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IN THE FIRST DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

CASE NO.: 1D2024-0062
L.T. CASE NO.: 23-CA-37

CALEB WALKER,

Appellant,

v.

CAPE FOODS PROPERTIES, LLC, CLAY ALDRIDGE, and WANDA ALDRIDGE,

Appellees.
_____/

APPELLANT'S INITIAL BRIEF

Appeal from the 14th Judicial Circuit
Honorable Devin D. Collier

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For Appellant

CERTIFICATE OF INTERESTED PERSONS

The following persons may have an interest in this case:

1. Caleb Walker, Appellant.

2. Clay Aldridge and Wanda Aldridge, Appellees.

3. Todd Godwin, John Gee, Vickie Godwin, and Sharon Gee, Members of Appellee, Cape Foods Properties, LLC.

4. Adrian J. Alvarez, Esq., and Sacha A. Boegem, Esq., TOBIN, REYES, ALVAREZ & DE BIASE, PLLC, Counsel for Appellant;

5. C. Andrew Weddle, Esq., and Julia K. Maddalena, Esq., HAND ARENDALL HARRIDON SALE LLC, Counsel for Appellees;

6. Honorable Devin D. Collier, Presiding Circuit Court Judge.

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PRELIMINARY STATEMENT

The following symbols, abbreviations, and references will be utilized throughout the Initial Brief of Appellant:

"Appellant" shall refer to Defendant/Counter-Plaintiff/Third-Party Plaintiff, Caleb Walker, in the Circuit Court below.

"Appellees" shall refer to Plaintiffs/Counter-Defendants, Cape Foods Properties, LLC ("CFP"), a Florida limited liability company, Clay Aldridge, and Wanda Aldridge (collectively, "Aldridges"), in the Circuit Court below.

"Temporary Injunction" shall refer to the appealed *Order Granting Plaintiff's Motion for Temporary Injunction* issued December 5, 2023 by the Circuit Court below against Appellant.[1]

"Appendix" and "App." shall refer to the Appendix to Initial Brief filed by Appellant contemporaneously herewith.

[1] The Order issued on December 5, 2023 also granted a separate motion for temporary injunction filed by Defendant/Appellant (Caleb Walker) which is <u>not</u> the subject of this appeal.

STATEMENT OF THE CASE

This is an appeal of the Temporary Injunction [App. 00471-90] granted against Appellant, and in favor of Appellees, enjoining Appellant from obstructing Appellees' use of a purported express beach access easement ("Disputed Easement") and a boardwalk located on the Disputed Easement ("Boardwalk") by installing a gate across the Disputed Easement or Boardwalk.[2]

This action for declaratory and injunctive relief was brought by Appellees, owners of certain real property in the Hide-A-Way Shores subdivision, to establish their alleged right to use the Disputed Easement, and to temporarily and permanently enjoin Appellant, the owner of the alleged servient estate, from obstructing Appellees' use of the Disputed Easement by installing a gate across it [App. 00006-32]. Appellant is the owner of beachfront property ("Beachfront Property") on which the Disputed Easement is located, and he disputes the existence of the Disputed Easement or, if it is found to exist, disputes that installing a gate, which allows access (with a key)

[2] For ease of reference, and unless needed for clarity, Appellant will simply refer to the Disputed Easement herein going forward as it is understood that the Boardwalk is located on the Disputed Easement.

to the Gulf coast beach via the Beachfront Property only to those entitled to use the Disputed Easement, would unreasonably interfere with the easement rights of those entitled to use the Disputed Easement [App. 00033-39; 00050-92; 000102-111].

Shortly after filing their Complaint, Appellees moved for a temporary injunction to enjoin Appellant from obstructing use of the Disputed Easement with a gate or otherwise [App. 00040-49].[3] The parties thoroughly briefed this motion [App. 00040-111], and the trial court held an evidentiary hearing on the motion on October 3, 2023 ("Hearing") [App. 00112-352], following which it issued the Temporary Injunction on December 5, 2023 [App. 00471-90].

SUMMARY OF ARGUMENT

The trial court erred in issuing the Temporary Injunction for one or more of the following three reasons:

First, the Temporary Injunction fails to include clear, definite, and unequivocally sufficient factual findings to support each of the four legal conclusions necessary for a temporary injunction; namely:

(1) a likelihood of irreparable harm;

[3] The parties stipulated to an order on the motion that precluded the installation of a gate or any other obstruction of the Disputed Easement until the court heard the motion for temporary injunction.

(2) unavailability of an adequate legal remedy;
(3) a substantial likelihood of success on the merits; and
(4) that the public interest supports entry of the injunction.

Rather, in the Temporary Injunction, the trial court merely recites certain evidence and facts that were presented at the Hearing (in Section III), and then (in Section IV) states in conclusory fashion that the second (no legal remedy), third (likelihood of success on the merits), and fourth (public interest) requirements for a temporary injunction had been met. The trial court does not address the first requirement (irreparable harm) at all. This is insufficient as a matter of law because the trial court did not make factual findings to support each of the four requisite legal conclusions. As such, the trial court erred by never tying the evidence and facts it references to specific factual findings in support of each of the requisite legal conclusions.

Second, the trial court erred in finding that Appellees had shown a substantial likelihood of success in establishing the Disputed Easement as there is no competent evidence to support that the owner of the alleged servient estate (*i.e.*, of the Beachfront Property) at the time the easement was purportedly created, Milton Pettus ("Pettus"), granted an easement appurtenant to the Hide-A-Way Shores subdivision (where Appellees own property).

Rather, the evidence presented at the Hearing demonstrates that the Hide-A-Way Shores subdivision was created ***after*** Pettus had obtained title to the Beachfront Property, that Pettus had no involvement in its creation and never granted any easement rights to the Hide-A-Way Shores subdivision, and that nothing in the public record at the time Pettus obtained title to the Beachfront Property identified the alleged dominant estate of the Disputed Easement – let alone that the dominant estate was Lots 1, 2, and 3 of the then non-existent and yet-to-be-created Hide-A-Way Shores subdivision.

