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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,	:	**No. 401, 2020**
Defendants/Counterclaim Plaintiffs Bellow/ Appellants,	:	**ON APPEAL FROM THE SUPERIOR COURT OF DELAWARE OF AND FOR NEW CASTLE COUNTY**
v.	:	
GELLERT SCALI BUSENKELL & BROWN, LLC,	:	
Plaintiff/Counterclaim Defendant Bellow/Appellee.	:	

APPELLANTS' AMENDED OPENING BRIEF

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NATURE OF THE PROCEEDINGS

This is a legal malpractice action arising from a series of underlying litigation matters. Appellants/Counterclaim Plaintiffs, below, Country Life Homes, LLC, Hearthstone Manner, 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 (collectively "Country Life"), were defendants in several commercial debt collection actions brought by their business lender, Fulton Bank, N.A. ("Fulton"). Appellee/Counterclaim Defendant, Gellert Scali Busenkell & Brown, LLC's ("GSB&B") represented Country Life in those actions and also represented them as plaintiffs in a suit against Fulton.

On March 22, 2019, GSB&B filed a Complaint against Country Life asserting three claims: (i) Breach of Contract; (ii) Unjust Enrichment; and (iii) Quantum Meruit. All three of GSB&B's claims were predicated upon purportedly owed attorneys' fees and costs incurred during the litigation with Fulton. On June 19, 2019, Country Life filed their Answer, Affirmative Defenses, and Counterclaims, bringing two claims against GSB&B: (i) Legal Malpractice and (ii) Respondeat Superior, also arising as a result of GSB&B's earlier representation in the litigation with Fulton. On September 5, 2019, GSB&B 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 GSB&B's Motion to Dismiss. The parties later settled GSB&B's claims and on November 4, 2020, Judge Medinilla granted the parties' stipulation to dismiss GSB&B's claims, thus terminating the litigation.

On November 20, 2020, Country Life filed a Notice of Appeal of Judge Medinilla's decision granting GSB&B's Motion to Dismiss Country Life's Counterclaims. This is Country Life's Opening Brief.

SUMMARY OF THE ARGUMENTS

1. The Superior Court erred in holding that Country Life's Counterclaim failed to state claims upon which relief could be granted. *Country Life's Counterclaim contained well pled allegations, which must be accepted as true, and if proven satisfy the elements of a legal malpractice claim.*

2. The Superior Court erred in applying the strict "case within a case" but-for causation analysis, traditionally employed in legal malpractice claims arising from underlying litigation, when Country Life's theory of liability did not allege that Country Life lost the Underlying Actions as a result of GSB&B's negligence, but rather that GSB&B was negligent in advising Country Life to defend against the Fulton actions and to prosecute its own claims against Fulton. *Country Life never pled or argued that it could have succeeded in litigating the Underlying Actions, but-for GSB&B's negligence. Rather, Country Life pled and argued that litigating the Underlying Actions was a hopeless and fruitless endeavor and Country Life could never have succeeded. Country Life pled and argued that GSB&B's advice to Country Life to pursue that litigation was a deviation of the applicable standard of care, which required GSB&B to advise Country Life to settle with Fulton and forgo defending/prosecuting the Underlying Actions.*

3. The Superior Court erred in not applying the causation analysis used for malpractice claims alleging underlying transactional malpractice, when Country Life's theory of liability did not allege that Country Life lost the underlying actions as a result of GSB&B's negligence, but rather that GSB&B was negligent in advising Country Life to defend against the Fulton actions and to prosecute its own claims against Fulton. *When analyzing causation for a legal malpractice claim that arises from underlying transactional malpractice, Courts often analyze whether the plaintiff-client would have had a more favorable outcome from the transaction, but-for the attorney's error. Country Life pled and argued that GSB&B deviated from the standard of care by advising them to defend/prosecute the Underlying Actions, instead of settling with Fulton. Country Life pled and argued that GSB&B's advice was akin to the advice given by an attorney representing a*

client in a business transaction, and thus the Court should have utilized the same standard.

4. The Superior Court erred in holding that Country Life's damages claim was fatally speculative, considering the well-pled allegations in its Counterclaim and given the standard of review for a Motion to Dismiss pursuant to Super. Ct. Civ. R. 12(b)(6). *Country Life's Counterclaim alleged that GSB&B deviated from the applicable standard of care and committed malpractice by not advising it that defending against Fulton's claims was a fruitless endeavor – as was prosecuting its own claims against Fulton – and that GSB&B should have advised Country Life to settle with Fulton under the most favorable terms possible. Country Life also alleged that this negligent advice caused it to incur over $1,000,000.00 in damages in the form of GSB&B's attorneys' fees, expert expenses, litigation costs, and fee shifting, all of which would have been avoided had GSB&B advised them to settle with Fulton. The Superior Court held that because no settlement offer was actually made, it was speculative to believe a settlement was possible. The Court erred in not allowing the case to proceed to discovery, whereby depositions of Fulton employees could have confirmed that it would have settled with Country Life had it been offered.*

STATEMENT OF FACTS

Country Life is engaged in the business of residential real estate development in Sussex County Delaware.[1] On March 1, 2016, Country Life engaged GSB&B to represent them to restructure various commercial loans with their longtime lender, Fulton.[2] Ultimately, however, Fulton sued Country Life in a series of debt collection actions.[3] While litigating those collections actions, GSB&B advised Country Life that the sums sought in the various Fulton matters were overstated and that in fact, Country Life had overpaid Fulton and was owed money.[4]

As a result, GSB&B advised Country Life to mount a vigorous defense to the Fulton claims and to file their own direct actions against Fulton (all underlying litigation hereinafter collectively the "Underlying Actions").[5] To support the claims and defenses in the Underlying Actions, GSB&B commissioned accounting firm, Gavin/Solmonese, LLC ("G/S") to review the underlying loan documents from Fulton and to prepare a comprehensive report intended to establish that

[1] A037 at ¶¶ 13-14.

[2] A037-A038 at ¶¶ 16-18.

[3] A038-A046 at ¶¶ 19-73.

[4] A046-A047 at ¶¶ 74-76.

[5] A047 at ¶¶ 77-79.

Fulton in fact owed monies to Country Life.[6] Despite its six-figure price tag, G/S's report (the "G/S Report") was in fact deeply flawed and predicated on faulty assumptions, hindering its utility in assisting in litigating the Underlying Actions.[7] As Country Life would later learn, GSB&B failed to accurately identify the weakness of Country Life's claims and defenses and greatly exaggerated the likelihood of a successful outcome in the Underlying Actions.[8] In fact, Country Life's claims and defenses in the Underlying Actions were very weak and any overpayments to Fulton would be vastly surpassed by sums legitimately owed to Fulton.[9] Accordingly, litigating the Underlying Actions was a waste of time and precious financial resources.[10]

One key issue GSB&B largely ignored was the fact that Country Life would be responsible for paying Fulton's legal expenses if they successfully prosecuted their collections matters.[11] GSB&B failed to accurately advise Country Life that given their likely defeat at trial in the Underlying Actions, they should have settled

[6] *Id.*at ¶ 81.

