IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GARY STAFFIERI and ADRIA CHARLES STAFFIERI, husband and wife, Plaintiffs, v. HENRY BLACK and MARYLOU BLACK, husband and wife, and RAYMOND BUCHTA, W. SCOTT BLACK, BLACKBALL PROPERTIES, LLC, PAUL MILLER AND CANDY MILLER, husband and wife, and GAKIS PROPERTIES II, LLC, Defendants.	)	C.A. No. 7439-VCL

POST-TRIAL ORDER

WHEREAS plaintiffs filed claims for breach of an easement, tortious interference with an easement, trespass, private nuisance, civil conspiracy, and declaratory judgment;

WHEREAS the Court held trial on October 4-5 and 12, 2012, heard testimony from two expert and eleven fact witnesses, and has considered the arguments and submissions of counsel;

NOW THEREFORE, this 24th day of October, 2012, the Court finds and orders as follows:

1. The lots currently designated 1701, 1703, 1705, and 1707 Concord Pike originally were owned by Concord Development Corporation ("Concord") as a single piece of property (the "Original Property"). In 1946, Concord executed deeds transferring title to lots 1701, 1703, and 1705 Concord Pike to three different purchasers

(the "1946 Deeds"). In this litigation, the parties dispute whether the current owner of lot 1707 possesses easements that burden lots 1701, 1703, and 1705. The plain and direct language of the 1946 Deeds reserved two express easements appurtenant in favor of Concord and its successors in title as the owner of 1707 Concord Pike. Consequently, plaintiffs, in their capacity as the current owners of 1707 Concord Pike, hold the easement rights set forth in the 1946 Deeds.

2. A two-story triplex building constructed in the mid-1940s spans lots 1701, 1703, and 1705 (the "Triplex"). One third of the Triplex stands on each lot. In front of the Triplex is a seventy-two foot wide, twenty-seven foot deep paved area containing seven parking spots (the "Front Parking Area"). Behind the Triplex is an equally wide and deep paved area (the "Back Parking Area"). The Back Parking Area is reached by a nine-foot wide driveway north of the Triplex and located on lot 1705 (the "Common Driveway").

3. A single-story building constructed in 1962 sits on lot 1707 (the "Building"). The Building replaced an earlier wooden structure. Between the front of the Building and Concord Pike is a trapezoidal paved area approximately fifty-seven feet deep with nine feet of frontage on Concord Pike. This area historically accommodated parking for two or three cars. Behind the Building is a roughly triangular area that historically accommodated parking for an additional car.

4. Each of the 1946 Deeds contains two sets of granting and reserving clauses. The first set refers to the Front Parking Area and grants to the transferee:

> [t]he free and uninterrupted right, use and privilege forever in common with Concord Development Company, its successors and assigns, of the hereinafter described twenty-seven foot wide Common Parking and Driveway Area, for parking and driveway purposes. Subject, however, to a proportionate share of the expense of keeping said area in good order and repair. . . .
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> RESERVING, however, unto Concord Development Company, its successors and assigns, the free and uninterrupted right, use and privilege in common with others entitled thereto, forever, for parking and driveway purposes of the whole of the hereinabove described common parking and driveway area. Subject, however, to a proportionate share of the expense of keeping said area in good order and repair.

The second set of granting and reserving clauses refers to the Back Parking Area and Common Driveway and grants to the transferee:

> [t]he free and uninterrupted right, use and privilege forever, in common with Concord Development Company, its successors and assigns, of the hereinafter described common driveway for driveway purposes. Subject, however, to a proportionate share of the expense of keeping said area in good order and repair. . . .
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> ALSO RESERVING, however, unto Concord Development Company, its successors and assigns, the free and uninterrupted right, use and privilege in common with others entitled thereto, forever, for driveway purposes of the whole of the hereinabove described common driveway. Subject, however, to a proportionate share of the expense of keeping said area in good order and repair.

Similar language is not found in the deeds to lot 1707.

