IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,375

SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY, P.A.,

Petitioner,

vs.

PAIGE N. POLETZ, a minor,
by and through her parents,
WILLIAM RANDOLPH POLETZ, et al.

Respondents.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, SECOND DISTRICT

BRIEF OF PETITIONER

SEARCY, DENNEY, SCAROLA, BARNHART
& SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Fla. 33409
-and-
PODHURST, ORSECK, JOSEFSBERG,
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TABLE OF CONTENTS

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
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I.
STATEMENT OF THE CASE AND FACTS

The issue in this proceeding is how the reasonable value of a law firm's services is to be measured under the doctrine of quantum meruit, where the firm has been discharged without cause after substantially performing, but before fully completing, its contingent fee contract. The facts are straightforward, and largely undisputed. They also demonstrate rather compellingly, we think, that the measurement required by some of the existing district court decisions on the subject (including the decision under review here) is neither logical nor fair. In the argument which follows, we will ask the Court to follow its own decision in *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982), and to adopt a measure of recovery consistent with the doctrine of quantum meruit, as that doctrine has historically been applied. Hopefully, the facts themselves will plainly demonstrate the need for the fairer rule of law which we seek from this Court.[1/]

In September, 1988, Paige Poletz was born with severe brain damage (R. 898).[2/] In March, 1989, her parents, William and Mindy Poletz, as natural guardians of their child and in their own right, hired the firm of Searcy, Denney, Scarola, Barnhart & Shipley, P.A. to bring a medical malpractice action against several health care providers, and executed a court-approved contingent fee contract in which they agreed to pay the Searcy firm 40% of

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[1/] The transcript of trial testimony was prepared by two different court reporters, so it is not consecutively paginated. Volumes 1 and 2 of the transcript are contained in the "Second Supplemental Record." References to them will be preceded by the symbols T1 and T2, followed by the appropriate page number. Volumes 3 and 4 of the transcript are contained in the "Supplemental Record." References to them will be preceded by the symbols T3 and T4, followed by the appropriate page number.

[2/] A considerable amount of the factual and procedural background to the issue on appeal is set out in the trial court's "Order on Attorneys' Fees and Distribution of Escrowed Trust Fund," at R. 898-906. For ease of discussion, many of our record references will be to the recitations in that order, rather than to the underlying documents supporting the recitations.

the recovery (R. 898). After an extensive and expensive investigation, suit was filed against several health care providers, including Dell Weible, M. D., the obstetrician, and Morton F. Plant Hospital Association, Inc. (R. 1). Day-to-day responsibility for the case was assigned within the Searcy firm to an associate, Phillip Taylor, under the supervision of Mr. Searcy (R. 898; T2. 104).[3/] After the Searcy firm had devoted in excess of 340 hours preparing the case for trial, Mr. Taylor resigned from the firm effective November 21, 1991 (R. 898, 905).

Mr. Taylor thereafter joined the newly-titled firm of Gary, Williams, Parenti & Taylor, P.A. and solicited Mr. and Mrs. Poletz to discharge the Searcy firm and hire his new firm as their attorney (R. 898). The Gary firm was substituted as counsel six days after Mr. Taylor departed the Searcy firm (T3. 54). Shortly thereafter, Mr. Taylor's conduct was adjudicated to be improper, and he was enjoined from communicating with any of the Searcy firm's clients, including Mr. and Mrs. Poletz, in an order which was ultimately affirmed (R. 899; T3. 33-35, 137). *See Taylor v. Searcy, Denney, Scarola, Barnhart & Shipley, P.A.*, 596 So.2d 1287 (Fla. 4th DCA 1992). Mr. Gary thereafter determined that Mr. Taylor had improperly solicited the case, withdrew his firm's representation, and recommended to Mr. and Mrs. Poletz that they retain the Searcy firm (R. 899). The Searcy firm was then reinstated as counsel of record (R. 899).

After his discharge by the Gary firm, Mr. Taylor illegally solicited Mr. and Mrs. Poletz to fire the Searcy firm again and to hire the firm of Montgomery & Larmoyeux, which was thereafter hired under a standard 40/30/20% contingent fee contract (R. 899; T1. 124-29, 185). Mr. Taylor then found employment with the Montgomery firm, under an

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[3/] Mr. Taylor was a former general surgeon who had attended law school, from which he graduated in 1988; because he had a history of two prior bankruptcies, alcoholism, and drug addiction, he was admitted to the Florida Bar on condition that he work only under the supervision of another lawyer (T2. 94, 105-06; T3. 30).

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agreement by which he was to receive 50% of any fee recovered in the Poletzes' case (R. 899; T4. 201-02). The Searcy firm asserted a retaining lien and filed a charging lien to protect its fees and costs, and the Montgomery firm was substituted as counsel for Mr. and Mrs. Poletz, less than three weeks after the Searcy firm's second discharge (R. 899).

One week later, Mr. and Mrs. Poletz entered into a partial settlement with Dr. Weible for $1,000,000.00 (R. 899-900). The record reflects that Mr. Montgomery expended only approximately 20 hours to effect this settlement (T1. 186-88, 191-92; T4. 194-95, 219).[4/] The settlement was ultimately approved, and a sum in excess of $480,000.00 was set aside to cover the pending claims for fees and costs (R. 900). The Searcy firm's claim of lien, as well as the amount of the Montgomery firm's fee, was thereafter tried to the Honorable Thomas A. Penick, Jr. Mr. Montgomery took the position that he was entitled to a fee of 40% of the recovery by virtue of his contingent fee contract, but was voluntarily reducing his claim to $250,000.00 (T1. 26, 69).

As it had in its charging lien, the Searcy firm asserted two alternative positions at trial. First, it argued that, because it had done substantially all of the work necessary to effect the settlement, its fee should be measured under the doctrine of quantum meruit as all or a substantial portion of the 40% contingent fee to which it would have been entitled had it not been discharged without cause, or between $320,000.00 and $400,000.00, and that the Montgomery firm's fee should be reduced accordingly so that the total fees not exceed 40% of the recovery (T1. 43-54; T4. 224-27). Expert testimony supporting such a recovery was thereafter adduced (T1. 117-18).

The Searcy firm acknowledged, however, that it would take a strained construction

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[4/] At one point, Mr. Montgomery testified that he spent much more than 20 hours on the case (T4. 194-95). Shortly thereafter, however, he conceded that a fee award of $40,000.00 to him would amount to compensation of $2,000.00 per hour -- which is an admission that he spent 20 hours on the case (T4. 219).

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of the existing case law from the Second District to reach such a result, and it argued alternatively that, if its first proposed measure of recovery had to be rejected because of the existing case law, it was entitled at minimum to a fee measured by the factors set forth in *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985), including a "contingency risk multiplier" (T1. 43-54). Expert testimony supporting a "contingency risk multiplier" of 2.5 was thereafter adduced (T1. 105-16; T2. 122-26). Mr. and Mrs. Poletz took the position that, according to existing case law from the Second District, the Searcy firm's quantum meruit recovery had to be measured by utilizing the factors set forth in *Rowe*, and that, according to existing case law from the First District, no "contingency risk multiplier" could be applied (T1. 55-56, 65-67).[5/]

Three months after the trial, the trial court entered an order finding that the Searcy firm was entitled to be compensated for 343.1 hours expended on behalf of Mr. and Mrs. Poletz prior to its initial discharge on November 27, 1991 (and that it was not entitled to any fees for its post-discharge efforts to retain its clients thereafter) (R. 905). It computed the fee owing to the Searcy firm by multiplying the hours expended by the reasonable hourly rates of the various paralegals and attorneys involved (at hourly rates of from $75.00 to $500.00), resulting in a straight hourly fee award of $78,195.00 (*id.*). In the meantime, Mr.

