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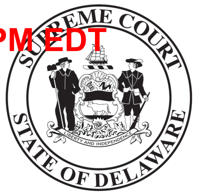

THE SUPREME COURT OF THE STATE OF DELAWARE

GMG INSURANCE AGENCY,	:	
	:	**No. 213, 2023**
Plaintiff Below/Appellant,	:	
	:	**ON APPEAL FROM THE**
v.	:	**SUPERIOR COURT OF**
	:	**DELAWARE**
MARGOLIS EDELSTEIN,	:	
	:	
Defendant Below/Appellee	:	

APPELLANT'S SECOND AMENDED OPENING BRIEF ON APPEAL

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NATURE OF THE PROCEEDINGS

This is a legal malpractice action arising from Appellee/Defendant-Below Margolis Edelstein's ("Margolis") prior representation of GMG Insurance Agency ("GMG"), which was a co-defendant along with Harold Wilson ("Wilson"), filed by Lyons Insurance Agency, Inc., ("Lyons") seeking to enforce the terms of a non-compete agreement ("agreement"). Lyons had with Wilson (The Lyons litigation or the underlying litigation").[1]

Margolis contended, and the Court-Below mistakenly ruled,[2] that because GMG did not anticipate this development, it was therefore so abnormal, highly extraordinary, or unforeseeable as to constitute superseding cause for GMG's damages. GMG timely filed a Motion for Reargument, which the Court denied.

On June 14, 2023, Appellant GMG filed its Notice of Appeal of Judge Johnston's decision, granting Margolis Edelstein's Motion for Summary Judgment. This is Appellant GMG Insurance Agency's Opening Brief.

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[1] The Lyons litigation occurred in the Delaware Court of Chancery, and was encaptioned Lyons Insurance Agency, Inc. v Howard Wilson and GMG Insurance Agency, C.A. No. 2017-0092-SG.

[2] Attached hereto as Exhibit 1. Order and Opinion of the Honorable J. Johnston Granting Defendant's Motion for Summary Judgment. (A143-A154)

SUMMARY OF THE ARGUMENTS

1. The rulings and orders from the Court-below are predicated upon two erroneous premises: (i) a fundamental misunderstanding of GMG's theory of Margolis' liability for professional malpractice; and (ii) the incorrect application of Delaware law with regard to superseding cause.[3]

2. As to the former, the Court-below failed to account for the fact that but-for their failure to develop the underlying factual record and to properly brief GMG's underlying arguments for summary judgment[4] on Lyons Insurance Agency's ("Lyons") tortious interference claim, GMG would not have been in a position where the last-minute perjured testimony of Howard Wilson ("Wilson") would place it in legal jeopardy. Wilson's independent decision to later lie about a conspiracy between GMG, Wilson, and others to violate Lyons' employment agreement could not have had any effect on GMG. Simply put, GMG would have been out of the case.

3. As to the latter, the Court-Below improperly applied Delaware law regarding superseding cause. GMG did not anticipate that Howard would change his story and perjure himself at the last minute, until he did. Margolis contends that because GMG did not anticipate this development, it was therefore so abnormal, highly extraordinary, or unforeseeable as to constitute superseding cause for GMG's damages. However, that is not the test.

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[3] The Underlying Action was preserved in the Complaint at pages 7-26 (A013-A032), and Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment at pages 11-13. (See, A089-A091)

[4] At pages 10-11, the Court-below took the mistaken leap that because Defendants were successful in having most of the causes of action dismissed, "this ruling alone evidences the competence and diligent representation… by Defendant". It is respectfully submitted that having an unsupportable claim in the Lyons litigation dismissed is not necessarily evidence of diligence or competence of defense counsel. Moreover, the Court's Conclusion (at p. 11) is troubling, in that the Court went beyond the issue presented, and stated that "it finds the evidence fails to support Plaintiffs legal malpractice claim." Again, the court-below itself stated issues of "negligence…on the part of the Defendant …. are, except in rare cases, questions of fact which ordinarily should be submitted to the jury to be resolved," and …. thus are generally not appropriate for summary judgment. (See, A152-A153)

4. The test for superseding cause is whether or not it was reasonably foreseeable or reasonably anticipated that Howard could do so, not that he would do so. This objective analysis is, in almost all instances, the exclusive province of the fact-finder and thus could not be decided by the Court-Below as a matter of law. It is not abnormal, highly extraordinary, or unforeseeable that an attorney's failure to have their client summarily dismissed from a lawsuit would expose that client to an unanticipated, yet not wholly unforeseeable, development in that litigation which would prejudice their case. It was reasonably foreseeable that Witness Wilson would recant and change his prior testimony under oath at deposition, and later, on the eve of trial, lie about the issues to the extreme prejudice of GMG. In fact, Wilson's change of testimony was likely a lie which was compelled by Wilson's desire to seek revenge on GMG. More importantly, any such question was a factual question for the jury and one for the Court to rule as a matter of law.[5]

