No. 129599

In the
Supreme Court of Illinois

ANDREW W. LEVENFELD AND ASSOCIATES, LTD.
and STEPHEN J. SCHLEGEL, LTD.,

Plaintiffs-Appellants,

v.

MAUREEN V. O'BRIEN and DANIEL P. O'BRIEN III,

Defendants-Appellees.

On Leave to Appeal from the Illinois Appellate Court
First Judicial District, No. 1-21-1638.
There Heard on Appeal from the Circuit Court of Cook County,
County Department, Chancery Division, No. 17 CH 15055.
The Honorable **Cecilia A. Horan**, Judge Presiding.

APPELLANTS' REPLY BRIEF AND RESPONSE TO REQUEST FOR CROSS RELIEF

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STATEMENT OF ADDITIONAL FACTS

Below is a summary of evidence relating to Defendants' requests for cross-relief to the extent such evidence was not previously addressed in the Statement of Facts within Plaintiffs' opening brief:

A. Terms of Attorney-Client Agreement: The Hourly Floor

The attorney-client agreement contains not only the previously-addressed contingency rate, but also a fee provision calling for a minimum hourly "floor." Because of the risks of the engagement, Plaintiffs sought a contingency fee with a backup hourly "floor" in order to cover their overhead in the event of an unfavorable outcome. (R340-R341.) The parties ultimately entered into an agreement that contained such a "disaster clause" with a small hourly rate to provide for a minimum fee. (R337.) The hourly rates identified therein were based on the lowest rate that Schlegel charged to his most credit-worthy long-term clients. (R337.) At the time, he was charging hourly rates that were quite a bit higher for complex litigated matters, regularly between $450 and $600 per hour. (R338.) He would not have billed at the "disaster clause" rates for clients in the illiquid position that the Defendants were in absent a contingency provision. (R338.)

B. Potential Roadblocks to Recovery on Behalf of Defendants

When their family disputes arose, Maureen and Dan had undisputed percentage interests in the trusts, estates and other family asset vehicles but there were significant roadblocks to a monetary recovery. (R326.)

First, Peggy was managing the estates and trusts and preferred giving revenues to her own son or other people such that there would be no net revenue paid to the equity owners. (R326.) Second, because the properties were being managed such that there was no net revenue and the properties were not being sold by the management, there were no revenues

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available to provide for income to any equity owner, including Dan and Maureen; the only way to monetize their interests would be to obtain relief from a court. (R327.) A court would not necessarily afford them relief; to do so, it would have to overturn the decisions made by Dan Sr. and Mary, who were ostensibly competent people, and it would also have to conclude that Dan and Maureen were being taken advantage of such that a legal remedy was needed. (R327-R328.) The court would either have to remove Peggy from control or compel the assets to be sold so that the beneficiaries could receive cash value. (R328.)

A further challenge was that in order to try to establish a basis for the foregoing, the lawyers would have to get access to the records regarding the family assets, which Peggy had prevented Dan and Maureen from accessing; only with the benefit of supporting information could they pursue claims of mismanagement and damages. (R349.)

Moreover, although probate estates were open relative to both Dan Sr. and Mary, the estates owned only a very small percentage of the family assets, so actions directed at the business entities in which the assets were held would have to be brought via suits for partition or to liquidate the business entities in chancery. (R340, R345.)

C. Petitions to Remove Executors, Citation Proceedings, and Chancery Court Proceedings

In probate court, Plaintiffs filed two essentially identical petitions to remove each of Peggy and Richard as executor/co-executors of the estates. (C4766-C4780; R358, R557.) The petitions to remove were founded upon assertions that Peggy and Richard had engaged in mismanagement by, among other things, failing to pay taxes on certain properties. (R358, R557.) The probate court denied these petitions, concluding that probate court was the wrong forum within which to address issues relative to the family assets, which were owned almost entirely outside of the probate estates, and that action could instead be pursued in chancery or via a citation to recover assets. (R359, R558.) The probate court found their

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allegations to relate to a business dispute, not an estate administration issue. (R1350.) Plaintiffs filed one notice of appeal for both estates rather than one for each estate, resulting in the dismissal of one appeal; in the other, the appellate court affirmed, holding that the trial court had discretion to deny the petition under the circumstances. (R564; C4472-C4477.)

At the time that Defendants fired Plaintiffs, the previously-addressed Citation proceeding remained pending and depositions of Peggy and Jim West were scheduled. (R1211, R1442.)

In the previously-addressed Chancery Court proceedings, Plaintiffs withdrew one of the four counts that they had asserted in their original complaint, two counts were dismissed without prejudice and with leave to re-plead, and a fourth count was transferred to probate. (R567.) After being given leave to re-plead relative to those counts dismissed without prejudice, Plaintiffs filed an amended complaint on. (R565; C4772.)

ARGUMENT

I. THE APPELLATE COURT ERRED IN VACATING THE TRIAL COURT'S AWARD BY REFERENCE TO THE AGREED CONTINGENCY RATE.

The Appellate Court erred in holding that a quantum meruit award may not be determined by reference to a contingency fee rate structure agreed to by the parties if the lawyers violated Rule 1.5(e) of the Illinois Rules of Professional Conduct[1] (the "Rules" or a "Rule") in failing to obtain client consent to a fee-split. ¶ 44.[2]

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[1] As noted in Plaintiffs' Opening Brief, Rule 1.5 was adopted on July 1, 2009, effective January 1, 2010, and was then amended on March 1, 2023, with an effective date of July 1, 2023. The additions and other recent revisions to Rule 1.5 do not affect the parties' arguments in this case. As in Plaintiffs' Opening Brief, and for the sake of convenience, references herein to Rule 1.5 are to the version of the Rule effective January 1, 2010, unless otherwise noted.

[2] Citations beginning "¶" or "¶¶" are to paragraphs of the Appellate Court's opinion, *Andrew W. Levenfeld & Associates, Ltd. v. O'Brien*, 2023 IL App (1st) 211638.

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The Appellate Court's holding is erroneously based on a conclusion made without engaging in any analysis and without reference to only a single legal authority. The court concluded that a Rule 1.5(e) violation renders an attorney-client contingency fee agreement void and unenforceable *ab initio*. ¶ 44. In support of this conclusion, the court cited only to *Donald W. Fohrman & Associates, Ltd. v. Mark D. Alberts, P.C.*, 2014 IL App (1st)123351, ¶ 44, for the proposition that "strict compliance with Rule 1.5 is mandatory for any claim seeking fees under a fee-sharing agreement." ¶¶ 41, 44.

Here, Plaintiffs do not seek to enforce a fee-sharing agreement, either in breach of contract or otherwise. Were this a dispute between the two Plaintiff law firms as to how a single fee should be shared between them, that fee-sharing agreement could not be enforced due to the Rule 1.5(e) violation. But there is no dispute as to how the legal fee should be shared between two law firms. Rather, Plaintiffs seek, in quantum meruit, the reasonable value of their legal services from their former clients, Defendants.

The distinction between attorney-client agreements and inter-attorney fee-sharing agreements is critical, yet it is a distinction that neither the Appellate Court nor Defendants have directly addressed. We address the distinction in Section I.A., below.

Rather than address the distinction between a contingency-fee relationship between lawyers and clients, on the one hand, and the sharing of a fee between law firms, on the other hand, Defendants conflate the two. They repeatedly re-frame the issue before this Court as whether a quantum meruit award may be based on a fee-sharing agreement that violates Rule 1.5(e), without acknowledging that that the quantum meruit award was based on a contingency rate that the Plaintiff law firms and Defendant clients had agreed to, not on a fee-sharing agreement between the Plaintiff law firms. Defendants characterize the issue

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raised by the foregoing distinction as one of "severability." As discussed in Section I.B., below, Defendants' various severability arguments are flawed for multiple reasons.

Defendants engage in innuendo relative to Plaintiffs' principals' uncertainty as to how they would have shared in a fee here. Their argument is nothing more than a red herring, addressed in Section I.C., below.

Defendants contend that public policy does not support an award by reference to a contingency rate agreed to by the parties where Plaintiffs violated Rule 1.5(e). They argue that the violation deprived Defendants of the knowledge as to proportion by which each of the Plaintiff law firms would share in any fee calculated by reference to the contingency rate. Yet Defendants fail to identify how any public policy considerations would be defeated by permitting the trial court to render an award by reference to the contingency rate agreed to by the parties. We address Defendants' public-policy argument in Section I.D., below.

A. Fee-sharing agreements between attorneys vs. attorney-client fee agreements.

Plaintiffs use the term "attorney-client fee agreements" to refer to the arrangements between lawyers, on the one hand, and clients, on the other hand, relating to how the lawyers will charge their clients for their legal work. These agreements are governed by certain subsections within Rule 1.5. Rule 1.5(a) requires the fee to be reasonable. Ill. R. Prof. Conduct 1.5(a) (eff. Jan. 1, 2010). Rule 1.5(b) requires attorneys to communicate to the clients "the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible" and further notes that this communication should be made "preferably in writing" although a writing is not always required. Ill. R. Prof. Conduct 1.5(b) (eff. Jan. 1, 2010). Where a contingent fee is to be charged, as was the case here, Rule 1.5(c) requires the terms of the attorney-client contingency fee agreement to be set forth in a writing, signed by the client and setting forth "the method by which the fee is to be

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determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal." Ill. R. Prof. Conduct 1.5(c) (eff. Jan. 1, 2010). Defendants do not dispute that the attorney-client fee agreement entered between the parties in this case complied in all respects with Rule 1.5(a), (b) and (c).

Plaintiffs have used the term "fee-sharing agreement" to refer to the agreement between lawyers as to how a single, earned legal fee will be shared between them. Fee-sharing agreements are governed by subsection (e) of Rule 1.5, which sets forth the requirements for sharing fees under such circumstances. Ill. R. Prof. Conduct 1.5(e) (eff. Jan. 1, 2010). There existed no formal or informal fee-sharing agreement between Plaintiffs. As such, Plaintiffs necessarily violated Rule 1.5(e) by failing to obtain informed consent to the terms of the nonexistent fee-sharing agreement.

