IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S ANSWERING BRIEF

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APPELLEE'S OPENING BRIEF

NATURE OF PROCEEDINGS

This is a legal malpractice action. Plaintiff-Appellant GMG Insurance Agency ("GMG") appeals from the trial court's Order that properly held that the evidence of record, including GMG's own admissions, precluded a finding of causation as a matter of law, as an unforeseeable event between the alleged malpractice and the injury nearly two years later was a superseding cause. More specifically, some twenty (20) months after GMG terminated Defendant-Appellee Margolis Edelstein ("Margolis") as GMG's counsel in the underlying lawsuit brought by Lyons Insurance Agency, Inc. ("Lyons"), and on the eve of trial of the Lyons Action,[1] GMG's co-defendant and former employee Howard Wilson ("Wilson") filed a Supplemental Affidavit recanting his prior sworn testimony and testifying that he and GMG conspired to violate a restrictive covenant in Wilson's employment agreement with Lyons. GMG then promptly settled the Lyons Action for twice what it could have settled for 20 months earlier. The trial court properly found that Wilson's Supplemental Affidavit was an unforeseeable event which constituted a

[1] Lyons Insurance Agency, Inc. v. Howard Wilson and GMG Insurance Agency, C.A. No. 2017-0092-SG (Del. Chanc.).

superseding cause breaking the chain of causation between any alleged malpractice and GMG's injury—its settlement of the Lyons Action—more than two years later.

GMG admitted that despite all of Margolis's prior alleged failings more than two years earlier, it was fully prepared to try the Lyons Action, and was confident of winning at trial, right up until it learned of Wilson's new and dramatically different version of the facts. The only thing that changed was Wilson's Supplemental Affidavit, which "gravely jeopardized GMG's legal position," and caused GMG to settle that Action in order "to limit its exposure to a sizeable verdict," and avoid the "very tangible threat of the Court issuing a decision describing GMG, Viehweger, and Thomas engaging in an unsavory conspiracy."[2] GMG admitted that it did not anticipate Wilson's Supplemental Affidavit,[3] and produced no evidence to support an inference that an affidavit that either admitted to prior perjury, or was itself perjury, was reasonably foreseeable to Margolis who had been discharged twenty months before. Thus, the trial court properly concluded that Wilson's Supplemental Affidavit constituted a "superseding cause" that broke the chain of causation and precluded any finding of liability on the part Margolis —

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[2] A020-A021, ¶¶ 103, 106, 107.
References to "A_" are to pages in Appellant's Sept. 6, 2023 Amended Appendix.
References to "B_" are to pages in Appellee's Appendix.

[3] B773, ¶4.

even if Margolis was negligent, which Margolis denies and which the Record does not support.

SUMMARY OF THE ARGUMENTS

1. Denied. The Superior Court both understood GMG's theory of Margolis' liability, and properly applied Delaware's law of superseding cause.

2. Denied. The Superior Court properly understood that granting summary judgment is discretionary, and that GMG's argument that it would have been entitled to summary judgment on Lyons' tortious interference claim, if only it had been briefed differently, was entirely speculative. Indeed, in view of the suspicious timing of GMG's employment of Wilson, and the inherently subjective nature of GMG's "good faith" and "no intent" defense, summary judgment in the underlying case was always unlikely at best. Moreover, even if summary judgment dismissing Lyons' tortious interference claim had been granted, any judgment could have been stricken or opened once Wilson changed his story. GMG's complaint is, in essence, that it was prevented from perpetrating a fraud upon the court.

3. Denied. Wilson's Supplemental Affidavit, in which Wilson retracted and contradicted his prior sworn testimony, and either committed perjury or admitted to prior perjury, some twenty months after Margolis no longer represented GMG, was so abnormal, extraordinary, and unforeseeable as to constitute a superseding cause. That GMG itself did not anticipate it confirms this conclusion.

4. Denied. The proper test of superseding cause, as stated by this Court, is whether the subsequent action that caused the actual harm was reasonably

foreseeable to the original tortfeasor. The test is not whether the subsequent action was theoretically "possible," but whether it was sufficiently likely to have been reasonably foreseeable. That a witness would change his prior sworn testimony on the eve of trial is not a usual or reasonably foreseeable consequence of failing to obtain summary judgment, and Margolis—which had been out of the case for twenty (20) months when it happened—could not reasonably have foreseen it.

5. Denied. Although witnesses can change their testimony and evidence is spoliated, perjury and spoliation are unusual occurrences which may be subject to criminal and other sanctions. If the integrity of evidence should foreseeably be questioned until the moment it is presented, summary judgment would never be appropriate.

6. Denied. Under the facts before it, the documentary evidence, and GMG's own admissions, the Superior Court did not usurp the function of the jury, as no reasonable person would find that Wilson current or prior perjury was reasonably foreseeable by Margolis, and no reasonable person could have concluded that Margolis' alleged negligence in handling discovery, over two years earlier, played any role in GMG's decision to settle the case it was fully prepared to try until Wilson filed his Supplemental Affidavit.

STATEMENT OF FACTS

The following facts were either conclusively proven by documentary evidence, admitted by GMG, or both, and were not genuinely disputed.

A. Wilson, USI, and Lyons

In 2014, Howard Wilson moved from his former employer, USI Midatlantic ("USI"), to Lyons. A number of Wilson's clients, including his largest, OTG, quickly followed him to Lyons. USI sued Wilson and Lyons for violating his restrictive covenant, and obtained a preliminary injunction, barring Wilson and Lyons from servicing the clients that had left USI for Lyons. Those clients were forced to take their business to other brokers, typically ones recommended by Wilson. OTG first went to Gallagher.

Lyons kept Wilson on, although he generated little new business, at a salary of $205,000 per year, and also paid to defend him against USI's continuing lawsuit. The plan was that Wilson would maintain his personal relationships with these former clients (*e.g.*, OTG), and entice them back to Lyons once Wilson and Lyons were no longer subject to the USI restrictive covenant.

