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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,

Respondent/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 Cityof 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

THE CITY OF REHOBOTH BEACH AND CITY MANAGER GREG FERRESE'S ANSWERING BRIEF IN RESPONSE TO APPELLANTS' OPENING BRIEF

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Dated: January 6, 2015

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NATURE AND STAGE OF THE PROCEEDINGS

On June 1, 2012, Appellee Kuhns[1] filed a verified petition to quiet title in the Court of Chancery, seeking that "an Order to Quiet Title be entered by [the] Court confirming that [Appellee Kuhns has] an easement over, across, and under [Appellant Hiler's] property . . . for the purpose of conveying water and sewer via pipelines that currently exist in [Appellant Hiler's] property."[2]

Appellant Hiler[3] filed the first of four versions of his Answer, Counterclaim, and Third-Party Complaint on September 17, 2012. The first version contested the existence of the easement claimed in the petition to quiet title, sought damages from Appellee Kuhns for "compensatory and punitive damages for all the harm and injury suffered as a consequence of [Appellee Kuhns's] interference with the property rights of [Appellant Hiler]," and sought damages from the City Defendants[4] based upon an alleged 2012 trespass and a federal "takings" claim.[5]

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1 Throughout this brief, Paul and Anne Kuhns are referred to collectively as "Appellee Kuhns."

2 B0003 (Verified Petition, Request for Relief Paragraph A).

3 Throughout this brief, Bruce Hiler as Trustee of the Bruce A. Hiler Delaware QPRT (Qualified Personal Residence Trust) and Elaine M. Cacheris as Trustee of the Elaine M. Cacheris Delaware QPRT are referred to collectively as "Appellant Hiler."

4 Throughout this brief, the City of Rehoboth Beach and Gregory Ferrese are referred to as the "City Defendants."

5 A0022-34 (Respondents and Counterclaim/Third-Party Plaintiffs' Answer to Complaint, Counterclaim, and Third-Party Complaint).

The second version of Appellant's Answer was filed on November 1, 2012, amending the Counterclaim to include a demand that Appellee Kuhns be ordered to remove the water and sewer lines located on the Hiler property, and amending the Third-Party Complaint against the City Defendants to make a similar demand.[6]

The third version of Appellant's Answer was filed on December 6, 2012, removing the "takings" claim and associated demands for relief.[7]

The fourth and final version of Appellant's Answer was attached to their July 19, 2013 Motion for Leave to File Third Amended Third Party Complaint. This version amended Appellant's prior trespass claim into a claim that, "[i]n or around January of 2012, the [City Defendants] entered, or aided and abetted [Appellant Kuhns] in entering, the Hiler Property without permission, with notice of [Appellant Hiler's] objection to their entry, and supervised the installation of operable water and sewer lines through the Hiler property."[8]

It is unclear whether this version of the Third Party Complaint was legally effective or not. The docket shows no evidence that the court granted Appellant Hiler's Motion for Leave to File Third Amended Third-Party Complaint, or that

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[6] B0022, B0028 (Respondents and Counterclaim/Third-Party Plaintiffs' Answer to Complaint, Amended Counterclaim, and Amended Third-Party Complaint).

[7] A0035-47 (Respondents and Counterclaim/Third-Party Plaintiffs' Answer to Complaint, Second Amended Counterclaim, and Amended Third-Party Complaint).

[8] B0071 (Respondents and Counterclaim/Third-Party Plaintiffs' Answer to Complaint, Second Amended Counterclaim, and Third Amended Third-Party Complaint).

Appellant ever filed or served the Third Amended Third Party Complaint on anyone. Nonetheless, the court and counsel treated the Third Amended Third-Party Complaint as effective during oral argument.

Read in the light most favorable to Appellant Hiler, after four bites at the apple and almost a year to consider the claims and relief he wanted the court below to rule upon, Appellant Hiler complained only that the City Defendants trespassed, or aided and abetted a trespass, in January of 2012, and requested as his sole injunctive relief that the City Defendants be ordered to "remove the water and sewer lines servicing the Kuhns' Property that are located on the Hiler Property."[9]

The parties entered into a pre-trial-scheduling order, drafted by Appellant Hiler's counsel, and ordered by the court below on April 15, 2013.[10] Appellant Hiler attempted to have the court below give him an additional month to conduct expert discovery, and the City Defendants opposed that attempt in part because the City Defendants believed Appellant Hiler would use the additional time to obtain

[9] B0072 (Answer, Second Amended Counterclaim, Third Amended Third-Party Complaint, Request for Relief, ¶ (c)). Notably, at oral argument on the cross-motions for summary judgment, Appellant Hiler personally told the court below that, "We are not asking for the pipes, by the way, to be removed." A0905 (Oral Arg. at 76:5-6). *See also* A0815 (Hiler's Reply Brief to Third-Party Defendants, pp. 28-29); A0908 (Oral Arg. at 79:12-13) ("We do not necessarily want the pipes removed . . . .").

