THOMAS TRABOCCO, Plaintiff-Appellant, V. VERIZON COMMUNICATIONS, INC., FIRSTENERGY CORP. DOING BUSINESS AS JERSEY CENTRAL POWER & LIGHT, INC., Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No.: A-002240-23T2 CIVIL ACTION On Appeal from the Superior Court of New Jersey, Law Division, Monmouth County Docket No. Below: MON-L-2838-22 Sat Below: Hon. Andrea I. Marshall, J.S.C.

PLAINTIFF-APPELLANT THOMAS TRABOCCO'S BRIEF IN SUPPORT OF APPEAL

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PRELIMINARY STATEMENT

Plaintiff Thomas Trabocco appeals from the grant of summary judgment dismissing his claims for nuisance and trespass against Defendants Verizon New Jersey Inc. (improperly pled as Verizon Communications, Inc.) ("Verizon"), Jersey Central Power & Light, and FirstEnergy Corp. (collectively "JCP&L", or together with Verizon, "the utility companies"). Mr. Trabocco had filed a complaint seeking to enjoin the utility companies and seeking damages for trespass and nuisance.

The basis for Mr. Trabocco's claim is that the utility companies entered his property, added a guy wire to a utility pole, and replaced part of his fence with inferior fencing. A guy wire is a suspension cable that in this case extends approximately six feet into his yard from the utility pole located at Mr. Trabocco's fence. During discovery a picture taken by Mr. Trabocco's insurance company demonstrated that as of November 22, 2021, there was no guy wire. Pictures produced by JCP&L demonstrated that as of December of 2022, the new guy wire extended from the utility pole into Mr. Trabocco's yard annexing part of his property with the wire and causing a tripping hazard with the large pole sticking out of the ground to which the guy wire adheres.

Although a picture tells a thousand words, in this case, the trial court ignored that record evidence that demonstrated that Verizon and JCP&L had entered the property after November 22, 2021 in order to construct a dangerous,

obtrusive guy wire in Mr. Trobacco's yard. This conduct constituted both trespass and nuisance, but the trial court focused only on the trespass theory that entirely overlooked the impact of this guy wire on the analysis. As a result, this court in reviewing the record de novo should reverse and remand the matter for trial.

STATEMENT OF FACTS

Mr. Trabocco lives in a residential neighborhood with a fenced in yard. (Pa46 at ¶¶ 12-13.[1]) Mr. Trabocco purchased 9 Buttonwood Lane East in 1982, but at the time, neither the survey nor the deed reflected any easement. (Pa85, Pa243 at ¶¶ 2-3, Pa194-234 & Pa169-70.) Subsequently, in 2022, Mr. Trabocco learned that Verizon entered his property and installed Verizon's guy wire.[2] (Pa85, Pa90-91.) He made report of the trespass to the police. (Pa190.)

An expert opined that the pole was recently placed on the property because 1) dirt was loose to indicate recent disruption to the ground immediately surrounding the pole, 2) there was no vegetation on the instant pole but there

[1] The term "Pa" refers to Plaintiff-Appellant Thomas Trobacco's Appendix in Support of Appeal; the term "1T" refers to the Transcript of Motion dated January 19, 2024.

[2] The Complaint incorrectly uses the term "guidewire," but the proper term is "guy wire," as noted by JCP&L's counsel. See Pa305-06. According to Wikipedia, a guy-wire "is a tensioned cabled designed to add stability to a freestanding structure," including utility poles. https://en.wikipedia.org/wiki/Guy-wire (last accessed August 29, 2024). This brief uses the term "guy wire" rather than "guidewire."

were vines on a nearby pole, 3) the fence was recently replaced but not by Mr. Trabocco, 4) the grounding wire is in disrepair that might indicate the pole was recently transferred from another location; 5) pink ribbons are near the rear side of the fence near the pole indicating recent work; and 6) insurance photographs taken on November 22, 2021 indicate recent work: a) the cable wires are at a different angle in the 2021 pictures than the expert's current inspection, and b) there is increased wiring running to the home than seen on the pictures in 2021. (Pa186 at ¶ 3, Pa192.)

This lawsuit arises from Mr. Trabocco's claims that Verizon and JCP&L should remove their property and reimburse Mr. Trabocco for damages. (Pa1-8.) Mr. Trabocco certified that neither Verizon nor JCP&L requested permission to enter his property or place the utility pole. (Pa166 at ¶ 7.) Mr. Trabocco further certified that sections of his fence had been replaced, which were near the pole in question. (Pa166 at ¶ 9, Pa91.) He also explained that the ground near the pole appeared disturbed and there were wires and equipment over his property that had not been present earlier. (Pa166-67 at ¶¶ 8-12, Pa248-51, Pa253, Pa258-59, Pa270.) Utility flags also provided an indication that the utility companies had recently been on Mr. Trabocco's property without his consent. (Pa254-55, Pa269.) The utilities' property included a guy wire. (Pa91.) The guy wire is clearly not present in the 2021 photos from Mr. Trabocco's insurance company

indicating that even if Verizon or JCP&L had an easement for Pole Number 1077, they had materially enlarged and excised a more significant portion of his property without his consent and outside of any prescriptive easement period. (Pa347, cf. Pa88 to Pa90-91.)

Mr. Trabocco further certified that his neighbor has a utility easement and that based on investigation, Mr. Trabocco believed the pole at issue had been relocated from his neighbor's property to his own without his consent. (Pa166-67 at ¶¶ 7-11.) He also cited to the fact that a Google Earth photo demonstrates that the pole was not on his property in 2011, which creates a genuine dispute of material fact in defendants' position. (Pa167 at ¶13, Pa288.) Mr. Trabocco further demonstrated that he is now uninsured for issues relating to the pole. (Pa167 at ¶ 14, Pa236.) As a result of the unavailability of insurance for all of his property, his home has now been devalued by the utility companies' trespass. (Pa166 at ¶ 7, Pa236.)

Verizon claims ownership over the utility pole, Pole 1077, in Mr. Trabocco's backyard. (Pa46 at ¶ 8.) According to Verizon's employee, Thomas H. Young's review of Verizon records, Pole No. 1077 was installed in 1978 at 9 Buttonwood East in the backyard, back left corner of the property, and has never been relocated, removed, or replaced. (Pa120-21 at ¶¶ 10-12.) The

documentation that Verizon attached listed Pole Record System documents that listed Pole 1077 as 13211978. (Pa122.)

The document further indicates that Verizon is the owner and JCP&L is a non-owner of the pole. (Pa122.) Further, JCP&L admitted that "JCP&L has high-voltage wires and equipment on the subject utility pole, as well as a transformer." (Pa46 at ¶ 9.) While the proofs submitted with the motion for summary judgment listed the pole as Pole 13211978, the requests for admissions served by JCP&L labeled the pole as BT1O77RN. (Pa58, Pa75.)

Verizon and JCP&L performed a site inspection of the property on December 13, 2022. (Pa49 at ¶ 24; Pa89-91.) Comparing the 2021 photograph to the ones that JCP&L took thirteen months later in 2022, supports Plaintiff's contentions: a utility guy wire was added and parts of Plaintiff's fence were removed at sometime between November 22, 2021 and December 2022. (Pa347, cf. Pa88 with Pa91-92.) On September 28, 2023, Verizon stated that it has a "prescriptive easement for the pole in its present location." (Pa127, Pa132 at ¶ 17.) Neither JCP&L nor Verizon made any statement regarding any easement over the land under the guy wire or Mr. Trabocco's fence. (Id.; Pa44-136.)

PROCEDURAL HISTORY

Plaintiff filed his complaint on October 17, 2022 alleging that Verizon and JCP&L had installed a pole, guidewire,[3] and transformer electrical box on his property without permission. (Pa1, Pa3 at ¶¶10-15.) He also alleged the guidewire constituted a hazard and tripping hazard. (Pa3 at ¶ 12.) Plaintiff further alleged that Defendants had removed his fencing and replaced it with substandard fencing. (Pa4 at ¶ 19.)

Both JCP&L and Verizon answered, but neither raised a prescriptive easement as an affirmative defense. (Pa15-16; Pa28-31.) And neither defendant counterclaimed seeking the affirmative right to continue to access Plaintiff's property. (Pa12-22; Pa23-34.) JCP&L's Answer further stated it "did not own, install, inspect or maintain the subject utility pole." (Pa30.)

On November 3, 2023, the trial court dismissed Plaintiff's complaint without prejudice for failure to provide more specific answers to requests for admissions. (Pa112.)

While the period for discovery was still ongoing and before entry of the dismissal without prejudice, JCP&L moved for summary judgment on October 30, 2023. (Pa42.) Verizon also cross-moved for summary judgment. (Pa115.) Plaintiff opposed the motion. (Pa137.) While the utility companies' summary

[3] See footnote 1 explaining the correction of the word "guy wire" for "guidewire," which is the incorrect term that Plaintiff used in his Complaint.

judgment motions were pending and discovery was incomplete, the Honorable Andrea I. Marshall, J.S.C., entered a subpoena for documents from Mr. Trabocco's homeowner's insurance company relating to claims made prior to 2021 regarding 9 Buttonwood Lane East. (Pa157-58.)

Verizon's motion for summary judgment stated because the pole was added in 1978, "Verizon has a full and complete right to occupy plaintiff's real estate with its utility pole in the location where the pole has remained for the past 45 years." (Pa135.) During oral argument, JCP&L argued, "It's a Verizon pole, but to move it it's quite an effort for all the utility companies to have that equipment on there. It's not just something you just pick up and move. You have to install a new pole first, transfer everything." (1T5:11-25.) Counsel argued "it's a very, very old pole that's in place here . . . nothing else's put there." (1T6:1-6.) But the evidence did not support this statement as the companies added the guy wire sometime after November 22, 2021. (Pa347, cf. Pa88 to Pa90-91.)

In opposition, plaintiff's counsel argued that plaintiff identified witnesses to testify that the pole was not there before August 2022, but that the utility companies choose not to depose them. (1T7:12-24.) On January 19, 2024, the trial court granted summary judgment to both defendants. (Pa159-62.) In rendering the decision, the trial court noted, "defendants offered two

photographs taken in 2021 and 2022 that they assert demonstrates that the pole was in the same spot in 2021 prior to the time plaintiff alleges Verizon moved the pole to his property and 2022 after plaintiff had identified the pole as having been moved to his property." (1T11:6-12 (citing Pa88 and Pa90-91).)

The trial court found, "Plaintiff has failed to . . . produce any documentary evidence in support of his assertion that the location of the pole changed and his certified discovery responses conflict with each other and with the complaint." (1T15:15-19.) The trial court further found "plaintiff produced – photograph from 2021 from his insurance company which shows that the pole was located on the property in the same location that the defendants allege the pole existed since 1978. The plaintiff produced a photograph showing that the pole was there in 2021 despite the fact that plaintiff's complaint and his answers to interrogatories allege that the pole wasn't on his property until August of 2022." (1T15:20-16:5.) But the trial judge overlooked the differences between the 2021 and 2022 pictures: the new construction of the guy wire and the replaced fencing. (Pa347, cf. Pa88 to Pa90-91.)

Plaintiff then moved for reconsideration, and Defendants cross moved for fees and sanctions. (Pa163, Pa173, Pa180.) The trial court refused to consider new evidence that Plaintiff presented finding that "considering that the discovery end date was December 4, 2023, over two months prior to Plaintiff's

filing of this instant Motion." (Pa308.) The trial court found "Plaintiff has not provided any justification for why this evidence could not have been produced during the discovery period." (Pa308.) The trial court further found that Plaintiff "failed to demonstrate why the Court, in the interest of justice, should consider this untimely evidence." (Pa308.) As a result, the trial court denied the motion. (Pa308.)

On the same day, the trial court granted both utility companies' cross motions for fees and sanctions. (Pa310-19.) Because both utility companies failed to submit certifications for fees and costs as required by that Order, and the companies indicated that they were abandoning this claim, Plaintiff does not address that issue in this appeal, even though it was listed as a basis for the appeal. (Pa325, Pa341.) This appeal now follows seeking reversal of the trial court's orders granting summary judgment and denying reconsideration. (Pa325.)

STANDARD OF REVIEW

This Court reviews de novo the grant of summary judgment searching the record for a genuine dispute of material fact without granting any deference to the trial court's decision. Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021). The Supreme Court has warned that in reviewing a motion for summary judgment, the court is not to weigh the evidence. Rios, 247 N.J. at 13 (internal citation

omitted); see also Parks v. Rogers, 176 N.J. 491 (2003) ("It was not the court's function to weigh the evidence and determine the outcome but only to decide if a material dispute of fact existed.")

"[S]ummary judgment is not meant to shut a deserving litigant from his or her trial." Rios, 247 N.J. at 13. In applying this standard, this Court should reverse and reinstate Plaintiff's complaint. Neither utility company demonstrated all of the elements necessary for a prescriptive easement as explained in Point One. Instead, the trial court erred in focusing on one element – time, but in doing so, the trial court overlooked genuine disputes of material fact that demonstrate neither defendant is entitled to summary judgment.

Further, neither Verizon nor JCP&L addressed Plaintiff's claims for injunction or nuisance, and therefore there was no basis for the trial court to summarily dismiss them. (Pa44-136.) Given the utility companies only raised the issue of N.J.S.A. 2A:14-30 regarding the time when the alleged easement was created, summary judgment was improper on dismissing the injunction and nuisance claims as different elements apply to these claims. (Pa104-36.) The statute does not immunize parties for either injunction or nuisance claims. For these reasons, the matter should be reversed and remanded for a trial on the merits.

LEGAL ARGUMENT

POINT ONE

The Trial Court Erred in Granting Summary Judgment Because the Trial Court Did Not Make Findings of the Five Required Elements for a Prescriptive Easement. (1T10:3-16:18.)

The trial court erred in dismissing Mr. Trabocco's entire complaint based on the single Verizon document that lists a pole having been built in 1978. (1T15:12-19.) The trial court found Mr. Trabocco failed to present documentary evidence challenging Verizon's pole record, but that one factor of time does not relieve the utility companies' obligations to prove all of the elements necessary for an easement by prescription.

Summary judgment was improper because neither Verizon, nor JCP&L, nor the trial court addressed Verizon and JCP&L's burden to prove the five elements for an easement by prescription by a preponderance of the evidence. "The burden of proof rests on the party claiming title by adverse possession." Maggio v. Pruzansky, 222 N.J. Super. 567, 576 (App. Div. 1988) (citing Patton v. North Jersey Dist. Water Supp. Comm'n, 93 N.J. 180, 187 (1983)).

"[T]he proponent of an easement by prescription must prove an adverse use of land that is visible, open and notorious for at least thirty years." Yellen v. Kassin, 416 N.J. Super. 113, 120 (App. Div. 2010)(citing Randolph Town Ctr., L.P. v. County of Morris, 374 N.J. Super. 448, 453–54 (App. Div. 2005), rev'd

in part, 186 N.J. 78 (2006) and Restatement (Third) Property: Servitudes § 2.17 (2000)).

The New Jersey Supreme Court has explained to obtain an easement by prescription the use

> must be a continuing, open, visible and exclusive user, hostile, showing intent to claim as against the true owner, and must be under a claim of right with such circumstances of notoriety as that the person against whom it is exercised may be so aware of the fact as to enable him to resist the acquisition of the right before the period of prescription has elapsed.

Plaza v. Flak, 7 N.J. 215, 220 (1951)(citing Poulos v. Dover Boiler & Plate Fabricators, 5 N.J. 580, 588 (1950); Carlisle v. Cooper, 21 N.J. Eq. 576, 596 (E. & A. 1870)). "The question whether possession has been held adversely continuously for the [requisite] period . . . with the requisite notoriety, is one of fact for the jury." Foulke v. Bond, 41 N.J.L. 527, 545 (E. & A. 1879). Here, the problem with the trial court's analysis is that the only element reviewed was time when there are four other elements. (1T15:6-16:5.) As explained below, because neither utility company demonstrated the elements of continuous use and notoriety, the trial court's decision should be reversed.

An owner may eject another from the owner's land if the period of time for adverse possession has not been reached. J & M Land Co. v. First Union Nat'l Bank ex rel. Meyer, 166 N.J. 493 (2001). Thus, the first question for this

case is whether there was open, notorious, use since 1992 – thirty years before the complaint was filed. Here, the utility companies' use changed after November 22, 2021 when the companies annexed Mr. Trabocco's yard through a dangerous and obtrusive guy wire. (Cf. Pa88 to Pa91-92.) This addition defeated the utility companies' claim of continuous use. Jaqui v. Johnson, 27 N.J. Eq. 526, 531 (1875)(holding continuous element is destroyed when the easement holder unilaterally extends to include additional area or uses).

In J & M, defendant owned an undeveloped parcel of property adjacent to Plaintiff's undeveloped parcel. 166 N.J. at 497. Plaintiff entered into a lease to a third-party to operate three billboards, one of which was located on defendant's undeveloped parcel. Id. The use continued for thirty-nine years. Id. at 498. Because the ejectment was sought before the period for adverse possession ran, the continuity element was destroyed. Id. at 519.

In the J & M case, the trial court had found that the adverse possessor's use was not "'notorious' because the boundary line between the two properties was not visible to the naked eye." Id. at 498. The Appellate Division found a prescriptive easement must be a "limited use or enjoyment of the land," rather than a possessory interest with profit. Id. at 499 (citing J & M Land Co. v. First Union Nat'l Bank, 326 N.J. Super. 591, 595-96 (App. Div. 1999)). The Supreme Court in resolving the issue did not address these findings but instead found that

because the landowner took action prior to the running of the sixty years for the uncultivated land, ejectment was proper. Id.

