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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE DELAWARE PUBLIC SCHOOLS LITIGATION	)	No. 138, 2023
	)	On appeal from C.A. No. 2018-0029-JTL (COUNTY TRACK) in the Court of Chancery of the State of Delaware

APPELLEES' CORRECTED ANSWERING BRIEF

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NATURE AND STATE OF THE PROCEEDINGS

Plaintiffs Delawareans for Educational Opportunity ("DEO") and NAACP Delaware State Conference of Branches ("NAACP") (collectively, "Plaintiffs") filed this action in January 2018 against the county officials("Defendants") who were responsible for tax collection in all three counties, and senior state officials. All were sued in their official capacities.[1] The Defendants were sued for violating 9 *Del. C.* §8306(a) (the "True Value Statute") and Del. Const. Art. X, § 1 (the "Uniformity Clause").[2] The state defendants were sued violating Del. Const. Art. X, § 1 by failing to provide an adequate education for low-income children, children with disabilities, and children whose first language is not English ("Disadvantaged Students").[3] All defendants moved unsuccessfully to dismiss.[4]

After denying the motions, the trial court bifurcated the litigation into a "County Track" and "State Track."[5] The two tracks proceeded separately. Plaintiffs and the state officials settled in October 2020, shortly before trial was to begin.[6]

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1 A001; B045 (Verified First Amended Complaint ("VFAC"), ¶¶ 17-20).

2 B046-47.

3 *See Delawareans for Educ. Opportunity v. Carney,* 199 A.3d 109 (Del. Ch. 2018)("*DEO II*")(state defendants).

4 *See Delawareans for Educ. Opportunity v. Carney,* 2018 WL 4849935, *1 (Del. Ch. Oct. 5, 2018)(*"DEO I"*)(Defendants)*; DEO II,* 199 A.3d 109, 179 (Del. Ch. 2018).

5 Dkt. 67. "Dkt." is used herein to refer to Chancery Court filings.

6 B247-62 (State Track Settlement Agreement and Order); Dkt. 232, p.2.

The County Track was bifurcated into separate merits and remedial phases.[7] Shortly before trial was to begin on liability, Defendants moved for summary judgment, asserting that Plaintiffs lacked standing and had failed to join necessary parties.[8] Following briefing, which was completed shortly before trial, the motion was denied without prejudice.[9] Evidence on standing was presented at trial.[10]

The court ruled after the liability trial that Plaintiffs had standing and that all three counties were violating the True Value Statute and the Uniformity Clause").[11]

Trial on remedy was initially scheduled to begin on March 29, 2021.[12] Between January and April 2021, each Defendant settled, with each county agreeing to conduct a general reassessment.[13]

In May 2021 Plaintiffs moved for an award of attorneys' fees and expenses. The trial court ruled that Plaintiffs are entitled to an award of fees and expenses, and then awarded Plaintiffs $1,476,001.88 in fees and $73,470.02 in expenses.[14]

Plaintiffs sought a fee award under the common benefit doctrine for all County Track work and, in the alternative, under Chancery Rule 37(c) for

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7 Dkt. 98.
8 Dkt. 156.
9 Dkts. 174, 191, 205.
10 *See In re Delaware Public Schools Litigation,* 239 A.3d 451, 527 (Del. Ch. 2020)*("DEO III")*.
11 *Id.* at 464.
12 Dkt. 390.
13 Dkts. 418, 427, 441.
14 Order Awarding Attorneys' Fees and Expenses ("Award") ¶¶ 18-20.

Defendants' failure to admit certain admissions requests. Having ruled that Plaintiffs were entitled to prevail on the first claim, the trial court did not reach the Rule 37(c) issue.[15]

Defendants appealed from the Entitlement Order and the Award, but not from the post-trial opinion.[16] The amount of the Award is not challenged.[17]

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[15] A505-09; Order Determining that Plaintiffs are Entitled to An Award of Attorneys' Fees and Expenses ("Entitlement Order" or "EO") ¶26. Copies of the Award and Entitlement Order are attached Defendants' Opening Brief.

[16] B308-12 (Amended Notice of Appeal).

[17] *See* Appellants' Opening Brief ("AOB").

SUMMARY OF ARGUMENT

1. Denied. The fee award does not contravene *Dover Historical Society, Inc. v. City of Dover Planning Comm'n*[18] and *Korn v. New Castle Cnty.*[19] for three independent reasons. First, this action resulted in many benefits besides causing the government to perform properly. Second, the rationale of *Korn* is not limited to public interest suits that can be characterized as taxpayer suits. Third, this action is a taxpayer suit. The complaint requested declaratory and injunctive to end Defendants' use of public money to collect taxes in contravention of the Uniformity Clause and the True Value Statute.

2. Denied. In requiring the counties to pay attorneys' fees and expenses, the trial court carefully evaluated the facts and applied existing precedent to those facts. It found that (a) the benefits resulting from the litigation were not speculative, (b) non-speculative benefits of the litigation inured to the counties, (c) neither the school districts and students in the counties nor the property owners who pay taxes to the counties are unrelated to the Defendants or the counties, and (d) the counties are positioned to require that their taxpayers, including individuals who will receive a benefit from Plaintiffs' litigative efforts, share the costs of the litigation if they so choose.

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18 902 A.2d 1084 (Del. 2006).

19 922 A.2d 409 (Del. 2007)(*Korn II*).

3. Denied. Fee shifting is permissible under *Dover Historical* only when a litigation's benefits include more than the social good that comes from making the government do its job properly. The private attorney general doctrine does not have that requirement. The Entitlement Order shows that trial court did not disregard the requirement of a benefit beyond the social good of making the government comply with the law, so it shows that the court was not applying the private attorney general doctrine.

STATEMENT OF FACTS

A. Preliminary Note

Plaintiffs cite *DEO III,* the post-trial opinion, in support of some facts stated herein. Defendants did not refer to *DEO III* in their notice of appeal or attach it to their opening brief, so it appears that they have not appealed from it.[20] *DEO III*'s legal and factual findings are therefore law of the case, and not subject to review on this appeal.[21] Nevertheless, as a matter of caution, where Defendants' opening brief has challenged those findings, Plaintiffs discuss responsive evidence.

B. Facts

1. School Districts are entitled to an additional $51.17 million in local tax revenue annually

The trial court determined that "the litigation created a yearly benefit by increasing annual revenue by roughly $51,000,000 for the school districts and

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[20] *See* Supreme Court Rules 7(c)(3) (the notice of appeal shall "[d]esignate the judgment, order or final award, or part thereof, sought to be reviewed") and 14(b)(vii)("The opening brief of the appellant shall include a copy of the order or orders of judgment being appealed and, if any, the separate written or transcribed rationale of the trial court.").

