JOHN AND LORI WESTERHOLD, Plaintiffs/Respondents/Cross-Appellants, v. NORMANDY BEACH ASSOCIATES, INC., NORMANDY BEACH IMPROVEMENT ASSOCIATION, Defendant/Appellant/Cross-Respondent and TOWNSHIP OF BRICK, NEW JERSEY, Defendant/Respondent,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-2551-22T4 **Civil Action** On Appeal From Order of The Superior Court of New Jersey, Chancery Division, Ocean County Docket No. OCN-C-37-20 Sat Below: Hon. Francis Hodgson, Jr., P.J.Ch.

BRIEF ON BEHALF OF DEFENDANTS/APPELLANTS/CROSS-RESPONDENTS NORMANDY BEACH ASSOCIATES, INC. AND NORMANDY BEACH IMPROVEMENT ASSOCIATION IN SUPPORT OF THEIR APPEAL

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PRELIMINARY STATEMENT

Defendants/appellants Normandy Beach Associates, Inc. ("NBA") and Normandy Beach Improvement Association ("NBIA") appeal the trial court's erroneous order that granted partial summary judgment to plaintiffs/respondents John and Lori Westerhold on their claim for an implied easement appurtenant across NBA's private property and the protective sand dunes constructed thereon. In addition to the burdens and harms that the trial court's decision caused to private property rights, this case also involves an issue of significant public and private importance with far-reaching implications concerning preservation of beach dunes constructed at huge public expense to protect our beaches and coastal communities.

NBA and its predecessors-in-title previously permitted plaintiffs and their predecessors-in-title to access the mean high-water line ("MHWL") of the Atlantic Ocean by walking directly from their property across the NBA property as an alternative to the nearby common access paths used by the rest of the community. That changed after Hurricane Sandy struck in October 2012 and demonstrated the devastating damage that ocean storms can cause to coastal communities. The United States Army Corps of Engineers ("USACE"), the State of New Jersey, and many municipalities spent hundreds of millions of dollars to construct sand dunes along the Jersey Shore as a storm-damage reduction measure. The dunes constructed on and over NBA property are essential to protecting Normandy Beach and other

coastal communities, and required NBA to take appropriate and critical steps to preserve them. Consistent with the USACE design plans and the New Jersey Department of Environmental Protection's ("NJDEP") Coastal Zone Management Rules ("CZM Rules"), NBA determined that to avoid damage to and degradation of the protective dunes it could no longer allow its beachfront property owners, such as plaintiffs, to breach the dunes to access the MHWL. Instead, NBA would limit intrusions across the dunes to the eight street ends, which are no further than 150 feet from any beachfront property owner. In fact, most beachfront owners, including plaintiffs, are only about 50 feet from the nearest beach access point.

NBA was and is fully within its private property rights to limit beach access to these common access points, as this is exactly what the original developers of Normandy Beach intended. The foundational 1925 Map shows that the original owners and sellers of the plaintiffs' property planned to construct a boardwalk, which would have been a physical barrier to east-west crossing, along the beach with common access points; no private access points are shown. Further, neither the chain of title to plaintiffs' property nor the chain of title to NBA's property contains a reference to any such easement. Rather, the express language in the chain of title to plaintiffs' property defines the eastern boundary as ending "two feet west" of a reservation for the planned boardwalk on NBA's property, which NBA's predecessor-in-title specifically withheld for itself.

Nevertheless, unconcerned with preserving the dunes or protecting the broader community from the next super storm or hurricane, and instead indignant over a 50-foot walk, plaintiffs filed suit to force NBA to allow them to walk across the federally funded and environmentally protected dunes. Plaintiffs' claim for an implied easement is essentially built on a single premise: that because their property is in close proximity to the beach, conveyance instruments, boundaries, borders, regulations, and case law does not apply to them. Plaintiffs' claim further rests on the argument that their own self-serving assumptions about a grantor's intent in 1929 should take precedence over the express language used at that time or the host of more reasonable interpretations of what the original parties intended.

The motion record, viewed in the light most favorable to defendants, failed to establish an implied easement appurtenant by the requisite clear and convincing evidence. Indeed, the record had substantial evidence from which a factfinder could reasonably conclude that no such easement was intended. Nevertheless, swayed by the proximity of plaintiffs' property to the ocean, the trial court incorrectly ruled that plaintiffs have an easement across NBA's property and the protective dunes based on its own interpretation of what it thought would have been reasonable for the original seller and buyer to have assumed about beach access in 1929. The trial court's erroneous decision to grant plaintiffs an implied easement that burdens their property rights and threatens the protective integrity of the dunes should be reversed.

PROCEDURAL HISTORY

Plaintiffs filed a complaint on February 28, 2020, against NBA, NBIA, and Brick Township, asserting, in addition to their claim for an implied easement, claims for breach of an express easement, violation of riparian rights, nuisance, trespass, equitable and promissory estoppel, and inverse condemnation. (Da14) Plaintiffs filed an amended complaint on June 29, 2020, adding claims for fraud and a prescriptive easement. (Da154)

Plaintiffs thereafter filed a motion for partial summary judgment as to their implied easement claim on October 1, 2021. (Da9) The trial court held oral argument on November 12, 2021, after which Judge Hodgson ruled from the bench and granted plaintiffs an implied easement to cross NBA's property. (T61:8—T73:20) After entering an order with a mistake as to the relief awarded (referencing the wrong count of plaintiffs' complaint), the trial court entered a corrected order on November 22, 2021 memorializing its oral ruling. (Da2566-Da2567)

In December 2021 NBA sought interlocutory appellate review of the trial court's order to vindicate its property rights and safeguard the protective sand dunes, but NBA's motion for leave to appeal was denied. (Da2573) After additional proceedings and rulings at the trial court, all then-remaining claims were dismissed, and the trial court entered a final judgment order for this case on March 14, 2023. (Da2568-Da2572) This appeal followed.

STATEMENT OF FACTS

The Facts Before the Trial Court

The detailed facts of this dispute are set forth in the parties' extensive submissions before the trial court as reflected in the accompanying multi-volume appendix. In brief, the key facts are as follows:

In 1921, NBA's predecessor-in-title, Coast and Inland Development Company ("C&I"), acquired oceanfront land that became known as Normandy Beach. A subdivision plan for Normandy Beach was created in 1923 and filed with the Ocean County Clerk in 1925 ("1925 Plan"). (Da420) The 1925 Plan included a map ("1925 Map") setting forth multiple blocks and lots, including the two properties that are at issue in this case. (Da420-Da424)

NBA owns one of the properties, known as Normandy Beach ("Normandy Beach" or "NBA Property"). (Da486) NBA's chain of title runs successively and directly from C&I. (Da447-Da501; Da666-Da704). None of the title transfers in the chain from C&I through NBA for the NBA Property contains any language identifying any easement enabling other property owners to access the Atlantic Ocean below the MHWL via Normandy Beach, or implies any similar burden on the NBA Property. (Da447-Da501, Da666-Da704)

Plaintiffs own the other property, known as 526 Ocean Terrace, Normandy Beach, Brick Township, New Jersey (the "Westerhold Property"). (Da405) Their

chain of title runs successively and directly from a 1929 conveyance from C&I to Samuel Berger (the "Berger Indenture"). (Da447, Da405) None of the title transfers in the chain from C&I through plaintiffs for the Westerhold Property contains any express language identifying or granting any easement over any adjacent lots to any owners of the Westerhold Property, nor does any contain language implying such an easement. (Da405; Da447; Da496-504)

Indeed, the 1925 Plan, which is the source of any appurtenant rights for plaintiffs, demonstrates that no such rights should be implied. (Da420) The 1925 Plan shows 74 lots (of which 37 are beachfront) and eight defined entrances to Normandy Beach from each of eight identified avenues. Ibid. Nothing in the 1925 Plan implies direct access from any beachfront lot across the NBA Property to the beach, as such access is shown at the eight street entrances. Ibid.

The 1925 Plan also shows a two-foot wide "Ocean Boardwalk Reservation" ("Reservation") to the west of Normandy Beach and to the east of the beachfront properties, including the Westerhold Property. Ibid. The 1925 Plan does not show access points to or across the Reservation from properties located west of the Reservation, does not expressly identify any easements from properties located west of the Reservation to Normandy Beach, and does not expressly identify any easements from properties located west of the Reservation to the MHWL of the Atlantic Ocean. Ibid. The Reservation was included because, as also shown on the 1925 Plan, C&I

intended to erect a boardwalk on property it retained for itself, and the Reservation provided C&I with access to maintain the boardwalk. (Da914) In recognition of this Reservation, neither the Berger Indenture, nor any of the succeeding conveyances of the Westerhold Property through the deed conveyed to plaintiffs, has an eastern boundary that ends less than two feet west of Normandy Beach. (Da405, Da447, Da501-Da506)

In 1949, Charles Kupper acquired the Westerhold Property through a Final Judgment issued by the Superior Court of New Jersey, Ocean County, Chancery Division. (Da506) Normandy Beach Owners, Inc., the then-owner of Normandy Beach, was not a named party, nor was Normandy Beach one of the properties at issue in the 1949 Final Judgment. (Da506) Nothing in the 1949 Final Judgment, including the description of the property awarded to Kupper, contains anything indicating that the Westerhold Property had any express or implied easements of access across the NBA Property to the MHWL or the Atlantic Ocean. (Da506-Da513) To the contrary, everything relating to the filing of the 1949 Final Judgment, and particularly the specificity with which the property rights were described, indicates that Kupper (only 24 years after the 1925 Plan was filed) had no easement rights over the NBA Property. (Da632-Da640) In addition, the 1949 Judgment contains nothing to suggest an easement across the NBA Property with respect to

the other properties covered by 1949 Judgment, either. (Da506-Da513, Da632-Da640)

After Hurricane Sandy, the NJDEP in partnership with the USACE undertook flood hazard risk reduction measures that included the construction of engineered sand dunes and beach berm projects.[1] As part of those efforts, the USACE required New Jersey to obtain Deeds of Dedication and Perpetual Storm Damage Reduction Easements ("PSDREs") from some property owners, including plaintiffs and NBA, for the construction, operation, and maintenance of the sand dune project. (Da514, Da520) However, the PSDREs do not require the private property owners to grant any public access, nor did the PSDREs take property away from anyone. (Da1115, Da1275-Da1276) Thus, the Westerholds were not given any rights to, or over, the NBA Property as a result of the Westerhold PSDRE. (Da514, Da1115) Likewise, the Westerholds were not granted any rights to, or over, the NBA Property by the NBA PSDRE. (Da514, Da520, Da1115, Da1275-1276) Moreover, there are no provisions in the NBA PSDRE that require NBA to provide private dune overwalk structures to parties (such as plaintiffs) demanding private access to the MWHL, and

[1] State and local authorities have also acted to protect the integrity and effectiveness of these dunes; for example, NJDEP put up signs telling all people to stay off the dunes and Brick has ordinances enforced by fines warning people to stay off the dunes.

the NBA PSDRE expressly provides that "[s]tructures not part of the project are not authorized." (Da520)

In 2018, plaintiffs constructed a private dune walkover directly from their property to the beach, traversing the protective dunes built by the USACE on the NBA Property. (Da1370) Brick Township issued violation notices to plaintiffs and to NBA because the plaintiffs had constructed their walkover without first securing the required permit and demanded that the walkover be removed from their respective properties. (Da784-Da786) Plaintiffs' subsequent permit application was denied because plaintiffs did not have NBA's consent[2] to build the walkover across NBA Property, and NBA removed that portion of plaintiffs' walkover from its property as directed. (Da783-Da787, Da543-Da545) Following the trial court's ruling in their favor on their motion for summary judgment that granted them an implied easement across the NBA Property, plaintiffs again built a private dune walkover from their property over NBA's Property to the beach.

The Trial Court's Erroneous Decision

At the conclusion of oral argument on plaintiffs' motion for partial summary judgment, the trial court issued a verbal ruling that plaintiffs have an implied easement appurtenant over the NBA Property. (T61:8—T73:20) In so doing, the trial

[2] Whether or not NBA, or its predecessors-in-title, previously permitted plaintiffs, or their predecessors-in-title, to cross the NBA Property to the MHWL is of no legal consequence to plaintiffs' claim to an implied easement appurtenant.

court relied on the proximity of the Westerhold Property to the Atlantic Ocean, as well as its own interpretation of what it thought would have been reasonable for the parties to have assumed about access to the Atlantic Ocean in 1929. (T66:19—T72:8)

The trial court's decision was contrary to the record before it, which was to be viewed in the light most favorable to defendants. Even with a view most favorable to plaintiffs, there was a dearth of information on which to imply an easement across the NBA Property. Although there was no evidence to support this, the trial court speculated that the original requirement in the Berger Indenture that a house built on a lot that bordered the NBA Property must cost more and be larger than houses built on lots not bordering the NBA Property somehow meant that the original parties intended there to be an unwritten easement that owners of such bordering lots could cross the NBA Property to the beach. (T68:19-69:18) The trial court similarly speculated, again without evidential support, that the inclusion of terms such as "Surf Fishing" and "Surf Bathing" in a 1920s advertisement for Normandy Beach – activities that were available to all purchasers of property in Normandy Beach and not just purchasers of lots that bordered the NBA Property – implied an intent to include an unwritten easement for owners of only the bordering lots to cross the NBA Property to the beach. (T66:23—T67:7) The trial court further relied on its unsupported supposition that the original purchaser of the Westerhold Property

would not have felt "obligated" to access the beach at one of the many street ends. (T67:8-15) Finally, the trial court concluded that C&I's subsequent decision not to build the planned boardwalk supported its ruling that at the time of the initial conveyance of the Berger Indenture the parties intended an unwritten easement to cross the NBA Property to the beach. (T69:19—T71:1)

LEGAL ARGUMENT

THE TRIAL COURT'S ERRONEOUS ORDER MUST BE REVERSED BECAUSE PLAINTIFFS DID NOT AND CANNOT ESTABLISH AN IMPLIED EASEMENT APPURTENANT BY CLEAR AND CONVINCING EVIDENCE (Da2601-2607, T61:8—T73:20)

A. Standard of Review

When determining a motion for summary judgment, the trial judge must determine whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder 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). Naturally, "conclusory and self-serving statements by one of the parties are insufficient," to create a genuine issue of material fact. Pruder v. Beuchel, 183 N.J. 428, 440-41 (2005). This court is to use "the same standard governing the motion judge's decision," but owes "no special deference to the motion judge's legal analysis." Russi v. City of Newark, 470 N.J. Super. 615, 619-20 (App. Div. 2022) (citations omitted).

B. An Implied Easement Appurtenant Must Be Established by Clear and Convincing Evidence

"An easement appurtenant is created when the owner of one parcel of property (the servient estate) grants rights regarding that property to the owner of an adjacent property (the dominant estate)." Rosen v. Keeler, 411 N.J. Super. 439, 450 (App. Div. 2010) (citing Village of Ridgewood v. Bolger Found., 104 N.J. 337, 340 (1986) (quoting Weber v. Dockray, 2 N.J. Super. 492, 495 (Ch. Div. 1949))).

Appurtenant easements can be express, prescriptive, or implied.[3] See Leach v. Anderl, 218 N.J. Super. 18, 24 (App. Div. 1987). Because implied easements appurtenant arise, if at all, at the time a property owner subdivides and conveys a portion of its property, any analysis of whether such an implied easement exists must focus on the time of that original conveyance. Id at 24-25 (explaining that "implied easements operate on the principle that the parties to the conveyance are presumed to act with reference to the actual, visible and known conditions of the properties at the time of the conveyance and intend that the benefits and burdens manifestly belonging respectively to each part of the entire tract shall remain unchanged").

Determination of an implied easement appurtenant is a fact-specific inquiry that requires clear and convincing evidence. Id. at 26; see also Eileen T. Quigley,

[3] As noted above, this appeal involves only plaintiffs' claim for an implied easement. Plaintiffs' claims for an express easement and for a prescriptive easement were separately dismissed and are not part of NBA and NBIA's appeal.

Inc. v. Miller Family Farms, 266 N.J. Super. 283, 294 (App. Div. 1993) (stating that "implied easements must be established by proofs which are clear and convincing as to all elements"); A. J. & J. O. Pilar, Inc. v. Lister Corp., 38 N.J. Super. 488, 498-500 (App. Div.), aff'd, 22 N.J. 75 (1956) (stating that "the proof of all of the requisite and essential elements of an alleged implied grant should be clear and convincing").

In addition to needing to establish their claimed implied easement by clear and convincing evidence, plaintiffs also were required to meet the summary judgment standard because this issue was before the trial court on their motion for partial summary judgment. Under R. 4:46-2, summary judgment is only appropriate when the "pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged, and that the moving party is entitled to a judgment or order as a matter of law." Plaintiffs were thus required to demonstrate that no reasonable factfinder could conclude that there was not an implied easement. Brill, 142 N.J. at 540.

C. The Record Before the Trial Court Did Not and Cannot Establish an Implied Easement Appurtenant by Clear and Convincing Undisputed Evidence

1. The reasons relied on by the trial court do not establish an implied easement

As noted above, the trial court's analysis of whether plaintiffs had an implied easement appurtenant required a fact-specific inquiry and a determination as to

whether the record established the existence of such an easement by clear and convincing evidence. Moreover, because it was plaintiffs' motion for summary judgment, the trial court needed to determine that no reasonable factfinder could do anything other than decide in plaintiffs' favor. The speculative and unsupported reasons proffered by the trial court in support of its decision failed this standard, and accordingly, the trial court's decision should be reversed.

a. Proximity to the beach

Before examining the specifics of the trial court's opinion, it is important to recognize, as the trial court itself acknowledged, that its ruling was primarily influenced by the proximity of the Westerhold Property to the beach. (T67:8-16, T69:19-23) New Jersey Courts have addressed questions of beachfront access rights before, and proximity to the beach has not, by itself, been the deciding factor. Instead, these courts have recognized the importance of an express easement for access, which necessarily belies the notion that mere proximity is sufficient to imply such an easement.

For example, in Rosen v. Keeler, 411 N.J. Super. at 450, the owners of a single beach lot between a boulevard and the Atlantic Ocean subdivided their lot into a "boulevard lot" fronting the road and an "ocean lot" fronting the ocean. They expressly granted an easement to the boulevard lot so those property owners could access the ocean. The Rosen court noted that this express easement made the

boulevard lot "marketable," implicitly recognizing that without the express easement, the boulevard lot owners would not have ocean access through proximity alone. Id. at 443. That is, the mere fact that the boulevard lot was adjacent to a 'beach' lot (like plaintiffs claim here) did not compel an easement into existence; an express easement was necessary to "make the boulevard lot marketable." Id.

Similar to plaintiffs here, in Levinson v. Costello, 74 N.J. Super. 539 (App. Div. 1962), an oceanfront lot was conveyed to the plaintiffs by reference to a subdivision map. Their lot was among a section of lots that was the recipient of an express easement for access to and from the Atlantic Ocean. Id. at 543. Although Levinson (like Rosen) did not involve an implied easement, the fact that the grantor of the map-described lots found it necessary to expressly convey an easement to non-beachfront lots to allow access to and use of the beach means that proximity alone was not sufficient to guarantee such access through an implied easement.

The notion that mere proximity is a sufficient basis on which to imply an easement is further belied by Bubis v. Kassin, 323 N.J. Super. 601 (App. Div. 1999). In Bubis there were streets running directly from the oceanfront lots to the beach, yet the grantors conveyed an express easement for the oceanfront properties to access the beach in order to "resolve" any "possible doubt" of rights to the beach. As the Bubis court explained:

> . . . plaintiffs' predecessors in title purchased lots in a planned development immediately adjoining the Atlantic Ocean. The map with

> reference to which those lots were sold showed streets running directly from the lots to the beach and an unnamed street next to the Beach and Bluff. Consequently, any person acquiring one of those lots would reasonably have assumed that one of the benefits of property ownership was convenient access to the beach and ocean by means of this street network. Moreover, if there were any possible doubt that access to the ocean and beach was an essential part of the package of benefits which the developers conveyed to plaintiffs' predecessors in title, that doubt would be resolved by the fact that each purchaser acquired not only a lot but also an express easement over the Beach and adjoining Bluff.

Id. at 611.

