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Case Number 637,2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEES' ANSWERING BRIEF

Gary Staffieri & Adria Charles-Staffieri
100 Sackville Mills Lane
Wallingford, PA 19086

Dated: March 8, 2013

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STATUTES

RESTATEMENT

NATURE OF PROCEEDINGS

The Appellees, Gary Staffieri and Adria Charles-Staffieri filed their Complaint in this matter on April 18, 2012. On that same date, the Staffieris filed a Motion to Expedite the Proceedings in this action.

On April 20, 2012, the Staffieris filed a Motion for Preliminary Injunction seeking a removal of the cement parking blocks and fencing. On April 24, 2012 the Blacks filed a response in opposition to the Staffieris Motion to Expedite the Proceedings. On April 24, 2012, the Court denied the Staffieris Motion to Expedite the Proceedings. The Court also denied the Staffieris Motion for Preliminary Injunction. The Court entered an Order scheduling trial for July 9-10, 2012.

On May 2, 2012, the Blacks filed an Answer to the Complaint and a Counterclaim. On May 9, 2012 the Staffieris filed an answer to the Blacks Affirmative Defenses and an Answer to the Blacks Counterclaim. On May 25, 2012, the Staffieris filed a Motion for Leave to File an Amended Complaint. On June 5, 2012, the Court entered an Order granting the Staffieris Motion for Leave to File an Amended Complaint and granted the Blacks Motion to

Continue Trial. The Court entered an Order scheduling trial for October 4-5, 2012.

On June 6, 2012 the Staffieris filed the Amended Complaint adding Scott Black and Gakis Properties II, LLC as Defendants. All parties were served with the Amended Complaint. The Blacks answered the Amended Complaint and filed two counterclaims. The Staffieris filed an Answer to the Counterclaims. The Millers and Gakis Properties II, LLC never answered the Complaint or Amended Complaint. On August 14, 2012 the Staffieris filed a Motion for Partial Summary Judgment on the issue of liability. The Blacks opposed their having to file an answer to the Motion for Partial Summary Judgment. The lower court entered an Order indicating that it would not decide the liability issue by way of a summary judgment motion.

The Staffieris did not make a claim against Gakis Properties II, LLC for breach of easement. Gakis Properties II, LLC was made a party to this case in the declaratory judgment action only. In the declaratory judgment action the Staffieris sought a determination with regard to their right to use the parking and driveway area in front of and behind the triplex building.

On September 26, 2012 Appellees filed a Motion for Judgment by Default and request for attorneys fees and costs against the Millers. On September 27, 2012 the lower Court entered an Order of judgment by Default against the Millers. The Order directed the Millers to remove the parking blocks and fencing. The Court awarded attorneys fees in favor of the Staffieris. On October 4, 2012 Appellees filed a Motion for Judgment by Default against Gaskis Properties II. On that same date the lower Court entered an Order granting Appellees Motion for Entry of Default Judgment against Gakis Properties II. On October 4-5, 2012 trial on this case took place before the Honorable Travis J. Laster.

On October 24, 2012 the lower Court handed down a Post-Trial Order. The Court found in favor of the Staffieris on their easement claim. The Court held that the plain language of the 1946 deeds reserved easement rights for Appellees property. The Court found that the Blacks acted in bad faith and awarded attorneys fees and costs to the Staffieris. The Court denied the Staffieris claim for loss of business profits. It is the Order of October 24, 2012 that is sought to be reviewed in this appeal.

SUMMARY OF ARGUMENT

I. It is denied that the trial court erred in concluding that the 1946 language in the deeds for lots 1701, 1703 and 1705 reserved easement rights for lot 1707. The trial court concluded that the words "successors and assigns of Concord Development Company" as used in the 1946 deeds for lots 1701, 1703, and 1705 was intended to mean the successors in ownership of the property and not the successors in ownership of the corporation.

II. It is denied that the trial court erred in granting an award of attorney's fees. The Court may award attorney's fees as equity requires. See *MBKS Co. Ltd. v. Reddy*, 2007 WL 2814588, at *8 (Del. Ch. Apr. 30, 2007). warrants fees as a form of damages.

III. The trial court did not err with regard to ruling on the counterclaims of the Blacks. Although the trial court did not expressly make reference to the Blacks counterclaims, the lower court ruled that the 1946 deeds reserved easement rights for the Staffieris. Thus, by inference the lower court found that the Blacks counterclaims for reformation and mistake had no merit.

STATEMENT OF THE FACTS

1. The Parties

This suit was filed by the Appellees, Gary Staffieri and Adria Charles Staffieri.

