EFiled: Apr 16 2020 11:46AM EDT
Filing ID 65581713
Case Number 43,2020D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEAN SHERMAN, Plaintiff Below/ Appellant/ Cross-Appellee, v. STEPHEN P. ELLIS, ESQUIRE, Defendant Below/ Appellee/ Cross-Appellant.	No. 43, 2020 On appeal from the Superior Court of the State of Delaware, C.A. No. K18C-06-009 JJC

APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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Dated: April 16, 2020

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NATURE OF PROCEEDINGS

On June 12, 2018, Appellant Dean Sherman ("Sherman") filed his Complaint in the Superior Court of the State of Delaware against Appellee Stephen Ellis, Esq. ("Ellis"). (A0001-A0052). Sherman pled one count of legal malpractice, arguing that Ellis negligently drafted Sherman's Ante-Nuptial Agreement (the "Agreement"), which was intended to protect Sherman's assets in the event he divorced from his then-future spouse, Margaret Willoughby ("Willoughby"). (*Id*.).

On October 2, 2019, Ellis filed a Motion for Summary Judgment and, on October 23, 2019, filed several motions *in limine*. (A0269-A0598; A703-A0704). On January 2, 2020, the Superior Court granted the Motion for Summary Judgment. (A0667-A0693).[1]

On January 29, 2020, Sherman filed his Notice of Appeal from the Superior Court's decision dismissing the action. (D.I. 1). On February 12, 2020, Ellis filed a Notice of Cross-Appeal. (D.I. 5). On March 17, 2020, Sherman filed his Opening Brief on Appeal.[2] This is Ellis' Answering Brief on Appeal and Opening Brief on Cross-Appeal.

[1] The Superior Court did not expressly rule on the pending motions *in limine*.

[2] Citations to Sherman's Opening Brief on Appeal are referred to as "OB__."

SUMMARY OF ARGUMENT

Ellis' Response to the Summary of Arguments Listed in Sherman's Opening Brief

1. Denied. The Superior Court correctly determined that there was insufficient record evidence to allow a jury to conclude that Willoughby would have accepted the inclusion of waiver language in the Agreement.

2. Denied. The Superior Court correctly determined that there was insufficient record evidence to allow a jury to conclude that Willoughby would have accepted the inclusion of waiver language in the Agreement, and that therefore, Sherman failed to produce evidence to demonstrate that a failure to include the waiver language caused Sherman to sustain damages. Moreover, to the extent Willoughby's testimony was necessary to support Sherman's theory, she should have been deposed, as Sherman had the burden of producing evidence in response to a motion for summary judgment.

3. Denied. The Superior Court applied the correct legal standard to Sherman's legal malpractice case. While Sherman advocates for the adoption of an increased risk of harm standard, as has been applied in medical malpractice cases, Sherman misinterprets the medical malpractice standard and, in any event, "but for" causation is appropriate in this case. In addition, even if the Superior Court adopted an increased risk of harm standard, Sherman's claim would still fail because he could not produce evidence showing that Willoughby would have accepted the waiver

provision if presented to her. Thus, Sherman cannot show that Ellis, in fact, increased any risk of harm to Sherman.

Ellis' Summary of Arguments on Cross-Appeal

4. The Superior Court erred in holding that, under the Delaware Premarital Agreement Act, 13 *Del. C.* § 326, a waiver of disclosures provision in a premarital agreement bars any challenge to that agreement under unconscionability grounds, even if the disclosures made were inaccurate, unreasonable, or fraudulent.

STATEMENT OF FACTS

Sherman brought this action for legal malpractice against his former attorney, Ellis, alleging that Ellis negligently drafted the Agreement. (A0001-A0051). Sherman retained Ellis to draft the Agreement with the goal that his assets would be protected in the event he divorced from his then-future spouse, Willoughby. (A0003-A0004). Sherman and Willoughby ultimately executed the Agreement and married, but later divorced. (A0005 at ¶¶ 16-19).

Following the divorce, Willoughby brought an action in the Family Court of the State of Delaware (the "Family Court Action") seeking to set aside the Agreement. (A0031-A0037). The Family Court granted that motion, holding:

> The premarital agreement entered by these parties was unconscionable when it was entered and [Willoughby] was not provided a fair and reasonable disclosure of the property or financial obligations of Husband, that she did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of Husband, and that she did not have, nor reasonably could have had, an adequate knowledge of the property or financial obligations of Husband.

(A0051).

