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Case Number 619,2013 D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SOKOL HOLDINGS, INC., THOMAS SINCLAIR and BRIAN SAVAGE, *Plaintiffs Below, Appellants*,	:	No. 619, 2013
v.	:	Court Below The Superior Court The County of New Castle The State of Delaware C.A. No. SN09C-08-239 JAP
DORSEY & WHITNEY LLP, *Defendant Below, Appellee*.	:	

APPELLEE'S ANSWERING BRIEF

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Dated: February 17, 2014

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NATURE OF PROCEEDINGS

This is a case about clients refusing to pay the lawyers they engaged and urged to perform all the work that the lawyers did indeed perform. Five and a half years after bringing this suit to avoid their obligation to pay Dorsey & Whitney LLP for the legal services it rendered on their behalf, Plaintiffs still will not settle their debt.[1] Instead, they have filed this appeal to challenge the trial court's discretionary determination of the amount of reasonable attorney fees they owe Dorsey. Further, they contend, without citation, that the Colorado pre-judgment interest statute, despite its terms, does not permit Dorsey to collect interest on the fees Plaintiffs wrongfully withheld. Neither position is tenable.

The trial court's resolution of these two issues—reasonable fees and pre-judgment interest—are the only issues remaining in this lengthy proceeding. Plaintiffs have wriggled their defenses to Dorsey's claims for payment through court systems in both Colorado and Delaware, both chancery and law courts in Delaware, discovery, repetitive motion practice, a multi-week trial, and now this appeal. They have explored every process to which they are due. Dorsey requests that this Court ensure that this appeal will be the last chapter in this saga by affirming the lengthy, detailed decision of the Superior Court.

[1] Plaintiff Frontier Mining, LTD did not join in this appeal. Thus, the judgment against it is unchallenged and remains enforceable. (*See* A. 2.)

SUMMARY OF ARGUMENT

1. Dorsey denies Plaintiffs' characterization of the trial court's decision. In fact, the decision below is a detailed, thorough analysis and determination of a reasonable amount of Dorsey's fees, which the trial court arrived at after a multi-week trial. The sole issue at trial was the reasonableness of the fees. Plaintiffs' contention that the trial court committed error, legal or otherwise, is false.

2. Dorsey denies Plaintiffs' assertion that their expert provided "the only relevant piece of evidence on the central question at issue in the case." Abundant evidence was put forth by Dorsey supporting its claim for fees, and the trial court determined that neither side's calculations were correct. Well-established law permits a fact-finder to weigh competing evidence, and the trial court did not commit legal error by refusing to adopt Plaintiffs' view of the facts.

3. Dorsey denies that Colorado law precludes an award of pre-judgment interest in this case. Plaintiffs failed to appropriately raise this issue in the trial court, and they cite no authority for their position that pre-judgment interest may not be awarded. Therefore, Plaintiffs have waived this argument. Moreover, Colorado law does in fact permit an award of pre-judgment interest because of Plaintiffs' wrongful withholding of funds from Dorsey.

STATEMENT OF FACTS

Dorsey's services on behalf of Plaintiffs began as the result of Michael Wilson & Partners ("MWP") seeking documents and discovery from Plaintiffs in connection with claims it had against one of its former partners. (Appellants' Br. Ex. A at 4.) MWP, a Kazakhstan law firm, had provided legal services to Plaintiffs in connection with a deal in which Plaintiff Sokol Holdings, Inc. had sold oil rights in Kazakhstan to a company called Max Petroleum in exchange for cash and 134 million shares of its stock. (*Id.* at 5.) The transaction allowed Sokol to designate the recipients of the Max Petroleum shares and a substantial number were designated to Plaintiff Thomas Sinclair. (*Id.*) The trial court found that the value of the shares was estimated to be $40-$50 million. (*Id.*) Eventually those shares ended up in a Bahamian trust associated with a former MWP partner's family. (*Id.*) MWP sought information about the transfer of the shares because it believed that it was entitled to some portion of them. (*Id.* at 4, 6.) Sinclair and the other Plaintiffs vigorously disputed MWP's claim to the Max Petroleum shares. (*Id.* at 6.)

