EFiled: Dec 03 2014 03:04PM EST
Filing ID 56413186
Case Number 576,2014D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRUCE A. HILER, as Trustee of BRUCE A. HILER DELAWARE QPRT AND ELAINE M. CACHERIS, as Trustee of the ELAINE M. CACHERIS DELAWARE QPRT, Respondents/Counterclaim and Third-Party Plaintiffs Below - Appellants v. PAUL G. KUHNS AND ANNE M. KUHNS, Petitioners/Counterclaim Defendants Below - Appellees, and THE CITY OF REHOBOTH BEACH, a municipal corporation of the State of Delaware, and GREGORY FERRESE, in his capacity as the City Manager of the City of Rehoboth Beach, Third-Party Defendants Below - Appellees.	No. 576, 2014 Court Below: Court of Chancery of the State of Delaware C.A. NO. 7586-VCG

CORRECTED OPENING BRIEF FOR APPELLANTS

Daniel A. Dreisbach (#2583)
Sarah A. Clark (#5872)
Richards, Layton & Finger, P.A.
One Rodney Square
Wilmington, DE 19899
(302) 651-7700

Respondents/Counterclaim and Third-Party Plaintiffs Below - Appellants

Of Counsel:

Matthew J. MacLean
Jeetander T. Dulani
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037-1122
(202) 663-8383

Dated: December 3, 2014

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **Page(s)**

Statutes

Other Authorities

NATURE OF PROCEEDINGS

This is an appeal from an Order of Final Judgment issued by the Court of Chancery of the State of Delaware which partially granted and partially denied the Motion for Summary Judgment ("the Motion") filed by appellants, Respondents and Counterclaim/Third-party Plaintiffs below, Bruce A. Hiler and Elaine M. Cacheris (hereinafter referred to as "the Hilers" or "Respondents"). The appellees, Paul and Anne Kuhns ("the Kuhns" or "Petitioners"), also filed a Motion for Summary Judgment below. Although this litigation began when the Kuhns filed a Verified Petition for Quiet Title with the Court of Chancery, the underlying action for which the Hilers sought relief was a trespass involving the City of Rehoboth Beach ("the City") and the Kuhns.

In the court below, the Kuhns and the City claimed an easement for a water line and a sewer line (hereinafter collectively referred to as the "lines," "pipes," or "laterals") running to the Kuhns' property at 101 Lake Drive, Rehoboth Beach, Delaware ("101 Lake Drive"). The Kuhns alleged that the lines ran through and along the eastern boundary of the Hilers' property, 100 St. Lawrence Street, Rehoboth Beach, Delaware ("100 St. Lawrence St."), and that these lines provided water and sewer service to 101 Lake Drive from the City's water and sewer mains that run along St. Lawrence Street. The Hilers denied the existence of such an easement and claimed that the Kuhns and the City trespassed onto 100 St.

Lawrence St. on numerous occasions over more than a three-year period to attempt to replace or upgrade the pipes, including a continuing trespass that commenced in January of 2012 when the Kuhns had a spigot installed on their property and the City turned on the water service to the water line. Additionally, the Kuhns further trespassed on January 24, 2012, when they installed a permanent addition in the sewer line: a flexible PVC lining pipe called "Perma-liner." The Kuhns and the City took these actions with full knowledge of the Hilers' objection to any work on the lines and the Hilers' assertion that no easement existed. The Hilers further asserted that the City also trespassed upon 100 St. Lawrence St. and argued that the City participated in and aided and abetted the Kuhns' trespasses.

On June 1, 2012, the Kuhns filed a Verified Petition to Quiet Title against the Hilers, seeking an easement for the lines that run across the Hilers' property at 100 St. Lawrence St. and service the Kuhns' property at 101 Lake Drive. On September 17, 2012, the Hilers answered, filing a Counterclaim against the Kuhns and a Third-Party Complaint against the City. On September 16, 2013, the parties filed Cross Motions for Summary Judgment. In their motion, the Hilers asked the Court of Chancery: (1) to award them quiet title of 100 St. Lawrence St. and determine that any alleged easement did not exist; (2) to award compensatory and punitive damages against the Kuhns for their repeated trespass; (3) to award damages against the City for aiding and abetting the Kuhns' trespass upon the

Hilers' property; and (4) to enjoin the Kuhns and the City from further trespass and all other relief that was necessary and proper.

On March 31, 2014, the Court of Chancery issued its memorandum opinion, ruling partially for and partially against the Hilers. The court agreed with the Hilers that no easement existed for the Kuhns' or the City's use of the lines. The origin of the lines themselves was unclear from the record, and the court determined that their presence did not meet the "open and notorious" burden required by a prescriptive easement. The court also agreed with the Hilers that "the passage of water and the PVC liner" through their property was a trespass but awarded only nominal damages.

However, the court disagreed with the Hilers that the City had aided and abetted the Kuhns' trespass on the ground that the City had not substantially assisted the Kuhns' conduct. Moreover, the court denied or failed to rule on the Hilers' requests for equitable relief and denied them any meaningful monetary relief. Finally, the court determined that the parties would be responsible for their own attorney's fees. In short, the court granted the Hilers a right without a remedy. The Hilers are appealing that decision.

The Hilers filed a Notice of Appeal on October 7, 2014. This is the Hilers' opening brief.

SUMMARY OF ARGUMENT

1. The Court of Chancery incorrectly denied or failed to rule on the Hilers' request for an order to remove the trespassing Perma-liner and to preclude further trespasses by enjoining use of the lines. The Court misapplied established Delaware law regarding trespass remedies and ignored evidence that the Kuhns, in cooperation with the City, improperly engaged in self-help.
2. The Court of Chancery incorrectly found that the City was not liable for aiding and abetting the Kuhns' trespass or that the City was not liable as a joint tortfeasor. Not only did the court fail to apply the legal test to the facts, but it improperly ignored a substantial body of relevant evidence. The court also erred in failing to rule on and find several additional trespasses by the Kuhns and the City.
3. The Court of Chancery wrongly decided that all issues in the case were deemed submitted fully stipulated and therefore improperly denied the Hilers their chance to present evidence on damages. Further, the court erred by refusing to remove this case for a hearing on punitive damages.
4. The Court of Chancery abused its discretion by refusing to consider and grant an award of attorneys' fees because the Kuhns' and the City's actions met the requirements for the bad faith exception to the American Rule.

