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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.

FROM THE DISTRICT COURT FOR WOODBURY COUNTY
WOODBURY COUNTY NO. LACV182567
The Hon. Nancy L. Whittenburg

FINAL REPLY BRIEF OF DEFENDANTS-APPELLANTS

Bruce Johnson AT0003859
CUTLER LAW FIRM, P.C.
1307 50th Street
West Des Moines, Iowa 50266
Telephone: 515-223-660
Facsimile: 515-223-6787
E-mail: bjohnson@cutler.com

ATTORNEYS FOR DEFENDANTS-APPELLANTS

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ARGUMENT IN REPLY

I. Preservation of Error.

1. A Cross-Motion for Summary Judgment is Unnecessary.

Defendants did not need to file a cross-motion for summary judgment because once the district court applies the correct legal standard for determining whether the Appellee is charging an unreasonable fee, the court will have to decide a fact question on the amount of fee Munger , Reinschmidt & Denne, L.L.P. ("Munger Firm") is entitled to.[1] Not only the Munger Firm's contract claim but also the Plantes' counterclaim for declaratory judgment would be tried to determine the amount of fee due to the Munger Firm.

Also, if Plante's defense that the attorney fee contract charges an unreasonable fee is correct, the Munger Firm has no existing claim under its contract. Plantes have paid the Munger Firm $439,000 without recourse and if the Munger Firm wants more it would have to prove it is entitled to a larger fee on a quantum meruit basis.

[1] Stanley Munger, partner of the Munger Firm, will be referred to as "Stanley Munger".

2. The Interest Appellee is Charging Is for Unpaid Fees Allegedly Owed and Therefore Is an Element of the Munger Firm's Charged Fee the Plantes Have Challenged.

Section 15 of the fee contract charges 1% interest per month. Section 15 provides: "Attorney charges simple interest on all past due amounts for fee, expenses and advances…." Here the Munger Firm is charging interest only on unpaid fees so interest is an element of its claim for attorney fees. Further, the only reason for charging such an economically unsupportable high rate of interest on unpaid fees that the Munger Firm alleges are owed is to deter a client from challenging the reasonableness of the fee or to saddle the client with a penalty for doing so.[2]

II. The Munger Firm's Contention that an Attorney-Client Contingent Fee Contract is Evaluated for Reasonableness Only on the Basis of Facts Existing at the Time the Parties Entered into the Contract is Incorrect.

The District Court's March 4, 2019 Ruling stated at page 6: "The question before the Court presently is purely legal: whether Plaintiff's

[2] If the district court's ruling granting Appellee's motion for summary judgment is reversed because of an error at law, the Plantes should not owe any interest for the time that passed from the filing of the motion for summary judgment until the district court commences further proceedings after remand. The Plantes should not be penalized for delay caused by Appellee's erroneous view of the law subsequently adopted by the district court.

contingency fee is unreasonable under Iowa Rule of Professional Conduct 32:1.5."

Walker v. Gribble, 689 N.W.2d 104 (Iowa 2004), is held out by the Munger Firm as establishing the principle that a lawyer who has signed a contingency fee agreement with another lawyer representing her in a personal injury case cannot later challenge the validity of the attorney-client contingency fee contract. The Munger Firm argues this is so because under *Walker* the lawyer/client is impermissibly trying to get out of her "bad bargain". *Walker* provides no authority that will aid this Court in deciding this case. First, Rosanne Plante was a family law practitioner and had never handled a personal injury case when she signed the Munger Firm fee contract on December 8, 2016. Second, she was a distraught Plaintiff whose overwhelming concern was her husband, Chad, who was in a coma. She was entirely wound up in the all-encompassing questions of whether Chad would live, and if so, how severe his disabilities would be. Third, and of decisive importance, is that the *Walker* contract was not an attorney-client contingency fee contract to which DR 2-106 applied. *Id*. at 116. Nor would Iowa R. of Prof'l Conduct 32:1.5 have applied after its enactment in 2005.

