EFiled: Apr 23 2025 03:17PM EDT
Filing ID 76135053
Case Number 523,2024

THE SUPREME COURT OF THE STATE OF DELAWARE

COUNTRY LIFE HOMES, LLC; HEARTHSTONE MANOR I, LLC; HEARTHSTONE MANOR II, LLC; RIVER ROCK, LLC; KEY PROPERTIES GROUP, LLC; CEDAR CREEK LANDING CAMPGROUND, LLC; MBT LAND HOLDINGS, LLC; ELMER FANNIN; and MARY ANN FANNIN Plaintiffs Bellow/ Appellants, v. **GELLERT SCALI BUSENKELL & BROWN, LLC,** Defendant Bellow/Appellee.	:	No. 523, 2024 Court Below: Superior Court of the State of Delaware C.A. No. N19C-03-228 (VLM)

APPELLANTS' AMENDED OPENING BRIEF ON APPEAL

IPPOLITI LAW GROUP
Michael R. Ippoliti, Esquire (#2545)
Christopher Isaac, Esquire (#6291)
1225 N. King Street, Suite 900
Wilmington, DE 19801
Ph: (302) 428-1400
Fax: (302) 428-9664
Email: Michael@ippolitilawgroup.com
Email: Christopher@ippolitilawgroup.com
Attorneys for Appellant

Date: April 23, 2025

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Rules

Treatises

NATURE OF THE PROCEEDINGS

This is a legal malpractice action arising from a series of underlying litigation matters between Country Life Homes, LLC (and its affiliates) and Fulton Bank. Appellants / Plaintiffs below, Country Life Homes, LLC; Hearthstone Manor I, LLC; Hearthstone Manor II, LLC; River Rock, LLC; Key Properties Group, LLC; Cedar Creek Landing Campground, LLC; MBT Land Holdings, LLC; Elmer Fannin, and; Mary Ann Fannin (herein after "Country Life" or "CLH), were defendants in eight (8) commercial debt collection actions brought by their business lender, Fulton Bank, N.A. ("Fulton"). Appellee / Defendant below, Gellert Scali Busenkell & Brown, LLC's ("GSBB") represented CLH in those actions, in addition to also representing Country Life Homes, LLC as plaintiffs in two lawsuits against Fulton.[1]

In mid-September 2018, CLH terminated GSBB, and hired the law firm of Ashby Geddes as its new counsel.[2] On December 4, 2018, all of the litigated matters between CLH and Fulton were settled at mediation.

On March 22, 2019, GSBB filed a Complaint against CLH asserting three claims: (i) Breach of Contract; (ii) Unjust Enrichment; and (iii) Quantum Meruit. All three of GSBB's claims were predicated upon attorneys' fees purportedly owed and

[1] GSBB was hired on March 1, 2016, (initially) solely for the purpose of restructuring several outstanding loans (on behalf of CLH) with Fulton.

[2] Trans. 12365996.

costs incurred during the underlying litigation with Fulton. On June 19, 2019, CLH filed their Answer, Affirmative Defenses, and Counterclaims, bringing two claims against GSBB: (i) Legal Malpractice and (ii) Respondeat Superior, also arising as a result of GSBB's earlier representation in the multiple litigations with Fulton. On September 5, 2019, GSBB file a Motion to Dismiss those Counterclaims. Oral argument was held before the Honorable Vivian L. Medinilla ("Judge Medinilla") on November 18, 2019. On December 16, 2019, Judge Medinilla issued an Opinion and Order, granting GSBB's Motion to Dismiss.[3]

On November 20, 2020, CLH appealed the dismissal of their legal malpractice claims to the Supreme Court, which reversed and remanded the matter back to the Superior Court in September 2021.[4]

Following remand, on February 7, 2022, the Superior Court issued a Trial Scheduling Order ("TSO"). Of note, CLH's expert witness report deadline was set for July 29, 2022. CLH's expert witness deadline was ultimately extended by stipulation to January 12, 2024. When CLH was unable to meet this January deadline, GSBB filed a Motion to Compel Expert Report. The Superior Court

[3] The parties later settled GSBB's claims and on November 4, 2020, Judge Medinilla granted the parties' stipulation to dismiss GSBB's claims. Trans. ID. 66078162.

[4] Country Life Homes, LLC v. Gellert Scali Busenkell & Brown, LLC, 259 A.3d 55 (Del. 2021).

granted this motion, ordering production of CLH's expert witness report by March 21, 2024. On March 26, 2024, (5) days after the court-imposed deadline CLH served its expert witness report. On May 31, 2024, GSB&B filed a Motion for Summary Judgment, which – among other things – argued that, CLH's expert, Mr. Lou Friedman was unqualified to serve as an expert in a Delaware legal malpractice litigation case. Subsequently, CLH identified Steven Holfeld, Esq. as their "bridging" expert on June 18, 2024. Mr. Holfeld submitted his bridging expert witness report on June 26, 2024. On July 29, 2024, CLH also filed a Motion to Deem Identification of Bridging Expert and the Expert Report as Timely Filed, which requested that the Superior Court declare its bridging expert identification and associated bridging expert report to be timely filed. GSB&B opposed. On November 19, 2024, the Superior Court denied CLH's Motion to Deem Identification of Bridging Expert and the Expert Report as Timely Filed, and granted GSBB's Motion for Summary Judgment.[5]

This timely (second) appeal followed.

[5] Exhibit 1.

SUMMARY OF THE ARGUMENTS

I. The Superior Court erred in holding that CLH's expert witness, Lou Friedman, Esq. / CPA, was not qualified to testify as an expert witness.

A. Lou Friedman was eminently qualified as an expert on behalf of CLH.

B. The Superior Court erred in holding that an expert witness regarding the standard of care in a Delaware legal malpractice action must be licensed to Practice Law in the State of Delaware.

C. The Superior Court erred in holding that Mr. Friedman could not be both an expert and a fact witness on behalf of CLH.

II. Even without Mr. Friedman as its expert, Superior the trial Court erred in holding that CLH still required the Trial testimony of a standard of care expert, based on its mistaken belief that this case was a jury trial, rather than a bench trial.

STATEMENT OF FACTS

Country Life Homes, LLC ("CLH") is engaged in the business of residential real estate development in Sussex County Delaware. For many years, Delaware National Bank ("DNB") provided commercial loans and lines of credit to Country Life Homes to assist in the operations of their various development projects.

In 2010, DNB merged with Fulton Bank, N.A. ("Fulton"), and thereafter Fulton assumed DNB's old loans and lines of credit with CLH. Following some issues regarding the loans and financing with Fulton, CLH decided to seek legal assistance in order to restructure the loans. On March 1, 2016, CLH engaged the Delaware law firm of Gellert Scali Busenkell & Brown (hereinafter "GSBB") to represent it – and its various affiliated companies, (e.g., Key Properties Group, etc.) – to restructure the various commercial loans/lines of credit with Fulton. Thereafter, GSBB, on behalf of CLH, notified Fulton of its retention.

On April 19, 2016, GSBB launched its first "salvo" to Fulton, in support of GSBB's contention that certain Fulton loans were "overstated". In the letter, GSBB, in response to Fulton, sets forth its calculation of amounts owed on four (4) loans, based on, inter alia, spreadsheets for each account provided by Fulton.[6]

[6] Exhibit 2. Bates stamped GSBB_C Brown_ESI_063970 to 063971.