[21] *Sullivan v. Mayor of Town of Elsmere*, 23 A.3d 128, 134 (Del. 2011) (holding that party's failure to appeal from trial court determination made it law of the case, not subject to review on appeal). *See* also, *Wheeler v. Wheeler*, 636 A.2d 888, 892 (Del. 1993) (where party abandoned right to review of a trial court finding by dismissing appeal, it could not challenge that finding in a later appeal).

vocational-technical school districts in New Castle County, Kent County, and Sussex County."[22]

Approximately 31% of Delaware public school funding is supplied by local real estate taxes.[23] School districts are required by statute to use assessed values established by the counties when levying those taxes.[24] The counties have used an indefinite-base-year method of assessment since 1974 in the case of Sussex County, 1983 in New Castle County, and 1986 in Kent County,[25] thereby "create[ing] problems for Delaware's public schools and undermin[ing] Delaware's system for funding public schools."[26] Delaware policy makers have long recognized this fact.[27] For example, a committee of executive and legislative branch representatives, established pursuant to a House Joint Resolution and charged with developing recommendations for the reassessment of real property for the taxation by county governments and school districts, reported to Governor Minner and the General Assembly on November 26, 2008, *inter alia*, that the counties' failures to assess property at its present fair market value affected the ability of school districts to raise

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22 Award, ¶ 14.
23 *DEO III*, 239 A.3d at 465.
24 *Id.*; 14 *Del C.* §1912.
25 *See DEO III*, 239 A.3d at 467-69.
26 *Id.* at 470.
27 *Id*., citing*, e.g*. trial exhibit JX4 (B131).

local funding and undermined the school districts' ability to receive their fair share of state education equalization funding.[28]

Plaintiffs, two non-profits who want all Delaware children to receive a meaningful opportunity for an adequate education,[29] filed suit against Defendants because of these problems, seeking, *inter alia*, a declaratory judgment that "Defendants are violating Article VIII § 1 of the Delaware Constitution and 9 *Del. C.* § 8306(a) and an injunction "compelling Defendants to … to cease violating Article VIII § 1 of the Delaware Constitution and 9 *Del. C.* § 8306(a)."[30] Ultimately, the County Track settled, with all three counties agreeing to perform general reassessments of their taxable real property.[31]

The trial court concluded that due to the reassessments

> ascertainable groups will receive substantial benefits. After the reassessments are complete "each of the sixteen local school districts will have the right to claim a 10% increase in property tax revenue without having to succeed in a tax referendum, *see* 14 *Del.* C. § 1916(b), and the three vocational-technical school districts will have the right to a 10% increase in property tax revenue without seeking legislative approval, *see* 14 *Del.* C. § 260l(c)."[32]

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28 B139, 144.
29 *See DEO I,* 2018 WL 4849935, at *4.
30 B047-48 (VFAC, Prayer for Relief, ¶¶ 1. G., 2).
31 *See* Dkts. 418, 427, 430.
32 EO ¶ 19.

This is because the increase in assessed value in every school district will be dramatically more than 10%[33] and the statutes provide that whenever a general reassessment changes the total assessed valuation in a county, the local school boards shall calculate a new real estate tax rate which, at its maximum, would realize no more than 10% increase in actual revenue over the revenue derived by real estate tax levied in the fiscal year immediately preceding such reassessed real estate valuation.[34]

Local tax revenue for current expenses received by the nineteen school districts was $511.17 in FY2021.[35] Ten percent of $511.7 million is, of course, $51.17 million, so after the reassessments the districts will collectively have the right to an additional $51.17 million per year for school district operating expenses.

The trial court found that "[t]he additional revenue will make more funds available to support the needs of Disadvantaged Students, which will benefit all students."[36] This finding was supported by the testimony of DEO's president, New Castle County Councilman Jea Street, who "described the problems that Disadvantaged Students face, and … testified from personal knowledge that the

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33 *See* 239 A.3d at 480-83 (discussing evidence). *See also,* B169,174 (JX 61 at pp. 13, 18); A294 (Pretrial Order, Statement of Uncontested Fact, ¶ 49).

34 14 Del. C. §§ 1916(b), 260l(c).

35 B270 (State of Delaware Equalization Committee Fiscal Year 2021 Recommendations, Table 2).

36 EO ¶ 19, citing *DEO III*, 239 A.3d at 527.

problems could have been addressed with additional resources,"[37] and testimony by Kent and Sussex County parents detailing problems in their children's schools and how additional funding could help.[38]

2. Deficiencies in the State Equalization funding system will be corrected.

A second benefit to the local school districts and the children the serve is that the reassessments and the likely change in reassessment practice going forward will correct problems that have plagued state equalization funding for less wealthy districts for many years.[39]

3. Individual Taxpayers Will Benefit Financially

"The reassessment will re-establish vertical equity and restore price-related uniformity, thereby benefiting those disadvantaged taxpayers who were injured by the counties' regressive system."[40] This will remedy the harm caused by the counties that had, "by using tax assessments from decades ago … created a system in which …. [a]cross all three counties, higher-valued properties were assessed at a lower percentage of fair market value than lower-valued properties, resulting in a regressive system in which owners of lower-valued properties bear a greater

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37 *DEO III,* 239 A.3d at 525. *See also* B092, 095, 097 (Trial Transcript ("Tr.") 58-59, 64-65, 76, 85-86.)

38 B326-27, 332 (Tr. 24-25, 237, 283, 289).

39 See B131-52; *DEO III*, 239 A.3d at 471-73.

40 EO ¶ 21.

relative share of the tax burden" and "[r]esidents of the City of Wilmington, for example, paid more than their fair share compared to other residents of New Castle County."[41] Once the reassessments are complete, identifying the individual property owners who benefit and the amount of their benefits will be straightforward. A county-by-county University of Chicago study shows the magnitude of the Delaware regressivity. For example, in Sussex County the tax on an average property in the bottom decile of price was 50.7% above the fair tax, while the tax an average property in the top decile was 59.5% below the fair tax.[42]

4. The county tax collection systems will be improved and made more efficient

"The updated reassessments with current data also will make it easier for the counties to keep their assessments current in the future."[43] Importantly, the contracts between the counties and their reassessment vendor, Tyler Technologies, require Tyler not only to conduct countywide reassessments but also to install Computer-Assisted Mass Appraisal systems.[44] The General Assembly has recently passed legislation that will require each county to reassess the value of real property in the

41 EO ¶ 21, citing DEO III, 239 A.2d at 495-96.
42 A492 n. 5.
43 EO ¶19.
44 *See, e.g.*, B271 (New Castle County -Tyler Technologies contract).

county at least once every five years, beginning five years after the current reassessments are completed,[45] so this modernization is important.

