IN 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; MBTG LAND HOLDINGS, LLC; ELMER FANNIN; and MARY ANN FANNIN,	:	No. 523, 2024
Plaintiffs Below/Appellants,	:	Court Below: Superior Court of the State of Delaware
GELLERT SEITZ BUSENKELL & BROWN, LLC	:	C.A. No.: N19C-03-228 (VLM)
Defendant Below/Appellee.	:	

APPELLEE'S ANSWERING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

Appellee/Defendant below, Gellert Seitz Busenkell & Brown, LLC ("GSB&B"),[1] commenced this matter on March 22, 2019, when it filed a complaint seeking payment of unpaid fees for legal services provided to its former clients, Appellants/Plaintiffs below (referred to collectively as "Country Life").[2] (A0189; A0228).[3] In response to GSB&B's complaint, Country Life filed counterclaims sounding in legal malpractice (Count I) and *respondeat superior* (Count II). (A0046-A0050). GSB&B's claims against Country Life have resolved. (A0096).

GSB&B was retained to defend Country Life with respect to eight civil actions brought against it for Country Life's alleged nonpayment and default of various commercial loans with Fulton Bank, N.A. ("Fulton" or "Fulton Bank"), and it also represented Country Life Homes, LLC as plaintiffs in two actions against Fulton

[1] On November 3, 2023, the Superior Court granted the parties jointly filed motion to amend the case caption to identify the Country Life parties as Plaintiffs and GSB&B as Defendant. (A0149). On May 12, 2025, this Court granted the parties' stipulation to change the caption to reflect Defendant's new firm name, Gellert Seitz Busenkell & Brown, LLC.

[2] Appellants include the following: Country Life Homes, LLC; Hearthstone Manor I, LLC; Hearthstone Manor II, LLC; River Rock, LLC; Key Properties Group, LLC; Cedar Creek Landing Campground, LLC; and, MBT Land Holdings, LLC. Also included are Elmer Fannin and Mary Ann Fannin, the principals of the LLC Defendants.

[3] Country Life's amended Appendix is cited herein as "A____." GSB&B"s Appendix, filed herewith, is cited herein as "B____."

Bank. *See* Appellants' Op. Br., at 1.[4] Country Life subsequently terminated its relationship with GSB&B, retained another firm, and the litigation with Fulton Bank resolved through mediation. *Id.*

On September 19, 2019, GSB&B moved to dismiss Country Life's counterclaims. (A0016). On December 16, 2019, the Honorable Vivian L. Medinilla issued an opinion and order granting the motion. (A0099-0104). Country Life appealed, and the ruling was reversed and remanded for further proceedings in September 2021. *See Country Life Homes, LLC v. Gellert Scali Busenkell & Brown, LLC*, 259 A.3d 55 (Del. 2021).

Following remand the Superior Court issued a Trial Scheduling Order ("TSO"). (A0228). The deadline for Country Life's expert reports was July 29, 2022. (A0229). The deadline was extended multiple times, with a final deadline of January 12, 2024. (A.0229).

When Country Life failed to meet the January 12th deadline, GSB&B filed a Motion to Compel Expert Report. (A0229). The Superior Court granted the unopposed motion by order dated March 1, 2024, and directed Country Life to produce their expert report by March 21, 2024. (A0229). Country Life served the report on March 26, 2024, five days *after* the court-imposed deadline. (A0155). They designated their accountant, Louis Friedman, who is also a Maryland-licensed

[4] Appellants' Amended Opening Brief is cited herein as "Op. Br."

attorney, as their expert witness. (A0229).

On May 31, 2024, GSB&B moved for summary judgment on the basis that Country Life could not meet its burden to prove that: (1) GSB&B breached any standard of care because their untimely identified expert, Louis Freedman, was not licensed to practice law in Delaware and was otherwise not qualified to testify as an expert; and (2) GSB&B caused Country Life to sustain damages. (B021 at ¶ 23). GSB&B filed its opening brief in support of its motion for summary judgment on June 12, 2024. (B029). On June 18, 2024, Country Life responded by identifying Delaware attorney Steven Holfeld as their bridging expert. (A0179; A0230). They filed their answering brief in opposition to summary judgment on July 22, 2024. (A0186). Country Life submitted Holfeld's report on June 26, 2024—more than six months *after* the expert disclosure deadline. (A0230).

On July 29, 2024, Country Life filed a "Motion to Deem Identification of its Bridging Expert and the Expert Report as Timely Filed," asking the Superior Court to declare their bridging expert identification and report to be timely filed. (A0205-A0209). GSB&B opposed the motion. (A0229). Since Country Life's lead counsel was not present during oral arguments to establish good cause for the delays, the Superior Court provided Country Life with an opportunity to supplement the record, with the same courtesy to GSB&B to respond. (A0229).

Judge Medinilla heard oral argument on the above motions on August 14, 2024. *See* Appellants' Op. Br., at Exhibit 9. By Memorandum Opinion dated November 19, 2024, Judge Medinilla granted GSB&B's summary judgment motion and denied Country Life's "Motion to Deem Identification of its Bridging Expert and the Expert Report as Timely Filed." (A0224). Summary judgment was granted to GSB&B on two grounds: (1) Country Life failed to establish the breach of standard of care since, among other things, Friedman's accounting experience and lack of litigation experience did not qualify him as a litigation expert in a legal malpractice case where the complex issues required expert testimony; and (2) Country Life failed to establish causation and damages. The Superior Court held that, "even if Country Life could establish through an appropriate expert a breach of a standard of care, the record fails to show that a genuine [issue] of material fact exists as to causation and damages."[5] (A0241).

