CHALLENGER ACRES LLC, Plaintiff-Respondent, v. JAMES E. BAXTER and FELICE CARPENTER BAXTER, husband and wife, Defendants-Appellants, RICHARD STINSON and KATIE STINSON, husband and wife; and John Doe 1-10, Mary Roe 1-10, and ABC Corporation 1-10, said names being fictitious parties who may claim to have an interest in the subject roadway and lands referenced herein but whose identities are not currently known, Defendants.	: SUPERIOR COURT OF NEW JERSEY : APPELLATE DIVISION : Docket No. A-3070-22T4 : Civil Action : On appeal from final judgment of the Chancery Division, Hunterdon County (Margaret Goodzeit, P.J. Ch., sitting below)

BRIEF OF DEFENDANTS-APPELLANTS

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[1] Several entries included voluminous exhibits found elsewhere in the record. To avoid unnecessary duplication, this Index incorporates by reference those earlier-filed exhibits.

[2] The original complaint was filed on December 8, 2021, but was superseded by an Amended Complaint with no intervening pleadings.

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Statement of Procedural History

Plaintiff, Challenger Acres LLC ("Challenger"), the owner of a landlocked parcel of real estate in East Amwell, Hunterdon County, commenced this declaratory judgment action in the Chancery Division alleging entitlement to an express easement to a public street across nearby lots owned, respectively, by defendants James Baxter and Felice Carpenter, and Richard and Katie Stinson. (Da1-Da86) After taking discovery, all parties cross-moved for summary judgment. The motion record included a stipulation of undisputed background facts, the parties' respective statements of material facts and supporting certifications. (Da143-Da808)

Challenger argued that its right to an express easement was explicitly granted by way of a reservation in a deed to one of Baxter's predecessors in title. Baxter disputed that claim and argued that Challenger's action was precluded by *res judicata*, collateral estoppel and the entire controversy doctrine because of earlier litigation brought by Brian Trunell, one of Challenger's predecessors in title.[3]

[3] The complaint in that earlier litigation named Jane Baxter, James's wife at the time, as a co-defendant. They divorced in 2006, and in 2013 James married Felice Carpenter who is named as his co-defendant in the present matter. To avoid confusion, we will refer to James Baxter, or "Baxter," as the owner of the property unless the context requires otherwise.

The motions were argued on March 3, 2023. In an Order and Statement of Reasons issued March 16, 2023 (Da809-Da834), Presiding Judge Margaret Goodzeit found that Challenger enjoyed an enforceable easement by reservation over Baxter's property based on a 1966 deed in Baxter's chain of title, and granted summary judgment against Baxter. She denied Challenger's motion as to the Stinsons, however, due to genuine issues of material fact, and that remaining claim is currently awaiting trial.

After Judge Goodzeit issued her ruling against Baxter, the undersigned substituted as his counsel and wrote to Judge Goodzeit requesting that she conduct further proceedings to determine what specific uses Challenger may make of the easement. (Da835; Da837-Da838) Challenger's counsel opposed that request and submitted a proposed order memorializing the express easement and directing the Clerk of Hunterdon County to record it. (Da839-Da843)

On June 5, 2023, Judge Goodzeit entered Challenger's proposed order along with a separate order deeming her summary judgment "final as to the Baxter defendants as of today, so as to allow them to exercise any appellate rights they deem appropriate." She explained her reasons in an accompanying letter. (Da845-Da850)

Baxter filed a notice of appeal in the Appellate Division on June 12, 2023 (Da853-Da856). The Clerk of the Appellate Division questioned the finality of

Judge Goodzeit's order (Da873-Da874), but after reviewing an explanation from Baxter's counsel (Da875-Da876) posted a notice on the docket on October 2, 2023, authorizing Baxter to proceed with this appeal.[4]

Statement of Facts

James Baxter and his wife, Felice Carpenter, own 23 Losey Road, Block 27, Lot 43 in East Amwell. James and a previous wife, Jane Baxter, acquired the property in 1990 ("the Baxter Lot"). (Da789-Da790). Challenger acquired a nearby parcel, Block 27, Lot 45, from Corwin and Beth Roth in 2020 ("the Challenger Lot"). (Da401-Da406) The Roths acquired the Challenger Lot from Brian Trunell, Beth Roth's brother, in 2009 (Da408-410). Brian and Beth purchased the lot together in 2003 from representatives of the Estate of Stephen Kovac, but only Brian's name appeared on the deed. (Da395; Da412-Da414)

From 1955 until 1966, the Baxter Lot consisted of two separate parcels referred to as the North Baxter Lot and the South Baxter Lot. In 1966, Margaret Totten and Fred Totten, then owners of the South Baxter Lot, conveyed it to Jan and Helen Liniewicz, who had recently acquired the North Baxter Lot from Robert Mannon and Joanne Mannon, resulting in common ownership of the two parcels. (Da398-Da399, Da476-Da478)

[4] The notice read: "Thank you for your finality response. The appeal will proceed in the normal course. Marijean R. Stevens, Staff Attorney.

The Challenger Lot is landlocked. It does not share a common border with the Baxter Lot. The Stinsons' property, which they purchased in 2022, is situated between the Challenger Lot and the Baxter Lot. (Da396, Da397, Da451-Da459)

The 1966 Totten-to-Liniewicz deed to what was then the South Baxter Lot contained the following recital:

> Excepting and reserving from the above the rights of the public or owners of property lying westerly and southerly of Totten farm to use a roadway or driftway running thru this tract to reach their properties from the public road mentioned in the description above. (Da480-Da483)

The parties have stipulated that the "property lying westerly and southerly of Totten farm" included the Challenger Lot.

From 1966 onward, the Baxter Lot changed ownership several times until Baxter purchased it in 1990. The intervening deeds included abridged versions of the 1966 deed recital. By the time Baxter took ownership, the reference to the driftway in his deed read, simply, "subject to the rights of others, if any, in an old driftway crossing the southerly portion of the above described lot." (Da502)

Trunell, and a predecessor-in-title Stephen Kovacs, used the driftway across the South Baxter Lot only occasionally and unintrusively. Kovacs utilized it primarily on weekends only a few times per month, at most. He would not visit the lot in the winter and some other months not at all. (Da790) Baxter would permit

neighbors to stroll along the driftway to pick raspberries. A portion of the driftway would also be used, on occasion, by a local organization that conducted fox hunts in the area. Farmers would occasionally use it to go from one field to another in the vicinity, but that had not occurred for roughly 15 years prior to the commencement of this action. (Da789-Da791)

Trunell purchased the Challenger Lot without the benefit of a title search, a title insurance policy or a survey, and did not have his lawyer attend the closing. (Da567) He and his sister Beth intended to construct two homes on that lot; however, when applying for a building permit from East Amwell Township, they were advised that their deed needed to have language granting them access to the driftway, which it did not. Deposition of Beth Roth, T:17-7 to T:21-8, Da663-Da664; Da569.

Trunell filed suit in the Chancery Division in 2005, against Baxter and several other nearby landowners, including the Trust for Hazel Harrison ("the Harrison Trust"), seeking a "determination [that he] is entitled to a right of residential access to and from his property over the lands of one or more of the Defendants" and related relief. *See* Complaint in *Trunell v. Trust for Hazel Harrison, et als*, Docket No. C-14004-05, Da82-Da86. In November of 2005, he voluntarily dismissed the claims against all parties except Baxter.

Trunell and Baxter cross-moved for summary judgment. In a memorandum opinion and order issued September 28, 2006, Presiding Judge Harriet Derman rejected three legal theories advanced by Trunell in support of his easement claim -- easement by necessity, easement by prescription and express easement - and granted summary judgment to Baxter dismissing the complaint "with prejudice." Da100-Da107.[5] Judge Derman asked Baxter to allow Trunell access to the driftway to the end of the year, which he agreed to do. (Da790)

Shortly afterward, Trunell moved to reinstate his complaint against the Harrison Trust seeking an easement by necessity over that defendant's property. Judge Derman granted his motion and, following a trial, issued another opinion and order rejecting Trunell's claim against the Harrison Trust as well. (Da553-Da632) Although Baxter was not a participant in that subsequent proceeding, Judge Derman's opinion included several passages that are relevant to the present case.

After summarizing the trial testimony, Judge Derman began her analysis as follows:

> Plaintiff Brian Trunell claims an easement by necessity. He originally sued several neighboring land owners in January of 2005. Plaintiff

[5] We anticipate Challenger will argue, as it did below, that Judge Derman's observations regarding Trunell's express easement claim were merely *dicta* since that theory was not explicitly pleaded in his complaint and was raised for the first time at the summary judgment stage. As we will explain in Point II below, Trunell's express easement claim was actually litigated and adjudicated.

> voluntarily dismissed the Harrison Trust as a defendant, but moved to reinstate his complaint when Baxter was successful in maintaining a summary judgment motion against Plaintiff in September of 2006. This court ruled that Plaintiff, who apparently had undertaken little or no discovery, *enjoyed neither an express easement* nor a prescriptive easement over Baxter's land. Plaintiff then focused his attention on the Harrison land, claiming an easement by necessity. (Da600)(emphasis added)

Judge Derman also made these "findings of fact:"

> 9. Plaintiff has always accessed his property by using a lane from Losey Road across Baxter's property, *apparently pursuant to a revocable license*, and then, with the permission of his neighbor to the north, Totten. . . .
>
> 10. Plaintiff has no legal right to use the Baxter Lane because this court has already granted summary judgment to Baxter that *Plaintiff did not have an express easement* or a prescriptive easement to do so. Baxter apparently continues to allow Plaintiff to use the lane and gain access to Losey Road. (Da612-Da613)(emphasis added)

Later in her opinion, Judge Derman referred to Baxter "*informally permitting access*" to the portion of the driftway on his property for a period of time but refusing to acknowledge an easement. (Da619)(emphasis added).

Referring to the earlier proceedings, she wrote,

> Baxter objected to a judgment finding an *express easement* or an easement by prescription and, prevailing in 2006, eliminated [Trunell's] right of access. This deprivation, however, did not entitle Plaintiff to now look to [the Harrison Trust's] land since the conveyance from Servis to Williamson did not deprive Lot 45 of

> access to Losey Road, but rather Baxter's revocation of what apparently was a *license*." (Da622)(emphasis added)[6]

"[Trunell] has not attempted to find an alternative easement from any of his several other neighbors, including Baxter who prevailed on summary judgment as to the existence of an *express easement* and the lack of a prescriptive easement." (Da632)(emphasis added).

Trunell appealed that decision to the Appellate Division, which affirmed it in an opinion issued March 16, 2010 (Da634-Da643). In the meanwhile, in 2009, Beth Roth and her husband acquired title to the Challenger Lot from Trunell. As Beth described it in her deposition, Trunell "just kind of backed out of it and we kept it." *See* Deposition of Beth Roth, T:15-11 to 16-10 (Da663).

In 2020, Rowe purchased the property from the Roths under the name Challenger Acres, LLC.[7] He was familiar with it because he lived in the area and his brother owned adjacent property. Deposition of Jamie Rowe, T:9-8 to 18, Da690. Rowe testified in his deposition that he assumed the property was not landlocked because of "the policy in New Jersey that doesn't allow landlocked

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[6] In a footnote to this passage, Judge Derman wrote: "If A is allowed to use B's land the relationship is similar to an easement, but such privilege is revocable at the will of the servient owner, B, and is a license. *Powell on Real Property,* 2000, Section 34.24."(Da622)

[7] Rowe chose the name "Challenger" because the 1970 Dodge Challenger was his favorite car and thought it would be "a nice name." Deposition of Jamie Rowe, T:8-24 to T:9-4, Da690.

property" and "[j]ust things I've heard over the years." Deposition of Jamie Rowe, T:13-19 to T:14-8, Da691-Da692.

Rowe did not conduct a title search of the property before purchasing it but claimed the Roths told him they accessed the lot "by way of a roadway easement starting at Losey Road." (Da511) It is undisputed that Baxter never recorded anything in the County property records alerting prospective purchasers of the Challenger Lot to the outcome of the *Trunell* litigation; however, Beth Roth testified in her deposition that she made Rowe at least generally aware that there had been litigation over entitlement to an easement across Baxter's property.[8]

Standard of Review

Appellate courts apply a *de novo* standard of review to a trial court's grant of summary judgment and apply the same standard as the trial court in determining

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[8] Beth testified in her deposition that she was fully aware of the litigation her brother brought against Baxter and the other neighboring property owners, and that Judge Derman rejected her brother's claims to an easement. Deposition of Beth Roth, T:19-17 to T:25-14, Da664-Da665. Roth told Rowe about the litigation before he purchased the property, though she was unsure whether she disclosed Judge Derman's final decision or just that another judge who presided earlier in the case was no longer on the bench. *Id.,* T:30-20 to T:32-3, Da667. Rowe, in his deposition, denied any knowledge of those proceedings before purchasing the property. Deposition of Jamie Rowe, T:16-5 to 11, Da692. Judge Goodzeit decided the case based on the language of the 1966 deed alone and did not address whether Rowe knew or should have known of the *Trunell* litigation and its outcome.

whether summary judgment is appropriate. *Globe Motor Co. v. Igdalev*, 225 *N.J.* 469, 479 (2016). Pursuant to Rule 4:46-2, a court shall grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, ... 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."

Argument

Point I

Judge Goodzeit erred by finding a reservation of an easement in favor of strangers to the deed (Da809).

Judge Goodzeit found that the 1966 Totten-to-Liniewicz deed in Baxter's chain of title memorialized an easement in favor of unnamed owners of the separate lot eventually purchased by Challenger, even though they were not participants in the transaction. For the following reasons this finding was erroneous and should be reversed.

At common law, an easement in favor of a third person could not be created by reservation or exception. What has come to be known as the "stranger-to-the-deed" rule presumes that deeds conveying land are between a grantor and a grantee, and views with distrust any attempt to use the deed to create a property interest in any other party, *i.e.*, a "stranger." *Conway v. Miller*, 356 *Mont*. 231, 232 *P.*3d 390, 397 (2010).

"The early rule, still strongly adhered to in most jurisdictions, is that in an instrument of conveyance a mere reservation in favor of a stranger to the deed is inoperative to create in him any right or interest in the property conveyed." Annotation, *Reservation or exception in deed in favor of stranger*, 88 A.L.R.2d 1199 (1963). "A reservation of interest in real property, to be good, must be made to all, some, or one of the grantors, and not to a stranger to the deed." 23 Am. Jur.2d, *Deeds*, § 68 (2021).