Under the law of adverse possession, the use must be strictly construed. Mannillo v. Gorski, 54 N.J. 378, 383 (1969). Thus, here, where the adverse possessor usurped a greater portion of Mr. Trabocco's property, the trial court erred in awarding a prescriptive easement to Defendants. Under New Jersey law, "if the possession is claimed to be adverse, the act of the wrongdoer must be strictly construed, and the character of the possession clearly shown." Id. (quoting Preble v. Maine Cent. R. Co., 85 Me. 260, 27 A. 149, 21 L.R.A. 829 (Sup.Jud.Ct.Me.1893)). "The moral justification of the policy lies in the consideration that one who has reason to know that land belonging to him is in the possession of another, and neglects, for a considerable period of time, to assert his right thereto, may properly be penalized by his preclusion from thereafter asserting such right." Mannillo, 54 N.J. at 387.

To establish adverse possession, the hostile possessor must demonstrate the use is open and notorious: "Acts of dominion over the land must be so open and notorious as to put an ordinarily prudent person on notice that the land is in actual possession of another. Hence, title may never be acquired by mere possession, however long continued, which is surreptitious or secret or which is not such as will give unmistakable notice of the nature of the occupant's claim."

Id. at 387–88 (quoting 4 Tiffany, Real Property (Supp.1969), at 291) and (citing 5 Thompson, Real Property (1957 Replacement), 2546; 6 Powell, Real Property, 1013 (1969)). The notoriety required is so the true owner may reasonably be expected to have had notice of the nature and extent of the title being acquired thereunder." Foulke, 41 N.J.L. at 550.

The Supreme Court has explained, "Notoriety of the adverse claim under which possession is held, is a necessary constituent of title by adverse possession, and therefore the occupation or possession must be of that nature that the real owner is Presumed (sic) to have known that there was a possession adverse to his title, under which it was intended to make title against him." Mannillo, 54 N.J. at 388 (quoting Foulke, 41 N.J.L. at 545).

This Court has explained that under the open and notorious elements, the use must not be a secret and "generally means that the use is actually known to the owner, or is widely known in the neighborhood." Yellen v. Kassin, 416 N.J. Super. 113 (App. Div. 2010). Use is not hostile when the parties do not act with a claim to a right over the property. Id. at 122. In Yellen, the Appellate Division reversed a trial court's findings of mutual prescriptive easements over neighboring driveways because "the evidence does not establish that the use of the driveways was hostile in the sense that either party considered use of the other's driveway under a claim of right with the intent to claim an interest in the

other's property." Id. at 122. Similar to Yellen, it was not until the utility companies asserted dominion over Mr. Trabocco's yard by replacing his fence without notice and adding a dangerous guy wire that Mr. Trabocco filed his action. (Pa166-67 at ¶¶ 5-14, Pa90-91.)

In Mannillo, a minor border dispute of fifteen inch encroachment did not meet the notoriety requirement because a survey was necessary to determine the issue. Id. at 264. Likewise, in Maggio, 222 N.J. Super. at 573, an intruding strip slightly more than one foot in width, did not satisfy the open and notorious element. The analysis in Mannillo applies here because Mr. Trabocco had not noticed the pole, but when the addition of the obtrusive and dangerous guy wire was installed, he filed the Complaint almost immediately. (Pa1, Pa91.) In fact, the trial court's faulting of Mr. Trabocco for his inconsistent timeline regarding the pole only furthers the issue that the use was not sufficiently notorious to put Mr. Trabocco of a claim until the utility companies constructed the guy wire. (See 1T11:13-13:14.)

Here, too, even if the pole has been in its present location since 1978, which Plaintiff disputes, it was a minor encroachment that does not satisfy the elements for a prescriptive easement. It was not until after November 22, 2021 that Verizon and JCP&L extended their use of the property in a substantial fashion to add a dangerous guy wire. (Pa88.) Not only is the guy wire sticking

up precariously from the ground, but it extends Verizon and JCP&L's use by at least six feet. (Pa88.) The encroachment thus went from de minimis to a substantial use.

Here, the notoriety element was missing because as the utility companies only pointed to the pole at the fence line, their use in 2022 became far greater to exercising possession over Mr. Trabocco's yard. (Pa347, cf. Pa88 to Pa90-91.) That greater use within a year of the Complaint defeated the utility companies' claims, and therefore summary judgment was improper.

Defendants' entire argument rested on N.J.S.A. 2A:14-30. (Pa105-11; Pa130-36.) That statute provides:

> Thirty years' actual possession of any real estate excepting woodlands or uncultivated tracts, and 60 years' actual possession of woodlands or uncultivated tracts, uninterruptedly continued by occupancy, descent, conveyance or otherwise, shall, in whatever way or manner such possession might have commenced or have been continued, vest a full and complete right and title in every actual possessor or occupier of such real estate, woodlands or uncultivated tracts, and shall be a good and sufficient bar to all claims that may be made or actions commenced by any person whatsoever for the recovery of any such real estate, woodlands or uncultivated tracts.

N.J.S.A. 2A:14-30. Verizon and JCP&L's proofs also were limited to the pole, but Mr. Trabocco's Complaint was broader than just the pole. (Cf. Pa105-11 and Pa130-36 with Pa1-8.) The trial court erred in granting summary judgment

because the photographs attached to JCP&L's own motion demonstrate that there was a trespass at some point between November 22, 2021 and December 2022 where the utilities placed a dangerous guy wire across Mr. Trabocco's property and extended their use without permission. (Pa347, cf. Pa88 with Pa90-91.)

Along with the notorious element, the utility companies also failed to meet their burden under the continuous use element. By expanding the use to include the guy wire, Defendants defeated the time element and thus Mr. Trabocco's claim should not have been dismissed without a trial. Because Verizon and JCP&L's use vastly expanded between 2021 and the filing of the action, the time for adverse possession under N.J.S.A. 2A:14-30 does not apply. The initial use did not have the continuity that the courts require. Jacqui, 27 N.J. Eq. at 530.

Verizon's evidence only addresses the pole; it does not address that after November 22, 2021, Verizon or JCP&L entered the property, added a guy wire and substantially expanded their use. (Pa347, Pa90-91.) "Even though a person may be authorized to make some uses of property, the person may become an adverse user with respect to uses that go beyond the authorized use if the excessive use gives rise to a cause of action for ... interference with a property interest." Restatement, supra, at § 2.16 comment f. It is black letter law that because Verizon and JCP&L expanded their use within the last three years, they

have not satisfied the period for prescription. Id.; see N.J.S.A. 2A:14-30 (requiring thirty years for adverse possession).

The trial court erred in acting as a fact-finder by rejecting Plaintiff's certified interrogatory answers that the pole was not on his property when he purchased it in 1982 but accepting the certification of a Verizon employee without personal knowledge who certified the pole was on the property in 1978 and never "relocated, removed or replaced" simply based on a review of records. (Cf. Pa155-56 to Pa120 at ¶¶ 6-11.) The employee's statement was incorrect on its face because the pictures that the utility companies submitted on the motion showed that there was work done to the pole—the addition of the obtrusive guy wire at some time after November 22, 2021. (Pa347, cf. Pa88 to Pa90-91 and Pa120-21 at ¶¶6-12.) Thus, the trial court erred in rejecting Plaintiff's certified interrogatory answers and failing to find a genuine dispute of material fact.

The trial court compounded this error in denying the proofs that Mr. Trabocco presented on reconsideration providing additional reasons to reject the Verizon employee's citation of Verizon records over Plaintiff's certified statement that the pole was relocated including the ground being disturbed near the pole, new utility markers consisting of pink flags, and destruction of parts of his fence. (Pa166-67 at ¶¶5-15.) These issues were fact issues that could not be resolved without a jury. Foulke, 41 N.J.L. at 545.

Thus, given all these factual issues, the trial court erroneously granted summary judgment without consideration of any of the statutory factors for adverse possession. (1T10:3-16:18.) Because the trial court did not consider the factors, this Court should reverse the grant of summary judgment.

POINT TWO

The Trial Court Erred in Granting Summary Judgment Because the Trial Court Failed to Address Plaintiff's Claim for an Injunction. (1T10:3-16:18.)

Even if the utility companies had an easement by prescription over the pole, which Mr. Trabocco disputes as addressed supra, the trial court failed to address the proofs submitted on the motion. The trial court overlooked that the guy wire was constructed sometime after November 22, 2021, and thus Plaintiff had the ability to move for ejectment under N.J.S.A. 2A:14-30. (1T10:3-16:18, Pa347, cf. Pa88 to Pa90-91.) Even if the utility companies had an easement over the pole, New Jersey courts require that the dominant tenement, otherwise known as the easement holder, must still act with care, and permit the servient tenement to obtain an injunction when the use is unreasonable or exceeds the scope of the easement. Jaqui v. Johnson, 27 N.J. Eq. 526, 529–30 (1875); Taylor v. Pub. Serv. Corp., 75 N.J. Eq. 371, 379 (Ch. 1909) (holding "injunction will therefore go to prevent such misuse" of easement), aff'd o.b. sub nom. Taylor v. Pub. Serv. Corp. of New Jersey, 78 N.J. Eq. 300 (1911).

The New Jersey Supreme Court has explained, "there is, arising out of every easement, an implied right to do what is reasonably necessary for its complete enjoyment, that right to be exercised, however, in such reasonable manner as to avoid unnecessary increases in the burden upon the landowner." Tide-Water Pipe Co. v. Blair Holding Co., 42 N.J. 591, 604 (1964)(citing Lidgerwood Estates, Inc. v. Public Service Electric and Gas Co., 113 N.J. Eq. 403 (Ch. 1933)). Under this principle, "the easement use shall not unreasonably interfere with the use of, or increase the burden upon, the landowner . . ." Id. (citing Lidgerwood, 113 N.J. Eq. 403). The easement holder may "not . . . increase the servitude, nor change it to the injury of the owner of the servient tenement." Id. (quoting Tallon v. Hoboken, 60 N.J.L. 212, 218 (E. & A. 1897) and citing 2 Thompson, Real Property § 426, p. 694 (1961 repl.); 2 American Law of Property § 8.66, p. 278 (1952)). Where the utility company acted without leave or license to install utility poles, a landowner has a right to seek an injunction. Broome v. N.Y. & N.J. Tel. Co., 42 N.J. Eq. 141, 142 (Ch. Ct. 1887).

For instance, in Jaqui, 27 N.J. Eq. at 529–30, because the holder of the easement was increasing the draw of water with a larger pipe, the use was "clearly in excess of his grant, and the decree for injunction in respect to that was right." New Jersey's highest court explained, "One may not invade the property of another, and justify or excuse the legal wrong because attended with

no actual injury to such property, and especially so when the question of whether injurious or not rests only on the opinion of the trespasser." Jaqui, 27 N.J. Eq. at 532. The Court further explained, "It is the exclusive right of the owner of the servient tenement, suffering the burdens of an easement localized and defined, to say whether or not the dominant owner shall be permitted to change the character or plan of the servitude." Id.

Likewise, courts do not permit the grantee to change the location of the easement at its pleasure. Id. at 530-31 (citing Jennison v. Walker, 11 Gray 423, 77 Mass. 423 (Mass. 1858)). In Jennison, for over thirty years, the dominant tenement holder had "a general and unlimited grant of an easement in plaintiff's lands," and sought to move an aqueduct that was decaying and change the direction of the water. Id. at 530 (citing Jennison, 11 Gray at 425, 77 Mass. 423). "Such change, it was alleged, was not more injurious to the owner than the other, and was necessitated by the occupancy of the old route by a newly-constructed railroad." Jacqui, 27 N.J. Eq. at 530 (citing Jennison, 11 Gray at 425, 77 Mass. 423). The court granted an injunction because "where an easement is granted in general terms, without definite location, the grantee does not thereby acquire a right to use the servient estate without limitation as to plan or mode of enjoying the easement: when the right granted has once been fixed and exercised in a

defined course, with the acquiescence of the parties, it cannot be changed at the pleasure of the grantee." Id.

As approvingly relied upon by New Jersey's highest court, Massachusetts' highest court explained, "where the terms of a grant are general or indefinite, so that its construction is uncertain and ambiguous, the acts of the parties, contemporaneous with the grant, giving a practical construction to it, shall be deemed to be a just exposition of the intent of the parties." Jennison, 11 Gray at 427, 77 Mass. 423 (citation omitted). The court further explained, "If therefore the easement has not been extinguished or lost by non-user and adverse possession, the defendant was clearly guilty of a trespass in digging up the soil of the plaintiff for the purpose of laying pipes in a line different from that occupied by the original aqueduct." Id. The court upheld a jury verdict of trespass awarding damages because the dominant tenement holder committed a trespass by digging the landowner's soil in order to lay pipes that differed from than the original structure. Id. Here, too, the public utilities exceeded any easement that they may have obtained by prescription by installing an additional guy wire and removing a portion of Mr. Trabocco's fence without approval. (Pa347, cf. Pa88 to Pa90-91.)

In Lorenc v. Swiderski, 109 N.J. Eq. 147, 148 (Ch. Ct. 1931), even though the easement holder had an easement to use the property, there was no right to

build onto the easement. Accordingly, the court granted an injunction to stop the construction of a concrete walk or otherwise disturb the landowner's soil. Id. Likewise here, even if the utility companies had an easement for the pole, they did not have the right to extend that easement by adding a dangerous guy wire to Plaintiff's property. Plaintiff was entitled to an injunction for this trespass, and the trial court summary disposition of the claim without any analysis was error.

Notably, in Jacqui, the parties had written easements granting rights, but even the writing did not justify the dominant tenement's extension of the easement. Without any writing, the utility companies have no legal authority to extend the easement beyond the claim in the utility pole. (Pa132 at ¶ 17.) They have no authority to remove Mr. Trabocco's fence or his soil; nor do they have any authority to place a dangerous guy wire. Because of the utility companies' own position in this litigation limited to the pole, they were not entitled to summary judgment because they did not continuously claim possession over Mr. Trabocco's property at the guy wire or fence for over thirty years. (Pa347, cf. Pa88 to Pa90-91.)

As the Court has explained, a dominant tenement's extension of possession violated the continuous element necessary for an easement, and thus violates the rights to continue that possession upon the objection by the servient

tenement. Jacqui, 27 N.J. Eq. at 532. Here, the photographs clearly show that the utility companies trespassed onto Mr. Trabocco's property and added a guy wire sometime after November 22, 2021 as the guy wire did not exist in the photographs that JCP&L attached to its motion. (Pa347, cf. Pa88 to Pa90-91.) Time – the only defense raised by either defendant - is no defense to this conduct as Mr. Trabocco filed the action within a year of the annexation of his property for the utility companies' use of the guy wire. (Pa1, Pa88, Pa90-91, Pa104-11, Pa130-36.) Accordingly, the trial court's dismissal of the entire complaint on summary judgment was error and should be reversed.

POINT THREE

The Trial Court Erred in Failing to Consider Mr. Trabocco's Claim for Nuisance. (1T10:3-16:18.)

In addition to the claim for injunction, the trial court further erred in granting summary judgment limited to the time issue without analyzing Mr. Trabocco's claim for nuisance. The trial court's decision basically permits the utility companies to use Mr. Trabocco's property however they see fit despite never recording an easement. Even if they obtained an easement by prescription, which Mr. Trabocco disputes, the companies still owe a duty to act reasonably. Neither the trial court nor the utility companies addressed that even if the time

had run under N.J.S.A. 2A:14-30, that does not immunize them from causing a nuisance. (Pa7 at ¶¶ 31-33.)

A party has a right to a remedy in nuisance when a utility company uses the landowner's property for placement of pipes or poles. Broome v. N.Y. & N.J. Tel. Co., 42 N.J. Eq. 141, 144 (Ch. Ct. 1887)(citing Goodson v. Richardson, L.R. 9 Ch. 221). Here, the trial court entirely overlooked the claims in the Complaint for nuisance.

"[A]s a general rule and absent a contrary agreement, the holder of an easement has a duty to maintain and repair the property/facility on a servient tenement subject to the easement." Poblette v. Towne of Historic Smithville Cmty. Ass'n a New Jersey Corp. & Roseland Mgmt. Co., 355 N.J. Super. 55, 676 (App. Div. 2002) (citing Lake Lookover Property Owner's Ass'n v. Olsen, 348 N.J. Super. 53, 67 (App. Div. 2002); Island Improvement Ass'n of Upper Greenwood Lake v. Ford, 155 N.J. Super. 571, 574–75 (App. Div. 1978); Ingling v. Public Service Electric & Gas Co., 10 N.J. Super. 1, 10–11 (App. Div. 1950); Braun v. Township of Mantua, 270 N.J. Super. 404, 408 (Law Div.1993); 2 Thompson, Real Property, § 428 at 666–67 (1980)).

The Honorable William J. Brennan before he became a Justice, explained the duties of an easement holder: "where the easement is of a character that want of repair injuriously affects the owner of the servient land, it becomes not

only the right but the duty of the owner of the easement to cause all necessary repairs to be made." Ingling v. Pub. Serv. Elec. & Gas Co., 10 N.J. Super. 1, 11 (App. Div. 1950) (quoting Washburn, The Law of Easements and Servitudes, 4th Ed. (1885) p. 733). The Appellate Division held "the defendants were under an affirmative duty to make reasonable inspections of their easement upon plaintiff's property and to use due care to keep the guy wires and [protective covering] in good repair." Ingling, 10 N.J. Super. at 10–12 (citations omitted).

