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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS L. HUNT, ESQUIRE, Appellant, v. COURT OF CHANCERY OF THE STATE OF DELAWARE, Appellee.	)	No. 233,2020 On appeal from an Order of the Court of Chancery in C.A. 2018-0553 JRS

REPLY BRIEF OF
APPELLANT THOMAS L. HUNT, ESQUIRE

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I. THE PLAINTIFFS-BELOW ARE A PARTY TO THIS APPEAL.

As stated in footnote 1 of the Notice of Appeal (attached hereto as Exhibit A), in preparing the Notice of Appeal, Hunt relied on two cases in determining the caption: *Crumplar v. Superior Court ex rel. New Castle County*, 56 A.3d 1000 (Del. 2012), and *Evans v. Justice of the Peace Court No. 19*, 652 A.2d 574 (Del. 1995). In both of those cases, the sanctioned lawyer named the sanctioning court as the appellee. Hunt used them as a model.

However, in candor to the Court, in retrospect those cases may be distinguishable in that the sanction was paid to the court, and not the opposing party. In the event this Court determines that the caption is incorrect, that error does not require dismissal of the appeal.

In *State Personnel Commission v. Howard*, 420 A.2d 135 (Del. 1980), this Court recognized that Delaware "de-emphasizes the technical procedural aspects of appeals and stresses the importance of reaching and deciding the substantive merits of appeals whenever possible." *Id.* at 137. Applying this policy, this Court adopted guidelines in determining whether an omission of a party in a Notice of Appeal is fatal to the maintenance of the suit. Omitting a party in the Notice of Appeal will not cause the appeal to be dismissed unless the omission is substantially prejudicial

to a party in interest. The burden is on Hunt, as appellant, to establish the absence of such substantial prejudice. *Id.*

As to the prejudice aspect, this Court noted that:

> An important purpose served by the procedural requirements as to the form and service of the notice of appeal, is to provide notice of the appeal to all litigants who may be directly affected thereby, and to afford them an opportunity to come in and adequately protect their interests in the appellate court. It is within this function of the notice of appeal that the question of prejudice in this case lies.

Id. at 138 (citation omitted).[1]

The facts here are even more compelling here than those in *State Personnel Commission*. It is not disputed that Hunt filed a timely notice of appeal. While the Quantlab Group was not named in the caption, they are identified in the body of the Notice of Appeal as parties benefitting from the sanction. Indeed, they are separated from other parties below who are identified as those "against whom the appeal is not taken." (Ex. A). Members of the Quantlab Group are listed as appellees in File&Serve's records (Ex. B hereto) and receive email notices. Their attorney was named as a recipient of the briefing schedule letter from this Court. (Ex. C). They

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[1] Notwithstanding this, the Court of Chancery argues that the fact that Quantlab Group had notice of the appeal is irrelevant. (Ans. Brf. 13 n.43). This is clearly wrong.

filed in this Court a Disclosure of Corporate Affiliations and Financial Interest, thereby acceding to appellate jurisdiction.[2]

The Court of Chancery attempts to explain away the Disclosure form by arguing that it was "necessitated by the purpose of Rule 7(g)…." (Ans. Brf. at 13 n.43). However, Supreme Court Rule 7(g) by its terms applies only to *parties*. As such, the Quantlab Group correctly recognized that they are parties to this appeal.

The members of the Quantlab Group clearly were named in the body of the Notice of Appeal (as parties), were served with the Notice of Appeal, received notice of the briefing schedule, and have taken action indicating their awareness that they are participating in the appeal. They cannot claim that they did not have notice of the appeal or the ability to protect their interests. As such, there can be no legitimate claim of prejudice.

The Quantlab Group also clearly had early notice of the appeal and were monitoring its status because they filed a July 21, 2020 letter in the Court of Chancery, in which they asked the Court of Chancery to accept that letter as their response in Opposition to Hunt's Motion to stay the Court's June 22, 2020 order pending this appeal. (A-1-2, D.I. 189).

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[2] This Court can take judicial notice of its own records, D.R.E. 292(d)(1)(C), including electronic records, and Hunt asks that this Court do so.

Hunt is filing, contemporaneously with his Reply Brief, a Motion to Amend the Caption. Although the Court of Chancery states it is untimely, this Court has recognized that, where there is a motion to amend the caption, the deadline for such a motion is relaxed. *Id.* at 138 n.4.

Although the Court of Chancery relies on *Hackett v. Bd. of Adjustment of City of Rehoboth*, 794 A.2d 596 (Del. 2002), it fails to note that, unlike the present action, that case involved a petition for certiorari to the Superior Court from the decision of an administrative agency where the absent party was not named in either the caption or the body. *Id.* at 598. This Court has since expressly distinguished cases involving appeals to the Superior Court, saying that "[t]he *Howard* test is limited to dismissals by the Supreme Court." *Genesis Healthcare v. Delaware Health Resources Board,* 2015 WL 8486195 at *2 n.8, disposition reported at 130 A.3d 931 (Del. 2015) (Table).