Thus, as the foregoing cases make clear, nothing about the proximity of the Westerhold Property to the beach provides a basis on which to imply an easement for access across the NBA Property, and the trial court was wrong to give this notion any credence.

b. The required cost and size of a house on the Westerhold Property

In addition to proximity, one of the trial court's specific reasons for its decision was its belief that the requirement that a house built on a lot that bordered the NBA Property must cost more and be larger than houses built on other lots somehow meant that C&I intended there to be an unwritten easement that the owners of the bordering lots could cross the NBA Property to the beach. (T68:19—T69:18) There is simply no logical reason why having a bigger house would have any impact on beach access. Not only was there no affirmative, non-speculative evidence in the record to establish this conclusion, the trial court disregarded other more plausible rationales for these housing requirements. For example, it is reasonable to believe

that C&I intended that houses built on such properties should be bigger and look grander because they would be visible from the planned boardwalk and/or the beach itself and would therefore serve as a positive advertisement for the community. Further, the inclusion of such requirements in the Berger Indenture shows that C&I was sophisticated enough to spell out any easement rights it intended to convey; the fact that C&I did not include any such express easement is thus itself evidence that C&I did not intend to create or convey such an easement, which the trial court failed to properly acknowledge.

c. References to "Surf Fishing" and "Surf Bathing"

Next, the trial court speculated that the inclusion of terms such as "Surf Fishing" and "Surf Bathing" in a 1920s-era advertisement for the sale of lots by C&I implied an intent to include an unwritten easement for owners of bordering lots to cross the NBA Property to the beach. (T66:3—T67:7) The fatal flaw in the trial court's rationale, however, is that the general promotional descriptions of activities available at Normandy Beach were applicable to all owners; availability was not limited to owners of lots bordering the NBA Property, but rather applied generally to all housing lots offered for sale by C&I throughout the Normandy Beach development. (Da425) There is absolutely nothing in this advertisement to suggest, for example, that the purchaser of a lot immediately to the west of the plaintiffs' property would have an implied easement across plaintiffs' property to the beach,

yet that is what would logically be implied by the trial court's decision that the mention of "Surf Fishing" or "Surf Bathing" meant all lots in the development would have direct beach access. In fact, no property owner in the development needed an easement to engage in "surf fishing," "surf bathing," or any of the myriad other activities noted in the advertisement, as all property owners already had ocean access via the eight marked street ends. There is nothing specific about "surf fishing" and "surf bathing" on which to imply an easement across the NBA Property to the beach as opposed to access from the marked street ends instead.

d. Whether Berger felt "obligated" to access the beach via the street ends

The trial court also relied on its unsupported supposition that the original purchaser of the Westerhold Property (Berger) would not have felt "obligated" to access the beach at one of the many street ends. (T67:8-15) Not only is there absolutely no evidence of this in the record, and thus no way for anyone to know Berger's private feelings, but Berger's subjective belief would not be determinative of whether the parties to that initial conveyance – and especially C&I as the original grantor – intended there to be an unwritten easement across the NBA Property to the beach.

e. The boardwalk not being built

The trial court further concluded that C&I's subsequent decision not to build the boardwalk that appeared on the 1925 Map supported its ruling that at the time of

the initial conveyance of the Berger Indenture the parties intended an unwritten easement to cross the NBA Property to the beach. (T69:19—T71:1) However, the subsequent decision not to build the boardwalk is irrelevant to inferring reasonable conclusions about C&I's intent at the time the map was filed. "[W]hen the intent of the parties is evident from an examination of the instrument, and the language is unambiguous, the terms of the instrument govern." Rosen, 411 N.J. Super. 439 (quoting Hyland v. Fonda, 44 N.J. Super. 180, 187 (App Div. 1957)). As defendants' expert Bill Slover explained, "If the boardwalk never was built, it proves, at most, that Coast & Inland, and its successors-in-interest, decided that a boardwalk was either unnecessary or un-welcome. An equally likely explanation for the absence of the boardwalk is that Coast & Inland decided to control access through other means. In any case, a subsequent decision by the owner of Normandy Beach not to build the boardwalk is not evidence of the intent of the parties in 1929." (Da632-Da640)

f. The trial court's erroneous reliance on Lennig v. Ocean City Ass'n

Last but not least, the trial court's reliance on Lennig v. Ocean City Ass'n, 41 N.J. Eq. 606 (1886), was erroneous because Lennig is a use case, not an access case, in which the issue was whether the defendant developer had the right to change the fundamental nature of the "tenting ground" properties at issue. Again, as Slover explains:

> Unlike Lennig, [the Westerholds] have never suffered a change of use of the beach or been denied reasonable access to it; unlike Lennig, in

> which "Tenting Grounds" was written clearly on the land to be used in common, there is no indication on the Filed Map that Berger, or any other beachfront owner, would have a private property right to access the ocean directly from their property; and unlike Lennig, there is an improvement in the common area shown on the Filed Map that indicates that the developer is retaining control of Normandy Beach. For Lennig to apply to the case at hand, the Plaintiffs would have to show that they had been deprived of any reasonable access to Normandy Beach; of course, the Plaintiffs cannot show that to be the case. They simply can walk one and one-half blocks to the designated entrance to the beach at the end of Eighth Avenue.

(Da626)

Lennig stands for the proposition that a conveyance describing land conveyed by reference to a map may imply the creation of a servitude restricting use of the land shown on the map to the indicated uses**.** Id. at 608; see also *Restatement (Third) of Property: Servitudes* § 2.13 ("In a conveyance . . . description of the land conveyed by reference to a map or boundary may imply the creation of a servitude, if . . . (1) A description of the land conveyed that refers to a plat or map showing streets, ways, parks, open space, beaches, or other areas for common use or benefit, implies creation of a servitude restricting use of the land shown on the map to the indicated uses"). The comments to the *Restatement* explain that when a

> deed does not expressly spell out the intent to create the servitude or the terms of the servitude, the same cautionary concerns that enter into other decisions to recognize and enforce servitudes that are not fully expressed in writing should be observed in determining whether to imply servitudes under this section. Servitudes should not be implied on the basis of equivocal map labels or references.

See *Restatement (Third) of Property: Servitudes* § 2.13 cmt. a (emphasis added).

Comments b and c of this section of the *Restatement* further confirm that Lennig is inapplicable to plaintiffs' claim for an implied easement. See id. at cmt. b ("If a map or plat clearly designates an area as devoted to a particular use, the inference that servitudes will be created to implement the planned use is strong. Only a clear statement that the developer retains the right to deviate from the uses shown on the map will ordinarily be sufficient to prevent implication of a servitude under the rule stated in this section.") (emphasis added); cmt. c ("When plat shows more than one street or facility for common use. The purchaser of a lot in a subdivision acquires rights to use all the roads, parks, beaches, open spaces, and other areas designated on the plat for common use and enjoyment. With respect to roads, the implied servitudes ordinarily extend to all roads shown on the plat, but in an appropriate case may be limited to those that are reasonably necessary for the enjoyment of the benefited lot.") (emphasis added).

Here, NBA has never changed the use of the beach as a beach nor prevented plaintiffs from using the beach or accessing the beach from the designated street ends. Accordingly, Lennig does not support plaintiffs' claim for an implied easement appurtenant across the NBA Property.

2. Substantial other aspects of the record disprove an easement

The trial court's myopic focus on these speculative and unsupported reasons obscured the substantial import of other significant portions of the motion record

applicable to the Westerhold Property that demonstrate that plaintiffs' motion for summary judgment on their claim for an implied easement should have been denied.

a. The Berger Indenture

The Berger Indenture (in which plaintiffs' property rights have their genesis) demonstrates the strong indication that C&I desired to retain control over what is now NBA's property to the exclusion of any easement such as the trial court awarded to plaintiffs. For example, in addition to describing the eastern boundary of the Westerhold Property as "two feet west" of an "Ocean Boardwalk Reservation" depicted to the east of the beachfront properties on the 1925 Plan, the Berger Indenture also has a number of other restrictive covenants, such as prohibiting the erection of any building within 40 feet of the boardwalk. (Da425, Da447) As Defendants' title expert Slover concluded with respect to these restrictive covenants and the limited eastern boundary:

> in my opinion, [they] demonstrate a desire on the part of the grantor [C&I] to retain: (i) dominion and control over Normandy Beach; (ii) the right to restrict access to the beach itself; and (iii) some level of control over the quality of housing within the development.[cite]. None of this is consistent with an intent to convey an easement benefiting Plaintiffs' property. (emphasis added)

(Da621) Indeed, even plaintiffs' expert agrees that the Berger Indenture does not establish an implied appurtenant easement for plaintiffs. (Da556)

b. The 1925 Plan

Plaintiffs also concede that the 1925 Plan, which they acknowledge is critical to any analysis of their property rights, does not contain anything to support the easement they seek. (Da966) Rather, plaintiff's expert admits that their claim to an easement is, essentially, "we're on or near the beach":

> Q. Okay. Like, for example, is it fair to derive from this that the [implied easement appurtenant] that the Westerholds are talking about is not specifically addressed in a conveyance?
>
> A. It's not, but the genesis document is, is the map, and the map doesn't specifically textually say that you have rights to the beach. It does not say that there.
>
> * * *
>
> Q. Okay. Is there anything else on the map other than proximity that otherwise suggests an easement other than the proximity?
>
> A. No.

(Da902, Da911) Because, as explained above, mere proximity to the beach is not enough under New Jersey law to establish an implied easement, the 1925 Plan does not support plaintiffs' claim for an implied easement.

c. The 1949 Judgment

In addition, even if documents subsequent to the time of the initial conveyance of the Westerhold Property via the Berger Indenture are considered (which they should not be), the 1949 Judgment does not support plaintiffs' claim for an implied easement. Instead, there are three reasonable inferences to be drawn from the 1949

Judgment: (i) had the parties believed in 1949 that the beachfront lots had the implied easement for direct access that the Westerholds now claim, they would have included specific language in the 1949 Judgment to make that clear; (ii) their failure to do so, or to do anything that would indicate they believed they had such an easement, means that they did not hold such a belief; and (iii) if those beachfront lot owners did not believe that they had such an implied easement nearly 75 years ago, that is further evidence that the current owners of the Westerhold property do not have one. In other words, as Slover cogently explains:

> . . . if Woerner and Kupper thought that their beach-front lots had the direct access now claimed by the Westerholds, it is reasonable to infer that they would have included specific language in the proposed Final Decree to that effect. They cared enough about the right of Normandy Beach property owners to access the beach via the streets that they included that language, even though, presumably, no one had ever questioned the existence of that implied easement based upon the map. Yet given the opportunity to establish the easement now claimed by the Westerholds by naming [Defendants' predecessors in interest] as a defendant in the tax sale foreclosure, or at least inserting language describing the direct access easement in the Final Decree, Kupper and Woerner consciously did not do so. In my opinion such inaction under those circumstances (opportunity and a good faith argument) indicates that Woerner and Kupper did not believe that they had the easement the Plaintiffs now are seeking. And if litigants owning beachfront lots held that view 24 years after the creation of the Normandy Beach development, then that is evidence that C&I did not intend to grant a direct access easement to beachfront owners in 1925.

(emphasis added) (Da635-Da636)

CONCLUSION

The record before the trial court was insufficient to find, by the required clear and convincing evidence, that plaintiffs have an implied easement appurtenant to access the Atlantic Ocean directly from their property over the NBA Property. None of the relevant conveyance documents provides a basis to imply an easement to allow plaintiffs to walk across NBA's property (and over the new protective sand dunes) to reach the Atlantic Ocean. While the trial court was swayed by plaintiffs' "proximity to the beach" argument, which is contrary to New Jersey law, and while the trial court was also able to proffer a subjective interpretation of some of the record evidence as supportive of plaintiffs' claim, the trial court did not and could not find that no reasonable factfinder could decide against plaintiffs' position. In fact, there was substantial evidence in the record from which a reasonable factfinder could easily conclude that at the time of the original conveyance of plaintiffs' property, no such easement was created or intended and thus that plaintiffs do not have an implied easement directly from their property across NBA's property. Plaintiffs' motion for partial summary judgement should therefore have been denied. Accordingly, for the foregoing reasons, NBA and NBIA urge this Court to reverse the trial court's order granting plaintiffs an implied easement appurtenant across NBA's property.

Respectfully submitted,

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Appellants/Cross-Respondents
Normandy Beach Associates, Inc. and
Normandy Beach Improvement
Association

By: *<u>/s/ H. Lockwood Miller, III</u>*
H. Lockwood Miller, III

Dated: August 16, 2023

JOHN AND LORI WESTERHOLD, Plaintiffs/Respondents/ Cross-Appellants, v. NORMANDY BEACH ASSOCIATES, INC., NORMANDY BEACH IMPROVEMENT ASSOCIATION, Defendants/Appellants/Cross-Respondents and TOWNSHIP OF BRICK, NEW JERSEY, Defendant/Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2551-22T4 CIVIL ACTION On Appeal from Order of the Superior Court of New Jersey, Chancery Division, Ocean County Docket No. OCN-C-37-20 Sat Below: Hon. Francis R. Hodgson, Jr., P.J.Ch.

BRIEF OF PLAINTIFFS-RESPONDENTS/CROSS-APPELLANTS JOHN AND LORI WESTERHOLD

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PRELIMINARY STATEMENT

Defendants/Appellants Normandy Beach Associates, Inc. ("NBA") and Normandy Beach Improvement Association ("NBIA") (collectively "Defendants") appealed under the guise that they are protecting the sand dunes constructed on NBA property after Hurricane Sandy hit Normandy Beach. Plaintiffs/Respondents John and Lori Westerhold ("Westerholds") are beachfront homeowners in Normandy Beach, who, along with their beachfront neighbors and predecessors in title, always enjoyed direct access from their home to the beach and the high-water line of the Atlantic Ocean by permissibly crossing over NBA-owned property where the dunes are now constructed.

After the dunes were built, the Westerholds consulted with the New Jersey Department of Environmental Protection ("NJDEP") and installed an at-grade, four-foot-wide dune "walkover" to restore their direct ocean access. Defendants tore down the walkover and installed a fence that blocked the Westerholds' direct access to the ocean.

Defendants' brief pejoratively characterizes the Westerholds as "unconcerned with preserving the dunes or protecting the broader community from the next super storm or hurricane," (Db3) ignoring the fact that every agency responsible for installing, financing, and regulating the dunes confirms private dune walkways are safe, permissible, and cause no harm to the integrity

of the dunes, including NJDEP, the United States Army Corps of Engineers ("USACE"), and the Townships of Brick and Toms River (the location of Normandy Beach). Dune walkovers are part of the fabric of the Jersey Shore, and permitted in nearly every jurisdiction. Defendants want Normandy Beach to be the exception, irrespective of whatever historical property rights the beachfront homeowners may possess or what the NJDEP, USACE, and townships say about their safety.

Defendants argue that an implied easement appurtenant must be proven by clear and convincing evidence, and that the evidence presented did not meet that standard. Defendants' argument is misplaced. This is a map case, where an implied easement appurtenant based on a map referenced in a genesis deed need only be shown by a preponderance of the evidence.

Under any standard, the uncontroverted evidence proved the Westerholds possess an implied easement. The trial court thoroughly examined the 1925 Plan of Normandy Beach when the land was subdivided, the history of use, historical documents, advertisements from the original developers, and photographs of the land in the 1920s showing what a purchaser at that time would have seen in real time. The trial court holistically analyzed the undisputed evidence, applied controlling caselaw, and rightly concluded as a matter of law that the Westerholds possess an implied easement appurtenant to cross the NBA Beach

Lands to directly access the mean high-water line from their property as they and their predecessors in title have done since the land was originally conveyed. No reasonable person could conclude otherwise and this court should affirm the trial court's partial summary judgment order on Count 2.

In addition, this Court should grant the Westerholds' cross-appeal. The trial court erred when it granted Defendants' motions *in limine* substantively dismissing the Westerholds' claims for attorney's fees and punitive damages in contravention of Rule 4:25-8(a)(1), which precludes motions *in limine* that are dispositive in nature. The trial court also erred when it denied the Westerholds' earlier motion for leave to amend that sought permission to add new claims and a new party based on facts uncovered during discovery. That discovery revealed the depths Defendants were willing to go to demonize the Westerholds for simply trying to protect their long-standing property rights in a safe and lawful manner. The proposed new causes of action included claims for malicious prosecution and libel *per se* based on the deposition testimony of NBA president Stephen Kirby, who admitted he knowingly filed a false criminal complaint against John Westerhold after NBA Board members discussed how doing so might give Defendants an advantage in this litigation. The Westerholds respectfully request this Court reverse these orders so the Westerholds may pursue full compensation for the harm caused by Defendants.

STATEMENT OF FACTS

A. The Parties

Normandy Beach is located in Brick Township and Toms River Township, Ocean County. The Westerholds are the fee simple owners of the beachfront home located at 526 Ocean Terrace, Normandy Beach, Brick Township (the "Premises"). (Da405-Da409).

NBA is a for-profit, New Jersey corporation that operates as a community association organized for the benefit of Normandy Beach residents, who are dues paying members. (Da155; Da324-Da325). The NBA "sets strategic direction and provides the long range planning function for the [Normandy Beach] Community in terms of properties, buildings and major capital expenditures," and is "an advisory board to the Normandy Beach Improvement Association, Inc." (Pa114).

NBIA is a New Jersey, not-for-profit entity that promotes the civic interests of the home and real estate owners of Normandy Beach and does "any and all things necessary or incident to the improvement" of Normandy Beach. (Da156; Da265; Pa125). The NBIA is the "operating arm" of the two associations, which manages the summertime activities, performs maintenance, stations lifeguards, posts signage, cleans and maintains the beach lands, and sells beach badges to access the beach and ocean. (Da2072; Pa76).

B. The 1925 Plan of Normandy Beach

In 1925, by way of an approved subdivision plan known as the "Plan of Normandy Beach, Ocean County, N.J.," (the "1925 Plan") the Coast and Inland Development Company ("Coast and Inland") subdivided a large parcel of oceanfront land and created what is now known as "Normandy Beach." (Da420-Da424; Pa330).[1]

The 1925 Plan provided for 25 total blocks, featuring eight blocks fronting the beach and Atlantic Ocean. (Id.). The 1925 Plan also reserved an area for a potential boardwalk and restrooms, and a two-foot "buffer" between the proposed boardwalk and the eastern boundary of the oceanfront lots (collectively, the "NBA Beach Lands"). (Da421; Pa330). The 1925 Plan showed that all oceanfront lots abutted a black solid double line, which abutted a two-foot reservation and proposed "boardwalk," with the potential boardwalk abutting the beach and ocean waters beyond. (Id.). That double solid line remains intact throughout the entirety of Normandy Beach, including all the street ends, and provides a two-foot buffer between the upland lot and the easterly boardwalk reservation. (Da420-Da424; Pa330). There were no breaks in the solid double line at either the oceanfront lots or the street ends. (Id.).

---

[1] An enlarged hard copy print of the 1925 Plan is included the Westerholds' Appendix at Pa330. This enlarged copy was provided to the trial court during summary judgment proceedings. (See T6:18-23).

Contrary to Defendants' assertion, the 1925 Plan does not contain "eight defined entrances to Normandy Beach from each of eight identified avenues" (Db6), and the experts on both sides agreed the 1925 Plan did not limit beach access to the street ends. (Da1968-Da1970; Da1986; Da557).

From 1925 and continuing until approximately 1940, Coast and Inland retained ownership of the NBA Beach Lands and the properties due west thereof, as shown on the 1925 Plan, and it marketed those lots for sale. (Da430; Pa270).[2] Coast and Inland advertised and sold these lots as having "Attractions" including "Surf Bathing" and "Surf Fishing," selling beach access to would-be buyers. (Id.).

The 1925 Plan was referenced in the Indenture to the Westerholds' predecessor, Samuel Berger ("Berger Indenture"), and every intervening title holder between 1929 and 2000.[3] The right to access the NBA Beach Lands has run with the land since Berger acquired it from Coast and Inland in 1929. That

---

[2] A Coast and Inland advertisement from this period was published in Helen H. Bicher's booklet Normandy Beach, A Brief History 1916-2016, (2d ed.). (Da425-Da445; Pa265-Pa285). The advertisement included in Defendants' Appendix does not contain the full advertisement. Plaintiffs included the full advertisement in their Appendix. (Pa270).

[3] See Coast and Inland Indenture to Berger 1929 (Da447-Da449); Berger to Kupper, via 1949 Final Judgment (Da507-Da513); Kupper by Indenture to Spinello 1967 (Da502-Da505); Spinello by Deed to Pedicini 1985 (Da497-Da500); Pedicini by Deed to Westerhold 2000 (Da406-Da409).

right was never modified, abandoned, relinquished, or extinguished in any way and presently resides with the Westerholds. (Da532-Da539).

C. Historic Use of Implied Easement Access

Since the 1920s, all Normandy Beach beachfront homeowners, including the Westerholds' successors in title,[4] crossed over the NBA Beach Lands to access the Atlantic Ocean as a claim of right. (Da2092-Da2093; Da1035; Da1231). Beachfront homeowners had direct footpath beach access over the NBA Beach Lands until 2019 when Defendants first tried to take it away. (Da1035; Da1231; Da2092-Da2093; Pa311-Pa312; Pa328-Pa329).

The Westerholds acquired the Premises in December 2000. (Da406-Da409). Their deed, like those of all their predecessors, references the 1925 Plan. (Da407). Since taking ownership of the Premises, the Westerholds used the right of access to the water by walking across the NBA Beach Lands, without complaint, interference, or obstruction by Defendants. (Da2366; Da2374; Da2394-Da2395).

---

[4] This Court may take judicial notice that five beachfront homeowners in Normandy Beach currently have cases pending in the Superior Court, Chancery Division, Ocean County, where the trial court has granted partial summary judgment and held the homeowners possess an implied easement to cross the NBA Beach Lands to directly access the high-water line. Langenfeld v. Normandy Beach Assoc., OCN-C-85-20; Estate of Corrigan v. Normandy Beach Assoc., OCN-C-138-20; O'Keefe v. Normandy Beach Assoc., OCN-C-151-20; Rodman v. Normandy Beach Improvement Authority, OCN-C-187-22; Davi v. Normandy Beach Assoc., OCN-C-85-20.

D. Perpetual Storm Damage Reduction Easements Retained the Right for Property Owners to Construct Dune Walkovers

Hurricane Sandy struck the Jersey Shore in 2012. The Westerholds' home, the NBA Beach Lands, and thousands of other New Jersey properties were heavily damaged. Following Hurricane Sandy, it fell to the USACE to repair New Jersey's beaches, including private property such as the NBA's.

As a condition precedent for undertaking the beach replenishment project, the USACE required the NBA in 2013 "to grant and convey" an "irrevocable, assignable, perpetual and permanent easement" to NJDEP and Brick Township via a Perpetual Storm Damage Reduction Easement ("PSDRE").[5] (Da521-Da530). The NBA's PSDRE[6] transferred all rights to "[c]onstruct, preserve, patrol, repair, rehabilitate, and replace a public beach and dune system" to NJDEP and Brick Township (Da524), along with the right to "[f]acilitate preservation of the dunes and vegetation through the limitation of access to dune areas." (Da524). In exchange, the NBA (and all property owners with PSDREs) retained the right to "construct a dune overwalk structure" to gain access to the

[5] The USACE required all oceanfront property owners abutting the proposed reconstructed dune to provide a PSDRE. The Westerholds executed a PSDRE on October 22, 2013. (Da515-Da519).

