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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE/CROSS-APPELLANT'S AMENDED ANSWERING BRIEF AND OPENING BRIEF

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Dated: August 31, 2012

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NATURE OF PROCEEDINGS

Appellee, Cross-Appellant, Shore Investments, Inc., concurs with Appellants' Nature of Proceedings, as set forth in Appellants' Amended Opening Brief, up to the last sentence thereof. This is Appellee's Answering Brief thereto and Cross-Appellant's Opening Brief.

SUMMARY OF ARGUMENT

I.A. APPELLANTS' ARGUMENTS I.A. AND I.B. ARE DENIED. The Appellants failed to assert "manager" or "affiliate privilege" defenses; nor are these defenses applicable in this case. The Trial Judge correctly held Pires, *et al*., liable for tortious interference with an existing contract.

I.B. APPELLANTS' ARGUMENT I.C. IS DENIED. The Trial Judge correctly determined that the Appellants acted without justification without explicit reference to the seven factors in Restatement (Second) of Torts § 767.

II.A. APPELLANTS' ARGUMENT II.A. IS DENIED. The Trial Judge correctly assessed punitive damages against Appellants, as there was ample support for same; however, the punitive damages awarded were inadequate under the circumstances.

III.A. APPELLANTS' ARGUMENT III.A. IS DENIED. The Trial Judge's finding that Shore made reasonable efforts to mitigate its damages is without error.

III.B. APPELLANTS' ARGUMENT III.B. IS DENIED. The Trial Judge correctly awarded Shore rent for the remainder of the lease term as taking back the keys to mitigate damages does not necessarily constitute an "acceptance" of the leased premises or the termination of the term.

III.C. Awarding rent through the end of the term is consistent with Appellants' claim that rent is due to the date of the trial.

STATEMENT OF FACTS

Appellee/Cross-Appellant, Shore Investments ("Shore"), owned by T. Theodore Jones ("Jones"), owns a multi-building retail cluster located at 4313 Highway One, Rehoboth Beach, Delaware (the "premises").

On August 31, 2004, Shore entered into a Lease (the "Lease")[1] with BHole, Inc. ("BHole"), whose principal was Kiran Patel ("Patel"), which required operation of a Delaware licensed retail liquor store for off-premises consumption ("liquor store") at the premises,[2] as it was designed for such use. The premises is one in a cluster of rental units owned and leased by Shore. The Lease provided for an original term ending August 31, 2011 with an option to renew until August 31, 2018.[3]

The portions of the Lease most relevant to this action are Paragraphs 10, 11, providing:

> **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.[4]

[1] Appellants' Appendix (hereinafter "AA") at 239.
[2] AA243.
[3] AA239.
[4] AA243.

From August 2004 through April 2009, BHole operated a retail liquor store at the premises in conformity with the mandatory use provision of the Lease;[5] BHole was considered Shore's anchor tenant.

In June 2008, Appellant Alexander J. Pires ("Pires"), a class action lawyer and entrepreneur contacted Jones, proposing that the Lease be assigned from BHole to a company he owned, now Outlet Liquors, LLC ("Outlet"), a subsidiary of one of his entities, Highway One.[6] Pires desired to operate a big box liquor store at the beach.[7] After seeking unsuccessfully to purchase Atlantic Liquors, an existing big box liquor store nearby on Route 1, he set his sights on BHole's liquor store,[8] knowing the Lease required BHole to operate a liquor store at the premises.[9]

Pires submitted a written proposal and met with Jones to discuss it.[10] He requested an assignment with numerous material modifications,[11] including a scheme to temporarily expand the liquor store into an adjoining building, not owned by Shore, and to modify the Lease to expunge the mandatory requirement of operating a liquor store.[12]

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[5] AA148.
[6] AA96. Pires' entities operate the Rusty Rudder, multiple restaurants and he is the founder of Community Bank.
[7] AA263.
[8] *Id.*
[9] *See* Post-Trial Opinion AA10.
[10] AA204-260, 225, 275-276. The major modifications were to Paragraph 10 and Paragraph 11 and provided "10. USE OF PREMISES 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. 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."
[11] CAA1-4.
[12] As found by the Trial Court and not appealed.

Jones requested $250,000.00 for the assignment as modified.[13] Jones understood that at the end of the lease, Pires' scheme would leave Shore with a building designed for use as a liquor store, without a liquor license (a "white elephant").[14] Shore, for cause, refused.[15]

Upon Shore's refusal, Highway I, *et al.*, filed an action in the Court of Chancery on July 25, 2008, seeking to require Shore to acquiesce to the Assignment of Lease with the modifications.[16] Highway I's application for a Temporary Restraining Order ("TRO") was denied in August 2008, and Highway I voluntarily dismissed that action.[17]

On November 14, 2008, Patel's counsel noticed Jones that Pires had purchased all of Patel's stock in BHole.[18] This transaction occurred without notice to Shore. Shore concluded that, after it refused to consent to Pires' original scheme, transfer and vacation of the premises, a new plan was formulated to achieve the same objective, with the intent of tortuously interfering with Shore's existing contract and business expectations.

The new approach, carried to fruition, was for Outlet to acquire BHole for a $700,000[19] premium over its inventory value, for a business

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[13] AA98-99.
[14] AA99; CAA1-4. Further, modification to the Lease included a new Paragraph 44. "Tenant shall be authorized to move ... the licensed premises of the retain [sic] liquor sales facility to the adjacent building."
[15] AA99-101.
[16] *Id.*
[17] AA100.
[18] CAA5.
[19] CAA6.

that was netting only $4,700 in 2007.[20] The $700,000 is attributable to the value of the liquor license granted to BHole by the Delaware Alcoholic Beverage Control Commission (hereinafter the "DABCC"). Based upon the geographic limitations of 4 *Del. C.* §543 on the type of license issued, it could not relocate within a mile of a like licensed premises. However, BHole's license had to operate at the premises under the Lease. Although Pires knew of the Lease's requirements, he also knew the DABCC would allow the liquor license to transfer,[21] and he was willing to pay a $700,000 premium to Patel[22] so the Lease could be breached.

Pires crafted the takeover of BHole with the express intent to control the liquor license, transfer it to the building next door, and remove it and the business from the premises.[23] Appellant knew the scheme would leave Shore with a white elephant.

Prior to any grant or denial of the transfer, BHole commenced renovation of the Salvation Army building, anticipating the success of its application, having discussed the same, *ex parte*, with the DABCC Commissioner, Mr. Cordrey.[24]

Although Shore tried to protect its interest by objecting to BHole's application to DABCC, it was approved.[25] On April 7, 2009,

[20] *See* Appellants' Opening Br. at p. 4; CAA7-19.
[21] AA208-209.
[22] AA284.
[23] *See* Post-Trial Opinion, at 9-10 and 24-25; AA293.
[24] AA206-209.
[25] AA23 (Chancellor Opinion at 2); AA107, 197.

Shore, desperately trying to protect its contract rights, appealed the transfer of the liquor license to the DABCC, but to no avail.[26]

BHole removed the liquor license from the premises and transferred the entire operation to the Salvation Army building in April 2009.[27] Under 4 *Del. C.* § 436, the proximate result of the transfer left Shore with a white elephant. The removal of the liquor license decreased the market value of the premises, for the balance of the Lease term and all potential renewals.

BHole ceased its required liquor store use of the premises shortly after DABCC approval, and terminated electric services to the premises, leaving the space to go un-conditioned during hot summer months causing mold intrusion,[28] which Appellants failed to remedy as required by the Lease.[29] Shore demanded BHole return the liquor store to the premises and clean-up the mold.[30] Appellants failed to comply with Shore's demands, opting to hand over the keys to the premises in September 2009 and stop paying rent.[31]

To mitigate damages, Shore attempted to find another tenant, and entered into discussions with Matthew Haley ("Haley"), a local restaurateur and principals of Nage Restaurants.[32] Both attempts were unsuccessful. In a continued mitigation effort, Shore listed the

[26] AA23 (Chancellor Opinion at 2); AA97, 106.
[27] AA198.
[28] CAA20-35; AA109, 198-199.
[29] AA244.
[30] AA200-201, 21-323. The mold condition was also determined to be a breach of the Lease causing damages to Shore and the Post-Trial Opinion at 16 awarded damages to Shore for its breach of Lease and tortuous interference claims. The Appellants have not appealed the findings related thereto.
[31] AA114, 163, 201.
[32] AA118-125.

premises with a commercial realtor.[33] Notwithstanding its efforts, given bleak economic conditions, no viable tenant was found.

