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| <p>MICHAEL BATTISTA; TRACEY BATTISTA; 529 WATERFRONT PROPERTIES, LP AND COLITE 24, LLC,</p> <p>Plaintiffs/Appellants,</p> <p>v.</p> <p>MICHAEL GARGIULO and PATRICIA GARGIULO,</p> <p>Defendants/Respondents.</p> | <p>SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION</p> <p>DOCKET NO.: A-2700-23</p> <p>On Appeal from:<br/>Superior Court Of New Jersey,<br/>Law Division, Morris County</p> <p>Docket No. MRS-C-54-20 c/w<br/>MRS-C-55-20</p> <p>Sat Below:<br/>Hon. Frank J. DeAngelis, J.S.C.</p> |
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**BRIEF ON BEHALF OF APPELLANTS,  
MICHAEL BATTISTA, TRACEY BATTISTA,  
529 WATERFRONT PROPERTIES, LP, AND COLITE 24, LLC**

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### **PRELIMINARY STATEMENT**

The parties in this matter, Appellants, 529 Waterfront Properties, LP, (“Waterfront”), Michael Battista, Tracey Battista, Michael Battista, Jr. and Colite 24, LLC (collectively the “Battista Parties”) and Respondents, Michael and Patricia Gargiulo (the “Gargiulos”), assert competing claims with regard to a written agreement (hereafter the “Easement”). The disputes between Waterfront, the dominant owner, and the Gargiulos’, the servient estate owner, fall into three categories which were resolved adversely to the Battista Parties on summary judgment. (Aa190 to Aa246).

First, the Court concluded that Waterfront, as the dominant estate owner, is limited to using a 14-foot-wide driveway on the 50-foot-wide by 1250-foot-long Easement for no purpose other than to access a public road known as Van Beuren Road. The trial Court’s opinion misread the Easement language, afforded no significance to the metes and bounds description included in the deeds granting the Easement, and ignored language in the chain of title specifying the purpose of the Easement as being more extensive than providing access to Van Beuren Road. The Court also disregarded a 75 years history of the Easement’s use as well as a contrary conclusion reached by Superior Court Judge Kenneth McKenzie in a dispute between the parties’ predecessors in title on this very issue. The Easement by its terms must be 50 feet in width and 1250 feet long and must be available for “all roadway uses and purposes.”

Second, the Court found “clear and convincing evidence” that the Easement rights to Lot 6.01 were abandoned by Waterfront’s predecessor based on an ambiguously worded 1975 deed between one dominant owner, Thomas Walker, who owned Lot 6.01 and other parts of the dominant estate, and Sol and Dorothea Levine, who purchased lot 6.01. The Court misread the Levine Deed which merely created a personal limitation on the ability of the Levines (not their heirs and assigns) to traverse a portion of the Easement to be an abandonment of the Easement by Walker. In reaching this conclusion, the trial Court did not explain how an ambiguously worded deed could be “clear and convincing evidence” of an abandonment, misread the deposition testimony of the Battistas, and seemed to conclude that Thomas Walker, who retained other appurtenant land abandoned his right to that portion of the Easement abutting Lot 6.01. And, in its analysis, the Court improperly resolved a material factual dispute on a motion for summary judgment.

Third, the Court found that the Gargiulos did not violate Waterfront’s rights to use the Easement when they planted trees which significantly narrowed it, added a deer fence and a split rail fence that blocked access by Waterfront, and shortened it by 150 feet to construct a formal entry gate. An Easement that, by its terms, may be used for “all roadway uses and purposes” now can no longer be crossed by Michael Battista, Jr, his children and occupants of the dominant estate to visit his



parents and grandparents located some 100 feet directly on the other side of the Easement. Most jurisdictions do not permit an Easement described by metes and bounds to be altered at all without the consent of both the dominant and servient owners. In New Jersey, an easement cannot be altered absent a substantial showing of need - a test that the Gargiulos did not, on the summary judgment record, satisfy.

### **PROCEDURAL HISTORY<sup>1</sup>**

#### **A. The Parties and Their Properties**

Appellant, 529 Waterfront Properties, L.P., owns Block 5, Lots 6.01, 6.02 and 6.03 on the tax map of the Township of Harding (the “Waterfront Property”). Respondents, Michael and Patricia Gargiulo, own a flag lot designated as Block 5, Lot 8 on the tax map of the Township of Harding (the “Gargiulos’ Property”). (Aa190).

All of the lots were in common ownership until 1946 and shared a common property line with abutting properties. Two of the lots owned by Waterfront, Lots 6.01 and 6.02, abut an Easement created by a 1946 deed between the parties’ predecessors in title which consists of the staff portion of the Gargiulos’ flag lot. The Easement, described by metes and bounds, is 50 feet wide and roughly 1250<sup>2</sup>

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<sup>1</sup> 1T refers to the transcript of the April 20, 2023 oral argument which is not cited in this brief.

<sup>2</sup> Depending upon the description and survey, the Easement length has been variously described as 1248 feet, 1250 feet or 1251 feet. These discrepancies are immaterial to this appeal.

feet long, extends from Van Beuren Road in the northerly direction, along Lot 6 (owned by others) and Lots 6.01 and 6.02, and terminates at the base of the flag portion of the Gargiulos' Property. (Aa190 to Aa191).

## **B. The Disputes and the Pleadings**

In recent years, a number of disputes have arisen between Waterfront and the Gargiulos' in connection with the Easement. Waterfront has contended that the Gargiulos have deprived it of full use of the Easement; the Gargiulos have contended that the Easement has, with regard to lot 6.01, been abandoned. The dispute came to a head when, in June 2020, the parties sued each other.<sup>3</sup>

### **1. Pleadings Filed in MRS-C-54-20**

On June 2, 2020, the Gargiulos filed a five count Verified Complaint against Michael J. Battista, Tracey Battista, Michael Battista, Jr., 529 Waterfront Properties, LP, and Colite 24, LLC under docket no. MRS-C-54-20. In Count I of their Complaint, the Gargiulos sought to enjoin the Battista Parties from interfering with the Gargiulos' effort to remove trees from the Easement. Count II sought a declaratory judgment that the owners of Lots 5, 7.04 and 7.05 (which are lots owned individually by Michael Battista) could not use the Easement, and that a

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<sup>3</sup> The actions were subsequently consolidated by Order filed June 17, 2020. (Aa184).

1975 deed to Sol and Dorothea Levine extinguished the easement rights appurtenant to lot 6.01. Counts III and IV alleged claims in trespass and nuisance; Count V sought to eject the Battista Parties from the Easement. (Aa1 to Aa18).

On July 24, 2020, the Battista Parties filed an Answer and Counterclaim denying all material allegations of the Plaintiffs' Complaint. In Count I of their Counterclaim, Waterfront alleged that the Gargiulos had breached the Easement Agreement. Count II asserted a claim for prescriptive rights in the Easement, and Count III alleged that the Gargiulos had unlawfully constructed structures within the Easement. Counts IV and V plead claims in trespass relating, in part, to the Gargiulos' disposal of construction debris on Waterfront's property, and private nuisance. (Aa67 to Aa85). The Gargiulos filed their Answer to the Counterclaim on September 18, 2020 which denied all material allegations. (Aa86 to Aa93).

## **2. Pleadings Filed in MRS-C-55-20**

On June 2, 2020, Michael and Tracey Battista, 529 Waterfront Properties, LP and Colite 24, LLC filed a Verified Complaint against the Gargiulos and the Township of Harding. That five count Complaint plead that the Gargiulos had breached the Easement Agreement, alleging that the servient owner had no right to alter the Easement (Count I). In addition, the Complaint alleged claims sounding in private nuisance (Count II), trespass (Count III), and sought a preliminary injunction preventing removal of approximately two dozen trees on the Easement

(Count IV). The fifth Count was a claim in lieu of prerogative writs against the Township of Harding, and is not relevant to this appeal. (Aa116 to Aa133).

The Gargiulos filed their Answer along with a Counterclaim on July 24, 2020 denying the material allegations of the Complaint. The Counterclaim alleged that the Battista Parties had breached the access easement (Count I), and plead causes of action in trespass and nuisance (Counts II and III). (Aa134 to Aa152).

On June 18, 2021, the Battista Parties filed their First Amended Complaint in what was now the consolidated matters of MRS-C-54-20 and 55-20. That Amended Complaint charged the Gargiulos with breaching the Easement Agreement (Count I), breach of an implied right to use the Easement under a Harding Township Ordinance (Count II), private nuisance (Count III), trespass (Count IV), and violation of a Harding Township ordinance dealing with the location of fences (Count V). (Aa153 to Aa168). The Gargiulos thereafter filed their Answer to the First Amended Complaint. (Aa172 to Aa183).

On or about July 20, 2021, the Gargiulos filed an Amended Counterclaim in the consolidated action which largely duplicated earlier filings but added a slander of title claim. (Aa 94 to Aa105). The Battista Parties filed their Answer to the Amended Counterclaim on August 2, 2021. (Aa106 to Aa115).

On January 27, 2023, all parties filed cross motions for summary judgment on some but not all issues (the Battista parties did not move on the debris claim

which was Count IV of their Counterclaim). (Aa267 to Aa270; Aa779 to Aa781).

### **C. The Summary Judgment Orders and Decisions**

On April 28, 2023, the trial Court granted summary judgment in favor of the Gargiulos on nearly all of their claims. The text of the opinion was not consistent with the Court's orders, but the inconsistencies were thereafter resolved by consent. The Court entered two orders on the summary judgment motion. On the April 28, 2023 form of Order submitted by counsel to Waterfront, the Court struck out all relief sought in the Order and wrote the word "Denied" on the second page. (Aa187 to Aa189). Concurrently, the Court entered the Gargiulos' order granting summary judgment on Count II of the Gargiulos' Verified Complaint and Counts I and II of the Gargiulos' Amended Counterclaim. The Order also dismissed all counts of the Battista Parties' Amended Complaint and Counterclaim. (Aa247 to Aa250).

The Court, in its opinion, denied the Gargiulos' motion for summary judgment on their slander of title claim and, as noted above, Waterfront did not move for summary judgment on its debris disposal claim which the Court had declined to dismiss. The Order read, in part, as follows:

**ORDERED** that the properties designated as Block 5 Lot 6.01 ("Lot 6.01") Block 5 Lot 7.04 ("Lot 7.04") and Block 5, Lot 7.05 ("Lot 7.05") on the Tax Map of the Township of Harding (the "Township") have no rights to use any portion of the Gargiulos' property designated as Block 5 Lot 8 ("Lot 8") on the Tax Map of the Township for

roadway purposes, or for ingress and egress to Van Beuren Road, or for ingress and egress to adjoining properties; and it is further

**ORDERED** that any rights of Lot 6.01 to use Lot 8 for ingress/egress to Van Beuren Road or for roadway purposes created by the deed from John W. Castles to Horace C. Jeffers, dated May 14, 1946, and recorded in the Morris County Clerk's Office on May 15, 1946 at Book Y40, Page 433 (the "Jeffers Deed") be and hereby are deemed to have been abandoned and are no longer existing; and it is further

**ORDERED** that any use of Lot 8 for roadway purposes or ingress and egress benefitting Block 5 Lot 6.02 on the Tax Map of the Township ("Lot 6.02") shall be limited to the reasonable use of only the portion of paved driveway in the flagstaff of Lot 8 necessary for ingress/egress between Lot 6.02 and Van Beuren Road; and it is further

**ORDERED** that the lamppost installed by the Battistas on Lot 8 shall be removed within 60 days of the date of this Order;<sup>4</sup>

(Aa248 to Aa249).

The opinion and Orders were a bit confusing because in one Order, the Court had simply denied summary judgment to Waterfront. In the second Order, the Court purported to dismiss all counts of the Battista Parties' Amended Complaint and Counterclaims. And in its opinion, the Court had ruled that two claims, the Gargiulos' slander of title claim and their claim to dismiss Waterfront's debris disposal claim raised factual issues which were not amenable for resolution on summary judgment. (Aa243 to Aa245; Aa234).

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<sup>4</sup> Appellants have not appealed this paragraph of the Order.

The parties thereafter negotiated a resolution of the remaining claims and, on April 25, 2024, the Court entered a Consent Order submitted by the parties disposing of the claims on which the Court had refrained from granting summary judgment. (Aa251 to Aa255).

All issues having been disposed of, the Battista Parties filed a Notice of Appeal on May 10, 2024. (Aa256 to Aa265).

### **STATEMENT OF FACTS**

#### **A. The Parties and Their Properties**

Plaintiff-Appellant, Waterfront, owns a home on property designated as tax block 5, Lot 6.02 on the Harding Township tax map where Michael Battista, Jr. lives with his wife and baby. Waterfront also owns two parcels of vacant land designated as tax block 5, Lots 6.01 and 6.03 on the Harding Township tax map. Lot 6.01, which is actively farmed and has been for decades, lies to the northwest of Lot 6.02. a residence. Lot 6.03 is a narrow strip of land abutting Lot 6 (owned by others) and terminating in a cul-de-sac at the base of lot 6.02. Lots 6.01 and 6.02 comprise the dominant estate of the Easement. (Aa190 to Aa191).

The managing partner of Waterfront is Michael Battista. Mr. Battista and his wife also own properties across from the Easement, Lots 7.04 and 7.05, where they reside, but which are not part of the dominant estate. (Aa190 to Aa191; Aa752 to Aa753; Aa760). However, both Lots abut the Easement. (See p. 10).

The Gargiulos are the owners of a flag lot designated as tax block 5, Lot 8 on the Harding Township tax map, with an address of 595 Van Beuren Road. The flag portion of the Gargiulo property is to the north of Lot 6.01 and the staff portion of Lot 8 abuts Lots 6, 6.01 and 6.02. The flag staff, defined by metes and bounds, is 50 feet wide and extends roughly 1250 feet from the base of the Gargiulo property to Van Beuren Road. (Aa190). See map below.

THE MAP REFERENCED ABOVE CAN BE FOUND  
IN APPENDIX VOLUME V, PAGE Aa753

(Aa753).

**B. The Title History**

As described below, all parties' title derives from a common owner, John Castles, the predecessor to Waterfront and the Gargiulos. In 1946, Castles



conveyed part of the easterly side of his property to Horace Jeffers and part to Thomas Walker, together with a 50-foot wide by 1250-foot-long Easement along the eastern boundary. Walker ultimately acquired the Jeffers property and later subdivided a piece off of that parcel creating Lot 6.01. In 1975, Walker sold Lot 6.01 to Sol and Dorothea Levine who later sold this lot to Waterfront and years later Walker did a second subdivision creating Lot 6.02 which he sold to Thomas Carey who later sold it to Waterfront. Lot 8 was acquired by The Gargiulos in 2013. The title history is set forth in more detail below.

**1. Conveyances of Lots 6, 6.01 and 6.02  
(Dominant Property)**

By a deed made on April 25, 1927, John W. Castles acquired approximately 114.346 acres of land in the Townships of Harding and Morris, which included Lot 8, along with the Waterfront Properties (Lots 6.01, 6.02 and 6.03) and Lot 6. (Aa753; Aa365 to Aa368). On May 14, 1946, Castles and his wife, Dorothea (the “Castles”), conveyed a portion of this tract, 6.524-acres, to Horace C. Jeffers (the “Jeffers Parcel”). On August 23, 1996, Castle conveyed another portion of his land to Thomas Walker. (Aa370 to Aa374).

The Castles to Jeffers deed is important for four reasons. First, it created the Easement at issue in this appeal and described it with a metes and bounds description as follows for use by the grantees’ servants, agents and invitees:

[t]ogether with a right-of-way fifty (50) feet in width **for all roadway uses and purposes** and for the installation and maintenance of utilities, extending northwesterly from Van Beuren Road and more particularly described as follows:

- 1) along the line of lands of said Mellon, North 42 degrees 01-minute West 1248.62 feet; thence
- 2) South forty-seven degrees fifty-nine minutes West fifty feet

\* \* \* \*

Said right of way is for the benefit of the said Horace C. Jeffers, his heirs and assigns, and his and their **servants, agents and invitees in common with others**. (Emphasis added).

(Aa365 to Aa366).

Second, the deed stated that the right-of-way was for “**all roadway uses and purposes**,” not simply for ingress and egress to and from Van Beuren Road.

Third, the Jeffers Deed implied that the Easement was not intended only to access Van Beuren Road. Thus, the deed made provision for the grantee (Jeffers) to use an existing (different) driveway on a parcel about to be conveyed to Thomas G. and Elizabeth Walker until the 50-foot-wide Easement here in issue was improved in order “for purposes of ingress and egress” to the Jeffers Tract and to Castles’ “remaining land,” not just to go to Van Beuren Road. The Jeffers Deed read in pertinent part:

The party of the second part, his heirs and assigns and his and their servants, agents and invitees, shall have the right to pass over the existing northerly driveway extending from Van Beuren Road across the premises about to be conveyed by the party of the first part to

Thomas G. Walker and Elizabeth F. Walker, his wife, for a period of two years from May 15, 1946, or to the date, provided it is prior to May 14, 1948, **when a driveway extending to Van Beuren Road is established over the strip of land fifty feet wide, which fifty-foot strip of land the party of the first part has set aside and over which he proposes to establish a right of way for purposes of ingress and egress to the lands herein conveyed to the party of the second part and to the remaining lands of the party of the first part . . .** (Emphasis added).

(Aa366).

Fourth, the right-of-way was “for the benefit of said Horace C. Jeffers, his heirs and assigns, and his and their servants, agents and **invitees** in common with others.” (Emphasis added).

On May 15, 1951, Jeffers conveyed the Jeffers Parcel to Elizabeth Walker. This deed of 6.524 acres consisted of what is now Lot 6.01 and part of Lot 6.02. The conveyance was expressly made subject to the 50-foot wide by 1250-foot-long right-of-way again described by metes and bounds. As a result of this conveyance, the Walkers in 1951, owned all of what would become Lots 6, 6.01, 6.02, and 6.03. (Aa374 to Aa377). Lot 6.01 included 317.80 feet of frontage along the Easement. (Aa756).

On February 10, 1975, the Walkers conveyed Lot 6.01, 3.735 acres, to Sol and Dorothea Levine which was a portion of the land which the Walkers had acquired from Horace Jeffers in 1946. That deed contained the following statement:

No easement by necessity or otherwise over the remaining lands of the party of the first part or over the right of way fifty (50) feet in width more particularly described in the deed from Horace C. Jeffers, unmarried, to Elizabeth F. Walker, hereinabove referred to shall arise by legal implication, the strip of land twenty-five (25) feet in width extending northwesterly from Van Beuren Road included in the herein conveyed 3.735 acres is for the purpose of providing ingress and egress to the lands conveyed by the party of the first part to the party of the second part.

(Aa379 to Aa382). On June 4, 2019, Waterfront acquired block 5, Lot 6.01 from Philip Levine, as Executor under the Last Will and Testament of Dorothea B. Levine (the “Levine Property”). (Aa1202 to Aa1208). At that time, Walker continued to own what would become Lot 6.02.

The Harding Township Planning Board, on July 28, 2003, approved a subdivision of Lot 6 (9.8233 acres) into four parcels: new Lot 6 (a 5.0125-acre parcel that abutted Van Beuren Road), Lot 6.02 and Lot 6.03 (a .6540 private road that abutted lot 6 and terminated in a cul-de-sac on Lot 6.02). Paragraph 5 of the Board Resolution noted that the Applicant, Mr. Walker, intended to continue to use the flag staff of lot 8 (the Easement here in issue) for access to Lot 6.02. (Aa420 to Aa427).

Richard and Alexandra Hawrylo, who then owned Lot 8 (currently the Gargiulos’ lot), opposed the subdivision application arguing that, as a consequence of the availability of Lot 6.03 to access Lot 6.02 from Van Beuren Road, the easement rights of the Walkers to use the Easement on what would become the

Gargiulos' Property had been extinguished. At Paragraph 18 of the Board's Resolution, the Board rejected the Hawrylos' challenge reasoning that the "continued use of the shared driveway on Lot 8 pursuant to the recorded access easement" allowed Lot 6.03, to remain unimproved which was a goal of the Township. (Aa423).

