STATE OF MICHIGAN
IN THE COURT OF APPEALS

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**BONNIE and MICHAEL FARAONE**,

Plaintiff/Appellants,

v

**LANSING BOARD OF WATER AND LIGHT**,

Defendant/Appellee.

Court of Appeals Case No. 365804

Lower Court Case No.: 22-0255-CZ

Hon. James S. Jamo

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**DEFENDANT / APPELLEE**

**BRIEF ON APPEAL**

*****ORAL ARGUMENT REQUESTED*****

Respectfully submitted,

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## STATEMENT OF JURISDICTION

Appellee, Lansing Board of Water and Light, does not dispute appellant's statement of jurisdiction.

## COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Did the trial court properly determine that appellee Lansing Board of Water and Light ("LBWL") has a prescriptive easement over appellants' property where its existing electrical equipment is located and that the scope of the easement allows LBWL to trim or remove any vegetation that overhangs, interferes with, or threatens its equipment?

Appellant answers: "No."

Appellee answers: "Yes."

The Trial Court answered: "Yes."

II. Did the trial court properly dismiss appellant's claim of a "governmental taking" where the pleadings were deficient, no cognizable harm was alleged, and where the claim was rendered moot by the ruling on the existence and scope of appellee's easement?

Appellant answers: "No."

Appellee answers: "Yes."

The Trial Court answered: "Yes."

III. Did the trial court properly dismiss appellants' claim of trespass-nuisance based on an alleged "hazardous service drop" wire hanging too closely to a neighboring garage where LBWL offered evidence that the service drop had sufficient clearance over appellants' property and appellant had no competent evidence to refute the claim?

Appellant answers: "No."

Appellee answers "Yes."

The Trial Court answered "Yes."

IV. Did the trial court properly dismiss appellants' Fourth Amendment claims relating to alleged "filming" of Bonnie Faraone where there was no evidence to support the allegation that filming ever occurred, and where no reasonable expectation of privacy was violated?

Appellant answers: "No."

Appellee answers "Yes."

The Trial Court answered "Yes."

## COUNTER STATEMENT OF FACTS

### Introduction

Appellee, the City of Lansing's Board of Water and Light ("LBWL"), is a municipally owned utility providing electric power service to the mid-Michigan region since 1892. Appellants Michael and Bonnie Faraone ("Faraones") are the residents of 717 Moores River Drive, Lansing, Michigan ("Property"). Michael Faraone is the sole owner of the Property. LBWL has maintained electrical power facilities on and over the Property since the neighborhood was developed, around 1919. LBWL's wires serving three homes have traversed over the Property in the current configuration since at least 1979. See Exs 1 and 2 to Appellee's Motion for Summary Disposition,[1] copies attached at appellee's Appendices A and B, respectively.

In December 2013, mid-Michigan was hit with an ice storm that caused more than 35,000 LBWL customers to lose power for several days. Nearly all the power outages were caused by tree limbs caked with ice falling on and pulling down power lines. Following that storm, the City of Lansing, the Michigan Public Service Commission, and LBWL reviewed LBWL's practices in an effort to find ways to avoid or at least reduce such outages. That review resulted in a recommendation for more regular and frequent tree trimming around and above LBWL's power lines.[2] LBWL updated its tree maintenance practices ("Vegetation Management") specifically to focus on preventing tree limbs from overhanging and coming into contact with its electric power

[1] References to "exhibits" in this Brief are to the exhibits presented in support of LWBL's Motion for Summary Disposition in the trial court.

[2] "Five years after the ice storm…" *Lansing State Journal*, Dec. 20, 2018, *accessed at* Lansing ice storm: 5 years later, what lessons have we learned? (lansingstatejournal.com)

lines, resulting in safer and more reliable electric power to its customers.[3] See Ex 3, appellee's Appendix C.

**Background.**

In the fall of 2021, LBWL was in the process of planning its tree trimming in the neighborhood where the Property is located. The process is that a planner arborist walks the areas in question and observes where trees may conflict with LBWL's electric power equipment and specifically its power lines. The planner then devises a plan calling for trimming or, in some cases, removal of a tree or trees based on proximity to the lines. Specific trimming decisions are made by the LBWL arborist in charge of the work when done. The Property has a utility pole near the south Property line and three separate lines traversing the Property, two of which serve neighboring parcels. Some of the trees on the Property appeared dead, damaged, or dying, and in close proximity to and overhanging the electric power lines. LBWL identified the trees slated for trimming to Faraones.[4] On November 5, 2021, LBWL personnel met with Bonnie Faraone to explain the proposed trimming plan. Mrs. Faraone immediately became agitated and terminated the conversation. She told LBWL that it would be "hearing from [her] husband, who is a lawyer." As Mrs. Faraone later admitted in her deposition, she hated LBWL and never intended to let it trim trees on the Property. See B. Faraone Deposition (Ex 4) at pp 29, 39 ("I didn't want the Board of Water and Light to touch my trees…Since the minute I lived in Lansing" and "I think everybody

[3] In their Brief on Appeal, Faraones claim that the report following the 2013 ice storm "never called upon the Board to cut a 6' swath around their secondary lines." See p 2. Faraones have misunderstood the events. The recommendation did not come from the Community Review Team report, but from the response to that report made by the Michigan Public Service Commission, a subject-matter expert on the topic, as explained in the LBWL affidavits attached as Exhibits 3 and 12 to the LBWL summary disposition motion. See appellee's Appendices C and O, respectively.

[4] If LBWL planners believe the required trimming warrants a complete removal of a tree, it will recommend a removal of that tree to the property owner.

that lives in the area hates the Board of Water & Light").

Shortly thereafter, Michael Faraone sent two letters to LBWL, in which he claimed that the trees slated for trimming were "100+ year old trees," that LBWL has no easement to maintain the lines in question, and that LBWL and its "agents have no consent to enter or trespass onto that property or remove anything from it, including any part of any tree." See Exs 5 and 6, attached at appellee's Appendices D and E, respectively; see also Ex 4, pp 47, 58-59 and M. Faraone Deposition (Ex 7), pp 9-10.[5]

LBWL representatives met with Faraones to discuss a plan that would meet LBWL's safety and reliability standards and be acceptable to Faraones. Ex 8, copy attached at appellee's Appendix H. The Faraones became increasingly hostile and irrational. In early January of 2022, when a LBWL truck was parked on a neighboring property, Bonnie Faraone came out and angrily confronted the crew, asking "what the hell they were doing." Ex 4, pp 73-77. She later falsely claimed that a member of the crew (who was in the truck watching an online video on his phone) had "filmed her" without her consent. Ex 9, attached at appellee's Appendix I.

Despite the Faraones' overt hostility toward LBWL and its agents, LBWL continued its efforts to resolve matters amicably, even making the effort to design a proposed alternate route for the secondary powerline that serves Faraones and neighboring properties. Unfortunately, however, the alternate route could not be effectuated because Faraones' neighbors would not agree.[6] On

[5] Although excerpts of Michael and Bonnie Faraone's deposition transcripts were included in the appellants' Appendix, they fail to include all relevant testimony. Full transcripts were attached to LBWL's Motion for Summary Disposition. Accordingly, LBWL has attached the full transcripts as appellee's Appendices F and G, respectively.

[6] Faraones' Brief on Appeal demonstrates a lack of understanding on this issue, and some irony by insinuating that LBWL did not need written easement agreements because "the secondary line already crosses those yards" and the utility pole "already sits on the neighbor's (Waligorski's) property." See p 6, fn 4. However, the proposal would have created an entirely new wire routes

April 22, 2022, Michael Faraone emailed Mark Matus, General Counsel of LBWL, asking for time to negotiate with his neighbors and stating that he would hold off on any lawsuit. Mr. Matus responded via email the next business day, agreeing to wait on planned trimming until May 29, 2022, to allow for more discussion. Ex 10, copy attached at appellee's Appendix J. Contrary to his representation, Faraone filed the lawsuit and obtained a temporary restraining order two days later. LBWL has not done any preventative trimming of the trees growing on the Property. At least one dead or dying tree and several limbs[7] have fallen onto electrical lines on neighboring properties, prompting calls to LBWL to address the issues.[8] Ex 4, pp 42-45.

**Procedural History.**

On April 25, 2022, the Faraones filed their lawsuit and an *ex parte* motion for temporary restraining order ("TRO") without giving LBWL notice or an opportunity to respond. The trial court granted the TRO and, following a hearing, left it in place while the parties agreed to mediate the dispute. See May 2, 2022 Temporary Restraining Order and May 20, 2022 Continued Temporary Restraining Order. Faraones' complaint asserted seven causes of action: (I) Request

over properties not owned by Faraones. Without the agreement of the neighbors to grant a written easement, the proposal could not be implemented.

[7] Faraones allege that one of the fallen limbs was caused by a "discarded piece of a powerline that the tree grew around." See Appellants' Brief, p 8. The insinuation that LBWL bears responsibility for the broken limb has no basis in fact and was included to be inflammatory. The wire in question is not LBWL equipment.

[8] Faraones downplay these incidents by calling the broken limb a "twig" (Appellants' Brief, p 9, fn 6) and suggesting that an outage could not have occurred because their neighbor (Beachy) does not recall it. Appellant's Appendix, p 169a. Faraones are ignoring the testimony of LBWL employee John Rademacher, who explained that a limb did fall on a wire (as evidenced by photographs), but LBWL was able to isolate the outage and prevent the need for a power interruption to the Beachy home. See Transcript of J. Rademacher Deposition, p 45, included as Exhibit B to Faraones' Response to the LBWL Motion for Summary Disposition. A copy is attached at appellee's Appendix P (although excerpts of this deposition were provided in appellant's Appendix, appellee's Appendix provides the entire transcript for context).

for Temporary Restraining Order; (II) Declaratory Judgment and Permanent Injunction; (III) Governmental Taking; (IV) Trespass and Nuisance; (V) Intentional Infliction of Emotional Distress; (VI) Lack of Easement and Historical Acquiescence or Estopple[sic]; and (VII) Violation of Fourth Amendment. LBWL filed an answer and affirmative defenses.