STATEMENT OF FACTS

I. The History of the Properties at Issue

This case centers around two pipes—one metal, one terra cotta—that run across the Hilers' property approximately seven feet below the surface.[1] And while the origins of the pipes are murky, the parties agree that the pipes extend from the mains on St. Lawrence Street, through the length of the Hilers' land, and terminate on the Kuhns' property at 101 Lake Drive.[2]

In the mid-1920s, both the Hilers' and the Kuhns' future plots were owned by a single entity, the Rehoboth Heights Development Company ("RHDC"). A0048-53; A0281-83. The RHDC sold both plots which came to be held by different owners, and title eventually passed through a chain of deeds and transfers to the Hilers and the Kuhns today. *See, e.g.*, A0048-53; A0186-203; A0256-80. The record does not establish when precisely the two lines were installed.

II. The Parties Discover the Pipes

The Kuhns purchased their property in 2008 and prepared to demolish the existing home to build a new home. A0186-88. Prior to construction, the City required the Kuhns to cap off their sewer and water supply, which they did.

---

[1] 100 St. Lawrence St. is owned by the Bruce A. Hiler Delaware Qualified Personal Residence Trust ("QPRT") and Elaine M. Cacheris Delaware QPRT. The owners will be referred to as "the Hilers" for the sake of convenience.

[2] No documentation that is contemporaneous with the construction of the pipes exists to show precisely where they lie, but a survey made for the Kuhns in preparation for litigation reflects a modern estimation of where the lines sit. A0156-57.

A0069. The Kuhns' plumber, Mr. Harry Caswell, then reached out to the City for guidance on how to handle the laterals and consulted with Rehoboth Water Department Superintendent Howard Blizzard. Both the City and Mr. Caswell encouraged the Kuhns to upgrade the aging pipes because the Kuhns were "required by the City's Water Department to upgrade the City's water and sewer service to their property." A0073-76. In early 2009, after consulting with the City, Caswell began his preliminary digging for this project and discovered that the pipes servicing the Kuhns' property traveled under the Hilers' property. *Id*. At some point, he realized that replacing the pipes risked damaging the Hilers' property, so he telephoned the Hilers and explained the situation. *Id.*

The Hilers were surprised to discover that their neighbors' pipes traveled under their own land, and they were upset and concerned about Caswell commencing work on their property. A0077-79. The Hilers immediately and steadfastly opposed any further construction work that would encroach on their property. *Id.* When the Hilers next returned to their Rehoboth home, they discovered a 6 to 7 foot long "scar" on their land near the Kuhns' property line as a result of Caswell's preliminary digging. *Id.*; A0309-10.

III. The City Enters the Fray

At the request of the Kuhns' attorney, on May 9, 2009, the City Manager wrote to Mr. Hiler: 1) claiming that an easement existed for the laterals; 2)

explaining that the City had directed the Kuhns to upgrade the pipes; and 3) claiming that the Hilers had no right to object to the work. A0075. The Hilers informed the City that no easement existed and reiterated their objection to any trespass on their land. A0077-79. Despite this, the Kuhns moved forward. By May 21, 2009, Caswell had begun to insert a narrow, rigid liner into the 1930's era sewer line running under the Hilers' property. A0082. Caswell was unsuccessful, however, as the rigid liner hit a snag approximately 65 feet in, and he abandoned the project. *Id.* The insertion of the rigid pipe liner onto the Hilers' property was itself a trespass, which the court only nominally addressed in its analysis. *Id.* And while the Kuhns kept the City apprised of their actions, they failed to inform the Hilers of their trespass. *Id.*; *see* A0507-09 (Hiler Dep. at 82-84).

The Kuhns then attempted to sell their property. *See, e.g.*, A0132-33. As part of this process, the Kuhns' attorney wrote to City Manager Ferrese on September 13, 2011, asking for a certification of water and sewer service to 101 Lake Drive to placate concerned potential buyers. A0095. Two days later, the City Manager certified that the Kuhns' property received water and sewer service "from the lines that run through the lot located at 100 St. Lawrence Street and these lines are the responsibility of the property owner at 101 Lake Drive in regard to repair and/or replacement." A0096.

After receiving the City Manager's certification, the Kuhns learned of "Perma-lining," which was a new process for strengthening old pipes. *See* A0122-130. Perma-lining involves inserting a flexible plastic sleeve into a pipe and heating the sleeve by forced jets of air. *Id.* The heated sleeve expands and hardens in the interior of the existing pipe. *Id.* The Kuhns realized that Perma-lining allowed them to access and reinforce the sewer line that ran through the Hilers' property while conducting all of the above-ground work from their own property. A0110-15. They hired Caswell and another company to perform this Perma-lining, who, with City employees present and after running a camera down the length of the sewer line, installed the Perma-liner. A0122-27. At the same time, Caswell installed a yard hydrant spigot on the Kuhns property, now a bare lot. *Id.* The City then turned on the water flow from the main on St Lawrence Street, allowing water to flow freely through the Hilers' land, into the Kuhns' property. The Hilers were not informed of these trespasses and were unaware of them until months later, at which time they strongly objected. A0131-37.

