Case No. 110483

IN THE SUPREME COURT OF THE STATE OF KANSAS

MAHNAZ CONSOLVER,

Plaintiff / Appellant,

vs.

CHRIS HOTZE,

Defendant,

BRADLEY A. PISTOTNIK and
THE AFFILIATED ATTORNEYS OF PISTOTNIK LAW OFFICES, P.A.,

Lienholders / Appellees.

Appeal from the District Court of Sedgwick County
Honorable J. Patrick Walters, District Judge
District Court Case No. 11CV3868

SUPPLEMENTAL BRIEF OF THE APPELLEES

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Summary

Lienholder/Appellee Bradley Pistotnik performed substantial services for Plaintiff/Appellant Mahnaz Consolver on a 33 1/3% contingency basis in a difficult personal injury case, costing Mr. Pistotnik over $10,000 in expenses and successfully resulting in a $300,000 settlement offer from the defendant. In an attempt to avoid Mr. Pistotnik's contingent fee, the plaintiff terminated him without cause and hired a new attorney to finalize the settlement. Mr. Pistotnik sought to recover on his attorney lien under K.S.A. § 7-108.

After two lengthy evidentiary hearings, the district court found Mr. Pistotnik had performed 90% of the work to achieve the settlement. Analyzing the factors in KRPC 1.5, it held he equitably deserved 90% of his 33 1/3% contingent fee on the $300,000 settlement, plus expenses, in *quantum meruit*, for a total award of $97,101.08.

The Court of Appeals reversed. It held that ***no*** equitable *quantum meruit* award under a contingent-fee attorney lien ***ever*** may be based on the contingency, no matter the facts or circumstances. Instead, it held that ***all*** such determinations ***must*** be by rote "lodestar" calculation of hourly rate multiplied by time, transmuting the contingency into an hourly agreement.

This violated the standard of review and misapplied the law of Kansas. This Court always has held that, when a client in a contingent arrangement terminates the lawyer without cause in order to circumvent the contingency after the lawyer substantially has performed, it is not an abuse of discretion to award the attorney a portion of the contingent fee. To hold otherwise would end contingent fees in Kansas, preventing injured Kansans who cannot afford to pay an attorney out-of-pocket from having access to the courts.

The district court did not abuse its discretion. This Court should reverse the Court of Appeals' judgment and affirm the district court's.

Argument and Authorities

I. A district court's determination of the amount of attorney fees owed under a K.S.A. § 7-108 attorney lien in *quantum meruit* is reviewed for abuse of discretion. It may be reversed only if no reasonable person could agree with the district court that the amount was appropriate under the facts and circumstances, viewed most favorably to its judgment.

As the Court of Appeals noted, it is not in dispute that Mr. Pistotnik[1] perfected "an attorney lien under K.S.A. § 7-108, thereby encumbering the [plaintiff's] settlement funds to the extent of any compensation due to him." *Consolver v. Hotze*, 51 Kan.App.2d 286, 290, 346 P.3d 1094 (2015). Instead, the parties dispute only "the amount of compensation" that Mr. Pistotnik deserves under that lien. *Id.*

The Court of Appeals correctly held that "[t]he determination of reasonable legal fees is typically entrusted to the district court's sound discretion" and thus only may be reversed if the district court abuses that discretion. *Id.* at 289 (citing *Unruh v. Purina Mills, LLC*, 289 Kan. 1185, 1200, 221 P.3d 1130 (2009)). Then, however, citing this Court's clarification of the general abuse of discretion standard in *State v. Ward*, 292 Kan. 541, Syl. ¶3, 256 P.3d 801 (2011), the Court of Appeals proceeded to warp this stringently deferential standard 180 degrees into ***unlimited*** review, reasoning that whether a district court "acts outside the [appropriate] legal framework" is reviewed *de novo*. *Consolver*, 51 Kan.App.2d at 289, 291.

In *Ward*, this Court distilled its lengthy discussion of the general abuse of discretion standard in *State v. Gonzalez*, 290 Kan. 747, 755-56, 234

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[1] Both the lien and the underlying contract with the plaintiff were not solely by Mr. Pistotnik, himself, but by the law firm of Lienholder/Appellee The Affiliated Attorneys of Pistotnik Law Offices, P.A. (R. 7 at 32-33). For ease of reference, however, this brief refers to all the lienholders/appellees as "Mr. Pistotnik."

P.3d 1 (2010), into three parts: a judicial action constitutes an abuse of discretion if it either (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of fact; or (3) is based on an error of law. 292 Kan. at Syl. ¶3, 256 P.3d 801. This last reason would be subject to unlimited review, because whether an exercise of judicial discretion is based on an error of law is, itself, a question of law. *Gonzalez*, 290 Kan. at 755, 234 P.3d 1. For,

> even under the deferential abuse of discretion standard of review, an appellate court has unlimited review of legal conclusions upon which a district court judge's discretionary decision is based. Because '[a] district court by definition abuses its discretion when it makes an error of law … [t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.

Id.

A. The amount of a district court's attorney fee award only may be reversed if no reasonable person would agree.

But this Court never has applied unlimited review to any facet of a district court's determination of an *amount* of attorney fees awarded. *Ward* and *Gonzalez* were criminal cases in which the discretionary decision being reviewed had nothing to do with an amount of attorney fees. *See Ward*, 292 Kan. at 809-10, 256 P.3d 801 (review of decision denying a mistrial); *Gonzalez*, 290 Kan. at 755, 234 P.3d 1 (review of decision denying motion to quash subpoena).