"When servient estates are exposed to nuisances as a result of an easement, the proper remedy is a nuisance suit." 25 Am. Jur. 2d Easements and Licenses § 96. Under New Jersey law, "the servient tenement will not be burdened to a greater extent than was contemplated or intended at the time of the creation of the easement, and the use of the easement must not unreasonably interfere with the use and enjoyment of the servient estate. Lidgerwood Ests. v. Pub. Serv. Elec. & Gas Co., 113 N.J. Eq. 403, 407 (Ch. 1933) (citations omitted)(citing Kentucky & West Virginia Power Company v. Elkhorn City Land Company, 212 Ky. 624, 279 S. W. 1082, and Taylor v. British Legal Life Assurance Company, 1 Ch. 395, 14 British Ruling Cases, 989.) But this is exactly what Mr. Trabocco alleged: what was barely noticeable in 2021, in 2022, became so substantial that it interfered with his use of his property and which he could no longer completely insure his property due to the utility companies'

use of the property without his permission. (Pa245 at ¶ 14, Pa236.) The guy wire is a nuisance on Mr. Trabocco's property as it is a tripping hazard and unreasonably interferes with Mr. Trabocco's ability to use and enjoy his backyard. (Pa90-91.)

In Lidgerwood, the issue was whether the easement that was granted permitted the dominant estate, the public utility company, to build a boardwalk and trestle to construct its steel tower for its transmission lines. 113 N.J. Eq. at 405. The court recognized, "this court has often entertained jurisdiction to enjoin the use of an easement in a manner different from the grant." Id. at 406 (citing Johnston v. Hyde, 25 N.J. Eq. 454 (Ch. Ct. 1875); Jaqui v. Johnson, 27 N. J. Eq. 526; Lorenc v. Swiderski, 109 N. J. Eq. 147 (Ch. Ct. 1931)). The court resorted to the language of the easement to determine whether the use was contemplated by the parties. Id. Based on the language and testimony regarding necessity of use, the court enjoined the utility company ordering the removal of part of the boardwalk and trestle. Id. at 411-12.

The statute on which Verizon and JCP&L rely only relates to ejectment; it does not apply to nuisance. Ingling, 10 N.J. Super. at 10–12; see Kruvant v. 12-22 Woodland Ave. Corp., 138 N.J. Super. 1, 17 (Law Div. 1975)(holding easement by prescription did not include use of property for dressage field). Here, there is no written easement. (Pa168-72, Pa193-234.) Moreover, the utility

companies have conceded that to the extent they have a prescriptive easement by adverse possession, it is limited to Pole 1077. (Pa132 at ¶ 17.) Neither utility company presented any proofs that they had an easement over the guy wire. (Pa44-136.) The trial court likewise made no findings on the guy wire. (1T10:3-16:18; Pa303-09.) Moreover, the trial court rejected even the review of Plaintiff's proofs that his property was not insurable as to the utility companies' annexation of a greater portion of his backyard. (Pa308, Pa236.) Due to the trial court's failure to even consider the nuisance argument when granting summary judgment, this Court should reverse because Mr. Trabocco sufficiently demonstrated a genuine dispute of material fact that the guy wire was placed sometime after November 22, 2021 and presents a tripping hazard that interferes with his use and enjoyment of his property. (Pa347, Pa90-91.)

POINT FOUR

The Trial Court Incorrectly Denied Reconsideration Based on a Palpably Incorrect Basis. (Pa303-09).

The trial court erred in denying the motion for reconsideration because Plaintiff's expert report demonstrated a genuine dispute of material fact was not considered. (Pa308.) The trial court's basis for not considering the report was that discovery was over and that the report could have been provided in opposition to the motion for summary judgment, but the motion for summary judgment was filed when Plaintiff's complaint was dismissed without prejudice

for outstanding discovery before the close of discovery. (Pa308, Pa112-14.) Because once the discovery issue was cured, the Court Rules would have permitted Plaintiff the time to complete discovery, the trial court's basis was palpably incorrect. See R. 4:24-1(c).

This Court reviews the denial of a motion for reconsideration for an abuse of discretion. Branch v. Cream-O-Land Dairy, 459 N.J. Super. 529, 541 (App. Div. 2019), aff'd as mod., 244 N.J. 567 (2021). This Court may reverse the denial of reconsideration when 1) the "[c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence[.]" Id. at 541 (quoting Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)).

The trial court rejected Plaintiff providing proofs on the motion for reconsideration because it was after the close of discovery, but neither Verizon nor JCP&L asserted an affirmative defense or counterclaim for an easement by adverse possession during the time for discovery. (Pa12-33.) On the motion record, the first reference to a prescriptive easement was Verizon's letter of September 28, 2023. (Pa127.) Plaintiff then served the expert report in response on January 23, 2024. (Pa192, Pa239.) The trial court denied reconsideration

because Plaintiff's expert report was served on January 23, 2024 after the seeming close of discovery, but the problem was that the report was served at a time when the Complaint was dismissed without prejudice for failure to provide discovery, and thus, discovery should have been extended upon reinstatement. See R. 4:24-1(c); Pa112-14. JCP&L had obtained a dismissal of Plaintiff's Complaint without prejudice for failure to provide more specific answers to requests for admissions on November 8, 2023. (Pa112-14.) The docket does not indicate that the Complaint was reinstated. Instead, JCP&L moved – while the Complaint was dismissed without prejudice – for summary judgment. (Pa42.) At the time of filing, discovery was in limbo given the dismissal without prejudice for a discovery deficiency. Pa112-14; see R. 4:24-1(c).

As the trial judge pointed out on reconsideration, the discovery end date at that time was December 4, 2023. (Pa308.) The Court Rule states, "On restoration of a pleading dismissed pursuant to Rule 1:13-7 or Rule 4:23-5(a)(1) or if good cause is otherwise shown, the court shall enter an order extending discovery." R. 4:24-1(c). Accordingly, Plaintiff would have been entitled to additional time for discovery from the date that the Complaint was reinstated, and thus, the expert report would have been timely. R. 4:24-1(c). Here, Plaintiff's expert report was served on January 23, 2024 and added in support of his motion for reconsideration. (Pa239, Pa192.)

The trial court used the wrong legal standard to exclude that report: because the Complaint was dismissed without prejudice, Plaintiff deserved the opportunity to submit an expert report. R. 4:17-4(e) & R. 4:17-7. Because of this mistake of law, Plaintiff has met the palpably incorrect standard. See Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Moreover, the trial court's analysis for excluding the new information on reconsideration was error where the summary judgment motion was filed before the December 4, 2023-close of discovery like JCP&L had done. (Pa42.)

The trial court's error was compounded by failing to consider the probative, competent evidence of the expert's report. (Pa308.) The report was served on January 4, 2024, and thus it was not a document that could have been presented earlier. As long as Plaintiff would have been entitled to more time for discovery under R. 4:24-1(c), there was no basis for the Court to exclude that evidence. Even Verizon took the position that after December 4, 2023 more discovery was needed because on December 7, 2023, before the return of the motion for summary judgment, Verizon served a subpoena for additional documents upon Plaintiff's insurance company. (Pa157.) The trial court signed the subpoena, and thus, for the trial court to use the December 4, 2023 date as a sword against Plaintiff violates the concept that cases should be decided on the merits and not on strategic gamesmanship. (Pa158); see Bilotti v. Accurate

Forming Corp., 39 N.J. 184, 206 (1963)(explaining plaintiff should have the full course of discovery prior to dismissal of claims). Here, the trial court recognized the need for more discovery by signing the subpoena, but refused to let Plaintiff produce an expert report that was necessary to rebut the recent change in Defendants' legal theories regarding a prescriptive easement. (Pa127, Pa157-58, Pa308.)

Furthermore, Verizon's counsel emailed Plaintiff on February 23, 2024 stating that discovery amendment of January 2, 2024 regarding the expert was served after the close of discovery and therefore, Verizon objected to the amendment in accordance with R. 4:17-7. (Pa240.) But such rejection had no basis in the Rules because as of January 2, 2024, Plaintiff's complaint was still dismissed without prejudice, and therefore, the December 3, 2023 end date would be enlarged by Court Rule 4:24-1(c). (Pa112.) Importantly, Verizon's counsel's waiting fifty-three days to send the objection meant that the amendment was proper under R. 4:17-7 that requires formal objection within twenty days. Given the trial court admitted not considering the evidence, the trial court abused its discretion in denying the motion for reconsideration.

CONCLUSION

Viewing the facts in the light most favorable to Plaintiff, the trial court erred. Defendants failed to present any facts to establish the factors necessary

for a prescriptive easement. Moreover, on the one element that the trial court did consider, the trial court erred because there was a genuine dispute demonstrating that Defendants constructed the guy wire and enlarged their use of Plaintiff's property for which the thirty year-time period had not run. Furthermore, the trial court did not address Plaintiff's claims for injunction or nuisance. Finally, the trial court erred in the basis for denying reconsideration since the period for discovery should not run when the matter is dismissed without prejudice for a discovery violation. Accordingly, the matter should be reversed and reinstated.

Respectfully submitted,
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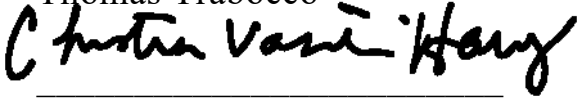
Attorneys for Plaintiff-Appellant,
Thomas Trabocco



CHRISTINA VASSILIOU HARVEY
ANDREW BROOME

Dated: August 29, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-002240-23T2

THOMAS TRABOCCO Plaintiff v. VERIZON COMMUNICATIONS, INC., FIRSTENERGY CORP. doing business as JERSEY CENTRAL POWER & Light, inc., John Does 1-10 (being fictitious names) and ABC Corporations 1-10 (being fictitious entities) Defendants	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY DOCKET NO: MON-L-2838-22 SAT BELOW HON. ANDREA I. MARSHALL, J.S.C. CIVIL ACTION

BRIEF AND APPENDIX OF DEFENDANTS/RESPONDENTS, FIRSTENERGY CORP. AND JERSEY CENTRAL POWER & LIGHT

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PRELIMINARY STATEMENT

Plaintiff Thomas Trabocco, who resides in a residential home near the Rumson Country Club in Rumson, New Jersey, has fabricated numerous claims, changed his story numerous times, filed numerous false affidavits and filed a frivolous complaint against defendants Verizon and Jersey Central Power & Light (JCP&L), claiming the defendants secretly moved a utility pole with high-voltage wires and equipment into plaintiff's fenced-in backyard – without plaintiff ever seeing any of this alleged construction activity in his backyard. Verizon, the owner of the pole, has produced pole records that indicate the utility pole was installed in plaintiff's backyard in 1978 and has not been moved since 1978.

Moving a single utility pole requires a considerable amount of pre-work engineering, planning and mark-outs, which occurs before many large commercial trucks from different utility companies appear to install a new pole and transfer all the wires and equipment from the old pole to the new pole. Due to the tension on the various wires on a pole, and the fact that wires and poles are all interconnected to other nearby poles, it is impossible to just "move" one pole to another location without causing widespread damage to the nearby poles and wires. The process is to first install a new pole, then transfer all the wires and equipment from the old pole to the new pole. Then the old pole can be removed. Poles cannot just be

pulled out of the dirt, with energized equipment on them, and carried to another location.

Curiously, plaintiff claims he never saw any utility trucks or utility employees "trespassing" in his fenced-in backyard at any time. He never saw any JCP&L or Verizon heavy-equipment trucks or employees in his backyard.

Plaintiff has fabricated at least four stories, all of which are objectively false – and ultimately led to a frivolous pleading finding by the trial court against plaintiff. First, plaintiff claimed the pole was secretly moved into his fenced-in backyard in 2021. When that proved false, he changed his story to allege that the pole was secretly moved into his backyard in 2022. When plaintiff received photographs of his backyard from November 2021 from his property insurance adjuster (who was there because fallen trees had damaged plaintiff's fencing), he changed his story again and falsely alleged that the November 2021 photographs proved there was no pole in his backyard in November 2021.

However, when plaintiff realized the November 2021 photographs do, in fact, show the same utility pole in the same location in his backyard, he changed his story yet again to falsely allege, in this appeal, that the November 2021 photographs show that a "guy wire" was not there in November 2021 (which is also objectively incorrect).

As plaintiff has meandered from one false story to another, while simultaneously going through four attorneys in this litigation, three things have remained constant: (1) the Verizon pole records show the pole has not been moved since it was installed in plaintiff's backyard in 1978; (2) the November 2021 photograph shows the pole is located at the same exact location in plaintiff's backyard; and (3) plaintiff has no evidence that JCP&L moved the subject pole (a pole it did not own) into plaintiff's backyard.

Plaintiff took no depositions. Plaintiff served no expert reports. Plaintiff failed to oppose numerous motions. Plaintiff ignored court orders that compelled discovery from plaintiff, which led to the dismissal of plaintiff's complaint on November 8, 2023 – before summary judgment was even granted. Plaintiff never moved to reinstate the complaint – but, in reality, he could not do so because he never provided the discovery that was court ordered.

Undaunted by his conduct, plaintiff now files this appeal.

PROCEDURAL HISTORY

Respondent JCP&L adds the following Procedural History to that provided by appellant/plaintiff.

On October 17, 2022, plaintiff Thomas Trabocco filed a complaint against defendants Verizon and Jersey Central Power & Light ("JCP&L"). (Pa1). Plaintiff alleges in his complaint that, "in or about August 2022, the plaintiff did discover that a [utility] pole belonging to the defendant Verizon and containing its cable and internet transmitting equipment had been installed on the subject Property." (Pa1 at ¶10). Plaintiff alleges that Verizon "installed an unauthorized pole" on plaintiff's property. (Pa1 at ¶ 19).

Plaintiff's counsel who filed the original complaint was Stuart Schlem, Esq. (Plaintiff's Attorney #1). (Pa1).

On December 12, 2022, JCP&L filed an answer to plaintiff's complaint, and asserted as a defense that plaintiff's complaint was a frivolous pleading as to JCP&L. (Pa23 at Affirmative Defense number 10).

On February 6, 2023, Jordan Brewster, Esq., filed a Substitution of Attorney and took over as the second plaintiff's counsel (Plaintiff's Attorney #2). (Pa56).

On April 24, 2023, JCP&L sent Plaintiff's Attorney #2 (Jordan Brewster, Esq.) a frivolous pleading letter, outlining the legal basis why plaintiff's complaint as to JCP&L was frivolous. (Pa64).

On July 11, 2023, James Kinneally, Esq., filed a Substitution of Attorney and took over as the third plaintiff's counsel (Plaintiff's Attorney #3). (Pa67).

On July 20, 2023, as a courtesy, JCP&L sent Plaintiff's Attorney #3 (James Kinneally, Esq.) the same frivolous pleading letter that JCP&L previously sent to Plaintiff's Attorney #2 (Jordan Brewster, Esq.). (Pa69).

On August 16, 2023, JCP&L filed a motion to compel plaintiff to provide more specific responses to JCP&L Request for Admissions.

Plaintiff did not oppose this motion.

On September 12, 2023, the trial court granted JCP&L's unopposed motion to compel plaintiff to provide more specific responses to Request for Admissions, and gave plaintiff fourteen days to serve those responses. (Pa38).

Plaintiff ignored and otherwise failed to comply with the trial court's September 12, 2023, discovery order.

On September 25, 2023, the court issued a Notice to all parties that the discovery end date was December 2, 2023. (Da1).

On October 11, 2023, JCP&L filed a motion to dismiss plaintiff's complaint for failing to comply with the September 12, 2023, court order that required plaintiff to provide, within fourteen days, more specific responses to JCP&L's Request for Admissions.

Once again, plaintiff did not oppose this motion to dismiss by JCP&L.

On October 30, 2023, JCP&L filed a summary judgment motion on liability. (Pa42). Plaintiff produced no evidence that JCP&L moved the subject pole (a pole it did not own) into plaintiff's backyard in 2021 or 2022.

On November 8, 2023, the trial court granted JCP&L's unopposed motion to dismiss plaintiff's complaint for failure to comply with the September 12, 2023, court order. (Pa112).

Plaintiff's complaint has been dismissed at all times from November 8, 2023, through today. Plaintiff never moved to reinstate his complaint, but in reality he could not move to reinstate his complaint because he never provided the discovery that was court ordered.

Technically and procedurally, when summary judgment was granted to JCP&L on January 22, 2024, plaintiff's complaint had been and remained dismissed since November 8, 2023, for the prior discovery deficiencies. JCP&L's summary judgment motion was filed due to the time restrictions under *Rule* 4:46-1 for filing summary judgment motions relative to trial dates.

On December 2, 2023, the discovery end date expired. Plaintiff took no depositions and served no expert reports before December 2, 2023.

On December 12, 2023, after the discovery end date, plaintiff filed an opposition brief to JCP&L's summary judgment motion. Plaintiff raised three points in his opposition: (1) factual disputes about the year the pole was placed on

plaintiff's property; (2) "discovery is incomplete;" and (3) Verizon's reliance on *N.J.S.A.* 2A:14-30. Plaintiff's opposition brief was five pages long and, including exhibits, was a total of 32 pages. This is the extent of the "summary judgment record" that plaintiff provided to the trial court. *Id.*

Plaintiff's "discovery is incomplete" argument is/was incorrect because (1) the discovery end date expired on December 2, 2023, ten days before plaintiff's opposition brief was filed; and (2) plaintiff's complaint was still dismissed at this time without a motion to reinstate.

Further, in plaintiff's opposition brief, plaintiff ignored all of JCP&L's facts set forth in its numbered Statement of Material Facts, which results in each of JCP&L's Statement of Material Facts being deemed admitted under *Rule* 4:46-2(b). Plaintiff failed to "file a responding statement either admitting or disputing each of the facts in the movant's statement." *Rule* 4:46-2(b).

