IN THE SUPREME COURT OF THE STATE OF DELAWARE

BHOLE, INC., OUTLET LIQUORS, LLC, HIGHWAY I LIMITED PARTNERSHIP, and ALEXANDER J. PIRES, JR.,	)	No. 305, 2012
Defendants Below, Appellants,	)	
v.	)	On appeal from C.A. No. S09C-09-013 (ESB) in the Delaware Superior Court, Sussex
SHORE INVESTMENTS, INC.,	)	
Plaintiff Below, Appellee.	)	

APPELLANTS' <u>AMENDED</u> OPENING BRIEF

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Dated: July 24, 2012

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NATURE OF PROCEEDINGS

This litigation began in the Court of Chancery. Appellee-Plaintiff below filed its complaint on December 24, 2008, seeking specific performance and legal damages. Appellants-Defendants below moved to dismiss the complaint, and the Court of Chancery granted that motion on July 14, 2009, dismissing the complaint with leave to transfer to the Superior Court.

Appellee filed its complaint in the Superior Court on September 10, 2009. A two-day bench trial was held on March 7-8, 2011. Post-trial briefing was completed on August 5, 2011. The Superior Court issued a Letter Opinion on November 28, 2011 (the "Post-Trial Opinion"). Appellee submitted applications for attorney's fees and costs and a motion to amend judgment, and Appellants contested the substance of those applications and the motion. The Superior Court issued a Letter Opinion on April 9, 2012 regarding those applications and the motion (the "Fees and Costs Opinion"). The parties then collaborated to submit a Final Order of Judgment, which was So Ordered and docketed on May 8, 2012.

Appellants filed their Notice of Appeal on June 4, 2012 (Trans. Id. 44613803), appealing decisions made in the Post-Trial Opinion. Appellants did not appeal from the Fees and Costs Opinion. Appellants filed an Amended Notice of appeal on June 5, 2012 to reflect E-Service. Appellee filed its Notice of Cross-Appeal on June 19, 2012, which appeals from both of the Superior Court's Opinions.

This is Appellants' Opening Brief.

SUMMARY OF ARGUMENT

-I.A. The Trial Judge erred when he found Alexander J. Pires, Jr. (Pires) liable for tortious interference with the lease because the Trial Judge relied upon innapposite authority to hold Pires personally liable, and Pires was protected by the Restatement (Second) of Torts Section 770 and affiliate privileges because he acted within his scope as principal of Bhole and pursued in good faith the interests of the three-entity common enterprise of Bhole, Inc. (BHole), Outlet Liquors, LLC (Outlet), and Highway I Limited Partnership (Highway One).

-I.B. The Trial Judge committed plain erred when he found Outlet and Highway One liable for tortious interference with the lease because he failed to apply the affiliate privilege, which provides Outlet and Highway One a complete shield from liability in this case.

-I.C The Trial Judge erred in formulating and applying the law of by failing to apply the factors in Restatement (Second) of Torts § 767 to determine whether the interference was improper.

-II.A The Trial Judge erred by imposing punitive damages upon Pires, Outlet, and Highway One, when there is no evidence of outrageous, egregious, or malicious conduct, and the only rights of Shore Investments, Inc. (Shore) that were violated were genuinely disputed.

-III.A The Trial Judge's finding that Shore "made a reasonable effort" to mitigate damages during the time period from February 2010 to March 2011 is without record support.

-III.B The Trial Judge erred by rewarding Shore the rent that was not yet due at the time of trial where the lease did not contain an acceleration clause.

STATEMENT OF THE FACTS

A. The Parties.

This case involves a landlord, a tenant, an old liquor store, and a new liquor store. The landlord is the Appellee-plaintiff below, Shore Investments, Inc. ("Shore").[1] Ted Jones is the principal of Shore. Shore owns the old liquor store property (the "Old Store").[2] The tenant of the Old Store was BHole, Inc. ("Bhole"). Kiran Patel was the principal and owner of Bhole, Inc. until November 13, 2008, when Bhole's stock was bought by Outlet Wines, LLC ("Outlet").[3] Outlet is a wholly-owned subsidiary of Highway I Limited Partnership ("Highway One").[4] Alexander J. Pires, Jr. is the principal of Highway One and Outlet, and became the principal of Bhole after the stock purchase.[5] Highway One is the tenant of the new liquor store (the "New Store") which is not owned by Shore, and Outlet is the liquor license holder and subtenant of Highway One.[6]

Patel, Bhole, Outlet, Highway One, and Pires were the defendants below. Patel did not participate in the lawsuit. The Appellants are the defendants below except for Patel ("Appellants").

B. The Liquor Stores.

Both stores are located in the same shopping center on Route 1 in Rehoboth Beach near the furthest south outlet center.[7] The Old Store is a 4,440 square foot building that was built around 1971, which was bought

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[1] A51-52.
[2] *Id.*
[3] *Id.*; A210-12, 216-217. Outlet Wines, LLC was later renamed as Outlet Liquors, LLC. *Id.*
[4] A48, 52, 210.
[5] A51, 104, 146-145, 191, 203.
[6] A210-11, 13.
[7] A52, 84, 224.

by Jones, through Shore, in 1977.[8] From 1977 until March 2011, Jones had not renovated the Old Store, except the roof had to be replaced in 1998.[9] It is a block wall building, with most of the interior walls uncovered.[10] It has no public bathrooms and was described as "very small" and "rundown."[11] The Old Store was operated as a liquor store when Jones bought it, and he ran the store for 22 years.[12] Jones sold the business in 1999, but Shore remained as landlord. [13]

Patel bought the business at the Old Store in 2003.[14] In 2007, Patel's business began to suffer, netting only $4,700.00.[15] The business had suffered a $200,000 drop in gross volume between 2006 and 2007.[16] Patel wanted to get out of the business and move away,[17] so when he was presented the opportunity to sell his business in 2008, he took it.[18]

The New Store, trading as Outlet Liquors, opened in April 2009 once the Bhole liquor license transfer from the Old Store was approved.[19] The New Store is located in what was referred to as the "old salvation army building," which is 22,000 square feet and was once a Safeway.[20] It is located a few feet from the Old Store.[21] A North Carolina company was hired to renovate the building into a large, modern retail liquor store.[22]

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[8] A116, 133.
[9] A134-36.
[10] *Id.*
[11] A216.
[12] A85, 136.
[13] *Id.*
[14] *Id.*
[15] *Id.* That was with Patel only taking a $50,000 salary. *Id.*
[16] *Id.*
[17] A285-86 (Pires Depo.; admitted as "Plaintiff's 3", at A185-86).
[18] *Id.*; A101.
[19] A53, 198-99, 211.
[20] A52, 84, 213-14.
[21] A166.
[22] A214-16.

The New Store features marble-floored bathrooms, wine tasting, a humidor, numerous coolers, many rows of shelving, four cash register, etc.[23] As Pires stated, "[the Stores are] not really comparable."[24]

The Old Store and the New Store, being neighbors, could not sell alcohol at the same time. The transition of the business from the Old Store to the New Store is where the controversy lies.

C. The Lease.[25]

The Lease between Shore and Bhole had a term of seven years, with a termination date of August 31, 2011 and an option to renew for another 7 years. The rent was $61,600 per year, which breaks down to $5,133.33 per month, plus additional monthly CAM payments of $392.54. The Lease included the following provisions, in pertinent part:

- 5. Rent - .... Each such installment being due by the first (1st) day of each month ....
- 10. Use of Premises - Tenant shall use the premises for the purpose of conducting the business of retail sales of alcoholic beverages including beer, wine and spirits, and all other retail sales of merchandise allowed by the Delaware Alcoholic Beverage Control Commissioner ["DABCC"].
- 11. Operation of Business - Tenant shall conduct its business on the premises at least during the regular and customary days, nights and hours for such type of business, as regulated by the [DABCC].
- 25. Default - The prompt payment of the rent for said Premises upon the dates named and the faithful observation of the terms of this Lease are the conditions upon which this Lease is made and accepted and upon any failure on that part of the Tenant to pay the rent due hereunder or any failure to comply with the terms of this Lease which shall continue for a period of ten (10) days following notice of such default by Landlord to Tenant, the Landlord, his agents or attorneys shall have the right to enter said Premises and remove all persons therefrom by legal proceedings to recover possession of said Premises.
- 35.Minimization of Damage – Under this Lease, both Landlord and Tenant shall faithfully attempt to avoid and minimize damages resulting from the conduct of the other party.

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[23] *Id.*
[24] A216.
[25] The facts stated in this sub-section are drawn from the Lease, found at A239-52.

There is no provision granting Shore the right to accelerate the balance of the rent for the remaining term of the Lease upon default.

D. Outlet acquires Bhole after assignment request is rejected.

Pires, through Highway One, wanted to run a larger liquor store.[26] Pires first tried to buy Atlantic Liquors on Route 1 between Lewes and Rehoboth Beach, but that ultimately proved unsuccessful.[27] Pires then approached Patel sometime in early 2008 about buying his business.[28]

Initially, the plan was for Patel to sell Bhole's assets to Outlet, a subsidiary of Highway One.[29] Outlet would have to be assigned Bhole's lease, and the Lease required Shore's consent.[30] In June 2008, Pires sent a letter to Jones that informed him of Outlet's desire to buy the assets of Bhole and sought his consent for an assignment of the lease[31] The letter also outlined a creative plan to move the liquor business from the Old Store to the New Store: join the two buildings together so that they may be considered the same store, which, subject to approval by the Delaware Alcohol Beverage Control Commissioner ("DABCC"), would permit the expansion of the liquor business to the much larger New Store, with the Old Store remaining an active part of the liquor store.[32] The Lease would be amended with Outlet assuming the rent obligation of Bhole, provide a 7 year extension option with accelerating rent, and the use provisions would be changed to general retail.[33]

Jones rejected the assignment request. In July 2008, Jones and

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[26] A198.
[27] *Id.*
[28] A101, 191-92.
[29] A195-96.
[30] A191-92, 196, 243(Lease at ¶15).
[31] A319; *see* A193.
[32] A319; *see* A194-95, 293.
[33] *Id.*

Pires discussed the proposal, and Jones said he would only assign the lease for a payment of $250,000.00, which Pires believed was unreasonable.[34] Pires offered to alter the terms of the assignment and lease amendments by scrapping the expansion plan and the renovations, but Jones would not agree.[35] Then, in August 2008, Highway One sought an injunction compelling the assignment, but that effort was unsuccessful.[36]

At that point, Appellants and Patel took a different approach. They changed the transaction to a stock purchase.[37] On November 13, 2008, Outlet bought the stock of Bhole from Patel, making Outlet the owner of Bhole while leaving Bhole as the tenant.[38] Outlet, as sole stock holder of Bhole, then operated the Old Store and paid the rent.[39]

E. Shore attempts to stop the relocation of the liquor license in the Court of Chancery and before the DABCC – and fails on both fronts.

The goal remained opening the New Store.[40] Bhole, with Outlet in charge, filed an application with the DABCC on December 3, 2008 to change the location of the liquor license from the Old Store to the New Store.[41]

Shore immediately embarked on a two-pronged effort to stop the relocation of the license. First, Shore filed a complaint in the Court of Chancery, seeking *inter alia* an injunction prohibiting the DABCC from considering Bhole's transfer application and an order requiring specific

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[34] A194-95. Pires and Jones had never met prior to these events. A147.
[35] *Id.*; A280, 292-93.
[36] A100.
[37] A196.
[38] A196, 210-12, 216-17.
[39] A196, 199. Outlet applied for and the DABCC approved the change of beneficial ownership of Bhole's liquor license. *See* A295.
[40] A319; *see* A213, A293.
[41] A197; *see* A23 (Chancellor Opinion at 2).

performance of the use obligations under the lease.[42] Around the same time, Shore filed a protest with the DABCC contesting the transfer application.[43] Shore's protest triggered the requirement for a DABCC hearing, which was scheduled for February 19, 2009.[44] After acting to get a hearing, Shore moved for a preliminary injunction preventing the hearing from going forward.[45] The Chancellor denied that motion, allowing the hearing to proceed.[46] Shore, through Jones and counsel, appeared at the hearing to oppose Bhole's transfer application.[47]

April 7, 2009 marked the beginning of the end of Shore's attempt to stop the transfer. First, the DABCC granted Bhole's transfer application, which Shore appealed.[48] Appellants immediately worked to open the New Store.[49] Next, on July 14, 2009, the Chancellor dismissed Shore's complaint.[50] Then, on July 16, 2009, the DABCC's decision approving the transfer was affirmed, and no further appeal was taken.[51]

F. The Chancellor rejects Shore's belief that it had a right or interest in Bhole's liquor license.

It is worth pausing for a moment to consider Chancellor Chandler's opinion, which was a trial exhibit and was discussed at trial. The Chancellor paraphrased Shore's core belief as follows: "Shore argues [the law restricting liquor stores being in close proximity] creates a monopolistic business opportunity for the licensee and the landlord

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[42] A23 (Chancellor Opinion at 2), A107.
[43] A23 (Chancellor Opinion at 2), A197.
[44] A23 (Chancellor Opinion at 2).
[45] *Id.*
[46] *Id.*
[47] A197.
[48] A42-43; *see* A23 (Chancellor Opinion at 2).
[49] A198, 217.
[50] A27 (Chancellor Opinion at 6).
[51] A53, A77.

derivatively enjoys a unique benefit tied directly to the license being authorized at the landlord's property." Based upon that belief, Shore contended it was entitled to an order of specific performance compelling Bhole to operate its license on Shore's property. The Chancellor rejected this argument, stating that a landlord has "no enforceable rights" in the "geographic monopoly" and "intrinsic value" enjoyed by a licensee because Title 4 of the Delaware Code and case law does not allow third-parties to assert an interest in a license.[52] The Chancellor concluded: "Shore points to no authority for its novel theory that a landlord acquires a possessory interest in the lessee's exclusive license to sell alcohol. Shore's claim for specific performance is meritless."[53]

G. The Old Store after the transfer – April '09 to September '09.

As of early April 2009, no alcohol was sold out of the Old Store. Outlet used it for storage of anything but alcohol, including water, soda, food, shelves, lights, and electronics.[54] Outlet maintained and paid for the electric and continued paying the rent each month until Shore demanded and was voluntarily given possession in September 2009.[55]

In May 2009, Jones claimed to find mold in the Old Store.[56] Appellants argued that the mold was caused by the building's poor condition and water leaks. Shore argued that the mold was caused by Appellants keeping the climate control too high. The Trial Judge accepted Shore's position and found Bhole in breach of the Lease on this issue. Appellants are not appealing this finding.

