No. 125,277

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KRIGEL & KRIGEL, P.C.,
Appellee,

v.

SHANK & HEINEMANN, LLC,
Appellant.

SYLLABUS BY THE COURT

1.

In summary judgment proceedings the district court must resolve all reasonable inferences drawn from the evidence in favor of the party against whom summary judgment is sought.

2.

Quantum meruit is an equitable doctrine based on a promise implied in law that one will restore to the person entitled thereto that which in equity and good conscience belongs to that person. It requires a benefit conferred by the person claiming quantum meruit, an appreciation or knowledge of the benefit by the recipient of the benefit, and the acceptance or retention by the recipient of the benefit under circumstances that make it inequitable for the recipient to retain the benefit without payment of its value.

3.

Waiver is the intentional relinquishment of a known right. A waiver can be explicit or it can be implied from the conduct or inaction of the holder of the right. Waiver must be manifested in some unequivocal manner by some distinct act or by inaction inconsistent with an intention to claim a right. While waiver may be implied

from acts or conduct warranting an inference of relinquishment of a right, there must normally be a clear, unequivocal, and decisive act of the relinquishing party.

Appeal from Johnson District Court; ROBERT J. WONNELL, judge. Opinion filed April 21, 2023. Reversed and remanded with directions.

Kirk T. May and *William D. Beil*, of GM Law PC, of Kansas City, Missouri, for appellant.

Stephen J. Moore, *Ivan L. Nugent*, and *Lara Krigel Pabst*, of Krigel & Krigel, P.C., of Kansas City, Missouri, for appellee Krigel & Krigel, P.C.

Before CLINE, P.J., ISHERWOOD, J., and PATRICK D. MCANANY, S.J.

MCANANY, S.J.: This case arises from a dispute between two law firms over attorney fees obtained upon settlement of a contingent fee case. Shank & Heinemann, LLC, what with the comings and goings of various attorneys, has been known over the years as Shank, Laue & Hamilton, P.C.; Shank & Hamilton, P.C.; Shank & Moore, LLC; and Shank & Heinemann, LLC. For convenience we will simply refer to the firm as "Shank" without regard to its various iterations over the years. The other firm is Krigel & Krigel, P.C. (Krigel). Stephen Moore started out as an associate at Shank and ultimately became one of three owners of the firm. He eventually left Shank and joined Krigel, taking with him one of Shank's contingent fee cases. When the contingent fee case settled, Shank issued notice of its attorney's lien based upon quantum meruit. Krigel responded with this action for declaratory judgment, seeking a determination that Shank has no interest in the settlement proceeds. Shank countered with its own summary judgment motion. It is the district court's rulings on those matters that brings this case to us.

FACTUAL AND PROCEDURAL HISTORY

Moore was hired as an associate at Shank in 2008. In 2016, he became part owner of the firm with a 35% interest. In 2019, Trudi Shouse hired the Shank firm on a contingent fee basis to pursue her claim in an employment dispute. She acknowledged in her engagement agreement with the firm that Shank would have an attorney's lien against any award or settlement in the matter.

In 2021, Moore left Shank and took the Shouse litigation with him to Krigel. A few days after Moore joined Krigel, Shouse's employment litigation was settled and Krigel refused to honor Shank's attorney lien. This action followed. Krigel sought a declaratory judgment against Shank seeking to invalidate Shank's attorney lien claim in order to avoid sharing the contingent fee with Shank. The two firms filed competing motions for summary judgment. The district court entered judgment in favor of Krigel and against Shank, resulting in Krigel being entitled to retain the entire contingent fee from the Shouse litigation to the total exclusion of Shank.

In its analysis of the parties' competing summary judgment motions, the district court focused on Shank's operating agreement, which was entered into when Moore became an owner of the firm in 2016, long before Shouse came along. The agreement stated: "This Operating Agreement (this 'Agreement') is effective [on] the Conversion Date (as defined below), among the persons set forth on Schedule A." Schedule A listed Moore and the other two owners, Christopher Shank and David Heinemann. Only those three signed the operating agreement.