[5/] Because of a controlling decision of the Second District requiring that fees of a discharged attorney be measured by utilizing the *Rowe* factors, the Searcy firm's first alternative position was simply mentioned to preserve it, but not pressed at any length or developed in any detail, and the bulk of the argument and the evidence was focused upon application of the *Rowe* factors to the determination of the fee. Since the trial court was bound to reject the Searcy firm's first alternative position, this was an appropriate manner under the circumstances in which to preserve the position for later review. The existence of the Second District's prior decisions on the point also operated to the Searcy firm's detriment in another way: the trial court prevented the Searcy firm at every turn from challenging the propriety of Mr. Montgomery's claim to a fee of $250,000.00, and left the defense of that claim entirely to Mr. and Mrs. Poletz and their child's guardian ad litem (who apparently had no qualms about paying Mr. Montgomery $12,500.00 per hour for his 20 hours of work) (T1. 186-91; T2. 4-5, 62, 90-91; T3. 38, 46-47, 182; T4. 233-39).

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Montgomery had settled the Poletzes' claim against the hospital and waived the claim for the $250,000.00 fee which he had asserted at trial, so the order contained no fee award for Mr. Montgomery (R. 901). The trial court also apparently accepted the Poletzes' position concerning the legal inapplicability of a "contingency risk multiplier"; it did not mention the subject in its order, and it applied no multiplier to the straight hourly fee which it had computed. In addition, of course, because the trial court had determined that the Searcy firm was entitled only to a straight hourly fee, the Searcy firm was awarded no additional fees from the proceeds of the post-trial settlement with the hospital.[6/]

In short, notwithstanding that Mr. and Mrs. Poletz had agreed to pay the Searcy firm 40% of any recovery in the case, the Searcy firm received a fee of less than 10% of the $1,000,000.00 recovery after doing more than 90% of the work resulting in the recovery. And, of course, by the simple expedient of discharging the Searcy firm without cause to follow Mr. Taylor elsewhere, Mr. and Mrs. Poletz ended up pocketing in excess of $300,000.00 which would have gone to the Searcy firm from the $1,000,000.00 had Mr. Taylor been loyal to his employer rather than to himself. In addition, because the Searcy firm received a straight hourly fee, rather than a fee tied to the results of the two settlements which its substantial efforts ultimately produced, it should be apparent that either the Poletzes or Mr. Montgomery (depending on the amount of the fee which Mr. Montgomery ultimately took from the second settlement) received a substantial windfall from the total recovery, at the Searcy firm's considerable expense. For reasons which should be obvious at this point, a timely appeal followed to the District Court of Appeal, Second District.

On appeal, we accepted the trial court's conclusion that only 343.1 hours were

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[6/] Because this settlement occurred between trial of the charging lien and the entry of judgment, the record on appeal does not reflect the amount of the settlement, the amount of time spent by Mr. Montgomery in effecting the settlement, or the amount of attorneys' fees taken by Mr. Montgomery from the settlement.

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compensable, and we did not challenge the trial court's disallowance of fees for the hours expended by the Searcy firm after its initial discharge. The only issue which we presented on appeal was whether the trial court erred in computing the Searcy firm's quantum meruit recovery as a straight hourly fee, rather than (1) awarding it an equitable pro rata share of the total fees which Mr. and Mrs. Poletz would have owed under the "market price" of a contingent fee contract, or alternatively, (2) an hourly fee enhanced by a "contingency risk multiplier." We urged the district court to recede from its own decisions on the subject and to follow the decisions of the Third and Fourth Districts -- which hold that the "lodestar" method adopted in *Rowe* for assessment of statutory "prevailing party" attorneys' fees does not apply to the determination of a discharged attorney's fee under the doctrine of quantum meruit. We also argued that, if the court should decline to recede from its own decisions, the conflict should be certified to this Court.

In response, Mr. and Mrs. Poletz devoted their entire answer brief to an argument that the trial court correctly disallowed fees for the time expended after November 27, 1991 -- a point which was not even in issue in the appeal -- and presented no argument whatsoever on the single legal issue which we had presented to the district court. Our entire reply brief was therefore devoted to demonstrating the absolute irrelevance of everything argued in the Poletzes' answer brief. (Hopefully, Mr. and Mrs. Poletz will not impose upon this Court with the same irrelevant reponse.) Despite the Poletzes' failure to offer any argument at all in defense of the court's prior decisions on the point, the district court declined to recede from its prior decisions; it affirmed the trial court's order; and it certified the conflict to this Court. *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz*, 19 Fla. L. Weekly D503 (Fla. 2d DCA Mar. 4, 1994). (A copy of the decision is included in the appendix to this brief, for the convenience of the Court.) In the argument which follows, we will ask the Court to resolve the conflict by quashing the decision under review, and by approving

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the manner in which the Third and Fourth Districts have answered the question presented here.

II.
ISSUE ON APPEAL

WHETHER THE TRIAL COURT ERRED IN COMPUTING THE SEARCY FIRM'S QUANTUM MERUIT RECOVERY AS A STRAIGHT HOURLY FEE, RATHER THAN (1) AWARDING IT AN EQUITABLE PRO RATA SHARE OF THE TOTAL FEES WHICH MR. AND MRS. POLETZ WOULD HAVE OWED UNDER THE "MARKET PRICE" OF A CONTINGENT FEE CONTRACT, OR ALTERNATIVELY, (2) AN HOURLY FEE ENHANCED BY A "CONTINGENCY RISK MULTIPLIER."

III.
SUMMARY OF THE ARGUMENT

Because of the numerous conflicting decisions on the point in issue here, our argument will be sufficiently complex that it cannot readily be summarized in a page or two. Our argument will also be short enough that a summary of it here would probably amount to unnecessary repetition. We therefore alert the Court simply that we intend to argue both of the alternative positions which the Searcy firm advanced in the trial court. First, we will demonstrate that, under the quasi-contractual remedy of quantum meruit required by *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982), as that doctrine is ordinarily applied, the trial court should have (1) determined the "market price" of a contingent fee contract for cases like the Poletzes'; (2) divided the fee owing under such a contract between the two firms which prosecuted her case to a successful conclusion in equitable pro rata shares based upon their respective contributions to that result; and (3) awarded the Searcy firm the recovery to which it would have been entitled under such a computation. We will also demonstrate that that is the *only* disposition of the problem presented here which has any foundation in simple logic or fundamental fairness.