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[52] A26 (Chancellor Opinion at 5).
[53] A26 (Chancellor Opinion at 5).
[54] A198-99, 315-16.
[55] A199, 218 (electric); A52-3, 99, 196 (rent).
[56] A109, 153-54.

H. Shore demands possession of the Old Store in September '09.

In mid-September 2009, Jones decided he wanted possession of the Old Store, despite knowing that he would no longer receive rent for the Old Store.[57] Shore sent out a letter dated September 21, 2009 notifying Appellants of numerous breaches and threatening to go to JP Court to gain possession if the breaches were not remedied in ten days.[58] One of the demands was the resumption of the liquor business at the Old Store, which could not be complied with because the liquor license had been transferred to the New Store. Appellants opted to not contest the demand for possession and delivered the keys to Shore.[59]

I. Shore's mitigation efforts.

The Lease requires Shore to mitigate its damages, and that effort got off to a promising start in the second half of 2009. Jones was approached by two successful restaurateurs regarding the Old Store.[60] First, he was contacted by Matt Haley ("Haley") at some point in the summer of 2009.[61] In fact, in September 2009, Appellants had sought Shore's approval assigning the Lease to Haley, but Jones refused.[62] Haley testified that he was excited about the space but felt it needed significant renovations.[63] He sent a letter of intent to Jones outlining his proposal for a restaurant, and offered to pay $5,000 a month in rent,[64] nearly the amount Bhole was paying. Jones, however, did not pursue Haley's offer further, and, sometime in late 2009, Jones contacted

[57] A46, 49-51, 99-100.
[58] A321-23.
[59] *Id.*, A114, 201.
[60] A118-19, 155-57, 160-162.
[61] A168. Haley owns Fish On, Blue Coast, Catch 54, etc. A223.
[62] A168, A233-236.
[63] A225.
[64] A119, 225.

Haley and told him without explanation that he was no longer interested.[65]

The other prospective tenants were the owners of Nage, an upscale restaurant that is a tenant of Shore's in the same shopping center.[66] In early September 2009, Nage proposed converting the Old Store into a farmer's market.[67] Nage and Jones engaged in numerous discussions and traded proposals in December 2009.[68] Nage also sought renovations to the building, though less extensive than Haley, and offered less rent.[69] Jones, however, was unwilling to help finance any renovations to his 45+ year-old building, and he rejected Nage's rent offer and demanded rent equal to what Bhole was paying, so this effort ended in February 2010.[70]

At that point in early 2010, Shore's attempts to re-let the Old Store essentially stopped. There is little evidence in the record about what happened with the Old Store from February 2010 to March 2011, the time of trial. Jones testified that he turned the property over to a commercial realtor, and that he had no success leasing the property.[71] Jones rejected advice from his realtor about how to make the Old Store more attractive to prospective tenants.[72] And it surely did not help that he insisted on listing the rent at the same rate Bhole had been paying.[73]

J. Pires and his point of view about the liquor license.

Before turning to Shore's claims and the Trial Judge's findings, it is important to consider Pires' background and his testimony. Pires

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[65] A226-27.
[66] A120.
[67] A119.
[68] *Id.*, A123-24.
[69] A124, 159.
[70] A124, 159, 160.
[71] A125.
[72] *Id.*
[73] A163.

resides in Dewey Beach and is a lawyer who still practices class-action law in Washington, D.C.[74] Through Highway One, he is an indirect owner and manager of numerous businesses including restaurants, a taproom, and two liquor stores.[75] As an operator of about a dozen liquor-licensed businesses, Pires has over 20 years of experience interacting with Delaware's liquor laws and the DABCC.[76]

Pires testified that he became aware of the Lease and its contents when he began discussions with Patel about buying his business.[77] In particular, he was aware of paragraphs 10 and 11 of the Lease, which stated in essence that Bhole "shall use the premises" as a liquor store.[78]

Pires believed that paragraphs 10 and 11 were neither "enforceable, nor legal."[79] This belief was based upon his perspective on contracts and his experience with Delaware's liquor law and the DABCC. Pires testified that the word "shall," when used in a contract, is often, but not always, a mandatory word, because the context must be taken into account.[80] Pires believed the relevant "context" here was the pervasive regulation of the sale of alcohol.[81] He believed that the DABCC and Delaware law severely restricted the ability to contract about the sale of alcohol – "you can't draft language that's inconsistent with their law."[82] Thus, Pires testified that, based upon his experience and advice of trial counsel,[83]

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[74] A190-91, 255-57.
[75] *Id.*
[76] A197, 206, 257-58, 261-62, 271-72, 278-79.
[77] A191-92, 274.
[78] A196.
[79] A300.
[80] A272-73.
[81] A207-9, 283-84.
[82] A309-10; *see* A292-93.
[83] A306.

paragraphs 10 and 11 of the Lease were not enforceable.[84] The following trial testimony summarizes Pires' belief:

> Q. Did you consider the fact that by not using the business as a liquor store that you would be violating this lease?
> A. It was subject to the ABC. This lease is all subject to ABC. My feeling was I've had licenses for 20, 22 years, 23 years in different parts of Delaware, and I knew I was moving next door, and I knew they were going to allow it. The general rule in Delaware is if you stay within 500 feet it's an automatic approval. So I have done that before. So I knew I was moving and the question was: Was I going to violate the lease? I knew ABC was going to approve it. So I would still have the lease.[85]

That testimony, as well as a lengthy deposition colloquy,[86] shows that Pires had thought about the subject and that his belief was genuine.

K. Shore's Claims.[87]

Shore transferred its suit to Superior Court on September 10, 2009. Shore asserted four claims. First, it alleged that Bhole breached the Lease. The remainder of Shore's claims were against the other Appellants, which in essence are claims for tortious interference with current and prospective business relations.

As for damages, for the breach of lease claim, Shore sought the balance of rent due for the entire term of the Lease, as well as rent for the renewal term, remediation costs, consequential damages, and fees and costs. Regarding the other claims, Shore sought a laundry list of remedies, including: damages for "the loss of a geographical monopoly tenant" for 20 years; damages for the loss of Bhole exercising the extension, apparently for perpetuity; damages for inability to rent the Old Store as a liquor store in the future; the cost to outfit the

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[84] A300, 302-3, 306.
[85] A197.
[86] A300-302, 306-11.
[87] *See* A28-47 (Superior Court Complaint).

property for an alternative tenant; and punitive damages for "intentional, outrageous and malicious interference." Jones testified that he was seeking damages totaling around $1,150,000.00, as well attorney's fees and punitive damages.[88]

L. The Trial Judge's Opinion.

The Trial Judge issued his 32 page Post-Trial Opinion ("PTO") on November 28, 2011. The findings pertinent to Appellants' appeal are outlined below.

The Trial Judge found in favor of Shore on the breach of lease claim. Appellants are appealing the Trial Judge's damage calculations. The Trial Judge found that Shore was obligated to mitigate its damages, and that it "made a reasonable effort to do so" (PTO at 16-17). Regarding the amount of rent due Shore, the Trial Judge awarded the full amount due for the remainder of the Lease, even though trial was held almost six months before the Lease term expired (PTO at 19-20).

As for the remaining claims, the Trial Judge found for Shore on its tortious interference with Lease claim (PTO at 24-25), and Appellants are appealing that finding of liability. The Trial Judge assessed $25,000 in punitive damages against Pires, Outlet, and Highway One (PTO at 26-28), and Appellants are appealing that finding of liability.

The Trial Judge otherwise found against Shore. For instance, it found no liability for tortious interference with prospective business relations, and it rejected many of Shore's theories of damages. Appellants are not appealing those findings.

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[88] A129; *see* Post-Trial Opinion at 5.

ARGUMENT

I. THE TRIAL JUDGE ERRED WHEN HE FOUND PIRES, OUTLET, AND HIGHWAY ONE LIABLE FOR TORTIOUS INTERFERENCE WITH THE LEASE.

A. The Trial Judge committed legal error regarding Pires' personal liability for tortious interference by relying upon inapposite law; Pires' actions were protected by the Restatement Section 770 and affiliate privileges.

i. *Question Presented*

Is Pires protected from personal liability for tortious interference by both the privilege for managers in RESTATEMENT (SECOND) OF TORTS § 770 and the "affiliate privilege"? The parties did not present the issue of Pires' personal liability to the Trial Judge. The Trial Judge, however, raised *sua sponte* in the Post-Trial Opinion the issue of Pires's personal liability for tortious interference.[89] Accordingly, this Court should allow the parties to be heard on this issue.[90]

ii. *Scope of Review*

The scope of review is whether the Trial Judge erred in formulating and applying legal precepts; thus, this Court's review is *de novo*.[91]

iii. *Merits of Argument*

The Trial Judge's legal support for holding Pires personally liable is innapposite. The Trial Judge cited authority about tortious acts of

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[89] Post-Trial Opinion at 31.

[90] *Reddy v. MBKS Co.*, 945 A.2d 1080, 1086 (Del. 2008) ("It is apparent to us that the issue presented on this appeal was never "fairly presented" to the trial court, as Supreme Court Rule 8 requires. But, it does not necessarily follow, in this specific case, that we should not consider the issue. In his written opinion, the Vice Chancellor held sua sponte that Reddy's actions constituted an attempted cancellation of shares that required a charter amendment under Section 242. Because the parties were not heard on this specific issue, it serves the "interests of justice" for us to consider Reddy's claim, as Supreme Court Rule 8 permits."); *Lawson v. Preston L. McIlvaine Const. Co.*, 552 A.2d 858 (Del. 1988) ("Because the trial judge, sua sponte, addressed the merits of the section 2702 claim, the question was fairly presented to the Superior Court and is thus properly before this Court on appeal.").

[91] *Genger v. TR Investors, LLC*, 26 A.3d 180, 190 (Del. 2011).

an employee. The law of tortious interference is more complex and involves certain privileges which, when applied here, compel reversal.

a. *The Trial Judge erred in formulating the applicable law by relying solely upon authority about respondeat superior.*

The Trial Judge held Pires personally liable based upon the following reasoning: "Pires does not escape liability for his tortious actions even though at times he may have been acting as an employee of one or more of the defendants."[92] The Trial Judge cited two cases and an AM. JUR. Section. None apply in this situation.

Ths first case is *Fields v. Synthetic Ropes, Inc.*,[93] which was a personal injury action related to a car accident, where the wife sued the husband driver who was driving a company car. The court ruled that the wife could not sue the husband, but the wife could sue the company under *respondeat superior*.[94] The other case is *Zaleski v. Mart Assoc.*,[95] which involved litigation about a fire that destroyed a shopping center. An individual defendant argued that he could not be personally liable because he was acting as an employee of one of the defendant entities. The court held that he could be personally liable for torts committed while acting within the scope of his employment because there was evidence that his negligence caused the fire. Lastly, the Trial Judge cited 53 AM. JUR. 2D *Master and Servant* § 446, which states, in part, "[a]n employee who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command or on account of his employer."

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[92] Post-Trial Opinion at 31.
[93] 215 A.2d 427 (Del. 1965).
[94] *Id.* At 432-33.
[95] 1988 WL 97900 (Del. Super.). The facts of the *Zaleski* case are not discussed in the cited opinion. For the facts of the case, *see In re Bowe Co.*, 1986 WL 15437 (Del. Super.).

None of those authorities address the liability of a principal of an entity for tortious interference.

b. *Established privileges protect Pires from personal liability.*

Pires was the principal of Bhole at the time of breach, therefore he cannot be held liable for tortious interference as long as he was acting within the scope of his duties. If the argument is he acted outside of his scope and instead on behalf of Outlet and Highway One, then the affiliate privilege protects him because he was pursuing in good faith those affiliated entities' interests.