Country Life timely appealed, and has filed its opening brief on appeal. GSB&B now files this answering brief.

[5] On appeal, Country Life does *not* challenge the Superior Court's grant of summary judgment on the basis that if failed to establish causation or damages. 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). As such, any challenge to the Superior Court's alternative basis for granting summary judgment is waived, and the summary judgment ruling stands regardless of the outcome of this appeal.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly determined that Country Life's expert witness, Louis Friedman, Esquire, was not qualified to testify as an expert witness.

A. Denied. Friedman, Country Life's accountant, was not "eminently qualified" as an expert on behalf of Country Life. He was not licensed to practice law in Delaware. Moreover, although Friedman was licensed to practice law in Maryland, his *curriculum vitae* revealed primarily accounting experience with no experience in commercial banking litigation or legal malpractice matters, and he admitted his lack of litigation experience.

B. Denied. The Superior Court properly held that Friedman was not qualified to offer expert standard of care opinions in a Delaware legal malpractice action, and its decision did not turn on the fact that he was an out-of-state attorney, but rather his lack of litigation experience given that he practices primarily as an accountant.

C. Denied. The Superior Court properly held that Friedman was not qualified to serve as an expert witness in addition to a fact witness regarding the underlying litigation, particularly given Friedman's involvement in determining that Fulton Bank had overstated Country Life's claimed debt given his role as Country Life's accountant in connection with the Underlying Actions.[6]

2. Denied. The Superior Court correctly determined that Country Life was required to establish the applicable standard of care in this case through the presentation of expert testimony. Country Life is not relieved of this burden because the applicable standard of care for an attorney in a commercial banking litigation

[6] Country Life does not raise this argument in the body of its opening brief, and this issue is thus waived. *See Ploof, supra*.

matter involves myriad complex issues, nor is the applicable standard of care in such a complex case something that trial judges are *per se* competent to determine such that Country Life is relieved of their burden merely by electing a bench trial. As Country Life's counsel acknowledged at oral argument, a judge has discretion, in the context of a bench trial, to determine if expert testimony is required.[7]

3. Denied. The Superior Court properly exercised its discretion in denying Country Life's "Motion to Deem Identification of its Bridging Expert and the Expert Report as Timely Filed."[8] Country Life did not establish good cause to excuse the untimely designation of their bridging expert and his report after GSB&B moved for summary judgment, and the report was otherwise deficient and the untimely submission prejudiced GSB&B.

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[7] Country Life's "Summary of the Arguments" includes only two legal propositions, with the first identifying three sub-issues at A-C. *See* Appellants' Op. Am. Br., at 4. Their brief addresses two of these sub-issues (but not the third) under separate argument headings. GSB&B will address the sub-issues under its first argument, *infra*, as they pertain to Country Life's assertion that the Superior Court erred in holding that Friedman was not qualified.

[8] Country Life's amended opening brief includes an argument that the Superior Court abused its discretion in denying this motion. *See* Appellants' Op. Br., at 39. This legal proposition, however, is not identified in Country Life's "Summary of the Arguments." Because the legal proposition is included in the body of Country Life's opening brief, GSB&B specifically denies it.

STATEMENT OF FACTS

The underlying representation began on March 1, 2016, when Country Life retained GSB&B to represent them to restructure various commercial loans and lines of credit they had with Fulton Bank. (A0032 at ¶¶ 17, 18). Efforts to restructure the loans and lines of credit were unsuccessful; thus, in 2016 and 2017, Fulton Bank prosecuted civil actions against Country Life seeking repayment of approximately $6.6 million in unpaid loans. (A0032-A0039 at ¶¶ 23, 24, 29, 30, 38, 39, 46, 47, 52, 53, 58, 59, 65, 66). Country Life retained Attorneys Charles Brown and Michael Busenkell of GSB&B to represent them in defending the civil actions brought by Fulton Bank. (A033-A0039 at ¶¶ 25, 31, 40, 48, 54, 60, 67).

Country Life alleges that, while defending Fulton Bank's civil actions, Attorneys Brown and Busenkell advised them that sums sought in the Fulton Bank actions were "overstated." (A0039 at ¶ 68). Attorneys Brown and Busenkell also allegedly advised Country Life that Fulton Banks's claimed debts of $6,598,205.00 for which it sought recovery were inaccurate, and that only $3,086,259.51 was owed. (A0040 at ¶ 70).

On December 11, 2017, Brown and Busenkell filed two civil actions against Fulton Bank on behalf of Country Life. (A0039-A0041 at ¶¶ 68-79). In those matters, Country Life sought a judicial declaration that Fulton Bank had overstated the amounts owed by Country Life. (A0040-A0041 at ¶¶ 71-72, 78). The complaints

filed against Fulton also asserted claims for breach of contract and breach of the covenant of good faith and fair dealing, alleging that Fulton's dealings with Country Life had harmed their businesses. (A0040-A0041 at ¶¶ 73, 79). Prior to filing these actions GSB&B retained the accounting firm, Gavin/Solmonese, LLC ("G/S"), to review the underlying loan documents from Fulton Bank and to prepare a comprehensive report intended to establish that Country Life had overpaid on some of their accounts. (A0041-A0042 at ¶¶ 81, 83; A0227). G/S concluded that Country Life had overpaid Fulton Bank by approximately $3.086 million. (A0039 at ¶ 70; A0227). Fulton Bank, represented by attorneys from McCarter & English, LLP ("M&E), "vigorously prosecuted the Fulton Actions and defended the Country Life Actions," (hereinafter "the Underlying Actions"). (A0041 at ¶ 80).

