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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PATRICK DAUGHERTY, Plaintiff Below/Appellant, v. JAMES DONDERO, HUNTON ANDREWS KURTH LLP, MARC KATZ, MICHAEL HURST, SCOTT ELLINGTON, AND ISAAC LEVENTON, Defendants Below/Appellees,	:	No. 60, 2023 (Appeal from Court of Chancery- C.A. No. 2019-0956-MTZ)

APPELLEE MICHAEL HURST'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

On December 1, 2019, Appellant Patrick Daugherty, ("Daugherty"), filed a Verified Complaint against James Dondero, ("Dondero"), Highland ERA Management, LLC, ("HERA Management"), Highland Employee Retention Assets LLC, ("HERA"), Hunton Andrews Kurth LLP, Marc Katz, Michael Hurst, ("Mr. Hurst"), Scott Ellington, Thomas Surgent and Isaac Leventon, (collectively, "Defendants"), alleging fraud and conspiracy in failing to satisfy a $2.6 million judgment awarded to Daugherty against HERA in *Highland Capital Management, L.P. v. Daugherty*,[1] (the "Texas Action"). Daugherty claims Mr. Hurst participated in a fraudulent transfer of assets so that the award could not be paid to Daugherty.

The 2019 Verified Complaint, however, was Daugherty's second Delaware action mirroring his first Delaware action against the same parties. The first Delaware action (the "Delaware Related Action") was stayed in October 2019 on the third day of trial due to the bankruptcy of Defendant Highland. In the instant "second" action, Daugherty added as defendants those attorneys who represented Defendants HERA and HERA Management in the Texas Action.

On March 6, 2020, Mr. Hurst filed his Motion to Dismiss pursuant to Court of Chancery Rule 12(b)(6). On May 15, 2020, Daugherty filed an Amended

[1] 12-04005, District Court of Dallas County, 2014 Tex. 68th Judicial District.

Verified Complaint. And, on July 15, 2020, Mr. Hurst filed his Motion to Dismiss the Amended Verified Complaint which included seven arguments.

On March 10, 2021, after briefing was complete, the Court of Chancery also stayed this second action pending confirmation of a settlement for Daugherty in the first action from Defendant Highland's bankruptcy.

In December 2021, a bankruptcy settlement was reached in the amount of $12,750,000 that included the claims in the first action. And, yet, Daugherty did not withdraw his claims in the second action.

In May 2022, the Court of Chancery requested supplemental briefing on two arguments only: claim-splitting and the Texas Attorney Immunity Doctrine. Supplemental briefing was completed, and oral argument on these two issues was held on October 6, 2022.

On January 27, 2023, the Court of Chancery in a letter decision granted dismissal of the action based on claim-splitting and denied Daugherty's request to consolidate the first and second Delaware actions.

Daugherty appealed the letter decision and filed his Opening Brief on April 6, 2023.

This is Mr. Hurst's Answering Brief in Support of the Court of Chancery's order of dismissal.

SUMMARY OF ARGUMENT

1. *Appellant's Contention*

Denied. The Court of Chancery did not err in granting Mr. Hurst's Motion to Dismiss based on claim-splitting because the claims were impermissibly split.

2. *Alternative Ground for Affirmance – The Texas Attorney Immunity Doctrine*

Daugherty sued Mr. Hurst, the attorney for the parties adverse to Daugherty in the Texas Action, for fraud. Daugherty bases his claims on testimony elicited by Mr. Hurst from a trial witness and Mr. Hurst's closing argument summarizing that testimony at a trial that took place in Texas in 2014. The Texas Attorney Immunity doctrine protects a practitioner from all claims brough by opposing parties if the attorney's acts are related to representation of his clients.

3. *Alternative Grounds for Affirmance – Failure as a Matter of Law*

Furthermore, the lack of any specific allegations that Mr. Hurst made a fraudulent statement or served as either transferor or transferee of funds shows that Daugherty's fraud claims fail as a matter of law.

STATEMENT OF FACTS

Daugherty resides in Dallas, Texas, and was a partner of non-party Highland Capital Management L.P., ("Highland"), from 1998 to 2011 when he resigned.[2]

Highland, a multi-billion dollar global alternative investment platform, is a Delaware limited partnership with its principal place of business in Dallas, Texas.[3] Dondero co-founded Highland in 1993, served as its president, and had a controlling interest in Highland.[4] At the time the dispute arose, Dondero was also the president of HERA Management, a Delaware LLC, and manager of HERA, also a Delaware LLC.[5]

Marc Katz and Mr. Hurst are both Texas lawyers who represented Highland and HERA (respectively) in the Texas Action.

The allegations made against Mr. Hurst relate to his January 2014 advocacy in the Texas Action during closing arguments, his direct examination of Dondero, and in his appellate brief.[6]

The backdrop against which these allegations arose emanated from actions taken following the financial crisis in 2009 when Highland was performing poorly

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[2] A0608.
[3] A0608
[4] A0608.
[5] A0608-09.
[6] A0615, A0626-27, A0630-31.

and losing employees.[7] Highland created HERA, a Delaware LLC, to hold illiquid assets distributed by Highland for the purpose of distributing "equity-like awards" to Highland employees as an incentive to prevent resignations.[8] Daugherty was a director of HERA at its start and was awarded with equity-like membership units, and his "ownership percentage increased as other employees resigned" culminating in 1,909.69 vested Series A preferred units, an approximate 19% share at the time of his resignation from Highland on September 28, 2011.[9]

On February 16, 2012, the HERA directors voted to remove Daugherty as director, and the Board then executed an amendment to the HERA operating agreement, (the "Amendment"), drafted by Defendant Thomas Surgent which added Article 12—a litigation safety that (1) suspended distributions to any member who makes a claim against HERA or Highland until the end of such litigation, and (2) deducted the costs of that litigation or resulting diminution in value of the HERA units from the member's distribution.[10]

On April 11, 2012, Highland and HERA initiated the Texas Action suing Daugherty for breach of his employment agreement and fiduciary and confidentiality obligations while Daugherty then counterclaimed and added third-

[7] A0610.
[8] A0610-11.
[9] A0611.
[10] A0612.

party claims against HERA and certain of its former board members. According to Daugherty, during the Texas Action, Dondero, allegedly relying on his in-house counsel and their "plethora of external legal counsel," purchased the HERA units held by all other member-employees leaving only Daugherty as claimant to its assets.[11] Daugherty alleges that later Dondero would take the position that the value of Daugherty's units was exceeded by the costs of litigation and diminution of value to HERA as a result of Daugherty's counterclaims.[12] Daugherty claims that this language tracks the language of the Amendment which authorized withholding funds from a litigating member, and, thus was the first part of the alleged fraud.[13]

During the Texas Action, Daugherty alleges that it was represented "more than a dozen times" that the Amendment was not employed even though Daugherty claims that the Amendment was used against him.[14] More specifically, in the Texas Action, Daugherty claimed the Amendment would operate effectively to divest him of his HERA units.[15] Daugherty alleges that Mr. Hurst, however,

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[11] A0614-15.
[12] A0615.
[13] A0614-15.
[14] A0614-15.
[15] *Id*.

made clear in his closing statement that Daugherty still owned the units and that divestment had not occurred.[16]

