



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

OPTIMISCORP, a Delaware corporation, )  
ALAN MORELLI, and ANALOG )  
VENTURES, LLC, )  
)  
Plaintiffs Below, ) No. 523, 2015  
Appellants/Cross-Appellees, )  
) Case Below:  
v. ) Court of Chancery  
) C.A. No. 8773-VCP  
JOHN WAITE, WILLIAM ATKINS, )  
GREGORY SMITH and WILLIAM )  
HORNE, )  
)  
Defendants Below, )  
Appellees/Cross-Appellants. )

**CROSS-APPELLANT WILLIAM HORNE'S  
REPLY BRIEF ON CROSS-APPEAL**

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## **PRELIMINARY STATEMENT<sup>1</sup>**

Horne prevailed on the merits of every claim below, and as detailed in Horne’s Answering Brief, the Plaintiffs below engaged in wide-ranging discovery and litigation misconduct. Despite that misconduct, the trial court declined to shift Horne’s attorneys’ fees and expenses under the bad faith exception to the American Rule. Horne filed his cross-appeal as to that single issue, and timely filed his brief in support of that cross-appeal on December 9, 2015. On January 11, 2016, Plaintiffs below filed their Reply Brief on Appeal and Answering Brief on Cross-Appeal (“PRB”).

In response to Horne’s arguments that the trial court abused its discretion in declining Horne’s request for attorneys’ fees, Plaintiffs generally assert that (i) the trial court’s decision was not arbitrary and capricious, (ii) defendants failed to establish that the bad faith exception to the American Rule below, and (iii) public policy does not support defendants’ request to shift fees. Horne responds to Plaintiffs’ arguments below.

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<sup>1</sup> Unless otherwise defined herein, capitalized terms are as defined in Appellee William Horne’s Answering Brief on Appeal and Cross-Appellant’s Opening Brief on Cross-Appeal (“H.A.B.” or the “Answering Brief”).

## ARGUMENT

### I. THE TRIAL COURT ABUSED ITS DISCRETION IN DECLINING TO SHIFT HORNE'S ATTORNEYS' FEES AND EXPENSES TO PLAINTIFFS

#### A. The Trial Court's Decision Denying Horne's Request for Fees and Expenses Was an Abuse of Discretion

As Horne explained in his Answering Brief (at 67-68), the trial court abused its discretion when it declined to award fees to Horne because two of its stated bases were inconsistent with other findings the lower court made. First, the trial court stated that defendants prevailed on “most” issues, which is incorrect because Horne prevailed on *all* issues. *See Op.* at 212-13. Plaintiffs respond that Horne cannot “separate himself from the Director Defendants’ breaches of fiduciary duties.” PRB at 43 n.52. The only breach of fiduciary duty by the Director Defendants found by the lower court related to the Defendant Directors’ efforts to rescind the Rancho-Optimis transaction based on a flaw in the corporate structure. *Op.* at 205. The lower court held that “[t]here is no evidence Horne knew of that defect or that Horne had any involvement with the subsequent Rescission Action.” *Id.* Plaintiffs do not challenge that finding.

In rejecting Plaintiffs’ other breach of fiduciary duty claims against the Director Defendants, the lower court determined factually that Horne’s role in such other conduct was limited. *Id.* at 90 (“there is little, if any . . . evidence tying Horne to any of the Director Defendants”), 115, 124-25, 150-51, 205. Plaintiffs offer no explanation of how such factual findings were clearly erroneous.

Beyond those unchallenged factual determinations, the trial court also rejected, as a matter of law, Plaintiffs' proffered theory that Horne's identification of the need to amend the stockholders agreement in a discussion with the Company's counsel and Waite (the COO and a director) was a breach of fiduciary duty, holding instead that it was an act *consistent* with his fiduciary duties. *Id.* at 206. Therefore, Plaintiffs are wrong, as a matter of fact and law, that Horne cannot "separate himself" from the Director Defendants.

Second, in denying Horne's request for fees, the trial court relied on its determination that Plaintiffs' argument regarding *Adlerstein v. Wertheimer*, 2002 WL 205684 (Del. Ch. Jan. 25, 2002) was reasonable. *Op.* at 212. However, the *Adlerstein* argument was never made below against Horne and was therefore waived. *See* H.A.B. at 45-49, 67-68. From the Opinion, it is clear that the lower court understood Plaintiffs' claim under *Adlerstein* and its progeny to be limited to the Director Defendants because the trial court specifically excluded Horne from its discussion of that issue. *See* *Op.* at 172, 175 (referencing only the "Director Defendants" in discussing *Adlerstein*). Plaintiffs respond that this argument was not waived as to Horne because they appealed "all of the findings and rulings, on all of their claims." PRB at 1. However, they identify no specific record cites where this particular claim was asserted against Horne, and offer no explanation as

to how the trial court erred in analyzing that claim solely against the Director Defendants.

In sum, the lower court's rationale for denying fees implicitly assumes that (1) Horne succeeded on most, but not all, issues, and (2) the *Adlerstein* argument, which the trial court found to be plausible, applied to Horne. Those assumptions, however, are inconsistent with the record, including the other explicit findings and holdings of the lower court. Because the lower court's primary reasons for denying fees do not apply to Horne, the lower court abused its discretion when it declined to shift Horne's fees to Plaintiffs.

