

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GEMINI INSURANCE COMPANY,	§	
	§	No. 127, 2026
Plaintiff Below/	§	
Appellant,	§	
	§	Court Below: Court of Chancery
v.	§	of the State of Delaware
	§	
BAUSCH & LOMB AMERICAS, INC.,	§	C.A. No. 2026-0048
	§	
Defendant Below/	§	
Appellee.	§	

Submitted: September 30, 2026

Decided: October 1, 2026

Before **LEGROW**, **GRIFFITHS**, and **ZURN**, Justices.

ORDER

After consideration of the parties’ briefs and the record on appeal, it appears to the Court that:¹

1. The parties are engaged in an insurance coverage dispute regarding a policy with a forum selection clause sending disputes to the Court of Chancery and, if it declined jurisdiction, the District of Delaware.² The insured filed in a different state court, inspiring the insurer to seek an antisuit injunction from the Court of Chancery.

¹ Citations in the form “A__” refer to the Appendix to Appellant’s Opening Brief.

² A044–45.

2. The parties joined issue at the preliminary injunction stage on the Court of Chancery’s subject matter jurisdiction and the availability of a transfer to the Superior Court under 10 *Del. C.* § 1902.³ A nominal defendant sought an injunction enforcing the forum selection clause, and argued the Court of Chancery “may” decline jurisdiction “and transfer the case to Superior Court under” Section 1902.⁴ In opposing that motion, the appellee contended the forum selection clause “expressly forecloses transfer to Superior Court.”⁵ The appellant replied with the argument that “the forum selection clause does not divest this Court of statutory authority to transfer the matter to Superior Court.”⁶ The appellant did not argue Section 1902’s plain text required the opportunity for transfer.⁷

3. At the February 13, 2026 preliminary injunction hearing, the Court of Chancery denied the antisuit injunction, explaining the motion failed on the merits

³ 10 *Del. C.* § 1902 (“No civil action, suit or other proceeding brought in any court of this State shall be dismissed solely on the ground that such court is without jurisdiction of the subject matter, either in the original proceeding or on appeal. Such proceeding may be transferred to an appropriate court for hearing and determination, provided that the party otherwise adversely affected, within 60 days after the order denying the jurisdiction of the first court has become final, files in that court a written election of transfer, discharges all costs accrued in the first court, and makes the usual deposit for costs in the second court.”).

⁴ A237; *see also* A240 (arguing that “if there is no Chancery jurisdiction, this case should be transferred to Delaware Superior Court”). The nominal defendant did not join this appeal.

⁵ A268.

⁶ A305–06.

⁷ A300–10; A134–47.

prong because the Court of Chancery lacked subject matter jurisdiction over the underlying insurance dispute.⁸ The trial court also offered its view that dismissal was “not a route to transfer under Section 1902” because the forum selection clause specified the District of Delaware, not Superior Court, as the “fallback jurisdiction.”⁹ In denying the motion for preliminary injunction, the Vice Chancellor concluded the case had to be dismissed, but gave the parties the option to brief a motion to dismiss specifically to avoid an appellate argument that the trial court had deprived the plaintiff of due process.¹⁰ The Vice Chancellor asked the parties to inform the court of their choice early in the week of February 16.¹¹

4. The parties could not agree on whether to conduct another round of briefing before dismissal, as reflected in several letters.¹² The plaintiff expressed it was attempting to preserve its appeal rights and forego additional briefing, while “agreeing that insurers will not raise the prejudice argument” the trial court had predicted.¹³ The plaintiff specifically sought a stipulation that it could appeal “the alleged *right* to transfer to Superior Court pursuant to Section 1902,” which the

⁸ Appellant’s Op. Br. Ex. B [hereinafter “Bench Ruling”] at 59–72.

⁹ *Id.* at 70–71.

¹⁰ *Id.* at 73.

¹¹ *Id.* at 74.

¹² A311–22.