[6] The NBA's original PSDRE, executed on October 18, 2013, was rescinded in 2016 by NJDEP, and reissued with the exact same granting language. (Da521-Da530).

Atlantic Ocean below the mean high-water line, provided these access paths complied with federal, state, and local laws and regulations. (Da525).

Accordingly, NJDEP and Brick Township – not the NBA – took control over repair, maintenance, and access to the dune – a right they will have "in perpetuity." (Da521-Da530).

E. The Westerholds Installed an At-Grade Dune Walkover and Defendants Took Adverse Action Months Later

In November 2018, after consulting the NJDEP and notifying Defendants (see Da767-Da772; Da760-Da765), the Westerholds installed an at-grade, dune walkover which traversed the NBA property, returning them to status quo ante Hurricane Sandy. The Westerholds dune walkover complied with the applicable state environmental regulations, and was reflected in NBA's 2017 Coastal Area Facilities Review Act ("CAFRA") permit. (Da532-Da539).

In 2019, Defendants' representatives "called [Kelley Staffieri, NJDEP's Director of Coastal Engineering] and said they didn't want to allow all the oceanfront property owners to have a path across the dune." (Da1035). On or about July 3, 2019, approximately eight months after the Westerholds installed a NJDEP-compliant at-grade dune walkover enabling access from their home to the area below the mean high-water line, the NBA emailed the Westerholds and other oceanfront homeowners stating—for the very first time since 1925—

members could no longer access the beach from their homes. (Da2546-Da2548; Da2100).

On July 10, 2019, Stephen Kirby, NBA president, sought and obtained notices of violation ("NOVs") against both the NBA itself and the Westerholds with respect to the dune walkovers, alleging the dunes had been constructed without a "Township Clearing and Grading Permit." (Pa286-Pa288). Elissa Commins, Brick Township's Municipal Engineer, testified Kirby asked for the NOVs to be issued, including the NOV against the NBA, "so he could remove the [Westerholds' walkover]." (Da1349-Da1350). When Commins emailed the NOVs to Kirby, she wrote "Oddly enough – the violation you requested is attached for your use" (Pa286), because "[i]t's odd for someone to request a violation on their own property." (Da1343).

The Westerholds retained counsel, who on August 1, 2019, informed Defendants' counsel the Westerholds intended to take legal action if Defendants blocked their direct access to the ocean. (Da543-Da544). NBA Board members discussed how the NBA might gain a litigation advantage in such a case. The "solution:" a possible a criminal complaint alleging that John Westerhold had been seen breaking an NBA-owned fence and trespassing over NBA-owned land. (Da2543).

On August 2, 2019, Defendants removed the Westerholds' at-grade dune walkover and installed a wooden fence that blocked access to the NBA Beach Lands the Westerholds had enjoyed since their purchase of the Premises in 2000. (Da543). On that same date, Defendants' counsel threatened to prosecute the Westerholds if they interfered with the fence and walked on that portion of the NBA property. (Da543).[7] While Defendants represented they were removing the Westerholds' dune walkover because of the NOVs, they did not mention Kirby had asked Brick Township to issue an NOV against the NBA so the Westerholds would also be issued a NOV. (Da1079; Da1342-Da1344; Da1349-Da1350; Pa286).

Four days later, even though no one had actually seen John Westerhold walk over the dunes or break down the NBA-owned fence, Kirby went to the Brick Township Police Station on August 6, 2019, and swore a handwritten complaint on behalf of the NBA averring he personally witnessed John Westerhold break through an NBA-owned fence and "continuously" trespass on NBA-owned land between January and August 2019. (Pa82-Pa87). Kirby

[7] On August 2, 2019, Thomas Hofstetter, an NBA Board member and attorney wrote to counsel for the Westerholds: "NBA demands that your client cease and desist from accessing the NBA property on or about the area in question or otherwise. Additionally, violations of NBA's rights in this regard will be considered acts of trespass and will be dealt with accordingly." (Da543).

testified he was the only witness to the allegations stated in his criminal complaint. (Pa317-Pa320). The handwritten criminal complaint averred:

> Block 1, Lot 1 is the beach in Normandy Beach, owned by the Normandy Beach Association, Inc. on behalf of its members. After the dune replenishment project, two Boards representing membership voted to keep the dunes from residents crossing over the property. They can use 8 public street entrances. Westerhold placed fencing and continuously walks over the property. The Township of Brick sent an NOV to us to remove the fence. We did but Westerhold broke through our beach fence and crosses our property against our wishes. Defiant trespasser, criminal mischief.
>
> [(Pa84).]

The criminal complaint charged John Westerhold with violating N.J.S.A. 2C:17-3A(2) (criminal mischief)[8] and N.J.S.A. 2C:18-3.b (defiant trespasser).[9] (Pa85-Pa86). Brick Township police typed up the complaints and assigned complaint numbers 2019-000798 and 2019-000799. (Id.).

By letter dated August 15, 2019, Municipal Court Judge Joseph Grisanti informed Kirby the court had not "found cause to issue your complaints against

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[8] N.J.S.A. 2C:17-3A(2) provides a "person is guilty of criminal mischief if he: . . . Purposely, knowingly or recklessly tampers with tangible property of another so as to endanger person or property, including the damaging or destroying of a rental premises by a tenant in retaliation for institution of eviction proceedings." Even the lowest grade of Criminal Mischief can impose a penalty of 6-months' imprisonment.

[9] N.J.S.A. 2C:18-3.b provides a person commits the offense of defiant trespasser if "he enters or remains in any place as to which notice against trespass is given" while "knowing that he is not licensed or privileged to do so."

John Westerhold charging in violation of 2C:17-3A(2) and 2C:18-3B. Accordingly, the matter is closed." (Pa87). John Westerhold remained unaware of Kirby's criminal complaint until the day before Kirby's deposition, when Defendants supplied a supplemental document production, which included a copy of the criminal complaint. (Da2543).

Despite having sworn in the criminal complaint he personally witnessed John Westerhold "continuously" walk over NBA-owned property over a nine-month period, Kirby admitted at deposition he never saw John Westerhold do so even once. (Da2542-Da2543) ("I never saw Westerhold do it . . . I did not see Westerhold [cross the fenced portions of the NBA property] himself"). Also, Kirby admitted he willfully made a false statement to law enforcement:

> Q. And when you told the police that you saw him continuously walking over and you certified that was a true statement, what you actually did was you made a false statement to law enforcement; do you understand that?
>
> Mr. Press: Objection.
>
> Yes.
>
> [(Da2542-Da2543).]

Kirby also did not witness John Westerhold break down an NBA-owned fence between January and August 2019; instead, he only saw the fence was broken. (Pa322-Pa323). Because Defendants did not install the fence until

August 2, 2019, Kirby's statement that John Westerhold broken the fence starting in January 2019 could not have been true. (Da543-Da545).

PROCEDURAL HISTORY

A. Pleadings

The Westerholds filed their Amended Complaint in June 2020 against Defendants and Brick Township.[10] (Da155-Da210). Defendants filed answers in July 2020. (Da324-Da369; Da264-Da308).

B. The Westerholds' Motion for Leave to Amend

In March 2021, the Westerholds' moved for leave to amend to file a proposed Second Amended Complaint to (1) add Stephen Kirby as a defendant, and (2) add new causes of action for malicious prosecution, libel *per se*, and violations of the New Jersey Consumer Fraud Act and the New Jersey Civil Rights Act. (Pa1-Pa2; Pa10-Pa77). Defendants cross-moved for partial summary judgment seeking dismissal of the Westerholds' claim for attorney's fees. (Pa149-Pa150).

The trial court held oral argument on the cross-motions on April 16, 2021, and requested supplemental briefing. (1T50:12-1T51:2; 1T52:24-1T55:8).[11] On

[10] The trial court granted summary judgment to Brick Township by order dated April 1, 2022. (Pa258). The Westerholds did not appeal that order and Brick Township is not involved in this appeal.

[11] The transcripts in this matter are cited as follows:

May 21, 2021, the court heard a second round of argument. (See 2T). Ruling from the bench, the trial court (1) denied the Westerholds' motion for leave to amend their complaint, and (2) denied Defendants' cross-motion for partial summary judgment on the Westerholds' claim for attorneys' fees. (Pa246-Pa247; Pa248-Pa249; 2T69:14-2T73:21). In denying Defendants' cross-motion, the trial court explained "I think I am going to reserve on that to the conclusion of the case." (2T71:23-2T74:2; Pa248-Pa249).

The Westerholds sought reconsideration, which the trial court denied without oral argument on June 25, 2021. (Pa250-Pa251; Pa252-Pa253).

C. Partial Summary Judgment in Favor of Westerholds on Count 2 of the Amended Complaint

At the close of discovery, the Westerholds moved for partial summary judgment as to their right to continued use of their implied easement appurtenant (Count 2 of the Amended Complaint). (Da9). Following substantial briefing and oral argument, the trial court granted the Westerholds' motion. The trial

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T = Transcript of November 12, 2021 Summary Judgment hearing and decision

1T = Transcript of oral argument on Motion for Leave to Amend conducted on April 16, 2021

2T = Transcript of oral argument and trial court's decision on Motion for Leave to Amend conducted on May 21, 2021

3T = October 25, 2022 Transcript of Trial and Motions *in Limine*

court issued an oral opinion from the bench on November 12, 2021, followed by an order granting a permanent injunction. (T61:8-T73:20; Da2566-Da2567).

The trial court thoroughly considered all of the evidence submitted by the parties, including the historical map, advertisements, photographs, and history of direct access by the Westerholds, their predecessors in title, and neighbors to arrive at a fair and common-sense analysis of what the intent of Coast & Inland was in 1925. (T66:17-T72:8). Relying on the Restatement of Property and Lennig v. Ocean City Ass'n, 41 N.J. Eq. 606 (1886), the trial court found that potential purchasers who came to the Premises, "a strip of sand in 1925 and saw where a house was – was to be built on the ocean front," and saw "the historic advertisements which brought them to that strip of land, which included references to using the beach and bathing. They saw the map which had nothing interfering with them going directly to the beach, other than the potential for a new boardwalk being constructed, which was never constructed." (T66:20-T67:4).

The trial court also referenced the historical photographs, which provided insight and "really show . . . how [the parties] viewed it." (T67:4-7). "[T]he backyard . . . was essentially the beach . . . clearly they walked directly to the water. There is . . . no common-sense argument that can be made that would indicate that they would somehow feel obligated to walk along what was a paper

street, not even an actual road, to a street end and then walk to the beach or to the water." (T67:2-15).

In reference to the deed restrictions for construction of a house, the trial court noted it was "clearly contemplated that the houses were – were getting something more than the houses that were inland. . . . They were required to build a – a more expensive house," and "were required to have certain requirements as far as setbacks, windows, and fences." (T68:13-T69:1).

As to the never-built boardwalk, the trial court found "there was no reason to build the boardwalk other than for . . . the benefit of the homeowners in the Normandy Beach area. There wasn't any retained commercial interest." (T69:2-5). Thus, "the reason to require a higher payment . . . or higher price to build a house and a higher price for the property itself, in the Court's view, had to be the access to the water. It had to be the direct access to the water." (T69:6-11). Looking at the situation from a common-sense perspective, the trial court posited "[t]he idea that, if you were . . . to draw it out and have them walk down the street to the beach ends, it would be no . . . more benefit than someone who was living on the side street and walking to the beach." (T69:12-16). The trial court further analogized the boardwalk reservation to the reservation of land in Lennig that "the idea that, while they — they reserve the right through the designation of a boardwalk — they didn't build the boardwalk," and that Lennig

stood "for the proposition that there are certain rights that are conveyed with the property, appurtenant to the property that are implied." (T69:24-T70:5).

Thus, because Coast and Inland "never built a boardwalk[,] [t]hey can't now say, well, we had a right to build a boardwalk there, never knowing what the boardwalk would have been, whether it be grade level, whether it would interfere with the access," but because Defendants had the boardwalk there, they can now interfere with ocean access. (T70:20-T71:1). The trial court found the Defendants' arguments had no basis in the law or the historical record:

> The idea that the defendant's retained, . . . through their chain of title, running with the land, the right to direct where the ocean front owners – essentially that's what the argument is – the right to retain – to control where they went to the beach at the street ends when it was clearly – I – I find, in viewing the maps, and the advertisements, and the – the historical documents that were provided, it was very clearly portrayed as being on the ocean front, access to the ocean, access to the beach – direct access to the beach and the ocean. You were paying more for it.
>
> And, the idea that they somehow secretly were able to retain the right to redirect them to a place of their choosing I don't think is – is supported by our – by our contract law. It's not supported – and, I don't think its supported by the – by the documents that were provided to the Court.
>
> [(T71:4-21).]

Lastly, the trial court briefly discussed a Final Judgment from 1949, which led to the transfer of the Premises from Berger to Kupper and mentioned an easement for "harborside" homeowners to access the beach through the public

street ends. (See Da507-Da513; T71:22-T72:8). The court found that this judgment did not "strongly support" direct access for oceanfront homeowners, but rather it "support[ed] the idea that it was not considered" because direct beach access for oceanfront homeowners was already "assumed," "implied," and "accepted," and that the reason to spell out any easement rights in that judgment was because harborside homeowners were not afforded that same assumption. (T71:24-T72:8). Thus, to ensure harborside homeowners could access the beach, an easement needed to be "addressed specifically." (T72:3-6).

Following the trial court's grant of partial summary judgment confirming the Westerholds' implied easement appurtenant, the Westerholds applied for and obtained a permit from Brick Township to build a new at-grade dune walkover. The Westerholds installed their new dune walkover pursuant to that lawful permit on December 9, 2021. Four days after the walkover was installed, Defendants sought interlocutory appellate review of the trial court's partial summary judgment order, which this Court denied on January 6, 2022. (Da2573).

D. Partial Summary Judgment in Favor of Defendants and Voluntary Dismissal of Additional Claims

Defendants subsequently moved for summary judgment on all remaining claims. Following briefing and oral argument, the trial court entered an Order on January 28, 2022, granting Defendants' motion in part and dismissing Counts

1, 5, 7, 8, 9, and 10 of the Amended Complaint.[12] (Pa254-Pa255; Da2568-Da2572). Following that Order, Counts 2, 3, 4 and 6 of the Amended Complaint remained.

On January 28, 2022, the parties stipulated to the dismissal of Count 4 of the Amended Complaint. (Pa256-Pa257; Da2568-Da2572).

On April 29, 2022, Plaintiffs' counsel advised the Westerholds would proceed to trial as to damages only on Count 2 of the Amended Complaint and would voluntarily dismiss Counts 3 and 6 of the Amended Complaint, which the trial court formally dismissed in the Final Judgment. (Pa260; Da2568-Da2572).

E. Trial and the Motions *in Limine*

Even though the trial court previously denied Defendants' cross-motion for summary judgment on the Westerholds' claim for attorney's fees by Order dated May 21, 2021, Defendants filed a motion *in limine* on October 3, 2022 returnable at trial contending that the Westerholds should be precluded from presenting evidence to support a claim for attorney's fees because they could not recover their fees as a matter of law. (See Pa261-Pa262). During oral argument, Defendants added an oral motion to similarly bar evidence related to the Westerholds' claim for punitive damages on the ground that punitive damages were not recoverable as a matter of law. (3T6:6-23; 3T7:18-3T9:2).

[12] None of these Counts are subject of this appeal.

The Westerholds opposed both motions on procedural (R. 4:25-8(a)(1)) and substantive grounds. (3T9:5-3T12:9; 3T14:21-3T15:5; Pa293-Pa299; Pa301-Pa302). The trial court granted both of Defendants' motions which, as set forth in the Final Judgment, had the effect of dismissing these claims on their merits. (3T15:7-3T19:23; Da2568-Da2572).

Following the trial court's ruling on the motions *in limine*, the parties reached a settlement of the Westerholds' damages on Count 2 of the Amended Complaint (implied easement appurtenant). (Da2571-Da2572). However, as the Final Judgment made clear, the settlement agreement (1) did not settle the Westerholds' claims for attorney's fees and/or punitive damages, and (2) did not waive or relinquish any appeal rights that any of the parties may have related to any prior decisions made by the Court, including but not limited to all grants and denials of motions for summary judgment, motions for leave to amend, and motions *in limine*. (Da2572). This appeal followed.

ARGUMENT

I. STANDARDS OF REVIEW

A. Summary Judgment

A trial court's grant or denial of summary judgment is reviewed de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any show that there is no

genuine issue as to any material facts challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). To avoid summary judgment, the non-moving party must submit properly admissible evidence that creates a genuine issue of material fact for each challenged essential element of her claims. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 521, 529, 540 (1995) (citing R. 4:46-2). The evidence must be "sufficient to permit a rational fact finder to resolve the alleged dispute" in the non-moving parties' favor. Id. at 540. Indeed, "a non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Id. at 529. Rather, the disputed fact issues must be substantial, "not imaginary, unreal, or apparent only." Id. at 529-30.

B. Motion to Amend Pleadings

A trial court's ruling on a motion to amend the pleadings is reviewed under the abuse of discretion standard. Fisher v. Yates, 270 N.J. Super. 458, 467 (App. Div. 1994). Pursuant to Rule 4:9-1, parties are permitted to amend a pleading after ninety days of its service, upon a motion for leave to amend the pleading or written consent of the adversary. Leave of the court "shall be freely given in the interest of justice." R. 4:9-1. A motion to amend "will be denied either if prejudice will inure to the party opposing the amendment or if the amended

pleading itself is without legal merit, that is, if the amendment as proposed would be futile." Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 494, 498 (2006).

The moving party does not need to prove the case. The question is whether the allegations, if they can later be proven, are sufficient to satisfy the elements of the proposed cause of action. Kieffer v. High Point Ins. Co., 422 N.J. Super. 38, 43 (App. Div. 2011); see also Donato v. Moldow, 374 N.J. Super. 475, 482 (App. Div. 2005).

C. Motion for Reconsideration

A grant or denial of a motion for reconsideration is reviewed under an abuse of discretion standard. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). Reconsideration should be granted "only in 'those cases which fall into that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative competent evidence . . . ." Castano v. Augustine, 475 N.J. Super. 71, 78 (App. Div. 2023) (quoting Triffin v. SHS Grp., LLC, 466 N.J. Super. 460, 466 (App. Div. 2021) (alterations in original)).

II. THE TRIAL COURT PROPERLY GRANTED PARTIAL SUMMARY JUDGMENT ON COUNT 2 (IMPLIED EASEMENT APPURTENANT) OF THE AMENDED COMPLAINT IN FAVOR OF THE WESTERHOLDS (T61:8-T73:20; Da2566-Da2567)

A. An Implied Easement Appurtenant Must Be Established by a Preponderance of the Evidence

New Jersey courts have long held that an implied easement can be created when a map is referenced in a genesis deed. Lennig v. Ocean City Ass'n, 41 N.J. Eq. 606, 608-09 (1886) (implied easement based on map); Point Pleasant Manor Bldg. Co. v. Brown, 42 N.J. Super. 297, 303 (App. Div. 1956) (affirming trial court's conclusion that developer's intent was evident in the first-filed map); Brunetti v. Old Bridge Mun. Utils. Auth., A-4576-13T3, 2015 WL 5611788, at *1-*2 (N.J. Super. Ct. App. Div. Sept. 22, 2015)[13] (affirming summary judgment based in part on the trial court interpretation of map); see also Wilson v. Miller, 25 N.J. Super. 280, 287 (App. Div. 1953) (affirming summary judgment based on trial court's interpretation of relevant documents in partition action, despite defendants' argument that it constituted a "trial by affidavit").

An implied easement based on a map referenced in a genesis deed must be shown by a preponderance of the evidence. Point Pleasant, 42 N.J. Super. at 303 (rejecting that an easement arising from a map must be shown by a clear

[13] This unpublished opinion was provided to the trial court and is found at Da315.

manifestation of intent); see also State v. E. Shores, Inc., 131 N.J. Super. 300, 311 (Ch. Div. 1974) (finding implied easement from filed map of community without reference to clear and convincing standard).

Defendants incorrectly suggest "an implied easement appurtenant must be established by clear and convincing evidence." (Db12-Db13). While there was a time when prescriptive easements were subject to a "clear and convincing" evidence standard, this is not a prescriptive easement case and that burden of proof was struck down long ago. See Yellin v. Kassin, 416 N.J. Super. 113, 120 (App. Div. 2010).

The trio of cases Defendants rely upon have not only been rejected by modern courts, but are also substantially distinguishable. A.J. & J.O. Pilar, Inc. v. Lister Corp., 38 N.J. Super. 488 (App. Div. 1956) (party to an express easement also sought to claim an easement by implication, causing the Appellate Division to caution that "judicial power" in such circumstances should be "exercised most cautiously" and "these are rational reasons why the proof of the requisite elements of an alleged implied grant should be clear and convincing" under those circumstances); Eileen T. Quigley, Inc. v. Miller Family Farms, Inc., 266 N.J. Super. 283 (App. Div. 1993) (claim for implied easement based on oral representation, which violated the statute of frauds); Leach v. Anderl, 218 N.J. Super. 18 (App. Div. 1987) (easement by necessity).