In short, while the developer of the Hide-A-Way Shores subdivision, Mackay Properties, LLC and its principal, Noel Mackay (collectively, "Mackay"), tried to create the Disputed Easement, the easement is void *ab initio* because there was never a valid granting of the Disputed Easement by the alleged servient estate (*i.e.*, by Pettus) to the alleged dominant estate (*i.e.*, Lots 1, 2, and 3 of the Hide-A-Way Shores subdivision). As such, Appellees did not and cannot show that they have a substantial likelihood of success in establishing the Disputed Easement.

Third, the trial court erred in issuing the Temporary Injunction because, even if the Disputed Easement exists, it is undisputed that

it is a limited private easement (*i.e.*, not open to the public), and Appellant is entitled to preclude use of the Disputed Easement by those not entitled to use it as long as doing so does not unreasonably interfere with the use of the easement by those entitled to use it. No competent evidence was presented that installing a gate which allows access (with a key) to the Gulf coast beach via the Beachfront Property only to those entitled to use the Disputed Easement would unreasonably interfere with Appellees' rights.

Conversely, to enjoin the installation of such a gate, as the Temporary Injunction does, is a clear violation of Appellant's property rights as it allows members of the public, who indisputably have no right to use the Disputed Easement (yet the evidence shows use it regularly), to trespass on the Beachfront Property, and impermissibly increases the burden on the servient estate. Therefore, even if the Disputed Easement exists and Appellees are entitled to use it as owners of the alleged dominant estate (*i.e.*, as owners of property in Lots 1, 2, and 3 of the Hide-A-Way Shores subdivision), Appellant is still entitled to install a gate to prevent trespassing by the public.

Therefore, even presuming the Disputes Easement exists, Appellees have not shown (and cannot show) a substantial likelihood

of success in establishing that the proposed gate would unreasonably interfere with their easement rights.

Accordingly, for one or more of these reasons, the trial court erred in issuing the Temporary Injunction.

ARGUMENT

A. Standard of Review of Temporary Injunction

This Court's "review of an order granting a temporary injunction is hybrid: the trial court's legal conclusions are reviewed de novo, while its factual findings are reviewed for an abuse of discretion." *Holland M. Ware Charitable Found. v. Tamez Pine Straw LLC*, 343 So. 3d 1285, 1289 (Fla. 1st DCA 2022). "Further, whether the evidence is **legally sufficient** to justify entry of an injunction **is a question of law that [the Court] review[s] de novo**." *Id.* (emphasis added).

B. Standard for Granting of a Temporary Injunction

"A temporary injunction is an extraordinary remedy that should be granted sparingly. . . . Four essential elements must be proven to obtain this extraordinary relief: (1) a substantial likelihood of success on the merits, (2) a lack of an adequate remedy at law, (3) the likelihood of irreparable harm absent the entry of an injunction, and (4) that injunctive relief will serve the public interest." *Id.* (internal

quotations and citations omitted). "**Each of these elements** must be proven by the movant with **competent, substantial evidence**," and "[f]ailure to prove any one of the four elements **mandates denial** of the motion for temporary injunction. *Id.* (emphasis added); *see also DeSantis v. Florida Educ. Ass'n*, 306 So. 3d 1202, 1213 (Fla. 1st DCA 2020) ("The trial court must make specific factual findings to support each element, and those findings must be supported by competent, substantial evidence. . . . If any one of the elements is not established, the trial court **may not grant the injunction**.") (emphasis added).

Also, any order granting a temporary injunction must strictly comply with Rule 1.610. *See Randolph v. Antioch Farms Feed & Grain Corp.*, 903 So. 2d 384, 385 (Fla. 2d DCA 2005) ("An order granting a temporary injunction must strictly comply with [Fla. R. Civ. P. 1.610]. **Of primary importance is the trial court's obligation to state sufficient factual findings in support of each element** entitling a party to a temporary injunction.") (emphasis added); *Yardley v. Albu*, 826 So. 2d 467, 470 (Fla. 5th DCA 2002) ("Because the entering of a temporary injunction is an extraordinary remedy, strict compliance with the provisions of rule 1.610 is required. . . . The appellate courts have held that compliance with the rule **requires the trial court to**

set forth sufficient factual findings to support each of the criterion that must be established to entitle the party to a preliminary injunction.") (emphasis added); *Graham v. Battey*, 347 So. 3d 515, 519-20 (Fla. 5th DCA 2022) (same).

C. The Trial Court Erred in Issuing the Temporary Injunction Because it Failed to Make Sufficient Factual Findings to Support Each of the Requisite Elements

As referenced above, to obtain a temporary injunction, "[t]he movant must establish (1) a substantial likelihood of success on the merits, (2) a lack of an adequate remedy at law, (3) the likelihood of irreparable harm absent the entry of an injunction, and (4) that injunctive relief will serve the public interest." *State, Dep't of Health v. Bayfront HMA Med. Ctr., LLC*, 236 So. 3d 466, 472 (Fla. 1st DCA 2018). Significantly, the movant "must prove each element with competent, substantial evidence." *Id.* Moreover, "**[c]lear, definite, and unequivocally sufficient factual findings must support each of the four conclusions** necessary to justify entry of a preliminary injunction." *Id.* (quoting *City of Jacksonville v. Naegele Outdoor Advert. Co.*, 634 So.2d 750, 754 (Fla. 1st DCA 1994)) (emphasis added; internal quotations omitted). "If the party seeking the

temporary injunction fails to prove one of the requirements, the motion for injunction **must be denied**." *Id.* (emphasis added).