5. The guiding principle when interpreting a deed is to "ascertain and give effect to the intent of the parties as reflected in the language they selected." *Point Mgmt., LLC v. MacLaren, LLC*, 2012 WL 2522074, at *16 (Del. Ch. June 29, 2012). If the

meaning is clear, extrinsic evidence will not be consulted. If the language is ambiguous, then the parties' intent may be ascertained by analyzing the "facts and circumstances surrounding the transaction." *Id.* (internal quotation marks omitted). Ambiguities are resolved in favor of the grantee. *See Judge v. Rago*, 570 A.2d 253, 257 (Del. 1990). An express easement will be found when the deed "contain[s] plain and direct language evidencing the grantor's intent to create a right in the nature of an easement." *Alpha Builders v. Sullivan, Inc.*, 2004 WL 2694917, at *4 (Del. Ch. Nov. 5 2004) (citing *Judge v. Rago*, 1989 WL 25802, at *5 (Del. Ch. Mar. 16, 1989) *aff'd* 570 A.2d 253 (Del. 1990)). No particular words are required; any words "clearly showing the intention to grant an easement are sufficient." 25 Am. Jur. 2d Easements and Licenses § 15; *see also Acierno v. Goldstein*, 2005 WL 3111993, at *8 (Del. Ch. Nov. 16, 2005) (finding an express easement in a deed stating "TOGETHER with the right of ingress and egress along a 50# wide right-of-way over the Southwesterly side of lands. . . ."); *Lynam v. Clayville,* 128 A.2d 316, 317 (Del. Ch. 1957) (finding an easement by reservation in a deed stating that the sale was "[s]ubject, however, to the free and uninterrupted right of the [seller], his heirs and assigns, to the use forever of a lane of private road twenty six feet wide . . . ."). Once an express easement is created, it can be terminated in a number of ways including through adverse possession, express release, or merger of the dominant and servient estates. Non-use "will not, by itself," extinguish an express easement. *Ayers v. Pave It,* LLC, 2006 WL 2052377, at *2 (Del. Ch. July 11, 2006).

6. There are two types of easements: appurtenant and in gross. *O'Shaughnessy v. Bice*, 2003 WL 22787612, at *2 (Del. Super. Sept. 30, 2003). An

easement appurtenant benefits a dominant tenement and burdens a servient tenement. *Tubbs v. E&E Flood Farms, L.P.*, 13 A.3d 759, 768 (Del. Ch. 2011). An easement in gross does not benefit a dominant tenement but rather is "personal to the grantee." *O'Shaughnessy*, 2003 WL 22787612, at *2 (internal quotation marks omitted). Although distinguishing between the two can be difficult, an appurtenant easement is typically "more useful to a successor to a property interest . . . than it would be to the original beneficiary after transfer of that interest to a successor." Restatement (Third) of Property (Servitudes) § 4.5(1)(a). An easement in gross typically serves a purpose "more useful to the original beneficiary than it would be to a successor to an interest in property held by the original beneficiary at the time the servitude was created." *Id.* § 4.5(1)(b).

7. Easements appurtenant "'run with the land,' which means they pass with the dominant tenement to successors in interest." *Tubbs*, 13 A.3d at 768; *see also* Restatement (Third) of Property (Servitudes) § 5.1 ("An appurtenant benefit or burden . . . passes automatically with the property interest to which it is appurtenant."). Easements appurtenant transfer with the dominant property even if not mentioned in the documents transferring title. *See Pusey v. Clayton*, 1986 WL 2636, at *2 (Del. Ch. Feb. 20, 1986); *Potter v. Gustafson*, 192 A.2d 453, 456 (Del. Ch. 1963); *Lynam*, 128 A.2d at 317.

8. The plain and direct language of the 1946 Deeds clearly evidences the grantor's intent to burden lots 1701, 1703, and 1705 by reserving express easements appurtenant to the Common Driveway, Front Parking Area, and Back Parking Area for the benefit of lot 1707. The 1946 Deeds reserve for Concord and "its successors and assigns" the "free and uninterrupted right, use and privilege" to use the Common

Driveway, Front Parking Area, and Back Parking Area "forever," subject to the sharing of maintenance expenses. The plain meaning of "successors and assigns" in this context refers to Concord's successors and assignees *in title* as owners of lot 1707. In the context of a document conveying title, that is the clear intent of the words. This usage comports with the view expressed in the Restatement (First) of Property, which was operative at the time of the 1946 Deeds:

> The word 'successors' is used broadly in this Section to mean all who succeed to the position of the predecessor with respect to the land in question. It may thus include both those who succeed to his position as the owner of interest in the land and those who succeed to his position as the possessor of the land regardless of whether there is a succession to any other interest.

