EFiled: Feb 07 2014 01:17PM EST
Filing ID 54964805
Case Number 619,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SOKOL HOLDINGS, INC., *et. al*	)	
	)	No. 619, 2013
v.	)	
	)	
DORSEY & WHITNEY, LLP	)	

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SOKOL HOLDINGS, INC., THOMAS SINCLAIR and BRIAN SAVAGE	)	
	)	No. 619, 2013
	)	
Plaintiffs below	)	
Appellants,	)	
v.	)	**APPEAL FROM**
	)	**SUPERIOR COURT,**
DORSEY & WHITNEY, LLP,	)	**NEW CASTLE COUNTY**
	)	
Defendant below	)	
Appellee,	)	

APPELLANTS' CORRECTED OPENING BRIEF

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Date: February 5, 2014

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Appellants, by and through their counsel, respectfully submit this brief in support of their appeal.

NATURE OF PROCEEDINGS

This case was brought by four clients – two men, Brian Savage and Thomas Sinclair; Sokol Holdings, Inc., and Frontier Mining, Ltd., against the law firm of Dorsey & Whitney ("Dorsey") because Dorsey billed the plaintiffs over $3 million (slip op. at 2, Attached as Exhibit A) for what should have been a brief representation to help the plaintiffs respond to a third-party subpoena. The trial court held a bench trial lasting approximately two weeks. It ruled that the amount of Dorsey's billed fee was unreasonable. But it held that the plaintiffs were properly charged $864,629 in fees for this exercise and $650,863 in costs, for a total of $1,515,492. Because other fees not in dispute had also been billed, and certain amounts had also been paid, the court held that $633,339 was due and owing. The court also imposed prejudgment interest on that amount from the day Dorsey's bills were issued, in the amount of $342,931.56, and so entered a total judgment of $976,270.56.

In May of 2010, well after this case was filed, but before trial, Plaintiffs tendered a written settlement offer ("Settlement Offer") to Defendant for an

amount which, it is not disputed, substantially exceeded the amount found by the trial court to be due. Transcript on Motion for Re-argument at 4, (Attached as Exhibit B). Dorsey rejected this proposal. Under Colorado law, which the parties agree governs here, prejudgment interest may be imposed only if the sum awarded had been "wrongfully withheld." Colorado law also provides, however, that if a settlement offer is made which exceeds the amount ultimately found to be due, the opposing party must pay all costs incurred by the tendering party after the settlement offer was made and rejected. Because appellants had tendered an amount in excess of the amount found due by the trial court, however, appellants argued that the amount had not in fact been wrongfully withheld. The trial court rejected this contention. This appeal followed.

SUMMARY OF ARGUMENT

1. The trial court found that Dorsey had been retained in what should have been a small and quickly concluded representation involving third-party discovery from the contents of two laptops and a desktop computer, which was sought in a foreign lawsuit. The trial court concluded that, while this legal work should have cost at most a few hundred thousand dollars, [redacted] The trial court therefore found that Dorsey had failed to carry its burden of demonstrating that its fee was reasonable. Having made that legal determination, however, the trial court essentially ignored the rule it purported to be applying – because when it set out to determine what *was* a reasonable fee, it began with the very number it had just rejected: the amount Dorsey billed. The trial court quoted the applicable and governing authorities, which mandate that a proper analysis begins with a determination of the hours *reasonably* expended, multiplied by a reasonable hourly rate. But nowhere in the trial court opinion is there any determination of what a reasonable number of hours should be for any one of the legal assignments at issue. Instead, the trial court analyzed each phase of the work by beginning with Dorsey's billed hours, and then

making arbitrary reductions (and then, in one instance, an increase) in those amounts. This was legal error.

2. The trial court compounded this error by ignoring the one piece of evidence in the record which – the trial court acknowledged – constituted evidence of what a reasonable fee should have been for the work here at issue. This was expert testimony proffered by plaintiffs, from an experienced litigator, that the entire assignment should have cost $280,000. The trial court quoted this testimony approvingly, and never found any reason why the expert opinion was not relevant, or why the figure was not applicable to the instant facts. But that figure played absolutely no role in the trial court's analysis. This too was legal error. As the only relevant piece of evidence on the central question at issue in the case, this figure should have either been adopted or distinguished in some way. Instead it was effectively ignored.

