IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| ARTHUR (GREG) LUNDEEN, III, RICHARD FRENCH, and JAMES M. CHAMBERLAIN, | § | No. 508, 2006 |
| Plaintiffs Below, Appellants. | § | Court Below: Superior Court of the State of Delaware in and for New Castle County |
| v. | § | |
| PRICEWATERHOUSE COOPERS, | § | C.A. No. 04C-03-200 |
| Defendant Below, Appellee. | § | |

Submitted: December 19, 2006
Decided: March 5, 2007

Before **HOLLAND, BERGER** and **RIDGELY**, Justices.

***O R D E R***

(1) Appellants Arthur Lundeen, III, Richard French and James Chamberlain appeal the Superior Court's grant of summary judgment in favor of Appellee Pricewaterhouse Coopers, LLC ("PwC") in this action for negligent misrepresentation. Appellants make three arguments on appeal. First, Appellants contends that the trial court should have granted their motion to amend their expert's report after discovery period had expired. Second, they contend that the trial court should not have granted summary judgment because a genuine issue of material fact

did exist. Finally, Appellants contends that the trial judge erred by not considering affidavit of a lay witness. Because these arguments lack merit, we affirm.

(2) This case arose out of the sale of Appellants' company, Consolidated Reprographics, Inc. ("CR"), to Lason, Inc. in 1998. In determining whether to sell the company, the Appellants claim to have relied upon Lason's Annual Report and 10-K as well as the audited financial statements accompanying those reports for the year ending 1997. Pursuant to the sales agreement, CR received approximately $30 million in cash, $6 million in Lason stock, and deferred "earnout payments." These earnout payments were based on CR's performance and would be paid by Lason. On December 5, 2001, Lason filed for bankruptcy and, as a result, Appellants could not receive the full amount of the earnout payments.

(3) A special committee was formed by Lason's Board of Directors in July 2000 to investigate Lason's possible accounting irregularities. In March 2001, Lason announced in a Form 8-K that it informed the SEC and U.S. Attorney of certain accounting irregularities that affected portions of Lason's third quarter 1999 financial statements and that those irregularities "may go back to late 1997." The special committee never concluded that Lason's 1997 financial statements were affected and Lason never restated its 1997 financial statements.

(4) Two other companies filed similar actions in the Superior Court.[1] In the *Carello* action, the plaintiffs contended that PwC made negligent misrepresentations in Lason's 1997 *and* 1998 financial statements. This action resulted in a settlement. In the *Coleman* action, the Superior Court granted summary judgment in favor of PwC. This action was based *solely* on misstatements in Lason's 1997 financial statements. The plaintiff's expert witness, Bennett Goldstein, was unable to identify with specificity any material misstatement in Lason's 1997 financial statements. Instead, he merely hypothesized as to a possible understatement of intangible asset amortization expense.

(5) The record before the trial court in this case is the same as the record in the *Carello* and *Coleman* actions, with the addition of a few additional items of evidence. Those additions include: a supplemental expert report from Mr. Goldstein, new deposition testimony from Mr. Goldstein regarding the "hypothetical" he gave in the *Coleman* action, a March 11, 2002 Letter from PwC to the SEC concerning misstatements of Lason's 1997 financial statements, and an affidavit from two of the Appellants, stating that PwC would not have advised Lason to inform users not to rely on the 1997 financial statements if they had not included misstatements.[2] It is

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[1] *Carello v. Pricewaterhouse Coopers, LLP*, 2002 WL 1454111 (Del. Super.); *Coleman v. Pricewaterhouse Coopers, LLC*, 2005 WL 1952844 (Del. Super.), *aff'd*, 902 A.2d 1102 (Del. 2006).
[2] *Lundeen v. Pricewaterhouse Coopers, LLC*, 2006 WL 2559855 (Del. Super.).

the admissibility of the expert report and deposition as well as the affidavit of one of the Appellants that forms the bases for this appeal.

(6) On March 11, 2002, PwC submitted a letter with the SEC concerning Lason's financial statements. That letter read, in relevant part:

> As disclosed in the March 23, 2001 Form 8-K and again in the February 21, 2002 Form 8-K, Lason management reported that a Special Committee found evidence of accounting irregularities and deficiencies in the Company's accounting systems which affected certain of the Company's financial statements, *and the affected financial statements may go back to 1997*. We requested that Lason management include an explicit statement in the February 21, 2002 Form 8-K, that the March 26, 2001 press release and related 8-K effectively advised users and potential users that they should not rely on the quarterly and annual financial statements and our audit reports thereon for 1997 through 1999. Lason advised us that they believed such a statement was unnecessary.

(7) On June 14, 2005, more than six months after the expert discovery deadline, the Appellants sought to amend the report of Mr. Goldstein. This new report included Mr. Goldstein's opinion that there were material misstatements in Lason's 1997 financial statements. This report was excluded because it was submitted well outside the deadline for expert discovery.

