mr. Steck concluded the pool deck does not comply with the zoning and wall encroaches. (4T21:24-22:19)

Mr. Steck did, however, concede the wall is a retaining wall, and retains the rear yard of 1 Howe which is at a higher elevation. (4T28:14-24) [1 Howe's principal, who has considerable experience in construction, confirmed a removal of the wall would precipitate a collapse of 1 Howe's rear yard – but, the Judge would not permit the testimony. (4T182:3-185:18)]

C. BAR OF TESTIMONY BY CONTRACTOR

1 Howe sought to present testimony by a contractor concerning the work and cost to demolish the encroaching section of the retaining wall and rebuild it on 1 Howe's side of the redetermined boundary line. This contractor had presented an Estimate (Da054), and the Court required a Rule 104 Hearing to determine the admissibility of his opinions.

The hearing was conducted and the Judge barred his testimony, concluding it would be a "net opinion." (4T73:4-81:16)

D. RULING ON MOTION TO DISMISS PUNITIVE DAMAGE CLAIM

When Susanne rested, 1 Howe moved to dismiss Susanne's punitive damage claim. (4T:133) The Judge dismissed the claim with prejudice concluding there was

no proof to support the claim and holding with respect to the evidence on the zoning violations:

(a) The zoning violations have nothing to do with the trespass. (4T147:2-17)

(b) The zoning violations are matters between 1 Howe and Bay Head. (4T148:3-4)

E. THE DECISION FOR FINAL JUDGMENT

On February 25, 2025, the Judge issued an oral decision. (5T)

It was again noted the sole issue to be decided was the proper remedy for the trespass. (5T6:13-17) Susanne seeks removal of the encroachments and 1 Howe defends based upon the Doctrine of Relative Hardship.² (5T6:18-20)

The Judge then serially recounted the testimony by the witnesses with no qualitative analysis. (5T7:1) except the Judge:

1) Found Susanne's principals, Ms. Lyons and Ms. Sinden, to be credible. (5T9:5; 5T10:11-12)

2) Found Mr. Gagliano's analysis of value of Susanne's lot to be credible. (5T14:9-11) Similarly, his testimony and opinions on the value of the easement to be reasonable and credible. (5T15:13-15)

² This is not entirely accurate because Susanne presented an easement as an alternate remedy and 1 Howe asserted that there was no proof that the imposition of a mandatory injunction was either reasonable or warranted.

3) Found Mr. Brody to not be credible in his conclusion Susanne could not improve its rear yard, because of the improvements in 1 Howe's yard.³ (5T16:1-7)

The Judge then made the following pertinent findings:

1) Susanne has owned the property for decades, using it for vacations and rental two (2) months each year. (5T17:2-6)

2) 1 Howe's property abuts the northern border of Susanne's property. (5T17:7-17)

3) In March 2021, 1 Howe commenced construction including the wall. (5T17:18-19)

4) A survey discloses encroachments: the retaining wall encroaches approximately 12 inches at its widest point, a gutter overhangs approximately 9 inches and a soffit overhangs by approximately 4 inches. (5T18:7-13)

5) The improvements vary from the plans approved by Bay Head – instead of lawn, a concrete paver deck is installed by the pool. (5T18:15-23)

6) The pool contractor and engineer both advised 1 Howe to not install a concrete pool deck, and this advice was disregarded. (5T18:24-19:10)

³ No proofs were presented to establish how, or why, 1 Howe was able to install improvements.

7) Bay Head issued two (2) violation notices: One cited the wall encroachment. (5T19:11-14) The violation Notice said it could only be resolved by removal or agreement. (5T20:3-9)

8) 1 Howe's workers accessed Susanne's property on two (2) occasions to remove vegetation. (5T20:10-20)

9) An encroachment is an intrusion without right or possession or an invasion onto another's land. Bier v. Waldman, 102 N.J.L. 368, 370 (E&A 1926); La Salle v. La Pointe, 14 N.J. 476, 482 (1954) (5T20:21-21:1)

10) Susanne is not entitled to injunctive relief as a matter of course, it is discretionary and depends upon the circumstances of the case. Sczymczak v. Laferrara, 280 N.J. Super. 223, 231 (App. Div. 1995); Gilpin v. Jacob Ellis Realities, Inc., 47 N.J. Super. 26, 29 (App. Div. 1957). The Court may consider the Doctrine of Relative Hardship, which may preclude an injunction. Sczymczak, 229 citing to Gilpin at 34 (5T21:21-23:4)

11) The Court does not find Susanne has a commercial venture. (5T23:7-9)

12) There is no showing that the removal and relocation of the improvements would be of considerable magnitude to 1 Howe. The only evidence is costs to build by the pool based upon a permit. (5T23:8-25) 1 Howe did not present evidence on the cost to build the wall nor provide "credible estimate" of the cost to remove and relocate. (5T24:1-4)

13) No testimony was provided about what the removal would entail and, **absent such evidence from the defendant**, the Court cannot consider the issue of Relative Hardship. (5T24:5-13) Similarly, there was no evidence of the cost to adjust the gutter and soffit. (5T24:16-19)

14) The Court agreed with 1 Howe that the improvements on its property had nothing to do with the trespass remedy. (5T24:20-25:2) But, nevertheless determined those improvements cannot equitably be used to establish hardship due to their existence. (5T25:3-13)

15) 1 Howe has pointed-out there is no evidence to establish how the retaining wall is to be removed and re-built. However, 1 Howe failed to supply these proofs on methodology or cost. (5T25:14-26:3)

16) As to the issue of hardship or cost, 1 Howe's expert valued the easement, which was an alternative remedy, at \$1. He cited no authority for the proposition that nothing could be done with the dune. (5T26:4-16)⁴

⁴ This ignored the fact that Susanne's expert testified the wall did not interfere with the use that could be put to this area. (4T116:21-117:10) It also ignored the fact that a principal of Susanne testified this area has been overgrown with dune vegetation and never used for decades. (3T60:22-61:15) It also overlooks the fact that Mr. Brody testified he based his opinion on experience in dealing with Bay Head ocean-front properties and nobody asked for a cite to the pertinent law or regulation.

17) Mr. Brody's testimony that no maintenance was required was without basis. (5T26:13-15)⁵

18) The law requires that a beneficiary of an easement has a duty to repair and maintain. Lake Lookover Property Owners Association v. Olsen, 348 N.J. Super. 53, 67 (App. Div. 2002) (5T27:1-7)

19) Mr. Brody's position on maintenance is belied by the two (2) occasions when workers went over the wall. The Court finds that any easement would have to include some access for maintenance. Hence, Mr. Gagliano's testimony on this point is more credible. (5T27:8-22)

20) The Judge recalculated the access easement – but did this by way of illustration because “there's absolutely nothing before the Court to suggest that defendant's cost of removal of the wall and replacement on his property would grossly outweigh that number or any other number for – for that matter.” (5T27:23-28:13)

⁵ Mr. Brody testified he was aware of no proof maintenance for this type of wall was required. (4T151:15-20) Ironically, Mr. Gagliano's position that a permanent maintenance easement is required was accepted by the Court despite the fact that – given his conceded lack of knowledge about the care and maintenance of concrete walls – his opinion was without any legitimate basis and accordingly utter speculation.

21) The Court simply has no evidence to determine the cost to 1 Howe would grossly outweigh the value of the property right lost. (5T28:14-17)⁶

22) It cannot be concluded removal is not the proper remedy without proper evidence of 1 Howe's hardship. (5T28:17-21)

23) The removal and relocation of the encroachments is required. (5T28:21-29:2)

24) 1 Howe has 90 days for these tasks and must be afforded reasonable access to Susanne's property. (5T29:3-5)

25) There is no basis for awarding Susanne damages or counsel fees. (5T29:6-12)

26) When asked about the 90 days, the Judge responded: "Truthfully, the reason that I – that I thought 90 days way – was reasonable, was, you know, in part, because of weather-related issues, and, you know, in consideration of where the wall is located, but I would assume that that could always be adjusted, you know, by necessity." (5T30:2-13)

⁶ This ignores the acceptance of Mr. Gagliano's opinions that the encroachment did not reduce the value of Susanne's property.

LEGAL ARGUMENT

POINT I: THE COURT IMPROPERLY IMPOSED THE MANDATORY INJUNCTION REQUIRING REMOVAL OF THE ENCROACHMENTS AND THE ERROR MUST BE REVERSED. (Da001)

THE STANDARD FOR GRANTING MANDATORY INJUNCTIONS

Mandatory injunctions are extraordinary remedies that are sparingly granted. Gilpin v. Jacob Ellis Realities, 47 N.J. Super. 26 (App. Div. 1957) In order for a situation to be eligible for the imposition of an injunction, the claimant cannot have an adequate alternate remedy available. Green v. Piper, 80 N.J. Eq. 288 (Ch. 1912) When an adequate alternate remedy at law is available, a mandatory injunction cannot be granted. Gilpin, 47 N.J. Super. at 29. The grant of a mandatory injunction is thusly subject to a searching review to assure there is no viable alternate remedy available. Sunbeam Corp. v. Windsor-Fifth Avenue, 14 N.J. 222, 232-33 (1954) Hence, a claimant seeking mandatory injunctive relief must satisfy a “particularly heavy burden.” Guaman v. Velez, 421 N.J. Super. 239, 247 (App. Div. 2011); Rinaldo v. RLR Inv. LLC., 387 N.J. Super. 387, 396 (App. Div. 2006)

The grant of mandatory injunction is a discretionary act, since no party is ever entitled to an injunction as a matter of course. Gilpin, 47 N.J. Super. at 30. When considering an application for an injunction, the Court must consider and weigh several factors, including: (i) The adequacy of an injunction as compared to other remedies; (ii) A comparison of the hardship to the plaintiff if relief is denied and the

hardship to the plaintiff if the relief is granted. Verna v. Links at Valley Brook, 371 N.J. Super. 77, 89 (App. Div. 2004); Sheppard v. Twp. of Frankford, 261 N.J. Super. 5 (App. Div. 1992)

In Mannillo v. Gorski, 54 N.J. 378, 389 (1969), the Supreme Court instructed that, when dealing with a claim for removal of an encroachment⁷, the Court must consider whether the removal is either impractical or expensive; and, if the removal is impractical or can only be accomplished with great hardship, the encroachment must be endured upon payment of fair value.

In this instance – as is hereinafter discussed in more detail – the Judge acknowledged the existence of many of these standards but nevertheless ignored them. Significantly, the Judge granted this mandatory injunction despite Susanne’s concession that an easement was an adequate remedy to redress the wall encroachment⁸, since it was a *de minimis* trespass that neither impaired the use of Susanne’s property nor its value. Similarly, the Judge eliminated the weighing of hardships based upon her erroneous conclusion that 1 Howe could only establish hardship by establishing the cost of compliance with an injunction and her

⁷ There, the encroachment was fifteen (15) inches.

