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 BRIEF OF DEFENDANTS-APPELLANTS

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I. Should the Munger fee contract be evaluated for reasonableness from its inception to the conclusion of provision of services, and if so does that evaluation show the fee contract violates Rule 32:1.5(a) of the Iowa Rules of Professional Conduct because it charges an unreasonable fee and expense and the fee contract is therefore void and unenforceable?

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ROUTING STATEMENT

This appeal should be retained by the Supreme Court because it is the type of case set out in Iowa R. of App. P. 6.1101(2)(c): "Cases presenting substantial issues of first impression." The question in this case is whether a law firm's contingent fee contract providing for a fee of 33% of the recovery is valid and enforceable under Iowa R. Prof'l Conduct 32:1.5(a). Iowa adopted the ABA Rules of Professional Conduct in 2005. Prior to that under DR 2-106 of the Code of Professional Responsibility the test was whether an attorney fee contract provided for a "clearly excessive" fee. Iowa R. Prof'l Conduct 32:1.5(a) provides that an attorney shall not charge an "unreasonable fee or expense". The District Court relied on *Comm. on Prof'l Ethics and Conduct of the Iowa State Bar Ass'n v. McCullough*, 468 N.W.2d 458, 460 (Iowa 1991) in which the court applying the now discarded DR 2-106 "clearly excessive" standard said: "Nor do we believe that it is the intent of DR 2-106(B) that contingent fee agreements must be reexamined at the conclusion of successful litigation with respect to the factors applicable to noncontingent fees." *Id.* at 461.

Even prior to adoption in 2005 of Rule 32:1.5(a), the court in *Iowa Supreme Court Board of Professional Ethics and Conduct v. Hoffman*, 572 N.W.2d 904, 908 (Iowa 1997), found that "[w]hile the fee agreement…may have been reasonable at the time of its inception, changes in the attending circumstances…rendered the 33-percent contingent fee unreasonable and excessive."

The District Court, relying on *McCullough* ruled that under Rule 32:1.5(a) the reasonableness of a contingent fee contract is to be determined at the time the parties entered into the contract, but that the contract cannot be evaluated for reasonableness during the course of its operation including at the conclusion of the provision of legal services.

Since the 2005 adoption of the Iowa Rules of Professional Conduct the Supreme Court has not decided the issue of at what time in the life of the fee contract it is to be evaluated for reasonableness under Rule 32:1.5(a). This is a case presenting a substantial issue of first impression and should be retained by the Supreme Court.

STATEMENT OF THE CASE

Plaintiff Munger Firm filed its Petition September 4, 2018 seeking payment of legal fees in the amount of $2,559,456.66 from Defendants Chad Plante and Rosanne Plante. Plaintiff also demanded interest at 1% per month on unpaid fees under a provision in the fee contract. On September 26, 2018 Defendants filed their First Amended Answer and Counterclaim. The counterclaim sought a declaratory judgment that the fee contract is invalid and Plaintiff is not entitled to a quantum meruit fee in excess of the funds already paid to Plaintiff by Defendants. The counterclaim did not change the substance of the issues but did seek an early resolution of the counterclaim to prevent hardship to Defendants due to delay in obtaining a judicial determination of the issues. On October 26, 2018 a Trial Scheduling and Discovery Plan was entered setting a trial for March 12, 2019.

On January 14, 2019 Plaintiff filed its Motion for Summary Judgment seeking judgment on its claim for fees and for interest at 1% per month. Defendants resisted. On March 4, 2019 the District Court entered its Ruling on Plaintiff's Motion for Summary Judgment and Judgment Entry. The District Court ruled that at the time the parties

entered into the fee contract it was reasonable, 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 at any other time after the inception of the contract, and that the fee contract therefore was valid and enforceable. The District Court entered judgment in favor of Plaintiff for the total amount of fees prayed for less $380,000 already paid to Plaintiff by Defendants, resulting in a total judgment in the amount of $2,179,456.66. On March 28, 2019 the District Court entered its Ruling and Order Re Defendants' Amended and Substituted Rule 1.904(2) Motion to Amend Judgment. The judgment was amended to show that $439,436.67 had actually been paid by Defendants to Plaintiff. That reduced the amount of the judgment to $2,120,019.99 together with interest payable at the rate of 1% per month.

On May 7, 2019 a Supersedeas Bond was posted in the amount of $290,000 to cover projected interest for a period of 183 days commencing on April 3, 2019.

A timely notice of appeal was filed on April 3, 2019.

STATEMENT OF THE FACTS

1. Plaintiff Munger, Reinschmidt & Denne, L.L.P., ("Munger Firm") has retained in its firm trust account a sufficient portion of the recovery obtained from the City of Sioux City to pay the disputed legal fees. Defendants Chad Plante and Rosanne Plante have posted with the Clerk of Woodbury County District Court a Supersedeas Bond in the amount of $290,000 to cover projected interest for a period of 183 days commencing on April 3, 2019.

2. On May 7, 2018 Randy Stefani, attorney for the City of Sioux City, Iowa, opened the mediation session between the Plantes and the City by stating that "the City was accepting 100% responsibility for the accident." (App. 853-854). At the mediation the City offered the Plantes $7,500,000 to settle their claims and agreed to give the Plantes 60 days to decide whether to accept that offer. (App. 765; App. 853; Exhibit 18, Plaintiff's MSJ Facts, May 8, 2018 R. Stefani email).

3. Moreover, no party in the present proceedings, disagrees with the Trooper's testimony and conclusion that Chad Plante's speed was not a factor in the accident. (App. 769). Therefore, there can be no genuine issue of fact as to whether or not he was speeding.

4. The Iowa State Patrol Technical Collision Investigation authored by Trooper L.M. Olesen states at page 14:

> **CONCLUSIONS**
> After careful evaluation and analysis of the available evidence, I determined the following:
>
> - Vehicle #1 was being operated by Jamie Pica
> - Vehicle #2 was being operated by Chad Plante
> - Vehicle #1 was northbound on Highway 75, intending on making a left turn to Outer Drive
> - Vehicle #2 was southbound on Highway 75
> - Jamie Pica was not wearing a seatbelt in violation of Iowa Code 321.445
> - Jamie Pica failed to yield the right of way to opposing traffic on a left hand turn in violation of Iowa Code 321.256
> - Vehicle #1, while making a left turn, collided with vehicle #2
> - The collision resulted in serious injuries to Chad Plante
> - There was no improper action(s) by Chad Plante or vehicle #2

(App. 952).

5. Defendants' Exhibit A to its Corrected Resistance to Plaintiff's Motion for Summary Judgment, is a May 11, 2018 email from Ann Collins showing a summary of Plaintiff's time records through April 30, 2018, which is the last day included on the last statement for services sent by Plaintiff to the Plantes. The summary shows 57.97 hours at $310 per hour for Stan Munger and 125.05 hours at $155 per hour for Ann

Collins. The total hourly rate value charged by the Munger Firm for the time shown in Exhibit A is $37,353.45. Exhibit 1 to Plaintiff's Reply to Defendants' Counterclaim for Declaratory Judgment shows Plaintiff's internal time records from November 16, 2016 through October 9, 2018. Exhibit 1, pages 30-32, showing time from May 1, 2018 through May 7, 2018, shows during that time period Stan Munger recorded 12.55 hours and Ann Collins recorded 13.80 hours, which valued on Plaintiff's hourly rate basis amounts to a total of $6,029.50. Through and including the mediation on May 7, 2018 Plaintiff's recorded time when valued on Plaintiff's hourly rate basis totals $43,382.95. (App. 935; App. 792; App. 821-823).

6. Plaintiff points out that its time records show Stan Munger worked 119.45 hours and paralegal Ann Collins worked 188.2 hours from November 16 through September 10, 2018. (App. 44-45).

7. Stan Munger testified:

> Q. It just looked to me, when I read this, like you were saying that if the court determined that a reasonable fee in this case was less than 33 percent, which is the fee set out in the contract, that it would cause members of our bar to do work inefficiently and do what was unnecessary. Because they want to get more money. That's the way I read this. Is that --
>
> A. This is --

Q. Am I wrong?

A. That is what that is saying. And there's case law and law review -- at least one law review article, I think, that I have read that -- that supports that position; that they recognize that lawyers are human beings and that it is difficult to sort out, as a matter of human nature, some of these issues. I -- I'm not alone in saying this. This is -- this is stated by –

Q. I'm not --

A. This is stated by -- in at least one law review article I have read. I think this is well-recognized as a policy statement that I'm saying.

Q. So you believe, then, that the court, in determining what is a reasonable fee under the circumstances of this case, should use as a factor, in determining that, that a reasonable fee should be one that takes into account that lawyers will work inefficiently and unnecessarily for the purpose of earning more money, getting more money? Is that what you're advocating or not?