Here, the trial court did not expressly identify the burden of proof it applied, but the court's opinion makes clear the overwhelming evidence easily satisfied either a clear and convincing or preponderance of the evidence standard. Relying on the 1925 Plan, the Berger Indenture, the historical documents and advertisements, historical photographs, and expert reports "as a whole in a fair and common-sense manner," the trial court correctly concluded the evidence supported the only possible legal result: the Westerholds possessed an implied easement appurtenant. (T63:12-14; T63:24-T64:2).

B. Lennig is Controlling and the Trial Court Properly Relied Upon It

"If a map or plat clearly designates an area as devoted to a particular use, the inference that servitudes will be created to implement the planned use is strong." Restatement (Third) of Property: Servitudes, § 2.13, cmt. b (the "Restatement"). "Only a clear statement that the developer retains the right to deviate from the uses shown on the map will ordinarily be sufficient to prevent implication of a servitude under the rule stated in this section." Id. "The purchaser of a lot in a subdivision acquires rights to use all the roads, parks, beaches, open spaces, and other areas designated on the plat for common use and enjoyment." Id. at § 2.13, cmt. c.

In Lennig v. Ocean City Ass'n, 41 N.J. Eq. 606 (1886), the Court held that a map designating as open space land abutting the homeowner's property and

lying between the homeowner's property and the Atlantic Ocean created easement rights for the homeowner to that open space. Id. at 609. This remains the law.

In Lennig, the property lying between homeowners and the Atlantic Ocean was originally designated on a filed map as an open campground. The developer retained ownership of the land designated for the campground. When the developer later sought to develop the campground for individual bungalows and tried to change the original plat plan to reflect this new use, the plaintiff Lennig successfully complained that he had relied on the filed map that showed the open land. Id. at 609-10. Reasoning the homeowner purchased his property near the ocean in reliance on the filed map, which showed open land between his property and the Atlantic Ocean, the Court wrote:

> Whenever the owner of a tract of land lays it out into blocks and lots upon a map, and on that map designates certain portions of the land to be used as streets, parks, squares, or other modes of a general nature calculated to give additional value to the lots delineated thereon, and then conveys those lots by reference to the map, he becomes bound to the grantees not to use the portions so devoted to the common advantage otherwise than in the manner indicated. . . . From this doctrine it, of course, follows that such distinct and independent private rights in other lands of the grantor than those granted may be acquired, by implied covenant, as appurtenant to the premises granted, although they are not of such a nature as to give rise to public rights by dedication. The object of the principle is, not to create public rights, but to secure to persons purchasing lots under such circumstances those

> benefits, the promise of which, it is reasonable to infer, has induced them to buy portions of a tract laid out on the plan indicated.
>
> [Id. at 608-09 (citations omitted).]

Applying this to the facts in this case, the trial court correctly found the historical deed documents referencing the 1925 Plan established a clear right to an implied easement appurtenant. (T65:24-T73:16). The 1925 Plan, showing the beach and proposed boardwalk in the open space, makes this case a virtual mirror image of Lennig.

Defendants erroneously contend the trial court's reliance on Lennig was error, characterizing Lennig as a "use" case and not an "access" case, which seems to be a distinction without a difference in this context. (Db19-Db21). Lennig did not address the plaintiff's access to the campground adjacent to his property; rather, the Court examined the negative impact the plaintiff's property would suffer if the campground between his property and the Atlantic Ocean was changed to permit permanent structures instead of temporary tents. Lennig, 41 N.J. Eq. at 608. The Court confirmed the issue was not the public right to use the open space designated on the map as a campground. Id. at 609. The plaintiff was not looking to install a tent in the designated open space instead of a building. Rather, he relied on the map to show the area between his property and the sea "were to be kept open." Id.

The Court concurred, finding permanent structures instead of "temporary structures" such as tents "very differently affect[] the complainant's property." Id. at 610. "Instead of a camp, occupied for a few weeks only by tents which will scarcely at all interfere with the prospect or the breeze over an open space 600 feet wide, extending to the ocean," the permanent structures would disrupt the plaintiff's view of the ocean. Ibid. "The contrast between the two situations covers much of the attractiveness of a sea-side resort. If the present scheme of the defendant be carried out, it is certain that the complainant will lose a great portion of those advantages which the association impliedly promised him as inducements to the purchase of its lots." Ibid.

Here, the trial court understood the legal principles, noting Lennig "stands for the proposition that there are certain rights that are conveyed with the property, appurtenant to the property that are implied." (T70:2-5). This case is not about the Westerholds' ability to use the beach as a beach any more than Lennig was about his ability to use the campsite as a campsite. Instead, direct access from the Premises to the ocean is a "great portion of [the] advantages" of living in an oceanfront home and creates rights. Defendants' attempt to distinguish Lennig[14] is unavailing.

[14] Defendants improperly rely on their proposed expert for his legal analysis in an attempt to distinguish Lennig. (Db19-Db20). "It is well-established that [e]xpert witnesses simply may not render opinions on matters which involve a question of

C. The Trial Court Properly Relied on the Totality of Evidence to Find the Westerholds Possessed an Implied Easement Appurtenant.

Defendants contend the evidence the trial court relied upon was insufficient and its reasoning was "speculative and unsupported." (Db14). In criticizing what they call the trial court's "myopic focus" (id. at 21), Defendants miss the forest for the trees. The trial court did not place undue weight on any specific piece of evidence. Instead, as Defendants' own brief acknowledges, the trial court considered the substantial weight of all of the evidence, including the proximity to the beach (id. at 14-16), the housing restrictions in the Berger Indenture (id. at 16-17), historical advertisements (id. at 17-18), Berger's understanding of his right to access the beach (id. at 18), and the boardwalk not being built (id. at 18-19).

Considering the evidence as a whole – which the trial court must do – the trial court correctly concluded the Westerholds have an implied easement appurtenant across the NBA property to the mean high-water line, and no reasonable person could conclude otherwise. (T66:17-T72:8).

1. The 1925 Plan

Coast and Inland had the ability to develop "Normandy Beach" in any way it sought fit, subject to the approval of local government. Its 1925 Plan laid out

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the law." Boddy v. Cigna Prop. & Cas. Cos., 334 N.J. Super. 649, 659 (App. Div. 2000) (internal quotations and citations omitted).

its intentions: there would be residential lots (and homes) abutting its retained beach property; there was the potential to build a boardwalk and restrooms; and the beach would be available for fishing, bathing, and recreational purposes, the very uses one would expect from such property. (Da420-Da424; Da430; Pa270).

While these details are visible in the 1925 Plan, it was filed without attachments, amendments, or covenants regarding future, alternative uses for the areas Coast and Inland retained to wit: the NBA Beach Lands. Importantly, there is no evidence Coast and Inland retained the right to deviate from its 1925 Plan and change the use of the NBA Beach Lands. See Restatement, § 2.13, cmt. b.

Indeed, Coast and Inland's NBA Beach Lands fell squarely within the analytical framework set up by the Lennig Court approximately 40 years earlier. Direct access from an oceanfront residence to the Atlantic Ocean is just the sort of "additional value" Lennig referenced. The 1925 Plan showed the NBA Beach Lands without any obstruction, existing or proposed, that would be constructed on the sandy beach between the oceanfront homeowners and the Atlantic Ocean. Instead, the 1925 Plan showed only open spaces – similar to Lennig – with a place reserved for a future boardwalk, to be placed two feet seaward of its western-most property line, and then just open space to the east – sandy beach, with the surf beyond. Thus, according to the 1925 Plan, the oceanfront

homeowners would be free to traverse directly from their oceanfront properties to the area below the mean high-water line.

The principle laid out in Lennig secured for the Westerholds' predecessor, Samuel Berger, the "benefit[] [of walking from his home directly to the ocean], the promise of which, it is reasonable to infer," and is obviously an inducement to purchase oceanfront "portions of [the] tract laid out on the plan." See Lennig, 41 N.J. Eq. at 609.

The language of the 1929 Indenture from Coast and Inland to Samuel Berger is telling. Coast and Inland used that instrument not only to convey the property, but also to restrict Berger's use of lots he acquired and to impose other requirements. (Da448). At the time of the 1929 conveyance, Coast and Inland retained ownership of the NBA Beach Lands east of the Premises and held many of those lots, as reflected in the 1925 Plan. Accordingly, Coast and Inland asserted itself as the "master" developer in the Indenture, exercising control and mandating: the use of the lot; the type of construction; the minimum value associated with any building; the setback for any building on the site vis-à-vis

the intended boardwalk; and limitations on fencing in order to protect access and visibility to the intended boardwalk and beach. (See Da420-Da424).[15]

For example, the Berger Indenture specified costs all homes on the oceanfront and each lot to the west of those properties were required to bear. (Da448; Da556). There costs were paid as "[a]nother recognition that Beach front lots were special and therefore may enjoy additional appurtenant rights." (Da556). Absent was any restriction of access or use of the proposed boardwalk abutting the property or the remainder of the NBA Beach Lands, literally just several feet seaward.

The repeated references to the 1925 Plan in the Berger Indenture combined with Coast and Inland's advertising – and in particular, its specific inclusion of activities such as "Surf Fishing" and "Surf Bathing" – clearly highlighted a purchaser's unfettered beach access. It is "reasonable to infer" that "those benefits" "induced [Samuel Berger] to buy" the Premises as "laid out on the [1925 Plan]." Lennig, 41 N.J. Eq. at 609.

A reasonable purchaser, relying on the 1925 Plan, would understand an oceanfront lot provided direct access to the beach identical to the access

[15] Additionally, the oceanfront properties cost more to purchase. As the Westerholds' expert concluded, this was "[u]ndoubtedly because of the unique nature of the lots adjoining Normandy Beach." (Da556).

provided by the roads abutting the beach. And as Lennig recognized, access to the beach and ocean from an oceanfront lot is identical to the public access where designated roads abut the property line and the proposed boardwalk, purposefully "calculated to give additional value to the [oceanfront] lots delineated [on the 1925 Plan]; thus [when Coast and Inland] conveyed those lots by reference to the map, [it] bec[ame] bound to the grantees not to use the portions so devoted to the common advantage otherwise than in the manner indicated." Lennig, 41 N.J. Eq. at 608.

That appurtenance – direct access from the Premises to the proposed boardwalk and beach – not only runs with the land, but also applies to Berger's "heirs and assigns" and Coast and Inland's "successors[] and . . . all and every other person or persons whomsoever lawfully claiming or to claim the same." (Da448-Da449). Accordingly, Berger acquired the rights to use not only the roads designated on the 1925 Plan, but also to use the proposed boardwalk and restrooms and the NBA Beach Lands to the east, i.e., "open spaces," for his enjoyment. Restatement, § 2.13, cmt. c.; see also Lennig, 41 N.J. Eq. at 608.

The 1925 Plan showed oceanfront lots directly abutting the open space of the beach. The 1929 conveyance to Berger specifically referenced the 1925 Plan more than once, which "impliedly create[d] private rights in those streets, rights of way, [and] beaches." E. Shores, Inc., 131 N.J. Super. at 311. Berger

purchased the Premises as any reasonable purchaser would, understanding that he had the right to directly access the Atlantic Ocean from the Premises.

For all the reasons set forth above, the 1925 Plan supports the implied easement appurtenant. The analysis and conclusion of Defendants' "expert" contending Coast and Inland intended only street ends be used for beach access is belied by the map itself. The unbrokenness of the buffer line separating the subdivided oceanfront lots from the NBA Beach Lands tells the tale: either there is no access whatsoever to the NBA Beach Lands from any point, including at the street ends, or that unbroken line has no significance beyond illustrating the boundary of what was still held by Coast and Inland and subsequently never used for any purpose.

Nothing in the record suggests access was intended for street ends alone. Such a conclusion undermines the marketing objective of Coast and Inland, to create ocean-front property owners. Further, there is no designation on the 1925 Plan evincing a possible obstruction — such as a fence — to direct access from the Premises to the beach and ocean. Such an impediment would constitute a change in circumstances for which an express designation is required. See Restatement, § 2.13, cmt. b.

While the 1925 Plan clearly creates a right to cross over the NBA Beach Lands to access the high-water line, to the extent the 1925 Plan is deemed to be

ambiguous, that ambiguity must be construed against the Defendants, who are the successors of the Plan's drafter. See Dunn v. English, 23 N.J.L. 126, 127, 129 (1851) (construing a deed against the grantor in a dispute over an obstruction of a private way for which the plaintiff sought "merely the uninterrupted enjoyment of the way").

2. The Location of the Westerholds' Premises

Defendants contend the trial court's ruling "was primarily influenced by the proximity of the Westerhold Property to the beach (T67:8-16, T69:19-23)," and our courts have held "proximity to the beach has not, by itself, been the deciding factor" for questions of beachfront access rights. (Db14). Defendants' argument is wrong for three reasons.

First, the precise location of the Westerholds' property and its proximity to the beach, provides the inalterable linkage to Lennig because location is critical. In Lennig, the fact that the homeowner's property was contiguous to the open space on the map answered the inquiry of "whether [the developer] entered into an implied covenant with the complainant not to use those blocks in the mode now proposed, and has granted to him, as appurtenant to his lots, the benefits to be derived from such restriction." Lennig, 41 N.J. Eq. at 609 (emphasis added). The Lennig Court concluded: "[I]t is certain that the complainant will lose a great portion of those advantages which the association

impliedly promised him as inducements to the purchase of its lots." Id. at 610. And the "advantages" specified by the Lennig Court were specific to properties abutting the open space, not just any property generally within the tract.

Here, the Westerholds' predecessor Samuel Berger enjoyed direct access to the Atlantic Ocean from his own backyard from 1929, as did his successors for upwards of 90 years, continuing with and including the Westerholds. This direct access was an inducement for the purchase of the Premises. Indeed, so said the trial court:

> I find, in viewing the maps, and the advertisements, and the – historical documents that were provided, it was clearly portrayed as being ocean front, access to the ocean, access to the beach – direct access to the beach and ocean . . . [a]nd the idea that [the NBA] somehow secretly were able to retain the right to redirect them to a place of their choosing [the street ends] I don't think it is supported by our contract law – and I don't think its supported by the documents that were provided to the Court.
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> [(T71:10-21).]

Second, proximity was not the sole basis for the trial court's ruling. The trial court explicitly relied on maps, advertisements, and historical documents, which included historical photographs, as well as the Berger Indenture. (Id.).

Third, Defendants proffer New Jersey courts "recognized the importance of an express easement for access." (Db14). Defendants' argument is wholly reliant on three cases where the parties granted an express easement. Levinson

v. Costello, 74 N.J. Super. 539 (App. Div. 1962); Rosen v. Keeler, 411 N.J. Super. 439 (App. Div. 2010); Bubis v. Kassin, 323 N.J. Super. 601 (App. Div. 1999). None of these cases stand for the proposition that an express easement is the only way to convey a property right over the land of another.

Because the Bubis, Levinson, and Rosen courts never had to address whether the location detailed on an incorporated map is sufficient to create an implied easement appurtenant, the cases have no relevance to the question of whether an implied easement exists here. None of these cases addressed, let alone overruled, the long-standing law of implied easements. Moreover, none of these courts addressed whether "proximity" alone was enough to create an implied easement because that issue was not before them.

While Bubis is indisputably an express easement case, the Appellate Division's rationale nevertheless supports the Westerholds' position. The Bubis Court reasoned that "any person acquiring one of these lots [after reading the map] would reasonably have assumed that one of the benefits of property ownership was convenient access to the beach and ocean by means of this street network." 323 N.J. Super. at 611. As this Court then followed, "if there were any possible doubt that access to the ocean and the beach was an essential part of the package . . . that doubt would be resolved by the fact that each purchaser

acquired not only a lot but also an express easement over the Beach and adjoining Bluff." Ibid.

3. The Deed Restrictions in the Berger Indenture Concerning the Cost of a House

Defendants contend the trial court relied too heavily on the Berger Indenture restriction that houses built on oceanfront properties were required to be more expensive than houses on other lots, and that "[t]here is simply no logical reason why having a bigger house would have any impact on beach access." (Db16).

The Berger Indenture required oceanfront houses must cost at least $2500. (Da448). The trial court correctly recognized the "reason [Coast and Inland] were able to require a . . . higher price to build a house and a higher price for the property itself . . . had to be the direct access to the water." (T69:6-11). The trial court did not solely rely on this particular restriction in determining an implied easement appurtenant existed, rather it was simply a piece of the court's common-sense analysis and application. (See T69:19-23).

Defendants also misconstrue the restriction in the Berger Indenture by conflating a more expensive house with a "bigger" and "grander" house. (Db16-Db17). The trial court correctly attributed the "more expensive house" requirement to paying a premium for direct beach access. Defendants'

supposition that more expensive meant "bigger" or "grander" is simply specious. The premium was not for the size of the house; it was for the location.

Lastly, Defendants argue the inclusion of the price restriction demonstrates the sophistication of Coast and Inland, and they extrapolate from there to speculate that a sophisticated seller would never have intended an implied easement. (Db17). That speculation is no more valid than arguing that a sophisticated seller would have expressly made clear that beachfront homeowners had no right to directly access the ocean. More importantly, Defendants' argument would eliminate every implied easement where a grantor is deemed to be "sophisticated," a position our courts have never taken. Rather than eliminate implied easements when the seller is "sophisticated," our courts construe any ambiguity against the drafter. See Dunn, 23 N.J.L. at 127, 129.

4. The Historical Advertisements

Defendants next suggest the trial court placed too much emphasis on the historical advertisements by Coast and Inland that mentioned "Surf Fishing" and "Surf Bathing" in finding that these advertisements "implied an intent to include an unwritten easement for owners of bordering lots to cross the NBA Property to the beach." (Db17). This argument misunderstands the trial court's decision.

The trial court recognized the Coast and Inland advertisements promoted use of the beach, making it "reasonable to infer" that "those benefits" "induced

[Berger] to buy" the Premises as "laid out on the [1925 Plan]." Lennig, 41 N.J. Eq. at 609. Taken together, Coast and Inland's advertisements marketing the use of the beach combined with the 1925 Plan showing the Premises abutting and contiguous to the NBA Beach Lands demonstrated to a reasonable purchaser that they would have direct access to the beach.

5. The Boardwalk Reservation

Relying on pure speculation from their proposed expert, Defendants argue the trial court should have found that Coast and Inland did not build the boardwalk because it "was either unnecessary or un-welcome," or "Coast and Inland decided to control access through other means." (Db19).

This argument flies in the face of Lennig, which stands for the proposition that one cannot reserve an opportunity to construct something and then use that reservation to retain control and restrict the right of access later. See Lennig, 41 N.J. Eq. at 608-09. Moreover, there is nothing on the 1925 Plan or any other document,[16] demonstrating what the boardwalk would have looked like. See Restatement, § 2.13, cmt. b ("[O]nly a clear statement that the developer retains the right to deviate from the uses shown on the map will ordinarily be sufficient to prevent implication of a servitude."). A century later, Defendants cannot now

[16] The 1925 Plan was filed without any attachments, amendments, or any other document explaining anything on the map.

say, as the trial court put it, "well, we had a right to build a boardwalk there, never knowing what the boardwalk would have been, whether it be grade level, whether it would interfere with the access. But, we have a right now to interfere with your access to the ocean because we had . . . that boardwalk right there." (T70:21-T71:1).

Defendants suggest the trial court did not sufficiently consider the opinion of their proposed expert, William Slover, Esquire, but the trial court properly rejected his illogical assertions. For example, Slover initially conceded that, if the property line of the Premises directly abutted the area designated for the boardwalk, Berger then could have claimed "an implied easement to access the Boardwalk." (Da622). Slover later back-peddled, stating Berger could use the boardwalk, but not traverse it to gain "access . . . to the beach and ocean beyond." (Da622). Slover then concluded there could be no easement to the never-built boardwalk because the map indicated an undefined buffer between the boardwalk reservation and Berger's property line. (Da623).

At his deposition, however, Slover could not logically explain his position. Without explanation, Slover asserted there is an easement only at the street-ends but not from the beachfront homes, even though the exact same two-foot buffer and proposed boardwalk transect all of those areas equally. (Da1982). Slover even went so far as to suggest Berger would have been a

trespasser if he entered the boardwalk from anywhere but the street ends – but not a trespasser if he entered at the street ends. (Da1972-Da1974).

Slover admitted Berger and other beachfront homeowners had an easement right to use the boardwalk and bathroom had they been built because they were shown on the map. (Da1982-1983). Slover further admitted that because the beach is also on the map, the beachfront homeowners "can use the beach." (Da1983).

Ironically, Slover's reasoning supports the Westerholds' position, i.e., the Westerholds would have had an easement right to the boardwalk and bathrooms (had they been built) because they are on the 1925 Plan. From there, it follows that there would be an easement right to directly travel to the ocean from the Premises. Therefore, because the 1925 Plan shows the beach, which Coast and Inland marketed as an amenity for "Surf Fishing" and "Surf Bathing," and the Westerholds' property abuts and is contiguous to that beach there is a "strong" "inference that [a] servitude [was] created to implement [that] planned use." Restatement, § 2.13, cmt. b.

6. The Reasonable Purchaser's Expectations Regarding Direct Beach Access

Defendants assert the trial court improperly relied on Berger's subjective belief regarding his beach access. Actually, the trial court analyzed what a reasonable purchaser would have thought as to his beach access, stating:

> If they're purchasing it, . . . the backyard . . . was essentially the beach . . . clearly they walked directly to the water. There is no indication . . . there's no common-sense argument that can be made that would indicate that they would somehow feel obligated to walk along what was initially a paper street, not even an actual road, to a street end and then walk to the beach or the water.
>
> [(T67:8-15).]

7. The 1949 Final Judgment

Defendants argue that the Final Judgment issued to the Westerholds' predecessor, Charles J. Kupper, in 1949 does not support a claim for an implied easement. (Db23-Db24). According to Defendants the only three inferences to be drawn from that judgment are that (1) if oceanfront homeowners in 1949 believed they had implied easements, they would have included express language in the judgment making that clear; (2) the failure to do so means they did not think they had such access; and (3) if they did not think they had such access, the Westerholds do not have such access now. (Db24).

