SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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RE: ***The Council of Unit Owners of Windswept Condo. Ass'n v. Schumm v. Ocean Atlantic Assocs., VII, LLC***
C.A. No. S12C-08-011 RFS

Date Submitted: February 20, 2014
Date Decided: May 19, 2014

Dear Counsel:

On November 20, 2013 the Court granted Defendant Robert Schumm's ("Schumm") Motion for Summary Judgment. On August 9, 2012 Plaintiff The Council of Unit Owners of Windswept Condominium Association ("Windswept") filed a breach of contract action and sought reimbursement for the costs incurred to repair Schumm's unit and the unit below. Windswept claimed Schumm's shower pan had cracked, causing water to seep into the floor of Schumm's unit and the unit below, resulting in extensive structural damage. However, the Court determined Windswept had failed to prove causation as to the extensive structural damage and

granted summary judgment in Schumm's favor.

As the prevailing party, Schumm submitted an Affidavit in support of Attorney's Fees (the "Affidavit"). The Court found the Affidavit lacked specificity, and requested Schumm provide additional information in order for the Court to fully evaluate the reasonableness of the requested fees pursuant to *General Motors Corp. v. Cox*[1]. The Court has received additional briefing from the parties, and the issue is ripe for a decision.

PARTIES' CONTENTIONS

Schumm alleges that he is entitled to the award of fees and costs arising out of litigation that Windswept brought. Schumm requests fees be made payable to "Robert W. Schumm and Wetzel & Associates, P.A.", and *not* payable to his insurance carrier.

First, Schumm contends that the payment of his attorney's fees by his insurance carrier on his behalf is a collateral source and should not be considered by the Court in making its fee award.[2] "The collateral source rule is predicated upon the theory that a tortfeasor has no interest in, and therefore no right to benefit from, monies

[1] 304 A.2d 55 (Del. 1973).

[2] Def.'s Second Supplemental Submission at para. 2.

received by the injured person from sources unconnected with the defendant."[3] Put another way, Windswept has no right to any mitigation of damages because Schumm contracted for insurance and paid the insurance premiums.

Second, Schumm points to Superior Court Civil Rule 54(d) ("Rule 54(d)")[4] and various statutory provisions, including 10 *Del. C.* §§ 5101[5] and 8906[6], to support his notion that fees should be awarded to him as the prevailing party in this matter.

> Neither the rule nor statutes provide any exclusion for recovery of a prevailing party's costs if that party's costs

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[3] *Yarrington v. Thornburg*, 205 A.2d 1, 2 (Del. 1964).

[4] Superior Court Civil Rule 54(d) reads:

> **Costs.** Except when express provision therefor is made either in a statute or in these Rules or in the Rules of the Supreme Court, costs shall be allowed as of course to the prevailing party upon application to the Court within ten (10) days of entry of final judgment unless the Court otherwise directs.

[5] Title 10, section 5101 of the Delaware Code states:

> In a court of law, whether of original jurisdiction or of error, upon a voluntary or involuntary discontinuance or dismissal of the action, there shall be judgment for costs for the defendant. Generally a party for whom final judgment in any civil action, or an a writ of error upon a judgment is given in such action, shall recover, against the adverse party, costs of suit to be awarded by the court.

[6] Title 10, section 8906 of the Delaware Code states, in pertinent part:

> The fees for witnesses testifying as experts or in the capacity of professionals in cases in the Superior Court . . . shall be fixed by the Court in its discretion, and such fees so fixed shall be taxed as part of the costs in each case and shall be collected and paid as other witness fees are now collected and paid.

> have, in the first instance, been paid by the prevailing party's insurance carrier. Courts awarding costs to prevailing parties do not look behind the cost award to see who paid those costs.[7]

In reaching this conclusion, Schumm compares the case at hand to that of a defendant involved in an automobile accident case. There, the defendant is defended by their insurance carrier, yet as the prevailing party the defendant is awarded costs and testifying expert fees.[8]

Lastly, Schumm relies on the Code of Regulations for Windswept Condominium, Article X, Section 1(c) (the "Code"). The Code provides ". . . the prevailing party shall be entitled to recover the costs of the proceedings, and such reasonable attorneys' fees as may be determined by the court."[9] "According to the contract between Schumm and Windswept, Schumm is entitled to his attorney's fees, and the Court should not provide Windswept with what would ultimately result in a windfall."[10]

In response, Windswept maintains the collateral source rule is traditionally a

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[7] Def.'s Second Supplemental Submission at para. 3.

[8] *Id.* (citing *Campbell v. Whorl*, 2008 WL 4817078 (Del. Super. Oct. 30, 2008) (awarding a defendant in an automobile accident case costs and expert witness fees pursuant to Superior Court Civil Rule 54(d) and 10 *Del. C.* § 8906 as the prevailing party).)

[9] *Id.* at para. 4.

[10] *Id* .

tort doctrine *not* a contract doctrine; and the matter before the Court is based solely on contract law.[11] Therefore, the doctrine cannot be extended to apply to the matter at hand because, unlike tort damages, contract damages are simply designed to place the injured party in the same place he would have been had there been no injury or breach.[12] The only potential injury would have been Schumm's defense costs; however, those costs were covered by his insurance carrier.[13]

Furthermore, Schumm cannot rely on Rule 54(d) or 10 *Del. C.* §§ 5501 and 8906 for the proposition that he may recover attorney's fees and expert fees.[14] Neither Rule 54(d) nor 10 *Del. C.* § 5501 allow the Court to award attorney's fees to the prevailing party; rather, such authorities allow the Court to award *costs*.[15] "A court may not ordinarily order the payment of attorney's fees as costs to be paid by the losing party."[16] Lastly, pursuant to 10 *Del. C.* § 8906 Schumm cannot recover expert fees because the experts in this case never testified at trial.[17]

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[11] Pl.'s Resp. to Def.'s Second Supplemental Submission at para. 4 (emphasis added).