Daugherty further claims that Dondero, allegedly relying on in-house and external counsel whose names are not specified, collaborated with HERA to transfer HERA's management powers to HERA Management in order for Dondero to have sole authority to act on behalf of HERA.[17] Thus, the second part of the alleged fraud occurred as Daugherty was the only remaining unit holder of HERA.[18] Daugherty further claims that Dondero, again allegedly relying on unspecified in-house and external counsel, transferred all of HERA's assets to Highland which Dondero also controlled.[19]

Plaintiff alleges that another amendment was executed eliminating the rights of the HERA unit holders and an escrow with interest by instituting an arbitrary process by which Highland could cancel the value of a member's interests by fiat.[20] These allegations are irrelevant because as Daugherty avers on February 1, 2013, Dondero executed an expense allocation agreement permitting Highland's legal expenses to be allocated to HERA for the benefit of Defendants.[21] Daugherty

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[16] A0614-15.
[17] A0616.
[18] *Id*.
[19] A0616-17.
[20] A0618.
[21] A0621.

alleges that this allocation was used to apply Highland expenses to HERA thereby "fraudulently funnel[ing] assets and benefits to Dondero, Andrews Kurth, Katz, and Hurst" without any explanation as to how Mr. Hurst received any of these assets and benefits.[22]

Daugherty further alleges that on April 30, 2013, Dondero, allegedly relying on advice of Delaware counsel, executed an assignment declaring that Highland was the sole interest holder of HERA permitting Highland to transfer HERA's assets to Highland.[23] Daugherty contended further that in December 2013, Dondero formed an escrow for certain HERA assets representative of Daugherty's stake, which were valued at about $3.1 million.[24] The escrow agreement provided that, in the event Daugherty prevailed in the Texas Action, upon certain conditions, assets in the amount of the judgment would be transferred to HERA.[25] Mr. Hurst allegedly "signed off on" the operative provision of the Escrow Agreement.[26]

In the Texas Action, Mr. Hurst's closing statement included reference to Dondero's testimony that Daugherty, if he prevailed, would get his interest which was being held in an escrow account.[27] Defendant Surgent testified that the

[22] A0622.
[23] A0622.
[24] A0622-23.
[25] A0623-24.
[26] A0624.
[27] A0626-27.

Amendment was not used.[28] Daugherty contends that Mr. Hurst also argued on summary judgment that the HERA Board had not voted to suspend any escrow distributions and the Amendment was not used.[29] Yet, Daugherty claims that "Defendants" said just the opposite in the Delaware Related Matter without specifying who.[30] Mr. Hurst who was trial attorney in the Texas action was not involved in the Delaware Related Matter,[31] and no facts are alleged regarding any statements originating from Mr. Hurst.

The jury in the Texas Action found *inter alia* that HERA breached an implied covenant of good faith and fair dealing owed to Daugherty in adopting the Amendment and awarded damages to Daugherty in the amount of $2.6 million.[32] The jury also found that Daugherty breached contractual and fiduciary duties to Highland but awarded no damages, and yet awarded $2.8 million in attorneys' fees to Highland for having proven Daugherty's breaches.[33] Both sides appealed the various verdicts with Mr. Hurst representing HERA's appeal of the $2.6 million award in favor of Daugherty. Daugherty claims that Mr. Hurst wrote in HERA's brief that Daugherty's assets were still in escrow.[34] The accuracy of Mr. Hurst's

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[28] A0627-28.
[29] *Id*.
[30] A0628.
[31] A0609.
[32] A0628.
[33] A0629.
[34] A0630-31.

writing is borne out by Daugherty's concession that the assets were not removed from escrow until December 2016.[35] Still, Daugherty made the conclusory allegation that the statements in Mr. Hurst's brief were false and part of "the strategy to mislead … that all the defendants had agreed upon and cooperated to effect . . . ."[36] Nonetheless, there are no factual averments supporting the existence of any agreement to mislead, and the arguments in Mr. Hurst's brief that were supported by trial testimony were just that—arguments—not Mr. Hurst's own statements.

On December 1, 2016, Daugherty's judgment for $2.6 million became final.[37] On December 2, 2016, the escrow agent resigned, and Highland directed the agent to return the assets to it, which it did on December 5.[38] Daugherty claims that Highland encouraged the escrow agent to resign and terminate the escrow, and assumes that all of Highland's counsel participated in "this part of the fraudulent scheme"[39] without providing any particular facts as to how counsel was involved or what counsel did. Since HERA no longer had the assets and claimed insolvency, Daugherty was unable to collect the judgment.[40]

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[35] A0633.
[36] A0630-31.
[37] A0632.
[38] A0633.
[39] A0633-34.
[40] A0634.

Daugherty further contends that Dondero used similar allegedly fraudulent schemes to avoid paying other judgement creditors.[41] None of these contentions discuss Mr. Hurst. In addition, Daugherty alleges that Highland's bankruptcy process exposed evidence of misrepresentations, but at the same time states that Hurst did not participate in these alleged misrepresentations.[42] Daugherty "has no specific knowledge of [Hurst's] involvement."[43]

Other facts specifically relevant to a particular argument are set forth in that argument's section.

[41] A0638, A0640-42.
[42] A0638.
[43] A0638-39, n. 4.

ARGUMENT

I. Claim-Splitting is Impermissible When the Plaintiff Had Sufficient Opportunity to Bring the Claims in the Original Action.

A. Question Presented

Did the Court of Chancery err in dismissing the action on claim-splitting grounds when Plaintiff had the opportunity to bring the claims in the original action?[44]

B. Standard and Scope of Review

A trial court's dismissal of claims based on claim-splitting is reviewed for abuse of discretion.[45]

C. Merits of Argument

While res judicata precludes the re-litigation of factual and legal issues previously decided in an earlier lawsuit, the rule against claim splitting eliminates the contemporaneous litigation of the same factual or legal issues in different matters.[46] The rule was founded on two key principles: (1) that no person should be unnecessarily harassed with a multiplicity of suits; and (2) to prevent a litigant from getting two bites at the apple.[47] Therefore, where a Plaintiff has had a full,

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[44] Preserved at B0696, B0708, B1030.
[45] *See Schneider v. United States*, 301 F. App'x 187, 190 (3d Cir. 2008).
[46] *J.L. v. Barnes,* 33 A.3d 902, 918 (Del. Super. 2011).
[47] *Goureau v. Lemonis,* 2021 Del. Ch. LEXIS 59, at *21-22 (Del. Ch. Mar. 30, 2021) (discussing *J.L. v. Barnes,* 33 A.3d at 918).

free and untrammeled opportunity to present his facts, but has failed to assert claims which should have be asserted, he is barred from bringing those omitted claims in a subsequent action.[48] Simply put, the question is whether the Plaintiff was able to present the claim, in its entirety, in the prior forum.[49] It is fairer to require Plaintiff to present, *in one action,* all of his theories of recovery relating to a transaction, and all of the evidence relating to those theories, than to permit him to prosecute overlapping actions in different courts at different times.[50]

Delaware applies the transactional approach wherein a second lawsuit is precluded if it arises from the same transaction as a previous adjudication.[51] Two matters are from the same transaction if they both come from a common nucleus of fact.[52] If the Plaintiff knows or could have known those common facts at the time of the first action, then the claim is barred in the second.[53] The burden is on the Plaintiff to show that he could not have raised his new claims in the first proceeding.[54]

Here, Appellant had a full opportunity to present his claims but through his own negligence failed to further investigate the possibility of a claim against the

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[48] *Id.* (discussing *Mells v. Billops,* 482 A.2d 759, 761 (Del. Super. 1984)).
[49] *Maldonado v. Flynn,* 417 A.2d 387, 383 (Del. Ch. 1980).
[50] *Id.* at 382.
[51] *LaPoint v. AmerisourceBergen Corp.,* 970 A.2d 185, 193 (Del. 2009).
[52] *Id.* at 193.
[53] *Id.*
[54] *Maldonado*, 417 A.2d at 383-84.

new defendants in this action, Hunton Andrews Kurth LLP, Marc Katz, Michael Hurst, Scott Ellington, and Isaac Leventon ("Defendants"). It is clear that these matters are both under a common nucleus of operative fact—both matters involve the same claims with the new defendants being included for their alleged involvement in the same transactions causing the Delaware Related Action. Appellant was aware of the common facts of this matter at the time of filing as they involve the same incidents and parties. As such, Daugherty's claim is barred.