After an unsuccessful attempt to enforce the Lease provisions in the Delaware Court of Chancery, which found that Shore had an adequate remedy at law, depriving it of jurisdiction,[34] Shore transferred its claims to the Superior Court,[35] and this appeal follows the Superior Court rulings of November 28, 2011 (hereinafter the "Post-Trial Opinion") and April 9, 2012 (hereinafter the "Cost and Fees Opinion").

[33] AA125, 163.
[34] AA25-27.
[35] CAA36-38.

ANSWERING ARGUMENT

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

A. The Appellants failed to assert "manager" or "affiliate privilege" defenses; nor are these defenses applicable in this case. The Trial Judge correctly held Pires, *et al.*, liable for tortious interference with an existing contract.

i. Question Presented

Can Pires assert the privilege for managers in Restatement (Second) of Torts § 770, not raised below; and can Pires, and his entities raise "affiliate privilege" on appeal, which Appellants concede was not raised below?

ii. *Scope of review*

Notwithstanding Appellants' claims, the parties fully litigated the issue of Pires' personal liability in the Court below. Pires now attempts to raise "managers privilege" of Restatement (Second) of Torts § 770, not raised below. Further, Pires legal entities seek to raise the "affiliate privilege," admittedly not raised below and reviewable under the plain error standard, rather than a *de novo* standard.[36] When arguments not fairly presented to a trial judge are presented initially on appeal, the standard of review for the Delaware Supreme Court is "plain error."[37]

[36] *See* Appellants' Opening Br. at 21, claiming *de novo*.
[37] *See Powell v. Department of Services for Children, Youth, and their Families*, 963 A.2d 724 (Del. 2008).

iii. *Merits of Argument*

a. The Trial Judge properly held that Pires cannot escape liability, even though he may have been acting as an employee for one or more of the defendants.

Appellants protest the finding below; "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"[38] and the reasonable implication, that, at other times Pires was acting personally. Appellants argue that the Trial Court's cited authority,[39] are not analogous, or applicable to the case at bar.[40] Appellants claim that, where the issue is liability of a principal for tortious interference with an existing contract, the "respondeat superior" doctrine applied by the Trial Judge is not relevant, citing *Wallace v. Wood*.[41]

Appellants' cited authority rests on a premise that an existing corporate principal may advise his existing corporate entity to breach an existing contract.[42] However, here, Pires and his existing legal entities decided they needed an asset of BHole (the liquor license) to implement their scheme,[43] requiring tortuous interference with the Lease. Had BHole transferred the license, and Outlet purchased the stock after, there would be no question of tortious interference. Attempting crafty lawyering around tortious interference with existing

[38] *See* Post-Trial Opinion at 31.
[39] *See Fields v. Synthetic Ropes*, Inc., 215 A.2d 427 (Del. 1965); *Zaleski v. Mart Assoc.*, 1988 WL 97900 (Del. Super. 1988); 53 Am. Jur. 2d Master & Servant § 446.
[40] *See* Appellants' Opening Br. at 16.
[41] *See Wallace v. Wood*, 752 A.2d 1175 (Del. Ch. 1999).
[42] *Id.* at 1182-83.
[43] AA197.

contracts is not condoned by courts, which delve behind deceptive form, designed to obscure the interference. In *Don King Productions, Inc.*[44] a Federal District Court stated:

> Crafty lawyering thus presents for decision here the question whether the inclusion in a contract of a term that conditions contractual performance upon obtaining what is in essence advance judicial clearance for a contemplated, potentially interfering course of conduct forecloses finding the signatory liable for improperly and intentionally inducing a breach of another's contract. Although contract conditionally well may have that immunizing effect in some case, the present one does not appear to be a proper candidate.[45]

Don King Productions, Inc. is also instructive on Pires' asserted belief of the unenforceability of the contract terms he sought to interfere with, as the tort of contractual interference is not precluded by the interferer's belief/hope that the existing contract is unenforceable.

> However, should it prove to pass that Mirage's dealings ... foreseeably caused interference with DKP's enjoyment of known contractual rights, and those rights turn out to be valid and enforceable, Mirage's mistaken or wishful belief that they were not would not appear ... to save it from answering for any breaching conduct its acts of intentional interference brought on.[46]

Additionally, Pires poses that a corporate principal or a corporate employee cannot, as a matter of law, be held liable for the tortious interference of his corporate employer. However, employment by a tortuously interfering legal entity alone does not preclude liability of the corporate agent. Whether an employee is acting within

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[44] *Id.*
[45] 742 F.Supp. 741, 772 (S.D.N.Y. 1990).
[46] *Id.* at 777.

the scope of his employment is a factual inquiry.[47] Since Pires failed to raise this defense below, the factfinder was not presented with the question. Rather, the Trial Court applied precedent, that an employee who does an act which is a tort is not relieved from liability purely because the act was on account of his employer, finding Pires liable.[48]

Factually, Pires was not a principal of BHole when he directed Outlet to purchase BHole's shares to breach the Lease. The motive for buying BHole was to obtain its liquor license and move it next door.[49] The only impediment was BHole's lease requiring that the license stay put. Pires and/or his controlled legal entities were strangers to the Lease when executed. In a similar situation, a proposed takeover orchestrated for breaching an existing contract, injunctive relief halted the interfering motivated takeover.[50] The fact that Shore had to seek relief after the ownership change should not deprive Shore relief from an improperly motivated takeover.[51]

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[47] *See McHugh v. Bd. of Ed. of Milford School Dist.*, 100 F. Supp.2d 237 (Del. 2000).

[48] *See* Post-Trial Opinion at page 31, citing 53 Am.Jur.2d Master and Servant § 446, *et seq*.

[49] AA293.

[50] *See The York Group, Inc. v. York Town Caskets, Inc.*, 924 A.2d 1234 (PA Super. 2007), (enjoying sale of stock in casket distributor to competing casket manufacture to enable breach of exclusive distribution agreement).

[51] *See Temporaries, Inc. v. Krane*, 472 A.2d 668 (PA Super. Ct. 1984), Son of franchisee, tortuously interfered causing father to not renew a temporary employment franchise. The Trial Court found tortious interference by the son, utilizing a corporate vehicle awarding compensatory and punitive damages; punitive award was upheld on appeal for "outrageous" conduct).

b. Appellants failed to raise the defenses of the privilege for managers in Restatement (Second) of Torts § 770; and "affiliate privilege", below. Appellants have waived said defenses. This Court should not hear the issues on these waived "privileges".

An affirmative defense, if not pled, is waived.[52] "Affiliate privilege" and "manager's privilege" are affirmative defenses to tortious interference. Their preclusive effect, when applicable, demonstrates the affirmative defense attribute. Precedent from other jurisdictions reveals that privilege asserted to block an action for tortious interference operates as an affirmative defense.[53] Appellants concede they did not raise the privilege for managers in Restatement (Second) of Torts § 770 ("manager's privilege")[54] or the "affiliate privilege" below. As such, Appellants waived assertion of these defenses. Appellants cannot raise affirmative defenses for the first time on appeal.

The Delaware Supreme Court generally reviews only questions fairly presented below.[55] When conducting a review under the plain error standard, the error complained of must be "so clearly

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[52] *See* Super. Ct. Civ. R. 8(c) and *James v. Glazer*, 570 A.2d 1150 (Del. 1990) citing *Tydings v. Loewenstein*, 505 A.2d 443, 446 (Del. 1986); *City of Wilmington v. Spencer*, 391 A.2d 199, 203 (Del. 1978).

[53] *See Pleas v. City of Seattle*, 774 P.2d 1158 (Wash. 1989) ("Any justification or privilege the defendant might have is treated as an affirmative defense which a defendant must prove."); *Maximus Inc. v. Lockheed Information Management Systems Company, Inc., et. al.*, 493 S.E.2d 375 (Va. 1997); *C.W. Development, Inc. v. Structures, Inc. of West Virginia*, 408 S.E. 2d 41 (W.Va. 1991) ("If a plaintiff makes a prima facie case, a defendant may prove justification or privilege, affirmative defenses.").