On August 12, 2003, Walker conveyed Lots 6, 6.02 and 6.03 to Thomas and Barbara Carey by a deed that included a metes and bounds description of the 50-foot wide by 1250-foot-long Easement, which thus included the portion of the Easement abutting Lot 6.01. (Aa1703 to Aa1708). Thomas Carey, on January 24, 2019, sold Lots 6.02 and 6.03 to Waterfront. This deed also contained a metes and bounds description of the Easement as being 50 feet wide by 1250 feet in length. (Aa282 to Aa285). Therefore, as of 2019, Waterfront had become the owner of Lots 6.01 and 6.02, all being the dominant estates benefitted by the recorded Easement.

## **2. Conveyances of Lot 8 (Servient Property)**

On July 20, 1954, the Castles conveyed 38.03 acres of land, including what is now Lot 8, to Alice P. Work ("Work Deed"). That deed was made subject to "a right of way 50 feet in width for all roadway purposes and for the installation and maintenance of utilities . . . as set forth in the deeds from John W. Castles to Thomas Glenn Walker and Horace C. Jeffers, above referred to." (Aa765). This is

the 50-foot wide by 1250-foot-long Easement at issue in this matter. (Aa755; Aa453 to Aa456).

On June 18, 1956, Ruth and Joseph Guenster, as successors by inheritance to Alice Work, conveyed the Work property (Mrs. Work had died on October 5, 1955) to Helen Duff again subject to the 50-foot-wide Easement. On June 30, 1965, Duff conveyed her property to Charles and Greta Silloway “subject to the Easement 50 feet in width . . .” (Aa383 to Aa387).

Approximately thirty years later, the Harding Township Planning Board approved a subdivision of the property to create Lot 8 (the Gargiulo Lot). Thereafter, on October 31, 1989, the Silloways conveyed what is now Lot 8 to Richard and Alexandra Hawrylo. (Aa457 to Aa463). On October 31, 2013, the Hawrylos conveyed the property to the Gargiulos. (Aa918 to Aa924).

The Gargiulos’ title commitment noted that title was subject to the 50 foot by 1250-foot easement referring specifically to the 1946 deed which included the Easement. (Aa471). Thus, the Gargiulos’ property, Lot 8, has been continuously subject to the 50-foot wide by 1250 long Easement.

### **C. The 1990 Litigation Over the Easement**

In 1990, the Walkers, who then owned Lot 6 (which included part of what would become Lot 6.02), sued the Hawrylos, the then owners of Lot 8, who disputed the Walkers’ right to use the Easement for access to what is now Lots 6,

6.01, and 6.02. On December 21, 1990, the Court heard oral argument on a partial summary judgment motion. At the argument, the Hawrylos' attorney claimed, *inter alia*, that when the Walkers acquired all of the property along the Easement extending to Van Beuren Road, it became one lot, the Easement was no longer needed, and therefore it had been extinguished because Lot 6 now had access to Van Beuren Road. (Aa767; Aa399 to Aa402).

The Walkers' attorney disagreed, arguing that the purpose of the Easement was not simply to access Van Beuren Road. It was also to be used, he argued, to access structures on what had been the Jeffers property which was not on Van Beuren Road but did abut the Easement, as well as to access other lands abutting the Easement as Walker had done in the past:

For more than 40 years the driveway has been used exactly as it is used today to service the property behind the Walker and now Levine tract and to service the Jeffers' structure, the Jeffers' property.

According to Walkers' attorney, the "purpose for which the driveway was created still exists; that is to provide access to the rear structure on what is now the Walker property." (Aa405).

The Court, Judge Kenneth McKenzie, J.S.C., denied the Hawrylos' motion for summary judgment because, in his view, the Hawrylos had confused the concept of need with that of purpose, finding that a purpose exists "to service the back lot off of Van Beuren Road" (as Appellants here argue). "The language of

the easement is clear and unmistakable,” the Court wrote, and “supports the Walkers position.” (Aa411). Thus, as of 1990, the Walkers had asserted that the use and purpose of the Easement was **not** limited to accessing Van Beuren Road but extended to the entire dominant estate. Judge McKenzie agreed, but Judge DeAngelis would, in this matter, reach a contrary conclusion limiting the use of the Easement to a 14-foot driveway only to access Van Beuren Road only.

**D. The Trial Court’s April 28, 2023 Opinion**

Following the completion of discovery, the parties in this matter cross-moved for partial summary judgment. The material issues on summary judgment (other than those later resolved by consent) dealt with (1) whether the Easement rights of the owner of Lot 6.01 had been abandoned by the Levine Deed; (2) whether the Easement’s use was confined to accessing Van Beuren Road; and (3) the extent of the rights of the servient owner, the Gargiulos, to alter the Easement.

The Court’s discussion of the abandonment issue spanned some 18 pages. The first 17 pages (Aa197 to Aa213) summarize the parties’ arguments. The Court’s analysis begins on page 24 where it concludes that the 1975 Levine Deed constituted “convincing evidence” of the “intent to abandon” the Easement; that Waterfront’s use of the Easement had been permissive; and that Lot 6.01 was not, as a consequence of the loss of the Easement, “landlocked.” (Aa214).



In another finding, the Court limited the use of the Easement along Lot 6.02 to accessing Van Beuren Road. At page 25 of its opinion, the Court accurately observed that “[a]s no party disputes maintaining the Utilities Easement or the Access Easement up to Lot 6.02, these portions of the 1946 Easement are retained . . .” (Aa214). But, the Court concluded that the sole use of the Easement was to permit the owners of Lot 6.02 to access Van Beuren Road (Aa221), thereby precluding its use for “all roadway uses and purposes.” In doing so, the Court ignored (1) the statement of purpose in the Easement description (“for all roadway uses and purposes”); (2) language in the various deeds indicating that the purpose of the Easement was to access other lands of the servient owner; (3) the Walkers’ position before Judge McKenzie in the Hawrylo litigation; (4) Judge McKenzie’s contrary finding in that litigation; and (5) the historical use of the Easement. As a result of that opinion, the occupant of Lot 6.02, Michael Battista, Jr., could no longer invite his parents to cross the Easement to visit with him from their home 100 feet across the Easement without his parents travelling approximately ½ mile down their property, along Van Beuren and up to their son’s home.

The Court then turned to the lawfulness of the Gargiulos’ actions to fence in the Easement, shorten its length, and narrow it. On this issue, the Court made a mixed finding of law and fact as to the ability of a servient owner to modify an easement. (Aa220 to Aa221). It rejected Waterfront’s legal argument and the

decisions of Courts throughout the nation, that an easement described by metes and bounds could only be modified with the consent of both the servient and dominant owners. It then applied the wrong legal standard and concluded, as a matter of fact, that, notwithstanding Waterfront's contrary factual submissions, the Gargiulos' modifications to the Easement did not unduly burden the rights of Waterfront, the dominant owner.

## **ARGUMENT**

### **SCOPE OF REVIEW**

On appeal, a trial Court's decision to grant summary judgment is reviewed *de novo*, *Sashihara v. Nobel Learning Communities, Inc.*, 461 N.J. Super. 195, 205 (App. Div. 2019), with all facts viewed "in the light most favorable to the non-moving party." *Estate of Hanges v. Metropolitan Property & Cas. Ins. Co.*, 202 N.J. 369, 374 (2010).

### **POINT I**

#### **THE TRIAL COURT MISCONSTRUED THE EASEMENT INsofar AS IT RULED, WITH NO BASIS TO DO SO, THAT ITS SOLE PURPOSE WAS TO GAIN ACCESS TO VAN BEUREN ROAD (Aa221; Aa248 to Aa249)**

Before assessing the Court's determination on abandonment with regard to Lot 6.01 and use with regard to Lot 6.02, it is important to understand the rights granted by the Easement.

The trial court correctly found that

As no party disputes maintaining the Utilities Easement or the Access Easement up to Lot 6.02, those portions of the 1946 Easement are retained . . . (Aa214).

However, the trial Judge concluded that the written Easement, which was described by metes and bounds and which granted a 50-foot wide by 1250 long right of way to be used for “all roadway uses and purposes,” should be reduced to a 14-foot-wide driveway whose sole purpose was to access Van Beuren Road from Lot 6.02. (See Aa221).

Therefore, the Easement could no longer be used as it had in the past: (1) to move farm equipment adjacent to Lot 6.02 or to move farm equipment between Lots 6.01 and 6.02; (2) to travel among Lots 6, 6.01, 6.02 and Lot 8; and (3) to cross the Easement so that the Battistas, permitted invitees, could walk from their home on Lot 7.04 when invited by their son who lived on Lot 6.02, to visit their son and their grandchildren. (Aa274 to Aa275). The Court’s determination was not consistent with language in the Easement, extrinsic evidence, common sense, or case law. Nor did the Court discuss or abide by the requirement that easements, if ambiguous, be strictly construed against the grantor. *Hyland v. Fonda*, 44 N.J. Super. 180, 187 (App. Div. 1957).

The deed which included the Easement reads in part as follows:

[t]ogether with a right-of-way fifty (50) feet in width **for all roadway uses and purposes** and for the installation and maintenance of utilities, extending

northwesterly from Van Beuren Road and more particularly described as follows:

- 1) along the line of lands of said Mellon, North 42 degrees 01-minute West 1248.62 feet; thence
- 2) South forty-seven degrees fifty-nine minutes West fifty feet

\* \* \*

Said right of way is for the benefit of the said Horace C. Jeffers, **his heirs and assigns, and his and their servants, agents and invitees in common with others.** (Emphasis added).

(Aa365 to Aa366).

The trial Judge, disregarding this language, ruled that the Easement along Lot 6.02

shall be limited to the reasonable use of only the portion of paved driveway in the flagstaff of Lot 8 necessary for ingress/egress between Lot 6.02 and Van Beuren Road . . .

(Aa248 to Aa249).

#### **A. The Relevant Legal Principles**

When an easement is in writing, the language of the grant defines the scope of the easement. *Tide-Water Pipe Co. v. Blair Holding Co.*, 42 N.J. 591, 605 (1964). If the language is clear, it will determine the rights of the parties. *Id.* If the easement language is ambiguous, extrinsic evidence may be considered but any ambiguity as to the parties' intent "should be construed most strongly against the grantor . . ." *Hyland v. Fonda*, 44 N.J. Super. at 187. Therefore, the trial Court's

analysis should have begun with the language used in the 1946 Easement grants in the Jeffers, Work and Walters Deeds.

**B. The Easement Language Did Not Limit its Use to Accessing Van Beuren Road**

First, there is nothing in the language of the Easement that limits its use to ingress and egress to Van Beuren Road. That street name, while mentioned as part of the metes and bounds description, is not used as a limitation on the use or in connection with the purpose of the Easement. Rather, it is mentioned only as a point of reference for the beginning and end points of the Easement, as are other locations (e.g. the Easement also runs “along the lines of the land of said Mellon”). The Easement could no more be construed to limit its use to access Van Beuren Road than it could be construed to limit its use to access the Mellon land. Van Beuren Road reference is, like the Mellon land reference, a way point.

The Easement language did however describe its purpose which was “for all roadway uses and purposes.” The use of the word “all” in this phrase connotes “every one, or the whole number of particulars; the whole number.” It is among the most comprehensive words in the English language. *Vanderade v. Appert*, 125 N.J. Eq. 366, 369 (Ch. Div. 1939) (citations omitted); *Shafter v Reo Motors, Inc.* 205 F2d 685, 687 (3d Cir 1963) (the word “all, needs no definition; it includes everything and excludes nothing. There is no more comprehensive word in the language . . .”). “All” as used in case law and dictionaries (*see e.g.* Random

House Dictionary of the English Language (1971)) is comprehensive and inclusive. The Court's construction of the Easement, limiting its use to accessing Van Beuren Road, is incompatible with the use of the adjective "all" as descriptive of the permitted "roadway uses and purposes."

Third, the 1946 Castles to Jeffers Deed made provision for the grantee to use an existing driveway on property Castles was about to convey to the Walkers until the 50-foot right-of-way here in issue was improved:

The party of the second part . . . shall have the right to pass over the existing northerly driveway extending from Van Beuren Road across the premises about to be conveyed by the party of the first part to [the Walkers] for a period of two years from May 15, 1946, or to the date, provided it is prior to May 14, 1948, when a driveway extending to Van Beuren Road is established over the strip of land fifty feet wide, which fifty-foot strip of land the party of the first part has set aside and over which he proposes to establish a right of way for purposes of ingress and egress to the lands herein conveyed to the party of the second part and to the remaining lands of the party of the first part . . .

(Aa366). Pointedly, that deed did not say the use was for purposes of "ingress and egress to Van Beuren Road," it was for ingress and egress "to the lands herein conveyed . . ."

Fourth, were the purpose of the Easement simply to allow access to Van Beuren Road, Castles need not have granted a 50-foot wide by 1250 long Easement. Jeffers could have accessed Van Beuren Road, 850 feet away from anywhere along the Easement frontage using a narrow driveway.

Finally, Judge McKenzie found that the language of the Easement was “clear and unambiguous” – as being intended, as the Walkers argued, “as a separate means of ingress and egress to the Jeffers’ Lot.” (Aa1725 to Aa1726). Walkers, the then owners, could and did use the Easement to access the Jeffers’ portion of Lot 6 via the Easement.

In summary, if there were any ambiguity as to the parties’ intent, which there is not, the deeds of easement must “be construed most strongly against the grantor . . .” *Hyland v. Fonda*, 44 N.J. Super. at 187. The trial Court should not have reduced the 50 by 1250 Easement to a 14-foot-wide limited use driveway. Judge McKenzie was correct; the Court here erred.

**C. Extrinsic Evidence Supports Waterfront’s Position that the Easement Was to Be Used to Access All Adjoining Properties**

Given the unambiguous language of the Easement grant, there is no need to consider extrinsic evidence. Were that evidence to be considered, it supports Waterfront’s position.

It was undisputed that the Easement had historically been used for purposes other than to access Van Beuren Road. Lots 6.01 and 6.02 were farmed. Access to the Easement from much of Lots 6.01 and 6.02 was required to move farm equipment and livestock between the lots. Over the years Waterfront has used the Easement both to move farm equipment and livestock and to traverse up and down the Easement without going to Van Beuren Road as well as to cross the Easement

from one side to the other. (Aa1767 to Aa1768; Aa274 to Aa275). It is also undisputed that the Walkers filed a suit to preserve his use of the full Easement to travel to and from their property to the Jeffers property.

Second, when the Walkers conveyed lot 6 to the Careys, they included a metes and bounds description of the Easement as being 50 feet wide by 1250 feet long. Lot 6 already had access to Van Beuren Road on which it fronted and thus, there was no need for the Walkers to convey a 1250-foot-long easement to the Careys unless it was to be used to access the rear property that did not abut Van Beuren Road. (Aa1707).

**D. The Court's Ruling Defies Common Sense and Case Law**

As a consequence of the Court's ruling, the owners of lots 6.01 and 6.02 are prohibited from using the Easement to access other parts of their property and Michael Battista Jr.'s parents cannot cross the Easement when invited to their son's home. To visit their grandchild, Michael and Tracey Battista, must now walk 1000 feet along Lot 7.04, 150 feet west along Van Beuren Road (a two-lane country road without shoulders or sidewalks), and several hundred feet north in the Easement: Before the Court's opinion they could simply have walked across the 50-foot-wide Easement to their son's home. Nor can their son and the Battista grandchildren visit the Battistas without undertaking a nearly half mile journey to



and from Van Beuren Road.<sup>5</sup> These limitations are not compatible with a use for “all roadway uses and purposes,” inasmuch as roadways are meant to be crossed to get to the other side.

The Court’s limitation upon the Easement’s use is inconsistent with New Jersey case law. This is so because an easement of way, such as that at issue here, “is available as a general way for all purposes to which the dominant tract might be devoted.” *Caribbean House, Inc. v. N. Hudson Yacht Club*, 434 N.J. Super. 220, 227 (App. Div. 2013); *Levinson v. Costello*, 74 N.J. Super. 539 (App. Div. 1962) (dominant owners can allow guests and invitees to use easement). Therefore the Easement can be used to access adjacent lots provided those doing so are invited to Lots 6.01 or 6.02 or to depart from either of those Lots to reach an adjacent lot or to go anywhere along its length.

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In summary, the 50-foot wide by 1250-foot-long Easement, described by metes and bounds to be devoted to “all roadway uses and purposes” is clear and

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<sup>5</sup> The Battistas do not and never have asserted that, as owners of Lots 7.04 and 7.05, they have any independent rights in the Easement. They have continually asserted, however, that if they are invited by the owners of the dominant estate to visit, they may cross the Easement since, by its terms, the Easement may be used by “servants, agents and invitees.” They also assert that the owners of the dominant estate may cross the Easement to gain access to Lots 7.04 and 7.05 because that use is consistent with “all roadway uses and purposes.” It would make no sense to say that an invitee to Lots 6.01 or 6.02 can only use the Easement if they begin their journey at Van Beuren Road.

unambiguous. Even if ambiguous, any ambiguity must be construed against the grantor (the Gargiulos and their predecessors), and the Court's ruling is incompatible with extrinsic evidence, defies common sense, and is inconsistent with case law.

## POINT II

### **THERE WAS NO CLEAR AND CONVINCING EVIDENCE THAT THE EASEMENT WAS ABANDONED WITH REGARD TO LOT 6.01. (Aa197 to Aa213; Aa248 to Aa249)**

While an easement may be modified or extinguished by abandonment, *Van Horn v. Harmony Sand & Gravel, Inc.*, 442 N.J. Super. 333, 345 (App. Div. 2015), the “party asserting such abandonment must present clear and convincing evidence of an intention on the part of the owner to abandon the easement.” *Fairclough v. Baumgartner*, 8 N.J. 187, 189–90 (1951). And that intention must be to abandon the easement forever. *Rossi v. Sierchio*, 30 N.J. Super. 575, 580 (App. Div. 1954):

To establish that an owner of an easement has abandoned it there must be clear and convincing evidence of . . . an intention on his part to abandon it forever . . . .”

*Accord, Penn Cent. Transp. Co. v. Pirate Canoe Club, Inc.*, 463 F 2d. 127, 128 to 29 (2d Cir. 1972) (an intention to abandon must “clearly demonstrate the permanent relinquishment of all right to the easement”).

Clear and convincing evidence is evidence that

produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established,' evidence 'so clear, direct and weighty and convincing as to enable (the factfinder) to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.' [internal citations omitted]"

*In re Samay*, 166 N.J. 25, 30 (2001). There was no clear and convincing evidence that Walker intended to abandon the Easement forever.

The trial Court here found abandonment on three grounds. First if found that the following restriction in the Levine Deed clearly and convincingly demonstrated an abandonment by Walker:

No easement by necessity or otherwise over the remaining lands of the party of the first part or over the right of way fifty (50) feet in width more particularly described in the deed from Horace C. Jeffers, unmarried, to Elizabeth F. Walker, hereinabove referred to shall arise by legal implication, the strip of land twenty-five (25) feet in width extending northwesterly from Van Beuren Road included in the herein conveyed 3.735 acres is for the purpose of providing ingress and egress to the lands conveyed by the party of the first part to the party of the second part.

(Aa380). Second, it found that Waterfront's use of the Easement along Lot 6.01 was "permissive" and that such permissive use "is not indicative of a party with easement rights;" and third because there was no risk of Lot 6.01 being landlocked, the Easement was deemed to have been abandoned. (Aa214). The Court erred on all three grounds; none are "clear and convincing evidence" of an intention to abandon the Easement forever, and all required the resolution of factual disputes.

**A. The Levine Deed Does Not Clearly and Convincingly Prove Abandonment**

For several reasons, the restriction in the Levine Deed is not clear and convincing evidence of the Walkers' intention to abandon the Easement. The language in the deed was merely a restriction personal to the Levines barring them from using the Easement during their ownership to travel along that part of the Easement that abutted the Walkers' home during their ownership. There is absolutely no indication that the Walkers intended to abandon any right.

A deed that is susceptible to two constructions, one as abandonment of the Easement forever and the other as a restriction personal to the Levines, is ambiguous. *Nester v. O'Donnell*, 301 N.J. Super. 198, 210 (App. Div. 1997). *Accord Chubb Custom Ins. Co. v. Prudential Ins. Co. of America*, 195 N.J. 231, 237 (2008); *Barr v. Barr*, 418 N.J. Super. 18 (App. Div. 2011). An ambiguous agreement cannot by itself be clear and convincing evidence.