The parties engaged in written discovery and deposed parties and witnesses, including Michael Faraone, Bonnie Faraone, and LBWL arborist John Rademacher. At the close of discovery, LBWL filed for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10).

LBWL's primary assertion in the motion was that it has a prescriptive easement over the Property (by virtue of its electrical power equipment, which has serviced the property in its existing location and configuration for well over the statutorily prescribed period), and that the proposed trimming was within the right of maintenance afforded to utility easements. LBWL further asserted that the remaining claims should be dismissed because: (1) Bonnie Faraone (who does not own the Property) was not a proper party in interest, (2) vegetation trimming to prevent interference with electrical utilities is not a "governmental taking," nor did the Faraones plead any substantial loss, (3) the trespass-nuisance claim was purely hypothetical and no damage existed,[9] (4) the intentional infliction of emotional distress claim was legally barred, and (5) there was no recognized expectation of privacy nor any supporting evidence for the claim under the Fourth Amendment. See LBWL's Motion for Summary Disposition dated November 30, 2022.

Faraones responded to LBWL's motion by arguing that there is no easement over the Property, but, in the alternative, that LBWL's proposed trimming unduly burdened their servient

[9] Faraones' trespass-nuisance claim relates to a "service drop" wire that Faraones alleged "hangs too closely" to their garage and may cause future harm. Complaint, ¶ 46. LBWL agents advised Faraones that the service drop was measured and found to be within LBWL's acceptable clearance limits over the Faraone garage. Ex 14, attached at appellee's Appendix K.

estate. Faraones maintained that their speculations (about being filmed and the service-drop clearance) were sufficient to state claims for governmental taking, trespass-nuisance, and violations of the Fourth Amendment. See Faraones' Response to LBWL Motion for Summary Disposition dated December 14, 2022. However, Faraones conceded that their intentional infliction of emotional distress argument lacked support and offered to dismiss it. *Id.* at p 19.

Following a hearing on December 28, 2022, the trial court ruled that: (1) Faraones' Counts V and VII (intentional infliction of emotional distress and violations of the Fourth Amendment) were dismissed with prejudice as to all parties; (2) all claims by Bonnie Faraone, a non-owner of the Property, relating to real property rights (being Counts I – IV and VI: injunctive relief, governmental taking, trespass-nuisance, and lack of easement) were dismissed with prejudice;[10] and (3) the remaining counts (including the claims by Michael Faraone on Counts I – IV and VI) would be taken under advisement and a written opinion issued. See Order dated January 17, 2023, copy attached at appellee's Appendix L.

**Summary Disposition Ruling.**

On February 28, 2023,[11] the trial court issued its Opinion and Order on the remaining issues. See Opinion and Order attached at appellants' Appendix, p 175a. The trial court determined that the LBWL equipment had been in its existing configuration on the Property during the entirety of the Faraones' ownership, and likely much longer. Appellants' Appx, p 175a. The trial court

[10] On this point, the trial court judge noted that "[w]ith regard to Counts 1, 2, 3, 4, and 6, in fact, it is a relevant factor and a necessary element, I believe, for those claims, that Bonnie Faraone have a property, a title interest in the property in order to assert these claims…we are dealing with real property interest when it comes to the effect of an easement – the existence and scope of an easement on the property. And her not being a titled owner to the property does undermine those claims…I am going to grant the dismissal of Mrs. Faraone, Bonnie Faraone, plaintiff[s'] claims with regard to those counts." See December 28, 2022 Hearing Transcript at pp 81-82.

[11] The Opinion and Order mistakenly states the date as "February 28, 2022."

went on to find that LBWL met the elements necessary for a prescriptive easement over the Property: use of the land upon which the equipment is located in a manner that is open, notorious, adverse, hostile, and continuous for a period of at least fifteen years. *Id.* at pp 177a- 179a.

The trial court then held that the easement "includes the same rights that exist under an express easement, including but not limited to the right to access, maintain, and repair its equipment, and the right of ingress and egress over the Property." *Id.* at 179a. The trial court also noted that LBWL's easement "specifically includes the right to trim and/or remove and vegetation . . . tree limbs or branches that overhang, interfere with, or threaten" LBWL's equipment, as such right is "necessary to effective enjoyment of the easement — in this case, not only the ability to maintain, repair, and inspect its equipment, but also to ensure the safe and reliable delivery of its service." *Id.* The trial court specifically noted that the scope of the easement is not unduly burdensome on the Faraones, and that the rebuttal evidence offered by Faraones did not adequately address the concerns of public safety, work crew safety, or the ability of LBWL to safely and reliably provide electrical service. *Id.* at 179a – 181a. Accordingly, the trial court granted summary disposition in LBWL's favor on Counts I, II, and VI (temporary/permanent injunctive relief and lack of easement) pursuant to MCR 2.116(C)(10).

On Count III (governmental taking), the trial court found that Michael Faraone failed to state a claim upon which relief could be granted based on the harms alleged in the Complaint, and further found that the claim was rendered moot by the finding that a prescriptive easement exists. Accordingly, it dismissed the claim pursuant to MCR 2.116(C)(8). *Id.* at 181a.

On Count IV (trespass-nuisance), the trial court granted summary disposition in favor of LBWL pursuant to MCR 2.116(C)(8) and (10), as Michael Faraone failed to plead any damage

and was unable to rebut LBWL's measurements or otherwise present evidence to establish that the service drop poses a significant safety hazard. *Id.* at 181a-182a.

The trial court ordered that the parties conduct a survey of the current configuration of the LBWL equipment and the trees to be submitted for adoption into the record and to effectuate a final dismissal. *Id.* at 181a-182a.

**Final Order and Motion for Reconsideration.**

LBWL submitted the survey[12] and a proposed final order, to which Fararones objected and moved to stay the proceedings pending an appeal to this Court. In the objection, Faraones alleged that they would "forgo an appeal" if LBWL would walk away from its claims for fees and costs and allow the Faraones to choose which LBWL employee would carry out the Court's order. See Faraone Objection, copy attached at appellee's Appendix M. When that proposal did not prompt their desired result, Faraones moved for reconsideration, alleging that that the trial court misapplied its legal analysis, displayed bias,[13] and made factual errors in its Opinion.[14] See Faraones' March 20, 2023 Motion for Reconsideration.

[12]The survey, which was conducted on January 31, 2023, definitively determined that the pole and several of the trees slated for trimming or removal were not located on the Property. See survey attached as Exhibit 1 to the trial court's April 12, 2023 Order.

[13] Michael Faraone suggests that prior litigants challenging trimming policies were treated differently because the trial court judge lives in the same neighborhood as those litigants, and alleges that he, "the peasant homeowner," is being punished for "defying the government's will." See Motion for Reconsideration at p 8. However, as discussed *infra*, the prior litigants (Richard and Connie Crittenden) were also unsuccessful in their efforts to keep a dangerous tree limb from being trimmed in accordance with LBWL's easement and policies.

[14] The "factual error" alleged relates to two sentences in the Opinion and Order that reference discussions about "steam" and the "cost of steam." While those discussions between LBWL and Faraones did occur, they related to steam service at the Faraones' business, not the Property. Ex 4, p 20. LWBL submits that the error is wholly insignificant to the ruling.

On April 12, 2023, the trial court entered its order dismissing all claims in the Faraones' complaint, establishing the bounds of the LBWL easement, and authorizing planned trimming to commence in accordance with the work plan submitted by LBWL. See April 12, 2023 Order, copy attached at appellee's Appendix N.

On May 1, 2023, the trial court then issued its final order, which (1) denies an award of sanctions to LBWL; (2) denies Faraones' Motion for Reconsideration for lack of any palpable error shown, and (3) grants Faraones' motion for stay pending appeal. See appellant's Appendix, p 173a. The trial court notes that "[a]though the Court does not believe Plaintiff is likely to succeed on the merits . . . it is in the interest of justice to allow Plaintiff to exhaust his appellate efforts while maintaining the trees as currently situated." *Id.* at 174a. This appeal ensued.

## ARGUMENT

### I. The trial court properly determined that LBWL has a prescriptive easement over Faraones' property where its existing electrical equipment is located and that the scope of the easement allows LBWL to trim or remove any vegetation that overhangs, interferes with, or threatens its equipment.

The Faraones' refusal to allow LBWL on the Property or to trim was never based on an objective weighing of the relative rights of LBWL as the easement holder versus their rights as the occupants of the burdened property. What this case (and appeal) is really about is Faraones' acknowledged dislike of LBWL, and their personal crusade to prevent LBWL from managing vegetation in accordance with its policies.

#### A. Preservation of Issue.

The Faraones' Complaint sought injunctive relief preventing LBWL from trimming trees on the Property, as well as a declaratory ruling that LBWL lacks an easement over the Faraone Property. See Complaint Counts I, II, VI. The trial court granted summary disposition in LBWL's

favor and dismissed Counts I, II, and VI as to plaintiff Bonnie Faraone, who is not on the title to the Property. See January 17, 2023 Order, appellee's Appx L.

