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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	)	No. 619, 2013
Plaintiffs below Appellants,	)	
v.	)	**APPEAL FROM SUPERIOR COURT,**
DORSEY & WHITNEY, LLP,	)	**NEW CASTLE COUNTY**
Defendant below Appellee,	)	

APPELLANTS' REPLY BRIEF

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COUNTERSTATEMENT OF FACTS

The lengthy factual recitation with which Dorsey begins its opposition brief in this Court musters not a single fact relevant on this appeal. The facts that matter on this appeal are few, were found by the trial court, set forth in Plaintiffs' opening brief, and, in Dorsey's brief in opposition left entirely undisturbed – as Dorsey did not appeal from any of these factual findings, and did not say anything in its brief even to limit the force of those findings. The findings, in summary, are:

1. Plaintiffs retained Dorsey to handle the response to a third party subpoena. Other work handled by the Defendant is irrelevant here because payment for that work was timely and fully made and is not in dispute. If anything, the fact that Dorsey was fully paid for everything else it did for plaintiffs gives the lie to Dorsey's *sotto voce* suggestion, throughout its brief to this Court, that plaintiffs are litigating this bill simply out of an irrational refusal to pay what's due.

2. Dorsey billed over $3 million to handle discovery responses from two laptops and two desktop computers and one file cabinet.

3. The only evidence before the trial court that actually answers the question "what *should* this work have cost?" was proffered by plaintiffs. Plaintiff's expert's answer was: $300,000. This was *exactly the same number* that Defendant quoted to plaintiffs as its estimate of what the

representation would cost. The trial court's conclusion about what the work should have cost bears no relationship to this number.

4. Dorsey got to $3 million with an astounding array of inefficiencies, mistakes, failures to pay attention, failures to be aggressive or to confront the party against whom it was supposed to be litigating, and poor judgment about what to do when the consequences of all of this unprofessional conduct came down upon the heads of Dorsey's clients. The long and disappointing record of Dorsey's conduct is set forth in the trial court's extensive factual findings. Dorsey has not challenged a single one of these many determinations.

Rather than use its factual discussion in its brief to this Court, or its right to appeal, to challenge any of the trial court's many detailed findings about how poor a job Dorsey did, Dorsey has introduced its brief to this Court with nothing more than sniping at plaintiffs for having the temerity to not simply pay Dorsey's $3 million bill without questioning it. But plaintiffs were obviously correct to proceed as they have, particularly given the trial court's determination that over 60% of Dorsey's charges were inappropriate.[1]

[1] Dorsey's suggestion that plaintiffs somehow did wrong by bringing this action, in Delaware, to challenge Dorsey's bill, is particularly mystifying. Parties who are just trying to avoid paying a bill do not bring litigation to challenge it; they do not litigate such a challenge through trial, successfully; and they certainly do not choose the most efficient, and business-friendly courts in the country in which to

ARGUMENT 1

DORSEY OFFERS NO MEANINGFUL OPPOSITION TO PLAINTIFFS' DEMONSTRATION THAT THE TRIAL COURT FAILED TO CORRECTLY APPLY APPLICABLE LAW ON HOW TO CALCULATE A REASONABLE FEE, BECAUSE THE TRIAL COURT NEVER DECIDED HOW MUCH TIME DORSEY SHOULD HAVE SPENT DOING THE WORK AT ISSUE

I. THE SCOPE OF REVIEW

Defendants err when they suggest that the scope of this Court's review on the first of the issues raised on appeal is for an abuse of discretion by the trial court. Plaintiffs' argument to this Court, as to the determination of a reasonable fee is that the trial court erred as a matter of law. This argument turns on purely legal issues. This Court's scope of review is therefore *de novo*. *Alaska Elec. Pension Fund v. Brown*, 941 A.2d 1011 (Del. 2007).