Here, the Court need not even consider the evidence presented at the Hearing to conclude that the Temporary Injunction must be reversed. Rather, the mere fact that the trial court failed to make "clear, definite, and unequivocally sufficient factual findings" to support each of the four conclusions necessary for a temporary injunction **requires that the Temporary Injunction be reversed**. *See, e.g., Housman v. Housman*, 370 So. 3d 1006, 1009 (Fla. 5th DCA 2023) ("[A]fter reviewing the guardianship court's freeze order, we find that it is **legally insufficient** insofar as it fails to adequately address and set forth factual findings to support **all four of the requisite elements** for a temporary injunction.") (emphasis added).

Specifically, in Section III of the Temporary Injunction, the trial court recites evidence and facts that were presented at the Hearing. While some – maybe even all – of the statements made by the trial court in Section III may constitute findings of fact, such findings are never identified as supporting any of the legal conclusions required for the issuance of a temporary injunction. Rather, in Section IV, which the trial court classifies as the "Analysis" section of the

Temporary Injunction, the trial court merely states in conclusory fashion that the second (no legal remedy), third (likelihood of success on the merits), and fourth (public interest) requirements for a temporary injunction have been met, and does not address the first requirement (irreparable harm) at all. In other words, despite the title of Section IV, the trial court never analyzes the facts and explains why specific facts support each of the trial court's legal conclusions.

This is insufficient as a matter of law to support the issuance of the Temporary Injunction. As an initial matter, "a temporary injunction cannot be issued absent a showing of irreparable harm." *State v. Planned Parenthood of Sw. & Cent. Florida*, 342 So. 3d 863, 867 (Fla. 1st DCA 2022). While it is true that courts recognize a limited exception to this rule for restrictive covenants that affect real property, that is not what is at issue here. *See Springsted Holdings, Inc. v. Del Prado Mall Prof'l Condo. Ass'n, Inc.*, 349 So. 3d 939, 945 (Fla. 2d DCA 2022) ("[i]njunctive relief is normally available to redress violations of ... restrictive covenants [affecting real property] without proof of irreparable injury or a showing that a judgment for damages would be inadequate.") (internal quotations and citations omitted); *Clark v. Bluewater Key RV Ownership Park Prop. Owners Ass'n, Inc.*,

226 So. 3d 276, 284 (Fla. 3d DCA 2017) ("A trial court may grant injunctive relief to redress violations of a restrictive covenant affecting real property without proof of irreparable harm.").

Rather, at issue here is a (disputed) easement. As the Florida Supreme Court has explained, an easement "is essentially an inherently legal interest in land, as distinguished from a restriction resulting from a restrictive covenant, which is but a creature of equity arising out of contract." *Homer v. Dadeland Shopping Ctr., Inc.*, 229 So. 2d 834, 836 (Fla. 1969); *see also 8425 Biscayne LLC v. Pinnacle Towers LLC*, 340 So. 3d 515, 516 (Fla. 3d DCA 2022) ("The distinction between an easement and a restrictive covenant is that an easement allows its holder to go upon the land possessed by another, and a covenant imposes upon the possessor restrictions on how he or she may use the land."); *accord Shiner v. Baita*, 710 So. 2d 711, 712 (Fla. 1st DCA 1998) ("First, we find that the reservation is not a restrictive covenant. Instead, the deed to Shiner's predecessor created an easement."). Accordingly, the trial court's failure here to find a likelihood of irreparable harm in the absence of a temporary injunction, let alone to make findings of fact to support such a ruling, requires the reversal of the Temporary Injunction.

However, even if irreparable harm is presumed, the trial court's failure to tie the evidence and facts it recites in Section III to specific factual findings in support of each of the requisite legal conclusions is clear error that requires the reversal of the Temporary Injunction. Indeed, it is impossible to know from the Temporary Injunction which factual findings support each of the requisite legal conclusions, and thus the trial court has not made "clear, definite and unequivocally sufficient" factual findings to support each of the four conclusions.

Again, this requires reversal of the Temporary Injunction regardless of whether evidence was actually presented at the Hearing to support each of the four requisite legal conclusions. This was most recently made clear by the Sixth DCA in *Lusby v. Canevari*:

> While the injunction order in this case contains sufficient findings regarding irreparable harm, the likelihood of success on the merits, and public interest considerations, **there are no findings as to the unavailability of an adequate remedy at law**. Although the Canevaris make a persuasive argument that sufficient evidence was presented at the injunction hearing to establish the unavailability of an adequate remedy at law, they do not dispute that **the injunction order is silent on this prong of the analysis**. Thus, in keeping with the requirements of rule 1.610 and longstanding case law interpreting the rule, **we conclude that the failure to address this**

> **element in the injunction order necessitates reversal**. *See, e.g.*, *Phelan v. Trifactor Sols., LLC*, 312 So. 3d 1036, 1038-39 (Fla. 2d DCA 2021) (reversing temporary injunction that lacked the requisite findings and observing that "[i]n some cases, procedure precedes substance").

363 So. 3d 233, 235 (emphasis added).

Accordingly, the Temporary Injunction must be reversed.

D. The Trial Court Erred in Issuing the Temporary Injunction Because Appellees Failed to Show a Substantial Likelihood of Proving the Disputed Easement

1. The rules of contract interpretation apply to the creation and enforcement of easements

An easement "is an interest that gives to one other than the owner a right to use the land for some specific purpose." *Am. Quick Sign, Inc. v. Reinhardt*, 899 So. 2d 461, 464 (Fla. 5th DCA 2005). "When determining whether an easement conveys a particular right, the rules of contract interpretation apply, giving effect to the plain meaning of the terms as stated." *Buie v. Bluebird Landing Owner's Ass'n*, 172 So. 3d 519, 521 (Fla. 1st DCA 2015).[4]

[4] "Typically, an [appurtenant] easement contains the following five elements: (1) it grants an incorporeal right; (2) it is imposed on corporeal property; (3) it does not entitle the holder to profit from the land; (4) it benefits a corporeal property; and (5) it involves a dominant and servient estate." *Dunes of Seagrove Owners Ass'n, Inc. v. Dunes of Seagrove Dev., Inc.*, 180 So. 3d 1209, 1211 (Fla. 1st DCA

