

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

JOSEPH J. POUSER,	)	
	)	
Plaintiff Below-Appellant,	)	
	)	
v.	)	C.A. No. 06A-12-009 RRC
	)	
DIMENSIONAL STONE PRODUCTS, LLC,	)	
	)	
	)	
Defendant Below-Appellee.	)	

Submitted: October 20, 2008  
Decided: January 12, 2009

On Appeal from a Decision of the Court of Common Pleas.  
**REVERSED and REMANDED.**

**MEMORANDUM OPINION**

Timothy J. Wilson, Esquire, Martin & Wilson, P.A., Wilmington, Delaware,  
Attorney for Plaintiff Below-Appellant.

Charles Gruver, III, Esquire, Charles Gruver III P.A., Hockessin, Delaware,  
Attorney for Defendant Below-Appellee.

COOCH, J.

## I. INTRODUCTION

Before the Court is the appeal of Joseph J. Pouser (“Mr. Pouser” or “Appellant”) from an order of the Court of Common Pleas which awarded Appellant \$5,811.31 for withheld wages, pursuant to the Delaware Wage Payment and Collection Act (“DWPCA”).<sup>1</sup> However, the Court of Common Pleas did not award Mr. Pouser attorney’s fees. Mr. Pouser appeals the Court of Common Pleas’ order only as to its failure to have awarded attorney’s fees.

Pursuant to the DWPCA, an award of attorney’s fees was statutorily required in this instance. Therefore, the decision of the Court of Common Pleas as to its failure to award attorney’s fees was error and is **REVERSED** and the case is **REMANDED** to that court for further proceedings consistent with this opinion.

## II. FACTS AND PROCEDURAL HISTORY

This action arises from a claim filed by Mr. Pouser in the Court of Common Pleas against his former employer, Dimensional Stone Products, LLC (“Dimensional Stone” or “Appellee”) for withheld wages. Dimensional Stone sells granite, marble, limestone, tile, and other products,

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<sup>1</sup> 19 *Del. C.* § 1101 et. seq.

used by customers in kitchens and bathrooms.<sup>2</sup> Mr. Pouser was employed as a salesman for Dimensional Stone from about July 2001 through October 2003 and was paid strictly on a commission basis.<sup>3</sup> At the time of Mr. Pouser's October 2003 resignation there were several outstanding contracts, which Mr. Pouser had arranged on behalf of Dimensional Stone.<sup>4</sup> Mr. Pouser claimed he was owed \$12,864.27 in commissions. The Court of Common Pleas analyzed each claimed commission and, after trial, awarded Mr. Pouser \$5,811.31.<sup>5</sup> Appellant also had requested an award of attorney's fees, pursuant to the DWPCA.<sup>6</sup>

Section 1113(c) provides for attorney's fees:

Any judgment entered for a plaintiff in an action brought under this section shall include an award for the costs of the action, the necessary costs of prosecution and reasonable attorney's fees, all to be paid by the defendant.<sup>7</sup>

Section 1103(b) deals with liquidated damages and provides,

If an employer, without any reasonable grounds for dispute, fails to pay an employee wages, as required under this chapter, the employer shall, in

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<sup>2</sup> Trial Tr., Docket Item ("D.I.") 8 at 37.

<sup>3</sup> *Id.* at 37-38.

<sup>4</sup> *Id.* at 198-215.

<sup>5</sup> *Pouser v. Dimensional Stone Prod., LLC*, C.A. No. 2004-04-356 (Del. Super. Jan. 12, 2004) (ORDER), D.I. 25.

<sup>6</sup> Trial Tr. at 9-19.

<sup>7</sup> 19 *Del. C.* § 1113(c).

addition, be liable to the employee for liquidated damages in the amount of 10 percent of the unpaid wages for each day, except Sunday and legal holidays upon which such failure continues after the day upon which payment is required or in amount equal to the unpaid wages, whichever is smaller . . . .<sup>8</sup>

At the conclusion of trial the Court entered judgment in favor of Mr. Pouser in the amount of \$5,811.31. The Court, however, also found that “there was a bona fide dispute between the parties from day one in this matter. Therefore, . . . there will be no requirement to pay statutory [liquidated] damages, because that’s not necessary under the law. Nor will there be any attorney’s fees due, because those are not due under the law.”<sup>9</sup> Mr. Pouser filed an appeal raising only the issue of whether an award to him of attorney’s fees was statutorily mandated by § 1113(c) of the DWPCA in this case.

### **III. CONTENTIONS OF THE PARTIES**

Appellant contends that the word “shall” in § 1113(c) is mandatory and requires that attorney’s fees be awarded to Mr. Pouser because judgment was entered on his behalf.<sup>10</sup> Appellant maintains that while the DWPCA provides that liquidated damages will not be awarded if there are

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<sup>8</sup> 19 *Del. C.* § 1103(b).

<sup>9</sup> Trial Tr. at 344.

<sup>10</sup> Opening Brief of Appellant Joseph J. Pouser, D.I. 10 at 3-4.