Country Life terminated GSB&B's services in September 2018 and retained successor counsel, Ashby & Geddes, P.A. (A0045 at ¶ 104; A0027). In December 2018 Country Life agreed to a settlement with Fulton Bank under which Country Life agreed to pay Fulton the full principal and interest balances due under the Fulton loans, plus M&E's attorneys' fees and post-settlement interest, totaling approximately $6.73 million. (A0045 at ¶¶ 106, 107).

In the instant action, Country Life claims that Attorneys Brown and Busenkell failed to accurately identify the weaknesses of the claims and defenses in the Underlying Actions. (A0042 at ¶ 84). Attorneys Brown and Busenkell allegedly

failed to advise Country Life that they would likely lose at trial and that they "should have settled with Fulton [Bank] under terms as favorable as possible." (A0042-A0043 at ¶¶ 87, 89). Country Life also alleges that "[d]espite its six figure price tag, G/S's report was in fact deeply flawed and predicated on faulty assumptions, hindering it utility in assisting in litigating the Underlying Actions." (A0042 at ¶ 82).

Country Life does not allege that GSB&B or its attorneys caused them to lose the Underlying Actions, or that Fulton Bank would have been amenable to a lesser settlement. They speculate that they could have obtained a favorable settlement if the Underlying Actions had not been vigorously litigated. (A0043 at ¶¶ 89, 90). Country Life also alleged that Attorneys Brown and Busenkell made other errors such as not demanding a jury trial (A0043 at ¶ 93), not filing a compulsory counterclaim (A0043-A0044 at ¶¶ 94, 95), and not filing an affidavit to request a continuance to allow for more time to include the G/S report in response to Fulton Bank's motion for summary judgment. (A0044 at ¶¶ 98-100). They do not contend that these alleged procedural errors caused them to lose any of the Underlying Actions. To the contrary, Country Life has alleged that their claims and defenses in the Underlying Actions were weak, and that they would have lost at trial if the claims had not settled. (A0042-A0043 at ¶¶ 84-89). Regarding damages, Country Life sought to recover the amount they paid to GSB&B, the amount they claim to have paid for expert witness services to Gavin/Solmonese, LLC, and the amount they paid

for Fulton Bank's legal fees and litigation expenses. (A0045 at ¶ 15).

The discovery record established that Attorneys Brown and Busenkell did not advise the Country Life entities that Fulton Bank had overstated the amounts owed by Country Life. Ross Waetzman, CIRA, CDBV, the insolvency and restructuring advisor with G/S who analyzed Country Life's loans, attested that his findings were based upon information provided to him by Fulton Bank and the Country Life entities. (B061-B063). The calculations were not based on any information provided by GSB&B or its attorneys. *Id.* Among other things, Waetzman stated in his affidavit as follows:

> * I was retained by Michael Fannin, President / CEO of Country Life Homes on or about May 11, 2017.
>
> * G/S, with me as the assigned consultant, was requested to provide a limited scope report relating to two disputed loans, a Country Life Homes Loan ("CLH") and a Key Properties Group Loan ("KPG"), which were entered into by and between CLH and Delaware National Bank ("DNB") and/or Fulton Bank ("Fulton"), and specifically regarding G/S's assessment of the loan balances for the disputed loans.
>
> * Alleged overpayment figures by CLH and KPG were calculated by G/S *based on information and documents received from Michael Fannin, CLH, KPG, and Fulton*.
>
> * *G/S calculations were not based on any information provided by GSBB or its attorneys*.
>
> * Attached hereto as "Schedule A" is a Summary Payoff Analysis G/S prepared, *based on information provided to us by Mr. Fannin, CLH, KPG, and Fulton, which reflects that, as of August 15, 2017* and based on information received at that time, CLH and KPG had made overpayments to Fulton on their loans in the amount of

> $3,086,259.51, which is the figure [the Country Life entities] now claim was made known to them as an owed amount by Attorney Brown and Attorney Busenkell at ¶ 76 of the Counterclaim.
>
> * *Neither GSBB, nor its attorneys, were involved in calculations or preparation associated with attached Schedule A, including for the referenced and disputed CLH or KPG loans*.

(B061-B063) (emphasis added).

Michael Fannin, the former President of Country Life Homes, was deposed as Country Life's corporate representative. (B066). Fannin testified that he and his father, Elmer Fannin, along with Country Life's accountant Louis Friedman, were involved in the determination that Fulton Bank owed Country Life money. Regarding this determination, Fannin testified as follows:

> A. Me, Elmer, Lou [Friedman], Mike, maybe Charlie. But we felt as a group that the fact that we had settlement sheets that we show paying the Bank based on the little bit they did provide us that Lou analyzed with us, there was no payment, and so it triggered they're saying you owe more than, in fact, you do.
>
> And I think Mike felt comfortable putting that claim in there, that there was evidence of overpayment and that's why we wanted to get to the bottom of it. We want a Counterclaim that not only you say we owe you money; we think you owe us money.

(B074 at 30).

