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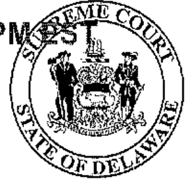

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEES GARY AND ADRIA STAFFIERI'S MOTION TO AFFIRM

Appellees hereby move, pursuant to Supreme Court Rule 25(a), to affirm the Court of Chancery's decision below on the grounds that it is manifest on the face of Appellants' opening brief that the appeal is without merit for the following reasons: 1) the Court of Chancery's holding that Appellees have certain express easement rights by deed to a common driveway and parking areas is supported by well-settled Delaware law; 2) the Court of Chancery did not abuse its discretion in awarding attorneys' fees and costs to Appellees based on the bad faith of Appellees; and (3) the Court of Chancery, according to well-settled Delaware law, implicitly denied Appellants' counterclaims.

1. **First**, the Court of Chancery's holding that Appellees have express easement rights appurtenant to a

common driveway and parking area, based on the Court of Chancery's construction of the relevant deeds, should be affirmed because it is governed by clearly settled Delaware law. *See Staffieri v. Black*, Del. Ch., C.A. No. 7439-VCL, Laster, V.C. (Oct. 24, 2012) (the "Order"). In the Order, the Court of Chancery relied upon deeds that conveyed lots 1701, 1703, and 1705 Concord Pike from the original owner to subsequent purchasers (the "1946 Deeds"). *See* Order at 1, ¶ 1; *see also* A-139-143 (1946 deed for 1701); A-135-138 (1946 deed for 1703); A-139-134 (1946 deed for 1705). Using settled canons of deed interpretation, *see* Order at 3, ¶ 5, the Court of Chancery held that the "plain and direct language of the 1946 Deeds reserved two express easements appurtenant in favor of [the original owner] and its successors in title as the owner of 1707 Concord Pike", *see* Order at 1, ¶ 1. The Court of Chancery ultimately held that Appellees, as current owners of 1707, hold the easement rights in the 1946 Deeds. *See* A-144-145.

2. In so holding, the Court found that the language reserving such easement rights was "plain and direct" and unambiguous. Order at 1, ¶ 1, and 5, ¶ 8. Thus, according to well-settled Delaware law, the Court of Chancery did not consult extrinsic evidence in reaching its initial holding that Appellees have easement rights under the 1946 Deeds.

See Pellaton v. Bank of New York, 592 A.2d 473, 478 (Del. 1991). Instead, the Court of Chancery, contrary to Appellants' arguments otherwise (*see* Appellants' Op. Br. at 17) relied upon the plain meaning of the term "successors and assigns," which appears in each of the 1946 Deeds. The Court also relied on section 530 of the Restatement (First) of Property in defining the term "successors and assigns" as successor and assigns in title, such as Appellees.[1] *See* Order at 6, ¶ 8. The Court of Chancery used well-settled canons of interpretation in construing the 1946 Deeds in reaching its holding and, thus, it should be affirmed.

3. **Second**, the Court of Chancery did not abuse its discretion in finding that Appellants acted in bad faith when they installed cement parking blocks and fencing along the common driveway to prevent Appellees from accessing their property by way of the two easements. *See* Order at 11, ¶ 16. Awards of attorneys' fees and costs based on the bad faith exception are subject to review under the abuse of discretion standard. *See Johnston v. Arbitrium (Cayman Islands) Handels AG,* 720 A.2d 542, 546 (Del. 1998). Below,

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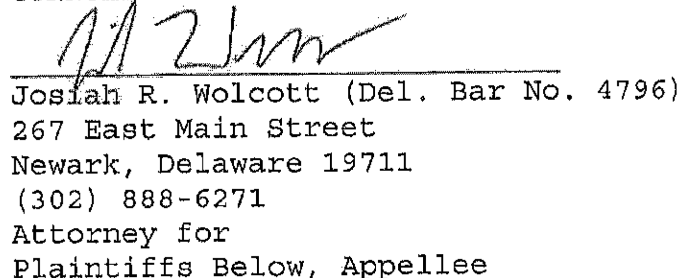
1 Appellants argue that "successors" means corporate successors by merger and that "assigns" refers to parties that have received a written assignment of easement rights. *See* Appellants' Op. Br. at 17. Such an interpretation would lead to an absurd result as none of the current owners of 1701, 1703, 1705, or 1707 fit into either of those definitions.