5. Other Benefit to the Counties

Recognizing that "without the real humans who live within their borders, the counties are empty legalisms," the trial court noted that "[t]he benefits to the school districts also inure to the counties in the form of improved educational opportunities for the county residents."[46] As one parent witness testified when asked why she belonged to DEO, "I believe education for any student is crucial because it builds them to be a better person in life, to succeed in their career, in college. And if we have better students, we have better citizens. We have better citizens, we will have a better state and country overall."[47]

The trial court awarded $1,467,002 in fees and $73,470.02 in expenses.[48]

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45 *See* House Bill No. 62, 152nd General Assembly, currently awaiting action by the Governor. https://legis.delaware.gov/BillDetail?legislationId=130021 (last visited July 27, 2023).

46 EO ¶ 23.

47 B325 (Tr. 19-20).

48 Award ¶¶ 18-19.

ARGUMENT

I. CHANCERY HAS LATITUDE TO APPLY THE COMMON BENEFIT EXCEPTION WHEN LITIGATION TO COMPEL THE GOVERNMENT TO CEASE ACTING ILLEGALLY CAUSES BENEFITS LIKE THOSE RESULTING FROM THIS ACTION

A. Question Presented

Whether Chancery Court had latitude to award attorneys' fees and costs on the facts of this case.

B. Standard Of Review

Questions of law are reviewed *de novo*.[49] Findings of historical fact are subject to the deferential "clearly erroneous" standard of review.[50] Subject to the foregoing, the standard of review of an award of attorney fees in Chancery is abuse of discretion.[51]

C. Merits Of Argument

1. The Entitlement Order is Consistent with *Dover Historical and Korn II*

Plaintiffs sought attorneys' fees and expenses for the legal work done in the County Track, invoking the "common benefit exception [to the American Rule,

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49 Delaware Dep't of Nat. Res. & Env't Control v. Sussex Cnty., 34 A.3d 1087, 1090 (Del. 2011).

50 *Hall v. State*, 14 A.3d 512, 516 (Del. 2011).

51 *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980).

which] allows a successful litigant to recover attorneys' fees if the litigation creates a monetary benefit that is shared by others,"[52] because this action did just that.

The exception is most frequently applied in corporate litigation but has been applied in other contexts as well.[53] Prior to *Dover Historical* this Court had not addressed whether the exception was applicable in cases where a government agency was the defendant.

In *Dover Historical,* where the resulting benefit was only the social benefit of causing the government to perform properly, this Court held that the exception was unavailable.[54] One year later, in *Korn II,* when addressing whether the exception was applicable where the litigation had caused the government to perform properly and had produced an additional benefit, this Court described the *Dover Historical* ruling:

> the Society "clearly created a social benefit" by causing the Commission to do its job properly. Nonetheless, we held that the Society was not entitled to a fee award because such a social benefit does not justify an exception to the traditional rule that each party must pay its own fees.[55]

It then distinguished *Dover Historical* and ruled that the *Korn* plaintiffs were entitled to a fee award because they "did more than merely achieve the social benefit that

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52 *Korn v. New Castle Cty*., 922 A.2d 409, 410 (Del. 2007), as revised (Apr. 17, 2007)(*Korn II*).

53 *See, e.g.,* Entitlement Order ¶9 (citing cases).

54 *Dover Historical*, 902 A.2d at 1091.

55 *Korn II*, 922 A.2d at 413 (footnote omitted).

invariably results when a government agency is required to do its job."[56] The benefit recognized by this Court was that the litigation had caused New Castle County to take corrective action and "'return[]' approximately $540,000 to taxpayers – a tangible benefit that is both substantial and quantifiable."[57] The returned funds benefited only a subset of the taxpayers and it was feasible to have the fees paid by that subset, so the court directed the defendant to do so.[58]

The trial court determined that the rationale of *Korn II* was applicable to the case *sub judice.*[59] After reviewing precedent and considering the facts, the trial court concluded that equity "requires recognizing that the plaintiffs are entitled to an award of fees and expenses under the common benefit doctrine on the facts presented."[60]

Defendants assert that "*Dover* rejected fee-shifting in public interest litigation."[61] It did not. *Dover Historical* rejected fee-shifting where a plaintiff has only "caused a government agency to do its job properly," stating that that social benefit is not, in and of itself, sufficient to justify a new exception to the American

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56 *Id.*
57 *Id.*
58 *Korn v. New Castle Cty.*, 2007 WL 2981939, (Del. Ch. Oct. 3, 2007)(*Korn III*) at *4.
59 EO ¶11.
60 EO ¶ 26.
61 AOB 17 (initial capitals and bolding deleted).

Rule.[62] The trial court recognized this and was careful to list the benefits in addition to making the government comply with the law that were caused by the litigation.[63]

Defendants' assertion that the "inescapable conclusion" is that "the litigation was brought to cause the County Defendants to 'perform properly' their obligation to comply with the True Value Statute and the Uniformity Clause by reassessing, and that the Court of Chancery awarded fees on that basis in direct contravention" of *Dover Historical*,[64] disregards the other benefits resulting from the litigation. Most importantly, the nineteen school districts will have the right to millions of dollars every year because Plaintiffs proved that Defendants were failing to "perform properly" by using grossly inaccurate and nonuniform assessments for tax collection.[65]

Defendants argue at AOB 23-25 that the common benefit doctrine as applied in *Korn II* could not be applied to the instant case because *Korn II* was a suit by a taxpayer that created a substantial and quantifiable benefit for other taxpayers and, they contend, this case is not.[66] First, they argue that since *Korn II* "did not frame the Court of Chancery's error as failing to apply a sufficiently expansive view of the

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62 902 A.2d at 1091.
63 EO ¶¶ 19-21, 23.
64 AOB 22.
65 *DEO III,* 239 A.3d at 470-73.
66 Entitlement Order, ¶ 10 (describing Defendants' argument).

common benefit exception in public interest litigation"[67] and observed that Chancery "did not address the question of whether the common benefit exception to the standard rule should be applied in the context of a taxpayer suit,"[68] meaning that the opinion should be read as limiting itself to taxpayer suits.[69] Plainly, *Korn II* referred to the underlying case as a taxpayer suit because it was a taxpayer suit. Likewise, since the case was a taxpayer suit *Korn II* had no reason to frame Chancery's error as a failure to apply the common benefit exception to both to taxpayer suits and non-taxpayer suits.

Defendants point to no language in *Korn II* indicating that taxpayer suits were to be treated differently than other public interest suits for purposes of the common benefit exception. Nor do Defendants offer any reasonable (or, for that matter, unreasonable) basis for a court to apply the exception differently in taxpayer suits and other public interest suits or suggest any difference between the *Korn* litigation and the instant case that would render the rationale of the common benefit exception applicable to support a fee in the *Korn* litigation but not the instant case.

The trial court correctly rejected Defendants' interpretation of *Korn II*, stating that "the counties construe *Korn II* too narrowly. The *Korn II* decision recognized that the common benefit doctrine could apply to public interest litigation." *Id.,* ¶ 11.