Fannin was asked about Country Life's allegation that Attorneys Brown and Busenkell advised Country Life that Fulton's debts were overstated, and he had no recollection as to whether the allegation was a truthful statement. Rather, Fannin testified that Attorneys Brown and Busenkell relied on information provided by

Country Life's accountant, Louis Friedman:

> Q. Is it a truthful statement that Attorney Brown and Attorney Busenkell advised the Country Life entities that Fulton's claimed debts, $6,598,205.00 sought in the 077 Action and the 076 Action, were inaccurate; and, further, they stated when you had this communication with Country Life entities, that only $3,086,259.51 was owed?
>
> A. That's what it says.
>
> Q. Is that a truthful statement, that Mr. Busenkell and Mr. Brown made these representations and findings and presented them to the Country Life entities?
>
> A. I can't answer that.
>
> Q. You don't know?
>
> A. I don't remember.
>
> * * *
>
> Q. Let's go back to the decision. *I understand Mike Busenkell and Charlie may have recommended or did recommend a Counterclaim. It's our position that that recommendation was based on information they received from you and Lou Friedman -- not you, but the Country Life entities and Lou Friedman. Is it your position that the information that Mr. Busenkell and Mr. Brown relied upon for asserting that Counterclaim came from whom*?
>
> A. *I'd say Lou Friedman*.
>
> * * *
>
> Q. And *did the Country Life entities and you and Lou Friedman work with Gavin/Solmonese in connection with trying to ascertain balances owed*?
>
> A. *Yes*.
>
> Q. Paragraph 82: "Despite its six-figure price tag," Gavin/Solmonese's "report was in fact deeply flawed and predicated

> on faulty assumptions, hindering its utility in assisting in litigating the Underlying Actions." *How was it deeply flawed*?
>
> A. *I don't know*.

(B075-B076 at 36-39) (emphasis added).

Moreover, Fannin acknowledged that Country Life continues to believe that Fulton Bank mishandled their loans:

> Q. Okay. As you sit here today, you believe those loans were mishandled, don't you?
>
> A. Yes.
>
> Q. So to the extent my clients suggested that your loans were being mishandled, that would have been an accurate representation?
>
> A. Yes.
>
> * * *
>
> Q. You were looking to find out how much was really owed; correct?
>
> A. Correct.
>
> Q. If you found out through litigation, would that have been a successful outcome?
>
> A. Yes.

(B077 at 42-44).

Fannin further acknowledged that the only settlement opportunity that was available to Country Life during GSB&B's representation was for the full amount owed, minus a $500,000 discount. The settlement demand was rejected, however, because Country Life did not believe Fulton Bank's representations as to how much

was owed by the Country Life entities. Specifically, Fannin testified as follows:

> Q. What settlement opportunities did the Country Life entities have with Fulton Bank prior to the settlement that was facilitated after Ashby & Geddes got involved?
>
> A. *I'm aware of one offer in the very beginning* offering just a flat, I think, $500,000 settlement.
>
> Q. 500,000?
>
> A. Off of what balances they had.
>
> Q. Was that offer presented to you at the time?
>
> A. No. It was in the form of a letter; not to me. It was in the form of a letter from David White [counsel for Fulton] that was passed to us from Mike Busenkell.
>
> Q. Did you receive it at that time?
>
> A. Yes.
>
> Q. Okay. *Was that offer accepted*?
>
> A. *No*.
>
> Q. *Why not*?
>
> A. *We didn't know how much we owed*.
>
> Q. Okay.
>
> A. Is that a good number? a bad number? I don't know.
>
> Q. Do you believe that Mike Busenkell should have recommended that the Country Life entities accept that proposal without knowing how much they actually owed?
>
> A. It wasn't given to us for consideration. We didn't know how much we owed. We thought it was less than the Bank was asking. We didn't know by how much. But it was a determination that we could figure out those amounts by doing a deep dive into the accounting and comparing it to the Fulton records. And based on the

> 3 million it was presented to us that we should go in the form of a forensic audit, which we knew nothing about at the time.
>
> * * *
>
> A. It was a letter from David White in the form of a letter to his firm that [Mike Busenkell] passed on to us to say: Here is a proposal to take $500,000 off. But at that point we weren't saying is that a good deal. We weren't considering it saying is that a good deal or is that a bad deal, what should we do. It was how much do we owe and then we can look at that.
>
> Q. *So if I understand you correctly, the Country Life entities were not prepared to accept that proposal because you were not confident that Fulton Bank was representing accurately how much was owed by the Country Life entities*.
>
> A. *Correct, correct, 100%.*
>
> Q. Okay. And that's why you didn't agree to that proposal.
>
> A. Correct.

(B078-B079 at 49-53) (emphasis added).

No other evidence was adduced to show that any other settlement opportunity was available during the time GSB&B represented Country Life.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT TO GSB&B ON THE BASIS THAT COUNTRY LIFE'S EXPERT, LOUIS FRIEDMAN, WAS NOT QUALIFIED TO TESTIFY AS AN EXPERT WITNESS

A. Question Presented

Did the Superior Court correctly determine that Country Life's expert witness, Louis Friedman, Esquire, was not qualified to testify as an expert witness in support of Country Life's legal malpractice claims against GSB&B?

B. Scope of Review

This Court reviews a grant of summary judgment *de novo* "to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving 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." *Sherman v. Ellis*, 246 A.3d 1126, 1131 (Del. 2021) (quoting *Homeland Ins. Co. of N.Y. v. CorVel Corp.*, 197 A.3d 1042, 1046 (Del. 2018) (*en banc*)); *see also ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011). This Court reviews a decision to exclude expert testimony for abuse of discretion. *Baldwin v. Benge,* 606 A.2d 64, 67 (Del. 1992).