B. Defendants' "severability" argument is unavailing.

1. The doctrine of severability is inapplicable to quantum meruit cases.

The doctrine of severability applies to statutory construction and breach of contract actions. In breach of contract claims, where one term of a contract is illegal, unconscionable or otherwise unenforceable, a court will enforce the rest of the contract only where the unenforceable term is severable from the remainer of the contract. *Kane v. Option Care Enterprises, Inc.*, 2021 IL App (1st) 200666, ¶ 37. Absent a severability clause, one clause of a contract will be enforceable despite there being another unenforceable clause as long as the clauses operate independently. *Tortoriello v. Gerald Nissan of N. Aurora, Inc.*, 379 Ill. App. 3d 214, 238 (2d Dist. 2008). On the other hand, even if the contract contains a severability clause, the otherwise enforceable provision will be nonetheless rendered unenforceable if it is "so closely connected with unenforceable provisions that to do so would be tantamount to

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rewriting the agreement." *Abbott-Interfast Corp. v. Harkabus*, 250 Ill. App. 3d 13, 21 (2d Dist. 1993).

When part "of a contract is unenforceable as against public policy, 'a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.' " *Kepple & Co. v. Cardiac, Thoracic & Endovascular Therapies, S.C.*, 396 Ill. App. 3d 1061, 1066 (3d Dist. 2009) (quoting Restatement (Second) of Contracts, § 184(1), at 30 (1981)).

A severability analysis applies only to breach of contract claims and has no application in quantum meruit claims. There is no published decision in Illinois in which a court has applied the severability doctrine to a quantum meruit claim and Defendants have offered no reason that this Court should do so. Quantum meruit "is an equitable remedy [citation], which allows the circuit court to use its broad discretion in arriving at what it determines to be the reasonable value of the discharged attorney's services." *Seiden Law Group, P.C. v. Segal*, 2021 IL App (1st) 200877, ¶ 29. A remedy is available in quantum meruit only when there is no enforceable contract between the parties. *Weydert Homes, Inc. v. Kammes*, 395 Ill. App. 3d 512, 522 (2d Dist. 2009). It would be fundamentally inconsistent with the nature a quantum meruit claim to apply severability principles.

In light of the foregoing, Defendants' forfeiture argument has no teeth. Plaintiffs have not made a severability argument, even at this stage, as a severability analysis does not apply to quantum meruit case at bar. Rather, Defendants have raised the severability issue. Plaintiffs cannot forfeit an argument they have merely responded to.

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2. Even as applied to a breach of contract case, severability principles provide no basis upon which to render an agreed contingency rate unenforceable in fact or in effect due to a Rule 1.5(e) violation.

As discussed above, a contract may be enforced despite the inclusion of a provision void as against public policy as long as both (1) the party seeking enforcement did not engage in "serious misconduct," and (2) performance of the unenforceable provision is not "an essential part of the agreed exchange." *Kepple & Co.* 396 Ill. App. 3d at 1066. Applying the foregoing analysis to the attorney-client fee agreement, the contingency rate would remain enforceable despite regardless of any Rule 1.5(e) violation.

A severability analysis does not apply neatly to a fee-sharing situation. Regardless of compliance with Rule 1.5(e), a fee-sharing agreement between lawyers is itself unlikely to be contained in the same contract in which the client and lawyer agree to a fee structure. There is likewise no requirement in Rule 1.5(e) or elsewhere that a client's informed consent to a fee-sharing arrangement must be memorialized in the same attorney-client agreement in which the fee structure is set forth. See Ill. R. Prof. Conduct 1.5 (eff. Jan. 1, 2010).

A severability analysis cannot be applied to a term not contained in the agreement, and there is no fee-sharing term in the contract entered into between Plaintiffs and Defendants.

Even if a severability analysis could be applied under such circumstances, assuming for instance that the mere identification of two law firms as Defendants' lawyers under the agreement could be considered violative of public policy, the contingency rate negotiated by the parties and clearly set forth in the agreement would remain enforceable under severability principles.

Absent "serious misconduct"—Defendants acknowledge that they "overlook" in their severability analysis any question whether Plaintiffs engaged in "serious misconduct"—the

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contingency rate would be enforceable unless the fee-splitting component is "an essential part of the agreed exchange." It is not.

It was essential to the engagement from all parties' perspective that there would be lawyers from different firms (Levenfeld and Schlegel) involved in the representation. (R1575, R332, R1656.) That two firms would be each represent Defendants was set forth in the written agreement between the parties. (C5359-C5360.)

It is certainly possible that, in other cases, the proportion to which lawyers will share in a fee would be essential to the engagement. But in this case, the evidence presented at trial overwhelmingly demonstrates that the manner by which the Plaintiff law firms would share in a fee was entirely unimportant to the term of the attorney-client fee agreement and, more generally, the engagement as a whole. As the trial court found, (C6283), Defendants knew that Plaintiffs were two different firms and that Plaintiffs would share fees but did not care how fees would be split between the two. (R344, R347, R1503, R1547, R1591.) Defendants also knew both that lawyers at both law firms would be responsible for handling their legal matters, (id.), and that Schlegel would not represent them unless Levenfeld would join as co-counsel. (R332, R1575, R1656.) During the engagement, Defendants communicated regularly with the principals of both Plaintiffs regarding their legal issues. (R1208-R1209, R1503.) As Defendants themselves admitted at trial, the way in which the Plaintiff law firms would share in a fee was entirely inconsequential to them. The way in which Plaintiffs would divide the total fee between them was in no way an essential part of the agreed exchange. Thus, even if the theoretical fee-sharing arrangement between attorneys was unenforceable, it would not render the contingency fee structure contained in the attorney-client fee agreement also unenforceable.

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The holding in *Bennett v. GlaxoSmithKline LLC*, 2020 IL App (5th) 180281, ¶¶ 56, 60, supports this conclusion. In *Bennett*, the court effectively enforced a 40% contingency rate despite an unenforceable fee-sharing agreement between the lawyers. Defendants seek to distinguish Bennett from this case on the basis that, in *Bennett*, there was an actual fee-sharing agreement between the lawyers where, here, there is no actual fee-sharing agreement between the lawyers. This is a distinction without a difference.

Defendants do not dispute that there is no published Illinois appellate opinion in which a court has invalidated an attorney-client fee agreement for failure to obtain consent to a fee-sharing agreement as required by Rule 1.5(e). They do point to a trial-level, federal court case in which the court reached that result. In *United States ex rel. Figurski v. Forest Health Sys.*, 96 C 4663, 1999 WL 1068659, at *7, 1999 U.S. Dist. LEXIS 18222, at *7 (N.D. Ill.), the federal district court held that a contingency fee agreement was unenforceable due to a violation of the fee-splitting rule in Rule 1.5(e), instead permitting recovery in quantum meruit. Although the court invalidated the contingency fee agreement, the court did not identify an explanation for this portion of its ruling. *Figurski* provides no value, precedential or persuasive.

The other cases to which Defendants cite also lend no support to their position. As noted in Section I.B.1., above, *Kepple & Co.,* 396 Ill. App. 3d 1061, stands for the proposition that, "when some portion of a contract is unenforceable as against public policy, 'a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.'" (quoting Restatement (Second) of Contracts § 184 (1981)). Defendants cite to *Kepple & Co.* in support of their contention that the failure to include a fee-sharing clause in a contract renders the entirety of the contract unenforceable.

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Although *Kepple & Co.* did involve the omission of a fee-sharing clause from a contract, and the court did conclude that the omission of the fee-sharing clause rendered other clauses in the contract unenforceable, it is highly distinguishable from the case at bar.

In *Kepple & Co.*, unlike here, the fee-sharing clause was the basis by which the plaintiff would be paid for its services. The fee-sharing clause in that case is akin to the contingency-fee clause in this case and very much unlike any fee-sharing arrangement between Plaintiffs.

In *Kepple & Co.*, the plaintiff was a billing and collection firm that had entered into a contract to provide billing services to the defendant medical services provider. *Id.* at 1062. Under the contract, the plaintiff was to be compensated by receiving a percentage of billings collected on behalf of the defendant, which the court referred to as a "fee-sharing" clause, though it was more of the nature of a contingency clause. *Id.* The contact also contained a nonsolicitation clause. *Id.* The lawsuit turned on the nonsolicitation clause, which the plaintiff alleged the defendant breached by hiring away an employee from the plaintiff. *Id.* at 1063.

The "fee-sharing" clause—the provision that defined how the plaintiff would be compensated for the services that it was to provide under the contract—was unenforceable as it violated a statute that prohibits medical providers from sharing compensation with third parties. *Id.* 1064-65. The question in *Kepple & Co.* was whether the rest of the contract—including the nonsolicitation clause—was rendered unenforceable due to the illegality of the "fee-sharing" compensation clause. *Id.* The court held that the fee-sharing compensation clause was not severable from the rest of the contract because it was an essential term of the contract. *Id.* at 1066.

The court held that "there can be no dispute that the fee-sharing clause is an essential part of the services contract" in light of the fact that the plaintiff's agreement to provide

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medical billing and collection services in exchange "for a percentage of the amount collected is the very essence of the services contract." *Id.* As such, the illegal provision could not be severed and the entire contract was unenforceable. *Id.*

Although the case at bar also involves a "fee-sharing" component, it is nothing like the fee-sharing term in *Kepple & Co.* Here, the essence of the agreement between Plaintiffs and Defendants was that Plaintiffs would provide legal services to Defendants in exchange for a percentage of Defendants' ultimate recovery. This contingency fee structure was essential to the contract, just as the "fee-sharing" contingency structure was essential to the contract in *Kepple & Co*. But the fee-sharing component here—how Defendants would share the total fee between them—was in no way essential to the contract.

