IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

FRANK E. ACIERNO, Plaintiff, v. LAWRENCE GOLDSTEIN, BARBARA GOLDSTEIN, RONALD GOLDSTEIN, STEVEN GOLDSTEIN and KAREN LIPSY, Defendants.	)	Civil Action No. 20056-NC

MEMORANDUM OPINION

Submitted: July 1, 2005
Decided: November 16, 2005

Richard L. Abbott, Esquire, ABBOTT LAW FIRM, Hockessin, Delaware, *Attorney for Plaintiff*

Neal C. Belgam, Esquire, Alisa E. Moen, Esquire, BLANK ROME LLP, Wilmington, Delaware, *Attorneys for Defendants*

Barbara Goldstein, *Defendant Pro Se*

Lawrence Goldstein, *Defendant Pro Se*

PARSONS, Vice Chancellor.

The Court regrets having to write this opinion, but the parties and their attorneys have left it no choice. This proceeding began with a claim for adverse possession. A few weeks before trial, Plaintiff, Frank E. Acierno ("Acierno"), moved to dismiss his claim for adverse possession. The Court granted that motion and allowed the Defendants and Counterclaimants to continue to pursue their counterclaims for trespass to timber and an access easement and to assert a claim for attorneys' fees. Acierno also has asserted a claim for attorneys' fees. These issues formed the basis for a two day trial.

This is the Court's post-trial opinion. For the reasons stated below, the Court awards Counterclaimants a percentage of their attorneys' fees, dismisses Counterclaimants' claim for trespass to timber, concludes that Acierno has interfered with Counterclaimants' access easement and dismisses Acierno's claim for attorneys' fees.

I. BACKGROUND

Many of the facts are set out in the Court's June 2004 Memorandum Opinion, denying certain cross-motions of the parties directed to the merits of various claims and counterclaims.[1] Only those facts pertinent to the claims currently before the Court are recited below.

A. The Parties and the Parcel

In 1979, Ronald Goldstein ("R. Goldstein"), Steven Goldstein and Karen Lipsy (collectively, the "Counterclaimants"), along with Barbara and Lawrence Goldstein, acquired record title to a 5.015 acre portion of New Castle County Tax Parcel 09-030.00-

[1] *See Acierno v. Goldstein*, 2004 WL 1488673, at *1–2 (Del. Ch. June 25, 2004).

030 and a right of ingress and egress over neighboring lands to Brown's Lane via the residuary clause of the Last Will and Testament of their uncle, Jacob Goldstein.[2]

Acierno owns over 100 acres of land in White Clay Creek Hundred, New Castle County, Delaware, within tax parcels 09-030.00-030 and 09-0303.00-002.[3] This land includes Acierno's Christiana Town Center shopping mall and will be referred to as the "CTC Property." The CTC Property completely surrounds the Counterclaimants' land.[4]

Acierno claimed adverse possession over a 3.65 acre portion of the Counterclaimants' land (the "Disputed Parcel").[5]

B. The Proceedings

Acierno filed a Verified Complaint (the "Complaint") for adverse possession of the Disputed Parcel in November 2002. The Complaint avers the five elements of an adverse possession claim,[6] but recites very few specific actions taken by Acierno with respect to the Disputed Parcel. On May 16, 2003, Acierno responded, under oath, to the Counterclaimants' first set of interrogatories. The responses contained fewer specific facts and were even more vague than the Complaint.[7]

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2 Pretrial Stipulation ¶¶ II.3, II.4; DX 1.

3 *Acierno*, 2004 WL 1488673, at *1.

4 Pretrial Stipulation ¶ II.1.

5 The parties never explained how only 3.65 acres of the 5.015 acre parcel Jacob Goldstein acquired via Sheriff's Deed in 1958, *see* DX 1, came to be at issue here, Pretrial Stipulation ¶ II.2.

6 To state a claim for adverse possession, a plaintiff must aver that she has "openly, exclusively, notoriously, continuously, and adversely" possessed the land for a period of twenty years. *Acierno*, 2004 WL 1488673, at *6 (citing *Stellar v. Woodkeeper*, 257 A.2d 391, 394–95 (Del. Super. 1969)).

7 *Compare* Complaint ¶ 11 ("Acierno has made several land development plan submissions to New Castle County . . . including development plans proposed in

In April 2003, the Counterclaimants asserted counterclaims for trespass to land, timber, and chattels and for conversion, ejectment, injunctive relief and a declaratory judgment quieting title to the Disputed Parcel. Later that same month, Acierno moved for judgment on the pleadings and to dismiss the counterclaims. In June 2003, Counterclaimants moved for summary judgment on Acierno's adverse possession claim. This Court heard argument on these motions in January and March 2004.[8] At argument, Acierno presented two exhibits that had not previously been disclosed to the Counterclaimants or the Court: a 1979 aerial photograph (the "1979 Photograph") and a 1970 tax map of the Disputed Parcel and the surrounding land. Although the Court expressed reluctance "to rely too heavily on this belatedly produced evidence," it did "provide some corroboration for Acierno's averments and his interrogatory responses" and contributed to the Court's decision to deny Counterclaimants' motion for summary judgment.[9] The Court denied all of the motions in a Memorandum Opinion entered on June 25, 2004 and revised on June 29 (the "2004 Opinion").[10]

Subsequently, the Court set the case down for trial on October 28 and 29, 2004. The parties agreed that all discovery would close on September 30, 2004.[11] On or about

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1972 and 1985") *with* Pl.'s Objections and Responses to Defs. Ronald Goldstein, Steven Goldstein and Karen Lipsy's First Set of Interrogs. ("PRI") ¶ 1 ("Specifically, Plaintiff . . . proposed plans for approvals to improve the Property").

8 The case was reassigned in late 2003 after Vice Chancellor (now Justice) Jacobs was elevated to the Supreme Court.

9 *Acierno*, 2004 WL 1488673, at *7.

10 *Acierno*, 2004 WL 1488673.

11 Stipulation to Second Revised Scheduling Order ¶ 1 ("All discovery shall be initiated so that it may be completed on or before September 30, 2004.").

September 30, Counterclaimants identified their expert on trespass damages for the first time. Acierno objected to the disclosure as untimely and sought to exclude the expert from testifying. At the October 21 Pretrial Conference, the Court barred the expert's testimony because Counterclaimants' disclosure was untimely and failed to meet the notice requirements of the Court of Chancery Rules and because allowing the testimony would be unfairly prejudicial to Plaintiff.[12]

On October 13, 2004, Acierno moved to dismiss his own claim for adverse possession citing, *inter alia*, the possibility that this Court would require him to prove the claim by clear and convincing evidence.[13] The Court granted Plaintiff's motion at the Pretrial Conference.[14] As a result, Acierno essentially admitted to trespassing on the Disputed Parcel. The Counterclaimants effectively withdrew their claim for trespass to chattel[15] and did not press their claim for conversion.

On October 28 and 29, 2004, the Court held a trial to determine: (1) whether Counterclaimants are entitled to attorneys' fees under the bad faith exception to the American Rule for having to defend against Acierno's adverse possession claim; (2) what, if any, damages Counterclaimants are entitled to for Acierno's trespass to timber on the Disputed Parcel; (3) whether Counterclaimants are entitled to either (a) a declaratory

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12 Pretrial Conference Tr. at 60–61, 64. The Court also observed that Counterclaimants should have been aware for some time of the possibility of a damages claim. *See id.* at 61–63 ("I certainly conclude that the defendants either knew or could have known much earlier than the close of discovery all the facts that they needed to know in order to be able to come up with a theory as to how they were being harmed by the alleged trespass since 1997.").

13 Pl.'s Mot. to Dismiss ¶ 4.

14 Pretrial Conference Tr. at 36–37.

15 *Id.* at 42.

judgment restoring access to their parcel or (b) an easement by necessity over Acierno's land because their parcel is landlocked; and (4) whether Acierno is entitled to attorneys' fees under the bad faith exception to the American Rule for having to defend against Counterclaimants' counterclaims.