In 2006, MWP commenced multiple litigations against some of its former partners, arguing that the Max Petroleum transaction was relevant to the disputes. (*Id.* at 4-5.) Pursuant to 28 U.S.C. § 1782, MWP obtained an order from the United States District Court for the District of Colorado permitting it to issue

multiple subpoenas demanding discovery from Plaintiffs. (*Id.* at 5.) The subpoenas were part of what the trial court recognized as a "world-wide litigation" in which Plaintiffs were connected through their business dealings. (*Id.* at 4-6.) The litigation began as court proceedings and arbitration in England and New South Wales. (*Id.* at 4.) It also spread to the Bahamas, where Sinclair filed suit to protect his interest in the Max Petroleum shares.[2] (*Id.* at 6.) Thus, even though they were not parties to all parts of the world-wide litigation, Plaintiffs "had considerably more at stake in connection with the 1782 subpoena than that of a garden-variety third-party witness simply responding to a subpoena for documents." (*Id.*)

Plaintiffs initially hired Dorsey to defend against and respond to the subpoenas. (Appellants' Br. Ex. A at 6-8.) Eventually, Dorsey came to represent Plaintiffs and coordinate their responses to numerous litigations world-wide. (*Id.* at 7-8.) When retaining Dorsey, Plaintiffs asked about its international capabilities and learned of an attorney in Dorsey's London office, Jean-Pierre Douglas-Henry, who became involved in their representation from its inception and participated in most of the events giving rise to the fee dispute. (*Id.* at 3, 7.) Dorsey lawyers in Denver and London provided most of the services to Plaintiffs and a "significant

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[2] In addition to these findings, the record reveals that criminal proceedings were pending in Switzerland and there were related activities in the British Virgin Islands. (B. 50-51; B. 73.)

portion of the work was done in Dorsey's London office." (*Id.* at 33 n.19.) Douglas-Henry subsequently left Dorsey and continues to represent Plaintiffs in other litigation and business transactions. (*Id.* at 3.)

Plaintiffs wanted Dorsey to aggressively represent them, and Dorsey believes that all the work it performed for them was to advance that goal. (*See* Appellants' Br. Ex. A at 8.) The trial court concluded, however, that Dorsey's work could have been performed more efficiently. (*Id.* at 8.) The trial court found that Dorsey's work occurred over a more extended interval than was reasonable. (*Id.* at 8-13.) The trial court also critiqued Dorsey's approach to use of document review processes, outside vendors, and contract attorneys. (*Id.* at 13-33.) It concluded that a different approach could have lowered the ultimate cost of responding to the subpoenas, and that had the firm adopted a different strategy for dealing with opposing counsel, it might have narrowed the scope of the inquiry. (*Id.*)

For their part, Plaintiffs "made it unnecessarily difficult for the lawyers to do their job." (Appellants' Br. Ex. A at 50.) The trial court credited testimony that Plaintiffs did not return frequent telephone calls from Dorsey. (*Id.*) The trial court found the record "rife" with examples of Dorsey lawyers' attempts to get Plaintiffs' attention and being "often reduced to the point of begging [Plaintiffs] Savage or Sinclair for a response." (*Id.*) "At other times Dorsey seemed besieged

by unreasonable requests fueled by Savage and Sinclair's unrealistic expectations." (*Id.*) The trial court found that Savage and Sinclair did not focus on Dorsey's advice and instead vented about the legal process and gave "this matter low priority." (*Id.* at 51.) Ultimately, this "difficult" relationship "served to increase the fees." (*Id.* at 52.)

Dorsey's invoices for all of the work it performed for Plaintiffs did not identify the portion of the billings directly related to responding to the subpoenas. (Appellants' Br. Ex. A at 2.) In a document specially prepared for trial well after he had left Dorsey, but while he continued to represent Dorsey's former clients, Douglas-Henry allocated Dorsey's fees into fourteen categories related to the work it did in responding to the subpoenas. (*Id.* at 3.) The trial court accepted Douglas-Henry's allocation of the fees and built its decision around its analysis of whether the amount charged for each category was reasonable. (*Id.* at 4; *see also id.* at 65-66.)

