IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

C.E. RUPERT SMITH, III,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 2175-VCS
	)	
THE RESERVES DEVELOPMENT CORPORATION, a Delaware corporation,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: July 31, 2008
Date Decided: August 12, 2008

Mark F. Dunkle, Esquire, PARKOWSKI, GUERKE & SWAYZE, P.A., Wilmington, Delaware, *Attorney for Plaintiff.*

Richard P. Beck, Esquire, Edward M. McNally, Esquire, MORRIS JAMES LLP, Wilmington, Delaware, *Attorneys for Defendant.*

STRINE, Vice Chancellor.

I. Introduction

In this case, two formerly friendly Sussex County land developers battle over an approximately 100 foot stretch of a 15 foot wide road. That "Disputed Road" is the last 100 feet of an old farm road that ran across the corner of the property now owned by plaintiff C.E. Rupert Smith, III and enabled access to Woodland Avenue from property now owned by defendant the Reserves Development Corporation (the "Reserves"). The parties' dispute can be distilled to three key issues: (1) Did a 1974 deed that originally granted an interest in the Disputed Road to the owners of the Reserves property grant a fee simple interest in the Disputed Road?; (2) If the interest granted in the Disputed Road was an easement rather than a fee simple interest, has that easement been abandoned?; and (3) If the easement has not been abandoned, could Smith unilaterally relocate that easement from its historic location to another location by placing it in a different location on a recorded subdivision plan and constructing a driveway near the original location of the easement?

That these questions have to be answered at all suggests the stubbornness of and mutual antipathy harbored by the parties. This is a situation that cool heads could have resolved. But, answer them I must. After wading through the parties' oft-confusing submissions, I answer the questions as follows: (1) no; (2) no; and (3) no.

II. Factual Background

Smith built a driveway into his development, Smithfield, that covers a portion of the Disputed Road. But the driveway, named "Smithfield Court," does not encompass the entire Disputed Road. The remainder of the Disputed Road is covered by a curb,

elevated land, and a stop sign that were put in place by Smith at a time when he knew that the Reserves desired to use the Disputed Road in its historic location. In attempting to understand the dispute, a picture is helpful:

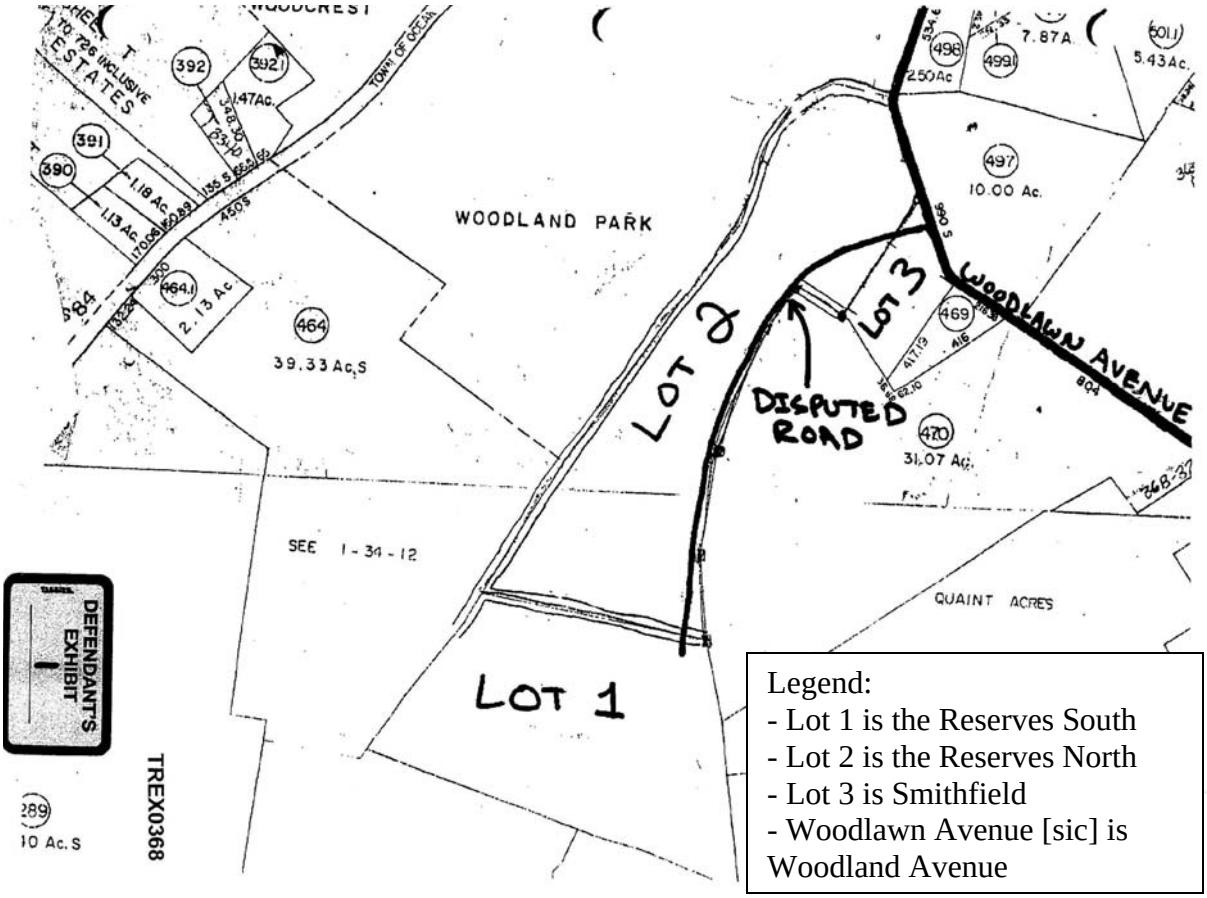
The Reserves desires that the Disputed Road, depicted in the picture by two orange lines (shown with an SUV in their midst), be paved over. The Reserves wants to use the Disputed Road as a secondary entrance to its property, which is being developed into an upscale residential community named the Reserves Resort, Spa and Country Club (the "Resort"). The Reserves desires to use the Disputed Road as an entrance to the Resort for construction vehicles because it contends that heavy vehicles cannot use the primary entrance to the Resort without damaging that entrance.

