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March 30, 2022

The Honorable Vice Chancellor Sam Glasscock III
Court of Chancery
34 The Circle
Georgetown, DE 19947

Via: E-Filed

RE: *Swann Keys Civil Association v Dippolito et al*
C.A. No. 2021-0614 SG

Dear Honorable Master Griffin,

On March 28th, 2022 Defendants Post-Trial Answering Brief was filed by the Attorney below.

Two (2) courtesy copy of said Defendants Post-Trial Answering Brief was hand delivered to the Court of Chancery on this 30th day of March, 2022 for your review.

If you have any further questions or concerns please contact me.

Respectfully,

Law Office of Dean A. Campbell, PA

/s/ Dean A. Campbell

Dean A. Campbell, Esquire
Bar UD # 3611
"Words": 121

DAC/ rac
Cc: D. Hutt, Esq
Client

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Case No. 2021-0614-SG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SWANN KEYS CIVIC ASSOCIATION,	:	
	:	C.A. No.: 2021-0614-PWG
Petitioner,	:	
v.	:	
	:	
MICHAEL DIPPOLITO,	:	
JOSEPH W. MANNING,	:	
SHARON MANNING,	:	
THERESA A. CORRICK,	:	
ROBERT C. DUFFY, and	:	
JESSICA A. DUFFY	:	
	:	
Respondents.	:	

DEFENDANTS' POST- TRIAL ANSWERING BRIEF

Law Office of Dean A. Campbell, PA

/s/ Dean A. Campbell
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Attorney for Respondent

Dated: 3-28-2022

"WORDS:" 8,500

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INITIAL OBJECTION

The Plaintiff's Post Trial Opening Brief for the first time raises the claim of Adverse Possession. The initial Complaint's claim for Quiet Title relied solely on the Settlement of the Class Action suit as its supporting theory. Likewise, the Pre-Trial Stipulation and Order, entered pursuant to Rule 16, did not raise the theory of Adverse Possession. Pursuant to Rule 16(a)(1), the Plaintiff had an opportunity to identify the issues and could have raised Adverse Possession. Pursuant to Rule 16(c)(5), the Plaintiff could have identified Adverse Possession as an Amendment to the Pleadings. Even between the time of the Pre-Trial Conference and trial, Plaintiff could have moved to modify the Pre-Trial Order thereby giving Defendants notice of the new theory being raised. There was, and has been, no mention of Adverse Possession until the Opening Brief. Adverse Possession was simply never raised prior to Plaintiff's Opening Post-Trial Brief.

Although the issues of Adverse Possession may overlap some of the issues of a Prescriptive Easement, the underling theory is very different in that one identifies use as grounds for ownership and one establishes a right to use and burden the property. By failing to give Defendants adequate notice of this theory, Defendants have been prejudiced. Had Defendants known this theory was on the table counsel could have, and would have, directed questions to Plaintiffs'

witnesses regarding their claim of ownership, not just of use. Furthermore, this attorney did not, and in fact could not, address Adverse Possession in Defendants' Opening Post-Trial Brief.

A party to an action has a right to rely on the pretrial order to govern the course and issues of a case, unless modified to prevent manifest injustice. *Barrow v. Adramowicz,* 931 A.2d 424 (Del. 2007).

Notwithstanding the foregoing objection, Defendants will respond to the claim of Adverse Possession but reserve all rights to reserve and present this objection to the Court, or on appeal.

INTRODUCTION

The record from the 1985 lawsuit contains many errors and uncertainties. Prior to the Settlement Agreement being created or written the Court in late 1984 identified the title to the common areas as being an "insurmountable" problem, putting the parties on notice that title to common areas had to be resolved.

Notwithstanding that warning from the Court, The Settlement Agreement and Order both acknowledged the fact that title to amenities and common elements were unclear. To account for that uncertainty, the Association was given sixty (60) days after the effective date of the Settlement Agreement, to further investigate the common elements and their respective title.

After the Settlement was confirmed, and the passage of those sixty (60) days, the deeds conveying the common areas were drafted by the Association's attorney in 1986 and specifically omitted boat ramps from their identified common elements being conveyed. The description of what was being conveyed was defined by the Plot Plan references which do not show any Boat Ramps.

Now, more than thirty (35) years later the Association comes to this Court asking the Court for yet another bite at the apple by fixing what should have been done back then.

To compound the confusion, the evidence shows there were not two (2) concrete boat ramps in Swann Keys, but that there were three (3) boat ramps in Swann Keys.

As what appear to be alternative arguments, the Association argues that it is entitled to either a prescriptive easement over the Boat Ramps or Easement by Estoppel. Because of the Association's failure to keep good records over the last thirty-five (35) plus years, the Association cannot prove that it, i.e. the Association, used the Boat Ramps continuously, adversely, and exclusively for the statutory period. The only information available is that the Boat Ramps were used at times by members. Neither the Association nor any of its members ever gave the property owners notice that it, the Association, was claiming a property right in the Boat Ramps.

As to Easement By Estoppel, the Association has failed to establish any evidence that any of the previous owners of the Boat Ramps ever represented to the Association that it had an easement – a necessary element for easement by estoppel. Even if the Court disagrees with that assessment, the argument of easement by estoppel only applies to the East Ramp since that it the only ramp where repairs were allegedly made by the Association.

If the Court finds the Association has proven its rights to either ownership or use of the Boat Ramps, the Court will be condemning these Defendants', and their predecessors in interest, to a continuation of the nuisance that has been demonstrated by the Defendants in their counterclaim.