Plaintiffs refused to pay for Dorsey's services. (B. 2-3.) Instead, Plaintiffs initiated a lawsuit against Dorsey in the Court of Chancery on July 2, 2008. (B. 3.) Plaintiffs' tactics in the Chancery Court "resulted in a tortured path of litigation." (B. 4 (Strine, V.C.).) Plaintiffs chose to file their complaint in Delaware despite the dispute's "tenuous connection to this state, the irrelevance of [Delaware] law, and the inefficiency of proceeding here." (*Id.*) After racing to file the dispute in

Delaware, "Sokol plodded its way through the litigation and failed to timely meet its obligations." (B. 5.)

Despite commencing the case there, Plaintiffs eventually suggested that the Chancery Court might lack jurisdiction over a dispute concerning law firm bills. Dorsey moved to maintain jurisdiction. (B. 7.) Plaintiffs "refused to muster any argument" on the motion and the court found that the "refusal to address an issue Sokol itself raised was entirely improper and disrespectful to Sokol's adversaries and the court." (B. 7.) Nevertheless, the Chancery Court concluded that it lacked jurisdiction and ordered the case transferred to the Superior Court for a bench trial. (B. 13, 26-27; A. 2.)

The Superior Court phase of the litigation began in August 2009. (A. 2.) After extended motion practice, the case went to trial over multiple weeks in June and August of 2010. (A. 17-21.) In its decision, the trial court resolved the single remaining substantive issue by making its own determination of the reasonable amount of Dorsey's attorney fees and entered judgment for Dorsey for $633,339, plus pre-judgment interest pursuant to Colorado Revised Statutes Annotated section 5-12-102(1)(a). (Appellants' Br. Ex. A at 66.) Plaintiffs moved for re-argument pursuant to Superior Court Rule of Procedure 59(e) and argued, <u>for the first time</u>, that a pretrial settlement offer precluded the award of pre-judgment interest. (Appellants' Br. Ex. B at 4.) On October 2, 2013, the trial court denied

Plaintiffs' motion and signed an order to that effect on October 9, 2013. (*Id.* at 18.) Plaintiffs filed their notice of appeal on December 9, 2013. (A. 31.)

ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion in Determining the Reasonable Value of Dorsey's Attorney Fees.

A. Question Presented.

Whether the trial court erred in its determination of the reasonable value of Dorsey's attorney fees after it considered weeks of evidence and all relevant factors identified in Colorado rules and case law.

B. Scope of Review.

This Court reviews awards of attorney fees for abuse of discretion. *National Grange Mut. Ins. Co. v. Elegant Slumming, Inc.*, 59 A.3d 928, 933 (Del. 2013).

C. Merits of Argument.

1. Plaintiffs Ignore the Applicable Standard of Review and Misconstrue Colorado Law.

Plaintiffs attempt to avoid the deferential standard of review by casting the issue as one of "burden of proof." (Appellants' Corrected Br. at 9.) They argue that Colorado law dictates reversal. But Colorado law, like Delaware law, supports a deferential review of a trial court's judgment on attorney fees. Plaintiffs quote a snippet from the Colorado case *Stuart v. North Shore Water & Sanitation District*, but they ignore the immediately preceding sentence, which reads: "The determination of what constitutes a reasonable award of attorney fees is a question of fact for the trial court and will not be disturbed unless it is patently erroneous and unsupported by the evidence." 211 P.3d 59, 63 (Colo. App. 2009). Indeed,

this is a well-settled principle of law. *Melssen v. Auto-Owners Ins. Co.*, 285 P.3d 328, 339 (Colo. App. 2012) ("Because the reasonableness of attorney fees and costs was a question of fact, issues relating to the credibility of witnesses and the weight of the evidence concerning fees and costs were within the province of the trial court.").