Sherman later filed an appeal of the Family Court Opinion to this Court. (A0282). Before that appeal was heard, however, he (prematurely) filed this legal

malpractice action against Ellis.[3] Sherman alleged that Ellis' failure to include a provision providing that the parties waived their right to a disclosure of assets caused Sherman damages (in excess of $5,000,000) and was the reason the Family Court ruled against him. (A0007-A0008, at ¶¶ 33, 34) (alleging that Ellis' "failure to include disclosure waiver language in the Agreement, as per 13 *Del. C.* § 326" was a negligent act that was the proximate cause of Sherman's damages).[4]

Subsequently, this Court overturned the Family Court's decision, holding that the Agreement was, in fact, valid and enforceable. (A0276-A0292). In so holding, the Supreme Court found that Willoughby was given a full and complete disclosure

[3] Had Sherman waited until this Court ruled on his appeal from the Family Court Decision before filing the malpractice action, it is overwhelmingly likely that Sherman would never have filed this suit to begin with.

[4] 13 *Del. C.* § 326 provides:

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

(1) Such party did not execute the agreement voluntarily; or

(2) The agreement was unconscionable when it was executed and, before execution of the agreement, that party:

a. Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

b. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

c. Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(b) Any issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

of Sherman's assets, obviating the need for any waiver of disclosure. (*Id.*). This Court thus held that the Family Court was incorrect in finding that the Agreement was unconscionable. (*Id*.). As a result, it is now irrefutably settled that: 1) the Agreement was valid and enforceable; 2) Sherman's assets were entirely protected from Willoughby, as per Sherman's original objectives; and 3) the waiver of disclosures clause advocated for by Sherman, was, as Ellis had always believed, unnecessary to protect Sherman's interests.

Although one would have expected Sherman to have dropped the malpractice lawsuit against Ellis at the time this Court overturned the Family Court's decision, Sherman refused, arguing that, if nothing else, the failure to include a waiver of disclosure provision caused Sherman to incur increased litigation costs.[5] (A0269-A0364; A0590-A0598). Ellis moved for summary judgment on multiple grounds, and the Superior Court granted Ellis' motion and dismissed the action.

[5] Ellis argued in his Motion for Summary Judgment that this theory of damages is fatally speculative inasmuch as it requires a jury to guess as to: 1) whether Willoughby would have agreed to such a waiver of disclosure provision if it was proposed; 2) whether the inclusion of such language would have lessened Sherman's litigation expenses before the Family Court; 3) how the Family Court would have ruled if such waiver language was included; and 4) whether Willoughby would have appealed if she had lost at trial. (A0269-A0364; A0590-A0598). Under these circumstances, it is not just the amount of damages that are speculative, but that there is zero proof that Ellis caused Sherman any damages at all.

ARGUMENT

I. THE TRIAL COURT PROPERLY CONCLUDED THAT SHERMAN FAILED TO PRODUCE ANY EVIDENCE SHOWING THAT WILLOUGHBY WOULD HAVE ACCEPTED THE WAIVER PROVISION HAD IT BEEN PRESENTED TO HER.

A. Question Presented.

Whether the Superior Court correctly concluded that Sherman failed to produce evidence that Willoughby would have accepted the waiver provision had it been presented to her. *See* OB at 11.

B. Scope of Review.

In Delaware, "[a] trial court's decision on a motion for summary judgment is subject to a de novo standard of review on appeal." *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus.*, 871 A.2d 428, 433 (Del. 2005).

C. Merits of Argument.

The Superior Court correctly held that to prove his claim of transactional malpractice, Sherman must establish that Willoughby would have accepted the waiver provision had it been presented to her.[6] (A0692-0693). Likely fearful that Willoughby would have provided unhelpful testimony, Sherman made a litigation decision not to depose her or her counsel. (A0692).

[6] "If the alleged error is the failure to obtain or advise of a provision, concession or benefit, the client must prove that the other party would have agreed." 3 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 24.5 (2019 ed.).

Instead, Sherman relied on what he believed to be circumstantial evidence. Specifically, Sherman argued that because Willoughby accepted certain other contractual provisions that were disadvantageous to her, one can infer that she would have accepted *any* provision proposed to her, regardless of what that provision stated or how detrimental it would have been to her. *See* OB at 13-15. This is a wholly illogical premise.