Two notable events transpired during this Perma-lining procedure. First, City officials were necessary participants in the process, because they had shut off the water to the Kuhns, confirmed that it was shut off, and then reconnected water service and turned the water flow on to the Kuhns' yard hydrant. Second, a number of City officials were present on the Kuhns property when the Perma-

lining was installed into the sewer line underneath the Hilers' property. *See, e.g.*, A0132. The record indicates that the Perma-liner installation was fully supervised and monitored by City representatives, and City officials tested the new pipes before reconnecting service. *Id.*

IV. Prelude to Litigation

Approximately three years after the discovery of the laterals, Mr. Hiler suspected that someone had reconnected the water and sewer lines. A0116-18. His suspicion was accurate. Further, he believed that the flow of water under his land amounted to a clear trespass. *Id.* On January 15, 2012, faced with years' worth of fruitless negotiations and recurring trespasses, Mr. Hiler emailed Glenn Mandalas, the attorney for the City. *Id.* Venting his frustration, Mr. Hiler asserted once again that "[a]bsolutely no easement exists on [his] property" and suggested that he may "tap off" the pipes on his property entirely. *Id.* Mr. Mandalas emailed the Kuhns' attorney the next day to discuss pursuing injunctive relief against the Hilers. A0119.

Months later, Mr. Hiler discovered the Kuhns' Perma-lining trespass. A0132-37. Despite the Kuhns' clear trespass, Mr. Hiler did not engage in self-help by tapping off the lines. He knew that the only way to achieve finality was though the courts. A0116. The Kuhns filed their Verified Petition to Quiet Title in the Court of Chancery on June 1, 2012 and set this suit in motion.

ARGUMENT

I. DELAWARE LAW SUPPORTS AN INJUNCTION TO REMEDY THE KUHNS' TRESPASS UPON THE HILERS' PROPERTY

A. Question Presented

Whether the Court of Chancery erred by failing to remedy the invasion of the Hilers' rights with injunctive relief and by ordering removal of the Perma-liner. A0833; A0911.

B. Standard and Scope of Review

This Court ordinarily reviews the Court of Chancery's grant of summary judgment *de novo*. *U.S. Cellular Inv. Co. v. Bell Atlantic Mobile Sys., Inc.*, 677 A.2d 497, 499 (Del. 1996). However, when reviewing appeals from cross-motions for summary judgment, this Court will defer to the factual findings of the trial court unless clearly wrong. *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 100 (Del. 1992). Regardless, the Supreme Court will examine questions of law decided by the lower court *de novo*. *Id.* at 99.

C. Merits of Argument

When considering a mandatory permanent injunction, the Court of Chancery balances the harm that will result from a failure to enjoin the actions that threaten the movant with the harm that will befall the non-movant if an injunction is granted. *Sierra Club v. Del. Dep't of Natural Res. & Envtl. Control*, 919 A.2d 547 (Del. 2007). This balancing of equities may lead to the entry of a mandatory

injunction when, as here, the movants have suffered an egregious and continual violation of their property rights. *See, e.g.*, *Gordon v. Nat'l R.R. Passenger Corp.*, 1997 WL 298320 at *7 (Del. Ch. 1997). Here, the Court of Chancery erred twice: first, by failing to enjoin use of the pipes; and second, by failing to consider the Hilers' additional ground of relief.

The Court of Chancery correctly decided that the Kuhns trespassed upon the Hilers' land through their installation of the Perma-liner in the sewer line and the flow of water in the water pipe.[3] *Kuhns v. Bruce A. Hiler Del. QPRT*, 2014 WL 1292860 at *20-21 (Del. Ch. Mar. 31, 2014). However, despite the fact that Delaware courts have consistently recognized that the victim of a trespass has a right for a cessation of that trespass, the court allowed the trespass to continue. *See Gordon*, 1997 WL 298320 at *8-9 (citing Restatement (Second) of Torts § 929 cmt. b (1979)). Indeed, the Chancery Court's injunction analysis focused only on whether removal of the pipes themselves was warranted and left the Hilers without any relief. At a minimum, the court should have ordered the removal of the Perma-liner, as restoration is "ordinarily allowable as the measure of recovery" for trespass. *Id.* Moreover, the Court's analysis failed to consider the most basic

[3] Although the court below noted that the same trespass analysis applies for the flow of water, the Perma-liner, and the attempted 2009 re-sleeving, the court nevertheless failed to include this latter trespass in its conclusion. We request that this Court hold that the May 2009 conduct also constituted trespass.

remedy of enjoining use of the pipes. In sum, the court allowed the pipes and the liner to remain, and the flow of water to continue, thereby allowing the Kuhns' trespasses to continue unabated.

The Chancery Court's failure to provide any remedy to the Kuhns' repeated and ongoing trespass was based on the incorrect position that the Kuhns were blameless bystanders, guilty only of a technical trespass. But this perception is unsupported by the record. In fact, the Kuhns were fully aware of the Hilers' repeated objections to their use of the laterals. By the time the Kuhns installed the Perma-liner, the Hilers had been voicing their objections for approximately three years.[4] But the Kuhns chose to ignore the Hilers' property rights and instead pursued self-help by installing the Perma-liner. Delaware courts have historically disfavored self-help when it comes to property rights, because it leads to the likelihood of "endangerment of persons and property, and breaches of the peace." *Bateman v. 317 Rehoboth Ave., LLC*, 878 A.2d 1176, 1183 (Del. Ch. 2005) (citing Restatement (Second) of Property, Land. & Ten. § 14.3 cmt. a (1977)). For this reason, a party exercising self-help generally assumes the risk of all consequences if he is wrong, whatever the burden of those consequences might be. *See Hollingsworth v. Szczesiak*, 84 A.2d 816, 822 (Del. 1951) ("[W]hen the defendant

[4] The pipes were discovered in early 2009, and the Perma-lining took place January 2012. *See* A0193-98.

has gone on wrongfully in a willful invasion of another's rights relative to real property, the injured party is entitled to have the property restored to its original condition, even though the wrongdoer thereby would suffer great loss.").