[10] B0009-11 (April 15, 2013 Stipulated Scheduling Order).

expert testimony on damages, in violation of a discovery deadline that had already run.[11]

The court below held a teleconference on scheduling issues on August 9, 2013, and as a result of that conference the expert deadlines remained the same. On this date, it became clear that Appellant Hiler could not prevail on any significant damages claim, as he had failed to name any experts relevant to damages. The parties entered into a revised pre-trial scheduling order that gave a more exact summary judgment briefing schedule, again drafted by Hiler's counsel, and ordered by the court below on August 26, 2013.[12] Neither of these scheduling orders mentioned anything about a Superior Court damages hearing. They did, however, provide for cross-motions for summary judgment on a stipulated record.

Having missed the discovery deadline to name a damages expert on phthalates or emotional distress,[13] Appellant Hiler inserted a brand new claim into the proposed order on his motion for summary judgment: he claimed, for the first time, to be entitled to have the damages portion of his case transferred to the

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[11] B0105 (Third Party Defendants' Response to Motion to File Third Amended Third-Party Complaint and Letter Requesting Extension of the Scheduling Order, at ¶9).

[12] B0109-12 (August 26, 2013 Revised Pre-Trial Scheduling Order).

[13] These are the sorts of damages Appellant Hiler claims should have been tried by the Superior Court. *See* A0908-10 (Oral Arg. at 79:12-81:10); *Kuhns v. Bruce A. Hiler QPRT*, 2014 WL 1292860 at *21, fn. 196 (Del. Ch.).

Superior Court of Sussex County.[14] Appellant Hiler also, for the first time, sought an injunction regarding the use of the water and sewer lines, in addition to the removal of the laterals.[15] Appellant's brief, delivered contemporaneously with the motion, marked the first time Appellant claimed that it was pursuing the City Defendants for conduct other than allegedly supervising the 2012 relining of the sewer lateral.[16]

Cross-motions for summary judgment were briefed between September 16, 2013 and November 11, 2013. Oral argument before the Court of Chancery was held on November 18, 2013. The court below issued its Opinion on March 31, 2014, and while the court below agreed with Appellant that no easement for the laterals could be found, the court below declined to consider legal theories and declined to award judicial remedies Appellant Hiler failed properly to plead.

This is the City Defendants' Response to Appellant Hiler's appeal of that decision.

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[14] B0120-21 (Proposed Order on Respondents' Counterclaim and Third Party Plaintiffs' Motion for Summary Judgment). Such a transfer would be an elegant solution to Appellant Hiler's failure to obtain the damages expert he needed in Chancery Court, as the transfer to the new court would likely come with a new scheduling order and a new expert deadline.

[15] B0120 (Proposed Order on Respondents' Counterclaim and Third Party Plaintiffs' Motion for Summary Judgment).

[16] A0406-09 (Respondents' and Counterclaim and Third-Party Plaintiffs' Opening Brief in Support of Their Motion For Summary Judgment, p. 37-40).

SUMMARY OF ARGUMENT

The court below declined to consider allegations Appellant Hiler failed to plead, and declined to provide judicial remedies Appellant Hiler either did not request in his pleadings or expressly said he did not want. These are the errors Appellant Hiler now complains of, and for which Appellant Hiler believes he should be awarded his attorneys' fees. The City Defendants disagree.

A review of the record demonstrates that the City Defendants did not commit the trespass pled by Appellant Hiler, and did not aid or abet the trespass pled by Appellant Hiler. As such, there can be no liability on the part of the City Defendants.

The City Defendants respectfully request that this Court affirm the Opinion of the court below in its entirety, and finally put this matter to rest.

STATEMENT OF RELEVANT FACTS

The court below has accurately set forth the facts of this case in its Opinion, and the City Defendants incorporate those facts by reference. Appellant Hiler's primary factual dispute with the court below revolves around an alleged conspiracy between Appellee Kuhns and the City Defendants, and additional facts related to that dispute are set forth below.

Appellant Hiler eventually identified several categories of trespass for which he believes the City Defendants should be held liable.[17] First, in 2009, Appellee Kuhns's plumber, Harry Caswell, attempted to insert a "sleeve" into the sewer lateral serving the Kuhns property.[18] Second, in 2012, Mr. Caswell successfully installed a "perma-liner" in the sewer lateral serving the Kuhns property.[19] Finally, Appellant Hiler complains that the use of the water and sewer on the Kuhns property constituted a continuing trespass beginning in 2012.[20]

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[17] As explained in the Nature and Stage of the Proceedings, *supra*, only the 2012 "perma-lining" trespass was actually pled against the City Defendants. The remaining trespass claims were advanced by Appellant after the close of discovery, in the course of motion practice.

[18] B0129 (Caswell Dep. 22:15-20, 23:14-16), *Kuhns v. Bruce A. Hiler QPRT*, 2014 WL 1292860 at *7 (Del. Ch.).

[19] B0136 (Caswell Dep.50:5-13), *Kuhns v. Bruce A. Hiler QPRT*, 2014 WL 1292860 at *11 (Del. Ch.).

[20] *Kuhns v. Bruce A. Hiler QPRT*, 2014 WL 1292860 at *12 (Del. Ch.); A0404 (Respondents' and Counterclaim/ Third-Party Plaintiffs' Opening Brief in Support of Their Motion for Summary Judgment, p. 35).