In the fall of 2015, OTG, dissatisfied with Gallagher, agreed on Wilson's recommendation to move to GMG, effective January 1, 2016. In around the same

time period (October 2015), GMG consulted with an attorney (Douglas Maloney) about the possibility of hiring Wilson.[4]

On July 18, 2016, Lyons finally settled with USI, for $525,000. Wilson immediately took a vacation, spent a couple of weeks unsuccessfully trying to get his old clients back, resigned from Lyons effective August 12, and promptly moved to GMG on August 18, 2016, where OTG and some other clients had moved their business.[5]

[4] *See* A005, ¶24.

[5] *See* Sept. 28, 2018 decision on cross-motions for summary judgment in Lyons Action, at B142-143, B153, B154 n.105.

B. The Lyons Chancery Court Action

Lyons sued GMG and Wilson in Chancery Court in February 2017, seeking a preliminary injunction and damages (the "Lyons Action"). Margolis was hired to defend both GMG and Wilson.[6] Discovery proceeded on an expedited basis in advance of the hearing on Lyons' preliminary injunction motion. Although discovery initially presented a challenge for Margolis, it overcame its early difficulties, and successfully defended against Lyons' preliminary injunction motion. The court thought it likely that Wilson had violated his restrictive covenant, but that the liquidated damages clause in his contract made a preliminary injunction inappropriate.[7]

Both sides took additional discovery. In February 2018, both sides moved for summary judgment, which was argued in June 2018. On September 28, 2018, the Chancery Court granted Lyons' motion holding Wilson liable for breaching his contract, with damages to be determined later; granted defendants' motion to the

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[6] *See* Engagement Letter, A046-A048. Because GMG and Wilson both denied that Wilson was in violation of the Lyons non-compete Agreement, and GMG wanted Wilson to continue working for it and servicing clients, GMG's and Wilson's interests were completely aligned, and there was no conflict of interest at the time.

[7] *See* decision on motion for preliminary injunction, attached to Margolis' Answer as Exhibit A, pp. 15, 17 (B263, B265).

extent of dismissing a number of claims, including all claims against GMG except the tortious interference claim; and denied both cross-motions with respect to Lyons' claim against GMG for tortious interference with Wilson's restrictive covenant. In granting Lyons summary judgment against Wilson, the Court specifically found that Wilson had not made a good-faith effort to obtain the return of the clients he had brought to Lyons back to Lyons.[8]

On March 2, 2019, Michael Miller ("Miller"), one of the Margolis attorneys representing GMG and Wilson, emailed to GMG a detailed budget for the continued defense of the Lyons Action, including depositions of Joe Valerio of Lyons, and Chris Redd and Joe Ozalas of OTG.[9] GMG never accepted this budget and never authorized the additional discovery.

After the Chancery Court's summary judgment decision, from about October 2018 into 2019, the parties engaged in a drawn-out mediation process. At the beginning of January 2019, OTG left GMG for another broker. Eventually, the mediator advised Margolis that he thought Lyons would take $600,000 to settle the

[8] *See* B142-B143, B153, B154n.105.

[9] B464. Margolis' budget for additional depositions and other discovery, trial preparation and attendance, expert witness fees, and post-trial motions ranged from $161,250 to $188,750. *Id.* After terminating Margolis, GMG retained Laurence Cronin, who for the next 20 months took no additional depositions or other discovery, nor obtained any affidavits, even as he and GMG prepared to go to trial.

case. Exercising sound judgment for the benefit of its client, Margolis declared its willingness to take additional discovery to defend the case vigorously, but also urged GMG to pay the $600,000 to settle the case in emails in late March 2019. In his March 20, 2019 email, Miller stated that he had

> no issue with putting forward a vigorous defense, including depositions of Valerio and Joe and recalling Lyons' CFO and asking for a corporate designee prior to trial, but it stands to reason that we may not do better than the $600,000 which Lyons seemingly wants to settle the case.

Miller's March 20, 2019 email further outlined the situation and risks, and concluded:

> In short, my sincere and strong recommendation is to resolve this matter for $600,000. You may not like that outcome or that recommendation from me, but that is my recommendation. We can take our chances at trial, but I do not like our odds at obtaining a verdict in our favor significantly less than that amount, when including potential defense fees and costs. And, of course, there is always the risk that Judge Glasscock could find an award higher than the $600,000.

Despite Miller's sincere and strong recommendation, GMG refused to settle the case: In his response emailed on April 1, 2019, GMG's Thomas declared "We will NOT increase our offer."[10]

[10] *See* Miller-GMG emails, B460.

On April 10, 2019, Miller sent a follow-up email to GMG, referencing the previously sent budget and stating: "I also need to know whether you authorize me going forward with additional discovery on this. Since I sent the budget, I do not believe I have received a clear response."[11] GMG's response was to terminate Wilson's employment, terminate Margolis's representation in mid-April 2019, and hire Larry Cronin ("Mr. Cronin" or "Replacement Counsel") to represent GMG alone. Wilson also retained separate counsel.[12]

After being retained as GMG's new counsel, Mr. Cronin was given certain correspondence in which GMG had communicated with an attorney on the subject of whether or not to hire Wilson, some ten months before it actually did so. It is undisputed that GMG had not previously provided this correspondence to Margolis, despite having been asked about any due diligence it undertook before hiring Wilson.[13] Mr. Cronin produced this correspondence once GMG finally disclosed its existence to counsel, perhaps in an effort to show that GMG had acted in good faith (though it never asserted reliance on the advice of counsel as a defense), and Lyons

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[11] *Id.*

[12] *See* A018, ¶¶ 90-91; B240, ¶21-23.

[13] As GMG admitted, *see* B782, ¶¶ 45-46.

in turn moved for sanctions. At the argument on this motion on March 10, 2020, the Vice Chancellor expressed extreme skepticism as to GMG's position:

> THE COURT: What is the defense going to be if we go forward to trial? They certainly knew he had an employment agreement. They certainly knew that the litigation was being paid for by Lyons. As soon as the litigation is over, they hire him, and he comes over and services his former client. I'm struggling a little bit to see what the defense is going to be at this point.[14]

The Vice Chancellor accordingly invited the parties to renew their summary judgment motions: "There is no reason, is there, to go to a trial? *Couldn't we simply repeat the summary judgment motion*?" [Emphasis added][15]

Despite this invitation and GMG's current argument, GMG's Replacement Counsel (perhaps correctly reading the Vice Chancellor's "tea leaves") never renewed its motion for summary judgment.

