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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,	:	No. 576, 2014
Petitioners/Counterclaim Defendants Below-Appellees,	:	Court Below: Court of Chancery of the State of Delaware
and	:	C.A. No. 7586-VCG
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.	:	

AMENDED ANSWERING BRIEF FOR APPELLEES PAUL G. KUHNS AND ANNE M. KUHNS

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Dated: January 14, 2015

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NATURE AND STAGE OF PROCEEDINGS

This appeal concerns water and sewer lines that have served Appellees' Paul and Anne Kuhns' (hereinafter "Kuhns") Rehoboth Beach property for more than 70 years via a connection across the Appellant Trustees' (hereinafter "Hilers'"[1]) property in the City of Rehoboth Beach, Delaware. When Hiler threatened to unilaterally cap off the lines to Kuhns' property, this litigation was initiated by Kuhns to obtain confirmation of their right to maintain and use the pipes serving their property.

Kuhns filed their Petition to Quiet Title of an easement for the lines on May 31, 2012. On September 17, 2012, Hiler filed an Answer and also a Counterclaim against Kuhns seeking a determination that no easement exists and added a Third Party Complaint against the City of Rehoboth Beach (hereinafter "Rehoboth") claiming a Trespass to Land and a Taking. Kuhns answered the Counterclaim and filed their own claim against Rehoboth: since the City controls the water and sewer lines and since the City directed and subsequently confirmed the points of connection via the Respondents' property, the City should be solely responsible for all costs associated with any court-ordered relocation of the existing and fully functional utility lines.

[1] The Appellants are two trusts: The Bruce A. Hiler Delaware QPRT and the Elaine M. Chacheris Delaware QPRT. For clarity, the trusts are referenced collectively as "Hiler" herein.

After several amended counterclaims and Scheduling Orders, Hilers' counsel drafted and efiled a Revised Stipulated Pre-Trial Scheduling Order on August 26, 2013. Relevant to this appeal, the Order did not set aside any issues for separate consideration, such as a special damages hearing. Likewise, the Order contained discovery and expert designation deadlines. No damages experts were designated.

The parties thereafter filed Cross Motions for Summary Judgment with subsequent briefing. In accordance with the Scheduling Order, the entire case was addressed via these Motions; the Motion filed by Hiler was not one for partial summary judgment. Similarly, the parties jointly prepared a Stipulated Record for the entire case; that Record was submitted by Hiler's counsel without indication that other facts existed beyond the scope of the Record. There were no exceptions from the Stipulated Record and no evidence was reserved by Hiler for separate consideration by the Court.

On March 31, 2014, the Court of Chancery issued its decision, finding that while an easement by quiet title was not appropriate given the underground (and therefore not open and notorious) location of the lines, a trespass in only the most *de minimus* sense occurred by their underground and unobtrusive existence. As a result, the Court awarded only nominal damages in the amount of three dollars to Hiler.

Hiler has appealed that decision. *Kuhns v. Hiler,* 2014 WL 1292860 (Del. Ch. March 31, 2014). [2]

This is Appellees', Paul and Anne M. Kuhns', Answering Brief.

[2] Attached to Appellants' Opening Brief.

SUMMARY OF ARGUMENT

1. DENIED. The Court of Chancery, after considering facts set forth in the Stipulated Record, Mr. Hiler's statements during oral argument and then balancing the equities involved, correctly ruled that removal of the utility lines or the Perma-Liner within the sewer line was unnecessary.

2. No response from Kuhns is required with regard to Hilers' Second Summary of Argument (regarding a claim that Appellee City of Rehoboth Beach "aided and abetted" any trespass).

3. DENIED. All facts and issues were completely stipulated in accordance with the various Scheduling Orders and culminating with the Revised Pre-Trial Scheduling Order prepared and efiled by Hiler. The Court did not commit an error in refusing to remove the case for separate damages proceedings.

3. DENIED. There is no basis for an award of attorneys' fees to Hiler. As admitted by them, Hilers' own actions created the need to litigate.

STATEMENT OF FACTS

In 1924, Morgan Gum, a local surveyor, plotted lots and streets for the Rehoboth Heights Development Company (hereinafter the "RHDC") in the area now identified as "South Rehoboth". The RHDC advertised the sale of the lots with the following statement: "When You Buy a Lot You are Assured of: First you are getting dollar for dollar in value for your money. Second you are assured of a delightful place in which to erect a Summer Cottage. Third, a property with a splendid view of Ocean and Lake with sidewalks, curbing, water and electric light facilities." James D. Meehan, *Rehoboth Beach Memoirs* p. 78-79 (2000). As advertised and as referenced in various deeds, the RHDC installed the various utilities serving the lots it was selling, including water and electric lines.