II. ARGUMENT

Dorsey fails even to acknowledge, much less to answer, the argument plaintiffs made in their opening brief. That argument was simple. Under Colorado law, the Court cannot identify a reasonable fee without deciding how many hours Dorsey should have spent doing the tasks Dorsey should have performed. As explained by the principal authority relied upon by the trial court, the task of identifying a reasonable fee begins with "the number of hours reasonably expended" by counsel.

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bring such a challenge. Dorsey's effort to make that effort by plaintiffs into evidence of a nefarious plot is incomprehensible.

Slip op.at 36, quoting *Spensieri Farmers Alliance Mutual Ins. Co.*, 804 P.2d 268, 270-71 (Colo. App. 1990) (internal citations omitted).[2]

The trial court never decided "the number of hours [Dorsey should] reasonably [have] expended" on this work. Yet such a determination universally forms the basis for a determination of what constitutes a reasonable fee. See generally *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).

The trial court's opinion identifies no such number of hours for any specific task, and it identifies no such number of hours for the representation as a whole. It follows, necessarily, that the trial court did not obey the law that the trial court itself said should govern. Therefore the trial court's result cannot stand.

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[2] It is thus both true and irrelevant that "there is no precise rule or formula for determining attorney's fees." Defendant's Br. at 10, quoting *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). Plaintiffs' point is not that the lodestar is a binding formula. Plaintiffs' point is simply that, as the authority quoted above makes clear, analysis must "begin with" the product of a reasonable hourly rate times the number of hours reasonably expended" as *an* essential part of the analysis. That multiplication problem was never completed in this case, because the "number of hours" variable was never defined.

Defendant admits, as it must, that under all of the authorities plaintiffs cite for the proposition – adopted explicitly by the trial court, though not correctly applied there –the lodestar method is the beginning of analysis of a reasonable fee. Defendant suggests – without citation of a single case or any other authority to support the proposition – that lodestar is just one of the permissible bases for determining a reasonable fee.

Defendant's argument fails for multiple reasons. First, Dorsey cites no case or authority identifying any other basis for deciding what a reasonable fee is if the lodestar method is not used. And indeed plaintiffs are unaware of any such basis. Certainly the trial court identified no such other basis – which is why Dorsey is unable to point to any analysis, legal or factual, in the trial court's opinion that approves of any method for defining a reasonable fee that does not begin with determination of "the number of hours reasonably expended."

In the absence of any authority telling courts how to assess the reasonableness of a lawyer's bill without using the lodestar method, Dorsey leaves its own argument, as it would leave the courts, with a completely standardless inquiry. Thus, Dorsey's defense of what the trial court actually did is simply to list what Dorsey considers to be all of the relevant facts at issue in the case, followed by the suggestion that, if the trial court recites those facts, and then rolls them all

up into a ball and applies a number of dollars to the result, that constitutes an appropriate determination of a reasonable fee.

This is plainly wrong. No trial court, no matter how much discretion it has or how gently an appellate court treats the trial court's analysis, is permitted to ground its decision on anything other than a discernable and valid legal standard. There must be some legal rule or metric that is actually applied that governs the facts.

Dorsey offers none. The trial court had one – the lodestar method Dorsey wishes away -- but plainly failed to apply it, as proven by the fact that the trial court's opinion nowhere says "Dorsey's work should have taken X hours." In the absence of such a factual determination, based on evidence, the trial court's decision must be reversed.

ARGUMENT 2

COLORADO LAW PRECLUDES THE AWARD OF PREJUDGMENT INTEREST HERE BECAUSE COLORADO LAW MAKES CLEAR THAT NO MONEY DUE WAS WRONGFULLY WITHHELD

Dorsey's opposition to the award of prejudgment interest also fails, as does its contention that the issue was not properly raised below.

A. The Prejudgment Interest Issue Was Properly Preserved, As Even The Trial Court Acknowledged

While suggesting to the Court that plaintiffs failed to preserve this issue, Dorsey neglects to tell the Court that they raised *that* issue to Judge Parkins and that he rejected their contention, in a ruling that Dorsey has not challenged.