Although a rational person who looks at the picture would question why the Reserves' construction trucks cannot simply use the driveway in the current location,

there is a history of disputes over the Disputed Road and use of that Road by construction vehicles stretching back to before Smith owned Smithfield. But on top of the historical feuding there is a new, although still solvable, practical problem. As is clear from the picture, the Disputed Road appears to lead directly into the front room of a newly built house. The history behind that rather odd reality was never fully explained, but for present purposes all that is important is that the Disputed Road will take an S-curve around the house. The Reserves wants to use the Disputed Road in its historic location so as to give the construction trucks a straight entrance off Woodland Avenue rather than creating a slalom of a turn from Smithfield Court and the S-curve around the house.

A. A Description Of The Land

The Disputed Road crosses what was once three parcels of land in Baltimore Hundred, Sussex County, Delaware, that were owned by a common grantor, Sidney Bennett. The parcels were used as farmland before Smith and the Reserves began developing the parcels into the aforementioned residential developments. For ease of reference, I will refer to the three parcels as "Reserves South," "Reserves North," and "Smithfield," although the developments themselves have only been planned and developed in the last decade. The relevant parcels are depicted in a diagram submitted at trial and reproduced below:



Historically, the Disputed Road began at Woodland Avenue and traveled over Smithfield for a short distance of approximately 100 feet until it crossed into Reserves North. From there, the Disputed Road traveled the entire length of Reserves North and into Reserves South. The portion of the Disputed Road in dispute lies within the Town of Ocean View, Delaware, although some of the land owned by the developers is in unincorporated Sussex County. By the late 1990s, the portion of the Disputed Road at issue was 10 feet wide, although there is no way of knowing how wide it was originally.

B. The Relevant Land Conveyances

In 1974, Sidney Bennett sold Reserves South to C.F.L. Enterprises, Inc. ("CFL"), a Delaware corporation that was developing a nearby residential community. At that

time, the sole access to Reserves South from Woodland Avenue was by the Disputed Road, which extended several thousand feet across Reserves North and Smithfield, both of which Bennett retained. The particular language of the June 18, 1974 deed that transferred Reserves South to CFL is as follows:

> WITNESSETH, That Sidney A. Bennett and Ruth M. Bennett, his wife, . . . hereby grant(s), bargain(s), sell(s), and convey(s) [to CFL] in fee simple, all his, her, its or their right, title and interest in the lands described as follows:
>
> ALL THAT CERTAIN tract, piece and parcel of land [a metes and bounds description of Reserves South follows].
>
> TOGETHER WITH an existing 15 foot road across other lands of the Grantors for ingress and egress to the property from Woodland Avenue.[1]

Nothing further is mentioned of the Disputed Road in that deed. Although Sidney Bennett has since passed away, Loren E. Evans, Sr., one of three founders of CFL — and whose first name forms the "L" in CFL — and a shareholder and officer of CFL both at that time and today, testified by affidavit about the 1974 sale of Reserves South.[2] According to Evans, "[w]hen we purchased [Reserves South], we did not believe we were also purchasing the farm road that ran across the rest of Sidney Bennett's property to Woodland Avenue."[3] Evans "ha[s] never believed that C.F.L. Enterprises, Inc. owned the farm road."[4]

In connection with a planned conveyance of a portion of Smithfield to his son, Mark Bennett, Sidney Bennett commissioned a survey of Reserves North and Smithfield

[1] TREX0372-73.
[2] TREX0326.
[3] TREX0327.
[4] *Id.*

in 1980. Although that survey showed Sidney Bennett's land and the nearby land conveyed to CFL in 1974, it did not show a fee interest in the Disputed Road bisecting Sidney Bennett's land, or locate the Disputed Road otherwise.

When Sidney Bennett died, the land constituting Reserves North and Smithfield passed to his four children (the "Bennett Heirs"). On July 31, 1998, Abraham Paul Korotki, the president and sole shareholder of the Reserves, bought Reserves North from the Bennett Heirs. In that deed, the Bennett Heirs conveyed Reserves North "[s]ubject to a right of way contained in deed from Sidney A. Bennett and Ruth M. Bennett, his wife, to [CFL] dated June 18, 1974, and of record . . . ."[5] On March 16, 2000, Mark Bennett purchased Smithfield from the Bennett Heirs.

