EFiled: Jan 18 2018 11:16AM EST
Filing ID 61582133
Case Number 296,2017

IN THE SUPREME COURT FOR THE STATE OF DELAWARE

SOKOL HOLDINGS, INC. THOMAS SINCLAIR, and BRIAN SAVAGE, Defendants and Counterclaim Plaintiffs Below, Appellants and Cross-Appellees, v. MARGOLIS EDELSTEIN, MARCUS & AUERBACH, JEROME MARCUS, JONATHAN AUERBACH, and HERBERT MONDROS, Plaintiffs and Counterclaim Defendants Below, Appellees and Cross-Appellants,	:	No. 296, 2017

CROSS-APPELLEES' CORRECTED ANSWERING BRIEF ON CROSS-APPEAL

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Dated: January 18, 2018

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NATURE OF THE PROCEEDINGS

The Cross-Appeal concerns the trial court's June 30, 2017 decision and order (the "Order") to deny the Motion for Rule 11 Sanctions Against Defendants and Counsel (the "Motion") filed on behalf of Plaintiffs/Appellees/Cross-Appellants Margolis Edelstein, Marcus & Auerbach, Jerome Marcus, Jonathan Auerbach and Herbert Mondros (collectively, "Cross-Appellants"). (LA00002-73).

On September 1, 2017, Cross-Appellants filed the Notice of Cross-Appeal concerning the Order "to the extent the trial court denied Cross-Appellants' Motion for Sanctions Pursuant to Rule 11." (Transaction No. 61059672).

On December 6, 2017, Cross-Appellants filed the Answering Brief of the Appellants and Opening Brief of Cross-Appellants (the "Opening Brief" or "Op. Br.").

This is the Corrected Answering Brief on Cross-Appeal filed on behalf of Cross-Appellees Schwartz & Schwartz, Attorneys At Law, P.A. and Benjamin A. Schwartz, Esquire (collectively, "Schwartz").

SUMMARY OF ARGUMENT

A. Cross-Appeal

I. Denied. The Motion did not seek affirmative relief against Schwartz, and thus, Cross-Appellants waived the issue on Cross-Appeal with respect to Schwartz. (LA00218-19). The Opening Brief further corroborates the limited scope of Cross-Appellants' position on Cross-Appeal. (Op. Br. at p. 32). Further, the record before the trial court is that Schwartz inquired as to the basis and authority for the counterclaims giving rise to the Motion, and subsequently, concluded that the relevant counterclaims contained sufficient factual and legal support based on information reasonably available to Schwartz. (LA00289-90). The Court should affirm the decision of the trial court that Schwartz conducted himself in a manner that is consistent with the professional and ethical obligations governing Delaware counsel. Should the Court conclude that the record on appeal is inadequate, then the Court should remand the matter to the trial court for further proceedings, at which time, Schwartz can further develop the record concerning his due diligence.

COUNTERSTATEMENT OF FACTS

Cross-Appellants filed separate lawsuits against Sokol Holdings, Inc., Frontier Mining Ltd., Brian Savage, and Thomas Sinclair (collectively, "Appellants") in the Delaware Superior Court, which sought, among other things, a declaration from the trial court that Cross-Appellants did not commit legal malpractice. (A025-62). Appellants denied Cross-Appellants' claims and countersued Cross-Appellants for legal malpractice and breach of contract (collectively, the "Counterclaims"). (LA00170-180). The Counterclaims were asserted in response to Cross-Appellants' request for declaratory relief, and they arose out of Cross-Appellants' prior legal representation of Appellants, in which Appellants alleged that Cross-Appellants failed to prosecute their claims against Dorsey & Whitney, failed to preserve their claims against Dorsey & Whitney, and failed to file suit in the correct court. (LA00177). Schwartz served as Delaware Counsel to Paul Gordon ("Colorado Counsel") in his representation of Appellants before the trial court.

