IN THE SUPREME COURT OF IOWA
No. 19-0519

MUNGER, REINSCHMIDT & DENNE, L.L.P.,
Plaintiff-Appellee,

vs.

ROSANNE M. LIENHARD PLANTE and CHAD L. PLANTE,
Defendants-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY NO. LACV182567
THE HONORABLE NANCY L. WHITTENBURG

PLAINTIFF-APPELLEE'S BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

Plaintiff-Appellee Munger, Reinschmidt & Denne, LLP (hereinafter "MRD" unless otherwise indicated) agrees with the Routing Statement of Defendants-Appellants Rosanne M. Lienhard Plante and Chad Plante (hereinafter referred to collectively as the "Plantes" unless stated otherwise) insofar as MRD submits that the Iowa Supreme Court should retain the present appeal. However, as set forth in more detail below, MRD disagrees that this case is one "presenting substantial issues of first impression" pursuant to Iowa R. App. P. 6.1101(c), as existing precedent supports the judgment of the district court.

Instead, MRD believes that the case involves a "fundamental and urgent" issue of "broad public importance requiring prompt or ultimate determination by the supreme court" as set forth in Iowa R. App. P. 6.1101(d). If accepted, the Plantes' arguments would upend attorney-client relationships by subjecting fees earned according to undisputedly reasonable contingency fee agreements to post hoc review by courts without the benefit of contractual notions of reasonableness as a lodestar, using subjective and arbitrary notions of reasonableness instead. For that reason, MRD believes that it is appropriate for the Iowa Supreme Court to retain the present appeal.

STATEMENT OF THE CASE

MRD does not dispute the Plantes' statement of the case, with two exceptions. The holding of the trial court is not set forth in its proper context when it is alleged that the trial court found that "Iowa law did not allow the District Court to evaluate the reasonableness of the fee contract at the conclusion of the provision of legal services or any other time after the inception of the contract." (Proof Brief, p. 12). In its ruling, the trial court acknowledged the statement in *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Hoffman*, 572 N.W.2d 904 (Iowa 1997) that while an agreement "may have been reasonable at the time of its inception, changes in the attending circumstances by the time the petition for partial commutation was filed rendered the thirty-three percent contingent fee unreasonable and excessive." (App. 772; quoting *Hoffman*, 572 N.W.2d at 908). The trial court's ruling did not ignore or overturn the holding in *Hoffman* as the Plantes insinuate, but instead limited *Hoffman* to its unique factual context, i.e., where the recovery received by the client was not obtained through any work performed by the attorney pursuant to an agreement which was otherwise valid at the time it was signed.

Furthermore, on the motion of MRD, the Court clarified that interest was running at 1% a month, 12% APR. (App. 776-778.)

STATEMENT OF FACTS

MRD is a law firm whose principals at all relevant times were and are licensed to practice law in the State of Iowa. (App. 108). Munger has practiced law since 1974, working first as a prosecutor in Arizona, then practicing law in the State of Iowa since 1978. (App. 160-162). Munger has extensive experience representing plaintiffs in civil litigation, including personal injury cases and other litigation wherein he achieved large settlements and jury verdicts for his clients. (App. 139-205). He has received an AV rating from Martindale-Hubbell, which is the highest possible rating in both legal ability and ethical standards. (App. 204-205). The other attorneys in MRD are David Reinschmidt (partner) and Jay Denne (of counsel). (App. 161).

Rosanne has practiced law in the State of Iowa since 1996. (App. 123). Prior to the underlying accident, she had been employed for three years by IBP, where she worked on litigation matters. (App. 123). She also was employed by the City of Sioux City, Iowa as a litigation attorney. (App. 160; App. 380). MRD and Rosanne became acquainted when she worked as a City Attorney, as a witness for an MRD client in a sexual harassment case against the City, through seeking Munger's legal advice, and she also had sought employment with MRD, all prior to Chad's 2016 injury. (App. 160).

Chad has a bachelor of science degree in technology education and a master's degree in project management, and prior to the collision that gave rise to the underlying subject matter of this case, he worked for Palmer Candy Company. (App. 128).

At approximately 5:41 a.m. on November 15, 2016, Chad was traveling southbound in a Chevrolet Tahoe on Highway 75 in Sioux City while on his way to work at Palmer Candy Company in Sioux City, when a northbound Sioux City Transit bus, driven by Jamie Pica, turned left in front of Plante's vehicle, and the vehicles collided. (App. 174). Chad was seriously injured and taken to Mercy Hospital in Sioux City in critical condition. (App. 175). As a result of the collision, Chad suffered from broken legs and a traumatic brain injury. (App. 435).

Rosanne contacted Munger the day after the collision, November 16, 2016, and told him what had happened the previous day. (App. 229; App. 147). Munger accepted representation of Chad and Rosanne on that day as per Rosanne's request. And all that Rosanne knew at that time was that her husband's vehicle had been violently hit by a City bus while driving to work, that he was in a coma, and may not live. She did not know much else about the collision, including a lack of knowledge about who bore fault for the collision. (App. 229; App. 147).

Based on Munger's experience as an attorney, he knew that it was likely that a case with such severe injuries would require a great deal of time and skill to establish maximum fault as to the City, including potentially hiring experts as to liability and damages. (App. 147). Accordingly, on the same day that Rosanne contacted Munger and he agreed to represent them (November 16, 2016), he hired a private investigator, Jeff Miller, to immediately begin investigating the case and Munger himself began to personally investigate. (App. 229-230; App. 218-224; App. 381).

The following day (November 17, 2016), Munger communicated with the City of Sioux City and requested that the City not destroy any evidence regarding the collision including, but not limited to, videos, photographs or 911 recordings. (App. 225-226). On December 12, 2016, Munger again communicated with the City of Sioux City, and advised them that MRD would be working on behalf of the Plantes with respect to the collision, requested videos in the City's possession, and asked the City to pay the Plantes' out of pocket expenses caused by the collision. (App. 227-228).

On December 8, 2016, Iowa State Patrol Trooper L.M. Olesen met with Munger and Rosanne Plante to go over his Investigation Report. (App. 231; App. 234-237). Olesen's Report noted his finding that Chad had a

green light when he was traveling through the intersection, and thus had the right of way. (App. 188).

However, the speed limit on Highway 75 at the location of the collision is 50 miles per hour, and Trooper Olsen calculated that Chad was traveling between 52.6 and 53.3 miles per hour immediately prior to the collision, which was also consistent with an eyewitness who reported that he believed Chad was traveling approximately 50-55 miles per hour prior to impact. (App. 185). Therefore, the statement at pages 13-14 of the Plantes' Proof Brief does not accurately state the record. Chad was speeding, and Munger knew that under Iowa's comparative fault law, this would have entitled the City to a fault instruction against Chad[1]. (App. 376).

Following the meeting with Olesen, Munger asked Rosanne if she wanted to hire MRD on an hourly fee basis, on a 1/3 contingency with the Plantes paying expenses, or a 35% contingency with MRD advancing expenses. (App. 158-159). Rosanne rejected the hourly option, chose the 1/3 contingency fee, and signed an Attorney Fee Contract with MRD on December 8, 2016, on behalf of herself and on behalf of Chad (via Power of Attorney). (App. 118). Said Contract begins with the following language:

> **IT IS AGREED** between Chad L. Plante & Rosanne Plante, Client(s), and Munger, Reinschmidt & Denne, Attorney as follows:

[1] See Iowa Civil Uniform Jury Instructions 600.2 and 600.8.

1. **FIRM EMPLOYMENT.** Client(s) agrees that this employment is between the Client(s) and the firm of Munger, Reinschmidt & Denne and includes all attorneys in the firm, including partners and associates and those different attorneys may work on Client(s) matter at the discretion of Munger, Reinschmidt & Denne. Munger, Reinschmidt & Denne employs paralegals and law clerks to assist them in their practice and may use said paralegals and law clerks to assist in the conduct of Client(s) claim under the supervision of an attorney and Client(s) agrees to the use of paralegals and law clerks. Paralegals or law clerks may contact the Client(s) to obtain information or to report to the Client(s) on behalf of the attorneys and Client(s) agrees to cooperate with the paralegals and law clerks.

   The subject of the Firm employment is: **Personal injury suit against the City of Sioux City, Iowa.**

(App. 113).

The Plantes agreed to pay expenses of the case as incurred. (App. 113). Paragraph 3 of the Attorney Fee Contract set forth the agreed-upon fee as follows:

> **3. CONTINGENT FEE.** In the event of recovery, Client(s) shall pay Attorney the following fee based on the amount of the recovery: a fee equal to 33 1/3% of the recovery regardless of whether a case is filed; a fee equal to 40% after notice of appeal and before the case is sent back down for re-trial; a fee equal to 45% if the case is re-tried; and a fee equal to 45% if there is a notice of appeal after the re-trial. *IN THE EVENT NO RECOVERY IS MADE, ATTORNEY SHALL RECEIVE NO FEE FOR SERVICES PERFORMED UNDER THIS CONTRACT*. In the event of a "structured settlement" Attorneys shall receive the above percentage of the present day value of the settlement on the date of the payment of the first installment. In the event the court awards attorney fees, the Attorneys shall recover the greater of:

> the above percentages applied to the total recovery (which is award plus attorneys fees awarded) or the amount of the court-ordered attorneys fees, whichever is greater. EXPENSES ARE ALL PAID BY CLIENT AND ARE NOT DEDUCTED IN ANY WAY IN FIGURING RECOVERY.