Where the language creating the easement is clear and unambiguous, courts must give effect to the terms as stated without resorting to other rules of construction designed to ascertain meaning. *Am. Quick*, 899 So. 2d at 465. But "[w]hen the intended extent of the easement is not ascertainable from the written language alone, the court may consider extrinsic evidence." *Meadows Country Club, Inc. v. Unnever*, 702 So. 2d 586, 588 (Fla. 2d DCA 1997). In doing so, the goal must be to determine the scope of the easement as intended by the parties **at the time it was created**. *Am. Quick*, 899 So. 2d at 465 ("If the provisions are ambiguous, extrinsic evidence

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2015); *see also Morris v. Winbar LLC*, 273 So. 3d 176, 178-79 (Fla. 1st DCA 2019) ("Significantly, an appurtenant easement is a permanent easement running with the land and passes as an incident to it. . . . The holder of an appurtenant easement possesses the 'dominant tenement' while the owner of the land against which the easement exists possesses the 'servient tenement.' A 'dominant estate' is the estate that receives the benefit of an easement.") (internal quotations and citations omitted). Florida also "recognizes easements in gross, which are mere personal interests in land that are not supported by a dominant estate." *Dunes*, 180 So. 3d at 1211; *see also Morris*, 273 So. 3d at 179 ("[A]n easement 'in gross' is a mere personal interest in the real estate of another; it is not supported by a dominant estate.") (citing *N. Dade Water Co. v. Fla. State Tpk. Auth.*, 114 So.2d 458, 461 (Fla. 3d DCA 1959)). While typically recognized in situations involving utilities, easements in-gross are not limited thereto. *See, e.g., Dunes*, 180 So. 3d at 1212 (recognizing easement in-gross that granted a vendor the exclusive right to provide beach services, which it then properly assigned to a developer).

may be examined to determine the intent of the parties at the time the document establishing the easement was created."); *Hillsborough County v. Kortum*, 585 So. 2d 1029, 1031 (Fla. 2d DCA 1991) ("To determine the scope of the easement, the court must attempt to ascertain the intent of the parties in light of the surrounding circumstances at the time the easement was created."). Thus, to determine the scope of an easement, a court "may consider the circumstances surrounding the creation of the easement and the conduct of the parties." *Meadows*, 702 So. 2d at 589.

2. There is no evidence that Pettus granted an easement appurtenant to the Hide-A-Way Shores subdivision

Here, Appellees did not and cannot show that they have a substantial likelihood of success in establishing the Disputed Easement as there is no evidence that Pettus granted an easement appurtenant[5] to Lots 1, 2, and 3 of the Hide-A-Way Shores

[5] As the documents discussed below demonstrate, there is also no evidence Pettus granted an easement in-gross to Mackay, but even if he had, Mackay could not assign his easement rights to the Hide-A-Way Shores subdivision, somehow converting his personal easement rights into an appurtenant easement benefiting the subdivision. It is axiomatic that the beneficiary of an easement in-gross has no right to unilaterally convert such an easement into an appurtenant easement, as a "general principle governing all easements is that the burden of right of way upon the servient estate must not be increased

subdivision. The chronology and details of the subject documents are critical to understanding why the Disputed Easement is void *ab initio*:

Mackay had a survey prepared on July 13, 2001 ("2001 Survey") [App. 00353, 00496] on which the Beachfront Property is identified as Parcel "B" and references a beach access easement, the property east of Parcel B is identified as Parcel "A," and the property north of Parcel A is identified as Parcel "C." Significantly, there is no indication of which parcel, or portions of parcels, Mackay intended to benefit from the beach access easement, and the Trading Post[6] is split between Parcels A and C (*i.e.*, its structure/footprint is ignored). Mackay recorded a Minor Replat on August 23, 2001 ("2001 Replat") [App. 00449-50, 00491-92] which is consistent with the 2001 Survey

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to any greater extent than reasonably necessary and contemplated at the time of initial acquisition," and thus "the easement holder cannot expand the easement beyond what was contemplated at the time it was granted." *Walters v. McCall*, 450 So. 2d 1139, 1142 (Fla. 1st DCA 1984) (internal quotations and citations omitted).

[6] "Trading Post" refers to the grocery store located on Lot 1 of the Hide-A-Way Shores subdivision. CFP owns Lot 1, but the Trading Post, owned by Mackay in the late 1990s, is now owned and operated by non-party, Cape Foods, LLC [App. 00135, 23:9-15, 118:1-11]. The configuration of the area is as follows [App. 00454-56, 00493-95]:

Beachfront Property Owned by Appellant	Lot 3 Cabins 1-9	Lot 2 Aldridges	Lot 1 Trading Post

except that what was Parcel "C" (containing half of the Trading Post) is merely identified as "unplatted lands" on the 2001 Replat.

The most critical point as to the 2001 Survey and Replat is that neither identified the alleged dominant estate of the referenced beach access easement (and they ignored/split the Trading Post).

Moreover, even if the dominant estate had been identified by Mackay at this time, he was then the owner of both the alleged servient estate (*i.e.*, the Beachfront Property) and the alleged dominant estate (*i.e.*, what is now Lots 1, 2, and 3 of the Hide-A-Way Shores subdivision), and it is **black-letter Florida law** that "one cannot, while being owner of both a dominant and servient estate, grant an easement to oneself in one's own property." *AFP 103 Corp. v. Common Wealth Tr. Services, LLC*, 48 Fla. L. Weekly D401, 2023 WL 2146247, *4 (Fla. 3d DCA Feb. 22, 2023). In both *AFP* and *One Harbor Fin. Ltd. Co. v. Hynes Properties, LLC*, 884 So. 2d 1039 (Fla. 5th DCA 2004), Florida appellate courts applied this long-established legal principle. *See AFP*, 2023 WL 2146247 at *4 ("[B]ecause South Florida Hotel was the fee simple owner of all the parcels, it did not possess the legal right to grant an easement over its own property to itself."); *One Harbor*, 884 So. 2d at 1044 ("Hoffenberg, as fee simple

owner of both parcels, did not possess the legal right to grant an easement over his own property. Accordingly, the Agreement was void *ab initio*.”). Thus, Mackay could not have created (and did not create) the Disputed Easement through the 2001 Survey and/or Replat.