[54] *See* Appellants' Opening Br. at 21.

[55] *See* Supr. Ct. R. 8; *Culver v. Bennett*, 588 A.2d at 1096 (Del. 1995); *Jenkins v. State*, 305 A.2d 610 (Del. 1973).

prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[56]

Appellants had ample opportunity to raise these "privileges" during the proceedings below. Any prejudice to them is created by their own waiver, below.[57]

> *c. Notwithstanding waiver of the asserted privileges if this Court reaches the issue of the "managers" or the "affiliate privilege", neither would protect Appellants from liability for their actions in this matter.*

If the Court finds Appellants are able to raise privileges for "managers" or "affiliates" initially on appeal, neither precludes liability.

Pires argues the "managers privilege" enabled him to direct a breach after gaining control of BHole, contending a principal at the time of the breach, cannot be held liable for tortious interference, if he was "acting in the scope of his duties,"[58] an issue not presented, below.

To this end, he cites *Grand Ventures, Inc. v. Paoli's Restaurant, Inc.*,[59] a case entirely distinguishable from that at hand. The principal of Paoli, Mr. Paoli, did not acquire, or buy into the "manager's privilege."

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[56] *See Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).
[57] CAA39-46 (Answer to Superior Court Compl. – November 12, 2009).
[58] *See* Appellants' Opening Br. at 17.
[59] 1996 WL 30022 (Del. Super. 1996).

The authority examined in *Grand Ventures*, Restatement (Second) of Torts § 770, states:

> § 770. Actor Responsible for Welfare of Another.
>
> One who, charged with responsibility for the welfare of a third person, intentionally causes that person not to perform a contract or enter into a prospective contractual relation with another, does not interfere improperly with the other's relation if the actor
>
> (a) does not employ wrongful means and
> (b) acts to protect the welfare of the third person.[60]

First, Pires employed wrongful means by paying, in essence, a bribe of $700,000 to Patel for a business netting $4,700 in the prior year,[61] to acquire BHole to direct it to breach. After Shore rightfully rejected Pires' assignment proposal, he deliberately orchestrated a new scheme, a premeditated attempt to achieve his objective: to interfere with the Lease so that he could operate a large liquor store next door concurrently acquired as part of the scheme,[62] knowing, at all times, that Shore would be left with a white elephant.

Second, Pires was clearly not seeking to protect BHole's best interests under a motive to acquire it expressly to have it breach and expose it to contract breach and tortious interference claims. Pires has ruthlessly followed his pursuit to own a big box liquor store in Rehoboth, paying whatever price was asked to do so.[63] He was seeking to promote his interests when he acquired Bhole as the vehicle to implement his scheme.

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[60] *See* Restatement (Second) of Torts § 770.
[61] CAA7-19 (Bhole 2007 Tax Return).
[62] CAA47 (Lease for Salvation Army Building).
[63] AA284-286.

Outlet and Highway One claim an affiliate relationship with the breaching party to avoid liability. Appellants cite *Tenneco Auto., Inc. v. El Paso Corp.*[64] for the proposition that only strangers to a contract are liable for tortious interference. Appellants claim not to be "strangers" to the Lease by virtue of Outlet's acquisition of Patel's stock in Bhole,[65] under the "affiliate privilege" articulated in *Shearin v. E.F. Hutton Group, Inc.*[66] The rationale of the affiliate privilege is observance of the common economic interests between a parent and subsidiary corporation.[67]

Pires formed Outlet, a subsidiary of Highway One, the "affiliates" asserting the privilege, for the intended purpose of interfering with a contract, the Lease, between Shore and BHole. It is disingenuous to assert "privilege," when the profit seeking objective of the existing entities was acquiring BHole to enable them to direct the acquired entity, previously a stranger, to commit a breach on their behalf. The directed breach enabled the liquor license to operate at their newly acquired location next door. These actions were clearly not a "good faith" pursuit of a "common economic seeking objective" between Appellants and BHole, owned by Patel. BHole and Patel were strangers to Outlet and Highway One before Appellants launched their takeover to implement the quest of operating a big box liquor store. Applying "affiliate privilege" to the acquisition of a stranger entity, whose existing contract thwarts the acquiring

[64] 2007 WL 92621 at *6 (Del. Ch. 2007).
[65] *See* Appellants' Opening Br. at 21-22.
[66] 652 A.2d 578 (Del. Ch. 1994).
[67] *Id.* at 590.

entity's desires, effectively ends the protection afforded to the non-breaching party's legally recognized interest in freedom from contract interference.

UbiquiTel Inc. v. Sprint Corp.[68] illustrates the flaws in Appellants' position. Faced with a first impression issue, whether anticipatory breach completes the tort of intentional interference, the Court agreed with a Kansas decision, *Hawkinson v. Bennett*[69]:

> I agree with the reasoning ... that anticipatory breach is sufficient to satisfy the breach element for tortious interference with contract. If the Court were to hold otherwise, it might allow a party to a merger to tortuously interfere with a contract but then avoid tort liability for such interference by consummating the merger. Such a result arguably would be inequitable because it would permit a party to commit a wrong in tort without being exposed to liability for a tort-based remedy.[70]

The inequities *UbiquiTel Inc.* describes, mirrors Appellants' attempt to assert "privilege" here. Acquiring a new affiliate to enable a breach would "permit a party to commit a wrong in tort without exposure to liability." In short, acquiring an affiliate to direct a breach does away with the long recognized judicial recognition of the harms caused by tortious interference with contracts embodied by the Restatement (Second) Torts § 766. Under Appellants' theory, form would supplant substance. Any stranger to an existing contract could simply purchase the contracting party it desired to breach, escaping liability in tort for an otherwise

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[68] 2005 WL 3533697 (Del. Ch. 2005).
[69] 962 P.2d 445, 471-72 (Kan. 1998).
[70] 2005 WL 3533697 at *8, citing *Agostino v. Hicks*, 2004 WL 443987, at *9 (Del. Ch. Mar. 11, 2004) ("[E]quity will not suffer a wrong without a remedy…."); *Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical*, 2004 WL 415251, at *2 n. 12 (same).

tortious act. Accepting Appellants' position would overrule the body of law developed to protect against tortious interference. Any legal entity with economic power to buy out a party whose contract interferes with the acquiring parties' business plan will buy out that party to execute an end-run around the tort.

Contrary to an asserted motive of saving BHole's business, and "no evidence" of bad faith, Appellants knew that by buying BHole, they would direct it to breach and move the liquor license next door. Appellants paid $700,000 to Patel, an intentional act to acquire controlling interest in BHole, enabling strangers to direct BHole to intentionally, with reckless indifference of Shore's rights, breach the Lease and leave it with a white elephant.

d. The Appellants' privilege arguments fail to recognize the distinction between existing contracts and contract expectations.

Delaware precedent differentiates between tortious interference with an existing contract and a prospective contract.

Below, Appellants relied upon the fair competition privilege. In response, Appellee argued that a fair competition defense does not apply to tortious interference with an existing contract,[71] citing Restatement (Second) of Torts § 768(2), providing:

> [t]he fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.[72]

[71] CAA97-98 (Plaintiff's Post-Trial Reply Br. at 14-15).
[72] *See* Restatement (Second) of Torts § 768 (1979).

Delaware Exp. Shuttle, Inc. v. Older,[73] observes:

> The torts of interfering with existing contracts and interfering with prospective contracts are closely related both historically and in their required elements...There is, however, a distinction between the two torts, that "being the availability to the defendant of a privilege to interfere within the limits of fair competition with prospective business opportunities."[74]

Although Delaware precedent does not address the applicability of the affiliate privilege to an existing contract, *PSC Info Group v. Lason, Inc.*,[75] finds no significant difference between Delaware and Pennsylvania law pertaining to tortious interference.[76] Appellees urge this Court to embrace *PSC Info Group* application of Pennsylvania law:

> Those cases that have acknowledged a corporate parent privilege under Pennsylvania law have done so only in the context of a prospective contract or a contract terminable at will. *See Green v. Interstate United Mgmt. Servs. Corp.*, 748 F.2d 827, 831 (3d Cir.1984) (holding that a corporate parent is privileged to interfere in the *595 prospective contractual relationships of its wholly-owned subsidiary in order to avoid dissipation of the subsidiary's assets) ... To the extent that the Restatement itself codifies a corporate parent privilege, that codification also applies only to prospective contractual relations and not to existing ones. *See* Restatement (Second) Torts § 769 ...*id.* cmt. b (clarifying that this section does not apply to breach of an existing contract).[26]

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[73] 2002 WL 31458243 (Del. Ch. 2002).