¹³ A311–12.

defendant rejected as an “entirely new argument[.]”¹⁴ The defendant asked the plaintiff if it wanted to brief a motion to dismiss, and the plaintiff did not respond.¹⁵

5. Mid-afternoon on Friday, February 20, the defendant asked the trial court to order the plaintiff to elect briefing or dismissal by Monday, February 23.¹⁶ The plaintiff still did not respond. After noon on February 23, the Court of Chancery entered an order dismissing the case for lack of subject matter jurisdiction, without any comment on Section 1902.¹⁷ The trial court observed the parties “were jockeying for advantage in the form of ancillary terms.”¹⁸ The plaintiff did not file any notice of election of transfer before Section 1902’s deadline.

6. The plaintiff appeals the Court of Chancery’s order of dismissal on two grounds. First, it argues for the first time that Section 1902 mandates the plaintiff have the opportunity to transfer its case to the Superior Court; put differently, that Section 1902 grants a right to transfer. And second, it asserts the trial court denied the plaintiff due process by prohibiting transfer without providing the opportunity to be heard.

¹⁴ A316; A321 (emphasis added).

¹⁵ A316; C.A. No. 2026-0048-JTL, Docket Item (“D.I.”) 89, Ex. 2.

¹⁶ A314; C.A. No. 2026-0048-JTL, D.I. 89.

¹⁷ Appellant’s Op. Br. Ex. A at 2 (“NOW, THEREFORE, this case is dismissed for lack of subject matter jurisdiction.”); C.A. No. 2026-0048-JTL, D.I. 90.

¹⁸ Appellant’s Op. Br. Ex. A ¶ E.

7. Under Delaware Supreme Court Rule 8, “[o]nly questions fairly presented to the trial court may be presented for review.”¹⁹ Rule 8 offers “an escape hatch that allows the Court to review an unpreserved argument ‘when the interests of justice so require.’”²⁰ That exception is not available for waived issues.²¹ An issue is unreviewable as “waived” when a party “knowingly and intelligently” waives a right.²² A “conscious decision” to refrain from pursuing a position before the trial court “as a tactical matter is a waiver that will negate plain error appellate review.”²³ By contrast, when a party forfeits a right, as by failing to timely assert it, this Court reviews it for plain error when justice requires.²⁴ The appellee has the

¹⁹ *Suber v. State*, 360 A.3d 203, 209 (Del. 2026).

²⁰ *Id.* at 210.

²¹ *Id.* at 211, n.27.

²² *Id.* at 210.

²³ *Wright v. State*, 980 A.2d 1020, 1023 (Del. 2009).

²⁴ *Suber*, 360 A.3d at 211, n.27 (citing *Purnell v. State*, 254 A.3d 1053, 1101 (Del. 2021)); see also *Purnell*, 254 A.3d at 1101 (“Waiver is the voluntary and intentional relinquishment of a known right. . . . By contrast, forfeiture is the failure to make the timely assertion of a right. The distinction between waiver and forfeiture is most visible in so-called ‘plain error’ analysis, where a forfeited allegation that a defendant’s rights were violated can nevertheless be the basis for later reversal[,] but a waived right cannot.” (internal citations and quotations omitted)); e.g., *Beebe Medical Center, Inc. v. Bailey*, 913 A.2d 543, 550–55 (Del. 2006) (determining the defendants-appellants had tactically chosen not to limit the evidence of damages at trial, including by declining the trial judge’s invitation to review the evidence and to provide limiting instructions, which choice amounted to waiver that foreclosed consideration of the appellant’s argument to limit the scope of damages on appeal).

burden of proving an issue was waived, and the Court will “indulge in every reasonable presumption against waiver.”²⁵

8. The appellant knowingly, intelligently, and tactically waived the opportunity to argue to the trial court that Section 1902 mandates transfer. The parties joined issue on subject matter jurisdiction on the motion for preliminary injunction, and the appellant argued only that Section 1902 granted the trial court authority to transfer the case notwithstanding the forum selection clause.²⁶ After the trial court rejected that argument, it generously offered the parties the opportunity to brief a motion to dismiss.²⁷ The appellant did not pursue that opportunity—even as it contemplated appealing on the grounds that Section 1902 mandated transfer.²⁸ The appellant’s series of decisions to make one Section 1902 argument but not another, of which it was aware, amounts to waiver that forecloses appellate review.