The most reasonable construction of the Levine covenant is that it created a personal restriction binding the Levines for the benefit of the Walkers. First, in order for the Levine restriction to bind successors, it must run with the land. Several factors militate against the Levine covenant running with the land and binding successive owners of the dominant estate. The restrictive language only refers to the rights of the "party of the first part" and the "party of the second part," not to their heirs and assigns. As this Court observed in *Mazzeo v. Kartman*, 234

N.J. Super. 223, 232 (App. Div. 1989) (a case involving a real estate agreement) in the absence of the words such as “heirs and assigns,” real estate agreements have been reasonably construed “to reflect a personal right of the parties and to last for their lifetimes,” nothing more.

Pointedly, other parts of the Levine Deed use the words “heirs and assigns.” For instance, the conveyance clause has the words “their heirs” typed in to the form. *Cf Loucks v. Kaufman*, A-4322-13, 2015 N.J. Super LEXIS 2555 (App. Div. Nov 5, 2015) (Aa2279 to Aa2287) <sup>6</sup> (use of heirs and assigns in one part of deed but not in a second part indicates that the second covenant is personal only).<sup>7</sup>

Second, rather than saying the Easement was abandoned, the deed language merely says that “no easement . . . shall arise by legal implication.” Had it been the Walkers’ intention to terminate the Easement, they would have used the word “terminate” but did not, or Walker could have reached an agreement to do so directly with the servient owner. Walker clearly knew how to terminate or abandon an easement because the deed he received from Castles (Aa370 to Aa373) had two provisions which expressly provided that easement rights elsewhere on the Castles property would “terminate.” For example, certain water rights would “terminate on September 8, 1949” and certain access rights “shall terminate on

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<sup>6</sup> The undersigned certifies that he is unaware of any unpublished opinions contrary to those cited in this brief.

May 14, 1948.”. (Aa371 to Aa372). Walker could have used this language were that his purpose but he did not.

Third, the language in the Levine Deed states that its intent is only to limit the use of the Easement because there is an alternative access “providing ingress and egress” to the Levine parcel. The Easement however includes a larger bundle of rights insofar as it may be used for “all roadway uses and purposes.” A sensible reading of the Levine Deed is that the Walkers did not want the Levines to travel by the Walkers’ home when accessing Levine’s property from Van Beuren Road, i.e. the covenant was personal and limited to the period of Walker’s ownership. The full bundle of easement rights, which included the right to traverse along that part of the Easement which abuts lot 6.01, or to cross the Easement, or to travel to lot 8, were not abandoned.

Fourth, while the Walkers might have cared if the Levines drove by their home, it would make no sense for them to care about what the Levines did in the Easement abutting the Levine property. If the Walkers thought the Easement had been abandoned by the 1975 Levine Deed, they would not, years later, have conveyed the 50 foot by 1250-foot Easement to the Careys in 2003. (Aa432). Nor would the Walkers care what the owner of Lot 6.01 did once the Walkers sold their remaining land, Lots 6 and 6.02. And it would make absolutely no sense for the Walkers, who still owned Lots 6 and 6.02, to give up their rights to use the

appurtenant easement along Lot 6.01 “forever.” *Rossi v. Sierchio*, 30 N.J. Super. at 580. On the contrary, the Walkers litigated with the Hawrylos in an effort to protect their use of the entire Easement. And if the Levines intended to have alternative access, they would have improved the alternative flag staff of Lot 6.01 but did not.

Fifth, there was no manifestation of intent directed to the Gargiulos. The Levine Deed was between a dominant owner and his buyer. The Easement remained of record in the Gargiulos’ title chain and the Easement was a specifically described exception in the Gargiulos’ title policy. (Aa465 to Aa473 at Aa471). *Nuzzi v. Corcione*, 139 N.J. Eq. 339, 344 to 45 (Ch. 1947) (the fact that an easement remains in the chain of the servient owner’s title supports continued validity of the easement).

In addition, the Second Circuit Court of Appeals read language that is nearly identical to that in the Levine deed as insufficient to find an abandonment. *Penn Cent. Transp. Co. v. Pirate Canoe Club, Inc.*, 463 F 2d. 127. The Court there affirmed summary judgment which had been granted to the dominant estate owner construing a nearly identical deed claimed to be evidence of an abandonment. In that matter, the dominant owner, Young, had an easement to cross Penn Central’s railroad tracks. In 1968, Young conveyed land on the west side of the track to the Pirate Canoe Club. The deed of conveyance stated the that Club was aware

that its property was landlocked and was not acquiring “any right of way over or through other lands” owned by the seller. The Canoe Club, the Court observed, intended to secure an alternative access by means of an existing road. Young thereafter conveyed her land on the east side of the track to the Canoe Club along with the easement. Penn Central argued that the easement had been abandoned in the 1968 deed between Young (like Walker) and the Canoe Club (Like Levine). The Court of Appeals disagreed: “We cannot say that the [1968] conveyance represented an unequivocal set by Annette Young to permanently . . . abandon her easement.” *Id.* at 128.

Although that case arose under New York substantive law, that law, in all material respects, is identical to New Jersey substantive law. *Penn Central*, was correctly decided, is consistent with New Jersey law, and undermines any notion that the Levine Deed is “clear and convincing” evidence of an abandonment. Finally, were the dispute in equipoise, Waterfront was entitled to prevail.

In summary the restriction in the Levine Deed is not clear and convincing evidence of abandonment by Walker. The Levine restriction merely created a personal covenant. And as set forth below, all of the extrinsic evidence belies the Court’s finding of an abandonment.

Insofar as the Court may have implicitly rejected Waterfront’s argument and proofs, it should have made specific findings explaining its decision to do so, *N.J.*



*Court R. 1:7-4. Estate of Doerfler v. Fed. Ins. Co.*, 454 N.J. Super. 298 (App. Div. 2018); *Pardo v. Dominguez*, 382 N.J. Super 489 (App. Div. 2006), and it did not.

**B. Waterfront's Use of the Easement Was Not Permissive**

The Court supported its finding of abandonment based upon the premise that the facts showed that Waterfront's use of the Easement had been permissive. The Court misread the record and made an impermissible factual finding insofar as it rejected Waterfront's contrary evidence.

In its original summary judgment motion, Waterfront's Statement of Material Undisputed Facts stated that Lot 6.01 had been used for farming and contended that:

Over the years Michael Battista has used the Easement to move farm equipment and traversed up and down the Easement, and pedestrians and livestock have crossed the Easement from one side to the other in locations that are no longer accessible.

(Aa771). Nowhere in the motion record was there a suggestion that these uses were, as the Court found, "permissive." The Gargiulos did not deny the truth of those factual assertions but merely claimed, in their Response to Waterfront's Statement of Material Undisputed Facts, that they are neither relevant nor material. (Aa1969 to Aa1971). The Court, however, ignored this assertion.

The "permissive use" to which the Court referred was not that of the dominant owner, Waterfront. Rather, it involved the personal use of the individual Battistas as the owners of lot 7.05 who had no easement rights. For its finding on

this issue, the Court cited to the following: “Gargiulo Cert., Ex. 11 of a Certification 48:25-50:20; 51:4-52:6, 82:17-20; Ex. 16, 24:17-24; 83:15-84:25.” (Aa214).

“Gargiulo Cert., Ex. 11” is the deposition of Michael Battista. There is nothing about the permissive use of the driveway at three of the cited pages: 48:20-50:20. The testimony was to the opposite. Thus, Mr. Battista testified that **Mr. Levine continued to use the easement** to access lot 6.01. See 49:15-18. At 51:4-52:66 (Aa940 to Aa941), Mr. Battista merely says that he never spoke to the prior owner, Hawrylo (sic Jarillo), about use of the driveway, but that **Mr. Battista and his wife** would use the driveway to visit the Hawrylos when they were invited to do so. At 82:17-20, Mr. Battista again stated that **he and his wife** would also use the driveway when they were invited to the Walkers. Mr. and Mrs. Battista needed an invitation because they lived across from the dominant estate and had no rights to use the Easement unless invited to do so. Mr. Battista said nothing about **Waterfront’s** use in the cited testimony. (Aa949). In fact, it was not until 2019 that Waterfront acquired the dominant estate. (Aa1201 to Aa1208). Therefore, when they were visiting the Walkers they could only do so from their home on the other side of the Easement.

As Mr Battista said two pages later at 84:20 to 85:1: “Several times throughout the years that I owned 7.05 when we crossed it to get to the Jarillos (sic

Hawryllo) or to the Walkers.” And in the preceding pages, 78:5 to 79:6, Mr. Battista is questioned about his activities on his personal property, Lots 7.04 and 7.05, which had no easement rights. (Aa948 to Aa949).

Exhibit 16, on which the Court also relied, is the deposition of Michael Battista, Jr., who does not own any lot benefited by the Easement. At 24:17-24, Mr. Battista Jr says that Lot 6.01 was owned by Sol Levine, which has nothing to do with permissive use. (Aa1116). At 83:15 to 24, Michael Battista Jr. says that “at the time [he was] living at Lot 7.05” (not the dominant estate), he had permission to take Christmas card pictures of the Easement. (Aa1131). At ¶ 82 of the Gargiulos’ Statement of Material Undisputed Facts, they acknowledge that the permissive use was that of Michael Battista, Jr.’s family, not Waterfront:

Battista, Jr. admits that **his family** was permitted to use the Driveway to take pictures and that he had permission to use it to go on runs. MBJr1 Dep. 81:24-:15-84:5 . . . (Emphasis added).

(Aa1637).

The factual premise that underlay the Court’s conclusion was inaccurate. Waterfront, as the owner of Lots 6.01 and 6.02, the dominant estate, did not make a “permissive use” of the Easement. The Battista family, as the owners of Lots 7.04 and 7.05, did make a permissive use of the Easement because those lots were not part of the dominant estate. In the absence of an invitation by the dominant owners, the owners and occupants of Lots 7.04 and 7.05 had no rights to use the

Easement. The Court resolved a factual dispute on summary judgment and did so incorrectly.

**C. Alternative Access is Not Relevant**

The trial Judge noted that “the Battista Party is correct in asserting that an alternative route does not necessarily extinguish easement rights” but seemed to attach some significance to the finding that lot 6.01 would not be landlocked without the Easement. (Aa214).

The availability of alternate access does not extinguish an easement created by deed. *M.G. Grp. of Companies, L.L.C. v. Johnkins*, A-5023-06T1, 2008 WL 1913180, at \*1-2 (N.J. Super. Ct. App. Div. May 2, 2008). (Aa696 to Aa699). Nor does non-use. *Fairclough v. Baumgartner*, supra at 189–90. *Arlington Realty Co. v. Keller*, 105 N.J. Eq. 196 (E&A 1929) (no abandonment found).

Moreover, the Court here, in making this factual finding, ignored ¶ 43 of Waterfront’s Statement of Material Undisputed Facts:

When 529 purchased Lot 6.01, the Easement was the sole means of vehicular access to Van Beuren Road for said lot, and it remains the sole means of vehicular access to Van Beuren Road. Battista Cert. at ¶¶ 9 & 13.

(Aa770). *See also* Waterfront’s Response to the Gargiulos’ Statement of Material Undisputed Facts in which Waterfront stated that vehicular access to lot 6.01 could not be accomplished other than via the Easement. (Aa1801 to Aa1802). Even if the Gargiulos might have disagreed with Waterfront’s Statement of Material

Undisputed Facts, there was a dispute of fact which the Court resolved adversely to the non-moving party.

**D. Extrinsic Evidence Supports Waterfront's Contention that the Walkers Did Not Abandon the Easement.**

All the extrinsic evidence before the Court contradicted its finding of abandonment:

- When Waterfront purchased Lot 6.01, the Easement was its sole means of vehicular access, and Lot 6.01's flag staff (alternative access) was and remains an undeveloped pasture covered by grass and trees. (Aa769 to Aa770);
- The Easement was shown on title records up to the present. (see pp. 11 to 18 above);
- The Easement was included as an exception in the Gargiulos' title policy. (Aa770; Aa1699, item 10);
- The Harding Township Planning Board, 20 years after the 1975 Levine conveyance, envisioned continued use of the Easement (as the Walkers requested) in its Board Resolution granting subdivision approval to the Walkers. (Aa768);
- The Walkers, many years after the Levine conveyance, claimed the Easement continued in their litigation with the Hawrylos. (Aa766);
- Judge McKenzie ruled, in 1990, that the Easement was available to access the properties which it abutted. (Aa767);
- The Walkers' Deed to the Careys conveyed the full 1250-foot-long Easement. (Aa1707);
- The Easement was examined by the Gargiulos' counsel and therefore they are charged with knowledge of it. (Aa2202 to Aa2203);

- The Gargiulos never claimed to be ignorant of the Easement;
- The Gargiulos never claimed to know about or rely on the restriction in the Levine deed.

There is no “clear and convincing evidence” on which to find that the 1946 Easement was extinguished as to Lot 6.01. Rather, the 1975 deed created a restriction on the use of the Easement, personal to the immediate grantee (Levine) to go by the Walkers’ home.

### POINT III

**THE GREEN GIANT ARBORVITAES, THE LINDEN TREES, THE MAGNOLIA TREES AND PACHYSANDRA GROUND COVER PLANTED BY MICHAEL AND PATRICIA GARGIULO AND THE CONSTRUCTION OF A FORMAL GATED ENTRANCE IN THE EASEMENT VIOLATE THE EASEMENT RIGHTS OF 529 WATERFRONT PROPERTIES, LP. (Aa220 to Aa221; Aa248 to Aa249)**

The trial Court’s erroneous conclusion that the sole purpose of the 50 foot by 1250-foot Easement was to access Van Beuren Road drove its decision rejecting Waterfront’s argument that the Easement alterations were unlawful:

The Battista Party has not demonstrated how lining a driveway with trees, installing a gate shortly before the flag portion of Lot 8, installing piers and a deer grate, or installing a deer gate interferes with the Battista Party’s ability to use the Flag staff Driveway as a right of way to Van Beuren Road . . .

(Aa221). The Court, in addition, rejected Waterfront’s legal position that alterations of the Easement could only be justified upon a showing of substantial need. (Aa220).

As set forth in Point I above, the trial Court misconceived the purpose of the Easement – it was intended for “all roadway uses and purposes,” not simply as a 14-foot driveway to access Van Beuren Road. The Court thus focused on the wrong impact – interference with access to Van Beuren Road - and for this reason, its determination should be reversed. Moreover, as argued below, the decision should be reversed on two entirely separate grounds: the Court misconstrued the law and made an improper finding of fact.

**A. The Gargiulos’ Plantings and the Structures within the Easement**

Michael and Patricia Gargiulo have planted a solid row of 250 green giant Arborvitaes, and 44 Linden trees, magnolia trees and pachysandra ground cover on both sides within Waterfront’s Easement. The row of green giant arborvitaes will grow to between 20 and 30 feet in height, and as much as 20 feet in width; they extend much of the length of Lots 6.01 and 6.02, and completely bar access to Lot 6.01 and block much of the access to Lot 6.02. These plantings have narrowed the Easement width by 35 feet and prevented continued access to the Easement from both of Waterfront’s Lots by farm equipment, livestock, and pedestrians. (Aa771).

In addition, the Gargiulos have installed a 5-foot-tall split rail fence and a 7-foot-tall wire deer fence within the Easement, along both sides, which completely bars access to and from Lot 6.01 and bars access to and from much of Lot 6.02. Finally, the Gargiulos have constructed a formal entrance consisting of a metal

gate, brick pillars and an iron deer grate, across the full width of the Easement, which shorten the length of the Easement by about 150 feet. (Aa772). None of these changes were necessary; all impair Waterfront's right to make full use of the 75-year-old 50 foot wide by 1250-foot-long Easement. These obstructions are, for the reasons set forth below, unlawful.

**C. An Easement Described By Metes And Bounds May Not Be Altered Without The Consent Of The Dominant Estate Owner.**

Easements may be created by express acts of the parties, by implication, or by prescription. *Kline v. Bernardsville Ass'n, Inc.*, 267 N.J. Super. 473 (App. Div. 1993). Easements created by express acts may be further classified according to the precision of the instrument creating them, which in turn governs the relative rights of the dominant and servient owners. If the easement is generally described, such as an easement for access at an unspecified location on the property of the servient owner, the servient estate owner enjoys the right to relocate or to change the easement.

However, when the instrument creating the easement does so with a precise metes and bounds description, the servient owner has far less authority to modify the easement. This is so for three reasons. First, where the language of the easement is clear, the parties have reduced their understanding to a precise writing and must abide by its terms. Second, the precise language in the grant which describes the dimensions and location of the easement would be rendered



superfluous if the servient owner retained the right to change its dimensions or location. Third, while an easement grant is not the conveyance of the fee title, it is a property interest acquired by the dominant estate owner that cannot be impaired without his or her consent. To permit a unilateral change in an easement would bestow an economic benefit upon the servient estate owner for which it did not bargain when the easement was created, at the expense of the dominant owner who provided consideration for the acquisition of an easement precisely described. A lessor could not reduce the size of leased property during a lease term without the tenant's consent: a servient owner should not be able to reduce the dimensions of an easement without the dominant owner's consent.

For these reasons, in many jurisdictions, an easement described by a metes and bounds description cannot be changed in any respect without the consent of the dominant estate owner. New Jersey courts may have a less rigid rule but recognize that the alteration of an easement is an “extraordinary remedy and should be grounded in a strong showing of necessity.” *Kline v. Bernardsville Ass'n, Inc.*, 267 N.J. Super, *supra* at 480; *Swan v. Lamanna*, A-2866-21, 2024 N.J. Super. LEXIS 1 (App. Div. Jan. 2, 2024). (Aa674 to Aa695)

Here, the Easement granted in the 1946 Deed from Castles to Jeffers is described in a metes and bounds description. The law with respect to changes in precisely defined easements is as follows:

**When a person has an express right-of-way over an easement of a specified width, he or she has the right to use the full width; the servient owner cannot interfere with any portion of the easement. In such cases, “considerations about what may be reasonably necessary for the dominant tenement owner’s use or needs is not appropriate or relevant.”** Rather, the courts see an absolute right to the full easement, not subject to a balancing of the servient and dominant owners’ needs or a general reasonableness test. Interference with a clear, defined property right will not be tolerated. (Emphasis added).

Korngold, G., *Private Land Use Arrangements*, § 4.06 (1990).

The application of this principle is illustrated in several cases. In *Lindhorst v. Wright*, 616 P.2d 450 (Okla. Ct. App. 1980), an Oklahoma Appellate Court enjoined the planting of trees and crops within but on the edge of a 40-foot-wide access easement. Relying on black letter treatises, the Oklahoma Court of Appeal wrote:

The law appears to be settled that where the width, length and location of an easement for ingress and egress have been expressly set forth in the instrument the easement is specific and definite. The expressed terms of the grant or reservation are controlling in such case and considerations of what may be necessary or reasonable to a present use of the dominant estate are not controlling.

Continuing the court wrote:

In 3 *Tiffany, Real Property*, § 805, pp. 331, 332 (3d ed. 1939) it is said:

. . . . A specific statement in the grant obviously governs, and such a statement is ordinarily not controlled by considerations as to what is reasonable or necessary . . . .

It is stated in 28 *C.J.S. Easements* § 75, p. 753:

If the grant or reservation is specific in its terms, it is decisive of the limits of the easement. On the other hand, where the easement is not specifically defined, it need only be such as is reasonably necessary and convenient for the purpose for which it was created.

In *Consol. Amusement Co. v. Waikiki Bus. Plaza*, 719 P.2d 1119, 1120 (Haw. Ct. App. 1986), the Hawaii Court of Appeals ruled that a specifically described access easement could not be narrowed even where the narrowing did not impact the use. There, the court ordered that judgement be entered in favor of the owner of the dominant estate:

The dispositive issue is whether the owner of the servient estate can erect and maintain structures on a portion of an easement for ingress and egress which is of a specified width and length and with definite boundaries, where the structures do not "obstruct" the dominant estate owner's use of the easement. We answer no and reverse.

In *Aladdin Petroleum Corp. v. Gold Crown Properties, Inc.* 561 P. 2d 818, 822 (Kan 1977), the Supreme Court of Kansas ordered removal of a car port from an easement of a fixed width and length:

The law appears to be settled that where the width, length and location of an easement for ingress and egress have been expressly set forth in the instrument the easement is specific and definite. The expressed terms of the grant or reservation are controlling in such case and considerations of what may be necessary or reasonable to a present use of the dominant estate are not controlling. If, however, the width, length and location of an easement for ingress and egress are not fixed by the terms of the grant or reservation the dominant estate is ordinarily entitled to a way of such width, length and location as is sufficient to afford necessary or reasonable ingress and egress.