[7] A048 at ¶ 82.

[8] *Id.*at ¶¶ 84-85.

[9] *Id.* at ¶ 86.

[10] *Id.*at ¶ 87.

[11] A049 at ¶ 88.

with Fulton under terms as favorable as possible.[12] This strategy would have also greatly limited Country Life's exposure to Fulton's claims for legal expenses.[13]

Ultimately, Country Life was defeated summarily in all of the Underlying Actions and during a December 4, 2018 mediation conference with a Superior Court Commissioner, Country Life, then with new counsel, agreed to a settlement with Fulton, under which Country Life agreed to pay Fulton the full principal and interest due under the Fulton loans, plus Fulton's attorneys' fees and post-settlement interest.[14] At the time the settlement agreement memorializing the terms of the settlement was executed, the balance due was $6,730,578.71.[15] Country Life paid Fulton in excess of this amount in final satisfaction of its obligations under the loans and the settlement agreement arising from the litigation over the loans.[16]

But for GSB&B's failure to properly advise Country Life to promptly settle Fulton's collections actions and forgo the foolhardy litigation against Fulton, Country Life would not have incurred significant money damages, including: ((i) $393,151.04 in attorneys' fees, needlessly paid to GSB&B; (ii) $334,201.73

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[12] *Id.*at ¶ 89.

[13] *Id.*at ¶ 90.

[14] A051 at ¶¶ 104-106.

[15] *Id.*at ¶ 107.

[16] *Id.*at ¶ 108.

needlessly paid for the G/S Report; and (iii) $823,633.00 for Fulton's attorneys' fees and litigation expenses.[17]

[17] A054 at ¶ 116.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN HOLDING THAT COUNTRY LIFE'S COUNTERCLAIM FAILED TO STATE CLAIMS UPON WHICH RELIEF COULD BE GRANTED

A. Questions Presented

1. Did the Superior Court err in holding that Country Life's Counterclaim failed to state claims upon which relief could be granted?[18]

B. Standard and Scope of Review

The Supreme Court of the State of Delaware reviews "a decision to grant a motion to dismiss under Rule 12(b)(6) de novo to determine whether the trial judge erred as a matter of law in formulating or applying legal precepts."[19] Moreover, in reviewing a decision the Court recognizes, "[d]ismissal is appropriate only if it appears with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiff would not be entitled to relief."[20] Finally, "[i]n reviewing the grant or denial of a motion to dismiss, we view the complaint in the light most favorable to the non-moving party, accepting as true its

[18] The argument that Country Life's Counterclaim did not fail to state claims upon which relief could be granted was raised and preserved in Country Life's Answering Brief in Opposition to GSB&B's Motion to Dismiss. *See*, A091-A101 at p. 6-16.

[19] *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009) (internal quotations omitted).

[20] *Id.* (internal quotations omitted).

well-pled allegations and drawing all reasonable inferences that logically flow from those allegations."[21]

C. Merits

i. Country Life's Counterclaim Sufficiently Pled Factual Allegations Which If Accepted As True Satisfy The Elements Of A Claim For 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."[22] As in most jurisdictions, "it is well-established in Delaware that expert testimony is necessary to support a claim of legal malpractice."[23] 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."[24] Country Life's Counterclaim contained sufficient factual allegations that: (i) GSB&B's attorneys owed a duty to Country Life to discharge their legal work in a manner consistent with the standard of care expected of Delaware commercial

[21] *Id.*

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

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

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

litigators; (ii) that GSB&B's attorneys breached that duty by negligently advising Country Life to vigorously defend/prosecute the Underlying Actions; and (iii) that this breach was the actual and proximate cause of economic damages incurred by Country Life – $393,151.04 in attorneys' fees paid to GSB&B, $334,201.73 needlessly paid for the G/S Report, and $823,633.00 in shifted fees for Fulton's attorneys' fees and litigation expenses.[25]

ii. It Is Immaterial That Country Life Did Not Contend That They Would Have Prevailed In The Underlying Actions "But For" GSB&B's Negligence

GSB&B's main argument in support of its request for dismissal was that Country Life could not prove that they would have prevailed in the Underlying Actions, but for GSB&B's deviations from the applicable standard of care. Thus, GSB&B's main defense was based upon analysis of the merits of the "case within a case" – a common feature in legal malpractice actions.[26] However, the "case within a case" analysis is only appropriate in legal malpractice claims, wherein the plaintiff alleges an error committed in an underlying litigation resulted in the loss of that case. GSB&B's argument fundamentally misconstrued Country Life's theory of liabilty and therefore reached an erroneous conclusion. For sake of

[25] *See*, A052-A054 ¶¶ 109-117.

[26] *See, e.g., Villare v. Katz*, 2010 Del. Super. LEXIS 218, at *17 (Del. Super. May 10, 2010) (granting defendant-attorney's motion for summary judgment in legal malpractice claim after determining that "the undisputed facts and applicable law do not support a conclusion that [plaintiff] would have enjoyed a better outcome in the Engel case but for [defendant's] misconduct.").

brevity, Country Life incorporates herein by reference its arguments below as to why the "case within a case" causation analysis was inappropriate for the facts alleged in its Counterclaim, that the proper causation analysis should have been that employed for transactional malpratice claims, and that Country Life's Counterclaim adequately pled the existence of damages incurred as a result of GSB&B's negligence.