Defendant Theresa Shoulders testified that "times have changed". This was probably a piece of evidence to which the Court could have taken judicial notice. The ever increasing population in combination with the "me generation" of today has changed what was a neighborly gesture into a unbearable nuisance for these homeowners.

REBUTTAL OF FACTS

- Defendants take note of Plaintiff's statements on Page 5 of the Answering Brief and repeats it here: "What began as a straightforward lawsuit by residents against the current developer, BET Inc., to resolve a dispute regarding a deed restriction evolved into years of litigation and instability in the community, with the Court characterizing the legal problems at issue as **'almost insurmountable title problems.'**"[Emphasis added here]. It is important to note that the presiding Judge in 1984 identified the title problems well before the Settlement Agreement was written or approved the following year. Plaintiff further quotes from the 1984 opinion: "The only real issue to be determined in this lawsuit now revolves around a determination of how the nonprofit corporation is to obtain title to the common facilities . . . ." (Answering Brief, PP. 5-6, citing *Atkinson and Swann Keys Civic Association v. B.E.T. Inc.* 1984 WL 159375 (Del. Ch. Dec. 4, 1984)).

This acknowledgement is important to note because it demonstrates that the Association, and the Court, had advance notice of the title problems to the common areas but later chose not to address those concerns as they were related to the Boat Ramps.

- The Association claims to have made "numerous repairs" to the Boat Ramps over the years. (Answering Brief, P.9) First, it should be noted that there is no

evidence of any repairs to the West Ramp. All repairs were to the East Ramp. Those **numerous** repairs total three (3) within thirty-five (35) plus years. They are: (1) 2005 repairs = $5000.00; (2) 2012 repairs = $3000.00; and (3) 2014 repairs $10,400.00. (JX-40- 53) The Association could not substantiate, nor did it document, any other maintenance or repairs within its thirty-seven (37) year history. These repairs totaling $18,400.00 average to $497.29 per year. The evidence likewise shows that the actual repairs were primarily to the canal bottoms adjacent to the ramp and not the ramps themselves. Plaintiff argues that the "Association has allotted approximately $65,000.00" for future repairs, but that is irrelevant to the Court's consideration. (Answering Brief P. 9)

- Plaintiff maintains "the residents of Swann Keys have regularly used the Boat Ramps to launch and load boats . . . ." (Answering Brief, P. 9) There is no evidence of this assertion other than the self-serving testimony of the President of the Association. There are 606 lots in Swann Keys. (See Pre-Trial Stipulation) Yet the Association could only identify five (5) people using the ramps. (Jeff Markiewicz, Ronald Young, Richard Schofield, Leo Winterling, and Dennis Napieralski).

The Association has no logs, videos, or other documentation of who was using

the ramps. Furthermore, even for those members who may have been using the ramps over the years, there has been no showing that they were in any way representing the Association rather than themselves.

- In what may be an attempt to present evidence that does not exist, Plaintiff states that: "the Court received fifteen affidavits of long-time residents who confirm the long-standing use of the Boat Ramps [then identifying fifteen affidavits JX275 – JX305). The Affidavits referenced DO NOT make any reference to the use of boat ramps. Instead, they establish the existence of the ramps only. Nothing about actual use is mentioned in the fifteen affidavits.

In addition, even the information contained in the Affidavits is false or misleading. Each Affidavit states that there have always been only two (2) boat ramps in Swann Keys. Conversely, the Association's witness, Dennis Napieralski testified in his deposition about how his lot at the end of Laws Point Road had a boat ramp on it when he purchased the Lot, but that he removed that ramp prior to this litigation.

- The Plaintiff states: "Ronald Young testified that the lock had been on the Boat Ramps since 1968 or 1970." This is in sharp contrast to Mr. Markiewicz's testimony that the survey revealed the locks not on the boat ramps, but were

actually on Association property next to the road. (See Trial Transcript (TT. P. 67, LL. 6 – 10)

- Not until 2021 did the Association post any user rules at the ramps (JX36 – 37). The Association had no policy regarding enforcement. In fact, Mr. Young and Mr. Schofield were identified as persons responsible for enforcement. But when Mr. Schofield was asked about his security function and enforcement, he denied having any kind of security function. (TT. P. 86, LL. 4 – 7) Likewise, Mr. Young indicated he had never "dealt personally with anybody – with a non-member using the ramps". (TT. P. 99, LL. 14 – 17).

- Plaintiffs state that "Respondents did not present any evidence of their own maintenance of the Bot Ramps . . ." (Plaintiff's Opening Brief P. 11). This clearly contradicts the evidence presented by Defendants. Mr. Dippolitto testified to picking up trash around the East Ramp and repairing yard posts knocked down by boaters trying to back their boat trailers into the ramp. (Trial Transcript PP. 233 - 234) Mr. Duffy, presented testimony about how he had cleaned up around the West Ramp when he first bought the property by removing poison ivy, and cutting and pruning limbs on some of the trees surrounding the ramp. (TT. PP. 223 – 224)

- Plaintiffs throughout the Introduction and Facts section of their Opening Brief seek to blame Defendants for the instant dispute. As outlined in Defendant's

Opening Brief, the public use of the boat ramps has been a problem since at least 2012 when it was noted in the meeting minutes. More recently, the Duffy's went to the Association Board of Directors in June 2020 and complained. (JX-60) Nothing was done except posting hollow rules with no enforcement. Regrettably, Defendants were forced to take matters into their own hands after the Association failed to address the problems and the nuisance created by the boat ramps users were allowed to continue without any control by the Association. Had the Association acted reasonably and worked to fix the problems to protect the license it had, including the public access, the Defendants may have very well continued to permit the use of the Ramps.

