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No. 1-21-1638

In the

# Appellate Court of Illinois

## First Judicial District

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

*Plaintiffs-Appellees,*

v.

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

*Defendants-Appellants.*

Appeal from the Circuit Court of Cook County,
County Department, Chancery Division, No. 17 CH 15055.
The Honorable **Cecilia A. Horan**, Judge Presiding.

## BRIEF OF PLAINTIFFS-APPELLEES

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## NATURE OF THE CASE

This lawsuit involves a quantum meruit claim by two law firms, Stephen J. Schlegel, Ltd. and Andrew W. Levenfeld and Associates, Ltd. (together, "Plaintiffs"), against their former clients, Maureen V. O'Brien and Daniel P. O'Brien III (together, "Defendants"). Plaintiffs filed suit to recover the reasonable value of legal services provided to Defendants in nine pieces of underlying litigation over the course of about nineteen months.

At the outset of the engagement, Defendants had agreed to pay Plaintiffs a contingency fee of 15% of the first $10,000,000 recovered and 10% of any excess. About eighteen months into the engagement, the parties were engaged in settlement negotiations. Plaintiffs made a settlement demand on Defendants' behalf in the amount of approximately $17,100,000. Their opponent countered with a $16,250,000 offer. Instead of responding, Defendants fired Plaintiffs, thereby rendering the contingency fee agreement void and unenforceable. Within weeks after hiring new lawyers to replace Plaintiffs, and with an agreement to pay the new lawyers a $500,000 flat fee, Defendants settled their underlying claims for $16,850,000. They refused to pay Plaintiffs anything for their work.

Because the contingency fee agreement ceased to be operative due to the fact that Defendants fired Plaintiffs before agreeing to a settlement, Plaintiffs sued Defendants in quantum meruit.



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Following a bench trial, Judge Cecilia A. Horan of the Circuit Court of Cook County rendered a judgment in the Plaintiffs' favor. The trial court declined to bar or otherwise limit Plaintiffs' claims due to a technical violation of Rule 1.5(e) of the Illinois Rules of Professional Conduct for failing to obtain client consent to the proportion by which legal fees would be split between the two Plaintiff law firms. The trial court further found that Plaintiffs' legal work benefited Defendants in providing them the leverage needed to settle for $16,8500,000 and that, based on an application of seven quantum meruit factors, Plaintiffs' work had a reasonable value of $1,692,390.60 – about a tenth of the amount of the underlying settlement. The trial court arrived at this figure by applying the agreed contingency rate to the $16,8500,000 settlement entered into shortly after Plaintiffs' discharge, adding a small sum for unreimbursed costs incurred by Plaintiffs in the underlying litigation, and then subtracting the $500,000 flat fee that Defendants paid to their successor counsel to complete settlement negotiations on Defendants' underlying claims.

Defendants filed the instant appeal from the judgment entered by the trial court following the bench trial.



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## ISSUES PRESENTED FOR REVIEW

1. Whether the trial court abused its discretion in awarding Plaintiffs a recovery in quantum meruit by reference to a contingency rate in light of Plaintiffs' failure to comply with Rule 1.5(e) with respect to a division of fees between Plaintiffs, where Defendants presented no evidence that they were prejudiced by the failure to disclose or that the failure prejudiced the administration of justice, where the parties agreed to the contingency rate by which the trial court calculated Plaintiffs' fees, and where the contingency rate was consistent with usual and customary charges in like litigation.

2. Whether the trial court's finding that Defendants benefited from Plaintiffs' legal work was against the manifest weight of the evidence where Defendants had received no settlement offer before retaining Plaintiffs, where Defendants received a $16,250,000 offer prior to firing Plaintiffs, and where Defendants' successor counsel settled their claims for $16,850,000 within weeks after being hired.

3. Whether the trial court's finding that Plaintiffs' legal work had a reasonable value of $1,692,390.60 was against the manifest weight of the evidence where the trial court found that all seven quantum meruit factors supported Plaintiffs' claim and calculated the reasonable value of Plaintiffs' work by reference to a contingency rate to which the parties agreed and which was consistent with usual and customary charges in like litigation.



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## STATEMENT OF FACTS

### I. FACTUAL OVERVIEW

Plaintiffs are two law firms that represented Defendants in efforts to monetize Defendants' interests in various family assets. (C5332-C5334.)[1] Other members of Defendants' family controlled the family assets and had frozen out Defendants from receiving any monetary benefit from the estate, which was valued in the tens of millions of dollars. (C5333.) Defendants had little or no other means of income or support. (Id.) Defendants represented Plaintiffs over the course of approximately nineteen months and in nine pieces of litigation. (C1746-C1747, C4472-C4796.) Their time records reflect over 3,000 hours spent working on Defendants' behalf, including time spent by principals of both law firms, by an associate attorney, and by a legal assistant/paralegal. (C4235-C4353.)

About eighteen months into the engagement, and after engaging in a back-and-forth process of obtaining offers and making counter-demands, Defendants rejected a counteroffer of $16,250,000 made in response to Defendants' demand of $17,100,000. (C4217-C4222, C5334.) Plaintiffs recommended that Defendants should issue a counter-demand. (R388-R399.) Instead, Defendants fired Plaintiffs and retained new lawyers. (C5333-C5334.) Defendants paid their new lawyers a $500,000 flat fee. (Id.) The new lawyers did nothing to litigate any of Defendants' claims. (R1492-1493,

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[1] Citations herein to pages within the Common Law Record begin with the letter "C". Citations to pages within the Report of Proceedings begin with the letter "R."



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R1499-R1500, R1533- R1534; C4478-C4796.) Within three weeks after being retained, Defendants' new lawyers settled Defendants' claims for $16,850,000. (C5334.) Defendants refused to pay Plaintiffs for their work.

Defendants had hired Plaintiffs pursuant to a contingency fee agreement under which Plaintiffs were to be paid 15% of the first $10 million recovered and 10% of any excess. (C5333.) Upon their engagement, Plaintiffs did not obtain Defendants' agreement, confirmed in writing, to as to how any fees would be shared between Plaintiffs. (C5333) Plaintiffs have not disputed that, for this reason, they failed to comply Rule 1.5(e) of the Illinois Rules of Professional Conduct of 2010 ("Rule 1.5(e)" and the "Rules"). However, Defendants acknowledge that they were aware that the two Plaintiff law firms would split the contingency fee and that they did not care how the fees were to be split. (R.539, R546, R1502-R1503.)

When Defendants refused to pay Plaintiffs for the value of the legal services that Plaintiffs provided and further refused to reimburse Plaintiffs for legal expenses incurred in the representation, Defendants sued Plaintiffs seeking to recover the reasonable value of the legal services provided under a quantum meruit theory. (C1743-C1754, C5334.)

The instant lawsuit proceeded to a bench trial at which Judge Cecilia Horan heard five days of evidence, including the testimony of principals of both Plaintiff law firms, an associate attorney, a legal assistant, both



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Defendants, and retained expert witnesses for both Plaintiffs and Defendants. (R. R193-R2053.)

After evidence concluded and the parties submitted written closing arguments, (C6206-C6221, C6222-C6238), and proposed findings of fact and conclusions of law, (C6151-C6203, C6241-C6273), the trial court issued a 15-page Trial Memorandum and Order. (C6277-C6291.) There, the trial court made detailed findings, including that Plaintiffs were entitled to recovery in quantum meruit, that Plaintiffs' technical violation of Rule 1.5(e) did not preclude Plaintiffs' recovery in quantum meruit, that Defendants benefited from Plaintiffs' work, and that an application of the quantum meruit factors entitled Defendants to an award of $1,692,390.60, calculated by applying the agreed-to contingency rate to the settlement achieved shortly after Plaintiffs' discharge, adding a small amount of unreimbursed costs, and subtracting the $500,000 flat-fee paid to successor counsel. (Id.)

This appeal followed.

## II. EVIDENCE ADDUCED AT TRIAL

Unless otherwise indicated below, the following facts were stipulated to by the parties at trial, admitted via the parties' pleadings, or established via uncontested testimony or other uncontroverted evidence at trial.