(App. 113-114).

In Paragraph 5 of the Agreement, set forth the risks involved in proceeding with the case and to litigation were set forth:

> **5. RISK OF LITIGATON:** Client(s) has the ultimate responsibility for deciding whether to accept a settlement or to go to trial. Not all cases which are filed receive a settlement offer. Attorney does not file cases unless the Client(s) assures the Attorney that the Client(s) is willing to proceed through trial and appeal. Client(s) recognizes that jury decisions are always unpredictable and Attorney does not claim the ability to forecast exactly what a jury will do. It is certainly possible that a jury will return a verdict favorable to the Defendant even where a great deal of time and money has been invested by the Client(s) and the Attorney. This is a risk of the litigation.

(App. 114). In paragraph 8 of the Agreement, it was made clear that the client retained the right to make all final decisions:

> **8. DECISIONS.** It is understood that the Client(s) makes all final determinations as to the type of dispositive actions to be taken in the matter and the Attorney will advise the Client(s) actions. This final determination includes the right of the Client(s) to file and to dismiss the claim. It is understood that the decision of the Client(s) is limited to the decisions as to types of actions to be taken and dismissal and settlement offers and by signing the document Client(s) expressly gives the Attorney the authority to make all decisions regarding the procedures to be taken and the handling of the matter.

(App. 114-115).

The Plantes were under no compulsion to accept the 33 1/3 % contingency fee, as in paragraph 27 of the Agreement, the Plantes were offered the ability to hire MRD on an hourly basis rather than a contingency basis. Rosanne verbally declined that offer prior to signing the Agreement and again declined it by signing the Agreement. (App. 158-159; App. 117).

> **27. HOURLY FEE AGREEMENT ALTERNATIVE.**
>
> Attorney hereby offers to represent Client(s) on an hourly basis rather than a contingency basis. By signing this Agreement, Client(s) decline that offer.

(App. 117).

The City did not accept Trooper Olesen's Report and hired their own accident reconstruction company to investigate the accident, a fact which became known to Munger and the Plantes, as the City corresponded with Munger about possessing Chad's vehicle for the purposes of that investigation. (App. 238). The hiring of an accident reconstruction company revealed that the City was still investigating the claim in order to dispute it, and confirmed that they were not accepting liability, and the attorney for the City (Randall Stefani) admitted as such because he told Munger in a phone call on January 18, 2017, that they were carefully looking at Chad's driving. (App. 376). Therefore, the statement at pages 13-14 of the Plantes' Proof Brief ("Moreover, no party in the present proceedings, (sic) disagrees with

the Trooper's testimony and conclusion that Chad's speed was not a factor in the accident") misstates the essence of the evidence: The issue is not whether the Plantes and MRD agreed with Trooper Olesen's conclusions, but whether the liability of the City was still a question, and the City's behavior throughout the proceedings makes it clear that the issue was not settled. Munger's conclusion, based on his experience, was that the City would find an expert favorable to their position who would testify that the accident would not have happened but for Chad speeding.[2] (App. 376).

During that same time frame, after negotiations between Munger and the City, the attorney for the City communicated to Munger on January 5, 2017, that he would prepare an agreement to pay for certain expenses incurred by the Plantes. (App. 239-247). The Payment Assistance Agreement prepared by the City was sent to Munger on January 10, 2017,

[2] Accordingly, MRD also submits that the statement in the district court's ruling that "no party, in the present proceeding, disagrees with the Trooper's testimony and conclusion that Chad's speed was not a factor in the accident," should be read as a statement that the parties agree this was the Trooper's opinion. It does not accurately reflect the pertinent issue. (App. 769). Again, the issue is not whether MRD and the Plantes believed that Chad's speed was not a factor, as their interests were aligned on that issue – the issue is that there was risk involved with taking the case because the City had made it known that they were performing their own investigation, had hired their own accident reconstruction expert, and at no point ever conceded liability (other than for the purposes of the mediation only, well over a year after the attorney fee contract was signed).

and following negotiations between Munger and the City as to its contents, it was signed by Rosanne on January 13, 2017. (App. 119-121).

The Payment Assistance Agreement between Rosanne and the City makes it clear that the City was still preparing to dispute the claim, as the agreement specifically stated that the City was not admitting to liability for the crash and that the agreement was not admissible unless the City so agreed. See the following language in the agreement:

> **3. NON-ADMISSION OF LIABILITY.** ***It is expressly understood and agreed by the parties that by entering into this Agreement, the City in no way admits it, or any of its agents, employees, or other representatives, have violated any federal, state or local statute or ordinance or common laws, and, to the contrary, expressly deny any such violation. Plante agrees that the covenants, promises, actions, and assignments contained herein, and payments and other consideration provided pursuant to this Agreement, are not deemed or to be construed as an admission of any wrongful conduct, fault, or culpability of any kind whatsoever by the City or any of its agents, employees, or other representatives, but are to be considered strictly as good faith financial assistances.*** It is also expressly understood and agreed by the parties the terms of this Agreement do not limit or preclude either Rosanne Plante or Chad Plante from bringing any claims against the City for personal injury or other damages, subject only to an offset/credit on recovery as set for the in Section 4 below. The parties further expressly understand and agree that evidence of payments made under this Agreement would only be admitted into evidence in an administrative, arbitration, or court proceeding, or other proceeding of like nature, by the City or with the City's express written consent.

(App. 120)(the underlined emphasis is found in the original document, whereas the bold and italics are added).

The City bus driver, Pica, was found guilty of Failure to Obey Traffic Control Device on March 3, 2017 - she did not plead guilty. (App. 360-361). Findings of guilt are not admissions or admissible. Iowa Code §§ 321.489 and 321.490 and Iowa Rule of Evidence 5.609.

During the investigatory period, which ultimately led to the settlement of the case well over a year later, MRD performed multiple services on behalf of the Plantes. (App. 381-385). Munger immediately inspected the scene and discussed the scene with the tow truck company. (App. 381). Counsel negotiated with the City to enter into three separate Payment Assistance Agreements which resulted in substantial pre-settlement payments to the Plantes, and fulfilled the terms of those agreements by assembling and submitting the requests for payment. (App. 381). Counsel continued to counsel Rosanne during the pendency of the case, discussed whether to file suit, coordinated and prepared a video of Chad's daily life, took statements of several witnesses, and performed legal research into issues that developed during the pendency of the case. (App. 382).

On March 15, 2018, well over a year following the collision and the resulting fee agreement between MRD and the Plantes, Munger received a

phone call from the attorney for the City suggesting that the case be mediated. (App. 232). Following negotiations between MRD and the City, the parties agreed to mediate the case on May 7, 2018. (App. 248-249). MRD performed extensive work in preparation of the mediation, including a pre-mediation statement, working with a videographer to prepare a presentation, and obtaining a written damage opinion from a vocational specialist regarding Chad's damages. (App. 382-383).

During the mediation, the City agreed – for the purposes of the mediation only – to accept fault for the collision. The City made it clear that it was not an admission for any purpose other than the mediation. (App. 134-135). Therefore, the statement at page 13 of the Plantes' Proof Brief that the attorney for the City (Stefani) "opened the mediation session between the Plantes and the City by stating that 'the City was accepting 100% responsibility for the accident" leaves out the critical qualification made by Stefani during his testimony that the acceptance of liability was for the purposes of the mediation only. (App. 135).

During the mediation, the City offered the Plantes $7,500,000 in "new money" and agreed to leave the offer open for 60 days. (App. 250). Munger continued to give counsel and extensive legal advice to the Plantes during the next several weeks regarding why it was in their interest to accept the

City's offer, reviewed the proposed settlement agreement, and continued to negotiate with the City as to its terms. (App. 382-383). Moreover, MRD continued to work on behalf of the Plantes by negotiating subrogation claims against the Plantes, working on Medicare set-aside, and investigating issues surrounding Chad's competency, including whether a conservatorship should be set up. (App. 384).

At no point in time before or during the mediation did the Plantes believe that the fee agreement was unreasonable, nor did they communicate to MRD that they believed that the fee was unreasonable prior to or during the mediation. (App. 124-126). The Plantes ultimately accepted the offer from the City, but only after trying to leverage the settlement offer in an unsuccessful attempt to renegotiate their attorney fee agreement with MRD. (App. 336; App. 153-154; App. 628).