3. Finally, the trial court's imposition of pre-judgment interest was error because applicable law permits such a charge only when funds have been "wrongfully withheld." Well before trial, plaintiffs made a settlement offer to defendants of an amount well in excess of the amount ultimately found to be due, and under governing law plaintiffs were therefore entitled to tax defendants with all of the costs they incurred after the settlement offer was made and rejected.

While plaintiffs do not demand those costs here, they do contend that, by providing for such reimbursement, applicable law makes clear that funds have not been wrongfully withheld by the tendering party. Imposition of pre-judgment interest was therefore legal error.

STATEMENT OF FACTS

In early 2007 Plaintiffs Brian Savage, Thomas Sinclair, Sokol Holdings, Inc. and Frontier Mining , Limited each received a third-party subpoena pursuant to 28 U.S.C. §1782 demanding that, as third-party witnesses, they provide testimony in aide of litigation then pending outside the United States. Sokol and Frontier were Delaware corporations with offices in Colorado, and the subpoenas were issued out of the United States District Court for the District of Colorado. Slip op. at 5. Plaintiffs retained defendant Dorsey & Whitney to represent them in responding to the subpoenas. Slip op. at 6-7.

Material responsive to the subpoenas resided in the laptop computer maintained by Mr. Savage and that of Mr. Sinclair, and in one corporate server. Slip op. at 7. A total of approximately 325,000 documents resided on all three computers. Slip op. at 2.

The trial court found that Dorsey's work was characterized [redacted]

bear. Slip op. at, *e.g.*, 8. [redacted]

Ultimately, Dorsey caused plaintiffs to expend hundreds of thousands of dollars to create a computerized database of all documents on all three of the computers, with the intent of facilitating word searches of the documents to identify material potentially responsive to the subpoenas. [redacted] Instead, ten months after the subpoena was issued, the presiding court ordered plaintiffs to produce responsive material in 30 days. So, Dorsey hired a phalanx of contract lawyers, printed out every single page of potentially responsive materials residing on all three computers, and had the contract personnel work around the clock to read every page and determine what should be produced. Slip op. at 28, 30ff. Ultimately,

only 5% of the material in the computers was deemed responsive. See slip op. at 2 (approximately 17,000 documents produced out of the universe of 325,000).

Finally, the trial court categorized the millions of dollars billed into the following categories: "services rendered before court order [compelling discovery];" "data capture, review and production after court order;" "misc. correspondence after court order;" "objection and scope of subpoena after court order;" "protective order issues after court order;" "defending motions after court order;" "Instructing [database manager] KPMG after court order;" "anti-suit injunction after court order;" and "cost recovery after court order." Slip op. at, e.g., 65-66. It reached a conclusion about the appropriate amount of money charged by Dorsey for each category of legal work. *Ibid*. But the trial court did not make any findings about the appropriate number of hours it would have been reasonable for Dorsey to expend doing these various tasks.

ARGUMENT 1

The Trial Court Misapplied The Burden Of Proof By Beginning Its Analysis With The Amount Billed, And Then Deducting Amounts From That Number, While Ignoring All Record Evidence Of The Value Of The Work Done

I. QUESTION PRESENTED

Where the reasonableness of a law firm's fee is at issue, did the trial court commit error when:

(a) it disregarded the only record evidence, expert testimony that was unrebutted and accepted without qualification as to its weight or reliability by the Court, on what a reasonable fee should be; and

(b) it starts its analysis of the reasonable fee with the amount billed, and then makes deductions from that number, when controlling legal authority makes clear that such analyses must commence with what is a reasonable fee under similar circumstances and only then make adjustments as the evidence and legal justification warrant? The sole evidence of the amount of a reasonable fee was presented by Plaintiffs through Mr. McMichaels's testimony. Slip op. at 49-50. Although acknowledged by the Court, this dispositive evidence was ignored by the Court in its calculation of the reasonableness of the fees.

II. SCOPE OF REVIEW

The application of the burden of proof is a question of law, and this Court reviews questions of law *de novo*. *Alaska Elec. Pension Fund v. Brown*, 941 A.2d 1011 (Del. 2007).

III. MERITS OF ARGUMENT

There are two simple and independently dispositive reasons why the trial court's opinion must be reversed. First, the trial court made no substantive use of the only record evidence of what a reasonable fee would have been for the work here at issue. And second, the trial court's method of analysis throughout its opinion was to begin with the amount Dorsey actually billed its clients for various categories of service. The trial court then reduced this figure by certain amounts on the basis of various factors reflecting the quality of Dorsey's work.