The Chancery Court granted Lyons' sanctions motion to the extent of requiring that Thomas, Viehweger and Wilson be re-deposed, all at GMG's expense. But, in any event, Lyons never did re-depose those witnesses, and no costs were ever imposed on GMG.[16]

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[14] B181 – B182.

[15] B182

[16] B784, ¶¶ 51-52.

On or about June 9, 2020, fourteen months after GMG had fired and replaced Margolis, Lyons made a settlement demand on GMG of $750,000. GMG's Replacement Counsel called the demand "laughable." GMG rejected that demand, and made no counteroffer.[17]

Trial on damages and the claim for tortious interference was eventually scheduled for December 10, 2020. During the intervening period, GMG and its Replacement Counsel prepared for the trial. At no time did Replacement Counsel seek or obtain the depositions of Valerio, Redd or Ozala. At no time did Replacement Counsel express doubt about GMG's chances of success, or recommend that GMG settle the case — whether because of anything Margolis had done (or not done), or for any other reason.[18] Moreover, in a December 7, 2020 email to GMG's Thomas and Viehweger, their Replacement Counsel admonished them that "the credibility of both of you is key to our getting a good decision from the Court."[19]

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[17] *See* B775-B776, ¶¶ 14, 15, 16, & 17.

[18] *See* B776, ¶19, B782-B784, ¶¶ 47-50; A062; Email, B741.

[19] *See* email, B741. Replacement counsel's emphasis on the importance of Thomas's and Viehweger's credibility renders even more implausible the notion that GMG would ever have been entitled to summary judgment dismissing Lyons' tortious interference claim against it. Indeed, if Replacement Counsel had believed that GMG could obtain summary judgment, he could have re-filed the summary judgment motion at any time during the 20 months that he represented GMG. He never did.

That same day, December 7, 2020, just three days before the trial, Replacement Counsel emailed Chuck Thomas and Ron Viehweger to tell them that Wilson's counsel had called to advise that Wilson had told his counsel that morning that Wilson would testify that he and GMG had conspired to "park" OTG at GMG to await the time when Wilson was freed from the USI injunction so he could go work for GMG. GMG's Replacement Counsel reported that Wilson said

> that he may testify at trial that there was a plan in place for him to join GMG while the USI injunction was still pending, and that there are emails (that he no longer has access to) that demonstrate this plan. I told [Wilson's counsel] that I couldn't help but think this was part of [Wilson's] desperate scheme to push GMG to settle. That being said, if he testifies to those facts at trial, *and we don't have proof he is lying*, we are in deep shit. While apparently Howard was vague as to the details, he said that most of these secret communications were with Chuck. [Emphasis added][20]

A supplemental affidavit to that effect ("Wilson's Supplemental Affidavit") was filed on December 9, 2020, the day before the trial.[21] In his Supplemental Affidavit, Wilson expressly recanted his prior deposition and preliminary injunction hearing testimony (thus admitting to perjury), and stated under oath that he, GMG, and OTG had agreed, in a series of meetings and phone conversations in late 2015

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[20] *See* email, B762.

[21] B196-B199.

and early 2016, that OTG would move its business to GMG and that GMG would hire Wilson to service OTG and other clients as soon as he was no longer subject to the USI injunction.

Wilson's Supplemental Affidavit — in which he changed his prior sworn testimony and admitted to perjury — changed everything. As GMG's Complaint affirmatively alleges (A0020, ¶103), the Affidavit's assertions "gravely jeopardized GMG's legal position in the Underlying Matter,…" And GMG further "admit[ted] that prior to December 7, 2020, Plaintiff did not anticipate Wilson recanting or changing this testimony;"[22] GMG also "admits that until it received Laurence Cronin's December 7, 2020 email (Margolis Answer Exhibit I), GMG intended to defend itself in the Underlying Action at the hearing or trial then scheduled for December 10, 2020."[23]

Finally, in response to Margolis's First Set of Interrogatories, no. 41 [43], which asked GMG to "State when You first believed that Wilson would give testimony along the lines set forth in his December 9, 2020 Supplemental Affidavit," GMG responded:

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[22] *See* B773, GMG Answer to First Requests For Admissions, at no. 4.

[23] *See* B776, GMG Answer to First Requests For Admissions, at no. 19.

> On December 7, 2020, Howard Wilson's counsel contacted Replacement Counsel by phone and notified him that Wilson intended to change his original testimony, including the substance of the changes, and that he planned to submit and [*sic*] Affidavit to that effect. Replacement Counsel relayed this information to Ronald Viehweger and Charles Thomas and GMG's earlier expectations regarding Wilson's testimony at trial was altered accordingly.[24]

Wilson's Supplemental Affidavit thus caused GMG's condition to flip suddenly from confident of success to certain of defeat. Accordingly, just "[a] few hours later" from receiving the Supplemental Wilson Affidavit,[25] GMG agreed in principle to settle the case for $1.2 million.[26] — which was *twice* what it could have settled the case for 18 months earlier, in April 2019 (as Margolis had urged), $450,000 more than it could have done six months earlier, in June 2020, and the same amount ultimately awarded against Wilson after trial.

The trial went forward the next day against Wilson alone, and without GMG, to determine what damages Wilson owed Lyons. At the trial, Wilson testified about the conspiracy he claimed he and GMG had engaged in. On April 29, 2021, the

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[24] *See* A064.

[25] *See* April 29, 2021 Damages Opinion, B743-B760, at B753 (p.10).

[26] A021, ¶106. A reasonable inference can be drawn from this that GMG knew that Wilson's Affidavit was truthful, and knew that they could not rely on any testimony to the contrary. As such, that GMG's case is premised on the argument that because Margolis did not obtain summary judgment on the tortious interference claim, it was prevented from carrying out what would have been, effectively, a fraud on the Court.

Court found that Wilson and GMG had engaged in conspiracy and perjury, and awarded Lyons $1.2 million in damages against Wilson, plus partial attorney fee shifting as a result of the perjury.[27]

Wilson's Supplemental Affidavit — in which he changed his prior sworn testimony and admitted to perjury — was unexpected, unanticipated, extraordinary, abnormal, beyond the realm of normal experience, and was not reasonably foreseeable by Margolis—or anyone.