Paul and Anne M. Kuhns ("Kuhns"), are the owners of 101 Lake Drive, Rehoboth Beach, Delaware ("101 Lake"), a lot in South Rehoboth that has been in legal existence since 1924.[3] *Kuhns,* p. 4; *see also* Joseph Way Deed, A0048-53. Kuhns acquired title to 101 Lake in 2008; prior conveyances in the chain of title occurred in 1970, 1954, 1944 and earlier. *See, e.g.,* A0048-53; A0186-203; A0256-80. The first deed to this Lot conveyed the land and "all and singular the buildings, improvements, fixtures, ways, woods, waters, watercourses, easement rights,

[3] *See* A0232 for a map showing the location of 101 Lake Drive identified as Parcel 80 on the map. Hilers' 100 St. Lawrence, discussed below, is identified as Parcel 117 fronting on St. Lawrence on the map.

liberties, privileges, hereditaments, and appurtenances to the said lands...." A-0048-53. With regard to utilities in particular, the deed called out water, gas and electric service as being provided and installed by the RHDC. The original home on the Kuhns' property was constructed in the 1920s.

Hiler owns 100 St. Lawrence Street, Rehoboth Beach, Delaware ("100 St. Lawrence"), having originally acquired the property on June 12, 2002. Since then, it has been transferred back and forth individually and through various Hiler trusts and other iterations of title no less than nine times. A234-260. The legal existence of 100 St. Lawrence traces back to a deed from the RHDC dated September, 1930. According to the City's records, the original home on the Hiler property was constructed in 1938 on Lots 25, 26, 27 and 28; it was torn down when the lots were partitioned into two separate parcels more than 60 years later.

This appeal relates to the City water and sewer service to 101 Lake Drive owned by Kuhns. Those utilities are connected to the City's lines embedded in St. Lawrence Street via laterals running under the eastern edge of 100 St. Lawrence and into the northern end of 101 Lake. *See*, Utility Location Survey, B1. They are located entirely within the setback areas of 100 St. Lawrence. A0075. The utility lines have been in use in this location since the 1920s and 1930s.

Soon after 100 St. Lawrence and 101 Lake were created by the RHDC, the development was annexed into the City. As part of the annexation process, the City

inventoried the equipment, mains, etc. that were to be included in the new municipal boundary. In 1927, the City appointed a committee to survey "the Water Mains, Valves, Fittings, Fire Hydrants, etc. already installed or on the ground ready for installation...." *Kuhns,* p. 9. The City then acquired title from the RHDC to "the water mains, piping and appurtenances ... together with all rights, privileges, and franchises belonging to said Rehoboth Heights Development Company with reference to said streets, including electric light franchises, water franchises, and all other franchises now or heretofore owned by [RHDC]...." *Kuhns,* p. 9; *see also* A0054-56. The conveyance specifically referenced mains "on St. Lawrence Street from King Charles Avenue Westward to Bayard Avenuc"; no reference is made to water lines on Lake Drive because lots fronting on Lake were not served via any lines in Lake Drive. A0054-56.

Recognizing the need to replace aging cesspools that were still in use, the City conducted a referendum on the establishment of a central sewer system in 1934. *Kuhns,* p. 13.[4] The referendum passed, bonds were issued, and construction of the pipelines and sewer treatment plant was started in 1936. *Kuhns,* p. 13; *See also* A0058. During the planning process for this system, the City re-routed the planned sewer lines away from Lake Drive. This led to the installation of the sewer service

[4] According to an editorial in the August 3, 1934 Delaware Coast News supporting the central sewer effort: "Cesspools in Rehoboth are out of date. They are as much a thing of the past as thc horse is for travel." *Kuhns,* p. 12.

to 101 Lake via a pipe crossing the eastern edge of 100 St. Lawrence in the vicinity of the pre-existing water line and connecting into the sewer main in St. Lawrence Street. *See,* Survey, B1. Other properties fronting upon Lake Drive connected to the City's utility systems the same way.

In the years since, maintenance and replacement work has occurred on both the water and sewer systems serving 100 St. Lawrence and 101 Lake Drive. For instance, in 1946, the City authorized a public works project to improve the water delivery. Next, between 1992 and 1995, the city individually metered all of the lots; this resulted in two clearly visible water meters in front of 100 St. Lawrence. A0304. Just a few years ago, the 1930's-era sewer main in St. Lawrence Street was excavated and replaced. As this work was underway, each of the homes was notified of the pending interruption in sewer service while the excavation occurred in the street in front of 100 St. Lawrence

101 Lake's water and sewer utility service through 100 St. Lawrence was publicly before the City and its residents in the 1990s. The Hiler property was originally part of a larger lot, and the owners in 1999 sought to partition it into two 50 by 100 foot lots. *See* A0233 for survey depicting partitioned lots. During hearings before the City's Planning Commission, the existence of the water and sewer lines to 101 Lake was again discussed publicly, with at least one commissioner specifically recognizing their existence.

Once the partition occurred, the house straddling both lots was demolished, and two new homes were constructed on the now separated lots, including what is now Hilers' house at 100 St. Lawrence. A0061-62. During that construction process, the City advised the contractor that two laterals were present on the property- one for the prior home that was demolished and the second being the one providing service to 101 Lake. A0063-64. The new homes (ultimately including the Hiler house) were connected to their own water meters, and the meter and lines serving 101 Lake Drive were untouched.

As stated above, the home at 101 Lake had been in existence since the 1920s. When Kuhns purchased the property, they planned to replace the dilapidated structure with a new residence for themselves. A0066-67. As part of the demolition process, their contractor tapped off the sewer line with an above ground "cleanout" and a spigot at the terminus of the water service. Kuhns has continuously paid the associated water and sewer bills for these services.