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We will argue alternatively that, if this measure of recovery is to be rejected in favor of a wooden application of *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985), the trial court should at least have enhanced the Searcy firm's clearly inadequate compensation and reduced the Poletzes' unjustified windfall by applying a "contingency risk multiplier" to the straight hourly fee which it awarded, as *Rowe* plainly requires. We apologize in advance for the apparent complexity of what follows, but the fault lies in the numerous inconsistencies in the decisional law which has developed on the subject.

IV.
ARGUMENT

THE TRIAL COURT ERRED IN COMPUTING THE SEARCY FIRM'S QUANTUM MERUIT RECOVERY AS A STRAIGHT HOURLY FEE, RATHER THAN (1) AWARDING IT AN EQUITABLE PRO RATA SHARE OF THE TOTAL FEES WHICH MR. AND MRS. POLETZ WOULD HAVE OWED UNDER THE "MARKET PRICE" OF A CONTINGENT FEE CONTRACT, OR ALTERNATIVELY, (2) AN HOURLY FEE ENHANCED BY A "CONTINGENCY RISK MULTIPLIER."

A. The trial court should have awarded the Searcy firm an equitable pro rata share of the total fees which Mr. and Mrs. Poletz would have owed under the "market price" of a contingent fee contract.

The parties to this appeal will agree upon only one thing -- that the appropriate starting point for this controversy is *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982). In that case, this Court followed the decisions of the California courts and held that a law firm employed under a contingent fee contract which is discharged without cause before the contingency occurs may not recover the full contract price in a breach of contract action; instead, its fees for the services rendered prior to its discharge must be determined under the traditional quasi-contractual remedy of quantum meruit, limited by the maximum contract price, and only after the contingency occurs. We therefore agree at the outset here that the

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Searcy firm's recovery must be governed by traditional principles of the quasi-contractual remedy of quantum meruit.[7/]

Unfortunately, *Rosenberg* is far from specific on how the fees of a discharged attorney are to be measured under that doctrine. The most that the decision offers on the point is a vague set of generalities:

> In computing the reasonable value of the discharged attorney's services, the trial court can consider the totality of the circumstances surrounding the professional relationship between the attorney and client. Factors such as time, the recovery sought, the skill demanded, the results obtained, and the attorney-client contract itself will necessarily be relevant considerations.

409 So.2d at 1022. Because of the lack of concrete, fact-specific guidance in this catalogue, the district court decisions interpreting this language are in total disarray. We will reserve discussion of them for the moment, however, in order to explore the doctrine of quantum meruit itself, as it has historically been applied by the courts of this nation.

The basic principle of the measurement of a recovery under the doctrine is expressed in §371, *Restatement (Second) of Contracts*, as follows:

> If a sum of money is awarded to protect a party's restitution interest, it may as justice requires be measured by either
>
> (a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or
>
> (b) the extent to which the other party's property has been increased in value or his other interests advanced.

Only subsection (a) of this provision is applicable here.

The thrust of this provision is that a recovery under the doctrine of quantum meruit

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[7/] The Latin phrase "quantum meruit" means simply "as much as he deserves." *Black's Law Dictionary*, p. 1119 (5th Ed. 1979).

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should be measured, not by some artificial valuation of what the plaintiff might have charged for individual increments of the part performance under a hypothetical contract which did not exist between the parties, but by the "market price" of what it would have cost the defendant to have obtained services similar to those rendered by the plaintiff, so that the defendant is not unjustly enriched by discharging the plaintiff at the plaintiff's expense. *See* Comment a to §371. As a general rule, the contract itself is deemed the best evidence of that "market price," and a pro rata recovery of the contract price for the part performance rendered is therefore the ordinary measure of recovery under the doctrine of quantum meruit. *See* 12 *Williston on Contracts*, §§1483, 1485 (1970 Ed.). *See also* Comment b to §377, *Restatement (Second) of Contracts* (requiring pro rata recovery of contract price where quantum meruit becomes appropriate remedy because contract performance has been frustrated or rendered impracticable).

In most commercial contexts, the computation is relatively simple. If a painter is discharged without cause after painting 90% of a house, for example, the successor painter will normally charge only for painting the remaining 10% of the house, and the "market price" of the total undertaking is easily prorated 90% to the first painter without the need to resolve a conflicting claim by the second painter. The circumstances presented by the type of fee dispute in issue here are unusual, because a successor attorney employed under a contingent fee contract normally contracts for the whole (rather than for the uncompleted portion of the litigation), since it is usually impossible to know at the outset of the relationship how much time and effort will be involved to complete the contract. As a result, when the contingency ultimately occurs, there are normally two conflicting claims to the whole to be resolved. As we will demonstrate, however, these conflicting claims can fairly be resolved by the same type of pro rata apportionment available in the more ordinary case of our hypothetical painters, so the circumstances presented by the facts in this case are

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simply a complication; they are not an obstacle to fair compensation for both sets of attorneys.

Applying this basic principle of the *Restatement* to the instant case produces a perfectly logical and eminently fair result. Because the "market price" for engaging an attorney to prosecute a medical malpractice case is (as everyone conceded below) a contingent fee of up to 40%, Mr. and Mrs. Poletz could expect to pay an attorney that amount for the successful prosecution of their case. The fact that they chose to hire two successive sets of attorneys to prosecute their case to conclusion should not change that fact. They should still expect to pay a contingent fee of up to 40% for the successful prosecution of their case, because that is the "market price" of the total package of services which they would receive.[8/] And when one of the firms does 90% of the work, and the other firm does 10% of the work, it is both logical and fair that this "market price" of the total package of services be divided on a pro rata basis between the two firms, according to their respective

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[8/] A complicating wrinkle exists in the instant case, since the Poletzes initially agreed to pay the Searcy firm a non-standard, court-approved 40% contingency fee, and later agreed to pay Mr. Montgomery a standard "40/30/20" contingent fee. The relevant "market price" is therefore not plainly established on the record. Because the second contract was negotiated when very little work remained to be done, a decent argument can be made that it does not represent the "market price." A decent argument can also be made that, because the Poletzes agreed to a 40% contract when initially testing the market for counsel to handle their complicated medical malpractice case, a contingent fee of 40% is the relevant "market price." In addition, because the settlement with Dr. Weible did not exceed $1,000,000.00, the 30/20% portion of the standard contingency fee contract approved by the Rules Regulating the Florida Bar is not implicated by the Poletzes' initial recovery, so the Court could declare that 40% of the recovery represents the relevant "market price" of the Searcy firm's services, at least up to the first $1,000,000.00 recovered by the Poletzes.

Nevertheless, because the Searcy firm's charging lien attaches to the additional recovery from the hospital as well, and because the 30/20% portion of the standard contract is implicated by that recovery, a factual question plainly remains as to the relevant "market price" for the total package of services obtained by Mr. and Mrs. Poletz. The Court need not decide that question of fact, of course. The actual "market price" can be determined on remand if we are successful in obtaining the quashal which we seek here.

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contributions to the final result -- 90% to one, and 10% to the other.[9/]

This, incidentally, is precisely the way in which the American Law Institute recommends that the problem be handled in the more specific *Restatement* which it is presently considering on the subject. On the measurement of quantum meruit recoveries by discharged attorneys, §52 of the *Restatement of the Law Governing Lawyers* (Tentative Draft No. 4, April 10, 1991), provides in pertinent part as follows:

> When the client-lawyer relationship ends before the lawyer has completed the services due for a matter:
>
> (1) a lawyer who has been discharged without forfeiting the lawyer's fee under §49 [such as "without cause"] and after substantially performing the services due, or any severable part of them, may recover the compensation provided by any otherwise enforceable agreement, less the value of the services covered by that contractual compensation that the lawyer did not provide because of the discharge; . . .

