[Cite as *Rayco Mfg., Inc. v. Murphy, Rogers, Sloss & Gambel*, 2021-Ohio-3040.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

RAYCO MANUFACTURING, INC., :

Plaintiff-Appellant, :

No. 110354

v. :

MURPHY, ROGERS, SLOSS & GAMBEL, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 2, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-13-815844

Appearances:

Cohen Rosenthal & Kramer, L.L.P., Joshua R. Cohen, and Ellen M. Kramer, *for appellant*.

Kehoe & Associates, L.L.C., Robert D. Kehoe, and Kevin P. Shannon, *for appellee*.

FRANK D. CELEBREZZE, JR., P.J.:

{¶ 1} Appellant, Rayco Manufacturing, Inc. (hereinafter "Rayco"),[1] brings this appeal challenging the trial court's judgment granting appellee Kehoe &

[1] Rayco is now known as JRB Family Holdings, Inc.

Associates, L.L.C.'s (hereinafter "Kehoe") motion to enforce a charging lien. Rayco argues that the trial court erred by granting Kehoe's motion to enforce without considering Rayco's defenses and counterclaims challenging Kehoe's entitlement to attorney fees. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶ 2} On October 16, 2012, Kehoe, Rayco, and Rayco's general counsel, Critchfield, Critchfield, & Johnson Ltd. ("CCJ"), executed a "Contingent Fee Agreement for Legal Services" (hereinafter "Agreement"). Rayco's President and Chief Executive, John Bowling, signed the Agreement on Rayco's behalf. Pursuant to the Agreement, Kehoe and CCJ would investigate the representation provided by (1) Murphy, Rogers, Sloss & Gambel, (2) Cavitch, Familo & Durkin Co., L.P.A., and (3) certain attorneys from each of these law firms (hereinafter "malpractice defendants") in a prior lawsuit Rayco had filed against Deutz Corporation and Deutz AG (collectively, "Deutz") for breach of warranty and other claims pertaining to Deutz's sale of engines to Rayco.[2]

{¶ 3} In October 2013, Rayco filed a legal malpractice action against the malpractice defendants. *Rayco* at ¶ 39.[3] The parties attempted to resolve the malpractice dispute through mediation in 2015 and 2016. At a mediation in June 2016, Rayco authorized the mediator to convey an aggregate settlement demand of

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[2] *See Rayco Mfg. v. Murphy, Rogers, Sloss & Gambel*, 2019-Ohio-3756, 142 N.E.3d 1267, ¶ 2, fn. 1 (8th Dist.).

[3] For a full recitation of the factual and procedural history in this case, see this court's opinion in *Rayco Mfg. v. Murphy, Rogers, Sloss & Gambel*, 2019-Ohio-3756, 142 N.E.3d 1267 (8th Dist.).

$3,050,000 to the malpractice defendants. *Rayco* at ¶ 40. At the conclusion of the mediation, however, no agreement to settle the case had been reached.

{¶ 4} In July 2016, the mediator, in a written recommendation, recommended that the parties settle the case for $2,650,000. Rayco's counsel disputed the mediator's recommendation and indicated that the malpractice defendants would have to pay the full $3,050,000 Rayco had previously demanded in order to settle the case. *Id*. at ¶ 41. The mediator met with Bowling in September 2016 to discuss the possibility of resolving the case through settlement. *Id*.

{¶ 5} Settlement negotiations continued throughout 2016 and 2017. Kehoe negotiated a settlement with the malpractice defendants, and a settlement agreement memorializing the terms of the parties' agreement was drafted and revised. *Id*. at ¶ 47-49. Rayco did not, however, sign the settlement agreement. *Id*. at ¶ 50.