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67 AOB 24.

68 *Id. citing Korn II*, 922 A.2d at 412.

69 *Id.*

This Court, of course, is to decide *de novo* the meaning of *Korn II,* but the points made by the trial court show that this conclusion was correct.

First, "[t]he form of suit is not a deciding factor; rather, the question to be determined is whether a plaintiff, in bringing a suit either individually or representatively, has conferred a benefit on others."[70] As detailed in the Statement of Facts, the instant case conferred multiple benefits on others. Under *Tandycrafts,*[71] it does not matter whether the action was a taxpayer suit or another type of suit. Second, on remand from *Korn II* Chancery Court recognized that the ruling applied to public interest suits generally and was not limited to taxpayer suits, quoting *Korn III*'s statement that "Under the Supreme Court's holding in this case, local governments face a new financial risk because plaintiffs' attorneys are now incentivized to bring public interest lawsuits."[72]

Defendants disparage the trial court's observation that that fear had not been realized,[73] but the fact is that complex public interest suits brought on behalf of non-profits are not for the faint-hearted. Plaintiffs' counsel spent almost 3000 hours on the County Track, exclusive of time spent on the fees motion, *see* Award ¶ 9 and Table 3. The effective blended hourly of the fee award for the County Track was

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70 EO ¶ 9 (quoting *Tandycrafts, Inc. v. Initio P'rs*, 562 A.2d 1162, 1166 (Del. 1989) (cleaned up).

71 *Tandycrafts*, 562 A.2d 1162.

72 EO ¶ 11 (quoting *Korn III*, 2007 WL 2981939, at *2).

73 AOB 42 n.121.

$521.04.[74] The record shows that the County Track was the smaller part of the litigation[75] and that there was no fee in the State Track,[76] so the effective hourly rate for the entire case was less than $261. The trial court based the award on a quantum meruit calculation rather than on the benefit achieved, at Defendants' urging, because Plaintiffs' counsel had agreed among themselves to seek fees based on the number of hours devoted to the relevant part of the case multiplied by reasonably hourly rates, Award ¶¶ 2-4. It used hourly rates 25% below what Plaintiffs had submitted because Defendants were government officials.[77]

The trial court was correct when it said "[t]he Entitlement Order did not create a new exception. The court applied the Delaware Supreme Court's decision in *Korn II* in conjunction with long-standing equitable principles governing fee awards,"[78] and concluded that under the facts of the case, equitable principles warranted a fee award.[79]

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74 Award, ¶10.

75 See A026. A032, A047, A053, A063, A066-67, A069-074, A084-88, A097, A101 (showing approximately 49 depositions noticed in the State Track and 20 in the County Track); Dkts. 351-52, and B236-46 (showing 16 experts in the State Track). One expert testified in the County Track trial. *See DEO III.*

76 B247-62 (State Track Settlement Agreement and Order).

77 See Award ¶7 (d.- e.)(citing, *e.g., Dover Hist. Soc'y v. City of Dover Plan. Comm'n*, 2007 WL [1805777], at *3 (Del. Super. Ct. June 4, 2007), aff'd, 2007 WL 3407263 (Del. 2007)(finding discounted hourly rate reasonable when setting fee award under bad faith exception to the American Rule).

78 B297 (Memorandum Opinion denying Defendants' request for certification of an interlocutory appeal, p. 23).

79 EO ¶12.

2. If the trial court's understanding of the scope of Korn II was error, it was harmless error because the instant case is a "taxpayer suit."

a. This Action is a Taxpayer Suit.

Defendants' argument that the trial court's ruling contravened *Dover Historical* and *Korn II* should be rejected for the reasons set forth above. But there is another, entirely different, reason why Defendants are wrong when they argue that Korn II precludes an award of fees under the common benefit doctrine: They erroneously presume that this case should not be viewed as a taxpayer suit. Defendants correctly equate "taxpayer suits" with suits where the plaintiff has taxpayer standing, and quote decisions that evaluate claims of taxpayer standing to identify the characteristics of a taxpayer suits.[80] The characteristic for which they quote *Lechliter* is that these cases are "focused on whether use of public funds or property itself is legal, not merely on the process by which decisions regarding such use are made." *Id.*

The instant case is a taxpayer suit. Its focus was on whether public funds were being used to collect taxes legally, not on the process by which tax collection decisions were made. Plaintiff sought declaratory and injunctive relief that would have prevented Defendants' collection of taxes, absent a settlement that would result

[80] *See, e.g.*, AOB 19 (quoting *Lechliter v. Del. Dept. of Nat. Res. & Envtl. Control*, 2015 WL 7720277, at *7 (Del. Ch. Nov. 30, 2015), rearg. denied, 2016 WL 878121 (Del. Ch. Mar. 8, 2016).

in countywide reassessments making property tax collection legal.[81] Defendants were violating the law in two respects when they collected taxes. The effective tax rate being applied to property in each jurisdiction was not uniform, in violation of the Uniformity Clause. The assessed values used by Defendants to levy real estate taxes were not based on the fair market value of the property, in violation of the True Value Statute.[82] It meets *Lechliter*'s description of a taxpayer suit.

The case *sub judice* is in many ways analogous to a taxpayer suit decided by this Court, *City of Wilmington v. Lord*.[83] There are fact differences between the cases – Plaintiffs herein sought to enjoin tax collection, which necessarily involves using public money, since tax collectors are not free, and the challenged conduct was illegal because it violated constitutional and statutory provisions, while the *Lord* plaintiffs sought to enjoin a use of public land that violated a trust. But the principle is the same.

The trial court had no reason to decide after trial whether Plaintiffs had taxpayer standing, since it based its finding of standing in the post-trial opinion on other grounds.[84] It had no reason to decide whether this case was a taxpayer suit when ruling on the fees motion, since it did not read the *Korn II* precedent as limited

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81 B048 (VFAC, Prayer for Relief, ¶2.)

82 *DEO III*, 239 A.3d at 485-86.

83 378 A.2d 635, 637 (Del. 1977)("taxpayer does have standing to sue to enjoin the unlawful expenditure of public money")(citing cases).

84 *Id.,* pp. 524, 536, 538.

to taxpayer suits. But if, as Defendants contend, the trial court erred in finding that the common benefit exception could be applied to public interest suits that were not taxpayer suits, since the case *sub judice* is a taxpayer suit that would have been harmless error.[85]

An argument by Defendants that this case is not a taxpayer suit because Plaintiffs were seeking an order requiring reassessments, not an order directing Defendants to cease collecting taxes illegally, would be directly contrary to what they said in open court when arguing their motion to dismiss. Counsel for New Castle County accurately described Plaintiffs' position:

> Now, we [Plaintiffs] are not asking the Court to order a general reassessment. We're asking the Court to prohibit the three finance directors from collecting taxes, because we think, the plaintiffs, think that those taxes are being collected on an illegal basis because of Title 9, [§] 8306.[86]

Counsel for Kent County, who had argued to the court that Plaintiffs "asked for a reassessment initially," ultimately responded to the court's questioning by agreeing "it actually doesn't say that in the complaint."[87] The complaint said

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[85] *See* Chancery Rule 61 ("The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

[86] B005 (Oral argument on motion to dismiss, p. 5). *See also, DEO I*. 2018 WL 4849935, *7 ("[P]laintiffs have argued the most fitting remedy would be an injunction barring defendants from collecting taxes until the counties have complied with" the True Value Statute.)