In this case, it is simply unreasonable to infer that acceptance of certain provisions is circumstantial evidence that Willoughby would have accepted all of them. *See* MALLEN & SMITH, LEGAL MALPRACTICE § 24.5 (citing *Hazel v. Thomas, P.C. v. Yavari*, 465 S.E.2d 812, 815 (Va. 1996) when explaining that it is "not sufficient to show that the other party 'might have' agreed" to prove proximate cause of harm in a transactional malpractice claim); *Viner v. Sweet*, 70 P.3d 1046, 1053 (Cal. 2003) (there must be at a minimum, circumstantial evidence of a probability of acceptance of the term). By definition, circumstantial evidence amounts to a "very probable conclusion from the facts actually proven." *Oberly v. Howard Hughes Med. Inst.*, 472 A.2d 366, 384 (Del. Ch. 1984). Here, as correctly noted by the Superior Court, Sherman fails to establish that it is "very probable" that Willoughby would have accepted the waiver provision where she did not testify, her counsel was not deposed, and Sherman's own expert testified that it was "pure speculation" to assume Willoughby would have accepted the language. (A0692).

As conceded by Sherman, the record is replete with examples of Willoughby's counsel, Thomas Gay, Esq. ("Gay"), pushing back on numerous provisions suggested by Sherman and his counsel, Ellis. *See* OB at 13-14. It is not as if Willoughby and Gay blindly accepted any provision proposed without a fight. There is no reason to assume that Gay would not have similarly fought the waiver provision. Importantly, there is no testimony on that issue one way or another.

Since the waiver provision was seemingly unimportant to Sherman or his counsel, Ellis, it is reasonable to assume that they would not have insisted on Willoughby's acceptance of the waiver provision in the face of objections from her and Gay. It would have been a reasonable negotiating strategy to push for provisions they care about, while conceding those they do not. Again, there is no evidence on this issue one way or another, despite the fact that Sherman has the burden of proof.

Sherman's alternative argument – that his failure to obtain evidence regarding whether Willoughby would have accepted the waiver provision is curable because he can obtain Willoughby's testimony at trial – misses the point. The time for producing evidence needed to survive a summary judgment motion is before the dispositive motion deadline and close of discovery. As Delaware courts have explained:

> Although the question of whether and to what extent a litigant will depose his own witnesses may be a tactical decision, it remains that the burden shifts to the non-moving party once a motion for summary judgment is properly supported, and the non-moving party must do

> more than merely allege "some metaphysical doubt as to material facts."

Glob. Energy Fin. LLC v. Peabody Energy Corp., 2010 Del. Super. LEXIS 430, at *84-85 (Oct. 14, 2010) (quoting *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1955)).

Here, Sherman's "failure to develop a factual record (assuming, without deciding, that [he] could) that could demonstrate any genuine issue of material fact in dispute now precludes [him] from carrying [his] burden." *Id*.

> Indeed, on the current record, all [Sherman] can allege is some speculative, or "metaphysical," possibility of a dispute of fact, to potentially emerge at the time of trial, based on what facts [his] witnesses may or may not testify to at trial. As previously stated, motions for summary judgment must be decided on the current factual record, not on evidence or facts that are "potentially possible."

Id. (quoting *Rochester v. Katalan*, 320 A.2d 704, 708 n.7 (Del. 1974)).

It is also notable that Sherman did not submit an affidavit asserting that he needed to take additional discovery as required under Superior Court Rule 56(e) and (f), and the discovery deadline had expired by that point in any event.[7]

In the end, Sherman made a calculated litigation decision in not seeking evidence that Willoughby would have accepted the waiver provision. Had Sherman

[7] Again, the reason why Sherman did not ask for additional time to take Willoughby's deposition is because he likely believed her testimony would be unhelpful. Having made this strategic litigation decision, Sherman should not be permitted a second bite at the apple.

sought such evidence, it is reasonable to conclude that Sherman would not have liked the answer he received, which would have further bolstered the case for summary judgment. Having made a considered litigation decision, Sherman should not be entitled to a do-over after the case was dismissed.[8]

[8] Regardless, this issue is waived, as Sherman concedes he failed to raise the issue in briefing or argument on the motion for summary judgment before the Superior Court. *See* OB at 17, n.46; *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (citing *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993); *Loudon v. Archer-Daniels-Midland Co*., 700 A.2d 135, 140 n.3 (Del. 1997)) ("Issues not briefed are deemed waived.").

II. THE SUPERIOR COURT CORRECTLY CONCLUDED THAT SHERMAN FAILED TO PRODUCE SUFFICIENT EVIDENCE TO SUPPORT THAT ELLIS CAUSED HIS SUPPOSED DAMAGES.

