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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.,	C.A. No. 204, 2024
Plaintiffs Below, APPELLANTS,	Court Below: Superior Court of the State of Delaware
v.	C.A. No. N23C-11-112 FJJ
BAIRD MANDALAS BROCKSTEDT & FEDERICO, LLC; CHASE T. BROCKSTEDT; PHILIP C. FEDERICO; BRENT CERYES; STEPHEN A. SPENCE; SCHOCHOR, STATON, GOLDBERG AND CARDEA, P.A.,	
Defendants Below, APPELLEES.	

APPELLEES' ANSWERING BRIEF ON APPEAL

MARSHALL DENNEHEY, P.C.
M. Claire McCudden, Esq.
Supreme Court ID 5036
1007 N. Orange Street, Suite 600
Wilmington, DE 19899 – 8888
MCMcCudden@mdwcg.com
(302) 552-4354
Josh J.T. Byrne, Esq.
2000 Market Street, 24th Floor
Philadelphia, PA 19103

MARKS, O'NEILL, O'BRIEN, DOHERTY, & KELLY, P.C.
Marc Sposato, Esq.
Supreme Court ID 5663
Georgia C. Pham
Supreme Court ID 6316
300 Delaware Avenue, Suite 900
Wilmington, DE 19801
MSposato@moodklaw.com
(302) 658-6538
Counsel for Appellees

Dated: October 28, 2024

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NATURE OF PROCEEDINGS

Tiffany Hernandez and Jose Hernandez-Alvarez, Individually and as *Guardian ad Litem* for their child, L.H., (Appellants/Plaintiffs, hereinafter "Plaintiffs") commenced this matter on December 11, 2023, when they filed a complaint for legal malpractice and other claims against Appellees, Defendants below. (A9-A56).[1] Baird Mandalas Brockstedt & Federico, LLC, Schochor, Staton, Goldberg and Cardea, P.A., Chase T. Brockstedt, Stephen A. Spence, Philip C. Federico and Brent Ceryes (Appellees/Defendants, hereinafter "Defendants") are attorneys and their law firms (and successor law firms) who successfully prosecuted a large class action against Mountaire (the "Underlying Action"). Defendants represented Plaintiffs in the Underlying Action.

Baird Mandalas Brockstedt & Federico, LLC, Chase T. Brockstedt, and Stephen A. Spence filed their Motion to Dismiss Plaintiffs' Complaint on December 8, 2023. (A65-A68). Philip C. Federico, Brent Ceryes, and Schochor, Staton, Goldberg and Cardea, P.A., joined the Motion to Dismiss Plaintiffs' Complaint on December 11, 2023. (A69-A70).

Oral argument was held on April 23, 2024, before the Honorable Francis J. Jones. (A576-A680). During the argument, Plaintiffs argued that Defendants were negligent in failing to advise Plaintiffs to affirmatively opt out of the class and pursue

[1] Appendix citations reference Plaintiffs' amended appendix.

an individual claim. (A623). Plaintiffs additionally argued that there is no precedent that allows for a claims administrator's or adjudicator's finding to be given preclusive effect. (A644). Defendants argued that the underlying matter was litigation and Plaintiffs had not alleged that "but for" Defendants' representation they would have succeeded in litigating the claim against Mountaire to recover a verdict. Defendants also argued that the Claims Administrator's decision and Judge Karsnitz's conclusion that the settlement was fair and class counsel was found to make an excellent representation, precludes this Court from later finding there was a breach of duty. (A610-A612).

On May 13, 2024, Judge Jones issued an Opinion and Order Granting Defendants' Motion to Dismiss. (Exhibit 1 to Plaintiffs' Brief)[2]. Thereafter, Plaintiffs timely appealed Judge Jones' ruling granting Defendants' motion to dismiss.

Plaintiffs have filed their opening brief on appeal, and Defendants now file this answering brief.

[2] Citations to Plaintiffs' Brief are to their Amended Opening Brief.

SUMMARY OF ARGUMENT

I. Denied. The Superior Court properly applied collateral estoppel to bar Plaintiffs' claims against Defendants. This Court should affirm the Superior Court's ruling.

a. Denied. This Court should affirm the Superior Court's ruling that the Claims Administrator's decision was a final adjudication on the merits by a court of competent jurisdiction as the claims process was an approved process set up by Judge Karsnitz.

b. Denied. Plaintiffs had a full and fair opportunity to litigate their claims in the claims administration process. This Court should affirm the Superior Court's ruling.

c. Denied. All four elements of collateral estoppel were met and public policy, fairness, and justice does not require that Plaintiffs be permitted to pursue their claims against Defendants for negligently failing to advise them on how to obtain relief for L.H.'s injuries. This Court should affirm the Superior Court's ruling.

II. Denied. Plaintiffs' claim is not for transactional malpractice and is barred by the application of collateral estoppel. This Court should affirm the Superior Court's ruling that the instant claim is a litigation claim and not a transactional claim.

COUNTERSTATEMENT OF FACTS

Plaintiffs are the parents of L.H., a minor. (A10 at ¶1). Plaintiffs entered into an agreement for legal services for prosecution of a claim against Mountaire Corporation and its affiliates ("Mountaire") due to the presence of nitrate contamination in the water well on their property. *Id*. Plaintiffs allege that L.H. suffered catastrophic injuries due to severe premature birth at twenty-seven weeks of gestation which they attribute to nitrate contamination. *Id*. L.H. spent five months in the hospital and after discharge, L.H. was diagnosed with cerebral palsy and developmental delay. (A18 at ¶27-28). She has also been diagnosed with acortical vision impairment in both eyes, she cannot walk and suffers epileptic seizures. *Id*.

Defendants are attorneys and their law firms (and successor law firms) who successfully prosecuted a large class action against Mountaire and represented plaintiffs in the Underlying Action.

