



IN THE SUPREME COURT OF THE STATE OF DELAWARE

COUNTRY LIFE HOMES, LLC;)	
HEARTHSTONE MANOR I, LLC;)	No. 401, 2020
HEARTHSTONE MANOR II, LLC;)	
RIVER ROCK LLC; KEY)	
PROPERTIES GROUP, LLC;)	Court Below: Superior Court of
CEDAR CREEK LANDING)	the State of Delaware
CAMPGROUND, LLC; MBTG LAND)	
HOLDINGS, LLC; ELMER)	
FANNIN; and MARY ANN FANNIN,)	C.A. No.: N19C-03-228-VLM
)	
Defendants/Counterclaim)	
Plaintiffs Below/)	
Appellants,)	
)	
GELLERT SCALI BUSENKELL &)	
BROWN, LLC)	
)	
Plaintiff/ Counterclaim)	
Defendant Below/Appellee.)	

PLAINTIFF/COUNTERCLAIM DEFENDANT BELOW, APPELLEE
GELLERT SCALI BUSENKELL & BROWN, LLC'S AMENDED
ANSWERING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

Appellee, Plaintiff/Counterclaim Defendant below, Gellert Scali Busenkell & Brown, LLC (“GSB&B”), commenced this matter on March 22, 2019, when it filed a complaint seeking payment of unpaid fees for legal services provided to its former clients, Appellants, Defendants/Counterclaim Plaintiffs below (referred to collectively as “Country Life”). (A019).¹ In response to GSB&B’s complaint, Country Life filed counterclaims sounding in legal malpractice (Count I) and *respondeat superior* (Count II).² (A052-A056).

GSB&B filed a motion to dismiss the counterclaims on September 5, 2019. (A059-A067). Thereafter, GSB&B filed its opening brief in support of its motion to dismiss. (A068-A081). Country Life filed a response in opposition to the motion to dismiss on October 24, 2019, and GSB&B filed a reply in support of its motion. (A082-A101; A0103-A115).

Oral argument was held on November 18, 2019, before the Honorable Vivian L. Medinilla. (A116-A154). During the argument, Country Life’s counsel characterized the legal malpractice claim as one “suggesting that my client received deficient advice,” and asserted that Country Life should have been

¹ Appendix citations reference Country Life’s amended appendix.

² Appellants, Defendants/Counterclaim Plaintiffs include the following: Country Life Homes, LLC; Hearthstone Manor I, LLC; Hearthstone Manor II, LLC; River Rock, LLC; Key Properties Group, LLC; Cedar Creek Landing Campground, LLC; and, MBT Land Holdings, LLC. Also included are Elmer Fannin and Mary Ann Fannin, the principals of the LLC Defendants. (A037 at ¶ 14).

advised by GSB&B to “do a strategic retreat” in the underlying litigation. (A137; *see also* A092). Country Life argued that the “case within a case” but-for causation standard should not apply to its malpractice claims. (A137). Country Life’s counsel conceded that he was presenting a “novel argument” in support of his clients’ legal malpractice claims, and that he did not have “any Delaware case law to support [his] position.” (A138).

On December 16, 2019, Judge Medinilla issued an opinion and order granting GSB&B’s motion to dismiss with prejudice. (A161-A166).

The parties subsequently settled GSB&B’s claims, and Judge Medinilla granted the parties stipulation to dismiss on November 4, 2020, thereby terminating the litigation. (A167). Country Life timely appealed Judge Medinilla’s ruling granting GSB&B’s motion to dismiss.

Country Life has filed its opening brief on appeal,³ and GSB&B now files this answering brief.

³ Citations to Country Life’s brief are to their amended opening brief.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court properly granted GSB&B’s motion to dismiss Country Life’s counterclaims for legal malpractice because Country Life admittedly could not demonstrate that they would have been successful in the underlying litigation but for professional errors made by their attorneys as is required to meet the causation element of a litigation-related legal malpractice claim under settled Delaware law. This Court should affirm the Superior Court’s ruling.⁴

2. Denied. The Superior Court did not err in applying the “case within a case” but-for causation standard because Delaware law is settled that this causation standard applies where a legal malpractice claim involves alleged negligence that occurred in the course of litigation. Country Life’s legal malpractice counterclaims involve alleged negligence that occurred in the course of litigation, and no Delaware cases support a different causation standard where a plaintiff acknowledges that she could not have prevailed irrespective of her attorneys’ alleged malpractice. The only cases cited are from other jurisdictions and those cases turn on unique facts and do not support abandoning settled Delaware law.