**B. The Lower Court's Finding of Bad Faith Required that It Exercise Its Discretion to Apply the Exception to the American Rule**

Horne refers to his Answering Brief for his full explanation of why the trial court abused its discretion in denying his request to shift his attorneys' fees and expenses to Plaintiffs. H.A.B. at 58-72. Specific points raised by Plaintiffs are addressed below.

Plaintiffs cite the trial court's statement that "apart from the witness tampering discussed at length *supra*, I do not find that Plaintiffs engaged in bad faith or vexatious litigation conduct" as justifying the denial of fees. PRB at 46 (quoting Op. at 212-13). The bad faith conduct in the form of witness tampering is enough to support Horne's request for fees. The trial court was not required to find

other, additional conduct that constituted bad faith or was vexatious. As stated in Horne’s Answering Brief, this Court recently affirmed the “fact that a party engaged in conduct which, on its face, would establish a *prima facie* case for violating a criminal statute provides powerful evidence that the party acted in bad faith.” H.A.B. at 71 (citing *Choupak v. Rivkin*, 2015 WL 1589610, at \*21 (Del. Ch. Apr. 6, 2015), *aff’d sub nom.*, *Rivkin v. Choupak*, Case No. 292, 2015 (Del. Dec. 4, 2015) (Order)).<sup>2</sup> Thus, the trial court’s statement was inconsistent with the law on the bad faith exception to the American Rule and was therefore an abuse of discretion.

Second, Plaintiffs argue that Horne has no evidence to support his contention that “Morelli, in bad faith, caused the company to sue Horne out of vindictiveness and to further Morelli’s own cause in the divorce proceedings.” PRB at 46 n.55 (quoting H.A.B. at 60 n.24). That is wrong. Plaintiffs are correct that the trial court denied Horne’s evidentiary proffer, wherein Horne sought to introduce one of the terms of a settlement offer from Plaintiffs’ counsel that tied the resolution of Plaintiffs’ claims against Horne to the resolution of Morelli’s property division proceedings with Doherty. A654. However, the following record evidence supports a finding that Morelli’s decision to sue Horne was made

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<sup>2</sup> Plaintiffs did not respond to *Choupak*, save for its inclusion in a string citation devoid of legal analysis. See PRB at 46-47 n.56.



in bad faith: (i) Horne is engaged in a relationship with Morelli's ex-wife (Op. at 67), (ii) Morelli did not learn of the relationship until after the October 20 Meeting (*id.* at 135-36), (iii) Morelli was engaged in property division litigation with his ex-wife when he initiated this litigation (A177), (iv) there is no evidence that the Company's Board ever authorized litigation against Horne, despite the Board's affirmative consideration of and approval of litigation against the Director Defendants (Op. at 141 & n.488 (citing B294-96)),<sup>3</sup> and (v) the trial court's finding that Morelli "is the locomotive propelling this litigation." Op. at 4.

Furthermore, the lower court understood there to be other evidence of Morelli's motive. In denying Horne's evidentiary proffer of the settlement condition, the trial court stated:

I think it's almost cumulative. The bad feeling with respect to Mr. Morelli and Mr. Horne, once it became known that Mr. Horne was dating Mr. Morelli's ex-wife and what has happened since that time is fairly well known to the Court and is repeatedly referred to, I believe, in the papers. . . . And I don't think this kind of additional evidence of the conversation that was had being excluded would really change that calculus at all.

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<sup>3</sup> Plaintiffs assert that "there was record evidence that the board did authorize the lawsuit, including against Horne." PRB at 34 n.45. The *only* evidence proffered by Plaintiffs is Morelli's *deposition* testimony, where he vaguely recalled a meeting in July 2013 where suit against Horne was approved. *See* AR57. That "evidence" was rejected by the trial court. Op. at 141 & n.488.

A655 (emphases added). Having had their evidentiary objection granted based, in part, on the determination that the proffered evidence was cumulative, Plaintiffs' assertion that there is no evidence of Morelli's bad faith motive is without merit.

Finally, Plaintiffs attack Horne's Answering Brief for including "an irrelevant factual recitation" and charge that Horne presents issues not before the Court. *See* PRB at 5, 7-8, 49. Plaintiffs miss the point of Horne's argument. Horne does not appeal from the denial of his motion for summary judgment. Rather, Horne identifies the repeated discovery misconduct and Plaintiffs' ever-shifting claims and strategies (*see* Op. at 21 n.41, 144-45, 198) to show a pattern of conduct by Plaintiffs, beyond just witness tampering, that undermined the integrity of the lower court proceedings, impaired Horne's ability to defend against Plaintiffs' claims economically and efficiently, and further demonstrate that the lower court abused its discretion when it denied Horne's request for fees. H.A.B. at 18-24.

**C. Defendants' Attorneys' Fees and Expenses Must Be Shifted As A Matter of Public Policy**

In response to Horne's public policy argument (*see* H.A.B. at 68-70), Plaintiffs assert that (i) Horne waived this public policy argument below and (ii) that the argument is also fundamentally flawed. PRB at 47-49. Plaintiffs are wrong.