Appellants are Henry Black, Mary Lou Black, Scott Black, Raymond Buchta, Blackball Properties LLC, (the Blacks) (owners of lots 1703 and 1709). Paul and Candy Miller (owners of lot 1705), and Gakis Properties II, LLC (owners of lot 1701) were Defendants in the lower Court.

The Staffieris are the owners of commercial property located at 1707 Concord Pike. *See* Appendix Ex. 1. The property is located in a small commercial shopping center. *See* Appendix Ex. 14. The shopping center is comprised of one large building with three units (the triplex building) and the Staffieris' building, which sits, by itself on the northern most end of the shopping center. *See* Appendix, Ex. 14. The Blacks, are the owners of the middle unit in the triplex building, their property being identified as lot 1703. *See* Appendix., Ex. 3. Appellant Henry Black and his wife, Mary Lou Black, are also the owners of 1709 Concord Pike. Lot 1709 is not part of the commercial shopping center that is the subject matter of this legal dispute. The Blacks operate a video store at 1709 Concord Pike. *See* Appendix Ex. 19.

The Millers are the owners of the end unit on the north end of the triplex building, their property being identified as lot 1705. *See* Appendix Ex. 2. Gakis Properties II, LLC, is the owner of the end unit on the south end of the triplex building, their unit being identified as lot 1701. *See* Appendix, Ex. 4.

2. The Common Grantor's Conveyance of lots 1701, 1703 and 1705

The common grantor of the four properties in the shopping center (the commercial tract) was Concord Development Company. Percival Johnson was the owner of Concord Development Company. In the early 1940's Percival Johnson purchased the commercial tract along with a larger tract of land located behind the shopping center. The larger tract of land behind the shopping center is a residential development known as Deerhurst. Concord Development Company built the triplex building in the shopping center in the mid-1940's. Concord Development Company also built a separate building on lot 1707 for the purposes of marketing the sale of homes in Deerhurst. In 1946, Concord Development Company[1] sold the three units in

[1] Concord Development Company merged with Johnson Realty Company, Johnson Development Company and W. Percival Johnson and Son, Inc. in 1955. *See* Appendix Ex. 38.

the triplex building. The first property that was recorded in the recorder of deeds was lot 1705.[2] *See* Appendix Ex. 5, pg. 451. The deed is dated October 11, 1946. *See* Appendix Ex. 5 pg. 447. The deed indicates that it was recorded on October 11, 1946. The second property recorded was lot 1703. *See* Appendix Ex. 6 pg. 87. The deed is dated October 11, 1946. The deed indicates that it was recorded on October 14, 1946. The last property recorded was lot 1701. *See* Appendix Ex. 7 pg. 531. The deed is dated November 8, 1946. The deed indicates that it was recorded on November 12, 1946.

3. The Common Grantor's Conveyance of Lot 1705

When Concord Development Company conveyed lot 1705, the conveyance included conveyance of ownership of the building situate on lot 1705 and conveyance of ownership of the nine-foot wide driveway located between lot 1705 and lot 1707 (common driveway).[3] *See* Appendix Ex. 9(A) ¶ 4, Ex. 11(F). The conveyance of lot 1705 also included

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[2] 25 Del. Code § 153 provides: "A deed concerning lands or tenements shall have priority from the time that it is recoded in the proper office without respect to the time that it was signed, sealed and delivered." *See* Appendix Ex. 10(B).

[3] The description of the property conveyed to lot 1705 is set forth on page 448 paragraph two (2) starting with the word: "BEGINNING" and ending at top of page 449 of deed. *See* Appendix Ex. 5.

conveyance of ownership of a section of the parking/driveway area in front of and behind the triplex building.[4] *See* Appendix Ex. 9(A) ¶¶ 7. 9 and 9(B). The section of the parking/driveway area in front of the triplex building that was conveyed is the section directly in front of unit 1705.[5] *See* Appendix Ex. 9(B). The section of the parking/driveway area behind the triplex building that was conveyed is the section directly behind unit 1705. *See* Appendix Ex. 9(B).

4. The Two Easements that Were Established

The 1946 deed for lot 1705 reserved two easements for the benefit of "Concord Development Company and its successors and assigns." *See* Appendix, Ex. 9(A).[6] (For the purposes of distinguishing the easements they are referred to as Easement 1 and Easement 2).

Easement 1 encompasses the driveway/ parking area in front of the triplex building. *See* Appendix Ex. 9(B). The

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[4] *See* also Appendix Ex. 5 pg. 448 ¶ 2 describing "BEGINNING" and ending at top of pg. 449.

[5] The width of the parking/driveway area that connected the property to Concord Pike was 29 feet.