The rule has been criticized by some commentators and a number of jurisdictions have abandoned it, yet "the prevailing view still appears to be that a reservation or exception of an easement may operate only in favor of the grantor." Jon W. Bruce and James W. Ely, Jr., *The Law of Easements & Licenses in Land*, § 3:9 (2021). The main rationale is that the rule promotes certainty in land titles and provides protection for bona fide purchasers. *Id.*

The stranger-to-the-deed rule is still observed by New Jersey's neighbors to the north and west. *See Estate of Thomson v. Wade*, 69 *N.Y.*2d 570, 516 *N.Y.S.*2d 614, 509 *N.E.*2d 309, 310 (1987) (New York); *In re Condemnation by Cty. of Allegheny of Certain Coal, Oil, Gas, Limestone, Mineral Properties*, 719 *A*.2d 1, 3-4 (Pa. Commw. Ct. 1998) (Pennsylvania). Our neighbor to the south has adopted at least variation of it, holding that strangers to the deed may not invoke the doctrine of estoppel by deed. *See State v. Phillips*, 400 *A*.2d 299, 309 (Del. Ch. 1979).

The New Jersey Supreme Court has never considered the stranger-to-the-deed rule. In *Borough of Wildwood Crest v. Smith*, 210 *N.J. Super.* 127, 142-44 (App. Div. 1986), the Appellate Division recognized the rule's common law roots and its acceptance by "most jurisdictions." The panel also noted a minority view, adopted in the *Restatement of the Law of Property*, § 472 and by some jurisdictions, that a grantor may reserve an easement for the benefit of a third party where it is manifestly clear that was the grantor's intent. *Wildwood Crest*, 210 *N.J. Super* at 142-44.

The deed recital at issue in *Wildwood Crest* read as follows:

> . . . Under and subject to an easement to be given by the party of the first part to the Borough of Wildwood Crest for the area from the mean high water line to 150 feet westerly thereof, the purpose of said easement being to reserve said area as a public bathing beach.

This language explicitly stated an intention to create "an easement" that did not previously exist, and precisely delineated its boundaries. The panel did not categorically reject the common law rule but, given the clearly expressed intention of the grantor "under the circumstances present in [that] case," adopted the minority view. *Id.* at 143-44.

A year later, in *Leach v. Anderl*, 218 *N.J. Super.* 18 (App. Div. 1987), the Appellate Division declined to find an express easement for an adjoining neighbor to use a roadway where "the several references to the right of way as a 'roadway' in various deeds are only for the purpose of describing the property and its

boundaries and do not constitute a grant of the right to use the adjoining property." *Id.* at 28.

Judge Goodzeit did not explicitly rely on *Wildwood Crest* in her opinion or otherwise discuss the stranger-to-the-deed rule, but appears to have implicitly adopted the minority position applied in that case. This was wrong for two reasons: first, despite some criticism of the common law rule, it serves a valid purpose and should be adopted in New Jersey absent compelling circumstances rendering it inequitable in a given case; and second, even if there is good reason to deviate from the common law rule where the grantor's intention is clearly and precisely expressed, that did not happen here.

A. Reasons for Adopting the Majority Rule

The Court of Appeals of New York has observed:

> The long-accepted rule in this State holds that a deed with a reservation or exception by the grantor in favor of a third party, a so-called "stranger to the deed" does not create a valid interest in favor of that third party. Plaintiff invites us to abandon this rule and adopt the minority view which would recognize an interest reserved or excepted in favor of a stranger to the deed, if such was the clearly discernible intent of the grantor.
>
> Although application of the stranger-to-the-deed rule may, at times, frustrate a grantor's intent, any such frustration can readily be avoided by the direct conveyance of an easement of record from the grantor to the third party. The overriding considerations of the public policy favoring certainty in title to real property, both to protect bona fide purchasers and to avoid conflicts of ownership, which may engender needless litigation, persuade us to decline to depart from our settled rule.

Estate of Thomson v. Wade, 69 *N.Y.*2d 570, 516 *N.Y.S.*2d 614, 509 *N.E.*2d 309, 310 (1987)(citations and internal quotation omitted).

The Supreme Court of Montana has noted three reasons why transactions involving strangers to the deed are disfavored:

> First, the dominant estate . . . does not have the opportunity to negotiate with the grantor on issues like location, width, extent of use, and allowable use. Second, the easement will fail to appear in the chain of title of the appurtenant parcel, which leaves bona-fide purchasers without notice that the land benefits from an easement. Finally, the conveyance to a stranger to the deed allows for no acceptance by the would-be dominant estate, raising questions of unexpected taxes, environmental concerns, and potential litigation.

Loomis v. Luraski, 306 *Mont*. 478, 484-85, 46 *P*.3d 862 (2001)(citation omitted.).

The Appellate Division in *Wildwood Crest* did not address, much less refute, these justifications for the common law rule. The panel merely noted the competing viewpoints, and in conclusory fashion found the *Restatement*'s approach to be "better" given "the circumstances present in [that] case[.]" 210 *N.J. Super.* at 144. The record in our case, on the other hand, proves the wisdom of applying the common law rule.

Rowe, having thrown caution to the wind when purchasing the Challenger Lot, had no valid reason to assume any legally enforceable right to access Baxter's property. As is evident from his deposition testimony, his understanding of his legal rights was based on nothing more than uninformed scuttlebutt.

Assuming that New Jersey's recording statute placed Baxter on constructive notice of the 1966 deed recital relied on by Challenger in this case, we say, respectfully, so what? For reasons we discuss in more depth below, Baxter would have had no reason to suspect that "the rights" mentioned in that deed were anything more than the occasional, unintrusive meanderings along that unimproved strip of land described in his certification below that he voluntarily permitted as a revocable license. (Da789-Da791) If Trunell or any of Challenger's other predecessors in title desired anything more than that, they would have had to negotiate for an express easement.

As Judge Derman observed toward the end of her 2008 opinion:

> Even based on a reasonable necessity, [Trunell] has undertaken too little and made too few overtures with other neighbors and presents the court with no evidence of the hurdles he must overcome to exact an express easement from his neighbors. Presumably, [Trunell], having lost his quest before this court, will now approach his neighbors to determine if they are amenable to such an arrangement and if so, at what cost. (Da630)

There is no evidence in our record of any such efforts by Trunell or any of his successors in title over the next twelve years preceding Challenger's purchase of the property in 2020.

It is undisputed that no easement rights were reflected anywhere in the Challenger Lot's chain of title. Under the common law rule, a purchaser of that property would have been on notice that there was no entitlement to an express

easement across the Baxter's property, and that any such right would have to be negotiated for consideration unless an easement could be established by necessity or prescription. Prospective purchasers presumably would take that into consideration before acquiring the Challenger Lot, and litigation such as the present case would be avoided.

B. Baxter Should Prevail Even Under The Minority Rule

Even in jurisdictions where transactions granting interests to strangers are viewed with skepticism, courts have sometimes given effect to the grantor's intent where it "*is clearly shown*[.]" *See, e.g., Medhus v. Dutter*, 184 *Mont.* 437, 603 *P*.2d 669, 673 (1979)(citing *Cushman v. Davis*, 80 *Cal. App.*3d 731, 735, 145 *Cal. Rptr.* 791, 793 (1978))(emphasis in original) To determine that intent,

> courts have considered the express language of the deed, testimony by grantors stating their intent, the fact that the grantor received less value for the property conveyed because of the existence of an easement, and, the sufficiency of the description of the location of the easement and whether or not the reservation names a dominant tenement. (citations omitted).

[*Medhus,* 184 *Mont*. at 444, 603 *P*.2d at 673.]

The sole evidential basis for the trial court's ruling in our case was the recital in the 1966 Totten-to-Liniewicz deed in the Baxters' chain of title:

> Excepting and reserving from the above the rights of the public or owners of property lying westerly and southerly of Totten farm to use a roadway or driftway running thru this tract to reach their properties from the public road mentioned in the description above.

We submit that this language does not evince the grantor's intent with sufficient clarity to deviate from the common law rule.

To begin with, the phrase "[e]xcepting and reserving" is an oxymoron. Although the two terms are often used interchangeably, they reflect distinct concepts. A reservation is the creation of a new right in favor of the grantor, while an exception operates to exclude some interest from the grant. *Wenske v. Ealy*, 521 *S.W.*3d 791 (Tex. 2017). "The words in their technical meaning are contradictory. The grantors could not have intended an exception and a reservation both in their technical sense." *City Club of Auburn v. McGeer*, 198 *N.Y.* 609, 610, 92 *N.E.* 105 (1910). *See also Senterra, Limited v. Winland*, 169 *Ohio St.* 3d 595, 608, 207 *N.E.*2d 632, 644 (2022). At common law, these words could not convey an easement. *Sackett v. O'Brien*, 43 *Misc.*2d 476, 251 *N.Y.S.*2d 863, 865-66 (Sup. Ct. 1964)(citing *Durham and S. Railway Co. v. Walker*, 2 Q.B. 940; *Wickham v. Walker*, 7 M. & W. 75; *Corp. of London v. Riggs*, 13 Ch. Div. 798)).

American courts tend to overlook the internal contradiction of this phrase and usually construe the language as either an exception or reservation based on available evidence of the grantor's intent, *Riefler & Sons v. Wayne Storage Water Power Co.*, 232 *Pa.* 282, 288, 81 *A*. 300, 302 (Pa. 1911), but such evidence is nowhere to be found in the record below. It is well established that a deed of easement is to be construed in light of the contemplation of the parties at the time

the easement was created. *See Hyland v. Fonda*, 44 *N.J. Super.* 180, 187-92 (App. Div. 1957).

What evidence was there, either on the face of the deed or otherwise in the record, to establish the Tottens' intent at the time of their conveyance to Liniewicz? We say none. The deed purports to except and reserve "the rights" of the public or owners of the Challenger Lot to use "a roadway or driftway" across Baxter's land but nowhere mentions an easement *per se*. It is unclear from the deed recital alone whether the Tottens intended to preserve some undefined rights already in existence at the time of the transaction, or to create new ones in the transaction itself. If the former, how and when were those rights created and what limitations, if any, were intended on their exercise? If the latter, how intense a right of access did the grantors intend to create?

To answer these questions, Judge Goodzeit would have had to resort to extrinsic evidence, but there was none in the motion record. The parties' stipulation of facts nowhere addressed the Tottens' intentions at the time of the conveyance, or how those rights were intended to be exercised either before or after the transaction. (Da393-Da507) Neither did Challenger's statement of material facts (Da145-Da147) or Rowe's supporting certification. (Da508-Da545).

Baxter's motion papers did not address the Tottens' intent either, but did describe the very nominal and unobtrusive use of the driftway for many years

before and after he took title in 1990. He also represented that the driftway "is currently overgrown and impassable. It has only been used sporadically, if at all, since Judge Derman granted Summary Judgment in 2006." (Da789-Da791)

Judge Goodzeit did not point to any evidence of Totten's intentions either. She based her findings solely on the language of the 1966 deed which plainly was insufficient. Compare the record in our case to what was before the Appellate Division in *Wildwood Crest*, where the grantor explicitly stated an intention to create "an easement," the location and dimensions were precisely identified, and the trial court reached its findings only after a trial.

For the reasons presented above, there was insufficient evidence to support Judge Goodzeit's finding of an express easement.

Point II

Challenger's claim was precluded by *res judicata*, collateral estoppel and the entire controversy doctrine (Da809).

Baxter argued below that *res judicata*, collateral estopped and the entire controversy doctrine precluded Challenger's claim by virtue of the 2006 and 2008 judgments entered in the *Trunell* litigation. Judge Goodzeit rejected that argument but it is meritorious and warrants reversal.

Res Judicata

"The term 'res judicata' refers broadly to the common-law doctrine barring relitigation of claims or issues that have already been adjudicated." *Velasquez v.*

Frank, 123 *N.J.* 498, 505 (1991). The doctrine "provides that a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding." *Ibid.* "By insulating courts from the relitigation of claims, *res judicata* prevents the judicial inefficiency inherent in multiplicitous litigation[,]" ensures the finality of judgments, and advances the interest of fairness "[b]y preventing harassment of parties[.]" *Watkins v. Resorts Int'l Hotel & Casino, Inc.*, 124 *N.J.* 398, 409 (1991).

The elements of *res judicata* have been summarized as follows:

> (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one.

Watkins, *supra*, 124 *N.J.* at 412. Judge Goodzeit also relied on *Brookshire Equities, LLC,* 346 *N.J. Super.* 310, 318 (App. Div. 2002) for the proposition that there must be "identity of issues" or "identity of the cause of action." (Da816)

Judge Goodzeit found no identity of issues and causes of action because the *Trunell* litigation "focused on plaintiff's purported right to enter the land by prescription or by necessity[,]" not express language contained in a deed. (Da829) She also found that the requisite final adjudication was lacking because the portion of Judge Derman's opinion addressing Trunell's express easement claim was

merely *dicta*, "based on incomplete facts, on theories not raised in the complaint," and the 1966 Totten-to-Liniewicz deed was never presented to that court. (Da830-Da831)

Judge Goodzeit's analysis of *res judicata* was fatally flawed. Judge Derman's ruling on the express easement theory was not *dicta*. "[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*." *Woods v. Interstate Realty Co.*, 337 *U.S.* 535, 537, 69 *S.Ct.* 1235, 1237, 93 *L.Ed.* 1524 (1949). We are not faced here with the scenario addressed by our Supreme Court in *Ettin v. Ava Truck Leasing, Inc.*, 53 *N.J.* 463 (1969), where a jury verdict might have been based upon any one of several grounds, but it was impossible for another court to determine which one. In such cases, the judgment is not preclusive as to any of those grounds. *Id*. at 480.[9]

Judge Derman addressed all three easement theories on their merits. Having rejected Trunell's claims for an easement by necessity or prescription, her ruling on

[9] Under certain circumstances, *e.g.,* in bankruptcy claims, where the risks of cursory consideration at trial and on appeal, or of the lack of adversarial zeal by either party, is particularly high, collateral estoppel may not apply to alternate grounds for a determination. *See Blair v. Taxation Div. Director*, 9 *N.J. Tax* 345, 350 n. 6 (1987)(citing *Halpern v. Schwartz*, 426 *F*.2d 102 (2d Cir. 1970)). However, absent such special circumstances, collateral estoppel generally applies to all issues actually litigated, whether they are alternate grounds or not. *Blair*, 9 *N.J. Tax* at 350, n. 6 (citing *Williams v. Ward*, 556 *F*.2d 1143 (2d Cir. 1977) and *Winters v. Lavine*, 574 *F*.2d 46 (2d Cir. 1978)). *But see Restatement, Judgments* 2d, § 27.

the express easement claim was essential to her ultimate rejection of Trunell's claim to an easement under any theory.

More importantly, even if Trunell had not raised the express easement theory at all, Judge Goodzeit's decision ignored settled law that "[t]he preclusive effect of *res judicata* applies not only to matters which were raised in a prior action *but also to matters which could have been raised." Joseph L. Muscarelle, Inc. v. State*, 175 *N.J. Super.* 384, 395 (App. Div. 1980), *app. dismissed*, 87 *N.J.* 321 (1981)(emphasis added). Even *Culver v. Ins. Co. of N. Am.*, 115 *N.J.* 451 (1989), cited by Judge Goodzeit as authority for her analysis of the issue (Da828), held as much. *See Culver, supra*, 115 *N.J.* at 463 (*Res judicata* bars "not only ... 'all matters litigated and determined by such judgment *but also as to all relevant issues which could have been presented, but were not*.'")(citing *Anselmo v. Hardin*, 253 *F*.2d 165, 168 (3d Cir. 1958))(emphasis added).

