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Case Number 213,2023

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 REPLY BRIEF ON APPEAL

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Plaintiff Below/Appellant hereby respectfully submit the following Reply Brief to counter the various arguments raised in Defendant Below/Appellee's Answering Brief.[1]

[1] "AB" refers to Margolis' Answering Brief. References are to page numbers.

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.

In its Opening argument, Margolis insists that the Superior Court properly held that the Wilson Affidavit, filed twenty months after GMG fired and replaced Margolis, and in which Wilson either committed perjury or admitted to the prior perjury, was an "unforeseeable, extraordinary and superceding cause, which broke the chain of causation of Margolis' admitted malpractice. Margolis posits that GMG even admitted that the change in Wilson's testimony was "unanticipated".[2] In sum, Margolis argues that "Wilson's Supplemental Affidavit – in which he changes his prior sworn testimony and admitted to perjury – changed everything."[3] It did not.

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[2] Margolis actually makes much of GMG's "admission" that the Wilson Supplemental Affidavit was "unanticipated" (see, e.g. AB – 19, 32), essentially enlarging that term to mean "unforeseeable". GMG submits that one has little to do with the other. For instance, when the undersigned leaves his office every evening, he does not anticipate getting a flat tire on the way home. According to Margolis, that means that it is "unforeseeable". This, of course, is patently incorrect. Getting a flat tire on the way home is always a possibility, no matter how remote that possibility is.

[3] AB - 15.

As GMG made clear in its Opening Brief, no one – including the Superior Court or Margolis – knows whether Wilson was telling the truth prior to his filing of the Supplemental Affidavit or after that filing.[4]

Moreover, Margolis conveniently omits another crucial fact: that upon learning that Mr. Wilson intended to testify at the December 10th Hearing consistent with that which he outlined in his supplemental Affidavit, replacement counsel immediately made an emergency request for an additional sixty (60) days of discovery to challenge the veracity of Wilson's changed testimony. The Vice Chancellor summarily denied the request, without any explanation[5] and it was after that event that GMG decided to settle the case, not the receipt of Wilson's

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[4] Apparently, Vice Chancellor Glasscock seemed to accept that Mr. Wilson's testimony at the December 10, 2020, Hearing was the honest version of the facts, as opposed to his prior sworn testimony. However, it is noteworthy that Wilson never produced any of the alleged documentation that he claimed that he previously had in the form of email communication, to demonstrate that he was now telling the truth. Moreover, the Vice Chancellor never explained why he believed Wilson's trial testimony to be credible, in lieu of Wilson's prior sworn testimony.

[5] Margolis also fails to acknowledge that had they conducted discovery competently, the discovery dispute that arose in the underlying Lyons litigation, and which ultimately required adjudication by the Vice Chancellor, and against GMG, would likely not have occurred. It is unclear what role this played in the Vice Chancellor's decision to deny the emergency request, but it is arguable that the previous discovery deficiencies and the subsequent sanctions against GMG, created consternation in the Vice Chancellor, which may have influenced the Vice Chancellor's decision to deny GMG's emergency request.

supplemental Affidavit. Had the Vice Chancellor granted the request, it is conclusively clear that GMG would not have settled the case the day before Trial.

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

Margolis' second argument is that the Superior Court properly held that there was no genuine issue of material fact.[6] Although Margolis acknowledges that if "Wilson perjured himself with his Supplemental Affidavit – as GMG must allege and would have had to prove…," it then (circuitously) claims that the honesty of Wilson, nevertheless, does not represent "a material dispute"[7]

The argument borders on frivolous.

> "In determining what constitutes a genuine issue as to any material fact for purposes of summary judgment, an issue is "material" if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action."[8]
>
> "A fact is "material' and precludes grant of summary judgment if proof of that fact would have effect of establishing or refuting one of essential elements of a cause of action or defense asserted by the parties and would necessarily affect application of appropriate principle of law to the rights and obligations of the parties."[9]

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[6] AB – 38.

[7] Id.

[8] Black Law Dictionary 881 (5th Ed. 1979), citing Austin v. Wilder, 26 N.C. App. 229, 215 S.E.2d 794, 796.

[9] Black Law Dictionary 881 (5th Ed. 1979), citing Johnson v. Soulis, Wyo., 542 P.2d 867, 872.

In determining if the last-minute affidavit of Wilson was actually untrue, and had GMG not been denied the opportunity to gather sufficient evidence to demonstrate its untruthfulness, then the result would most certainly have been different. GMG surely would not have agreed to settle and would certainly not have settled before Trial. Restated, viewing the facts in the light most favorable to GMG – as this Court must[10] – it cannot be seriously argued that the result would still have been the same.