[6] The language in the deeds coupled with the circumstances surrounding the conveyance of the three properties demonstrates that the easements were established for parking and driveway purposes for the benefit of all four properties within the shopping center.

easement extends the 27-foot wide distance from the front of the triplex building to Concord Pike. The length of "Easement 1" is 72 feet extending from one end of the triplex building to the other end of the building. It is the first easement described in the deed. It is referred to as the "twenty-seven feet wide Common Parking and Driveway Area, for parking and driveway purposes." *See* Appendix Ex. 5 pg. 449 ¶ 1.

Easement 2 encompasses the common driveway between lot 1705 and lot 1707 and the parking/driveway area behind the triplex building. It is referred to in the deed as "common driveway for driveway purposes." *See* Appendix Ex. 5 pg. 449 ¶ 4.

With regard to Easement 1 the granting clause in the 1946 deed for 1705 states:

> **TOGETHER** with the free and uninterrupted right, use and privilege forever in common with Concord Development Company, its successors and assigns, of the hereinafter described twenty-seven feet 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, said twenty-seven feet wide Common Parking and Driveway Area being more particularly bounded and described as follow, to wit:
>
> [description of metes and bounds of Easement 1]
>
> **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. *See* Appendix Ex. 5, pg. 449. (Emphasis added)[7]

With regard to Easement 2 the 1946 the granting clause of the 1946 deed for 1705 states:

> **ALSO TOGETHER** with the 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 common driveway in good order and repair. Said common driveway being more particularly bounded and described as follows, to-wit: (Emphasis added)
>
> [Description of Easement 2]
> (*See* Appendix Ex. 5 pg. 449-450)
>
> 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 common driveway in good order and repair. *See* Appendix Ex. 5 pg. 450. (Emphasis added).

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[7] The terms "reservation" and "exception" are often used as synonymous when the thing to be secured to the grantor is a part of the granted premises, and when they are so used they are to be construed accordingly. *Sheldon Slate Products v. Gerturde Jurjiaka*, 204 A.2d 99 (Vt. 1964).

5. The Common Grantor's Conveyance of Lot 1703

When Concord Development Company conveyed ownership of lot 1703, the Company conveyed ownership of unit 1703 and also conveyed ownership of the parking/driveway area directly in front of the unit 1703 and the parking/driveway area directly behind unit 1703. *See* Appendix. Ex. 6, 9(A). The grantor's conveyance of 1703 was subject to the same two easements (Easement 1 and Easement 2) described in the deed for lot 1705. *See* Appendix Ex. 6 pg. 85-87.[8]

6. The Common Grantor's Conveyance of Lot 1701

When Concord Development Company conveyed ownership of lot 1701, the Company conveyed ownership of unit 1701 and also conveyed ownership of the parking area directly in front of the unit and directly behind the unit. *See* Appendix Ex. 9(A). Concord Development Company's conveyance of lot 1701 was subject to the same two easements,

[8] Although the deed for lot 1703, (recorded 3 days after the deed for lot 1705) reserves easement rights for use of the driveway and parking easement areas on lot 1705, the language is null and void of legal effect because Concord Development Company lot had previously been conveyed (as determined by the order of recording) lot 1705. Thus any easement rights claimed by lot 1703 for use of easement areas on lot 1705 is not by reason of the language in the 1946 deed for lot 1703, but rather, by reason of the language "successors and assigns of Concord Development Company, contained in the 1946 deed for lot 1705.

(Easement 1 and Easement 2) described in the deed for lot 1705. *See* Appendix Ex. 7 pg. 529-530.

The testimony of expert witness Michael Parasckewich of the Pelsa Company confirmed the location and ownership of the express easements and the nine foot wide common driveway. *See* Trial Transcript Volume I, pgs 11 to 18

7. Concord Development Company retains ownership of Lot 1707

Concord Development Company retained ownership of lot 1707. The Company built a building on lot 1707 and used the property as a sales office for the real estate development company. *See* Appendix Ex. 12(D).

8. Appellees Purchase of 1707

In 1980 Concord Development Company sold lot 1707. *See* Appendix Ex. 8. There were four subsequent transfers of lot 1707 prior to the Staffieris purchase of the property in June of 2000. The Staffieris rented their property from 2001 until June of 2010.

9. The Historical Use of the Paved Area in the Front of Lot 1707

Historical photos provided to the New Castle County Land Use Department by the Blacks show that the area in front of the building on lot 1707 was used for parking purposes. *See* Appendix, Ex. 11(A), 12(C), (D). One photo

shows that vehicles were parked on lot 1707 running parallel to the common driveway. *See* Appendix, Ex. 12(C).