By early November, 2016, GSBB purportedly recognized "storm clouds on the horizon" between CLH and Fulton, and decided to pre-emptively file a complaint on behalf of CLH and against Fulton, on the disputed loans.[7] In doing so, it turned for assistance (at least in part) to Lou Friedman C.P.A./JD, CLH's long-term accountant and a Maryland lawyer, to assist in preparing the draft complaint.[8]

Despite being retained for over six (6) months, GSBB was not able to restructure a single loan.[9]

A. THE UNDERLYING ACTIONS, AND THEIR LITIGATION

1. Loan Number 5670448-0361 ("0361"), C.A. No. N16C-12-077 PRW

On or about August 30, 2002, DNB approved CLH for a revolving construction line of credit, loan number x0361, in the amount of $2,000,000.00.[10]

---

[7] "Timewise", Fulton actually started filing its complaints against CLH first. CLH filed the third Complaint in the underlying litigation.

[8] Exhibit 3. Bates stamped GSBB_C Brown_ESI_055621. The draft complaint is set forth at Exhibit 4 Bates stamped GSBB_C Brown_ESI_055622 to 055328. It is noteworthy that GSBB did not supply CLH with a single document prior to this, explaining why any (attempted) further "loan restructuring" should cease, or why CLH should resort to litigation with Fulton.

[9] In its Memorandum Opinion granting Summary Judgment (Memo Op), the Trial Court stated that the "restructuring efforts were not successful." Id. at 3. But what remains unclear is precisely what GSBB actually did to try to "restructure" the loans.

[10] Mr. and Mrs. Fannin personally guaranteed repayment of the line of credit, as they did for all of the associated loans/lines of credit.

When CLH failed to finish making payment by the credit maturity date, Fulton – as DNB's successor – on September 9, 2016, declared the line of credit in default. On December 9, 2016, Fulton filed suit against CLH and Mr. and Mrs. Fannin (CLH's owners, and hereinafter collectively included in "CLH"), in the Superior Court, initiating an action encaptioned Fulton Bank v. Country Life Homes, Inc., et al., C.A. No. N16C-12-077 PRW (the "077 Action").[11] CLH engaged GSBB to represent them in the 077 Action and were primarily represented by Attorney Brown and Attorney Busenkell.

On December 23, 2016, GSBB (on behalf of CLH) filed its Answer and Counterclaim against Fulton.[12] On January 12, 2017, Fulton filed a Motion to (a) Enter Default Judgment against CLH and (b) Dismiss CLH's Counterclaims.[13]

In furtherance of CLH's claims and defenses CLH (at the behest of GSBB) commissioned the firm, Gavin/Solmonese, LLC ("Gavin") to review the underlying loan documents from Fulton and to prepare a limited scope review ("LSR") report regarding what was actually pled on the "0361" loan.

---

[11] Trans. 59936882.

[12] Trans. 59993319.

[13] On February 2, 2017, GSBB filed CLH's Responses to Fulton's Motion. GSBB also filed CLH's Answer and Amended Counterclaims. Trans. 60152642; Trans. 60155100.

On March 2, 2017, GSBB filed a Motion to consolidate Case Nos. N16C-11-200, N16C-12-076, N16C-12-077 and N17C-02-062.[14] On March 20, 2017, Judge Wallace granted in part and denied in part CLH's Motion to Consolidate.[15]

On July 17, 2017, GSBB tendered Gavin's initial LSR to Fulton.

In response to CLH's request to both GSBB and Gavin to structure a final settlement package, Gavin, with assistance from Mr. Friedman, finalized a proposed settlement package by August 4, 2017, after receiving what appears to be Fulton's final series of financial inputs.[16]

On November 17, 2017, (in case no "-077"), following a hearing on October 31, 2017, Judge Wallace entered an order granting Fulton's Motion for Entry of Default Judgment against CLH, and dismissing CLH's counterclaims against Fulton.[17] GSBB, however, did not immediately notify CLH of the Court's decision.

---

[14] Trans. 60281006.

[15] Trans. 60358054.

[16] Exhibit 5. Bates stamped GSBB_C Brown_EIS_054298 to 054300. Note that Fulton's representative (Ms. Ashley) was critical of, inter alia, Attorney Busenkell, who, inter alia, either did not review or did not retain the comprehensive financial documentation forward to him by Fulton.

[17] Trans. 61390271. The Court further ordered "that [CLH] shall have ten (10) days from the entry of this Order to amend its counterclaims in accordance with the ruling of this Honorable Court as expressed on the record at the hearing held on Tuesday, October 31, 2017, at 3:30 p.m." GSBB (on behalf of CLH) failed to do so.

The Gavin Report was completed in June of 2018.

On March 22, 2019, Stipulated Dismissal with Prejudice for consolidated Action No. N16C-12-077 and Vacate Summary Judgment on Action No. N17C-12-104.[18]

2. Loan Number 97084550101 ("55-0101"), C.A. No. N16C-12-076 PRW

On or about September 7, 2006, Fulton approved Key Properties (a companion company of CLH, and hereinafter included in the CLH identity) for a construction line of credit, loan number 55-0101, in the amount of $15,000,000.00.[19]

After declaring the loan in default, on December 9, 2016, Fulton filed suit against CLH, in the Superior Court, initiating an action encaptioned Fulton Bank v. Key Properties Group, LLC, et al., C.A. No. N16C-12-076 PRW (the "076 Action"). GSBB was again retained to defend the action, and on December 23, 2016, GSBB filed CLH's Answer and Counterclaims against Fulton.[20] On January 12, 2017, Fulton filed a Motion to (a) Enter Default Judgment against CLH and (b) Dismiss CLH's Counterclaims. Oral Arguments were scheduled for March 9, 2017.[21] On

[18] Trans. 63094008.

[19] On January 30, 2009, the line of credit was increased to $8,000,000.00.

[20] Trans. 59993088.

[21] Trans. 60066045.

February 2, 2017, GSBB filed CLH's Responses to Fulton's Motion. GSBB also filed CLH's Answer and Amended Counterclaims.[22]

Following Oral Arguments on Fulton's Motions, the Court granted the Motion for Judgment in part and denied in part as to dismissal of counterclaims.[23]

On December 26, 2017, GSBB filed a Response in Opposition to Fulton's Motion for Judgment on the Pleadings and to hold CLH in Civil Contempt.[24]

On May 10, 2018, Stipulation to Consolidate Actions No. N16C-12-076 SKR, N17C-12-138 SKR.[25]

On July 17, 2018, CLH moved to file its First Amended Complaint,[26] and on August 7, 2018, Fulton filed its Response in Opposition to CLH's Motion.[27]

---

[22] Trans. 60152533. On March 2, 2017, GSBB filed a Motion to consolidate Case Nos. N16C-11-200, N16C-12-076, N16C-12-007 and N17C-02-062. Trans. 60281006. On March 20, 2017, Judge Wallace granted in part and denied in part CLH's Motion to Consolidate.