As part of the planned construction, Kuhns' plumber intended to improve the terra cotta sewer line, and initially wanted to replace it. The first plan was to trench and replace the line; that option was immediately discarded by the plumber after physically inspecting the site. Despite the claim in Hilers' briefing, no digging occurred on 100 St. Lawrence, and there is no evidence that any digging occurred

upon the Hiler property (other than Hilers' opinion and despite the fact that he was never present during any alleged digging).

Because the plumber would not dig upon Hilers' property, the next approach was to insert a solid "sleeve" through the existing terra cotta line via a hole dug entirely on Kuhns' property. That became unworkable given the uneven interior of the terra cotta line. *Kuhns,* p. 17; *see also* A0082. Ultimately, Caswell was able to vastly improve the line by inserting a flexible "Perma-liner" sleeve into the existing pipe connecting with the St. Lawrence Street sewer main. A0122-130. Once inserted, that sleeve was heated by forced air to expand and harden to the interior surface of the existing pipeline, creating essentially a stronger pipe within a pipe. *Kuhns,* p. 27; A0123-129; *see also,* OB at 8, describing the Perma-lining as "a new process for strengthening old pipes." During this work within the 70-year old terra cotta pipe, there was no disturbance to Hilers' property at 100 St. Lawrence. A0111-15. The water line remains in working order the same as the day it was installed.

As stated above, no digging occurred on the Hiler property. A0114. But, as part of the investigation into the method of improving the lines, the existing utility lines were marked as required by State Law (26 Del.C. Chapter 8). Hiler objected to the markings, their locations, and even the very existence of both utility lines. When this was brought to the attention of the City, the City Manager sent a letter to Hiler dated May 4, 2009 with the following statement:

As I believe you are aware, the City's connection point for water service to 101 Lake Drive is currently across and under the eastern side yard setback area of your lot. It is my understanding that Mr. Kuhns has been in contact with you, as has his plumbing contractor, to discuss the work that needs to be performed on these lines. It is also my understanding that you have stated your unwillingness to allow access to your property or for the work to be performed with regard to these sewer and water service lines.

These lines have been in existence for well more than 20 years. Furthermore, the City has provided access to sewer and water service to 101 Lake Drive by directing a prior owner of that property to connect through the property that is now your lot for this service. As a result of this required connection point and the fact that the lines have been in existence for well more than 20 years, it is the City's position that an implied, or prescriptive easement exists across your property.

A0075. Hiler continued to oppose the use of the 70 year old utility lines, despite the fact that they were in place when the property was first acquired by Hiler.

Given the circumstances, it should be no surprise that Kuhns no longer wanted to construct their permanent residence at 101 Lake Drive. However, Hilers' stubbornness about the utility lines also prevented any sale of the property to third parties. Because Hiler was telling prospective purchasers that there was no water or sewer service to 101 Lake (even though both lines were fully functional), the City recertified the existence of the utility service in a September 15, 2011 letter. A0097. Following that certification, Kuhns sent a November 28, 2011 letter to Hiler outlining the circumstances as they existed at that time (in pertinent part):

...[Y]ou are undoubtedly aware that my wife and I now plan to sell the lot at 101 Lake Drive. The original work was to be performed as part of our plans to construct a new home on the property. The City was requiring a second water line in addition to the existing water and sewer line for

irrigation. Since we have abandoned our plans to construct a home on the property, the need for that new second line no longer exists.

We have performed an extensive investigation in the water and sewer lines and we've spoken with representatives of the City and its Public Works Department. We've learned from the City that the water and sewer lines have been in their current location for well more than 20 years. We have also learned that this situation is not uncommon in the City of Rehoboth Beach, where one property's water or sewer lines can meander across a neighboring property line or cut through an adjoining property for the nearest point of connection to the main lines.

I am hopeful that under these circumstances, you will recognize that the situation as it exists between Lake Drive and St. Lawrence Street is not unusual and that the water and sewer line can and will remain in its current configuration.

A0107-108. Hiler still did not relent, and went so far as to state to the Rehoboth Beach City Solicitor in January of 2012 that "I will be tapping off the pipes that are run on my property as soon as the ground thaws. You should sue me if you want to assert an easement or stop me from capping the lines." A0116. Faced with that sentiment, and the fact that Hiler's actions were interfering with the use, enjoyment and ultimate sale of their property, Kuhns initiated this litigation to obtain a Court Order confirming their ability to use the water and sewer lines just like all of their predecessors in title over the past 70-plus years.

The Court below determined that no prescriptive easement for the utility pipes could be found based upon the difficulty in establishing their open and notorious existence. Despite this finding, neither the Court of Chancery nor the parties disputed the existence of water and sewer service to 101 Lake via 100 St. Lawrence Street. Indeed, the pipes have been in their current location though multiple owners

of 100 St. Lawrence (not including the 9 transfers of ownership during Hilers' tenure). For this reason, while the Court of Chancery found a technical trespass to occur based upon their existence, it also appropriately found that only nominal damages stem from their existence.

