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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 Below/ Appellants, v. **GELLERT SEITZ BUSENKELL & BROWN, LLC,** Defendant Below/Appellee.	:	No. 523, 2024 Court Below: Superior Court of the State of Delaware C.A. No. N19C-03-228 (VLM)

APPELLANTS' CORRECTED REPLY BRIEF

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COUNTER – STATEMENT OF FACTS

In this, its Reply Brief Country Life Homes ("CLH") is content to rely on its recitation of facts set forth in its Opening Brief, and does not object to the facts (as opposed to argument or propositions offered as "fact") set forth in Gellert Seitz Busenkell & Brown, LLC ("GSBB") Answering Brief. CLH does offer the following additional facts to create a more complete record for this court's review.

As the Court will recall, in the face of Futon's request to have CLH – a very long- standing client – attempt to bring various underpaid balances of multiple loans with Fulton "up to date," CLH engaged GSBB – at that time – solely for "restructure" the loans.[1]

By March 11, 2016, 3 days after being retained by CLH, Fulton provided GSBB with a complete copy of the Fulton "pay off" documents for every loan.[2] But it is unclear what, if anything, GSBB did with this information.

By September 30, 2016, well before any litigation had been filed, Fulton's counsel forwarded a comprehensive "payoff[]" package detailing all of Fulton's accounts with CLH and its related entities. It is unclear, however, whether this package was forwarded to, or even discussed with, CLH.

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[1] A review of GSBB's Agreement (A-001) with CLH fails to reveal exactly what GSBB was to do on behalf of CLH.

[2] See, Appendix A-003 .

ARGUMENTS

I. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR IN REQUIRING THE TESTIMONY OF AN EXPERT, ON THE MISTAKEN BELIEF THAT THIS CASE WAS A JURY TRIAL, RATHER THAN A BENCH TRIAL

A. ORDINARILY, EXPERT TESTIMONY IS REQUIRED TO SUPPORT A PLAINTIFFS CLAIM FOR LEGAL MALPRACTICE.[3]

B. IT IS NOW SETTLED THAT, IF THE CASE IS TO BE TRIED BEFORE A JUDGE, THE JUDGE IS THE EXPERT, AND ADDITIONAL EXPERT TESTIMONEY IS NOT REQUIRED

It appears to be settled Delaware law that an expert is not required in a legal malpractice case, if the matter is tried before a judge, rather than a jury.[4] 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."[5] This case [however] is a bench trial, thus the Court is the trier of fact. It is unnecessary for an expert witness to provide testimony on the appropriate standard of care for an

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[3] This is because "the [jury] is not familiar with the standard of care that … attorneys are expected to observe as they go about their work." See Michael Sean Quinn & Olga Seelig, Legal Malpractice & Evidence from Experts, 30 Litig. 40, 42 (2003). "Only a lawyer can serve as an expert witness on a lawyer's standard of care … the standard of care normally applicable in a legal malpractice in a legal malpractice case is that observed by reasonably prudent lawyers in similar circumstances." Id. See generally, Marie K. Pesando, Qualifications of Expert to Testify in Legal Malpractice Action, 82 A.L.R. 6th 281 (2013 & 2024 Supp.).

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

[5] Citing, Del. R. Evid. 702(a).

> 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."[6] [7]

Not surprisingly, GSBB makes no attempt to argue that: (1) the decision is not precisely "on point" with this case, (2) that the decision lacks precedent, or (3) that the holding in Cannon is not controlling here.

In light of the strength of this argument, and the logic of the Cannon decision, this Honorable Court should reverse the trial court's dismissal.