Defendants cite to *Practice Mgmt., Ltd. v. Schwartz*, 256 Ill. App. 3d 949 (1st Dist. 1993) in further support of their "severability" argument. But *Practice Mgmt.*, just like *Kepple & Co.*, stands only for the proposition that a compensation term in a contract between a medical services provider and third party that calls for the sharing of a physician's fee—a statutorily prohibited practice and term—renders the fee-sharing agreement void and unenforceable. *Id.* at0 954-55. *Practice Mgmt.* does not support Defendants' argument.

Finally, Defendants cite to *Kane v. Option Care Enterprises, Inc.*, 2021 IL App (1st) 200666. *Kane* also involved a fee-sharing agreement in a service agreement where the fee-sharing component was the method by which one party would compensate the other. *Id.* at ¶¶ 8, 39. As the essential "compensation" term of the services agreement, the unenforceability of the statutorily-prohibited fee-sharing clause rendered the remainder of the contract unenforceable, as well. *Id.* at ¶ 27. *Kane* does not support Defendants' position.

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C. It does not matter, currently, how Plaintiffs would have shared in a fee.

Throughout their brief, Defendants frequently make complaints such as that "Plaintiffs apparently still do not know how they will divide any fees." (Pl. Br. at 18.) Defendants' criticism is invalid for multiple reasons. First, the attorney-client fee agreement was terminated and became unenforceable as soon as Defendants fired Plaintiffs. *Will v. Northwestern Univ.*, 378 Ill. App. 3d 280, 303 (1st Dist. 2007). Plaintiffs' quantum meruit recovery, if any, will not be a divided fee under Rule 1.5(e).

Second, during the course of the representation, Plaintiffs could not have identified the proportions by which they were going to divide any earned contingency fee. Rule 1.5(e)(1) permits a division of fees in either of two circumstances: first, where "the division is in proportion to the services performed by each lawyer"; or, second, "where the primary service performed by one lawyer is the referral of the client to another lawyer." Ill. R. Prof. Conduct 1.5(e)(1). Here, the two Plaintiffs were not in a referring-lawyer/handling-lawyer relationship. Rather, attorneys from both firms were going to, and did, share in actively handling Defendants' legal matters, each spending considerable time working on behalf of each Defendant. (R332, R395, R756, R1203-R1209, R1503, R1575-R1576, R1656; C4235-C4337, C4338-C4353.) Under Rule 1.5(e)(1), unless one lawyer's role is the referral of the case to the other, the lawyers much share the fee "in proportion to the services performed by each lawyer." Ill. R. Prof. Conduct 1.5(e)(1). Until the engagement was concluded, there would have been no way for the separate firms to identify the proportion of services that each ultimately performed.

D. Public policy supports the trial court's award by reference to the contingency rate structure agreed to by the parties.

It is true that strong public policy considerations underpin the fee-sharing requirements of Rule 1.5(e). The fee-sharing rule "embod[ies] this state's public policy of placing the rights

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of clients above and beyond any lawyers' remedies in seeking to enforce fee-sharing arrangements." *Romanek v. Connelly*, 324 Ill. App. 3d 393, 399 (1st Dist. 2001). Rule 1.5(e) is founded on an interest in ensuring that clients will be represented by their chosen counsel and, if more than one lawyer or law firm is involved, an interest in knowing who will be ultimately responsible for the client's legal matters. *Albert Brooks Friedman, Ltd. v. Malevitis*, 304 Ill. App. 3d 979, 984 (1st Dist. 1999). As Defendants state, client consent to fee-sharing arrangements "leads to greater accountability by giving clients control 'over not only which lawyers have responsibility for handling their legal matters, but to what degree.' " (Def. Br. at 28, citing *Phillips v. Joyce*, 169 Ill. App. 3d 520, 529 (1st Dist. 1988).) Rule 1.5(e) "protects the client from unearned or excessive fees" such that "[n]o attorney whom the client has not retained will be entitled to payment from the client via a secret deal with the client's attorney." *Phillips*, 169 Ill. App. 3d at 529.

Here, the public policy considerations underpinning Rule 1.5(e) were met despite the rule violation. Plaintiffs had control over which lawyers would be responsible for handling their legal matters. They entered into an attorney-client agreement that identified both Plaintiff law firms as Defendants' lawyers. (R332, R1575, R1656.) They knew that the principals of both firms would be responsible for handling their legal matters and the roles that each would play. (R344, R347, R1503, R1547, R1591.) Possibly because they already knew the foregoing, Defendants did not care how fees would be split between the two firms. (R344, R347, R1503, R1547, R1591.)

None of the foregoing means that substantial compliance with Rule 1.5(e) is always sufficient. It means only that in this case substantial compliance served to meet the public policy grounds upon which the rule is based.

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In light of the foregoing, it makes no sense from a public policy perspective or otherwise to prevent the trial court from rendering a fee award based on the contingency rate that the parties agreed was fair and reasonable and which itself complies with all legal and ethical requirements, and to thereby force the trial court to render such an award by reference to some other consideration. Why should a court of equity be precluded from considering what Defendants—the clients—thought was fair and reasonable when determining a fair and reasonable fee? There is no public policy justification for doing so.

In some cases, courts have even permitted lawyers to enforce fee-sharing agreements where the fee-sharing agreements themselves violated the fee-sharing rules set forth in Rule 1.5(e), but the court found technical compliance with the rule. If public policy considerations were not only so strong but so universal, courts would not regularly condone something less than strict compliance with Rule 1.5(e), especially in the fee-sharing context. But they have.

In *Phillips*, 169 Ill. App. 3d 520, the court held that one law firm had the right to enforce its fee-sharing agreement with another law firm where the client was aware that fees would be shared between the firms but the disclosure did not explicitly identify the exact percentages that each firm would take. *Id.* at 530. The court concluded that, there, substantial compliance with the predecessor to Rule 1.5(e) was "preferable because it comports with practical realities" and was consistent with the Illinois Supreme Court's opinion in *Kravis* and other cases that have considered the scope of the disclosure requirement. *Id.* at 531.

In another case, *Davies v. Grauer*, 291 Ill. App. 3d 863, 872 (1st Dist. 1997), the appellate court reversed a trial court's judgment dismissing an action by a referring attorney against a handling attorney due to the failure to disclose a fee-sharing agreement in writing to clients, where there was evidence that there had been an oral disclosure to clients that there was a fee-split (though not identifying the proportions) which demonstrated "substantial

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compliance" with ethics rule requiring written disclosure as to fact of fee-split and proportions thereof.

The trial court, a court of equity sitting as trier of fact having heard six days of evidence, was in the best position to ensure a fair outcome for all parties. The trial court did not ignore Plaintiffs' Rule 1.5(e) violation. After having heard the evidence, the court found that Defendants' violation was technical in nature and prejudiced neither "the Defendants [n]or the administration of justice." (C6446.) The trial court could have barred or limited Plaintiffs' recovery based on the admitted violation, but declined to do so in light of evidence presented on these points. (Id.) Public policy does not weigh in favor of this Court creating a rule of universal application where such a rule would deprive trial courts of equity from fashioning fair and reasonable remedies based upon the evidence presented at trial.

Defendants contend that the "violation of Rule 1.5(e) was not a mere technicality because it deprived [Defendants] of important rights that the Rule was designed to protect." (Def. Br. at 29.) There are two problems with Defendants' statement. First, Defendants offer only theoretical ways in which they could possibly have been deprived of rights, but no ways in which they were actually deprived of any rights. For instance, they claim that they could have been dragged into a fee-sharing dispute between Plaintiffs. There is no fee dispute. Even were there a fee dispute, there is no reason that it would involve Defendants. Further, had such a dispute occurred, there is no merit in Defendants' claim that their "receipt of any recovery would be delayed until that dispute between Plaintiffs was resolved." (Def. Br. at 29.) The Rules of Professional Conduct account for this situation and provide ample protection to clients. Rule 1.15 (Safekeeping Property) provides that lawyers may hold only funds that are "in dispute." Ill. R. Prof. Conduct 1.15(f) (eff Jul. 1, 2023.) For example, if lawyers receive settlement funds from which they are to receive a 40% contingency fee, but

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there is a dispute as to the proportions to be shared by the lawyers, the lawyers must distribute the undisputed 60% portion to their clients, holding only the remaining 40% until the dispute between attorneys is resolved. *Id.* A fee-sharing dispute would not have impacted Defendants.

Second, Defendants' statement presents a slippery slope. Nearly every Rule of Professonal Conduct is designed to protect clients' rights, and a client could assert that a violation of any such rule should preclude their lawyer from collecting an agreed fee. As Comment [20] to the Preamble to the Rules provides, the Rules are not meant to be used in such a manner:

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy…. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.

Ill. R. Prof. Conduct, Preamble, Cmt [20].

The purpose of the Rules can be subverted when used as procedural weapons, just as Defendants are doing here. The Rules were not meant to provide clients with a means to avoid their own fair, reasonable fee agreements based on violations that have nothing to do with the clients' own obligation to pay a fee.

Even absent a rule barring the enforcement of attorney-client fee structures in the event of a Rule 1.5(e) violation, there already exists a legal framework by which a court of equity will consider the egregiousness of a plaintiff's conduct—including but not limited to a violation of Rule 1.5(e)— when assessing whether a fee is warranted and, if so, how much. *See, e.g., Much Shelist Freed Denenberg & Ament P. C. v. Lison*, 297 Ill. App. 3d 375 (1st Dist. 1998) (considering impact of rule violation a on quantum meruit recovery); *Rubin & Norris,*

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LLC v. Panzarella, 2016 IL App (1st) 141315 (same); *Anderson v. Anchor Org. for Health Maintenance*, 274 Ill. App. 3d 1001 (1st Dist. 1995) (same). The public policy of this state is protected without resorting to a rule such as the one adopted by the Appellate Court.

E. Defendants' "delegation" argument finds no basis in Plaintiff's position.

Defendants contend that Plaintiffs "fault" Defendants for Plaintiffs' failure to comply with Rule 1.5(e). (Def. Br. at 33). Defendants further imply that Plaintiffs' position is founded on the argument that they "delegated" their duty to comply with Rule 1.5(e) to Defendants. (Def. Br. at 32.) Plaintiffs make no such argument. Plaintiffs, alone, had a duty to comply with the Rules.