[87] B10.

Plaintiffs sought "permanent injunctions compelling Defendants to … cease violating Article VIII § 1 of the Delaware Constitution and 9 *Del. C.* § 8306(a).[88]

b. Plaintiffs have taxpayer standing.

Plaintiffs, who brought this action using associational and organizational standing, respectively, [89] are properly treated as taxpayers for the purpose of determining whether this is a taxpayer suit, since they had taxpayer standing to challenge illegal county action. An association has standing if its members would have standing,[90] and Defendants established through discovery that Plaintiffs' membership included county taxpayers. After requesting identification of DEO and NAACP members owning property in the three counties,[91] Defendants confirmed through deposition that both had taxpayer members in all three counties.[92]

Defendants' assert that Plaintiffs "abandoned the argument that they had benefited taxpayers."[93] Plaintiffs' focus was, indeed, on making improved education possible, but that did not the reduce the benefit to taxpayers hurt by the regressivity in the property tax system. Defendants' assertion of abandonment is unsupported by the page they cite, which shows only that when Plaintiffs calculated their fees claim

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88 B048 (VFAC, Prayer for Relief, ¶2.

89 *DEO III*, 239 A.3d at 524, 538.

90 *Id.* at 524 (citing *Oceanport Indus., Inc. v. Wilm. Stevedores, Inc*., 636 A.2d 892, 902 (Del. 1994)).

91 B050-64 (written discovery from Defendants).

92 B068-87 (depositions of DEO and NAACP members)

93 AOB at 11, citing Plaintiff's reply brief on entitlement at A578.

they did not include the benefit to the individual taxpayers.[94] The proposed fee they calculated based on the benefit to the school districts and school children would have been fair, so that was what they sought. A494-504.

Defendants' contention, citing A492, n. 5, that "Plaintiffs admitted that they were unable to quantify the benefit to taxpayers paying an unfair share of property taxes,"[95] is likewise misleading. Contrary to Defendants' characterization, the footnote describes the comparison of old and forthcoming new individual assessed values that will make the identities of the taxpayers who paid an unfairly high share "easily determinable."[96] The same comparison would enable one to calculate the overpayment made by each of those taxpayers.[97]

Defendants erroneously assert that this action does not satisfy what it characterizes as the "requirements" of Korn, that it be (1) "a taxpayer suit; (2) for benefits provided to an identifiable group of taxpayers; (3) that were substantial and quantifiable; and, (4) payable by the benefitted taxpayers." AOB 25. The first three of these points are addressed *supra* at 10-11, 20-24. The remaining point is addressed *infra* at 31.

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94 *See* A 577-578.
95 AOB 11, citing A492, n.5.
96 *Id.*
97 *See id.*

II. REQUIRING THE COUNTIES TO PAY ATTORNEYS' FEES IS EQUITABLE. THE BENEFITS CAUSED BY THIS ACTION ARE NOT SPECULATIVE.

A. Question Presented

Whether the trial court erred when it ruled that it was equitable to make Defendants pay attorneys' fees and expenses[98] or when it rejected Defendants' argument that the potential to claim a 10% increase in tax revenue was too speculative to support an award of attorneys' fees. and expenses.[99]

B. Standard Of Review

The allowance of fees is a discretionary act on the part of Chancery Court and, as such, is reviewed by the Supreme Court solely to determine if the trial court has abused its discretion,[100] unless the court's decision depends on a finding of fact that does not survive "clearly erroneous" review or on an error of law. Whether there has been an error of law is determined by *de novo* review.[101]

C. Merits Of Argument

1. The trial court did not abuse its discretion when it determined it was equitable to require Defendants to pay attorneys' fees and expenses.

In deciding whether to apply the common benefit exception and award attorneys' fees and expenses, the trial court recognized the importance of

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98 EO ¶¶ 23-24.

99 EO ¶ 20.

100 *See Chrysler Corp. v. Dann*, 223 A.2d 384, 389 (Del. 1966).

101 *Delaware Dep't of Nat. Res. & Env't Control, supra*, 34 A.3d at 1090.

determining whether Plaintiffs had conferred a benefit on others,[102] asked whether the litigation had resulted in benefits to others, and concluded resoundingly that it did.[103]

Defendants do not come to grips with that. Instead, they assert that *the* purpose of fee shifting is to prevent beneficiaries of a lawsuit from being unjustly enriched at a successful plaintiff's expense.[104] This court has flatly rejected that premise in *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*[105], stating "[t]hat individuals who benefit from the litigative efforts of others should share in the costs of achieving that benefit is … one policy reason why courts award attorneys' fees. But that is not the only policy sought to be furthered by fee awards." *Mentor* explained that "a second policy that underlies the common fund/common benefit exceptions to the American Rule [is] the need to create an incentive for shareholders (who would otherwise have no reason) to bring litigation to enforce duties owed by corporate fiduciaries to shareholders."[106]

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102 EO ¶9, citing *Tandycrafls, Inc. v. Initio P'rs*, 562 A.2d 1162, 1166 (Del. 1989)

103 EO ¶¶ 19-21, 23.

104 AOB 28.

105 789 A.2d 1216, 1231 (Del. Ch. 2001), *aff'd sub nom. Mentor Graphics Corp. v. Shapiro*, 818 A.2d 959 (Del. 2003).

106 *Id. See also, e.g., Seinfeld v. Coker,* 847 A.2d 330, 333 (Del. Ch. 2000) ("Delaware courts routinely grant fee awards in order to produce two primary incentives–the incentive for shareholders to bring meritorious lawsuits that challenge alleged wrongdoing and the incentive for plaintiffs to litigate such lawsuits efficiently."). *Carlson v. Hallinan,* 925 A.2d 506, 547–48 (Del. Ch. 2006), opinion

An independent reason for rejecting Defendants' argument is that, as the trial court recognized, the counties are beneficiaries of this action,[107]and that conclusion is well supported by the record: Defendants themselves recognized the importance of obtaining general reassessments to their work for the counties. The Kent and New Castle County defendants testified that those counties needed to conduct general reassessments for reasons of equity,[108] and the New Castle County defendant testified that the divergent levels of assessment had become "an issue of credibility" for the county.[109] Sussex County's Director of Assessments acknowledged that in Sussex County "assessed value has no correlation to market value."[110] *See also supra* 10-13 describing the other bases for the trial court's finding of benefit to the counties).