- Plaintiff wrote in their Opening Brief that: "No evidence was presented of other boat ramps within the community." This statement blatantly conflicts with statements by its own witness. Mr. Napieralski testified that when he bought property in Swann Keys in 2008 that there was a boat ramp on his lot. He subsequently removed that boat ramp before this litigation ensued. (JX-582 *et. seq.)*

ARGUMENT

I. PLAINTIFF'S QUIET TITLE CLAIM

A. QUIET TITLE ACTION BASED ON SETTLEMENT OF CLASS ACTION

In 1984, the year before the Settlement Agreement was reached, the Judge identified in a written decision that the title to the common elements was an "almost insurmountable title problem". The Class Representative (Richard Stokes, Esq., then of the law firm of Tunnel and Raysor) wrote: "Neither restriction speaks about ownership of title to the utilities, streets, Park or common areas of the Park. The common areas are undefined. . . . ." *Id., P. 2 (See also, JX 460).* Despite that warning from the Court, and acknowledgment from the Association's attorney, the Settlement Agreement only required B.E.T. to convey real property and did not require any conveyance by any of the owners of these affected lots. In fact, and unlike the streets, the Settlement Agreement did not call out any easements. The Settlement Agreement and Order could have included language about other owners (such as the owners of the boat ramps) conveying real property or granting easements. It did neither. The ONLY party conveying property was B.E.T. Inc.

The owners of the Boat Ramps were not original parties to the lawsuit but joined as class members. Accordingly Plaintiffs now point to language in the Settlement Agreement and Notice which identifies the conveyance of boat ramps by B.E.T. Inc. to the Association and somehow infer that conveyance requirement for B.E.T. to the individual owners. Neither document requires the boat ramp owners to convey the boat ramps or grant easements to the boat ramps.

Plaintiffs seem to make the argument that the boat ramp owners in 1985 should have known they were losing part of their land to the Association. In essence, Plaintiffs seemingly argue that the owners should have been able to read between the lines of the Notice of Settlement and the Settlement Agreement just because they mention two (2) boat ramps. Furthermore, under Delaware law, the presiding judge in a class action suit must examine the record prior to settlement to determine if there has been adequate notice. *Prezant v. DeAngelis,* 636 A.2d 915 (Del. 1994).

Had the Court intended to order the boat ramp owners at that time to convey property to the Association, such action would have resulted in a taking. It is a fundamental principal of Constitutional Law that before land can be taken through civil action, there must be notice and opportunity to be heard. *U.S. Const.,*

Amendments V and XIV. Moreover, the notice to the class should be fair notice of that intended taking. The Court of Chancery Rule 23(c)(2) requires the notice to be the "best notice practicable under the circumstances."

Within the Notice of Class Action Compromise and Settlement, the Court calls out one of the other title problems by stating: "In this regard, part of Swann Drive appears to be owned by other parties, but a permanent easement exists to insure ingress and egress to the Park." (JX-467, ¶12). Obviously this was one of "insurmountable" title problems managed in the class action settlement process which was resolved by the Court through its final order. However, there is no mention the boat ramps although the boat ramps seemingly represented the same dilemma. The Settlement Agreement and Notice could have easily given the Association an easement to the boat ramps – just as it did the roads. The Settlement Agreement and Notice could have easily required the boat ramp owners to convey the boat ramps to the Association – it did not.

But more importantly, the Notice of Class Action Compromise and Settlement (JX-482, ¶8) identifies the property to be conveyed to the Association as that described on the recorded Plot Plan at Book 14, Pages 99 – 100. The boat ramps do not appear on the plot plan. There was nothing giving the owners of the

boat ramps notice that they were going to loose the land where the boat ramps sit.

Moreover, both the Notice of Compromise and Settlement (JX486, ¶12) and the Settlement Agreement (JX-568, ¶1(D)) gave the Association the opportunity to inspect the property and inspect title to the property before settlement. Under the Settlement Agreement, the Association could have terminated the Settlement Agreement if it discovered title problems.

Notwithstanding the title problem now the subject of this case, on March 14, 1986 the Association not only proposed, but accepted, two (2) deeds from B.E.T. Inc. which did not include the boat ramps. (JX-398 – JX-401).

Plaintiffs also argue that the boat ramps are implicitly included in the deeds of conveyance. (Opening Brief PP. 16 – 17). The logic used by Plaintiffs is that because the language of the deed calls out the roads and then references the canals and lagoons, that it was effectively implied that the boat ramps were included because it "would be illogical to execute a deed to convey the lagoons and roads while omitting the boat ramps that provide access to the lagoons. (Plaintiff's Opening Brief, P. 17). This argument too must fail. The same deed referenced (JX-398) identifies the common areas as they are depicted in the plot plan recorded at Book 14, P. 199 and then, those common areas occurring in the plot plan, are called out. Within the plot plan (JX 392-393), no boat ramps are depicted and the

Defendants lots clearly connect to their neighbors lots in the area where the boat ramps now exit. It would have been very easy for the drafter of the deeds to have listed the boat ramps – but they did not. Whether by intent or error we will likely never know.

