STATE OF MICHIGAN

IN THE MICHIGAN COURT OF APPEALS

BONNIE and MICHAEL FARAONE,

Plaintiff-Appellants,

vs.

LANSING BOARD OF WATER AND LIGHT OF THE CITY OF LANSING,

Defendant-Appellee.

Court of Appeals
No.: 365804

Ingham County Circuit
Court No.: 22-0255-CZ

MICHAEL A. FARAONE, P.C.
Attorney for the Plaintiff-Appellants
3105 S. Martin Luther King Jr. Blvd.
Lansing Michigan 48910
Telephone: (517) 484-5515

RANDALL B. KLEIMAN (P-35628)
Attorney for the Defendant-Appellee
Oade Stroud & Kleiman P.C.
200 Woodland Pass, Suite D
East Lansing, Michigan 48823
Telephone: (517) 351-3550

PLAINTIFF-APPELLANTS' **REPLY BRIEF ON APPEAL**

ORAL ARGUMENT REQUESTED

[Counsel's certification of word count]

[Filed and served via truefiling.com]

Michael A. Faraone (P45332)
Attorney for Plaintiff-Appellants
3105 S. Martin Luther King, Jr. Blvd. No. 315
Lansing, Michigan 48910
Telephone: (517) 484-5515
attorneyfaraone@faraonelegal.com

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases **Page**

Statutes

REPLY ARGUMENT

An easement holder's use of an easement must impose "as little burden as possible to the fee owner of the land," *Smith v. Straughn*, 331 Mich App 209, 215–16; 952 NW2d 521 (2020). "Once granted, an easement cannot be modified by either party unilaterally." *Douglas v. Jordan,* 232 Mich 283, 287; 205 NW 52 (1925). In the case of prescriptive easements, the mode and extent of permissible use of the servient tenement are determined "by the mode and extent of the use during the prescriptive period," 8 Mich. Civil Jurisprudence, Easements §39.

The Board's brief doesn't engage the relevant law and is so violative of basic rules that a motion to strike was considered. But the brief succeeds in one important respect: it offers a glimpse into what the Faraones have been dealing with.

I. Opposing Counsel's Personal Insults

Opposing counsel's brief is full of personal attacks. The Faraones were on a "crusade" against the Board. The Faraones are "hostile and irrational." The undersigned is a liar. And that's just the first four pages. Opposing counsel tells the Court that Bonnie Faraone became agitated and rudely terminated a conversation. *Appellee's Brief* at 2. That never happened. That is opposing counsel's unsworn "testimony" regarding a meeting *he did not attend*.

When the Faraones questioned Board employees/agents under oath who *did* interact with the Faraones, the *opposite* was said. This is from the deposition of the Board's Chief Forester, John Rademacher:

> Q. On either of those occasions were – well, was Bonnie Faraone also present?
> A. Yes.
> Q. All right. And was [Michael Faraone] also present?
> A. Yes.
> Q. OK. And on either of those occasions where we rude to you?
> A. No.
> Q. Okay. Were they pleasant interactions? We didn't raise our voice? We answered your questions?
> A. Yeah. [See Appendix 41a:7-9].

Mr. Rademacher then testified that Randall Kleiman was not present (Appendix 41-42).

At a hearing in which opposing counsel again accused Bonnie Faraone of rudeness toward Board employees/agents, Ashley Thiel was asked:

> Q. You know – is it your testimony you were prevented from coming on our property?
> A. No. No, not at all. Mrs. Faraone was *very polite*. She scheduled dates for us to get on the property. No, I'm not saying that. [Appendix at 78-79; emphasis added].

Opposing counsel's fabrications – contradicted by the record – demonstrate the weakness of the Board's position. Nor is opposing counsel's unsworn "testimony" limited to his fulminations about the Faraones. There are too many examples to list in 3,200 words. For two, see Appellee's Brief at 2 and 13.