the Court of Chancery held that an award of fees and costs is proper because Appellants resorted to self-help, rather than seeking a judicial determination of their rights. *See id.* (citing *H&H Brand Farms, Inc. v. Simpler*, 1994 WL 374308, at *5 (Del. Ch. June 10, 1994) (Ex. A)). The Court of Chancery below did not abuse its discretion in awarding attorneys' fees and costs to Appellees.

4. **Third**, under well-settled Delaware law, even if the Court of Chancery did not explicitly deny Appellants' counterclaims below, the Court of Chancery did so implicitly because they involved the same issues as Appellees' claims. *See DeBonaventura v. Nationwide Mut. Ins. Co.*, 428 A.2d 1151, 1154 (Del. 1981) (affirming denial of certain claims by implication as they involved the same facts as the other claims decided by the trial court).

WHEREFORE, Appellees Gary and Adria Charles Staffieri respectfully request that the decision of the Court of Chancery below be affirmed.

CONNOLLY GALLAGHER LLP



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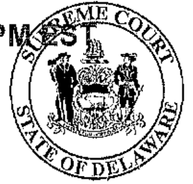

EXHIBIT A

1994 WL 374308
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware, Sussex County.

H & H BRAND FARMS, INC., Plaintiff,
v.
Theodore B. SIMPLER and Edward J. Kaye, individually and as a partnership known as Bailey's Landing Association, Defendants.

Civ. A. No. 1658. | Submitted June 3, 1994. | Decided June 10, 1994.

Attorneys and Law Firms

Lawrence B. Steele, III, of Lawrence B. Steele, III, P.A., Georgetown, for plaintiff.

William M. Chasanov of Brown, Shiels & Chasanov, Georgetown, for defendants.

Opinion

MEMORANDUM OPINION

CHANDLER, Vice Chancellor.

*1 This lawsuit, between plaintiff, H & H Brand Farms, Inc. ("plaintiff"), and defendants, Theodore Simpler, Edward Kaye and their partnership, Bailey's Landing Association (collectively "defendants"), concerns defendants' use of a right of way across plaintiff's land to defendants' property. In mid-March, 1994, defendants, of the opinion that they were entitled to develop and use a 60 foot strip of plaintiff's land necessary to develop their property for a residential subdivision, began plowing under plaintiff's field to prepare for the development of a road. Consequently, on March 18, 1994, plaintiff applied to this Court for a temporary restraining order, contending that defendants have no legal right to develop this 60 foot right of way. Shortly thereafter, the parties entered into a standstill agreement under which plaintiff restored his field to its original size and the parties agreed to litigate the issue of whether defendants are entitled to develop and use the 60 foot strip of land in question. A trial was held on June 3, 1994. This Opinion sets forth my findings of fact and conclusions of law.

I. BACKGROUND

Plaintiff owns a tract of land located in Broadcreek Hundred, Sussex County, Delaware (the "H & H land"). The H & H land was conveyed to plaintiff from Rudolph B. and Marian Lee Hastings, on December 1, 1976. *See* Joint Exhibit 4. Prior to this conveyance, in 1970, Rudolph and Marian Hastings (in conjunction with other family members) conveyed another, nearby, tract of land to the State of Delaware for the use of the Department of Natural Resources and Environmental Control ("DNREC"). *See* Joint Exhibit 3. This tract of land is known today as the Nanticoke Wildlife Refuge. Defendants own a tract of land adjoining plaintiff's property (the "Bailey's Landing property"), which they acquired from the Estate of Edward Krewatch on April 30, 1991. *See* Joint Exhibit 6. The Bailey's Landing property is located between the H & H land and the Nanticoke Wildlife Refuge.