But Plaintiffs take it one step further to infer the lagoons must be connected to the streets, otherwise it would be "illogical". There is nothing that mandates that communities must have boat ramps. In fact, the evidence suggests that most owners dock their boats beside their house in the canals and lagoons and keep them there for most of the boating season. To infer the canals and lagoons are useless without the boat ramps is preposterous. Owners can access those lagoons from a number of nearby public boat ramps. (See TT. 98, LL. 2 – 4 where Mr. Young testified that if he were to encounter non-members using the ramps he is to tell them to use "the State boat ramp, which is free, or go to Smitty McGee's.")

Plaintiffs in their Post-Trial Opening Brief raise the issue that the current owners of the boat ramps accepted deeds that reference the "recorded documents" and that should have been sufficient to put them on notice that they did not own the ramps. (Answering Brief PP. 17 – 18) We should consider what a buyer would have seen in the public record: (1) A buyer would have seen a Settlement Agreement from 1985 that indicated B.E.T. was to convey two (2) boat ramps; (2)

they would have seen the due diligence provision that made the agreement contingent on clear title and giving Swann Keys the right to terminate the agreement if they were not satisfied with what they were purchasing; (3) they would have seen the plot plans not depicting any boat ramps; and (4) most importantly, they would have seen the B.E.T. deed and every successive deed which do not reference any boat ramps.

Another problem with Plaintiff's argument is in recognizing what the lawsuit was about. Plaintiff admits that the lawsuit was brought "to resolve a dispute regarding deed restriction . . . ." (Plaintiff's Opening Brief P. 5). As one reads through the Settlement Agreement and Court Order, that becomes evident. Conveyance of the common areas was apparently an ancillary issue raised in the litigation in order to clarify responsibility for the Association and the community's obligation to pay assessments.

The biggest hurdle for Plaintiffs lies in their ability to overcome the doctrine of merger by deed. Under the doctrine of merger by deed, on the execution and delivery of a deed, the contract obligations of both parties are said to "merge" with the deed, and its terms become controlling. *Cravero v. Holleger,* 566 A.2d 8, 19 (Del. Ch. 1989). Once the buyer accepts a deed, the rights and obligations included in the contract are "extinguished". "This means that, after title has passed

via the deed, the contract generally ceases to be a viable basis upon which plaintiff may sue." *Haase v. Grant,* 2008 WL 372471, at *2 (Del. Ch. Feb. 7, 2008). There are some exceptions to the doctrine such as fraud or misrepresentation, but that has not been suggested. In fact, the Association has a lengthy due diligence period to inspect the property and the title precluding any argument of fraud.

In Defendants' Opening Post-Trial Brief, Defendants point-out that there were not two (2) "concrete boat ramps" in Swann Keys as evidenced by the photographs showing pavement, rather than concrete, as the surface of the East Ramp. In similar way, Plaintiffs lead the Court to believe there were only two (2) boat ramps in Swann Keys. Defendants, however, pointed out that there were actually three (3) boat ramps in Swann Keys at the time of settlement in 1986. In fact, Plaintiff questioned Mr. Napieralski about that third ramp in a deposition. Plaintiff even attached that deposition and all supporting documentation to the Joint Exhibits as JX-581 – JX-650.

In Defendants' Opening Post-Trial Brief, Defendants raised the defenses of waiver and merger by deed. Defendants will rely on those arguments as previously stated as those arguments are hereby incorporated by reference.

B. QUIET TITLE BY ADVERSE POSSESSION (Since the elements of adverse possession and prescriptive easement are substantially the same, this section is also intended to also address and overlap with prescriptive easement arguments.)

Defendants reserve all rights to object to this new argument of adverse possession first raised in Plaintiff's Post-Trial Opening Brief but respond in abundance of caution to prevent any waiver.

The elements of a valid claim to title through adverse possession are well established. Plaintiffs must show that they have had open, notorious, hostile, exclusive, adverse possession of land continuously for the prescribed period." The open and notorious elements are considered together, as each term essentially is duplicative of the other. Similarly, the hostile and adverse requirements are analyzed in tandem. *Tumulty v. Schreppler,* 132 A.3d 4, 23–24 (Del. Ch. 2015).

Before drilling in on the individual considerations, it is important to note that throughout this litigation the Plaintiffs have collectively referenced "the boat ramps" in unison as if they are the same singular owner. They, of course, are not. The East Ramp is owned in part by Dippolito. The West Ramp is owned in part by Duffy, Manning and Corrick. Use of one ramp does not impute use of the other. For example, Plaintiff's own witness, Dennis J. Napieralski, testified that he

"always used Mr. Dippolito's (i.e. the East Ramp). (JX-605-L. 20) Therefore, Mr. Napieralski's use of the East Ramp does not impute use of the West Ramp. Similarly, Mr. Winterling testified that he only used the West Ramp. (TT. P. 113, LL. 21-24) Although the Plaintiffs repeatedly refer to "the boat ramps" in pleadings and testimony, as if the plural is the singular, they are not. Because Plaintiffs have repeatedly referred to them together, there's no way for the Court to attribute use by anyone to either ramp.

The next problem the Plaintiff has not overcome is distinguishing between use by the Association; use by Association members on behalf of the Association; or simply use by the general public. For example, Mr. Napieralski was asked in his deposition whether he ever talked to the Duffys when he was launching or removing a boat and his answer was "No"? (JX-605, LL. 1 – 6). If Napieralski did not indicate he was there as member of the Association, the Duffy's could not have recognized the adverse or hostile use by the Association – it would have appeared to be Mr. Napieralski's individual use. Although the use may be characterized as hostile or adverse by Napieralski, there is nothing connecting his use to the Association. It is more likely that the use of the ramps was the permitted use by "neighbors" and not permitted use by the Association. (*See,* TT. 193, L. 11

("Because they're our neighbors")*)* Even Mr. Young, Swann Keys maintenance man, indicated he never talked to the owners when using the ramps. (TT. P. 100, LL. 13-15).