The case of *Hollingsworth* is particularly apposite. There, the defendant had erected an unusually large garage that violated a restrictive covenant in his housing community. *Id.* at 818. He did so without receiving the necessary approval for his construction plans from the relevant neighborhood committee. *Id.* at 819. Plaintiffs, the neighbors of the defendant, informed defendant that his actions violated their agreements; the defendant then consulted with his attorney, who agreed with the plaintiffs. *Id.* at 820. Nevertheless, the defendant built his garage, and his neighbors brought suit. *Id.* at 818. The court held that the defendant, by exercising self-help over the clear objections of the plaintiffs and thereby violating the plaintiff's property rights, cannot then complain of the burden of restoring the property to its original condition. In the court's words:

> In the present case, the defendants are not entitled to such [lenient] consideration. It has been found that with full knowledge of the restrictions they deliberately attempted to override them. They took their chances as to the effect of their conduct with their eyes open to the results which might ensue. They cannot therefore complain if they have suffered serious damage by reason thereof.

Id. at 822. So too here. The Kuhns fully understood the Hilers' objections to their actions. Nevertheless, they surreptitiously installed the Perma-liner in violation of

their neighbors' property rights.[5] In short, the Kuhns "took their chances," and cannot complain if they "suffe[r] serious damage" because of their self-help. *Id.* And as in *Hollingsworth*, the appropriate remedy is complete removal of the offending structure – here, the Perma-liner.

At a minimum, the lower court should have enjoined future use of the lines and ordered the City and the Kuhns to cut and cap the lines to stop the continuing trespass upon the Hilers' land. An injunction against future use places no undue burden upon the Kuhns and the City because there can be no rational hardship in ordering a party who has trespassed not to trespass again. Without this relief, the Hilers have no assurance that the Kuhns and the City will not trespass again. *Cf. Genentech, Inc. v. Wellcome Found. Ltd.*, 826 F. Supp. 828, 830 (D. Del. 1993) ("[T]hat the defendant has stopped infringing is generally not a reason for denying an injunction against future infringement unless the evidence is very persuasive that further infringement will not take place.") (quoting *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 842 F.2d 1275, 1281-82 (Fed. Cir. 1988)). Consequently, this Court should balance the equities of this case once again – taking into account the above-mentioned facts and law, including the Kuhns' repeated use of self-help in the face of the Hilers' clear objections.

[5] The Kuhns waited for approximately three months before informing the Hilers about the installation of the Perma-liner. A0132.

II. THE COURT OF CHANCERY FAILED TO RECOGNIZE THE CITY'S SUBSTANTIAL ASSISTANCE TO THE KUHNS' TRESPASS AND JOINT TORTFEASOR LIABILITY

A. Question Presented

Whether the Court of Chancery properly denied the Hilers' claim that the City and City Manager Ferrese aided and abetted the Kuhns' trespass and were joint tortfeasors, when it improperly applied legal doctrine and ignored key evidence in the record. A0920-24.

B. Standard and Scope of Review

This Court ordinarily reviews the Court of Chancery's grant of summary judgment *de novo*. *U.S. Cellular Inv. Co.*, 677 A.2d at 499. However, when reviewing rulings on cross-motions for summary judgment, this Court will defer to the factual findings of the trial court unless clearly wrong. *Merrill*, 606 A.2d at 100. But, the Supreme Court will nevertheless examine questions of law decided by the lower court *de novo*. *Id.* at 99.

C. Merits of Argument

The Court of Chancery erred in its conclusion that the City and City Manager Ferrese did not aid and abet the Kuhns' trespass. Aiding and abetting a third party's tort requires proof of three elements: underlying tortious conduct; knowledge; and substantial assistance. *Patton v. Simone*, 1992 WL 183064 at *8-9 (Del. Super. Ct. June 25, 1992). The Court of Chancery correctly found that the

City's actions met the first two elements. *See Kuhns*, 2014 WL 1292860 at *21-22. But, the court found that although the City knew of the trespass, the City had not substantially assisted the Kuhns' tort. *See id.*

This analysis fails on two counts. First, the court failed to present any reasoning for its failure to address certain critical record evidence. Second, the Court of Chancery misapplied the "substantial assistance" test and ignored the question of joint tortfeasor liability entirely.

1. The Court of Chancery's Analysis Incorrectly Applied the Facts to its Aiding and Abetting and Joint Tortfeasor Analysis

A court sitting in equity makes a ruling based upon the facts in front of it and must "give all issues in controversy deliberate, informed, impartial and studied analysis and consideration." Principles of Professionalism for Delaware Judges, http://courts.state.de.us/forms/download.aspx?id=39418 (last visited Nov. 20, 2014). And where a trial court encounters meritless facts, the court should dispose of those facts and "explain, when necessary, the reasons for the decisions of the court." *Id.* Here, the Court of Chancery ruled that the Hilers' aiding and abetting claim failed "as a matter of evidence," but ignored the record evidence that showed that the City substantially assisted the Kuhns' trespasses and was liable as a joint tortfeasor. *Kuhns*, 2014 WL 1292860 at *22. Indeed, a review of the record reveals that, but for the City's actions, the Kuhns' trespasses could not and would

not have occurred. The City actively and consistently commanded, encouraged, and enabled the Kuhns' trespasses in the following ways:

First, after receiving a request for assistance from the Kuhns' attorney, City Manager Gregory Ferrese sent a May 4, 2009 letter to Mr. Hiler, stating that the Kuhns were directed by the City to upgrade the pipes and asserting that an easement for the lines existed. *See* A0075-76 (discussing the work that "needs to be performed on these lines"); A0081 (statement from the Kuhns' attorney to the City's attorney that "[plumber] Caswell was directed by the City to upgrade the lines . . . which the City required to be in their current location."). This letter made it clear that, in the City's view, the Kuhns were required to upgrade their sewage pipe, and could use the lines despite any objection from the Hilers. This directly led to multiple trespasses by the Kuhns.

