EFiled: Dec 27 2017 02:49PM EST
Filing ID 61503884
Case Number 296,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SOKOL HOLDINGS, INC. THOMAS SINCLAIR, and BRIAN SAVAGE Defendants and Counterclaim Plaintiffs Below, Appellants, Cross-Appellees v. MARGOLIS EDELSTEIN, MARCUS & AUERBACH, JEROME MARCUS, JONATHAN AUERBACH, and HERBERT MONDROS Plaintiffs and Counterclaim Defendants Below, Appellees, Cross-Appellants.	:	No. 296, 2017

CORRECTED CORRECTED ANSWERING BRIEF OF APPELLEES AND OPENING BRIEF OF CROSS-APPELLANTS

MARGOLIS EDELSTEIN

Herbert W. Mondros (DE 3308)
300 Delaware Avenue, Suite 800
Wilmington, Delaware 19801
(302) 888-1112
hmondros@margolisedelstein.com

Counsel to Appellees, Cross-Appellants

December 27, 2017

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page**

Rules

NATURE OF PROCEEDINGS

This is a dispute between lawyers and their former clients.

The Appellees/Cross-Appellants, Marcus & Auerbach, Jerome Marcus, Jonathan Auerbach, Margolis Edelstein, and Herbert Mondros, (collectively the "Lawyers") successfully represented the Appellants/Cross-Appellees, Sokol Holdings, Inc., Brian Savage and Thomas Sinclair (collectively, the "Former Clients" or "Sokol") in underlying proceedings, and later filed suit in the Superior Court against the Former Clients to collect more than $1 million in unpaid attorneys' fees, costs and interest. The Former Clients asserted counter-claims for legal malpractice against the Lawyers. During the course of those proceedings, the Lawyers filed a Rule 11 motion for sanctions against the Former Clients.

By Order dated June 30, 2017, the trial court i) granted the Lawyers' motion for summary judgment on their claims for payment of fees and costs; ii) granted the Lawyers' motion to dismiss the Former Clients' counter-claims for legal malpractice; and iii) denied the Lawyers' motion for sanctions. That order, [LA1[1]], is the subject of this appeal and cross-appeal.

[1] "LA__" shall refer to the Lawyers' Appendix in support of this brief. "A__" shall refer to Sokol's Appendix.

SUMMARY OF ARGUMENT

A. Appeal

I. Denied. The trial court's disposition of Sokol's malpractice claims was entirely correct, and indeed although Sokol has appealed certain of the trial court's determinations it has not actually addressed most of the bases advanced by the trial court for its conclusions.

The arguments Sokol does make are entirely unsuccessful. Sokol's claim that Dorsey should have been sued for "delaying" its request for reimbursement in the Colorado discovery proceeding fails, first, because Sokol's pleading doesn't actually state this claim: they only claim in Sokol's counterclaim against the Lawyers is that Dorsey should have been sued for failing to seek reimbursement *at all.* This claim fails because Dorsey *did* seek reimbursement. When acquainted with this fact, Sokol did not amend its pleading but its counsel briefed and argued a different claim – that Dorsey should have made this request for reimbursement before the costs were incurred, not after.

The latter claim fails, first, for the same reason: Dorsey did seek reimbursement before the costs were incurred. Beyond that dispositive fact, the trial court also held, correctly, that it couldn't have made any difference when the request was made, because the grounds on which the request was adjudicate – that Sokol was an interested in party I the dispute pursuant to which the 1782 subpoena had

been issued – was true throughout the proceeding. Given that this was the basis for the Colorado court's ruling, it wouldn't have made any difference when the issue was raised. Other than Sokol's *ipse dixit* that things would have been different if the issue had been raised at some other time, there is nothing in the record to substantiate this claim. As Sokol has the burden of establishing that they would have achieved a better result if the Lawyers had proceeded as Sokol claims they should have, this claim must fail.

The same result follows for Sinclair and Sokol's claim that the Lawyers committed malpractice by not suing Dorsey for its advice with respect to a Bahamian trust. First, the parties' retainer agreement defined exactly what the scope of the Lawyers' representation would be and made clear that the Lawyers were not providing representation on any matter not identified by the parties' agreement. This by itself disposes of Sokol's claim that the Lawyers had a duty to advise Sokol with respect to an issue of Bahamian law, about which Sokol never consulted the Lawyers.

Secondly, -- and this forms an important basis for the Lawyers' Rule 11 motion as well – Sokol *did in fact* sue Dorsey, in England, for exactly this advice. But Sokol did not disclose, to the Lawyers or the Delaware trial court, that Sokol had instituted this claim, in England. It cannot possibly be that Lawyers can be sued for not prosecuting a claim if the claim is actually being prosecuted.

II. Denied. There is no basis for reversal of summary judgment on the legal malpractice claims and hence no basis to reverse the trial court's determination of the breach of contract claims.

III. Denied. Sokol's claim that it was entitled to discovery to investigate the above claims, and that the trial court should not have entered summary judgment without allowing such discovery, fails because Sokol's brief seeking discovery did not identify any material facts in dispute and did not show how any discovery could be relevant to any such dispute.

IV. Denied. The trial court had jurisdiction as Sokol waived any right to arbitration, which, in any event was not available to Sokol.

B. Cross-Appeal

The Lawyers filed a Rule 11 motion against Sokol and its counsel because the claims they had made were absolutely without any legitimate factual basis, and because Sokol's counsel breached his duty of candor to the tribunal by not disclosing the existence of the English claim. The trial court expressed its concern about this alleged breach of the duty of candor, but ruled that it should be dealt with only by disciplinary counsel. This was error, because the improper actions and breaches of duty have imposed substantial costs and prejudice upon the Lawyers. The Rule 11 motion should be adjudicated on its merits.