First, Pires enjoys a privilege from liability as the principal of Bhole. It is "generally accepted that officer[s] or director[s] may be held personally liable for tortious interference with a contract of the corporation *if and only if* [they] exceed the scope of [their] agency in so doing."[96] As was stated in *Wallace v. Wood*:

> "Employees acting within the scope of their employment are identified with the defendant himself so that they may ordinarily advise the defendant to breach his own contract without themselves incurring liability in tort. This rationale is particularly compelling when applied to corporate officers as their freedom of action directed toward corporate purposes should not be curtailed by fear of personal liability."[97]

This rule is based upon RESTATEMENT (SECOND) OF TORTS § 770, which provides a specific privilege from liability for tortious interference (the "Section 770 privilege"). Its application in a business setting was described in *Grand Ventures, Inc. v. Paoli's Restaurant, Inc.*:

> Comment b to § 770 states that the section is frequently applicable to those who stand in a fiduciary relation toward

[96] *Goldman v. Pogo.com, Inc.*, 2002 WL 1358760, at *8 (Del. Ch.) (emphasis added).

[97] 752 A.2d 1175, 1182-83 (Del. Ch. 1999); *see Kent Cnty. Equip., Inc. v. Jones Motor Grp., Inc.*, 2009 WL 737782, at *3-5 (Del. Super.) (citing and applying *Wallace*); *Goldman*, 2002 WL 1358760, at *9 (same).

> another, as in the case of agents acting for the protection of their principals, trustees for their beneficiaries or corporate officers acting for the benefit of the corporation. The text of § 770 and the comments thereto make clear that an officer or director may be held personally liable for tortious interference with a contract of the corporation if, and only if, said officer or director exceeds the scope of his agency in so doing.[98]

Furthermore, there is a presumption that the corporate officer "acted in order to benefit the corporation," and the plaintiff has the burden to overcome that presumption."[99] The plaintiff must prove that the actor "was motivated by personal benefit to the exclusion of his corporate responsibilities."[100] As applied here, there was no evidence that Pires was acting outside of the scope of his role as principal of Bhole. Thus, Pires is shielded from liability for tortious interference by the Section 770 privilege regarding his actions as principal of Bhole.

Second, Pires is also privileged from liability as principal of Outlet and Highway One. Delaware law is clear that affiliates of a breaching party cannot normally be held liable for tortious interference. This rule is known as the "affiliate privilege." The privilege's protections have been extended to the principals of the affiliates.[101]

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[98] 1996 WL 30022, at *3 (Del. Super.) (quotations and citations omitted) (citing *Local Union 42 v. Absolute Envtl. Servs.*, 814 F. Supp. 392, 400 (D. Del. 1993)).
[99] *Kent County Equip.*, 2009 WL 737782, at *2.
[100] *Id.*; *see Smith v. Hercules, Inc.*, 2002 WL 499817, at *3 (Del. Super.) (acting to further personal investments would be outside scope); *Ferko v. McLaughlin*, 1999 WL 167833, at *3 (Del. Super.) (acting to benefit personal debts and taxes would be outside scope).
[101] *Wallace*, 752 A.2d at 1182-83 (dismissing tortious interference claim against the affiliates *and* the individuals defendants when the individuals were the officers of both the breaching party and the breaching party's affiliates); *Tenneco Auto., Inc. v. El Paso Corp.*, 2007 WL 92621, at *6 (Del. Ch.) ("Because one need not be a party to a contract to be deemed not to be a stranger to the contract, officers, subsidiaries, and agents, such as lawyers, benefit from a privilege against tortious interference with contract claims because they are so (continued...)

The affiliate privilege is based on the general rule that, as a prerequisite to liability for tortious interference, the defendant must "be a stranger to both the contract and the business relationship giving rise to and underpinning the contract."[102]

The "affiliate privilege" received its name from Chancellor Allen's opinion in *Shearin v. E.F. Hutton Group, Inc.*,[103] which has particular application here because it applies the privilege to wholly owned subsidiaries and their parent. In *Shearin*, the plaintiff alleged that the her employment contract was terminated by her employer as a result of actions by agents of an affiliate of the company. The Chancellor dismissed the interference claim against the affiliate. The Chancellor reasoned that a parent and its subsidiaries share a "significant economic interest" that must be protected by a "qualified privilege" that "arises when the parent pursues lawful action in the good faith pursuit of its profit making activities."[104] The Chancellor further stated that the affiliate privilege applied to "wholly owned affiliates with a common parent" because those "entities share the commonality of economic interests which underlay the creation of an interference privilege."[105]

The plaintiff has the burden to prove that the affiliate privilege is not applicable.[106] The plaintiff must prove that the non-party "was not pursuing in good faith legitimate profit seeking activities of the

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[101](...continued)
closely related to the parties to the contract."); *see In re Transamerica Airlines, Inc.*, 2006 WL 587846, at *6 (Del. Ch.) (stating that corporation cannot conspire with agents).
[102] *Tenneco*, 2007 WL 92621, at *5 (Del. Ch.).
[103] 652 A.2d 578, 590-591 (Del. Ch. 1994).
[104] *Id.* at 590.
[105] *Id.* at 591 n.14. *See Grunstein v. Silva*, 2009 WL 4698541, at *16 (Del. Ch.) (applying the affiliate privilege).
[106] *Shearin*, 652 A.2d at 591.

affiliated enterprises," or "was motivated by some malicious or other bad faith purpose to injure the plaintiff."[107] The test has been described as applying a "stringent bad faith standard."[108]

In summary, a combination of the two established privileges – the Section 770 privilege and the affiliate privilege – results in Pires being protected from liability for tortious interference. Application of those privileges leads to the following conclusions: 1) the Section 770 privilege protects Pires' actions as manager of Bhole; 2) the affiliate privilege protects Bhole, Outlet, and Highway One, a three-entity common enterprise; 3) Pires' actions as manager of Outlet and Highway One are thus protected by the affiliate privilege, because his actions were done "pursuing in good faith legitimate profit seeking activities of the affiliated enterprises." Shore cannot show that Pires acted outside of his scope as principal of Bhole or that he was acting in bad faith and not pursuing the interests of the common enterprise. Rather, all the record evidence shows that Pires was pursuing the interests of the common enterprise by working to rescue the dying business of Bhole by utilizing the resources of Outlet and Highway One to open a larger liquor store that would better meet market demands.

Accordingly, this Court must hold that the Section 770 and affiliate privileges apply and reverse the Trial Judge's finding of personal liability against Pires. In the alternative, this Court should remand the case to determine whether Shore can present sufficient evidence to overcome the privileges.

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[107] *Id.*
[108] *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1039 (Del. Ch. 2006).

B. The Trial Judge committed plain error regarding Outlet and Highway One's liability for tortious interference by failing to apply the affiliate privilege.

i. *Question Presented*

Are Outlet and Highway One protected from liability for tortious interference by the affiliate privilege? The parties did not present this issue to the Trial Judge. And, unlike the situation regarding Pires' personal liability, the Trial Judge did not raise the issue *sua sponte*. Therefore, this Court will only review this issue if it falls within the plain error exception. Appellants contend that the plain error exception is met because the failure to apply the affiliate privilege to Outlet and Highway is "clearly prejudicial to [their] substantial rights as to jeopardize the fairness and integrity of the trial process,"[109] as the privilege would be a complete shield from liability in this case.

ii. *Scope of Review*

The scope of review is whether the Trial Judge erred in formulating and applying legal precepts; thus, this Court's review is *de novo*.[110]

iii. *Merits of Argument*

Outlet and Highway One are protected from liability for tortious interference with the Lease by the affiliate privilege, which is more fully explained in Part I.A. Bhole and Outlet, as wholly owned affiliates with a common parent, Highway One, all share a "commonality of economic interests" that makes the affiliate privilege applicable. As affiliated enterprises, they were not "strangers" to the Lease, and their actions – carrying out the plan to open the New Store, which

[109] *Duphily v. Del. Elec. Co-op., Inc.*, 662 A.2d 821, 832 (Del. 1995).
[110] *Genger v. TR Investors, LLC*, 26 A.3d 180, 190 (Del. 2011).

resulted in a breach of the Lease's use provisions – were done "in furtherance of their shared legitimate business interests" and in good faith pursuit of profit making activities. The goal of the affiliated enterprises was to save Bhole's business using the resources of Outlet and Highway One to open a larger, better liquor store. There is no evidence that the actions were "motivated by some malicious or other bad faith purpose to injure" Shore. Consequently, this Court should hold that the affiliate privilege applies to Outlet and Highway One and reverse the Trial Judge's finding of liability; or, in the alternative, this Court should remand the case to determine whether Shore can present sufficient evidence to overcome the affiliate privilege.

C. The Trial Judge erred in formulating and applying the law of tortious interference by failing to apply the seven factors in Restatement (Second) of Torts § 767 to determine whether the interference was improper.

i. *Question Presented*

Can Pires, Outlet, and Highway One be found to have acted "without justification" after application of the seven factors enumerated in RESTATEMENT (SECOND) OF TORTS § 767? Appellants presented this question to the Trial Judge in their second post-trial brief.[111]

ii. *Scope of Review*

The scope of review is whether the Trial Judge erred in formulating and applying legal precepts; thus, this Court's review is *de novo*.[112]

iii. *Merits of Argument*

The Trial Judge did not consider the factors listed in RESTATEMENT (SECOND) OF TORTS § 767 (the "767 Factors")[113] to determine whether Appellants' interference was improper. Appellants argued that application of the 767 Factors weighed in favor of finding that Appellants did not act improperly. The Trial Judge, however, did not even mention these factors, much less apply them. Instead, the Trial Judge, in formulating the applicable legal principles, just listed the five elements of the claim.[114] Delaware Courts have consistently held that the 767 Factors need to be considered and applied to determine

[111] A347-48 (Defs. Reply Br. at 6-7).
[112] *Genger v. TR Investors, LLC*, 26 A.3d 180, 190 (Del. 2011).
[113] The 767 Factors are: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the plaintiff with which the actor's conduct interferes,(d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties.
[114] Post-Trial Opinion at 24.

whether a defendant acted improperly or without justification.[115] Consequently, the Trial Judge erred as a matter of law by not considering the 767 Factors. Therefore, this Court must remand the case to the Trial Judge with instructions to consider and apply the 767 Factors.

Application of the 767 Factors shows that Appellants' actions were not improper. For instance, factor (a) - the nature of the actor's conduct - strongly favor's Appellants. The relevant comment calls (a) the "chief factor" which focuses on the means of interference and lists "predatory means" including physical violence, fraud, and threats of illegal conduct.[116] Appellants' actions cannot be classified as any of those "predatory means." Similarly, factor (b) - the actor's motive - favors Appellants. The relevant comment states that being solely motivated to interfere is improper, as is a "motive to injure another or to vent one's ill will on him."[117] Appellants motive was to improve a failing liquor-licensed facility to open a large modern liquor store. It was not Appellants' sole motive, or even a significant motive, to harm Jones. It is clear that the Trial Judge's analysis on this critical point is lacking. Delaware law requires the application of the 767 Factors. The Trial Judge failed to do so. Thus, a remand is necessary.

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[115] *Bobson v. Lifestyle Resorts, Inc.*, 1991 WL 134483, at *1 (Del. 1991) (reversing Trial Judge for "faili[ing] to define the element of justification, or to give the jury guidance in connection with the jury's application of that element to the facts of plaintiff's claim.") (citing § 767) ; *Bohatiuk v. Del. Chiropractic Servs. Network, LLC,* 1997 WL 34615032, at *3 (Del. Super.) (stating that 767 Factors need to be applied); *Grand Ventures, Inc. v. Paoli's Rest., Inc.,* 1996 WL 30022, at *5 n.3 (Del. Super.) (Same); *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987) (same); *Amer. Original Corp. v. Legend, Inc.*, 652 F. Supp. 962, 970 (D. Del. 1986) (same).

[116] RESTATEMENT (SECOND) OF TORTS § 767, cmt. c.

[117] *Id.*, cmt. d.

II. THE TRIAL JUDGE ERRED BY IMPOSING PUNITIVE DAMAGES UPON PIRES, OUTLET, AND HIGHWAY ONE.

A. The Trial Judge's imposition of punitive damages was legal error because there is not sufficient evidence to support that decision.

i. *Question Presented*

Are punitive damages appropriate, where there is no evidence of outrageous, fraudulent, egregious, or malicious conduct, and the only rights of Shore that were violated were genuinely disputed?

Appellants presented this question to the Trial Judge in the Pre-Trial Stipulation and in their second post-trial brief.[118]

ii. *Scope of Review*

The scope of review for whether an award of punitive damages is appropriate is unclear under Delaware law. This Court has not expressly set out the applicable level of review. Appellants argue that this Court should engage in a *de novo* review of the record to determine if the Trial Judge's decision to award punitive damages was proper and based upon sufficient evidence. Appellants' argument is based on both Delaware and Federal decisions.[119]

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[118] A54, 56-57 (Pre-Trial at 7, 9-10), 351 (Defs. Reply Br. at 10).