Having decided not to develop Reserves South, CFL sold that parcel of land along with two adjoining parcels to Korotki on December 21, 2000. Smith was involved in that transaction as Korotki's real estate broker. That deed contained a metes and bounds description of Reserves South "being the same land conveyed unto [CFL] by a Deed of Sidney A. Bennett and Ruth M. Bennett dated June 18, 1974 and filed for record . . . ."[6] The metes and bounds description of Reserves South contained in that deed was based off a boundary survey prepared for CFL in 1999. CFL had that survey approved by a Sussex County Planning and Zoning official and recorded in the Office of the Recorder of Deeds

[5] TREX0377 (capitalization altered); *cf.* BLACK'S LAW DICTIONARY 1351 (8th ed. 2004) (defining a right of way as "[t]he right to pass through property owned by another" and as "[t]he strip of land subject to a nonowner's right to pass through").
[6] TREX0382.

on December 21, 1999.[7] The 1999 CFL Survey did not show a road or strip of land into Reserves South from Reserves North.

On August 13, 2001, Korotki conveyed Reserves North and Reserves South to the Reserves, a corporation in which he was the sole shareholder. Around that time, Korotki began obtaining the necessary approvals for the Resort. Because the Resort was located partly in unincorporated Sussex County, and partly in the Town of Ocean View it needed to be approved by both authorities. Korotki caused various subdivision plans to be prepared and obtained their approval. Although Korotki intended to use the Disputed Road as a construction and maintenance entrance, the subdivision plans he recorded for the Resort did not show any construction road or land interest crossing into Smithfield near the historical location of the Disputed Road.[8] Similarly, the Declaration of Restrictions recorded with the subdivision plan did not identify any easement or other right to use the Disputed Road retained by the Reserves, but referenced previous easements in the chain of title.[9] In fact, the Disputed Road entered the Resort from Smithfield over a tract of land that was subdivided into a single family residence known as Lot 6. Lot 6, of course, contains the previously discussed house around which the Disputed Road will take an S-curve.

The Reserves soon began to develop the Resort in accordance with the plans and directed contractors to use the Disputed Road for shuttling construction materials into the Resort. As the main entrance to the subdivision, the Reserves constructed a driveway

[7] TREX0846.
[8] TREX0071; TREX0155.
[9] TREX0111-0147.

using stamped concrete and glass asphalt. Korotki intended to keep using the Disputed Road for construction and maintenance vehicles because heavy construction vehicles would damage the materials used to construct the main entrance to the Resort.

C. The Reserves Disputes The Disputed Road's Location With A Previous Landowner

By 2002, Mark Bennett, Sidney Bennett's son and the then-owner of Smithfield, grew tired of the Disputed Road's location across his land. The Disputed Road traveled over a modest 100 foot distance over Smithfield forming a small triangle of land defined by the Disputed Road, Woodland Avenue, and the boundary with Reserves North. That land was too small for farming or other practical use. By this time, the main entrance into the Resort from Woodland Avenue had been built only a few hundred yards away and ran roughly parallel to the Disputed Road. Because Reserves North and Reserves South were owned by the same corporation, Bennett saw little use in keeping the Disputed Road in its historical location. As a result, Bennett tilled up the compacted dirt base of the Disputed Road and planted crops where it was once located. When confronted by Korotki, Bennett offered to relocate the Disputed Road to the common boundary line.

In May 2002, the Reserves filed suit against Bennett in the Court of Chancery, seeking a preliminary injunction requiring Bennett to return the Disputed Road to its previous location and condition. Eventually, the parties settled that action. As part of the settlement, the action was dismissed without prejudice and the Disputed Road was rebuilt over Smithfield using a 10 foot wide stone base of "crusher run." The location and width of the rebuilt Disputed Road was based on a 1998 survey by LandTech Engineers and

Surveyors. After the road was rebuilt, contractors for the Reserves resumed regular use of the Disputed Road.

On May 20, 2004, the Reserves sold Lot 6, the now-subdivided lot in the Resort where the Disputed Road crosses the boundary into Smithfield to Crystal Properties, L.L.C. ("Crystal"). The deed that did so makes no express reservation of an easement in the Disputed Road.[10] It did, however, subject Lot 6's owners to all easements and other restrictions of record in the chain of title.[11]

D. Smith Purchases Smithfield And Begins To Plan And Develop It

Shortly before the Reserves conveyed Lot 6, on May 14, 2004, Smith purchased Smithfield from Mark Bennett. At that time, Smith was aware of both the existence of the Disputed Road and that Korotki and Bennett had been involved in litigation in the Court of Chancery over the Disputed Road. Before purchasing Smithfield, Smith hired Simpler Surveyors to survey the location of the 10 foot stone road to make certain that its location matched the location of the road before Bennett had it tilled under.

Smith soon began planning his own residential development named Smithfield, using Simpler Surveys to prepare the subdivision plan. In recognition of the Disputed Road, the Smithfield plan placed Smithfield Court, a 50 foot wide driveway, along the boundary between Smithfield and the Resort that would eventually be dedicated to public use. The Smithfield plan depicted that the Disputed Road's location across Smithfield was completely within Smithfield Court.

[10] TREX0455.
[11] TREX0456.

Smith proceeded to obtain the requisite approvals before construction on Smithfield could begin. He submitted the proposed plan to the Ocean View Planning and Zoning Commission and a public hearing on the proposed Smithfield plan was scheduled for January 19, 2006. Despite knowing of the dispute over the location of the Disputed Road that had resulted in the 2002 litigation between Mark Bennett and the Reserves, Smith did not attempt to directly contact Korotki or any representative of the Reserves regarding Smithfield Court or the Smithfield plan. When the Town of Ocean View sent notices for the public hearing, Korotki was out of town and no representative of the Reserves attended the hearing on the proposed site plan. Ultimately, that plan was approved.