II. Opposing Counsel's Fixation on Mrs. Faraone

At her deposition, opposing counsel argued with Bonnie Faraone about her "attitude." *Appellee's Appendix* F at 39:22-23, 46:11. He attempted and failed to portray her as "paranoid." *id.* at 48:12-17. Then he turned to, in his words, "the fun part." *Id*. at 61:20. Six pages after asking Bonnie Faraone about her wearing pajamas during the incident in which three young men appeared at her yard, after his questioning had moved on to different topics, opposing counsel was still thinking about the color of Bonnie Faraone's pajamas, "What color were your pajamas? Were they *bright pink*?" *Id*., 78:19.

On appeal, opposing counsel repeatedly insults Mrs. Faraone. One example, the Faraones property was purchased as husband and wife. The Faraones believed that Mrs. Faraone was on the title, a mistake never plead because *title* was not at issue. Nonetheless, with glee opposing counsel obtained dismissal of Mrs. Faraone as a party to all but one of the counts, a ruling Appellants have not appealed because it is of no consequence. Yet opposing counsel returns to that subject again and again in his brief.

III. Beyond the Personal Insults

Opposing counsel tells the Court, "Michael Faraone suggests that [the Crittendens] were treated

differently *because* the trial judge lives in the same neighborhood as those litigants." (emphasis added). The Faraones never said that.

A. The Easement Claim

The current configuration of the power lines could have been created months after the Faraones purchased the property in the spring of 2007 but before moving-in during November/December 2007. That would have been a convenient time for the Board. If so, 15-years did not pass before the April 25, 2022, complaint was filed.

Opposing counsel claims that Bonnie Faraone "admitted" that the current configuration was in place when the home was purchased. That mischaracterizes her testimony. *Appellee's Appendix* F 013-015. Opposing counsel began by asking about the move-in date, then switched to the purchase date, but never asked about the *current configuration*. Rather, his question was phrased in general terms ("the lines") which never distinguished the previous from the current configuration.

The deponent was confused ("Now you make me like did I leave the coffee pot on thing"), *id*. Opposing counsel, however, continued, "[W]hen you bought the property *the lines* were there … (emphasis added), *id.* And, "You don't dispute, seriously dispute that *those lines* haven't been there [sic] for 20 or 30 or 40 years, do you?" (emphasis added), *id*. Bonnie Faraone responded in a manner that indicates the source of the confusion, "I don't know because I haven't been there 20, 30, 40 years. I know that the Board of Water and Light maps are all different than what is configured in my backyard." To which opposing counsel responds, "But they generally depict the *same lines*, right?" (emphasis added).

Opposing counsel implies that the Faraones' trees or limbs have fallen and have caused a loss of power. We already addressed these false claims. *Appellant's Opening Brief* at 8-9. Opposing counsel now tries to distinguish "power interruptions" from "outages." *Appellee's Brief* at FN 8. Nothing in the record supports his bizarre new theory.

The use of the wires was permissive (not hostile), meaning not inconsistent with the rights of the homeowner and not done without their permission. Opposing counsel suggests that a 2004 *unpublished* and *out-of-state* decision, *Erickson v. Grand Marais PUC*, held that utility lines are in their nature a hostile use for purposes of a prescriptive easement. The reliance on an out-of-state unpublished case reveals the weakness in their argument. But it's worse: *Erickson* supports *the Faraones*. The *Erickson* Court found that writing "utility easement" on the homeowners' recorded deed changed a *permissive use* into an easement. If said phrase had not been recorded in the deed, the homeowners would have prevailed. See *Erickson* at 4.

The claim that the easement alone in *Erikson* gave the utility unfettered discretion to remove vegetation is another canard. The Court found "Evidence in the record established that merely trimming the trees would not provide proper clearance **for maintenance vehicles to enter to repair the lines**." *Erickson* at 5. Nothing of the kind exists in the present record. As seen in photos, sketches, and Count VII, the Board had no trouble driving right up to the lines.