With regard to the 2009 attempt to insert a "sleeve" into the sewer lateral serving the Kuhns property, the City Defendants could not have aided or abetted that alleged trespass. As explained in the Opinion of the court below, the only contact between the City Defendants and Appellee Kuhns prior to the attempted re-sleeving was a conversation between Harry Caswell and the City's Water Department Superintendent, Howard Blizzard, wherein Mr. Blizzard agreed with Mr. Caswell's recommendation that the water and sewer laterals serving the Kuhns property should be replaced.[21]

In January 2012, Mr. Caswell successfully inserted a "perma-lining" into the existing sewer pipe, using a machine located solely on the Kuhns property.[22] This work was particularly noteworthy, as the machine being used by Mr. Caswell to line the pipe was new technology and the City was interested in seeing this new machine in action.[23] Mr. Caswell invited the City employees to come observe the machine at work, and some City employees took him up on the offer.[24] During the one day that Mr. Caswell was using the machine to line the pipe, the following

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[21] *Kuhns v. Bruce A. Hiler QPRT*, 2014 WL 1292860 at *6, fn 70 (Del. Ch.) B0128 (Caswell Dep. at 17:14-17)

[22] B0165 (Kuhns Dep. at 57:12-15); B0135 (Caswell Dep. at 45:10-48:8); *Kuhns v. Bruce A. Hiler QPRT*, 2014 WL 1292860 at *11 (Del. Ch.).

[23] B0135 (Caswell Dep. at 48:9-21); B0165-0166 (Kuhns Dep. at 60:12-61:1); B0195 (Blizzard Dep. at 57:4-16); B0230 (Stenger Dep. at 41:1-42:5); B0247 (Woods Dep. at 30:12-24). *Kuhns v. Bruce A. Hiler QPRT*, 2014 WL 1292860 at *12 (Del. Ch.).

[24] *Kuhns v. Bruce A. Hiler QPRT*, 2014 WL 1292860 at *12, fn. 144 (Del. Ch.).

City employees spent the following approximate durations watching the new machine work from locations on the Kuhns property:

Howard Blizzard – 3-4 hours[25]

Bill Woods – 10-15 minutes[26]

Bob Stenger – 45-60 minutes[27]

At no time during the operation of the new machine did any City agent or employee set foot on the Hiler property.[28]

Finally, with regard to the alleged "continued use of the laterals" theory of trespass Appellant Hiler now favors, there are no record facts to support such a trespass. The Kuhns property is vacant, which implies that there are no toilet facilities.[29] No waste could have traveled down that sewer lateral for quite some time, and certainly not during the time period relevant to this litigation. Appellant

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[25] B0204 (Blizzard Dep. at 95:12-96:17). *Kuhns v. Bruce A. Hiler QPRT*, 2014 WL 1292860 at *12 (Del. Ch.).

[26] B0247 (Woods Dep. at 31:4-9). *Kuhns v. Bruce A. Hiler QPRT*, 2014 WL 1292860 at *12 (Del. Ch.).

[27] B0230 (Stenger Dep. at 41:17-18). *Kuhns v. Bruce A. Hiler QPRT*, 2014 WL 1292860 at *12 (Del. Ch.).

[28] B0135 (Caswell Dep. at 48:5-8); B0165 (Kuhns Dep. at 57:16-22); B0204-0205 (Blizzard Dep. at 96:18-97:8); B0230 (Stenger Dep. at 42:11-17); B0248 (Woods Dep. at 33:2-6). *Kuhns v. Bruce A. Hiler QPRT*, 2014 WL 1292860 at *11 (Del. Ch.).

[29] *Kuhns v. Bruce A. Hiler QPRT*, 2014 WL 1292860 at *11 (Del. Ch.).

asserts that the City "reconnect[ed]" the water lateral in January of 2012,[30] but the only record evidence that water may have been used is the Paul Kuhns deposition testimony that "once in a while I spray water on the property."[31] Evidence on this point was poorly developed, which is understandable where Appellant Hiler did not plead or otherwise assert this theory of trespass until well after the close of discovery in the case.

30 Appellants' Opening Brief at 19.

31 B0158 (Kuhns Depo. at 31:21-24).

LEGAL ARGUMENT

I. The Court of Chancery Properly Withheld Injunctive Relief

A. Question Presented

Appellant Hiler's Counterclaim and Third Party Complaint requested only one injunction, an injunction requiring that Kuhns or the City Defendants be ordered to remove the water and sewer lines servicing the Kuhns' Property that are located on the Hiler Property. At oral argument, Appellant Hiler told the Court of Chancery that he no longer wanted that remedy. Did the Court of Chancery err by accepting Appellant Hiler's position at oral argument?

B. Standard and Scope of Review

The City Defendants agree with the standard and scope of review set forth by Appellant Hiler in his Opening Brief.

C. Merits of Argument

Appellant Hiler's Opening Brief alleges that it was error for the Vice Chancellor to refuse to order Appellee Kuhns and the City Defendants to remove the laterals at issue.[32] Appellee Kuhns and the City Defendants should not have had to brief this issue, as Hiler, in person and admitted *pro hac vice* as counsel for

[32] Appellants' Opening Brief at 10-14.

his and his wife's QPRT's, specifically told the court below at oral argument, "We are not asking for the pipes, by the way, to be removed."[33] How can he now complain that the court below listened to him?