Plaintiffs allege Defendants pursued the Underlying Action and engaged in a sophisticated public relations campaign to cause as many possible potential plaintiffs to retain Defendants. (A13-A14 at ¶¶ 8-10). Plaintiffs allege in a general manner that Defendants did not evaluate individual claims or counsel Plaintiffs or other class members. (A14-A15 at ¶12). Plaintiffs allege that Defendants engaged in class action settlement discussions that resulted in the creation of a settlement fund in exchange for the release of all claims. (A15 at ¶13). Plaintiffs do not allege that the

settlement fund was inadequate to compensate Plaintiffs for damages they were able to prove were causally related to Mountaire's alleged wrongdoing. Plaintiffs allege that after the notice and opt-out period had ended, and it was clear that Defendants' motion for attorneys' fees and costs would be granted, Defendants withdrew their representation and "Plaintiffs were thrust into a claims adjudication process that was not designed to compensate L.H." (A15-A16 at ¶¶ 14-15). Plaintiffs do not identify any defect in the claim adjudication process that would have prevented Plaintiffs from being fully compensated to the extent they were able to establish injury related to Mountaire's alleged wrongdoing.

Plaintiffs allege that they contacted Defendants to provide information about the injuries sustained by L.H. and that no attorney ever contacted Plaintiffs to follow up or ask specific questions. (A30 at ¶¶ 54-56). Plaintiffs allege that Defendants' strategy was to incorporate L.H. into a class action settlement, and Plaintiffs were included in the proposed class settlement. (A35 at ¶¶68-69). Plaintiffs allege that they did not receive notice to opt out and/or seek legal advice from separate legal counsel regarding the process. (A37 at ¶ 77).

The Class Action Settlement Approval

On December 23, 2020, in the Underlying Action, plaintiffs and Mountaire filed a Class Action Settlement Agreement and Release which resolved claims related to alleged groundwater contamination and air pollution within the Millsboro,

Delaware community. (A108-A140). The Settlement Agreement required Mountaire to pay $65 million to resolve the Class Members' claims and provided for a Claims Adjudicator-directed process by which eligible Class Members could recover damages related to their individual claims. *Id*. As part of the Settlement Agreement, the Superior Court, on January 11, 2021, approved and ordered, among other things, the implementation of a proposed Notice Plan; established procedures for objections to the Settlement Agreement; established a procedure for opt-outs from the Settlement Agreement; and set a date for a fairness hearing. (A142-A152). Thereafter, Class Counsel directed notice pursuant to the **Court-approved** notice plan. (A154-A193) (Emphasis added). The notice campaign was robust and included mailing the notice to 6,720 Class Members, advertisements in multiple newspapers and a press release that generated news coverage in multiple media outlets. *Id*. Class Members were provided with a toll-free number and website to obtain the proposed settlement and case related documents. *Id*. Both direct and publication notices provided the Class Members with their right to exclude themselves from any settlement and the deadline for doing so. *Id*. After notice, 3,000 Class Members registered claims and only two Class Members objected to the Settlement Agreement. *Id*. Plaintiffs here, were part of the Class Members that registered claims and did not object to the Settlement Agreement.

On April 12, 2021, the Superior Court granted the Stipulated Motion to Approve Class Action Settlement. (A195-A220). The Superior Court held that the,

> …proposed Notice Plan was consistent with Rule 23(c)(2), represented the best practicable notice under the circumstances, and was reasonably calculated to apprise Class Members of the facts of this litigation and their rights with respect to the Settlement Agreement.

Id. In addition, the Superior Court found that having provided Notice to the Class Members in the manner directed by the Court, Defendants here, had provided sufficient notice and satisfied Rules 23(c)(2) and 23(e). *Id*. The Superior Court further found that the Settlement was fair, that the settlement amount was substantial, and liability was significantly at issue, and success at trial is subject to doubt. *Id*. Additionally, the Superior Court found that monetary relief will be administered through a comprehensive claims process to share the settlement amount with all class members after evaluating each class members' damages. *Id*. The Superior Court also found that Class Counsel, Defendants here, spent a substantial effort in time, and expenditure of money, and "saw the vigorous and determined work Class Counsel expended to prove the case, in the face of an equally determined defense." *Id*.

Finally, the Superior Court approved the payment of the litigation expenses and attorneys' fees of 25% of the settlement amount and found the amount consistent with and at the low end of tort cases. *Id*. In the Superior Court's view, the liability of Mountaire was a serious issue and the costs of proving the liability was

"enormous." *Id*. The Superior Court found that the potential for no recovery for the class was very real and that Class Counsel "worked diligently and professionally to bring about what to me is a remarkable result." *Id*.

L.H.'s Claim as Class Member

Defendants advised Plaintiffs that they could not represent L.H. individually. Plaintiffs retained new legal counsel, the same counsel that is currently representing them, and filed a claim package on behalf of L.H. alleging economic loss totaling between $8.6 million and $21.7 million. (A39 at ¶ 85). After review of L.H.'s claim, the Claims Adjudicator issued a Tier 1 award of $2,500 and later denied her appeal of the award. (A34 at ¶ 94).

Plaintiffs then filed a Motion to Amend Orders Granting Preliminary and Final Approval to Class Settlement. The Superior Court then issued an Order granting the Motion in part and ordered the Claims Adjudicator to take a "third look" at L.H.'s claim. (A36at ¶100; A222-A235). In granting the motion in part, the Superior Court noted that the claim was reviewed by "retired Judge Irma S. Raker, who formerly served on the Maryland Court of Appeals" and who "evaluated personal injury claims and determined the distribution of money to each Claimant." (A225-A226). As the Superior Court noted with respect to Plaintiffs' claims:

> Judge Raker determined that sufficient proof of causation was lacking and placed L.H. in the most modest distribution category. That category awards a Claimant $2,500.00. L.H.'s counsel categorizes the award as "insulting." If one were to assume causation between L.H.'s disabilities

> and Mountaire's conduct, counsel's characterization would be correct. It is patently clear that no one intended the award to be insulting, but a reflection of an evaluation of causation. As was her right, L.H. appealed the award. After further evaluation, including consultation with an independent physician in the field of maternal/fetal medical obstetrics/GYN and Public Health, the Claims Administrator denied L.H.'s appeal.

