IN THE SUPREME COURT OF THE STATE OF DELAWARE

HENRY BLACK, MARY LOU BLACK, RAYMOND BUCHTA, W. SCOTT BLACK, and BLACKBALL PROPERTIES, LLC,	)	No. 637,2012
Certain Defendants-Below Appellants,	)	
v.	)	Trial Court Below: Court Of Chancery of the State of Delaware C.A. No. 7439-VCL
GARY STAFFIERI and ADRIA CHARLES STAFFIERI,	)	
Plaintiffs-Below Appellees.	)	

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDING

Appellees Gary and Adria Staffieri (the "Staffieris") initiated this action by filing a Complaint in the Court of Chancery on April 18, 2012 which sought interim injunctive relief, permanent injunctive relief, and damages based on a purported easement they alleged was interfered with by the Appellants (the "Blacks").

On April 24, 2012, a Motion to Expedite proceedings was denied by the Trial Court. A Verified Answer And Counterclaim of Certain Defendants was filed on May 2, 2012, in which the Blacks denied the existence of an easement, stated numerous Affirmative Defenses, and asserted Counterclaims for Permanent Injunction and Declaratory Judgment to Quiet Title. The Blacks averred that no easement existed, or in the alternative that it had been abandoned/extinguished.

Next, a number of weeks went by without any action by the Staffieris to prosecute the case, which coincided with a change in their Delaware counsel. This resulted in a continuance of the originally scheduled trial date. On June 5, 2012, the Court below entered an Order postponing the July 10, 2012 trial to October 4 and 5, 2012.

The Staffieris then added numerous additional easement and damages claims in an Amended Complaint. On June 25, 2012, the Blacks filed their Answer And Counterclaims to the Amended Complaint. In it, the Blacks added a Counterclaim seeking Reformation of the Deed language based upon Mistake (*i.e.* scrivener's error).

In July and August of 2012, the parties engaged in an exchange of written discovery. And in August and September of 2012, deposition discovery was taken by the Blacks. Notably, the Staffieris never took any depositions at all.

The case proceeded to trial on October 4 and 5, 2012, as scheduled. Due to a witness's illness, trial was not completed until the following week, on October 12, 2012. Twelve (12) days later, on October 24, 2012, the Court issued its Post-Trial Order (the "Order"). The Order concluded that the Staffieris possessed an Express Easement right pursuant to Deed reservation language running in favor "Concord Development Company, its successors and assigns." In addition, the Order awarded Plaintiffs attorneys fees based upon the Bad Faith Exception to the American Rule.

On November 1, 2012, the Appellants filed a Motion for Reargument or New Trial. The Staffieris filed their response and opposition to the Motion on November 7, 2012. Just a few hours later, the Trial Court issued a summary denial of the Motion.

This appeal followed pursuant to the filing of a Notice of Appeal on December 5, 2012. On December 21, 2012, the Clerk forwarded a letter to counsel establishing the briefing schedule in this appeal. This is the Appellants Opening Brief on Appeal.

SUMMARY OF ARGUMENT

I. The Trial Court Erred In Concluding That Deed Language Reserving Driveway And Parking Area Use Rights To A Corporation And Its "Successors And Assigns" Constituted A Covenant Running With The Land By Interpreting The Language Based Solely Upon A Comment To The Restatement, Rather Than Applying Standard Precepts Of Construction.

II. The Trial Court Erred In Granting An Award Of Attorneys Fees Under The Bad Faith Exception To The American Rule On The Grounds That: 1) Conduct Giving Rise To The Litigation Cannot Generally Be Relied Upon To Establish Bad Faith; And 2) "Clear Evidence" Of A "Clearly Established Right" Was Not Present.

III. The Trial Court Erred In Failing To Decide The Counterclaims For Abandonment Or Extinguishment Of Easement And Reformation.

STATEMENT OF FACTS

I. The Properties, The Deeds, And Evidence Of Intent

A. The Sophisticated Developer Of Deerhurst Does Not Clearly Reserve Appurtenant Property Rights For 1707

In 1943, Concord Development Company, Inc. ("CDC") recorded a "Final Street And Lot Plan" of a portion of "DEERHURST" (the "Plan"). A-266. On the Plan, a "Commercial" parcel located on the eastern boundary of Concord Pike, along with approximately 111 residential building lots, was subdivided from a larger parcel of land. *Id.* Along the northern boundary of the Commercial parcel, a 5-foot wide Walkway was established, which traversed from Concord Pike to the internal residential subdivision street known as York Road (the "Walkway"). *Id.*

On August 26, 1943, CDC recorded two "round trip" Deeds which established a set of "Reservations, Restrictions, Covenants, and Conditions" (the "Covenants") on the lands subdivided by the Plan. A-256 and A-262. Language in the Covenants included the following:

> 1. These covenants are to run with the land and shall be binding on all parties and all persons claiming under them… .
>
> 12. Easements are hereby reserved over the rear five feet of each lot shown on said Plan for utility installation and maintenance. (emphasis added).

It is evident that CDC was aware of the terms and language needed to create covenants running with the land and express easements.

On October 11, 1946, CDC conveyed two separate, subdivided Commercial parcels "with the buildings thereon erected" to purchasers. A-130 and A-135. One Deed conveyed what is now

designated as 1705 Concord Pike ("1705"), and the second Deed conveyed 1703 ("1703"). *Id.* In order to reserve rights to use the common parking and driveway areas for 1701 Concord Pike, which was yet to be conveyed by CDC, the Deeds contained language expressly reserving the right for CDC to assign such rights.[1] Specifically, the language reserved use rights to CDC and "its successors and assigns," but did not reserve an "easement" *per se* or state that CDC's rights would "run with the land."