A. I'm saying as a matter of policy, which is what this is addressing, that it is not good policy to -- to do what the Plantes are arguing should be done, which is second-guess contingency fees after the result is known.

* * * *

Q. If -- if you had belief (sic) at the time of the mediation that if the case settled at that time, under the circumstances that had developed in the case, if you believed that the result of settling the case at that time would have, under law, meant that you were going to receive a substantially lower fee than the 33 percent in the contract, would you have tried to delay the settlement and done more work on the case in order to earn your full 33 percent?

MR. MUNGER: Why don't you read that back to me, would you?

* * * *

(The requested portion was read by the court reporter.)

* * * *

A. No. No.

MR. MUNGER: Read that question back. I want to make sure that the "no" was what I meant to say.

* * * *

(The requested portion was read by the court reporter.)

* * * *

A. Yeah. The answer is correct.

No, I wouldn't have. I would have done what I thought was best for our clients, which is what I did.

Q. I have no doubt that that is true.

(App. 964-965).

8. Stan Munger testified:

Q. . . . .

Now – then you state, "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 the plaintiffs."

A. Yes.

Q. And that's the way you viewed the case when you learned that Knight & Associates had been retained by the City?

A. Yes, it was.

Q. And did that happen?

MR. REINSCHMIDT: Object to the form of the question. Did what happen?

Q. Was it a long, drawn-out fight on liability?

A. No. But certainly I knew that I anticipated it would be, but I didn't know whether it would be or not. You don't -- you never know in these cases.

When you take a case like this, you don't know whether you're going to have to go to a trial and have an appeal, come back and retry it. You don't know if you're going to be able to settle it early. That's -- those are things you don't know. But you know that you don't know those things.

(App. 965).

9. Stan Munger testified

Q. ….

Was it your opinion during the case that Chad Plante suffered very serious brain and physical injuries as a result of the bus accident?

A. Yes.

Q. And did you believe that Rosanne Plante's life had taken a -- had become changed markedly due to the fact that the person she loved had sustained these injuries?

A. Yes

* * * *

Q. "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."

And how early along in the case did you -- did you come to that conclusion?

A. Well, certainly by the time I did the mediation statement. And I think once I found out Chad's condition, you know, that he wasn't going to die, and that it appeared that he probably had a traumatic brain injury, I think once I learned that, I -- I felt that the value of the case substantially much -- became much -- potentially much greater.

(App. 966).

Stan Munger testified:

Q. At page 21, Mr. Munger, paragraph 4, states, "There was a large amount of money involved due to the fact that Chad had permanent body and brain injuries as well as large economic damages and pain and suffering and because Rosanne had substantial loss of con -- had a substantial loss of consortium claim."

Did you believe that as the case was progressing?

A. Yes, I did.

Q. And those damages that you described there, they were long (sic) due to the fact that the City bus hit Chad; is that right?

A. Yes.

(App. 968).

10. Prior to the events that occurred at the mediation, Rosanne Plante, based on statements made to her by her counsel, believed the claim would turn into a lawsuit that would be a years long, drawn out, affair. Rosanne testified:

> 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.

(App. 945).

11. Plaintiff's expert James Daane stated at pages 5-6 of his expert 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.

(App. 926-927).

12. Plaintiff's expert Stan Munger stated at page 16 of his expert 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.

(App. 870).

13. Expert Daane further states at page 5 of his December 14, 2018 report:

> During that period, Plaintiff's counsel must anticipate retaining expert witnesses to rebut the conclusion of speeding and/or the conclusion that speeding made any substantial contribution to the collision having occurred. Such experts are very expensive, and require extensive time to retain, inform, obtain reports from, depose, and prepare for trial.

(App. 926).

14. The work described above in paragraphs 10, 11 and 12 did not occur in the present case.

15. The District Court's Ruling at page 3 states, "Per the Contract, the Plantes also agreed to cover all expenses incurred as the case progressed." Plaintiff's expert John Daane stated at page 7 in his December 14, 2018 report:

> The third provision, (c), simple interest of 1% per month, is identical to a provision I include in my own fee contract (copy attached), and is far less than the 21% rate authorized by Iowa Code §527.2201. At any given time, personal injury lawyers have advanced tens of thousands of dollars in costs on their clients' pending cases. Sometimes these costs are not

> recovered. If some fair interest rate was not applied to these balances during the pendency of these cases, lawyers would lose significant money on these advances and be less likely to offer advance expenses for, and therefore to provide contingency services to, needy plaintiffs. There is nothing unreasonable about this provision, as it is contained in almost every consumer type contract, and usually at much higher rates

(App. 928).

16. On October 20, 1984, the ABA Comm. on Ethics and Professional Responsibility issued its Informal Opinion 84-1509 (cited as "ABA Informal Op. 84-1509"), titled "Reasonable Legal Fees." It states in the fourth full paragraph:

> From the legislative history of Rule 1.5 and the mere substitution of 'reasonable' in the Rule for 'clearly excessive' in the Disciplinary Rule in otherwise parallel provisions, it appears clear that there was no intent to change the basic thrust of the DR from a prohibition against excessive fees to a 'minimum fee' standard. *The intent was simply to impose a stricter standard on lawyers who would charge too much, by changing the 'clearly excessive' test to a test of reasonableness*. [Emphasis added]

(App. 970).

17. The "Settlement Demand" given to the City as plaintiffs' mediation statement states at page 2, note 2:

> Traumatic brain injury triples the risk for early death, increases the risk of a dementia diagnosis for more than 30 years after the trauma, increases the risk of stroke (especially

ischemic stroke), increases the risk of addiction behaviors, and suicidal behavior.

(App. 976, p. 2, n. 2). This information was given to Stan Munger by Rosanne Plante and was provided to Rosanne by Chad Plante's care providers. It was provided to the City to give it an understanding of the extent to which Chad's future health risks had increased as a result of the accident. (App. 937, ¶ 10, App. 938 ¶¶ 11 and 12).

18. Rosanne Plante's Affidavit describes Chad Plante's and future health risks at paragraphs 10, 11, 12 and 13:

> 10. Traumatic brain injury (TBI) is seen by the insurance industry and many health care providers as an "event." Once treated and provided with a brief period of rehabilitation, the perception exists that patients with a TBI require little fur8ther treatment and face no lasting effects on the central nervous system or other organ systems. In fact, TBI is a chronic disease process, one that fits the World Health Organization definition as having one or more of the following characteristics: it is permanent, caused by nonreversible pathological alterations, requires special training of the patient for rehabilitation, and/or may require a long period of observation, supervision, or care. TBI increases long-term mortality and reduces life expectancy. Source: Lance Trexler, PhD Department of Rehabilitation Neuropsychology, Rehabilitation Hospital of Indiana, Adjunct Clinical Assistant Professor of PM&R, Indiana University School of Medicine, Adjunct Professor of Speech and Hearing Sciences at Indiana University, Adjunct Assistant Professor of Psychological Sciences at Purdue University

11. In addition, traumatic brain injury triples the risk for early death, increases the risk of a dementia diagnosis for more than 30 years after the trauma, increases the risk of stroke (especially ischemic stroke), increases the risk of addiction behaviors, and suicidal behavior.

12. The reality is Chad will not age as others do, he will suffer and struggle with his TBI the rest of his life. I need all his settlement to ensure I have the funds necessary to take care of him. I am also 9 years older than Chad, so it is a real possibility he may need care after I have passed away and will have no caretaker later in life. Funds will be needed to ensure a caretaker can be hired to care for him and his medical needs.

13. The money we have received from the settlement has been used to pay off our home, and the rest has been invested in very conservative bonds and annuities designed to be available if, at any time, I need more help to care for Chad.

(App. 937 ¶ 10; App. 938 ¶¶ 11, 12 and 13).

19. The November 1, 2017 Neuropsychological Assessment performed by Renee A. Hudson, Psy. D. ABPP, Board Certified in Clinical Neuropsychology states in part at pages 1-2:

> Summary: Mr. Plantes' estimated pre-injury level of cognitive functioning is within the average range. Scores in the low average range are suspect for mild decline and scores in the borderline impaired range or below are likely diminished from pre-injury levels. Mr. Plante suffered a severe traumatic brain injury on November 15, 2016, noted as diffuse axonal injury and areas of bifrontal lobe contusions, left greater than right. Mr. Plante was hospitalized for over one month and completed inpatient rehabilitation at Madonna Rehabilitation in

> Lincoln, NE and Quality Living, Inc. (QLI) in Omaha, NE. He was discharged to home with 24-hour supervision 04/26/2017. He has persisting left hemiplegia and ambulates with a cane.
>
> * * * *
>
> In summary, Mr. Plante's areas of persisting cognitive deficits include impaired auditory and visual memory, inaccurate memory, and executive functioning abilities of planning and organization, inhibitory control of motor responses, and perseveration. Insight into cognitive limitations is marginal. Fortunately, no disinhibited or problematic behaviors were reported. The areas of persisting cognitive deficits are consistent with his brain injury, including injury to the frontal lobes. A year has passed since injury onset and it is likely the majority of cognitive recovery has occurred. Some minor improvements are possible but these are not likely to change his cognitive functioning in any meaningful way.

