EFiled: Sep 27 2024 02:41PM EDT
Filing ID 74618427
Case Number 204,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TIFFANY HERNANDEZ and JOSE HERNANDEZ-ALVAREZ, Individually and as *Guardian ad Litem* for their child, L.H.,	No. 204, 2024
Plaintiffs/Appellants,	Court Below: Superior Court of the State of Delaware
v.	C.A. No. N23C-11-112 FJJ
BAIRD MANDALAS BROCKSTEDT & FREDERICO, LLC; CHASE T. BROCKSTEDT; PHILIP C. FREDERICO; BRENT CERYES; STEPHEN A. SPENCE; SCHOCHOR, STATON, GOLDBERG, AND CARDEA, P.A.,	
Defendants/Appellees.	

APPELLANTS' CORRECTED OPENING BRIEF

JACOBS & CRUMPLAR, P.A.
Thomas C. Crumplar, Esq. (DE #0942)
Courtney R. Prinski, Esq. (DE #5432)
10 Corporate Cir., Suite 301
New Castle, DE 19720
(t) (302) 656-5445
(f) (302) 656-5875
tom@jcdelaw.com

Attorneys for Appellants

September 27, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

NATURE OF PROCEEDINGS

This case presents review of a decision on an issue of first impression for this Court. For the first time, the doctrine of nonmutual collateral estoppel was extended beyond judicial or administrative agency decisions to findings by a class settlement administrator. Expanding the doctrine of collateral estoppel, the Superior Court ruled that the Plaintiffs below could not state a claim for legal malpractice because of the decision of a settlement Claims Adjudicator.

This legal malpractice claim does not attack the fairness, reasonableness or adequacy of the class settlement that was approved by the Superior Court or the Orders of Preliminary and Final Approval. Rather, this case is against the attorneys (the "**Retained Lawyers**") for legal malpractice arising from their advice to the underlying Plaintiffs (hereinafter collectively referred to as "**the Hernandez Family**" or "**Hernandez**") regarding the application of a class settlement to their individual claims. The Hernandez Family hired the Retained Lawyers following an ad campaign by the Retained Lawyers just after the catastrophically injured minor and her mother returned home from months of hospitalization. The ad campaign made clear that the minor's severely premature delivery and resultant injuries were caused by her mother's exposure to a chicken processing plant polluting the ground and water supply in a small Delaware community.

Through another individual serving as a class representative, the Retained Lawyers entered into a class action settlement with the chicken processing plant. Although this settlement was fair and adequate to the class as a whole, the Retained Lawyers were negligent in advising the Hernandez Family individually as to the settlement's benefits to them, their options under the settlement, and ultimately in advising the Hernandez Family to make a claim for a catastrophically injured minor in the settlement of finite funds designed to compensate thousands of less severely injured individuals. Notably, the settlement (and Rule 23) purposefully included an opt-out mechanism that should have been recommended by legal counsel here, but which was never brought to the Hernandez Family's attention by the Retained Lawyers.

Undersigned counsel wishes to be exceedingly clear at this juncture that the legal malpractice claim was not made against class counsel for failures to obtain an adequate class settlement; the legal malpractice claim was specifically made against the Hernandez Family's individually Retained Lawyers for their negligent legal advice, counsel, and acts in navigating the class settlement as it pertained to the Hernandez Family's individual claims.

In following the Retained Lawyers' advice, the Hernandez Family submitted a claim to a claims administration process with a single decisionmaker, barebones case development, and no meaningful appeal process. The Claims Adjudicator for

the class action wrongfully decided that causation was lacking to issue an award for catastrophic personal injuries to L.H. This legal malpractice claim ensued due to the Retained Lawyers' failures to act as reasonably prudent attorneys in failing to advise the Hernandez Family to opt out of the class action settlement despite the fact that the class action settlement was clearly an inadequate vessel for L.H.'s claims.

The Hernandez Family following the Retained Lawyers' advice led to their first exposure to the judicial system concluding with an award of $18.5 million to their attorneys and an award of $2,500 to the family's injured child.

The instant case was filed in an effort to obtain justice for the Hernandez Family and to show that the legal system could be redeemed. Unfortunately, following the Retained Lawyers' Motion to Dismiss – and in a sweeping expansion of the application of nonmutual collateral estoppel – the Superior Court held that a decision by a claims adjudicator (which was not appealable to a third party, for which no discovery was permitted, and which was not a judgment by a "court" as that term is defined under Delaware law) estopped the Hernandez Family from arguing causation in their legal malpractice claim against the Retained Lawyers.