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[6] Cannon, at 3. In its Answering Brief, GSBB spends most of its argument dissecting the Cannon decision, and what it claims the case doesn't stand for. It wholly fails, however, to (1) distinguish the Cannon case from this case, (2) offer any explanation of how the holding – or rationale – of the Cannon judge somehow wouldn't apply here, (3) or how the trial judge below would be unqualified to determine the requisite standard of care applicable to a Delaware attorney.[6]

[7] GSBB quickly latches onto CLH's one sentence statement at Oral Argument on the Hearing on the Motion for Summary Judgment that the Court "has the discretion to determine whether or not they require expert testimony …" Appellees Answering Br. on Appeal, at 28. That Statement represents nothing more than an acknowledgement that the Court always retains discretion to decide what evidence it will allow in Court.

II. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR IN GRANTING GSBB'S MOTION FOR SUMMARY JUDGMENT, ON THE ALTERNATIVE GROUND THAT GSBB'S MULITPLE LITIGATION ERRORS, … AND ITS SUBSEQUENT MISREPRESENTATIONS (OR OMMISSIONS) TO CLH SUPPORT A PRIMA FACIE CASE OF LEGAL NEGLIGENCE.

A. THE COURTS ROLE ON A MOTION FOR SUMMARY JUDGMENT.

Under Superior Court Civil Rule 56, summary judgment will be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[8] "A material issue of fact exists if 'a rational finder of fact could find some material fact would favor the moving party in a determinative way.'"[9] On a motion for summary judgment, this Court "(i) construes the record in the light most favorable

[8] Super. Ct. R. 56(c).

[9] Estate of Moulder v. Park, 2022 Del. Super. LEXIS 795, 2022 WL 4544837, at *3 (Del. Super. Ct. Sept. 28, 2022) (quoting Deloitte LLP v. Flanagan, 2009 Del. Ch. LEXIS 220, 2009 WL 5200657, at *3 (Del. Ch. Dec. 29, 2009).

to the non-moving party[10]; (ii) detects, but does not decide, genuine issues of material fact; and (iii) denies the motion if a material fact is in dispute.[11]

> "[T]he role of a trial court when faced with a motion for summary judgment is to identify disputed factual issues whose resolution is necessary to decide the case, but not to decide such issues."[12]

Here, however, it does not appear that the trial court made any effort to review the pertinent record, - which would necessarily include the underlying record of the Fulton litigations – and identify disputed factual issues. To the contrary, the trial court didn't make any substantive reference to any of the underlying Fulton litigations, and no effort to identify any factual issues in those cases, despite CLH's

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[10] Despite GSBB's insistence that it was not responsible for the numerous representations that (ostensibly obtained from CLH) certain loan amounts were not correctly calculated, it begs the question as to why GSBB actively defended the eight (8) lawsuits filed by Fulton, and initiated two (2) lawsuits against Fulton on behalf of CLH. Moreover, it further ignores the fact that every Pleading (and letter) wherein it was alleged by GSBB (on behalf of CLH) that several of the (Fulton) loan balances were "overstated," was signed by either Attorney Busenkell or Brown, representing that, "to the best of the persons knowledge, information and belief, formed after an inquiry reasonable under the circumstances, - [that inter alia] the allegations and other factual contentions have evidentiary support …" See, Del. R. Civ. Proc. 11(b)(3).

[11] US Dominion, Inc. v. Fox News Network, LLC, 293 A.3d 1002, 2023 WL 2730567, at *17 (Del. Super. Ct. 2023) (quoting CVR Ref., LP v. XCL Specialty Ins. Co., 2021 Del. Super. LEXIS 667, 2021 WL 5492671, at *8 (Del. Super. Ct. Nov. 23, 20210 (cleaned up)).

[12] Miller v. Leidos, Inc., Del. Super., C.A. No. N19C-11-173 EMD, Davis, J. (Oct. 21, 2024) (O-. at 8, n.53), quoting Merrill v. Crothall-American, Inc., 606 A.2d 96, 99 (Del. 1992).

long standing position, that there were a multitude of factual disputes that precluded Summary Judgment.[13]

Moreover, despite GSBB (and to a large extent Gavin's) attempt to interject an enormous amount of complexity in the multiple underlying Fulton litigation, those actions were standard debt actions. Most debt actions are essentially straight forward "math problems": First you determine what the beginning balance of the debt is, then you subtract the debtors payments, and finally, you adjust for interest and late fees. Whatever the sum is, that is the amount that the debtor owes.