[23] Trans. 61304100. On December 7, 2017, Fulton filed a Motion for Judgment on the Pleadings and to Hold CLH in Civil Contempt. Trans. 61439600.

[24] Trans. 61500085.

[25] Trans. 62018270.

[26] Trans. 62247500.

[27] Trans. 62316838. On August 28, 2018, CLH filed its Answering Brief in Opposition to Fulton's Motion to Dismiss.

In mid-September 2018, CLH terminated GSBB, and hired the law firm of Ashby Geddes as its new counsel.[28] Thereafter, the case was resolved at mediation.

3. Loan Number 9705067-9001 ("67-9001"), C.A. No. N17C-12-108 PRW

On or about March 31, 2003, DNB approved River Rock, LLC (a companion company to CLH, and hereinafter included in the CLH identity) for a commercial loan, loan number 67-9001, in the amount of $4,500,000.00.

On November 22, 2017, Fulton declared the loan in default, and on December 8, 2017, Fulton filed suit against River Rock, LLC et. al., in the Superior Court, initiating an action captioned Fulton Bank v. River Rock, LLC, et al., C.A. No. N17C-12-108 PRW (the "108" Action"). Again, River Rock, LLC (CLH) requested that GSBB represent them in the 108 Action. On January 3, 2018, CLH filed its Answer to the Complaint.[29]

On May 25, 2018, Fulton filed a Motion for Entry of Default Judgment, or in the Alternative, for Summary Judgment.[30] On July 6, 2018, CLH filed a Motion to Amend its Answer, to include a counterclaim.[31] On July 16, 2018, Fulton filed its

---

[28] Trans. 62365996.

[29] Trans. 61520451.

[30] Trans. 62069589. By this date, the case had been reassigned to the Honorable Sheldon Rennie. On June 18, 2018, CLH filed its Opposition to Fulton's Motion. Trans. 62150360.

[31] Trans. 62206999.

Opposition to CLH's Motion to Amend Answer.[32] On July 19, 2019, Judge Rennie granted CLH's Motion to file an Amended Answer, but denied its Request to file a Counterclaim.[33]

On July 26, 2018, CLH filed a Motion for Reargument.[34] On August 13, 2018, Judge Rennie issued a Memorandum Order, denying CLH's Motion for Reargument.[35] GSBB did not supply CLH with a copy of this decision. Thoroughly confused with the status of the litigation, on August 17, 2018, CLH posed a series of questions (via its real estate lawyer, Jim Griffin, Esq.) to GSBB.[36]

On August 23, 2018, GSBB (on behalf of CLH) filed an Application for Certification of Interlocutory Appeal ("Application") of this Court's Order Denying

---

[32] Trans. 62241404.

[33] Trans. 62257099.

[34] Trans. 62279225. On July 27, 2018, Fulton filed its Opposition to CLH's Motion for Reargument. Trans. 62283159. On July 31, 2018, Fulton's Motion for Default Judgment was denied. Trans. 62291466.

[35] Trans. 62340583.

[36] Exhibit 6. Bates stamped GSBB_CBrown_ESI_052249 to 052251.

its Motion to Amend Answer and Assert Counterclaims.[37] On September 7, 2018, CLH's Application was denied.[38]

Wednesday, August 22, 2018

As noted earlier, CLH subsequently terminated GSBB, and, with the assistance of the law firm Ashby Geddes, all of the litigation settled at Mediation on December 4, 2018.

4. Loan Number 9713196-0101 ("96-0101"), C.A. No. N17C-12-104 PRW

On November 22, 2017, Fulton declared the loan in default, and on December 8, 2017, Fulton filed suit against Hearthstone I, Hearthstone II and Key Properties, (also companion companies of CLH, and hereinafter referenced to as "Hearthstone" – where applicable – or as part of the CLH identity) in the Superior Court, initiating an action encaptioned Fulton Bank v. Hearthstone Manor I, LLC, et al., C.A. No. N17C-12-104 PRW (the "104" Action"). Key Properties (CLH) again requested that GSBB represent them in the 104 Action.

---

[37] Trans. 62377261. On August 28, 2018, Fulton filed its Response in Opposition to CLH's Application for Certification of Interlocutory Appeal. Trans. 62388082.

[38] Trans. 62426189. In its application, GSBB "maintain[ed] (on behalf of CLH) that its Application meets the criteria set forth in Rules 42(b)(i) and 42(b)(iii)(H)." The court, in its Order dated September 7, 2018, denied the Application, on the basis that it did not meet any of Rule 42's criteria, save for one.

On January 3, 2018, CLH filed its Answer and Counterclaims.[39]

> "With respect to Civil Action 104, there was no basis for a counterclaim. You had repeatedly advised that Hearthstone manor did not dispute the balance asserted by Fulton Bank. In fact, you provided us with a spreadsheet identifying the outstanding accounts between the Country Life entities and Fulton Bank which unequivocally identified the Hearthstone Manor account balance per Country Life as being the same as the balance asserted by Fulton Bank. Moreover, we had multiple telephone conversations where you reiterated that the only accounts that were in dispute were the 0361 account and the 0448 account. In light of these facts, it would have been unethical for us to assert a counterclaim in Civil Action 104 matter in light of the utter absence of any basis for such."

5. Loan Number 9713195-0101 ("5-0101"), C.A. No. N17C-12-146 PRW

On or about July 6, 2011, Fulton approved CLH for a commercial loan, loan number 5-0101, in the amount of $500,000.00. On or about August 18, 2011, the loan was increased to $1,000,000.00.

On November 22, 2017, Fulton declared the loan in default, and on December 11, 2017, it filed suit against CLH in the Superior Court, initiating an action encaptioned Fulton Bank v. Country Life Homes, Inc., et al., C.A. No. N17C-12-146 PRW (the "146" Action").

On January 22, 2018, GSBB filed (on behalf of CLH) an answer to the Complaint, along with an Affidavit in Support of Defendants Country Life Homes, Inc.; Key Properties Group, LLC; Elmer G. Fannin; Mary Ann Fannin's Answer to

[39] Trans. 61520318.

the Complaint. [40] On June 12, 2018, Fulton moved for entry of Default Judgment, or in the Alternative, for Summary Judgment. [41]

Defendants' CLH filed its response to Fulton's Motion for Default Judgment, or in the alternative, for Summary Judgment on July 3, 2018.[42]

On August 6, 2018, GSBB filed a motion and affidavit to allow discovery pursuant to rule 56(f).[43]

On August 7, 2018, Judge Rennie denied Plaintiff's Motion for Default Judgment and Granted Defendants' Motion to Allow Discovery. The parties were instructed to comply with the November 8, 2018, Discovery Deadline. [44]

On September 17, 2018, Fulton took the deposition of Lou Friedman, CPA/JD.

6. <u>Country Life Homes, et al. v. Fulton Bank</u>, C.A. No. N17C-12-138 PRW

---

[40] Trans. 61593379. On April 4, 2018, the 146 Action was reassigned to Judge Sheldon K. Rennie, and the case caption was changed to N17C-12-146 SKR. Trans. 61873291.

[41] Trans. 62129574.

[42] Trans. 62201762.

[43] Trans. 62312996. GSBB simultaneously filed the affidavit of Michael Fannin (CLH CEO) in support of Defendants Opposition to Plaintiff's Motion. Trans. 62314222.