> Since it has been determined that the causation issue is averse to L.H., and the causation issue is a necessary element of the legal malpractice claim against his attorneys, Defendants' Motion to Dismiss Count I, which is based on proof a legal malpractice claim, is **GRANTED**.

See Opinion and Order on Defendants' Motion to Dismiss (attached hereto as **Exhibit 1**). For this reason alone, the Superior Court granted Defendants' Motion to Dismiss. The Hernandez Family now brings this appeal.

SUMMARY OF ARGUMENT

I. Collateral estoppel should not have applied to bar the Hernandez Family's claims against the Retained Lawyers because:

a. The claims adjudicator does not qualify as a "court" for purposes of collateral estoppel;

b. The Hernandez Family did not have a full and fair opportunity to litigate their claims in the claims administration process; and

c. Even if all four elements of collateral estoppel were met, public policy, fairness, and justice require that the Hernandez Family be permitted to pursue their claims against the Retained Lawyers for negligently failing to advise them on how to obtain relief for L.H.'s severe and disabling injuries.

II. The Hernandez Family's claim for transactional legal malpractice is not barred by the application of nonmutual collateral estoppel even if the claims adjudicator's causation finding is entitled to the force of collateral estoppel as a matter of settled law.

STATEMENT OF FACTS

Tiffany Hernandez was exposed to pollution from the chicken processing plant while pregnant and delivered a severely premature, catastrophically injured child. Over the course of her pregnancy in late 2016 and early 2017, Tiffany Hernandez was unknowingly exposed to nitrate levels in her well water exceeding 10 ppm – the state and federal "Maximum Contaminant Level." Appendix at A27-A28, A43-A45. Consuming nitrates at these levels during pregnancy is known to be capable of causing "pre-term birth," "spontaneous abortions," and "developmental effects due to the known effects of hypoxia [lack of oxygen to the brain]." Appendix at A39-A40. The high nitrate levels in the soil and in the Hernandez Family's drinking water were the result of Mountaire Corporation and its affiliates "dispos[ing] of wastewater by spray irrigation on more than 900 acres of croplands," which increased nitrogen levels in the drinking water of affected residents, including L.H.'s family. Appendix at A26-A27, A45.

On March 14, 2017, Mrs. Hernandez appeared for a routine obstetrics examination at twenty-seven weeks pregnant. Appendix at A16. Mrs. Hernandez – who had birthed four other healthy children and who had regularly attended obstetrics appointments since learning of her pregnancy – was told at that appointment that she was in extremely premature labor. Appendix at A16. Efforts to stop labor were unsuccessful at Beebe Hospital and Mrs. Hernandez was rushed

emergently to Christiana Hospital. *Id.* Upon her admission to Christiana, Mrs. Hernandez was taken to Labor and Delivery, where she delivered "L.H." a full thirteen weeks (more than three months) early, making L.H. an extremely pre-term baby. *Id.*

L.H. was immediately placed in the Neonatal Intensive Care Unit ("**NICU**"), where she spent thirty (30) days prior to being transferred to the AI DuPont Children's Hospital ("**AIDCH**") NICU. Appendix at A17. Throughout the first four months of L.H.'s life, she had to have multiple surgeries: L.H. had three (3) shunts placed to relieve pressure in her brain and had a bowel resection and stoma creation to address her perforated bowel. Appendix at A17-A18. Since discharge, L.H. has been diagnosed with cerebral palsy, developmental delay, acortical vision impairment (CVI) Optic Atrophy in both eyes, epileptic seizures, severe gastrointestinal dysfunction, cognitive limitations, and physical limitations. Appendix at A18-A19. L.H. will never learn to speak more than a few words, will never walk, and will never have a functional gastrointestinal system, which was not given time to fully develop in utero and which now can never fully develop. Appendix at A19.

Shortly after L.H. and her mother returned home from the months-long stay in the NICU, they received a flyer from Baird Mandalas Brockstedt & Frederico, LLC (the "Baird Law Firm") and Schochor, Staton, Goldberg and Cardea, P.A. (the

"Schochor Law Firm" and, together with the individually named defendants, the "Retained Lawyers") telling them about Mountaire's pollution and inviting them to a "town hall meeting" to learn about getting compensated for their injuries. Appendix at A19-A20.