F. There is no merit in Defendants' contention that Plaintiffs bore no risk of non-payment.

In arguing that the trial court erred in assessing a reasonable fee by reference to the contingency rate agreed to by the parties, Defendants contend that Plaintiffs "bore no risk of non-payment." (Def. Br. at 37.) It is unclear how such a statement relates to the trial court's award by reference to the contingency rate. The statement is also false. Although the contingency-fee agreement between Plaintiffs and Defendants contained an hourly "floor"—a small hourly rate that could be charged in the event of no recovery or a small recovery—there was always a significant chance that Plaintiffs would recover nothing.

When Defendants hired Plaintiffs, they were broke, had essentially no income and little savings, and were unable to pay mortgages and other debts and bills. (R323-R324, R1642-R1646.) Had Plaintiffs been unsuccessful in their efforts to monetize Defendants' interests in the various family assets, there is no reason to believe that Defendants would have paid Plaintiffs anything, or even that Defendants would have been able to pay Plaintiffs anything. It matters not that Defendants might have been compelled to reduce liquid assets to liquid funds to pay legal bills, Plaintiffs had essentially no liquid assets.

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G. The contingency fee structure agreed to by the parties served as a proper basis for the trial court's award.

Defendants do not dispute that Plaintiffs not only agreed to the contingency fee structure, Dan proposed it. (R340, R1514-R1515, R1664.) Defendants do not dispute that the contingency fee structure itself complies in all respects with the Rules of Professional Conduct. And Defendants do not dispute that the contingency fee structure is consistent with usual and customary fees charged in like matters within the community.

Despite the foregoing, Defendants contend that a court of equity should be prohibited from awarding a reasonable fee by reference to that very contingency fee structure. Their contention is based solely on the idea that, if Plaintiffs were permitted to recover by reference to the same fee structure set forth in the unenforceable attorney-client agreement, Plaintiffs could "obtain the same result as if their fee agreement were fully enforceable." (Def. Br. at 34.) But Plaintiffs fail to offer a compelling reason why a court of equity should be barred, as a matter of law, from reaching just such a result.

Plaintiffs assert that allowing such a recovery would "create an easy route for evading Rule 1.5(e), and the rule would be rendered a nullity." (Def. Br. at 34.) This is not so. Rule 1.5(e) is a mandatory rule of ethics. Violators are subject to discipline, including censure, suspension, or worse. Further, allowing such a recovery in this case creates no significant precedent, it only reinforces the principle that courts of equity should have wide latitude to fashion appropriate remedies "based on the demands of justice in each case, however peculiar." *Glenn v. City of Chicago*, 256 Ill. App. 3d 825, 841 (1st Dist. 1993) (quoting *Davis v. Kurtz*, 165 Ill.App.3d 417, 421 (3d Dist. 1988)).

Plaintiffs further contend that the law already prohibits lawyers from recovering by reference to the terms of fee-sharing agreements that violate Rule 1.5(e), either in contract, in breach of fiduciary duty or in quantum meruit. But Plaintiffs ignore that, in those cases,

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the fee-sharing agreements themselves violate Rule 1.5(e); here, as discussed above, there is no dispute that the contingency rate applied by the trial court itself violated no rule of ethics.

Public policy considerations underlie the fee-sharing disclosure requirements of Rule 1.5(e); however, the fact that Plaintiffs failed to comply with Rule 1.5(e) does not mean that the public policy considerations were thwarted. Plaintiffs were represented by their chosen attorneys, who were named on the attorney-client fee agreement and who shared joint responsibility for the representation in every sense of the term. It may be the case that clients' rights should be placed above lawyers' rights in securing a fee, but in this case the clients' rights—Defendants own rights—were in no way harmed or impaired. The trial court, as both finder of fact and a court of equity, was in the best position to make that determination.

Finally, Defendants attempt to distinguish *Rhoades v. Norfolk & Western Ry. Co.*, 78 Ill. 2d 217 (1979), discussed in greater detail in Section II, below, on the basis that there was no Rule 1.5(e) violation in *Rhoades*. *Rhoades* stands generally for the proposition that courts may enter awards in quantum meruit to discharged lawyers by reference to an agreed contingency rate, though the contingency agreement is no longer enforceable. *Id.* at 227-30. Defendants offer no explanation why the holding in Rhoades would have differed had there been a Rule 1.5(e) violation. If, under *Rhoades*, the most equitable manner of assessing a reasonable fee in quantum meruit may be by reference to an agreed contingency rate, what possible good reason would there be in forcing the trial court to render such an award via a less equitable route?

For the foregoing reasons, this Court should reverse the Appellate Court's holding insofar as it vacated the award rendered by the trial court and should further affirm the award and judgment of the trial court.

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II. THIS COURT SHOULD DENY DEFENDANTS' REQUESTS FOR CROSS-RELIEF.

In a quantum meruit claim, a plaintiff must establish that: (1) the plaintiff performed a service to benefit the defendant; (2) the plaintiff performed that service nongratuitously; (3) the defendant accepted the service; and, (4) no contract existed to prescribe payment of the service. *Owen J-Pagener & Co. v. U.S. Bank*, 297 Ill. App. 3d 1045 (1st Dist. 1998).

In awarding quantum meruit fees, courts usually consider the following factors: (1) the time and labor required; (2) the lawyer's skill and standing; (3) the nature of the cause and the difficulty of the issues involved, including the amount at issue; (4) the novelty and difficulty of the subject matter; (5) the lawyer's degree of responsibility in managing the case; (6) the usual and customary charge for that type of work in the community; and (7) the benefits resulting to the client. *In re Estate of Callahan*, 144 Ill. 2d 32, 41 (1991).

Under the Illinois Supreme Court opinion in *Rhoades* and its progeny, Illinois courts have routinely awarded as quantum meruit damages the entire contractual contingent fee of a lawyer who has done most of the work in a case and who is discharged when or shortly before a settlement is reached. *Rhoades*, 78 Ill. 2d at 227-30 (noting that, where an attorney is fired shortly before settlement, "[i]n most instances, clients would hire another attorney and would still be liable for fees; in cases in which an attorney who has done much work is fired immediately before a settlement is reached, the factors involved in determining a reasonable fee would justify a finding that the entire contract fee is the reasonable value of services rendered."). *See also DeLapaz v. Selectbuild Const., Inc.*, 394 Ill. App. 3d 969, 975 (1st Dist. 2009) (affirming award of full 30% contingency fee, less fees due to successor counsel, on quantum meruit basis where the first firm "performed the bulk of the work prior to discharge based on the amount and nature of the work performed"); *Will*, 378 Ill. App. 3d at 306 (affirming award of contingency fee contract amount of one-third recovery on quantum

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meruit where lawyer was discharged because client did not agree with lawyer's recommendation to accept a settlement offer, but client was later ordered to accept same amount in settlement); *Wegner v. Arnold*, 305 Ill. App. 3d 689, 694-96 (2d Dist. 1999) (reversing trial court's award of less than discharged attorney's contingency rate of one-third of the settlement proceeds where a successor attorney settled the client's case shortly after the original attorney's discharge, even though the client purported to have terminated the lawyer for cause on the basis that the original lawyer had fallen asleep during her deposition, was unaware of the defendant's policy limits, and failed to object to the disclosure of private information); *Whalen v. Shear*, 190 Ill. App. 3d 84, 86-87 (3d Dist. 1989) (awarding full one-third contingency fee set forth in fee agreement on a quantum meruit basis where the court concluded that the amount offered and ultimately accepted in settlement was "attributable to the efforts primarily if not exclusively of the discharged attorney"); *Dobbs v. DePuy Orthopaedics, Inc.*, 885 F.3d 455, 459 (7th Cir. 2018) (affirming, under Illinois law, award of entire contingency contract fee of 35% of recovery on quantum meruit basis as the reasonable value of services rendered).

Here, the evidence supports the trial court's finding that Plaintiffs conferred a benefit upon Defendants and further supported the trial court's finding that $1,692,390.60 constituted a reasonable fee based on the quantum meruit factors. Both issues are discussed below.

Unlike the discretion afforded a trial court in ruling on a fee petition, the fact finding of the trial court at a bench trial will not be disturbed unless it is against the manifest weight of the evidence. *Jameson Real Estate, LLC v. Ahmed*, 2018 IL App (1st) 171534, ¶ 59. "In a civil trial, the necessity of legal services performed and the reasonableness of the amount charged are questions of fact [and] the trial judge, sitting as the trier of fact, decides these issues

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based on the weight of the competent evidence." *Wildman, Harrold, Allen & Dixon v. Gaylord*, 317 Ill. App. 3d 590, 599 (1st Dist. 2000) (internal citations omitted). As such, when "determining the reasonableness of attorney fees in a bench trial, the trial judge sits as the trier of fact and does not exercise 'broad discretionary powers.' " *Id.* at 598. For this reason, "a trial judge cannot abuse his discretion by determining that attorney fees are reasonable in a civil trial on the merits because 'discretion has nothing to do with the issue.' " *Id.* (quoting *Buckner v. Causey*, 311 Ill. App. 3d 139, 142 (1st Dist. 1999)). Rather, the trial court's findings, including its finding as to what constituted a reasonable fee, shall not be disturbed unless they are against the manifest weight of the evidence. *Id.* at 595-99.

A. The trial court's finding that Defendants benefited from Plaintiffs' legal work was not against the manifest weight of the evidence.

The trial court found that "global success on the matters undertaken is not the yardstick by which a benefit conferred should be measured in this case." (C6444-C6445.) Rather, the evidence showed that Plaintiffs' legal work benefited Defendants in providing them the leverage needed to settle for $16,8500,000, which "settlement amount was clearly based in significant part on the pressure Plaintiffs brought to bear on Peggy though their litigation efforts." (C6444-C6445, C6454-6455.) The appellate court affirmed, holding that the trial court's finding was not against the manifest weight of the evidence. ¶¶47-51.