The contract in *Walker* was a settlement agreement between the senior partner in a law firm and a junior partner who left the firm. At the time of the junior partner's departure she had been performing most of the services on four contingent fee class action cases that sought representation by the law firm because of the senior partner's firm presence. *Id*., at 107. Litigation ensued with each party making claims against the other about division of the class action fees. The litigation was brought to a close when the parties entered into a settlement agreement. *Id*. Among other provisions, the agreement had a safety valve for both parties: it provided that the firm would receive not less than thirty-five percent and not more than fifty-five percent of the fees earned in three of the four cases. *Id*., at 107-108.

The departing partner filed a declaratory judgment action to void the settlement agreement on the grounds she had done more work than contemplated by the parties when they entered into the settlement agreement. *Id*. The Supreme Court affirmed the District Court's summary judgment upholding the validity of the settlement agreement. *Id*., at 116.

Appellee's Brief at pages 37-38 quotes extensively from *Walker*. However, the first three words were deleted from the first paragraph of the quoted material. *Id.*, at 109. Those three words were "Against this backdrop". The "backdrop", previously outlined in the *Walker* opinion, explains that the case dealt with a settlement agreement resolving dispute claims between two former law partners, not an attorney-client personal injury agreement that now would be governed by Iowa R. Prof'l Conduct 32:1.5. *Id.*, at 116.

The "backdrop" included the case facts set out above. The "backdrop" also included the *Walker* court's explanation of the benefits of agreements to settle legal disputes. The court said:

> As indicated, Walker's primary complaint is that the district court erred in not finding the settlement agreement void insofar as it allegedly ran afoul of the Iowa Code of Professional Responsibility for Lawyers.
>
> In Wright v. Scott, we expounded upon the wisdom, nature, and guiding principles of settlement agreements:
>
> > The law favors settlement of controversies. A settlement agreement is essentially contractual in nature. The typical settlement resolves uncertain claims and defenses, and the settlement obviates the necessity of further legal proceedings between the settling parties. We have long held that voluntary settlements of legal disputes should be

> encouraged, with the terms of settlements not inordinately scrutinized.
>
> 410 N.W.2d 247, 249-50 (Iowa 1987) (citations omitted); *see also Shirley v. Pothast*, 508 N.W.2d 712, 715 (Iowa 1993).

Id., at 109.

The court in *Walker* then continued by giving an explanation of the specific benefits flowing from a settlement agreement between a law firm and a departing lawyer. The court said:

> In contingency-fee cases, settlement agreements generally benefit clients, insofar as they "simply seek[] to obviate time-consuming squabbles that formerly arose when [a lawyer's] entitlement to [a] fair share of any fee generated by a departing client's file was determined on a quantum meruit basis." *McCroskey, Feldman, Cochrane & Brock, P.C. v. Waters*, 197 Mich.App. 282, 494 N.W.2d 826, 828 (1992); *accord Phil Watson*, 650 N.W.2d at 567-68 (adopting quantum-meruit theory to resolve squabble between departing associate and firm over contingency-fee cases associate "grabbed" from firm). We enforce a settlement agreement much like any other contract. *See Phipps v. Winneshiek County*, 593 N.W.2d 143, 146 (Iowa 1999) ("[L]ike a contract, we enforce a settlement agreement absent fraud, misrepresentation, or concealment.").

Id.

At the conclusion of the Munger Firm's quoted material from *Walker* the court points out that the settlement agreement covered more

than just division of future fees and summarized the proof necessary to void a settlement agreement:

> 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 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].

Id. at 110.

The departing partner claimed that the settlement agreement was void because it resulted in the senior partner receiving a "clearly excessive fee" in violation of DR 2-106. *Id*. at 115-116. The Supreme Court agreed with the district court's ruling that DR 2-106 was not applicable. The court said:

> The court held DR 2-106 did not apply to disputes between lawyers regarding the division of a fee. Rather, the court pointed out that the purpose of the rule is to ensure that *clients* do not pay more than they should; so long as the total fee is reasonable, the court reasoned, the rule does not regulate how the lawyers may then divide that fee.
>
> We agree with the district court. The purpose of the rule is to ensure that the client is not charged an excessive fee. If the total fee is reasonable, a lawyer may not use such a rule to upend a settlement agreement that later became a bad bargain. *Cf. Joye v. Heuer*, 813 F.Supp. 1171, 1174 (D.S.C. 1993) (finding a related disciplinary rule did not apply to

> disputes amongst attorneys). Walker does not claim the entire fee charged to the client is excessive, just that the proportion of that fee given to Gribble would be excessive vis-à-vis his work on the project. (This analysis, however, ignores the fact that there was other consideration in the agreement.) The policy of the rule is to prevent attorneys from charging their clients excessive fees, not to guard against one attorney entering into a bad separation agreement that prevents her from getting her "fair share." The agreement does not violate DR 2-160.[3]

Id. at 116.