II. THE SUPERIOR COURT ERRED IN APPLYING THE STRICT "CASE WITHIN A CASE" BUT-FOR CAUSATION ANALYSIS, TRADITIONALLY EMPLOYED IN LEGAL MALPRACTICE CLAIMS ARISING FROM UNDERLYING LITIGATION, WHEN COUNTRY LIFE'S THEORY OF LIABILITY DID NOT ALLEGE THAT COUNTRY LIFE LOST THE UNDERLYING ACTIONS AS A RESULT OF GSB&B'S NEGLIGENCE, BUT RATHER THAT GSB&B WAS NEGLIGENT IN ADVISING COUNTRY LIFE TO DEFEND/PROSECUTE THE UNDERLYING ACTIONS

A. Questions Presented

1. Did the Superior Court err in applying the strict "case within a case" but-for causation analysis, traditionally employed in legal malpractice claims arising from underlying litigation, when Country Life's theory of liability did not allege that Country Life lost the Underlying Actions as a result of GSB&B's negligence, but rather that GSB&B was negligent in advising Country Life to defend against the Fulton actions and to prosecute its own claims against Fulton?[27]

B. Standard and Scope of Review

The Supreme Court of the State of Delaware reviews "a decision to grant a motion to dismiss under Rule 12(b)(6) de novo to determine whether the trial judge

[27] The argument that the Superior Court should not apply the strict "case within a case" but-for causation analysis, traditionally employed in legal malpractice claims arising from underlying litigation, because Country Life's theory of liability did not allege the it lost the Underlying Actions as a result of GSB&B's negligence, but rather that GSB&B was negligent in advising it to defend/prosecute the Underlying Actions was preserved at oral argument. *See,* A133-A135 at p. 18:23-20:14.

erred as a matter of law in formulating or applying legal precepts."[28] Moreover, in reviewing a decision the Court recognizes, "[d]ismissal is appropriate only if it appears with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiff would not be entitled to relief."[29] Finally, "[i]n reviewing the grant or denial of a motion to dismiss, we view the complaint in the light most favorable to the non-moving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations."[30]

C. Merits

i. Utilizing The Case Within A Case Causation Analysis Was Inappropriate Given Country Life's Theory Of GSB&B's Liability

In granting GSB&B's motion to dismiss, the Superior Court applied what it referred to as the "bright line rule under Delaware law" that as Country Life could not "establish that the underlying action[s] would have been successful but for the attorneys' negligence," the Counterclaim had to be dismissed[31] In so doing, Judge Medinilla employed the "case within a case" causation analysis often used in

[28] *Clinton*, 977 A.2d at 895 (internal quotations omitted).

[29] *Id.* (internal quotations omitted).

[30] *Id.*

[31] *See*, A165.

malpractice claims when the underlying engagement was litigation.[32] However, this analysis leaves an entire class of aggrieved clients without legal recourse – namely those clients whose attorneys negligently advised them to pursue litigation with no actual chance of success on the merits. This Court should not countenance such an unjust result, as other courts have elected to do, and jettison the supposed "bright line rule" that the "case within a case" causation analysis applies to ***all*** litigation based malpractice claims, regardless of the actual theory of liability.

Other courts have recognized the inherent inequity in failing to hold attorneys accountable for advising clients to pursue foolhardy litigation with no chance of success. In their seminal treatise on legal malpractice, Ronald E. Mallen and Jeffrey M. Smith explain the principle:

> The lawyer retained to prosecute or defend a case can be criticized not only for failing to succeed but for attempting to succeed where hindsight shows the effort to have been economically unwarranted. Attorneys have been charged with negligence for the expense of an unsuccessful prosecution or defense. These charges are made in hindsight. A related situation is a victory the cost of which exceeds the financial rewards.
>
> ***Although the quality of the client's case is not an attorney's responsibility, an attorney does have a counseling role. An attorney should advise his client of any substantial deficiencies in the merits or in the available defenses so that the client can decide whether and how to proceed. Also, the client should be advised if the cost of success will likely be exceeded by legal fees and litigation expenses. This principle recognizes that the client should have ultimate control over crucial decisions concerning the lawsuit***. Of course,

[32] *See, supra* note 26 and accompanying text.

> these judgment calls need to be based on the information that should be apparent to a reasonable lawyer and not measured by the wisdom of hindsight. Usually, the client's only injury is the expense that should have been avoided.[33]

The Court of Special Appeals of Maryland, in *Taylor v. Feissner*, reversed in part the trial court's granting of summary judgment to an attorney sued by a former client for malpractice arising from his earlier representation in a federal court age discrimination litigation matter.[34] The court affirmed the trial court's decision granting summary judgment to the attorney on the client's claim for damages in the form of the loss of a sizable judgment, determining that given the underlying facts, "no reasonable jury could conclude that, 'but for' Feissner's alleged negligence, Taylor would have recovered those damages."[35] However, the court reversed and remanded for trial the plaintiff's malpractice claim as it related to his alleged damages of $30,000.00 in attorneys' fees and litigation expenses spent pursuing a meritless lawsuit that the defendant should have advised against.[36] Accordingly, the court ruled that the plaintiff's malpractice claim was viable, despite the fact that he could never have proved his underlying claim – thus disregarding the "case within a case" causation analysis as a "bright line" rule.

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[33] RONALD E. MALLEN, JEFFREY M. SMITH, *Legal Malpractice* § 29.23, p.701-02 (4th ed. 1996) (emphasis added).

[34] *Taylor v. Feissner*, 653 A.2d 947, 949-50 (Md. App. 1995).

[35] *Id.* at 954.

[36] *Id.* at 954-56.

Similarly, the Court of Appeals of Michigan, in *Sherrard v. Stevens,* affirmed the trial victory of plaintiffs in legal malpractice action against their former attorney – who had earlier represented them in a meritless federal civil rights litigation action.[37] The plaintiffs' damages claim was for over $200,000.00 in attorneys' fees, needlessly paid to the defendant to pursue litigation that their trial expert testified had "'zero' chance of success."[38] Accordingly, the plaintiffs in *Sherrard,* not only brought colorable claims for legal malpractice against the defendant – but prevailed at trial – despite the fact that they could not demonstrate (and in fact never alleged) that their attorney's negligence prevented them from prevailing in the underlying litigation.

In another deviation from a "bright line" "case within a case" causation analysis, the Court of Appeal of Florida, in *Shear v. Hornsby & Whisenand, P.A.*, reversed the trial court's granting of summary judgment to defendant-attorneys in a legal malpractice action predicated upon underlying mechanic's lien litigation.[39] The plaintiff lost the underlying litigation when the trial court found that there was no contract between the underlying parties and ordered the plaintiff to pay the

[37] *Sherrard v. Stevens*, 440 N.W.2d 2, 3-4 (Mich. App. 1988).

[38] *Id*. at 4-5.

[39] *Shear v. Hornsby & Whisenand, P.A.*, 603 So. 2d 129, 130 (Fla. App. 1992).

underlying defendant's attorney's fees of $36,067.02.[40] The plaintiff then sued their attorneys for legal malpractice alleging they failed to adequately advise him of the exposure of fee shifting and sought the $36,067.02 as damages.[41] Thus, the court found that the plaintiff had stated a valid claim for legal mapractice stemming from an underlying litigation matter, despite the fact that the plaintiff could not show that the defendant's negligence caused him to lose an otherwise winnable case.