Opposing counsel also reasons that the "hostile" element of a prescriptive easement was shown by the Faraones' preference to trim their own trees. Logically, the acquiescence by the Board's General Manager, Peter Lark, is evidence of a permissive use. Even if that were not the case, those issues did not occur over a 15-year period, and their theory confuses the permissive use with a concern over whether the permission was about to be abused. By analogy, if Party A for 15-years grants Party B *permission* to use a driveway to perform deliveries to Party A and his neighbors, and then Party B demands a right to expand the permission outward, to other areas of the property, and Party A objects, those *objections* do not relate backward in time to transform the permissive use into a prescriptive easement.

The Faraone's do not care that the GIS images are not drawn "to scale." *Appellee's Brief* at FN 17. The issue is that the images put the pole in a *different lot* from where it exists and show lines running inconsistent with their current configuration.

B. Regarding the Scope of Any Easement

Opposing counsel insists that the circuit court held, in Crittenden, that the Board can cut trees "without limitation." *Appellee's Brief* FN 15 citing Exhibit T. But his exhibit T is an order entered in July which does not say what he represents *and* was followed by orders entered in August and September which spared the limb at issue in the Crittenden litigation. Appellant's Appendix at 155a-166a (the August and September orders). Opposing counsel knows this – he was counsel for the Board in Crittenden.

Opposing counsel argues that the Faraones offer "subjective and unreasonable" opinions. *Appellee's Brief* at 25. We provided a report from an expert arborist which found the Board's plan will turn our yard into a swamp. We submitted a report from a realtor. We offered a reasonable alternative plan.

It is stunning to read opposing counsel continue to pretend that the Board follows the standards of the International Society of Arboriculture. We addressed this in our opening brief. It reminds one of Abraham Lincoln's remark, "How many legs does a dog have if you call his tail a leg? Four. Saying that a tail is a leg doesn't make it a leg."

The claim that the Michigan Public Service Commission ("MPSC") recommended a "6' swath" around secondary lines is mendacious. *Appellee's Brief* at FN 3. As a municipally owned utility, the Board is not regulated by the MPSC. Utilities which are regulated by the MPSC do *not* impose 6' setbacks. *Appellant's Appendix* at 105a-114a. The MPSC offered advice to Lansing's Mayor in a report. Contrary to what the Board is stating, it does not call for 6' setbacks. Although cited by opposing counsel and his experts, the Board did not put the report into the record.

The Board argues that the Faraone's trees have "grown into becoming a threat." Photographic evidence shows the trees look no different than they did decades ago. One example, the third photo on page three of Appellant's opening brief. Worse, the Board argues that "it is not true" that it ignored the trees for 100 years. *id*. The Board has produced no evidence that they have ever

trimmed any vegetation on the Property.

In FN 22, the Board denies that the easements offered to the Faraones' neighbors "dictated that no structure or plant of any kind could be placed *under* their overhead line." The Court has the proposed easement. *Appellant's Appendix* at 152a.

Regarding MCL 560.190, the Board, and the circuit court, never engage the issues of statutory interpretation, or the language of *D'Andrea v. AT & T Mich*., 289 Mich App 70, 74–75; 795 NW2d 620 (2010), as discussed by the Faraones. *Appellant's Opening Brief* at 30.

The Board argues that the only difference identified between *Panhandle v. Musselman* and this case is that an express grant existed in the former. There is no truth in that. As discussed in our opening brief, in *Panhandle*, federal law required the easement holder to conduct arial inspections which necessitated removal of all overhanging vegetation. No equivalent to that federal law exists in the present case – no code, or regulation, or standard. And yet, even in *Panhandle* this Court required a careful balancing of interests test.

FN 26 states that the Faraones trimmed the trees in the past "in order to prevent interference with (i.e., 'maintain') the LBWL power lines." Once again, opposing counsel makes up facts. The deposition testimony does not state that.