A claim for an express easement surely "could have been presented" by Trunell, as it was reasonably knowable and actionable when he filed his suit in 2005. The deed relied on by Challenger in this case was recorded in 1966. It was easily ascertainable as evidenced Rowe's discovery of it on a visit to "to the Hunterdon County records room to research the chains of title to Plaintiff's Lot, the Baxter Lot and the Stinson Lot." (Da515) Assuming for argument's sake that deed

evidenced an express easement, a claim to that effect certainly could have been asserted by Trunell.

Judge Goodzeit also cited *Culver* for the relevant factors in determining if two causes of action are sufficiently similar:

> (1) whether the acts complained of and the demand for relief are the same; (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same; and (4) whether the material facts alleged are the same.

(Da816)(citing *Culver*, 115 *N.J.* at 461-62). But that was merely shorthand for a more nuanced concept explained at greater length elsewhere in that decision.

The passage from *Culver* cited by Judge Goodzeit was excerpted from this more in-depth analysis in *United States v. Athlone Industries, Inc.,* 746 *F.*2d 977, 984 (3d Cir. 1984):

> This court has on more than one occasion grappled with the difficult question of identity of causes of action for purposes of claim preclusion, *see, e.g., Davis v. United States Steel Supply*, [688 *F*.2d 166, 171-72 (3d Cir. 1982)*, certiorari* den.*,* 460 *U.S.* 1014 (1983); *Donegal Steel Foundry Co. v. Accurate Products Co.*, 516 *F*.2d 583, 587-88 (3d Cir. 1975), and it bears repeating that the term "'[c]ause of action' cannot be precisely defined, nor can a simple test be cited for use in determining what constitutes a cause of action for res judicata purposes." *Id*. at 588, n. 10. As we more recently noted in *Davis,* the term has been given varied treatment depending upon the facts in each case and the inquiry is often fraught with conceptual difficulties: More difficult is the question of identity of the causes of action. A single cause of action may comprise claims under a number of different statutory and common law grounds.... Rather than resting on the specific legal theory invoked, *res judicata* generally is thought to turn on the essential similarity of the underlying events giving rise to

> the various legal claims, although a clear definition of that requisite similarity has proven elusive....
>
> Whatever the conceptual difficulties inherent in any definition of a "cause of action," often the presence of a single cause of action is clear.
>
> *Davis*, 688 *F*.2d at 171 (emphasis added)(citations omitted).
>
> Although we declined to adopt *one* specific legal theory in *Davis,* we indicated a predisposition towards taking a broad view of what constitutes identity of causes of action --"an essential similarity of the underlying events giving rise to the various legal claims." We therefore do not adhere to any mechanical application of a single test but instead focus on the central purpose of the doctrine of res judicata. We are thus in keeping with "[t]he present trend ... in the direction of requiring that a plaintiff present in one suit all the claims for relief that he may have arising out of the same transaction or occurrence." 1B J. Moore & J. Wicker, Moore's Federal Practice ¶ 0.410[1], at 359 (2d ed. 1983).

[746 *F*.2d at 983-84.]

Causes of action are deemed part of a single "claim" if they arise out of the same transaction or occurrence. If, under various theories, a litigant seeks to remedy a single wrong, then that litigant should present all theories in the first action. Otherwise, theories not raised will be precluded in a later action. *McNeil v. Legislative Apportionment Comm'n*, 177 *N.J.* 364, 395 (2003). The New Jersey courts have distilled these principles to the simple phrase, reflected in decisions such as *Joseph L. Muscarelle, Inc.*, *supra*, that *res judicata* extends to all claims that were raised or "*could have been raised*." 175 *N.J. Super.* at 395 (emphasis added).

Each count of Trunell's complaint sought a "determination [that he] is entitled to a right of residential access to and from his property over the lands of one or more of the Defendants." (Da82-Da86) There is no reason why a claim for an express easement could not have been asserted at that time since the purpose of that relief would have been to "remedy" the same "wrong." *McNeil*, *supra*, 177 *N.J.* at 395.

Judge Goodzeit's decision was erroneous even under her narrower view of *res judicata* because it is clear from Judge Derman's two rulings that a claim of express easement was actually litigated and decided on the merits. Judge Goodzeit found otherwise because "Judge Derman specifically noted that there was nothing in Trunell's complaint to suggest that he pled a cause of action to an express easement." (Da816) We say that does not matter because an issue can be actually litigated for claim preclusion purposes even if not raised until a summary judgment motion.

This is clear from the *Restatement*'s discussion of the matter in the context of collateral estoppel. *See Restatement, Judgments* 2d § 27, comment d ("When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of this Section. An issue may be submitted and determined on . . . a motion for summary judgment . . …")(quoted in *Allesandro v. Gross*, 187 *N.J. Super.* 96, 105-

106 (App. Div. 1982)). *See also Montoya v. JL Astoria Sound, Inc.*, 92 A.D.3d 736, 738, 939 N.Y.S.2d 92, 94 (2012).

Judge Derman could have declined to address the express easement claim but instead chose to decide it squarely on the merits, and rejected it for lack of any supporting deed language. *See* part III of Judge Derman's decision ("*Express Easement Claim*") and the Conclusion ("Plaintiff has failed to show a *prima facie* case for an *express*, implied or prescriptive easement.")(emphasis added) (Da106-Da107) Having done so, the issue must be considered actually litigated.

Lest there be any remaining doubt, one need look no further than Judge Derman's summary of that ruling in her later opinion in 2008: "This court ruled that [Trunell], who apparently had undertaken little or no discovery, enjoyed neither an *express easement* nor a prescriptive easement Baxter's land." (Da600)(emphasis added). "[Trunell] has no legal right to use the Baxter Lane because this court has already granted summary judgment to Baxter that [Trunell] did not have an *express easement* or a prescriptive easement to do so." (Da612-Da613)

Judge Goodzeit observed, correctly, that Trunell never brought the 1966 deed to Judge Derman's attention when raising his express easement claim. But even assuming for argument's sake that deed would have supported his claim, an assumption we dispute for the reasons expressed above, applicability of the could-

have-been-raised element of *res judicata* cannot turn on whether a litigant, in the earlier action, looked under every rock when gathering evidence to support his case. Inadequate pretrial preparation does not entitle the losing party or his privies to a do-over.

Collateral Estoppel

The doctrine of collateral estoppel also barred Challenger from relitigating matters determined in Judge Derman's 2006 decision. Although Baxter was not a party to the reactivated litigation against the Harrison Trust, the doctrine barred Challenger from relitigating matters found by Judge Derman in her 2008 opinion as well. (Da555-Da632)

"'The doctrine of collateral estoppel is a branch of the broader law of *res judicata* which bars relitigation of any issue actually determined in a prior action generally between the same parties and their privies involving a different claim or cause of action.'" *Figueroa v. Hartford Ins. Co.*, 241 *N.J. Super.* 578, 584 (App. Div. 1990)(quoting *New Jersey Mfrs. Ins. Co. v. Brower*, 161 *N.J. Super.* 293, 297-98 (App. Div. 1978)). In order for the doctrine to apply, the party asserting the bar must show:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding;
>
> (2) the issue was actually litigated in the prior proceeding;

> (3) the court in the prior proceeding issued a final judgment on the merits;
>
> (4) the determination of the issue was essential to the prior judgment; and
>
> (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

[*In re Estate of Dawson*, 136 *N.J.* 1, 20 (1994)(citations omitted).]

In times past, collateral estoppel was available only where there was mutuality of estoppel; however, the requirement of mutuality is no longer adhered to in New Jersey. *Allesandro*, *supra*, 187 *N.J. Super.* at 104-106. Our courts have adopted the more flexible modern view of *Restatement, Judgments* 2d, § 29, that a party precluded from relitigating an issue with an opposing party is also precluded from doing so with another person unless he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. *See, e.g., State v. Gonzalez*, 75 *N.J.* 181, 188-92 (1977).

The requirement that the judgment be on the merits is explained in comment d to § 27 of the *Restatement, Judgments* 2d, quoted above. While § 27 of the *Restatement, Judgments* 2d, deals with the conclusive effect of issues of law and fact previously litigated between the same parties, the principles discussed there are also applicable to relitigation of issues with persons other than the parties to the prior litigation. *See Restatement, Judgments* 2d, § 29, comment a.

The gist of Trunell's claim against the Harrison Trust was that in 1851 his landlocked property was subdivided by the Harrison Trust's predecessor in title. The transfer made no provision for a right-of-way to a public road so Trunell claimed he was entitled to an easement by necessity from his property across the Harrison Trust property to Losey Road. (Da557) The legal status of the driftway across Baxter's property was necessarily implicated because, as an element of his easement-by-necessity claim, Trunell was obliged to prove that traversing the Harrison Trust property was his only option.

Judge Derman rejected the claim, in part because Trunell presented no evidence of any attempt to negotiate easement rights to the driftway across Baxter's property and, at least to that point, Baxter was voluntarily allowing Trunell to use it. In analyzing the evidence presented at the trial, Judge Derman specifically found that Trunell's access across Baxter's property was "apparently pursuant to a revocable license." (Da612)

This finding met all the criteria for a finding of collateral estoppel. The legal status of the driftway across the Baxter Lot was squarely in issue before Judge Derman and Judge Goodzeit. It was actually litigated in both cases. Judge Derman's two detailed opinions in 2006 and 2008 are proof positive that Trunell had a full and fair opportunity to litigate the matter. She issued a final judgment on the merits which was affirmed by the Appellate Division. A determination of

whether Trunell had an express easement was essential to Judge Derman's judgment. And Trunell was in privity with Challenger.

Judge Goodzeit rejected Baxter's collateral estoppel argument for much the same reason as she rejected *res judicata* -- because the 1966 Totten-to-Liniewicz deed was never presented to Judge Derman. (Da831) But Trunell's legal right to access Baxter's property was certainly litigated, and Judge Derman squarely addressed it in both of her opinions. As we argued above, as long as there is a full and fair opportunity to litigate the matter, there is no exception to the collateral estoppel doctrine for doing a poor job of it.

Entire Controversy Doctrine

The entire controversy doctrine "generally requires parties to an action to raise all transactionally related claims in that same action." *Largoza v. FKM Real Estate Holdings, Inc.*, 474 *N.J. Super.* 61, 79 (App. Div. 2022) (quoting *Carrington Mortg. Servs., LLC v. Moore*, 464 *N.J. Super.* 59, 67 (App. Div. 2020); *see also* Pressler & Verniero, Current N.J. Rules, cmt. 1 on *R*, 4:30A (2023). Specifically, under Rule 4:30A, "[n]on-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine."

The doctrine is rooted in the goal of encouraging parties to resolve all their disputes in one action. *Dimitrakopoulus v. Borrus, Goldin, Foley, Vignuolo, Hyman*

and Stahl, P.C., 237 *N.J.* 91, 98 (2019). In determining "what claims are 'required to be joined' by the doctrine, ... th[e] Court has explained that the 'claims must "arise from related facts or the same transaction or series of transactions" but need not share common legal theories.'" *Bank Leumi USA v. Kloss,* 243 *N.J.* 218, 226 (2020)(quoting *Dimitrakopoulus*, 237 *N.J.* at 119).

Even where the doctrine is otherwise applicable, a court has the discretion not to apply it when doing so would be inequitable on the facts of a particular case, or it would not promote the doctrine's underlying goals. *Carrington Mortg. Services, LLC, supra*, 464 *N.J. Super.* at 68. Judge Goodzeit did not appear to dispute that the entire controversy doctrine may well have required Trunell to include an allegation of express easement, but felt it would be inequitable to apply it in this case:

> Here, the Court is tasked with determining the fairness of applying the entire controversy doctrine at the expense of New Jersey's recording statute, which provides that any recorded document affecting the title to real property provides notice to all subsequent purchasers of the contents of the deed. *N.J.S.A.* 46:26A-12(a). It would be unfair to deny plaintiff the ability to enforce the clear and unambiguous reservation recorded in Baxter's chain of title just because Trunell did not rely on an express easement theory in his earlier litigation. (Da832)

We argued in Point I that the deed recital in Baxter's chain of title was not a "clear and unambiguous reservation," but even if it was, there is no authority for

the proposition that the entire controversy doctrine turns on the strength of the claim the plaintiff failed to join in the original action.

We suspect Judge Goodzeit may have had in mind the line of cases holding that the entire controversy doctrine does not bar related claims which were unknown at the time of the earlier action, *see, e.g., Milkap Corp. v. Industrial Constr. Co., Inc.*, 281 *N.J. Super.* 180, 185-86 (App. Div. 1995), but those cases do not require conscious awareness of a cause of action. To the contrary, knowledge of the existence of a cause of action, for purposes of the entire controversy doctrine, is the same as would trigger the running of the statute of limitations under the discovery rule. *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 274 *N.J. Super.* 405, 413 (App. Div. 1994), *aff'd*, 142 *N.J.* 280 (1995). That is, the point when a plaintiff knows, or through the exercise of reasonable diligence, should know of facts suggesting a breach of legal duty attributable to another. *Lynch v. Rubacky*, 85 *N.J.* 65, 70 (1981).

By that standard, Trunell surely had the requisite knowledge of a potential express easement claim. A title search of the Challenger Lot would have instantly revealed the absence of any easement rights in that chain of title. A reasonable litigant surely would have researched the titles of the property owners along the route of the driftway, which would have disclosed the 1966 deed on which Rowe

later based his claim. And even if Trunell did not undertake that exercise, he was on constructive notice of it anyway.

In *Fisher v. Yates*, 270 *N.J. Super.* 458 (App. Div. 1994), another case involving an owner of landlocked property seeking an access easement across a neighbor's land, the Appellate Division held that the recording statute that put Baxter on notice of the 1966 deed in *his* chain of title also put the plaintiff in *Fisher* on notice of recorded instruments in his *neighbor*'s chain of title. 270 *N.J. Super.* at 471.[10] Thus, when Trunell purchased the Challenger Lot, as a matter of law he had notice of the 1966 deed in Baxter's chain of title.

Fisher has additional implications for our case, as it also involved the entire controversy doctrine. The plaintiff filed suit alleging that the neighbor improperly relocated an easement in violation of a written agreement. After the trial judge entered a final judgment dismissing that claim, the plaintiff filed a new action alleging a prescriptive easement across the same route after discovering, through a title search eighteen months after the first complaint was filed, that the defendant did not have title to the property when the agreement was executed. The same trial judge found that the first action precluded the second one and dismissed that case as well.