Plaintiff's opposition brief failed to make any arguments about easements, prescriptive easements, injunctions or nuisance.

On December 12, 2023, JCP&L filed a reply brief in support of its summary judgment motion.

On January 2, 2024, one month after the discovery end date expired, and while his complaint was still dismissed, plaintiff sent a letter belatedly naming Arik Sevy "as a fact witness." (Pa239). Plaintiff did not include a Certificate of

Due Diligence under *Rule* 4:17-7. Plaintiff did not name Arik Sevy as an expert witness and no attachments or reports were included with this late amendment. Plaintiff did not file a motion to re-open discovery with this late amendment (or even a motion to reinstate his still-dismissed complaint).

On January 19, 2024, the trial court conducted oral argument on JCP&L's and Verizon's summary judgment motions. During the oral argument, plaintiff failed to make any arguments about easements, prescriptive easements, injunctions or nuisance. (1T7-2).

On January 22, 2024, the trial court granted JCP&L's summary judgment motion and dismissed plaintiff's complaint with prejudice. (Pa159).

On January 29, 2024, plaintiff filed a motion for reconsideration. (Pa163). When plaintiff filed this motion for reconsideration, his complaint was still dismissed from the November 8, 2023, order (and now was also dismissed by the summary judgment order). Plaintiff's motion for reconsideration was, including exhibits, a total of sixteen (16) pages.

On February 7, 2024, JCP&L filed an opposition brief to plaintiff's motion for reconsideration.

On February 7, 2024, JCP&L also filed a cross-motion for frivolous pleading sanctions, costs and fees from plaintiff for plaintiff's frivolous pleading. (Pa173).

On February 9, 2024, two months after the discovery end date expired, plaintiff filed an improper "supplemental certification of plaintiff." (Pa186). In this February 9, 2024, "supplemental" filing, plaintiff attached a new email from someone named Richard Arik Sevy ("Sevy"). (Pa192). This new, unsigned email from Sevy was filed on e-courts (not served on the defendants) two months after the discovery end date of December 2, 2023 – and while plaintiff's complaint (1) was dismissed for discovery deficiencies; and (2) was dismissed by summary judgment. Plaintiff is now claiming this late, unsigned email (filed only on e-courts) from their "fact" witness that was served after his complaint was dismissed (twice) constitutes an "expert report" against the defendants.

Plaintiff never amended his answers to interrogatories to identify any "experts" and never sought to re-open discovery to serve this late unsigned email. Further, plaintiff did not supply a Certificate of Due Diligence under *Rule* 4:17-7. Sevy's unsigned email only appears on e-courts.

On February 12, 2024, JCP&L filed an opposition to plaintiff's "supplemental certification."

On February 29, 2024, plaintiff filed an opposition brief to JCP&L's motion for frivolous pleading sanctions, costs and fees.

On March 4, 2024, the trial court denied plaintiff's motion for reconsideration. (Pa303).

On March 4, 2024, the trial court granted, in part, JCP&L's cross-motion for frivolous pleading sanctions from plaintiff, but only for the attorney's fees and costs JCP&L spent opposing plaintiff's motion for reconsideration. (Pa310).

As a gesture of good faith, and assuming the case had mercifully ended, JCP&L did not submit its fees and costs to the court to recover frivolous pleading sanctions and costs from plaintiff.

After going through three different attorneys in this litigation, plaintiff then retained Christina Vassiliou Harvey, Esq., as Plaintiff's Attorney #4 to handle this appeal.

STATEMENT OF MATERIAL FACTS

JCP&L adds the following Statement of Facts.

Plaintiff alleges that, since 1982, he has resided at 9 Buttonwood Lane East in Rumson, New Jersey. (Pa1 at ¶6). Plaintiff claims that, "in or about August 2022, the plaintiff discovered that approximately 40 feet of his new fencing had been removed from his property and replaced with substandard fencing." (Pa1 at ¶9). Plaintiff further alleges that, "in or about August 2022, the plaintiff did discover that a pole belonging to the defendant Verizon and containing its cable and internet transmitting equipment had been installed on the subject Property." (Pa1 at ¶10).

Plaintiff alleges that Verizon "installed an unauthorized pole" on plaintiff's property. (Pa1 at ¶19). Verizon is the owner of the utility pole in plaintiff's backyard and has telecommunication equipment on the pole. JCP&L does not own the pole. JCP&L, through a Joint Use Agreement, has high-voltage wires and equipment on the subject utility pole, including a transformer.

Verizon provided plaintiff with the pole records that show the subject utility pole was installed at this location in plaintiff's backyard in 1978 and has not been moved or relocated since 1978. (Pa122). Further, Thomas Young, Verizon's Senior Manager of Network Engineering, certified that the subject utility pole was

installed in plaintiff's backyard in 1978 and has not been moved or relocated since 1978. (Pa119).

Plaintiff did not depose Mr. Young, or anyone else from Verizon. Plaintiff took no depositions at all and served no expert reports during the discovery period, which expired on December 2, 2023. As set forth below, installing a new utility pole takes an enormous amount of engineering, planning, mark-outs and construction, all with the use of large construction vehicles from different utility companies. Plaintiff, however, saw nothing – in his own fenced-in backyard.

Plaintiff's home is in a residential neighborhood near the Rumson Country Club in Rumson, New Jersey, and his property is surrounded by other residential homes. Plaintiff's backyard is fenced in. In response to Request for Admissions, plaintiff responded:

> Plaintiff can testify that at the end of the summer of 2021 he heard substantial and very noticeable heavy machinery being used behind his house. At the time he was still recovering from serious back and neck surgery, in addition to a leg injury, and was not able to readily inspect the area of his home where the subject utility pole (BT1077RN) is from the middle of 2021 and through much of 2022, but heard extreme activity taking place behind his home in late summer of 2021 and cannot state that such activity was not Verizon or JCP&L employees and/or contractors removing, moving or installing the subject utility pole (BT1O77RN). Plaintiff knows that that as of November 2021, the subject utility pole (BT1077RN) was located in its current position but cannot say with certainty that the pole was located in that location throughout 2021.

(Pa74 at number 2).

For unknown reasons, plaintiff's "2021" story and his dates then changed. On September 21, 2023, plaintiff provided discovery responses to Verizon's discovery, including answers to interrogatories. In his answers to interrogatories, plaintiff certified that:

> There was no utility pole on Plaintiff's property until some time in 2022. Plaintiff discovered the utility pole on his property in 2022. Plaintiff did not witness the actual installation of the pole but discovered its existence when he saw it in his yard.
>
> (Pa85 at number 1).

Thus, plaintiff changed his story to now allege that the pole was secretly moved into his backyard in 2022 (not 2021). Plaintiff's dates and allegations will change again.

In these discovery responses, plaintiff also provided some critical photographs taken by his own homeowner's insurance carrier (Narragansett Bay Insurance Co.) in November 22, 2021, which shows the subject utility pole in the same exact location it is today – in plaintiff's backyard (where it has been since 1978). (Pa88). In November 2021, plaintiff was making a homeowner's insurance claim because of fence damage caused by fallen trees. Apparently, a storm knocked down some trees in or near plaintiff's backyard.

On December 13, 2022, counsel for JCP&L and Verizon participated in a site inspection in plaintiff's backyard. Photographs were taken of plaintiff's backyard on December 13, 2022. When the November 22, 2021, photograph taken by Narragansett Bay (Pa88) is compared to the inspection photographs from December 13, 2022 (Da35 to Da47), it is readily apparent that the pole has not been moved and is in the exact same location in plaintiff's backyard

Ignoring this photographic evidence of no change, plaintiff then certified in his answers to interrogatories that, "[t]hese photographs [from Narragansett Bay Insurance] show that there was no utility pole in Plaintiff's backyard in 2021." (Pa85 at number 1). It is unclear how plaintiff or his counsel could look at the November 2021 photograph (Pa88) and "certify" that there was no pole in his backyard in November 2021.

On September 21, 2023, immediately after receiving these documents and photographs from November 2021, Verizon's counsel sent an email to plaintiff's attorney advising him that plaintiff's allegations in his answers to interrogatories are incorrect because, "[t]he pole is clearly shown in your client's backyard on the photograph taken on 11/22/2021 . . . in the same exact location it is now. This photo proves that this pole was not installed in your client's backyard in July of 2022." (Pa93).

Despite this, during the summary judgment oral argument on January 19, 2024, plaintiff's counsel argued to the trial court that plaintiff's wife "can testify that the pole was not there prior to August of 2022." (1T7-14). If, in fact, plaintiff's wife would testify under oath that the pole was not in her backyard prior to August 2022, the November 2021 photograph from Narragansett Bay (Pa88) would disprove that proposed testimony. Notably, this representation by plaintiff's counsel occurred during oral argument on January 19, 2024, after the November 2021 photograph from Narragansett Bay had been produced to all parties.

At some unknown point thereafter, plaintiff must have realized that the November 2021 photographs do, in fact, show the utility pole in the same location in plaintiff's backyard because plaintiff yet again changed his story to allege that there is "no guy wire" in the November 2021 photographs taken by Narragansett Bay. As set forth below, that argument, too, is false. A "guy wire" is a non-energized cable that runs from a ground attachment (stake) to an elevated portion of the pole, and it serves as a stabilizing counterbalance to the weight on a pole that may "pull" the pole in a particular direction. There is no power or energy going through a guy wire – it is simply a cable used to stabilize a pole and serves as a counterbalance safety device.

Quite troubling, plaintiff incorrectly argues throughout his brief that the November 2021 photographs taken by Narragansett Bay prove that there was no

guy wire in 2021 (implying that someone installed a guy wire after November 2021). In his Preliminary Statement, plaintiff incorrectly argues that, "a picture taken by Mr. Trabocco's insurance company demonstrated that as of November 22, 2021, there was no guy wire[,]" (Pbi) and "Verizon and JCP&L had entered the property after November 22, 2021 in order to construct a dangerous, obtrusive guy wire in Mr. Trabocco's yard." (Pbi-ii).

Then, in his Statement of Facts, plaintiff incorrectly argues that the "guy wire is clearly not present in the 2021 photos from Mr. Trabocco's insurance company. . ." (Pbiii). Finally, plaintiff incorrectly argues in his Statement of Facts that "[c]omparing the 2021 photograph to the ones that JCP&L took thirteen months later in 2022, supports Plaintiff's contentions: a utility guy wire was added and parts of Plaintiff's fence were removed at sometime between November 22, 2021 and December 2022." (Pbv).

All of these representations by plaintiff are false. If one looks closely at the November 2021 photograph, the gray guy wire is clearly seen in the top left corner of the photograph. Although the guy wire can be seen in the top left corner of the photograph Pa88, JCP&L has (1) enlarged the Pa88 photograph (Da48), and (2) zoomed in at the top left corner of Pa88. (Da49). JCP&L is also attaching a photograph with two red arrows depicting the starting and ending points of the

gray guy wire. (Da50). The photographs clearly show the guy wire is present in November 2021. (Da48 and Da50).

Thus, plaintiff's entire guy wire argument, made throughout his brief, is simply wrong. The guy wire is present in November 2021 – plaintiff and his fourth counsel simply did not see it when they looked at the photographs.

Notably, for this appeal, plaintiff appears to have abandoned his claim that JCP&L and/or Verizon moved the pole onto his property – because they have changed stories to only allege now that the guy wire is not present in November 2021. Plaintiff is conceding that the pole was present in November 2021 – but he is now claiming the guy wire was not present in November 2021 (even though the guy wire is there, too).

Plaintiff's four shifting false stories started with the allegation that the pole was secretly moved into plaintiff's fenced-in backyard in 2021. When that story proved to be false, plaintiff changed his story to allege that the pole was secretly moved into his backyard in 2022. Plaintiff then changed his story to argue that the November 2021 photographs from Narragansett Bay show the pole was not in his backyard in November 2021. When that story proved to be false, plaintiff changed his story yet again to now argue in this appeal that the November 2021 photographs from Narragansett Bay show the guy wire is not there. However, the guy wire is present in November 2021.

Plaintiff also makes some ill-defined "fence" allegations, which are similarly baseless. As we know, plaintiff's fence was damaged in or around November 2021 from a storm that knocked down trees into plaintiff's fence, which led to the property damage adjuster from Narragansett Bay coming to the property to take photographs. As can be seen in the photographs taken by defense counsel on December 13, 2022, plaintiff's entire backyard is filled with mis-matched wooden fencing that has been "patched" at various times by plaintiff, plaintiff's neighbors and/or plaintiff's fencing company. (Da35 to Da47; Da51-Da55).

On September 13, 2023, plaintiff sent Verizon a letter demanding that, if Verizon did not remove the utility pole by October 28, 2023, that it would result in plaintiff "hiring a contractor to remove the pole." (Pa98).

On September 21, 2023, since JCP&L has high-voltage wires, equipment and a transformer on this utility pole, JCP&L sent a letter to plaintiff's counsel outlining the serious dangers associated with touching or moving high-voltage electrical equipment, as well as the criminal and civil statutes plaintiff, plaintiff's attorney and some unknown contractor would be violating if anyone went near or moved JCP&L's electric equipment. (Pa100).

As to easements, JCP&L, as noted above, is not the owner of the pole. Nevertheless, plaintiff, like every homeowner in New Jersey, has numerous easements on his property that he may not be aware of, such as water pipes, gas

lines, sewer pipes, underground cables/lines/pipes, stormwater, telephone/cable and electric. Utility easements are omnipresent and benefit each individual property owner.

LEGAL ARGUMENT

I. EVEN BEFORE SUMMARY JUDGMENT WAS GRANTED FOR JCP&L, PLAINTIFF'S COMPLAINT WAS DISMISSED ON NOVEMBER 8, 2023, FOR PLAINTIFF'S FAILURE TO COMPLY WITH A PRIOR COURT ORDER AND PLAINTIFF NEVER MOVED TO REINSTATE THE COMPLAINT. (Pa38; Pa112)

On August 16, 2023, JCP&L filed a motion to compel plaintiff to provide more specific responses to JCP&L Request for Admissions. Plaintiff did not oppose this motion. On September 12, 2023, the trial court granted JCP&L's unopposed motion to compel plaintiff to provide more specific responses to Request for Admissions, and gave plaintiff fourteen days to serve those responses. (Pa38).

Plaintiff ignored this court order and did not otherwise comply with the court's order. As such, on October 11, 2023, JCP&L filed a motion to dismiss plaintiff's complaint for failing to comply with the September 12, 2023, court order. Once again, plaintiff did not oppose this motion to dismiss by JCP&L.

On November 8, 2023, the trial court granted JCP&L's unopposed motion to dismiss plaintiff's complaint for failure to comply with the September 12, 2023, court order. (Pa112). Plaintiff never moved to reinstate his complaint, nor did he move for reconsideration – although neither option would have been successful because plaintiff never provided the discovery that was court ordered.

Technically and procedurally, plaintiff's complaint has been dismissed since November 8, 2023. Plaintiff failed to oppose both motions, failed to comply with the discovery order of September 12, 2023, and failed to file a motion to reinstate his dismissed complaint.

Indeed, up through and including today, plaintiff has never provided the more specific responses to JCP&L's Request for Admissions that were court-ordered. Plaintiff is in no position to argue "error" with any aspect of this litigation – since his complaint has been dismissed since November 8, 2023. JCP&L filed two discovery motions against plaintiff – both of which were unopposed by plaintiff. Plaintiff then ignored the court orders that were entered against him. None of this acquiescent conduct by plaintiff is JCP&L's fault.

Plaintiff had the burden of proof in this matter. Plaintiff had the obligation to prove, with competent and trustworthy evidence, that JCP&L moved this utility pole onto plaintiff's property in 2021 (or 2022). Plaintiff had no such proofs as to JCP&L. The trial court properly granted summary judgment to JCP&L.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO JCP&L BECAUSE PLAINTIFF FAILED TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT THAT JCP&L MOVED THE UTILITY POLE ONTO PLAINTIFF'S PROPERTY IN 2021 OR 2022. (Pa119; Pa122; Pa159; Pa310; Da35-47; Da48-50; *R.* 4:46-2(c)).

When the trial court granted JCP&L's motion for frivolous pleading sanctions, costs and fees, it was, unfortunately, limited to plaintiff's motion for reconsideration. (Pa310). Nevertheless, the trial court found plaintiff's motion for reconsideration, after summary judgment was granted, was a frivolous pleading. *Id.* Assuming (wrongly) that this case had finally been put to rest, JCP&L decided, as a gesture of good will, not to submit its fees and costs for payment by plaintiff. Perhaps the old adage "*no good deed goes unpunished*" is applicable.

A. Standard of Review.

An appellate court reviewing a summary judgment order must "confine [itself] to the original summary judgment record." *Lombardi v. Masso*, 207 N.J. 517, 542 (2011). Here, plaintiff's opposition brief to JCP&L's summary judgment motion was five (5) pages long and, including exhibits, was a total of 32 pages. This is the extent of "the original summary judgment record." To the extent that plaintiff's appellate appendix here contains new or different evidence that plaintiff did not provide to the trial court on the summary judgment record, this Court is confined to the summary judgment record that was before the trial court.

