IN THE SUPREME COURT OF THE STATE OF DELAWARE

HENRY BLACK, MARY LOU BLACK, RAYMOND BUCHTA, W. SCOTT BLACK, and BLACKBALL PROPERTIES, LLC, Certain Defendants-Below Appellants, v. GARY STAFFIERI and ADRIA CHARLES STAFFIERI, Plaintiffs-Below Appellees.	)	No. 462,2013 Trial Court Below: Court Of Chancery of the State of Delaware C.A. No. 7439-VCL

APPELLANTS' REPLY BRIEF

ABBOTT LAW FIRM

/s/ Richard L. Abbott
Richard L. Abbott, Esquire (#2712)
724 Yorklyn Road, Suite 240
Hockessin, DE 19707
(302) 489-2529

Attorneys for Appellants

Dated: January 14, 2013

TABLE OF CONTENTS

TABLE OF CITATIONS

Page

Cases

Statutes

Other Authorities

Rules

COUNTER-STATEMENT OF FACTS

A. The Staffieris' Property Is A Stand-Alone Parcel, Not Part Of A "Shopping Center"

In an obvious attempt to distort the facts, the Staffieris allege that their property at 1707 Concord Pike ("1707") is part of a "small commercial shopping center." AB at 6.[1] Instead, 1707 is an independent parcel of land improved with a detached office building. A-283, A-284, A-299. Appellant Blackball Properties, LLC ("Blackball") is one of the 3 owners in an attached triplex building located at 1701-1705 Concord Pike (the "Triplex Properties"), which share a common driveway and parking area as a unified facility separate and apart from 1707. A-144, A-313, and A-321.

B. The Common Driveway Is Not Available For Parking Purposes

In yet another attempt to mislead, the Staffieris apply the moniker "parking/driveway area" to the portion of the L-shaped driveway situated behind the 1701-1705 building in the rear of the Triplex Properties. AB at 10. The Staffieris concede, however, that the 1946 Deeds refer solely to a "common driveway for driveway purposes." AB at 10-11. This is in stark contrast to the 1946 Deeds' language regarding the area located in the front of the Triplex Properties, which the Staffieris admit states it may be used for "parking and

[1] References herein to "AB at _" are to the Appellees' Answering Brief dated November 12, 2013.

driveway purposes." AB at 10-11. Consequently, the rear area on the Triplex Properties is only available for driveway usage, not for parking.

C. 1703 Enjoys Rights To Use The Driveway And Parking Areas On The Triplex Properties By Virtue Of Written Assignment

The Staffieris incorrectly assert that Blackball could only possess rights to use the driveway and parking areas on the Triplex Properties based upon a perpetual "easement" right created by the 1946 Deeds. AB at 12, n.8. Instead, Blackball has the right to utilize driveway and parking areas based upon its status as an assignee of Concord Development Company ("CDC") via all Deeds in the 1703 chain of title. In addition, it was undisputed at trial that owners of the Triplex Properties shared parking and driveway areas for over 65 years, more than sufficient time for prescriptive rights to accrue.

Blackball's Deed expressly granted it the right to use the driveway areas in common with its neighbors at 1701 and 1705. A-185. And the Deeds of all of Blackball's predecessors in title included the verbatim language reserving rights to use the common driveway and parking areas contained in the 1946 Deeds. A-189 to A-266. Indeed, the consistent inclusion of express assignment language in the chain of title establishes that the term "successors and assigns" was only intended to be a personal right (*i.e.* an easement in gross) which could

be expressly assigned in subsequent Deeds in order for the common driveway and parking use rights to be transferred.

D. The Staffieris Concoct A Fairy Tale Story Of Woe, Which Is Unsupported By Any Record Evidence

In an apparent effort to garner sympathy from the Court, the Staffieris spin a series of tall tales which have no basis in fact. AB at 16-21. In their 5 page diatribe, they cite to a number of exhibits purportedly supporting their contentions. Most of these exhibits, however, constitute nothing more than Henry and Mary Lou Black's exercise of their 1st Amendment Constitutional Right to object to the illegal conduct of the Staffieris in modifying the use of 1707 without obtaining proper permits from New Castle County (the "County").