[44] Trans. 62318106.

While litigating the 077, 076, 108, 104, and 146 Actions (sometimes collectively the "Fulton Actions"), GSBB advised CLH that sums sought in the Fulton Actions were overstated.

On December 11, 2017, CLH (via GSBB) filed suit against Fulton, initiating an action encaptioned Country Life Homes, Inc., et al. v. Fulton Bank N.A., C.A. No. N17C-12-138 (the "138 Action").[45]

On January 11, 2018, Fulton filed a Motion to Dismiss the Complaint, or in the alternative, a Motion for Judgment on the Pleadings. [46]

On April 4, 2018, the case was reassigned to Judge Sheldon Rennie.[47]

Oral Argument on the Motion to Dismiss was held on September 28, 2018.[48] This matter was dismissed voluntarily, via stipulation, on March 22, 2019. [49]

7. Loan Number 9756997-9001 ("7-9001"), C.A. No. N16C-11-199 SKR

---

[45] The CLH Action sought declaratory relief, pursuant to 10 Del. C. § 6501, et seq., seeking a declaration from the Court that CLH owed $3,086,291.51, not the $6,598,205.00 claimed by Fulton. Trans. ID. 61453258. The CLH Action also brought claims for breach of contract and breach of the covenant of good faith and fair dealing – alleging Fulton's dealings with CLH and Key Properties had harmed its businesses. Id.

[46] Trans. 61560346.

[47] Trans. 61873340.

[48] Trans. 62502668.

[49] Trans. 63094237.

In early November 2016, Fulton declared that loan in default, and on November 18, 2016, Fulton filed suit against CLH in the Superior Court, initiating an action encaptioned Fulton Bank v. MTB Land Holdings, LLC., C.A. No. N16C-11-199 SKR (the "199" Action"). CLH again instructed GSBB to represent them in defending the 199 Action.

On January 5, 2017, Fulton filed a Motion for Entry of Default Judgment, or in the alternative, for Judgment on the Pleadings.[50]

On January 9, 2018, Judge Wallace granted Fulton's Motion (in consolidated cases Nos. "-199" and "-200"), for Entry of Default Judgment, or, in the alternative, for Judgment on the Pleadings,[51] against CLH. This resulted in a Judgment against MTB in the principle amount of $1,625,000.00 (the "MTB Judgment") and against Key in an amount to be determined, (the "Key Judgment").[52] GSBB, however, did not immediately notify CLH of the Court's decision.

8. Loan Number 9708455-9002 ("55-9002"), C.A. No. N16C-11-200 SKR

In early November 2016, Fulton declared this loan in default, and on November 18, 2016, Fulton filed suit against CLH in the Superior Court, initiating

---

[50] Trans. 60024690.

[51] Trans. 61545930.

[52] Id.

an action encaptioned Fulton Bank v. Key Properties Group, LLC., C.A. No. N16C-11-200 SKR (the "200" Action").[53] CLH again engaged GSBB to represent them in the 200 Action.

On January 5, 2017, Fulton filed a Motion for Entry of Default Judgment, or in the alternative, for Judgment on the Pleadings.[54]

On March 20, 2017, Judge Wallace granted a Motion to Consolidate in part, denied in part.[55]

B. THIS LITIGATION

1. GSBB v. CLH, et al.

This litigation commenced on March 22, 2019, when GSBB filed a complaint seeking payment of unpaid legal fees.[56] CLH responded with an Answer and four

[53] Fulton sought the following damages in the 146 Action: (i) $555,983.90 for unpaid principal; (ii) $21,631.62 in interest; (iii) $1,602.01 in late fees; and (iv) Fulton's attorneys' fees and court costs.

[54] Trans. 60024690.

[55] Trans. 60358054.

[56] Trans. 63093074.

(4) affirmative defenses,[57] and asserted counterclaims for legal malpractice and Respondeat Superior.[58]

In September 2019, GSBB filed a Motion to Dismiss the Counterclaims.[59] Following briefing and oral argument, in December 2019, the Superior Court

---

[57] The affirmative defenses were: (1) payment; (2) accord and satisfaction; (3) unclean hands; and (4) a dispute of the accuracy of the amount of principal, interest, and fees claims by GSBB Countercl. ¶¶34-37; id. ¶¶109-117.

[58] In its counterclaim, CLH alleged that, inter alia, GSBB: (1) failed to accurately identify the weakness of CLH's claims and defenses, (2) goaded CLH to litigate against Fulton – greatly exaggerating the likelihood of a successful outcome in the multiple Underlying Actions with Fulton, and (3) failed to accurately advise CLH that given their likely defeat at trial in the Underlying Actions, they should have settled with Fulton under terms as favorable as possible.

CLH alleged that the claims and defenses in the Underlying Actions were very weak and any overpayments to Fulton would be surpassed by sums legitimately owed to Fulton. Accordingly, litigating the two (2) CLH Actions against Fulton was a waste of time and resources.

One key issue that GSBB largely ignored was the fact that CLH would be responsible for paying Fulton's legal expenses if they successfully prosecuted the Fulton Actions.

This strategy would have also greatly limited CLH's exposure to Fulton's claims for legal expenses.

In addition to negligently advising CLH to defend the Fulton Actions and prosecute the Country Life Action, CLH also claimed that GSBB made various procedural and substantive errors in litigating the Underlying Actions.

[59] Transaction 64161870.

granted GSBB's Motion to Dismiss CLH's legal malpractice claims.[60] The parties thereafter settled GSBB's claim for unpaid legal fees.[61] CLH appealed the dismissal of their legal malpractice claims to the Supreme Court. By decision dated August 16, 2021, the Court reversed the dismissal and remanded the matter back to Superior Court in September 2021.[62]

2. CLH v. GSBB

Following the remand, the trial court issued its original Trial Scheduling Order ("TSO") on February 7, 2022, establishing, inter alia, CLH's expert report deadline as July 29, 2022. This deadline underwent several modifications: first to December 30, 2022, then February 28, 2023, and finally to January 12, 2024.[63]

When CLH was unable to meet the January 2024 deadline, GSBB filed a Motion to Compel Expert Report. The Court granted this motion, ordering production by March 21, 2024. CLH designed, Louis Friedman JD/CPA, CLH's Accountant who is also a Maryland-licensed attorney, as their expert witness. His

---

[60] Transaction 64532973.

[61] Transaction 65953068.

[62] Country Life Homes, LLC v. Gellert Scali Busenkell & Brown, LLC, 259 A.3d 55 (Del. 2021).

[63] In the interim, the Court granted the parties jointly filed Motion to Amend the Caption to identify CLH Entities as Plaintiffs and GSBB as the Defendant.

report was served on GSBB on March 26, 2024, five (5) days after the court-imposed deadline.[64]

On May 3, 2024, GSBB tendered the CV and Expert Report of Delaware attorney, Donald L. Gouge, Jr.[65]

On May 31, 2024, GSBB filed its Motion for Summary Judgment ("MSJ"), challenging, among other grounds, Mr. Friedman, JD/CPA's qualification to serve as an expert in a Delaware legal malpractice case.[66] On June 12, 2024, GSBB filed its Opening Brief in Support of its Appeal. On June 18, 2024, CLH identified Delaware attorney Steven Holfeld, Esquire, as their bridging expert and submitted his report to GSBB on June 26, 2024.[67] On July 29, 2024, CLH also filed a "Motion to Deem Identification of its Bridging Expert – and the Expert Report – as Timely Filed."[68] GSBB opposed the Motion.