⁴ The first three arguments in Country Life’s amended opening brief challenge the trial court’s ruling based on its application of the “case within a case” but-for causation standard applicable in legal malpractice cases involving alleged negligence that occurred in the course of litigation. Although these arguments overlap, GSB&B will address each in turn based on Country Life’s presentation of the arguments on appeal.

This Court should affirm the Superior Court's ruling.

3. Denied. Country Life was required to demonstrate that they were caused to lose a judgment in the underlying litigation in order to prevail on their legal malpractice counterclaims against GSB&B. Contrary to the argument advanced by Country Life, the underlying litigation were not transactional in nature. There is no legal authority that justifies treating Country Life's legal malpractice counterclaims as if they involve alleged transactional negligence where they plainly do not. This Court should affirm the Superior Court's ruling.

4. Denied. The Superior Court properly concluded that Country Life's claim for damages was also fatally speculative. Country Life could only speculate that they could have obtained a favorable settlement earlier in the underlying litigation, and no facts were plead to show that an earlier and more favorable settlement would have occurred but for their attorneys' conduct. This Court should affirm the Superior Court's ruling.

STATEMENT OF FACTS

The underlying representation began on March 1, 2016, when Country Life retained GSB&B to represent them to restructure various commercial loans and lines of credit they had with Fulton Bank, N.A. (“Fulton” or “Fulton Bank”). (A038 at ¶¶ 17, 18). Efforts to restructure the loans and lines of credit were unsuccessful; thus, in 2016 and 2017, Fulton Bank prosecuted civil actions against Country Life seeking repayment of approximately \$6.6 million in unpaid loans. (A038-A045 at ¶¶ 23, 24, 29, 30, 38, 39, 46, 47, 52, 53, 58, 59, 65, 66). Country Life retained Attorneys Charles Brown and Michael Busenkell of GSB&B to represent them in defending the civil actions brought by Fulton Bank. (A039-A045 at ¶¶ 25, 31, 40, 48, 54, 60, 67).

On December 11, 2017, Brown and Busenkell filed two civil actions against Fulton on behalf of Country Life. (A044-A047 at ¶¶ 68-79). In those matters, Country Life sought a judicial declaration that the amounts they actually owed to Fulton was less than claimed by Fulton. (A046-A047 at ¶¶ 72, 78). The complaints filed against Fulton also asserted claims for breach of contract and breach of the covenant of good faith and fair dealing, alleging that Fulton’s dealings with Country Life had harmed their businesses. (A046-A047 at ¶¶ 73, 79).

Fulton, represented by attorneys from McCarter & English, LLP (“M&E”), “vigorously prosecuted the Fulton Actions and defended the Country Life Actions,” (hereinafter “the Underlying Actions”). (A047 at ¶80). The accounting firm, Gavin/Solmonese, LLC (“Gavin/Solomnese”), was retained to review the underlying loan documents from Fulton and to prepare a comprehensive report intended to establish that Country Life had overpaid on some of their accounts, and it completed a report in June of 2018. (A047-A048 at ¶¶ 81, 83).

Country Life subsequently retained Ashby & Geddes, P.A. (“A&G”) to represent them in the Underlying Actions. (A051 at ¶ 104). At a December 4, 2018 mediation conference, Country Life “agreed in principle to a settlement with Fulton, under which Counterclaim Plaintiffs agreed to pay Fulton the full principal and interest balances due under the Fulton loans, plus M&E’s attorneys’ fees and post-settlement interest,” which is alleged to have been \$6,730,578.71. (A051 at ¶¶ 106, 107).

After being discharged, GSB&B commenced the instant litigation seeking to recover unpaid legal fees arising from the legal services they provided to Country Life in the Underlying Actions. (A003-A004 at ¶¶ 10-17). In response to GSB&B’s complaint, Country Life alleged that Attorneys Brown and Busenkell failed to accurately identify the weakness of their claims and defenses in the

Underlying Actions.⁵ (A048 at ¶84). Country Life further alleged that Brown and Busenkell failed to advise them that they would likely lose at trial and that they “should have settled with Fulton under terms as favorable as possible.” (A048-A049 at ¶¶ 87, 89). Country Life did not claim that GSB&B or its attorneys caused them to lose the Underlying Actions, *or* that Fulton Bank would have been amenable to a lesser settlement. Country Life speculated that they could have obtained a favorable settlement if the Underlying Actions had not been vigorously litigated. (A049 at ¶¶ 89, 90).