Cross-Appellants pursued motion practice at nearly every turn. They, in fact, filed not one, but two motions for Rule 11 sanctions in this action. Marcus & Auerbach LLC, Jerome Marcus and Jonathan Auerbach (collectively, the "Philadelphia Lawyers") made their first, failed attempt at oral argument on the pending Motion to Dismiss, which the trial court denied as procedurally improper.

(LA00284). The Cross-Appeal concerns the second Rule 11 motion filed on June 15, 2016. (LA00211-286). In no uncertain terms, Cross-Appellants "request[ed] that [the trial court] sanction Defendants and their counsel for violations in the form of an order: (i) dismissing Defendants' counterclaims against Plaintiffs with prejudice; and (ii) directing Defendants' lead counsel, Paul Gordon, Esquire, to pay the fees and costs Plaintiff have incurred in defending this matter ..." (LA00219). To that point, Cross-Appellants made references to the record concerning the conduct of Colorado Counsel (LA00227, LA00233), but did not allege or provide any evidence that Schwartz acted improperly. (LA00211-239).

On July 29, 2016, Schwartz submitted their written opposition to the Motion (the "Opposition"). (LA00287-291). The Opposition described Schwartz's pre-filing inquiry in detail:

> Before signing and filing the Counterclaims, Schwartz reviewed the pleadings provided to him. He questioned [Colorado Counsel] about the facts underlying the litigation. He satisfied for himself that the claims were being asserted for a proper purpose, not to harass or delay matters, and that they were supported by the law and the facts.

(LA00289). Schwartz was not aware of the existence of the Great Britain Litigation when he signed the Counterclaims. (LA00289). Even so, once made aware of the Great Britain Litigation, the Opposition set forth colorable argument underlying the appropriate nature of the Counterclaims asserted in response to Cross-Appellants' requests for relief. (LA00289-290).

On June 30, 2016, the Court entered the Order denying the Motion. (LA00002-71). In doing so, the Court expressed concern for certain acts, but in light of the Delaware Supreme Court's decision in *Crumplar v. Superior Ct. of Del.*, 56 A.3d 1000 (Del. 2012), it felt "those concerns [were] best resolved by Disciplinary Counsel ..." and denied the Motion. (LA0071).

LEGAL ARGUMENT

I. THE COURT SHOULD AFFIRM THE ORDER DENYING CROSS-APPELLANTS' REQUEST FOR SANCTIONS.

A. COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the trial court abused its discretion in denying Cross-Appellants' request for sanctions?

B. STANDARD OF REVIEW

Contrary to Cross-Appellants' assertion, the Cross-Appeal does not present a question of law. The Cross-Appeal, rather, concerns the order of the trial court denying the Motion based on the uncontroverted record and this Court's instruction in *Crumplar v. Superior Ct. of Del.*, 56 A.3d 1000 (Del. 2012). The Court will review a trial court's decision to deny sanctions for an abuse of discretion. *See Crumplar*, 56 A.3d at 1005.

C. CROSS-APPELLANTS LACK STANDING TO APPEAL THE ORDER.[1]

Cross-Appellants lack legal standing to appeal the trial court's denial of the Motion. "Standing to cross-appeal ... requires the party seeking relief to have been aggrieved by the judgment." *Hercules v. AIU Ins. Co.*, 783 A.2d 1275, 1277 (Del. 2000). "A cross-appeal is necessary only if ... the appellee[] 'seeks affirmative

[1] The undersigned searched Delaware case law for legal precedent and was unable to find any decisional law addressing the ability of a party to appeal the denial of a motion for Rule 11 sanctions. Accordingly, Schwartz respectively submits that this issue is a matter of first impression in Delaware.

relief from a portion of the judgment, i.e., enlarging its own rights or lessening the rights of an adversary." *Id.*