5. Witnesses change their testimony, evidence is spoliated or even manufactured, witnesses die before they can tell their story. These things occur in litigation. Therefore, such an occurrence cannot be said to break the causal chain between the attorney's failure to have their client dismissed from the case, and the later occurrence which becomes a major factor in the client's decision to mitigate their exposure, fold their defense, and settle.[6]

6. Most importantly, Appellant GMG submits that the Court-Below should not have usurped the function of the jury and mistakenly concluded that there could be "no reasonable difference of opinion", as to the conclusion reached regarding the factual issue question of foreseeability. Under the circumstances of this case and especially where, as here, the Margolis has admitted negligence in its competency to defend GMG and its handling of discovery, the Court-Below should have followed the usual and customary practice and left this factual question to the finder of fact**.**

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[5] The Underlying Actions were preserved in Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment at pages 10-16 (See, A088-A094).

[6] The Underlying Actions were preserved in Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment at page 15 (See, A093).

STATEMENT OF FACTS

A. Wilson, USI Insurance Services, and Lyons.

GMG is an insurance brokerage agency owned by Ronald J. Viehweger, Jr. ("Viehweger") and Charles A. Thomas ("Thomas").[7] Wilson, an insurance broker, was formerly employed by USI Insurance Services ("USI").[8] In July of 2014, Wilson resigned from USI and was hired by Lyons.[9] At the time of his resignation and hiring, Wilson was bound by the terms of a noncompete agreement with USI.[10]

USI later initiated a lawsuit (the "USI Litigation") against Wilson and Lyons, alleging that Wilson had violated USI's non-compete with the knowledge and assistance of Lyons.[11] The USI Litigation ultimately resulted in an eighteen-month injunction against Wilson and Lyons, issued by a Pennsylvania Court on August 8, 2014, which prohibited both from servicing any clients that moved with Wilson from

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[7]Compl. at ¶ 6 (A008). A copy of GMG's Complaint is attached and is included in Appellant's Appendix ("A007-A032") as Exhibit 2.

[8] _Id_. at ¶ 8. (A014).

[9] _Id_. at ¶ 9. (A015).

[10] _Id_. at ¶ 10. (A016).

[11] Compl. at ¶ 11. (A017).

USI to Lyons.[12] All of the customers which moved with Wilson from USI to Lyons either returned to USI or took their business to other brokerage firms.[13]

When Lyons hired Wilson, he executed the employment agreement, which contained non-competition, non-solicitation, and confidentiality provisions which restricted Wilson's ability to compete with Lyons for two years after the termination of his employment with the firm.[14] On July 18, 2016, Lyons paid USI $525,000.00 to settle the USI litigation. Consequently, the USI injunction was lifted, and the non-competition requirements ended. Thereafter, Lyons directed Wilson to solicit back the clients banned from Lyons by the injunction, although none, including OTG, decided to become clients of Lyons.

Partially as a result of his failure to solicit any of the formerly banned clients to come to Lyons, Wilson feared he would be terminated.[15] Wilson, who had known Viehweger and Thomas for years, met with them about possibly joining GMG.[16]

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[12] Id. at ¶ 12.

[13] Id. at ¶ 13.

[14] Id. at ¶ 14. One of Wilson's largest clients, OTG Management, LLC ("OTG") moved its business to Arthur J. Gallagher and Co. ("Gallagher") as a result of the injunction, although OTG later opted to move to GMG citing dissatisfaction with Gallagher's service. Compl. at ¶¶ 16-18. OTG was never Lyons' client. Compl. at ¶ 17. (A023)

[15] *Id*. at ¶ 22.

[16] *Id*. at ¶ 23.

Concerned about the risk the USI Litigation and the Lyons Agreement might pose on GMG's potential hiring of Wilson, Viehweger and Thomas sought legal advice from Douglas Maloney, Esquire ("Maloney") of Begley, Carlin & Mandio, LLP in late October of 2015 – ultimately declining to offer Wilson a job.

Almost a year later, after the USI injunction expired, GMG renewed its interest in hiring Wilson.[17] Wilson ultimately resigned from Lyons and accepted a verbal offer of employment with GMG on August 15, 2016.[18]

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[17] *Id*. at ¶ 26. (A022)

[18] *Id*. at ¶ 27. (A022)

B. The Underlying Chancery Court Litigation

On February 7, 2017, Lyons initiated a legal action against Wilson and GMG, captioned Lyons Insurance Agency, Inc. v. Wilson, et al., C.A. No. 2017-0092-SG, in the Court of Chancery of the State of Delaware (the "Underlying Matter"), by filing a Verified Complaint and Motion for Preliminary Injunction.[19] Lyons claimed Wilson was in violation of the terms of the Lyons Agreement through improper competition and that he had conspired with GMG to transfer clients, including OTG, to GMG.[20] Lyons' Complaint alleged three counts against GMG: civil conspiracy, aiding and abetting Wilson's breach of contract, and tortious interference with the Lyons Agreement.[21]

GMG hired Margolis as its counsel in the Underlying Matter, and Margolis assigned Michael R. Miller ("Miller"), Herbert W. Mondros ("Mondros"), Krista M. Reale, ("Reale"), and Christopher A. Tinari, ("Tinari") to work the case.[22] Although

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[19] *Id*. at ¶ 30.

