EFiled: Aug 21 2023 11:52AM EDT
Filing ID 70678328
Case Number 138,2023D

IN THE

# Supreme Court of the State of Delaware

IN RE DELAWARE PUBLIC SCHOOLS LITIGATION

NO. 138, 2023

On Appeal from the Court of Chancery of the State of Delaware,
C.A. No. 2018-0029 JTL

## APPELLANTS' REPLY BRIEF

Dated: August 15, 2023

CONNOLLY GALLAGHER LLP
Max B. Walton (No. 3876)
Lisa R. Hatfield (No. 4967)
Erica K. Sefton (No. 6916)
267 East Main Street
Newark, DE 19711
Telephone: (302) 757-7300
Email: mwalton@connollygallagher.com
lhatfield@connollygallagher.com
esefton@connollygallagher.com

NEW CASTLE COUNTY LAW DEPT.
Wilson B. Davis (No. 5154)
87 Reads Way
New Castle, DE 19720-1648
Telephone: (302) 395-5139
Email: wilson.davis@newcastlede.gov
*Attorneys for Appellant Michael R. Smith, Chief Financial Officer of New Castle County*

MARGOLIS EDELSTEIN
Krista M. Reale (No. 4748)
300 Delaware Avenue, Suite 800
Wilmington, DE 19801
Telephone: (302) 404-4785
Email: kreale@margolisedelstein.com
*Attorney for Appellant Gina Jennings, Finance Director for Sussex County*

SCHMITTINGER & RODRIGUEZ, P.A.
Craig T. Eliassen (No. 2276)
Gary E. Junge (No. 6169)
P.O. Box 497
Dover, DE 19903-0497
Telephone: (302) 674-0140
Email: celiassen@schmitrod.com
gjunge@schmittrod.com
*Attorneys for Appellant Susan Durham, Director of Finance of Kent County*

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**



**Other Authorities**

## INTRODUCTION

In *Dover*,[1] this Court held that "[i]n the public interest litigation context, absent legislative authorization, fee-shifting applications are disfavored [and] our courts have been cautious about creating and expanding judge-made exceptions to the American Rule absent express and clear legislative guidance."[2] The U.S. Supreme Court has similarly proclaimed that "[C]ourts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party … or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases."[3] Yet, in this case, a judge-made exception to the American Rule was either created or greatly expanded to award Plaintiffs' fees.

Plaintiffs do not (and cannot) dispute that no statute authorizes fee shifting here, or that no Delaware Court, before now, has applied the common benefit doctrine in the fashion applied by the Court of Chancery below. This non-taxpayer suit did not recover a single dollar for any of the named Plaintiffs, it did not result in any money being placed into or returned to the coffers of the Counties, and, at most,

---

1 *Dover Historical Society, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1090 (Del. 2006) ("*Dover*").

2 *Id.*

3 *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 269 (1975).

it allows the School Districts the option to increase revenue by up to 10% upon reassessment without the need for a voter referendum. Yet, with only a speculative potential future monetary benefit for the School Districts, the Court awarded fees – to be paid by the Counties.

The decision of the Court of Chancery below is a seismic expansion of the "common benefit" doctrine as set forth in *Korn v. New Castle County*[4] – which allowed application of the common benefit doctrine in a taxpayer suit whereby a specific and quantifiable monetary benefit was obtained. Because this is not a taxpayer suit, the facts here cannot (and should not be) shoehorned into *Korn*, and Plaintiffs' arguments should be rejected. Moreover, even if *Korn* is applicable, *Korn* requires a quantifiable monetary benefit for *all taxpayers* – which Plaintiffs did not create. Ultimately, the fee award by the Court of Chancery is an adoption of the private attorney general doctrine in all but name only – and that doctrine has already been shunned by this Court in *Dover*.

The fee award by the Court of Chancery should be reversed because it contravenes *Dover* and is an unprecedented and improper expansion of the common benefit doctrine.[5]

---

4 922 A.2d 409 (Del. 2007) ("*Korn"*).

5 *See Dover*, 902 A.2d at 1090.