For the past 70 years, a 15 foot right of way, located on plaintiff's property (the "Old Woods Road"), was used by plaintiff and its predecessors in interest, defendants and their predecessors in interest and DNREC and its predecessors in interest, to access the various properties described above. In 1970, however, as part of the conveyance of land known as the Nanticoke Wildlife Refuge, the Hastings family conveyed an easement to the State of Delaware and DNREC, to be located over the Old Woods Road. This easement can be expanded to no more than 60 feet in width, and, if expanded, must conform to the Highway Department of the State of Delaware requirements for a highway in a suburban development. *See* Joint Exhibit 3. DNREC and the State of Delaware have never developed nor used this easement.

Prior to closing their purchase of the Bailey's Landing property with the Krewatch Estate, defendants contacted DNREC about the possibility of developing and using the 60 foot wide easement. *See* Joint Exhibit 7. By letter dated May 14, 1991, DNREC refused defendants' request to develop the 60 foot easement, stating that it had no legal right nor desire to expand the use of the easement for private subdivision purposes. *See* Joint Exhibit 8. Later, defendants offered to acquire from plaintiff a right of way across plaintiff's land. *See* Joint Exhibit 10. After plaintiff refused to sell to defendants a right of way, defendants began staking out a 60 foot right of way on plaintiff's property and, in March, 1994, smoothed the

surface in preparation to construct a 60 foot right of way. Thereafter, plaintiff applied to this Court for a temporary restraining order and the parties agreed to have the issue determined in this lawsuit.

II. LEGAL ANALYSIS

*2 It is the language of the grant of the 60 foot wide easement to DNREC (the "easement") from which the present dispute arose. That language provides that the Hastings family grants to the State of Delaware and DNREC

> the use in common with others entitled thereto forever an easement over [the Old Woods Road], said easement to be located over the old right of way now existing ... [and] conform[ing] with the Highway Department of the State of Delaware requirements for its acceptance and maintenance as a road or highway in a suburban development but in no event shall this right of way including the present right of way be more than 60 feet in width.

See Joint Exhibit 3. Defendants maintain that they are persons included in the above language, "with others entitled thereto," and, therefore, are entitled to develop and use the 60 foot wide easement granted to DNREC from the Hastings family. Alternatively, defendants argue that by virtue of the terms of the grant of the easement and DNREC's and the State of Delaware's acceptance and recordation of the grant, a public road in the form of the 60 foot right of way was dedicated and accepted by the State.

Plaintiff, on the other hand, contends that the easement was intended to be for the use of DNREC, if and when it so chooses to construct the road. For example, if DNREC chose to develop the 60 foot wide right of way as a public accessway to the Nanticoke Wildlife Refuge, plaintiff asserts that defendants would then have the right to use the easement. Plaintiff argues, however, that DNREC is the only party that has the right, according to the language of the easement, to develop the 60 foot right of way. Moreover, plaintiff claims that it is entitled to damages resulting from defendants plowing under of its field and costs incurred in restoring plaintiff's field to its original size. Finally, plaintiff asserts that the State did not dedicate and accept a public road when it accepted the grant containing the easement in question.

A. *The Language of the Easement*

The scope of an easement arising by express grant, such as the one at issue here, depends upon the terms of the grant. Courts can, however, consider the circumstances surrounding the grant of the easement when the easement is imprecise in its terms. Ambiguities arising from the language of an express easement are generally construed against the grantor. Jon W. Bruce and James W. Ely, Jr., *The Law of Easements and Licenses in Land* ¶ 7.04[1] (1988).

As described more fully below, I am of the opinion that the easement grants to DNREC and the State the right to develop and use a 60 foot strip of plaintiff's property. The easement does not, however, grant defendants any rights in regard to this strip of land until it is constructed as a road by DNREC.