II. ANALYSIS

A. Counterclaimants' Claim for Attorneys' Fees

1. Legal standard

This Court has broad discretion to award attorneys' fees.[16] Normally, however, parties bear their own attorneys' fees pursuant to the American Rule.[17] "An exception exists in equity . . . when it appears that a party, or its counsel, has proceeded in bad faith, has acted vexatiously, or has relied on misrepresentations of fact or law in connection with advancing a claim in litigation."[18] There is not a single standard of bad faith that gives rise to an award of attorneys' fees; rather, bad faith turns on the particular facts of each case.[19] "[C]ourts have found bad faith where parties have unnecessarily prolonged or delayed litigation, falsified records or knowingly asserted frivolous claims."[20] This

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16 10 *Del. C.* § 5106 ("The Court of Chancery shall make such order concerning costs in every case as is agreeable to equity."); *RGC Int'l Investors, LDC v. Greka Energy Corp.*, 2001 WL 984689, at *19 (Del. Ch. Aug. 22, 2001) ("it is within this Court's equitable discretion to award attorneys' fees as costs under 10 *Del. C.* § 5106").

17 *McNeil v. McNeil*, 798 A.2d 503, 514 (Del. 2002).

18 *Rice v. Herrigan-Ferro*, 2004 WL 1587563, at *1 (Del. Ch. July 12, 2004).

19 *Jacobson v. Dryson Acceptance Corp.*, 2002 WL 31521109, at *16 (Del. Ch. Nov. 1, 2002) (internal citation omitted).

20 *Johnston v. Arbitrium (Cayman Is.) Handels AG*, 720 A.2d 542, 546 (Del. 1998) (internal citations omitted).

Court does not invoke the "bad faith exception" lightly[21] and imposes the stringent evidentiary burden of producing "clear evidence" of bad faith conduct on the party seeking an award of fees.[22]

2. Acierno's claim for adverse possession

In order to succeed on a claim for adverse possession, a plaintiff must prove by, at the very least, a preponderance of the evidence[23] that she has "openly, exclusively, notoriously, continuously, and adversely" possessed the land for a period of twenty years.[24] After hearing the testimony and examining the additional evidence, the Court concludes that Acierno had a good faith basis to believe he had adversely possessed the

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21 *Beck v. Atl. Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005); *Nagy v. Bistricer*, 770 A.2d 43, 64 (Del. Ch. 2000).

22 *Beck*, 868 A.2d at 851 (citing *Arbitrium (Cayman Is.) Handels AG v. Johnston*, 705 A.2d 225, 232 (Del. Ch. 1997), *aff'd Johnston*, 720 A.2d 542).

23 In its 2004 Opinion, the Court declined to decide whether the proponent of an adverse possession claim must prove the elements by a preponderance of the evidence or by clear and convincing evidence. *Acierno*, 2004 WL 1488673, at *6 n.39. The common law cause of action for adverse possession is codified at 10 *Del. C.* § 7901, but the statute does not specify the applicable burden of proof. *See Dukes v. Williams*, 2000 WL 364190, at *2 n.7 ("A most unhelpful statute drafted with the care of some unknown 19th century craftsman purports to codify the basic principle. It appears nigh impossible to translate it into modern American English."). Recent cases, however, have suggested that because adverse possession works a forfeiture of title, it must be proven by clear and convincing evidence. *See Miller v. Steele*, 2003 WL 1919332, at *2 (Del. Ch. Apr. 11, 2003); *Brown v. Houston Ventures, L.L.C.*, 2003 WL 136181, at *5 (Del. Ch. Jan. 3, 2003). For purposes of determining whether Acierno brought his claim in bad faith, the Court concludes that it was not unreasonable for Acierno to believe that the operative standard could be a preponderance of the evidence. *See, e.g.*, *Dickerson v. Simpson*, 798 A.2d 188 (Table), 2002 WL 371866, at *1 (Del. Mar. 5, 2002) (affirming Superior Court decision finding adverse possession proven by a preponderance of the evidence).

24 *Acierno*, 2004 WL 1488673, at *6.

Disputed Parcel and could so prove by a preponderance of the evidence.[25] Acierno testified that he grubbed the Disputed Parcel in the late 1970s or early 1980s,[26] stored equipment on the property during the 1980s and 1990s[27] while he was litigating over the proper use of the surrounding lands[28] and cleared the Disputed Parcel by 1997.[29] Although some of Acierno's testimony is self-serving,[30] the Court finds that these activities probably did occur.

It is equally likely that Acierno would have had a difficult time proving his case at trial. He did not have personal knowledge of many of the acts of adverse possession.[31] He also could not produce records to corroborate certain of his factual assertions.[32] And,

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25 The parties disputed whether R. Goldstein's 1998 Petition to Partition the Disputed Parcel tolled the prescriptive period. If it did, then Acierno would have had to establish adverse possession beginning in 1978; if it did not, then Acierno would have had to establish adverse possession beginning in 1982. Because the Court did not resolve the issue before Acierno withdrew his claim for adverse possession, events that occurred in the late 1970s and the early 1980s are relevant in determining whether Acierno brought his claim in bad faith.

26 Tr. at 44. Citations in this form are to the trial transcript ("Tr.") and indicate the page and, where it is not clear from the text, the witness testifying.

27 Tr. at 81.

28 Tr. at 50–51; *see Acierno v. New Castle County*, 40 F.3d 645, 647–52 (3d Cir. 1994) (describing litigation).

29 Pretrial Stipulation ¶ II.5.

30 *See, e.g.*, Tr. at 53 (Acierno) (testifying that "there was something going on [on the Disputed Parcel] from time to time" from 1979 to 1997). Aside from testimony concerning the storage of equipment, Acierno offered no proof to support this contention.

31 *See, e.g.*, Tr. at 82–83 (Acierno) (testifying that he did not know what equipment was stored on the Disputed Parcel or exactly where on the Disputed Parcel the equipment was stored); Tr. at 48–49 (Acierno) (providing elusive testimony about whether he had knowledge of the grubbing of the Disputed Parcel independent of various photographs).

32 *See, e.g.*, Tr. at 49 (Acierno) (admitting that he was not able to produce documents identifying the grubbing contractor).

Acierno made several offers to purchase the property during the prescriptive period.[33] Acierno's claim for adverse possession was weak from the start, but the Court does not find "clear evidence" that it was frivolous.[34] In some cases, a claim may be so weak that asserting it may be frivolous, but the Court does not reach that conclusion here. Thus, the Court concludes that Acierno's *assertion* of his claim for adverse possession was not in bad faith and declines to award fees on that basis.

3. Specific instances of bad faith conduct

Two specific actions by Acierno, however, do give rise to an award of fees. Acierno initiated this action by filing a verified complaint. Acierno personally swore that "[t]he factual statements contained in the foregoing Verified Complaint are true and correct to the best of my knowledge, information and belief." In fact, at least one statement in the Complaint is false. Acierno averred that he "made several land development plan submissions to New Castle County land use authorities . . . including

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33 Tr. at 105–09 (Acierno). One Delaware case has observed that "an acknowledgement within the prescriptive period of a superior right of the record owner by the person claiming a prescriptive easement *may* prevent the use from being deemed hostile." *Berger v. Colonial Parking, Inc.*, 1993 WL 208761, at *4 (Del. Ch. June 9, 1993) (emphasis added). It does not appear, however, that a Delaware court has held that offers to purchase during the prescriptive period absolutely defeat the hostility component of adverse possession. In fact, cases have held the opposite. *See, e.g., Houston Ventures*, 2003 WL 136181, at *5 ("I do not view the effort to negotiate a resolution as a waiver of any claim to rights arising by prescription. It is prudent to resolve through negotiation and documentation that which might otherwise give rise to, as it did here, litigation.") (internal citation omitted).

34 *Cf. Mother African Union First Colored Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, 1992 WL 83518, at *10 (Del. Ch. Apr. 22, 1992) (holding that prosecution of action based on a flawed perception of legal rights does not amount to bad faith sufficient to justify shifting of attorneys' fees).

development plans proposed in 1972 and 1985 to develop the Disputed Lands."[35] There were, in fact, no such submissions.[36] This falsity is especially significant because it is the only averment in the Complaint of a specific action with respect to the Disputed Parcel at an early enough date to establish possession for the prescriptive period. A reasonable investigation by Acierno before filing the Complaint almost certainly would have revealed that no such plans were submitted.[37] A careful review of the averments in the Complaint by Acierno and his counsel should have revealed the inaccuracy. Before one files a pleading under oath attempting to take away the property of another, one has an obligation to make a reasonable inquiry to ensure that the specific averments contained therein have evidentiary support, i.e., a basis in fact.[38] Here, it is clear that Acierno knowingly, or at the very least recklessly,[39] misrepresented a fact in connection with advancing a claim in litigation.

Moreover, Acierno never retracted the averment concerning the plans in the Complaint. In response to interrogatories, Acierno did not contend that he submitted

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35 Complaint ¶ 11.

