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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THOMAS L. HUNT, ESQUIRE, Appellant, v. COURT OF CHANCERY OF THE STATE OF DELAWARE, Appellee.	)	No. 233,2020 On appeal from an Order of the Court of Chancery in C.A. 2018-0553 JRS

COREECTED OPENING BRIEF OF APPELLANT THOMAS L. HUNT, ESQUIRE

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NATURE OF PROCEEDINGS

On August 1, 2018, plaintiffs Quantlab Group, LLC, Veloce, LP and Marco, LP ("Plaintiffs") brought a declaratory action against defendant Bruce P. Eames, Andrey Omeltchenko, AVG Holdings, LP and Aster Securities (US) LP ("Defendants") to determine whether amendments to a limited partnership agreement were valid.

On July 30, 2019, the Court of Chancery entered final judgment in favor Plaintiffs. This Court affirmed that ruling. *Eames v. Quantlab Group, LLC*, 2019 WL 5681414, *disposition reported at* 222 A.3d 580 (Del. 2019) (TABLE).

On June 11, 2020, the Court of Chancery, in a bench ruling, *sua sponte* sanctioned Thomas L. Hunt, Esq., attorney for Defendants, because of an email Hunt had sent to counsel for Plaintiffs. (Ex. A hereto at 28-31). On June 22, 2020, the Court of Chancery entered an Order setting the amount of the sanction at $14,989.00.

Hunt filed a timely Notice of Appeal on July 20, 2020.

On July 22, 2020, the Court of Chancery entered an Order Granting Motion of Thomas L. Hunt for a Stay Pending Appeal and Payment of the Sanction Into the Court in Lieu of a Supersedeas Bond.

This is Hunt=s opening brief on appeal.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred and denied due process by assessing a monetary sanction of $14,989.00 against Hunt for action allegedly prejudicial to the administration of justice without providing Hunt advance notice that a monetary sanction could be imposed, without an evidentiary hearing and the opportunity for Hunt to make an oral presentation, and without any inquiry into Hunt's financial ability to pay the sanction.

2. The Court of Chancery erred by determining that a single private email, not part of any judicial proceeding, and sent after all proceedings in the matter had ended except for the trial court's rendering its decision on a motion for a post-judgment injunction, prejudiced the administration of justice. Without evidence showing that the email was substantially likely to prejudice a judicial proceeding, the sanction violated Hunt=s rights under the First Amendment to the Constitution of the United States.

STATEMENT OF FACTS

On May 8, 2019, subsequent to resolution of this action on the merits, the plaintiffs sent a letter to the Court of Chancery repeatedly accusing Hunt of making "knowing misrepresentations" to that Court. (A-80-86).

Upset with this shocking and unprovoked attack on his integrity, Hunt responded (admittedly precipitously) and on that same day sent an email to counsel for Quantlab reading as follows:

> John - just got your last letter. Like most pusillanimous slanderers, you apparently feel cloaked in the safety of distance to launch a prevaricator=s baseless and ad hominum attack on me. As with most of the fabrications you foist upon the court, your spew is at best specious if not plain bogus. I look forward to meeting you face to face, if your bladder can handle it.

(A-94).

Counsel for Plaintiffs sent a letter to the Court of Chancery on May 12, 2020, bringing the email to that Court=s attention, repeating the accusation that Hunt made "*repeated and knowing* misrepresentations to the Court," suggesting violations of the Delaware Rules of Professional Conduct, and further suggesting (without actually moving pursuant to Chancery Court Rule 7(b)) that Hunt=s admission *pro hac vice* be revoked. (A-87-94). Plaintiffs, however, did not request any monetary sanction.

On May 13, 2020, Delaware counsel for the defendants submitted a letter to the Court apologizing, on behalf of himself and Hunt, for that email. (A-104). That same day, counsel for the defendants sent a separate letter responding to the merits of the claim that the defendants made "knowingly false" representations. (A-95-99).

On June 11, 2020, the Court of Chancery held a teleconference, primarily to address a post-judgment motion by Defendants for an anti-suit injunction. After denying the motion for an anti-suit injunction, the Court added:

> With those clarifications in hand, and before we part ways today, I do think I need to address some of the emails that I have seen that were exchanged between the parties in connection with this latest round of motion practice. Delaware's Rules of Professional Conduct, Rule 8.4(d), requires all lawyers practicing in the state to refrain from conduct that is prejudicial to the administration of justice. When opposing counsel argues that your arguments before two separate courts are internally and knowingly inconsistent, I think it's clearly prejudicial to the administration of justice to respond, not with a counter-explanation of the alleged inconsistencies, but with a personal threat to counsel. That threat from Mr. Hunt directed to Mr. Reed is attached to Mr. Reed=s letter of May 12 at DI 174, and I incorporate its contents here without repeating them. I'd say that the behavior exhibited by Mr. Hunt is not how we do things in Delaware, but that would suggest that it is how things might be done elsewhere. I suspect my colleagues in Texas would have no more tolerance for this behavior than we have here in Delaware.
>
> In any event, the question is, what is to be done about it. Vice Chancellor Glasscock wrestled with what should be done when an attorney's unprofessional behavior is brought to the attention of the Court in *Lendus LLC v. Goede*, decided in 2018. There, the Court was presented with repeated instances of very bad behavior by pro hac counsel during a deposition. The pattern of misbehavior caused the