This provision is explained in Comment b to §52 as follows:

> *b. Recovery of contractual fee when client discharges lawyer after services (or a severable part of them) were substantially complete.* A lawyer is entitled to the contractual fee (less the value of any services the lawyer did not provide that are covered by that fee) when the lawyer has substantially earned the contractual fee at the time of termination, except when forfeiture is warranted. The typical case occurs when a client discharges a contingent-fee lawyer without cause just before the contingency occurs and then argues that the lawyer should receive only the fair value of the lawyer's services, not the contractual percentage fee. There is no need to protect the

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[9/] We use these particular numbers simply because they are conveniently suggested by the facts proved below with respect to the $1,000,000.00 recovered prior to trial. We do not mean to suggest that a pro rata distribution of the total fees awarded necessarily has to be bottomed upon hours expended alone. Certainly some discretion would exist to adjust these numbers for things like quality of performance, unnecessarily expended time, and the like. In addition, the percentages will necessarily change on remand when the post-trial recovery from the hospital becomes relevant to the equation. All of these things remain for determination on remand.

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client's right to change lawyers during the case, because the case is in substance finished and a new lawyer is either unnecessary or could be hired for a small fee. Allowing a client to avoid paying the agreed fee by discharging the lawyer at the last minute would be unfair.

For similar reasons, a client who discharges a lawyer is liable on the basis of the fee contract with the lawyer who has substantially completed a severable part of the services contracted for, without any conduct by the lawyer that would warrant forfeiture. . . . Services are severable when a new lawyer would not reasonably have to repeat what has already been done in order to complete the representation and when (for example, because the parties had agreed to an hourly fee) it is possible with reasonable accuracy to determine the portion of the contractual fee allocable to the services already performed. If those conditions are met, recovery of the contractual fee will not inappropriately deter clients who wish to change lawyers, and denying such a recovery would make it possible for clients to obtain useful services at less than the agreed fee.

. . . .

Allowing the lawyer to recover under the contract when discharged at a point when the lawyer's services (or a severable part of them) are substantially complete does not wholly prevent abuse by the client, who could discharge the lawyer just before substantial completion and thereby deprive the lawyer of the benefit of the contract fee. The client runs some risk by doing so, however, because the client normally must pay another lawyer to complete the services and because the client may have mistakenly concluded that the services were not substantially complete.

Services should be found to be substantially completed when the client had no significant reason for discharging the lawyer other [t]han avoiding the contractual fee. . . . When the services were substantially complete but the lawyer, because of discharge, did not perform some services otherwise due, the value of those services, valued at the contractual rate, should be deducted from the lawyer's contractual recovery.

In the instant case, because Mr. Montgomery did not have to duplicate any of the

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work previously performed by the Searcy firm, the Searcy firm clearly completed a "severable part" of its contract. And if the quantum meruit recovery represented by §52 of the *Restatement* is what this Court meant in *Rosenberg* when it adopted quantum meruit as the measure of a discharged attorney's fee in Florida, then the trial court should have determined the "market price" of the total package of legal services rendered to Mr. and Mrs. Poletz by the two law firms which represented them, and divided that fee 90% to the Searcy firm and 10% to Mr. Montgomery (or in some other equitable shares) -- just as the Searcy firm urged in its first alternative position below.

In our judgment, there are two good reasons to believe that this is exactly what the Court intended in *Rosenberg*. First, in its general catalogue of factors to be considered when computing a reasonable fee under the doctrine of quantum meruit, the Court expressly required consideration of "the *totality of the circumstances* surrounding the professional relationship," including "*time*," "the *results obtained*, and *the attorney-client contract itself*." 409 So.2d at 1022 (emphasis supplied). Surely, consideration of all three of these factors (plus the other factors in the catalogue) points to something entirely different than the straight hourly fee which the trial court awarded the Searcy firm below. At the very least, there is certainly no indication in this catalogue that a client who hires two successive law firms to prosecute a medical malpractice case, and who recovers $1,000,000.00 as a result, can fairly pay less than 10% of the total recovery to the two firms, when the "market price" for such services is *considerably* higher. Neither is there any indication in this catalogue that the firm which did more than 90% of the work resulting in the $1,000,000.00 recovery could fairly be compensated by receiving less than 20% of the market price for such services as its fee.

The second good reason to believe that, in *Rosenberg*, the Court intended application of the doctrine of quantum meruit as that doctrine is ordinarily applied can be found in the fact that it followed the California decisions on the question. In California, the measure of

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a discharged attorney's quantum meruit recovery is exactly the measure spelled out in §52 of the *Restatement of the Law Governing Lawyers* (Tentative Draft No. 4, April 10, 1991):[10/]

> Our decision requires that we remand the case to the trial court for a determination of the reasonable value of the services rendered by Cazares & Tosdal on the Gutierrez case. . . . Because the hourly fee is the prevailing price structure in the legal profession, it is sometimes assumed that the quantum meruit standard applied to legal services includes nothing more than a reasonable hourly rate multiplied by the amount of time spent on the case. . . . As even Saenz's counsel candidly recognizes, however, this is an overly narrow view of the quantum meruit standard applied in the context of a contingent fee agreement which, through no fault of either party, could not be performed.
>
> A.
>
> As a matter of professional responsibility, California lawyers are entitled to charge clients no more than a reasonable fee for legal services. . . . What is reasonable in a given case depends on a host of circumstances. . . . Moreover, there may be a significant difference between what is reasonable in the context of a negotiated fee and the otherwise calculated reasonable value of legal services rendered. . . . A party to a contract may agree to pay a higher-than-market price for services, but where the bargaining process is a fair one, courts traditionally defer to the parties' agreement as the best measure of the value of the contract performance. . . .
>
> The hourly fee is the standard price structure in the legal profession. . . . Where a lawyer normally charges for work on the basis of an hourly fee, it is a fairly simple matter to calculate the reasonable value of services rendered even in the absence of a negotiated fee. The lawyer's customary hourly rate can be evaluated by comparison to the rate charged by others in the

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[10/] Ordinarily, we would not provide the Court with such a lengthy quotation. Because the quotation makes our point as well as we could ever hope to make it in the same space (and with far more authority, of course), we believe the lengthy quotation is an appropriate substitute for our own argument on the point.

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legal community with similar experience. The number of hours expended by the lawyer can also be evaluated in light of how long it would have taken other attorneys to perform the same tasks. Properly evaluated and adjusted, the product of the hourly rate and the number of hours expended should yield the reasonable value of the work completed.

Where a lawyer has contracted to provide services in exchange for a contingent percentage fee, calculation of the reasonable value of services rendered in partial performance of the contract becomes a more complicated task. It has been repeatedly recognized that a contingent fee "'may properly provide for a larger compensation than would otherwise be reasonable.'" . . . This is because a contingent fee involves economic considerations separate and apart from the attorney's work on the case.