Rather, while "[t]he issue of the district court's authority to award attorney fees is a question of law over which appellate review is unlimited," where, as here, that authority is not disputed, "the *amount* of such an award is within the sound discretion of the district court and will not be disturbed on appeal absent a showing that the district court abused that discretion." *Unruh*, 289 Kan. at 1185, 221 P.3d 1130. Particularly, the "district court is

considered an expert in the area of attorney fees and can draw on and apply its own knowledge and expertise in determining the value of the services rendered." *Id.* at 1204.

As a result, in Kansas, the district court's determination of that amount only ever has been reviewed for whether its decision "is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *Id.* at 1202. Essentially, when the question on appeal is whether the *amount* of attorney fees awarded was appropriate, "Discretion is abused only when no reasonable person would take the trial court's view." *Johnson v. Westhoff Sand Co.*, 281 Kan. 930, 940, 135 P.3d 1127 (2006).

This has been true even *after* the Court's re-clarification of the three possible grounds of abuse of discretion in *Gonzalez* and *Ward*. *See, e.g.*, *Cresto v. Cresto*, 302 Kan. 820, 848-49, 358 P.3d 831 (2015) (amount of attorney fees reviewed only for "whether no reasonable person would adopt the position taken by the district court;" "de novo" review "rejected"); *Snider v. Am. Family Mut. Ins. Co.*, 297 Kan. 157, 169, 298 P.3d 1120 (2013) (amount of attorney fees reviewed for whether it "was arbitrary, fanciful, or unreasonable," as this was the "prong" of the *Ward* statement "that is implicated"). Simply put, this Court never has turned review of the amount of attorney fees awarded into unlimited review, either before or after *Ward*.

Indeed, and for these reasons, in the modern era this Court *never* has reversed a district court's decision as to an *amount* of attorney fees awarded.[2]

[2] A search of all of this Court's decisions reviewing an amount of attorney fees awarded reveals that only once in the last 80 years has it ever reversed or modified the district court's decision. *See Lattner v. Fed. Union Ins. Co.*, 160

Succinctly, this Court may not "substitute [its] judgment for that of the district court on the amount of the fee unless 'in the interest of justice' [it] disagree[s] with the district court." *Link, Inc. v. City of Hays*, 268 Kan. 372, 383, 997 P.2d 697 (2000).

As a result, the law of Kansas is and must be that the district court's determination of the *amount* of Mr. Pistotnik's fees awarded under his lien only may be disturbed on appeal if it "is arbitrary, fanciful, or unreasonable," *Unruh*, 289 Kan. at 1202, 221 P.3d 1130 – if "no reasonable person would take the trial court's view." *Johnson*, 281 Kan. at 940, 135 P.3d 1127.

B. A district court's assessment of what *quantum meruit* warrants only may be reversed if no reasonable person would agree.

The Court of Appeals' decision below ignores all of this. Instead, observing that it was undisputed that Mr. Pistotnik correctly perfected an attorney lien under § 7-108, the parties "agree" that the amount of his compensation had to be "based on equitable principles of *quantum meruit*," and this is the legal standard the district court used, it nonetheless proceeded to engage in unlimited review, citing only foreign cases, of how it believed *quantum meruit* ***must*** be evaluated. *Consolver*, 51 Kan.App.2d at 289-90, 346 P.3d 1094. The law of Kansas is that this is untenable.

Whether a district court used the correct legal standard in awarding attorney fees is reviewed *de novo*, as it is a question of law. *Wiles v. Am. Family Life Assur. Co. of Columbus*, 302 Kan. 66, 81-84, 350 P.3d 1071 (2015) (reviewing whether district court had authority to award party attorney fees under K.S.A. § 40-256). As the Court of Appeals noted, however, here, the

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Kan. 472, 480-81, 163 P.2d 389 (1945). In *Lattner*, the Court modified a $500 attorney fee award in a simple case ($6,600 today) by decreasing it to $250. *Id.* Given the tightly circumscribed review employed today, though, the Court plainly would not do the same if presented with *Lattner* now.

legal standard is not in dispute: the parties agree that *quantum meruit* governs the amount of the fees due to Mr. Pistotnik and this is the standard the district court used. *Consolver*, 51 Kan.App.2d at 289-90, 346 P.3d 1094 (citing *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 904, 220 P.3d 333 (2009); *Madison v. Goodyear Tire & Rubber Co.*, 8 Kan.App.2d 575, 579, 663 P.2d 663 (1983)).

In reality, though, *quantum meruit* is not a "legal standard." As the Court of Appeals briefly observed, it is an "equitable principle …." *Id.* at 289. Latin for "as much as he deserved," *quantum meruit* is "[t]he reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship." BLACK'S LAW DICT. 1276 (8th ed.2004). A court determining *quantum meruit* "proceed[s] in equity," not law. *Sullivan, Bodney & Hammond v. Bodney*, 16 Kan.App.2d 208, 209, 820 P.2d 1248 (1991).

As a result, "Quantum meruit is not limited to mere determination of time spent or cost, or indeed how long the employment existed," but is "[a]s much as [the claimant] reasonably deserved to have for his labor." *Shultz v. Edwards*, 3 Kan.App.2d 689, 690, 601 P.2d 9 (1979). All that is "required is that the [trial] court … be guided by some rational standard." *Id.* at 691. "[T]he plaintiff in … quantum meruit should recover 'as much as he reasonably deserves for his services;'" "[t]here is no definite test to determine" this, and it instead "is a matter of equity, depending on the circumstances of each case." *Bordelon Motors, Inc. v. Thomson*, 176 So.2d 836, 838 (La. App. 1965) (citation omitted).