Defendants make another argument, that the common benefit exception cannot be applicable because "no identity of interest exists between County Defendants and the school and vocational districts or Disadvantaged Students as

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clarified, 2006 WL 1510759 (Del. Ch. May 22, 2006)(footnote omitted)(recognizing that Delaware Courts award fees in common fund cases "to provide an incentive to stockholders 'to bring a ... derivative suit to enforce the rights of ... the corporation as a whole under circumstances in which filing suit to enforce only their individual rights would be prohibitively costly or otherwise impracticable, thereby leaving unchallenged actionable wrongs against the ... corporation.'").

107 EO ¶23,

108 A297, A303 (Pretrial Order, Statement of Uncontested Fact, ¶¶ 61, 84).

109 B066-67 (Gregor Deposition, pp. 3, 77).

110 A291 (Pretrial Order, Statement of Uncontested Fact, ¶37 and n.9.)

students.[111] The once case they cite, *Richman v. DeVal Aerodynamics, Inc.,*[112] does not stand for that proposition.

Moreover, they are factually wrong. They argue that there is no identity of interests between the Defendants and the school districts or students because the Defendants are political appointees, whose only role in public education is to collect and remit school taxes.[113] To begin, Defendants were sued in their official capacities,[114] so this action must be treated as an action against the government entities employing the defendants.[115] Making this crystal clear, the parties have stipulated that if the Entitlement Order is affirmed the fee award will be paid from funds the counties have deposited with the Register in Chancery.[116] Thus, the question that would be relevant if an identity of interest requirement existed would be whether a county and the school districts located in that county have an identity of interests.

The counties undoubtedly have overlapping interests with the school districts and students. The counties exist, *inter alia*, to enhance the wellbeing of county

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111 AOB 29.

112 185 A.2d 884 (Del. Ch. 1962) (Fees awarded because plaintiff brought suit to benefit others in addition to himself.)

113 AOB 29.

114 VFAC ¶¶ 20.

115 *Mirzakhalili v. Chagnon*, No. Civ.A.18143, 2000 WL 1724326 at *21 (Del Ch. Nov. 9, 2000)("In an official capacity suit, the real party-in-interest is the government for whom the named defendants serve.").

116 B315-20.

residents.[117] Accordingly, they have an interest in county families having access to an adequate education. Moreover, they are required by statute to help the school districts obtain revenue. One statute requires the counties to collect tax revenue for the school districts,[118] and another requires that the assessed values used for levying school taxes be the values determined by the counties,[119] so the counties and the school districts share an interest in the tax collection not being done in contravention of law.

In addition to finding that the counties benefited from the litigation,[120] the trial court also discussed whether it would be equitable to require the counties to pay the award even if they were not beneficiaries. In so doing, it relied on the fact that "[u]nder the common benefit doctrine, th[e] court can require a party to pay the award when it is best positioned to compensate the plaintiffs on behalf of the parties that benefitted."[121] Defendants dispute the relevance of *First Interstate* decision because it differed factually from the instant case. AOB 30.

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117 *See* EO ¶ 23 ("[W]ithout the real humans who live within their borders, the counties are empty legalisms.").

118 14 *Del C.* §1917(a) (assigning the responsibility for school district tax collection to the receiver of taxes and county treasurers).

119 13 *Del. C.* § 1912.

120 EO ¶ 23.

121 EO ¶ 24, citing In re First Interstate Bancorp Consol. S'holder Litig., 756 A.2d 353, 362 (Del. Ch. 1999), aff'd sub nom. First Interstate Bancorp v. Williamson, 755 A.2d 388 (Del. 2000).

The facts may be different, but as Defendants observed when arguing that another decision, which differed factually from the instant case, was improperly distinguished by the trial court, "it is the principle that matters."[122] *First Interstate* illustrates both Chancery's authority to hold a party responsible for attorneys' fees when the traditional source of payment is unavailable, and the factors the court may consider in deciding whether doing so would be equitable. *First Interstate* resulted from an acquisition by merger, whereby Wells Fargo acquired First Interstate and the stockholders of First Interstate (or their successors in interest) became shareholders of Wells Fargo.[123] First Interstate's shareholders received increased consideration because of litigation that temporarily impeded the merger, but that consideration could not be used to pay an attorneys' fees award because it had been disbursed to the shareholders.[124] Recognizing that the usual source for payment of attorneys' fees arising out of shareholder litigation was unavailable, the court looked for an appropriate alternative source, and ruled that the target or its successor would be responsible for payment of fees because "fee shifting is an equitable device and, as the circumstances presented here demonstrate, is not properly or easily confined

122 AOB 31 (discussing *Mentor Graphics*).
123 756 A.2d at 356.
124 *Id.*, 362.

to rigid, predictable circumstances. Here, it is more fair to require First Interstate to pay a fee to plaintiffs' counsel than to deny them any fee at all."[125]

After citing equitable authority allowing the court to require the party best positioned to compensate plaintiffs' counsel under the common benefit doctrine do so,[126] the trial court explained why its decision to require Defendants to pay counsel fees would be equitable even if the counties were not beneficiaries of the litigation:

> The counties are optimally positioned to pay the award on behalf of their residents who will benefit. If the counties see fit, they can incorporate the cost of the fee award in the determination of a new tax rate, thereby ensuring that the residents who benefit from the corrected system of assessments bear the cost.[127]

If the counties decide to include the legal fee awards they pay in the expenses to be covered by property taxes, the fees will be borne by all county taxpayers in a manner analogous to that by which the *First Interstate* fees were borne by all shareholders of Wells Fargo, regardless of whether they were former First Interstate shareholders who benefited from the litigation. In the case *sub judice*, all county property owners benefited, because (a) they have children in the public schools, (b) are freed from paying more than their fair share of property tax when the property assessment becomes uniform, (c) have a property tax system that is more accurate

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125 *Id.*

126 EO ¶24 (citing *First Interstate*).

127 *Id.* ¶25.

and efficient, or (d) place that improves because its young people are better educated , would share the burden of the fee award.

Defendants do not acknowledge *First Interstate's* explanation of its ruling, that "it is more fair to require First Interstate to pay a fee to plaintiffs' counsel than to deny them any fee at all.[128] Instead, they claim the court shifted fees to Wells Fargo because "Wells Fargo likely agreed to pay plaintiffs' fees."[129] To the contrary, the court found that "it [is] obvious that there was never any agreement among the parties relating to the source of payment of fees."[130]

Defendants also argue that *First Interstate* is distinguishable because Wells Fargo benefited from plaintiff's efforts to scuttle the acquisition by the unsuccessful suitor and the benefited shareholders of *First Interstate* became shareholders of Wells Fargo.[131] But the attempted distinction disregards the benefits to the counties discussed above and at EO ¶¶ 234.