---

[64] Exhibit 7. Mr. Friedman JD/CPA's CV is attached, and his Expert Report is attached hereto.

[65] The report itself is dated April 24, 2024.

[66] Trans. 73282071. CLH submits that, to the extent that the Motion challenges Mr. Friedman, JD/CPA's qualifications as an expert in this case, it is, in substance, a Daubert Motion. The deadline, however, for filing a Daubert Motion had already expired prior to GSBB filing its Motion for Summary Judgement.

[67] Exhibit 8.

[68] Transaction 73833038.

On July 22, 2024, CLH filed its Answering Brief in Opposition to Defendant's Motion, and on August 1, 2024, GSBB filed its Reply Brief in Support of its Motion for Summary Judgment.[69]

On August 15, 2024, Judge Medinilla held oral argument on the Plaintiff's Motion to Deem its Identification of Bridging Expert – and the Bridging Expert Report – as timely filed.[70] The Court took both Motions under advisement.[71]

By Memorandum Opinion dated November 19, 2024, Judge Medinilla: (1) Denied Plaintiffs' Motion to Deem Identification of its Bridging Expert – and the Expert Report – as timely filed, and (2) Granted GSBB's Motion for Summary Judgment.[72] CLH thereafter filed this Appeal.

---

[69] Trans. 73835251.

[70] Exhibit 9. The transcript from August 15, 2024 Hearing, is attached hereto.

[71] Trans. 74073183.

[72] Trans. 75042868.

ARGUMENTS

I. THE TRIAL COURT ERRED IN GRANTING GSBB'S MOTION FOR SUMMARY JUDGMENT, ON THE BASIS THAT CLH'S EXPERT, MR. FRIEDMAN JD/CPA, WAS NOT QUALIFIED TO TESTIFY AS AN EXPERT WITNESS

A. Questions Presented

Did the Trial Court err in concluding that Lou Friedman, JD/CPA, was not qualified to testify as an expert in the standard of care in Delaware on a legal malpractice claim?[73]

B. Standard and Scope of Review

The appellate standard of review, following the grant of a motion for summary judgment, requires the Supreme Court to examine the record to determine whether, viewing the facts in the light most favorable to the nonmoving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law.[74]

---

[73] See, Appellant Appendix, at p. A-0197.

[74] Benge v. Davis, 553 A.2d 1180, 1182 (Del. 1989). In Vanaman v. Milford Memorial Hosp., 272 A.2d 718, 720 (Del. 1970), the Supreme Court stated: "It is elementary, of course, that [at the trial court level] summary judgment may be granted only if, on undisputed facts, the moving party establishes that he is entitled to that judgment as a matter of law. Any application for such a judgment must be denied if there is any reasonable hypothesis by which the opposing party may recover, or if there is a dispute as to a material fact or the inferences to be drawn therefrom. As in all summary judgment cases, the facts shall be stated in the light most favorable to the party against whom summary judgment is requested." Hazewski v. Jackson, 266 A.2d 885, 886 (Del. 1970). Conversely, a defendant

The scope of review on appeal of a decision granting summary judgment is de novo consideration, pursuant to which the Supreme Court will review the entire record, including the pleadings and any issues such pleadings may raise, affidavits and other evidence in the record, as well as the trial court's order and opinion.[75] From this review, the Court is free to draw its own conclusions with respect to the facts if the findings below are clearly wrong and if justice so requires, particularly where the findings arise from deductions, processes of reasoning or logical inferences.[76]

Moreover, the Supreme Court will view the facts in a light most favorable to the nonmoving party.[77] The Supreme Court then determines whether there is an issue of fact for trial which, if resolved in favor of the nonmoving party, would entitle the nonmoving party to judgment.[78]

---

moving for summary judgment has the burden of "producing evidence of necessary certitude demonstrating that there is no genuine issue of fact relating to the question of negligence and that the proven facts preclude the conclusion of negligence on its part." Hazel v. Del. Supermarkets, Inc., 953 A.2d 705, 709 (Del. 2008) (citation omitted).

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

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

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

[78] Id. Stated another way, the Court determines, under all the circumstances, the moving party is entitled to summary judgment. Brunswick Corp. v. Bowl-Mor Co., 297 A.2d at 69. See also, Delmarva Power & Light Co. v. City of Seaford, 575 A.2d 1089 (Del. 1990); Gilbert v. El Paso Co., 575 A.2d 1131 (Del. 1990).

C. Merits of the Argument

a. Mr Friedman, JD/CPA, was eminently qualified to testify as an expert on behalf of CLH, pursuant to Del. R. of Evidence 702, the trial Court held that

(1) The Standard for Admissibility of Expert Testimony, and the qualification of Experts, pursuant to Del. R. Evidence 702.

The admissibility of expert testimony is governed by Delaware Rule of Evidence 702 ("Rule 702"), which provides:

> "If scientific, technical or other specialized knowledge will assist he trier of facts to under the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (20 the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Delaware courts apply the analytical framework set forth by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc.,[79] and its progeny. Consistent with Daubert, the Court as the "gatekeeper" considers a five-step test to determine whether expert testimony is admissible at trial.[80] The Court must determine whether:

---

[79] M.G. Bancorporation, Inc. v. Le Beau, 737 A.2d 513, 521-22 (Del. 1999) (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993)).

[80] Bowen v. E.I. DuPont de Nemours & Co., 903 A.2d 787, 795 (Del. 2006).

1. The witness is qualified as an expert by knowledge, skill, experience, training or education;

2. The evidence is relevant;

3. The expert's opinion is based upon information reasonably relied upon by experts in that particular field;

4. The expert testimony will assist the trier if fact to understand the evidence or determine a material fact in issue, and

5. The expert testimony will not create unfair prejudice or confuse or mislead the jury.[81]

The gatekeeper must apply these particular "factors in a flexible manner that takes into account the particular specialty of the expert under review and the particular facts of the underlying case."… Restated, "[t]he reliability requirement is not a tool for the Court to use to exclude questionably reliable evidence." This Court's refusal to establish a bright line rule for proving causality has previously been considered. And no doubt, "the requisite proof necessary to establish causation will vary greatly case by case."[82]

The Supreme Court in Daubert was more direct: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible

[81] M.G. Bancorporation, Inc. v. Le Beau, 737 A.2d 513, 521-22 (Del. 1999).

[82] In re Zantac (Ranitidine) Litig., Del. Super., C.A. No. N22C-09-101 ZAN Medinilla, J. (July 1, 2024) (Opinion, at 5, n.21).

evidence." Thus guided, courts confronted by "shaky but admissible evidence" conduct their Daubert analyses "with a 'liberal thrust' favoring admission." (internal citations omitted).[83]

(2) The general requirement that the Plaintiff proffer the testimony of a qualified standard of care expert, to support its claim of legal malpractice.