These were both legal error. While the trial court correctly articulated the legal rule applicable in this case – that a law firm bears the burden of proving that the fee it should collect is reasonable – the trial court therefore did not actually follow that rule.

A. The Trial Court Opinion Does Not Take Into Account The Only Record Evidence on What A Reasonable Fee Would Have Been

The trial court acknowledged that Dorsey itself put forth absolutely no evidence of what the completed job should have cost. See slip op. at 32 (Dorsey "presented no evidence of fees charged in similar matters"). However, the record did contain such evidence.

The trial court cited but effectively ignored what it referred to as "the sole evidence on the amount of a reasonable fee" – the unrebutted testimony of litigator Lawrence McMichaels. McMichaels, a partner at the Philadelphia law firm of Dilworth, Paxson LLP, testified that the entire retention, including all document review and all other aspects of the production, should have cost $280,000. Slip op. at 50. As noted above, Dorsey offered no figure of its own.

The trial court opinion cites Mr. McMichaels' testimony and his opinion on what a reasonable fee should have been for the work here at issue. But having mentioned the number, the trial court opinion offers no analysis as to whether this figure would be reasonable here; whether it reflects or is based on facts which would compel some adjustment, up or down; or any other utilization of the figure. The number is mentioned and then ignored.

This was legal error. Because the trial court explicitly identified Mr. McMichaels' opinion evidence as "the sole evidence on the amount of a reasonable

fee," slip op. at 50, the McMichaels' opinion could not be ignored in this way. The Court should have either adopted it as dispositive or distinguished it in some way.

B. The Trial Court's Analysis Presumes the Reasonableness of Dorsey's Fee And Then Works From It, Rather Than Properly Applying The Burden Of Proof To Dorsey To Establish A Reasonable Fee

Applicable case law mandates that, when a law firm's fee is challenged,

> The initial estimate of reasonable attorney's fees is reached by calculating the "lodestar" amount, which represents the number of hours reasonably expended multiplied by a reasonable hourly rate.

Stuart v. North Shore Water Sanitation District, 211 P.3d 59, 63 (Colo. App. 2009). See also *Mercantile Adjustment Bureau LLC v. Flood,* 278 P.3d 348 (Colo. 2012); *City of Wheat Ridge v. Ceverney*, 913 P.2d 1110 (Colo. 1996). See also *Lindy Bros. Builders, Inc. v. American Radiator Standard Corp.,* 540 F.2d 102 (3d Cir. 1976) (*en banc)* and *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), both of which are well-known federal authorities on the calculation of attorney's fees to which the Colorado courts have looked as authority on the topic. Crucially, however, the trial court opinion contains no determination at all of what "a reasonable number of hours" would have been. The concept is completely ignored.

Instead, the trial Court began its analysis with the very number that the cases hold cannot be used – the *amount billed*, reflecting the number of hours ***actually***

expended, multiplied by the law firm's actual hourly rates. This method of proceeding gave a presumption of reasonableness and validity to the very figure which, the cases hold clearly, is entitled to no presumption at all - the *amount billed*.

Thus, the cases say that the place to begin is with "the number of hours ***reasonably*** expended" - not the number of hours ***actually*** expended. By beginning with the actual number, the trial court effectively presumed that Dorsey's billed number was reasonable, and then attempted to determine amounts by which that figure should be reduced.

The trial court's decision reflects this failure throughout its opinion. Thus, for example, the trial court concluded that "the time expended by Dorsey was clearly excessive for the task at hand in connection with the review and production of documents." Slip op. at 40. But the trial court ***never*** made a finding of what the reasonable amount of time would have been for any given task. The trial court opinion – like Dorsey's evidence – is completely silent on this point.[1] And that

[1] As the trial court noted, Dorsey's bills were prepared using the "block billing" method, which made it impossible to determine the amount of time spent by Dorsey personnel on ***any*** task. A chart prepared and submitted by plaintiffs attempted to reconstruct the amounts of time billed, but as the trial court recognized this was incomplete. Dorsey submitted absolutely no evidence on this point at all, and, as noted above, no evidence at all on how much time any task or aspect of the retention should have taken.

failure is repeated and compounded for every single component of Dorsey's work throughout the retention.