*Accord, Macmeekin v. Low Income Hous. Inst.*, 45 P.3d 570, 579 (Wash. Ct. App. 2002) (Washington adheres to the traditional rule that easements, however created, are property rights, and as such are not subject to change absent the consent of both parties).

Therefore, where the width, length and location of an easement are fixed in writing, any change to the easement dimensions or location without the consent of the dominant estate owner is, under general principles of common law, prohibited.

No New Jersey reported case addresses the ability to alter an easement described by metes and bounds. However, even where an easement is more generally described, our courts require that, in order to change an easement, the servient owners must make a “a strong showing of necessity.” Describing the law prior to 1993, the Appellate Division in *Kline v. Bernardsville Ass'n, Inc.*, 267 N.J. Super. at 478 wrote:

Once the way is fixed, it cannot be changed without the consent of both parties.” It has thus been said that “[i]t is the exclusive right of the owner of the dominant tenement to say whether or not the servient owner shall be permitted to change the character and place of the [easement] . . . regardless of any consideration of convenience of the owner of the servient tenement. (Citation omitted).

This Court however noted that

despite the unequivocal language of these opinions, our courts have deviated from these principles on **rare occasions** where justice and equity plainly mandated that course. (Emphasis added).

*Id.* at 479. Thus, it is possible that the character or location of an easement can be altered (if not described by metes and bounds) but only if the servient estate owner makes a “strong showing of necessity.” *Id.* at 480. *See also Lorenc v. Swiderski*, 107 N.J. Eq. 147, 148 (C. 1931). The trial Court here misread *Kline* as creating a limit on relocation of an easement only. (Aa220). That reading cannot be reconciled with the language in the *Kline* opinion cited above referring to “change the character” or with opinions of this Court.

The Court also misread the two other cases upon which it relied. *Wellmore Builders, Inc. v. Wannier*, 49 N.J. Super. 456, 465 (App. Div. 1958) (Aa220) did not address the issue. *Tide-Water Pipe Co. v Blair Holding Co.*, 42 N.J. 591 holds that a servient owner could not change an easement, as Appellant here asserts. That case did not involve an easement described by metes and bounds; the dominant owner merely had a right to lay pipes “on a route to be selected by the plaintiff.” *Id.* at 605. Therefore one would expect greater flexibility on the part of the servient owner – but the right to change the easement was nonetheless denied. That decision was made after trial not on summary judgment, *id.* at 599, and the Court recognized that if the language of the easement grant is plain, it controls. In the instant matter, the Easement language is plain.

In later cases, this Court has adhered to the *Kline* standard, *see e.g. Burke v. Jennings*, A-4821-06T2, 2008 N.J. Super. Unpub. LEXIS 1156, \*3 (App. Div.

January 9, 2008), and not the one employed by the trial court here. (Aa727 to Aa730). The Court there dealt with an express easement for roadway access. The servient estate owner had removed the easement roadway and replaced it with landscaping. Plaintiff filed suit challenging the change and, in response to plaintiff's motion for summary judgment, defendants acknowledged that they were required to restore the easement, but sought to change the surface from macadam to turfstone pavers. The trial judge required that the easement be restored to its prior surface and defendants appealed. Affirming the trial court, this Court found that because the owners of the "dominant tenement have not consented to the change in roadway surface," the surface could not be changed to fulfill defendants' "aesthetic" goals. *Id.* at \*3-4.

Construing *Kline*, this Court the following year, in *Paulson v. Currie*, Nos. A-5762-06T3, A-1642-07T3, 2009 N.J. Super. Unpub. LEXIS 509, at \*9 (App. Div. Mar. 17, 2009) (Aa731 to Aa737), affirmed a determination prohibiting fencing in an easement:

While we recognize that the Halsey Oval may not have remained entirely intact, we have been offered no principled reason why any further diversion from it should be permitted over the objection of the owners of the dominant estate. We are satisfied that the Curries did not offer the "strong showing of necessity" required to obtain the "extraordinary remedy" of relocation of the easement without the Paulson's consent. *Kline v. Bernardsville Ass'n, Inc.*, 267 N.J. Super. 473, 480, 631 A.2d 1263 (App. Div. 1993).

There was no proof before the trial Court that this was a “rare occasion” where “justice and equity plainly” mandated allowing the change. The Gargiulos failed to satisfy the *Kline* test.

**D. The Changes to the Easement Made by the Gargiulos Adversely Impacted Waterfront**

As noted above, the test which the Court applied in assessing the lawfulness of the Easement modifications had no support in New Jersey law. The test in any event implicated fact issues which were ignored.

- There were no green giant arborvitaes, Linden trees, Magnolia trees, or pachysandra ground cover, there was no formal entrance with gate, pillars or deer grate, there was no deer fence and no split rail fence on the Easement when it was created and for the ensuing nearly 75 years;
- The dominant estate owner had full use of the 50 foot by 1250-foot-long Easement for nearly 75 years – now the Easement is approximately 150 feet shorter and 35 feet narrower;
- At the time of the creation of the Easement in 1946, the area was farmed and access to the Easement was available throughout its length for farming use and until the Gargiulos made their changes;
- With the exception of a small driveway on Lot 6.02, the Easement, intended for “all roadway uses and purposes,” can no longer be crossed.

(Aa770 to Aa771).

Here, the right extended by the Easement grant is plain and it is clear:

Waterfront is to have an easement that is 50 feet wide and 1250 feet long to use for access at any point for “all roadway use and purpose” for the benefit of the dominant estate, “his heirs and assigns, and his and their servants, agents and

invitees, in common with others” as expressly provided in the Easement grant. The Easement is described by metes and bounds and cannot be changed without the consent of Waterfront. Even if the Easement was more generally described, this is not a “rare” case in which “justice and equity” and a “strong showing of necessity” warrant the changes. *Kline, supra*. At the very least, the Court, even if it disagreed, improperly resolved a material factual dispute on summary judgment.

### **CONCLUSION**

For the foregoing reasons, the determination of the trial court granting summary judgment should be reversed.

**SZAFERMAN, LAKIND, BLUMSTEIN  
& BLADER, P.C.**

Dated: September 15, 2024

*s/ Arnold C. Lakind*

---

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**SUPERIOR COURT OF NEW JERSEY**  
**APPELLATE DIVISION**

MICHAEL BATTISTA, TRACEY BATTISTA,  
529 WATERFRONT PROPERTIES, LP, and  
COLITE 24, LLC

Plaintiffs-Appellants,

v.

MICHAEL GARGIULO and PATRICIA  
GARGIULO,

Defendants-Respondents.

DOCKET NO. A-2700-23

ON APPEAL FROM LAW DIVISION  
MORRIS COUNTY

DOCKET NOS. MRS-C-54-20  
MRS-C-55-20

CIVIL ACTION

SAT BELOW: HON. FRANK J.  
DEANGELIS, P.J.Ch.

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**BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS MICHAEL  
GARGIULO AND PATRICIA GARGIULO**

---

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### **PRELIMINARY STATEMENT**

The Battistas own four lots adjacent to the flagstaff of the Gargiulos' residential flag lot. They have a road access easement for one of those lots over the paved driveway portion of the Gargiulos' flagstaff. An earlier access easement to a second Battista lot was abandoned by a deed of a predecessor, which provided a different flagstaff for access to that lot. By this appeal, the Battistas seek to overturn the trial court's decision that they are not entitled to prevent the Gargiulos from improving the parts of their flagstaff that do not alter or burden the Battistas' access easement. The trial court's decision, however, was well-reasoned, based on indisputable facts, and properly applied New Jersey law. It should be affirmed.

The undisputed, material facts, including the plain and unambiguous language of the granting deed, demonstrate that the "purpose" of the access easement was solely to provide "ingress and egress" from and to the public road. In asserting otherwise, the Battistas ask the Court to ignore multiple provisions of that deed and the New Jersey case law that limits the easement rights to the paved driveway on the Gargiulo flagstaff based on the intent of the parties that established the easement.

The Battistas' argument that the Gargiulos are prevented from improving their entire flagstaff because they are not allowed to "change" an easement fails because the Gargiulos have not changed anything about their driveway that prevents access to the Battista lot (Lot 6.02). The Battistas continue to use the driveway to access

that lot. Moreover, the Battistas are incorrect in asserting that New Jersey law prevents any changes to an easement area. The law only forbids changes that impede the purpose of an easement, which has not occurred here. Contrary to the Battistas' claim, the trial court did not base its ruling on disputed facts or misapply any law.

Furthermore, there are no access easement rights benefitting another of the Battistas' parcels (Lot 6.01). Those rights were abandoned by a 1975 deed, which not only expressly disavowed the easement rights, but also provided another means of access and stated the easement rights were not necessary due to that alternative access. Although, the Battistas control properties adjacent to the Gargiulo property, they are not legally entitled to dictate how the Gargiulos use their land.

For these reasons and those set forth in more detail in this brief, the Gargiulos respectfully request that this Court affirm the decision of the trial court.

### **PROCEDURAL HISTORY**

In December 2019, the Gargiulos applied for a tree removal permit. Aa1411-13.<sup>1</sup> On December 23, 2019, the Township issued a permit authorizing the removal of twenty-eight trees in the Flagstaff. Aa1414-15. On June 1, 2020, the Gargiulos filed a complaint (the "Gargiulo Complaint") with order to show cause in the Chancery Division under Docket No. MRS-C-54-20 seeking relief from harassing

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<sup>1</sup> "Aa" refers to the Battistas' appendix. "Ab" refers to the Battistas' brief.

conduct by the Battistas<sup>2</sup> that interfered with their tree-cutting work. Aa1-66. On June 2, 2020, the Battistas filed a complaint and order to show cause in the Chancery Division under Docket No. MRS-C-55-20, which was later superseded by their second amended complaint (the “Battista Complaint”). Aa116-133; Aa153-71. On June 17, 2020, the trial court entered an order consolidating the two matters and enjoining the Gargiulos from removing trees subject to the Battistas’ appeal of the tree removal permit to the Township Zoning Board of Adjustment (“ZBA”).<sup>3</sup> Aa184-86. On July 24, 2020, the Battistas filed counterclaims (the “Battista Counterclaims”) under Docket No. MRS-C-54-20. Aa67-85. That same day, the Gargiulos filed counterclaims (the “Gargiulo Counterclaims”) under Docket No. MRS-C-55-20, later superseded by the amended counterclaims filed in response to the Battistas amended complaint. Aa134-52; Aa153-71. On October 23, 2020, after the ZBA affirmed issuance of the tree removal permit, the Battistas filed an additional order to show cause seeking preliminary injunctive relief preventing the Gargiulos from removing additional trees in the Flagstaff. Aa901. On January 4, 2021, the trial denied the Battistas’ request for a preliminary injunction, concluding that the Battistas’ easement “d[id] not give them veto power or aesthetic authority

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<sup>2</sup> For ease of reference this Brief refers to the individual Battista family members and their entities collectively as the “Battistas.”

<sup>3</sup> The validity of the Township’s issuance of the tree removal permit was ultimately affirmed on appeal to the Law Division in a prerogative writs action. That matter is also pending before this Court in a separate appeal under Docket No. A-002007-23.

over the Gargiulos’ use and enjoyment of their estate so long as the Gargiulos d[id] not unreasonably burden the Battistas’ use of their easement.” Aa912-13.

After discovery ended, the parties filed competing motions for summary judgment. The trial court heard oral argument on April 10, 2023. 1T.<sup>4</sup> On April 28, 2023, the trial court entered orders accompanied by a statement of reasons granting the Gargiulos’ motion for summary judgment in most respects, and denying the Battistas’ motion for summary judgment. Aa187-250. Relevant here, the trial court granted summary judgment in favor of the Gargiulos on their declaratory judgment claim (Count Two of the Gargiulo Complaint) and dismissed the Battistas’ claims for breach of a right of way agreement (Counts I of the Battista Complaint and Counterclaims). Aa248. In doing so, the trial court held that (1) the purpose of the access easement was ingress and egress to Van Beuren Road; (2) the Gargiulos did not unreasonably burden the Battistas’ easement rights; and (3) access easement rights as to Lot 6.01 were abandoned by a 1975 deed. Aa220-21; Aa213-14.

On April 25, 2024, the Court entered a Consent Order dismissing with prejudice all remaining claims that had not been resolved by the Court’s April 28, 2023 summary judgment orders. Aa251-55. The parties also thereby waived their right to appeal the trial court’s dismissal of certain claims. Id. On May 10, 2024 the Battistas filed notice of their appeal of the trial court’s order limited to the portions

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<sup>4</sup> “1T” refers to the 4/20/23 summary judgment motion hearing transcript.

of the order relating to their breach of the right of way claims and the Gargiulos' claim for declaratory judgment regarding the scope of the right of way. Aa256-65.

## **STATEMENT OF FACTS**

### **I. The Parties and Their Properties**

The Gargiulos own Block 5, Lot 8.0 (“Lot 8.0”) as shown on the Tax Map (the “Tax Map”) of Harding Township (the “Township”). Aa1797, ¶ 1. The rear of Lot 8.0 where the residence is located is solely accessible from Van Beuren Road via a driveway (the “Driveway”) within a flagstaff strip of land approximately 1,250 feet in length and fifty feet in width (the “Flagstaff”). *Id.*, ¶¶ 4, 6; see also Aa359.<sup>5</sup> The Battistas (or their closely-held companies) own four properties adjacent to the Flagstaff – two parcels to the north of the Flagstaff (Lots 7.04 and 7.05) and two parcels to the south of the Flagstaff (Lots 6.01 and 6.02). See id., ¶ 9.

### **II. The 1946 Sale from Castles to Jeffers and the Creation of the Access Easement over the Driveway to/from Van Bueren Road.**

On April 25, 1927, John and Dorothea Castles purchased what are now Lots 6.01, 6.02, 6.03 and 8.0 (the “Castle Property”). See Aa1803, ¶ 25. The Castles sold part of the Castle Property to Horace Jeffers (“Jeffers”) by deed dated May 14, 1946

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<sup>5</sup> The Gargiulos respectfully direct the Court to the Tax Map found at Aa359 as a helpful guide for visualizing the layout of the relevant parcels. The parties' properties are located in the upper right-hand corner of the Tax Map. Lot 8.0 is a hexagonal parcel near the top of the map with a flagstaff running to Van Beuren Road. The Battistas own parcels abutting that flagstaff. A zoomed-in depiction of the parcels, with the Flagstaff highlighted in green, is at Aa372; Aa1613, ¶ 9.

(“Jeffers Deed”). See id., ¶ 26. The Jeffers Deed conveyed a portion of current Lot 6.01 and the westerly portion of current Lot 6.02. (the “Jeffers Property”) Id., ¶ 27; see also Aa365-68. The Jeffers Deed granted Jeffers a utilities easement (the “Utilities Easement”) over the Flagstaff on what is now Lot 8.0. Aa366. Because the Jeffers Property did not have access to a public road, the Jeffers Deed also granted an access easement over a Driveway to be installed in the Flagstaff to allow ingress and egress to Van Bueren Road (the “Access Easement”). Aa365-67. Several provisions of the Jeffers Deed address the Access Easement and its purpose:

Together with a right of way fifty feet in width **for all roadway uses and purposes** and for the installation and maintenance of utilities, extending northwesterly from Van Beuren Road and more particularly described as follows: Beginning at a point in the center line of Van Beuren Road . . . [metes and bounds description omitted] Said right of way is for the benefit of the said [Jeffers], his heirs and assigns, and his and their servants, agents and invitees, in common with others.

\* \* \*

The party of the second part [Jeffers], his heirs and assigns and his and their servants, agents and invitees, shall have the right to pass over the existing northerly driveway extending from Van Beuren Road across the premises about to be conveyed by the party of the first part [Castles] to Thomas G. Walker and Elizabeth F. Walker, his wife, for a period of two years from May 15, 1946, or to the date, provided it is prior to May 14, 1948, **when a driveway extending to Van Beuren Road is established** over the strip of land fifty feet wide, immediately adjoining on the north the lands hereinabove described and the lands about to be conveyed to Thomas G. Walker and Elizabeth F.

Walker, his wife, which fifty-foot strip of land the party of the first part has set aside and over which he proposes to establish a right of way **for purposes of ingress and egress** to the lands herein conveyed to the party of the second part and to the remaining lands of the party of the first part, but in any event and irrespective of whether or not such a driveway is established, it is understood and agreed that the right of the party of the second part, his heirs and assigns and his servants, agents and invitees to pass over the lands to be conveyed to Thomas G. Walker and Elizabeth F. Walker, his wife, shall terminate on May 14, 1948.

**It is expressly understood and agreed that** no easement by necessity or otherwise over the lands to be conveyed to Thomas G. Walker and Elixabeth F. Walker, his wife, shall arise by legal implication, **the party of the first part having set aside the fifty-foot strip of land hereinabove referred to for the purpose of establishing a right of way extending from Van Beuren Road to provide ingress and egress to the lands herein conveyed** to the party of the second part, and to the remaining lands of the party of the first part.

(Aa365-67) (emphasis added).

### **III. The Walker Purchase of Property from Castles and then Jeffers**

On August 23, 1946, Castles conveyed by deed (the “1946 Walker Deed”) to Thomas and Elizabeth Walker (the “Walkers”) land that included current Lot 6.0, Lot 6.03, and the portion of current Lot 6.02 that was not transferred by the Jeffers Deed. See Aa370-73. Because this parcel had over 450 feet of frontage on Van Beuren Road, the deed did not convey the Access Easement, but did include the Utility Easement. Id. Thus no access easement was ever created to benefit what are

now Lots 6.0 and 6.03, and the easterly (or lower) portion of Lot 6.02. On May 15, 1951, Elizabeth Walker purchased the Jeffers Property, which was still benefitted by both the Access Easement and the Utility Easement. Aa375-77. The Walkers then owned all of current Lots 6.0, 6.01, 6.02 and 6.03. Id.

**IV. The Walkers' 1975 Sale to the Levines of Lot 6.01 (Which Had Direct Access to Van Bueren Road) and Abandonment of the Access Easement**

The Walkers sold to Sol and Dorothea Levine (the "Levines") what is now Lot 6.01 by means of a February 10, 1975 deed (the "Levine Deed"). Aa379-82. The Levine Deed provided Lot 6.01 direct access from/to Van Bueren Road by a 25-foot flagstaff of land running to Van Beuren Road. Aa379; Aa359. The deed expressly included the Utility Easement. See id. Given that Lot 6.01 directly accessed Van Bueren Road, however, the Levine Deed explicitly abandoned the Access Easement and provided that no easement would exist over the Flagstaff or Driveway for the benefit of Lot 6.01. Id. Specifically, it states that:

No easement by necessity or otherwise over the remaining lands of the party of the first part or over the right of way fifty (50) feet in width more particularly described in the deed from [Jeffers] to Elizabeth F. Walker, hereinabove referred to shall arise by legal implication,

See Aa380. The Levine Deed explained that the Access Easement was abandoned because Lot 6.01 was being given direct access to Van Beuren Road when it states:

the strip of land twenty-five (25) feet in width extending northwesterly from Van Beuren Road included in the herein conveyed 3,735 acres is for the purpose of



providing ingress and egress to the lands conveyed by the party of the first part to the party of the second part.

See id. Accordingly, though the Levine Deed, the Walkers knowingly, intentionally, and voluntarily abandoned the rights of Lot 6.01 to the Access Easement.

The Levine's intent to abandon the Access Easement is shown by a Sketch Plat for Minor Subdivision prepared for the Walkers and approved by the Township Planning Board on November 11, 1974 ("Sketch Plat") before the sale of Lot 6.01 to Levine. See Aa341. The Sketch Plat shows the Flagstaff, the Driveway, and a driveway into what was then Lot 6.0 (and is now Lot 6.02). Aa359. It does not show any entrance point into Lot 6.01 from the Driveway. No deed conveying Lot 6.01 after the Levine Deed references the Access Easement. See Aa379-82; Aa1094-99. The Levines never developed Lot 6.01, which remained undeveloped until this litigation commenced. Aa1808, ¶ 48; Aa1614, ¶ 15.

