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.

APPELLEES' REPLY IN SUPPORT OF REQUEST FOR CROSS-RELIEF

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ARGUMENT

The Plaintiffs' legal work for Maureen and Dan O'Brien was precisely the opposite of what this Court expects of members of the legal profession. When the O'Briens were in desperate straits, the Plaintiffs persuaded them to sign an admittedly "unlawful" fee agreement. Reply at 43 (all-capitalization omitted). The Plaintiffs then persuaded Maureen to resign as a co-executor of her parents' estates. See R 1268-69, 1274-76, 1600-01. The Plaintiffs do not dispute that their legal advice was more than unwise. It was catastrophic. It caused Maureen to surrender important rights and benefits in exchange for nothing. R 1813-18, 1822. Over the next 19 months, the Plaintiffs achieved nothing: they obtained no favorable rulings, they took no depositions, they uncovered no facts in discovery that might have been used to support the O'Briens' claims, and all settlement offers were withdrawn. The Plaintiffs speculate that they created "leverage" for the O'Briens. Reply at 23. That speculation is belied by what actually happened—the O'Briens' adversaries withdrew all settlement offers and made no new ones until after the Plaintiffs were fired. C 5334, 6090, 6148.

The Plaintiffs erroneously argue that a *quantum meruit* claim requires no evidence that the defendant received any benefit at all. Reply at 33-34. That argument misapprehends the nature of a *quantum meruit* claim. It is no mystery why the Plaintiffs try to avoid their burden to show that they benefited their clients in some way. The manifest weight of the evidence shows that the Plaintiffs conferred no benefit at all on the O'Briens. The Plaintiffs argue that the circuit court's credibility determinations are entitled to deference (Reply at 23-24), but no witness (credible or not) offered testimony that could prove the Plaintiffs were responsible, in whole or in part, for the settlement that another lawyer achieved after the Plaintiffs were fired.

I. The circuit court's finding that the Plaintiffs conferred a benefit on the O'Briens is against the manifest weight of the evidence.

A. Without a measurable benefit, there can be no *quantum meruit* award.

Because the evidence shows that nothing the Plaintiffs did conferred any benefit on the O'Briens, the Plaintiffs argue that they would be entitled to nearly $1.7 million in *quantum meruit* even if they "failed to establish that their work benefited" the O'Briens. Reply at 33.[1] This argument is wrong as a matter of law.

"The theory of recovery in *quantum meruit* is that the defendant has received a benefit which would be unjust for him to retain without paying for it. Therefore, in order to recover in *quantum meruit*, it is essential that the services performed by the plaintiff must be of some measurable benefit to the defendant." *Van C. Argiris & Co. v. FMC Corp.*, 144 Ill. App. 3d 750, 753-54 (1986) (internal citations omitted) (a real estate broker cannot obtain recovery in *quantum meruit* merely by showing that they made phone calls and wrote letters; instead, the broker must prove that they were "the procuring cause" of a sale); see also *Bernstein & Grazian, P.C. v. Grazian and Volpe, P.C.*, 402 Ill. App. 3d 961, 978-79 (2010) (attorney's *quantum meruit* claim required proof of a measurable benefit); *Direct Energy Bus., LLC v. City of Harvey*, 2021 IL App (1st) 200629, ¶ 23 (plaintiff's service must be of "measurable benefit" to the defendant).

Bank of Alton v. Bowman illustrates this principle. See 198 Ill. App. 3d 329 (1990). In that case, a law firm named Storment and Read appealed from the denial of its fee petition in a tort case. Storment and Read represented Ollie Odom, a woman who had been injured in a car accident, and her husband, William Odom. *Id.* at 330. Storment and Read obtained a "substantial" settlement offer from the defendant, but Mr. and Mrs. Odom rejected that offer, and their tort claims against the defendant went to trial. *Id.* The jury rendered a verdict for the

[1] On page 33 and occasionally elsewhere in their Reply, the Plaintiffs mistakenly refer to themselves as the "Defendants" and to the O'Briens as "Plaintiffs."

defendant. *Id.* Storment and Read filed a post-trial motion. *Id.* At that point, Mr. and Mrs. Odom fired Storment and Read and hired a new law firm, Pratt & Callis, which promptly filed a supplemental post-trial motion. *Id.* The circuit court granted that motion and ordered a new trial. *Id.* Mrs. Odom died, so the case was retried as a wrongful death action. *Id.* Mr. Odom won the second trial. *Id.* Storment and Read then filed a fee petition and sought recovery in *quantum meruit*. *Id.* The circuit court awarded Storment and Read its costs but no fees. *Id.* Storment and Read appealed from the denial of its request for fees. *Id.*

