COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2024-SC-0306-D

EMERY LAW OFFICE, INC. **APPELLANT**

v.

Court of Appeals, 2013-CA-002074
Jefferson Circuit Court, 22-CI-2904

JOEL FRANKLIN **APPELLEE**

BRIEF FOR APPELLANT, EMERY LAW OFFICE, INC.

Respectfully submitted,

/s/ Peter L. Ostermiller
Peter L. Ostermiller
1303 Clear Springs Trace, Ste. 110
Louisville, Kentucky 40223
502-426-1798 (office)
502-470-9910 (fax)
502-648-4160 (cell)
peterlo@ploesq.com

/s/ Andrew S. Epstein
Andrew S. Epstein
Bahe, Cook, Cantley, & Nefzger
1041 Goss Avenue
Louisville, Kentucky 40217
(502) 587-2002 (office)
andrew@bccnlaw.com

Attorneys for Appellant, Emery Law Office, Inc.

CERTIFICATE OF SERVICE

I certify that this Brief for Appellants was electronically filed with Hon. Katie Bing, Clerk of the Supreme Court of Kentucky, State Capitol, Room 235, 700 Capital Avenue, Frankfort, KY 40601 using the Supreme Court of Kentucky eFiling system this 14th day of April, 2025, and served via U.S. Mail, First-Class postage prepaid, upon: (1) Judge Mitch Perry, Jefferson Circuit Court, Division Three, 700 West Jefferson Street, Louisville, Kentucky 40202; (2) Counsel for Appellee, Joseph E. Blandford, 1387 South Fourth Street, Louisville, Kentucky 40208, JEBlaw@bellsouth.net; and (3) Kate R. Morgan, Clerk, Court of Appeals, 669 Chamberlin Avenue, Suite B, Frankfort, Kentucky 40601. It is further certified that Appellant did not check out the record on appeal. Counsel further certifies that pursuant to RAP 44(D) that this Brief complies with said page limit set forth in RAP 44(d) and therefore, no word count certificate is necessary.

/s/ Peter L. Ostermiller
Peter L. Ostermiller

INTRODUCTION

This case is before this Court on Discretionary Review from a Court of Appeals' Opinion and Order, designated "Not To Be Published," reversing the Circuit Court's Opinion and Order. The Circuit Court, in ruling on Motions for Summary Judgment filed by both parties, held the departing lawyer fee allocation provision in the associate attorney employment agreement by which the Appellant, Emery Law Office, hired the Appellee, Mr. Franklin, was reasonable and enforceable. The Court of Appeals held the departing lawyer fee allocation clause was per se void in violation of SCR 3.130(5.6) as an improper limitation on the right of Mr. Franklin to practice law. The Appellant, Emery Law Firm, respectfully submits the Opinion and Order of the Circuit Court was sound and the Court of Appeals misapplied the law to the undisputed facts. The issue of attorney employment agreements contemplating what would otherwise be a quantum meruit fee allocation appears to be an issue of first impression with this Court. The Emery Law Firm respectfully requests this Court reverse the Court of Appeals and affirm the Opinion and Order of the Circuit Court.

STATEMENT CONCERNING ORAL ARGUMENT

This Court has designated this case for Oral Argument in its Order Granting Discretionary Review. The Appellant agrees that Oral Argument would be helpful to the Court in deciding the issues presented.

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STATEMENT OF THE CASE

PROCEDURAL HISTORY

On June 9, 2022, the Appellant, Emery Law Office, filed a breach of contract lawsuit in the Jefferson Circuit Court, 22-CI-002904, against a recently terminated associate attorney, the Appellee, Mr. Franklin. The lawsuit was based on the employment agreement Mr. Franklin signed before he began working for the Emery Law Office. (TR 1) The parties engaged in discovery by way of written discovery and depositions. Ultimately, both parties filed Motions for Summary Judgment. (TR 123 and 139)

The Circuit Court, in its April 18, 2023 Opinion and Order, a copy of which is attached hereto as Appendix B, granted Emery Law Office's Motion and denied Mr. Franklin's Motion. (TR 157) The Circuit Court held the departing attorney fee allocation provisions in Mr. Franklin's employment agreement did not constitute an improper fee division and that the fee division arrangement was fair. The Circuit Court also noted Mr. Franklin, as an attorney, was a "sophisticated party who negotiated the terms of the contract."

Mr. Franklin appealed to the Court of Appeals. Following Briefing, the Court of Appeals rendered its May 31, 2024 Opinion and Order Reversing and Remanding, a copy of which is attached hereto as Appendix A. The Court of Appeals held the fee allocation provision regarding a departing lawyer was not governed by SCR 3.130(1.5(e) regarding fee division. But the Court of Appeals held the provision violated SCR 3.130(5.6) as an improper limitation on the right of Mr.

Franklin to practice law and held that provision was not enforceable.

The Emery Law Office filed a Motion for Discretionary Review with this Court, to which Mr. Franklin filed a Response. On February 13, 2025, this Court entered an Order granting that Motion for Discretionary Review.