ARGUMENT

I. THE COURT OF CHANCERY, AFTER BALANCING THE EQUITIES OF THE STIPULATED RECORD, CORRECTLY DECIDED THAT AN INJUNCTION REQUIRING THE REMOVAL OF THE UTILITY LINES WAS UNNECESSARY.

A. Question Presented

Whether the Court of Chancery erred by failing to prevent the future use of the pipes or require the removal of the Perma-liner installed entirely within (and adhered to) the 70-year old sewer pipe underneath the eastern boundary of Hilers' property.

B. Standard and Scope of Review

Kuhns agrees with Hiler that while the Supreme Court reviews a grant of summary judgment *de novo,* on appeal from cross-motions for summary judgment the Court will defer to the factual findings of the trial court. *U.S. Cellular Inv. Co. v. Bell Atlantic Mobile Sys., Inc.*, 677 A.2d 497, 499 (Del. 1996); *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 100 (Del. 1992).

C. Merits of Argument

In analyzing whether to grant Hiler's request for injunctive relief this Court must look to the relief actually sought by Hiler in their pleadings. Hiler first argues that the Court of Chancery erred by not enjoining the use of the pipes. However, in

both their Counterclaim and their Second Amended Counterclaim, there was not such a prayer for relief. A0028 and A0041.[5]

With regard to the pipes themselves (now narrowed on appeal to just the removal of the Perma-liner installed within the pre-existing sewer line) the Court below correctly cited the applicable standards.[6] First, Court recognized that injunctive relief should only be granted sparingly. *Kuhns*, p. 51. The Court relied upon *Tolou v. Hertrich*, 1998 WL 409160, at *1 (Del. Ch. June 22, 1998) for the rule that "injunctive relief, especially the extra-ordinary remedy of mandatory injunctive relief, lies only in equity and will only issue where the facts, the law and the conscience of the Court believe it to be appropriate." Indeed, Hiler does not cite to any case that *requires* the court-ordered removal of the pipes or the Perma-liner, only that such relief *may* be appropriate, but only if it is found that they have suffered an egregious violation of their rights. OB at 10-11. The Court of Chancery committed no error by denying the injunctive relief now sought by Hiler.

At the outset, it is again necessary for this Court to understand the inconsistencies in Hilers' own claims for relief. In their initial filing, they sought a declaration that "the water and sewer lines servicing [Kuhns'] lot may not be located

[5] As a practical matter, both the water and sewer pipes have since been capped off by the City and are no longer useable at all.

[6] *See, Kuhns* p. 33, n. 4, describing the relief sought by Hiler as an "order[] that the [City Defendants] remove the water and sewer lines servicing the [Kuhns Property] that are located on the Hiler Property." *See also* A0023 and A0041. Now on appeal, Hiler changes the relief sought from the removal of the two utility lines to just the Perma-liner within the one sewer line.

on the Hiler Property." *See,* Respondents' and Counterclaim Plaintiffs' Answer to Complaint, Counterclaim and Third-Party Complaint, A0028. Next, in their Second Amended Counterclaim and Amended Third-Part Complaint, they clarified the relief sought as "ordering the water and sewer lines servicing [Kuhns'] lot located on the Hiler Property to be removed." A0041.

Notwithstanding these requests for relief, during oral argument, Mr. Hiler, representing the Trusts, conceded that "we are not asking for the pipes, by the way, to be removed" and "we do not necessarily want the pipes removed...." Oral Arg. at 76:5-6; 79:12-13, A0905; A0908. The Court of Chancery even relied upon the statement in Hilers' own Reply Brief that they were only seeking "a prohibition of the City using or allowing the use of the water and sewer lines that are serving the [Kuhns' Property]. *Kuhns* p. 51, n. 202, *citing* Hiler's Reply Br. at 28. Based upon the foregoing, the relief sought was the removal of the pipes; no reference is made (until now) of just the Perma-liner.

In the proceedings below, Hiler did not seek an injunction against the use of the pipes and he admitted that he did not even want the pipes removed as requested in his own pleadings. In reliance upon these representations, the Court appropriately did not require the removal of the pipes. Moreover, it did not require the removal of the Perma-liner since that was never requested, and in effect, based on the facts, is actually now part of the sewer pipe that Hiler no longer wants to remove.

Furthermore, the Court correctly found that there were no extraordinary, or in Hiler's words, "egregious" circumstances that warranted an injunction requiring the removal of the lines or the Perma-liner. This case is about utility lines that have been in place since the early part of the 20th century. They were in existence through each transfer of title to the property dating back through the decades, including Hiler's own nine transfers. The same analysis the Court applied to damages applies equally here: how can Hiler argue on the one hand that a prescriptive easement must fail because the pipes are so inconspicuous that no one could be put on notice of their existence, yet they are so "egregious" that the extraordinary relief of requiring their removal should be granted? Hiler cannot have it both ways.