[119] Delaware: *Porter v. Turner*, 954 A.2d 308, 312 (Del. 2008) ("On appeal, we must determine whether the facts presented at trial provided a sufficient basis for a jury to conclude that Porter's conduct exhibited a wanton or wilful disregard for the rights of Turner."); *Jardel Co. v. Hughes*, 523 A.2d 518, 527 (Del. 1987) ("After a full examination of the record in this case and the controlling law we must agree that the issue of punitive damages should not have been submitted to the jury."); *Cloroben Chem. Corp. v. Comegys*, 464 A.2d 887, 891 (Del. 1983) ("Our review of the record indicates that there is sufficient evidence to support a finding that Cloroben acted in a wilful or wanton manner against plaintiffs."); Federal: *Ventas, Inc. v. HCP, Inc.*, 647 F.3d 291, 318-319 (6th Cir. 2011) ("The question of whether there was sufficient evidence to support a punitive damages award is a question of law, which we review de novo."); *Farm Bureau Life Ins. Co. v. Am. Nat'l Ins. Co.*, 408 Fed. Appx. 162, 165 (10th Cir. 2011) ("Whether a punitive damages award is supported by

(continued...)

iii. *Merits of Argument*

If this Court holds that Appellants are not liable for tortious interference, then it must also reverse the award of punitive damages. "As a general rule in Delaware, punitive damages are not recoverable in an action for breach of contract."[120] Punitive damages may be awarded for breach of contract only when the "conduct also amounts independently to a tort."[121] Awarding punitive damages for a breach of contract conflicts with the "efficient breach" theory, recognized in Delaware, which holds that a party may intentionally breach a contract to pursue more lucrative opportunities with the understanding that it will owe expectation damages.[122] If Shore's tortious interference claims are stricken, the award of punitive damages must be reversed.

If the findings of liability for tortious interference are upheld, the punitive damages award must still be reversed because there is not, as a matter of law, sufficient supporting evidence.

Punitive damages "can be awarded only for conduct for which this remedy is appropriate."[123] "The penal aspect and public policy considerations which justify the imposition of punitive damages require that they be imposed only after a close examination of whether the defendant's conduct is 'outrageous,' because of 'evil motive' or 'reckless indifference to the rights of others."[124] Indeed, punitive

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[119](...continued)
sufficient evidence presents a question of law, which we review de novo.").

[120] *Ripsom v. Beaver Blacktop*, 1988 WL 32071, at *16 (Del. Super.).

[121] *Id.* at 446-47.

[122] *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 445-46 (Del. 1996).

[123] RESTATEMENT (SECOND) OF TORTS § 908, cmt. a.

[124] *Jardel,* 523 A.2d at 529 (Del. 1987).

damages have been "characterized as civil penalties which serve as a substitute for criminal prosecution for conduct which, though criminal, often goes unpunished by the public prosecutor."[125] Thus, punitive damages should be reserved for only the most egregious of cases.

The Trial Judge justified awarding punitive damages as follows:

> "Unwilling to wait until [the lease ended] and knowing full well how important it was to Shore to have an operating liquor store on its premises, the defendants intentionally and willfully caused Bhole to breach its lease by moving the liquor store from the leased premises to the Salvation Army building. . . . .The compensatory damages ... [are] not an adequate sanction for the defendants' conduct in this case."[126]

The most noteworthy thing about the Trial Judge's findings is what was *not* said. He did not find that Appellants' conduct was "outrageous," caused by an "evil motive," "fraudulent," "egregious," "reckless," "reprehensible," or "filled with malice." None of those epithets fit the facts here because there is no evidence that Appellants acted with mal intent or used reprehensible tactics; rather, Appellants motive was to save Bhole's business and open a more successful store, and they acted openly and used statutorily delineated processes to move the license.

It appears that the Trial Judge rested his decision to impose punitive damages on the finding that Appellants, by breaching the Lease and moving the liquor license, intentionally disregarded Shore's desire to have a liquor store on its premises. That finding is flawed.

Shore had only very limited "rights" to have a liquor store on its premises. First and foremost, Shore's belief that it had a possessory interest in Bhole's liquor license was thoroughly rejected by the Chancellor, who held that Shore could not specifically enforce the Lease

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[125] *Id.*
[126] Post-Trial Opinion at 28.

provisions requiring Bhole to operate its license on Shore's property. Similarly, the Trial Judge, in rejecting Shore's claim for interference with prospective contracts, recognized that Shore had no legal or contractual entitlement to a perpetually liquor-licensed property. Shore's primary right was the payment of rent in return for allowing the lessee to possess the property. While the Lease contained mandatory use provisions, a violation of those provisions only entitled Shore to recover possession – which Shore did. Shore received the benefit of all of the rights it was entitled to under the Lease.

Assuming that Shore had a "right" to a liquor store on its premises during the term of the Lease and that Appellants intentionally acted contrary to that right, that is not sufficient to justify imposing punitive damages. Transferring the license, closing the Old Store, and opening the New Store were all intentional acts. But Appellants, particularly Pires, did not act with a culpable state of mind.[127] Pires believed that Shore's expectation of a perpetually liquor-licensed premises was unreasonable – and both the Chancellor and the Trial Judge agreed. As for Shore's "right" to have a liquor store at the Old Store during the term of the Lease, Pires believed that the relevant Lease provisions were not enforceable. That belief was genuinely held and was advanced in good faith, based upon legal advice and many years of experience in the industry. In order to impose punitive damages, a defendant must have acted indifferently and in conscious disregard of a known right. There is no evidence of that here. Accordingly, the Trial Judge's decision to impose punitive damages must be reversed.

[127] *Littleton v. Young*, 1992 WL 21125, at *2 (Del.) ("The focus is upon the defendant's state of mind" when deciding upon punitive damages).

III. THE TRIAL JUDGE ERRED WHEN DETERMINING THE AMOUNT OF RENT DUE FOR BREACH OF THE LEASE.

A. The Trial Judge's finding that Shore "made a reasonable effort" to mitigate damages during the time period from February 2010 to March 2011 is without record support.

i. *Question Presented*

Did Shore meet its contractual and legal obligation to mitigate damages between February 2010 and March 2011 by listing the Old Store with a realtor but rejecting the realtor's advice making the property more marketable and insisting on keeping the rent at the amount Bhole was paying? Appellants argued at trial that Shore had failed to mitigate its damages,[128] and Shore recognized in the Pre-Trial Stipulation that it had a duty to mitigate damages.[129]

ii. *Scope of Review*

The question involved concerns findings of fact by the Trial Judge. This Court will reverse the finding if it is not supported by the record or is clearly wrong.[130]

iii. *Merits of Argument*

The Trial Judge found that Shore made a reasonable effort to meet its duty under both the Lease and the law to mitigate its damages.[131] The basis for the Trial Judge's decision was that Jones had discussions with two prospective tenants that did not work out, and he listed the Old Store with a commercial realtor who also had no luck. The Trial Judge had an adequate factual basis to conclude that Shore met its obligation to mitigate damages during the period when Jones was negotiating with the two prospective tenants. There is no record support, however, for the

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[128] A80-81.
[129] A54 (Pre-Trial at 7).
[130] *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).
[131] Post-Trial Opinion at 16-17.

Trial Judge's conclusion that Shore mitigated its damages from February 2010 to March 2011.

The Lease and the law required Shore to mitigate its damages. "As a general rule, a party cannot recover damages for loss that he could have avoided by reasonable efforts,"[132] "and whether a loss is mitigable turns on the circumstances."[133]

Appellants concede that the Trial Judge had an adequate factual basis to find that Shore acted reasonably to mitigate its damages between September 2009 and February 2010. While Appellants believe that Jones was unreasonable in refusing to reduce his rent or renovate his 45+ year-old building after demanding possession from Bhole, the Trial Judge's finding that his negotiations with Haley and Nage were reasonable will not be overturned under the deferential standard of review.

The Trial Judge's finding that Shore acted reasonably after those negotiations ended, however, has no record support. There is almost no testimony about 13-month period between February 2010, when negotiations with Nage ended, and March 2011, the date of trial. Below is the entirety of the testimony Shore offered about Jones' positive efforts to re-let the Old Store after things did not work out with Nage:

> Q. Have you subsequently turned the property over to a commercial realtor?
> A. Yes, I did.
> Q. Have you had any success in leasing the property?
> A. No.[134]

The only other relevant testimony cuts against Shore. Jones testified that his realtor suggested changes to the interior of the Old Store, but

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[132] *John Petroleum, Inc. v. Parks*, 2010 WL 3103391, at *6 (Del. Super.).
[133] *West Willow-Bay Crt., LLC v. Robino-Bay Crt. Plaza, LLC*, 2009 WL 458779, at *8 (Del. Ch.).
[134] A125.

he rejected that advice.[135] Similarly, Jones insisted on listing the rent at the same rate Bhole had been paying.[136] Furthermore, the Trial Judge stated that Jones testified that the real estate market was poor.[137] There is no testimony by Jones to that effect; rather, it was the Trial Judge who stated that "it's a lousy market out there."[138] In sum, there is no record support for the Trial Judge's finding that Shore took reasonable efforts to mitigate its damages from February 2010, when negotiations with Nage ended, up to trial in March 2011. Consequently, the Trial Judge's finding on that point must be reversed and remanded for further development.

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[135] *Id.*
[136] A163.
[137] Post-Trial Opinion at 17.
[138] A238.

B. The Trial Judge committed legal error by rewarding Shore the rent that was not yet due at the time of trial when the Lease did not contain an acceleration clause.

i. *Question Presented*

Can Shore recover rent that was not yet due as of the time of trial when the Lease did not contain an acceleration clause? Appellants presented this argument in the pre-trial stipulation, in trial, and in their second post-trial brief.[139] The Trial Judge, however, did not rule on this question.

ii. *Scope of Review*

The scope of review is *de novo* because this question involves contract interpretation[140] and applying the law to undisputed facts.[141]

iii. *Merits of Argument*

Without an acceleration clause in the Lease, Shore is only entitled to rent due at the time of trial. It is reversible legal error for the Trial Judge to hold that Shore was entitled to the full balance of the rent, because the Lease did not include an acceleration clause. This Court must hold that a commercial landlord may not recover rent that comes due post-trial unless the lease contains a valid acceleration clause. Accordingly, Shore may only recover rent from October 2009 to March 2011, but not rent for the months of April 2011 to August 2011, when the Lease ended.

The following undisputed facts are the basis for Appellants' argument: trial concluded on March 8, 2011; the Lease term ended on August 31, 2011; paragraph 5 of the Lease states that rent is "due by the

[139] A51 (Pre-Trial at 4), 79-80 (trial), 350 (Defs. Reply Br. at 9).
[140] *AT&T Corp. v. Lillis*, 953 A.2d 241, 251-252 (Del. 2008).
[141] *Donald v. State*, 903 A.2d 315, 318 (Del. 2006).

first (1st) day of each month"; there is no acceleration clause in the Lease, in the default paragraph (¶25) or otherwise.

No Delaware case has directly addressed the issue of whether rent due post-trial may be recovered when the lease does not have an acceleration clause. Appellants found two Delaware cases where a tenant argued that they were not liable for rent that was not yet due as of the trial date. In both cases, however, that argument was rejected because there *was* a valid acceleration clause.[142]

Persuasive authority and public policy support holding that rent due post-trial may not be recovered without an acceleration clause. Numerous courts from across the country have adopted this rule, and commentators are in agreement.[143] Furthermore, public policy supports requiring an

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[142] *Dana Commercial Credit Corp. v. Dura Med. Equip. Corp.*, 1997 Del. Super. LEXIS 236, at *4-5 (Del. Super.); *Asset Funding Assoc., Inc. v. Kinch*, 1990 WL 35309, at *1-2 (Del. Super.).

[143] Cases: *Odens Family Props., LLC v. Twin Cities Stores, Inc.*, 393 F. Supp. 2d 824, 831 (D. Minn. 2005) ("There is no obligation to pay until the rent is due according to the terms of the lease. Rent to be paid in the future is not a debt or liability for the recovery of which a present action will lie.… [A]n anticipatory breach will not accelerate rent without an acceleration clause."); *AAR Intl., Inc. v. Vacances Heliades S.A.*, 349 F. Supp. 2d 1114, 1116 (N.D. Ill. 2004) ("In the absence of an acceleration clause, recovery for breach of lease is limited to the amount due at the time of trial."); *Onal v. B.P. Amoco Corp.*, 275 F. Supp. 2d 650, 669-71 (E.D. Pa. 2003) (denying the landlord's post-trial motion for the collection of future rent because the commercial lease lacked an acceleration clause); *Klosterman v. Hickel Inv. Co.*, 821 P.2d 118, 125 (Ak. 1991) ("Absent an express provision in the lease for acceleration of unaccrued rent, however, it is improper for the courts to impose such a remedy."); *Nat'l. Adver. Co. v. Main Street Shopping Ctr.*, 539 So.2d 594, 595 (Fla. App. 1989) ("[R]ent will not be accelerated and future rent is demandable only in the amounts and at the time specified in the lease."); Commentary: 49 Am. Jur. 2d *Land. & Ten.* § 583 ("The failure to pay rent when it accrues does not accelerate the unpaid rent in the absence of a provision in the lease to that effect."); 49 Am. Jur. 2d *Land. & Ten.* § 642 ("In the absence of an acceleration clause, no suit can be brought for future rent. A lessor has the options of suing for rent installments as they come due, suing for several accrued

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acceleration clause for the recovery of rent due post-trial. The RESTATEMENT (SECOND) OF PROPERTY illustrates the logic of this rule by comparing a lease to a promissory note. In the case of a promissory note, acceleration of the balance is equitable because the obligor is only "being required to return sooner something he has already received."[144] Whereas, for the tenant, acceleration of the rent due "results in the payment for something the tenant has not yet received."[145] A default rule providing a landlord both the right to possession *and* the right to full rent would result in an unjust double recovery.[146] While that unjust result may be tempered by crediting the leasee with any reletting of the property, it is impractical if not impossible for a court to ensure that crediting occurs after the record is closed (i.e. end of trial). Therefore, the risk of possible double recovery post-trial should only be imposed on the leasee if the parties have bargained for the inclusion of an acceleration clause in the lease.