[20] Compl. at ¶ 30.

[21] *Id*. at ¶ 31.

[22] *Id*. at ¶¶ 32-34.

doing so presented an obvious conflict of interest, Margolis also represented Wilson, without obtaining a written conflict waiver from their clients.[23]

In an April 26, 2017, email from lead counsel, Miller, to Mondros, Miller admitted:

> "Over the last few weeks, it has become clear to e that I am wholly inexperienced with how to handle litigation in Chancery Court."

On July 12, 2017, the Chancery Court denied the preliminary injunction, noting what served as a liquidated damages clause in the agreement precluded a finding of incomparable harm necessary to support the injunction.[24]

On August 8, 2017, the Court granted GMG's Motion to allow discovery.[25]

Extensive discovery ensued and GMG produced over thirty-two thousand pages of documents.[26] Margolis, by its own admission, was not properly equipped to defend GMG in the Underlying litigation,[27] nor was it capable of adequately handling the discovery in the case.

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[23] Id. at ¶ 35. As Wilson was in violation of the Lyons Agreement, the dual representation was directly contrary to the interests of GMG, as is often the case in litigation involving non-compete agreements.

[24] See Memo Op. (dated Sept. 28, 2018) by Vice Chancellor Glasscock.

[25] Id.

[26] Id. at ¶ 41.

[27] Id. at ¶¶ 42-44.

On February 23, 2018, GMG, Wilson, and Lyons all moved for summary judgment – with GMG and Wilson seeking the dismissal of all counts.[28] The argument presented in Margolis' Opening Brief with regard to Lyons' tortious interference claim set forth the elements of the claim, but offered no factual or legal analysis of the elements, and their Reply Brief did not mention the claim at all.[29] By Memorandum Opinion dated September 28, 2018, the Vice Chancellor granted in part and denied in part Lyons' Motion for Summary Judgment. The Court found that Wilson's conduct impaired Lyons' relationship with prospective customers, Wilson breached the terms of the agreement. The Court, however, dismissed the aiding and abetting[30] counts set forth in Lyons Complaint, but denied summary judgment on the tortious interference claim, on the basis that the "factual record is not sufficiently developed as to whether GMG's actions satisfy the reminder of the tortious interference requirement."

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[28] Compl. at ¶¶ 58-59.

[29] Id. at ¶¶ 62 and Exs. 4 and 5. The Defendants filed their Reply Brief on March 29, 2018. See transaction ID 61855982.

[30] The Court also granted in part and denied in part GMG's Motion for Summary Judgment.

GMG subsequently terminated Margolis and engaged Laurence V. Cronin, Esquire, of Smith Katzenstein & Jenkins LLP ("SKJ") to continue litigating the Underlying litigation.[31] Based upon SKJ's advice, GMG immediately notified Wilson he would need to retain separate counsel.[32] SKJ quickly discovered significant deficiencies in Margolis' earlier representation of GMG, including finding documents and communications with Maloney seeking a legal opinion about GMG's consideration of hiring Wilson, which should have been produced to Lyons.[33] These documents had not been previously produced. SKJ completed a supplemental document production and upon receipt of the documents, Lyons moved for sanctions and the Court sanctioned GMG for discovery violations.[34]

On December 9, 2020, on the eve of the scheduled trial regarding damages, Wilson submitted a supplemental Affidavit ("Wilson Affidavit"), wherein he dramatically changed the story he presented of the underlying facts during his earlier deposition, and his subsequent hearing testimony, stating that he engaged in a scheme with Viehweger, Thomas, and Redd to violate the Lyons Agreement.[35]

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[31] *Id*. at ¶ 90.

[32] Id. at ¶ 91.

[33] Compl. at ¶¶ 92-94.

[34] Id. at ¶¶ 95-99.

[35] Id. at ¶ 100-101 and Ex. 8; See suppl. Wilson aff., Dkt. No. 183.

Wilson's Affidavit stated these individuals conspired to have OTG transfer all of its business to GMG and that Wilson would join GMG at the conclusion of the USI Litigation.[36] In essence, Wilson essentially claimed that he perjured himself during the course of the Lyons litigation, up until the time that he executed the Wilson Affidavit.

SKJ immediately requested a sixty-day extension of the trial date to allow for limited discovery regarding the assertions made in Wilson's Affidavit, most importantly the deposition of Redd. This request was denied by the Chancery Court.[37] A few hours later, Lyons and GMG informed the Court that they had reached an agreement in principle to settle the claims between them.[38] Thus, the trial on December 10 was limited to determining the extent to which Lyons was damaged by Wilson's conduct.

