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Case Number 204,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TIFFANY HERNANDEZ and JOSE HERNANDEZ-ALVAREZ, Individually and as *Guardian ad Litem* for their child, L.H.,	
Plaintiffs/Appellants,	No. 204, 2024
v.	Court Below: Superior Court of the State of Delaware
BAIRD MANDALAS BROCKSTEDT & FREDERICO, LLC; CHASE T. BROCKSTEDT; PHILIP C. FREDERICO; BRENT CERYES; STEPHEN A. SPENCE; SCHOCHOR, STATON, GOLDBERG, AND CARDEA, P.A.,	C.A. No. N23C-11-112 FJJ
Defendants/Appellees.	

APPELLANTS' REPLY BRIEF

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SUMMARY OF ARGUMENT

The Retained Lawyers' Answering Brief suffers two fundamental flaws that must render reversal and remand.

(1) The Retained Lawyers' argument that a Court Order finding the Class Action Settlement fair to the ***class*** collaterally estops the Hernandez Family's claim that the Retained Lawyers committed legal malpractice in their ***individual*** representation of the Hernandez Family is factually and legally unsupported in any way.

(2) The Hernandez Family vigorously preserved the argument that the settlement claims administrator's decision was not entitled to collateral estoppel. A293; A644-45.

(3) The Hernandez Family being afforded multiple opportunities to engage in an inadequate process does not establish a "full and fair" opportunity to litigate their claims.

(4) Public policy demands that where an individual hires an attorney to represent her claim as to her catastrophically injured child, the attorney is held to the standard of a reasonably prudent attorney in the individual representation of this client.

(5) Finally, the Hernandez Family asserted a transactional malpractice claim which was not subject to the doctrine of collateral estoppel and which must be

permitted to proceed.

ARGUMENTS IN REPLY

A. Questions Presented

Whether a Court Order finding a ***class settlement*** fair to a ***class*** collaterally estops an ***individual*** from claiming that legal malpractice was committed by the class counsel as to their ***individual*** case.

B. Scope of Review

The Delaware Supreme Court reviews "a trial court's application of collateral estoppel *de novo*." *Rogers v. Morgan*, 208 A.3d 342, 346 (Del. 2019) (referencing *California State Teachers' Ret. Sys. v. Alvarez*, 179 A.3d 824, 834 (Del. 2018)).

C. Merits of Argument

The Retained Lawyers' attempt to reframe the issue on collateral estoppel as a Court-approved class action settlement misses the mark. The ruling on the class action settlement addressed solely whether the proposed process and settlement terms were fair ***to the class as a whole*** – not whether the Retained Lawyers acted as reasonably prudent attorneys in the ***individual representation*** they had undertaken on behalf of the Hernandez Family. The issue presented in the instant Complaint – the negligence of the Retained Lawyers in advising the Hernandez Family to file a claim on L.H.'s behalf rather than to opt out of the class – has not previously been decided and is therefore not subject to collateral estoppel.

The Retained Lawyers' argument boils down to two distinct (and equally unsupportable) claims: (1) that because the "process" of informing class members of their option to file a claim was fair, the Hernandez Family is collaterally estopped from claiming that the attorney who represented their individual interests should have evaluated their individual claim and known immediately that L.H. was better served by opting out of the class; or (2) that because the class settlement was "approved" as fair to the class as a whole, the Retained Lawyers cannot be held liable for their improper legal advice to the Hernandez Family to register their claim. Neither argument is supported by facts or law and no facts or law were offered by the Retained Lawyers in making these conclusory allegations.

This misguided presentation of the issues led Appellees to wrongfully claim, without pinpoint citation, that the Superior Court found "class counsel did not breach the duty owed by them to the class members including Plaintiffs," and that this was a basis for entering dismissal. Appellees Brief at p. 11. This was not part of the Superior Court's Order. Moreover, it is not relevant because the Hernandez Family retained the services of the Retained Lawyers for their individual case and it is the advice provided to the Hernandez Family regarding how to handle L.H.'s individual case that is at issue, not the Retained Lawyers' representation of the class.

Appellees are not alleged to have breached duties owed to the class as imposed by Rule 23 or by the terms of the Settlement. Appellees are alleged to have been

negligent in their representation of Hernandez in their ***individual representation*** of them. The Superior Court did not rule on whether Appellees were negligent in fulfilling that obligation.

Instead, it is clear that:

> This case is about a client who had an attorney, the attorney had notice that there was an ability for her to opt out and he advised her to not opt out and to register her claim. We say that was negligence. Expert testimony will say that was negligence. And a jury could find that was negligence. That's where we are right now.