The trial court then also granted summary disposition and dismissed plaintiff Michael Faraone, finding that LBWL has a prescriptive easement over the Property and that the scope of the easement allows LBWL "to access, maintain, and repair its equipment" and "specifically includes the right to trim and/or remove and vegetation . . . tree limbs or branches that overhang, interfere with, or threaten" LBWL's equipment. February 28, 2023 Order, appellants' Appendix pp 175-182a; April 12, 2023 Order Confirming Easement, appellee's Appx N.

Question Presented One in Appellants' Brief on Appeal challenges the trial court's February 28, 2023 ruling (that a prescriptive easement exists and the scope thereof) but does not challenge the January 17, 2023 ruling (dismissing Bonnie Faraone, a non-owner, on Counts I, II, and VI). Accordingly, the issue is preserved as to appellant Michael Faraone only. Review of Bonnie Faraone's claim was waived by appellants' failure to raise it.

**B. Standard of Review.**

An issue not contained in the statement of questions presented is waived on appeal. *English v Blue Cross Blue Shield*, 263 Mich App 449, 459; 688 NW2d 523 (2004) (citing *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000)). Failure to raise an issue in the statement of questions presented means that issue is abandoned. *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 543; 730 NW2d 481 (2007). Because appellants do not challenge the trial court's ruling as to Bonnie Faraone on Counts I, II, and VI of the Complaint in their Statement of Questions Presented, those issues are waived and dismissal of those Counts as to Bonnie Faraone should stand.

With regard to Michael Faraone's claims in Counts I, II and VI, of the Complaint, the grant of a motion for summary disposition is reviewed de novo. *Travelers Ins Co v Detroit Edison Co,* 465 Mich 185, 205; 631 NW2d 733 (2001). A trial court's grant of summary disposition under MCR 2.116(C)(10) is proper where the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact and the moving party is entitled to judgment as a matter of law. *Maiden,* 461 Mich at 120. When a (C)(10) motion is made and supported as provided in the rule, an adverse party must, by affidavits or otherwise, "set forth specific facts showing that a genuine issue of material fact exists and cannot simply rest on mere conjecture and speculation to meet the burden of providing evidentiary proof establishing a genuine issue of material fact." *Altairi v Alhaj,* 235 Mich App 626, 628-629; 599 NW2d 537 (1999). The reviewing court should consider only the substantively admissible evidence actually proffered in opposition to the motion. *Maiden,* 461 Mich at 120. Similarly, an action for an easement by prescription is equitable in nature, and the appellate court reviews de novo the trial court's holdings in equitable actions. *Mulcahy v Verhines,* 276 Mich App 693; 742 NW2d 393 (2007).

### C. The trial court's finding that a prescriptive easement exists on the Property was supported by the evidence in the record.

An easement is a property interest — the right to use the land burdened by the easement for a specific purpose. *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc,* 472 Mich 359, 378-79; 699 NW2d 272 (2005). The land burdened by the easement is the servient estate, and the land benefitted by the easement is the dominant estate. *D'Andrea v AT&T Michigan*, 289 Mich App 70, 73 n2; 795 NW2d 620 (2010). Typically, the owner of the dominant estate is responsible for maintaining the easement, and the servient estate does not hold an "unrestricted veto power over the improvements sought to be made." *Bowen v Buck Hunting Club,* 217 Mich App 191, 193-94; 550 NW2d 850 (1996); *Carlton v Warner*, 46 Mich App 60, 62; 207 NW2d 465 (1973).

In this case, LBWL (the holder of the dominant estate) is the public utility providing electric power to the Property (the servient estate) and neighboring homes. The trial court determined, based on the evidence in the record, that LBWL's power lines have existed since 1919, and have been in their present configuration on the Property since at least the time of the Faraones' purchase in May 2007, which is more than fifteen years. Appellants' Appx, p 177a. As such, the trial court properly found that LWBL holds a prescriptive easement by virtue of the continued and uninterrupted presence of the equipment on the Property. To acquire an easement by prescription, a plaintiff's use of land must be: "(1) open, (2) notorious, (3) adverse, and (4) continuous for a period of fifteen years" or more. *Plymouth Canton Community Crier, Inc v Prose,* 242 Mich App 676, 679; 619 NW2d 725 (2000); MCL 600.5801(4).

**1. LBWL's equipment on the Property is open and notorious.**

An easement is considered "open" when there is "no doubt in the mind of the owner of the land that his rights are invaded." *Menter v First Baptist Church of Eaton Rapids*, 159 Mich 21, 25; 123 NW 585 (1909). Use that is "notorious" refers to use that an owner knows is not his own. Here, there was no dispute before the trial court that the electrical power equipment in question is (1) on the Property, and (2) not owned by the Faraones. As the trial court noted, the equipment is "plainly visible" and Faraones have been "aware that the lines are present" since they purchased the property in May of 2007. Appellants' Appx, p 177a-178a; and see Bonnie Faraone's deposition testimony, Ex 4, p 79, appellee's Appx F. The trial court did not err in finding that no question of material fact existed on these elements of a prescriptive easement.

**2. LBWL's equipment on the Property is adverse and hostile as those terms are interpreted under Michigan law.**

The term "hostile," as used in the law of prescriptive easements, "is a term of art and does not imply ill will…Adverse or hostile use is use that is inconsistent with the right of the owner,

without permission asked or given." *Mulcahy*, 276 Mich App at 702. Furthermore, a conclusive presumption arises that the right originated in a grant when the use has continued for many years, and no proof of whether the claimed easement originated in written grant or oral permission is available. See *Dyer v Thurston*, 32 Mich App 341, 342-343; 188 NW2d 633 (1971). In those instances, the party opposing the easement has the "burden to show that the use was merely permissive." *Id.*

In their Brief on Appeal, Faraones repeatedly emphasize that the trial court's prior ruling in a similar tree-trimming case involving LBWL (where the court found a prescriptive easement and permitted LBWL to trim trees)[15] differs from theirs because that case involved an express grant. See Appellants' Brief at p 7 ("In Crittenden, unlike the present case, the Board possessed a *written easement*"). However, the reality is that in Crittenden there were actually two easements. The first was included in very general language in the plat, and the second was the prescriptive easement to service lines no addressed by the easement in the plat. Moreover, there may well have existed a written grant in this case as well. LBWL began supplying power to the area in the early 1900s, and it should not be surprising that records of how and when those utility rights were established are sparse due to the intervening 100+ years. What *was* clear in the record, however, is that the existence of the power equipment on and over the Property "has continued for many years" and that there is no available evidence to show whether the claimed easement "originated in written grant or oral permission." *Dyer, supra*. Under those circumstances, the Faraones must

[15]In *LBWL v Crittenden*, Ingham County Circuit Court Case No. 15-212-CZ, homeowners attempted to bar LBWL from entering their property to trim trees. The trial court ruled that LBWL has a prescriptive easement over the Crittenden property, including "the right to trim and/or remove any vegetation, including without limitation tree limbs and branches, that overhang, interfere with, or threaten BWL's equipment," and that the Crittendens "shall hereafter not interfere with BWL's rights…including without limitation its right of maintenance and tree trimming or removal. See Order dated July 28, 2016, Ex 15, attached at appellee's Appendix T.

then establish that LBWL's use was "merely permissive." *Id.* Accordingly, the Faraones' argument that the trial court engaged in impermissible "burden shifting" is incorrect.

Furthermore, the trial court record was replete with "clear and cogent" evidence that the use was not permissive. In fact, Faraones' only argument on that point is that LBWL has "permissive contracts to supply electrical power." Appellants' Brief, p 13. Faraones continue to misconstrue the legal meaning of "permissive" use, as opposed to "adverse" or "hostile" use. Under Michigan law, "the use of another's property qualifies as adverse if made under a claim of right when no right exists" *Mulcahy*, 276 Mich App at 702. There is no requirement of "hostility" in the traditional sense, although Faraones have exhibited that sort. See, e.g., Ex 6 ("You and your agents have no consent to enter or trespass onto that property") and Ex 4, p 29 ("I didn't want the Board of Water & Light to touch my trees…Since the minute I lived in Lansing"). As the trial court correctly noted, the Faraones' own actions and statements establish that LBWL's use (particularly the maintenance of its equipment) was not permissive, and therefore meets the legal definition of "hostile." Appellant's Appx, p 178a.

LBWL's equipment physically runs over Faraones' backyard and prevents Faraones' from using or occupying the space where the equipment is located, an ability they would otherwise have. That is all that is required for use to be adverse. The Faraones' only response is a bald assertion that it is "implausible" that the placement of LBWL power equipment on the Property is "inconsistent with the Faraones' rights." See Appellants' Brief, p 15. Why? The basis for the alleged "implausibility" remains unclear. Despite describing the situation as a "classic mutual and permissive relationship" (Appellants' Brief, p 16), Faraones have presented no further explanation or legal authority in support of their argument. Apparently, this Court is to assume that all power

supply equipment on private property in Michigan is 'de facto' permissive.[16] "A party may not leave it to this Court to search for authority to sustain or reject its position. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority…An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Bank of Am, NA v Fid Nat'l Title Ins Co*, 316 Mich App 480, 517; 892 NW2d 467 (2016) (internal citation omitted).

Faraones cannot have it both ways. Either there is a right, established by virtue of an express utility grant made long ago and lost to time, or LBWL's use of the Property is adverse for purposes of a prescriptive easement analysis. See *Prose*, 242 Mich App at 681-684 ("Use of another's property qualifies as adverse when made under a claim of right when no right exists… [therefore, even] use under an invalid easement may establish an easement by prescription"). The trial court's ruling on this element should be affirmed.