II. THE COURT OF CHANCERY IMPROPERLY IMPOSED A MONETARY SANCTION *SUA SPONTE* WITHOUT ADVANCE NOTICE OR AN OPPORTUNITY TO BE HEARD.

In his opening brief, Hunt demonstrated that the actions of the Court of Chancery in issuing a monetary sanction *sua sponte* without prior notice and an opportunity to defend violated his right to due process as set forth in *Crumplar,* 56 A.3d at 1010-12.

The Court of Chancery argues that it did not act *sua sponte* because it was ruling on an application to revoke Hunt's *pro hac vice* admission. This is a non-sequitur. The issue is not whether the Court had before it an application for a sanction. The issue is whether the Court had before it a motion to assess a monetary sanction. It did not. *See Lai v. Wei*, 331 Fed.Appx. 143, 146 (3d Cir. 2009) (vacating monetary sanction because "Although Lai had notice of the possibility of a filing injunction and an award of attorneys fees (relief expressly sought by defendants), the Court *sua sponte* imposed without specific notice a monetary penalty payable to the Court"); *In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions,* 278 F.3d 175, 191-93 (3d Cir. 2002) (where requested sanction was attorneys' fees and expenses, additional sanction of requiring attaching notice to future *pro hac vice* applications was improper because "although Malakoff was clearly on notice that the court was empowered to make him pay for the increase in

cost resulting from his vexatious conduct and that Lead Counsel would request those costs, it is not as clear that Malakoff had notice that the court was considering requiring him to attach his scarlet letter to his *pro hac vice* admissions in the District of New Jersey"); *In re Giordano*, 1999 WL 1054726 at *3, *disposition reported at* 202 F.3d 277 (9th Cir. 1999) (where the moving party asked only for a monetary sanction, it was an abuse of discretion for the court to assess other sanctions *sua sponte* without prior notice and an opportunity to be heard); *D.A. Buckner Const. Co., Inc. v. Hobson*, 793 S.W. 74, 76 (Tex. App. 1990) (it was improper to assess monetary sanction without prior notice where such sanction was not requested).

Although the Quantlab Group's letter to the Court stated that Hunt's actions "may also warrant other sanctions…" (A-91), this lacks the specificity required to constitute fair notice. *See Gagliardi v. McWilliams*, 834 F.2d 81, 833 (3d Cir. 1987) (a vague demand for "other appropriate relief" is inadequate notice). Due process requires particularized notice as to the form of the contemplated sanction. *In re Tutu Wells Contamination Litig.,* 120 F.3d 368, 379 (3d Cir.1997) (overruled on other grounds by *Comuso v. Nat'l R.R. Passenger Corp*., 267 F.3d 331, 338–39 (3d Cir.2001)).

The fact that Hunt responded to the request for revocation of his *pro hac vice* status does not satisfy the requirement that he be given an opportunity to respond.

Had he been aware of the potential for a monetary sanction, he could have provided the court with legal authority and argument on the scope of a court's inherent authority to assess monetary sanctions and the propriety of such a sanction in this circumstance. *See, e.g., LendUS LLC v. Goede*, 2018 WL 6498675 at *8 (Del. Ch. Dec. 10, 2018) ("from time to time, otherwise professional and diligent advocates may suffer a momentary loss of composure, which is regrettable, but understandable during a contentious legal proceeding. These temporary lapses are unfortunate, but do not warrant motion practice…"). He could have also made a knowing, intelligent decision on whether to waive his right to a hearing. He did not get that opportunity.[3]

It is no response that Hunt could have filed a motion for reconsideration. Such a motion is not a sufficient, meaningful opportunity to be heard. To be fair or meaningful, the opportunity to be heard must be provided before rights are decided. *Epps v. State*, 941 So.2d 1206, 1207 (Fla. App. 2007). *See also Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 96 (2nd Cir. 1997).

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[3] The Court of Chancery cited *LendUS LLC* for the proposition that a court has authority to act *sua sponte* when attorney conduct prejudices the administration of justice. The Court of Chancery in that opinion stated that "the Court may raise the issue of sanctions sua sponte." WL Op. at *8. The Court did not state that, having raised the issue of sanctions *sua sponte*, it may issue a sanction *sua sponte* where there was no prior request for that sanction, and no notice or opportunity to be heard on that specific sanction.

The Court of Chancery next argues that the requirements of due process apply only where the sanctions were assessed under Rule 11, as was the case in *Crumplar.* Due process is also required, however, when issuing sanctions under a court's inherent authority. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991); *Johnson v. Cherry*, 422 F.3d 540, 551 (7th Cir. 2005) ("before a court may impose sanctions *sua sponte*, it must give the offending party notice of its intent to do so and the opportunity to be heard. This is true whether the court is sanctioning a party pursuant to its authority under Rule 11, section 1927, or its inherent authority"); *Simmerman v. Corino*, 27 F.3d 58, 64 (3d Cir. 1994) (due process requirements of notice and an opportunity to respond apply to both Rule 11 and inherent authority sanctions).

The Court of Chancery attempts to distinguish the cases cited by Hunt on their facts, but makes no effort to demonstrate how the due process requirements of notice and a right to be heard are fact-specific.