(A229). The Superior Court specifically: 1) noted that Plaintiffs and their counsel had been aware of the situation for at least a year before filing their motion; 2) noted that counsel for Plaintiffs "candidly admitted at the hearing he thought L.H.'s claims could be appropriately processed under the designed methodology"; and 3) noted the claims administrator's "work has been diligent, professional, and splendid." (A231-A233). Despite all this, the Superior Court directed the Claims administrator to review L.H.'s claim one more time.

Plaintiffs, with the assistance of current counsel, submitted additional materials in support of L.H.'s claim. L.H. was able to submit "additional supplemental materials including expert reports from a board certified Environmental and Occupational Exposure physician and a separate physician board certified in Obstetrics and Gynecology." (A44 ¶ 101-102 and Exhibit 1 to Plaintiffs' Brief p. 11). Upon this review, as well as a review of another OBGYN medical physician report, it was accepted by Judge Raker that the pre-term labor was the result of unexplained placental abruption, that was not related to the underlying nitrate contamination claims. (A44 at ¶ 102 and Exhibit 1 to Plaintiffs' Brief at 11-

12). Thereafter, the Claims Adjudicator did not increase the initial award of $2,500. (A46 at ¶107).

Claims in Present Action

Plaintiffs asserted several causes of action against Defendants including: (i) Negligence - Legal Malpractice; (ii) Recklessness, Promissory Estoppel – Detrimental Reliance; (iii) Promissory Estoppel – Detrimental Reliance; (iv) Breach of Contract; (v) Breach of the Implied Covenant of Good Faith and Fair Dealing; and seek punitive damages and reasonable attorneys' fees. The claims are all related to the same allegations which suggest Defendants did not adequately appreciate Plaintiffs' claim and did not advise Plaintiffs that they should opt out of the class settlement. (A46-48; A49-A51; A53-54; A56-A58 at ¶¶ 110, 114, 119, 128). Plaintiffs generally allege that the settlement was not appropriately designed to compensate catastrophically injured class members. (A46-48). However, Plaintiffs' Complaint does not acknowledge that the lack of a substantial award in the class settlement was due to Plaintiffs' inability to establish damages related to the alleged wrongdoing of Mountaire.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY GRANTED DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT IN ITS ENTIRETY.

The Superior Court properly granted Defendants motion to dismiss. Plaintiffs' appeal focuses solely on one of the arguments upon which dismissal was based, whether or not Plaintiffs are precluded through the application of collateral estoppel from establishing a causal connection between L.H.'s injury and the alleged negligence of Mountaire. Plaintiffs' appeal completely ignores that the Superior Court also granted dismissal based upon Defendants' argument that the underlying court approved settlement establishes that class counsel did not breach the duty owed by them to the class members including Plaintiffs. Plaintiffs do not appeal this separate basis for granting the motion to dismiss.

a. The decision of the Claims Administrator was a final adjudication on the merits by a court of competent jurisdiction.

1. Question Presented

Whether the Superior Court properly granted Defendants' motion to dismiss based on its determination that the decision of the Claims Administrator was a final adjudication on the merits by a court of competent jurisdiction?

2. Scope of Review

"This Court reviews the Superior Court's decision to grant a motion to dismiss under Rule 12(b)(6) *de novo* 'to determine whether the judge erred as a matter of

law in formulating or applying legal precepts.'" *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 871 (Del. 2020) (*quoting Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1160 (Del. 2010)). In reviewing the grant or denial of a motion to dismiss, this Court "view[s] the complaint in the light most favorable to the non-moving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations." *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009). However, this Court does not accept "conclusory allegations unsupported by specific facts, nor do[es] [it] draw unreasonable inferences in the plaintiff's favor." *Windsor I, LLC*, *supra*.

On appeal, the Delaware Supreme Court reviews the trial court's application of the doctrine of collateral estoppel *de novo*. *Rogers v. Morgan*, 208 A.3d 342, 346 (Del. 2019); *see also Cal. State Teachers' Ret. Sys. v. Alvarez*, 179 A.3d 824, 834 (Del. 2018).

3. Merits of Argument

The decision with respect to Plaintiffs' claims in the underlying action was a final adjudication by a court of competent jurisdiction on the merits of Plaintiffs' claims. Indeed, after a review of the parties' respective filings with respect to the motion to dismiss, Judge Jones wrote: "The parties do not seriously contest that the first three elements of issue preclusion are met" and the focus was on whether Plaintiffs were afforded a "full and fair opportunity" to litigate the causation issue.

(Ex. 1 to Pl.'s Brief at 13). However, on appeal Plaintiffs argue that the decision of a claims administrator is not entitled to collateral estoppel because the claims administrator is not a "court" as the term is defined under Delaware law. (Pl.'s Brief at 16, 18-22). This argument ignores that the decision of the claims administrator did not occur in isolation, but was the result of a court approved settlement of the litigation in which Plaintiffs were involved.