In *Price Waicukauski & Riley, LLC v. Murray*, the U.S. District Court for the Southern District of Indiana – applying Indiana substantive law – determined that a plaintiff's claims that the defedants' negligence resulted in increased legal expenses, could survive summary judgment.[42] The Court so ruled even if the plaintiff could not prove he would have won the underlying lawsuit.[43]

Finally, the Superior Court of New Jersey, Appellate Division, in *Gautam v. De Luca*, recognized that "the 'suit within a suit' rule may suffer from an undue rigidity."[44] The Court opined that the requirement of proving the underlying action

[40] *Id.*

[41] *Id.*

[42] *Price Waicukauski & Riley, LLC v. Murray*, 47 F. Supp. 3d 810, 823, 828-29 (S.D. Ind. 2014).

[43] *Id.*

[44] *Gautam v. De Luca*, 521 A.2d 1343, 1348 (N.J. Super. Ct. App. Div. 1987).

is unrealistic, noting "[t]he simple fact is that many, if not most, legal claims are not tried to a conclusion, but rather are amicably adjusted."[45]

As these other courts have demonstrated, utilizing a "bright line rule" that to prove causation in ***all*** legal malpractice actions arising from litigation, the plaintiff must demonstrate that their attorneys' negligence caused them to lose that litigation is unworkable. Allowing such a rule to exist, ignores the realities of the legal profession. As discussed by Mallen and Smith, some attorneys – either through ignorance of the law, failure to properly conduct factual investigations, or through sheer greed at the thought of obtaining a large volume of billable hours – advise clients to pursue litigation that is sheer folly and not in their client's best interests. There must be a mechanism whereby such attorneys can be held to account for their malpractice and not be let off the proverbial hook due to a technicality.

[45] *Id.*

III. THE SUPERIOR COURT ERRED IN NOT APPLYING THE CAUSATION ANALYSIS USED FOR MALPRACTICE CLAIMS ALLEGING UNDERLYING TRANSACTIONAL MALPRACTICE, WHEN COUNTRY LIFE'S THEORY OF LIABILITY DID NOT ALLEGE THAT COUNTRY LIFE LOST THE UNDERLYING ACTIONS AS A RESULT OF GSB&B'S NEGLIGENCE, BUT RATHER THAT GSB&B WAS NEGLIGENT IN ADVISING COUNTRY LIFE TO DEFEND/PROSECUTE THE UNDERLYING ACTIONS

A. Questions Presented

1. Did the Superior Court err in not applying the causation analysis used for malpractice claims alleging underlying transactional malpractice, when Country Life's theory of liability did not allege that Country Life lost the underlying actions as a result of GSB&B's negligence, but rather that GSB&B was negligent in advising Country Life to defend against the Fulton actions and to prosecute its own claims against Fulton?[46]

B. Standard and Scope of Review

The Supreme Court of the State of Delaware reviews "a decision to grant a motion to dismiss under Rule 12(b)(6) de novo to determine whether the trial judge erred as a matter of law in formulating or applying legal precepts."[47] Moreover, in reviewing a decision the Court recognizes, "[d]ismissal is appropriate only if it

[46] The argument that the Superior Court should have applied the causation analysis used for malpractice claims alleging underlying transactional malpractice, because Country Life's theory of liability did not allege the it lost the Underlying Action as a result of GSB&B's negligence, but rather that GSB&B was negligent in advising it to defend/prosecute the Underlying Actions was preserved at oral argument. *See,* A137-A141 at p. 22:15-26:20.

[47] *Clinton*, 977 A.2d at 895 (internal quotations omitted).

appears with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiff would not be entitled to relief."[48] Finally, "[i]n reviewing the grant or denial of a motion to dismiss, we view the complaint in the light most favorable to the non-moving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations."[49]

C. Merits

i. Utilizing The Causation Analysis For Transactional Malpractice Was Appropriate Given Country Life's Theory Of GSB&B's Liability

In granting GSB&B's motion to dismiss, the Superior Court declined Country Life's invitation to utilize the causation analysis utilized by the Court in *Dickerson v. Murray* and *Beneville v. Pileggi* – two malpractice cases stemming from underlying transactional engagements.[50] As detailed below, the causation analysis for transactional malpractice claims is the proper analysis given Country Life's theory of GS&B's negligence, liability, and Country Life's resulting damages.

[48] *Id.* (internal quotations omitted).

[49] *Id.*

[50] *See,* A165.

Country Life's pleading alleged that GSB&B deviated from the applicable standard of care by rendering faulty and misguided ***advice*** in connection with their legal representation, specifically:

- Failing to accurately identify the weakness of the Country Life's claims and defenses in the Underlying Actions;
- Failing to advise Country Life of the likelihood that Fulton would prevail in the Fulton Actions, and advising Country Life to fight Fulton – greatly exaggerating the likelihood of a successful outcome in the Underlying Actions;
- Failing to correctly advise Country Life that the proper course of action was to strategically attempt an early settlement with Fulton – on terms as favorable to Country Life as possible;
- Misrepresenting the strength of the G/S Report to Country Life;
- Failing to correctly advise Country Life that their claims and defenses in the Underlying Actions were very weak and any overpayments to Fulton would be vastly surpassed by sums legitimately owed to Fulton; and
- Advising Country Life to file the Country Life Action, an action with no real possibility of success.[51]

In essence, Country Life's allegations against GSB&B were akin to a legal malpractice claim wherein the defendant-attorney has provided improper legal advice in connection with the structuring of a business deal or some other transactional engagement. Delaware courts regularly adjudicate legal malpractice

[51] A053 at ¶ 114.

claims wherein the claims arise from an underlying engagement that is transactional in nature.[52]

Country Life's allegations were substantially similar to those considered by the Superior Court in *Dickerson*, as they arose as a result of faulty legal advice, which ultimately caused the client to incur financial harm. In that case, the plaintiff had retained the defendants in connection with a loan provided to her grandson intended to allow him to purchase a property.[53] The defendants prepared a promissory note to formalize the agreement.[54] However, the defendants failed to advise plaintiff to mortgage her grandson's property – leaving the debt

[52] *See, e.g.*, *Dickerson*, 2016 Del. Super. LEXIS 166, at *3, 6-8 (denying defendants' motion for summary judgment for malpractice claims where plaintiff alleged defendants prepared a promissory note for an inter-family loan but negligently failed to advise her to place a mortgage on the lendees' property); *Hardy v. Jacobs & Crumplar, P.A.*, 2015 Del. Super. LEXIS 182, at *3-4, 15-16, 19 (Del. Super. Apr. 2, 2015) (denying defendants' motion to dismiss malpractice claim predicated upon theory that defendants were negligent in assisting plaintiff to set up a trust to hold the proceeds of an earlier litigation settlement, by failing to perform a background investigation of the trustees – who later stole the trust's funds – and failed to monitor their behavior and properly advise plaintiff on the selection of trustees); *Shea v. Delcollo & Werb, P.A.*, 977 A.2d 899 (table), 2009 Del. LEXIS 424, at *6-8 (Del. 2009) (reversing trial court's decision to grant a motion to dismiss on statute of limitations grounds, in malpractice action arising from defendants' negligence in preparation of a deed); *Venables v. Smith*, 2003 Del. Super. LEXIS 131, at *1 (Del. Super. March 14, 2003) (denying defendants' motion for summary judgment on legal malpractice claims arising as a result of defendants' failure to timely record a deed); and *David B. Lilly Co. v. Fisher*, 800 F. Supp. 1203, at 1204 (D. Del. 1992) (denying defendants' motion for summary judgment on malpractice claims arising from negligence resulting in improperly structured corporate acquisition).