**V. The Access Easement Dispute in the Walker v. Hawrylo Matter.**

The Battistas refer to the transcript of a December 21, 1990 motion hearing and bench decision ("12/21/90 Transcript") in a matter captioned Walker v. Hawrylo. See Aa395-418. The issue on that motion was whether the Access Easement created by the Jeffers Deed still allowed the Walkers to use the Driveway to access their property (which included what are now Lots 6.0, 6.02 and 6.03), even though they had access to Van Beuren Road. See Aa399-418. The right of Lot 6.01 to use the Access Easement was not at issue. Id. The Levines, who owned Lot 6.01

at the time, were not parties to the lawsuit and were not represented at the hearing. See Aa395. At the hearing, the Walkers’ attorney admitted that the Access Easement was to provide “**driveway access** and utility access away from Van Beuren Road” and stated that it was the Driveway in the Flagstaff of Lot 8.0 that had been used “for more than 40 years” – not any other part of the Flagstaff.<sup>6</sup> Aa404 at 10:7-21 (emphasis added). In its oral opinion, the trial court did not address the rights of Lot 6.01. Aa399-418. The court found that the Access Easement was a “driveway easement,” the “purpose” of which was to provide “service off of Van Beuren Road.” Aa411 at 17:6-8; see also Aa410 at 16:11-19.

## **VI. The Creation of Lots 6.02 and 6.03 and Battistas’ Property Purchases**

By deed dated August 12, 2003 (the “Carey Deed”), Thomas G. Walker, Jr. and Reverse Construction Intermediary Corporation sold to Thomas and Barbara Carey (the “Careys”) current Lots 6, Lot 6.02 and 6.03. Aa429-33. The Careys then subdivided Lot 6.02 and Lot 6.03 on December 31, 2003. Aa435-43. Lot 6.03 was created to be a private roadway by a subdivision approved by a Township Planning Board resolution adopted on July 28, 2003. See Aa359; Aa419-27; Aa1614, ¶ 14.

The Battistas purchased Lot 7.05 on June 12, 1991. See Aa1082-85. Michael Battista Sr. and Tracy Battista live at this property. Ab9. The Battistas’ company,

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<sup>6</sup> The attorney’s reference to the “property behind the Walker and now Levine tract” was a reference to Lot 8.0, which is “behind” Lot 6.01, then owned by the Levines.

Colite 24, purchased Lot 7.04 on October 19, 2017. Aa1086-92. Lots 7.04 and 7.05 accesses Van Beuren Road through their own flagstaff driveways. See Aa273; Aa359; Aa1798, ¶ 11, 13. Later, the Battistas' company, 529 Waterfront, purchased Lots 6.02 and 6.03 by deed dated January 24, 2019. Aa1094-99. The Driveway provides vehicular access to Lot 6.02 by a separate driveway (the "Battista Driveway") that runs from Lot 6.02 and intersects the Driveway. See Aa1614, ¶ 12; Aa341; Aa957 at 115:23-116:2. 529 Waterfront purchased Lot 6.01 and Block 8, Lot 5 ("Lot 5") on June 4, 2019. See Aa1801, ¶ 20; Aa289-96.

Because Lot 6.02 is adjacent to Lot 6.01, the Lot 6.01 flagstaff can be used by both lots to access Van Beuren Road without the need to traverse the Driveway. Aa359; Aa962-63 at 137:25-138:4, 139:2-3; Aa1122 at 48:22-49:3. The Battistas can also access Lot 6.01 from Lot 6.02. Aa957 at 116:3-5; Aa974 at 185:14-17; Aa1136 at 102:1-4. Lot 6.01 has access to Van Beuren Road through Lot 5 owned by the Battistas. See Aa359. The Battistas use Lot 5 to access both Lots 6.01 and 6.02. Aa1614, ¶¶ 14-15.

## **VII. The Lot 8.0 Driveway and Flagstaff**

After the Jeffers Deed was executed, the Driveway was installed in the Flagstaff. Aa1810, ¶ 59. At the time, the paved Driveway was approximately 14 feet wide. Id., ¶ 60. A driveway spanning the entire 50-foot width of the Flagstaff has never existed. See Aa341 (Sketch Map showing Driveway did not take up the

entire Flagstaff as of 1974); Aa1177 at 43:12-25 (Battista, Jr. testifying that a driveway spanning the entire 50-foot width of the Flagstaff has never existed); Aa948 at 81:17-20 (Battista, Sr. testifying to the same effect).

Turf, vegetation and trees existed in the Flagstaff adjacent to the Driveway long before the Battistas and Gargiulos owned their properties. Aa952 at 96:18-97:4; Aa1034 at 275:6-12. The Battistas assert that trees in the Flagstaff adjacent to the Driveway dated back to the early twentieth century, Aa1407-08, ¶¶ 11, 15, and prevented the use of the entire Flagstaff area as a roadway or driveway. Aa1812, ¶ 67 (admitting that the trees prevented driving up the entirety of the non-paved portion of the Flagstaff). The Battistas also admit that vegetation and fencing has long existed on Lots 6.01 and 6.02 near the Flagstaff. Aa1128 at 70:17-72:15; Aa1129 at 75:17-25; Aa1123 at 50:20-52:6.

## **VII. The Gargiulos' Reasonable Use of their Property**

The Gargiulos purchased Lot 8.0 on or about October 31, 2013. Aa350-57. Following their purchase, the Gargiulos constructed a new house and developed the Lot 8.0. In or about 2020, the existing Driveway in the Flagstaff was repaved with new asphalt, but was not widened because the Battistas objected to its widening. Aa1815, ¶ 83; Aa757, ¶ 32. It is undisputed that since the Battistas bought Lot 7.05 in 1989, the paved Driveway has remained substantially unchanged. Aa1810, ¶ 61.

In December 2019, the Gargiulos applied for a tree removal permit from the Township and included as part of their application a tree replacement plan calling for the planting of over 300 arborvitaes. Aa1618, ¶ 54. After the permit was issued, the Gargiulos started removing the trees. Id., ¶ 58. The Battistas then began a crusade of harassing and dangerous behavior to attempt to physically prevent the Gargiulos from removing the trees. Id., ¶¶ 59-61. This led to the filing of this lawsuit.

Following the Battistas' appeals of the tree removal permit, the Gargiulos planted arborvitaes in the Flagstaff. The arborvitaes are planted approximately 5-feet from the border of the Flagstaff. Id., ¶ 79. No trees or vegetation have been planted in the driveway; cars can drive up and down the Flagstaff. Aa2011-12; Aa1173 at 28:14-24; Aa957 at 115:3-5, Aa1034 at 273:5-16, 275:2-5; Aa1621 ¶¶ 81-83. The Battistas have continued to use the Driveway to access Lot 6.02 since the arborvitaes were planted. Aa1621, ¶ 84. The Gargiulos intend to have the arborvitaes pruned each year to ensure that the branches of the arborvitaes do not extend into the Driveway. Id., ¶ 87. Throughout 2020 and 2021, the Gargiulos installed a split rail fencing, deer fence, gate and piers, and deer grate in the Flagstaff.<sup>7</sup> Aa1617, ¶ 45. The fencing is approximately 2 feet away from the property line of the Flagstaff. Id., 46. Some of the fencing is immediately adjacent

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<sup>7</sup> The Battistas appealed certain permits issued for this work to the Harding Township Zoning Board and thereafter to the Law Division in a Prerogative Writs Action where they were affirmed. Those decisions are not before this Court.

to the fencing previously installed on Lots 7.04 and 6.02. Id., 47. No fencing is in the Driveway or immediately adjacent thereto. Id., 48. None of the fencing prevents access to Lot 6.02 from the Battista Driveway that intersects the Driveway in the Flagstaff. Id., 49. The Battistas have used the Driveway and the Battista Driveway to access Lot 6.02 consistently since the installation of the fencing. Aa1817, ¶¶ 104. The gate, piers and deer grate were installed near the top of the Flagstaff adjacent to Lot 6.01. Aa1618, ¶ 51. The gate, piers and deer grate do not impact access to Lot 6.02. Id.

### **STANDARD OF REVIEW**

This Court reviews a trial court's summary judgment decision de novo. Samolyk v. Berthe, 251 N.J. 73 (2022). The Court should consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

### **LEGAL ARGUMENT**

The application of New Jersey law governing easements to the facts of this case shows that the trial court's decision was correct, and should be affirmed. It is black-letter law that the owner of land subject to an easement has all rights and benefits of ownership of the fee. Tyler Co. v. Hansen, 20 N.J. Super. 309, 312 (App.

Div. 1952); Wellmore Builders, 49 N.J. Super. 456, 465 (App. Div. 1958) (noting that “the grant of an easement is not a sale. **The owner of the servient estate still owns the fee and has all the rights and benefits of ownership consistent with the enjoyment of the easement.**”) (emphasis added). Thus, “the use of the easement must not unreasonably interfere with the use and enjoyment of the servient estate.” Levinson v. Costello, 74 N.J. Super. 539, 545 (App. Div. 1962) (citing Lidgerwood Estates, Inc. v. Public Service Electric & Gas Co., 113 N.J. Eq. 403, 407 (Ch. 1933)); see also Hyland v. Fonda, 44 N.J. Super. 180, 189 (App. Div. 1957).

Accordingly, New Jersey law is clear that an easement holder may only do that which is “reasonably necessary” to enjoy the easement. Tide-Water Pipe Company v. Blair Holding Company, 42 N.J. 591, 606 (1964). The use of an easement by a dominant tenant shall not “unreasonably interfere with the use of, or increase the burden upon, the landowner.” Id.; see also Lidgerwood, 113 N.J. Eq. at 407 (an easement must be used reasonably and impose as little burden on the servient estate as the nature of the easement and its object will permit); American Rieter Co. v. Dinallo, 53 N.J. Super. 388, 393 (App. Div. 1959) (burdened land cannot “be subjected to a greater burden than the parties contemplated at the time the easement was created”); Hammett v. Rosensohn, 26 N.J. 415, 425, (1958). This means that an easement “shall be exercised” by the easement holder “not in the manner determined by **mere convenience** of the easement holder, but only in a way

**reasonably necessary** for its own enjoyment.” Tide-Water, 42 N.J. at 605 (emphasis added). Simply put, the “touchstone is necessity and not convenience.” Hammett, 26 N.J. at 425. When determining what is reasonably necessary for the enjoyment of the easement holder, Courts focus on the purpose of the easement. See, e.g., Rinaldo v. Deluca, No. A-1495-14T2, 2016 N.J. Super. Unpub. LEXIS 878, at \*7, \*10 (App. Div. Apr. 18, 2016). Where an easement grants a right for ingress and egress, that particular use is what cannot be unreasonably abridged. Id. (“the right granted . . . was to share . . . a right of way [‘]for all purposes of ingress and egress to and from Main Street.’ It is this use that [owner] could not unreasonably abridge.”).

When determining the scope of an easement, New Jersey courts look to the intent of the grantor. See Sergi v. Carew, 18 N.J. Super. 307, 312 (Ch. Div. 1952) (it is “necessary” to “examine the instrument . . . in an attempt to ascertain the grantor's intention.”). “[T]he intent of the conveyor is normally determined by the language of the conveyance read as an entirety and in the light of the surrounding circumstances.” Hammett, 26 N.J. at 423. Courts thus analyze conveyance deeds “in accordance with the principles of contract interpretation, which include a determination of the intention of the parties as revealed by the language used by them.” Cooper River Plaza E., LLC v. Briad Grp., 359 N.J. Super. 518, 528 (App. Div. 2003). “Individual clauses and particular words must be considered in connection with the rest of the agreement, and all parts of the writing and every word



of it, will, if possible, be given effect.” Krosnowski v. Krosnowski, 22 N.J. 376, 387 (1956); Union Cnty. Indus. Park v. Union Cnty. Park Comm., 95 N.J. Super. 448, 453 (App. Div. 1967) (instrument “must be read as an entirety giving effect to all its terms”) (citation omitted). An interpretation which gives a reasonable meaning to all provisions will be preferred to one which leaves a portion of the writing useless or inexplicable. Cameron v. Int’l Alliance, etc., U.S. & Canada, 119 N.J. Eq. 577 (E. & A. 1936). Where there is ambiguity in a written instrument, “the surrounding circumstances, including the physical conditions and character of the servient tenement, and the requirements of the grantee, play a significant role in the determination of the controlling intent.” Hyland, 44 N.J. Super. at 187. Here, the undisputed evidence shows that the Access Easement is for the purpose of accessing Van Bueren Road over the Driveway, that the Access Easement was abandoned as to Lot 6.01, and that the Battistas are able to use the Driveway to access Lot 6.02.

**I. THE ACCESS EASEMENT’S PURPOSE IS ACCESS TO VAN BEUREN ROAD VIA THE DRIVEWAY. (Ab20)**

The trial court correctly held that the Access Easement’s purpose is for ingress and egress to and from Van Beuren Road over the Driveway.<sup>8</sup> Aa221. This ruling is consistent with settled law, the plain language of the Jeffers Deed, the surrounding

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<sup>8</sup> The Gargiulos contend that the Access Easement rights of Lot 6.01 have been extinguished (see Point II below). If the Court does not agree, the arguments in this section and Section III are equally applicable to Lot 6.01.

circumstances, and the prior rulings of two other judges,<sup>9</sup> and this Court should affirm it. The Battistas do not have unfettered rights to do whatever they want in the full width and length of the Flagstaff.

**A. The Jeffers Deed Demonstrates that the Access Easement is Only for Ingress/Egress to Van Beuren Road Over the Driveway**

The Court's analysis of the scope of the Access Easement can begin and end with the unambiguous language of the Jeffers Deed that demonstrates in multiple ways that the purpose of the Access Easement is solely for access to Van Beuren Road over the Driveway. *First*, the Jeffers Deed states in two places that the "purpose" of the Access Easement was to provide "ingress and egress" from and to "Van Beuren Road." See Aa365 (providing a "fifty-foot strip of land hereinabove referred to for the purpose of establishing a right of way extending from Van Beuren Road to provide ingress and egress to the lands herein conveyed"); Aa366 (referring to "driveway extending to Van Beuren Road" to be installed in "the right away for purposes of ingress and egress to the lands herein conveyed"). The Battistas ignore this language when incorrectly asserting that the only mention of Van Bueren Road is as a point of reference. See Ab23.

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<sup>9</sup> Two other Chancery Division judges previously found that Access Easement's purpose was to access Van Bueren Road via the Driveway. See Ab1; Aa205-06; (recognizing the purpose of the easement was road access over the Driveway); Aa410-11 at 16:11-14, 17:6-8 (stating the purpose of the Access Easement was to provide service off of Van Beuren Road over the Driveway).

Second, the Jeffers Deed clearly states that ingress and egress from Van Beuren Road was to be over a *driveway* to be installed within the fifty-foot Flagstaff. (Id.) For example, the Jeffers Deed granted Jeffers the right to use an existing driveway over an adjoining parcel, but only for two years, or until an earlier date,

**when a driveway extending to Van Beuren Road is established** over the strip of land fifty feet wide, which fifty-foot strip of land the party of the first part [Castles] has set aside and over which he proposes to establish a right of way **for purposes of ingress and egress** to the lands herein conveyed to the party of the second part [Jeffers 6.524] and to the remaining lands of the party of the first part [the Lot 8.0 ] . . . .

(Aa365) (emphasis added). This language states unequivocally that the Access Easement was to be over the Driveway to be installed in the Flagstaff. Id. Had Castles intended Jeffers to use any other part of the Flagstaff to access Van Beuren Road, or for any other purpose, there would have been no need to provide the right to use an existing driveway over adjoining property until the Driveway's installation.

Third, the Jeffers Deed's distinction between the "fifty-foot strip of land" and the "right of way" that was to be "established" in the future further evidences that the access easement was intended to be over the Driveway installed in the Flagstaff. Aa365-67. Had Castles intended Jeffers to use the entire fifty-foot strip of land, the deed would not have referred to the future "establishment" of a "right of way" for ingress and egress. Rather, the deed would have merely stated that the entire Flagstaff was to be immediately used for ingress and egress.

*Finally*, that the easement was to be for the use of the then yet-to-be installed Driveway in the Flagstaff is further confirmed by the language of the Jeffers Deed, which provides that the right-of-way was to be for “roadway uses” – not other activities. (Aa364-68); see also Polzo v. Cty. of Essex, 209 N.J. 51, 71 (2012) (“Roadways generally are intended for and used by operators of vehicles.”).

Thus, the Jeffers Deed makes clear that: (1) when Castles deeded Jeffers what are now Lots 6.01 and a portion of Lot 6.02, those lots were landlocked and had no access to Van Beuren Road; (2) due to this lack of access Castles granted Jeffers the temporary right to use a then-existing driveway for access; and (3) that use was limited to two years, or as soon as the Driveway was constructed, which Jeffers then had the right to use for ingress/egress to Van Bueren Road. Had Castles intended to grant Jeffers the unfettered rights the Battistas claim to have– unrestricted access for any purpose<sup>10</sup> over a parcel of land nearly a quarter of a mile long – this would have been explicitly detailed in the Jeffers Deed.

**B. The Access Easement’s Scope Does Not Include the Use of the Entire Flagstaff.**

The Battistas are not entitled to use the entire length and width of the Flagstaff simply because the deed uses the phrase “right of way fifty feet in width for all

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<sup>10</sup> Such expansive rights also would have come with corresponding obligations. The Jeffers Deed, however, creates no maintenance obligations over the Flagstaff on the part of the dominant estate.

roadway uses” in a single instance. Aa364. The Jeffers Deed “must be read as an entirety giving effect to all its terms.” Union Cnty., 95 N.J. Super. at 453. Thus, the Court cannot ignore the provisions of the Jeffers Deed stating that the Access Easement was for the “purpose” of “ingress and egress” to Van Beuren Road over “the [D]riveway” to be installed. Aa365-66. This language unambiguously demonstrates that Castles did not intent to that the Access Easement be over the entire 50 foot width of the Flagstaff. The Battistas’ interpretation impermissibly renders meaningless other terms of the Jeffers Deed, and can be rejected on that ground alone. See Krosnowski, 22 N.J. at 387; Hyland, 44 N.J. Super. at 187.

Nonetheless, even if the Jeffers Deed is somehow found to be ambiguous, the surrounding circumstances demonstrate that the parties intended the Access Easement to be solely over the Driveway. Courts in New Jersey and other jurisdictions have long held that language in an instrument granting a right of way for “roadway purposes” in or along a strip of a specified width does not automatically mean that the entire strip of land is to be used as a roadway by the easement’s beneficiary. See Hyland, 44 N.J. Super. at 188. (stating that an easement providing “right of ingress and egress for roadway purposes along a strip 25 feet in width” did not grant the beneficiaries the “absolute use at all times of a roadway actually 25 feet wide”); DeBenedette v. Delodzia, A-2768-08T2, 2009 N.J. Super. Unpub. LEXIS 3024, at \*9 (App. Div. Dec. 11, 2009) (holding that language

granting “a perpetual easement 50 foot [sic] in width” was intended to describe the “the space through which a right-of-way is permitted as reasonably necessary within the 50 strip” and not a roadway 50 feet wide)<sup>11</sup>; Grosbard v. Abbey on Willow Lane, LLC, 144 N.Y.S.3d 92, 95 (N.Y. App. 2d Dept. 2021) (“Having only a right-of-way for the purpose of ingress and egress, there is no merit to the defendant's contention that it is entitled to use the full expanse of the easement area described in its deed.”); Robinson v. Feltus, 68 So. 2d 815 (Fla. 1953) (the language “together with an easement over” a described tract was merely descriptive of the area over which the dominant estate had the right of ingress and egress sufficient to accommodate the actual and reasonable need); Barrett v. Duchaine, 149 N.E. 632 (Mass. 1925) (deed granting “right of way over a strip of land” did not grant way “over the whole of that land,” but “only . . . the area in which the way was to be located”).

In Hyland, the instrument in question provided a “right of ingress and egress for roadway purposes along a strip 25 feet in width,” but (unlike the Jeffers Deed) did not contain any clarifying language as to whether the entire 25 feet strip was to be used for a driveway or just a portion of it. Hyland, 44 N.J. Super. at 188-89. The Court held that “the language of the reservation does not specifically describe the

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<sup>11</sup> Undersigned counsel certifies that he is unaware of any unpublished opinions contrary to those cited in this brief.

intended *roadway* as 25 feet in width” and that where this “kind of ambiguity” is found, the rule is that:

Where a way is granted over a piece of land of a certain stated width, it will depend upon the circumstances of the case whether the reference is to the width of the way, or is merely descriptive of the property over which the grantee may have such a way as may be reasonably necessary.

Id. The court then found that the circumstances failed to demonstrate that the parties intended the roadway to be 25-feet wide because there was no evidence that the parties intended to tear down an existing fence and widen an existing roadway. Id.