[74] *See Delaware Express Shuttle, Inc. v. Older*, 2002 WL 31458243 (Del. Ch. Ct. 2002), citing *DeBonaventure v. Nationwide Mut. Ins. Co.*, 419 A.2d 942, PN 136 (Del. Ch. 1980); *Triton Const. Co., Inc. v. Eastern Shore Elec. Services, Inc.*, 2009 WL 1387115 (Del. Ch. 2009), provides the same analysis; *Aero Global Capital Mgmt., LLC v. Cirrus, Inc. Insutr., Inc.*, 871 A.2d 428, 437, N7 (Del. 2005); Empire Fire Services, Inc. v. Bank of NY, 900 A.2d 93, 98, N19 (Del. 2006).

[75] *PSC Info Group v. Lason, Inc.*, 681 F.Supp.2d 577 (2010).

[76] *See WP Devon Assoc., LP v. Hartstrings,* 2012 WL 3060513 (Del. Super, 2012).

B. The Trial Judge correctly determined that the Appellants acted without justification without explicit reference to the seven factors in Restatement (Second) of Torts § 767.

i. *Question Presented*

Did the Trial Judge properly find that Appellants acted without justification thorough an analysis of the five (5) factors of Restatement (Second) of Torts § 766, foregoing explicit mention of the seven (7) factors of Restatement (Second) of Torts § 767?

ii. *Scope of Review*

As justification is a factual issue involving tortious interference with an existing contract, and not a legal question,[77] the scope of review is whether the Trial Judge's findings are clearly erroneous.[78]

iii. *Merits of Argument*

Appellants claim that the Trial Judge erred, in finding "no justification," without vetting seven (7) factors listed in Restatement (Second) of Torts § 767. Appellants acknowledge that the Trial Judge listed and applied all five elements of tortious interference with contract, including justification under the Restatement (Second) of Torts §766, yet Appellants contend that the Trial Courts' analysis is insufficient without explicitly analyzing each of the § 767 factors.[79]

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[77] *DeBonaventure v. Nationwide*, 428 A.2d 1151, 1154 ("The determination of whether an actor's conduct is "privileged" or "not" under § 767 of the Restatement and the Restatement (Second) is particularly factual, depending on a wide variety of factors....")
[78] *See Osborn ex. rel. Osborn v. Kemp*, 991 A.2d 1153 (Del. 2010).
[79] *See* Appellants' Opening Br. at 23.

In his Post-Trial Decision, the Trial Judge stated:

> The elements of tortious interference with a contract under Delaware law require the proponents 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. 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.[80]

After addressing § 766 factor (1), (2) and (3), the Trial Judge addressed the justification, offered by Appellants, holding that Shore had proven each element. As to element (4), justification, the Trial Judge stated:

> [T]he 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 ... Shore is in the business of leasing out its buildings to tenants ... 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.[81]

Appellants claim the Trial Judge erred, citing *Bobson v. Lifestyle Resorts, Inc.*[82] In *Bobson*, the trial judge failed to define the element of justification to a jury, and further failed to address justification in granting judgment n.o.v. to the defendant.[83] The Court concluded that, considering all of the circumstances, the judgment n.o.v. had to be reversed, and a new trial granted with the jury instructed on the issue of justification.[84]

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[80] *See* Post-Trial Opinion at 24.
[81] *See* Post-Trial Opinion at 25.
[82] 599 A.2d 411 (Table)(Del. 1991).
[83] *Id.* at *1.
[84] *Id.* at *2.

This case is an appeal of a bench trial, unlike the jury trial in *Bobson*. Although the Trial Judge did not explicitly identify each of the § 767 factors in the Post-Trial Opinion, he did, nonetheless, address the justification factor (4) of § 767, vetting against the claimed justification, finding Shore's business pursuit was damaged by the interference. Appellants cite no precedent that a trial judge must list each of the § 767 factors where the interference is with an existing contract. The aggregate of the Trial Judge's statements on justification, while not vetting upon the § 767 factors, yields the same result.

In the *Koch Materials Co. v. Shore Slurry Seal, Inc.*,[85] analysis of a plaintiff meeting its burden under § 767, a New Jersey U.S. District Court, articulates Appellees view on applying the § 767 factors:

> A tortious interference plaintiff must show malice, that is intentional and wrongful interference by a non-party with a contractual relationship, and that a reasonably anticipated economic benefit was lost ... This rather neat formula, however, belies a murky balancing that ultimately determines whether a given interference with contract is tortious. See Restatement Second of Torts § 767 (1979) (listing seven vague factors for court or jury to consider in determining wrongfulness).[86]

The observation of the "murkiness" involved in a tortious interference analysis is insightful, particularly interference with an existing contract. Appellants argue the failure to address each § 767 factor by the Trial Judge is fatal to his decision. The murky nature

[85] 205 F.Supp.2d 324 (D. New Jersey 2002).
[86] *Id.* at 335 (citations omitted).

of the § 767 vague factors is fundamentally factual,[87] excusing unnecessary vetting over each § 767 factor by a Trial Judge. The findings below of no justification under § 766 is clearly not erroneous where the interference is with an existing contract.

Appellants desired to pursue a business model that they had not yet mastered, with self-professed anti-trust ramifications.[88] To implement their plan, BHole had to breach the Lease. Courts normally treat all § 767 factors, including actor's "motive" to be a factual determination.[89] Appellees note that this Court has recently found "only if the defendant's sole motive was to interfere with the contract will this factor support a finding of improper interference.[90] However, this Court's July 19, 2012 decision in *Wave Division Holding, LLC*[91] deals with perspective contractual interference, rather than interference with an existing contract, which are treated differently under Delaware jurisprudence.[92] Furthermore, in this proceeding, Appellees contend that the Appellants' sole motive was to cause the interference to the existing contract, since the contract impeded prior strangers to the contract's business plan.

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[87] *See Mason v. Oklahoma Turnpike Authority*, 115 F.2d 1442 (10th Cir. 1997), *Levee v. Beeching*, 729 N.E. 2d 215 (Ct. App. Ind. 2000); *Irwin v. Leighton, Inc.*, 532 A.2d 983 (Del. Ch. 1987).

[88] AA291-292.

[89] *Bobson v. Lifestyle Resorts, Inc.*, 599 A.2d 411 (1991) (Table Del. 1991) (directed a proper instruction on justification under Restatement (Second) Torts § 767 be given the jury); *DeBonaventure v. Nationwide Mutual Ins. Co.*, 428 A.2d 1151(Del. 1998) ("Determination of ... actors conduct ..." under § 767 is particularly factual).

[90] *See Wave Division Holding, LLC v Highland Capital Management, LP*, 2012 WL 2928604 (Del. July 17, 2012).

[91] *Id.*

[92] *See Delaware Exp. Shuttle, Inc. v. Older*, 2002 WL 31458243 (Del. Ch. 202); *Triton Const. Co., Inc. v. Eastern Shore Elec. Services, Inc.*, 2009 WL 1387115 (Del. Ch. 2009).

"Motivation," if determined as a matter of law,[93] may be appropriate where the interference is with a prospective contract. Under existing Delaware precedent, which differentiates between prospective contractual relations and interference with an existing contract[94] the application of the § 767 motivation factor as a factual or legal inquiry is unclear.

Nevertheless, in this case the intent or motive of Pires and other Appellants is unmistakable. The Appellants, knew of the contract benefiting Shore that required the liquor store stay put. The motive of the Appellants was to acquire the license by whatever means and have it move next door, the only way to implement the motive was to breach the Lease, otherwise barring Appellants scheme.

[93] *See Wave Division Holding, LLC v. Highland Capital Management, LP*, 2012 WL 2928604 (Del. 2012).
[94] *See Delaware Exp. Shuttle, Inc. v. Older*, 2002 WL 31458243 (Del. Ch. 202); *Triton Const. Co., Inc. v. Eastern Shore Elec. Services, Inc.*, 2009 WL 1387115 (Del. Ch. 2009).