Judge Jones determined Plaintiffs' legal malpractice claim should be dismissed because Plaintiffs are collaterally estopped from establishing L.H.'s injuries were causally related to the alleged negligence of Mountaire. "In Delaware, to prevail in a legal malpractice case, a plaintiff-client must meet each prong of a three element test, which includes proving: (1) the employment of the attorney; (2) the attorney's neglect of a reasonable duty; and (3) the fact that such negligence resulted in and was the proximate cause of loss to the client." *Keith v. Sioris*, 2007 WL 544039, at *5 (Del. Super. Ct. 2007) *citing Weaver v. Lukoff*, 1986 WL 17121, at *1 (Del. 1986) (*citing Pusey v. Reed*, 258 A.2d 460, 461 (Del.1969), *overruled on different grounds*, *Starun v. All American Engineering Co.*, 350 A .2d 765, 768 (Del.1978)). In order to establish the third element, a legal malpractice "plaintiff must demonstrate that but for his lawyer's negligence, he would have been successful in the prosecution or defense of the underlying action." *Id.* Dismissal of Plaintiffs' complaint was appropriate if, taking the well-pleaded facts as true, and viewing all

reasonable inferences in favor of the non-movant, Plaintiffs cannot establish that *but for* Defendants' negligence, they would have been successful in the underlying action. *HealthTrio, Inc. v. Margules*, 2007 WL 544156, *9 (Del. Super. Ct. 2007).

The Delaware Supreme Court has held that collateral estoppel bars any party from relitigating factual issues previously litigated. *Id*. *citing Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1216 (Del.1991). As set forth by Judge Jones in his ruling:

> 1. The prior action must be a final adjudication on the merits by a court of competent jurisdiction;
> 2. The issue of fact decided must be the same as the one presented in the subsequent case;
> 3. The party against whom the doctrine is invoked was the same party in the prior action; and
> 4. The party against whom the doctrine is invoked "had a full and fair opportunity to litigate" said issue of fact in the previous action.

(Exhibit 1 of Pl.'s Brief at 5-6).

Despite Judge Jones' finding that the issue was not "seriously contested," Plaintiffs argue that collateral estoppel does not apply in this matter because the underlying decision was not made by the "court." Plaintiffs suggest that collateral estoppel should not preclude their claims because the claims administration process was not subject to the protections afforded by litigation and the appellate process. Plaintiffs' focus on whether the Claims Administrator is a "court" is a red herring. Plaintiffs ignore that the decision by the Claims Administrator was the result of a decision by the Superior Court that the claims administration process was fair and

equitable, and that decision was subject to all of the same safeguards as any other litigation.

The Superior Court did not find that a Claims Adjudicator qualified as a "court," but instead held that the "Claims Administrator's decision was a final adjudication on the merits **by a court** of competent jurisdiction as the claims process was an approved process set up by **Judge Karsnitz**." (Ex. 1 to Pl.'s Brief at 12). (Emphasis added). Such approval and the Order granting the approval, were part of an extensive litigation process in the Superior Court and subject to the Rules of the Court and an appeal process.

Judge Jones also noted that "[i]t is well settled that decisions of Administrative Agencies are given collateral estoppel effect." *Id*. at p. 15. In doing so, Judge Jones cited to *Messick v. Star Enterprise*, 655 A.2d 1209 (Del. 1995), the sole case cited by Plaintiffs with respect to this argument, and undercut Plaintiffs' argument on appeal. Plaintiffs' argue that *Messick* held: "The well-established case law is clear that collateral only applies to decisions made by a 'court.'" Plaintiffs' argument is inconsistent with the finding of the Superior Court in *Messick* which held: "Collateral 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." *Id*. at 1211.

In the Underlying Action, Judge Karsnitz evaluated both Defendants' representation as Class Counsel and the underlying claim of L.H. Most importantly, after due consideration of Plaintiffs' Motion to Amend Orders Granting Preliminary and Final Approval to Class Settlement, the Superior Court issued an Order granting the Motion in part and ordered the Claims Adjudicator take a "third look" at L.H.'s claim. In doing so, Judge Karsnitz specifically found "Judge Raker determined that sufficient proof of causation was lacking." (A229).

Plaintiffs did not appeal the Order issued by Judge Karsnitz. Plaintiffs undertook the opportunity provided by the underlying court to submit additional documents and the initial award was upheld. Plaintiffs' assertion that there was no "check" on the decisions of the Claims Administrator is belied by what actually happened in the underlying action, where the Court ordered the Claims Administrator to take a "third look" at Plaintiffs' claim. As such, the Superior Court in the present action properly concluded that the underlying decision by the Claims Administrator, as approved by the Superior Court, was a final adjudication on the merits by a court of competent jurisdiction and therefore satisfied the required element for imposition of collateral estoppel, and this Court should affirm.

b. Plaintiffs had a full and fair opportunity to litigate their claims in the claims administration process.

1. Question Presented

Whether the Superior Court properly granted Defendants' motion to dismiss based on its decision that Plaintiffs had a full and fair opportunity to present their claims?

2. Scope of Review

"This Court reviews the Superior Court's decision to grant a motion to dismiss under Rule 12(b)(6) *de novo* 'to determine whether the judge erred as a matter of law in formulating or applying legal precepts.'" *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 871 (Del. 2020) (*quoting Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1160 (Del. 2010)). In reviewing the grant or denial of a motion to dismiss, this Court "view[s] the complaint in the light most favorable to the non-moving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations." *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009). However, this Court does not accept "conclusory allegations unsupported by specific facts, nor do[es] [it] draw unreasonable inferences in the plaintiff's favor." *Windsor I, LLC*, *supra*.

On appeal, the Delaware Supreme Court reviews the trial court's application of the doctrine of collateral estoppel *de novo*. *Rogers v. Morgan*, 208 A.3d 342, 346

(Del. 2019); *see also Cal. State Teachers' Ret. Sys. v. Alvarez*, 179 A.3d 824, 834 (Del. 2018).

3. Merits of Argument

The opportunity for Plaintiffs to establish a causal relationship between L.H.'s injuries and the alleged negligence of the underlying defendants was more than "full and fair." Plaintiffs were provided with multiple opportunities to establish to the satisfaction of the Claims Administrator that L.H.'s injuries were causally related to the alleged negligence of Mountaire. Despite getting a second and third bite at that particular apple, Plaintiffs were unable to establish causation. Dissatisfied with the result, Plaintiffs argue the process was not adequate to collaterally estoppel them from proceeding with the present claim against their attorneys.