The Staffieris complain mightily about 3 letters that Henry and Mary Lou Black submitted to the County objecting to the Staffieris' illegal conversion of the office building to a light automotive service facility and their attendant trespasses upon the Triplex Properties. AB at 16 and 27 *et seq.* (Exhibits 21(A), (B), and (D)). Yet these letters merely constitute legitimate complaints about unlawful conduct being committed by the Staffieris. No explanation is provided as to why complaints about the Staffieris' clear-cut violations of the County Code is somehow inappropriate.

Additionally, the Staffieris recite numerous alleged "facts" without any record support whatsoever. AB at 17-18. All of these assertions should be stricken or ignored by the Court.

ARGUMENT

I. THE RIGHT TO USE THE DRIVEWAY AND PARKING AREAS ON THE TRIPLEX PROPERTIES WAS ONLY EXPRESSLY RESERVED TO CDC AND ITS "SUCCESSORS AND ASSIGNS," NOT TO 1707 *PER SE*

Ignoring the clear and unequivocal language of the 1946 Deeds, the Staffieris contend that the reservation language inuring to the benefit solely of "Concord Development Company, its successors and assigns" may be magically transmuted into a covenant running with the land. AB at 21-22. The Staffieris do concede, however, that the determination of whether an easement is appurtenant or in gross must be based upon a review of the express Deed language. AB at 22. But the Staffieris then proceed to inconsistently rely upon conclusory statements contained in one Delaware decision and Comment c. to the Restatement (First) Of Property, § 531. Because the plain language of the 1946 Deeds creates nothing more than an easement in gross, however, the Staffieris' arguments are without merit.

A. The Plain Meaning Of Language In The 1946 Deeds, Not Conclusory Case Law And Restatement Excerpts, Should Prevail

1. The Plain Meaning Only Created An Easement In Gross

The Staffieris admit that the first applicable interpretative step is to look to the express language of the 1946 Deeds. AB at 22. But that language only

provides rights to use the common driveway and parking areas to "Concord Development Company, its successors and assigns," not to 1707. The 1946 Deeds do not indicate that rights are granted to CDC's "successors and assigns in title" or that such rights constitute "covenants running with the land." Instead, the clear and unequivocal language states that rights are reserved solely *In Personam*, subject to the ability for them to be: 1) assigned; or 2) transferred by operation of law pursuant to corporate succession.

Since CDC was a sophisticated real estate developer that had previously created documents expressly reserving "easement" rights and establishing "covenants running with the land," CDC's alternative use of the language "Concord Development Company, its successors and assigns" in the 1946 Deeds evidences a different intent. The unambiguous language facially creates only a personal right, not one attaching to any specific property retained by CDC such as 1707. Indeed, the 1946 Deeds do not refer to "1707 Concord Pike" or to 1707 by metes and bounds description. Thus, no *In Rem* interest was reserved that automatically passed in the chain of title. Only an easement in gross was created by CDC.

2. An Unexplained Statement In An Inapposite Decision Cannot Overcome The Plain Meaning

Next, the Staffieris rely on *Guy v. State*, 438 A.2d 1250 (Del. Super. 1981) for the theory that the phrase "Concord Development Company, its successors and assigns" created an interest running with 1707. AB at 22. But that decision is of no aid because, as the Staffieris citation signal "*See*" implies, the case does not directly support the proposition. A Uniform System Citation (14th ed.) at 8 (Rule 2.2.(a) – Introductory Signals). Instead the decision only contains a conclusory and unexplained statement.

Specifically, *Guy v. State* contains the following excerpt:

> The easement creates a promise that the parties intended would run with the land by its express language ('for themselves, their heirs, and assigns'). *Guy v. State* at 1254.

But the daylighting easement at issue in that action would, by its very nature, necessarily run with the land. A daylighting easement prohibits the obstruction of a clear view over the land at the intersection of two roads. *Guy v. State* at 1252. In contrast, a driveway easement can be either appurtenant or in gross. Regardless, the decision contains no rationale, and is therefore unpersuasive.

3. The Restatement Does Not Establish The Plain Meaning

Further, the Staffieris cling to a conclusory comment to Restatement (First) Of Property § 531 as the only other legal authority supporting their position. AB at 22-23. But use of the terms "successors" or "assigns" cannot *ipso facto* constitute an intention to create a covenant running with the land based upon the Plain Meaning Rule applicable to construction of Deed language in Delaware *jurisprudence.* While the Courts of this State have periodically relied upon some components of the Restatement Of The Law for legal principles, the meaning of Deed language has not been based on the Restatement. Instead, the Courts of this State look to the dictionary definition of undefined terms in order to discern their common and ordinary meaning. *Lorillard Tobacco Co. v. American Legacy Foundation*, 903 A.2d 728, 738 (Del. 2006). Thus, the Staffieris' position is without precedent and should be rejected by this Court.