If the Munger Firm is correct in its assertion that the settled case law governing an action to void an agreement settling existing disputes also governs disputes between an attorney and a client over the fee amount due the attorney under a contingency fee contract, then there would have been no reason to enact Iowa R. of Prof'l Conduct 32:1.5. The Munger Firm's position in the present case essentially is that the law governing actions to void settlement agreements should be applied here,

[3] *Accord, Frasier, Frasier & Hickman, L.L.P. v. Flynn*, 114 P.3d 1095, 1100 (Okla. Ct. App. 2005), in which the court said:

> More recently, in *Walker v. Gribble*, 689 N.W.2d 104 (Iowa 2004), the Iowa Supreme Court examined a settlement agreement reached between a lawyer and her former partner regarding division of several lucrative contingent fee causes. The case was before the Court on the lawyer's appeal from summary judgment granted in favor of the former partner. The lawyer, making arguments virtually identical to those made herein by Flynn, claimed the agreement she had reached with her former partner was void because it violated the Iowa Code of Professional Responsibility for Lawyers. Id. at 108. The Iowa Supreme Court disagreed, and after finding that clients were not affected by the agreement, determined: "Nothing in the parties' settlement agreement runs afoul of the Iowa Code of Professional Responsibility for Lawyers. It does not violate public policy. It is enforceable." *Id* at 116.

and that if as events developed the Munger Firm contingency fee agreement turned into a bad bargain for the Plantes, whatever the fee turns out to be is not unreasonable because the Plantes agreed to it on December 8, 2016.

Appellee Munger Firm is asking this Court to apply in this appeal the law of contracts applicable to ordinary commercial contracts. The court in *Estate of Burford v. Freeman*, 2019 WL 1615405 (Ct. App. Miss. April 16, 2019), explained that attorney fee contracts "are not to be enforced on the same basis as ordinary commercial contracts":

> ¶32. "Such a rule obviously encroaches upon the freedom of contract, but the limitation of reasonableness is a longstanding one." 1 Hazard et al., *supra* § 9.02, at 9-8. Moreover, the rule simply recognizes that "[l]awyers… owe their clients greater duties than are owed under the general law of contracts." Restatement, *supra*, § 34 cmt. b; *see also, e.g., In re A.H. Robins Co.*, 86 F.3d 364, 374 (4th Cir. 1996) ("An attorney has the burden of proof as to the reasonableness of his fee when he sues to recover from his client. This allocation of the burden of proof is premised on the relationship of trust owed by a lawyer to his client, with concomitant obligation to charge only a reasonable fee…. This approach is at the very heart of the special relationship between attorney and client.") (quoting *McKenzie Construction Inc. v. Maynard*, 758 F.2d 97, 100 (3d Cir. 1985). "Fee contracts between attorney and client are the subjects of special interest and concern to the courts, and are not to be enforced on the same basis as ordinary commercial contracts." 1 Rossi, *supra*, § 1:13, at 1-42.

Id. at *6.

In *Balducci v. Cige*, 192 A.3d 1064 (N.J. Sup. App. Div. 2018), the court said:

> In a LAD [Law Against Discrimination] case, as in any case, "[a] lawyer's fee shall be reasonable." RPC 1.5(1). Fee agreements in LAD cases are subject to the same ethical considerations as all contracts between lawyers and clients. In view of "the unique and special relationship between an attorney and a client, ordinary contract principles governing agreements between parties must give way to the higher ethical and professional standards enunciated by our Supreme Court." [Citations omitted]. For that reason, a "contract for legal services is not like other contracts." *Ibid*.