[13] Moreover, as this Honorable Court is well aware, the Trial Court is also required to "view the evidence in the light most favorable to the non-moving party." Merrill v. Crothall-American, Inc., 606 A.2d 96, 99 (Del. 1992), citing Moor v. Sizemore, 405 A.2d 679, 680 (Del. 1979).

But CLH submits that the Court did just the opposite. Both the language – as well as the tenor -of the Trial Courts Opinion reads as if any reasonable doubt was resolved against CLH. (In fact, the language of the Trial Courts decision seems to track GSBB's submissions, particularly its Opening Brief In Support of the Motion for Summary Judgment).

This, in itself, is reversible error, as it demonstrates that the Court misapplied the appropriate standards for adjusting a Motion for Summary Judgment.

B. EXPERT TESTIMONY IS ALSO NOT REQUIRED IN THOSE CASES WHERE THE ATTORNEYS NEGLIGENCE IS "OBVIOUS."

> "An exception to th[e Rule requiring expert testimony] exists, however, when the professional's mistake is so apparent that a layman, exercising his common sense, is perfectly competent to determine whether there was negligence."[14]

As discussed herein, GSBB not only made a multitude of obvious procedural and substantive errors in the multiple Fulton litigations, but later attempted to cover up its mistakes by shockingly creating a series of misrepresentations (or "false narratives") to CLH to, inter alia, divert CLH's attention away from the truth.

[14] Middlebrook v. Ayers, 2004 Del. Super., LEXIS 179 (June 9, 2004). Compare this line of cases where the Court held that expert testimony was not necessary for adjudication. It is well settled that when the [factfinder] is equally competent to form an opinion about the ultimate fact issues or the [proffered] expert's testimony is within the common knowledge of the jury, the trial court should exclude the expert testimony. Spencer v. Wal-Mart Stores East, L.P., 930 A.2d 881-882, 890 (Del. 2007) (excluding proffered expert testimony as the "expert opinion was more common sense than formulated opinion …")

C. GSBB COMMITTED A MULTITUDE OF OBVIOUS SUSTANTIVE AND PROCEEDURAL ERRORS IN THE VARIOUS UNDERLYING FULTON MATTERS, MANY OF WHICH WERE INDENTIFIED BY THE SUPERIOR COURT JUDGES ADDRESSING THE MATTERS.

In its final paragraph of Argument II, GSBB acknowledges that expert testimony is not necessary "where the attorney's mistakes are so obvious that such testimony is not required."[15] GSBB then states, as if it were fact, "that this is not a case where GSBB's mistakes are so obvious that expert testimony is not required."[16] But even a cursory review of GSBB's actions (or inactions) in the underlying Fulton litigations demonstrates multiple glaring and obvious mistakes it made; mistakes so obvious (and prejudicial to CLH) as to obviate the need for additional expert testimony.

1. GSBB's Obvious Negligence in the "-062" Litigation

In the "-062" litigation, GSBB (on behalf of CLH) filed suit against Fulton, vaguely alleging, inter alia, that Fulton misapplied payments made by CLH, which purportedly gave rise to CLH's claim of overpayment.[17] On April 17, 2017, Fulton moved to dismiss,[18] primarily on the basis that GSBB (on behalf of CLH) failed to

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[15] Appellees Ans. Br. on Appeal ("Ans. Br.") at 28, citing Lorenzetti, 2012 WL 1383186, at *2.

[16] Ans. Br. at 28-29.

[17] Trans. Id. 60161058.

[18] Trans. Id. 60480409. (Exhibit 4)

properly effect service of process – "a critical flaw" – and was woefully deficient ("fatally vague") in its allegations.[19]

It is elementary that perfection of service of process is a fundamental procedure requirement as part of filing a Complaint. It is equally elementary that GSBB's failure to do so was an "obvious" mistake. Moreover, the damage to CLH with its failure to perfect its claim against Fulton is equally obvious.