⁸ The Judge also required removal of the soffit and gutter encroachments despite the fact they were of so little consequence to Susanne that no proofs were introduced with regard to them.

conclusion that the impact upon 1 Howe's rear yard improvements (a pool and pool deck) could not be considered.

THE BURDEN OF PERSUASION (FORMERLY BURDEN OF PROOF)

Given the fact that an injunction is an extraordinary remedy, the burden of establishing an entitlement to the issuance of an injunction is upon the claimant and must be established by clear and convincing evidence. Van Name v. Federal Deposit Insurance Corp., 130 N.J. Eq. 433 (Ch. 1941) aff'd 132 N.J. Eq. 302 (E&A 1942)

Prior to issuing a permanent final injunction, the Court must determine that the applicant has established liability, the need for injunctive relief, and the appropriateness of such relief on a balancing of the equities. Rinaldo, supra; Sheppard, supra. This has been characterized as a "particularly heavy burden." Davidovich v. Israel Ice Skating Federation, 446 N.J. Super. 127, 160-61 (App. Div. 2016) In order to secure a permanent injunction, the claimant must prove it is both necessary and reasonable. Verna, supra.

Here, the Judge imposed no burden upon Susanne to establish its request for removal of the encroachments was reasonable or the only way to eliminate irreparable harm. Susanne was simply required to show the encroachments existed.

Susanne offered no proof on what was required to implement the relief it demanded.⁹ The Judge concluded, that since there was no proof of the cost to be incurred to remove and replace the encroachments¹⁰, she was obligated to grant the mandatory injunction. (5T28:14-29:2) Furthermore, this insistence that a defendant must prove the cost to remove an encroachment is prohibitively high, in order to avoid imposition of a mandatory injunction, ignores the Supreme Court mandate in Mannillo, supra that the Court should consider costs or the practicality of removing the encroachment.

THE APPLICATION OF THE DOCTRINE OF RELATIVE HARDSHIP.

The Doctrine of Relative Hardship has been applied in cases involving requests for mandatory injunctions to remove encroachments or covenant violations, since 1957 when Gilpin was decided.

Interestingly, an earlier case cited with approval and adopted in Gilpin is compellingly similar to this case. That case is Rossi v. Sierchio, 30 N.J. Super. 575

⁹ When the Court blocked the contractor testimony, this not only blocked proof of the cost to do the work, it also prevented proof concerning the precise work required to demolish and rebuild. Similarly, testimony by 1 Howe's principal, who had extensive construction experience, about the effect of knocking down the wall was not allowed to provide testimony on the impracticality of removing the wall. (4T183:14-185:18)

¹⁰ It is to be remembered that the Judge blocked testimony by the Contractor who provided an estimate of the cost to remove and rebuild the encroaching section of the wall.

(App. Div. 1954) There, a mandatory injunction was sought to compel the removal of a garage that was erected in such a manner as to obstruct a right of way. The right of way was not used by the plaintiff and the damage caused by the obstruction could have probably been compensated by nominal damages; but, this was not an alternative presented by the plaintiff who exclusively sought an injunction. The Appellate Court declined an opportunity to analyze whether there was an irreparable injury because it was apparent there was no injury. (30 N.J. Super. at 581) When a violation of a right is *de minimis*, it is deemed to be harmless. (Id. at 582) When there is no injury, injunctive relief is denied. (Id. at 583) The equitable view is that an injunction cannot be granted when it would impose injuries upon the defendant that greatly outweigh the injuries to plaintiff in letting the obstruction/encroachment stand.

In Gilpin, the Appellate Court relied upon the Doctrine and refused to require the removal of an improvement that violated a valid restrictive covenant. The actual cost of implementing an injunction was indirectly established. [The cost to remove (\$11,500) versus the cost to rebuild (\$1,000) were considered.] The Appellate Division held this Doctrine requires a balancing to determine whether the harm caused by the grant of the injunction is disproportionate to the damage to the plaintiff resulting from the violation. Importantly, the Appellate Division did not hold that proof of the cost of compliance was the *sine qua non* for imposition of the Doctrine.

The next case was Sautto v. Edenboro Apartments, 84 N.J. Super. 461 (App. Div. 1964) cert den. 43 N.J. 353 (1964). There, the Trial Court found an apartment building violated the zoning code and entered a mandatory injunction compelling the demolition of the building. The Appellate Division reversed, concluding the remedy was disproportionately harsh and unwarranted under the Doctrine of Relative Hardship. The trial court had mandated the demolition of a high-rise apartment building that violated zoning requirement. Proofs were taken that dealt with funds expended prior to the suit and a valuation established by the FHA; but, these proofs dealt with estoppel and waste claims. The Appellate Division reversed based upon the patently disproportionate benefit/detriment derived from the grant and rejection of the mandatory injunction.

The next case is Szymczak v. LaFerrera, 280 N.J. Super 223 (App. Div. 1995). There, a house was built 19 feet into the adjoining neighbor's lot, which was an undersized vacant lot held for speculation. The Trial Court directed demolition of the encroachment. The Appellate Division reversed concluding this remedy was grossly disproportionate to the harm caused by the encroachment — even though there was no proof of the value of the damage to the plaintiff; and, the Appellate Division actually remanded for a trial on damages.

Here, as in Szymczak, the disproportionate nature of the injunction is patent. Here, in fact, the situation is more compelling because it was established that the

encroachments did not have any adverse impact upon either the utility or value of Susanne's Property. Here, the Judge concluded that 1 Howe had the affirmative burden of proving the applicability of the Doctrine of Relative Hardship – a burden that she concluded could only be established by proving the cost of complying with the demand to remove the encroachments.¹¹ The Judge then concluded that the absence of proofs on the costs for the removal of the encroachments left her with no alternative other than to grant the mandatory injunction. Thus, Susanne was given the mandatory injunctive relief without satisfying the “particularly heavy burden” of establishing that this was reasonable, and accorded this relief notwithstanding the availability of an alternate remedy – the easement.

In this instance, the Doctrine of Relative Hardship was available to nullify Susanne's demand that the encroachment be removed. Admittedly, the Chancery Court determined that a basis for the imposition of this Doctrine was not established – essentially determining that 1 Howe needed to establish the dollar cost of removing the encroachments was disproportionately greater than the harm imposed. Given the fact that Susanne was not damaged by the encroachments, any material imposition upon 1 Howe *per se* represented a disproportionate imposition. In a real sense, the principle underlying *Res Ipsa Loquitur* is applicable by analogy. Here, we have 1

¹¹ This ruling places the burden of persuasion upon 1 Howe with no precedent to establish this is an affirmative defense as opposed to an element of proof to be satisfied by a plaintiff.

Howe's rear yard at a higher elevation that is retained and kept from collapsing into Susanne's lot by a masonry retaining wall. It is obvious that demolishing 54 feet of this wall would involve the establishment of a temporary structure to shore-up the area, fifty-four (54) feet of concrete wall (and footings) would have to be demolished, new footings would have to be poured, fifty-four (54) feet of new wall would have to be constructed inches away from the prior location, and the shoring would have to be removed. Thus, it is obvious that implementation of the injunction involves substantial work and ancillary work given the improvements in 1 Howe's yard. Thus, it is patent that compliance with the demanded injunction would involve a substantial and disproportionate imposition – particularly given Susanne's concession that the encroachment had no adverse impact and an easement for the encroachment had a value of \$13,700.

As noted above, no financial data on the cost of compliance was required in order for a determination to be made that the injunctive relief was creating far more harm than the cure being implemented. Similarly, no case supports the Court's conclusion that proof of such costs are the *sine qua non* for application of the Doctrine of Relative Hardship; and, Mannillo expressly holds that the Court is to consider the cost or impracticality of compliance with the demanded injunctive relief. The small sliver of Susanne's property was unusable, never used and of no value. The fact that this area, which was overgrown with dune vegetation was not

used, was confirmed by Susanne's principals, who both testified they never access that portion of the property. In fact, the only portion of this area of the Property between the house and the ocean that is used is a path that is cleared in the vegetation. (See, Da061) The absence of any value to the triangular sliver of encroachment was confirmed by Susanne's Appraiser, who testified the encroachment by the wall did not adversely affect the utility of Susanne's Property and did not have any financial impact upon the value of the Property.

It is of key importance that Susanne had no compensatory damages, as the Judge specifically found. However, it was nevertheless erroneously concluded that absence of financial data of the cost of compliance with a mandatory injunction, which was solely for 1 Howe to produce, left the Court with no alternative other than to grant the injunction. It is submitted, however, that the record established the fact that removal of an encroachment that causes no harm and is indiscernible without a survey (perhaps several surveys) does not warrant the mandated demolition and construction work — and obvious expenses of relocating approximately fifty-four (54) feet of retaining wall a matter of inches.

It warrants mention that the Trial Court also mandated the removal of the portion of the soffit and gutter; while acknowledging there was absolutely no proof concerning how, or to what extent, this encroachment on the air rights harmed Susanne. Thus, this unsupported ruling is, by definition, arbitrary.

In addition, the Judge improperly referenced, and relied upon, the evidence admitted for the limited purpose of Susanne's punitive damage claim. Specifically, in the Decision, the Judge acknowledged the evidence concerning the pool and other rear yard improvements had nothing to do with the encroachment trespass remedy. It was nevertheless inexplicably determined the reference to same could not equitably be used to establish hardship. (5T24:20-25:13) This, however, ignores the law which requires a comparison, and balancing, of hardships. (See, e.g. Verna, *supra.* and Sheppard, *supra.*

Furthermore, the Court concluded Susanne was not a commercial enterprise – apparently prompted by Judge Clapp's comment in Gilpin that the Doctrine of Relative Hardship was particularly applicable to commercial enterprises. Here, the Judge relied upon the fact the home was originally acquired by the principals' parents and still used by the principals for vacationing. However, Susanne is a Limited Liability Company, which is established to avoid personal liability, Kuhn v. Tumminelli, 366 N.J. Super. 431, 439 (App. Div. 2004) cert. den. 180 N.J. 354 (2004), is rented for most of Summer each year¹² and the financial activities are reported on Federal and State Tax Returns filed each year. This unmistakably makes Susanne a commercial enterprise and the finding to the contrary is unsupported.

¹² Judicial notice can be taken that July and August are the prime rental months at the Jersey Shore.

THE EASEMENT¹³

The existence of the Easement, as an alternate remedy, was ignored by the Court. The competing proofs were analyzed with the proofs presented by Susanne's appraiser being accepted and the proofs presented by 1 Howe's appraiser being rejected. However, these proofs were in effect treated as if they were offered as proof of damages and then ignored in the remedy determination.