C. Merits of Argument

GSB&B moved for summary judgment, *inter alia*, on the basis that Friedman was not qualified or competent to testify as Country Life's expert and, without a

competent expert, Country Life could not prevail on their legal malpractice claims as a matter of law. (A0231). The Superior Court granted summary judgment on this (and an alternative) basis, and this Court should affirm.

1. Friedman was not qualified as an expert on behalf of Country Life given his lack of any pertinent litigation experience in the matters at issue

To prevail on a legal malpractice claim under Delaware law a plaintiff must establish: (1) the employment of the attorney; (2) the attorney's neglect of a professional obligation; and (3) resulting loss. *Sherman*, 246 A.3d at 1131 (citations omitted). A 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." *Phillips v. Wilks, Lukoff & Bracegirdle, LLC*, 2014 WL 4930693, at *3 (Del. Oct. 1, 2014), *as corrected* (Oct. 7, 2014) (citation omitted). "Also, it is well-settled that expert testimony is necessary to support a claim of legal malpractice, except in those cases where the attorney's mistakes are so obvious that such testimony is not required." *Lorenzetti v. Enterline*, 2012 WL 1383186, at *2 (Del. 2012); *see also Country Life Homes, 259 A.3d at 59* (same); *Oakes v. Clark*, 2013 WL 3147313, at *1 (Del. Jun. 18, 2013) (citing *Brett v. Berkowitz*, 706 A.2d 509, 517-518 (Del. 1998)) (same).

As Country Life has acknowledged, Delaware Rule of Evidence 702 ("Rule 702") governs the admission of expert testimony. Under Rule 702, expert opinion

testimony is admissible provided that the witness "*is qualified as an expert by knowledge, skill, experience, training, or education*" if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of the fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has applied the principles and methods to the facts of the case.

D.R.E. 702 (emphasis added). As a threshold matter, a witness must have the requisite "knowledge, skill, experience, training or education" to qualify as an expert in the matters at issue. *See Matter of Abbott*, 308 A.3d 1139, 1182 (Del. 2023), *cert. denied sub nom. Abbott v. Supreme Ct. of Delaware*, 144 S. Ct. 2605, 219 L. Ed. 2d 1253 (2024) (concluding that witness "did not have the knowledge, skill, experience, training, or education to qualify as an expert witness on [the pertinent] subjects under D.R.E. 702."). The burden falls on the party seeking to admit the expert testimony to show, by a preponderance of the evidence, its admissibility under Rule 702. *Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787, 795 (Del. 2006).

Instantly, Friedman's *curriculum vitae* reveals that although he is licensed to practice law in the state of Maryland, his expertise is primarily "accounting and tax work." (B027). Friedman describes his "accounting and law practice" as concentrating in the following practice areas: "Accounting, Individual Taxes, Estate

Planning, Corporate Business Taxation, Taxation of Real Estate & Business Transactions, Tax impact of Mergers & Acquisitions, Probate & Estate Administration, Trust Administrations and Taxation of Charitable Non-profits." *Id.* The *curriculum vitae* does not indicate any experience in commercial banking litigation or any substantive litigation experience. (B027-028). Friedman further identifies himself as Country Life's accountant during the Underlying Actions with Fulton Bank, and notes that he was deposed in the context of the underlying litigation. (B028). In that deposition, Friedman was asked whether he participated in drafting discovery responses in the Underlying Actions or *any* litigation, and he responded that he could not recall doing so because "I don't do that kind of law." (B236 at 234). Friedman testified that he "never had a legal litigation." *Id.*

The Superior Court noted that Country Life's legal malpractice claims center on "allegations that GSB&B failed to accurately advise them and encouraged unnecessary litigation against Fulton Bank." (A0239). It also noted that Country Life criticizes GSB&B's "litigation strategies such as the failure to file compulsory counterclaims under Rule 13(a) in one case or to request a Rule 56(f) continuance in another." *Id.*; *see also* Appellants' Op. Br., Exhibit 9 at 38-43, 46-47, 65. Given the nature of the claims at issue, the Superior Court determined that "Mr. Friedman's accounting experience fails to satisfy the standards under Rule 702 as a litigation expert in a legal malpractice case." (A0240). This decision is supported by Delaware

law.

For example, in *Matter of Abbott*, *supra*, this Court held that a lawyer who was licensed to practice in Delaware was nonetheless disqualified from serving as his own expert because he "did not have the knowledge, skill, experience, training, or education" to offer expert testimony on the Delaware Lawyers' Rules of Professional Conduct and the First Amendment. 308 A.3d at 1182. In *Edelstein v. Goldstein*, 2011 WL 721490 (Del. Super. Ct. Mar. 1, 2011), the Court held that the counterclaimant's proffered expert in a legal malpractice case, a Delaware lawyer, was not qualified because the defendant was unable to demonstrate that the proffered expert had experience with the issues involved in the case, including "complex practice before the Court of Chancery, estate experience, [or] negotiations of real estate purchases." *Id.* at 6; *see also Martin v. Hudson*, 2025 WL 101645, at *5 (Del. Super. Ct. Jan. 14, 2025) (concluding that even if plaintiff had a bridging expert a New Jersey attorney with an impressive *curriculum vitae* was not qualified under Rule 702 because, among other things, the attorney was unfamiliar with Delaware procedure regarding stipulations and plaintiff alleged defendant attorney wrongly signed a stipulation as to medical damages in the underlying litigation). Even outside the context of a professional negligence claim, this Court has held that an expert lacking experience in the specific matters at issue is not qualified under Rule 702. *See, e.g.*, *Goodridge v. Hyster Co.*, 845 A.2d 498, 504 (Del. 2004) (affirming

preclusion of proffered expert in product liability action on basis that he lacked the educational background as well as the design experience to expound on the alleged design defect in a way that makes him an expert within the meaning of Rule 702, thus rendering him "unqualified to provide a relevant or reliable opinion about [defendant's] liability for the particular accident in question.").