FACTS

The case before the Circuit Court was resolved on corresponding Motions for Summary Judgment filed by both parties. Therefore, both parties acknowledged there were no genuine issues of material fact in dispute. The material facts set out below are not in dispute.

Emery Law Office is a law firm concentrating its practice in personal injury cases. Such cases are routinely pursued on a contingent fee basis.

In March of 2020, Emery Law Office hired Mr. Franklin as an associate attorney. Mr. Franklin's duties were the management and negotiation of personal injury cases at the pre-litigation stage and at the litigation stage. Mr. Franklin was paid a fixed salary and there was the possibility of quarterly bonuses based on revenue he generated based on certain performance thresholds. (TR 93, 95, 97)

Before Mr. Franklin's employment began, Emery Law Office and Mr. Franklin entered into a written employment Agreement. The Agreement contained a provision regarding the allocation of contingent attorney fees on cases which followed Mr. Franklin if he left the law firm, voluntarily or involuntarily. Pursuant to that provision, in the event Mr. Franklin left the law firm, any attorney's fees on cases which went with him and were resolved after he left would be divided 75% to

Emery Law Office and 25% to Mr. Franklin, and Emery Law Office would recover its costs. (TR 84-86) The language of that provision concerning contingent fee cases was set out in numerical paragraph 3 of the Agreement, and reads follows:

> "Law Firm acknowledges that should Employee's employment relationship with Law Firm terminate, there may exist instances where clients of the Law Firm may choose to continue to be represented by the Employee. As for contingency fee cases where a client of the Law Firm chooses to continue representation with the Employee, upon severance of the employment of Employee, whether voluntary or involuntary, Employee expressly acknowledges and agrees that Law Firm shall be entitled to payment of Seventy-Five percent of the contingency fee earned by Employee together with the repayment of all costs expended by the Law Firm prior to Employee's departure. The purpose of such agreement is to avoid disputes requiring time-consuming *Quantum Meruit* analysis or necessitating the involvement of clients and / or insurance adjusters which could in turn delay the settlement or distribution of settlement funds of a case. Employee further expressly acknowledges and agree that the Law Firm shall have charging lien upon the contingency matter until the foregoing seventy-five percent fee is paid. To that end, Employee expressly acknowledges and agrees that the Law Firm shall have the express right to perfect the charging lien as permitted by Kentucky law."

The last paragraph of that provision not shown above contained one sentence concerning hourly billed cases, which were not at issue in this case. All of the cases at issue were contingent fee cases.

The above-quoted provision in the Employment Agreement not only set out the percentage allocation but also set out disclosures and reasons to support the allocation. That paragraph of the Employment Agreement expressly noted the allocation would apply whether Mr. Franklin's employment termination was voluntary or involuntary, and that the purpose of such an allocation was to avoid lengthy disputes regarding a *quantum meruit* analysis, which could include the

involvement of clients and/or insurance adjusters, and the potential for delay in the resolution of the client's case.

The departing attorney fee allocation paragraph under the Employment Agreement was not between a new attorney for the client who had no previous employment or affiliation with the Emery Law Office. Instead, the departing attorney, Mr. Franklin, had already benefited from the affiliation and resources of the Emery Law Office in the pursuit of the case before Mr. Franklin left the Emery Law Office. Under these facts, the attorney, Mr. Franklin, would not have brought the client to the law firm, but instead it was the Emery Law Office which acquired the case and assigned the associate attorney, Mr. Franklin, to represent the client. This point is discussed in the Argument section of this Brief. However, this point is noted in this discussion of the facts since this case is a materially different scenario than when the client is no longer represented by the law firm and retains an entirely new attorney to continue to pursue the client's case, as in the *Baker v. Shapero* case, discussed later in this Brief.

In this case, a little over two years later, in April of 2022, the Emery Law Office terminated Mr. Franklin. He set up a solo law practice and continued his practice without interruption. (TR 97) There was no evidence presented by Mr. Franklin that his ability to set up his solo law practice was impaired in any way by the departing lawyer fee allocation provision of the Employment Agreement quoted above. Moreover, of the clients who had initially been at the Emery Law Office and went with Mr. Franklin, there was no evidence or contention that the

representation of any of those clients was impaired in any way by the fee allocation provision of the Agreement. Those considerations alone support the reasonableness of the above-quoted fee allocation percentages in Mr. Franklin's Employment Agreement.

Fourteen clients previously assigned to Mr. Franklin while he was at the Emery Law Office elected to go with Mr. Franklin to his solo practice. In three of those cases there were no attorney's fees earned or collected, and regarding the fourth case, the Emery Law Office voluntarily relinquished its fee claim. Therefore, the underlying civil suit concerned ten of the cases. All of the cases were contingent fee cases, which was consistent with the personal injury law practice of the Emery Law Office. A list and status of those cases at the time Emery Law Office filed its Motion for Summary Judgment is set out below.