If CDC had intended to create an easement that constituted a covenant running with the land, then it could have clearly so provided. But it did not. Instead, it reserved rights to itself personally, along with its "successors and assigns."

CDC's corporate successor by merger, W. Percival Johnson & Son, Inc., succeeded to CDC's rights to use the common driveway and parking areas on

the Triplex Properties. But the successor corporation failed to expressly assign its rights in the 1980 Deed conveying 1707. Therefore, the Staffieris did not obtain any rights to utilize the common driveway and parking areas on the Triplex Properties pursuant to their 2000 Deed for 1707.

B. Decisional Authority Establishes That An Easement Appurtenant Must Be Substantively Created; Mere Use Of Words Like "Successors" And "Assigns" Is Not Dispositive

Only an easement in gross, and not an easement appurtenant, was intended to be created by the 1946 Deeds since no direct or indirect reference to 1707 as the dominant estate is contained therein. This was the holding in *Schumacher v. Apple*, 2010 WL 4365808, *3-4 (Ohio App., Nov. 4, 2010), wherein the Court interpreted a deed that included language reserving rights to the grantor and "its successors or assigns" to use a private right-of-way for driveway access purposes but only described the driveway metes and bounds, not any dominant estate. Similarly, the 1946 Deeds only contain a description of the driveway and parking areas on the Triplex Properties, not a description of 1707 or reference to "1707 Concord Pike" (*i.e.* the supposed dominant estate). On this basis, the Court should conclude that CDC intended to create only an easement in gross: reference to an appurtenant estate is missing from the 1946 Deeds.

Further legal authority for the proposition that the mere use of the words "successors and assigns" is not dispositive of the appurtenant versus in gross issue comes from a decision from the 1940's era: *Steele v. Williams*, 28 S.E.2d 644 (S.C. 1944). In that case, the Court held that "[t]he fact that the deeds wherein the alley way was created contain the words 'it being reserved for the joint use of the grantor and grantee, their heirs and assigns forever,' does not operate to enlarge the use conveyed so as to make it an easement appurtenant to the lot of appellant." *Steele* at 647. In addition, the Court held that "[t]he fact that the words 'heirs and assigns forever' were used does not and cannot change an easement in gross to an easement appurtenant to land." *Id.* (emphasis added). Instead, two (2) of the essential elements necessary to establish an easement appurtenant were found lacking: 1) the easement must be essential to enjoyment of the dominant estate; and 2) the driveway must begin or end at the land of the party claiming the easement; it cannot simply run along a common boundary. *Id.*

In the case at bar, the common driveway on the Triplex Properties merely constitutes a common boundary parallel to 1707; the driveway does not have a terminus with 1707. In addition, use of the driveway and parking areas on the Triplex Properties is not essential for 1707; it has access from Concord Pike and available parking that has been sufficient for its use as an office building for

over 5 decades. Consequently, the Staffieris' claim to an easement appurtenant fails as a matter of law.

ARGUMENT

II. THE BLACKS VALID, GOOD FAITH POSITION REGARDING THE PROPER INTERPRETATION OF THE 1946 DEEDS PRECLUDES A FINDING OF BAD FAITH

The Staffieris contend that the Bad Faith Exception to the American Rule applies because the Blacks violated 1707's allegedly clear legal right to utilize the driveway and parking areas. AB at 29-31. In addition, they assert that the decision in *H & H Grand Farms, Inc. v. Simpler*, 1994 WL 374308, Chandler, V.C. (Del. Ch., June 10, 1994) supports their position. But the Staffieris are wrong on both counts. Therefore, the Staffieris' arguments are without merit.

A. No Clear Legal Right Existed

First, the Staffieris hardly had a clear legal right to use the driveway and parking areas on the Triplex Properties. The interpretation of the 1946 Deeds and a determination of whether their language created an easement in gross or an easement appurtenant involved a fact intensive inquiry. The Blacks presented a litany of historical facts and a number of well founded legal arguments in support of their position. Even assuming *arguendo* that the Staffieris should have prevailed, it was a close call. As a consequence, no bad faith by the Blacks was established.