Even if Colorado law applied to determine the scope of this Court's review of the trial court's determination regarding the reasonable amount of attorney fees, Colorado law does not mandate the fee calculation mechanism that Plaintiffs claim it does. The Colorado Supreme Court recently echoed the United States Supreme Court in holding that "there is no precise rule or formula for determining attorney's fees." *Planning Partners Int'l, LLC v. QED, Inc.*, 304 P.3d 562, 568 (Colo. 2013) (quoting *Evans v. Jeff D.*, 475 U.S. 717, 736 (1986); quotation marks omitted). The Colorado Supreme Court will not alter an attorney fee award on appeal "unless it is patently erroneous *and* unsupported by the evidence." *Id.* at 565 (emphasis added).

The Colorado cases Plaintiffs cite do nothing to undercut those rules. Plaintiffs chiefly rely on *North Shore Water*, which they argue mandates the use of the "lodestar" method in calculating reasonable attorney fees. (Appellants' Corrected Br. at 12.) But *North Shore Water* merely describes the "lodestar" method, while and affirming the trial court's decision using the method. 211 P.3d

at 63. Similarly, *Mercantile Adjustment Bureau, L.L.C. v. Flood* defines the "lodestar" method but does not mandate its use. 278 P.3d 348, 352 (Colo. 2012). Further, the court "did not grant certiorari to review the reasonableness of the attorneys' fees" and it did not do so. *Id.* at 357 n.8. In *City of Wheat Ridge v. Cerveny*, the Colorado Supreme Court identified the factors for a trial court to consider in weighing the reasonableness of an attorney fees award. 913 P.2d 1110, 1115-16 (Colo. 1996). But the court in *Wheat Ridge* did not apply those factors, because the issue was not before it. *See id.* Plaintiffs do not mention the fact that the only discussion of the "lodestar" method in the *Wheat Ridge* decision they rely upon is in a dissenting opinion. *See id.* at 1127 n.5 (Scott, J., dissenting).

2. <u>The Trial Court Did Not Abuse Its Discretion in Calculating the Amount of a Reasonable Fee.</u>

This Court reviews awards of attorney fees for abuse of discretion. *National Grange Mut. Ins. Co. v. Elegant Slumming, Inc.*, 59 A.3d 928, 933 (Del. 2013). When this Court reviews an act of judicial discretion, it will "not substitute its own notions for what is right for those of the trial judge, if his judgment was based on conscience and reason, as opposed to capriciousness or arbitrariness." *Id.* Following years of discovery and other pretrial proceedings and a multi-week trial devoted to the issue of the reasonableness of Dorsey's attorney fees, the trial court issued a sixty-nine page opinion on the requested fees. (A. 19, 21-22; Appellants' Br. Ex. A.) Plaintiffs had ample time and opportunity to present all their issues to

the trial court. As the opinion amply reveals, the trial court's decision "was based on conscience and reason," and it should be affirmed. *See National Grange Mut. Ins. Co.*, 59 A.3d at 933.

The trial court carefully applied the law in calculating the amount of a reasonable attorney fee. It began its analysis by recognizing that "[c]ourts in Colorado *generally* use the loadstar method for calculating reasonable attorneys' fees." (Appellants' Br. Ex. A at 34 (emphasis added).) In fact, the trial court devoted four complete pages of analysis to the appropriate mechanism for calculating reasonable attorney fees pursuant to Colorado law. (*Id.* at 34-38.) It then applied the factors identified in Colorado Rule of Professional Conduct 1.5(a).[3] (*Id.*)

Plaintiffs' argument that there was no evidence from which the trial court could discern a reasonable fee is specious. (Appellants' Corrected Br. at 10.) The court heard evidence of the customary rates charged by the Dorsey attorneys handling the matter. (B. 32-34, 42. 45.) There was testimony regarding the firm's review of bills to ensure accuracy and appropriateness (B. 35-39, 72); the reasonableness of partner, associate, contract attorney, and paralegal billing rates (B. 40-44, 47-48, 52); and the time spent on each portion of the litigation (B. 69).