{¶ 6} In June 2017, the malpractice defendants filed a motion to enforce the settlement agreement. Therein, the malpractice defendants argued that the parties agreed to settle the case on February 23, 2017, but Rayco refused to sign the settlement agreement. The malpractice defendants requested the trial court to enforce the settlement agreement and grant an award of attorney fees incurred by the malpractice defendants in enforcing the settlement agreement. Rayco opposed the motion to enforce the settlement agreement, arguing that

> there was no settlement agreement because, by the time [the malpractice defendants] "accepted" the $3,050,000 settlement offer Rayco made at the June 2016 mediation, it had lapsed. Rayco further

> argued that [Kehoe's] January 26, 2017 letters simply summarized the parties' past settlement positions and indicated Rayco's "willingness to re-open negotiations" and were not settlement offers.

Rayco, 2019-Ohio-3756, 142 N.E.3d 1267, at ¶ 52. Regarding the January 26, 2017 letters, Kehoe sent letters to counsel for the malpractice defendants in which

> [h]e indicated that he was writing "to follow up on the June 23, 2016 mediation and subsequent settlement discussions with [counsel for the malpractice defendants] and the mediator." [Kehoe] stated that Rayco had authorized the mediator to convey a "firm demand" of $3,050,000 to settle the case and had "made it clear" that "$3,050,000 was an absolute aggregate amount necessary to settle the case."

Id. at ¶ 43.

{¶ 7} The trial court held an evidentiary hearing on the malpractice defendants' motion to enforce the settlement agreement. The hearing was held before an advisory jury that was empaneled by the trial court, sua sponte, to determine "whether the parties entered into a contract to settle the lawsuit." *Id*. at ¶ 53. Following the presentation of evidence, the advisory jury "answered interrogatories indicating that the parties had entered into a settlement agreement and signed a verdict form in favor of [the malpractice defendants] and against Rayco on the motion to enforce the settlement agreement." *Id*. at ¶ 58.

{¶ 8} On December 14, 2017, the trial court granted the malpractice defendants' motion to enforce the settlement agreement. The trial court concluded that "the parties had 'a contract to settle with terms clear and enforceable' as a result of Rayco's 'acceptance' of [the malpractice defendants'] February 23, 2017 'offer' to

settle the case for $3,050,000."[4] *Id*. at ¶ 60. The trial court did not, however, grant the malpractice defendants' request to recover attorney fees incurred in enforcing the settlement agreement.

{¶ 9} Rayco filed an appeal challenging the trial court's judgment enforcing the settlement agreement. The malpractice defendants filed a cross-appeal challenging the trial court's denial of the request for attorney fees. *Rayco Mfg. v. Murphy, Rogers, Sloss, & Gambel*, 2018-Ohio-4782, 117 N.E.3d 153 (8th Dist.) (hereinafter "*Rayco I*"). In *Rayco I*, Rayco argued that the trial court erred in finding that the parties entered into an enforceable settlement agreement because

> (1) the $3,050,000 settlement offer Rayco made at the June 2016 mediation had lapsed by the time [the malpractice defendants] purported to accept it and (2) its counsel's January 26, 2017 letters simply indicated Rayco's "willingness to re-open negotiations" and were not sufficiently "certain and clear regarding the settlement terms" to constitute a valid settlement offer.

Rayco I at ¶ 32. Rayco did not argue that the settlement agreement was unenforceable because Kehoe lacked settlement authority. This court affirmed the trial court's judgment granting the malpractice defendants' motion to enforce the settlement agreement, reversed the trial court's judgment denying the malpractice defendants' motion for attorney fees, and remanded the matter to the trial court "for a determination of the amount of reasonable attorney fees [the malpractice defendants] incurred to enforce the settlement agreement." *Rayco I* at ¶ 74.

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[4] In the February 23, 2017 email, counsel for the malpractice defendants stated, in relevant part, "[the malpractice defendants] accept the collective settlement demand of $3,050,000 in the aggregate." *Id*. at ¶ 44.

{¶ 10} On December 27, 2018, Rayco filed a combined motion for reconsideration and en banc consideration. In support of its request for reconsideration, Rayco argued that this court's holding in *Rayco I* that the trial court "abused its discretion in denying [the malpractice defendants'] request for attorney fees" constituted an obvious error. *Rayco I* at ¶ 73. Rayco did not also seek reconsideration of this court's holding that the settlement agreement was enforceable, nor assert that Kehoe lacked settlement authority.