## ARGUMENT

### I. *DOVER* CONTROLS AND FEE SHIFTING IS IMPERMISSIBLE UNDER *KORN* BECAUSE THIS IS NOT A TAXPAYER SUIT

#### A. Plaintiffs' Procedural And Standard Of Review Contentions Should Be Rejected

Plaintiffs incorrectly claim that by not attaching *DEO III*[6] to the notice of appeal, the facts outlined in that decision are the law of the case. AB 6. As a point of fact, the Counties *could not* have appealed *DEO III* at this time, because, as the Vice Chancellor recognized "the settlement of the case imposes ongoing obligations on the parties," so any appeal of that decision could be interlocutory.[7] That is the reason a Rule 54(b) partial final judgment was entered below – only the Entitlement Order ("Order") and the Award are before the Court at this time.[8] To the extent that the Court of Chancery incorporated its findings from *DEO III* into the Order or the Award, those issues are properly addressed on appeal because they are a component of the Order and the Award.[9] There was no ability, nor requirement, to include *DEO III* as part of this appeal to allow for full resolution of the appeal of the Order and Award.

---

6 *In re Del. Pub. Sch. Litg.*, 239 A.3d 451 (Del. Ch. 2020) ("*DEO III*").

7 Award ¶22. There is also a sanctions motion pending before the Court of Chancery, which makes any appeal of *DEO III* interlocutory.

8 Award ¶¶22-23.

9 Order ¶¶19-22.

Similarly, the answering brief incorrectly claims that the abuse of discretion standard or clearly erroneous standard should be the scope of review. AB 25, 34. Here, the Counties are not challenging the factual findings of the Court below. Rather, the Counties' appeal centers on the Court of Chancery's ability to grant fees as a matter of law under the facts as found. This is a question of law.[10] "While this Court must accept findings of fact of the Court of Chancery, which are supported by the record, [this Court is] not bound to accept inferences and deductions which are either not supported by the record or are not the product of an orderly and logical deductive reasoning process."[11] Review therefore is plenary[12] and the legal principles regarding the fee award are reviewed *de novo.*[13]

### B. *Korn* Is Limited To Taxpayer Suits

The threshold legal issue on appeal is whether the Court of Chancery's application of this Court's decision in *Korn* was legally appropriate. The parties agree that the Court of Chancery "did not read the [*Korn*] precedent as limited to taxpayer suits." AB 21-22. However, failure to do so is an error of law which requires reversal of the Order and Award.

---

10 *See Stoltz Mgt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992).

11 *E.I. duPont de Nemours and Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).

12 *Id.*

13 *Gannett Co., Inc. v. Bd. of Mgrs. of the Del. Crim. Justice Info. Sys.*, 840 A.2d 1232, 1240 (Del. 2003).

*Korn* was a taxpayer suit challenging the expenditure of public funds. This Court stated unequivocally:

> [W]e consider whether taxpayers may recover attorneys' fees if their litigation satisfies the requirements of the so-called "common benefit" exception to the standard rule, under which each party bears its own attorneys' fees. . . We hold that the rationale of the common benefit exception applies to *taxpayer suits* that result in a quantifiable monetary benefit for *all taxpayers*.[14]

Stated simply, this Court meant what it said – the common benefit exception applies to taxpayer suits that result in a quantifiable monetary benefit for all taxpayers.[15] *Korn*, which applied common fund principles, did not expand the application of the common benefit doctrine beyond taxpayer suits because, just one year before in *Dover*, the Court made clear that "[t]he corporate benefit exception to the American Rule is typically applied in business enterprise litigation . . . [and] [i]n the public interest litigation context, absent legislative authorization, fee-shifting applications are disfavored."[16] *Korn* simply did not authorize any broad and wide-ranging expansion of the common benefit doctrine beyond taxpayer suits.

---

[14] *Korn,* 922 A.2d at 410 (emphasis supplied). Any plain reading of Chancellor Chandler's decisions leading up to the *Korn* appeal opinion makes clear that *Korn* is a quintessential taxpayer case. *See Korn v. New Castle Cty.,* 2005 WL 2266590, at *1-15 (Del. Ch. Sept. 13, 2005), *reargument denied*, 2006 WL 588041, at *1-3 (Del. Ch. Mar. 2, 2006).

[15] If this Court had desired to adopt a more widely applicable test, it would have done so.

[16] *Dover*, 902 A.2d at 1091.