Id. at 1074-1075. The court in *Balducci* further explained:

> Maximizing fees charged to clients should not be an attorney's primary aim….
>
> An [a]ttorney[ ] must never lose sight of the fact that the profession is a branch of the administration of justice and not a mere money-getting trade. [Citations and internal quotes omitted].

Id. at 1075.

The court in *Oral Sodium Phosphate Solution-Based Products Liability Action*, 2010 WL 2490994 (N.D. Ohio 2010), said: " 'Contingency agreements are of special concern to the courts and are not to be enforced on the same basis as are ordinary commercial contracts' " (Quoting *Dunn v. H.K. Porter Co., Inc.*, 602 F.2d 1105, 1108 (3rd Circuit 1979)). Likewise,

in *McKenzie Construction, Inc. v. Maynard*, 758 F.2d 97, 101 (3rd Circuit 1985), the court said, "Because courts have a special concern to supervise contingent attorney fee agreements, they are not to be enforced on the same basis as ordinary commercial contracts." *Accord*, *United States v. Overseas Shipholding Group, Inc.*, 625 F.3d 1, *11 n. 4 (1st Circuit 2010) (" '[C]ontingent attorney fee agreements…are not to be enforced on the same basis as ordinary commercial contracts.' " (Quoting *McKenzie* at 758 F.2d 101)).

Iowa Supreme Court Bd. of Professional Ethics and Conduct v. Apland, 577 N.W.2d 50 (Iowa 1998), did not involve a contingency fee contract. The attorney fee contract provided that a nonrefundable $5,000 advance would be paid to the attorney to defend the client in an OWI case. *Id*., at 52-53. The court held that a fee contract under which an attorney received a nonrefundable advance fee payment for performance of certain specified services is void and unethical because it would impose a penalty on a client who wished to exercise his right to discharge his attorney at any time for any reason. *Id*., at 57-58. Although *Apland* did not involve a contingency fee contract, the court's reasoning used in analyzing whether the nonrefundable fee contract violated DR 2-106(A)

was based on the eight evaluation factors in DR 2-106(B), which are identical to the eight evaluation factors in Iowa R. of Prof'l Conduct 32:1.5.[4] The court in *Apland* instructed that the determination of whether an attorney's fee complies with DR 2-106 is to be performed after the services have been rendered as well as at the time the contract was entered into. The court in *Apland* reasoned:

> As *Gastineau* points out,
>
> > [a] close examination of the text and context of the excessive-fee rule demonstrates that a lawyer may violate DR 2-106(A) by failing to refund an unearned fee under certain circumstances even though the initial advance payment was not unreasonable for the task a lawyer was to perform in the future. DR 2-106(A) provides that "[a] lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee." The disjunctive use of the word "collect" means that the excessiveness of the fee may be determined after the services have been rendered, as well as at the time the employment began. Also telling in the interpretation of the scope of the rule is the fact that one factor for determining the appropriateness of the amount of a fee, stated in DR 2-106(B)(4), requires consideration of "the results obtained."
>
> Id., 677 N.W.2d at 58 (quoting *In re Conduct of Gastineau*, 857 P.2d 136, 140 (Or. 1993)).

[4] *Apland* at 577 N.W.2d 58 sets out the eight evaluation factors in DR 2-106(B). DR 2-106(A) prohibited charging a "clearly excessive" fee, while Rule 32:1.5(a) prohibits charging an "unreasonable" fee.

Id. at 58.

The Plantes have paid to Plaintiff Munger Firm $439,436.67 in attorney fees without recourse. (App. 787). The Plantes also offered to resolve the fee dispute for payment of $1.25 million dollars, which was rejected by Appellee Munger Firm. (App. 828). These payments and offer to settle should not be considered admissions on the part of the Plantes. In *Apland* the attorney had refunded $2,000 of the $5,000 advance fee to the client. The Court held this would not be considered an admission. The Court said:

> Because we find the fee was not clearly excessive, Apland had no legal or ethical obligation to refund any part of the fee. Nevertheless, Apland did refund $2000, a sum we find he agreed to refund. Like other attorneys who find themselves in similar fee disputes with clients, Apland apparently believed the prudent thing to do was to compromise. We refuse to consider such a compromise an admission that Apland owed anything. To do so would discourage attorneys from reaching similar compromises in fee disputes with clients. We want to encourage such settlements because court suits involving fee disputes tend to discredit the profession in the eyes of the public.