Even were we to discount entirely Appellant Hiler's oral argument in the court below, equity generally issues a mandatory injunction to restore parties to the pre-litigation status quo.[34] The Appellant's third-party complaint asks for much more than that, seeking to force the City Appellees to remove the lateral pipes without ever alleging that the City Appellees wrongfully installed the pipes, owns the pipes, or did anything other than watch a plumber insert a liner in a previously existing pipe.[35]

As Vice Chancellor Glasscock's Opinion explains:

> The parties, however, have not established who initially laid the laterals, or who owns the laterals currently. Consequently, if I were to grant the Hilers' request, either the Kuhns (who, though I have found them liable for trespass, did not take part in the laying of the laterals) or

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[33] A0905 (Oral Arg. at 76:5-6). *See also* A0815-16 (Respondents/Third-Party Plaintiffs' Reply Brief in Support of Their Motion for Summary Judgment Against Third-Party Defendants, pp. 28-29); A0908 (Oral Arg. at 79:12-13) ("We do not necessarily want the pipes removed . . . .").

[34] Donald J. Wolfe, Jr. & Michael A. Pittenger, Corporate and Commercial Practice in the Delaware Court of Chancery § 12-2[c] (2003) ("a mandatory injunctive decree is essentially restorative in nature and ordinarily seeks to compel such actions as may be necessary to restore the status quo ante").

[35] Harry Caswell lined only one pipe, the sewer lateral. The water pipe beneath Appellant Hiler's property was never worked upon in 2012. B0130 (Caswell Dep. at 26:22-27:5).

> the City Defendants (who may not have been involved in the laterals' installation and who are not liable for trespass here) would face the heavy burden of removing the laterals from the Hiler Property . . . I find that this burden outweighs the harm that would be suffered by the Hilers in the absence of an injunction, as the laterals at issue are so inoffensive that they have existed for at least seventy years without anyone even noticing them, let alone being offended or irritated by their presence.[36]

Having specifically disavowed any entitlement to the relief he actually requested, Hiler attempts to force upon the Court and the other parties forms of equitable relief that he never pled.[37] In Appellant Hiler's third-party complaint he requests "that the [City] remove the water and sewer lines servicing the Kuhns' Property that are located on the Hiler property."[38] There is no mention of the provision of water or sewer service as a trespass, and there is no request that such conduct be enjoined.

The court below highlighted Appellant Hiler's pleading failures in its Opinion, noting that Appellant Hiler: (1) attempted to assert against the City Defendants occasions of trespass that he never pled;[39] and, (2) requested forms of

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[36] *Kuhns v. Bruce A. Hiler QPRT*, 2014 WL 1292860 at *23 (Del. Ch.).

[37] Appellants' Opening Brief at 14.

[38] B0067 (Respondents and Counterclaim/Third-Party Plaintiffs' Answer to Complaint, Second Amended Counterclaim, and Third Amended Third-Party Complaint, Request for Relief at subsection (c)).

[39] *Kuhns v. Bruce A. Hiler QPRT*, 2014 WL 1292860 at *20, fn. 186 (Del. Ch.) (declining to address trespass allegations Appellant Hiler failed to plead).

relief in his briefing and at oral argument that bore no relation to the relief he requested in his pleadings.[40] It can be no error for the court to withhold relief that was never properly requested by Appellant Hiler, on claims that were never properly pled by Appellant Hiler.[41]

[40] *Kuhns v. Bruce A. Hiler QPRT*, 2014 WL 1292860 at *22, fn. 202 (Del. Ch.).

[41] Although this fact is necessarily outside the record, the water for the Kuhns property has been disconnected pending the restoration of service via new laterals running from Lake Drive. The sewer lateral has not been used for many years. Nobody is using the pipes that are the subject of this litigation.

II. The Court of Chancery Correctly Determined That the City Neither Trespassed Nor Aided and Abetted a Trespass

A. Question Presented

Appellant Hiler's Counterclaim and Third-Party Complaint leveled only one trespass or aiding and abetting a trespass claim against the City Defendants, stating that "[i]n or around January of 2012, the [City Defendants] entered, or aided and abetted [Appellant Kuhns] in entering, the Hiler Property without permission, with notice of [Appellant Hiler's] objection to their entry, and supervised the installation of operable water and sewer lines through the Hiler property."[42] The Court of Chancery found no evidence supporting this claim, and found evidence indicating the contrary. Did the Court of Chancery err by ruling in favor of the City Defendants on the one claim Appellant Hiler pled?

B. Standard and Scope of Review

The City Defendants agree with the standard and scope of review set forth by Appellant Hiler in his Opening Brief.

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[42] B0071 (Respondents and Counterclaim/Third-Party Plaintiffs' Answer to Complaint, Second Amended Counterclaim, and Third Amended Third-Party Complaint, ¶18).

C. Merits of Argument

1. Summary Judgment Was Properly Granted in Favor of the City Defendants on the One Claim Appellant Hiler Pled.

Appellant Hiler expends significant effort attempting to convince this Honorable Court that the City Defendants "substantially assisted the Kuhns trespasses and was liable as a joint tortfeasor" and that the court below misapplied the test for substantial assistance of a tort.[43] Critically, Appellant Hiler overlooks the fact that the court below declined to address the majority of these trespass claims because Appellant Hiler failed to plead them. The court noted that "[t]he Hilers are not entirely clear as to which acts of trespass they complain" and goes on to explain:

> During briefing, the Hilers – relying on the City Defendants' conduct between 2009 and 2012 – argue multiple trespasses by the City Defendants, as well as several instances when the City Defendants allegedly aided and abetted trespasses of the Kuhns. However, the sole count of the Hilers' Third Amended Third-Party Complaint alleges that "[i]n or around January of 2012, [the City Defendants] entered, or aided and abetted the [Kuhns] in entering, the Hiler Property without permission, with notice of the [Hilers'] objection to their entry, and supervised the installation of operable water and sewer lines through the Hiler [P]roperty." **Here, I only address the trespasses by the City Defendants alleged in the Hilers' pleadings.[44]**

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[43] Appellant's Opening Brief at 16.