The Plantes signed the Settlement Agreement on June 5, 2018, and again on June 17, 2018, with an effective date of August 6, 2018, when the City's Mayor signed it on August 6, 2018. (App. 358-359).

The gross recovery of the Plantes as a result of MRD's representation was $7,678,369.39. (App. 109). Under the terms of the fee agreement, Plantes owe $2,559,456.66 to MRD. (App. 110). Defendants first agreed to pay MRD a fee of $250,000. (App. 110). Then on 9/4/18, the Plantes

agreed to pay MRD $380,000.00 leaving a total (before interest) of $2,179,456.66 owed to MRD per the fee agreement. (App. 337-338). Subsequently, they paid an additional $59,436.67, making the total the Plantes have paid to date $439,436.67. (App. 787-788). This leaves a balance owing of $2,120,019.99 plus interest.

The fee agreement also provides that interest is due according to the following terms:

> **15. INTEREST**. Attorney charges **simple interest** on all past due amounts for fee, expenses and/or advances more than thirty (30) days past due. This is 1% interest per month on all unpaid amounts due, including interest due (12.683% A.P.R.). Client(s) agrees to pay this interest and understands that this paragraph is a vital part of this Attorney Fee Contract.

(App. 115)[3].

The expert report of Attorney Jim Daane (retained by MRD for the purpose of this litigation) sets forth the opinion that the fee agreement was a duly executed and binding attorney fee contract. (App. 208; App. 367-372). Daane also opined that the terms of the fee agreement were fair and reasonable at the time of the agreement's execution. (App. 209). The expert reports of Daane also set forth the following opinions:

- At the time of the execution of the fee agreement, the potential

[3] The correct ARP is 12% per annum. This is reflected in the Court's Ruling on March 7, 2019.

time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly, were all exceptional. (App. 213).

- At the time the fee agreement was executed, it would have been apparent that the acceptance of the case by Attorney Munger would preclude other employment. (App. 211).
- The contingency fee charged in the fee agreement is customarily charged in the locality for similar legal services. (App. 211).
- The 1% simple interest provision was reasonable and customary and in fact, is the same interest rate charged in Mr. Daane's fee agreements. (App. 212-213).
- The amount involved in the case and the results obtained were exceptional. (App. 213).
- Munger's experience, reputation, and ability are widely recognized as preeminent. (App. 214).
- It would have a destructive and harmful impact in future plaintiffs' access to legal assistance to pursue their injury claims if clients could unilaterally renegotiate contingency fee contracts. (App. 216).

Sioux City Council member Dan Moore, also an attorney and former President of the Iowa State Bar Association, testified as to Munger's high skill level and high reputation within the legal community. (App. 363-366). The private attorney for the City retained for the purposes of the Plantes' case, Randall Stefani, testified as to Munger's reputation as a tenacious advocate for plaintiffs, and as to the excellent working relationship he had with Munger during a previous case and during the Plantes' case. (App. 130-133). Donna Forker, finance director for the City of Sioux City, testified as to Munger's high reputation in the legal community and an excellent working relationship with MRD during the pendency of the Plantes' case with regard to providing payments to the Plantes. (App. 137-138).

The expert retained by the Plantes during these proceedings, Attorney David Brown, states that a one-third contingency fee of a $7.6 million award is "patently unreasonable" based on the allegation that Munger spent 57.97 hours on the case and Munger's paralegal, Ann Collins, spent 125 hours on the case. (App. 350-351). This statement is repeated in the Plantes' Proof Brief at page 15. Brown's report erroneously limits Munger's time by cutting it off on the day of the mediation, but the case did not settle then. MRD continued to work as the Plante's attorneys for some time thereafter -

Munger actually spent 119.45 hours on the case from November 16, 2016 until September 10, 2018. Ms. Collins spent 188.2 hours on the case from November 16, 2016 until September 10, 2018 according to MRD time records. (App. 342-343). This does not count the time MRD is devoting to this collection. (App. 342-343). Moreover, it should be noted that Brown's expert report offered no opinion whatsoever as to the amount of risk or uncertainty involved in the case at the time the attorney fee contract was signed by the parties. (App. 350-351). Nor did he opine that the signed fee agreement was unreasonable. (App. 350-351; App. 372).

ARGUMENT

I. STANDARD OF REVIEW AND PRESERVATION OF ERROR.

MRD does not dispute the standard of review statement in the Plantes' Proof Brief.

Regarding preservation of error, while the Plantes did submit a resistance to MRD's Motion for Summary Judgment, MRD submits that they have not preserved error as to either request for relief submitted on appeal by the Plantes in the argument section of their Proof Brief, as summed up in the "Relief Requested" statement found at page 67. Preservation of error rules exist to provide district courts with the opportunity to avoid or correct errors and to provide a record for appellate

courts. *Veatch v. Bartels Lutheran Home,* 804 N.W.2d 530, 533 (Iowa Ct. App. 2011). A party must raise an issue, and the district court must rule on that issue to preserver error for appellate review. *Duck Creek Tire Serv., Inc. v. Goodyear Corners, L.C.,* 796 N.W.2d 886, 892 (Iowa 2011).

The order from the district court which the Plantes appeal from granted MRD's motion for summary judgment by finding that the attorney fee contract was reasonable and valid, and determined that there were no genuine issues of material fact. (App. 774). The Plantes did not file a cross-motion for summary judgment.

The Plantes have not alleged on appeal that there are genuine issues of material fact which should have prevented the court from granting MRD's summary judgment. Although their Proof Brief condenses their claims into one subheading, the Plantes have essentially raised two issues on appeal, as summarized in their "Relief Requested" (Proof Brief p. 67). Those two claims are as follows: (1) There should be a finding on appeal that MRD's fee contract charges an unreasonable fee, is void and unenforceable under Iowa law, and there should be a remand to the district court with directions to determine a reasonable fee based on quantum meruit. This is the claim made in the Plantes' counterclaim. (App. 32). (2) Alternatively, the Plantes

submit that the district court should be ordered to perform a "reasonableness evaluation of the fee contract." (Proof Brief p. 67).

The problem with the first item of relief requested by the Plantes is that they are essentially asking the appellate court to grant summary judgment in their favor on their counterclaim by determining as a matter of law that the attorney fee contract is void and unenforceable – but they did not file such a motion for summary judgment at the district court level. The resistance that the Plantes submitted to the district court in response to MRD's motion for summary judgment did allege that the fee contract was void and unenforceable. (App. 418). However, no cross-motion for summary judgment was accordingly filed by the Plantes seeking judgment as a matter of law on their counterclaim, which alleged that the fee contract was void. The requirement of a cross-motion for summary judgment is not a mere formalistic requirement – "summary judgment may be entered only for one who has filed a motion asking that relief and only after notice and hearing on that motion." *Matter of Campbell,* 253 N.W.2d 906, 908 (Iowa 1977). Therefore, error has not been preserved by the Plantes as to their first request for relief on appeal.

As to the second request for relief on appeal (under Iowa Rule of Professional Conduct 32:1.5(a), the district court should be obligated to hold

a "reasonableness evaluation" of the fee contract even in the absence of any genuine issues of material fact), the Plantes plainly failed to make this request to the district court. Iowa appellate courts do not address issues presented on appeal for the first time. *Plowman v. Fort Madison Cmty. Hosp.*, 896 N.W.2d 393, 413 (Iowa 2017). Moreover, they do not cite anything in the record, which indicates that they did make such a request - in violation of Iowa Rule of Appellate Procedure 6.903(2)(g)(3).

Although not set forth in the "Relief Requested" section of the Plantes' Proof Brief, it should also be noted that on appeal, the Plantes make the argument that the interest rate charged in the attorney fee agreement is not reasonable. This claim was not made anywhere in their Resistance to MRD's motion for summary judgment, so this aspect of their argument should also be dismissed due to the failure to preserve error.

II. THE RULING OF THE DISTRICT COURT GRANTING MRD'S MOTION FOR SUMMARY JUDGMENT ON THEIR BREACH OF CONTRACT CLAIM AGAINST THE PLANTES SHOULD BE UPHELD AS THE ATTORNEY FEE CONTRACT IS VALID AND ENFORCEABLE, AND CHARGES A REASONABLE FEE UNDER THE IOWA RULES OF PROFESSIONAL CONDUCT AND CASE LAW PRECEDENT.

A. INTRODUCTION.

The question before this Court is whether a client can back out of a properly executed contingency fee agreement with an attorney which

charges a reasonable fee. The district court properly said the answer to that question is "no."

Shortly after the traumatic collision between Chad and a City of Sioux City Transit bus which caused him immediate and life-threatening injuries, Rosanne (herself an attorney with approximately two decades of experience at the time) asked Munger to represent them[4]. Munger agreed to do so on behalf of MRD, and he began investigating the case immediately. The Plantes declined to retain MRD's services on an hourly basis and entered into a written contingency fee agreement pursuant to the mandatory provisions of the Iowa Rules of Professional Conduct. At the time the standard 33 1/3 percent contingency fee agreement (whereby the Plantes agreed to pay expenses but owed no fees to MRD until a recovery was obtained), the risks involved in the case were significant, and the ultimate outcome of the case was uncertain.