### A. Stephen J. Schlegel and Stephen J. Schlegel, Ltd.

Stephen J. Schlegel ("Schlegel") is the owner of Plaintiff Stephen J. Schlegel, Ltd. and has been licensed to practice law in the State of Illinois since 1969. (C1745, C5332; R293-R294.) Schlegel received his undergraduate



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education at Northwestern University before obtaining a J.D. from Chicago Kent IIT School of Law in 1969. (R293-R294.) Schlegel is also admitted to practice in various federal district courts and circuit courts of appeal, as well as the Supreme Court of the United States. (R294.) Until the early 2000s, he was also licensed to practice in New York and Michigan. (Id.) Schlegel's practice has always focused on litigation, and for the last four decades or so focused largely on litigating complex property, casualty, business and estate disputes. (R296.)

Schlegel's achievements include prosecuting civil claims in connection with the Richard Speck murders and serving as court-appointed lead counsel in the Agent Orange litigation. (R298-R299.)

From 2015 to 2017, Stephen J. Schlegel, Ltd. employed an associate attorney named Diola Xhaferri, as well as a non-attorney, Hilary Rushe, who performed analytical work as well as document organization and preparation. (R297.)

### B. Andrew W. Levenfeld and Andrew W. Levenfeld and Associates, Ltd.

Andrew W. Levenfeld ("Levenfeld") is the owner of Plaintiff Andrew W. Levenfeld and Associates, Ltd. and has been licensed to practice law in Illinois since 1973. (C1744-C1745, C5332.) He received an undergraduate degree in packaging industrial engineering from Michigan State University before graduating from Rutgers University Law School in 1973. (R1200.) Levenfeld is also admitted to practice in the Northern District of Illinois, the



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Northern District of Indiana and the United States Tax Court, (R1200-R1201), and was previously licensed in Florida, where he is currently on retirement status. (R1201.)

Levenfeld has focused his nearly fifty years of practice on business and corporate work, business disputes, and other litigation, including contested probate work and real estate and mechanic lien litigation. (R1201.) Levenfeld's achievements include writing the Bangladeshi constitution and drafting a proposed constitution for Belarus. (R1201- R1202.) He has prevailed on litigation in the Illinois Supreme Court, litigated in the Seventh Circuit Court of Appeals on many occasions, at one point had achieved the largest sexual harassment verdict in the Northern District of Illinois, and won a multi-million-dollar judgment in an undue influence claim in probate court. (R1202.)

### C. Defendants Maureen V. O'Brien and Daniel P. O'Brien, III

Defendant Maureen V. O'Brien ("Maureen") was one of several members of an O'Brien family that was involved in highly contentious legal proceedings among family members relating to family wealth, businesses and properties. (C1745, C5332.) She was a daughter of Daniel P. O'Brien Sr. ("Dan Sr.") and Mary D. O'Brien ("Mary"), both deceased. (Id.)

Defendant Daniel P. O'Brien III ("Dan") is Maureen's nephew and another member of the same O'Brien family. (C5332, C1745, C5332.) He was a grandson of Dan Sr. and Mary. (Id.)



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### D. Defendants' Family Assets and Family Disputes

By mid-2015, Maureen and Dan each held 25% interests in various family assets (the "family assets"), some of which were held via interests as heirs of Dan Sr. and Mary, some of which were held as beneficiaries in various family trusts, and the majority of which were held via interests in a large number of limited liability companies, limited partnerships and a general partnership. (R. R306-R207, R308-R309, R326; C5332- C5333.)

During their lifetimes, Dan Sr. and Mary had accumulated a large number of properties and businesses, including parcels of real estate, nursing homes, restaurants and bars, as well as a golf course, a hotel, a storage business and fast food franchises. (R308.) They had six children: Margaret ("Peggy"), Maureen, Dan, Patricia, Kathleen and Peter. (R312.)

Dan Sr. died in 2012. (R309.) After Dan Sr.'s death, Mary exercised a power of appointment to take the assets held in his trust and to transfer them into her trust. (R312.) Mary died within a year after Dan Sr. (R309.)

Per Dan's estate plan, the assets held and controlled by his trust and estate poured over to Mary's trust upon his death. (R310, R312.) Mary's estate plan also called for assets to pass into various trusts upon her death. (R309.)

After Dan Sr. and Mary died, the family assets were owned by the various limited liability companies and limited partnerships, but control in those family assets was vested in the managing partners of those entities. (R309-R310.) While the estates remained open, the managing partners were



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themselves owned and controlled by Dan's estate and/or Mary's estate. (R308-R310.) Whenever the estates were to be closed, ownership and control of the managing partners would pass into the various trusts. (R308-R310, R312.)

Following the deaths of Dan Sr. and Mary, a settlement was reached that conveyed out Peter's and Kathleen's interests in the family assets. (R310.) Control over the trusts and estates passed to Peggy and her husband, Richard Schulze ("Richard"). (R310, R315.) Peggy exerted that control as sole executor of Dan Sr.'s estate and as one of three executors of Mary's estate, along with her husband and Maureen. (R310, R314.) As two of the three executors of Mary's estate, Maureen and her husband, Richard, had majority control over the estate. (R314.)

The O'Brien family assets continued to be held and controlled via a complex structure of estates, trusts and corporate entities. (R. R306-R207, R308-R309, R326; C5332- C5333.) The two estates had managing power over virtually all of the family assets. (R310.) Ownership of the family assets was vested largely outside of the Estates, but control over the entities that held the assets was vested in the estates, which Peggy and Richard controlled. (R315-R316.) Had the estates closed, control would have poured over into the trusts that Peggy also controlled as trustee. (R315-R316.)

After Peter settled, there were four equal ownership interests – Peggy, the Mandalis brothers, Maureen and Dan – but those four did not have equal



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control. (R322.) Peggy and her husband, Richard, had almost absolute control over the family assets, including distributions. (R306-R309.)

### E. Defendants' Understanding of the Value of Interests in Family Assets

Maureen estimated that, in mid-2015, the total net value of the family assets was between $40 million and $80 million. (R314-R315.) Tax returns revealed that the estates and entities that they controlled had a tax value of approximately $52 million. (R325.) The tax returns were based in part upon figures provided by Maureen, who is a real estate broker and had valued them. (R325.) Balance sheets reflected that the family assets had a net value of about $36 million; when applying a valuation discount due to Dan and Maureen having minority interests and lacking control, their interests could have been valued at about $6.3 million apiece. (R1426-R1428.)

### F. Defendants' Need for Legal Representation

Although they had previously obtained income via their interests in the family assets, (R323), by the summer of 2015 Maureen and Dan were receiving no dividend, distribution, or other income via their respective 25% ownership interests in the family assets. (R323, R1574.)

Peggy, who controlled the family assets, refused to pay Maureen and Dan any income and squeezed out Maureen and Dan in an effort to buy them out for a fraction of what they thought their interests might be worth. (R323.)

Dan and Maureen needed money to survive. (R323-R324.) Maureen's residence in Chicago had been foreclosed upon. (R324.) Dan had been reliant



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on income from family businesses but his income from those businesses had stopped and he was unable to pay judgments entered against him. (R323-324.) Dan and Maureen did not have the ability to pay their own bills. (R324.) Dan testified that he had made a total of about $3,000-$4,000 between 2014 and 2016, all from selling items on eBay. (R1642.) He had no other income. (R1646.) He had only about $20,000-$30,000 in the bank. (R1646.) Maureen testified that she had exhausted her 401(k) and had dwindling income from her real estate practice. (R1573.) She had health issues and outstanding medical bills. (R1581.)

Maureen and Dan sought to hire lawyers in order to monetize their interests in the family assets. (C5333, R1594.) Maureen could not monetize or obtain assets on her own. (C5333.) It was important to Dan to convert his interests in the trusts and estates into income, and he believed that he needed to retain a lawyer to do so. (C5333.)

### G. Defendants' Initial Communications with Plaintiffs

Maureen initially reached out to Schlegel in the summer of 2015 to consult with him about potentially representing her and possibly Dan regarding their family disputes. (R299.) Schlegel told Maureen that he would get back to her with an answer as to whether he could help her. (R1575.) Schlegel then reviewed a set of documents that Maureen had provided and had multiple discussions with Maureen in order to further investigate the nature and history of the disputes, evaluate the relationships and their



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claims, and determine whether he could provide Maureen and Dan with some sort of effective representation. (R305-R306.)