(App. 905-906). At page 5 of Dr. Hudson's Assessment a chart sets out a summary of neuropsychological assessment results. It shows five possible categories for each of the 34 functions assessed. No functions were assessed as "Above Average"; 12 functions were assessed as "Average"; 4 functions were assessed as "Low Average"; 6 functions were assessed as "Borderline Impaired"; and 11 functions were assessed as "Impaired". (App. 909).

20. Defendants' expert witness David Brown states in part in his Rule 1.500(2)(b) Disclosure (Exhibit G):

* * * *

a. The Fee Agreement which was entered into between the parties must be evaluated throughout the course of the case and at the conclusion of the case to determine if the fee charged is "reasonable".

b. That the authorities, both in the Professional Code of Conduct cases from the Iowa Supreme Court and cases from other jurisdictions, make it clear that the Court, in determining the reasonableness of fees does not judge reasonableness only from the inception but must take all the facts and circumstances of the representation into account as the case progresses and is concluded.

c. That the conclusion by Mr. Munger that, based on the attorney fee contract and based on his expending 57.97 hours and his paralegal expending 125 hours, he is entitled to a fee of one-third of a settlement award of $7.6 million is patently unreasonable. He did not need to forego other employment (he worked less than one hour per week on this case). Furthermore, the issues in this case were not complex. That the Court will ultimately need to evaluate the claimed fees in light of the fee contract and what was actually done in the representation to determine what is a fair fee under all of the circumstances.

* * * *

e. That it is critical, to note that in this set of facts, no lawsuit was ever filed, no depositions were ever taken, no expert witnesses were ever retained, no Petition was ever filed, no interrogatories were ever served, no court scheduling order was ever entered, there was no need for presentation of instructions, trial briefs or motions in limine and that the matter was concluded after a one day mediation with no other activity by Claimant's counsel. The neuropsychologist who issues a report was actually retained and paid for by the Claimants and not by Mr. Munger. That the totality of the facts required to

> be evaluated in the assessment of a reasonable fee agreement are set forth in Iowa Model Rule 32.1.5. The factors of this Rule need to be applied by the Court in its assessment of what is a reasonable fee under all of the circumstances.

(App. 956-957).

21. David Brown in his Supplemental Rule 1.500(2)(b) Expert Witness Disclosure (Exhibit F to Defendants' MSJ Resistance) states in part:

> The reports of Plaintiff's experts, James Daane and Stan Munger, state that the fee contract was reasonable at the time it was executed by the parties. Their reports do not analyze the reasonableness of the fee contract in light of developments that occurred as the claim progressed and did not analyze reasonableness of the fee contract at the conclusion of the claim when the settlement was reached.
>
> * * * *
>
> I was on the Iowa Bar Association committee that studied the ABA Model Rules of Professional Conduct during the four-year period of study before they were adopted in Iowa. During this period of study the ABA Committee Comments were used as information on the intent of the rules. I was one of three attorneys who was asked to testify before the Supreme Court regarding adoption of the ABA Rules of Professional Conduct.

(App. 953-954).

22. The funds representing the disputed fee that have been held in Plaintiff's trust account have been invested at an approximate annual rate of 2%.

23. On May 17, 2018 the Plantes offered to resolve the fee dispute for a payment of $1.25 million dollars. Stan Munger rejected the offer saying he did not want to negotiate the fee. (App. 828).

24. The Plantes told Stan Munger on May 17, 2018 at a meeting in his office that they both believed the 33⅓% fee that his firm was charging was unfair. (App. 828-829). Stan Munger's time record for that day states:

> I Just wanted to find out from Mr. Plant what he thought about all of this. He said that he thought it should weigh on my conscience that I take that much money. Referring to the Fee Agreement.

(*Id*. at page 38). Mr. Munger told them he would not negotiate the fee but that in any event they should delay that matter until a settlement is reached. (*Id*. at page 37).

25. Rosanne Plante's May 31, 2018 email to Stan Munger advising him of the Plantes' acceptance of the City's $7.5 million dollar settlement offer, also says at paragraph 2 of the email: "I still want to discuss your fee once we secure the settlement with the City." (App. 934).

ARGUMENT

I. THE MUNGER FEE CONTRACT SHOULD BE EVALUATED FOR REASONABLENESS FROM ITS INCEPTION TO THE CONCLUSION OF PROVISION OF SERVICES, AND THAT EVALUATION SHOWS THE FEE CONTRACT VIOLATES RULE 32:1.5(a) OF THE IOWA RULES OF PROFESSIONAL CONDUCT BECAUSE IT CHARGES AN UNREASABLE FEE AND EXPENSE AND THE FEE CONTRACT IS THEREFORE VOID AND UNENFORCEABLE.

A. Preservation of Error.

On September 4, 2018 Plaintiff filed its Petition claiming that it had an enforceable written contingency fee contract with Defendants, that Defendants had breached the contract, and that Defendants owed Plaintiff $2,559,456.66 plus contract interest. (App. 11 ¶ 6; App. 12 ¶¶ 13-14; App. 13 ¶ 22).

Defendants admitted they signed the contingency fee greement but asserted "that under the attending circumstances as the case developed that Exhibit A [the fee agreement] is void and unenforceable because it violates Rule 32:1.5(a) of the Iowa R. Prof'l Conduct." Defendants further denied they had breached the contract or that they owed Plaintiff $2,559,456.66 or interest at the contract rate of 1% per month. (App. 34 ¶¶ 3; App. 35, ¶¶ 4, 9; App. 37 ¶16).

On January 14, 2019 Plaintiff filed its Motion for Summary Judgment claiming that Defendants had breached the fee contract and owed unpaid fees and interest. On January 31, 2019 Defendants filed their Corrected Resistance of Chad Plante and Rosanne Plante to Plaintiff's Rule 1.981 Motion for Summary Judgment. The Plantes' Resistance contended that the fee contract was void and unenforceable under Iowa R. Prof'l Conduct 32:1.5(a) which provides that "A lawyer shall not…charge, or collect an unreasonable fee or an unreasonable amount of expenses…." The District Court's Ruling held that the reasonableness of the fee contract could be evaluated only at the time the parties entered into the contract. The Plantes' Resistance contended that Iowa case law and authorities in other jurisdictions held that an attorney fee contract must be reasonable at the time of its inception and also throughout its operation to the conclusion of the provision of legal services.

B. Scope and Standard of Review.

In *Slaughter v. Des Moines University College of Osteopathic Medicine*, 925 N.W.2d 793, 800 (Iowa 2019), the court instructed:

> "We review summary judgment rulings for correction of errors at law." *Deeds v. City of Marion*, 914 N.W.2d 330, 339 (Iowa

> 2018). "Summary judgment is proper when the movant establishes there is no genuine issue of material fact and it is entitled to judgment as a matter of law." *Id.* (quoting *Goodpaster v. Schwan's Home Serv., Inc.*, 849 N.W.2d 1, 6 (Iowa 2014). "We view the record in the light most favorable to the nonmoving party." *Id.*

"Even when the facts are not in dispute or contradicted, if reasonable minds might draw different inferences from them a jury question is engendered." Iowa R. App. P. 6.904(3)(q). The moving party has the burden of proof. *Thompson v. Kaczinski*, 774 N.W.2d, 774 N.W.2d 829, 832 (Iowa 2009).

C. Existing Law Becomes Part Of A Contract For Purposes of Construction Of The Contract.

The general rule across jurisdictions is stated at 17A Am. Jur. 2d Contracts § 363:

> Contracting parties are presumed to contract in reference to the existing law, and to have in mind all the existing laws relating to the contract, or to the subject matter thereof.... By virtue of this rule, the laws which exist at the time and place of making a contract and at the place where it is to be performed, affecting its validity, construction, operation, performance, enforcement, and discharge, enter into and form a part of it as if they were expressly referred to or incorporated in its terms.

Cited as authority for the first sentence in the above quote is *United Suppliers, Inc. v. Hanson*, 876 N.W.2d 765 (Iowa 2016). The court in *United Suppliers* at 780 set out the Iowa rule:

> Contracting parties are presumed to contract in reference to the existing law, which becomes a part of the contract." *In re Receivership of Mt. Pleasant Bank & Trust Co.*, 426 N.W.2d 126, 134 (Iowa 1988).