I. STATEMENT OF FACTS

Plaintiffs below/Appellees/Cross-Appellants in this case are two law firms which previously represented Defendants below/Appellants/Cross Appellees.

The law firm of Marcus & Auerbach LLC, and its two partners, Jerome M. Marcus and Jonathan Auerbach, (collectively "M&A" or "Marcus & Auerbach"), and Margolis Edelstein and one of its partners, Herbert Mondros, (collectively "Margolis") previously represented Sokol Holdings, Inc., and its two shareholders, Brian Savage and Thomas Sinclair (collectively "Sokol" or the "Former Clients")

Marcus & Auerbach represented Sokol in two proceedings:

First, M&A replaced the law firm of Dorsey & Whitney ("Dorsey"), which represented Sokol in a discovery proceeding in federal court in Colorado, *Application Of Michael Wilson & Partners, Limited, For Judicial Assistance Pursuant To 28 U.S.C. § 1782*, Civil Action No. 06-cv-02575-MSK-KMT (D.Colo.) (the "Colorado Action"), in which Sokol had been served with a third party subpoena.

Second, M&A represented Sokol in a case brought in Delaware, (the "Delaware Action") by the Former Clients[2] against Dorsey, arising out of Dorsey's

[2] A fourth former client, Frontier Holdings LTD, was a plaintiff in the underlying Delaware Action against Dorsey and a subpoenaed party in the Colorado Action, but is now defunct and not a party to this appeal.

approximately $4 million in invoices for services incurred while representing Sokol in the Colorado Action.

For its part, Margolis served as local Delaware counsel to the former clients in the Delaware Action only.

The M&A retainer agreement [A36-39, attached as Exhibit B], specifically defined the scope of the representation and expressly disclaimed any representation on any other matter. It provided:

> This agreement relates solely to our representation of you in connection with your dispute with Dorsey and KPMB relating to the amounts they claim you owe for services rendered to you in connection with your response to the 1782 subpoena. Any other matters on your behalf are not included in the above, and you may be required to pay the attorneys additional compensation for any such matters.

As the trial court noted, "[t]here is no mention anywhere in the Marcus & Auerbach engagement letter that the lawyers were expected to render advice about Bahamian Trust matters. [LA42, Mem.Op. at 41].

The Margolis engagement letter, [LA79], references the Former Clients' dispute with Dorsey and narrowly defines the scope of Margolis's representation as follows:

> We will appear in this matter as your local counsel and address relevant legal issues with you. Specifically we will file the Complaint and related documents and pursue the litigation in a manner to assert/protect your legal rights in this litigation.

> We understand that ME's role is as local counsel and that Marcus & Auerbach LLC shall be primary counsel. We will confer with Marcus& Auerbach prior to engaging in work and incurring fees and costs in this matter.

Margolis was thus retained as local, Delaware counsel only, to take on a subset of the duties that M& A had taken on. "The letter leaves no doubt that Margolis' role was limited to serving as local Delaware counsel in the fee dispute with Dorsey. Like the Marcus Auerbach engagement letter the Margolis Letter makes no reference to the EPIL trust or the Bahamian litigation." [LA1, Mem. Op., at 42].

The limitation in M&A's retainer on the scope of representation is particularly relevant because Sokol, Savage and Sinclair were involved in litigation in multiple fora throughout the world, in each of which they were represented by counsel other than M&A, and other than Margolis. In fact, Sokol was represented by other counsel in the United Kingdom with respect to the Bahamian Trust issues.[3] [LA48-49].

The only matters for which Marcus & Auerbach, and Margolis Edelstein were retained were those specified in their respective retainer agreements. All other matters were governed by non-U.S. law, as to which neither Marcus & Auerbach nor Margolis Edelstein had any training or expertise; and in all of these matters,

[3] It is Sokol's failure to disclose this seemingly important fact to the trial court that gave rise to the Lawyers' Motion for Sanctions and the instant cross-appeal. *See* discussion, *infra*.

Sokol was represented by other counsel, who were barred in the relevant jurisdictions.

Marcus & Auerbach completed the representation of the Sokol parties in the Colorado Action after Sokol terminated Dorsey's representation. M&A also attempted to negotiate a resolution to the fee dispute between Sokol and Dorsey as to Dorsey's bill, but no agreement was attained.

As a result, the dispute with Dorsey went forward to trial in the Delaware Superior Court, before Hon. John A. Parkins, who entered judgment in favor Sokol, allowing Dorsey's fees and costs in the amount of $633,339 and disallowing the remainder of Dorsey's nearly $4 million bill.[4] *See Sokol Holdings, Inc. et al. v. Dorsey & Whitney*, C.A. No. 09C-08-239 (July 10, 2013)(Mem. Op.)[LA83]

In the Colorado Action, Dorsey had petitioned the Colorado court to order the party seeking discovery – a foreign law firm, Michael Wilson Partners – to bear the costs that Sokol would incur in producing the discovery sought by Michael Wilson. That motion, [LA297], was filed and briefed in mid-2007, and argued on July 20,

[4] Sokol's brief states at 7 that Marcus & Auerbach and Margolis Edelstein "made numerous mistakes in the course of this trial." As support for that assertion the Former Clients cite one source -- A73 -- as record evidence of this "fact." A73 is a page in their own counterclaim: it is nothing more than an allegation. It is not evidence of any kind. Supreme Court Rule 14(b)(v) requires that the Statement of Facts section of a brief cite record evidence in support of the factual assertions made therein.