After obtaining a favorable vote from the Town of Ocean View, Smith began to develop Smithfield. By this time, use of the Disputed Road over Smithfield by the Reserves' site contractors had substantially widened the Disputed Road. Construction vehicles crossed Smithfield in a two-way traffic pattern and vehicles were parked on the Disputed Road. The 10 foot crusher run road flared out at Woodland Avenue to as much as 80 feet.[12] At the boundary with the Resort, the Disputed Road widened to over 30 feet and shifted southwest from its historical location entering the Resort near the middle of Lot 6 on the Resort Subdivision Plan to the border between Lot 6 and Lot 7.[13]

Near the Disputed Road, Smith erected silt fencing, installed survey stakes, and parked storage trailers in a way that impeded traffic using the Disputed Road. In

[12] TREX0492-0522; Tr. at 12-15.
[13] TREX0085.

particular, the placement of the storage trailers forced the Reserves' contractors to cross into the Resort closer to the historic location of the Disputed Road near the middle of Lot 6. The Reserves' site contractor removed the fencing and stakes near the Disputed Road, and placed bales of hay along the edges of where they believed the Disputed Road to be located, thereby blocking Smith's use of what would become Smithfield Court. Smith removed the hay bales and removed stone from the road to return it to a 10 foot width, despite the 15 foot width described in the 1974 deed.

After the dispute erupted between Smith and the Reserves' contractors over the location of the Disputed Road, the Reserves obtained a copy of the recorded Smithfield plan and discovered for the first time that the Smithfield plan depicted the Disputed Road's location closer to the Resort than its historic location. As a result, the true location of the Disputed Road as it connects to Woodland Avenue is beyond the width of Smithfield Court. The Reserves sought an appeal of the Smithfield plan and at a hearing held on April 20, 2006, the Ocean View Board of Adjustment refused to render a decision on jurisdictional grounds. On May 22, 2006, Smith filed the complaint in this action seeking a declaration that the Reserves does not have a fee simple interest in the Disputed Road, that the easement it obtained has since been abandoned, and damages for trespass and attorneys' fees. Around this time, the Reserves' primary contractor filed for bankruptcy and use of the Disputed Road ceased.

Four days after filing the complaint, Smith obtained a survey from Merestone Consultants, Inc. (the "Merestone Survey")[14] that confirmed that the Smithfield plan incorrectly depicted the Disputed Road as being inside Smithfield Court.[15] In part because Smithfield Court and the Disputed Road each connect to Woodland Avenue at a different angle, the Merestone Survey showed that a planned curve extended into the location of the Disputed Road. Stated differently, the centerline of the Disputed Road in the 2003 Simpler Survey, as shown on the Merestone Survey is approximately 10 feet beyond the tip of the curve. After he received the Merestone Survey, Smith installed a curb, a stop sign, and a landscaping berm that is 4 feet above Woodland Avenue,[16] all of which block travel over the Disputed Road's location. A street lamp was also installed within inches of that location.

On January 3, 2008 the Delaware Superior Court ruled in litigation between the Reserves and Crystal that Crystal had purchased Lot 6 subject to the Disputed Road, which the Reserves had primarily characterized as an easement in that action. The court did not adjudicate the precise location and uses of the Disputed Road across Lot 6.[17] On January 28, 2008, a motion for reargument in that case was denied.

[14] TREX 0344 (Merestone Survey).
[15] Tr. at 31.
[16] That landscaping berm was added after the picture included earlier in the opinion was taken.
[17] TREX0351.

III. Legal Analysis

A. The 1974 Deed Created An Express Easement In The Disputed Road

The first major issue to be decided is whether (as the Reserves contends) the 1974 deed between Sidney Bennett and CFL created a fee simple interest in the Disputed Road in favor of CFL and its successors or merely an easement (as Smith argues). I begin with an analysis of that deed based upon well-settled principles of deed construction. Unless a contrary intention appears within the deed itself, a deed of the statutory form is presumed to pass fee simple title to the grantee.[18] Where the deed language itself contains an ambiguity, it must be read in the light of the intent of the parties as determined by the facts and circumstances surrounding the transaction.[19] If such an ambiguity remains after an inquiry into the intent of the parties to a deed it must be resolved in favor of the grantee.[20]

In relevant part, the 1974 deed provides as follows:

> WITNESSETH, That Sidney A. Bennett and Ruth M. Bennett, his wife, . . . hereby grant(s), bargain(s), sell(s), and convey(s) [to CFL] in fee simple, all his, her, its or their right, title and interest in the lands described as follows:
>
> ALL THAT CERTAIN tract, piece and parcel of land [a metes and bounds description of Reserves South follows].
>
> TOGETHER WITH an existing 15 foot road across other lands of the Grantors for ingress and egress to the property from Woodland Avenue.[21]

---

[18] 25 *Del. C.* § 121(b).
[19] *Rohner v. Niemann*, 380 A.2d 549, 552 (Del. 1977).
[20] *Maciey v. Woods*, 154 A.2d 901, 904 (Del. 1959) ("It is true that ambiguities in a grant are to be resolved in favor of the grantees, but we think this rule of construction must yield to the paramount rule that the intention of the parties is to be given effect if it can be ascertained and if, as ascertained, it does not contravene the clear meaning of the words of the grant.") (citing 16 *Am. Jur. Deeds* § 160); *see also Rohner*, 380 A.2d at 552 (citing *Maciey*, 154 A.2d at 904).
[21] TREX0372-73.