Appellant is unable to show that he could not have raised his new claims in the first proceeding. Appellant claims that the new matter is necessary because Defendants fraudulently concealed evidence that counsel was involved in the transactions making up the original matter, which he claims was only revealed during Dondero's testimony during trial.[55] The record bears out that this is not the case.

Appellant was on notice of possible involvement of Defendants in the Delaware-Related Action. The Defendants plead an affirmative defense that they "did not act with the necessary knowledge, intent, or scienter, and instead acted in good faith and with due care at all times."[56] On January 9, 2019, Defendants responded to Appellant's interrogatory requesting the basis for their defense by

[55] *Id.*
[56] A0247.

stating that their counsel had knowledge concerning the defense.[57] Appellant did not file a motion to compel further response.[58] Appellant does not explain his lack of investigation of this point but instead argues that he "pursued all areas of discovery with vigor. . . ."[59] On March 22, 2019, Appellant served a subpoena on Andrews Kurth LLP requesting documents relating to the escrow but did not file a motion to compel.[60]

At a hearing on May 24, 2019, Appellant identified his concerns with Defendants' privilege log but did not seek relief on any entry on the basis of the at-issue exception.[61] Appellant claims he did not pursue it because Dondero did not blame his lawyers until trial.[62] This is not accurate. Dondero's August 6, 2019, deposition testimony conveyed that he relied on the advice of counsel several times on various matters.[63]

Pretrial briefing also included references to the advice of counsel defense regarding the escrow.[64] Also, Appellant amended his Complaint in the Delaware

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[57] B0136-137.
[58] *See* Appellant's Opening Brief, Ex. A, at 10. (Hereinafter, OB).
[59] *See* OB, at 22.
[60] *See* OB, Ex. A, at 10.
[61] *Id.*
[62] *See* OB, at 22, fn. 3.
[63] B0218, 48:16; B0219, 52:22; B0220, 54:11.
[64] B0264; B0273-274; B0280-281.

Related Action twice and specifically noted that he did not contemplate any amendment to his pleadings.[65]

A review of the timeline above shows that Appellant was aware of the possibility of a reliance of counsel defense and did not further investigate. While Appellant claims that he pursued all areas of discovery "with vigor," the Court properly identifies key moments throughout the entire litigation where Appellant was alerted to the defense and did not investigate. After each moment, Appellant could have issued discovery or filed motions to identify these issues. Instead, Appellant continued to focus on claims in his Complaint and only introduced this second action when the first action was stayed by the bankruptcy.

Permitting Appellant's second action to continue defies the second principle of the claim-splitting doctrine by allowing Appellant to relitigate the same claims with new defendants and get a second opportunity at recovery with the unfair advantage of already litigation the case.

Appellant's argument that Defendants should have produced alleged additional information is directly at odds with the burden of proof for fraud.[66] The *Plaintiff* has the burden to prove the merits of the case.[67] While Appellant argues

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[65] A0274 ¶9, ¶14; A0295 ¶115.
[66] *See* OB, at 22.
[67] *Wilson v. W.E. Cleaver & Sons,* 1998 LEXIS 137, at *5 (Del. Super. May 4, 1998) ("The plaintiff has the burden of proof [in fraud actions]").

that Defendants withheld evidence during the Delaware Related Action, the record does this contention.[68] As previously stated, there were several key opportunities for Appellant to make the proper requests to obtain such alleged evidence.[69] Since Appellant ignored these prior opportunities, he cannot now demand the introduction of new defendants.

Appellant argues that the Court should apply an exception to the claim splitting doctrine that forecloses dismissal where a Plaintiff could not have discovered a cause of action due to Defendant's fraud or concealment.[70] However, this exception has not been adopted in Delaware at this time. Further, as discussed above, there was no concealment.

Appellant's discussion of the lack of mirrored Defendants does not sufficiently protect him from dismissal.[71] In *J.L. v. Barnes,* Plaintiff initially filed a claim in the United States District Court for the District of Delaware against several entities associated with the School District in which her incident arose, alleging that each defendant played a role in the negligent supervision of another student who assaulted her.[72] The Court dismissed the matter.[73] Plaintiff then filed a

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[68] *See* OB, at 21.
[69] *See* OB, Ex. A at 9-10.
[70] *See* OB, at 7-10 (*citing Havercombe v. Dep't of Educ. Of the Commonwealth of P.R.,* 250 F.3d 1, 8, n.9 (1st Cir. 2001)).
[71] *See* OB, at 19.
[72] *J.L.,* 33 A.3d at 909.
[73] *Id.*

second action in the Delaware Superior Court against the same defendants along with several new defendants for negligence that led to the incident in the initial action.[74] The Court compared this matter to *Winner Acceptance Corp. v. Return on Capital Corp.* In *Winner,* the Court determined that separate causes of actions could proceed without claim splitting violations because the second action involved separate acts.[75] However, the Court in *Winner* based their decision on the fact that the claims involved in both actions did not substantially overlap.[76] *J.L.*, contrarily, was virtually identical except for the addition of defendants. The court found that this was an insufficient distinction as to justify a new action.

This matter is identical to *J.L.* in this regard. The Defendants in this action include one Defendant who was dismissed from the Delaware-Related Action, and additional Defendants for the same actions argued in the Delaware-Related Action. Both claims involve the same series of transactions, which were the subject of the original Texas litigation and the Delaware Related Action. Appellant seeks to litigate the same claim against different Defendants instead of new claims against new defendants in a similar action. As such, the lack of duplicated defendants does not save Appellant's claim.

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[74] *Id.*
[75] *Id.* (*discussing Winner Acceptance Corp. v. Return on Capital Corp.,* 2008 Del. Ch. LEXIS 196 (Del. Ch. Dec. 23, 2008)).
[76] *Winner,* at 18.

Appellant's claim that there is no risk of multiple judgments is also misguided.[77] Appellant argues that double recovery is not sought because recovery from the bankruptcy settlement that is ruled to be attributable to claims for which current defendants bear joint and several liability would reduce any damages against the current defendants.[78] Such a task would be difficult.