Following the execution of the fee agreement, and through the efforts of counsel, the Plantes began receiving expense payments from the City, albeit with an express denial that said payments constituted any kind of an admission as to liability. The City hired their own accident reconstructionist

[4] Following the collision, Chad was in a coma, so Rosanne acted on Chad's behalf via a signed Power of Attorney form. (App. 118).

after the Iowa State Patrol found that the City bus driver was at fault (but also found that Chad was traveling in excess of the speed limit prior to impact), thus indicating that the City intended to contest the case.

Eighteen months following the collision (November, 2016 to May, 2018), a mediation session was held, whereby the City offered $7.5 million in "new money" to the Plantes to settle the matter. It was during the mediation that, for the first time in 18 months, the City accepted liability for the collision – but said acceptance was for the purpose of the mediation only. The Plantes were given 60 days to accept the offer, and they ultimately did so approximately a month after the mediation. It was not until after the mediation session and the $7.5 million offer that the Plantes – for the first time – thought the fee agreement was unreasonable. See the following testimony of Rosanne:

> Q: So when did it first occur to you that you did not want to pay our fee?
>
> A: Well, I needed to go home that day. I needed to go home and consider the fee. Consider the offer. Consider everything that had happened. That was a lot that day. You wanted me to make a decision that day immediately, and the mediator wanted a decision. And I was the one who said, "I need some time because this is the single biggest financial decision Chad and I are ever going to make. And we need to go home and think about this."

And when we went home and thought about it, that's when I did think that the fee was unreasonable based on that day and that change of circumstance.

Q: So you didn't raise that issue the day of the mediation; is that correct?

A: I don't remember. I - - that day of the mediation, as I said, it was eight hours and I hadn't eaten. And by the time we left, I know - - we had an offer and I - - I can't - - I can't tell you what I said that day. I can't.

Q: So just to absolutely be clear, you're saying you don't remember saying anything to me about reducing our fee on the day of the mediation. Is that your testimony?

A: I don't remember exactly if I said that that day.

Q: And I'm going to go back to my earlier question which is: When did you first consider not paying our fee?

A: I believe it's when I had went home and had some time to think about some things.

Q: On the day of the mediation?

A: I don't know if it was exactly on the day of the mediation. It might have been - - I needed some time to decompress.

Q: Was it before the mediation?

A: No.

Q: Before the mediation, did you consider that we had a reasonable Fee Agreement?

A: Yes. Based on what you had said. Based on the fact that you thought this was going to be a long, drawn-out situation; based on the fact that we thought there was going to be comparative

fault, you know, assigned to my husband; based on all the things that you had told me.

Q: This is before you signed the Fee Agreement?

A: No. You asked about before - - you had asked - - I was answering your question about before the mediation.

Q: Okay. I want to know - - you've told me that the Fee Agreement was reasonable before the mediation. And it was only on the day of the mediation that you decided you may not want to pay our fee, correct?

A: I don't know if it was on the exact day.

Q: It could have been the day after?

A: I had to go home and think about things.

Q: But it wasn't before the mediation --

A: No.

(App. 124-125).

The Iowa Supreme Court has indicated that following the successful conclusion of a case, it is both (a) inappropriate to judge the risk involved in a contingency fee case with hindsight, and (b) inappropriate to use the factors relevant to the reasonableness of noncontingent fees to judge the reasonableness of a contingency fee. *Comm. on Prof'l Ethics & Conduct of The Iowa State Bar Ass'n v. McCullough*, 468 N.W.2d 458, 461 (Iowa 1991). The Plantes' arguments on appeal rest on those two impermissible grounds and should be rejected accordingly.

Plantes' appeal notably does not dispute the following:

- They do not dispute that MRD offered to take this case on an hourly basis, and the Plantes declined their offer. Now, the Plantes argue that MRD should be paid a fee based on hours worked, an option they originally turned down.
- The Plantes do not challenge the fact that they have admitted that the attorney fee agreement was reasonable at the time it was signed. Their brief argues only that the fee "became unreasonable" after the mediation when the City offered to settle for more than $7,600,000.
- They do not deny that Rosanne was, at the time she signed the contingency fee agreement and turned down an hourly fee agreement, an experienced, long-time Iowa lawyer who presumptively would have known two things: (1) That in Iowa the essential characteristic of a contingent fee contract is that the attorney's right to be paid any amount for their services is dependent on the result obtained. *Wunshel Law Firm, P.C. v. Clabaugh*, 291 N.W.2d 331, 333 (Iowa 1980); (2) It is not the intent of Rule 32:1.5(a), which supersedes almost verbatim, DR 2-106(B), that contingent fees must be reexamined at the conclusion

of successful litigation with respect to the factors applicable to noncontingent fees. *Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. Hoffman*, 572 N.W.2d 904, 908 (Iowa 1997).

The importance of Rosanne's status as an experienced lawyer who knowingly and voluntarily signed the agreement (and agreed that the fee was reasonable all the way up until the time after the offer from the City was on the table) cannot be overstated. Iowa law simply does not allow parties, particularly lawyers like Rosanne, to back out of reasonable and enforceable agreements based on subsequent events which lead them to believe that they struck a bad bargain:

> [W]e may readily dismiss a running theme in Walker's argument: namely, her complaint the settlement agreement she signed eight years ago is unfair because she ended up working more than she anticipated when she signed it. The district court concisely and correctly dismissed this argument when it found:
>
> [W]hen these parties were negotiating, neither of them could know with any certainty how much time would be required to resolve the cases…Both parties accepted the risk inherent in contingent fee cases that no fees would be payable. Both assumed the proportional division with protective maximum and minimum percentages would guard against an unfair result. *The fact that one [(or both)] of the parties was wrong does not provide a basis for overturning a settlement agreement that was entered into as a result of arms-length negotiations by parties who are not only attorneys themselves but who were both also represented throughout the negotiations by other attorneys.... Walker must live with the bargain she freely entered into.*
>
> .... Walker wants now to renegotiate the [a]greement. This court will not entertain that effort. She made a bargain. Even if it was a bad

> bargain, under general principles of contract law, she lives with that bargain.
> (Emphasis added.) We agree with this assessment. Uncertainty is a powerful incentive for parties to accept a compromise settlement agreement. *See Wright,* 410 N.W.2d at 249. Much was uncertain when the parties signed the settlement agreement; such is the very nature of cases taken on a contingency-fee basis. The parties in this case assessed the situation and made their choices regarding the time and effort Walker would have to expend in the future to bring the overtime-pay cases to a successful resolution. They also gave up other claims against each other and each received some benefits. We will not interfere with their agreement—fully performed with the exception of the payment of the fees—simply because one party got the better end of the bargain. "It is ... well settled that to vitiate a settlement, *a mistake must be* mutual, material, and *concerned with a present or past fact.*" *Id.* (emphasis added, internal quotation omitted).
>
> Parties to contracts should not look to courts to rescue them from their bad bargains. *Smith v. Harrison,* 325 N.W.2d 92, 94 (Iowa 1982). Courts should ... support agreements which have for their object the amicable settlement of doubtful rights by parties.... [S]uch agreements are binding without regard to which party gets the best of the bargain or whether all the gain is in fact on one side and all the sacrifice on the other.
> *Id.* (internal quotation omitted). "The courts can have no concern with the wisdom or folly of ... a contract." *Bjornstad v. Fish,* 249 Iowa 269, 279, 87 N.W.2d 1, 7 (1957) (citations omitted).

Walker v. Gribble, 689 N.W.2d 104, 109–10 (Iowa 2004). The logic of the *Walker* holding applies - this was a reasonable fee agreement, signed by an experienced lawyer, during a time of great uncertainty as to the outcome of the case. Rosanne had the chance to strike a different bargain, and she chose not to do so. Her actions and admissions constitute conclusive evidence that the fee agreement is enforceable and leads to a reasonable fee.

Accordingly, MRD submits that the district court properly granted their motion for summary judgment under Iowa Rule of Civil Procedure 1.981.

B. THE MRD FEE CONTRACT WHICH CHARGES THE PLANTES A CONTINGENCY FEE OF 33 1/3 % IS REASONABLE AND ENFORCEABLE ON ITS FACE.

1. Case law and applicable rules of ethics governing lawyers establish the enforceability of contingency fee agreements such as the MRD fee agreement.