One of the provisions in the agreement established a method of calculating the share in the firm's net assets to which an owner would be entitled upon departing from the firm, either by death, withdrawing from the firm, being expelled from the firm, or being disbarred from the practice of law. The relevant section provided:

"**7.10 Redemption of Interest upon Death, Separation from Service, or Disbarment.**

In the event that any Member dies, withdraws or is expelled pursuant to Section 7.7(a), or becomes disbarred from practicing law in any state where such Member is required to be licensed under applicable law in order to practice law in such state, the Company shall redeem, and such Member shall sell, such Member's Interest, in accordance with the following terms and conditions:

"(a) The redemption price for such Interest shall be an amount equal to the Book Value multiplied by the Percentage Interest represented by such Interest."

The operating agreement defined "Book Value" as "the aggregate amount of the Members' equity in the Company as reflected in the books and records of the Company, as determined by the accountants retained by the Company at the time that Book Value is to be determined."

The company accountants were to include Shank's hard assets: company-owned real estate, buildings, improvements, fixtures, and equipment at their depreciated value as shown on the company books. As a general rule, the accountants were not to consider "goodwill or any similar intangible asset." But they were to include in their valuation Shank's accounts receivable already billed, which were to be discounted by "an appropriate reserve for bad debts." The accountants were not to place a value on unbilled fees and expenses and any pending contingent fee cases for which the firm had performed legal services.

One of the contingent fee matters pending when Moore left Shank was Shouse's employment-related claim. Shouse had entered an engagement agreement with Shank in 2019, which provided that Shank would be compensated on a contingent fee basis. The agreement also stated that Shank would have an attorney's lien on any recovery obtained

in connection with the representation, which would continue even if the firm withdrew or was discharged as counsel for Shouse.

Shank pursued the matter on Shouse's behalf. Shank filed suit on Shouse's behalf in September 2020 in the federal district court in Kansas, asserting a claim for retaliation under the federal False Claims Act, 31 U.S.C. § 3730(h) (2018). Shank pursued discovery in the matter and eventually sought to add a claim for whistleblower retaliation under Kansas common law.

On January 28, 2021, the district court granted Shank's motion to amend the complaint to add the whistleblower claim. *Shouse v. Catholic Charities of Northeast Kansas, Inc*., No. 20-2462-EFM-ADM, 2021 WL 289314, at *1 (D. Kan. 2021). The next day, January 29, Moore announced his intention to leave the Shank firm effective March 1, 2021.

On March 1, when Moore left Shank and joined Krigel, Shouse elected to leave Shank and to have the Krigel firm represent her in her ongoing employment litigation under a separate contingency fee agreement with Krigel. Shank was discharged as counsel for Shouse effective that date. Shank contended that the firm had invested 229.2 hours of lawyer time on the Shouse case before Moore moved to Krigel.

On March 9, 2021, after a day-long mediation session, Shouse and her former employer agreed to settle her employment claim. The parties entered into a written settlement agreement and, on May 24, 2021, filed with the court a joint stipulation of dismissal with prejudice. Shank contended that Krigel's records indicated that Moore spent between 39.3 and 53.1 hours working on the matter after leaving Shank.

On March 24, 2021, Shank issued a Notice of Attorneys' Lien in Shouse's case. The notice claimed that under the engagement agreement Shank had with Shouse, it was

entitled to costs, expenses, and attorney fees incurred prior to March 1, 2021, when Shouse discharged the firm. It later issued a Supplemental Notice of Attorney's Lien expressly stating that the lien was limited to settlement proceeds payable for fees and expenses in Shouse's case.

Thereafter, Shank continued to assert the right to recover expenses it advanced in Shouse's case and the quantum meruit value of the legal services it performed in the case prior to Moore's departure.

Krigel responded by filing the present declaratory judgment action in the Johnson County district court. In its petition, Krigel contended that Shank was entitled to nothing from Shouse's settlement because the Shank operating agreement "placed a fixed value of zero dollars ($0) on all of the firm's contingent fee matters (including the *Shouse* Action) regardless of whether the cases stayed with or left the firm upon a member's departure." Thus, according to Krigel, the operating agreement waived any claim of quantum meruit and Shank had no claim to any portion of the settlement proceeds from Shouse's suit.

Shank answered and asserted a counterclaim, contending that by entering into the operating agreement it had not waived its right to recover in quantum meruit on its attorney's lien claim to a portion of Shouse's settlement proceeds.