Court to conclude that it was not a one-off instance of an attorney losing his cool, but, rather, a strategic attempt to intimidate for litigation advantage. Ultimately, the Court declined to disqualify the offending counsel or to revoke his pro hac admission privileges. It did, however, impose monetary sanctions and report counsel to disciplinary counsel.

Here, while troubling, I don't see the behavior rising to the level of unprofessionalism that confronted the Court in *Lendus.* Mr. Hunt has apologized, and his outburst appears to be an isolated incident. With that said, it is a severe instance of misconduct, and it is worthy of a sanction. Mr. Hunt, not his clients, will pay the counsel fees incurred by the Bosarge Group in preparing Mr. Reed's May 12 letter at DI 174. I=ll also note that this is strike one against Mr. Hunt's pro hac vice admission. If there is another instance of unprofessional behavior here, I will certainly be receptive to a motion to revoke Mr. Hunt's privilege to practice before this Court in this case. And I hope that's clear. But having reviewed the matter carefully, I am satisfied it is a severe but isolated instance of unprofessional conduct and, therefore, disqualification, revocation, and, for that matter, a report to disciplinary counsel are not, in my view, justified.

That concludes my ruling. I'm going to ask that Mr. Reed submit his certification of counsel fees to me within five days. Once I receive that, I will enter an order awarding those fees. And I'll enter a summary order denying the motion to enforce without prejudice for the reasons stated on the record today.

Again, I appreciate very much counsel's patience as I've read this lengthy ruling. I apologize that I have to jump off. I have actually gone long, so I don't have time to entertain questions. But as I have said, you can direct those questions to me in writing to the extent you have them. Otherwise, I will await receipt of Mr. Reed's submission, and we will get the order entered promptly.

With that, we are adjourned. And, again, many thanks for your patience as I have read the ruling. Have a good day.

(Ex. A hereto at 28-31).

The Court of Chancery issued an Order implementing its bench ruling on June 22, 2020, setting the amount of the sanction at $14,989. (Ex. B hereto).

This appeal followed.

ARGUMENT

I. THE COURT OF CHANCERY IMPROPERLY IMPOSED A MONETARY SANCTION *SUA SPONTE* WITHOUT ADVANCE NOTICE OR AN OPPORTUNITY TO BE HEARD.

A. QUESTION PRESENTED.

Did the Court of Chancery err as a matter of law in imposing sanctions on Hunt in the absence of a motion for monetary sanctions, without prior notice that it was considering imposing monetary sanctions, and without an opportunity to respond?

Hunt had no opportunity to raise this issue before the Court of Chancery at the time of the ruling because it was announced *sua sponte* at the end of a telephonic hearing on another matter and the Court left immediately after the ruling without time for further comment. As such, the matter is properly before the Court. Ch. Ct. R. 46 ("if a party has no opportunity to object to a ruling at the time it is made, the absence of an objection does not prejudice the party").[1] *See also, e.g., Mood v. Kilgore*, 425 N.E.2d 341, 344 (Mass. 1981) (under similar rule, "if, as is the case here, the party had no opportunity to object at the time the ruling was made, the

[1] "At the time" refers to the time of the ruling. *See Merriam Webster Online*, https://www.merriam-webster.com/dictionary/at%20the%20time (defining "at the time" as "when something happened"); *Cambridge Dictionary Online*, https://dictionary.cambridge.org/us/dictionary/english/time ("at the particular point when something was thought of or done").

absence of an objection does not interfere with the right to appeal, as long as the additional requirements of the Rules of Appellate Procedure, including the thirty-day requirement of rule 4(a), are complied with").

B. SCOPE OF REVIEW.

This Court reviews *de novo* questions of what process is due before sanctioning an attorney. *Crumplar v. Superior Court ex rel. New Castle County*, 56 A.3d 1000, 1005 (Del. 2012).

C. MERITS OF ARGUMENT.

In *Crumplar*, this Court held that, before a court can *sua sponte* impose a monetary sanction on an attorney for violation of Superior Court Civil Rule 11(b), that court must apply heightened procedural protections, including (I) giving the attorney adequate notice of the proposed sanction, (ii) affording the attorney a reasonable opportunity to respond, including giving the attorney the opportunity to present evidence and respond orally at a hearing, and (iii) determining whether the attorney has the ability to pay the proposed sanction amount. *Id.* at 1010-12.