A653. This Court should see through the Retained Lawyers' efforts at causing confusion by reframing the issue.

A. Questions Presented

Whether the Hernandez Family contested below whether the settlement claims administrator's decision was a decision by a "court" entitled to collateral estoppel.

B. Scope of Review

The Delaware Supreme Court reviews "a trial court's application of collateral estoppel *de novo*." *Rogers v. Morgan*, 208 A.3d 342, 346 (Del. 2019) (referencing *California State Teachers' Ret. Sys. v. Alvarez*, 179 A.3d 824, 834 (Del. 2018)).

C. Merits of Argument

Initially, the Retained Lawyers wrongfully argue that the Hernandez Family failed to contest that the Claims Administrator is not a "court" that satisfies the first element of nonmutual collateral estoppel. Appellees' Brief at pp. 12-13. In fact, the Hernandez Family vigorously preserved this argument at the Superior Court: "And as Your Honor said, there's no case that says a claims administrator's or adjudicator's findings are given preclusive effect on causation here." Opening Brief Appendix at A644:10 – A644:14; *see also* Plaintiff's Answering Brief in Opposition to Defendants' Motion to Dismiss at A290 ("Defendants offer no fact that was actually litigated, determined ***or subject to a valid and final judgment***.") (emphasis added), A292 ("**The Claims Administrator's decision is not grounds for the application of collateral estoppel to Plaintiffs' claim.**") (emphasis in original).

The Hernandez Family argued that the claims adjudicator's decision was not entitled to preclusive effect because it was not a court, nor another forum like an administrative agency with adequate safeguards.

Interestingly, though the Hernandez Family clearly raised the issue that the claims administrator's decision as not entitled to preclusive effect, the Retained Lawyers' argument is entirely devoid of this argument. Instead of arguing the claims administrator's finding was entitled to preclusive effect, the Retained Lawyers argued **exclusively** that the *Superior Court's Order of Approval* is what was entitled to preclusive effect.

> Here, the Court again approved the notice, approved that that notice was adequate, giving people the opportunity to opt out. And that's designed for people who are not represented at the time. Whether or not Plaintiff was represented, the Court determined that that notice would give ample opportunity to opt out.
>
> The Court then approved the settlement, and the Court approved the process under which the claims administrator went forward and again gave exceptional deference here to Mr. Crumplar and his clients in allowing them to again litigate the issue after the claims administrator determined there was no cause.

A619-20.

At oral argument in the Superior Court, the Court raised the issue of the claims administrator's finding having preclusive effect, but seemingly agreed with the Hernandez Family that as a matter of law the Claims Adjudicator's causation

decision cannot give rise to issue preclusion or collateral estoppel. Specifically, the Court stated:

> So, I went and looked for cases on the issue, the preclusion issue and the collateral estoppel issue, about whether or not in a context just like this, this constitutes a Court of competent jurisdiction. I mean, the law in Delaware is clear. To have issue preclusion, there has got to be a decision by a Court or an administrative agency.
>
> I couldn't find any cases coming out of something like this where it's a claims administration process, where some Court has said that when it comes out of a claims administration process, that equals a court or an administrative agency which should trigger issue preclusion.

A597:10 – A598:4; *see also* Appellants' Opening Brief at pp. 18-19 (quoting *id*.).

Now, for the first time, the Retained Lawyers' Answering Brief argues the wholly unsupported position they carefully avoided in the lower court: that "[t]he decision with respect to Plaintiffs' claims in the underlying action was a final adjudication by a court of competent jurisdiction on the merits of Plaintiffs' claims." Appellees' Opening Brief at p. 12. Quite simply, this assertion is wrong. As already stated in Appellees' Opening Brief, the claims administrator is not a "court of competent jurisdiction." Appellees' Opening Brief pp. 16-22. There is no authority for this suggestion in Delaware case law or anywhere in the United States that Appellees' counsel could locate.

The claims administrator's conclusions did not amount to "an adjudication on the merits" in or like a court of law. It was a ***settlement***, not an adjudication. The

purpose was to equitably disburse funds to claimants, not to adjudicate the facts and apply the law.

The Retained Lawyers did not dispute this fact in the lower court, even though the Hernandez Family argued that the claims administrator was not a "court" that should be given preclusive effect. Although the Superior Court appeared to agree with the Hernandez Family at oral argument, it ultimately committed error in its written Order, which gives rise to this appeal.

A. Questions Presented

Whether the Hernandez Family alleged that, but for the Retained Lawyers' negligence, they would have been successful in their underlying claim.