Here, as in Hyland, the surrounding circumstances confirm it was never intended the Access Easement would extend to any part of the Flagstaff other than the Driveway. First, it is undisputed that a Driveway was installed in the Flagstaff after the Jeffers Deed was made. See Aa1170 at 17:20-24. Second, it is undisputed that the Driveway never encompassed the entirety of the Flagstaff. See Aa341; Aa1177 at 43:12-25; Aa948 at 81:17-20. Third, it is undisputed that the Driveway’s width has basically remained unchanged since installation. Aa1810, ¶¶ 59-61. Fourth, it is undisputed that at the time the Jeffers Deed was executed, there were trees in the Flagstaff on both sides of the Driveway, which the Battistas claim predate the Jeffers Deed. See Aa952. at 96:18-25; Aa1034 at 275:6-12; Aa1384, ¶¶ 12-13; Aa1392; Aa1407-08, ¶¶ 11, 15; Aa1173 at 26:24-27:1. Those trees prevented the use of the entire Flagstaff area as a roadway or driveway. Aa1034 at 275:6-18; 2013

Aerial Photo [Ex. 38]; 2006 Aerial Photo [Ex. 37]. The large trees in the Flagstaff at the time of the Jeffers Deed and for years thereafter evidence that it was never intended that the Access Easement would extend to the entire width of the Flagstaff, just as in Hyland, where there was no evidence that the parties intended to tear down a fence to enable use of the full twenty-five foot strip of land. Hyland, 44 N.J. Super. at 188-89. Fifth, the Battistas admit that vegetation and fencing has long existed on Lots 6.01 and 6.02 near the border of the Flagstaff, which prevented access at all points. Aa1128 at 70:17-72:15; Aa1129 at 75:17-25; Aa1123 at 50:20-52:6. This also demonstrates that the entire Flagstaff was never intended to be used for access. Thus, the circumstances confirm that the Jeffers Deed only granted the Access Easement over the Driveway for access to/from Van Bueren Road.

The so-called extrinsic evidence to which the Battistas point does not refute this. First, there is no evidence in the record that beneficiaries of the Access Easement before the Battistas used anything other than the Driveway when exercising their easement rights. Second, the Battistas point to no evidence that anyone before them actually used the Access Easement for farming purposes,<sup>12</sup> such as herding livestock, wrangling or logging. The Battistas' attempted use of the Flagstaff in 2019 (which led to this lawsuit) is not evidence of the intent of the parties

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<sup>12</sup> The Battistas' arguments about farming are tacit admissions that they are trying to expand the Access Easement's scope beyond its use for "roadway purposes."



to the Jeffers Deed. Third, the general claim that unspecified land in the area was used for farming in the past is immaterial to the determination of the scope of the Access Easement. The Battistas provide no evidence that anyone was actively farming on the land that is now Lot 6.01 or 6.02 at the time the Jeffers Deed was made. Aa1966-70, ¶¶ 49-53. It is undisputed that Lot 6.01 was undeveloped for decades after the Jeffers Deed was made. Aa1808, ¶ 48; Aa1614, ¶ 15. Fourth, the Battistas provide no evidence that prior beneficiaries of the easement claimed the right to use the Driveway or Flagstaff to do anything other than access Van Bueren Road. Fifth, the transcript of the 1991 hearing in the Walker v. Hawrylo matter does not evidence any intent by the parties to the Jeffers Deed to grant easement rights over the entire Flagstaff. The Walkers did not grant the Access Easement. The Walkers' attorney stated that the purpose of the Access Easement was to provide "driveway access and utility access away from Van Bueren Road." Aa404 at 10:7-21. Nothing in the transcript suggests that the Walkers sought to use any portion of the Flagstaff other than the Driveway. Sixth, the Carey Deed does not show any intent on the part of the Castles with respect to the Access Easement. Finally, that Michael and Tracy Battista wish to see their grandchildren has no bearing on the intended scope of the Access Easement when it was made. Accordingly, the trial court correctly held that the Access Easement's sole purpose is ingress and egress to Van Beuren Road, and this Court should affirm that holding on appeal.

**C. There is No Right to Use The Flagstaff To Access Adjacent Lots.**

The trial court correctly rejected the Battistas' argument that Access Easement gives the Battistas the right to cross the Flagstaff to access adjacent lots. Aa32. The Battistas concede that Lots 7.04 and 7.05 do not have any rights to use the Flagstaff or Driveway. See Ab27, n.5. Their argument that the owner of Lot 6.02 has the right to cross the Flagstaff to access adjoining lots, and to invite others to do so as well, is incorrect. The Access Easement only grants rights over the Driveway for ingress and egress from/to Van Beuren Road. Nothing in the Jeffers Deed grants the right to use the Flagstaff for direct access to adjacent properties, and such a right cannot be inferred. See Mathues v. Providence Friends School, Inc., 396 A.2d 707 (Pa. Super. 1978) (court properly enjoined easement holders from walking across driveway for the purpose of traveling from one tract of land to another since easement granted only right to use driveway as means of access to public road); Man v. Vockroth, 94 N.J. Eq. 511, 518-19 (E. & A. 1923) (easement for over private road through the second tract to and from a dwelling-house could not be used for ingress and egress to a different boarding-house built on dominant estate).

The Battistas' argument to the contrary conflates the purpose of an easement with the identity of the persons who may use the easement. U.S. Pipe-Line Co., 62 N.J.L. 254, 281 (E. & A. 1898) ("A right of way appurtenant to a dominant tenement can be used only for the purpose of passing to or from that tenement."). While the

Battistas may invite guests to use the Access Easement for the purpose of accessing Lot 6.02 from Van Beuren Road, they and their guests cannot do more than that. None of the case law cited by the Battistas hold that guests of a dominant estate can traverse between adjoining properties over an easement made to provide access to a public road. Ab27; Levinson v. Costello, 74 N.J. Super. 539 (App. Div. 1962) (dominant estate could use an access easement which afforded a right of beachfront access for the purposes of accessing the beach); Caribbean House, Inc. v. N. Hudson Yacht Club, 434 N.J. Super. 220, 228 (App. Div. 2013).

## **II. THE ACCESS EASEMENT WAS ABANDONED. (Pb28).**

The trial court correctly held that the Walkers permanently abandoned any Access Easement rights over the Driveway benefitting Lot 6.01. A “servitude benefit is extinguished by abandonment when the beneficiary relinquishes the rights created by a servitude.” Restatement (Third) of Prop.: Servitudes, § 7.4 (Am. Law Inst. 2000) (cited by Citizens Voices Ass’n v. Collings Lakes Civic Ass’n, 396 N.J. Super. 432, 443 (App. Div. 2007) and Van Horn v. Harmony Sand & Gravel, Inc., 442 N.J. Super. 333, 345 (App. Div. 2015)). The “holder of the easement is able to unilaterally terminate an easement through renunciation” and “abandonment ordinarily does not involve any transaction between the dominant and servient owners.” Van Horn, 442 N.J. Super. at 345; see also Restatement (Third) of Prop.: Servitudes, § 7.4, cmt. (abandonment can be done by “unilateral act”). Abandonment of an easement may

be established by proof of “an intention on [the easement-holder’s] part to abandon it forever[.]” Rossi v. Sierchio, 30 N.J. Super. 575, 580 (App. Div. 1954). An easement “will be extinguished, undoubtedly, by any conduct on the part of the owner of the dominant tenement, which unequivocally exhibits an intention to abandon it.” City Nat’l Bank v. Van Meter, 59 N.J. Eq. 32, 36-37 (1899). To succeed in establishing an abandonment “there must be two elements present, an act tantamount to an abandonment and an intention to abandon.” Freedman v. Lieberman, 2 N.J. Super. 537, 544 (Ch. Div. 1949). No New Jersey case holds that the intent to abandon an easement must be evidenced by the use of specific language in a deed. Here, the Levine Deed and surrounding circumstances clearly and convincingly demonstrate that the Walkers intended to abandon the Access Easement as to Lot 6.01, and did so.

**A. The Express Language of the Levine Deed Establishes that the Access Easement Was Abandoned as to Lot 6.01.**

The applicable language in the Levine Deed provides as follows:

No easement by necessity or otherwise over the remaining lands of the party of the first part or over the right of way fifty (50) feet in width more particularly described in the deed from Horace C. Jeffers, unmarried, to Elizabeth F. Walker, hereinabove referred to shall arise by legal implication, the strip of land twenty-five (25) feet in width extending northwesterly from van Beuren Road included in the herein conveyed 3,735 acres is for the propose of providing ingress and egress to the lands conveyed by the party of the first part to the party of the second part.

Aa380. This language convincingly evidences the abandonment of the Access Easement as to Lot 6.01 in numerous ways.

First, the easement states “no easement by necessity or otherwise shall arise by legal implication . . . over the right of way fifty (50) feet in width more particularly described in the [Jeffers Deed]”.

Second, the Levine Deed states the reason why Lot 6.01 was not to have Access Easement rights over the Flagstaff on Lot 8.0 was because the Walkers had conveyed the flagstaff portion of Lot 6.01 “for the purpose of providing ingress and egress to the lands conveyed by” the Walkers to the Levines. Aa380.

Third, the Levine Deed actually did convey a flagstaff running directly to Van Beuren Road. There was no reason for the Walkers to do this if they did not intend to eliminate the Levine’s ability to continue to use the Driveway on Lot 8.0.

Fourth, the Levine Deed expressly stated that Lot 6.01 had rights to the Utility Easement granted by the Jeffers Deed. See Aa379-82. Given that the Walkers addressed the entitlement of Lot 6.01 to use the Utility Easement over the Flagstaff of Lot 8, there can be no doubt that they would have done the same for the Access Easement had it not been abandoned.

Fifth, the Levine Deed expressly excepted the Utility Easement from the provision abandoning the Access Easement when they stated: “The right herein to use, repair and maintain said telephone and electric pole lines shall not be diminished

by the following paragraph,” immediately before the language that stated that “no easement by necessity or otherwise over . . . the right of way fifty (50) feet in width”. Aa380. Had the Walkers not intended to abandon the Access Easement, there would have been no reason for them to state that the language abandoning the Access Easement did not “diminish” the Utility Easement. Indeed, had they intended to maintain the Access Easement, they would have added a similar provision to the deed stating that it also was “not diminished” by the other language therein.

These provisions leave no doubt that the Walkers intended to abandon the Access Easement forever as to Lot 6.01 and effected that intent through the Levine Deed. Any other interpretation of the deed impermissibly renders meaningless much of the language contained therein. See Krosnowski, 22 N.J. at 387. The Walkers’ intent to abandon the Access Easement as to Lot 6.01 is so obvious that even the Battistas acknowledged it at their depositions. Aa959 at 123:1-8 (Acknowledging that Walker “attempted to modify the easement document . . . . Walker did not feel that there was a need or a purpose for the Levines to have the benefit of the easement.”); Aa960 at 126:12-14; Aa1133 at 91:11-21; Aa1120 at 41:16-19. Thus, the Levine Deed clearly and convincingly evidences the abandonment.

**B. The Battistas’ Arguments As To The Levine Deed Have No Merit.**

The Battistas attempt to create ambiguity in the Levine Deed where none exists by proposing obviously wrong and conflicting interpretations based on

isolated phrases of the deed. However, none of the Battistas’ arguments disprove the clear intent to abandon manifested by the Levine Deed.

First, the Battistas attempt to concoct ambiguity by incorrectly theorizing that the language abandoning the Access Easement was intended to be a “personal limitation” on the Levines’ ability to use the easement. However, nothing in the Levine Deed refers to an individualized “restrictive covenant” or “personal limitation.” Nor does it state that only the Levines were prohibited from using the Driveway. That a specific clause in the Levine Deed does not explicitly mention “heirs” or “assigns” does not mean that the abandonment of the Access Easement did not run with the land. The initial clause of the deed states that its provisions are applicable to the Levines and their heirs and assigns. Aa379 (conveyance was to “party of the second part, and to their heirs and assigns, forever, All that . . . land, . . . described as follows”)). The signature page of the deed likewise states that its provisions, including the clause abandoning the easement, are applicable to the Levines’ “heirs and assigns” when it provides with respect to the rights transferred:

Together with all and singular the trees, ways, . . . privileges, and advantages . . . to the same belonging or in anywise appertaining, **except as aforesaid**; Also, all the estate, right title interest, property, claim and demand whatsoever, of the said part of the first part, of, in and to the same, and of, in and to every part and parcel thereof, **except as aforesaid**, To have and to hold all and singular of the above described land and premises, with the appurtenances unto the said party of the second part, their heirs and assigns, to the only proper use, benefit and

behoof of said party of the second party, their heirs, and assigns, **forever except as aforesaid**. . .

(Aa382). The phrase “forever except as aforesaid” makes clear that the abandonment was applicable to the Levine’s heirs and assigns.

Mazzeo v. Kartman, 234 N.J. Super. 223 (App. Div. 1989), does not support the Battistas’ contention because it has nothing to with an easement or recorded property instrument. Rather, Mazzeo stands for the proposition that an options contract is not assignable absent “heirs and assigns” language in the contract. Id. at 233. Likewise, Loucks v. Kaufman, an unpublished opinion of this Court, is plainly distinguishable. There, this Court was called on to interpret a deed that included a clause granting an access easement and a separate clause creating a maintenance obligation. The former clause included “heirs and assigns” language while the latter clause did not, and this Court found the discrepancy suggested that the maintenance obligation was not intended to run with the land. 2015 N.J. Super. Unpub. LEXIS 2555, at \*13-14 (App. Div. Nov. 5, 2015). Here, the 1975 Levine Deed opens and closes with “heirs and assigns” language that is generally applicable to the entire deed and expressly noted (by use of the “except as aforesaid” language) that the abandonment of the Access Easement as to Lot 6.01 applied to heirs and assigns. There is simply no basis to interpret the Levine Deed otherwise.

Second, there is no merit to the Battistas’ argument for a conflicting interpretation that the Levine Deed abandoned only a portion of the “larger bundle



of rights” granted by the Access Easement (the right to use the Access Easement for ingress and egress to Van Beuren Road), while preserving the right to use the Access Easement for any other purpose. Ab32. This theory is simply another attempt to create artificial ambiguity. The Levine Deed contains no language suggesting that the abandonment of the Access Easement as to Lot 6.01 was limited in any way. The sole purpose of the Access Easement was to provide ingress and egress to Van Beuren Road. Thus, the abandonment of this right, abandoned the entire “bundle of rights” granted by the Access Easement.

*Third*, the Battistas incorrectly assert that the phrase in the Levine Deed stating that “no easement by necessity or otherwise . . . shall arise by legal implication” is ambiguous. See Ab31-32. This provision is not ambiguous; it makes clear that no easement by necessity **or otherwise** shall arise as to Lot 6.01. The Battistas’ contrary suggestion is nothing more than the attempt to “torture the language” of a single phrase to create ambiguity where none exists. Schor v. FMS Financial Corp., 357 N.J. Super. 185, 191 (App. Div. 2002) (“[t]he court should examine the document as a whole” and “should not torture the language of [a contract] to create ambiguity”). That the Battistas believe different language could have been used to describe the abandonment is of no moment.

Penn Central Transportation Co. v. Pirate Canoe Club, Inc., a Second Circuit case applying New York law does not support the Battistas’ argument. Ab33-34. In

Penn Central, the court rejected a railroad company’s argument that an access easement over railroad tracks in favor of a defendant-landowner had been abandoned. 463 F.2d 127 (2d Cir. 1972). The landowner purchased two parcels of land that were bisected by the railroad company’s tracks in separate transactions. Id. at 128. The predecessor in title to those parcels held an access easement over the tracks. Id. The deed for the first real estate transaction, which conveyed a landlocked parcel on the western side of the railroad tracks, provided, in pertinent part, that “the grantee does not acquire any right of way over or through other lands owned by the grantor, either by necessity or in any other way for ingress or egress to the lands described herein . . . .” Id. However, the parties agreed that, if the buyer was “unable to obtain access through other means” that the seller would transfer the easement with additional land on the eastern side of the railroad tracks. Id. Within nine months, because the buyer was unable to obtain alternative access, the seller “did convey to the [buyer] an additional acre on the east side of the tracks as well as her easement to ‘cross and recross’ those tracks.” Id. The Second Circuit thus held that there was no “unequivocal act” to permanently abandon the easement. Id. at 129.

A more distinguishable case could hardly be imaginable. There is no evidence here that the Walkers intended to preserve the easement rights of Lot 6.01 for any purpose, much less for the purpose of protecting Lot 6.01 from becoming landlocked. Nor was there any subsequent real estate transfer in which the Walkers

conveyed land to the Levines that would necessitate use of the Access Easement. It is undisputed that the Levine Deed provided Lot 6.01 with direct access to Van Bueren Road over the flagstaff that was part of Lot 6.01. Aa1806, ¶ 39. This eliminated the need for Lot 6.01 to use the Access Easement. Thus, the trial court correctly held that the Levine Deed clearly and convincingly establishes that the Access Easement was abandoned as to Lot 6.01, and this Court should uphold that decision.

**C. Extrinsic Evidence Further Establishes that the Access Easement Was Abandoned as to Lot 6.01. (Ab39-40).**

The undisputed extrinsic evidence further reinforces the intention to abandon the Access Easement. *First*, Battista Jr, testified that the Walkers’ son told him that the Walkers did not “feel there was a need for [the Levines] to be using the lotted flag staff” so “they made an agreement between them, Walker and Levine, that that wouldn’t happen.” Aa1120 at 40:23-41:15; Aa1806, ¶¶ 45-46.<sup>13</sup> *Second*, the 1975 Sketch Plat (created in connection with the subdivision of Lot 6.01) does not show any driveway into Lot 6.01 from the Driveway. *See* Aa341. This demonstrates the Walker’s intent to abandon the easement as to Lot 6.01 by showing that the Walkers

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<sup>13</sup> These statements are not hearsay as they are not offered for their truth, i.e., whether the Levines needed to use the Flagstaff or an agreement was made, but are evidence of the Walkers’ state of mind. *See* Biunno et al, Current N.J. Rules of Evidence, Comment 4 to N.J.R.E. 801(c)(2) (Gann) (“[I]f the truthfulness of the statement is not an issue, admitting the statement does not violate the hearsay rules.”).

did not plan to provide access from the Driveway to Lot 6.01. Third, no subsequent deed conveying Lot 6.01, including the deed conveying Lot 6.01 to 529 Waterfront, has ever referenced the Access Easement. Aa289-96. Fourth, Lot 6.01 was undeveloped at the time the Levines purchased it and remained undeveloped for years afterwards. See Aa963 at 138:11-12; Aa1120 at 40:1-15. As such there was no need for the Levines to access it over the Driveway. Fifth, there no evidence that the Levines actually used the Driveway on Lot 8 to access Lot 6.01 without being invited to do so. Had the Levines needed to access Lot 6.01, they could have done so over the flagstaff of Lot 6.01 or the adjacent Lot 5 that they owned.

In contrast to the aforementioned facts, each item of “extrinsic evidence” relied on by the Battistas is either irrelevant or mischaracterizes the facts and should be disregarded. Ab32-33, Ab39-40.

First, the Battistas’ contention that the Access Easement was the sole means of access to Lot 6.01 is incorrect and immaterial, as set forth below in Point II(D) below. Ab40.

Second, the fact that language regarding the Access Easement was contained in various title records after 1975 is irrelevant. Ab39. As noted, the Access Easement was not included in deeds transferring Lot 6.01 following the abandonment by the Levines in 1975. Mere references to the easements created by the Jeffers Deed in subsequent deeds for other lots are irrelevant to the Court’s analysis. The Levine

Deed abandoning the Access Easement is not in the chains of title of other lots. Further, the Levines only abandoned the Access Easement rights of Lot 6.01. They did not abandon Lot 6.01's Utility Easement rights or the Access Easement and Utility Easement rights of Lot 6.02. Thus, deeds conveying property affected by those existing easements would refer to the grants in the Jeffers Deed.

Third, the Battistas' contention that the Carey Deed somehow evidences that the Access Easement was not abandoned as to Lot 6.01 is without merit. Ab39. As the trial court observed, the Carey Deed (made in 2003) had nothing to do with Lot 6.01, and "therefore cannot convey easement rights to Lot 6.01." Aa214.