Wilson testified at the damages hearing – contrary to his earlier sworn testimony but consistent with his affidavit – that he had conspired with GMG to

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[36] Id. at ¶ 102. E.g., id. ¶ 11. Per Wilson, this plan was first conceived over breakfast in early 2016 and culminated with a lunch sometime in May of that yar. See id ¶¶ 11-14.

[37] Id. at ¶¶ 104-05.

[38] See Ltr. Re Partial Settlement, Dkt. No. 185.

leave Lyons to service his Book of Business at GMG, and further to lie about those facts in the Lyons litigation.[39]

At trial on December 10, 2020, Lyons presented its evidence of damages and made a post-trial oral application for fee-shifting.[40] Wilson responded in writing on January 7, 2021.[41] GMG filed its response in opposition to Lyons Motion for Sanctions and fee shifting on January 10, 2020.[42]The Plaintiff submitted its reply on January 14, 2021, and the Chancery Court considered the matter submitted for decision as of that date.[43]

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[39] E.g., Trial Tr. 21:4-25:20, Dkt. No. 188. He also testified that, while still employed by GMG, he felt pressure from the principals there to "stick to the [original, false] story" that there had been no such plan throughout this litigation. Trial Tr. 23:24-24:18. After being let go from GMG, Wilson claimed that he now wanted to "set the record straight," clear his conscience, and "let the chips fall where they may." Id. 25:18-25:20.

[40] See generally Trial Tr.

[41] Def.'s Post-Trial Opp'n Br., Dkt. No. 189.

[42] Transaction Id. 64606900

[43] Pl.'s Post-Trial Reply Br., Dkt. No 191.

C. THE SUPERIOR COURT MALPRACTICE COMPLAINT AGAINST MARGOLIS

On July 1, 2021, GMG filed this legal malpractice action against Margolis, alleging that Margolis' representation in the Lyons litigation fell well below the applicable standard of care. Specifically, GMG claimed, inter alia, that Margolis was negligent in: (1) failing to disclose to GMG, at the time that it was retained, that it was not competent to handle the Lyons litigation, (2) that it unjustifiably failed to recognize the potential conflict of interest in simultaneously representing both GMG and Wilson, (3) that its briefing on the tortious interference count was so deficient that it all but guaranteed failure in having the Chancery Court dismiss that count and (4) that the Margolis attorneys were not competent to handle most portions of the discovery in the Lyons litigation, ultimately resulting in sanctions against GMG. On September 17, 2021, Margolis filed its Answer, denying the allegations of the Complaint, and took the position that the Wilson affidavit was the reason in support of GMG's decision to settle the Lyons litigation, rather than because of any deficiencies in Margolis representation.

Margolis filed its Motion for Summary Judgment in the Court-below on March 22, 2022, and its on Opening Brief on April 12, 2022. GMG filed its

Memorandum of Law in Opposition to Defendant's Motion on May 2, 2022,[44] and Margolis filed its reply Brief on May 22, 2022.

The Court-Below heard oral argument on January 4, 2023, and on April 10, 2023, the Court issued its opinion, granting Margolis' Motion for Summary Judgment.[45]

GMG timely filed its Motion for Reargument on April 17, 2023, and Margolis filed its Response on April 21, 2023. The Court issued its Order on May 17, 2023, denying GMG's Motion.[46]

GMG filed Notice of Appeal on June 20, 2023. This is Appellants Opening Brief in its Support of its Appeal.

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[44] GMG Ins. Agency v Margolis Edelstein, 2023 WL 2854760, at *5 (Del. Super.). Exhibit 3. (A079-A094)

[45] See, Exhibit 1. (A143-A161)

[46] Exhibit 4. (A166-A170)

ARGUMENT

I. THE SUPERIOR COURT ERRED IN HOLDING AS A MATTER OF LAW, THAT THE WILSON AFFIDAVIT CONSTITUTED AN INTERVENING, SUPERSEDING CAUSE, THEREBY EXTINGUISHING THE LIABILITY OF THE DEFENDANT, DESPITE THEIR ADMITTED NEGLIGENCE.

A. Question Presented

1. Did the lower court commit an error of law in concluding that the Wilson affidavit was an intervening superceding cause, which prompted GMG to settle the case against it, and therefore extinguish Margolis' admitted negligence, despite the fact that questions of causation, particularly superceding cause, are rarely susceptible to resolution, except by the factfinder.