Right is the operative word, as Cross-Appellants did not possess a right to Rule 11 sanctions and the Motion did not limit, enlarge, or otherwise affect their rights. Schwartz analogizes to the concept of legal standing to pursue a claim at the trial court level. Legal standing, in such instance, requires a plaintiff to sustain an injury-in-fact. *See Dover Hist. Soc. v. Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003). An injury-in-fact is "an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.* (quoting *Soc. Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 175-76 (3d Cir. 2000)). The record below fails to demonstrate the existence of a legally-protected interest, let alone an actual and concrete invasion of such interest. *See id.* Cross-Appellants' interest is hypothetical at best, in which the decision to grant sanctions as well as the form of sanctions lies within the discretion of the court. *See* DEL. SUPER. CT. CIV. R. 11(c). Cross-Appellants did not possess a right to Rule 11 sanctions, and thus, the Cross-Appeal fails to "enlarg[e] its own rights or lessen[] the rights of [their] adversary." *Hercules*, 783 A.2d at 1277. Where the Cross-Appeal fails to enlarge Cross-Appellants' rights or lessen Schwartz's rights, the Cross-Appeal is unnecessary and Cross-Appellants lack standing.

D. CROSS-APPELLANTS' FAILURE TO SEEK AFFIRMATIVE RELIEF AGAINST SCHWARTZ CONSTITUTES WAIVER ON CROSS-APPEAL.

Cross-Appellants' failure to seek affirmative relief against Schwartz at the trial court level constitutes a waiver of the issue on the Cross-Appeal with respect to Schwartz. *See Gifford v. 601 Christiana Investors, LLC*, 2017 WL 1134769, at *5 (Del. Mar. 27, 2017) ("Neither of these arguments were fairly presented to the trial court and are therefore waived on appeal.") (affirming entry of judgment). Delaware Supreme Court Rule 8 mandates that "[o]nly questions fairly presented to the trial court may be presented for review ..." DEL. SUPR. R. 8. Where the party seeking appeal did not fairly present the issue to the trial court, the Delaware Supreme Court will review the issue under a plain error standard of review. *See Gifford*, 2017 WL 1134769, at *5. "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice." *Id.*

Cross-Appellants failed to seek affirmative relief against Schwartz at the trial court level. Cross-Appellants, in fact, petitioned the trial court to "sanction

Defendants and their counsel for these violations in the form of an order: (i) dismissing Defendants' counter-claim against Plaintiffs with prejudice; and (ii) directing Defendants' lead counsel, Paul Gordon, Esquire, to pay the fees and costs Plaintiffs have incurred in defending this matter in an amount to be determined ..." (LA00218-219). In support of their request for relief, Cross-Appellants filed a brief, which failed to allege, let alone substantiate any specific charges against Schwartz related to his representation of Appellants. (LA00214-240). Cross-Appellants confirm the limited scope of their request for sanctions on the Cross-Appeal, as evidenced by their admission that the Motion "asked the trial court to require 'Defendant's lead counsel' – *but not their Delaware counsel* – to be sanctioned with an order requiring him to pay the attorneys' fees incurred by Plaintiffs in the course of defending the various groundless counterclaims ..." (Op. Br. at p. 32 (emphasis added)). Cross-Appellants did not seek affirmative relief against Schwartz from the trial court, and thus, the issue is waived on Cross-Appeal to the extent that Cross-Appellants now attempt to reverse course from the position taken in the Motion and the Opening Brief, respectively. *See Gifford*, 2017 WL 1134769, at *5.[2]

[2] The denial of the Motion with respect to Schwartz did not constitute plain error where Cross-Appellants neither argued that Schwartz acted improperly or disputed the record before the trial court that Schwartz exercised due diligence prior to the filing of the Counterclaims. There is no defect in the record; rather, it is clear and

E. THE RECORD SUPPORTS THE TRIAL JUDGE'S FINDING THAT SCHWARTZ DID NOT VIOLATE DELAWARE SUPERIOR COURT CIVIL RULE 11.

The record on Cross-Appeal is devoid of any allegations, let alone evidence that Schwartz violated Delaware Superior Court Civil Rule 11. The record, rather, consists of Schwartz's uncontroverted statements that he questioned Colorado Counsel as to the factual and legal basis for the Counterclaims, and based on the information learned, concluded that there was a reasonable basis of support to assert the claims. While the Counterclaims were subject to attack and ultimately dismissed by the trial court, the Counterclaims' lack of success does not give rise to sanctions. Cross-Appellants failed to put forth any evidence to dispute Schwartz's pre-filing inquiry, and by any objectively reasonable standard, Schwartz satisfied his professional obligations under Rule 11.