Id., at 58-59.

Courts in other jurisdictions applying ABA Model Rule of Professional Conduct 1.5(a) to attorney fee contracts charging a "nonrefundable" flat fee are in accord with the Iowa Supreme Court's

opinion in *Apland*. In *Kentucky Bar Association v. Earhart*, 360 S.W.3d 241 (Ky. 2012), the court held that a fee agreement charging a nonrefundable fee became unreasonable and therefore void based on evaluation of the agreement after it was entered into and during its enforcement. The court in *Earhart* said:

> In determining the "reasonableness" of a lawyer's fee, the factors mentioned in Rule 1.5(a) apply, and the lawyer has the responsibility to prove the "reasonableness" of the fee applying principles of equity and fairness. Although "reasonableness" at the time of contracting is relevant, consideration is also to be given to whether events occurred after the fee agreement was made which rendered the fee agreement fair at the time it was entered into, but unfair at the time of enforcement. *See* *McKenzie Const., Inc. v. Maynard*, 758 F.2d 97 (3rd Cir. 1985). Hence, the client may be entitled to a return of some portion of the "non-refundable" fee retainer upon the termination of the representation, depending upon all the circumstances; that is, the "reasonableness" of the fee.[5]

Id. at 244 (quoting Kentucky Bar Association, Ethics Opinion E-380 (1995)). *Accord, In re Disciplinary Action Against Hoffman*, 834 N.W.2d 636, 646 (N.D. 2013) (finding a "nonrefundable" attorney fee charged was unreasonable under N.D. R. Prof. Conduct 1.5(a) after making a reasonableness evaluation not only at the time of contracting but also an

[5] *McKenzie Const., Inc. v. Maynard*, 758 F.2d 97 (3rd Cir. 1985), cited above in *Earhart*, involved an attorney contingency fee contract.

evaluation including later events which rendered the fee agreement unfair at the time of enforcement).

In *Estate of Burford v. Freeman*, 2019 WL 1615405 (Ct. App. Miss., April 16, 2019), the court held unreasonable a fee contract under which the attorney was to provide legal services in exchange for receiving a flat nonrefundable fee of $265,00 upon the client's death. At the conclusion of the case it turned out the attorney charged a fee of $265,000 for only 36 hours of work. *Id*. at *7. The *Burford* court disallowed the fee, stating: "[O]ur law is clear that a lawyer may not charge or attempt to collect an unreasonable or excessive fee. See M.R.P.C. 1.5(a); *Miss. State Bar Ass'n v. A Miss. Att*., 489 So.2d 1081 (Miss. 1986)." *Id*. at *6.[6]

The Third Circuit Federal Court of Appeals in *McKenzie Construction, Inc. v. Maynard*, 758 F.2d, 101, 97 (3rd Cir. 1985), held that the district court had erred in its evaluation of the reasonableness of a contingency fee agreement because it failed to consider "factors other

[6] The court in *Burford* further said, "Indeed, 'courts are generally more likely to find a fee unreasonable in the sense that it is unenforceable against the client than they are to find the same fee so unreasonable as to warrant professional discipline.'" (quoting Geoffrey C. Hazard et al., *The Law of Lawyering* § 9.06.1, at 9-23). *Burford* at *6.

than those existing at the time the fee agreement was executed." The court in *McKenzie* reasoned:

> We believe that the district court had too narrow a view. Because courts have a special concern to supervise contingent attorney fee agreements, they are not to be enforced on the same basis as ordinary commercial contracts. [Citation omitted]. This concern certainly extends to the performance of the attorney's contractual obligations as well as to the circumstances surrounding the engagement of the attorney. For example, the results obtained, the quality of the work, and whether the attorney's efforts substantially contributed to the result are all factors that have been used by courts in reviewing the reasonableness of contingent fees. [Citations omitted]. Further, events may occur after the fee arrangement was made so that "[a] contingent fee agreement '[that]…was in the first instance a fair contract becomes unfair in its enforcement.' " [Citations omitted]. While the reasonableness at the time of contracting is a relevant consideration, it is not the only one. We, therefore, conclude that the rule announced by the district court contained legal error to the extent that it excluded factors other than those existing at the time the fee agreement was executed.