[53] *Dickerson*, 2016 Del. Super. LEXIS 166, at *1-2.

[54] *Id.*

unsecured.[55] After making one payment the grandson and his wife defaulted.[56] In considering and ultimately disregarding the defendants' arguments for summary judgment, the Court noted that even the defense expert opined that the note was poorly drafted and, more importantly, that "[d]efendants should have advised [p]laintiff to obtain a mortgage on the [grandson's] property."[57]

In *Beneville v. Pileggi*, the Court similarly considered – and denied – the attorney-defendants' motions to dismiss the plaintiffs' legal malpractice claims.[58] The plaintiffs in *Beneville* alleged that their attorneys deviated from the applicable standard of care in the course of their representation of the two in connection with the negotiation and preparation of a stock purchase agreement.[59] The plaintiffs contended that the defendants failed to advise them of the significant negative impact of language inserted by the other party's attorneys, on the plaintiffs' stated goals of the deal.[60] The Court found that the plaintiffs had pled sufficient facts that

[55] *Id.* at *3-4.

[56] *Id.* at *1-2.

[57] *Dickerson*, 2016 Del. Super. LEXIS 166. at *7.

[58] *Beneville v. Pileggi*, 2004 U.S. Dist. LEXIS 5781, at *1-2 (D. Del. April 2, 2004).

[59] *Id.* at *2-3.

[60] *Id.* at *4-6.

defendants committed legal malpratice in the provision of deficient legal advice, such that the motions to dismiss were denied.[61]

These cases present facts that are similar to Country Life's allegations regarding the poor legal advice given by GSB&B. As noted by Mallen and Smith, at the outset of any litigation matter, an attorney's role in providing ***advice*** to their client is critically important: "Although the quality of the client's case is not an attorney's responsibility, an attorney does have a counseling role. An attorney should advise his client of any substantial deficiencies in the merits or in the available defenses so that the client can decide whether and how to proceed."[62] When a party is sued, they hire their attorney and their first expectation is stragetic advice: Do I have a strong legal position? Should I fight this or try to settle it? Do I have claims of my own? These are among the most important and critical decisions and questions of the entire engagement.

A client relying on the knowledge and skill of their attorneys in analyzing the strenths/weaknesses of claims and defenses is no different than a client relying on the knowledge and skill of their attorneys in analyzing the best way to structure a merger, a stock purchase agreement, or some other commercial transaction. If their attorney deviates from the applicable standard of care by negligently advising

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[61] *See, id. generally.*

[62] *See*, MALLEN & SMITH, *supra* n. 33 at § 29.23, p.702.

the client to pursue litigation with no hope of success, and their client relies on that advice and incurs a loss in the form of needlessly expended attorneys' fees and costs, fee shifting, etc., the attorney should be liable for malpractice – assuming that the client can sufficiently plead and later prove through lay and expert testimony that but for their attorney's negligent advice, they would not have litigated the case.

The allegations of Country Life's pleading – which again must be accepted as true – contended that GSB&B provided erroneous legal advice regarding the weakness of their claims and defenses in the Underlying Actions, and failed to provide the appropriate advice – that the proper course of action was to resolve Fulton's claims as quickly and cheaply as possible. Country Life's pleading contended that GSB&B did not provide the accurate legal advice necessary for them to make a properly informed decision regarding their approach to the Underlying Actions.[63] Country Life stated a viable theory that GSB&B deviated from the applicable standard of care in their provision of erroneous legal ***advice***.

[63] *See*, A048 – A049 at ¶¶ 85-90. *See also*, Del. Lawyers' R. Prof'l Conduct 1.4(b). ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

IV. THE SUPERIOR COURT ERRED IN HOLDING THAT COUNTRY LIFE'S DAMAGES CLAIM WAS FATALLY SPECULATIVE, CONSIDERING THE WELL-PLED ALLEGATIONS IN ITS COUNTERCLAIM AND GIVEN THE STANDARD OF REVIEW FOR A MOTION TO DISMISS PURSUANT TO SUPER. CT. CIV. R. 12(b)(6)

A. Questions Presented

1. Did the Superior Court err in holding that Country Life's damages claim was fatally speculative, considering the well-pled allegations in its Counterclaim and given the standard of review for a Motion to Dismiss pursuant to Super. Ct. Civ. R. 12(b)(6)?[64]

B. Standard and Scope of Review

The Supreme Court of the State of Delaware reviews "a decision to grant a motion to dismiss under Rule 12(b)(6) de novo to determine whether the trial judge erred as a matter of law in formulating or applying legal precepts."[65] Moreover, in reviewing a decision the Court recognizes, "[d]ismissal is appropriate only if it appears with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiff would not be entitled to relief."[66] Finally, "[i]n reviewing the grant or denial of a motion to dismiss, we view the

[64] The argument that Country Life's damages as pled in its Counterclaim were not fatally speculative was raised and preserved in Country Life's Answering Brief and at oral argument. *See*, A099-A101 p. 14-16; A118 at p. 21:17-21.

[65] *Clinton*, 977 A.2d at 895 (Del. 2009) (internal quotations omitted).

[66] *Id.* (internal quotations omitted).

complaint in the light most favorable to the non-moving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations."[67]

C. Merits

i. Country Life's Allegations Of Damages Are Not Speculative Simply Because They Will Need To Be Borne Out Via Discovery

In granting GSB&B's motion to dismiss, the Superior Court held with regard to Country Life's claim that it would have and could have settled with Fulton, and thus avoided incurring its damages: "There is no evidence of any such deal or a hint of proof that early settlement would have occurred but for the attorneys' conduct."[68] The Court went on to note, "[t]here are no such allegations" that "Fulton *was* amen[]able to 'early settlements.'"[69] Accordingly, the Court held that Country Life's "damages alleged are purely speculative."[70] With all due respect to Judge Medinilla in so ruling, the Court misapplied the standard of review for a motion to dismiss pursuant to Super. Ct. Civ. R. 12(b)(6) and improperly assumed the role of fact finder.

