IN THE SUPREME COURT OF IOWA

No. 19-0519

MUNGER, REINSCHMIDT & DENNE, L.L.P.,

Plaintiff-Appellee,

v.

ROSANNE M. LIENHARD PLANTE and CHAD L. PLANTE,

Defendants-Appellants.

Appeal from the Iowa District Court for Woodbury County,
The Honorable Nancy L. Whittenburg
LACV182567

AMICUS CURIAE BRIEF of the IOWA ASSOCIATION FOR JUSTICE

Supporting Plaintiff/Appellant

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IDENTITY AND INTEREST OF AMICUS CURIAE

The objectives of the Iowa Association for Justice (hereinafter "IAJ") include the promotion of the administration of justice for the public good, and the advancement of the cause for those who are damaged in person or property, or both, and who must seek redress through our civil justice system. As the leading organization for attorneys practicing at the plaintiff's bar in this state, the members of IAJ are uniquely experienced in the application of Iowa law and Iowa legal principles to the issues facing plaintiffs seeking a hearing in our state's courts, redress of grievance, compensation for injury, as well as defense in a criminal proceeding.

Presently comprising more than 700 members, IAJ member attorneys collectively represent thousands of injured Iowans each year. IAJ serves the legal profession and the public through its efforts to strengthen the civil justice system, promote the prevention of injuries, and foster the development of a judicial system wherein any aggrieved party can seek remedies for injuries, wrongs, or losses that are the responsibility of another party, and have that dispute heard by a fair and impartial tribunal. This system, and the rule of law that it supports, are the centerpiece of IAJ's mission to improve our legal system and promote justice in the courts.

IAJ members have long upheld the rights of plaintiffs in the state

and Federal courts of Iowa, and members have utilized the long-standing practice of entering into contingent fee agreements with plaintiffs seeking justice in those courts. The Association firmly believes that the use of contingent fee contracts fosters and maintains the right of Iowans of limited means to obtain qualified, zealous, and skilled legal counsel when seeking relief or damages for a civil wrong in Iowa courts.

The contingent fee system is a familiar, time-tested, and demonstrably beneficial system that spreads risk, serves to filter frivolous or baseless matters from taking up the courts' valuable time and resources, and promotes the effective use of market forces to ensure the widest possible distribution of justice to the widest possible set of Iowans. Excessive scrutiny or regulation of these fee contracts can only serve to have a chilling effect on these benefits and on the rights of Iowans in their courts. The interests of plaintiff's attorneys should be guarded by the Association, as those attorneys are the ones taking on the risk of lengthy litigation without fee unless the matter proves successful, often advancing expenses and expert witness fees, and devoting time, talents, and hard-won expertise in the service of a speculative endeavor designed to compensate the injured and the wronged in civil court.

ARGUMENT

I. THE CONTINGENCY FEE CONTRACT HAS A LENGTHY HISTORY OF SERVING PLAINTIFFS, THE PLAINTIFF'S BAR, AND THE JUDICIAL SYSTEM

The contingent fee system has its roots in the split occurring between English common law and American common law concerning fears that contingent fees were champertous and to be avoided, as well as the American rejection of the English system of "loser pays" at the end of a lawsuit. *See* Inselbuch, Elihu, "Contingent Fees and Tort Reform: A Reassessment and Reality Check," 64 Law & Contemp. Probs. 175 (Spring 2001). At some point in the 19th Century, states began to repeal prohibitions on contingency fees, and by the century's end, the practice was accepted in most jurisdictions. Brickman, Lester, "Contingent Fees without Contingencies: Hamlet Without the Prince of Denmark?" 37 UCLA L. Rev. 29, 37 (1989).

The United Kingdom has a robust system of Legal Aid, financed by the government, that covers civil and criminal matters for citizens. Inselbuch at 178. No such means for providing counsel in civil matters to those with limited means to hire an attorney exists in the United States. Born of equal parts tradition and necessity, the contingent fee system has served clients and their attorneys for many years without significant

oversight aside from the general ethical stricture that fees should be fairly charged.