Plaintiffs argue that they did not have a full and fair opportunity to litigate L.H.'s claims because the claims administration process did not provide the same "procedural opportunities" as would have been afforded in a separate litigation. (Pl.'s Brief at 23). In making this argument, Plaintiffs incorrectly rely upon case law which holds a client is not precluded from rearguing "an issue of law decided adversely to such client due to alleged attorney neglect." *Oakes v. Clark*, No. CIV.A. N10C-04146DCS, 2012 WL 5392139, at *3 (Del. Super. Ct. 2012), *aff'd*, 69 A.3d 371 (Del. 2013).

Plaintiffs' reliance on *Oakes* is misplaced. The ability of a client to litigate an issue of law decided incorrectly due to attorney malpractice is different from the issue of whether a client is estopped from relitigating a finding of fact against the client in an underlying action after a full and fair opportunity to be heard. While finding a claim for legal malpractice was not barred as a result of legal findings in the underlying family law matter, the Superior Court in *Oakes* specifically found that it "must accept the prior court's conclusion that Oakes was untruthful about his income and that his untruthfulness is the reason that the prior court denied awarding him alimony and denied him a larger share of the marital assets." *Id*. Here, there was no alleged negligence of the attorneys which led to the court adversely deciding a legal issue against Plaintiffs. However, like in *Oakes*, there was a finding in the Underlying Action, after a full and fair opportunity to be heard, that L.H.'s injuries were not causally related to the alleged negligence of the underlying defendant. As in *Oakes* the Superior Court in the present legal malpractice action determined it was bound by that finding.

Plaintiffs did not allege that, but for Defendants' negligence**,** they would have been successful in the underlying action. There was no alleged negligence by Defendants which caused the underlying finding that L.H.'s injuries were not causally related to the negligence of the under underlying Defendant. Plaintiffs were given multiple "full and fair" opportunities to establish the causation element, with

no restriction on what they could present, and they could not do so. Plaintiffs cannot now utilize a legal malpractice claim to relitigate the causation element that they were provided a full and fair opportunity to litigate during the claims administration process.

In the Superior Court's Opinion and Order, Judge Jones noted:

> Plaintiffs counsel conceded at the argument on the Motion to Amend Orders Granting Preliminary and Final Approval to Class Settlement that counsel believed L.H.'s claims could be appropriately processed under the designed methodology. This concession was made shortly after Plaintiffs learned at the hearing that $17,000,000 remained in the settlement fund when they thought not enough remained for their claim, which they valued between $7,000,000 to $22,000,000.

(Pl.'s Brief, Exhibit 1 at 13-14). This is consistent with Judge Karsnitz's comment that "despite the misgivings, counsel for L.H. decided to move forward within the confines of the class process. . . . [c]ounsel candidly admitted at the hearing he thought L.H.'s claims could be appropriately processed under designed methodology." *Id*. at 11.

As stated in Plaintiffs' Complaint, while represented by current counsel, the Court ordered a third review of Plaintiffs' claim, and despite the "full and fair" opportunity to present additional evidence, the original award was upheld. (A46 at ¶107). As Judge Jones noted in his opinion, Plaintiffs' Complaint described the multitude of actions they took during their additional chance to present evidence of causation before the Claims Administrator, including: (1) submitting additional

supplemental materials and expert reports; (2) discovering that the Claims Administrator had accepted a medical physician's report that preterm labor was the result of an unexplained placental abruption; (3) Plaintiffs counsel interviewing the OBGYN who provided the report to the Claims Administrator who agreed that there was an association between nitrites and preterm birth; (4) Submitting reports by two new physicians which allegedly eliminated the possibility that unexplained placental abruption caused the preterm labor; and (5) submitting a hydrogeologist's report which asserted that it was more likely than not that the nitrate level was higher than 10 ppm during the time period of interest. (Pl.'s Brief, Ex. 1 at 14-15). Judge Jones considered the facts as set forth in Plaintiffs' Complaint and held that "[t]hese actions reveal that the Plaintiffs took full advantage of their opportunity to supplement the record." *Id*. at 15. Judge Jones found that it is obvious the evidence and discussion Plaintiffs submitted was insufficient to cause the Claims Administrator to change her position on causation. *Id*. Judge Jones concluded "Plaintiffs were afforded a full and fair opportunity to litigate the issue of the causation of Plaintiff's injuries to Mountaire's actions." *Id.*

In the Underlying Litigation, there was a claim process established and approved by the Superior Court after a fairness hearing. Even after current counsel was retained, Plaintiffs did not opt out of that process. During the Underlying Action, current counsel for Plaintiffs "candidly admitted" he thought L.H.'s claims

could be appropriately processed under the established methodology. *Id.* at 11. The claims process was followed by Plaintiffs and they were unable to establish causation. Plaintiffs, sought and were provided further relief through the Court approved process from Judge Karsnitz. *Id.* Judge Karsnitz ordered the Claims Administrator to take a "third look." *Id*. Plaintiffs, represented by current counsel, "took full advantage" of the opportunity and presented significant additional evidence. *Id*. at 11-12, 14-15. "L.H. was the only complainant given a third bite at the apple." *Id.* at 16. The Superior Court correctly held that Plaintiffs were provided a full and fair opportunity to present sufficient evidence to prove causation in the underlying matter. Notwithstanding the evidence presented by Plaintiffs while represented by current counsel, a lack of causation was found. *Id*.