The Trial Judge's rent award must be reduced if this Court holds that a commercial landlord may not recover rent that comes due post-trial unless the lease contains a valid acceleration clause. As applied here, because there is no acceleration clause in the Lease, five months of rent must be reduced from the awarded amount. Moreover, the Trial Judge will have to reduce the interest award. Thus, a remand is necessary to reduce the amount of damages and interest.

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[143](...continued)
installments, or suing for the entire amount at the end of the lease term."); FRIEDMAN ON LEASES § 5:3 ("No action lies for future rent [without] an acceleration clause.").

[144] RESTATEMENT (SECOND) OF PROPERTY, *Land. & Ten.* § 12.1 (1977) cmt. k.

[145] *Id.*

[146] *See 1600 Penn Corp. v. Computer Scis. Corp.*, 2008 WL 4443016, at *14 (E.D. Pa.) (warning about possibility of double recovery).

CONCLUSION

Based on the foregoing reasons, Appellants request that this Court reverse in part and remand in part certain decisions made by the Trial Judge in the Post-Trial Opinion. More specifically, Appellants respectfully request that this Court vacate the judgment as follows:

I. *Tortious Interference*

Hold that Pires, Outlet, and Highway One are protected by the Section 770 and affiliate privileges from liability for tortious interference, and thus reverse the Trial Judge's finding of liability for tortious interference.

In the alternative, hold that Pires, Outlet, and Highway One are protected by the Section 770 and affiliate privileges from liability for tortious interference, and thus remand to determine of whether Shore can present sufficient evidence to overcome those privileges.

In the alternative, hold that the Trial Judge erred by failing to consider and apply the Restatement (Second) of Torts § 767 factors regarding "without justification," and thus remand for the Trial Judge to apply those factors.

II. *Punitive Damages*

Hold that there is not sufficient evidence to impose punitive damages on Pires, Outlet, and Highway One, and thus reverse the Trial Judge's imposition of punitive damages.

III. *Rent Award*

Hold that Trial Judge did not have record support to find that Shore met its obligation to mitigate damages between February 2010 and March 2011, and thus remand for further development on that issue.

Hold that Shore may not recover rent that was not yet due at the time of trial because the Lease did not have an acceleration clause, and thus reverse and remand for the Trial Judge to reduce the rent award and the related interest award.

Respectfully Submitted,

/s/ Stephen W. Spence

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Dated: July 24, 2012

Trial Judge's November 28, 2011
Post-Trial Opinion

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
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November 28, 2011

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RE: C.A. No. S09C-09-013-ESB
Shore Investments, Inc. v. Bhole, Inc., et al.
Letter Opinion

Date Submitted: August 5, 2011

Dear Counsel:

This is my post-trial decision in this case involving a dispute between a landlord and its tenant over the tenant's decision to move its liquor store from the landlord's building to a larger building next door before the tenant's lease expired. The dispute also involves the tenant's president and sole shareholder and the three other parties that worked together to acquire ownership of the tenant and cause it to move its liquor store to the large building they had leased. The landlord/plaintiff is Shore Investments, Inc. Shore's president is T. Theodore Jones. The tenant/co-defendant is Bhole, Inc. Bhole's president and sole shareholder at the start of this dispute was Kiran Patel. The three other parties/co-defendants are Outlet Liquors, LLC, Highway I Limited Partnership and Alexander J. Pires, Jr. Outlet Liquors later acquired Patel's stock in Bhole.

Background

Shore owns a 1.2 acre parcel of land located on Route One near Rehoboth Beach, Delaware. The land has three relatively small commercial buildings on it, ranging in size from 2624 square feet to 4400 square feet to 5000 square feet. Shore leased the 4400 square-foot building to Bhole, which used it for a liquor store trading as "Ocean Wines and Spirits." This building has been continuously used as a liquor store since 1971. Patel ran the liquor store. Shore leases the 2624 square-foot building to a business that sells steak sandwiches. It leases the 5000 square-foot building to an upscale restaurant, a company that sells vacuum cleaners, and a meat market. Highway I Limited Partnership operates restaurants, bars, nightclubs, motels, liquor stores and other businesses in the Dewey and Rehoboth Beach areas. It leases the 20,500 square-foot Salvation Army building that is located approximately two feet away from Bhole's former liquor store. Pires is a class action lawyer, entrepreneur and managing partner of Highway I. Outlet Liquors, LLC is an entity that Pires formed to acquire Bhole's common stock. It later merged with Bhole and now operates a liquor store in the Salvation Army building.

At some point in time Pires decided that he wanted to operate a large liquor store at the beach. He first tried to purchase Atlantic Liquors in Rehoboth Beach. When Pires was unable to purchase that liquor store, he turned his attention to Bhole's liquor store. His plan was to purchase Bhole's assets and expand the liquor store by moving it to the Salvation Army building. Pires hoped to do this by constructing an opening connecting Bhole's leased premises to the Salvation Army building. Pires formed Outlet Wines, LLC to buy Bhole's assets, including its liquor license. He also caused Highway I to enter into a lease for the Salvation Army building.

In order to expand Bhole's liquor store, Pires needed Shore to approve the assignment of Bhole's lease to Outlet Wines. Pires approached Ted Jones in June 2008. They exchanged letters and eventually met in person. Pires' letter enclosed three proposed amendments that he wanted to make to the lease. His amendments would have allowed Bhole to stop using its leased premises for the liquor store and to instead use them for any lawful general retail purpose. They would also have allowed Pires to move the liquor store to the Salvation Army building. Pires and Ted Jones were unable to reach an agreement on the amendments to the lease and the assignment of it. Jones wanted $250,000.00 to complete the deal. Pires refused to pay that and walked away.

When his plan to purchase Bhole's assets did not work out, Pires decided to purchase Patel's common stock in Bhole and transfer its liquor license to the Salvation Army building. Pires had Outlet Wines purchase Patel's common stock in Bhole on November 13, 2008. He filed an application with the Alcoholic Beverage Control Commission to transfer Bhole's liquor license to the Salvation Army building on December 3, 2008. Ted Jones was not happy with Pires' plans. He filed a lawsuit in the Court of Chancery, seeking an injunction prohibiting the transfer of Bhole's liquor license. That effort failed. Ted Jones also appeared at the hearing before the ABCC and opposed Bhole's application to transfer its liquor license. That effort also failed. The ABCC approved Bhole's application to transfer its liquor license on April 7, 2009. Bhole, which was by now a wholly-owned subsidiary of Outlet Wines, merged into Outlet Wines on April 30, 2009. Outlet Wines changed its name to Outlet Liquors on the same date.

Pires continued to operate a liquor store in Bhole's leased premises until the ABCC approved the transfer of Bhole's liquor license to the Salvation Army building. When the

ABCC approved the license transfer, he moved the liquor store into the Salvation Army building and used Bhole's leased premises for storage. Even though Pires had moved the liquor store, he continued to pay rent to Shore.

After Pires moved the liquor store, Ted Jones went in and inspected Bhole's leased premises. He found that the electric and air conditioner had been turned off. Ted Jones also found what he thought was mold on the walls. He hired a biologist to inspect the leased premises. The biologist determined that there was mold growing on the walls. This prompted Ted Jones to have his attorney send a letter to the defendants on September 21, 2009, threatening to enforce Shore's rights under the lease and applicable law if the defendants did not return the liquor store to Bhole's leased premises and clean up the mold. Instead of correcting the alleged breaches, Pires returned the keys for Bhole's leased premises to Ted Jones near the end of September 2009, reasoning that he would ultimately lose an action for possession of the leased premises. He also stopped paying rent. Ted Jones had a contractor clean up the mold and demolish a part of the interior of the leased premises. He tried to find another tenant, but was not able to do so.

The Lawsuit and Trial

Shore filed a lawsuit against the defendants on September 10, 2009. The lawsuit alleges that (1) Bhole breached its lease with Shore, (2) the defendants conspired to tortiously interfere with Shore's lease with Bhole, and (3) the defendants conspired to tortiously interfere with Shore's business expectations. Shore seeks unpaid rent for the balance of the lease term and compensation for the cost of cleaning up the mold, demolishing the interior of the building, removing debris from the building, installing a new heating, ventilation and air-conditioning system in the building, and remodeling the building.

Shore also seeks compensation for losses caused by it no longer having a liquor store as a tenant. Shore's total compensatory damages are claimed to be $1,146,614.63. Shore also seeks punitive damages and its attorneys' fees.

A bench trial was held on March 7, 2011. Ten witnesses testified at the trial. Ted Jones, Jeffrey T. Jones, Eric W. Jones, Robert Pepe, Patricia McDaniel, Susan E. White, and David J. Wilk testified for Shore. Pires, J. Frank Peter and Matthew J. Haley testified for the defendants. Patel did not defend himself or testify. Shore obtained a default judgment against him. Shore and the defendants submitted post-trial briefs.

Ted Jones testified about Shore's rental properties, the terms of the lease between Shore and Bhole, Pires' efforts to obtain amendments to and an assignment of the lease, Bhole's abandonment of the leased premises, damages to the leased premises, and his efforts to find another tenant for the leased premises.

Robert Pepe is a sales manager for the George Sherman Corporation, a company that does plumbing, heating and air-conditioning work. He testified about the cost of replacing the heating, ventilation and air-conditioning systems in the leased premises. Pepe testified that this would cost $57,094.52.

Patricia McDaniel is the president of Boardwalk Builders. She testified about the cost of converting the leased premises into a plain vanilla shell. McDaniel testified that this would cost $64,470.00, excluding the HVAC work.

Susan E. White is a certified microbial consultant with Sussex Environmental Health Consultants. She testified that she found mold in the leased premises and that it was caused by the failure to properly control the humidity.

Jeffrey T. Jones is a building contractor. He is also one of Ted Jones' sons. Jeff

Jones testified about cleaning up the mold and demolishing part of the interior of the leased premises. He charged $7,600.00 for cleaning up the mold and $10,355.00 for the demolition work.

David J. Wilk is a real estate appraiser with Greystore Realty Advisors. He testified that Shore's damages were in excess of $200,000.00 for the balance of the lease term.

Eric W. Jones is the owner of GT Capital, Inc., a proprietary trading firm that he owns. He is also one of Ted Jones' sons. He testified that Shore would suffer damages of $880,000.00 for the 20-year period of time following the end of the lease term because it would no longer have a liquor store as a tenant.

Pires testified about his negotiations with Ted Jones to amend Bhole's lease and obtain an assignment of it and the steps that he took to open a large liquor store in the Salvation Army building.

Matthew J. Haley is a restauranteur. He owns and operates a number of restaurants along the Delaware beach. Haley testified about his negotiations with Ted Jones to lease Bhole's former premises for a new restaurant.

J. Frank Peter is a consultant for Cogent Building Diagnostics. He testified that the mold was caused by water leaking into the leased premises.

The Claims

1. Shore's Breach of Lease Claims

Shore argues that Bhole breached the lease by not (1) continuously operating a liquor store in the leased premises, and (2) cleaning up the mold before surrendering

possession of the leased premises in September 2009.[1] Shore and Bhole entered into a lease on August 31, 2004. The lease was for a seven-year term, starting on September 1, 2004, and ending on August 31, 2011. There was, at Bhole's election, an option for one additional seven-year term. Rent was $33,000 per year for the first four years of the lease and $61,600 per year for the last three years. Bhole was also responsible for its proportionate share of the hazzard insurance expense, real estate taxes, common lighting costs, common area maintenance expenses, and sewer charges. The lease also had provisions regarding Bhole's obligation to use the leased premises for the operation of a liquor store and a provision regarding Bhole's obligation to maintain the leased premises in good condition. Bhole stopped operating a liquor store in the leased premises in April 2009. It turned over the keys to the leased premises to Shore in September 2009. Bhole did not pay any rent thereafter and it did not clean up the mold. A breach of lease occurs when a tenant does something prohibited by the lease or fails to do something required by

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[1] Shore also alleged that Bhole breached the lease when Outlet Wines purchased Patel's common stock in Bhole. This allegation was addressed briefly in Shore's post-trial brief. I have concluded that there was no breach because the lease remained with Bhole and no one else. Therefore, there was, as a matter of fact, no assignment of it.