2007, and adjudicated on October 30, 2007 -- all before the costs were incurred. In their brief addressing that Motion, Dorsey, on behalf of the Former Clients, asked that Michael Wilson bear the costs the Former Clients would incur in responding to Wilson's discovery requests. The Colorado Court held that the costs of responding to the subpoena, which were incurred in the autumn of 2007 and the early months of 2008, would be shared by Michael Wilson and Sokol. [LA314].

In an entirely separate proceeding, Dorsey represented Mr. Sinclair in litigation filed on his behalf in the Bahamas, which sought to protect Sinclair's interest in shares of Max Petroleum. [LA83, 2013 Mem Op., at 6-7]. Sokol's Bahamian counsel was also retained in connection with that proceeding. [LA83, 2013 Mem Op., at 51].

At the conclusion of these representations, Sokol had failed to pay the Lawyers hundreds of thousands of dollars in incurred fees and costs. Sokol owed Marcus & Auerbach $759,985.85 in fees and costs incurred in connection with both the Colorado and Delaware Actions, and Sokol owed Margolis $105,016.09 in fees and costs incurred in connection with its service as local counsel in the Delaware Action. [A25-33 (M&A Complaint); A54-59 (Margolis Complaint)].

After numerous demands to pay were left unanswered, the Lawyers brought an action in Delaware seeking payment.

On January 24, 2014 Margolis filed suit against Sokol in Superior Court seeking $105,016.09 in fees and costs. Defendants, represented by new counsel, Biggs & Battaglia, answered that Complaint on April 2, 2014. Margolis served discovery on May 19, 2014.

Three months later, on August 18, 2014, Biggs and Battaglia moved to withdraw, stating that Sokol had made "promises to counsel that they have not kept." Presumably they had not been paid. [LA153].

New counsel, Schwartz and Schwartz ("Schwartz"), entered its appearance for Sokol on September 26, 2014. [A04]. On July 31, 2017, - immediately after filing the Notice of Appeal in this Court on Sokol's behalf - Schwartz withdrew because Sokol had not paid its legal bills him for over a year.[5] [LA156}

On March 30, 2015, the Lawyers filed an Amended Complaint, which joined Marcus & Auerbach's claims for non-payment against Sokol with those already on file on behalf of Margolis. [LA160].

[5] Thus, prior to their present counsel, Sokol, Sinclair and Savage have been serially represented by, and have serially stiffed, the following law firms: i) Marcus & Auerbach; ii) Margolis Edelstein; iii) Biggs & Battaglia; and iv) Schwartz & Schwartz. It is also believed that Dorsey has not been able to collect even the reduced amount ordered by the trial court at the conclusion of the Delaware Action from Sokol.

On April 30, 2015, Sokol, represented by Schwartz, counterclaimed against Marcus & Auerbach and Margolis, asserting malpractice, against both law firms. [LA167].

On June 12, 2015, the Lawyers filed their Motion to Dismiss Sokol's Counterclaims or in the alternative for a more particular statement of those claims. [A7]. Sokol responded to this Motion on July 6, 2015. [A8]. The trial court denied the motion to dismiss, but granted the motion for a more particular statement on July 10, 2015. [A8]. On August 13, 2015, Sokol filed an Amended Answer and Counterclaims. [A9]. On September 9, 2015, M&A and Margolis each filed a motion to dismiss the counterclaims. [A9-10]. Sokol's opposition to the motions to dismiss was filed on October 18, 2014. [A12]

On October 16, 2015, the Lawyers took the depositions of Sinclair and Savage. [A12]. Between October 2015, and May 2016, there were various submissions and supplemental briefing to the trial court.

On May 4, 2016, the trial court announced its intention to treat the motions to dismiss as motions for summary judgment. [A14]. Plaintiff sought to stay the proceedings to take discovery, which request was denied by the Court on June 14, 2016 because Sokol had failed to make a particularized showing of its need for discovery. [LA199]

On April 28, 2016, the trial court wrote to counsel stating that it had discovered, while doing independent research, that Sokol was pursuing the same claim in the United Kingdom that it was claiming that M&A should have brought on its behalf against Dorsey, and that Sokol's U.K. proceeding had been dismissed because Sokol had failed to post the requisite bond. The trial court directed that Sokol provide responses to its inquiries as to i) how it could have been malpractice for M&A not to pursue a claim that Sokol's counsel was already pursing in the U.K.; and ii) why Sokol's counsel had not disclosed the U.K. action to the trial court. [LA191]. On May 15, 2016, Sokol's Colorado counsel, Paul Gordon, wrote to the trial court,[6] stating that the U.K. proceeding was not relevant. [LA195]. The Lawyers disagreed with this assessment in their May 19, 2016 letter to the Court [LA202].

On June 15, 2016, the Lawyers filed their Motion for Rule 11 Sanctions against Sokol and their counsel. [LA209]. On July 29, 2016, Schwartz, through its counsel, filed its opposition to the motion for sanctions, [LA287], and on August 1, 2010, Gordon, through Schwartz filed his response to the Motion for Sanctions. [LA293].

---

[6] Sokol's *pro hac vice* Colorado counsel had a habit of bypassing Delaware counsel and directly efiling papers in the trial court's electronic docket in violation of Superior Court Rule 90.1. On June 14, 2016, the trial court issued an order denying the Lawyers Motion to Strike these filings, but cautioned Colorado counsel that the violations should not be repeated. [LA199]

The Lawyers filed their Motion for Summary Judgment on August 22, 2016. [A139]. Sokol filed its response on September 3, 2016. A hearing was held on September 13, 2016. [A146]. Supplemental submissions were filed pursuant to the trial court's requests.

On June 30, 2017, the trial court issued its Memorandum Opinion that is the subject of this appeal. [LA1].

