

Petitioners, The Friends of Old Dover, Henry R. Horsey, Holly Johnson and Charles Johnson, are seeking attorney's fees and expenses in the amount of \$134,432.05¹ from Respondents, City of Dover Planning Commission, Young & Malmberg and Yozima. This is their second request for attorney's fees and expenses. In an Order dated June 20, 2005, this Court denied Petitioners' first request for fees and expenses opining that this case did not fall within the common benefit exception, because the "equitable and practical considerations that justify fee shifting are not presently before this Court."² However, in that decision, this Court also granted Petitioners leave to file a new petition for writ of certiorari to seek judicial review of the Commission's latest decision.³ A day after Respondents were served with this new petition, Mr. Zimmerman demolished the historic structures that were the root of this case. Petitioners argue that the destruction of the three historic structures that Petitioners were attempting to protect constituted "bad faith." Petitioners also argue that Respondents' actions rendered this case moot, which they argue is another applicable exception to the general rule that parties pay their own legal fees and expenses. Respondents assert that this application for fees and expenses is barred by the theory of *res judicata*. They also contend that both the bad faith and mootness

¹The attorney's fees amounted to \$126,660.00 and the expenses were \$7,772.05.

²*The Dover Historical Soc'y v. City of Dover Planning Comm'n*, Del. Super., C.A. No. 03A-06-002, Witham, J. (June 20, 2005) (ORDER).

³It should be noted that my decision in this case has no relevance to Petitioners' Writ of Certiorari. Nor is it pertinent to Petitioners' Complaint filed in the Court of Chancery seeking relief based on Mr. Zimmerman's conduct, over which I now have jurisdiction. This decision is restricted solely to the issue of attorney's fees.

arguments are without merit.

For the reasons set forth below, Petitioners' Application for Attorney's Fees and Expenses is *denied*.

Discussion

Petitioners' and Respondents' contentions will be addressed individually below.

Bad Faith:

Petitioners argue that the destruction of the three historic structures constitutes bad faith. In support of that argument, Petitioners cite *Slawik v. State*⁴ and *Brice v. State*.⁵ In *Slawik*, the Delaware Supreme Court stated, "[u]nder the so-called 'American Rule,' the remedy of fee shifting is ordinarily not available to a prevailing litigant absent statutory authority to award costs, including counsel fees."⁶ However, one exception to this rule occurs when the "losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . .'"⁷ Notably, the purpose of this exception is to deter abusive litigation and harassment, which in turn will protect the integrity of the judicial system, and it only applies in extraordinary cases.⁸ Examples of bad faith include "when 'parties have unnecessarily prolonged or delayed

⁴480 A.2d 636 (Del. 1984).

⁵704 A.2d 1176 (Del. 1998).

⁶480 A.2d at 639.

⁷*Id.* at 639 n5.

⁸*Brice*, 704 A.2d at 1179.

litigation, falsified records or knowingly asserted frivolous claims.”⁹ While this list is not conclusive, it is indicative of the type of behavior Delaware courts have deemed to be in bad faith.

In the case *sub judice*, the actions that Petitioners assert were conducted in bad faith are not comparable to the actions which Delaware courts have held to represent bad faith. Bad faith, according to the courts, applies to litigation tactics, not any conduct remotely related to the case before the court. Additionally, it is unfair, not to mention inaccurate, for Petitioners to summarily conclude that Mr. Zimmerman’s actions are attributable to Young & Malmberg and Yozima simply because they did not make an argument to the contrary in their responses. Therefore, I conclude that Respondents did not act in bad faith. Thus, this part of Petitioners’ argument fails.

Mootness:

Petitioners’ second contention is that this case falls within a second exception to the American Rule. That exception allows a court to award attorney’s fees and expenses where the petitioner demonstrates: “(1) the litigation was meritorious when filed, (2) the action rendering the litigation moot produced the same or a similar benefit sought by the litigation, and (3) there was a causal relationship between the litigation and the action taken producing the benefit.”¹⁰

This argument is unpersuasive for two reasons. First, *Grimes* is another “corporate benefit” case, which this Court already determined was inapplicable to the

⁹*Kaung v. Cole Nat’l Corp.*, 884 A.2d 500, 506 (Del. 2005).

¹⁰*Grimes v. Donald*, 791 A.2d 818, 821 (Del. Ch. 2000).

case *sub judice*.¹¹ Second, this case does not meet the test established in *Grimes*. The second prong clearly is not met because the action rendering the litigation moot, according to Petitioners, was Mr. Zimmerman's destruction of the three historical structures. Such action was the diametrical opposite of the result sought by Petitioners, as they were attempting to block Respondents from building the Water Street Office Plaza II within the historic district of Dover. Consequently, *Grimes* is inapposite and Petitioners' second contention is unsuccessful.

Res Judicata:

Respondents' primary argument in opposition to this petition is that the application is barred by *res judicata*. *Res Judicata* bars a "second suit based on the same cause of action after a judgment has been entered in a prior suit involving the same parties."¹² *Ingram v. 1101 Stone Associates LLC*,¹³ outlined the five-part test for *res judicata*:

(1) the original court must have jurisdiction over the subject matter and the parties; (2) the parties to the original action must be the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issues decided must be the same as the case at bar; (4) the issues in the prior action must have been decided adversely to the [Petitioner] in the case at bar; and (5) the decree in the prior action was a final decree.

Here, this Court had jurisdiction over the subject matter of the first application

¹¹*The Dover Historical Soc'y*, Del. Super., C.A. No. 03A-06-002, at 10.

¹²*One Va. Ave. Condo. Ass'n of Owners v. Reed*, 2005 Del. Ch. LEXIS 115, at *24.

¹³2004 Del. Super. LEXIS 77, at *23-24.

The Friends of Old Dover v. City of Dover Planning Commission, et al.
C.A. No. 05A-07-001 WLW
January 31, 2006

for attorney's fees and expenses. The parties in both actions are identical. Two issues were decided in the original cause of action - whether to allow a supplemental petition for writ of certiorari and whether to award attorney's fees and expenses. The issue of awarding attorney's fees and expenses is the same as the case at bar.¹⁴ In the prior action, this Court denied Petitioners' application for attorney's fees and expenses. Lastly, the decree in the prior action was a final decree on the issue of attorney's fees and expenses. As a result, I find that *res judicata* applies to this current action.

Based on the foregoing, Petitioners' Application for Attorney's Fees and Expenses is *denied*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

R.J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution

¹⁴While Petitioners argue that Mr. Zimmerman's conduct creates a new issue, this argument is not accepted. His conduct could not affect my previous decision to deny attorney's fees and expenses. My prior decision was based on my finding that this case did not fit into any exception of the American Rule. Despite Petitioners' latest attempt to assert that his conduct constituted bad faith, I am still unpersuaded.