[27] *See* April 29, 2021 Damages Opinion, B745-B746, B754 and fn. 57.

C. The Instant Action And GMG's Complaint

The basis for GMG's claim is encapsulated in its entirely speculative assertion that

> Had Margolis' attorneys properly developed the factual record and properly briefed and argued GMG's Motion for Summary Judgment, Vice Chancellor Glasscock would have granted GMG summary judgment on Lyons' tortious interference claim – such that GMG would never have been in a position which required it settle with Lyons for $1,200,000.00.[28]

Nowhere in the Complaint does GMG allege that Wilson's Supplemental Affidavit, representing a last-minute 180-degree reversal of his previous sworn testimony, was reasonably foreseeable to Margolis while Margolis represented GMG and Wilson 20 months before. And nowhere in the Complaint does GMG allege any facts to support such a conclusion.

Further, GMG alleged that if Margolis had properly developed the factual record it would have been entitled to summary judgment because it would have shown that GMG lacked the requisite intent.[29] Yet intent is a subjective matter, raising issues of credibility[30] that preclude summary judgment.

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[28] A021, ¶109.

[29] A0151, citing A011, ¶¶ 56-57, A012-A0013, ¶¶ 63-65; A085, citing A019-A020, ¶¶ 66-73.

[30] As Replacement Counsel's Dec. 7, 2020 email to GMG (B741) stressed.

In this action, the parties exchanged extensive document productions, including Replacement Counsel's file, as well as responses to Interrogatories and Requests for Admissions. GMG's answers and admissions in response to Margolis' discovery requests, as well as the email correspondence and other documents attached to the pleadings and produced in discovery, formed the evidentiary basis for Margolis' Motion for Summary Judgment in the Superior Court.

D. Margolis' Summary Judgment Motion And Hearing

Margolis' Motion for Summary Judgment established that it had always been unrealistic that GMG could have obtained summary judgment on Lyons' tortious interference claim. It further established that nothing that Margolis had or had not done caused GMG or its Replacement Counsel to doubt that they would prevail at trial, or to consider settling the Underlying Lawsuit. The only thing that caused GMG to settle the Underlying Lawsuit was Wilson's last-minute Supplemental Affidavit. Further, GMG admitted that it never anticipated Wilson's Supplemental Affidavit. Margolis' Motion argued that the facts of the case fit precisely into this Court's description of superseding cause, and cited cases in which this Court upheld dismissal on summary judgment on that basis.

In response, GMG filed a Memorandum which argued simply that causation is generally an issue of fact, and cynically asserted that Wilson's abject perjury was not so abnormal, unforeseeable, or extraordinary as to constitute a superseding

cause.[31] As exhibits to its opposition, GMG attached another copy of its Complaint, and an email exchange between GMG and its Replacement Counsel from April 2019, to which Margolis was never privy, in which Replacement Counsel questioned Wilson's reliability.

At the argument on Margolis' Motion, on January 4, 2023, the trial court asked GMG's counsel to "be more specific with me. I mean, you know as we all know, summary judgment is no slam dunk usually, there's a lot of discretion that goes into it. So tell me what it is precisely Defendants should have done, in Plaintiff's opinion, that would have changed the outcome of the summary judgment motion at that time." GMG's counsel acknowledged "I think we all can agree that the Court does have discretion with respect to a motion for summary judgment," but failed to identify what, precisely, Margolis should have done that would have guaranteed summary judgment to GMG on Lyons' tortious interference claim.[32]

The trial court then asked GMG's counsel "[a]re you making that argument that it was reasonably foreseeable that Mr. Wilson would change his testimony? And if so, what is your support for or evidence reflecting that argument?" Counsel's response was illuminating:

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[31] A092.

[32] A119-A120.

> MR. IPPOLITI: But part of the reason that we do discovery and we do take depositions and serve discovery and prepare affidavits is precisely because that's always a possibility, it's always a possibility, it's always a possibility that witnesses will forget, or that they will perjure themselves, or that they will change their story, or, you know, neglect to commit to memory matters that are pertinent to the particular litigation.[33]

In other words, that is the purpose of *discovery*—and of course, Wilson *had already been deposed and had already testified in court*. But it is not why parties move for summary judgment, and it is not a reasonably foreseeable consequence of a failure to obtain summary judgment.

Finally, GMG's counsel acknowledged the strange and extraordinary nature of Wilson's last-minute about-face:

> I think the timing of this is also interesting, Your Honor, in the sense that … I think it's interesting that all of a sudden Mr. Wilson, who has essentially had the same story all the way through in support of the position that was also been advanced by GMG, he's terminated, and then all of a sudden he wants to come clean and, you know, because he's having an agony of conscience after years and years of protracted litigation.[34]

GMG, despite its close working relationship with Wilson, also could not foresee the abrupt reversal of his sworn testimony.

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[33] A124-A125.
[34] A125.

E. The Trial Court's Decision

The Trial Court entered its Opinion granting Margolis's Motion for Summary Judgment on April 10, 2023. (A01061-A1072). The court noted that Margolis had been successful in getting every claim against GMG other than the tortious interference claim dismissed.[35] The court then properly explained the summary judgment standard.[36]

The trial court noted that when it "asked Plaintiff what evidence demonstrated that it was reasonably foreseeable that Wilson would change his prior testimony, Plaintiff did not directly answer the question." Instead, Plaintiff argued that although it was not anticipated, it was reasonably foreseeable "because the changing of witness testimony is always a possibility." But, the court noted, "simply because something is possible, does not mean that it is reasonably foreseeable." Plaintiff was unable (and remains unable) to identify any concrete evidence, or even any inference, that Wilson's last-minute change of testimony should have been reasonably foreseeable to Margolis.[37] The court concluded:

> …the undisputed evidence demonstrates that settlement would not have occurred at the time it did, or in the agreed amount, but for the Wilson Affidavit. The evidence on the record does not show that Defendant could reasonably foresee – twenty months before the

[35] A145.
[36] A148 (citing cases).
[37] A149-A150.