B. Standard and Scope of Review

The appellate standard of review, following the grant of a motion for summary judgment, requires this Court to examine the record to determine whether, viewing the facts in the light most favorable to the nonmoving 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.[47]

In Vanaman v. Milford Memorial Hosp., 272 A.2d 718, 720 (Del. 1970), the Supreme Court stated: "It is elementary, of course, that a summary judgment may

[47] Benge v. Davis, 553 A.2d 1180, 1182 (Del. 1989).

be granted only if, on undisputed facts, the moving party establishes that he is entitled to that judgment as a matter of law. Any application for such a judgment must be denied if there is any reasonable hypothesis by which the opposing party may recover, or if there is a dispute as to a material fact or the inferences to be drawn therefrom. As in all summary judgment cases, the facts shall be stated in the light most favorable to the party against whom summary judgment is requested."[48]

The scope of review on appeal of a decision on summary judgment is de novo consideration, pursuant to which the Supreme Court may review the entire record, including the pleadings and any issues such pleadings may raise, affidavits and other evidence in the record, as well as the trial court's order and opinion.[49] From this review, the Court is free to draw its own conclusions with respect to the facts if the findings below are clearly wrong and if justice so requires, particularly where the findings arise from deductions, processes of reasoning or logical inferences.[50]

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[48] Hazewski v. Jackson, 266 A.2d 885, 886 (Del. 1970).

[49] Pike Creek Chiropractic Ctr. v. Robinson, 637 A.2d 418 (Del. 1994).

[50] Dutra de Amorim v. Norment, 460 A.2d 511 (Del. 1983); Fiduciary Trust Co. v. Fiduciary Trust Co., 445 A.2d 927 (Del. 1982).

Nonetheless, the Supreme Court will view the acts in a light most favorable to the nonmoving party.[51] The appellate court then determines whether there is an issue of fact for trial which, if resolved in favor of the nonmoving party, would entitle the nonmoving party to judgment. Id. Stated another way, the Court determines whether under all the circumstances the moving party is entitled to summary judgment. [52]

[51] Alexander Indus., Inc. v. Hill, 211 A.2d 917 (Del. 1965).

[52] Brunswick Corp. v. Bowl-Mor Co., 297 A.2d at 69. See also, Delmarva Power & Light Co. v. City of Seaford, 575 A.2d 1089 (Del. 1990); Gilbert v. El Paso Co., 575 A.2d 1131 (Del. 1990).

C. Merits

1. CAUSATION IS ALMOST ALWAYS A QUESTION OF FACT TO BE DETERMINED BY THE FACTFINDER.

Delaware courts have routinely held that "[i]ssues of causation are rarely suitable for summary disposition."[53] "Delaware recognizes the traditional 'but for' definition of proximate causation." [54]Accordingly, "a proximate cause is one which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred."[55]

2. INTERVENING, SUPERCEDING CAUSE IS ALSO NEARLY ALWAYS A FACT QUESTION.

The Delaware Supreme Court has made clear that the question of superseding causation is almost always left to the jury. [56] "This is so even in cases

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[53] Wash. House Condominium Ass'n of Unit Owners v. Daystar Sills, Inc., 2017 Del. Super. LEXIS 388, at *58 (Del. Super. Ct. Aug. 8, 2017).

[54] Duphily v. Delaware Elec. Coop., Inc., 662 A.2d 821, 828 (Del. 1995).

[55] Id. at 829. (Internal quotation omitted) (emphasis in original).

[56]Duphily v. Delaware Elec. Co-Op, Inc., 662 A.2d 821, 830-831 (Del. 1995). See also, Laws v. Webb, 658 A.2d 1000, 1007 (Del. 1995). The Superior Court's opinion itself acknowledges that "Deciding superseding cause is usually a jury question…" Memo Op. at 10. See also, West v. Flonard, Del. Super., C.A. No. 08C-11-220 JRJ. Jurden, Pres. J. (Feb. 17, 2011) (Holding, inter alia, that summary judgment on issue of superseding cause was inappropriate, as it is usually a jury question).

where there is no serious dispute concerning the material facts, if the inferences to be drawn therefrom are reasonably capable of more than one conclusion."[57] In Buford v. Ligon,[58] this Court stated:

> "Through both Peterson[59] and Rogers,[60] the Supreme Court relayed one underlying principle on the issue of foreseeability: questions of foreseeability are jury questions and the unique characteristics of the particular [incident] should not be considered over other facts."[61]

However, an intervening cause is considered a superseding cause which breaks the chain of causation, if the act or event is "neither anticipated nor reasonably foreseeable by the original tortfeasor."[62] "If the intervening negligence of a third party was reasonably foreseeable, the original tortfeasor is liable for his negligence because the causal connection between the original tortious act and the resulting injury remains unbroken." However, if "the intervening negligence was not reasonably foreseeable, the intervening act supersedes and becomes the sole

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[57] McKeon v. Goldstein, 164 A.2d 60, 262 (Del. 1960).

[58] Del. Super., C.A. No. K17C-08-031 NEP, (Consolidated), Primos, J. (Nov. 30, 2021)

[59] Peterson v. Del. Food Corp., 2000 Del. Super., LEXIS 478, at *2 (Del. Super., Dec. 28, 2000), rev'd, 788 S.2d 132 (Del. 2001).

