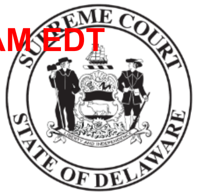
EFiled: Apr 16 2021 10:25AM EDT
Filing ID 66521099
Case Number 401,2020



THE SUPREME COURT OF THE STATE OF DELAWARE

COUNTRY LIFE HOMES, LLC; HEARTHSTONE MANOR I, LLC; HEARTHSTONE MANOR II, LLC; RIVER ROCK, LLC; KEY PROPERTIES GROUP, LLC; CEDAR CREEK LANDING CAMPGROUND, LLC; MBT LAND HOLDINGS, LLC; ELMER FANNIN; and MARY ANN FANNIN,	:	**No. 401, 2020**
Defendants/Counterclaim Plaintiffs Bellow/ Appellants,	:	**ON APPEAL FROM THE SUPERIOR COURT OF DELAWARE OF AND FOR NEW CASTLE COUNTY**
v.	:	
GELLERT SCALI BUSENKELL & BROWN, LLC,	:	
Plaintiff/Counterclaim Defendant Bellow/Appellee.	:	

APPELLANTS' REPLY BRIEF

IPPOLITI LAW GROUP
Patrick K. Gibson, Esquire (#6357)
1225 N. King Street, Suite 900
Wilmington, DE 19801
Ph: (302) 428-1400
Fax: (302) 428-9664
Email: patrick@ippolitilawgroup.com
Counsel for Appellants

Date: April 16, 2021

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE SUPERIOR COURT ERRED IN HOLDING THAT COUNTRY LIFE'S COUNTERCLAIM FAILED TO STATE CLAIMS UPON WHICH RELIEF COULD BE GRANTED 1

II. THE SUPERIOR COURT ERRED IN APPLYING THE STRICT "CASE WITHIN A CASE" BUT-FOR CAUSATION ANALYSIS, TRADITIONALLY EMPLOYED IN LEGAL MALPRACTICE CLAIMS ARISING FROM UNDERLYING LITIGATION, WHEN COUNTRY LIFE'S THEORY OF LIABILITY DID NOT ALLEGE THAT COUNTRY LIFE LOST THE UNDERLYING ACTIONS AS A RESULT OF GSB&B'S NEGLIGENCE, BUT RATHER THAT GSB&B WAS NEGLIGENT IN ADVISING COUNTRY LIFE TO DEFEND/PROSECUTE THE UNDERLYING ACTIONS 8

III. THE SUPERIOR COURT ERRED IN NOT APPLYING THE CAUSATION ANALYSIS USED FOR MALPRACTICE CLAIMS ALLEGING UNDERLYING TRANSACTIONAL MALPRACTICE, WHEN COUNTRY LIFE'S THEORY OF LIABILITY DID NOT ALLEGE THAT COUNTRY LIFE LOST THE UNDERLYING ACTIONS AS A RESULT OF GSB&B'S NEGLIGENCE, BUT RATHER THAT GSB&B WAS NEGLIGENT IN ADVISING COUNTRY LIFE TO DEFEND/PROSECUTE THE UNDERLYING ACTIONS 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

CD Realty Advisors, Inc. v. Riley,
2013 Phila. Ct. Com. Pl. LEXIS 424, at *17-23 (Phila. Ct. Com. Pls. Oct. 16, 2013) 11

Flowers v. Ramunno,
27 A.3d 551 (Table), 2011 Del. LEXIS 434, at *4 (Del. Aug. 16, 2011) 5, 6