In addition to compensation for the legal services rendered, there is the raison d'etre for the contingent fee: the contingency. The lawyer on a contingent fee contract receives nothing unless the plaintiff obtains a recovery. Thus, in theory, a contingent fee in a case with a 50 percent chance of success should be twice the amount of a non-contingent fee for the same case. Usually, the fee is contingent not only on the ultimate success of the case but also on the amount recovered; that is, the fee is measured as a percentage of the total recovery. Thus, the lawyer runs the risk that even if successful, the amount recovered will yield a percentage fee which does not provide adequate compensation. . . .

Finally, even putting aside the contingent nature of the fee, the lawyer under such an arrangement agrees to delay receiving his fee until the conclusion of the case, which is often years in the future. The lawyer in effect finances the case for the client during the pendency of the lawsuit. . . . If a lawyer was forced to borrow against the legal services already performed on a case which took five years to complete, the cost of such a financing arrangement could be significant.

Where the calculation of an attorney's reasonable fee requires evidence and analysis of all these factors, it can be a formidable undertaking. . . . Fortunately, when an attorney partially performs on a contingency fee contract, we already have the parties' agreement as to what was a reasonable fee for the entire case. If the trial court can determine what portion of the

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> contract was performed, calculating the reasonable value of that partial performance becomes a relatively simple procedure.
>
> To determine the extent of partial performance, the trial judge must calculate a fraction where the numerator is the value of the legal services rendered by the particular attorney or firm at issue and the denominator is the aggregate value of all the legal services rendered by any attorney in the case. This may be as simple as adding up the total number of hours spent by all attorneys on the matter, but it is by no means limited to "straight time." The trial court may adjust the fraction upward or downward to account for difficulty of the work or other relevant factors.
>
> The fraction thus calculated represents the attorney's or firm's proportionate work on the case and, if multiplied by the total fee due under the contract, should yield a reasonable approximation of the proportional fee due the attorney or firm. In effect, then, the reasonable value of the services rendered is measured by the attorney's or firm's pro rata share of the contract price.

Cazares v. Saenz, 208 Cal. App.3d 279, 256 Cal. Rptr. 209, 213-15 (1989) (footnotes omitted). *Accord Spires v. American Bus Lines*, 158 Cal. App.3d 211, 204 Cal. Rptr. 531 (1984). *See Joseph E. Di Loreto, Inc. v. O'Neill*, 1 Cal. App.4th 149, 1 Cal. Rptr.2d 636 (1991); *Schneider v. Kaiser Foundation Hospitals*, 215 Cal. App.3d 1311, 264 Cal. Rptr. 227 (1989), *review denied*. The law in New York is essentially the same. *See Cheng v. Modansky Leasing Co., Inc.*, 73 N.Y.2d 454, 539 N.E.2d 570, 541 N.Y.S.2d 742 (1989).[11/] Clearly, if this is what the Court meant in *Rosenberg* when it adopted California law on the subject in issue here, then the trial court should have determined the "market price" of the total package of legal services rendered to Mr. and Mrs. Poletz by the two law firms which represented them, and divided that fee 90% to the Searcy firm and 10% to Mr.

[11/] Nine additional decisions supporting Comment b of §52 of the *Restatement of the Law Governing Lawyers* (Tentative Draft No. 4, April 10, 1991), are cited in the "Reporter's Note" to §52. For additional decisions supporting our position here, *see* Annotation, *Quantum Meruit Recovery of Attorney*, 92 A.L.R.3d 690 (1979) (and supplement thereto).

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Montgomery (or in some other equitable shares) -- just as the Searcy firm urged in its first alternative position below.

Although the trial court might have preferred this much more equitable solution to the problem, it felt bound by at least some existing district court decisions to reach the upside-down result ultimately reflected in its final order. Most respectfully, the several district court decisions which have been rendered on the subject are in total disarray -- and, in our judgment, some of them are bottomed upon a total misunderstanding of the doctrine of quantum meruit. To begin with, most of the discharged attorneys who have had to argue the problem presented here in the various appellate courts have confused the recovery of fees under the doctrine of quantum meruit with the recovery of fees under a statutory authorization, and have assumed that *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985), which governs the computation of fees under a statutory authorization, also governs the computation of fees under the doctrine of quantum meruit. The confusion is understandable, given this Court's use of the single phrase "reasonable value of services" to describe the measure of both recoveries. The two concepts are entirely different, however -- and, in our judgment at least, the formula set forth in *Rowe* is an inappropriate measure of recovery under the doctrine of quantum meruit (which, according to *Rosenberg*, is the appropriate doctrine governing recovery in cases like this one).

We are reinforced in that conclusion by the American Law Institute's position on the point:

> The "fair value" fee recoverable under this Section is not measured by the standards applied when a party recovers a reasonable attorney's fee from an opposing party under a fee-award statute or doctrine. The latter kind of fee often implicates factors -- such as a legislative intent to encourage such suits or to limit fee awards to less than full compensation (for example, when the main purpose of the fee award is to deter misconduct by the fee-paying party) -- not present in quantum

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meruit recovery under this Section.

Comment a to §51, *Restatement of the Law Governing Lawyers* (Tentative Draft No. 4, April 10, 1991) (discussing quantum meruit recoveries from clients for services rendered without a fee contract).

Our position is also supported by several decisions of the Third and Fourth Districts. The issue first arose in *Stabinski, Funt & de Oliveira, P.A. v. Law Offices of Frank H. Alvarez*, 490 So.2d 159 (Fla. 3rd DCA), *review denied*, 500 So.2d 545 (Fla. 1986). In that case, a discharged attorney who was unhappy with the size of his quantum meruit recovery argued a single issue on appeal -- that the trial court's final order was deficient for failing to set forth specific findings to support the fee award, as *Rowe* required. The district court rejected this contention, holding that *Rowe* was entirely inapplicable to the recovery of fees under the doctrine of quantum meruit adopted as the measure of recovery in *Rosenberg*:

> We reject this contention upon the holding that *Rowe* and the federal lodestar method it adopts applies only to fees imposed ancillary to the primary action against a non-client either under common law principles, . . . or, as in *Rowe* itself . . . , pursuant to statutory authorization; they do not affect the assessment of attorney's fees which are due, as here, as damages for breach of an agreement for the payment of such fees by the client or other contracting party. This conclusion is in accordance with both the entire thrust of the *Rowe* decision -- which seeks to protect third parties from excessive awards over which they have no contractual or adversarial control -- as well as with much of its specific language. . . .

490 So.2d at 160.

This holding was followed in two subsequent decisions. In *Trend Coin Co. v. Fuller, Feingold & Mallah, P.A.*, 538 So.2d 919 (Fla. 3rd DCA 1989), the district court held that a discharged attorney's quantum meruit recovery is governed by the catalogue of factors in *Rosenberg*, rather than the factors set forth in *Rowe*. And in *David B. Mishael, P.A. v.*

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Ferrell, Cardenas, Fertel, Rodriguez & Mishael, P.A., 606 So.2d 651 (Fla. 3rd DCA 1992), *review denied*, 618 So.2d 209 (Fla. 1993), the district court rejected a discharged attorney's claim of entitlement to a "contingency risk multiplier" in computing fees under the doctrine of quantum meruit, because the *Rowe* factors are inapplicable in such a computation.