Highland is the main entity at which Defendant Dondero was employed and of which all counsel Defendants were providing advice to in the underlying Texas Action. Highland filed a Motion for Entry of an Order Approving Settlement with Appellant on December 8, 2021, settling the claims in the Delaware-Related Action.[79] Appellant received $12,750,000 for the same damages also claimed in the second action.[80] Appellant argues that he sought $8,573,934.69 in damages separate from the claims he sought against Highland.[81] However, the settlement was not defined as money for only some of the claims as Appellant argues.[82]

An analysis of the Original Complaint and Amended Complaint supports an inference that a settlement with Highland would also encompass claims made against the new Defendants. The key, and arguably only, difference between the

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[77] *See* OB, at 19.
[78] *See* OB, at 19-20.
[79] *See* OB, at 14.
[80] *See* OB, at 14-15.
[81] *Id.*
[82] *Id.*

two actions is the inclusion of claims against counsel who were working *for* Highland or their Board. To suggest that a settlement with Highland, the entity which employed the services of all new Defendants would be an entirely separate judgment on an independent basis conflates the issues on which the matter has already been litigated. It cannot be argued that the new Defendants guided the actions of Highland to the extent that their representation caused an independent injury requiring a separate judgment.

The claim-splitting doctrine is meant to prevent double recoveries for the same injury.[83] The Uniform Contribution Among Tort-Feasor law specifically states that a Defendant who seeks apportionment of fault against potential tortfeasors *not parties to the action* must raise the claim for contribution in the *pending action* or lose it.[84] A Plaintiff may not seek two awards of compensatory and/or exemplary damages relating to a single transaction and a single injury in two different actions.[85] Damages resulting from a single tortious act typically must be assessed in one proceeding, not separate suits.[86]

Here, Highland has already settled the claims of the Delaware Related Action. Allowing Appellant to bring essentially the same suit with new Defendants

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[83] *J.L.,* 33 A.3d at 921.
[84] *Id.,* at 919 (discussing 10 *Del. C*. § 6306).
[85] *Id.*
[86] *Id.*

when the settlement has been paid would create confusion in the allocation of damages. This is directly contrary to the Uniform Contribution Among Tort-Feasor law and would provide double recovery.

There is an exception to the doctrine: Where it appears that a Plaintiff could not, for jurisdictional reasons, have presented his claim in its entirety in the parallel adjudication, the rule against claim splitting will not be applied.[87] Appellant argues that the fraud exception and the bankruptcy stay trigger this exception. However, these arguments are insufficient. Plaintiff received repeated notice of the possibility of a reliance of counsel defense and refused to investigate fully before the close of the discovery period. So, regardless of the stay, there was no barrier preventing Appellant from fully litigating this in the Delaware Related Action. As such, the dismissal should be affirmed.

In addition, consolidation is also inappropriate. Under Chancery Court Rule 42(a), when actions involving a common question of law or fact are pending before the Court, it may order the matters be consolidated.[88] Consolidation is denied, however, when it provides no judicial economy and impedes the efficient processing of the cases.[89]

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[87] *Maldonado,* 417 A.2d at 383-384.
[88] Del. Ch. Ct. R. 42(a).
[89] *See e.g., Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 LEXIS 22, at *56 n.76 (Del. Ch. Jan. 27, 2010).

Here, Vice Chancellor Zurn stated, "After more than two years of hard-fought litigation involving extensive motion practice, [Plaintiff] is effectively requesting that I permit him to amend his complaint on the third day of trial to add, among other things, five new defendants to the case, based on a legal theory and discovery position he was on notice of during discovery."[90]

Accordingly, since Appellants had notice of all claims during the Delaware Related Action and consolidation offers no judicial economy, affirmance is appropriate.

[90] *See* OB, Ex. A at 15.

II. Under the Texas Attorney Immunity Doctrine, Claims against a Lawyer by the Opposing Party are Barred When the Alleged Acts Consist of the Provision of Legal Services.

A. Question Presented

Under Texas law, is a claim against a lawyer by the opposing party barred when the alleged acts consist of representing his clients in litigation?[91]

B. Standard and Scope of Review

The Delaware Supreme Court reviews the granting of a motion to dismiss *de novo*.[92] A motion to dismiss under Rule 12(b)(6) is granted when it appears with reasonable certainty that the plaintiff cannot not prevail on any set of circumstances inferred from the factual allegations in the complaint.[93]

C. Merits of Argument

Under Texas law and policy, lawyers are protected by the attorney immunity doctrine—a complete bar to all lawsuits by litigants against opposing counsel for alleged wrongful acts during representation of a client.[94] The attorney immunity

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[91] Preserved at B0674.
[92] *Chrin v. Ibrix Inc.*, 70 A.3d 205 (Del. 2012).
[93] *Id*.
[94] *Haynes and Boone, LLP v. NFTD, LLC*, 631 S.W.3d 65, at 76-80 (Tex. 2021); *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015); *Highland Capital Management, LP v. Looper Reed & McGraw, P.C.*, 2016 WL 164528, at *1-2 (Tex. Ct. App. Jan. 14, 2016) (finding that immunity extends even to allegedly criminal and tortious acts).

doctrine encompasses alleged fraudulent acts, knowing participation in fraud, and criminal conduct.[95]

One of the reasons for Immunity is to protect zealous advocacy—"[i]f an attorney could be held liable to an opposing party for statements made or actions taken in the course of representing his client, he would be forced constantly to balance his own personal exposure against his client's best interest."[96]

To maintain Immunity, however, a lawyer's act must be one that "involve[s] the uniquely lawyerly capacity of one who possesses the office, professional training, skill, and authority of an attorney."[97] The line is drawn where criminal or fraudulent activity is outside the scope of the attorney's legal representation of his client.[98] For example, neither publicity statements made by a lawyer to the press or on social media nor participation in fraudulent business schemes with a client receive the protection of Immunity.[99]

Here, the allegations leveled against Mr. Hurst emanate from Daugherty who was the opposing party in the Texas Action. Since Mr. Hurst was opposing counsel to Daugherty, Mr. Hurst is protected by the attorney immunity doctrine

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[95] *Haynes and Boone, LLP*, 631 S.W.3d at 77; *Cantey Hanger, LLP*, 467 S.W.3d at 483-4.
[96] *Olmos v. Giles*, 2022 LEXIS 77134, at *5 (N.D. Tex. Apr. 28, 2022).
[97] *Haynes*., at 77-78.
[98] *Id*., at 77.
[99] *Landry's, Inc. v. Animal Legal Def. Fund*, 631 S.W.3d 40, 51-52 (Tex. 2021); *Cantey Hanger, LLP*, 467 S.W.3d at *482.

under Texas law. The fact that Daugherty alleges fraudulent acts does not remove this cloak of protection from Mr. Hurst as the doctrine applies to all conduct within the course of representing a client.[100]

The acts in the underlying Texas Action alleged against Mr. Hurst consist of repeating false testimony by witnesses in his summation during the underlying trial and accepting payment of his legal fees in the underlying matter.[101] Mr. Hurst was, therefore, advocating for his clients. Repeating the testimony of witnesses in summation squarely falls into the category of zealous advocacy that the immunity doctrine protects. These acts all are part of Mr. Hurst's representation of HERA in the Texas Action—not one allegation involves an act outside of the scope of said representation. So long as the acts of delivering summation and questioning a witness were part of Mr. Hurst's representation at trial, the Court need go no further in its analysis. The focus is the type of conduct not the nature of the conduct. As such, the alleged fraudulent acts are within the protection of the Immunity doctrine.

In fact, reversing the below decision would set a precedent that whenever an opposing party does not believe or disagrees with arguments made in summation,

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[100] *Cantey Hanger, LLP,* 467 S.W.3d at 483-4.
[101] A0621, A0626-27.

the opposing party has a valid claim against opposing counsel. This cannot be allowed.