The appellate court affirmed the circuit court's refusal to award Storment and Read its fees in *quantum meruit*. *Id.* at 331-32. "In actions to recover compensation for legal services, the burden of proof rests on the attorney to establish his case," the appellate court explained. *Id.* at 331. Storment and Read's *quantum meruit* claim failed because, although it tried Mr. and Mrs. Odom's claims and filed a post-trial motion, it "failed to prove that the services it provided were of any measurable benefit to the Odoms." *Id.* The appellate court added:

> When Storment and Read appeared as counsel for plaintiffs, plaintiffs lost. Plaintiffs obtained no relief until Pratt & Callis took over the case. It is certainly possible, of course, that some of the work done by Storment and Read was ultimately utilized by Pratt & Callis in their successful retrial of the case. Had this been established, had Storment and Read proved that its work contributed to the verdict finally won by plaintiffs, Storment and Read could legitimately have claimed that their services were of some measurable benefit, thus entitling them to compensation based on *quantum meruit*. But the firm made no such showing. Even in its brief on appeal, Storment and Read makes no attempt to explain how the work it did helped Pratt & Callis win the case.

Id.

Thus, "Storment and Read failed to meet its burden of establishing its entitlement to compensation" in *quantum meruit*. *Id.* Importantly, Storment and Read could not prove that it contributed to the ultimate outcome merely by showing that it performed work on the case. It was required to come forth with evidence tying its own work to the client's ultimate recovery. *Id.* at 331-32.

Similarly, in *First National Bank of Springfield v. Malpractice Research, Inc.*, 179 Ill. 2d 353, 365-66 (1997), this Court reversed an award of fees in *quantum meruit* to a foundation that agreed to perform litigation consulting and expert witness searches for medical malpractice plaintiffs, finding that the foundation "failed to show that its activities conferred any benefit" on its clients. While the foundation "located a number of expert witnesses for the plaintiffs' original counsel, examined medical records, and prepared reports," there was no evidence that any of that work was actually used to advance the malpractice claims. *Id.* The foundation argued that its work "kept the [malpractice] case alive" for a time, but the attorney who successfully settled the malpractice claim "did not make use of the Foundation's efforts." *Id.* at 366. Citing *Bank of Alton*, 198 Ill. App. 3d at 331, this Court held, "Because the Foundation has failed to show that its activities conferred any benefit on [its clients], its *quantum meruit* claim *necessarily* fails." *First National Bank of Springfield*, 179 Ill. 2d at 366 (emphasis added).

The Plaintiffs cite *Ashby v. Price*, 112 Ill. App. 3d 114, 122-23 (1983) and *Much Shelist Freed Denenberg & Ament, P.C. v. Lison*, 297 Ill. App. 3d 375, 379-80 (1998) for the proposition that an attorney may recover in *quantum meruit* even without proving that their services conferred any measurable benefit on anyone. Reply at 33-34. The Plaintiffs never explain why such a rule would make any sense, or why the legal profession alone should benefit from some exception to the general rule that there can be no recovery in *quantum meruit* without proof of some measurable benefit. The Plaintiffs do not even explain how a *quantum meruit* award could be calculated in the absence of any measurable benefit.

Ashby expressed the view that it would be "inherently unfair to the attorney to permit his client to dismiss him, without justifiable cause, after the attorney had spent time preparing the case, and then to deny the attorney any compensation at all, because he had not settled or successfully tried the case prior to the discharge." See 112 Ill. App. 3d at 122. *Ashby* cited no

authority for this view, and to the extent it suggests that there can be a *quantum meruit* award in the absence of a measurable benefit, it is directly contrary to this Court's subsequent opinion in *First National Bank of Springfield*, 179 Ill. 2d at 365-66. Moreover, *Ashby* rested on the client's termination of his attorney "without justifiable cause." See 112 Ill. App. 3d at 122. Here, the O'Briens had justifiable cause to terminate the Plaintiffs for accomplishing nothing of value over the course of 19 months.

Much Shelist relied on *Ashby* for the proposition that an attorney may recover in *quantum meruit* even if the client received no "value or benefit" from the attorney's services. See 297 Ill. App. 3d at 379-80 (citing *Ashby*, 112 Ill. App. 3d at 122-23). This, too, was directly contrary to this Court's precedent in *First National Bank of Springfield*. The *Much Shelist* court also acknowledged the general rule that *quantum meruit* is "based on the implied promise of the recipient of services to pay for those services *that are of value to him*," see 297 Ill. App. 3d at 379 (emphasis added), but it failed to explain why the value of those services should be irrelevant simply because the *quantum meruit* claimant is an attorney. Surely the legal profession should not be the only one in which it is possible to recover in *quantum meruit* without proof that any benefit was conferred on one's client. Such a rule would work to clients' disadvantage and confirm the public's very worst impression of the legal profession—namely, that attorneys charge money without actually helping people. The correct rule, and the one that will best serve both the public and profession, ties an attorney's ability to recover in *quantum meruit* to some measurable benefit that the attorney achieved for their client. See *Bank of Alton*, 198 Ill. App. 3d at 331.