Krigel and Shank both moved for summary judgment. The district court found that Krigel was entitled to summary judgment on all claims. The court found that the following uncontroverted facts controlled the outcome of the competing motions:

> "Moore was an owner of Shank and Moore with a 35 percent interest. That the firm and Mr. Moore executed an operating agreement that was in place at the time of Mr. Moore's notice of withdrawal and ultimately governed his withdrawal.

> "In January of 2021, Mr. Moore gave notice of withdrawal pursuant to Section 7.7(a). This triggered a redemption of his interest under Section 7.10. At this point, upon notice of withdrawal, Moore was required to settle up and finalize with the firm based on the buy/sell analysis that was contained within the operating agreement.
>
> "Part of that analysis was to determine the book value of this case pursuant to Section 1.1. The book value definition in the operating agreement did not just contain basic boilerplate language, but a specific definition of the value of contingent-fee cases which was specifically set at zero.
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> "Notably, all accounts receivable that were not yet billed were also set at zero. Some clients went with Mr. Moore. Some clients went with Shank and Heinemann. Moore worked on cases and was responsible for his share of expenses associated with the contingency of the cases. Both the ones that went with him and the ones that stayed at his former firm.
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> "I realized that in the response the defendant controverted this particular fact, but as an owner with a 35 percent interest, Mr. Moore was indirectly paying his share of litigation expenses. Ultimately . . . the Shouse case . . . was settled after Mr. Moore left the firm. The fees paid from the client are remaining in trust subject to resolution of this dispute."

The court reasoned that under the general rule, when there is a dispute between a former firm and a departing attorney over a contingency fee, quantum meruit determines each party's share of the settlement. But there is an exception to quantum meruit when a contract controls; and here, the exception controlled because the operating agreement set the value of contingency fee cases at zero. Holding otherwise, the court theorized, could lead to quantum meruit proceedings in each of the other contingency fee cases Moore worked on while at Shank. This is "[t]he result that the parties presumably sought to avoid when they set the contingency case book value at zero." In its ruling the district court, having found that "Moore was required to settle up and finalize with the firm based on the buy/sell analysis that was contained within the operating agreement," determined that *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 220 P.3d 333 (2009), was controlling.

Shank's appeal brings the matter to us. Neither party contends that the district court's ruling on the competing summary judgment motions was premature because there remained genuine issues of material fact. The parties' appellate briefs focus solely on the district court's legal reasoning that led to its rulings.

ANALYSIS

Shank argues on appeal that the operating agreement was not a waiver of its right to recover in quantum meruit for the reasonable value of the services it performed for Shouse or the expenses it advanced while prosecuting her case.

Standard of Review

The standard of review applied to summary judgment decisions is well-settled:

> "Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. The district court must resolve all facts and reasonable inferences drawn from the evidence in favor of the party against whom the ruling is sought. When opposing summary judgment, a party must produce evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issue in the case. Appellate courts apply the same rules and, where they find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment is inappropriate. Appellate review of the legal effect of undisputed facts is de novo. [Citation omitted.]" *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981-82, 453 P.3d 304 (2019).

This case also involves contract interpretation, a matter over which we have unlimited review. *Trear v. Chamberlain*, 308 Kan. 932, 936, 425 P.3d 297 (2018). "The primary rule for interpreting written contracts is to ascertain the parties' intent." *Waste*

Connections of Kansas, Inc. v. Ritchie Corp., 296 Kan. 943, Syl. ¶ 3, 298 P.3d 250 (2013). In doing so, we do not isolate one particular portion of a contract but rather construe and consider the entire document. Likewise, we seek an interpretation that is reasonable and not one which would vitiate the purpose of the agreement or which results in an absurdity. 296 Kan. at 963.

Quantum Meruit

The district court recognized the central role the equitable doctrine of quantum meruit can play in a dispute such as this. As stated in *Haz-Mat Response, Inc. v. Certified Waste Services Ltd.*, 259 Kan. 166, Syl. ¶ 5, 910 P.2d 839 (1996): "Unjust enrichment/quantum meruit is an equitable doctrine. . . . The substance of an action for unjust enrichment lies in a promise implied in law that one will restore to the person entitled thereto that which in equity and good conscience belongs to that person." As a general rule "an attorney employed under a contingency fee contract who is discharged without cause is limited to a quantum meruit recovery for the reasonable value of the services rendered." *Consolver v. Hotze*, 306 Kan. 561, 569, 395 P.3d 405 (2017). A claim of quantum meruit has three elements:

> "(1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value." *Haz-Mat Response*, 259 Kan. 166, Syl. ¶ 6.

