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IN THE SUPREME COURT OF THE STATE OF DELAWARE

KATTEN MUCHIN ROSEMAN LLP, Intervenor Below/Appellant, v. MARTHA S. SUTHERLAND as Trustee of the Martha S. Sutherland Revocable Trust dated August 18, 1976, Plaintiff Below/Appellee.	No. 151, 2016 Appeal from Court of Chancery C.A. No. 2399-VCS

ANSWERING BRIEF OF PLAINTIFF BELOW/APPELLEE

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NATURE OF PROCEEDINGS

In its February 26, 2016 Letter Opinion and Order, the Chancery Court framed the issue now on appeal best: "Thus, the principal question is: may a lawyer obtain a charging lien upon a recovery by the (former) client based on the work done by the lawyer if the lawyer has already been paid for the work that led to the recovery? Stated differently, may a lawyer secure a charging lien for work done after the benefits supporting a fee award (in this instance, the derivative benefits accruing to the family business) were achieved if the lawyer's work which achieved the benefits has been paid for?" A1069.

Intervenor Katten Muchin Rosenman LLP ("Katten") represented Martha Sutherland from 2004 until 2011 and commenced litigation on behalf of Sutherland in Missouri and Delaware. Katten charged millions of dollars, and Sutherland paid millions of dollars for Katten's services. A0240-41. In Delaware, Katten represented Sutherland in a formal Section 220 action and then commenced derivative and double derivative actions against the nominal defendants in this case. A0146-52. The Delaware litigation was, for the most part, unsuccessful. *Id.* Katten withdrew as Sutherland's counsel in 2011. Subsequently, the Kusper Law Group, Ltd. (the "Kusper Law Group") represented Sutherland. A0923-24.

Attorney Stewart Kusper, from the Kusper Law Group, petitioned for and generated an attorneys' fee award for Sutherland. A0100-38, A0152. On July 31,

2014, the Chancery Court granted Sutherland a $275,000 attorneys' fee award. A0152, A1064. The fee award was based on the benefits the corporations received as a result of Sutherland's litigation. The court found the benefits were "minimal" and derived from the Special Litigation Committee's recommendation to modify employment agreements; the employment agreements were modified in July 2007. A1064-67; A0146-52.

Approximately one month later, Katten filed a Motion to Intervene, which was granted by the Chancery Court. A0153-59; A0173-86. After Katten's Motion to Intervene was granted, Katten filed a Motion for Summary Judgment and requested that the Chancery Court find it was entitled to an attorney's charging lien against Sutherland's $275,000 fee award. Katten claims it is owed $766,166.75 in unpaid attorneys' fees and expenses. The services for which Katten wishes to be paid occurred between July 2009 and January 2011, well after the 2007 benefits were achieved. A1064-71.

On February 26, 2016, the Chancery Court denied Katten's Motion for Summary Judgment and held that Katten was not entitled to an attorney's charging lien. *Id.* The court relied on *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Memorial Hospital, Inc*., 36 A.3d 336 (Del. 2012), and held Katten was not entitled to a charging lien because Katten sought a charging lien for work that produced no benefit and Katten had been paid in full for the services that produced the benefit.

A1070. The court found that what Katten sought was "inconsistent with the theoretical underpinnings of the attorney's charging lien." A1071.

SUMMARY OF ARGUMENT

1. Denied. The parties disagree on the terms of Katten's engagement and the reasonableness of its fees and services. However, the only issue before the Chancery Court, and now this Court, is whether Katten is entitled to a charging lien against the Chancery Court's July 31, 2014 fee award to Sutherland of $275,000 from services for which the firm has been paid. Katten does not have "the right to recoup" attorneys' fees charged for later services unrelated to the fee award.

2. Denied. Katten does not, as a matter of law, have an equitable right to a charging lien against Sutherland's $275,000 attorneys' fee award when it was paid for the services that led to the benefits upon which the fee award is based, and when it now asserts to recover for services that (i) were rendered years later, (ii) failed miserably, (iii) are in dispute as to their reasonableness and (iv) did not produce the benefit to the family business, or the fee award itself, as established by the Chancery Court's July 31, 2014 Opinion and Order.

STATEMENT OF FACTS

A. Katten's Representation of Sutherland.

Katten charged its former client, Martha Sutherland, millions of dollars in attorneys' fees relating to litigation that occurred from 2004 until 2011 in Delaware and Missouri; Katten was paid millions of dollars by Sutherland for that work. A0240-41. For the Delaware case, Katten charged $3,549,160.17 for attorneys' fees and expenses. A0240. Sutherland paid $2,782,994.40 to Katten for the work performed in the Delaware litigation. A0240-41.