Finally, *Much Shelist* cited a treatise for the proposition that "it is possible for a client to receive services and yet not be enriched in a tangible way." *Id.* (citing D. Dobbs, Handbook on the Law of Remedies § 4.2, at 237 (1973)). The *Much Shelist* court, however, overlooked the

same treatise's observation that *quantum meruit* may not provide "a suitable measure of the defendant's liability" in such circumstances. See D. Dobbs, Handbook on the Law of Remedies § 4.2, at 237-38 (1973).

For all these reasons, the Plaintiffs cannot escape their burden to prove that they conferred a measurable benefit on their clients.

B. The Plaintiffs conferred no benefit on the O'Briens.

The manifest weight of the evidence shows that the Plaintiffs conferred no benefit on their clients. "When Defendants hired Plaintiffs," the Plaintiffs say, "Defendants owed money, they were being frozen out and they were deriving no financial benefit whatsoever from their interests in the family assets." Reply at 27. But the Plaintiffs did nothing to change any of that, and exactly the same circumstances existed when the O'Briens fired the Plaintiffs 19 months later. In fact, the Plaintiffs' advice *worsened* the O'Briens' legal position. The Plaintiffs do not dispute that they advised Maureen to resign as a co-executor of her parents' estates, that her resignation caused her to forfeit valuable rights and benefits, or that she received no benefits at all from resigning. Appellees' Br. at 6, 12-13, 40-41. The O'Briens were therefore worse off because they hired the Plaintiffs and followed their advice.

The Plaintiffs attempt to distinguish *Bernstein & Grazian* on the basis that the attorney in that case did nothing more than speak with people and "work[] on written discovery." Reply at 31 (discussing *Bernstein & Grazian*, 402 Ill. App. 3d 961, 980 (Ill.App. 2010). By contrast, the Plaintiffs argue, they spoke with people and worked on written discovery. *Id.* at 32. In short, the Plaintiffs fail to offer any meaningful distinction between this case and *Bernstein & Grazian*.

The Plaintiffs argue that they "reviewed, organized, and analyzed" over 30 boxes of documents. Reply at 32. But they fail to identify even a single fact that they discovered by reviewing, organizing and analyzing those documents, let alone how they used any such fact

to achieve any of the O'Briens' goals. In that respect, the Plaintiffs are no different than the litigation consultant in *First National Bank of Springfield* who prepared reports but could not prove that those reports were used to advance anyone's legal claims. See 179 Ill. 2d at 365-66.

The Plaintiffs argue that they successfully moved to convert the administration of Maureen's parents' estates from independent to supervised. Reply at 27. Elsewhere, in an effort to minimize some of their litigation blunders, the Plaintiffs emphasize that the estates controlled relatively few of the assets in dispute. *Id.* at 2, 37-39.

In addition, the only identifiable consequence of that change in the type of administration was the production of more documents. *Id.* And, again, the Plaintiffs fail to explain how any of those documents were ever used to help the O'Briens achieve any of their goals. No documents (or any facts gleaned from any documents) were ever referenced or discussed in any settlement correspondence. See C 4208-09, 4217-18. No documents or facts gleaned from documents were used to achieve any favorable ruling on the merits of any claim. And the Plaintiffs offered no evidence to prove that the ultimate settlement was based, in whole or in part, on their analysis of any documents. The Plaintiffs speak of 30 boxes of documents, but they never explain specifically what those documents were, what new information they revealed, or whether anyone ever relied on those documents to achieve any of the O'Briens' goals. They identify not a single fact that their review of 30 boxes of documents uncovered.

Similarly, the Plaintiffs point out that some of the O'Briens' claims remained pending when they were fired. Reply at 33. But they never explain what those claims were, why the O'Briens' adversaries had any reason to believe that those claims might eventually succeed, or why the O'Briens' adversaries might have been motivated to settle those claims.

Without any citation to authority, the Plaintiffs argue 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." *Id.* That is wrong as a matter of law. See *First National Bank of Springfield*, 179 Ill. 2d at 365-66 (reversing *quantum meruit* award despite litigation consultant's claim that it kept its clients' tort claims "alive" for a period of time and those claims later resulted in a monetary settlement). The O'Briens were not suing their relatives just for the sake of suing, or because they derived some joy from the litigation process. They were suing to achieve specific goals, and the Plaintiffs not only failed to achieve those goals but made no meaningful progress toward achieving them over the course of 19 months. By the time of the Plaintiffs' termination, all settlement offers were withdrawn. C 5334, 6090, 6148.