For decades, the following statement by the Iowa Supreme Court has been the law of Iowa: "'Ordinarily a contract between attorney and client, providing for the payment of a fee for legal services contingent upon the results obtained by the attorney, without more, is not an illegal contract, but one that is enforceable.'" *Stoebe v. Kitley*, 249 N.W.2d 667, 669 (Iowa 1977)(quoting *Roten v. Tesdell & Machaman*, 195 Iowa 1329, 1332-1333, 192 N.W. 442, 443 (1923)). *See also Wunschel Law Firm, P.C. v. Clabaugh*, 291 N.W.2d 331, 333 (Iowa 1980)("We have long recognized the validity of contingent fee contracts generally", quoting *Wallace v. Chicago, Milwaukee & St. Paul Railway*, 112 Iowa 565, 567-68, 84 N.W. 662, 663 (1900)). Through their arguments made on appeal, the Plantes seek to upend this longstanding approval of contingent fee agreements in Iowa by subjecting

them to inappropriate hindsight and standards which do not apply to contingency fees.

Rule 32:1(a) of the Iowa Rules of Professional Conduct states as follows:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses, or violate any restrictions imposed by law. The factors to be considered in determining the reasonableness of a fee include the following:
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

As noted in the Plantes' Proof Brief, this Rule went into effect when the Iowa Rules of Professional Conduct were changed in their entirety in 2005. However, what the Plantes' Proof Brief does not note is that although the prohibition against "clearly excessive" fees in the former rule system (DR 2-106) was changed to a prohibition against "unreasonable" fees, ***the language***

of the eight factors to be considered in determining whether a fee was "clearly excessive" under DR 2-106 or "unreasonable" under 32:1.5 are exactly the same. Therefore, as set forth in more detail below, the Plantes' argument that the change in the rule scheme should cause the Iowa appellate courts to reconsider prior rulings is without merit, since the relevant part of the rule has not changed.

The fee sought by MRD is contingent (factor (8), and the Iowa Supreme Court has made it quite clear that it is not the intent of the rule "that contingent fee agreements must be re-examined at the conclusion of successful litigation with respect to the factors applicable to noncontingent fees." *Comm. on Prof'l Ethics & Conduct of The Iowa State Bar Ass'n v. McCullough,* 468 N.W.2d 458, 461(Iowa 1991). As *McCullough* was a pre-2005 case, it relied on the prior rule scheme, but as noted, the factors have not changed, so there is no basis for re-examining this precedent. Simply put, there is no warrant in either the rule or case law precedent to scrutinize the amount of the fee at the conclusion of this case, when the contingency fee percentage is reasonable.

The Plantes make the argument that somehow the commentary to Rules under the new regulatory scheme overrules case law precedent when they assert, *carte blanche,* that Comment 3 to Rule 32:1.5 makes all eight

factors "applicable to contingent fee contracts." (Proof Brief p. 38). That is not what Comment 3 states:

> Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee***, a lawyer must consider the factors that are relevant under the circumstances***.

Id. (emphasis added). Accordingly, contrary to the Plantes' argument, the first seven factors do not automatically apply – only those relevant under the circumstances apply. In no way does the commentary rule overrule Iowa case law precedent which indicates that "hindsight" review of contingency fees is not appropriate when the contingency fee is reasonable at the outset of the case pursuant to the applicable factors.

Rule 32:1(c) sets forth the requirement that contingent fees must be agreed to in writing:

> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the

> matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

There is no dispute that MRD complied with this Rule. The whole purpose of this Rule would be gutted if the Plante's argument were to be accepted. Lawyers should not be required to execute written fee arguments if a court could, after the fact, determine a contractual fee is unreasonable even though the agreement itself had previously been reasonable throughout the course of the representation.

2. Contingency fee agreements of one-third of the recovery are typical in cases, such as this one, where there was risk and uncertainty at the time the fee agreement was signed.

A summation of the pertinent case law in Iowa on the reasonableness of contingency fees is found at 16 Iowa Practice Series, *Lawyer and Judicial Ethic*s § 5:5(d)(2).[5] The article begins with the following statement:

> As Comment 3 to Rule 1.5 states, "[c]ontingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this rule." For the litigation case in which the risk of loss is significant, the Iowa Supreme Court has expressed approval of the typical one-third of recovery contingent fee. Indeed, in one particularly complex lawsuit, in which the law firm had advanced all costs despite the "a strong likelihood they would recover nothing," the court approved a 50 percent contingency fee. Thus, when the case is especially demanding in terms of attorney time and resources and the risk of loss

[5] Authored by Gregory C. Sisk (University of St. Thomas Law School) and Chief Justice Mark S. Cady.

> is greater than normal, a larger contingency fee may be reasonable. Uncertainty thus defines "the very nature of cases taken on a contingency-fee basis."

Id. (internal footnotes deleted). Therefore it is noted that the Iowa Supreme Court has expressed approval for the exact percentage fee charged in this case: one-third (The cases cited in the footnote in support of this conclusion are *Hoffman* and *McCullough*). Indeed, as noted, the Iowa Supreme Court has allowed even higher contingency fee percentages to be charged in certain cases, but this appeal does not involve that issue - the fee percentage in the present case is "typical."

At the time the Plantes retained MRD, and the fee agreement was signed, there was a great deal of uncertainty as to multiple factors, including the comparative fault of the parties. Munger's Expert Report sets forth the risks at the outset of the case:

> 1A. This was a case of comparative fault and was risky. While that may not seem novel on its face, the novelty is that each case presents a complex set of facts that must be uniquely persuasively presented and argued. At the time Mr. Munger accepted the case at Rosanne Plante's request, on November 16, 2016, Rosanne Plante described to Mr. Munger that the day before, on November 15, 2016, her husband Chad Plante's Tahoe had been violently hit by a City bus while driving to work and that he was in a coma and may not live. (It was soon known that his injuries included a right open distal tip-fibula fracture; left middle third comminuted displaced femur fracture; right segmental fibular fracture, displaced; severe traumatic brain injury, axonal; acute respiratory failure; and altered mental status.) She did not know much of anything else, including whose fault it was. It would have been known at the time and was known to Mr. Munger,

> that likely a case like that with such serious injuries would require a great deal of time and skill to establish maximum fault on the City, including hiring a liability expert or experts to prove the City's fault and Mr. Plante's lack of fault. When Trooper Olesen reported to Rosanne Plante and Mr. Munger, just prior to Rosanne signing the fee agreement, that he found the bus driver at fault, he also found that Chad was speeding. That meant that the City would be entitled to a comparative fault instruction against Chad. Almost immediately, it became known that the City hired Knight and Associates as their traffic accident reconstructionist. It was well known to Mr. Munger that Mr. Knight was a competent and thorough expert. The City's willingness to hire their own investigator and not rely on Trooper Oleson signaled that this would be a long, drawn out fight on liability requiring a very skillful trial attorney to represent Plaintiffs.

(App. 147-148).

Similarly, MRD's retained expert, Jim Daane, set forth the risks involved in his report at pages 5-6, including issues of comparative fault (indicated by the Trooper's findings that although Chad had the right of way, he was also speeding, as well as the fact that the City hired their own accident reconstructionist, Knight and Associates). (App. 371-372). ***Notably, Plantes' expert, David Brown, offered no opinion whatsoever as to the risks borne by MRD as a result of taking the case.*** (App. 350-351). Accordingly, it is undisputed that the risk of loss was significant, and the results were uncertain, so the fee agreement in the present case is squarely within the confines of acceptable fee agreements according to the Rule, as interpreted by the Iowa Supreme Court. The Plantes do not even attempt to

argue otherwise, and this is the reason why they make the impermissible "hindsight" argument.

3. The contingent fee, in this case, is neither a case where the "risk of loss was never substantial" or where the "ultimate recovery proved to be astronomically high."

The Iowa Practice Series article identifies only two scenarios where a contingency fee will be invalidated, neither of which apply to the present case: "However, if the risk of loss in a matter was never substantial or the ultimate recovery proves to be astronomically high, a contingency fee may be inappropriate or should be measured by a smaller percentage of the recovery."[6]

The first scenario where contingency fee agreements may be determined to be unreasonable is where the risk of loss was not substantial, and the article expounds upon this scenario as follows:

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[6] Similarly, the Restatement identifies the same two scenarios: "A tribunal will find a contingent fee unreasonable due to a defect in the calculation of risk in two kinds of cases in particular: those in which there was a high likelihood of substantial recovery by trial or settlement, so that the lawyer bore little risk of nonpayment; and those in which the client's recovery was likely to be so large that the lawyer's fee would clearly exceed the sum appropriate to pay for services performed and risks assumed. A lawyer's failure to disclose to the client the general likelihood of recovery, the approximate probable size of any recovery, or the availability of alternative fee systems can also bear upon whether the fee is reasonable." Restatement (Third) of the Law Governing Lawyers § 35 (2000)(Comment C).

> As a comment to the *Restatement of the Law Governing Lawyers* explains, the amount of a contingent fee may be unreasonable if "there was a high likelihood of substantial recovery by trial or settlement, so that the lawyer bore little risk of nonpayment," or if "the client's recovery was likely to be so large that the lawyer's fee would clearly exceed the sum appropriate to pay for services performed and risks assumed." For example, if the lawyer, by reason of his or her substantial experience, recognizes that the client is likely to obtain a positive result through a quick settlement, meaning that the lawyer will devote little time to the matter and bears little or no risk of being left without a fee, the typical one-third contingency fee would be unreasonable under the circumstances. In addition, where the results obtained simply are not attributable to the lawyer's efforts, any award of fees may be unreasonable, at least if based on the size of the recovery.