[67] *Id.*

[68] *See*, A165.

[69] *Id.*

[70] A166.

In its Motion to Dismiss, GSB&B characterized certain assertions in Country Life's pleading – which the Court should have be accepted as true for purposes of the Motion to Dismiss – regarding the prospect of an amicable settlement with Fulton as "speculative."[71] In granting the Motion, the Court held "[t]here are no such allegations" that "Fulton *was* amen[]able to 'early settlements.'"[72] In doing so, the Court misconstrued the standard of review for the Motion which required the Court to "view the complaint in the light most favorable to the non-moving party, ***accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations***."[73]

Country Life's Counterclaim contained various well pled allegations with regard to a settlement with Fulton. For instance, the pleading alleges: "Attorney Brown and Attorney Busenkell failed to accurately advise Counterclaim Plaintiffs that given their likely defeat at trial in the Underlying Actions, they should have settled with Fulton under terms as favorable as possible" and that "[t]his strategy would have also greatly limited Counterclaim Plaintiff's exposure to Fulton's claims for legal expenses."[74] The Counterclaim also alleges that GSB&B's

[71] *See, e.g.*, A078 at p. 8 ("They speculate that, but for their attorneys' conduct, they could have obtained a favorable settlement of the Underlying Actions.").

[72] A165.

[73] *Clinton*, 977 A.2d at 895. (emphasis added).

[74] A049 at ¶¶ 89-90.

attorneys deviated from the applicable standard of care by failing to identify the weakness of Country Life's defenses/claims in the Underlying Actions, greatly exaggerating Country Life's likelihood of succes, and for failing to advise them to "strategically attempt an early settlement with Fulton – on terms as favorable … as possible."[75] The only reasonable inference that logically flows from these well-pled allegations is that Fulton would have settled with Country Life. Accordingly, the Superior Court erred in applying the law to these allegations.

Whether or not Fulton and its attorneys, McCarter & English ("M&E"), would have agreed to early settlements in the Underlying Actions – and under what terms – was a factual question to be borne out through discovery in the litigation. For instance, depositions of pertinent Fulton employees and attorneys from M&E could very well demonstrate that Fulton would have been amenable to a prompt resolution of the Underlying Actions. This is further buttressed by the simple fact that the overwhelming majority of civil litigation is resolved via amicable settlement. If this was allowed to be established through discovery, it would also clearly establish Country Life's alleged damages – i.e. (i) $823,633.00 for Fulton's attorneys' fees and litigation expenses; (ii) 393,151.04 in attorneys' fees,

[75] A053 at ¶ 114.

needlessly paid to GSB&B; and (iii) $334,201.73 needlessly paid for the G/S Report – all of which could have been avoided.[76]

Whether or not Fulton would have agreed to settle the Underlying Actions with Country Life, and under what terms, is exactly the sort of fact question that Judge Stokes considered in *Dickerson*, when His Honor noted the following in his decision to deny the defendants motion for summary judgment:

> Whether [p]laintiff would have walked away from the deal had she been fully advised is a jury question. As stated, a judge does not make credibility determinations at this stage of the litigation, and the conflicting nature of [p]laintiff's deposition testimony may be challenged by cross-examination.[77]

It is also noteworthy that Judge Stokes made this analogous determination in *Dickerson* when deciding on a motion for ***summary judgment***, whereas the Superior Court, below, was considering a motion to dismiss, pursuant to Super Ct. Civ. R. 12(b)(6) – under which the standard of review is far less stringent.[78] As GSB&B correctly noted in its Motion, "whether an underlying case would have settled would likely be deemed a factual issue for a jury to decide."[79] Accordingly,

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[76] *See,* A051 and A053-A054 at ¶¶ 105-107, 114-116.

[77] *Dickerson*, 2016 Del. Super. LEXIS 166. at *12.

[78] *Id.* at *1. *See also*, *Highland Capital Mgmt., LP v. T.C. Group, LLC*, 2006 Del. Super. LEXIS 290, at *12-14 (Del. Super. July 27, 2006) (noting that generally when matters outside the four pages of the plaintiff's pleading are interjected into a motion to dismiss, the Court must consider utilize the more stringent standard of a motion for summary judgment and allow for discovery on those issues).

[79] A080 at p. 10.

in granting GSB&B's Motion to Dismiss, the Superior Court improperly assumed the role of fact-finder – the exclusive province of the jury.

CONCLUSION

For all the forgoing reasons, Counterclaim Plaintiffs below, Appellants herein, Country Life, Country Life Homes, LLC, Hearthstone Manner, 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, respectfully request that the the Superior Court's December 16, 2019 Opinion and Order granting Counterclaim Defendant, Gellert Scali Busenkell & Brown, LLC's, Motion to Dismiss should be reversed and the case remanded for trial on the Counterclaims.

Respectfully submitted,

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Date: March 23, 2021

RATIONALE AND JUDGMENT OF THE TRIAL COURT

SUPERIOR COURT
OF THE
STATE OF DELAWARE

VIVIAN L. MEDINILLA
JUDGE

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December 16, 2019

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Re: *Gellert Scali Busenkell & Brown, LLC, v. Country Life Holmes*, LLC, et al., C.A. No.: N19C-03-228

Dear Counsel:

In March of 2016, Defendants retained the legal services of Plaintiff Gellert Scali Busenkell & Brown, LLC[1] (Plaintiff). Plaintiff filed claims against Defendants[2] for unpaid monies allegedly owed for legal services rendered. In response, Defendants filed counterclaims alleging two counts of legal malpractice and *respondeat superior*. Plaintiff moves for dismissal under Superior Court Civil Rule 12(b)(6) for failure to state a claim. After consideration of all pleadings and

[1] For ease of reference, Plaintiff/Counterclaim Defendant, herein Plaintiff includes the law firm of Gellert Scali Busenkell & Brown, LLC.
[2] For ease of reference, Defendants/Counterclaim Plaintiffs, herein Defendants include 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. Elmer Fannin and Mary Ann Fannin are principals of these entities.

oral arguments on November 18, 2019, for the reasons stated below, Plaintiff's Motion is **GRANTED.**

Factual and Procedural Background

On March 1, 2016, Defendants retained Plaintiff to represent them in their efforts to restructure commercial loans and lines of credit that Defendants had through Fulton Bank, N.A. ("Fulton"). After unsuccessful efforts, Fulton instituted legal proceedings against Defendants for the repayment of over $6 million in unpaid loans. Fulton retained counsel to prosecute various civil actions.[3] Plaintiff defended these actions on behalf of Defendants including disputing the accuracy of the amounts owed to Fulton.[4]

In September of 2018, Defendants terminated Plaintiff's services and retained another law firm. Three months later, Defendants resolved the Fulton matter through mediation on December 14, 2018 and paid $6,730,578.71. This included, in relevant part, payment to Fulton in full satisfaction of all obligations under the loans, and the payment of Fulton's legal fees and litigation expenses.