In 1996 a public walkway between lot 1707 and 1709 was vacated. *See* Appendix Ex. 37. As a result of the sidewalk being vacated lots 1707 and 1709 were each given an additional 2½ feet of property. Sometime after the public sidewalk was vacated the parking on lot 1707 was changed to a diagonal configuration. *See* Appendix Ex. 11(B).

After the Blacks acquired the additional 2½ feet of property on lot 1709, the Blacks installed railroad ties along the border between lot 1709 and lot 1707. *See* Appendix., Ex. 11(C). As a result of the Blacks installation of the railroad ties, part of the nine-foot wide common driveway on lot 1705 was used for parking by vehicles parked diagonally in front of lot 1707. A picture of the Millers' vehicle parked diagonally in front of lot 1707 shows how vehicles parked diagonally used a portion of lot 1707 and 1705. *See* Appendix Ex. 12 (B).

10. Appellees Change of Use

In June of 2010, the Staffieris' business tenants terminated their lease of the property. After the tenants vacated the premises the Staffieris undertook repairs on the property and explored the idea of re-renting their property. The Staffieris ultimately decided that they

wanted to use their building to open a business of their own.

In March of 2011 the Staffieris consulted with officials from the New Castle County Land Use Department to determine if their property was suitable for the operation of a small auto detailing business. The Staffieris were advised that they could open up an auto detailing business by obtaining a change of use permit.

After the Staffieris learned that the New Castle County Code would allow them to change the use of the property to "light automotive," the Staffieris began working with the New Castle County Land Use Department in order to obtain the change of use permit. Between March of 2011 and October of 2011 the Staffieris made renovations to the property in accordance with the directives of the Land Use Department.

In August of 2011 the Staffieris were nearing the completion of their repairs. In August of 2011, the Staffieris had the blacktop area in front of their building re-paved in preparation for the opening of their new business. The Staffieris did not replace the diagonal parking stripes on the blacktop area after the repaving because they intended to change the parking configuration to parking that ran parallel with the common driveway

because that configuration would best suit pulling in and out of the garage structure on their property. *See* Appendix Ex. 11(H).

11. The Actions By the Blacks to Block Appellees Change of Use

During the time that the Staffieris were making the renovations to their property the Blacks were repeatedly contacting officials in the New Castle County Land Use Department via a plethora of emails, letters, photographs, scheduled appointments and spontaneous visits, in an effort to stop the Staffieris from obtaining the various permits needed to ultimately obtain a change of use. *See* Appendix Ex. 21(A),(B), 22 (D).

When the Blacks realized that they were not going to get the New Castle County Land Use Department to block the Staffieris' change of use, the Blacks decided to take matters into their own hands. The Blacks signed an agreement of sale for the purchase of lot 1703 on August 5, 2011 (*See* Appendix Ex. 21(D)), and created a corporation known as "Blackball Properties LLC" to serve as the purported owner of the property. The Blacks paid cash for lot 1703 and went to settlement on the property on September 8, 2011. *See* Appendix Ex. 21(D).

In mid-September of 2011, the Staffieris were working with the NCC Land Use Department to satisfy the final steps to be completed before the change of use certificate would be issued. On September 15, 2011 Mr. Staffieri met with NCC Land Use officials Ken Biere and John Janowski to obtain final approval on the parking requirements. (The change of use required the Staffieris to show that they could satisfy the four space parking required by the New Castle County Land Use Code.) Mr. Biere and Mr. Janowski advised the Staffieris to provide a survey of their property. Mr. Staffieri presented a survey of lot 1707 to Mr. Biere and Mr. Janowski. The Staffieris were not required to show any particular parking configuration in order to obtain approval on the parking. The Staffieris were also not required to satisfy the parking dimension requirements set forth in the New Castle Land Use Code because they were continuing with the non-conforming parking that was in existence. Mr. Biere and Mr. Janowski signed off on the parking compliance based upon the survey plan presented by Mr. Staffieri. *See* Appendix Ex. 41.

The testimony of witness Joseph M. Abele who is Planner 3 for the NCC Land Use Department explained the review process for approving the Staffieris change of use within the context of "nonconforming" parking spaces. Mr.

Abele stated "It's very common over time in New Castle County for dimensions to become nonconforming...Our goal, generally, is to encourage businesses—not to shut all the businesses down, like Fairfax Shopping Center, just because the dimension of the parking spaces may be over by a foot or so." *See* Trial Transcript Volume I, pgs. 58 to 62

Shortly after the Staffieris obtained the parking approval from Mr. Biere and Mr. Janowski the Blacks began to take action to block the Staffieris from obtaining their final change of use certificate. In an effort to stop the Staffieris from obtaining the final "Change of Use" certificate the Blacks also took action to eliminate the parking space that the Staffieris had behind their building. *See* Appendix Ex. 11(G). The Blacks contacted the neighbors who reside behind the Staffieris' building. The Blacks advised the neighbors that the Staffieris were going to be running an auto repair operation, that it would be dirty and greasy and that there would be cars parked all over the place. On the urging of the Blacks, the neighbors moved their fence forward toward the Staffieris rear property line. The movement of the fence reduced the area behind the Staffieris' property and made it difficult for the Staffieris to park a vehicle behind the building. Before the neighbors fence was moved, the Staffieris had a

large space behind their building that served as a parking space. *See* Appendix Ex. 11(K).

