



IN THE SUPREME COURT OF THE STATE OF DELAWARE

RICHARD BALDWIN,

Defendant / Counterclaim-
Plaintiff Below,
Appellant,

v.

NEW WOOD RESOURCES LLC,

Plaintiff / Counterclaim-
Defendant Below,
Appellee.

No. 334, 2023

Court Below:
Superior Court of the
State of Delaware
C.A. No. N20C-10-231
SKR CCLD

APPELLANT'S REPLY BRIEF

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Dated: December 19, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

 A. The Question Before This Court 1

 B. The Right to a Jury Trial in Delaware 1

 C. Measuring a Party’s Subjective State of Mind 2

 D. The Objective Evidence in This Case Creates a Genuine Issue of
 Material Fact..... 3

CONCLUSION 7

CERTIFICATES

TABLE OF AUTHORITIES

CASE LAW

<i>Allen v. Encore Energy P’rs, L.P.</i> , 72 A.3d 93 (Del. 2013).....	2
<i>Amirsaleh v. Bd. of Trade of City of New York, Inc.</i> , No. C.A. 2822-CC, 2009 WL 3756700 (Del. Ch. Nov. 9, 2009).....	2
<i>Baird v. Owczarek</i> , 93 A.3d 1222 (Del. 2014).....	2
<i>California v. Green</i> , 399 U.S. 149 (1970).....	6
<i>IBEW Loc. Union 481 Defined Contribution Plan & Tr. v. Winborne</i> , 301 A.3d 596 (Del. Ch. 2023).....	2-3
<i>Winston Plywood & Veneer LLC v. Oak Creek Investments, LLC</i> , C.A. No. 2018-0350 (Del. Ch.).....	1

CONSTITUTIONAL PROVISIONS & RULES

DEL. CONST. § 4	1-2
SUPER. CT. CIV. R. 38(a)	2

OTHER AUTHORITIES

5 WIGMORE, EVIDENCE § 1367 (3d ed. 1940).....	6
Mihailis Diamantis, <i>How to Read a Corporation’s Mind, in the Culpable Corporate Mind</i> (Elise Bant ed., 2023).....	2-3

ARGUMENT

A. The Question Before This Court

The question before this Court can be restated as whether there is sufficient *objective* evidence, going one way or another, to make a finding as a matter of law that: (1) New Wood Resources LLC (“New Wood”) acted in *subjective* good faith when it found; (2) there was *objective* evidence demonstrating; (3) Richard Baldwin, Ph.D., acted in *subjective* bad faith by seeking indemnification for the cost of defending himself in the Delaware Plenary Action.¹ In answering the questions on subjective good or bad faith (Nos. 1 and 3), this Court must consider the objective facts because that evidence is the only evidence of record by which one can measure the subjective mindsets of Dr. Baldwin and Andrew Bursky (“Bursky”), who signed the Written Consent. (A24-28.) What this Court lacks, and what the Superior Court lacked, is evidence of witness credibility from the witness stand, *see infra*.

B. The Right to a Jury Trial in Delaware

Under Superior Court Civil Rule 56, if there is *any* basis for a finding one way or another on a material fact, that assessment is one to be made by a jury in Delaware, not by a court of law. That is the purpose of a jury trial and it is of sufficient import that it is embodied in the Delaware Constitution. DEL. CONST. § 4 (“Trial by jury

¹ What is referred to as the Plenary Action is: *Winston Plywood & Veneer LLC, et al. v. Oak Creek Investments, LLC, et al.*, C.A. No. 2018-0350 (Del. Ch.).

shall be as heretofore.”); SUPER. CT. CIV. R. 38(a) (“The right to trial by jury shall be as heretofore.”); *Baird v. Owczarek*, 93 A.3d 1222, 1226 (Del. 2014) (“the right to a jury trial in civil proceedings has always been and remains exclusively protected by provisions in the Delaware Constitution.”).

C. Measuring a Party’s Subjective State of Mind

Whether someone (or some entity) acted in good faith or bad faith is question that requires an assessment of that person’s inherently subjective state of mind. *See, e.g., Amirsaleh v. Bd. of Trade of City of New York, Inc.*, No. C.A. 2822-CC, 2009 WL 3756700, at *5 (Del. Ch. Nov. 9, 2009) (“to prove bad faith a plaintiff must demonstrate that the defendant’s conduct was motivated by a culpable mental state . . . [or] driven by an improper purpose.”). In a judicial proceeding, that assessment can be made, in part, by looking at the objective evidence presented — what that person did or did not do under the circumstances — in an attempt to measure whether that person’s conduct has the indicia of a good or bad faith motive.

The Court of Chancery recently explained how objective evidence plays into measuring a subjective state of mind:

For a court to consider whether a decision appears extreme when assessing bad faith accords not only with *Encore I* [*Allen v. Encore Energy P’rs, L.P. (Encore I)*, 72 A.3d 93, 106 (Del. 2013)], but also with widely accepted scientific learning about the theory of mind.