More recently, in *Faro v. Romani*, 629 So.2d 872 (Fla. 4th DCA 1993), the Fourth District squarely agreed with the Third District, and certified the conflict which exists with the decisions which we will discuss in a moment. More recently still, the Fourth District followed *Faro* in another case in which Mr. Taylor stole a medical malpractice client from the Searcy firm and delivered her to Mr. Montgomery -- rendering a decision which is exactly contrary to the decision under review here, on almost identical facts: *Searcy, Denney, Scarola, Barnhart & Shipley v. Barner*, 19 Fla. L. Weekly D342 (Fla. 4th DCA Feb. 16, 1994). *See also Schwartz, Gold & Cohen, P.A. v. Streicher,* 549 So.2d 1044 (Fla. 4th DCA 1989).[12/]

For purposes of our first alternative position, we believe these decisions are correct in rejecting application of *Rowe* to the type of fee dispute in issue here. When computing a discharged attorney's quantum meruit recovery, the catalogue of factors set forth in *Rosenberg* governs -- not the factors set forth in *Rowe*. And because that general catalogue of factors is sufficiently broad to accommodate the type of pro rata recovery which we seek here, which is the type of recovery ordinarily available under the quasi-contractual remedy of quantum meruit, we believe that these Third and Fourth District decisions (which contain no language preventing such an analysis of *Rosenberg*) fully support our principal position here.

[12/] The *Faro* decision is presently pending on the merits in this Court (case no. 82,725). Ms. Barner has invoked the jurisdiction of this Court to review the *Barner* decision, and that case is pending here on jurisdictional briefs (case no. 83,383).

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The waters become considerably muddied as we look to the north. The Second District has reached a conclusion contrary to that reached by the Third and Fourth Districts. In *Riesgo v. Weinstein*, 523 So.2d 752 (Fla. 2nd DCA 1988), it explicitly announced its disagreement with *Stabinski*, and it held that the determination of a discharged attorney's fee under the doctrine of quantum meruit is to be made by applying the several factors in *Rowe* (presumably including its "contingency risk multiplier"). A similar conclusion in a related context was announced in *Rood v. McMakin*, 538 So.2d 125 (Fla. 2nd DCA 1989). And, of course, the Second District adhered to both of these decisions in the instant case. Since we have already announced our agreement with the Third and Fourth Districts, our disagreement with these cases necessarily follows.

Our disagreement with these cases follows for another reason. In *Riesgo*, the Second District bottomed its disagreement with *Stabinski* upon its earlier holding in *Freedom Savings & Loan Ass'n v. Biltmore Construction Co.*, 510 So.2d 1141 (Fla. 2nd DCA 1987), that *Rowe* applies whether the entitlement to attorneys' fees arises from a statute or from a provision in a contract between the plaintiff and defendant which is the subject of the litigation. It is here, we believe, that the Second District confused two quite different concepts, and therefore reached the wrong conclusion. *Rowe* may very well apply when determining the amount of an attorneys' fee to be awarded to a "prevailing party" in a contract dispute, where the contract provides for such an award. The district courts are split on this question. In the Third District, *Rowe* applies *only* to fees authorized by statute, and not to fees authorized by contract. *See Financial Services, Inc. v. Sheehan*, 537 So.2d 1111 (Fla. 3rd DCA 1989). In the First and Fourth Districts, *Rowe* applies to "prevailing party" attorneys' fees authorized by both statute and contract. *See Giltex Corp. v. Diehl*, 583 So.2d 734 (Fla. 1st DCA 1991); *Alston v. Sundeck Products, Inc.*, 498 So.2d 493 (Fla. 4th DCA 1986).

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These cases are inapposite to the type of problem presented in *Riesgo*, however, because the issue presented there was how a discharged attorney with no contract was to be compensated under the doctrine of quantum meruit, not the amount of fees to be assessed as additional damages against a losing litigant in a contract dispute, where the contract authorized an award of fees to the "prevailing party." In our judgment, "prevailing party" attorneys' fees arising under a contractual authorization can be appropriately analogized to "prevailing party" attorneys' fees arising under a statutory authorization, but neither can appropriately be analogized to a discharged attorney's recovery of fees for services rendered to a former client under the quasi-contractual remedy of quantum meruit. In cases like *Riesgo* and the instant case, *Rosenberg* should apply -- not *Rowe*. (That, incidentally, is all that the Court needs to say in this case; it need not reach the additional conflict represented by the cases cited in the preceding paragraph, because the Searcy firm's entitlement to attorneys' fees does not arise under a contractual authorization for "prevailing party" attorneys' fees.)

Further to the north, in an additional decision relied upon by Mr. and Mrs. Poletz below, and by which the trial court apparently felt it was bound, the First District has announced what we consider to be an even more anomalous and logically insupportable rule. In *Boyette v. Martha White Foods, Inc.*, 528 So.2d 539 (Fla. 1st DCA), *review denied*, 538 So.2d 1255 (Fla. 1988), it disagreed with *Stabinski*, agreed with *Riesgo*, and held that the *Rowe* factors govern determination of a discharged attorney's quantum meruit recovery under *Rosenberg*.[13/] It then disagreed with *Riesgo*, however, and held that the quantum meruit recovery contemplated by *Rosenberg* did not include the "contingency risk multiplier"

[13/] This conclusion was bottomed upon the same confusion between quantum meruit and contractual "prevailing party" attorneys' fees discussed in the preceding paragraphs.

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authorized by *Rowe*.[14/] Most respectfully, this is a hybrid which is bound to be infertile, and the rule announced in *Boyette* simply makes no sense. Either *Rosenberg's* catalogue of factors (which allows consideration of "the attorney-client contract itself") applies, or *Rowe's* catalogue of factors (which includes a "contingency risk multiplier") applies. And if *Rowe* applies, as *Boyette* holds, it is simply impossible that only some of the factors contained in *Rowe* can apply.[15/] We therefore announce our disagreement with *Boyette* as well.

We should also point out that *Boyette* appears to be in conflict with an earlier First District decision on the point -- *Sohn v. Brockington*, 371 So.2d 1089 (Fla. 1st DCA 1979), *cert. denied*, 383 So.2d 1202 (Fla. 1980) -- a decision which was rendered prior to this Court's decision in *Rosenberg*, and which this Court purported to follow in *Rosenberg* in several respects.[16/] In *Sohn*, which involved a dispute between a discharged attorney and a successor attorney over how the first attorney was to be compensated out of the proceeds of a settlement obtained by the successor attorney, the district court held that the second attorney's contingent fee of $30,000.00 was to be "apportioned . . . between the attorneys"

[14/] Actually, the *Boyette* Court purported to "distinguish" *Riesgo* on this point, stating that "[t]he issue in *Riesgo* dealt with factors affecting the amount of the attorney's fee other than the contingency risk multiplier." 528 So.2d at 541. In our judgment, this is an inaccurate reading of *Riesgo*. Although the specific factor of a "contingency risk multiplier" was not discussed in *Riesgo*, that factor was clearly subsumed in the *Riesgo* Court's all-embracing holding that, "[i]n determining the reasonable value of the attorney's services, the trial court must utilize the criteria set forth in *Rowe* . . . ." 523 So.2d at 754.