The Delaware Superior Court Civil Rules authorize the trial judge to sanction an attorney for his or her conduct. *See* DEL. SUPER. CT. CIV. R. 11. Rule 11(b) provides:

> (b) *Representations to Court*. By representing to the Court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –

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uncontroverted on this very point. Accordingly, the trial court did not commit plain error.

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

DEL. SUPER. CT. CIV. R. 11(b). "Delaware courts rarely impose Rule 11 sanctions." *McLeod v. McLeod*, 2015 WL 1477968, at *1 (Del. Super. Ct. Mar. 31, 2015). When confronted with a request for sanctions under Rule 11, the trial court should evaluate the conduct of the party and/or attorney under an objective standard. *See Crumplar*, 56 A.3d at 1008. The courts have described the objective standard in general terms: "that is, whether the knowledge and information on which the allegations are based constitute 'good ground' for the complaint." *Weinschel Eng'g Co., Inc. v. Midwest Microwave, Inc.*, 297 A.2d 443, 445 (Del. Ch. 1972). In light thereof, "Rule 11 sanctions should be reserved for those instances where the Court is reasonably confident that an attorney does not have an objective good faith belief in the legitimacy of a claim or defense." *Xen Investors, LLC v. Xentex Tech., Inc.*, 2003 WL 25575770, at *3 (Del. Ch. Dec. 8, 2003) ("While the circumstances in this case give rise to strong suspicions about the

defenses and tactics employed ..., the Court cannot conclude with confidence that Rule 11 sanctions are justified."). *See also McLeod*, 2015 WL 1477968, at *1 ("It is well-established that 'sanctions should be reserved for those instances where the Court is reasonably confident that an attorney does not have an objective good faith belief in the legitimacy of a claim or defense.'").

The Court recently provided a detailed, substantive explanation of Rule 11 in *Crumplar*. *See* 56 A.3d 1000 (reversing trial court's order sanctioning attorney). *Crumplar* concerned the trial court's *sua sponte* sanction of an attorney for his failure to distinguish legal precedent and the representations that the attorney made to the trial court, in which the attorney incorrectly cited to a case as proof of a legal proposition at oral argument. *See id.* at 1003. As to the attorney's representations to the trial court, he consulted with his staff and the records available to him in the courtroom for the name of the correct case. *See id.* They, however, were collectively mistaken as to the name of the case, and only in response to the trial court's rule to show cause order and after consulting with opposing counsel did the attorney identify the correct case. *See id.* On appeal, the Court held that trial courts should determine whether an attorney is subject to Rule 11 sanctions under an objective standard. *See id.* at 1008. Citing *Abbott, Fairthorne Maint. Corp.*, and *ASX Inv. Corp.*, the Court explained that "the attorney's duty is one of reasonableness under the circumstances." *Id.* Under the objective standard, the

Court concluded that the attorney's recollection of a similar case after consultation with his staff, which he "reasonably inferred probably resulted from a favorable ruling" satisfied his Rule 11 obligation. *Id.* The Court's conclusion was further aided by the lack of a publicly-available database for researching dispositions on summary judgment motions. *See id.* In light of his inquiry, "no reasonable attorney would have called another attorney, especially not opposing counsel, to confirm what he and his staff reasonably believed." *Id.*