Before an attorney-client agreement was signed on October 29, 2015, Schlegel told Dan and Maureen that he would not represent them unless they agreed that Levenfeld would serve as his co-counsel and thereby jointly represent Defendants. (R1575, R332, R1656.) At trial, Maureen recalled that Drew's involvement was a precondition to an attorney-client relationship, but could not recall whether this was discussed until they entered into the attorney-client agreement. (R1575-R1576.)

### H. Risks of Engagement from Plaintiffs' Perspective

As a result of Defendants' illiquid condition, Defendants could not pay a retainer. (R1238-R1239, R1586.) The parties stipulated at trial that Dan was unable to pay legal fees had they been charged and invoiced on a monthly basis. (C5333.) Both Dan and Maureen were receiving no income and had considerable debts. (R323-R324, R331-R332; R1570 R1573-R1574, R1642, R1646.) Maureen testified that she knew that the engagement would involve a significant amount of time by the law firms. (C4797-C4799; R1540.)

According to Levenfeld, Plaintiffs risked zero recovery via a contingency fee arrangement. (R1253.) Defendants each had 25% minority interests but they had no control over the family assets. (R1253.) Although Dan's and Maureen's percentage interests were not being disputed, it was uncertain whether they could get a monetary benefit or other value from their 25% interests. (R1252.)



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Schlegel concurred with Levenfeld. If Plaintiffs were unsuccessful in their efforts to compel a distribution or settlement, Dan and Maureen would simply continue to own equity in properties but not receive any revenues or income via their interests – they would be in the same position that they were in when they first came to Plaintiffs. (R341, R579.)

### I. Parties' Negotiation of Attorney-Client Agreement

Plaintiffs discussed with Defendants how the lawyers could get paid given that Defendants were unable to pay a retainer or pay an hourly fee. (R1248.) In light of Defendants' inability to pay an hourly fee, Schlegel initially considered asking for a contingency fee of 25 to 30%, which he found to be usual and customary at the time for such matters. (R339.) Plaintiffs and Defendants discussed a contingency arrangement and what would be an appropriate rate. (R1248.) Before entering into the attorney-client agreement, most of the discussion between Plaintiffs and Defendants was about the contingency clause. (R1583.)

Plaintiffs ultimately proposed a flat 15% contingency, (R339-R340, R875, R1248, R1250), which they memorialized in a proposed written engagement agreement. (R735-736; C5522-C5523.)

Defendants called Plaintiffs soon after receiving the initial proposed attorney-client agreement, for the sole purpose of re-negotiating the contingency fee provision. (R1513-R1514, R1584, R1663.) According to Dan, he was trying to negotiate to "save [him]self 5 percent." (R1513-R1514.) Dan proposed, and Maureen agreed, that the contingency should call for 15% of



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the amount recovered up to $10,000,000 and 10% of the amount recovered in excess of $10,000,000. (R340, R1514-R1515.) After a brief phone discussion, Levenfeld and Schlegel agreed to Dan's proposal and sent a revised version of the proposed agreement containing the negotiated contingency rate. (R340, R1515, R1664; C4797-C4798.)

During the period of negotiation neither Dan nor Maureen ever expressed any confusion about the terms of what came to be the written agreement. (R341-R342.) When the written agreement was proposed to Dan and Maureen, neither of them expressed any confusion about the terms. (R342.) The only question that either Dan or Maureen had asked of Plaintiffs relative to the engagement agreement was their request, as discussed above, to reduce the 15% flat contingency fee. (R342.) Maureen acknowledged that she had no questions about the engagement agreement. (R1541-R1542.)

The attorney-client agreement contains a fee provision calling for a minimum hourly "floor." Because of the risks discussed above, the lawyers sought a contingency fee with a backup hourly "floor" in order to cover their overhead in the event of an unfavorable outcome. (R340-R341.) As identified in the attorney-client agreement, 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



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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.)

**J. Terms of Attorney-Client Agreement**

The parties entered into the attorney-client agreement on October 29, 2015. (C1745-C1746.) The written attorney-client agreement was executed on the same day. (C5333, C5335-C5336.) The attorney-client agreement provided, in pertinent part, that: "the total fees to be charged shall be either 15% of the first $10,000,000 and 10% of any additional value of the assets recovered for the clients, or the amount of charges made for time expended, whichever is greater." (C5335-C5336, C1745-C1746.)

The engagement was structured as a joint engagement such that Levenfeld and Schlegel – and their respective law firms – each had direct professional obligations to the clients. (R344.) Before the attorney-client agreement was signed, they had explained to Maureen and Dan that there would be lawyers from two different firms representing them. (R344.)

The attorney-client agreement did not identify how any contingency fee would be split between the two Plaintiff law firms, nor did any other writing provided to Defendants. (C5333.) However, Maureen testified that she and Dan knew that the Plaintiff law firms would be splitting fees; the way in which fees were split was not a significant issue as she was going to be paying lawyers and it did not matter where her money went. (R539, R546.)



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Dan testified that he understood that Levenfeld and Schlegel were practicing in different firms and it did not particularly matter to him how fees would be split between the two firms. (R1502-R1503.)

Both Dan and Maureen were aware that they could go to either of Levenfeld or Schlegel if they had questions or issues regarding the legal matters. (R347.) In fact, both of them called both of the lawyers from time to time. (R347.) Dan and Maureen also testified that they understood that both lawyers would be representing both Dan and Maureen and that both lawyers would be responsible for the representation. (R1503, R1547, R1591.) Neither Dan nor Maureen ever expressed any concern, displeasure or questions about the nature of the arrangement in that there would be two firms representing them. (R344.)

### K. Potential Roadblocks to Recovery

Schlegel testified that, although Maureen and Dan had undisputed percentage interests in the trusts, estates and other family asset vehicles, 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 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.)



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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.)

### L. Litigation: Strategy and Implementation

Over the course of nineteen months, the Plaintiffs represented Defendants in the following litigation:

a. Estate of Daniel P. O'Brien Sr., administered by the Circuit Court of Cook County, Illinois, Probate Division, No. 2012 P 4381.

b. A citation to recover assets against James West Jr. filed in the Estate of Daniel P. O'Brien Sr., deceased.



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c. Estate of Mary D. O’Brien, administered by the Circuit Court of Cook County, Illinois, Probate Division, No. 2013 P 515.

d. Maureen and Dan vs. Peggy and Richard, individually and their in various capacities, in the Circuit Court of Cook County, Chancery Division, No. 2016 CH 7327, seeking accounting, damages for breach of fiduciary relationships, conversion and dissolution of corporate and partnership interests.

e. Richard v. Maureen, individually and as trustee of various trusts, in the State of Michigan, Berrien County Trial Court, Civil Division, No. 2016-000298-CK, where Richard sought repayment of advances for legal fees in excess of $600,000.

f. Richard v. Dan, individually and as trustee of various trusts, in the United States District Court, Northern District of Illinois, No. 1:16-cv-11386, where Richard sought repayment of advances for legal fees in excess of $600,000.

g. New Buffalo Commercial LLC v. O’Brien Development Co., Inc. (majority owned by Defendants), State of Michigan, Berrien County Trial Court, Civil Division, No. 2017-0051-CB-D, where the plaintiff alleged that the defendant breached a contract to make rent payments and sought damages in excess of $150,000.

h. New Buffalo Fast Food v. Dan, State of Michigan, Berrien County Trial Court, Civil Division, No. 2017-0050-CB-D, where the plaintiff sought damages in excess of $100,000.

i. Appeal, Illinois Appellate Court, First District, #16-0783, where appellants Maureen and Dan sought reversal of an order of the Probate Division denying a petition to remove Peggy and Dan as co-executors in the Estate of Mary D. O'Brien, deceased.

(C1746-C1747, C4472-C4796.)

Plaintiffs took various actions in probate court. The estates were being administered independently, which meant that the administrators and executors did not have to file reports or inventories, so Plaintiffs took action to convert the proceedings to supervised administrations, where they would



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also seek to remove the executors for mismanagement if they could establish grounds to do so. (R340-R341, R346-R347.) The probate court ultimately granted Plaintiffs' motion and terminated the independent administration, thereby turning both into supervised administrations, through which they were able to compel the estate's production of books and records. (R347-R348.)