In re MFW S'holders Litig.,
67 A.3d 496, 521 (Del. Ch. 2013) 3

McCartney v. Dunn & Conner, Inc.,
563 A.2d 525, 530 (Pa. Super. Ct. 1989) 11

Oakes v. Clark,
2013 Del. LEXIS 301, at *4 (Del. June 18, 2013) 4, 5

Sherman v. Ellis,
2021 Del. LEXIS 45 (Del. Feb. 3, 2021) 2, 3, 10

Sisson v. State,
903 A.2d 288, 306 (Del. 2006) 3

Weaver v. Lukoff,
1986 Del. LEXIS 1165 (Del. July 1, 1986) 6

Appellants/Counterclaim Plaintiffs, below, Country Life Homes, LLC, Hearthstone Manner, I, LLC, Hearthstone Manor II, LLC, River Rock, LLC, Key Properties Group, LLC, Cedar Creek Landing Campground, LLC, MBT Land Holdings, LLC, Elmer Fannin, and Mary Ann Fannin (collectively "Country Life") hereby respectfully submit the following Reply Brief to counter various arguments raised in Appellee/Counterclaim Defendant, Gellert Scali Busenkell & Brown, LLC's ("GSB&B") Answering Brief.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN HOLDING THAT COUNTRY LIFE'S COUNTERCLAIM FAILED TO STATE CLAIMS UPON WHICH RELIEF COULD BE GRANTED

GSB&B's response to Argument Section I of Country Life's Opening Brief relies upon various cases to support its argument that the trial court did not err in holding Country Life's Counterclaims failed to state a claim for legal malpractice, under prevailing Delaware law.[1] As detailed below however, this reliance is erroneous – as none of these cases involved a claim wherein the plaintiff alleged they were harmed when their attorney negligently advised them to pursue litigation, but rather that their attorney's negligence caused them to lose an otherwise winnable case.

[1] *See*, GSB&B's Answering Br. at p. 9-13*, generally*.

To state a claim of legal malpractice in Delaware, "the plaintiff must establish the following elements: a) the employment of the attorney; b) the attorney's neglect of a professional obligation; and c) resulting loss."[2] Quoting from this Court's recent opinion in *Sherman v. Ellis*, GSB&B also asserts, "'[i]n the context of legal negligence alleged to have occurred in the course of litigation … [i]n connection with the final element, the plaintiff must demonstrate that the underlying action would have been successful but for the attorney's negligence.'"[3]

At the outset, GSB&B's reliance on this Court's decision in *Sherman* for this proposition is misplaced. First, in *Sherman*, the plaintiff/appellant sued his attorney for commiting negligence in connection with an underlying transactional engagement, not litigation.[4] Secondly, the use of this quotation from *Sherman*, is from a section of the Court's opinion wherein it analyzed and declined appellant's invitation to deviate from established Delaware law with regard to but-for

---

[2] *Flowers v. Ramunno*, 27 A.3d 551 (Table), 2011 Del. LEXIS 434, at *4 (Del. Aug. 16, 2011).

[3] GSB&B's Answering Br. at p. 10-11, *quoting Sherman v. Ellis*, 2021 Del. LEXIS 45, at *11 (Del. Feb. 3, 2021).

[4] *Sherman*, 2021 Del. LEXIS 45, at *6 ("Mr. Sherman filed this action in the Superior Court, alleging that Mr. Ellis was negligent in the preparation of the [pre-nuptial] agreement. Mr. Sherman alleged that Mr. Ellis neglected to include a waiver of disclosure of assets as described in 13 Del. C. § 326(a)(2)b.").

causation analysis in legal malpractice actions and adopt an increased risk of harm standard.[5]

Here, Country Life is asking the Court to eliminate the "bright line rule" that the "case within a case" causation analysis applies to ***all*** litigation based malpractice claims, and create an exception for claims wherein plaintiffs allege their attorneys negligently advised them to pursue litigation, resulting in damages.[6] Accordingly, because this Court's statement that – "[i]n the context of legal negligence alleged to have occurred in the course of litigation … [i]n connection with the final element, the plaintiff must demonstrate that the underlying action would have been successful but for the attorney's negligence"[7] – was not central to its holdings in *Sherman* and it would not have effected the outcome of the case; it is dicta and not precedential as to this issue.[8]

---

[5] *Id.* at *10-14. *See also, id.* at *14-15 (The primary issue on appeal was whether the Superior Court erred in granting the defendant's motion for summary judgment, in light of the significant circumstantial evidence in the record plaintiff had presented to demonstrate that his ex-wife would have executed the agreement even if it included the additional waiver language, omitted by the defendant).

[6] *See*, Country Life Opening Br. at p. 14-19.

[7] *Sherman*, 2021 Del. LEXIS 45, at *11.