[60] Rogers v. Del. State University, 2005 Del. Super., LEXIS 341 at *7 (Del. Super., Oct. 5, 2005) aff'd in part, rev'd in part, 905 A.2d 747 (Del. 2006).

[61] Id., citing Peterson, 2001 Del. LEXIS 529.2001 WL 1586831 at *2.

[62] Duphily, 662 A.2d at 829.

proximate cause of the plaintiff's injuries, thus relieving the original tortfeasor of liability."[63]

GMG respectfully submits the Court-Below should not have usurped the function of the jury and mistakenly concluded that there could be "no reasonable difference of opinion", as to the conclusion reached. Under the circumstances of this case and especially where, as here, Margolis has admitted negligence in, inter alia, its handling of discovery, the Court should have followed the usual and customary practice and left this factual question to the finder of fact.

[63] *Id.*

3. ALTHOUGH THE WILSON AFFIDAVIT WAS AN UNUSUAL EVENT, IT WAS NOT A SUPERSEDING CAUSE OF DEFENDANT'S NEGLIGENCE.

Wilson's Affidavit declaring that his prior testimony was perjury was certainly an unusual event, but it was not related to, or have any effect on, Margolis' failure to be competent to defend GMG, to build a sufficient case, serve sufficient discovery or obtain assistance on a matter that they admitted in writing in internal emails to "being in over their heads". By failing to adequately develop a sufficient record, especially regarding that of a co-defendant, nearly guaranteed that if Wilson's position – or his prior testimony – became divergent with that of GMG, GMG would not be in a position to respond to Wilson's reversal.

Margolis' argument that Wilson's last-minute submission of a perjured affidavit is a superseding cause, which breaks the chain of causation which runs between Margolis' failure to have GMG summarily dismissed from the Underlying Matter, and the damages GMG incurred as a result, is wholly unpersuasive. At most, Wilson's act was an intervening cause, i.e., one which does not break the causal chain.[64]

[64] GMG notes that "Superseding cause" is a defense typically argued in the context of a personal injury action, and not in legal malpractice cases. (See, Exhibit 3 pages 10-16) The underlying Actions were preserved in Plaintiff's Motion for Reargument. (See, A155-A161).

Intervening causes come "into active operation in producing an injury subsequent to the negligence of the defendant."[65] Delaware courts have "long recognized that there may be more than one proximate cause of an injury," and "[t]he mere occurrence of an intervening cause … does not automatically break the chain of causation stemming from the original tortious conduct."[66]

There is no compelling reason why the Court-Below mistakenly decided to usurp the province of the fact finder and to incorrectly decide this issue as a matter of law. This was especially true in light of Margolis' admission, in writing, as to several instances of its own legal malpractice.

Margolis had twenty (20) months to gather evidence sufficient to demonstrate that GMG could not be held liable for the tortious interference with the contract claim alleged by Lyons. However, the record is devoid of any effort by Margolis to obtain any evidence to rebut this claim, despite the fact, that, inter alia, none of Lyons' clients previously serviced by Wilson ever "defected" to GMG. To date, Margolis has failed to offer any explanation as to why it chose not to obtain evidence necessary to support its position that the tortious interference claim should have been dismissed, at least at the summary judgment phase of the Lyons litigation.

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[65] Duphily, 662 A.2d at 829. (Emphasis in original).

[66] Id.

II. THE SUPERIOR COURT ERRED AS A MATTER OF LAW BY FINDING THAT THERE WERE NO GENUINE ISSUES OF MATERAL FACT.

A. Question Presented

1. Did the lower Court commit an error of law in concluding that there were not genuine issues of material fact, when there were several issues of diputed fact that precluded the grant of summary judgment.

B. Standard and Scope of Review

See supra.

C. Merits

The Court below erred as a matter of law in deciding, with little or no factual support, that there were no genuine issues of material fact that would preclude granting Margolis' Motion for Summary Judgment. In fact, GMG submits that there were at least two (2) genuine disputes regarding material fact, that make the lower Court's decision erroneous. First, was Wilson's affidavit, and his "revised" testimony at the December 10, 2020, hearing true, or was his pre-affidavit testimony in the Lyons litigation the truth? Second, although the Vice Chancellor initiated that he believed that Wilson's trial testimony was credible, there is no evidence regarding what role the affidavit had on GMG's decision to settle prior to Trial. Specifically, did GMG settle because the Vice Chancellor refused its emergency Motion to undertake discovery to obtain evidence – once and for all – that Wilson's pre-

affidavit testimony was true? Or, did GMG believe that it would not be able to offer sufficient evidence – with only one (1) days' notice – to rebut Wilson's (now) recanted testimony. Or, did GMG decide to settle because it believed that the obviously now frustrated Chancellor might, inter alia, use the higher of the two (2) methods proffered by Lyons to support the award of damages to Lyons, if GMG continued its vigorous defense of the litigation? Since there was no evidence proffered regarding precisely why GMG settled, the conclusion that it settled solely because of the Wilson affidavit is simply not supportable.[67] Hence, while the Wilson affidavit was "one of the considerations that GMG weighed in its decision to settle, it was the multifarious instances of professional negligence – by Margolis – either independently or cumulatively – that caused damage to GMG and set the state for Wilson to ultimately recant his prior testimony.

