

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

ELEANOR AHERN,

Appellant,

vs.

BROWNSTEIN HYATT FARBER
SCHRECK, LLP,

Respondent.

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Elizabeth A. Brown
District Court Case No.: Clerk of Supreme Court
P-09-066425-T

Appeal from the Eighth Judicial
District Court, The Honorable Gloria
Sturman Presiding

RESPONDENT'S SUPPLEMENTAL RESPONSE

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION¹

In accordance with the Court's May 15, 2018, order, BHFS hereby submits its supplemental response addressing whether an affirmative recovery was obtained in the District Court. In sum, BHFS' work on behalf of Ms. Ahern resulted in Ms. Ahern's retention of proceeds from the Trust in the form of payments from the court-appointed trustee. These payments constitute an affirmative recovery under controlling Nevada precedent and persuasive authority from this Court and at least one other jurisdiction that, like Nevada, limits recovery on a charging lien to the tangible fruits of an attorney's work.

BHFS is therefore entitled to the entirety of the fees it expended on account of the suit under NRS 18.015. However, in the event the Court is disinclined to award BHFS the entire sum the District Court awarded, BHFS respectfully requests an award of the fees it earned on the portion of work that directly contributed to Ms. Ahern's retention of Trust proceeds, in the amount of \$54,446.00.

¹ Unless otherwise noted, capitalized terms shall carry the same meaning ascribed to them in Respondent's Answering Brief.

II. AS A DIRECT RESULT OF BHFS' REPRESENTATION, MS. AHERN RETAINED HER RIGHT TO MONETARY DISTRIBUTIONS FROM THE TRUST

The work BHFS performed below generally falls into the following categories: defeating a motion to hold Ms. Ahern in contempt, defending a motion to forfeit her interest in the W.N. Connell and Marjorie T. Connell Living Trust, dated May 18, 1972 ("Trust") and award punitive damages, and numerous appearances concerning discovery-related issues and issues regarding the protection of her attorney-client privilege. (AR 8572.)

The motion to forfeit Ms. Ahern's beneficial interest was brought under the Trust's no-contest clause, and it threatened Ms. Ahern with effectively losing the entirety of her income from her beneficial interest in the Trust. Specifically, shortly after the District Court removed Ms. Ahern as trustee and appointed a new trustee (AR 5027-5028), and Ms. Ahern hired BHFS, her daughters filed a motion seeking, among other relief, to reduce Ms. Ahern's beneficial interest in the Trust to \$1.00 under the no-contest clause, as a result of Ms. Ahern's alleged misfeasance. (AR 5511-5534.) BHFS opposed the motion on behalf of Ms. Ahern. (AR 5675-5687.) Months later, BHFS represented Ms. Ahern at the District Court's evidentiary hearing on the matter, which spanned nearly two days. (AR 7552-7767, 7884-7979.)

BHFS succeeded in ensuring Ms. Ahern would continue to receive payments from the Trust. Although the District Court found that Ms. Ahern did not properly apply her duties as a trustee, it found that Ms. Ahern's conduct "does not warrant the harsh remedy of imposition of the no-contest clause ... Therefore, the Court will not enforce the no-contest clause as against Ms. Ahern as beneficiary." (AR 8453.) BHFS' representation of Ms. Ahern therefore resulted in Ms. Ahern's retention of the periodic payments flowing from her 35% beneficial interest in the Trust.²

III. MS. AHERN'S RETENTION OF HER RIGHT TO PAYMENTS UNDER THE TRUST IS AN AFFIRMATIVE RECOVERY TO WHICH BHFS' CHARGING LIEN PROPERLY ATTACHED

A. The "Affirmative Recovery" Requirement

Rooted in principles of equity, a charging lien represents an attorney's "right to be paid out of a fund or judgment which he has been instrumental in recovering for his client." *Morse v. Eighth Judic. Dist. Ct.*, 65 Nev. 275, 284, 195 P.2d 199, 203 (1948). A charging lien attaches "to any verdict, judgment or decree entered and to any money or property which is recovered on

² Ultimately, the District Court also awarded damages against Ms. Ahern for her failure to comply with her duties as trustee, such that the payments to her under the Trust (except for previously authorized payments for living expenses and legal fees) are suspended until the compensatory damages awarded against her are satisfied. (Supplemental Appendix ("SA") SA112-SA127.) The District Court's order does not affect Ms. Ahern's right to the trust proceeds, only her ability to collect those payments until the damages award is satisfied.

account of the suit or other action" *Leventhal v. Black & LoBello*, 129 Nev. 472, 476, 305 P.3d 907, 909 (2013) (quoting NRS 18.015(3)). In this regard, a charging lien "cannot attach to the benefit gained for the client by securing a dismissal; it attaches to 'the tangible fruits' of the attorney's services," which is "generally money, property, or other actual proceeds gained by means of the claims asserted for the client in the litigation." *Id.* at 477; *Argentina Consol. Min. Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 534, 216 P.3d 779, 783-84 (2009) (no charging lien where the client neither filed an affirmative claim nor obtained affirmative relief through the dismissal).