While “mind reading” might sound like a mentalist magic trick, for cognitive scientists it refers to the very pedestrian capacity we all

have for figuring out what another human being is thinking . . . Other people’s minds are opaque to us, so we cannot observe them directly. And yet, when someone walks toward the water fountain on a hot day, we know she wants a drink. When someone yelps after stubbing her toe, we know she feels pain. When someone aims an arrow at a target, we know she intends to hit it. We take in observable data about a person and infer something about her unobservable mental life.

Mihailis Diamantis, *How to Read a Corporation’s Mind, in the Culpable Corporate Mind* 222-23 (Elise Bant ed., 2023) (footnotes omitted). Clairvoyance plays no role. “We gather two types of observable information — what the person did and the circumstances in which he did it — and triangulate to a person’s unobservable mental state.” *Id.* (footnote omitted).

IBEW Loc. Union 481 Defined Contribution Plan & Tr. v. Winborne, 301 A.3d 596, 621 (Del. Ch. 2023).

D. The Objective Evidence in This Case Creates a Genuine Issue of Material Fact

New Wood has made no specific arguments that warrant a response. Its discussion of the objective evidence that supposedly supports a finding that Bursky acted in good faith and Dr. Baldwin acted in bad faith is what it is.

But against that supposed plethora of objective evidence that allegedly supports the entry of summary judgment, this Court must consider the objective evidence Dr. Baldwin presented to determine whether a genuine issue of material fact exists:

1. The advancement fees Dr. Baldwin was awarded were only for defending himself in the Plenary Action. As a result, Dr. Baldwin's good or bad faith has to be measured only by his seeking advancement for the fees incurred in defending himself against the claims brought against him by New Wood and others in *that case*. Any and all references to Dr. Baldwin's counterclaims in that case, to the other cases between the parties, and to Dr. Baldwin's work performance at Winston Plywood & Veneer in Mississippi (or elsewhere) are utterly irrelevant.

2. Although not controlling, *see* LLC Agreement ¶ 8.2 (A60), the fact that the claims against Dr. Baldwin in the Plenary Action were dismissed by New Wood is certainly relevant and admissible evidence that: (a) Dr. Baldwin did not act in bad faith by seeking advancement for the costs defending himself in that baseless lawsuit that was dismissed, and (b) Bursky acted in bad faith when he signed the Written Consent opining that Dr. Baldwin had acted in bad faith when he had no factual basis or support for making such an assertion against Dr. Baldwin.

In fact, it is virtually inconceivable that a jury could find Dr. Baldwin to have acted in subjective bad faith by defending himself against a lawsuit that was later dismissed. The only reasonable and legitimate jury findings in this case in terms of subjective mindset would be that Dr. Baldwin acted in good faith in defending himself and that a finding that he acted in bad faith was, itself, made in bad faith.

3. As New Wood points out in its brief, a party is entitled to a presumption of good faith and one must overcome that presumption with competent evidence to rebut the presumption. *See Answer Br. at 18.* Although this may be the case with respect to Bursky signing the Written Consent, it is likewise the case with respect to Dr. Baldwin seeking advancement of the fees for defending himself in the Plenary Action that was ultimately dismissed. And this is why summary judgment was not appropriate in this case — because New Wood presented absolutely no objective evidence that Dr. Baldwin acted in bad faith by seeking such advancement, meaning the only legitimate conclusions are that Dr. Baldwin acted in good faith and that Bursky acted in bad faith by fabricating the baseless conclusion that Dr. Baldwin had acted in bad faith.

4. Bursky signed the Written Consent on April 23, 2020. (A24-28.) This was more than a year and a half after Dr. Baldwin sought advancement and after the Court of Chancery had ordered such payment. A reasonable inference from this is that the Written Consent was executed in bad faith as an afterthought and not as a legitimate finding based on objective, legitimate facts that Dr. Baldwin had actually acted in bad faith.

5. The additional objective factual points Dr. Baldwin makes in his Opening Brief speak for themselves and will not be reiterated herein.

On a motion for summary judgment, a court can only review a paper record of deposition transcripts, affidavits, and other neutral records that are not subject to cross-examination and do not reveal credibility, believability, and self-serving motives. *See, e.g., California v. Green*, 399 U.S. 149, 158 (1970) (“Cross-examination, the ‘greatest legal engine ever invented for the discovery of truth’” (quoting 5 WIGMORE, EVIDENCE § 1367 (3d ed. 1940))). Credibility, believability, and self-serving motives (among other things) are the key evidentiary inquiries that are essential to determine whether someone has acted in good faith or bad faith. The Superior Court erred when it made that finding as a matter of law based on a paper record, which included inherently conflicting evidence on Bursky and Dr. Baldwin’s state of mind.

This case is a textbook example of why the right to a jury trial is enshrined in the Delaware Constitution — to have live witnesses explain themselves before a jury of their peers who can make those ultimate subjective determinations of good faith or bad faith based on a consideration of all the surrounding circumstances. A genuine issue of material fact is presented in this case and the appropriate, and constitutionally mandated, way to have it resolved is by a jury trial.

CONCLUSION

For the reasons set forth above, this Court should reverse the Superior Court's August 16, 2023, Final Order and Judgment and remand this case for a jury trial on whether New Wood acted in good faith when it found that Dr. Baldwin acted in bad faith by defending himself against the claims brought against him by New Wood that were ultimately dismissed.

Respectfully submitted,

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