In my view, this language, when read in the context it was used, is more consistent with the grant of an easement than of fee simple, but not unambiguously so. At first glance the language in the first clause of the deed that all "right, title, and interest in the lands described as follows" is "grant[ed], bargain[ed], s[old], and convey[ed] . . . in fee simple,"[22] and facially this language does suggest that a fee interest, rather than an easement was conveyed in the Disputed Road. But that is about all that supports the reading of the deed as a grant of a fee simple interest. The rest of the language, when considered in context, is far more consistent with the grant of an easement. I now explain why.

For starters, where Reserves South is described in considerable detail by metes and bounds, the Disputed Road in the next paragraph is only described as "an existing 15 foot road across other lands of the Grantors . . . to the property from Woodland Avenue."[23] The lack of a specific description of the Disputed Road supports the conclusion that an easement, rather than fee interest, was granted.[24] Next, the

---

[22] TREX0372-73.

[23] *See State ex. Rel. Dep't of Transp. v. Penn Cent. Corp.*, 445 A.2d 939, 949 (Del. Super. 1982) (finding that when a deed contained two descriptions of land, the first referring to "all that certain lot, piece or parcel of land" described by metes and bounds, and the second referring to a "right of way" that was "'66 feet wide for the entire length of land of said Honorable Edward Wootten' without any metes and bounds description . . . 'now occupied by the said . . . Railroad,'" comparing the less detailed description of the "right of way" to the metes and bounds description of the parcel of land was "helpful" in deciding that the second interest was in fact an easement); *see also* RESTATEMENT OF PROPERTY § 471 (stating that "the degree of precision with which the conveyance describes that part of the conveyor's land affected by it" is persuasive evidence in determining if an ambiguous interest is a fee or an easement).

[24] *See* RESTATEMENT OF PROPERTY § 471 (stating that "the extent to which the conveyance limits the uses authorized by it" is persuasive evidence in determining if an ambiguous interest is a fee or an easement).

"TOGETHER WITH" clause states that the use of the road is "for ingress and egress." The grant of a fee simple interest gives the grantee the right to use land for *any purpose* unless another conflicting property right exists restricting a particular use. Although it is, I suppose, barely plausible to argue that the specific and limited term "road" was used to identify the land to be conveyed in fee simple, the further clarification that the "road" was "for ingress and egress" strongly suggests that only an easement was intended.

Likewise, the commercial context supports reading the deed to convey an easement rather than a fee. For what use other than travel did CFL intend within the narrow confines of the 15 foot road to Woodland Avenue? Although it is certainly possible to grant a fee interest in a road, that is not the common practice. Moreover, because the road crossed other lands owned by Sidney Bennett, relinquishing a fee interest in the road would have bisected Bennett's property and left him unable to use that section of the Disputed Road to access his land from Woodland Avenue or even to cross the road to get to the other side. Bennett would have engaged in an act of trespass each time he traveled from one side of the road to the other without travelling to Woodland Avenue and around. Even worse, with a fee interest, CFL could have lawfully built a ten foot high fence from its land all the way to Woodland Avenue. The Reserves argues that this real-world interpretive point is irrelevant because Bennett's use of the road created a quasi-easement that became an easement by implication at the time the fee in the road was conveyed.[25] But the Reserves' counterpoint is strained. If the deed granted a fee

[25] *Cf. Judge v. Rago*, 570 A.2d 253, 258 (Del. 1990) (describing that when a grantor has traditionally crossed a portion of land that he owns, but later conveys, to reach land that he

interest in the road, why didn't Sidney Bennett reserve an express easement for travelling over and across the road? The Reserves does not explain why construing an ambiguous deed to convey a fee interest in a road with an implied easement over and across the road is a more plausible interpretation of the grantor's intent than reading the deed to convey only an easement.[26]

The Reserves leans heavily on case law stating that "in the absence of an indication of a contrary intention, a conveyance of a strip, piece or parcel of land is to be construed as passing a title in fee simple, and that a statement of the contemplated use thereof is not indicative of such a contrary intention."[27] In particular, the court in *Biggs v. Wolfe* held that when a 30 foot wide "strip of land for the purpose of a road" was conveyed the deed had granted a fee simple interest in the strip of land.[28] That case is inapplicable here because the deed it interpreted purported to convey in fee a strip of land that was otherwise described in the deed by metes and bounds with additional language describing its intended purpose as a road, but not described as a road itself. In other words, the granted fee could be located without observing in person the course of an existing road. Every case cited in *Biggs* to support the conclusion that a fee simple interest passed to the grantee involved a statement of intended purpose that accompanied

---

retains after the grant, an easement by implication to cross the granted land as the grantor had before may arise if the grantee is put on notice that grantor had been crossing the land as if he had had an actual easement before the grant).

[26] *See id.* at 258 n.3 ("The existence of a quasi-easement would also provide evidence that an ambiguous term in a conveyance was intended to create an express easement.").

[27] *Biggs v. Wolfe*, 178 A.2d 482, 483 (Del. Ch. 1962).