The Delaware litigation was largely unsuccessful as it achieved "minimal benefits" for the corporations in the derivative and double derivative actions Katten commenced on behalf of Sutherland. *See* A0146-52.

Thus, despite the fact that Katten has been paid millions of dollars in this litigation and achieved only minimal benefits as a result of that litigation, Katten asserts that it is entitled to $766,166.75. It seeks this payment through a common law charging lien against a fee award that was not generated by the services at issue.

Katten was retained by Sutherland in 2004. A0239. However, contrary to Katten's assertions, there is no written engagement letter. Sutherland does not recollect signing an engagement letter with Katten. A0998-99. The initial agreement between Katten and Sutherland was verbal in nature, and there were

many disagreements relating to the scope of the representation as well as the reasonableness and necessity of certain services and invoices from Katten. A0999. Katten has not produced a written fee agreement with Sutherland for either the Missouri or Delaware litigation.

Katten has been paid in full for the services that occurred between 2004 and July 2009. A0161. This includes the services that generated the benefits to a family business that justified the Chancery Court's attorneys' fee award of $275,000. A0150-52 ("Martha did not secure additional benefits for the companies after the Employment Agreements were modified" in July 2007.).

Services performed by Katten on behalf of Sutherland that remain unpaid took place between July 1, 2009 and January 8, 2011. A0161. During that time period, the litigation services provided by Katten to Sutherland related to continual motion practice, discovery issues, and, most significantly, opposing the defendants' motion for summary judgment, which was granted in substantial part. A0749-A0904; A0144.

Katten withdrew as Sutherland's counsel in January 2011. A0241. Subsequently, Sutherland was represented by the Kusper Law Group. Katten transferred Sutherland's documents to the Kusper Law Group in April 2011. A0923-24. A letter from Katten to the Kusper Law Group, dated April 2011,

memorializing the documents being transferred, does not refer to a written fee agreement. *Id.*

B. <u>The July 31, 2014 Attorneys' Fee Award.</u>

Attorney Stewart Kusper petitioned for and obtained an attorneys' fee award on behalf of Sutherland. A0100-38; A0152. Sutherland was awarded $275,000 for attorneys' fees and expenses expended in the derivative and double derivative actions. A0152.

The Chancery Court granted the award based on the premise that under Delaware law, a stockholder plaintiff is entitled to attorneys' fees and expenses if "(i) meritorious litigation is filed, (ii) an action producing a benefit to the corporation or its stockholders is taken by the defendants before judicial resolution is achieved, and (iii) the resulting benefit is causally related to the litigation". A0145.

The Chancery Court found the benefits achieved by Sutherland for the corporations were "minimal." A0146. The court stated that the minimal benefits to the companies stemmed from the amendments to the employment agreements, which occurred in July 2007. A0143, A0147-48. Other than the amended employment agreements, the litigation did not produce any other benefits on behalf of the companies. A0150. The court stated, "Martha did not secure additional benefits for the companies after the Employment Agreements were modified." *Id.*

Thus, as stated earlier, the $275,000 attorneys' fee award was based on the minimal benefits resulting from the modified employment agreements, which occurred in July 2007. A0151-52.

C. Katten's Intervention to Impose a Charging Lien.

Approximately one month after Sutherland was granted the $275,000 fee award, Katten filed its Motion for Leave to Intervene in order to impose an attorney's charging lien on the award. A0153-59. On February 27, 2015, the Chancery Court granted Katten's motion to intervene. A0173-86.

Katten seeks to take the July 2014 charging lien fee award on the ground that Sutherland has not paid Katten for services rendered between July 1, 2009 and January 8, 2011. The litigation services that occurred between July 2009 and January 2011 do not relate to, and did not produce, the benefits identified by the Chancery Court in its July 2014 Opinion that gave rise to the fee award. A0143, A0147-48. Furthermore, Stewart Kusper, Sutherland's subsequent counsel, petitioned for and provided argument for the fee award, thus obtaining the award itself. A0100-38. Katten has been paid in full for the litigation services it provided to Sutherland in 2006 through 2008, the services that produced the award as identified by the Chancery Court in its July 2014 Opinion. A0161; A0143, A0147-48.