[44] *Kuhns v. Bruce A. Hiler QPRT*, 2014 WL 1292860 at *20, fn. 186 (Del. Ch.) (emphasis added, internal citations omitted).

Appellant Hiler cites as error the Court of Chancery's failure factually to recognize trespasses evidenced by alleged 2009 conduct of the City Defendants, or by the alleged passing of water through a water lateral in 2012.[45] Appellant Hiler overlooks the fact that the Court of Chancery's determination with regard to the City Defendants was not based solely upon a weighing of evidence. Instead, the court below properly refused to allow Appellant Hiler to argue on summary judgment causes of action that he did not plead, even after four attempts. As the City Defendants argued to the court below:

> the trespass count was not pled in such a way to put the City on notice that the historical provision of water and sewer services over the past half century was an alleged trespass, and Respondent's assertion of such an argument is simply too late.[46]

To prevail on appeal, Appellant Hiler may not merely list a series of 2009 letters and emails from the City Defendants and say; Appellant Hiler must demonstrate that the evidence has some bearing on the trespass he actually pled,

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[45] Appellant's Opening Brief at 11.

[46] B0284 (The City's Answering Brief in Response to the Petitioner's and Respondent's Opening Briefs In Support of Summary Judgment, p. 20, fn. 86 (citing *Marshall v. Penn Twp.*, Pa., 458 F. App'x 178, 80 (3d Cir. 2012) ("It is one thing to set forth theories in a brief; it is quite another to make proper allegations in a complaint. Indeed, legal theories set forth in [the Plaintiff's brief] are helpful only to the extent that they find support in the allegations set forth in the Complaint."); *Dismon v. Fucci,* 2013 WL 2151695, at * 3 (Del. Super.) ("While a complaint need only provide a defendant with fair notice of the averment against them, at a minimum there has to be some identifiable assertion of such a claim for it to be presented at trial.")).

the City Defendant's alleged January 2012 entry, or aiding and abetting of Appellee Kuhns's entry, onto the Hiler property for the purpose of installing operable sewer and water laterals. That is a burden he cannot bear, as Appellant Hiler acknowledged at his deposition:

> Mr. Smith: Am I [to] understand that today you are saying the City's alleged instruction in 2009 is what caused you to allege that in 2012 the City quote, unquote "fully supervised"?
>
> Mr. Hiler: Oh, no. The 2012 [trespass] is based totally on Mr. - - at the time we made the allegation, that's based totally on this [April 30, 2012] e-mail [from Mr. Kuhns] we just talked about.
>
> . . .
>
> Mr. Smith: For the time being I am focusing solely on the 2012 [trespass] - -
>
> Mr. Hiler: I'm sorry. You're right. The only thing I had for that allegation at the time was this [April 30, 2012] email, that I can recall anyway.[47]

As shown above, even Appellant Hiler, who was both attorney and trustee for a party in interest in the court below, does not believe that the City's 2009 conduct has any bearing on the pled 2012 trespass.

The 2009 conduct being admittedly irrelevant to the 2012 trespass claim, Appellant Hiler next argues that a September 15, 2011 letter from the City

[47] A0627-0628 (Hiler Dep. at 202:16 - 203:11). Appellant Hiler also admits that the one piece of evidence he possessed was from a source he deemed unreliable.

Defendants to the Kuhns's attorney caused Appellant Kuhns to install the perma-liner in 2012.[48] This argument depends upon the City's letter being taken out of context. As explained in the City Defendants' Answering Brief in the court below:

> The text of that letter speaks for itself and simply does not support such a characterization, as the letter only recognizes the method whereby water and sewer service has been provided to 101 Lake Drive, a factual description that was and continues to be entirely accurate.[49] Moreover, while the Respondent attempts to characterize the September 15 letter as additional evidence of a conspiracy between Petitioner and the City, the September 15 letter is more properly read as a refusal by the City to provide the Petitioner his preferred certification.[50]

Appellant Hiler had the opportunity to respond to the above argument in the court below, but never did.

The same problems impair Appellant Hiler's argument that the Court of Chancery misapplied the test for substantial assistance.[51] Appellant complains of the same 2009 conduct, the same 2011 letter, and adds only an argument that the

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48 Appellant's Opening Brief at 18-19.

49 A0097.

50 B0287-88 (The City's Answering Brief in Response to the Petitioner's and Respondent's Opening Briefs in Support of Summary Judgment, p. 23-24). Compare A0097 with B0287-88. The City Defendants, in stark contrast to Appellee Kuhns's request, emphasize that the water and sewer laterals are not the City's responsibility, while reaffirming the City's understanding that the pipes are in place and have been in place for more than 20 years.