Following this meeting, the Hernandez Family hired the Retained Lawyers to represent them ***individually*** in their pursuit of just compensation for L.H.'s injuries. Appendix at A20-A21. The Contingency Fee Agreement/Power of Attorney repeatedly stated that the Baird Law Firm represents The Hernandez Family individually and makes no reference to class action lawsuit. *Id.*

The Hernanadez Family reasonably believed that they had hired the Retained Lawyers to represent their individual interests, and that the Retained Lawyers would advise them on what actions were in the Hernandez Family's best interests. Throughout the Retained Lawyers' representation of Hernandez, they sent "Dear Client" letters to them providing periodic updates on the case. Appendix at A21. The first of these letters begins: "You are receiving this correspondence because you are a client of my law firm, and the law firm of Schochor, Federico & Staton, concerning groundwater contamination caused by Mountaire Farms." Appendix at A21-A22.

A press release asserted that a class action lawsuit was "necessary" and detailed Mountaire's pollution, expert support for the Retained Lawyers' position

that this pollution led to, *inter alia*, increased nitrate levels in well water in the area, and informing the Hernandez Family that L.H.'s injuries were part of the class action lawsuit. Appendix at A24-A25.

Still another "Dear Client" letter informed the Hernandez Family that, "we will be turning our attention to the damages aspect of this case" and that such damages included "Premature birth" – exactly what happened with L.H. Appendix at A29-A30. The Hernandez Family provided all requested documentation to the Retained Lawyers concerning the damages suffered due to their consumption of nitrates in their drinking water. Appendix at A30-A31.

This was a critical stage of the Retained Lawyers' representation of the Hernandez Family where a reasonably prudent attorney representing a class of plaintiffs was required to evaluate the claims and damages of their clients, including Hernandez, to determine which, if any, were better served by "opting out" of the class and pursuing an individual claim. The Hernandez Family's claim for L.H. was a clear outlier, whose single damages claim may have absorbed up to one-half of the total settlement, and so L.H. should have been advised to opt out of the class.

The Retained Lawyers did not advise the Hernandez Family to opt out. To the contrary, they told the Hernandez Family in a February 9, 2021, letter that L.H.'s injuries were part of the class action lawsuit and directed The Hernandez Family "to

register your claim[.]" Appendix at A37. This letter made **no** mention of the right to opt out of the class, though the deadline to opt out had not yet passed. *Id*.

In fact, the Retained Lawyers did not send a single letter to The Hernandez Family advising them about their right to opt out, what the Hernandez Family's options and available outcomes were if they chose to register their claim, and what the Hernandez Family's options and available outcomes were if they chose to opt out. The Retained Lawyers represented the Hernandez Family during the **entirety** of the opt-out period, but the Retained Lawyers never advised them regarding the complex process of a class action settlement, their options, or the available and best actions to protect their interests. The Retained Lawyers' only advice to The Hernandez Family during this time was to "register [their] claim." Appendix at A37.

The Retained Lawyers advised the Hernandez Family to register their claims even though the Plan of Allocation for class members, which the Retained Lawyers assisted in preparing, made no provision for catastrophically injured minors and did not offer a path for appropriate recovery for the nature and extent of L.H.'s injuries. Appendix at A36.

On March 1, 2021 – **nine days after the deadline to opt-out had passed** – the Retained Lawyers sent the Hernandez Family a letter, returning "all of the information you provided to our firm" and notifying them for the first time that they were **no longer represented by the Retained Lawyers**. Appendix at A37-A39.

This letter was sent shortly after the Court approved attorneys' fees and costs in the amount of $18.5 million. Appendix at A15. It was the first time the Retained Lawyers stated that they were "class counsel and we represent **all** class members" rather than focusing on their individual representation of The Hernandez Family. Appendix at A37-A39.

CLAIMS PROCEDURAL HISTORY

Following the Retained Lawyers' abandonment after the opt out deadline, and confused by the complicated claims process, the Hernandez Family followed the Retained Lawyers' prior advice, retained present counsel, and submitted a claim. Because of the complexity of the claim, they retained present counsel shortly before the deadline to submit a claim, which was one-month after the deadline to opt-out. *See* Appendix at A260-A261. L.H.'s future economic special damages incorporated a life care plan and lost earning capacity reflecting economic damages in the range of $8.6 million and $21.7 million and incalculable emotional hardships. Appendix at A39.

In filing her claim, L.H. followed all proper protocols and then was called upon by the Claims Adjudicator hand-picked by the Retained Lawyers to provide information beyond that which is required under the Plan of Allocation, including requests to rule out other potential causes of her injuries. Despite L.H.'s catastrophic injuries and the substantial support for her claims that increased nitrate levels in Mrs. Hernandez's drinking water caused by Mountaire's pollution had led to these injuries, L.H. was awarded $2,500 – the lowest available bracket for payments under the Plan of Allocation. Appendix at A42. This determination and "award" provide further support for L.H.'s claims that the Retained Lawyers should have advised her to opt out of the class.