36 Tr. at 91 (Acierno).

37 In fact, Acierno undertook no investigation before verifying the Complaint. Tr. at 31 (Acierno).

38 *Cf. Nagy*, 770 A.2d at 65 (awarding attorneys' fees where a party advanced an argument with "no reasoned basis in law or logic"); Ct. Ch. R. 11 ("By presenting to the Court . . . a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . (3) the allegations and other factual contentions have evidentiary support . . . .").

39 *But see Huntington Homeowners Ass'n, Inc. v. 706 Investments*, 1999 WL 377827, at *6 (Del. Ch. May 28, 1999) (holding that an award of attorneys' fees under the bad faith exception to the American Rule requires intentional misconduct). The Court finds that Acierno's reckless averment, in conjunction with his failure to correct the falsity, rises to the level of intentional misconduct.

plans in 1972 or 1985, but did contend that he submitted plans.[40] The failure to retract the averment in the Complaint, which Acierno must have realized was false during the prosecution of this litigation, is an intentional act taken in bad faith.[41]

A misrepresentation of fact in Acierno's response to interrogatories also justifies an award of attorneys' fees. In Counterclaimants' first set of interrogatories, they asked Acierno to "[i]dentify and describe any communications by between or among you (or anyone acting on your behalf) and the Defendants, or anyone working on their behalf, regarding any purchase or acquisition of the [Disputed Parcel]."[42] Acierno responded, under oath, "[n]one known."[43] Counterclaimants also asked Acierno to identify any communications with third parties regarding his interest in acquiring the Disputed Parcel.[44] Again, Acierno responded "[n]one known."[45] In fact, Acierno made at least three offers to buy the Disputed Parcel,[46] one directly to Louis Goldstein during the prescriptive period.[47] Acierno neither corrected the misrepresentations of facts in his

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40 PRI ¶ 1 ("Specifically, Plaintiff . . . proposed plans for approvals to improve the Property").

41 The lack of specificity in the interrogatory answer supports an inference that Acierno realized the averment in the Complaint was false before he served his interrogatory answer.

42 *See* PRI ¶ 19.

43 *Id.*

44 *Id.* ¶ 20.

45 *Id.*

46 Tr. at 105 (Acierno) (admitting to attempting to purchase the Disputed Parcel); at 187–88 (Acierno) (testifying that he might have had a conversation with Barbara Goldstein or a third party regarding purchasing the Disputed Parcel).

47 Tr. at 105–07 (Acierno) (testifying to offering to buy the Disputed Parcel from Louis Goldstein in 1991). Louis Goldstein was the executor of the estate of Jacob Goldstein.

interrogatories[48] nor made any attempt to explain them at trial or in post-trial briefing. As such, it is reasonable to infer that there is no innocent explanation for the misrepresentations.

Based on this misconduct, the Court awards Counterclaimants 25% of their attorneys' fees in defending against Acierno's claim for adverse possession from the beginning of this action until the withdrawal of that claim. The Court declines to award fees on fees because Acierno's defense of Counterclaimants' request for attorneys' fees does not rise to the level of bad faith and therefore does not justify such an award in light of the Court's finding of only two isolated instances of bad faith conduct.[49]

4. The 1979 Photograph

In addition to relying on Acierno's bad faith conduct, Counterclaimants also argue that he engaged in vexatious conduct that justifies an award of attorneys' fees.[50] Specifically, they argue that Acierno misrepresented material facts and forced them to disprove those assertions.[51] The Court already has dealt with all but one of these alleged misrepresentations.[52] The remaining alleged misrepresentation concerns Acierno's

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48 *See* Ct. Ch. R. 26(e)(2).

49 *See Dunlap v. Sunbeam Corp.*, 1999 WL 1261339, at *6 (Del. Ch. July 9, 1999) (declining to award fees on fees because defendant's actions were not "so egregious or in such bad faith as to require that special form of discipline.").

50 Defs.' Opening Post-Trial Br. ("DOB") at 16.

51 *Id.* at 17–18.

52 *See supra* at II.A.3 (development plans and offers to purchase the Disputed Parcel); II.A.2 (continuous use of the Disputed Parcel). In addition, Counterclaimants argue that Acierno "failed to adduce any evidence at trial of hostile or exclusive possession" and thus his assertions in the Complaint of such possession of the Disputed Parcel are vexatious. The Court does not find any

counsel's submission of the 1979 Photograph. In opposing Counterclaimants' motion for summary judgment on the adverse possession claim, Acierno's counsel represented that the photograph showed the Disputed Parcel cleared in 1979. At trial in support of their claim for attorneys' fees, Counterclaimants presented evidence that cast some doubt on this representation.[53]

After hearing the testimony and examining the additional evidence, the Court concludes that the 1979 Photograph is susceptible to differing interpretations. It is difficult to locate the exact position of the Disputed Parcel on the photograph and it does show a large amount of land cleared in the vicinity of the Disputed Parcel. As such, Acierno's proffer of the 1979 Photograph as corroboration for his claim for adverse possession was not vexatious and does not provide an independent basis on which to award Counterclaimants attorneys' fees.

B. Counterclaimants' Claim for Trespass to Timber

Counterclaimants bring their claim for trespass to timber under 25 *Del. C.* § 1401 ("Section 1401"), which provides that "[w]hoever willfully, negligently or maliciously cuts down or fells or causes to be cut down or felled a tree or trees growing upon the land of another, without the consent of the owner, shall be liable for damages."[54] Acierno argues that the trespass to timber claim is time barred and, alternatively, that

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specific instances of bad faith or vexatious conduct with respect to Acierno's allegations of hostile or exclusive possession beyond what has been discussed.

[53] *See* Tr. at 63–68 (Acierno) (admitting that 1993 aerial photograph does not show the Disputed Parcel cleared); DX 16 (1993 aerial photograph showing the Disputed Parcel covered in trees).

[54] 25 *Del. C.* § 1401(a).

Counterclaimants have failed to prove damages.[55] On the issue of timeliness, Counterclaimants argue that the trespass is a continuing wrong and, alternatively, assert the unknowable injury exception to toll the statute of limitations.[56] Regarding damages, Counterclaimants respond by asking the Court to use its equitable powers to fashion a remedy out of whole cloth and, alternatively, to sanction Acierno for destroying evidence.[57]

1. Counterclaimants' claim for trespass to timber is not a continuing wrong

In its 2004 Opinion, the Court noted, as an alternative ground for denying Acierno's Motion for Judgment on the Pleadings and Motion to Dismiss, that "the alleged torts resulting from repeated entry on and clearing of the land, altering the topography and building a stormwater drainage basin on it all involve continuing wrongs."[58] The only trespass claim Counterclaimants pursued at trial, however, was for trespass to timber. Based on the more developed factual record at trial and the parties' pretrial stipulation that the land was cleared no later than 1997, the Court concludes that the trespass to timber claim is not for a continuing wrong.

A continuing wrong "is established by continual tortious *acts*, not by continual harmful effects from an original, completed act."[59] If the injury is "permanent and effects a permanent change in the condition of the land," then the injury is a permanent trespass

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55 Pl.'s Answering Post-Trial Br. ("PAB") at 17–18.
56 Defs.' Answering Post-Trial Br. ("DAB") at 11–12.
57 DOB at 21–23.
58 *Acierno*, 2004 WL 1488673, at *3.
59 *Sable v. Gen. Motors Corp.*, 90 F.3d 171, 176 (6th Cir. 1996) (applying Michigan law).

or wrong.[60] Here, Acierno entered the Disputed Parcel and cleared the timber. Such a trespass, even if done over time, was permanent as of the date of completion because it effected a permanent change to the land.[61] The harm continued, but the tortious conduct did not. Where, as here, the trespass is permanent and

> [T]he consequence of which in the normal course of things will continue indefinitely, there can be but a single action therefore to recover past and future damages and the statute of limitations runs against such action from the time it first occurred, or at least from the date it should reasonably have been discovered.[62]

The statute of limitations for claims brought pursuant to Section 1401 is three years.[63] The parties stipulated that Acierno cleared the Disputed Parcel no later than 1997.[64] The statutory limitations period on the Counterclaimants' trespass to timber

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60 *Dombrowski v. Gould Elecs., Inc.*, 954 F. Supp. 1006, 1012 (M.D. Pa. 1996) (citing *Tri-County Bus. Campus Joint Venture v. Clow Corp.*, 792 F. Supp. 984, 996 (E.D. Pa. 1992)).