As Defendants acknowledge, the trial court's finding that Plaintiffs' work benefited Defendants should be reversed only if the court's finding was against the manifest weight of the evidence. "A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002). This standard affords great deference to the trial court as the trial court is in a superior position to determine and weigh the credibility of the witnesses, to observe their demeanor, and to

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resolve conflicts in their testimony. *Jameson*, 2018 IL App (1st) 171534, ¶ 59. Under the manifest weight standard, the reviewing court may not reweigh the evidence or make an independent determination of the facts. *Id.* at ¶ 59.

"When contradictory testimony that could support conflicting conclusions is given at a bench trial, an appellate court will not disturb the trial court's factual findings based on that testimony unless a contrary finding is clearly apparent." *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 859 (1st Dist. 2008).

Here, the trial court found that Defendants benefited from Plaintiff's legal work in that "as a direct result of Plaintiffs' work, Defendants received all, or nearly all, of the leverage needed to consummate a $16,850,000 settlement" of the underlying disputes. (C6290.) Defendants contend that the trial court's finding was against the manifest weight of the evidence. To be clear, Defendants do not acknowledge that Plaintiffs' work benefited Defendants but contend that it did not benefit Plaintiffs to the degree necessary to support the trial court's award. Rather, Defendants contend that Plaintiffs' work did not benefit Defendants *at all*. In either event, the evidence strongly supports that Plaintiffs benefited considerably from Defendants' work.

When Defendants retained Plaintiffs, Defendants were receiving no benefit whatsoever from their 25% interests in the family assets. (C5333.) Plaintiffs' involvement quickly created leverage. Soon after Plaintiffs got involved, Peggy tried to buy out Dan's interest for $6,000,000, but Dan rejected the offer. (R375-R378.) Over the next year and a half, Plaintiffs obtained progressively larger settlement offers, going from $12,000,000 in September 2016 to $15,440,000 on April 11, 2017. (R380-R391, R1214-R1215, R1220-R1222, R1424-R1426; C4207-4211, C4217-C4222, C5334.) Peggy's $15,440,000 offer of April 11, 2017, purported to be a "final counterproposal" and was set to expire three days later. (R1424-R1426; C4210-

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4211, C6091-6092.) Plaintiffs made a counter-demand of $17,106,662 on April 17, 2017. (R1219-R1222; C4217-4218.) Defendants knew that Maureen wanted the option to purchase her Kluver Road home from the family via any settlement, so each demand – including the April 17, 2017, demand – provided that she could purchase the home. (R386; C4217-C4218.)

Although Peggy had characterized her $15,440,000 offer as a "final counterproposal" set to expire three days later, she responded to Plaintiffs' $17,106,662 demand with a $16,250,000 counteroffer on May 1, 2017. (R387; C4221-C4222, C5334.) Upon receipt of the counteroffer, Plaintiffs promptly proposed that Defendants should counter with a demand for $16,250,000 plus Maureen's Kluver Road home and further expressed the need to "accept, reject or counter the proposal." (C6072-C6076; R619-R621, R388- R389.)

Defendants did not follow Plaintiffs' advice – they never gave Plaintiffs the authority to accept, reject or counter the $16,250,000 offer. (R1377.) On May 10, 2017, Peggy withdrew the offer. (R1377; C5334, C6090.) Plaintiffs continued to have informal settlement discussions with Peggy's counsel over the next few weeks, and at one point recommended to Defendants that they should counter at $16,750,000, with an option to purchase the Kluver Road home. (R1378, R1382, R1419-R1422, R1509-R1510; C4230-4233.)

Defendants never authorized Plaintiffs to make a new counter-demand. Rather, Defendants fired Plaintiffs, retained the GKWW firm, and then settled for $16,850,000 within three weeks. (R5334.) To Dan and Maureen's knowledge, before settling their claims GKWW never did any legal work other than engaging in settlement negotiations and in related due diligence on Defendants' behalf. (R1492-1493, R1499-R1500, R1533- R1534.) GKWW did not even appear in any of the then-pending litigation. (C4478-C4742, C4766-4796.)

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The benefit in Plaintiffs' work can most easily be seen in the steadily increasing settlement offers received by Defendants, culminating shortly before Plaintiffs' firing in an offer very close to the amount for which Defendants settled very soon thereafter. But those benefits can be seen elsewhere in Plaintiffs' work, as well.

Defendants benefited from Plaintiffs' work in that their litigation positions were advanced by engaging in considerable complex investigation and discovery, over Peggy's objections and efforts to delay. (R347-359, R 362-R366, R557-R565, R1350, R1442.) Defendants benefited from the fact that Plaintiffs mounted defenses against multiple claims that Peggy and her husband had brought against Defendants in multiple forums. Contrary to Defendants' contention that Plaintiffs' litigation and negotiation efforts were "admittedly unsuccessful," (Def. Br. at 41.), and that Plaintiffs' litigation tactics "failed spectacularly," (Def. Br. at 40), a number of Defendants' claims against Peggy remained pending even after they fired Plaintiffs. (R565-R567; C4772.) Although some claims had been dismissed, other claims survived motion practice. (Id.)

Defendants offer no explanation why, if Plaintiffs' litigation efforts were "unsuccessful" and "failed spectacularly", Peggy continued to increase her settlement offers to the point where Defendants fired Plaintiffs shortly after Peggy had offered Defendants almost exactly 95% ($16,000,000) of Defendants' most recent settlement demand ($17,106,662). (R387; C4221-C4222, C5334.)

Defendants' entire argument is premised on a misconception of the nature of claimants-side legal work. Defendants' contention seems to be that a claimant's lawyer cannot provide value to a client until a settlement has been reached or a judgment obtained and money is in the client's pocket. But, just as the courts found in *Rhoades*, 78 Ill. 2d 217; *DeLapaz*, 394 Ill. App. 3d 969; *Wegner*, 305 Ill. App. 3d 689; *Whalen*, 190 Ill. App. 3d 84; and *Dobbs*, 885 F.3d

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455, claimants-side lawyers can benefit their clients significant by moving cases forward, avoiding dismissal and summary judgment.

There is no merit in Defendants' contention that the manifest weight of the evidence opposes a finding that Defendants benefited from Plaintiffs' work. When Defendants hired Plaintiffs, Defendants owed money, they were being frozen out and they were deriving no financial benefit whatsoever from their interests in the family assets. Multiple of the claims Plaintiffs had made on Defendants' behalf had survived motions to dismiss and had otherwise yielded positive results. Contrary to Defendants' claim that Plaintiffs only succeeded on one motion, (Def. Br. at 39), their successes included compelling a conversion of the estates from independent administration to supervised administration, compelling the production of trust and estate accountings, and orders compelling Peggy to turn over considerable documentation relative to trust and estate finances. (R297, R329, R363, R1179.) By the time Defendants fired Plaintiffs about nineteen months into the engagement, Defendants had received a settlement offer in the amount of $16,250,000. Without successor counsel, GKWW, doing anything to gain further leverage, a settlement was achieved for $16,850,000. The foregoing is ample evidence, without more, that as a direct result of Plaintiffs' work Defendants received all, or nearly all, of the leverage needed to consummate a $16,850,000 settlement.

Defendants further contend that they received no benefit from Plaintiffs' legal work because "Plaintiffs may have made efforts, but they achieved no results." (Def. Br. at 41.) Defendants' argument both ignores the nature of the underlying litigation and misstates the factual record. Defendants contend Plaintiffs' legal work did not increase their settlement leverage because Plaintiffs' "efforts failed at every turn." (Def. Br. at 41.) But Plaintiffs did not fail in their efforts. Defendants are correct that, among the nine pieces of litigation that

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Plaintiffs handled on Defendants' behalf, the two petitions to remove executors were dismissed with prejudice, one count was dismissed without prejudice, one of two essentially identical appeals was dismissed, and depositions had not yet proceeded. But Defendants' recitation of the evidence is incomplete: Plaintiffs had leave to re-file the count that was dismissed without prejudice and eventually re-filed. (R.368.) The other of the two essentially identical appeals that was not dismissed was unsuccessful on the merits. (R.4472-R4477.) Depositions had not yet proceeded but were about to go forward when Defendants fired Plaintiffs. (R1211, R1442.) Defendants also ignore that Plaintiffs had engaged in significant and extensive motion practice, including successful efforts to convert the estates into supervised administrations and successful efforts to compel document production, and that Plaintiffs engaged in extensive and complex document investigation, analysis and discovery. (R297, R329, R363, R587, R1210-R1211.) In light of evidence that Peggy increased her settlement offers as all of this was occurring, the evidence strongly supported the trial court's conclusion that Defendants benefited from considerable settlement leverage obtained via Plaintiffs' efforts.

Further, as the trial court noted in its Trial Memorandum and Order "global success on the matters undertaken is not the yardstick by which a benefit conferred should be measured in this case." (C6280-C6281.) Plaintiffs could not have "won" Defendants' claims before they concluded.

Defendants make one argument that they contend should be reviewed *de novo*. They contend that the trial court erroneously shifted the burden to Defendants to prove that Plaintiffs' legal work did not benefit them. (Def. Br. at 38, 41.) Other than quoting without context a sentence fragment from the trial court's decision in which the trial court noted that Defendants "presented no alternative theory for why Peggy settled," (C6281), Defendants

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offer no explanation for their contention that the trial court imposed a burden of proof on Defendants relative to the question whether Plaintiffs' work benefited them. As reflected in the trial court's Trial Memorandum and Order, the trial court did not shift the burden to Defendants. Rather, the trial court concluded that Defendants' argument that they received no benefit "is contrary to the evidence in the record." (C6280.) The court then articulated exactly how Plaintiffs had proven that their work resulted in the leverage used to settle:

> During the period of their engagement. Plaintiffs reviewed thousands of documents, formulated a litigation strategy, and engaged in multiple lawsuits on Defendants' behalf, including in state and federal court cases. Defendants argue that certain of Plaintiffs' litigation tactics failed; however, global success on the matters undertaken is not the yardstick by which a benefit conferred should be measured in this case. When they retained Plaintiffs, the O'Briens [Defendants] were receiving no benefit whatsoever from their combined 50% interest in the family assets. Over the next 19 months. Plaintiffs obtained progressively larger settlement offers, and three weeks before they were terminated, on May 1, 2017, Peggy offered to settle for $16,250,000.