Restatement (First) of Property § 530 cmt. b (1944). This usage also comports with the clear intent of the grantor when transferring title via the 1946 Deeds: By reserving easements to the common areas, the grantor enabled the owners of the different lots to continue using the common areas as if the Original Property were still a single parcel.

9. It is not reasonable, as defendants argue, to interpret the language in the 1946 Deeds as referring to Concord's *corporate* successors and assigns. Such a reading would assume unreasonably that Concord jeopardized its ability to obtain full value in a future sale of lot 1707. When the 1946 Deeds were executed, Concord retained lot 1707. If "successors" only referred to Concord and its corporate successors or assigns, then if lot 1707 were sold, the rights to use the common areas on lots 1701, 1703, and 1705 would not transfer to the purchaser of lot 1707. They would remain with Concord or its corporate successor. Because the rights to use the common areas would not run with

title to lot 1707, any purchaser would be at risk of being denied access to the Common Driveway and the Front and Back Parking Areas. Such an interpretation is unreasonable and counterintuitive, because Concord logically would want to be able to transfer the rights to use the common areas to future owners of 1707, thereby ensuring that Concord would receive the full value of the property in a sale. Without the ability to transfer the rights to access the common areas, lot 1707 would have less value. Consistent with rational economic behavior by Concord, the 1946 Deeds grant easements appurtenant that preserve the value of lot 1707 by securing for Concord's successors and assigns *in title* the right to access the Common Driveway and the Front and Back Parking Areas.

10. Extrinsic evidence confirms the plain meaning. Although there understandably were numerous conflicts in the evidence about use of the Common Driveway and the Front and Back Parking Areas, on balance the credible evidence indicated that the Common Driveway and the Front and Back Parking Areas were used collectively by the owners of lots 1701, 1703, 1705, and 1707. Defendant Henry Black testified that after his wife had difficulty backing out of the Common Driveway, he poured a cement pad behind the Building on lot 1707 lot as a turnaround area. His testimony demonstrates that the Blacks, when they lived above 1701, understood that the area behind the Building and the Triplex formed one common area. Other witnesses testified that owners of the Triplex lots used the parking in front of the Building from time to time and vice versa. It is true that several witnesses testified that the easements have not been used more recently by the businesses occupying the Building, but non-use

of an express easement does not by itself terminate the easement. *Ayers*, 2006 WL 2052377, at *2.

11. Additionally, the defendants assembled and introduced an impressive and painstaking analysis of the residential deeds that Concord used to transfer title to purchasers of homes in the adjacent Deerhurst development. With minor exceptions, the Deerhurst houses were built in pairs with each pair of residential lots sharing a common driveway. Many of the residential deeds included the same language as the 1946 Deeds and reserved the right to use the driveway "unto Concord Development Company . . . its successors and assigns. . ." JX 135. The deeds for 20 pairs of residential lots sharing a common driveway have the reserving language in *both deeds*. If the defendants were correct and Concord had truly meant to reserve usage rights only for itself and its corporate successors, the homeowners who subsequently purchased the lots would have no parking privileges in their shared driveways. Those rights instead would have remained with the corporate successors of Concord. What Concord obviously intended was to reserve the right to park in the driveways for successors *in title*.

12. The easements in the 1946 Deeds are appurtenant and run with the land. The easements benefit the owners of lot 1707 by providing access to the Common Driveway and the Front and Back Parking Areas. It cannot be credibly argued that access to these spaces is more useful to a former owner of lot 1707 than to the current owner of lot 1707. Nothing in the record suggests that these easements have terminated. Plaintiffs, as the current owners of lot 1707, have easement rights to use the Common Driveway and the Front and Back Parking Areas as set forth in the 1946 Deeds.