One month later, in May of 2022, Mr. Franklin, by counsel, sent a letter to the Emery Law Office. The letter stated Mr. Franklin was not going to follow the "break-up" provision of the Agreement he signed regarding the fee allocation on "public policy" grounds. Instead, Mr. Franklin contended that Emery Law Office was only entitled to a *quantum meruit* fee recovery on any of those ten cases. (TR 87) There is nothing in the record that Mr. Franklin, before he was hired by the Emery Law Office and signed his Employment Agreement, during his two years at the Emery Law Office, or during the process of leaving the Emery Law Office, stated he was going to repudiate the employment agreement if he was no longer employed at the law firm.

One month later, on June 9, 2022, the Emery Law Office filed the breach of contract lawsuit in the Jefferson Circuit Court, which initiated the present case. (TR 1) The procedural history which followed the filing of that Complaint is set out above in the Procedural History.

Below is a brief description and status of the above-mentioned ten cases at the time the parties filed their respective Motions for Summary Judgment before the Trial Court. This was the status of those cases at that time. Although the status of those cases would have changed since that time, for the purpose of the consideration of this case, the status of those cases should be considered when the breach of contract case was before the Trial Court in ruling on the competing Motions for Summary Judgment.

a. Client RC: car wreck case in pre-litigation where plaintiff is still treating for her injuries. Franklin's work on RC's case includes speaking to the client on the telephone, and making phone calls on her behalf, both before and after his termination on 4/18/22. (TR. 102-103). RC's accident occurred in Indiana, and Franklin is not licensed to practice law in Indiana. (TR. 102).

b. Client KG**:** uninsured motorist case in which Franklin referred it to counsel outside the Emery firm for purposes of litigation. Franklin drafted the complaint prior to 4/18/22, and then he and outside co-counsel evenly split the litigation tasks after 4/18/22, which consisted of the exchange of written discovery. There were no depositions taken in the case. The case ultimately settled for $20,000, without a trial. Franklin did not pay any of the litigation costs. (TR. 104-105).

c. Client BL: car accident case in which Franklin drafted the complaint completed the bulk of the litigation tasks prior to 4/18/22. The case settled at mediation 5/3/22, just two weeks after he left the Emery firm. The case settled for $15,000, without a trial. Franklin did not pay any of the litigation costs. (TR. 106).

d. Client WM: bad faith insurance case in which Franklin brought in outside counsel to assist him with the litigation. Franklin and co-counsel split the work. The lawsuit was filed in 2020 and settled on September 16, 2022, five months after

his termination from the Emery firm. The case ultimately settled for $70,000, without a trial. Franklin did not pay any of the litigation costs. (TR. 107-108)

e. Client DN: car accident case in which Franklin referred the case to outside counsel who filed suit. Franklin is not listed on the complaint as attorney for the plaintiff, though he states he has assisted his co-counsel with the litigation. The complaint was filed in June of 2022, and co-counsel paid the filing fee. Co-counsel has handled the exchange of written discovery. Franklin's work on the case while still employed with Emery consisted of talking to the client and drafting a settlement demand to the insurance carrier which was ultimately rejected. (TR. 109-110).

f. Client SN: car accident case in which Franklin filed suit on behalf of the plaintiff on September 9, 2020, and completed the bulk of the litigation tasks prior to his termination on 4/18/22. The case settled in September of 2022 for $10,000 without trial. Emery paid all of the case expenses. (TR. 110-111).

g. Client HS: car accident case in which Franklin filed suit on October 21, 2020. Franklin brought in outside co-counsel to assist him and they split the work. Franklin did not pay any of the case expenses. On September 9, 2022, (five months after his termination on 4/18/22), the case settled for $19,400, without a trial. (R. 112-113).

h. Client DS: nursing home neglect case in which Franklin referred the case to outside counsel. Suit was filed on April 23, 2021, and Franklin is not listed as attorney for the plaintiff on the complaint and did not draft the complaint. Franklin assisted outside counsel in defending the plaintiff's deposition, which was taken some time after he left the Emery firm. Franklin has not paid any of the case expenses. (TR. 113-114).

i. Client KS: car accident case in which the case settled in pre-litigation for $12,000. Emery's paralegal drafted the settlement demand, and Franklin revised it and sent it to the insurance company prior to 4/18/22. Franklin settled the case through final negotiations with the insurance adjustor sometime after 4/18/22. Franklin had no expenses associated with this case. (TR. 115-116).

j. Client JW: car accident case in which Franklin filed suit on September 19, 2022. Franklin paid the filing fee and hired a vocational expert for $400 to write a report about JW's lost wages. The case settled shortly after the lawsuit was filed with no exchange of written discovery, depositions, or motion practice. Prior to 4/18/22, Emery's paralegal helped Franklin gather all the relevant medical records. Also prior to his termination, Franklin drafted a settlement demand letter to the insurance

company and engaged in some negotiations. The case ultimately settled for $155,000. (TR. 116-117).

As noted in these cases, Emery Law Office resources and support staff assisted in a number of these cases even after Mr. Franklin left the Emery Law Office. And, in some of these cases the resolution occurred in a relatively short period of time after Mr. Franklin left the Emery Law Office, and not a significant amount of work was performed by Mr. Franklin on those cases after he left the office. Again, these factors support the reasonableness of the fee allocation provision in the departing attorney fee allocation paragraph in the Employment Agreement quoted earlier in this Brief.