> execution of the Wilson Affidavit – that Wilson would perjure himself by changing his prior sworn testimony with the Wilson Affidavit. Therefore, the Court finds the Wilson Affidavit was a superseding cause that broke the causal chain leading to the settlement of the Underlying Litigation.[38]

GMG filed a motion for reargument, which re-hashed its summary judgment motion arguments,[39] and which the Superior Court accordingly denied.[40]

[38] A153.
[39] A155-A161.
[40] A166-A168.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY HELD THAT WILSON'S SUPPLEMENTAL AFFIDAVIT, IN WHICH WILSON ADMITTED TO COMMITTING PERJURY, WAS A SUPERSEDING CAUSE THAT BROKE ANY CHAIN OF CAUSATION.

A. Question Presented

Did the Superior Court properly hold that the Wilson Affidavit, filed twenty months after Plaintiff fired and replaced Margolis, and in which Wilson either committed perjury or admitted to prior perjury, was an unforeseeable, extraordinary and superseding cause, breaking any chain of causation?[41]

B. Standard and Scope of Review

Summary judgment must "be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[42] "When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must

[41] Preserved at A065-A071; A074-A076.
[42] RCP 56(c); *Grabowski v. Mangler*, 938 A.2d 637 (Del. 2007).

set forth specific facts showing that there is a genuine issue for trial."[43] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[44]

> Pursuant to Delaware law, a valid action for legal malpractice must pass the following three-prong test:
>
> 1) Employment of the attorney;
>
> 2) Neglect of a professional duty by the attorney; and
> 3) Loss resulting from the attorney's neglect.
>
> In addition, in order to sustain the loss element, a plaintiff must demonstrate that, but for the attorney's neglect, the plaintiff would have been successful.[45]

On appeal from the trial court's grant of summary judgment, this Court's standard of review is de novo, and its scope of review is plenary.

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[43] RCP 56(e); *PNC Bank, N.A. v. Mueller*, C.A. No. S17C-11-015, 2019 WL 549587 (Del. Super., Feb. 12, 2019).
[44] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[45] *Oakes v. Clark*, 2012 WL 5392139 (Del.Super., Nov. 2, 2012), at *3, *aff'd*, 69 A.3d 371 (Table), 2013 WL 3147313 (Del., June 18, 2013).

C. Merits

1. As A Matter Of Law, Wilson's Supplemental Affidavit Is A Superseding Cause That Precludes Liability And Recovery; Superseding Cause Is Not A Question Of Fact Where, As Here, The Facts Are Undisputed And The Permissible Inferences Are Not Subject To Reasonable Dispute.

The description of what constitutes a superseding cause set forth in the well-established caselaw of this state fits the facts of this case exactly. Delaware follows the "but for" test of proximate cause and allows that there may be two or more proximate causes of an injury.[46] Although cases often use the terms interchangeably, our law distinguishes between an "intervening" cause and a "superseding" cause. An intervening cause is any negligence or action that is subsequent to the original negligent act. If it is the sort of action that could reasonably have been predicted or anticipated, it does not break the chain of causation nor relieve the prior tortfeasor of liability.

On the other hand, if it is the sort of action that is so unusual and abnormal as not to be reasonably foreseeable or predictable, it constitutes an entirely independent cause, breaking the chain of causation, and is a "superseding" cause. This Court explained this in *Duphily*:

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[46] *E.g.*, *Duphily v. Delaware Elec. Co-op., Inc*., 662 A.2d 821, 828-829 (Del. 1995).

> An intervening cause is one which comes into active operation in producing an injury subsequent to the negligence of the defendant. Restatement (Second) of Torts § 440 (1965); W. Page Keeton, et al., Prosser and Keeton on Torts, § 44 (5th ed. 1984). The mere occurrence of an intervening cause, however, does not automatically break the chain of causation stemming from the original tortious conduct. This Court has long recognized that there may be more than one proximate cause of an injury. Laws, 658 A.2d at 1007; Moffitt, 640 A.2d at 174; McKeon v. Goldstein, Del. Supr., 164 A.2d 260, 262 (1960). In order to break the causal chain, the intervening cause must also be a superseding cause, that is, *the intervening act or event itself must have been neither anticipated nor reasonably foreseeable* ***by the original tortfeasor***. Stucker v. American Stores Corp., Del.Supr., 171 A. 230, 233 (1934); 1 J.D. Lee & Barry A. Lindahl, Modern Tort Law: Liability & Litigation, § 4.07 (1994).[I]n a case of negligent conduct followed by an intervening act causing injury, liability of the [original] tortfeasor should turn on whether the risk of particular consequences is sufficiently great to lead a reasonable [person] ... to anticipate them, and to guard against them." [Emphasis added][47]

In *Stucker v. American Stores Corp.*, this Court explained that a new, independent and unexpected factor that is the actual cause of the injury complained of will break the chain of causation and bar recovery:

> Damage cannot be attributed to a given negligent act as the proximate cause, when it appears that subsequent to that negligence *a new and independent and unexpected factor intervenes which itself appears to be the natural and real occasion of the mischief*. … In Harrison v. Berkley, 1 Strob. (S. C.) 525, 47 Am. Dec. 578, it is held that the intervening negligence, if it be

[47] *Id.*, 662 A.2d at 829.

> such as to constitute an independent proximate cause as the sole legal cause.[Emphasis added; citation omitted][48]

This Court further observed that while proximate cause usually presents an issue of fact, it can be decided on summary judgment where the facts are admitted or otherwise undisputed and there is only one inference that can reasonably be drawn:

> The question of proximate cause is usually for the jury, as it is generally a mixed question of law and fact. 'But where the facts are undisputed and the inferences to be drawn from them are plain and not open to doubt by reasonable men, it is the duty of the court to determine the question as a matter of law.' Cooley on Torts (4th Ed.) 50, p. 121.[49]

In *McKeon v. Goldstein*, this Court explained that a prior remote cause that merely allows or fails to prevent a subsequent unrelated cause from causing injury cannot be the basis of liability:

> A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated and efficient cause of the injury

[48] 35 Del. 594, 171 A. 230, 232-233 (1934).