First, Horne did not waive the public policy arguments regarding the trial court's denial of Horne's request for attorneys' fees and expenses. Horne argued to the trial court that any sanction for Plaintiffs' misconduct must incorporate the dual objectives of punishment and deterrence. A939. Having broadly raised policy issues below, Horne's arguments are preserved on appeal. *See Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 547 n.4 (Del. 2006) (where the Court concluded that, in part because the appellant "object[ed] generally" in the trial court, it preserved the broader argument on appeal). Moreover, as the trial court recognized, "[i]n Delaware there is the fundamental constitutional principle that [the Supreme] Court, alone, has sole and exclusive responsibility over all matters affecting governance of the Bar." Op. at 14 (quoting *In re Appeal of Infotechnology, Inc.*, 582 A.2d 215, 220 (Del. 1990)). Here, the trial court's factual findings demonstrate an abuse of the litigation process in Delaware by Morelli, a Delaware lawyer.<sup>4</sup> Moreover, the bad faith exception to the American Rule is a creature of common law, not statute. *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 506 (Del. 2005). As the highest constitutional Delaware state court, it is uniquely within this Court's authority to determine important policy issues, such as sanctions that should result from such litigation misconduct. *See Adams v.*

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<sup>4</sup> Plaintiffs also acknowledge that Horne's argument for the imposition of fees against Plaintiffs is as a result of Plaintiffs "and their counsel's" litigation misconduct. PRB at 44.

*Delmarva Power & Light Co.*, 575 A.2d 1103, 1107-08 (Del. 1990) (determining public policy of Delaware’s workmen’s compensation law). Thus, there is no basis to preclude Horne’s arguments on appeal under Supreme Court Rule 8.<sup>5</sup>

However, even if the Court does not consider Horne’s policy argument fairly presented below, it should nevertheless consider the argument in the interests of justice. The litigation misconduct and corresponding consequences is outcome-determinative on the issue on the application of the bad faith exception to the American Rule and has “significant implications for future cases.”<sup>6</sup> *See Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 679 (Del. 2013). The current policy argument also naturally arises from the trial court’s decision to deny Horne’s request for fees and that decision’s potential impact on future litigants, further justifying this Court’s consideration of the issue in the interests of justice. *See SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 347 n.71 (Del. 2013) (considering argument in the interests of justice that “arises from the Vice Chancellor’s decision”).

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<sup>5</sup> Plaintiffs also argue that the trial court erred in its analysis of their litigation misconduct “as a matter of both law and public policy.” PRB at 44. Thus, Plaintiffs have apparently taken the position that policy issues are before the Court related to their liability for misconduct but not the corresponding consequences.

<sup>6</sup> In Plaintiffs’ own words, “[t]his appeal raises issues of great importance to members of the Delaware Bar and the clients they advise . . . .” O.B. at 27.

Second, Plaintiffs' assertion that the lower court's denial of fees is supported by its finding that Plaintiff's claims were colorable is irrelevant. PRB at 48. Horne does not seek fees because Plaintiffs' claims were not colorable. Horne is entitled to fees because Plaintiffs' conduct (i) compromised the integrity of the proceedings addressing those claims (Op. at 40), (ii) were undertaken to gain an advantage in the lower court proceedings (*id.* at 50), and (iii) materially impacted the trial court's ability to accurately find facts (*id.* at 51). Those specific findings by the lower court of misconduct that fundamentally impacted the integrity of the proceedings below mandate a shifting of fees. That conduct directly prejudiced Horne by increasing the burden and expense of the litigation on him, and denying him a fair opportunity to seek resolution of the claims against him at an earlier stage.

### **CONCLUSION**

The trial court made specific findings of bad faith conduct by the Plaintiffs that compromised the integrity of the proceedings below. The remedy granted by the lower court (dismissal of the claims against Horne, and making certain inferences in his favor) will not deter future such conduct by litigants because Plaintiffs are no worse off than they would have been had they not engaged in such conduct; Plaintiffs' claims would have otherwise been dismissed for lack of evidence. Because the purpose of the bad faith exception to the American Rule is

to deter similar conduct in the future, the lower court abused its discretion in denying Horne's request for his fees and expenses because its failure to do so will not discourage such conduct by future litigants, and because such conduct appears, on its face, to violate criminal statutes.

For the foregoing reasons and the reasons stated in Appellee William Horne's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross-Appeal, Horne respectfully requests that the Court reverse that portion of the Opinion and Order denying Horne's request for attorneys' fees and expenses, and enter judgment against the Plaintiffs, jointly and severally, awarding Horne his attorneys' fees and expenses, with interest, incurred in the lower court and these proceedings.

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Dated: January 22, 2016

## CERTIFICATE OF SERVICE

I, Eric J. Juray, do hereby certify on this 22nd day of January, 2016, that I caused a copy of Cross Appellant William Horne's Reply Brief on Cross-Appeal to be served via eFiling through File & Serve*Xpress* upon the following counsel of record:

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