51 Appellant's Opening Brief at 21-23.

presence of City employees to observe the perma-lining lent "the full weight of the City's imprimatur behind the Kuhns' trespass."[52]

As explained by the City Defendants, and as held by the court below, the City's presence during the alleged perma-lining had nothing to do with the Hiler-Kuhns dispute. Instead, Mr. Caswell invited members of the City water and sewer department to see a company demonstrate a new machine that Caswell was considering purchasing.[53] This machine was notable for its ability to repair an in place pipe without disturbing the ground above it. The City was interested in this machine and its capabilities as a result of the wide variety of situations the City encounters where it would like to repair a sewer pipe without being forced to tear up a street.[54] Three City employees spent between fifteen minutes and four hours observing the demonstration of the machine on the Petitioner's property,[55] and Caswell went on to purchase the machine for his business.[56] This is not a tort, this is four plumbers evaluating new plumbing equipment.

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[52] Appellant's Opening Brief at 22.

[53] B0246 (Woods Dep. at 25:12- 26:3); B0230 (Stenger Dep. at 41:1-10); B0135-0136, B0140 (Caswell Dep. at 48:9-49:9; 65:11-66:1).

[54] B0189-0190, B0194, B0195, B0202 (Blizzard Dep. at 36:18-37:2; 55:22-56:19; 57:17-58:2; 87:7-88:5).

[55] B0204 (Blizzard Dep. at 95:12-96:17); B0247(Woods Dep. at 31:4-9); B0230 (Stenger Dep. at 41:17-18).

[56] B0140 (Caswell Dep. at 65:11-66:1).

2. The Municipal Tort Claims Act Immunizes the City Defendants From Liability

Even if this Honorable Court were to determine that the City Defendants are liable for trespass or aiding and abetting a trespass, the Municipal Tort Claims Act ("MTCA") immunizes the City Defendants from liability. Appellant Hiler's claim against the City is for "Trespass to Land."[57] The claim revolves around allegations that the City "entered the Hiler property without permission"[58] and that this "unlawful entry . . . diminished the value of the property."[59] As a result, Respondent requests "compensatory damages."[60] Pursuant to the MTCA, "all governmental entities and their employees shall be immune from suit on any and all tort claims seeking recovery of damages."[61] Trespass is a tort claim, and Appellant Hiler is seeking damages.

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[57] B0071 (Respondents and Counterclaim/Third-Party Plaintiffs' Answer to Complaint, Second Amended Counterclaim, and Third Amended Third-Party Complaint, Title to Count One).

[58] B0071 (Respondents and Counterclaim/Third-Party Plaintiffs' Answer to Complaint, Second Amended Counterclaim, and Third Amended Third-Party Complaint, ¶ 18).

[59] B0071 (Respondents and Counterclaim/Third-Party Plaintiffs' Answer to Complaint, Second Amended Counterclaim, and Third Amended Third-Party Complaint, ¶ 19).

[60] B0072 (Respondents and Counterclaim/Third-Party Plaintiffs' Answer to Complaint, Second Amended Counterclaim, and Third Amended Third-Party Complaint, Request for Relief subparagraph (b))

[61] 10 *Del. C.* §4011(a)

The court below never reached the MTCA issue because it found no liability on the part of the City Defendants. Nevertheless, it is clear that the City Defendants, as a governmental entity and an employee of the same, are immune.[62]

[62] B0289-90 (The City Defendants' Answering Brief in Response to the Petitioners' and Respondents' Opening Briefs in Support of Summary Judgment, p. 25, 26), B0317-18 (The City Defendants' Sur-Reply Brief in Response to the Petitioners' and Respondents' Reply Briefs in Support of Summary Judgment, p. 14-15).

III. The Court of Chancery Correctly Determined That Appellant Hiler Had Not Reserved Any Issues for Future Hearings

A. Question Presented

Appellant Hiler failed to produce any relevant damages expert within the time period provided in the stipulated scheduling order his counsel drafted. After the Court of Chancery declined to grant an expert discovery extension, Appellant Hiler argued for the first time in his Motion for Summary Judgment that his damages should be heard in a different court. Did the Court of Chancery err by refusing to allow Appellant Hiler to correct his discovery deficiencies with an extremely late request for the transfer of damages to the Superior Court?

B. Standard and Scope of Review

The City Defendants agree with the standard and scope of review set forth by Appellant Hiler.

C. Merits of Argument

This case, like most cases, was subject to a scheduling order. It was drafted by Appellant Hiler's counsel, and required that all experts be identified by July 1, 2013, with any expert reports delivered to the parties no later than 30 days

thereafter.[63] July 1 came and went, and Appellant Hiler did not name any experts relevant to damages.

On July 29, 2013, Appellant Hiler's counsel, by letter and not by motion, attempted to convince the court below to modify the scheduling order to allow an additional month for the production of expert reports, allegedly to "allow time for the parties to complete the [sic] discovery obligations."[64]

The City Defendants were skeptical regarding Appellant's motives in requesting an expert discovery extension, given that as of July 30, 2013, Appellant had not named any damages experts. The City Defendants filed their Third-Party Defendants' Response to Motion to File Third Amended Third-Party Complaint and Letter Requesting Extension of the Scheduling Order, stating:

> On information and belief . . . [Appellant Hiler] wants another month . . . to retain an expert and create an expert report that, unlike the expert reports they have produced up to this point, actually provides an opinion as to damages.[65]

On the day following the City Defendants pointing out that Appellant Hiler had no damages expert, and well after the time for naming experts under the scheduling order, Appellant Hiler attempted to offer the report of a real estate

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63 B0010 (April 15, 2013 Scheduling Order).