Id.

The court in *McKenzie* explained that while it employs an abuse of discretion standard in reviewing a district court's factual decision on the reasonableness of an attorney fee, a district court's failure to use the correct legal standard is an error at law. The court said:

> We fully appreciate that the reasonableness standard, when employed in an attorney-client fee dispute is, by its very nature, difficult to define, much less apply. As a factual

> dispute in this area fades into the gray area, reasonable judges will disagree. Use of an abuse of discretion standard by this court is but a pragmatic judicial solution to a problem heavily implicating subjective judgment. However, in this case, because our disagreements with the district court go to the proper standards and burden of proof rather than its judgment of reasonableness, we believe the interests of justice dictate that the district court should be afforded an opportunity to find the facts in light of the correct legal standards.

Id. at 102.

In *Krause v. Rhodes*, 640 F.2d 214, 220 (6th Circuit 1981), *cert. denied*, 454 U.S. 836 (1981), the Sixth Circuit Federal Court of Appeals similarly stated:

> This, however, is not the only aspect to be considered in assessing the reasonableness of an attorney's fee. A contingent fee arrangement "may be such that what was in the first instance a fair contract becomes unfair in its enforcement." [Citations omitted]. Clearly, however reasonable and appropriate the instant fee contracts were when signed, the situation now existing differs drastically from that which the contracting parties originally contemplated.

In *Rohan v. Rosenblatt*, 1999 WL 643501, *4 (Conn. Super. 1999) (Unpublished Opinion), the court after citing *McKenzie* and *Krause*, endorsed the rule in those cases that the reasonableness of an attorney fee contract must be evaluated through the conclusion of the representation. The court said:

> "[I]n most jurisdictions the reasonableness of a contingent fee must be judged not only under the circumstances that prevailed at the time the fee agreement was made but also in light of events that occurred subsequently." ABA/BNA, Lawyers' Manual on Professional Conduct, § 41:911, No. 147, p. 13.
>
> Under the circumstances here, all of the events relating to the reasonableness of a contingent fee, including the events subsequent to the making of the agreement, should be considered in determining the reasonableness of that fee. Indeed, given that the "result obtained" and the "time and labor required" to perform the legal service are factors to be considered by the court under Rule 1.5 of the Rules of Professional Conduct, and those factors can only be determined at the conclusion of the representation, the court believes it necessarily must consider facts subsequent to the making of the contingency fee agreement.

Id. at *4.

The First Circuit Federal Court of Appeals in *United States v. Overseas Shipholding Group, Inc*., 625 F.3d 1, *9 (1st Cir. 2010), citing *McKenzie*, likewise stated:

> The power to review fees pursuant to an agreement is not limited to situations in which the fee is ethically excessive at the inception but extends to situations in which "the unreasonableness is due to factors that occur after the fee arrangement is made." *McKenzie*, 758 F.2d at 101.

Accord, *In Re: National Football League Players' Concussion Injury Litigation*, 2019 WL 1639749, *1 (E.D. Penn., April 16, 2019) ("The *McKenzie* formulation requires us to scrutinize the reasonableness of the

CFA [Contingent Fee Agreement] at the time of the contract's signing and then determine if the circumstances compel a different evaluation of the CFA at the time of its enforcement.").

At page 45 Appellant's Amended Proof Brief, states: "Notably, Plantes' expert, David Brown, offered no opinion whatsoever as to the risks borne by MRD as a result of taking the case." However, in his Supplemental Expert Witness Disclosure Brown did discuss the reduced risk of the representation that occurred over the course of the case due to factors that were not the result of client representation efforts by the Munger Firm. (App. 953-954). Brown observed that State Trooper Oleson's report found Chad Plante not guilty of any fault, the city bus driver either pleaded guilty or told the judge she wanted to be found guilty without trial (R. Plante depo. 73-77), the City at the mediation opened negotiations by stating negotiations would proceed on the basis of 100 percent fault on the part of the City, and that the Munger Firm's "risk in the case was further greatly reduced" when the City on the day of mediation made a $7.5M offer "when at the time the Munger Firm had only a minor number of hours of work invested in the claim and the Plantes' had paid the expenses so the Munger Firm did not have to

advance expenses." Brown's Supplemental Report further states at page 2:

> Plaintiff's expert James Daane stated at pages 5-6 of his report:
>
> > In short, this case, at the time the Fee Agreement was entered into, experienced plaintiff's counsel would have expected to have invested at a minimum, either by him/herself or through staff, thousands of hours in performing all these requirements, all to the exclusion of other potentially more certain income-producing work.
>
> Plaintiff's expert Stanley Munger stated at page 16 of his report:
>
> > The magnitude of the amount of money at stake, potentially millions, even before the particulars of the case were known or developed, meant this promised to be a very difficult, time consuming, challenging case.
>
> As it turned out, none of these concerns the Munger Firm may have contemplated initially ever in fact occurred.[7]

At page 19, n. 2, Appellee's Brief makes a labored attempt to argue that the district court did not mean what it said when stating: "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". However, there is no evidence that the City's expert investigator or anyone else on

[7] See discussion of Munger Firm's time spent on Plantes' case at p. 51 of Appellants' Brief.

behalf of the City claimed that Chad Plante's vehicle speed was in fact a causal factor in the accident.

The Munger Firm's Appellee Brief at pages 50-54 relied heavily on *Lawrence v. Miller and Lawrence*, 23 N.E.3d 965 (Ct. App. N.Y. 2014). At page 51 of Appellee's Brief it stated: "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." (Emphasis added). However, during the 21 years of hourly representation the law firm had obtained a recovery totaling $320 million dollars for the plaintiff and her children. *Id*. at 984, n. 4, 970. (*See* Appellants' Brief at pages 59-65). With the recovery in 2005 included the law firm had recovered for the plaintiff and her children a total of $420 million dollars since 1983. Id. at 979; (*See* Appellants' Brief at pages 63-65).

Appellee Munger Firm (Appellee's Brief pages 50-54) and the District Court's ruling at pages 9-10 cite the Iowa Practice Series as authority for reliance on *Lawrence* for the principle that evaluation of the reasonableness of an attorney contingent fee contract need only consider facts existing at the time the parties entered into the contract. The Iowa

Practice Series performs a fine and valuable service to the Iowa Bar covering a broad group of areas of practice. However, this Court's opinion in this case will determine what rule the Iowa Practice Series endorses on this issue in its next revision.

RESPONSE TO AMICUS CURIAE BRIEF OF THE IOWA ASSOCIATION FOR JUSTICE

The Amicus Brief at pages 5-21 adds 16 additional pages of argument entirely directed in support of Appellee Munger Firm's position: that it should be awarded a fee of $2,559,456.66 because of the contingent fee contract the parties signed on December 8, 2016.[8] Much of the Amicus Brief explains the history of and the benefits that the use of contingent fee contracts bestows upon injured persons. Whether the use of contingent fee contracts can provide substantial benefits to injured

[8] The court in *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062 (7th Circuit 1997), observed: "The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief". *Accord*: *Wildearth Guardians v. Zinke*, 368 F.Supp.3d 41, 59 (D.C.C. 2019); *International Union of Operating Engineers Local 139 v. Schimel*, 210 F.Supp.3d 1088, 1101 (E.D. Wis. 2016) (quoting *Ryan*). In *Idaho v. Coeur v. D'Alene Tribe*, 2014 W.L. 2218329, *1 (D. Ida. 2014), the court in allowing the amicus brief noted:

> The Court reaches this decision with some reservations, however, as it appears that some of the Shoshone-Bannock Tribes' arguments are either (i) similar to the arguments the Coeur d'Alene Tribe is already making or (ii) arguments the Coeur d'Alene Tribe easily could have made for itself.

persons is not an issue in this appeal. The Plantes in this appeal do not challenge the concept of a contingent fee contract. They challenge the reasonableness of Appellee Munger Firm charging a fee of $2,559,456.66 for the settlement of the Plantes' claim against the City of Sioux City.