First Interstate is not *sui generis. See, Sugarland Indus., Inc., supra,*[132] which affirmed a trial court decision to require defendant corporation to pay attorneys fees to plaintiff counsel for the non-pecuniary benefits of one phase of multi-phase

128 756 A.2d at 362.
129 AOB 30, citing *First Interstate,* 756 A.2d at 356.
130 756 A.2d at 362.
131 AOB at 30.
132 420 A.2d at 148.

litigation even though that benefit did not inure directly to the benefit of the corporation and its stockholders").

Defendants cite *Mentor Graphics Corp.,*[133] because it did not require a successful bidder to pay attorneys' fees to an unsuccessful bidder whose actions had benefited other shareholders by precipitating a price increase. The *Mentor Graphics* court had numerous reasons for its decision, the most important being that under Delaware law that fees are not awarded to a bidder for corporate control even if that bidder's litigation has the effect of benefiting other shareholders, since there is no need to give a bidder incentive to litigate and doing so "would perversely alter the dynamics of a bidding contest, to the detriment of the target company stockholders who are the intended beneficiaries of the competitive bidding."[134]

Defendants' accusation, which borders on the scurrilous, that "according to the Court of Chancery, under the common benefit exception, it is irrelevant who benefits, provided the defendants have deep pockets[,]"[135] is refuted by the care with which the trial court detailed the benefits and beneficiaries of this action, and the reasons why "even if the counties were not beneficiaries, it remains equitable to require them to pay the award."[136]

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133 AOB 30-31.
134 *Mentor Graphics*, 789 A.2d at 1232.
135 AOB at 28.
136 EO ¶¶19-24.

2. The trial court did not abuse its discretion in rejecting Defendants' argument that school districts' right to the $51.2 million was too speculative to permit a fee award.

As discussed *supra* at 6-9, the 19 school districts will have the right to a $51.2 million increase in annual local tax revenue just for the asking once the reassessments are completed. Defendants argue that this is speculative because they might not ask for it, so the benefit does not satisfy *Korn II.*[137]

The trial court rejected this argument when Defendants first made it, stating finding that "'it is highly likely that school districts would happily accept the 10% increase in revenue that would result from a general reassessment.'"[138] That finding is law of the case because Defendants did not appeal from *DEO III.*[139] If there is any doubt that school districts are likely to accept the increase in revenue, the record shows the many reasons why the trial court's finding on likelihood of acceptance is correct.[140]

Moreover, the argument that the school districts need to accept some or all of the $51 million in increased revenue to make the benefit substantial and quantifiable is legally incorrect. "The litigation provides the opportunity to receive the money;

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137 AOB 32-33.

138 DEO III, 239 A.3d at 532.

139 *See supra* 6.

140 *See DEO III*, 239 A.3d at 470-71(recognizing that districts need to increase local revenue regularly just to maintain the status quo because of inflation and the burdensomeness and difficulty of prevailing in the referenda required to raise local tax rates).

plaintiffs' counsel cannot force people to take it. Courts are generally content to assume that people will accept the money that the settlement offers."[141] The possibility that some beneficiaries of a settlement may not take advantage of it "is not novel, nor is it unique to this context."[142] That "institutional investors historically have not sought their share of recoveries in securities actions …. has not changed how courts evaluate fee awards, where the analysis generally does not involve consideration of take-up rates."[143]

Defendants do not argue that the benefit to individual taxpayers from the reassessment's putting an end to the counties' regressive property tax are speculative. They say "Plaintiffs admitted that they were unable to quantify the benefit to taxpayers paying an unfair share of property taxes,[144] but as discussed above the page they cite for that proposition shows the opposite.

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141 B301; Memorandum Opinion denying application for certification of interlocutory appeal from entitlement order, p. 27 n. 3.

142 *Id.*

143 *Id.* (citing authorities).

144 AOB 11, citing A492, n.5.

III. THE TRIAL COURT DID NOT ADOPT THE PRIVATE ATTORNEY GENERAL DOCTRINE

A. Question Presented

Did the Court of Chancery err by adopting the private attorney general exception to the American Rule in contravention of *Dover*?

This question was not fairly presented to the trial court. Defendants cite four pages of the record below,[145] but none of those pages mention the private attorney general exception or otherwise assert that the trial court was erroneously adopting it.

B. Standard Of Review

The threshold question on consideration of a question not fairly presented to the trial court is whether the interests of justice require this Court to consider the question.[146]

If this Court considers the question, legal conclusions are subject to *de novo* review[147] and fact determinations are subject to clearly erroneous review.[148]

C. Merits Of Argument

1. The interests of justice do not require consideration of the question.

Defendants had a full and fair opportunity to argue below that precedent prohibits an attorneys' fees award in this matter. The trial court thoughtfully

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145 See AOB 34 (citing A607-07, A644, A649).
146 Supreme Court Rule 8.
147 Delaware Dep't of Nat. Res. & Env't Control v. Sussex Cnty., *supra*.
148 Hall v. State, *supra*.

considered whether an award would be consistent with precedent before concluding that equity "requires recognizing that the plaintiffs are entitled to an award of fees and expenses under the common benefit doctrine on the facts presented."[149]

2. The Trial Court Did Not Adopt the Private Attorney General Exception In All but Name

The private attorney general exception as described by Defendants is a doctrine, adopted for the purpose of incentivizing private counsel to enforce important public policies, under which courts may require defendants to pay attorneys' fees regardless of whether the litigation results in a substantial and quantifiable benefit.[150] Given the care taken by the trial court in evaluating whether the litigation had resulted in such benefits, it is beyond cavil that the trial court did not adopt or apply the private attorney general exception.

As Defendants point out, the trial court did say that the litigation was the type of "socially beneficial litigation that should be rewarded," "[p]ublic policy supports providing an incentive for litigants like plaintiffs who take on difficult constitutional and statutory issues," and it was "not 'reasonably likely that anyone except groups

149 EO ¶ 24.

150 *See* AOB 35 (citing cases); AOB 36 quoting *State Bd. of Tax Comm'rs v. Town of St. John*, 751 N.E. 2d 657, 662 (Ind. 2001) for the three-factor analysis commonly used in determining whether the exception is applicable: "(1) the societal importance of the vindicated right; (2) the necessity for private enforcement and the accompanying burden; and (3) the number of people benefitting from the decision."

like the plaintiffs would be able to mount a meaningful challenge.'"[151] But the trial court never said that would have been sufficient for a fee award without the benefits resulting from this action. It did not disregard *Dover Historical*, *Korn II*, and the principles of equity. It was careful to detail the benefits it found beyond the social good of government compliance with the law that justified application of the common benefit exception. The trial court's recognition of public interest and the effect of its decision does not invalidate its ruling. Consideration of those matters is part of its responsibility.[152]

Thus, the concerns expressed in the amicus brief - that the trial court established a novel formulation of the public benefit doctrine for public interest cases,[153] increased exposure to legal fees for government agencies found to have violated the law[154], disregarded *Dover Historical*,[155] and brought the private attorney general doctrine into Delaware law through the back door,[156] - are without basis in the trial court's decisions. Likewise, the trial court's thorough explanation of the benefits resulting from the litigation shows that it did not think it had authority to

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151 AOB_36-37, quoting EO ¶¶ 13-15.