(8) Mr. Goldstein also testified at a deposition on June 22, 2005. In this deposition, he stated that the "hypothetical" he referred to in past reports was no longer hypothetical. Because this opinion was based on the expert report that was excluded, the trial court refused to consider this testimony.

(9) Finally, the Appellants sought to introduce two affidavits that stated that PwC would not have advised Lason to inform users of possible misstatements in the 1997 financial statements if there was not, in fact, a misstatement. The trial court refused to consider these affidavits because neither deponent had personal knowledge of the Letter, nor were they offered as expert witnesses.[3]

(10) Appellants first argue that the trial court abused its discretion by denying them the opportunity to supplement their expert report. We review pretrial discovery rulings for abuse of discretion.[4]

(11) Appellants contend that Mr. Goldstein's opinion changed after learning about the existence and contents of the March 11, 2002 Letter and a related email from a PwC partner, Ms. Dunn. They further claim that they did not learn about the Letter and email until after the expiration of the expert discovery deadline and the cause of their late discovery was PwC. PwC responds that Appellants could have, and should have, found those documents earlier, making it possible for their expert to review and make a report before the expiration of the expert deadline.

(12) The Superior Court found that Appellants did not demonstrate good cause to allow for a supplemental expert report after the expert report period had

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[3] *Lundeen*, 2006 WL 2559855, at *8.

[4] *Coleman v. Pricewaterhouse Coopers*, LLC, 902 A.2d 1102, 1106 (Del. 2006) ("Judicial discretion is the exercise of judgment directed by conscience and reason, and when a court has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused.").

expired. "Good cause is likely to be found when the moving party had been diligent, the need for more time was neither foreseeable nor its fault, and refusing to grant the continuance would create a substantial risk of unfairness to that party."[5] The trial court found that PwC did not wrongfully withhold these documents from the plaintiffs. In addition, the trial court noted at oral argument that "[t]his case and the related Coleman case have been marked by such extensive rule and practice noncompliance by the plaintiffs."[6] The March 11, 2002 Letter was publicly on file with the SEC. Indeed, the Appellants "utilized the SEC publicly-available documents in connection with this case," but apparently did not notice the March 11, 2002 Letter. We find no abuse of discretion by the Superior Court in denying Appellants' motion to supplement.

(13) Appellants next argue that the trial court erred by granting summary judgment because there is a genuine issue of material fact as to whether there was a material misstatement in Lason's 1997 financial statements. We review the grant of summary judgment *de novo*.[7]

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[5] *Id.* at 1107.
[6] The trial court gave the Appellants an opportunity to support their claim that the email was wrongfully withheld, but they were unable to do so. *Id.*
[7] *Stroud v. Grace*, 606 A.2d 75, 81 (Del. 1992).

(14) Appellants claim that the March 11, 2002 Letter provides a genuine issue of material fact with regard to a material misstatement.[8] The trial court disagreed; concluding that the letter simply states that the 1997 financial statements *may* be misstated, not that it does, in fact, include material misstatements.

(15) The March 11, 2002 Letter is not, as Appellants suggest, an admission. The letter simply states that the 1997 financial statements *may* be misstated; it does not state that those statements were in fact misstated. In addition, Richard Muir, the PwC partner who approved the Letter, testified that it did not constitute an admission that the 1997 financial statements contained errors. Indeed, he testified that if it did contain misstatements, Generally Accepted Accounting Principles ("GAAP") requires a restatement of the financial statements. No restatement occurred in this case. The Appellants have not set forth any record evidence to support their claim that Lason's 1997 financial statements were misstated. The mere possibility of misstatement is insufficient to withstand a motion for summary judgment.[9] The Superior Court did not err when it granted summary judgment in this case.

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[8] After concluding that the expert report could not be supplemented to include Mr. Goldstein's new opinion, the only real difference between this case and *Coleman* is the March 11, 2002 Letter.

[9] *Rochester v. Katalan*, 320 A.2d 704, 708 n.7 (Del. 1974) ("It is fundamental that a motion for summary judgment must be decided on the record presented and not on evidence potentially possible"); *Trenwich Am. Litig. Trust v. Ernst & Young, LLP*, 906 A.2d 168, 216 (Del. Ch. 2006) ("The Litigation Trust does not identify a single violation of generally accepting accounting principles or any other specific material misstatement of financial fact in the relevant financial statements. All that the complaint alleges is that the financial statements were false in some unspecified way.).

(16) Lastly, Appellants argue that the Superior Court erred when it refused to consider the affidavit of Richard Coleman. Specifically, Appellants claim that Coleman was testifying not as an expert, but as a fact witness. The problem with Appellants argument is that Coleman has no personal knowledge of the March 11, 2002 Letter or of PwC's practices when the letter was sent. Instead, he attempts to base his opinion on the practices of Price Waterhouse, PwC's predecessor, when he worked for the firm in 1974. Because Coleman cannot testify from personal knowledge as to the reasons supporting PwC's instruction to Lason to advise users to not rely on the 1997 financial statements, the Superior Court properly excluded his affidavit.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/Henry duPont Ridgely
Justice