Fourth, the Battistas' arguments regarding the Gargiulos' title insurance policy and commitment are likewise irrelevant to the Court's analysis of the abandonment issue. Ab39. That a deed referencing the Access Easement was listed in a title commitment obtained on behalf of the Gargiulos in 2013 has no bearing whether the Access Easement was abandoned in 1975. A title insurance policy or commitment is not a statement as to the condition of title; rather it is a statement of risks against which a title insurance company will or will not insure. See Lawrence J. Fineberg, Handbook of New Jersey Title Practice, §1002 (2012) ("[T]he policy does not guaranty that title is held as stated therein; rather, the policy insures against loss in the event title is not so held.") (emphasis in original); Barlow Burke, Law of Title Insurance, §2-5 (3d. Ed. 2003).

Fifth, the purported knowledge of the Gargiulos or their attorney regarding the Access Easement when they purchased the property in 2013 has no relevance to whether the Walkers intended to abandon the easement over 35 years earlier. Ab39-40. See 25 Am. Jur 2d Easements and Licenses in Real Property § 95 (“Generally, once an easement is extinguished, it is gone forever.”).

Sixth, that the July 28, 2003 Resolution of the Harding Township Planning Board approving the subdivision of Lots 6.02 and 6.03 made a general reference to the Access Easement does not evidence that the Access Easement still benefitted Lot 6.01 in 2003. Aa419-27. Nothing in the Resolution approving the subdivision created any easement over the Flagstaff. Id. Moreover, the Resolution was completely silent as to the use of the Driveway to access Lot 6.01.

Finally, the Battistas’ reliance on the transcript of the December 21, 1990 hearing in the Walker v. Hawrylo matter to support their argument is completely misplaced. The right of Lot 6.01 to use the Access Easement was not at issue on the motion and not discussed. See Aa399-418. Nor were the owners of Lot 6.01 at the time, the Levines, parties to the matter or represented at the hearing. See Aa399. The court made no finding with respect to the right of Lot 6.01 to use the Driveway. Thus, the hearing transcript from the Walker v. Hawrylo is irrelevant.

In sum, the Gargiulos respectfully submit that the Court should affirm the trial court’s finding that the Access Easement was abandoned by clear and convincing

evidence based on the express terms of the easement and surrounding circumstances of the land transfers. Even if the Court looks to extrinsic evidence, that evidence provides further support to the trial court's opinion as set forth above.

**D. The Battistas' Permissive Use of the Access Easement Is Irrelevant to the Issue of Abandonment, and Was Not the Basis for the Trial Court's Decision. (Ab35-38).**

The trial court did not mistakenly rest its holding on abandonment on a finding of fact that the Battistas were "permissive users" of the Driveway. The Battistas' argument to the contrary misstates the trial court's actual holding and is an obvious attempt to conjure an artificial factual dispute in an effort to avoid summary judgment. Ab35-38. This is evident in several respects.

First, the trial court's core holding on the issue of abandonment was that: "The language of the 1975 [Levine] Deed, when read in its entirety, demonstrates by clear and convincing evidence that the [Access] Easement was abandoned . . . ." Aa214. As set forth above in Points II(a) and -(b) of this Brief, the trial court's decision was correct. Nothing in the trial court's opinion suggests its reference to the Battistas' permissive use of the Access Easement was necessary to its determination.

Second, whether the Battistas' use of the Driveway was permissive is irrelevant as to the abandonment issue, and any "factual dispute" is therefore immaterial. Whether the Battistas' used the Driveway or Flagstaff with or without permission has no bearing on whether or not the Walkers and Levines intended to

abandon the Access Easement as to Lot 6.01 over 40 years earlier in the Levine Deed.

Third, the Gargiulos raised the issue of Battistas’ permissive use below in response to the Battistas’ now-abandoned prescriptive easement argument. Aa236-37; see also Noye v. Hoffman-La Roche Inc., 238 N.J. Super. 430, 432 n.2 (App. Div. 1990) (noting an argument not raised in appellant’s brief is deemed abandoned). The Battistas have abandoned their prescriptive easement argument. Thus, they cannot now claim that this “factual dispute” – which has nothing to do with the issue of abandonment – warrants reversal of the trial court’s decision. The Gargiulos respectfully submit that this argument should be rejected out of hand as completely meritless.

Fourth, the Battistas concede that the owners of Lots 7.04 and 7.05 have no independent right to use the Access Easement and admit that their use of the Flagstaff before they purchased Lots 6.01 and 6.02 in 2019 was permissive. Ab37-38; Aa1815, ¶¶ 81-82.

Fifth, the Battistas’ generalized claim that they used the Access Easement to move farm animals and equipment and to traverse “up and down” and “from one side to another” does not create a material dispute. Ab35. This assertion does not address whether the purported use was permissive or when the use occurred.



*Finally*, the Battistas’ effort to distinguish their personal use of the Driveway from that of their company 529 Waterfront is immaterial and does not create a factual dispute. The statement of fact that the Battistas rely on in support of their argument refers to “Michael Battista”. Ab35; Aa771. Moreover, the Battistas admit their use of the Flagstaff prior to purchasing Lot 6.01 and 6.02 in 2019 was permissive.

In sum, the issue of permissive use is irrelevant to the issue of abandonment and was not necessary to the trial court’s decision. Even if this Court considers the issue, the motion record is undisputed that the Battistas permissively used the Driveway prior to their purchase of Lot 6.02. Thus, the trial court’s understanding of the facts was correct. Accordingly, this so-called “factual dispute” is no basis to reverse the trial court’s decision.

**E. The Trial Court Did Not Rely on “Alternative Access” in Finding Abandonment of the Access Easement.**

The trial court’s recognition that the Battistas have alternative access to Lot 6.01 does not render erroneous its holding that the Access Easement was abandoned as to Lot 6.01. The Battistas’ argument otherwise is nothing more than an effort to generate an artificial factual dispute where none exists. See Ab38. The trial court held that the express language of the Levine Dead clearly and convincingly established abandonment. Aa213-14. The trial court made no mention of “alternative access” as a basis for this determination. Id. Indeed, the trial court expressly found that the Battistas “[we]re correct in asserting that an alternate route does not

necessarily extinguish easement rights.” Aa214. Thus, the Battistas’ speculation that the trial court “seemed to attach some significance” the fact that Lot 6.01 is not landlocked does not warrant a reversal of the trial court’s decision. Ab38.<sup>14</sup>

### **III. THE GARGIULOS HAVE NOT VIOLATED THE BATTISTAS’ EASEMENT RIGHTS. (Ab40-50).**

The trial court correctly held that the Battistas do not have an “unfettered right” to use the Flagstaff and that the Gargiulos’ alterations thereto do not “unreasonably interfere with” or “substantially burden” the Battistas’ ability to use the Access Easement to access Van Bueren Road.” Aa220-21. The trial court’s decision should be affirmed for several reasons.

#### **A. The Battistas Can and Do Access Lot 6.02 Over the Driveway.**

As set forth above, the Access Easement’s sole purpose is to provide Lot 6.02 with ingress and egress from and to Van Beuren Road over the Driveway. Thus, the Battistas may only burden the Gargiulo Property by doing that which is “reasonably necessary” for access between Van Beuren Road and Lot 6.02. Tide-Water, 42 N.J. at 605-06; Rinaldo, 2016 N.J. Super. Unpub. LEXIS 878, at \*10. The indisputable

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<sup>14</sup> That said, the trial court’s findings that Lot 6.01 has a flagstaff with direct access to Van Beuren Road, that Lot 6.02 abuts Lot 6.01 and that Lot 5 also abut Lot 6.01, are all indisputable. See Aa359; Aa962-63 at 137:25-138:4, 139:2-3; Aa1120 at 48:22-49:3; Aa1801, ¶ 21). The Battistas’ allegation that there is a lack of “vehicular access” does not change this. That the Battistas have chosen not install a paved driveway onto Lot 6.01 does not mean that Lot 6.01 is landlocked.

facts demonstrate that the Gargiulos have not prevented what is reasonably necessary for the Battistas to access Van Bueren Road over the Driveway.

***Gate, Piers and Deer Gate.*** The Gargiulos installed a gate, piers and deer grate near the upper portion of the Driveway many hundreds of feet away from the Battista Driveway into Lot 6.02. See Aa379 (noting that the frontage of Lot 6.01 along the Flagstaff is 317.8 feet); Aa1618, ¶ 51. Thus, there is no plausible basis to claim that the gate, piers and deer grate have impacted access to Lot 6.02, and it is therefore not “reasonably necessary” for them to be removed.

***Fencing.*** All fencing installed by the Gargiulos is within feet of the property line of the Flagstaff. Aa1817, ¶ 100. No fencing is in the Driveway or immediately adjacent thereto, nor does fencing prevent access to Lot 6.02 from the Battista Driveway that intersects the Gargiulo Driveway in the Flagstaff. Id., ¶¶ 103-04. The Battistas have used the Driveway and the Battista Driveway to access Lot 6.02 since the installation of the fencing. Id.; see also Aa1618, ¶ 50. Its removal is unnecessary.

***Planting of Trees.*** The existing arborvitaes and linden trees do not prevent the Battistas from using the Driveway or the Battista Driveway into Lot 6.02. Aa1621, ¶¶ 81-84; Aa1821, ¶¶ 125-26. These trees do not encroach on the Driveway or the Battista Driveway. Id. at 48-52, 82; Aa1173 at 28:14-24; Aa1034 at 273:5-16, 275:2-5. The Battistas have continued to access Lot 6.02 via the Driveway and Battista Driveway since the trees were planted. Aa1821, ¶ 126. Neither the removal

of trees nor a prohibition against planting other vegetation is reasonably necessary for the Battistas to access Lot 6.02.

**B. The Battistas' Seek to Impermissibly Burden the Gargiulos**

The Battistas' demand that the Gargiulos remove the fencing, trees and the deer grate seeks to unreasonably interfere with the Gargiulos' use and enjoyment of their property. Levinson, 74 N.J. Super. at 539. None of this is necessary for the Battistas to access Lot 6.02. It will, however, prevent the Gargiulos from developing and using Lot 8.0 as they see fit. That the Battistas disapprove of how the Gargiulos use Lot 8.0 does not mean that the Battistas can somehow exercise veto authority over the Gargiulos' day-to-day uses. The trial court's opinion in this regard was correct and should be affirmed.

**C. The Gargiulos Have Not "Changed" The Access Easement**

The Battistas' assertion that the Access Easement has been "changed" is incorrect. It is undisputed that: (1) the Gargiulos have not relocated, narrowed or widened the Driveway; (2) the Gargiulos have not impeded transit over the Driveway between Lot 6.02 and Van Beuren Road; and (3) the Battistas continue to use the Driveway to access Lot 6.02. Aa1810, ¶ 61; Aa1817, ¶¶ 103-04; Aa1821, ¶¶ 125-26 The Flagstaff contains an opening approximately 25-feet wide through which Lot 6.02 is accessed. Aa957 at 115:23-16:2; Aa1613, ¶¶ 7-8, 10; Aa1617-17, ¶¶ 48-52; Aa1621, ¶¶ 81-84; Aa1850-53; Aa1867-68. The alleged "changes" to the

Flagstaff the Battistas identify are immaterial; they do not involve changes to the Access Easement over the Driveway. Ab49. That said, the trial court considered these allegations. Aa214-24. Simply put, the Gargiulos have not changed the Driveway to prevent access between Lot 6.02 and Van Bueren Road.

**D. New Jersey Law Does Not Prevent The Gargiulos' Improvements to the Flagstaff.**

Even if it could be said that the Gargiulos' improvements to the Flagstaff have somehow "changed" the Access Easement, such changes are permissible as they do not make using the Driveway significantly more difficult. The law in New Jersey with respect to changes to an easement not involving relocation is that a "landowner may not, without the consent of the easement holder, unreasonably interfere with the latter's right or change the character of the easement *so as to make the use thereof significantly more difficult or burdensome.*" Tide-Water, 42 N.J. at 604 (emphasis added).<sup>15</sup> "If interference by the owner of the servient estate in an easement is slight and immaterial, it is not objectionable." 25 Am Jur 2d Easements and Licenses in Real Property, § 75. Thus, the law does not forbid *any* changes within an easement area, but only changes that make it significantly more difficult or burdensome to

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<sup>15</sup> This principle has been "restate[d] positively" by the American Law Institute to say "except as limited by the terms of the servitude . . . the holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude." Scaduto v. State, A-3240-20, 2023 N.J. Super. Unpub. LEXIS 58, \*14-15 (App. Div. January 12, 2023) (quoting Restatement (Third) of Prop: Servitudes, § 4.9 and citing Kline and Tide-Water).

accomplish the purpose of the easement. No New Jersey case holds that this principle does not apply if an easement is described by metes and bounds. Owners of easements described by metes and bounds are still entitled to the use and enjoyment of their property.

Accordingly, numerous New Jersey cases have allowed changes to easement areas without the consent of dominant tenant when the changes did not make the use of the easement significantly more difficult or burdensome. For example, in Rinaldo the landowner built a retaining wall, a stone wall and a patio that extended into a 19 foot-wide access easement, and planted three arborvitae near the easement. Rinaldo, 2016 N.J. Super. Unpub. LEXIS 878, at \*1. The Court nonetheless found that the easement had not been violated because there was no “objective evidence that [the landowner] unreasonably interfered with [the dominant tenant’s] use of the easement” and there was “no objective evidence regarding the size of the arborvitae or the extent to which they allegedly interfered with the use of the easement.” Id. at \* 10-11. Among other things, there was no “expert report, survey or other data that showed the width of the easement at the points at which DeLuca’s walls, patio and trees encroached the common driveway.” Id. at 10; see also Maywood Realty Assocs., LLC v. Jos. L. Muscarelle Inv. Co., No. A-2304-16T4, 2018 N.J. Super. Unpub. LEXIS 1009, at \*1 (App. Div. May 1, 2018) (placement of six-inch wide bollards in middle of shared driveway did not violate easement because there was

no evidence that “the bollards have unreasonably interfere[d] with [plaintiffs’] rights or change[d] the character of the easement so as to make the use thereof significantly more difficult or burdensome.”); Scaduto v. State, A-3240-20, 2023 N.J. Super. Unpub. LEXIS 58, \*14-15, 21 (App. Div. January 12, 2023).

The Battistas ask the Court to change New Jersey law and to hold for the first time that property owners are forbidden from making *any* “changes” to an easement “described by metes and bounds” absent the dominant tenant’s consent. Ab42-43, 46. The Battistas concede that no New Jersey reported case holds this, Ab46, and that “New Jersey courts may have a less rigid rule” than they propose, Ab43. They nonetheless implore the Court to apply case law from out of state.

The foreign case law relied on by the Battistas, however, is contrary to settled New Jersey law. All of the cases that the Battistas cite come from jurisdictions that employ a rule that is different than the “reasonableness” standard applicable in New Jersey set forth in Tide-Water. These jurisdictions apply a “bright-line” rule that where an access easement is described with particularity, the servient landowner is unable to alter the easement **in any way** absent the dominant tenement’s consent. See Metro Water Dist. Of Salt Lake & Sandy v. Sorf, 542 P.3d 87 (Utah 2023) (describing the relevant split of authority and adopting the “reasonableness” standard applied by New Jersey courts as the preferable rule); Lindhorst v. Wright, 616 P.2d 450 (Ok. App. 1980) (holding where an “easement is specific and definite” a court

shall not consider “what may be necessary or reasonable to a present use of the dominant estate”); Aladdin Petroleum Corp. v. Gold Crown Properties, Inc., 561 P.2d 818 (Kan. 1977) (holding that a servient landowner could not construct permanent structures over any “portion of an easement for passage of a definite width”); Consolidated Amusement Co. v. Waikiki Business Plaza, 719 P.2d 1119 (Haw. App. 1986) (rejecting the “reasonableness” approach applied by New Jersey courts and holding that a servient landowner cannot erect structures that encroach on a particularly described easement). The key factor in these cases is not whether an easement is described by metes and bounds, but, rather, whether an easement is described with particularity. Id.

The “bright line” rule proposed by the Battistas is not the law in New Jersey, and New Jersey courts have expressly rejected this approach, as demonstrated by the New Jersey cases discussed above. See Tide-Water, 42 N.J. at 604, Maywood, 2018 N.J. Super. Unpub. LEXIS 1009, at \*1; Rinaldo, 2016 N.J. Super. Unpub. LEXIS 878, at \*1; Scaduto, 2023 N.J. Super. Unpub. LEXIS 58, \*14-15. For example, the access easement in Hyland was described with particularity to include a twenty-five foot strip of land “along the entire northerly boundary” of the servient estate. 44 N.J. Super. at 186. This is the same type of description in Lindhorst relied on by Battista. 616 P.2d at ¶ 2 (providing a “perpetual right of ingress and egress on and across the easterly 40 feet” of the southwest portion of the servient estate).



Nevertheless, Hyland held that the dominant estate was entitled to use only the portion of the strip reasonably necessary to achieve the purpose of the access easement, i.e., vehicular roadway access.

The Battistas' reliance on Kline v. Bernardsville Ass'n, Inc., 267 N.J. Super. 473 (App. Div. 1993) is misplaced. Kline involved the *relocation* of an easement – not changes within an easement area.<sup>16</sup> The Kline Court held that a landowner could not *relocate* an easement without the consent of the benefitted party unless it was necessary in the “interest of justice.” Id. at 480. In applying this standard to the *relocation* of an easement, Kline actually declined to join jurisdictions that follow a bright line rule similar to that proposed by the Battistas. 267 N.J. Super. at 480 (internal citations omitted).<sup>17</sup> Moreover, Kline reaffirmed the general rule that consent is required for changes not involving relocation if a landowner “change[s] the character of the easement so as to make the use thereof significantly more difficult or burdensome.” Id. at 478 (quoting Tide-Water, 42 N.J. at 604). Kline does

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<sup>16</sup> Most of the New Jersey cases relying on Kline to prohibit the alteration of easements focus on proposed *relocations*. See, e.g. Pfrang v. Buonopane, A-2022-09T3, 2011 N.J. Super. Unpub. LEXIS 1154, \*11-12 (App. Div. May 6, 2011) (denying a request to *relocate* an easement); Paulson v. Currie, A-1642-07T3, 2009 N.J. Super. Unpub. Lexis 509, \*11 (App. Div. March 17, 2009) (owner's request to *relocate* easement failed to satisfy the standard set forth in Kline).

<sup>17</sup> Indeed, Kline rejected the rationale of Coast Storage Co. v. Schwartz, 351 P.2d 520, 525 (Wash. 1960), which is cited by one of the cases relied on by the Battistas. 267 N.J. Super. at 480; see also Ab46 (citing Macmeekin v. Low Income Hous. Inst., 45 P.3d 570, 579 (Wash. App. 2002)). Macmeekin, like Kline, involved the issue of abandonment. New Jersey courts have expressly rejected the Washington approach.

not rely on a “metes and bounds” description for its holding. Thus, Kline does not support the Battistas’ argument that all changes to an easement described by metes and bounds are forbidden without the consent of the parties.<sup>18</sup>

As set forth above, nothing the Gargiulos have done to the Flagstaff has prevented access between Lot 6.01 and Van Bueren Road. Thus, even if the improvements to the Flagstaff are considered “changes” to the Access Easement, they are permitted. As such, the trial court properly refused to require the Gargiulos to remove their improvements because the Battistas cannot burden the Lot 8.0 more than is reasonably necessary to use the Driveway for ingress and egress to Van Beuren Road. This Court should affirm that decision and deny the Battistas’ appeal.

### **CONCLUSION**

For the foregoing reasons, the Gargiulos respectfully request that the Court deny the Battistas’ Appeal and affirm the Trial Court’s judgment.

Respectfully submitted,  
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Date: December 9, 2024

By: /s/ Nicholas Racioppi, Jr.  
Nicholas Racioppi, Jr.

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<sup>18</sup> Burke v. Jennings also does not support the Battistas’ arguments. A-4821-06T2, 2008 N.J. Super. Unpub. LEXIS 1156, \*4 (App. Div. January 9, 2008) (denying request to add turfstone pavers in place of prior macadam roadway subject to easement due to “valid objections, premised upon safety and maintainability” that would have interfered with the ability to use the easement for access.)