2. GSBB's Obvious Negligence in the "-077" Litigation

Another example of GSBB's breach of its duty of reasonable care to CLH occurred in the "-077" litigation, where it appears that GSBB was unaware of, inter alia, the legal requirements necessary to prepare an affidavit of defense.

In that case, encaptioned Fulton Bank v. Country Life Homes, Inc. Elmer G. Fannin, Mary Ann Fannin & MG Development, Inc.; Fulton filed suit on Loan No. 56704480361, claiming that CLH had defaulted on the loan. In responding to Fulton's complaint,[20] Fulton demanded, inter alia, that CLH file and serve an Affidavit of Defense. CLH, upon GSBB's advice, filed and served an answer and counterclaim.[21]

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[19] The Complaint was eventually dismissed following a Ruling in favor of Fulton by the Court.

[20] Trans. Id. 59936882.

[21] Trans. Id. 59943319.

On January 12, 2017, Fulton moved for : (1) Entry of Default Judgment and (2) Dismiss of the Counterclaim with prejudice.[22] Fulton alleged that despite the clear language of 10 Del. C. § 3901(c), Defendants Elmer Fannin and Mary Ann Fannin "ignored the requirements of [ ] § 3901 entirely by failing to submit an affidavit of defense."[23]

Fulton argued that the substance of the affidavit was so deficient, that the averments of its Complaint were to be deemed admitted, and that default judgment should be entered as a matter of law."[24] Fulton also moved to dismiss the counterclaim on the basis (1) that most of the counterclaimants were not even parties to the litigation, (2) that other counterclaimants lacked standing to even assert a counterclaim, and (3) the "various pleading deficiencies plainly fail[ed] to provide the Bank with notice of the claims asserted against it." Following a Hearing on the Motion on October 31, 2017, the Court dismissed the counterclaims of the non-parties named in the counterclaim, and provided counterclaimant CLH ten (10) days to amend its counterclaim in accordance with "the Court's ruling stated on the record

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[22] Trans. Id. 60066214

[23] Fulton also noted that the counterclaim included six (6) entities that were not even parties named in the Complaint. Id. Fulton further pointed out that Defendants did not join the counterclaimants, and the counterclaimants neither sought nor received authority to intervene in this action." Id., at 2-3.

[24] Indeed, a reading of the substance of the counterclaim doesn't identify any legal basis for the claim against the Bank.

at the October 31st Hearing."[25] But rather than heed the Court's advice, and accept its (gracious) offer to amend, GSBB negligently did nothing, and the deadline lapsed without any effort to rectify its errors. GSBB did not provide an explanation to CLH as to the results of the proceedings

3. GBSS's Obvious Negligence in the "-104" Litigation.

In Civil Action 104, the court granted summary judgment to Fulton for $788,440. In his ruling in footnote 5, he stated that "Defendant could have, and should have, submitted a Rule 56(f) Affidavit in the previous proceeding, if, as they contend in their motion for re-argument, they were unable to obtain the necessary material to rebut Plaintiff's motion for summary judgment. But they have failed to do so." Accordingly, your motion for re-argument was denied

4. GSBB's Obvious Negligence in the "-108" Litigation.

On July 6, 2018, GSBB, on behalf of CLH, filed a Motion to Amend its Answer[26] to assert several counterclaims against Fulton. In it, GSBB (mis) represented that it first learned of facts suggesting that Fulton was actually overpaid on the Loan (as a result of the Gavin audit) completed in June 2018.

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[25] Trans. Id. 61390271.

[26] Trans. Id. 62206999.