(C6280-C6281.)

Defendants also take liberties with the evidence. They assert that "the chancery court dismissed two other claims altogether and severed and transferred another. When the Plaintiffs tried to replead, their amendment was stricken." (Def. Br. at 37.) In citing to pages 368 and 574 of the record for the foregoing proposition, Defendants omit the last part of the testimony on this point: Schlegel testified that the amendment was stricken without prejudice and that, afterwards, "we amended again." (R.368.) By their omission, Defendants mischaracterize the evidence to create the false impression that dismissed claims were stricken and never re-pleaded.

Defendants also contend that, because they fired Defendants before a settlement could be accomplished, it was speculative to conclude that Defendants benefited from Plaintiffs' work in the form of the $16.85 million settlement that they received. (Def. Br. at 41-44.) Illinois law does not support Defendants' argument. As discussed in the introduction to this

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Section II, *Rhoades*, 78 Ill. 2d 217; *DeLapaz*, 394 Ill. App. 3d 969; *Wegner*, 305 Ill. App. 3d 689; *Whalen*, 190 Ill. App. 3d 84; and *Dobbs*, 885 F.3d 455, all stand for the proposition that a measurable benefit can be defined by reference to work done prior to discharge combined with the mere fact that a settlement occurred shortly after discharge.

Defendants' "speculation" argument flies in the face of all of the decisions discussed above, in each of which courts upheld quantum meruit awards based on findings that clients benefited from legal work performed by the lawyers in the form of a settlement achieved after the lawyers' dismissal. Defendants also ignore the testimony of Plaintiffs' retained expert, Foley & Lardner trusts and estates litigator John Brooks, who concluded that Plaintiffs' work gave Defendants leverage in their settlement negotiations with Peggy and therefore benefited Defendants. (R1057-R1058.)

Defendants also contend that they received no benefit from Plaintiffs' legal work because, when they fired Plaintiffs, no settlement offer remained pending. (Def. Br. at 42.) As the trial court found, "this fact is inconsequential" in that the settlement negotiations had involved considerable posturing, offers had been previously made and withdrawn only for negotiations to continue, and both sides acted as though negotiations were continuing even after Peggy withdrew the $16,250,000 offer. (C6291.) Further, the fact that GKWW settled Defendants' claims for a slightly greater figure shortly thereafter demonstrates that, in fact, settlement negotiations had not come to an end. Defendants also ignore that Plaintiffs did not allow the $16,250,000 offer to expire – they promptly informed Defendants of the offer and recommended that Defendants should make a counter-demand. (C6072-C6076; R388-R389, R619-R621, R631-R633. The offer expired due to Defendants' own conscious or inadvertent inaction. (R1377; C5334, C6090.) Further, even had Defendants authorized Plaintiffs to counter Peggy's most recent demand, as they had on numerous prior occasions,

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it would have nullified Peggy's offer by operation of law. *Olympic Rest. Corp. v. Bank of Wheaton*, 251 Ill. App. 3d 594, 601 (2d Dist. 1993). It does not matter whether the offer was withdrawn, rejected or nullified via a counter-demand.

None of the cases to which Defendants cite provides support for their position. In *Bernstein & Grazian, P.C. v. Grazian & Volpe, P.C.*, 402 Ill. App. 3d 961, 962, 964 (1st Dist. 2010), an attorney, Bernstein, was a partner in a law practice in which his two partners had agreed to split with him fees earned on claimant-side contingency-fee cases on a 50/50 basis. Berstein's two partners then left and formed a new firm, through which they handled many of the contingency-fee cases that had originated at Bernstein's law practice. *Id.* at 964-65. Bernstein and the new firm ultimately engaged in litigation, including over Bernstein's right to contingency fees that had originated at the Bernstein firm. *Id.*

The trial court ruled that quantum meruit afforded the only remedy by which Bernstein could recover. *Id.* at 965. Noting that it could not identify what specific contribution Bernstein had made towards the cases for which he sought compensation, the trial court nevertheless awarded Bernstein 10% of the legal fees in the cases the new firm had assumed. *Id.*

The appellate court reversed, finding that Bernstein failed to present any evidence that he performed any work that benefited his former law partners, from whom he sought a quantum meruit award. *Id.* at 979-80. By that point in his career, Bernstein was not taking depositions, arguing motions, going to court, reviewing records or retaining experts. *Id.* Bernstein offered only "extremely generalized" testimony that, during the timeframe in question, he spoke to clients and adjustors and worked on written discovery, though not necessarily limited to those cases that the new firm had assumed. *Id.* at 980. No evidence was presented that he spent any time on the subject cases, much less how much time. *Id.* The

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trial court had referred to Bernstein's contributions to the firm as having "diminished" and "deteriorated" and that Bernstein had even become a "liability" and "burden" to the law firm. *Id.*

The appellate court concluded that, in light of the fact that the trial court could not identify anything that Bernstein had done to benefit his former law partners relative to the cases at issue, the quantum meruit award was against the manifest weight of the evidence. *Id.*

The case at bar could not be more different than *Bernstein*. Here, the trial court heard approximately three days of detailed testimony by Plaintiffs' principals, an associate attorney and a paralegal, regarding Plaintiffs' litigation strategy, settlement negotiations, and substantive litigation work performed on Defendants' behalf in nine separate pieces of litigation. (R292-R484; R523-R756; R803-895; R929-991; R1199-R1292; R1346-R1461.) The trial record also contains approximately 120 pages of single-spaced time records detailing the over 3,000 hours of legal work performed by Plaintiffs on Defendants' behalf. (C4235-C4353.) Over the course of the engagement, Plaintiffs put together a paper file that filled about thirty file boxes, not including volumes of electronic documents, all of which were reviewed, organized, and analyzed in addition to the other litigation work that Plaintiffs performed. (R.363.) Plaintiffs did not just analyze documents, they prepared and responded to pleadings, engaged in motion practice, appeared before courts, and supervised local counsel in out-of-state litigation. Unlike in *Bernstein*, where there was no evidence showing that attorney Bernstein had necessarily performed any work on any of the subject cases, here there is a mountain of evidence that Plaintiffs performed considerable, complex and time-consuming legal work on Defendants' behalf.

Defendants cite to *First Nat. Bank of Springfield v. Malpractice Research, Inc.*, 179 Ill. 2d 353 (1997), for their proposition that "the mere fact that Plaintiffs 'reviewed' documents offered

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nothing to [Defendants]." In *First Nat. Bank*, this Court held that a contract between medical malpractice plaintiffs and a firm retained to find and hire expert witnesses was unenforceable as against established precedent prohibiting the award of contingency fees to witness finders. *Id.* at 359-64. The search firm was barred from recovering in quantum meruit on multiple grounds, including because the search firm provided no benefit to the medical malpractice plaintiffs as the plaintiffs did not retain any of the experts or rely on any reports prepared by the search firm. *Id.* at 366-67.

As discussed above, unlike the defendant search firm in *First Nat. Bank*, Plaintiffs did far more than just review documents on Defendants' behalf. *First Nat. Bank* provides no support for Defendants' position.

Defendants' argument seems to be that Plaintiffs' work could only have benefited them if Plaintiffs had won summary judgment, a trial judgment, or achieved a settlement on their behalf, though Defendants fired Plaintiffs before they could accomplish any of the foregoing. Defendants ignore that, in most claimants-side litigation, success and benefit are measured by nothing more than keeping a claim going by avoiding dismissal or summary judgment as to the entire claim. There is ample factual and legal support for the trial court's finding that, even though Defendants' claims were not settled until after Plaintiffs' discharge, Plaintiffs' work significantly benefited Defendants.

Moreover, Illinois law supports the conclusion that an award in quantum meruit would have been appropriate even if Defendants had failed to establish that their work benefited Plaintiffs. In *Much Shelist*, 297 Ill. App. 3d at 379-80, the court held that although "it is possible for a client to receive services and yet not be enriched in a tangible way," which may have occurred in that case, the plaintiff law firm was nonetheless entitled to recover in quantum meruit for the value of services provided. *See also Ashby v. Price*, 112 Ill. App. 3d

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114, 122-23 (3d Dist. 1983) (holding that former client who discharged his lawyer had to pay the quantum meruit value of the lawyer's services even if the former client received no tangible benefit).

This Court should affirm the circuit court's judgment in its entirety, and should further affirm the Appellate Court's opinion to the extent that it reversed the trial court's judgment.

B. Plaintiffs proved the reasonable value of the legal services provided to Defendants.

1. The trial court did not err in rendering an award consistent with cases applying a contingency rate.

As discussed above, under this Court's opinion in *Rhoades* and its progeny, Illinois courts have routinely awarded as quantum meruit damages the entire contractual contingent fee of a lawyer who has done most of the work in a case and who is discharged when or shortly before a settlement is reached. See introduction to Section II, *supra.* Defendants contend that the trial court erred as a matter of law in rendering an award by reference to the general principles set forth in this line of cases, that the reasonable value of legal services can be, but is not always, found by applying the agreed contingency rate to the settlement ultimately obtained. Defendants contend that the opinions in *Rhoades*, 78 Ill. 2d 217; *DeLapaz*, 394 Ill. App. 3d 969; *Wegner*, 305 Ill. App. 3d 689; *Whalen*, 190 Ill. App. 3d 84; and *Dobbs*, 885 F.3d 455, are distinguishable because in none of those cases did the lawyer violate the Rules. But Defendants fail to flesh out this argument.