The Plaintiffs point out that eventually all claims were settled by the attorney who succeeded them. Reply at 25, 33, 41-42. But there is no evidence that the Plaintiffs' work caused or even contributed to that ultimate settlement. The Plaintiffs fault the O'Briens for not identifying any alternative explanation for the ultimate settlement. *Id.* at 28-29. It was the Plaintiffs' burden, however, to prove that they caused the ultimate settlement or otherwise conferred some measurable benefit on their clients. See *Bank of Alton*, 198 Ill. App. 3d at 331. It was not the O'Briens' burden to disprove that proposition. *Id.*

The Plaintiffs also overlook the most obvious alternative explanation for the eventual settlement: Peggy, the O'Briens' litigation adversary, is Maureen's sister and Dan's aunt. R 1569, 1649. Peggy may simply have acted out of a desire for some semblance of family peace. Or perhaps the attorney who succeeded the Plaintiffs was an especially skilled negotiator. Because neither Peggy, nor her husband Richard, nor any of Peggy and Richard's attorneys, nor the lawyer who represented the O'Briens in the final and successful settlement

negotiations testified at trial, there is no evidence to support the Plaintiffs' attempt to take credit for the settlement. The Plaintiffs also do not and cannot dispute two fundamental truths about the settlement negotiations: (i) none of the settlement offers that were made during the Plaintiffs' representation of the O'Briens were acceptable because each one of them would have forced Maureen to leave her home (R 386, 616, 1216, 1615-16); and (ii) the Plaintiffs' involvement in settlement negotiations ended with Peggy and Richard withdrawing all offers (C 5334, 6090, 6148).

The Plaintiffs cryptically argue that, at the time they were fired, the parties "acted as though" settlement negotiations were ongoing. Reply at 25, 30. In the circuit court, however, the Plaintiffs stipulated that "[b]etween all offers being withdrawn on May 10, 2017, and the time of termination on May 25, 2017, Plaintiffs did not obtain any new or active offers to settle Defendants' claims." C 5334. Withdrawing all offers and making no new ones does not imply the continuation of negotiations, and the Plaintiffs' own time records belie any claim that negotiations continued after Peggy and Richard withdrew all offers. See C 5411-12, 5502-05.

Moreover, the fact that the O'Briens' next attorney obtained a settlement in a relatively short amount of time does not show that the Plaintiffs somehow caused or contributed to that settlement. If anything, it shows that a reasonably competent attorney could have settled the litigation quickly instead of wasting 19 months and prompting the O'Briens' adversaries to withdraw all offers.

The Plaintiffs claim that they supplied "leverage" that was used by the O'Briens' next attorney to successfully negotiate a settlement. Reply at 27. Any claim that the Plaintiffs created "leverage" is belied by the undisputed evidence of what actually occurred: The O'Briens' adversaries withdrew all settlement offers. C 6090, 6148. That is not the behavior of someone

who feels any pressure to settle a claim. In fact, the O'Briens *lost* leverage because the Plaintiffs persuaded Maureen to resign as a co-executor of her parents' estates. R 1816, 1822, 1926.

The Plaintiffs argue that the O'Briens' next attorney did nothing but engage in settlement negotiations and perform due diligence. Reply at 25. But that is all the Plaintiffs did as well. *Id.* at 32 (Plaintiffs argue that they engaged in settlement negotiations and reviewed documents). The difference is that the O'Briens' next attorney obtained a settlement.

More importantly, there is no evidence showing that the ultimate settlement resulted, in whole or in part, from anything the Plaintiffs did. That settlement was negotiated by another attorney, and "the value of the first attorney's services cannot be measured by the result obtained by another." *In re Estate of Callahan*, 144 Ill. 2d 32, 40 (1991). The attorney who successfully obtained a settlement never testified, and there is no evidence that he relied on any work performed by the Plaintiffs. See *Bank of Alton*, 198 Ill. App. 3d at 331-32.

There also is no evidence that the settlement resulted from any progress made in negotiations by the Plaintiffs. Again, by the time the Plaintiffs were fired, all offers were withdrawn. C 6090, 6148; R 1377-78. The Plaintiffs also built no reservoir of good will with Peggy and Richard's attorney, who criticized the Plaintiffs for negotiating in bad faith and undermining settlement negotiations with a "stunt." C 5952. Moreover, none of the Plaintiffs' settlement correspondence contained any legal or factual arguments that might have affected Peggy and Richard's assessment of the litigation. C 4208-09, 4217-18. The Plaintiffs' settlement correspondence never even gave Peggy and Richard any reason why they should settle on the O'Briens' proposed terms. *Id.* In short, the settlement occurred in spite of, not because of, the Plaintiffs' prior involvement in the case.