**3. The only competent evidence in the record established that the continuous presence of LBWL's equipment on the Property exceeded the 15 year period required for an easement by prescription.**

Under Michigan easement law, what is considered "continuous" is dependent on the nature of the easement claimed. The test is "if it is used whenever the claimant chooses to use it.…[w]here the claimant needs the use of the easement from time to time, and so uses it, there is a sufficiently continuous use." *Dummer v US Gypsum Co*, 153 Mich 622, 634; 117 NW 317 (1908). Once a

[16] Faraones also claim that "[t]he evidence shows that the Board used the property because they believed they had permission to do so, not because they thought they were asserting an independent right to use it." Appellants' Brief, p 16. This assertion is unsupported by any citation to the record and leaves the Court to guess at what "evidence" Faraones are purportedly relying upon. As the assertion is untrue, there is no such evidence.

prescriptive easement has been established, it becomes appurtenant, and mere interference does not defeat it. *Toney v Knapp*, 142 Mich 652; 106 NW 552 (1906).

In this case, LBWL's equipment has been in its current location and configuration since at least 1979, as established by affidavits and by GIS images of the Property showing the poles and lines. Exs 1, 2, 3. As the trial court noted in its Opinion and Order, Faraones did not and could not dispute that LBWL's lines and poles have continuously provided power to the Property in their current locations since they purchased it. See Appellant's Appx, p 177a; and see Ex 4, p 13 ("Q. Were those lines there when you purchased the property in 2007? A. They were."). On appeal, Faraones continue to argue that the images and affidavits are insufficient.[17] To the contrary, LBWL provided clear and cogent evidence that the equipment was in its existing location for over 15 years, and it was Faraones that failed to present any competent rebuttal evidence to create an issue of material fact for trial.

Faraones represent on appeal that the "current configuration began no earlier than 2003 and as late as 2007," and then — inexplicably — assert that this means that "15 years did not pass before plaintiff's complaint was filed on April 25, 2022." If anything, the opposite is demonstrated: the configuration was almost certainly in its existing configuration for *at least* the requisite 15 years, and likely longer. If Faraones had support for their assertion that the configuration was changed *and* that the change was material (and they had no such evidence)[18] they still had to have

[17]The Faraones' argument as it relates to the LBWL GIS sketch (Ex 2) is that it is not "to scale," and therefore "none of their [LBWL's] schematics have ever been reliable." Appellants' Brief, p 17. However, the LBWL record is a computer image that was never intended to be to scale, as the accompanying affidavit of LBWL employee Darin Thelen explains. Ex 1 Rather, it is the existence of the record, and the text on it, that provides evidence of the existing configuration being placed in 1978.

[18]There was no evidence that LWBL's equipment placement was ever materially changed. Faraones' argument is premised on speculation that the wooden utility pole servicing the Property

some competent evidence that it occurred after April 25, 2007, in order to survive summary disposition. The Faraones' "reconfiguration" theory could not conceivably impact the prescriptive easement period unless LBWL somehow materially reconfigured the entire power supply system to the Property (and the three neighboring properties, which are serviced from the same secondary line) in the few days between April 25, 2007 and the Faraones' purchase in May 2007.[19] Of course, LBWL did not materially reconfigure the power supply during that time and have testified as much in affidavits. See Ex 3. Faraones' speculations are insufficient to overcome the evidence properly presented.

The trial court did not err when it concluded that the evidence before it was sufficient to establish that LBWL's placement and use of equipment on the Property was "(1) open, (2) notorious, (3) adverse, and (4) continuous for a period of fifteen years" or more, thereby establishing a prescriptive easement. *Prose,* 242 Mich App at 679.

### D. The scope of the LBWL easement as determined by the trial court is proper and necessary to the safe use and enjoyment of said easement.

The grantee of an easement has the right to use the easement in a way that is "reasonably necessary and convenient to the proper enjoyment of the easement." *Blackhawk Development Corp*

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looks to be in better shape than expected for 44+ year old wood. Appellants' Brief, p 18. The trial court correctly rejected the argument. Speculation is insufficient to create a question of material fact. *Altairi,* 235 Mich App at 628-629. Furthermore, it would not defeat LBWL's easement if an aging wood pole were replaced by a newer one in the same location. As discussed *infra,* maintenance of the equipment is an expected and ordinary exercise of utility easement rights.

[19]In response to the trial court's conclusion that the existing configuration of LBWL's equipment has been in place since at least May of 2007 (see Appellants' Appx, p 177a), Faraones also misrepresent Bonnie Faraone's testimony, stating that "she testified that they *may* have existed in their current configuration when Faraones *moved into* the property in late 2007, long after April 25, 2007." Appellants' Brief, p 18 (emphasis in original). This assertion is demonstrably false, and indicative of Faraones' lack of credibility. At page 13 of Bonnie Faraone's deposition, she was specifically asked: "were those lines there when you **purchased the property** in 2007?" and she responded: "They were." Ex 4, p 13 (emphasis added).

*v Village of Dexter*, 473 Mich 33, 42; 700 NW2d 364 (2005). Michigan courts have long recognized that the grant of an easement gives the owner of the dominant estate a right to modify the land burdened by the easement. *Harvey v Crane*, 85 Mich 316, 319-320; 48 NW 582 (1891). In *Harvey*, the Supreme Court examined whether the owner of a dominant estate could erect a fence along an easement and concluded that the proper inquiry turned not on a literal definition of "necessity," but on whether it would be reasonable in order for the owner of the dominant estate to enjoy her easement. *Id.* at 325. The Court noted that the owner of the dominant estate sought "simply to be allowed, at her own expense, to make this way as convenient as the modes of passage which farmers usually provide for themselves upon their own premises," and permitted the fence to be constructed. *Id.*

Since *Harvey*, Michigan courts have expanded upon the rule by explaining that the "necessity" requirement is about whether the activity sought to be performed allows for the effective or reasonable enjoyment of the rights conveyed under the easement. *Blackhawk*, 473 Mich at 42. What is considered necessary and reasonable will depend on the nature and uses of the properties involved, as well as the customary improvements for such uses. *Harvey*, 85 Mich at 325. In general, an owner of a utility easement is entitled to reasonable access to the land for maintenance and repair purposes. *Eyde v Michigan*, 82 Mich App 531, 541; 267 NW2d 442 (1978).

On appeal, Faraones argue that the scope of the prescriptive easement found by the trial court exceeds "what was originally contemplated, and the use made of it over the past 15 years.[20]" Appellants' Brief, p 19. At least four or five times throughout their Brief, Faraones make the

[20]It is unclear how Faraones could even know what was "originally contemplated" when electric power equipment was first installed in the early 1900s. Nonetheless, they ultimately acknowledge that the equipment has, in fact, been used by LBWL for in excess of the requisite 15-year period.

unsupported assertion that "for 100 years the Board ignored the trees growing around the power lines." *Id.* at p 20. This disregards the reality of power line maintenance; namely, that trees are living, growing (and, ultimately, dying) organisms. They are not static, and do not retain the same size, shape, vitality, or integrity as time passes.[21] A tree that did not pose a threat to a power line ten, five, or even two years ago may pose a threat today. Accordingly, even if Faraones' allegation that LBWL "ignored" trees on the Property for 100 years were true (and it is not true), a tree falling on a power line in the 101st year is no less a threat to the equipment, the crews, and the public. This is why Michigan law recognizes that the scope of a utility easement must include vegetation management, as needed.[22]

The Faraones' position on this issue — that trimming to maintain a safe clearance area around power lines is outside the scope of LBWL's easement — is belied by caselaw, statute, industry practice, and common sense. The Land Division Act of Michigan specifically grants public utilities the "right to trim or remove trees that interfere with their use of easements." MCL 560.190. This is because removal of vegetation is not only reasonably necessary, but actually necessary in order to "effectively enjoy" an easement for electrical power. Dealing with threats to power supply as they arise is not "expanding the scope" of the easement as Faraones allege.

[21]The Faraones' Brief focuses on the age of the trees in question, including various photos showing that the trees were once smaller and grew up into the power lines. See, e.g., p 3. LBWL submits that this "evidence," to the extent it is authentic and admissible (see MCR 2.116(G)(6)) actually supports LBWL's position: that the trees *became* a threat to the power supply that had to be dealt with through eventual trimming and removal.

[22] Faraones claim LBWL's trimming standards are arbitrary, alleging that the proposed easements presented to the neighboring property owners "dictated that no structure or plant of any kind could be placed *under* their overhead line." Faraones are misstating the language, which does not prohibit planting trees, but notes that LBWL must approve the *types* of trees planted under existing power equipment to avoid the very problem now faced by Faraones: that certain varieties will grow tall and large enough to interfere with the power lines.

In reaching its conclusions, the trial court cites *Panhandle Eastern Pipeline Co v Musselman*, 257 Mich App 477; 668 NW2d 418 (2003). In *Panhandle*, the plaintiff (a gas pipeline company), sought to enforce a right of way over the defendants' property by clearing "trees and shrubbery [that had] grown and been planted on the property by defendants." *Id.* at 478. Plaintiff wished to clear the property to accommodate maintenance, repair, and testing of the pipeline, but defendants refused to allow plaintiff to clear the property…[and] argued that plaintiff did not need to remove trees in order to accommodate any maintenance, repair, or testing of the pipeline [or] make a thirty-foot clearing on either side of the pipeline." *Id.* at 478-79. In other words, the defendants' position in *Panhandle* was very similar to the Faraones' position in this case. However, the *Panhandle* court disagreed with the defendants, finding that the purpose of the easement was to inspect and repair the pipeline, including the right "to clear the property to an extent necessary for reasonable maintenance, repair, and inspection" in the manner that was customary for the plaintiff. *Id.* at 485-86. Here, as in *Panhandle*, the inquiry is two-fold: (1) whether the maintenance is necessary to effective enjoyment of the easement, and (2) whether the maintenance unreasonably increases the burden on the servient estate. *Harvey*, *supra*, at 325. The trial court weighed these considerations and found in favor of LBWL.

