DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JORDAN M. SCHERER, as parent and legal guardian of Mallory M. Scherer; JORDAN M. SCHERER, as personal representative of the Estate of Logan Scherer, deceased; BROOKE N. SCHERER; JORDAN M. SCHERER; and JOSEPH PATSKO,

Appellants,

v.

AUSTIN ROE BASQUILL, P.A., f/k/a AUSTIN, ROE & PATSKO, P.A.; GREGORY ANDRIOTIS; GREGORY ANDRIOTIS, as employee of Harper Limbach, LLC; GREGORY ANDRIOTIS, as employee of Limbach Facility Services, LLC; HARPER LIMBACH, LLC; and LIMBACH FACILITY SERVICES, LLC,

Appellees.

No. 2D20-1116

June 16, 2021

Appeal from the Circuit Court for Hillsborough County; Emmett Lamar Battles, Judge.

Steven L. Brannock and Joseph T. Eagleton of Brannock Humphries & Berman, Tampa; and Robert M. Klein of Klein Glasser Park & Lowe, PL, Miami, for Appellants.

F. Wallace Pope, Jr., and Caitlein J. Jammo of Johnson, Pope, Bokor, Ruppel & Burns, LLP, Clearwater, for Appellee Austin Roe Basquill, P.A., f/k/a Austin, Roe & Patsko, P.A.

No appearance for remaining Appellees.

SMITH, Judge.

Jordan M. Scherer and Brooke N. Scherer, individually, and Jordan M. Scherer, as parent and legal guardian of Mallory M. Scherer and in his capacity as personal representative of the Estate of Logan Scherer (collectively, the Scherers), and Joseph Patsko appeal from the order of final summary judgment entered in favor of Austin Roe Basquill, P.A. (Austin Roe), f/k/a Austin, Roe & Patsko, P.A. (ARP)—the law firm that filed a charging lien related to its prior representation of the Scherers under a contingency fee agreement, within their personal injury lawsuit.[1] For the reasons expressed in this opinion, the trial court erred in applying the methodology set forth in *Frates v. Nichols*, 167 So. 2d 77 (Fla. 3d DCA 1964), and its progeny when it entered the final summary judgment order

[1] "The charging lien is an equitable right to have costs and fees due an attorney for services in the suit secured to him in the judgment or recovery in that particular suit. It serves to protect the rights of the attorney." *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom*, 428 So. 2d 1383, 1384 (Fla. 1983) (citing *Worley v. Phillips*, 264 So. 2d 42 (Fla. 2d DCA 1972)).

awarding Austin Roe its contingency fee—adjusted to account for the firm's percentage share according to its shareholder agreement with a departing partner. Because the Scherers terminated ARP before the contingency occurred, by exercising their right of choice under rule 4-5.8, Rules Regulating the Florida Bar after their chosen attorney, Joseph Patsko, parted ways with ARP, the trial court instead should have awarded fees to Austin Roe pursuant to a modified quantum meruit determination as set forth in *Rosenberg v. Levin*, 409 So. 2d 1016 (Fla. 1982).[2] We therefore reverse the final

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[2] To avoid restricting a client's freedom to discharge his attorney, a number of jurisdictions in recent years have held that an attorney discharged without cause can recover only the reasonable value services rendered prior to discharge. . . . The . . . court established quantum meruit recovery for the attorney on the theory that the client does not breach the contract by discharging the attorney. Rather, the court reasoned, there is an implied condition in every attorney-client contract that the client may discharge the attorney at any time with or without cause. With this right as part of the contract, traditional contract principles are applied to allow quantum meruit recovery on the basis of services performed to date.

Rosenberg, 409 So. 2d at 1020 (citation omitted) (citing *Covington v. Rhodes*, 247 S.E.2d 305 (N.C. 1978); *Johnson v. Long*, 305 N.E.2d

summary judgment on the charging lien and remand with instructions for the trial court to enter a final summary judgment awarding Austin Roe fees under the correct method. As this issue is dispositive of this appeal, we decline to comment on the other remaining issues.

I.