Country Life also alleged that Brown and Busenkell made other errors such as not demanding a jury trial (A049 at ¶ 93), not filing a compulsory counterclaim (A049-A050 at ¶¶ 94, 95), and not filing an affidavit to request a continuance to allow for more time to include the Gavin/Solomnese report in response to Fulton’s motion for summary judgment. (A050 at ¶¶ 98-100). Country Life did not allege that these alleged procedural errors caused them to lose any of the Underlying Actions. To the contrary, Country Life alleged that their claims and defenses in the Underlying Actions were weak and that they would have lost at trial if the claims had not settled. (A048-A049 at ¶¶ 84-89).

⁵ Country Life’s counterclaim for legal malpractice related to the representation of Attorneys Brown and Busenkell (Count I), and its counterclaim under a theory of *respondeat superior* was asserted against their firm, GSB&B (Count II). (A052-A053 at ¶¶ 112-114; A055 at ¶¶ 119, 120).

With respect to damages, Country Life sought the amount they paid to GSB&B, the amount they claim to have paid for expert witness services to Gavin/Solomnese, and the amount they claim to have paid for Fulton's legal fees and litigation expenses. (A053-A054 at ¶ 115).

ARGUMENT

I. THE SUPERIOR COURT PROPERLY GRANTED GSB&B'S MOTION TO DISMISS COUNTRY LIFE'S LITIGATION-RELATED LEGAL MALPRACTICE CLAIMS BECAUSE COUNTRY LIFE FAILED TO ALLEGE SUFFICIENT FACTS TO SHOW THAT THEY WOULD HAVE BEEN SUCCESSFUL IN THE UNDERLYING ACTIONS, BUT FOR PROFESSIONAL ERRORS MADE BY THEIR ATTORNEYS, AS IS REQUIRED UNDER SETTLED DELAWARE PRECEDENT

A. Question Presented

Did the Superior Court properly grant GSB&B's motion to dismiss Country Life's litigation-related legal malpractice counterclaims because Country Life failed to allege facts sufficient to show that it would have been successful in the Underlying Actions, but for professional errors made by their attorneys, as is required under settled Delaware precedent?

B. Scope of Review

"This Court reviews the Superior Court's decision to grant a motion to dismiss under Rule 12(b)(6) *de novo* 'to determine whether the judge erred as a matter of law in formulating or applying legal precepts.'" *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 871 (Del. 2020) (quoting *Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1160 (Del. 2010)). In reviewing the grant or denial of a motion to dismiss, this Court "view[s] 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."

Clinton v. Enter. Rent-A-Car Co., 977 A.2d 892, 895 (Del. 2009). However, this Court does not accept “conclusory allegations unsupported by specific facts, nor do[es] [it] draw unreasonable inferences in the plaintiff’s favor.” *Windsor I, LLC*, *supra*.

C. Merits of Argument

GSB&B moved to dismiss Country Life’s counterclaims on the basis that Country Life failed to allege facts sufficient to state a legal malpractice claim under settled Delaware precedent. (A068-81). Specifically, GSB&B asserted that Country Life did not and could not demonstrate that GSB&B caused them to lose the Underlying Actions. (A077-A079). This Court should affirm.

“It is settled law in Delaware that to prevail on a legal negligence claim, the plaintiff must establish three elements: ‘a) the employment of the attorney; b) the attorney’s neglect of a professional obligation; and c) resulting loss.’” *Sherman v. Ellis*, 2021 WL 405841, at *4 (Del. Feb. 3, 2021) (Slip. Op.) (*quoting Oakes v. Clark*, 2013 WL 3147313, at *1 (Del. June 18, 2013) (TABLE), *citing Weaver v. Lukoff*, 1986 WL 17121, at *1 (Del. Jul. 1, 1986) (TABLE)); *see also Flowers v. Ramunno*, 2011 WL 3592966, at *2 (Del. Aug. 16, 2011) (TABLE). And, [i]n the context of legal negligence alleged to have occurred in the course of litigation,” this Court has stated that “[i]n connection with the final element, the plaintiff must demonstrate that the underlying action would have been successful *but for* the

attorney's negligence.” *Sherman*, 2021 WL 405841 at *4 (quoting *Oakes*, 2013 WL 3147313 at *1), citing *Weaver*, 1986 WL 17121 at *1) (emphasis added); see also *Flowers*, 2011 WL 3592966 at *2. “As to the last element, an attorney must cause more than speculative damage to a plaintiff. Even when proven or obvious, the 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.” *Balinski v. Baker*, 2013 WL 4521199, at *3 (Del. Super. Aug. 22, 2013) (Mem. Op.) (internal citations omitted).