Moreover, as painstakingly made clear in GMG's Opening Brief, Margolis' contention that there is no issue of disputed fact, is wrong for at least two (2) reasons. First, there is a genuine issue of material fact: Specifically, when was Wilson telling the truth?[11] But the Court did not address this clear dispute. Rather, the Court held:

> "…the undisputed evidence demonstrates that settlement would not have occurred at the time it did, or in the agreed upon amount, but for the Wilson Affidavit."[12]

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[10] The Supreme Court will view the acts in a light most favorable to the nonmoving party, here GMG. Alexander Indus., Inc. v. Hill, 211 A.2d 917 (Del. 1965). The 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.

[11] As Appellants made clear in their Opening Brief, this is the first of two (2) errors committed by the Superior Court in its Opinion.

[12] (Emphasis added). The Court went on to state "The evidence on the record does not show that Defendant could reasonably foresee – twenty months before the execution of the Wilson Affidavit – that Wilson would perjure himself by changing his prior sworn testimony with the Wilson Affidavit."

Second, there remains a dispute as to what effect the Vice Chancellors summary denial of GMG's emergency request to continue the Hearing for an additional sixty (60) days. GMG obviously would not have settled when it did (as the Superior Court stated) had the Vice Chancellor permitted the additional discovery that replacement counsel urgently requested. However,

> "At the summary judgment stage "all that is required [for non-moving party to survive the motion], is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve [at trial] the parties differing versions of the truth…"[13]

> "Further, because intent is a substantive element of this cause of action – generally to be inferred from the facts and conduct of the parties – the principle is particularly apt that courts should not draw factual inferences in favor of the moving party and should not resolve any genuine issues of credibility."[14]

The case of Rogers v. Del. State Univeristy,[15] illustrates this point well. In Rogers, following an assault upon him at the University, plaintiff sued DSU for, inter alia, negligence, gross negligence, breach of contract and detrimental reliance. The Superior Court ruled: (a) the attack on Rogers was neither foreseeable nor preventable, and (b) DSU's failure to provide security patrols was not the proximate

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[13] First Nat'l Bank of Ariz. v. Cities Servs. Co., 391 U.S. 253, 288-289, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968).

[14] Ness v. Marshall, 660 F.2d 517, 519 (3rd Cir. 1981).

[15] 905 A.2d 747 (Del. 2006).

cause of Rogers' injuries. After finding that there was no genuine issue of material fact, the Superior Court granted DSU's motion for summary judgment as a matter of law, holding that no reasonable jury could find that the absence of security patrols was a proximate cause of Rogers' injuries. Rogers appealed, claiming that the Superior Court erred when it granted DSU's motion for summary judgment because there were genuine issues of material fact regarding: (a) whether the attack was reasonably foreseeable, and (b) whether the lack of security was the proximate cause of Rogers's injuries. The Supreme Court after first noting that there could be more than one proximate cause of the injury, reversed. The Court held that:

> "[b]ased on our review of the record, we conclude that there are material facts in dispute in this case. When the evidence is viewed in the light most favorable to Roger's, a reasonable juror could conclude that the failure of DSU to follow usual and customary student safety and security measures was a proximate cause of Rogers' injuries. The Superior Court erred when it granted summary judgment on the issue of proximate cause."[16]

Clearly, there are genuine issues of material fact in this case, the most important being when Wilson was telling the truth. If his Affidavit – and Supplemental Affidavit – are false, the result clearly would have been quite different. To the extent that the Superior Court concluded otherwise, it erred.

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[16] Rogers v. Del. State Univ., 905 A.2d 747 (Del. 2006)

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.

Finally, Margolis incorrectly asserts that "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".[17] On the contrary, the allegations in the underlining cases against Wilson alone constitute evidence of the foreseeability of his dishonesty, lying, and changing his testimony. Wilson was accused by Lyons of having tortiously interfered with the confidentiality and non-compete Agreements, as well as conspiring to steal Clients from them. In other words, Wilson was a "bad actor". This is certainly enough evidence to show that Wilson was a liar, who was likely guilty of the allegations by Lyons that he was dishonest.[18]

Most of the cases referred to and cited by Margolis, when read carefully and thoroughly, support GMG's positions and arguments that, except in "extraordinary

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[17] Duphily v. Delaware Elec. Co-Op., Inc., 662 A.2d 821, 828-829 (Del. 1995).