The Association has acknowledged that it does not have any boats are watercrafts. (TT. P. 48, L. 23 – P. 49, L.15). In the same line of questioning, Mr. Marliewicz testified that he personally has watercraft and used the ramps personally. (TT.P. 49, L.22). In fact, Mr. Markiewicz was asked directly: "So what you mean when you say 'is used,' you mean the members have used the boat ramps? A. That's correct.") (TT. P 49, L23 – P. 50, L. 1) Its unlikely that the members using the ramp ever considered the possibility that they were acting as representatives of the Association. Following that exchange, Mr. Marliewicz was asked: "How many member use the boat ramps? A. That would be an impossible number to get."

But it should not be an impossible number to get. In 2011 (JX-39) and again in 2014 (JX-44) board members, responding to complaints about non-members using the ramps, suggested the installation of a key-card system to measure the use by members – but nothing was done. If the Association had installed the key-card access ten (10) years ago, the Association would likely now have evidence to

demonstrate not only how many members used the ramps, who used the ramps, and it would also identify which ramp was used and the exclusive or non-exclusive use by members.

I. Continuous and Exclusive:

Defendants do not dispute the fact that the boat ramps have been used for many years, perhaps back to the 1970s'. In fact, Defendant T. Shoulders (Corrick") testified that as a child, during the 70's and 80's the boat ramps were used. (TT. P. 131). But she also testified that back in those days there was a guardhouse and access to the community was limited to members and guests. But that guardhouse limiting access to the community has been gone for "a while". (TT. PP. 137 – 138) Ms. Duffy, who bought in 2010, has never seen security guards. (TT. P. 194, LL4-6) Mr. Markiewicz confirmed that there are no security guards to control access. (TT. P. 53, L. 4; P.69, LL. 9 – 14). He placed responsibility for enforcement on the Association's maintenance team. Similarly, there are no ID cards issued to members and no stickers put on cars or boats identifying members as such. (TT. P. 69). Without confronting the users, there was no way for the Defendants' to identify users as members or non-members.

The bottom line is that the Association has not proven who is using the

ramps. It could be members. It could be non-members. It could be the general public. The latter, and not the former, seems to be the case.

The evidence presented by Plaintiff shows nothing more than at least four (4) of its members have used "A" boat ramp. That calculates to .6% of the members have used the ramps. The Plaintiffs incorrectly state on Page 20 of their Opening Brief that evidence was presented "by way of fifteen Affidavits" of longtime residents supporting their use of the boat ramps. (JX-275 – 306). Plaintiff should read its own Affidavits. None of the Affidavits state that any of these owners use the ramps.

Instead, Plaintiff identifies that at one point in time, August 2021, it counted "approximately 200 boats and watercraft located in the Swann Keys lagoons" and approximately 80 boats or watercraft on trailers in Swann Keys." (Plaintiff's Opening Brief, P. 20). All this does is to show that Swann Keys is a boating community. There's no evidence that any of those 200 boats in the lagoons used the ramps at issue. Like stated by Plaintiffs witnesses, these members could have used the State Park boat ramp or Smitty McGee's. There's no evidence that those other 80 boat owners use, have used, or will use the ramps. In fact, this count shows only one point in time and does nothing to show continuous use for the statutory period of twenty (20) years.

In 1954, Vice Chancellor Bramhall wrote the following about adverse possession:

"There is no fixed rule whereby the actual possession of real property by an adverse claimant may be determined in all cases. It may be stated as a general rule that the claimants' possession must be such as to indicate their exclusive ownership of the property. Not only must his possession be without subserviency to, or recognition of, the title of the true owner, but it must be hostile thereto, and to the whole world. It has been declared that the disseisor 'must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest.' He must intend to hold the land for himself, and that intention must be made manifest by his acts. It is the intention that guides the entry and fixes its character. No particular act or series of acts is necessary to demonstrate an intention to claim ownership. Such a purpose is sufficiently shown where one goes upon the land and uses it openly and notoriously, as owners of similar lands use their property, to the exclusion of the true owner. . . . Plaintiffs must recover upon the strength of their own title; they cannot rely upon the weakness of defendant's title." *Marvel v. Barley Mill Rd.* Homes, 104 A.2d 908, 911 (Del. Ch. 1954). In this case, Defendant have strong title and the Association has no title.

Plaintiff falls short on showing "exclusive use". "Exclusive possession means that the adverse possessor must show exclusive dominion over the land and an appropriation of it to his or her benefit." *Tumulty v. Schreppler*, 132 A.3d 4, 26 (Del. Ch. 2015). Exclusive possession means that the adverse possessor must show exclusive dominion over the land and an appropriation of it to his or her benefit. *Ocean Baltimore, LLC v. Celebration Mall, LLC,* 2021 WL 1906374, at *7 (Del. Ch. May 12, 2021), *report and recommendation adopted*, (Del. Ch. 2021).

The Plaintiff has fallen woefully short in proving exclusive dominion over the ramps. It was established through Defendants' testimony that the boat ramp was being used by the general public. (See Defendants' Opening Post-Trial Brief). There is no evidence in this case to show any form of dominion and control over the disputed boat ramps.