Because this is a determination of what equity requires, it, too, is entirely within the district court's sound discretion. It is well-established in Kansas that "the application of an equitable doctrine rests within the sound

discretion of the trial court." *Bankers Trust Co. v. United States*, 29 Kan.App.2d 215, 218, 25 P.3d 877 (2001); *Harms v. Burt*, 30 Kan.App.2d 263, 266, 40 P.3d 329 (2002); *Shaffer v. City of Topeka*, 30 Kan.App.2d 1232, 1236, 57 P.3d 35 (2002); *Nat'l City Mortg. Co. v. Ross*, 34 Kan.App.2d 282, 287, 117 P.3d 880 (2005); *Cousatte v. Lucas*, 35 Kan.App.2d 858, 868, 136 P.3d 484 (2006); *Fleetwood Enters. v. Coleman Co.*, 37 Kan.App.2d 850, 864-65, 161 P.3d 765 (2007); *First Nat'l Bank of Omaha v. Centennial Park, LLC*, 48 Kan.App.2d 714, 721, 303 P.3d 705 (2013).

Therefore, a district court's decision as to what constitutes appropriate *quantum meruit* – the amount Mr. Pistotnik deserved considering the circumstances of the case; the reasonable value of his services; what was ***equitable*** – also is reviewed for abuse of discretion. *City of Wichita v. B G Prods., Inc.*, 252 Kan. 367, 372-75, 845 P.2d 649 (1993) (amount of attorney fee awarded as *quantum meruit* and rationale for reaching that amount reviewed for abuse of discretion); *Munn v. Bramble*, 212 Kan. 576, 582, 512 P.2d 99 (1973) (amount of commission awarded as *quantum meruit* and rationale for reaching that amount reviewed for abuse of discretion).

And, indeed, this is the rule everywhere. In equity, "The proper measure of restitution depends on the particular circumstances of a given case. It is within the trial court's discretion to determine the measure of restitution that justice requires." *Far West Fed. Bank, S.B. v. Office of Thrift Supervision-Dir.*, 119 F.3d 1358, 1367 (9th Cir. 1997) (citing RESTATEMENT (SECOND) OF CONTRACTS § 371); *see also, e.g., Farrell v. Whiteman*, 152 Idaho 190, 194, 268 P.3d 458 (2012) (amount of and rationale behind *quantum meruit* award reviewed for abuse of discretion and only reversible where decision was objectively unreasonable); *Brankline v. Capuano*, 656 So.2d 1, 6-7 (La. App. 1995) (same); *Blackie's Rental Tool & Supply Co. v. Vanway*, 563

So.2d 350, 354 (La. App. 1990) (same); *W.H. Wooley & Co. v. Bear Creek Manors*, 735 P.2d 910, 912 (Colo. App. 1986) (same); *Constantino v. Am. S/T Achilles*, 580 F.2d 121, 122-23 (4th Cir. 1978) (same).

Thus, just like an award of attorney fees generally, the district court's determination in *quantum meruit* as to what "the reasonable value of [Mr. Pistotnik's] services" were, BLACK'S LAW DICT. at 1276, what Mr. Pistotnik "reasonably deserved to have for his labor," *Shultz*, 3 Kan.App.2d at 690, 601 P.2d 9, and what "rational standard" guided its decision, *id.* at 691, all were entirely within the district court's discretion. *B G*, 212 Kan. at 582, 845 P.2d 649; *Munn*, 212 Kan. at 582, 512 P.2d 99.

The law of Kansas therefore is and must be that the district court's determination of the *amount* of Mr. Pistotnik's *quantum meruit* and its rationale for reaching that amount only may be disturbed on appeal if it "is arbitrary, fanciful, or unreasonable," *Unruh*, 289 Kan. at 1202, 221 P.3d 1130 – if "no reasonable person would take the trial court's view." *Johnson*, 281 Kan. at 940, 135 P.3d 1127.

II. The district court did not abuse its discretion in determining that, under the circumstances of this case, Mr. Pistotnik reasonably deserved 90% of his one-third contingent fee, amounting to $86,944.27, plus $10,156.81 of expenses.

Although every jurisdiction in the United States, including Kansas, always has held that *quantum meruit* is not subject to any particular test, but instead depends on the equities of the case's facts and circumstances, reviewed for abuse of discretion, *supra* at 5-8, the Court of Appeals below held otherwise. *Consolver*, 51 Kan.App.2d at 291-93, 346 P.3d 1094.

Instead, the Court of Appeals held that, rather than analyzing KRPC 1.5's criteria for what constitutes a reasonable fee, based on the facts and circumstances of the case, resulting in a fee that, in the court's expertise, is

reasonably based on a rational standard, district courts throughout Kansas ***must*** use a "lodestar computation" for ***all*** determinations of the amount of fees owed under an attorney lien, or else commit error. *Id.* Essentially, it held that the ***only*** allowable method for calculating a reasonable attorney fee due under an attorney lien, regardless of the facts and circumstances, is to determine "a reasonable hourly rate" based on "the prevailing rates in the community for lawyers of comparable experience and skill doing similar work," determine "the reasonable number of hours required to handle the litigation," and then multiply the rate by the hours. *Id.* at 291-92.

Mr. Pistotnik does not dispute that the "lodestar method" can be ***a*** reasonable way, within a district court's discretion and in an appropriate case, of determining an amount of an attorney fee due. Under the standard of review for the district court's decision in this case, however, that is not the question. The question is whether ***failing*** to use it is *per se* ***unreasonable***.