The parties agree that Shank typically would be entitled to compensation based on quantum meruit by virtue of its contract with Shouse and the legal work Shank performed on Shouse's behalf. But here, Krigel contends—and the district court agreed—that in establishing the Shank operating agreement several years before Shouse engaged Shank to represent her, Shank waived its right to seek quantum meruit when Moore left the firm

and Shouse followed the departing Moore to Krigel and engaged Krigel as her new counsel.

Shank did not Waive its Right to Quantum Meruit

The waiver that the district court necessarily relied on is defined as "the intentional relinquishment of a known right." *Prather v. Colorado Oil & Gas Corp.*, 218 Kan. 111, 117, 542 P.2d 297 (1975). A waiver can be explicit: I hereby waive my right to X; or it can be implied from the conduct or inaction of the holder of the right. Waiver must be manifested in some unequivocal manner by some distinct act or by inaction inconsistent with an intention to claim a right. *Patrons Mut. Ins. Ass'n v. Union Gas System, Inc.*, 250 Kan. 722, 725-26, 830 P.2d 35 (1992).

When Shank's three owners entered into the operating agreement, they clearly anticipated that the firm would take on contingent fee matters. The operating agreement itself makes that clear. The history of every group of lawyers who band together to practice law, including the Shank firm, reflects that over time lawyers come and go in one manner or another. Krigel would have us conclude that under these circumstances the three owners of Shank agreed that should an owner leave the firm and take a contingent fee client with him, the firm would waive its right to be compensated through quantum meruit for all of its investment of time and money in the case should the departing client ultimately prevail.

The Operating Agreement is not an Express Waiver of Shank's Right to Quantum Meruit

There is nothing in the operating agreement that could be construed as an express waiver by Shank of its right to relief through quantum meruit upon Shouse discharging Shank and retaining Krigel in its stead. The provision of the operating agreement valuing

in-process contingency fee cases at $0 is found within the long definition of Book Value. The provision is included in a list of "principles" to be used when calculating the firm's Book Value. There is no mention of quantum meruit within that definition or within the relevant provisions of the operating agreement included in the record on appeal. Thus, the issue is whether Shank, by its conduct or inaction, impliedly waived its right to seek quantum meruit.

The Operating Agreement is not an Implied Waiver of Shank's Right to Quantum Meruit

While waiver "may be implied from acts or conduct, or a course thereof warranting an inference of relinquishment of a right, there must normally be a clear, unequivocal, and decisive act of the relinquishing party." 31 C.J.S., Estoppel and Waiver § 99. Here, the "clear, unequivocal, and decisive act of the relinquishing party" is claimed to be the execution of the operating agreement years before Shouse entered the scene.

Does this disregard of pending contingent fee cases in calculating the firm's equity evidence "a clear, unequivocal, and decisive act" by the owners of Shank to waive the right to impose an attorney's lien on settlement proceeds and to recover in quantum meruit for work performed by the firm in some future contingent fee case should one of the firm's owners later depart the firm and take the contingent fee client with him to another firm? In answering this question our interpretation of the operating agreement must make business sense and cannot create an absurd outcome. See *Short v. Blue Cross and Blue Shield of Kansas*, 56 Kan. App. 2d 914, 921, 441 P.3d 1058 (2019) (affirming district court's interpretation of a contract because it reflected "a reasonable business practice, and the district court's interpretation of the contract does not lead to an absurd result").

The district court inferred from the language of the operating agreement that Shank waived its right to quantum meruit recovery. We find, for reasons that will be explained, that the more reasonable inference to draw from the evidence is that Shank did not intend to waive its right to quantum meruit recovery. Additionally, we will demonstrate that the district court's interpretation of the operating agreement leads to unreasonable results.

a. *Shank's Interpretation of the Operating Agreement is Reasonable*

One simple reason for the operating agreement to disregard the value of contingent fee cases is that the value of contingency fee cases would be virtually impossible for the firm's accountants to quantify. The operating agreement defined "Book Value" as "the aggregate amount of the Members' equity in the Company as reflected by the books and records of the Company, as determined by the accountants retained by the Company at the time that Book Value is to be determined." The company accountants were to value Shank's hard assets: company-owned real estate, buildings, improvements, fixtures, and equipment at their depreciated value as shown on the company books. The agreement called for the services of accountants, not appraisers. Thus, as a general rule, the accountants were not to consider "goodwill or any similar intangible asset." But they were to include in their valuation Shank's accounts receivable already billed, which were to be discounted by "an appropriate reserve for bad debts." They were to disregard accounts receivable yet to be billed and pending contingent fee cases.