The Blacks also installed fencing along the common driveway in the rear of the property so that the Staffieris could not access the area behind their building by vehicle. *See* Appendix, Ex. 11(J) and (K), Ex. 42 Ex. 43. The Blacks also installed cement parking barriers along the common driveway in the front of the property so that the Staffieris could not access their property through use of the common driveway. *See* Appendix., Ex. 11(I).

When the Staffieris learned that the Blacks had installed barriers along the common driveway they contacted the New Castle County Land Use Department. The Staffieris spoke to assistant land use manager James Smith.[9] Mr. Smith advised the Staffieris that the Code Enforcement department could cite the Blacks for interfering with the free flow of traffic in the shopping center. Mr. Smith confirmed this in an email that he sent to the Blacks on October 21, 2011. In that email he said:

> ….you created a very dangerous situation by erecting a wheel stop border at the edge of the common driveway (which, by the way, you can expect to receive a violation notice to remove immediately)… *See* Appendix Ex. 22(B). (underline added)

[9] Mr. Smith is also a lawyer, but does not work in the capacity as legal counsel for the land use department.

The Blacks responded with an email on October 21, 2011. In that email Mr. Black said:

> If there in fact is a dangerous situation, it was created in 1962 when the county allowed an entrance to be built on 6.5 feet of right-of-way entrance to the 1707 address. *See* Appendix Ex. 21(F).

In an email dated November 17, 2011 responding to the Blacks concerns about wrong- way drivers Mr. Smith wrote in part:

> While you contend that the wheel stop barrier is necessary to keep the common driveway unobstructed, and you were within your rights to erect said barrier, citing to the language in the deeds for 1701-1705 that you believe proves that the common driveway benefits only 1701-1705 and not 1707 (a point I disagree with), and you could have erected a fence because no permit is required, you are overlooking that the barrier interferes with the historic traffic circulation for this commercial center and creates a compromised and dangerous situation for those who frequent these businesses. Unlike the wheel stops used to define parking areas and stop cars from rolling on other properties along Concord Pike, your barrier is the only one that actually hinders the use of available parking and frustrates movement within a commercial center. …….unfortunately cannot deny a non-discretionary application (i.e. one that does not require that the property be rezoned) based on the sentiments of neighbors or area businesses. State law requires that the proposed use be evaluated according to the laws as codified on the date that the change of use application was received by New Castle County, and a use permit application was submitted and approved by the Department of Land Use.
> At this juncture, our Code Enforcement Division is pursuing the removal of the illegal wheel stop barrier that was erected on the north side of the common driveway and proper permitting of all signs at 1707 and 1709 Concord Pike. …. *See* Appendix Ex. 22 (C).

Jim Smith also testified at trial the extent of the danger created by the Blacks installation of the cement parking blocks on the common driveway. *See Trial Transcript Volume I, pgs. 33 to 41* Having no success with their efforts to obtain removal of the barriers with the assistance of county officials the Staffieris contacted legal counsel and were forced to file this lawsuit.

ARGUMENT

I. THE TRIAL COURT PROPERLY INTERPRETED THE EASEMENT LANGUAGE IN THE 1946 DEEDS FOR LOTS 1701, 1703 AND 1705 ACCORDING TO THEIR PLAIN MEANING

A. Question Presented

Whether the trial court properly interpreted the easement language in the 1946 deeds for lots 1701, 1703 and 1705?

B. Standard and Scope of Review

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

The Easements Established in the 1946 Deeds were Intended to Run with the Land.

Easements are classified as either easements appurtenant or easements in gross. *Hyde Road Development v. Pumpkin*, 21 A.3d 945 (Conn. App. 2011). Easements in gross

exist only so long as the parties to the agreement are the owners of the property. Easements appurtenant run with the land. [10] *Id.* Two distinct estates are involved in an easement appurtenant: the dominant estate to which the easement belongs and the servient estate upon which the obligation rests. *Id.* An easement appurtenant inheres in the land and cannot exist separate from it nor can it be converted into an easement in gross. *Id.* In determining whether an easement is appurtenant or in gross the Courts first look to the language in the deed for express language evidencing an intent that the easement run with the land. *See Guy v. State of Delaware*, 438 A.2d 1250 (Del. Super. 1981) where the court held that the words "for themselves, their heirs and assigns" created a promise that was intended to run with the land.