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON DEFENDANTS' "DELAY" CLAIM

A. Counterstatement of the Question Presented:

Did the trial court correctly conclude that there was no dispute about any material fact regarding Defendants' claim that Dorsey should have been sued for malpractice because Dorsey did not seek reimbursement for costs, when there is no dispute that Dorsey did in fact seek such reimbursement? **A 103-108; LA 25-30.**

B. Scope of Review:

This Court reviews the grant of summary judgment *de novo.* *Coleman v. PriceWaterhouseCoopers, LLC*, 854 A.2d 838, 842 (Del. 2004)

C. Merits of Argument

The "delay" claim fails for multiple reasons, most of which, though invoked by the trial court, are not even addressed by Sokol.

First, no "delay" claim is actually pled in Sokol's pleading. The pleading – Sokol's Answer and Counterclaim – in which this claim is articulated alleges only that Dorsey did not raise the cost issue *at all*. Sokol's Answer and Counterclaim at paragraph ¶31a(i) alleged that the lawyers should have sued Dorsey "for failing to seek reimbursement under the subpoena *duces tecum* for any amount Dorsey had billed to the Sokol Defendants." [A077]

Rather than amending their pleading (something the trial court explicitly gave Sokol time to do, [LA357], Sokol simply advanced new arguments in briefs, and in a telephonic appearance at argument on this topic, after the Lawyers showed that in fact Dorsey had raised the cost issue. Now, Sokol claims what it really meant was that the cost claim had been made too late: the mistake, they now asserted, was that the cost issue should have been made before the challenged costs had been incurred.

The first fatal flaw with Sokol's newly invented "claim" is that it too ignores the facts. Dorsey *did* raise the cost claim before the costs were incurred. [LA297]. Indeed, Dorsey's brief seeking this relief was filed in July of 2007, and even the Colorado court's cost ruling, which mandated that the costs be shared, was issued – after briefing by all parties and argument -- before the challenged costs were incurred. [LA314]. Given this, Sokol's single paragraph of argument on this topic – bereft as it is of even a single citation to any pleading, evidence, or legal authority – fails.

The second independently dispositive flaw is that the Colorado court's reason for granting only partial cost reimbursement, rather than total reimbursement, was that Savage and Sinclair were not disinterested bystanders. They had an interest in the outcome of the underlying litigation, as part of which the subpoenas had been issued. As Judge Parkins held, in an argument that Sokol does not even bother to

address, the factual basis for this holding was true throughout the 1782 proceeding. So it could not possibly have mattered when the issue was raised.

Sokol makes absolutely no effort to address or refute the trial court's reasoning on this score. They simply assert, without citation to anything at all, that "Had Dorsey asked for permission, the clients either would have been reimbursed or would have never incurred the fees and costs." [Op. Br. at17]. Sokol provides absolutely no reason why this Court should credit this totally unfounded assertion. Sokol offers no facts in support of this claim, and makes absolutely no effort to contest the trial court's determination that this claim is groundless.

The trial court offered several additional bases for its holding, not a single one of which is even addressed by Sokol:

The trial court cited Delaware law for the proposition that "when a legal malpractice claim arises from a litigation mistake, the legal malpractice plaintiff must prove he or she would have won the underlying case." [LA1. at 25 (citing *National Grange Mut. Ins. Co. v. Goldstein, Heslop, Steel, Clapper, Oswalt & Stoehr*, 142 Fed. Appx. 117, 2005 WL 1805667 at *3 (3d Cir. 2005)). *See also* slip op. at 29, nn. 27 & 28, citing *Phillips v. Delaware Power & Light Co.,* 216 A.2d 281 (Del. 1969) and *Hayes v. Erie County Office of Children and Youth,* 804 F. Supp.2d 356 (E.D. Pa. 2011) for the proposition that a plaintiff must show that the

challenged error actually caused an adverse result, i.*e.* if the error had not been made, the result would have been different].

Sokol completely ignores this holding, and this rule. It makes no effort to show it can satisfy the standard, and makes no argument that the trial court was wrong to impose this standard. Sokol points to no evidence -- and indeed no evidence exists -- suggesting that if the cost issue had been raised at a different time the result would have been different. (Of course, the entire question exists only in theory, because in reality the cost issue was raised before the costs were incurred). The trial court held that the cost issue is appropriately for the bench, not a jury. [LA1, Mem. Op. 26 at 30]. Sokol totally ignores this holding as well. Sokol makes no effort to show how it can succeed given the rule, and makes no effort to show that the trial court's reading of the law was wrong. Instead, Sokol's single paragraph of "argument" on this topic simply asserts that this Court should reverse the decision below so they can reach a "jury."

II. THE BAHAMIAN TRUST ISSUE WAS CORRECTLY DECIDED BY THE TRIAL COURT

A. **Counterstatement of the Question Presented:** Did the trial court correctly grant summary judgment on Defendants' claim that Plaintiffs' actions prevented Defendants from suing Dorsey regarding Dorsey's advice with respect to stock held in a Bahamian trust, when Defendants did in fact sue Dorsey for precisely that (but failed to disclose that fact to the trial court)? **This argument has not been preserved for appeal, compare A86 (nondisclosure was due to lack of relevance) with Op. Br. at 19 n.3 (nondisclosure due to ignorance of issue), and is not subject to the interests of justice exception.**

B. **Scope of review:** This Court applies *de novo* review to the trial court's grant of summary judgment. *Coleman v. PriceWaterhouseCoopers, LLC*, 854 A.2d 838 *, 2004 Del. LEXIS 308(Del. 2004).

C. Merits of Argument: Again ignoring both the facts and the trial court's holding, Sokol asks this Court to reverse the trial court's determination that Sokol could not sue their lawyers for malpractice on this issue.