On August 31, 2001, Mackay transferred the Beachfront Property to Pettus via a warranty deed (“Pettus Deed”) [App. 00451-53]. The Pettus Deed states it is “subject to” a reservation of a beach access easement, but like the 2001 Survey and 2001 Replat, fails to identify the dominant estate of such easement. On November 13, 2001, Pettus recorded a Minor Replat (“Pettus Replat”) [App. 00454-55, 00493-94], which also references a beach access easement, yet also fails to identify the dominant estate of such easement.[7]

First, Florida law is clear that “subject to” language within a deed is insufficient, without more, to create an easement. *See Robertia v. Pine Tree Water Control Dist.*, 516 So. 2d 1012, 1013 (Fla. 4th DCA 1987) (holding that the words “subject to” in a deed was

[7] Notably, Mackay entered into a purchase and sale agreement in October 2001 to sell current Lot 3 (Cabins 1-9) to Donna Lemmond [App. 00358-64] which stated that the sale is “contingent on property having deeded beach access,” suggesting that no deeded access existed at the time (which was after the sale to Pettus).

insufficient in itself to create an easement); *Behm v. Saeli*, 560 So. 2d 431, 432 (Fla. 5th DCA 1990) (same); *Procacci v. Zacco*, 324 So. 2d 180, 182 (Fla. 4th DCA 1975) (same, and noting that the words "subject to" in a deed conveying an interest in real property are words of qualification of the estate granted). Further, *even if* such "subject to" language *were* sufficient to create an easement, no easement was created because no dominant estate is identified in the Pettus Deed or Pettus Replat (nor in the 2001 Survey or Replat).

In sum, none of the 2001 documents establish the scope of the referenced beach access easement, nor is there competent extrinsic evidence showing Pettus understood or agreed that the dominant estate would be, as Appellees now allege, Lots 1, 2, and 3 of the then non-existent and yet-to-be-created Hide-A-Way Shores subdivision.[8]

[8] Notably, the trial court found that Mackay reserved the Disputed Easement for himself, and that Pettus knew about the easement [App. 00479, ¶ 17]. However, as discussed above, Mackay, as owner of both the alleged servient and dominant estates, could not grant an easement to himself in his own property. Further, the trial court's finding that Pettus knew about the Disputed Easement is inaccurate because there is no evidence that Pettus knew the scope of the beach access easement, including the alleged dominant estate. Thus, there is no evidence Pettus knew of the Disputed Easement as defined in this action (*i.e.*, as an appurtenant easement that is appurtenant to current Lots 1, 2, and 3 of the Hide-A-Way Shores subdivision).

Indeed, Roger Bradley ("Bradley"), a transactional broker (*i.e.*, not an agent of Mackay, Pettus, or anyone else)[9] involved with sales of property by Mackay, including the sale of the Beachfront Property to Pettus, did not recall a specific conversation with Pettus in which the purpose of the referenced beach access easement was conveyed, and Bradley's attempt testify to Pettus' understanding about the easement was correctly rejected by the trial court as speculation:

> Q. And [Pettus] understood what [the four-foot beach access easement] was for?
>
> A. Yes, sir.
>
> **MR. ALVAREZ: Objection, Your Honor. Speculation.**
>
> THE COURT: Will you lay a foundation for the answer to the last question of what he understood?
>
> MR. WEDDLE: Sure.
>
> Q. Did you have any conversation with Mr. Pettus about the beach access easement and what its purpose was?
>
> A. We would have had to let him know, disclose there was an easement on there.
>
> **MR. ALVAREZ: Objection.**

[9] As a transactional broker, Bradley was not an agent of any party, and did not, and does not, have the authority to speak on behalf of, or bind, Mackay or Pettus. *See* Fla. Stat. § 475.01(1)(l) (defining "transaction broker" as "a broker who provides limited representation to a buyer, a seller, or both, in a real estate transaction, but does not represent either in a fiduciary capacity or as a single agent.").

> THE COURT: One moment. Will you lay a foundation for it?
>
> BY MR. WEDDLE:
>
> Q. Do you have a recollection of having a conversation with Mr. Pettus about that?
>
> A. [1] It was 20 some odd years ago. [2] Not specifically, no, sir. [3] But we would have made him aware I'm sure.
>
> **THE COURT: I'll sustain the objection to the latter part of what Mr. Pettus understood. But I'll overrule to the first two answers.**

[App. 00147-48, pp. 35:11 – 36:11] (emphasis added).

Bradley also confirmed that nothing in the public record at the time identified, or put Pettus on notice of, the intended dominant estate or beneficiaries of the referenced beach access easement:

> Q. In looking at the MacKay Minor Replat marked as Exhibit 2, is there anything on this minor replat that would indicate whether or not the beach access easement was intended for the cottages, the mobile home, or the Trading Post?
>
> A. **Not that I know of. No, sir. . . .**
>
> Q. Are you aware of any public record that was in Gulf County public records that Mr. Pettus would have seen with his own eyes, or otherwise have known about eight days before he closed that would indicate exactly what parcels or what structures would benefit from the beach access easement?
>
> A. **No, sir. Not that I'm aware of.**

[App. 00155-56, pp. 43:21 – 44:22] (emphasis added).

Accordingly, there is no competent evidence of the scope of the referenced beach access easement at the relevant time period (*i.e.*, at the time that Pettus obtained title to the Beachfront Property). Specifically, the dominant estate or beneficiary of the referenced easement was never identified, and there is no evidence that Pettus, as the owner of the alleged servient estate, intended to grant an appurtenant easement to Lots 1, 2, and 3 of the then non-existent and yet-to-be-created Hide-A-Way Shores subdivision.