The Superior Court in the present action correctly determined that it would not be able to make a different finding of causation because Plaintiffs were provided with a full and fair opportunity to prove causation in the underlying matter and were unable to do so. Any fault in what was presented in order to attempt to prove causation does not lie with Defendants who did not represent Plaintiffs during that process. As collateral estoppel precludes the Superior Court from making a finding that there was a causal link between L.H.'s injuries and the alleged negligence of Mountaire, Plaintiffs cannot establish the existence of harm related to the alleged malpractice as a matter of law. There is "no conceivable set of circumstances

susceptible to proof under the complaint" upon which Plaintiffs can prevail on the legal malpractice claim. *HealthTrio, Inc. v. Margules*, 2007 WL 544156, at *10. The Superior Court properly concluded that Plaintiffs were afforded a full and fair opportunity to litigate the issue of whether Mountaire's actions caused Plaintiffs' injuries, and the determination that no causal link existed precludes any finding that Plaintiffs could have succeeded in a claim against Mountaire but for some alleged negligence of Defendants.

c. Plaintiffs cannot utilize concepts of public policy to circumvent the application of collateral estoppel.

1. Question Presented

Whether Plaintiffs can utilize concepts of public policy to circumvent the application of collateral estoppel?

2. Scope of Review

On appeal, the Delaware Supreme Court reviews the trial court's application of the doctrine of collateral estoppel *de novo*. *Rogers v. Morgan*, 208 A.3d 342, 346 (Del. 2019); *see also Cal. State Teachers' Ret. Sys. v. Alvarez*, 179 A.3d 824, 834 (Del. 2018) On appeal to the Supreme Court, issues of public policy are considered matters of law which this Court must decide via *de novo* review. *See e.g., Jones v. State Farm. Mut. Auto. Ins. Co.,* 610 A.2d 1352, 1353 (Del. 1992) (holding that to the extent a decision turns on public policy grounds it is purely a question of law for which *de novo* review is appropriate).

3. Merits of Argument

Plaintiffs contend that principles of public policy, fairness, and justice compel this Court to permit them to proceed with their lawsuit despite the Superior Court's clear holding that collateral estoppel precluded their claims. (Pl.'s Brief at 26-28). In support of this position, and as mentioned generally in their claims below, Plaintiffs have cited only one case, *Messick v. Star Enterprises*, 655 A. 2d 1209 (Del. 1995).

Case law and principles of public policy support a finding directly opposed to Plaintiffs' position. As discussed in Section III, *infra*, courts have consistently been reluctant to allow claims of legal malpractice by settling members of a class due to the requirement of an explicit finding by the court that the representation of counsel was adequate before any class settlement is entered into. Moreover, the doctrine of collateral estoppel is a judicially created rule that is itself based on principles of public policy to "promote judicial economy." *Chrysler Corp. v. New Castle County*, 464 A.2d 75, 82 (Del Super. Ct. 1983). Further, "[i]n 1934, the requirement of mutuality was rejected on a public policy rationale when a full, free and untrammeled opportunity to present all the facts had been afforded." *Id.* (*citing Coca-Cola Co. v. Pepsi-Cola Co.*, 172 A. 260, 262 (Del. Super. Ct. 1934)).

In the present case, Plaintiffs have had the opportunity three times as discussed above to litigate the merits of their claim - specifically, to demonstrate that Mountaire's contamination is or was the proximate cause of L.H.'s unfortunate injuries. Indeed, and as noted by Judge Jones in his Opinion, counsel for L.H. "candidly admitted at the hearing he thought L.H.'s claim could be appropriately processed under designed methodology." (Pl.'s Brief, Exhibit 1, at 11, *citing* J. Karsnitz Order dated May 9, 2023, at A231). This is an issue that has been fully and repeatedly addressed through the claims process, as approved by the Superior Court. This process included a third opportunity to present additional evidence in

accordance with the decision of the Superior Court. Even after that "third bite at the apple," the conclusion remained the same, that Mountaire was not the proximate cause of L.H.'s injuries. (A44 at ¶¶ 101-102). Plaintiffs now seek a fourth opportunity to litigate the issue of proximate cause that has already been 'litigated and determined.' To permit this continued re-litigation of a resolved issue is not only contrary to public policy, it also acts as the type of "collateral attack" on a court's findings of the type discussed by *Wyly*. *Wyly v. Weiss,* 697 F.3d 131 at 141-142 (2d. Cir. 2012).

Moreover, Plaintiffs' reliance on *Messick* is misplaced. In *Messick*, this Court stated repeatedly that its holding was limited to the extremely narrow and specific circumstances of that case. *See, e.g.*, 655 A.2d. at 1213. *Messick* involved an injured worker who was denied workers' compensation benefits before the IAB and then sought to file a third-party civil suit against a different party. *Id*., at 1211. This Court held that applying collateral estoppel here ran afoul of Delaware's Workers' Compensation statute, which explicitly stated that there be no election of remedies as between filing a claim with the IAB which could afford a Plaintiff more immediate relief and a third-party civil suit which could take longer but provide the possibility of more remunerative relief. *Id*., at 1212-1213. This Court's language is instructive, stating that the holding is "strictly limited to the narrow set of circumstances where a statute mandates that there be no election of remedies and the

application of collateral estoppel would result in such an election." *Id*. at 1213. This Court further stated that:

> nothing herein is intended to be applied as precedent in connection with the application of principles of collateral estoppel in other proceedings … in the absence of a statute such as 19 *Del. C*. § 2363, involving the acceptance of compensation benefits or the taking of proceedings not acting as an "election of remedies."

Id. at 1213 n.3. This is precisely what Plaintiffs seek to do here. Plaintiffs cite to no similar statute prohibiting an election of remedies. As such, Plaintiffs' reliance on *Messick* is misplaced, and public policy cannot circumvent the application of collateral estoppel in this matter.

II. THE SUPERIOR COURT CORRECTLY HELD THAT PLAINTIFFS' CLAIM IS NOT FOR TRANSACTIONAL MALPRACTICE AND IS BARRED BY THE APPLICATION OF COLLATERAL ESTOPPEL.

1. Questions Presented

Whether Plaintiffs can avoid the bar created by collateral estoppel by mislabeling their claim as one for "transactional malpractice?"