II. IN MANY CONTINGENT FEE CONTRACTS, CLIENTS ARE PAYING FOR THE ATTORNEY'S REPUTATION, SKILLS AT CASE DEVELOPMENT AND NEGOTIATION, AND OTHER INTANGIBLES

"Even in a so-called 'riskless' case – one where liability is apparent and recovery certain – a contingent fee can still be appropriate because it will require lawyer expertise and time or genuine risk suddenly arises." American Bar Association Tort Trial & Insurance Practice Section, *Report on Contingency Fees in Medical Malpractice Litigation* (2004). With the practice of law being as much of an art as a science, the client who retains a skilled and expert attorney to represent her in a litigation matter is, in fact, hiring a complete package that goes beyond mere legal acumen or trial experience. Often, the experienced litigator has a bundle of effective skills, abilities, and relationships that can be brought to bear on the case at hand, with the net effect of increasing a case's value, significantly increasing the likelihood of a successful settlement or trial verdict. Counsel may have preexisting relationships with defense counsel or a given insurance company, a reputation among the defense bar as a dogged competitor or a no-nonsense valuer of a case whose opinion can influence an adjustor or insurance company officer regarding the exposure of the client or the case's

ultimate value. The attorney may know just the expert to use, or the investigator or accident reconstructionist to retain in order to develop the case's facts.

The ABA Standing Committee on Ethics and Professional Responsibility recognized that early settlements can often be a function of the bank of intangibles that skilled counsel brings to the negotiation table. "[A]n early settlement offer is often prompted by the defendant's recognition of the ability of the plaintiff's lawyer fairly and accurately to value the case and to proceed effectively through trials and appeals if necessary. There is no ethical reason why the lawyer is not entitled to an *appropriate consideration for this value that his engagement has brought to the case*, even though it results in an early resolution." (emphasis added) ABA Formal Opinion 94-389 (December 5, 1984).

Following this logic, it is short-sighted to reduce every contingent fee taken to a dollars-to-minutes conversion. Unless a fee is clearly ethically unsound, there is no reason to disturb it or the fairly-bargained for fee contract between counsel and client.

III. MANY IOWANS LACK SUFFICIENT RESOURCES TO HIRE AN ATTORNEY AND CONTINGENT FEES ALLOW MORE ACCESS TO JUSTICE

As early as 1840, state courts were noticing the role of the contingent fee agreement as a way for those of limited means to obtain the services of an attorney. "The poor suitor may not have the present means of payment, and this policy [of avoiding contingent fee contracts] may deprive him of counsel… [h]is rights are nothing unless he can have the means of enforcing them." *Bayard v McLane*, 3 Del. (1 Harr.) 139, 207, 219-20 (1840). Later, a Missouri judge observed that "[m]any a poor man with a just claim would find himself unable to prosecute his rights, could he make no arrangement to pay his advocate out of the proceeds of his suit." *Duke v. Harper*, 2 Mo. App. 1, 10-11 (1886).

In 2015, the Iowa State Bar Association estimated that more than one million Iowans have difficulty affording an attorney to handle basic legal needs. Iowa Access to Justice Commission Report, p. 1, 2018. Accordingly, in collaboration with the Iowa State Bar Association and Iowa Legal Aid, on June 27, 2016, Chief Justice Cady ordered the establishment of the Iowa Access to Justice Commission. In the Matter of Establishment of the Iowa Access to Justice Commission (Iowa, 2016). The over-arching concern of the Commission was that Iowa was seeing an increasing number of self-represented litigants who had no choice but to proceed to court on their own due to, among other things, inability to afford counsel. Id., at 1.

It is true that Iowa Legal Aid serves some of this population and attorneys working *pro bono* also help, but it is estimated that these efforts combine to serve only about three percent of those in need of legal assistance. Id. at 2. Because of this, the Supreme Court's Access to Justice Commission is working on ways to foster more corporate involvement in providing access to justice, public outreach through websites and technology, rebranding the importance of civil justice, hosting *pro bono* work days and motivating private attorneys to take on more *pro bono* work, among other avenues. Id.