16 Iowa Practice Series, *Lawyer and Judicial Ethics* § 5:5(d)(2)(internal footnotes deleted). As noted above, that is simply not the case here. Even after the fee agreement was signed, the City's actions made it clear that they intended to contest liability. The Payment Assistance Agreement specifically denied that it was an admission of fault, and that evidence of said payments would be inadmissible. The bus driver, Pica, was found guilty, but did not plead guilty, thus indicating the intent to contest liability.[7] Even the City's agreement to liability at the mediation (18 months after the collision) was only for the purposes of the mediation. Therefore, the City made it clear, both before and after the fee agreement, that comparative fault

[7] A guilty plea by Pica would have been admissible in the civil case. *Employers Mut. Cas. Co. v. Van Haaften*, 815 N.W.2d 17, 29 (Iowa 2012). Her conviction would not be admissible. Iowa Code § 321.489.

would be an issue if the matter were to be litigated. Accordingly, the fee agreement was reasonable because of the risks involved.

The primary case relied upon by the Plantes in this case, *Hoffman*, 572 N.W.2d 904, is of no avail to them. There, the Iowa Supreme Court disciplined attorney Hoffman for charging his client an excessive fee because he did **absolutely nothing** to help her win her workers compensation claim against her deceased husband's employer:

> "…**the recovery of the workers' compensation claim was in no manner due to respondent's work as Jahde's lawyer.** Farmland was totally unaware of respondent's representation until after it had investigated the merits of paying workers' compensation and had agreed to pay the claim."

Id. at 908. (Emphasis added.) Even though he did nothing to get money for his client, Hoffman still charged her a 33% contingency fee of a death benefit he did not obtain for her and had no role whatsoever in obtaining for her. This, the Iowa Supreme Court determined, was clearly excessive. *Id.* The statement in the Plantes' Proof Brief that the Iowa Supreme Court found that a fee of $37,000 for 20 hours of work (Proof Brief p. 45) was "clearly excessive" is misleading. The Court did not find that the ratio of hours to the fee (and the resulting hourly rate) was "clearly excessive" – they found that none of Hoffman's work led to the recovery. The Plantes do not disagree that MRD's work led to the recovery from the City. Unlike Hoffman, MRD

worked for the Plantes for over a year and a half, and because of the firm's hard work and sound advice, the Plantes ultimately collected a $7,678,369.39 settlement.

The second scenario where contingency fee agreements may be determined to be unreasonable is when the "ultimate recovery is astronomically high." The article expounds upon this scenario as follows:

> Nonetheless, commentators and many courts insist that even a contingent fee agreement that was "reasonable when made may be rendered unreasonable by subsequent events." As the New York Court of Appeals observed, in unusual circumstances, fee agreements "that are not unconscionable at inception may become unconscionable in hindsight." in particular, the magnitude of the result against which the plaintiff's contingent fee is typically calculated cannot be known until the final disposition, at which point a measurement that appeared reasonable at the outset measurement may prove outrageous if applied without qualification to an outsized recovery.

Id. (internal footnotes deleted). Before delving into this scenario further it should be noted that no Iowa case law is cited and that this kind of a guideline could be applied in a fashion inconsistent with the precedent indicating that contingency fees should not be retroactively examined for reasonableness set forth in *McCullough,* 468 N.W.2d at 461 (indicating that contingency fees should not be invalidated due to "hindsight" or by analyzing factors relevant to non-contingency fee cases). Therefore, MRD submits that this second scenario should not be applied under Iowa law.

In any event, the present case does not fit that scenario, either. First of all, the Plantes have not attempted to make that argument – they have instead focused on the ratio of hours to the recovery (and the fee which would have resulted based on payment on an hourly basis), which is not a valid argument as set forth above. In any event, although the 7.5 million dollar settlement is a large one, it is by no means an "ultimate recovery that is astronomically high." *Id.* Tort litigation in the United States regularly leads to settlements and verdicts in the hundreds of millions and even billions.[8] Recent cases in Iowa have led to results several times larger than the recovery in the present case. For example, there have been verdicts of $32.8 million,[9] $240 million,[10] and $29.5 million.[11]

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[8] See, e.g., "5 of the Largest Personal Injury Verdicts Ever" noting results ranging from $2.2 billion to $150 billion (https://www.mccunewright.com/blog/2017/march/5-of-the-largest-personal-injury-verdicts-ever, accessed January 11, 2018); "The Largest Class Action Lawsuits & Settlements" noting 16 verdicts and settlements in the billions (https://www.gjel.com/blog/largest-class-action-settlements.html, accessed January 11, 2018).

[9] *Toe v. Cooper Tire & Rubber Co.*, 834 N.W.2d 82, 2013 WL 1749739 (Iowa Ct. App. 2013).

[10] https://www.eeoc.gov/eeoc/newsroom/release/5-1-13b.cfm, accessed January 10, 2018.

[11] https://www.desmoinesregister.com/story/news/crime-and-courts/2018/06/13/jury-awards-29-5-m-verdict-womans-death-medical-malpractice-case/699854002/, accessed January 10, 2018.

The New York Court of Appeals case cited in the Iowa Practice Series article for the proposition that fee agreements "that are not unconscionable at inception may become unconscionable in hindsight" actually confirms that the present case does not involve an "astronomically high" recovery and confirms the conclusion that the 33 1/3 percent fee agreement applied to the settlement, in this case, leads to a reasonable fee. *In re Lawrence*, 24 N.Y.3d 320, 23 N.E.3d 965 (2014). In that case, the law firm represented the wife of the decedent in a protracted estate litigation battle beginning in 1983. Notably, the law firm represented the client on an hourly basis from 1983 until 2004, and the client had paid an astounding $18 million in fees with respect to the estate litigation. In January, 2005, the law firm proposed a revised retainer agreement whereby the firm would be paid a 40% contingency fee from any proceeds distributed to the estate after January 1, 2005. *Id.* at 24 N.Y.S.3d at 329.

On May 18, 2005 - only five months after the revised agreement which switched the terms of the representation from hourly to contingency - the case abruptly settled in an amount ultimately over $100 million. The firm sought payment of a fee pursuant to the contingency fee agreement - $44 million. The client balked, and litigation ensued. The underlying court rejected the firm's payment request. *In re Lawrence*, 106 A.D.3d 607, 609,

965 N.Y.S.2d 495, 498 (2013)(noting a finding of fact that the revised retainer agreement would lead to an hourly rate of $11,000 per hour).

The New York Court of Appeals reversed, and much of the discussion which led the court to enforce the contingency fee, in that case, confirms why the fee agreement, in this case, should be enforced. The court began by noting that the "hindsight" review to determine substantive unconscionability is extremely limited:

> Agreements that are not unconscionable at inception may become unconscionable in hindsight, if "the amount becomes large enough to be out of all proportion to the value of the professional services rendered" (*King,* 7 N.Y.3d at 191, 818 N.Y.S.2d 833, 851 N.E.2d 1184). A close reading of the cases that create this "hindsight" review, however, seem to limit the principle to a more narrow application. Although "[t]he word 'unconscionable' has frequently been applied to contracts made by lawyers for what were deemed exorbitant contingent fees," what is meant is that "the amount of the fee, standing alone and unexplained, may be sufficient to show that an unfair advantage was taken of the client or, in other words, that a legal fraud was perpetrated upon him" (*Gair v. Peck,* 6 N.Y.2d 97, 106, 188 N.Y.S.2d 491, 160 N.E.2d 43 [1959] [internal quotation marks and citation omitted]).

Lawrence, at 24 N.Y.S.3d at 339. The Plantes have not made an argument that a legal fraud was perpetrated on them, nor have they offered any evidence to support such an argument.

The court goes on to confirm how rarely contingent fee agreements that are valid at their inception should be voided:

> Absent incompetence, deception or overreaching, contingent fee agreements that are not void at the time of inception should be enforced as written (*Lawrence,* 11 N.Y.3d at 596, 873 N.Y.S.2d 517, 901 N.E.2d 1268 n. 4). As we further observed on the prior appeal in this case, "the power to invalidate fee agreements with hindsight should be exercised only with great caution" because it is not "unconscionable for an attorney to recover much more than he or she could possibly have earned at an hourly rate" (*id.*). In fact, "the contingency system cannot work if lawyers do not sometimes get very lucrative ***711 fees, for that is what makes them willing to take the risk—a risk that often becomes reality—that they will do much work and earn nothing. If courts become too preoccupied with the ratio of fees to hours, contingency fee lawyers may run up hours just to justify their fees, or may lose interest in getting the largest possible recoveries for their clients" (*id.*).