Because Plaintiffs would be pursuing claims that there were issues in the execution of Mary's estate, Plaintiffs recommended that Maureen should resign as co-executor to avoid putting her in a position of conflict as both executor and beneficiary challenging the actions of the executors. (R355, R358, R1275-R1276.)

Also in the probate court, Plaintiffs filed petitions to remove 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 allegations to relate to a business dispute, not an estate administration issue. (R1350.) Plaintiffs appealed, and the appellate



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court eventually affirmed, concluding that the trial court had discretion to deny the petition under the circumstances. (R564; C4472-C4477.)

Plaintiffs also filed a citation to recover assets (the "Citation") against Peggy's son, Jim West, in an effort to obtain discovery and possibly demonstrate that West had assets that belonged to the estates. (R562; R1210-R1211.) By doing so, they hoped to not only recover assets for the estates, but to put pressure on Peggy to settle. (Id.) Through the Citation, Plaintiffs obtained discovery from both Peggy and her son, Jim West. (R1211.) At the time that Defendants fired Plaintiffs, the Citation proceeding remained pending and depositions of Peggy and Jim West were scheduled. (R1211, R1442.)

Plaintiffs also pursued claims on Defendants' behalf in chancery court. Although there was motion practice relative to the original complaint filed in chancery, discovery proceeded on all theories while the pleadings were being addressed. (R565.) Plaintiffs ultimately withdrew one of the four counts in the 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 February 17, 2017. (R565; C4772.)

After being in pleadings disputes for a year, the parties engaged in document discovery. (R362, R368-R369.) Over Peggy's objections, Plaintiffs



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succeeded in obtaining a large volume of documents in discovery. (R329, R361.) They obtained over 10,000 documents including tax returns, checking account information and other data relating to 20-30 business entities, which they stored in approximately 30 file boxes as well as in electronic storage. (R363.)

To process and analyze the considerable amounts of document discovery, Rushe and Xhaferri, sometimes with Maureen and Dan, reviewed, organized, analyzed and summarized the documents as they came in. (R361.) This organization, including Rushe's creation of summaries and a chronology as part of a 118-page binder, was an ongoing process essential to their strategy. (R364-R366). Through their analysis, Plaintiffs learned more about how the family assets were held and specifically how the family interests were structured through various limited liability companies and limited partnerships. (R361-R362.) They also learned that Peggy was paying her son, Jim West, a large sum of money to manage certain family assets. (Id.)

Plaintiffs also actively defended retaliatory claims that Peggy and Richard had filed against Dan and Maureen. (R361-R363.) Peggy filed various lawsuits against Dan and Maureen in Berrien County, Michigan. (C4472-C4796) Because Dan and Maureen could not afford to hire counsel in Michigan, Schlegel found and paid Michigan-licensed lawyers who appeared on Defendants' behalf. (R372-R373; C4472-C4796.) Plaintiffs also appeared in and actively defended lawsuits that Peggy's husband, Richard, filed in federal



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court seeking to recover legal fees that he had paid on Defendants' behalf relative to other legal matters. (R564; C4781-C4785.)

### M. Plaintiffs' Communications with Defendants Throughout Engagement

Both Dan and Levenfeld testified that Levenfeld had numerous communications with Dan and Maureen over the course of the representation, including at least weekly phone calls with Dan. (R1208-R1209; R1503.) Dan acknowledged that the lawyers and clients would also communicate via email as well as meetings that occurred once to twice a month. (R1677.) If there was a development in the matters, either Levenfeld or Schlegel would update both clients. (R1209-R1210.)

### N. Settlement Negotiations

When Defendants hired Plaintiffs, Defendants had never received a settlement offer from Peggy. (R620.) However, during the course of Plaintiffs' representation of Defendants, a number of settlement offers and demands were exchanged between Peggy's counsel and Plaintiffs, as counsel for Defendants. (C5334.)

Early in the engagement, Dan received a settlement offer of around $5,000,000 to $6,000,000 – he thought that Peggy was trying to buy him off cheap and rejected the proposal. (R375.) Peggy then made a second offer—for $6,000,000—to Dan, alone, which he also rejected. (R375-R378; C4204-4206.) Plaintiffs also met with Peggy's counsel and engaged in unsuccessful



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settlement negotiations primarily structured around a potential transfer of real estate to Maureen and Dan. (R378- R379.)

About a year into the engagement, in September of 2016, Peggy made a settlement offer of $12,000,000 to Dan and Maureen. (R380; C4207.) Defendants rejected the offer. (R380-R381.)

On April 5, 2017, Plaintiffs issued a settlement demand on Defendants' behalf in the amount of $18,300,000. (R381-R390; C4208-4209.) Peggy responded on April 11, 2017, with a counteroffer of $15,440,000. (R382-R383, R1214-R1215; C4210-4211, C6091-6092.) In the offer letter, Peggy's counsel referred to the gap in settlement negotiations as having "closed significantly." (R1215; C4210-4211; C6091-6092.) He also referred to the offer as the "final counterproposal" and requested a response by "the close of business Thursday," April 14, 2017. (R1424-R1426; C4210-4211, C6091-6092.)

Plaintiffs promptly sent the settlement offer to Defendants, who rejected it, at least in part based on Maureen's disappointment that the offer would require her to vacate her home on Kluver Road in New Buffalo, Michigan, which was a family asset under Peggy's control. (R393; R1215-R1217.)

Although Peggy's counsel characterized the $15,440,000 offer as the "final counterproposal," Plaintiffs believed it was merely a negotiation tactic – the lawyer would often make such statements and then continue to negotiate. (R1220-R1221.) The refusal to allow Maureen to keep her home was also in keeping with Peggy's petty tactics. (R1223.)



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Plaintiffs understood that it was difficult for Maureen and Dan to fight with their sister/aunt, Peggy, and that it was getting emotional for them, (R1224-R1225), but Peggy and her lawyer's tactics were not that different from tactics that others had employed in negotiations that Plaintiffs had been involved in. (R1225.)

Plaintiffs believed that Peggy would continue to negotiate and that they could reach a resolution, (R1223), so on April 17, 2017, they recommended that Defendants make a counter-demand, expressing urgency in doing so. (R394-R395, R1219-R1221; C4213-4216.) Plaintiffs sent Defendants a proposed counter-demand letter that day. (C4213-C4216; R384-385). The next day, Defendants approved the counter-demand and it was promptly sent to Wentzel. (R1219-R1221; C4217-4218.) There, they demanded $17,106,662. (R1222; C4217-C4218.) Under the terms of their counter-demand, Peggy would be permitted to purchase the Kluver Road home for $350,000, which Plaintiffs knew was important to Maureen. (R386; C4217-C4218.)

On April 21, 2017, Wentzel wrote to Plaintiffs expressing that the parties were "significantly far apart on economic issues" despite his prior statement that the gap had "closed significantly" and despite the fact that the outstanding demand of $17,106,662 was less than 11% more than Peggy's last offer. (R1422-R1423; C5952.)

A week and a half later, on May 1, 2017, Peggy responded to the $17,106,662 demand. (R387; C4221-C4222.) Peggy increased her offer from



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$15,440,000 to $16,250,000 but refused to make an accommodation to Maureen regarding the Kluver Road home. (R387; C4221-C4222, C5334.)

Plaintiffs promptly sent Peggy's offer to Defendants; later that day, Maureen responded that she would not agree to vacate her Kluver Road home. (C6072-C6076; R631-R633.) Schlegel promptly responded that a decision needed to be made as to whether to "accept, reject or counter the proposal." (C6072-C6076; R619-R621.) He suggested that they should agree to the $16,250,000 figure but counter-demand and ask for the Kluver Road home in addition. (R388- R389.)

Defendants never gave Plaintiffs the authority to respond to Peggy's May 1, 2017, offer. (R1377.) On May 10, 2017, Peggy's lawyer communicated that all offers were withdrawn. (R1377; C5334, C6090.)