As discussed in Section C. below, Plaintiffs did not bring a taxpayer suit challenging the expenditure of public funds, but instead brought suit to force the government to perform properly under Article VIII, Section 1 of the Delaware Constitution ("Uniformity Clause") and 9 *Del. C.* §8036(a) ("True Value Statute"). The Court of Chancery erred by contravening *Dover* (which precludes fee awards for suits designed to compel the government to perform properly) and by expanding the reach of *Korn* to non-taxpayer suits.

### C. This Is Not A Taxpayer Suit

As explained in the opening brief, taxpayer suits are reserved for a narrow set of claims involving challenges either to *expenditure* of public funds or use of public lands.[17] Taxpayer suits involve challenges to *expenditures* of the municipal government – and where a plaintiff is not challenging the *expenditure* of tax funds, such suit does not qualify as a taxpayer suit.[18]

This case is not a taxpayer suit – and Plaintiffs fail to point to a single citation below where they contended that this is a taxpayer suit or that they had taxpayer

---

[17] OB 19; *Reeder v. Wagner*, 974 A.2d 858, 2009 WL 152945, at *2 (Del. June 2, 2009).

[18] *See Nichols v. City of Rehoboth Beach*, 836 F.3d 275, 281 (3d Cir. 2015) (noting that where the plaintiff was not "contesting the expenditure of tax funds," but instead was challenging the "legality of a Special Election" which authorized issuance of over fifty million dollars in revenue bonds, plaintiffs lacked taxpayer standing).

standing.[19] Much the same as in *Nichols*, Plaintiffs here were not challenging the *expenditure* of municipal funds to collect taxes, rather, they sought a ruling that the Counties were violating the Uniformity Clause and the True Value Statute by failing to reassess real property.[20] At no time did Plaintiffs seek to enjoin the *expenditure* of municipal funds – they sought a declaration that the County's collection of taxes (and the amounts thereof) were in violation of statutory and constitutional provisions. Seeking an injunction to enjoin tax collection because a person believes there is a statutory or constitutional violation is certainly not the same as seeking to enjoin the expenditure of public funds. One involves the expenditure of funds and the other involves collection – the principle is not the same. AB 21. Taxpayer cases are squarely 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."[21] As such, this is not a taxpayer case.[22]

---

[19] Because Plaintiffs did not raise the issue below, this claim is waived on appeal. Supr. Ct. R. 8.

[20] *See DEO III*, 239 A.3d at 463-64.

[21] *Lechliter v. Delaware Dep't of Nat. Res. Div. of Parks & Recreation*, 2015 WL 7720277, at *7 (Del. Ch. Nov. 30, 2015). Plaintiffs fail the *Lechliter* test because they are not challenging the *expenditure* of funds by the County – they are challenging the process and method of property reassessment.

[22] There was never any finding by the Court of Chancery that Plaintiffs had taxpayer standing and the issue was not litigated. *DEO III*, 239 A.3d at 512 ("The plaintiffs do not rely on taxpayer standing in this case."). As discussed below, Plaintiffs do not have taxpayer standing because they never sought to enjoin the *expenditure* of public funds, but rather sought a declaration that using the outdated

Plaintiffs now claim on appeal that the "instant case is a taxpayer suit," because, purportedly, their focus was "whether public funds were being used to collect taxes legally." AB 20. Plaintiffs premise this claim on their Amended Complaint's prayer for relief,[23] but the prayer for relief does not seek to prevent "Defendants' collection of taxes" (AB 20); rather, it seeks an injunction compelling Defendants to "cease violating" the True Value Clause and the Uniformity Statute. B048. Any fair reading of the Amended Complaint reveals that Plaintiffs' focus has always been on increasing school funding for Disadvantaged Students by compelling the Counties to change the methodology by which they calculate and collect taxes – not on any purported expenditures of tax funds by the Counties. Any alleged benefits to taxpayers generally were certainly incidental and never the focus of this litigation. A274; A638, 44:13-15 ("It was not purposeful when we brought the case."). This case, therefore, does not qualify as a taxpayer suit.

Plaintiffs also assert that this case is analogous to *City of Wilmington v. Lord*[24] but fail to explain how the underlying "principle is the same." AB 21. In *Lord*, the court held that "a taxpayer does have standing to sue to enjoin the unlawful expenditure of public money,"[25] which the Counties do not dispute. In

---

assessments deprived schools of additional funding. This is insufficient to confer taxpayer standing. *See infra* n.26.