64 B0098 (July 29, 2013 Letter from Appellant Hiler to the Court).

65 B0105 (Third-Party Defendants' Response to Motion to File Third Amended Third-Party Complaint and Letter Requesting Extension of the Scheduling Order, at ¶9).

appraiser to quantify the value of the easement asserted by Appellee Kuhns and the City Defendants. No expert was named regarding any toxic tort, such as the phthalates Appellant Hiler complained of for the first time at oral argument.[66] No expert was named who might be qualified to quantify the "emotional distress" suffered by a Qualified Personal Residence Trust, again complained of for the first time by Appellant Hiler at oral argument.[67]

Given the deficiencies in Appellant Hiler's discovery practices, there was no chance for Appellant Hiler to receive substantial damages in the Court of Chancery. Only after that became clear did Appellant Hiler begin to assert that his damages claims should be heard in the Superior Court. Thus, on September 16, 2013, Appellant Hiler claimed for the first time that the damages component of Appellant Hiler's case should be transferred to another court.[68]

The court below and the parties were surprised by yet another new theory asserted late in the game by Appellant Hiler.[69] The court requested that the parties submit letter memoranda discussing whether the damages component of the case

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66 A0908-10 (Oral Arg. at 79:12-81:10) (The court regarding Appellant Hiler's phthalates damages, "I'm not going to take judicial notice of any such thing . . . it would have to be done through expert testimony.")

67 A0910 (Oral Arg. at 81:9-24).

68 B0120-21 (Respondents' Counterclaim and Third-Party Plaintiffs' Motion for Summary Judgment, Proposed Order).

69 A0907-08 (Oral Arg. at 78:9-79:2).

had been reserved for a future hearing. The City Defendants explained to the court below that the entire matter, including damages, had been submitted for determination.[70] In support of this assertion, the City Defendants explained:

1. Appellant Hiler could not have reserved the toxic tort and emotional distress damages portion of the case, because he never pled a toxic tort or emotional damages;[71]

2. Appellant is a Trust. Trusts do not suffer emotional distress, and cannot be compensated for it;[72]

3. Appellant did not designate any experts related to a toxic tort, emotional damages, or any other form of damages, and the time for naming experts had long since expired;[73]

4. The parties agreed that the matter would be entirely resolved on cross-motions for summary judgment, and that was reflected in the scheduling order;[74]

5. Appellant failed to provide any discovery regarding these new damages claims, despite being asked by both Appellees. This failure would justify the dismissal of the damages claims;[75] and,

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70 A0827-29 (November 25, 2013 Letter to Court from City Defendants).

71 A0827 (November 25, 2013 Letter to Court from City Defendants, p. 1).

72 A0828 (November 25, 2013 Letter to Court from City Defendants, p. 2).

73 A0828 (November 25, 2013 Letter to Court from City Defendants, p. 2).

74 A0828 (November 25, 2013 Letter to Court from City Defendants, p. 2).

6. Appellant Hiler's decision to be admitted *pro hac vice* and to personally argue the case before the Court of Chancery would, in the event that a future damages hearing were actually required, place him squarely in violation of Delaware Lawyers Rule of Professional Conduct 3.7.[76]

As the court below explained during oral argument:

> I can tell you right now I am not disposed to transfer this to Superior Court for a further hearing. I've already read the briefs. I'm familiar with it. I'm not going to burden the Superior Court with it. If you wanted punitive damages, you should have brought - - instead of bringing a counterclaim here, you should have brought it there. You could have moved it over by having me appointed by special designation or we could have moved it all over to the Superior Court , having the Superior Court judge act as a Vice Chancellor by special designation. But this is going to stay here.[77]

Nothing has occurred to change the Vice Chancellor's initial analysis. The City Defendants only add that, while 10 *Del. C.* § 1902 was intended to be many things, it was never intended to be an end-run around a litigant's discovery obligations or a court's scheduling order. Appellant Hiler had an opportunity to present damages evidence to the court below, but utterly failed to do so:

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75 A0828 (November 25, 2013 Letter to Court from City Defendants, p. 2).

76 A0828-29 (November 25, 2013 Letter to Court from City Defendants, p. 2-3).

77 A0907 (Oral Arg. at 78:9-20).

Mr. Hiler: We do not necessarily want the pipes removed, but the perma-liner is a source of distress and a potential health concern.

The Court: A potential health concern?

Mr. Hiler: Your Honor, what we have for this is a two-page sheet -- it's not very clear -- that says that this has been third-party tested and certified environmentally safe/odorless materials.

The Court: Isn't it a piece of PVC? Isn't it PVC that's in this pipe?

Mr. Hiler: My understanding it is, but, Your Honor, my understanding is also that --

The Court: **Isn't that your burden to show by expert testimony?** You can't just say, "I'm distressed because there may be health concerns because of a piece of PVC in the ground." There's PVC in the ground all over the country.