Plaintiffs raised the propriety of the award of prejudgment interest immediately after prejudgment interest had been awarded. Plaintiffs argued then that the amount Judge Parkins found due to the defendant was less than the amount plaintiffs had offered, before trial, to pay in settlement. Under Colorado law, all the parties agree, prejudgment interest can be awarded only on funds "wrongfully withheld." Plaintiffs argued that they could not be found to have wrongfully withheld funds they offered, in writing, to pay.

As plaintiffs argued in the trial court, there would have been no point in disputing defendant's right to prejudgment interest before the parties knew whether there would be an award less than the amount plaintiffs offered to pay in settlement. In addition, plaintiffs' opposition to prejudgment interest was based on

the fact that they had tendered a settlement offer to defendant before trial. That offer was inadmissible under Delaware Rule of Evidence 408, and it would have been wildly prejudicial for plaintiffs to have introduced that offer, to the finder of fact, before trial.

In a ruling that Dorsey neither acknowledges nor disputes, Judge Parkins agreed that plaintiffs had properly raised the prejudgment interest question on a motion for reargument after issuance of the trial court's award. His reasoning is sound:

> I do find that it was fairly raised in the present context, because unless and until the plaintiffs -- excuse me -- yes, the plaintiffs knew what my judgment was going to be, there was no opportunity for them to raise this argument because if my judgment had been for a greater amount, this argument would not have been valid.
>
> And the other thing, too, is that I believe the plaintiffs were justified in keeping from me, first, the fact that a settlement offer had been made; and secondly, the amount of the settlement offer. So, therefore, I think that they had preserved the issue for purposes of raising it now.

Transcript of Argument on Motion for Reargument at 18-19 (Exhibit B to Plaintiffs' Opening Brief).

Judge Parkins was correct. Indeed, before Judge Parkins decided that the amount due was less than the amount plaintiffs had offered in settlement, plaintiffs could not possibly have sought anything other than an advisory opinion on the availability of prejudgment interest. Plaintiffs raised the issue when it was first an actual issue.

B. Colorado Law Makes Clear No Funds Were Wrongfully Withheld Here

On the merits, however, Judge Parkins' decision was incorrect. The Colorado cases provide that prejudgment interest is due only when funds have been "wrongfully withheld." C.R.S. 512102(a). But under the Colorado "offer of judgment" statute and the cases applying it, a written settlement offer for more than the amount awarded – by itself, and without the actual payment of any money – frees the offeror from any obligation to pay a wide variety of costs. C.R.S. 13-17-202. See generally *Dillon v. HealthOne L.L.C,* 108 P.3d 297, 300-301 (Colo. Ct. App. 2004).

Plaintiffs do not contend here that the offer of judgment provision entitles plaintiffs to recapture the various costs to which that statute applies. Plaintiffs do contend, however, that the statute's provisions make clear that a party which makes such a written offer cannot possibly be understood to have wrongfully withheld the funds offered simply because the money was not actually paid and accepted. On the contrary, the Colorado offer of judgment statute makes clear that the simple tender of such funds is worthy of respect and reward as a matter of Colorado law.

Because that's so, the funds at issue in such an offer cannot, as a matter of Colorado law, have been "wrongfully withheld."

It follows that, once having made their settlement offer, Plaintiffs were no

longer wrongfully withholding any money due to Defendant. Therefore the award of prejudgment interest was erroneous as a matter of law.

CONCLUSION

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

a) As to the trial court's determination of a reasonable fee, remand with an Order directing the trial court to review the evidence and determine the number of hours that should reasonably have been spent by Dorsey in the performance of those tasks which should in fact have been performed, and to then complete its analysis on the basis of the evidence before the trial court, including expert and other evidence on what the assignment should have cost;

b) As to the trial court's award of prejudgment interest, reverse and remand with instructions that no such award should be made.

Date: March 19, 2014

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