D. The February 26, 2016 Opinion.

Katten filed a Motion for Summary Judgment seeking an attorney's charging lien on Sutherland's $275,000 fee award. Vice Chancellor John W. Noble denied Katten's motion and held that Katten was not entitled to a charging lien.

As the court noted, the purpose of a charging lien is "to make sure that the client does not avoid paying her lawyer for the benefits she obtained". A1070. It held that Katten, however, was seeking a charging lien "for work which caused no benefit and has no connection to the recovery, other than having occurred in the same litigation." *Id.* The court found that Katten had been paid in full for services that produced the benefits to the companies, which was the basis of the fee award. *Id.* Relying on *Doroshow*, the court rejected the petition stating, "Seeking a charging lien for work which produced no benefit when the law firm has already been paid for the work which produced the benefit (whether the benefit for the family corporation or the corresponding fee award) is inconsistent with the theoretical underpinnings of the attorney's charging lien." A1070-71.

ARGUMENT

I. THE CHANCERY COURT DID NOT ERR WHEN IT DENIED KATTEN'S REQUEST FOR A CHARGING LIEN AGAINST AN ATTORNEYS' FEE AWARD RELATING TO SERVICES FOR WHICH KATTEN HAD ALREADY BEEN PAID.

A. Question Presented.

Does Katten have a valid charging lien against Sutherland's $275,000 fee award for certain attorneys' fees and expenses when it has already been paid for the work that led to the recovery?

B. Scope of Review.

"On appeal of a grant or denial of a motion for summary judgment the scope of review is *de novo*." *Lank v. Moyed,* 909 A.2d 106, 108 (Del. 2006).

C. Merits of Argument.

1. The Chancery Court Did Not Err in Finding Katten Is Not Entitled to a Common Law Attorney's Charging Lien.

The Chancery Court did not err when it denied Katten's Motion for Summary Judgment and held that Katten was not entitled to a common law charging lien. Contrary to Katten's assertions, the Chancery Court's decision is supported by Delaware law. Thus, the Chancery Court's decision is not a "misreading of Delaware law" and would not produce "absurd results." OB at 16.

Katten wants this Court to impose a charging lien against Sutherland's $275,000 attorneys' fee award simply because Katten believes it should be paid for

services that are in dispute. Katten does not have an unfettered right to a common law charging lien.

An attorney is entitled to a charging lien when the attorney's unpaid services or efforts substantially relate to or produce the award generated for the client. In *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Memorial Hospital, Inc*., 36 A.3d 336 (Del. 2012), this Court stated that a charging lien is "'the right of an attorney at law to recover compensation for his services ***from a fund recovered by his aid***, and also the right to be protected by the court to the end that such recovery might be effected.'" *Id.* at 340 (emphasis added) (quoting 2 Edward Mark Thornton, *A Treatise on Attorneys at Law* § 578 (1914)). This Court in *Doroshow* recognized this premise a second time when it stated that "attorneys have a right to compensation for ***funds recovered by their efforts***." *Id.* at 343 (emphasis added). In determining whether the Doroshow law firm was entitled to a charging lien, this Court correctly recognized that Doroshow's unpaid services "achiev[ed] the Nationwide settlement." *Id.* at 342. Thus, a valid charging lien must derive from a "fund recovered" by the attorney's "aid"—that is, the fund as to which the attorney wishes to assert a lien must result from the services and efforts by the attorney.

Katten is not entitled to a charging lien against Sutherland's award because the unpaid services for which Katten wishes to be paid for did not produce the $275,000 award. Unlike in *Doroshow*, Katten did not achieve the $275,000

judgment for Sutherland. Katten withdrew as Sutherland's counsel in January 2011. Subsequently, the Kusper Law Group represented Sutherland. The Kusper Law Group obtained the $275,000 award for Sutherland. Stewart Kusper petitioned for and argued the merits of the petition on behalf of Sutherland. Thus, since Katten withdrew from the case in January 2011 before the judgment was rendered and the Kusper Law Group generated the award on July 31, 2014, Katten cannot impose a charging lien on an award for services that did not produce the award.

In addition, the July 31, 2014 Chancery Court Opinion shows that the services for which Katten wishes to be paid for do not relate to the award, nor did those services produce the benefits upon which the award is based. The $275,000 fee award was based on the benefits to the companies, which derived from the modified employment agreements. These modifications took place in July 2007. The Chancery Court stated that the litigation benefitting the companies, and giving rise to the fee award, related only to the employment agreements. However, it is undisputed that Sutherland has paid Katten in full for all of its invoices from that period.