Hiler primarily relies upon *Hollingsworth v. Szczesiak*, 84 A.2d 816 (Del. 1951) as factually supportive of their argument that the removal of the pipes or Perma-liner is required. However, the scenario on appeal is distinguishable from the facts in *Hollingsworth*. In *Hollingsworth*, the court addressed whether it was appropriate to require the removal of a garage constructed by the defendants in violation of a restrictive covenant. The differences between the facts could not be more different:

(a) The utility lines at issue were not constructed by Kuhns and they were in the same location for generations.

(b) The structure at issue in *Hollingsworth* was an unusually large garage constructed voluntarily by the property owner, a structure accessory (but not necessary) to the main use of the property as a residential dwelling. Conversely, the utilities at issue in this appeal were fundamental to the ongoing use of the property as a residential dwelling. The voluntary construction of an accessory structure by the *Hollingsworth* defendants tipped the balance in favor of removing the structure.

(c) The pipes at issue are subterranean, and are not in any way visible to Hiler, Kuhns, other property owners, or passersby. The Court of Chancery extended its analysis beyond mere visibility, recognizing that the lines do not affect the Hilers' present or future use of the property in any way. *Kuhns,* p. 8 ("I find, based on a preponderance of the evidence, that the laterals are located entirely in the side yard setback---that is, in an unbuildable portion---of the Hiler property.") Unlike the offending garage in *Hollingsworth,* there is nothing to suggest they even exist. Hiler successfully argued this point below to demonstrate that the pipes are not so open and notorious to justify a prescriptive easement. His own landscaper dug a large ditch on the property and could not even find them.

(d) In *Hollingsworth,* there is no indication that the Plaintiffs ever admitted that they did not want the garage removed. Here, on at least three separate occasions, Hiler conceded that he did not want the pipes removed.

(e) Finally, Hiler cites to *Hollingsworth* for the injunctive solution that the property should be "restored to its original condition." Here, the "original condition" is 100 St. Lawrence at the time Hiler first acquired title to it—with the water and sewer pipes in the ground. Thus, Hiler already has exactly what he is seeking.[7]

Now, for the first time on appeal and likely the result of Hiler's own statements against interest, the distinction is made between the removal of the pipes and the removal of the Perma-liner installed within the pre-existing sewer line. Perma-lining is a system that is used to strengthen existing sewer lines and extend their life. A0128-129. It is a process that is preferable to excavating and replacing sewer lines, since there is no surface disturbance and the work occurs entirely within the existing line. The Perma-lining adheres permanently to the interior of the existing sewer line. In this case, the Perma-lining process was staged entirely from Kuhns' lot. A0126. By its very nature and design, it did not touch anything beyond the interior of the old terra cotta sewer line. It is not a new "structure" comparable

[7] Indeed, in *Hollingsworth,* had he garage been present for the same 70+ years these pipes have been in the ground, the outcome would have been much different, with the Court likely finding that any enforcement of the restrictive covenants was waived long ago.

to the garage in *Hollingsworth*—it is an invisible coating installed within an invisible utility line and they are now one and the same. Hiler has stated that he does not want the sewer line removed, and that includes the Perma-liner system that is adhered within it.

In conclusion, Hiler has conceded the only relief sought--the removal of the lines--and there was no basis for the Court of Chancery to require the removal of the Perma-liner.

II. ALL ISSUES WERE FULLY STIPULATED IN ACCORDANCE WITH THE STIPULATED SCHEDULING ORDER; THERE WAS NO IMPROPER DENIAL OF ANY OPPORTUNITY TO PRESENT EVIDENCE.

A. Question Presented

Whether the Court of Chancery correctly determined that the facts of the case, including facts about potential damages, were fully stipulated; and whether the court correctly refused to transfer the case for a separate hearing on punitive damages.

B. Standard and Scope of Review

When reviewing cross-motions for summary judgment, the Supreme Court defers to the factual findings of the court below. *Merrill*, 606 A.2d at 100. If a party claims that summary judgment was rendered in the face of material factual disputes, the Supreme Court's review on that issue is *de novo*. *Merrill*, 606 A.2d at 100.

C. Merits of the Argument

1. Hiler Had Not Reserved Anything For A Later Hearing

In the Opening Brief, Hiler argues that the Court improperly exercised, indeed abused, its discretion in determining that the record was fully stipulated on the cross-motions for summary judgment. In support of this, Hiler argues that they were denied an opportunity to present evidence about damages in the Court of Chancery or upon transfer to Superior Court. However, the Court was simply following the directives of the parties, led by Hiler.

Like any case, the Court of Chancery established a Scheduling Order for the proceedings. In this particular case, the Order was revised on several occasions, ending with the final "Revised Pre-Trial Scheduling Order" filed on August 26, 2013. B2; Docket Entry 72, A0010. The Final Order, *drafted by Hiler's own counsel*, contained a deadline for designating experts—no experts in regard to damages were identified by Hiler. The Order also contained a general discovery deadline. More importantly, the Revised Order, like all of the Scheduling Orders that preceded it, makes no provision for any special damages hearing, either in the Court of Chancery or the Superior Court. The Court of Chancery simply followed the directives of Order agreed upon by the parties. *See also,* Petitioners' position paper by Griffin & Hackett, A0825-26, and Petitioners' position paper by Baird Mandalas Brockstedt, A0827-29.