Before Defendants fired Plaintiffs on May 25, 2017, Levenfeld continued to have informal settlement discussions with Peggy's lawyer, including discussing how they could reach a resolution that would keep Maureen in her Kluver Road home. (R1378, R1382.)

On May 15, 2017, Plaintiffs again proposed to Defendants that they should make a counter-demand. (R1508-R1509.) Plaintiffs sent Defendants a proposed counter-demand letter that would seek $16,750,000 and Maureen would have option to purchase the Kluver Road home. (R1419-R1422, R1509-R1510; C4230-4233.) Dan and Maureen never approved the issuance of this demand. (R1422, R1510; R390.)



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### O. Defendants Fire Plaintiffs

Defendants terminated Plaintiffs as their lawyers on May 25, 2017. (C5334.)

### P. Defendants' Retention of New Counsel and Settlement

On or about June 30, 2017, Dan engaged the law firm of Gardiner Koch Weissberg & Wrona ("GKWW") to represent him in connection with the matters that Plaintiffs had previously handled. (C5334.) On or about July 5, 2017, Maureen engaged GKWW for the same purpose. (C5334.)

Following Defendants' hiring of GKWW to replace Plaintiffs, Levenfeld and Schlegel cooperated with Defendants' new lawyers. (R395.) With the assistance of GKWW, Defendants settled with Peggy by July 21, 2017. (C5334.) On July 21, 2017, a term sheet memorializing the general terms of the settlement agreement was executed. (C5334.) Under the terms of the settlement, Dan and Maureen would receive total consideration in the amount of $16,850,000, to be split evenly between the two. (R. 1490, R1532.)

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 appear for either Defendant in any of the eight pieces of then-pending trial-court-level litigation prior to settlement. (C4478-C4796.)



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Defendants paid GKWW a $500,000 flat fee. (R1685; C5334.) Defendants never paid Plaintiffs for either their legal services or costs advanced by Plaintiffs. (C1749, C5334.)

### Q. Plaintiffs' Time Spent and Cost Incurred on Defendants' Behalf

According to time records, Schlegel, Xhaferri and Rushe worked about 2,500 hours and Levenfeld worked over 600 hours on Defendants' behalf before their termination. (R395, R756, R1203-R1204; C4235-C4337, C4338-C4353.) Plaintiffs advanced costs in the amount of $7,390.60. (C5334.)

### R. Expert Testimony

Both parties presented expert testimony at trial. Plaintiffs' expert, John Brooks, is a trusts and estates litigator with Foley & Lardner where he charges clients a minimum of $870/hour, which he testified is consistent with the rates charged by other lawyers at large firms for such work when billed on an hourly basis. (R1009, R1065.) Brooks testified that the contingency fee structure agreed to between Plaintiffs and Defendants is reasonable and consistent with the usual and customary charges for like matters. (R1055-R1056.) He relied on the fact that the contingency rate was negotiated between Plaintiffs and Defendants; that a rate of 15% of the first $10,000,000 recovered and 10% of any additional amount is "very reasonable" within the practice of complex trusts, estates and business litigation, where lawyers will sometimes use the one-third rate that is common in many types of litigation; and that there was no guarantee of success – even if successful, it could have



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taken many years to obtain a favorable outcome. (R1055-R1056.) Brooks also testified that Plaintiffs' work benefited Defendants in that it gave them the leverage necessary to settle for $16,850,000. (R1057-R1058.) He further opined that Levenfeld and Schlegel were experienced, skilled and highly qualified lawyers, (R1055), and that Plaintiffs' work entailed performing considerable work over a significant amount of time, (R1054-R1055), and explained how the underlying litigation was complex, novel and difficult, (R1035-R1037, R1053-R1054).

## ARGUMENT

### I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CALCULATING THE REASONABLE VALUE OF PLAINTIFFS' WORK BY REFERENCE TO THE AGREED CONTINGENCY RATE.

Defendants contend that the trial court erred "as a matter of law" in calculating the reasonable value of Plaintiffs' work by reference to the contingency rate agreed to by the parties. Plaintiffs contend that, because Plaintiffs admittedly violated Rule 1.5(e) in failing to obtain client consent to the proportion by which fees would be split between the two Plaintiff law firms, the trial court should have barred Plaintiffs from recovering in quantum meruit by reference to a contingency rate that was agreed to by the parties and which itself violated no rule of ethics. Def. Br. at 26.)

There is no merit in Plaintiffs' contention. Although courts have declined to permit lawyers to recover from one another based on the terms of fee-splitting agreements that were not disclosed to clients in violation of Rule 1.5(e), Illinois law does not stand for the proposition that a failure to disclose



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a fee-split should preclude lawyers from recovering a reasonable fee from their clients. As the trial court concluded in this case, Plaintiffs' failure to disclose the fee-split between them was neither prejudicial to Defendants nor prejudiced the administration of justice. As such, the trial court did not err in declining to bar or limit Plaintiffs' recovery as a result.

Before addressing the substance of Defendants' argument on this point, it is important to recognize what Defendants have not argued. In the trial court, Defendants asserted an affirmative defense whereby they claimed that Plaintiffs' failure to comply with Rule 1.5(e) should have served as a complete bar to Plaintiffs' recovery. (C17510-C1754.) Defendants were unsuccessful in pursuing this defense on summary judgment, (C1282-C1289), and at trial, (C6277-C6291). Defendants were unsuccessful because, under Illinois law, a technical violation of Rule 1.5(e) for failure to obtain consent to a fee-split does not serve to bar lawyers' recovery of the reasonable value of their legal services in quantum meruit. *Much Shelist Freed Denenberg & Ament, P.C. v. Lison*, 297 Ill. App. 3d 375, 381-82 (1st Dist. 1998). Although Defendants raised this issue before the trial court, Defendants do not now contend that the trial court erred in following *Much Shelist* and concluding that Plaintiffs' claims were not barred as a matter of law by virtue of their failure to strictly comply with Rule 1.5(e) in connection with a fee-sharing agreement that was tangential, at most, to the matters at issue before the trial court in this case.



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Even were Defendants to assert that Plaintiffs should have been barred from recovery due to a violation of Rule 1.5(e), such an argument would be unavailing in light of *Much Shelist*, 297 Ill. App. 3d at 381-82. There, the court concluded that a law firm was entitled to recover for the value of services provided to a client in quantum meruit even though the firm had failed, in clear violation of Rule 1.5, to reduce a contingency fee agreement to writing. The court concluded that "[w]hether quantum meruit recovery is barred should depend on the egregiousness of the particular conduct involved." *Id.* at 381 (citing *Anderson v. Anchor Organization for Health Maintenance*, 274 Ill. App. 3d 1001, 1006 (1st Dist. 1995)). The failure to enter into a written agreement with the client, though required by the Rules of Professional Conduct, "was not sufficiently serious to taint [the firm's] lawsuit for quantum meruit recovery." *Id.* at 382. The court reviewed the trial court's decision not to bar or limit the law firm's recovery based on its violation of Rule 1.5 for an abuse of discretion. *Id.* at 382 ("Whether an attorney acted egregiously should be a matter for the trial court to determine in its discretion."). *See also Anderson*, 274 Ill. App. 3d at 1007 (the question whether an attorney's conduct warrants forfeiture of "recovery in quantum meruit is a matter committed to the discretion of the trial court.").

As the trial court noted in its judgment, a number of other courts have likewise concluded that lawyers' violations of Rule 1.5(e) and its predecessor should not preclude a recovery in quantum meruit for the value of services



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provided. For instance, in *In re Del Grasso*, 111 B.R. 178, *183-*184 (N.D. Ill. Bankr. 1990), a lawyer had violated the predecessor to Rule 1.5(e) by failing to obtain client consent to a fee-sharing agreement with a referring lawyer. The lawyer characterized the failure as an "oversight." *Id.* at *184. The lawyer also violated Rule 1.5 by failing to obtain in writing the client's agreement to a contingency fee. *Id.* Applying Illinois law, the bankruptcy court held that the ethical failures did not affect public policy and would not serve to bar or otherwise lessen the lawyer's recovery in quantum meruit. *Id.* at 185. 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.), a federal district court applied Illinois law and concluded that although a contingency fee agreement was unenforceable due to a violation of the fee-splitting rule now memorialized in Rule 1.5(e), recovery could be made in quantum meruit.