There is no contention that the actual values to the firm of its contingent fee cases were "reflected by the books and records of the Company" as called for in the operating agreement. We would be shocked if it were otherwise so. Lawyers more often than not have a difficult time arriving at a reasonable valuation of a plaintiff's ultimate recovery, if any. The multitude of variables affecting the value of a contingent fee case—both in terms of the likelihood of any recovery whatsoever and the likely amount of any such

recovery—would render such a valuation by lay accountants a virtual shot in the dark. See *In re Marriage of Hershewe*, 931 S.W.2d 198, 204 (Mo. Ct. App. 1996); *Musser v. Musser*, 909 P.2d 37, 38-39 (Okla. 1995). Thus, the only reasonable interpretation of this provision is that in settling up with a departing owner of the firm, the value of this asset—a yet to be realized fee for services in a contingent fee case—which is nowhere to be found in "the books and records of the Company," cannot be calculated with any degree of reasonable certainty so it simply will be disregarded.

Consideration of the cyclical nature of law firms also demonstrates why Shank's interpretation of the operating agreement is reasonable. There are a multitude of methods used by law firms to compensate departing attorneys. Some firms have followed the biblical observation we can paraphrase as: "Naked into this world we come and naked we shall depart, for the Lord giveth and the Lord taketh away."

Under this approach, young associates come to the firm with no clients or cases of their own but are compensated for working on matters previously brought to the firm over the years through the efforts of their seniors. As those young associates mature, they ultimately take the place of the senior attorneys who fed them business in the early years. So when it is their turn to retire or depart, they—like their predecessors—leave behind the clients and cases they, in turn, cultivated in order to provide a body of legal work for the next crop of young associates who follow in their footsteps. Thus, for the sake of firm continuity, the firm giveth a young associate business to develop and taketh it away when years later the young associate matures and decides to depart or retire.

Under such an arrangement, the departing senior attorney may be compensated for capital contributions to the firm and the attorney's share of the tangible assets of the firm but not for any intangibles such as goodwill or for work in progress or a share in unrealized recoveries in pending cases. Such an arrangement does not signal a disregard for the value of these intangibles for which a departing attorney realizes no monetary

consideration. Rather, the arrangement recognizes the importance of husbanding the value of these intangibles for the cultivation and development of new attorneys who will carry on the task of maintaining and expanding clients for the future health of the firm. We fail to see how such an arrangement could ever be viewed as an abandonment of the firm's right to seek relief through quantum meruit from clients who choose to take their legal business elsewhere.

b. *The District Court's Interpretation of the Operating Agreement is Inconsistent with Shank's Actions and the Concept of Principal-Agent Relationships*

Interpreting the operating agreement as a waiver of the right to quantum meruit recovery is inconsistent with actions Shank took after executing the operating agreement, particularly the engagement agreement it entered with Shouse. Shank took on Shouse's case on a contingent fee basis and spelled out in the engagement agreement its right to an attorney's lien against any recovery by Shouse if she went to another law firm. And when Shouse left and Krigel settled the case, Shank asserted its attorney lien for the work done on the case before Shouse left. None of this is consistent with waiver, but it is entirely consistent with the right to claim quantum meruit.

The district court believed that its interpretation of the operating agreement was reasonable because allowing quantum meruit in the Shouse case would allow Moore to make a quantum meruit claim in the cases that stayed at Shank and this was "[t]he result that the parties presumably sought to avoid when they set the contingency case book value at zero." Such an interpretation ignores the fact that Moore had no quantum meruit claim in cases he worked on while at Shank. The clients were the clients of Shank and Moore was paid for his work on the firm's clients through his compensation agreement with the firm. See *Shamberg*, 289 Kan. at 903 ("Oliver's employment contract would dictate that he be considered an agent of Wallace Saunders while performing attorney

services during his period of employment."). This could not have been the reason for the accountants to disregard contingent fee cases.