Second, emails from May 20 and 21, 2009, demonstrate the close cooperation between the City and the Kuhns' attorney as to work done to and use of the pipes. In one email, the Kuhns' attorney shares video and photographs of the Hiler property and warns the City's attorney to "be wary of Hiler claiming that the video/photos were a trespass onto his property." *Id.* The two parties also discussed their plans for Caswell to reline the sewer pipe, and the Kuhns' attorney explicitly outlined some of the steps that the City may have to take to assist the process, including "stabiliz[ing] the phone pole which is next to the line, [but] not

really an issue for Hiler, since it is on City property." A0082. The City's initial efforts at cooperation and support of the Kuhns quickly increased as the Hilers continued to defend their property rights.

Third, the day after the above emails, City officials, including City Manager Ferrese, met with Mr. Hiler and after conceding that there was no easement, nonetheless asked Mr. Hiler to grant the Kuhns an easement. This bold request was the result of a clear agreement between the Kuhns and the City. Indeed, in emails exchanged before the meeting, the Kuhns' attorney described the City's request as "our position." A0081. Of course, the City made this request knowing that the Kuhns' plumber had already trespassed upon the Hilers' property when he "shot a sleeve through 65 feet of the existing sewer line." A0082. But, the City failed to even mention this trespass to the Hilers and the Hilers did not even learn of this trespass until the emails were produced in discovery in the litigation. *See* A0524-528 (Hiler Dep. at 99-103).

Fourth, on September 15, 2011, at the request of Kuhns' attorney, City Manager Ferrese sent a letter to the Kuhns and their attorney "certify[ing]" that the Kuhns' water and sewer utilities from the City were served by the lines that ran through the Hilers' property and stating that these lines were the Kuhns' responsibility to repair or replace. A0094-96. Relying upon the City's

certification, the Kuhns engaged in the final and most egregious trespass of installing the Perma-liner underneath the Hilers' property.

In the end, the Kuhns' litany of trespasses can be directly traced to the City's baseless easement claims and continued encouragement, commanding, and enabling actions. *See Quillen v. Betts*, 39 A. 595, 597 (Del. Super. Ct. 1897) (noting that a party who orders, incites, or advises a trespassing party may be equally liable for trespass); Restatement (Second) of Torts § 876(a), (c) (1979) ("Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct . . . . The agreement need not be expressed in words and may be implied and understood to exist from the conduct itself."). It is difficult to imagine a more compelling case of substantial assistance, under any rational definition.

Moreover, the City's actions culminated in the reconnection of water service and its flow through the Hilers' property to the Kuhns' spigot in January of 2012. The City's act of turning on the water was itself a trespass, done with the full knowledge that the Hilers had objected to any trespass on their land for three years. In sum, the record shows that the City is liable as a joint tortfeasor based on its aiding and abetting, counseling, commanding, and inciting the Kuhns' trespass, and its own trespass of turning on the water. The Court below ignored this evidence. Accordingly, the Hilers ask this Court: (1) to overturn the lower court's

ruling and find the City and City Manager Ferrese liable for trespass, for aiding and abetting the Kuhns' trespasses, and as joint tortfeasors; and (2) to remand for further proceedings on damages.

2. The Court of Chancery Incorrectly Applied the Test for Substantial Assistance to the Facts of this Case

In Delaware, one is liable as a joint tortfeasor for harm to a third person from the tortious conduct of another if he "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." Restatement (Second) of Torts § 876(b) (1979); *see Anderson v. Arco*, 2004 WL 2827887 at *4-5 (Del. Super. Ct. Nov. 30, 2004) (discussing and applying Restatement). This applies whether the act is intentional or negligent, even where the other party does not know the act is tortious. *Id.* cmt. d. Delaware has adopted this provision and formalized the test for substantial assistance or encouragement: the court must weigh (1) the nature of the act encouraged; (2) the amount and kind of assistance given; (3) the defendant's absence or presence at the time of the tort; (4) the relationship to the tortious actor; (5) the defendant's state of mind; and (6) the duration of the assistance. *Patton v. Simone*, 1992 WL 183064 at *12 (Del. Super. Ct. Dec. 14, 1992).[6]

[6] This test essentially restates Comment d of the Restatement, which says: "In determining this, the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind are all considered." Restatement (Second) of Torts § 876 cmt. d (1979).

Although the Court of Chancery recited these factors, it refused to apply this test to the facts, and it also failed to balance the factors. Indeed, the court's analysis relied on three findings: (1) the City did not supervise the installation of the Perma-liner; (2) the City's disconnection and reconnection of water to the pipes failed to reach substantiality; and (3) the City's failure to issue permits and licenses did not accommodate the Kuhns' trespass. But not only did the court err in finding that the City's reconnection and turning on of the water was not substantial assistance, it failed to consider other uncontroverted facts in the record that demonstrated the City's substantial assistance under the factors of *Patton v. Simone, supra*:

1. This Court should consider the egregious trespasses that the City encouraged. The Kuhns repeatedly trespassed upon the Hilers' land for years and ultimately installed a permanent liner in a sewer pipe running through the Hilers' land. *See* A0132. And, the Kuhns continued committing their trespasses without ever asking permission, despite the fact that the Kuhns knew of the Hilers' "explicit objection to any such trespass." A0134.

2. The City provided direct assistance to the Kuhns by certifying that the Kuhns had the right and responsibility to maintain the water and sewer lines, and that the City claimed and utilized those lines for providing its services to the Kuhns, even though the lines lay almost entirely on the Hilers' property. A0096.

Furthermore, the City's certification ignored the fact that the City had no recorded easement authorizing those lines. The City's express certification directly led to the installation of the Perma-lining in 2012.

3. Several City employees attended the Perma-liner installation and did far more than observe. Although the City later denied that it supervised the Perma-lining, a few months after the installation, Mr. Kuhns admitted that the Perma-lining "was applied with the full supervision of representatives of the City of Rehoboth," and that "City officials from both the water and sewer department [were] present" to test the pipes beforehand. A0132. The City's presence was critical because it assured the Kuhns that their trespass was sanctioned by the City. In other words, their presence placed the full weight of the City's imprimatur behind the Kuhns' trespass.