In *Abbott*, the Delaware Superior Court found that an attorney's "duty is one of reasonableness under the circumstances, and a subjective good faith belief in the legitimacy of the claim or even an overzealous desire to repair manifest injustice does not alone satisfy the requirements of Rule 11." *Abbott v. Gordon, et al.*, 2008 WL 821522, at *25 (Del. Super. Ct. Mar. 27, 2008). The attorney's conduct was "replete with examples of undeveloped, unresearched and frivolous arguments ... [that] completely ignore[d] controlling Delaware Supreme Court case law that is directly contrary to the arguments that he asserts." *Id.* at *26. The attorney made no effort to distinguish legal precedent. *See id.* Further, once his adversaries raised the issues in legal briefing, he "persisted in misstating" the law. *Id.* Such conduct, despite the attorney's subjective belief that he complied with Rule 11, led to the trial court's finding that the attorney neither satisfied Rule 11 nor the Delaware Rules of Professional Responsibility. *See id.*

Meanwhile, in *Fairthorne Maint. Corp.*, the Delaware Court of Chancery applied an objective standard in granting monetary sanctions against a party and its attorney for asserting frivolous arguments. *See Fairthorne Maint. Corp.* v. *Ramunno et al.*, 2007 WL 2214318, at *12 (Del. Ch. July 20, 2007). The court found that the attorney engaged in "a troubling pattern of conduct ... that does not befit an officer of this court." *Id.* at *1. The troubling conduct originated as "thinly-veiled threats to advance a cornucopia of frivolous claims ..." *Id.* at *10. The threats materialized into two (2) demands for books and records, which the court described as "spiteful and litigation-driven ...," *id.* at *3; and the assertion of nine (9) affirmative defenses and five (5) counterclaims that "reflect[ed] a sort of a shocking willingness to simply make assertions as retribution for something that someone doesn't like, even though the assertions have no grounding in fact or in law[,]" *id.* at *4. The attorney's conduct relative to his adversary and the court, which the court viewed in its entirety, "warrant[ed] both a fee-shifting award and a sanction under Rule 11." *Id.* at *12.

The record on Cross-Appeal falls woefully short of the pattern of frivolous conduct undertaken by the parties and attorneys in *Abbott* and *Ramunno*, respectively. Schwartz served as Delaware counsel to the Appellants and Colorado Counsel. To satisfy his Rule 11 obligations, Schwartz reviewed the Counterclaims and questioned Colorado Counsel concerning the factual and legal basis therefor

prior to filing the pleading. (LA00289). Specifically, Schwartz was not aware of the Great Britain Litigation at the time that he approved the Counterclaims for filing. (LA00289). While Google and other Internet search engines provide the public with access to a wealth of information, technology can contribute to 'gotcha' moments that prove unfair and unreasonable under the circumstances, because the mere choice of a particular search engine or keyword term can reveal significantly different results. The record on Cross-Appeal demonstrates that Schwartz did not rubber stamp the documents that came across his desk. (LA00289). He, rather, inquired with Colorado Counsel whom had direct access to the clients. (LA00289). This inquiry neither revealed the existence of the Great Britain Litigation[3] nor any facts that would compel Schwartz to undertake further investigation. *See Beck v. Atlantic Coast, PLC*, 868 A.2d 840, 856 (Del. Ch. 2005) (exercising discretion not to sanction Delaware local counsel where the record failed to reveal Delaware local counsel's knowledge of the information concealed from the court by his client and out-of-state co-counsel). Accordingly, Schwartz's conduct was reasonable under the circumstances. *See Crumplar,* 56 A.3d at 1008.

Cross-Appellants concede that the decision to award sanctions lies within the discretion of the trial court. (Op. Br. at p. 35). They, however, fail to show how the trial court abused its discretion in this instance, and thus, the Cross-Appeal

[3] According to Cross-Appellants, it is unclear if and when Colorado counsel knew of the Great Britain Litigation. (Op. Br. at 33).