The Plaintiffs argue that their expert testified that the Plaintiffs created leverage for the O'Briens. Reply at 30, citing R 1057-58. That is not, in fact, what their expert said, and in

any event, the cited testimony was stricken by the circuit court. R 1057-58 (striking opinion testimony because it was not timely disclosed and "it's based on speculation"). The Plaintiffs do not argue that the circuit court erred by striking that testimony.

No individual who was directly or indirectly involved in the final and successful settlement negotiations (*e.g.*, Peggy, Richard, their attorney, the O'Briens' next attorney, or the O'Briens themselves) testified that the ultimate settlement occurred because of any "leverage" created by the Plaintiffs. It was the Plaintiffs' burden to prove that their work measurably benefited the O'Briens, see *Bank of Alton*, 198 Ill. App. 3d 331, and the Plaintiffs offered no evidence to meet that burden.

The Plaintiffs downplay the fact that all settlement offers were withdrawn. They say it "does not matter whether the offer was withdrawn, rejected or nullified via a counter-demand." Reply at 31. But the Plaintiffs' entire *quantum meruit* claim is based on the notion that the settlement offers grew "progressively larger" during the time they represented the O'Briens. *Id.* at 24. If the progress of settlement negotiations during the attorney-client relationship is relevant to the *quantum meruit* claim, surely it is relevant that all the "progressively larger" offers were reduced to zero before the Plaintiffs were fired.

The Plaintiffs cite several cases 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." Reply at 29-30. But the heart of a *quantum meruit* claim is the benefit conferred on the defendant. See *First National Bank of Springfield*, 179 Ill. 2d at 365-66. Unless the "work done prior to discharge" caused or at least provably contributed to the settlement that "occurred shortly after discharge," there is no benefit to the defendant.

The Plaintiffs rely on cases where the discharged attorney successfully negotiated a settlement or at least procured the same settlement offer that the client ultimately accepted.

The measurable benefit was the settlement itself, not some combination of work performed and proximity in time to a settlement negotiated by someone else. See *Will v. Northwestern Univ.*, 378 Ill. App. 3d 280, 306 (2007) (attorney negotiated "exactly" the same settlement that the client ultimately accepted); *Wegner v. Arnold*, 305 Ill. App. 3d 689, 695 (1999) (attorney "obtained the maximum gross benefit available to the client" before termination, and opposing counsel in the underlying matter offered testimony showing that the settlement was "solely attributable" to the terminated attorney's work); *Whalen v. Shear*, 190 Ill. App. 3d 84, 86 (2009) (settlement was in "the exact same amount" the terminated attorney had negotiated); *Dobbs v. DePuy Orthopaedics, Inc.*, 885 F.3d 455, 459 (7th Cir. 2018) (when attorney was terminated, "[a]ll that remained" for the client to do was to complete an online settlement enrollment form).

In *DeLapaz v. SelectBuild Construction, Inc.*, 394 Ill. App. 3d 969, 970-77 (2009), one attorney was primarily responsible for the settlement, and the case was a dispute between the two law firms where that lawyer was employed at various times. There was no dispute over the total *quantum meruit* award that would be paid collectively to the two law firms that employed the attorney who achieved the settlement. *Id.* Unsurprisingly, the lawyer who settled the case did not argue that his own work on the same case at his previous firm did not contribute to the ultimate settlement. *Id.*

In *Rhoades v. Norfolk & Western Ry. Co*, 78 Ill. 2d 217, 229-30 (1979), this Court remanded a fee dispute to the circuit court to determine what would constitute a "reasonable fee" under circumstances where the discharged attorney did not negotiate a settlement or obtain a favorable ruling. This Court opined that a *quantum meruit* award based on a contingency fee, such as the one at issue in this case, "would under these circumstances raise a question of excessive fees" and impair a client's right to discharge their attorney. *Id.* at 229.

Importantly, in *Rhoades*, the Court said little else about what the attorney was entitled to receive and instead remanded the case for further proceedings on that question. *Id.* at 229-30.

In a subsequent case, this Court clarified that "the former client will only be liable" in *quantum meruit* "for the reasonable value of the services received during the attorney's period of employment," and "[i]n some cases, it is possible for someone to receive services and yet not be enriched in a tangible way at all." *In re Estate of Callahan*, 144 Ill. 2d at 41 (citing D. Dobbs, Handbook on the Law of Remedies § 4.2, at 237 (1st ed. 1973)). This is such a case, and if there is no tangible benefit at all, there can be no *quantum meruit* recovery. *First National Bank of Springfield*, 179 Ill. 2d at 365-66.

Finally, the Plaintiffs argue that the O'Briens' position "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." Reply at 26. That is not the O'Briens' position. Lawyers can provide measurable benefits to their clients in a variety of ways. Under the circumstances presented here, however, the Plaintiffs failed to meet their burden to prove that they conferred any measurable benefit on their clients. As discussed above, the Plaintiffs' disastrous legal advice actually left their clients worse off.