B. Scope of Review

The Delaware Supreme Court reviews "a trial court's application of collateral estoppel *de novo*." *Rogers v. Morgan*, 208 A.3d 342, 346 (Del. 2019) (referencing *California State Teachers' Ret. Sys. v. Alvarez*, 179 A.3d 824, 834 (Del. 2018)).

C. Merits of Argument

The Retained Lawyers claim that "Plaintiffs did not allege that, but for Defendants' negligence, they would have been successful in the underlying action." However, that is precisely what was alleged throughout the underlying Complaint. *See*, *e.g.*, A48-49 ("As a proximate and direct result of each of these failures, Defendants have caused serious financial harm to Plaintiffs in excess of the $21.7 million economic loss of future damages and in addition past loss in medical bills and past and future non-economic loss and punitive damages.").

The basis of the Hernandez Family's malpractice claim is precisely that, with a full and fair opportunity to litigate their case, including to a jury of her peers and not a settlement administrator, the Hernandez Family's recovery would have been millions (if not tens of millions) of dollars – not the $2,500 awarded in the claims process the Retained Lawyers advised the Hernandez Family to participate in.

The Complaint thoroughly identified the reasons for the Hernandez Famiy's allegation that they would have been successful, including, but not limited to, identifying favorable testimony of well-qualified experts in each field which would be required to prove causation and damages – a feat well beyond what is traditionally required at this stage of the proceedings. To claim otherwise is simply not supported.

A. Questions Presented

Whether the Hernandez Family had a "full and fair opportunity" to litigate their claim and whether they waived their argument in the trial court.

B. Scope of Review

The Delaware Supreme Court reviews "a trial court's application of collateral estoppel *de novo*." *Rogers v. Morgan*, 208 A.3d 342, 346 (Del. 2019) (referencing *California State Teachers' Ret. Sys. v. Alvarez*, 179 A.3d 824, 834 (Del. 2018)).

C. Merits of Argument

The Hernandez Family has already identified the reasons the claims process was not a "full and fair opportunity" to be heard, notably because it was nothing like civil litigation. Appellants' Corrected Brief at pp. 23-25. In an apparent attempt to argue that the claims process was full and fair as to the Hernandez Family (creating, at most, a factual issue to be determined at a later stage of the proceedings), the Retained Lawyers expanded the comments of the Hernandez Family's counsel in the underlying class action. Appellees' Brief at pp. 21-22.

The full extent of the quote is necessary for a more accurate reflection of what was admitted and, perhaps more significantly, what was not:

> I think the process **could** result in a fair thing. We do say in our motion that **if** we did 60(b) if the Court felt that Tier 4 could not accommodate this, they could come up with a Tier 5 because the more I look at it and the more I see how the Claims Adjudicator on her own came up with subgroups. So not everybody in Group 4 got the same amount for

> property damage. In Group 3, they had 3A and B. Could [sic] have had those subgroups.

A338:23 – A339:9 (emphasis added).[1] As becomes evident from the entirety of the quoted statement, the Hernandez Family's counsel was asking the Superior Court to work within the approved settlement to set up a "fair process" and stating that the Court could do so by amending it and adding a "Tier 5" that would compensate catastrophically injured people.

Consistent with the Hernandez Family's counsel's argument that perhaps the process **could** be made fair as to L.H. was counsels' repeated assertions that the current process was **not** fair: "I find a certain unfairness that [the Claims Adjudicator] can have stuff that we cannot have." A400:16 – A400:17; s*ee also* A350:8 – A350:10 ("…is this Settlement allocation fair. We are saying it's not.").

Furthermore, the question of collateral estoppel was never raised by anyone in the underlying class action. The Hernandez Family's counsel asserting that a claims administrative process "could" be fair by amending the process should not be conflated with the type of "full and fair opportunity" that results in collateral estoppel, and to claim otherwise constitutes a gross distortion of the arguments, history, timeline and facts of this case.

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[1] The transcript was attached as Exhibit B to the Hernandez Family's opposition to The Retained Lawyers' Motion to Dismiss.

The Retained Lawyers rely on a line from the Superior Court's decision that "The ability of a client to litigate an issue of law decided incorrectly due to attorney malpractice is different from the issue of whether a client is estopped from relitigating a finding of fact against the client in an underlying action after a full and fair opportunity to be heard." Appellees' Brief at p. 19. It bears repeating that the Retained Lawyers never argued the finding of fact from the claims administrator was entitled to preclusive effect, only that the Order of the Superior Court approving the settlement process was. *Supra*. Regardless, either assertion is unsupported in fact or law.