2. Scope of Review

On appeal, the Delaware Supreme Court reviews the trial court's application of the doctrine of collateral estoppel *de novo*. *Rogers v. Morgan*, 208 A.3d 342, 346 (Del. 2019); *see also Cal. State Teachers' Ret. Sys. v. Alvarez*, 179 A.3d 824, 834 (Del. 2018).

3. Merits of the Argument

Plaintiffs allege Defendants committed "transactional malpractice" because they allegedly lost a chance at a better result through a settlement agreement that would have better compensated L.H. individually. Plaintiffs argue that this is a "transactional malpractice" claim, and is thus not precluded by collateral estoppel. (Pl's. Brief, at 29-32). This flawed argument is premised on the incorrect assumption that principles related to transactional malpractice apply to this case at all – one involving purely litigation. It also ignores that the underlying settlement indeed provided compensation for injuries up to and including wrongful death and survival claims.

Plaintiffs' arguments fail at the outset as this matter, as correctly noted by Judge Jones, is one where the underlying cause of action involves litigation. (Pl.'s Brief, Ex. 1, at 16). Transactional malpractice occurs when an action arises from an underlying transactional matter. This Court, in *Country Life Homes, LLC v. Gellert Scali Busenkell & Brown, LLC,* 259 A.3d 55, 60 (Del. 2021) explains that a transactional setting is one "where a plaintiff claims that loss was suffered because of an attorney's negligence in such matters as the drafting of an agreement, a real estate transaction, or a business transaction." *County Life Homes* goes on to provide a trio of cases that provide examples of negligence in a transactional setting: *Sherman v. Ellis*, 246 A.3d 1126 (Del. 2021) (*en banc*); *Dickerson v. Murray*, 2016 Del. Super. LEXIS 166, (Del. Super. Ct. 2016); and *Beneville v. Pileggi*, 2004 U.S. Dist. LEXIS 5781, (D. Del. 2004). To be clear, *Sherman* involved a malpractice claim centering around the preparation of a premarital agreement; 246 A.3d. 1126. *Dickerson* involved a malpractice action regarding the drafting of a promissory note; 2016 Del. Super. LEXIS 166, at *1-2; and *Beneville* involved claims about an underlying business transaction document. 2004 U.S. Dist. LEXIS 5781, at *2. In other words, none of these matters are akin to the present case, which at its core is one of class action *litigation*. That a settlement agreement was part of the conclusion of the underlying litigation does not change the fact that the underlying matter was non-transactional in nature.

Moreover, even if we accept the flawed premise that the underlying matter was somehow transactional, Plaintiffs' argument ignores that the Settlement Plan provided for all types of personal injuries up to and including wrongful death and survival claims. (A504). The Plan, as approved by the Superior Court, set forth four categories of damages and related criteria. Each of the four categories of damages was then associated with a claim amount. The criteria included, in relevant part:

> (1) Type and severity of personal injuries, including wrongful death and survival claims, associated with exposure to alleged groundwater contamination and/or air pollution associated with the alleged contamination at issue in this Action in the Groundwater Area, the Air Area, or both, as applicable;
>
> (2) Risk of future personal injury and necessity for medical monitoring, based on exposure to groundwater contamination and/or air pollution associated with the alleged contamination at issue in this Action as applicable;

(A504) .

Thus, the Settlement Plan, as approved, accounted for those who were catastrophically injured or even deceased as a result of the alleged conduct of Mountaire.

In addition to the forgoing, the argument regarding transactional malpractice is also based on the clearly erroneous conclusion that had an amendment been added to the agreement dealing with "those catastrophically injured" it would have resulted in a different outcome for L.H. The problem for L.H. is not the truly grievous and extreme nature of the injuries she suffered, but rather a lack of causation between

those injuries and the conduct of Mountaire. The issue of proximate cause is one that has been addressed repeatedly in the past, and no number of amendments to the underlying agreement would change the lack of causation between the alleged breach and L.H.'s injuries.

Further, this claim rests on the flawed and purely hypothetical claim that the results would have been different for L.H. if Mountaire had been approached to settle her claim outside of the class action process. Not only is this argument based on pure speculation, it also ignores the lack of causation between L.H.'s injuries and Mountaire's conduct, which would be just as much at issue in this hypothetical situation as it was in the claims process.

The purpose of Plaintiffs' reliance on the tenuous argument that this is somehow a "transactional claim" is to convince this Court that a relaxed standard of proof would apply. To support this premise below, Plaintiffs cited to *Sherman v. Ellis*, 2020 WL 30393 (Del. Super. Ct. 2020). However, as Judge Jones noted in his Opinion, the Delaware Supreme Court reversed the holding in *Sherman,* finding that the "traditional 'but for' test remained in both litigation and transactional malpractice claims." (Pl.'s Brief, Ex. 1, at 16) *Sherman v. Ellis*, 246 A.3d 1126 (Del. 2021).

Finally, even with all of the issues outlined above, the complaint does not include any factual basis for the claim that the underlying settlement was insufficient

to compensate catastrophically injured individuals, nor that Mountaire would have accepted additional terms in favor of L.H. As Judge Jones noted in his Opinion, Plaintiffs' counsel conceded at the argument on the Motion to Amend Orders Granting Preliminary and Final Approval to Class Settlement that "counsel believed L.H.'s claims could be appropriately processed under the designed methodology." A concession that came "shortly after Plaintiffs learned . . . that $17,000,000 remained in the settlement fund. (Pl.'s Brief, Ex. 1, at 13-14). As such, there is no transactional malpractice claim, and Plaintiffs cannot overcome collateral estoppel on this basis.

III. THE SUPERIOR COURT'S FINDING THAT REPRESENTATION OF THE CLASS WAS ADEQUATE SERVES AS AN INDEPENDENT BASIS TO PRECLUDE PLAINTIFFS' ALLEGATION OF MALPRACTICE.