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[10] N.*J.S.A.* 46:21-1, the recording statute cited in *Fisher*, was the version then in effect. It was repealed as of 2012, *see L.* 2011, *c*. 217, § 2, eff. May 1, 2012, and superseded by *N.J.S.A.* 46:26A-12.

In a consolidated appeal from both dismissals, the Appellate Division held that the entire controversy doctrine barred the second case because the prescriptive easement claim could and should have been asserted in the first case:

> In both cases plaintiff sought essentially the same relief, restoration of the original easement location. In Fisher I, the theory was that the new easement was not of the same type or quality as the one given by the agreement; while in Fisher II, the underlying theory was one of prescriptive right. Nonetheless, both claims arose out of the same transaction or occurrence. [270 *N.J. Super.* at 470.]

The panel viewed the breach of contract claim asserted in the first action, and the prescriptive easement claim asserted in the second action, as sufficiently related to warrant preclusion of the second action. By the same standard, even if Trunell had never raised his express easement theory in his summary judgment motion and it was never addressed by Judge Derman at all, the entire controversy doctrine still precluded Challenger from raising it in this case.

The panel in *Fisher* also found no excuse for the plaintiff's belated title search of the defendant's property when the recording statute put the plaintiff on constructive notice of the defendant's chain of title from day one.[11] The same holds true for Trunell, who never searched Baxter's title at all. Judge Goodzeit's concern

[11] In this regard, the panel stated: "Plaintiff, as a potential judgment creditor, must be charged with notice of any deed which has been duly recorded in the proper county recording office. A title search of the servient tenement should have been made prior to the filing of the complaint in *Fisher* I, and plaintiff had over eighteen months to do so after filing the complaint." 270 *N.J. Super.* at 471.

for the primacy of the recording statutes cuts both ways in this case and does not tilt in Challenger's favor.

What's more, withholding application of the entire controversy doctrine based on a litigant's failure to avail himself of easily available evidence would frustrate the policies underlying the entire controversy doctrine because it would punish future defendants for an earlier plaintiff's laziness. As with *res judicata* and collateral estoppel, inattentive case preparation by an earlier plaintiff does not entitle a future plaintiff to a do-over.

Challenger argued below that Judge Goodzeit should exercise her discretion not to apply the entire controversy doctrine because Baxter "engaged and litigated the case, served discovery, answered discovery, took depositions, and in all respects litigated the case through the close of discovery." *See* Judge Goodzeit's summary of Challenger's arguments at Da817. Judge Goodzeit did not rely on this delay as a basis for her decision, but we anticipate Challenger may raise it in opposition to our appeal. For the following reasons, this argument has no merit.

Baxter pleaded the defense in his answer to the complaint (Da94), so Challenger was on notice of it from the start. Any delay in raising it by motion was relatively brief. The timeline of this litigation is reflected in the docket which we have provided to the Court. (Da884) Challenger filed its complaint on December 8, 2021, but the pleadings stage of the case was not concluded until late June 2022.

Challenger filed its summary judgment motion on November 11, 2022, only five months later, and Baxter's cross-motion promptly followed. In the meanwhile, the parties did exchange interrogatories and took two depositions, but that relatively fast-tracked discovery period is no basis to deny application of the entire controversy doctrine.

Our Supreme Court has invoked the entire controversy doctrine to dismiss a subsequent claim where the delay in raising it was far longer. In *Oliver v. Ambrose*, 152 *N.J.* 383 (1988), the defendant pleaded an entire controversy doctrine defense for the first time three years after the complaint was filed, and did not move for summary judgment on that ground until the year after that. The Supreme Court, in upholding dismissal of the complaint based on the entire controversy doctrine, observed that judicial economy is only one consideration, and such concerns cannot override the doctrine's overall objective of fairness to litigants. *Id*. at 403 (citing *DiTrolio v. Antiles*, 142 *N.J.* 253, 278 (1995)).

Considerations of fairness, in our case, weigh heavily in Baxter's favor. He endured 21 months of litigation in the *Trunell* case and prevailed.[12] His reasonable reliance on Judge Derman's 2006 ruling was reinforced by her subsequent decision in 2008, two years later, when Trunell reactivated the litigation against the

[12] Trunell filed his complaint on January 11, 2005. (Da82-Da86). Judge Derman entered her order granting summary judgment to Baxter on September 29, 2006. (Da99)

Harrison Trust. For 13 years after that, until Challenger commenced its suit in late 2021, Baxter justifiably believed that the owners of the Challenger Lot, whoever they may be, had no legally enforceable right to access his property.

Challenger's principal, Rowe, has attempted to play the role of an innocent victim in this case, but the evidence clearly shows he was miscast. We concede that nothing in the County property records would have alerted Rowe to the outcome of the *Trunell* litigation, but that does not entitle him to the sympathy he claimed. For starters, he never relied on the 1966 deed in his purchasing decision because he was unaware of it until afterward. (Da513) Furthermore, his rights can rise no higher than Trunell's, with whom he was in privity. Trunell was on constructive notice of the 1966 deed in Baxter's chain of title, *Fisher*, *supra*, but, consistent with his casual approach to the purchase of the Challenger Lot, never researched the matter and forfeited that claim for himself and all future owners.

Rowe, for his part, was equally casual in his own purchase of the property. He did not conduct a title search of his or Baxter's property, and relied on nothing more than his lay opinion of the law, and anecdotal information from the Roths about their use of the driftway across Baxter's land. Astoundingly, he made no attempt to ascertain Baxter's position on the matter. Had he done so, Baxter surely would have alerted him to Judge Derman's decisions in the *Trunell* litigation, which may have dissuaded him from purchasing the property at all.

As noted above, there also is evidence in the record, albeit disputed by Rowe, that Beth Roth told him about the *Trunell* litigation before he purchased the property, but no evidence that he ever attempted to acquaint himself with Judge Derman's rulings. We need not explore here whether Rowe may have a cause of action against the Roths for representing he could access the driftway across Baxter's property without disclosing the judgments in *Trunell*. Suffice it to say, if Rowe was a victim at all, he should not be looking to Baxter for relief.

In sum, there is nothing unfair to Challenger about applying the entire controversy doctrine in this case, and not doing so would be grossly unfair to Baxter.

Point III

In the alternative, the Court should remand the matter for consideration of relevant issues not addressed by the trial court (Da845, Da846, Da849).

For the reasons presented in Points I and II, the Court should reverse the judgment below and direct the entry of summary judgment in Baxter's favor. In the alternative, should this Court be inclined to accept Judge Goodzeit's finding of an enforceable easement, the Court should remand the matter to address what uses and activities are permissible before Challenger is permitted to move forward with whatever plans it may have.

The cross-motions for summary judgment focused on the abstract question whether the 1966 deed gave Challenger legally enforceable easement rights across Baxter's property. The litigation to that point did not address what Challenger could do with the easement if found to exist.

Our case law requires consideration of the contemplation of the parties at the time the easement was initially created, the negative effect of any paving or other improvements on the servient estate, and other factors. *See Hyland*, *supra*, 44 *N.J. Super.* at 187-92. Accordingly, while the summary judgment order was still interlocutory, to avoid any entire controversy doctrine concerns, the undersigned wrote to Judge Goodzeit requesting that she schedule further proceedings to address "what the plaintiff is permitted to do on that easement." (Da837)

Judge Goodzeit denied that request:

> At the outset, the pleadings before the Court addressed whether Challenger Acres, LLC enjoys easements over the Baxter and Stinson properties. However, the nature of plaintiff's utilization of each easement -- if found to exist -- is not before the Court. Mr. Rubin's suggestion that this now be addressed because the Court granted Summary Judgment against his client is not appropriate. This case is one and a half years old and will not be expanded because the Baxters are fearful of what actions, if any, plaintiff may undertake in connection with the easement. (Da849-Da850)

Instead, even though Challenger's claim against the Stinsons remained unresolved, she entered an order converting the summary judgment against Baxter to a final judgment immediately appealable as of right. (Da845)

Even if Judge Goodzeit's finding of an express easement were correct, all of the considerations underlying the entire controversy doctrine warrant consideration, in the same action, of what specific uses and activities Challenger may engage in, especially given the history of occasional, unintrusive use of the driftway. (Da789-Da791) With the substantial record already amassed in this case, no useful purpose would be served by committing the parties to litigating these issues from scratch in a new action.

Conclusion

For the reasons presented above, the common law stranger-to-deed rule should be applied in this case. Under the minority view, grantors could convey easements to third parties who do not request, negotiate for, rely upon or perhaps even know of the easement ostensibly reserved for their benefit. If grantors intend to create easements for the benefit of others, they can, and should, do so through a transaction directly between them and the benefitted party, documented by an instrument suitable for recording in the grantee's chain of title.

Even if the minority view is adopted, the grantors' intent was not clear enough, in this case, to find an express easement in Challenger's favor. And even if it was, Challenger is barred by the *res judicata*, collateral estoppel and the entire controversy doctrine from pursuing that claim.

The judgment of the Chancery Division should be reversed and summary judgment entered in favor of Baxter dismissing the complaint. In the alternative, the matter should be remanded for further proceedings concerning what use Challenger may make of the easement.

Respectfully submitted,

DAVID B. RUBIN, P.C.
Attorney for Defendants-Appellants

By: 
DAVID B. RUBIN

Dated: December 29, 2023

CHALLENGER ACRES LLC, Plaintiff/Respondent, vs. JAMES E. BAXTER and FELICE CARPENTER BAXTER, husband and wife; Defendants/Appellants RICHARD STINSON and KATIE STINSON, husband and wife; and John Doe 1-10, Mary Roe 1-10 and ABC Corporation 1-10, said names being fictitious parties who may claim to have an interest in the subject roadway and lands referenced herein but whose identities are not currently known, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-3070-22T4 **Civil Action** On appeal from summary judgment of Chancery Division, Hunterdon County (Margaret Goodzeit, P.J., Ch., sitting below)

BRIEF ON BEHALF OF THE PLAINTIFF-RESPONDENT

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PRELIMINARY STATEMENT

Plaintiff-respondent, Challenger Acres LLC ("Respondent"), duly obtained summary judgment below against defendant-appellants, James Baxter and Felice Carpenter Baxter (the "Appellants" or "Baxters"), declaring that the Baxters' chain of title includes a valid easement by reservation in favor of the owners of Respondent's property (described herein as the "Challenger Lot") to use an existing roadway running from the public right of way through the Baxters' property and then through lands owned by the defendants, Richard and Katie Stinson (the "Stinsons"), before entering the Respondent's property. Without the access in question, Respondent's property is completely landlocked.

This Court should now affirm the lower court's order, entering summary judgment against the Baxters. The stipulated record below establishes that there are multiple deeds in the Baxters' chain of title that contain the following express easement by reservation in favor of the owners of the Challenger Lot to use an existing roadway on their land to access the otherwise landlocked parcel:

> Excepting and reserving from the above the rights of the public or owners of property lying westerly and southerly of Totten farm to use a roadway or driftway running thru this tract to reach their properties from the public road mentioned in the description above.

The parties stipulated on summary judgment that the "property lying westerly and southerly of Totten farm" is the Challenger Lot.

The Baxters own two separate lots in East Amwell, New Jersey. From their creation in 1955 to December 1966 those two lots were owned by different people. In December 1966, Jan and Helen Liniewicz ("Liniewicz") became the record owner to both lots. In 1972, Liniewicz sold both lots in a single deed to John and Margaret Repetz ("Repetz"). The deed Liniewicz conveyed to Repetz, however, unilaterally truncated the Tottens' easement language quoted above to read as follows:

> Subject to the rights of others, if any, in an old driftway crossing the southerly portion of the above described lot.

The truncated description of the easement from the 1972 Liniewicz-to-Repetz Deed was thereafter repeated in all future conveyances up to and including the deed into the Baxters.

The court below correctly ruled that Liniewiczs' 1972 deed to Repetz that truncated the easement language from the 1966 Totten-to-Liniewicz Deed was ineffective and void as a matter of law. The court also correctly ruled that the unambiguous easement created in the Totten-to-Liniewicz Deed continues to run with the land and burdens the Baxters' property for the benefit of the Challenger Lot.

The Court should not consider the argument Appellants advance for the first time on appeal that the common law 'stranger-to-the-deed rule' applies. The argument was not made by Appellants below in either their brief or at oral argument. Even if the Court were to consider the argument, it has been squarely addressed and resolved against Appellants in Borough of Wildwood Crest, infra.

The Chancery court properly rejected each of the Appellants' arguments advanced below, including the application of res judicata and collateral estoppel. There exists no similarly or identity of claims between this case and the case brought by Respondent's predecessor in title. Nor is the relief sought the same. Those two facts render res judicata and collateral estoppel inapposite. Finally, Judge Goodzeit correctly exercised her discretion in declining to invoke the entire controversy doctrine on fundamental fairness grounds as any contrary decision would plainly violate the New Jersey Recording Statute – a result that our Supreme Court has instructed the Courts to avoid. Any contrary result would also leave the Challenger Lot landlocked and without value. For the reasons set forth herein, the Court should affirm Judge Goodzeit's grant of summary judgment in all respects.

PROCEDURAL HISTORY

Respondent commenced this lawsuit on December 8, 2021, followed by two amended complaints to amend the parties (Da154 at ¶27; Da1; Da193). At the close of discovery, the parties filed competing motions for summary judgment (Da143, Da711; see also Da546).

On March 3, 2023, Judge Goodzeit, P.J. Ch., heard oral argument on the dueling motions for summary judgment. See Transcript of Hearing submitted on appeal. By Order and written decision dated March 16, 2023, Judge Goodzeit awarded Respondent summary judgment against the Appellants (Da846). Judge Goodzeit also ruled that issues of fact existed concerning Respondents' claims against the Stinsons.

By letter dated May 18, 2023, Appellants requested that Judge Goodzeit enter an order in recordable form to be submitted to the Hunterdon County Clerk for recording (Da839). By letter dated May 23, 2023, Appellants objected to entry of that order, claiming the matter was still interlocutory (Da844). On June 5, 2023, Judge Goodzeit enter the proposed form of order submitted by Respondent and, *sua sponte*, entered a second order, certifying the Court's summary judgment order as final as to the Baxters (Da845; Da846). Appellants filed this appeal on June 12, 2023 (Da851).

STATEMENT OF FACTS

Respondent is the owner of Block 27, Lot 45 in the Township of East Amwell, New Jersey (the "Challenger Lot"), having acquired it from Corwin and Beth Roth (the "Roths") in December 2020 for $202,000.00 (Da509 at ¶2). Challenger Lot has no frontage to a public street and is completely landlocked (Da511 at ¶16). Respondent's sole owner is Jamie Rowe ("Rowe") (Da508). At the time Respondent acquired Challenger Lot, Rowe inquired of the Roths as to how they accessed the property and was told by way of an existing roadway across the lands owned by the defendants (Da511 at ¶14). The roadway can be seen from the street, appears on surveys, and has been used consistently, albeit sparingly, by the owners of the Challenger Lot over the years (Da511-512 at ¶¶ 15, 16, 17).