[8] *See*, *In re MFW S'holders Litig*., 67 A.3d 496, 521 (Del. Ch. 2013) ("Our Supreme Court follows the traditional definition of dictum, describing it as judicial statements on issues that would have no effect on the outcome of [the] case. In Delaware, such dictum is without precedential effect. Thus, broad judicial statements, when taken out of context, do not constitute binding holdings.") (internal citations and quotations omitted). *See also*, *Sisson v. State*, 903 A.2d 288, 306 (Del. 2006) ("[W]e do not read the dictum from Evers as Sisson does. The quoted language from Evers was not necessary or central to its holding, and we decline to adopt what Sisson calls the 'analysis' of Evers as opposed to examining its 'result.'").

GSB&B also cites to this Court's decisions in *Oakes v. Clark*, *Weaver v. Lukoff*, and *Flowers v. Ramunno* in support of this position.[9] However, all three of these cases are distinguishable from the issues presented in this appeal.

While it is true that this Court's decision in *Oakes*, does contain the language "[i]n connection with the final element, the plaintiff must demonstrate that the underlying action would have been successful but for the attorney's negligence,"[10] the case is still distinguishable from the instant matter. In *Oakes*, the plaintiff sued his attorney for damages as a result of negligence in connection with the litigation of ancillary divorce proceedings, namely equitable distribution and alimony.[11] The Court's opinion does not discuss, nor analyze, the plaintiff's actual theory of liability against the defendant or what deficiencies in the underlying representation he alleged.[12] However, as the Court noted, "the Superior Court properly determined that Oakes could not demonstrate that he would have been successful on his claims in the Family Court but for professional errors made by his attorney," it suggests that the plaintiff alleged that but-for his attorney's

---

[9] GSB&B's Answering Br. at p. 10-11.

[10] *Oakes v. Clark*, 2013 Del. LEXIS 301, at *4 (Del. June 18, 2013).

[11] *Id.* at *2.

[12] *See*, *id.*, *generally.*

negligence he would have had a more successful outcome on equitable distribution and alimony.[13]

Accordingly, *Oakes* appears to have been a case where the traditional "case within a case" causation analysis was appropriate. In this matter, however, Country Life alleged that GSB&B was negligent in advising it to vigorously defend/prosecute the Underlying Actions – an entirely different theory of liability – wherein the use of the "case within a case" analysis was incompatible.[14]

This Court's opinion in *Flowers*, also used the language quoted by the Court in *Sherman* regarding a more successful outcome in the underlying matter.[15] However, *Flowers* was similarly appropriately analyzed via the "case within a case" causation analysis, as the plaintiff had alleged that the defendant's failure to interview witnesses, obtain medical records, and properly prepare a settlement demand, caused him to obtain a less favorable outcome in the underlying litigation.[16] Again this is entirely at odds with Country Life's theory of GSB&B's

---

[13] *See*, *id.* at *4.

[14] *See*, Country Life Opening Br. at p. 14-19.

[15] *Flowers v. Ramunno*, 2011 Del. LEXIS 434, at *4 (Del. Aug. 16, 2011).

[16] *See*, *id.* at *3.

negligence and liability, as detailed in its Counterclaims, which were improperly dismissed as a result of the Superior Court's use of that causation standard.[17]

Finally, this Court's opinion in *Weaver* is entirely inconsistent with the premise it purportedly supports as presented in GSB&B's Answering Brief. First, the *Weaver* opinion is devoid of GSB&B's quoted language from the *Sherman, Oakes, and Flowers* opinions.[18] Second, in *Weaver* the underlying action was a criminal prosecution wherein the plaintiff (then the defendant) was found guilty of first degree rape and first degree kidnapping.[19] Accordingly, while not expressly stated in the opinion, it suggests that the plaintiff alleged that but-for some negligence on his attorney's part, he would have been acquitted or received a lighter sentence – allegations which properly lend themselves to the "case within a case" analysis.[20] Moreover, the defendant in *Weaver* received a directed verdict because the plaintiff did not present expert testimony regarding the standard of care, as the law requires.[21]

As detailed in its Opening Brief, Country Life contends that the Superior Court erred in applying the "case within a case" causation analysis to its

---

[17] *See*, Country Life Opening Br. at p. 14-19.