In *Zutrau v. Jansing*, 2014 WL 7013578 (Del. Ch. Dec. 8, 2014) an hourly rate case, the Chancery Court discussed Delaware law requiring a charging lien to relate to the services that merited the award. *Id.* at *3 ("[T]here is language in the

Delaware charging lien cases that suggest that a charging lien may be limited to the amount recovered *because of* the attorney's assistance.").

Katten is also not entitled to a charging lien under Delaware law for the related but additional reason that Sutherland has already paid for the services the fee award was based upon. In *Doroshow*, this Court held that one necessary element of a charging lien is that the attorney was not compensated for the work that produced the funds. The Court in *Doroshow* stated, "Doroshow provided Acosta legal services by representing her and achieving the Nationwide settlement. Because Doroshow represented Acosta on a contingent fee basis, ***the law firm had not been compensated before its work produced the funds***. Therefore, Doroshow was entitled to assert an attorney's charging lien against the settlement fund." *Doroshow*, 36 A.3d at 342 (emphasis added).

In *Doroshow*, the attorney was not paid for the services that produced the fund. By contrast, not only does Katten wish to be paid for services that did not produce the award at issue, Sutherland has in fact paid Katten for services that did produce the fee award. Thus, Katten is not entitled to an equitable charging lien because the services the award was based upon have been paid by Sutherland in full.

Katten advocates a charging lien for fees and expenses unrelated to the judgment obtained as long as they arise out of the same litigation because

otherwise "any litigant owing fees to an attorney could legally avoid a charging lien by simply choosing to pay *only* for the services directly related . . . to the litigation's beneficial results." OB at 17-18. Often, the attorney decides how to apply payments to outstanding invoices; in any event, an attorney may move to withdraw from a case if a client chooses not to pay certain bills.

Katten concedes that it is easy to separate the attorneys' fees that led to the fee award and those that did not in the present matter but argues it might be difficult to make such distinctions in other cases. OB at 18-19. Delaware courts, however, already make such factual decisions in resolving fee applications where it is appropriate to shift some, but not all, of the attorneys' fees. *See, e.g.*, *El Paso Nat. Gas Co. v. Amoco Prod. Co.*, 1994 WL 728816, at *6 (Del. Ch. Dec. 16, 1994); *Dreisbach v. Walton*, 2014 WL 5426868, at *7 (Del. Super. Oct. 27, 2014). It is no more difficult to do so in the context of a charging lien.

2. Case Law from Sister States that Have a Common Law Charging Lien Supports the Chancery Court's Decision.

As recognized by *Doroshow*, there are only a few cases that have developed the doctrine of the common law charging lien in Delaware. *Id.* at 340-41. *Doroshow* supports the proposition that an attorney is entitled to a charging lien if the attorney's unpaid services produced the fund generated for the client. *Id.* at 340, 342. However, there is little other case law in Delaware that expands on this

issue. An examination of case law from sister states that have common law attorney charging liens is thus warranted.

Courts enforcing common law charging liens analyze the efforts and/or services produced by the attorney in order to determine whether there is a valid charging lien. This is contrary to Katten's assertion that there is no law that supports the "burden" of showing to the Court the work or services that produced the judgment for the client. OB at 16. In addition, the services that generated the benefit for the client must remain unpaid.

For example, in Florida, an attorney is entitled to a common law attorney's charging lien if, among other requirements, the evidence shows the attorney's services provided a positive judgment or settlement for the client. *See Walther v. Ossinsky & Catchart, P.A.*, 112 So.3d 116, 117 (Fla. Dist. Ct. App. 2013) ("[T]he services must, in addition, produce a positive judgment or settlement for the client, because the lien will attach only to the tangible fruits of the services."); *Litman v. Fine, Jacobson, Schwartz, Nash, Block & England, P.A.*, 517 So.2d 88, 91-92 (Fla. Dist. Ct. App. 1987) (citing *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom*, 428 So.2d 1383, 1385 (Fla. 1983)). In addition, the services that secured the benefit must remain unpaid or disputed. *Walther*, 112 So.3d at 117.

Similarly, in *Cohen v. Goldberger*, 141 N.E. 656 (Ohio 1923), the Ohio Supreme Court established that an attorney's charging lien is valid when the services that created the benefit remain unpaid. The court stated:

> The right of an attorney to payment of fees earned in the prosecution of litigation to judgment, though usually denominated a lien, rests on the equity of such attorney ***to be paid out of the judgment by him obtained, and is upheld on the theory that his services and skill created the fund***.