In accordance with the Scheduling Order, the parties submitted cross-motions for summary judgment accompanied by a stipulated record consisting of 430 pages agreed upon by the parties. During preparation of this record, Hiler never asserted that it was somehow incomplete or that it excluded evidence about damages for some later proceeding. Like the Revised Stipulated Scheduling Order, counsel for Hiler

supplied the Court of Chancery with the stipulated record under the following two cover letters dated September 16, 2013:[8]

> *Dear Vice Chancellor Glasscock,*
>
> *I write on behalf of Respondents Bruce A. Hiler Delaware QRPT and Elaine M. Cacheris Delaware QRPT, and Lot 27 and 28, Block 23, Rehoboth Heights, Rehoboth Beach, Delaware ("Respondents") in order to submit the stipulated record agreed to by the parties in this case. The stipulated record is Bates-labeled A-0001-0430. Enclosed is the first half of this record, which is Bates-labeled A-0001-0238.*[9]

And,

> *Dear Vice Chancellor Glasscock,*
>
> *I, again, write on behalf of the Respondents Bruce A. Hiler Delaware QRPT and Elaine M. Cacheris Delaware QRPT, and Lot 27 and 28, Block 23 Rehoboth Heights, Rehoboth Beach, Delaware ("Respondents") in order to submit the second half of the stipulated record, which is Bates-labeled A-0239-0430.*[10]

There is no reservation, or even suggestion, in either the stipulated record or Hilers' own cover letters submitting it, that additional evidence was reserved for some later date or proceeding.

In fact, Hilers' position on appeal—that the record was incomplete—is contrary to their specific position on documentation that Kuhns wanted to add to the Stipulated Record before filing it with the Court of Chancery. In an email dated September 9, 2013, Kuhns' counsel sought to add "a photo of South Rehoboth which

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[8] Two separate cover letters were necessary because the record was separated into halves for efiling purposes.
[9] Court of Chancery Docket Entry 74, A0009, B6.
[10] Court of Chancery Dockett Entry 75, A0009, B7.

[the Rehoboth Beach Museum] had obtained from Hagley." B8. Hilers' counsel denied the request with the following reply: "The point of giving everyone until September 16th to sign off on the stipulated record was to add in any documents that were already produced in this litigation that I inadvertently left out. You acknowledge that the documents you want to add are "supplemental discovery responses"; however, the discovery cut off has long since passed...." B8. Hiler denied the inclusion of the information, and the parties proceeded with the record as stipulated.

Notwithstanding, Hilers' stated objections about adding to the record, during the oral argument before the Court of Chancery, Hiler, representing his own Trust and his wife's' Trust *pro hac vice*, began to argue about facts not in the Stipulated record.[11] In the Opening Brief, Hiler spins the Court's reaction to these unstipulated, and indeed unpled facts, to suggest that the Court was unsure whether separate damages proceedings should occur. A complete review of this discussion reveals otherwise.

First, the discussion with the Court cited at page 25 of the Opening Brief followed Mr. Hiler's statements about damages for "annoyance and distress." Setting aside three fatal flaws in these claims—(1) that an artificial entity such as a

[11] The "argument" took on the appearance of improper "testimony" at times, leading to a question about whether Hilers' *pro hac vice* admission and his statements during oral argument violated Rule 3.7 of the Delaware Rules of Professional Conduct. *See, e.g.* City's Post-Argument Letter to Vice Chancellor Glasscock; A0827, 0828-9.

trust can suffer neither annoyance nor distress[12], (2) that such claims were never pled by Hiler,[13] and (3) that no information about such claims was ever disclosed to anyone by Hiler in discovery—the fact remains that they were never mentioned (nor alternatively, reserved) from the Stipulated Record submitted to the Court. So, it is only logical that the Court would show such concern when faced with issues raised by Mr. Hiler for the very first time during oral argument.

Based on the foregoing, it is unnecessary to dispel point-by-point whether the Court of Chancery has the authority to transfer the case to the Superior Court. However, as a precursor to such a transfer, there had to be a basis for it set forth in the pleadings, in the Stipulated Scheduling Orders, discovery, expert designation, or finally, the fully stipulated record. There is no such basis.

Hilers' statement that the Court of Chancery erred because it "offered no explanation [about the damages question], thus the inescapable conclusion is that the court either ruled on the issue without rationale, or it ignored the Hilers' position entirely" is without merit. OB, p. 27. As stated above, there was nothing in Hilers' own stipulated submissions to support such claims. The Court did not ignore this issue, and it did provide a rationale for its decision:

[12]During Oral Argument, Mr. Hiler, admitted *pro hac vice* on behalf of the Respondent-Trusts, argued that "the respondents would like the opportunity for Ms. Cacheris and Mr. Hiler to testify and have jury hear about their distress and annoyance...." A-0907. Niether Ms. Cacheris nor Mr. Hiler were parties to the proceedings below.
[13] *See* A0028 and A0041.