[18] *See generally*, *Weaver v. Lukoff*, 1986 Del. LEXIS 1165, at *1-3 (Del. July 1, 1986).

[19] *Id.* at *1.

[20] *See*, *id.*

[21] *Id.* at *1-2.

malpractice counterclaims – due to the nature of its theory of liability, which differs signficantly from the allegations considered by this Court in *Sherman, Oakes, Weaver,* and *Flowers.*

II. THE SUPERIOR COURT ERRED IN APPLYING THE STRICT "CASE WITHIN A CASE" BUT-FOR CAUSATION ANALYSIS, TRADITIONALLY EMPLOYED IN LEGAL MALPRACTICE CLAIMS ARISING FROM UNDERLYING LITIGATION, WHEN COUNTRY LIFE'S THEORY OF LIABILITY DID NOT ALLEGE THAT COUNTRY LIFE LOST THE UNDERLYING ACTIONS AS A RESULT OF GSB&B'S NEGLIGENCE, BUT RATHER THAT GSB&B WAS NEGLIGENT IN ADVISING COUNTRY LIFE TO DEFEND/PROSECUTE THE UNDERLYING ACTIONS

GSB&B's response to Argument Section II of Country Life's Opening Brief mistates Country Life's argument.

Country Life does not ague – and has never argued – that the "case within a case" causation analysis should be completely abandoned by Delaware Courts.[22] Rather, Country Life asks this Court to jettison the supposed "bright line rule" that the "case within a case" causation analysis applies to ***all*** litigation based malpractice claims, regardless of the actual theory of liability.[23] Country Life argues that the Court should make an exception from the "bright line rule," and adopt a new causation analysis for claims – such as Country Life's – wherein the plaintiff alleges their attorney deviated from the applicable standard of care by advising they pursue litigation, and such negligent advice causes economic damages.[24] Finally, Country Life suggests that the most practical means to create

[22] *See*, GSB&B's Answering Br. at p. 15 ("Preliminarily, the argument that the "case within a case" causation analysis should be totally jettisoned, versus an exception carved out…"

[23] Country Life's Opening Br. at p. 15.

[24] *See*, *id.*, *generally*.

this exception is the utilize the causation analysis traditionally employed in transactional malpractice claims, when a plaintiff alleges their attorney negligently advised them to pursue litigation.[25]

[25] *See*, *id.* at p. 20-26.

III. THE SUPERIOR COURT ERRED IN NOT APPLYING THE CAUSATION ANALYSIS USED FOR MALPRACTICE CLAIMS ALLEGING UNDERLYING TRANSACTIONAL MALPRACTICE, WHEN COUNTRY LIFE'S THEORY OF LIABILITY DID NOT ALLEGE THAT COUNTRY LIFE LOST THE UNDERLYING ACTIONS AS A RESULT OF GSB&B'S NEGLIGENCE, BUT RATHER THAT GSB&B WAS NEGLIGENT IN ADVISING COUNTRY LIFE TO DEFEND/PROSECUTE THE UNDERLYING ACTIONS

GSB&B's response to Argument Section III of Country Life's Opening Brief contends that even in a transactional malpractice claim, a plaintiff must still prove but-for causation.[26] Country Life does not disagree with this assertion. In fact, Country Life contends the Superior Court, below, should have utilized the causation analysis as set forth recently by this Court in *Sherman*: "Proving causation in a transactional malpractice claim … requires proof that, but for the attorney's negligence, the plaintiff would have obtained a more favorable result."[27]

GSB&B's Answering Brief cites to several Pennsylvania cases in support of its argument that Country Life's Counterclaims failed to aver that it could have obtained a more favorable settlement with Fulton, had their attorneys not negligently advised them to vigorously defend and prosecute the Underlying Actions.[28] However, these cases are distinguishable given their procedural posture.

---

[26] GSB&B Answering Br. at p. 20-21.

[27] *Sherman*, 2021 Del. LEXIS 45, at *13-14 (Del. Feb. 3, 2021).

[28] *See*, GSB&B Answering Br. at p. 22-23.