II. THE TRIAL JUDGE CORRECTLY IMPOSED PUNITIVE DAMAGES UPON PIRES, *ET AL.*, ALTHOUGH THE AMOUNT OF PUNITIVE DAMAGES AWARDED WAS INSUFFICIENT.

A. The Trial Judge correctly assessed punitive damages against Appellants, as there was ample support for same; however, the punitive damages awarded were inadequate under the circumstances.

i. *Question Presented*

Was the Trial Judge correct in imposing punitive damages upon Appellants, vetting punitive damage goals and purpose; given Appellants' reckless indifference to Shore's consequences?

ii. *Scope of Review*

Appellants concede that the scope of review of punitive damages awards is unclear in Delaware. Appellee asserts the Court should review punitive damages awards under a "clearly erroneous" standard, whether the facts found below support punitive damages.[95]

iii. *Merits of Argument*

Appellants contend the Trial Judge erred in awarding punitive damages, because the Trial Judge "did not find that Appellants' conduct was 'outrageous,' caused by an 'evil motive,' 'fraudulent,' 'egregious,' etc."[96]

However, the Trial Judge was not required to use these terms to award punitive damages. Instead the Trial Judge analyzed the object and purpose of punitive damages, citing to Delaware precedent, and §908 of the Restatement (Second) of Torts (1979), observing the "dual purpose" of punitive damages: to punish wrongdoers and deter similar conduct. The Trial Judge quoted § 908(1): "Punitive damages are

[95] *See Osborn ex. rel. Osborn v. Kemp*, 991 A.2d 1153 (Del. 2010).
[96] *See* Appellants' Opening Br. at 27.

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."[97]

Appellants focus on: 1) § 908(2), which provides, in pertinent part: "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others"; and 2) comment b. to § 908, which attests that punitive damages purpose is not compensation to the injured, but punishment for outrageous conduct, i.e., reckless indifference to the rights of others, which fully support the Trail Judge's finding.

The Trial Judge determined Appellants desired a large liquor store, but the Lease prevented the scheme.[98] Unwilling to wait until the expiration of the lease term, Appellants "intentionally and willfully caused BHole to breach its lease" by transferring the license.[99] Awarding punitive damages, the Trial Court cited precedent noting that "reckless" behavior warranted punitive damages and found compensatory damages awarded to Shore did not sanction Appellants' conduct.[100]

Appellants acted with reckless indifference to Shore's rights, causing BHole to breach and leaving Shore with a white elephant. Appellants implemented their scheme to breach the Lease "knowing full

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[97] Restatement (Second) of Torts § 908(1) (1979).
[98] *See* Post-Trial Opinion at 11.
[99] *See* Post-Trial Opinion at 28.
[100] *See Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 529 (Del. 1987), *Littleton v. Young*, 1992 WL 21125 at *2 (Table) (Del. 1992).

well how important it was to Shore to have an operating liquor store on its premises…"[101]

Pires' undifferable plan was to obtain the BHole liquor license and put it into a big box. A $700,000 premium to acquire the stock in BHole was paid without quibble over the price[102] to gain the license and breach the Lease, knowing Shore would be left with a white elephant.

Appellants' decisions to direct BHole to breach, followed by cutting off electricity and failing to cure, is conduct they do not deny, offer justification for, or refute. Their actions caused decrease to the value of the premises and damage thereto, necessitating substantial repairs and remodeling. The consequence to Shore is articulated by the Trial Court: "Moreover, no landlord wants a tenant's store to go "dark" ... 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."[103] Appellants displayed a "conscious indifference" to foreseeable consequences of causing the premises to go "dark."

Turning to claims: Shore had no "right" to a liquor store on the premises, Pires did not act with a "culpable state of mind," and Pires' beliefs of contract unenforceability. Appellants have not appealed the Trial Courts ruling that the Lease was intentionally breached. Knowledge of a contract's terms, even if the interfering actor perceives or wishes the contract to be unenforceable, does not

[101] *Id.*
[102] AA284-286.
[103] *See* Post-Trial Opinion at 12.

protect an interfering actor from liability.[104] Appellants knew of Shore's rights and consciously interfered to implement their motive with no regard of consequences to Shore.

In awarding punitive damages for interference, the interferer's economic power to implement a scheme and willingness to do so, notwithstanding the impact on Shore's rights follow the fact pattern below and analysis of outrageous conduct. "Outrageous conduct" has been defined as an act "done with a bad motive or with reckless indifference to the interests of others."[105]

> Reckless indifference to the interest of others, or as it is sometimes referred to wonton misconduct means that the actor has intentionally done an act of an unreasonable charter in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.[106]

Appellants' actions display callous indifference to the consequences to Shore. The Trial Judge's factual findings fully support an award of punitive damages. The inadequacy of these damages is addressed in Cross-Appeal Argument II.

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[104] *See Don King Associates, supra.; Agranoff v. Miller*, 1999 WL 219650 (De. Ch. 1999). (Actor's efforts to be shielded from knowledge and asserted belief that option right expired was not a defense to tortious interference).

[105] *See* supra, *Temporaries, Inc. v. Krane*, 472 A.2d 668 (citations omitted).

[106] *See Evans v. Philadelphia Transp.*, 212 A.2d 440, 443 (Pa. 1965).

III. THE TRIAL JUDGE PROPERLY DETERMINED SHORE MITIGATED ITS DAMAGES AND THE AMOUNT OF RENT DUE TO SHORE RESULTING FROM APPELLANTS' BREACH OF THE LEASE.

A. The Trial Judge's finding that Shore made reasonable efforts to mitigate its damages is without error.

i. *Question Presented*

Whether Shore pursue "reasonable efforts" to mitigate damages?

ii. *Scope of Review*

Appellants admit that mitigation of damages concerns factual findings,[107] therefore, this Court will only reverse factual findings if clearly erroneous.[108]

iii. *Merits of Argument*

The Appellants did not argue below reducing rent or retrofitting the premises to a vanilla envelope as a failure to mitigate, this issue should not be heard for the first time on appeal, under Delaware Supreme Court Rule 8.[109]

However, if this claim is reviewable, Shore presented ample evidence of its efforts to mitigate damages. [110] Appellants concede that the Trial Judge had "an adequate factual basis" supporting Shore's obligation to mitigate during the period of time when Jones was in negotiations with Haley and the owners of Nage.[111] Appellants' contend Shore's efforts to mitigate after February 2010 are unreasonable.

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[107] Appellants' Opening Br. at p. 29.
[108] *See Osborn v. Kemp*, 991 A.2d 1153 (Del. 2010), *NorKei Ventures, LLC v. Butler-Gordon, Inc.*, 2008 WL 4152775 (Del. Super. 2008).
[109] See *Gamles Corp. v. Gibson*, 939 A.2d 1269 (Del. 2007).
[110] CAA116-117 (Post-Trial Letter Mem. at 13-14); *Katz v. Exclusive Auto Leasing, Inc.* 282 A.2d 866 (Del. Super. 1971), citing *Wise v Western Union Telegraph Co.*, 181 A.302 (1935).
[111] *See* Appellants' Opening Br. at 29.

Appellants concede that the property was listed with a commercial realtor to seek a new tenant.[112] An injured party must make "reasonable" efforts to mitigate damages, engaging a commercial realtor was reasonably calculated to minimize Shore's damages, as factually determined, below. It is not necessary that Shore go above and beyond; reducing rent is not required. The Trial Judge stated:

> 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.[113]

An injured party need not reduce its expectations, "[m]itigation is subject to a rule of reasonableness."[114] The *West Willow-Bay*[115] court cited *In re Kellett Aircraft Corp.*,[116] stating:

> The rule of mitigation...may not be invoked by a contract breaker as a basis for hypercritical examination of the conduct of the injured party ... showing that the injured person might have taken steps ... wiser .... One is not obligated to exalt the interest of the defaulter to his own detriment.[117]

Appellants cannot establish clear error in the Trial Judge's finding that Shore made reasonable efforts to mitigate its damages, a factual determination supported by the record.

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[112] *See* Appellants' Opening Br. at 30.
[113] *See* Post-Trial Opinion at 17. While Appellants quibble about who noted the poor real estate market, the sheer number of vacant store fronts on Route 1 established the fact in March 2011.
[114] *See West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779 (Del. Ch. Ct. 2009).
[115] *Id.*
[116] 186 F.2d 197 (3d Cir. 1950).
[117] *See West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779 (Del. Ch. Ct. 2009).