> At Oral Argument, the Hilers contended that they are concerned that the Perma-liner, which is composed of PVC plastic, may in some way prove toxic to them. *See, e.g.*, Oral Arg. Tr. 79:13-14 ([T]he [P]erma-liner is a source of distress and a potential health concern."); *id.* At 80:21-81-1 (I think the Court can take judicial notice, for example, as indicated in the articles, that flexible PVC, with this claims to be, has phthalates in it . . . and phthalates in 2008 were banned in children's toys."). *Such a supposition is unsupported by the record.*

Kuhns, p. 49, n. 196 (emphasis added). The Court clearly and correctly dealt with the issue based on Hilers' own stipulations.

2. There Was No Justification For Punitive Damages.

Hiler also argues that the Court of Chancery erred by not transferring their punitive damages claims to Superior Court. They claim in their Opening Brief to this Court that their request for a transfer to Superior Court was "clearly and consistently stated", yet they only reference a single footnote in a brief filed below. Conversely, as explained above, Hilers' own filings undermine this claim.

Prior to the single footnote, Hiler's counterclaim and third-party claim (and the amendments to each) did not request any transfer to another venue for a punitive damages determination. Again, Hiler also prepared and filed the Revised Stipulated Scheduling Order that does not set aside, reserve, or transfer any punitive damages claims for a separate hearing in another court. B2. This followed prior Scheduling Orders which were also silent about punitive damages proceedings. The same holds true for the stipulated record. Finally, nothing in any of Hilers' discovery responses

(with deadlines long-expired) alludes to evidence supporting damages of anxiety, distress or other potential health concerns as raised for the first time by Hiler during Oral Argument.

The stipulated facts of this case do not justify any award of punitive damages, either. The utility pipes at issue were in use since the first half of the Twentieth Century. They existed and were used through many different transfers of ownership of what are now both Kuhns' and Hilers' properties. The water line was installed when the Rehoboth Heights development was in its infancy in the 1920s, and the sewer line was installed soon thereafter. Both were maintained, used, upgraded, and in the case of water—metered, by the City and Kuhns' predecessors in title. They were even discussed openly in City proceedings concerning the partition of what is now Hilers' property. *Kuhns,* p. 40. These utilities were in existence for at least the last seventy years and they were an integral part of the use and enjoyment of Kuhns' (and everyone else who owned 101 Lake Drive) during that time period. No other utility connections were available, and the City explicitly directed the points of connection through the existing, decades-old lines. Hiler cannot seek punative damages for pipes that were in Rehoboth before he was.

Hiler refers to the Perma-lining process as justification for punitive damages, but no evidence bears out that claim, either. As the Court below correctly ruled, despite Hilers' *pro hac vice* claim about the use of PVC for the first time during oral

argument, the stipulated record contains no basis for such an award. Indeed, Hilers' own argument to this Court is contraindicative of such an award. The Perma-liner was installed entirely within the interior of the old sewer pipe from a staging area located entirely on Kuhns' property. A0126. As Hiler quotes at page 8 of the Opening Brief filed on appeal to this Court, the Perma-lining process was "a new process for strengthening old pipes."

Finally, Hiler laid in wait for Kuhns to sue. He cannot now claim to be a victim of the onset of litigation. He threatened to unilaterally cap the pre-existing utility lines himself. *Kuhns*, p. 31; A0116. In furtherance of this, he asked his own landscaper to dig a ditch to locate the laterals. However, they could not be found at all.[14] Consequently, as the Court of Chancery noted, he did nothing but wait to be sued by someone else: "[W]hat really stopped me from suing and doing a lot of these things [including capping off the lines] was eventually the title company said you should just wait and get sued, really." *Kuhns*, p. 32, n.154.

In summary, there was not an "I don't care" attitude by Kuhns at any point. They had serviceable utility lines that had been in use for longer than they have been alive, in a location that was mandated by the City of Rehoboth. They simply, and understandably, wanted to continue using the lines- in the case of the sewer lines

[14] This fact alone begs the question about both compensatory and punitive damages: if they could not even be located by Hilers' own professionals, how could they have caused any real or punitive damage to Hiler? The lack of evidence in the stipulated record about any damages further bears this out.

with the Perma-liner improvement that increased the integrity of that pipe for the benefit of both Kuhns and Hiler. If anything, there was an "I don't care attitude" expressed by Hiler: regardless of the historic existence of the lines, for the first time after 70 years of use they wanted to cap them off. Then, when they could not find their underground location, they compelled Kuhns to litigate- they just waited to be sued. Such circumstances, as the Court below recited, do not justify Hilers' request for punitive damages.

Because there is no evidence supporting compensatory or punitive damages in the record, there was no need for a transfer of any damages element of this case to Superior Court. Assuming, *arguendo,* that there was such evidence, Hiler also failed to properly assert any demand that the determination of damages occur in Superior Court in the pleadings or the Revised Scheduling Order (again prepared by Hiler). Consequently, the Court of Chancery did not err by awarding Hiler three dollars in compensatory damages and declining any request for further damages proceedings in another Court.

III. THERE IS NO BASIS FOR AN AWARD OF ATTORNEYS' FEES TO HILER.

A. Question Presented

Did the Court of Chancery abuse its discretion in denying an award of attorneys' fees to Hiler?