Mr. Rowe is a lifelong resident of Hunterdon County (Da510 at ¶13). He purchased Challenger Lot with the intention of demolishing the existing structures and constructing a new single family home to serve as his family's primary residence (Da510 at ¶13). The existing structures were electrified when in use by Mr. Rowe's predecessor, Steven Kovacs (Da512 at ¶¶19-20). The existing electrical lines run along the roadway in question, extending

beyond Challenger Lot to the south (Da512 at ¶20). The electric company maintains its easement to service those electrical lines via the same roadway (See id.).

Shortly after purchasing the Challenger Lot, Rowe introduced himself to the Baxters and informed them that he would be bringing in contractors via the roadway to perform percolation and other testing (Da512 at ¶18). On the last day that Rowe's contractors were on site, Ms. Baxter advised that they were not permitted to be on the roadway and that Respondent's right to use the roadway had been extinguished in connection with a prior lawsuit brought by a previous owner of the Challenger Lot, Brian Trunell ("Trunell") (Da512 at ¶22).

In January 2021, Rowe, through counsel, wrote to the Baxters, refuting, among other things, their claim that the roadway easement had been extinguished (Da158). Respondent also explored other options to try to gain access to Challenger Lot other than through the Baxter Lot (Da513-14). Specifically, Respondent made inquiry of each of the other adjacent landowners but was unable to establish any formal access due to deed restrictions against one property limiting all uses to agricultural only, and due to the existence of freshwater wetlands, transition buffers, and State open waters along the other side of the land (Da513-514 at ¶¶30, 32-35; Da525; Da545).

In addition to seeking out alternative ways to access the Challenger Lot, Rowe personally went to the Hunterdon County Clerk's Office and reviewed the chains of title to each of the properties affected by the roadway (Da513 at ¶29; Da515 at ¶37). Rowe located and obtained copies of the deeds granting the Challenger Lot owners the right to enter and cross the Baxters' property via the existing roadway, but the Baxters refused to acknowledge their validity (Da345; Da433; Da461).

Historical Deeds to the Baxter Lot Provide the Owner of Challenger Lot an Express Right to Access and Cross Over the Baxter Lot to Access Challenger Lot

The Baxters' property consists of two separate parcels, Lots 43 and 44, in Block 27 on the Official Tax Map for East Amwell, New Jersey (Da502). However, the lots were not always under common ownership. During the time the two parcels were owned by different people, the southerly portion (referred to herein as the "South Baxter Parcel") consisted of approximately .51 acres while the northern parcel (referred to herein as the "North Baxter Parcel") consisted of approximately .88 acres (Da397 at ¶16). The Baxter's home sits on the North Baxter Parcel and the roadway easement at issue traverses the South Baxter Parcel (Da517 at ¶¶48-49).

The North Baxter Parcel was created by Deed dated June 6, 1955 and recorded on July 1, 1955 from Totten to Robert B. Mannon and Joanne Mannon ("Mannon") (Da398; Da471). Mannon then conveyed

the North Baxter Parcel to Liniewicz in October, 1966 (Da398 at ¶19; Da476).

The South Baxter Parcel was first created in February, 1955 when Frederick H. Totten and Madge E. Totten ("Totten") conveyed the land to Sanford L. Hillpot and Margaret E. Hillpot ("Hillpot") (Da397 at ¶15; Da461). The Totten-to-Hillpot Deed contains the following easement by reservation in favor of the owners of Challenger Lot to access their land:

> Excepting and reserving from the above the rights of the public or owners of property lying westerly and southerly of Totten farm to use a roadway or driftway running thru this tract to reach their properties from the public road mentioned in the description above (Da462) (emphasis supplied).

The land referred to above as "Totten farm" is currently owned by the Stinsons and the parties stipulated on summary judgment that Challenger Lot is the land situated to the west and south of the Totten farm, a/k/a Stinson Lot (Da395 at ¶17; Da397 at ¶13). Respondent's right to use the roadway to cross the Baxter Lot is express and unambiguous. The South Baxter Parcel was thereafter conveyed by: (i) Hillpot to Margaret P. Totten in September 1965; and then by (ii) Margaret P. Totten and Fred H. Totten to Liniewicz in December, 1966 (Da398 at ¶¶17-20; Da466; Da471; Da476; Da480). When Liniewicz acquired the South Baxter Parcel in December 1966, they became the common owner to both the North Baxter Parcel and

South Baxter Parcel (collectively referred to herein as the "Baxter Lot") (Da476; Da480).

Five years later, Liniewicz sold both properties in a single deed of conveyance to John J. Repetz and Margaret Repetz ("Repetz") (Da399 at ¶21; Da485). The Liniewicz-to-Repetz Deed, however, improperly and unilaterally truncated the description of the easement the Tottens created in the 1966 Totten-to-Liniewicz Deed to read as follows:

> Subject to the rights of others, if any, in an old driftway crossing the southerly portion of the above described lot (Da486).

The Liniewicz-to-Repetz Deed omitted the material clause: "the rights of the public or owners of property lying westerly and southerly of Totten farm to use a roadway or driftway running thru [the South Baxter Parcel] to reach their properties from the public road mentioned in the description above" from the property description (Compare Da481 with Da485). Thereafter, the Baxter Lot was conveyed: (i) from Repetz to Howard T. Morris and Shirly I. Morris ("Morris") in August, 1974; and (ii) from Morris to Kenneth and Gayle Kobezak in March, 1977; and then from Kenneth Kobezak to Baxter in November, 1990 (Da399 at ¶¶22, 23, 25; Da490; Da494; Da498; Da502). Each Deed following the Liniewicz-to-Repetz Deed included the same incomplete and truncated version the property description, omitting the express rights granted to the

owners of Challenger Lot to use the roadway (Da490; Da494; Da498; Da502).

Respondent's Lawsuit and Defendants' Defenses

Respondent commenced this case on December 8, 2021, seeking declaratory judgment to confirm its right to use the roadway to access its property based on the recorded land records on file in Hunterdon County (Da154 at ¶27). Respondent thereafter filed two amended complaints to amend the parties (Da1; Da345). Respondent's claim is insular and discreet and is limited to the parties' record titles. Appellants' Answer denies knowledge and information as to many of Respondent's allegations (Da87; Da215). Appellants asserted seven affirmative defenses consisting of: (i) failure to state a claim upon which relief can be granted; (ii) res judicata; (iii) collateral estoppel; (iv) entire controversy doctrine; (v) laches; (vi) unclean hands; and (vii) Respondents' "damages" are barred by the doctrine of waiver (Da94; Da222). Appellants also pled a counterclaim for declaratory judgment that Respondent has no right to use the roadway to cross the Baxters' property (Da224). The Stinsons also filed a responsive pleading wherein they repeated Appellants defenses and added the additional defenses of abandonment, statute of limitations and that the Stinsons'

property (Totten farm) is now encumbered by a Deed of Easement and Farmland Preservation Agreement (Da230).[1]

The basis for the Appellants' defenses of res judicata, collateral estoppel and entire controversy doctrine stem from a prior lawsuit commenced in 2005 by plaintiff's predecessor in title, Brian Trunell ("Trunell") (Da224). Trunell was completely unaware of the easement created by the Tottens in the 1966 Totten-to-Liniewicz Deed and, therefore, commenced a complaint in the Superior Court of New Jersey – Hunterdon County, Chancery Division, seeking a judicially created easement across the Baxter Lot (Da178). Trunell's Complaint consisted of only two counts (Da178). The first pled a claim for implied easement by necessity (Da178). The second cause of action sought an implied easement by prescription (Da180). No claim for express easement of any type was asserted by Trunell (Da106; Da830).

By Order and decision dated September 28, 2006, the court (Judge Harriet Derman, P.J. Ch.) granted summary judgment and dismissed Trunell's complaint with prejudice (Da99; Da102). See id. Judge Derman found that because Trunell failed to establish that the Challenger Lot and Baxter Lot originated from the same

[1] By Order and decision dated February 28, 2024, Judge Suh, P.J. Ch., entered final judgment in favor of the Respondent against the Stinsons, confirming Respondents' access rights across the Stinsons' property a/k/a the Totten farm along the existing roadway to access the Challenger Lot.

grantor, Trunell was not entitled to an easement by necessity (Da105-106). Addressing Trunell's claim for easement by prescription, Judge Derman found that Trunell also failed to offer the Court any evidence that he satisfied the *prima facie* elements to obtain that relief (Da104-105).

Judge Derman then addressed, in *dicta*, whether there could be an easement by express right notwithstanding that Trunell never pled the claim (Da106). That portion of Judge Derman's decision is telling insofar as it evidences that neither Trunell nor the Baxters ever placed the operative deeds covering the South Baxter Parcel before the court. Instead, Judge Derman clearly decided the case using the incomplete and truncated language in the Liniewicz-to-Repetz Deed that omitted the clause giving "rights of the public or owners of property lying westerly and southerly of Totten farm to use a roadway or driftway running thru [the South Baxter Parcel] to reach their properties from [Losey Road." (Da106). Judge Derman's decision on that point reads as follows:

> Plaintiff's complaint lacks any allegation regarding a claim to an express easement. Plaintiff's papers in support of his cross-motion, however, contain numerous references to a "recorded easement." In its letter brief in support of its motion for summary judgment, Plaintiff states that the facts and circumstances demonstrate that he "has a right of access through the Baxter property to his own property which access is undisputed (citations omitted) (emphasis in original). This statement does not reflect the facts based on the evidence presented to the Court. Defendants strongly dispute Plaintiff's right of access through their land.

> Even if Plaintiff amended his complaint to include a claim to an express easement, the evidence still supports a finding that Defendants are entitled to Summary Judgment. First, it is clear that a driftway exists; Defendants admit as much. Second, the driftway route, as alleged by Plaintiff, crossed other properties, including the Totten land. Express easements are created by grant and the language of the grant is controlling (citations omitted). In Leach, the Appellate Division concluded that no express easement existed for an adjoining neighbor to use a roadway where, "[t]he several references to the right-of-way as a 'roadway' in the various deeds are only for the purpose of describing the property and its boundaries and do not constitute a grant of a right to use the adjoining property" (citation omitted).
>
> Similarly, **no language exists in any deed brought to the Court's attention that purports to grant any right to use of enjoyment in that part of the driftway that runs from the boundary of Defendant's property to Losey Road**. Defendants' deed is subject to existing rights in the driftway if any. Thus, it does not purport to create an easement, nor does it acknowledge any right in the Respondent or his predecessors. Additionally, Defendant James Baxter's statements to the East Amwell Zoning Board clearly do not amount to a grant of an affirmative easement under state law. At most, he acknowledges the existence of a driftway and its use by others. At no time does he make any statements acknowledging a grant made to Respondent or his predecessors (Da106 (emphasis supplied)).

Obviously, neither the 1955 Totten-to-Hillpot Deed nor the 1966 Totten-to-Liniewicz Deed were placed before Judge Derman by either party during the Trunell case. Moreover, Appellants admit that they failed to record any document in the Hunterdon County land records to place the world on notice of the result reached in Trunell's lawsuit (Da221 at ¶59). Simply put, there was nothing

in record title to place Respondent on notice of any prior lawsuit, concerning access to the Challenger Lot, the existence of which was unnecessary in the first instance given the express easements contained in, among others, the Totten-to-Liniewicz Deed (Da480). For the reasons set forth herein, Respondent respectfully requests that the Court affirm Judge Goodzeit's grant of summary judgment to the Respondent in all respects.

STANDARD OF REVIEW

The application of res judicata is a question of law "to be determined by a judge in the second proceeding after weighing the appropriate factors bearing upon the issue." Colucci v. Thomas Nicol Asphalt Co., 194 N.J. Super. 510, 518 (App. Div. 1984). Respondent, therefore, takes no issue with this Court's *de novo* review of Judge Goodzeit's decision not to invoke the doctrines of res judicata and collateral estoppel. See Selective Ins. Co v. McAllister, 327 N.J. Super. 168, 173 (App. Div. 2000).

However, Judge Goodzeit's decisions not to invoke the entire controversy doctrine and not to expand the scope of the lawsuit beyond the pleadings, should be viewed under an abuse of discretion standard. As the New Jersey Supreme Court has determined, the entire controversy doctrine is an *equitable* doctrine *left to the sound discretion of the Court* based on the factual circumstances of individual cases. See Bank Leumi USA v. Kloss, 243 N. J. 218, 227 (2020). On appeal, a trial court's discretionary decisions are typically reviewed under the heightened abuse of discretion standard and not de novo. See State v. Chavies, 247 N.J. 245, 257 (2021). In addition, Judge Goodzeit's decision not to consider issues involving the scope and maintenance of the easement when never raised by the parties in their pleadings is similarly

reviewable under the abuse of discretion standard. See generally Rendine v. Pantzer, 141 N.J. 292, 310 (1995) (addressing the severance of claims as being within the court's discretion). Accordingly, as the Court conducts its *de novo* review of the legal claims, its review of the application of the entire controversy doctrine and refusal to expand the case beyond the pleadings should be considered under an abuse of discretion standard.

LEGAL ARGUMENT

POINT I

APPELLANT DID NOT RAISE TO THE TRIAL COURT ANY ARGUMENT UNDER THE COMMON LAW PROHIBITION AGAINST PROVIDING RIGHTS IN FAVOR OF THIRD-PARTIES IN A DEED AND CANNOT DO SO FOR THE FIRST TIME ON APPEAL.

It is well-settled that the appellate courts in this State decline to consider questions or issues raised for the first time on appeal. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234(1973). Only where the newly advanced argument: (i) *substantially* implicates a public interest; (ii) addresses jurisdictional concerns; or (iii) raises an issue of plain error, may an issue be raised for the first time on appeal. Id. (quoting Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959), certif., den. 31 N.J. 554 (1960)); see also N.J. Ct. Rule 2:10-2; Bonefish Capital, LLC v. Autoshred, LLC, 2024 WL 446264 at *2 (Feb. 6, 2024). As set forth herein, Appellants are improperly raising for the first time their argument that the court below erred by not applying the archaic, common-law, prohibition against creating rights in third-parties through deed conveyances. That argument was neither raised below by the Appellants nor does it meet the exceptions articulated in Nieder.

Appellants' asserted no such defense in their pleading (Da94; Da117). Similarly, Appellants never raised the argument in their

summary judgment motion (Da821). The trial court opinion contains separate and lengthy recitations (by party) of all the legal arguments advanced below (Da813 (Respondents' arguments); Da821 (Appellants' arguments); Da823 (Stinsons' arguments)). Nowhere is the stranger-to-the-deed argument even mentioned. Appellants' brief on appeal concedes that the issue was not addressed before the trial court (Db13).