B. The Trial Judge correctly awarded Shore rent for the remainder of the lease term as taking back the keys to mitigate damages does not necessarily constitute an "acceptance" of the leased premises or the termination of the term.

i. *Question Presented*

Is Shore entitled to rent for the balance of the lease term under precedent relied upon below, which provides that a tenant can be held responsible for rent, even though the landlord takes the keys, when the landlord is left with no choice?

ii. *Scope of Review*

Contrary to Appellants' claims, this question concerns findings of fact by the Trial Judge, therefore, this Court will only reverse if clearly erroneous.[118]

iii. *Merits of Argument*

Appellants submit: 1) Shore is entitled to rent due at the time of trial; 2) which they calculated as ending on March 8, 2011. The Trial Court properly found, factually, Shore's act of receiving the keys to mitigate damages did not constitute an "acceptance" of the leased premises or a Lease termination.[119]

Appellants acknowledge Shore's notice of lease violation, stating an intent to commence a summary judgment proceeding.[120] In response, the keys were returned and rent ceased. However, the Lease ran through August 31, 2011. Despite vacating the premises early, Appellants were obligated for rent through the end of the term, since the Lease was

[118] *See Osborn v. Kemp*, 991 A.2d 1153 (Del. 2010).
[119] *See* Post-Trial Opinion at 19.
[120] CAA121(September 21, 2009 letter) Pires conceded that Shore was entitled to possession as he stated "so rather than fight the possession, which I knew I was going to lose, I gave the keys."

not terminated by a summary possession action.[121] The Lease provides, upon default, for the landlord to take possession "by legal proceedings."[122] Shore intentionally did not seek summary possession and secured legal possession on August 31, 2011, the term end.

Appellants argue the rent obligation ended on the date of trial, citing 49 Am. Jur.2d L-T § 583. The Trial Judge, following *Conner v. Jordin*,[123] found the act of turning over the keys did not extinguish the tenant's duty to pay rent, or terminate the Lease, which Appellants have not challenged on appeal.

The Court in *Conner v. Jordin*, relied upon by the Trial Judge states:

> 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 ... if 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.[124]

The Trial Judge followed the *Conner* case making a factual finding that Shore did not "accept" the leased premises, rather BHole left Shore no choice, except to clean up mold and try to mitigate its losses by finding another tenant. Shore is rightfully owed the amount

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[121] *See Curran v Smith-Zillinger Co.*, 18 Del. Ch. 220 (1931).
[122] AA247 (Paragraph 25 of Lease).
[123] 181 A. 229 (Del. Super. 1935).
[124] *See* Post-Trial Opinion at 18 citing *Conner v. Jordin*, 181 A. 229, 231 (Del. Super. 1935) *Curran v. Smith-Zulling Co.*, 157 A.2d 432 (Del. Ch. 1931).

due for the balance of the lease term[125] as found by the Trial Court, free of clear error.

C. Awarding rent through the end of the term is consistent with Appellants' claim that rent is due to the date of the trial.

i. *Question Presented*

When is trial over?

ii. *Scope of Review*

Undeterminable under Delaware Precedent.[126]

iii. *Merits of Argument*

A bench trial is defined by Black's Law Dictionary as "[a] trial before a judge without a jury. The judge decides questions of fact as well as questions of law."[127] Accordingly, if Appellants are correct that in the absence of an acceleration clause, rent is recoverable to the date of Trial, a bench trial ends, not with the taking of testimony, but upon the Court rendering its decsioin. The Trial Court's decision is dated October 28, 2011, after the Lease term ended on August 31, 2011.

[125] *See* Post-Trial Opinion at 20.
[126] Appellees could find no Delaware authority on the time of trial; Superior Court Civil Rule 39(b) provides "issues" not demanded by jury ... shall be tried by the Court."
[127] See Black's Law Dictionary 1543 (8th Edition 2004).

SUMMARY OF CROSS-APPEAL ARGUMENT

I.A. The Trial Judge committed a legal error when he found that Cross-Appellees were not liable for tortious interference with Shore's business expectancy.

I.B. Shore's requests instructions on remand for its tortious interference with its business expectation claims.

II.A. Although the Trial Judge properly assessed an award of punitive damages against Pires, *et al.*, the amount of $25,000.00, is grossly inadequate.

III.A. The Trial Judge erred when he declined to assess damages against Patel, as Patel knowingly and intentionally enabled Pires, *et al.*, to breach the lease with Shore; and Patel is liable due to a default judgment of liability.

IV.A. The Trial Judge erred as to the amount of attorney's fees awarded to Shore, the prevailing party in this action, as he improperly allocated percentages to the amount of time spent on each claim.

CROSS-APPEAL OPENING ARGUMENT

I. THE TRIAL JUDGE ERRED WHEN HE MADE A FINDING OF NO TORTIOUS INTERFERENCE WITH SHORE'S REASONABLE BUSINESS EXPECTATIONS.

A. The Trial Judge committed a legal error when he found that Cross-Appellees were not liable for tortious interference with Shore's business expectancy.

i. *Question Presented*

Did the Trial Judge err in finding Shore did not establish its claims of tortious interference with business expectancy? Cross-Appellant presented this question to the Trial Judge is its complaint, the pre-trial stipulation, its post-trial letter memorandum, and post-trial reply brief.[128]

ii. *Scope of Review*

The review is of the Trial Judge error in formulating and applying legal precepts; thus this Court's review scope is *de novo*.[129]

iii. *Merits of Argument*

The Trial Judge incorrectly ruled that Shore did not establish its reasonable business expectations that BHole would operate a retail liquor store at the premises after August, 2011.[130] Shore entered the Lease expecting BHole to continuously operate a liquor store at the premises. By causing BHole to breach the lease, Pires, *et al*., tortuously interfered with Shore's business expectation. "The elements of a claim of tortious interference with prospective business relation are: (i) the existence of a reasonable probability of a business

[128] AA55 (Pre-Trial Stip. at 8); CAA96-99 (Pl.'s Post-Trial Reply Br. at 13-16); 114 (Pl. Post-Trial Letter Mem. at 114); 130-133 (Pl.'s Compl. at 10-13).
[129] *See Genger v. TR Investors, LLC*, 26 A.3d 180, 190 (Del. 2011).
[130] The original term of the Lease ended August 31, 2011, with an option to renew for seven (7) years.

expectancy; (ii) the interferer's knowledge of the expectancy; (iii) intentional interference that induces or causes termination of the business expectancy; and (iv) damages."[131]

Shore had a reasonable expectation that its tenant would elect to extend the lease term after August 2011. Jones testified that Shore anticipated a long-term relationship with the tenant, due to historic use, the DABCC's distance requirements, and Shore's willingness to expand the premises.[132] Jones stated "I wanted to ensure we would have a long-term tenant."[133] Jones' expectation testimony was not rebutted and a default judgment was entered against Patel on all claims alleged against him, except damage.

Patel received $700,000, an intentional act to allow the buyer to control BHole to cause "BHOLE to intentionally, outrageously (because of the Defendants' evil motive, or reckless indifference to the rights of Plaintiff) and maliciously breach the Lease with Shore by ceasing to operate a ... liquor store ... at the premises and abandoning same."[134]

Patel engaged in an intentional act, selling his stock in BHole to the Appellants to enable Pires, *et al*., to interfere:

> ... and Patel knew that the sale of his stock to Pires or his controlled entities Outlet Liquors and/or Highway I would enable Pires ... to effect the disclosed intent of Pires ... to transfer the location of the liquor license issued to BHOLE ... Patel, at the time of his negotiation for the sale of his interest in BHOLE, falsely represented to Shore Investments that he would not deal with Pires or

[131] *See American Homepatient, Inc. v. Collier*, 2006 WL 1134170 (Del. Ch. 2006).
[132] AA22-26.
[133] AA25-26.
[134] CAA130.

his related entities.[135]

Shore also alleged against Patel:

> The injury suffered by Shore as a direct and proximate cause of the tortious interference with its contract, it business relationship and its business relationship expectancy with BHOLE include... loss of ... projected long-term ...relationship with no vacancy for the subject premises for no less than 20 years, ... b) the loss of the probability that BHOLE would be compelled to exercise an option for a second term of the Lease ... and thereafter enter into further leasing of the subject premises.[136]

There was no legal justification for BHole to breach its lease, which required it to retain a liquor store and to operate at the premises as found by the Trial Court. The intentional act of Pires, *et al.*, to buy and Patel to sell the shares was the sole cause for BHole to breach the Lease; and the proximate cause of the tortious interference with Shore's business expectancy with BHole, causing Shore injury, including: a) loss of a tenant holding a liquor license, the anchor of its retail shopping complex; b) the loss of the probability that BHole would exercise its option to continue operation of a liquor store at the premises.[137]

The default judgment entered against Patel[138] establishes that Cross-Appellees knew of the existing expectancy of Shore. Similar to the intentional interference with the existing contract claims found against Appellants,[139] their same actions caused intentional interference with Shore's business expectancy.

