IN THE SUPREME COURT OF THE STATE OF DELAWARE

HENRY BLACK, MARY LOU BLACK, RAYMOND BUCHTA, W. SCOTT BLACK, and BLACKBALL PROPERTIES, LLC,	)	No. 462,2013
Certain Defendants-Below Appellants,	)	
v.	)	Trial Court Below: Court Of Chancery of the State of Delaware
GARY STAFFIERI and ADRIA CHARLES STAFFIERI,	)	C.A. No. 7439-VCL
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, seeking interim and permanent injunctive relief and damages based on a purported easement they alleged was interfered with.

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 Appellants (the "Blacks") denied the existence of an easement, stated Affirmative Defenses, and asserted Counterclaims for Permanent Injunction and Declaratory Judgment to Quiet Title.

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.

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.

The case proceeded to trial on October 4, 5, and 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 Appurtenant pursuant to Deed reservation language running in favor "Concord Development Company, its successors and assigns." In addition, the Order granted Plaintiffs attorneys fees based upon the Bad Faith Exception.

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.

Out of an excess of caution, the Blacks initiated an appeal in No. 637,2012. But this Court concluded that a fee and cost award was needed before there was a final judgment; it dismissed the appeal on March 13, 2013.

Due to confusion caused by the Order's reference to a "Back Parking Area," the Blacks filed a Motion on July 19, 2013 seeking clarification. Specifically, the Blacks requested that the Trial Court clarify that a driveway area did not permit parking. On July 24, 2013, just three (3) business days later, the Trial Court summarily denied the Motion, stating that parking was permitted in driveway areas. The Trial Court also unleashed *ad hominem* attacks on the Blacks, alleging that they had "acted throughout this dispute in an overbearing, harassing, and intimidating manner towards the [Staffieris], including through their use of video technologies to place the [Staffieris] under

constant 24 hour surveillance and their efforts to escalate any misstep into a legal violation."

Next, the parties briefed their positions on the Attorneys Fees and Costs issue. The Trial Court entered a Final Order And Judgment on August 8, 2013 (the "Fee/Cost Order"). It granted the Staffieris: a) 95% of attorneys fees requested; and 2) 100% of litigation expenses sought (regardless of whether the expenses constituted "court costs" under 10 *Del. C.* § 5106 or arose from claims the Staffieris prevailed on).

The Fee/Cost Order also launched further personal attacks on the Blacks, alleging they used "superior financial and technological resources to bully, intimidate, and wear down [the Staffieris]..." despite conceding the Blacks' actions were within their 1st Amendment rights. Order at ¶¶2 and 11. And the Trial Court admitted its finding of bad faith took the Blacks' legal exercise of their rights into account. *Id.* at ¶¶11 and 12.

This appeal followed pursuant to the filing of a Notice of Appeal on September 3, 2013. On September 25, 2013, the Clerk issued a letter establishing the briefing schedule. 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 Deed 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.

IV. The Trial Court Erred In Denying The Rule 60 Motion To Modify Its Post-Trial Order So As To Delete Reference To The Abbreviated Term "Back Parking Area" Where The Deed Language Clearly Established That Area Could Only Be Used For "Driveway Purposes."

V. The Trial Court Erred In Awarding Virtually All Attorneys Fees And Litigation Expenses Requested Under The Bad Faith Exception, Where The Fees And Expenses Were Excessive, Unexplained, Duplicative, Incurred For Unsuccessful Purposes And Claims, And Went Beyond Awardable Costs.

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 appurtenant 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*, state that CDC's rights would "run with the land," or reference any land (*versus* the corporate CDC "person").

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 "flag pole" portion of a flag-shaped driveway area is located on the north side of 1705 Concord Pike, adjacent to the southern boundary of 1707. *Id.* And the "flag" portion of the flag-shaped "driveway" area is located in a 27-foot deep by 63-foot wide area behind the buildings on the Triplex Properties.[2] *Id.*

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

[2] This is the area the Trial Court referred to as the "Back Parking Area" in the Order.