“reasonable grounds for dispute,”<sup>11</sup> this language does not pertain to the award of attorney’s fees. Appellant distinguishes this case from *Delaware Bay Services, P.A. v. Swier*, in which the Supreme Court reversed a decision of the Superior Court that had awarded attorney’s fees, but where the employer’s claim for set-off was found to exceed the employee’s claim.<sup>12</sup> Appellant contends that the Supreme Court in *Swier* only reversed the award of attorney’s fees because the plaintiff did not “prevail” on his claim because the employer’s right to set-off in fact exceeded the withheld wages due to the employee.<sup>13</sup>

Appellee responds that the word “shall” in 19 *Del. C.* § 1113(c) does not mean “mandatory” and cites to cases in which Delaware courts have construed “shall” to be permissive.<sup>14</sup> In addition, Appellee contends that this appeal is controlled by *Swier*, and that an award of attorney’s fees, like liquidated damages, is permissive when an employer had reasonable grounds, as here, to dispute the wage claim.<sup>15</sup>

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<sup>11</sup> 19 *Del. C.* § 1103(b).

<sup>12</sup> *Delaware Bay Services, P.A. v. Swier*, 900 A.2d 646, 654 (Del. 2006).

<sup>13</sup> Opening Brief of Appellant Joseph J. Pouser at 6.

<sup>14</sup> Appellee’s Answering Brief, D.I. 11 at 3.

<sup>15</sup> *Id.* at 4-5.

#### IV. STANDARD OF REVIEW

“In an appeal from the Court of Common Pleas to the Superior Court, the standard of review is whether there is legal error and whether the factual findings made by the trial judge are sufficiently supported by the record and are the product of an orderly and logical deductive process.”<sup>16</sup> “Where the issue on appeal is a matter of law, the appellate court must determine whether the trial court erred in formulating or applying legal precepts.”<sup>17</sup> Because statutory construction involves a purely legal interpretation, the standard of review in this case is de novo.<sup>18</sup>

#### V. DISCUSSION

The central issue in this case is whether an employee who is awarded damages for withheld wages under the DWPCA is entitled to attorney’s fees where the employer did not have a right of set-off that exceeded the employee’s withheld wages.

Delaware courts have noted the difference in language used in § 1113(c) (“shall”) and § 1103(b) (“may.”) In *Dickinson Medical Group, P.A. v. Foote* this Court held:

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<sup>16</sup> *Wright v. Platinum Financial Services*, 2007 WL 1850904, at \*2 (Del.).

<sup>17</sup> *Furniture and More, Inc. v. Hollinger*, 2007 WL 2318126, at \*1 (Del. Super.).

<sup>18</sup> *State v. Baker*, 720 A.2d 1139, 1144 (Del. 1998); *Moses v. Board of Educ. of New Castle County Vocational Technical School District*, 602 A2d 61 (Del. 1991).

[b]ecause 19 *Del. C.* § 1103(b) provides for liquidated damages only when an employer withholds payment without reasonable grounds for dispute, [the employee's] claim for liquidated damages in the amount of \$26,862.77 is rejected. [The employee] is entitled however, to her costs, including reasonable attorneys' fees incurred in connection with her counterclaim for unpaid wages.<sup>19</sup>

More recently, the Delaware Supreme Court juxtaposed the different standards for liquidated damages and attorney's fees in *Delaware Insurance Guaranty Association v. Christiana Care Health Services, Inc.* The Court wrote:

In the case where wages are wrongfully withheld, the employer *could* assume additional liability. [citing § 1103(b), the liquidated damages provision]. *In any event, the employer will incur the costs of the action, the necessary costs of prosecution and reasonable attorney's fees.* [citing § 1113(c), the attorney's fees provision].<sup>20</sup>

These cases indicate that an award of liquidated damages is discretionary, based on the trial court's determination of whether the employer had "reasonable grounds [to] dispute" the payment of wages, whereas "reasonable grounds for dispute" is not part of the court's analysis when awarding attorney's fees.

In the recent case of *Delaware Bay Services, P.A. v. Swier*, relied on by both parties, the Supreme Court affirmed the Superior Court's award for withheld wages but reversed the award of liquidated damages and,

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<sup>19</sup> *Dickinson Medical Group, P.A. v. Foote*, 1989 WL 40965, \*8 (Del. Super.).

<sup>20</sup> *Delaware Ins. Guar. Assoc. v. Christiana Care Health Serv., Inc.*, 892 A.2d 1073, 1079 (Del. 2006) (emphasis added).

significantly, of attorney's fees.<sup>21</sup> The *Swier* Court held that, "[b]ecause [the employer] had reasonable grounds to dispute the payment of wages based upon the employment contract, liquidated damages and attorney fees were not due [to the employee] under the WPCA."<sup>22</sup> While the Supreme Court's decision in *Swier* at first blush may appear in conflict with previous interpretations by the Supreme Court of § 1103(b) and § 1113(c),<sup>23</sup> a closer examination reconciles the outcome in *Swier* with previous cases.