61 *See Davis v. Allen*, 2002 Ohio 193 (Ohio Ct. App. 2002) ("A permanent trespass occurs when the defendant's tortious act has been fully accomplished, but injury to the plaintiff's estate from that act persists in the absence of future conduct by the defendant.") (internal citations omitted); s*ee also Sullivan v. Davis*, 29 Kan. 28, 34 (Kan. 1882) ("Doubtless when timber is cut and hauled away, the trespass may be considered as a continuing trespass, not completed until the timber is hauled away, and under those circumstances the statute of limitations would not commence to run until the removal of the timber was completed . . . .").

62 *Dombrowski*, 954 F. Supp. at 1012 (citing *Sustrik v. Jones & Laughlin Steel Corp.*, 197 A.2d 44 (Pa. 1964)).

63 10 *Del. C.* § 8106 ("No action to recover for trespass . . . no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action . . . ."); *see also Acierno*, 2004 WL 1488673, at *3 ("By its terms, section 8106 applies to Counterclaimants' claim[] for . . . trespass to timber . . . .").

64 Pretrial Stipulation ¶ II.5.

claim thus began to run by December 31, 1997.[65] Therefore, the claim for trespass to timber was presumptively time barred as of December 31, 2000.

2. Time bar as to claim for trespass to timber

Although a court of equity is not bound by the legal statute of limitations, this Court generally applies the legal limitations period by analogy because equity follows the law.[66] Delay beyond the period fixed by the statute is presumptively unreasonable and the equitable doctrine of laches may bar the claim.[67] Absent circumstances that make application of the legal limitations period unjust, the doctrine of laches will bar an untimely claim.[68] Because Counterclaimants' claim for trespass to timber is a purely legal claim,[69] there is no basis for according that claim the benefits of the more flexible

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65 *See Fike v. Ruger*, 754 A.2d 254, 260 (Del. Ch. 1999) ("A cause of action accrues at the moment of the wrongful act, even if the plaintiff is ignorant of the wrongful act.") (internal citation omitted).

66 *Acierno*, 2004 WL 1488673, at *2 (internal citation omitted).

67 *Bush v. Hillman Land Co.*, 2 A.2d 133, 134 (Del. Ch. 1938) ("[W]here the statute bars the legal remedy, it shall bar the equitable remedy in analogous cases, or in reference to the same subject matter, and where the legal and equitable claims so far correspond, that the only difference is, that the one remedy may be enforced in a court of law, and the other in a court of equity."); *Wright v. Scotton*, 121 A. 69, 73 (Del. 1923) ("Under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law . . . .").

68 *Acierno*, 2004 WL 1488673, at *2 (citing *U.S. Cellular Inv. Co. v. Bell Atl. Mobile Sys.*, 677 A.2d 497, 502 (Del. 1996)); *see also Wright*, 121 A. at 73 ("[I]f unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer period than that fixed by the statute, the Chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it.").

69 *Acierno*, 2004 WL 1488673, at *5 (exercising discretion to hear Counterclaimants' legal claims under the clean-up doctrine).

doctrine of laches in terms of requiring proof of knowledge, delay and prejudice.[70] Counterclaimants thus bear the burden of proving that imposition of the legal limitations period would be unjust in the circumstances of this case.

In their Post-Trial Answering Brief, Counterclaimants state that "Acierno failed to adduce evidence at trial that any of the Goldsteins knew or should have known that Acierno cleared the property in or about 1997 and there is no evidence to this effect cited in Acierno's brief."[71] Counterclaimants misunderstand their burden. In the 2004 Opinion, this Court held that it "cannot conclude that Counterclaimants cannot prove any set of facts in support of their claims which would enable them to prevail. . . . There is a factual question, for example, as to whether a reasonably prudent person would have inquired into whether someone was trespassing on the property under these circumstances."[72] The Court thus denied Acierno's motion for judgment on the pleadings as to the timeliness of the counterclaims, but left it to the Counterclaimants to prove that the legal limitations period should not bar their claim.[73]

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70 *See Yaw v. Talley*, 1994 WL 89019, at *5–6 (Del. Ch. Mar. 2, 1994) ("[W]here the complaint asserts a [legal] claim that on its face would be time-barred, the plaintiff bears the burden of pleading facts that would operate to toll the statute."); *Bren v. Capital Realty Senior Hous., Inc.*, 2004 WL 370214, at *4 (Del. Ch. Feb. 27, 2004) ("If the claim is time barred under the statute of limitations, the Court need not engage in a traditional laches analysis.") (citing *Atlantis Plastics Corp. v. Sammons*, 558 A.2d 1062, 1064 (Del. Ch. 1989)); *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 527 (Del. Ch. 2005) (citing *Kerns v. Dukes*, 2004 WL 766529, at *3 (Del. Ch. Apr. 2, 2004)).

71 DAB at 11.

72 *Acierno*, 2004 WL 1488673, at *3.

73 *Id.* ("Because factual disputes exist as to whether Counterclaimants timely discovered and asserted their trespass claims, Acierno's motion for judgment on the pleadings that those claims are time barred will be denied.").

Under the time of discovery exception, the legal limitations period would not run against Counterclaimants until they had reason to know of the trespass to timber if the injury was "inherently unknowable" and the Counterclaimants were "blamelessly ignorant."[74] The Court concludes, however, that the trespass in question was not inherently unknowable.

For an injury to be inherently unknowable, "there must have been no observable or objective factors to put a party on notice of injury."[75] Widespread cutting of timber is inherently observable. Although it is possible to imagine a situation in which so few trees are cut on a parcel covered in trees that such trespass would be unnoticeable absent close inspection, that is not the situation here. The Disputed Parcel was covered in trees[76] and then *completely* cleared of all vegetation.[77] Further, Counterclaimant R. Goldstein testified that he knows where the Disputed Parcel is located and how to get to it and that he frequently visited it until the mid-1990s.[78] Since Counterclaimants have failed to

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74 *See Mentis v. Del. Am. Life Ins. Co.*, 1999 WL 744430, at *8 (Del. Super. July 28, 1999) (explaining time of discovery exception and citing cases).

75 *Pettinaro Enters.*, 870 A.2d at 531 (citing *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5 (Del. Ch. July 17, 1998)).

76 *See* DX 58 (1993 aerial photograph showing Disputed Parcel covered in trees); Tr. at 240 (Barry Lipsy) (testifying to seeing trees on Disputed Parcel taller than 24 feet). Barry Lipsy is Counterclaimant Karen Lipsy's husband.

77 DX 14 (1997 aerial photograph showing Disputed Parcel completely cleared); Tr. at 60–61 (Acierno) (testifying that DX 14 shows Disputed Parcel completely cleared).

78 Tr. at 258–61.

sustain their burden of proving that the trespass to timber was inherently unknowable, they do not qualify for the time of discovery exception.[79]

Counterclaimants offered no other explanation as to why imposition of the legal limitations period would be unjust. Thus, the legal limitations period bars their claim for trespass to timber.[80]

3. Proof of damages

Even assuming that Counterclaimants' counterclaim for trespass to timber was not time barred, they have utterly failed to prove damages. R. Goldstein testified to seeing trees "around 30 feet [high] or thereabouts" on the Disputed Parcel.[81] Barry Lipsy testified to seeing deciduous trees at least 24 feet in height.[82] Acierno testified to the existence of "massive huge woods and trees."[83] Together, this testimony proves that there were trees on the Disputed Parcel, but nothing more. Because there is no evidence in the record that would allow the Court to determine the value of the trees, the Court has no reliable basis upon which to award damages. Delaware law does not permit the fact

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79 The testimony of R. Goldstein also calls into question the Counterclaimants' assertion that they were blamelessly ignorant. He testified to the need to "constantly examine properties that you owned in case there was some change in the circumstances that you weren't aware of." Tr. at 259. Further, R. Goldstein filed a Petition for Partition of the Disputed Parcel in 1998, DX 37, which proves that he knew he owned the Disputed Parcel and had reason to examine it during the relevant time period.