The Plaintiff did establish that chains were placed on Association property blocking the ramps and fixed with a combination lock. However, the chains and locks were not monitored and often left lying on the ground for entry by anyone. Robert Duffy testified that the chains were "a joke" because the chains were laying on the ground 90 percent of the time because most boaters who pull their boats out don't take the time to put it back. (TT. P. 222, LL. 1 – 5). In fact, past board member Nancy Flacco confirmed this testimony. In 2020 Ms. Flacco, at the

request of the board, issued a report about the problem with the boat ramps. In June 2020 Ms. Flacco was asked to assess the problem with the boat ramps. Ms. Flacco's findings could not have been clearer:

"1. The combination lock has not been changed for years.

2. Boat launch facilities have the code from previous years.

3. "People in the community share the code with friends and neighboring communities and,

4. People unlock the chain and do not relock the chain." JX-307

This was not the first time the non-exclusive use had been addressed by the Association Board. In fact, in or around 2013, the Association recognized the problem of non-member use and the idea was raised about installing electronic passes and gates. But it never happened. (TT. P. 165, L. 10 – P. 166, L. 10).

Another indication of dominion by the Association, if it existed, should be seen through its financial management. Mr. Markiewicz confirmed that the boat ramps were not in the reserve studies until 2019. (TT. P. 60, LL. 2 – 5) Nancy Flacco also confirmed that from at least 2011 (until 2019), the boat ramps were not included in the reserve studies. (TT. PP. 160 -161).

In 2009, the Delaware Legislature enacted the Delaware Uniform Common Interest Ownership Act ("DUCIOA") which required all subdivision communities to conduct reserve studies for the purpose of determining the amount of the assessments. 25 Del.C. §81-315. The general concept of reserve studies is to assess all of the communities fixed assess to provide for repair or replacement at the end of the assets useful life. A reserve study accordingly starts by identifying its assets. So based on Mr. Markiewicz's and Ms. Flacco's testimony, the Association did not identify the boat ramps as an asset until recently. This fact is further borne out by the checks written to Mr. Winterling in which the repair bills were paid through the "Play Ground" fund. (JX-253)

C. OPEN AND NOTORIOUS

The requirements of open and notorious use overlap greatly with the elements of "continuous use", "exclusive use", and "adverse use".

Defendants do not dispute the fact that the boat ramps have been used for a long time. The question becomes whether it was the Association's use, individual member use, non-member use, or even public use.

The only real evidence the Association has presented to establish its "open and notorious use" is that at some point in time, of which we're not sure, a chain

was placed across the entrance to each ramp. Photos of the chains were presented by Plaintiff at JX4 and JX9. Discussed above was the lack of maintenance of these chains, the lack of ensuring they were locked, and the lack of security over the use. However, even looking at the chains as presented, the signs say nothing more than "No Trespassing" or "Boat Ramp ___". (Note that the sign to the left of JX9 was only recently installed. See TT. P. 47, LL. 2 -6). It's also noteworthy to repeat that the posts holding the chains are actually on Swann Keys property and not on the disputed land. (TT. P. 67, LL. 6 – 18).

The Association has presented this singular piece of evidence of chains to support their open and notorious use of the boat ramps. The same chains could be used to prevent entry into the canal and lagoons. The canals and lagoons are owned by the Association. There's nothing presented by Plaintiff to establish whether they are trying to prevent use of the boat ramps or entry into the lagoons.

It also must be noted that, without citation to the record, Plaintiff states that the Association consists of "over 600 properties whose residents have used the Boat Ramps on a regular basis." There was no such testimony as the Plaintiff could only identify four (4) people who have used the ramp. The Association kept no records to document use of the boat ramps.

I. Adverse Use and Neighborly Accomodation

In a typical claim of adverse possession, a party claiming title or rights by adverse possession or use, such as the Association, has the burden of proving all the elements of an adverse holding. *David v. Steller,* 269 A.2d 203, 204 (Del. 1970). That burden of showing adverse and exclusive use by the claimant includes the obligation to prove the use was not permissive. *Dewey Beach Lions Club, Inc. v. Longanecker,* 905 A.2d 128, 135 (Del. Ch. 2006). That duty is especially true when the right is over a neighbors roadway or path. *Id.* The logic behind this rule is that land on neighboring property which is left open to use by the public or others should not be burdened by a prescriptive easement. *Id.* In such a situation, there is a presumption that use of such space by others for their own purposes is permissive. *Id.*

The Courts of New York state the rule like this:

"Generally, proof that use of a property was open, notorious continuous and undisputed will give rise to a presumption that the use was hostile and under a claim of right (*see Allen v. Mastrianni, supra* at 1024, 768 N.Y.S.2d 523). The burden is then shifted to the party denying the existence of an easement to establish that the use of the subject land was, indeed, permissive (*see id.*). Exceptions to the

rule that the presumption of hostility ***1060** will arise (1) when the relationship between the parties is one of neighborly accommodation and cooperation (*see id.; McNeill v. Shutts,* 258 A.D.2d 695, 696, 685 N.Y.S.2d 318 [1999]) and (2) when the subject area is used by the general public (*see Rivermere Apts. v. Stoneleigh Parkway,* 275 A.D.2d 701, 702, 713 N.Y.S.2d 356 [2000]). It then becomes incumbent on the user to come forward with affirmative facts to establish that the use was, indeed, adverse to the interests of the landowner (*see id.* at 702, 713 N.Y.S.2d 356; *McNeill v. Shutts, supra* at 696, 685 N.Y.S.2d 318)." Cole v. Rothe, 795 N.Y.S.2d 373, 375 (App. Div. 2005)

Plaintiff attempts to overcome Defendants' argument of neighborly accommodation by arguing that the "neighborly accommodation doctrine" is contradicted by Duffy and Shoulders' testimony that they "believed the Boat Ramps were owned by the Association." (Plaintiff's Opening Brief, P. 24). However, Plaintiff is not only misstating the record but misstating the law.