Strangely, though the Claims Adjudicator determined that causation was lacking in L.H.'s case, she also determined that Tiffany Hernandez and Jose Hernandez (L.H.'s mother and father) as well as one of L.H.'s older brothers, Jose, Jr., were caused personal injury and were awarded damages recognizing that they had been exposed at their home. None of these were claims of catastrophic injury that may have made the settlement fund unworkable in the Claims Adjudicator's view.

Pursuant to the Plan of Allocation, L.H. requested that the Claims Adjudicator reconsider her findings – the only option for "appeal" provided to L.H. under the Plan of Allocation. Appendix at A42. The Claims Adjudicator denied L.H.'s request for her to reconsider her determination as to L.H.'s claim. *Id.*

On March 9, 2023, The Hernandez Family filed a Motion to Amend Orders Granting Preliminary and Final Approval to Class Settlement with the Superior Court that the approved the Class Settlement. Appendix at A42. Following briefing and oral argument on May 8, 2023, the Court issued an order eloquently opining on the role of a jurist and the "suggest[ion] that a just resolution should be always on my mind." Appendix at A224. Ultimately, however, the Court made clear that "the Claims Administrator will issue her final decision as to L.H.'s claims…" and that the Court would not adjudicate the merits of her claim, including causation and damages. Appendix at A234.

The Claims Adjudicator once again refused to change her determination as to L.H.'s claim and award. Appendix at A46.

Thereafter, on November 13, 2023, the Hernandez Family filed their Complaint in the Superior Court for the State of Delaware, making the foregoing detailed allegations of legal malpractice primarily focused on the Retained Lawyers' failure to advise L.H. to opt out of the class because the significance and severity of L.H.'s injuries made clear that an individual claim against Mountaire was in L.H.'s best interests. Appendix at A9-A64.

Defendants Baird Mandalas Brockstedt & Frederico, LLC, Chase T. Brockstedt, and Stephen A. Spence moved to dismiss the Complaint on December 8, 2023. Appendix at A65-A68. On December 11, 2023, Defendants Philip C. Frederico, Brent Ceryes, and Schochor, Staton, Goldberg and Cardea, P.A., filed a Notice of Joinder joining in the Motion to Dismiss. Appendix at A69-A70.

Thereafter, on January 29, 2024, the Retained Lawyers submitted their Opening Brief in Support of their Motion to Dismiss. Appendix at A71-A278. On March 11, 2024, the Hernandez Family submitted their Answering Brief in Opposition to Defendants' Motion to Dismiss. Appendix at A279-A452. The Retained Lawyers filed their Reply Brief in Support of Their Motion to Dismiss on April 1, 2024 (Appendix at A453-A515), the Hernandez Family filed their Sur-Reply Brief in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss

on April 18, 2024 (Appendix at A516-575), and oral argument was held on April 23, 2024. The Court issued its decision on May 13, 2024, granting the Retained Lawyers' Motion to Dismiss the Complaint. *See* Opinion and Order on Defendants' Motion to Dismiss (attached hereto as **Exhibit 1**). The Hernandez Family filed the instant appeal on May 23, 2024 and the Court revised its order on May 28, 2024. Appendix at A1. The Hernandez Family now submit this Opening Brief in support of their appeal.

ARGUMENT

(1) Question Presented

Whether the decision of a claims administrator is entitled to collateral estoppel effect? (Preserved in the record at Appendix A289-A295 and at oral argument (A576-A680)).

(2) Scope of Review

The Delaware Supreme Court reviews "a trial court's application of collateral estoppel *de novo*." *Rogers v. Morgan*, 208 A.3d 342, 346 (Del. 2019) (referencing *California State Teachers' Ret. Sys. v. Alvarez*, 179 A.3d 824, 834 (Del. 2018)).

(3) Merits of Argument

This case presents an issue of first impression for the Delaware Supreme Court: whether a decision by a Claims Adjudicator in a class action settlement is entitled to the preclusive force of nonmutual collateral estoppel.