The Easement proofs, however, were affirmatively offered by Susanne as an alternate remedy, which the appraiser agreed could be granted without having any impact upon Susanne's use of its Property and without adversely impacting its value. This is significant, since the easement for the wall could, and should, have been imposed instead of the imposition of an injunction, as recognized by long-established equitable principles.

THE AWARD OF THE INJUNCTION PRESENTED AN ABUSE OF DISCRETION.

Given the fact that the issuance of a mandatory injunction is a discretionary act, appellate review is based upon an abuse of discretion standard. Sheppard, 261 N.J. Super. 9-10. This standard provides for a reversal when the challenged decision departs from established policies or rests upon an impermissible basis. Customers Bank v. Reitnour Inv. Props, 453 N.J. Super. 338 (App. Div. 2018)

¹³ The validity of the findings, with respect to the easements, is addressed *infra* at Point II.

In this instance, the errors detailed above demonstrate the fact that the issuance of the injunction here represents an abuse of discretion.

SUMMARY

To recap, the fact the imposition of this mandatory injunction constitutes reversible errors is demonstrated by:

- (i) The existence of an alternate remedy at law: The Easement.
- (ii) The failure to subject Susanne to the “particularly heavy burden” of establishing it was being irreparably harmed and this could only be redressed by the imposition of a mandatory injunction.
- (iii) The imposition of the burden of persuasion upon 1 Howe to establish the cost of compliance or suffer the imposition of the mandatory removal injunction while not imposing any burden upon Susanne to establish how the injunction would be implemented or how it was reasonable (not impractical) under the circumstances, or how the balancing of hardships should be struck in its favor.
- (iv) The failure to balance and consider the fact that the removal of the encroachments is obviously a very substantial undertaking as compared to the *de minimis* nature of the encroachments that did not limit Susanne’s use of its land nor reduce its value.
- (v) The mandate that the encroachments to air space, by the gutter and soffit, had to be removed without any proofs being presented concerning them.

POINT II: THE COURT'S ANALYSIS OF THE EASEMENT PROOF WAS PATENTLY FLAWED. (5T15:16-16:19; 5T26:4-28:13)

It is acknowledged that an Appellate Court customarily accepts, and is bound by, the factual determinations in a non-jury case. Seidman v. Clifton Savings Bank, 205 N.J. 150, 169 (2011) The exception to this general rule is a situation where the findings are sufficiently inconsistent with the competent evidence as to offend the interests of justice. (Id.)

Here, the Judge's findings with respect to the easements are so clearly wide of the mark that same cannot justly be permitted to stand. Specifically:

1) Susanne's appraiser testified that the wall encroachment had no negative impact on the use or value of Susanne's Property. Nevertheless, he ascribed a value of \$13,700 upon an Easement to continue this encroachment because: "You must pay something."

2) 1 Howe's appraiser placed a \$1.00 value upon this Easement because it had no deleterious impact.

3) The Judge accepted the valuation by Susanne's appraiser and rejected 1 Howe's appraiser even though they both agreed there was no adverse impact by the wall encroachment. The Judge erroneously seized upon, and rejected, 1 Howe's appraiser's testimony that in addition to not using the rear yard, Susanne could not install improvements under current regulations; and, concluded this was not credible because: (i) 1 Howe had installed improvements in its rear yard; and (ii) The

appraiser did not identify by citation the law or regulation that prohibited improvements. This rejection was arbitrary and otherwise erroneous because: (i) It involved speculation that 1 Howe's lot did not enjoy grandfathering or other immunity that was not available to Susanne; and (ii) The appraiser provided a foundation for his opinion based upon his large number of beach property appraisals in Bay Head; and (iii) He was never asked to provide a cite for the applicable statute, ordinance or regulation.

4) Susanne's appraiser testified a permanent maintenance easement that was six (6) feet wide, with an ascribed value of over \$90,000 was required, so that 1 Howe could maintain the wall. When pressed for a basis, the appraiser was forced to concede that he had none since he had no knowledge of what sort of (if any) maintenance was required for walls of this type.

5) 1 Howe's appraiser testified that he disagreed with the assertion a maintenance easement was appropriate, since he saw no proof that maintenance of the wall was required.

6) The Judge again adopted Susanne's proffer, and noted the visits by 1 Howe's workers established a need for maintenance of the wall. However, the visits by the workers was to pull poison ivy that was growing up and over the wall and not to maintain the wall. Further, it was established that the elimination of the growing

vines could – and in the future exclusively would – be eliminated by cutting them back from the top of the wall.

Thus, the Court erroneously failed to consider the \$1 Easement when performing the Relative Hardship analysis, deemed a permanent maintenance easement to be required and failed to impose the \$1 Easement instead of the mandatory injunction.

POINT III: THE COURT IMPROPERLY BARRED THE ENTIRETY OF THE CONTRACTOR'S PROPOSED TESTIMONY (4T76:11-81:17) AND TESTIMONY BY 1 HOWE'S PRINCIPAL (4T181:7-185:18)

1 Howe attempted to present testimony by a Contractor about an Estimate he provided for the cost to demolish and rebuild the wall (Da063) as well as what construction activities would be involved in doing this job. The Judge convened a Rule 104 Hearing due to Susanne's objections and concluded:

(a) The contractor was qualified to provide the proffered testimony. (4T73:19-74:20)

(b) The contractor's opinion was a net opinion; and, therefore, he was barred from testifying. (4T76:11-81:17)

The barring of the testimony about the amounts estimated is not challenged on this appeal. However, the extension of this bar to preclude testimony about what the implementation of the injunction would entail is challenged. The Judge focused her ruling entirely on cost and ignored the importance of factual information on the

practicality of implementing the injunction, which was within the knowledge and experience of this contractor. Correa v. Maggiore, 196 N.J. Super. 273, 282 (App. Div. 1984)

This error was repeated when the Court would not permit 1 Howe's principal to testify about the effect of removing the retaining wall even though his construction background was established. (4T181:7-185:18) This should have been permitted. As to qualification, a party's opinion about his own property is admissible – even without expert knowledge. Lane v. Oil Delivery Inc., 216 N.J. Super. 579, 585-86 (App. Div. 1987) When, as here, a party has qualifications, he may offer lay opinion. State v. Kittrell, 279 N.J. Super. 225, 235-36 (App. Div. 1995)

The excluded testimony was relevant and should have been admitted. It would have established the magnitude of the hardship involved in compliance with the demanded injunction.

CONCLUSION

For the reasons stated, the mandatory injunction should be vacated and the \$1.00 Easement should be established in its place.

BRAY & BRAY, LLC
Attorneys for Defendant-Appellant

By: /s/ PETER R. BRAY
PETER R. BRAY

Dated: June 11, 2025

SUSANNE, LLC,

Plaintiff-Respondent,

v.

1 HOWE STREET BAY HEAD,
LLC,

Defendant-Appellant.

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2223-24

CIVIL ACTION

On Appeal From the Superior Court of
New Jersey, Chancery Division, Ocean
County

Docket No. OCN-C-228-22

Sat Below:
The Honorable Therese A.
Cunningham, P.J. Ch.

BRIEF OF PLAINTIFF-RESPONDENT SUSANNE, LLC

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PRELIMINARY STATEMENT

Plaintiff commenced this action for trespass arising out of Defendant's construction of improvements that encroached on Plaintiff's property. Prior to trial, in granting Plaintiff's motion for summary judgment, the Trial Court held that a retaining wall and cap, a garage gutter, a garage soffit, and a wooden fence constructed by Defendant on Plaintiff's property constituted trespass. Thus, the issue at trial was straightforward: determine the appropriate remedy to impose as a result of Defendant's trespass. Defendant is not appealing the Court's order granting summary judgment on trespass. The sole issue on this appeal is the remedy imposed by the Court as a result of Defendant's trespass.

Plaintiff sought an injunction requiring removal of the encroachments. Defendant argued that, under the doctrine of relative hardships, the Trial Court should allow the encroachments to remain, grant an easement in favor of Defendant, and award Plaintiff one dollar (\$1.00) for the easement. Plaintiff countered that if a mandatory injunction did not issue, the harm to Plaintiff's property if the encroachments remained would be an amount no less than \$105,800. Following a two-day bench trial during which the Court heard testimony from eight witnesses and considered thirty-nine exhibits entered into evidence, the Trial Court, in its exercise of discretion, ordered the encroachments to be removed.

Critically, while Defendant invoked the doctrine of relative hardship, the Trial Court found that Defendant failed to present any competent or credible evidence at trial regarding the cost or hardship to remove the encroachments—the very foundation of its “relative hardship” defense. In short, the Court was simply left with no evidence or factual basis on which to apply the doctrine.

Throughout its brief, Defendant complains that the burden was placed on it, rather than Plaintiff, to prove the costs or hardship it would incur if it were ordered to remove the encroachments. Yet that is precisely what the doctrine of relative hardships, invoked by Defendant at trial, requires. Defendant raised the doctrine but faced a complete failure of proof on this issue at trial. On appeal, Defendant is still unable to point to any competent evidence presented at trial concerning the alleged hardship it would suffer as a result of the mandatory injunction.

The Trial Court did not abuse its discretion in ordering removal of the encroachments. To the contrary, the Trial Court’s decision, based upon well-established law and factual determinations which are entitled to substantial deference, is supported by adequate, substantial, and credible evidence. There is no basis to reverse its well-reasoned conclusion that a mandatory injunction was the proper remedy to impose in this case. Accordingly, this Court should

affirm the Trial Court's February 25, 2025 Order and Judgment in its entirety and deny Defendant's appeal.

PROCEDURAL HISTORY

Plaintiff commenced this action for trespass by filing its Complaint against Defendant on October 20, 2022. (Da003). Defendant filed its Answer on January 11, 2023. (Da008). Plaintiff filed an Amended Complaint on June 4, 2024. (Da011). Defendant filed its Answer to the Amended Complaint on June 10, 2024. (Da018).

By Order entered September 6, 2024, the Chancery Court granted Plaintiff's motion for summary judgment on Plaintiff's claim of trespass against Defendant, arising from multiple encroachments, including a wall, gutter, soffit and fence that Defendant constructed on Plaintiff's property. (Da027). Trial was conducted on December 3, 2024 and December 4, 2024. (*See generally* 3T, 4T).¹ On February 25, 2025, following a two-day bench trial, the Trial Court entered an Order and Final Judgment ordering Defendant to remove the encroachments from Plaintiff's property within 90 days. (Da001) On March 27,

¹ Plaintiff adopts the transcript naming convention from Defendant's appellate brief, (*see* Db3, n. 1), such that "3T" refers to the Transcript from the first day of Trial, dated December 3, 2024; "4T" refers to the Transcript from the second day of Trial, dated December 4, 2024; and "5T" refers to the Transcript of Decision, dated February 25, 2025.