Here, the trial court's finding that Plaintiffs' failure to disclose how fees would be split between them in accord with Rule 1.5(e) was neither prejudicial nor egregious was not against the manifest weight of the evidence. Nor did the court abuse its discretion in concluding that, where the violation was neither prejudicial nor egregious, Plaintiffs' recovery should not be barred or limited. In fact, as the trial court correctly noted, "Defendants failed to present any evidence at all tending to show that the violation was egregious or prejudicial to them or to the administration of justice." (C6282.) As the trial court also found, (C6283), Defendants knew that Plaintiffs were



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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 Plaintiff law firms would be responsible for handling their legal matters, (id.), and that Schlegel would not represent them unless Levenfeld – principal of the other Plaintiff law firm – would join him in representing Defendants, (R332, R1575, R1656). During the engagement, Defendants communicated regularly with the principals of both Plaintiffs regarding their legal issues. (R1208-R1209, R1503.) Defendants suffered no harm as a result of the failure to comply with the strict terms of Rule 1.5(e). As the trial court ruled, "Defendants have failed to meet their burden of demonstrating Plaintiffs' violation of Rule 1.5 was sufficiently egregious to preclude quantum meruit recovery or that such recovery would be prejudicial to Defendants or the administration of justice." (C6283.)

The trial court's ruling was consistent not only with the holding in *Much Shelist*, but with other decisions holding that improper and unethical conduct by lawyers should not necessarily bar the lawyers' ability to recover the value of their services from their clients in quantum meruit. *See, e.g., Lustig v. Horn*, 315 Ill. App. 3d 319, 328 (1st Dist. 2000) (noting that "a denial of [the plaintiff-attorney's fee-claim under a quantum meruit theory], imposed solely as a sanction for unprofessional conduct on his part, would constitute an impermissible infringement on the exclusive power of the supreme court,



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acting through the ARDC, to adjudicate disciplinary matters."); *Kravis v. Smith Marine, Inc.*, 15 Ill. App. 3d 494, 501-02 (1st Dist. 1973), rev'd on other grounds, 60 Ill.2d 141 (1975) (holding that breach of fiduciary duty by referring lawyer in failing to disclose two fee-sharing agreements did not preclude recovery from the client in quantum meruit for value of legal services even where lawyer both intentionally did not disclose fee-split arrangement with one lawyer and failed to disclose proportions to which fee would be split with second, subsequent handling lawyer). *See also Davies v. Grauer*, 291 Ill. App. 3d 863, 872 (1st Dist. 1997) (involving litigation between attorneys regarding fee split and reversing trial court's judgment dismissing action by referring lawyer against handling lawyer due to failure to disclose fee-sharing agreement in writing to clients, where there was evidence that oral disclosure to clients that there was a fee-split demonstrated "substantial compliance" with ethics rule requiring written disclosure as to fact of fee-split and proportions thereof.)

None of the cases cited by Defendants stand for the proposition that a failure to strictly comply with Rule 1.5(e) must, as a matter of law, result in a forfeiture of a right to seek fees in quantum meruit. For instance, *Donald W. Fohrman & Associates v. Marc D. Alberts, P.C.*, 2014 IL App (1st) 123351, ¶¶ 35, 40-41, 44-45, stands for the altogether different proposition that fee-sharing contracts between lawyers that violate Rule 1.5(e) are against public policy and cannot be enforced as between the lawyers. Unlike this case,



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*Fohrman* involved one law firm's efforts to enforce a fee-sharing referral agreement against another law firm where the fee-sharing agreement violated Rule 1.5(e) in that it was not disclosed to the clients. *Id.* at ¶ 1. There, the clients did not seek to avoid paying a contingent fee based on the failure of the lawyers to disclose how they would split that fee among them. *Fohrman* is further distinguishable in that it involved a referral by a lawyer not identified on the face of the engagement agreement, *Fohrman*, 2014 IL App (1st) 123351, ¶ 9, unlike the current case which involves a co-counsel relationship between two law firms both known to the clients and identified on the face of the engagement agreement.

Defendants also do not contend that the trial court erred in utilizing the contingency rate as a basis for calculating a reasonable fee because the parties did not agree to the rate. The parties did agree to the rate. Defendants testified that not only did they agree to the specific contingency structure relied upon by the trial court in rendering its judgment in this case, they proposed it. (R340, R1513-R1514, R1664.)

As discussed above, Defendants do not now assert that the trial court erred as a matter of law in declining to bar Plaintiffs' claim based on the violation of Rule 1.5(e). They do not now assert that the trial court abused its discretion in concluding that the egregiousness of the violation did not warrant barring the claim or reducing Plaintiffs' recovery. And they do not now assert that the agreed contingency rate should not have been applied



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because it was not agreed to by the parties. Rather, Defendants now contend that the trial court erred in considering the contingency rate that was agreed to by the parties merely because it was contained a written contingency fee agreement entered into although Plaintiffs failed to obtain client consent as to how Plaintiffs would share fees between them, in violation of Rule 1.5(e). Defendants' contention is without merit and Defendants have cited to no Illinois decision that supports such an argument.

Defendants' argument is premised on a single California decision—*Chambers v. Kay*, 56 P.3d 645 (Cal. 2002)—that both lacks precedential value and stands for a proposition inapplicable to the case at bar. *See Bank of Am. v. WS Mgmt., Inc.*, 2015 IL App (1st) 132551, ¶ 121 (out-of-state decisions are not binding on this court). Defendants cite to *Chambers* for two propositions, neither of which has merit.

Defendants cite to *Chambers* to support their contention that this Court should apply a *de novo* standard of review when considering whether the trial court erred in considering the agreed-to contingency rate when determining a reasonable fee where Defendants violated Rule 1.5(e) by failing to disclose how fees would be divided between the lawyers. (Def. Br. at 25.) However, as discussed above, Illinois law provides that a trial court's determination whether a violation of a rule of ethics should limit or bar recovery in quantum meruit should be reviewed for an abuse of discretion. *See Much Shelist*, 297 Ill. App. 3d at 381-82; *Anderson*, 274 Ill. App. 3d at 1007



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Defendants also cite to *Chambers* for the proposition that the trial court erred in basing its calculation of legal fees upon a contingency rate set forth in a fee agreement between lawyers and clients where the lawyers violated Rule 1.5(e). (Def. Br. at 29-33.) *Chambers* stands for no such proposition.

In *Chambers*, the court held only that, in California, a fee-sharing agreement between lawyers setting forth a calculation as to how fees would be split between the lawyers cannot provide the basis for a lawyer to recover from a former co-counsel, either in contract or in quantum meruit, where the fee-sharing agreement itself violates the rules of ethics. *Id.* at 658.

*Chambers* involved one lawyer's (Lawyer A) breach of contract and quantum meruit claims against his former co-counsel (Lawyer B). *Id.* at 647-48. Lawyers A and B represented a common client in pursuing the client's lawsuit against third parties. *Id.* Lawyer B entered into a contingency fee agreement with the client whereby Lawyer B would receive 40% of the amount recovered on the client's behalf. *Id.* at 648. Lawyer B then brought Lawyer A in as co-counsel and the two agreed to split the total 40% contingency fee between themselves such that Lawyer A would receive 16.5% of the total fee if the matter settled before depositions, and 28% of the total fee if the matter resolved thereafter. *Id.* The lawyers did not obtain their client's written consent to the lawyers' agreement to share fees between themselves on a percentage contingency basis. *Id.*



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After Lawyer A was discharged, Lawyer B took the client's lawsuit to trial and won, receiving a large judgment. *Id.* Lawyer B received the full 40% contingency fee from the client but refused to pay Lawyer A a portion thereof in accord with the written fee-sharing agreement between the lawyers. *Id.* Lawyer A then sued Lawyer B for breach of contract and in quantum meruit. *Id.* The trial court entered summary judgment for the defendant, Lawyer B, on both claims and Lawyer A appealed. *Id.*

The appeal eventually reached the Supreme Court of California, which affirmed the order of summary judgment in favor of Lawyer B and against Lawyer A on both claims. *Id.* at 658-59. On appeal, the court considered California's ethics rule that provides that lawyers "shall not divide a fee" without the client's written consent. *Id.* at 657. The court held that, the lawyers' failure to obtain written client consent to their fee-splitting agreement constituted a violation of the California ethics rule, rendering the unethical fee-splitting agreement unenforceable in a breach of contract action or in quantum meruit. *Id.* The court reasoned that a lawyer should not be permitted to take advantage of the undisclosed agreement to split fees on a percentage basis where that very agreement violated an ethics rule that required the lawyers to obtain written client consent to the fee-split itself. *Id.* at 654-57. The court also concluded that, if the proportion by which fees would be split between lawyers was unenforceable under the written fee-splitting agreement, the lawyer could not avoid the consequences of the



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ethical violation by seeking recovery in quantum meruit via reference to the proportions set forth in the undisclosed fee-splitting agreement. *Id*. at 658.