Id. at 339. Indeed, the entirety of the Plantes' argument is preoccupied with the ratio of fees to hours – an argument which should be rejected according to the sound logic of *Lawrence* and Iowa case law precedent.

The court proceeded to note the risk borne by attorneys who enter into contingency fee agreements with clients:

> Whether $44 million is an unreasonably excessive fee depends on a number of factors, primarily the risk to the attorneys and the value of their services in proportion to the overall fee. Here, Graubard undertook significant risk in entering into a contingency fee arrangement with Lawrence. The risk to an attorney in any retainer agreement is that the client may terminate it at any time, "leaving the lawyer no cause of action for breach of contract but only the right to recover on *quantum meruit* for services previously rendered" (*Gair,* 6 N.Y.2d at 106, 188 N.Y.S.2d 491, 160 N.E.2d 43).

Id. at 339–40. The following passage notes the additional risks present in these kinds of cases.

> In addition to Graubard's risk in entering the revised retainer agreement, we also must consider the proportionality of the value of Graubard's services to the fee it now seeks. As we stated in the prior appeal, the value of Graubard's services should not be measured merely by the time it devoted to prosecuting the claims (*Lawrence,* 11 N.Y.3d at 596 n. 4, 873 N.Y.S.2d 517, 901 N.E.2d 1268). Rather, the value of Graubard's services (for the purpose of hindsight analysis) should be the $111 million recovery it obtained for Lawrence.
> We agree with Graubard that a hindsight analysis of contingent fee agreements not unconscionable when made is a dangerous business, especially when a determination of unconscionability is made solely on the basis that the size of the fee seems too high to be fair (*see In re Smart World Tech., LLC,* 552 F.3d 228, 235 [2d Cir.2009] ["the fact that contingency fees may appear excessive in retrospect is not a ground to reduce them because early success by counsel is always a possibility capable of being anticipated" (internal quotation marks omitted)]). It is in the nature of a contingency fee that a lawyer, through skill or luck (or some combination thereof), may achieve a very favorable result in short order; conversely, the lawyer may put in many years of work for no or a modest reward. Most cases, of course, fall somewhere in between these two extremes (*see* ***712 Restatement [Third] of Law Governing Lawyers § 34, Comment *c* [2000] ["(a) contingent-fee contract ... allocates to the lawyer the risk that the case will require much time and produce no recovery and to the client the risk that the case will require little time and produce a substantial fee. Events within that range of risks, such as a high recovery, do not make unreasonable a contract that was reasonable when made"]).

Id at 340–41. In that passage, the *Lawrence* court squarely identifies the reason why contingency fee agreements, such as the one in the case at bar, must be enforced. Moreover, it illustrates why the Plantes' argument that the agreement is unreasonable because the lawsuit was not filed is irrelevant.

The final paragraph in the *Lawrence* opinion is also worth noting:

> Finally, it bears reemphasizing that Lawrence was no naif. She was a competent and shrewd woman who made a business judgment that was reasonable at the time, but which turned out in retrospect to be disadvantageous, or at least less advantageous than it might have been. As a general rule, we enforce clear and complete documents, like the revised retainer agreement, according to their terms (*see Vermont Teddy Bear Co. v. 538 Madison Realty Co.,* 1 N.Y.3d 470, 475, 775 N.Y.S.2d 765, 807 N.E.2d 876 [2004]).

Id. at 341. At the time the fee agreement was signed by Rosanne on behalf of herself and on behalf of Chad, she had been an attorney for 20 years, so indeed, she was "no naif." MRD offered her the ability to pay attorneys fees on an hourly basis. She declined that offer, and agreed to the 33 1/3 percent contingency fee. "Buyer's remorse" does not constitute grounds to withdraw from a fee agreement.

4. Contingency fee agreements are to be evaluated on their own terms, and not in comparison to what an hourly billing would have produced.

The third paragraph of the Iowa Practice Series article, citing pertinent Iowa Supreme Court case law, puts the proverbial "nail in the coffin" to the Plante's position:

> In making the reasonableness assessment of a contingent fee, the Iowa Supreme Court has cautioned against an unfair examination made from "a position of hindsight, [which] suggests that the litigation was simple and that the chances for success were good."[8] The circumstances must be evaluated based upon the facts as known to the attorney and client at the time the contingent fee agreement was signed. **Furthermore, contingency fees should be evaluated on**

> **their own terms, not by comparison with what an hourly billing would have produced**. **The Iowa Supreme Court has rejected the suggestion "that contingent fee agreements must be reexamined at the conclusion of successful litigation with respect to the factors applicable to noncontingent fees." Thus, the reasonableness of a contingency fee cannot be determined by simply looking at the size of the fee in comparison to the amount of work performed by the attorney**. The degree of risk assumed by the lawyer at the outset of the representation ordinarily is the crucial factor.

Id. (citing *McCullough,* 468 N.W.2d at 461)(emphasis added)(internal footnotes deleted). In a similar fashion, the Restatement notes:

> *c. Reasonable contingent fees.* A contingent fee may permissibly be greater than what an hourly fee lawyer of similar qualifications would receive for the same representation. **A contingent-fee lawyer bears the risk of receiving no pay if the client loses and is entitled to compensation for bearing that risk. Nor is a contingent fee necessarily unreasonable because the lawyer devoted relatively little time to a representation, for the customary terms of such arrangements commit the lawyer to provide necessary effort without extra pay if a relatively large expenditure of the lawyer's time were entailed.** However, large fees unearned by either effort or a significant period of risk are unreasonable.

Restatement (Third) of the Law Governing Lawyers § 35 (2000)(Comment C)(emphasis added). *See also Estate of Bruess v. Law Firm of John Gehlhausen, P.C.*, 838 N.W.2d 868, 2013 WL 4010290 (Iowa Ct. App. 2013) ("We recognize, however, that 'time spent' may not be as significant a factor in contingent fee cases as in some other fee cases, as the amount of time required to be invested by the attorney is indeed one of the contingencies he assumes in such a case."); David A. Hyman, Bernard Black

& Charles Silver, *The Economics of Plaintiff-Side Personal Injury Practice*, 2015 U. Ill. L. Rev. 1563 (2015).

The Plantes try to counteract Iowa law by arguing that the result in *Clark v. General Motors,* LLC, 161 F.Supp.3d 752 (W.D. Mo. 2015), supports their argument. *Clark* is not a binding precedent in Iowa, and its facts are different than in the present case. The case involved a contingent fee agreement of 40%, which the court said was *unreasonable when it was entered into* because counsel knew that GM was likely creating a compensation fund that would pay those with claims like Plaintiff's, an ignition switch defect. It likened the risk the attorneys were taking to that of an automobile crash case where a 33 1/3 percent contingency fee was typical and reasonable. The court, unlike the Iowa Supreme Court, applied what it called a "reasonableness in operation" test at the conclusion of the case, using the same factors as are found in Rule 32:1.5(a). In doing so, it placed a heavy emphasis on the fact that a Compensation Fund with a protocol and algorithm for paying claims was set up, and counsel's skill and experience had little to do with the eventual settlement of the claim. *Id.* at 765.

These facts are nothing like the facts of the present case where (1) there was significant risk to Plaintiff's attorneys when they took the case, (2) there was a 1/3 contingency fee agreement that everyone agrees was reasonable at

the time it was entered into, (3) there was no compensation fund with a protocol to make a claim in the works at the time of the fee agreement, (4) no compensation fund was put in place with a published protocol to make an approved claim, and (5) a great deal of attorney and staff work, skill and experience were significant factors in the result. Also, counsel in *Clark* did not offer an hourly fee agreement to their client as did Plaintiff.

Munger's expert-written opinion on December 14, 2018 (App. 878) stated that:

> The Court in *Iowa Supreme Court Bd. Of Professional Ethics and Conduct v. Hoffman* stated that Iowa Courts will not look back at the conclusion of a contingency case to determine the reasonableness of a fee, however, even if the court would do that, Mr. Munger's opinion that the written fee agreement is reasonable remains the same for the reasons previously given.

The "reasons previously given" were an evaluation of the same factors considered in *Clark*: those that are contained in Rule 32:1.5(a). Although MRD's position is that there need not be a reevaluation of the reasonableness of the fee at the end of the case (based on the Court's statement to that effect in *Hoffman)* even if that evaluation is done, the result is the same. MRD's fee agreement is reasonable and enforceable. While *Clark* is not binding, and it applies the "reasonableness in operation" test, which is not recognized in Iowa, its result supports the conclusion Plaintiff should be paid per their agreement with the Plantes.