The court in *In re Receivership of Mt. Pleasant Bank & Trust Co.*, 426 N.W.2d 126 (Iowa 1988), quoted above in *United Suppliers*, stated at 134:

> A corollary to this rule requests us to give that interpretation to an agreement that will avoid violation of the law. *See Fortgang Bros., Inc. v. Cowles*, 249 Iowa 73, 80, 85 N.W.2d 916, 920 (1957); 17 Am.Jr.2d *Contracts* § 254, at 647-48.

Construing a North Carolina contract, the United States Supreme Court laid down the same rule as part of federal contract law:

> Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge.

Farmers' & Merchants' Bank of Monroe, N.C. v. Federal Reserve Bank of Richmond, Va., 262 US 649, 660 (1923). The fee contract in the present case must be read with reference to Iowa Code of Professional Conduct Rule 32:1.5(a).

D. An Attorney Should Make A Good Faith Effort Not To Charge The Attorney's Client For Performance Of Excessive Or Unnecessary Work.

Plaintiff has suggested that a policy reason for not evaluating the reasonableness of a fee contract at the conclusion of a case is that allowing at the conclusion of a case an evaluation of the reasonableness of the fee charged would result in lawyers having a contingent fee contract delaying settlement and performing unnecessary work for the purpose of "earning" their 33 percent fee. (App. 964, p. 10; App. 965 p. 14). This Court should not apply a proposed construction of Iowa Rule of Professional Conduct 32:1.5(a) that is urged on the basis of the contention the construction is necessary to prevent Iowa lawyers from performing excessive or unnecessary work in order to earn more money from their clients. On the subject of excessive or unnecessary work, the United States Supreme Court instructed:

> "Counsel for the prevailing party [in a fee-shifting matter] should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.".

Hensley v. Eckerhart, 461 U.S. 424, 434 (1983).

E. A Fee Contract Is To Be Evaluated For Reasonableness Under Rule 32:1.5(a) Throughout Its Performance and The Munger Firm Fee Contract When Evaluated In That Manner Is Void And Unenforceable.

The "Iowa Rules of Professional Conduct", Chapter 32 of the Iowa Rules of Court, were enacted in 2005 (adopting the ABA Model Rules of Professional Conduct). Those rules replaced the rescinded Chapter 32 "Iowa Code of Professional Responsibility for Lawyers" (the ABA Code of Professional Responsibility). Rule 32:1.5 governs an attorney's agreement with a client for charging or collecting a fee.

Rule 32:1.5(a) provides:

> (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.

* * * *

Prior to 2005 fee agreements between attorneys and clients were governed by the Iowa Code of Professional Responsibility, Disciplinary Rule 2-106, which provides in part: "(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." Its replacement, Rule 32:1.5(a), provides in part: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee…." The ABA Committee On Ethics And Professional Responsibility Informal Opinion 84-1509, "Reasonable Legal Fees", states in part at the fourth paragraph:[1]

> From the legislative history of Rule 1.5 and the mere substitution of 'reasonable' in the Rule for 'clearly excessive' in the Disciplinary Rule in otherwise parallel provisions, it

[1] Westlaw, Secondary Sources, By Publication Series, American Bar Association, ABA Ethics Opinions, search "84-1509". ABA Informal Opinion 84-1509 is attached to Corrected Resistance to Motion for Summary Judgment, Exhibit F, Supplemental Rule 1.500(2)(b) Expert Witness Disclosure of David L. Brown.

> appears clear that there was no intent to change the basic thrust of the DR from a prohibition against excessive fees to a 'minimum fee' standard. The intent was simply to impose a stricter standard on lawyers who would charge too much, by changing the 'clearly excessive' test to a test of reasonableness.

[Emphasis added][2]. (App. 955).

> The District Court's ruling states at page 7:
>
> Iowa law has consistently concluded, despite the change in the Rule's language in 2005, that the reasonableness of contingency fees will not necessarily be subject to reexamination at the conclusion of successful litigation. *See Comm. on Prof'l Ethics and Conduct of the Iowa State Bar Ass'n v. McCullough*, 468 N.W.2d 458, 461 (Iowa 1991); *Estate of Bruess v. Law Firm of John Gehlhausen*, P.C., 838 N.W.2d 868, 2013 WL 4010290 at *4 (Iowa Ct. App. Aug. 7, 2013) (unpublished opinion).

Comment (3) to Rule 32:1.5 provides in part:

> 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.

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[2] Defendants' expert witness David L. Brown states in his Supplemental Rule 1.500(2)(b) Expert Witness Disclosure at pages 2-3:

> I was on the Iowa Bar Association committee that studied the ABA Model Rules of Professional Conduct during the four-year period of study before they were adopted in Iowa. During this period of study the ABA Committee Comments were used as information on the intent of the rules….Attached is ABA Informal Op. 84-1509. The fourth paragraph of Op. 84-1509 is relevant to the present case. (App. 953; App. 956-957).

Accord, Estate of Bruess v. Law Firm of John Belhensen, P.C., 838 N.W.2d 868 (Table), *4 (Ia. Ct. App., Aug. 7, 2013) (unpublished opinion).

In *Comm. on Prof'l Ethics and Conduct of the Iowa State Bar Ass'n v. McCullough*, 468 N.W.2d 458, 460 (Iowa 1991), the Iowa Supreme Court applied the discarded DR 2-106(A) "clearly excessive" standard. The court in *McCullough*, applying the old rule, said: "Nor do we believe that it is the intent of DR 2-106(B) that contingent fee agreements must be reexamined at the conclusion of successful litigation *with respect to the factors applicable to noncontingent fees."* (Emphasis added). 468 N.W.2d at 461. The 2005 adoption of the Rules of Professional Conduct including Rule 32:1.5(a), requires a different analytical approach to determining whether fees and expenses charged or collected under an attorney's fee contract are valid and enforceable. The factors listed in Rule 32:1.5(a) are applicable to contingent fee contracts. (Comment 3 to Rule 32:1.5) While "the time and labor required" will be weighted differently in the context of a contingency fee contract, it still is an important factor for the District Court to examine. It is a factor that the District Court can only examine and weigh at the conclusion of the provision of legal services to the clients. This is also true of the second, fourth and fifth factors in Rule

32:1.5(a). Regardless of how the *McCullough* opinion applying DR 2-106 may be read, analysis of whether fees and expenses charged or collected under an attorney fee contract are reasonable under Rule 32:1.5(a) requires a review of the attending circumstances not only at the inception of the contract but throughout the provision of legal services. "Hindsight" review of the reasonableness of an attorney fee contract is not only allowable, it is mandated by Rule 32:1.5(a).

Even prior to adoption in 2005 of Rule 32:1.5(a), it was recognized in *Iowa Supreme Court Board of Professional Ethics and Conduct v. Hoffman*, 572 N.W.2d 904 (Iowa 1997), that a contingent fee contract that did not appear to be "clearly excessive" under DR 2-106(A) when first entered into could as the facts of the case developed become invalid and unenforceable. The court in *Hoffman* said:

> While the fee agreement entered into by respondent and Elaine Jahde 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.

572 N.W.2d at 908.

In *McCullough* the court did not endorse a bright line rule that a contingent fee contract could never be examined retrospectively to

determine whether it was valid and enforceable. In *McCullough* the attorney tried the case to judgment. 468 N.W.2d at 459. The *McCullough* court said: "Although the Committee [On Professional Ethics And Conduct], arguing from a position of hindsight, suggests that the litigation was simple and that the chances of success were good, we reject that contention." The court said the plaintiff attorney's theory of liability was difficult to establish. Among other problems, it depended upon the credibility of the plaintiff herself. The court said:

> As Nancy's counsel, appellant was required to convince the court of these circumstances by the testimony of a witness who sought to gain a substantial sum of money if the litigation was successful. Being able to do this was far from a sure thing.

Id. Thus, the court in *McCullough* did not decide the case by applying a rule dictating that a contingency fee contract can never be evaluated retrospectively. The court said that in the case at hand, which was tried to judgment, it did not believe the quality of the Committee's retrospective evaluation was fair to the attorney.

In *Estate of Bruess v. Law Firm of John Gehlhausen, P.C.,* 838 N.W.2d 868, 2013 WL 4010290 at *4 (Iowa Ct. App. Aug. 2013)

(unpublished opinion),[3] the court's quotation of language from *McCullough* was coupled with language from Iowa R. of Prof'l Conduct 32:1.5(a) Comment 3. The court said at 838 N.W.2d 868, *4:

> Our supreme court has explained that contingent fee agreements may not necessarily be subject to reexamination "at the conclusion of successful litigation with respect to the factors applicable to noncontingent fees." *Comm. on Prof'l Ethics & Conduct v. McCullough*, 468 N.W.2d 458, 461 (Iowa 1991). Nevertheless, "[c]ontingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this rule." Iowa R. of Prof'l Conduct 32:1.5(a) cmt.3. [Emphasis added].