Finally, Shore incurred substantial damages as a result, as

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[135] *Id.*
[136] CAA132.
[137] *Id.*
[138] CAA142 (Default judgment against Patel).
[139] *See* Post-Trial Opinion at 24-26.

evidenced by the unrebutted testimony and report of its expert Eric Jones, projecting a minimum loss of rental income of $880,000 over a 20 year time period, from 2011-2031, for the loss of a liquor store tenant[140] and cost to convert the premises to a vanilla envelop.

The "justification" Appellants offered below for interference was to pursue "fair competition," which the Trial Court rejected on the tortious interference with existing contract claim finding Shore to be in a different business.[141]

The Trial Judge erred in finding against Shore on its reasonable expectation claim hinging his ruling on Patel's undisclosed intentions, stating:

> Patel did not testify at 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...[i]t looks like Patel also saw the marketplace changing for the worse and decided to leave the liquor store business, at least at this location.[142]

However, on October 26, 2009, a default judgment on liability was entered against Patel.[143] Accordingly, all allegations against Patel were judicially determined in Shore's favor, except the amount of damages.[144] The question whether Patel intended to extend the lease beyond 2011, was determined by virtue of a default judgment entered

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[140] CAA144 (Testimony of Eric Jones); CAA116 (Analysis of rental income).
[141] *See* Post-Trial Opinion at 25.
[142] *See* Post-Trial Opinion at 29.
[143] CAA142.
[144] *See Gebelein v. Four State Builders,* 1982 WL 17829 (Del. Ch. 1982).

against him. The Trial Judge clearly erred when he speculated on Patel's intent and ignored the default judgment previously entered.

The Trial Judge's speculation should be replaced with the appropriate implications from Patel's liability for tortious interference based upon the default judgment. With Patel's liability established, it naturally flows that Pires, *et al*., would be liable for this tort as well. Considering the consequences of Patel's default, the intention of Shore's and Bhole's business expectancy was to continuously operate a liquor store at the premises.

Accordingly, a finding that Shore did not establish its business expectancy claims must be reversed, and this issue be remanded to properly assess Shore's damages against the Cross-Appellees.

B. Shore requests instructions on remand for its tortious interference with its business expectation claims.

Shore has noticed its Cross-Appeal to include an appeal of the Trial Court's denying its mitigation of damage claim and denial of its expert witness fees. However, due to procedural constraints, Shore submits that those issues are more appropriately addressed by a request for instructions on remand.

For remand purposes, the Court should instruct the Trial Court to review the testimony of Shore's offered experts, Eric Jones,[145] on the unrebutted projected long term rental loss of Shore, deprived of a liquor store tenant, Patricia McDaniel[146] on the costs of turning the premises into a vanilla envelope and Jeffrey T. Jones[147] for the cost

[145] CAA144-151.
[146] CAA164-170.
[147] CAA171-182.

of removing the liquor store fit-out, as more appropriate damages for tortious interference with Shore's business expectancy, than as mitigation damages. Further, the instruction should request the Trial Court to consider the value of these witnesses testimony in assisting in the Court deliberations on these remanded issues.

II. THE AMOUNT OF PUNITIVE DAMAGES AWARDED BY THE TRIAL JUDGE IS GROSSLY INADEQUATE GIVEN THE WILLFUL AND WANTON CONDUCT OF CROSS-APPELLEES.

A. Although the Trial Judge properly assessed an award of punitive damages against Pires, *et al*., the amount of $25,000.00, is grossly inadequate.

i. Question Presented

Did the Trial Judge commit clear error awarding only $25,000.00 in punitive damages, considering egregious conduct of all cross-appellees, and lack of a deterrent effect? Cross-Appellant presented this question to the Trial Judge in the complaint, pre-trial stipulation, its post-trial memorandum and post-trial reply brief.[148]

ii. Scope of Review

Appellants acknowledge in Argument II.A. of their opening brief that the scope of review for an award of punitive damages under Delaware law is unclear. In its Answering Brief II.A., Shore contends the Court should look to whether the amount of punitive damage awarded is an abuse of discretion.[149]

iii. Merits of Argument

Shore addressed punitive damages in its Answering Brief, Argument II.A. On Cross-Appeal, Shore submits that the amount of punitive damages, was insufficient to serve its legal purpose.

Punitive damage awards are granted to deter the actor and others from engaging in similar conduct in the future. In Delaware, punitive

[148] AA57 (Pre-Trial Stip. at 10); CAA102 (Post-Trial Reply Br. at 19); 120 (Post-Trial Letter Mem. at 17); 137-140 (Pl.'s Compl. at 17-20).
[149] *See, International Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437 (Del. 2000).

damages are awarded to punish and deter.[150]

Restatement (Second) of Torts § 908 (1979) provides:

> (1) 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.
>
> (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

Appellants intentionally breached the Lease in order to achieve their myopic goal to transfer the liquor license, and as a result, the liquor store, to a new location, with reckless indifference to Shore's interests. Outlet, the entity formed to acquire BHole and interfere with the lease, paid a $700,000 premium to accomplish the coupe.

The Trial Judge, as the trier of fact, failed to properly consider the factors of § 908(2), including the character of the act, the nature and extent of the intended harm to Shore, and the wealth of all Cross-Appellees, in particular, Pires.

The character of Cross-Appellees' actions, was to conspire to intentionally and willfully cause BHole to breach its lease and interfere with Shore's contract and business expectations. The act was a calculated maneuver to transfer the liquor license following Shore's denial of the lease assignment, in knowing violation of Lease provisions. In doing so, Cross-Appellees acted with reckless indifference to the rights of Shore. The Appellants knew that the

[150] *See Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 529 (1987).

breach and abandonment would leave Shore with a white elephant.

The nature and intended harm was obvious, Shore would be left with a store that went "dark,"[151] and a white elephant, which necessitated initial demolition work in the amount of $7,600 to remove the liquor store fit-out and demolition and remodeling work in the amount of $64,470 to turn it into a rentable vanilla envelope.[152]

Regarding the wealth factor of § 908, Pires is a class-action lawyer, and owner of several businesses through Highway One, including restaurants, liquor stores, and other various investments which "come and go".[153] He is a man of great wealth, due in no small part to his role as principal of Highway One, Outlet, and founder of Community Bank.[154] Further, at trial, Pires acknowledged that Highway One is paying in excess of a quarter of a million dollars in annual rent for the previous Salvation Army store.[155]

Shore argued below for an award of $350,000[156] in punitive damages, representing 50% of the premium paid for the stock acquisition. The Trial Judge awarded punitive damages of $25,000.00, 3.57% of the amount paid to acquire Bhole, and offered no insight on how the figure was derived,[157] without rationale and grossly inadequate, to deter Pires, *et al.*, or others like him.

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[151] *See* Post-Trial Opinion at 12.
[152] CAA166 (Patricia McDaniel testimony at 130).
[153] AA255-257.
[154] CAA183-188 (Response to Motion for Stay).
[155] AA213.
[156] CAA102; 120.
[157] *See* Post-Trial Opinion at 28.

III. THE TRIAL JUDGE IMPROPERLY DECIDED NOT TO ASSESS ANY DAMAGES AGAINST PATEL, DESPITE HIS CLEAR PARTICIPATION AND CONTRIBUTION TO THE ACTIONS OF PIRES, *ET AL.*, WHICH LEAD TO TORTIOUS INTERFERENCE AND BREACH OF THE LEASE.