fails. Cross-Appellants cite to several Delaware cases for the unremarkable proposition that a trial court will exercise its discretion in favor of awarding sanctions. (Op. Br. at p. 36). Schwartz does not dispute this point, and attempts to focus the Court's attention on whether or not the trial court, in this instance, abused its discretion by denying the Motion. Cross-Appellants' arguments fail to support their intended outcome, particularly Cross-Appellants' reliance on *In re Asbestos Litig.*, 2011 WL 5344308 (Del. Super. Ct. Oct. 28, 2011), which the Court subsequently reversed in part and vacated the sanctions. *See Crumplar*, 56 A.3d 1000. Likewise, *Beck* fails to support Cross-Appellants' position where the trial court declined to sanction Delaware local counsel, because, like here, there was no evidence that Delaware local counsel knew of or participated in the concealment of material information to the court. *See Beck*, 868 A.2d at 856.

Cross-Appellants' arguments in support of the Cross-Appeal miss the mark. First, Cross-Appellants filed the Motion to buttress their prior requests for dismissal of the Counterclaims. The fact that Cross-Appellants requested dismissal of the Counterclaims as a form of sanctions cannot be lost on the Court. Second, Cross-Appellants fail to address the points raised by Appellants below in support of the Counterclaims or otherwise show that the Counterclaims were frivolous.[4] Cross-Appellants, rather, approach the issue with blinders in taking the position

[4] Schwartz denies that the Cross-Claims were frivolous and incorporates, by reference, Appellants' arguments on this point.

that there is no position other than their own, and this attitude spurred the fervent manner, in which Margolis Edelstein and the Philadelphia Lawyers ran to the trial court at every turn. At no point did Cross-Appellants address the legal and ethical obligations of Schwartz in representing Appellants' interests, for example, the effect on the attorney-client relationship. Third, they overemphasize the purported burden that the Counterclaims imposed, while underestimating the ability of the trial court to manage its docket. Fourth, Cross-Appellants' frequent appeals to the trial court's interest in promoting judicial economy failed to capture the trial court's attention. Cross-Appellants' argument, rather, is noteworthy in light of the overly litigious manner, in which they conducted themselves. A cursory glance at the docket is a prime illustration of the pot calling the kettle black where Cross-Appellants unsuccessfully sought Rule 11 sanctions not once, but twice (LA0209-286); opposed counsel's motion to withdraw (A003 at Transaction No. 55910378); moved to compel discovery responses (A002 at Transaction No. 55910226), which they subsequently withdrew (A004 at Transaction No. 56106430); filed two motions for more definitive statement (A006 at Transaction Nos. 57398941, 57399368); filed multiple applications to dismiss the Counterclaims (A006, A009-10, A017 at Transaction Nos. 57398941, 57846859, 57850447, 58883519, 59446880); and required Appellants to seek court intervention to address scheduling issues (A012, A016 at Transaction Nos. 58029695, 59345234). Cross-

Appellants were relentless in seeking a favorable ruling on the Counterclaims, and the Motion was but one more application for the trial court's consideration in furtherance of their end game.

In sum, Cross-Appellants failed to demonstrate that the trial court's denial of the Motion constituted an abuse of discretion. The Order reflects the trial court's consideration of Cross-Appellants' arguments, which it ultimately found unpersuasive. The Order, in fact, is a prime example of the trial court managing its docket despite Cross-Appellants' assertions to the contrary. Adhering to the Court's instruction in *Crumplar*, the trial court denied the Motion and noted the role of disciplinary counsel as an alternative avenue for addressing Cross-Appellants' concerns. Accordingly, the Order should be affirmed.

F. THE MOTION REPRESENTS CROSS-APPELLANTS' ATTEMPT TO EVADE THE AMERICAN RULE.

While Cross-Appellants ultimately proved successful in obtaining judgment on their claims and dismissing the Counterclaims, the entry of judgment does not allow for the recovery of attorneys' fees. "Delaware follows the American Rule, under which parties to litigation generally must pay their own attorneys' fees and costs." *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014). There are limited exceptions to the general rule, including an exception for bad faith conduct. *See P.J. Bale, Inc. v. Rapuano*, 2005 WL 3091885, at *1 (Del. Nov. 17, 2005) (quoting *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206,

227 (Del. 2005)) (affirming denial of request for attorneys' fees). "The bad faith exception is applied in 'extraordinary circumstances' as a tool to deter abusive litigation and to protect the integrity of the judicial process." *Id.* (quoting *Montgomery Cellular Holding Co.*, 880 A.2d at 227).