23 AB 21 n.81 (citing B048 – Amended Complaint Prayer for Relief ¶2).

24 378 A.2d 635 (Del. 1977).

25 *Id*. at 637.

acknowledging the factual differences between *Lord* and this case, Plaintiffs highlight the very problem with their argument: "Plaintiffs herein sought to enjoin tax collection, which necessarily involves using public money, since tax collectors are not free…." AB 21. Simply because such request "involves using public money, since tax collectors are not free" does not transform the nature of the underlying suit into a taxpayer challenge to the expenditure of public funds. Indeed, such allegations are insufficient to invoke taxpayer standing,[26] and therefore cannot morph this case into a taxpayer case.

[26] *See Nichols,* 836 F.3d at 283 (for taxpayer standing, Plaintiffs are required to show a direct "dollars and cents injury"); *ACLU-NJ v. Township of Wall*, 246 F.3d 258, 264 (3d Cir. 2001) (holding that use of township employees was a de minimis expenditure and such expenditures did not make the suit "a good faith pocketbook action" as required for taxpayer standing); *see also Fuller v. Volk*, 351 F.2d 323, 327 (3d Cir. 1965) ("[I]n order for the taxpayer to have standing, he must show that his position as a taxpayer is in some way affected . . .").

## II. THE *KORN* STANDARDS ARE NOT SATISFIED AND THE FEE AWARD SHOULD BE REVERSED

### A. There Is No Quantifiable Monetary Benefit For All Taxpayers

Even assuming *arguendo* that *Korn* applies beyond taxpayer suits (or if this suit were deemed a taxpayer suit), the Court of Chancery erred in awarding fees as a matter of law because, per *Korn*, "the rationale of the common benefit exception applies to taxpayer suits that result in a quantifiable monetary benefit for all taxpayers,"[27] and here, there are not *quantifiable monetary benefits* inuring to the benefit of *all taxpayers*, or the Counties.[28]

**School District Ability To Raise Taxes Absent A Referendum Post Reassessment.** The first and primary benefit identified as allegedly supporting the fee award is the School Districts' entitlement to additional local tax revenue after the reassessment. AB 6-10. According to Plaintiffs and the Court of Chancery, such entitlement amounts to an option for an additional $51.17 million in local tax revenue annually. *Id*. The Counties' opening brief explained at length the speculative

---

27 *Korn*, 922 A.2d at 410.

28 The requirement that the benefit inure to "all taxpayers" is a requirement that all members of the class of beneficiaries charged with the fee award must realize the benefits. *See Korn v. New Castle Cty*., 2007 WL 2981939, at *4 (Del. Ch. Oct. 3, 2007) (holding on remand that the fee award must be paid from the light-tax fund because of the "inequity in requiring the entire class of county taxpayers to pay the cost of litigation that benefited just a subset of taxpayers" and that "county residents who did not receive any refund should not be obligated to pay the costs of this litigation").

nature of that amount and the purported benefit generally (*see* OB 32-33 – because the purported benefit only creates the *opportunity* for additional funding), and there is no guarantee that *any* school district will raise taxes. Moreover, it is axiomatic that some taxpayers will not benefit if taxes are raised because they will pay higher taxes. To the extent that the School Districts' entitlement to additional local tax revenue can be deemed a quantifiable, monetary benefit, it is the School Districts[29] that will receive the benefit, not the Counties, and not "all taxpayers." Moreover, by operation of state statute, that money simply passes through the Counties' possession on its way to the School Districts[30] – so there is no common fund for payment of the purported benefit.

**Improvements To State Equalization Funding.** Plaintiffs also cite the correction of deficiencies in the State Equalization funding system as a benefit resulting from the litigation. AB 10. This purported benefit has not been quantified, and while the benefit may involve money, it is not a monetary benefit. The Counties did not implement, nor do they operate or control the State Equalization funding system. To the extent that correcting such deficiencies is deemed to be a benefit

---

[29] Even if School Districts exercise their ability to raise taxes absent a referendum, there is no guarantee that the School Districts will use the funds in a way that actually benefits Disadvantaged Students. The funds could be used for higher administrator salaries, more busses, athletic facilities – the list goes on. Benefits such as this are "too speculative" and "cannot be considered a monetary benefit for purposes of a fee award." *Korn*, 922 A.2d at 413.