In the trial court, Faraones pointed out that in *Panhandle* this Court remanded the matter for a determination of whether the trees in question predated the pipeline, and whether the vegetation in question had been intentionally planted by the plaintiffs. However, in the appeal from the decision on remand, this Court affirmed, noting that "**regardless of its source or age, any vegetation causing an improper obstruction could be cleared**." *Panhandle E Pipeline Co v Musselman*, 2007 Mich App LEXIS 2304 at *6 (Oct 9, 2007) (emphasis added), copy attached at

appellee's Appendix Q.[23] In any event, Faraones have no evidence that the trees in question predate the LBWL equipment (the installation of which goes back to approximately 1919) and acknowledged that they have no idea whether the trees are planted or wild. Ex 4, pp 55-56.

On appeal, Faraones now argue that the trial court "misapplied" *Panhandle*. Their position is that *Panhandle* is distinguishable solely because the easement in that case arose out of an express grant. Appellants' Brief, p 28. Faraones are willfully ignoring the import of the *Panhandle* ruling. As discussed above, "a conclusive presumption arises that the [easement] right originated in a grant when the use has continued for many years, and no proof of whether the claimed easement originated in written grant or oral permission is available. *Dyer*, 32 Mich App at 342-343. Furthermore, whether the easement in question arises by prescription or by express grant makes no difference: the question is whether the requested vegetation management is reasonably necessary for its enjoyment, irrespective of whether the vegetation in question was planted or wild. In this case, the trial court weighed the Faraones' concerns and alleged damages against the "potential threats to public safety, work crew safety, [and] the ability of Defendant to safely and reliably deliver its services," and correctly concluded that LBWL's requested vegetation management was reasonably necessary. Appellants' Appendix, p 180a.

If trimming is necessary for the power lines to be effectively maintained and enjoyed by customers — and it indisputably is — then it is part of LBWL's easement rights regardless of whether the right is ever stated explicitly. This has been confirmed by other jurisdictions as well. See, e.g., *Motes v PacifiCorp*, 230 Ore App 701; 217 P2d 1072 (2009) ("A prescriptive easement to run power lines is understood to encompass the right to maintain the lines and the vegetation

[23] This unpublished case is cited because it was raised and discussed in the trial court's Opinion and Order in response to Faraones' arguments (see appellant's Appx, p 179a-180a) and contradicts the Faraones' interpretation of the published decision preceding it.

under and around them")[24]; *Erickson v Grand Marais PUC*, 2004 Minn App LEXIS 736 at *1 (June 29, 2004) (prescriptive easement in favor of power utility was proper, and the utility did not exceed the scope of the utility easement by clearing the trees on the landowners' property)[25] (copy attached at appellee's Appendix R). The trial court's determination of the scope of LBWL's easement should be affirmed.

### E. LBWL's proposed vegetation management does not unreasonably burden Faraones, and the trial court properly balanced the parties' interests.

As it relates to the burden of LBWL's easement right on the servient estate, Faraones allege that "[t]he circuit court undertook no balancing test of any kind," and simply rejected their arguments. See p 27. A review of the trial court's ruling shows that the allegation is untrue. The trial court opinion specifically discusses the report submitted by the Faraones' arborist, considers it, and weighs it against the evidence submitted by LBWL, including testimony from LBWL agents

[24] The cited case also notes that "plaintiffs contend that, because there is no evidence that PacifiCorp or its predecessors have in the past entered the subject property to maintain the wires and vegetation, any easement may not encompass such a right. However, although PacifiCorp did not have specific records of having entered the subject property to maintain the lines or prune vegetation, PacifiCorp's witnesses testified that it is company practice to inspect every inch of line every four years and that, in light of the nature of the vegetation growing in the area, PacifiCorp must have pruned under the lines over the years…The grant of an easement includes the right to do whatever is necessary by way of repairs, even though damage to the servient estate may result" *Id.* at 710-711, 713.

[25] The court's decision in *Erickson* addresses another complaint of the Faraones: that removal of trees goes too far and is unreasonably burdensome on the servient estate. The *Erickson* court disagreed, noting that "merely trimming the trees would not provide proper clearance for maintenance vehicles to enter to repair the lines. Therefore, **the complete clearing of trees underneath the line was reasonably necessary to maintain the easement for its primary purpose: providing electricity** to the PUC's customers **in a safe and efficient manner**. There can be no doubt that health, safety, and welfare issues were involved in the actions of respondents. Thus, the city and the PUC did not exceed the scope of the utility easement by clearing the trees on the Ericksons' property." *Id.* at *15 (emphasis added). The trial court in this case similarly weighed the health, safety, and welfare issues in its determination that the LBWL easement includes the right to trim and remove the Faraones' trees where they pose a threat to the power lines. Appellants' Appendix, p 180a.

on the threats of vegetation, as well as the testimony of an electrical engineering expert. Appellants' Appendix, p 180a. As the trial court discusses, the affidavits from LBWL representatives all affirm that damage from trees is the most prevalent cause of interruption in LBWL's electrical service.[26] See Ex 12, Affidavit of B. Don Russell, attached at appellee's Appendix O,[27] and Ex 3, Affidavit of D. Bolan, appellee's Appx C. The trial court then compares that evidence to the Faraones' proffered report, which notes that other utilities follow "less severe standards," but "does not offer an opinion regarding potential threats to public safety, work crew safety, or the ability of Defendant to safely and reliably deliver its services." Appellants' Appendix, p 180a.

On appeal, Faraones focus on "industry standard," despite, as the trial court observed, "offer[ing] no case law or statute that requires Defendant to set its policies and standards to align with other municipalities and power companies." Appellant's Appendix, p 181a. To the extent the issue is relevant, Faraones are incorrect.[28] The principles outlined in the International Society of Arboriculture ("ISA") "Best Management Practices" treatise provide support for LBWL's

[26] Even the Faraones acknowledge that they have trimmed the very trees in question "on average once every 20 months" in order to prevent interference with (i.e., "maintain") the LBWL power line. Ex 4, pp 17-18. They also admit that the trees in question have not been trimmed since at least 2019. Ex 1; Ex 4, p 32.

[27] The Faraones' efforts to discredit Dr. Russell are specious. They compare his affidavit in this case (stating that he has "over 30 years" of experience) to his affidavit in the 2016 Crittenden case (stating that he has "over 40 years" of experience), snidely compare him to "Wizard Merlin," and claim that he "should have been given no weight." Appellants' Brief, p 24. As this Court will recognize, inclusion of the word "over" means that the statements in both affidavits can simultaneously be true, and that the inconsistency is irrelevant. What is more important, as the trial court correctly recognized, is that Dr. Russell's affidavit provides evidentiary support for LBWL's position, while Faraones rely on speculation and emotional rhetoric.

[28] Faraones also allege on appeal that "[i]n no document, deposition, or affidavit is there a citation to any study or survey defining the industry standards they claim to follow. This is false. Dr. Russell's affidavit cites to and discusses reports, studies, and the standards at length. See Ex 12.

position. See Geoffrey P. Kempter, "Utility Pruning of Trees," special companion publication to the *ANSI A300 Part 1: Tree, Shrub, and Other Woody Plant Maintenance – Standard Practices, Pruning*, copyright 2004, pp iv, 1-3, 5, 11, 17, 20 (emphasis added), Ex 13 (copy attached at appellee's Appendix V).

Faraones summarily conclude in their Brief on Appeal that the ISA pamphlet supports *their* argument because the reference to "overhang" in the pamphlet is in the context of "high voltage electric transmission lines." See p 23. Faraones' "take-away" from the entire pamphlet seems to be that, if the lines over the Property (which carry voltage sufficient to be lethal) are not within a "high priority," "high voltage" classification, removal of overhang automatically becomes unreasonable. That conclusion is simply untrue, as the LBWL affidavits make clear. Exs 3, 12.

Furthermore, what Faraones' "balancing test" argument fails to acknowledge is that LBWL's easement provides power not only to the Property, but to neighboring properties as well. When the trial court considered the circumstances of this easement, this power line, and these trees, it correctly found that the equities supported LBWL's position. Trimming is not an unreasonable burden on the Faraones' servient estate. There is simply no way of knowing when or how the trees and branches in question will come down. What is undisputed, however, is that removal of the overhanging branches and creating adequate clearance eliminates the risk and allows LBWL to maintain the reliability of its electric power delivery system. Because trees are living organisms, there is no 'status quo,' and the Faraones know full well that overhang presents a threat to the lines. See Ex 4, pp 35-36 ("Q. [Y]ou don't disagree that trees pose a danger, alive or dead, pose a danger to power lines? A. They can. Q.… And they pose a danger to the provision of power as well as a safety danger? A. They can."); also see Ex 7, p 43 ("Q. Do you believe or have an opinion as to whether that gives them a right to maintain vegetation that may interfere with their use of that

easement? A. I believe the Board of Water & Light does have some authority to maintain the vegetation around their easements, yes.").