Country Life contends that Friedman's *curriculum vitae* makes clear that he has "extensive experience" in "the analysis and reconciliation of banking and financial matters." *See* Appellants' Op. Br., at 28. They further assert that Friedman has been Country Life's "dedicated CPA since and least 2009," and that he worked "regularly in the underlying litigation" with GSB&B who relied on him. *Id.* But Country Life ignores that Friedman has no relevant experience whatsoever in commercial banking litigation. Friedman may have experience in banking and financial matters in his capacity as an accountant, but the record is devoid of any evidence to show that he has any experience *litigating* complex commercial banking claims such that he was competent to offer standard of care opinions specific to the legal malpractice claims at issue in this case. On this record, the Superior Court's determination that Friedman was not qualified under Rule 702 is entirely proper. *See, e.g.*, *Matter of Abbott*, *Edelstein and Goodridge, supra*.

Country Life also suggests that the Superior Court wrongly addressed Friedman's qualifications in ruling on GSB&B's summary judgment motion

because this issue was not raised in GSB&B's summary judgment filings. *See* Appellants' Op. Br., at 29. This argument cannot withstand scrutiny. GSB&B asserted in its summary judgment motion that Friedman was not a litigator and thus not qualified to opine as to the standard of care. (B021). Then, in its opening brief in support of its summary judgment motion, GSB&B argued that Friedman was not qualified under Rule 702 based on, among other things, his lack of experience "in banking litigation or loan restructuring." (B052). GSB&B cited Friedman's prior deposition testimony regarding his lack of litigation experience. (B054). Country Life responded to GSB&B's arguments in their answering summary judgment brief, and GSB&B filed a reply brief that further addressed the issue. (A0200-A0204; B288-B293). Moreover, the parties specifically addressed the issue of whether Friedman was qualified to testify as an expert during oral argument on GSB&B's summary judgment motion. *See* Appellants' Op. Br., Exhibit 9 at 64-79. As such, the Superior Court did not go "far upfield" in concluding that Friedman did not qualify as an expert under Rule 702 based on his lack of experience in commercial banking litigation or legal malpractice matters. This issue was squarely before the Superior Court.

To the extent that Country Life contends that the Superior Court rendered its ruling based on "one small snippet of isolated testimony" and ignored the record, *see* Appellants' Op. Br., at 30, this is belied by the Superior Court's well-reasoned

opinion and the oral argument on GSB&B motion. The parties had an opportunity to fully brief and argue the issue of whether Friedman was qualified to offer expert testimony in support of Country Life's legal malpractice claims, and the Superior Court's thorough analysis of the issue reflects careful consideration of this issue in the context of the record evidence.

Finally, Country Life's reliance on decisions from other jurisdictions is misplaced. *See* Appellants' Op. Br., at 30. The decisions referenced are—*First Union Nat. Bank v. Benham*, 423 F.3d 855 (8th Cir. 2005), *Weber v. Sanborn*, 526 F. Supp. 2d 135 (D. Mass. 2007), *Hjelle v. Ross, Ross & Santini*, 2007 WL 532899 (D. Wyo. Dec. 19, 2007), and *Phillips v. Duane Morris, LLP*, 2014 WL 2218359 (D. Colo. May 29, 2014). Putting aside that these decisions have no precedential value, they are all inapposite.

In *Benham* the plaintiff filed a legal malpractice lawsuit against his merger and acquisitions attorney for failure to timely file a lawsuit under an Arkansas statute to determine the fair value of stock acquired during a merger. 423 F.3d at 858. The plaintiff's proffered expert had been licensed in the state of Arkansas for over 36 years and "practiced extensively in the area of mergers and acquisitions." *Id.* at 863. The Sixth Circuit Court of Appeals held the district court erroneously precluded plaintiff's expert on the basis that the expert's opinions were based on his *own extensive experience in similar litigation* because such experience is a proper basis

for rendering an expert opinion.

In *Weber* the district court denied defendants' motion to preclude plaintiff's proffered expert. It rejected defendants' argument that the witness's lack of any prior experience serving as an expert witness rendered him unqualified to offer expert testimony in a legal malpractice action. 526 F. Supp. 2d at 146. It also rejected the defendants' argument that the principles of substantive law employed by the expert were improper because the expert employed proper legal principles in conducting his analysis. *Id.* The defendants did not challenge the expert's legal expertise or knowledge of the matters at issue in the litigation.

In *Hjelle* the district court held that plaintiff's proffered experts were qualified even though neither was licensed to practice law in Wyoming. 2007 WL 5328994, at * 1. Both experts indisputably had "extensive qualifications." *Id.* The district court reasoned that courts have allowed experts in legal malpractice cases to become familiar with the applicable standard of care through research, and that both proffered experts had the requisite skills and experience to undertake the necessary study so as to render expert opinions. *Id.*

In *Phillips v. Duane Morris* the defendants sought to preclude plaintiff's expert in a case where plaintiff alleged malpractice arising from an underlying patent action. The proffered expert was "a highly experienced Colorado civil trial attorney," and had "varied and extensive trial experience." 2014 WL 2218359, at *3.