On July 16, 2018, Fulton filed its Opposition to CLH Motion to Amend the Answer,[27] claiming that the counterclaim – a compulsory counterclaim[28] - should be denied, since GSBB had knowledge of the alleged irregularities on the loan as far back as February 2017, as those alleged irregularities were alleged in the Complaint – which GSBB prepared – against Fulton in the "-062 litigation." The court agreed, and denied the Motion to Amend as untimely.[29]

On July 26, 2018, Country Life Homes, via, GSBB, moved for Rearmament. Fulton opposed the Motion, and on August 13, 2018, via Representative Opinion-Court denied the Motion for Reargument.[30] The Court, inter alia, observed that the failure to timely file, compulsory counterclaim "can only be seen as dilatory."[31]

5. GSBB Foolhardy Defense in the "199" and "200" Litigations.

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[27] Trans. Id. 62241404.

[28] GSBB admitted that the counterclaim was compulsory under Super. Ct. Civ. R.

[29] In so doing, the Court obviously found that GSBB's representation that it did not know of the facts in support of the counterclaim until June 2018, was not credible.

[30] Trans. Id. 62340583.

[31] Memo Op. at 6. The Court further observed that although "[d]efendants may not have known the exact [amount of the] damages until June 2018, … they are not required by the Delaware Rules of Civil Procedure to plead the exact amount of damages to set forth a viable counterclaim." Id., citing Super. Ct. Civ. R. 9(g). It would appear that GSBB was also unaware of the input of this Rule.

On November 18, 2016, Fulton filed its second lawsuit against CLH, alleging a default on loan "7-9001"[32] GSBB (on behalf of CLH) Answered and denied Fulton's allegations. Thereafter, the parties engaged in extensive discovery and some Motions practice, generally in the form of Motions to Compel discovery filed by Fulton.

On January 5, 2017, Fulton moved for entry of default judgment, or, in the alternative, for judgment on the pleadings.[33] The Motion alleged, inter alia, that the Answer and Affidavit of defense were grossly deficient, and failed to set forth any legitimate grounds for denying the relief sought by Fulton. GSBB (on behalf of CLH) responded in opposition to the Motion on January 26, 2017.[34]

Following a Hearing, the Court – on January 9, 2018 – granted Fulton's Motion, and entered a judgment of default (on both lines of credit) in favor of Fulton in the consolidated action.[35]

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[32] Trans. Id. 59855358.

[33] Trans. Id. 60024690. Soon thereafter, the "-199" litigation and "-200" litigation were consolidated.

[34] Trans. Id. 60125571.

[35] Trans. Id 61545930. It does not appear that GSBB ever discussed the Court's decision with CLH.

D. GSBB CONSISTENTLY – AND EGREGIOUSLY – PATENTLY MISREPRESENTED, MISINFORMED OR WITHHELD INFORMATION FROM CLH ABOUT THE RESULTS IN THE MULTIPLE FULTION LITIGATIONS

1. GSBB Failed to Inform CLH of the results of the "-062" Litigation

Based on a review of all of accessible correspondence between GSBB and CLH, GSBB never informed CLH of its failure to perfect service of process in the litigation, and that the matter was ultimately dismissed in favor of Fulton.

2. GSBB Misrepresented the Results in the "-077" Litigation to CLH

3. GSBB Misrepresented the Results in the "-104" Litigation to CLH

4. GSBB Misrepresented the Results in the "-108" Litigation to CLH

In perhaps the most shocking and egregious display of an artifice to conceal its error, GSBB fabricated a false narrative that the case was lost because CLH's claims were barred by the State of Limitation.

> 1. Do you agree with the reasoning of the decision denying your[36] motion to add a counterclaim?
>
> WE DO NOT. THE JUDGE FOUND THAT THE CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS AND SHOULD HAVE BEEN BROUGHT YEARS AGO. WE ARGUED

[36] The entirety of GSBB's recitation is set forth in CLH Exhibit 6 to its Opening Brief.