Despite the above testimony, Faraones continue to take the position that LBWL must obtain express permission, based on property owners' subjective opinions, as opposed to following its own experts' determinations regarding the threat posed and the need for preventative maintenance. Essentially, Faraones believe that they should have "veto" power over LBWL's determinations where it suits them. Ex 7, p 43. Faraones are not interested in LBWL making determinations at all, and their argument about what is "reasonable" is a pretext.[29] As Bonnie Faraone finally acknowledged, no matter how reasonable LBWL's proposal is: "I didn't want the Board of Water and Light to touch my trees…Since the minute I lived in Lansing." Ex 4, p 29.

The Faraones' concerns, as presented, were subjective and unreasonable, and not enough to establish that LBWL's use of its easement is an "unreasonable burden" in light of the evidence presented to the trial court. The trial court's ruling was proper, and this Court should affirm.

### F. The trial court did not rule that MCL 560.190 "abrogate[s] the common law," it correctly recognized that LBWL's utility easement rights should include the requested trimming in this case.

The Faraones' argument regarding "abrogation" of the common law is puzzling. The trial court's only reference to MCL 560.190 in its ruling was a direct quote from the statute, which was then analyzed *in connection with* the common law as applied in *Panhandle, supra.* Appellants' Appx, pp 179a-180a. At no point did the trial court conclude that common law does not apply in this case, nor did it "abrogate" anything. Rather, after concluding that a prescriptive easement

[29] Faraones initially alleged that LBWL's trimming standards are not reflective of the "industry standard," but eventually admitted that they don't know of any "industry standard." See Ex 7, p 70 ("Q. What is the industry standard, in your opinion? A. I don't know that there is an industry standard").

exists under the common law, the trial court referenced the statute (which permits trimming and removal of trees that "interfere with" easements[30]) as it provides guidance for the scope of vegetation management in connection with utility easements. *Id.* There was no abrogation of a common law right, and the appellate Court need not consider any issue that was not the basis of the trial court's decision. See *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

## II. The trial court properly dismissed Faraones' claim of a "governmental taking" or inverse condemnation where the pleadings were deficient, no cognizable harms were alleged, and the claim was rendered moot by the ruling on the existence and scope of LBWL's easement exists.

### A. Preservation of Issue.

The Faraones' Complaint alleged a governmental taking by LBWL and sought damages in excess of $25,000.00 relating to "threatened conduct" and "a fear that the Defendant's agents will arrive unannounced to cut or remove their trees." See Complaint Count III. The trial court granted summary disposition in LBWL's favor and dismissed Count III as to plaintiff Bonnie Faraone, who is not an owner of the Property. See January 17, 2023 Order, appellee's Appx L.

The trial court also granted summary disposition in LBWL's favor and dismissed Count III as to plaintiff Michael Faraone. See February 28, 2023 Order, Appellant's Appendix p 181a. The trial court found that arguments founded on "threatened conduct" and "subjective fear" in the pleadings were deficient, did not rise to the level of "governmental taking," and lacked cognizable

[30] Faraones' statement that "the Board has never asserted that the Faraones' trees have ever *interfered with* the use of that easement" (see Appellants' Brief, p 29) is even more bizarre, as that is the impetus of this entire case. LBWL marked trees for removal and trimming based on those trees and limbs posing a threat to power supply (a.k.a. "interfering with" the utility easement), the Faraones objected and sued.

legal authority. *Id.* The trial court further found that the governmental taking claim was rendered moot by the finding of a prescriptive easement over the Property. *Id.*

Question Presented Two in Appellants' Brief on Appeal challenges the trial court's February 28, 2023, ruling (dismissing Michael Faraone's claims raised in Count III) but does not challenge the January 17, 2023 ruling (dismissing Bonnie Faraone, a non-owner, on Count III). Accordingly, the issue is preserved as to appellant Michael Faraone only. Review of Bonnie Faraone's claim was waived by appellants' failure to raise it.

**B. Standard of Review.**

An issue not contained in the statement of questions presented is waived on appeal. *English*, 263 Mich App at 459. Failure to raise an issue in the statement of questions presented means that issue is abandoned. *Ypsilanti Fire Marshal*, 273 Mich App at 543. Because appellants do not challenge the ruling as to Bonnie Faraone on Count III in their Statement of Questions Presented, that issue is waived and dismissal of Count III as to Bonnie Faraone should stand.

With regard to Michael Faraone's claims in Count III of the Complaint, the grant of a motion for summary disposition is reviewed de novo. *Travelers Ins Co*, 465 Mich at 205. A motion for summary disposition under MCR 2.116 (C)(8) tests the legal sufficiency of a claim based on the pleadings and is appropriately granted when the opposing party has failed to state a claim on which relief can be granted. *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001). Summary disposition should be granted where the claim is unenforceable as a matter of law and factual development will not justify a right of recovery. *Maiden v Rozwood*. 461 Mich 109, 119; 597 NW2d 817 (1999).

This Court reviews de novo questions of law, including whether an issue is moot. *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 254; 833 NW2d 331 (2013). An issue is moot if

"an event occurs that renders it impossible for a reviewing court to grant relief," and therefore mootness is an appropriate ground for granting summary disposition under MCR 2.116(C)(8). *B P 7 v Bureau of State Lottery*, 231 Mich 356, 359; 586 NW2d 117 (1998).

### C. Faraones' claim under the Takings Clause of the Michigan Constitution for inverse condemnation was properly dismissed on multiple grounds.

To prevail on a government taking or "inverse condemnation" claim, a plaintiff property owner must establish that: (1) a governmental entity's actions caused a substantial decline in value to the plaintiff's property; and (2) the governmental entity "abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *Heinrich v Detroit*, 90 Mich App 692, 700; 282 NW2d 448 (1979). Before a court may conclude that a taking occurred, it must examine the totality of the acts alleged to determine whether the governmental entity abused its exercise of legitimate power to the plaintiff's detriment. *Id.* at 698 (citing *Sayre v Cleveland*, 493 F2d 64, 69 (6th Cir 1974); *In re Urban Renewal, Elmwood Park Project*, 376 Mich 311, 318; 136 NW2d 6 (1965)). Even in cases where abuses can be established, a causal connection must be drawn between the government's actions and an individual's alleged loss. Michigan courts have adopted a standard whereby the actions of the defendant must have "*substantially contributed to* and accelerated the decline in the value of plaintiff's property." *Id.* at 700 (emphasis in original). "Compensation cannot be recovered for an interference with property rights which is not substantial in nature." 29A CJS, Eminent Domain, § 82(a), p 228.

#### 1. The takings count was rendered moot by the trial court's determination that LBWL possessed an easement and did not impermissibly expand the scope of its easement or unreasonably burden the servient estate.

On appeal, the Faraones' argument is that LBWL impermissibly expanded the scope of its easement, and that this "expansion" constituted a taking under the state and federal constitutions. In other words, whether Faraones properly stated a cause of action in Count III of their Complaint

hinged on whether the trial court agreed with them on Counts I, II, and VI: whether LBWL has a valid easement and whether the scope of that easement was exceeded by the proposed trimming. The trial court determined that: (1) LBWL has a valid easement, (2) the proposed trimming is within the scope of that easement, and (3) the Faraones' servient estate is not unreasonably burdened, making the governmental takings claim, Count III, moot. Appellant's Appx, p 181a.

Where a takings claim is interrelated with a land use claim, once "the land claim is resolved, that resolution renders the original takings claim and attendant constitutional issues moot. Once rendered moot, those constitutional claims should not be adjudicated." *Df Land Dev v Charter Ann Arbor*, 2008 Mich App LEXIS 2223 at *13 (Oct 23, 2008) (copy attached at appellee's Appendix S)[31] "An issue is moot and should not be reached if the court can no longer fashion a remedy." *Eller v Metro Contracting*, 261 Mich App 569, 571; 683 NW2d 242 (2004). Here, once the trial court determined that LBWL's trimming is within the scope of its easement and does not unreasonably burden Faraones, it correctly determined that it could fashion no remedy on the takings claim and that it should be dismissed as a matter of law. This Court should affirm.

**2. Faraones failed to properly plead a cause of action under the Takings Clause, as they did not allege any decline in property value, substantial or otherwise, in their Complaint.**

As the trial court recognized, the Faraones' pleadings do not allege any decline in property value, substantial or otherwise, giving rise to the cause of action. The only specific damage alleged in the Complaint is that "[f]or week-long periods of time, the Plaintiffs have been unable to leave their home out of fear that Defendant's agents will arrive unannounced to cut or remove their trees. The sound of their chainsaws being, at times, a constant noise in the neighborhood. The actions of

[31] This unpublished case is cited because it directly addresses how mootness applies in a land situation, and appellee was unable to locate any published authority discussing the mootness rule specifically in the context of land dispute.