II. The circuit court's finding that the Plaintiffs conferred almost $1.7 million in benefits on the O'Briens is against the manifest weight of the evidence.

Even if the Plaintiffs conferred some measurable benefit on the O'Briens—and, for the reasons discussed above, they did not—the circuit court's finding that the reasonable value of the Plaintiffs' services approximated $1.7 million was against the manifest weight of the evidence. The factors ordinarily used to calculate a *quantum meruit* award weigh heavily against the windfall awarded by the circuit court:

The Attorneys' Skill and Standing: The Plaintiffs describe themselves as "accomplished litigators," and in support of that self-serving appraisal, they say that Schlegel

worked on "civil claims in connection with the Richard Speck murders" and "the Agent Orange litigation," and that Levenfeld "wrote the Bangladeshi constitution." Reply at 36-37.[2]

The O'Briens' case was not a dispute over the Bangladeshi constitution, and it bore no similarity to any litigation over the Richard Speck murders or Agent Orange. None of that experience was valuable to the O'Briens. Schlegel's first instinct upon being approached about the case, in fact, was that he could not handle it alone and needed help. R 332, 1575, 1656.

The Plaintiffs next assert, with no citation to authority, that judges' criticism of their litigation blunders "hardly suggests that Plaintiffs' principals were not of the highest skill and standing." Reply at 37. To the contrary, judges' real-time assessments of the Plaintiffs' skills and performance are highly relevant. An attorney "of the highest skill and standing," for example, might not have drafted a pleading that one judge deemed "the exact opposite" of how lawyers are trained to plead things. R 573-74.

The Plaintiffs concede that they missed the deadline for filing a notice of appeal, but they raise a curious defense: An "identical appeal was lost on the merits," so their loss of the other appeal was "of no consequence." Reply at 37. It was "of no consequence" only in the sense that the O'Briens received no benefit either from the untimely appeal or from the one that failed on the merits. A more competent attorney might have helped the O'Briens by filing a notice of appeal on time *and* making a meritorious appellate argument.

The Nature of the Cause and the Difficulty of the Issues Involved: The Plaintiffs argue that the case was "very complex" but concede that it "did not go to trial" and "no depositions were taken." Reply at 37-38. The Plaintiffs therefore did not reach the stage of

[2] The Bangladeshi constitution was drafted in 1972 (http://bdlaws.minlaw.gov.bd/act-367.html (last visited Jan. 19, 2024)), before Levenfeld was admitted to practice law (R 1200). Dr. Kamal Hossain, who served as Bangladesh's Minister of Law and Foreign Minister, is credited with authoring his country's constitution. See https://news.nd.edu/news/notre-dame-to-confer-six-honorary-degrees-at-commencement-2/ (last visited Jan. 19, 2024).

litigation that would have forced them to actually litigate any issues, complex or otherwise, before a trier of fact. The Plaintiffs point out that depositions were scheduled (*id.* at 38), but they do not argue that scheduling the depositions was a complex task. They also argue that they succeeded in converting the probate estates from independent administration to supervised administration, which resulted in "voluminous document discovery. *Id.* But, again, they never explain specifically what the documents were, what valuable information was newly discovered from those documents, or how they used any documents to advance settlement negotiations. The settlement correspondence never mentioned any documents. C 4208-09, 4217-18. The Plaintiffs assert that a certain claim "provided additional leverage" in settlement negotiations (Reply at 38), but that assertion is not supported by any citation to the record, so it should be disregarded. See *People v. Stephenson*, 2016 IL App (1st) 142031, ¶ 21 ("This conclusory statement will be disregarded since it is unsupported by legal analysis, citation to legal authority, or citation to the record").

The Novelty and Difficulty of the Subject Matter: The Plaintiffs assert that the "underlying litigation was extremely difficult and involved novel issues" (Reply at 39), but they never identify any legal issue of first impression or otherwise explain why the issues were "novel." The Plaintiffs concede that "Dan and Maureen's 25% interests in the family assets were not contested or disputed." *Id.* They assert that "numerous" other issues "were contested," but they do not articulate why, aside from the existence of a dispute, those issues were more novel or difficult than those in other similar litigation. *Id.*

The Attorneys' Degree of Responsibility in Managing the Case: The Plaintiffs simply assert that they had responsibility for handling the case. Reply at 40. They do not respond to the O'Briens' argument on this factor: namely, that the Plaintiffs failed to adequately discharge their responsibilities to the O'Briens. Appellees' Br. at 51.