[28] *Id.*

the clear conveyance of a carefully described strip of land.[29] Well-reasoned decisions from other jurisdictions establish, by contrast, that an attempt to convey a "road" rather than a strip of land "for the purpose of a road" is generally presumed to pass an easement.[30] Although the deed is ambiguous, the best reading of the deed's language is that it conveys an easement in the road.[31] The indication "contrary" to a fee simple grant is in the deed itself, read contextually by its failure to describe the metes and bounds of a "road" and its indication that the grant was for the limited purpose of "ingress and egress."[32]

Looking to the facts and circumstances surrounding the 1974 conveyance and the course of conduct of the parties to the deed further confirms that it was Sidney Bennett's

---

[29] *See Rowell v. Gulf, M. & O.R. Co.*, 28 So.2d 209, 210 (Ala. 1946); *Vail v. Long Island R.R. Co.*, 12 N.E. 607, 608 (N.Y. 1887); *Robb v. Atl. Coast Line R.R. Co.*, 117 So.2d 534 (Fla. App. 1960); *Midland Valley R.R. Co. v. Arrow Indus. Mfg. Co.*, 297 P.2d 410, 411 (Okla. 1956); *Cooper v. Selig*, 191 P. 983, 984 (Cal. App. 1920).

[30] *E.g.*, *Homan v. Hutchison*, 817 S.W.2d 944, 949 (Mo. Ct. App. 1991) (explaining that where "[t]he language 'strip of land' is indicative of the conveyance of a fee simple absolute . . . there is a strong, almost conclusive presumption that the words 'road' or 'roadway' seldom have been defined to mean land, but instead indicate a right of passage") (internal citations omitted)); A.M. Swarthout, *Deed as Conveying Fee or Easement*, 136 A.L.R. 379, 391-92 (1942) ("It appears to be well established that a deed purporting to convey a 'road,' 'roadway,' 'alley,' 'street,' 'highway,' or 'way,' will, in the absence of some indicia of a contrary intention of the parties, be construed as passing an easement only and not a title in fee."). This result is consistent with our public policy disfavoring "narrow strips of land distinct in ownership." *Smith v. Smith*, 622 A.2d 642, 648 (Del. 1993) (adopting the majority view that the conveyance of land abutting a railroad right of way passes title to the middle of the right of way if the grantor owns the land on the other side as a means of reducing "vexatious litigation as a matter of policy" because "the existence of narrow strips of land distinct in ownership from the adjoining territory would create a prolific source of litigation") (quoting *Cuneo v. Champlin Refining Co.*, 62 P.2d 82 (Okla. 1936)).

[31] For this reason, construing the deed to convey an easement interest in the road does not upset the statutory presumption that deeds following the statutory form provided in 25 *Del. C.* § 121(a) convey a fee simple interest. Not only does a "contrary intention appear[]" within the deed itself, but the interest in the road is "otherwise restricted or limited," to ingress and egress. 25 *Del. C.* § 121(b).

[32] *See* 25 *Del. C.* § 121(b).

intent to convey and CFL's intent to receive an easement.[33] In 1974, the road was made of dirt compacted from use by farm equipment and it did not follow a straight line across Bennett's other property. This meant that the road was subject to changing positions over time and this lack of a permanent position is therefore more consistent with an easement.

Sidney Bennett's actions after the 1974 conveyance are also more consistent with an easement, which is probative of his intent in the 1974 deed. When he had a survey of his land prepared and recorded in 1980, that survey did not show a strip of land bisecting his lands as would be expected if he believed CFL owned a ribbon of land across his property.

Likewise, the conduct of the grantee, CFL, is more consistent with an easement interest in the road. The 1999 CFL Boundary Survey it had prepared does not show any fee simple strip leading to Woodland Avenue.[34] The 2000 CFL Deed to Korotki describes Reserves South in three ways. First, it includes a metes and bounds description of Reserves South that does not include a description or reference to a fee interest in the road. Second, it refers to the recorded 1999 CFL Boundary Survey. Third, it states that the parcel being conveyed is "the same land conveyed" by the 1974 deed.[35] By using this language rather than "being *a part of* the same lands conveyed" as the deed described another parcel several paragraphs away, CFL tied any interest created in the 1974 deed to

[33] *See, e.g.*, *Rohner*, 380 A.2d at 553 (evaluating the facts and circumstances surrounding a deed, including the later conduct of the grantor and grantee, to determine the intent of the parties and then applying that intent to interpret the language of the deed).
[34] TREX0846.
[35] TREX0382.

two descriptions that were inconsistent with a fee simple interest in the Disputed Road.[36] Finally, CFL's co-founder, stockholder, and officer, Loren Evens testified that CFL never believed it was purchasing the Disputed Road and he never thought that CFL owned the road.[37] Although cast in layman's terms, this testimony is persuasive as to the intent of the parties to the 1974 deed.

The Reserves would have me believe that every person that has ever had reason to know of the intent of the parties to the 1974 deed or reviewed it in a professional capacity has wrongly concluded that Sidney Bennett intended to grant an easement in the road. In fact, the Reserves has not produced any person not acting on its behalf in litigation who believed that it, or anyone in its chain of title, ever owned a fee interest in the Disputed Road. Even the Reserves itself cannot say that it has always maintained that position.[38] The 1974 deed, the facts and circumstances surrounding the transaction, and the conduct of the parties afterward all support the conclusion that the 1974 deed conveyed an easement in the Disputed Road.