Shore previously filed an action in the Court of Chancery against Bhole, Pires, Outlet Wines and Highway I, seeking an injunction to (1) stop Bhole from transferring the liquor license to the Salvation Army building, and (2) force Bhole to operate a liquor store in the leased premises. The Court of Chancery granted the defendants' motion to dismiss, reasoning that it had no jurisdiction over these matters because Bhole's application to transfer its liquor license was properly before the ABCC and that Bhole's remedy for its breach of lease claim regarding the operation of the liquor store was an award of monetary damages, which could be awarded by the Superior Court. As such, the Chancery Court did not address the merits of Shore's breach of lease claims. (*Shore Inv., v. Bhole, Inc.*, 2009 WL 2217744 (Del. Ch. July 14, 2009).

the lease.[2]

A. Continuous Operation of the Liquor Store

Shore argues that the lease required Bhole to continuously operate a liquor store in the leased premises. This argument is based on paragraphs 10 and 11 of the lease, which state as follows:

> **10. Use of Premises** - Tenant shall use the premises for the purpose of conducting the business of retail sales of alcoholic beverages including beer, wine and spirits, and all other retail sales of merchandise allowed by the Delaware Alcoholic Beverage Control Commissioner.
>
> **11. Operation of Business** - Tenant shall conduct its business on the premises at least during the regular and customary days, nights and hours for such type of business, as regulated by the Delaware Alcoholic Beverage Control Commissioner.

Bhole argues that it did not breach the lease because (1) paragraphs 10 and 11 merely authorized it to operate a liquor store in the leased premises, but did not require it to do so, (2) the breaches were not material and were excused by the fact that it kept paying rent, and (3) the ABCC approved the transfer of the liquor license from the leased premises to the Salvation Army building, thus prohibiting it from using the leased premises as a liquor store. I have concluded that Shore's interpretation of paragraphs 10 and 11 is correct and that there is no merit to any of Bhole's arguments.

In deciding what the language of paragraphs 10 and 11 means I am governed by

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[2] A lease is a "contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, usually rent." Black's Law Dictionary 970 (9th ed. 2009). A breach of contract is a "[v]iolation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance." Black's Law Dictionary 213 (9th ed. 2009).

well-established rules of contract interpretation. These rules have been stated as follows:

> When interpreting a contract, the role of the court is to effectuate the parties' intent. In doing so, we are constrained by a combination of the parties' words and the plain meaning of those words where no special meaning is intended. In *Rhone-Poulenc [Basic Chemicals Co. v. American Motorists Ins. Co.*, 616 A.2d 1192 (Del. 1992)], this Court explained the paramount importance of determining what a reasonable person in position of the parties would have thought the language of a contract means. Clear and unambiguous language . . . should be given its ordinary and usual meaning. Absent some ambiguity, Delaware courts will not destroy or twist policy language under the guise of construing it. When the language of a . . . contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented. . .
>
> Ambiguity does not exist where a court can determine the meaning of a contract without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends. Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty. The true test is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.[3]

I have concluded that paragraphs 10 and 11 are clear and unambiguous. Both use "shall," which is generally interpreted to be mandatory.[4] The two paragraphs, when taken together, clearly required Bhole to operate a liquor store in the leased premises during the regular and customary days, nights and hours for this type of business as set by the ABCC.

Pires also understood exactly what these paragraphs meant. His understanding of them can be gleaned from an examination of his plans for a large liquor store and the nature of the amendments that he proposed to make to these paragraphs in order to carry

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[3] *Lorillard Tobacco Company v. American Legacy Foundation,* 903 A.2d 728, 739 (Del. 2006).

[4] *Miller v. Spicer*, 602 A.2d 65, 67 (Del. 1991).

out his plans. Pires wanted to operate a liquor store in the Salvation Army building. In order to do this he needed Bhole's leased premises, but not for very long, which is why he wanted to amend Bhole's lease. Pires proposed to delete the original paragraph 10 and replace it with the following language:

> Tenant shall be authorized to use Premises for any lawful general retail purpose permitted under the zoning code for Sussex County, Delaware including, but not limited to, the retail sales of alcoholic beverages.

Pires proposed to delete the original paragraph 11 and replace it with the following language:

> Tenant shall conduct its business on the premises at least during the regular and customary days, nights and hours for such type of business.

Pires proposed to add a new paragraph 44, which states as follows:

> Subject to obtaining all required governmental approvals and permits, Tenant shall be authorized to create an opening between the Premises and the existing building located to the west of the Premises and may seek approval from the DABCC to move or expand the licensed premises of the retail liquor sales facility to the adjacent building.

Pires' proposed amendments would have allowed him to immediately stop operating a liquor store in the leased premises, move the liquor store to the Salvation Army building, and use the leased premises for any lawful general retail purpose of his choosing. Obviously, Bhole's obligation to operate a liquor store in the leased premises was an obstacle to his plans to operate a liquor store solely in the Salvation Army building. Pires tried to eliminate that obstacle by amending paragraphs 10 and 11 and adding a new paragraph 44. When he did not succeed in amending Bhole's lease, he decided to ignore its provisions by moving the liquor store to the Salvation Army's building and just use the leased premises for storage. That was clearly a breach of the lease.

Moreover, that breach was material and is not excused by the fact that Bhole kept paying rent. "Material breach" has been explained as follows:

> "It has been said that a "material breach" is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract. In other words, for a breach of contract to be material, it must "go to the root" or "essence" of the agreement between the parties, or be "one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract." A breach is "material" if a party fails to perform a substantial part of the contract . . . . "[5]

> "Not all breaches will authorize the other party to abandon or refuse further performance. To justify termination, 'it is necessary that the failure of performance on the part of the other go to the substance of the contract.' [M]odern courts, and the Restatement (Second) of Contracts, recognize that something more than mere default is ordinarily necessary . . . . Thus, although a material breach excuses performance of a contract, a nonmaterial-or *de minimis*-breach will not allow the non-breaching party to avoid its obligations under the contract."[6]

Shore and the defendants appreciated the importance of these paragraphs, albeit for different reasons. Shore viewed them as furthering its interests by guaranteeing that it would have a liquor store as a tenant. Pires viewed them as an obstacle to his plans for a liquor store in the Salvation Army building.

Shore wanted to have a liquor store on its property for a number of reasons. One, the leased premises are ideally suited for the operation of a liquor store. The 4400 square foot building was built to be a liquor store and has been used as one since 1971. It has large coolers for the beer and shelving to display the liquor and wine. As such, it was not easily turned into something else. Two, Shore believed that a liquor store was able to pay

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[5] 23 Williston on Contracts § 63:3 (4th ed.).

[6] *DeMarie v. Neff,* 2005 WL 89403, at *4 (Del. Ch. Jan. 12, 2005).

a higher rent than other types of stores because liquor stores have something of a geographic monopoly. Paragraphs 10 and 11 were certainly core requirements of the lease for Shore.

The importance of these paragraphs to Jones is further evidenced by his reaction to Pires' proposed amendments to paragraphs 10 and 11 of the lease and the new paragraph 44. Jones understood that these amendments would allow Pires to move the liquor store to the Salvation Army building. Even though Pires would still have to operate some type of business in the leased premises, Jones was unwilling to give up the liquor store unless Pires paid him $250,000.00. There is nothing immaterial about this amount of money.

Moreover, no landlord wants a tenant's store to go "dark." Shore has three buildings on its property that it leases to a variety of businesses. The liquor store was in the second largest building. To have a store of this size go "dark" in a small shopping center was certainly undesirable to Shore, as it would be to any landlord.

Pires also fully understood the importance of paragraphs 10 and 11 to Shore. As I have already noted, he knew that Jones wanted $250,000.00 to amend them. Pires also understood that they stood in the way of his plan to move the liquor store to the Salvation Army building. I find it ironic that the paragraphs of the lease that the defendants now argue are immaterial are exactly the same ones that they wanted to modify because they stood squarely in the way of their plans. If they were immaterial, then why bother to try to amend them. The answer is that they were material because they were an obstacle to Pires' plans.

Finally, the compliance with one provision of the lease, such as paying rent, does

not excuse non-compliance with the other provisions. No tenant gets to pick which provisions of a lease that it will abide by and which ones it will ignore. The fact that Bhole kept paying the rent for some time does not excuse its breach of its other obligations under the lease. These are obligations that must be met. The lease itself defined the obligations set forth in it as "interdependent on one another" and that the failure to faithfully observe them was as an event of default.[7]

The ABCC's action does not excuse Bhole's breach of its lease either. The ABCC merely approved the transfer of the liquor license from the leased premises to the Salvation Army building. It did not have the authority to re-write the lease between Shore and Bhole. Moreover, Bhole's argument fails to recognize that it was Bhole who requested to transfer its liquor license, not the ABCC. The lease also dealt with governmental action in a very specific and limited way. This is set fourth in paragraph 28, which states:

> In the event that any law, regulation, or ordinance of any governmental authority now in effect or hereafter enacted or adopted shall prohibit or restrict the uses of the Premises for the purposes stated hereinabove, then, at Tenant's option, this Lease shall terminate and the rent due hereunder, if any, for such period as Tenant shall have occupied the Premises shall be adjusted to the date and such termination by Tenant.

The ABCC did not rule that Bhole's leased premises could not be used for a liquor

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[7] 25. Default - The prompt payment of the rent for said Premises upon the dates named and the faithful observation of the terms of this Lease are the conditions upon which this Lease is made and accepted and upon any failure on the part of the Tenant to pay the rent due hereunder or any failure to comply with the terms of this Lease which shall continue for a period of ten (10) days following notice of such default by Landlord to Tenant, the Landlord, his agents or attorneys, shall have the right to enter said Premises and remove all persons therefrom by legal proceedings to recover possession of said Promises.(**Emphasis added**).

30. Interdependence of Provisions - All covenants, responsibilities, obligations and promises contained herein are mutually dependent, i.e. interdependent on one another.

store. If it had done so, then Bhole could have terminated its lease and moved the liquor store to the Salvation Army building without any consequences. That is not what happened in this case.

B. Mold

Shore argues that Bhole also breached the lease by allowing mold to grow on the walls in the leased premises and not cleaning it up. Shore and the defendants had the leased premises inspected by experts. There is no dispute that there was mold growing on the walls. The presence of moisture and high humidity led to the growth of mold. The dispute is over what caused it to grow and who is responsible for cleaning it up. Shore argues that Bhole failed to run the air conditioning system in the leased premises after it moved the liquor store to the Salvation Army building, resulting in the growth of the mold. Bhole argues that the mold was caused by water leaking into the leased premises from the roof and walls.

Shore's argument is based on paragraphs 10, 11 and 16 of the lease. Paragraphs 10 and 11 obligated Bhole to continuously operate a liquor store in the leased premises. Paragraph 16(a) states, in applicable part:

> The Tenant shall, during the term of this Lease and any renewal or extension thereof, at its sole expense, keep the interior of the premises in as good order and repair as it is at the date of commencement of this lease.

Shore combines Bhole's obligations under these three paragraphs and argues that if Bhole had kept the liquor store in the leased premises and operated the air conditioning system at the appropriate level during the hot and humid summer, then the mold would not have grown on the walls. Paragraph 16(a) standing alone would have required Bhole to clean up the mold once it appeared. Thus, according to Shore, Bhole could have dealt

with the mold either by preventing it from growing in the first place or cleaning it up once it appeared.

Bhole argues that the mold was caused by water leaking into the leased premises through the roof and walls and that it was not responsible for this. Its argument is based on paragraph 16(b) of the lease, the applicable part of which states:

> The Landlord shall keep the foundations, structural supports, and exterior walls and roof of the building housing the Premises in good order and repair.

Shore was initially responsible for keeping the exterior walls and roof of the building in good order and repair. The evidence indicates that Shore did not do this. There were stains on the inside of the walls and ceiling tiles, indicating that water had come in through the roof and walls at some time. The roof was fairly old. The walls were made of concrete block and were over 40-years-old and had not been painted in a long time.

However, the evidence indicates that Bhole only once complained of water leaking through the roof in 2008 and that Shore fixed the problem. Thus, it is unclear when the water leaked into the leased premises and if it had done so during the summer of 2009. Moreover, this issue is complicated by the fact that the defendants had assumed responsibility for maintaining the leased premises even though they were not required to do so by the lease. Pires testified that he leases many buildings and that, regardless of the terms of the leases, he maintains the buildings just as if he owned them. This would explain why Bhole never complained to Shore in the summer of 2009 about water leaking into the leased premises if, in fact, that was happening at the time. Shore also could not, as a practical matter, do anything about water leaking into the leased premises until Bhole made it aware of the problem. Bhole was in possession of the leased premises and in the

best position to know if there was a problem. There is no evidence establishing that Bhole complained to Shore about water leaking into the leased premises during the summer of 2009. If it was aware of water leaks, but did not notify Shore of them, or handled them itself, then Bhole has no reason to complain.

Given that the defendants assumed responsibility for maintaining the roof and walls and never complained to Shore about water leaking into the leased premises, I have concluded that Bhole is responsible for the mold. Quite simply, Bhole was responsible for the conditions that allowed the mold to grow. It did not keep the water from leaking into the leased premises. It did not notify Shore about water leaking into the leased premises. It did not run the air conditioning system enough to keep the humidity low enough to prevent the mold from growing. It did not clean up the mold. I also note that there was no evidence of complaints by Bhole of mold in the leased premises before it shut down the air-conditioning system. Therefore, I conclude that Bhole breached the lease by not cleaning up the mold.