The law of Kansas, as practically everywhere else in the United States, is that this is not so. To the contrary, under the facts and circumstances of this case, the district court's chosen method of determining that Mr. Pistotnik did the vast majority of the work in the case, substantially performed his agreement, solely was responsible for procuring a settlement offer, his contingent fee and expenses were reasonable, his contingent fee therefore should be prorated, and for these reasons Mr. Pistotnik deserved 90% of his contingent fee plus expenses, was eminently reasonable. It certainly was ***not*** something with which no reasonable person could agree.

The district court did not abuse its discretion. This Court should reverse the Court of Appeals' judgment and affirm the district court's judgment.

A. The "lodestar method" is not and must not be the *only* permissible method of calculating an attorney's *quantum meruit* under a contingent-fee-agreement attorney lien when the attorney was terminated before collection without cause.

Beyond merely failing the standard of review, the Court of Appeals' decision that district courts ***must*** use the "lodestar method" in calculating all amounts of attorney fees in *quantum meruit* under attorney liens stemming from contingent-fee agreements, no matter the circumstances, is an incorrect statement of law, is unreasonable, and would result in an injustice to the people of Kansas.

To the contrary, appellate courts throughout the United States, including many times in Kansas, have affirmed decisions awarding *quantum meruit* of whole or partial contingent fees when, as here, the attorney performed substantial work toward and resulting in the client's recovery, but the client circumvented the attorney without cause just before that recovery. If this Court were to affirm the Court of Appeals and disallow this *ipso facto*, a "cottage industry" would develop in which attorneys would poach clients for nominal fees to "finish up" representations, no attorneys in Kansas would enter into contingent-fee agreements, and injured Kansans unable to pay attorneys out-of-pocket would go unrepresented and left without recourse.

The Court must not allow this. It should reinforce what until now uniformly has been the existing law of Kansas and uphold a district court's discretion to determine reasonable *quantum meruit* for attorney lien awards under the facts and circumstances of each individual case, including a partial or whole contingent fee when, as here, the circumstances equitably warrant it. The district court's decision in this case was readily reasonable under the facts and circumstances. The Court should reverse the Court of Appeals' judgment and affirm the district court's judgment.

1. Courts throughout the United States, including in Kansas, have allowed attorneys all or part of a contingent fee owed when the attorney was terminated without cause.

The Court of Appeals held below that "[a] *quantum meruit* payment is fundamentally incompatible with a contingency fee in a contract for legal services,"[3] reasoning that "a contingency fee builds in a premium over and above the fair market value of the services to account for the risk of no recovery …." *Consolver*, 51 Kan.App.2d at 291, 346 P.3d 1094. As a result, it held that "a contingent-fee model should not be used to establish a *quantum meruit* value of a lawyer's services to a particular client," and instead district courts faced with this situation ***must*** use "[a] lodestar computation, folding in the relevant KRPC 1.5 criteria," which "should generate a fee amount approximating the fair market value of the services a lawyer has provided to a client and, thus, the value of the benefit conferred for a *quantum meruit* award." *Id.* at 291, 293.

This cannot be squared with the law of *quantum meruit*, either in Kansas or in Anglo-American jurisprudence in general. In *quantum meruit*, the "fair market value" is in the equitable eye of the factfinder, to be reasonably determined by that factfinder based on the facts and circumstances of the case, not some rote mathematical calculation.

Thus, when determining the amount due in *quantum meruit* to an attorney who substantially performed under a contingent-fee agreement, "An award in quantum meruit should in all cases reflect the court's assessment of the qualitative services value of the services rendered, made after weighing all relevant factors considered in valuing legal services," one of which is "[a]n agreement as to compensation …." *Padilla v. Sansivieri*, 815 N.Y.S.2d 173,

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[3] The Court of Appeals cited no authority for this statement. *Consolver*, 51 Kan.App.2d at 291, 346 P.3d 1094.

174 (App. Div. 2006). As such, depending on the circumstances, the award could be "fixed as a portion of a contingent fee …." *Id.*

Classically,

> If I employ a person to transact any business for me, or perform any work, the law implies that I undertook, or assumed to pay him ***so much as his labor deserved***. And if I neglect to make him amends, he has a remedy for this injury by bringing his action on the case upon this implied assumpsit; wherein he is at liberty to suggest that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. ***But this valuation of his trouble is submitted to the determination of a jury; who will assess such a sum in damages as they think he really merited***. This is called an assumpsit on a quantum meruit.

3 WILLIAM BLACKSTONE, COMMENTARIES *161 (spelling modernized and Americanized) (emphasis added).

200 years later, the law of Kansas agrees: "Quantum meruit ***is not limited to mere determination of time spent or cost***, or indeed how long the employment existed," but is "[a]s much as [the claimant] ***reasonably deserved to have*** for his labor." *Shultz*, 3 Kan.App.2d at 690, 601 P.2d 9 (emphasis added). Plainly, as Blackstone recounted in the eighteenth century and Kansas courts continue to observe today, the facts may well require more in order equitably to determine the "reasonable value" of services than "time multiplied by rate." The case's facts and circumstances must be taken into account, and the district court, an expert on attorney fees, does not abuse its discretion by doing so and factoring them into its decision.

Notably, the Court of Appeals' decision does not cite any previous Kansas cases reviewing *quantum meruit* determinations of attorney fees owed under attorney liens stemming from contingent-fee agreements. *Consolver*, 51 Kan.App.2d at 293. Instead, the ***only*** jurisdiction it invokes is

the "federal courts in New York," which it says "have used [the lodestar calculation] process, combining factors like those in KRPC 1.5 with a lodestar calculation, to establish fees due terminated lawyers on charging or attorney liens." *Id.* (citing *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 148-49 (2d Cir. 1998); *Antonmarchi v. Consol. Edison Co. of N.Y.*, 678 F.Supp.2d 235, 242 (S.D.N.Y. 2010); *Balestriere PLLC v. CMA Trading, Inc.*, No. 11 Civ. 9459, 2014 WL 7404068 at *3-5 (S.D.N.Y. Dec. 31, 2014)). Reading the Court of Appeals' opinion, one would think that the propriety of awarding a full or partial contingent fee under circumstances like those here, in which the attorney performs the vast majority of the work to obtain the client's recovery but then is terminated without cause shortly beforehand, is a novel question, the only American authorities reviewing which have held it improper.