The *Bruess* court's "may not necessarily" language coupled with direction to the Comment 3 statement that "the reasonableness standard of paragraph (a)" applies to all attorney fees including contingent fees, does not set out a bright line rule prohibiting an evaluation of reasonableness of a contingency fee contract at the conclusion of the provision of legal services.

Immediately prior to the *Bruess* court's statement referencing *McCullough* and Comment 3, the court set out in full Iowa Rule of Prof'l Conduct 32:1.5(a). *Id.* at *3-*4. Section 633.139, Iowa Code, sets out a

[3] *Estate of Bruess* does not constitute controlling legal authority. Iowa R. App. P. 6.904(2)(c).

nonexclusive list of factors to consider in determining the reasonable value of services provided by an attorney representing an estate. The court said that Iowa Rule of Prof'l Conduct 32:1.5 lists factors "[m]irroring much of section 633.139".

The fee contract in *Bruess* gave the attorney authority to incur substantial expenses at the attorney's sole discretion. The court in *Bruess* said: "Although the fee agreement that he drafted ostensibly gave him that authority, both Iowa Code section 633.199 and rule 32:1.5 overlay that agreement with the requirement that the entire fees and expenses be reasonable." Section 633.199(1) and Iowa Rule of Prof'l Conduct 32:1.5(a)(1) both list the time and work an attorney was required to spend on a case as a factor in the analysis. The court noted "however, that 'time spent' may not be as significant a factor in contingent fee cases as in some other fee cases…." Defendant Plantes recognize this – they have already without recourse paid the Munger Firm $440,000 which it can retain regardless of the outcome of this action. (App. 787).

The "time and labor required" is still an important factor and becomes more important as the amount of time and labor required diminishes and the amount subject to the contingency fee percentage

increases. The nonrecourse $440,000 payment to Plaintiff is ten times the hourly rate value of the time the Munger Firm says it devoted to the case up to and including the mediation at which the City extended its $7.5 million dollar offer with a sixty-day window for acceptance. A multiplier of ten times the hourly rate value of work performed under a contingent fee contract is a very substantial addition to the fee that would have been earned under an hourly rate fee contract.[4] *See, Clarke v. General Motors, LLC*, 161 F. Supp. 3d 752, 769 n.16 (W.D. Mo. 2015) (saying its fee award using a multiplier of six is "unusually high" and "an outlier").

The Superior Court of New Jersey, Appellate Division, recently decided a fee contract was void and unenforceable under New Jersey Rule of Professional Conduct 1.5(a) which provided that "[a] lawyer's fee shall

[4] Defendants' Exhibit A to its Corrected Resistance to Plaintiff's Motion for Summary Judgment, is a May 11, 2018 email from Ann Collins showing a summary of Plaintiff's time records through April 30, 2018, which is the last day included on the last statement for services sent by Plaintiff to the Plantes. The summary shows 57.97 hours at $310 per hour for Stan Munger and 125.05 hours at $155 per hour for Ann Collins. (App. 935). The total hourly rate value charged by the Munger Firm for the time shown in Exhibit A is $37,353.45. Exhibit 1 to Plaintiff's Reply to Defendants' Counterclaim for Declaratory Judgment shows Plaintiff's internal time records from November 16, 2016 through October 9, 2018. Exhibit 1, pages 30-32, showing time from May 1, 2018 through May 7, 2018, shows during that time period Stan Munger recorded 12.55 hours and Ann Collins recorded 13.80 hours, which valued on Plaintiff's hourly rate basis amounts to a total of $6,029.50. Through and including the mediation on May 7, 2018 Plaintiff's recorded time when valued on Plaintiff's hourly rate basis totals $43,382.95. (App. 792-840; App. 821-823).

be reasonable." *Balducci v. Cige*, 192 A.3d 1064 (N.J. Sup. App. Div. 2018). The court said:

> In a LAD case, as in any case, "[a] lawyer's fee shall be reasonable." RPC 1.5(a). 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." Cohen v. Radio-Electronics Offers Union, 275 N.J. Super. 241, 259, 645 A.2d 1248 (App. Div. 1994), modified on other grounds, 146 N.J. 140, 679 A.2d 1188 (1996). 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.' " Alpert, Goldberg, Butler, Norton & Weiss, PC v. Quinn, 410 N.J. Super. 510, 529, 983 A.2d 604 (App. Div. 2009) (alterations in original) (quoting Kriegsman v. Kriegsman, 150 N.J. Super. 474, 480, 375 A.2d 1253 (App. Div. 1997)).

Id. at *9.

The Iowa Supreme Court applied the discarded DR 2-106(A) "clearly excessive" standard in *Iowa Supreme Court Board of Professional Ethics and Conduct v. Hoffman*, 572 N.W.2d 904 (Iowa 1997). In *Hoffman*

the client signed a 33% contingent fee agreement in a workers' compensation case. *Id.* at 908. The attorney argued that the 33% contingent fee agreement should not be considered excessive because at the time it was signed it was not unreasonable. *Id.* However, in determining whether the fee was "clearly excessive" the court examined the circumstances of the case as it developed, and determined that those circumstances rendered the fee charged "unreasonable and excessive." The court instructed:

> While the fee agreement entered into by respondent and Elaine Jahde 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.

Id. The court explained that the attorney had only performed 15 hours of work on the case prior to the time that the defendant insurance company admitted compensability. The court said "respondent spent only 20 hours on the workers' compensation claim, yet sought over $37,000 in attorney fees via the partial commutation….", and held that was an "excessive" fee. *Id.*, at 908-909.

The fee charged by the attorney in *Hoffman* of $37,000 for 20 hours of work would have compensated the attorney at the rate of $1,850 per hour. That was held to constitute a clearly excessive fee under DR-2-106.

The United States District Court for the Western District of Missouri recently dealt with a case involving a contingent fee contract which, if applied literally to the settlement recovery, would have resulted in an unreasonable fee under Missouri Rules of Professional Conduct, Rule 4-1.5(a), which is identical to Iowa Rule 32:1.5(a). In *Clark v. General Motors, LLC*, 161 F.Supp.3d 752 (W.D. Mo. 2015), the Seattle, Washington attorneys were experienced in automotive crashworthiness cases. The agreement provided for a contingent fee of 40% on all money recovered and provided that if there was no recovery the client was still responsible for all costs and expenses.

The court in *Clarke* said that a fee contract that violates Missouri's ethical rule prohibiting charging an unreasonable fee is unlawful and therefore void. The court explained:

> Although the Court must order the distribution of attorneys' fees "as contracted," a "contract or transaction prohibited by law is void." *White v. Med. Review Consultants, Inc.*, 831 S.W.2d 662, 665 (Mo.Ct.App.1992) (Fenner, J.). Missouri's Rules of Professional Conduct have the force of law. *In re Ellis*, 359 Mo. 231, 221 S.W.2d 139, 141 (1949). Hence the Fee

> Agreement is void if it violates Rule 4-1.5. *See* *Eng v. Cummings, McClorey, Davis & Acho, PLC*, 611 F.3d 428, 435 (8th Cir.2010) (holding a fee-splitting agreement was unenforceable as a matter of law because it violated Missouri Rule of Professional Conduct 1.5(e)).

Id., at 758-759.

The court in *Clark* further explained that while a 40% contingent fee is not *per se* unreasonable, the fee "must be earned" and must be reasonable in the case at hand. The court said:

> Attorneys' fees must be earned. *See* *Neilson v. McCloskey*, 186 S.W.3d 285, 287 (Mo.Ct.App2005) (noting that to be entitled to a given fee, attorneys must perform an appropriate share of work or assume a share of the financial risk and ethical responsibility). The question in this case is whether collecting a $1,527,728 fee under the circumstances of this case violates Rule 4-1.5(a)'s prohibition on charging or collecting an unreasonable fee. [Emphasis added]. The question is not whether collecting a forty percent fee is reasonable in a typical automotive crashworthiness case; the question is whether collecting a $1,527,728 is reasonable under the circumstances of this *particular* case. *See* *McCoy v. The Hershew Law Firm, P.C.*, 366 S.W.3d 586, 597 (Mo.Ct.App.2012) (observing a fee's reasonableness varies "on a case-by-case basis depending on the circumstances").

Id., at 759. The attorneys charged a $1.5 million fee although the value of the work performed on an hourly basis was only $157,500. *Id*., at 768-769. Nevertheless, that was far greater than the $38,000 of hourly work performed by the Munger Firm. (App. 935; App. 44-45).