80 The legal limitations period also bars Counterclaimants' claim for costs pursuant to Section 1401.

81 Tr. at 261.

82 Tr. at 240.

83 Tr. at 186.

finder to supply a damages figure based on "speculation or conjecture" where the plaintiff has failed to meet its burden of proof on damages.[84]

Acknowledging their failure to adduce evidence on the value of the cleared timber,[85] Counterclaimants argue that the Court should sanction Acierno $50,000 for the destruction of evidence.[86] Counterclaimants ignore the fact that a party can be sanctioned for destroying evidence only if it had a duty to preserve the evidence.[87] "The obligation to preserve evidence arises when a party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."[88] It is stipulated that Acierno cleared the Disputed Parcel by 1997. There is no evidence that Acierno knew that the trees would be relevant evidence in litigation that did not begin until 2002. Further, the Court concludes that Acierno is not expected to

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84 *Henne v. Balick*, 146 A.2d 394, 396 (Del. 1950) (further holding that proof of injury is insufficient, in and of itself, to allow an award of damages without some other evidence of the amount of damages).

85 DOB at 21.

86 *Id.* at 23 ("Goldsteins respectfully request that the sum of $50,000 be imposed . . . for the destruction of evidence by Acierno.").

87 *Brandt v. Rokeby Realty Co.*, 2004 WL 2050519, at *11 (Del. Super. Sept. 8, 2004) ("A party, anticipating litigation, has an affirmative duty to preserve relevant evidence."); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003). Under Delaware law, the Court may draw an adverse inference from the destruction of evidence even if the destruction was unintentional. *Burris v. Kay Bee Toy Stores*, 1999 WL 1240863, at *1 (Del. Ch. Sept. 17, 1999) (citing *Lucas v. Christiana Skating Ctr., Ltd.*, 722 A.2d 1247 (Del. 1998)). Even with such an inference, however, the Court still cannot determine an amount of damages without substantive proof. *See Collins v. Throckmorton*, 425 A.2d 146, 150 (Del. 1980) ("[E]ven if the defendants were entitled to some kind of inference from the plaintiff's failure to produce records, this inference does not amount to substantive proof and cannot take the place of proof of a fact necessary to [defendants'] case.") (internal citation omitted).

88 *Zubulake*, 220 F.R.D. at 216 (citing *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)).

know that trees he cut down under a disputed claim of right would be the only evidence of their value more than seven years later.[89] Therefore, the Court will not sanction Acierno for the destruction of the timber on the Disputed Parcel.

Finally, there are policy reasons not to allow Counterclaimants to prevail on their claim for damages for trespass to timber by way of a discovery sanction. First, it is the plaintiff's burden to show damages. Allowing an end-run around this burden sets a dangerous precedent and signals to future plaintiffs that they may be careless in the presentation of their case but still prevail. Second, sanctioning Acierno for a misdeed in discovery would potentially allow for double recovery in cases of trespass to timber and conversion. To wit, a party could prove damages and then also ask the Court to sanction the defendant for destroying the object at issue in the substantive claim. The Court will not permit such bootstrapping of a substantive claim for damages into a request for a discovery sanction.[90] The cutting of the timber in this case provides the factual predicate for the claimed trespass to timber. The Court concludes that it would be inappropriate to allow that same conduct to form the basis for a discovery sanction.

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89 In fact, the timber that was once on the Disputed Parcel is likely not the only evidence of its value. Presumably, an expert could have testified to the value of the timber on surrounding lands and extrapolated the likely value of the timber on the Disputed Parcel. Such an expert also might have been able to glean information relevant to damages from the available aerial photographs.

90 *Cf. Lucas*, 722 A.2d at 1250 (declining to create a tort-based cause of action for tampering or destroying evidence).

C. Counterclaimants' Claim for an Access Easement

Counterclaimants argue that the deed to the Disputed Parcel includes an access easement to Neury's Lane across lands originally owned by Joshua Brown ("Brown").[91] Neury's Lane connects to Brown's Lane, an undisputed public road. If such an easement exists, it is undisputed that it is now blocked by federally protected wetlands, a ravine and a stream, and is impassible.[92] Further, the Court finds that Acierno has blocked at least a portion of the easement by building a stormwater management basin between the Disputed Parcel and Neury's Lane.[93]

Counterclaimants also argue that, if they cannot prove the existence of an express easement, they are entitled to an easement by necessity because the Disputed Parcel and the surrounding lands descend from a common grantor—Brown—and the lack of an access easement would leave the Disputed Parcel landlocked.[94]

Acierno denies the existence of an express easement, arguing that Neury's Lane is a private road over which Counterclaimants must establish an easement all the way to

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91 DOB at 24; DX 1.

92 Tr. at 133 (Acierno); PAB at 24; DOB at 24.

93 *See* Tr. at 131–32 (Acierno) (testifying that if the easement is a straight line from the Disputed Parcel to Neury's Lane, the stormwater management basin blocks it). Acierno implicitly conceded that the stormwater management basin blocks any such easement, no matter how it is configured. *See* Pl.'s Supplemental Br. in Opp'n to Certain Defs.' Claims Regarding Alleged Driveway Easement ("PSB") at 11 ("Acierno constructed a stormwater retention basin on his land in 1998 based in part upon the Parcel owners' [*i.e.*, Counterclaimants'] lack of intention to open a driveway or use the Parcel.").

94 DOB at 25. In light of its finding of the existence of an express easement, the Court does not address the issue of an easement by necessity.

Brown's Lane, which, he argues, they have not done.[95] Alternatively, Acierno argues that any easement, whether express or created by necessity, was extinguished by abandonment or estoppel and that Counterclaimants' claim is barred by laches.[96] Finally, Acierno again challenges this Court's jurisdiction with respect to the dispute over the access easement.[97]

The Court finds that the Counterclaimants possess an express easement from the Disputed Parcel to at least the northern terminus of Neury's Lane[98] and that Acierno has blocked that easement.[99]

1. The Disputed Parcel's express easement

A property owner may create an express easement across her land within the language of a deed.[100] Such language should "evidenc[e] the grantor's intent to create a right in the nature of an easement."[101] Further, the Delaware Statute of Frauds[102]

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95 PSB at 1–7.

96 *Id.* at 7–12.

97 *Id.* at 12–13.

98 The northern terminus is the end opposite the intersection of Neury's Lane and Brown's Lane.

99 The Court finds it unnecessary to decide whether Neury's Lane is a public or private road because the Court finds that Counterclaimants used Neury's Lane to access their easement to the Disputed Parcel. *See* Tr. at 258 (R. Goldstein) (testifying to driving up Neury's Lane to access the easement to the Disputed Parcel). Thus, regardless of the road's status, the Counterclaimants had an effective easement until Acierno interfered with it. The Court also observes that the deeds and maps admitted into evidence appear to indicate that the grantor who conveyed the easement in the deed to the Disputed Parcel—Brown—owned all of the land surrounding Neury's Lane and thus could have granted the Disputed Parcel an express easement over the lands fronting on Neury's Lane.

100 *Alpha Builders, Inc. v. Sullivan*, 2004 WL 2694917, at *4 (Del. Ch. Nov. 5, 2004).

101 *Id.* (internal quotation omitted).

102 6 *Del. C.* § 2714(a).

"requires that a writing, signed by the party to be charged with granting the interest, exist before any action to enforce a conveyance occurs."[103]

The deed to the Disputed Parcel contains the requisite language evidencing the grantor's intent to convey an access easement:

> TOGETHER with the right of ingress and egress along a 50' wide right-of-way over the Southwesterly side of lands known as a 4-acre tract conveyed by Joshua H. Brown to Percy Jones and a 6-acre tract conveyed by said Joshua H. Brown to William Steward and southerly along an existing roadway over lands of Joshua H. Brown connecting the aforesaid rights of way with Brown's Lane.[104]

The existing roadway referred to in the grant is Neury's Lane. The deeds of the parcels servient to the easement contain similar language and conclusively demonstrate the existence of an express easement from the Disputed Parcel over lands now owned by Acierno to the northern terminus of Neury's Lane.

In 1947, Brown acquired 14.38 acres of land that included the Disputed Parcel and the land over which the access easement runs to Neury's Lane.[105] In July 1954, Brown conveyed a six acre parcel situated southeast of what is now the Disputed Parcel to William Stewart ("Stewart"), but reserved an easement over it.[106] The northern terminus of Neury's Lane is at the border of this six acre parcel.[107] Later that same year, Brown

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103 *Alpha Builders*, 2004 WL 2694917, at *4.

104 DX 1. William Steward is actually William Stewart. *See* DX D.

105 DX C-1.

106 DX D ("Reserving therefrom the right of ingress and egress over said land [illegible] the southwesterly line from a roadway or lane now running through lands [illegible] Joshua H. Brown connecting with Brown's Lane, and other lands to be conveyed [illegible] northwest of this 6 acre tract as described.").