The Board falsely told the circuit court that Ashley Thiel was an "*utility* arborist" to give her special credibility. *Appellant's Brief* at 10. Now they complain that Appellant noted the sloppiness in Dr. Russell's affidavit. The Board asks this Court to defer to ipse dixit in sloppy (Russell) and self-serving (Bolan and Thelen) affidavits. In any event, a case the Board cites, their Exhibit U, states that production of a competing expert is not a requirement that a party must meet in order to establish a genuine issue of material fact. *id*., at 4.

C. The Takings Claim

This Court has held that an "[i]nverse condemnation can occur without a physical taking of the property; a diminution in the value of the property *or a partial destruction* can constitute a

'taking.'" *Merkur Steel Supply Inc v. Detroit*, 261 Mich App 116, 125 (2004)(emphasis added). The impact of the Board's plan on the Faraones' home was plead throughout their complaint. But if it had not been, the Faraones should have been allowed to amend their complaint. An amendment would not have prejudiced the Board. It would have simply described the findings in the reports prepared by the Faraones' real estate appraiser and arborist as given to the Board *months earlier*. Instead, the circuit court ignored that request.

The Board does not argue that an amendment would have been unfair. Rather, it argues that it would have been futile because the issue was rendered moot by the holding that the Board had an easement. But that finding violated a long line of federal takings cases that specifically regard easements. See *Appellant's Opening Brief* at 34-35.

Opposing counsel substitutes his own words and terms for case law. In his telling, a takings claim requires "an abuse of authority." *Appellee's Brief* at 30-32. Takings jurisprudence does not require an "abuse of authority." He does the same when he cites his unpublished sewage backup case, Appellee's Exhibit U. Sewer backups can be cleaned; the loss of old growth trees will alter the Faraone's property for the remainder of their lifetime. The Faraones will suffer *today* as their yard becomes a swamp. Appendix 5a.

Opposing counsel's bizarre theories are also undermined by the circuit court's opinion which states, "**[T]he Court acknowledges that the trees at issue in this case are irreplaceable** and finds it is in the interest of justice to allow Plaintiff to exhaust his appellate efforts while maintaining the trees as currently situated." Appendix 173a-174a (emphasis added; language opposing counsel removed through an ellipsis, See Appellee Brief at 9).

Opposing counsel argues that the Faraones will not suffer a unique impact. But having one's yard "turned into a swamp is a *particularized* burden, not a common burden shared by the public." *Appellant's Opening Brief* at 32. The Court will search the record in vain for an argument disputing that fact.

D. The Trespass/Nuisance Claim

The Board has its facts wrong. It argues that, without the service drop at issue, "the Faraone's would not enjoy electrical power." The drop provides power to a neighbor (the Waligorskis) not the Faraones and the Faraones never asked for the drop to be removed.

The Board insists that the Faraones seek money, not an abatement. *Appellee's Brief* at FN 36. That is false. See Plaintiffs' Response to Summary Motion at 19 and T. 12/28/2022, at 149. As discussed in our opening brief, the drop violates the National Electric *Safety* Code 230.24(A): "Overhead service conductors must maintain a minimum clearance of 8 ft above the surface of a roof for a minimum distance of 3 ft in all directions from the edge of the roof." That could be read to require an 8' clearance; we plead 3' because the *Board's own expert* said the minimum clearance is 3'. Said distance is not met and the drop hangs over a flammable roof near other structures.

