EFiled: Oct 26 2023 11:34AM EDT
Filing ID 71197376
Case Number 180,2023D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEMATIC CORP., Appellant/Cross-Appellee, *vs.* FORTIS ADVISORS, LLC, Appellee/Cross-Appellant.	:	No. 180, 2023 Court Below: Superior Court of the State of Delaware C.A. No. N18C-12-104 AML CCLD

CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

Jeffrey S. Goddess (#630)
Carmella P. Keener (#2810)
COOCH AND TAYLOR, P.A.
1000 N. West Street, Suite 1500
The Brandywine Building
Wilmington, DE 19801
(302) 984-3816
ckeener@coochtaylor.com

Attorneys for Plaintiff Below,
Appellee/Cross-Appellant
Fortis Advisors, LLC

OF COUNSEL:

Michael A. Pullara
(*pro hac vice* motion forthcoming)
1111 Hermann Drive, Suite 21A
Houston, Texas 77004
(713) 569-9758

Dated: October 26, 2023

TABLE OF CONTENTS

PAGE:

TABLE OF AUTHORITIES

CASES **PAGE:**

OTHER AUTHORITIES

ARGUMENT

1. The Superior Court Misplaced the Burden of Proof on Dematic's Indemnification Claim.

In its memorandum opinion, the Superior Court held that "Fortis [had] not proved by a preponderance of the evidence that the settlement amount was unreasonable."[1] Dematic admits that it would be error to place this burden on Fortis. Nevertheless, Dematic claims that the court "did not impose the burden of proof on Fortis" but, instead, merely "failed to expressly state the (obvious) point that Dematic bears the burden of proof associated with its own claim related to the D'Angela Litigation."[2] Dematic is wrong.

---

[1] Opinion ("Op."), p. 64.

[2] Dematic's Reply Brief, p. 45. Dematic admits that it bears the burden of proof associated with its claim for indemnity and argues throughout its response that it proved by a preponderance of the evidence that the settlement amount was reasonable. Nevertheless, in its fn. 23, Dematic offers an alternative inconsistent defense; *to wit*, that the amount of settlement consideration paid by it pursuant to § 7.1(a) is not subject to challenge on the basis of reasonableness. According to Dematic, § 7.3(b) granted it "sole discretion" to "defend and settle" the D'Angela Litigation. However, the power to "defend and settle" is not the same thing as the right to be indemnified for Losses associated with that settlement. That right is defined by § 7.1(a) and includes, as a condition to indemnification for obligations voluntarily incurred by the indemnitee, that the Loss for which indemnity is sought be reasonable. *See* Cross-Appellant's Opening Brief, pp. 58-59.

In addition, Dematic argues that the provisions of the Escrow Agreement amend and supersede the reasonableness requirement of the Merger Agreement and, therefore, Fortis has no right to challenge the amount of the settlement. According to Dematic, "it makes no sense" that the source of funds for indemnification (*i.e.*, Escrow *versus* Earn Out) should affect Fortis's right to challenge the reasonableness of the

Dematic claims that the Superior Court's misstatement of the legal standard is harmless error because the court nevertheless *applied* the correct legal standard. This creative reading of the memorandum opinion is not supported by the text. Nowhere in the memorandum opinion did the Superior Court find – by a preponderance of the evidence *or otherwise* – that the settlement amount and attorneys' fees paid in the D'Angela Litigation were reasonable.[3]

In fact, the only mention of evidence proffered by Dematic in support of the settlement occurs in the context of the Superior Court's discussion of Fortis's alleged failure to meet what the court held to be Fortis's evidentiary burden to prove unreasonableness; *to wit*, that Fortis failed to rebut testimony that Dematic's head of accounting "authorized the settlement amount in consultation with Dematic's executives and lawyers and that the amount authorized was consistent with Dematic's estimates during due diligence regarding the likely cost of resolving the

settlement. This is wrong. If Dematic had offset the indemnity against the Escrow, it would have been offsetting against the only pool of funds available to pay the EBITDA Adjustment. By offsetting against the Earn-Out Consideration, it preserved its ability to recover both the indemnity and the EBITDA Adjustment. Thus, Dematic's vested self-interest acted as a modest guarantee of good faith and reasonableness.

[3] *See* A1236-A1238. In what can only be described as an extraordinary coincidence, the settlement amount and associated attorneys' fees allegedly paid by Dematic to resolve the D'Angela Litigation were very nearly the exact amount of Contingent Consideration that Dematic conceded was owed by it to Fortis.

D'Angela Litigation."[4] Thus, the Superior Court never found that the cited testimony was sufficient to prove by a preponderance of the evidence that the settlement amount was reasonable. Instead, based on its finding that Fortis had not proved by a preponderance of the evidence that the settlement amount was unreasonable, the Superior Court held that Dematic was "entitled to indemnification in the total amount of the settlement and associated attorneys' fees for the D'Angela Litigation."