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.*

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").[3] A-268. The 1980 Deed did not contain any reference to the grant or conveyance of any Easement or Covenant rights, nor any mention of any "driveway" or "parking 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.* Nor did the Deed reference any "parking" or "driveway" rights. *Id.*

[3] 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).

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

In 1946, a small, old wooden shed building was situated on 1707, at the very rear of the parcel (the "Old Shed"). A-286, A-298, A-301, A-305, A-306, and A-78 to 79. The Old Shed was used by CDC owners W. Percival Johnson and his son Joseph as a construction trailer or "contractor's shack."[4] A-122 to 123 and A-126. The area between the Old Shed and Concord Pike was paved with asphalt. A-286 and A-301. Due to termite damage, the Old Shed 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.

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 access and maneuvering. A-267. At that time, Concord Pike was a 2-lane road; it 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.

[4] 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).

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 for "stacked parking" – *i.e.* other cars parking behind those situated 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 on 1707 standing alone.

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. Henry 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 Mulrines, 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 Old Shed on 1707. A-76 to 77. He observed that vehicles accessing 1707 parked in front of the Old Shed. A-77. The Old Shed 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, 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 at 1709, then a Chevron. A-82. Black observed in this time period that Joseph Johnson would either walk to 1707 or park in front of the 1962 office building. A-83. 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 Old Shed and the 1962 office building. A-123. If the Johnsons 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. A-56. 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 associated with 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"

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) when the Old Shed was on 1707, it 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 (when the Staffieris purchased). 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 residential 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 knew how to reserve easements appurtenant and also 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 of 2000. 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 section and 1707 by Ray Buchta, Henry Black, and Scott Black, the three owners of Blackball Properties, LLC ("Blackball"). 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 Blackball installations. 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. 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.[5]

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 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

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

new auto detailing use proposed. A-33. He conceded that the non-conforming provisions of 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.[6]

[6] This was later confirmed by a New Castle County License, Inspection And Review Board decision, which invalidated the Change of Use Permit. A-572 *et seq.*

ARGUMENT

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

A. Question Presented

Whether 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 driveway and parking rights reserved to CDC and "its successors and assigns" established an easement appurtenant to 1707. 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 comment in Restatement (First) of Property. *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 and legal scholars. The Restatement is relied upon for legal principles, not the meaning of undefined contract terms.

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. 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.[7]

In contrast, the successor by merger 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. 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.

[7] 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.

(c) Extrinsic Evidence 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 on.

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 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 wooden shed structure on 1707 directly abutted the rear boundary line and Walkway, leaving no rear yard on 1707; 6) Concord Pike was a lightly travelled, two-lane road with parallel parking spaces; 7) 1707 had at least 3 parking spaces for its small shed building; 8) the Triplex Properties shared 6 total parking spaces for the 3 businesses and 3 apartments; 9) CDC did not regularly use the shed on 1707; it was utilized to store tools and review plans for Deerhurst new home construction; 10) 1707 had an 11.5 foot wide area for Concord Pike ingress and egress; 11) a 20 foot wide area in the State right-of-way allowed vehicles to slow down to turn into 1707; 12) CDC knew to use the terms "easement" and "covenant running with the land" or to reserve rights to a parcel of land in order to create an easement appurtenant; and 13) in the 1946 Deeds, CDC did not use

language it used in other documents like "easement," "covenant running with the land," or benefitting specific lands.

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.

In 1946, CDC would not have reasonably worried about whether 1707 had access to the Triplex Properties given the 11.5 foot wide access, 20 foot wide deceleration area, and the little amount of parking needed for the sporadically used Old Shed. And it is counterintuitive to suggest that CDC would have reserved the right to use a driveway when it had no rear yard to access and the language in the 1946 Deeds does not permit parking in the rear of the Triplex Properties. Why would CDC reserve rights for 1707 to use a driveway to nowhere? Only the Triplex Properties' businesses needed to get to the rear, for deliveries.

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 Old Shed on 1707. CDC's limited parking needs would be easily satisfied by the two head-in spaces and additional stacked parking behind them.