There is no evidence—and we would be surprised if there were—that Moore, as either an associate or owner of the firm, had his own cases separate and apart from those of the firm for which he could claim fees solely for himself and not for the firm. All indications are that Moore worked on firm business while employed by Shank. Moore had no quantum meruit claim to assert against Shank's contingent fee cases he worked on. The fees generated from those cases belonged to the firm, not to Moore. Based on the summary judgment standard expressed earlier in *GFTLenexa*, in considering Krigel's claim of waiver we must resolve all facts and reasonable inferences drawn from the evidence in favor of Shank, the party claimed to have waived it's right to quantum meruit relief. The district court's inference was not reasonable. The only reasonable inference we find is that the contingent fee cases were disregarded in calculating the equity of a departing owner of the firm because it was unrealistic to expect the firm's accountants to do so.

The present dispute is between Shank and Krigel. Krigel claims the only object of its suit is a declaration that Shank has no interest in the settlement proceeds from the Shouse case. Moore, an agent of Shank in his work on the Shouse case and an agent of Krigel after Shouse retained Krigel to take over prosecution of the claim, is not a party and has asserted no independent claim against the proceeds of the Shouse settlement. It would not be consistent with the general principles of contract law under which the operating agreement was executed to permit third parties like Krigel to utilize the operating agreement as a tool to defeat quantum meruit claims by predecessor counsel. For a third party to claim benefits from a contract, "an intent to benefit a third person must be clearly expressed in the contract." *State ex rel. Stovall v. Reliance Ins. Co.*, 278 Kan. 777, Syl. ¶ 6, 107 P.3d 1219 (2005). No such intent is evident here.

c. *The District Court's Interpretation of the Operating Agreement is Unreasonable when Considered in the Context of the Entire Operating Agreement*

The district court's interpretation of the provision in the operating agreement valuing contingency fee cases at zero leads to unreasonable results when that interpretation is applied to other scenarios in which the operative language applies.

The operating agreement's provision for establishing the equity of a departing owner of the firm does not set different rules depending on the circumstances under which a lawyer-owner departs. They are all treated the same. Book value is calculated in the same manner whether a member voluntarily withdraws, dies, is expelled, or is disbarred. Nothing in the operating agreement creates a special and distinct rule applicable when a member voluntarily withdraws from the firm. Accordingly, we must construe this provision in a manner consistent with all the alternatives to which it applies. Thus, under Krigel's theory, death of one of the owners necessarily would trigger these same provisions of the operating agreement; and because the value of contingent fee matters would not be calculated in arriving at the value of the deceased owner's equity in the firm, a contingent fee client—or all the firm's contingent fee clients, for that matter—would be free to pick up and move to a different firm and, in the process, insulate the proceeds of any recovery in their cases from a claim under quantum meruit by Shank for legal work performed on their behalf. The same could be said of the other means by which an owner of the Shank firm could depart: an owner being expelled from the firm or being disbarred. Such an outcome based on Krigel's interpretation of the operating agreement would be an absolute absurdity. Moreover, we cannot rewrite the operating agreement under the guise of construction in order to accommodate Krigel's theory of waiver. See *Quenzer v. Quenzer*, 225 Kan. 83, 85, 587 P.2d 880 (1978).

Additionally, from the plain reading of the operating agreement, the waiver of the right to assert a claim under quantum meruit, which Krigel seeks to impose on Shank, is

not limited to Shank's interest in the recovery of fees in contingent fee matters. In arriving at the book value of the redemption interest of one of Shank's owners on separation from the firm, the firm's accountants are required to disregard the value of unbilled fees and expenses—accounts receivable for legal work performed but not yet billed. Extending Krigel's argument to its logical conclusion would result in Shank waiving its right to claim relief under quantum meruit for unbilled legal work performed for any client of the firm upon the departure of one of the firm's owners.

Finally, because the portion of the operating agreement at issue here deals only with calculating the equity interest payable to an owner of Shank upon departure from the firm, it does not apply to nonowner Shank lawyers who may decide to leave the firm and take with him or her a client matter for which Shank has a contingent fee contract. Thus, under Krigel's theory of the case, Shank does not waive quantum meruit relief when a junior associate of the firm leaves and takes a contingent fee client with him or her; but when one of the firm owners leaves under identical circumstances, the firm waives its right to be compensated based on the doctrine of quantum meruit. We fail to see how such an outcome was intended or anticipated by the signers of the operating agreement or how such an arrangement satisfies the *Short v. Blue Cross* reasonableness standard. See 56 Kan. App. 2d at 921.