These "inferences" are nonsensical, and are nothing more than Defendants arguing that because there is no express easement, there is no easement at all. Instead, the proper inference to draw from the 1949 Final Judgment, which the trial court correctly did, is that the failure to mention the easement rights of oceanfront homeowners while specifically mentioning easement rights for harborside homeowners was that it was not obvious nor assumed how the harborside homeowners would access the beach. Thus, it was necessary to spell

out such access rights. (See Da557-Da558). The fact that the oceanfront homeowners were not mentioned in that judgment further supports the idea that their direct access was so well understood to exist that it need not be mentioned in the judgment. (Da558). Otherwise, the oceanfront homeowners would have been included in the 1949 Final Judgment and given the same access as the harborside homeowners.

8. Evidence as a Whole

Taking all of this evidence as a whole, the trial court correctly concluded there was more than enough undisputed evidence to satisfy either a preponderance of the evidence or a clear and convincing burden of proof as to the existence of implied easement appurtenant. Accordingly, the trial court's order granting partial summary judgment in favor of the Westerholds on Count 2 of the Amended Complaint should be affirmed.

III. THE TRIAL COURT ERRED IN DENYING THE WESTERHOLDS' MOTION FOR LEAVE TO AMEND AND RECONSIDERATION OF THAT ORDER (Pa246-Pa247; Pa252-Pa253; 2T69:14-2T73:21)

The Westerholds filed a timely motion for leave to amend to add Kirby as a defendant and to add claims for (1) malicious prosecution; (2) libel *per se*; (3) violation of the Consumer Fraud Act; and (4) violations of the Westerholds'

civil rights. The trial court denied the motion in its entirety on May 25, 2021, and on June 25, 2021 denied the Westerholds' motion for reconsideration.[17]

A. Malicious Prosecution

"Malicious prosecution provides a remedy for harm caused by the institution or continuation of a criminal action that is baseless." LoBiondo v. Schwartz, 199 N.J. 62, 72, 89 (2009). "Malicious prosecution requires the plaintiff to prove four elements: (1) a criminal action was instituted by this defendant against this plaintiff; (2) the action was motivated by malice; (3) there was an absence of probable cause to prosecute; and (4) the action was terminated favorably to the plaintiff." Id. at 90 (citation omitted).

Counts 14 and 15 of the Westerholds' proposed Second Amended Complaint set forth allegations which, if later proven to be true, would be sufficient to prove each of these four elements against Kirby and the NBA:

- Paragraphs 257-262 and 270-275 alleged that Kirby, acting individually and on behalf of the NBA, instituted a criminal complaint against John Westerhold by filing a false handwritten complaint with the Brick Township Police Department on August 6, 2019.

- Paragraphs 268 and 281 alleged that Kirby and the NBA were motivated by malice, namely that Kirby was admittedly "incensed" when he filed the criminal complaint. The evidence submitted in support of the motion further established that NBA Board members, after learning the Westerholds intended to take legal action if the NBA blocked their direct access to the

[17] The Westerholds are only appealing the trial court's denial of their motion for leave to amend and motion for reconsideration with regard to the malicious prosecution and libel *per se* claims.

beach, discussed how a criminal complaint against John Westerhold would give them a litigation advantage.

- Paragraphs 264-267 and 277-280 alleged that Kirby and the NBA lacked probable cause to prosecute the criminal complaint because (1) Kirby later admitted at deposition he knew that the statements in the criminal complaint were false and that he did not witness Mr. Westerhold doing the alleged acts, and (2) the Municipal Court concluded there was no probable cause.

- Paragraphs 267 and 280 alleged that the criminal action was terminated favorably to Mr. Westerhold when the Municipal Court concluded there was no probable cause.

(Pa65-Pa72).

The trial court erroneously concluded that the proposed malicious prosecution claim would be futile because John Westerhold could not prove (1) that a criminal action was instituted against him; and (2) that Kirby lacked probable cause.

1. Institution of a Criminal Action

First, the trial court erroneously reasoned that because the Municipal Court judge did not find probable cause to issue a summons, no criminal action was actually instituted against John Westerhold. (1T10:14-19; 1T11:17-23; 1T12:12-13; 2T25:18-2T27:5; 2T70:7–2T71:20). In so doing, the trial court relied solely on Restatement (Second) of Torts § 654, cmt. d and Richmond v. Thompson, 901 P.2d 371 (Wisc. App. 1995).

Under New Jersey law, the "institution of criminal action" element does not require that the criminal matter proceed past the filing stage. Rather, the

"criminal action" element of malicious prosecution "is committed ordinarily by the filing of a criminal complaint with malice and without probable cause" and that "the 'essence' of the tort is the wrongful conduct in making the criminal charge." Muller Fuel Oil Co. v. Ins. Co. of N. Am., 95 N.J. Super. 564, 576 (App. Div. 1967) (citations omitted) (emphasis added). The model jury charge for malicious prosecution provides that "[t]he general rule is that a malicious prosecution action must be predicated upon the institution of a proceeding before a judicial tribunal." Model Jury Charge 3.12(B) at p. 8.

A number of New Jersey cases, in a variety of contexts, have made clear that it is the act of filing a criminal complaint that meets the first element, not what happens procedurally thereafter. For example, a "criminal action" is instituted even if a municipal court or grand jury does not find probable cause in the first instance. See, e.g., Jacobs v. Mark Lindsay & Son Plumbing & Heating, Inc., 458 N.J. Super. 194 (App. Div. 2019) (municipal court did not find probable cause and dismissed charge); Geyer v. Faiella, 279 N.J. Super. 386, 393-95 (App. Div. 1995) (grand jury did not return indictment because of lack of probable cause; Appellate Division concluded "criminal complaint" element was satisfied at pleading stage).

A "criminal action" is also instituted even when the prosecutor administratively terminates a matter without further action. Taffaro v. Taffaro,

DC-0778-10, 2011 WL 6014225, at *1-2 (N.J. Super. Ct. App. Div. Dec. 5, 2011).[18] And in the context of insurance coverage for malicious prosecution claims, the "occurrence" that triggers the indemnity obligation is the filing of the criminal complaint, not any subsequent acts, even though the accused plaintiff's claim for malicious prosecution does not accrue until after he has been exonerated of the underlying criminal charge. Muller Fuel Oil Co., 95 N.J. Super. at 576-79.

No New Jersey case has ever held that the "criminal action" element requires some form of judicial action beyond the filing of the criminal complaint itself. Indeed, a malicious prosecution action "may be predicated upon the institution of other than a judicial action, at least where such proceedings are adjudicatory in nature and may adversely affect legally protected interests." Toft v. Ketchum, 18 N.J. 280, 284 (1955). Moreover, as a policy matter, it should make no difference when the criminal complaint was judicially found to be meritless.

The trial court's reliance on the Restatement (Second) of Torts §654 comment c was misplaced, because (1) no New Jersey case had followed that comment, and (2) the comment is inconsistent with the precedential cases cited

[18] This unpublished case can be found at Pa303.

above. Likewise, the trial court should not have relied on Richmond v. Thompson, 901 P. 2d 371 (Wisc. App. 1995). In Richmond, a state trooper issued a ticket to a driver, a confrontation ensued, and the driver accused the officer of threatening to kill him. The driver later sent letters to the Governor's office, county prosecutor and a district court judge. The driver's allegations were brought to the attention of the state police, which conducted an internal investigation and determined the charges were unfounded. The trooper sued the driver for a variety of claims, including malicious prosecution. Under those circumstances, the court found no criminal action had been instituted. These facts pose quite different circumstances than here. Kirby filed with the police what he admits he knew to be a false criminal complaint, which was given a docket number and considered by a judge, who ultimately rendered a decision on the merits of whether probable cause existed.

2. Lack of Probable Cause

The trial court also erred in concluding Kirby had probable cause to institute criminal charges against John Westerhold. The proposed amended pleading set forth Kirby's admission that he knew the allegations in his criminal complaint were false when he filed them. In addition, the proposed pleading explained the municipal court judge, following review, found no probable cause.

As a result, the proposed Second Amended Complaint more than sufficiently alleged a lack of probable cause sufficient to meet the pleading standard.

At its very core, probable cause is based on whether the affiant "honestly believed" in the truth of the charge at the time it was made. LoBiondo v. Schwartz, 199 N.J. 62, 93 (2009); Shoemaker v. Shoemaker, 11 N.J. Super. 471, 477 (App. Div. 1951). Here, the proposed Second Amended Complaint set forth Kirby's admissions, which sufficiently revealed Kirby did not honestly believe the truth of the charges at the time he wrote them.

Instead of limiting its analysis to the allegations in the proposed pleading, the trial court mistakenly concluded Kirby had probable cause because Kirby relied on what other unidentified persons supposedly told him. No evidence existed for this finding. Moreover, (1) Kirby testified that he was the sole witness to the allegations in the criminal complaint, and (2) the criminal complaint itself did not mention any hearsay, circumstantial evidence, or other witnesses, but was couched entirely in Kirby's own (albeit false) first-person observations. There was no factual or legal basis for the trial court to have considered what others may have told Kirby, especially when Kirby testified he was the lone witness.

The trial court also went beyond the pleading and concluded Kirby's personal observation – which took place on a single occasion from two blocks

away – provided probable cause to file criminal charges against John Westerhold. (2T8:5-2T16:6). Kirby expressly testified: "I got out of my beach chair and looked north and saw someone coming down, I don't know if they were Westerholds' children, friends or Mr. Westerhold himself." (Pa317). He also testified that "They seemed to be younger people. I think one was a man with brown hair. I forget, I thought there were three people. I stood up and looked north. I just remember somebody coming to tell me about it, so I stood up and looked north and witnessed it." (Pa318).

Kirby's testimony does not support the trial court's finding. Not only had Kirby admitted he did not know who he saw from two blocks away, but he specifically testified he did not know if John Westerhold was one of the individuals he saw. Accordingly, the trial court erred when it concluded Kirby's limited personal observation provided probable cause to file criminal charges against a specific person.

The trial court also erred when it failed to consider (1) the criminal complaint claimed Kirby witnessed John Westerhold commit these same crimes "continuously" over an eight-month period, even though Kirby's personal observation was limited to one event concerning persons Kirby could not identify, and (2) Defendants constructed their fence on August 2, 2021, making

it impossible for Kirby to have seen John Westerhold break a then-non-existent fence in the preceding seven months, as Kirby alleged in the criminal complaint.

B. Libel *Per Se*

The elements of defamation are: (1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting at least to negligence by the publisher. Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 585 (2009) (quoting DeAngelis v. Hill, 180 N.J. 1, 13 (2004)). Defamation *per se* exists when one falsely accuses another of having committed a criminal offense. Too Much Media, LLC v. Hale, 413 N.J. Super. 135, 167 (App. Div. 2010) (quoting McLaughlin v. Rosanio, Bailets & Talamo, Inc., 331 N.J. Super. 303, 313-14 (App. Div. 2000)). A showing of damages is not required if the writing is libelous *per se*. MacKay v. CSK Pub. Co., 300 N.J. Super. 599, 616 (App. Div. 1997).

Count 16 of the proposed Second Amended Complaint set forth sufficient allegations that, if later proven true, would be sufficient to prove the elements of libel *per se*:

- Paragraphs 283-288 alleged that on August 6, 2019, Kirby and the NBA filed a written criminal complaint against John Westerhold that contained a false statement.

- Paragraph 285 alleged that this false statement was published to at least one third-party without privilege.

- Paragraphs 286-287 alleged that Kirby and the NBA acted knowingly when filing the false statement.

- Paragraphs 283-285 alleged that the writing imputed the commission of two crimes, namely N.J.S.A. 2C:17-3A(2) (Criminal Mischief) and N.J.S.A. 2C:18-3.b (Defiant Trespasser).

(Pa72-Pa73).

Accepting Plaintiffs' counsel representation that the proposed libel *per se* claim was inextricably intertwined with the malicious prosecution claim, the trial court dismissed it as futile for the same reasons. (2T38:16-39:3; 2T72:24-2T73:2). For the reasons identified above, that ruling was erroneous.

C. The Trial Court Erred in Denying the Westerholds' Motion for Reconsideration

In its statement of reasons attached to the order denying the motion for reconsideration, the trial court did not include any specifics as to why it denied the motion. (See Pa253). However, the issues raised by the Westerholds placed this case in the "narrow corridor" in which reconsideration should have been granted. Castano, 475 N.J. Super. at 78.

The Westerholds' motion for reconsideration properly explained how (1) the trial court should have limited its analysis to the allegations in the proposed pleading, (2) the evidence the trial court considered outside the proposed pleading did not support its original order, and (3) the trial court should not have relied on Restatement (Second) of Torts §654. For the reasons discussed more

thoroughly above, see supra Section III.A, the trial court should have reconsidered and granted the Westerholds' motion.

IV. The Trial Court Erred in Granting Defendants' Motions *in Limine* That Effectively Dismissed the Westerholds' Claims for Attorney's Fees and Punitive Damages (Pa263-Pa264; Pa293-Pa299; Pa301-Pa302; 3T9:5-3T12:9; 3T14:21-3T15:5; 3T15:7-3T19:23)

The trial court scheduled the case for trial on October 25, 2022. The only remaining cause of action at that time was the Westerholds' claim for damages under Count 2 (implied easement appurtenant). The Westerholds sought the following damages on Count 2: (1) compensatory damages, (2) punitive damages, and (3) attorney's fees in excess of one million dollars. The trial court had previously denied Defendants' motion for partial summary judgment on the attorney's fee claim, noting "[w]ith regard to the attorney's fees [cross-motion], the Court's going to deny that. I think I'm going to reserve on that to the conclusion of the case." (2T73:23-2T74:2).

In anticipation of trial, Defendants filed a motion *in limine* to preclude the Westerholds from presenting any evidence that would support their claim for attorney's fees. Defendants argued any factual evidence should be excluded solely because attorney's fees would not be recoverable as a matter of law. Defendants also made an oral motion on the first day of trial, without a written motion, to preclude all evidence of punitive damages on grounds that punitive damages were not recoverable as a matter of law. (3T6:10-23).

The trial court granted the motions *in limine*, which had the effect of dismissing the Westerholds' claims for attorney's fees and punitive damages. (Da2568-Da2572). The trial court granted the motion because it concluded the Westerholds could not recover attorney's fees or punitive damages as a substantive matter. (3T16:15-3T20:2).

Defendants' motions were expressly prohibited by Rule 4:25-8(a)(1), which in relevant part precludes motions *in limine* that are dispositive in nature:

> In general terms and subject to particular circumstances of a given claim or defense, a motion *in limine* is defined as an application returnable at trial for a ruling regarding the conduct of the trial, including admissibility of evidence, which motion, if granted, would not have a dispositive impact on a litigant's case.

As the Appellate Division noted in Cho v. Trinitas Regional Medical Center, 443 N.J. Super. 461, 471 (App. Div. 2015), motions *in limine* that seek the dismissal of claims are a "misuse of the motion *in limine*." Instead, "when granting a motion will result in the dismissal of a plaintiff's case or the suppression of a defendant's defenses, the motion is subject to Rule 4:46, the rule that governs summary judgment motions." Jeter v. Sam's Club, 250 N.J. 240, 250 (2022).

In addition to the inappropriate procedural context, the trial court should have allowed the evidence to be presented at trial and for the claims to be decided on their substantive merits. While "New Jersey follows the 'American

Rule,' which requires litigants to bear their own litigation costs, regardless of who prevails," Kamienski v. State, Dep't of Treasury, 451 N.J. Super. 499, 521 (App. Div. 2017), our Supreme Court "has also recognized several 'exceptions to the American Rule that are not otherwise reflected in the text of Rule 4:42-9' and are not allowed pursuant to a statute, court rule, or contract." Tarta Luna Properties, LLC v. Harvest Restaurant Grp., LLC, 466 N.J. Super. 137, 154 (App. Div. 2021) (quoting In re Estate of Vayda, 184 N.J. 115, 120-21 (2005)). "This category of common law fee-shifting arises out of fiduciary breaches in certain settings, for example the attorney-client relationship or attorneys acting as escrow agents," id. at 154-55 (citing In re Estate of Folcher, 224 N.J. 496, 507 (2016)), or "when the interests of equity demand it." Vayda, 184 N.J. at 123 (quoting In re Estate of Lash, 169 N.J. 20, 43 (2001) (Verniero & LaVecchia, J.J., dissenting) (quoting Red Devil Tools v. Tip Top Brush Co., 50 N.J. 563, 575-76 (1967))).

Whether a court should allow fee shifting in "the interests of equity" depends "on the particular circumstances as they appear from the totality of the evidence presented." Red Devil Tools, 50 N.J. at 573. In Red Devil Tools, the plaintiff sold painting tools (except paint brushes) under a "Red Devil" trademark it had used for decades. Id. at 565-66. The defendant began selling paint brushes using the "Red Devil" trademark and selling in the same stores as

the plaintiff, deliberately making no attempt to distinguish the brands in order to benefit from the plaintiff's reputation. Id. at 566-68, 572-75. The Court determined the equities demanded the plaintiff be entitled under the common law to its attorney's fees because the defendants engaged in "shenanigans" and was "deliberat[e]," "willfull[,] and calculated," in choosing to use the plaintiff's trademark and sell in the same stores. The Court concluded that a grant of fees would protect "plaintiff for the future[,] take care of its actual damage to date, . . . cut into any unjust enrichment of the defendants," and would serve "deterrent purposes." Id. at 573-75.

Here, the Westerholds proffered that the evidence would show Defendants denied consent for walkovers sought by many Normandy Beach beachfront homeowners and forced those homeowners into litigation, which would support an award based on deterrence. The Westerholds also proffered that the evidence would show Defendants' Board Members engaged in wrongful actions and "shenanigans," including: (1) requesting that Brick Township issue a notice of violation against the NBA itself and the Westerholds in order to use that violation as a pretext for removing the Westerholds' walkover, which they did while the Westerholds were lawfully pursuing their property rights and a permit; (2) falsely filing a criminal trespass charge against Mr. Westerhold for the purpose of trying to gain an advantage in Defendants' dispute with the

Westerholds; (3) posting messages in a private Facebook Group encouraging Normandy Beach residents to protest at beachfront owners private homes and to even go onto their private walkways to watch fireworks; (4) intentionally stirring up animosity against the Westerholds and other beachfront homeowners, who were then subjected to confrontations with other Normandy beach residents; and (5) telling rank and file members Defendants had insurance coverage for their legal defense and, therefore, the members would not have to pay anything to fund the defense for as long as it took. (3T9:6-3T12:9; Pa291-Pa299).

The American Rule is not absolute. Courts are permitted to award counsel fees under the common law when a defendant has engaged in "shenanigans" and when a common law fee award will serve as a deterrent against future bad conduct. Here, the risk of continued bad conduct was high because it continued even after the trial court restored the Westerholds' lawful easement rights. A common law award of legal fees would cause Defendants to think twice before continuing their wrongful behavior toward the Westerholds and other beachfront homeowners.

"Punitive damages are sums awarded apart from compensatory damages and are awarded as punishment or deterrence for particularly egregious conduct." Maudsley v. State, 357 N.J. Super. 560, 560 (App. Div. 2003) (citing Leimgruber v. Claridge Assocs., Ltd., 73 N.J. 450, 454 (1977)). "Generally

punitive damages are a limited remedy and must be reserved for special circumstances." Id. at 590-91 (citing Cochetti v. Desmond, 572 F.2d 102, 106 (3d Cir. 1978)).

The New Jersey Punitive Damages Act, N.J.S.A. 2A:15-5.9 et seq. (the "Act") provides that punitive damages can be awarded:

> only if the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions.
>
> [N.J.S.A. 2A:15-5.12(a).]

The Act defines "actual malice" as "intentional wrongdoing in the sense of an evil-minded act," and "wanton and willful disregard" as "a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission." N.J.S.A. 2A:15-5.10. In determining whether punitive damages should be awarded, the finder of fact must consider all relevant evidence, including but not limited to:

> (1) the likelihood, at the relevant time, that serious harm would arise from the defendant's conduct; (2) the defendant's awareness of reckless disregard of the likelihood that the serious harm at issue would arise from the defendant's conduct; (3) the conduct of the defendant upon learning that its initial conduct would likely cause harm; and (4) the duration of the conduct or any concealment of it by the defendant.

[N.J.S.A. 2A:15-5.12(b)(1)-(4).]

"[C]ircumstances of aggravation and outrage, beyond the simple commission of a tort are required. . . ." Pavola v. Mint Mgmt. Corp., 375 N.J. Super. 397, 404-05 (App. Div. 2005). "The standard can be established if the defendant knew of or had reason to know of circumstances which would bring home to the ordinary reasonable person the highly dangerous character of [its] conduct." Dong v. Alape, 361 N.J. Super. 106, 116-17 (App. Div. 2003).

The same evidence the Westerholds proffered as supporting their claim for a common law award of attorney's fees, if accepted as true following the trial, would have supported an award of punitive damages and should not have been barred on a motion *in limine*.

CONCLUSION

The trial court carefully and holistically analyzed the substantial weight of all of the evidence, including (1) the 1925 Map, (2) the historical use of the implied easement right by the Westerholds, their predecessors and their similarly situated beachfront neighbors, (3) the proximity of the Premises to the beach, (4) the housing restrictions in the Berger Indenture, (5) the historical advertisements, (6) the expectations of a reasonable purchaser, and (7) the fact that for a century, nothing was ever done with the "boardwalk reservation." Following its careful analysis, the trial court appropriately reached the only

possible conclusion — the Westerholds possess an implied easement appurtenant to cross directly from their beachfront home to the high-water line of the Atlantic Ocean. The Westerholds respectfully request that this Court affirm that reasoned decision.