ARGUMENT

STANDARD OF REVIEW

Both parties filed Motions for Summary Judgment. Emery Law Office filed its Motion for Summary Judgment, (TR 123), and Mr. Franklin filed his combined Response and Counter-Motion for Summary Judgment, (TR 139). Therefore, both parties have acknowledged there were no genuine issue of material fact to be resolved by the trier of fact. As such, the appellate standard of review is de novo, since a Summary Judgment does not involve any Findings of Fact. *3D Enters. Contracting Corp. v. Louisville & Jefferson County Metro Sewer District*, 174 SW2d 440, 445 (Ky. 2005). Moreover, this is a contract action based on an employment contract whereby Mr. Franklin was employed as an associate attorney with the Emery Law Office. Therefore, the interpretation and construction of the

contract is a matter of law subject to de novo review. *EQT Production Company v. Big Sandy Company LP*, 590 SW3d 275, 285 (Ky. App 2019)

A. Law Firms And Lawyers May Enter Into Employment Agreements Which Include Provisions For How Contingent Case Attorney's Fees Will Be Allocated Regarding Cases The Departing Attorney Continues To Handle After Termination Of Employment.

The issue of such employment agreements between law firms and attorneys contemplating the fee allocation following an attorney's departure appears to be a question of first impression with this Court. This Court has previously addressed, to varying degrees, the issue of the *quantum meruit* determination to be made if a client is represented by successor counsel in an contingent fee case. But, this Court has not considered the issue of law firms and their attorneys addressing the issue through an employment agreement before the attorney departs the law firm.

Set out below is a discussion of cases from around the country which have addressed this issue and have generally indicated that law firms and their lawyers may contractually anticipate what will occur if the lawyer leaves the law firm concerning the allocation of fees on contingent fee cases which accompany the lawyer. Courts have turned aside attacks on such agreements as violative of their jurisdictions' version of the fee division Rule, SCR 3.130 (1.5(e)) in Kentucky, or the Rule concerning restrictions on the right to practice law, SCR 3.130(5.6) in Kentucky.

These cases reflect a reasoned analysis and approach which is particularly

significant regarding contingent fee cases given prevailing case law if there is no contractual allocation of those fees if an attorney leaves a law firm. In Kentucky, that general *quantum meruit* case law goes back to *Baker v. Shapero,* 203 S.W.3d 697 (Ky 2006). Pursuant to that body of law, the attorney's fee of the first lawyer, or in this case the law firm, is subject to a *quantum meruit* fee analysis. The complexity, inherently contentious time-consuming and costly nature of such *quantum meruit* claims and litigation is discussed in detail below as noted in case law which has confronted those issues. Of course, contractual language anticipating that possibility would address that issue, as in the present case.

That does not mean such employment agreements are not subject to judicial oversight. But, that would be a contract case issue concerning the reasonableness of the contract language, not an amorphous *quantum meruit* lawsuit. And, that judicial oversight is what occurred in the present case. The underlying lawsuit filed by Emery Law Office was a contract action to enforce the employment agreement Mr. Franklin signed when he began working for that law firm. When Mr. Franklin, after leaving the law firm, repudiated the fee allocation language, the Emery Law Office filed a contract case to enforce the contractual provision. When Mr. Franklin raised an issue before the Circuit Court as to the reasonableness of the contract language concerning fee allocation, the Circuit Court held the contract term was reasonable and enforceable. That is the way the process should work.

The contractual fee allocation provisions found in contracts which have

been the subject of reported cases around the country sometimes fall into several categories. Some contracts provide for one percentage regarding all cases which go with the departing lawyer, such as seventy-five percent/twenty-five percent allocation as in the present case. Other contracts may provide for a sliding scale in which the percentage to the law firm decreases the longer the case has been with the departing lawyer after leaving the law firm. However, those are issues of degree not kind. Such contractual provisions themselves are deemed reasonable and enforceable.

The threshold issue to consider before looking at why such contract terms are reasonable is to review prevailing law regarding the *quantum meruit* analysis which is required in the absence of any contractual resolution of the issue.

In *Baker v. Shapero,* 203 S.W.3d 697 (Ky 2006), this Court held that if the client terminates the attorney in a contingent fee case and obtains successor counsel, the second attorney is compensated pursuant to a contingent fee agreement less the *quantum meruit* allocation to the first attorney.

Later case law from this Cout reaffirmed the applicability of the *Baker v. Shapero quantum meruit* approach. The Court in subsequent case law has not provided objective criteria to be used in making that analysis. Of course, that is understandable given the inherent ambiguity of a *quantum meruit* fee calculation.