[49] *Id*. In *Stucker*, it was held that if the employer were negligent in sending a ten year-old boy out on a delivery through the busy streets of Wilmington, then it was predictable that the boy might encounter a negligent driver, and so the driver's negligence was not necessarily a superseding cause.

> even though such injury would not have happened but for such condition or occasion.[50]

It is hardly possible to think of a better summary of the basis for GMG's claim here — that failure to obtain dismissal on summary judgment "did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible." Indeed, GMG admits that it was Wilson changing his testimony and filing his Supplemental Affidavit that caused it to settle the case — a case it had always before stoutly resisted settling — on the eve of trial. GMG's complaint against Margolis is simply that Margolis failed to prevent Wilson from doing so. But Margolis had no control over Wilson, and no duty to prevent him from changing his testimony and filing his Supplemental Affidavit, and no ability to divine that he might someday do so. *McKeon* makes clear that these facts cannot support a claim.

Summary judgment based on superseding cause was granted in *MacDougall v. Mahaffy & Assocs., Inc.*, 2013 WL 1091005 (Del. Super., Jan. 22, 2013), at *3-*4, *aff'd on opinion below*, 2013 WL 3828512, 72 A.3d 502 (Del., July 19, 2013) (Table). The *MacDougall* court granted summary judgment to defendants that negligently designed an electrical system with a faulty breaker; plaintiff was nearly

[50] 53 Del. 24, 164 A.2d 260, 28 (1960). In *McKeon*, the issue was a jury question: whether the landlord who failed to insulate a hot steam pipe should have anticipated that a mother would put her infant child on a bed near the steam pipe, where it could come into contact with the pipe and be seriously burned.

electrocuted when he went to replace the breaker. The court held as a matter of law that plaintiff's negligent failure to ensure that the current was off and "locked" before attempting to replace the breaker, and not the need to replace the defective breaker itself, was the superseding cause of his injury.

Summary judgment was also granted to defendant based on superseding cause in *Sims v. Stanley*[51],where defendant damaged plaintiff's car while it was parked in a parking lot. Aware of the damage and believing that the car was not safe to drive, plaintiff nevertheless proceeded to drive it on several trips over the next two days, ultimately crashing into a tree at least in part because of the damage to the car. The Superior Court granted summary judgment to defendant, holding as a matter of law that plaintiff's continued driving of a damaged car she knew to be unsafe was unreasonable and therefore a superseding cause, and this Court affirmed. The Court explained:

> We find that there can be no reasonable difference of opinion that Sims's actions were extraordinary, risky and unforeseeable. The evidence in the record, even taken in the light most favorable to Sims, undisputedly shows she knew that the convertible top was not latched properly and that she did not seek to have it repaired before continuing to drive the car. Having identified the damage to her car and admitting that she found the car to be unsafe, Sims nevertheless continued to drive her car with the top only half-latched. Driving a car in that condition beyond what was necessary to seek repair exceeds what reasonable people would consider normal or minimally risky. Her actions did not seek to

[51] 2008 WL 853538, 945 A.2d 1168 (Del. 2008) (Table)

> protect her own safety in the face of a known risk and thus could not have been anticipated. We agree with the Superior Court judge's characterization of Sims's continued driving as being 'so flagrant in nature that it served to break the causal connection between Defendant's tortious conduct and Plaintiff's injury.' Therefore, Sims's actions superseded Stanley's negligence and became the sole proximate cause of the March 22 accident.[52]

While GMG repeatedly notes that issues of causation are "rarely" suitable for summary disposition, they sometimes *are* suitable for summary disposition, as *McDougall* and *Sims* demonstrate, and this is just such a case. Tellingly, GMG has not attempted to distinguish these cases.

Although none of these cases deals with facts precisely like those at issue, nevertheless, the Wilson Supplemental Affidavit neatly fits the definition of "superseding" cause set forth in the caselaw. Either Wilson committed perjury in his Supplemental Affidavit (as GMG must necessarily allege), or he confessed to a prior perjury of which Margolis (and, presumably, Replacement Counsel and even GMG) were unaware. *In either case* it constitutes an extraordinary and unforeseeable development, certainly outside of what could reasonably have been foreseen and anticipated—and especially outside what Margolis anticipated and could have foreseen. No reasonable person could deny that Wilson's Supplemental

[52] *Id*., at ¶6, 2008 WL 853538, at *2.

Affidavit constituted "a new and independent and unexpected factor … which itself appears to be the natural and real occasion of the mischief" of which GMG complains."[53] Margolis could not have anticipated that its former client, Wilson, would turn "rat" more than two years after the denial of the summary judgment motion. GMG produced no evidence to the contrary. Indeed, GMG itself never anticipated such a development, as *GMG* admits.

GMG admits that right up until the time, three days before the trial, that Wilson's attorney advised Mr. Cronin, and Mr. Cronin advised GMG, that Wilson would testify that he and GMG had conspired together, GMG was fully prepared to try the case and did not anticipate Wilson changing his testimony. GMG expressly admits that it "did not anticipate Wilson recanting or changing this testimony" prior to December 7, 2020;"[54] and GMG *expressly admits* "that until it received Laurence Cronin's December 7, 2020 email (Margolis Answer Exhibit I), GMG intended to defend itself in the Underlying Action at the hearing or trial then scheduled for December 10, 2020."[55] Thus GMG has expressly admitted the facts that, under the

[53] 171 A.2d at 232-233.

[54] *See* B773, ¶4.

[55] *See* B776, ¶19. *See also,* A071.

law, render Wilson's Supplemental Affidavit a superseding cause that breaks any chain of causation and precludes any liability on the part of Margolis.

GMG's argument that causation is rarely suitable for summary disposition is particularly ironic, considering that GMG claims it was entitled to summary judgment on Lyons' tortious interference claim based on GMG's alleged lack of motive and desire — which are subjective matters that necessarily raise issues of credibility, as GMG's own attorney stressed (*see* B741, 12/7/20 email). Indeed, the inherently suspicious timing of GMG's hiring of Wilson, together with GMG's deliberate assignment of Wilson to work on his book of business and Lyons' former clients' accounts, all while being fully aware of the restrictive covenants in the Wilson-Lyons employment agreement, constituted prima facie, if not probative, evidence of GMG's "intention" to interfere with those covenants.