107 DX 6.

conveyed what is now the Disputed Parcel to Theodore Johnson ("Johnson") with an easement over the six acre parcel conveyed to Stewart and over a four acre parcel situated between the Disputed Parcel and Stewart's parcel. In 1955, Brown conveyed the four acre parcel, but reserved an easement over it.[108]

In November 1954, Johnson conveyed two small contiguous parts of his parcel.[109] The deeds to these properties contain easements over each other and over a parcel situated to the west of the Disputed Parcel that Brown had conveyed in 1953.[110] The easements over these three parcels connect to the easement over the four and six acre parcels,[111] while their respective deeds convey the right to use the easement over the four and six acre parcels to connect to Neury's Lane.[112] The deed to the parcel Brown conveyed in 1953 also includes the right to use the easement to Neury's Lane and the right to use Neury's Lane.[113]

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108 DX C-2 ("Reserving therefrom the right of ingress and egress over said land along the southwesterly line connecting lands on the northwesterly side of said tract with a lane running through lands of Joshua H. Brown and Brown's Lane.").

109 *See* DX E; DX F.

110 DX G.

111 DX E ("Together with the right of ingress and egress over a 30' wide right of way along the southeasterly line of this tract and together with the right of ingress and egress along a 50' wide right of way over the southwesterly side of lands known as a 4 acre tract conveyed by Joshua H. Brown to Percy Jones and a 6 acre tract conveyed by said Joshua H. Brown to William Steward and southerly along an existing roadway over lands of Joshua H. Brown connecting the aforesaid rights of way with Brown's Lane."); DX F (containing identical language).

112 *Id.*

113 DX G ("Together with the right of ingress and egress over a 30' wide right of way along the southeasterly line of this tract and together with the right of ingress and egress along a 50' wide right of way over the southwesterly side of lands known as a 4 acre tract conveyed by Joshua H. Brown to Percy Jones and a 6 acre tract conveyed by said Joshua H. Brown to William Steward and southerly along an

As these various deeds make clear, when Jacob Goldstein acquired the Disputed Parcel in 1958 an easement over the four and six acre parcels to Neury's Lane had been reserved by Brown. The Court also finds that the reservation of an easement over the four and six acre parcels was properly in the chain of title when Acierno purchased those two parcels.[114] Thus, when the Disputed Parcel passed to the Counterclaimants and their siblings by operation of law in 1978, it included an easement over Acierno's lands to Neury's Lane.[115]

In attempting to rebut this evidence of the existence of the easement, Acierno argues that Brown had no legal right to convey a fifty foot easement to Johnson because

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existing roadway over lands of Joshua H. Brown connecting the aforesaid rights of way with Brown's Lane.").

[114] DX G-1 ("RESERVING therefrom the right of ingress and egress over said land along the southwesterly line connecting lands on the northwesterly side of said tract with a lane running through lands of Joshua H. Brown and Brown's Lane."); DX G-6. The six acre parcel is one of three parcels conveyed in DX G-6. Although the description of the parcel does not contain the reservation of the easement, Acierno was on record notice of the reservation because it is properly recorded in the chain of title. *See In re Elin*, 20 B.R. 1012, 1019 (D.N.J. 1982) ("A purchaser is chargeable with notice of every matter affecting the estate, which appears on the face of any deed forming an essential link in the chain of title; and also notice of whatever matters he would have learned by any inquiry which the recitals in these instruments made it his duty to pursue.") (internal citations omitted). Further, Acierno was on constructive notice of the reservation of the easement because the description of another parcel contains the reservation of the easement over the four and six acre parcels. *See id.* at 1020 (holding that plaintiffs were given constructive notice of deeds affecting their title by virtue of a reference in the chain of title).

[115] The Court finds inapposite Acierno's citations to *Alpha Builders* to rebut the existence of the easement. Pl.'s Opening Post-Trial Br. ("POB") at 15. There, the Court concluded, at the preliminary injunction stage, that the plaintiff had not proven the existence of an easement. *Alpha Builders*, 2004 WL 2694917, at *5. The Court observed that, at most, the plaintiff had shown intent to create an easement in the future. *Id.* at *4. Here, the Court concludes, after trial, that Counterclaimants have proven the existence of an easement.

Brown had only reserved an easement of unspecified width over the six acre parcel conveyed to Stewart.[116] This argument is a makeweight. Stewart had purchased property with a valid easement of unspecified scope.[117] The fact that the grantor later specified a reasonable width under the circumstances does not invalidate the prior valid reservation of the easement. At most, the later specification of the width of the easement is evidence of some ambiguity in the prior reservation. Ambiguity, however, does not invalidate an easement. Rather, it requires the Court to construe the reservation in favor of the grantee.[118] Under these circumstances, Brown's limiting of the width of the easement likely inured to Stewart's benefit. Thus, the Court has no need to construe the original reservation of an easement over Stewart's parcel.[119]

2. Abandonment of the easement[120]

An express easement may be lost by abandonment "when there is intent to abandon together with manifestation of such intent through acts."[121] "Mere nonuse does

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116 PSB at 5.

117 Although language evidencing an easement *should* generally be plain and direct, *Alpha Builders*, 2004 WL 2694917, at *4, it need not be so to create a valid easement, *Judge v. Rago*, 570 A.2d 253, 257 n.1 (Del. 1990). If a question had arisen as to the width of the easement before Brown specified a width of 50 feet, then a court would have "consider[ed] the surrounding circumstances, such as actual use, to determine the extent of the easement." *Papa v. Prince of Piedmont Soc'y*, 1994 WL 41831, at *2 (Del. Ch. Jan. 27, 1994) (internal citation omitted).

118 *Judge*, 570 A.2d at 257.

119 *See Papa*, 1994 WL 41831, at *2 ("language of easement grant in deed will be given its ordinary import in absence of anything in the situation or surrounding circumstances which indicates a contrary intent") (internal citation omitted).

120 Acierno's arguments concerning Counterclaimants' acquiescence to his blocking of their easement, *see* PSB at 8, sound in estoppel, not abandonment, and therefore will be addressed *infra* at II.C.3 Estoppel.

121 *Smith v. Smith*, 1990 WL 54919, at *4 (Del. Ch. Apr. 17, 1990).

not constitute abandonment."[122] Rather, "[t]here must be unequivocal acts affirming the purpose to abandon and thereby give up ownership."[123]

Acierno has adduced no evidence of unequivocal acts committed by Counterclaimants evidencing an intent to abandon the easement. At most, the evidence shows that the easement has not been used since the mid-1990s.[124] The fact that Counterclaimants did not "develop" the easement or build a road on it[125] is irrelevant. They had an easement to get to and from the Disputed Parcel that they used intermittently to reach the parcel on foot. There is no requirement that the holder of an easement develop it. Indeed, there is no requirement that the holder of an easement even use it, so long as she does not act in a way that manifests an intent to abandon the easement.[126]

3. Estoppel

An express easement also may be lost by estoppel. The only Delaware case that directly addressed the question of extinguishment of an easement by estoppel observed that extinguishment will lie "where the grantee *knowingly* permits actions by the grantor inconsistent with the grantee's rights."[127] Extinguishment by estoppel is thus similar to

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122 *Id.* (internal citation omitted).

123 *Id.* (internal citation omitted); *Papa*, 1994 WL 41831, at *2.

124 Tr. at 257 (R. Goldstein).

125 *See* PSB at 8 (arguing that the easement has never been "opened or maintained").

126 *See Wolfman v. Jablonski*, 99 A.2d 494, 496–97 (Del. Ch. 1953) (holding nonuse of an express easement for "several years" insufficient to constitute intent to abandon and observing that nonuse for twenty years might still be insufficient); *see also Pencader Assocs., Inc. v. Glasgow Trust*, 446 A.2d 1097, 1101 (Del. 1982) (holding that trial court erred as a matter of law in finding abandonment of an easement by necessity by mere nonuse for 170 years).

127 *Pencader Assocs.*, 446 A.2d at 1100 (referring to extinguishment of "a way-of-necessity") (emphasis added). In *Papaioanu v. Comm'rs of Rehoboth*, the Court

the principle of acquiescence, which dictates that "if a party stand[s] by, and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he can not afterwards have relief."[128]

Acierno adduced no evidence that Counterclaimants knew of his actions. Counterclaimants stopped going to the Disputed Parcel by the mid 1990s.[129] Acierno did not begin significant work on and around the Disputed Parcel until in or around 1997.[130] Thus, Counterclaimants could not knowingly have permitted actions by Acierno inconsistent with their right to an easement over his land.