{¶ 11} Subsequently, in *Rayco,* 2019-Ohio-3756, 142 N.E.3d 1267, this court, sitting en banc, concluded that a conflict existed between *Rayco I*, and this court's decisions in *R.C.H. Co. v. Classic Car Auto Body & Frame, Inc.*, 8th Dist. Cuyahoga No. 83697, 2004-Ohio-6852, and *Mayfran Internatl. v. May Conveyor, Inc.*, 8th Dist. Cuyahoga No. 62913, 1993 Ohio App. LEXIS 3511 (July 15, 1993), regarding "whether attorney fees incurred as a result of a motion to enforce a settlement agreement are recoverable as compensatory damages." *Rayco* at ¶ 1. The en banc majority concluded that "attorney fees can be awarded as compensatory damages on a motion to enforce a settlement agreement when the fees are incurred as a direct result of the breach of a settlement agreement." *Id.* at ¶ 20. As in *Rayco I*, the merit panel affirmed the trial court's judgment enforcing the settlement agreement. This court concluded that "the trial court's finding that the parties entered into an enforceable settlement agreement is supported by sufficient competent, credible evidence." *Rayco* at ¶ 81.

{¶ 12} In November 2019, Rayco filed an appeal in the Ohio Supreme Court challenging the decision of the en banc court. *Rayco Mfg., Inc. v. Murphy, Rogers, Sloss & Gambel, a Professional Law Corporation, et al.*, Ohio Supreme Court Case No. 2019-1498. Rayco did not challenge this court's decision affirming the trial court's judgment enforcing the settlement agreement. Rayco only challenged the decision of the en banc court regarding attorney fees. The Ohio Supreme Court accepted the matter for review on January 27, 2020, and oral arguments were held on August 18, 2020.

{¶ 13} While the matter was pending in the Ohio Supreme Court, Rayco and the malpractice defendants reached an agreement resolving the dispute regarding attorney fees. Although Rayco disputes the validity and enforceability of the settlement of the malpractice case in this appeal on the basis that Kehoe lacked actual authority to settle the malpractice case, Rayco does not dispute the validity of the settlement it reached with the malpractice defendants regarding the attorney fee dispute: "during the pendency of the Supreme Court proceedings, Rayco and the malpractice [d]efendants reached an agreement to resolve their dispute over [attorney] fees and to implement the $3.05-million settlement that [the Eighth District] and the [trial court] had enforced." Appellant's brief at 2. In November 2020, the parties jointly applied for dismissal of the case, indicating that "[a]ll claims have been settled." The Ohio Supreme Court granted the joint application for dismissal and dismissed the appeal on November 12, 2020.

{¶ 14} On November 24, 2020, Kehoe filed a motion to enforce a charging lien. Therein, Kehoe argued it was entitled to be compensated for its work pursuant to the terms of the Agreement executed by Kehoe, CCJ, and Rayco on October 16, 2012. In support of the motion to enforce, Kehoe attached a copy of the Agreement and a closing statement that Kehoe presented to Bowling, but Bowling refused to sign. The closing statement detailed the manner in which compensation was determined under the Agreement and contained a summary of costs and expenses to be deducted from the settlement amount, as required by R.C. 4705.15.

{¶ 15} The Agreement contained a "payment of expenses" provision that provided, in relevant part, "[i]t is understood and agreed that *if the efforts of* [*Kehoe and CCJ*] *are unsuccessful*, there shall be nothing owed by [Rayco] to [Kehoe and CCJ] other than court costs and expenses actually incurred, subject to the terms of this Agreement." (Emphasis added.) The Agreement contained a contingent fee provision that provided,

> [a]s attorney fees, [Rayco] agrees to pay [Kehoe and CCJ] thirty-three and one-third percent (33-1/3%) of all the amounts received by way of settlement, mediation, arbitration, or trial. The amount due to [Kehoe and CCJ] under this Agreement shall be determined prior to any reduction of expenses listed in [the payment of expenses provision]. If a structured settlement is obtained, the attorney fees shall amount to the foregoing percentage of the present value of the settlement, and shall be paid in full upon receipt of the initial settlement payment. No offer of settlement made by any defendant or other person against whom a claim is made may be accepted without the consent of [Rayco].