The "parking" area on the Triplex Properties fronts on Concord Pike. A-144. It is 63 feet wide and 27 feet deep. *Id.* A 9-foot wide driveway area is located on the north side of 1705 Concord Pike, adjacent to the southern boundary of 1707. *Id.* And an additional "driveway" area (not for parking purposes) is located in a 27-foot deep by 63-foot wide area behind the buildings on the Triplex Properties. *Id.*

On November 8, 1946, CDC conveyed 1701 Concord Pike ("1701") by Deed (the "Last Deed," and jointly referred to with the Deeds for 1703 and 1705 as the "1946 Deeds"), which included language granting rights to use the common parking and driveway areas situated on the Triplex Properties. A-139. The Last Deed also contained the exact same reservation language as the Deeds for 1703 and 1705. *Id.* Rights were not reserved for 1707 specifically or generally. *Id.* In addition, no reference to a reservation of "Easements" or "Covenants Running With The Land" was included. *Id.*

[1] 1701-1705 Concord Pike are jointly referred to herein as the "Triplex Properties."

On June 24, 1955, CDC merged with W. Percival Johnson & Son, Inc. A-270. And on October 9, 1980, W. Percival Johnson & Son, Inc. conveyed 1707 Concord Pike to a partnership (the "1980 Deed").[2] A-268. The 1980 Deed did not contain any reference to the grant or conveyance of any Easement or Covenant rights. *Id.*

1707 was subsequently conveyed to the Staffieris by Deed dated June 29, 2000. A-284. The Deed did not include any language granting or conveying any Easement or Covenant rights. *Id.*

B. No Reason Existed For CDC To Retain More Than Personal Rights To Use The Driveway And Parking Areas Circa 1946

In 1946, an old wooden shed building was situated on 1707, at the very rear of the parcel (the "Old Building"). A-286, A-298, A-301, A-305, A-306, and A-78 to 79. The small Old Building was used by CDC owners W. Percival Johnson and his son Joseph as a construction trailer or "contractor's shack."[3] A-122 to 123 and A-126. The area between the Old Building and Concord Pike was paved with asphalt. A-286 and A-301. Due to termite damage, the Old Building was ultimately demolished and replaced in 1962 with the existing structure situated on 1707. A-126 and A-354. So from 1962 to present, 1707 has had a very small triangular shaped rear yard area (currently occupied by an air conditioning unit and posts). A-322.

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[2] W. Percival Johnson & Son, Inc. was a sophisticated real estate developer. *See e.g. Shields v. Welshire Development Co.*, 144 A.2d 759 (Del. Ch. 1958).

[3] W. Percival Johnson died in 1962, potentially as a result of complications arising from a personal injury suffered at the DuPont Building in downtown Wilmington. A-327. *See* also *Johnson v. E.I. du Pont de Nemours & Co.*, 182 A.2d 904 (Del. Super. 1962).

Circa 1946, 1707 enjoyed 6.5 feet of frontage on Concord Pike, with the 5-foot wide Walkway providing a total of 11.5 feet for vehicular maneuvering. A-267. At that time, Concord Pike was a 2-lane road, which was not expanded to 4 lanes until the 1950's. A-66 and A-303 to 305. The Plan for Deerhurst dedicated additional right-of-way to the State, which provided an area for vehicles to decelerate in order to make a right turn into 1707 from Concord Pike. A-266.

In front of the 1962 office building constructed on 1707, there were two striped parking spaces and a concrete curb to provide for "head-in" parking. A-287 and A-308. Additional asphalted area on 1707 allowed other cars to park behind vehicles parked in the lined parking stalls. *Id.* And the 20-foot wide paved area located in the State Right-Of-Way, which was not in the Concord Pike lanes of travel, allowed for adequate backing movements for vehicles to exit 1707. *See* A-321. Consequently, sufficient parking and maneuverability area existed for 1707.

The Walkway was vacated by Order of the Superior Court in 1996. *In re Petition to Vacate Public Walkway in Deerhurst*, 1995 WL 411339, Babiarz, J. (Del. Super., June 29, 1995) and A-149. The decision references: 1) the growth in automobile traffic beginning in the mid 1950's; and 2) the inadequacy of parking on 1707 and the Triplex Properties. With the closure of the Walkway, the commercial establishments lost the ability to allow employees or customers to park in the residential section of Deerhurst and gain access to

their business locations by foot (to preserve the limited parking on 1701 through 1707 Concord Pike).

C. 3 Witnesses With Knowledge Of Historic Use Of The Properties Provided Extrinsic Evidence Of CDC's Intent: No Easement Running With 1707 Was Intended

1. Black Provides Facts On Historic Use From The 1950's to Present

Henry Black ("Black") testified that from 1951 to 1956 he lived at 1693 Concord Pike, right near the Triplex Properties. A-66 to 67. At that time, 1701 had a liquor store run by the Malrines, 1703 was a pharmacy with a soda fountain that sold sundries, and 1705 was Deerhurst Food Market operated by Mr. Fine. A-68. For the most part, the area just north of the Triplex Properties was undeveloped farmland. A-69 and A-300 and A-301. A CALSO (California Standard Oil) service station was at the corner of Murphy Road and Concord Pike at 1709. A-74 and A-298.

Black explained that in the 1950's: 1) 1707 was used as an office by Percival Johnson and his son Joseph; and 2) he would walk past the Triplex Properties and 1707 multiple times a day, to either patronize a business there or visit friends in the residential Deerhurst neighborhood via the Walkway. A-70 to 71. At that time, not many people owned cars (it was a luxury) and there was a bus line that ran along Concord Pike that residents used for transportation. A-72 and A-75 to 76. Concord Pike was so lightly traveled that Black would play in the street there, some days only counting 8 cars traveling by in an hour. A-73.

Black also testified that Percival and Joseph Johnson lived in Deerhurst and typically walked to the building on 1707. A-76 to 77.

He observed that vehicles accessing the building on 1707 parked in front of the building there. A-77. It was used to store tools associated with the construction of homes in Deerhurst and to review plans. A-78 to 79 and A-83.