Acierno argues for a more lenient test to find extinguishment by estoppel. Citing to the Restatement of Property Section 505, Acierno asserts that three factors comprise the test: "whether 1) the action [of the party claiming estoppel] was in reasonable reliance upon conduct of the easement owner; 2) the easement owner could have reasonably foreseen such reliance and the resulting action; and 3) the continued existence of the easement would cause unreasonable harm to the servient tenement owner."[131] Even if this were the applicable test, the Court finds that Acierno has failed to demonstrate that he acted in *reasonable* reliance upon conduct of the easement owner.

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analogized to extinguishment of an easement by estoppel in the context of finding the plaintiff equitably estopped from asserting contract rights. 186 A.2d 745, 749 (Del. Ch. 1962).

128 *Papaioanu*, 186 A.2d at 749.

129 Tr. at 257 (R. Goldstein).

130 Tr. at 50–56, 151–52 (Acierno); *compare* DX 16 (1993 aerial photograph showing Disputed Parcel completely covered in trees) *with* DX 14 (1997 aerial photograph showing Disputed Parcel completely cleared, but stormwater management basin not yet built).

131 PSB at 10.

First, the easement owners' only relevant conduct was their failure to use the easement in the late 1990s. The easement owners engaged in no affirmative conduct evidencing an intent to abandon the easement. Second, in the context of this case, Acierno could not reasonably rely on mere inaction as grounds for completely blocking an easement and landlocking the owners' parcel.[132] As such, even under the standard advanced by Acierno, he has not proven that Counterclaimants' easement has been extinguished by estoppel.[133]

4. Laches

Acierno raises laches as an equitable defense. Consequently, he has the burden of proving that Counterclaimants (1) knew or should have known of the invasion of their rights, (2) unreasonably delayed in bringing suit to vindicate them, and (3) that the delay has resulted in injury or prejudice to Acierno.[134]

Counterclaimants had constructive knowledge of the invasion of their easement right at least as early as the filing of this suit in late 2002. They brought their counterclaims in April 2003. Given the circumstances of this case, where all five defendants live out of state and where, owing to family strife, only three have chosen to

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132 *See Ogle v. Phila., Wilmington & Balt. R.R. Co.*, 8 Del. 302, 318 (Del. 1866) ("One possessing a legal right or advantage cannot be divested of it upon a mere presumption, which he would be, were a grant of it inferred from equivocal or inconclusive acts. . . . [I]f [acts are] relied upon to work an estoppel, the acts must be such as could have been understood by those affected by them only as importing a relinquishment of the right.").

133 The Court also finds that the continued existence of the easement, albeit in a modified form, will not cause unreasonable harm to Acierno.

134 Donald J. Wolfe, Jr. & Michael A. Pittenger, Corporate and Commercial Practice in the Delaware Court of Chancery § 11-5[b] (2005) (citing cases).

actively defend this suit, the time they took to file their counterclaims after Acierno filed suit is not unreasonable.[135] Thus, to conclude that laches bars Counterclaimants' enforcement of their easement rights, the Court would have to find that Counterclaimants knew or should have known of Acierno's invasion of their easement at some earlier point in time. Acierno, however, neither presented evidence that Counterclaimants knew of his invasion of their easement before he filed suit, nor argued persuasively why they should have known.

Nevertheless, the Court notes that Counterclaimants did not file their counterclaims or otherwise complain to Acierno until more than four years after the regrading of the land between the Disputed Parcel and Neury's Lane and the completion of the stormwater management basin. During that time, R. Goldstein filed his Petition for Partition of the Disputed Parcel in this Court.[136] He also acknowledged the need "to constantly examine properties that you own[] in case there [is] some change in the circumstances that you [aren't] aware of."[137] With any diligence on their part, Counterclaimants would have discovered that Acierno was invading their easement right.

However, "[i]n the absence of circumstances counseling for inquiry into the record status of the [Counterclaimants'] holdings, it would be fundamentally unfair to hold the [Counterclaimants] subject to an equitable defense for that which [they] did not know and

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135 *See Betley v. Gordy Constr. Co.*, 115 A.2d 475, 478–79 (Del. Ch. 1955) (finding that plaintiffs could not be charged with neglect for failing to know of changes to their property because they lived away from the property and visited it infrequently).

136 DX 37.

137 Tr. at 259.

that which [they] had no reason to inquire into."[138] "In applying laches, a plaintiff is chargeable with such knowledge of a claim as he or she might have obtained upon inquiry, *provided the facts already known to that plaintiff were such as to put the duty of inquiry upon a person of ordinary intelligence*."[139] Just as one with an interest in real property has no obligation to go to the Recorder's Office on a regular basis to assure herself that no documents adverse to her title have been recorded, one with an interest in real property has no obligation to visit the property to assure herself that no one is trespassing on it.[140] This last point is especially true here where the land around the Disputed Parcel has undergone intense development in recent years.[141]

The Court concludes that the Counterclaimants neither knew of Acierno's invasion of their easement right nor had a legal obligation to know. Therefore, laches will not operate to bar their claim. The Court is mindful, however, of the significant expense and regulatory hurdles involved in building the stormwater management basin in particular and in developing the CTC Property in general. Accordingly, the Court will fashion relief with an eye on the current realities of the property.[142]

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138 *Grand Lodge of Del., I.O.O.F. v. Odd Fellows Cemetery of Milford, Inc.*, 2002 WL 31716359, at *7 n.24 (Del. Ch. Nov. 18, 2002).

139 *Id.* at *7.

140 *See id.* at *7 n.24.

141 *Acierno*, 2004 WL 1488673, at *3.

142 *See Betley*, 115 A.2d at 479 (abridging plaintiffs' relief from defendant's obstruction of their roadway easement because plaintiffs' delay in bringing suit after they learned of the obstruction caused equities to accrue to the defendant in the intervening time).

5. Relief

Where, as here, the servient landowner (Acierno) has blocked the dominant landowners' (Counterclaimants) express easement, the Court may either order restoration of the easement or relocate it.[143] Restoration of the express easement according to its original terms is not practicable in this case because it likely would require the destruction or modification of the stormwater management basin, regrading of the land between the Disputed Parcel and Neury's Lane, regulatory approval and significant expense. Based on the availability of alternative relief and the equities created by Counterclaimants' questionable diligence, the Court will not order restoration of the easement according to its terms, but rather will craft substitute relief.

Acierno appears to argue that the Court should not grant Counterclaimants any injunctive relief with respect to their access easement because they established, at most, a "road to nowhere."[144] Neury's Lane may be difficult or even impossible to traverse, as Acierno represents,[145] but it is not necessary for the Court to resolve whether Neury's Lane is passable or whether it is a public road to resolve the case *sub judice*. The Court has found both that Counterclaimants possess an access easement across Acierno's land to Neury's Lane and that Acierno has blocked that easement. No further finding is

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143 *Id.* (finding plaintiffs' express easement blocked but declining to order removal of the offending structure and thus ordering substitute relief because "plaintiffs' rights are sufficiently recognized under the circumstances by granting them reasonable access roads from their parcels of land to the paved portions of the Boulevard").

144 POB at 14.

145 *Id.* at 15; Tr. at 186 (Acierno) (testifying that junk is strewn around the northern terminus of Neury's Lane).

required to entitle Counterclaimants to restoration of their easement across Acierno's land to Neury's Lane or relocation of the easement.

If the Court were to order restoration of the easement, Counterclaimants would have an unobstructed easement to the northern terminus of Neury's Lane. It is not clear from the record whether or not Counterclaimants would have any significant difficulty in exercising their ingress and egress rights from that point to Brown's Lane or a comparable public road. To the extent they did, the record suggests that Counterclaimants could pursue various alternatives, such as cleaning up the northern terminus or bringing another proceeding to clarify the nature of Neury's Lane as a public or private road, and, in either event, their rights with respect to it. Further, as a matter of equity, Acierno will not be heard to complain of the impassibility of Neury's Lane when it is he who has made even getting to Neury's Lane impossible by interfering with Counterclaimants' easement.[146]

Based on the evidence presented, the Court finds that the only feasible route to and from the Disputed Parcel, on the one hand, and a public road, on the other, is over Acierno's CTC Property. Delmarva Power & Light owns the land to the northwest of the Disputed Parcel.[147] Federally protected wetlands surround the Disputed Parcel to the north, east and south.[148] The Court thus declares that the owners of the Disputed Parcel

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146 The unclean hands analysis *infra* at text accompanying nn.153–54 & 156 is equally applicable here.