In point of fact, none of the testimony proffered by Dematic and cited by the Superior Court relates to the issue of reasonableness. Dematic's head of accounting testified that he authorized the settlement amount "in consultation with Dematic executives and lawyers."[5] However, this testimony relates to Dematic's *process for reaching a decision to settle* and not at all to *whether the decision reached was reasonable*. Further, that same head of accounting testified that "the amount authorized was consistent with Dematic's estimates during due diligence regarding the likely cost of resolving the D'Angela Litigation."[6] The mere fact that one decision is consistent with another decision is some evidence of consistency but no evidence of reasonableness.

---

[4] Op., p. 64.

[5] *Ibid*. *See also* Trial Tr. V at 158-166 (Matt Carlson) (B673-B675).

[6] *Ibid*.

To prove that the amount paid in settlement was reasonable, Dematic needed, at a minimum, expert testimony (i) analyzing the legal and financial exposure presented by the D'Angela Litigation; and (ii) calculating the cost and expenses of defending the D'Angela Litigation at trial and on appeal. This evidence would have enabled the expert to quantify the risks, perform a cost-benefit analysis, and define a reasonable range of settlement. Dematic offered no such evidence. In fact, the only witness who testified about the settlement at all was Matt Carlson, the above-referenced head of accounting. Dematic did not designate Carlson as an expert and he never testified that the settlement was reasonable.

In order qualify for the harmless error exception cited in *Wainaina v. Bayshore Ford Truck, Inc.*, 2013 WL 5755636, at *1 (Del. Super. Oct. 10, 2013), and relied upon by Dematic, the Superior Court's application of the correct standard by must be "evident from the body of the order." *See also Briones v. ConagraPerdue Farms*, 1998 WL 110094, at *2 (Del. Super. Jan 7, 1998) ("There is substantial evidence to support the conclusion that Briones failed to bear the evidentiary burden imposed by *McCormick Transportation Co. v. Barone*.").[7]

[7] Neither of the cases cited by Dematic in support of its harmless error exception involve a circumstance in which the trial court placed the burden of proof on the wrong party. *Wainaina* concerned a motion for reargument of an order remanding the case to the Court of Common Pleas. In that case, the Superior Court that authored the challenged order explained its error in stating the wrong standard of review and demonstrated its actual application of the correct standard. *Briones* was an appeal

In the instant case, there is nothing in the body of the memorandum opinion to support Dematic's claim that the Superior Court placed a *sub rosa* burden on Dematic or that Dematic proved by a preponderance of the evidence that the settlement amount was reasonable. The Superior Court said it was placing the burden on Fortis to prove that the settlement amount was unreasonable and that is exactly what it did.

And that is error.

---

from an administrative order denying a worker compensation claim. In that case, the Board imposed a higher burden of proof on the claimant than the law requires (*i.e.*, that she prove her work was "*the* substantial cause" of her injury as opposed to "*a* substantial cause" of her injury). The Superior Court deemed that to be harmless error because the claimant had failed to offer evidence tending to show *any* causal connection between her employment and her injury. Nevertheless, an erroneous statement of the *standard of review* is a completely different animal from the erroneous placement of the *burden of proof*. Dematic cites no cases in which any court found that misplacement of the burden of proof is harmless error.

2. There is No Evidence to Support the Award of Attorneys' Fees.

In its cross-appeal, Fortis prays that this Court render a take nothing judgment regarding Dematic's indemnity claim for attorney's fees incurred by it to defend the D'Angela Litigation. Fortis argues that, at the trial of this claim, Dematic offered no evidence to permit the Superior Court to assess reasonableness of the fees based on the factors set forth in Delaware Lawyers' Rule of Professional Conduct 1.5(a). *See Mahani v EDIX Media Gp., Inc*., 935 A.2d 242, 245 (Del. 2007). A cursory examination of the memorandum opinion reveals that no such analysis was performed, and no judgment of reasonableness was rendered.

Dematic responds by pooh-poohing the need for a systematic analysis based on the Rule 1.5(a) factors. According to Dematic, "A court need only 'consider the Rule 1.5(a) factors as a guide then exercise its discretion in reaching a reasonable fee award, acknowledging that "mathematical precision" is neither necessary nor readily achievable.'"[8] Having relegated the Rule 1.5(a) factors to 'mere guide'

---

[8] Dematic Reply, pp. 45-46 (quoting *Macrophage Therapeutics, Inc. v Goldberg*, 2021 WL 5863461, at *2 (Del. Ch. Dec. 10, 2021)). A contextualized reading of *Macrophage* reveals the misleading nature of Dematic's selective quotation. Confronted by an appellant who demanded a line-item analysis of opposing counsel's fee request, the *Macrophage* court said:

> "Determining reasonableness does not require that this Court examine individually each time entry and disbursement." [Citations omitted.] Instead, the Court will consider the Rule 1.5(a) factors as a guide and then exercise its discretion in reaching a reasonable fee award, acknowledging that "mathematical precision" is neither necessary nor

status, Dematic proceeds to ignore those factors completely. Thus, there is no discussion of:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

See Del. Lawyers' R. Prof. Conduct 1.5(a).