However, he had not litigated a patent case. *Id.* The district court held the proffered expert was qualified to offer standard of care opinions because the focus of the malpractice action was "not on the intricacies of patent law, but on the more general considerations that would be expected to inform a reasonable attorney's decisions in settlement negotiations in civil litigation more broadly." *Id.* Because the expert had extensive litigation experience, he was qualified to render an expert opinion on the matters at issue in that case.

In the above cases all of the proffered experts had extensive legal experience that was relevant to the malpractice claims at issue. As such, these cases are inapposite and do not support County Life's contention that Friedman, who indisputably works primarily as an accountant and has no substantive experience litigating any cases—is qualified to render an expert opinion in this case centered on litigation-related matters.

In sum, Judge Medinilla properly determined that Friedman was not qualified to render expert standard of care opinions in support of Country Life's legal malpractice claims.

2. The Superior Court did not hold that all standard of care expert witnesses must be licensed to practice in Delaware and did not preclude Friedman simply because he was not licensed to practice in Delaware

In a one page argument, with the merits of the argument consisting of one sentence, Country Life contends that the Superior Court erred by holding that

Friedman has to be a licensed Delaware attorney to offer a standard of care opinion in a Delaware legal malpractice action. *See* Appellants' Op. Br., at 36. The Superior Court's decision did not center on Friedman being licensed in Maryland versus Delaware, but rather his lack of litigation experience more broadly. In any event, even if Friedman had some pertinent litigation experience (and he does not), he would need a bridging expert to offer expert opinions in this case.

In *Brett v. Berkowitz*, 706 A.2d 509 (Del. 1998), this Court held that an expert witness in a legal malpractice action must "be familiar with the applicable standard of care in the locality where the alleged malpractice occurred." *Id.* at 517-18. Out-of-state expert witnesses "must be well acquainted or thoroughly conversant with the degree of skill ordinarily employed in the local community." *Id.* (internal quotations marks omitted; citation omitted); *see also Phillips*, 2014 WL 4930693, at *2. If a designated expert is not qualified as an expert on the Delaware standard of care, a bridging expert is required. *Id.* And if a plaintiff fails to secure a bridging expert, an out-of-state attorney is properly precluded from rendering an expert opinion in a Delaware legal malpractice matter. *Id.*

Instantly, Friedman was not well acquainted or thoroughly conversant with the degree of skill ordinarily employed by litigation attorneys in Delaware. As such, he needed a bridging expert. Country Life, however, failed to timely secure a bridging expert.

II. THE SUPERIOR COURT CORRECTLY DETERMINED THAT COUNTRY LIFE WAS REQUIRED TO ESTABLISH THE APPLICABLE STANDARD OF CARE AND BREACH IN THIS CASE THROUGH THE PRESENTATION OF EXPERT TESTIMONY

A. Question Presented

Did the Superior Court correctly determine that expert testimony in this case was required to prove Country's Life's legal malpractice claim regardless of whether there was a bench trial and that in the absence of such testimony GSB&B was entitled to summary judgment?

B. Scope of Review

This Court reviews a grant of summary judgment *de novo*. *Sherman*, *supra*.

C. Merits of Argument

In an abbreviated argument, Country Life contends that the Superior Court erred by holding that expert testimony was necessary for a bench trial. *See* Appellants' Op. Br., at 37. Country Life supports this argument with a single block quote from *Cannon v. Poliquin*, 2020 WL 1076051 (Del. Super. Ct. Mar. 5, 2020) that is otherwise devoid of any analysis. *Id.* While the trial judge in *Cannon* determined that the plaintiff in that particular legal malpractice action did not need an expert because the "case is a bench trial," the judge did not hold or suggest that expert testimony is never required in a bench trial. *Cannon*, an unpublished Superior Court decision, does not stand for a blanket rule that applies broadly to all legal

malpractice actions where the parties elect a bench trial. To the contrary, in *Cannon*, the judge, speaking for "the Court," stated: "It is unnecessary for an expert witness to provide testimony on the appropriate standard of care for an attorney because the Court knows the applicable standard of care." *Id*. at *2.

Country Life's counsel acknowledged during oral argument that *Cannon* did not establish a blanket rule that excuses a plaintiff from supporting a legal malpractice claim with expert testimony in the context of a bench trial. Rather, Country Life's counsel asserted that *Cannon* "stands for the proposition that in the event that it is a bench trial, *the court has the discretion* to determine whether or not they require expert testimony to determine the appropriate standard of care." *See* Appellants' Op. Br., Exhibit 9 at 62-63 (emphasis added). In response to counsel's argument that she had discretion to decide the issue, Judge Medinilla advised that expert testimony was required in this case:

> Yes, I think that the issues in this case, and the allegations of legal malpractice in this case, given the number of and the intricacies of the numbers in the lawsuits, the accounting, and all of that, absolutely requires an expert if you are going to make a claim. It is not obvious at all, so you need an expert.

Id. at 63-64.

Expert testimony is necessary to support a claim of legal malpractice, except in those cases where the attorney's mistakes are so obvious that such testimony is not required." *Lorenzetti*, 2012 WL 1383186, at *2. This is not a case where

GSB&B's mistakes are so obvious that expert testimony is not required. As such, the Superior Court properly exercised its discretion in determining that expert testimony was required given the complexities involved.

III. THE SUPERIOR COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING COUNTRY LIFE'S MOTION TO DEEM IDENTIFICATION OF ITS BRIDGING EXPERT AND THE EXPERT REPORT AS TIMELY FILED

A. Question Presented

Did the Superior Court properly deny Country Life's Motion to Deem Identification of its Bridging Expert and the Expert Report as Timely Filed?