[15/] More recently, in a case involving assessment of statutorily-authorized attorneys' fees, the First District held that consideration of a "contingency risk multiplier" is *mandatory* under *Rowe*. *Loper v. Allstate Insurance Co.*, 616 So.2d 1055 (Fla. 1st DCA 1993).

[16/] The only aspect of *Sohn* which this Court did not follow in *Rosenberg* was its conclusion that the cause of action for a quantum meruit recovery accrued immediately upon discharge of the attorney. This Court held in *Rosenberg* that the cause of action did not accrue until the contingency occurred. All other aspects of *Sohn* appear to have been endorsed by the *Rosenberg* decision.

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based upon the respective contributions of the two attorneys to the ultimate settlement. 371 So.2d at 1095. That, of course, is exactly what we have urged here as the fairest and most logical disposition of these types of controversies -- and we therefore urge the Court to follow *Sohn*, as it did in *Rosenberg*.

Sohn brings us back to where we began. Most respectfully, *Rowe* simply does not apply to the determination of a discharged attorney's fee under the quasi-contractual remedy of quantum meruit. No decision of this Court says so, and all of the cases in which this Court has applied *Rowe* involve statutorily-authorized attorneys' fees. Instead, *Rosenberg* clearly applies -- and there is nothing in *Rosenberg's* general catalogue of factors which even arguably suggests that the determination of a discharged attorney's fee under the doctrine of quantum meruit should be limited to the type of straight hourly fee which the Searcy firm received below, notwithstanding that it had been hired under a 40% contingent fee contract, for doing 90% of the work required to obtain a $1,000,000.00 settlement of one of the Poletzes' claims (and a substantial percentage of the work required to obtain the additional settlement of their other claim). Indeed, *Rosenberg's* implicit approval of *Sohn*, as well as its express approval of California's solution to the problem, strongly suggests that the type of pro rata apportionment which we seek here is the proper way to resolve this type of controversy.

Moreover, the type of pro rata apportionment which we seek here is the *only* solution to this type of controversy which has a foundation in simple logic and fundamental fairness. Neither will the solution we have proposed here place any restraint whatsoever upon a client's right to discharge an attorney for any reason or no reason at all, because the client will still pay no more than the "market price" fee for the total package of legal services received, and the predecessor and successor attorneys will simply divide that fee between themselves in realistic and equitable shares. In contrast, the solution imposed upon the

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problem by the trial court below has nothing in logic or fairness to commend it, and it provides a strong economic incentive for contingent-fee clients with substantial cases to discharge their initial attorneys after most of the work has been done. Indeed, it provides a strong economic incentive for associate attorneys to prepare such cases to the point where they are ready to be settled, and then steal them, take them for themselves, and pocket the substantial fees earned on their former employers' time -- as Mr. Taylor did in the instant case.

The facts in this case, we respectfully submit, should make those things perfectly clear. Although the "market price" for the legal services they received was a contingent fee of up to 40%, Mr. and Mrs. Poletz ended up paying less than 10% of their $1,000,000.00 recovery to the two sets of attorneys they hired, and thereby obtained an enormous windfall which they would never have received if they had not followed Mr. Taylor's unethical importuning and allowed him to steal their case from the Searcy firm after it had been substantially prepared. The Montgomery firm, which now employs Mr. Taylor, would also have received an enormous windfall as a result of Mr. Taylor's unethical conduct -- if it had pursued its contractual claim or its voluntarily reduced claim to $250,000.00, based on only 20 hours of work, after the Searcy firm had done 90% of the work. And the Searcy firm, which did nearly all of the work contributing to this windfall, received less than 20% of the amount which Mr. and Mrs. Poletz initially agreed to pay them for their services. The inequity of all of this is further compounded, of course, by the fact that the Poletzes and Mr. Montgomery have since recovered additional sums, also as a result of the Searcy firm's initial efforts, which were never factored into the equation used to determine the Searcy firm's fees -- resulting in a further windfall to either the Poletzes or Mr. Montgomery, or perhaps to both.

While the inequity of that result is plain enough, we should also note that the inequity

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produced by utilization of *Rowe* to compute a quantum meruit fee can also be redirected, and fall squarely on the client in cases capable of producing only modest recoveries. Assume, for example, that the Poletzes' case had been worth only $100,000.00, rather than millions, and that they had contemplated discharging the Searcy firm after it had devoted 343.1 hours to its preparation. If *Rowe* were to govern the Searcy firm's fees after its contemplated discharge, the "lodestar" computed under *Rowe* would greatly exceed the 40% which the Poletzes had contracted to pay, so the Searcy firm's quantum meruit fees would be capped at the contract price by *Rosenberg*, and would therefore be $40,000.00. In order to hire another attorney, the Poletzes would have to agree to pay an *additional* 40% of their recovery to the second attorney, which would leave them only 20% of their recovery in the end.

Were the Poletzes to adopt that course, they would end up paying 80% of their recovery to their two sets of attorneys -- which is obviously an inequitable result. More likely, of course, the prospect of having to pay out 80% of their recovery to hire two sets of attorneys would effectively deter them from changing attorneys at all -- which is precisely what this Court set out to *prevent* in *Rosenberg*. Most respectfully, the only equitable solution to *this* type of problem -- the type of problem presented by cases with modest value, which is simply the reverse of the problem presented in the instant case -- is an equitable pro rata apportionment of the "market price" of a single contingent fee contract between the predecessor and successor attorneys. And because that is also the only equitable solution to the flip side of the problem presented by the facts in the instant case, where the value of the case is substantial, it should be readily apparent that *Rowe* should not be utilized to measure a discharged attorney's quantum meruit fee in *any* circumstance -- and that the solution to the problem we have proposed here is the only fair solution in *all* circumstances in which a discharged attorney's fee is to be computed under the doctrine of quantum meruit.

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We challenge the Poletzes to convince this Court that there is some basis, any basis at all, in logic or fairness or sound public policy to justify the type of upside-down results which will inevitably be produced by measuring a discharged attorney's quantum meruit recovery with the "lodestar" method adopted in *Rowe* for statutory "prevailing party" attorneys' fees -- and if they do so, we will acquiesce in the Court's rejection of our first alternative position here. We respectfully submit, however, that no such basis can be advanced. The *only* disposition of this controversy which makes any sense at all is the pro rata apportionment required by the doctrine of quantum meruit -- as that doctrine is ordinarily applied, as it was applied in *Sohn*, and as it is presently applied by the California decisions upon which this Court relied in *Rosenberg*.

Most respectfully, the district court's decision should be quashed, and the district court should be directed to remand the case to the trial court with instructions to (1) determine the "market price" of a contingent fee contract for cases like the Poletzes'; (2) divide the fee owing under such a contract between the two firms which prosecuted their case to a successful conclusion, in equitable pro rata shares based upon their respective contributions to that result; and (3) award the Searcy firm the recovery to which it will be entitled after that computation is made.

B. Alternatively, if *Rowe* governs determination of the amount of the Searcy firm's quantum meruit recovery under *Rosenberg*, a "contingency risk multiplier" should have been applied.