*Chambers* provides no support for Defendants' position. It stands only for the proposition that lawyers who fail to obtain client consent to a fee splitting agreement that violates the ethics rules may not recover from one another by reference to the terms of the unethical fee-splitting agreement. Here, as in *Chambers*, the lawyers violated a rule of ethics by failing to disclose how they planned to split fees. However, unlike in *Chambers* where the plaintiff sought to recover from another lawyer based on the unethical fee-splitting agreement itself, this case does not involve one lawyer's attempt to recover from another lawyer under a fee-splitting agreement. Rather, this case involves Plaintiffs' efforts to recover from former clients based on a contingency rate that was agreed to by the clients, that was disclosed in writing to the clients, that was consistent with the usual and customary rates in like matters, and that itself violates no ethical rule.

There is likewise no merit in Defendants' contention, (Def. Br. at 28-29), that the trial court erred in concluding that Plaintiffs' violation of Rule 1.5(e) "did not prejudice the [Defendants] O'Briens [or] affect the administration of justice or public good," (C1267). Defendants are correct that *Fohrman* stands for the proposition that "contracts *between lawyers* that violate Rule 1.5 are against public policy and cannot be enforced." (Def. Br. at 28-29, citing *Fohrman*, 2014 IL App (1st) 123351, ¶ 40) (our emphasis added.) However, as



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discussed above, this case does not involve a contract *between lawyers*. *Fohrman* does not stand for the proposition that the unenforceable nature of a fee-splitting contract between lawyers should preclude the lawyers from recovering the reasonable value of their services from their former clients.

Further, as discussed above, although Defendants claim that a violation of Rule 1.5(e) is automatically prejudicial and automatically affects the administration of justice, at trial "Defendants failed to present any evidence at all tending to show that the violation was egregious or prejudicial to them or to the administration of justice." (C6282.)

Finally, as noted above, an abuse of discretion standard should be applied, rather than a *de novo* standard. However, Defendants cite to the California case, *Chambers*, for the proposition that this Court should apply a *de novo* standard of review. Their citation is inapposite.

In asking this Court to apply a *de novo* standard, Defendants incorrectly frame the issue whether the trial court could properly rely upon the contingency rate agreed to by the parties as an issue requiring an interpretation of Rule 1.5(e). Although a *de novo* standard would apply to an interpretation or construction of Rule 1.5(e), this appeal does not involve either the interpretation or construction of Rule 1.5(e). As the trial court noted in its Trial Memorandum and Order, Plaintiffs never disputed that the contingency fee agreement violated Rule 1.5(e). (C6282.) Rather, the trial court properly framed the issue relative to Rule 1.5(e) as whether, based on



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the "egregiousness of the violation [of Rule 1.5(e)] and any resulting prejudice to the clients or the administration of justice … a violation of Rule 1.5 precludes quantum meruit recovery." (C6282.) The trial court found that Plaintiffs' violation was neither egregious nor prejudicial to Defendants or the administration of justice. This finding was not against the manifest weight of the evidence and the trial court did not abuse its discretion in declining to bar or limit Plaintiffs' recovery as a result.

## II. THE TRIAL COURT DID NOT ERR IN FINDING THAT PLAINTIFFS' WORK BENEFITED DEFENDANTS OR IN AWARDING PLAINTIFFS $1,692,390.60 BASED ON AN APPLICATION OF THE QUANTUM MERUIT FACTORS.

In a claim for quantum meruit, 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).

Here, the evidence supports the trial court's finding that Plaintiffs conferred a benefit upon Defendants and further supported the trial court's



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finding that $1,692,390.60 constituted a reasonable fee based on the quantum meruit factors.

### A. A "manifest weight of the evidence" standard applies.

Defendants are correct that 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. However, Defendants are incorrect that the trial court's ultimate determination as to what constituted a reasonable fee should be reviewed for an abuse of discretion. This Court should evaluate the trial court's findings on both issues under a "manifest weight of the evidence" standard.

Defendants are incorrect that the standard of review of a trial court's ruling on a fee petition also applies to the finding by a trial court, sitting as trier of fact in a bench trial, as to the reasonable value of services provided.

When a trial court makes a ruling as to a reasonable fee to be awarded to a lawyer based on a fee petition heard by the trial court, the appellate court will review that decision for an abuse of discretion. *See, e.g.*, *Vandenberg v. RQM, LLC*, 2020 IL App (1st) 190544, ¶ 27, appeal denied, 159 N.E.3d 966 (Ill. 2020). However, a different standard applies here, as this case did not involve a lawyer's fee petition. Because this appeal stems from a judgment rendered following a bench trial, the trial court's finding should be reversed only if it is against the manifest weight of the evidence.

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



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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 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.

In *Wildman*, the court explicitly rejected both parties' contention that the findings of a trial judge sitting as trier of fact in determining the reasonableness of legal fees to be awarded should be reviewed for an abuse of discretion. *Id.* at 595-99. The court pointed out that although findings in fee petition cases are within the sound discretion of the trial court, the same standard should not be applied to review findings of a trial judge sitting as the trier of fact in a bench trial. *Id.* at 597. Rather, the court employed a



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"manifest weight of the evidence" standard in reviewing a judgment following a bench trial. *Id.* at 597-99.

"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 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).

**B. 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 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,



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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, they 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; C4210-4211, 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'



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$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.) GKWW did not even appear in any of the then-pending litigation before a settlement was reached. (C4478-C4742, C4766-4796.)

The foregoing demonstrates that there is no merit in Defendants' contention that the manifest weight of the evidence opposes a finding that they benefited from Plaintiffs' work. When Defendants hired Plaintiffs, they were owed money, they were being frozen out and they were deriving no financial benefit whatsoever from their interests in the family assets. By the



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time Defendants fired Plaintiffs about nineteen months later, they had received a settlement offer in the amount of $16,250,000. Without successor counsel doing anything to gain further leverage, a settlement was achieved for $16,850,000. 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 although "Plaintiffs may have made efforts, they achieved no results." (Def. Br. at 39.) 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 29.) But Plaintiffs did not fail in their efforts. Defendants are correct that, among the nine pieces of litigation that 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



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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 also contend that they received no benefit from Plaintiffs' legal work because, when they fired Plaintiffs, no settlement offer remained pending. As the trial court found, "this fact is inconsequential" in light of the fact 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



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offer to expire – they promptly informed Defendants of the offer and recommended that Defendants should make a counter-demand. The offer expired due to Defendants' own inaction. Further, even had Defendants authorized Plaintiffs to counter Peggy's most recent demand, as they had on numerous prior occasions, 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.

Defendants contend that the trial court erroneously shifted the burden to Defendants to prove that Plaintiffs' legal work did not benefit them. As reflected in the trial court's Trial Memorandum and Order, the trial court did no such thing. 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.

(C 6280-C6281.)



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Defendants also take liberties with the evidence. They assert that "the chancery court dismissed two other claims altogether and severed and transferred another. [citation] When the Plaintiffs tried to replead, their amendment was stricken." (Def. Br. at 37.) In citing to page 368 of the record for the foregoing proposition, Defendants omit the last part of the testimony on this point: Schlegel testified that the amendment was also 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, Defendants could not possibly have benefited from Plaintiffs' work. Illinois law does not support Defendants' argument. Following the Illinois Supreme Court opinion in *Rhoades v. Norfolk & Western Ry. Co.*, 78 Ill. 2d 217, 230 (1979), and its progeny, Illinois courts have routinely awarded as quantum meruit damages the entire contingent fee of a lawyer who has done most of the work in a case but is discharged shortly before a settlement is reached.