Time and Labor Required: Instead of explaining what amount of time and labor was reasonably required to litigate the O'Briens' case, the Plaintiffs simply assert that they and their volunteer helper spent a large number of hours "just to organize and chronologize the key documents and information Plaintiffs received, reviewed and analyzed." Reply at 40. The Plaintiffs never explain why it was necessary to organize and "chronologize" those documents, or how that work was used—if at all—to benefit the O'Briens. They assert that this work was necessary to "convince Peggy to steadily increase her settlement offers from nothing to $16,250,000." *Id.* But none of the documents were used to "convince Peggy" of anything. None of the settlement correspondence said anything about any documents or about any facts gleaned from any documents. C 4208-09, 4217-18. Additionally, Peggy's settlement offers fell back down to zero before the Plaintiffs were fired. C 6090, 6148; R 1377-78.

The Plaintiffs quibble over whether it is accurate to call their volunteer helper a "paralegal"—and it is undisputed that she was not actually a paralegal—but they never respond to the more fundamental point that they would receive an unfair windfall if the O'Briens were required to compensate them for work they received for free. Reply at 40-41. They instead simply assert, without citation to any pertinent authority, that "there would have been no error in considering the time that [the volunteer] spent" in calculating a *quantum meruit* award. *Id.* at 41. But why should the O'Briens be required to compensate the Plaintiffs for help that the Plaintiffs received gratuitously? *Quantum meruit* is intended to compensate one for the value of services rendered non-gratuitously. *Bernstein & Grazian*, 402 Ill. App. 3d at 979.[3]

[3] The appellate court noted that Schlegel sponsored the volunteer for handball tournaments (*Andrew W. Levenfeld & Associates, Ltd. v. O'Brien*, 2023 IL App (1st) 211638, ¶ 20), but the Plaintiffs do not argue that the handball tournament sponsorship was compensation for any work performed by the volunteer.

The Plaintiffs cite *Father & Sons Home Improvement II, Inc. v. Stuart*, 2016 IL App (1st) 143666. Reply at 41. In that case, the appellate court explained that a paralegal's time may be compensable under Ill. Sup. Ct. R. 137 if the paralegal performed tasks that an attorney might otherwise perform, but "general administrative tasks, such as updating the case status reports and organizing the case file" would not be compensable. See 2016 IL App (1st) 143666, ¶¶ 69-71. Here, the volunteer helper's time was spent on general administrative tasks, including organizing the case file. Reply at 40 (work was performed "just to organize and chronologize the key documents and information"). Schlegel, and the volunteer herself, admitted that her work was "clerical and administrative." R 702, 931.

The Plaintiffs attempt to distinguish *Young v. Alden Gardens of Waterford, LLC*, 2015 IL App (1st) 131887, ¶ 108, on the basis that they "never charged Defendants for anything." Reply at 41. But they recorded their time for the purpose of recovering fees from the Defendants. C 5343. The Plaintiffs fail to explain any meaningful distinction between that and "charg[ing] Defendants" for fees. Reply at 41.

Benefits Resulting to the Clients: The Plaintiffs say that they obtained "a $16,250,000 settlement offer" (Reply at 41), overlooking that this settlement offer was a non-starter because it would have rendered Maureen homeless (C 6093-94; R 616, 1216, 1613-16), and the offer was later withdrawn (C 6090, 6148; R 1377-78). The Plaintiffs again claim to have delivered "leverage" (Reply at 41-42), but they cite only testimony that was stricken by the circuit court as speculative (R 1057-58), and testimony that said nothing about any "leverage" (R 1179).

The Usual and Customary Charge for Like Work in the Community: Schlegel testified that he thought a 25-30% contingency fee would be customary (R 339), but that is not what he proposed to the O'Briens (SA 1-2; R 336-37). The Plaintiffs refer to their expert's

testimony, but their expert testified only that: (i) the contingency fee was "quite reasonable" because it was "negotiated with the client," (ii) "most people think of a third" when they think of a contingency fee, but "that's not set in stone," and (iii) a one-third contingency fee would be reasonable if "the parties had agreed to it." R 1055-57. The parties never agreed to it. SA 1-2; R 336-37.[4]

The Plaintiffs disavow the $300 hourly rate in their fee agreement. Reply at 42. They argue that Schlegel testified that his "usual and customary hourly charges are much higher, between $450 and $600." *Id.* In the cited testimony, Schlegel admitted that he charged other clients $300 per hour (R 338), and he never testified that $450 to $600 was a usual and customary charge in the community for similar work (*id.*). Schlegel's usual fees in his other cases would not provide a reliable benchmark in any event. The O'Briens' case was not similar to other matters Schlegel ordinarily handled, which is why Schlegel immediately recognized that he needed help from another firm with more experience in probate matters. R 332-33.