[30] 14 *Del. C.* §1917.

resulting from the underlying litigation, the State, the School Districts, and some children will realize this benefit – not the Counties, not "all taxpayers," and not an identifiable subset of taxpayers.

**Vertical Equity And Price Related Uniformity.** Plaintiffs claim that individual taxpayers will benefit financially from the re-establishment of vertical equity and restoration of price-related uniformity. They allege: "Once the reassessments are complete, identifying the individual property owners who benefit and the amount of their benefits will be straightforward." AB 11. Thus, Plaintiffs acknowledge that this benefit has not yet been realized and will only inure to the benefit of some property owners, not the Counties and not "all taxpayers" as required by *Korn*.[31] To the extent that an identifiable subset of taxpayers can be deemed to have realized a quantifiable, monetary benefit, under the *Korn* remand decision, the equitable outcome requires that only those taxpayers be obligated to share in the costs of the litigation.[32]

**Keeping Assessments Current.** Plaintiffs also point to the Court of Chancery's claim that updated reassessments will "make it easier for the counties to

---

[31] The Court of Chancery recognized that after reassessment some taxpayers will see their tax bills go up rather than down but claimed that "[t]hose taxpayers had no reliance interest in the continuation of an unconstitutional regime." Order ¶21. But, such observation does not change the fact that "re-establishment of vertical equity and restoration of price-related uniformity" are not quantifiable, monetary benefits to all taxpayers.

[32] *See supra* n.28.

keep their assessments current in the future." Order ¶19; AB 11. Plaintiffs attempt to bolster this argument by noting that the General Assembly recently passed legislation requiring each county to reassess the value of real property in the county every five years.[33] AB 11-12. Noteworthy, however, is that this alleged benefit is not a quantifiable, monetary benefit to the Counties, for all taxpayers, or for an identifiable subset of taxpayers. Reassessment is an expensive endeavor (millions of dollars), and such costs must be passed on to all taxpayers – if anything, a substantial subset of taxpayers are equally as likely to view this as a detriment rather than a benefit because the benefits Plaintiffs claim come at a substantial cost to the Counties.

**Improved Educational Opportunities.** Finally, Plaintiffs' discussion of "other benefits to the counties" cites the Court of Chancery's claim that "[t]he benefits to the school districts also inure to the counties in the form of improved educational opportunities for the county residents," (Order ¶23; AB 12) and quotes a parent-witness (not an expert) that testified to her belief that "if we have better students, we have better citizens. We have better citizens, we will have a better state and country overall." AB 12; B325 (Tr. 19-20). Again, even if these benefits are

[33] This highlights that a reassessment requirement could have been imposed by the General Assembly, at any time, even without the underlying litigation.

realized, they are not quantifiable, monetary benefits for "all taxpayers" or an identifiable subset of taxpayers.

****

The purported benefits outlined above are benefits to society and are social benefits for the public at large. As such, *Dover* controls, and the Court of Chancery's failure to follow *Dover* constitutes reversible error.

### B. Awarding Fees For Benefits Realized By Unrelated Beneficiaries In The Government Context Is An Unprecedented Expansion Of The Common Benefit Doctrine

It is undisputed that "[t]he common benefit doctrine does not operate as a generalized mechanism for achieving redistributive justice"[34] (OB 28), but that is precisely what occurred here. The Court of Chancery, relying on corporate shareholder cases, noted that a corporation can be required to pay a fee award for a benefit conferred on stockholders, and by analogy, ordered the Counties to pay the fee award "even if the counties were not beneficiaries." Order ¶24. Neither the Court of Chancery, nor Plaintiffs, cite a single case from any jurisdiction where the government was required to pay fees and expenses for benefits realized by unrelated beneficiaries (such as the School Districts and the Disadvantaged Students) that lack

[34] *Judy v. Preferred Comm'n Sys., Inc.*, 2016 WL 4992687 at *15 (Del. Ch. Sept. 19, 2016).

an identity of interest with the government payor. AB 26, Order ¶9.[35] Heretofore, there must be an identity of interest between the defendant and the beneficiaries to invoke the common benefit doctrine[36] – but none was required here under the Court of Chancery's novel formulation. This new formulation is precisely the type of newly minted judge-made exception to the American Rule that is disfavored under *Dover* absent "express and clear legislative guidance."[37]