The decision of the claims administrator is not entitled to collateral estoppel because: (1) a claims administrator is not a "court" as that term is defined under Delaware law and as required for collateral estoppel to apply; (2) the Hernandez Family were not afforded a "a full and fair opportunity to litigate" but rather partook in a streamlined process designed to efficiently process thousands of claims; and (3) even if the above requirements for the application of collateral estoppel had been met, public policy, fairness, and justice are not served by denying the Hernandez

Family – in their first experience with the justice system – the opportunity to truly investigate and litigate their claims against the attorneys they trusted to guide them in recovering for their catastrophically injured daughter, and who ultimately led the Hernandez Family to a recovery of $2,500 while those attorneys walked away with tens of millions of dollars.

a. A Claims Adjudicator Does Not Qualify as a "Court" for Collateral Estoppel Purposes

The well-established case law is clear that collateral only applies to decisions made by a "court." "Under the doctrine of collateral estoppel, if a ***court*** has decided an issue of fact necessary to its judgment, that decision precludes re-litigation of the issue in a suit on a different cause of action involving a party to the first case." *Messick v. Star Enterprise*, 655 A.2d 1209, 1211 (Del. 1995) (emphasis added).

The term "court" was not defined by the Delaware Supreme Court in *Messick*, but it is defined in Section 8801 of Title 10 of the Delaware Code, which provides that the terms "'[c]ourt' or 'courts' shall mean all constitutional or statutory courts of this State." This definition is consistent with the Delaware Supreme Court's finding that "[c]ollateral estoppel extends not only to issues decided by courts, but also to issues decided by administrative agencies acting in a judicial capacity where the parties had an opportunity to litigate." *Messick*, 655 A.2d at 1211 (citing *Foltz v. Pullman, Inc.*, 319 A.2d 38, 42 (Del. Super. 1974)).

Neither Delaware, nor any other state, has ever previously applied collateral estoppel to a Claims Adjudicator of a settlement.

> THE COURT: "So, I went and looked for cases on the issue, the preclusion issue and the collateral estoppel issue, about whether or not in a context just like this, this constitutes a Court of competent jurisdiction. I mean, the law in Delaware is clear. To have issue preclusion, there has got to be a decision by a Court or an administrative agency. I couldn't find any cases coming out of something like this where it's a claims administration process, where some Court has said

> that when it comes out of a claims administration process, that equals a court or an administrative agency which should trigger issue preclusion. Did I miss it? Are there any cases out there?"

Exhibit 1. No party ever brought forth any such case, and the Superior Court referenced none in its Order. *Id.*; *see also* Appendix at A681-A700. Nonmutual collateral estoppel should not now be expanded beyond its settled application to courts and quasi-judicial administrative agencies that have adequate safeguards to protect the litigants by maintaining reasonable access to full and fair fact-finding.

The Delaware Supreme Court clearly intended collateral estoppel only to apply where statutory safeguards as to the litigation and appellate process were in place. Such safeguards are plainly in place with respect to the Courts, which are governed by the Delaware Rules of Civil Procedure and the Delaware Rules of Evidence, and with respect to which appeals are available (including, as has been done here, to a panel of justices on the Delaware Supreme Court).

Unlike the claims administrator in this matter, certain administrative agencies are "statutory courts" of this State. One such administrative agency which has been made a "statutory court" of the State of Delaware is the Industrial Accident Board. 19 Del. C. § 2349 ("An award of the [Industrial Accident] Board, in the absence of fraud, shall be final and conclusive between the parties[.]"). The IAB's process, however, provides for many processes which were not available with respect to the settlement claims administrator in the instant case, including: a hearing upon a

disagreement in the award that either party can seek (19 Del. C. § 2345); a request for review by the Board if either party is dissatisfied with the award (19 Del. C. § 2348(b)); the ability to subpoena documents and witnesses (19 Del. C. § 2348 (d), (e)); the statutory right to "to present all available evidence and the Board shall give full consideration to all evidence presented[;]" (19 Del. C. § 2348(i)); the requirement that the Board "render a written decision that succinctly and clearly states its findings of fact and conclusions of law." (19 Del. C. § 2348(k)); and significantly, "[t]he Superior Court shall have jurisdiction to hear and determine all appeals taken pursuant to this chapter." (19 Del. C. § 2350(a)). No such statutory authority exists for Claims Adjudicators and no such procedure with those safeguards was available to the Hernandez Family in any remotely commensurate way.

The absence of any authority endorsing the application of collateral estoppel to a settlement administrator's extra-judicial awards is not surprising. There are no set procedural requirements for Claims Adjudicators – the procedures are determined on a case-by-case basis. Claims Adjudicators are not required to follow the Rules of Civil Procedure, the Rules of Evidence, or any formal process outside of what is outlined in whatever document appoints them. In fact, the purpose of the Plan of Allocation as set up by the class settlement agreement was not to obtain the full disclosure of facts and presentation of all the evidence for non-biased

adjudication by the parties' peers. Instead, the Claims Adjudicator was charged to "evaluate each claim and categorize each claimant to determine fair, reasonable, and equitable compensation based upon the established categories of damages and the proposed Plan of Allocation." Appendix at A165. Instead of considering the merits of L.H.'s claim on its own, the Claims Adjudicator was required to allocate funds to her while maintaining "equitable" consideration of all the other claims that were made. This is not civil litigation.