On March 22, 2019, Plaintiff filed a Complaint against Defendants seeking approximately $124,000 for unpaid fees related to alleged legal services rendered in the Fulton matter. On June 19, 2019, in addition to the Answer and Affirmative Defenses, Defendants filed these counterclaims for legal malpractice related to the representation of attorneys Charles J. Brown III, Esquire and Michael Busenkell, Esquire (Attorneys Brown and Busenkell) (Count I), and under a theory of *respondeat superior* against their firm (Count II). Defendants allege strategic and

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[3] *See* Defendants' Counterclaim ¶¶ 19-79 (referring to cases: (1) C.A. No. N16C-11-199 PRW; (2) C.A. No. N16C-11-200 PRW; (3) C.A. No. N16C-12-077 PRW; (4) C.A. No. N16C-12-076 PRW; (5) C.A. No. N17C-12-108 PRW; (6) C.A. No. N17C-12-104 PRW; (7) C.A. No. N17C-12-146 PRW; (8) C.A. No. N17C-12-138 PRW; and (9) C.A. No. N17C-02-062 PRW).

[4] As part of the litigation, on December 11, 2017, Plaintiff filed two civil actions against Fulton on behalf of Defendants, seeking a judicial declaration that the amounts owed to Fulton was less than claimed. *See* Plaintiff's Opening Brief in Support of Motion to Dismiss at pages 2-3 (citing Defendants' Counterclaim at ¶¶ 72, 78 (referring to C.A. No. N17C-12-138 PRW and C.A. No. N17C-02-062 PRW)). The claims against Fulton asserted claims for breach of contract and breach of the covenant of good faith and fair dealing based on information that Defendants had overpaid Fulton on some of their accounts, as reported by an accounting firm, Gavin/Solmonese, LLC, retained to review loan documents from Fulton. *See id.* at page 3 (citing Defendants' Counterclaim at ¶¶ 73, 79 (referring to C.A. No. N17C-12-138 PRW and C.A. No. N17C-02-062 PRW)).

procedural errors committed in defending the Fulton action prevented Defendants from obtaining a more favorable outcome that entitles them to damages "in excess of $1,000,000.000."[5]

On September 5, 2019, Plaintiff filed a Motion to Dismiss under Superior Court Civil Rule 12(b)(6). On October 24, 2019, Defendants filed their response. On October 31, 2019, Plaintiff filed its Reply. The Court heard oral argument on November 18, 2019. The matter is ripe for review.

Standard of Review

On a Motion to Dismiss for failure to state a claim under Superior Court Civil Rule 12(b)(6), all well-pleaded allegations in the complaint must be accepted as true.[6] Even vague allegations are considered well plead if they give the opposing party notice of a claim.[7] The Court must draw all reasonable inferences in favor of the non-moving party;[8] however, it will not "accept conclusory allegations unsupported by specific facts," nor will it "draw unreasonable inferences in favor of the non-moving party."[9] Dismissal of a complaint under Rule 12(b)(6) must be denied if the plaintiff could recover under "any reasonably conceivable set of circumstances susceptible of proof under the complaint."[10]

Discussion

Delaware law has established that to succeed on a claim for legal malpractice, 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.[11]

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[5] Defendants' damage calculation includes (i) $393,151.04 [previously paid] to Plaintiff in attorneys' fees; (ii) $334,201.73 for the Gavin/Solmonese, LLC Report; and (iii) $823,633.00 for Fulton's attorneys' fees and litigation expenses. Defendants Counterclaim at ¶¶ 116-117.

[6] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

[7] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002)).

[8] *Id.*

[9] *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011) (internal citation omitted).

[10] *Spence*, 396 A.2d at 968 (citing *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952)).

[11] *Oakes v. Clark*, 69 A.3d 371, 2013 WL 3147313, at *1 (Del. June 18, 2013) (TABLE) (citing *Weaver v. Lukoff*, 511 A.2d 1044, 1986 WL 17121, at *1 (Del. July 1, 1986) (TABLE) (citing *Seiler v. Levitz Furniture Co.*, 367 A.2d 999, 1008 (1976))); *see Lorenzetti v. Enterline*, 44 A.3d 922, 2012 WL 1383186, at *2 (Del. April 18, 2012) (TABLE) (citing *Weaver v. Lukoff*, 511 A.2d 1044, 1986 WL 17121, at *1 (Del. July 1, 1986) (TABLE) (citing *Seiler v. Levitz Furniture Co.*, 367 A.2d 999, 1008 (1976))) ("On a claim of legal malpractice, the plaintiff must establish

To establish the third element, "the plaintiff must demonstrate that the underlying action would have been successful but for the attorney's negligence."[12] To establish this element, "an attorney must cause more than speculative damage to a plaintiff,"[13] and "[e]ven when proven or obvious, '[t]he mere breach of professional duty, causing only . . . speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence . . . .'"[14]

The crux of Defendants' claims for legal malpractice and *respondeat superior* allege that Attorneys Brown and Busenkell deviated from the standard of care expected of a Delaware attorney in the practice of commercial litigation. Specifically, the allegations include that they failed to identify the weaknesses of Defendants' civil actions early on, misrepresented the strength of Defendants' cases, and failed to advise Defendants that they would likely lose at trial such that they "should have settled with Fulton under terms as favorable as possible."[15] Defendants also argue that procedural errors were committed when the attorneys failed to request a jury trial, failed to file a compulsory counterclaim or file an affidavit to request a continuance to allow more time to include the accounting report in response to Fulton's Motion for Summary Judgment. The negligence theory advanced is insufficient to state a claim under Rule 12(b)(6).