The *Restatement (First) of Property* § 531 comment c provides in part:

> **c.** *…it is not necessary that the expression of intention shall take any particular form. Any form of expression indicative of an intention that successors shall be bound is sufficient. If the promise in term purports to bind them by the use of such words as "successors" or "assigns," little question can arise as to the existence of the necessary intention.*

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[10] The law that applies to easement contracts generally applies to easement contracts. *Baker Revocable Trust v. Cenex supra.*

In the instant case the grantor's use of the words "successors and assigns" and the grantors use of the word "forever" in the 1946 deeds for lots 1701, 1703 and 1705 evidence a clear expression of intent that the easements reserved in the deeds were intended to run with the land.[11]

Lots 1701, 1703, 1705 and 1707 were intended to benefit from the easements established in the 1946 deeds for lots 1701, 1703 and 1705.

Although the 1946 deeds for lots 1701, 1703 and 1705 do not identify the lot numbers of the properties that were the intended beneficiaries of the easements, it is clear from the use of the words "Concord Development Company and its successors and assigns" and the circumstances surrounding the creation of the easements that the intended beneficiaries of the easements were the four lots that were originally part of the common tract before the shopping center was created.

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[11] The Blacks admitted that the easement is a covenant running with the land. *See* Appendix Ex. 30.

In cases where there is no clear expression of intent in the deeds, the courts look to the intention of the grantor and the circumstances surrounding the conveyance. *Birdsey v. Kosienski*, 140 Conn. 403, 101 A.2d 274 (1953); *American National Bank of Denver v. Hoeffer*, 18 Colo. App. 53, 70 P. 156 (1902). The value of the easement to the dominant estate is also a factor that the courts look to in cases where there are no words of inheritance. *See Watson v. Sweeney*, 2006 Conn. Super. LEXIS 3377.

The meaning of a conveyance is to be found in its language construed in the light of the relevant circumstances. *The Restatement of the Law, Property*, § 483 comment d.

In this case, the circumstances surrounding the establishment of the two easements described in the deeds for lots 1701, 1703 and 1705 demonstrate that the common grantor established the easements in connection with the subdivision and conveyance of three properties within a commercial shopping center while reserving ownership of the fourth property for himself. It would strain credulity beyond reasonable limits to conclude that Percival Johnson, (the owner of Concord Development Company), conveyed ownership of the common areas to lots 1701, 1703 and 1705, and reserved the right for those lots to enter the shopping center through an opening that was 81 feet wide and left only 6.5 feet for himself as owner of lot 1707 and his business invitees to enter and exit his property. Many trucks and cars both in 1946 and today are wider than 6.5 feet.[12]

The Blacks assert that Percival Johnson intended for the word "successors" to mean the successors of Concord

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[12] The dimension of a 1946 truck exceeded 6.5 feet. *See* Appendix. Ex., 20.

Development Company by "merger, acquisition, etc." (Appellant's brief at page 17) If that interpretation were correct then none of the four properties in the shopping center could claim their easement right as successors of CDC.

The Blacks further assert that the term "assigns" was intended to mean "parties who received a written assignment of CDC's rights via future Deed conveyance language." (Appellant's brief at page 17) The Blacks assert that lots 1701, 1703, and 1705 "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." The Blacks assert that there was no "express assignment of the reserved easement ***in gross*** to utilize parking and driveway areas on the Triplex Properties in the 1980 Deed conveying 1707." (Appellant's brief at page 18) Emphasis added.

The Blacks assertion that the easements were easements in gross ignores the plain meaning of the words "successors and assigns" and the word "forever." The words "successors and assigns" and the word "forever" are words that are universally used to convey an intent that the easements are intended to run with the land. *Restatement (First) of Property* § 531 comment (c) supra.

The Blacks also ignore the fact that the easements rights for all four properties emanate from the easement language in the servient deeds. Thus all four properties are subject to the same interpretation of the words successors and assigns. The Blacks also fail to recognize that an easement is an agreement and that as long as the easement is recorded in the chain of title for the sevient estate, subsequent owners of the servient estate are deemed to be on notice of all agreements that were intended to run with the land. In short, the Blacks fail to recognize that the reservation of an easement appurtenant in the servient deed is valid and enforceable against subsequent purchasers of the servient property.