This is simply untrue. Numerous courts throughout the United States in like circumstances, ***including this Court***, rightly have affirmed determinations precisely akin to the district court's in this case.

First, the three federal New York decisions the Court of Appeals cited are inapposite. One did not involve an attorney lien stemming from a contingent-fee agreement at all. *See Sequa*, 156 F.3d at 148-49 (affirming lodestar calculation for attorney fees earned under hourly-fee agreement through date of termination). While the other two did involve using the lodestar method to calculate fees owed on a contingent-fee agreement, they were trial-court-level determinations of those amounts after the client discharged the attorney midway through the representation and the case still was far from complete at the time of the fee determination. *See Antonmarchi*, 678 F.Supp.2d at 242; *Balestriere*, 2014 WL 7404068 at *3-5.

Most importantly, none of those three foreign decisions holds that, when an attorney is terminated without cause from a contingent-fee

representation after performing nearly all the work to gain the client imminent recovery, a rote lodestar calculation ***must*** be used to the exclusion of any other rationale, and any other rationale is an abuse of discretion.

To the contrary, numerous decisions across the country, including in Kansas, ***have*** reviewed that situation and ***have*** approved trial courts' discretion to enter full or partial contingency awards in that circumstance. George J. Blum, *Limitation to quantum meruit recovery, where attorney employed under contingent-fee contract is discharged without cause*, 56 A.L.R.5th 1 at §§ 3(c), 6, and 7 (1998 supp. 2016) (collecting cases); *see, especially*:

- *Tolson v. Sistrunk*, 332 Ga.App. 324, 332-35, 772 S.E.2d 416 (2015) (where predecessor attorney's work on 5% of contingent fee case benefitted client's ultimate recovery and attorney was discharged without cause, trial court did not abuse its discretion in determining attorney deserved 5% of contingent fee in *quantum meruit*);
- *Wodecki v. Vinogradov*, 2 N.Y.S.3d 590, 590-91 (App. Div. 2015) (same re: 25% of contingent fee);
- *Rosenthal, Levy & Simon, P.A. v. Scott*, 17 So.3d 872, 875-76 (Fla. App. 2009) (predecessor attorney deserved percentage of contingent fee in *quantum meruit* based on work he performed before being discharged without cause, reversing trial court's decision otherwise);
- *Padilla*, 815 N.Y.S.2d at 174 (where predecessor attorney was disbarred for unrelated reason during client's case and contributed to client's recovery, trial court did not abuse its discretion in holding attorney deserved corresponding portion of contingent fee in *quantum meruit*);
- *Taylor v. Shigaki*, 84 Wash.App. 723, 728-31, 930 P.2d 340 (1997) (where predecessor attorney prosecuted case through settlement offer, client fired

him without cause and retained new attorney to finalize settlement, trial court did not abuse its discretion in finding predecessor attorney substantially performed his contract and deserved *quantum meruit* of full contingent fee on the amount of the settlement he negotiated);

- *Martin v. Buckman*, 883 P.2d 185, 191-96 (Okla. App. 1994) (same re: appropriate portion of initial settlement offer; "If an attorney is discharged without cause, the lawyer working on a contingent fee basis is entitled to receive for his services a proportionate share of any contingent fee fund eventually created");
- *Morris v. City of Detroit*, 189 Mich.App. 271, 277-80, 472 N.W.2d 43 (1991) (where predecessor attorney's work on 99.4% of contingent-fee case benefitted client's ultimate recovery and he was discharged without cause, trial court did not abuse its discretion in determining he deserved 99.4% of contingent fee in *quantum meruit*);
- *Cazares v. Saenz*, 208 Cal.App.3d 279, 286-90 (1989) (same re: 50% of contingent fee); and
- *Kaushiva v. Hutter*, 454 A.2d 1373, 1374-75 (D.C. App. 1983) (where predecessor attorney prosecuted case through arbitration and client then fired attorney without cause and hired new attorney to finalize award, trial court did not abuse its discretion in finding predecessor attorney substantially performed his contract and deserved full contingent fee on the amount of the award in *quantum meruit*; citing other states' cases).

The reason for this is, plainly, where an attorney's substantial work under a contingent-fee agreement benefits the client, and the attorney nonetheless is terminated without cause, especially, as here, in an attempt to avoid his fee, that benefit the client received is a factor the trial court does not abuse its discretion in equitably factoring into *quantum meruit*:

> Where the efforts of an attorney who was employed under a contingent fee contract would have a tendency to advance the client's claim or to enhance the possibility of a favorable result, … the contract and the reasonably estimated value of the case should be considered in fixing a reasonable attorney's fee. ***For "the real value of the service" encompasses "the benefits resulting to the client."***

Booker v. Midpac Lumber Co., Ltd., 65 Haw. 166, 172, 649 P.2d 376 (1982) (citation omitted) (emphasis added).