Finally, the Court of Chancery argues that that a shifting of attorneys' fees is not a fine, citing *Lewis v. Gulf Health, Inc.*, 540 So.2d 159 (Fla. App. 1989). In that case the Court held that an award of fees for contempt under the facts of that case was neither coercive nor compensatory, and so the contemnor could not be jailed for failure to comply. That is not this case. In any event, an award of attorneys' fees

pursuant to a court's inherent power can be deemed a sanction. *See Chambers*, 501 U.S. at 45-46.

III. A SINGLE EMAIL SENT PRIVATELY TO A LAWYER, AND NOT PART OF A JUDICIAL PROCEEDING, AFTER PROCEEDINGS ON THE MERITS HAD CONCLUDED, WHICH IN NO WAY AFFECTED PROCEEDINGS OR IMPAIRED THE ABILITY OF THE RECEIVING LAWYER TO PERFORM HIS DUTIES, DOES NOT CONSTITUTE CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

In his Opening Brief, Hunt demonstrated that, under *Matter of Member of Bar: Hurley*, 2018 WL 1319010, *disposition reported at* 183 A.3d 703 (Del. Mar. 14, 2018), a single letter or email sent to opposing counsel, not as part of any document filed with a court, does not constitute action prejudicial to the administration of justice. *See also U.S. v. Wunsch*, 84 F.3d 1110, 1117 (9th Cir. 1996) ("In the instant case, however, we have a single incident involving an isolated expression of a privately communicated bias with no facts that would show how that communication adversely affected the administration of justice, either in this or in any other case").

In response, the Court of Chancery relies on *In re Abbott*, 925 A.2d 482 (Del. 2007). The conduct deemed prejudicial to the interests of justice in that case involved statements in a brief filed with the court. "The Superior Court, in response to the Respondent's use of offensive and sarcastic language, was required to strike *sua sponte* portions of the Respondent's written arguments and to write an opinion explaining its actions. Thus, the Respondent caused a waste of judicial resources that

otherwise would be devoted to the merits of other cases before the Superior Court." *Id.* at 486-87.

The present action does not involve anything Hunt filed with the Court. He did not cause the Court of Chancery to waste judicial resources. Any judicial action was caused by the Quantlab Group, as they were the ones who, when faced with the option of rising above it or trying to use the email to gain some advantage with the Court, chose the latter path. Indeed, had they desired, the Quantum Group could have filed a complaint with disciplinary counsel. They did not, perhaps thinking that a referral from the Court of Chancery would carry greater weight.

The principle underlying *Hurley* is that if an action occurs outside of a judicial proceeding and not of itself interfere with judicial proceedings, it does not fall within the rubric of "prejudicial to the administration of justice." Comment 3 to Delaware Rule of Professional Responsibility 8.4(d), reflecting the *Hurley* decision, further makes the point: "A lawyer who in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, desirability, age, sexual orientation or socioeconomic status, violates paragraph (d) *when such actions are prejudicial to the administration of justice.*"

This language indicates that the discriminatory conduct is not of itself a violation of Rule 8.4(d). Rather, it also has to interfere with a judicial proceeding.[4]

This principle should not depend on the content of the communication. To do so would render the phrase "prejudicial to the administration of justice" vague and uncertain, and would have a chilling effect on speech. Rather, it should depend on the context. In this case, there was a single private email after all litigation (except for a ruling on a post-judgment issue) was concluded, and provoked by accusations of lying by counsel for the Quantlab Group. *See Farmer v. Board of Professional Responsibility of the Supreme Court of Tennessee*, 660 S.W.2d 490 (Tenn. 1983) (calling opposing counsel a liar in court papers deemed conduct prejudicial to the administration of justice); *State Industries, Inc. v. Jernigan*, 751 So.2d 680 (Fla. App. 2000) (admission *pro hac vice* revoked for calling lawyer a liar on the record during a deposition).

The Court of Chancery argues that the First Amendment does not protect true threats, The email, if viewed in context, does not express a true threat. The case was effectively over, meaning that Hunt had no need to come to Delaware, and did

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[4] The Oklahoma Supreme Court has commented that "replacing the phrase 'conduct prejudicial to the administration of justice' with 'conduct prejudicial to the administration of judicial process' better expresses the meaning of the rule." *State ex rel. Oklahoma Bar Ass'n v. Minter*, 37 P.3d 763, 776 n.55 (Okla. 2001).

not express any desire to come to Delaware to meet Mr. Reed, and there is no indication that Mr. Reed intended to go to Texas, or if he did, that he would be anywhere near Hunt. There is nothing in the record indicating that Mr. Reed in any way felt threatened or in danger of physical harm. *See Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1076 (9th Cir. 2002) ("these factors go to how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm. This suffices to distinguish a 'true threat' from speech that is merely frightening"). The language did not convey a threat, but rhetorical anger at being accused of lying to the Court of Chancery.

CONCLUSION

WHEREFORE, for the foregoing reasons, as well as the reason stated in hos opening brief, Appellant Thomas L. Hunt, Esq., respectfully requests that this Court reverse the imposition of a sanction upon him.

Respectfully submitted,

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