The Agreement provided that the earned contingent fee would be "equally divided between CCJ and Kehoe."

{¶ 16} Finally, the Agreement contained a "settlement offers" provision that provided,

> [a]ll offers of settlement will be submitted to [Rayco] and none will be accepted without the approval of [Rayco]. If an offer of settlement is submitted to [Rayco], recommended by [Kehoe and CCJ], and rejected by [Rayco], [Kehoe and CCJ] shall have the right to withdraw from the case. In that event, [Rayco] shall owe [Kehoe and CCJ] fees, the calculation of which shall include consideration of the fee which would have been earned pursuant to [the contingent fee provision] if [Rayco] had accepted the recommended offer of settlement, provided such fee would be reasonable and not excessive.

{¶ 17} On December 22, 2020, Rayco filed a brief in opposition to Kehoe's motion to enforce. Therein, Rayco argued that Kehoe failed to establish its right to a charging lien. Specifically, Rayco argued, in relevant part that (1) Rayco deserved an opportunity to present defenses and counterclaims related to Kehoe's claim for attorney fees, and (2) the dispute between Rayco and Kehoe regarding attorney fees would best be resolved in a separate lawsuit.

{¶ 18} Regarding Rayco's defenses and counterclaims to Kehoe's entitlement to attorney fees, Rayco suggested that Kehoe negotiated and settled the malpractice case without Rayco's permission, and in direct contradiction of Bowling's instructions. Rayco argued that although Kehoe may have had apparent authority to settle with the malpractice defendants, Kehoe lacked actual authority to settle. Rayco appeared to contend that had Kehoe followed Bowling's instructions, Rayco "could have netted more from the lawsuit [and settlement agreement]."

{¶ 19} In support of its brief in opposition, Rayco submitted an affidavit of Bowling. In his affidavit, executed on December 21, 2020, Bowling averred that

Kehoe served as Rayco's lead counsel in the legal malpractice action, the trial court "enforced a settlement between the parties that Rayco never actually authorized," and that the settlement proceeds were in a trust account maintained by Kehoe's cocounsel CCJ. Bowling did not dispute that Kehoe procured the settlement fund. Rather, Bowling challenged Kehoe's "handling of the settlement" in the malpractice case. Specifically, Bowling averred, in relevant part,

> * * *
>
> 6. Rayco takes issue with [Kehoe's] handling of the settlement in Case No. CCV-13-815844. [Kehoe] negotiated and assented to the agreement on the company's behalf without actual authority to do so and in direct violation of the position I repeatedly instructed him to take with respect to the lawsuit.
>
> 7. Rayco had no desire to settle Case No. CV-13-815844 for the amount [Kehoe] agreed to accept. I believe the company could have and would have received considerably more had [Kehoe] followed my directives.
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> * * *
>
> 9. I told [Kehoe in July 2016] that Rayco's willingness to accept the $3.05 million terminated when the mediation ended. As I explained to [Kehoe], it then became my intention to take Case No. CV-13-815844 to trial. With respect to settlement, I instructed [Kehoe] not to initiate any discussions with defense counsel. If they happened to raise the subject, he was to listen to their proposal, without negotiating or committing to anything.
>
> 10. [Kehoe] repeatedly approached me about the subject of settlement in the months following the [July 2016] failed mediation. My message in response remained the same. The offer of $3.05 million was no longer on the table. Rayco intended to take Case No. CV-13-815844 to trial. [Kehoe] had no authority to engage in settlement negotiations or to agree to any deal.
>
> 11. In February 2017, [Kehoe] informed me that the Defendants in Case No. CV-13-815844 had accepted Rayco's offer to settle for $3.05 million. But no such outstanding offer existed — the company's