First, the easement at issue here was conveyed in a deed to the State and DNREC from the Hastings family. Defendants were not a party to that deed and are not in the chain of title of the deed containing the grant of the easement. Defendants' title derives from an unrelated grantor, the Krewatch estate, and the deed of conveyance to defendants does not mention an easement or right of way. In addition, nothing in the language of the 1970 deed to the State and DNREC indicates that defendants were intended to be third party beneficiaries of the easement grant. Nor is it sensible to think that the State would negotiate and pay for an easement to benefit an unrelated third party property owner. Thus, it is doubtful whether defendants have standing to assert any rights that might arise by virtue of the easement.

*3 Second, the grant of the easement merely gives DNREC and the State the *right* to develop a 60 foot right of way, if it so chooses. It does not require DNREC and the State to build a 60 foot right of way. Nor does it confer upon the general public the right to develop a 60 foot right of way. For example, DNREC, if it chose not to develop the right of way, could convey it back to plaintiff, thereby extinguishing *anyone's* right to develop the right of way. *See Maciey v. Woods,* Del.Supr., 154 A.2d 901, 904-05 (1959) (holding that the conveyance of a proposed easement to the subservient property owner extinguishes the easement and makes the grant inoperable).

Third, the 1970 deed plainly grants to the State the right to use forever, "in common with others entitled thereto," the easement over the Old Woods Road. The phrase "in

common with others entitled thereto" is a short-hand way to acknowledge that other persons had a right to use the Old Woods Road to access contiguous properties. This was true of defendants' predecessors in title, who for years possessed, and used, an easement by necessity over the Old Woods Road. The Hastings' 1970 deed to the State merely recognized this extant legal entitlement, expanding the servitude only in favor of the named grantee, the State and DNREC. In other words, the plain language of the easement grants to DNREC and the State the right to use the existing easement, the Old Woods Road, recognizes that others are also entitled to use that same easement (*e.g.*, persons possessing an easement by necessity to access their property), and grants DNREC and the State the right to expand the existing easement to 60 feet in width. It neither grants nor operates to bestow any other rights on any other parties.

Moreover, Philip Carpenter, an employee of DNREC with the authority to grant use of the 60 foot wide easement, testified that DNREC did not intend the easement to be used until and unless DNREC determines to construct the right of way. In light of the fact that DNREC is a party to the deed which contains the easement, I find Carpenter's testimony persuasive. *See Macley,* 154 A.2d at 904 ("the question of whether or not an express grant of a private easement ... was made to plaintiffs ... depends upon the meaning of the language of the deed in the light of the intention of the parties as determined by the surrounding facts and circumstances").

Defendants argue, however, that Carpenter's testimony should be discounted because DNREC has an interest in these proceedings. Apparently, DNREC and defendants have entered into an option contract regarding DNREC's purchase of the Bailey's Landing property, the price of which is dependent upon an appraisal of the property. An appraisal, defendants suggest, will be significantly lower if the 60 foot right of way cannot be lawfully constructed or used by defendants.

As to this argument, I first note that DNREC, as a party in the chain of title of the deed containing the easement, has an interest in these proceedings regardless of the existence of an option contract between defendants and DNREC. DNREC's interest is that this Court interpret the deed to the Nanticoke Wildlife Refuge as DNREC intended when it accepted the deed. Such an interest should hardly cause this Court to discount Carpenter's testimony and, in fact, as noted above, should result in this Court giving his testimony greater weight. Second, I am not persuaded that the highly contingent option contract should affect negatively the weight given to Carpenter's testimony. Pursuant to the terms of the option contract, defendants have no obligation to sell the Bailey's Landing property to DNREC. Moreover, Mr. Simpler testified that defendants intend to develop the Bailey's Landing property into a 60 lot subdivision. Thus, it appears likely that DNREC will not have an opportunity to exercise its rights under the option contract. As a result, its interest in any appraisal value that might be placed on the Bailey's Landing property is contingent at best.