2025, Defendant filed a Notice of Appeal of the Trial Court's February 25, 2025 Order and Final Judgment. (Da032).

STATEMENT OF FACTS

Plaintiff Susanne, LLC owns and has continuously owned since 1963 the residential property located at 507 East Avenue, Bay Head, New Jersey, legally described as Block 65, Lot 4 on the tax maps for the Borough of Bay Head ("Plaintiff's Property"). (3T 31:8–16). Plaintiff's members have used Plaintiff's Property as a family vacation home since 1963. (3T 32:1–12, 79:18–21).

Defendant purchased the adjacent property at 1 Howe Street, Bay Head, New Jersey (Block 65, Lots 5 and 5.01) in late 2017 ("Defendant's Property"). (3T 62:22–23). The northern border of Plaintiff's Property immediately adjoins and abuts the southern border of Defendant's Property. (Da061). At the time Defendant purchased Defendant's Property in 2017, physical boundary markers including railroad ties and Plaintiff's wooden fence clearly delineated the property line. (3T 39:23–40:21, 43:16–44:19). The original wooden fence was located entirely within Plaintiff's property line and had served as a property boundary marker. (3T 43:18–44:15).

In March 2021, Defendant commenced construction activities that would ultimately result in multiple encroachments built on Plaintiff's Property. (3T

38:9–14). During construction, Defendant removed Plaintiff’s existing wooden fence without permission, accessed Plaintiff’s Property without permission or notice, and used Plaintiff’s Property during construction without permission. (3T 188:3–6; Pa003). Defendant constructed multiple structures that encroach onto Plaintiff’s Property, including: “a retaining wall and cap that encroaches by 1.2 to 1.3 feet, a garage gutter which overhangs the property line by .8 to .9 feet, a garage soffit that overhangs by .3 feet and a wooden fence at the ocean side of the property that encroaches by .5 to .6 feet.” (5T 18:7–15). Defendant also removed vegetation from Plaintiff’s Property without permission and created an unauthorized access/maintenance path on Plaintiff’s Property. (3T 49:11–12).

The wall and related structures, as built, significantly differ from the approved plans submitted to and approved by the Borough of Bay Head. (4T 21:19–23:3). Specifically, while the plans showed that there was to be an area of lawn south of the pool to the proposed wall, Defendant instead constructed a concrete paver deck that deviated from zoning setback requirements. (4T 21:19–23:3). Two of Defendant’s own professional contractors, Robert Kniffin (pool contractor) and Charles Lindstrom (engineer), specifically advised Defendant against pouring concrete from the pool on his property to the wall on

Plaintiff's Property. (3T 217:23–218:5). Defendant disregarded this professional advice. (3T 217:23–218:5).

On August 18, 2022, Defendant's own surveying firm, Lindstrom, Diessner & Carr, P.C., confirmed that the wall encroached onto Plaintiff's Property. (Pa004; 3T 164:15–165:21). The Borough of Bay Head subsequently issued two Notices of Violation to Defendant. (Pa002; Pa005). The September 7, 2023 Notice cited the wall encroachment and improper stormwater drainage and concluded that Defendant was in violation of the Bay Head Land Use Code because of the encroachments and because the roof drainage systems cascades to a downspout that discharged directly onto Plaintiff's Property. (Pa006). The Borough further concluded that Defendant failed to submit an as-built survey, which was necessary to ensure that what was built complied with the approved plot plans. (Pa006). The April 20, 2024 Notice of Violation addressed the deficiencies in the as-built survey that was finally submitted by Defendant. (Pa002). The Zoning Officer found the survey to be defective in that it did not identify all dimensions and elevations shown on the approved plot plan, information that was necessary to make a direct comparison of what was approved versus what was constructed. (Pa002). Defendant still has not submitted an as-built survey that complies with the Borough's requirements.

After having knowledge of and confirmation that the wall encroached on Plaintiff's Property, Defendant and its agents continued to trespass onto Plaintiff's Property, including two documented instances in 2023 where workers came from Defendant's Property, around the wall, and entered onto Plaintiff's Property without permission to remove vegetation, despite being specifically instructed to leave. (3T 87:17–88:11). The construction and encroachments have prevented Plaintiff from using and enjoying portions of its property, specifically the area where the wall encroaches and the surrounding area affected by Defendant's unauthorized access path and vegetation removal. (4T 168:3–169:18).

At trial, evidence was presented concerning Defendant's estimated cost to build the wall, as reflected in Defendant's own permit applications, establishing an approximate cost of \$20,000–\$21,200. (4T 62:5–16). Despite claiming hardship regarding potential removal costs, Defendant presented no credible evidence of actual payments made for the original wall construction, with Edward Kloss (Defendant's principal) testifying only to some obscure "credit" arrangement with the contractor. (3T 180:18–181:5).

At trial, Plaintiff offered the testimony of Robert Gagliano, a real estate appraiser, concerning the impact on the market value of Plaintiff's Property as a result of Defendant's encroachments. He determined that the impact of the

encroachments on Plaintiff's Property was at least \$105,800 and that the encroachments would have a negative impact on the value of Plaintiff's Property. (4T 103:2–11). The Court found Mr. Gagliano's testimony to be "reasonable and credible." (5T 15:13–15).

In contrast, Defendant presented testimony from an appraiser, Jon Brody, whom the Court found not credible. Mr. Brody testified that he agreed that Mr. Gagliano had set forth a reasonable conclusion regarding his valuation of the wall encroachment easement. (4T 150:18–22). Nevertheless, Mr. Brody opined that the value of the easement should the encroachments remain was one dollar (\$1.00). (4T 151:2–4). Unlike Mr. Gagliano's testimony, the Trial Court found that Mr. Brody's testimony "lack[ed] credibility." (5T 16:5).

Plaintiff also offered the testimony of Peter Steck, a zoning and planning expert, who testified that the as-built surveys differed from the zoning permits submitted for approval prior to construction in multiple ways, including that the approved plans showed an area of grass between the edge of the pool and the proposed wall near the property line, rather than concrete decking from the pool to the wall. (4T 17:13–22, 20:9–25). Mr. Steck concluded that the construction on Defendant's Property did "not comply with the plans that were filed to construct the wall, the patio and the pool." (4T 21:19–22:5). In addition, Mr.

Steck testified that the construction of the improvements violated the zoning setback requirements. (4T 22:6–19).

Following a two-day bench trial, during which the Court heard testimony from eight witnesses and considered thirty-nine exhibits entered into evidence, on February 25, 2025, the Trial Judge rendered an oral opinion and accompanying order concerning the proper remedy to impose regarding Defendant’s trespass. The Court recognized that the parties disputed the appropriate remedy noting that “Plaintiff seeks removal of the encroachments, and [D]efendant asked the Court to deny that relief by applying the Doctrine of Relative Hardship.” (5T 6:18–20). The Court found that Doctrine to be inapplicable.

Specifically, the Court acknowledged that the Doctrine is most appropriately considered where commercial, rather than personal, property is at stake, and found that Plaintiff’s Property was not commercial and has been a treasured family vacation for generations. (5T 23:1–13). Next, the Court found that “there’s no credible evidence before the Court to show that removal and relocation of the encroaching section of the wall or other encroachments would be of ‘considerable magnitude,’ to the defendant.” (5T 23:13–17 (emphasis added)). In fact, “Defendant did not provide any proof of the actual cost of the building of the wall, nor did he provide any credible estimate of the removal and

relocation of the encroaching part of the wall on his own property.” (5T 24:1–4 (emphasis added)). Indeed, Defendant provided “no testimony or evidence regarding what the actual removal would entail.” (5T 24:5–6 (emphasis added)). In short, “[t]he Court [was] simply left without any of that evidence to apply the doctrine.” (5T 24:17–19).

The Court’s determination that Defendant failed to present any evidence concerning relative hardship was based, in part, on the fact that it did not consider the proffered opinion of Andrew Rusin, Defendant’s proposed construction expert, concerning the purported costs of removing the encroachment. Specifically, during a hearing at trial pursuant to N.J.R.E. 104, Defendant called Mr. Rusin to testify as to the costs Defendant would incur in removing the encroachments. Plaintiff moved to exclude Mr. Rusin’s opinion on the basis that the opinion was not credible and offered no assistance to the Court regarding the alleged relative hardship to remedy the encroachment. (4T 68:19–69:4). The Trial Court granted Plaintiff’s motion and held that Mr. Rusin’s expert report and testimony was “of no assistance at all” and that “the Court can neither accept his report or testimony into evidence . . . as to the issues that he was intending to render an opinion.” (4T 81:13–15 (emphasis added)).

In determining that the Doctrine of Relative Hardship was inapplicable, the Trial Court further found that “any difficulty that the defendant might

experience with relocating the wall itself was compounded by the defendant's failure to adhere to the original plan submitted to the Borough of Bay Head for approval." (5T 25:9–13 (emphasis added)). Specifically, the Trial Court found that "the retaining wall and related structures as built [] differ significantly from the approved plan submitted to and approved by the Borough of Bay Head." (5T 18:15–18). The Trial Court therefore found that removal of the encroachments was the appropriate remedy. (5T 28:21–29:2). The Trial Court ordered that the encroachments be removed within 90 days—i.e., by May 26, 2025. (5T 31:8–14; Da001). Defendant failed to comply with that Court-ordered deadline, and to date, the encroaching structures remain of Plaintiff's Property.²

LEGAL STANDARD

The decision whether to grant permanent injunctive relief "is normally left to the sound discretion of the trial court." Sheppard v. Twp. of Frankford, 261 N.J. Super. 5, 9 (App. Div. 1992). When a court determines whether to grant permanent injunctive relief after the development of a complete trial record, "the court must make findings of fact based on the evidence presented at trial and

² Defendant moved for a stay of the Order and Final Judgment, which was denied by the Trial Court, the Appellate Division, and the Supreme Court. (Pa013). Additionally, after Plaintiff moved for sanctions and to enforce litigant's rights, the Trial Court imposed per diem sanctions on Defendant for its failure to comply with the February 25, 2025 Order and remove the encroachments within 90 days. (Pa014).

then determine whether the applicant has established the liability of the other party, the need for injunctive relief, and the appropriateness of such relief on a balancing of equities.” Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 397 (App. Div. 2006) (citing Verna v. The Links at Valleybrook Neighborhood Ass’n, 371 N.J. Super. 77, 89 (App. Div. 2004)).