The trial court's evidentiary determinations are reviewed for abuse of discretion. *Schwartz v. Means*, 251 N.J. 556, 570 (2022); *Rodriguez v. Wal-Mart Stores, Inc.*, 237 N.J. 36, 57 (2019) ("[E]videntiary decisions are reviewed under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion."). However, the court's grant or denial of summary judgment is reviewed *de novo*, subject to the *Rule* 4:46-2 standard that governs a trial court's ruling on a summary judgment motion. *Schwartz*, 251 N.J. at 570; *Nicholas v. Mynster*, 213 N.J. 463, 477-78 (2013). *Rule* 4:46-2(c) provides, in pertinent part:

> (c) **Proceedings and Standards on Motions.** The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact. The court shall find the facts and state its conclusions in accordance with R. 1:7-4.

B. The Verizon Pole Records. First and foremost, JCP&L does not own the utility pole in plaintiff's backyard. Verizon owns the pole. Like all utility companies, JCP&L is not permitted to remove, replace or relocate utility poles it does not own. Logically, if the pole is owned by JCP&L, only JCP&L can relocate

or replace that pole. Similarly, if Verizon owns a pole, only Verizon can relocate or replace that pole. Here, Verizon owns the pole.

Verizon, as the owner of the pole, provided plaintiff with the Verizon pole records that show the subject utility pole was installed at this location in plaintiff's backyard in 1978 and has not been moved or relocated since 1978. (Pa122). Further, Thomas Young, Verizon's Senior Manager of Network Engineering, certified that the subject utility pole was installed in plaintiff's backyard in 1978 and has not been moved or relocated since 1978. (Pa119).

This is evidence. This is evidence plaintiff did not act on. Plaintiff did not depose Mr. Young or anyone else from Verizon, nor did plaintiff objectively dispute this evidence. Plaintiff did nothing, and now wants his frivolous complaint revived by this Court.

C. Plaintiff's Guy Wire Falsehood.

Incredibly, plaintiff spends considerable time in his brief falsely arguing that the November 2021 photographs taken by Narragansett Bay prove that there was no guy wire in plaintiff's backyard in November 2021 (implying that someone installed a guy wire after November 2021). This is plaintiff's fourth, most-recent theory, which only surfaced when plaintiff realized his prior argument that the November 2021 photographs showed the pole was not in his backyard was false.

In his Preliminary Statement, plaintiff incorrectly argues that, "a picture taken by Mr. Trabocco's insurance company demonstrated that as of November 22, 2021, there was no guy wire[,]" (Pbi) and "Verizon and JCP&L had entered the property after November 22, 2021 in order to construct a dangerous, obtrusive guy wire in Mr. Trabocco's yard." (Pbi-ii).

Then, in his Statement of Facts, plaintiff incorrectly argues that the "guy wire is clearly not present in the 2021 photos from Mr. Trabocco's insurance company. . ." (Pbiii). Finally, plaintiff incorrectly argues in his Statement of Facts that "[c]omparing the 2021 photograph to the ones that JCP&L took thirteen months later in 2022, supports Plaintiff's contentions: a utility guy wire was added and parts of Plaintiff's fence were removed at sometime between November 22, 2021 and December 2022." (Pbv).

All of these representations by plaintiff are false. One need only look closely at the November 2021 photograph to see that the guy wire is clearly seen in the top left corner of the photograph. Although the guy wire can be seen in the top left corner of the photograph Pa88, JCP&L has (1) enlarged the Pa88 photograph (Da48), and (2) zoomed in at the top left corner of Pa88. (Da49). JCP&L is also attaching a photograph with two red arrows depicting the starting and ending points of the guy wire. (Da50). The photographs clearly show the guy wire is present in November 2021. (Da48 and Da49).

Thus, plaintiff's entire guy wire argument, made throughout his brief, is simply wrong. The guy wire is present in November 2021 – plaintiff and his counsel simply did not see it when they looked at the photographs. Unfortunately, this type of laziness and sloppiness has been plaintiff's theme throughout this case. Plaintiff has made fictitious and unverifiable claims, which JCP&L (or Verizon) would be forced to objectively rebut and disprove. When objectively disproved, plaintiff (and his counsel of the month) would simply change stories and create a new allegation. His newest attorney did not look at, or otherwise see, the guy wire that is clearly seen in the November 2021 photographs.

D. Plaintiff's 2021 (or maybe 2022) Falsehood.

Plaintiff lives in a residential home near the Rumson Country Club in Rumson, New Jersey, and his property is surrounded by other residential homes. Plaintiff's backyard is fenced in. In response to Request for Admissions, plaintiff responded:

> Plaintiff can testify that at the end of the summer of 2021 he heard substantial and very noticeable heavy machinery being used behind his house. At the time he was still recovering from serious back and neck surgery, in addition to a leg injury, and was not able to readily inspect the area of his home where the subject utility pole (BT1077RN) is from the middle of 2021 and through much of 2022, but heard extreme activity taking place behind his home in late summer of 2021 and cannot state that such activity was not Verizon or JCP&L employees and/or contractors removing, moving or installing the subject utility pole (BT1O77RN). Plaintiff knows that

> that as of November 2021, the subject utility pole (BT1077RN) was located in its current position but cannot say with certainty that the pole was located in that location throughout 2021.
>
> (Pa74 at number 2).

At this point, plaintiff was alleging that the pole was secretly moved into his backyard in 2021. Then, plaintiff altered his allegations. On September 21, 2023, plaintiff provided discovery responses to Verizon's discovery, including answers to interrogatories. In his answers to interrogatories, plaintiff certified that:

> There was no utility pole on Plaintiff's property until sometime in 2022. Plaintiff discovered the utility pole on his property in 2022. Plaintiff did not witness the actual installation of the pole but discovered its existence when he saw it in his yard.
>
> (Pa85 at number 1).

Thus, plaintiff changed his story to now allege that the pole was secretly moved into his backyard in 2022 (not 2021). Although plaintiff was wildly moving the goal posts, no matter where the goal posts ended up, plaintiff could not provide objective or trustworthy proofs for any of his allegations. Through this journey, three things remained constant: (1) the Verizon pole records showed the pole has not been moved since 1978; (2) the November 2021 photograph shows the pole is in the same place in plaintiff's backyard; and (3) plaintiff has no evidence that JCP&L moved the subject pole (a pole it did not own) into plaintiff's backyard.

Quite simply, plaintiff's most-recent "2022" argument is objectively disproved by the November 22, 2021 photograph taken by Narragansett Bay Insurance. (Pa88). Since the November 2021 photographs show the pole in plaintiff's backyard, plaintiff's story about the pole being moved into his backyard in 2022 is an impossibility. When plaintiff finally realized that the pole was, in fact, in his backyard in November 2021, plaintiff shifted theories yet again and is now arguing in this appeal that there is "no guy wire" in the November 2021 photograph (which, too, is false).

And, of course, plaintiff claims he never saw any commercial trucks and never saw any JCP&L or Verizon employees inside his fenced-in backyard performing all this construction work.

Despite all this, during the summary judgment oral argument on January 19, 2024, plaintiff's counsel, quite shockingly, argued to the trial court that plaintiff's wife "can testify that the pole was not there prior to August of 2022." (1T7-14). If, in fact, plaintiff's wife would testify under oath that the pole was not in her backyard prior to August 2022, then the November 2021 photograph from Narragansett Bay (Pa88) would disprove that proposed testimony and establish that plaintiff's wife, like her husband, would be pushing falsehoods upon the court, JCP&L and Verizon.

E. Plaintiff's "Expert" Falsehood.

Plaintiff does not have any experts. On November 8, 2023, on JCP&L's unopposed motion to dismiss, the trial court dismissed plaintiff's complaint for failure to comply with the September 12, 2023, court order. (Pa112). Plaintiff never moved to reinstate his complaint. On December 2, 2023, the discovery end date expired. Plaintiff took no depositions and served no expert reports before December 2, 2023.

On January 2, 2024, one month after the discovery end date expired, and while his complaint was still dismissed, plaintiff sent a letter belatedly naming Arik Sevy "as a fact witness." (Pa239). Plaintiff did not include a Certificate of Due Diligence under *Rule* 4:17-7, which means this amendment "shall be disregarded by the court and adverse parties." *Rule* 4:17-7. Plaintiff did not name Arik Sevy as an expert witness and no attachments or reports were included with this late amendment. Plaintiff did not file a motion to re-open discovery with this late amendment, or a motion to reinstate his dismissed complaint.

On January 22, 2024, the trial court granted JCP&L's summary judgment motion and dismissed plaintiff's complaint with prejudice. (Pa159).

On January 29, 2024, plaintiff filed a motion for reconsideration. (Pa163). When plaintiff filed this motion for reconsideration, his complaint was still dismissed from the November 8, 2023, order (and now was dismissed by the summary judgment order).

On February 9, 2024, plaintiff filed an improper "supplemental certification of plaintiff." (Pa186). In this February 9, 2024, "supplemental" filing, plaintiff attached a new email from Richard Arik Sevy ("Sevy"). (Pa192). This new, unsigned email from Sevy was filed on e-courts (not served on the defendants) two months after the discovery end date of December 2, 2023 – and while plaintiff's complaint (1) was dismissed for discovery deficiencies; and (2) was dismissed by summary judgment. Plaintiff is now claiming this late, unsigned email (filed only on e-courts) from their "fact" witness that was served after his complaint was dismissed (twice) constitutes an "expert report" against the defendants.

Plaintiff never amended his answers to interrogatories to identify any "experts" and never sought to re-open discovery to serve this late unsigned email. Further, plaintiff did not supply a Certificate of Due Diligence under *Rule* 4:17-7. The unsigned email only appears on e-courts. *Rule* 4:17-7 provides:

> Except as otherwise provided by *R.* 4:17-4(e), if a party who has furnished answers to interrogatories thereafter obtains information that renders such answers incomplete or inaccurate, amended answers shall be served not later than 20 days prior to the end of the discovery period, as fixed by the track assignment or subsequent order. Amendments may be allowed thereafter only if the party seeking to amend certifies therein that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date. In the absence of said certification, the late amendment shall be disregarded by the court and adverse parties. Any challenge to the certification of due diligence will be deemed waived unless brought by way

> of motion on notice filed and served within 20 days after service of the amendment. Objections made thereafter shall not be entertained by the court. All amendments to answers to interrogatories shall be binding on the party submitting them. A certification of the amendments shall be furnished promptly to any other party so requesting.

The Rule mandates that this Court, JCP&L and Verizon "disregard" the late amendment.

F. Plaintiff's Google Earth Photograph Falsehood.

Plaintiff's Google Earth photograph proves nothing. The satellite photograph depicts a lot of trees in the area and it is not clear at all that the pole is not there. One must understand that a utility pole is simply a wooden tree that has been treated with chemicals, so differentiating a brown wooden tree from a brown wooden pole from a Google Earth satellite about 450 miles away is difficult at best. And if plaintiff thinks this photograph proves something, he could have retained an expert to opine on what the photograph from 450 miles away shows or does not show. Further, there has been no authentication of this photograph.

G. Plaintiff's Fence Falsehood.

Plaintiff's "fence" allegations are similarly baseless. JCP&L is a public utility company that provides electrical services to customers throughout New Jersey. JCP&L is not in the business of removing private fences – or installing "old" fence in place of new fence.

As can be seen in the photographs from December 13, 2022, plaintiff's entire backyard is filled with mis-matched wooden fencing that has been "patched" at various times by plaintiff, plaintiff's neighbors and/or plaintiff's fencing company. (Da35 to Da47). Plaintiff has not served an expert report that outlines which portions of the fencing was allegedly "installed" by JCP&L.

H. Utility Poles Cannot Just "Move."

As JCP&L tried to explain to one or more of the plaintiff's attorneys, utility poles are not simply "moved" – they require significant engineering and operational planning, lay-out crews, work orders, hole-digging trucks, utility crews and mark-out crews to transfer all the electric and telecommunication wires from one pole to another. Due to the tension of wires that run from pole to pole, you cannot just pick up a pole and move it. It would have a dangerous and cascading effect on the other interconnected poles and equipment. By way of example, if you have ten poles with wires and equipment running parallel along a street and you

"move" one of those poles toward the street (or a home), it will pull on all the interconnected wires and possibly cause the nearby poles to collapse or break.

Adding a new pole takes numerous steps. First, after all the pre-work engineering and planning is complete, a new 30-40 foot pole must be trucked to the site and installed near the old pole – which requires large commercial hole-digging trucks (also called digger derrick trucks) and equipment. These digger derrick trucks have augers that drill down into the earth anywhere from six to ten feet deep. Second, after the new pole is installed, the utility company that owns the pole is the first company to transfer its equipment from the old pole to the new pole.

Third, the utility pole owner then notifies all the other utility companies that have equipment on that pole (*i.e.*, JCP&L, PSE&G, Comcast, Cablevision, Xfinity, Optimum, *etc.*) that they must transfer their equipment from the old pole to the new pole (usually within 30-60 days of receiving the notice). One utility company is not permitted to touch or move any other utility company's wires or equipment. This notification by the pole owner to the other companies that have equipment on the pole is called a Transfer Advice, which alerts the other companies to go to that pole and transfer its wires to the new pole. These communications, of course, generate a paper trail between the companies. No such Transfer Advice documents exist in this case. After all companies have transferred their respective equipment

to the new pole, the utility pole owner can return to the site to remove the old pole.

As such, if this pole was secretly moved into plaintiff's backyard, which JCP&L denies, then quite a few utility companies would have driven their respective commercial trucks through plaintiff's wooden fence and onto his property to transfer its equipment to the new pole. Clearly, no such construction occurred in plaintiff's backyard.

And notably, plaintiff never saw a single truck or worker in his backyard.

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO JCP&L BECAUSE PLAINTIFF FAILED TO RAISE THE LEGAL ISSUES BEING RAISED NOW ON APPEAL. (Pa42; 1T7-2).

On October 30, 2023, JCP&L filed a summary judgment motion on liability. (Pa42). On December 12, 2023, after the December 2, 2023, discovery end date, plaintiff filed an opposition brief to JCP&L's summary judgment motion. (Pa137). Plaintiff raised three points in his opposition: (1) factual disputes about the year the pole was placed on the property; (2) "discovery is incomplete;" and (3) Verizon's reliance on *N.J.S.A.* 2A:14-30.

Plaintiff's "discovery is incomplete" argument was frivolous because (1) the discovery end date expired on December 2, 2023, ten days before the opposition was filed and (2) plaintiff's complaint was still dismissed from November 8, 2023, at this time without a motion to reinstate.

On this appeal, plaintiff is now arguing that the trial court did not consider plaintiff's arguments related to "prescriptive easement" (Point I), "injunction" (Point II) and "nuisance" (Point III). However, plaintiff's opposition brief from December 12, 2023, does not raise the issues of prescriptive easements, injunctions or nuisance. Further, during the summary judgment oral argument on January 19, 2024, plaintiff failed to raise and/or argue anything related to prescriptive easements, injunctions or nuisance. (1T7-2). As noted above, an appellate court

reviewing a summary judgment order must "confine [itself] to the original summary judgment record." *Lombardi v. Masso*, 207 N.J. 517, 542 (2011).

Plaintiff had the burden of proof in this matter. Plaintiff had the obligation to prove, with competent and trustworthy evidence, that JCP&L moved this utility pole (a pole it did not own) onto plaintiff's property in 2021 (or 2022). Plaintiff had no such proofs as to JCP&L. The trial court properly granted summary judgment to JCP&L.

CONCLUSION

For the reasons set forth herein, defendant Jersey Central Power & Light respectfully requests that the Trial Court's rulings as to JCP&L be affirmed in their entirety.

Respectfully submitted,

RUDOLPH KAYAL & ALMEIDA
Counselors at Law, P.A.
Attorneys for Defendants FirstEnergy Corp.
and Jersey Central Power & Light

STEPHEN A. RUDOLPH

DATED: October 4, 2024

THOMAS TRABOCCO Appellant - Appellant, v. VERIZON NEW JERSEY, INC., FIRSTENERGY CORP. DOING BUSINESS AS JERSEY CENTRAL POWER & LIGHT, INC., JOHN DOES 1-10 (BEING FICTITIOUS NAMES) AND ABC CORPORATIONS 1-10 (BEING FICTITIOUS ENTITIES), Defendants - Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002240-23T2 Civil Action On Appeal from the Superior Court of New Jersey, Law Division, Monmouth County Docket No. Below: MON-L-2838-22 Sat Below: Hon. Andrea I. Marshall, J.S.C.

DEFENDANT-RESPONDENT VERIZON NEW JERSEY INC.'S BRIEF IN SUPPORT OF ITS OPPOSTION TO PLAINTIFF-APPELLANT'S APPEAL

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PRELIMINARY STATEMENT

Without any credible or reliable evidence to support his claim, appellant, Thomas Trabocco, filed a frivolous complaint alleging that Verizon and/or JCP&L secretly installed a utility pole and guide wire (aka guy wire) on his property without his authorization "in or about August 2022." (See Pa1-8.) Appellant subsequently provided certified answers to interrogatories that stated that the pole was not in his backyard until "some time in 2022." (Pa155.) Appellant also submitted a certification executed by appellant in support of his motion for reconsideration stating that the pole was not in his backyard until he "discovered a utility pole in August 2022." (Pa166.) The objective evidence in this case, however, proves otherwise.

During discovery, Verizon produced its pole records and a certification from a Verizon engineer that established that the pole was installed in the appellant's backyard in 1978 and was never moved or relocated since that time. (Pa119-125.) Appellant also provided a photograph taken on November 22, 2021 by an adjuster for his homeowner's insurance company that showed the pole in appellant's backyard on that date. This photograph completely contradicts the claims made in appellant's certified complaint, certified answers to interrogatories, and certification submitted in support of appellant's motion for reconsideration and shows that the pole was in appellant's backyard prior to 2022. (Pa88.)