4. The City had a close and collaborative relationship with the Kuhns. As early as May 4, 2009, the City wrote to the Hilers expressing their support for the Kuhns' position, claiming an easement for the lines and stating that the Hilers likely could not object to their use. A0075. And when the City met with Mr. Hiler on May 22, 2009, the Kuhns' attorney wrote the City's attorney to clarify what "our position" would be. A0081. Throughout, they had kept the City well-apprised of the attempts to line the sewer line. *Id.* Additionally, the City granted a

certification, at the Kuhns' request, that made it clear that the Kuhns were served by the City through the pipes on the Hilers' land. A0096.

5. The record evidence also shows the City's state of mind. City Manager Ferrese's communications show that the City actively supported the Kuhns' position, and both parties reassured each other that the trespass onto the Hilers' land was warranted. *See, e.g.*, A0138 (Kuhns' attorney email to the City's attorney stating that "neither [party] ha[s] done anything wrong"). Indeed, the City had its own interest in using the lines to fulfill its obligation to provide water and sewer services to the Kuhns' property. A0353-55 (Ferrese Dep. 48:20-23; 50:4-14; 54:13-16).

6. Finally, the Court should note that the City's support and knowledge of the Kuhns' trespasses spanned several years. A0075.

In sum, the City substantially assisted the Kuhns' trespass over several years. The Court of Chancery erred because it failed to consider the above evidence, did not apply the test to the only three facts or findings it enumerated, and failed to balance any factors. *See Kuhns*, 2014 WL 1292860 at *21-22. The Hilers ask this Court: (1) to hold that the City trespassed, acted as joint tortfeasors, and aided and abetted the Kuhns' trespasses; and (2) to remand to the Court of Chancery, with an instruction to transfer the case to the Superior Court for a hearing on damages.

III. THE COURT OF CHANCERY IMPROPERLY DENIED THE HILERS THE CHANCE TO PRESENT EVIDENCE ON DAMAGES BY DEEMING ALL ISSUES SUBMITTED FULLY STIPULATED

A. Question Presented

Whether the Court of Chancery erred by incorrectly deeming the damages issues of this case as fully stipulated, or by refusing to transfer this case for a hearing on punitive damages. A0904; A0906-08; A0910; A0957-58.

B. Standard and Scope of Review

This Court normally reviews the Court of Chancery's grant of summary judgment *de novo*. *U.S. Cellular Inv. Co.*, 677 A.2d at 499. But, when reviewing appeals of cross-motions for summary judgment, this Court will defer to the factual findings of the trial court unless they are clearly wrong. *Merrill*, 606 A.2d at 100. However, when – as in this section – a party claims that summary judgment was rendered despite the existence of material factual disputes, this Court makes that determination *de novo*. *Id.*

C. Merits of Argument

The Court of Chancery is a court in equity that, once it has acquired jurisdiction over part of a controversy, may either exercise jurisdiction over an entire case, even those portions that have an adequate remedy at law, or transfer the legal counts to another appropriate court. *See Getty Refining & Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147, 150 (Del. Ch. 1978), *aff'd*, 407 A.2d 533 (Del. 1979); 10 *Del. C.* § 1902 ("This section shall be liberally construed to permit and

facilitate transfers of proceedings between the courts of this State in the interests of justice"). The Court of Chancery has discretion with regard to transferal of cases. *See El Paso Natural Gas Co. v. TransAmerican Nat'l Gas Corp.*, 669 A.2d 36, 39 (Del. 1995). But the court cannot retain jurisdiction of a case and then make unfounded or improper rulings upon those legal issues. *See Ball v. Div. of Child Support Enforcement*, 780 A.2d 1101, 1105 (Del. 2001) ("The failure of a trial judge to give reasons for the court's disposition constitutes a *per se* abuse of discretion.") (internal quotations and alterations omitted) (citing *Husband M. v. Wife D.*, 399 A.2d 847, 848 (Del. 1979)).

1. The Court of Chancery Erred by Considering this Case Submitted for Ruling on the Merits when the Hilers had Reserved Damages for a Later Hearing

The court below improperly considered the record closed with respect to damages. Indeed, at oral argument, the Court of Chancery was uncertain whether the record was fully stipulated with regard to damages, and it asked the parties to submit their positions on the matter. *See* A0904-09 (Transcript of Oral Argument on Cross Motions for Summary Judgment); *Kuhns*, 2014 WL 1292860 at *14. The record shows that the Hilers reserved the damages issue for a later hearing, and repeatedly requested a transfer to the Superior Court under Delaware Code § 1902 for a full determination on damages. *See, e.g.*, A0823-24 (Letter from Nicole M. Faries, Prickett, Jones & Elliott, to the Hon. Sam Glasscock, III (Nov. 25, 2013));

A0904-06 (Transcript of Oral Argument on Cross Motions for Summary Judgment). In fact, the Hilers stated their position clearly in the oral argument below:

> THE COURT: . . . Is it your position that I have sufficient facts before me to determine the damages question?
> MR. HILER: No, Your Honor. I think -- no, I do not.
> * * *
> MR. HILER: My understanding was that we would have a damages portion, [a] hearing on damages.

Id. Furthermore, when Mr. Hiler later expressed his concern about the harmful side-effects of the flexible PVC material in the Perma-liner, the court acknowledged that this topic would be best heard at a subsequent damages hearing. *Id.* at 80-81 ("If we go forward to a damages hearing, if that's been reserved, then I suppose you have the right to [argue] that.").