In the 1960's, Mr. Black and a partner operated a landscaping business out of the second story of 1705. A-80 to 81. From 1969 to 1971, he lived in the apartment on the second floor of 1701 after he got married. *Id.* He also worked at the former CALSO station, then a Chevron. A-82. Black observed in this time period that Joseph Johnson would either walk to the 1707 building or park in front it. A-83. Joseph Johnson's homebuilding activities were largely run out of model homes located in the new home communities he was developing. A-84.

Throughout the 1970's Black returned to the Triplex Properties to patronize two businesses there. A-85. Then he bought the service station at 1709 in 1983. A-86, A-87 and A-349. And he continued to operate an auto repair business there until 1995. A-88.

2. The Deerhurst Barber Testified to Parking And Driveway Use From 1958-1978: The Johnsons Parked On 1707

Marvin Redmond ("Redmond") owned 1703 and ran a barbershop there between 1958 and 1978. A-118 to 119. In 1958: 1) Concord Pike was not heavily traveled; 2) Redmond would typically park along Concord Pike (as did the owners of 1701 and 1705); and 3) many Deerhurst residents used the Walkway to catch the Short Line Bus into Wilmington. A-121 and A-124 to 125.

Minor parking lot and driveway maintenance was undertaken by Redmond. A-129. And when Joseph Johnson built a new building on 1707, the three owners of the Triplex Properties paid equal shares to repave their parking and driveway areas, but Johnson only paid enough to cover repaving 1707. *Id.*

Redmond also testified that the Johnsons would park their cars on 1707 when they used the building. A-123. If the Johnsons ever needed to park in the parking spaces on the Triplex Properties, they would ask Redmond for permission to park there briefly. *Id.*

3. The Deerhurst Baker Confirms 1707 Users Parked On 1707 Only

Testimony was also provided by Susan Rosen, who operated a business known as The Baker's Rack at 1705 Concord Pike from 1983 to 1993. A-55. Her first husband, Ed Jacobs, owned 1707 at one time. T295. And her second husband, Fred Rosen, purchased 1707 from Mr. Jacobs, to use it for his accounting business office. A-58 to 59. Ms. Rosen testified that the businesses and visitors to 1707 parked on 1707, and not on the Triplex Properties or behind the building on 1707. *Id.* The only cars that parked on the Triplex Properties were tenants or visitors related to the Triplex Properties. A-59 to 60.

D. Historic Use And Deed Language Mistake Evidence Also Showed CDC's Intent; No Rights "Running With The Land" for 1707

Raymond Buchta ("Buchta") testified about his Delaware Digital Video Factory business on 1709, and its studio at 1703. A-91. He is Black's son-in-law. A-92. Buchta testified that: 1) Blackball's closing attorney for the purchase of 1703 provided him with a copy of the title search; 2) the Deeds for 1707 said nothing about using

any areas on the Triplex Properties; and 3) his attorney, David Matlusky, Esquire, advised that the Triplex Properties and 1707 were separate and independent of one another. A-93 to 95, A-268, A-270, and A-284.

Buchta also did some independent research regarding 1707 and the Triplex Properties after litigation commenced. A-96 to 98, A-265 to 267, A-283, A-286 to 289, A-307 to 315, and A-320. He discovered that: 1) the Old Building had about 20 feet of additional parking area versus present day; 2) an MLS listing showed 1707 had two striped, head-in parking spaces; 3) the MLS listing also indicated that 1707 had two (2) off-street parking spaces; and 4) the parking situation on 1707 was the same in 2000. A-99 to A101, A-267, A-287, and A-309.

Buchta also testified that fencing was installed in the rear along the driveway for security reasons, and the roll stops were placed in the front to keep the driveway unobstructed. A-102 to 104, A-316, and A-317.

Buchta prepared an exhibit showing an aerial view of 1701 through 1709, with an overlay of the 20-foot State right-of-way that permitted continued access to 1707 regardless of the roll stops. A-104a to 104b and A-321. He also prepared an exhibit which established that 1707 only has one (1) UDC-compliant parking space. A-105 to 106 and A-299.

Finally, Buchta prepared an exhaustive search of CDC Deeds for the 111 homes in Deerhurst. A-106 to 107, A-322a, and A-350a to 350b. The houses had shared driveways that straddled adjacent lot

lines. *Id.* Twenty-three (23) pairs of Deeds contained reservation language similar to the 1946 Deeds, while 26 Deeds excluded the reservation language (*i.e.* the second home of the pair). A-108 and A-322a. In addition, one Deed dated April 13, 1946 contained language providing:

> UNDER AND SUBJECT, however, to a driveway easement for the use and benefit of the owners and occupants of Lot No. 72, Section B, adjoining the hereinabove described premises on the East, for driveway purposes, said driveway easement being more particularly bounded and described as follows, to-wit:"

A-109 to 110 and A-322a (emphasis added). Finally, two (2) Deeds for adjacent, shared driveway parcels contained no reservation language at all. A-110 and A-322a. So CDC made dozens of mistakes in its Deeds.

II. The Properties During The Staffieris' Ownership

A. 1707 Is Used For Office Purposes, And Then Illegally Converted To Auto Service

The Staffieris purchased 1707 in June. A-284. A year later, 1707 was leased to a pay day loan/cash advance business. A-290. 1707 was occupied by tenants until 2010. A-38 to 39.

After being unable to rent 1707 for about a year, the Staffieris decided to open an auto detailing business on 1707 in 2011. A-39. They began work without proper permits from New Castle County ("County"), and were cited for Code Violations. A-346, A-351, and A-352. The County determined that 1707 lacked the requisite 4 off-street parking spaces, and denied a Change of Use Permit the Staffieris needed to open for business. A-292, A-343, and A-359.

Parking roll stops and fencing were installed along the boundary of the 9-foot driveway and 1707 by Ray Buchta, Henry Black, and Scott Black, the three owners of Blackball Properties, LLC. A-111 to 114. The wheel stops were installed because people were blocking the driveway, and the fence was installed after conferring with the neighbors at 1701 and 1705 and receiving confirmation from the County that it was permissible. A-112 to 113. Mary Lou Black had no involvement with the installation. A-115.