In their Proof Brief, the Plantes also rely upon and quote from *In re Discipline of Charles L. Dorothy*, 605 N.W.2d 493 (S.D. 2000), as well as cases from other states, and submit those cases for the general proposition that courts will review fees for reasonableness. MRD does not dispute that Iowa Courts review fees for reasonableness, but that does not support the Plantes' argument that there must be some kind of reasonableness review hearing at the conclusion of a case when: (1) there is no dispute that the contingency attorney fee agreement is valid, (2) it charges a reasonable percentage, and (3) there are no genuine issues of material fact which could otherwise render the agreement unenforceable. Accordingly, *Dorothy* and the other cases cited by the Plantes add nothing to a resolution of this case. They are not binding on this court and have little to no legal or factual similarity. For example, in those cases, counsel did not offer an hourly fee agreement as an alternative to a contingency fee agreement.

One of the issues Defendants raise is the risk they ostensibly took because they agreed to pay expenses. Plaintiff offered them, in addition to the offer of an hourly fee and a 1/3 contingency fee, a 35% contingency fee agreement wherein MRD would agree to pay expenses. The Plantes considered that additional 1 2/3 % cost not to be worth it to them. They chose to pay the expenses rather than pay a minimally higher fee. As

Rosanne told Munger in discussing which fee option she chose, and she said they could afford to pay the expenses. (App. 157-158).

In making her decision, she did not consider the risk of losing her expense money to be significant, or she would have chosen the 35% fee option MRD offered her–nevertheless she considered the case sufficiently risky that she declined the hourly fee option and chose the 33 1/3 contingency fee. This is illustrative of a major point of difference between the facts of the case at bar and the facts of the cases the Plantes rely upon: The Plantes were given choices by MRD regarding the fees, while the clients in those cases were not. Additionally, the potential client was a licensed practicing Iowa attorney.

To give this a slightly different perspective, as Munger stated in his MSJ Ex. A, ¶ 20 (App. 762-763), just because a client agrees to pay all expenses does not mean they will. When they do not, as happened in this case, MRD paid those, the client did not, knowing that was a risk of the case that they assumed regardless of the fee agreement language. It is not true that the Plantes assumed all the risk of paying the expenses; MRD shared that risk.

Furthermore, despite the Plantes' insinuations to the contrary, this case did not evolve into a case where liability and damages were

uncontested. The City never unequivocally conceded liability[12]. The bus driver never admitted fault. The City's admission was for the purposes of the mediation only. Many things could have occurred during the pendency of litigation, which could have threatened the Plantes' ability to recover anything. As noted previously, Chad's speeding was an issue, and the City was not bound in any sense to the Trooper's opinions – they could have found an expert who would find that Chad was traveling even faster. They could have hired a human factors expert. The bus driver could have testified credibly that she was not at fault, that there were extraneous factors that caused the accident. The jury could have determined that Chad and Rosanne were not credible and reduce their damages accordingly. The Plantes' damages could be affected by a variety of unknown factors. Many other things can occur during the course of the litigation which could have significantly jeopardized the case – all keeping in mind that the burden of proof is always on the Plantes, under Iowa Code Chapter 668, to prove that he was less than 51% at fault in order to recover anything from the City.

Finally, it must again be remembered that the reasonableness of a contingency fee is not determined in a vacuum. Law firms take many cases

[12] The City did not concede liability in the Settlement Agreement, either. (App. 355).

on a contingency fee basis which do not lead to any fee at all or a relatively small fee. David A. Hyman et. al., *The Economics of Plaintiff-Side Personal Injury Practice*, 2015 U. Ill. L. Rev. 1563, 1601 (2015). The "effective hourly rate" of a plaintiff's lawyer is not determined by one case; it is determined over the course of a career of wins, losses, and ties. It is not fair to a plaintiff's counsel to assess the reasonableness of a fee based on just one case, which is a win. Moreover, as noted above, per Iowa Supreme Court case law, the 1/3 fee is standard – and as noted on the aforementioned law review article, is actually lower than many fee agreements, which are 40% or higher.

Therefore, given that the Plantes concede that they believed the fee agreement was reasonable for a year and a half, until after the mediation; that they do not make any kind of an argument which contradicts the undisputed facts in the record that this case involved significant risk; and do not argue that this case involves an "astronomical recovery"; there is simply no basis for setting aside the fee agreement and reducing the fees earned in this case.

As noted above, when the Plantes' argument is reduced to its essence, the claim is that using hindsight, the ratio between the hours spent and the fee sought pursuant to the agreement is unreasonable. That argument is not

available to them under the law. Accordingly, the fee agreement is reasonable on its face and should be enforced.

C. WITHOUT WAIVING THE POSITION THAT FACTORS APPLICABLE TO NON-CONTINGENT FEES SHOULD EITHER NOT BE CONSIDERED IN THIS CASE, OR ONLY BE GIVEN LIMITED CONSIDERATION, THOSE FACTORS NEVERTHELESS SUPPORT ENFORCEMENT OF THE AGREEMENT.

As noted in *McCullough* and *Hoffman,* the Iowa Supreme Court has stated that the factors pertinent to the reasonableness of noncontingent fees are not to be applied to contingent fees at the conclusion of a successful case. Moreover, Comment [1] to Rule 32:1.5 of the Iowa Rules of Professional Responsibility states: "Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance." Without waiving their position that the other factors should either not be considered or be given limited consideration, MRD submits that when those factors are applied, they also support the reasonableness of the fee.

The expert reports of Munger and Daane go through several of the factors point by point and discuss how they establish the reasonableness of the fee. In particular, Daane's report (combined with the testimony of others cited in the Statement of Facts above) establish the difficulty of these kinds

of cases, how the results obtained were exceptional, and how the role (and reputation) of Munger and the MRD firm in the case led to the settlement. Daane's report succinctly states:

> While "amount involved" and "results obtained" are far more relevant in an end-of-case evaluation of the reasonableness of an hourly, fixed fee or value-based fee charged in a finite "amount involved" (e.g. a contract-based collection claim), a nearly $7.7 million settlement is easily in the 99% percentile of all recoveries made in Iowa, and cannot be described in any other way than as exceptional. It is relevant that the mediator thought so, too, that the City's witnesses agreed that Mr. Munger's reputation was a factor in their assessment of the Plantes' claim, and that the Plantes ultimately decided to accept the offer rather than risk of trial.

(App. 213).

Daane's opinion that the "amounts involved" and "results obtained" factors are the most important factors to be considered is consistent with a well-reasoned opinion from the Fourth Circuit:

> The district court also overlooked another important *Barber/Allen* factor—"the award involved and the results obtained." *Allen,* 606 F.2d at 436 n. 1. We have noted that "the most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Doe v. Chao,* 435 F.3d 492, 506 (4th Cir.2006) (citation omitted). While that statement came in a fee-shifting case, there is no reason why it should be inapplicable in a contingency situation. After all, the job of an advocate is to achieve beneficial outcomes for a client, and success is every bit as important to the prevailing party in a contingency case as under a fee-shifting statute.

In re Abrams & Abrams, P.A., 605 F.3d 238, 247 (4th Cir. 2010)(the balance of the opinion furthermore sets forth the importance of contingency fee

agreements because they provide access to the justice system to many people who would not be able to pursue claims otherwise).

As to the balance of the factors, the time and labor involved in these types of significant personal injury claims can be immense, and a case of this magnitude required the corresponding skill of a firm like MRD to perform it. (App. 210). Similarly, it would have been apparent that the magnitude of the case would preclude MRD from other employment. (App. 211). As noted in the Statement of Facts above, Munger took the case and immediately began investigating the claim as soon as Rosanne called him, without knowing any details. The contingency fee charged is the fee customarily charged in the locality for similar services (App. 211). Daane notes that the interest rate charged in the fee agreement (one percent simple interest per month) is exactly the same rate that he charges, and is far less than the maximum interest rate authorized under Iowa law. (App. 212). Therefore, the Plantes' challenge to the interest rate is without merit as well.

Time limitations were routinely imposed due to the clients' behaviors (App. 214), there was a prior attorney-client relationship between MRD and Rosanne (App. 214), and Munger's "experience, reputation, and ability are widely recognized as preeminent" (App. 214-215).

Of course, the testimony of Rosanne herself (as an experienced lawyer) that she believed the fee agreement was reasonable for the first year and a half of the attorney-client relationship is also relevant to the analysis of these factors, and is indicative that the fees are reasonable under those factors. Therefore, if the Court reviews the fee under the factors applicable to non-contingent fees set forth in Rule 32:1.5, they all support the reasonableness of the fee sought by MRD.

CONCLUSION

For all of the foregoing reasons, Plaintiff-Appellee Munger, Reinschmidt & Denne, LLP submits that the decision of the district court granting summary judgment in their favor be upheld in its entirety.

REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellee requests to be heard orally upon submission of this matter.

Respectfully submitted,

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CERTIFICATE OF COST

I hereby certify that the true actual cost of printing the foregoing Plaintiff-Appellee's Brief was the sum of $0.00.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the 17th day of September, 2019, the foregoing Plaintiff-Appellee's Brief was filed electronically with the Clerk of Court using the CM/ECF system, which sent notification of such filing to the following:

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