The *quantum meruit* approach is fact-driven, as one would expect for a valuation based on a reasonableness determination which itself requires the

consideration of multiple factors set out by this Court in SCR 3.130 (1.5(a)). However, in the first attorney/second attorney contingent fee case situation, there is a significant distinction between two separate scenarios. The first scenario was in the *Baker v. Shapero* case when the client terminated the first attorney and then retained a new attorney, who did not have any affiliation, past or present, with the previous lawyer/law firm. However, the second scenario was present concerning the Emery Law Office and Mr. Franklin's case. In the second scenario, the attorney who continued in the representation of the client previously worked for the law firm or first attorney, and continued to represent the client after leaving the law firm. There is a significant difference between the equities in those two situations.

In the present case, Mr. Franklin had been an associate attorney at the Emery Law Office for about two years. During that time, he received a salary and a bonus based on performance thresholds. Therefore, as a result of Mr. Franklin receiving a salary, he was being paid in advance before there was any recovery by the client, assuming there was ever going to be a recovery. Throughout the time, Mr. Franklin was representing any clients while he was at the Emery Law Office, and he would still receive a salary even if there was the potential the Emery Law Office would receive nothing if there was no recovery. Mr. Franklin's receipt of up-front compensation by the Emery Law Office while working on any of the cases which later went with him is in stark contrast to the first scenario as found in *Baker.* That distinction again supports the inherent reasonableness of the 75%/25% allocation

set out in the Employment Agreement signed by Mr. Franklin.

The factors to determine what constitutes a *quantum meruit* reasonable fee are set out by this Court in SCR 3.130 (1.5(a)). That Rule sets out a non-exclusive list of eight factors, (actually 13 if broken down), as to what constitutes a reasonable fee. In practice, Courts typically use either a percentage calculation to allocate the fee between the lawyers, or determine the *quantum meruit* fee based on time incurred multiplied by an hourly rate. Given the number of factors to be considered and the necessary comparison between what attorneys and law firms did on behalf of the client based on successive representation, the process can be involved, lengthy and litigious.

Quantum meruit litigation can be quite messy. Case law from around the country cited in this Brief note the policy considerations to support a contractual provision to address what otherwise would be potentially costly, complicated and time-consuming litigation, especially if there are multiple contingent fee cases which need to be addressed on an individual *quantum meruit* basis. The case files of the first attorney, (or law firm), and the second attorney, (departing attorney), are subject to discovery production to determine the reasonable fee to the first attorney/law firm. Depositions, written discovery requests, subpoenas duces tecum to third parties such as insurance adjusters, etc., are standard steps in litigating attorney's fee disputes regarding a *quantum meruit* fee allocation. A departing lawyer fee allocation provision in the lawyer's employment contract avoids those

issues.

And, as noted in the case law cited in this Brief, absent some contractual provision between the law firm and the departing attorney to address the *quantum meruit* issue, law firms and lawyers are left to deal with the unfortunate "black hole" of negotiations, litigation, and the corresponding cost and time, to resolve the *quantum meruit* issue regarding one or many separate contingent fee cases. And, when this becomes an issue, the relationship between the law firm and the departing lawyer has frequently deteriorated by that point and looks more like spouses divorcing than lawyers addressing a legal issue. Unfortunately, litigation between lawyers over attorney's fees is at the core of a *quantum meruit* analysis. Ironically, in some cases, the litigation to address a *quantum meruit* fee allocation, which could include pleadings, discovery, Motion practice and evidentiary hearings, could be more involved and take longer than the resolution of the underlying personal injury claims, which are typically resolved by settlement.

Permitting departing attorneys and law firms to enter into reasonable agreements to provide for the global resolution of potential *quantum meruit* attorney's fee disputes avoids the avoidable abyss of individual *quantum meruit* fee resolutions.

Reasonable agreements to avoid litigation, time and expense of potentially multiple individual *quantum meruit* determinations is appropriate. As summarized in the ABA/Bloomberg Law Lawyers' Manual on Professional Conduct, Section

20.170:

> Law firms are granted a great deal of freedom to decide how the firm's income will be divided when a lawyer retires or withdraws from the firm. Generally speaking, this includes the right to divide fees generated by pending cases between the departing lawyer and the remaining members of the firm. *Anderson, McPharlin and Conners v. Yee,* 37 Cal. Rptr. 3d 627

Discussed below in this Brief is case law from around the country which has established that law firms and lawyers may enter into employment agreements which contemplate fee allocations regarding cases which began at the law firm and concluded when an attorney left the law firm. These cases also set out the significant policy considerations to support such post-departure fee allocation provisions in employment agreements between law firms and attorneys.

Reduced to its basics, the process set out in these cases is consistent with what happened before the Circuit Court in the present case. The departing attorney, Mr. Franklin, challenged the employment agreement he signed contending it was unenforceable, unreasonable, etc., and the Trial Court reviewed the employment agreement and found the terms reasonable. That is what happened in the present case in the Circuit Court's Opinion and Order, a copy of which is attached hereto as Appendix B. (TR 157)

A common element among these departing attorney fee allocation employment agreement clauses is the significant distinction between cases in which there was successor counsel who continued to represent the client but had no previous affiliation with the law firm/lawyer who previously represented the client.

That is not the present case. In this case, Mr. Franklin was paid a salary by the Emery Law Office, the clients he represented were brought in through the marketing and other efforts of the Emery Law Office, and then assigned to Mr. Franklin.