The first reason the trial court was right is that, though one would never know it from Sokol's brief, Sokol has actually brought the very claim it says it was prevented from bringing.

In this claim, Sokol alleges that the Lawyers' error prevented it from suing Dorsey for malpractice about how stock was handled in a legal proceeding in the

Bahamas. But the fact is that Sokol *did in fact* sue Dorsey for exactly this alleged malpractice: it filed this claim in England, and it was pending at the very time it was suing in Delaware on the ground that it had been prevented from prosecuting this claim.

In the trial court, this fact was discovered independently by Judge Parkins, who then demanded an explanation as to why Sokol's counsel had not disclosed this to the Court. [LA191]. Sokol's counsel claimed he did not disclose this fact to the trial court because it was "irrelevant." [LA195] To this Court, however, Defendants have a new reason: now they say – without citation to any kind of evidence – that they didn't disclose this to the trial court because they were unaware of it. Of course the clients themselves could not possibly have been unaware of the fact that they were prosecuting this claim in England. But counsel for the Defendants did not make this argument in the trial court. Sokol may not raise this issue for the first time on appeal. *Deibler v. Kacser*, 1995 Del. LEXIS 383 (Del. 1995)(citing Supr. Ct. R. 8; *Jeffery v. Seven Seventeen Corp*., 461 A.2d 1009 *, 1983 Del. LEXIS 452(borrower's failure to raise promissory estoppel before trial court precluded raising that issue on appeal)). In fact, Sokol's alternating responses to this fact are necessarily a breach of their duty of candor to the tribunals of this State.

Moreover, there is absolutely nothing in the record that substantiates Sokol's this factual claim –which renders the argument inadmissible in this Court. *See*

Morgan v. Scott, 2014 Del. LEXIS 424 *, 2014 WL 4698487 (Del. 2014) (declining to review issues raised by the pro se appellant which failed to cite to the record on appeal).

How can Sokol possibly allege that their lawyers prevented them from doing something that they actually did do? It is not possible to do so in any honest or accurate way. The claim failed, and Sokol does not argue that it failed because it was time-barred, or for any other reason connected to any action or inaction by the Lawyers whom Sokol has sued here. In fact, the record shows without dispute, the English claim was dismissed when Sokol violated an order of the English court to post a bond for costs. That was obviously no fault of Marcus & Auerbach or Margolis.

As the trial court accurately held, the engagement letters between Sokol and Marcus and Auerbach and between Sokol and Margolis were expressly limited to the Dorsey bill, and explicitly excluded any other matter. The trial court correctly held that this explicit restriction on the scope of representation is enforceable. See [LA1 at 41-44]. That limitation is underscored in particular by the fact that, as Sokol does not dispute, in this case they were actually represented by another firm which was, indisputably, handling this issue.

Further, as the trial court also held, and as Sokol does not dispute, the issue was one of foreign law, not the law of any U.S. jurisdiction, about which the Lawyers have no expertise.

Sokol offers no authority to the contrary, and has instead simply ignored the trial court's holding, even though it is dispositive of their claim. Sokol's authorities are, for this reason, irrelevant, because in none of them was there an explicit statement in the retainer agreement that other matters were not included in the scope of the representation. See *Campbell v. File Olin & Anderson,* 642 N.Y.S.2d 819, (N.Y. Sup. Ct. 1996) [7] (noting the lack of any evidence "that the attorney-client relationship was limited to [the specific] representation" to which the lawyers there pointed). In *Janik v. Rudy, Exelrod & Zieff,* 14 Cal. Rptr. 3d 751 (Cal. Ct. App. 2004) there was no retainer agreement at issue; the lawyers, who had represented a plaintiff class in a class action, argued that they could only be held responsible for prosecuting those claims identified in the order certifying the class; again, there was no agreed-upon restriction, as there is in this case, on the scope of the representation. *Nichols v. Keller,* 19 Cal. Rptr. 2d 601 (Cal. Ct. App. 1993), *Keef v. Widuch,* 747 N.E.2d 992 (Ill App. Ct. 2001) and *Smith v. Becnel,* 396 So.2d 444 (La. Ct. App. 1981) are all, like the *Campbell* case referenced above, worker's compensation cases

[7] Sokol identifies this as an appellate decision. It is not, but is instead a ruling of the New York Supreme Court, which is that state's trial level tribunal.

in which there was no explicit limitation on the scope of representation. *McCarty v. Browning,* 797 So.2d 30 (Fla. 3d Dist. Ct. App. 2001) affirms summary judgment against a client, holding that "it is not sufficient merely to assert an attorney-client relationship, but to also allege that the relationship existed with respect to the acts or omissions upon which the malpractice claim is based."

The *McCarty* court does hold that "an attorney has a duty to advise the client of legal problems not within the scope of the task the attorney was retained to perform, but of which the attorney becomes aware, see *Maillard v. Dowdell,* 528 So. 2d 512 (Fla. 3d DCA 1988), here the record reflects that [the lawyer] was not aware of the code violation." Sokol has not alleged that the Lawyers here were actually aware of the alleged issue, so this case is of no help to them. And here again, there was no explicit restriction of the scope of representation, as there is in this case, and there is no holding overriding such a restriction. *Daugherty v. Runner,* 581 S.W. 2d 12 (Ky. App. 1978) upholds a jury verdict in favor of a lawyer who did not bring a medical malpractice claim, because it was outside his specialty. There was no explicit restriction on the scope of the representation, but the lawyer was still found not to have had a duty to investigate or bring the claim.