Plaintiff states in its Opening Brief that Theresa Shoulders and Robert Duffy Duffy both testified that until 2020, they believed that the Boat Ramps were common property and a Swann Keys amenity. This reference cites to Pages 131 and 228 in the Trial Transcript for support. But after reviewing those pages, it is clear that Theresa Shoulders did not say that she thought the ramps were a

common element amenity. (TT. P. 131). Likewise, there is no such statement on Page 228 by Mr. Duffy. In fact, he testified that when they bought the property they didn't know and, apparently didn't care who owned the ramp. (TT. P. 229, LL. 4 – 14). Ultimately, Mr. Duffy was asked: "And so prior to getting that survey done so you could put a new home up, you believed that the boat ramp was a community amenity? A. I believe so." The survey was in 2019. (TT. P. 193, L. 6) But after that, the boat ramp remained, and was used, without objection from Duffy until this dispute began.

Therefore, Plaintiff's argument against neighborly accommodation can only be applicable from 2010 (when the Duffys bought the property) until the survey was done in 2019. The Plaintiff, conversely, has a burden to negate the neighborly accommodation for twenty (20) years, not just nine (9) years.

One reason why the Plaintiff's argument must fall short is because they have neglected to negate the neighborly accommodation doctrine for the East Ramp and the West Ramp of the owners before the Duffys. Furthermore, it is clear in the record what the previous owners of the Duffy property and of the Dipollito property believed they owned the entire property. Each deed in their respective chains of title refer to conveyance of their full lots and did not exclude any exception for the portion of the lot containing the boat ramp nor reserve any

easements. (JX-440: JX-443, JX-445; JX-f11: JX-413; and JX-416.)

Regardless of what Defendants believed, the real issue where Plaintiff falls short is overcoming the presumption of neighborly accommodation. The presumption is that the neighbor's use is not adverse but is permissive, and the result of neighborly accommodation on the part of the landowner. *Dewey Beach Lions Club, Inc. v. Longanecker,* 905 A.2d 128, 136 (Del. Ch. 2006).

In summary, and as stated in the *Dewey Beach Lions Club*, it was the Plaintiff's burden to overcome the presumption of permissive use and they have presented no evidence to do so.

II. Prescriptive Easement

As the elements of a prescriptive easement are similar to those of adverse possession, the individual elements will not be discussed here further.

Plaintiff is correct, however, that their burden of proof for a prescriptive easement is the higher standard of clear and convincing evidence and that they are not favored in the law.

Plaintiff has not addressed the unreasonable interference being caused by the continued use of the boat ramps. The holder of an easement is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment. *Restatement (Third) of Property (Servitudes)* § 4.10 (2000). The

continued use of an easement cannot cause unreasonable damage to or interfere unreasonably with the enjoyment of the servient property. *Green v. Templin,* 2010 WL 2734147, at *9 (Del. Ch. July 2, 2010).

To the extent necessary, Defendants repeat and incorporate the Nuisance section below.

III. Easement by Estoppel

An easement by estoppel is created when 1) a promisor's representation that an easement exists has been communicated to a promissee; 2) the promisee believes the promisor's representation; and 3) the promisee acts in reliance upon the promisor's representation. *K & G Concord, LLC v. Charcap, LLC,* 2017 WL 3268183, at *8 (Del. Ch. Aug. 1, 2017)[Emphasis added herein]. It is the first element for which no evidence has been presented.

In Plaintiff's argument for Easement by Estoppel, there is no evidence of any affirmative representation by an owner that an easement exists. Instead, Plaintiff's argument is that none of the Defendants consented.

D. NUISANCE

Nuisance-in-fact exists where a defendant, although acting lawfully on his own property, permits acts or conditions "which become nuisances due to the

circumstances or location or manner of operation or performance. . . . In such a case, the plaintiff must prove by a preponderance of the evidence that the use made by his neighbor of the neighbor's property constitutes an *unreasonable* invasion of the plaintiff's property rights . . . . This analysis-whether the conditions permitted to emanate from one property upon another are so unreasonable as to constitute nuisance-in-fact-involves a weighing of the facts and of the conflicting interests of the parties involved. *Beam v. Cloverland Farms Dairy, Inc.*, 2006 WL 2588991, at *2 (Del. Ch. Sept. 6, 2006).

Robert Duffy testified that he cannot keep his boat at his own bulkhead because it is continuously being damaged by boaters using the ramp. (TT. P. 226, LL. 14 – 16). Similar testimony was heard from Ms. Shoulders. (TT. P. 141, LL. 14 – 24). She even testified that they sold their boat because they couldn't keep it in the water. *Id.* Mr. White testified about damage to his boat. (TT. PP. 153 – 154). Mr. Dippolitto testified about having to fix his fence 10 or 15 times in the past couple years because of damage caused by boaters backing in their long trailers. (TT. P. 234, LL. 6 – 10).