And, at the Emery Law Office, Mr. Franklin had available to him the general support structure present at the Emery Law Office in handling personal injury cases, including general office overhead, non-lawyer support staff, including a paralegal, office equipment, professional liability insurance, and all other costs in the operation of a law firm borne by the employer of Mr. Franklin, the Emery Law Office. These factors, and the other considerations set forth in this Brief, establish the reasonableness of the fee allocation provision in the employment agreement signed by Mr. Franklin.

In *Miller v. Jacobs & Goodman, PA*, 699 So.2d 729 (Fla. App. 1997), the Florida Court of Appeals held that "lawyers are free to enter into agreements which provide for post-termination allocation of client fees." (at 732) The Court stated that such agreements were not unenforceable as against public policy and did not create an "undue economic burden" on the client's freedom to choose legal representation.

In *Miller*, the employment agreement provided that for post-termination cases which went with the departing lawyer, the law firm would receive seventy-five percent of the fees and the departing attorney would receive twenty-five percent of the fees. The employment agreement also contained a liquidated damage clause,

above and beyond the issue of the fee allocation for cases taken by the departing lawyer. However, the fee allocation contractual provision itself was not deemed a liquidated damages clause. That fee allocation provisions approved by the Florida Court of Appeals is essentially the same as in the present case.

In *Bennett v. Ashcraft & Gere, LLP,* 303 A.3d 1237 (Md. App. 2023), the Maryland Court of Appeals affirmed the Trial Court's upholding of an agreement signed by the attorney at the beginning of employment at the law firm. That agreement provided how attorney's fees on contingent fee cases would be divided if the attorney left the law firm and the client went with the attorney. The agreement provided a sliding scale formula based on time, i.e., the time while the case was at the law firm and the amount of time when the departing attorney had the case. The Circuit Court held using time was a "surrogate" for the respective contribution of the parties. The Court noted that absent an agreement between the law firm and the attorney, the attorney's fees would be based on a reasonable fee evaluation for each of the cases.

The Court in *Bennett* noted the benefits to all concerned to avoid being required to do a *quantum meruit* analysis, which the Court euphemistically stated was a "factually intensive exercise, with competing experts and acrimonious charges and counter-charges." The Court also noted that the *quantum meruit* process of fee allocation typically would require a trial, and a significant expenditure of time by the law firm and the lawyer. As the Court concluded, "attorneys

quarreling over fees does not put the legal profession in the best possible light."

In *Seattle Truck Law, PLLC v. Banks*, 2023 Wash. App. Lexis 2027 rendered October 30, 2023, the Washington Court of Appeals held that a fee-splitting provision in an employment agreement of an attorney at a law firm did not violate Rule 5.6(a) of the Rules of Professional Conduct, and therefore was enforceable. A copy of that Opinion is attached hereto as Appendix C. The employment agreement provided that if the attorney left the law firm, the attorney would owe the law firm fifty percent of any attorney's fees for the first year after the attorney departed, and forty percent the second year and thereafter. The Court, citing case law from other jurisdictions, held that Rule 5.6 of the Rules of Professional Conduct was not violated and the agreement was not unenforceable as against public policy.

The Court in *Seattle Truck Law* cited a New Jersey case, *Groen, Lavson, Goldberg & Rubenstone v. Kancher*, 827 Ap. 2d 1163 (NJ App. 2003). In *Groen*, the partnership agreement provided that contingent fee cases which went with the departing attorney would be divided equally between the law firm and the departing attorney. The Court in that case noted that there was no showing in the record that the Agreement, with its fee-allocation provision, prevented the departing attorney from continuing his practice. The Court found the Agreement did not present any unreasonable restriction on the right of the departing attorney to continue to represent clients.

Similarly, in the present case, there was no evidence of any impairment on

the part of Mr. Franklin for the continued representation of the clients who went with him. Mr. Franklin was able to resolve most of the cases which accompanied him when he left the law firm. Of course, as noted earlier in this Brief, in a survey of those ten cases, the Emery Law Office staff provided some degree of support to Mr. Franklin in a number of those cases after he left the law firm. And a number of those cases were resolved without any significant action on the part of Mr. Franklin and were resolved within a relatively short period of time after he left the Emery Law Office.

Reduced to its basics, Mr. Franklin's attempted repudiation of his Employment Agreement had nothing to do with any impairment on his law practice, since there was no proof of any impairment. His repudiation of the Agreement was his effort to avoid the fee allocation so he could keep a larger amount of the attorney's fees, beyond that provided for in the Employment Agreement he signed.

The Court of Appeals in the present case on page 8 of its Opinion cited *McCroskey, Feldman, Cochran and Brock, PC v. Waters,* 494 N.W. 2d 826 (Mich App 1992) and acknowledged that some agreements between lawyers may be ethically compliant under Rule 5.6. However, the Court of Appeals did not discuss the underlying facts of *McCroskey*. The facts of that case are not materially different than the facts of the present case.