Although GMG attached to its Opposition as Exhibit B an email thread from early April 2019, in which its Replacement Counsel, Mr. Cronin, notes to GMG's two principals that Wilson is capable of lying, that was solely in the context of Wilson's employment agreement and a possible future claim by him against GMG on that subject. Notably, Mr. Cronin does not suggest any concern that Wilson would change his story in the Lyons litigation. Even more important, Margolis was not privy to that communication, and there is simply no evidence suggesting any basis for believing that Wilson's subsequent 180-degree change of his prior sworn

testimony was, or should have been, reasonably foreseeable by Margolis any more than it was for GMG or Mr. Cronin.

Indeed, it is essential to GMG's claim that Wilson's change of story was perjury: a criminal act and that it was reasonably foreseeable by Margolis that Wilson would commit the criminal act of perjury. "A person is guilty of perjury in the first degree when the person swears falsely and when the false statement consists of testimony and is material to the action, proceeding or matter in which it is made. First degree Perjury in the first degree is a Class D felony."[56] Class D felonies are punishable by a maximum sentence of eight (8) years in prison.[57] That a person would risk eight years in prison to falsely change his prior testimony is not reasonably foreseeable; it was certainly not foreseeable (much less reasonably so) to Margolis, more than two years earlier.[58]

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[56] 11 Del .C. §1223.

[57] 11 Del. C. §4205(b)(4).

[58] Cases relied on by GMG are factually distinguishable and do not warrant reversal. For example, in *Wash. House Condominum Ass'n of Unit Owners v. Daystar Sills, Inc*., 2017 Del. Super. LEXIS 388, at *57-*59, 2017 WL 3412079 (Del. Super., August 8, 2017), there was a genuine issue as to whether the architects' negligent omission of details made faulty installation reasonably foreseeable. *Rogers v. Del. State Univ*., 905 A.2d 747 [Table], 2006 Del. Super. LEXIS 409 (Del., July 25, 2006), and *Peterson v. Delaware Food Corp*., 788 A.2d 132 [Table], 2001 Del. LEXIS 529 (Del., Dec. 6, 2001), both involved physical assaults where the evidence showed that such assaults were predictable and defendant had not followed standard

2. The Wilson Affidavit Was The Superseding Cause Of GMG's Decision To Settle The Underlying Action; Margolis' Alleged "Negligence" Did Not Cause GMG To Settle The Underlying Action, Which It Was Fully Prepared To Try, Until Wilson Unexpectedly Changed His Testimony.

GMG focuses almost entirely on Margolis's alleged negligence, even though GMG admitted that nothing Margolis did or didn't do caused it or its Replacement Counsel to seek a settlement or believe they would not prevail at trial. It was only Wilson's unexpected Supplemental Affidavit that caused them to suddenly seek an immediate settlement on the eve of trial. Indeed, GMG's Argument heading I(C)(3) (2d Amended Brief, p.21) well states the fallacy of its position. That heading states:

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

It is true that the Wilson Affidavit was "not a superseding cause of Defendant's [alleged] negligence." But that is irrelevant. Superseding cause has nothing to do

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security procedures. Prior similar incidents and failure to follow established security procedures were also at issue in *Buford v. Ligon*, 2021 WL 5630048 (Del. Super., Nov. 30, 2021), which involved a motor vehicle accident resulting in personal injuries. And in *West v. Flonard*, C.A. 08C-11-220 JRJ (Del. Super., Feb. 17, 2011), another personal injury case, the failure of defendant to properly implement safety measures to bar vehicle access made the subsequent motor vehicle accident foreseeable. None of these cases has any relevance to the case at Bar.

with a defendant's alleged negligence. The Wilson Affidavit was the superseding cause of GMG's *injury*.

GMG's argument that "Margolis had twenty (20) months to gather evidence sufficient to demonstrate that GMG could not be held liable" for tortious interference[59] is deeply ironic, because the same is true of counsel who replaced Margolis. The undisputed fact is that Replacement Counsel had twenty (20) months to gather evidence sufficient to demonstrate that GMG could not be held liable on the tortious interference with contract claim. However, the record is devoid of any effort by Replacement Counsel to obtain any evidence to rebut this claim. To date, GMG has failed to offer any explanation as to why it and its Replacement Counsel chose not to obtain evidence necessary to support its position, nor any explanation why they chose not to renew GMG's motion for summary judgment, which GMG now claims should have been a *fait accompli*. The obvious answer is that GMG and Mr. Cronin both understood that there was no evidence they could obtain that would entitle GMG to summary judgment.

Margolis cannot be responsible for GMG settling the Underlying Action, twenty (20) months after Margolis was no longer involved in that lawsuit, and twenty

[59] 2nd Amended Brief, p.22

(20) months after GMG had been represented by other counsel. Wilson's Supplemental Affidavit was the superseding cause of that settlement.

II. THE SUPERIOR COURT PROPERLY HELD THAT THERE WAS NO GENUINE ISSUE OF *MATERIAL* FACT.

A. Question Presented

Did the Superior Court properly hold that there was no genuine issue of fact material to the outcome of the case?

B. Standard and Scope of Review

See Section I.B.,*supra*.

C. The Merits

GMG claims that there were "at least two … genuine disputes regarding material fact." (2d Amended Brief, p.23) GMG is mistaken. The first "dispute" claimed by GMG was whether Wilson's Supplemental Affidavit and revised testimony was true, or was his prior testimony true. This is not a material dispute. In either case, Wilson's Supplemental Affidavit is a superseding cause. Either (a) Wilson perjured himself with his Supplemental Affidavit — as GMG must allege and would have had to prove (although, significantly, GMG did not challenge it at the time) — or (b) Wilson's Supplemental Affidavit was truthful (as Vice Chancellor Glascock found), and GMG's only complaint is that it was prevented from perpetrating a fraud on the Court. In neither case, could Margolis have foreseen it, and in neither case can Margolis be liable in malpractice for failing to predict it.