The district court's interpretation of the operating agreement raises many questions. Why would a law firm unilaterally waive its statutory right to an attorney's lien in all contingent fee cases when some future contingent fee client leaves the firm while the case is ongoing? Why would a law firm exert effort and advance fees and expenses knowing that at any time—particularly when discovery is complete and the case is ready for trial or ripe for settlement—plaintiff could take his or her file to another firm and stiff the original firm for all its work in the case? Why would a law firm ever take on a contingent fee case under these circumstances? The obvious answer to these questions is that a reasonable law firm would not accept contingency fee cases if the firm's operating

agreement created such a substantial risk that the firm's investment in those cases could be eliminated.

Shamberg v. Oliver *is distinguishable*

This leaves us to consider whether the holding in *Shamberg* undermines these conclusions. In its rulings, the district court relied heavily on our Supreme Court's holding in *Shamberg*, 289 Kan. 891. *Shamberg* involved a dispute over a referral fee in a medical malpractice action. Michael Oliver was an attorney and shareholder at Wallace, Saunders, Austin, Brown & Enochs, Chartered (Wallace Saunders). The family of Sara Hotchkiss contacted Oliver after Hotchkiss experienced severe medical complications. Oliver met Hotchkiss' family to discuss a possible medical malpractice claim, but because Wallace Saunders was engaged in the defense of medical malpractice actions, Oliver proposed referring the case to another firm. After meeting with several attorneys, the Hotchkiss family selected Victor Bergman of Shamberg, Johnson & Bergman, Chartered (Shamberg) to represent them. The Hotchkisses entered a contract with Shamberg under which they agreed to pay a contingent fee of 40% of any recovery.

In January 2003 and again in May 2004, Bergman wrote to Oliver on behalf of Shamberg and offered Wallace Saunders a referral fee. Under the proposed agreement, Shamberg would litigate and finance the case, but Oliver would assist and advise on certain specified matters. Oliver did not promptly respond. Oliver resigned from Wallace Saunders in January 2005 and took with him the Hotchkiss file and continued to assist the Shamberg firm with the case. After Oliver's resignation, both Oliver and Wallace Saunders wrote to Shamberg and claimed entitlement to the referral fee. Oliver had spent only 15 or so hours working on the Hotchkiss case while at Wallace Saunders, but he spent approximately 151 hours working on the case after his departure.

Oliver had an employment contract with Wallace Saunders as well as a Deferred Compensation Agreement (DCA). The DCA provided Oliver with compensation in addition to that established in his employment contract and provided a method for valuing Oliver's interest in active accounts receivable and work-in-process upon his departure from the firm. The DCA arbitrarily valued work-in-process files at $150, regardless of the expected recovery or whether the case was to be billed as an hourly or contingent fee case. When Oliver left Wallace Saunders, he was paid his share of $150 for each active account receivable and work-in-process file that remained with the firm. His deferred compensation was reduced by 32 files, which were withdrawn from the firm. Oliver took with him 12 of those 32 files, including the Hotchkiss file.

Ultimately the Hotchkiss case settled, resulting in a substantial referral fee. Shamberg filed an interpleader action when Oliver and Wallace Saunders continued to each claim entitlement to the referral fee. Unlike in our present case, Wallace Saunders did not claim recovery based on quantum meruit. Rather, it claimed it was entitled to the entire referral fee.

The district court granted summary judgment to Wallace Saunders. The Kansas Supreme Court reversed and granted Oliver the entire referral fee. 289 Kan. at 910. The court noted that the referral fee agreement was between Shamberg and Wallace Saunders and the agreement contemplated continuing obligations from Wallace Saunders, specifically Oliver's continued participation and assistance with the case. The referral fee was predicated on a contingency fee agreement. Because the contingency fee had not been earned at the time of Oliver's departure from Wallace Saunders, the referral fee likewise could not have been earned. The court reasoned: "Generally, an attorney who is discharged before the occurrence of the contingency provided for in a contingency fee contract may not recover compensation on the basis of the contract, but rather the attorney is entitled only to the reasonable value of the services rendered based upon

quantum meruit." 289 Kan. at 904. But Wallace Saunders was not seeking a share of the referral fee based on quantum meruit; it claimed it was entitled to the entire fee.