In *Leventhal*, a divorce and child custody case, the Court determined that there was no affirmative recovery associated with the custody agreement because a "child-custody agreement wherein Leventhal retained his share of custody and the associated benefits does not demonstrate any affirmative claim to, or recovery of, money or property." *Leventhal*, 129 Nev. at 477-78. The *Leventhal* decision did not reach the issue of whether the other claimed affirmative recovery—assets distributed pursuant to the property settlement and divorce decree—constituted "tangible fruits." *Id.* at 478. The court found that the attorneys failed to timely serve notice of the lien, because they did not even make a colorable attempt to perfect the lien until eight months after the case

settled, when there were no longer proceeds to which the lien could attach. *Id.* at 478-479.

Picking up where the *Leventhal* court left off in determining what constitutes affirmative relief, this Court later decided that a client who disputed the proposed distribution of assets in a spendthrift trust sought affirmative relief, such that there was a claim to which a charging lien might attach. *Matter of Trust of JMWM Spendthrift Trust*, 385 P.3d 35, Docket No. 68454, Sept. 21, 2016 (unpublished disposition). In other words, charging liens can attach to the tangible fruits of an attorney's work in the context of beneficial interests in trusts.

To be clear, "[a]ffirmative recovery . . . requires more than just a judgment in the client's favor—there must be proceeds to which the lien can attach." *DeCesare v. Hutchison & Steffen, LLC*, 405 P.3d 104, at *2, Docket No. 72042, Nov. 15, 2017 (unpublished disposition). In *DeCesare*, where the client retained an interest in an LLC but the district court made no monetary award, this Court found that the "district court's denial of the defendant's rescission claim merely resulted in DeCesare *retaining* her interest in San Clemente rather than her *recovering* any proceeds." *Id.* (emphasis in original).

On the other hand, where the district court's action not only results in the adjudication of a beneficial interest, but also recovery of monetary benefits

associated with that interest, the client has made an affirmative recovery to which an attorney's lien attaches. *Rudd v. Rudd*, 960 So. 2d 885, 887 (Fla. 4th DCA 2007)³ (holding in divorce proceedings that a "charging lien may issue in a dissolution action and attach to the proceeds that are awarded to the client as part of the equitable distribution of property"); *Menz & Battista, PL v. Ramos*, 214 So. 3d 698, 699-700 (Fla. 4th DCA 2017) (holding that charging lien attached to husband's IRA and pension as "tangible fruits" in divorce proceedings, where attorney's work resulted in retention of equal right to those assets, recognizing that "a charging lien may attach to assets awarded in equitable distribution").

In the estate context, "[a]n attorney may be allowed a lien on his or her client's share in a decedent's estate." 4 Fla. Jur 2d Attorneys at Law § 520; *In re Baxter's Estate*, 91 So. 2d 316, 319 (Fla. 1956) (county court has the power "to entertain and to determine matters pertaining to the fixing of fees for services rendered by an attorney to a legatee or a distributee in an estate proceeding in such court, and likewise has the power to award a lien therefor and to order payment of such fees from funds due the legatee or distributee from the estate involved"); *In re Warner's Estate*, 160 Fla. 460, 464, 35 So. 2d 296, 299 (1948)

³ Like Nevada, Florida law provides that a charging lien will attach only to the "tangible fruits of the services" for which fees are sought. *Rudd*, 960 So. 2d at 887.

("When the probate court was vested with 'jurisdiction of the settlement of the estates of decedents and minors' he was empowered to adjudicate attorney's fees that properly arise in the course of such settlement").

B. Ms. Ahern's Affirmative Recovery

BHFS obtained an affirmative recovery for Ms. Ahern's benefit by retaining her right to continued payments under the Trust, which Ms. Ahern's daughters vigorously fought to eliminate. (*See* Section II, above.) That is, unlike cases where an attorney merely obtained dismissal of affirmative claims without any tangible benefit for the client (*e.g.*, *Argentina*, 125 Nev. at 534), child-custody benefits without a tangible recovery (*Leventhal*, 129 Nev. at 477-78), or retention of an interest without an attendant monetary benefit (*DeCesare*, 405 P.3d 104, at *2), in this case Ms. Ahern will receive a tangible benefit in the form of ongoing monetary payments from the court-appointed trustee because of BHFS' efforts. (*See* Section II, above.)

These ongoing payments are more than a mere adjudication of rights in Ms. Ahern's favor (*DeCesare*, 405 P.3d 104, at *2)—they are the fruits of BHFS' labor. There can be no question that BHFS' work resulted in Ms. Ahern's retention of her right to distributions from the Trust, and the District Court has appointed a trustee and is overseeing and approving monetary distributions from the Trust. (*See* Section II, above.) Because a charging lien properly attaches to

a client's retained assets subject to the action (*Menz & Battista, PL*, 214 So. 3d at 699-700), and properly attaches to the assets of a distributee in an estate proceeding (*In re Baxter's Estate*, 91 So. 2d at 319), BHFS' charging lien properly attached to Ms. Ahern's retained payments in the form of distributions of the Trust. Ms. Ahern should not be allowed to reap the reward of her attorneys' work without paying for the services of those who earned it. *Leventhal*, 129 Nev. at 475.