3. All documents after the Pettus Deed are immaterial

As no dominant estate is identified in the 2001 documents, Appellees point to the Declaration of Covenants and Restrictions for Hide-A-Way Shores subdivision ("Declaration"), recorded April 18, 2002 [App. 00457-59], and to the plat for the subdivision ("2002 Plat"), recorded in May 2002 [App. 00456, 00495]. These documents, however, are irrelevant because there is no evidence that Pettus, the owner of the alleged servient estate, agreed to anything contained in either of these documents. Moreover, the 2002 Plat does not even

reference the Beachfront Property or any easement.[10] Indeed, Bradley admitted Pettus had no involvement in the creation of the Hide-A-Way Shores subdivision, the plat of which does not include the Disputed Easement (or reference any beach access easement):

> Q. Did Mr. Pettus -- was Mr. Pettus involved in any way in the creation of Hideaway Shores?
>
> A. **Not to my knowledge. No, sir.**
>
> Q. And he was not involved in any way in the creation of the parameters or boundaries of what would eventually become Hideaway Shores, correct?
>
> A. **Correct.**
>
> Q. The Hideaway Shores plat that we've been discussing, that document itself does not make any reference itself to a beach access easement, does it?
>
> . . .
>
> A. I can't read the text. But **this does not include the gulf front parcel which has the easement**.

[App. 00164, p. 52:1-18] (emphasis added).

In sum, while Mackay tried to create the Disputed Easement, the easement is void *ab initio* because there was never a valid granting of the Disputed Easement by Pettus (*i.e.*, by the owner of the

[10] Further, the 2002 Plat expands the footprint of the subdivision to include the Trading Post. Thus, even if an easement had existed, its scope could not be unilaterally expanded by Mackay in 2002.

servient estate) to the Hide-A-Way Shores subdivision (*i.e.*, to the alleged dominant estate). Thus, Appellees did not and cannot show that they have a substantial likelihood of success in establishing the Disputed Easement, and so the Temporary Injunction must be reversed. S*ee, e.g., Bayfront*, 236 So. 3d at 474 (reversing injunction: "Bayfront failed to establish a substantial likelihood of success on the merits of its claim and the trial court erred by finding otherwise.").[11]

E. The Trial Court Erred in Issuing the Temporary Injunction Because Appellees Failed to Show a Substantial Likelihood of Proving the Proposed Gate Would Unreasonably Interfere with Their Rights

1. The Disputed Easement is a limited private easement, yet is routinely being unlawfully used by the public

Even if the Disputed Easement exists, which it does not, Appellant is still entitled to install a gate as he has proposed because doing so would protect his private property from trespassing without unreasonably interfering with Appellees' easement rights. Indeed, no competent evidence was presented showing that a keyed gate as proposed by Appellant, where Appellees would receive a key to the

[11] The Disputed Easement will also not be implied, as there is no evidence that it is, and it is not, absolutely necessary. *See Tortoise Island Communities, Inc. v. Moorings Ass'n, Inc.*, 489 So. 2d 22, 22 (Fla. 1986); Fla. Stat. § 704.01 (requiring absolute necessity).

gate, would unreasonably interfere with Appellees' purported easement rights. Thus, even if the Disputed Easement exists, Appellees failed to show a substantial likelihood of proving the proposed gate would interfere with their easement rights.

As an initial matter, no evidence was presented to suggest that the Disputed Easement, or Jamaica Drive (which is where Appellees' properties are located, and which extends from the Disputed Easement across the Hide-A-Way Shores subdivision to Cape San Blas Road [App. 00448]), is public. Rather, if anything, the Disputed Easement is private and limited to use by the parties. This is not only supported by all the documents already discussed, none of which indicate or suggest that the Disputed Easement was granted or dedicated to the public or for public use, but also by testimony.

For example, Appellee Wanda Aldridge testified as follows:

> Q. You do though agree that Jamaica Drive is private and belongs only to the houses on Jamaica Drive, right?
>
> A. **It says it's a private road.**
>
> Q. Do you agree with that?
>
> A. **Uh-huh. It's got a sign.**
>
> . . .

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> Q. You also agree that Acklins Drive owners, the people whose property on the roadway right to the south of Jamaica Drive, do you agree that they should not be using your boardwalk on Jamaica Drive, right?
>
> A. **No, sir. They have their own.**
>
> Q. So they should not be using your boardwalk, right?
>
> A. **No, sir. They've got their own.**
>
> Q. Okay. Therefore I am correct that it's your position that you object to Acklins owners or occupants using the boardwalk that's on my client's property [*i.e.*, the Disputed Easement], right? I'm correct?
>
> A. **Yes.**

[App. 00212, p. 100:9-14; App. 00215, p. 103:1-4] (emphasis added).

Notwithstanding the limited private nature of the Disputed Easement (presuming it is not void *ab initio* or otherwise unenforceable), testimony from the Hearing confirms that members of the public routinely trespass on the Beachfront Property by using the Disputed Easement to access the Gulf coast beach, including people who are specifically directed by an inn ("Inn") located across Cape San Blas Road from the Trading Post, to access the beach by using the Disputed Easement. For example, Katie Wright ("Wright"), an owner of property in the subdivision, testified about the public, including people from the Inn, using the Disputed Easement:

Q. When you're present at your property, have you had occasions to encounter individuals coming from locations off of Jamaica Drive trying to use the boardwalk that's on my client's property?

A. **I have.**

. . .

Q. What were the circumstances of those encounters of people off of Jamaica Drive and how do you know?

A. Okay. I had come up once from sunset and there was a Jeep parked in front of my particular cottage. . . . I was walking down Jamaica Drive a little later . . . and saw the Jeep drive back out Jamaica Drive, take a left, and then a couple of houses down turn right onto a bay side property. . . . **Also multiple occasions as testified that there's people walking across the street to the Inn**.