In *Swier*, the trial court awarded the plaintiff, Dr. Swier, \$18,356.52 for withheld wages plus \$18,356.52 (the identical amount) in liquidated damages and a separate (unspecified) award of attorney's fees.<sup>24</sup> Thus, the total "wage claim" determined by the court was \$36,713.04.<sup>25</sup> The defendant was awarded \$25,000 in connection with its contract claim since the Superior Court determined that Dr. Swier had wrongfully terminated his

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<sup>21</sup> *Swier*, 900 A.2d at 654.

<sup>22</sup> *Id.*

<sup>23</sup> See *Delaware Ins. Guar. Assoc.*, 892 A.2d 1073; *Dickinson Medical Group*, 1989 WL 40965.

<sup>24</sup> *Delaware Bay Services, P.A. v. Swier*, 2004 WL 2827895, \*4 (Del. Super. 2004) (noting "the reasonableness of [attorney's fees is] to be determined upon the filing of Plaintiff's counsel's affidavit.").

<sup>25</sup> *Id.*

employment agreement early.<sup>26</sup> The focus of the appeal was whether liquidated damages were appropriate and whether the employer had “reasonable grounds for disput[ing]” the payment of Dr. Swier’s wages. The Supreme Court determined that Dr. Swier’s employer had “reasonable grounds for dispute,” and therefore reversed the award to him of \$18,356.52 in liquidated damages.<sup>27</sup> The Supreme Court affirmed Dr. Swier’s award for \$18,356.52 (his underlying wage claim) and his employer’s award of \$25,000; thus, after the Supreme Court’s decision, Dr. Swier owed his employer \$6,643.48. The *Swier* decision did not explain the Court’s rationale for reversing the trial court’s award of attorney’s fees; however, a letter opinion from the trial court after remand explained to counsel why an award of attorney’s fees was not appropriate, given the Supreme Court’s holding.

That letter supports this Court’s conclusion that the Court of Common Pleas should have awarded attorney’s fees in this case. The substance of that letter states,

Pursuant to 19 *Del. C.* § 1113(c), Plaintiff asked this Court for attorney’s fees incurred in the appeal of this Court’s initial decision. Plaintiff also asked for a reinstatement of the attorney’s fees granted

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<sup>26</sup> *Id.*

<sup>27</sup> *Swier*, 900 A.2d at 654.

Plaintiff in this Court's initial decision, but reversed by the Supreme Court. Plaintiff's request for attorney's fees is denied.

The Supreme Court determined that Defendant had a reasonable right of set-off which was greater than the wages Defendant owed Plaintiff. Therefore, the Supreme Court reversed this Court's ruling which found otherwise, and determined attorney's fees were not to be awarded under the wage claim statute. Plaintiff unsuccessfully sought reargument in the Supreme Court.

Now, the Plaintiff wants this Court to ignore the Supreme Court's rulings and reinstate the attorney's fees. There is no reason or merit in Plaintiff's request. *The Supreme Court has determined Defendant had a right of set-off in an amount exceeding the wage claim; therefore, attorney's fees were not permitted.* It would be contrary to the rule of law for this Court to grant Plaintiff's reinstatement request, and the Court is befuddled by such a request.

Nor is Plaintiff entitled to attorney's fees arising from the Supreme Court appeal. It did not successfully defend this Court's decision as to the wage claim.<sup>28</sup>

The Supreme Court in *Swier* apparently reversed the trial court's award of attorney's fees because the employer's right of set-off exceeded the employee's wage claim. Such facts are not present in the instant case. While Mr. Pouser claimed more wages than he was ultimately awarded, nonetheless, he was awarded \$5,811.31 for withheld commissions. Unlike the employer in *Swier*, Dimensional Stone was not awarded any monetary damages. The Court of Common Pleas ordered Mr. Pouser to return "all documents he took when terminating his employment," but denied

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<sup>28</sup> *Swier v. Delaware Bay Surgical Serv., P.A.*, C.A. No. 03C-03-030 (Del. Super. Aug. 18, 2006) (Letter Op.) (emphasis added).

Dimensional Stone’s “counterclaim for damages associated with such taking  
... .”<sup>29</sup>

Therefore, the determination of the Court of Common Pleas that  
“Plaintiff’s claim for liquidated damages and attorney’s fees pursuant to the  
Delaware Wage Claim Act is denied as there was a bona fide dispute  
between the parties at the time Plaintiff’s employment terminated”  
constituted legal error. Because Mr. Pouser was awarded damages by the  
Court of Common Pleas for withheld commissions and Dimensional Stone  
was found by that Court not to be entitled to a set-off exceeding Mr.  
Pouser’s withheld commissions, § 1113 of the DWPCA requires an award of  
reasonable attorney’s fees by the Court of Common Pleas.

## **VI. CONCLUSION**

For the foregoing reasons, this Court finds that the Court of Common  
Pleas committed legal error by failing to award reasonable attorney’s fees,  
pursuant to 19 *Del. C.* § 1113(c). Therefore, the decision of the Court of  
Common Pleas as to attorney’s fees is **REVERSED** and **REMANDED** to  
the Court of Common Pleas for proceedings consistent with this opinion.

oc: Prothonotary

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<sup>29</sup> *Pouser v. Dimensional Stone Prod., LLC*, C.A. No. 2004-04-356 (Del. Super. Jan. 12, 2004) (ORDER).