The allegations set forth in support of Country Life’s counterclaims involve “legal negligence [that is] alleged to have occurred in the course of litigation.” *Sherman, supra*; see also *Flowers, supra*. Indeed, the Superior Court characterized Country Life’s theory of liability as follows, and this characterization is not challenged on appeal:

The crux of Defendants’ [Country Life’s] 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 lose at trial such that they “should have settled with Fulton under terms as favorable as possible.” 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.

(A164; *see also* Appellants' Am. Br. at 26).

Applying the above precedent, the Superior Court properly concluded that the “negligence theory” advanced by Country Life was “insufficient to state a claim under Rule 12(b)(6).” (A164). Specifically, the Superior Court concluded: “Fatal to the claims is that [Country Life] cannot establish that the underlying action would have been successful but for the attorney’s negligence or that [GSB&B’s] alleged conduct caused them to lose any of the underlying actions.” (A165). This ruling is fully consistent with the settled precedent of this Court, which was recently reaffirmed in *Sherman, supra*.

Country Life’s legal malpractice claims stem from alleged negligence in the handling of *underlying litigation*. As such, Country Life was required to plead facts to show “that the underlying action[s] would have been successful but for the attorney's negligence.” *Sherman, supra; see also, Flowers, supra*. Yet, Country Life conceded at oral argument that they could not satisfy the causation element of a litigation-related legal negligence claim. (A130; *see also* A122-123, A131). The Superior Court thus properly granted GSB&B’s motion to dismiss, and this ruling is fully supported by settled Delaware precedent.

Country Life challenges the Superior Court’s ruling by arguing that it is “*immaterial*” that they did not contend that they would have prevailed in the Underlying Actions “but for” GSB&B’s negligence, because the “case within a

case” defense is “only appropriate in legal malpractice actions [] wherein the plaintiff alleges an error committed in the underlying litigation resulted in the loss of that case.” (Appellants’ Am. Br. at 11) (emphasis added). Country Life “incorporates” its arguments below, and contends that the “proper causation analysis should have been that employed for *transactional* malpractice claims.” (Id.) (emphasis added).

The problem with Country Life’s circular argument is that their legal malpractice claims are in fact litigation-related. They do not arise from an underlying transactional matter. This is clear on the face of the counterclaims. In fact, at oral argument, Country Life conceded that they were presenting a “novel argument” that is unsupported by any Delaware case law. (A137-A138; *see also* A140-A141, A151). As such, the Superior Court properly concluded that “there is no factual or legal basis upon which a trier of fact could conclude that there was professional negligence or that [the] underlying litigation would have been successful *but for* [GSB&B’s] conduct.” (A165-A166). Country Life did not plead and cannot show a requisite element of a legal malpractice claim involving alleged negligence that occurred in the course of underlying litigation, and under controlling Delaware law they thus cannot state a viable legal malpractice claim. *Flowers, supra* at *2.

II. THE SUPERIOR COURT DID NOT ERR IN APPLYING THE “CASE WITHIN A CASE” BUT-FOR CAUSATION STANDARD BECAUSE COUNTRY LIFE’S LEGAL MALPRACTICE CLAIMS INVOLVE ALLEGED NEGLIGENCE THAT OCCURRED IN THE COURSE OF LITIGATION

A. Question Presented

Did the Superior Court apply the proper causation standard in dismissing Country Life’s legal malpractice counterclaims?

B. Scope of Review

“This Court reviews the Superior Court’s decision to grant a motion to dismiss under Rule 12(b)(6) *de novo* ‘to determine whether the judge erred as a matter of law in formulating or applying legal precepts.’” *Windsor I, LLC*, 238 A.3d at 871. In reviewing the grant or denial of a motion to dismiss, this Court “view[s] 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.” *Clinton*, 977 A.2d at 895. This Court does not accept “conclusory allegations unsupported by specific facts, nor do[es] [it] draw unreasonable inferences in the plaintiff’s favor.” *Windsor I, LLC, supra*.