Q. Okay. And when you say walking across the street to the Inn, do you see people coming **from the beach going towards the Inn?**

A. **That is correct.**

Q. When is the last time that you saw someone from off of Jamaica Drive using Mr. Walker's boardwalk?

A. **This morning on my walk**. . . . I was walking on the beach and exchanged greetings with a nice couple. Went back to my property. And I was walking down Jamaica Drive . . . and they were walking behind me. And they just happened **to walk across the street to the Inn**.

. . .

Q. Have you had any occasion to see anyone from Acklins Drive or from Tobago Drive cutting across the property to get over to Jamaica to have access for the boardwalk?

A. I have. . . .

> Q. In order for people from the Acklins side which is south to go north into Jamaica Drive to use the boardwalk?
>
> A. That is correct.
>
> Q. Do you recall that there was . . . a cease and desist . . . letter sent to the Acklins Drive owners . . . earlier this year?
>
> . . .
>
> A. Yes. I wrote the letter on behalf of the neighborhood community.
>
> Q. And what was the purpose of that letter?
>
> A. There were new owners. So we were just making them aware that their guests were using our street and boardwalk. And requested that they instruct their guests to use their own private access.

[App. 00252-454, pp. 140:5 – 142:22] (emphasis added).

Further, the owner of the Inn, Britt Kuglar ("Kuglar"), admitted at the Hearing that guests of the Inn use the Disputed Easement:

> Q. Do your guests use the boardwalk on Jamaica Drive to access the gulf?
>
> A. **Yes.**

[App. 00244, p. 132:2-4] (emphasis added). Moreover, Kuglar testified that he specifically directs guests of the Inn to trespass on Appellant's private Beachfront Property by using the Disputed Easement:

> Q. Mr. Kuglar, are you still directing or having your staff direct visitors of the Inn to use Mr. Walker's property at the boardwalk?
>
> A. **Absolutely, yes. Yes.**

> Q. Has that stopped since -- did that stop for any period of time from the time this lawsuit was filed through today?
>
> A. **No.**

[App. 00249, p. 137:2-9] (emphasis added). Appellant also testified to unauthorized use of his Beachfront Property and of the Disputed Easement by the public, including guests of the Inn, and his liability concerns associated therewith [App. 266-71, pp. 153:15 – 159:12].

Accordingly, competent evidence establishes that the Disputed Easement (if it even exists) is a limited private easement, yet is routinely subject to trespassing by members of the public.

2. Appellant is entitled to install a gate to prevent trespassing by the public on the Disputed Easement and Beachfront Property as the proposed gate would not unreasonably interfere with Appellees' rights

As an initial matter, "a temporary injunction may . . . be entered to protect a party's private property rights when . . . the temporary injunction prevents an alleged ongoing trespass. The trial court does not abuse its discretion by entering the injunction even if the injunction effectively disrupts, rather than preserves, the status quo." *Annex Indus. Park, LLC v. Corner Land*, LLC, 206 So. 3d 739, 741 (Fla. 3d DCA 2016) ("A temporary injunction may be entered to protect a property owner's right to use its land, and exclude

unauthorized persons from interfering with that right.").[12] This is relevant here because the trial court suggests in the Temporary Injunction that Appellant should be enjoined from installing a gate because the "status quo . . . was no gate" across the Disputed Easement [App. 00484-85, ¶ 33]. The trial court attempts to distinguish *Annex* by stating that, unlike in *Annex*, the trial court has not determined that Appellees' use of the Disputed Easement is unauthorized [*Id.*]. But the trial court misses that, by enjoining the installation of a gate, the trial court is allowing members of the public, who the evidence demonstrates have no right to use the Disputed Easement, to trespass on Appellant's Beachfront Property.

This is a **clear violation of Appellant's property rights**, and goes directly against Florida's strong public policy of protecting private property rights. *See TR Inv'r, LLC v. Manatee Cnty.*, 355 So. 3d 1004, 1016 (Fla. 2d DCA 2023) ("[I]t is clear that TR Investor retained complete ownership of the wetland buffers and all of its

[12] *See also Fla. Action Films, Inc. v. Green E. No. 2, Ltd.*, 29 So.3d 471 (Fla. 3d DCA 2010) (affirming injunction against continuing trespass over appellee's land); *N. Dade Water Co. v. Adken Land Co.*, 114 So.2d 347 (Fla. 3d DCA 1959) (affirming temporary injunction enjoining a continuous trespass that interfered with plaintiff's ownership rights).

property rights, **including the right to exclude others**.") (emphasis added).[13] It also ignores that the trial court can, and should, disrupt the status quo when necessary to prevent trespassing. Further, as referenced earlier, it ignores that allowing the public to trespass on Appellant's property violates the "general principle governing all easements . . . that the burden of right of way upon the servient estate must not be increased to any greater extent than reasonably necessary and contemplated at the time of initial acquisition," and that an "easement holder cannot expand the easement beyond what was contemplated at the time it was granted." *Walters*, 450 So. 2d at 1142 (internal quotations and citations omitted); *accord Terrill v. Coe*, 1 So. 3d 223, 225 (Fla. 5th DCA 2008); *see also Eadgear, Inc. v. Baca*,

[13] *See also Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) ("The right to exclude is 'one of the most treasured' rights of property ownership.") (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)); Fla. Stat. § 70.001 ("The Legislature recognizes that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution. The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens."); *Gulf Coast Transp., Inc. v. Hillsborough Cnty.*, 352 So. 3d 368, 380 (Fla. 2d DCA 2022) (right to exclude others from real property is defined by state law).

93 So. 3d 1246 (Fla. 1st DCA 2012) ("An injunctive order should never be broader than is necessary to secure the injured party, without injustice to the adversary.").