B. The Staffieris Got Exactly What They Bargained For: 1707 Sans Parking Or Driveway Rights

When the Staffieris bought 1707 in 2000, they were unaware of the reservation language contained in the 1946 Deeds for the Triplex Properties. A-35. It was not until eleven (11) years later that James Smith, Assistant General Manager of the New Castle County Land Use Department ("Smith"), informed them that language in the 1946 Deeds might provide driveway and parking use rights. A-35 to 36, A-292, and A-295.

C. The Staffieris Never Paid To Maintain Any Of The Driveway Or Parking Areas On The Triplex Properties, Nor Is There Any Proof That Any Prior Owner Of 1707 Did So

The 1946 Deeds contain language establishing an obligation for the beneficiary of the use rights to pay a proportionate share of the cost to maintain the driveway and parking areas. A-132, A-137, and A-141. The lack of any maintenance cost contribution by 1707 owners would show either that: 1) 1707 was not intended to enjoy the benefit of those areas; or 2) any such rights are now extinguished by breach of condition.

The Staffieris repaved and seal-coated the asphalt area on 1707 in 2011. A-47 to 48. But they had no evidence that any owner of 1707 ever contributed to maintain the asphalted driveway and parking areas on the Triplex Properties. A-49.[4]

D. Two County Witnesses Confirmed That 1707 Lacked The Necessary 4 Parking Spaces For A Change Of Use Permit

Smith testified that the Staffieris were proposing to change the use of 1707 for an auto detailing business, which constituted a "light auto service use" under the County's Unified Development Code ("UDC"). A-24. Smith also testified that the Staffieris' use required four (4) off-street parking spaces, and the four (4) diagonal spaces striped in front of the building on 1707 were not a valid, legal non-conforming situation. A-27 to 28. Thus, the Blacks' installation of the wheel stop buffer did not cause the County to place a hold on the issuance of a Change of Use Permit for the Staffieris to open their business. Smith conceded that the County did not cite the Blacks for their installation of such a "parking buffer." A-23.

Additionally, County Land Use Department Planner Joseph Abele testified that he was the one that signed off on the 1707 parking situation being a valid, non-conforming situation. A-29 and A-31 to 32. Mr. Abele agreed that the non-conformity was based on the fact that 1707 only needed three (3) parking spaces for its prior office use, but four (4) spaces were needed for the new auto detailing use proposed. A-33. He conceded that the non-conforming provisions of

[4] The "driveway" area behind the buildings on the Triplex Properties is not asphalt; it is concrete. A-318 to 319.

UDC Article 8 do not permit an expansion of the non-conformity. A-33 to 34. But obviously 1707 would become more non-conforming if 1707 was one additional parking space short of the UDC minimum (4 spaces needed vs. 3 spaces prior to the Use Change). Consequently, Mr. Abele's testimony established that the issuance of a Change of Use Permit for the Staffieris' auto detailing business was legally erroneous.

ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO CONSTRUE THE DEED LANGUAGE PURSUANT TO STANDARD PRECEPTS OF DEED INTERPRETATION

A. Question Presented

Whether the Deed language reserving rights to use a driveway and parking area to "Concord Development Company, its successors and assigns" constituted an easement in gross, rather than an easement appurtenant? The question was preserved in the Trial Court in a pleading (A-372 to 373), a pre-trial brief (A-395 to 401), and in a Motion for Reargument (A-426 to 433).

B. Standard and Scope of Review

Because the proper construction of a Deed is a question of law, the appellate standard of review is *de novo*. *Smith v. Smith*, 622 A.2d 642, 645 (Del. 1993).

C. Argument

1. The Order Erroneously Concluded That An Express Easement Existed, Contrary To The Plain Meaning Rule, Interpretive Rules, And Extrinsic Evidence

(a) The Court Misconstrued Certain Defendants' Argument

The Order concluded that the reservation of driveway and parking rights included in the 1946 Deeds by CDC and "its successors and assigns" established the intent to create an express easement appurtenant to 1707 on the adjacent Triplex Properties. Order at ¶¶5-6. Specifically, the Court held that the term "successors and assigns" meant successors and assignees in title to 1707, based upon a Restatement (First) of Property Comment. *Id.* at ¶6.

The Court also concluded that it was not reasonable, as the Blacks purportedly contended, to read the term "successors and assigns" to refer only to corporate successors and assigns. Order at ¶9. But this was not the Blacks' argument. Instead, the Blacks argued that: (1) the term "successors" referred to corporate successors by merger, acquisition, etc., and (2) the term "assigns" meant parties who received a written assignment of CDC's rights via future Deed conveyance language. A-395 to 401 and A-426 to 433.

(b) The Plain Meaning Rule And Interpretation Principles Were Overlooked

It is well settled in Delaware that the "Plain Meaning Rule" of contract construction calls for the Court to look to the dictionary definition of terms. *Lorillard Tobacco Co. v. American Legacy Foundation*, 903 A.2d 728, 738 (Del. 2006). The Order's reliance upon a Restatement Comment to decide the meaning of the terms "successors" and "assigns" runs afoul of the Plain Meaning Rule. The Plain Meaning Rule requires the application of the common and ordinary meaning of language as "an objectively reasonable third-party observer" would. *Fox v. Paine*, 2009 WL 147813, *5, Lamb, V.C. (Del. Ch., Jan. 22, 2009) . In direct contradistinction, the Restatement is a treatise prepared by a group of law professors.

Additionally, the Order failed to resolve any ambiguities pursuant to the rule it referenced: "[a]mbiguities are resolved in favor of the grantee." Order at 4, ¶5. Appellant Blackball Properties, LLC, ("Blackball") is successor in interest to the original grantee of 1703. Consequently, any ambiguity regarding the

meaning of the word "assigns" must be resolved in favor of Blackball and against the Staffieris.