Mitigation of Damages

Shore had the obligation under the applicable law and paragraph 35 of the lease to mitigate its damages.[8] I have concluded that it did make a reasonable effort to do so. Ted Jones did talk to several prospective tenants. He spoke with Haley, who runs a number

[8] Minimization of Damage - Under this Lease, both Landlord and Tenant shall faithfully attempt to avoid and minimize damages resulting from the conduct of the other party. [Furthermore, in Delaware "[a] party has a general duty to mitigate damages if it is feasible to do so." *Norkei Ventures, LLC v. Butler-Gordon, Inc.*, 2008 WL 4152775, at *2 (Del. Super. Aug. 28, 2008). "As a general rule, a party cannot recover damages for loss that he could have voided by reasonable efforts." *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, at *4 (Del. Ch. Feb. 23, 2009). Accordingly, "the injured party has a duty to minimize . . . its costs and losses." *Id.*].

of restaurants at the beach, and the other owners of Nage Restaurant, a current tenant of Shore. In both instances nothing worked out and the evidence suggests that this was through no fault of Shore. Neither prospective tenant got very far in the negotiations, raising some doubts in my mind as to how serious they were. Moreover, both prospective tenants would have wanted Shore to share a substantial portion of the cost of turning the former liquor store into a restaurant, an obligation that could have cost Shore hundreds of thousands of dollars. I find no fault in Shore's actions in this regard. When Ted Jones was unable to find a tenant himself, he retained a commercial real estate company to find a tenant. It had no more luck than Ted Jones, which is not surprising given, as Ted Jones noted at trial, the poor real estate market.

The Breach of Lease Damages

Shore seeks unpaid rent for the balance of the lease term and compensation for the cost of cleaning up the mold, demolishing the interior of the building, removing debris from the building, installing a new heating, ventilation and air-conditioning system in the building, and remodeling the building.

A. Rent

Shore seeks rent in the amount of $127,095.21 from Bhole for the period of time from the day that Bhole turned over the keys for the leased premises until the end of the initial seven-year term of the lease. This covers the period of time from September 2009 to the end of August 2011.

Bhole kept paying the monthly rent after it moved the liquor store from the leased premises to the Salvation Army building. It was using the leased premises for storage. When Shore threatened to evict Bhole if it did not return the liquor store to the leased

premises and clean up the mold, Bhole turned the keys over to Shore and stopped paying rent.

The issue is what legal effect is to be given to Bhole's turnover of the keys and Shore's efforts to find another tenant for the leased premises. Shore and Bhole did not reach an agreement on what it meant. Bhole argues that its obligation to pay rent ended when Shore accepted the keys and took possession of the leased premises. Shore argues that Bhole left it with no choice but to take the leased premises back, clean up the mold and try to mitigate its losses by finding another tenant.

The law in Delaware is that when a tenant surrenders the leased premises prior to the expiration of the lease term and the landlord "accepts" the leased premises without reservation, then the landlord may not recover rent from the tenant for the balance of the lease term. However, what constitutes "acceptance" is not always clear, as evidenced by the Court's statements in *Conner v. Jordin*,[9] one of the few cases in Delaware to address the issue:

> A mere surrender of the premises by lessee is not sufficient, but there must also be an acceptance by the lessor. The fact that the landlord received the keys is evidence of a surrender, but generally speaking, that of itself does not amount to an acceptance. There are many reasons for which the landlord might require the keys after the premises had been abandoned by the tenant. The most usual of which are caring for the property, making necessary repairs and showing it to prospective renters. Acts of this nature are not considered an acceptance.[10]

The Court went on to add the following:

> When, however, the landlord takes absolute possession of the

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[9] 181 A. 229 (Del. Super. 1935).

[10] *Id.* at 231.

> property without any qualification, such an act constitutes an acceptance; unless he expresses an intention to hold the tenant for rent, or unless there was some provision in the lease authorizing him to re-enter if the property became vacant.[11]

The Court ultimately found in *Conner* that the tenant who had abandoned the premises and gave the keys back to the landlord was responsible for the rent even though the landlord took the keys and tried to find another tenant for the premises.

I conclude that Shore is in the same position that the landlord was in *Conner.* Shore did nothing more than make the best of a situation that was not of its own making. Thus, this is a case of mitigation, not acceptance. Shore had met all of its obligations under the lease. Bhole had not and Pires knew it, which is why he simply turned the keys over to Shore and stopped paying rent. When Bhole walked away from the leased premises and stopped paying rent, Shore was left with no choice but to take the leased premises back and try to find another tenant. Indeed, as I noted earlier, paragraph 35 of the lease required Shore to "avoid and minimize damages resulting from the conduct" of Bhole. It had no choice but to take the leased premises back and mitigate its losses by cleaning up the leased premises and trying to find another tenant. When you are left with no choice, doing the only thing that you can do is hardly an act of "acceptance," particularly when you are required to do so by the terms of your lease.

The measure of damages that Shore is entitled to recover is the difference between the rent it was entitled to recover under the lease less the fair market value of a replacement lease.[12] Since Shore was unable to find another tenant for the leased

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[11] *Id.*

[12] *Curran v. Smith-Zillinger Co.*, 157 A. 432 (Del. Ch. 1931).

premises, the amount owed is the amount due for the balance of the lease term, which is $127,095.21.

B. Building Renovations

Shore seeks $64,470 so that it can turn the leased premises into a vanilla shell in order to rent it out to another tenant. The leased premises are set up for the operation of a liquor store. It can not be a liquor store anymore because there is now one next door and the ABCC regulations prohibit liquor stores from being this close together. Thus, Shore argues that it had to turn the leased premises into a vanilla shell so that they can be rented as part of its mitigation of damages.[13]

Shore obtained an estimate from Boardwalk Builders to renovate the leased premises. The work is fairly exhaustive and includes both demolition and construction. The demolition included removal of the walk-in coolers that were used to store and chill the alcoholic beverages, removal of the floor tile, and removal of the damaged portions of the ceiling grids. The new construction included building walls to create a utility room for the electrical panels, adding a suspended ceiling and insulation, performance of electrical work for various lights, the installation of new drywall and trim and painting the interior of the leased premises.

Shore argues that it had to incur these expenses in order to mitigate its damages by getting the leased premises ready to rent out to another tenant. Shore's argument is based on contract law where "the measure of damages has always been tempered by the rule requiring the injured party to minimize his loses, although the party causing the breach

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[13] *Norkei Ventures, LLC*, 2008 WL 4152775, at *2.

would pay for the cost of minimizing the injury."[14] The problem is that Shore never spent this money to mitigate its losses. The loss that Shore was trying to mitigate was the lost rent for the balance of the lease term. The lease term has now expired and Shore has still been unable to find another tenant. Thus, Shore's lost rent claim is fixed at $127,095.21. To compensate Shore now for remodeling its building when spending the money will not mitigate its losses is not appropriate, particularly since my award to Shore of rent for the balance of the lease term will fully compensate it for the loss it was trying to mitigate. Therefore, I award no remodeling costs to Shore.

C. Demolition

Shore seeks $7,600.00 for the cost of certain demolition work that it had done to the leased premises after Bhole left in order to get the leased premises ready to be remodeled. Shore had a contractor remove the office walls, cashier's elevated platform, carpeting, shelving, paneling, ceiling tiles, insulation, ceiling grid frames, wall at the rear of the retail area, and all debris. The contractor left the building broom clean. This work cost $7,600.00. Pires testified that Bhole had moved all of its property out of the leased premises before it left.

Shore's claim implicates both the lease and its duty to mitigate damages. The applicable lease provision is set for in paragraph 23 of the lease, which states as follows:

> All additions, fixtures, or improvements which may be made by Tenant and attached to the realty, other than trade fixtures, shall become the property of the Landlord and remain upon the Premises as part thereof, and be surrendered with the Premises at the termination of this Lease. All trade fixtures, including, but not limited to, signs, cabinetry, counters, computer desks and stands and smoke or heat distillation devices, shall remain the

[14] *Katz v. Exclusive Auto Leasing, Inc.*, 282 A.2d 866 (Del. Super. 1971).

> property of the Tenant and Tenant shall have the right to remove said fixtures at any time provided no damage is done to the premises in the removal process and the premises are returned to the Landlord in the same condition as when the premises were demised normal wear and tear excepted.(**Emphasis added**).

Bhole had the right to remove its trade fixtures from and the obligation to return the leased premises to Shore "in the same condition as when the premises were demised normal wear and tear excepted." The leased premises have been used as a liquor store since 1971. Ted Jones, the president of Shore, operated it himself as a liquor store for many years. Virtually everything that Shore demolished and removed was used for the operation of the liquor store and, given the absence of evidence to the contrary, was most likely in the leased premises when Bhole entered into its lease in 2004. Given the description of what was removed by Shore's contractor, it appears that Bhole did remove its trade fixtures. Therefore, it is unclear to me as to whether Bhole had an obligation to remove everything from the leased premises that Shore removed. There was no evidence regarding the condition of the leased premises when Bhole took over and no evidence regarding the condition of the leased premises when Shore got them back. Thus, I have concluded that Bhole is not responsible for these demolition costs under the lease. I have also declined to award these costs as part of Shore's effort to mitigate its damages because the demolition costs were incurred to prepare the building for remodeling, which I have concluded were not compensable. Therefore, I award no demolition damages to Shore.

D. HVAC

Shore seeks $57,094.52 to pay for the cost of installing a new heating, ventilation and air-conditioning system in the leased premises. This would include two new oil fired

furnaces and two new air-conditioning units and the related duct work and control systems. This claim is governed by paragraph 16(b) of the lease, which provides, in applicable part, that:

> The Tenant shall maintain in good working order and repair all interior plumbing, toilet facilities, and other fixtures and equipment installed for the general supply of water, heat, air-conditioning, and electricity. It is warranted by the Landlord that the Walk-in-boxes (Beer coolers) plumbing, heating and air conditioning relevant to the subject Premises are in good, operating condition at the time of the commencement date of this lease.

The lease between Shore and Bhole was entered into on August 31, 2004. The HVAC system was quite old at the time. Robert Pepe, the person who prepared the estimate for the new HVAC system, testified that one of the oil furnaces was 20-years-old and had lived out its useful life and that the air-conditioner on the roof was over 20-years-old and obsolete. He also testified that much of the duct work was obsolete. Obviously, the HVAC did not get old and obsolete in the seven years that Bhole was responsible for it.

Moreover, Bhole's obligation was to keep the HVAC system in good working order, not replace it when it had outlived its useful life. There was no evidence that the HVAC system was not in good working order. Indeed, it seems that it was working properly since Bhole operated a liquor store in the leased premises until April 2009. Bhole only turned off the HVAC because it moved the liquor store next door and had no need to run the HVAC when it was only using the leased premises for storage. I conclude that Shore has failed to prove that the HVAC system was not in good working order.

E. Mold Clean-up

Shore seeks $7,900.00 to pay for the cost of cleaning up the mold. I have already

determined that Bhole breached the lease by allowing mold to grow in the leased premises and not cleaning it up. The cost to inspect for mold was $300.00. The cost to clean up the mold was $7,600.00. Therefore, Shore is entitled to recover $7,900.00 from Bhole.

F. Attorneys' Fees and Costs

Shore seeks recovery of its attorneys' fees. This is governed by paragraph 19 of the lease, which states that:

> Tenant and Landlord agree to pay to the prevailing party all reasonable costs, attorney's fees, and expenses which shall be made and incurred by the Tenant or Landlord as the case may be in enforcing the respective covenants and agreements of this lease.

Since Shore has prevailed on its breach of lease claims, it will be entitled to recover its attorneys' fees and costs from Bhole.

2. Shore's Claim for Tortious Interference With its Lease

Shore argues that the defendants conspired to tortiously interfere with its lease with Bhole by causing Bhole to move its liquor store from the leased premises to the Salvation Army building. The elements of tortious interference with a contract under Delaware law require the proponent to establish: (1) a contract, (2) about which defendant knew, and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury.[15] The defendants argue that their actions were justified because they were merely competing with Shore by moving the liquor store into a bigger building and everything they did was approved by the ABCC.

Shore has proven each of these elements. One, there was a lease between Shore and Bhole. Two, the defendants knew about the lease. Indeed, Pires had approached

[15] *Irwin & Leighton, Inc. v. W.M. Anderson Company,* 532 A.2d 983 (Del. Ch. 1987).

Jones about renegotiating the terms of the lease and obtaining an assignment of it. Three, the defendants did cause a breach of the lease. They did this by obtaining ownership and control of Bhole and then causing it to breach the lease by moving the liquor store from the leased premises to the Salvation Army building, thus violating the continuous operation provisions of the lease. Four, the defendants were certainly not justified in breaching the lease. As I have previously concluded, the ABCC's approval of the transfer of Bhole's liquor license was not approval for Bhole to breach the lease. The defendants' fair competition argument is similarly unpersuasive. Shore and the defendants were not in competition with each other in the marketplace. Shore is in the business of leasing out its buildings to tenants who largely operate retail businesses. The defendants are, as far as this case is concerned, in the business of operating a large liquor store. These are distinct and different businesses. Five, Shore was damaged by the defendants' actions.