The present appeal differs from *Crumplar* only in that *Crumplar* involved Rule 11, which expressly provides for notice and an opportunity to respond. Ch. Ct. R. 11(c). However, this is a distinction without a difference. When courts impose sanctions *sua sponte* pursuant to their inherent authority, they are still obligated to

meet the requirements of due process, specifically prior notice and an opportunity to respond. *E.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-67 (1980) ("Like other sanctions, attorney=s fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record," citation and footnotes omitted). *See also Shelly v. Kramer*, 334 U.S. 1, 16 (1948) ("The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment"); *Gottlieb v. Ford*, 633 Fed.Appx. 38, 39-40 (2nd Cir. 2016); *Johnson v. Cherry*, 422 F.3d 540, 551-52 (7th Cir. 2005).

Plaintiffs did not request a monetary sanction (and certainly did not file a motion). The Court of Chancery imposed it *sua sponte* with no advance notice during a teleconference convened for a different purpose. There was no opportunity at that time to raise an objection (and even if there were, absent advance notice Hunt would not have had an opportunity respond in a meaningful way on the spot). There was no inquiry into Hunt's ability to pay the sanction. None of the requirements of due process were met. This warrants reversal.

II. A SINGLE EMAIL SENT PRIVATELY TO A LAWYER, AND NOT PART OF A JUDICIAL PROCEEDING, AFTER PROCEEDINGS ON THE MERITS HAD CONCLUDED, WHICH IN NO WAY AFFECTED PROCEEDINGS OR IMPAIRED THE ABILITY OF THE RECEIVING LAWYER TO PERFORM HIS DUTIES, DOES NOT CONSTITUTE CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

A. QUESTION PRESENTED.

Did the Court of Chancery err as a matter of law in concluding that a single private email, occurring outside any judicial proceeding, constituted an action prejudicial to the administration of justice?

Hunt had no opportunity to raise this issue before the Court of Chancery at the time of the ruling because the Court left immediately after the ruling to attend to another matter. As such, the matter is properly before this Court. Ch. Ct. R. 46; *Mood*, 425 N.E.2d at 344.

B. SCOPE OF REVIEW.

Whether actions are prejudicial to the administration of justice is a question of law. *See Matter of Cottingham,*423 P.3d 818, 825 (Wash. 2018); *Matter of Stuhff*, 869 P.2d 1200, 1202 (Az. 1994). Legal conclusions are reviewed *de novo*. *Williams Companies, Inc. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 271 (Del. 2017).

C. MERITS OF ARGUMENT.

The Court of Chancery concluded that Hunt sending a single (albeit inappropriate) private email to opposing counsel, outside of any judicial proceeding, was prejudicial to the administration of justice. The Court of Chancery did not explain how.

In *Matter of Member of Bar: Hurley*, 2018 WL 1319010, *disposition reported at* 183 A.3d 703 (Del. Mar. 14, 2018) (Table), Mr. Hurley sent letters to Deputy Attorneys General containing inappropriate and disparaging sexual and religious comments. WL Op. at *1-2. The Board on Professional Conduct found that the letters did not prejudice the administration of justice Abecause they were >private= and did not directly burden the trial court or affect the outcome of pending litigation.@ WL Op. at *3. This Court accepted that conclusion, but added that such action could be prejudicial to the administration of justice where Athe conduct affected the performance of opposing counsel or had some other distinct impact on the judicial process.@ *Id.*

The circumstances here are far less egregious than in *Hurley*. Instead of numerous inappropriate comments to multiple people, Hunt=s was a single email. Instead of hubris, Hunt expressed contrition, as the Court of Chancery recognized.

Perhaps most importantly, there was no evidence submitted, and no finding based on such evidence, that the judicial proceeding was adversely affected. In fact, the judicial proceeding had ended, except for a ruling on a post-judgment motion. There was no evidence or finding that the email impaired or could impair further proceedings (of which there were none) in the action. There was no evidence that opposing counsel felt intimidated or consequently changed his behavior in any way to the detriment of the clients or that he experienced any emotional distress as a result of the email. Nor was there any evidence or finding of bad faith.

Even if this Court were to somehow find the email prejudicial, regulation of an attorney=s speech outside of a court violates the First Amendment unless the speech is *substantially likely* to *materially* prejudice a judicial proceeding. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); *Schoeller v. Board of Registration of Funeral Directors and Embalmers*, 977 N.E.2d 524, 533-34 (Mass. 2012). Absent such a showing, the decision of the Court of Chancery should be reversed.

CONCLUSION

WHEREFORE, for the foregoing reasons, Thomas L. Hunt, Esq., respectfully requests that this Court reverse the imposition of a sanction upon him.

Respectfully submitted,

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