The Westerholds also respectfully request that this Court reverse the trial court's orders granting Defendants' motions *in limine* and denying the Westerholds' motion for leave to amend. Under Rule 4:25-8(a)(1), the trial court should have allowed the Westerholds to present their evidence related to attorney's fees and damages at trial for consideration on the merits. On the motion for leave to amend, the proposed Second Amended Complaint adequately alleged facts that met the pleading requirements and the trial court misread evidence it considered outside the proposed pleading. Reversing these decisions will allow the Westerholds a fair opportunity to recover the full scope of the damages they suffered as a result of Defendants' actions.

Respectfully submitted,

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Date: October 5, 2023.
227811616 v16

JOHN AND LORI WESTERHOLD, Plaintiffs/Respondents/Cross-Appellants, v. NORMANDY BEACH ASSOCIATES, INC., NORMANDY BEACH IMPROVEMENT ASSOCIATION, Defendant/Appellant/Cross-Respondent and TOWNSHIP OF BRICK, NEW JERSEY, Defendant/Respondent,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-2551-22T4 **Civil Action** On Appeal From Order of The Superior Court of New Jersey, Chancery Division, Ocean County Docket No. OCN-C-37-20 Sat Below: Hon. Francis Hodgson, Jr., P.J.Ch.

REPLY BRIEF ON BEHALF OF DEFENDANTS/APPELLANTS/CROSS-RESPONDENTS NORMANDY BEACH ASSOCIATES, INC. AND NORMANDY BEACH IMPROVEMENT ASSOCIATION IN SUPPORT OF THEIR APPEAL AND IN OPPOSITION TO CROSS-APPEAL

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PRELIMINARY STATEMENT

This appeal by defendants/appellants/cross-respondents Normandy Beach Associates, Inc. ("NBA") and Normandy Beach Improvement Association ("NBIA") (collectively, "Defendants") is not about the environmental propriety of dune walkovers, although valid concerns about dune integrity and the ability of the dunes to protect against the ravages of ocean storms is an important reason why Defendants care deeply about this case. This appeal is about private property rights and whether there was sufficient evidence in the summary judgment motion record to require the trial court to grant partial summary judgment to plaintiffs/respondents/cross-appellants John and Lori Westerhold ("Westerholds" or "Plaintiffs") on their claim for an implied easement appurtenant across NBA's private property.

This Court should reverse the trial court's erroneous decision to grant summary judgment to Plaintiffs on their claim for an implied easement appurtenant that would allow Plaintiffs to cross NBA's private property and the protective sand dunes constructed thereon. The motion record, when viewed (as it must be) in the light most favorable to Defendants, failed to establish Plaintiffs' entitlement to an implied easement appurtenant by the requisite clear and convincing evidence. Indeed, the record had substantial evidence from which a factfinder could reasonably conclude that no such easement was intended at the time of the initial conveyance

of the subject property. The trial court therefore should not have granted partial summary judgment in favor of Plaintiffs, but instead should have denied Plaintiffs' motion and required Plaintiffs to attempt to prove their claim for an implied easement appurtenant to the factfinder at trial.

Plaintiffs' opposition to Defendants' appeal focuses on their interpretation of that portion of the evidence in the record that they believe supports their claim, but their focus is misplaced; that is not the standard here. This Court is not being asked to review a decision by a factfinder following a trial, in which the inquiry would be whether there was sufficient evidence in the record to support the factfinder's decision. Rather, because the trial court decision at issue here was on Plaintiffs' motion for summary judgment, the correct inquiry is whether there was evidence in the motion record on which a reasonable factfinder could find in favor of the non-moving parties (i.e., Defendants). Accordingly, because there was sufficient evidence in the record to support a finding by the trier of fact that Plaintiffs could not establish an implied easement appurtenant by the required clear and convincing evidence, the trial court should have denied Plaintiffs' motion. Therefore, the order granting Plaintiffs an implied easement appurtenant must be reversed, and the issue sent back for a trial.

Turning to Plaintiffs' cross-appeal, this Court should not reverse the trial court's discretionary ruling to deny Plaintiffs' motion to file an amended complaint

to implead Kirby and assert malicious prosecution and libel per se claims against him. Accepting as true all of the evidence in the motion record proffered in support of Plaintiffs' application, the trial court found that Plaintiffs could not establish essential elements of those claims. The trial court's finding that such claims therefore would be futile was neither incorrect nor an abuse of discretion, and should be upheld.

This Court also should not reverse the trial court's discretionary ruling to preclude Plaintiffs from offering evidence at trial in support of claims for attorneys' fees or punitive damages. Plaintiffs' claim for attorneys' fees does not fall within any recognized basis under New Jersey law, and Plaintiffs' attempt to base their claim on "the interests of equity" and alleged "shenanigans" is not consistent with New Jersey law and would lead to claims for attorneys' fees in virtually every case in New Jersey. Similarly, Plaintiffs' claim for punitive damages fails to meet the high threshold for such a claim required under New Jersey law. Accepting as true all of the evidence in the motion record proffered in support of Plaintiffs' claims for such damages, the trial court found that Plaintiffs had not demonstrated a sufficient basis on which to seek either of them. The trial court's decision was neither incorrect nor an abuse of discretion, and should be upheld.

COUNTER-STATEMENT OF FACTS

The facts relevant to this Court's review of the trial court's order granting Plaintiffs an implied easement appurtenant are set forth in Defendants' opening brief as well as in the detailed motion record below. Defendants take issue with several incorrect factual assertions in Plaintiffs' brief that pertain to that decision. First, Defendants dispute Plaintiffs' contention (Pb6) that the "1925 Plan did not limit beach access to the street ends." Defendants likewise dispute Plaintiffs' assertion (Pb6) that "[t]he right to access the NBA Beach Lands has run with the land since Berger acquired it from Coast and Inland in 1929." In addition, Defendants dispute Plaintiffs' allegation that any PSDRE created any implied easement right for Plaintiffs to cross NBA property to access the beach. Rather than repeat themselves, however, Defendants refer to their opening brief on these issues.[1]

Defendants also take issue with Plaintiffs' mischaracterization of the events surrounding Kirby's 2019 complaint against Westerhold, which forms the basis for

[1] Defendants also dispute Plaintiffs' request (Pb7, fn4) that this Court "take judicial notice that five beachfront homeowners in Normandy Beach currently have cases . . . where the trial court has granted partial summary judgment and held the homeowners possess an implied easement to cross the NBA Beach Lands to directly access the high-water line." Plaintiffs fail to mention that each of those decisions was decided after, and relied on, the very trial court ruling that Defendants are appealing here. Thus, none of those decisions lends any support whatsoever for the trial court's ruling here. In fact, if this Court agrees with Defendants on this appeal and reverses the trial court's implied easement decision in this case, then each of the subsequent decisions in the five "judicial notice" cases cited by Plaintiffs may also need to be revisited and reversed.

Plaintiffs' properly rejected motion to implead Kirby as a defendant and to assert claims against him for malicious prosecution and libel. There is simply nothing in the record – other than Plaintiffs' counsel's accusatory conjecture – on which to establish Plaintiffs' uncited claim (Pb10) that NBA concocted a false complaint against Westerhold in order to "gain a litigation advantage." Rather, as the evidence before the trial court esta blished, each sentence in Kirby's 2019 complaint against Westerhold (Pb12) was either true or was otherwise based on probable cause:

- "Block 1, Lot 1 is the beach in Normandy Beach, owned by the Normandy Beach Association, Inc. on behalf of its members."
    - This is correct. There is no dispute that NBA owns this property on behalf of its members. Plaintiffs do not claim otherwise.
- "After the dune replenishment project, two Boards representing membership voted to keep the dunes from residents crossing over the property."
    - This is correct. There is no dispute such votes occurred after the dune replenishment project. Plaintiffs do not claim otherwise.
- "They can use 8 public street entrances."
    - This is correct. There is no dispute that residents can use the 8 public street entrances to reach to beach. Plaintiffs do not claim otherwise.
- "Westerhold placed fencing and continuously walks over the property."

  - This is correct. Plaintiffs do not, and cannot, deny that they initially placed fencing across NBA's property nor that they repeatedly walked across NBA's property to reach the beach.

- "The Township of Brick sent an NOV to us to remove the fence."
  - This is correct. There is no dispute that Brick Township sent a notice of violation to NBA to remove the fence installed by Plaintiffs on the dunes across NBA's property. Plaintiffs do not claim otherwise.
- "We did but Westerhold broke through our beach fence and crosses our property against our wishes."
  - This is correct. Plaintiffs do not, and cannot, deny that the NBA fence in front of the Westerhold property was broken through, nor that they, or members of their household, were responsible for breaking through the fence and/or for crossing the NBA property – against NBA's wishes – to reach the beach.

Moreover, in order to fashion an alleged basis for their claim against Kirby, Plaintiffs accuse him of saying and doing things that he neither said nor did. For example, contrary to Plaintiffs' assertion (Pb13), Kirby never "swor[e] in the criminal complaint he personally witnessed John Westerhold 'continuously' walk over NBA-owned property over a nine-month period." Likewise, again contrary to

Plaintiffs' assertion (Pb13), Kirby never said that he personally "witness[ed] John Westerhold break down an NBA-owned fence between January and August 2019."

Rather, as Kirby himself explained at his deposition, he was on the beach in early August 2019 when people came up to him and told him that there were people crossing the dune in the area in front of the Westerhold property. (Pa317-Pa318) He stood up from his beach chair and looked north, and personally observed three people, including a man with brown hair, crossing from the Westerhold property over the NBA property where NBA fencing had recently been installed. (Pa317-Pa318) After witnessing this, and after consulting with other NBA board members, he spoke with the police about what he had observed and was advised by the police chief to file a complaint, which he then did. (Pa320-Pa322)

LEGAL ARGUMENT

I. THE TRIAL COURT'S ERRONEOUS ORDER GRANTING SUMMARY JUDGMENT TO PLAINTIFFS FOR AN IMPLIED EASEMENT APPURTENANT MUST BE REVERSED

A. An Implied Easement Appurtenant Must Be Established by Clear and Convincing Evidence

As they did below, Plaintiffs again argue, contrary to New Jersey law, that the burden of proof to establish an implied easement appurtenant is a mere preponderance of the evidence. Plaintiffs are wrong. Neither Point Pleasant Manor Bldg. Co. v. Brown, 43 N.J. Super. 297 (App. Div. 1956), nor State v. E. Shores,

Inc., 131 N.J. Super. 300 (Ch. Div. 1974), says that the standard of proof for an implied easement appurtenant is a preponderance of the evidence.

Rather, as Defendants demonstrated before the trial court and in their opening brief on this appeal, clear and convincing evidence is required to establish an implied easement appurtenant. See Eileen T. Quigley, Inc. v. Miller Family Farms, 266 N.J. Super. 283, 294 (App. Div. 1993) (stating that "implied easements must be established by proofs which are clear and convincing as to all elements"); A. J. & J. O. Pilar, Inc. v. Lister Corp., 38 N.J. Super. 488, 498-500 (App. Div.), aff'd, 22 N.J. 75 (1956) (stating that "the proof of all of the requisite and essential elements of an alleged implied grant should be clear and convincing"). Tellingly, while Plaintiffs argue that the cases on which Defendants rely on this point "have … been rejected by modern courts," Plaintiffs cite nothing to support their allegation.

B. The Record Before the Trial Court Did Not and Cannot Establish an Implied Easement Appurtenant by Clear and Convincing Evidence Sufficient to Meet the Summary Judgment Standard

Because the issue of whether Plaintiffs had an implied easement appurtenant was before the trial court on Plaintiffs' motion for summary judgment, the trial court needed to determine that no reasonable factfinder could do anything other than decide in Plaintiffs' favor in order to grant Plaintiffs' motion. Thus, combined with the requisite burden of proof for the existence of an implied easement appurtenant, this required the trial court to determine that no reasonable factfinder could decide,

viewing the motion record in the light most favorable to Defendants, that Plaintiffs had not established an implied easement appurtenant by clear and convincing evidence. Simply stated, because the motion record contained evidence on which a reasonable factfinder could find that Plaintiffs had not established an implied easement appurtenant by clear and convincing evidence, Plaintiffs' motion should have been denied.

The key to determining whether Plaintiffs have an implied easement appurtenant is whether, at the time of the initial conveyance of the Westerhold property, the original grantor (C&I) and the original grantee (Berger) intended that there was an implied easement for access from the Westerhold Property across the NBA Property to the beach. Leach v. Anderl, 218 N.J. Super. 18, 24-25 (App. Div. 1987) (explaining that "implied easements operate on the principle that the parties to the conveyance are presumed to act with reference to the actual, visible and known conditions of the properties at the time of the conveyance and intend that the benefits and burdens manifestly belonging respectively to each part of the entire tract shall remain unchanged"). That question of intent is, of course, a factual one to be determined by a factfinder. Id. at 26. The trial court's role, then, on Plaintiffs' motion for summary judgment was to determine if a reasonable factfinder could determine that question of original intent in Defendants' favor. Brill v. Guardian Life Ins. Co.

of Am., 142 N.J. 520, 540 (1995). If a reasonable factfinder could do so based on the motion record, Plaintiffs' motion should have been denied.

In their opening brief, Defendants demonstrated why the speculative and unsupported reasons proffered by the trial court in support of its decision were insufficient to require, as a matter of law, a decision in favor of Plaintiffs on their motion. Defendants also identified other evidence in the motion record on which a reasonable factfinder could determine that C&I did not intend that there was an implied easement to cross from the Westerhold Property over the NBA Property to the beach. Taken together, all of this evidence in support of Defendants' position – that the Westerholds do not have an implied easement appurtenant – was more than sufficient to raise an issue as to the original intent and thus require the trial court to have denied Plaintiffs' motion.

1. Lennig is not controlling

Just as the trial court did, Plaintiffs continue to misunderstand the import – or lack thereof – of Lennig v. Ocean City Ass'n, 41 N.J. Eq. 606 (1886). Lennig, which involved an attempt by the defendant developer to change the use of a designated "tenting ground" property shown on a map on which the plaintiff claimed he had relied when purchasing his property, supports the proposition that a conveyance describing land conveyed by reference to a map may imply the creation of a servitude restricting use of the land shown on the map to the indicated uses. Id. at

608-610; see also Restatement (Third) of Property: Servitudes § 2.13 ("In a conveyance . . . description of the land conveyed by reference to a map or boundary may imply the creation of a servitude, if . . . (1) A description of the land conveyed that refers to a plat or map showing streets, ways, parks, open space, beaches, or other areas for common use or benefit, implies creation of a servitude restricting use of the land shown on the map to the indicated uses"). The Lennig court determined that the defendant could not change the denoted use of the "tenting ground" property because such a change would interfere with rights which the plaintiff had otherwise acquired at the time he purchased his property in reliance on the description of that property as "tenting ground." Lennig, 41 N.J. Eq. at 608-610.

Here, there is no dispute that NBA has never changed the use of the beach as a beach nor prevented Plaintiffs from using or accessing the beach from the designated street ends shown on the 1925 Map. If NBA had tried to change the use of the beach as a beach or had tried to preclude Plaintiffs from accessing the beach from the street end-access points shown on the map, then Lennig would be applicable. But that is not the issue at issue on this appeal.

The issue here is whether the original purchaser of the Westerhold Property, at the time of that purchase, acquired an implied right to cross over what is now the NBA Property in order to access the beach. As Plaintiffs themselves concede, nothing about Lennig involved any implied right to cross over the designated

"tenting grounds" in order to access the nearby beach. Therefore, nothing about Lennig can be used to imply that the Westerholds, or any of their predecessors in title, had any implied right to cross over the NBA Property to reach the beach. In other words, Lennig is exactly a "use" case and not an "access" case, and that distinction makes all the difference here.

2. Plaintiffs' "totality of evidence" argument

Plaintiffs devote multiple pages of their brief to explaining those portions of the motion record that they contend support their claim for an implied easement across the NBA Property. At the conclusion of that section of their brief (Pb45), Plaintiffs summarize their argument, saying: "[t]aking all of this evidence as a whole, the trial court correctly concluded there was more than enough undisputed evidence to satisfy either a preponderance of the evidence or a clear and convincing burden of proof as to the existence of implied easement appurtenant."

Plaintiffs' statement captures in a nutshell their misunderstanding of the relevant inquiry here. As discussed above, this Court is not concerned with whether there was sufficient support in the factual record for the trial court's motion decision in Plaintiffs' favor. That is because this appeal does not involve a review of a decision by the factfinder, after the full presentation of evidence, including the opportunity to hear from and judge the credibility of witnesses. Nor does this appeal involve a review of a summary judgment decision in favor of Defendants rejecting

Plaintiffs' claim for an implied easement appurtenant, for which again the relevant inquiry would be whether the motion record contained evidence in favor of Plaintiffs' position. Rather, this appeal involves a ruling on Plaintiffs' motion for summary judgment, for which the proper inquiry is whether there was sufficient evidence in the motion record in favor of Defendants as the non-moving parties. Brill, 142 N.J. at 540.

Thus, it is meaningless to argue that there was "enough undisputed evidence" in the motion record "to satisfy either a preponderance of the evidence or a clear and convincing burden of proof as to the existence of implied easement appurtenant." What is important on this appeal is whether there was evidence in the motion record, after affording all reasonable inference to Defendants as is required under New Jersey law, from which a reasonable factfinder could determine that Plaintiffs did not establish their claim for an implied easement appurtenant by the requisite clear and convincing evidence. Simply stated, because there was such evidence in the record – as more fully identified, discussed, and explained in Defendants' opening brief – Plaintiffs' motion should have been denied, and the trial court's order granting Plaintiffs' motion should be reversed.

II. THE TRIAL COURT CORRECTLY DENIED PLAINTIFFS' MOTION TO AMEND THEIR COMPLAINT TO IMPLEAD KIRBY AND ASSERT CLAIMS FOR MALICIOUS PROSECUTION AND LIBEL PER SE

In their cross appeal, Plaintiffs allege that the trial court incorrectly denied their motion to amend their complaint to implead Kirby and assert claims for malicious prosecution and libel per se. As Plaintiffs acknowledge (Pb22), the trial court's decision is reviewed under an abuse of discretion standard. See Fisher v. Yates, 270 N.J. Super. 458, 467 (App. Div. 1994). While Rule 4:9-1 provides that leave to amend "shall be freely given in the interests of justice," a motion to amend "will be denied either if prejudice will inure to the party opposing the amendment or if the amended pleading is without legal merit, that is, if the amendment as proposed would be futile." Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 495, 498 (2006). The trial court's decision to deny Plaintiffs' motion to amend, made after two rounds of oral argument and extensive briefing, was neither incorrect nor an abuse of discretion and should be upheld.

A. The Trial Court Correctly Rejected Plaintiffs' Malicious Prosecution Claim

Malicious prosecution is not a favored cause of action because citizens should not be inhibited in instituting prosecution of those reasonably suspected of crime. Lind v. Schmid, 67 N.J. 255, 262 (1975). As Plaintiffs recite, a claim for malicious prosecution requires proof of four elements: "(1) a criminal action was instituted by

this defendant against this plaintiff, (2) the action was motivated by malice, (3) there was an absence of probable cause to prosecute, and (4) the action was terminated favorably to the plaintiff." LoBiondo v. Schwartz, 199 N.J. 62, 90 (2009). The trial court correctly determined that Plaintiffs' proposed malicious prosecution claim was futile for two reasons: (1) Plaintiffs could not prove that a criminal action was instituted, and (2) Plaintiffs could not prove that Kirby lacked probable cause.

1. Institution of a criminal action

Relying on the Restatement (Second) of Torts § 654, the trial court found that the written complaint signed by Kirby did not constitute the institution of a criminal action for purposes of satisfying that element of a malicious prosecution claim. While Plaintiffs argue that this is contrary to New Jersey law, New Jersey courts have recognized and followed the Restatement in their analysis of claims for malicious prosecution. See, e.g., Shoemaker v. Shoemaker, 11 N.J. Super. 471 (App. Div. 1951).

As set forth in the Restatement, a criminal proceeding is instituted when:

> (a) process is issued for the purpose of bringing the person accused of a criminal offense before an official or tribunal whose function is to determine whether he is guilty of the offense charged, or whether he shall be held for later determination of his guilt or innocence; or
>
> (b) without the issuance of process an indictment is returned or an information filed against him; or
>
> (c) he is lawfully arrested on a criminal charge.

Restatement § 654. Comment (d) to this section of the Restatement further explains:

> Under the rules stated in Clauses (a) and (b), formal action must be taken by an official or a tribunal before there can be that institution of criminal proceedings which the plaintiff must prove in order to make his accuser liable under the rule stated under § 653. The mere fact that a person has submitted to a magistrate an affidavit for the purpose of securing a warrant for another's arrest or a summons for him to appear at a hearing, does not justify a finding that he has initiated criminal proceedings against the other. The proceedings are not instituted unless and until the warrant or summons is issued.

Id. at cmt. d. (emphasis added). Moreover, as the Restatement of the Law (Third) Liability for Economic Harm § 21 Malicious Prosecution similarly explains:

> Criminal proceedings are not begun, for purposes of this Section, by the filing of a complaint or affidavit. They are begun by the official action of a tribunal or official, namely, the issuance of some form of process that summons the accused party to court. The most common form of such process is a warrant for arrest that brings the accused before a magistrate. In the alternative, a grand jury may indict the accused or a prosecutor may file an information; those steps mark the start of criminal proceedings if no arrest warrant has yet issued. Finally, proceedings can be started by a valid arrest made without a warrant. If the arrest is invalid, no action for malicious prosecution will lie unless a further step is taken, such as bringing the accused before a magistrate for a preliminary hearing. . . .