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[3] This Court identified substantially the same factors in *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973).

Finally, Marcy Glenn, an expert on the ethical obligations and practices of Colorado attorneys, provided detailed testimony about appropriate fees for and supervision of contract attorneys, and provided her conclusion that both were appropriate as to Dorsey's billings. (B. 54-68.)

There was no abuse of discretion because the trial court's decision reflects thorough consideration of all of the factors in Colorado Rule of Professional Conduct 1.5(a). (Appellants' Br. Ex. A at 34-35.) The trial court addressed the time and labor required, the difficulty of the questions involved, and the required skills of the attorneys. (*Id.* at 39-40.) It considered the effect the representation had on the attorneys' ability to take on other work. (*Id.* at 42.) It adjudicated the fees customarily charged in like circumstances. (*Id.*) It addressed the amount involved and the results obtained. (*Id.* at 42-44.) It considered the limitations imposed by the clients and the professional relationship with the clients. (*Id.* at 44-53.) It weighed the experience, reputation, and ability of the lawyers. (*Id.* at 40-41.) It emphatically refused to rubber-stamp Dorsey's fee request. The court reduced Dorsey's billed fees by roughly 60%. (*Id.* at 2, 66.) Indeed, while Dorsey itself disagrees with a number of the trial court's fee reductions, it does not claim that the court abused its discretion and it does not seek to extend this already overlong and expensive litigation still further.

The trial court's findings and analysis demonstrate how Plaintiffs' conduct increased their legal bills. (*See* Appellants' Br. Ex. A at 3, 7, 33 n.9.) Plaintiffs sought out Dorsey for its international capabilities. (*Id.*) Douglas-Henry, who the trial court recognized continued to represent Plaintiffs after his departure from Dorsey and the commencement of this dispute, was based in Dorsey's London office, where a significant portion of the work was performed, even though the subpoenas in question were issued in Colorado. (*Id.*) The trial court found that Plaintiffs "made it unnecessarily difficult for the lawyers to do their job." (*Id.* at 50.) Dorsey lawyers had to beg Plaintiffs to respond to their inquiries. (*Id.*) Savage and Sinclair had unrealistic expectations and gave their own case a "low priority." (*Id.* at 51.) As could be expected, this conduct "served to increase the fees." (*Id.* at 52.) After considering this complex backdrop, the trial court did not abuse its discretion in awarding Dorsey at least as much in fees as it did.

Finally, Plaintiffs contend that the trial court "effectively ignored" the testimony of their expert witness. (*See* Appellants' Corrected Br. at 11.) It is axiomatic that this Court does not re-weigh the evidence presented to the trial court. *Olson v. Halvorsen*, 986 A.2d 1150, 1157 (Del. 2009); *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1, 24 (Del. 2005). The fact-finder, whether a judge or a jury, has a unique opportunity to evaluate live witnesses and assess their demeanor and credibility. *Hudak v. Procek*, 806 A.2d

140, 150 (Del. 2002). The trial court determines the weight to give conflicting evidence. *Id.*

As Plaintiffs acknowledge, the trial court analyzed their expert's opinion in its decision. (Appellants' Br. Ex. A at 39, 42, 49-50.) The trial court also "agree[d]" with portions of the expert's testimony and found that the expert's testimony "weighs heavily against Dorsey." (*Id.* at 39, 42.) That the trial court did not adopt the expert's opinion in full, and instead weighed the evidence against the weeks of other evidence it heard, including the testimony of Dorsey's expert, is not reversible error. *See Hudak*, 806 A.2d at 150.

The Superior Court did not abuse its discretion in conducting an exhaustive analysis of the reasonable amount of Dorsey's attorney fees based on weeks of testimony. Accordingly, this Court should affirm its decision.

II. The Trial Court Properly Awarded Pre-judgment Interest Pursuant to Colorado Law Because Plaintiffs Wrongfully Withheld Funds From Dorsey.