The arguments advanced by the Appellants below, both in writing and orally, were limited to: (i) *Respondent's* chain of title did not contain any grant of an easement to access Appellants' land;[2] (ii) res judicata; (iii) collateral estoppel; and (iv) entire controversy doctrine (Da821). In addition to failing to brief the stranger-to-the-deed rule below, Appellants never raised the argument during oral argument either, choosing instead to double down on their procedural arguments (T15:10-17:2; 19:3-22:21; 26:22-28:5; 28:25-29:17; 30:12-31:20; 34:16-35:2;

[2] Respondent concedes that it cited to and relied upon this Court's decision in Borough of Wildwood Crest v. Smith, 210 N.J. Super. 127 (App. Div. 1986) [hereinafter Wildwood Crest] in its brief opposing this aspect of Point I of Appellants' cross-motion for summary judgment. As addressed in Point II, infra, Wildwood Crest is directly on point and holds, in part, that the preferred approach to deed construction is the modern one espoused by the Restatement (3rd) of Property where the intent of the grantor is ascertained and enforced – not the archaic, common law, approach applicable in times when livery of seisin was the method of transferring land titles. See Wildwood Crest, 210 N.J. Super. at 144; see also Howard H. Harris, *Reservations in Favor of Strangers to the Title*, 6 Okla. L. Rev. 127 (1953).

36:24-37:7; 39:3-40:24). The Court should decline Appellants' invitation to depart from Nieder and refuse to address this new argument on appeal.

POINT II

THE COURT SHOULD AFFIRM THE LOWER COURT'S RULING, ENFORCING THE TOTTENS' CLEAR AND UNAMBIGUOUS INTENTION TO CREATE A MEANS OF ACCESS FOR THE OWNERS OF THE CHALLENGER LOT TO CROSS THE SOUTH BAXTER PARCEL TO REACH THEIR PROPERTY, AS STATED IN THE RECORDED 1966 TOTTEN-TO-LINIEWICZ AND 1955 TOTTEN-TO-HILLPOT DEEDS.

If, for any reason, the Court considers Appellants' argument under the common law stranger-to-the-deed rule, it should reject it for a number of reasons. As a threshold matter, this Court has already considered and rejected the common law approach in Borough of Wildwood Crest v. Smith, 210 N.J. Super. 127, 144 (App. Div. 1986) [hereinafter Wildwood Crest], in favor of the approach espoused in the Restatement (3rd) of Property whereby the court derives the intention of the grantor using the words used and attending circumstances. The Wildwood Crest panel noted how the common-law has evolved in certain jurisdictions as opposed to others. Wildwood Crest, 210 N.J. Super. at 143-145. The panel also noted that no New Jersey case appeared to have addressed the issue. Id. at 143.

After considering all the arguments across the various jurisdictions, this Court held, in part, that: "[a]lthough we recognize that most jurisdictions still follow the common-law

rule, under the circumstances present in this case, we believe the approach of the *Restatement* to be better and thus adopt it." Wildwood Crest, 210 N.J. Super. at 144 (emphasis supplied). Contrary to, Appellants' argument, New Jersey has absolutely considered the issue they raise in Point I of their appeal. There is no need or good faith reason to depart from the Court's decision in Wildwood Crest, which governs this case. For that reason alone, the Court should find no error with the Chancery court's decision enforcing the clear and unambiguous language contained in the 1966 Totten-to-Liniewicz Deed and declaring Respondent's rights thereunder.

Appellant offers the Court no good faith basis to reverse course and return to the common law stranger-to-the-deed rule. "While a reservation could theoretically vest an interest in a third party, the early common law courts vigorously rejected this possibility, apparently because they mistrusted and wished to limit conveyance by deed as a substitute for livery by seisin. Willard v. First Church of Christ, Scientist, Pacifica, 7 Cal. 3d 473, 498 P.2d 987 (Cal. 1972) (citing Harris, Reservation in Favor of Strangers of the Title (1953) 6 Okla. L. Rev. 127, 132-133). Indeed, as the author of the article noted: "[t]he common law rule prohibiting conveying rights to third parties originated from feudal times, when "precepts governing alienability of property by

deed were fettered with, and inextricably circumscribed by, the common-law concept of livery of seisin." Harris, *Reservations in Favor of Strangers to the Title*, 6 Okla. L. Rev. at 131, 132. Livery of seisin is defined to be:

> The appropriate ceremony, at common law, for transferring the corporal possession of lands or tenements by a grantor to his grantee. Black's Law Dictionary, (4th Ed. 1951); see also Micheau v. Crawford, 8 N.J.L. 108 (1825) (emphasis supplied),

Livery of seisin was achieved through physical delivery, often by way of a shovel of dirt or a branch from a tree to confirm the grantor's intent to deliver seisin to the grantee.[3] Harris, supra, 6 Okla. L. Rev. at 132 (noting that no matter how explicit the instrument was under common law, there had to be a formal passing of seisin under the English property laws). It has been said that the "inherent weakness of the common law's evolutionary process" is that "its stringent rules of property survive in one form or

[3] See also Michelle Andrea Wenzel, *The Model Surface Use and Mineral Development Accommodation Act: Easy Easements for Mining Interests*, 42 Am. U.L. Rev. 607, 614 n.25 (1993) ("THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 11 (2d ed. 1984). Additionally, the transferor had to chant words of grant while handing the soil to the transferee. Id. In an age lacking detailed land records, this ceremony worked to engrave the transfer in the participants' memories and sufficed to notify feudal lords of the transaction. Id. at 10-11. Livery of seisin remained the dominant method of land transfer in England until 1536 and continued until 1845. Id. at 11. In 1845 the English Parliament passed the Real Property Act, which did not explicitly abolish livery of seisin but did sanction the use of written deeds as granting devices, thereby producing the same effect as outright abolition of the ritual. Id. at 11 n. 25.").

another long after the reasons which initially gave them birth have faded into obscurity." Harris, supra, Okla. L. Rev. at 131.

With the advent of central recording systems, including the current New Jersey Recording Act, the days of delivering title and/or possession of property via livery of seisin are a distant memory. See Egbert v. Chew, 14 N.J.L. 446, 450 (1834) (noting that "actual livery of seizen is not now necessary, a delivery of the deed of the premises, would have been a full performance of the agreement on the part of the plaintiff"). Hence, the underlying reason why the common law prohibited transferring fee to one with rights in favor of another (*i.e.* the grantor could not physically deliver seisin to both) quickly disappeared in favor of the rule of intention. See Betts v. Massachusetts Bonding and Ins. Co., 90 N.J.L. 632, 636 (E. & A. 1919).

The rule of intention provided that, in the absence of a fixed legal or technical meaning requiring a certain construction;

> "the best construction … is that which is made by viewing the subject-matter of the contract as the mass of mankind would view it; for it may be safely assumed that such was the aspect in which the parties themselves viewed it. A result thus obtained is exactly what is obtained from the cardinal rule of intention." Id.

Since the early 19th century, our Supreme Court has consistently disfavored the common law approach and instructed that, when construing instruments including deeds, courts must strive to

ascertain and implement the intention of the grantor or testator using the words actually used and expressed in the particular instrument. See e.g., Sisson v. Donnelly, 36 N.J.L. 432, 439-440 (E. & A. 1872); see also Micheau v. Crawford, 8 N.J.L. 90, 103 (1825) (noting that the court was "bound to treat [a will] with the utmost tenderness and liberality; and it is only when a reasonable construction and the discovery of the intent of the testator are utterly hopeless, that all effect should be denied").

More modern cases continue to recognize and build upon that rule of construction. See Normanoch Ass'n v. Baldasanno, 40 N.J. 113, 125 (1963) ("[t]he court's "prime consideration" when interpreting a deed is to derive "the intention of the parties"); see also Boss v. Rockland Elec. Co., 95 N.J. 33, 38 (1983) ("What the easement holder's rights are, *vis-à-vis* the landowner, depends first of all on the intent of the parties as expressed in the language of the grant.") (quoting Tide-Water Pipe Co. v. Blair Holding Co., 42 N.J. 51, 604 (1964)); Fidelity Union Trust Co. v. Caldwell, 36 Backes 362, 367 (Ch. Ct. 1945) (noting that a will can be enforced even absent a recitation in the instrument of the power to dispose of property where testator's intention is clear from the provisions and power to dispose of property otherwise exists); Board of Home Missions of Presbyterian Church in U. S. of America v. Saltmer, 24 Backes 33, 37 (Ch. Ct. 1939) (same).

The courts in New Jersey construe easements in the same manner:

> language purportedly granting an easement is ambiguous or in dispute, 'the primary rule of construction is that the intent of the conveyor is ... determined by the language of the conveyance read as an entirety and in the light of the surrounding circumstances.'

Poblette v. Towne of Historic Smithville Cmty. Ass'n, 355 N.J. Super. 55, 63 (App. Div. 2002) (quoting Hammett v. Rosensohn, 26 N.J. 415, 423 (1958)); see also Camp Clearwater Inc. v. Plock, 52 N.J. Super. 583, 596 (Ch. Div. 1958) (citing 28 C.J.S. Easements s 24, p. 677); Jon W. Bruce and James W. Ely, Jr., *The Law of Easements and Licenses in Land*, at §3.9 (2021-22 Ed.) (the primary consideration in interpreting an easement is determining and effectuating the grantor's intentions).

Under modern day principles of contract construction and the approach espoused by the Restatement, there is no legitimate question that the Tottens intended to create an easement by reservation in favor of the owners of the Challenger Lot so they could access their property via the existing roadway across the South Baxter Parcel. The reasons why the Court should reject the old, unworkable, common law doctrine were stated perfectly back in 1953 by the author of the law review article cited herein above, after having gone through an exhaustive analysis of the purpose of the common law's stranger-to-the-deed rule

and considering how the various different jurisdictions have evolved therefrom as follows:

> That a rule so incongruous with our modern social and legal philosophy has survived in even a modified form is in itself something of a mystery. Certainly any rule which can only operate to defeat a grantor's intention is undesirable and should be discarded unless some overriding public policy requires its retention. It is difficult to perceive any overriding public policy to support the common-law rule because, as pointed out earlier, the rule condemns only the method of transferring title, rather than the transfer itself. All would agree that the transfer of title to a spouse [a stranger to the deed in many examples offered in the article] contravenes no public policy. If the purpose to be promoted by application of the common-law rule is the establishment of uniform or standard reservations, the purpose simply cannot be accomplished by employment of the rule. This is because the very nature of the functions performed by such provision requires that they be individualistic, and because the rule is not comprehensive enough to effect a standardization. It is submitted that the common-law rule is an oppressive thorn which has ceased to justify its existence. Harris, *Reservations in Favor of Strangers to the Title*, 6 Okla. L. Rev. at 154.

Seventy-one years later, the reasons why the common law could not permit rights in favor of a stranger to a deed remain extinct. Our modern society conveys real estate via deeds that, once duly recorded and indexed, enjoy priority under the New Jersey Recording Act against other unrecorded or later recorded instruments. The Court should, therefore, reject Appellants' suggestion that Wildwood Crest be distinguished, limited, or in any way deviated from in favor of the common law as there exists no good faith

reason to do so other than to grant the Baxters an estate in land that their predecessors in interest, the Tottens, never intended.

POINT III

THE COURT BELOW PROPERLY REJECTED APPELLANTS' DEFENSES OF RES JUDICATA AND COLLATERAL ESTOPPEL TO BAR RESPONDENT'S CLAIM FOR DECLARATORY JUDGMENT.

Appellants' suggestion that Respondent's claim for declaratory judgment is barred because of the prior lawsuit filed by Respondent's predecessor in title is both flawed and draconian. While Respondent cannot and does not deny the existence of Trunell's prior lawsuit, the court below properly rejected Appellants' arguments and addressed the merits of Respondent's claim and decided the matter as dictated by the New Jersey recording system. See Palamarg Realty Co. v. Rehac, 80 N.J. 446, 453 (1979).

A. *Res Judicata Does Not Bar Respondent's Claim.*

The lower court properly rejected Appellants' argument under res judicata. Res judicata "precludes parties from relitigating the same cause of action." See e.g., Kram v. Kram, 94 N.J. Super. 539, 551 (Ch. Div.), rev'd on other grounds, 98 N.J. Super. 274 (App. Div. 1967), aff'd, 52 N.J. 545 (1968). "Res judicata, or claim preclusion, insulates courts from the inefficiency of relitigating claims that have already been resolved, thereby protecting the integrity of judgments and

preventing the harassment of parties." Bondi v. Citigroup, Inc., 423 N.J. Super 377 (App. Div. 2011); see also Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 409 (1991); Velasquez v. Franz, 123 N.J. 498, 505 (1991). "The rationale underlying res judicata recognizes that fairness to the defendant and sound judicial administration require a definite end to litigation." Velasquez, 123 N.J. at 505 (citations omitted). "In order for res judicata to apply, there must be (1) a final judgment by a court of competent jurisdiction, (2) identity of issues, (3) identity of parties, **and** (4) identity of the cause of action." Brookshire Equities, L.L.C. v. Montaquiza, 346 N.J. Super. 310, 318 (App. Div.), certif. denied, 172 N.J. 179 (2002) (emphasis supplied).

To determine if two causes of action are the same, the court must consider: (1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions); (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first); and (4) whether the *material* facts alleged are the same. Culver v. Ins. Co. of N. Am., 115 N.J. 451, 461-62 (1989) (internal citations omitted).

Here, the Chancery judge below properly found, and this Court should too, that there exists no commonality of claims between Trunell's lawsuit and the instant case (Da828; Da178; Da194). Where Trunell sought a new, judicially created, implied easement to burden the defendants' properties, Respondent here seeks to confirm an express easement by reservation existing in the record title to the Baxters' property dating back to 1966 (Da829; Da178; Da194). As Judge Goodzeit aptly noted, the proofs required to establish Trunell's claims involved a host of considerations axiomatically unrelated to the New Jersey Recording Act, including meeting the requirements of adverse possession to obtain an easement by prescription. See id. (citing Yellen v. Kassin, 416 N.J. Super. 113, 119-20 (App. Div. 2010) and Leach v. Anderl, 218 N.J. Super. 18, 25 (App. Div. 1987)). Similarly, to prove an easement by necessity, Trunell was required to show common ownership of the parties' lots and a severance leaving the Challenger Lot landlocked (See id.).

Unlike Trunell's claims, Respondent here relies upon the language contained in the 1966 Totten-to-Liniewicz Deed that was duly recorded against Appellants' chain of title (Da194; Da480). As Judge Goodzeit properly found:

> [T]the evidence relied upon would be different from that in the Trunell case because here plaintiff relies on the express language of the recorded deeds such as

> the 1966 Totten to Liniewicz Deed as to the Baxter Lot. This deed contains the claimed easement by reservation that plaintiff is seeking to enforce. Plaintiff does not rely on any of the evidence used by Trunell such as evidence of exclusive, continuous and uninterrupted use to establish an easement right by prescription; as well as any evidence of the property being landlocked, which Trunell would have relied upon in his argument to create an easement right by necessity (Da829).

This Court should follow Judge Goodzeit's cogent and accurate analysis and find that res judicata can not and does not apply preclude Respondent's right to declaratory judgment because there is no commonality of claims between the two cases. Montaquiza, 346 N.J. Super. at 318.