The court concluded that "[w]hen Oliver took the Hotchkisses' file, he not only assumed the obligation to complete the performance that was due the clients, but he also received the benefits of the fee arrangement that was tied to that performance." 289 Kan. at 908. Wallace Saunders received its "contractually allocated share of the referral agreement" when it deducted Oliver's share of the $150 file valuation from his final compensation. 289 Kan. at 907. Because "Oliver paid the agreed-upon value for the Hotchkisses' file under the DCA . . . he . . . was entitled to the future fees generated by that file." 289 Kan. at 909. Wallace Saunders, through the DCA, agreed to place a fixed value on files-in-progress when a member left the firm "rather than to allocate value on the basis of quantum meruit." 289 Kan. at 909.

The Supreme Court briefly discussed the possibility of a quantum meruit claim by Wallace Saunders, stating:

> "[P]art of the performance on the Hotchkisses' file was effected while Oliver was an agent of Wallace Saunders. Accordingly, the firm was entitled to that part of the compensation the clients consented to be paid to Oliver that was earned during his employment. Arguably, in such circumstances, an allocation between the firm and departing attorney could be made on the basis of quantum meruit. However, Wallace Saunders does not seek only a fair share of the fee and, more importantly, the firm had reached a prior agreement with Oliver, through the DCA, to place a fixed value on the file, rather than to allocate value on the basis of quantum meruit. [Citations omitted.]" 289 Kan. at 908-09.

The facts in *Shamberg* are *sui generis* and while they support the conclusion in *Shamberg*, they do not support Krigel's application of those conclusions to the facts now

before us. The divergence of facts and legal theories between those in *Shamberg* and those now before us lead to the conclusion that *Shamberg* does not control.

In *Shamberg*, Oliver provided consideration to Wallace Saunders by paying for the Hotchkiss file under the DCA. Wallace Saunders "received all of its contractually allocated share of the referral agreement." 289 Kan. at 907. In our present case, it is apparent that Shank and its owners simply agreed to disregard the value of contingent fee cases because of the many difficulties in calculating their worth and the provision of the operating agreement that the accountants confine their calculations to values recorded on the books and records of the firm.

Moreover, Wallace Saunders did not claim a share of the referral fee but rather the whole amount. Thus, resolution of the dispute did not turn on a claimed waiver of the right to assert an attorney's lien in order to secure a quantum meruit recovery. In *Shamberg*, the dispute was between the firm and its departing lawyer. There, the court focused on the ongoing obligation of Wallace Saunders "on the file after referral." 289 Kan. at 903. Here, Shank had no ongoing duty to Shouse when Shouse abandoned Shank and contracted with Krigel to handle the matter.

Conclusion

Shank represented Shouse for the majority of her case. It paid $2,401.68 in expenses, provided the staff needed to assist with the case, and paid the overhead costs that come with operating a law firm. It also compensated Moore for the time he worked at the firm. Interpreting the operating agreement as a waiver of quantum meruit recovery in the Shouse action would result in a windfall to Krigel, which has provided no consideration for the benefit.

Upon notice that Shouse was terminating Shank's representation and had hired Krigel to represent her in the matter, Shank served its notice of attorney's lien under K.S.A. 7-108. The lien was against the proceeds from Shouse's settlement of her claim from which Shank sought in quantum meruit the value of the legal services and expenses it had provided and incurred between the time it undertook Shouse's representation until Shouse discharged Shank from further representation in the matter. The terms of the operating agreement do not contain an explicit waiver of this right. Nor did Shank ever by implication voluntarily relinquish its statutory right to impose a lien on Shouse's settlement proceeds and to recover in quantum meruit from those proceeds the value of its legal services to Shouse during the period of its representation of Shouse.

Shank's interpretation of the operating agreement is reasonable whereas Krigel's—and the district court's—interpretation of the operating agreement is not. The district court's orders granting summary judgment to Krigel and denying partial summary judgment to Shank are reversed. The case is remanded to the district court for further proceedings consistent with this opinion (1) to determine the amount of attorney fees and expenses recovered in the Shouse action to which Shank is entitled and (2) to enter judgment accordingly.

Reversed and remanded with directions.