The Scherers were brought in as clients of ARP by then shareholder, Mr. Patsko, in September 2016. At that time, ARP was a professional service corporation duly organized under chapter 621, Florida Statutes, and Mr. Patsko had been a named shareholder since 1991. The Scherers signed a contingency fee agreement for ARP, specifically Mr. Patsko, to represent them in their personal injury lawsuit against Gregory Andriotis, Harper Limbach, LLC, and Limbach Facility Services, LLC.[3] However, shortly after the Scherers retained ARP, prior to the filing of their

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30 (Ill. 1973); *State Farm Mut. Ins. v. St. Joseph's Hosp.*, 489 P.2d 837 (Ariz. 1971)).

[3] These party defendants in the underlying lawsuit have not appeared in this appeal but are listed as appellees pursuant to Florida Rule of Appellate Procedure 9.020(g).

lawsuit and before any contingency occurred under the fee agreement,[4] Mr. Patsko decided to part ways with ARP.[5] On January 26, 2017, Mr. Patsko and ARP wrote a joint letter to the Scherers pursuant to rule 4-5.8 notifying the Scherers of Mr. Patsko's impending departure and their right to either continue as a client of ARP or retain new counsel or retain Mr. Patsko's new law firm. The Scherers promptly responded and indicated that they were going to retain Mr. Patsko's new firm to represent them in their personal injury action. At the time of his departure, Mr. Patsko had expended approximately fifty hours of attorney time on the case.

Soon after Mr. Patsko's departure, on or around February 1, 2017, the Scherers signed a contingency fee agreement with Mr. Patsko's new law firm—The Patsko Law Group. Austin Roe filed a Notice of Charging Lien on February 16, 2017, and an Amended

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[4] "Until [the client] actually recover[s] something from the judgment debtor, the contingency contemplated in the fee agreement d[oes] not occur." *Arabia v. Siedlecki*, 789 So. 2d 380, 382 (Fla. 4th DCA 2001) (en banc).

[5] After Mr. Patsko left the firm, ARP (Austin, Roe & Patsko, P.A.) changed its name to Austin Roe (Austin Roe Basquill, P.A.).

Notice of Charging Lien on December 5, 2017, which, when taken together, (1) claimed that Austin Roe, as the new iteration of ARP, was entitled to "the entire contingency fee in [the Scherers' lawsuit], less any amount owed to Mr. Patsko under his [shareholder] agreement with [ARP]" because Mr. Patsko owed fiduciary duties of loyalty and care to ARP as a shareholder, officer, and director of ARP, citing *Frates* and its progeny, and (2) alternatively sought "the reasonable value of its services for its representation of the [Scherers] between September 24, 2016 and January 31, 2017."

In January 2019, almost two years after Mr. Patsko's departure from ARP, the case was resolved favorably for the Scherers when a settlement was reached, and as a result, the cause was dismissed with prejudice with the trial court reserving jurisdiction "to address any and all asserted charging lien issues related to this matter." With the occurrence of the contingency—the payout of the settlement to the Scherers—both Austin Roe and the Scherers filed competing motions for partial summary judgment related to the appropriate methodology for calculating the amount of fees due to Austin Roe—with Austin Roe arguing for an award of the fees based on *Frates*, under which the portion owed to Mr.

Patsko is calculated based on his shareholder interest in ARP, and the Scherers arguing that Austin Roe's share of the fees should be determined by the modified quantum meruit theory explained in *Rosenberg*.[6] Austin Roe also moved to strike the Scherers' motion for summary judgment and to exclude the Scherers from participating further in the charging lien matter—arguing they lacked standing because the cause and parties had been dismissed by the trial court upon settlement and they had paid the contingency fee by putting the money in escrow. The trial court's ruling on these partial motions for summary judgment serve as the basis for this reversal.