Furthermore, Mr. Hurst did not participate in the Delaware Related Action, so, he never represented HERA and Highland without the cloak of protection particularly afforded him as a Texas lawyer. It hardly seems appropriate that this protection could be eviscerated by Daugherty simply by suing Mr. Hurst in a Delaware Court. Since Mr. Hurst was representing his clients in the Texas Action when he allegedly committed fraudulent acts, Mr. Hurst is securely under the cloak of the Texas Attorney Immunity Doctrine.

The Court has every reason to apply Texas law to this issue. "When conducting a choice of law analysis, Delaware courts follow the most significant relationship test in the Restatement (Second) of Conflict of Laws.[102] Delaware courts have found that Delaware does not have the most significant relationship where the only connection to Delaware is the fact that parties to the action are incorporated in Delaware.[103] To determine the most significant relationship in an interstate system, then, Section 6 of the Restatement provides *inter alia* that the following relevant factors be considered:

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[102] *Sinnott v. Thompson*, 32 A.3d 351, 354 (Del. 2011) (quoting Restatement 2d of Conflict of Laws, § 145 (2nd 1988)).
[103] *See e.g., Pfizer Inc. v. Advanced Monobloc Corp.*, 1998 WL 110129, at *5 (Del. Super. Jan. 23, 1998); *Abrahamsen v. ConocoPhillips Co.*, 2014 WL 2884870, at *4 (Del. Super. May 30, 2014).

- the relevant policies of other interested states . . .; and
- the protection of justified expectations.[104]

In applying these factors, courts should consider:

(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.[105]

Here, since Mr. Hurst is a Texas lawyer litigating a Texas case in the State of Texas, there is no doubt that he had an expectation of being protected by Texas law. And, there can be little doubt that the interests of the State of Texas are relative to the instant dispute because the Texas' policy of protecting Texas trial attorneys litigating in Texas courts from liability to opposing parties is now under the microscope of an out-of-state court. So, while considering the above factors, it is crucial to keep in mind the Texas policy of having its attorneys blanketed with immunity along with the expectation of Mr. Hurst to litigate in Texas without the concern of a possible lawsuit by the opposing party.

The parties in the instant action are all Texans. Plaintiff resides in Texas,[106] the attorney Defendants are all Texas lawyers,[107] and Defendant Hunton Andrews

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[104] *Sinnott,* 32 A.3d at 354 (quoting Restatement 2d of Conflict of Laws).
[105] *Id*.
[106] A0608.
[107] A0609-10.

Kurth is a Texas law firm.[108] The underlying matter from which the instant allegations arose is a Texas lawsuit tried in a Texas court before a Texas judge and jury.[109] The alleged acts of Mr. Hurst occurred during a Texas jury trial in a Texas courtroom.[110] While the entity Defendants, HERA and Highland, are incorporated in Delaware,[111] none of the alleged acts of Mr. Hurst are connected to Delaware, and Mr. Hurst was not involved in the Related Delaware Action.

Since the only connection Delaware has, here, is the incorporation of the entity parties, Delaware law should not be applied to strip application of the Texas attorney immunity doctrine to Mr. Hurst. Accordingly, since Texas law provides Immunity to Mr. Hurst, dismissal should be affirmed.

Mr. Hurst also incorporates the choice of law arguments from the Katz Defendants' brief that Texas law should apply and immunize Mr. Hurst.

To the extent Texas law is not applied so as to immunize counsel from these claims, Mr. Hurst argues below that Daugherty has failed to state a claim under Delaware law.

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[108] A0609.
[109] A0605-07, A0613, 15.
[110] A0615, A0627-28.
[111] A0608.

III. A Claim for Fraudulent Transfer Does Not Survive Dismissal When Plaintiff Fails to Allege that Defendant was the Transferor or Transferee or that He Ever Had Control of the Subject Property.

A. Question Presented

Under Delaware law, does a claim for fraudulent transfer survive dismissal when no factual allegations state defendant was the transferor or transferee or had control of the subject property?[112]

B. Standard and Scope of Review

The Delaware Supreme Court reviews the granting of a motion to dismiss *de novo*.[113] A motion to dismiss under Rule 12(b)(6) is granted when it appears with reasonable certainty that the plaintiff cannot not prevail on any set of circumstances inferred from the factual allegations in the complaint.[114]

C. Merits of Argument

Under the Delaware Uniform Fraudulent Transfer Act,[115] a transfer is fraudulent "if the debtor made the transfer . . . [w]ith actual intent to hinder, delay or defraud any creditor . . . ."[116] "[T]he only proper defendants in a fraudulent transfer action under the . . . Act are the transferor or transferee of the assets at

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[112] Preserved at B0673.
[113] *Chrin v. Ibrix Inc.*, 70 A.3d 205 (Del. 2012).
[114] *Id*.
[115] 6 *Del. C*. § 1301-1311.
[116] 6 *Del. C*. § 1304(a)(1).

issue."[117] The Act "does not create a cause of action for aiding and abetting, or conspiring to commit, a fraudulent transfer."[118] A fraudulent transfer claim fails where it is asserted against a party that is not the transferor or transferee.[119] Moreover, no right to relief exists against an attorney "who has not acted in bad faith on account of any transfer", it being presumed that the attorney counseled in good faith as to said transfer.[120] Since Mr. Hurst was neither the transferor nor transferee of the HERA units, the fraudulent transfer claim against him cannot stand.

Furthermore, assuming that a lawyer is a fiduciary so as to support claims for breach of fiduciary duty and/or aiding and abetting, often referred to as conspiracy, is insufficient.[121] Cases evaluating attorney conduct in terms of breach of fiduciary duty generally involve an attorney acting in some capacity beyond the provision of legal services.[122] The mere existence of an attorney-client relationship

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[117] *Edgewater Growth Capital Partners, L.P. v. H.I.G. Capital, Inc.*, 2010 WL 720150, at *2 (Del. Ch. Mar. 3, 2010) (citing *Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 203 (Del. Ch. 2006), *aff'd sub nom. Trenwick Am. Litig. Tr. v. Billett*, 931 A.2d 438 (Del. 2007)).
[118] *Id*.
[119] *Quadrant Structured Products Co., Ltd.*, 102 A.3d at 203.
[120] 6 *Del. C*. § 1307.
[121] *Sokol Holdings, Inc. v. Dorsey & Whitney*, LLP, 2009 WL 2501542, at *4 (Del. Ch. Aug. 5, 2009).
[122] *Id*., at *3-4.

does not give rise to a fiduciary relationship absent property control that is the hallmark of a fiduciary relationship.[123]

Here, the involved "property" consists of the units of HERA and the funds in the escrow account. The alleged involvement of Mr. Hurst regarding the disposition of the HERA units is non-existent—his legal services did not involve the exercise of control over any HERA property. Daugherty claims Mr. Hurst received compensation for legal services provided to HERA. The Amended Complaint neither avers that any HERA units were transferred to Mr. Hurst or controlled by Mr. Hurst nor alleges that Mr. Hurst had control of any funds belonging to his clients whether in an escrow account or elsewhere. In fact, there are no allegations that arise out of anything other than legal services—most notably his advocacy in the Texas Action—which, per *Sokol*, does not form the basis for a fiduciary relationship between Mr. Hurst and his clients or Daugherty.[124]

Even taking Daugherty's allegations as true, Mr. Hurst is only alleged to have an attorney-client relationship with HERA and the two individual board members Daugherty sued. As such, he would have been permitted to advise HERA and its former board members as to the various actions available to them

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[123] *Id*.
[124] *Id*.

under a particular set of legal circumstances and could advise them as to the different levels of risk each action has.[125] Those clients, however, were not the parties with the authority to make decisions as to the transfer of the HERA assets.