A. Question Presented.

Whether the Superior Court correctly concluded that Sherman failed to prove that Ellis caused his supposed damages. *See* OB at 16.

B. Scope of Review.

In Delaware, "[a] trial court's decision on a motion for summary judgment is subject to a de novo standard of review on appeal." *AeroGlobal*, 871 A.2d at 433.

C. Merits of Argument.

Whether Sherman produced sufficient facts to support that Ellis caused him damages depends, in the first instance, on whether Sherman was able to produce sufficient facts from which one can infer that Willoughby would have accepted the waiver provision. If Sherman cannot establish that Willoughby would have accepted the waiver provision, he cannot establish that anything Ellis did or did not do caused him damages.[9] Thus, the Superior Court correctly held that Sherman could not prove

[9] Again, Sherman would also have to do more than just produce facts showing Willoughby would have ultimately accepted the waiver provision. Sherman would also have to produce facts showing that Gay would not have pushed back on such a provision, and that Sherman and Ellis – having made a full and complete disclosure of Sherman's finances – would have fought Gay on this issue. Sherman failed to produce facts on any of these points.

any "damages" he suffered were caused by Ellis, and Sherman's appeal on this issue should be denied for the reasons stated above.

Sherman's damages theory also fails because it is fatally speculative. Even Judy Jones, Esq. ("Jones"), Sherman's expert witness, conceded that her expert report and opinion is riddled with possibilities, speculation, and guesses.

For example, Jones opines that Ellis must not have known about § 326 when drafting the Agreement, and that his failure to include waiver language caused an increase in fees incurred in connection with Willoughby's motion to set aside the Agreement. (A0124 at 99:2-6; A0167). However, during her deposition, Jones admitted that she did not actually know if Ellis knew about the existence of § 326. (A1025 at 104:20-24). In fact, she was just "assuming" and "guessing" that he did not, and she did not "really know one way or another." (*Id*. at 106:18-107:7).

Similarly, she admits she did not know whether Ellis recommended the waiver language, and it was "**a complete guess**" to believe Willoughby would have ever signed the Agreement had the waiver language been included. (A0112 at 51:8-13; A0130 at 124:13–20) (emphasis added). In her own words, it was "speculation," and there was no way to know whether Willoughby would have agreed to that language. (A0106 at 39:15-40:4).

Despite this "guess," Jones unequivocally agrees that Willoughby would have challenged the Agreement regardless of whether the waiver language was included.

(A0108 at 37:11-15). Jones agreed that she had no idea what Willoughby's counsel would have argued had the waiver language been included. (A0131 at 127:11-18). However, she is "guessing" that the Family Court would have ruled in Sherman's favor at the outset if the language was included. (A0113 at 54:1–4; A0131 a 127:2-10).

In that alternate universe, had the Family Court ruled in Sherman's favor, Jones does not know whether Willoughby would have appealed. (A0113 at 54:5-10). To assume one way or the other, and thus whether Sherman would have incurred fees in connection with an appeal regardless of who won at trial, was admittedly "speculation." (*Id*. at 56:12-57:5). If Willoughby had appealed an adverse Family Court ruling, Jones believed the appeal could have been resolved without oral argument. However she admits she is not an expert in the area of how the Supreme Court chooses to schedule argument, and this conclusion, too, is the result of "speculating." (A0131 at 128:1-130:12).

Finally, Jones presumes that 80% of the $353,000 in fees incurred in connection with the divorce proceedings would have been related to the issues regarding waiver language in the Agreement. However, she conceded that she had no independent knowledge of the amount of fees incurred in the underlying litigation, had no contact with Sherman's Family Court attorneys, and had no knowledge of what tasks Sherman's attorneys billed. (A0123 at 96:3-98:3; A0132

at 130:18-24).[10]

Here, it is not just the amount of damages that are speculative, but there is no evidence to support whether Ellis caused Sherman any damages at all. Such speculation requires the dismissal of Sherman's claims.

"The quantum of proof required to establish the amount of damage *is not as great as that required to establish the fact of damage*." *Total Care Physicians, P.A. v. O'Hara*, 2003 WL 21733023, at *3 (Del. Super. Ct. July 10, 2003) (emphasis added). "The attorney must have caused more than theoretical damage to the client. The mere breach of professional duty causing only speculative harm is not sufficient to create a cause of action for negligence." *ISN Software Corp. v. Richards, Layton & Finger, P.A.*, 2019 WL 670083, at *2 (Del. Super. Ct. Feb. 18, 2019). Because Sherman's claims are fatally speculative, the Superior Court correctly granted judgment in Ellis' favor.