Instead, for "review and production" as for every other element of the assignment, the trial court analysis begins with the number of hours actually billed and then attempts to make adjustments of various kinds to reflect problems or deficiencies in the quality or timeliness of Dorsey's work. Because the opinion contains no statement of what "the number of hours reasonably expended" should have been, the court's analysis is fundamentally flawed.

One particularly egregious example of this flawed analysis is the trial court's treatment of the $525,000 Dorsey billed for work done before actual production even began. Here, as for all other elements of the trial court's analysis, the opinion contains no estimate of the "the number of hours reasonably expended." Instead, the trial court finds that the number of dollars billed was too high, and so reduces it – only to inflate it part of the way back up. Why? Because, the trial court opinion holds, the clients sometimes were not responsive to their counsel's requests for phone calls or meetings. See slip op. at 50-51.

The crucial piece missing from the trial court's analysis is the absence of any connection between the clients' actions and the number of hours actually billed, or the number of hours that should have been billed, by the lawyers – the ever-elusive

"number of hours reasonably expended." Thus the trial court opinion contains no finding that the clients' actions caused any particular result, or any particular delay, or indeed that those actions had any identified impact at all on the course of the representation or the substance or timing or efficiency of Dorsey's work.

Yet, solely on the basis of this simple conclusion – that the clients were not always immediately responsive to their lawyers' requests for attention – the court added $78,750 to plaintiffs' tab. The record contains absolutely no mention of why that, rather than some other figure, represents the actual impact of plaintiffs' conduct on what a reasonable fee should be.

ARGUMENT 2

Plaintiffs' Settlement Offer Shows That No Money Was "Withheld" From Defendant, Much Less Wrongfully Withheld. Therefore, No Prejudgment Interest Can Be Awarded.

I. QUESTION PRESENTED

When governing law provides that pre-judgment interest can be imposed only if the sum due has been "wrongfully withheld," can such interest be charged against a party that makes a settlement offer for an amount in excess of the sum ultimately found to be due – or can the party avoid pre-judgment interest only by paying the sum offered unconditionally, and then continuing to litigate over the propriety of the amount billed? This issue was timely raised below on Plaintiffs' Motion for Re-argument and Costs filed on July 26, 2013. (A-30) Argument was held before the Superior Court on October 2, 2013. This issue was raised on pages 2 through 4 and is discussed throughout the hearing transcript. The October 2, 2013 hearing transcript is attached hereto.

II. SCOPE OF REVIEW

This is a question of law, which is reviewed *de novo*. *Alaska Elec. Pension Fund v. Brown,* 941 A.2d 1011 (Del. 2007).

III. MERITS OF ARGUMENT

As the trial court correctly held, Colorado law is controlling on the question of whether and to what extent prejudgment interest may be imposed in this matter. Colorado law permits the imposition of prejudgment interest only when funds have been "wrongfully withheld." C.R.S. 5-12-102(a), slip opinion at 66. See also *South Park Aggregates, Inc. v. Northwestern Nat'l Ins. Co*., 847 P.2d 218, 227 (Colo. App. 1992) (pre-judgment interest awardable only when funds wrongfully withheld). Here, however, as the Settlement Offer makes clear, plaintiffs did not seek to withhold the funds at all: the amount held to be a reasonable fee – and several hundred thousand dollars on top of that – was proffered to Defendant, Reargument transcript at 3-4, but Defendant refused it.

Given these two undisputable facts: Plaintiffs offered to pay Defendant, but Defendant refused –Plaintiffs did not in any way "wrongfully withhold money" from Defendant after the settlement offer was made. For that reason, no pre-judgment interest should be imposed.

As the trial court correctly held, slip op. at 67, Colorado pre-judgment interest statute is designed to prevent parties who owe money from benefiting from the use of funds until judgment. The record is clear here that Plaintiffs did not

attempt to do that. Defendant alone is responsible for the fact that it has not already been paid more than this Court has held Defendant is entitled to be paid. No pre-judgment interest should have been awarded.

On reargument, the trial court held that money would be wrongfully withheld, even if a settlement offer was made that conformed to Colorado law, unless the plaintiffs had unconditionally paid the amounts they had offered in settlement. Reargument transcript at 18. This holding completely ignores the language of the cases establishing that funds must be "wrongfully withheld," and it also ignore the Colorado statute on settlement offers – which considers money meaningfully tendered solely on the basis of a written settlement offer, and without the unconditional payment that the trial court required.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the Order below and remand for further proceedings.

Date: February 5, 2014

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