C. Merits of Argument

Country Life contends that 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,” because Country Life did

not allege facts sufficient to meet this standard but, instead, argued that GSB&B was negligent in advising Country Life to defend and prosecute the Underlying Actions. (Appellants' Am. Br. at 13). Again, there is no Delaware case law to support this "novel argument," as Country Life conceded at oral argument. (A137-A138, A140-A141). Accordingly, this circular argument is not supported by any Delaware case law to show that the Superior Court's ruling was erroneous. Rather, Country Life cites decisions from various other jurisdictions and urges this Court to "jettison the supposed 'bright line rule' that the 'case within a case' causation analysis" applies to its litigation-based malpractice claims. (Appellants' Am. Br. at 15).

Preliminarily, the argument that the "case within a case" causation analysis should be totally jettisoned, versus an exception carved out for this case, was not presented below. Indeed, none of the foreign cases cited in Country Life's appellate brief were presented to the Superior Court in Country Life's briefing on GSB&B's motion to dismiss. (A083-A102). Country Life contends that this specific argument was preserved during oral argument on the motion to dismiss. (Appellants' Am. Br. at 13, n. 27). A review of the portion of the transcript cited, however, shows that Country Life argued that the strict "case within a case" but-for causation standard should not apply because this case was "more akin" to a "business transaction." (A134-A135). Country Life argued that an *exception* to

the bright-line rule should be carved out for the instant case, and conceded that they had “no authority to support this avenue.” (A137-A138, A140-A141).

In arguing below that the instant case is “more akin” to a “business transaction,” Country Life urged the Superior Court in its briefing to apply the causation standard set forth in two Delaware case—*Dickerson v. Murray*, 2016 WL 1613286 (Del. Super. Mar. 24, 2016) (Mem. Op.) and *Beneville v. Pileggi*, 2004 WL 758038, at *1 (D. Del. 2004). (A093-A096; *see also* A165). Those cases involved transactional legal malpractice claims. Because Country Life’s argument to jettison the “case within a case” but-for causation standard based on case law applied in other jurisdictions was not raised below, it is waived. *Mammarella v. Evantash*, 93 A.3d 629, 636 (Del. 2014).

In any event, the cases that Country Life cites from other jurisdictions, *Taylor v. Feissner*, 653 A.2d 947 (Md. App. 1995), *Sherrard v. Stevens*, 440 N.W.2d 2 (Mich. App. 1988), *Shear v. Hornsby & Whisenand, P.A.*, 603 So. 2d 129, 130 (Fla. Dist. Ct. App. 1992), *Price Waicukauski & Riley, LLC v. Murray*, 47 F. Supp. 3d 810, 814 (S.D. Ind. 2014) and *Gautam v. De Luca*, 521 A.2d 1343, 1348 (N.J. Super. Ct. App. Div. 1987), are unpersuasive and do no support an abandonment of settled Delaware law. (Appellants’ Am. Br. at 16-19). As recently as February 2021, this Court reaffirmed that where, as here, a legal malpractice case involves alleged litigation negligence, a plaintiff “must

demonstrate that the underlying action would have been successful but for the attorney's negligence.” *Sherman, supra* at *4; *see also Flowers, supra*. No arguments set forth in any of the cases from these other jurisdictions supports abandoning settled Delaware law. Most of the cited cases are decades old, and Country Life fails to show that this Court has ever looked to any of these cases for guidance in determining the causation standard applicable to litigation-related legal malpractice claims. Moreover, each of the cited cases involve unique fact patterns and none supports the adoption of an entirely new causation standard in legal malpractice actions where, as here, a plaintiff acknowledges that she could not have prevailed irrespective of her attorneys’ alleged malpractice.

In sum, even if not waived, Country Life’s reliance on primarily decades old case law from various foreign jurisdictions highlights that there is no Delaware legal authority that obviates the need for a legal malpractice plaintiff to prove the “case within the case” in legal malpractice cases involving alleged litigation negligence. The Superior Court properly granted GSB&B’s motion to dismiss under settled Delaware law, and this Court should affirm.

III. THE SUPERIOR COURT PROPERLY DECLINED TO APPLY THE CAUSATION ANALYSIS APPLICABLE TO LEGAL MALPRACTICE CLAIMS INVOLVING ALLEGED TRANSACTIONAL NEGLIGENCE

A. Question Presented

Did the Superior Court properly decline to apply the causation analysis applicable to legal malpractice claims involving alleged transactional negligence because Country Life's legal malpractice counterclaims do not stem from underlying transactional engagements?