2. The 1946 Deeds 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).

(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... . (emphasis added).

An easement may be created by express reservation. *Judge v. Rago*, 570 A.2d 253, 255 (Del. 1990). On its face, however, the 1946 Deeds' 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,"[8] the phrase "covenant running with the land,"[9] or any other language which would have 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 use of terms such a "successors" and "assigns" in a contract "indicates an intention of the parties that the contract should be assignable." 6 Am. Jur. 2d, Assignments § 16. In the case of a corporation, "successor" means "another corporation which by a process of amalgamation, consolidation, or

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

[9] 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.

duly authorized legal succession has become invested with the rights and has assumed the burdens of the first corporation." *TRST Atlanta, Inc. v. 1815 The Exchange, Inc.*, 469 S.E.2d 238, 240 (Ga. App. 1996). 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.

An assignee is one who receives the transfer of a right or interest in property. *TRST Atlanta, Inc.* at 240. But "assigns" can mean the parties to whom rights or property is transferred. BLACK'S LAW DICTIONARY (9th Ed.) at 135 (defining "assignment"). And CDC failed to use clear terms like "assigns in title" or "assigns in interest." Thus, the term "assigns" could be ambiguous: either an assignee of personal rights or a real property interest.

Any ambiguity regarding the meaning of the term "assigns" should be resolved in favor of Blackball, the "grantee" of title to 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 assigned 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 abandoned pursuant to the 1980 Deed.

If the Johnsons wanted to reserve an easement appurtenant for 1707 to use the Triplex Properties' driveway and parking areas, then they would and could have done so clearly and unequivocally in the 1946 Deeds. As sophisticated real estate developers, they would have used clearer terms, like they did in other Deerhurst legal documents. Or they would have expressly reserved rights to 1707 (the land). But they did not. Instead, the Johnsons chose language reserving rights personal to CDC, its corporate successors and written assigns. Accordingly, the Trial Court committed an error of law; an easement appurtenant running in favor of 1707 was not created by the 1946 Deeds, and the easement in gross rights no longer exist.

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 erroneously awarded attorneys' fees to the Staffieris. Order at para. 16, p.11. 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 did 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. 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 before using 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* is not on point.[10]

[10] 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.

Finally, the Order's assertion that the County warned the Blacks "that their claimed rights were contested" is incorrect. Order at ¶66. Instead, the County advised the Staffieris that they might possess rights to use the parking and driveway areas on the Triplex Properties. A-295 to 296. And the County advised the Blacks that installing the fence was permissible. A-112 to 113.

Only the Staffieris contested the Blacks' legal position, first doing so 4+ months after the fence and roll stops were installed. A-40 and *Cf.* A-146. If opposition to an opposing party's position alone is sufficient to award attorneys fees, 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 sets a dangerous precedent.

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 Staffieris' claims. Thus, the Trial Court erred.

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 Blacks' legal position was not frivolous.

The analysis of a claim under the Bad Faith Exception is exacting:

> 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).

At most, the Blacks relied upon a losing, albeit plausible, legal interpretation of Deed language. That does not meet the high Bad Faith standard.

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: the Bad Faith Exception would swallow the American Rule whole. Thus, the Trial Court erred.

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.

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) the Blacks' lawyers agreed with their position; 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 TRIAL COURT 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 or breach? 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 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 & Extinguishment Claims

In their Answer And Counterclaim, the Blacks asserted claims for: 1) Reformation of the Deed language based upon scrivener's error; and 2) Abandonment of easement. A-373 to 376. The Order failed to decide these two (2) claims. A-372 to 373.

It is well settled that a Delaware Judge must state the reasons for his decision. *B.E.T., Inc. v. Bd. of Adjustment of Sussex County*, 499 A.2d 811 (Del. 1985). In that action, this Court held that the incorporation by reference of a party's brief as the trial court's opinion is an unacceptable judicial "shortcut." *Id.* at 812.