First, GSB&B cites to *McCartney v. Dunn & Conner, Inc.*, wherein the plaintiff alleged the defendant was negligent for *inter alia* failing to secure a favorable settlement before he lost at trial.[29] However, *McCartney* differs from the Superior Court's dismissal of Country Life's Counterclaims, as that Court was considering the defendant's motion for summary judgment – presumably after the plaintiff had the opportunity to discover and introduce evidence into the record that the opposing party would have considered or accepted a settlement.[30] GSB&B cites to *CD Realty Advisors, Inc. v. Riley* for the same proposition.[31] However – as was the case in *McCartney* – the Court in *CD Realty Advisors, Inc.* was evaluating the defendant's motion for summary judgment and found no record evidence to support plaintiff's contention that the underlying plaintiff would have settled for an amount lower than the eventual verdict – the damages claim was purely speculative.[32]

In this matter, the Superior Court granted GSB&B's motion to dismiss, before Country Life had the opportunity to engage in discovery which could produce evidence that, in fact, Fulton would have been amenable to early

---

[29] *McCartney v. Dunn & Conner, Inc.*, 563 A.2d 525, 530 (Pa. Super. Ct. 1989).

[30] *See, id.*

[31] GSB&B Answering Br. at p. 23.

[32] *CD Realty Advisors, Inc. v. Riley*, 2013 Phila. Ct. Com. Pl. LEXIS 424, at *17-23 (Phila. Ct. Com. Pls. Oct. 16, 2013).

settlement negotiations had Country Life been advised to do so.[33] Simply put, unlike the plaintiffs in *McCartney* and *CD Realty Advisors, Inc.*, Country Life was never given the opportunity to discover and introduce evidence into the record which could conclusively prove the well-pled allegations in its Counterclaims.

[33] *See*, A161-A162. *See also*, Country Life's Opening Br. at p. 28-32.

CONCLUSION

For all the forgoing reasons, as well as those argued in their Amended Opening Brief, Counterclaim Plaintiffs below, Appellants herein, Country Life, Country Life Homes, LLC, Hearthstone Manner, I, LLC, Hearthstone Manor II, LLC, River Rock, LLC, Key Properties Group, LLC, Cedar Creek Landing Campground, LLC, MBT Land Holdings, LLC, Elmer Fannin, and Mary Ann Fannin, respectfully request that the the Superior Court's December 16, 2019 Opinion and Order granting Counterclaim Defendant, Gellert Scali Busenkell & Brown, LLC's, Motion to Dismiss should be reversed and the case remanded for trial on the Counterclaims.

Respectfully submitted,

IPPOLITI LAW GROUP

/s/ Patrick K. Gibson

PATRICK K. GIBSON, ESQ.
DE Supreme Court ID, 6357
1225 N. King Street, Suite 900
Wilmington, DE 19801
(302) 428-1400
patrick@ippolitilawgroup.com
Counsel for Appellants

Date: April 16, 2021

Word Count: 2,709

THE SUPREME COURT OF THE STATE OF DELAWARE

COUNTRY LIFE HOMES, LLC; HEARTHSTONE MANOR I, LLC; HEARTHSTONE MANOR II, LLC; RIVER ROCK, LLC; KEY PROPERTIES GROUP, LLC; CEDAR CREEK LANDING CAMPGROUND, LLC; MBT LAND HOLDINGS, LLC; ELMER FANNIN; and MARY ANN FANNIN,	:	**No. 401, 2020**
Defendants/Counterclaim Plaintiffs Bellow/ Appellants,	:	**ON APPEAL FROM THE SUPERIOR COURT OF DELAWARE OF AND FOR NEW CASTLE COUNTY**
v.	:	
GELLERT SCALI BUSENKELL & BROWN, LLC,	:	
Plaintiff/Counterclaim Defendant Bellow/Appellee.	:	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. Appellants' Reply Brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2010.

2. Appellants' Reply Brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 2,709 words, which were counted by Microsoft Word 2010.

Respectfully submitted,

IPPOLITI LAW GROUP

/s/ Patrick K. Gibson
PATRICK K. GIBSON, ESQ.
DE Supreme Court ID, 6357
1225 N. King Street, Suite 900
Wilmington, DE 19801
(302) 428-1400
patrick@ippolitilawgroup.com
Counsel for Appellants

Date: April 16, 2021

Word Count: 194