[67] GMG submits that the only credible evidence as to why GMG settled could only come from the two (2) GMG principals, or from Mr. Cronin, Esquire, and that none of their testimony regarding this issue was in fact solicited or obtained.

III. THE COURT ERRED AS A MATTER OF LAW BY FAILING TO RECOGNIZE THAT, DUE TO THE MARGOLIS' MULTIPLE INSTANCES OF NEGLIGENCE, WHETHER INDEPENDENTLY OR CUMULATIVELY, SET THE STAGE FOR WILSON'S INDEPENDENT DECISION TO RECANT HIS PRIOR TESTIMONY, THEREBY PROMPTING GMG TO RE-EVALUATE ITS POSITION AS TO WHETHER TO CONTINUE TO DEFEND THE LYONS LITIGATION.

A. Question Presented

1. Did the Superior Court err as a matter of alw in failing to recognize that, as a resullt of Margolis' multiple instances of negligence, beginning first with its acknowledgment tha tthey were not competent to handle the Lyons litigation, set the stage for Wilson to declare – at the "eleventh hour" – that his prior testimony was perjurous?

B. Standard and Scope of Review

See supra.

C. The Merits

The multifarious instances of the negligence of Margolis set the stage for Wilson to ultimately recant his prior testimony. For instance:

1. Margolis privately acknowledged that they were not competent to represent GMG in the Lyons litigation.

The alleged negligence of the Margolis attorneys began from the moment they were hired, as Mondros later acknowledged in his April 6, 2017, email, that

the firm was not qualified to undertake this representation.[68] Specifically, Mondros admitted, in a confidential internal email dated April 6, 2017, that

> "In truth, we are ill-equipped to engage in this sort of litigation. I have been smoke and mirroring it in our D & O cases to date."

The Margolis attorney's internal acknowledgement that they were not competent to represent GMG in the Lyons litigation all but guaranteed that the result against GMG was going to be disastrous. And, not surprisingly, it was.

2. Margolis unjustified failure to acknowledge that there was a potential conflict of interest in simultaneously representing GMG and Howard Wilson.

Margolis, ostensibly because of its lack of experience and sophistication in this area of the law, negligently failed to advise GMG that Wilson should be represented by separate counsel, an obvious failure in judgment that was immediately recognized as a liability by SKF, which prompted GMG to notify Wilson that he needed to retain his own independent counsel.

3. Margolis' failure to adequately brief and argue in favor of dismissing the tortious interference count of Lyon's Motion for Injunction.

Margolis failed to develop the factual record necessary to defeat Lyons' claims against GMG.[69] For instance, Margolis failed to ask Viehweger and

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[68] Mondros never bothered to inform his (former) client – GMG – that he was not competent to represent them in the Lyons litigation.

[69] Compl. at ¶ 50.

Thomas if they consulted with an attorney prior to GMG's hiring of Wilson, and specifically any discussions about whether the hiring would violate the Lyons Agreement.[70] As a result, Margolis never consulted or deposed Maloney, whose testimony and documentary evidence was critical to show GMG's lack of intent – a necessary element to the tortious interference claim.[71]

The Court below erred in its failure to account for the fact that but-for its failure to develop the underlying factual record and to properly brief GMG's underlying arguments for summary judgment on Lyons' tortious interference claim, GMG would not have been in a position where the last-minute testimony of Wilson would place its defense of the case in jeopardy. Wilson's independent decision to later recant his earlier testimony and to then lie about a conspiracy between GMG, Wilson, and others, to violate Lyons' employment agreement could not have had any effect on GMG. Simply put, had Margolis submitted a cogent legal argument in its brief in support of its Summary Judgment Motion, then GMG would have already been out of the case prior to Wilson's affidavit.

Had Margolis properly developed the record, as detailed above, and properly

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[70] Id. at ¶ 48.

[71] Id. at ¶¶ 54-57. Similarly, GMG submits that Margolis should have deposed OTG's general counsel Chris Redd ("Redd"), whose testimony would have confirmed there was no conspiracy between Wilson, GMG, and OTG to violate the Lyons Agreement's terms. Id. at ¶¶ 51-53.

briefed and argued GMG's request for summary judgment on Lyons' tortious interference count, Lyons would not have survived summary judgment on the claim as they could not satisfy the last three elements of the claim.[72] There was simply no evidence to support Lyons' argument that GMG intended for Wilson to violate the Lyons Agreement or that it encouraged him to do so, thereby preventing Lyons from establishing the intent required to prove the tortious interference claim.[73] Similarly, proper development of the record and briefing by Margolis would have shown that Lyons could not make a prima facie showing of an improper purpose or damages, the last two elements of the claim.[74] Nevertheless, Margolis failed in its duties in this regard and the Court denied summary judgment in GMG's favor regarding the tortious interference claim.[75]

GMG was in a good position to win its defense case on its Cross Motion for Summary Judgment before the Chancery Court. In fact, the Vice Chancellor dismissed all of the claims by Lyon's against GMG, except for the claims of conspiracy and tortious interference. There is unfortunately no doubt, however, that Defendant could not win its argument on the intentional interference claim, based on the egregious lack of proper argument submitted by Margolis in the Opening Brief as written.