Plaintiffs contend that a "second policy" underlying the common benefit doctrine is to "create an incentive for shareholders . . . to bring litigation." AB 26. But this incentive applies only to shareholder suits – not suits against the government. Indeed, in *Dover*, the Court did not adopt the private attorney general doctrine, which, at its core, is meant to encourage suits which effectuate strong public policy by awarding substantial attorneys' fees for successful suits that benefit a broad class of citizens.[38] The common benefit doctrine, in the government context, is not designed to encourage suits as the doctrine is applied in the corporate/shareholder context – especially when this Court has not adopted the private attorney general exception to the American Rule. Thus, the purpose of fee

---

35 *See Stevens v. Mun. Ct. for San Jose-Milpitas Jud. Dist.*, 603 F.2d 111, 113 (9th Cir. 1979) ("The common benefit exception to the rule has no application to a benefit to all citizens of a county … for such a broad class would merge the exception into the private-attorney-general concept rejected in *Alyeska* . . .") (citing cases).

36 OB 28, n.78 (citing cases).

37 902 A.2d at 1091.

38 OB 35 (quoting *In re Head*, 721 P.2d 65, 67 (Cal. 1986)).

shifting under the common benefit doctrine in the taxpayer suit context is to "balance the equities to prevent persons who obtain the benefit of a lawsuit without contributing to its costs from being unjustly enriched at the successful litigant's expense"[39] – and nothing more.

Likewise, attempting to analogize special corporate circumstances, as found in *First Interstate*,[40] is inappropriate. While the Court in *First Interstate* allowed payment from an "appropriate alternative source" for a successful shareholder litigation (AB 30), the contention that the Counties have an overlapping interest with School Districts and Disadvantaged Students "to enhance the wellbeing of County residents," (AB 28), "in county families having access to an adequate education" (AB 29) and in "tax collection" (AB 29), is insufficient. Such an attenuated, general, purported overlapping interest, as a matter of law, is insufficient to burden the Counties, as an "alternative source" for payment of a fee award of over $1.5 million dollars – when the Counties are paying fees for otherwise unrelated beneficiaries (School District and Disadvantaged Students). This is especially true when the Counties have no authority to administer schools – that function rests squarely with the State. OB 29-30.

---

[39] OB 28 (quoting *Dover*, 902 A.2d at 1091); *see also Korn*, 922 A.2d at 410.

[40] *In re First Interstate Bancorp v. Williamson*, 756 A.2d 353 (Del. Ch. 1999), *aff'd*, 755 A.2d 388 (Del. 2000) (Table).

This fee award is an unprincipled result, and if cases in the corporate context are appropriate comparisons, *Mentor Graphics*[41] provides the appropriate comparison that should be applied because there, like here, fees should not be paid by a party that is not a beneficiary of the purported fund. OB 31. The Counties should not be required to increase tax rates for all County taxpayers to fund an attorneys' fee award (AB 31; Order ¶25) in a case where there is no identity of interest between the School Districts, the Disadvantaged Students, and the Counties, and when the Counties have no authority over schools. To the extent that the Court of Chancery held that "bringing an organization into compliance with the law is a benefit" to the Counties (Order ¶23), fees cannot be awarded on that basis because requiring the government "perform properly," is a purported benefit that "is not of the kind that justifies creating a novel exception to the American Rule."[42]

---

41 *Mentor Graphics v. Quickturn Design Sys., Inc.*, 789 A.2d 1216 (Del. Ch. 2001), *aff'd*, 818 A.2d 957 (Del. 2003).

42 *Dover*, 902 A.2d at 1091.

## III. THE COURT OF CHANCERY ADOPTED THE PRIVATE ATTORNEY GENERAL DOCTRINE IN ALL BUT NAME ONLY

### A. The Issue Was Fairly Raised Below

The claim that the Counties did not sufficiently raise the issue of the private attorney general doctrine below (AB 36) is without merit. The Counties have always maintained that *Dover* is controlling (A642-43), and *Dover* makes clear that the private attorney general doctrine is not a component of Delaware law.[43] Moreover, the Counties could not argue that the Court of Chancery adopted the private attorney general doctrine in all but name until the Court issued the Orders now on appeal.[44] In addition, the Counties plainly argued that the Court of Chancery had created a new exception to the American Rule in their application to certify an interlocutory appeal from the Order (A644; A649) – and the raising of the broader issue is sufficient to preserve it for appeal.[45] As the Counties argued that *Dover* is controlling

---

43 *Id.*

44 The Counties were not required to seek reargument to raise the issue. *See Allen v. Scott*, 257 A.3d 984, 992 (Del. 2021) ("an issue already raised in the trial court need not be re-asserted in a Motion for Reargument").