Mr. Hiler: I don't, Your Honor. The website to which this refers talks about the third-party testing. We have the third-party testing.

The Court: **Where is that in the record that's before me now?**

Mr. Hiler: This is in the record -- and these are --

The Court: No; I'm talking about --

Mr. Hiler: -- available documents.

The Court: That may be.

Mr. Hiler: Okay.

> The Court: **But it's your duty to create a record on which I can rule.** You don't expect me to go to the website, do you, and then look at the website to make my own determination?
>
> Mr. Hiler: No. But I think the Court can take judicial notice, for example, as indicated in articles, that flexible PVC, which this claims to be, has phthalates in it -- p-h-t-h-a-l-a-t-e -- and phthalates in 2008 were banned in children's toys.
>
> The Court**: I'm not going to take judicial notice of any such thing. If you had wanted to present that, it would have had to be done through expert testimony.** If we go forward to a damages hearing, if that's been reserved, then I suppose you have the right to do that. But I'm not going to take judicial notice of it. I have no such understanding.
>
> Mr. Hiler: But, Your Honor, the petitioners have had significant distress . . . [78]

Discovery in this case is long closed, and Appellant Hiler's damages case is irretrievably broken due to his failure to name any relevant experts. Further consideration of Appellant Hiler's claims would be futile. Should this Court determine that a Superior Court damages hearing is appropriate, the City Defendants respectfully request that the Court make it clear that Appellant Hiler may not conduct new discovery, name new witnesses, or issue new expert reports.

[78] A908-10 (Oral Arg. at 79:12 - 81:10) (emphasis added).

IV. Appellant Hiler Should Bear His Own Attorneys' Fees

A. Question Presented

Did the Court of Chancery abuse its discretion by permitting Appellant Hiler to bear his own counsel fees?

B. Standard and Scope of Review

The City Defendants agree with Appellant Hiler that the Supreme Court will review the trial court's assessment of attorneys' fees for an abuse of discretion.[79] Appellant Hiler's attempt to modify that standard by referencing fee shifting decisions in the common fund context is ill-conceived;[80] Appellant Hiler's litigation efforts did not create a common fund.

C. Merits of Argument

In the final analysis, the City Defendants did not trespass, did not aid or abet a trespass, and are in no way liable to Appellant Hiler. In the absence of any liability, an award of fees to Appellant Hiler from the City Defendants would be inappropriate. Even were liability found, the City Defendants are immune from

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[79] Appellants' Opening Brief at 31.

[80] Appellants' Opening Brief at 31, citing *Alaska Elec. Pension Fund v. Brown*, 941 A.2d 1011, 1015 (Del. 2007).

suit due to the Municipal Tort Claims Act.[81] Where Appellant Hiler lacks the ability to bring a damages suit, he cannot logically seek fees on the damages suit.

Appellant Hiler argues that the City Defendants' acknowledgment that the laterals were used to satisfy the City's obligation to provide water and sewer to the Kuhns property converts this case to the worst sort of "self-help."[82] The reality is far more mundane. For at least seventy years, multiple generations of people peacefully used the subject laterals to provide water and sewer service to the Kuhns Property. After extensive research, nobody is certain how the pipes got there, and nobody is certain who put them there.

The City Defendants continue to believe that somewhere, lost in the annals of the City's history, is proof sufficient to show that the modern use of the laterals was valid. Unfortunately, the evidence discovered by the City Defendants was insufficient to vindicate that historical use, and the matter is now decided. Given such longstanding and peaceful use, it was not bad faith for the City Defendants to assume that the use was legally valid.

A significant portion of the time and expense of this litigation has been caused by the Appellant Hiler's litigation tactics. By way of ready example, Appellant Hiler has claimed in this appeal that the court below erred by not

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81 10 Del. C. §4011(a).

82 Appellants' Opening Brief at 33.

ordering removal of the laterals, while Appellant himself told the court below that he was not asking for the laterals to be removed. The majority of the trespass argument in the court below, and before this Honorable Court, arises out of alleged trespasses Appellant Hiler failed to plead; yet all parties were and are forced to spend attorney time addressing Appellant Hiler's un-pled allegations. Similarly, the most likely motivation for Appellant Hiler's late decision to advocate the transfer of the damages portion of the case to Superior Court was Appellant Hiler's failure to abide by the Court of Chancery scheduling order and timely produce expert evidence regarding Appellant Hiler's phthalates and emotional distress claims.

The attorney hours spent on these and similar issues resulted not from the conduct of the City Defendants, but from the conduct of Appellant Hiler. Given the source of the legal expense, Appellant Hiler should pay his own attorneys' fees.

CONCLUSION

Ultimately, the City Defendants ask this Honorable Court to once again reaffirm a fundamental tenet of civil procedure: You only get to argue the claims you fairly plead. Throughout this litigation, and on through this appeal, Appellant Hiler has persisted in pursuing un-pled legal theories, continued claiming relief never requested, and needlessly increased the legal fees of all parties. Appellant Hiler would now like to expand these strategies to a new forum, the Superior Court, to avoid the consequences of his failure to obtain expert witnesses in a timely fashion. All of this over two pipes that have remained in place, without incident, for the better part of a century.

The City Defendants ask this Honorable Court to affirm the decision of the court below in all respects, with each party to bear their own fees.

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