The Amicus Brief Conclusion states, "There is no compelling reason to overanalyze a fee contract or amount, or implement a check on contingent fee amounts." The Conclusion then continues "*There are already existing ethical rules concerning excessive fees that serve to protect litigants and police the fee-taking activities of counsel.*" (Emphasis added). That is exactly the point that Appellant Plantes urge. Iowa R. of Prof'l Conduct 32:1.5(a) requires that the Munger Firm must not charge an unreasonable fee.[9] The issue on appeal is whether the District Court applied the correct legal standard in evaluating reasonableness of the fee only as of the time the fee contract was entered into by the parties. The Plantes' position is that the fee contract must also be evaluated for reasonableness during the performance of the contract and at the time of enforcement of the contract.

[9] Comment (3) to Rule 32:1.5 provides in part that, "Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this rule."

The Amicus Brief does not address the issue that is on appeal before this Court. Instead, the Amicus Brief Conclusion uses its final sentence to state, "The Court should not consider applying an unnecessary layer of judicial gloss to the current contingent fee system that needs no improvement." Appellant Plantes are asking this Court to determine the correct legal standard to be used in applying Rule 32:1.5(a) to determine the reasonableness of an attorney fee. That is not a request for "judicial gloss".

The Amicus Brief at pages 7-8 states, "[T]he 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." That is the goal of Rule 32:1.5(a) requiring that an attorney cannot charge an "unreasonable" fee. At page 9 the Amicus Brief states, "[I]t is short-sighted to reduce every contingent fee taken to a dollars-to-minutes conversion." Appellants Plantes do not urge that on this appeal. Appellants do not contend that an attorney on a contingent fee contract should not earn much more than would be earned on an hourly rate basis. The Plantes just contend that in some cases when evaluated during performance of the contract and at the case's conclusion

of provision of services a fee based on the contingent fee contract percentage can be unreasonable, even if it was not unreasonable at its inception.

At pages 14-15 the Amicus Brief argues:

> 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 to or willing to take on "small" cases or *pro bono* cases will go down, thereby limiting Iowans' access to justice.

Appellants Plantes do not contend that a lawyer should not be able to charge and collect a large contingent fee that is not unreasonable under Rule 32:1.5(a). There is no lifetime achievement award exception to the Rule's proscription against charging or collecting an unreasonable fee. If "things happened to go well" it is relevant under Rule 32:1.5(a) to examine what went well during the case and why.

At page 15 the Amicus Brief states there are "over 19,000 Complex Civil Tort, and Civil Law & Equity cases filed in Iowa in 2015. Then the Amicus Brief theorizes, "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 14 judicial districts each year." First, Rule 32:1.5(a) and Comment 3 stating

the Rule applies to contingent fees, has been in effect since 2005. Second, and more importantly, the Amicus Brief's forecast of gloom and doom credits Iowa attorneys and clients with little capacity to treat each other reasonably. In reality disputes over attorney fees are nearly always resolved by the attorney and the client. *See, Apland*, 577 N.W.2 at 58-59. In the present case, the appellee law firm rejected a compromise offer made by the Plantes of $1.25 million dollars.[10]

RELIEF REQUESTED

Appellants Chad Plante and Rosanne Plante request relief as set out at pages 67-68 of their Appellants' Brief.

Respectfully submitted,

/s/ Bruce E. Johnson
Bruce E. Johnson AT0003859
CUTLER LAW FIRM, P.C.
1307 50th Street
West Des Moines, IA 50266
Tel: 515-223-6600
Fax: 515-223-6787
Email: bjohnson@cutlerfirm.com
ATTORNEYS FOR
DEFENDANTS-APPELLANTS

Dated: September 17, 2019

[10] Rejection of the offer extinguished that offer.

CERTIFICATE OF COST

I, Bruce E. Johnson, hereby certify that the cost of preparation and production of Appellant's Amended Proof Brief was $0.00, and that this cost has been paid in full.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(*g*)(1) and Iowa R. App. P. 6.1103(4) because this brief contains 5,969 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(*e*) and the type-style requirements of Iowa R. App. P. 6.903(1)(*f*) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook.

/s/ Bruce Johnson
Bruce Johnson

September 17, 2019
Date

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2019, the foregoing instrument was filed with the Clerk of the Court using the electronic filing system which sent notification of such filing to all registered users and parties to this proceeding.

/s/ Bruce Johnson
Bruce Johnson