In other words, by granting the Temporary Injunction prohibiting a gate, the trial court effectively authorized trespassing by the public on Appellant's private property. This turns property law on its head. A court should not allow trespassing in violation of private property rights absent some extraordinary circumstance where allowing trespassing is necessary to protect the rights of others. That is not the case here, where Appellant has proposed to install a gate which allows access (with a key) to the Gulf coast beach via the Beachfront Property only to those who may be entitled to use the Disputed Easement. As Appellant testified:

> Q. Mr. Walker, what would you like to do in order to prevent people without access rights from being able to traverse your boardwalk?
>
> A. I would like to be able to put up a gate that has a lock, and provide those with granted access keys to be able to access and still get to the beach. But I think anything short of putting up a gate across the boardwalk at this point is in vain. We've already had testimony from Mr. Kuglar that he's going to ignore any signage or request that I make.

Q. How exactly is it that you intend to manage the key access? What if an owner were to lose a key, how are you going to deal with that practical beyond?

A. So there are locksmiths that are able to give each key a serial number. And those keys with serial numbers can be assigned certain serial numbers to the users. And then there would just have to be a request made to replace those keys if they were lost, with a reasonable explanation of why or where they were lost. My property manager can certainly hold on to additional keys so at a moment's notice they can be provided as backup. It doesn't have to be that complicated of a process.

Q. Do you rent out your property as well?

A. We do.

Q. Do you understand the need for having access through the gate?

A. Yes. My tenants would also need to have keys to the gate just like anyone else's.

Q. And if your tenants were to -- were to lose the keys, how would they replace the keys?

A. Through my property manager as well.

Q. That would be the same means and methods that would have to be followed by anyone else that hold the keys?

A. That's correct.

[App. 00282-84, pp. 170:15 – 172:5].

Moreover, presuming the Disputed Easement exists, whether a gate such as that proposed by Appellant can be installed depends upon whether it would unreasonably interfere with Appellees'

easement rights. *See Summerland Key Cove Park, LLC v. Murphy*, 321 So. 3d 888, 892 n. 3 (Fla. 3d DCA 2021) (stating that "whether the restriction may be imposed depends on whether the restriction unreasonably interferes with the rights of the easement holder.").

For example, in *Summerland*, the court held that "the trial court's conclusion – that, as a matter of law, the New LLC is powerless to place any restrictions on the subdivision property owners' use of the park – effectively grants the subdivision property owners 'absolute ownership of the easement property contrary to well-established property law.'" 321 So. 3d at 892-93 (quoting *Dianne v. Wingate*, 84 So. 3d 427, 431 (Fla. 1st DCA 2012)). And in *Sandlake Residences, LLC v. Ogilvie*, 951 So. 2d 117 (Fla. 5th DCA 2007), the appellate court reversed the trial court's granting of a temporary injunction, holding that the subject easement did not absolutely preclude a gate, and that the easement holders failed to demonstrate a likelihood of successfully proving that the gate "unreasonably interfered" with their easement rights. *See also, e.g., Roberson v. Kitchen*, 12 So.3d 813, 813-14 (Fla. 5th DCA 2009) (finding that although easement for ingress and egress encompassed entirety of described track, servient tenement holder was not required to remove

an iron gate or large trees lining roadway, and was prevented only from erecting permanent obstructions that would encroach upon the dominant tenement holder's ingress and egress).

Here, there is no competent evidence that installing a gate with keyed access would unreasonably interfere with Appellees' purported easement rights. Notably, Wright testified that a keyed gate such as that proposed by Appellant would not so unreasonably interfere:

> Q. Do you understand that Mr. Walker is able to or has your permission to install a gate with keyed access so long as he provides you with copies of keys?
>
> A. Yes.
>
> Q. Do you find that to be an unreasonable interference with your right to access the beach?
>
> A. **I do not.**
>
> Q. The majority of the occupants of your cottage, are those people you rent to?
>
> A. That is correct.
>
> Q. And you understand that they have to also utilize the key to access the gate when you're not there, right?
>
> A. I do.
>
> Q. Do you find that to be an unreasonable interference with your property rights?
>
> A. **I do not.**

[App. 00257-58, pp. 145:10 – 146:2] (emphasis added).

Accordingly, Appellees have not shown, with competent, substantial evidence, a substantial likelihood of successfully proving that Appellant's proposed gate would unreasonably interfere with Appellees' purported easement rights. As such, Appellant's property rights, including his right to install a keyed gate to prevent trespassing by the public, must be respected as there is no evidence that the proposed gate would unreasonably interfere with Appellees' purported easement rights (which they are unlikely to be able to prove as the Disputed Easement is void *ab initio* as discussed earlier).

Therefore, the Temporary Injunction must be reversed.

CONCLUSION

In sum, the trial court:

(1) erred by failing to make sufficient factual finding in support of each of the requisite elements for a temporary injunction;

(2) erred in finding that Appellees had a substantial likelihood of success in establishing the Disputed Easement (as the evidence shows the Disputed Easement is void *ab initio*); and

(3) even if the Court were correct (which it was not) in finding that Appellees showed a substantial likelihood of success in establishing the Disputed Easement, erred in finding that Appellees showed a substantial likelihood of success in proving that Appellant's proposed gate would unreasonably interfere with Appellees' easement rights.

Accordingly, for one or more of the foregoing reasons, the Temporary Injunction must be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished this 17th day of January, 2024, via email and through the Florida Courts E-Filing Portal to: Julia K. Maddalena, Esq., and Andrew Weddle Esq., Attorneys for Cape Food Properties, LLC, Clay Aldridge, Wanda Aldridge, and Phillip D. Williams, Hand Arendall Harrison Sale, 16901 Panama City Beach Parkway, suite 200, Panama City, FL 32413; Email: jmaddelena@handfirm.com, viseminger@handfirm.com, Aweddle@handfirm.com.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is Bookman Old Style 14-point Font and complies with the font, word/page count, and other requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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