Defendant have violated the Plaintiffs' right to quite[sic] enjoyment of their property and the threat is ongoing." See ¶ 42. In other words, the allegations stated in the Faraone pleadings, which are accepted as true for purposes of a motion under MCR 2.116(C)(8), fail to allege any "substantial decline" in property value at all. Instead, their alleged damages amount to subjective fears and disruption of quiet enjoyment. Faraones cannot now complain on appeal that the trial court improperly "reduced [their] concerns to 'the sound of chainsaws,'" when that is, indisputably, the only damage their Complaint alleges. Where Faraones' failed to plead the required elements of an inverse condemnation action under Michigan law, LBWL's motion under MCR 2.116(C)(8) was properly granted.[32]

**3. Faraones did not carry their burden of showing that LBWL's vegetation management standards constitute an abuse of authority, were targeted specifically at the Faraone Property, or that any future decline in value is permanent.**

Even assuming the action for a government taking had been properly pled, Faraones did not show that LBWL's actions were targeted at the Faraones specifically or an abuse of governmental power. "Not every injury to property remotely associated with governmental actions will amount to a taking." *Attorney General v Ankersen*, 148 Mich App 524, 561; 385 NW2d 658 (1986). "In determining whether a taking occurred, the form, intensity, and deliberateness of the governmental party actions toward the injured party's property must be examined…there must be some action by the government specifically directed toward the plaintiff's property that has the

[32] Faraones now argue that they should have been permitted to amend their Complaint. Appellant's Brief, p 37. However, as discussed above, once the trial court issued its ruling on the easement claims, the inverse condemnation claim became moot, and any amendment would be futile. Under these circumstances, it is not error to deny a request for amendment. *Formall, Inc v Community Nat'l*, 166 Mich App 772, 783; 421 NW2d 289 (1988) ("A trial court does not abuse its discretion by refusing to permit an amendment when the amendment would be futile").

effect of limiting the use of the property." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 295; 769 NW2d 234 (2009).

Here, LBWL's proposed trimming on the Property is not targeted at the Faraones or their property at all. Rather, it is part of a standard Vegetation Management policy that applies to all properties LBWL services. While the Faraones made clear their dislike for the policy, they did not produce any evidence to support an argument that their situation is unique (in fact, their continual references to the Crittenden case show just the opposite). They also failed to establish that the loss of the trees and limbs in question would meet the standard of "substantial decline."[33] While no trimming has occurred to date, any alleged damage caused by the proposed trimming on the Property is insufficiently permanent to constitute a "taking" under Michigan law. Trees are dynamic and will continue to grow where trimmed. Areas where trees are removed can be replanted with varieties that do not threaten the lines. As the Michigan Supreme Court has recognized, "[u]nder Michigan law, a 'taking' for purposes of inverse condemnation means that governmental action has permanently deprived the property owner of any possession or use of the property" *Hart v Detroit*, 416 Mich 488, 501-502; 331 NW2d 438 (1982). "Temporary damage simply does not support a cause of action for inverse condemnation." *Campbell v City of Hudson*, 2016 Mich App LEXIS 2601 at *19 (Oct 19, 2017) ("plaintiffs failed to set forth any evidence of permanent deprivation or affirmative action by defendant specifically directed at plaintiffs' property") (copy attached at appellee's Appendix U[34]).

[33] Faraones also ignored the fact that, without the poles and lines in question remaining intact and properly maintained, their home would not receive the public utility service that *adds* to its value.

[34] This unpublished case is cited because it specifically and directly addresses the issue of temporary versus permanent damage in a takings claim.

Faraones did not properly plead or create a question of material fact on substantial and permanent decline in value to the Property, nor any abuse of power by LBWL that targeted their property specifically. Based on the easement ruling, the deficient pleadings, and the failure to carry the requisite evidentiary burden, the trial court's dismissal of Fararones' Count III was proper, and this Court should affirm.

## III. The trial court properly dismissed Faraones' claim of trespass-nuisance where LBWL offered evidence that its service drop had sufficient clearance and Faraones had no competent evidence to support the claim.

### A. Preservation of Issue.

The Faraones' Complaint alleged a "trespass and nuisance" and sought damages in excess of $25,000.00 in connection with a LBWL service drop that purportedly hangs too close to their garage. See Complaint Count IV. The trial court granted summary disposition in LBWL's favor and dismissed Count IV as to plaintiff Bonnie Faraone, who is not on the title to the Property. See January 17, 2023 Order, appellee's Appx L.

The trial court also granted summary disposition in LBWL's favor and dismissed Count IV as to plaintiff Michael Faraone. See February 28, 2023 Order, Appellant's Appendix p 181a – 182a. The trial court found that Faraones offered no evidence to rebut the LBWL measurements of the service drop clearance over the Property. *Id.*

Question Presented Three in Appellants' Brief on Appeal challenges the trial court's February 28, 2023, ruling (dismissing Michael Faraone's claims raised in Count IV) but does not challenge the January 17, 2023 ruling (dismissing Bonnie Faraone, a non-owner, on Count IV). Accordingly, the issue is preserved as to appellant Michael Faraone only. Review of Bonnie Faraone's claim was waived by appellants' failure to raise it.

**B. Standard of Review.**

An issue not contained in the statement of questions presented is waived on appeal. *English*, 263 Mich App at 459. Failure to raise an issue in the statement of questions presented means that issue is abandoned. *Ypsilanti Fire Marshal*, 273 Mich App at 543. Because appellants do not challenge the trial court's ruling as to Bonnie Faraone on Count IV of the Complaint in their Statement of Questions Presented, that issue is waived and dismissal of Count IV as to Bonnie Faraone should stand.

With regard to Michael Faraone's claims in Count IV of the Complaint, the grant of a motion for summary disposition is reviewed de novo. *Travelers Ins Co*, 465 Mich at 205. A motion for summary disposition under MCR 2.116 (C)(8) tests the legal sufficiency of a claim based on the pleadings and is appropriately granted when the opposing party has failed to state a claim on which relief can be granted. *Beaudrie*, 465 Mich at 129-130. Summary disposition should be granted where the claim is unenforceable as a matter of law and factual development will not justify a right of recovery. *Maiden*, 461 Mich at 119.

A trial court's grant of summary disposition under MCR 2.116(C)(10) is proper where the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact and the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120. When a (C)(10) motion is made and supported as provided in the rule, an adverse party must, by affidavits or otherwise, "set forth specific facts showing that a genuine issue of material fact exists and cannot simply rest on mere conjecture and speculation to meet the burden of providing evidentiary proof establishing a genuine issue of material fact." *Altairi v Alhaj*, 235 Mich App 626, 628-629; 599 NW2d 537 (1999). The reviewing court should consider only the substantively admissible evidence actually proffered in opposition to the motion. *Maiden*, 461 Mich at 120.

### C. Faraones' trespass-nuisance claim was properly dismissed as it lacks any legal or factual support and is based on speculative damage.

Trespass-nuisance is a "trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and resulting in personal or property damage" *Continental Paper Co v Detroit*, 451 Mich 162, 164; 545 NW2d 657 (1996). To establish trespass-nuisance, the plaintiff must show "condition (nuisance or trespass), cause (physical intrusion), and causation or control (by government)." *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 169; 422 NW2d 205 (1988).

LBWL does not dispute that it controls and maintains the lines at issue on the Property. It does, however, dispute that their mere existence constitutes a trespass-nuisance. Faraones have claimed that there is a "service drop hazard" on their Property because a LBWL service line "hangs too closely" to their garage. Complaint, ¶ 46. Their entire argument at Count IV of the Complaint is inaccurate and based on a one-time miscommunication with an LBWL representative. During discussions with Faraones, Justin Wilson, a LBWL representative viewing the service drop from afar with a naked eye, mentioned that it was possible that it might hang low. Ex 7, p 15. Faraones latched onto the statement and attempted to wring a cause of action out of it. See, e.g., Complaint ¶ 16. The reality, however, is that after measurements were taken, LBWL confirmed that the service drop exceeds the required clearance standards on the Faraone Property. The same employee who made the original observation created a record of the measurement, and LBWL presented evidence on this issue in its motion.[35] See Letter from J. Wilson, Ex 14, attached as appellee's Appendix W.

[35]Despite this, Faraones repeatedly assert as fact in their Brief on Appeal that LBWL "acknowledged" or "found" various violations of safety standards. The assertions simply are not true. See, e.g., Brief at pp 38.

Once it became apparent that no violation exists on the Faraone Property, Faraones changed their theory, arguing that the proximity of a service drop to a *neighboring* garage is sufficient to state a cause of action. Appellants' Brief, p 41. In addition to lacking standing to assert a purported hazard on a property that does not belong to them, Faraones have never had any competent evidence to support the trespass-nuisance claim. The only evidence presented to the trial court was Michael Faraone's opinions based on photographs and visual observation. Accordingly, the trial court concluded that Faraones failed to establish a question of material fact for trial and dismissed the count. Appellant's Appx, p 182a.

Furthermore, however, the third element of a trespass-nuisance claim — "personal or property damage" — is not met here. An uncertain future event does not give rise to a cause of action, and nothing has happened with regard to the service drop that damages the Faraones in any way. Their claim is not ripe. "The doctrine of ripeness is designed to prevent 'the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim is not ripe if it rests upon contingent future events'…Hence, when considering the issue of ripeness, the timing of the action is the primary focus of concern." *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 615-16; 761 NW2d 127 (2008) (internal citation omitted). A party may not premise an action on a hypothetical controversy. *Id.*

Faraones have not explained (and cannot explain) how, exactly, the mere existence of the service drop on a neighboring property — without some purely hypothetical injury or controversy that may occur in the future — has damaged them[36] or interfered with their use or enjoyment of

[36]Faraones are also now claiming that they "sought abatement of the trespass-nuisance, not money damages." Appellants' Brief, p 39. Again, this is untrue. The relief requested at Count IV of the Complaint includes damages in excess of $25,000. See Complaint, p 11.

their home. In fact, the opposite is true: *without* the service drop on the Property, Faraones would not enjoy electrical power service *necessary* to their use and enjoyment of the home.