In *McCroskey*, the employment agreement of a law firm partner provided how attorney's fees would be divided regarding cases which went with the departing

partner. If the later recovery was $20,000 or less, the partner was to pay 25% of the attorney's fees to the law firm and 50% of any attorney's fees if the fee was in excess of $20,000. If the case was on appeal at the time the partner left, and there was a recovery, the law firm would receive the 75% of any fee.

Moreover, such contractual fee allocation provisions in employment agreements are not a prohibited financial penalty nor financial disincentive to the departing lawyer. A financial penalty or financial disincentive is when a financial term is added to an employment agreement to induce a person to not act or to act in a certain way. However, that is not the case concerning the allocation of fees in a contingent fee case if the client goes with the lawyer who leaves the law firm. When that occurs, the *quantum meruit* issue arises automatically, as a matter of law, when a client terminates a law firm\lawyer and retains the departing attorney pursuant to a contingent fee agreement. The issue of fee allocation already exists under prevailing law. All the employment agreement does is provide clarity by contractual resolution of a pre-existing *quantum meruit* fee allocation issue.

As noted in some of the case law cited in this Brief, a policy consideration in favor of such contractual arrangements is to reduce issues between attorneys and law firms, which is the exact opposite of the financial disincentive issue. The mere existence of an unliquidated *quantum meruit* fee claim of the law firm creates a cloud of ambiguity as to the financial circumstances between the law firm and the departing lawyer. Such a claim could hang over the head of the departing lawyer,

with the departing lawyer knowing he or she may have to engage in litigation with the former law firm to quantify the *quantum meruit* claims of the former law firm for all contingent fee cases which went with the departing lawyer. That itself could be argued as having a chilling effect on the decision of the departing lawyer to take clients with him or her when departing the law firm. However, a contract provisions, as in the present case, provides a contractual resolution to resolve the otherwise difficult and elusive *quantum meruit* issue.

The fee allocation provision at issue in this case was not anti-competitive but merely provided a reasonable quantification of the *quantum meruit* claims which already existed. The contract provision in the present case is facially valid because it concerns an associate attorney, Mr. Franklin, who received a salary and the potential for quarterly bonus payments based on the success of the firm. Furthermore, Mr. Franklin reaped the benefits of the support staff, law firm resources and advance expenses paid for by the Emery Law Office while he was handling those cases during his time at that law firm.

The mere invocation by a party to the employment contract, such as the Appellee, Mr. Franklin, in the present case, of an alleged speculative and unsupported "financial penalty" or "financial disincentive" regarding some term in an employment agreement should not be presumed. There has to be some evidence of some actual effect. However, in the present case, there was no such evidence. There was no evidence of any actual impairment on any of the activities of Mr.

Franklin in the solo practice he established.

An agreement between the law firm and the departing lawyer reducing the *quantum meruit* analysis to a percentage allocation in all cases provides clarity to all parties. In some instances, the allocation may be of benefit to the law firm, and in other instances the percentage allocation may be to the benefit of the departing lawyer. That is the give-and-take of any contract. In short, in the present case, there was no "financial penalty" or "financial disincentive" arising from the departing attorney fee allocution provision of Mr. Franklin's Employment Agreement.

In summary, case law around the country indicates law firms and lawyers may enter into a contractual arrangements to reasonably address the issue of fee allocation if an attorney leaves a law firm and takes contingent fee cases with them. Such contracts are not arbitrarily precluded under SCR 3.130(5.6). Such agreements are not unreasonable limitations on the ability of an attorney to practice. The issue, as it was addressed before the Trial Court below, is one of reasonableness. For example, a division of 95% to the law firm and 5% to the departing attorney was considered unreasonable, (*Hackett v. Moore,* 939 N.E.2d 1321 (Ohio 2010)). But, a division of 75% to the law firm and 25% to the departing attorney, as in the present case, has been held to be reasonable, (*Ruby v. Abington Memorial Hospital* 50 A.2d 128 (Pa 2012)).

The Emery Law Office respectfully submits the departing attorney fee allocation paragraph in the Employment Agreement signed by Mr. Franklin was a

reasonable provision and the Trial Court's Order should be affirmed.

B. Status And Sophistication Of The Parties Is A Relevant Factor To Be Considered In Determining The Enforceability Of A Departing Lawyer Fee Allocation Provision.

The Court of Appeals summarily rejected as a relevant consideration the sophistication and status of the parties. But, whether a party was aware of the "contents and ramifications," (the phrase used by the Court of Appeals), in the negotiation and execution of a contract is a relevant consideration to determine reasonableness.