A. Question Presented.

Whether the trial court erred in awarding pre-judgment interest pursuant to Colorado Revised Statutes Annotated section 5-12-102(1)(a) after determining that Plaintiffs wrongfully withheld the amount of the judgment from Dorsey.

B. Scope of Review.

This Court reviews the Superior Court's statutory interpretations de novo. *Wyatt v. Rescare Home Care*, 81 A.3d 1253, 1260 (Del. 2013).

C. Merits of Argument.

1. Plaintiffs Failed to Adequately Brief This Argument and Thus Waived Their Objection.

Without citing any record evidence or providing any legal basis, Plaintiffs argue that a settlement offer in excess of the ultimate judgment cuts off a prevailing party's statutory right to pre-judgment interest on money wrongfully withheld as provided for by Colorado Revised Statutes Annotated § 5-12-102(1)(a). *See also Goodyear Tire & Rubber Co. v. Holmes*, 193 P.3d 821, 828 (Colo. 2008) (holding that the purpose of the statute is to compensate a party for the time value of money wrongly withheld from it). Plaintiffs cite a single Colorado case, but it does not stand for the proposition they argue. Instead, the case merely recites the "wrongfully withheld" standard for awarding interest. (*See*

Appellants' Corrected Br. at 16-17 (citing *South Park Aggregates, Inc. v. Nw. Nat'l Ins. Co.*, 847 P.2d 218, 227 (Colo. App. 1992).) This Court can thus affirm on the fundamental ground that Plaintiffs have failed to articulate "arguments and supporting authorities on each issue or claim of reversible error." *Tumlinson v. Advanced Micro Devices, Inc.*, --- A.3d ----, 2013 WL 4399144, at *2 (Del. 2013); *see also Turnbull v. Del. Admin. for Reg'l Transit*, 644 A.2d 1322, 1324 (Del. 1994). "The rules of this Court specifically require an appellant to set forth the issues raised on appeal and to present an argument in support of those issues in their opening brief." *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004).

Plaintiffs fail to comply with this precedent and rule because they fail to cite any record evidence or articulate any legal reasoning in their second argument. *South Park* is the only source they cite. (*See* Appellants' Corrected Br. at 16-18.) This is not an issue of first impression. The applicable statutes have been extensively analyzed by courts in Colorado and elsewhere. Plaintiffs failed to cite a treatise, a scholarly article, or even a dictionary. This leaves Dorsey in the impossible position of responding to an argument that has not been articulated, leaving it open for ambush by reply brief. The Court should affirm based on Plaintiffs' failure.

2. **Plaintiffs Failed to Preserve This Issue in the Superior Court.**

In the three years between Plaintiffs' purported settlement offer and the judgment in this case, Plaintiffs never suggested that Colorado law would prohibit an award of pre-judgment interest. They first raised this issue in a motion for re-argument pursuant to Delaware Superior Court Rule of Procedure 59(e). (Appellants' Br. Ex. B at 4.) Plaintiffs' offer did not appear in the trial court record in any form.

Rule 59(e) is a vehicle "for seeking *reconsideration* by the Trial Court of its findings of fact, conclusions of law, or judgment, after a non-jury trial." *Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969) (emphasis added). A motion for re-argument is not an opportunity for a party to raise arguments for the first time. *Strong v. Dunning*, 2013 WL 5784426, at *2 (Del. Super. Ct. 2013). Permitting litigants to raise an issue for the first time in a Rule 59(e) motion prejudices opposing parties and is an inefficient use of judicial resources. *Id.*

Plaintiffs moved for re-argument pursuant to Rule 59(e) to inappropriately raise the issue of pre-judgment interest for the first time, based on a settlement offer that was not made part of the trial court record. The motion resulted in an additional round of briefing and a several month delay before this case became ripe for appellate review. Plaintiffs waived this argument by failing to raise it at any earlier time before the Superior Court, and this Court should thus affirm.