Despite the Court of Appeals' failure below to cite any Kansas authorities in holding otherwise, this notion is far from foreign to the law of Kansas. On many occasions throughout the past century, Kansas appellate courts, including this Court, have held that a district court did not abuse its discretion in determining in *quantum meruit* that an attorney employed under a contingent-fee agreement but terminated without cause deserved a corresponding portion of his contingent fee – or even the full contingent fee. *See Carter v. Dunham*, 104 Kan. 59, 177 P. 533, 533-35 (1919); *Graham v. Wichita Terminal Elevator Co.*, 115 Kan. 143, 222 P. 89, 90-91 (1924); *Sowers v. Robertson*, 144 Kan. 273, 58 P.2d 1105, 1105-07 (1936); *Bryant v. El Dorado Nat'l Bank*, 189 Kan. 486, 486-90, 370 P.2d 85 (1962); *Madison*, 8 Kan.App.2d at 576-82, 663 P.2d 663; *Jim ex rel. Grimes v. Gamelson*, No. 106664, 2013 WL 1876428 at *1, 300 P.3d 115 (Kan. App. 2013) (unpublished).

In *Carter*, a client entered into a contingent-fee agreement with an attorney in a personal injury case (the Court's opinion does not disclose the contingency percentage). 177 P. at 533. Over the next six months, the attorney performed a variety of pretrial services, after which the client suddenly dismissed the case without the attorney's knowledge. *Id.* at 534. The client then turned around and hired another attorney who filed a new

suit and quickly settled the action. *Id.* The first attorney filed a lien on the settlement proceeds and sued for a portion of his contingent fee (the Court's opinion does not disclose the portion). *Id.* The district court agreed and awarded the attorney that portion. *Id.*

On appeal, this Court held that Kansas's attorney lien statute applies equally to sums due under contingent-fee agreements. *Id.* at 534-35. It then held that the attorney was indeed due a portion of his contingent fee and the district court did not err in determining the amount. *Id.* at 535.

In *Graham*, a client hired an attorney on a 33 1/3% contingency to pursue a workers' compensation claim. 222 P. at 90. While the case was ongoing, but before trial, the client took it upon himself to settle the claim without the attorney's knowledge. *Id.* The attorney filed a lien on the proceeds of the settlement and sought to recover 33 1/3% of what he argued was the (much higher) likely full amount of a judgment had the claim proceeded to trial. *Id.* The district court agreed and equitably awarded the attorney that amount. *Id.*

On the client's appeal, this Court held that, while the client had the right to fire the attorney and settle with the defendant himself, the attorney substantially had performed under their agreement and equitably deserved 33 1/3% of the proceeds. *Id.* at 91. Under the terms of the contract, however, the "proceeds" were not the theoretical amount of a post-trial judgment, but instead were the amount of the settlement. *Id.* The Court affirmed the district court's judgment but modified the amount of the fees to equal 33 1/3% of the settlement. *Id.*

In *Sowers*, a client hired an attorney on a 40% contingency to pursue a personal injury claim. 58 P.2d at 1105. The attorney reached a settlement with the defendant, which the client rejected. *Id.* Then, without the

attorney's knowledge, the client contacted the defendant and agreed to the settlement. *Id.* The attorney filed a lien and sought to collect his contingent fee on the amount for which the client had settled. *Id.* The district court agreed, awarded the fee, and the client appealed. *Id.*

This Court affirmed, holding that the attorney substantially had performed his agreement, and it had "no difficulty in finding in the record sufficient competent evidence to sustain the findings of the trial court …." *Id.* at 1107. The attorney was responsible for the client's recovery of the amount and equitably deserved his entire contingent fee. *Id.* at 1106-07.

In *Bryant*, a client hired an attorney on a 25% contingency to collect on a judgment on a promissory note. 189 Kan. at 486-87, 370 P.2d 85. For some 15 years, the attorney tried to find property on which to execute, filing numerous executions and engaging in a detailed investigation, all without success. *Id.* at 487-88. Unbeknownst to the attorney, the client then hired a second attorney, who quickly settled with the judgment debtor. *Id.* at 488. The first attorney then sued the client to recover his contingent fee on the settlement, and the district court agreed. *Id.* at Syll.

Echoing the cases discussed above, this Court affirmed. *Id.* at 488-90. The attorney substantially had performed under the agreement and equitably deserved his share. *Id.* "[T]he evidence of record … was ample to sustain the trial court's judgment …." *Id.*

In *Madison*, a client hired an attorney on a 25% contingency to pursue a workers' compensation claim. 8 Kan.App.2d at 576, 663 P.2d 663. After a year of pretrial proceedings, the client discharged the lawyer and hired a new attorney also on a 25% contingent basis, who proceeded through hearing and an award. *Id.* at 576-77. The first attorney filed a statutory request for his 25% contingent fee, which the second attorney disputed. *Id.* The

administrative law judge held a hearing and, though the attorney could not prove his hours in the case, the judge apportioned the 25% award between the two lawyers, granting the first about 4% of the total award and the remainder to the second, and the director affirmed. *Id.* The first attorney appealed, arguing he deserved the entire 25%. *Id.*

The Court of Appeals held that this apportionment was not an abuse if discretion. *Id.* at 578-82. "To allow two or more attorneys, each of whom has represented a single claimant at various stages of the proceedings before the division of workers' compensation, to each collect a contingent fee of 25 percent of the compensation awarded that claimant would substantially reduce, if not totally eradicate, his recovery." *Id.* at 580. Had the attorney substantially performed the agreement, as in *Bryant*, *Sowers*, *Graham*, and *Carter*, that might have been different. *Id.* at 579. Given the circumstances, however, the apportionment was reasonable. *Id.* at 581-82.