The Blacks assert that the 1980 deed for lot 1707 failed to reserve the easement rights and that the failure to document the easement rights extinguished them. An easement established by reservation in the servient deed is not extinguished by reason of the fact that the easement is not recorded in the chain of title for the dominant estate (the benefitting property).[13] A transfer of real property

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[13] Lot 1707's easement rights in the shopping center were preserved in the 1946 deeds for lots 1701, 1703 and 1705. Likewise, lot 1701's easement rights are reserved in the 1946 deeds for lots 1703 and 1705; lot 1703's easement rights are reserved in the 1946 deeds for lots 1701 and 1705 and lot 1705's easement rights are reserved in the

passes all easements appurtenant thereto although not referred to in the instrument of transfer. *See* Del. Code Ann. Tit. 25 § 121(b); *Wallner v. Johnson,* 1987 Ark. App. LEXIS 2407. A document releasing an easement must meet the requirements of one creating an easement, including a legal description of the interested conveyed. *Patterson v. Buffalo Nat. River,* 76 F.3d 221 (8th Cir. 1996); *Fogal v. Swart,* 1908 Pa. Super. LEXIS 266.

In their brief, the Blacks argue extensively about the history of the property and assert that the easements were not intended to be benefit lot 1707. However, the Blacks fail to recognize that where the language of the deed is clear and unambiguous the court must apply the plain meaning of the language in the deed.[14]

The Blacks assert that the words "successors and assigns" is ambiguous and susceptible to multiple meanings. The Blacks argument fails for multiple reasons. The words "successors and assigns" is conveyance language that is

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1946 deeds for lots 1701 and 1703. All property owners with the shopping center claim their easement rights as successors and assigns of Concord Development Company.

[14] An easement by prescription is created if an easement existed adverse for the period of prescription. [14] The *Restatement of the Law, Property,* § 457. In this case, the two easements were used by all four properties for parking and driveway purposes for 20 years as required under Delaware law. *See* Appendix Ex. 31, 32, 33, 34.

used every day in deeds and is language that has been used throughout the history of this country. It is language that has clearly accepted meaning. If the Black's assertion that the words successors and assigns is ambiguous then the universally accepted meaning would be non-existent and it would open the doors to a flood of litigation by property owners seeking to undo easements. Not only does the assertion counter the universally accepted meaning of the words, but in addition, the assertion is premised on the claim that the easements were in gross, an argument which ignores the plain meaning word "forever." The words forever and in gross are inconsistent. In gross means that the promise is personal whereas forever suggests that the promise is intended to run with the land.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING THE STAFFIERIS ATTORNEYS FEES UNDER THE BAD FAITH EXCEPTION

A. Question Presented

Whether the lower court erred in finding that Appellants acted in bad faith and awarding attorneys fees to the Staffieris.

B. Standard and Scope of Review

The standard and scope of Review is whether the trial court abused its discretion. *Versata Enters v. Selectia, Inc.*, 5 A.3d 586 (Del. 2012)

C. Argument

Attorneys fees are warranted where there is evidence of bad faith.

Under Delaware law attorney's fees may be assessed if the court concludes that a party acted in bad faith, vexatiously, wantonly or for oppressive reasons. *Judge v. City of Rehoboth Beach*, 1994 Del. Ch. LEXIS 55 (holding that bad faith exists where a defendant requires a plaintiff to utilize the court in order to enforce a right which clearly belongs to the plaintiff; such bad faith was found where the "defendants were faced with a mountain of evidence, including legal opinions, legal authority and judicial declarations, demonstrating" the plaintiff's right to an easement). See also *Slawik v. State*, Del. Supr., 480 A.2d 636, 639, n.5 (1984)., *Weinberger v. U.O.P., Inc.*, Del.Ch., 517 A.2d 653, 656 (1986), *Barrows v. Bowen*, 1994 Del.Ch. LEXIS 164.

The Court may award attorneys' fees as equity requires. See *MBKS Co. Ltd. v. Reddy*, 2007 WL 2814588, at *8 (De. 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 to the instant 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, despite having been advised by counsel that their easement claim was dubious. In this case, rather than seek jurisdiction declaration of their rights, the Blacks resorted to self-help and erected the fence and cement roll-stop barriers. Furthermore, under Delaware law an award of attorney's fees and costs is appropriate where a Plaintiff is forced into the judicial forum to reclaim a clear legal right.

Bad faith is also demonstrated when a defendant's obstinate refusal to grant a plaintiff his clear legal rights forces a plaintiff into a judicial forum to vindicate those rights. *Id.* [citing *Indian Head National Bank v. Corey, N.H. Supr.* 129 N.H. 83, 523 A.2d 70 (1986) where the court held that action by a defendant necessitating judicial intervention to secure a clearly

defined and established right constitutes evidence of bad faith.]