The Hilers' position could not be clearer. Nor was their request unusual. The Court of Chancery has declined to rule on damages if an issue is beyond the scope at hand, just as it may allow cases to transfer to the Superior Court under § 1902 once the court has disposed of their equitable claims. *See, e.g.*, *Phoenix Equity Grp. LLC v. BPG Justison P2 LLC*, 2010 WL 1223619 (Del. Ch. Mar. 25, 2010) (allowing transfer under § 1902 after the court granted a motion for summary judgment that disposed of all claims based in equity); *Invenergy Solar Dev. LLC v. Gonergy Caribbean SARL*, 2011 WL 6155689 (Del. Ch. Nov. 28, 2011) (declining to rule on damages because that issue was beyond the scope of

plaintiff's pending motion for summary judgment); *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513 (Del. Ch. 2005) (allowing transfer under § 1902 after the court disposed of equitable issues).

Here, the Court of Chancery refused either to sever damages for a later hearing or to allow a transfer of a portion of the case under § 1902. Because the court offered no explanation, the inescapable conclusion is that the court either ruled on the issue without rationale, or it ignored the Hilers' position entirely. *See B.E.T., Inc. v. Bd. of Adjustment*, 499 A.2d 811, 811-12 (Del. 1985) ("A judge of [Delaware] must understand that the legal requirement of supplying reasons is a matter of judicial ethics as well as a matter of law."). This refusal unfairly precluded the Hilers from presenting the evidence they intended to argue at a damages hearing – including evidence for compensatory damages for annoyance and distress. *See Williams v. Manning*, 2009 WL 960670 at *11 (Del. Super. Ct. Mar. 13, 2009). This was wrong, and this Court should remand with an instruction to transfer this case to the Superior Court for a hearing on damages.

2. Alternatively, the Court Erred by Refusing to Remove this Case to Superior Court for a Hearing on Punitive Damages

Even if the parties had fully stipulated damages – and they did not – the court below should have transferred the Hilers' legal claims to the Superior Court for a hearing on punitive damages. Although the Court of Chancery "routinely decides controversies that encompass both equitable and legal claims" and has

discretion to hear and decide remedies at law, its ability to do so is not plenary. *Medek v. Medek*, 2008 WL 4261017 at *3 (Del. Ch. Sept. 10, 2008) (internal quotations omitted). Specifically, the court cannot award punitive damages. *See Box v. Box*, 697 A.2d 395, 398 n.11 (Del. 1997). Punitive damages address and deter behavior and conduct that is considered "egregious," "reckless," "reprehensible," or "motivated by malice." *Jardel Co. v. Hughes*, 523 A.2d 518, 528 (Del. 1987).

And while a court in equity might justifiably refuse to transfer a plaintiff's claim for punitive damages in some circumstances, the facts of this case favor transfer. *See, e.g.*, *Wilson v. Pepper*, 608 A.2d 731 (Del. 1992) (TABLE). The Hilers did not initiate this litigation in the Court of Chancery. Rather, the Hilers were forced to defend against the Kuhns' suit after their opposition to repeated trespasses was ignored by the Kuhns and the City. It would be unjust to prevent the Hilers from pursuing a fair remedy, especially when this injury was created by the abusive tactics of the City government.

Moreover, the Hilers' transfer requests to allow the Superior Court to hear their punitive damages claims were clearly and consistently stated. *See* A-0405 (Opening Brief for Respondents and Counterclaim/Third-Party Plaintiffs in Support of their Motion for Summary Judgment n. 67). Yet, the court's analysis ignored the punitive damage issue entirely. *See B.E.T., Inc.*, 499 A.2d at 811 ("It is

established law in this State that a judge must state the reasons for his decision. Failure to give such reasons constitutes an abuse of discretion.") (citations omitted). The court also failed to "liberally construe" the Hilers' request for a separate punitive damages hearing. *See* 10 *Del. C.* §1902. As such, this Court should remand to the Court of Chancery with an instruction to transfer the case for hearing in the Superior Court on the issue of these damages.

In addition, the facts of this case clearly support an award of punitive damages. *See Jardel*, 523 A.2d at 527 (holding that punitive damages should be considered if "the evidence supported a reasonable inference of conduct meeting the standard."). The decision in *Williams v. Manning* is instructive. 2009 WL 960670. The *Williams* Court granted compensatory damages for annoyance and distress and upheld a punitive damages award because of egregious conduct that reflected an "I don't care attitude." *Id.* at *12 (internal quotation omitted). In *Williams*, a party repeatedly trespassed onto their neighbor's property over a period of years, despite being told not to. *See id.* The Superior Court condemned the conduct and awarded punitive damages. *Id.*

The record shows that the Kuhns' and the City's actions over a period of three years reflected the same "I don't care" attitude that warranted punitive damages in *Williams*. As detailed in the statement of facts *supra*, the Kuhns repeatedly trespassed on the Hilers' land: first by their plumber's attempts to dig

up the lines (with some digging on the Hilers' property) (A0310); then through their attempts to reline the sewer pipe (A0070-72), including running a camera through the pipe (A0132); and finally ending with the installation of a Perma-liner (A0122-30). The Kuhns and the City sought to hide these repeated trespasses, despite being aware of the Hilers' objections. The Kuhns took these actions, after assuring the Hilers that no further work would occur without discussion with the Hilers. *See* A0439 (Hiler Dep. at 14:6-14); A0499 (Hiler Dep. at 74:5-7).

Mr. Kuhns' email to Mr. Hiler about the Perma-liner demonstrates the Kuhns' "I don't care" attitude. A0132-33. Sent months after the installation took place, Mr. Kuhns states that the Perma-lining "was done with no disturbance whatsoever to your property." A0132. Thus, Mr. Kuhns acknowledged his trespass and extoled the virtues of a potentially irreversible fabrication constructed without permission under the Hilers' land. A0132-33. Moreover, Mr. Kuhns ignored the fact that neither he nor the City had a legal right to have the previous pipes or the Perma-liner running under the Hilers' property. Mr. Kuhns, it is evident, simply did not care about his trespass. *Williams*, 2009 WL 960670 at *12.