45 *Watkins v. Beatrice Companies, Inc.*, 560 A.2d 1016, 1020 (Del. 1989) ("the mere raising of the issue is sufficient to preserve it for appeal."); *North River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 383 (Del. 2014) (holding that where the broader issue was sufficiently raised below, Rule 8 does not bar consideration). Even if not raised, the Court could consider the issue if justice so requires. Supr. Ct. R. 8.

and argued that the Court of Chancery created a new exception to the American Rule below, the question is fairly presented for review.

### B. The Court's Invocation Of The Private Attorney General Doctrine Was Improper

While Plaintiffs contend that it is "beyond cavil" that the Court of Chancery did not adopt the private attorney general exception (AB 37), that is exactly what happened. To quote *Dover*, which is equally applicable here, "this case is not unlike one where a citizen sues successfully on behalf of the public interest as a private attorney general, and then seeks reimbursement of his or her attorneys' fees for having successfully caused a government agency . . . to do its job properly."[46] The Court of Chancery here deemed the case to be "socially beneficial," (Order ¶15), stated that "[p]ublic policy supports an incentive for litigants like plaintiffs who take on difficult constitutional and statutory issues," (Order ¶13), called Plaintiffs "courageous," (Order ¶14), and based upon the Vice Chancellor's belief that there is a need for private enforcement, awarded Plaintiffs $1.5 million in fees to be paid the Counties.

The private attorney general doctrine is designed to encourage "suits effectuating a strong [public] policy by awarding substantial attorney's fees . . . to those who successfully bring such suits."[47] A plain reading of the Order removes any

---

46 *Dover,* 902 A.2d at 1091.

47 OB 35 (citing cases).

doubt that the Court below sought to encourage suits effectuating public policy by awarding substantial attorneys' fees in this case. Order ¶¶12-15. This is a clear invocation of the private attorney general doctrine in all but name only.

It was an error of law for the Court of Chancery to apply the doctrine. Based upon the Vice Chancellor's perceived public benefit, the Court shifted fees and created a judge-made exception to the American Rule – and awarded fees for a suit that sought to force government agencies to purportedly perform properly and reassess. This result is squarely precluded by *Dover*, which highlights (as does the opening brief) the bevy of cases which establish that – almost uniformly – fee shifting is improper for public interest litigation unless authorized by statute.[48]

The narrow exception delineated in *Korn* lends itself to objective application, requiring a showing of a tangible and quantifiable monetary benefit to all taxpayers. Conversely, the Court of Chancery's expansion of *Korn* is inherently incapable of principled resolution, resting on a judge's subjective impression of whether a benefit is sufficiently societally beneficial to warrant fee shifting.[49] This is the rationale of the bevy of courts, including this Court and the U.S. Supreme Court, that have rejected the private attorney general doctrine. OB 38-40. As *Dover* makes clear, the

---

48 *Dover,* 902 A.2d at 1091 n.16; OB 39, n.111.

49 The problematic questions presented in the opening brief regarding types of future cases that might warrant fee awards (OB 40-41) are left unanswered by Plaintiffs' answering brief.

public policy to make such fee shifting decisions normally rests with the General Assembly, and not with the Courts. "Historically, our courts have been cautious about creating and expanding judge-made exceptions to the American Rule absent express and clear legislative guidance" – but that was not the case here.[50] The Court of Chancery's invocation of the private attorney general doctrine, in all but name only, should be rejected at the fee award should be reversed.

### C. Plaintiffs' Contrary Arguments Should Be Rejected

Contrary to Plaintiffs' contentions, the Counties do not argue that courts should "ignore the law when presented by plaintiffs who have standing," (AB 40), nor do the Counties contend that "a court is doing something wrong when it interferes with government action or inaction by declaring what the law is." AB 41. The Counties' argument is straightforward – while it is the Plaintiffs' right to bring a suit to force the government to perform properly, and it is the Court's job to say what the law is and means, the American Rule prevents fee shifting here because Delaware (like most other states) has not adopted the private attorney general doctrine.