The court in *Clark* next cited *Brown & Strum v. Frederick Rd. Ltd. P'ship*, 768 A.2d 62, 79 (Md. App. 2001) for a two-part test for determining reasonableness of a fee that has been used by other states adopting the ABA Model Rule 1.5(a). The court in *Clark* said:

> They first determine whether the agreement was "reasonable in principle when the parties entered into it." Id. Second, at the conclusion of the case when the fee is quantified, they examine whether the agreement "was reasonable in operation" as determined by the eight factors above [in Rule 4-1.5(a)]. Id. Both parts of the test must be satisfied. Id. Because this test is well-reasoned and has been used successfully in other jurisdictions, the Court holds the Missouri Supreme Court would likely embrace it. Consequently, the Court applies it here.

Id., at 760. The Iowa Supreme Court has recognized this principle that a fee contract must be "reasonable at the time of its inception and also in light of later "changes in attending circumstances" that occur as the case develops and proceeds. *Hoffman*, 572 N.W.2d at 908.

The attorneys in *Clark* contended that the fee agreement need only be reasonable at the time it was made. As the Iowa Supreme Court did in *Hoffman*, the court rejected that proposed rule. The court in *Clark* reasoned:

> As the Supreme Court of Arizona observed, even if the fee agreement is reasonable when struck, *this does not "give the lawyer carte blanche to charge the agreed percentage*

> *regardless of the circumstances which eventually develop.* Either a fixed or contingent fee, proper when contracted for, may later turn out to be excessive." *In re Swartz*, 141 Ariz. 266,686 P.2d 1236, 1243 (1984) (citations omitted). This approach is also incompatible with the text of Rule 4-1.5(a)(1) since it is impossible for a court to determine "the time and labor required … to perform the service properly" or to judge the "results obtained" until *after* the litigation has concluded.
>
> On the facts and circumstances of this case, the Court finds that the forty percent contingency fee here was unreasonable, both at its inception and after it was quantified.

[Italics in text added]. *Id*.

The court in *Clark* determined that the "Fee Agreement is unreasonable in operation under Rule 4-1.5(a)." *Id*., at 762. The court then said: "Reasonableness in operation is determined at the conclusion of the case when the fee has been quantified by applying the eight Rule 4-1.5(a) factors." *Id*. The court found that "the total amount of time spent working on this case—attorneys, paralegals, investigators, and others—did not exceed 450 hours." The court also noted that the attorneys had "advanced less than $5,000 in expenses (which the client was obliged to repay even in the event of a loss)…." *Id*., at 764. In the present case the Plantes paid expenses as incurred, from the neuropsychology expert down to copy expenses. The court in *Clark* then described the unreasonableness of the fee charge in that case:

> Assuming the law firms invested 450 total hours in this case, collecting a $1,527,728.00 fee is equivalent to charging a blended rate of $3,395 an hour. This rate is more than six times Mr. Rogers' hourly rate, and much of the work here was probably performed by paralegals, investigators, or associates, whose hourly rates are much lower.

Id. The court added at 161 F.Supp.3d 769, note 12: "Even if the Court wildly underestimated the number of hours worked on this case, and the firms had actually spent twice as much time—900 hours—on it, the effective hourly rate would still be almost $1,700 an hour."

The court in *Clark* held that the attorneys could not recover under the fee agreement because the fee charge was unreasonable but that they could recover in *quantum meruit*. The court explained:

> The question then becomes to what fee, if any, is Plaintiff's counsel entitled? Where a contingency fee agreement is void or was not properly entered into, the attorney may not recover under the agreement. *See* Tobin, 243 S.W.3d at 441; R.A. Horton, *Attorney's Recovery in Quantum Meruit for Legal Services Rendered Under a Contract Which is Illegal or Void as Against Public Policy*, 100 A.L.R.2d 1378 Art. 1, § 2 (2015). The attorney may, however, recover in *quantum meruit* if the services rendered were otherwise compensable and not intrinsically illegal or contrary to public policy. *See* Tobin, 243 S.W.3d at 441; Horton, *supra*. Here, although the proposed fee is unreasonable, the services rendered were "otherwise compensable" and not "intrinsically illegal" or violative of public policy, so counsel is entitled to an award in *quantum meruit*.

Id., at 767. In the present case, the Munger Firm's fee contract is not enforceable because the firm charged an unreasonable fee. The Munger Firm may, however, recover in *quantum meruit*.

The court in *Clark* then set out its reasoning underlying its determination of the amount of its *quantum meruit* award:

> Consequently, the Court calculates the *quantum meruit* award as follows. All the work performed on this case (legal, paralegal, secretarial, etc.) totaled 450 hours. To ensure the firms are fully compensated, the Court applies a generous blended hourly rate of $350 an hour to compensate them for this work. This yields $157,500.00. However, this amount fails to account for the fact that this case was taken on a contingency fee basis and involved a matter of great importance, some responsibility, and a substantial amount of money. Consequently, the Court enhances this amount by a factor of six.[16] This yields a total *quantum meruit* award of $945,000.00.

Id., at 768-769. The court added at 161 F.Supp.3d 769, note 16: "The Court recognizes that this [six] is an unusually high multiple to apply and that its application is an outlier."

Plaintiff points out that its time records show Stan Munger worked 119.45 hours and paralegal Ann Collins worked 188.2 hours from November 16 through September 10, 2018. (Pages 4-5 of Plaintiff's Reply to Defendants' Counterclaim for Declaratory Judgment). At the Munger Firm's hourly rate charges this totals $66,201. That means a $2,559,000

fee would be a multiplier of 38. The Munger Firm time records also show that 41% of Stan Munger's total hours worked on the case occurred after May 7, 2018 when the City made its $7.5 million dollar offer. The Munger Firm hourly rate value of $43,382 for hours recorded through and including the mediation on May 7, 2018 means that a $2,559,000 fee would be a multiple of 59.

The South Dakota Supreme Court addressed application of Rule 1.5 of the ABA Model Rules of Professional Conduct where an attorney had attempted to charge a client $60,000 (and had collected $47,000) in fees and costs in a case concerning child custody and support issues. *Discipline of Charles L. Dorothy*, 605 N.W.2d 493, 495-496, 498 (S.D. 2000). The court at 499 discussed the ethics rule change to "unreasonable fee" from "clearly excessive":

> Many courts including South Dakota now adhere to the American Bar Association's Model Rules of Professional Conduct.[2] Under Rule 1.5, the benchmark for triggering judicial review of fees has been lowered and its scope broadened. Cassandra M. Neely, Comment, *Excessive Fees and Attorney Discipline: The Committee on Legal Ethics v. Tatterson*, 90 WVa LRev 562, 569 (1987/88). Rule 1.5 requires a lawyer's fee must be "reasonable," thereby eliminating the previous requirement to show a fee is "clearly excessive" in order to warrant disciplinary action. *Id*. This rule sets out a list of factors for determining reasonableness of a fee. (*See* n1 of this opinion). Thus, for disciplinary action to be imposed, it

is now only necessary that a fee be unreasonable in proportion to the services performed. *Neely*, at 569. When faced with a question about Rule 1.5 of the Model Rules of Professional Conduct, the ABA clarified:

> From the legislative history of Rule 1.5 and the mere substitution of 'reasonable' in the Rule for 'clearly excessive' in the Disciplinary Rule in otherwise parallel provisions, it appears clear that there was no intent to change the basic thrust of the DR from a prohibition against excessive fees to a 'minimum fee' standard. The intent was simply to impose a stricter standard on lawyers who would charge too much, by changing the 'clearly excessive' test to a test of reasonableness.
> ABA Comm. On Ethics and Professional Responsibility, Informal Op 84-1509 (1984).

Id., at 499-500.

The court in *Dorothy* also looked to Arizona as a jurisdiction whose authority provided guidance. The court said:

> Arizona courts, like South Dakota, promulgated their ethical rules after the ABA Model Rules of Professional Conduct. In *Matter of Struthers*, 179 Ariz. 216, 877 P.2d 789 (1994), the court found that the attorney's fee charged was unreasonable in relation to the work performed and in violation of Ethical Rule 1.5(a). *Id.* at 796. The court reiterated a principle from the *Swartz* case:
>
> > We have stated before and state again: 'a fee agreement between lawyer and client is not an ordinary business contract.' Although the lawyer is certainly free to consider his own interests, the primary concerns are those of the client. Fees must be reasonably proportional to the services

> rendered and to the situation presented. *Id*. at 796 (citing *Swartz*, 686 P.2d at 1243) (internal citations omitted).