Finally, in *Jim*, the Court of Appeals affirmed *per curiam* a district court's apportionment of a $1.6 million attorney fee in a medical malpractice case between the plaintiff's first set of attorneys and his second set. 2013 WL 1876428 at *1, 300 P.3d 115. (Though the court's unpublished decision did not detail the district court's 73-page decision, a copy is in the record on appeal (R. 6 at 9-81).)

The first set of attorneys filed an attorney lien for $1.1 million, which the second set contested. *Id.* Ultimately, analyzing all the KRPC 1.5 factors and reasoning that the first set substantially performed under the agreement, achieved a $2,980,759 settlement offer, and "there would have been no case, no jury trial, no award of damages, and no attorney fees had it not been for" the first set, the district court initially calculated the first set's fees based on the settlement offer, which equated after expenses to a 33 1/3%

contingent fee of $928,002.12 (R. 6 at 72). At the same time, it held that counsel's failings meant that this fee should be reduced a further 25%, for a net recovery of $696,071.20, which the district court awarded (R. 6 at 72).

The Court of Appeals affirmed. 2013 WL 1876428 at *1, 300 P.3d 115. It stated simply that,

> Having independently reviewed the record on appeal, the thorough written ruling issued by the district court, and the parties' appellate briefs, we affirm the district court's decision under Supreme Court Rule 7.042(b)(3), (5), and (6) … because no reversible error of law appears, the findings of fact of the district court are supported by substantial competent evidence, the opinions or findings of fact and conclusions of law of the district court adequately explain the decision, and the district court did not abuse its discretion.

Id.

Plainly, whatever calculation methods the Court of Appeals observed below that a few federal courts in New York have used, in ***each and every instance*** in the history of Kansas in which a district court equitably determined that an attorney who was terminated without cause deserved a partial or full amount of his contingent fee for having substantially performed under his agreement, the appellate court held this was not an abuse of discretion and affirmed.

This is because this is how equitable determinations of *quantum meruit* – what a party reasonably deserves for his labor – must be reviewed: they must be affirmed unless no reasonable person could agree with the district court. Here, as in all these cases, and particularly as in *Sowers*, *Bryant* and *Jim*, the district court equally did not abuse its discretion in determining that Mr. Pistotnik substantially had performed under his agreement and deserved 90% of his agreed-upon contingent fee in *quantum meruit*.

2. If, under these circumstances, all contingent-fee agreements in Kansas had to be transformed into hourly-fee agreements, no attorneys would enter into contingent-fee agreements, working a terrible injustice on the public.

The Court of Appeals' decision below, though, does not merely violate Kansas's actual abuse of discretion standard of review and fundamentally ignore the century of existing Kansas law contrary to it. If affirmed, it also would work a grave systemic injustice.

If this Court were to agree with the Court of Appeals that, in ***all*** circumstances, the amount due under ***all*** contingent-fee attorney liens ***must*** be calculated by the rote lodestar method – only the lodestar method, and nothing but the lodestar method, transmuting them into hourly-fee agreements – Kansas attorneys no longer would agree to contingent fees. If that occurred, ordinary Kansans who have suffered personal injuries, professional negligence, property damage, breaches of contract, etc., and who could not afford to pay an attorney out-of-pocket, would have no possibility of representation. As a matter of justice, the Court must not allow that.

The Court of Appeals below characterized a contingent fee, purely from an attorney's perspective, as an arrangement that "builds in a premium over and above the fair market value of the services to account for the risk of no recovery – and, thus, no payment – not only in that case but in other cases the lawyer considers or takes" – that "offsets uncompensated time the lawyer spends investigating or litigating matters that end up producing no revenue." *Consolver*, 51 Kan.App.2d at 291, 346 P.3d 1094.

Technically, economically, that may well be true. But that is not how a working-class injured client sees it. "Often contingent fee agreements are the only means possible for litigants to receive legal services – contingent fees are still the poor man's key to the courthouse door. The contingent fee system

allows persons who could not otherwise afford to assert their claims to have their day in Court." *Sneed v. Sneed*, 681 P.2d 754, 756 (Okla. 1984).

The Court of Appeals' approach would destroy Kansas attorneys' ability economically to enter into contingent-fee agreements and pursue justice for citizens unable to afford it otherwise. Under it, if an attorney entered into a contingent-fee agreement with a client, performed substantial work, and pursued the case all the way up to the point of a settlement offer, à la *Sowers* or this case, the client could fire the lawyer without cause, hire a new attorney to be paid nominally to finalize the settlement, and the first attorney could receive only to a rote lodestar calculation of his time. Indeed, given the Court of Appeals' holding, the attorney could pursue the case all the way ***through trial***, even to judgment, perhaps for years, but as long as no money yet had been collected the client still could void the contingency. Where is the line? The Court of Appeals does not draw one.

Essentially, clients would be able to hire an attorney, pay him nothing with the future promise of a possible great deal more, and then take that promise away at the last minute, all with no consequences. Why would any attorney agree to a contingent fee knowing he likely never will receive it, and his contract is worthless? Indeed, it is easy to see the "cottage industry" of secondary "poaching" lawyers that would develop: attorneys charging a small nominal fee for a few hours' work to finalize what another lawyer has spent years of hard work pursuing, increasing the client's aggregate award by decreasing the first attorney's agreed-upon compensation.

Plainly, ***mandating*** pure, rote lodestar calculations for contingent-fee attorney liens in ***all*** circumstances would work a severe injustice to Kansas's most needful citizens. This Court must allow district courts discretion under the proper facts and circumstances, as here, to see the equities differently.

B. The district court's award of $97,101.08 was reasonable.

As in all the cases from other jurisdictions detailed *supra* at 14-15, and the Kansas decisions discussed *supra* at 16-20, the district court did not abuse its discretion in holding that, under the facts and circumstances of this case, Mr. Pistotnik equitably deserved 90% of his contingent fee on the settlement amount he negotiated, plus his expenses.