Accordingly, this case deserves a punitive damage award and this Court should remand with an instruction to transfer those issues to the Superior Court where they may be properly heard.

IV. THE COURT OF CHANCERY ERRED BY DENYING THE HILERS RECOVERY OF ATTORNEYS' FEES

A. Question Presented

Whether the Court of Chancery abused its discretion when it refused to award attorneys' fees to the Hilers in light of the Kuhns' multiple, wanton trespasses, the City's aiding and abetting of those trespasses, and the City's own trespasses. A0029; A0034; A0042.

B. Standard and Scope of Review

When an appeal arises from a motion for summary judgment, the Supreme Court will review the trial court's assessment of attorney's fees for an abuse of discretion. *Sternberg v. Nanticoke Mem. Hosp., Inc.*, 62 A.3d 1212, 1220 (Del. 2013); *Cooke v. Murphy*, 99 A.3d 226 (Del. 2014) (TABLE). But, the Court of Chancery's application of legal principles in making the fee determination is subject to *de novo* review. *Alaska Elec. Pension Fund v. Brown*, 941 A.2d 1011, 1015 (Del. 2007).

C. Merits of Argument

The Court of Chancery should have awarded the Hilers' attorneys' fees. While Delaware courts ordinarily require parties to pay their own costs under the American Rule, courts may award attorney's fees where "the action giving rise to the suit involved bad faith, fraud, conduct that was totally unjustified, or the like." *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*,

68 A.3d 665, 687-88 (Del. 2013) (internal citations and quotations omitted). There also is a strong policy established by this Court that favors granting attorney's fees to a party in an easement case where the other party undertook self-help remedies. *See, e.g.*, *Black v. Staffieri*, 2014 WL 814122 (Del. Feb. 27, 2014) (TABLE); *H&H Brand Farms, Inc. v. Simpler*, 1994 WL 374308 at *5 (Del. Ch. June 10, 1994) (stating that fees may be awarded where a party acted "fraudulently, negligently, frivolously, vexatiously, wantonly or oppressively") (citing *Slawick v. State*, 480 A.2d 636 (Del. 1984)).

The case of *H&H Brand* is particularly apposite. There, the defendant partnership mistakenly believed that it had an easement to develop a portion of the plaintiff's land and began plowing that land to prepare for the future construction of a roadway. *Id.* at *1. The court held that the defendants acted in bad faith because they knew they had no "uncontroverted legal right" to develop the land at issue. *Id.* at *6. The court explained why the defendants' actions were sanctionable:

> Taking matters into their own hands and physically damaging plaintiff's property as a means of establishing what defendants knew were dubious rights to the 60 foot easement, can only be described as acts of bad faith and wanton disregard for the rights of others.

Id. The Kuhns and the City have engaged in the same "wanton disregard for the rights of others" here. *Id.* The record shows that after hearing the Hilers' objections, and with full knowledge that there was no recorded easement, the

Kuhns, with the City's support and assistance, took matters into their own hands and repeatedly trespassed upon the Hilers' property. After the Hilers discovered and objected to the Kuhns' overt trespasses, the Kuhns instructed their plumber to trespass surreptitiously and the City substantially aided that effort. *See* A0132 (revealing to the Hilers, months after the fact, the installation of the Perma-liner). Indeed, as noted *supra* at page 23, the City had its own interest in having the Kuhns upgrade and use the lines, as it openly claimed to be using the lines to fulfill its obligation to provide water and sewer services to the Kuhns' property and claimed an easement in its favor in the litigation. A0353-55 (Ferrese Dep. 48:20-23; 50:4-14; 54:13-16)."

The Kuhns' and the City's resort to self-help is especially troubling as it violated both the law and a policy preference against self-help in property disputes. In fact, courts have long recognized that resorting to self-help in property disputes may lead to unnecessary escalation and endanger the populace. *See* Restatement (Second) of Property, Land. & Ten. § 14.3 cmt. a (1977). Therefore, self-help has been and continues to be heavily disfavored. *Id*. This court should affirm this policy by condemning the Kuhns' improper and illegal resort to self-help, the City's aid to the Kuhns, and the City's own trespass.

The Chancery Court ignored this evidence and ruled without any supporting analysis – an arbitrary result and an abuse of discretion. *See Pitts v. White*, 109

A.2d 786, 788 (Del. 1954) (“the essence of judicial discretion is the exercise of judgment directed by conscience and reason, as opposed to capricious or arbitrary action.”); *Ball*, 780 A.2d at 1105 ("The failure of a trial judge to give reasons for the court’s disposition constitutes a *per se* abuse of discretion.”). This Court should remand with an instruction to transfer this case to Superior Court for a hearing on attorneys’ fees owed by the City and the Kuhns for both the proceedings below and this appeal.

CONCLUSION

The Court of Chancery acknowledged that the Kuhns violated the Hilers' property rights yet afforded the Hilers no remedy. This is an inequitable result and plainly erroneous. For these and all foregoing reasons, the Hilers respectfully request that this Court: (1) grant injunctive relief for the Hilers against future use of the lines and order removal of the Perma-lining; (2) reverse the Court of Chancery and find the City and Ferrese liable as joint tortfeasors and for aiding and abetting the Kuhns' trespass; and (3) remand the remaining damages and attorney's fees portion of this case to the Court of Chancery with instructions to allow transfer to the Superior Court under 10 *Del. C.* § 1902.

/s/ Daniel A. Dreisbach
Daniel A. Dreisbach (#2583)
Sarah A. Clark (#5872)
Richards, Layton & Finger, P.A.
One Rodney Square
Wilmington, DE 19899
(302) 651-7700

Respondents/Counterclaim and Third-Party Plaintiffs Below - Appellants

Of Counsel:

Matthew J. MacLean
Jeetander T. Dulani
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037-1122
(202) 663-8383

Dated: December 3, 2014