The second alleged dispute proffered by GMG was whether GMG settled because of the Wilson Supplemental Affidavit, or because the Vice Chancellor denied GMG's counsel's last-minute request for a 60-day adjournment. GMG's assertion that "there is no evidence regarding what role the affidavit had on GMG's decision to settle prior to Trial" is wholly refuted by the Record. GMG and Replacement Counsel were set to try the Underlying Action right up until the eve of trial. They were confident of success. At no time did Replacement Counsel indicate that anything Margolis had done or not done lessened GMG's chances of success.

Then, Wilson filed his Supplemental Affidavit and GMG settled with Lyons *within hours*, for the full amount demanded. Of course, Wilson's Supplemental Affidavit was the reason that GMG settled: it was the only thing that had changed.[60]

Whether GMG's decision to settle was also influenced by the Vice Chancellor's refusal to grant GMG's requested 60 day continuance is irrelevant, because that request was only made necessary by Wilson's Supplemental Affidavit.

[60] As GMG's counsel admitted on the Motion argument, Wilson's Supplemental Affidavit "caused great concern on a matter that they were otherwise prepared to proceed forward with trial." (A126.) He also admitted that "the change in testimony that was being proposed by Wilson the day before trial … I think prompted the decision to, or we submit that prompted the decision to settle." (A128.)

And as the Superior Court here correctly noted, the Chancery Court's refusal to grant the last-minute continuance could not be attributable to Margolis.[61]

[61] *Id.*

III. THE TRIAL COURT PROPERLY HELD THAT ANY ALLEGED NEGLIGENCE ON THE PART OF MARGOLIS HAD NO BEARING ON AND WAS NOT THE CAUSE OF GMG'S DECISION TO SETTLE THE CASE BECAUSE OF WILSON'S INDEPENDENT DECISION TO RECANT HIS PRIOR SWORN TESTIMONY, SOME TWENTY MONTHS AFTER TERMINATING MARGOLIS'S REPRESENTATION.

A. Question Presented

Did the Superior Court properly recognize that any alleged negligence by Margolis had no bearing on and was not the cause of GMG's decision to settle the case because of Wilson's independent decision to recant his prior sworn testimony, some twenty months after GMG terminated Margolis's representation?

B. Standard and Scope of Review

See Section I.B., supra.

C. The Merits

GMG purports to allege "multifarious instances" of Margolis' "negligence." Margolis denies any negligence, but what is more to the point is that GMG fails to allege how any of these alleged instances harmed it. Thus, Margolis' initial challenges regarding electronic discovery in early 2017 did not prevent it from successfully defending GMG and Wilson against Lyons' preliminary injunction motion. Nor did that cause the result against GMG to be disastrous, as GMG wrongly implies. Rather, it was GMG's foolhardy refusal to settle the case in April 2019, as Margolis wisely urged it to do, that proved ultimately disastrous.

GMG equally fails to explain how it was harmed by Margolis' joint representation of GMG with its employee Wilson, whom it wanted to keep in its employe. In fact, it was only after GMG and Wilson had been represented by *separate* counsel for twenty (20) months that Wilson unexpectedly filed his Supplemental Affidavit causing GMG to need to settle the case.

GMG's argument that Margolis' failure to obtain summary judgment dismissing Lyons' tortious interference claim "set the stage" for Wilson's unrelated, independent, and unanticipated decision to recant his prior sworn testimony is entirely speculative and based on several false premises. In the first place, and most fundamental, the argument represents "nothing more than" that Margolis allegedly "furnish[ed] the condition or g[a]ve rise to the occasion by which the injury was made possible" by "a distinct, successive, unrelated and efficient cause of the injury" — that is, by Wilson's Supplemental Affidavit — which this Court has held cannot support a claim.[62] Thus, the argument fails as a matter of law.

Secondly, it is pure speculation that if only Margolis had developed the factual record and adequately briefed the motion, Lyons' tortious interference claim would have been dismissed. If that were actually the case, then Replacement Counsel and GMG would have developed the record and renewed the summary judgment

[62] *McKeon v. Goldstein*, 53 Del. 24, 164 A.2d 260, 262 (1960)

motion—as Vice Chancellor Glasscock invited the parties before him to do.[63] Replacement Counsel and GMG did not do that. They did not do that undoubtedly because they understood from the Vice Chancellor's skeptical comments, based on the inherently suspicious timing of Wilson's jump to GMG,[64] together with the inherently subjective nature of GMG's "good faith" defense, that GMG was not going to get summary judgment.

Finally, even if the Court had granted summary judgment dismissing the tortious interference claim against GMG, Wilson could still have submitted his Supplemental Affidavit and given his testimony, and Lyons could then have moved to vacate the judgment in favor of GMG for newly discovered evidence or fraud, pursuant to RCP 60(b)(2) & (3), or the Court could have "set aside [the] judgment for fraud on the court" on its own, pursuant to the 2nd to last sentence of RCP 60(b).

The fact is, even in the face of all of Margolis' alleged prior negligence, GMG and its Replacement Counsel refused to settle the case and were fully prepared to defend the claim at trial, confident of success, right up until the time Wilson changed his testimony. Therefore, it was Wilson's Supplemental Affidavit alone, and nothing that Margolis did or did not do, that constituted "a new and independent and

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[63] B182

[64] B142-B143, B153, B154 n.105, B181-B182

unexpected factor … which" was "the natural and real occasion of the mischief" of which GMG complains.[65] Any negligence on Margolis' part played no part in Wilson's Supplemental Affidavit, and no part in GMG's decision to settle for $1.2 million, rather than face Wilson in court. Accordingly, GMG's recitation of these alleged instances of negligence serves no purpose, and is merely an unprofessional attempt to embarrass Margolis on the record.

[65] *Stucker v. American Stores Corp*., 35 Del. 594, 171 A. 230, 232-33 (1934).

CONCLUSION

The Wilson Supplemental Affidavit fits well within the description of a superseding or supervening cause, as set forth in the Delaware cases. GMG itself has admitted these facts. Accordingly, Margolis Edelstein cannot be the cause of, nor liable for, any injury claimed by Plaintiff arising out of the Underlying Lyons Action. The Superior Court properly granted Margolis Edelstein's Motion for Summary Judgment, and its Judgment should be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE STATE OF DELAWARE

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

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATIONS

1. This Appellee's Answering 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.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 8,802 words, which were counted using Microsoft Word.

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