1. Questions Presented

a. Does the Superior Court's findings that representation of the class was adequate to approve the settlement serve as an independent basis to preclude Plaintiffs' allegation of malpractice?

b. Did Plaintiffs waive any argument contesting this basis of preclusion by failing to address it within the body of the opening brief?

2. Scope of Review

"This Court reviews the Superior Court's decision to grant a motion to dismiss under Rule 12(b)(6) *de novo* 'to determine whether the judge erred as a matter of law in formulating or applying legal precepts.'" *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 871 (Del. 2020) (*quoting Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1160 (Del. 2010)). In reviewing the grant or denial of a motion to dismiss, this Court "view[s] the complaint in the light most favorable to the non-moving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations." *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009). However, this Court does not accept "conclusory allegations unsupported by specific facts, nor do[es] [it] draw unreasonable inferences in the plaintiff's favor." *Windsor I, LLC*, *supra*.

On appeal, the Delaware Supreme Court reviews the trial court's application of the doctrine of collateral estoppel *de novo*. *Rogers v. Morgan*, 208 A.3d 342, 346 (Del. 2019); *see also Cal. State Teachers' Ret. Sys. v. Alvarez*, 179 A.3d 824, 834 (Del. 2018).

3. Merits of Argument

Judge Jones, in his opinion, correctly held that "[t]he underlying court's findings that representation of the class was adequate to approve the settlement serves as an independent basis, beyond the Claims Administrator's decision, to give preclusive effect to Plaintiffs' assertion that Defendants committed malpractice." (Pl.'s Brief, Ex. 1, at 18-19). Superior Court Civil Rule 23 outlines the lengthy requirements necessary to establish, maintain, and ultimately settle a class action matter. In reaching his conclusion, Judge Jones explains through the example *Thomas v. Albright,* 77 F.Supp.2d 114,121 (D.D.C. 1999) that an essential aspect of Rule 23 is the condition that, prior to a settlement's approval the court must find, and class counsel must establish, that the settlement was fair to the class members and that class counsel adequately represented the class. (Pl.'s Brief, Ex. 1, at 17). The Opinion continues that it is for this reason that "courts have been very hesitant to allow individual class members to maintain legal malpractice actions against class counsel." (*Id*.). In other words, "what is clear is that the settlement … rest[s] on the essential finding that class counsel has adequately represented the plaintiffs."

Thomas, 77 F.Supp.2d 114, at *121*. To permit otherwise would "constitute[] a collateral attack" on a court's "findings that the Settlement was 'fair, reasonable, and adequate.'" *Wyly v. Weiss*, 697 F.3d 131,142 (2d Cir. 2012) (internal citations omitted).

The Superior Court's conclusion is based on significant precedent, much of which is thoroughly outlined in the Opinion. An emphasis must be placed on the discussion of *Wyly*, in which the court determined that "class members could not establish a breach of duty as a matter of law" because a finding that the class had been adequately represented is implicit in the court's ultimate approval of a class settlement." (Pl.'s Brief, Ex. 1, at 17-18)(discussing *Wyly v. Weiss*, 697 F.3d 131,142 (2d Cir. 2012) . In this context, Judge Jones held that in the underlying action at issue, Judge Karsnitz had evaluated the representation of class counsel and held that "notice was proper, the settlement was fair and he approved the award of attorneys' fees and costs and found that the Class Counsel worked diligently and professionally in order to arrive at a remarkable result." (Pl.'s Brief, Ex. 1, at 18) (internal citations omitted).

Plaintiffs do not address this independent basis for preclusion of their claims in their Opening Brief and as such, have waived argument on the issue. In fact, Plaintiffs concede in their brief that 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." (Pl.'s Brief, at 1).

Pursuant to Supreme Court Rule 14, "the merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal." *See* Supr. Ct. R. 14(b)(vi)(A)(3); *see also Ploof v. State*, 75 A.3d 811, 821-822 (Del. 2013). Delaware case law specifically holds an opening brief must "fully state the grounds for appeal, as well as the arguments and supporting authorities on each issue or claim of reversible error." *Id. at 822.* This Court in *Ploof* specifically held that casually mentioning an issue or otherwise providing cursory treatment "is insufficient to preserve the issue for appeal." *Id.* This holding also would apply to a party's attempt to argue that such claims should be considered incorporated by referring to briefs in his/her appendix. *Id.* As such, Plaintiffs do not contest Judge Jones' opinion that, the "underlying court's findings that representation of the class was adequate to approve the settlement serves as an independent basis, beyond the Claims Administrator's decision, to give preclusive effect to Plaintiffs' assertion that Defendants committed malpractice." (Pl.'s Br., Ex. 1, at 18-19).

The Superior Court properly determined that the underlying court's findings that representation of the class was adequate is an independent basis to dismiss Plaintiffs' complaint, and that determination has not been appealed by Plaintiffs.

This Court can, and should, affirm the Superior Court's decision to dismiss Plaintiffs' Complaint on that basis.

CONCLUSION

For the above reasons, this Court should affirm the Superior Court's ruling granting Defendants' motion to dismiss.

Respectfully submitted,

MARSHALL DENNEHEY, P.C.

/s/ M. Claire McCudden
M. Claire McCudden, Esq. (I.D. No. 5036)
1007 N. Orange Street, Suite 600
P.O. Box 8888
Wilmington, DE 19899

Josh J.T. Byrne, Esq.
2000 Market Street, 24th Floor
Philadelphia, PA 19103

MARKS, O'NEILL, O'BRIEN, DOHERTY & KELLY, P.C.
/s/ Marc Sposato
Marc Sposato, Esq. (I.D. No. 5663)
Georgia C. Pham, Esq. (I.D. No. 6316)
300 Delaware Avenue, Suite 900
Wilmington, DE 19801

Attorney for Defendants

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