When an appellate court reviews a trial court’s discretionary decision to enter a mandatory injunction, the appellate court applies the abuse of discretion standard of review. Sheppard, 261 N.J. Super. at 9–10 (“trial court resolution of any application for [permanent injunctive relief] is always subject to appellate review on the issue of mistaken exercise of that discretion.”).

Moreover, “[w]hen reviewing the result of a bench trial, [an appellate court does] not make factual findings.” State in Int. of D.M., 451 N.J. Super. 415, 424 (App. Div. 2017), aff’d, 238 N.J. 2 (2019). An appellate court “must give deference to those findings of the trial judge which are substantially influenced by his or her opportunity to hear and see the witnesses and have the ‘feel’ of the case, which [the appellate court does] not enjoy upon appellate review.” Ibid. (quoting State ex rel. S.B., 333 N.J. Super. 236, 241 (App. Div. 2000)). Indeed, on appeal, the appellate court does “not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence” because the appellate court is “not in a good position to judge credibility and

ordinarily should not make new credibility findings.” Ibid. (quoting Mountain Hill, L.L.C. v. Twp. of Middletown, 399 N.J. Super. 486, 498 (App. Div. 2008)). As to expert witness testimony, appellate courts “apply [a] deferential approach to a trial court’s decision to admit expert testimony, reviewing it against an abuse of discretion standard.” Townsend v. Pierre, 221 N.J. 36, 53 (2015) (citing Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371–72 (2011)).

It is for this reason that the “scope of appellate review of a trial court’s fact-finding function is limited.” Cesare v. Cesare, 154 N.J. 394, 411 (1998). “[F]indings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence.” Ibid. (citing Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)). “[A]n appellate court should not disturb the ‘factual findings and legal conclusions of the trial judge unless [it is] convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.’” Ibid. (quoting Rova Farms, 65 N.J. at 484).

Finally, appellate courts do not consider “documentary material which was not before the trial court and is improperly before [the appellate court].” Middle Dep’t Inspection Agency v. Home Ins. Co., 154 N.J. Super. 49, 56 (App.

Div. 1977); see also Rule 2:5-4(a) (“The record on appeal shall consist of all papers on file in the court or courts . . . below”).

ARGUMENT

I. The Trial Court Properly Concluded that the Doctrine of Relative Hardships Does Not Apply in this Case

Defendant argues that the Trial Court erred in determining that the Doctrine of Relative Hardship does not apply in this case. Each argument raised by Defendant lacks merit and is addressed in turn below.

A. The Trial Court Considered All Relevant Factors Related to the Doctrine of Relative Hardships

Contrary to Defendant’s argument, the Trial Court did not ignore relevant considerations when she determined that imposition of a mandatory injunction was an appropriate remedy. Rather, after consideration of all relevant factors, the Trial Court correctly determined that a mandatory injunction was the appropriate remedy.

The doctrine of relative hardships is an equitable doctrine that may, in very limited circumstances, allow an encroachment to remain where the hardship to the encroaching party from removal would be grossly disproportionate to the hardship caused by the encroachment. Szymczak v. Laferrara, 280 N.J. Super. 223, 229–30 (App. Div. 1995). The burden of establishing the extraordinary circumstances in which the doctrine of relative

hardships is applied to negate the default remedy of removal rests entirely on the encroaching party. Id. at 230–31.

The doctrine of relative hardships does not ordinarily apply in residential settings or when personal interests are involved. Gilpin v. Jacob Ellis Realities, 47 N.J. Super. 26, 34–35 (App. Div. 1957). Gilpin involved two commercial properties, one of which was a movie theater. Gilpin stands for the proposition that the doctrine has been held to be “particularly applicable to a case . . . dealing with two commercial properties [where] personal interests, or the pleasure that may be secured in the enjoyment of an equitable servitude of a certain type, is in no way involved.” Ibid.

Other courts that have applied the doctrine have found it “highly pertinent” that the case involved commercial, rather than private, interests. Szymczak, 280 N.J. Super. at 231. In Szymczak, in applying the doctrine and denying injunctive relief, the court found it “highly pertinent” that the property which was being encroached upon was a vacant lot being held as an investment opportunity for future development, and “never, for instance as a potential personal retirement or vacation site.” Ibid.

Plaintiff’s property is neither vacant, being held for future development, nor commercial in nature. (3T at 31:8–32-16, 79:14–23). In fact, it is the opposite—a private beachfront vacation home that has been enjoyed by

Plaintiff’s members and their families for decades. (3T at 31:8–32-16, 79:14–23). As such, this doctrine is not applicable to the circumstances of this case.

The doctrine of relative hardships “does not call for the mere balancing of conveniences.” Gilpin, 47 N.J. at 34. A “mere disproportion between the harm to defendant and the benefit to the plaintiff will not warrant a refusal of [injunctive] relief,” particularly where it is the sole reason offered by the defendant, “unless the disproportion is gross or of considerable magnitude.” Ibid.

The circumstances in this case are a far cry from those in Szymczak, where removal of the encroachment would have resulted in the complete destruction of defendant’s home, 280 N.J. Super. at 35, or those in Sautto v. Edenboro Apartments, wherein an injunction would have resulted in the total or substantial demolition of a 64-unit high-rise building, 84 N.J. Super. 461 (App. Div. 1964). Here, the Trial Court correctly determined held there was “no credible evidence before the Court to show that removal and relocation of the encroaching section of the wall or other encroachments would be of ‘considerable magnitude’ to the defendant.” (3T 23:13–17).

Defendant’s reliance on Mannillo v. Gorski, 54 N.J. 378 (1969) is misplaced. Mannillo concerned a property owner’s claim of adverse possession (not an issue in the case sub judice) and is entirely distinguishable. There,

defendant claimed title to land of an adjoining property owner on which defendant mistakenly built improvements. The Court held that “any entry and possession for the required time which is exclusive, continuous, uninterrupted, visible and notorious, even though under mistaken claim of title, is sufficient to support a claim of title by adverse possession.” Id. at 386–87. Contrary to Defendant’s assertion, Mannillo does not stand for the proposition that “the encroachment must be endured.” (Db13). Rather, the Mannillo Court’s discussion confirms that courts look to the particular facts and circumstances of a case in balancing hardships to determine whether an encroachment should be removed, and in doing so, courts should consider whether removal could be accomplished “only with great hardship” and “great expense” as well as the damage in allowing the encroachment to remain. Mannillo, 54 N.J. at 389.

The record demonstrates that the Trial Court expressly considered these factors in rendering its decision. As to costs related to removal of the encroachments, the Trial Court found the doctrine inapplicable because Defendant failed to “provide any credible estimate of the removal and relocation of the encroaching part of the wall.” (5T 24:2–4). As to whether removal of the encroachments was impractical, the Trial Court found “there was no testimony or evidence regarding what the actual removal would entail.” (5T 24:5–6). Based on this complete failure of proof, the Trial Court held “[a]bsent defendant

presenting any such evidence to the Court in response to the plaintiff's evidence to show the estimated cost of building the entire wall, the Court cannot consider such arguments as even remotely persuasive on the issue of relative hardship as to relocating a portion of it." (5T 24:6–12; see also id. 25:19–22 (“Defendant failed to put forth any credible evidence of the cost or difficulty of relocating the encroaching part of the wall to his own property.”)). It is simply not the case that the Court failed to consider relevant factors, but rather that Defendant failed to present any credible evidence concerning the expense or hardship of removing the encroachments.

Defendant's reliance on Rossi v. Sierchio, 30 N.J. Super. 575 (App. Div. 1954) is also misplaced. That case involved an easement/right of way plaintiff had over defendant's property for ingress and egress by motor vehicle. The defendant in Rossi built a garage on the right of way, but provided a doorway in the garage. In denying injunctive relief, which would have required the demolition of the garage, the court held that plaintiff still had access by motor vehicle through the back doorway; thus, there was no damage to plaintiff's right of way as a result of construction of the garage. Id. at 581. The facts and circumstances of Rossi are entirely distinguishable from the case at bar.

Here, we have a permanent and continuous trespass on Plaintiff's Property. Both this Court and the United States Supreme Court have recognized the

individual's legal right to exclude others from private property. Dolan v. City of Tigard, 512 U.S. 374, 384 (1994). The harm from a continuous trespass is presumed, as the harm is not just to the land upon which the encroachment was unlawfully built, but "in the loss of the individual's right to exclude others from his or her property." Feld v. Feld, 783 F. Supp. 2d 76, 78 (D. D.C. 2011); see also Jacque v. Steenberg Homes, 563 N.W.2d 154, 159–60 (Wisc. 1997) ("the law recognizes that actual harm occurs in every trespass . . . the individual has a strong interest in excluding trespassers from her or her land."); Rhodes v. Harwood, 544 P.2d 147, 159 (Ore. 1975) ("The common law action of trespass could be maintained without proof of any actual damage. From every direct entry upon the soil of another, the law infers some damage." (quoting Prosser, Law of Torts 66, § 13 (4th ed. 1971))).

In addition, Plaintiff proved at trial that the harm it would incur if an injunction did not issue was no less than \$105,800, through a witness that the Trial Court found "reasonable and credible." (5T 15:13–15).

Accordingly, the Trial Court considered all relevant factors in concluding that the doctrine of relative hardships did not apply and a mandatory injunction should issue.

B. Plaintiff Presented Credible Evidence that the Encroachments Impaired the Value of Plaintiff's Property and the Use of the Property

Defendant's contention that the encroachments "neither impaired the use of Plaintiff's property nor its value" is, again, inconsistent with the trial record.³ As to the use of Plaintiff's Property, the Court rejected the argument that the land where the encroachments were located was unusable, finding that Defendant had made "substantial improvements . . . in the same area next door." (5T 26:12–13). As to the encroachments impairing the value of Plaintiff's Property, Plaintiff's real estate appraisal expert testified that the encroachments would have a negative impact on the value of Plaintiff's Property. (5T 15:11–12). The Trial Judge found that testimony to be "reasonable and credible." (5T 15:14–15).

Taken together, the Trial Court considered all relevant factors in making its determination that the Doctrine of Relative Hardship did not apply and that removal of the encroachments was the appropriate remedy.

³ While Defendant attempts to classify the encroachments as "a de minimis trespass," (Db18), no such conclusion was ever reached by the Trial Court. In fact, quite the opposite is true. The Trial Judge credited the testimony of Mr. Gagliano who testified that the total square footage of the encroachment was 59 square feet. (5T 28:15–21). Accordingly, the Court should reject Defendant's attempt to invoke a legal term of art that is inconsistent with the Trial Court decision and unsupported by the record.