Further, the Order ignored the fact that Blackball and the owners of 1701 and 1705 Concord Pike have received rights to utilize the parking and driveway areas on the Triplex Properties through express written assignment in the 1946 Deeds and all subsequent Deeds in their chains of title. A-152 to 250. The personal or "in gross" right for the owners of the Triplex Properties to use the parking and driveway areas has been assigned by Deed.[5]

In contrast, the successor to CDC, W. Percival Johnson & Son, Inc., declined to make an express assignment of the reserved easement in gross rights to utilize parking and driveway areas on the Triplex Properties in the 1980 Deed conveying 1707. That deed was signed by Joseph Johnson, who was one of the original members of CDC. The actual intent could not be any clearer; the easement in gross was not assigned and therefore ceased.

(c) Extrinsic Evidence Completely Favors The Blacks' Position

The primary focus in discerning CDC's intent regarding the reservation language in the 1946 Deeds is: (1) the facts and circumstances that existed in 1946, and (2) the conduct of CDC and the Johnsons from 1946 to 1980. The Order failed to consider the totally one-sided evidence which showed that no easement appurtenant

[5] Obviously, the owners of the Triplex Properties do not need any easement right to use each of their individual lands which they hold fee simple legal title to.

was intended to be reserved to 1707; only personal rights were reserved in favor of CDC and its "successors and assigns."

The circumstances that existed in 1946 were: 1) the automobile was much less common, and not owned by many residents; 2) many Deerhurst residents travelled on the Short Line bus, which had a nearby bus stop on Concord Pike; 3) Deerhurst was a suburban outpost, with farmland to the north; 4) the heavily used Walkway connected Deerhurst to Concord Pike; 5) the Triplex Properties' businesses served Deerhurst, and a distant customer base via direct delivery; 6) the wooden structure on 1707 directly abutted the rear boundary line and Walkway, leaving no rear yard on 1707; 7) in the decades following 1946, the Johnsons parked solely on 1707; when they occasionally parked on the Triplex Properties they asked for and received permission; 8) Concord Pike was a lightly travelled, two-lane road with parallel parking near the Triplex Properties; 9) 1707 had at least 3 parking spaces for its small shed building; 10) the Triplex Properties shared 6 total parking spaces for the 3 businesses and 3 apartments; 11) the Johnsons lived in Deerhurst and often walked to 1707; 12) CDC did not regularly use the shed on 1707; 13) the shed was used to store tools and review plans for Deerhurst new home construction; 14) the Johnsons had offices at "model homes" at other new home construction locations; 15) including the Walkway, 1707 had an 11.5 foot wide area for vehicular maneuvering and Concord Pike ingress and egress; 16) CDC knew to use Deed language like "driveway easement for the use and benefit of the owners and occupiers of Lot No. 72," "easements," and

"covenants are to run with the land" when it intended to create appurtenant servitudes; and 17) CDC did not use language in the 1946 Deeds which clearly evidenced an intent to reserve rights appurtenant to 1707.

The facts point to the inexorable conclusion that CDC would not have worried about whether it had access to the Triplex Properties given its 11.5 foot wide access and the little amount of parking that it would have anticipated needing for its limited use of 1707 in that era. And it is counterintuitive to suggest that CDC would have thought it necessary to reserve the right to use a driveway when it had no rear yard to access and the language contained in the 1946 Deeds does not permit parking behind the building situated on the Triplex Properties. Why would CDC reserve rights for 1707 to use a driveway to nowhere?

Nor is it reasonable to believe that CDC would have reserved rights for 1707 to use parking areas in front of the buildings on the Triplex Properties. CDC did not need much parking for its periodic use of the tiny building on 1707. And the little amount of parking needs that it had would be easily satisfied pursuant to the use of the two head-in spaces and additional stacked parking behind them.

2. The Plain Meaning Of The 1946 Deeds' Language Only Created Personal Rights, Now Abandoned

The interpretation of a Deed is a question of law which is based upon rules governing the interpretation of contracts. *Point Management, LLC v. MacLaren, LLC*, 2012 WL 2522074, *16, Glasscock,

V.C. (Del. Ch., June 29, 2012). The fundamental rule in construing Deeds is to determine and apply the intent of the parties in accordance with the Deed language. *Id.* If that language is ambiguous, the party's intent is determined based upon a facts and circumstances analysis and extrinsic evidence. *Id.* Any ambiguity in Deed language should be resolved in favor of the grantee and against the grantors. *Rohner v. Neimann*, 380 A.2d 549, 552 (Del. 1977).

Language is ambiguous when it is reasonably susceptible to multiple meanings. *Fox v. Paine*, 2009 WL 147813, *5, Lamb, V.C. (Del. Ch., Jan. 22, 2009). And language is viewed based upon the common and ordinary meaning of the language, as "an objectively reasonable third-party observer" would. *Id.*

(a) The Common And Ordinary Meaning Of The Reservation Language Created Only Personal Rights In CDC

The operative language contained in the 1946 Deeds is:

> 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… .

An easement may be created by express reservation. *Judge v. Rago*, 570 A.2d 253, 255 (Del. 1990). On its face, however, the language reserves rights to use parking and driveway areas on the Triplex Properties only to CDC and its "successors and assigns."

Notably, CDC chose not to establish an express easement by affirmative written grant, even though it easily could have since it originally owned all 4 parcels: 1701-1707. Nor did CDC use the

terms "easement," "covenant," "servitude,"[6] the phrase "covenant running with the land,"[7] or any other language which would have clearly and unequivocally established an intention to create a real property interest appurtenant to 1707. Indeed, CDC did not even use the term "successor in interest," which is defined as "[o]ne who follows another in ownership or control of property," which "retains the same rights as the original owner." BLACK'S LAW DICTIONARY (9th Ed.) at 1570.

The term "successor" is defined as "[a] corporation that, through amalgamation, consolidation, or other assumption of interest, is vested with the rights and duties of an earlier corporation." *Id.* at 1569. Accordingly, the term "successors" is clear and unambiguous: it means entities such as W. Percival Johnson & Company, which was the successor by merger to CDC.