> willingness to accept that sum expired at the conclusion of the mediation in July 2016, as I had explained to [Kehoe] multiple occasions. From that point forward, [Kehoe] had no authority to represent that Rayco would settle for $3.05 million (or for any specific amount, for that matter.) I did not sign the settlement agreement [Kehoe] negotiated with opposing counsel, since I never assented to the stipulated payment on which it was based.
>
> 12. I believe [Kehoe] breached his professional duties by agreeing to a settlement in Case No. CV-13-815844 that I had not authorized. I am currently investigating whether Rayco has any legal recourse for this violation. At the very least, I believe [Kehoe's] conduct invalidates all or part of the claim for attorneys' fees made by him and his law firm.

{¶ 20} On December 30, 2020, Kehoe filed a reply brief in support of its motion to enforce. Therein, Kehoe argued that it had a contractual right to a charging lien pursuant to the Agreement and the enforceable settlement agreement resolving the malpractice action. Kehoe asserted that because the services and skill of Kehoe and CCJ procured the settlement funds, Kehoe was entitled to an equitable charging lien pursuant to *Cohen v. Goldberger*, 109 Ohio St. 22, 141 N.E. 656 (1923), and its progeny. Finally, Kehoe asserted that if, as Rayco alleged, Kehoe lacked authority to bind Rayco to the settlement agreement, Rayco would not have a defense to Kehoe's charging lien, but rather a separate and unrelated cause of action.

{¶ 21} On January 5, 2021, the trial court scheduled an evidentiary hearing on Kehoe's motion to enforce for February 24, 2021. The hearing did not take place.

{¶ 22} On February 23, 2021, in a stipulated judgment entry, the trial court granted Kehoe's motion to enforce a charging lien against settlement proceeds obtained in the underlying legal malpractice action. The trial court concluded, in relevant part, "Kehoe has proven that a settlement fund exists and that it was

procured through the law firm's services and skill. Rayco has presented no evidence to the contrary."

{¶ 23} Rayco filed the instant appeal on March 12, 2021, challenging the trial court's February 23, 2021 judgment. Rayco assigns one error for review:

> I. The trial court abused its discretion in enforcing the charging lien sought by [Kehoe] without considering [Rayco's] defenses and counterclaims to [Kehoe's] claim for attorneys' fees.

II. Law and Analysis

{¶ 24} In its sole assignment of error, Rayco argues that the trial court abused its discretion in granting Kehoe's motion to enforce a charging lien.

{¶ 25} This court reviews a trial court's decision regarding a charging lien or distribution of funds for an abuse of discretion. *See Cuyahoga Cty. Bd. of Commrs. v. Maloof Properties, Ltd.*, 197 Ohio App.3d 712, 2012-Ohio-470, 968 N.E.2d 602, ¶ 12 (8th Dist.), citing *Garrett v. Sandusky*, 6th Dist. Erie No. E-03-024, 2004-Ohio-2582, and *Minor Child of Zentack v. Strong*, 83 Ohio App.3d 332, 334-335, 614 N.E.2d 1106 (8th Dist.1992). An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude or decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 26} Initially, we note that the doctrine of res judicata and issue preclusion arguably apply in this case. "Under the doctrine of res judicata, 'a final judgment or decree rendered on the merits by a court of competent jurisdiction is a complete bar to any subsequent action on the same claim between the same parties or those in

privity with them.'" *Jones v. Wainwright*, 162 Ohio St.3d 491, 2020-Ohio-4870, 165 N.E.3d 1253, ¶ 6, quoting *Brooks v. Kelly*, 144 Ohio St.3d 322, 2015-Ohio-2805, 43 N.E.3d 385, ¶ 7. The doctrine of res judicata encompasses both claim preclusion (historically called estoppel by judgment in Ohio), and issue preclusion (traditionally known as collateral estoppel). *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 653 N.E.2d 226 (1995). "Issue preclusion 'prevents parties or their privies from relitigating facts and issues in a subsequent suit that were fully litigated in a prior suit.'" *State ex rel. Jefferson v. Russo*, 159 Ohio St.3d 280, 2020-Ohio-338, 150 N.E.3d 873, ¶ 9, quoting *Thompson v. Wing*, 70 Ohio St.3d 176, 183, 637 N.E.2d 917 (1994).