C. Defendant Makes No Serious Attempt to Argue that Plaintiff's Property is Commercial

The Trial Court began its discussion concerning the applicability of the Doctrine of Relative Hardship with the uncontroversial observation that “[a]pplication of the doctrine is more appropriate to consider ‘where commercial rather than person interests are involved.’” (5T 23:1–4 (citing Gilpin, 47 N.J. Super. at 34)). The Court then found that Plaintiff’s Property does not “constitute[] a commercial venture,” and rather that it “has been a treasured family property for more than six decades.” (5T 23:7–13).

Defendant makes no serious attempt to rebut the Trial Court’s finding or conclusion of law, claiming only that Plaintiff should be a considered a commercial entity because it is an LLC whose financial activities are reported on tax returns. (Db20). Unsurprisingly, Defendant cites no case law support for the proposition that Plaintiff’s status as an LLC impacts whether Plaintiff’s Property is residential or commercial.

The only other argument offered in support of its assertion that Plaintiff’s Property is commercial is that Plaintiff’s Property is rented out for a few months in the summer.⁴ That argument was expressly considered and rejected by the

⁴ Without any legal support, Defendant declares that the Court can take judicial notice that July and August “are the prime rental months at the Jersey Shore.” (Db20, n. 12). Defendant makes no effort to substantiate this claim pursuant to N.J.R.E. 201, and it should thus be ignored.

Trial Court. (5T 23:9–13 (“Although it is true and undisputed that the property is rented for a couple of months during the year presently, it’s also true that the property has been a treasured family property for more than six decades.”)). There is no reason to disturb the Trial Court’s finding that the Doctrine of Relative Hardship is more appropriate to consider in the commercial context or that Plaintiff’s Property is not commercial.

D. The Cases Cited by Defendant Do Not Support its Argument that the Trial Court Misapplied the Doctrine of Relative Hardship

A large section of Defendant’s brief is dedicated to citing to cases in which courts have declined to impose a mandatory injunction based on the Doctrine of Relative Hardship in property line disputes. (Db15–17). While Defendant’s precise argument in this section of its brief is difficult to decipher—no effort is made to distinguish the facts and findings in this action from the facts and findings in those cases—it appears to argue by citation to these cases that the Trial Court misapplied the doctrine. However, the cases on which Defendant relies present inapposite facts and are distinguishable.

In Gilpin, the court denied a request to award a mandatory injunction in large part because the two properties at issue were commercial properties and “personal interests, or the pleasure that may be secured in the enjoyment of an equitable servitude of a certain type, is in no way involved.” 47 N.J. Super. at 35. Here, by contrast, Plaintiff’s Property is not commercial, and rather “has

been a treasured family property for more than six decades.” (5T 23:7–13). In addition, the issue in Gilpin involved a portion of a building defendant erected on its own land that violated a restrictive covenant with respect to the height of the building and certain air rights. Gilpin, 47 N.J. Super at 28. It did not involve a building or structure that was erected on plaintiff’s adjoining property, which is the case here.

In Sautto, an apartment building was constructed in violation of a zoning ordinance which provided that “a ten-foot minimum side yard was required for all proposed buildings in the apartment district.” 84 N.J. Super. at 465–66. The residential homeowner plaintiffs commenced an action in lieu of prerogative writ to enforce the side yard restrictions. Id. at 468–69. In contrast to the case at bar, it did not involve a structure built on an adjoining landowner’s property. Ultimately, the court applied the Doctrine of Relative Hardship to hold that enforcing the ordinance would have required the total or substantial demolition of a 64-unit high-rise building, which the Appellate Division found to be “economic waste” and an “unconscionable hardship.” Id. at 477. Here, by contrast, the mandatory injunction requires removal of a portion of a wall, soffit, and gutter. Moreover, in Sautto, there was no actual trespass onto the plaintiff’s property; rather, defendant had merely violated a zoning ordinance requiring

apartment buildings to have a ten-foot side yard. As the Trial Court correctly found in this action, Defendant's encroachments constitute an actual trespass.

Another case cited by Defendant, Szymczak, 280 N.J. Super. 223, likewise involved the complete demolition of a home that encroached on neighboring undeveloped vacant property with no personal interest implicated. The Szymczak Court found it "highly pertinent" to the case before it that the neighboring property was a vacant lot held as an investment opportunity and "never for instance, as a potential personal retirement or vacation site." Id. at 231. Here, of course, we are not dealing with the demolition of a home or a high-rise building, as the Trial Court correctly noted, (5T 22:2–23:6), but the removal of a wall. And the encroachment is not upon a vacant undeveloped lot held for speculative development but rather is Plaintiff's personal family vacation residence.

The Trial Court correctly held there was "no credible evidence before the Court to show that removal and relocation of the encroaching section of the wall or other encroachments would be of 'considerable magnitude,' to the defendant." (5T 23:13–17). In fact, "Defendant did not provide any proof of the actual cost of the building of the wall, nor did he provide any credible estimate of the removal and relocation of the encroaching part of the wall on his own property." (5T 24:1–4 (emphasis added)). Indeed, Defendant provided "no testimony or

evidence regarding what the actual removal would entail.” (5T 24:5–6). In short, “[t]he Court [was] simply left without any of that evidence to apply the doctrine.” (5T 24:17–19).

Despite Defendant’s complete failure of proof regarding the costs it would incur to remove the encroachments, Defendant seeks, for the first time on appeal, to present new arguments in its brief concerning difficulty it would allegedly encounter if it complies with the mandatory injunction. Defendant argues, without any citation to the record because nowhere in the record is this remotely even alluded to, that compliance with the Trial Court’s Order would involve demolishing the wall at different elevations, would require shoring up during construction, and new footings at various distances. (Db18). These new arguments, raised for the first time on appeal in a legal brief without any citation to the record before the Trial Court, must be completely disregarded by the Court. See, e.g., State v. Legette, 227 N.J. 460, 467 (2017) (declining to consider argument raised “for the first time on appeal” (citing State v. Robinson, 200 N.J. 1, 20 (2009))).

II. Plaintiff Satisfied its Burden of Establishing that it is Entitled to an Injunction

Defendant claims that the Trial Court imposed no burden on Plaintiff to establish that its request for a mandatory injunction was reasonable. (Db14). Not so. Plaintiff offered substantial credible proof at trial regarding the

reasonableness of the requested relief. Specifically, Plaintiff offered proof concerning the impact of the encroachments on the value of its Property and the harm that would incur if a mandatory injunction did not issue. Defendant, by contrast, failed to present any evidence concerning the costs or hardship associated with removing the encroachments.

Unbelievably, Defendant claims that Plaintiff was required to offer proof concerning costs that Defendant would incur to remove the encroachments. (Db15). That is nonsensical. In applying the Doctrine of Relative Hardship, a court is to determine whether “the economic benefit derivable by the plaintiff [if an injunction is granted] is grossly less than the expense which would thereby be put upon the defendant in carrying out the injunction.” Gilpin, 47 N.J. Super. 26 at 31. Pursuant to the doctrine, Defendant was required to submit proof of the expense or hardship it would incur as a result of the injunction. Plaintiff satisfied its burden by offering proof of the harm it would incur if the injunction did not issue. Defendant, by contrast, offered no proof concerning costs it would incur to remove the encroachments. (5T 24:2–6 (Defendant failed to “provide any credible estimate of the removal and relocation of the encroaching part of the wall . . . there was no testimony or evidence regarding what the actual removal would entail.”)). It strains logic to argue that Plaintiff should be

responsible for establishing costs that Defendant would incur were it ordered to remove the encroachments.

Moreover, the trial record makes it clear that Defendant understood it had a burden to present evidence concerning the costs of removal of the encroachments. Indeed, Defendant attempted to call Mr. Rusin to give testimony concerning a cost estimate to remove the encroachments. However, the Trial Court granted Plaintiff's motion to exclude the testimony of Mr. Rusin holding that his expert report and testimony was "of no assistance at all" and that "the Court can neither accept his report or testimony into evidence . . . as to the issues that he was intending to render an opinion." (4T 81:13–15).

Defendant's argument that Plaintiff has a burden to present evidence concerning costs that Defendant would incur in removing the encroachments is contrary to the law and must be rejected.

III. At All Times Plaintiff Sought a Mandatory Injunction Remedy

Defendant's contention that Plaintiff "conce[ded] that an easement was an adequate remedy to redress the wall encroachment," (Db14), is simply untrue. While Plaintiff offered testimony from a real estate appraisal expert to determine the impact of an easement on the value of Plaintiff's Property—and to rebut Defendant's appraisal expert's valuation of a potential easement—at all times since the inception of this action, Plaintiff sought injunctive relief pursuant to

which the encroachments would be removed. (Da011, “Am. Complaint” ¶ 1 (“This is an action for trespass and injunctive relief to compel Defendant to vacate Plaintiff’s property and remove Defendant’s newly constructed stone wall that unlawfully encroaches on Plaintiff’s property.”) (emphasis added); *id.* at Wherefore Clause (“Plaintiff demand judgment against Defendant as follows: For an Order compelling Defendant to vacate Plaintiff’s Property and remove all encroachments upon Plaintiff’s Property.”)). At no time prior to or during trial did Plaintiff concede that an easement was an appropriate remedy.

IV. The Alternate Remedy of an Easement was Expressly Considered and Rejected by the Trial Court

Defendant argues that the existence of an easement as an alternate remedy was ignored by the Trial Court.⁵ (Db20). A review of the Trial Court’s February 25, 2025 oral decision renders that argument completely meritless.

At the outset of the February 2025 oral opinion, the Trial Court framed exactly what was to be decided at trial:

“The Court having previously found via summary judgment that the defendant was entitled to summary judgment as a matter of law on the issue of trespass, the sole issue before the Court was the issue of the proper remedy. Plaintiff seeks removal of the encroachments, and defendant asked the Court to deny that relief by

⁵ Confusingly, Defendant first argues that the Court ignored the possibility of an easement remedy, but then concedes, in the very next sentence, that “competing proofs [regarding the value of an easement] were analyzed” by the Court. (Db20).

applying the Doctrine of Relative Hardship. Both parties presented expert evidence on the value of an easement for the encroaching wall.”

(5T 6:13–22 (emphasis added)).

Prior to rendering her judgment, the Trial Judge again summarized the parties’ conflicting positions concerning the appropriate remedy:

“Plaintiff is seeking to have the encroachments removed as its remedy, which essentially amounts to an injunction to stop the continuing trespass. Defendant argues that the Court must consider the Doctrine of Relative Hardship when considering such a remedy, and can consider relief less burdensome to the defendant such as the granting of an easement. Of course, plaintiff and defendant differ greatly in their assessment of the value of such an easement. Plaintiff’s expert, having assessed a total value of \$105,000 and defendant’s expert at \$1.”

(5T 21:5–15 (emphasis added)).