Outside of *pro bono* work, Iowa's only help for individuals who need to go to court, but who cannot afford to do so, is Iowa Legal Aid. Iowa Legal Aid receives funding, in part, from the Legal Services Corporation, established by the federal government under President Nixon. According to the federal regulations, only individuals whose income is equal to or less than 125% of the Federal Poverty Guidelines may receive advice or assistance from Iowa Legal Aid. Therefore, a family of four must have less than $32,188 in gross annual income to qualify for help in 2019. 45 CFR §1611, Appendix A. If the family qualifies for help initially, but later on receives more income that is expected to continue, the family is no longer eligible for services. 45 CFR §1611.8.

According to the United Way, as of April, 2017, seven of Iowa's ninety-nine counties had 22-30% of its families living at or below 125% of the federal poverty level. Even the wealthiest counties have as many as 12.1% of their families living under the federal poverty level. The 2018 ALICE Report found that approximately twelve percent of Iowa's households live below the Federal Poverty Level and an additional 25%, while considered above the poverty level, are unable to cover basic expenses like housing, food, transportation and health and childcare. United Way's 2018 ALICE Report found that more than one-third of Iowa's households are unable to afford the state's cost of living.

With these financial limitations, few Iowans would have the financial wherewithal to retain counsel in an injury case or other tort matter. Some authorities describe the costs involved in a medical malpractice case as so significant as to foreclose any plaintiff from mounting a *pro se* effort to be compensated in the courts. Hyman, David A. and Charles Silver, "Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid," 59 Vand. L. Rev 1085 (2006). Other tort matters pose similarly daunting monetary barriers for effective litigation, where expenses for investigation, witnesses, jury consulting, legal and medical research, and trial preparation effectively bar anyone but well-organized and well-funded plaintiffs'

attorneys who are willing to sign a contingent fee contract with a client and assume the risk of case development and ultimate success or failure.

Similarly, legal fees are generally out of reach of the average citizen were a potential case to be billed on an hourly basis. "With medical expenses, disability, pain with which to deal, and often an inability to work, most everyday people would lack funds to pay next week's rent or mortgage, let alone an hourly attorney's fee." *Courthouse Cornerstone: Contingency Fees and Their Importance for Everyday Americans*, Center for Justice & Democracy, New York Law School, No. 26 (January 2013). And, with plaintiffs often facing well-heeled corporations and insurance companies, with the ability to pay hourly fees for lawsuit defense, the resources of most citizens are no match for the deep pockets of such defendants.

IV. THE CONTINGENT FEE CONTRACT HAS PRACTICAL BENEFITS

Contingency fee contracts enable an individual with a valid claim to seek redress through the courts without having to choose between paying their bills and losing their lawsuit. The arrangement allows the lawyer to take on nearly all of the risk of loss and often times, the entire out-of-pocket costs of the litigation. It is easy, after the fact, to find cases where a lawyer received a large fee relative to the work performed, but the question should be whether the fee arrangement is justified from the beginning. Almost

universally, a lawyer who agrees to take on a contingency fee case does not know whether it will settle in one month, year, or decade, how much time it will actually take or how much it will actually cost for case expenses. They don't know if this will be a "needy" client or one with unreasonable expectations, or a client who will take missteps along the way and mess-up the case, thereby devaluing the lawyer's work. Other variables include the status of the case at the time the client hires the lawyer, what insurance company is involved, the sophistication of the defendant, what defense counsel is involved, whether the client has ancillary issues like Medicare and Medicaid issues that must be addressed, whether there will be appeals, the complexity of the issues, the need to hire experts, and so on. Lawyers who work on a contingency fee basis sign the contract and hope for the best from beginning to end.

Slashing contingency fees after-the-fact fails to take into consideration that the lawyers who work on a contingency fee basis universally also have a multitude of "small" cases where the lawyer will not generate much income per hour above traditional, hourly rates. Nor does it give credit to the lawyers who often write down or otherwise reduce their attorney fees in other cases to help put more money in the clients' pockets or to help get the case settled. If lawyers cannot have a once-or-twice in a lifetime case where

they collect a large fee because things happened to go well, the odds that the lawyers are able or willing to take on "small" cases or *pro bono* cases will go down, thereby limiting Iowans' access to justice.