Similarly, the Trial Court used an equally impermissible shortcut by asserting that mere failure to decide the Blacks' two Counterclaims constituted an implicit rejection of them. *See* Order dated November 7, 2012 ("defendants' motion is DENIED for the reasons stated in the plaintiffs' opposition") and A-699 to 700. Without providing even the briefest explanation of its reasoning on the Reformation and Extinguishment of Easement Counterclaims, the Trial Court committed reversible error.

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, this Court should remand the matter for a decision on the merits of the two Counterclaims, unless mooted by reversal of the Order.

ARGUMENT

IV. THE TRIAL COURT ERRED IN DENYING A MOTION TO CLARIFY ITS POST-TRIAL ORDER ON THE DRIVEWAY VS. PARKING AREAS

A. Question Presented

Whether the Trial Court erred in denying the Rule 60 Motion To Modify its Post-Trial Order so as to delete reference to the abbreviated term "Back Parking Area" where the Deed language clearly established that area could only be used for "driveway purposes"? The question was preserved in the Trial Court in "Certain Defendants' Rule 60 Motion To Modify Post-Trial Order" filed on July 19, 2013. A-649 to 652.

B. Standard and Scope of Review

Normally, the standard of review of the denial of a Rule 60 motion is abuse of discretion. *Poe v. Poe*, 2005 WL 1076524, *2 (Del. 2005)(Order). In this instance, however, the issue involves the Trial Court's interpretation of Deed language, which is subject to a *de novo* standard of review. *Smith v. Smith*, 622 A.2d 642, 645 (Del. 1993).

C. Argument

Pursuant to Court of Chancery Rule 60(a), the Court is authorized to correct any clerical mistake or error contained in an Order arising from oversight. Under Court of Chancery Rule 60(b)(1) and (6), the Court may

relieve a party from an Order based upon mistake or for "any other reason justifying relief from the operation of the judgment," respectively.

1. The Order Mistakenly Referred To The Rear Portion Of 1707 As A "Back Parking Area," Despite Its Limitation For Driveway Purposes

In the Order, the Trial Court adopted an abbreviated term for one portion of the driveway area situated on the Triplex Properties: the "Back Parking Area." Order at 2. Inclusion of the word "Parking" was a misnomer; the 1946 Deeds clearly establish that the area the Court was referring to is a "common driveway" available only for "driveway purposes," and not a "parking area" available for "parking purposes." A-132 to 133, A-137 to 138, A-141 to 142. The Staffieris' own expert surveyor prepared a plot plan confirming this fact. A-144.

The Order holds that the Staffieris have easement rights "as set forth in the 1946 Deeds." Order at p.8, ¶12. In turn, language contained in the 1946 Deeds expressly describes: 1) a 27 foot deep by 63 foot wide area in front of the Triplex Buildings that is available for "parking and driveway purposes"; and 2) a flag-shaped area, whose "pole" is 9 feet wide and runs to the rear of the Triplex Buildings and whose "flag" is 27 foot deep by 72 foot wide, which is

the "common driveway" available solely for "driveway purposes." A-132 to 133 and A-144.

Despite the Order's clear holding that easement rights only exist to the extent provided for in the 1946 Deeds, the use of the term "Back Parking Area" in the Order incorrectly implied that the driveway was available for parking. In addition, the Court's use of the "Back Parking Area" reference caused the Staffieris and New Castle County to contend that the "common driveway" area could be used for parking vehicles. *See* A-667 to 668 and A-650 to 651.

Unambiguous language in the 1946 Deeds establishes that the "common driveway" is available only for "driveway purposes." In contrast, the area in the front of the Triplex Buildings is called a "Common Parking and Driveway Area" which is made expressly available "for parking and driveway purposes." As a consequence, the 1946 Deeds show that the Trial Court committed legal error in concluding that the flag-shaped common driveway could be utilized for parking purposes.