Sokol's claim on this issue is even more clearly meritless for two additional reasons: First, the issue about which it is suing the Lawyers involves the law of a foreign nation. None of the Lawyers is barred in that jurisdiction or has, any

expertise in the law of that jurisdiction. Moreover, Sokol *already had counsel* who were specifically mandated to represent them on this issue.

III. THE TRIAL COURT'S DECISION ON ARBITRATION WAS CORRECT

A. Counterstatement of the Question Presented:

Did the trial court correctly hold that Defendants waived any right to arbitration when they never filed a motion to compel arbitration and where they waited over a year after answering the Complaint to even mention arbitration in the trial court? **A148; LA 13-15.**

B. Scope of Review:

This Court will review this legal issue *de novo. See Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 395, (Del. 2010).

C. Merits of the Argument

In holdings whose substance Sokol again fails to confront, the trial court held that Sokol waived its right to seek arbitration, and that in any event, the forum identified by the parties to arbitrate disputes lacked jurisdiction over any aspect of this case.

The trial court's holding on waiver is in itself dispositive and Sokol's argument against it fails to explain even the cases Sokol itself cites. There is no dispute that any right to arbitrate is waivable – just as any other right conferred by contract is waivable. Sokol acknowledges this and cites the binding Delaware precedent so holding. *Parfi Holding AV v. Mirror Image Internet, Inc.*, 842 A.2d 1245, 1260 n. 39 (Del. Ch. 2004).

Sokol attempts to escape this principle by invoking cases holding that arbitration agreements define the subject matter jurisdiction of courts and then a separate line of authorities holding that limitations on subject matter jurisdiction are not waivable and can be invoked at any time. But there is no inconsistency between these two common sense principles. Restrictions on a court's subject matter jurisdiction imposed *by law* cannot be waived by private parties. That is the holding of the one case Sokol cites against waiver, from Minnesota. *Guzhagin v. State Farm Mut. Ins. Co.,* 566 F.Supp.2d 962 (D. Minn. 2008). But restrictions on subject matter jurisdiction conferred voluntarily by private parties can of course be waived – otherwise there would never be any such thing as waiver of the right to arbitration.

The facts of this case, and Sokol's strategic behavior, are the dictionary definition– and the Delaware courts' definition -- of waiver. As the *Parfi* Court holds, waiver is effected *not only* by an explicit verbal waiver but also, and entirely separately, by conduct establishing an intent to litigate in court:

> It is, of course, the case that a party may waive its right to arbitration by expressly waiving that right, actively participating in litigation as to an arbitrable claim, **or** otherwise taking action inconsistent with the right to arbitration. See, e.g., Ballenger v. Applied Digital Solutions, Inc., 2002 Del. Ch. LEXIS 53, 2002 WL 749162 at *7-8 (Del. Ch. Apr. 24, 2002); Wilshire Restaurant Group, Inc. v. Ramada, Inc., 1990 Del. Ch. LEXIS 196, 1990 WL 195910 at *2 (Del. Ch. Dec. 5, 1990).

842 A.2d at 1260 n.39 (emphasis added).

In a holding about which Sokol says absolutely nothing, the trial court carefully enumerated the facts establishing that Sokol waived its right to arbitration because it participated actively in this litigation in the Delaware courts for two years until it became clear that it was going to lose – and then, and only then sought arbitration:

> More than two years and 115 docket entries elapsed between the time the Sokol Defendants filed their answer and when they first mentioned arbitration. Indeed they did not raise their arbitration argument until after the court advised the parties that it would dismiss the counterclaims.

[LA1. at 15-16].

Sokol's total failure to address this holding is fatal to its appeal on this issue. Its *ipse dixit* that it did not consent [Op. Br. at 27], with no citation to any fact or record evidence, simply ignores the trial court's recitation of the facts establishing that Sokol willingly litigated in state court until it became clear that it was going to lose. Neither Delaware, nor any other jurisdiction, nor common sense permits a party to seek arbitration at such a stage in any litigation.

IV. THE TRIAL COURT PROPERLY HELD THAT SOKOL COULD NOT FORESTALL SUMMARY JUDGMENT WITH ITS BELATED LIST OF "DISCOVERY" REQUESTS

A. Counterstatement of the Question Presented:

Did the trial court correctly refuse to delay the entry of summary judgment where Defendants proposed discovery topics did not address any material fact in dispute? **This issue was not preserved for appeal, *see, infra,* at 29, and the interests of justice exception of Rule 8 does not apply.**

B. Scope of Review:

This court will review a trial court's pretrial discovery rulings for abuse of discretion. *Hecksher v. Fairwinds Baptist Church, Inc.*, 115 A.3d 1187, 1208, (Del. 2015)(citing *Phillips v. Wilks, Lukoff & Bracegirdle, LLC*, 2014 Del. LEXIS 449, 2014 WL 4930693, *4 (Del. Oct. 1, 2014). This Court applies *de novo* review to the trial court's grant of summary judgment. Coleman v. Price Waterhouse Coopers, LLC, 854 A.2d 838, 842 (Del. 2004).

C. Merits of Argument:

The trial court was entirely correct in holding that, having slept on its rights for over a year without seeking a shred of discovery, Sokol could not keep this case alive with its one-page wish list, much of which was a list of publicly available documents; much of the rest of which they already had or had access to; and all of which was entirely irrelevant.

No discovery was necessary, or could possibly help, with respect to Sokol's claim that Dorsey failed to properly seek reimbursement of discovery expenses. This is so, in part, because the contention that Dorsey didn't properly seek costs fails no matter what "discovery" Sokol now claims it needed to "investigate" this claim. First, Sokol alleges simply and only that the Lawyers should have sued "Dorsey for failing to seek reimbursement under the subpoena duces tecum for any amount Dorsey had billed to the Sokol Defendants." [A077 Counterclaim ¶31a(i)]. This claim fails because, as noted above, Dorsey *did* seek reimbursement – so granting leave to take discovery about the reasons why Dorsey didn't do so is obviously pointless.