605 N.W.2d at 500.

In another Arizona case, decided subsequent to *Dorothy*, the Arizona Supreme Court said that if review of the case at its conclusion shows the fee agreement was unreasonable then the attorney "must reduce the fee." *Matter of Connelly*, 55 P.3d 756, 761 (Arizona 2002) (Underscore added). The court explained:

> We have also explained that "[r]egardless of how [a] fee is characterized … each [fee agreement] must be carefully examined on its own facts for reasonableness." *Id*. Finally, like other fee arrangements, non-refundable flat fees are subject to retrospective analysis. *See In the Matter of Swartz*, 141 Ariz. 266, 273, 686 P.2d 1236, 1243 (1984) ("we hold … that if at the conclusion of a lawyer's services it appears that a fee, which seemed reasonable when agreed upon, has become excessive, the attorney may not stand upon the contract; he must reduce the fee.").

Id. *Accord: Rubin v. Murray*, 943 N.E.2d 949, 948-959 (App. Ct. Mass. 2011) ("Because contingency fees are negotiated at a time of significant uncertainty, and with the possibility that the client lacks true bargaining power, contingent fee agreements may be reviewed for reasonableness once the attorney's services are completed and the outcome known."; *Holmes v. Loveless*, 94 P.3d 338, 339 (Ct. App. Wash. 2004) ("The fee a

lawyer collects for legal services must be reasonable. Attorney fee agreements are subject to continued review for reasonableness over the course of the agreement.").

The District Court's Ruling states at pages 9-10 that the Plantes did not raise an objection to the terms of the fee agreement until August 6, 2018. The Plantes in fact told Stan Munger on May 17, 2018 at a meeting in his office that they both believed the 33⅓% fee that his firm was charging was unfair. (App. 828-829, Plaintiff's Time Records).

Mr. Munger told them he would not negotiate the fee but that in any event they should delay that matter until a settlement is reached. (*Id*. at App. 828). A May 31, 2018 email from Rosanne Plante to Stan Munger told Mr. Munger to advise the City's attorney that she and Chad had decided to accept the City's offer. She further stated at paragraph 2, "I still want to discuss your fee once we secure the settlement with the City." (App. 934).

The District Court's Ruling at page 10 states: "A great deal of work and time was also put forth negotiating the expense payments received by Defendants prior to any settlement discussions." It is true that a large part of the hours claimed by the Munger Firm were spent on this task

which required no extraordinary skill or experience. More importantly, the end result of all those hours spent has been quantified at just under $180,000. Thirty-three percent of that modest recovery has a known value of $60,000. The Munger Firm claimed and the District Court found that the total fee owed under the fee agreement, including the fee owed for the payment plan recovery, was $2,559,456.66. (District Court Ruling pages 3, 11). Therefore, after deducting the $60,000 fee earned from the payment plan work, the Munger Firm claimed, and the District Court awarded, a fee of $2.5 million dollars for the time spent by the Munger Firm not including "a great deal of work and time…put forth" to obtain the $180,000 payment plan recovery.

The District Court's Ruling at page 10 states:

> Mr. Munger put in the time and efforts necessary to ensure that Defendants were successful and, while Rosanne may have been incredibly helpful during this process, her assistance does not render any and all work Mr. Munger did useless and ineffective, thus warranting that their once reasonable fee arrangement be held unenforceable.

The Plantes do not claim that attorney Munger's work was "useless and ineffective". If that was the Plantes' position they would not have paid the Munger Firm $440,000 without recourse. Nor would they have tried to resolve the disagreement prior to institution of litigation. The Plantes

met with Stan Munger on May 17, 2018 and Mr. Munger's time records for that meeting state in part:

> We discussed the settlement, but before we got into that Ms. Plante wanted to negotiate with me about cutting my fee to $1.25 million because I should feel that the money should go to Mr. Plante and not be my fee.
>
> * * * *
>
> The $1.25 million offer she wanted me to consider was [a] 15% Fee Agreement. My response was that I had a Fee Agreement and I did not want to negotiate it further. I said that if you want to deal with the fee issue then we should do that at the conclusion of all of this….

(App. 828). Mr. Munger's time record for May 17, 2018 further states:

> I just wanted to find out from Mr. Plante what he thought about all of this. He said that he thought it should weigh on my conscience that I take that much money. Referring to the Fee Agreement.

(*Id*. at App. 829).

The Plantes do not claim that the Munger Firm is not entitled to a fee very substantially exceeding the value of their work measured on their own hourly rate basis. Rather, the Plantes' position is that the fee the Munger Firm claims, and the District Court awarded, is unreasonable, that the fee contract therefore is invalid and unenforceable, and consequently the fee owed to the Munger Firm must be measured on the basis of quantum meruit.

The District Court's Ruling at page 3 states, "Per the Contract, the Plantes also agreed to cover all expenses incurred as the case progressed." Plaintiff's expert John Daane stated at page 9 in his December 14, 2018 report that interest at 1% per month was justified because personal injury lawyers may advance tens of thousands of dollars in expenses on a case. (App. 930). The Munger Firm advanced no expenses that would justify the 1% interest rate it has charged and is attempting to collect on fees it claims are owed but unpaid. The fees claimed by Plaintiff are in its trust account invested, with Defendants' consent, at about 2.2% per year.[5] The only reason for the exorbitant interest rate charged is as a deterrent to questioning the reasonableness of the charged fee. In addition, the Plantes' offer to Stan Munger to resolve the fee dispute for a payment of $1.25 million dollars was rejected.

[5] Section 535.3(1), Iowa Code, provides that interest on judgments shall be at a rate calculated according to Section 668.13, Iowa Code. Section 668.13(1) provides that interest except interest awarded for future damages shall accrue from the date of the commencement of the action. Plaintiff commenced this action on September 4, 2018. Section 668.13(3) provides that interest shall be calculated as of the date of the judgment at a rate equal to the one-year treasury constant maturity published by the federal reserve in the H15 report settled immediately prior to the date of the judgment plus two percent. The interest on any judgment in the present action, calculated under state law, would be 4.58%. Section 668.13(5) provides that interest shall be computed daily to the date of payment.

Plaintiff therefore is not entitled to recover any interest on any judgment for fees of $1.25 million dollars or less. (App. 828).

At pages 20-23 of Plaintiff's Statement of Material Facts and Memorandum of Law filed in support of its Motion for Summary Judgment the Munger Firm relied heavily on *Lawrence v. Miller and Lawrence*, 23 N.E.3d 965 (Ct. App. N.Y. 2014). The District Court also placed its faith in *Lawrence* to guide the court in its determination of whether the reasonableness of a contingent fee contract can be evaluated at any point during representation of the client other than the time at which the parties entered into the contingent fee contract. The Plaintiff's and the District Court's reliance on *Lawrence* was misplaced.

At pages 9-10 the District Court's Ruling states:

> The Iowa Practice series, in a discussion of the invalidating [of] contingent fees that were valid at inception, cites to a New York Court of Appeals decision which wrote "…the fact a contingency fee 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." *In re Lawrence*, 24 N.Y.3d 320, 23 N.E.3d 965, 978-979 (2014). The appellate court in *Lawrence* also wrote, "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*. at N.Y.3d 339, at N.E.3d at 978. Absent incompetence, deception or overreaching,

> contingent fee agreements that are not void at the time of inception should be enforced as valid. *Id.* [Emphasis added].

The District Court then ruled that because it found the contingency fee contract was reasonable at the time the parties entered into it, "it will not now reexamine that reasonableness." (District Court Ruling, page 10). Under Iowa R. of Prof'l Conduct 32:1.5(a) a contingency fee contract is invalid if it charges "an unreasonable fee or an unreasonable amount for expenses…." Under Rule 32:1.5(a) a contingency fee contract is not valid merely because of an absence of "incompetence, deception or overreaching".

In *Lawrence* the plaintiff Lawrence family was a beneficiary to her deceased husband's estate having New York commercial real estate holdings valued at one billion dollars. Seymour Cohn, the decedent's brother and life-long equal business partner was the executor of the estate. The Lawrence family wanted to sell the real estate holdings and distribute the proceeds. Cohn did not want to execute that business plan. The Lawrence family commenced suit in 1983. Litigation continued for over two decades, outlasting Cohn, who died in 2003, and his estate continued on. Thus, *Lawrence* was a very lengthy court battle between

two already very wealthy parties over the disposition of the assets of a one-billion-dollar estate.