When asked about this, Mr. Faraone acknowledged that if the alleged "service drop hazard" does not exist, Count IV of the Complaint is moot or should be dismissed. Ex 7, p 11. Mr. Faraone also acknowledged that the part of the service drop that is allegedly "too low" is actually over his neighbor's property, not his, and that he has no evidence to support damages:

Q. Do you have anything that supports what's in the complaint?
A. Yes, the measurement of the service drop over the Waligorskis' garage.
Q. Besides that, what do you have?
A. Well, the issue is whether the wire comes within 3 feet of a structure. I think that's really the heart of it. I don't know what else there could be. So I guess the answer is nothing that I can think of at the moment
Q. …But you are not familiar with the code specifically with regard to what may or may not be an actual service drop hazard…Sitting here today, you can't cite any specific code sections?
A. No.
Q. …Describe what the effect or how the use of your property has been affected by the service drop? Let me ask you this: Have you stopped using your property?
A. No.
Q. Have you vacated your home?
A. No.
Q. …Did you stop using the garage because of the service drop?
A. No.
Q. Have you specifically changed your uses or your behaviors of your property…the way you use it or what you do on the property?
A. I think it's changed my behavior. It hasn't changed the way we've used the property, no…I can't say it's changed the way I use my home.
Q. …How much are you seeking for the service drop?
A. To be honest, I have no idea.

Ex 7, pp 23, 34, 36-38.

The trial court's dismissal of the claim for trespass nuisance was proper and this Court should affirm.

## IV. The trial court properly dismissed Faraones' Fourth Amendment claims relating to alleged "filming" of Bonnie Faraone where there was no evidence to support the allegation that filming ever occurred, and where no reasonable expectation of privacy was violated.

### A. Preservation of Issue.

The Faraones' Complaint alleged a violation of the Fourth Amendment to the United States Constitution and sought damages in excess of $25,000.00 in connection with the alleged filming of Bonnie Faraone by a LBWL agent after she confronted a crew on a neighboring property. See Complaint Count VII. The trial court granted summary disposition in LBWL's favor and dismissed Count VII in its entirety, finding that no issues of material fact remained for trial. See December 28, 2022 Hearing Transcript at pp 81-82; see also January 17, 2023 Order, appellee's Appx L.

Question Presented Four in Appellants' Brief on Appeal challenges the trial court's January 17, 2023, ruling dismissing Bonnie Faraone's Fourth Amendment claims raised in Count VII. The issue has been preserved for appeal.

### B. Standard of Review.

"This Court reviews de novo both questions of constitutional law and a trial court's decision on a motion for summary disposition." *Johnson v Vanderkoi*, 509 Mich 524, 534; 983 NW2d 779 (2022). A trial court's grant of summary disposition under MCR 2.116(C)(10) is proper where the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact and the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120. When a (C)(10) motion is made and supported as provided in the rule, an adverse party must, by affidavits or otherwise, "set forth specific facts showing that a genuine issue of material fact exists and cannot simply rest on mere conjecture and speculation to meet the burden of providing evidentiary proof establishing a genuine issue of material fact." *Altairi v Alhaj*, 235 Mich App 626, 628-629; 599 NW2d 537 (1999). The reviewing court should consider only the

substantively admissible evidence actually proffered in opposition to the motion. *Maiden*, 461 Mich at 120.

### C. There was no "improper search" as alleged: Bonnie Faraone was not filmed when she came outdoors and harassed a LBWL crew — in plain view— while that crew was legally and permissibly on someone else's property conducting its work.

The Faraones' Count VII was premised entirely on Bonnie Faraone's unsupported assertion that she was filmed by a LBWL representative without her consent. It is important at the outset to note the Faraones' misstatement of the facts in their Brief on Appeal. Faraones describe that a LBWL work crew[37] "appeared at the Faraones' yard…to harass Bonnie Faraone." See p 42.

The reality, as discussed at length in Mrs. Faraone's deposition, is quite different. The LBWL crew was working, with authorization, on a neighboring property that is visible from the Faraone home. Mrs. Faraone, agitated by the sound of their equipment, stormed out of her home in her pajamas, and angrily confronted them to "ask[] them what the hell they were doing." Ex 4, pp 73-77. Once Mrs. Faraone provoked a confrontation, several of the crew members retreated from the hostility to the truck to await further instruction. Ex 4, pp 75-76. One of the crew members, Kegan Hatt, was looking at TikTok on his phone while waiting. See Affidavit of K. Hatt, Ex 9, attached at Appellee's Appx I. Mrs. Faraone, fueled by anger and paranoia, leaped to the conclusion that Mr. Hatt was "filming her" without her consent, and filed a cause of action for an illegal search and seizure under the Fourth Amendment to the United States Constitution. See Complaint, Count VII, and see generally Ex 4, pp 69-81.

The assertions in the Complaint are fabricated out of Mrs. Faraone's imagination and fueled by an irrational belief that LBWL is out to film her and "publish [it] on the Internet."

[37] LBWL subcontracts tree trimming work to Wright Tree Service, and it was a Wright crew trimming at the Faraones' neighbor's property on the day in question.

Complaint, ¶ 13. It is emblematic of the approach that Faraones have taken to LBWL generally. When asked about the interaction, Mrs. Faraone testified as follows:

Q. So, you say "one of the men filmed plaintiff who was alone at the time"?
A. Uh-huh [affirmative]
Q. …Did he come onto your property?
A. No.
Q. Did he put the bucket truck up, or were you in plain view?
A. I was in plain view from my property to his truck.
Q. …How do you know he filmed you?
A. Because he's got his cell phone up.
Q. Okay. How do you know he filmed you?
A. If I was doing this [gestures] to you, would you think I was just reading my phone?
Q. You might. Or maybe playing a video game or something, I don't know.
A. Okay.
Q. Is that possible?
A. **I suppose it's possible.**
Q. …And, in fact, sitting here today, you have absolutely no knowledge or evidence that he took a video or any picture on that phone?
A. **I have no knowledge.**
Q. You don't have any evidence?
A. **I don't have any evidence of it.**

Ex 4, pp 76-83 (emphasis added). Ironically, Mrs. Faraone *did* video Mr. Hatt. See Ex 4, p 81 ("I took video and photograph back of him"). However, aside from the lack of evidence that any photographing occurred, photographing a person as they appear in public does not violate any reasonable expectation of privacy. *Sponick v Detroit Police Dep't*, 49 Mich App 162, 198-199; 211 NW2d 674 (1973). "[T]here is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye." *Fry v Ionia Sentinel-Standard*, 101 Mich App 725, 729; 300 NW2d 687 (1980). The inquiry in this case turns on reasonable expectations of privacy.

Ultimately, Mrs. Faraone claims her privacy rights were violated, but also acknowledges that (1) the crew was never on the Property, and (2) that she came out in plain view of an area where they were authorized to be in order to confront them. Ex 4, pp 76-83. There is no legitimate expectation of privacy in areas of private property that are openly visible to the public, such as a

driveway or front yard. *United States v Ventling*, 678 F2d 63, 66 (8th Cir 1982). An expectation of privacy is reasonable only where there is "both an actual subjective expectation and, even more importantly, that expectation must be one which society will accept as reasonable." *McDonell v Hunter*, 809 F2d 1302, 1306 (8th Cir 1987). Mrs. Faraone's cause of action fails to recognize that visual observations of objects and activities, even those inside a person's home, from a location where the observer may properly be, does not transgress Fourth Amendment protections. *People v Cooke*, 194 Mich App 534, 536; 487 NW2d 497 (1992). Here, Mrs. Faraone was not in her home, she was out, in plain view, in her yard. Accordingly, the trial court correctly concluded that:

> The facts of this case as presented are that there was an individual who was an employee of a contractor of a governmental entity not sent by the governmental entity to photograph Mrs. Faraone…He is in a position where, from the legitimate, authorized position that he was located, he could see Mrs. Faraone, in a sense, in public, though she was in her backyard. People can be viewed from either public locations or from permissive private locations – permissive being that the person was there with permission in some location where they can see the individual – and that is not something that violates the reasonable expectation of privacy…I [also] have to be practical in my view of what happens at trial. What are we going to ask the fact-finder to decide? Based on the facts that are presented here, both with regard to support for the summary disposition request and in opposition to it, the facts are that the individual indicates he did not photograph or video Mrs. Faraone and the opposition to that, with respect to this motion, says, well, we could ask the fact-finder to speculate…I don't think that's permissible for me to do when it comes to evaluating admissible evidence for purposes of a summary disposition motion request

December 28, 2022 Transcript at pp 80-81. Count VII of the Faraone Complaint was unsupported by fact or law[38] and was properly dismissed. This Court should affirm the trial court's ruling.

[38]Faraones also acknowledge on appeal that the Count was asserted for the vindictive and improper purpose of extracting an "apology" out of LBWL. See Appellant's Brief, p 43 ("If the Board (the City of Lansing) had been apologetic, we might have dismissed this count. They chose otherwise and the Faraones brought a civil Fourth Amendment claim"). LBWL submits that this assertion is sufficient for this Court to conclude that the Faraones' appeal of Count VII is vexatious pursuant to MCR 7.216(C)(1).

## RELIEF REQUESTED

For all of the foregoing reasons, defendant/appellee, Lansing Board of Water and Light, respectfully requests entry of this Court's order affirming the entirety of the trial court's ruling.

Respectfully submitted,

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Attorneys for Plaintiffs/Appellees

Dated: October 30, 2023

*/s/ Randall B. Kleiman*
Randall B. Kleiman (P35628)

## CERTIFICATE OF WORD COUNT

Pursuant to ADM File No. 2019-16, I certify that the above brief, which was prepared using Times New Roman 12-point typeface, contains 14,291 words, excluding the parts of the document exempted by subsection (B). This certificate was prepared in reliance on the word count function of the word processing system (Microsoft Word) used to prepare the document.

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Dated: October 30, 2023

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