This Claims Adjudicator's decision, as is typical of such settlements, was also not subject to appeals the way that trial courts or statutory administrative agencies are. While courts and even administrative agency findings are subject to appellate review usually by a court of law or at least by a separate tribunal, appeals of this Claims Adjudicator's decisions could only be appealed directly to the Claims Adjudicator herself, essentially amounting to a request that she change her mind. There was no process set up to provide a check on the Claims Adjudicator's determinations as is done with courts and statutorily empowered administrative agencies. In other words, none of the procedures, checks, or formalities associated with "courts" were incumbent upon the Claims Adjudicator in the instant case. There is simply ***no*** judicial oversight of a Claims Adjudicator whose charge is to settle the matter ***outside*** of litigation by agreement of the parties.

Based on the fact that the Claims Adjudicator is not a "court" as that term is defined under 10 Del. C. § 8801 and is not granted judicial authority and procedures under any statute, the decisions made by the Claims Adjudicator do not (and should not) constitute "a valid and final judgment" by "a court" and should not be entitled to the preclusive effect of collateral estoppel. For this reason alone, the Superior Court's order below should be reversed and the case remanded.

b. Collateral Estoppel Does Not Apply to Bar the Hernandez Family's Claims Because the Hernandez Family Did Not Have an Adequate Opportunity to Litigate

The third element of collateral estoppel – that "the parties had an opportunity to litigate" the issue – is likewise lacking. "[C]ollateral estoppel should not apply where '[t]he forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined.'" *Messick*, 655 A.2d at 1213 (Del. 1995) (quoting *Restatement (Second) of Judgments* § 29(2), Comment d, at 291-294 (1982)).

"Collateral estoppel should not apply where 'the forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined." *Messick*, 655 A.2d at 1213 (citing Restatement (Second) of Judgments § 29(2), *Comment d*, at 291-294 (1982)).

It is generally established that "[t]he very nature of a legal malpractice claim by an aggrieved client…encompasses a claim that said client did not have a full and fair opportunity to litigate where the alleged negligence prevented the client from fully presenting a defense." *Oakes v. Clark*, 2012 Del. Super. LEXIS 476, at *7 (Del. Super. Nov. 2, 2012) (citing *Avon Dev. Enters. Corp. v. Samnick*, 286 A.D. 2d 581,

730 N.Y.S. 2d 295, 297 (2001)). "Therefore, under the doctrine of collateral estoppel, a client is not precluded from rearguing an issue of law decided adversely to such client due to alleged attorney neglect." *Id.*

As stated above, the Hernandez Family was not afforded even minimal procedural opportunities in the claims administration process. In the claims administration process, the Hernandez Family was not entitled to discovery and were only able to submit a written claim with written expert reports to a single person – the hand-picked Claims Adjudicator. The Claims Adjudicator could consult and rely upon opinions by certain experts, who did not submit written reports of these opinions and who were not subject to depositions or cross-examination. Appendix at A312. Although the Claims Adjudicator could consult with experts and obtain live testimony from the limited list of experts, the Hernandez Family was only able to submit a written report from their experts. *Id.*

There was also no opportunity for the Hernandez Family to present live testimony from their experts. Accordingly, there was no opportunity for the Claims Adjudicator to evaluate the Hernandez Family's experts' demeanor and determine their credibility in the event their opinions differed from the experts with whom the Claims Adjudicator consulted. There is not even a record of the facts that were presented and reviewed by the Claims Adjudicator.

There was no opportunity for appeal to a new and different decision-maker, much less a Court of Law. *Supra*. The only opportunity for appeal was to appeal to the Claims Adjudicator to change her mind. Appendix at A314-A315. In litigation, there is a robust appeals process which permits litigants to appeal to the Delaware Supreme Court, where a panel of jurists will review the case, hear oral arguments, and issue an opinion.

In addition, the Claims Adjudicator was not subject to any of the Rules of Civil Procedure or Rules of Evidence. By contrast, "[l]itigation in the Superior Court permits litigants to undertake full discovery of witnesses and parties, including document production, interrogatories, and depositions." *Messick*, 655 A.2d at 1213 (citing Super. Ct. Civ. Rs. 26-34). Differences also exist in the evidentiary rules, the award of damages, and the time and manner allowed to present the case. *Compare generally* Super. Ct. Civ. Rs. with Plan of Allocation (Appendix A310-A320).