Defendants argue that *DeLapaz* illustrates their point, but it does not. *DeLapaz* involved the allocation of legal fees between a law firm, which was discharged before settlement, and a lawyer who had worked with the law firm but left and obtained the settlement for the client after his departure. *DeLapaz*, 394 Ill. App. 3d at 971. The law firm sought an adjudication of their attorney lien, seeking the full one-third contingency as set forth in its

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attorney-client fee agreement, less any fees to which the lawyer was entitled on an hourly basis. *Id.* The trial court awarded fees on that basis, allocating about $3,300 to the lawyer based on an hourly metric and the remainder of a one-third contingency to the discharged law firm. *Id.* at 972.

The lawyer appealed, arguing in part that the trial court had erred in awarding the law firm a fee by reference to the agreed contingency rate. *Id.* The appellate court rejected the lawyer's argument, noting that where the law firm had performed the overwhelming share of the work on the case, the trial court did not err in awarding the fee by reference to the contingency rate as applied to the settlement amount. *Id.* at 975.

The lawyer also argued that, although he never had a fee agreement with the client, his recovery should have been determined by reference to the contingency rate in the contract between the client and the law firm. *Id.* at 972. Unsurprisingly, the appellate court rejected this argument, as well, as there exited no basis in quantum meruit by which to calculate the lawyer's fee by reference to an agreement to which he was not a party. *Id.* at 976-77.

Although Plaintiffs are much like the law firm in *DeLapaz*, which had a contingency fee agreement rendered unenforceable due to its termination before recovery was made, and very different from the lawyer who simply had no fee agreement with the client of any sort, Defendants liken Plaintiffs to the lawyer, rather than the firm. Defendants' attempt to draw a parallel fails.

Defendants also contend that the line of cases discussed above is distinguishable because those cases "involve clients who terminated their attorneys after the attorneys secured favorable settlements for their clients." (Def. Br. at 46.) Defendants' contention is simply untrue. As noted above, in *DeLapaz*, the law firm that recovered by reference to its contingency fee was terminated before the case settled. *Id.* at 971. The same is true in

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Rhoades, 78 Ill. 2d at 222-23; *Wegner*, 305 Ill. App. 3d at 691; *Whalen*, 190 Ill. App. 3d and 86; and *Dobbs*, 885 F.3d at 456. Defendants cannot reasonably dispute that Illinois law clearly permits recovery of the full contingency amount, possibly less fees due to successor counsel, where the original law firm did most of the work and was fired shortly before settlement. Although it appears that the trial court may have cited to the wrong cases for this proposition, the proposition itself remains well-settled.

As Defendants point out "attorneys are not entitled to their fees on a contingency basis simply because they were discharged shortly before the conclusion of the litigation." (Def. Br. at 47.) However, where attorneys performed most of the legal work and were discharged when settlement was near, an award by reference to the contingency rate may be the most equitable outcome. And where rendering an award by reference to the contingency rate and amount of the settlement is the most equitable process and yields the most equitable outcome—this may not often be the case—there is no legal or policy justification for prohibiting a court of equity from applying these equitable principles.

2. The trial court's finding that Plaintiffs' services had a reasonable value of $1,692,390.60 was not against the manifest weight of the evidence.

The trial court applied all seven of the quantum meruit factors in determining that $1,692,390.60 constituted the reasonable value of Plaintiffs' work. All seven factors support the trial court's award by reference to the contingency rate that the parties agreed would constitute a reasonable basis by which to charge a fee, then subtracting the fees paid to Defendants' successor counsel.

<u>The Attorneys' Skill and Standing:</u> Plaintiffs' principals, Levenfeld and Schlegel, are highly skilled, of good standing in the legal community, and have about 100 years of combined practice. (R1055.) Both were accomplished litigators; Schlegel's achievements include prosecuting civil claims in connection with the Richard Speck murders and serving

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as court-appointed lead counsel in the Agent Orange litigation and Levenfeld wrote the Bangladeshi constitution. (R298-R299; R1201- R1202.)

As discussed in Section II.A., above, Defendants are incorrect when they assert that "[Plaintiffs] did not obtain any favorable rulings." (Def. Br. at 50.) It is true that Defendants missed the deadline to file a notice of appeal but, as also discussed above, an identical appeal was lost on the merits, demonstrating that the late filing was of no consequence. Defendants cite to their own proposed findings of fact presented to the trial court and to their own question at trial which the trial court permitted only insofar as it related to the effect on the listener in asserting that "courts criticized [Plaintiffs] for practicing 'the exact opposite of way the way we were all taught." (Def. Br. at 50, citing C6266; R573-74.) Regardless of the evidentiary problems with Defendants' assertion, an admonition by a trial court judge hardly suggests that Plaintiffs' principals were not of the highest skill and standing.

<u>The Nature of the Cause and the Difficulty of the Issues Involved:</u> Defendants are correct that the underlying case did not go to trial, and that no depositions were taken. But that does not mean that the litigation was not difficult. As discussed in Section I.F., above, there is no merit in Defendants' contention that the nature of the underlying cause left Plaintiffs with no risk of zero recovery. There was a risk of zero recovery and even were Plaintiffs to have recovered on the hourly floor pursuant to the "disaster clause," it would only have covered their overhead. (R337.)

As Plaintiffs' expert, Brooks, testified, the underlying litigation was very complex. (R1035.) It arose from a complicated family dispute that involved many dozens of properties spread out over three states and largely held in numerous limited liability companies and limited liability partnerships, with control vested in a general partner that was itself controlled by Peggy and Richard, who played a multitude of roles, including executor, co-

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executor, trustee, co-trustee and corporate director. (R1035, R1045, R1053.) Because Defendants lacked any control over the management of the family assets, and because Peggy's control over the family assets yielded no net income to be distributed to Defendants, Plaintiffs were faced with the difficult prospect of utilizing the court system to attempt to compel the conversion of percentage interests in family assets into cash, which Peggy had no obligation to do. (R1045-R1047.) It would be difficult, if not impossible, to compel the liquidation and sale of the family assets where the controlling legal documents—the wills, trusts, partnership agreements and operating agreements—called for no such thing and where the decisions by Peggy and Richard, who were in control, could be characterized as legitimate business decisions. (Id.)

Over objections from Peggy's lawyers, Plaintiffs succeeded in having Dan Sr.'s and Mary's probate estates converted from independent administrations to supervised administrations, in having the court order accountings and in otherwise obtaining voluminous document discovery – about 30 file boxes – relative to the business entities in which the family assets were almost entirely owned, which Plaintiffs carefully analyzed, chronologized and charted as they put together documentary evidence to support the narrative needed to support their claims. (R297, R329, R363, R1179.) The citation to recover assets directed against Peggy's son yielded additional document discovery, necessitating additional review, organization, and analysis. (R587, R1210-R1211.) This claim also provided additional leverage as Plaintiffs worked to negotiate a settlement. Plaintiffs had set the depositions of Peggy and her son but were fired before the depositions could proceed. (Id.)

The Novelty and Difficulty of the Subject Matter: Defendants contend that "there is no evidence that the Plaintiffs performed work that was novel or difficult." (Def. Br. at 50.) The record is replete with such evidence, including nearly a day's worth of Schlegel's testimony

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regarding the analysis of complex set of business structures, estates and trusts in which the family assets were held, and their efforts via litigation to place the ownership vehicles in a position where they could challenge Peggy's managerial discretion. (R306-R310, R. 315-R316, R326-328, R340-R349, R1275-1276.)

The underlying litigation was extremely difficult and involved novel issues, due in part to its complexity. (R.1054.) There was an extremely large volume of documents and properties. (Id.) Although Dan and Maureen had uncontested 25% interests, they had no control and were receiving no distributions. (R1045-R1046.) They wanted to turn their interests into cash but Peggy (and Richard) had no obligation to comply. (R1046.) Plaintiffs' efforts to force distributions presented difficult issues that Peggy and Richard fought and called for the court to rule on what could be cast as business decisions. (R1046-R1047.)

Dan and Maureen's 25% interests in the family assets were not contested or disputed, (R1049); however, there were numerous issues that were contested, as there were issues about accountings, about Peggy paying her son, Jim West, with family assets, and relative to Peggy's refusal to provide Dan and Maureen with cash in exchange for their percentage interests, (id.). Even if the probate estates could be closed, the assets would go into trusts, which were likewise controlled by Peggy and Richard, so they would retain control over the family assets. (R1050.)

Further, it was not the province of the probate court to order a liquidation of the family assets, especially where even those assets owned by the estates would pour over into a trust. (R1050-R1051.) Moreover, there was a significant risk that Dan's and Maureen's standing could not be improved via litigation; a considerable amount of time could be spent and they may still have not recovered anything, simply being left where they started, with a combined 50% interest in the family assets that was providing them no monetary benefit. (R1084.)

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The Attorneys' Degree of Responsibility in Managing the Case: Until they were fired, Plaintiffs were the only lawyers with responsibility for handling the Defendants' legal matters. (R1059-R1060.)

Time and Labor Required: Plaintiffs' representation of Defendants involved a considerable amount of time and labor. Plaintiffs' time records reflect that lawyers Levenfeld, Schlegel and Xhaferri, as well as paralegal/administrative assistant Rushe, spent thousands of hours working on Defendants' behalf over approximately nineteen months. Levenfeld and Schlegel detailed the considerable amount of work they had to perform to convince Peggy to steadily increase her settlement offers from nothing to $16,250,000. (R4204-R4211, R4217-4222, R4235-R4353.) The 118-page binder that Rushe prepared provides a small snapshot of the amount of work that had to be undertaken just to organize and chronologize the key documents and information Plaintiffs received, reviewed and analyzed. (C4354-4471.)

Defendants contend that the trial court should not have considered the time spent by Rushe, as she was an unpaid legal assistant whom Defendants contend could not have been properly considered to be a "paralegal." Defendants ignore that: (1) it was undisputed that, without including Rushe's time, time records revealed that lawyers Levenfeld, Schlegel and Xhaferri spent well over 1,500 hours working on Defendants' behalf, (R4235-4353); (2) Rushe had an undergraduate degree in business and law and had work experience in banking and market research that made her contributions valuable to the team effort, regardless of whether she should have been called a "paralegal", (R930-R931); (3) that Plaintiffs' expert reviewed Rushe's work and concluded that "it looked like what you would have a paralegal do," (R1097), and (4) the trial court did not find the time expended by Plaintiffs to have a significant impact on its determination of a reasonable fee, (C6290).