[10] Ellis moved to preclude the impermissibly speculative testimony by Sherman's prior counsel as to the alleged damages figures, as well, but the motions *in limine* were mooted by the Superior Court's dismissal of the action.

III. "BUT FOR" CAUSATION IS THE APPROPRIATE STANDARD FOR THIS ACTION.

A. Question Presented.

Whether the Superior Court correctly utilized traditional "but for" causation in analyzing Sherman's claim. *See* OB at 25.

B. Scope of Review.

"This Court reviews *de novo* the Superior Court's grant or denial of summary judgment to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law." *Norman v. All About Women, P.A.*, 193 A.3d 726, 729 (Del. 2018).

C. Merits of Argument.

Because Sherman cannot meet the "but for" standard of causation traditionally used in malpractice actions, he argues "that the unique circumstances presented by the facts of this case warrant the adoption of a lower increased risk of harm standard of analysis." OB at 27. Specifically, Sherman argues that a plaintiff in a transactional malpractice case should not have to prove that the attorney's error caused actual harm, but only that it caused "an increased risk of a future threat." *Id.* at 33-34.

In making this argument, Sherman wrongly relies on *United States v. Anderson*, 669 A.2d 73, 74, 79 (Del. 1995), a medical malpractice case in which this

Court analyzed whether the mere increase of risk of future harm is presently compensable; a question this Court answered in the affirmative. Contrary to Sherman's apparent belief, this Court did not do away with the "but for" standard used in malpractice cases. Rather, it merely held that any potential future harm can be included as a present measure of damages.[11]

A plaintiff must still prove, however, that the tortfeasor directly caused the harm – something Sherman cannot establish. *Id.* ("Compensating a tort victim for an increase in risk which results from some harm caused *by a tortfeasor* fits comfortably within traditional damage calculation methods.") (emphasis added).

The "risk of a future threat" analysis advanced by Sherman also fails as applied to this case because there is no risk of a future threat. This Court found the Agreement to be valid and enforceable. To the extent Sherman suffered any damages (and he did not), they were known and compensable. There is no reason to depart from traditional causation principles.[12]

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[11] In *Anderson*, the Court held that a doctor that caused the plaintiff to suffer an increased risk of cancer reoccurring is compensable as a present damage. *Id.* at *78.

[12] Sherman's attempt to lower the causation standard in the transactional malpractice context is also illogical, as it would allow for a legal malpractice claim to be brought against any attorney, any time a party later challenged a transaction or contract, regardless of whether that transaction or contract is found to be valid and enforceable. By Sherman's standard, a cause of action exists merely because someone brings suit at a later date. This is simply not consistent with traditional causation principles.

IV. THE TRIAL COURT ERRED IN HOLDING THAT, UNDER THE DELAWARE PREMARITAL AGREEMENT ACT, A WAIVER OF DISCLOSURE PROVISION ACTS AS A "SILVER BULLET" THAT BARS ANY CHALLENGE TO A PREMARITAL AGREEMENT ON THE GROUNDS OF UNCONSCIONABILITY.

A. Question Presented.

Whether the Superior Court erred in holding that a waiver of disclosure of assets provision in a premarital agreement bars any subsequent challenge to that agreement on unconscionability grounds, even if the disclosure of assets has not been fair and reasonable. The issue was addressed in briefing before the Superior Court, extensively argued during the hearing on the Motion for Summary Judgment, and was addressed at length in the Superior Court's Opinion. (A0625-A0632; A0635-A0638; A0645-A0646; A0653-A0656; A0663-A0664; A0676-A0680)

B. Standard of Review.

Because this cross-appeal presents "a pure statutory interpretation issue, the standard of review is effectively *de novo*." *Mills v. State*, 201 A.3d 1163, 1169 (Del. 2019) (citing *Patrick v. State*, 2007 WL 773387, at *2 (Del. 2007)).

C. Merits of Argument.

The Delaware Premarital Agreement Act provides two avenues of challenging premarital agreements. The first, pursuant to § 326(a)(1), is by showing that a party to a premarital agreement did not execute it voluntarily.