In sum, BHFS' fees arose on account of Ms. Ahern's suit and the relief obtained in the underlying suit qualifies as an affirmative recovery giving rise to BHFS' valid charging lien. BHFS' charging lien thus properly attached to Ms. Ahern's retention of the Trust payments. BHFS respectfully requests this Court affirm the District Court's order and uphold BHFS' valid charging lien against Ms. Ahern's proceeds.

IV. ALTERNATIVELY, BHFS' CHARGING LIEN AT LEAST ATTACHES TO THE WORK BHFS SPECIFICALLY PERFORMED IN CONNECTION WITH THE NO-CONTEST PROCEEDINGS

BHFS maintains that all its work for Ms. Ahern contributed to her success in the action resulting in tangible fruits; namely, her share of proceeds from the Trust. NRS 18.015(4)(a) (charging lien attaches to recovery "on account of the suit or other action"—not merely on account of specific tasks performed in the

course of representation). Moreover, if BHFS had not succeeded in defeating the contempt proceedings, Ms. Ahern faced not only the possibility of incarceration but also the imposition of additional monetary penalties that would have further reduced the amount of income due to her by the Trust. *State, Dep't of Indus. Relations, Div. of Indus. Ins. Regulation v. Albanese*, 112 Nev. 851, 856, 919 P.2d 1067, 1071 (1996) (noting that "[c]ivil contempt is characterized by the court's desire to . . . compensate the contemnor's adversary for the injuries which result from the noncompliance"); *In re Determination of Relative Rights of Claimants & Appropriators of Waters of Humboldt River Stream Sys. & Tributaries*, 118 Nev. 901, 909, 59 P.3d 1226, 1231 (2002) ("A civil contempt order may be used to compensate the contemnor's adversary for costs incurred because of the contempt.")

In any event, BHFS respectfully submits that its lien at least attaches to Ms. Ahern's recovery of trust proceeds directly flowing from BHFS' work to maintain her interest in the trust. As reflected in the Supplemental Appendix⁴—

⁴ In its May 15, 2018, Order Directing Supplemental Response, the Court acknowledged that it may be necessary for BHFS to file a supplemental appendix. Out of an abundance of caution, concurrently with this supplemental response, BHFS is filing a motion to supplement the record. In the event that the Court is disinclined to consider the evidence in BHFS' Supplemental Appendix but agrees with BHFS that it is entitled to fees for the work described in this Section IV, BHFS respectfully requests that the Court remand the matter to the District Court to determine the appropriate amount of fees.

consisting of BHFS' invoices for unpaid⁵ work at issue in this appeal—the following work directly resulted in Ms. Ahern's recovery:

- BHFS' preparation of Ms. Ahern's Motion to Strike Supplement to Motion for Assessment of Damages Against Eleanor Ahern; enforcement of no contest clause; and surcharge of Eleanor's Trust Income (AR 6260-627), which sought to exclude an untimely reply captioned as a "supplement";
- BHFS' preparation of the trial memorandum submitted in connection with the hearing on the no-contest clause (AR 7290-7484); and
- BHFS' participation in the no-contest clause evidentiary hearing, resulting in Ms. Ahern's retention of continued rights to payments under the terms of the Trust (AR 7552-7767, 7884-7979).

Ms. Ahern incurred \$54,446.00 for BHFS' work on the no-contest clause portion of the case. (SA0001-SA0111; *see also* BHFS Fee Breakdown, Exhibit 1 to Declaration in Support of Respondent's Supplemental Response, And Motion for Leave to Supplement the Record on Appeal, filed concurrently herewith.)

⁵ Some of BHFS' work on the no-contest clause issues is not at issue in this appeal, either because Ms. Ahern paid for that work or because BHFS incurred the fees after the court's adjudication of the charging lien.

In the event that the Court is disinclined to award the entirety of BHFS' fees at issue in this appeal, BHFS respectfully submits that its charging lien attaches to Ms. Ahern's Trust income at least in the amount of \$54,446.00, which necessarily resulted in Ms. Ahern's success in retaining her Trust income.

Dated this 14th day of June, 2018.

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NRAP 32(a)(9)(C) CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

- ☒ [X] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Professional Plus 2010 in 14-point Times New Roman font; or
- ☐ [] This brief has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

- ☒ [X] Proportionately spaced, has a typeface of 14 points or more, and contains 2,367 words; or
- ☐ [] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or
- ☐ [] Does not exceed _____ pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be

supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 14th day of June, 2018.

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NRAP 36(c)(3) CERTIFICATE

1. I hereby certify that this brief complies with the service requirements of NRAP 36(c)(3), and that Appellant has been served with copies of all unpublished dispositions cited in this supplemental appellate brief, as Appellant is not represented by counsel.

DATED this 14th day of June, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELLANT'S SUPPLEMENTAL RESPONSE** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System on June 14, 2018.

I also hereby certify that on June 14, 2018, I served a copy of this document by mailing a true and correct copy, postage prepaid, via U.S. Mail, addressed to the following:

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