B. Scope of Review

“This Court reviews the Superior Court's decision to grant a motion to dismiss under Rule 12(b)(6) *de novo* ‘to determine whether the judge erred as a matter of law in formulating or applying legal precepts.’” *Windsor I, LLC*, 238 A.3d at 871. In reviewing the grant or denial of a motion to dismiss, this Court “view[s] 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.” *Clinton*, 977 A.2d at 895. This Court does not accept “conclusory allegations unsupported by specific facts, nor do[es] [it] draw unreasonable inferences in the plaintiff's favor.” *Windsor I, LLC, supra*.

C. Merits of Argument

Country Life also contends that the Superior Court erred in declining their

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.” (Appellants’ Am. Br. at 21). Country Life asserts that “the causation analysis for transactional malpractice claims is the proper analysis given Country Life’s theory of GSB&B’s negligence.” (*Id.*). The Superior Court properly declined to apply the causation standard applicable to transactional malpractice claims. This was not erroneous. Simply put, Country Life’s theory of liability does not stem from an underlying transactional engagement.

As noted by the Superior Court, *Dickerson* and *Beneville* are inapposite. (A165). *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.” *Dickerson*, 2016 WL 1613286 at *3. *Beneville*, a federal case, also involved legal advice provided in the context of a transactional matter to include the drafting of complex agreements. *Beneville*, 2004 WL 758038 at *1. Neither case involved legal advice provided *in the context of underlying litigation*. Accordingly, the plaintiffs in *Dickerson* and *Beneville* were not required to prove “that the underlying action would have been successful but for the attorney’s negligence.” *Sherman*, 2021 WL 405841 at *4. Because Country Life’s legal malpractice claims involve advice rendered in the context of underlying litigation

based on the face of Country Life’s pleadings, they were required to allege sufficient facts to show that they would have been successful in the Underlying Actions but for GSB&B’s negligence. Country Life failed to do so, and conceded that they cannot meet this element of a legal malpractice claim. (A136-A137, *see also* A140-A141, A148, A150). They also admitted that no Delaware case law supports the argument that their legal malpractice counterclaims are “more akin to [a] negligent transaction.” (A136-A137). The Superior Court thus properly declined to eschew settled precedent in favor of applying a causation standard applicable to legal malpractice claims stemming from transactional engagements. Under settled and controlling Delaware precedent, Country Life failed to state a viable legal malpractice cause of action as a matter of law. *See, e.g., Flowers*, 2011 WL 3592966 at *2.

Moreover, and importantly, the Superior Court noted that even in a legal malpractice action arising from a transactional matter, a plaintiff must still prove the third element of a legal malpractice claim—resultant loss proximately caused by their attorneys’ alleged negligence. (A165). In *Sherman, supra*, this Court rejected the more relaxed “increased risk of harm” causation standard in cases that involve alleged transactional legal negligence. *Sherman*, 2021 WL 405841, at *4. Instead, it held that a traditional “but for” causation standard applies, and agreed with the Superior Court that “[p]roving causation in a transactional malpractice

claim, as in a litigation malpractice claim, requires proof that, but for the attorney's negligence, the plaintiff would have obtained a more favorable result.” *Id.* at *5.

Country Life averred in its counterclaim complaint that Attorneys Brown and 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.” (A049 at ¶ 89, *see also id.* at ¶90). In their brief, Country Life characterizes its pleading as asserting that GSB&B “failed to provide the appropriate advice – that the proper course of action [in the Underlying Actions] was to resolve Fulton’s claims as quickly and cheaply as possible” given “the weakness of their claims and defenses in the Underlying Actions.” (Appellants’ Am. Br. at 26). The Superior Court noted that in *Dickerson* it was alleged that the plaintiff would have “walked away” from a deal if they had been fully advised. (A165, *citing Dickerson*, 2016 WL 1613286 at *3). In the instant case, however, there was “no evidence of any such deal or a hint of proof that early settlement would have occurred but for the attorneys’ conduct.” Specifically, the Superior Court noted the Country Life asked it to “assume” that:

(1) Fulton was amen[]able to “early settlements;” (2) Plaintiff [GSB&B] identified this opportunity; and (3) Plaintiff failed to convey a settlement demand during the course of the underlying litigation.

(A165) (emphasis in original). Yet, Country Life made no such allegations. In fact, during argument, Country Life conceded that there is no allegation that Fulton

had conveyed an earlier settlement offer that GSB&B failed to convey to Country Life. (A136-A137). Country Life did not allege facts to show that Fulton would have settled earlier and more cheaply but for GSB&B's allegedly negligent advice.