Furthermore, it is presumed that Mr. Hurst counseled his client in good faith. Daugherty fails to overcome this presumption—nothing in the Amended Complaint discusses any act of Mr. Hurst that can be inferred by the Court as bad faith. And, while Daugherty contends that Mr. Hurst "signed off on" the escrow agreement upon its adoption in 2013, nothing is alleged regarding how that act is bad faith on the part of a corporate attorney.

Daugherty's best attempt to implicate Mr. Hurst in a conspiracy connected to the December 2016 transfer relates to Mr. Hurst's acceptance of compensation for legal services provided to HERA. At the same time, Daugherty supports Mr. Hurst's acceptance of such payment by listing Mr. Hurst's services—his trial performance, his questioning of witnesses, and his summation that reiterated trial testimony.[126] Mr. Hurst's performance of legal services as cited in the Amended

[125] *See Peterson v. Katten Muchin Rosenman LLP*, 792 F.3d 789, 791 (7th Cir. 2015).
[126] A0627-28.

Complaint make him a *bona fide* recipient of transferred funds for reasonable equivalent value and, as such, not subject to liability under Delaware statute.[127]

Therefore, since Mr. Hurst had no fiduciary duties, was neither the transferor nor the transferee of the HERA units, and was a *bona fide* recipient for value, the fraudulent transfer claim against him cannot stand.

Accordingly, dismissal should be affirmed.

[127] *Duffield Associates, Inc. v. Lockwood Bros., LLC*, 2017 WL 2954618, at *3 (Del. Ch. July 11, 2017); *see e.g. Magnum Steel & Trading, L.L.C. v. Roderick Linton Belfance, L.L.P.*, 41 N.E.3d 204, 207 (Ohio Ct. App. 2015) (finding that a transfer is deemed not fraudulent against a lawyer who accepted payment of legal fees in good faith for reasonably equivalent value of legal services provided to defendant in an underlying trial who had a judgment rendered against him where an issue of fact existed as to the whether the money to pay the lawyer came from an alternative source but were legitimately owed).

IV. A Claim of Conspiracy to Commit Fraud Fails When Only Conclusory Allegations are Plead and When No Alleged Facts Demonstrate Fraud or a Meeting of the Minds Between the Defendant and the Co-conspirator.

A. Question Presented

Under Delaware law, does a claim for conspiracy to commit fraud fail when only conclusory allegations are plead and when no alleged fact demonstrates fraud or shows a meeting of the minds between the defendant and the co-conspirator?[128]

B. Standard and Scope of Review

The Delaware Supreme Court reviews the granting of a motion to dismiss *de novo*.[129] A motion to dismiss under Rule 12(b)(6) is granted when it appears with reasonable certainty that the plaintiff cannot not prevail on any set of circumstances inferred from the factual allegations in the complaint.[130]

C. Merits of Argument

In order to allege a claim for civil conspiracy, a plaintiff must plead facts that show a confederation of two or more persons, an unlawful act in furtherance of the conspiracy, and causation of actual damages.[131] Civil conspiracy, standing alone, is not an independent cause of action. "There must be some underlying

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[128] Preserved at B0673.
[129] *Chrin v. Ibrix Inc.*, 70 A.3d 205 (Del. 2012).
[130] *Id*.
[131] *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1036 (Del. Ch. 2006).

actionable tort by each individual defendant in order to obtain recovery on a civil conspiracy theory."[132] "Negligence cannot be the basis for a conspiracy claim."[133] An allegation of conspiracy based on assumptions of conspiratorial conduct do not constitute a valid claim for civil conspiracy.[134]

"In order to state a claim for a civil conspiracy to defraud, a plaintiff must sufficiently allege the following elements: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as a proximate result thereof . . . ."[135] The complaint must allege facts, not legal conclusions, "which, if true, show the formation and operation of a conspiracy, the wrongful act or acts done pursuant thereto, and the damage resulting from such acts."[136] "[C]onspiracy to commit fraud must be pled with particularity, though knowledge may be averred generally."[137]

Moreover, where there are no specific factual allegations from which one could reasonably infer that an alleged co-conspirator either knew of any alleged

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[132] *Brooks-McCollum v. Shareef*, 2006 WL 3587246, at *3 (Del. Super. Nov. 1, 2006).
[133] *Anderson v. Airco, Inc.*, 2004 WL 2827887, at *3 (Del. Super. Nov. 30, 2004).
[134] *Shareef, at *3* (emphasis added).
[135] *Zirn v. VLI Corp.*, 1989 WL 79963, at *9 (Del. Ch. July 17, 1989).
[136] *Atlantis Plastics Corp. v. Sammons*, 558 A.2d 1062, 1066 (Del. Ch. 1989).
[137] Del. Ch. Ct. R. 9(b); *LVI Grp. Investments, LLC v. NCM Grp. Holdings, LLC*, 2018 WL 1559936, at *14 (Del. Ch. Mar. 28, 2018).

fraud or was in a position to know of it, a claim for conspiracy fails.[138] Simply alleging the position of the alleged fraudster and the amount involved is not sufficient to support a conspiracy claim.[139] Instead of conclusory statements, particularity in a fraud claim requires a plaintiff to allege "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby."[140]

Here, Daugherty generally alleges that Dondero relied on his counsel's advice in purchasing the HERA units from the holders,[141] executing the Amendment, and directing the return of monies in the escrow account. From this, Daugherty assumes that Dondero's counsel advised Dondero how to commit fraud.[142] Yet, Daugherty provides no actual statements by Mr. Hurst. Instead, Daugherty alleges that Mr. Hurst knowingly presented a false argument to the jury in the Texas Action when Mr. Hurst recited testimony in his summation that Daugherty's interest was kept in escrow and that the Amendment was never invoked by the Board. Daugherty, however, provides no factual allegations as to

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[138] *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 146–47 (Del. Ch. 2004).
[139] *See id*.
[140] *Autrey v. Chemtrust Indus. Corp.*, 362 F. Supp. 1085, 1092–93 (D. Del. 1973) (dismissing a fraud claim where only conclusory statements were alleged); *MHS Capital LLC v. Goggin*, 2018 WL 2149718, at *9 (Del. Ch. May 10, 2018).
[141] A0615.
[142] A0633-34.

how or why the argument was false, how Mr. Hurst allegedly conspired with any of the other Defendants, or how Mr. Hurst had knowledge that his argument, based on information from his client and other witnesses, was allegedly false. And, if the money was moved from the escrow account at a later time, the argument presented at trial was not shown to be false contemporaneously. Without a factual allegation as to how Mr. Hurst allegedly conspired or had a meeting of the minds with someone else, Daugherty fails to demonstrate a confederation of two or more persons. Daugherty is assuming conspiratorial conduct, which does not meet the mark for a *prima facie* case.[143]

More specifically, Daugherty asserts that Mr. Hurst told the jury, "[Y]ou heard Jim Dondero testify, [Daugherty] gets his interest which is currently escrowed . . . ."[144] Such a statement to the jury is not factual evidence that Mr. Hurst knowingly made a false statement in conspiracy with Dondero. It merely demonstrates that Mr. Hurst repeated Dondero's testimony as part of his summation. Repeating witness testimony during summation in no way demonstrates a false statement or confederation of a conspiracy but, instead, demonstrates a typical method of argument repeated every day in every courtroom across the country.