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|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>MICHAEL BATTISTA; TRACEY BATTISTA; 529 WATERFRONT PROPERTIES, LP AND COLITE 24, LLC,</p> <p>Plaintiffs/Appellants,</p> <p>v.</p> <p>MICHAEL GARGIULO and PATRICIA GARGIULO,</p> <p>Defendants/Respondents.</p> | <p>SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION</p> <p>DOCKET NO.: A-2700-23</p> <p>On Appeal from:<br/>Superior Court Of New Jersey,<br/>Law Division, Morris County</p> <p>Docket No. MRS-C-54-20 c/w<br/>MRS-C-55-20</p> <p>Sat Below:<br/>Hon. Frank J. DeAngelis, J.S.C.</p> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

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**REPLY BRIEF ON BEHALF OF APPELLANTS,  
MICHAEL BATTISTA, TRACEY BATTISTA,  
529 WATERFRONT PROPERTIES, LP, AND COLITE 24, LLC**

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This brief is submitted on behalf of Plaintiffs-Appellants, Michael Battista, Tracey Battista, 529 Waterfront Properties, LP and Colite 24, LLC (collectively “Waterfront”) in reply to the response brief filed by Defendants-Respondents, Michael and Patricia Gargiulo (collectively “the Gargiulos”).

### **ARGUMENT**

In the opening pages of their legal argument, the Gargiulos cite to a number of cases with regard to general easement law. Appellants agree that the intent of the grantor is determinative, that the language of the conveyance read in its entirety in light of surrounding circumstances is the best indication of that intent, and that all provisions of a conveyance must be given effect. (Rb16 to 17).

While the cases cited by Respondents support those propositions, two, which involve changes proposed by a servient owner, yielded outcomes inconsistent with Respondents’ position. *See e.g. Tyler v. Hansen*, 20 N.J. Super. 309, 313 (App. Div. 1952) (Rb14)<sup>1</sup> where this Court ruled that temporary parking in an easement might be within the contemplation of a right-of-way agreement but observed that “the erection of a permanent structure . . . in a private way is generally an infringement of the rights of the owner of the dominant estate.” (Emphasis added).

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<sup>1</sup> “Ab” refers to Appellants’ initial brief; “Rb” refers to Respondents’ response brief.

In *Tide-Water Pipe Co. v Blair Holding Co.*, 42 N.J. 591, 604 (1964), the Court held that a servient owner could not change an easement in a way that makes it more difficult to repair a buried pipe. In reaching this conclusion, the Court wrote:

Equally well recognized is the corollary principle that 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.

Waterfront simply wishes to preserve its right to have “complete enjoyment” of the Easement; it has not imposed an “increase in burden” on the Gargiulos.

Several of the other cases deal with efforts of a dominant owner to expand its rights. *See e.g. Hammett v. Rosenshon*, 26 N.J. 415, 424 (1958) (the dominant owner cannot construct a boat house); *Levinson v. Costello*, 74 N.J. Super. 539 (App. Div. 1962) (invitee may not obstruct passageway by parking car); *Hyland v. Fonda*, 44 N.J. Super. 180, 187 (App. Div. 1957) (dominant owner cannot pave easement); *Lidgerwood Estates v. Public Serv. Elec. & Gas Co.* 113 N.J. Eq. 403 (Ch. 1933) (dominant owner cannot construct a trestle). In this case, in contrast, the dominant owner, Waterfront, does not wish to change the Easement from what it was in 1946.

Other cited cases are irrelevant. *See e.g. Wellmore Builders, Inc. v Wannier*, 49 N.J. Super. 456 (App. Div. 1958) which dealt with the right of the servient owner to sell its property, not with changes made by the servient owner.

## POINT I

### **THE 50' WIDE BY 1250' LONG EASEMENT GRANTED IN THE JEFFERS DEED IS, BY ITS TERMS, TO BE USED FOR "ALL ROADWAY USES AND PURPOSES," AND NOT SIMPLY TO ACCESS VAN BEUREN ROAD**

Point I of the Gargiulos' Brief ignores language in the Jeffers Deed, conflates several phrases in the Easement grant, and fails to address Appellants' argument that an ambiguous easement must be construed "most strongly against the grantor." *Hyland v. Fonda*, 44 N.J. at 187.

The May 14, 1946 Castles to Jeffers deed ("Jeffers Deed") which included the Easement reads in part as follows:

[t]ogether with a right-of-way fifty (50) feet in width **for all roadway uses and purposes . . .**, extending northwesterly from Van Beuren Road and more particularly described as follows:

- 1) along the line of lands of said Mellon, North 42 degrees 01-minute West 1248.62 feet; thence
- 2) South forty-seven degrees fifty-nine minutes West fifty feet . . .

Said right of way is for the benefit of the said Horace C. Jeffers, his heirs and assigns, and his and their servants, agents and invitees in common with others. (Emphasis added).

(Aa365 to Aa366). That deed also provides that:

The party of the second part . . . shall have the right to pass over the existing northerly driveway extending from Van Beuren Road across the premises about to be conveyed by the party of the first part to [the Walkers] for a period of two years from May 15, 1946, or to the date, provided it is prior to May 14, 1948, when a driveway extending to Van Beuren Road is established over the strip of land fifty feet wide, which fifty-foot strip of land the party of the first part has set aside and over which he proposes to establish **a right of way for purposes of ingress and egress to the lands**

**herein conveyed to the party of the second part and to the remaining lands of the party of the first part . . .** (Emphasis added). (Aa366).

Respondents read this language to mean that the sole purpose of the grant of a 50 foot wide right-of-way was to allow use of a 14 foot driveway to be constructed for ingress and egress to Van Beuren Road. (Rb17 to Rb27).

**A. The Easement Language Grants the Right to Use the 50' Wide by 1250' Long Easement for "All Roadway Uses and Purposes" for Ingress and Egress to the "Lands Herein Conveyed . . . and to the Remaining Lands," Not Simply to Access Van Beuren Road**

Respondents' argument ignores much of the language of the Easement grant. First, the right-of-way is to be used "for all roadway uses and purposes . . .," not just a driveway to reach a single street. The word "all" is to be broadly construed. *Shafter v Reo Motors, Inc.* 205 F2d 685, 687 (3d Cir 1963). Second, if the Easement was intended to be coincident with a 14 foot driveway to be later constructed, then there would be no reason to describe the easement by metes and bounds as being 50 feet wide. Third, if the Easement's use were confined to accessing Van Beuren Road by a driveway, it would have read as follows:

together with a *driveway for ingress and egress to Van Beuren Road . . .*  
(italics added by this brief writer).

Fourth, if the right-of-way were intended only to provide ingress and egress to Van Beuren Road, it need not have been 1250 feet long. It could have ended at the base of the Jeffers property.

Moreover, the second reference to the Easement in the Jeffers Deed describes the to-be-constructed driveway as within a right-of-way consisting of a “fifty-foot strip of land” which was set aside “for purposes of ingress and egress to the lands herein conveyed to the party of the second part and to the remaining lands of the party of the first part.” (Aa365 to 67). Thus, the dominant owner was afforded the right to go from one part of its property to another and to go to the “remaining lands” of the grantor using land within a right-of-way.

The references to Van Beuren Road in the Jeffers Deed merely describe way points, not the scope of use which was for “all roadway uses and purposes.” And, to the extent the Easement is ambiguous, it must be construed against Respondents.

In addition, the Jeffers Deed does not read as Respondents suggest. It does not state “in two places that the ‘purpose’ of the Easement was to provide ‘ingress and egress’ from and to ‘Van Beuren Road.’” (Rb18). Rather, the expressly stated purpose is to provide for “all roadway uses and purposes” and to access the lands conveyed and the remaining lands of the grantor.

The dominant owner, Waterfront, has a right to “complete enjoyment,” *Tide-water*, 42 N.J. 591, 604 (1964), of the Easement, not simply to access Van Beuren Road.

### **B. The Easement Includes Use of the Entire 50' Wide Flagstaff**

The notion that the breadth of the 50' wide Easement is confined to a 14' driveway is incompatible with the fact that the Easement is described by metes and bounds, as 50 feet wide, and the legal principle that all words of the grant must be given effect. In *Hyland*, 44 N.J. Super. at 187, on which Respondents rely, the Court distinguished between the width of a right of way that “is definitely fixed by the grant . . . , which means that the dominant owner has use of the ‘entire width,’” and one in which there is an ambiguity. The grant, the *Hyland* Court wrote, did not “specifically describe the intended roadway,” *Id* at 188. Here, the right-of-way is described as 50' in width along a precise course. And by using the terms “driveway” and “right-of-way” in the same instrument, it may be presumed that the grantor understood them to be two different concepts.

The easement in *Grossbard v. Abbey*, 144 N.Y.S. 3d 92 (N.Y. App. 2d, 2021) was specifically limited to ingress and egress and was not “for all roadway uses and purposes.” The other cases which the Gargiulos cite do not involve easements described by metes and bounds. One, *Barrett v. Duchaine*, 149 N.E. 632 (Mass 1925), was later distinguished in *Beaudoin v. Sinodinos*, 48 N.E.2d 19 (Ma. 1943), which held that where an easement is described by metes and bounds, the dominant estate has the right to use the right of way “throughout its entire width.”

### C. Waterfront and Its Invitees May Cross the Easement

Even had the Easement language not included the words, “all roadway uses and purposes,” it still should be constructed to permit the dominant owner to cross to the other side. An easement of way “is available as a general way for all purposes to which the dominant tract might be devoted.” *Caribbean House, Inc. v. N. Hudson Yacht Club*, 434 N.J. Super. 220, 227 (App. Div. 2013). Crossing an easement to be used for “all roadway uses and purposes” in order to travel from one side to the other is consistent with use of an easement as a “general way.”

Respondents’ cases on this issue are all distinguishable. The easement language in the *Mathues v. Providence Friends School, Inc.*, 396 A.2d 707 (Pa. Super. 1978) expressly limited the easement “for a passageway and water course into and from Providence Road.” That easement was not available for “all roadway uses and purposes” as is the Easement in this matter.

In *Man v. Vockroth*, 94 N.J. Eq. 511, 518-19 (E. & A. 1923) (Rb26), the Court construed an easement that expressly described its use to gain access to a particular house on the dominant estate. Had the language been as in the Jeffers Deed, the Court indicated that it would have reached a different conclusion:

The right of way is expressly described or defined as being for passage over the private road to and from--not the lands remaining to the grantor, but a particular portion thereof--the particular dwelling-house of William Man thereon erected.

*Id.* at 522.

This Court, in *Krause v Taylor*, 135 N.J. Super. 481, 485 (App. Div. 1975) distinguished *Man* on this very ground. Reversing a trial court's decision which limited the use of an easement by a dominant owner, the Court wrote:

[N]othing appearing in the grant limits the purposes to which the dominant estate could be put as affecting or restricting the granted right of use for access purposes. Compare the more restricted grants of easements construed in . . . *Man v. Vockroth, supra*, 94 N.J. Eq. at 512 . . .

Waterfront has never argued that other properties owned by the Battista family have easement rights. (Rb26). Rather, it has argued that, as the dominant owners, Waterfront, can cross the Easement in order to access their other properties or that invitees from those other properties can cross the dominant estate if invited as that is a common "roadway use."

Finally, Respondents misreads *Levinson v. Costello*, 74 N.J. Super. 539 (Rb15) which holds that a bona fide social guest of the dominant owner can use an easement - which is precisely what Waterfront desires to do when it invites family members to cross the Easement.

## POINT II

### THE WALKERS DID NOT ABANDON THEIR EASEMENT RIGHTS

The trial Court erred when it concluded that the Walkers permanently abandoned any Easement rights. (Rb27). While the Walkers did not want the Levines to travel by the Walkers' home, it would be inconceivable that the



Walkers would have the intent to abandon their rights to use the Easement to access the conveyed and remaining lands as the Easement provides. Evidence of abandonment must be “unequivocal,” *City Nat’l Bank v. Van Meter*, 59 N.J. Eq. 32, 36 to 7 (1899) (finding no abandonment), and there is no clear and convincing evidence of an unequivocal intention on the part of the Walkers do abandon their easement forever.

Respondents imply that because the Levines had alternative access to their property, the Walkers abandoned their easement. As Judge McKenzie found (Aa 411 to Aa 418), the availability of alternative access is not evidence of abandonment. Non-use will only work an abandonment where the servient owner relies on the non-use. *Joachim v. Belfus*, 107 N.J. Eq. 240, 245 (Ch. 1930).

As Respondents note, the Levine deed did preserve the rights to maintain utilities, that was so because utilities were already in place. Nor is the language in the Levine deed rendered meaningless (Rb30): As a consequence of that deed, the Walkers could prevent the Levines from traveling by their home.

*Penn Central Transportation Corp. v. Pirate Canoe Club, Inc.*, 463 F. 2d 127 (2d Cir 1927) is not distinguishable. The deed to the Canoe Club did not state that “if the buyer ‘was unable to obtain access through other means’ that the seller would transfer the easement with additional land . . .” (Rb34). Rather, the Court

inferred that the seller might wish to transfer additional land and the easement would facilitate that transfer, as is the case here.

Respondents disagree with Waterfront's characterization of the extrinsic evidence as well as the implications drawn from that evidence. (Rb35 to Rb39). Waterfront did not suggest that the easement was the "sole means of access to Lot 6.01" (Rb36). Rather, it stated that the Easement was the sole means of **vehicular access** to lot 6.01. (Ab38; Ab39). The Carey deed (Rb37) is relevant because, if the Walkers had intended to abandon the Easement, they would not have included the entire 1250 foot Easement in the deed to the Careys. And while the Levines were not parties to the *Walker v Hawrylo* matter, (Aa 395 to Aa 418), Judge McKenzie's read the Easement - as does Waterfront - as seeking to preserve the right of access to other properties (the "back lot" (Aa411)), not simply Van Beuren Road.

The proper inquiry is not, in any event, into which of the parties is correct: the proper inquiry is whether or not, given the facts cited by Appellants, was there "clear and convincing evidence" of the intention of the Walkers to abandon the Easement forever.

Notwithstanding Respondents' assertion (Aa40), the use by the Battista family of the Easement which the Court found to be permissive was one of the bases for the Court's finding of abandonment. (Aa214). That discussion appears

in section (d) of the Court's opinion addressed to "... the purported abandonment of the easements," not in the discussion of prescriptive rights. The Court should have focused on Waterfront's use not the Battistas' use.

### **POINT III**

#### **THE GARGIULOS IMPERMISSIBLY ALTERED THE CHARACTER OF THE EASEMENT WITHOUT THE CONSENT OF THE DOMINANT OWNER AND WITHOUT MAKING A STRONG SHOWING OF NECESSITY**

##### **A. The Court Must Consider the Impact of the Gargiulos' Alterations on the Entire Easement**

The Gargiulos alterations (the installation of a 7 foot tall deer fence, the split rail fence, and the impenetrable wall of arborvitaes) have, all parties agree, prevented any access to the Easement from Lot 6.01. (Rb13; Rb43 to Rb44). Respondents argue that since the sole purpose of the Easement is to access Van Beuren Road and because the Easement rights appurtenant to Lot 6.01 have been abandoned, they are free to bar that access.

The Gargiulos have permitted Waterfront to maintain a single driveway access to the Easement from Lot 6.02 in order to reach Van Beuren Road, several hundred feet to the south. This limitation is proper, they argue, notwithstanding the fact that the Easement which is appurtenant to the upper portion of Lot 6.02 includes, according to the express language of the grant, the full 1250 foot long Easement abutting both Lots 6.01 and 6.02. (Aa771 to Aa776).

Thus, irrespective of how the Court resolves the disputes briefed in Points I and II, it is necessary to determine whether the Gargiulos' alterations to the Easement are lawful.

**B. Waterfront is Not Impermissibly Burdening the Gargiulos**

In Point III(B) of their brief, the Gargiulos argue that Waterfront is impermissibly burdening the Gargiulos. The focus is not, in this dispute, on the impact of Waterfront's conduct, but on whether the Gargiulos, the servient owners, can justify altering the Easement. *Levinson v. Costello*, 74 N.J. Super. 539 (Rb44) did apply the "unreasonable interference" test. However, the test to be applied was not adjudicated, and the Court, even using that liberal test, ruled that it was improper to park a car in the 20 foot wide passageway, *id.* at 544, because it would "tend to impair the free and unobstructed use of the way by others."

**C. The Gargiulos Have Changed the Easement**

The Respondents' argument in Point III(C), that they have not changed the Easement, is based on its assumption that the rights extended to the dominant owner to use a 50' wide Easement described by metes and bounds is confined to use of a 14' wide driveway. Since the driveway has not been reduced in size, the Easement, they argue, has not been changed. As discussed above, the Gargiulos' construction fails to afford meaning to all language in the Easement grant. *See pp.* 2 to 3.

It is, in addition, inconsistent with this Court's decision in *Brisgel v. Artis*, 2006 N.J. Super. LEXIS 2148, \*7 to 8 (App. Div. Dec. 19, 2006) holding that a servient owner cannot alter a grass area abutting a driveway within an easement:

The judge was also unquestionably correct in enjoining plaintiff from fundamentally altering the easement without agreement of the other interested parties. Although the alteration, plaintiff's violation of the easement by widening the road into the grassy area in front of the defendants' house, has been corrected, defendants were entitled to assurance that no such action, or similar action, would occur again.

**D Under Any Applicable Test, the Gargiulos' Alterations are Prohibited**

Respondents' case law, cited in Point III(D), does not support their argument. Thus, Respondents omit from their description of *Tide-water*, 42 N.J. at 604, the language that the dominant owner of a property benefitted by an easement has "an implied right to do what is reasonably necessary for its **complete enjoyment**" (emphasis added) without unnecessarily increasing the burden on the landowner. Waterfront simply wishes to preserve its right to have "complete enjoyment" and has not imposed an "increase in burden" on the Gargiulos. Moreover, the Gargiulos have failed to demonstrate that the changes in the Easement are, as the *Tide-water* Court wrote, "reasonably necessary for the landowner's enjoyment of his reserved rights." *Id* at 607.

*Rinaldo v. DeLuca*, 2016 N.J. Super. Unpub. LEXIS 878 (App. Div. Apr. 18, 2016) involved an easement that was not described by metes and bounds and in

that record, there was no evidence as to the impact of the changes made by the servient owner: Here there is undisputed evidence that the Easement has been narrowed from a 50' right-of-way to a 14' driveway, access has been obstructed except for a small driveway on Lot 6.02, the length of the Easement reduced by the installation of an entry gate and a deer grate, 150 feet from the northern end which can only be opened by the Gargiulos, and Waterfront is blocked from crossing the Easement at any location to get to the other side. (Aa 223).

In *Maywood Realty Assoc., LLC v. Jos. L. Muscarelle Inv. Co.*, 2018 N.J. Super. Unpub. LEXIS 1009 (App. Div. May 1, 2018), this Court permitted the installation of bollards within two existing yellow traffic lines in order to prevent trespasses from an adjoining highway because the installation fell within the servient owners express “right to maintain the easement.” *Id.* at 7. In *Metro. Water Dist. of Salt Lake & Sandy v. Sorf*, 542 P.3d 87 (Utah 2023) (Rb47), a pipeline case, the Court declined to apply the “bright line” prohibition on easement changes endorsed elsewhere because all the courts to have adopted the bright-line rule “have done so in the context of ingress/egress easements.” (P40).

It defies common sense to argue that a slight relocation of an Easement requires a strong showing of necessity but a substantial reduction in the size of a right-of-way described by metes and bounds which prevents its use, even to cross to the other side, is acceptable. A change in any easement, even one not described

by metes and bounds, is on this record unlawful. *Kline v. Bernardsville Ass’n, Inc.*, 267 N.J. Super. 473, 480 (App. Div. 1993). (“We merely add that relocation of an easement without the mutual consent of the parties is an extraordinary remedy and should be grounded in a strong showing of necessity.”).

In a decision reiterating its holding in *Kline*, this Court ruled earlier this year that any “modification” without the consent of the dominant owner is prohibited:

[R]elocation of an easement without the mutual consent of the parties is *an extraordinary remedy* and should be grounded in *a strong showing of necessity*. (Emphasis in original).

\* \* \*

In sum, the trial court had sound reasons—grounded in the factual record and consistent with the law—to reject plaintiffs’ request for the “extraordinary remedy” of modification.

*Swan v. Lamanna*, 2024 N.J. Super. Unpub. LEXIS 1, \*20 and \*16 to 17 (App. Div. Jan. 2, 2024).

## CONCLUSION

For the foregoing reasons and the reasons set forth in Appellant’s initial brief, the determination of the trial Court should be reversed.

**SZAFERMAN, LAKIND, BLUMSTEIN  
& BLADER, P.C.**

s/ Arnold C. Lakind

Dated: December 20, 2024

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