Res judicata is also inapplicable here because the relief sought by Respondent is nothing like the relief Trunell sought (Da830; Da178; Da194).[4] On this point there can be no dispute. Trunell did not seek declaratory judgment over anything. Instead, he sought a judicially created easement, either by necessity or by prescription (Da178; Da830). Unlike Trunell, Respondent merely seeks the remedy of declaratory judgment based on the recorded land records following Appellants' refusal to honor the Totten-to-Hillpot Deed (or Totten-to-Liniewicz Deed) and because

[4] Respondent concedes that there exists commonality of parties and that there was a final judgment rendered by Judge Derman previously, both of which satisfy the res judicata test. However, because the test requires all elements to exist, the doctrines cannot apply.

Appellants claimed that the access easement was judicially terminated without filing any notice thereof. Under the circumstances, Respondent had every right to commence this action and adjudicate the parties' claims and defenses over the record title.

It is plainly obvious that none of the parties in the Trunell case knew about the recorded 1966 Totten-to-Liniewicz Deed because, had they, the case would never have been brought in the first place. The very relief Trunell was looking to obtain from the Court is found on the face of the 1966 Totten-to-Liniewicz Deed – an instrument that was never before the court previously:

> Defendants' deed recorded on December 14, 1990 states that the land is subject to, "the rights of others, if any, in an old driftway crossing through the southerly portion of the herein described premises" [*i.e.* the truncated Liniewicz description]
>
> * * *
>
> No language exists in any deed brought to the Court's attention that purports to grant any right to use of enjoyment in that part of the driftway that runs from the boundary of Defendants' property to Losey Road. Defendants' deed is subject to existing rights in the driftway if any. Thus, it does not purport to create an easement, nor does it acknowledge any right in the plaintiff or his predecessors. (Da102-103; Da106) (emphasis supplied).

As set forth in Points V and VI, infra, because Respondent's right to use the roadway at issue plainly appears in valid, recorded, land records, the Court should decide this case in the manner that

best effectuates the New Jersey Recording Act. Friendship Manor, Inc. v. Greiman, 244 N.J. Super. 104, 113 (App. Div. 1990), certif. denied, 126 N.J. 321 (1991) (quoting Palamarg Realty Co., 80 N.J. at 453. That result can only be achieved by rejecting the application of res judicata.

B. Collateral Estoppel Does Not Bar Respondent's Claim

The doctrine of collateral estoppel is equally unavailing to the Appellants for similar reasons. It is well-settled that for collateral estoppel to apply, there must be identity of the issues litigated and to be litigated, notice, and a full and fair opportunity to be heard and equality of forum. See generally Winters v. North Hudson Reg. Fire., 212 N.J. 67, 85 (2012). The court has broad discretion to determine whether to invoke or apply collateral estoppel in a case. See Adelman v. BSI Financial Servs., Inc., 453 N.J. Super. 31, 39 (App. Div. 2018). Although the doctrine "is designed to protect litigants from relitigating identical issues and to promote judicial economy," a court in exercising its discretion must "weigh economy against fairness." Id. at 40. As the trial court judge did below, this Court here should reject defendants' contention that Respondent's claim is barred by collateral estoppel both on the merits and as a matter of fundamental fairness.

As to the merits, there can be no dispute that Trunell never pled a claim for express easement like the Respondent bases its claims for declaratory judgment upon here (Da178; Da194). Thus, there can be no common issue between the two cases. It is true that the trial court in Trunell raised in *dicta* how it would consider a claim for express easement had one been made (Da106). It is equally true, however, that the court never had the language in the Totten-to-Liniewicz Deed that continues to run with the South Baxter Parcel and, *a fortiori*, Baxter Lot. When considering that the deeds to the South Baxter Parcel were never raised to the court before and that no claim for express easement was pled by Trunell previously, it would be patently improper and unfair to apply collateral estoppel to Respondent's request for declaratory judgment now that the governing, operative, deed is before the Court and unambiguously provides Respondent with the needed access to reach its otherwise landlocked property.

POINT IV

THE CHANCERY COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO APPLY THE NEW JERSEY ENTIRE CONTROVERSY DOCTRINE TO BAR THIS CASE.

The third preclusive defense Appellants continue to advance to bar Respondent's ability to access their landlocked lot sounds under New Jersey's entire controversy doctrine. As noted in the Standard of Review, supra, the entire controversy doctrine is an equitable doctrine left to the sound discretion of the Court based on the factual circumstances of individual cases. See Bank Leumi USA, 243 N. J. at 227. The Supreme Court held in Bank Leumi USA that the trial courts should not preclude a claim under the doctrine if such a remedy would be unfair in the totality of the circumstances or would not promote the doctrine's objectives of conclusive determinations, party fairness and judicial economy and efficiency. See id.; see also Carrington Mortgage Servs, LLC v. Moore, 464 N.J. Super. 59, 68 (App. Div. 2020). Accordingly, the Chancery judge properly rejected the doctrine here.

The polestar of the entire controversy doctrine is judicial fairness, requiring the court to "apply the doctrine in accordance with equitable principles, with careful attention to the facts of a given case". Moore, 464 N.J. Super. at 68; see also Wadeer v. New Jersey Manufacturers Ins. Co., 220 N.J. 591, 605 (App. Div. 2015). The Supreme Court has also cautioned that application of

the doctrine should be a "remedy of last resort." See Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman and Stahl, P.C., 237 N.J. 91, 111 (2019).

It would be inequitable to apply the entire controversy doctrine to bar Respondent's claim. First, Trunell's entire lawsuit was commenced on a fundamental misunderstanding of the record title of the Baxters' lands. Because Trunell already had the express right to use the existing roadway through the 1966 recorded Totten-to-Liniewicz Deed, he had no reason whatsoever to seek an implied easement of any type, whether in 2005 or ever. For good reason, Trunell lost his claims for an implied easement.

However, Trunell's lack of entitlement to an implied easement says nothing about his pre-existing (albeit unknown) express rights as they appear in the recorded Totten-to-Liniewicz Deed as the Appellants' argue. Nowhere in the orders dismissing Trunell's case is there any other relief provided to the Appellants (Da99; Da100). Appellants concede that they failed to record the Order granting them summary judgment in the Trunell case (Da93 at ¶59). Under the facts presented, the Court must reject Appellants' attempt to use Trunell's erroneously filed lawsuit to bar Respondent relief it is absolutely entitled to through the recorded land.

Both Baxter and Trunell had an equal obligation to present the Court below with the operative deeds and, for whatever reasons, they both failed to do so. The Trunell case was therefore tantamount to an *unintentional* fraud on the Court. Trunell's theory of relief was flawed. Appellants' recitation of the status of their record title was flawed. The parties' duty to place the operative deeds before the Court was flawed. Appellants' argument that the decision in Trunell's case in any way affected the record title to the Baxter Lot is equally flawed. The absurd circuity of defendants' argument to bar an otherwise slam dunk claim is the paradigm of unfair and unreasonable and must not be countenanced.

Under New Jersey's recording statute, Appellants had the ability to file a certified copy of the court's decision but they neglected to do so (Da93 at ¶59). See N.J.S.A. 46:26A-2(h) (permitting "certified copies of judgments, decrees, and orders of courts of record" affecting title to be recorded). Appellants filed no such notice because, upon information and belief, the relief Trunell sought was *judicial relief* and not based on the record titles appearing in the Hunterdon County land records. Therefore, there was no basis to record anything in the land records.

It is well-settled that a party's conduct may estop him from relying on an affirmative defense. See Zaccardi v. Becker, 88

N.J. 245, 256-257 (1982). Here, although pleading entire controversy doctrine as a defense, Appellants never moved for dismissal and, instead, engaged and litigated the case. Appellants served and answered discovery, took depositions, and in all respects litigated the case through the close of discovery. It would be both prejudicial and unfair to the Respondent for the defendants to now ask that the case be dismissed after having actively and voluntarily engaged throughout the discovery period and after the court considered the merits of Respondent's claim.

POINT V

THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT, DECLARING THE EASEMENT CREATED BY THE TOTTENS IN THE 1966 TOTTEN-TO-LINIEWICZ DEED TO BE A VALID AND BINDING COVENANT, BURDENING THE SOUTH BAXTER PARCEL AND, A FORTIORI, THE BAXTER LOT.

The Chancery judge below reached the correct result in granting summary judgment against Appellants based on the record title to the South Baxter Parcel (Da826-27). The operative easement was created by the Tottens in 1955 when they created that separate lot through the Totten-to-Hillpot Deed (Da461). The Tottens then repeated the exact same easement reservation in 1966 when they conveyed the South Baxter Parcel to Liniewicz[5] (Da480). Both recorded instruments filed by the Tottens include the following easement by reservation:

> Excepting and reserving from the above the rights of the public or owners of property lying westerly and southerly of Totten farm to use a roadway or driftway running thru this tract to reach their properties from the public road mentioned in the description above (Da826; Da462; Da482).

As noted, supra, the parties stipulated on summary judgment that the 'property lying westerly and southerly of Totten farm' is the Challenger Lot (Da397 at ¶13). The above-quoted language is both unambiguous and express in its intentions. Accordingly, Judge

[5] The Tottens reacquired the South Baxter Parcel from the Hillpots in September 1965 (Da398 at ¶17; Da466).

Goodzeit properly and justly concluded that the 1966 Totten-to-Liniewicz deed created a valid, enforceable, easement in favor of the owners of the Challenger Lot to use the existing roadway traversing the South Baxter Parcel to reach their property. These determinations should be affirmed in all respects.

The New Jersey Uniform Declaratory Judgments Law, N.J.S.A. 2A:16-50 *et seq*. (the "DJL") was specifically created to "settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." N.J.S.A. 2A:16-51. It is not required that there be a breach of contract prior to obtaining declaratory judgment as the DJL expressly authorizes the courts to construe contract rights either before or after a breach. See N.J.S.A. 2A:16-54. All that need be shown to invoke declaratory judgment jurisdiction is that a justiciable controversy exists between interested and adverse parties upon facts that are neither future, contingent, nor uncertain. See New Jersey Mfrs. Ins. Co. v. McDermott, 201 N.J. Super. 251, 254 (Law Div. 1985). As this Court has noted, "[w]here a concrete, contested issue is presented, and there is a definite assertion of legal rights on the one side and a positive denial thereof on the other, there exists a 'justiciable controversy,' justifying maintenance of an action for declaratory judgment." Bress v. L. F. Dommerich & Co., 94 N.J. Super. 282, 284 (App. Div. 1967)

(quoting Sperry & Hutchinson Co. v. Margetts, 25 N.J. Super. 568, 577 (App. Div. 1953), aff'd 15 N.J. 203 (1954)).

Respondent's Second Amended Complaint states a claim for declaratory judgment. Respondent alleged the requisite deeds that provide an express right to use the roadway through the Baxter Lot (via the 1955 Totten-to-Hillpot Deed and 1966 Totten-to-Liniewicz Deed) (Da199-Da205). Respondent also alleged how Appellant objected to its and its contractor's use of the roadway and Appellant's claim that its access rights had been judicially terminated (Da206 at ¶¶54-55). Respondent wrote to Appellants several times prior to commencing suit to refute their position and to bring to their attention the recorded deeds recorded against the South Baxter Parcel that were never presented to the Court (Da158 and Da345). When Appellants continued to refute Respondent's position and insisted that the roadway was somehow extinguished, there arose a sufficient case in controversy to obtain declaratory judgment, justifying Judge Goodzeit's order. For the reasons stated herein, the court should affirm the decision reached by the trial court below in all respects.

POINT VI

THE NEW JERSEY SUPREME COURT HAS DIRECTED THAT MATTERS BE DECIDED IN A MANNER THAT BEST PRESERVES THE SANCTITY OF THE RECORDING STATUTE AND, THEREFORE, THE COURT SHOULD AFFIRM THE LOWER COURT'S SUMMARY JUDGMENT ORDER AGAINST APPELLANTS.

Respondent's right to use the roadway is contained in the recorded documents in Hunterdon County and, therefore, New Jersey's recording statute, N.J.S.A. 46:26A-1 *et seq.*, must control this dispute. See Palamarg Realty Co., 80 N.J. at 454. New Jersey's recording statute provides in relevant part that:

> Notwithstanding the provisions of P.L. 2021, c.371 (N.J.S.A. 47:1B-1 et al.), any recorded document affecting the title to real property is, from the time of recording, notice to all subsequent purchasers, mortgagees and judgment creditors of the execution of the document recorded and its contents. N.J.S.A. 46:26A-12(a).

New Jersey is considered a race-notice jurisdiction, meaning that when two competing interest holders are vying for priority, the one that records first prevails and takes priority over the second provided it had no actual knowledge of the other stakeholders' previously obtained interest. See Palamarg Realty Co., 80 N.J. at 454; Sovereign Bank v. Gillis, 432 N.J. Super. 36, 43 (App. Div. 2013). As a corollary to this rule, parties are generally charged with constructive notice of instruments that are properly recorded. See Friendship Manor, 244 N.J. Super. at 108. In the

context of the race notice statute, constructive notice raises the obligation of a claimant to "make a reasonable and diligent inquiry as to existing claims or rights in and two real estate." Id. In applying the race notice statute, New Jersey' s Appellate Division and Supreme Court have held that the integrity of the recording scheme must be paramount. "[A]bsent any unusual equity' the stability of titles and conveyances requires the judiciary to follow that court 'that will best support and maintain the integrity of the recording system.'" Friendship Manor, 244 N.J. Super. at 113 (quoting Palamarg Realty Co., 80 N.J. at 453).

Applying the foregoing to this case, the Court must find that Appellants were on notice and bound to the grants contained in the Totten-to-Hillpot and Totten-to-Liniewicz Deeds (Da461; Da480). The truncated language in Appellants' Deed, providing that the conveyance was "subject to the rights of others, if any, in an old driftway crossing the southerly portion" while ineffectual to cut off Plaintiff' s rights, certainly put Appellants on notice that the record title to their land was likely encumbered or restricted in some manner. For reasons unknown to Respondent, Appellants failed to perform their due diligence as to true state of their title. Because there was no material issue of disputed fact as to Appellants' record title, the trial Court properly granted summary

judgment against the Appellants. The lower court's ruling should, therefore, be affirmed in full.

POINT VII

THE TRIAL COURT COMMITTED NO ERROR BY DENYING APPELLANTS'REQUEST TO CONSIDER ISSUES OUTSIDE THE PARTIES' PLEADINGS.

The final point raised by Appellants on appeal is that the trial court erred when, after entering final judgment, it denied Appellants' request to consider brand new issues such as what uses and what improvements Respondent may conduct on the easement (Db38). Those issues have never been part of this case (Da1; Da87; Da117; Da193; Da214; Da849). It is nothing if not ironic that the Appellants now argue that issues remain unresolved. The fact remains that New Jersey law addresses the duties of both the dominant and servient tenements in the easement context. The parties are bound to conduct themselves in conformance with applicable law.