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[143] *Shareef*, 2006 WL 3587246, at *3.
[144] A0626-27.

Daugherty further claimed that Mr. Hurst stated during the Texas Action that the Amendment was never implemented.[145] To support this alleged false representation, Daugherty refers to the questioning of Defendant Surgent at trial during which Defendant Surgent was asked, "When was [the Amendment] used?" and Defendant Surgent responded, "Never."[146] If that statement were false, Mr. Hurst is not the one who said it. Again, the questioning of a witness is a typical part of a trial attorney's job, not an act showing collusion. Dondero's and Defendant Surgent's testimony can neither be transmogrified into false statements by Mr. Hurst nor used to say that Mr. Hurst made a false representation. The other witnesses' testimony also does not support the idea that Mr. Hurst was involved in a confederation of conspiracy as there is no allegation that the witnesses mentioned Mr. Hurst in their testimony. Daugherty's use of witness testimony as a way to darken Mr. Hurst's actions at trial is a glaring example of an attempt to use an assumption to frame a claim for conspiratorial conduct.

While Daugherty alleges the positions of Dondero and Mr. Hurst and the amount of the funds involved in the alleged fraud, nowhere does Daugherty aver false representations by Mr. Hurst or the time or location of such representations. In fact, the assets in escrow remained untouched during Mr. Hurst's advocacy as

[145] A0627-28.
[146] A0627.

they were not moved until December 2016.[147] Nowhere did Daugherty allege any particular facts regarding either acts or statements of Mr. Hurst or a meeting of the minds between Mr. Hurst and any other person.[148] In fact, Daugherty admitted that he "cannot rule out that [Mr.] Hurst was also involved in the Delaware trial strategy, but has no specific knowledge of such involvement."[149] Therefore, as in *Autrey*,[150] Daugherty, here, is presenting assumptions and conclusory statements as factual allegations, and, as such, his claim fails.

Accordingly, since assumptions do not support a conspiracy claim, dismissal should be affirmed.

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[147] A0633.
[148] *See Fortis Advisors LLC v. Dialog Semiconductor PLC*, 2015 WL 401371, at *8 (Del. Ch. Jan. 30, 2015) (finding that failure to particularize how, when, who, and to whom alleged statements were made other than to unnamed directors and officers is fatal to a claim for fraud).
[149] A06038-39, Fn. 4.
[150] 362 F. Supp. 1092-3.

V. A Claim for Civil Conspiracy Does Not Survive Dismissal When it is Based on an Underlying Claim of Unjust Enrichment.

A. Question Presented

Does a claim for civil conspiracy survive dismissal when it is based on an underlying claim of unjust enrichment?[151]

B. Standard and Scope of Review

The Delaware Supreme Court reviews the granting of a motion to dismiss *de novo*.[152]

C. Merits of Argument

Under Texas law, an underlying claim of unjust enrichment fails to support a conspiracy claim because unjust enrichment is not a claim in and of itself but, instead, a theory of recovery in an action for quasi-contract.[153] In fact, in Delaware, unjust enrichment does not survive as a standalone claim but is considered as part of damages.[154] Furthermore, a claim for civil conspiracy does not stand on a claim of breach of contract[155] (implicated by the escrow agreement).

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[151] Preserved at B0673.
[152] *Chrin v. Ibrix Inc.*, 70 A.3d 205 (Del. 2012).
[153] *Mowbray*, 76 S.W.3d at 679.
[154] *Incyte Corp. v. Flexus Biosciences*, Inc., 2017 WL 7803923, at *3 (Del. Super. Nov. 1, 2017).
[155] *See Kurodo*, 971 A.2d at 892.

Unjust enrichment requires "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification and (5) the absence of a remedy provided by law."[156]

Here, Daugherty brings a claim for civil conspiracy based on unjust enrichment—a claim that cannot legally support conspiracy as it does not stand alone as a claim. A conspiracy claim must be supported by an actionable tort.[157] A claim for breach of contract cannot support conspiracy. So, it is not too long of a reach to conclude that the quasi-contract theory of unjust enrichment cannot support civil conspiracy as it does not stand alone and is not an actionable tort.

Furthermore, Daugherty has failed to allege facts that implicate Mr. Hurst in an unjust enrichment—he shows no benefit conferred to Mr. Hurst to Daugherty's detriment in Mr. Hurst's acceptance of fees for legal services. Instead, Daugherty alleges facts that support the justification for Mr. Hurst to accept fees—Mr. Hurst's performance at trial, his questioning of witnesses, and his summation that reiterated witness testimony. So, Daugherty has not been unjustly enriched. Moreover, such performance of legal services and receipt of fees makes Mr. Hurst

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[156] *Jackson Nat. Life Ins. Co. v. Kennedy*, 741 A.2d 377, 393 (Del. Ch. 1999).
[157] *Shareef*, 2006 WL 3587246, at *3.

a *bona fide* recipient of transferred funds for reasonably equivalent value and, as such, not subject to liability under the Delaware UFTA statute.[158]

Since Daugherty fails to establish a valid underlying claim of unjust enrichment, the action cannot be resurrected.

[158] *Duffield Associates, Inc.*, 2017 WL 2954618, at *3; *see e.g. Magnum Steel & Trading, L.L.C.*, 41 N.E.3d at 207 (finding that a transfer is deemed not fraudulent against a lawyer who accepted payment of legal fees in good faith for reasonably equivalent value of legal services provided to defendant in an underlying trial who had a judgment rendered against him where an issue of fact existed as to the whether the money to pay the lawyer came from an alternative source but were legitimately owed).

VI. A Claim for Aiding and Abetting the Breach of Fiduciary Duty Fails When No Alleged Facts Demonstrate Knowledge of or Participation in Wrongful Conduct by Defendant.

A. Question Presented

Does a claim for aiding and abetting the breach of fiduciary duty fail when no alleged facts demonstrate knowledge of or participation in wrongful conduct?[159]

B. Standard and Scope of Review

The Delaware Supreme Court reviews the granting of a motion to dismiss *de novo*.[160]

C. Merits of Argument

"Claims for civil conspiracy are sometimes called aiding and abetting. The basis of such a claim, however, regardless of how it is captioned, is the idea that a third party who knowingly participates in the breach of a fiduciary's duty becomes liable to the beneficiaries of the trust relationship."[161]

A valid claim for aiding and abetting the breach of a fiduciary duty must contain the following four elements: (1) the existence of a fiduciary relationship, (2) the breach of a fiduciary duty, (3) knowing participation in that act by a defendant who is not a fiduciary, and (4) damages proximately caused by the

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[159] Preserved at B0673.
[160] *Chrin v. Ibrix Inc.*, 70 A.3d 205 (Del. 2012).
[161] *Triton Const. Co., Inc. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *17 (Del. Ch. May 18, 2009), *aff'd*, 988 A.2d 938 (Del. 2010).

breach.[162] "Knowing participation in a board's fiduciary breach requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach."[163] The plaintiff must allege facts from which such knowing participation can reasonably be inferred.[164] The Court will not infer knowledge of a breach of fiduciary duty unless the conduct comprising the alleged breach is "inherently wrongful."[165] When a plaintiff fails to allege any facts from which it may be inferred that the alleged conduct was wrongful, the claim for aiding and abetting a breach of fiduciary duty fails.[166]