The Plaintiffs claim that their expert witness testified that his own hourly rate of $870 "is consistent with other charges in the community for the sort of work Plaintiffs performed." Reply at 42. In fact, the expert testified that $870 per hour is consistent with rates charged by "larger firms." R 1065. No witness described either Plaintiff as a "larger firm."

III. The Plaintiffs waived and forfeited any claim to recovery in *quantum meruit* on any basis other than their admittedly "unlawful" fee agreement.

The Plaintiffs dispute that they waived any *quantum meruit* claim on any alternative basis. They first assert that the O'Briens' argument is not supported by legal authority. Reply at 43. In fact, the O'Briens supported this argument with a citation to *Buenz v. Frontline*

[4] The Plaintiffs mistakenly cite R 1239 when describing the expert's testimony (Reply at 42), but the cited testimony was by Levenfeld, who merely testified that he thought the contingency fee was reasonable. R 1239.

Transportation Co., 227 Ill. 2d 302, 320 n.2 (2008) (see Appellees' Br. at 52), which explains that waiver is the "voluntary relinquishment of a known right." The O'Briens then explained that the Plaintiffs expressly represented to the circuit court that they were "seeking a recovery based on the contingency, not on the time records." R 1555. The Plaintiffs thus voluntarily relinquished their known right to claim a *quantum meruit* recovery based on the time records, or based on anything other than the contingency fee.

The Plaintiffs argue that they "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." Reply at 43. This misses the point. The Plaintiffs had the right to make a particular claim, and they voluntarily relinquished the right to make such a claim. R 1555.

The Plaintiffs also argue that the waiver somehow did not count because it occurred at a motion hearing, not at trial. Reply at 43. The Plaintiffs cite no authority for the proposition that no waiver can ever occur at a motion hearing or that a waiver does not count unless it occurred at a trial.

The Plaintiffs argue that the record contains evidence on which an alternative *quantum meruit* award could be based. Reply at 44-45. That is the primary basis on which the Plaintiffs attempt to distinguish *Vandenberg v. RQM, LLC*, 2020 IL App (1st) 190544, ¶ 48, which refused to "give [a law firm] the proverbial second bite at an apple and ignore the rules of forfeiture."[5]

But the Plaintiffs again exaggerate the trial testimony on this subject. Contrary to the Plaintiffs' assertion, the record does not show that "usual and customary charges for like services could be calculated at an hourly rate of between $450 and $600 or even $870 or more."

[5] The Plaintiffs attempt to distinguish *Vandenberg* on the basis that "Plaintiffs obtained a favorable award from the trial court, only that award was vacated by the appellate court." Reply at 45. The Plaintiffs never explain why that distinction would make any difference. Either way, an hours-based *quantum meruit* claim was forfeited because it was never made in the circuit court. *Vandenberg*, 2020 IL App (1st) 190544, ¶ 48.

Reply at 45. Schlegel testified that he charged some other clients $450 to $600 per hour in other matters, but never testified that those other matters were like the O'Briens' dispute. R 338. The Plaintiffs' expert, an attorney at Foley & Lardner, testified that he charged $870 per hour and that his rate is consistent with rates at "other larger firms." R 1009, 1065. There is no evidence that the Plaintiffs are "larger" firms or that they are otherwise comparable to Foley & Lardner. No one testified that "more" than $870 per hour is a customary hourly rate. Reply at 45. The Plaintiffs assert that "a usual and customary contingency rate" would have been "between 25% and one-third." *Id.* The Plaintiffs' expert testified that a one-third contingency fee would have been reasonable if "the parties had agreed to it." R 1065. The parties never agreed to it. SA 1-2; R 336-37.

The Plaintiffs exaggerate the record on this issue because they failed to offer competent evidence at trial of any alternative basis for calculating a *quantum meruit* award. Because the Plaintiffs failed to seek a *quantum meruit* award based on an hourly rate multiplied by hours worked or on any basis other than the unlawful contingency fee, they waived and forfeited any such *quantum meruit* claim. They should not be allowed a second bite at the apple at this late stage of the litigation. Appellees' Br. at 52-53.

CONCLUSION

Defendants-Appellees Maureen V. O'Brien and Daniel P. O'Brien III respectfully request that this Court: affirm the appellate court's opinion insofar as it reversed the circuit court's judgment in part; reverse the appellate court's opinion insofar as it affirmed the circuit court's judgment in part; reverse the circuit court's judgment in its entirety; and award any other relief that this Court deems proper.

Respectfully submitted,

/s/ John M. Fitzgerald

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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 this brief, 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), contains 20 pages.

/s/ John M. Fitzgerald
John M. Fitzgerald

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 24, 2024, there was electronically filed and served upon the Clerk of the above court the Appellee's Reply in Support of Request for Cross-Relief. On January 24, 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.

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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/ John M. Fitzgerald
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