[18] This is further evidenced by the fact that, once Wilson's interests were severed from GMG, Wilson changed his testimony to protect his own, individual interest.

circumstances", the questions of superseding and proximate cause are factual questions to be left for the jury to decide. For example, in the Duphily case,[19] then Superior Court Judge Walsh thoroughly analyzed this issue and stated as follows (with emphasis added):

> "In this case, the Superior Court's instruction to the jury on superseding cause was modeled, in part, after Section 447 of the Restatement (Second) of Torts. That section provides:
>
> § 447. Negligence of Intervening Acts
>
> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if
>
> (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
>
> (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person so acted, or
>
> (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.
>
> Restatement (Second) Torts § 447 (1965).
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> This Court has cited Section 447 approvingly in the past.[20]

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[19] Duphily v. Delaware Elec. Co-Op, Inc., 662 A.2d 821, 828-829 (Del. 1995). AB – 26.

[20] Citing McKeon, 164 A.2d at 262; Sirmans, 588 A.2d at 1108 n. 4; see also, Nutt, 526 A.2d at 567. The Court next observed that "We note, however, that part of Section 447 is currently inconsistent with Delaware law since this Court rejected the

> The crucial question in this case is whether the issue of superseding causation may be determined as a matter of law. This Court has consistently held that the issue of proximate cause is ordinarily a question of fact to be determined by the trier of fact.[21] To be sure, the issue of proximate cause "is to be determined, on the facts, upon mixed considerations of logic, common sense, justice, policy and precedent."[22]
>
> Just as the issue of proximate cause is generally a question for the jury, similarly, the question of superseding causation is fact-driven.[23] Indeed, in application, the factors of Section 447 of the Restatement undoubtedly present questions of fact. Under that section, an intervening negligent act will not relieve the original tortfeasor from liability if: the original tortfeasor at the time of his negligence should have realized (foreseen) that another's negligence might cause harm; or, if a reasonable person would not consider the occurrence of the intervening act as highly extraordinary; or, if the intervening act was not extraordinarily negligent. Considerations of foreseeability and what a reasonable person would regard as highly extraordinary are factual

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"substantial factor" rule of proximate cause in favor of the common law "but for" rule of proximate causation. Nonetheless, the Superior Court did not use the "substantial factor" portion of Section 447 in its instructions to the jury, and, in our view, the "but for" change does not alter the substance of the provision. We thus approve Section 447 of the Restatement with this slight variation."

[21] Citing Laws, 658 A.2d at 1007; Huang, 652 A.2d at 572; Money v. Manville Corp. Asbestos Disease Comp. Trust Fund, 596 A.2d 1372, 1375 (Del. 1991); Culver, 588 A.2d at 1098; Wyatt v. Clendaniel, 320 A.2d 738, 739 (Del. 1974); Chudnofsky, 208 A.2d at 519; Boyd v. Hammond, 187 A.2d 413, 416 (Del. 1963); Carnes v. Winslow, 182 A.2d 19, 22 (Del. 1962); McKeon, 164 A.2d at 263; Stucker v. American Stores Corp., 171 A. 230, 232 (Del. 1934).

[22] Citing Chudnofsky, 208 A.2d at 518 (emphasis added).

[23] Citing Laws, 658 A.2d at 1008 n. 8; Vadala v. Henkels McCoy, Inc., 397 A.2d 1381, 1383 (Del. 1979); 57A Am. Jur. 2d Negligence § 601 (1989 & Cum. Supp.); 1 Modern Tort Law, supra, § 4.07.

questions ordinarily reserved for the jury.[24] Additionally, the roles of the court and the jury in resolving the issue of superseding causation are set forth in Section 453 of the Restatement. Comment b of that section provides:

> "If, however, the negligent character of the third person's intervening act or the reasonable foreseeability of its being done (see §§ 447 and 448) is a factor in determining whether the intervening act relieves the actor from liability for his antecedent negligence, and under the undisputed facts there is room for reasonable difference of opinion as to whether such act was negligent or foreseeable, the question should be left to the jury. Restatement (Second) Torts § 453 cmmt. b (1965)."

In other words, only where there can be no reasonable difference of opinion as to the conclusion to be reached on the question of whether an intervening cause is abnormal, unforeseeable, or extraordinarily negligent, should the question be determined by the Court as a matter of law.[25] Here, there was evidence presented that New Look Homes either instructed or knowingly permitted Duphily to get on the roof of a moving structure, without any means of support, to bare-hand electrical wires while walking backwards along the edge of the house. While performing these tasks, it was anticipated that the trailer would pass over uneven terrain, including a speed bump. New Look Homes permitted Duphily to engage an obviously dangerous venture with no instructions or precautionary safeguards. Under the circumstances, we believe that reasonable minds could differ whether New Look Homes was extraordinarily negligent or not in permitting Duphily to encounter this highly dangerous situation.