The relevancy of an attorney's sophistication in the law when entering into a contract was addressed by the Court of Appeals in *Wilson v. Ky. Ret. Sys*., 683 S.W.3d 663,668 (Ky. App. 2023). In that case, an attorney, Mr. Wilson, sought to avoid the terms of a settlement agreement concerning his employment. The Court of Appeals, in rejecting his effort to avoid the terms of the agreement he signed, stated:

> Regardless, Wilson was able to offer testimony regarding his understanding of the separation agreement and how he believed it pertained to his last day of paid employment. Although he claimed otherwise in his testimony, Wilson's experience as a licensed attorney for approximately 30 years afforded him a level of sophistication related to understanding both the terms of the settlement agreement and the relevant statutes pertaining to his last day of paid employment. (emphasis added)

Therefore, the status and sophistication of Mr. Franklin as a licensed attorney is a relevant and material consideration in determining the reasonableness of the departing attorney fee allocation provision in the employment agreement he

signed. If Mr. Franklin wanted to contend the departing attorney fee allocation clause of his employment contract was contrary to any Rule of the Rules of Professional Conduct in SCR 3.130, he should have raised that before he signed his employment agreement, or the very least during the time he worked for the Emery Law Office. He did neither.

Mr. Franklin, as a licensed attorney, knew the Rules of Professional Conduct when he signed the employment contract. But he waited until years after his employment began and waited until there was a dispute concerning attorney's fees before he sought to re-interpret his employment contract to his benefit. That is why his status and sophistication as a lawyer must be taken in consideration in this case. Otherwise, the analysis of the reasonableness of the contract language agreed to by Mr. Franklin before he even began working at the Emery Law Office becomes artificially suppressed. His status as an attorney is a relevant consideration in his attempted attack concerning the Employment Agreement he signed.

C. The Departing Lawyer Fee Allocation Provision Was Not an Impermissible Liquidated Damages Clause

Mr. Franklin argued below that the departing attorney fee allocation provision in his Employment Agreement was an impermissible liquidated damages clause. The Emery Law Office contended below that the contract provision at issue was not an impermissible liquidated damages clause. The Emery Law Office noted on pages 11 and 12 of its Brief for Appellee before the Court of Appeals, that even though the fee allocation provision in Mr. Franklin's Employment Agreement was

not a liquidated damages clause, even if it was, it would be permitted under the facts of this case under prevailing law. The Emery Law Office cited to the Court of Appeals this Court's Opinion in *Patel v. Tuttle Properties, LLC,* 392 SW3d 384 (Ky 2013). And, this Court noted in *Patel v. Tuttle Properties, LLC.,* 392 S.W.3d 384 (Ky. 2013) that a liquidated damages clause is a way in which parties to a contract may provide contract language to avoid uncertainty as to the damages a party may sustain. Such clauses may be held invalid if the liquidated damages amount is "grossly disproportionate" to the actual damages incurred.

The Court of Appeals, on page 9 of its May 31, 2024 Opinion and Order, conflated the Emery's Law Office argument by contending that the Emery Law Office was raising the liquidated damages clause language. That was not the case. That was an argument raised by Mr. Franklin on page 2 of his Brief for Appellant before the Court of Appeals in an effort to contend the contract language was an impermissible liquidated damages clause. All that the Emery Law Office noted was that prevailing law from this Court requires that the actual damages must not be "grossly disproportionate" to the liquidated damage amount, citing *Patel*. And, as to that issue, there was nothing "grossly disproportionate" under the facts of this case concerning the percentage allocation in the departing attorney fee allocation provision in the Employment Agreement Mr. Franklin signed. In this case, the 75/25 split in which Mr. Franklin would receive twenty-five percent is not only "not grossly disproportionate" but is facially reasonable given Mr. Franklin was a

salaried employee of the Emery Law Office with the law office covering all of the overhead and case expenses while he worked at that law firm.

In short, the "liquidated damages" argument, not initially raised by the Emery Law Office, is a red herring argument to deflect attention away from the validity and reasonableness of that employment contract language to address the *quantum meruit* issue. All the Emery Law Office did was point out the error in that analysis.

CONCLUSION

Based on the foregoing, the Appellant, Emery Law Office, Inc., by counsel, respectfully submits that the Court of Appeals Opinion and Order represented a flawed legal analysis of the relevant issues. The approach followed by the Circuit Court in granting the Motion for Summary Judgment of the Emery Law Office represents a proper application of prevailing law in the majority of the jurisdictions which have addressed this issue and is consistent with prevailing law in Kentucky regarding the contractual arrangements between attorneys and law firms.

In the present case, under the undisputed facts, the seventy-five percent/twenty-five percent allocation between the Emery Law Office and Mr. Franklin was facially reasonable and was correctly found so by the Circuit Court.

If the Court of Appeals Opinion in this case, and its underlying reasoning, was allowed to stand, more costly and time consuming litigation would occur when using an firms would not be able to enter into an employment agreement at the

beginning of the attorney's employment. Allowing sophisticated parties, such as attorneys, to enter into employment agreements providing an equitable and efficient means of dividing up contingent fees under such circumstances removes such disputes from lower Court time-consuming, costly and contentious *quantum meruit* litigation.

The Appellant, Emery Law Office, by counsel, respectfully requests this Court reverse the Opinion and Order of the Court of Appeals and affirm the Opinion and Order of the Circuit Court.

Respectfully submitted,

/s/ Peter L. Ostermiller____
Peter L. Ostermiller

/s/ Andrew S. Epstein_____
Andrew S. Epstein

Attorneys for Appellant, Emery Law Office