*4 Finally, the result is the same if the language in the easement is characterized as ambiguous. Under that approach, I must resolve any ambiguity in favor of the grantee, in this case, the State and DNREC. *See Macley,* 154 A.2d at 904. DNREC has taken the position that the "others entitled thereto" language applies to defendants only if, and when, DNREC develops the right of way. As a result, construing the easement language in DNREC's favor would result in the conclusion that defendants, until DNREC constructs the 60 foot right of way, have no right pursuant to the terms of the easement to use the 60 foot easement. This construction is consistent with DNREC's intention as to the meaning of the easement when it accepted the deed.

B. *Dedication of a Public Road*

Defendants' second argument is, that by virtue of the terms of the grant of the easement and DNREC's and the State's acceptance and recordation of the deed containing the grant, the State dedicated and accepted a 60 foot wide public road, which defendants are entitled to use to develop their property as a residential subdivision. It is unclear upon what theory defendants rely in asserting that the State has dedicated and accepted a public road. But, as described below, it is very clear that defendants have not established that the State's actions in regard to the deed conveying the Nanticoke Wildlife Refuge resulted in the dedication and acceptance of a public road in the form of the easement mentioned therein.

First, the grant of the easement was not intended to dedicate a public road. Rather, it merely gave DNREC the right to build a road that conformed to certain specifications. Second, the grant of the easement does not meet the requirements for dedication and acceptance of a public road. A public road may be created in three ways: by statutory dedication and acceptance, by common law dedication through adverse use, and by recordation of a subdivision showing streets, the conveyance of lots by reference to the subdivision plan and public use. *Brosius-Eliason Co. v. DiMondi,* Del.Ch., C.A. No. 11338, Berger, V.C. (Nov. 15, 1991).

Here, there has been no statutory acceptance and

dedication by the State because there is no evidence of any act of public authorities expressly creating or recognizing the 60 foot strip of land as a public road. Nor is there any evidence of implied dedication of the easement because the State has not assumed control over nor improved the 60 foot strip of land in question. *See Reinhardt v. Chalfant,* Del.Ch., 110 A. 663, 665 (1920). As mentioned above, neither the State nor DNREC has ever used or developed the land referred to in the easement. Likewise, there has been no common law dedication of the 60 foot strip of plaintiff's land because there is no record evidence of use of the 60 foot right of way by the public as of right. The requirement of public use is necessary for common law acceptance of the way as a public road. *Id.* Although Mr. Carpenter testified at trial that DNREC permitted certain hunters to use the Old Woods Road to access the Nanticoke Wildlife Refuge, this discretionary use does not amount to use by the public *as of right.* Finally, because the right of way at issue is not part of a subdivision development plat that was recorded by public authorities, that means of accepting and dedicating a public road is also inapplicable. *See, e.g., Hart v. Durr,* Del.Supr., 154 A.2d 898 (1959). Accordingly, I find that the State has not dedicated the 60 foot strip of plaintiff's land referred to in the easement as a public road and defendants are not entitled to develop it on that basis.

*5 For the foregoing reasons, I find that defendants are not entitled to use or develop the 60 foot wide right of way granted to DNREC and the State by the Hastings family. They may continue to use the existing 15 foot right of way, the Old Woods Road, that has been used for the past 70 years.

C. *Damages*

As a result of defendants' act of plowing under plaintiff's field, plaintiff seeks damages in the amount of approximately $23,000, representing its estimation of loss of earnings on the damaged field. In addition, plaintiff seeks reimbursement, in the amount of $125, for the cost of restoring its field to its original size, and reimbursement for the surveyors' costs relating to the restoration. Finally, plaintiff seeks attorney fees on the basis that defendants' conduct in regard to the Old Woods Road has been egregious.

At trial, plaintiff presented evidence that approximately six-tenths of an acre of its seedless watermelon field were damaged by defendants' actions. Plaintiff then presented an expert on soil who testified as to the projected crop loss that might result from defendants' damaging of plaintiff's soil. The expert testified, however, and his report indicates, that a yield loss figure for the damaged soil cannot be determined until two or three crops have been grown and the results measured. *See* Joint Exhibit 13.