The Faraones are allowed to seek an abatement before damage occurs. See *Mich. Ass'n of Home Builders v. Troy*, 504 Mich 204, 225 (2019). Opposing counsel claims that the Faraones "latched onto" the statement of a Board employee to "ring a cause of action out of it" is bizarre. The problem would have been fixed long ago if opposing counsel's firm had an interest in resolving problems. Remember, early in this dispute the Faraones nearly resolved this matter with Mr. Rademacher until attorney Ellen Ward, opposing counsel's daughter intervened, and later the Faraones offered to pay over $5,000 to move a public utility pole to resolve this matter. Appendix 43a, 49a-50a, 54:21-24. Unlike opposing counsel, the Faraones are not billing anyone for the time and expenses they have spent on this matter. See T. 12/28/2022 page 22, 38. Yet today, opposing counsel argues that the Faraones just wanted a lawsuit.[1]

[1] In opposing counsel's motion and brief for sanctions, he noted Michael Faraone's personal litigation history since being admitted to the bar in 1991 – *one case* in which the undersigned was a party in a lawsuit prior to this one. To be candid to the Court, there were two other cases in which the undersigned's firm sued over a legal fee. So, arguably, three in 32-years, two of which involved the undersigned's law firm. I am hardly litigious.

E. The Fourth Amendment Claim

For the first time, the Board admits that the three men were sent to the Faraone's home that day by *the Board*. The brief repeatedly uses the phrase "LBWL crew." Until now, they had only been described as agents of Wright Tree Service.

Days after being told that the Board would negotiate this dispute, the Board's agents (three young men) appeared without notice, to the Faraones and their neighbors, drove a bucket truck all the way through the neighbor's front and back yard, to a plainly non-public spot, to stand by the trees at issue. According to opposing counsel, Mrs. Faraone, age 58, 5'5," her foot in a medical boot healing from an Achilles tear, in pajamas, "stormed out of her home," "fueled by anger and paranoia," and "provoked a confrontation" with such fearsomeness that Mr. Hatt and the other two men fled into their truck to self-sooth by watching TikTok videos. This insults the intelligence of the reader.

The Faraones brought this lawsuit because there was no other meaningful way to petition their government. The Board responds by calling us *vindictive* and cites this sentence as their evidence, "If the Board (City of Lansing) had been apologetic, we might have dismissed this count. They chose otherwise and the Faraones brought a civil Fourth Amendment claim." *Appellee's Brief* at FN 38. As we said at the beginning of this filing, the Board's brief gives this Honorable Court a glimpse into what we have been dealing with.

IV. Conclusion

Unprofessional insults, hyperbole, and misrepresentations of the record are usually an effort to camouflage weakness. When viewed in a light most favorable to the Faraones, it is clear that they have provided substantial evidence that, at the very least, raises genuine issues of material fact. The summary judgment granted to the Board should be reversed.

ORAL ARGUMENT REQUESTED

Plaintiff-Appellants, through counsel, Michael A. Faraone, requests that this Honorable Court grant oral argument pursuant to MCR 7.214(E)(2).

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Plaintiff-Appellants, through counsel, Michael A. Faraone, thanks this Honorable Court for its time and consideration, and asks that this Court reverse the circuit court's order granting summary judgment and remand the matter back to the circuit court for further proceedings, or any further relief this Court deems just.

Respectfully submitted,

MICHAEL A. FARAONE, P.C.

/s/ Michael A. Faraone

Michael A. Faraone (P45332)
Attorney for Defendant-Appellant
3105 S. Martin Luther King Blvd. No. 315
Lansing, Michigan 48910
Telephone: (517) 484-5515
attorneyfaraone@faraonelegal.com

Dated: December 3, 2023

CERTIFICATE OF COUNSEL REGARDING WORD COUNT

NOW COMES Michael A. Faraone to certify that counsel understands the word-count limit of the Michigan Court Rules for this filing to be 3,200 words. Counsel has run the brief section of this filing through his word processing software which calculates the number of words at 3,158. The margins and font size also comply with the court rules.

CERTIFICATE OF SERVICE

NOW COMES Michael A. Faraone to certify that on December 3, 2023, he served the attached Brief on Appeal on opposing counsel by filing and serving the same on said counsel through this Honorable Court's electronic filing system.