ARGUMENT

V. THE TRIAL COURT ERRED IN AWARDING VIRTUALLY ALL ATTORNEYS FEES AND LITIGATION EXPENSES REQUESTED; MOST FEES AND EXPENSES ARE NOT AWARDABLE AS A MATTER OF LAW

A. Question Presented

Whether the Trial Court erred in awarding 95% of attorneys fees and 100% of litigation expenses requested, where the fees where duplicative, unnecessary, and unexplained, and the "costs" far exceeded awardable court costs? The question was preserved in the Trial Court in the "Certain Defendants' Answering Brief In Opposition To Plaintiffs' Cost And Fee Application," which was filed on May 20, 2013 (A-595 to 603) and at oral argument (A-621 to 639).

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

The Trial Court awarded attorneys fees and litigation expenses in the amount of $176,670.47 slightly less than the total amount of $184,320.47 requested. *See* Final Order And Judgment dated August 8, 2013 at ¶¶16, 29,

and 30. The award constituted 95% of fees and 100% of expenses. Cf. *Id.* and A-504 to 571. In so doing, the Trial Court rejected the Blacks' arguments on: 1) block billing and overly general task descriptions; 2) the Staffieris' prevailed on only a fraction of their claims; 3) numerous wasteful litigation efforts undertaken despite their obvious futility; 4) duplication of effort between Pennsylvania and Delaware counsel; 5) the unawardability of pre-litigation fees; 6) appeal work done by Pennsylvania counsel as a ghost writer of "*pro se*" filings; 7) the bar to awarding attorneys fees expended on losing claims; and 8) the limited costs awardable pursuant to 10 *Del. C.* § 5106 and the Bad Faith Exception. *See* A-595 to 603 and A-621 to 639. In effect, the Trial Court concluded that it could award whatever amounts it wanted to, with unbridled discretion.

1. The Litigation Expense Award Was Legally Erroneous, It Far Exceeded The Limited Scope Of Reimbursable Costs

(a) The Legal Standard For Costs; Only Limited Court Related Costs Are Awardable

Costs awardable under 10 *Del. C.* § 5106 are incidental damages awarded to reimburse a prevailing party for expenses necessarily incurred in asserting his or her rights in Court. *Peyton v. Williams C. Peyton Corp.*, 8 A.2d 89, 91 (Del. 1939). *See also Donovan v. Del. Water & Air Resources Com'n*, 358 A.2d 717, 723 (Del. 1976).

Delaware Courts have previously refused to award costs for items such as photocopying, transcripts, travel expenses, and computer research. *All Pro Maids, Inc. v. Layton*, 2004 WL 3029869, *3, Parsons, V.C. (Del. Ch., Dec. 27, 2004), citing *Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, *4, Lamb, V.C. (Del. Ch., April 27, 2004). *See also Tanyous v. Happy Child World, Inc.*, 2008 WL 5424009, *1, Noble, V.C. (Del. Ch., Dec. 19, 2008). In *All Pro Maids, Inc.*, the Court limited its award to costs charged by the Register In Chancery, efiling, and service of Summonses and Subpoenas.

Costs for losing claims should not be awarded: $1,750 for the Staffieris auto detailing expert witness is improper since they did not prevail on the business damages claim. *See* A-512 and A-596. In addition, costs related to expert witnesses and deposition transcripts in the amounts of $2,700 and $937.20, respectively, fall outside the bounds of awardable court-related costs. *See* A-507 to 510 and A-596.

Further, charges for transcripts, printing, copying, postage, legal research, and hand deliveries are not awardable costs. *See* A-537, 539, 544, 546, 548, and 553. The only reimbursable "costs" are: LexisNexis and Register In Chancery filing fees totaling $2,215.50 from Mr. Wolcott's bills. *Id.* As a consequence, the Trial Court erred in awarding expenses greater than $2,215.

2. The Attorneys Fee Application Was Unreasonable And Excessive

(a) The Legal Standard For Fees; Reasonable And Rule 1.5 Compliant

It is well-settled that an award of attorneys fees under the Bad Faith Exception must be in a reasonable amount. *Ableman v. Katz*, 481 A.2d 1114, 1121 (Del. 1984). In evaluating the reasonableness of an attorneys fee award, the Court relies upon the factors contained in Rule 1.5(a) of the Delaware Lawyers' Rules Of Professional Conduct and relevant case law. *Mahani v. Edix Media Group, Inc.*, 935 A.2d 242, 247 (Del. 2007).