After hearing testimony in two lengthy evidentiary hearings from Mr. Pistotnik, the plaintiff, and the defendant's counsel, and viewing numerous exhibits (R. Vols. 3-7), the district court entered detailed findings of fact and conclusions of law (R. 1 at 81-84). It found Mr. Pistotnik represented the plaintiff for 14 months, during which he "interviewed witnesses, hired experts, obtained medical records, propounded discovery, attended depositions, prepared a settlement brochure, and attended mediation," "incurred expenses in the amount of $10,156.81," which were "reasonable," and "did the majority of the work to prepare the case for settlement and/or trial" (R. 1 at 82, 84). His hard work secured a $300,000 settlement offer (R. 1 at 82). At that point, "the case was 90% complete" (R. 1 at 84).

If the case did not settle, Mr. Pistotnik's contingent share was to increase, which the plaintiff knew (R. 1 at 82, 84). Shortly before that occurred, the plaintiff fired Mr. Pistotnik without cause – "without explanation and/or complaint," even though she was satisfied with his work and "trusted him completely" (R. 1 at 83-84). Thereafter, through the new attorney, the case settled for $360,000, though, as defense counsel testified, this increase over the earlier settlement offer was due merely to the fact that the plaintiff became employed, increasing prospective damages (R. 1 at 82-83). As a result, the plaintiff's new attorney "added no value to the settlement of the case" (R. 1 at 83).

Viewing the record in a light most favorable to the district court's judgment, "accept[ing] as true the evidence, and all inferences to be drawn therefrom, which support or tend to support the findings in the trial court, and disregard[ing] any conflicting evidence or other inferences which might be drawn therefrom," *Matter of Estate of Robinson*, 236 Kan. 431, 439, 690 P.2d 1383 (1984), these findings are supported by substantial evidence. *See* Court of Appeals Brief of the Appellees pp. 1-9. The primary inference, of course, is that the plaintiff sought to avoid Mr. Pistotnik's contingent fee by terminating him without cause and employing another attorney nominally to complete the recovery Mr. Pistotnik had spent more than a year procuring.

From these findings, the district court analyzed the KRPC 1.5 factors – ***one of which is "whether the fee is fixed or contingent,"*** *id.* at 1.5(a)(8)[4] – and prior case law, including *Jim* and *Madison*, to determine the appropriate equitable *quantum meruit* award for Mr. Pistotnik (R. 1 at 83-84). Noting that "Mr. Pistotnik did not finalize the settlement," but procured a $300,000 offer and performed 90% of the work toward the eventual final settlement to which the second attorney added no value, it determined that "Mr. Pistotnik is entitled to 90% of his one-third contingency fee of $300,000.00 [($300,000.00 - $10,156.81] x 33 1/3% x 90% = $86,944.27]," plus his expenses of $10,156.81, for a total award of $97,101.08 (R. 1 at 83-84).

As in the cases from other jurisdictions detailed *supra* at 14-15, and the Kansas decisions discussed *supra* at 16-20, especially *Sowers*, *Bryant*, and *Jim*, the district court's decision plainly was reasonable. It certainly was not "arbitrary, fanciful, or unreasonable." *Unruh*, 289 Kan. at 1202, 221 P.3d

[4] Extraordinarily, and citing no authority, the Court of Appeals held that this express factor should be ***excluded*** from the district court's *quantum meruit* analysis. *Consolver*, 51 Kan.App.2d at 292, 346 P.3d 1094.

1130. Especially given the decisions from throughout the United States, including Kansas, affirming identically-reasoned awards in identical circumstances, it certainly cannot be said that "no reasonable person would take the trial court's view." *Johnson*, 281 Kan. at 940, 135 P.3d 1127.

The district court's determination in *quantum meruit* as to what Mr. Pistotnik "reasonably deserved to have for his labor," *Shultz*, 3 Kan.App.2d at 690, 601 P.2d 9, was based on a well-established "rational standard" routinely used in these exact circumstances, both previously in Kansas for nearly a century and throughout the United States. *Id.* at 691.

Mr. Pistotnik's "efforts … under [his] contingent fee contract" with the plaintiff "advance[d] the plaintiff's claim [and] enhance[d] the possibility of a favorable result …." *Booker*, 65 Haw. at 172, 649 P.2d 376. As a result, it was not and could not be an abuse of discretion for the district court to determine it was equitable to consider that "contract and the reasonably estimated value of the case … in fixing a reasonable attorney's fee." *Id.* "[T]he real value of [Mr. Pistotnik's] service emcompasse[d] the benefits resulting to the" plaintiff. *Id.* (citation and quotation marks omitted).

The district court was well within its discretion to hold that, under these facts and circumstances, viewed most favorably to its judgment, the reasonable fees and expenses Mr. Pistotnik deserved in *quantum meruit* were $97,101.08. The Court of Appeals' decision otherwise violated the applicable standard of review, misapplied a century of Kansas law, and would work a grave injustice on a huge swath of ordinary Kansans. Its judgment should be reversed and the district court's judgment affirmed.

Conclusion

The Court should reverse the Court of Appeals' judgment and affirm the district court's judgment.

Respectfully submitted,

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Certificate of Service

I certify that, on February 24, 2016, I electronically filed the foregoing with the Clerk of the Court by using the electronic filing system, which will send notice of electronic filing to the following, that I mailed two true and accurate copies of the foregoing to the following, and that I e-mailed a true and accurate Adobe PDF copy of the foregoing to the following:

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