The law in Delaware is that the party opposing the imposition of nonmutual collateral estoppel must have been afforded a "full and fair" opportunity to litigate her case. *See* Appellees' Opening Brief, pp. 23-25. Delaware has only ever found that courts of law and certain administrative agencies satisfy this burden. For the first time, and with no case law to support it, the Superior Court and the Retained Lawyers seek to expand the application of collateral estoppel to a settlement claims administrator who created no record, was subject to no discovery procedures, and made a finding without any explanation as to her reasons. This is incompatible with the law limiting nonmutual collateral estoppel and must be reversed.

A. Questions Presented

Whether public policy precludes the imposition of collateral estoppel.

B. Standard of Review

The Delaware Supreme Court reviews "a trial court's application of collateral estoppel *de novo*." *Rogers v. Morgan*, 208 A.3d 342, 346 (Del. 2019) (referencing *California State Teachers' Ret. Sys. v. Alvarez*, 179 A.3d 824, 834 (Del. 2018)).

C. Merits of Argument

There is a strong public policy to promote the public's faith and confidence in the judicial system. Judgment by way of nonmutual collateral estoppel in this case undermines that policy.

The Retained Lawyers were retained by the Hernandez Family (and either hundreds or thousands of other individuals) for the purpose of obtaining reasonable compensation for serious personal injuries. The Hernandez Family did not retain the Retained Lawyers to be a negotiating point in a class settlement that would not compensate them for their injuries. They relied on lawyers who affirmatively advised them to file a claim to receive this compensation. Now, the court system has immunized the Retained Lawyers from their own negligence by expanding Delaware case law to new heights. This is detrimental to the legal profession and to the public's confidence in the judicial system.

The Retained Lawyers continue to miss the point that distinguishes prior class action legal malpractice cases from this one. Here, the Retained Lawyers were retained by the actual class member for her individual case, and they specifically advised her to partake in the class settlement process. The Hernandez Family is not alleging that Appellees failed in their duties to the class. They are alleging that the Retained Lawyers' legal advice to remain in the class and not opt out of the class settlement was negligent. Lawyers who are retained by class members who desire advice on how to proceed with or without a class settlement should act as a reasonably prudent lawyer should.

A. Questions Presented

Whether the Hernandez Family has alleged a transactional malpractice claim.

B. Standard of Review

This Court reviews "the grant of a Rule 12(b)(6) motion to dismiss *de novo* to 'determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.'" *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011)

C. Merits of Argument

The Retained Lawyers do not dispute that the Hernandez Family's transactional malpractice claim is not subject to the doctrine of collateral estoppel, which was the basis for dismissal. Instead, they only suggest that the Hernandez Family's claim cannot state a transactional malpractice claim as a matter of law because the Hernandez Family's claim is allegedly "one involving purely litigation." Appellees' Answering Brief, p. 28.

This argument ignores the case law establishing that an alleged failure to obtain a settlement for L.H., individually, is a viable transactional malpractice claim.

> "Legal malpractice actions in the transactional context often do not look back on the success or failure of litigation, but involve evaluating an attorney's actions that, at the time, looked forward toward a future deal, **settlement**, or the prevention of litigation."

Sherman v. Ellis, 2020 Del. Super. LEXIS 1, 2020 WL 30393 at *16 (Del. Super. Ct. Jan. 2, 2020) (emphasis added).

What separates this from a litigation malpractice claim is that on this specific allegation the Hernandez Family is not alleging that Appellees failed to do anything in litigation that caused L.H. a verdict. Instead, the Hernandez Family is alleging that The Retained Lawyers failed to enter into a transaction that a reasonably prudent attorney would have entered into under the same or similar circumstances. In a litigation malpractice claim, a failure to act in a reasonably prudent way would have ended with a finding against the plaintiff, *i.e.* the Hernandez Family. But in a transactional malpractice claim, a plaintiff alleges that a reasonably prudent lawyer would have entered into a transaction, including a settlement.

Appellees flip the burden of proof at the motion to dismiss stage, claiming that the allegation is "hypothetical." *Id*., p. 31. But, at a motion to dismiss stage, it is Appellees' burden to show a claim for failing to obtain L.H. an individual settlement is implausible as a matter of law. The Retained Lawyers come nowhere close to meeting their burden that this is not a plausible claim under Rule 12(b)(6). Hernandez must given an opportunity to perform discovery and put forth evidence based on the discovered facts that a settlement for her would have been more likely than not obtained, instead of forcing her into a collective class settlement. But this is a fundamentally different allegation than the failure to litigate her case appropriately.

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