To state a claim of legal malpractice in Delaware, "the plaintiff must establish the following elements: a) the employment of the attorney; b) the attorney's neglect of a professional obligation; and c) resulting loss."[84] As in most jurisdictions, "it is well-established in Delaware that expert testimony is necessary to support a claim of legal malpractice."[85] Accordingly, "in order to sustain a claim of professional negligence against a Delaware attorney, plaintiff must establish the applicable standard of care through the presentation of expert testimony, a breach of that standard of care, and a causal link between the breach and the injury."[86]

---

[83] Id. See also, Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 596, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993). See also Barricanal v. Gibbs, 697 A.2d 1169, 1173 (Del. 1997).

[84] Flowers v. Ramunno, 27 A.3d 551 (Table), 2011 Del. LEXIS 434, at *4 (Del. Aug. 16, 2011).

[85] Dickerson v. Murray, 2016 Del. Super. LEXIS 166, at *5 (Del. Super. Mar. 24, 2016).

[86] Middlebrook v. Ayres, 2004 Del. Super. LEXIS 179, at *19 (Del. Super. June 9, 2004).

(3) Mr. Friedman was Eminently Qualified to Testify as an Expert in this case

As evident from both his CV and his Expert Report, Mr. Friedman was well qualified to testify as an expert in this case. As Mr. Friedman's CV makes clear, he has extensive experience in, among other things, the analysis and reconciliation of banking and financial matters. He has been a licensed attorney for nearly 40 years. He has been CLH's "dedicated" CPA since at least 2009, and he worked regularly in the underlying litigation with Gavin and GSBB, who relied upon his expertise and experience in, inter alia, responding to the multiple Fulton lawsuits. Viewing this evidence in the light most favorable to CLH, and resolving all doubts in its favor - as the trial court was required to – yields the conclusion that Mr. Friedman was qualified to testify as an expert in this case. The trial court's conclusion to the contrary, was plain error, and must be reversed.

GSBB also argued that Mr. Friedman, JD/CPA, was not qualified to testify as an expert on the applicable standard of care in a legal malpractice case, because "the expert must be licensed to practice in Delaware."[87] Since Mr. Friedman is not licensed to practice law in Delaware,…he is disqualified from serving as an expert

[87] GSBB MSJ at 6. As discussed infra, this is a patent misrepresentation of Delaware law.

witness in this matter.[88] The trial court's opinion on the MSJ, however, went far upfield from GSBB's argument, instead stating:

> "Even forgiving the untimeliness of the expert report of the proposed bridging expert [CLH's] accountant fails to meet the requirements for the admissibility of expert testimony under Delaware Rule of Evidence, 702.[89] Mr. Friedman's [CV]…does not indicate "experience in commercial banking litigation or legal malpractice matter." Yet one of [CLH's] claims center on allegation that GSBB failed to accurately advise them and encouraged unnecessary litigation against Fulton Bank.[90]"

Relying upon one question and one answer from one deposition,[91] the Court concluded that Mr. Friedman's accounting experience failed to satisfy the standard under Rule 702 as a litigation expert in a legal malpractice case."[92]

---

[88] Id. GSBB made no other argument regarding Mr. Friedman's ability to testify as an expert. GSBB did not challenge his experience, reliability or competency. The most that is said, without any legal support, was he was "not a litigator," and thus not qualified to one as to the standard of care." Id. at 6, fn. 7. Putting aside the fact the "loan restructuring" – the very reason that GSBB was hired in the first place – is designed to avoid litigation, not promote it, caselaw (and discussed herein) clearly states that a legal malpractice expert in a litigated case need not be a litigator.

[89] Decision on MSJ, at 15.

[90] Id., at 15-16. (Emphasis added).

[91] Id., at 16-17. Elmer Fannin's deposition was taken on October 18, 2018, and occupied 129 pages of testimony.

[92] Id. at 17.

CLH submits that the Court justified its broad conclusion to ultimately strike Mr. Friedman as an expert on one small snippet of isolated testimony, while ignoring the extensive record in this case, which included – a multitude of depositions,[93] extensive discovery, and thousands of email communications.

(4) The Jurisprudence in Other Jurisdictions firmly supports CLH's Position that Mr. Friedman was a Qualified Expert.

Moreover, a multitude of other jurisdictions follow the rationale advanced here. For instance, in First Union National Bank v, Benham,[94] an Arkansas federal district court refused to allow Charles Owen, an Arkansas mergers and acquisitions lawyer, to testify about the standard of care applicable to mergers and acquisitions lawyers in Arkansas.[95] According to the court, Owen's own experience was insufficient – what was needed was familiarity with the practices of other Arkansas mergers and acquisitions lawyers.[96] On appeal, the Eighth Circuit reversed[97] and

---

[93] For instance, Cathy Ashley, CLH's account manager at Fulton, was deposed on October 17, 2018. Her deposition transcript comprises 291 pages.

[94] First Union Nat. Bank v. Benham, 423 F.3d 855 (8th Cir. 2005).

[95] Id. at 861. In identifying a party's expert, courts vary in their use/non-use of the expert's title and middle initial. In each instance, we have used the court's nomenclature.

[96] Id. at 861-62.

[97] Id. 858.

cited Evidence Rule 702, "which expressly allows a witness to qualify as an expert based on his own knowledge, skill, experience, training or education."[98]

In Weber v. Sanborn,[99] the plaintiff sued his former real estate lawyer in a Massachusetts federal court.[100] When the lawyer produced an expert (Andrew Perlman), the plaintiff moved to exclude him because: (1) Perlman's teaching and writing were in the areas of civil procedure and professional responsibility, rather than legal malpractice, and (2) Perlman had never testified as an expert.[101]

Finding these grounds to be "unreasonably restrictive,"[102] the court denied the motion.[103]

> "The court observed that FRE 702 lists five bases for qualification as an expert – "knowledge, skill, experience, training or education" – and read the disjunctive conjunction to mean that any one of these bases would qualify someone as an expert.[104] Thus, Perlman's lack of experience was not sufficient to prevent him from testifying

---

[98] Id. 862.

[99] Weber v. Sanborn, 526 F, Supp. 2d 135 (D. Mass. 2007).

[100] Id. at 139.

[101] Id. at 146.

[102] Id.

[103] Id. at 147.

[104] Id. at 146.

> because the other bases had not been challenged and this reaching and scholarship were sufficient to make him an expert."[105]

The court also dismissed the plaintiff's substantive attack on Perlman's opinions, reasoning that such concerns "may more appropriately be dealt with on cross-examination."[106]

In Hjelle v. Ross, Ross & Santini,[107] the alleged legal malpractice had occurred in a Wyoming personal injury case.[108] Two experts (William A. Barton and Jean E. Dubofsky), neither of whom was licensed to practice law in Wyoming, were proffered by the plaintiffs.[109] Nevertheless, because they had "familiarized themselves sufficiently in Wyoming law to testify regarding the legal standard of care in similar cases in Wyoming"[110] and "[t]he standard of care for attorneys in Wyoming has been developed through rules an decisions rendered by the courts, not by immersion in the local legal culture[,]"[111] they were allowed to testify although

---

[105] Id. at 146-47.

[106] Id.