We conclude, therefore, that there was a sufficient factual basis for the issue of superseding cause to go to the jury. To be sure, there may be circumstances where only one conclusion may be drawn from the

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[24] See, Prosser and Keeton on Torts, supra, § 45 at 320 ("The issue of whether a described consequence is `foreseeable,' or was `directly' caused, and the issue as to whether an intervening force was `abnormal' are to be decided . . . by a jury.").

[25] Citing Vadala, 397 A.2d at 1383.

> established facts which would warrant a finding of superseding cause, or the lack thereof, as a matter of law.[26] In this case, however, the issue was properly reserved for the trier of fact. This is clearly not a case where only one conclusion may be drawn from the facts, which would warrant a finding of superseding cause as a matter of law."[27]

The Sims[28] case relied upon by the Margolis, is misplaced and has no relevance to the case before this Court, since the question before that Court arose in the context of contributory negligence (tort) case, wherein the Plaintiff continually operated a motor vehicle, despite knowing that the vehicle had a mechanical defect that made it unsafe to operate. Sure enough, the defect resulted in a collision injuring the Plaintiff. The Court ultimately held that:

> "A tortfeasor is not responsible for damage that ensues when the plaintiff has unreasonably and repeatedly failed to take reasonable steps to protect her safety."[29]

Likewise, Margolis' reliance on the MacDougal case[30] is also misplaced. The Court decided the question of liability in that case based on the language in a contract

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[26] Citing see generally, DiSabatino, 188 A.2d at 535.

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

[28] Sims v. Stanley, C.A. No. 06C-01-020 (Del. Super. Ct. June 29, 2007)

[29] Id.

[30] MacDougal v. Mahaffy & Assoc. Inc., 2013 WL 1091005, (Del. Super. Ct. Jan. 22, 2013), at *3-4, aff'd on Opinion Below, 2013 WL3848512, 72 A.3d 502 (Del. July 19, 2013) (Table); AB - 29, 31

and did not address the question of superseding cause. There, summary judgment was granted in favor of the defendants based on the explicit language of the contract.[31] Clearly this case relied upon by Margolis has little relevance to the case at bar.

Similarly in McKeon,[32] the Court concluded that:

> "Under the facts of this case and the surrounding circumstances, we cannot say as a matter of law, as did the court below, that the negligence of the mother was the proximate cause of the accident and that the negligence of the landlords was a remote cause. We think that more than one inference may be drawn from the evidence. Hence the determination of proximate cause is a question of fact for the trier of facts and not for the Court to decide as a matter of law."[33]

Further, the Duphily case and the other cases cited by Margolis clearly stand for the proposition that the Court below committed error, and the question of superseding cause should have been presented to the jury as the trier of fact, instead of the Court rushing to judgment and mistakenly usurping the province of the trier of fact.

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[31] MacDougall v. Mahaffy & Assocs, Inc., 2013 WL 1091005, (Del. Super. Ct. Jan. 22, 2013).

[32] McKeon v. Goldstein, 164 A.2d 260, (Del. 1960); AB - 27, 28, and 29.

[33] Id.

Margolis also incorrectly asserts that the cases relied upon by Appellant GMG are distinguishable or not applicable.[34] On the contrary, the noted caselaw, consistently followed in Delaware,supports GMG's argument that "issues of causation are rarely suitable for summary disposition… and it is an issue for the jury to determine."[35]

Accordingly, GMG submits that the cases cited and relied upon by both GMG and Margolis are consistent and in short stand for proposition that, absent "extradentary circumstances", the issue of causation and superseding are questions to be left for the jury to decide. The Court below erred in ruling on that question as a matter of law.

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[34] AB – 34, fn 58.

[35] Wash. House Condominum Ass'n of Unit Owners v. Daystar Sills, Inc., C.A. No. N15C-01-108 WCC CCLD (Del. Super. Ct. Aug. 8, 2017). ("Issues of causation are rarely suitable for summary disposition.") Similarly, in Peterson, the Supreme Court ruled that: In determining whether there is sufficient evidence to submit a matter to the jury, "it is improper for the trial judge to weigh the facts or pass on the credibility of the witnesses." Peterson v. Delaware Food Corp., 788 A.2d 132 (Del. 2001)

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, be reversed and the case remanded back to the Superior Court for trial on the merits.

Respectfully submitted,

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