(i) the employment of the attorney; (ii) the attorney's neglect of a professional obligation, and (iii) resulting loss, i.e., that the underlying action would have been successful but for the attorney's negligence."); *see also Flowers v. Ramunno*, 27 A.3d 551, 2011 WL 3592966, at *2 (Del. Aug. 16, 2011) (TABLE) (citing *Weaver v. Lukoff*, 511 A.2d 1044, 1986 WL 17121, at *1 (Del. July 1, 1986) (TABLE) (citing *Seiler v. Levitz Furniture Co.*, 367 A.2d 999, 1008 (1976))); *see also Rich Realty, Inc. v. Meyerson & O'Neill*, No. CV N13C-06-270 MMJ, 2014 WL 1689966, at *3 (Del. Super. Ct. Apr. 14, 2014), *aff'd sub nom. Rich Realty, Inc. v. Meyerson & O'Neill, Shelsby & Leoni, P.A.*, 103 A.3d 515 (Del. 2014) (citing *Farmers Bank of Willards v. Becker*, No. CIV.A.S09C-11016 MMJ, 2011 WL 3925428, at *3 (Del. Super. Ct. Aug. 19, 2011)).

[12] *Oakes*, 2013 WL 3147313, at *1; *see Flowers*, 2011 WL 3592966, at *2; *see also Rich Realty, Inc. v. Meyerson & O'Neill*, 2014 WL 1689966, at *3.

[13] *Balinski v. Baker*, No. CV N13C-02-246 PRW, 2013 WL 4521199, at *3 (Del. Super. Ct. Aug. 22, 2013) (quoting *Power Gourmet Concepts, Inc. v. Irwin & McKnight*, 2010 WL 5147233, at *3 (M.D. Pa. Oct. 1, 2010)).

[14] *Id.* (quoting *Rizzo v. Haines*, 555 A.2d 58, 68 (Pa. 1989) (quoting *Schenkel v. Monheit*, 45 A.2d 493, 494 (Pa. Super. Ct. 1979) and *Budd v. Nixon*, 491 P.2d 433, 436 (Cal. 1971) (invalidated by statute))).

[15] Defendants' Counterclaim at ¶¶ 87, 89.

The Court commends Defendants' counsel for his candor in representing that Defendants concede they cannot establish the third element of resultant loss. To get around this obstacle, Defendants invite this Court to carve out an exception by stretching the holdings in *Dickerson v. Murray*[16] and *Beneville v. Pileggi*[17] to fit within the facts of this case. This Court declines the invitation to make an exception to the bright line rule under Delaware law.

Fatal to the claims is that Defendants cannot establish that the underlying action would have been successful but for the attorney's negligence or that Plaintiff's alleged conduct caused them to lose any of the underlying Fulton actions. These civil actions settled by agreement of the parties through mediation. Defendants' claims would improperly require speculation as to what happened during these settlement negotiations. Thus, damages are also speculative.

Neither *Dickerson* nor *Beneville* help Defendants as they are not applicable. *Dickerson* involved a legal malpractice claim in relation to "the applicable standard of care a lawyer must observe when representing a client in a real estate transaction."[18] *Beneville* also involved claims related to legal advice provided in a transactional matter. Even in the transactional matter in *Dickerson,* the Court still required proof of resultant loss—and assessed whether "the attorney's negligence resulted in and was the proximate cause of plaintiff's loss."[19]

Defendants take a leap of faith to suggest that Plaintiff's legal strategies and alleged procedural errors are akin to those alleged by the *Dickerson* plaintiff who would have "walked away from the deal had [they] been fully advised."[20] There is no evidence of any such deal or a hint of proof that early settlement would have occurred but for the attorneys' conduct. Defendants ask the Court to assume that: (1) Fulton *was* amendable to "early settlements;" (2) Plaintiff identified this opportunity; and (3) Plaintiff failed to convey a settlement demand during the course of the underlying litigation. There are no such allegations.

Under Rule 12(b)(6), in viewing the facts in the light most favorable to Defendants, there is no factual or legal basis upon which a trier of fact could

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[16] No. CV S14C-07-026 RFS, 2016 WL 1613286 (Del. Super. Ct. Mar. 24, 2016).
[17] No. CIV.A. 03-474 JJF, 2004 WL 758038 (D. Del. Apr. 2, 2004).
[18] *Dickerson v. Murray*, No. CV S14C-07-026 RFS, 2016 WL 1613286, at *3 (Del. Super. Ct. Mar. 24, 2016).
[19] *Id.*
[20] *Dickerson*, 2016 WL 1613286, at *3.

conclude that there was professional negligence or that Defendants' underlying litigation would have been successful *but for* Plaintiff's conduct. Because Defendants are unable to demonstrate a resultant loss in the underlying litigation and damages alleged are purely speculative, Defendants fail to state a claim for which relief can be granted. For these reasons, Plaintiff's Motion to Dismiss is **GRANTED, with prejudice.**

Vivian L. Medinilla
Judge

EFiled: Oct 15 2020 03:32PM
Transaction ID 66023340
Case No. N19C-03-228 VLM

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

GELLERT SCALI BUSENKELL & BROWN, LLC,	**C.A. No. N19C-03-228 VLM**
Plaintiff,	
v.	
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	
Defendants.	

It is hereby stipulated to, by and between the parties, subject to the approval of the Court, through their undersigned counsel, that Plaintiff Gellert Scali Busenkell & Brown, LLC's claims are hereby dismissed with prejudice.

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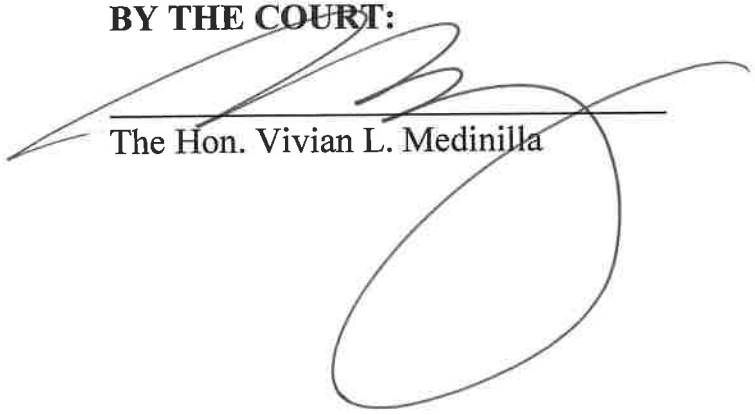
BY THE COURT:



The Hon. Vivian L. Medinilla

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,	:	**No. 401, 2020**
Defendants/Counterclaim Plaintiffs Bellow/ Appellants,	:	**ON APPEAL FROM THE SUPERIOR COURT OF DELAWARE OF AND FOR NEW CASTLE COUNTY**
v.	:	
GELLERT SCALI BUSENKELL & BROWN, LLC,	:	
Plaintiff/Counterclaim Defendant Bellow/Appellee.	:	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. Appellants' Amended Opening Brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2010.

2. Appellants' Amended Opening Brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 7,414 words, which were counted by Microsoft Word 2010.

Respectfully Submitted,

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Date: March 24, 2021