Cuyahoga Cty. Bd. of Comm'rs v. Maloof Props., Ltd., 968 N.E.2d 602 (Ohio Ct. App. 2012) (quoting *Cohen v. Goldberg*, 109 Ohio St. 22 (1923)) (emphasis added) (internal quotes omitted). In applying *Cohen*, Ohio courts do not apply a "but for" test to determine the validity of a charging lien because it would permit "minimal" or "remote" contribution of services to justify a charging lien. *Maloof Props.*, 968 N.E.2d at 605. Instead, the attorney must "demonstrate the significance his contribution has to that judgment." *Id.*

The courts in Pennsylvania, New Mexico, and Connecticut, all of which have a common law charging lien, rely on and examine whether the attorney's services created or substantially secured the fund in which the attorney seeks a lien. The Supreme Court of Pennsylvania applies a five factor test to determine whether an attorney is entitled to a charging lien, and, among those factors, it must appear "that the services of the attorney operated ***substantially or primarily*** to secure the fund out which he seeks to be paid." *Recht v. Urban Redevelopment*

Auth. of City of Clairton, 168 A.2d 134, 138-39 (Pa. 1961) (emphasis added). The Supreme Court of New Mexico reversed a trial court's imposition of an attorney's charging lien because the fund in which the attorney sought to impose a lien was not recovered by the attorney for the benefit of his client. *Albuquerque Nat'l Bank v. Albuquerque Ranch Estates, Inc*., 687 P.2d 91 (N.M. 1984). Last, a series of cases in Connecticut realize that attorneys cannot collect on all unpaid fees through a common law charging lien. *Butterworth & Scheck, Inc. v. Cristwood*, 1999 WL 549369, at *4 (Conn. Super. Ct. June 18, 1999) ("A charging lien is founded upon the equity of paying an attorney for fees and disbursements out of the judgment obtained through the attorney's efforts. . . . This principle would be defeated by allowing attorneys to recover fees unrelated to the judgment obtained."); *Intercity Dev., LLC v. Rose*, 2010 WL 1006098, at *4 (Conn. Super. Ct. Feb. 11, 2010).

These states also require that the services that created the benefit remain unpaid. For example, in Connecticut, an attorney sought a charging lien for fees generated at an hourly rate, and the fee agreement between the attorney and client was silent concerning whether the attorney could be paid from the judgment obtained through the litigation. The appellate court granted the charging lien because the lawyer obtained a judgment for the client and had not been paid for those services. *D'Urso v. Lyons*, 903 A.2d 697, 700 (Conn. App. Ct. 2006).

North Carolina law "has generally limited the use of a charging lien to representation taken on a contingency basis." *Wilson v. Wilson*, 644 S.E.2d 379, 383 (N.C. Ct. App. 2007). It is well settled law in North Carolina "that no right to an attorney's charging lien exists when an attorney working pursuant to a contingent fee agreement withdraws prior to settlement or judgment being entered in the case." *Mack v. Moore*, 418 S.E.2d 685, 688 (N.C. Ct. App. 1992); *see also Wilson*, 644 S.E.2d at 383. For example, in *Covington v. Rhodes*, 247 S.E.2d 305 (N.C. Ct. App. 1978), the North Carolina appellate court held that an attorney was not entitled to a common law charging lien because the attorney was discharged before the judgment was recovered; therefore, it was not a fund recovered by the attorney's aid. *Id.* at 309. If an attorney withdraws from the case, the attorney's only remedy is to commence a suit for quantum meruit recovery of fees against the former client. *Mack*, 418 S.E.2d at 688.

In the present case, Katten fails to satisfy the standard for an attorney's charging lien. As all the states seem to agree, a charging lien can only be obtained if the services that led to the judgment remain unpaid for. *See, e.g., Zutrau*, 2014 WL 7013578, at *3 ("[T]here is language in the Delaware charging lien cases that suggest that a charging lien may be limited to the amount recovered *because of* the attorney's assistance."); *Butterworth*, 1999 WL 549369, at *4 ("A charging lien is founded upon the equity of paying an attorney for fees and disbursements out of

the judgment obtained through the attorney's efforts. . . . This principle would be defeated by allowing attorneys to recover fees unrelated to the judgment obtained."). Here, Katten has already been paid for all of its services that helped Sutherland succeed in part on her fee petition filed by the Kusper Law Group. Because Katten has already been fully reimbursed for the work it did that helped lead to Sutherland's fee award, it has no equitable entitlement to an attorney's charging lien.

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