THAT THE STATUTE OF LIMITATION DID NOT START RUNNING UNTIL THE FANNINS LEARNED OF THE MISAPPLIED PAYMENTS AND THE MISSING PAYMENTS AFTER ROSS WAETZMAN COMPLETE [SIC] HIS ANALYSIS. ALTERNATIVELY, WE ARGUED THAT THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN BECAUSE FULTON'S BREACH WAS AN ONGOING WRONG. OBVIOUSDLY, JUDGE RENNIE DIDN'T AGREE WITH EITHER OF OUR ARGUMENTS. HE RELIEF [SIC] UPON THE FACT THAT, IN THE PAST, CLH HAD MADE REPRESENTATION [SIC]THAT IT HAD LONG SOUGHT A RECONCILIATION OF ITS ACCOUNTS WITH FULTON, AND, THUS, HAD A "DISPUTE" THAT WOULD TRIGGER THE STATUTE OF LIMITATIONS. WE DISAGREE WITH HIS REASONING AND WOULD SUBMIT THAT HE IS CONFLATING A DESIRE FOR A RECONCILIATION WITH AN ACTUAL DISPUTE AS TO THE BALANCE. IN OTHER WORDS, CLH DID NOT KNOW OF ANY BASIS TO COMPLAIN ABOUT THE LOAN BALANCE (I.E THE MISAPPLIED PAYMENT AND THE MISSING PAYMENT) UNTIL THE AUDIT WAS COMPLETE.

GSBB continued this false narrative:

Please also note that when we argued in front of Judge Rennie about Civil Action 104 and Civil Action 108, Judge Rennie made it clear, and David White agreed, that any misapplied payment, with the possible exception of payments that might have misapplied beyond the statute of limitations, would be addressed at the time that a complete reconciliation of all the accounts had been completed. As such, neither Country Life nor any of its affiliates can claim that they were harmed by Judge Rennie's decisions. Judge Rennie's decision in those two cases were designed to narrow the issues. 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."

III. THE SUPERIOR COURT ERRED IN HOLDING THAT CLH'S EXPERT WITNESS, LOU FRIEDMAN, ESQ. / CPA, WAS NOT QUALIFIED TO TESTIFY AS AN EXPERT WITNESS[37]

A. MR. FRIEDMAN WAS QUALIFIED TO TESTIFY AS AN EXPERT

For the reasons set forth in its Opening Brief,[38] CLH maintains that Mr. Friedman, Esq. / CPA was eminently qualified to testify as an expert on behalf of CLH.

B. THE COURT ABUSED ITS DISCRETION IN EXCLUDING MR. FRIEDMAN'S PROFFERED EXPERT TESTIMONY

Exclusion of an expert's testimony is one of the most severe sanctions for non-compliant with a discovery deadline, because it can effectively result in dismissal of the claims that depend upon that testimony. The "sanction of dismissal [or exclusion of an essential expert] is severe and courts are and have been reluctant to apply it, except as a last resort."[39]

> In determining the appropriate sanction for the late expert production, the Court must consider several factors, including: (i) the party's personal responsibility; (ii) the prejudice to the party seeking exclusion or dismissal; (iii) history of dilatoriness; (iv) whether the

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[37] As noted earlier , CLH is satisfied that, based on the extant caselaw, it did not require an expert to testify as a witness in support of its prima facie case. Nevertheless, …

[38] Opening Br. at ___ - ___.

[39] Drejka v. Hitchens Tire Service Inc., 15 A.3d 1221, 1224 (Del. 2010) (quoting Hoag v. Amex Assurance Co., 953 A.2d 713, 717 (Del. 2008)). CLH submits that the Trial Court employed it as a "first resort."

> conduct was willful or in bad faith; (v) the effectiveness of other, less severe sanctions; and (vi) the meritoriousness of the claim of defense.[40]

But here, the trial court didn't evaluate any of these factors before deciding to dismiss the case. CLH submits that the trial courts failure to follow the well established Drejka analysis was patently erroneous, and on this basis alone, should reverse the trial court's decision.