B. The Easement Across Smithfield Was Not Abandoned

Smith makes three arguments as to why the easement over the Disputed Road has been abandoned over time. An express easement may be extinguished through

[36] *Id.* (emphasis added).
[37] TREX0327.
[38] *E.g.*, Post-Trial Reply Br. at 10, *Reserves Dev. LLC v. Crystal Props., LLC*, C.A. No. 05C-11-011 (RFS), (Del. Sup. Ct.), Oct. 19, 2007 ("[T]he deeds of record clearly show this construction easement as well. The Declaration of Restrictions . . . also show Esham accepted and adopted that easement.").

abandonment by "intent to abandon together with manifestation of such intent through . . . unequivocal acts affirming the purpose to abandon and thereby give up ownership."[39]

Smith's first argument is that because the Reserves came to own both Reserves North and Reserves South in August 2001 before it conveyed Lot 6 to Crystal, the easement to use the Disputed Road was extinguished by the doctrine of merger over Reserves North, leaving only the easement from Woodland Avenue to the boundary of Lot 6.[40] Another corresponding argument is that by failing to place the Disputed Road on the Reserves' recorded subdivision plan and by selling Lot 6 to Crystal without expressly reserving the right to cross Lot 6, the Reserves has abandoned its easement. Both arguments rest on the premise that the Reserves cannot cross Lot 6 to reach the easement as it crosses into Smithfield. But Crystal has already had its day in court and lost; the Superior Court ruled earlier this year that the Reserves retains an easement to cross Lot 6.[41] Smith has advanced no reason why I should second-guess that judgment, nor has he shown why the Reserves' insistence on subjecting Lot 6's buyers and successors in interest to previously recorded easements was not sufficient for it to retain its rights to cross over the Disputed Road.

---

[39] *Acierno v. Goldstein*, 2005 WL 31119993, at *9 (Del. Ch. Nov. 16, 2005) (quoting *Smith v. Smith*, 1990 WL 54919, at *4 (Del. Ch. Apr. 17, 1990)).
[40] *See generally Edgell v. Divver*, 402 A.2d 395, 397 (Del. Ch. 1979) (describing that an easement may be extinguished by merger when there is unity of ownership in the dominant and servient estates); *see also Guy v. State*, 438 A.2d 1250, 1252-53 (Del. Super. 1981) (same).
[41] TREX0351.

Smith's final abandonment argument is that because the crossing point of the Disputed Road into the Resort has shifted over time further from Woodland Avenue,[42] the Reserves has abandoned the original crossing point and thus the easement. But even Smith does not argue that the Disputed Road was moved completely outside of its historical location.[43] In fact, Smith premises this suit based in part on the widening and heavy use of the Disputed Road. The shifting use of a dirt road to a new location close by does not demonstrate an overt act of abandoning that easement. Yet another obvious reason why the Reserves has not abandoned the easement in the Disputed Road is that the Reserves has actively fought to keep it in its original location against Mark Bennett in 2002, against Crystal in the Superior Court earlier this year, and against Smith in this suit.

C. Future Use Of The Disputed Road

The Reserves seeks the return of the easement in the Disputed Road to its original condition and location. Smith argues that by paving the 50 foot wide driveway into Smithfield he has improved the Reserves' entry into the Resort from Woodland Avenue because the Reserves may use the driveway as a publicly dedicated street to access the crossing point of the easement into the Resort. He notes that any problems resulting from the different angle that vehicles must now cross into the Resort were caused by the Reserves itself when it sold Lot 6 for construction of a single family home. He does not dispute that access to Woodland Avenue over the path that the Disputed Road historically

[42] *See* TREX0085; TREX0066; TREX0292-0302.
[43] Smith Post-Trial Op. Br. at 29 ("[T]he Reserves has intentionally abandoned *all but approximately 4 feet* of the 1974 Farm Road in its shifting of the crossing point by 50 feet as documented in the Coffman Survey.") (emphasis added).

traveled has been impeded by his installation of a stop sign, street light, curb and four foot high landscaping berm. Smith knew that the location of the Disputed Road was important to the Reserves because of the 2002 litigation, and the parties in that dispute took care to return the road to its previous location. When it serves his litigation advantage, Smith has insisted upon a persnickety compliance with the location of the Disputed Road.[44] The holder of a servient estate "may not interfere with the proper and reasonable use by [the owner of the dominant estate] of their dominant right."[45] Smith cannot unilaterally relocate the position of the 15 foot easement in the disputed road.[46] Accordingly, I will issue an injunction requiring Smith to discontinue obstructing the use of the easement of the Disputed Road in its original location. As a practical matter, this will require Smith to work with the proper zoning authorities for a solution that allows the Reserves to access Lot 6 from Woodland Avenue, and that does not create a public safety hazard because of conflicting traffic patterns.

Just as Smith is confined to the use of the 15 foot easement in the Disputed Road in its original location, so too is the Reserves constrained to the 15 foot easement in its original location. I will therefore issue an injunction preventing the Reserves, or any

---

[44] *See* Smith Pre-Trial Op. Br. at 17 ("The Reserves cannot also unilaterally relocate the crossing point of the 1974 easement road since such a relocation requires mutual consent of both parties to the easement."); *see also id.* at 19 ("Trespass is a strict liability offense and intrusion into land is trespass whether the intruder acted intentionally or not.").

[45] *Vandeleigh Indus., Inc. v. Storage Partners of Kirkwood, LLC*, 901 A.2d 91, 96 (Del. 2006) (internal quotations and citations omitted).