In its briefing below and at oral argument, (A110-A112, A142-A143), GSB&B also asserted that Pennsylvania courts have addressed similar circumstances, and in particular whether a legal malpractice plaintiff must demonstrate that she was caused to lose a judgment as opposed to merely losing a settlement opportunity. Those courts have upheld the "case within a case" requirement, and the reasoning is persuasive.⁶

For example, in *McCartney v. Dunn & Conner, Inc.*, 563 A.2d 525 (Pa. Super. 1989), the plaintiff was a defendant in the underlying matter who later argued that his attorneys should have negotiated a favorable settlement before an adverse verdict was entered against him. The court held that McCartney could not prevail on his legal malpractice claim because he could not demonstrate that his attorneys caused him to lose a judgment. *Id.* at 528 ("when a . . . plaintiff alleges that [a] defendant lawyer negligently provided services to him or her as a plaintiff in the underlying action, he or she must establish that he or she would have

⁶ Although this case involves Delaware law, it has been recognized that "Pennsylvania's legal malpractice standard is substantially similar and leads to the same conclusions." *Brooks v. Quinn & Quinn, Att'ys at Law*, 2010 WL 582750, at *4, n.31 (D. Del. Feb. 19, 2010), *report and recommendation adopted sub nom. Brooks v. Quinn & Quinn*, 2010 WL 2035705 (D. Del. May 24, 2010).

recovered a judgment in the underlying action in order to be awarded damages in the malpractice action, which are measured by the lost judgment.").

Also, in *CD Realty Advisors, Inc. v., Riper, Hollin & Colagreco*, 2013 WL 6927347 (Pa. Com. Pl. Oct. 17, 2013), *aff'd without published opinion*, 2014 WL 10823750 (Pa. Super. 2014), an adverse verdict was rendered against the legal malpractice plaintiff, CD Realty. Thereafter, CD Realty filed a legal malpractice claim against its attorneys for failing to negotiate a favorable settlement, notwithstanding that no settlement demands were made by the plaintiff in the underlying litigation. The court dismissed the legal malpractice claims because CD Realty could not demonstrate that it would have prevailed in the underlying litigation, and because its damages were speculative since no firm settlement demand was made by the underlying plaintiff. *Id.* at *6-8.

The circumstances here are not substantially different. The Underlying Actions were not transactional in nature. They involved litigation. Country Life has alleged that their attorneys should have negotiated a favorable settlement given a likely adverse outcome. Country Life does not claim or allege that there was a settlement opportunity – that is, a lost business opportunity. Instantly, Country Life, like the legal malpractice plaintiffs in *McCartney* and *CD Realty*, failed to show proof of loss—a requisite element of a litigation-related legal malpractice claim.

In sum, *Dickerson* and *Beneville* are inapposite and do not support carving out an exception to the “case within a case” but-for causation standard applicable to actions such as the instant case which stems from alleged litigation-related negligence. The Superior Court did not error in applying settled Delaware law and dismissing Country Life’s legal malpractice counterclaims. Country Life cannot avoid the “case within a case” but-for causation requirement merely because they admittedly cannot meet this standard and thus did not plead facts sufficient to state a litigation-related legal malpractice claim.

IV. THE SUPERIOR COURT PROPERLY CONCLUDED THAT COUNTRY LIFE'S DAMAGES CLAIM WAS FATALLY SPECULATIVE

A. Question Presented

Did the Superior Court properly conclude that Country Life's alleged damages are purely speculative?

B. Scope of Review

“This Court reviews the Superior Court's decision to grant a motion to dismiss under Rule 12(b)(6) *de novo* ‘to determine whether the judge erred as a matter of law in formulating or applying legal precepts.’” *Windsor I, LLC*, 238 A.3d at 871. In reviewing the grant or denial of a motion to dismiss, this Court “view[s] 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.” *Clinton*, 977 A.2d at 895. This Court does not accept “conclusory allegations unsupported by specific facts, nor do[es] [it] draw unreasonable inferences in the plaintiff's favor.” *Windsor I, LLC, supra*.

C. Merits of Argument

As set forth above, to prevail on a legal malpractice claim a plaintiff must establish, *inter alia*, “resulting loss.” *Sherman and Flowers, supra*. To show resulting loss, an “attorney must cause more than speculative damage to a plaintiff. Even when proven or obvious, the 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.” *Balinski*, 2013 WL 4521199 at *3.