CDC also used the term "assigns," which can mean the parties to whom rights or property is transferred. BLACK'S LAW DICTIONARY (9th Ed.) at 135 (defining "assignment"). Thus, the term "assigns" is ambiguous. Indeed, CDC failed to use clear terms like "assigns in title" or "assigns in interest."

The ambiguity regarding the meaning of the term "assigns" should be resolved in favor of Blackball, the "grantee" of title to

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[6] The term "servitude" includes easements, irrevocable licenses, profits, and real covenants. BLACK'S LAW DICTIONARY (9th Ed.) at 1492.

[7] A "covenant running with the land" is defined as "[a] covenant intimately and inherently involved with the land and therefore binding subsequent owners and successor grantees indefinitely." BLACK'S LAW DICTIONARY (9th Ed.) at 421.

1703. Thus, "assigns" should be construed to mean persons who receive a written assignment, by Deed or other instrument.

CDC's personal right to use the driveway and parking areas on the Triplex Properties succeeded to W. Percival Johnson & Son, Inc. by operation of corporate merger. But when 1707 was conveyed by W. Percival Johnson & Son, Inc. in 1980, no express written assignment of any rights to use the driveway and parking areas on the Triplex Properties was included in the Deed. Therefore, no rights were passed in the chain of title to the Staffieris.

(b) The Reservation Language Created Rights To CDC "In Gross," Not Rights Appurtenant to 1707

The language contained in the 1946 Deeds creates nothing more than a "private servitude": "[a] servitude vested in a particular person," which "include[s] a landowner's personal right-of-way over an adjoining piece of land." BLACK'S LAW DICTIONARY (9th Ed.) at 1493. It is also described as a "personal servitude": which is "[a] servitude granting a specific person certain rights in property." *Id.*

Reservation language in the 1946 Deeds created only: 1) a "servitude in gross": "[a] servitude that is not accessory to any dominant estate for whose benefit it exists but is merely an encumbrance on a given piece of land"; or 2) a "profit in gross": an interest in another's land that may be expressly conveyed. BLACK'S LAW DICTIONARY (9th Ed.) at 1493 and 1330, respectively. *See also* "covenant in gross" and "easement in gross." BLACK'S LAW DICTIONARY (9th Ed.) at 420 and 586.

The rights reserved specifically to CDC and its corporate successors or written assignees do not constitute a "profit appurtenant" or a "servitude appurtenant." Such appurtenant rights only arise where the right is accessory or attached to a piece of land, for the benefit of that identified land. BLACK'S LAW DICTIONARY (9th Ed.) at 1330 and 1493. The 1946 Deeds do not indicate that CDC's reservation of rights to use the parking and driveway areas on the Triplex Properties is for the benefit of 1707. Consequently, only a personal right for CDC to use the driveway and parking areas was created, which was later abandoned pursuant to the 1980 Deed.

ARGUMENT

II. THE TRIAL COURT ERRED IN AWARDING PLAINTIFFS ATTORNEYS FEES UNDER THE BAD FAITH EXCEPTION TO THE AMERICAN RULE; THE BLACKS HAD A GOOD FAITH LEGAL ARGUMENT

A. Question Presented

Whether the Court of Chancery erred in awarding the Staffieris attorneys fees under the Bad Faith Exception where the Blacks had a valid good faith legal position? The question was preserved in the Trial Court both in a pre-trial brief (A-494 to 498) and in a Motion for Reargument (A-433 to 435).

B. Standard and Scope of Review

The standard of review regarding an award of attorneys fees under the Bad Faith Exception to the American Rule is abuse of discretion. *Versata Enterprises, Inc. v. Selectica, Inc.*, 5 A.3d 586, 607 (Del. 2010). The standard looks to whether the decision was arbitrary or capricious. *Id.* at 608.

C. Argument

Under the American Rule, "express statutory provisions to the contrary, each party involved in litigation will bear only their individual attorneys' fees no matter what the outcome of the litigation." *Cantor Fitzgerald, L.P. vs. Cantor*, 2001 WL 536911, *4, Steele, JJ. (Del. Ch., May 11, 2001). Under the Bad Faith exception to the American Rule, however, "fees may be awarded against the defendant where 'the action giving rise to the suit involve[s] bad faith, fraud, conduct that was totally unjustified, or the like and attorneys' fees are considered an appropriate part of damages."

The proponent of a request for an award of attorneys' fees bears the heavy burden of establishing "clear evidence" of bad faith. *Beck v. Atlantic Coast PLC,* 868 A.2d 840, 851 (Del. Ch. 2005). And a determination of whether the parties' conduct rises to the level of clear evidence of bad faith has been held to constitute "a fact-intensive inquiry." *Auriga Capital Corp. v. Gatz Properties,* 40 A.3d 839, 881 (Del. Ch. 2012).

1. The Order's Bases For Awarding Fees Are Legally Infirm And Factually Erroneous

The Order also erroneously awarded attorneys' fees to the Staffieris. Order at para. 16, p.11. But a good faith dispute over the meaning of unclear Deed language falls far short of the egregious conduct necessary to support such an award.

As set forth in Argument I, well-settled Deed construction principles and extrinsic evidence support the Blacks' position that the Staffieris do not possess easement rights. Their good faith legal position precludes a finding of bad faith. Indeed, the first time easement rights were "clearly established" was when the Order was issued.

Additionally, the Order's grant of attorneys fees based upon the decision in *H&H Brand Farms, Inc. v. Simpler,* 1994 WL 374308, Chandler, V.C. (Del. Ch., June 10, 1994) is misplaced. The decision is inapposite.

In *H&H,* the defendant plowed over a farm field and graded an area to establish an access road on adjacent land. The defendant's purported justification for doing so was a farfetched theory that an

express easement granted to the State entitled defendant to easement rights based on general language that other (unidentified) parties were entitled to use the right-of-way. *H&H Brand* at *2-3. No express language created rights in the public generally or any third party specifically. In addition, the defendant asserted a second frivolous claim: a grant of easement rights to the State constituted a public road dedication. *Id.* at *4. Lastly, the defendant's attorney had expressly advised defendant to obtain permission from the State or the property owner to use the right-of-way. *Id.* at *5.