[107] Hjelle v. Ross, Ross and Santini, No. CIVA2:07SV00006WDMKL, 2007 wl 5328994 (D. Wyo. Dec. 19, 207).

[108] Id. at *1.

[109] Id.

[110] Id.

[111] Id.

their "limited experience in Wyoming may be fertile ground for cross-examination."[112] The court further stated:

> "Indeed, the practice of law in general is based on study and comparison of statutes and caselaw, and lawyers are trained to – and frequently must – learn the law of jurisdictions in which they are not licensed. In a case like this, in addition to the fairly ordinary task of studying Wyoming law on the standard of care, out-of-state attorneys like Mr. Barton and Ms. Dubofsky have an additional task, which is to study and understand local practice standards, The Court is satisfied that both Mr. Barton and Ms. Dubofsky have the skills and experience to undertake the necessary study so as to render expert opinions here."[113]

Phillips v. Duane Morris, LLP,[114] arose from the alleged mishandling of a patent infringement lawsuit.[115] When the plaintiff sought to have William A. Trine serve as its legal malpractice expert, the defense objected because Trine, a "highly experienced Colorado civil trial lawyer,"[116] had never litigated a patent suit.[117] The defense also argued that Trine should not be allowed to testify regarding whether the

---

[112] Id.

[113] Id.

[114] Phillips v. Duane Morris, LLP, No. 13-CV-01105-REB-MJW, 2014 WL 2218359 (D. Colo. May 29, 2014).

[115] Id. at *3.

[116] Id.

[117] Id.

trial judge who had heard the underlying lawsuit would have granted a stay to facilitate settlement negotiations and whether the defendant's fee ($250,000) was reasonable.[118]

To resolve matters, the court looked to FRE 702, as interpreted by Daubert, and noted that it enjoyed broad discretion in deciding whether: (1) Trine was qualified; and (2) his testimony was likely to prove reliable, relevant, and useful to the trier of fact.[119]

The court first found that Trine was qualified, even though he was not familiar with patent law, because the plaintiff intended to use Trine merely to describe the handling of settlement negotiations rather than the intricacies of patent law.[120] The court next held that Trine could testify about whether the trial judge would have granted a stay because this constituted a factual matter within Trine's area of expertise.[121] Lastly , the court ruled that Trine could discuss the reasonableness of the defendant's fee because this too was a factual question within his area of

---

[118] Id.

[119] Id. at *1-2.

[120] Id. at *3.

[121] Id. at *4.

expertise.[122] Addressing the defendant's argument that Trine lacked a sufficient basis to form an opinion about the defendant's fee, the court explained that this amounted to nothing more than a disagreement as to the import of the facts, rather than a true challenge to the quantum of facts, on which the opinion is based.

Again, such matters go to the weight, not the admissibility, of the expert's opinion and do not warrant striking Mr. Trine's opinion.[123]

[122] Id.

[123] Id.

II. THE TRIAL COURT ERRED IN HOLDING THAT THE STANDARD OF CARE EXPERT WITNESS IN A DELAWARE LEGAL MALPRACTICE CASE MUST BE LICENSED TO PRACTICE LAW IN THE STATE OF DELAWARE.

> "The requirement that an expert witness be familiar with community standards in malpractice cases is founded on the desire to eliminate 'wandering experts' who testify in mercenary fashion.[124] Although competency requirements are not designed to preclude all testimony from out-of-state experts, expert witnesses must be "well acquainted or thoroughly conversant" with the degree of skill ordinarily employed in the local community. In cases where an expert is familiar with a different locality where the standard of care is identical to that observed in the relevant Delaware locality, another expert may provide bridging testimony to reconcile the two standards."[125]

A. Questions Presented

Did the Trial court err by holding that Lou Friedman had to be a licensed delaware Attorney?[126]

B. Standard and Scope of Review

De novo

C. Merits of the Argument

Delaware does not require that an expert witness needs to be licensed in this jurisdiction.

---

[124] Brett v Berkowitz, 706 A.2d 509, 516 (Del. 1998), citing Loftus v. Hayden, 391 A.2d 749, 752 (Del. Super., 1978).

[125] McKenzie v. Biasetto, 686 A.2d at 163 (Del. 1992).

[126] See, Appellant Appendix, at pp. A-0200-0204.

III. EVEN WITHOUT MR. FRIEDMAN AS ITS EXPERT, THE TRIAL COURT ERRED IN HOLDING THAT CLH STILL REQUIRED THE TRIAL TESTIMONY OF A STANDARD OF CARE EXPERT, BASED UPON THE COURT'S MISTAKEN BELIEF THAT THE CASE WAS A JURY TRIAL, RATHER THAN A BENCH TRIAL.

A. Questions Presented

Did the Trial court err by holding that expert testimony was necessary for a bench trial. [127]

B. Standard and Scope of Review

See, supra.

C. Merits of the Argument

(a) As This Matter Was a Bench Trial, Expert Testimony Was Not Required.

It appears to be settled Delaware law that a standard of care expert is not required, in a legal malpractice case, if the case is tried before a judge, rather than a jury.[128]

Said the Court in Cannon:

> "Under Delaware's Uniform Rules of Evidence, a witness is qualified as an expert witness if that witness's "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue."[129] This case [however] is a bench trial, thus the Court is the trier of fact. It is unnecessary for an

---

[127] See, Appellant Appendix, at p. A-0201.

[128] Cannon v. Poliquin, Del. Super., C.A. No. K19C-03-023 CLS, Scott, J. (March 5, 2020) (Opinion, at 3).

[129] Del. R. Evid. 702(a).

expert witness to provide testimony on the appropriate standard of care for an attorney, because the Court knows the applicable standard of care. Accordingly, an expert witness's "specialized knowledge" will not help the trier of fact determine the appropriate standard of care for an attorney. Because an expert witness is not required for Plaintiffs' claim, Defendant has failed to show that he is entitled to judgment as a matter of law on Plaintiff's' claim for legal malpractice."

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING CLH'S MOTION TO DEEM THE IDENTITY - AND ITS BRIDING EXPERT REPORT - AS TIMELY FILED.[130]

A. Questions Presented

Did the trial court abuse its discretion in denying CLH's Motion to Deem the identity – and its bridging expert report – as timely?[131]

B. Standard and Scope of Review

See, supra.

Abuse of Discretion.

As to legal errors, however, the Court's review is plenary.[132] This review determines "whether the court erred in formulating or applying legal precepts."[133] Hence, when the issue on appeal is whether the proper legal principles have been

---

[130] CLH acknowledges that, if this Court accepts either Argument I or Argument II, this Argument, and the following two (2) will be moot. Nevertheless, CLH proposes to take a "belt and suspenders" approach, and assert its arguments, lest they be deemed waived.

[131] See, Appellant Appendix, at pp. A-0206-A0208.

[132] Brooks v. Johnson, 560 A.2d 1001, 1002 (Del. 1989). Restated, errors of law are reviewed de novo, See, Bermudez v PTFE Compounds, Inc., 2006 WL 2382793, at *3 (Del. Super., August 16, 2006).