[40] Id. See also, Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 156 (3d Cir. 1995). "The imposition of sanctions pursuant to Rule 37(c)(1) is within the sound discretion of the trial court." However, "the exclusion of critical evidence is an extreme sanction, not normally imposed absent a showing of willful deception or flagrant disregard of a court order by the proponent of the evidence." Konstantopoulos v. Westvaco Corp., 112 F.3d 710, 719 (3d Cir. 1997) (quoting) Meyers v. Pennypack Woods Home Ownership Association, 559 F.2d 894, 905 (3d Cir. 1997)

C. THE COURT WHOLLY FAILED TO ADDRESS WHETHER THERE WAS PREJUDICE TO GSBB BY ITS UNTIMELY PRODUCTION

Finally, and perhaps most importantly, CLH notes that the trial court wholly failed to discuss, let alone analyze how (or even whether) GSBB was prejudiced by its late expert submissions.

CLH submits that even in the absence of an affirmative showing of "good cause," the Court is still required to engage in an analysis regarding whether there is any substantial prejudice to the opposing party, before it can dismiss a case because of a party's failure to meet a production deadline.[41]

[41] See e.g. Helmick v. Miller, 2012 WL 2833057, at *1, 4, wherein the court declined to exclude the plaintiffs' expert when the expert report was provided five months late. The plaintiffs had ordered a report from the expert between 1-3 months before the deadline, but the expert did not submit her report until roughly five months after the deadline. The court accepted the representations of plaintiffs' counsel that he had made various attempts to contact the expert and expedite the submission of the expert's report. The court did order, as a sanction, that the plaintiffs pay defendant's cost of deposing the expert. See also Teles v. Cisco Sys., D. Del. , C.A. No. 09-72-SLR-LPS (Consolidated), Stark, J. (Dec. 28, 2008) (Opinion and Order at 6) (Court granting Defendants Motion for Leave to take additional depositions after discovery deadline, in the absence of undue prejudice or burden to Plaintiff); Trott v. Bayhealth Medical Center, Inc., Del. Super., C.A. No. N20C-09-182 SPL, Lugg, J. (Feb. 16, 2024) (Memo Op. and ORDER, at 7, n. 54). ("The Court understands that defendants object to its consideration of Dr. Holsapple's Supplemental Correspondence as having been provided after an established discovery deadline. The Court considers this document, together with Dr. Holsapple's report and deposition, in the light most favorable to the non-moving party. The Court declines to reject this document on procedural or other grounds.")

D. MR. FRIEDMAN'S TESTIMONY WOULD CLEARLY HAVE ASSISTED THE JUDGE, IF SHE HADN'T DECIDED TO STRIKE HIM.

E. MR. FRIEDMAN COULD HAVE ASSISTED THE JUDGE AS A FACT WITNESS, IF SHE HADN'T DECIDED TO STRIKE HIM.[42]

[42] Although not dispositive, the trial court also held that Mr. Friedman could not testify as both an expert and a fact witness. Memo Opinion. This is incorrect. To the contrary, it is fairly well settled that a witness can testify as both an expert and a fact witness in the same litigation, see e.g. United States v. Dukagjini, 326 F.3d 45 (2nd Cir. 2002), although this tends to occur much more frequently in criminal cases than in civil litigation.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING CLH'S MOTION TO DEEM THE IDENTITY – AND ITS BRIDGING EXPERT REPORT – AS TIMELY FILED

In its final ("III") argument, GSBB takes issue with CLH's argument that the trial court abused its discretion in barring CLH's bridging expert – and his expert report – because it was untimely filed.[43] In this regard CLH is content to rely on its analysis and Argument as set forth in its Opening Brief, it replies (3) fold, to GSBB's Answering Argument.

[43] Ans. Br. at 30.

CONCLUSION

For all of the reasons set forth herein, CLH respectfully requests that this Honorable Court reverse the Trial Court's decision to grant Summary Judgment in favor of GSBB, and remand the matter for further proceedings back to the Superior Court.

Respectfully submitted,

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