B. Standard and Scope of Review

In reviewing the assessment of attorneys' fees as part of an appeal from a motion for summary judgment, the Court will determine whether the lower court's determination was an abuse of discretion. *Sternberg v. Nanticoke Memorial Hospital, Inc.*, 62 A.3d 1212, 1220 (Del. 2013).

C. Merits of the Argument

From the stipulated facts, the Court of Chancery correctly denied Hilers' application for attorneys' fees. There is simply no basis for such an award based on the history of the pipes at issue, coupled with Hilers' own conduct.

Under the American Rule and Delaware Law, all parties are responsible for their respective attorneys' fees without regard to the successful party in the litigation. *Siga Technologies, Inc. v. PharmAthene, Inc.*, 67 A.2d 330, 352 (Del. 2013). As an exception to this Rule, nearly all of the cases that permit or deny an award of attorneys' fees under principles of equity explain that there must be some unusual

circumstances that merit such an award. Examples of such circumstances include fraudulent action, bad faith, negligence, frivolous claims, oppressiveness or similar action by the party against whom the fees are sought to be assessed. *Slawik v. State*, 480 A.2d 636 (Del. 1984); *Loretto Literary and Benevolent Inst. v. Blue Diamond Coal Co.*, 444 A.2d 256 (Del. Ch. 1982); *Wilmington Trust v. Coulter*, 208 A.2d 677 (Del. Ch. 1965); *Weinberger v. UOP, Inc.*, 517 A.2d 653, 656 (Del. Ch. 1986). In these proceedings, there is no evidence that Kuhns did anything to trigger an award of attorney's fees under the foregoing criteria.

In this appeal, unlike the factual scenarios cited by Hiler from *Black v. Staffieri*, 2014 WL 814122 (Del. Feb. 27 2014) and *H&H Brand Farms, Inc. v. Simpler*, 1994 WL 374308 (Del. Ch. June 10, 1994)[15], Kuhns were merely continuing the use of the water and sewer lines that had been in place for decades. In *Black*, the defendant blocked the existing legal right of vehicular access to another property. Here, Kuhns did nothing to block, prevent or hinder Hilers' use of 100 St. Lawrence Street. To the contrary, Kuhns continued to use the pipelines in the same location, and in the same manner, as they existed at the time Hiler acquired the property. The only difference was Kuhns' insertion of the Perma-liner sleeve *inside* of the sewer line. The Perma-liner did not alter the exterior of the sewer line in any way, shape or form. It had no impact on Hilers' property whatsoever— indeed, it

[15] Both *Black* and *H & H Brand Farms* are attached to Appellants' Opening Brief.

did not even touch the earth beneath Hilers' property. In *Black*, the court also found that the defendants knew they had no right to barricade the right of access. In this case, Kuhns were told by the City of Rehoboth Beach that they had every right to use the pipes, and further that these pipes were where the City mandated connection to its water and sewer utility systems. Finally, unlike *Black* where the defendants took action that was inconsistent with the prior use of the easement over a long period of time, Kuhns utilized the pipes at issue the same way they had been in use since their installation in the 1920s and 1930s.

The facts in this appeal are also distinguishable from those found in *H&H Brand Farms*. In that case, the court ruled that "It is clear that the defendants knew... that they did not have an uncontroverted legal right to develop [within an easement area].... Defendants, knowing that they did not have a clear legal right to develop... should have sought declaratory or similar relief regarding their rights....". *H&H Brand Farms*, p. 6. In *H&H Brand Farms*, however, the easement in question was for the benefit of an entirely different party (the Department of Natural Resources and Environmental Protection, or "DNREC") than the defendants. Moreover, despite the fact that the easement did not even name the defendants, they proceeded to plow up the plaintiff's crops and field. Thus, they took an action that was new and different from anything that previously existed. In contrast, Kuhns merely continued with the longstanding usage of utility lines serving their property. In

further contrast, the governmental entity in *H&H Brand Farms* (DNREC) denied the defendants' use of the area. In this appeal, the governmental entity of the City of Rehoboth Beach not only confirmed their belief that an easement existed, but also installed the sewer pipes in the first place and more recently directed that the pipes at issue were the sole means of connecting to the City's water and sewer utilities.

The cases cited by Hiler in support of an award of attorneys' fees could not be more different from the facts and circumstances involving the parties herein. There is no indication that Kuhns acted in bad faith or oppressively, when all they were doing was continuing to utilize the 70-plus year old pipes in their underground location as expressly directed by the City of Rehoboth Beach.

CONCLUSION

The Court of Chancery's decision on all issues was correct based upon the record before it. Despite Hilers' moving target of relief sought, the Court ultimately agreed with Hilers' final request during oral argument and did not require the removal of the utility pipes. Since removal of the Perma-lining—now sought for the first time on appeal—was never before the Court of Chancery, that Court appropriately did not address it. A remand for that request would not be appropriate at this late stage of the proceedings, and would be inconsistent with the pleadings and the record. Likewise, since no transfer of damages proceedings was ever sought (indeed no damages can be found in the record) no remand with instructions to transfer to Superior Court is warranted, either. Finally, there is no basis for any award of attorneys' fees. In summary, the Court of Chancery did not commit any errors, and its decision must be affirmed.

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