Because the Hernandez Family did not have the opportunity to fully litigate, or even meaningfully litigate, the issues before the Claims Adjudicator, and did not have the opportunity to appeal the Claims Adjudicator's decisions to any other person (much less to a competent Court of Law), collateral estoppel should not apply to the Claims Adjudicator's findings.

c. Collateral Estoppel Does Not Apply Because Public Policy, Fairness, and Justice Would Not Be Served by Preventing the Hernandez Family, Who Were Misled by Their Attorneys, an Opportunity for Justice

"Mutuality must be retained in instances, as here, where the desire to end litigation and avoid conflicting decisions is overshadowed by statutory public policy and by principles of fairness and justice." *Messick*, 655 A.2d at 1212 (citations omitted). Relying on equitable principles of fairness and justice alone, *Messick* found that, although all four criteria for collateral estoppel were met, the Court the collateral estoppel did not apply because doing so went against "statutory public policy and the principles of fairness and justice." *Id.*

Likewise, public policy, fairness, and justice require that the Hernandez Family be able to proceed with their lawsuit. Public policy does not allow a single retained individual to be the unreviewable arbiter of justice through nonmutual collateral estoppel. Nowhere in America is the justice system designed to operate this way. States have lower courts and appellate courts. Often in appellate courts, one encounters a panel of judges or justices. Administrative decisions – which are entitled to collateral estoppel – can be appealed to state courts, which can then be appealed to the appellate courts. Federal District Court decisions can be appealed to Circuit Courts and then to the United States Supreme Court. Nowhere in the American legal system is there a place where one person acts as the judge, jury, and

appellate court with no check on that power and that decision would bar a claim against a non-party.

Here, the Claims Adjudicator made her decision. The only available appeal of this decision was to appeal the decision to the same Claims Adjudicator for a second look (and even a third look). It cannot be so that the decision of this individual prohibits the opportunity for a truly full and fair litigation on the facts of this case. If anything, the Claims Adjudicator's decision establishes the damages suffered by this family when they followed the advice of their attorney to register their claim in the class and were not instructed to opt out and pursue an individual claim. It is not consistent with public policy to find that a single individual offers the only avenue for relief.

Likewise, fairness and justice are not served by applying collateral estoppel here. To find that collateral estoppel applies to this case is to say that, no matter how egregious the failure or fault of an attorney in a class action lawsuit towards any individual client that retained him, such attorney cannot be held responsible for their failures if their client takes their advice to submit a claim. The specific and individual retainer becomes a nullity.

Here, the Hernandez Family's attorneys specifically advised them in a letter to register their claim. Appendix at A37. The Hernandez Family did so and proceeded through the claims administration process only to obtain an award that

wouldn't cover a day at the hospital, much less compensate the Hernandez Family for the life-altering impact of the pollution that poisoned Mrs. Hernandez and led to L.H.'s severely premature arrival.

If collateral estoppel is found to apply in this instance, it will leave a gravely injured minor whose parents were repeatedly misled without a remedy for their suffering. The attorneys who misled the Hernandez Family will walk away with $18.5 million in fees and costs. Expanding this publicly unknown legal doctrine for the purpose of protecting officers of the court not only injures the litigant victims, but it potentially damages the system in the eyes of the public. That expansion is not justice. It is not fair.

(1) Question Presented

Whether collateral estoppel applies to the element of proximate cause of this transactional malpractice claim? (Preserved in the record at Appendix A295-A300 and at oral argument (A576-A680)).

(2) Scope of Review

The Delaware Supreme Court reviews "a trial court's application of collateral estoppel *de novo*." *Rogers v. Morgan*, 208 A.3d 342, 346 (Del. 2019) (referencing *California State Teachers' Ret. Sys. v. Alvarez*, 179 A.3d 824, 834 (Del. 2018)).

(3) Merits of Argument

The Hernandez Family's claim was not merely a complaint for lack of a better outcome by failing to opt out of the class so that a verdict may have been obtained in their favor. The Hernandez Family's claim includes the loss of the chance to negotiate a settlement that would have provided real relief to L.H. by either 1) negotiating an individual settlement for L.H., or 2) negotiating terms into the class settlement and Plan of Allocation that would have compensated catastrophically injured children from the class settlement. These allegations of malpractice, *i.e.* the allegations of transactional malpractice, are not subject to collateral estoppel.

The Hernandez Family's allegations that the Retained Lawyers failed to negotiate a settlement for L.H. is not "litigation malpractice," as failure to obtain a settlement has been expressly defined as a "transactional malpractice" claim.