In the instant action, no frivolous legal position was taken by the Blacks; they had a valid, good faith argument as to the meaning of the Deed language. Nor did the Blacks receive any legal advice contrary to their position. Consequently, *H&H Brand Farms, Inc. v. Simpler* is not on point.[8]

Finally, the Order's assertion that the County warned the Blacks "that their claimed rights were contested" is incorrect. Instead, the County advised the Staffieris that they might possess rights to use the parking and driveway areas on the Triplex Properties. Exs. 99 and 100. But the County did not take any enforcement action against the Blacks, or otherwise warn them in any way. In fact, the County advised the Blacks that installing the fence was permissible. The County was involved with Code issues, not private easement rights.

[8] Perhaps this is why the Order only cites the decision with the reference "*See.*" According to § 2.2(a) of the Bluebook, or Uniform System Of Citation, the Introductory Signal "*See*" is used when the proposition is not stated by the cited authority, but purportedly follows from it.

Only the Staffieris contested the Blacks' legal position, first doing so 4 and 5 months after the fence and roll stops were installed, respectively. A-40 and *Cf.* A-146. If one party's opposition to an opposing party's position is sufficient to award attorneys fees standing alone, then the Bad Faith Exception to the American Rule will be transformed into a mere "Prevailing Party" rule that completely eviscerates the American Rule in Delaware *jurisprudence*. Accordingly, the Order's award of fees was unjustified.

2. Appellants' Litigation Positions And Conduct Were Taken In Good Faith; Clear Evidence Of Clearly Established Rights Was Lacking

This Court has previously held that "[g]enerally, the Bad Faith Exception for the American Rule for attorneys' fees 'does not apply to the conduct that gives rise to the substantive claim itself.'" *Versata Enteprises, Inc., supra*. In the case at bar, the Court below awarded attorneys fees based upon the conduct that gave rise to the litigation. Consequently, the Court of Chancery erred, and reversal is warranted.

Only where a party's legal position is frivolous may fees be awarded. This Court has previously held that "courts have found bad faith where parties have unnecessarily prolonged or delayed litigation, falsified records, or knowingly asserted frivolous claims." *Johnston v. Arbitrium (Cayman Islands) Handels AG,* 720 A.2d 542, 546 (Del. 1998).

The analysis of a claim under the Bad Faith Exception is exacting. The Court of Chancery has previously held that:

> The party invoking the Bad Faith Exception "bears the stringent evidentiary burden of producing 'clear evidence' of bad-faith conduct" by the opposing party. "The standard is arduous: situations in which a party acted vexatiously, wantonly, or for oppressive reasons." Generally, a party acting merely under an incorrect perception of its legal rights does not engage in bad-faith conduct; rather, the parties' conduct must demonstrate "an abuse of the judicial process and clearly evidence [] bad faith." (emphasis added).

But the Blacks did not take a frivolous legal position. Instead, the action involved, at best, an incorrect legal interpretation of Deed language. Once again, reversal is therefore warranted.

In the end, the trial court's award of fees, if allowed to stand, would mean that the Bad Faith Exception is now nothing more than a "Prevailing Party" rule. Under those circumstances, the Bad Faith Exception would swallow the American Rule whole, and result in a new "automatic fee shifting" rule in Delaware. The Order was in error.

3. The Blacks Did Not Violate Rights Which Were "Clearly Established" Pre-Litigation

A good example of the egregious type of conduct necessary to establish an entitlement to an award of fees under the Bad Faith Exception is presented by *Judge v. City of Rehoboth Beach*, 1994 WL 198700, *2-3, Chandler, V.C. (Del. Ch., April 29, 1994). In *Judge*, the City denied a property owner access to the public road network even after: 1) the Court of Chancery held that access was legally required; 2) the Delaware Supreme Court affirmed; and 3) the City's own lawyer provided an opinion that access must be provided. In addition, the denial of access was inconsistent with the grant of

access to neighboring property owners, and the record was devoid of any valid basis for the City's decision. *Id.* at *6. Based upon these 5 facts, the Court concluded the City's position was taken in bad faith and awarded fees.

In direct contradistinction to *Judge*: 1) the Staffieris' right to use the driveway and parking areas on the Triplex Properties was not previously adjudicated; 2) no legal opinion contrary to the Blacks' position was provided; and 3) the Blacks' possessed a valid, good faith Deed interpretation argument supporting their position. Under these circumstances, the record establishes that the award of fees to the Staffieris was arbitrary and capricious.

The type of bad faith award granted in *Judge* is referred to in Court of Chancery *jurisprudence* as a "subset" of the Bad Faith Exception, where a defendant's conduct forced the plaintiff to file suit to "secure a clearly defined and established right." *McGowan v. Empress Entertainment, Inc.*, 791 A.2d 1, 4 (Del. Ch. 2000). The fact that the Order had to construe the Deed language and rely upon extrinsic evidence proves that the rights were not clearly established in the Deed. The Order was the first time that rights were clearly established. Consequently, the award of attorneys fees was in error.

ARGUMENT

III. THE COURT OF CHANCERY ERRED IN FAILING TO DECIDE COUNTERCLAIMS FOR ABANDONMENT OR REFORMATION OF THE EASEMENT

A. Question Presented

Whether the trial court erred in failing to decide two Counterclaims asserted by Appellants: 1) Abandonment of any easement; and 2) Reformation of any easement based upon mistake? The question was preserved in the Trial Court in a Counterclaim pleading (A-372 to 376), a pre-trial brief (A-417 to 421), and in a Motion for Reargument (A-435 to 437).

B. Standard and Scope of Review

The Trial Court's failure to enter Judgment on the Counterclaims, as required by Court of Chancery Rule 54(b), raises a question of law. This Court reviews questions of law *de novo*. *Sweeney v. Delaware Dept. of Transp.*, 55 A.3d 337, 341-42 (Del. 2012).