B. Scope of Review

This Court reviews a trial court's decision to exclude an expert report submitted after discovery deadlines for abuse of discretion. *Jackson v. Hopkins Trucking Co.*, 2010 WL 3397478, at *3 (Del. 2010).

C. Merits of Argument

Country Life argues that the Superior Court erred in excluding their bridging expert, Steven Holfeld, by refusing to grant their motion to deem his late designation and report timely. *See* Appellants' Op. Br., at 39-41. After several extensions, the final deadline for production of Plaintiff's expert reports was January 12, 2024. (B001). Country Life did not comply with the deadline, and GSB&B moved to compel Country Life's expert report. (B006). The Superior Court granted the motion as unopposed, and directed Country Life to produce an expert report by March 21, 2021. (B014). Country Life did not meet this deadline; rather, it produced Friedman's report on March 26, 2024, five days *after* the court-imposed deadline. (A0155). Although Friedman was an out-of-state expert witness licensed to practice

law in Maryland, Country Life did not serve a bridging report at that time to establish that the standard of care in Maryland and Delaware are identical. Holfeld's bridging expert report was not filed until June 27, 2024, *after* GSB&B moved for summary judgment arguing, among other things, that Friedman was not qualified to offer a standard of care opinion in this case. His report is one page long, and is comprised of just a few substantive sentences. (A0179). As noted by the Superior Court, the report "fails to provide the detailed bridging analysis necessary to establish that the standard of care for attorneys is similar in Maryland as in Delaware." (A0238). The Superior Court also noted that GSB&B was prejudiced by the late submission since discovery had closed and it could not depose Holfeld or obtain rebuttal expert testimony. (A0238).

Paragraph 11 of the Superior Court's Amended TSO of May 17, 2023 warned that the deadlines were firm, and that further extensions may be refused absent good cause shown:

> 11. Counsel and self-represented are advised that all of the deadlines established by this Amended Trial Scheduling Order *are firm deadlines. Failure to meet these deadlines, absent good cause shown, may result in the Court refusing to allow extensions regardless of the consequences*.

(B004) (emphasis added).

The Superior Court properly exercised its discretion in denying Country Life's Motion to Deem Identification of its Bridging Expert and the Expert Report

as Timely Filed because Country Life did not establish good cause to excuse the untimely designation of a bridging expert or his report. The Superior Court correctly pointed out that the "need for a Delaware licensed expert or appropriate bridging testimony was foreseeable from the outset of litigation, as these requirements are well-established in Delaware law." (A0237).

Tellingly, Country Life does not substantively address the Superior Court's rationale for denying their novel motion. They ignore this Court's decision in *Jackson* which, as the Superior Court pointed out, specifically addressed "the submission of late expert reports in the summary judgment context." (A0236). In *Jackson*, this Court affirmed the trial court's exclusion of an expert report submitted after the extended discovery deadline, and after defendant had moved for summary judgment. *Id.* at *3. This Court referenced the scheduling order in that case, which also warned that deadlines are firm and failure to meet the deadlines, absent good cause shown, would likely result in the court refusing extensions regardless of consequences. *Id.*, at *2. It also noted that the trial court properly balanced the relevant factors concerning the submission of an untimely report, to include whether there was good cause shown to allow the untimely report. *Id.* at *3.

Country Life makes no effort to distinguish *Jackson* or to show that they established good cause for their untimely production of Holfeld's designation and report. Nor does Country Life challenge the Superior Court's determination that

Holfeld's bridging expert report was deficient. Instead, relying primarily on *Drejka v. Hitchens Tire Serv. Inc.*, 15 A.3d 1221 (Del. 2010), Country Life argues that the Superior Court improperly dismissed their case as a sanction for discovery violations. But this is not true. The Superior Court's decision centered on the fact that Holfeld's bridging report was not filed until after GSB&B moved for summary judgment challenging Friedman's qualifications thereby prejudicing the defense, the report failed to provide the requisite bridging analysis, and the absence of good cause shown to allow a bridging report produced after a repeatedly extended deadline solely in response to a motion for summary judgment.

To the extent that Country Life argues that the Superior Court erred in dismissing their claims because GSB&B was required to show "substantial prejudice" pursuant to an Order entered in *Fasano v. Tuerff*, 2024 WL 378703, at *2 (Del. Super. Ct. Feb. 1, 2024), this argument cannot withstand scrutiny. There, the Superior Court refused a defendant's request to depose a witness after all the relevant deadlines had passed. The Superior Court did not address the submission of an untimely expert report submitted after a discovery deadline in response to a motion for summary judgment. Moreover, it refused to extend the scheduling deadlines to accommodate defendant's request. *Fasano* is inapposite, as are the few other cases cited by Country Life.

In sum, as in *Jackson*, the Superior Court did not abuse its discretion in

precluding Holfeld's deficient and untimely expert report.

CONCLUSION

For the above reasons, this Court should affirm the Superior Court's ruling granting GSB&B's summary judgment motion. And even if the Court finds some merit in Country Life's arguments on appeal (and it should not), affirmance is warranted on the alternative basis set forth in the Superior Court's opinion, namely, Country Life's failure to establish causation and damages. Country Life does *not* challenge the Superior Court's grant of summary judgment on this alternative basis in their opening brief, and they have thus waived this issue on appeal. *See* Supr. Ct. R. 14(b)(vi)(A)(3); *see also Ploof*, *supra*.

Respectfully submitted,

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