A. The Trial Judge erred when he declined to assess damages against Patel, as Patel knowingly and intentionally enabled Pires, *et al.*, to breach the lease with Shore; and Patel is liable due to a default judgment of liability.

i. Question Presented

Did the Trial Judge commit legal error in assessing no damages against Cross-Appellee Patel, as Patel's sale of stock clearly enabled Pires, *et al.*, to breach the lease; and the default judgment against Patel made him liable on all allegations of the complaint against him? Cross-Appellant presented this question in the complaint, pre-trial stipulation, its post-trial letter memorandum and post-trial reply brief.[158]

ii. Scope of Review

The scope of review is of the Trial Courts abuse of discretion in determining damages.[159]

iii. Merits of Argument

Default judgment against Patel via Super. Ct. Civ. Rule 55 was entered on October 26, 2009,[160] with all claims against Patel determined in Shore's favor, except damages.[161] However, the Trial

[158] AA55-57 (Pre-Trial Stip. at 8-10); CAA102 (Pl.'s Post-Trial Reply Br. at 19, requesting judgment as to *all* Defendants); 104 (Pl.'s Post-Trial Letter Mem. at 1, ft. nt. 1); 130-140 (Pl.'s Compl. at 10-20).
[159] *See International Telecharge, Inc., supra.*
[160] CAA142 (Default Judgment, Docket No. 7, granted October 26, 2009).
[161] The consequence of a default judgment is that all allegations of the Compl. are found against the Defendant. *See Gebelein v. Four State Builders*, 1982 WL 17829 (Del. Ch. 1982).

Judge, in error, found Patel did not damage Shore.[162]

Patel clearly received the benefit of the $700,000.00 premium paid to induce him to sell his BHole stock, an entity earning around $5,000 in its prior year, thereby enabling Pires, *et al.*, to tortuously interfere with Shore's contract and business expectations. Patel was deceitful, having misrepresented to Shore that he cut-off his dealings with Pires before the stock was sold.[163] The default judgment found all allegations of the Complaint against him in Shore's favor.[164] Ignoring this suit and Shore's claims do not relieve him of the allegations of the Complaint found against him.

The default judgment entered against Patel determines his liability on all of Shore's claims. The Trial Judge should have assessed some damage award against Patel,[165] including all damages appropriately determined for tortious interference with Shore's existing contract, business expectations, and punitive damages. An award of zero damages upon a finding of liability in tort ignores *Amalfitano v. Baker*, stating: "...zero damages is inadequate and unacceptable as a matter of law where uncontradicted...testimony establishes a causal link between an accident (substitute Tort) and injuries sustained," which should apply to the bench finding of zero damages in the face of an unrebutted record. This issue should be remanded to the Court below for an assessment of damages against Patel.

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[162] *See* Post-Trial Opinion at 31-32.
[163] AA102.
[164] *See Gebelein v. Four State Builders, supra.*
[165] *See Amalfitano v. Baker,* 794 A.2d 575 (Del. 2001), citing Maier v. Santucci, 697 A.2d 747, 749 (Del. 1997).

IV. IN HIS SECOND LETTER OPINION, DATED APRIL 9, 2012, THE TRIAL JUDGE ERRED IN REDUCING THE AMOUNT OF ATTORNEY'S FEES AWARDED.

A. The Trial Judge erred as to the amount of attorney's fees awarded to Shore, the prevailing party in this action, as he improperly allocated percentages to the amount of time spent on each claim.

i. Question Presented

Was the Trial Judge arbitrary or clearly wrong when he assigned percentages to the amount of time Shore's attorneys spent on each claim. Is Shore rightfully entitled to the full amount of its attorney's fees and costs related to this action? Cross-Appellant presented this question in the pre-trial stipulation, its post-trial letter memorandum, its post-trial reply brief, and in its affidavit in support of attorney's fees and costs in favor of Plaintiff.[166]

ii. Scope of Review

The scope of review is whether the Trial Judge abused his discretion reducing Shore's attorney's fees in his April 9, 2012 Opinion. This Court's review is abuse of discretion.[167]

iii. Merits of Argument

The April 9, 2012 Opinion below, discusses the attorney's fees and costs due to Shore under the terms of the lease, the Trial Judge improperly used a percentage formula when determining the amount of attorney's fees and costs awarded Shore, the overall successful party in this action.

[166] AA55 (Pre-Trial Stip. at 8); CAA102 (Pl.'s Post-Trial Reply Br. at 19); 114 (Pl.'s Post-Trial Letter Mem. at 11); Pl.'s Attorney's Fees Affidavit (Docket No. 86, filed December 7, 2011).
[167] *See Chavin v. PNC Bank, De,* 873 A.2d 287 (Del. 2005).

The Trial Judge rightfully acknowledged that Shore was due its attorney's fee and costs, as the overall successful party, pursuant to Paragraph 19 of the Lease, which states:

> 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 and Landlord as the case may be in enforcing the respective covenants and agreements of this lease.[168]

Further, Paragraph 35 of the Lease provides:

> 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.[169]

Since BHole breached the Lease and participated in the tortious interference activities, those activities clearly breached Paragraph 35 of the Lease as tortious interference activity violated the tenant's obligation "to faithfully attempt to avoid and minimize damages resulting from the conduct" of the tenant.

The Trial Court ignored Paragraph 35 of the Lease in attempting to segregate the time Shore's counsel expended on each theory of Shore's relief as Shore was entitled under Paragraphs 19 and 35 to be awarded all costs and reasonable attorney's fees as the tenant participated in the tortious interference activities, violating the requirements of Paragraph 35.

The Trial Judge broke down attorneys' fees, costs, and expenses incurred in Chancery Court and Superior Court.

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[168] *See* Costs and Fees Opinion at 3.
[169] *See* AA249.

He first determined that Shore was not entitled to recover costs and attorney's fees in Chancery Court, finding Shore was not successful there. However, the action in Chancery was pursued as an instrumental part of Shore's efforts to enforce the Lease covenants. Although Shore's pursuit of an equitable remedy was denied, dismissal was with the right to transfer to Superior Court under 10 *Del. C.* § 1092. The transfer lead to successful recovery by Shore on the adequate legal remedy available, which the Court of Chancery found deprived it of equitable jurisdiction. In the assessment of attorney's fees under 42 USC § 1988, it has been stated "where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have her attorney's fee reduced simply because the district court did not adopt each contention raised.[170] Accordingly, the Trial Judge erred in denying Shore its fee and costs relating to the Chancery action, and Shore should be awarded its reasonable fee and costs related to the Chancery Court action, in the amount of $32,512.

Turning to the fees related to the Superior Court action, the Trial Judge articulated that the award should be reduced to reflect Shore's partial success.[171] As more fully set forth in the above Cross-Appeal Argument I, Shore believes that the Trial Judge erred in his findings on tortious interference with business expectations. Additionally, Shores successful pursuit of the tortious interference claims with the existing contract were pursued by Shore to enforce the tenant's breach of Paragraph 35 of the Lease, therefore Shore is

[170] *See Hershey v. Eckerhart*, 461 U.S. 424 (1983).
[171] *See* Costs and Fees Opinion at 4 citing *Fasciana v. Electronic Data Systems Corp.*, 829 A.2d 178, 185 (Del. Ch. 2003).

entitled to recover these costs and expenses under Paragraph 19 of the Lease.

Overall, Shore submits that it was successful in proving all of its claims below, and therefore should be awarded its attorneys' fees, court costs, and expenses, in the full amount claimed related to the Superior Court action, or $69,083.77 under the US Supreme Court's analysis in *Hershey v. Eckhart, supra.*

Even if this Court does not find that Shore to be successful in proving all of its claims in the Superior Court action, the Trial Judge arbitrarily assigned percentages to the time Shore's counsel spent proving each claim.

In arbitrarily assigning percentages to determine the award of attorney's fees, the Trial Court's decision is contrary to the terms of the Lease, which do not provide for such deduction. Further, Shore won substantial relief below and therefore should be awarded the full amount of fees and costs incurred in relation to this action against Outlet, the successor to BHole as the tenant under the Lease, under *Hershey v. Eckhart, supra*.

CONCLUSION

For the foregoing reasons Appellees request that the appeal of the Appellants be dismissed, and that Cross-Appellant be granted the relief requested in the Opening Brief on Cross-Appeal.

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