Instead, Dematic relies on two things (and two things only) to demonstrate that the prayed-for attorneys' fees were reasonable. First, Dematic cites

---

readily achievable. [Citations omitted.]

Then – on the basis of this holding – the *Macrophage* court performed precisely the kind of 1.5(a) factor-by-factor analysis that Dematic eschews in its brief. *See Macrophage*, 2021 WL 5863461, at *2-*3.

conversations among Dematic's head of accounting and an unidentified "team of professionals" which resulted in the non-attorney accountant concluding "that similar claims typically settle for '2 to 3 million.'"[9] Assuming *arguendo* that this unsourced hearsay and non-expert opinion is admissible, it is not evidence regarding the reasonableness of any attorneys' fee. It is *at best* undigested statistical data about the average value of *other* cases involving *other* parties, *other* facts, and *other* legal issues. It does not address the legal services required to litigate and settle the D'Angela Litigation and it is not relevant to any of the Rule 1.5(a) factors.

Second, Dematic cites the billing statements offered at trial to prove that the prayed-for legal fees were actually "paid or incurred."[10] But – like so much of what Dematic has said in this lawsuit – this is just not true. The parties stipulated that Dematic had paid fees and expenses totaling $236,217.40 in connection with the D'Angela Litigation.[11] And, without discussion, the Superior Court included that amount as an offset against Fortis's recovery. In its Answering Brief, Dematic relies

[9] *See* Dematic Reply, p. 46. Dematic supplements the quoted testimony with the phrase "…making the $1.5 million total (including legal fees) Dematic spent to settle D'Angela reasonable and appropriate." Both the quotation and the conclusion of reasonableness are improperly cited to Tr. V 163, 165 (B674-B675). There is nothing in the cited testimony (or anywhere else) to support the assertion that the settlement amount (including legal fees) was 'reasonable and appropriate.'

[10] *See* Dematic Reply, p. 46.

[11] Fortis did not stipulate that the fees were incurred or that the amount paid was reasonable. *See*, *e.g.*, Tr. V 17-18 (B638).

on 19 billing statements to justify this $236,217.40 award. These billing statements were not cited by the Superior Court and they do not support the award. Whereas the Superior Court granted an offset of $236,217.40 for total fees and expenses *paid*, the billing statements reflect that the total fees and expenses *incurred* were $135,638.11.[12] Thus, the evidence on which Dematic relies to demonstrate the reasonableness of a $236,217.40 award actually shows with mathematical precision that the actual cost of the subject fees and expenses was $100,579.29 *less* than the award.[13] The amount of offset awarded for fees and expenses is not based on any evidence and Dematic's belated effort to justify it fails utterly.

And that is not reasonable.

[12] *See* B63-B81, B89-B108, B110-B11, B115-B121, B141-B150. It is apparent from the invoices that Dematic typically did not pay the current month's invoice prior to the next month's invoice being issued. As a result, past-due charges for the preceding month are stated on each subsequent month's billing statement. These past due charges are not new billings; rather, they are carry-forwards of old unpaid billings. In order to correctly calculate the total D'Angela Litigation billings, one must disregard the carry-forwards and include only those charges incurred during the current month.

[13] *See* Dematic Reply, p. 46. Dematic cites *Creel v. Ecolab, Inc.*, 2018 WL 5733382, at *10 (Del. Ch. Oct. 31, 2018), in support of its claim that the attorneys' fees were "actually paid or incurred" and, therefore, should be presumed reasonable. *Creel* applies to legal fees incurred pursuant to DGCL § 145 – a statutory provision that is not at issue in this case. Nevertheless, the 19 billing statements presented by Dematic indicate that the amount of Dematic's fee claim was paid but *not* actually incurred.

CONCLUSION

For the reasons stated, Fortis respectfully requests that this Court reverse the Superior Court's judgment for Dematic and against Fortis in the amount of $1,512,808.10, and, with regard to such, (a) render a Take Nothing judgment regarding Dematic's claim against Fortis seeking indemnity for or set off of legal fees paid in defending the D'Angela Litigation (*i.e.*, $236,217.40) and (b) remand to the Superior Court Dematic's claim against Fortis seeking indemnity for or set off of consideration paid to settle the D'Angela Litigation (*i.e.*, $1,276,590.72)

Dated: October 26, 2023

COOCH AND TAYLOR, P.A.

/s/ Jeffrey S. Goddess

Jeffrey S. Goddess (# 630)
Carmella P. Keener (#2810)
1000 N. West Street, Suite 1500
The Brandywine Building
Wilmington, DE 19801
(302) 984-3816
jgoddess@coochtaylor.com
ckeener@coochtaylor.com

Attorneys for Plaintiff Below, Appellee/ Cross-Appellant Fortis Advisors, LLC

OF COUNSEL:

Michael A. Pullara
(*pro hac vice* motion forthcoming)
1111 Hermann Drive, Suite 21A
Houston, Texas 77004
(713) 569-9758