[46] *Edgell v. Divver*, 402 A.2d 395, 397-98 (Del. Ch. 1979) ("The general rule is well established that an easement may not be relocated without the consent of the owners of both the dominant and servient estates. . . . 'A way once located cannot be changed by either party without the consent of the other. When the right of way has once been exercised in a fixed and definite course, with full acquiescence and consent of both parties, it cannot be changed at the pleasure of either of them.'") (quoting *Sibbel v. Fitch*, 34 A.2d 773 (Md. App. 1943)).

agent or contractor working on its behalf from crossing into or out of Smithfield outside the width and location of the 15 foot Disputed Road as it crosses Smithfield's common boundary with Lot 6.[47]

Frankly, the parties do not do a good job of explaining the remaining dispute (if it is even still an active one) over the extra 5 feet resulting from locating a 15 foot easement from a road that was historically 10 feet wide in this location. The parties agree that the location of the reconstructed 10 foot stone road after litigation with Mark Bennett in 2002 is identical to its location on the 2003 Simpler Survey and the 1998 LandTech Survey and I am convinced that this placement is most consistent with the Disputed Road's probable location in 1974. The obvious answer is to make the centerline of the 10 foot road shown in these surveys the centerline of the 15 foot easement. Any remaining disputes over the location of the Disputed Road will be submitted to a qualified independent surveyor chosen by the parties whose decision as to the centerline shall be final. The cost of the surveyor shall be borne equally by both parties.

D. Smith Is Not Entitled To Damages For Trespass

Smith claims that the Reserves' contractors trespassed on his property by directing traffic well outside of the width of the Disputed Road and in doing so they damaged, destroyed or removed various survey stakes and silt fences.[48] Smith would have me

[47] Because Smithfield Court is 6 to 8 inches from the boundary with Reserves North, Tr. at 49, the Reserves does not have unobstructed access to the property line from the dedicated street.
[48] *Cochran v. Mayor and Council of Wilmington*, 77 A. 963, 64 (Del. Super. 1909); *Gordon v. Nat'l R.R. Passenger Corp.*, 2002 WL 550472, at *14 (Del. Ch. April 5, 2002) (citing the Restatement (Second) of Torts § 427(b) for the proposition that "where a defendant employs an

award $16,641.66 for the costs of resurveying and restoring the Disputed Road to a 10 foot wide stone road. But although it is clear that the Reserves' contractors trespassed over Smithfield, Smith was equally culpable for infringing upon the Reserves' right to use the *15 foot* easement for entry into the Resort. Smith removed the bales of hay the Reserves' contractors placed to mark the width of the Disputed Road, placed storage containers against the edge of a 10 foot path through Smithfield, and removed stones from the 15 foot easement of the Disputed Road.[49] Under these circumstances, awarding Smith the costs of restoring a 10 foot wide road over Smithfield is no more reasonable than requiring Smith to repay the Reserves, as the Reserves suggests, the value of the stones that were removed and the stones that were incorporated in the bed of Smithfield Court. Likewise, I cannot overlook Smith's decision to install curbs, a stop sign, and a four foot high landscaping berm in the very location where the Merestone Survey placed the Disputed Road, which Smith became aware of shortly after filing this action, but before that work was done. Smith's own obstructive conduct at times contributed to a need for the Reserves' contractors to swing outside the 15 foot easement. Most importantly, there was adolescent behavior on both sides, which involved trespass by each party and its agents, causing minimal costs to both Smith and the Reserves when considered in the scheme of the parties' development conduct. Perhaps one party is more at fault, but not in any way that allows for a fair summing up by me. For these reasons, I do not award damages for the trespass of the Reserves' contractors.

---

independent contractor to do work which the defendant knows is likely to result in a trespass the defendant is liable for the resulting trespass").

[49] Tr. at 21, 40-42, 47.

E. The Reserves Has Not Acted In Bad Faith

In Smith's opening pre-trial brief, he sought a shifting of attorneys' fees under the "bad faith" exception to the American Rule because the Reserves exceeded the width of the easement in its use of the Disputed Road and because the Reserves took the position in this suit that it owned a fee simple interest in the Disputed Road despite taking the position in other litigation that the interest was merely an easement. Similarly, Smith claimed that the Reserves had needlessly run up the cost of litigation in this case by maintaining its position that a fee simple interest was created despite a ruling on a motion for summary judgment that the deed was ambiguous and certain evidence supporting the creation of an easement that was uncovered during discovery. This argument fails because the conduct of the Reserves does not rise to the level of egregiousness required to award attorney's fees under this exception.[50] Although the Reserves' litigation positions were at times fluid, shall I say, none of its papers in the prior litigation or this one clearly foreswore any claim to a fee simple interest. It is, of course, regrettable that this small dispute has been so costly, but when parties cannot reach accord on their own by compromise, that sort of inefficiency often results. And none of the unneighborly behavior here is so unusual that it can justify fee shifting.

[50] *See Nagy v. Bistricer*, 770 A.2d 43, 64 (holding that "arguments [that] were advanced with no reasoned basis in law or logic [were] frivolous[] and in bad faith"); *cf. Judge v. City of Rehoboth Beach*, 1994 WL 198700, at *2 (Del. Ch. April 29, 1994) (awarding attorneys' fees where "the record show[ed] that defendants were faced with a mountain of evidence, including legal opinions, legal authority and judicial declarations, demonstrating the City's obligation to grant plaintiffs access" to a public right of way).

IV. Conclusion

For the foregoing reasons, the Reserves has an easement interest over the portion of Smithfield that the Disputed Road once crossed. Neither party is entitled to damages. The parties will confer and submit a final order consistent with this opinion within 10 days.