B. *H & H Grand* Is Inapposite; No Clear Right To Use the Driveway And Parking Areas Was In Effect

Second, the *H & H Grand Farms, Inc.* decision is distinguishable from the case *sub judice*. In contrast to the facts in that decision, the Staffieris did not have a mountain of evidence, legal opinions, legal authority, and judicial declarations demonstrating that they clearly possessed an easement appurtenant to use the driveway and parking areas. Instead, the Staffieris figuratively "woke up" 11 years after they bought 1707 and suddenly asserted that some latent right existed in a set of 65 year old Deeds that had theretofore never been utilized by any owner of 1707.

The Staffieris only had a claim; no legal right had yet been established. The 1946 Deeds' language only facially reserved personal rights to the defunct CDC and its corporate successors and written assignees, which rights had arguably expired. The facts extant are far shy of the compelling evidence of bad faith present in *H & H Grand Farms, Inc.*

C. Bad Faith Is Not "Prevailing Party" And Cannot Be Founded On Conduct Giving Rise To The Cause Of Action

The Blacks had a legitimate legal dispute with the Staffieris. The parties' respective rights were not clear until their arguments were decided by the Court below. The Bad Faith Exception is not a "Prevailing Party Exception." *Kaung*

v. Cole Nat. Corp., 884 A.2d 500, 506 (Del. 2005). As a consequence, the Staffieris were not entitled to an award of attorneys fees under the Bad Faith Exception to the American Rule.

This Court has previously held that the Bad Faith Exception to the American Rule on attorneys fees is not applicable to conduct that gave rise to a party's claim for relief. *Versata Enterprises, Inc. v. Selectica*, 5 A.3d 586, 607 (Del. 2010)(en Banc). An award of fees for bad faith conduct may only be based upon the bad faith commencement of an action or bad faith conduct taken during the litigation, "not from conduct that gave rise to the underlying cause of action." *Id.*, quoting *Johnston v. Arbitrium (Cayman Islands) Handels*, 720 A.2d at 546 (emphasis added). In the instant action, the Staffieris' claim for injunctive relief arose from the very same actions of the Blacks that the Trial Court pinned its bad faith decision upon: the Blacks' placement of roll stops and fencing along the boundary between the driveway and 1707 (*i.e.* the so-called "self-help"). Consequently, the decision of the Court below was contrary to law and should be reversed.

D. Unsupported Assertions And Personal Attacks Should Be Disregarded

Finally, the Staffieris drone on with supposed "argument" based upon unsupported assertions in support of their "bad faith" argument against the

Blacks. AB at 31-35. Citing to no legal authority or record evidence, the Staffieris simply cast aspersions on the Blacks and articulate a series of *ad hominen* attacks. Because no factual or legal basis exists to support this diatribe, however, the Court should strike or ignore the Staffieris' rant.

ARGUMENT

III. THE BLACKS' COUNTERCLAIMS FOR ABANDONMENT AND REFORMATION WERE NEVER DECIDED BY THE COURT BELOW, NECESSITATING REVERSAL AND REMAND

The Staffieris barely dispute the fact that the Trial Court failed to decide the Blacks' two Counterclaims, which would have caused the extinguishment of the Staffieris' supposed easement rights. AB at 35. In a one-sentence response, the Staffieris: 1) concede that the Trial Court failed to specifically address the Blacks' Counterclaims; and 2) suggest that the Trial Court impliedly rejected them. Such a non-responsive response fails to adequately contest the issue. Thus, the Court should reverse and remand for a decision on the Counterclaims.

ARGUMENT

IV. THE STAFFIERIS FAIL TO REBUT THE SELF-EVIDENT FACT THAT A "DRIVEWAY FOR DRIVEWAY PURPOSES" CANNOT BE USED FOR PARKING

The Staffieris contend that a driveway may be used for parking based upon the Court of Chancery's *ipse dixit*. AB at 36-37. Not so. Since the 1946 Deeds clearly and unequivocally provide that the driveway was for "driveway purposes" only (not for parking purposes), it is clear beyond *peradventure* that the Trial Court erred in denying the Blacks' Rule 60 Motion for Clarification. The unambiguous language in the 1946 Deeds precludes use of the driveway area as a parking lot.

The Trial Court got it wrong. Despite that fact, the Black's Rule 60 Motion was denied. Consequently, reversal and remand with instructions to grant the Rule 60 Motion is warranted.