After consideration of the appraisal experts’ competing assessments of the easements and other evidence presented, the Trial Court held that “there’s absolutely nothing before the Court to suggest that defendant’s cost of removal of the wall and replacement on his property would grossly outweigh that number or any other number [] for that matter.” (5T 28:5–11).

As is clear from the above, the Trial Court expressly considered the alternative remedy of an easement and, because Defendant failed to present any evidence that an easement was a more equitable outcome than removal of the

encroachments, rejected that remedy and ordered Defendant to remove the encroachments. Defendant's argument that the Court ignored alternative remedies is without merit.

V. The Trial Court, in Its Exercise of Discretion, Made Reasonable and Well-Supported Credibility Determinations

Additionally, Defendant takes issue with the credibility determinations made by the Trial Court concerning the testimony of the appraisal experts. While Defendant claims that the "Court erroneously failed to consider the \$1 Easement when performing the Relative Hardship analysis," (Db23) as demonstrated supra, the Court expressly considered the testimony of Defendant's expert and found that it "lack[ed] credibility." (5T 16:5). As to Defendant's appraisal expert's testimony that the value of a proposed easement was \$1, the Court found that valuation non-credible on the basis that Defendant has made "substantial improvements to the [Defendant's] property in the same area" that Mr. Brody testified was unusable on Plaintiff's Property. (5T 26:4–13).

It is well established that appellate courts should give deference to the credibility determinations made by the trial judge during a bench trial because the trial judge's determinations "are substantially influenced by his or her opportunity to hear and see the witnesses and have the 'feel' of the case, which [the appellate court does] not enjoy upon appellate review." State in Int. of D.M.,

451 N.J. Super. at 424. After thorough consideration of the competing testimony of Plaintiff's and Defendant's appraisal experts, the Trial Judge credited the testimony of Plaintiff's expert. Pursuant to well established review standards, that credibility determination should not be disturbed by this Court.

VI. The Trial Court Appropriately Exercised its Discretion to Bar the Testimony of Defendant's Contractor Expert

At trial, the Court held a hearing pursuant to N.J.R.E. 104 to determine whether the testimony from Mr. Rusin, Defendant's contractor expert, was admissible at trial. (4T 31:20). After the hearing was conducted, and both parties were permitted an opportunity to present argument, the Trial Court ruled that Mr. Rusin's report and testimony was not helpful to the trier of fact and must be barred under the net opinion rule. (4T 80:23–81:15). While Defendant does not appeal the decision to bar Mr. Rusin's testimony concerning the cost to remove and rebuild the encroachments, Defendant takes issue with the Trial Court's Rule 104 determination to the extent the Trial Court barred testimony concerning "what the implementation of the injunction would entail." (Db24). In raising this argument, Defendant ignores the plain language of the Trial Court's ruling.

In barring the contractor's testimony, the Court held, inter alia:

"There was no indication that [Mr. Rusin] had any idea of the cost of the initial wall or why it was built that way. There was no review of any blueprints, which he

testified he would normally do. He relied on . . . viewing the wall on a social visit some eight months before as the [] basis for [] what was presented to the Court. There was no indication to the Court as to why he would build a different wall or what the cost differential was . . . he just looked at [the wall] . . . on site some eight months before. I'm not even sure if it was in anticipation at that point of preparing a report. There was no testimony to that. And this was on a social visit, which again, wasn't even referenced in the[] report itself.”

(4T 79:5–22).

Stated differently, the Trial Court found that Mr. Rusin had no knowledge concerning how the encroaching wall was built; did not review any blueprints; and only saw the wall once eight months ago during a social visit to Defendant's Property. Contrary to Defendant's argument, these findings are not “focused entirely on cost,” (Db24), but have equal applicability to any testimony Mr. Rusin could offer concerning what steps would be necessary to demolish and rebuild the wall. Simply, the Trial Court correctly found that Mr. Rusin had insufficient knowledge of how the wall was built or what would be required to rebuild the wall. See Townsend, 221 N.J. at 53 (courts “apply [a] deferential approach to a trial court's decision to admit expert testimony, reviewing it against an abuse of discretion standard.” (citing Pomerantz Paper Corp., 207 N.J. at 371–72)).

It is wholly unclear for what purpose Defendant cites to Correa v. Maggiore, 196 N.J. Super. 273, 282 (App. Div. 1984). (Db32). In that case, the court found, “qualifications of an expert witness are generally addressed to the discretionary determination of the trial judge.” Correa, 196 N.J. Super. at 282. Consistent with that proposition in Correa, the Court should affirm the Trial Court’s discretionary determination that Mr. Rusin was not qualified to offer testimony concerning what was required to remove and rebuild the encroaching wall.

Finally, Defendant argues that it was error to not permit Mr. Kloss, Defendant’s principal, to testify about the effect of removing the wall. (Db24). Mr. Kloss was not qualified as an expert and did not submit an expert report during discovery in the case. The Trial Court, in its exercise of discretion, appropriately sustained Plaintiff’s objection to Mr. Kloss offering testimony concerning the impact on Defendant’s Property if the encroachments were removed. (4T 183:14–185:18).

The cases relied upon by Defendant to support the proposition that a party can offer testimony about its own property without expert knowledge are easily distinguishable. (Db24). In Lane v. Oil Delivery, Inc., the court permitted a homeowner to testify about the price to replace home furnishings, clothing, and jewelry that was lost in a fire. 216 N.J. Super. 413, 419 (App. Div. 1987). In

State v. Kittrell, the court held that a detective’s testimony “that beepers are used by drug traffickers . . . exceeded the bounds of proper lay opinion testimony.” 279 N.J. Super. 225, 235–36 (App. Div. 1995). Plainly, these cases in no way support Defendant’s argument that a homeowner should be able to testify concerning the technicalities and implications for removing a retaining wall on his property and any related construction.

CONCLUSION

For all of these reasons, the Court should affirm the Court’s February 25, 2025 Order imposing a mandatory injunction on Defendant requiring the removal of the encroachments from Plaintiff’s Property.

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By: /s/ Laura Leacy Kyler
Laura Leacy Kyler

Dated: August 5, 2025

SUPERIOR COURT of NEW JERSEY

Appellate Division

Docket No. A-002223-24

<p>SUSANNE LLC,</p> <p>Plaintiff-Respondent,</p> <p>v.</p> <p>1 HOWE STREET BAY HEAD,</p> <p>Defendant-Appellant.</p>	<p><u>Civil Action</u></p> <p>On Appeal From Orders Of The Superior Court of New Jersey, Chancery Division, Ocean County</p> <p>Docket No. OCN-C-228-22</p> <p>Sat Below: Therese A. Cunningham, P.J.Ch.</p>
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DEFENDANT-APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Plaintiff (“Susanne”) opens its Opposition Brief by asserting Defendant (“1 Howe”) is not challenging the Summary Judgment determination that the retaining wall trespasses, and this appeal solely deals with the remedy imposed. (Pb1) This is technically true but misleading. The Summary Judgment relied upon an as-built survey prepared by 1 Howe’s surveyor, Bruce Rigg (“Rigg”), to establish the existence, and extent, of the encroachments. (2T7:10-19) However, the Final Judgment inexplicably adopts the boundary line established by Susanne’s surveyor (Blue Marsh). (Da2) This further demonstrates the arbitrary, and erroneous, nature of the Trial Judge’s Decision.

Susanne rewrites history and attempts to disavow the fact that it proposed an easement for the encroaching section of the retaining wall as an alternate remedy. It does so by contending it presented testimony on the value of easements as a counter, and to reply, to the position adopted by 1 Howe that an easement should be imposed. (Pb1; Pb27) In fact, Susanne presented its proofs on easements through testimony by an appraiser, Robert Gagliano (“Gagliano”), on its main case and not on rebuttal. (4T85) It was 1 Howe who presented testimony to undermine the valuation Susanne proposed, which was confirmed by 1 Howe’s appraiser, Jon Brody (“Brody”), who testified his assignment was to review and critique Gagliano’s conclusions.

(4T150:10-13) Thus, it is Susanne who acknowledged an easement was a suitable remedy for the retaining wall encroachment.

Susanne also cavalierly dismisses the precept that it had an obligation, as the proponent of mandatory injunctive relief, to establish it was a reasonable and appropriate remedy. (Pb2) It is beyond any legitimate dispute that a plaintiff has the burden of proof on each claim; and, when the claim involves mandatory injunctive relief, this burden must be satisfied with clear and convincing evidence that the injunction is reasonable and necessary. In this case, as Susanne effectively concedes, it did nothing to satisfy this burden, and this was ignored by the Trial Judge.

Susanne continuously seeks to bolster the Decision by asserting the encroachments had a negative impact upon the utility and value of its property (Pb5; Pb20), which diminished the value of its property – per Gagliano – by \$105,800. (Pb1; Pb8) This grossly mischaracterizes the proofs. A review of Gagliano’s testimony discloses he testified:

- (i) The two (2) easements did not change or negatively impact the utility of Susanne’s property. (4T117:2-13) [This was consistent with the testimony of Susanne’s two (2) principles, who admitted the area of the encroachment was kept overgrown and never accessed by them or their renters.]
- (ii) The easements did not damage the remainder. (4T117:14-16)

(iii) He ascribed a value of \$13,700 to the easement for the wall encroachment, which does not represent a reduction in the fair market value of the property and represents compensation for the easement. (4T118:5-12) He explained how an easement that had no material impact would have the value he ascribed to it by stating: “You must pay something.” (4T:117:14-118:11)

A review of all of the circumstances, as further hereinafter detailed, demonstrate the fact that the result imposed by the Trial Court represents an egregious abuse of her discretion. This highlighted by her treatment – actually, her failure to properly assess – the easement. The oral decision acknowledged the fact that an easement was a “less burdensome remedy.” (5T21:8-12) However, other than going through the meaningless exercise of approving Gagliano’s assessment of the compensation to be paid, the Judge never analyzed how, or why, the admittedly more draconian remedy was warranted and an easement was inappropriate – even though it was proposed by Susanne and the case law mandates that an available less burdensome remedy must be selected.