The Motion represents Cross-Appellants' attempt to gain end-around the American Rule. The adversarial system functioned properly, in which Cross-Appellants filed numerous motions to obtain favorable rulings concerning the Counterclaims, and the trial court ultimately entered judgment in their favor. While Appellants did not prevail on the Counterclaims at the trial court level, the American Rule applies, notwithstanding Cross-Appellants' attempt to disguise their request for attorneys' fees as a Rule 11 motion. There is no evidence of bad faith on the part of Schwartz (or any party), as Schwartz did not falsify records, prolong the litigation, or knowingly assert frivolous claims. *See P.J. Bale, Inc.*, 2005 WL 3091885, at *1. Appellants' failure to prevail on the Counterclaims does not equate to bad faith for purposes of shifting fees, *see id.* at *2, and thus, Cross-Appellants are not entitled to recover their attorneys' fees. *See Anguilla RE, LLC v. Lubert-Adler Real Estate Fund IV, L.P.*, 2012 WL 5351229, at *8 (Del. Super. Ct. Oct. 16, 2012) ("Anguilla and Small's success on the previous motions to dismiss does not provide a basis to impose sanctions ...").

The trial court's handling of the Motion mirrors the instructions that the Court provided in *Crumplar*. *See* 56 A.3d 1000. The Court explained:

> If a trial judge believes an attorney has committed misconduct, referral to the Office of Disciplinary Counsel, not Rule 11 sanctions, is the proper recourse in the absence of prejudicial disruption of the proceeding. ... Referral to the Office of Disciplinary Counsel, an agency of this Court, is consistent with the principle that this Court alone has the inherent authority and exclusive responsibility for disciplining members of the Delaware Bar.

Crumplar, 56 A.3d at 1009. Based on its review of the Motion and the responses in opposition thereto, the trial court denied the Motion. It expressed concern with the failure to disclose the existence of the Great Britain Litigation, but felt that "those concerns [were] best resolved by Disciplinary Counsel." (LA0071).

In closing, Schwartz notes that the trial judge incorrectly referred to Appellants' legal counsel as a plural possessive noun (counsels') rather than a singular possessive noun (counsel's) limited to Colorado Counsel. (LA0071). The record on this point is clear and uncontroverted—Schwartz was not aware of the existence of the Great Britain Litigation prior to the trial court's letter.[5] Schwartz exercised due diligence in questioning Colorado Counsel as to the factual and legal basis for the Counterclaims prior to the filing of the Counterclaims, and at no point did Colorado Counsel disclose the existence of the Great Britain Litigation. As Cross-Appellants noted in the Opening Brief, it is unknown if and when Colorado

[5] Further, it cannot be lost on the Court that Cross-Appellants did not seek affirmative relief against Schwartz in the Motion.

Counsel learned of the Great Britain Litigation. (Op. Br. at p. 32). Accordingly, the trial court's use of the plural possessive lacks support in the record and constitutes legal error. *See generally Haley v. Town of Dewey Beach*, 672 A.2d 55, 58-59 (Del. 1996) ("An appellee who does not file a cross-appeal ... may defend the judgment with any argument that is supported by the record, even if it questions the trial court's reasoning or relies upon a precedent overlooked or disregarded by the trial court.").

CONCLUSION

For the reasons set forth herein, the trial court did not abuse its discretion by denying the Motion. The trial court was an active participant in the proceedings, and while aware of the parties' arguments and the behavior of legal counsel in asserting such arguments, it declined to award sanctions. Schwartz notes the trial court's error in referring to counsels' conduct in the plural possessive rather than the singular tense, and it asks that the Court correct such error in its order on appeal.

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