Slashing contingency fee contracts after the fact opens a Pandora's box for clients and attorneys, as well as the court. If a client can get out from under a contract just because the case was a good deal for the lawyer, relative to the time ultimately spent, then an attorney would, theoretically, be able to charge more to a client after-the-fact if the case does not go as well as the lawyer hoped it would. Rather than rejoice together over a successful outcome, clients and lawyers will be pitted against one another, never knowing if the other, when all is said and done, will balk. In 2015, there were over 19,000 Complex Civil, Tort, and Civil Law & Equity cases filed in Iowa. NCSC Judicial Workload Assessment, p. 14 (2016). If only ten percent of these involved an unsatisfied client or attorney, that would mean an additional 135 contract or equity disputes being filed, on average, in each of Iowa's fourteen judicial districts each year. It is doubtful that the system could handle this many more disputes per year without additional funding from the legislature. Meanwhile, enforcement of contracts, as written, will deter clients, and lawyers, from filing claims against one another

immeasurably, thereby preserving harmony in the attorney-client relationship.

Enforcement of contingency fee agreements, as written, is good public policy. In America, our system of laws and justice is rooted in contract. We expect that when we go into the marketplace for any goods or services and are told up-front, in writing, what the cost will be, and we knowingly and voluntarily sign on to the agreement anyway, even in the face of other options, we are bound by our agreement. There is no good reason to disturb this tradition. In Iowa, our word is our honor and this is particularly so when an agreement was made between two established attorneys in an arms-length transaction. The four corners of the written fee contract should control the outcome of the case as it provides clarity for all parties and makes the court's job easy. Were the case at bar lost by Munger's firm, as is the case with many contingency fee cases across the state, Munger's firm would not have, after-the-fact, billed the Plantes for his firm's time. The mere thought is unconscionable.

V. CONTINGENCY FEES SPREAD RISK TO ALLOW ATTORNEYS THE FREEDOM TO TAKE ON LITIGATION AT THE BENEFIT OF PLAINTIFFS

Iowa's sister states and the federal courts have recognized that contingency fees are often the only way a person would be represented in the

wrongs done against him or her. "A plaintiff sometimes has little to offer a lawyer other than his personal plight." *Pellegrin v. Nat'l Union Fire Ins. Comp. of Pittsburgh (In re Abrams and Abrams, PA)*, 605 F.3d 238, 245 (4th Cir. 2010). Absent a contingency fee agreement, a person "may not have any thing else to give, and without the aid of the matter in the contest, he can never sue for his right, nor otherwise have the means to employ counsel." *Rust v. Larue*, 4 Littl. (Ky.) 411, 421 (1823) (quoted in Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DePaul L. Rev. 231, 238 (1998)).

An attorney takes on a significant risk when he or she agrees to take a case on a contingency basis. "Entering such a contract is a gamble for both the lawyer and the client because the value of the professional services actually rendered by the law may be considerably higher or lower than the agreed-upon amount, depending on how the litigation proceeds." *Ga. Dep't of Corr. v. Couch*, 759 S.E.2d 804, 816 (Ga. 2014). One court compared the risks a lawyer takes to those taken by a realtor on commission, accepting the possibility of a quick potential reward to the possibility of no sale at all. *Pellegrin*, 605 F.3d at 236.

The significance of this risk was emphasized in *Smith v. R.J. Reynolds Tobacco Company*, 630 A.2d 820 (N.J. Super. Ct. App. Div. 1993). Several law firms entered into contingency fee agreements for multiple lawsuits against cigarette manufacturers and members of the tobacco manufacturing institute. *Id.* at 821. Nearly ten years later, two of the law firms sought to withdraw from one of the lawsuits because they suffered "an unreasonable financial burden." *Id.* at 825. Specifically, the cases had required over 20,000 hours of attorney and paralegal time, 80 days of fact witness depositions, 97 days of expert witness depositions, and over 100 filed motions in the lead case. *Id.* at 824. The firms estimated that they had incurred more than $1,000,000 in out-of-pocket expenses and more than $5,000,000 for lawyer and paralegal fees. *Id.* The jury verdict in the lead case was only $400,000. *Id.* at 830. Although the district court had permitted the law firms to withdraw, the case was reversed and remanded for the district court to reconsider. *Id.* at 832.