147 DX 8; DX 11. Tr. at 33 (Acierno) (authenticating DX 11).

148 DX 11.

shall have a right of egress and ingress over the proposed relief route connector, as identified by Acierno in his 2004 submission to New Castle County.[149]

Counterclaimants shall have the right to use this substitute easement in a manner commensurate in scope with the usage on the proximate portions of Acierno's CTC Property. In other words, Counterclaimants shall have a right to reasonable commercial usage of the easement, consistent with the zoning of the Disputed Parcel and traffic on the CTC Property. Acierno argues that the easement is limited by the doctrine of reasonable use and that what is reasonable is determined by reference to when the easement was granted.[150] Thus, Acierno contends that because the Disputed Parcel was zoned residential when Jacob Goldstein acquired it and the accompanying easement in 1958, Counterclaimants' use of the easement today is limited to reasonable use for a parcel zoned residential.[151] Assuming without deciding that Acierno is correct as a matter of law, the Court cannot ignore the fact that Acierno caused the Disputed Parcel's zoning to be changed from residential to commercial even though he never owned the Disputed Parcel.[152] The doctrine of unclean hands therefore bars Acierno from complaining that Counterclaimants prospective use of their easement might be inconsistent with the original zoning of their land.

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149 *Id.* To the extent that the relief route connector is not paved all the way to the Disputed Parcel, Tr. at 36–37, the Counterclaimants shall have the right to cross Acierno's land along the line marked S 78°47'18" E, 150.50' on DX 11 to access the paved portion of the relief route connector.

150 POB at 16.

151 *Id.*

152 Tr. at 172–73 (Acierno).

"The unclean hands doctrine is aimed at providing courts of equity with a shield from the potentially entangling misdeeds of the litigants in any given case. In effect, the Court refuses to consider requests for equitable relief in circumstances where the litigant's own acts offend the very sense of equity to which he appeals."[153] Acierno admitted to having the zoning of the Disputed Parcel changed.[154] To achieve this result, Acierno apparently deceived certain administrative personnel of New Castle County. Even if he did not intend to do so, Acierno still cannot escape the fact that he now wishes to avoid something—commercial use of the easement—that he himself necessitated. If the Disputed Parcel were still zoned residential, Counterclaimants would have no need for commercial use of the easement. But, because of Acierno's rezoning of the Disputed Parcel, Counterclaimants now need a commercial easement to use their land effectively.[155] With respect to what is a reasonable use of the easement, Acierno thus comes to this Court with unclean hands. As a result, "the doors of the court of equity will be shut against him" because, in such cases, "the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy."[156] Counterclaimants may make reasonable commercial use of the relief route connector, commensurate with the use on the neighboring CTC Property.

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153 *In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *12 (Del. Ch. Aug. 18, 2005) (internal citations omitted).

154 Tr. at 172–73.

155 *See* New Castle County, Del., Unified Development Code ch. 30, art. 3 (prohibiting the vast majority of residential uses of land zoned commercial).

156 *Silver Leaf*, 2005 WL 2045641, at *11.

6. The Court's Jurisdiction

At the end of his Supplemental Brief in Opposition to Certain Defendants' Claims Regarding Alleged Driveway Easement, Acierno again challenged this Court's jurisdiction.[157] The Court dealt with this issue *at length* in the 2004 Opinion.[158] The currently pending claims for attorneys' fees arise out of actions in this Court, including what occurred during the trial of this matter. Thus, the interests of judicial economy and efficiency weigh heavily in favor of deciding the claims for attorneys' fees, as well as Counterclaimants' remaining legal claims.[159] For these reasons and those stated in the 2004 Opinion, the Court reaffirms its subject matter jurisdiction over this dispute.

D. Acierno's Claim for Attorneys' Fees[160]

Acierno's claim for attorneys' fees for having to defend against Counterclaimants' claims for trespass and conversion borders on frivolous. It is undisputed that as of 1993 the Disputed Parcel was covered in timber.[161] The parties stipulated that Acierno cleared the Disputed Parcel.[162] Acierno therefore admitted to committing trespass to timber in contravention of 25 *Del. C.* § 1401. Counterclaimants' claim for trespass to timber was

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157 PSB at 12–13.

158 *See Acierno*, 2004 WL 1488673, at *4–6 (exercising jurisdiction over counterclaims pursuant to both the clean-up doctrine and Court of Chancery Rule 13).

159 *See id.* at *5 (reciting factors Court considers in deciding whether to retain ancillary legal claims); *see also Giordana v. Marta*, 1999 WL 350493, at *2 (Del. Ch. Apr. 28, 1999) (exercising jurisdiction over legal counterclaims even after original equitable claims were dismissed); *Wolfman*, 99 A.2d at 497 (exercising jurisdiction to decide title to real estate because the issue had been fully tried).

160 For the legal standard for an award of attorneys' fees, *see supra* II.A.1. Legal Standard.

161 *See* DX 58 (1993 aerial photograph showing Disputed Parcel covered in trees).

162 Pretrial Stipulation ¶ II.5.

not brought in bad faith, but to vindicate a legally protected right and recover damages therefor.[163] Although the Court ultimately concluded that the claim was time barred, nothing in the record suggests that Counterclaimants did not have a good faith basis for arguing that the trespass was a continuing wrong or that the limitations period had been tolled.[164]

Similarly, that Counterclaimants ultimately failed to prove damages does not evidence bad faith. Acierno did not abandon his adverse possession claim until two weeks before trial. Until shortly before that time, this litigation involved many other issues that reasonably could have taken precedence over Counterclaimants' damages claim for trespass to timber. Thus, the Court concludes that Counterclaimants' failure to develop their damages case in a more timely manner was not the product of bad faith.[165]

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163 Counterclaimants' counterclaim for conversion relates to the same wrong, *i.e.*, the clearing of the timber on the Disputed Parcel. The counterclaim thus provided Counterclaimants an alternative ground with which to vindicate a legally protected right and recover damages therefor. That Counterclaimants ultimately elected to pursue damages under a different theory does not evidence bad faith; rather, it reflects litigation strategy.

164 *Cf.* Ct. Ch. R. 11(b) ("By presenting to the Court . . . a pleading . . . an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law . . . .").

165 Acierno's allegations of resultant harm are overblown. He argues that he "was caused to undertake substantial written and deposition discovery in an effort to determine the type and magnitude of damages that [Counterclaimants] were requesting." POB at 12. Those tasks, however, hardly support a finding of undue burden or prejudice to Acierno. Such discovery is routine and not especially time-consuming. Moreover, the effort was far from wasted: Counterclaimants' failure to identify their damages witness and proofs sooner in response to Acierno's discovery requests contributed to the Court's decision to bar such evidence.

Acierno's claim for attorneys' fees for having to defend Counterclaimants' claims regarding their access easement is similarly without merit. Counterclaimants have the right to access their parcel, Acierno has interfered with that right and the Counterclaimants sought to vindicate it. The Court cannot find that Counterclaimants acted in bad faith in pursuing their meritorious claim for access to the Disputed Parcel.

Finally, the Court denies Acierno's claim for attorneys' fees for having to defend Counterclaimants' claim for their own attorneys' fees based on its finding that Acierno acted in bad faith in the prosecution of his adverse possession claim.

III. CONCLUSION

For the reasons stated, the Court hereby quiets title to the Disputed Parcel in Counterclaimants and Barbara and Lawrence Goldstein. To the extent he has not already done so, Acierno is ordered to vacate the Disputed Parcel and is hereby enjoined from trespassing on it.

The Court has determined that Counterclaimants are entitled to an award of attorneys' fees against Acierno in the amount of 25% of the fees incurred in defending against Acierno's claim for adverse possession until the time that Acierno dismissed that claim. In all other respects, Counterclaimants' request for attorneys' fees is denied. To enable the Court to quantify the 25% award, Counterclaimants' counsel shall submit appropriate documentation as to their attorneys' fees in defending against Acierno's claim of adverse possession within 20 days of the date of this Memorandum Opinion. Within 20 days thereafter, Acierno shall submit any opposition to the request for attorneys' fees.

Counterclaimants' claims for trespass to chattels, trespass to timber and conversion are dismissed with prejudice.

The Court hereby grants Counterclaimants and Barbara and Lawrence Goldstein substitute access to the Disputed Parcel, as set forth herein.

Acierno's claim for attorneys' fees is dismissed with prejudice.

IT IS SO ORDERED.