{¶ 27} In this appeal, Rayco suggests that Kehoe committed malpractice by settling the malpractice case without actual authority, and that Rayco can raise Kehoe's malpractice as a defense to Kehoe's claim for attorney fees.[5] The implication of Rayco's argument is that the settlement agreement between Rayco and the malpractice defendants was not valid and enforceable because Kehoe did not have actual authority to settle the malpractice case. Rayco could have, and should have raised this argument in *Rayco I*, 2018-Ohio-4782, 117 N.E.3d 153, in support of its argument that the settlement agreement was not enforceable. Rayco failed to do so.

[5] We recognize that the issue of whether Kehoe committed legal malpractice is different than the issue of whether the settlement agreement between Rayco and the malpractice defendants was valid and enforceable. However, the facts related to Kehoe's alleged malpractice and the enforceability of the settlement agreement between Rayco and the malpractice defendants are interrelated in this case.

{¶ 28} This issue — the enforceability of the settlement agreement between Rayco and the malpractice defendants – was already resolved by this court in *Rayco I*, and *Rayco*, 2019-Ohio-3756, 142 N.E.3d 1267. By affirming the trial court's judgment enforcing the settlement agreement between Rayco and the malpractice defendants, this court inherently found that Kehoe did, in fact, have actual authority to settle the malpractice lawsuit. Rayco did not challenge this court's findings regarding the enforceability of the settlement agreement in its appeal to the Ohio Supreme Court. Accordingly, pursuant to the issue preclusion branch of the doctrine of res judicata, Rayco is arguably barred from relitigating, either directly or implicitly, the issue of the enforceability of the settlement agreement in the malpractice case based on Kehoe's purported lack of actual authority to enter into the settlement agreement with the malpractice defendants.

{¶ 29} Even if Rayco is not barred from arguing that Kehoe lacked actual authority to settle the malpractice case, we are unable to conclude that the trial court abused its discretion in granting Kehoe's motion to enforce the charging lien.

> A charging lien is "[a]n attorney's lien on a claim that the attorney has helped the client perfect, as through a judgment or settlement." *Black's Law Dictionary* 1108 (11th Ed.2019). In 1908, [the Ohio Supreme Court] stated, "There is no statute in this state which gives to an attorney a lien upon his client's cause of action and provides a remedy for the enforcement of such lien." *Pennsylvania Co. v. Thatcher*, 78 Ohio St. 175, 192, 85 N.E. 55, 58, (1908). What was true in 1908 is true today: Ohio — unlike a majority of states, 23 Lord, Williston on Contracts, Section 62:11 (4th Ed.2019) — has no statute addressing how and when an attorney's charging lien attaches or how it can be enforced. Instead, in Ohio, charging liens are recognized and enforced under the common law.

> [The Ohio Supreme Court] has long recognized the viability of charging liens, the philosophical underpinning of which is that an attorney who has not been paid for his or her legal services is entitled to receive payment for those services from a judgment or fund that was created through his or her efforts: "Cases not infrequently arise, in equity, where the court would be as fully warranted in decreeing compensation to be made out of the fund to be distributed to the attorneys through whose services the same was secured, as to a receiver by whom it has been preserved." *Olds v. Tucker*, 35 Ohio St. 581, 583 (1880).

Kisling, Nestico & Redick, L.L.C. v. Progressive Max Ins. Co., 158 Ohio St.3d 376, 2020-Ohio-82, 143 N.E.3d 495, ¶ 9-10.