It is well settled under Delaware law that a plaintiff may not recover for damages which are speculative or conjectural. *Coleman v. Garrison,* Del.Supr., 349 A.2d 8, 12 (1975). Here, plaintiff's expert testified that a yield loss figure cannot be estimated with precision until plaintiff has grown two or three crops on the damaged soil. Nor could the expert state with certainty how long it would take to restore the damaged soil to its original fertility. As a result, notwithstanding the uncontroverted fact that a little over half an acre of plaintiff's lands were damaged by defendants' unlawful action, plaintiff cannot recover for loss of earnings on these damaged lands because any estimated damage figure would be speculative. Plaintiff is entitled, however, to reimbursement for the cost of restoring the field to its original size and related survey costs.

I find also that plaintiff is entitled to attorney fees. This Court has authority to award attorney fees as equity so requires. 10 *Del.C.* § 5106. Fees are not generally awarded, however, unless the party against whom the fees are assessed acted in bad faith, fraudulently, negligently, frivolously, vexatiously, wantonly or oppressively. *See, e.g., Slawick v. State,* Del.Supr., 480 A.2d 636 (1984).

The facts of this case, I think, demonstrate clearly that defendants acted in bad faith by preparing to construct the 60 foot right of way without DNREC's or plaintiff's permission. James Yori, the attorney who represented defendants throughout their negotiations and purchase of the Bailey's Landing property, testified that he advised defendants that, in his opinion, they were lawfully entitled to develop the 60 foot roadway, *but* that his opinion was not a legal certainty and defendants first should obtain permission from DNREC or plaintiff to use and develop the 60 foot right of way. In addition, Yori testified that the title insurance company retained to insure defendants' title to the Bailey's Landing property, refused to insure defendants' right to access the Bailey's Landing property from any public road.

*6 Based on this evidence, it is clear that defendants knew, before they purchased the Bailey's Landing property, that they did not have an uncontroverted legal right to develop the 60 foot right of way at issue here. In fact, defendants contacted both DNREC and plaintiff about developing the 60 foot right of way, and both DNREC and plaintiff denied that defendants had any right to do so. Notwithstanding DNREC's and plaintiff's

failure to grant defendants permission to develop the right of way, defendants undertook to do so on their own. In light of the fact that defendants were specifically warned by their attorney that they may not have a legal right to develop the road, defendants' self-help actions of plowing under plaintiff's field to prepare for construction of the road can only be viewed as taken in bad faith. Defendants, knowing they did not have a clear legal right to develop the 60 foot right of way, should have sought declaratory or similar relief regarding their rights to develop and use the 60 foot right of way. Taking matters into their own hands and physically damaging plaintiff's property as a means of establishing what defendants knew were dubious rights to the 60 foot easement, can only be described as acts of bad faith and wanton disregard for the rights of others. *See, e.g., Ennis v. Gray,* N.J.Ch., 84 A.2d 35 (1951) (attorney fees awarded where defendant altered an easement without plaintiff's consent and notwithstanding plaintiff's legal right to have the easement returned to its former condition). In the exercise of my discretion, therefore, I find plaintiff is entitled to attorney fees.

I ask that plaintiff's counsel submit an affidavit setting forth the fees and costs incurred by plaintiff in this matter, as well as an affidavit setting forth surveying costs incurred by plaintiff in connection with restoring its field to its original size. Defendants are permanently enjoined from developing the 60 foot right of way, and must instead use the Old Woods Road, no greater than 15 feet in width, to access and develop their property.

Plaintiff's counsel shall submit a form of order implementing all of the foregoing rulings on notice.

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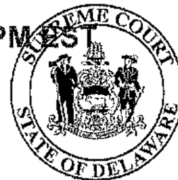

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January, 2013, I caused the foregoing **Appellees' Motion to Affirm** to be served on the following in the manner indicated:

VIA LEXISNEXIS FILE & SERVE:

Richard Abbott, Esquire
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Josiah R. Wolcott (Del. Bar No. 4796)