Alternatively, if the Court should conclude (contrary to the Third and Fourth Districts, but consistent with the First and Second Districts) that *Rowe* governs determination of the amount of the Searcy firm's quantum meruit recovery under *Rosenberg*, the trial court should at least have enhanced the Searcy firm's clearly inadequate "hourly" compensation and reduced the Poletzes' unjustified windfall by a "contingency risk multiplier," as *Rowe* plainly requires. Although we have disagreed with the Second District's conclusion in

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Riesgo that *Rowe* applies in the context presented here, *Riesgo* at least supports the proposition that, if *Rowe* applies, all of *Rowe's* factors apply (and if it does not, it must be disapproved at least in part, given the decisions of this Court which we will quote in a moment.)

The only decision to the contrary is the First District's decision in *Boyette*, in which that court reached the anomalous and logically insupportable conclusion that *Rowe* governed the determination of a discharged attorney's quantum meruit recovery, but that *Rowe's* allowance of a "contingency risk multiplier" was inappropriate in that context because *Rosenberg* says nothing about such an enhancement. (*Rosenberg* does allow consideration of "the attorney-client contract itself," however, which would appear to allow the type of enhancement represented by *Rowe's* "contingency risk multiplier"; at the very least, there is nothing in *Rosenberg* to suggest that a straight hourly fee without any enhancement for the risk of a contingent fee contract is an appropriate measure of a discharged attorney's fee under the doctrine of quantum meruit.)[17/]

Most respectfully, the anomalous conclusion reached in *Boyette* makes no sense. Either *Rosenberg* applies, or *Rowe* applies. And if *Rowe* applies, then *Rosenberg* does not. And if *Rowe* applies, then *all* of its factors must be applied: "We emphasize again that '*all* the factors contained in *Rowe* apply whenever the lodestar approach applies.'" *Perez-Borroto v. Brea*, 544 So.2d 1022, 1023 (Fla. 1989), *quoting Miami Children's Hospital v. Tamayo*, 529 So.2d 667, 668 (Fla. 1988). *See Standard Guaranty Insurance Co. v. Quanstrom*, 555

[17/] The Poletzes may argue that the Third and Fourth Districts' decisions also disallow use of a "contingency risk multiplier" in computing a discharged attorney's fee. The Third and Fourth Districts certainly do disallow the use of such a multiplier, but that is because they disallow application of *Rowe* altogether in the computation of a discharged attorney's fee under the doctrine of quantum meruit. No decision of the Third or Fourth District is even remotely consistent with *Boyette*, which requires application of some of *Rowe's* factors, and disallows use of one of them.

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So.2d 828 (Fla. 1990) (although use of a "contingency risk multiplier" is not mandatory in every case in which plaintiff's counsel has a contingent fee contract, it is mandatory that the trial court at least consider whether or not a "contingency risk multiplier" would be appropriate under the facts); *Lane v. Head*, 566 So.2d 508 (Fla. 1990) (similar).

The reason why such a multiplier should be applied in appropriate cases is, we respectfully submit, perfectly obvious. As *Rowe* itself explains, "[b]ecause the attorney working under the contingent fee contract receives no compensation when his client does not prevail, he must charge a client more than the attorney who is guaranteed remuneration for his services." 472 So.2d at 1151. In measuring the "reasonable value of services" rendered by an attorney employed under a contingent fee contract, it is therefore wholly inappropriate to measure it solely by the hourly fee which the attorney would have charged if his remuneration had been guaranteed -- as the trial court did in the instant case (over Mr. Searcy's perfectly reasonable objection that, if he were to charge an hourly fee which was *contingent* upon a recovery in a case, he would charge at least three times the hourly fee he charges in a non-contingent case -- T3. 20-22). The point is also nicely explained in the lengthy quotation from *Cazares v. Saenz*, 208 Cal. App.3d 279, 256 Cal. Rptr. 209 (1989), set out at pages 15-17, *supra*.

The point should be obvious enough that we need not belabor it. We simply reiterate that *Boyette* is an infertile hybrid which makes no sense -- and that, if *Rowe* applies in the context presented here at all, *all* of its factors must apply. And if the Court rejects our first alternative position here in favor of the upside-down result which will be produced by adopting *Rowe* as the measure of recovery in the entirely different context presented by a recovery under the quasi-contractual remedy of quantum meruit, the very least that it should do is quash the district court's decision with directions to remand the case to the trial court with instructions to enhance the straight hourly fee which it awarded to the Searcy firm by

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an appropriate "contingency risk multiplier." We rest our case. We invite the Poletzes to justify the upside-down result reached below on any ground -- in logic, in fairness, or in sound public policy -- if they can. We respectfully submit that, just as this challenge went wholly unanswered below, no such justification will be forthcoming here.

V.
CONCLUSION

It is respectfully submitted that the district court's decision should be quashed. The district court should be directed to reverse the judgment and remand the case to the trial court with instructions to (1) determine the "market price" of a contingent fee contract for cases like the Poletzes'; (2) divide the fee owing under such a contract among the two firms which prosecuted their case to a successful conclusion, in equitable pro rata shares based upon their respective contributions to that result; and (3) award the Searcy firm the recovery to which it will be entitled after that computation is made. Alternatively, if *Rowe* rather than *Rosenberg* is to govern the issue presented here, the district court should be directed to reverse the judgment and remand the case with instructions to enhance the straight hourly fee awarded to the Searcy firm by an appropriate "contingency risk multiplier."

Respectfully submitted,

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APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A., Appellant,	)	
v.	)	Case No. 93-01699
PAIGE N. POLETZ, a minor child, by and through her parents, WILLIAM RANDOLPH POLETZ and MINDY J. POLETZ, and WILLIAM RANDOLPH POLETZ and MINDY J. POLETZ, individually, Appellees.	)	

Opinion filed March 4, 1994.

Appeal from the Circuit Court for Pinellas County; Thomas E. Penick, Jr., Judge.

Christian D. Searcy of Searcy, Denney, Scarola, Barnhart & Shipley, P.A., West Palm Beach, and Joel D. Eaton of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Miami, for Appellant.

F. Wallace Pope, Jr. of Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A., Clearwater, for Appellees.

PATTERSON, Judge.

In this dispute over how the fee of a lawyer, first retained under a contingent fee contract, then discharged, should be

calculated on a quantum meruit basis, we affirm the trial court. See Rood v. McMakin, 538 So. 2d 125 (Fla. 2d DCA 1989); Riesgo v. Weinstein, 523 So. 2d 752 (Fla. 2d DCA 1988). We certify conflict with Stabinski, Funt & De Oliveira, P.A. v. Law Offices of Frank H. Alvarez, 490 So. 2d 159 (Fla. 3d DCA), review denied, 500 So. 2d 545 (Fla. 1986), and Faro v. Romani, 18 Fla. L. Weekly D2206 (Fla. 4th DCA Oct 13., 1993).

FRANK, C.J., and HALL, J., Concur.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 6th day of April, 1994, to: F. Wallace Pope, Jr., Esq., Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A., 911 Chestnut Street, Clearwater, Fla. 34617.

By: Joel D. Eaton
JOEL D. EATON