Plaintiffs also misunderstand why the fee award here, if not reversed, will open the floodgates for policy dispute cases. AB 42. They claim that this is "an action

---

50 *Dover,* 902 A.2d at 1091.

to enforce obligations under existing law" (*id.*)[51] – the same as numerous other public interest cases filed in the past three years (as detailed by the Amicus) which seek to enforce existing laws.[52] Under the Court's holding below, these public interest plaintiffs are now entitled to seek fees (here, $1.5 million in fees), and as such, public interest suits are incentivized. This is precisely the goal of the private attorney general doctrine (OB 35) – but this Court and most other courts that have considered the doctrine have rejected it. OB 38-40.

The Court of Chancery's holding below did not follow this Court's command in *Dover* that courts should be "cautious about creating and expanding judge-made exceptions to the American Rule absent express and clear legislative guidance."[53] The fact that Plaintiffs were successful in enforcing a statute and causing reassessments does not entitle them, or any other public interest plaintiff, to an award of fees under the American Rule.

---

[51] Plaintiffs' litigation did not create a new right or a new benefit for either the County Defendants or the School Districts. The School Districts already have a mandatory obligation (not just the right) to recalculate its existing tax rate following a reassessment, which rate cannot result in a revenue increase of more than 10% from the prior year. *See* 14 *Del. C.* §1916(b). Accordingly, the Plaintiffs did not create a benefit which did not already exist under applicable state law and, therefore, the common benefit doctrine does not apply. *See, e.g., Moore v. Davis*, 2011 WL 3890534, at *2 (Del. Ch. Aug. 29, 2011).

[52] DLLG Amicus Br. 1-3.

[53] *Dover,* 902 A.2d at 1091.

Finally, Plaintiffs' failure to address – in any meaningful way – the Counties' citation to and discussion of *State Bd. of Tax Commissioners v. Town of St. John*,[54] is telling. In that case, the plaintiffs prevailed in an action to have the state's real property assessment scheme declared unconstitutional. The Indiana Supreme Court reversed the award of fees and declined to award attorneys' fees to the successful plaintiffs under the private attorney general doctrine. The rationale of *Town of St. John* applies equally here. The Counties request that the Indiana rationale be adopted, and that this Court reject the Court of Chancery's invocation of a new common law exception to the American Rule for challenges to real property assessment.

[54] 751 N.E.2d 657 (Ind. 2001).

## CONCLUSION

Appellants respectfully request that this Court reverse the Order and Award.

Dated: August 15, 2023

CONNOLLY GALLAGHER LLP

*/s/ Max B. Walton*
Max B. Walton (No. 3876)
Lisa R. Hatfield (No. 4967)
Erica K. Sefton (No. 6916)
267 East Main Street
Newark, DE 19711
Telephone: (302) 757-7300
Email: mwalton@connollygallagher.com
lhatfield@connollygallagher.com
esefton@connollygallagher.com

NEW CASTLE COUNTY LAW DEPT.
Wilson B. Davis (No. 5154)
87 Reads Way
New Castle, DE 19720-1648
Telephone: (302) 395-5139
Email: wilson.davis@newcastlede.gov
*Attorneys for Appellant Michael R. Smith, Chief Financial Officer of New Castle County*

MARGOLIS EDELSTEIN

*/s/ Krista M. Reale*
Krista M. Reale (No. 4748)
300 Delaware Avenue, Suite 800
Wilmington, DE 19801
Telephone: (302) 404-4785
Email: kreale@margolisedelstein.com

*Attorney for Appellant Gina Jennings, Finance Director for Sussex County*

SCHMITTINGER & RODRIGUEZ, P.A.

*/s/ Craig T. Eliassen*
Craig T. Eliassen (No. 2276)
Gary E. Junge (No. 6169)
P.O. Box 497
Dover, DE 19903-0497
Telephone: (302) 674-0140
Email: celiassen@schmitrod.com
gjunge@schmittrod.com

*Attorneys for Appellant Susan Durham, Director of Finance of Kent County*