[12] *Id.* (internal citations omitted).

[13] *Id.*

[14] *Id.* at para. 5.

[15] *Id.* (emphasis added).

[16] *Id.* (citing *Dover Historical Soc., Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1090 (Del. 2006)).

[17] *Id.* at para. 5.

DISCUSSION

The Court decides the present issue based on the following two questions: (1) whether Schumm is entitled to the payment of attorney's fees and costs when such expenses were paid by Schumm's insurance carrier; and (2) whether Schumm is entitled to the payment of expert witness fees when no expert testified at trial.

To begin, Schumm seeks to collect from Windswept any paid attorney's fees or costs associated with his defense. Schumm specifically requests that payment be made to "*Robert W. Schumm* and Wetzel & Associates, P.A." and not his insurance carrier.[18] However, it is evident from Schumm's Supplemental Submission to the Court that his insurance carrier contracted with defense counsel for the payment of Schumm's attorney's fees and costs.[19] As a result, Schumm did not incur any such expenses, and cannot point to a loss. Schumm, therefore, urges the Court to extend the collateral source doctrine in order for him to receive payment from Windswept for fees and costs that he did not actually incur.

The collateral source doctrine is based on the theory that a tortfeasor has no interest in, and therefore no right to benefit from, monies received by the injured

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[18] Emphasis added.

[19] Def.'s Second Supplemental Submission at para 1 ". . . [P]ursuant to a contract with Schumm's insurance carrier, the hourly rates billed were quite reasonable. . .".

person from other, unrelated sources.[20]

> The application of the collateral source rule, *traditionally a tort doctrine*, to contract actions is an undecided issue in Delaware. A Delaware court has recognized that there is 'some support for the application of the doctrine both in contract and in tort actions, especially where the alleged breach of contract sounds, at least, partially, in tort.'[21]

However, no Delaware court has gone so far as to apply the doctrine in a pure contract action.[22]

Here, the context for recovery is based solely on contract law, rather than tort law.

> In the application of the collateral source doctrine. . .a distinction is sometimes drawn between damages in tort and damages in contract, and by some authorities it has been indicated that the collateral source doctrine, although applicable in tort actions, does not generally apply where damages in contract are being sought.[23]

Hence, the Court is not willing to extend the collateral source doctrine to the instant matter, a contract dispute.

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[20] *Yarrington*, 205 A.2d at 2.

[21] *W & G Seaford Associates, L.P. v. E. Shore Markets, Inc.*, 714 F. Supp. 1336, 1350 (D. Del. 1989) (emphasis added) (internal citation omitted).

[22] *Id.*

[23] *Church Home Foundations, Inc. v. Victorine, Inc.*, C.A. No. 6513, at 3 (Del. Ch. Jan. 27, 1982) (internal citation omitted).

Furthermore, contract damages ordinarily are based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed.[24] Applying this concept to the matter at hand, the only potential injury Schumm would have endured would have been his defense costs. Yet, Schumm did not pay for his defense. Thus, Schumm has no "injury" for which the Court must remedy. In fact, to award Schumm attorney's fees and costs would result in a substantial windfall. The Delaware Supreme Court has held that damages awarded in a breach of contract action should not act as a windfall.[25]

Lastly, as it relates to this first issue, Schumm's insurance carrier is not a party and there has been no claim that Schumm's insurance carrier has any interest in recovering the fees and costs it expended.

With respect to Schumm's argument that he is entitled to expert witness fees, the Court again must disagree. Schumm has failed to provide the Court with authority for the notion that he may collect from Windswept expert witness fees when no expert provided courtroom testimony. Rather, Schumm asserts he is entitled to

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[24] RESTATEMENT (THIRD) OF CONTRACTS § 347 cmt. a. Expectation interest (1981).

[25] *Universal Enter. Grp., L.P. v. Duncan Petroleum Corp.*, C.A. No. 4948, at 19 (Del. Ch. July 1, 2013) (citing *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146 (Del. 2009)).

such fees pursuant to 10 *Del. C.* § 8906 because "expert testimony was necessary to support [his] motion for summary judgement. . .".[26] This is not the case. "An expert's fee permitted under Section 8906 is generally limited to time the expert spends in attendance upon the court for the purpose of testifying."[27] "Attendance includes travel time to and from the courthouse, wait time to be called as a witness, and testifying."[28] Thereby, the Court is reluctant to depart from well settled law and award expert witness fees following a grant of summary judgment.

CONCLUSION

For the reasons detailed above, the Court denies Schumm's request for attorney's fees and costs.

Finally, Windswept has requested the Court assess Schumm in order to recover the costs spent by Windswept on the repairs to Schumm's unit. Windswept claims "[i]t would be inequitable to have all the other Unit Owners split the cost of repairing his Unit, with no cost to Schumm, when his Unit was the only one affected by and benefitted from such work."[29] However, such claim has not been addressed because

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[26] Def.'s Supplemental Submission at para. 2.

[27] *Foley v. Elkton Plaza Associates, LLC,* 2007 WL 959521, at *1 (Del. Super. Mar. 20, 2007) (citing *State v. 0.0673 Acres of Land, More or Less,* 224 A.2d at 602).

[28] *Midcap v. Sears Roebuck and Co.*, 2004 WL 1588343, at *3

[29] Pl.'s Resp. to Def.'s Supplemental Submission at para. 6.

it is beyond the purview of this Court.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

cc: Prothonotary's Office
cc: All counsel of record