PROCEDURAL HISTORY

1 Howe relies upon the Procedural History in its initial Brief filed on June 11, 2025.

REPLY TO STATEMENT OF FACTS

Susanne says the only proof about the wall costs was the cost estimate included with the permit. (Pb7) However, the accuracy of that estimate was not established; and, more importantly, this cost estimate was not admitted into evidence. [The admissibility of the estimated cost was extensively considered, and ultimately rejected, by the Trial Judge, who admitted the permit for the limited purpose of establishing a permit was issued for the retaining wall. (3T181:18-186:3) Nevertheless, the Trial Judge improperly referenced these estimated costs in her Decision. (5T23:8-25)]

Susanne references the testimony by the Planner, Peter Steck (“Steck”), as establishing the fact the improvements constructed by 1 Howe did not comply with the approved plans. (Pb8 to Pb10) However, the compliance of the pool and patio were not relevant; and, the non-compliance of the retaining wall was limited to its encroachment. (4T22:1-5)

LEGAL ARGUMENT

POINT I: SUSANNE FAILED TO SATISFY ITS BURDEN OF PROOF. **(Pb26)**

Susanne makes alternative arguments with respect to the burden of proof. On the one hand, Susanne urges it had no obligation to prove anything other than the existence of an encroachment, citing Szymczak v. LaFerrera, 280 N.J. Super 223 (App. Div. 1995). (Pb14) On the other hand, Susanne asserts it offered proofs to satisfy its burden of proof. (Pb26)

A reading of Szymczak confirms it does not support Susanne's position. There, the plaintiff was the encroacher, and the defendant filed a counterclaim to compel the removal of the encroachment. [A home that encroached nineteen (19) feet into/onto the defendant's undeveloped lot.] The Appellate Court remarked that the plaintiff had voluntarily accepted the burden of demonstrating why the house should not be removed notwithstanding the fact it was the defendant who was seeking the injunctive relief. (280 N.J. Super. at 227) The plaintiff sought damages and the defendant sought an injunction, which the Trial Court granted. The Appellate Division reversed, holding the situation supported a less extreme remedy like damages or an easement. In this regard, it held the Relative Hardship Doctrine was appropriate when a lesser remedy is available. (280 N.J. Super. at 229-230) Reliance was placed upon the Restatement (Second) of Torts §941 (1979), which cautions that injunctions should not be issued because of the existence of a technical tort. (Id.)

In that regard, Gilpin v. Jacob Ellis Realities, 47 N.J. Super. 26 (App. Div. 1957) was appropriately cited for the proposition that injunctive relief is not an entitlement to be granted as a matter of course, since it depends upon many variables.

The cases dealing with mandatory injunction uniformly hold that a mandatory injunction is a remedy that is sparingly granted when there is no available alternate remedy. Gilpin; Green v. Piper, 80 N.J. Eq. 288 (Ch. 1912) For this reason, the claimant has what has been characterized as a particularly heavy burden of proof, which must be satisfied by clear and convincing evidence that the injunction is both necessary and reasonable. Guaman v. Velez, 421 N.J. Super. 239, 247 (App. Div. 2011) Van Name v. Federal Deposit Insurance Corp., 130 N.J. Eq. 433 (Ch. 1941) aff'd 132 N.J. Eq. 302 (E&A 1942) Verna v. Links at Valley Brook, 371 N.J. Super. 77, 89 (App. Div. 2004)

A review of the record demonstrates that Susanne presented no proof on the impact of, and harm created by, the encroachment. As the Trial Court observed, there was no proof of compensatory, or punitive, damages. At best and at most, the encroachments were benign. Susanne criticizes 1 Howe's characterization of the encroachments as *de minimis*; however, the Trial Judge specifically stated the encroachments are *de minimis* given their size and location. (2T14:4-7) Similarly, Susanne presented no evidence to establish how the injunctive relief sought could

reasonably be implemented and no evidence to establish how (or why) the injunction was a better alternative than the admittedly less burdensome easement.¹

Thus, it is crystal clear that Susanne did not carry its burden of proof and the Trial Judge arbitrarily imposed the mandatory injunctive relief.

POINT II: SUSANNE’S PROPERTY IS AN INCOME-PRODUCING, AND THEREFORE, COMMERCIAL PROPERTY. (ST23:7-13)

Susanne goes to great lengths to support the Trial Judge’s disputed finding that Susanne is not a commercial enterprise. (Pb15; Pb20-22) In connection with this, Susanne challenges 1 Howe’s position that this Appellate Court can take judicial notice that the active rental months for the New Jersey Shore are July and August (Pb21) This is a potentially important fact, since Gilpin suggests the Relative Hardship Doctrine is particularly suited to commercial properties.

The facts developed at trial demonstrate the Trial Judge erroneously found that Susanne did not use the property as a commercial venture. Those facts – none of which are disputed – are:

- 1) The property is owned by Susanne, which is a limited liability company.
- 2) Susanne receives rental income each year.

¹ Also absent was any proof concerning what governmental approvals would be required, what plans would be needed to secure permits, and what amount of time would reasonably be needed to implement the injunctive relief.

- 3) Susanne rents the property for July and August each year.
- 4) The principals of Susanne, and their families, stay at the property when it is not rented.

N.J.R.E. 201(b)(1) & (2) provides that a Court can take judicial notice of facts that are of such universal common notoriety or common notoriety within the area pertinent to the event that they cannot be reasonably disputed or questioned. Here, it is clearly a matter of common knowledge that vacation rentals at the New Jersey Shore is a seasonal business. It is similarly a matter of common knowledge that the rental season is focused on July and August each year.

Consideration of these facts demonstrates that Susanne's property is a commercial property. The personal use by the principals is secondary to the rental use; and, the fact that the commercial business is focused upon July and August does not alter these facts. Hence, the Trial Judge made a determination that is not supported by the evidence.

This challenge to the Trial Judge's finding that Susanne does not operate a commercial venture does not disregard the deference given to findings made after a bench trial. Seidman v. Clifton Savings Bank, 205 N.J. 150, 169 (2011) However, such deference requires that the finding be supported by competent, relevant and reasonably credible evidence. (Id.) Here, the evidence simply does not support this finding and it must accordingly be disregarded.

POINT III: THE RELATIVE HARDSHIP DOCTRINE WAS MISAPPLIED.
(5T22:12-24:19)

Susanne goes through a slanted analysis of the many Relative Hardship Cases and urges these cases support the Trial Judge's conclusion here that the Relative Hardship Doctrine was inapplicable and she was accordingly required to grant the injunctive relief. (Pb23 to Pb25) This position is, however, unsustainable for several reasons.

First, none of the cases cited – or the Restatement Principles relied upon in each – stand for the proposition that a defendant must prove the cost of compliance with a mandatory injunction, in order to be eligible for the application of the Relative Hardship Doctrine.

Second, all of the cases stand for the proposition that the Court must consider the relative hardship of granting, and denying, the mandatory injunction and should not grant a mandatory injunction because of a technical tort, since injunctive relief is dependent upon a number of variables. Restatement; Szymczak, 280 N.J. Super. at 230-231; Gilpin, 47 N.J. Super. at 29. The Supreme Court cautioned in Mannillo v. Gorski, 54 N.J. 378, 389 (1969) that a Court must consider whether the removal of an encroachment is impractical or expensive; and, if it is either, it must be endured upon payment.

Third, a Court confronted with an application has an obligation and choices. The obligation is to consider, and weigh, all of the variables. One such variable is

what needs to be done in order to implement the injunction – including the elimination of the air rights encroachments about which there were absolutely no proofs at trial. Susanne complains that 1 Howe references the height of the wall, the shoring that required the demolition and the reconstruction, which were not established at trial. (Pb25)² The fact is, however, that these tasks speak for themselves. The pictures (Da61; Da62) show how high the wall is and Susanne’s expert (Steck) testified about its height. (4T22:1-5) The wall is a retaining wall, which retains 1 Howe’s rear yard, which is at a higher elevation. Common experience dictates that the encroaching area must be shored-up before the wall is demolished, the encroaching section must be demolished and removed, new footings must be placed on the other side of the boundary line established in the Final Judgment.³ Consideration of these factors, as well as the *de minimis* extent of the encroachment, leads to the inescapable conclusion that the demolition, and relocation, of the retaining wall was impractical.

² As referenced earlier, Susanne mentions these things as if it were an observer and not the litigant who demanded that this work be required.

³ Again, the trespass (extent) was determined on Partial Summary Judgment based upon the Rigg Survey. The Trial was limited to remedy. Nevertheless, the Judge adopted, and required compliance with, the line established in the Blue Marsh Survey, which varies from the line Rigg established.

The choices available were: (i) Grant the requested injunction. (ii) Grant the easement, which was presented as an alternative to the injunction. (iii) Grant no relief.

Here, however, the Trial Judge misapplied the Relative Hardship Doctrine and erroneously concluded she was powerless to do anything other than grant the mandatory injunction. This result is the byproduct of the failure to consider the required variables and represents an abuse of discretion.

POINT IV: THE ALTERNATE REMEDY OF AN EASEMENT WAS REQUIRED TO BE CONSIDERED BUT WAS IGNORED. (5T21:4-15)

Susanne urges that the Trial Judge considered, and rejected, the easement remedy. (Pb28) Susanne bases this argument upon the Trial Judge’s analysis of the appraiser’s placement of a value on the easements and the fact the Final Decision references the presentation of an easement as a “less burdensome remedy.” (Pb29) The problem with Susanne’s position is that the Trial Judge never actually analyzed, nor weighed, the appropriateness of an easement, which she was required to do under the aforesaid cases.

The analysis of the amount of compensation to be paid for an easement, or the need for a so-called maintenance easement,⁴ had nothing to do with how, or why, an

⁴ As set forth in 1 Howe’s Appellate Brief, the need for a maintenance easement was clearly a net opinion. (Db29-Db31)

easement for the wall was a valid or preferable remedy. Similarly, mentioning easements having been proposed is far short of acknowledging that Susanne presented this as an appropriate alternate remedy and the precedents dictate that the draconian remedy of a mandatory injunction should not be granted where less intrusive and more practical remedies are available.

Thus, it was reversible error for the Trial Court to not consider, and adopt, the easement as the remedy.

POINT V: IT WAS NOT APPROPRIATE TO COMPLETELY BAR 1 HOWE'S CONSTRUCTION EXPERT (4T76:11-81:17) AND 1 HOWE'S PRINCIPAL (4T181:7-185:18).

Susanne defends the complete barring of any testimony by 1 Howe's construction expert (Rusin) by asserting the Trial Judge concluded he had no knowledge of how the walls were built. (Pb31) This is not so. The Judge concluded that his estimate of the cost to demolish and rebuild the wall was a net opinion. She did not conclude he did not have the experience and know how to provide testimony about retaining wall construction; nevertheless, the Trial Judge erroneously prevented him from providing testimony about what was required to perform the work that Susanne was seeking to have the Court impose.

Susanne then urges that the Judge properly prevented 1 Howe's principal (Kloss) from providing testimony despite his construction experience – both general

and with 1 Howe's rear improvements. Per Susanne, this was proper since no expert report was provided for Kloss. The law is to the contrary.

CONCLUSION

The grant of mandatory injunctive relief was the byproduct of a series of material errors. This represents an abuse of discretion, warranting a reversal of the judgment.

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Dated: August 18, 2025