Sokol fares no better with its half-hearted attempt to escape this fact, by saying in court – but never amending its pleading to allege – that its claim was really that Dorsey waited too long to seek such reimbursement. This fails for the same reason that the first version failed: it's demonstrably false, and no discovery is need to show that. The record shows without possibility of dispute that Dorsey had made exactly this request in a brief it filed on July 13, 2007, and that the claim had been ruled on by October 30, 2007. The excessive costs Dorsey incurred were incurred after that, as explained in the trial court's 2013 opinion. No discovery could possibly do anything to change any of these facts.

The trial court ruled that this discovery request would necessarily be fruitless for an additional reason: because the ground upon which the trial court allocated costs was a purely legal one, which did not change and could not have changed no matter when the issue had been raised. For this reason as well, discovery could not possibly have accomplished anything.

Moreover, Sokol, in its claimed need for discovery does not discuss the MAX shares, or any claim relating to the MAX shares, at all, and does not identify any discovery relating to that alleged claim. That on its own is sufficient to resolve the appeal on this aspect of the Court's ruling, because in fact, in the trial court, there was never a request for discovery on this claim. The issue is therefore entirely waived and there is no question on this topic properly before this Court. *See* Del. Supr. Ct. Rule 8; *Shelley v. State*, 2017 Del. LEXIS 257 *, 166 A.3d 102, 2017 WL 2686551 (Del. 2017)(finding waiver where appellant did not raise claim in the motion he filed in the Superior Court. Supreme Court "will not consider it for the first time on appeal"); *Martin v. Nat'l Gen. Assur Co*., 2014 Del. LEXIS 310 *, 99 A.3d 227, 2014 WL 3408674 (Del. 2014) ("appellant's "failure to raise this argument below constitutes a waiver of this claim on appeal.").

In any event, Sokol's brief in this Court does not identify any specific claim with respect to which it needed discovery and does not specify any specific fact they needed in discovery. While its brief muses about the scope of the attorney-client

relationship, Sokol says nothing about why the parties are not bound by the retainer letter's careful and specific enumeration of the matters within the scope of the representation, and, as noted above, Sokol cites no case holding that such a specific definition of the scope of representation, and the explicit exclusion of all other matters, is not binding. The trial court held that they were binding. See [LA1 at 43, citing *Ambase Corp. v. Davis Polk & Wardwell*, 866 N.E.2d 1033 (N.Y. Ct. App. 2007) for the proposition that "[w]here, as here, the engagement letters clearly define the scope of representation, other matters (such as the Eagle Trust) do not fall within the duty of care owed to the client." Sokol's failure to even criticize, much less refute, this holding is dispositive of its claimed right to seek discovery.[8]

[8] This case began with the Lawyers' effort to obtain an order requiring the Former Clients to pay their bills, and the trial court granted summary judgment for the Lawyers on that claim. Sokol's only proffered argument for why that judgment should be reversed rests on Sokol's claim that the Lawyers committed malpractice. Because the latter argument fails, the former does as well, even by the clients' own acknowledgement. But it is also true that the Former Clients have identified no errors of any kind, factual or legal, in the substance of the trial court's adjudication of the Lawyers' request for payment. Because that is so, there is no basis for disturbing the trial court's judgment on this issue no matter what happens with respect to the rest of Sokol's appeal.

THE LAWYERS' CROSS-APPEAL

I. THE TRIAL COURT ERRONEOUSLY FAILED TO ADDRESS THE MERITS OF PLAINTIFFS-APPELLANTS' RULE 11 MOTION, AND THAT ERROR SHOULD BE REVERSED

A. QUESTION PRESENTED:

Did the trial court err by failing to address the merits of Plaintiffs' Rule 11 Motion? **LA 209-288; LA 69-70.**

B. Scope of Review:

This Court will review questions of law *de novo*, and therefore independently determines what process Rule 11 demands. This Court will review decisions to impose sanctions for an abuse of discretion. *Crumplar v. Superior Court*, 56 A.3d 1000, 1005, 2012 Del. LEXIS 553, *5-8 (Del. 2012).

C. Merits of Argument:

At the heart of the Lawyers' Rule 11 Motion is the assertion that Sokol's malpractice claims are based on factual claims that are demonstrably false and that Sokol must have known are false. Sokol claims that Dorsey should have been sued in the United States for malpractice relating to the advice it rendered regarding the Bahamian proceeding: but Sokol itself sued Dorsey, for exactly that claim; and in so doing, it specifically alleged that the courts of England have jurisdiction over the relevant actors, who were based there. Thus in their Particulars of Claim ¶12, Sinclair and Sokol allege:

> Mr Douglas-Henry and other employees of Dorsey London . . . assumed the lead role in co-ordinating the response of Mr Sinclair and Sokol with respect to . . .
>
> b. the Freezing Order; [and]
> d. the Bahamas Proceedings.

[LA361]. There is no allegation that anyone who participated in the relevant actions is a U.S. barred lawyer, or that any relevant actions took place anywhere in the United States.

The Lawyers' Rule 11 motion asked the trial court to require "Defendants' lead counsel" — but not their local Delaware counsel — to be sanctioned with an order requiring him to pay the attorneys' fees incurred by Plaintiffs in the course of defending the various groundless counterclaims Sokol has filed in this case. [LA__N at 25].