{¶ 30} In *Diehl v. Friester*, 37 Ohio St. 473 (1882), the Ohio Supreme Court recognized,

> an attorney may have a claim upon the fruits of a judgment or decree which he [or she] has assisted in obtaining, or upon a sum of money which he [or she] has collected, and under some circumstances courts will aid him [or her] in securing or maintaining such claim. Thus he [or she] will be protected in retaining his [or her] fee out of money which he [or she] has collected for his [or her] client.

Id. at 477.

{¶ 31} The Ohio Supreme Court has held that the enforcement of a charging lien is an equitable remedy: "[t]he right of an attorney to payment of fees earned in the prosecution of litigation to judgment, though usually denominated a lien, rests on the equity of such attorney to be paid out of the judgment by him [or her] obtained, and is upheld on the theory that his [or her] services and skill created the fund." *Cohen*, 109 Ohio St. 22, 141 N.E. 656, at paragraph one of the syllabus. An attorney's right to obtain payment from the judgment for work performed on behalf of the client or former client also encompasses a settlement the attorney obtains on the client's behalf. *Maloof Properties, Ltd.*, 197 Ohio App.3d 712, 2012-Ohio-470,

968 N.E.2d 602, at ¶ 15. The attorney's right to obtain payment from the settlement is "based on the theory that the attorney's 'service and skill created the fund.'" *Id.*, quoting *Cohen* at paragraph one of the syllabus.

{¶ 32} In order for a charging lien to be enforceable, there are generally four elements that must be present:

> (1) "a valid express or implied contract between the attorney and the client," (2) "a fund recovered by the attorney," (3) "notice of intent to assert a lien," and (4) "a timely assertion of the lien." 2 Rossi, Attorneys' Fees, Section 12:13 (3d Ed.2019). The second element ("a fund recovered by the attorney") is a recognition that the enforcement of a charging lien is an equitable remedy; "'Ohio courts recognize an attorney's equitable right to enforce such a lien,'" *Minor Child of Zentack v. Strong*, 83 Ohio App.3d 332, 334, 614 N.E.2d 1106 (8th Dist.1992), quoting *Mancino v. Lakewood*, 36 Ohio App.3d 219, 224, 523 N.E.2d 332 (8th Dist.1987).

Kisling, Nestico & Redick, L.L.C. at ¶ 12.

{¶ 33} In the instant matter, the record reflects that Kehoe demonstrated the existence of all four elements required to enforce a charging lien. Regarding the first element, Kehoe's charging lien was created by an express agreement — the contingent fee provision in the October 16, 2012 Agreement executed by Kehoe, CCJ, and Rayco. The Agreement's contingent fee provision provided that "[a]s attorney fees, [Rayco] agrees to pay [Kehoe and CCJ] thirty-three and one-third percent (33-1/3%) of *all the amounts received by way of settlement*, mediation, arbitration, or trial." (Emphasis added.)

{¶ 34} This Agreement, which specified the amount of recovery that Kehoe and CCJ were entitled to receive, operates as an equitable lien in favor of Kehoe. *See*

Mancino at 224. Furthermore, although the contingent fee provision provided that "[n]o offer of settlement made by any defendant or other person against whom a claim is made may be accepted without the consent of [Rayco]," it did not provide that Kehoe would forfeit its entitlement to the contingency fee, or be entitled to a reduced amount, if Kehoe accepted a settlement offer without Rayco's consent.

{¶ 35} Regarding the second element, it is undisputed that the settlement fund was recovered by Kehoe. In his affidavit, Bowling did not dispute that Kehoe recovered or procured the settlement fund. Rather, Bowling challenged the manner in which Kehoe recovered or procured the settlement fund, and Kehoe's "handling of the settlement" in the malpractice case.