Realizing the weaknesses of his arguments at the trial level, appellant is now claiming, for the first time, that the respondents "added a guy wire to a utility pole" sometime after November 22, 2021. Appellant relies on the photograph taken by appellant's insurance company to demonstrate that as of November 22, 2021 (the date the photograph was taken), there was no guy wire. (Pbi, Pa88.) Setting aside the fact that appellant never made this claim in the complaint or in his answers to interrogatories, and never raised this argument in his oppositions to the summary judgment and cross motions filed by the respondents or in his motion for reconsideration and the certification submitted in support of the motion for reconsideration, the November 22, 2021 photograph actually shows the existence of the guy wire, proving once again that appellant continues to make false and baseless claims to the Court. The November 22, 2021 photograph is depicted on page 28 of this brief and shows the gray metal guy wire in the upper left corner of the photograph. (I added two red arrows to point out the guy wire.) (See also Pa88 & Da48-50 of JCP&L's appendix.)

Finally, it must be noted that appellant's complaint was dismissed without prejudice for failure to provide Court Ordered more specific answers to respondent's Requests for Admissions on November 3, 2023. (Pa112.) Significantly, the appellant took no steps whatsoever to reinstate the complaint prior to the December 2, 2023 discovery end date or the Court's entry of summary judgment in favor of the

respondents on January 29, 2024 and never attempted to provide more specific responses to the Requests for Admissions. (Pa112.) Despite this, appellant incredulously argues that "discovery should have been extended upon reinstatement." (Pbxxxi.) Appellant also argues that the "Court Rules state, 'On restoration of a pleading dismissed pursuant to R. 1:13-7 or R. 4:23-5(a)(1) or if good cause is otherwise shown, the court shall enter an order extending discovery. R. 4:24-1(c).'" Appellant, however, ignores the fact that he never provided the Court Ordered discovery, never filed a motion to reinstate the complaint, and never raised this issue in either his opposition to the motions for summary judgment or in appellant's motion for reconsideration. Since appellant never sought to reinstate the complaint at the trial level, appellant cannot now raise this argument on appeal. See *Nieder v. Royal Indemnity Ins. Co*., 62 N.J. 229, 234 (1973) (quoting *Reynolds Offset Co., Inc. v. Summer*, 38 N.J. Super. 542, 548 (App. Div. 1959)(holding that "[i]t is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'")

Undaunted by the dismissals of his complaint and his frivolous pleadings, appellant now files this appeal.

PROCEDURAL HISTORY

Appellant filed his complaint on October 17, 2022 alleging that Verizon and JCP&L had installed a pole "in or about August 2022" on appellant's property. (Pa1-8.) In the complaint, appellant also alleged that the pole installed on his property was secured by a guidewire (aka guy wire) anchored into the ground and contained a transformer or other electrical box owned by JCP&L. (Pa3.) There was no allegation in the complaint that alleged that the guidewire (aka guy wire) was added to the pole sometime after November 22, 2021. (Pa1-8.)

Verizon filed its answer to the complaint on December 15, 2022 (Pa12) and JPC&L filed its answer to the complaint on December 21, 2022 (Pa23.)

On September 12, 2023, the trial court entered an Order compelling appellant to provide more specific answers to requests for admissions within fourteen (14) days of the date of the Order. (Pa38-39.)

Appellant failed to comply with the Court's Order and never sought an extension to provide the Court Ordered discovery.

Subsequently, JPC&L filed a motion to dismiss the appellant's complaint for failing to provide the Court Ordered discovery. (Pa112.) Appellant did not oppose that motion. (Pa114.)

On November 8, 2023 (almost two months after the date of the Court Order compelling appellant to provide more specific answers to Requests for Admissions),

the Court entered an Order dismissing the appellant's complaint without prejudice. (Pa112.)

The discovery end date was December 2, 2023.

Appellant never made a request to extend the discovery end date, never provided the more specific responses to the Requests for Admissions as ordered by the trial court, and never took any steps to reinstate the complaint before or after the discovery end date.

On October 30, 2023, JCP&L filed its motion for summary judgment. (Pa104.)

On November 17, 2023, Verizon filed a cross motion for summary judgment. (Pa115.)

On November 28, 2023, the court rescheduled the motions for summary judgment until December 15, 2023.

On December 12, 2023, just 3 days before Verizon and JCP&L's motions for summary judgment were to be decided, appellant filed his opposition to the motions. (Pa137.)

On December 12, 2023, JPC&L filed its reply brief. (Brief omitted.)

On December 13, 2023, Verizon filed its reply brief. (Brief omitted.)

Subsequently, the trial judge rescheduled the motions to January 5, 2024, and then again to January 19, 2024.

On January 19, 2024, the Hon. Andrea I. Marshall, J.S.C. conducted oral argument and on January 22, 2024, granted summary judgment to Verizon and JCP&L for the reasons stated on the record. (Pa159-161.)

On January 29, 2024, appellant filed a motion for reconsideration. (Pa163.)

On February 7, 2024, JPC&L filed opposition to appellant's motion for reconsideration and a cross-motion for frivolous sanctions, fees and costs. (Pa173-175.)

On February 7, 2024, Verizon filed an opposition to appellant's motion for reconsideration. (Pa239.)

On February 8, 2024, Verizon filed a cross-motion for frivolous sanctions, fees and costs. (Pa180.)

On February 9, 2024, appellant improperly and untimely filed a supplemental certification in further support of its motion for reconsideration that included exhibits never served during the discovery period and never referenced in appellant's opposition to the motions for summary judgment, including but not limited to a so called "expert" report in the form of an email from Arik Sevy dated January 23, 2024. (Pa186.)

On February 12, 2024, JCP&L filed an opposition to appellant's supplemental certification.

On February 23, 2024, Verizon filed an opposition to appellant's supplemental certification.[1] (Da001.)

On February 29, 2024, appellant filed a letter brief in reply to the oppositions to the motion for reconsideration and in opposition to the cross motions for frivolous pleading sanctions, fees, and costs. (Letter brief omitted.)

On March 4, 2024, the Hon. Andrea I. Marshall, J.S.C. filed orders and opinions: (1) denying appellant's motion for reconsideration; (2) partially granting JPC&L's cross-motion for frivolous pleading fees and costs; and (3) partially granting Verizon's cross motion for frivolous pleading fees and costs. (Pa303-319.)

As a gesture of good faith to appellant, JPC&L and Verizon did not submit certifications of fees and costs for appellant's frivolous pleading.

[1] Rule 2:6-1 permits briefs that were submitted to the trial court to be included in the appendix when the question of whether an issue was raised in the trial court is germane to the appeal. On this appeal, appellant is raising new arguments and issues not raised with the trial court and Verizon's opposition brief was referenced by the trial court in its opinion. (See Pa304-306.)

STATEMENT OF MATERIAL FACTS

Verizon hereby adopts JPC&L's Statement of Material Facts and adds the following facts:

The utility pole that appellant alleges was installed in his backyard sometime in 2022 was personally observed and identified by Thomas H. Young, Senior Manager – Outside Plant, Network Engineering for Verizon, as Pole No. 1077 and is owned by Verizon New Jersey Inc. (Pa119.)

The only Verizon records that would indicate when and where a pole was installed, or if the pole was relocated, removed or replaced, are the records contained in Verizon's Pole Record System ("PRS"). (Pa119.)

A PRS record for Pole No. 1077 is contained in Verizon's Pole Record System. (Pa119.)

According to the PRS record, Pole No. 1077 was installed in 1978. (Pa 122, Properties Tab.)

In the Address tab of the pole record for Pole No. 1077, the PRS record indicates the house number of where the pole is located as House Number 9; the street name as "PP OFF BUTTONWOOD EAST;" and that the pole record was placed on private property. (Pa122, Address Tab.) In the Remarks tab of the PRS record for Pole 1077, the pole record says: "POLE IS IN BACKYARD, BACK LEFT CORNER." (Pa 125, Remarks Tab.)

This pole record would also indicate whether Pole No. 1077 was ever relocated, removed or replaced in the Address, Properties, and Work Order tabs. Significantly, there is no "Removing Job#" or "Removing Print#" in the Address tab; there is nothing noted in the "Removed by" or "Year Removed" section in the Properties tab; and there are no work orders in the Work Order tab. (See Pa 119 and Pa 122 - 123.)

Based upon the information contained in this pole record and the observations of Thomas Young, Sr. Manager – Outside Plant, Network Engineering for Verizon, Pole No. 1077, was installed in the backyard of 9 Buttonwood East, Rumson, New Jersey in 1978 and has never been relocated, removed or replaced. (Pa119.)

Appellant never requested the deposition of Thomas Young of Verizon.

Since it became clear that appellant's allegations in the complaint and his certified answers to interrogatories, specifically his certified answer that "[t]here was no utility pole on Appellant's property until sometime in 2022" are disingenuous and just plain wrong, counsel for Verizon sent appellant's third attorney, James Kinneally, Esq., a frivolous litigation letter on August 10, 2023 and requested that appellant execute a Stipulation of Dismissal. (Pa126.) Counsel for appellant refused to do so.

Subsequently, in response to Verizon discovery demands, appellant provided some photographs taken by appellant's homeowner's insurance carrier, Narragansett

Bay Insurance Co., in November 22, 2021, which showed Pole No. 1077 in the same exact location it is in today – and has been since it was installed there by Verizon in 1978. (Pa88.) Incredibly, appellant certified in his answers to interrogatories that "[t]hese photographs show that there was no utility pole in Appellant's backyard in 2021. (Pa85.) Significantly, appellant never claimed at the trial level that the guy wire attached to the pole was added after the date of this photograph as he is now claiming for the first time on this appeal.

Immediately after appellant served this discovery, counsel for Verizon sent an email to appellant's attorney advising him that the appellant's answers to interrogatories were incorrect because "[t]he pole is clearly shown in your client's backyard on the photograph taken on 11/22/2021 . . . in the same exact location as it is now. This photo proves that this pole was not installed in your client's backyard in July of 2022." (Pa93.) Counsel for Verizon also renewed its demand for dismissal and warned of possible frivolous pleading sanctions. (Pa93.) Still, counsel for appellant refused to dismiss Verizon from this case.

Instead, despite the lack of merit in appellant's case, counsel for appellant sent counsel for Verizon a letter demanding that Verizon remove the pole from appellant's backyard by 10/28/2023 or that Mr. Trabocco would hire a contractor to remove the pole. (Pa98.)

In response, on Sept. 28, 2023, counsel for Verizon sent a letter counsel for appellant joining in JCP&L's letter to appellant advising against doing so and advising of the consequences that would follow. (Da007) Counsel for Verizon again explained to counsel for appellant why appellant's claims are without merit and that Verizon has a prescriptive easement for the pole in its present location. (Da007.)

During the summary judgment oral argument on January 19, 2024, appellant's counsel represented to the trial court that plaintiff's wife "can testify that the pole was not there prior to August of 2022." (1T7-14.) Appellant, however, never provided a certification of appellant's wife to this effect during the discovery period, with appellant's opposition to the motions for summary judgment, or with appellant's motion for reconsideration.

Apparently realizing that he cannot prove that the pole was not there prior to August of 2022, appellant has changed his story once again to now argue, for the first time on this appeal, that the guy wire that supports the pole was added to the pole sometime after November 22, 2021.

Significantly, appellant's argument on this appeal is entirely based on appellant's new guy wire argument; an argument that was not raised at the trial level at any time. But this argument, just like all the others, is false and without merit. Contrary to appellant's claims, the guy wire was not added to the pole sometime

after November 22, 2021, and can be clearly seen when you look closely at the November 22, 2021 photograph. (See Da48-50 of JCP&L's appendix.)

STANDARD OF REVIEW

In *Lombardi v. Masso*, our Supreme Court held that an appellate court reviewing a summary judgment order must "confine [itself] to the original summary judgment record." *Lombardi v Masso,* 207 N.J. 517, 542, (2011). Our Supreme Court has also held that "[i]t is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" *Nieder v. Royal Indemnity Ins. Co.*, 62 N.J. 229, 234 (1973) (quoting *Reynolds Offset Co., Inc. v. Summer*, 38 N.J. Super. 542, 548 (App. Div. 1959)).

The New Jersey Supreme Court has also held that "[a]ppellate review is not limitless. The jurisdiction of appellate courts rightly is bounded by the proofs and objections critically explored on the record before the trial court by the parties themselves." *State v Robinson, 200 N.J. 1,* 19 (2009). Indeed, the consideration "on appeal of a new argument that is premised on an alteration of a key factual assertion would be unfair and prejudicial to defendant." Darlington Heritage Props., LLC v.

Certain Underwriters at Lloyd's London, 2021 N.J. Super. Unpub. LEXIS 371. (Da009). A party may not even advance a new argument in a reply brief. *Bouie v. N.J. Dep't of Cmty. Affs*., 407 N.J. Super. 518, 525, n.1 (App. Div. 2019).

While the trial court's grant or denial of summary judgment is to be reviewed *de novo*, subject to the *Rule* 4:46-2 standard that governs a trial court's ruling on a summary judgment motion, the trial court's evidentiary determinations are reviewed for abuse of discretion. *Schwartz v. Menas,* 251 N.J. 556, 570 (2022); *Rodriguez v. Wal-Mart Stores, Inc.,* 237 N.J. 36, 57 (2019).

The Supreme Court in *Schwartz* also noted that when "a trial court is 'confronted with an evidence determination precedent to ruling on a summary judgment motion,' it 'squarely must address the evidence decision first.'" *Schwartz,* 251 N.J. 569 (citing *Townsend v. Pierre*, 221 N.J. 36, 53, 110 A.3d 52 (2015) (quoting *Est. of Hanges v. Metro. Prop. & Cas. Ins. Co.*, 202 N.J. 369, 384-85, 997 A.2d 954 (2010)). "Appellate review . . . proceeds in the same sequence, with the evidentiary issue resolved first, followed by the summary judgment determination of the trial court." *Ibid.* (quoting *Est. of Hanges*, 202 N.J. at 385, 997 A.2d 954).

In this case, the appellant's brief in opposition to the summary judgment motions was five (5) pages long, and with exhibits, appellant's opposition was a total of 32 pages. Appellant made three arguments in his opposition papers: (1) factual

disputes about the year the pole was placed on his property; (2) that discovery was incomplete; and (3) Verizon's reliance on N.J.S.A. 2A:14-30. Appellant never raised the guy wire argument he now makes in this appeal at the trial level, and did not raise the issues of prescriptive easements, injunctions or nuisance in his opposition brief to the summary judgment motions or at oral argument. (See 1T7-9.) This is the extent of the original summary judgment record. To the extent that appellant's appellate brief makes new arguments and appendix contains new or different evidence that appellant did not provide to the trial court on the summary judgment record, the Court must decline to consider those new arguments and the new "evidence." *See Lombardi,* 207 N.J. at 542; *Nieder,* 62 N.J. at 234; *Bouie* 407 N.J. Super. 525.

LEGAL ARGUMENT

I. APPELLANT'S COMPLAINT WAS DISMISSED ON NOVEMBER 8, 2023 FOR FAILURE TO COMPLY WITH A COURT ORDER. APPELLANT NEVER MOVED TO REINSTATE THE COMPLAINT AND HAS NOT RAISED THIS ISSUE ON APPEAL.

In this case, appellant's complaint was dismissed for failing to comply with the trial court's order requiring appellant to provide more specific responses to Requests for Admissions. (Pa112.) Prior to the entry of the Order, on August 16, 2023, JCP&L filed a motion to compel appellant to provide more specific responses to JPC&L's Requests for Admissions. Significantly, the appellant did not oppose that motion. On September 12, 2023, the trial court granted JCP&L's motion and gave appellant fourteen (14) days to serve those responses. (Pa38.) Appellant ignored the trial court's Order.

Subsequently, on October 11, 2023, JCP&L filed a motion to dismiss plaintiff's complaint for failing to comply with the September 12, 2023 Order. Once again, appellant did not oppose this motion.

On November 8, 2023, the trial court granted JCP&L's unopposed motion to dismiss the plaintiff's complaint. (Pa112.)

Discovery in this case ended on December 2, 2023. At no time did plaintiff seek an extension of discovery, seek an adjournment of JCP&L's motion to dismiss, request more time to provide more specific responses to JCP&L's Requests

for Admissions, or move to reinstate the complaint either before or after the December 2, 2023 discovery end date. In fact, to this day, appellant has not provided the court ordered discovery responses. Since appellant never sought to reinstate the complaint at the trial level, appellant cannot now raise this argument on appeal. See *Nieder v. Royal Indemnity Ins. Co*., 62 N.J. 229, 234 (1973) (quoting *Reynolds Offset Co., Inc. v. Summer*, 38 N.J. Super. 542, 548 (App. Div. 1959)(holding that "[i]t is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'")

Despite this, in his appeal, appellant incredulously argues that "discovery should have been extended upon reinstatement." (Pbxxxi.) Appellant also argues that the "Court Rules state, 'On restoration of a pleading dismissed pursuant to R. 1:13-7 or R. 4:23-5(a)(1) or if good cause is otherwise shown, the court shall enter an order extending discovery. R. 4:24-1(c).'" In making this argument, appellant completely ignores the fact that appellant's complaint was dismissed for failure to provide court ordered discovery responses well before the entry of summary judgment in January 2024 and has chosen NOT to appeal the dismissal of the complaint for failure to comply with the trial court's order. Regardless of appellant's reasons for not appealing the dismissal of its complaint for failing to comply with

the trial court's order, the fact remains that appellant's complaint was dismissed prior to the granting of the summary judgment motions filed by Verizon and JCP&L and will remain dismissed even if appellant somehow prevails on this appeal.