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Further, regardless of whether Rushe should be called a "paralegal," a "legal assistant" or something else, it would have been proper to include her time when determining a reasonable fee to have been awarded. In *Father & Sons Home Imp. II, Inc. v. Stuart*, 2016 IL App (1st) 143666, ¶ 69, the court held that, in identifying a reasonable legal fee to be awarded, a court may consider work performed by "paralegals or other non-attorneys…which would otherwise have to be performed by an attorney" as long as that work should not be considered ordinary "overhead expenses" that are taken into account in the lawyer's hourly rate. Here, the parties agreed to a contingency rate and the trial court rendered its award by reference to that rate – even if Rushe's time could not have been billed to clients under an hourly-fee arrangement, there would have been no error in considering the time that she spent in assessing the time expended by Plaintiffs under a quantum meruit analysis.

Defendants' citation to *Young v. Alden Gardens of Waterford, LLC*, 2015 IL App (1st) 131887, ¶ 108, (Def. Br. at 49), provides no support for their position. Defendants state that, in *Young*, the court "affirm[ed] exclusion of administrative tasks from lawyers' 'reasonable baseline hours.' " (Def. Br. at 49.) But, in *Young*, the court did not address the exclusion of any time from consideration merely because it was administrative. Rather, the court held that a fee petition was defective because the lawyer had falsely "charg[ed] attorney hourly rates for nonlegal tasks." *Id.* at ¶ 107. Plaintiffs in this case never charged Defendants for anything; they merely recorded the time spent by the various individuals who worked on Defendants' behalf.

<u>Benefits Resulting to the Clients:</u> As discussed at length in Section II.B., above, Defendants received considerable, valuable benefits as a result of Plaintiffs' representation, including but not limited to receipt of a $16,250,000 settlement offer and the leverage

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needed for successor counsel to settle Defendants' claims for a slightly greater amount. (R1057-R1058, R1179.)

The Usual and Customary Charge for Like Work in the Community: Defendants falsely assert that "the Plaintiffs did not present any evidence regarding the usual and customary charge in the community for the work they performed for [Defendants]." (Def. Br. at 51.) In fact, the trial court heard ample evidence that a legal fee calculated as 15% of the first $10,000,000 recovered and 10% of any amount recovered in excess thereof is consistent with usual and customary charges for similar work. (R1055-R1057.)

Schlegel testified that a much higher contingency rate—25% to 30%—was usual and customary at the time for such matters. (R339.) Plaintiffs' expert, Brooks, likewise opined that the contingency fee structure agreed to by the parties was consistent with usual and customary rates charged in like matters. (R1055-R1056, R1239.) He testified that lawyers often use one-third contingencies in disputes such as Defendants'. (Id.)

There is no merit in Defendants' contention that the trial court should have applied the $300 hourly "floor" set forth in the attorney-client fee agreement when assessing the usual and customary charges for like services in the community; rather, there was also evidence of usual and customary hourly charges at a much higher rate. (Def. Br. at 51.) The $300 floor does not represent a usual and customary charge in the community, or even for attorney Schlegel, who testified that his usual and customary hourly charges are much higher, between $450 and $600. (R338.) Brooks testified that his own hourly rate—a minimum of $870 per hour—is consistent with other charges in the community for the sort of work Plaintiffs performed. (R1009, R1065.)

All seven factors weigh heavily in favor of Plaintiffs and support the trial court's award in quantum meruit by reference to the contingency rate, less the $500,000 flat fee that

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Defendants paid to successor counsel, despite successor counsel not having even appeared in any of the nine then-pending pieces of litigation.

C. Plaintiffs Have Neither Waived Nor Forfeited any Quantum Meruit Claim Based On Hourly Rates or on any Other Basis Independent of Their Unlawful Fee Agreement.

Defendants contend that Plaintiffs affirmatively waived a claim to a quantum meruit award by reference to anything other than the agreed contingency rate. Defendants posit that Plaintiffs' counsel's argument in opposition to Defendants' motion for a directed finding on the issue of unclean hands—an issue that Defendants have not raised on appeal—in which Plaintiffs' counsel noted that Defendants were seeking a quantum meruit recovery based on the contingency rate rather than on an hourly basis, constitutes an affirmative waiver of any right to recover on such an hourly basis. Defendants offer no argument as to how a statement made in a motion hearing could constitute a waiver of the ability to present a theory of damages at a later trial, so the argument does not merit consideration. *Hall v Naper Gold Hospitality*, 2012 IL App (2d) 111151, ¶ 12 ("Mere contentions, without argument or citation to authority, do not merit consideration on appeal.").

Even if the issue merited consideration, it should be rejected. "Waiver arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right." *Home Ins. Co. v. Cincinnati Ins. Co.*, 213 Ill. 2d 307, 326 (2004). Plaintiffs cannot have relinquished a "right" to have the court enter an award based on any particular theory of damages, as Plaintiffs had no such right in the first place. The issue as to the proper measure of damages was to be decided by the trial court based on the evidence, not based on any right of the parties to a particular outcome.

Even if the ability to be awarded damages based on a measure of damages supported by the evidence could be considered a "right", as part of their failure to develop their argument

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Defendants have pointed to nothing in the record to suggest that Plaintiffs intentionally and affirmatively relinquished the potential that the trial court could determine that a damages award should be rendered by reference to the evidence presented at trial.

Defendants also contend that, even if not waived, Plaintiffs have forfeited the ability to seek recovery based on anything but the agreed contingency rate. They cite to *Vandenberg v. RQM, LLC*, 2020 IL App (1st) 190544, as reaching such a conclusion under "comparable circumstances," but the circumstances of that case are anything but comparable. In *Vandenberg*, a law firm terminated for cause in connection with a number of breaches of fiduciary duties to a set of clients, sought recovery on an attorney lien in connection with legal work performed in connection with the clients' eventual settlement. *Id.* at ¶¶ 6, 22. In presenting its fee petition to the trial court, the firm presented evidence only as to the amount of the settlement and the contingency rate set forth in the fee agreement with the clients—the firm presented no evidence as to the number of hours spent representing the client. *Id.* at ¶ 23. The trial court ruled that, absent any evidence as to the number of hours spent, the firm could not recover in quantum meruit and entered an award of zero. *Id.*

The appellate court held that although the trial court could have awarded fees in quantum meruit by reference to the contingency rate, it was not an abuse of discretion to decline to do so under the circumstances, especially considering findings that the law firm had engaged in eleven separate and specific breaches of fiduciary duty in representing the clients. *Id.* at ¶¶ 36-39.

The appellate court found an alternative basis to uphold the award of zero legal fees. The court held that the law firm could have sought recovery based on its written fee agreement with the clients, as the fee agreement explicitly provided for recovery of fees on an hourly basis in the event that the firm was terminated. *Id.* at ¶¶ 44-45. However, the firm presented

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no evidence to the trial court upon which an award could have been entered by reference to the hourly rate—the firm failed to present any evidence as to the hours spent. *Id.* at 46. At oral argument on appeal, the firm asked the appellate court to remand the matter to permit it to present evidence of its hours. *Id.* at 48. The appellate court held that the firm had forfeited any right to an award based on its hourly rate as it failed to present any such evidence to the trial court. *Id.*

The circumstances presented by this case are entirely different. First, unlike the law firm in *Vandenberg*, Plaintiffs obtained a favorable award from the trial court, only that award was vacated by the appellate court. Second, and more importantly, unlike in *Vandenberg*, Plaintiffs presented considerable evidence upon which the trial court could have rendered, or could yet render, an award in quantum meruit other than the contingency rate set forth in the attorney-client fee agreement. As discussed at length above, the trial court not only received considerable evidence as to the exact number of hours spent by each attorney and non-attorney, (C4235-C4353), the trial court also heard testimony that a usual and customary charges for like services could be calculated at an hourly rate of between $450 and $600 or even $870 or more, (R338, R1009, R1065), or by reference to the settlement amount and a usual and customary contingency rate of between 25% and one-third, (R339; R1055-R1056, R1239).

Neither waiver nor forfeiture is warranted here.

CONCLUSION

For all of the foregoing reasons, Plaintiffs-Petitioners Andrew W. Levenfeld and Associates, Ltd., and Stephen J. Schlegel, Ltd., respectfully request that this Court reverse the opinion and judgment of the Appellate Court insofar as it reverses the judgment of the trial court, affirm the opinion and judgment of the Appellate Court insofar as it affirms the

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judgment of the trial court, and affirm the judgment of the trial court entered on November 19, 2021, or, in the exercise of supervisory authority, vacate that portion of the Appellate Court's opinion and judgment reversing the trial court's judgment and remand to the Appellate Court for further proceedings.

Respectfully submitted,

By: */s/ Jeremy N. Boeder*
One of the Attorneys for Plaintiffs-Appellants Andrew W. Levenfeld and Associates, Ltd., and Stephen J. Schlegel, Ltd.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b) and Rule 315(h). The length of the Appellant's Reply Brief and Response to Request for Cross-Relief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 46 pages.

/s/ Jeremy N. Boeder
Jeremy N. Boeder

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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

ANDREW W. LEVENFELD AND ASSOCIATES, LTD. and STEPHEN J. SCHLEGEL, LTD., *Plaintiffs-Appellants,*	)	
v.	)	No. 129599
MAUREEN V. O'BRIEN and DANIEL P. O'BRIEN III, *Defendants-Appellees.*	)	

The undersigned, being first duly sworn, deposes and states that on January 10, 2024, there was electronically filed and served upon the Clerk of the above court the Appellants' Reply Brief and Response to Request for Cross Relief. On January 10, 2024, service of the Brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Jeremy N. Boeder
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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Jeremy N. Boeder
Jeremy N. Boeder

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