In addition to the damage, there was significant testimony about how the use of the boat ramp has interfered with the Defendants' quiet enjoyment of their

property. Photograph #6, #8, #11, #12, #13, all taken from the Duffy's video monitoring system, show boaters tying to their bulkhead, walking on their deck, walking around the front of their house, having lunch in the Manning's back yard etc. Ms. Duffy also showed the video of her encounter with a trespasser who repeatedly called her a "bit—" and went unabated across her deck even after being warned not to trespass. More disturbing, Ms. Duffy testified that it was the "fourth" time that day when someone had walked across their property after tying up a boat. (TT. P. 205, L. 6) Ms. Shoulders testified to the trash being left behind by the boaters. (TT. P. 136, L. 4) Ms. Duffy further testified about the drunken behavior of the boaters, cigarette butts, beer bottles and other debris left behind . (TT 193, 15 – 20) Mr. Dippolitto testified similarly to the trash and litter being left behind and even "stuffed underneath [his] shed." (TT. 233, LL 19 – 24.)

And then there's the noise and problems that come from "power-loading" At the East Ramp, Mr. Dippolito testified that the power-loading has caused back-wash to raise the canal bed to a point where his neighbor couldn't float his boat. (TT. 238, LL. 17 – 22). This was confirmed by Mr. White. (TT. PP. 155 – 156) Mr. Markiewicz even testified that it is virtually impossible to load a boat at the East Ramp without power-loading. (TT. P. 57, LL. 19-24). The power-loading,

which is very loud, occurs both day and night. (TT. 140). The use of the boat ramps occurs around the clock – in the middle of the night; at midnight; and early in the mornings. This is particularly disturbing to the Duffy's whose bedroom is next to the ramp. (TT. P. 190). The Duffy's even installed a fence to stop people from trespassing but instead boaters would simply walk around the front of their property thereby trespassing to a greater degree. (TT. P.198, L. 19 – P. 199, L. 14).

The complaints of interference with the enjoyment of their property are quite understandable. JX-4, JX-7, JX-8, JX-16, JX-19, all show the close proximity of the boat ramps to the residences. Boaters using the boat ramps are faced with the dilemma of how to safely load/unload the boats without trespassing. Nonetheless, the property owners are being sued by the Association rather than being thanked for tolerating these interferences over the years.

One consideration is the fact that these boat ramps were originally constructed more than perhaps fifty (50) years ago. Theresa Shoulders testified that back in the '70s and '80s was "awesome". It was family oriented and vey neighborly. "It was just a great place to be as children and young adults." (TT. P. 131, L. 6-12). She also testified that people were different then. If someone bumped into your boat, they'd apologize, or even apologize for being in the way.

(TT. P.132, LL. 1 – 13). But, in all honesty, does the Court need a witness to testify about how the world has changed and how people have become increasingly rude and uncaring. It has became a way of life. Few people today follow the concepts embodied in the Scout Oath or the Scout Law.

To compound matters, at some point Swann Keys abolished having security guards and removed the guardhouse. Presumably, the security guards and the guardhouse were there to prevent undesirables from coming into the community. There's nothing to stop that entry now and has not been for some undetermined time.

As a result of the lack of security, and the changing world and attitudes, this problem arises. Essentially these boat ramps have been used as public boat ramps and they lie in the middle of a residential neighborhood and literally in the back yard of these Defendants. No person wants their house directly adjacent to a public boat ramp.

Conclusion

Plaintiff's claim of Quiet Title as a result of the Settlement Agreement must fail for a plethora of reasons, the least of which is that clear legal title remains in the Defendants', or their predecessors' names, since well before the Settlement Agreement was reached, drafted, and filed with the Court. It is clear from the record that the Association had an opportunity to assess its ownership, or non-ownership, of the Boat Ramps before the title conveyance of the common areas but apparently either did not or chose not to. This omission cannot be reversed now as the doctrine of merger prevents contract terms from being enforced after the deed.

What has been occurring over the years since the class action was settled appears to be nothing more than neighborly acquiescence. But Vice Chancellor Lamb established this rule of law:

" Simply put, taking neighborly acquiescence for the kind of laxity required for the establishment of a prescriptive easement is not a rule in accordance with the law of this state."

Dewey Beach Lions Club, Inc. v. Longanecker, 905 A.2d 128, 136 (Del. Ch. 2006)

For all the foregoing reasons, Defendants pray the Court will reject Plaintiff's arguments.

Defendants reserve all rights to make application for attorneys' fees in the event it is successful in defending the Plaintiff's claims.

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Dated: March 28, 2022

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SWANN KEYS CIVIC ASSOCIATION,	:	
	:	C.A. No.: 2021-0614-PWG
Petitioner,	:	
v.	:	
	:	
MICHAEL DIPPOLITO,	:	
JOSEPH W. MANNING,	:	
SHARON MANNING,	:	
THERESA A. CORRICK,	:	
ROBERT C. DUFFY, and	:	
JESSICA A. DUFFY	:	
	:	
Respondents.	:	

CERTIFICATE OF SERVICE

Dean A. Campbell, Esquire hereby states and affirms that on this 28th day of March, 2022 a copy of Defendants Post -Trial Answering Brief , Compendium and this Certificate of Service was served by Electronic Mail and File n Serve upon the following; David C. Hutt, Esquire, Morris James LLP, 107 West Market Street, P.O Box 690, Georgetown, DE 19968 dhutt@morrisjames.com, *Attorney for Petitioner.*

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Dated: March 28th , 2022