Simply stated, because the actions alleged by Plaintiffs to have been taken by Kirby do not fall within the parameters set forth by the Restatement for institution of a criminal action, the trial court did not abuse its discretion in finding that Plaintiffs could not establish that essential element of such a claim. Moreover, even if this Court were to agree with Plaintiffs that the trial court's decision on this issue was somehow incorrect, it would merely be harmless error because there were and

are other valid reasons to support the trial court's denial of Plaintiffs' motion to assert a malicious prosecution claim.

2. Lack of probable cause

The other basis for the trial court's finding that Plaintiffs' proposed malicious prosecution claim would be futile, and thus that Plaintiffs' motion to assert such a claim should be denied, is the trial court's determination that Plaintiffs could not establish that Kirby lacked probable cause.

"The essence of [malicious prosecution] is lack of probable cause, and the burden of proof rests on the plaintiff. The plaintiff must establish a negative, namely, that probable cause did not exist." Lind, 67 N.J. at 262-63. As Lind further explains:

> The plaintiff must demonstrate that at the time when the defendant put the proceedings in motion the circumstances were such as not to warrant an ordinarily prudent individual in believing that an offense had been committed. Was the state of facts such as to lead a person of ordinary prudence to believe on reasonable grounds the truth of the charge at the time it was made?

Id. at 263 (citing Mayflower Industries v. Thor Corp., 15 N.J. Super. 139, 152 (Ch. Div. 1951), aff'd, 9 N.J. 605 (1952) and Galafaro v. Kuenstler, 53 N.J. Super. 379 (App. Div. 1958)). In other words, Lind teaches that "probable cause means reasonable grounds for suspicion supported by circumstances sufficiently strong in themselves to warrant an ordinarily cautious man in the belief that the accused is guilty of the offence with which he is charged." Id.

With this standard in mind, the trial court correctly determined that the motion record demonstrated that Plaintiffs could not establish that Kirby lacked probable cause.[2] As the record before the trial court showed, people came up to Kirby and told him in early August 2019 that there were people crossing the dune in the area in front of the Westerhold property, and Kirby personally observed multiple people crossing from the Westerhold property over the NBA property where NBA fencing had recently been installed. (Pa317-Pa318)

There was thus more than sufficient reason for Kirby to believe that the Westerholds were accessing the beach via the unauthorized walkover, as they had openly done before without NBA's consent. Conversely, there was no reasonable basis to think anyone other than the Westerholds would have been using this particular area to access the beach, as to do so they would have had to first walk across the Westerholds' property. After Kirby personally observed what he believed at the time to be either a Westerhold family member or one of their friends going

[2] Plaintiffs argue that the trial court should have only read the allegations in the proposed amended complaint and should have ignored all of the facts and information in the motion record – including facts and information submitted by Plaintiffs themselves. This argument is nonsensical, as Defendants had a right to proffer, and the trial court an obligation to consider, arguments and evidence as to whether the new claims Plaintiffs wished to pursue would be futile. See, e.g., Notte, 185 N.J. at 498 (remanding for consideration of futility of proposed amended complaint because lower court did not do so).

over the dune, he consulted with the NBA board about what to do and then went to the police, who in turn instructed him to file a complaint.

Based on the foregoing information in the motion record, the trial court correctly determined that, at the time Kirby made the complaint to the police, Kirby had probable cause to believe the Westerholds were continuing to access the beach via the unauthorized walkover that had just been blocked off by NBIA on NBA's property, and then trespassing over NBA property. (1T 22:22—25:23; 2T 22:25—23:7) Thus, the trial court correctly determined that Plaintiffs could not establish that Kirby lacked probable cause, and thus Plaintiffs' proposed malicious prosecution claim against Kirby was futile.

Plaintiffs do not address in their brief this information that Kirby legitimately had, or what Kirby reasonably believed, or even what reasonable inferences were to be drawn from those facts. Rather, Plaintiffs focus on what they erroneously claim Kirby supposedly lied about <u>seeing</u>.

In particular, Plaintiffs allege that Kirby's complaint to the police is based on a certification in which he "lied" about seeing Westerhold break through the fence and trespass over NBA property. The flaw in Plaintiffs' argument, however, is that Kirby never certified in the criminal complaint that he saw Westerhold do these things.

The trial court recognized this fatal flaw in Plaintiffs' proposed malicious prosecution claim, and correctly concluded that Plaintiffs could thus not establish that Kirby lacked probable cause:

> Kirby reports that he observed from others, that he observed unidentified occupants of the house damage the fence. And he was aware of the Brick Township before that fencing had been placed. As I indicated, PC can be – probable cause can be based on hearsay and accumulation of circumstantial evidence. And so I'm satisfied that, that that statement is not untrue and that it does have – it does include probable cause. And more importantly, the plaintiffs hasn't [sic] demonstrated as an element, even prima facie, that there is no probable cause based on, on that particular element.
>
> * * *
>
> Probable cause is determined separately by this Court. And I'm satisfied that there was probable cause based on that affidavit for the charges as I indicated.
>
> (1T 24:7-18, 1T 25:20-23)
>
> And I – I've heard the arguments of counsel. It is my view that at the time he – he – he – he appeared at – to the sign the – attempt to sign the summons, I believe that, based on his knowledge and what was told to him and what he observed, that there was sufficient probable cause, given circumstantial evidence, that he believed – or that – that the Westerholds were trespassing.
>
> (2T 22:25—23:7)

As a result, the trial court correctly found that allowing Plaintiffs to assert a malicious prosecution claim would be futile and properly denied their motion.

3. Lack of Malice

While the trial court did not base its decision on this, Plaintiffs' proposed malicious prosecution claim was also futile because of their inability to establish that Kirby acted with malice, which is the "intentional doing of a wrongful act, without just cause or excuse." See Izzo v. Viscount, 74 N.J.L. 65, 67 (1906). As explained in the preceding section, Kirby did not lie in his written complaint, but instead recounted the history of the parties' property dispute, what he was told by others, and what he believed to be the case – that Plaintiffs broke the fence and crossed NBA's property. Because Kirby had reason to believe, based upon the facts and circumstances and history of the dispute between the parties, that the information in the complaint was correct, he did not intentionally commit a wrongful act without just cause. Therefore, because Plaintiffs failed to meet their burden of establishing this element of their proposed claim against him (including presenting nothing to the trial court to support their attorney's assertion that anyone concocted a false report to secure a litigation advantage), their claim was futile for this reason as well.

B. The Trial Court Correctly Rejected Plaintiffs' Libel Per Se Claim

During oral argument before the trial court, Plaintiffs conceded that their libel per se claim was based on the same alleged conduct as, and thus inextricably intertwined with, their proposed malicious prosecution claim, and Plaintiffs do not disavow that position on this appeal. Based on that concession, and based on its

discretionary determinations that Plaintiffs' malicious prosecution claim was futile (as explained above) in part because Plaintiffs could not show that Kirby lacked probable cause and thus did not make a false statement to the police, the trial court correctly determined that Plaintiffs' libel per se claim was likewise futile.

Although the trial court did not decide this issue, Plaintiffs' claim for libel per se was also futile because it was untimely. The alleged libel was committed on August 6, 2019, when Kirby submitted his written complaint to the police containing what Plaintiffs have inaccurately identified as a lie. Because the statute of limitations for a cause of action for libel per se is one year, Plaintiffs had until August 6, 2020 to file a claim based thereon. See N.J.S.A. § 2A:14-3 ("Every action at law for libel or slander shall be commenced within 1 year next after the publication of the alleged libel or slander."); see also NuWave Inv. Corp. v. Hyman Beck & Co., Inc., 432 N.J. Super. 539, 564-565, 567-570 (App. Div. 2013) (statute of limitations for libel or slander is one year). Plaintiffs' motion to amend to add a claim for libel per se, initially filed in March 2021, was thus untimely on its face and therefore independently futile.

Plaintiffs' untimely libel per se claim is not saved by the discovery rule, which generally tolls a cause of action until the plaintiff either discovers, or reasonably should have discovered, the basis for the claim, because the discovery rule is not applicable to such a claim. See Williams v. Bell Telephone Laboratories Inc., 132

N.J. 109, 117 (1993) (holding that the discovery rule is not available in the interpretation of the application of the defamation statute of limitations, N.J.S.A. § 2A:14-3); Lawrence v. Bauer Publ'g & Printing, Ltd., 78 N.J. 371, 375 (1979) (Pashman, J, concurring) (stating that "[t]he Legislature has therefore fixed a precise date on which the limitations period begins to run. Once the date of publication is determined, there is no need for further judicial interpretation. Hence, the discovery rule is inapplicable to libel actions.").

Nor would the assertion of a libel per se claim relate back to February 2020, when Plaintiffs initially filed their original complaint. As Rule 4:9-3 provides, "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." However, "an entirely new and distinctly different cause of action" is not saved by the relation back doctrine. See Young v. Schering Corp., 275 N.J. Super. 221, 230 (App. Div. 1994).

Young is instructive on this issue, as in that case, the plaintiff brought suit against his employer for, among other things, wrongful termination and slanderous acts that defendants allegedly committed against him the day after he was fired. Id. at 226. Plaintiff later moved to amend his complaint to add a claim that the same act of firing alleged in the original complaint was also retaliatory. Id. The Appellate

Division, affirming the trial court's dismissal of this new claim as untimely, concluded about the relation-back doctrine that "we must be mindful of the general proposition that an entirely new and distinctly different cause of action cannot by means of an amendment of the pleadings be introduced after the statute has tolled the action." Id. at 230.

In light of this standard, Plaintiffs' new, different, and unrelated allegation of libel per se, pertaining to a new defendant and allegedly committed on a different date, cannot reasonably be said to relate back to the original filing of Plaintiffs' complaint and is therefore time-barred. Indeed, the conduct that is the subject of the libel per se claim – making a complaint to the police - is literally unrelated to the conduct at issue in the complaint and amended complaint – that is, Defendants' removal of Plaintiffs' illegally constructed walkover and Plaintiffs' claimed entitlement to an implied easement appurtenant across the NBA Property. Thus, not only was Plaintiffs' libel per se claim futile for the reason articulated by the trial court, but it was also futile because it was barred by the statute of limitations.

III. THE TRIAL COURT CORRECTLY PRECLUDED PLAINTIFFS FROM OFFERING EVIDENCE IN SUPPORT OF A CLAIM FOR ATTORNEYS' FEES OR PUNITIVE DAMAGES

Plaintiffs also appeal the trial court's discretionary rulings, made prior to the start of trial, to preclude them from offering any evidence in support of their claims

for attorneys' fees or punitive damages. Neither of the trial court's rulings were an abuse of discretion, and both should be upheld.

1. Defendants' application to bar the evidence was not untimely

Plaintiffs initial argument – that the trial court should have declined to hear Defendants' application to bar this evidence – is based on a misapprehension of New Jersey law. Neither Rule 4:25-8(a)(1) nor Cho v. Trinitas Regional Medical Center, 443 N.J. Super. 461 (App. Div. 2015), operates as a bar to Defendants' application because Defendants' application did not seek a summary judgment dismissal of Plaintiffs' case via a motion in limine.

Based on the trial court's prior rulings, as well as Plaintiffs' decision to voluntarily dismiss their other then-remaining claims, the only issue for trial was Plaintiffs' claim for damages under Count Two of their Complaint for an implied easement appurtenant across the NBA Property. For this claim, Plaintiffs intended to seek (i) compensatory damages for the replacement cost of the walkover fence that Plaintiffs claimed Defendants had improperly removed, (ii) compensatory damages for Plaintiffs' claimed loss of use of their claimed easement from the time their walkover fence was removed until the time the trial court granted them summary judgment on their easement claim (the same summary judgment order that Defendants have appealed), (iii) attorneys' fees, and (iv) punitive damages.

Defendants previously moved in early 2021 to dismiss Plaintiffs' claims for attorneys' fees and punitive damages as to all of the counts in Plaintiffs' then-current complaint, but the trial court denied Defendants' application without prejudice and reserved for the time of trial. By the time the parties approached trial in October 2022, Plaintiffs' only then-remaining claim was for damages under Count 2 of their complaint (their implied easement claim for which the trial court previously granted summary judgment). At that time, Defendants renewed their application and sought a ruling that would preclude Plaintiffs from offering evidence relating to attorneys' fees or punitive damages with respect to Plaintiffs' remaining implied easement claim because there was no basis under New Jersey law to recover such damages for such a claim. Indeed, Plaintiffs and Defendants each raised and discussed Plaintiffs' claims for attorneys' fees and punitive damages in their respective trial briefs, which were submitted to the trial court prior to trial, and therefore Plaintiffs cannot claim to have been unprepared to address these issues with the trial court prior to the start of trial. After reviewing the parties' submissions, and listening to oral argument, the trial court agreed that Plaintiffs' proffered evidence did not support a basis to seek attorneys' fees or punitive damages and properly exercised its discretion to preclude Plaintiffs from offering such evidence at trial.

2. Attorneys' fees

Under established New Jersey law, in the absence of a contractual agreement stating otherwise, each party is responsible for its own attorneys' fees unless the matter comes within one of eight specified fee-shifting exceptions. Rule 4:42-9(a); see also NJDPM v. N.J. Dept. of Corrections, 185 N.J. 137, 152 (2005). These exceptions permit recovery of attorneys' fees in family actions, where there is a "fund in court," probate actions, mortgage foreclosure and tax sale certificate foreclosure actions, and actions arising out of liability or indemnity policies. Rule 4:42-9(a)(1)-(6). Attorneys' fees are also recoverable where explicitly authorized by Court Rule, see, e.g., Rule 4:42-9(a)(7); Rule 1:4-8 (frivolous actions); Rule 4:14-8 (failure to attend deposition or serve deposition subpoena); Rule 4:23-1 to -5 (discovery sanctions); Rule 4:37-1(b) (voluntary dismissal); Rule 4:86-4(e) (attorney for alleged incompetent); Rule 5:5-5 (early settlement program), or where explicitly authorized by statute; see, e.g., Rule 4:42-9(a)(8); N.J.S.A. § 2C:41-6(c) (RICO Act); N.J.S.A. § 10:5-27.1 (Law Against Discrimination); N.J.S.A. § 20:3-26 (eminent domain); N.J.S.A. § 34:11B-12 (Family Leave Act); N.J.S.A. § 2A:15-59.1 (2017) (frivolous claims); N.J.S.A. §§ 34:19- 5 to -6 (Conscientious Employee Protection Act);N.J.S.A. § 56:8-19 (Consumer Fraud Act); see also Garcia v. L&R Realty, Inc., 347 N.J. Super. 481, 492-93 (App. Div. 2002) (awarding attorneys' fees where plaintiff sued under fee shifting statute of Massachusetts consumer fraud law);

Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 440 (2001) ("[A] prevailing litigant can recover attorneys' fees "if they are expressly provided for by statute, court rule, or contract."); Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 385 (2009) (stating, because New Jersey disfavors shifting of attorneys' fees, that when a contract provides for fee shifting, "the provision should be strictly construed in light of our general policy disfavoring the award of attorneys' fees").

Plaintiffs' claim for an implied easement across NBA Property certainly did not fall within any of these narrow prescribed exceptions, and thus Plaintiffs had no recognized basis to seek attorneys' fees or to introduce evidence in support thereof. Recognizing this, Plaintiffs seek instead to fundamentally upend established New Jersey law by to pursuing a claim for attorneys' fees based solely on "the interests of equity" and alleged "shenanigans," basing their argument on citation to an unfair competition and trademark infringement case in which the court elected to fashion an equitable remedy and allow attorneys' fees as an element of damages. That case – Red Devil Tools v. Tip Top Brush Co., 50 N.J. 563 (1967) – is wholly inapplicable from a factual standpoint because the claim for unfair competition and trademark infringement and the calculation of resulting damages under the unique circumstances of that case have nothing whatsoever in common with Plaintiffs' (still) disputed claim to an implied easement appurtenant allowing them to cross NBA's private property.

Indeed, the court in Red Devil Tools elected to allow recovery for attorneys' fees in that specific factual situation as an equitable remedy alternative to the more traditional accounting often used in an unfair competition case because the defendant's sales of the infringing products were too low to provide meaningful compensation for injury to plaintiff's intellectual property. See id. at 572-75. In contrast, in this case, there are two potential damages outcomes, neither of which calls for the exercise of equity to fashion a unique remedy.

On the one hand, if the trial court's order awarding Plaintiffs an implied easement is not reversed, or if it is reversed but Plaintiffs then prevail on the merits at trial, Plaintiffs will have secured a significant property right by virtue of having acquired a right to an easement across NBA's Property. On the other hand, if the trial court's easement order is reversed and Plaintiffs do not ultimately prevail on the merits of their easement claim at trial, Plaintiffs will not be entitled to any damages of any kind on their claim. Either way, there is no basis on which this Court should go beyond established parameters to fashion an equitable remedy and allow Plaintiffs to recover attorneys' fees that they are not otherwise entitled to seek under New Jersey law for an easement claim.

Moreover, allowing Plaintiffs to pursue a claim for attorneys' fees in this case based solely on "the interests of equity" and alleged "shenanigans" would set a precedent that would allow plaintiffs to seek attorneys' fees in virtually every case

in New Jersey. Virtually every plaintiff in New Jersey could and would make an argument that "the interests of equity" in their particular case, coupled with the alleged "shenanigans" of the particular defendant, justify seeking attorneys' fees. Our courts would then be required to address this issue in virtually every case, and the current structure in New Jersey law – in which attorneys' fees are recoverable in certain, specified situations as set forth by statute or court rule – would be swallowed up.

Finally, the hodgepodge of alleged conduct that Plaintiffs term "shenanigans" (Pb58-59) is wholly unlike the deceptive trade practices and trademark infringement that led the court in Red Devil Tools to fashion an equitable remedy to include attorneys' fees. For example, Defendants' vigorous pursuit of their litigation defenses, including their belief that Plaintiffs were and are not entitled to an implied easement appurtenant to cross NBA's property, is not "shenanigans." Nor is Plaintiffs' thrice-rejected effort to assert malicious prosecution or libel per se claims against Kirby a basis to seek attorneys' fees from Defendants. Similarly, Plaintiffs' general allegations about other, unnamed individuals posting messages on Facebook or "stirring up animosity" towards Plaintiffs is not a basis to seek attorneys' fees from Defendants, either, especially without some connection – which is wholly absent here – between those alleged actions and Defendants' alleged breach of Plaintiffs' implied easement to cross NBA property.

Relying primarily on Tarta Luna Properties, LLC v. Harvest Restaurant Group, LLC, 466 N.J. Super. 137 (App. Div. 2021) – a recent Appellate Division decision in which the trial court's decision to allow an equitable award of attorneys' fees was soundly rejected and reversed – the trial court found that there were multiple reasons why Plaintiffs' claim for attorneys' fees should be dismissed. The trial court found that Plaintiffs and Defendants were seeking to exercise their respective property rights, the scope of which did not become resolved (subject to this appeal) until the court entered summary judgment in favor of Plaintiffs on their implied easement claim, and the fact that "emotions" may have "run high" was no basis to allow attorneys' fees. (3T 15:17—16:10, 3T 17:4-11) The trial court also determined that, for this same reason, there was no deterrent effect to be gained by allowing attorneys' fees. (3T 16:23—17:11) The trial court further found that Defendants were not enriched by their actions. (3T 17:21-21) Finally, the trial court found that there was no need to fashion an alternative remedy for Plaintiffs to include attorneys' fees in this case. (3T 17:21—18:17) Ultimately, the trial court concluded:

> So in applying the guidance that is offered by the Tarta court in referring to the Red Devil case, and applying the facts as understood by the parties, and even accepting the facts as offered by the plaintiff in this case, the Court finds that there's an insufficient basis for me to award attorneys' fees under our strict American rule in this State.
>
> (3T 18:15-21)

For all of these reasons, the trial court's discretionary decision to preclude Plaintiffs from offering evidence in support of a claim for attorneys' fees for their implied easement claim was neither an abuse of discretion nor incorrect, and should not be reversed by this Court.

3. Punitive Damages

Finally, Plaintiffs claim the trial judge should have permitted them to introduce evidence in support of a claim for punitive damages in connection with their implied easement claim, relying on the same alleged "shenanigans" that they sought to use to support their rejected claim for attorneys' fees. In another discretionary ruling that was neither an abuse of discretion nor incorrect, the trial judge correctly found that Plaintiffs' proffered evidence – even if presumed to be true – fell well short of the threshold to consider punitive damages under New Jersey law and thus ruled that Plaintiffs could not offer such evidence at trial. As the trial court succinctly explained:

> Now this does – as counsel has alluded to, this does match up nicely with the assertion with regard to punitive damages. The same facts that are alleged for an argument for attorneys' fees should be had are also alleged for punitive damages.
>
> Under our Punitive Damages Act, generally similar things are required as are required for the common-law attorneys' fees application. There has to be a higher level of proof.
>
> First of all, there has to be some malicious, wanton act that results in some serious harm. And again, it has to be an aggravation beyond a

> simple tort. It's can't be something that is ordinary between parties addressed as a simple tort. And the court just doesn't find it here.
>
> I don't find the serious harm that is necessary. I don't find it by the level of proof that is necessary that, you know, whether the actual wanton behavior that is required to cause harm that is outside of what is the normal bounds of a tort, I just don't find in this action between parties over a property right.
>
> And so for those reasons, I'm going to grant the motion in limine, denying all evidence with regard to attorneys' fees or punitive damages. I'm satisfied that there's an insufficient basis for the court to find under any circumstances that those actions – we should hear evidence.
>
> (3T 18:22—19:24)

Simply stated, the trial court's rulings as to attorneys' fees and punitive damages should not be reversed by this Court.