C. Argument

1. The Court Failed To Decide The Blacks' Reformation Claim

In their Answer and Counterclaim, Certain Defendants asserted a claim for Reformation of the Deed language based upon scrivener's error. A-373 to 376. But the Order did not decide the claim.

At trial, the Blacks presented evidence that CDC mistakenly included and/or excluded reservation rights in other Deerhurst Deeds. In addition, CDC's corporate successor did not assign any easement rights in the 1980 Deed by which it conveyed 1707. Further, undisputed extrinsic evidence established the lack of any

legitimate need for CDC to reserve rights to use the driveway and parking areas on the Triplex Properties in favor of 1707; the driveway would have led to nowhere, and more than sufficient access and parking was available for 1707 given CDC's minimal requirements in the 1946 era. Consequently, adequate record evidence exists to establish that the inclusion of reservation language in the Last Deed by CDC was a mistake and that its inclusion to the Deeds for 1703 and 1705 was only intended to reserve rights temporarily so CDC could grant rights to 1701 in the Last Deed.

2. The Court Also Failed To Decide The Blacks' Counterclaim Seeking Easement Extinguishment By Abandonment

Nor does the Order contain any decision on the Blacks' Counterclaim seeking a declaration that easement rights were extinguished by Abandonment. *See* A-372 to 373. CDC's corporate successor abandoned rights by failing to include an express written assignment of those rights in the 1980 Deed. In addition, CDC and its corporate successor did not use the driveway and parking areas on the Triplex Properties in the 34 years post-1946. Lastly, an abandonment by breach of easement condition was also established (failure to pay 25% of maintenance costs).

3. The Trial Court's Failure To Decide Two Counterclaims Is Grounds For Remand For A Decision On Both

The Blacks' 2 Counterclaims were compulsory pursuant to Court of Chancery Rule 13(a), as they arose out of the same transactions and occurrences as the subject matter of the Staffieris' easement claims. The Blacks fully briefed the Counterclaims. And they

presented evidence at trial through testimony and documents in support of the two Counterclaims.

On the issue of Abandonment, the Blacks cited the Restatement (Third) of Property, which modifies the long-held principle regarding the type of evidence needed to establish extinguishment of an easement by Abandonment. The modern rule provides that mere non-use for an extended period of time is sufficient to establish Abandonment. Restatement (Third) of Property § 7.4, Comment c. The Comment also provides that, at a minimum, the quantum of additional evidence needed beyond mere non-use diminishes as the period of non-use grows.

Additionally, Restatement (First) of Property § 545, Comment b. provides that the act of failing to include reference to a covenant running with the land in an out-conveyance Deed "may be to extinguish liability on the promise, thus making the withholding equivalent to a release." In the case at bar, evidence was presented establishing that the successor to CDC failed to include reference to any use rights for the driveway and parking areas on the Triplex Properties in the 1980 Deed conveying 1707. Combined with 34 years on non-use, the evidence supported a finding of Abandonment.

Deed language may be reformed based upon unilateral mistake with knowing silence. *Collins v. Burke*, 418 A.2d 999, 1002 (Del. 1980). Evidence that the reservation language in the 1946 Deeds was a unilateral mistake by CDC included: 1) CDC had no need to reserve driveway or parking rights for use on 1707; it had direct access

from Concord Pike and parking for its tiny "construction trailer" type building in 1946; 2) CDC and its successor by merger did not use the driveway and parking areas on the Triplex Properties without express permission for 34 years after 1946; 3) CDC made mistakes in dozens of Deeds for residential parcels which shared driveways in Deerhurst; and 4) CDC's successor by merger did not include any express grant of reserved rights when it conveyed 1707 in 1980. But this claim remains outstanding, and undecided in the Court of Chancery.

Finally, evidence adduced at trial established that no owner of 1707 ever complied with the easement condition: payment of a proportionate share of driveway and parking maintenance costs. In fact, Joseph Johnson had a chance to do so when he redeveloped 1707 in 1962, but he only paid enough to repave 1707; the owners of the Triplex Properties paid enough to repave the asphalt portions of the driveway and parking areas. In addition, the Staffieris only paved 1707, and they had no evidence that prior owners of 1707 complied with the condition. Accordingly, any easement was rendered unenforceable by virtue of a 66 year breach of condition precedent.

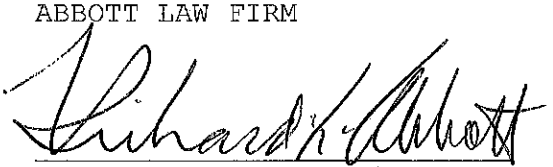
Under Court of Chancery Rule 54(b), the Court's failure to adjudicate fewer than all of the claims "shall not terminate the action as to any of the claims." Thus, the two Counterclaims are still pending before the Court of Chancery, awaiting its decision. Accordingly, the Court should remand the matter for a decision on the merits of the two Counterclaims, unless mooted by reversal of the Order.

CONCLUSION

Based on the foregoing, the Blacks respectfully request that this Court reverse the Order's holdings regarding an Express Easement and an award of attorneys fees. In the alternative, the Blacks respectfully request that the Court remand the case for a decision on the Abandonment and Reformation Counterclaims.

The Trial Court erred in construing the phrase "Concord Development Company, its successors and assigns" contained in the Deed to constitute a covenant running with the land. Deed construction principles ascribe a meaning which created only a since-abandoned easement in gross. In addition, the Trial Court erred in granting an award of attorneys fees based upon the Bad Faith Exception to the American Rule on the grounds that the Staffieris failed to provide "clear evidence" that the Blacks violated a "clearly established" easement right. Lastly, the Trial Court erred in failing to decide the Black's Abandonment and Reformation Counterclaims. Accordingly, the Court should either reverse the Trial Court's easement and attorneys fees decisions, or in the alternative remand the action for a determination of the 2 undecided Counterclaims.

ABBOTT LAW FIRM



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