The court in *Lawrence* decided the case applying a standard for attorney conduct that was not based on ABA Model Rule 1.5(1), which is the basis for Iowa's Rule 32:1.5(1). The *Lawrence* court instead applied an "unconscionable contract" test that is far more lenient than Iowa Rule 32:1.5(1). The court in *Lawrence* at 23 N.E.3d 969 discussed an "unconscionable contract":

> As we explained in this case's earlier trip here, an unconscionable contract is generally defined as "one which is so grossly unreasonable as to be [unenforceable according to its literal terms] because of an absence of meaningful choice on the part of one of the parties [procedural unconscionability] together with contract terms which are unreasonably favorable to the other party [substantive unconscionability]" [Citation omitted].

Even the court in *Lawrence* recognized that a fee contract not unconscionable when made can become unconscionable as the case progresses. The court in *Lawrence* enunciated this principle and continued with language showing how very lenient the New York "unconscionable test" is compared to Iowa's reasonableness standard:

> 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.W.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". [Citation omitted]. [Emphasis added].

923 N.E.2d at 978. The court in *King v. Fox*, 851 N.E.2d 1184, 1192 (Ct. App. N.Y. 2006), cited above in *Lawrence*, likewise said:

> It is inherently difficult to determine the unconscionability of contingent fee agreements because at the time of agreement, the precise amount of recovery is still unknown. [Emphasis added]. As such, it is not necessarily the agreed-upon percentage of the recovery due the attorney or the duration of the recovery that makes a contingent fee agreement unconscionable [Citations omitted] but rather the facts and circumstances surrounding the agreement, including the parties' intent and the value of the attorney's services in proportion to the fees charged, in hindsight [Emphasis added] (*see Gross v. Russo*, 47 A.D.2d 655, 364 N.Y.S.2d 184 [2d Dept. 1975]).

In *Hogan Willig v. Handel*, 126 A.D.3d 1311, 1312 6 N.Y.S.3d 338, 340 (Sup. Ct., App. Div., 4th Dept., N.Y. 2015), the court, quoting an earlier case in the lengthy Lawrence litigation, *Lawrence v. Graubard Miller*, 901 N.E.2d 1268, 11 N.Y.3d 588 (Ct. App. N.Y. 2008)), said:

> We further conclude that the court properly denied the petition insofar as it sought to enforce the contingency fee agreement that respondent negotiated with petitioner. As the Court of Appeals recently noted, case law in New York "clearly provides that circumstances arising after contract formation can render a contingent fee agreement not unconscionable when entered into unenforceable where the amount of the fee, combined with the large percentage of the recovery it represents, seems disproportionate to the value of the services rendered" (*Lawrence v. Graubard Miller*, 11 N.Y.3d 588, 596, 873 N.Y.S.2d 517, 901 N.E.2d 1268; *see King v. Fox*, 7 N.Y.3d 181, 191, 818 N.Y.S.2d 833, 851 N.E.2d 1184).[6]

It is hard to imagine how the facts in the Lawrence litigation could lie any more distant from the facts in the present case than they do. The 2014 opinion of the court in *Lawrence* recounted at 23 N.E.3d 969 that the law firm had started on the case in 1983 and "battled" for "over two decades" trying to maximize the plaintiff's share of the $1 billion dollar estate. From 1983 through 1997 the law firm had recovered $196 million dollars for the plaintiff's family. 23 N.E.3d at 984, n.4. In 1998, 15 years after the estate litigation began, the law firm recovered for plaintiff Lawrence another $84 million dollars and $40 million dollars for her

[6] The court in *Lawrence v. Graubard Miller*, 901 N.E.2d 1268, 11 N.Y.3d 588 (Ct. App. N.Y. 2008) quoted above in *Hogan Willig*, quoted two other New York cases supporting fee evaluation at the time of recovery:

> …[S]ee*Gair v. Peck*, 6 NY2d 97, 106-107 [1959] ["there comes a point where the amounts to be received by attorneys under contingent fee contracts are large enough to be (unenforceable) under the circumstances of the case" (*id*. at 107)]; *see also King*, 7 NY3d at 192 [determining whether a contingent fee agreement is unconscionable requires an analysis of "the facts and circumstances surrounding the agreement, including the parties' intent and the value of the attorney's services in proportion to the fees charged, in hindsight"]).

children. Before that recovery plaintiff Lawrence already had a net worth of $220 million dollars. The money recovered in *Lawrence* by the law firm on its contingent fee did not reduce the fund remaining for future care of an extremely seriously injured plaintiff with a poor prognosis for the future, as is true in Chad Plante's case. The funds paid to the law firm in *Lawrence* had the effect of reducing the net worth of an already very wealthy plaintiff. *Id.* at 972-973. From 1983 through 2004 the law firm had been paid $18 million dollars on an hourly fee basis and recovered $320 million dollars. *Id.* at 970.

The Lawrence contingent fee agreement was entered into in 2004. The court said that following execution of the contingent fee agreement the law firm "doggedly pursued" an issue that produced the "smoking gun". The court said: "The 'smoking gun' revelation was so damaging that the Cohn Estate paid a substantial premium to bring the litigation to a swift and certain conclusion." *Id.* at 972. A $100 million dollar offer was extended in 2005 and was accepted.

Over time, the recovery by the law firm of $196 million dollars through 1997, followed by the $124 million dollar recovery in 1998 for Lawrence and the children, and a final $100 million dollar recovery under

the contingent fee agreement, provided a $420 million dollar total recovery since 1983. After the contingent fee agreement was signed and up to the final settlement, the New York City law firm spent 4,000 hours preparing for the May, 2005 trial. *Id.*at 979. In the context of the facts and circumstances of the 22 year old case, the decades long prior representation, the "doggedly" pursued "smoking gun", and the other difficulties the case presented, the *Lawrence* court's determination that the fee agreement did not fail the New York unconscionability test does not provide support for the proposition that the fee charged by Plaintiff in the present case is reasonable under Rule 32:1.5(a).

The purpose of a tort action for negligence causing personal injury is to obtain compensation for the injured person(s). The purpose is not to provide the injured person's attorney anything more than a reasonable fee. The Defendant City of Sioux City evaluated Plante's claim as one of sure liability with such serious injuries and damages that it was worth $7.5 million to avoid the rendering of a jury verdict on the evidence. The Munger Firm never filed a petition. Two separate extensive investigations were performed. One was an Iowa State Patrol Technical Collison Investigation that was performed and paid for by the State of

Iowa. It found the City's bus driver entirely at fault. The other was a private investigation by Knight & Associates commissioned and paid for by the defendant City. The City never at any time claimed its expert investigator produced any finding contradicting the State Patrol Investigator's conclusions. The Munger Firm did not commission, perform or pay for either investigation. These investigations drove the defendant City's decision to admit 100% liability at the commencement of the mediation session.

The case was then reduced to evaluation of a jury's decision on compensation for the injuries and damage sustained by Chad and Rosanne Plante[7]. It is compensation of those injuries and damages that Iowa tort law makes the purpose of the legal action. Payment of a fee to the Munger Firm is a tangential by-product, not the purpose of the legal action. An attorney's reputation is a factor in determining a reasonable fee, and so is the skill and experience of the attorney to the extent those factors are needed during the progress of the case. But providing an attorney an extravagant fee in a case where a high recovery is driven to

[7] The City's counsel undoubtedly understood that if the City spent its credibility by trying to present some evidence to support a contention of fault on the part of Chad Plante, the City would have depleted its credibility with the jury when the City offered evidence on the all-important damages issue.

a large extent by serious and greatly debilitating injuries and a lack of client negligence, neither of which factors were the product of the attorney's efforts, is not the intent of Rule 32:1.5(a). An attorney fee contract must be evaluated for reasonableness throughout its operation. Evaluation of the Munger Firm's fee contract leads to the conclusion that it charges an unreasonable fee when analyzed in light of the particular circumstances occurring in this case throughout the operation of the contract. The fee contract is therefore void and unenforceable and the Munger Firm can only recover a fee on a quantum meruit basis.

RELIEF REQUESTED

Defendants Chad Plante and Rosanne Plante request that the Court enter an order:

1. Finding that the fee contract of Plaintiff Munger, Reinschmidt & Denne, L.L.P. charging a fee of $2,559,456.66 charges an unreasonable fee and unreasonable expense and is void and unenforceable under Iowa R. of Prof'l Conduct 32:1.5(a) and remanding the case to the District Court directing that the District Court determine a reasonable fee based upon quantum meruit and reasonable interest if any is owed;

2. Alternatively, if on remand the District Court is directed to perform a reasonableness evaluation of the fee contract, instructing the District Court that any evaluation of the fee contract for reasonableness under Rule 32:1.5(a) should be performed with reference not only to the inception of the contract but throughout the progress of the case up to and including conclusion of the provision of legal services; and

3. Such other relief as the Court deems fair and equitable.

Respectfully submitted,

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Dated: September 17, 2019

CERTIFICATE OF COST

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

/s/ Bruce E. Johnson

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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/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