CONCLUSION

This Court should reverse the trial court's order that granted summary judgment to Plaintiffs on their claim for an implied easement appurtenant because the evidence in the motion record, when viewed in the light most favorable to Defendants, failed to establish that no reasonable factfinder could find for Defendants on that claim or conclude that Plaintiffs could not establish their claim by the required clear and convincing evidence. In fact, there was more than sufficient evidence in the motion record supporting Defendants' claim that no such easement was implied at the time of the initial property conveyance. The trial court should therefore have denied Plaintiffs' motion and required Plaintiffs to present their proofs at trial, at which time the factfinder would determine whether Plaintiffs had established such an easement by clear and convincing evidence.

This Court should not reverse the trial court's discretionary ruling to deny Plaintiffs' motion to file an amended complaint to implead Kirby and assert malicious prosecution and libel per se claims against him. Accepting as true all of the evidence in the motion record proffered in support of Plaintiffs' application, the trial court found that Plaintiffs could not establish essential elements of these claims. The trial court's finding that such claims therefore would be futile was neither incorrect nor an abuse of discretion, and should be upheld.

Similarly, this Court should not reverse the trial court's discretionary ruling to preclude Plaintiffs from offering evidence at trial in support of claims for attorneys' fees or punitive damages. Plaintiffs' claim for attorneys' fees does not fall within any recognized basis under New Jersey law, and Plaintiffs' attempt to base their claim on "the interests of equity" and alleged "shenanigans" is not consistent with New Jersey law and would be precedent that would lead to claims for attorneys' fees in virtually every case in New Jersey. Likewise, Plaintiffs' claim for punitive damages fails to meet the high threshold for such a claim required under New Jersey law. Accepting as true all of the evidence in the motion record proffered in support of Plaintiffs' claims for such damages, the trial court found that Plaintiffs had not demonstrated a sufficient basis on which to seek such damages. The trial court's decision was neither incorrect nor an abuse of discretion, and should be upheld.

Respectfully submitted,

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By: *<u>/s/ H. Lockwood Miller, III</u>*
H. Lockwood Miller, III

Dated: December 7, 2023

JOHN AND LORI WESTERHOLD, Plaintiffs/Respondents/ Cross-Appellants, v. NORMANDY BEACH ASSOCIATES, INC., NORMANDY BEACH IMPROVEMENT ASSOCIATION, Defendants/Appellants/Cross-Respondents and TOWNSHIP OF BRICK, NEW JERSEY, Defendant/Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2551-22T4 CIVIL ACTION On Appeal from Order of the Superior Court of New Jersey, Chancery Division, Ocean County Docket No. OCN-C-37-20 Sat Below: Hon. Francis R. Hodgson, Jr., P.J.Ch.

REPLY BRIEF OF PLAINTIFFS-RESPONDENTS/CROSS-APPELLANTS JOHN AND LORI WESTERHOLD

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I. THE TRIAL ERRED IN DENYING JOHN WESTERHOLD'S MOTION FOR LEAVE TO AMEND TO ADD A MALICIOUS PROSECUTION CLAIM

A. The Trial Court Erred in Concluding that No Criminal Action Was Instituted

In arguing that no criminal action was instituted against John Westerhold, Defendants ignore the central arguments in Plaintiffs' initial brief: (1) New Jersey's history of holding that a criminal action is instituted when a criminal complaint is filed (Pb47-Pb49); (2) that the lone case the trial court relied upon, Richmond v. Thompson, 901 P.2d 371 (Wisc. App. 1995), is wholly distinguishable (Pb50); and (3) that no New Jersey case has ever held that the "criminal action" element of a malicious prosecution cause of action requires judicial action beyond the filing of the criminal complaint itself. (Pb49).

Instead, Defendants look outside New Jersey and contend the trial court properly relied on Restatement (Second) of Torts §654 comment c. Defendants do so even though they do not dispute either (1) that no New Jersey case has ever followed that comment, or (2) that the comment is inconsistent with New Jersey precedent. Defendants' sole argument is that a single New Jersey case "recognized and followed the Restatement in their analysis for malicious prosecution." (Drb15) (citing Shoemaker v. Shoemaker, 11 N.J. Super. 471 (App. Div. 1951)). But the reverse is actually true. In Shoemaker, this Court

examined the Restatement's analysis of whether certain types of pre-trial dismissals constituted conclusive proof of the lack of probable cause needed for a malicious prosecution claim. In so doing, this Court *rejected* the Restatement because it was inconsistent with New Jersey law. Id. at 476-77. To the extent it is relevant to this case, Shoemaker stands for the proposition that factual disputes as to the existence of probable cause are a matter for the fact finder. Id. at 479-80; see also Zalewski v. Gallagher, 150 N.J. Super. 360, 368 (App. Div. 1977).

Defendants also urge this Court to follow the Restatement of the Law (Third) Liability for Economic Harm § 21, which was not even published until 2020. However, Defendants fail to cite a single case that has ever adopted that section or even explain why this Court should follow the Restatement when it contradicts New Jersey precedent.[1] Just like the Shoemaker Court, this Court should follow New Jersey precedent instead of the Restatement.

B. The Trial Court Erred in Concluding that John Westerhold Could Never Prove Stephen Kirby Lacked Probable Cause

In arguing John Westerhold could never prove Stephen Kirby lacked probable cause to file his criminal complaint, Defendants do not directly address: (1) Kirby's admission that he made a false statement to law

[1] Our own research has not uncovered a single New Jersey case that has followed the Restatement of the Law (Third) Liability for Economic Harm § 21.

enforcement (Da2542-Da2543); (2) Kirby's admission that he never once saw John Westerhold cross over the NBA dune to access the water line (Da2542; Pa323); (3) Kirby's admission that he never saw John Westerhold (or anyone else) break the NBA fence (Da2230-Da2232; Da2238); and (4) the municipal court's finding that Kirby did not have probable cause. (Pa87). Those irrefutable facts, standing alone, should have led the trial court to conclude that a reasonable fact finder could find Defendants and Kirby lacked probable cause to file their criminal complaint against John Westerhold.

Unable to refute those facts, Defendants instead argue John Westerhold could never prove Kirby lacked probable cause because "people came up to Kirby and told him in August 2019 that there were people crossing the dune in front of the Westerhold property, and Kirby personally observed multiple people crossing from the Westerhold property over the NBA property where NBA fencing had recently been installed." (Drb18).

There are multiple flaws in this argument. First, Kirby admittedly did not rely on what anyone else told him (Da2230; Pa317-Pa322), making Defendants' argument that hearsay is a proper basis for establishing probable cause a red herring because that is not what happened here by Kirby's own admission.

Second, even if Kirby had relied on hearsay, that hearsay did not identify anyone specific and, therefore, did not provide probable cause to file criminal

charges against a specific person. Defendants do not contend anyone actually told Kirby they saw John Westerhold commit these alleged crimes. In fact, Kirby's own limited observations from two blocks away, in which he claims he saw "younger people" (Pa318), demonstrates this "hearsay" did not provide sufficient probable cause to file criminal charges against John Westerhold.

Third, because the alleged hearsay addressed a single event, it could not provide probable cause that John Westerhold "continuously walks over the property," (Pa84) (emphasis added), which was identified in the criminal complaint as an eight-month period. Likewise, given that no one ever actually saw anyone break the NBA fence, there could not possibly be probable cause that John "Westerhold broke through our beach fence and crosses our property against our wishes." (Pa84) (emphasis added).

Defendants strangely accuse Plaintiffs of not addressing the trial court's reliance on hearsay (Drb19), even though Plaintiffs' brief addressed the hearsay issue directly. (Pa51-Pa52). Because Kirby testified that he based the allegations in the criminal complaint solely on his personal knowledge (Da2230; Pa317-Pa322), what others may have told him was irrelevant. Similarly, Defendants wrongfully accuse Plaintiffs of failing to address "what Kirby reasonably believed, or even what reasonable inferences were to be drawn from those facts," (Drb19) even though Plaintiffs directly addressed this issue by

quoting Kirby's testimony demonstrating that he did not have a reasonable belief in the truth of his accusations. (Pb13-Pb14; Pb51-Pb52). And even if Defendants and Kirby were somehow entitled to "reasonable inferences" in their favor on Plaintiffs' motion for leave to amend (which they were not),[2] it would not be reasonable to infer Plaintiffs could never prove Kirby lacked probable cause when Kirby admitted his allegations were false. (Da2542-Da2543).

Unable to explain away Kirby's admissions, Defendants try to turn the tables by making an argument not raised below. Without citation to the record, Defendants contend the Westerholds never denied that they committed the crimes charged by Kirby and the Defendants:

> Plaintiffs do not, and cannot, deny that the NBA fence in front of the Westerhold property was broken through, nor that they, or members of their household, were responsible for breaking through the fence and/or for crossing the NBA property – against NBA's wishes – to reach the beach.
>
> [Drb6].

This is patently untrue. John Westerhold testified that no one from his family broke the NBA fence, explaining he reached an agreement with Brick Township not to touch the NBA fence in order to resolve the notice of violation that the NBA asked

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[2] A proposed amendment would be futile if it would not survive a motion to dismiss under the Rule 4:6-2(e) standard, under which the plaintiff is given every reasonable inference of fact. Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 501 (1986); Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989).

to have issued to itself and the Westerholds. (Da2425-Da2426). Likewise, Lori Westerhold denied that anyone crossed the NBA dune from the Westerholds' property after the NBA installed the fence to try to stop them:

> Q. Do you know if you or anyone coming from your property have crossed that location where the walkover had previously existed subsequent to August 2nd of 2019?
>
> A. You mean after?
>
> Q. Correct, after.
>
> A. No one has used that since it has been closed off.
>
> [Pra4].[3]

Defendants' attempt at revisionist history is belied by the record. Kirby testified that he was the only witness from the NBA who provided the basis for the charge that John Westerhold broke through the NBA fence. (Da2230).[4] But when

[3] John Westerhold explained that, beginning shortly after the NBA tore down his family's original walkway, he reached an informal agreement that allowed the Westerholds to use the neighbor's lawfully-permitted dune walkover. (Da2396-Da2398). It is highly likely that, from their location two blocks away, Kirby and the others actually observed people walking on the neighbor's lawfully permitted, non-NBA walkover.

[4] Defendants correctly point out that Plaintiffs stated in their initial brief that the criminal complaint alleged Kirby had personally witnessed John Westerhold commit the alleged criminal acts. (Drb6-Drb7). Those words—"personally witnessed"—do not appear in the text. However, Kirby testified he was the only witness and did not rely on anyone else. (Da2230; Pa317-Pa320). Coupled with his handwritten text in the criminal complaint, the logical conclusion was that Kirby represented he observed John Westerhold commit the alleged crimes. But, Kirby unequivocally testified that he did not see John Westerhold do the things alleged in the criminal

asked repeatedly if he saw either Mr. Westerhold, his wife or any member of his family cut the fence, Mr. Kirby candidly admitted he had not. (Da2230-Da2232; Pa322-Pa323). All Kirby actually saw was that the fence had been cut. (Da2238). Kirby admitted he understood his criminal complaint constituted a false statement to law enforcement. (Da2542-Da2543). The trial court should have found these allegations were sufficient to satisfy the pleading stage.

C. The Proposed Amended Complaint Properly Set Forth the Element of Malice

Although not relied upon by the trial court, Defendants argue the proposed malicious prosecution claim was futile because Plaintiffs could never prove Kirby acted with malice. (Drb21). But (1) Defendants do not dispute that paragraphs 268 and 281 alleged that Kirby and Defendants acted with malice (Pa68-Pa72), and (2) other than incorrectly contending at Drb21 that Plaintiffs did not cite the record, Defendants do not deny that the evidence submitted in support of the motion for leave to amend demonstrated that the NBA board members discussed how the filing of a criminal complaint might give them a litigation advantage against the Westerholds. (Pb10; Da2543). If proven to be true, those facts would more than sufficiently establish the malice element.

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complaint. (Da2230-Da2231; Da2542). Indeed, he could not have seen John nor any other Westerhold do those things because they did not. (Da2425-Da2426; Pra4).

II. THE TRIAL ERRED IN DENYING JOHN WESTERHOLD'S MOTION FOR LEAVE TO AMEND TO ADD A LIBEL *PER SE* CLAIM

Defendants incorrectly argue that the trial court did not decide whether Plaintiffs' proposed libel *per se* claim was timely. (Drb22). In fact, the trial court properly concluded that John Westerhold's proposed amended claim would be deemed timely under the relation-back doctrine because all of the issues arose out of the same ongoing property dispute. (1T32:8-1T33:5).[5]

Relying solely on Young v. Schering Corp., 275 N.J. Super. 221, 230 (App. Div. 1994), Defendants incorrectly argue that the relation-back doctrine does not apply here because the proposed libel *per se* claim is too unrelated to the original claim. (Drb23). Defendants' reliance on Young is misplaced. There this Court found no relation back because "[p]laintiff's original and amended complaints rel[ied] on two distinct factual occurrences" that led to his termination. 275 N.J. Super. at 231. Unlike the proposed amendment here, the Young Court found the amended complaint "presented a distinct claim from the one originally raised" as it was "almost entirely contradictory to the thrust of [plaintiff's] first allegation." Id. at 229-30. Also, unlike this case, this Court

[5] John Westerhold was unaware of the criminal complaint until the night of January 11, 2021, after a full day of deposition testimony from Kirby and the night before Kirby was to appear for a second day of testimony on January 12, 2021. (Da2543). This was months after documents were to be produced. (Pa79; Da2542-Da2543). John Westerhold acted quickly upon learning what happened by filing his motion to amend just two months after learning about the criminal complaint. (Pa1-Pa2).

noted that twenty months had passed between the dismissal of the original complaint and the filing of the amended complaint, which "provided a sufficient ground" to dismiss the amended complaint. Id. at 232.

Here, unlike Young, there are no distinct factual occurrences or contradictory allegations. Instead, the trial court correctly found the facts central to the libel per se claim arose out of the same ongoing property dispute as the original complaint. (1T32:8-1T33:5). Indeed, Defendants and Kirby filed the false criminal complaint because (1) Kirby and the NBA were "incensed" and "furious" over the property dispute issues, and (2) Defendants discussed how the existence of a criminal complaint would undermine the Westerholds' chances in the property dispute. (Da2542-Da2543). Moreover, the fence that Defendants and Kirby falsely accused John Westerhold of breaking in the criminal complaint was erected as part of Defendants' effort to block Plaintiffs' easement over the dunes. Clearly, the issues are bound together and, unlike Young, John Westerhold acted quickly. In fact, the only reason John Westerhold did not file his motion for leave to amend sooner was because Defendants hid the existence of their false criminal complaint against him until after the statute of limitations had expired. Finding the proposed claim did not relate back would reward Defendants for their wrongful withholding of this information.

Defendants' arguments are unpersuasive. First, their argument that the claims are unrelated because the events took place at different times (Drb24) is both legally irrelevant[6] and factually wrong because Defendants and Kirby filed the criminal complaint at the same time they were denying Plaintiffs the right to use their easement. Second, Defendants cite no authority for their argument that the relation-back doctrine would not apply because the proposed pleading contained a new defendant. Rule 4:9-3 specifically allows relation-back even when the new pleading adds a new party if (1) the new claim arose from the same conduct, transaction, or occurrence, (2) the new party received notice of the action, albeit informal, and will not be prejudiced in maintaining a defense, and (3) the party knew or should have known such an action would have been brought against him. Here, Kirby was well aware of the action, was deposed over two days, and any reasonable person in his position would have known that an action could be brought against him based on his personal conduct.

[6] See, e.g., Lawlor v. Cloverleaf Memorial Park, Inc., 56 N.J. 326, 339-43 (1970) (applying relation-back doctrine even though the events giving rise to the proposed new claim took place at a different place and time).

III. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTIONS IN LIMINE THAT EFFECTIVELY DISMISSED THE WESTERHOLDS' CLAIMS FOR ATTORNEY'S FEES AND PUNITIVE DAMAGES

A. The Trial Court Should Have Denied Defendants' Motions in Limine as Procedurally Improper

Defendants argue R. 4:25-8(a)(1) and Cho v. Trinitas Reg. Med. Center, 443 N.J. Super. 461 (App. Div. 2015) do not apply because "Defendants' application did not seek a summary judgment dismissal of Plaintiffs' case via a motion in limine." (Drb25). While the proposed order did not directly ask for dismissal, that was exactly what the motion sought. The motion did not seek to bar a specific piece of evidence; it sought to bar all evidence of any kind that would support an attorney's fees claim. (3T6:12-15). Defendants argued the trial court should preclude Plaintiffs from introducing all evidence in support of that claim solely because Plaintiffs allegedly had no legal entitlement to seek attorney's fees. (3T7:4-17). Relying on both the motion in limine brief and the previously-filed summary judgment brief, Defendants' counsel focused his oral argument on the legal entitlement to attorney's fees and punitive damages, and never mentioned a single rule of evidence. (3T6:18-3T9:2; 3T12:13-3T14:18; 3T6:24-3T7:2).[7]

[7] The trial briefs did not address the motion in limine with respect to punitive damages because Defendants made that motion orally for the first time at trial. (3T6:10-23).

At argument, the trial court clearly treated the motion in limine as dispositive on the issue of both attorney's fees and punitive damages (3T16:15-3T20:2), as reflected in the Final Judgment Order:

> WHEREAS, on the first day of trial on October 25, 2022, the Court granted Defendants NBA and NBIA's Motions in Limine barring Plaintiffs from presenting any evidence relating to attorneys' fees and punitive damages, which had the effect of dismissing those claims from the case.
>
> [Da2571.]

Defendants acknowledge they had previously lost an earlier summary judgment motion to dismiss Plaintiffs' claim for attorneys' fees, but seemingly argue that the motion in limine should not be considered a second dispositive motion because the number of claims were different, even though the arguments were the same. (Drb26). Defendants cite no law or rule that would make this alleged distinction meaningful, and Plaintiffs have not found any such authority.

Lastly, Defendants proffer a "no harm, no foul" defense by arguing the procedural deficiency should be ignored because Plaintiffs opposed the motion in limine with respect to attorney's fees in their trial brief. (Drb26). In Cho, this Court rejected the "no harm, no foul" defense when a party files a summary judgment motion wrongfully styled as a motion in limine: "Further, we utterly reject the argument that the dismissal should be affirmed, despite the violation of summary

judgment rules, because plaintiffs suffered no prejudice in the dismissal of claims that lacked merit." Cho, 443 N.J. Super. at 358-59. This Court should do the same.

B. The Trial Court Erred When It Granted the Motions in Limine

Defendants do not deny New Jersey recognizes a common law claim for attorney's fees, which is to be determined in "the interests of equity" depending "on the particular circumstances as they appear from the totality of the evidence presented." Red Devil Tools v. Tip Top Brush Co., 50 N.J. 563, 573 (1967).

Defendants instead argue that the evidence Plaintiffs were denied the opportunity to present at trial could never meet the standard. First, Defendants argue that a deciding factor in Red Devil was the substantial amount of attorney's fees compared to the relatively small amount of available compensatory damages. (Drb29). To the extent that is the appropriate measure, the evidence here meets that standard. Plaintiffs proffered to the trial court that their attorney's fees exceeded one million dollars, while the compensatory damage recovery was only $50,000. (Pb55; Da2571-Da2572).

Defendants next argue that a common law fee award should be denied where the plaintiff obtains equitable relief. (Drb29). That argument is contrary to Red Devil, where the Supreme Court upheld the trial court's grant of equitable relief and awarded common law attorney's fees. 50 N.J. at 575-76.

Next, Defendants argue that the totality of the evidence would not meet the existing standard. (Drb29). The problem with this argument is that, unlike the partial summary judgment motion where the trial court carefully analyzed every piece of evidence presented by both sides, the trial court never analyzed the evidence Plaintiffs proffered because it never admitted it into evidence. The trial court should not have ruled on a motion in limine that the evidence it had not yet heard or seen would not meet the standard for punitive damages.

Finally, Defendants argue a classic slippery slope—allowing Plaintiffs to present their evidence would open the flood gates to common law attorney's fees claims in nearly every case in the state. (Drb29-Drb30). This hyperbole is misguided. Plaintiffs did not ask the trial court to expand or change the standard. They asked the trial court to consider their evidence and decide on the merits whether that evidence satisfied the existing standard. Summary judgment remains the appropriate procedural vehicle when a party believes its adversary cannot meet its burden of proof on a claim for a common law award of attorney's fees. Here, Defendants moved for summary judgment on that issue and the trial court denied the motion. (Pa248; Da2570). If Defendants took issue with the trial court's denial of their summary judgment motion, the remedy was not to mischaracterize a renewed dispositive motion as a motion in limine.

IV. CONCLUSION

Defendants did far more than engage in a "vigorous pursuit of their legal defenses." (Drb30). Defendants not only used their access to insurance coverage to force the Westerholds to spend over one million dollars in attorney's fees, but they also used public meetings and social media to turn the community against the beachfront homeowners by creating the false impression that they were willing to destroy the dunes and put others' homes at risk. Defendants and Kirby needlessly riled up the community, leading to calls for protests at private beachfront homes, and they even went so far as to file the false criminal complaint against John Westerhold as a litigation tactic. The Westerholds have their easement back, but they lost much in the process. Under prevailing precedent and our Court Rules, the trial court should have afforded them the opportunity to present their evidence demonstrating the unnecessary lengths Defendants and Kirby went to and why they should be held financially responsible for more than the temporary loss of the Westerholds' property right.

Respectfully submitted,

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