For this reason alone, appellant's appeal should be denied and the trial court's orders affirmed.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO VERIZON BECAUSE APPELLANT FAILED TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT THAT THE POLE REMAINED ON PLAINTIFF'S PROPERTY AT ITS PRESENT LOCATION SINCE 1978.

A. Appellant provided no competent or reliable evidence to show that the pole was installed on his property in 2021 or 2022.

In the complaint, appellate alleged that in or about August 2022, he discovered a pole belonging to Verizon that was installed on his property. (Pa3.) Appellant also alleged that the pole installed on his property was secured by a guidewire (aka guy wire) anchored into the ground and contained a transformer or other electrical box owned by JCP&L. (Pa3.)

Subsequently, on May 3, 2023, plaintiff provided responses to JCP&L's Requests for Admissions which stated:

> Plaintiff can testify that <u>at the end of the summer of 2021</u> he heard substantial and very noticeable heavy machinery being used behind his house. At the time he was still recovering from serious back and neck surgery, in addition to a leg injury, and was not able to readily inspect the area

> of his home where the subject utility pole (BT1077RN) is from the middle of 2021 and through much of 2022, but heard extreme activity taking place behind his home in late summer of 2021 and cannot state that such activity was not Verizon or JCP&L employees and/or contractors removing, moving or installing the subject utility pole (BT1O77RN). Plaintiff knows that that as of November 2021, the subject utility pole (BT1077RN) was located in its current position but cannot say with certainty that the pole was located in that location throughout 2021.
>
> (Pa74 at number 2.)

At this point, appellant was alleging that the pole was installed in his backyard in 2021 without his knowledge or authorization. But then appellant changed his story. On September 21, 2023, appellant provided the following *certified* answer to Verizon's interrogatories:

> There was no utility pole on Plaintiff's property until sometime in 2022. Plaintiff discovered the utility pole on his property in 2022. Plaintiff did not witness the actual installation of the pole but discovered its existence when he saw it in his yard.
>
> In addition, Plaintiff made a homeowners insurance claim in 2021 for wind damage to the premises. The insurance adjuster visited the home and took pictures of the yard. These pictures show that there was no utility pole in Plaintiff's yard in 2021. Please see attached photos.
>
> (Pa85 at number 1.)

Immediately after appellant served this discovery, counsel for Verizon sent an email to appellant's attorney advising him that the appellant's answers to interrogatories were incorrect because "[t]he pole is clearly shown in your client's

backyard on the photograph taken on 11/22/2021 . . . in the same exact location as it is now. This photo proves that this pole was not installed in your client's backyard in July of 2022." (Pa93.) Counsel for Verizon also renewed its demand for dismissal and warned of possible frivolous pleading sanctions. (Pa93.)

Undaunted by this clear misrepresentation of the truth, on February 9, 2024, appellant submitted an improper and late certification to the trial court in support of appellant's motion for reconsideration in which appellant himself certified that "there was no utility pole on my property until I discovered a utility pole in August, 2022." (Pa166.)

Since the November 22, 2021 photograph proves that appellant's certified answers to interrogatories and certification submitted to the trial court in support of his motion for reconsideration are misrepresentations of the truth, these certifications should be completely disregarded by the court. Appellant's certification submitted in support of the motion for reconsideration should also be disregarded by this court since it was not part of the summary judgment record. *See Lombardi,* 207 N.J. at 542; *Nieder,* 62 N.J. at 234; *Bouie* 407 N.J. Super. 525.

B. Appellant's so called expert and his "expert report" should also be disregarded by this Court.

Appellant never named an expert or provided an expert report during the discovery period. The discovery end date in this case expired on December 2, 2023. Plaintiff took no depositions and served no expert reports prior to December 2, 2023.

On January 2, 2024, one month after the discovery end date expired, and while appellant's complaint was still dismissed for failure to provide with the trial court's order, appellant sent a letter naming Arik Sevy as a "fact witness." (Pa239.) Appellant, however failed to include a certification certifying that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date as required by New Jersey Court Rule 4:17-7. Significantly, the *Rule* provides that "[i]n the absence of said certification, the late amendment *shall be disregarded by the court and adverse parties."* *R.* 4:17-7 (Emphasis added.)

Subsequently, on January 29, 2024, after summary judgment was granted to both Verizon and JCP&L, and with the complaint still dismissed for failing to comply with the trial court's order, appellant filed a motion for reconsideration. (Pa163.) Then on February 9, 2024, appellant filed an improper "supplemental certification of plaintiff" in support of the motion for reconsideration. (Pa186.) Attached to this improper supplemental filing was an email from Richard Arik Sevy ("Sevy") that was not previously provided during the discovery period or with appellant's opposition to the summary judgment motions. (Pa186.) Appellant is now claiming that this unsigned email from "Sevy" which was never served during or after the discovery period or provided with appellant's opposition papers to the

summary judgment motions, somehow constitutes an "expert report" that should be considered by the Appellate Division.

For the reasons set forth above, this Court cannot consider the email of Sevy on this appeal. *See Lombardi,* 207 N.J. at 542; *Nieder,* 62 N.J. at 234; *Bouie* 407 N.J. Super. 525.

C. Appellant's Google Earth Photograph

The Google Earth image referred to in appellant's Certification proves nothing, was not provided during the discovery period, was not relied on by the appellant when appellant opposed Verizon's and JCP&L's motions for summary judgment and has not been authenticated. Regardless, as shown by the exhibits relied on by Verizon and JCP&L in their summary judgment motions (see Pa88, Pa90, Pa91), the subject pole is located in appellant's backyard adjacent to appellant's fence in the middle of a tree line, and it is not at all clear from the Google Earth image that the pole is not there. It should be noted that utility poles are created from trees, typically Southern Yellow Pine, and there is no way that this image taken from a satellite in space can differentiate a tree from a utility pole that is made from trees.

D. Appellant's baseless fence allegation.

Verizon is a telecommunications provider and does not install or replace fences. As discussed in more detail below, Verizon provided its pole records for Pole 1077 and a Certification from Thomas H. Young, Senior Manager of Network Engineering who certified that the pole was installed in plaintiff's backyard in 1978 and has not been moved or relocated since 1978. (Pa119.) This evidence, along with the photograph taken by plaintiff's homeowner's insurance company on November 22, 2021 (Pa88), proves that the pole was placed in appellant's backyard in 1978 and that Verizon did no further work on this pole since that time. Appellant's claim that JCP&L or Verizon removed and replaced his fence is yet another false and unsupported claim submitted by appellant. Appellant provided no objective evidence or an expert report to show that JCP&L or Verizon removed or replaced portions of appellant's fence in 2021 or 2022. Moreover, as shown in the photographs taken by counsel for JCP&L on December 13, 2022, the fencing in appellant's entire backyard is a patchwork of fencing made up of mismatched wooden fencing that was clearly replaced at various times over the years. (See Da51 to Da55 of JCP&L's appendix.)

E. Verizon's pole records

The utility pole that appellant alleges was installed in his backyard sometime in 2022 was personally observed and identified by Thomas H. Young, Senior Manager – Outside Plant, Network Engineering for Verizon, as Pole No. 1077 and is owned by is owned by Verizon New Jersey Inc. (Pa119.) The only Verizon records that would indicate when and where a pole was installed, or if the pole was relocated, removed or replaced, are the records contained in Verizon's Pole Record System ("PRS"). (Pa119.) A PRS record for Pole No. 1077 is contained in Verizon's Pole Record System. (Pa119.)

According to the PRS record, Pole No. 1077 was installed in 1978. (Pa 122, Properties Tab.) In the Address tab of the pole record for Pole No. 1077, the PRS record indicates the house number of where the pole is located as House Number 9; the street name as "PP OFF BUTTONWOOD EAST;" and that the pole record was placed on private property. (Pa122, Address Tab.) In the Remarks tab of the PRS record for Pole 1077, the pole record says: "POLE IS IN BACKYARD, BACK LEFT CORNER." (Pa 125, Remarks Tab.)

This pole record would also indicate whether Pole No. 1077 was ever relocated, removed or replaced in the Address, Properties, and Work Order tabs. Significantly, there is no "Removing Job#" or "Removing Print#" in the Address tab; there is nothing noted in the "Removed by" or "Year Removed" section in the

Properties tab; and there are no work orders in the Work Order tab. (See Pa 119 and Pa 122 - 123.)

Based upon the information contained in this pole record and the observations of Thomas Young, Sr. Manager – Outside Plant, Network Engineering for Verizon, Pole No. 1077, Pole No. 1077 was installed in the backyard of 9 Buttonwood East, Rumson, New Jersey in 1978 and has never been relocated, removed or replaced. (Pa119.)

Verizon's pole records and the certification of Thomas Young, Verizon's Senior Manager of Network Engineering are evidence that appellant has not been able to genuinely dispute. It is evidence that appellant simply ignored and did not act on. Appellant did not even attempt to depose Mr. Young or anyone else from Verizon during the discovery period and has not provided any objective evidence or expert reports to dispute or call into question Verizon's evidence.

F. The trial court did not err in finding that appellant presented no credible evidence to raise a genuine issue of material fact that showed that the pole was not present in appellant's backyard since 1978.

N.J.S.A. 2A:14-30 provides: "Thirty years' actual possession of any real estate excepting woodlands or uncultivated tracts, and 60 years' actual possession of woodlands or uncultivated tracts, uninterruptedly continued by occupancy, descent, conveyance or otherwise, shall, in whatever way or manner such possession might have commenced or have been continued, vest a full and complete right and

title in every actual possessor or occupier of such real estate, woodlands or uncultivated tracts, *and shall be a good and sufficient bar to all claims that may be made or actions commenced by any person whatsoever for the recovery of any such real estate*, woodlands or uncultivated tracts." (Emphasis added.)

In this case, Verizon's pole records for utility pole number 1077, along with the photograph taken by Narragansett Bay Insurance (Pa88) that depicts the pole in plaintiff's backyard in November of 2021, and the certification of Thomas H. Young of Verizon conclusively establish that Pole No. 1077 has been located in plaintiff's backyard at 9 Buttonwood East, Rumson, NJ in the same location where it is today since 1978 – for well over 30 years. It should also be noted that plaintiff has lived at 9 Buttonwood East, Rumson, NJ since 1982. *(Pa2.)* As such, Verizon has a full and complete right to occupy plaintiff's real estate with its utility pole in the location where the pole has remained for the past 45 years.

Appellant had the burden of proof in this case. He had the burden to provide competent, credible and reliable evidence that Verizon or JCP&L moved the pole onto his property in 2022. Appellant provided no such proofs during discovery or to the trial court with its opposition to the summary judgment motions. Instead, appellant provided unreliable, incompetent, and false evidence in discovery and to the trial court in a vain attempt to prove his case. Appellant failed and the truth has

prevailed. Therefore, the Hon. Andrea I. Marshall did not err when she granted summary judgment to Verizon and JPC&L.

Why appellant was motivated to make misrepresentations in his complaint, in his answers to interrogatories, and in certifications submitted to the trial court remains a mystery, but the fact that appellant is now on his fourth attorney is telling.

G. The trial court did not abuse its discretion in reviewing the evidence presented to the court during the summary judgment phase or when appellant improperly presented new "evidence" and a supplemental certification during the motion for reconsideration phase.

As stated previously, a trial court's evidentiary determinations are reviewed for abuse of discretion. *Schwartz v. Menas,* 251 N.J. 556, 570 (2022); *Rodriguez v. Wal-Mart Stores, Inc.,* 237 N.J. 36, 57 (2019). In this case, appellant has not shown how Hon. Andrea I. Marshall's abused her discretion when determining the evidence presented to her during the summary judgment motions or how she abused her discretion in properly refusing to consider the new "evidence" provided by appellant with the motion for reconsideration.

III. APPELLANT'S NEW ARGUMENTS NOT MADE DURING THE SUMMARY JUDGMENT PHASE CANNOT NOW BE CONSIDERED BY THIS COURT.

Realizing the weaknesses of his arguments at the trial level, appellant is now claiming, for the first time, that the respondents "added a guy wire to a utility pole" sometime after November 22, 2021. Appellant relies on the photograph taken by appellant's insurance company to demonstrate that as of November 22, 2021 (the date the photograph was taken), there was no guy wire. (Pbi, Pa88.) Setting aside the fact that appellant never made this claim in the complaint or in his answers to interrogatories, and never raised this argument in his oppositions to the summary judgment and cross motions filed by the respondents or in his motion for reconsideration and the certification submitted in support of the motion for reconsideration, the November 22, 2021 photograph actually shows the existence of the guy wire, proving once again that appellant continues to make false and baseless claims to the Court. The November 22, 2021 photograph is depicted below and at Da48-50 of JPC&L's appendix and shows the metal guy wire in the upper left corner of the photograph. (I added two red arrows to point out the guy wire.) (See also Pa88 & Da48-50 of JCP&L's appendix.)

As appellant has pointed out in his brief, a picture tells a thousand words (Pbi), and this picture clearly shows the existence of the guy wire and the pole in appellant's backyard on November 22, 2021, and is yet another example of appellant's misrepresentations to the Courts.

Appellant also argues that the trial court did not consider plaintiff's arguments related to "prescriptive easement" (Point I), "injunction" (Point II), and "nuisance" (Point III). However, appellant's opposition to Verizon's and JCP&L's motions for summary judgment never raised these issues or arguments. Appellant also never raised these arguments during the oral argument of the summary judgment motions. (1T7-9.)

As explained in the Standard of Review section of this brief, an appellate court reviewing a summary judgment order must "confine [itself] to the original summary judgment record." *Lombardi v Masso,* 207 N.J. 517, 542, (2011). Our Supreme Court has also held that "[i]t is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" *Nieder v. Royal Indemnity Ins. Co.*, 62 N.J. 229, 234 (1973) (quoting *Reynolds Offset Co., Inc. v. Summer*, 38 N.J. Super. 542, 548 (App. Div. 1959)). In this case, appellant's new arguments and the arguments not presented to the trial court during summary judgment do not go to the jurisdiction of the trial court and certainly do not concern matters of great public interest.

The New Jersey Supreme Court has also held that "[a]ppellate review is not limitless. The jurisdiction of appellate courts rightly is bounded by the proofs and

objections critically explored on the record before the trial court by the parties themselves." *State v Robinson, 200 N.J. 1,* 19 (2009). Indeed, the consideration "on appeal of a new argument that is premised on an alteration of a key factual assertion would be unfair and prejudicial to defendant." Darlington Heritage Props., LLC v. Certain Underwriters at Lloyd's London, 2021 N.J. Super. Unpub. LEXIS 371. (Da009.) Finally, this Court has stated that a party may not even advance a new argument in a reply brief. *Bouie v. N.J. Dep't of Cmty. Affs*., 407 N.J. Super. 518, 525, n.1 (App. Div. 2019).

CONCLUSION

For all of the foregoing reasons, the trial court did not commit reversable error in granting summary judgment to Verizon and JCP&L. Therefore, Respondent, Verizon New Jersey Inc., respectfully requests that this Court affirm the trial court's rulings in their entirety.

Respectfully submitted,

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Thomas M. Crino

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Attorneys for Respondent,
Verizon New Jersey, Inc.

Date: October 4, 2024

THOMAS TRABOCCO, Plaintiff-Appellant, V. VERIZON COMMUNICATIONS, INC., FIRSTENERGY CORP. DOING BUSINESS AS JERSEY CENTRAL POWER & LIGHT, INC., Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No.: A-2240-23T2 CIVIL ACTION On Appeal from the Superior Court of New Jersey, Law Division, Monmouth County Docket No. Below: MON-L-2838-22 Sat Below: Hon. Andrea I. Marshall, J.S.C.

PLAINTIFF-APPELLANT THOMAS TRABOCCO'S REPLY BRIEF IN FURTHER SUPPORT OF APPEAL

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Dated submitted: October 21, 2024

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PRELIMINARY STATEMENT

Plaintiff Thomas Trabocco asks this Court to reverse and reinstate his claims that Defendants-Respondents FirstEnergy Corp. and Jersey Central Power & Light (collectively "JCPL"), and Verizon New Jersey Inc. ("Verizon") trespassed on his property and caused a nuisance through the installation of a utility pole, guy wire, and other equipment on Plaintiff's property. He also sought an injunction for the property to be removed. Because the trial court did not search the Complaint before granting judgment and then overlooked proofs offered in reconsideration, this Court should reverse.

Defendants' opposition briefs miscomprehend the nature of the de novo standard of review. Defendants only argued to the trial court that because the pole was on the property since 1978, it meant they have a prescriptive easement entitling them to dismiss Plaintiff's claims. But time is not the only factor that the trial court needed to consider to determine whether Defendants proved there were no genuine disputes of material fact for their affirmative defense of prescriptive easement. Notably, even if Defendants had demonstrated the five factors for a prescriptive easement over the pole, they made no showing that they were not causing a nuisance. Plaintiff's Complaint was more expansive than just the pole. Accordingly, this Court should construe the summary judgment record de novo, and reverse and reinstate the Complaint.

REPLY STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Verizon argues that "there was no allegation in the complaint that the guidewire (aka guy wire) was added to the pole sometime after November 22, 2021" (Vb4[2]), but the Complaint states that Plaintiff discovered both the pole and the guy wire[3] in August 2022. (Pa3 ¶¶ 10-11.) There is a genuine dispute of material fact as to whether the guy wire as it currently exists was on the property in 2021 based on the record before the trial court. Verizon argues Pa88 shows guy wire but it only shows a wire – not a guy wire, which is only noticeable when enlarged with the addition of red arrows. (Cf. Pa88 to Da50 and Vb27-28; Jb26[4].)