Appellants' know full well that the purpose of the easement is to provide Respondent (and its successors) with a means of access to and from the Challenger Lot (Da826; Da462; Da482). Without the access, the Challenger Lot is completely landlocked – a result abhorred by the courts and one never intended by the Tottens, who are the Baxters' predecessors in title (Da826; Da462; Da482).

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that the Court affirm the trial court's grant of summary judgment against the Appellants, declaring that the easement created in the 1966 Totten-to-Liniewicz Deed constitutes a valid easement by reservation burdening the South Baxter Parcel and, a fortiori, the Baxter Lot. In addition, Respondent requests that, if the Court is inclined to address the issue of whether to employ the old common-law approach or the modern view adopted by the Restatement and formally adopted in Wildwood Crest, that it affirm the Wildwood Crest approach and formally declare the approach espoused by the common law to be antiquated, unnecessary, and not the law in the State of New Jersey.

Dated: March 13, 2024

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CHALLENGER ACRES LLC, Plaintiff-Respondent, v. JAMES E. BAXTER and FELICE CARPENTER BAXTER, husband and wife, Defendants-Appellants, RICHARD STINSON and KATIE STINSON, husband and wife; and John Doe 1-10, Mary Roe 1-10, and ABC Corporation 1-10, said names being fictitious parties who may claim to have an interest in the subject roadway and lands referenced herein but whose identities are not currently known, Defendants.	: SUPERIOR COURT OF NEW JERSEY : APPELLATE DIVISION : Docket No. A-3070-22T4 : Civil Action : On appeal from final judgment of the Chancery Division, Hunterdon County (Margaret Goodzeit, P.J. Ch., sitting below)

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANTS-APPELLANTS

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Introductory Statement

Most all of Challenger's arguments were anticipated and addressed in our earlier brief, so we reiterate our earlier positions only as necessary for context.

Standard of Review

In our earlier brief, at page 9, we explained that the proper standard of review on this appeal is *de novo*. Challenger generally concedes this with the caveat that Judge Goodzeit's rejection of Baxter's entire controversy doctrine defense is reviewable by an abuse of discretion standard. We disagree. When "facts relevant to the application of the entire controversy doctrine are not in dispute," the determination of whether the doctrine applies is a question of law, which appellate courts review *de novo*. *Higgins v. Thurber*, 413 *N.J. Super.* 1, 6 (App. Div. 2010), *aff'd*, 205 *N.J.* 227 (2011).

Challenger further argues that Judge Goodzeit's refusal to address the allowable uses on the easement, following her summary judgment ruling, is also reviewable by an abuse of discretion standard. Again, we disagree. Although our request to consider that issue was made just after the grant of summary judgment, it pertained directly to the subject matter of that motion and Judge Goodzeit's ruling should be reviewed by the same standard applicable to review of summary judgments. That is especially so since the relevant facts before the trial court on that issue were not in dispute.

Point I

The Issue Of Conveying Rights To Strangers To The Transaction Was Sufficiently Raised Below.

In Point I of its brief, Challenger argues that we may not rely on the stranger-to-the-deed rule on appeal because it was not raised below. For the following reasons, we disagree.

We acknowledge the universally-recognized tenet of appellate practice that "issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts. But this principle does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469, 120 S.Ct. 1579, 1586, 146 L.Ed.2d 530 (2000).

Exceptions to this rule are made when questions raised on appeal relate to important questions of public policy. *Meeker v. Meeker*, 52 *N.J.* 59, 65 (1968). Courts will hear such questions where "it is manifest that justice requires consideration of an issue central to a correct resolution of the controversy and the lateness of the hour is not itself a source of countervailing prejudice[.]" *In re Appeal of Howard D. Johnson Co.*, 36 *N.J.* 443, 446 (1962)(quoted in *Meeker*, 52 *N.J.* at 65).

We say Judge Goodzeit was "fairly put on notice" of the viability of the common law stranger-to-the-deed rule in the proceedings below.[1] Baxter argued, in his initial brief:

> Plaintiff's application is now based upon historical deeds of either adjoining or remote neighbors. Those deeds reference access to the driftway but do not grant any specific right of easement to any specific party. Express easements are created by grant. The language of the grant is controlling. *Leach v. Anderl*, 218 *NJ Super* 18, 28 (App. Div. 1987). In *Leach*, the Appellate Division concluded that no express easement existed for an adjoining neighbor to use a roadway where, "the several references to the right of way as a 'roadway' in various deeds are only for the purpose of describing the property and its boundaries and do not constitute a grant of a right to use the adjoining property." [Supp.App.3]

Challenger argued, in response, that New Jersey has rejected the common law stranger-to-the-deed rule, and allows the conveyance of property rights to parties uninvolved in the transaction:

> It is beyond settled that an easement may be created by direct grant (as the defendants recognize) as well as by reservation or exception in a deed of conveyance. . . . Indeed, it is now widely recognized and accepted that easements may be created by reservation provided the grantor owned the lands on which the reservation relates at the time of the conveyance. . . .
>
> An easement by reservation is so common and so widely recognized that it even merits an entry in Black's Law Dictionary (7th Ed., 1999) ("Reserved Easement. An easement created by the grantor of real

[1] We have provided to the Court a supplemental appendix with relevant portions of the parties' briefs below, as permitted by Rule 2:6-1(a))(2)("Briefs submitted to the trial court shall not be included in the appendix unless . . . the question of whether an issue was raised in the trial court is germane to the appeal, in which event only the material pertinent to that issue shall be included.")

> property to benefit the grantor's retained property and to burden the granted property."). In their opposition and cross-motion papers, neither the Baxters nor Stinsons address easements by reservation, exception or restriction whatsoever. The Court must reject the Baxter's myopic and unconvincing argument that an easement may only exist where there is grant language contained in the land records to the dominant land. By its nature, an easement by restriction is placed on the grantor's chain of title, which is perfectly acceptable and fully enforceable under New Jersey law. . . .
>
> Equally well-settled is New Jersey's abrogation of the archaic common law prohibition against creating easements in favor of strangers to the underlying transaction and adoption of the modern approach espoused by the Restatement of Property that the instrument be construed to achieve the grantor's intention. See Borough of Wildwood Crest v. Smith, 210 N.J. Super. 127, 143-144 (App. Div. 1986); see also Restatement (Third) of Property – Servitudes - §2.6(2) (2000) ("The benefit of a servitude may be granted to a person who is not a party to the transaction that creates the servitude."); Jon W. Bruce and James W. Ely, Jr., The Law of Easements and Licenses in Land, at §3.9 (2021-22 Ed.) (listing cases in various jurisdictions rejecting the strict common law approach). The Tottens' intention was expressly stated on the face of the Totten-to-Hillpot Deed, namely to provide the owners of the Challenger Lot access to their property along the existing roadway through both the Baxter Lot and Stinson Lot. [Supp.App. 5-7]

Baxter joined issue in his reply brief:

> Generally, an easement by reservation is created for the benefit of the grantor and not third parties. See generally Leasehold Estates, Inc. v. Fulbro Holding Co., 47 N.J. Super. 534, 136 A.2d 423 (Super. Ct. App. Div. 1957). See also New Jersey Easements and Rights of Way, New Jersey Society of Professional Land Surveyors, February 5, 2015, Page 33. [Supp.App.9]

At oral argument on the motions, Challenger's counsel doubled down on his contention that New Jersey has rejected the stranger-to-the-deed rule:

> And I'd like to just highlight, Your Honor, the key case here is the Appellate Division case in BOROUGH OF WILDWOOD CREST VERSUS SMITH, and that's at 210 NJ Super. 127. It's an App Div. case from 1986. And the significance of that case, Your Honor, is the Appellate Division recognizing that New Jersey is going to abandon the common law approach to construing deeds and conveyances like this in favor of the restatement view. And that's significant because under the common law there was a general prohibition about parties to a conveyance making rights and favor of a stranger. And the restatement position, the more modern approach said, That's nonsense. What we need to do is we need to enforce and construe these instruments consistent with the grantors and vent. Hands of the Appellate Division adopted the restatement, rejected the common law.[sic] (Transcript at 8-9)

Unlike *Abel v. Board of Works of City of Elizabeth*, 63 *N.J. Super.* 500 (App. Div. 1960), where "[t]here was nothing whatsoever to alert either the trial court or counsel to a realization that these matters were in issue," *id* at 510,[2] New Jersey's supposed rejection of the stranger-to-the-deed rule was raised before the trial court by Challenger itself to rebut Baxter's contention that the deeds in question should not have been construed to grant rights to third parties. Judge Goodzeit did not explicitly address the issue in her opinion, but she implicitly accepted the argument since she could not otherwise have ruled in Challenger's favor.

We concede that Baxter's former counsel did not explore the stranger-to-the-deed rule in the depth we have in our brief before this Court, but the trial court was

[2] Even so, the appellate panel in *Abel* considered the issue anyway because it was a matter of public importance.

sufficiently "put on notice as to the substance of the issue," *Nelson*, *supra*, 529 U.S. at 469, for Baxter to raise it on this appeal.

Even if this Court were to find that the issue was not sufficiently raised below, it is still worthy of consideration under the plain error rule. The status of the stranger-to-the-deed rule is an important, unresolved issue affecting New Jersey real property law, and Judge Goodzeit's implicit acceptance of Challenger's position was clearly capable of producing an unjust result. *See* R. 2:10-2; *Nieder v. Royal Indem. Ins. Co.*, 62 *N.J.* 229, 234 (1973). Surely Challenger can claim no prejudice as it raised the issue itself before the trial court, the question has now been fully briefed by the parties and the matter is now ripe for appellate review.

Point II

The Historical Deeds Relied Upon By The Trial Court, Standing Alone, Were Insufficient To Support The Trial Court's Ruling.

In our earlier brief, at pages 11-13, we explained why the Appellate Division's discussion of the stranger-to-the-deed rule in *Borough of Wildwood Crest v. Smith*, 210 *N.J. Super.* 127 (App. Div. 1986), was not a categorical rejection of the rule but was limited to the unique facts of that case. At pages 13-16, we also offered reasons why the rule makes sense today, even if its archaic origins are no longer relevant. We also explained how rejection of the rule would make New Jersey an outlier among its neighbors in the region.

Challenger argues that a grantor's clearly-expressed intention to confer rights on a third party should be respected, but as we explained at pages 16-19 of our earlier brief, there is no evidence in this record of the Tottens' intention other than the text of the deed itself. The deed purports to except and reserve "the rights" of the public or owners of the Challenger Lot to use "a roadway or driftway" across Baxter's land but nowhere mentions an easement *per se*. It is unclear from the deed recital alone whether the Tottens intended to preserve some undefined rights already in existence at the time of the transaction, or to create new ones in the transaction itself. And nothing in the motion record below establishes how and when those rights were created, what limitations, if any, were intended on their exercise, or how intense a right of access the grantors intended.

Point III

The Trial Court Wrongly Rejected Baxter's Res Judicata and Collateral Estoppel Defense.

In Point III of its brief, Challenger argues that Judge Goodzeit properly rejected Baxter's *res judicata* and collateral estoppel defenses. In Point II of our earlier brief, we summarized the New Jersey courts' current formulation of those doctrines. As we will explain, Challenger's summary of the case law omits a key element of *res judicata* that is fatal to its position.

Challenger "concedes that there exists commonality of parties and that there was a final judgment rendered by Judge Derman previously," (Challenger's Brief

at 30, n. 4), but argues that there was no identity of issues because Trunell asserted a different legal theory than Challenger has in this case. Challenger further argues that because "none of the parties in the Trunell case knew about the recorded 1966 Totten-to-Liniewicz Deed," and it was never presented to the court at that time, Challenger is entitled to a do-over. (Challenger's Brief at 31.) We disagree.

The fundamental premise of Challenger's argument -- that identity of issues requires assertion of precisely the same legal theory in both actions -- is simply wrong. As we explained at length in our earlier brief at pages 23-26, causes of action are deemed part of a single "claim" if they arise out of the same transaction or occurrence. If a litigant seeks to remedy a single wrong, in this case denial of access to the easement across Baxter's property, that litigant should present all theories in the first action. Otherwise, theories not raised will be precluded in a later action. *McNeil v. Legislative Apportionment Comm'n*, 177 *N.J.* 364, 395 (2003).

The New Jersey courts have distilled these principles to the simple phrase, reflected in decisions such as *Joseph L. Muscarelle, Inc. v. State*, 175 *N.J. Super.* 384, 395 (App. Div.1980), *app. dismissed*, 87 *N.J.* 321 (1981), that *res judicata* extends to all claims that were raised or "*could have been raised*." 175 *N.J. Super.* at 395 (emphasis added). There is no reason why a claim for an express easement

could not have been asserted by Trunell since the purpose of that relief would have been to "remedy" the same "wrong." *McNeil*, *supra*, 177 *N.J.* at 395.

Challenger entirely ignores the could-have-been-raised element of *res judicata*, instead choosing to highlight the supposed unfairness of saddling Challenger with the consequences of Trunnel's less-than-optimal litigation strategy. Challenger's attempt to cast itself as a victim of unfairness is problematic, for three reasons. First, it ignores the unfairness to Baxter who litigated the previous case, prevailed and reasonably relied on that result for years. Second, it presumes that the more ineptly an earlier case was handled, the more that litigant's privies are entitled to a second bite at the apple -- an astounding proposition. And third, Challenger, like its predecessor Trunnell, proceeded recklessly into the transaction without conducting appropriate due diligence.

Point IV

The Trial Court Wrongly Rejected Baxter's Entire Controversy Doctrine Defense.

In Point IV of its brief, Challenger argues that Judge Goodzeit properly rejected Baxter's entire controversy defense. In Point II of our earlier brief at pages 30-38, we explained why Judge Goodzeit got it wrong. In response to Challenger's argument that Baxter hoodwinked Judge Derman in the *Trunell* litigation by not presenting the relevant deeds necessary to make Trunnell's case, we explained why Trunell had sufficient notice of those deeds and only himself to blame for not

bringing them to Judge Derman's attention. *See Fisher v. Yates*, 270 *N.J. Super.* 458, 471 (App. Div. 1994)(recording statute puts property owners on notice of recorded instruments in neighbors' chains of title). We also explained why Baxter was not precluded from raising the issue at the summary judgment stage. *See Oliver v. Ambrose*, 152 *N.J.* 383 (1988). We have nothing further to add.

Conclusion

The arguments raised by Challenger in Points VI, VI and VII of its brief were been addressed in different portions of our earlier brief, and we rest on what we have already presented to the Court.

For the reasons above, and previously, the judgment of the Chancery Division should be reversed and summary judgment entered in favor of Baxter dismissing the complaint. In the alternative, the matter should be remanded for further proceedings concerning what use Challenger may make of the easement.

Respectfully submitted,

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By:_____
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