> "[Lyon's] cannot establish that there was any unlawful or intentional act by either [Wilson or GMG] or that any damages resulted

[72] *Id*. at ¶ 63.

[73] *Id*. at ¶¶ 66-73.

[74] Compl. at ¶¶ 74-84.

[75] *Id*. at ¶ 89.

> from such unlawful or intentional act since the clients at issue were never "prospective" clients of Lyons as discussed supra. As such, [Lyon's] claim for civil conspiracy and tortious interference must fail."

That is all that Margolis wrote and submitted on the crucial issue of tortious interference (Count III). It is patently deficient. This combined one sentence argument is so poorly drafted as to be virtually nonsensical. Moreover, the argument fails to apply the law to facts.[76] There is no doubt that the Vice Chancellor could not possibly rule in favor of GMG on these issues, notwithstanding the absence of provable damages by Lyons on the tortious interference claim. It was this atrocious argument on 2 important counts that otherwise kept GMG from being dismissed.

The Court-Below mistakenly failed to account for the fact that but-for Margolis' failure to make any effort to develop the record, and to properly brief GMG's underlying argument for summary judgment on Lyons' tortious interference claim, GMG would not have been in a position to address and respond to changed last-minute testimony of Wilson. Wilson's independent decision to later lie about a conspiracy between GMG, Wilson, and others to violate Lyons' employment agreement could not have had any effect on GMG, because, simply put, GMG would have been out of the case well before Wilson recanted his testimony.

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[76] Finally, the short statement several times referring to "supra", does so without citing to the prior content and pages of the Brief.

4. **The Discovery debacle**.

In an email to Miller, Mondros shockingly confessed that:

> They are probably correct that we are using an obsolete tool to do this discovery. In truth, we are ill-equipped to engage in this sort of litigation … we have not been able to access the documents they produced, and we are prejudiced as a result.[77]

Miller similarly confided to Mondros that:

> "Over the last few weeks, it has become clear to me that I am wholly inexperienced with how to handle litigation in Chancery Court. I was unaware of Delaware's comprehensive e-discovery requirements and initially treated discovery as I would in a PA/NJ case, producing documents in PDF format without metadata. I complained when we received over 100,000 pages of documents in an e-discovery format that we could not open or review.
>
> After speaking with Sarah, and also with Deniz Uzel and Kyle Wu (both Philadelphia associates who went to Widener), it has become clear to me that it is expected of those litigating in Delaware to produce documents and information in a manner that I am not familiar with. As a result of this late discovery, and as you know, we are severely behind the 8-ball in discovery. Opposing counsel is threatening to seek an adverse inference if we do not complete document production this week, which is next to impossible."[78]

As a result of Margolis' admitted incapability to compentently handle discovery, Lyons subsequently moved for sanctions, and fee shifting, which the Vice Chancellor granted.

These multiple instances of negligence set the stage for the mischief that untimately resulted: Wilson revising his testimony at the "eleventh hour".

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[77] Id. at ¶ 43 and Ex. 2.

[78] Id. at ¶ 44 and Ex. 3.

CONCLUSION

For all the forgoing reasons, Plaintiff below/Appellant herein, GMG Insurance Agency, respectfully requests that the the Superior Court's April 10, 2023 Opinion and Order granting Defendant Below/Appellee, Margolis Edelstein's Motion for Summary Judgment, should be reversed and the case remanded back to the Superior Court for trial on the merits.

TRIAL COURT'S JUDGMENT AND RATIONALE

In an Opinion dated April 10, 2023, Judge Johnston opined that there were no genuine issues of material fact in dispute and granted Margolis' Motion for Summary Judgment. The judge went further to state that there was no reason to conclude that Defendant's actions breached the standard of care in developing the factual record.[79]

GMG filed a Motion for Reargument, stating that the Court should have followed the usual and customary practice and left the factual question to the finder of fact. The Court denied the Motion.[80]

Respectfully submitted,

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[79] This is incorrect, as Margolis acknowledged in an internal email that they were "ill-equipped to engage in this sort of litigation … we have not been able to access the documents they produced, and we are prejudiced as a result." This fact is further belied by the fact that GMG was sanctioned for failure to provide complete discovery responses.

[80] A166-A170.