Relevant Rule 1.5 factors are:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (4) The amount involved and results obtained;
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;... .

In addition, the Court should consider whether the number of hours devoted to the litigation was excessive, redundant, duplicative, or otherwise unnecessary. *Mahani* at 247-48. The Blacks focused on: 1) the reasonable time required; 2) the results obtained; and 3) the experience and ability of the lawyer.

An award of attorneys fees may not be made under 10 *Del. C.* § 5106; applications for attorneys fees are based solely upon the Court of Chancery's

inherent equitable powers. *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665-87, (Del. 2013)(en Banc).[11]

(b) Excessive, Duplicative, Unnecessary Fee Amounts Abound In The Plaintiffs' Application; Significant Amounts Of Time Should Be Disallowed

(i) Only One-Half Of The Final, Reduced Amount Of "Reasonable Fees" Should Be Awarded; Plaintiffs Prevailed On Only Half Of Their Case At Best

The Plaintiffs only prevailed on one (1) of eight (8) claims asserted: Express Easement.[12] The Plaintiffs improvidently pursued numerous alternative and additional claims, most of which were unnecessary and had no legitimate prospect of success on the merits. As a result, considerable time was chewed up in the litigation chasing farfetched, "shotgun approach" causes. On these grounds alone, the fees awarded should have been no more than one-half (½) of the final "reasonable" amount.

The Court frequently awards only a percentage of total fees incurred. *See e.g. Auriga Capital Corp. v. Gatz Props., LLC*, 48 A.3d 839, 881-82 (Del. Ch. 2012)(awarding one-half of reasonable attorneys fees based upon opposing party's "less than ideal" litigation efforts); *Beck v. Atlantic Coast PLC,* 868

[11] The Court expressly held that "[a]ny contrary precedent, we expressly overrule." at 685.

[12] Attorneys fees were not claimed in a specific cause of action. Fees were only generally, parenthetically prayed for in *ad damnum* clauses regarding some of the Counts.

A.2d 840, 856 (Del. Ch. 2005)(awarding $25,000 of approximately $60,000 in fees as an estimate of costs incurred for actions of counsel); and *Acierno v. Goldstein*, 2005 WL 3111993, *4, Parsons, V.C. (Del. Ch., Nov., 16, 2005)(awarding 25% of attorneys fees in defending against claimant who made certain misrepresentations in support of an ultimately abandoned adverse possession claim).

(ii) The Attorney Time And Fees Should Be Reduced To A "Reasonable" Amount

It is well settled that an application for an award of attorneys fees should be copiously examined to ferret out wasteful and legally unawardable time/fees. In *Richmont Capital Partners I, L.P. v. J.R. Invs. Corp.*, 2004 WL 1152295, *3, Lamb, V.C. (Del. Ch., May 20, 2004), the Court held that reducing the fee amount requested is appropriate for: a) time attributable to two (2) lawyers being present in a courtroom or conference when one (1) would do; and b) excessive, redundant, duplicative, or otherwise unnecessary hours.

The Court should deny a substantial portion of the Staffieris' fee demand on the grounds that the amount of time expended is excessive. The assertion by Ms. Cherry that she spent 60+ hours preparing a brief and 60+ hours preparing for trial is outlandish and excessive. *See* A-513 to 525 and A-567 to 571. And her fees incurred performing non-litigation work are simply not awardable. *Id.*

The fact that Ms. Cherry's bills do not provide the degree of specificity customary in Delaware practice and necessary for the Court to evaluate the legitimacy of her time is additional cause to significantly reduce the hours awarded. A substantial reduction in her bill is warranted due to the paucity of proof that her hours were reasonable. Block billing with amorphous task descriptions are insufficient.

Additionally, numerous wasteful efforts evidence Ms. Cherry's lack of experience and ability in Delaware law generally and real property law specifically. Futile Preliminary Injunction and Summary Judgment practice wasted tens of thousands of dollars in time. Associating with a supposed "local" counsel who could not legally litigate the action wasted more money.