[133] Id. "Hence, when the issue on appeal is whether the proper legal principles have been applied, this Court reviews it de novo." Johnson Controls Inc. v. Fields, 758 A.2d 506, 509 (Del. 2001), citing E.I. DuPont de Nemours & Co, Inc. v. Shell Oil Co., 498 A.2d 1108, 1113 (Del. 1985).

applied, this Court's review is *de novo*.[134] "Reversal is warranted if the Court…made findings of facts unsupported by substantial evidence."[135]

Absent an error of law, the standard of review for the Court's Decision is abuse of discretion.[136] When a decision is committed to the Court's discretion, this Court reviews for an abuse of discretion de novo.[137] An abuse of discretion occurs when "the Court has…exceeded the bounds of reason in view of the circumstances [or has]…so ignored recognized rules of law or practice so as to produce injustice."[138]

C. Merits of the Argument

(a) The Requirment that the Court Apply the Drejka (and its progeny) Factors before Deciding Whether a Late Filing Should be Disallowed, and the Case Dismissed.

---

[134] Johnson Controls, Inc. v. Fields, 758 A.2d 506, 509 (Del. 2000), citing, E.I. DuPont de Nemours & Co., Inc. v. Shell Oil Co., 498 A.2d 1108, 1113 (Del. 1985).

[135] Olney v. Cooch, 425 A.2d 610, 613 (Del. 1981); Kreshtool v. Delmarva Power and Light, 310 A.2d 649, 652 (Del. Super. 1973). Restated, the Court shall not overturn the factual findings of the Board except where no satisfactory evidence exists to sustain the findings. Bustos v. Castle Const. of Delaware, Inc., 2005 Del. Super. LEXIS 322, at *7 (Del. Super. Aug. 31, 2005).

[136] DiGiacomo v. Board of Public Education, 507 A.2d 542, 546 (Del. 1986).

[137] Gibson v. Car Zone, 2011 Del. Super. LEXIS 627, at *7 (Del. Super. May 3, 2011).

[138] Lily v. State, 649 A.2d 1055, 1059 (Del. 1994).

In Hill v. DuShuttle, 58 A.3d 403 (Del. 2013), the Supreme Court reversed the trial court's decision to disallow the untimely submission of an expert report, and therefore dismissed the Plaintiff's complaint. In announcing its decision, the Supreme Court referred back to Drejka v. Hitchens Tire Serv. Inc,[139] which reversed a decision of this Court. In Drejka, the Supreme Court had excluded an expert report supplied two months before the trial date, stating that was too late for the defendant to rebut it. Starting with the proposition that this Court has discretion in imposing sanctions, the Supreme Court, nevertheless, reiterated the Delaware "rule" that dismissal is "severe and rare".[140] Further, the Courts are admonished to have cases resolved on their merits."[141]

The Supreme Court reiterated a six-part test to determine if dismissal is an abuse of discretion:

> [T]o determine whether the trial court has abused its discretion in dismissing or refusing to lift a default, we will be guided by the matter in which the trial balanced the following factors, … and whether the record supports its findings: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.[142]

---

[139] 15 A.3d 1221 (Del. 2010).

[140] Id. At 1224.

[141] Id.

[142] 15 A.3d at 1224 (citing Minna v. Energy Coal S.p.A., 984 A.2d 1210, 1215 (Del. 2009)).

The Supreme Court's reversal in Hill v. DuShuttle was not the only opinion it issued on January 2, 2013. It was part of a trilogy of cases issued the same day; Keener v. Isken[143] and Christian v. Counseling Resources Assoc., Inc., were the other two. Keener involved a reversal of the Court for refusing to reopen a summary judgment after the non-moving party missed a deadline to respond to the summary judgment motion. The Supreme Court held that the trial Court did not address the requirements of Superior Court Rule 60(b) in refusing to reopen the judgment.

(b) The Trial Court Erred in Dismissing the CLH Claims in the Absence of a Showing of Substantial Prejudice to GSBB.

As the Court in Simmons v. One Stop Tobacco Outlet & Mkt., LLC, Del. Super., C.A. No. N23C-10-010 SPL, Lugg, J. (March 21, 2024) (ORDER, at 3), observed:

> "For failure of the plaintiff to prosecute or to comply with these Rules, or any order of Court, a defendant may move for dismissal of an action or any claim against the defendant."[144] The Superior Court has discretion in imposing a sanction for a party's failure to follow a scheduling order or to comply with Court procedure.[145] The Court is mindful [however] that "[t]he sanction of dismissal is severe and courts are, and have been, reluctant to apply it, except as a last resort."[146]

---

[143] 58 A.3d 407 (Del. 2013).

[144] Super. Ct. R. Civ. P. 41(b).

[145] Drejka v. Hitchens Tire Service Inc., 15 A.3d 1221, 1224 (Del. 2010).

[146] Id. (quoting Hoag v. Amex Assurance Co., 953 A.2d 713, 717 (Del. 2008)).

It is well settled that an untimely filing will not be stricken or disregarded in the absence of a showing of prejudice againt the complaining party.[147] The Court wholly failed to identify what "substantial prejudice" was visited upon the defendants.[148]

[147] See e.g., Global link Logistics, Inc. v. Olympus Growth Funds III, LP, Del. Ch., C.A. No. 4444-VCP, Parsons, V.C. (February 24, 2010); Harmon v. State of Delaware, Del. Super., C.A. No. 07C-01-003 WLW, Witham, J. R.J. (Dec. 21, 2010) (Order, at 1) (Denying Motion to exclude evidence produced well after deadline, on the basis that there was no prejudice to the complaining party.).

[148] Fasano v. Tueff, Del. Super., C.A. No. N21C-03-309 DJB, Brennan, J. (Feb. 1, 2024) (ORDER, at 2-3) (Rejecting defendant's claim of prejudice that the plaintiffs untimely designation of an expert because, inter alia, it could not depose the expert, finding "[f]irst and foremost, a deposition is not a prerequisite to that testimony so [the experts] presentation is still available [to the defendants] [for cross-examination] at trial").

V. CONCLUSION

For all the forgoing reasons, and viewing all of the evidence in the light most favorable to CLH, Appellants/Below Plaintiffs, CLH, respectfully request that the the Superior Court's Opinion and Order granting, GSBB's Motion for Summary Judgment should be reversed and the case remanded for trial on the merits.

VI. RATIONALE AND JUDGMENT OF THE TRIAL COURT

The trial court justified its decision to ultimately exclude Mr. Friedman as an expert, on the basis that he was not qualified to testify, pursuant to Del. R. Evidence 702. The court also believed that he was required to be an attorney licensed to practice in Delaware.

Finally, the Court was satisfied that since Mr. Friedman had little actual litigation experience, he was not competent to tesitfy as an expert.

The court denied the Plaintiff's Motion to deem its bridging expert – and his expert report – on the basis that it was untimely, and that GSBB would be prejudiced in having to resond to it.

Respectfully submitted,

IPPOLITI LAW GROUP

/s/ Michael R. Ippoliti
MICHAEL R. IPPOLITI, ESQ. (2545)
CHRISTOPHER ISAAC, ESQ. (6291)
1225 N. King Street, Suite 900
Wilmington, DE 19801
(302) 428-1400
Michael@ippolitilawgroup.com
Christopher@ippolitilawgroup.com

Date: April 23, 2025