13. In addition to the foregoing declaration regarding the scope of the easements, plaintiffs seek a permanent injunction enforcing and protecting their rights. A permanent injunction is appropriate when a plaintiff has shown (i) actual success on the merits, (ii) irreparable harm without the injunction, and (iii) a threat of harm from failing to issue an injunction that outweighs the harm on the opposing party from granting the injunction. *Nebenzahl v. Miller*, 1996 WL 494913, at *1 n.2 (Del. Ch. Aug. 26, 1996). A party with the right to an easement generally is "entitled to enjoin the defendant's interference with their use of the easement unless equitable considerations preclude entry of the injunction." *Rowe v. Everett*, 2001 WL 1019366, at *7 (Del. Ch. Aug. 22, 2001). Plaintiffs have successfully established their easement rights. The owners of lots 1701, 1703, or 1705 (and their successors and assigns, whether as owners of the lots or otherwise) are hereby permanently enjoined from interfering with plaintiffs' easement rights.

14. Plaintiffs also seek damages. They purchased lot 1707 on June 29, 2000. After renting the Building out for a decade, they decided to open an auto detailing shop. The Blacks own lot 1703 and the neighboring property at 1709 Concord Pike. The Blacks opposed the plaintiffs' new business and vigorously encouraged New Castle County to enforce all possible permitting and zoning regulations against the plaintiffs. After the plaintiffs renovated the Building and were working with New Castle County to address the infractions, the Blacks engaged in two acts of self-help. First, they installed a fence along the property line between lots 1705 and 1707. At trial, the Blacks testified that they installed the fence as a security measure to limit access to the Back Parking

Area and to make the area safer for female tenants. Their testimony was not credible. The fence does not add any incremental protection. It does not attach to the Building, and a person readily could hide behind the Building or the fence itself. Having conducted a site visit, I find that the fence was intended to limit the plaintiffs' ability to have meaningful access to the area behind the Building. Second, and just weeks after they installed the fence, the Blacks placed cement roll-stop parking barriers along the property line between lot 1705 and lot 1707 along the edge of the Common Driveway. The Blacks testified that they did so to ensure that the Common Driveway stayed clear, thereby protecting the easement to use the Common Driveway that benefits lot 1703. The practical effect of the roll-stop parking barriers was to make it exceedingly difficult and dangerous to enter or exit lot 1707.

15. Despite these actions by the Blacks, the plaintiffs failed at trial to carry their burden of proof on damages. A plaintiff may recover only for damages that "can be proven with reasonable certainty." *Pharmathene, Inc. v. SIGA Techs., Inc.*, 2010 WL 4813553, at *11 (Del. Ch. Nov. 23, 2010). A plaintiff cannot recover for lost profits that are "uncertain, contingent, conjectural or speculative." *Id. (*quoting *Callahan v. Rafail*, 2001 WL 283012, at *1 (Del. Super. Mar 16, 2001)). These principles apply with particular force to a new business. Although the plaintiffs have experienced success in starting other businesses, they have minimal business experience in auto detailing. At trial, they presented an expert who attempted to predict how their business would have performed, but his report relied on far too many assumptions and conjectures to be sufficiently reliable.

16. By contrast, the plaintiffs' request for an award of attorneys' fees and costs is granted. This Court may award attorneys' fees as equity requires. *See MBKS Co. Ltd. v. Reddy,* 2007 WL 2814588, at *8 (Del. Ch. Apr. 30, 2007). Fees may be awarded, among other instances, when litigation was brought or maintained in bad faith, or when a party's pre-litigation conduct is so egregious that it warrants fees as a form of damages. *See Arbitrium (Cayman Islands) Handels AG v. Johnston,* 705 A.2d 225, 231 (Del. Ch. 1997). In an analogous case, then-Vice Chancellor Chandler, later Chancellor, awarded attorneys' fees and costs. *See H&H Brand Farms, Inc. v. Simpler*, C.A. No. 1658 (Del. Ch. June 10, 1994). The defendants in *H&H Brand* resorted to self-help to enforce an easement by plowing under farmland, despite having been advised by counsel that their claim to the easement was dubious. The Court held that the defendants should have sought a declaration regarding their rights, rather than resorting to self-help. Similarly in this case, the Blacks were advised by New Castle County and by plaintiffs' counsel that their claimed rights were contested. Rather than seeking a judicial declaration of their rights, the Blacks resorted to self-help and erected the fence and cement roll-stop barriers. As in *H&H Brand*, plaintiffs are entitled to an award of fees and costs against defendants Henry Black, Marylou Black, Raymond Buchta, W. Scott Black, and Blackball Properties LLC.

Vice Chancellor J. Travis Laster