Further, fees charged by Mr. Wolcott to attend the trial should be denied in their entirety: a total of 14.8 hours or $3,700. A-545. Ms. Cherry tried the entire case and was admitted *pro hac vice*, thereby rendering Mr. Wolcott's presence at the 2+ day trial unnecessary.

Finally, Mr. Karagelian unnecessarily incurred fees on the ill-fated Preliminary Injunction request. Specifically, his bill reflects about 9.3 hours at $300 per hour, or $2,790, was wasted. A-529 to 530.

The Court should also deny Ms. Cherry's claim for fees regarding her involvement in appeal matters. A-571. She was not admitted *pro hac vice* in

the Supreme Court. *See* No. 637,2012. And the Staffieris submitted their Answering Brief on appeal *pro se*. *Id.* Ms. Cherry claimed appeal related time of 22.3 hours, which equates to unawardable fees of $6,690. A-570 to 571.

(iii) Calculations Of "Reasonable" Awardable Fees: No More Than $41,412.50 Should Be Awarded

Ms. Cherry's initial request was for $114,000 in fees and her supplemental request was for $7,450, for a total of $121,450. A-513 and A-567. Specific deductions for unawardable time in the form of a title insurance claim, representation *vis a vis* New Castle County, and the appeal justifies a reduction in her billings of $16,040, to $105,410. A-517 to 521, A-523, and A-530 to 571. That amount should be reduced by 50% based on the various wasteful efforts, the excessive and duplicative nature of her bills, and her overly general block billing. This results in maximum "reasonable" fees of $52,705. A further 50% reduction based upon the fact that the Staffieris prevailed, at best, on only one-half of their claims in the action would result in a maximum fee award in the amount of $26,352.50 for Ms. Cherry's work.

Mr. Wolcott's fee applications totaling $27,370 should be reduced by $3,700, to $23,670 (for duplicative trial time). A 50% reduction due to the mixed results obtained results in a maximum award for his time of $11,835.

Mr. Karagelian's fee application seeking $9,240 should be reduced by $2,790 to $6,450 due to the unnecessary Preliminary Injunction request. Halving that amount due to one-half success/results equals $3,225.

The $26,352.50, $11,835, and $3,225 amounts of awardable fees for Ms. Cherry and Messrs. Wolcott and Karagelian make for a grand total of $41,412.50.

3. No Award Should Be Entered Against Any Party Other Than Blackball Properties, LLC, The Owner Of 1703

The Trial Court awarded attorneys fees and costs against all Defendants, even though the evidence established that: 1) Mary Lou Black had absolutely no involvement at all in the supposed "self-help" which formed the basis for the Court's award; and 2) the actions of Blackball members Henry Black, W. Scott Black, and Raymond Buchta were all within the scope of their artificial entity owner role.

At trial, Mary Lou Black testified that she had no involvement with the installation of parking roll-stops and fencing along the boundary line between the Triplex Properties and 1707. A-115. And Scott Black confirmed that fact. A-114. Thus, Mrs. Black cannot be liable for fees; she had nothing to do with the actions that caused the Staffieris to bring suit. Accordingly, the Court's award of fees and costs against her was legally unwarranted.

Additionally, the Trial Court's award of fees against the 3 individual members of Blackball was inappropriate on the grounds that evidence established that their conduct was taken under the guise of their limited liability company. The only reason the 3 individuals, Messrs. Henry Black, Scott Black, and Buchta, had a legal right to install the parking roll-stops and fencing was their ownership of 1703 under the auspices of Blackball. Otherwise, their installations would have constituted an illegal trespass and the Staffieris could have physically removed the roll-stops and fencing. Instead, they brought suit because Blackball as the owner of 1703 possessed express Deed rights to occupy, possess, and control the common driveway area on the Triplex Properties where the roll-stops and fence were installed.

Pursuant to 6 *Del. C.* § 18-303, no member of a limited liability company is personally liable in contract tort, or otherwise for acts taken within their membership scope. Consequently, the award of fees and costs against the individual owners of Blackball was legal error.