152 *See* Benjamin Nathan Cardozo, *Nature of the Judicial Process* 43 (recognizing the importance to judges of considering social utility when applying precedent).

153 *Id.,* p. 3.

154 *Id.*, p. 7-8.

155 *Id.,* p. 10.

156 *Id.*, pp. 18-19.

award attorneys' fees in any litigation it deemed "to be of a sufficient 'public benefit,'" as amicus contends.[157]

Finally, this is an odd case for amicus's expression of concern about a possible "disincentive for the municipality or governmental body to vindicate what it believes is the correct formulation of the law."[158] Lead counsel for New Castle County told the audience at a New Castle County public information session on reassessment that the county's existing assessments "live in a fantasy world."[159] The record shows that Defendants had no defense on the merits. They "could not muster any factual or legal basis to contend that the Indefinite Base Year Method [which resulted in the Counties using assessments dating back to 1974, 1986 and 1986, depending on the county] did not violate the True Value Statute or Uniformity Clause."[160] The trial court, in responding to Defendants' argument that considerations of justice favored an interlocutory appeal because that might enable them to avoid the work of challenging quantification of the award, the trial

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157 Amicus Brief at 1.

158 *Id.,* p. 5.

159 B307 (Plaintiffs' Reply Brief, p. 11, citing https://www.newcastlede.gov/2358/Reassessment-Public-Meetings (at 1:05:45-60 of the October 27, 2021 Zoom Public Information Session)).

See D.R.E. 201(declaring that courts can take judicial notice of facts that can be accurately and readily determined from sources whose accuracy cannot be questioned).

160 B302 (Mem. Op., p. 28); A289, 295, 299 (Pretrial Order, Statement of Undisputed Facts, ¶¶ 32, 52, 69.

court observed that the counties "could have avoided this entire proceeding by acknowledging that the Indefinite Base Year Method was problematic and taking action to comply with the law. By doing so they would have avoided the risk of a meaningful fee award."[161] But, "[e]lected county officials would have needed to touch a political third rail by making a decision that would lead to property tax increases for some county residents."[162]

Defendants complain that because of the trial court's decision "public interest litigants now have an incentive to circumvent elected officials and achieve their policy goals through Delaware courts."[163] But they do not show this is a reason for courts to ignore the law when presented by plaintiffs who have standing.

Defendants certainly have not shown that the trial court was free to decide the issues presented by Plaintiffs' complaint and Defendants' responses. This first came up when the trial court was questioning Defendants' counsel at oral argument on the motion to dismiss. The court's correct understanding of its role was clear when it asked, in dialogue with defense counsel, "what is politically disrespectful about enforcing a statute that the General Assembly has passed? Isn't that politically respectful? Isn't that what I'm actually supposed to do?[164]

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161 B302 (Mem. Op., p. 28).
162 *Id.*
163 AOB 41.
164 B14-15.

Nevertheless, Defendants suggest that the trial court decision "has invite[d] the usurpation of elected officials by unelected litigants and Delaware courts."[165] Two remarkable positions are embedded in this suggestion: The trial court should not have ruled for Plaintiffs because that might induce others who believe they have been injured by a governmental violation of law to seek judicial redress. And a court is doing something wrong when it interferes with government action or inaction by declaring what the law is." Both are refuted by basic Delaware law. "The judicial function is to interpret the law and apply its remedies and penalties in particular cases."[166] "All courts shall be open … [s]uits may be brought against the State, according to such regulations as shall be made by law.[167]

Defendants begin their usurpation argument by referring to their earlier assertion that because the Supplemental Information Sheet in this case identified *Young v. Red Clay*[168] as a tangentially related case, Plaintiffs "essentially ensur[ed]"

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165 AOB 41-42.

166 *Evans v. State*, 872 A.2d 539, 548 (Del. 2005).

167 Del. Const., Art. I, § 9.

168 159 A.3d 713, 797 (Del. Ch. 2017)(where the court explained why school district problems caused by New Castle County's failure to conduct general reassessments since 1983 contributed to its rejection of plaintiffs' claim for relief, although the Red Clay Consolidated School District had violated the Elections Clause of the Delaware Constitution, Del. Const. art. I, § 3: Red Clay has a legitimate interest in not being forced to hold a referendum again when, if the system functioned properly, Red Clay might never have needed to hold the referendum in the first place.

that the vice chancellor who decided *Young* would be assigned to this case.[169] Not surprisingly, the rule they cite to show that a party can select which judicial officer will hear a case,[170] does not do that. Moreover, the Supplemental Information Sheet to which they refer [171] is part of the package served with the Complaint.[172] They have known of it since they were served with the complaint, yet they complained about the information it provided the court for the first time in their opening brief in this Court.[173]

Defendants' argument that awarding fees will open the floodgates for policy dispute cases misunderstands the posture of the instant matter. This case is not a policy dispute about reassessment, but an action to enforce obligations under existing law. Judicial involvement was requested because inaction had been the counties' long-term response to concerns arising from their violations of the True Value Statute and the Uniformity Clause, and the problems for Delaware schools caused by those violations.[174].

A decade passed after the problems caused by the counties' violations of the True Value Statute were reported to Governor Minner and the General Assembly

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169 AOB 41 n. 120.
170 AOB 7 n. 16 citing Del. Ch. Ct. R. 3(a)(2).
171 A185.
172 Dkts. 1-2.
173 AOB 7.
174 *See* B132-52.

and before suit was filed. DEO's president Jea Street had been taught years ago by a pillar of the bar "that the courts don't want to run the school system, and you only go to court as the last resort."[175] He has been focused on the need for increased school funding since 2001,[176] yet this is action was filed in 2018. The concern about an increase in suits against governments expressed 16 years ago in *Korn III*[177] has not borne out. Moreover, the existing criteria for fee shifting, and the ever-present opportunity for government agencies to avoid fee claims by following the law, guard against undue litigation. The trial court's decision is consistent with precedent and properly based on the factual record of this case. It should not be reversed.

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175 B091 (Tr. 51).
176 B089 (Tr. 44)
177 2007 WL2981939, *2.

CONCLUSION

For the reasons stated above and in [the four opinions] the Entitlement Order and Award should be affirmed.

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