> "Legal malpractice actions in the transactional context often do not look back on the success or failure of litigation, but involve evaluating an attorney's actions that, at the time, looked forward toward a future deal, **settlement**, or the prevention of litigation."

Sherman v. Ellis, 2020 Del. Super. LEXIS 1, 2020 WL 30393 at *16 (Del. Super. Ct. Jan. 2, 2020) (emphasis added). In the Hernandez Family's claim that they lost the chance of a better result obtainable via settlement, the Hernandez Family have alleged a plausible claim. *Id*. at *24 (outlining that a plaintiff may succeed on a "transactional malpractice claim" by offering evidence "that, but for the attorney's negligence, the plaintiff would have obtained a more favorable result."). This transactional malpractice claim is not susceptible to any collateral estoppel defense because none of the four elements of collateral estoppel have been satisfied. *Supra*., *Messick* at 1211.

Specifically, the Hernandez Family alleged that the Retained Lawyers missed multiple opportunities to negotiate terms beneficial for L.H., or an all-together separate, beneficial settlement for her including, but not limited to:

> e. Failing to negotiate terms into a Class Action Settlement Agreement that would compensate minors with catastrophic injuries, including future medical needs and future lost earning capacity;
>
> f. Entering into class action settlement discussions that did not exclude L.H. as a separate claim;
>
> g. Entering into class action settlement discussions that they believe conflicted with their ability to represent individuals, including L.H.

Appendix at A46. These failures caused the alleged "loss of an ability to obtain a reasonable settlement and the loss of full compensation from a jury." *Supra*, *id.* at A46-A47.

Whether or not the Claims Adjudicator found in favor of the Hernandez Family on causation is immaterial to the allegations that the Retained Lawyers failed to draft an appropriate settlement that would compensate L.H.

> Proving causation in a transactional malpractice claim, as in a litigation malpractice claim, requires proof that, but for the attorney's negligence, the plaintiff would have obtained a more favorable result. While ultimate success in litigation in a case like Mr. Sherman's does not *per se* bar a malpractice claim, when the claim involves alleged negligence in not proposing or including an additional term in a proposed agreement, the plaintiff-client must first show that the other party would have agreed to the omitted term.

Sherman, 2020 WL 30393 at *24. Whether Mountaire would have agreed to an additional term that would have either amended the Plan of Allocation to include catastrophically injured people, or whether Mountaire would have agreed to settle L.H.'s claim individually is not a question of fact that was actually determined, adjudicated, or subject to final order. And finally, neither Judge Karsnitz nor the Claims Adjudicator made any finding regarding the Retained Lawyers' alleged negligence and causation of damages related to failures to negotiate better terms in the settlement that would have benefited their individual client, L.H.

This claim is also "plausible" as required by Delaware pleading standards. *Central Mortg. v. Morgan Stanley Mortg. Del*, 27 A.3d 531, 536 n.6 (Del. 2011) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face…")). As a matter of public record, Mountaire resolved over one-hundred plaintiffs' individual claims in a parallel-filed mass tort that alleged personal injuries to numerous individuals. *See Balback, et al v. Mountaire Farms of Del., Inc.*, CA No. S18C-06-034 RFS (Filed June 28, 2018). Several minor children alleged personal injuries as part of the *Balback* matter, and motions to approve settlements for their individual claims were filed and ordered. *See* Appendix A411-A450.

The Superior Court failed to accept the settled precedent that a failure to obtain a chance of a settlement is a transactional claim. "the instant claim is a litigation claim not a transactional claim." Appendix at A696. This characterization of the specific allegation of a loss of obtainment of a settlement as a litigation malpractice claim is in contradiction to Delaware case law and clear error.

Therefore, the claim that the Retained Lawyers negligently failed to negotiate a better agreement for L.H. is not subject to any collateral estoppel defense. These allegations are specifically included in the Complaint and are laid out as part of the proximate cause allegations as well. Appendix at A46-A47.

CONCLUSION

For the reasons set forth herein, Appellants the Hernandez Family respectfully request that the Delaware Supreme Court reverse the Superior Court's order and remand the case with instructions to deny the motion to dismiss.

JACOBS & CRUMPLAR, P.A.

/s/ Courtney R. Prinski, Esq.

Thomas C. Crumplar, Esq. (DE 942)
Courtney R. Prinski, Esq. (DE 5432)
10 Corporate Circle, Suite 301
New Castle, DE 19720
courtneyp@jcdelaw.com
(t) (302) 656-5445
(f) (302) 656-5875
Attorneys for Plaintiffs-Appellants

DATE: September 27, 2024