In a further attempt to minimize their financial losses and avoid protracted litigation, the Staffieris filed their Complaint in April and sought to have the matter expedited. The Blacks filed pleadings objecting to the Staffieris request for expedition of the matter. After the matter was scheduled for a trial date of July 10th the Blacks again requested that the matter be postponed.

On July 2, 2012 the Staffieris again initiated contact with the Blacks through a letter from their lawyer. The Staffieris again requested that the Blacks reconsider their position and remove the barriers due to the spiraling expenses being incurred by all parties. Despite all of the pleas made by the Staffieris to the Blacks, the Blacks nevertheless obstinately refused to back down and left the Staffieris with no alternative but to continue to incur the spiraling legal expenses to vindicate their rights. The financial losses for the Staffieris have been staggering.

The Blacks assertion that this is a good faith dispute has no merit

In support of their assertion that the deed language is uncertain, the Blacks assert an interpretation of the words successors and assigns that defies the universally

accepted meaning and suggest that the strained interpretation applies only to lot 1707 and not to lots 1701, 1703 and 1705. The Blacks ignore the word "forever" in their strained interpretation of the deed language. The Blacks argument that the easement rights for lot 1707 were extinguished in 1980 also has no legal merit. The Blacks believe that they can avert an award of damages in favor of the Staffieris simply by putting forth a variety of legal arguments, regardless of how illogical or insensible the arguments may be. The Blacks argument that there was a mistake in the 1946 deed for lot 1701 has no factual basis. It is a proposition that is contrary to all logic. The Blacks argument that there was a mistake in the 1701 deed is also irrelevant to the Staffieris claim of easement rights in the nine foot common driveway on lot 1705 because the Staffieris easement rights emanate from the reservation language in the 1946 deed for lot 1705.

Aside and apart from the fact that the arguments put forth by the Blacks have absolutely no legal merit, the evidence shows that the Blacks had a complete recognition of the Staffieris easement rights from the very outset. Their recognition of the Staffieris easement rights explains why the Blacks deleted the easement language from their deed; language that had been recited in all of the

their attorney, to suggest that they might consider giving back to the Staffieris their driveway rights, if the Staffieris offered them some money. *See* Appendix Ex. 30.

Their lack of respect for the law is demonstrated by their failure to remove the fencing on the property even after the lower Court entered an Order denying their claims. Not only have the Blacks ignored the clear Order of the Court of Chancery they have gone so far as to install no parking signs on the common easement areas after the Court of Chancery handed down the Post Trial Order. They have further evidenced their complete disregard for the law by posting false and defamatory comments on their wherewilltheypark.com website, re-launched after the Chancery Courts post trial order.

The Blacks tortiously interfered with the Staffieris clear legal rights and left the Staffieris with no other choice but to enter the judicial forum and expend vast sums of money to reclaim what is rightfully owned by the Staffieris. After having callously ignored the Staffieris clear legal rights and after having inflicted extreme financial harm on the Staffieris, the Blacks now seek to characterize the Staffieris claims as di minimus.

The lower court order that the Blacks exercise of self-help rather than to seek a judicial determination of

the meaning of the deed language warranted an award of attorney's fees.

III. THE LOWER COURT RULED IN FAVOR OF THE STAFFIERIS ON EASMENT BY DEED AND BY IMPLICATION THE LOWER COURT DENIED THE BLACKS COUNTERCLAIMS FOR ABONDONMENT AND REFORMATION

A. Question Presented

Whether the trial court decided the Blacks counterclaims.

B. Standard and Scope of Review

The issue as to whether the trial court ruled on Appellants counterclaims is a question of law. The standard of review on a question of law is de novo. *Sweeney v. Delaware Dept. of Transp.*, 55 A.3d 337, 341-42 (Del. 2012).

C. Argument

Although the lower court did not make specific reference to the Blacks Counterclaims it is clear from the Court's Order of October 24, 2012, finding easement by deed in favor of the Staffieris, that the counterclaims of Appellant lacked merit and were thus denied.

CONCLUSION

WHEREFORE, Appellees, Gary Staffieri and Adria Charles Staffieri, request the Court to enter an Order affirming the judgment of the Court of Chancery.

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Dated: March 8, 2013

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of March, 2013, I served Appellees Answering Brief on the following in the manner indicated:

Via Hand Delivery

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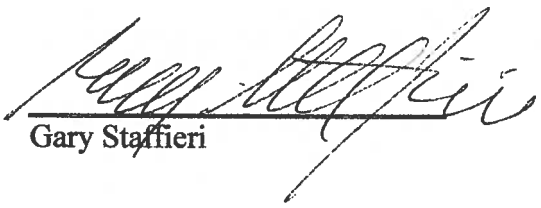

Gary Staffieri