9. The appellant’s arguments to the contrary are not persuasive. The appellant argues its request that the appellee stipulate the appellant could appeal its mandatory transfer interpretation shows the appellant did not waive that argument.²⁹

²⁵ *Suber*, 360 A.3d at 210 (quoting *Flamer v. State*, 490 A.2d 104, 113 (Del. 1983)) (alteration omitted).

²⁶ A305; Bench Ruling at 22, 23, 33. The appellant concedes it is arguing for the first time on appeal that Section 1902 mandates transfer. Opening Br. at 16.

²⁷ Bench Ruling at 72–73.

²⁸ A311–13; A320–21.

²⁹ D.I. 15 at 4–6.

This argument shows appellant was aware of the argument, but chose not to present it to the trial court: a knowing waiver. The appellant also argues its mandatory transfer position was “fairly encompassed by its position below” and that the distinction between permissive and mandatory transfer is “pure legal refinement.”³⁰ But the statute cannot be simultaneously mandatory and permissive. Finally, the appellant argues it would have been futile to raise its mandatory transfer argument in another round of briefing, as the trial court had made up its mind. The point is that accepting the trial court’s offer would have preserved the issue for appeal.

10. As to the second question presented, the appellant’s choices below foreclose its due process complaint on appeal. Procedural due process requires “meaningful notice and an opportunity to be heard.”³¹ But parties may waive procedural due process rights just like any other right.³² When a party fails to raise an inadequate notice issue below, it effectively waives a due process argument on

³⁰ Appellant’s Reply Br. at 12–13.

³¹ *Wright v. Evans-Grant*, 160 A.3d 483, 2017 WL 1410775, at *3 (Del. Apr. 19, 2017) (TABLE).

³² *Mazik v. Decision Making, Inc.*, 449 A.2d 202, 204–05 (Del. 1982) (holding that due process rights to notice may be waived where, under the totality of the circumstances, the party’s conduct shows a voluntary, knowing and intelligent relinquishment of those rights).

appeal.³³ A notice claim is also foreclosed when earlier proceedings raised the underlying issue.³⁴

11. The appellant had sufficient notice and opportunity to be heard on its Section 1902 argument: as the Court of Chancery noted, the appellant could address the statutory transfer issue before the preliminary injunction hearing in its opening brief and its reply brief.³⁵ The appellant waived any due process argument by failing to object at the preliminary injunction hearing. Then, after the trial court denied the preliminary injunction and indicated it favored dismissal without leave to transfer, the appellant failed to avail itself of the express invitation to enjoy additional due process by briefing dismissal.³⁶ Instead, it jockeyed for advantage on a proposed stipulation that it would not appeal a due process violation.³⁷ The appellant had three

³³ *Christiana Town Center, LLC v. New Castle Cty*, 865 A.2d 521, 2004 WL 2921830, at *3 (Del. Dec. 16, 2004) (TABLE) (concluding the appellant “voluntarily, knowing and intelligently waived its due process rights to adequate notice of the RTC hearing by failing to object to the inadequate notice at the actual hearing”); *see also Powers v. Waters*, 2009 WL 189859 at *1–2 (Del. Jan. 12, 2009) (TABLE) (holding that the appellant husband’s due process rights were not violated when the Family Court provided only one week notice of a PFA hearing because the appellant was fully apprised of the issues during pre-hearing settlement negotiations, and that the husband’s failure to object to the inadequate notice foreclosed review of his due process claim).

³⁴ *Sunder Energy, LLC v. Jackson*, 332 A.3d 472, 492–93 (Del. 2024) (concluding the appellant had adequate notice of the appellee’s intention to assert a particular affirmative defense and had the opportunity to respond to it in its reply brief below).

³⁵ Bench Ruling at 72–73.

³⁶ *Id.* at 73–74.

³⁷ A319–21.

chances to present its Section 1902 argument, and two chances to make a due process argument, but chose to forego them all. It cannot be heard to complain it did not receive due process.

NOW THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery is AFFIRMED.

BY THE COURT:

/s/ Morgan T. Zurn
Justice