Shore seeks damages of $200,000 for this claim. Its claim is based on an analysis performed by David Wilk, a real estate appraiser. His written analysis of Shore's damages states that Shore "is entitled to the three plus years of rent that was due under the executed lease which is equivalent to approximately $200,000.00 before any repair costs, environmental issues and costs, legal fees or other damages." He testified that Shore's damages are in excess of $200,000 for the balance of the lease term because Shore can not lease the leased premises for use as a liquor store. He testified further that Shore would have to remodel the leased premises in order to lease them out, but he did not include the cost of this in his written analysis or testimony. In any event, Wilk's report and testimony do not demonstrate how he came up with damages of $200,000.00. The rent for the balance of the lease term is only $127,095.21, leaving a large portion of Wilk's

damage claim unexplained. Thus, I have rejected his testimony as unfounded. However, Shore did adequately establish its damages under its breach of lease claim, which is also an adequate measure of damages for this claim. Therefore, the total damages that the defendants are responsible for is the unpaid rent in the amount of $127,095.21 and mold clean-up costs of $7,900.00.

Punitive Damages

Shore seeks punitive damages to compensate it for the defendants' conspiracy to tortiously interfere with its lease with Bhole. The object and purpose of an award of compensatory damages in a civil case is to impose satisfaction for an injury done.[16] In tort actions that satisfaction normally takes the form of an award of monetary damages to an injured plaintiff, with the size of the award directly related to the harm caused by the defendant.[17] Punitive damages are fundamentally different from compensatory damages both in purpose and formulation.[18] Compensatory damages aim to correct private wrongs, while assessments of punitive damages implicate other societal policies.[19] Though the injured plaintiff may receive the punitive damage award, to the extent the plaintiff has already been fully compensated by actual damages, an award of punitive damages is, in a real sense, gratuitous.[20] An award of punitive damages must therefore subsist on

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[16] 22 Am.Jur.2d *Damages* § 1, at 13 (1965).

[17] *Jardel Co., Inc., v. Hughes*, 523 A.2d 518, 528 (Del. 1987).

[18] *Id.*

[19] *Id.*

[20] *Id.* citing *Malcolm v. Little*, 295 A.2d 711, 714 (Del. 1972).

grounds other than making the plaintiff "whole."[21] The punishment element of punitive damages has long been recognized.[22] The imposition of punitive damages has been sanctioned only in situations where the defendant's conduct, though unintentional, has been particularly reprehensible, *i.e.* reckless, or motivated by malice or fraud.[23] A majority of jurisdictions now accept that punitive damages serve a dual purpose - to punish wrongdoers and deter others from similar conduct.[24] This dual purpose is reflected in § 908 of the Restatement (Second) of Torts (1979), which provides in part: "Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." It is not enough that a decision be wrong. It must result from a conscious indifference to the decision's foreseeable effect. "In actions arising *ex contractu*, punitive damages may be assessed if the breach of conduct is characterized by willfulness or malice."[25] "[W]here the defendant's actions are similar in nature to that of a tort,"[26] or it appears that the defendant has committed a "willful wrong, in the nature of deceit," the Court will award punitive damages under a contract.[27]

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[21] *Jardel Co., Inc.*, 523 A.2d at 528.

[22] *Id.*

[23] *Id.* at 529.

[24] Minzer, Nates, Kimball & Axelrod, *Damages in Tort Actions*, § 40.12 (1982).

[25] *Littleton v. Young*, 1992 WL 21125, at *2 (Del. Jan. 2, 1992).

[26] *Smith v. New Castle County Vocational-Technical School District*, 574 F.Supp. 813, 826 (D.Del. 1983).

[27] *Standard Distributing Co., v. NKS Distributors, Inc.*, 1996 WL 944898, at *6 (Del. Super. Jan. 3, 1996).

I have concluded that punitive damages should be assessed against the defendants for their conduct in this case. The defendants had a plan to open a large liquor store in the Salvation Army building. Shore's lease with Bhole prevented them from doing that until the expiration of the lease on August 31, 2011. Unwilling to wait until then and knowing full well how important it was to Shore to have an operating liquor store on its premises, the defendants intentionally and willfully caused Bhole to breach its lease by moving the liquor store from the leased premises to the Salvation Army building. The compensatory damages that I have awarded to Shore only compensate it for the monies that Bhole was obligated to pay Shore under the lease. That is not an adequate sanction for the defendants' conduct in this case. Therefore, I have assessed them with $25,000.00 in punitive damages.

3. Shore's Claim for Tortious Interference with its Business Expectations

Shore argues that the defendants conspired to tortiously interfere with its business expectation that Bhole would exercise its option to extend the lease for an additional seven-year term and operate a liquor store at the leased premises until August 31, 2018.[28] The elements of a claim for tortious interference with a prospective business relation are: (1) the existence of a reasonable probability of a business expectancy; (2) the interferer's knowledge of the expectancy; (3) intentional interference that induces or causes termination of the business expectancy; and (4) damages.[29] Shore argues that it had a

[28] Shore also argued that this claim covered the period of time ending on the expiration of the initial seven-year lease term. I conclude that this overlaps with Shore's claim for tortious interference with its lease. As such, it is duplicative in that regard.

[29] *American Homepatient, Inc. v. Collier,* 2006 WL 1134170 (Del. Ch. April 19, 2006), citing *All Pro Maids v. Layton*, 2004 WL 1813276, at *5 (Del. Ch. Aug. 9, 2004).

reasonable expectation that Bhole would exercise its option to renew the lease for another seven years and continue to operate a liquor store at the leased premises. I have concluded that there was no such reasonable expectation.

It is uncertain if Patel would have exercised Bhole's option to extend the lease term if the defendants had not purchased his stock. Once the defendants did, it became clear that they would not exercise the option. The issue is whether the defendants' actions were wrongful. I have concluded that they were not in this instance.

Patel did not testify at the trial. Thus, it is not clear what he intended to do upon the expiration of the initial lease term on August 31, 2011. Shore's argument that Patel would have exercised Bhole's option to extend the lease is based on its belief that the liquor store business is very profitable and that Patel would have likely stayed with it. However, the marketplace is changing for small liquor stores like Bhole's. Pires testified that small liquor stores are giving way to large liquor stores like Atlantic Liquors. This trend and the adverse effect of it on Bhole are reflected in its declining sales and income. Bhole had sales of $1,224,418.00 and income of $45,725.00 for 2006. It had sales of $1,019,821.00 and income of $4,714.00 for 2007. There was a decline in sales of $204,597.00 and income of $41,011.00 in just one year. It looks like Patel also saw the marketplace changing for the worse and decided to leave the liquor store business, at least at this location.

Patel had the right to sell his common stock in Bhole and the defendants had the right to purchase it. They completed this transaction on November 13, 2008. Once Bhole filed an application with the ABCC to transfer its liquor license from the leased premises to the Salvation Army building, Shore certainly had to know that the option would not be exercised because the defendants no longer needed Bhole's leased premises. Any

uncertainty on Shore's part was removed once the ABCC approved the license transfer on April 7, 2009. Thus, Shore knew a full 16 months before the expiration of the lease term that the option would not be exercised.

The defendants did not violate Shore's lease or its reasonable business expectations by purchasing Patel's stock and transferring the liquor license to the Salvation Army building. However, they did cause Bhole to breach its lease with Shore by moving the liquor store to the Salvation Army building before the lease expired on August 31, 2011. If Bhole had continued to operate a liquor store in the leased premises and otherwise complied with the lease until August 31, 2011, then Shore would not have any claims against the defendants. Since the only thing that the defendants did wrong was to breach the lease, I have concluded that there was no tortious interference by them with Shore's reasonable business expectations regarding the option. Stated another way, the defendants' actions are adequately covered by Shore's two other claims.

Conclusion

Shore Investments, Inc. has prevailed on two of its three claims against the defendants. Its total compensatory and punitive damages are $159,995.21. I will summarize the damages for these claims and identify the defendants who are responsible for them.

On Shore's breach of lease claim, I award Shore compensatory damages of $134,995.21, consisting of rent for the balance of the lease term of $127,095.21 and mold clean-up costs of $7,900.00. I also award Shore its attorneys' fees, the costs of this action

and pre- and post-judgment interest at the applicable rate.[30] The responsible defendants are Bhole, Inc. and Outlet Wines, LLC, which became responsible for Bhole's obligations by merging with it.[31]

On Shore's tortious interference with lease claim, I award Shore compensatory damages of $134,995.21, consisting of rent for the balance of the lease term of $127,095.21 and mold clean-up costs of $7,900.00. I also award Shore punitive damages of $25,000.00. I also award Shore its attorneys' fees, the costs of this action, and pre- and post-judgment interest at the applicable rate.[32] The responsible defendants are Alex J. Pires, Jr., Highway I Limited Partnership and Outlet Wines, LLC, who are jointly and severally responsible. Pires does not escape liability for his tortious actions even though at times he may have been acting as an employee of one or more of the defendants.[33]

Even though Shore obtained a default judgment against Kiran Patel, I have not assessed any damages against him because I have concluded that he did not conspire with the other tenants to breach Bhole's lease. There was simply no evidence indicating

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[30] The pre-judgment interest is limited to the award of rent. Each monthly payment of rent was due at a certain time and will accrue interest from that date due until paid. Shore also was entitled to its attorneys' fees under the lease, making its attorneys' fees an element of damages for this claim and Shore's claim for tortious interference with its lease with Bhole.

[31] 8 *Del.C.* § 259. See *Fitzsimmons v. Western Airlines, Inc.,* 290 A.2d 682, 685 (Del. Ch. 1972) ("It is thus a matter of statutory law that a Delaware corporation may not avoid its contractual obligations by merger; those duties 'attach' to the surviving corporation and may be 'enforced against it.' In short the survivor must assume the obligations of the constituent.").

[32] See footnote 30.

[33] "While an employer is liable for the torts of its employees committed while acting within the scope of his employment, *Fields v. Synthetic Ropes, Inc.,* 215 A.2d 427 (1965), this does not relieve an employee of liability. See Generally 53 Am. Jur. 2d Master and Servant § 446 et. Seq." *Zaleski v. Mart Associates*, 1988 WL 97900, at *2 (Del. Super. Sept. 14, 1988).

that he was a part of the other defendants' plan to gain control of Bhole and move the liquor store to the Salvation Army building in violation of its lease with Shore.

I will prepare an order of judgment after Shore submits its application for attorneys' fees and costs. I will allow Shore 10 days to do that. I will allow the defendants 10 days to comment on Shore's application for attorneys' fees and costs.

IT IS SO ORDERED.

Very truly yours,

/S/ E. Scott Bradley

E. Scott Bradley

Final Order of Judgment
Docketed May 8, 2012

EFiled: May 4 2012 4:26PM DT
Transaction ID 44081869
Case No. S09C-09-013 ESB

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

SHORE INVESTMENTS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. NO. S09C-09-013 ESB
	)	
BHOLE, INC.,	)	
OUTLET LIQUORS, LLC,	)	
HIGHWAY I LIMITED PARTNERSHIP,	)	
KIRAN PATEL, and	)	
ALEXANDER J. PIRES, JR.,	)	
	)	
Defendants.	)	

FINAL ORDER OF JUDGMENT

AND NOW, this 7th day of May, 2012, having conducted trial on March 7 and 8, 2011, and having issued a post-trial decision by Letter Opinion dated November 28, 2011, having found no liability against defendant KIRAN PATEL, having found against some of Plaintiff's claims, and having issued a decision regarding Plaintiff's motion to amend judgment and Plaintiff's request for expert fees, attorney's fees, and costs by Letter Opinion dated April 9, 2012;

IT IS HEREBY ORDERED that:

A. Judgment is entered in favor of Plaintiff in the total amount of $220,568.52 (consisting of back rent $127,095.21, mold remediation $10,655.00, attorney's fees $45,801.21, punitive damages $25,000.00 and prejudgment interest on rent $12017.10 through May 7, 2012,[1] plus post-judgment interest at the legal rate of 5.75% per annum at a per diem of $34.75.

[1] November 28, 2011 Opinion FN 30.

B. Of that total amount, $45,801.21 is for attorney's fees, costs, and expenses; the only defendant liable for that specific amount is OUTLET LIQUORS, LLC (successor-by-merger with BHOLE, Inc.).

C. The defendants, OUTLET LIQUORS, LLC (successor-by-merger with BHOLE, Inc.), HIGHWAY I LIMITED PARTNERSHIP, and ALEXANDER J. PIRES, JR. are jointly and severally liable for the remaining amount of $174,767.31. That remaining amount is broken down as follows:

Compensatory damages of $137,750.21 (consisting of back rent $127,095.21 and mold remediation $10,655.00);

Prejudgment interest of $12017.10 (on back rent through 5/7/12); and

Punitive damages of $25,000.00

Total: $174,767.31

Honorable E. Scott Bradley

DATE: May 7, 2012

Approved as to form:

/s/ John A. Sergovic, Jr. Dated: 5/4/12
John A. Sergovic, Jr. #623

/s/ Stephen W. Spence Dated: 5/4/12
Stephen W. Spence #2033