ARGUMENT

V. THE EXORBITANT AND OUTLANDISH AWARD OF OVER $176,000 FAR EXCEEDS THE REASONABLE AND NECESSARY ATTORNEYS FEES AND IMPROPERLY INCLUDES ALL OUT-OF-POCKET EXPENSES

Vaingloriously regaling in their victory on the easement and bad faith issues, the Staffieris deludingly contend that the astronomical award of over $176,000 in attorneys fees and countless out-of-pocket expenses is an awardable and reasonable amount to grant under the Bad Faith Exception. AB at 37-46. But the Trial Court far exceeded the bounds of what may be awarded. Indeed, the Staffieris were improperly awarded tens of thousands of dollars in attorneys fees and expenses for losing claims, duplicative legal work, amorphous block billing time, and expenses unrelated to their single successful claim: Express Easement.

A. Only Reasonable Attorneys Fees & Costs Charged By The Court Are Awardable By Law

Since the Bad Faith Exception to the American Rule only covers attorneys fees and costs awardable under 10 *Del. C.* § 5106 are only those charged by the Register In Chancery, thousands of dollars in expenses were erroneously awarded. In addition, only reasonable and necessary attorneys fees may be awarded. Accordingly, the $176,000+ award should be reversed.

The reasonableness of attorneys fees is based on Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct and decisional law applying it. *Mahani v. Edix Media Group, Inc.*, 935 A.2d 242, 247 (Del. 2007). The complexity of the litigation and the results obtained are two factors under Rule 1.5(a)(1) and (4). And excessive or unnecessary time is not awardable. *Mahani* at 247-48.

Out-of-pocket expenses are not awardable under Rule 1.5(a). And spending over $100,000 on a simple driveway easement claim is unnecessary and excessive on its face.

B. Much Of The Staffieris' Brief Is False & Unsupported

Next, the Staffieris fallaciously allege that the Blacks "landlocked" 1707 " for close to 14 months." AB at 37. The record evidence is undisputed, however, that 1707 maintained full access via its entrance from Concord Pike and a 20 foot wide paved area outside the lanes of travel in the State right-of-way which allowed for more than sufficient vehicular ingress and egress. A-321, A-316, and A-144. The false assertion by the Staffieris is obviously intended to exaggerate the case in order to justify the completely unjustifiable award of more than $176,000 in this simple easement case.

As with much of their Answering Brief, the Staffieris ramble on extensively with assertions that are unsupported by citation to any record evidence. AB at 37-38 and 39-45. These portions of their brief should not be considered by the Court.

C. The Award Of Fees & Expenses Arising From Numerous Failed Claims Is Arbitrary *Per Se*

Finally, the Staffieris suggest that the Trial Court's award of tens of thousands of dollars for attorneys fees and expenses incurred to present losing claims is appropriate. AB at 40-41. But the Staffieris provide no legal authority in support of this proposition. Instead, they claim to have been victimized by the Blacks, which they contend justifies an award for their baseless causes.

The Staffieris' posit is the epitome of an arbitrary and capricious argument. Claims asserted without any legal justification cannot be a legally valid basis for an award of attorneys fees under the Bad Faith Exception. Fees incurred on losing claims are not "reasonable" under DLRPC Rule 1.5(a)(4) since the results obtained were failure. As a result, the Staffieris' position is without merit.

CONCLUSION

Based upon the foregoing, Appellants Henry Black, Mary Lou Black, Raymond Buchta, W. Scott Black, and Blackball Properties, LLC respectfully request that this Court reverse the Trial Court and hold that no easement exists in favor of 1707 and/or that the parties must bear their own attorneys fees and expenses. The Staffieris failed to prove that an easement appurtenant existed in favor of 1707 for use of the parking and driveway areas on the Triplex Properties. The plain meaning of the driveway and parking use reservation language in the 1946 Deeds fails to evince an intent to create a covenant running with the land; only an easement in gross was created. And CDC's personal rights expired when its corporate successor failed to assign the rights in its 1980 out-conveyance Deed. Regardless, the existence of a legitimate legal dispute between the parties eliminates the possibility that Appellants acted in bad faith. Otherwise, the 2 Counterclaims must be decided and the $176,000 award should be reversed as excessive and unreasonable.

ABBOTT LAW FIRM

Richard L. Abbott (#2712)
724 Yorklyn Road, Suite 240
Hockessin, DE 19707
(302) 489-2529
Attorneys for Defendants

Dated: January 14, 2014