In *Rhoades*, the respondent-client entered into a contingency-fee agreement with the claimant-law firm to represent him in an injury claim against his employer. *Id.* at 221. However, he reconsidered his decision to sue his employer that evening and called the law firm to terminate the engagement the very next day. *Id.* Despite having been fired by its client, the



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law firm filed suit against the employer three days later. *Id*. After the client made repeated efforts to have the law firm dismiss the lawsuit, the law firm ultimately complied. *Id.* at 222. After the lawsuit was dismissed, the client and his employer reached an agreement to settle the client's claims for $15,000. *Id.*

The law firm, which had asserted a lien upon the client's recovery, sought an adjudication that it was entitled to 25% of the settlement as its fee agreement had called for a 25% contingency. *Id.* The trial court granted the law firm's request and awarded it the full contingency amount – one quarter of the settlement: $3,750. *Id.*

On eventual appeal to the Illinois Supreme Court, the court held that although the law firm possessed no valid lien, the firm was entitled to recover for the value of its work on a quantum meruit basis. *Id.* at 228-29. However, in light of the fact that the law firm had been discharged after less than a day, the court questioned whether an award of the full 25% contingency was appropriate. *Id.* at 229. The court therefore remanded the matter to the trial court for a determination of a reasonable fee. *Id.* at 229-30. The court also recognized that "[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." *Id.* at 230.



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The rationale and ruling in the *Rhoades* opinion have been followed by the appellate courts of this state and the Seventh Circuit Court of Appeals on numerous occasions. For instance, in *DeLapaz v. Selectbuild Const., Inc.*, 394 Ill. App. 3d 969, 975 (1st Dist. 2009), the court affirmed an award of the entire 30% contingency fee, less fees due to successor counsel, on a 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." In *Wegner v. Arnold*, 305 Ill. App. 3d 689, 694-96 (2d Dist. 1999), the appellate court reversed a trial court's award of less than the discharged lawyer's contingency rate of one-third of the settlement proceeds where a successor lawyer settled the client's case shortly after the original lawyer'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. In *Whalen v. Shear*, 190 Ill. App. 3d 84, 86-87 (3d Dist. 1989), the appellate court affirmed an award of the full one-third contingency fee set forth in a 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." In *Dobbs v. DePuy Orthopaedics, Inc.*, 885 F.3d 455, 459 (7th Cir. 2018), the Seventh Circuit Court of Appeals, applying Illinois law, affirmed an award of the entire contingency contract fee of 35% of



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recovery on quantum meruit basis as the reasonable value of services rendered.

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 and an award by reference to the contingency fee was merited.

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, this 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 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).

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

Although 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, Defendants do not contend that the trial court erred in finding that four of the factors—(1) the lawyers' skill and standing; (2) the nature of the cause and the difficulty of the issues involved, including the



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amount at issue; (3) the novelty and difficulty of the subject matter, and (4) the lawyers' degree of responsibility in managing the case—weighed in favor of its award. Defendants contend only that the trial court erred in its application of the other three factors: (1) the time and labor required, (2) the usual and customary charge for that type of work in the community; and (3) the benefits resulting to the client. As discussed below, Defendants are incorrect. All seven factors support the trial court's award.

Though Defendants focus on three factors, it would be improper to review the trial court's determination as to what constituted a reasonable fee without reference to the evidence supporting Plaintiffs' case on all seven quantum meruit factors considered by the trial court. As such, before addressing those factors that Defendants contend fail to support the trial court's award, we briefly address the four factors that Defendants tacitly acknowledge did support the trial court's award. As shown below, an application of all seven factors strongly supports the trial court's award calculated by reference to the full contingency rate.

**(1) Defendants do not dispute that four factors support the trial court's award.**

<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.)

<u>The Nature of the Cause and the Difficulty of the Issues Involved:</u> As Plaintiffs' expert, Brooks, testified, the underlying litigation was very



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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-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



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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: 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.).



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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.)

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.)

**(2) Defendants are incorrect that three factors do not support the trial court's award.**

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



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$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); (4) that Plaintiffs' expert reviewed Rushe's work and concluded that "it looked like what you would have a paralegal do," (R1097), and (3) the trial court did not find the time expended by Plaintiffs to have a significant impact on its determination of a reasonable fee, (C6290.)

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



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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



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$16,250,000 settlement offer and the leverage needed for successor counsel to settle Defendants' claims for a slightly greater amount. (R1057-R1058, R1179.)

<u>The Usual and Customary Charge for Like Work in the Community:</u> 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 the O'Briens." (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 set forth in the attorney-client agreement 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 likewise no merit in Defendants' contention that the application of the contingency rate (reduced by the $500,000 flat-fee paid to successor counsel) caused Defendants to "experience[ ] the worst of both worlds." (Def. Br. at 52.) Here, Defendants claim that Plaintiffs should have been limited to a recovery based on an hourly rate, but their claim ignores that applying an



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hourly rate would have been unfair to Plaintiffs. Defendants needed legal counsel, but they were unable to pay lawyers at an hourly rate or to fund a retainer. (R1248.) Plaintiffs were understandably not willing to engage in lengthy litigation on an hourly basis without being paid regularly, especially where the risk of zero recovery might have meant that they would never get paid. (R1248-R1249.) Thus, the parties agreed that a contingency arrangement would be fair in light of the fact that Plaintiffs would not be able to work for other clients and would incur the risk of no or limited recovery. (R1443.)

**(3) The evidence supports the trial court's judgment.**

In light of an evaluation of all seven quantum meruit factors, all of the evidence presented at trial strongly supported the trial court's conclusion that the reasonable value of Plaintiffs' services should be calculated by reference to the full contingency structure agreed to by the parties and consistent with fee structures in other like litigation.

Even if this Court's review of the trial court's finding as to the reasonable fee to be awarded to Plaintiffs should be based on an abuse of discretion standard, the trial court's finding should be upheld for all of the reasons discussed above. If anything, the trial court may have awarded Plaintiffs too little. Although the evidence reflected that Plaintiffs' legal work put Defendants' successor counsel in position to achieve a $16,850,000 settlement – there was no evidence that successor counsel did anything to litigate any of the nine pieces of litigation – the trial court nonetheless calculated Plaintiffs'



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reasonable fee by subtracting the $500,000 flat fee that Defendants paid successor counsel from what Plaintiffs would have been entitled to based upon the agreed contingency rate. (R6291.)

Under any applicable standard, the trial court did not err in applying the quantum meruit factors and concluding that Plaintiffs' work benefited Defendants and had a reasonable value of $1,692,390.60.

## CONCLUSION

Plaintiffs-Appellees, Stephen J. Schlegel, Ltd. and Andrew W. Levenfeld and Associates, Ltd., respectfully ask this Court to enter an order affirming the judgment entered by the trial court on November 19, 2021.

Respectfully submitted,

By: *<u>/s/ Jeremy N. Boeder</u>*
Jeremy N. Boeder, attorney for Plaintiffs-Appellees, Stephen J. Schlegel, Ltd. and Andrew W. Levenfeld and Associates, 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 this brief, excluding the words 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 14,942 words.

*/s/ Jeremy N. Boeder*
Jeremy N. Boeder



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**NOTICE OF FILING and PROOF OF SERVICE**

In the Appellate Court of Illinois
First Judicial District

| | | |
|---|---|---|
| ANDREW W. LEVENFELD AND ASSOCIATES, LTD. and STEPHEN J. SCHLEGEL, LTD., *Plaintiffs-Appellees,* | ) | |
| v. | ) | No. 1-21-1638 |
| MAUREEN V. O'BRIEN and DANIEL P. O'BRIEN III, *Defendants-Appellants.* | ) | |

The undersigned, being first duly sworn, deposes and states that on October 25, 2022, there was electronically filed and served upon the Clerk of the above court the Brief of Plaintiffs-Appellees. 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 6 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

*/s/ Jeremy N. Boeder*
Jeremy N. Boeder

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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