{¶ 36} Regarding the third and fourth elements, the record reflects that Kehoe gave Rayco notice of its intent to assert a charging lien and asserted the charging lien in a timely manner. On November 9, 2020, the underlying dispute was settled, and the settlement funds were issued. On November 10, 2020, Kehoe prepared and signed the "statement and disbursement summary." When Rayco disputed Kehoe's entitlement to recover attorney fees, Kehoe filed a motion to enforce a charging lien in the trial court on November 24, 2020.

{¶ 37} In opposing Kehoe's motion to enforce a charging lien, Rayco argued that it had a "right to contest Kehoe's entitlement to fees" and requested an opportunity to "present defenses and counterclaims related to Kehoe's claim for [attorney] fees." Rayco suggested that Kehoe did not have actual authority to settle the lawsuit, and that Kehoe did not follow Bowling's directives in settling the matter.

Rayco suggested that if Kehoe settled the lawsuit without actual authority, Kehoe's entitlement to fees would be "reduced or eliminated."

{¶ 38} In this appeal, Rayco argues that it was entitled to an opportunity to defend against and challenge Kehoe's motion to enforce a charging lien. Rayco asserts that Kehoe committed malpractice or professional negligence by settling the malpractice lawsuit without actual authority, and that Kehoe's "conduct could qualify as malpractice that negated [Kehoe's] eligibility to recover all or part of the fees it sought through its charging lien." Appellant's brief at 6. Rayco contends that by granting the motion to enforce, the trial court foreclosed litigation on the issue of Kehoe's purported malpractice and preempted Rayco from asserting a malpractice claim against Kehoe.

{¶ 39} Rayco's arguments, both in the trial court and in this appeal, regarding its defenses or counterclaims to Kehoe's charging lien are misplaced.

{¶ 40} As noted above, it is undisputed that the settlement fund was recovered by Kehoe. If, as Rayco claims, Kehoe negotiated and accepted a settlement offer without actual authority to do so, Rayco's remedy would be a cause of action for breach of the 2012 Agreement's "contingent fee" and "settlement offers" provisions. The Agreement contained provisions that (1) required Kehoe to submit all settlement offers to Rayco, (2) prohibited Kehoe from accepting settlement offers without Rayco's permission, and (3) authorized Rayco to reject any settlement offers submitted by the malpractice defendants. Rayco could also assert a cause of action for legal malpractice against Kehoe. *See Roberts v. Hutton*, 152 Ohio App.3d 412,

2003-Ohio-1650, 787 N.E.2d 1267, ¶ 50 (10th Dist.) (the question of whether an attorney is entitled to be compensated for the reasonable value of the services he or she provided is "legally and conceptually separate from the question of whether [the attorney] committed malpractice.") Rayco's remedy would not be withholding the 33-1/3 percent of the settlement fund from Kehoe or paying a reduced amount of the settlement fund to Kehoe.

{¶ 41} The Agreement's "payment of expenses" provision provides, in relevant part, that "*if the efforts of* [*Kehoe and CCJ*] *were unsuccessful*, there shall be nothing owed by [Rayco] to [Kehoe and CCJ] other than court costs and expenses actually incurred, subject to the terms of this Agreement." (Emphasis added.) Kehoe's efforts were successful, and therefore, Kehoe was entitled to collect, as attorney fees, an equal share of the 33-1/3 percent of the settlement.

{¶ 42} For all of the foregoing reasons, we find no basis upon which to conclude that the trial court's judgment granting Kehoe's motion to enforce the charging lien was unreasonable, arbitrary, or unconscionable. The record clearly demonstrates that Kehoe's services, as lead counsel, generated the settlement award upon which Kehoe sought to enforce the charging lien. *See Galloway v. Galloway*, 2017-Ohio-97, 80 N.E.3d 1225, ¶ 20 (8th Dist.) Accordingly, the trial court did not abuse its discretion in granting Kehoe's motion to enforce.

{¶ 43} Rayco's sole assignment of error is overruled.

{¶ 44} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
EMANUELLA D. GROVES, J., CONCUR