Country Life asserts that the Superior Court misconstrued the standard of review on a motion to dismiss when it concluded that their damages were speculative because no facts were alleged to show that Fulton was in fact amenable to early settlements. (Appellants’ Am. Br. at 29). Country Life points to various allegations in set forth in their counterclaims, but none establish that Fulton would have entered into an earlier and better settlement but for GSB&B’s alleged negligence. Indeed, Country Life tacitly concedes this very point, by asserting instead that its allegations give rise to a “reasonable inference” that Fulton would have settled with Country Life. (Appellants’ Am. Br. at 30).

Country Life further contends that whether or not Fulton would have agreed to early settlements and the amount of those settlements are factual questions that would have been “borne out through discovery in the litigation.” (*Id.*). However, no facts were pleaded to show that there was an earlier settlement demand and thus there was no dispute regarding a purported earlier settlement. Country Life’s damages argument assumes, with no factual support, that Fulton, which “vigorously” litigated the Underlying Actions (A047 at ¶80), would have settled those matters earlier and more cheaply.

Moreover, as noted by the Superior Court there was no demand for an earlier

settlement in the Underlying Actions. (A165). As GSB&B argued below, (A113), in the absence of a settlement demand, the issue of whether an underlying case could have been settled is “speculative”:

[A]ppellant's contention that the appellees were negligent because they failed to evaluate the settlement potential of the Huguley counterclaim is entirely speculative, and thus no cause of action for legal malpractice may be maintained. . . . Whether or not Huguley had any reason to settle for an amount less than the jury ultimately awarded is anyone's guess, although we find the prospect less likely in view of the legal basis for the counterclaim. In any event, this Court has not allowed legal malpractice actions based upon speculations regarding settlement negotiations.

McCartney, 563 A.2d at 530 (internal citations omitted); *see also Mariscotti v. Tinari*, 485 A.2d 56 (Pa. Super. 1984) (whether appellant could have obtained a better settlement if her attorney had given her a correct evaluation of her husband's stock was speculative, thus defeating any cause of action for malpractice of the attorney negotiating the settlement); *CD Realty Advisors, Inc.*, *supra* (concluding that legal malpractice plaintiffs “have failed to show proof of loss and have only offered speculation that the Underlying Action would have settled if Defendants had somehow apprised them of ‘reasonable settlement options.’ Since there is no evidence of a reasonable settlement option, there cannot be a showing of actual loss.”).

Further, Delaware Courts have recognized that “the results of litigation are unpredictable, with many factors potentially affecting an outcome.” *Korotki v.*

Hiller & Arban, LLC, 2017 WL 2303522, at *17 (Del. Super. Ct. May 23, 2017) (Mem. Op.). Putting aside the lack of factual allegations to show “resulting loss” under the applicable causation standard, Country Life’s “prediction as to the possible outcomes is an experienced guess at best and puffing at worst.” *Id.*

To the extent that Country Life suggests that *Dickerson, supra*, supports their argument that the damages are not speculative, Country Life’s reliance on that case is misplaced. *Dickerson* involved a transactional legal malpractice action and the plaintiff there, unlike Country Life, was not required to “demonstrate that the underlying action would have been successful but for the attorney's negligence.” *Sherman, supra*; see also *Flowers, supra*.

Finally, to the extent that Country Life suggests that GSB&B acknowledged in the lower court that the question of whether an underlying case would settle presents a factual issue for a jury to decide, (Appellants’ Am. Br. at 31), Country Life has misrepresented GSB&B’s statement. GSB&B did not concede that the damages issue in this case presents a factual issue for a jury to decide. Rather, GSB&B argued in its motion to dismiss that eschewing the “case within a case” but-for causation standard in litigation-related legal malpractice cases “can lead to multiple problems.” (A079). Specifically, GSB&B argued: “[W]hether an underlying case would have settled would likely be deemed a factual issue for a jury to decide; thus, most legal malpractice cases would lead to long, drawn out,

expensive litigation if the plaintiff only needed to demonstrate that her underlying case would have resulted in a settlement.” (A080). GSB&B did not concede, as Country Life suggests, that a fact issue exists in this case under the applicable causation standard. Instead, it pointed out how the abandonment of the “case within a case” causation standard would lead to the very argument that Country Life is now making.

In sum, the Superior Court properly concluded that Country Life’s damages were speculative and could not support a legal malpractice claim against GSB&B.

CONCLUSION

For the above reasons, this Court should affirm the Superior Court's ruling granting GSB&B's motion to dismiss.

Respectfully submitted,

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