Similarly, Sokol's ' claim with respect to the reimbursement order is completely groundless: Dorsey *did* seek reimbursement, and it sought reimbursement before the costs were incurred. This is shown beyond dispute by documents filed of public record and indisputably in the hands of Sokol and its counsel. It is inconceivable that Sokol was unaware of the palpable absence of any shred of factual predicate for the claim they made against the Lawyers.

Worse, with respect to the Bahamas claim, Sokol has (a) failed to disclose relevant facts to the tribunal and (b) not spoken honestly to the court about these facts.

The failure to disclose is clearly documented: although Sokol raised claims in Delaware on the theory that it was prevented from prosecuting a claim against Dorsey, it did not disclose to the trial court that it was in fact prosecuting exactly that claim elsewhere. And having been asked why it did not disclose this fact, Sokol's counsel has provided two inconsistent answers: in the trial court Mr. Gordon said he did not disclose it because it was "irrelevant." [LA195]. But in this appeal, Sokol claims it was not disclosed because its counsel did not know about it. Obviously, if the latter were true, counsel should have given that answer in the trial court – though even if that were so, it is clear Sokol must have known that it was speaking out of two sides of its mouth at the same time. That Sokol did not give the same answer in these two different tribunals can mean only one thing: (at least) one of the two answers it has given must be false.

The Lawyers moved for sanctions under Rule 11 because Sokol refused to abandon these claims even after they had been confronted with the facts. The trial court did not hold that Sokol's actions were innocent; but it also did not analyze the merits of Plaintiffs' motion. Instead, the trial court ruled that the conduct of counsel for Defendants should be reported to Disciplinary Counsel, and then denied the Rule 11 motion without assessing its merits.

This was error. The law governing Rule 11 motions makes clear that Sokol's conduct should be sanctioned. "Rule 11 sanctions are designed to deter abusive

litigation and protect the integrity of the judicial process." *STMicroelectronics N.V. v. Agere Systems, Inc*. 2009 WL 1444405, 3 (Del.Super.). Of course, an attorney who files a pleading verifies that, to the best of his knowledge, information and belief formed after a reasonable inquiry, the pleading is well grounded in fact and supported by existing law, or a good faith argument for the modification, extension or reversal of existing law. *ASX Investment Corp. v. Newton*, 1994 WL 178147, 2 (Del.Ch.) (emphasis added). Under Rule11, "the attorney's duty is one of reasonableness under the circumstances; a subjective good faith belief in the legitimacy of a claim does not alone satisfy the requirements of Rule 11." *Id.; see also, Fort Howard Cup Corporation v. Quality Kitchen Corporation*, 1991 WL 18003 (Del. Super.) "Where that obligation is not upheld, sanctions, including the imposition of the opponent's costs, may be imposed." *Fairthorne Maintenance Corp. v. Ramunno,* 2007 WL 2214318, 10 (Del.Ch.).

"Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay." *Fairthorne Maintenance Corp. v. Ramunno* 2007 WL 2214318, 10 (Del.Ch.) (citing *Cooter & Gell*, 496 U.S. at 398). "Courts must reserve Rule 11 awards for situations in which sharp practice and obstructive conduct must be reprimanded as a deterrent against future unprofessional and deleterious behavior." *STMicroelectronics*, 2009 WL 1444405 at *3 (Del.Super.).

The need for sanctions is all the more clear when, as here, that conduct has specific victims: the courts, first and foremost, which have devoted hundreds of hours to adjudicating claims that have absolutely no factual basis, involving hours of hearings and forcing a trial court judge to prepare a lengthy opinion assessing and disposing of the "merits" of these claims; and second, the law firms, whose integrity has been groundlessly impugned.

Specifically, the Court has discretion to order the lawyer, law firm or party in violation of the rule "to pay a penalty into Court" or issue an "order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Superior Court Civil Rule 11(c)(2). Delaware courts have, in the appropriate circumstances, exercised that discretion. See, e.g. *In re Asbestos Litigation,* 2011 WL 5344308, 2 -3 (Del.Super.)(on appeal)(ordering counsel found to have violated Rule 11 to pay the Court a penalty of 25,000); *Beck v. Atlantic Coast PLC*, 868 A.2d 840, 856 (Del.Ch. 2005)(shifting fees and costs of litigation under bad faith exception to the American Rule, and under Rules 11 and 37, where a party and its counsel taxed the resources of this court and made the litigation excessively expensive for the defense); *Wimbledon Fund LP-Absolute Return Fund Series v. SV Special Situations Fund LP*, 2011 WL 6820362, 3 and n. 17 (Del. Ch.)(shifting fees and costs to party not complying with Court rules and orders); *Fairthorne Maintenance Corp. v. Ramunno*,

2007 WL 2214318, 11 (Del.Ch.)(shifting fees and costs where baseless claims pervaded the litigation).

The appropriate remedy in this Court is simply for the trial court to be directed to exercise its discretion with respect to the merits of Plaintiffs-Appellees' Rule 11 motion. See *e.g., McCoy v. State, Del. S.Ct. , Nos. 558, 2012 and 595, 2012 (consolidated) (ORDER)(Del. Oct 1, 2014) ; Acierno v. Worthy Bros. Pipeline Corp*., 656 A.2d 1085 *, (1995 Del. LEXIS 92).

CONCLUSION

For all the foregoing reasons, the judgment of the trial court should be affirmed in all respects, except the trial courts' denial of the Lawyers' Motion for Sanctions should be remanded to the trial court for further findings.

Respectfully Submitted,

MARGOLIS EDELSTEIN

/s/ Herbert W. Mondros
Herbert W. Mondros, Esq.
Del. No. 3308
300 Delaware Ave, Suite 800
Wilmington, DE 19801
302-888-1112
Attorneys for Appellees/Cross-Appellants

Date: December 27, 2017