3. **Plaintiffs' Unsupported Characterization of Colorado Law is Incorrect.**

Under Colorado law, an offer of settlement under Colorado Revised Statutes Annotated section 13-17-202 entitles the "offering" party to "actual costs" incurred after the date of the offer. The statute does not allow for cancellation of pre-judgment interest and makes no mention of pre-judgment interest. No court has ever held that pre-judgment interest is an "actual cost" under section 13-17-202. Nor has any court held that an offering party whose offer is not exceeded by the damages awarded in an action is entitled to cancellation of pre-judgment interest.

After entry of judgment in this matter, Plaintiffs moved the court to reconsider its award of pre-judgment interest. In ruling from the bench on the pre-judgment interest issue, the trial court held that "the conditional offer of money by the plaintiffs to the law firm does not alter the equation as to whether money was wrongfully withheld" and that "unless there was an unconditional offer to pay X dollars and that money was, in fact, paid, the money was then wrongfully withheld." (Appellants' Br. Ex. B at 18.) Plaintiffs do not, and cannot, point to any authority contradicting that statement of law.

Under Colorado law, when property has been "wrongfully withheld" from a party, pre-judgment interest shall be recovered. Colo. Rev. Stat. Ann. § 5-12-102(1)(a). The purpose of this statute is to compensate an innocent party for the time value of money that is owed, but not paid, to that party. *Goodyear Tire &*

Rubber Co. v. Holmes, 193 P.3d 821, 828 (Colo. 2008). As the Colorado Supreme Court has held, "wrongful withholding" occurs when a party "lost or was deprived of something to which she was otherwise entitled." *Id.* at 825.

Colorado's "offer of judgment" statute does not apply to this action. *See* Colo. Rev. Stat. Ann. § 13-17-202. By its express and unambiguous terms, Colorado Revised Statute section 13-17-202 only applies to a "civil action of any nature ***commenced or appealed in any court of record in this state***," (*i.e.*, Colorado). *Id.* (emphasis added). The statute therefore has no application to a case brought in Delaware. That section 13-17-202 has no application here is unsurprising; it is procedural in nature. In cases where other states' substantive law applies, the law of Delaware continues to apply to procedural issues. *See* *MPEG LA, L.L.C. v. Dell Global B.V.*, 2013 WL 812489, at *3 (Del. Ch. 2013) (holding that New York offer of judgment statute was procedural, not substantive).

Plaintiffs' argument is further belied by multiple Colorado court opinions awarding pre-judgment interest for money wrongfully withheld while simultaneously awarding the losing party costs because of the "offer of judgment" statute. In *Bennett v. Hickman*, a defendant was entitled to recover its actual costs after its pretrial settlement offer was more than the plaintiff recovered. 992 P.2d 670, 674-75 (Colo. App. 1999). The court held that the defendant was entitled to offset the cost award <u>after</u> the pre-judgment interest had been added to the verdict.

Id. The court would not have faced this question if the "offer of judgment" statute precluded an award of pre-judgment interest. *See id.*; *see also Novak v. Craven*, 195 P.3d 1115, 1120-21 (Colo. App. 2008) (analyzing pre-judgment interest separately from effect of offer of judgment on costs).

The trial court properly awarded Dorsey pre-judgment interest because Plaintiffs wrongfully withheld the amount of the judgment. Colo. Rev. Stat. Ann. § 5-12-102(1)(a). The trial court correctly interpreted Colorado law and applied common sense. Plaintiffs refused to pay their bills, and Dorsey is entitled to interest to compensate it for the lost time value of money. *See Goodyear Tire & Rubber Co.*, 193 P.3d at 828.

Plaintiffs do not cite authority for the position they advance, and their argument is without merit. The Court should affirm the Superior Court's decision awarding pre-judgment interest on the judgment.

CONCLUSION

For the foregoing reasons, Dorsey respectfully requests that this Court affirm the decision on appeal.

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Dated: February 17, 2014

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2014, a copy of the public, un-redacted version of the foregoing was served electronically via *File & ServeXpress* upon the following counsel of record:

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Dated: March 7, 2014

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