The second basis for challenging a premarital agreement, at issue here, is by establishing that it was both "unconscionable when executed" and that the party moving to set aside the agreement:

> a) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> b) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
>
> c) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

13 *Del. C.* § 326(a)(2)(a-c). A party seeking to set aside a premarital agreement must prove each of these elements. *Id.*

In its Opinion, the Superior Court held that "by including subparagraph (a)(2)(b) in the Act, the General Assembly has permitted any party who includes a waiver of disclosure provision in a premarital agreement to in all cases defeat a challenge to the Agreement based upon alleged unconscionability." (A.0680). Thus, according to the Court, a premarital agreement cannot be deemed unconscionable – even if there is no disclosure of assets or a fraudulent disclosure of assets – as long as there is a waiver of such disclosure.

Section 326(a)(2)(b) should not be read in such a manner. Instead, the inclusion of the phrase "beyond the disclosure provided" should be read to mean that the parties waive their rights to additional, supplemental, or future disclosures. It

should not be construed as to shield a party from making inaccurate or fraudulent disclosures.[13]

If the Superior Court's statutory interpretation is upheld, the phrase "beyond the disclosure provided" would be rendered superfluous, something that even Sherman's expert, Jones, recognized. (A0462 at 25:5-16). Indeed, if such a position is adopted, § 326(a)(2)(b) could be rewritten from:

- "did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party *beyond the disclosure provided*," (emphasis added) to

- "did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party ~~beyond the disclosure provided.~~"

The words "beyond the disclosure provided" would have no meaning as a waiver of disclosure provision would bar any challenge to inadequate disclosures – provided or not. Delaware courts do not interpret statutes in such a manner. *See e.g.*, *Shy v. State*, 459 A.2d 123, 125 (Del. 1983) ("Any different reading would

[13] This distinction is critical in this case. If the Delaware Premarital Agreement Act does not protect a party from making unfair and unreasonable disclosures, then Ellis' inclusion of such a provision in the Agreement would not have prevented a challenge to the Agreement before the Family Court, nor would it have lessened Sherman's litigation expenses. Instead, the parties would have had to litigate the question of whether the disclosures were "fair and reasonable" in any event, and the failure to include a waiver of disclosure provision could not have been the proximate cause of Sherman's "damages."

render part of the statute meaningless, a result foreclosed by generally accepted principles of statutory construction.").

Although this Court has not yet addressed the proper interpretation of § 326(a)(2)(b), at least one other court interpreted an identical waiver provision under the UPAA to apply only to a waiver of future disclosures, not those made prior to execution.[14] In *Davis v. Miller*, for example, the parties entered into a marital agreement governed by a Kansas statute, which like Delaware, tracked the language of the Uniform Premarital Agreement Act (the "UPAA"). *Davis v. Miller*, 7 P.3d 1223, 1229-30 (Kan. 2000). The plaintiff attacked the agreement on the basis of an inadequate financial disclosure. *See id*. at 1230. The agreement at issue in *Davis* included a waiver provision as follows: "Waiver of additional financial information. The parties hereto each voluntarily and expressly waive any right to disclosure of the property, financial position or obligations of the other *beyond the disclosures provided* herein and by the attachments hereto." *Id*. at 1233 (emphasis added).

While the court found disclosure in that case to have been adequate, it specifically interpreted the language of the Kansas statute – akin to § 326 – "to be a waiver of any *future* disclosures and not to apply to a waiver of any and all

[14] The Delaware statute is modeled after the UPAA. *See Silverman v. Silverman*, 206 A.3d 825, 831 (Del. 2019).

disclosures made in the *past*."[15] *Id*. at 1234 (emphasis in original). *See also Kwon v. Kwon*, 775 S.E.2d 611, 615-16 (Ga. App. Ct. 2015) ("Just as imposing a duty to inquire on one party would eviscerate the other party's duty of full disclosure, so would allowing a waiver provision to substitute for full disclosure eviscerate the duty to disclose… This holding does not support the proposition that a party who is not fully informed can contractually waive her right to information.").

As in *Davis*, this Court should hold that the DPAA does not permit a party to shield itself from making false disclosures by merely including a waiver of disclosure provision in the premarital agreement.

[15] In the case cited by Sherman in his letter submission to the Superior Court, *In re Marriage of Solano*, 124 N.E.3d 1097 (Ill. App. Ct. 2019), the *Solano* Court specifically disagreed with the *Davis* Court's opinion.

CONCLUSION

For the foregoing reasons, we respectfully request that Sherman's appeal be denied, and that the Superior Court's grant of Summary Judgment in Ellis's favor be affirmed. To the extent that Sherman's appeal is granted and the case is remanded, Ellis respectfully requests this Court to grant its Cross-Appeal.

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Word Count: 4,821

Dated: April 16, 2020