Despite Defendants' vociferous arguments in opposition to the appeal, Plaintiff's appendix is limited to the documents before the trial court. Contrastingly, Defendants have improperly added pictures that were not before

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[1] Due to the intertwined nature of these sections, they have been combined.

[2] Plaintiff relies upon the abbreviations from his Opening Brief. In addition, the term "Vb" refers to Verizon New Jersey Inc.'s Brief in Opposition to Appeal; "Jb" refers to FirstEnergy Corp. and Jersey Central Power & Light's Brief in Opposition to Appeal; the term "Da" refers to FirstEnergy Corp. and Jersey Central Power & Light's Appendix in Opposition to Appeal.

[3] Although Plaintiff's prior pleadings to the trial court used the term "guidewire," the proper term is "guy wire," and thus, will be used as such in this brief.

[4] JCPL attacks Plaintiff's counsel as "lazy" and "sloppy," but Defendants needed to both enlarge the photograph and then add two large red arrows to make the single wire visible, which notably the picture does not include the anchor into the ground that would demonstrate if it is or is not the guy wire at issue. (See Jb26 & Pa91.)

the trial court and should not be considered by this Court because they were not before the trial court and never properly added to the record under R. 1:6-6 so that present counsel – who never handled the matter below – would know important details like the date, the author, and what is depicted.[5] (Jb14.) Plaintiff cannot respond to the inferences that Defendants ask to be construed in their favor because this information was never developed below. R. 2:5-4.

Despite Defendants' interpretations of the record regarding when Defendants installed the pole, Plaintiff's certified response is that he does not know when the pole was installed, but he did not notice it until 2022, which was one year after he heard loud noises in his backyard when he was recovering from back surgery. (Pa85 at ¶ 1.) Moreover, neither Defendant provided any proofs regarding the installation of the guy wire, the installation of the equipment on Plaintiff's home, or the replacement of Plaintiff's fence. (1T5:11-7:1.) Each of these were outlined in Plaintiff's complaint. (Pa2-7, ¶¶ 9-33.)

JCPL admits the Google picture does not show the pole, but defense counsel argues that this Court should take inferences in support of Defendants' position, which violates Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). (Jb31.) Importantly, JCPL's explanation that a "utility pole is simply

[5] Plaintiff further notes the modified photograph that was improperly included in Verizon's brief. See Vb28.

a wooden tree," also construes facts incorrectly as the pole at issue had a transformer on it, and thus, would not appear to be a tree by aerial view. (Pa91.)

According to JCPL's recitation of the discovery, discovery was not yet over (Jb3); thus, discovery should have been extended once discovery violations were cured. Verizon argues about fairness (Vb29-30), but it was unfair to seek dismissal for a discovery violation and while that motion was pending file the motion for summary judgment. (Pa104, Pa114.) JCPL faults Plaintiff for not reinstating prior to the entry of summary judgment but the motion for summary judgment was filed 8 days before the Order granting the motion to dismiss without prejudice. (Pa104, Pa112-14.) There is no document in the record that Plaintiff's counsel complied with R. 4:23-5(a)(1), yet JCPL faults Plaintiff for failing to provide the outstanding discovery or to seek reinstatement. (Jb4-5.)

JCPL further faults Plaintiff for being on his fourth attorney, but that issue demonstrates that Plaintiff, through no fault of his own, was the victim of poor lawyering. (Jb3.) Plaintiff should not be faulted when his attorney "took no depositions," "failed to oppose numerous motions," and "never moved to reinstate the complaint." (Jb3.) The documents that Defendants included on the motions for summary judgment were limited to the pole; nothing was produced as to when the guy wire was installed. (Pa45-51; Pa130-32.)

REPLY LEGAL ARGUMENT

POINT ONE

Defendants Did Not Meet Their Required Burden to Demonstrate Dismissal Was Appropriate As a Matter of Law. (1T10:3-16:18.)

The Court has held that the trial court must "continue to require a searching review" of the Complaint before dismissal with prejudice. Brill, 142 N.J. at 541. But here, the trial court accepted Defendants' argument that time alone established the right to judgment overlooking the elements required to prove a prescriptive easement. Plaza v. Flak, 7 N.J. 215, 220 (1951); Maggio v. Pruzansky, 222 N.J. Super. 567, 576 (App. Div. 1988). Summary judgment was improper because there is no proof of a recorded easement and Defendants did not make any showing of the five factors for a prescriptive easement. See id.; Cf. Pa45-51 and Pa130-32 with Pa194-234 & Pa169-70. Furthermore, nuisance does not require proof of time which is the only fact that Defendants relied on to the trial court for the proposition that the Complaint must be dismissed with prejudice. (1T5:11-7:1.) Thus, summary judgment was improper.

If Defendants are correct, then anytime a neighbor uses property for over thirty years, even if none of the other factors are met, that neighbor gets title to that property. That is simply not the law in this State, nor does it serve the public policy behind property law. See Maggio, supra. This Court should reverse because even in opposition to the appeal, Defendants did not establish the five elements required for a prescriptive easement. (See Vb; Jb.) Defendants argue

that Plaintiff has created new arguments on appeal, but Plaintiff's appeal is from the trial court's grant of summary judgment without the trial court considering the elements for the torts set forth in Plaintiff's complaint as Brill, 142 N.J. at 540-41, requires. In order for this Court to perform its de novo review, it must consider the elements; otherwise, it will perform the same legal error of overlooking the elements for Plaintiff's torts and Defendants' defenses (which were never properly contained in their Affirmative Defenses in their Answer as required by R. 4:5-4.) (Pa12-33.)

Neither Defendant addresses the elements of Plaintiff's three claims on appeal. (See Jb, Vb.) Citation to N.J.S.A. 2A:14-30 does not relieve Defendants from establishing their affirmative defense of prescriptive easement as a matter of law. (Pa45-51; Pa130-32.) Verizon's pole record and Certification of Thomas H. Young do not provide proof of the five elements required. (Pa119-21.) As a result, the matter should not have been dismissed because the trial court was required to conduct a "searching" review of the Complaint before dismissal with prejudice. Brill, 142 N.J. at 540-41.

Defendants rely on Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) for the proposition that "appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go

to the jurisdiction of the trial court or concern matters of great public interest.'" Id. (citing Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App.Div.1959), certif. den. 31 N.J. 554 (1960)). But the decision supports Plaintiff's argument that this Court on its de novo review is compelled to analyze the summary judgment record de novo in the light most favorable to Plaintiff, which includes applying the facts to the elements of the claims. Id.

In Nieder, 62 N.J. at 235, the Court reversed even though the plaintiff had presented affidavits in a haphazard and confusing manner and failed to raise certain factual issues to the trial court:

> there was error as a matter of law in the trial court's approach to the nature of the limitation provisions of the policies and the litigation on that issue would have to be remanded in any event. We therefore conclude that justice requires a remand for the orderly and complete presentation of the proofs at a plenary hearing on all issues.

Likewise here, the trial court committed legal error by dismissing the action without considering the elements. (1T10:3-16:18.) Defendants were not entitled to judgment as a matter of law based upon one element of a five factor-test. See Plaza, 7 N.J. at 220 (listing elements for prescriptive easement). The undisputed evidence demonstrated that neither the survey nor the title work demonstrated that there was a pole on the property over which Defendants had an easement. (Pa196-234; Pa169-70.) Thus, the trial court needed to consider whether Defendants met their burden in demonstrating the elements for a

prescriptive easement. Brill, 142 N.J. at 540-41. Given on appeal, Defendants have not demonstrated where in the record on summary judgment they met this burden, this matter should be reversed and remanded.

JCPL argues, "plaintiff's opposition brief from December 12, 2023, does not raise the issues of prescriptive easements, injunctions or nuisance," (Jb35), but this argument overlooks that the trial court had to conduct a "searching" review of the pleadings before granting a dismissal. See Brill, 142 N.J. at 541. The trial court could not dismiss without establishing the five elements for a prescriptive easement. Plaza, N.J. at 220. Simply arguing that the pole existed since 1978 when Plaintiff's claim was more than just a pole does not establish entitlement as a matter of law. (Pa1-8.) This is particularly true when even if Defendants have an easement, which Plaintiff disputes, that easement may still cause a nuisance entitling Plaintiff to relief. Ingling v. Pub. Serv. Elec. & Gas Co., 10 N.J. Super. 1, 11 (App. Div. 1950)(holding utility company's guy wire may cause nuisance even though it had an easement). Nuisance was part of the Complaint, and the trial court could not dismiss the claim without considering the elements for nuisance. (Cf. Pa1-8 with 1T10:3-16:18.)

Verizon relies on Lombardi v. Masso, 207 N.J. 517, 542 (2011) to argue that Plaintiff's appellate argument must be dismissed summarily. (Vb14.) However, the case supports the standard of review that Plaintiff has argued in

the opening brief. (Pbix-x.) On appellate review of a motion for summary judgment, this Court looks "to the original summary judgment record, the contents of which have been agreed on by the parties, and to determine whether, viewed in a light most favorable to plaintiff, it presented genuine issues of material fact requiring trial." Lombardi, 207 N.J. at 542. Here, the trial court erred because Defendants had not demonstrated entitlement to dismissal of all of Plaintiff's claims. (Cf. Pa1-8 with 1T10:3-16:18.)

Defendants confuse the Court's use of the word "record" with "argument." Lombardi, 207 N.J. at 542. Plaintiff's opening brief in the points related to the improper grant of summary judgment were based upon construing the record in the light most favorable to Plaintiff to the legal elements that the Court should have applied to decide whether Defendants were entitled to judgment as a matter of law. (Pbxi-xxix.) Construing the summary judgment record in the light most favorable to Plaintiff, Defendants failed to show the five required elements for a prescriptive easement. Simply arguing the pole has been on the property since 1978 did not entitle either Defendant to judgment as a matter of law. See e.g., Mannillo v. Goski, 54 N.J. 378, 386 (1969) (explaining party must establish "entry and possession for the required time which is exclusive, continuous, uninterrupted, visible and notorious"). The law requires elements. Id. Similar to the case cited by Defendants, Lombardi, 207 N.J. at 544, even if below the

"plaintiff may not have done as much to protect her own legal interests as she should have, when this record is reviewed globally, as it must be," the appellate court will review the record de novo and permit "assessment by a jury" when the defendant fails to meet the burden to show entitlement to judgment.

Verizon asks this Court to apply an abuse of discretion standard but even the case Verizon cites requires a de novo review. (Vb13 (citing Schwartz v. Menas, 251 N.J. 556, 570 (2022).) The Court stated, "We review de novo the Appellate Division's legal determination that under New Jersey law, the new business rule bars any new business's claim for lost profits damages." Id. (citation omitted). Unlike the threshold issue in Schwartz, there is no evidential issue that the Court must decide before considering whether Defendants demonstrated they were entitled to judgment as a matter of law on Plaintiff's three claims: trespass; nuisance; and injunction. Verizon's citation to Rodriguez v. Wal-Mart Stores, Inc., 237 N.J. 36, 57 (2019), is equally misplaced as the case dealt with evidence admissibility at trial not summary judgment. (Vb13.)

JCPL's argument as to the guy wire asks this Court to look at the picture without any certification that the guy wire was present in 2021. (Jb16-17; Da50.) After JCPL argued the summary judgment record cannot be expanded on appeal (which Plaintiff did not do), JCPL then adds new evidence that was not before the Court to explain why the guy wire was present in 2021. (Da50.) This is wrong

for two reasons. First, because as JCPL argues, the record is limited to the motion for summary judgment and reconsideration, which Plaintiff did in the opening brief and appendix as all documents had the court stamp showing when they were filed with the trial court. Second, the new pictures in JCPL's appendix are devoid of a certification authenticating the documents. R. 1:6-6.

JCPL calls present counsel "lazy" for not seeing a gray wire in a picture (Jb26), but the picture only depicts a wire not the guy wire. (Pa88.) The picture does not show the guy wire referenced in Pa91, which is the tripping hazard at issue. It is unknown to present counsel when that guy wire was installed as the summary judgment record is devoid of any such reference. Neither Verizon nor JCPL provided evidence on the motion for summary judgment as to when it was installed even though Plaintiff argued the guy wire was new. (Cf. Pa3 at ¶ 11 with Pa45-51 and Pa130-32.) There is no evidence in the record to establish JCPL's claim that "poles are not simply 'moved.'" (Jb32.) To make such a claim, JCPL would need a certification of a person with first-hand knowledge. R. 1:6-6. Having not done so, it cannot make this argument on appeal.

In opposition to appeal, Defendants did not make any arguments as to the required elements. Because this Court must construe the record de novo, it should reverse because the trial court did not consider the torts.

POINT TWO

The Trial Court Abused Its Discretion in Failing to Consider Evidence on Reconsideration Because Discovery Was in a State of Procedural Limbo Given the Dismissal of the Complaint Without Prejudice. (Pa303-09.)

The trial court erred by not considering the new evidence of the expert report on reconsideration as it was not available until after summary judgment was granted and discovery was in procedural limbo due to the dismissal of the complaint without prejudice. (Pa192; Pa112-14); see Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996)(trial court abuses discretion when trial court fails to appreciate competent evidence).

Defendants fault Plaintiff for never providing the overdue discovery, but the dismissal was on November 8 and at least one motion for summary judgment was pending at the time the action was dismissed. (Vb3, Vb15-17, Jb20-21.) JCPL's argument that the expert report could not be considered because there was no certificate of due diligence is incorrect given at the time the report was served, the complaint was dismissed without prejudice and upon reinstatement, discovery would have been extended. R. 4:24-1(c). Cf. Jb29 with Pa112-14.

Furthermore, the record does not indicate the required notice was given to Plaintiff personally by his counsel regarding the dismissal without prejudice for failure to provide discovery. R. 4:23-5(a)(1). Under the Court Rules, no dismissal with prejudice shall be granted for a failure to produce discovery without this notice. R. 4:23-5(a)(2). Accordingly, Verizon and JCPL's arguments

that summary judgment was appropriate because discovery was not provided confuses two distinct procedures that should not be used to penalize Plaintiff without the required showing that he personally received notice that the case was dismissed without prejudice for a discovery violation.

Verizon argues that the report of Arik Sevy cannot be considered by this Court because it was served after the close of discovery (Vb20-21), but discovery technically had not closed since the complaint was dismissed without prejudice before the time for discovery ran and had not been reinstated at the time summary judgment was granted. (Pa112-14, Pa308.) Verizon cites three cases for its proposition that the Sevy report could not be considered (Vb21), but none apply to the legal issue raised by Plaintiff – whether the trial court erred in denying Plaintiff the ability to present the expert report on reconsideration. (Vb21.) First, Lombardi, 207 N.J. at 542, stands for the proposition that the standard of review on a motion for summary judgment is de novo; there is no analysis of the standard of a trial court excluding evidence submitted on a motion for reconsideration. Verizon also cites to Bouie v. New Jersey Dep't of Cmty. Affs., 407 N.J. Super. 518, 525, n.1 (App. Div. 2009) for the proposition that a new issue cannot be raised in an appellate reply brief, but Verizon's argument goes to issues in Plaintiff's opening brief on an appeal from the grant of summary judgment that has a de novo standard of review.

Likewise, Verizon cites Nieder, 62 N.J. at 234-35, but as explained in Point One, that case provides that evidence can be considered when the trial court commits an error in law. Here, the trial court had committed error in finding the discovery end date had run when the Complaint had been dismissed without prejudice, and our Rules provide litigants the opportunity to cure that defect, particularly here, where there was no proof that Plaintiff's prior counsel notified Plaintiff of the dismissal without prejudice. R. 4:23-5(a)(1).

Verizon further argues that because the Sevy Report was not produced with a certification of due diligence, "the late amendment shall be disregarded by the court and adverse parties." (Vb20) But the amendment was not late because the Complaint had been dismissed without prejudice and was not reinstated. The Rule provides "[o]n restoration of a pleading dismissed pursuant to . . . R. 4:23-5(a)(1) . . . the court shall enter an order extending discovery." R. 4:24-1(c). Therefore, given the matter had not been dismissed with prejudice for failure to provide discovery, the Rules permitted discovery to proceed upon reinstatement.

Verizon further argues the Google Earth photograph was "not authenticated," but in support of the motion for reconsideration, Mr. Trabocco did certify that he discovered the 2011 Google Earth photograph that did not demonstrate the pole was on his property in 2011. (Pa167 at ¶ 13.) Verizon and

JCPL contend "there is no way that this image taken from a satellite in space can differentiate a tree from a utility pole that is made from trees." (Vb21, Jb31.) However, this argument is construing a material fact against Plaintiff, particularly when Defendants' own proofs show a transformer on top of the pole, which is not simply wood as they now contend. (Cf. Pa90-91 with Vb21 & Jb31.)

Because the trial court summarily did not consider the proofs offered on reconsideration and overlooked the dismissal without prejudice that affected the discovery end date, there was an abuse of discretion justifying a reversal and remand. (See Pa308.)

CONCLUSION

This Court should review the summary judgment record de novo in order to conclude that the trial court erred in dismissing the three torts of trespass, nuisance, and injunction. The trial court further abused its discretion in failing to consider new evidence given the Complaint had been dismissed without prejudice at the time that the motions for summary judgment had been filed.

Respectfully submitted,
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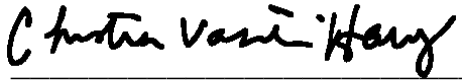

CHRISTINA VASSILIOU HARVEY

Dated: October 21, 2024