Furthermore, to allege the element of proximate cause effectively, a plaintiff must assert that his damages resulted from the combined action of the fiduciary and the non-fiduciary.[167] Plaintiff must contend that but for the complicity of the fiduciary and the non-fiduciary in a wrongful act, it would not have suffered

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[162] *In re Transkaryotic Therapies, Inc.*, Del. Ch., 954 A.2d 346, 370 (2008), *as revised* (June 24, 2008); *Weinberger v. Rio Grande Indus., Inc.*, Del. Ch., 519 A.2d 116, 131 (1986).
[163] *Malpiede*, 780 A.2d at 1097.
[164] *In re Shoe-Town, Inc. Stockholders Litig.*, 1990 WL 13475, *418 (Del. Ch. Feb. 12, 1990).
[165] *Lewis v. Leaseway Transp. Corp.*, 1990 WL 67383 (Del. Ch. May 16, 1990).
[166] *Lewis,* 1990 WL 67383, at *828.
[167] *In re Transkaryotic Therapies, Inc.*, 954 A.2d at 373.

loss.[168] There must be an understanding between the fiduciary and the non-fiduciary with respect to their plot to breach fiduciary duties.[169]

Here, the factual allegations do not support the contention that Mr. Hurst was a knowing participant in any breach of fiduciary duty. The allegations are limited to Mr. Hurst's brief and his actions at trial—the questioning of witnesses and his summation. The argument Mr. Hurst presented at trial and in his brief came from the testimony of witnesses; they were not his own statements. Daugherty did not allege any conduct by Mr. Hurst that demonstrated knowledge that the testimony was allegedly fraudulent. Thus, Daugherty fails to sufficiently allege actual knowledge, participation, or complicity by Mr. Hurst.

Moreover, Daugherty has failed to allege any wrongful conduct by Mr. Hurst. Daugherty alleges that Mr. Hurst gave wrongful advice to his client in order to defraud Daugherty but does not allege what Mr. Hurst said to his client.[170] Daugherty alleges that Mr. Hurst continued a strategy to mislead Daugherty, but does not state how Mr. Hurst did so or provide any connection between the alleged strategy and Mr. Hurst.[171] And, finally, Daugherty alleges that Mr. Hurst effected

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[168] *Id*.
[169] *Carlton Investments v. TLC Beatrice Int'l Holdings, Inc.*, 1995 WL 694397, at *15 n. 11 (Del. Ch. Nov. 21, 1995).
[170] A0616-17.
[171] A0630-31.

a transfer of assets without stating how Mr. Hurst did so.[172] Such general statements made in an effort to lasso Mr. Hurst into the so-called scheme do not amount to factual allegations of wrongful conduct by Mr. Hurst. Without allegations of wrongful conduct, the claim does not stand.

Accordingly, there is no support for reversal.

[172] A0650.

VII. A Claim for Civil Conspiracy to Commit Fraud is Barred by Laches When it is Filed More than Three Years After the Running of the Statute of Limitations.

A. Question Presented

Is a claim of civil conspiracy to commit fraud is barred by laches when it is filed more than three years after the running of the statute of limitations?[173]

B. Standard and Scope of Review

The Delaware Supreme Court reviews the granting of a motion to dismiss *de novo*.[174] "… [I]f it is clear from the face of the complaint that the claims are time-barred, particularly when an analogous statute of limitations is in play, it is appropriate to adjudicate the claims on a motion to dismiss."

C. Merits of Argument

"The Court of Chancery is a court of equity and follows the doctrine of laches."[175] The laches defense requires a defendant to show "(1) the plaintiff had knowledge of his claim; (2) he delayed unreasonably in bringing that claim; and (3) the defendant suffered resulting prejudice."[176] Failing to file before the analogous statute of limitations has run is presumptively an unreasonable delay.[177]

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[173] Preserved at B0673.
[174] *Chrin v. Ibrix Inc.*, 70 A.3d 205 (Del. 2012).
[175] *TrustCo Bank v. Mathews*, 2015 WL 295373, at *5 (Del. Ch. Jan. 22, 2015).
[176] *Id*.
[177] *Id*.

"[A] cause of action generally accrues at the time of the alleged harmful act."[178] An action for civil conspiracy must be brought within three years from the accruing of the cause of action.[179] An action for fraud must be brought within three years from the time of the wrongful act, even if the plaintiff is ignorant of said act.[180] Daugherty's claims in the Delaware Related Action, specifically those arising from the 2012 Amendment, have already been barred by laches.[181]

A claim for civil conspiracy must be supported by an underlying actionable tort; it cannot be supported by a claim of fraudulent transaction[182] or a claim of unjust enrichment.[183] Therefore, the remaining claim of conspiracy to commit fraud is the claim herein discussed in relation to laches.

Daugherty alleged execution of the Amendment in 2012, buyback of the HERA units in 2013, and transfer of the monies in escrow on December 2, 2016.[184]

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[178] *K&K Screw Products, L.L.C. v. Emerick Capital Investments, Inc.*, 2011 WL 3505354, at *17 (Del. Ch. Aug. 9, 2011).
[179] 10 *Del. C.* § 8106; *Atlantis Plastics Corp.*, 558 A.2d at 1064.
[180] *Jeter v. RevolutionWear, Inc.*, 2016 WL 3947951, at *9 (Del. Ch. July 19, 2016).
[181] *Daugherty v. Highland Capital Mgmt., L.P.,* 2018 LEXIS 213, at *17 (Del. Ch. June 29, 2018).
[182] *Sinex v. Bishop*, 2005 WL 3007805, at *3 (Del. Super. Oct. 27, 2005); *Quadrant Structured Products Co., Ltd. v. Vertin*, 102 A.3d 155, 203 (Del. Ch. 2014).
[183] *Mowbray v. Avery*, 76 S.W.3d 663, 679 (Tex. App. 2002); *see also Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 892 (Del. Ch. 2009) (finding that a claim for civil conspiracy cannot be supported by a claim of breach contract); *Incyte Corp.,* 2017 WL 7803923, at *3.
[184] A0642-43.

Despite the many years passing from the execution of the Amendment in 2012 and the its subsequent litigation beginning in 2012, the Complaint was not filed until 2019, significantly more than three years from the accruing of the conspiracy to defraud claim.[185] Since Daugherty did not file within the time allowed by the analogous statute of limitations, an unreasonable delay is presumed. Therefore, the civil conspiracy to defraud claim is barred by laches because Daugherty failed to timely file within the statute of limitations for either fraud or civil conspiracy.

Accordingly, the dismissal should be affirmed.

Mr. Hurst adopts all relevant arguments presented by Co-Appellees in their Answering Briefs.

[185] The analysis applies with equal force under Texas law which allows a four-year statute of limitations period for all fraud actions. *See Williams v. Khalaf*, 802 S.W.2d 651, 658 (Tex. 1990).

CONCLUSION

Since Mr. Hurst is protected by the Texas Attorney Immunity Doctrine, Daugherty failed to pursue all of his theories in the first action, and Daugherty fails to allege facts to support fraud, Daugherty's action fails as a matter of law.

Accordingly, Mr. Hurst respectfully requests this Honorable Court affirm dismissal.

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