Because of this risk of contingency-fee cases, "it may be necessary to provide a greater return than an hourly fee offers to induce lawyers to take on representation for which they may never be paid, and it makes sense to arrange these fees as a percentage of any recovery." *Couch*, 759 S.E.2d at 816. "[C]ontingent fees also counterbalance prior gambles the attorney took

that returned little or nothing in terms of compensation." *Anderson v. MSI Preferred Ins. Co.*, 697 N.W.2d 73, 89 (Wis. 2005) ("We recognize that contingency fees play a vital role in ensuring that certain claimants get access to the courts by providing attorneys with a sufficient incentive that outweighs the risks of litigating uncertain claims.")

Reducing contingency fees after the fact may limit the ability for a person in need to find an attorney to take the case. In *Pellegrin*, a district court reduced an attorney's fee from the agreed-upon thirty-three percent down to only three percent of the settlement. 605 F.3d at 242. The Fourth Circuit reversed and remanded, stating in part that the district court must recognize and consider "the important role played by contingency fees in this type of litigation." *Id.* at 249. In support, the court stated that "plaintiffs may find it difficult to obtain representation if attorneys know their reward for accepting a contingency case is merely payment at the same rate they could obtain risk-free for hourly work, while their downside is no payment whatsoever." *Id.* at 246.

The risk is not only in terms of whether the case will be won or lost. Risk also takes the form of uncertainty about the amount of recovery, the cost in effort, time, and expense in order to obtain recovery, and the all-too-common delay once the case is won to secure the actual recovery for the

client. *See* Kritzer, Herbert M., *Seven Dogged Myths Concerning Contingency Fees*, 80 Wash. U. L. Q. 739 (2002). In extremely high-stakes litigation, such as tobacco litigation, massive corporations initiate scorched earth tactics to "starve out victims or overwhelm them with legal attacks and costs." *Courthouse Cornerstone* at 5.

A novel way to consider the spreading of risk is developed in Elihu Inselbuch's article:

> "The plaintiff's attorney, representing a portfolio of clients under contingent-fee contracts, plays a role not unlike the defendant's insurer. Like the insurer, the attorney has an inventory of cases, and the risk of losing any one of them is spread across the entire inventory. The attorney's risk aversity approximates that of the adversary, and so the attorney is better able to strike settlements in the client's behalf that are in line with the fair value of their claims." Inselbuch at 178-9.

Again, the reality of the spreading of risk inures to the benefit of the plaintiffs represented and provides yet another avenue promoting the representation of the interests of the plaintiffs by capable counsel.

The ability of Iowans to obtain quality legal representation in the event of injury needs to be preserved, and no further requirements which effectively scrutinize or tamper with the contingent fee agreement arrived at between counsel and client should be considered by this Court.

CONCLUSION

Contingent fee contracts have served Iowans well over the history of our courts. There is no compelling reason to overanalyze a fee contract or amount, or implement a check on contingent fee amounts. There are already existing ethical rules concerning excessive fees that serve to protect litigants and police the fee-taking activities of counsel.

Contingency fees serve a useful purpose to connect injured or aggrieved plaintiffs with skilled and capable counsel. They make it possible for any person to obtain relief in our courts with the assistance of an attorney whose services were not obtained on a prohibitively expensive hourly basis. They reward attorneys for engaging with clients by spreading risk, providing incentive to involvement in important and meaningful litigation.

Contingent fees are also a fair way to compensate lawyers for engaging in matters for the benefit of their clients, and for the development of valuable skills and relationships that serve the interests of their clients and the judicial system in general. They also provide market forces that tend to drive out frivolous cases and free judicial resources for other use. The Court should not consider applying an unnecessary layer of judicial gloss to the current contingent fee system that needs no improvement.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS

This brief complies with the type-volume limitation contained in Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains XXXX words, excluding those parts exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief also complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the style requirements of Iowa R. App. P. 6.903(1)(f), because it has been prepared in a proportionally spaced typeface, namely Times New Roman, size 14 font, in Microsoft Word.

/s/ Joel E. Fenton

PROOF OF SERVICE AND CERTIFICATE OF FILING

I hereby certify that on July 24, 2019, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Docket Management System, which will send notification to all parties of record.

/s/ Joel E. Fenton