At the hearing on the cross-motions for summary judgment, the trial court granted Austin Roe's motion to strike the Scherers' motion for summary judgment finding the Scherers lacked standing

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[6] The total amount of contingency fees owed for Mr. Patsko's entire representation of the Scherers is not in dispute; for the purposes of this appeal, the dispute in this case was only over whether any portion of that amount is owed to Austin Roe and, if so, under what calculation method. Accordingly, an agreement was reached between the Scherers, Mr. Patsko, and Austin Roe that the attorney's fees would be held in escrow pending this appeal.

based upon the April 24, 2019, dismissal of the Scherers as parties. The trial court specifically found that

> to the extent that the Scherers present arguments related to their beliefs, their reliance on agreements, and any perceived impact on them that may result from the ruling on this matter, [the] Court finds such arguments are not properly before it and as such, the Court will not consider them. The Court will fully consider the [Scherers' motion for summary judgment] only as it relates to Patsko.

The trial court also granted Austin Roe's motion for partial summary judgment, determining that *Frates* should govern this fee dispute but leaving open the issue of what portion of the fees was owed to Mr. Patsko based on his equity interest in ARP.

Thereafter, Austin Roe moved for final summary judgment on the amount of Austin Roe's share of the fees. The trial court entered final summary judgment in favor of Austin Roe determining that it was entitled to the full contingency fee, less Mr. Patsko's shareholder interest of 33.11258%, pursuant to ARP's 1991 shareholder agreement. This appeal by the Scherers and Mr. Patsko followed.[7]

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[7] Mr. Patsko was present with counsel at the hearings on the motions for summary judgment. Mr. Patsko and the Scherers filed

II.

We first address the Scherers' argument that the trial court erred by striking their motion for summary judgment finding they "lacked standing" to challenge Austin Roe's claim to a share of the attorney's fees. The charging lien at issue was filed by Austin Roe within the Scherers' cause of action. The settlement reached in the underlying case resulted in a dismissal of the cause, and the trial court specifically reserved jurisdiction to determine the remaining issues related to the charging lien—but the Scherers were not dismissed as parties by the dismissal of the cause, and they remain interested in the matter related to equitable claims for fees based on the agreement to which they were a party. *See Pirate's Treasure, Inc. v. City of Dunedin*, 277 So. 3d 1124, 1128 (Fla. 2d DCA 2019) ("In determining whether a party has such an interest in the judicial resolution of a dispute, it is helpful to ask whether a decision in the

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a joint notice of appeal, specifically maintaining that while the Scherers were the proper parties in the trial court and are the proper appellants here, Mr. Patsko joined as an appellant on appeal in order to protect all arguments related to party status and rights thereunder. We note that even if he had not joined in the notice of appeal, Mr. Patsko would be a named appellee pursuant to rule 9.020(g).

case will actually resolve the rights and obligations of the parties, in which case standing likely exists, or simply will produce an advisory opinion, in which case it does not."). Here, it is clear that the Scherers had sufficient interest as to maintain standing in relationship to the charging lien determinations.

"The charging lien is an equitable right to have costs and fees due an attorney for services in suit secured to him in the judgment or recovery in that particular suit." *Naftzger v. Elam*, 41 So. 3d 944, 946 (Fla. 2d DCA 2010) (quoting *Baucom*, 428 So. 2d at 1384). An attorney who seeks to enforce an attorney's fee charging lien is required to "show: (1) an express or implied contract between attorney and client; (2) an express or implied understanding for payment of attorney's fees out of the recovery; (3) either an avoidance of payment or a dispute as to the amount of fees; and (4) timely notice." *Id.* (quoting *Daniel Mones, P.A. v. Smith*, 486 So. 2d 559, 561 (Fla. 1986)). Under *Naftzger*, the interested parties to an attorney's charging lien proceeding necessarily include <u>both</u> the attorney who seeks to enforce the charging lien and the client with whom the attorney or firm contracted to perform services and from whom payment is being sought. *See Crescenze v. Bothe*, 4 So. 3d

31, 33 (Fla. 2d DCA 2009) ("Indispensable parties are necessary parties so essential to a suit that no final decision can be rendered without their joinder." (quoting *Sudhoff v. Fed. Nat'l Mortg. Ass'n*, 942 So. 2d 425, 427 (Fla. 5th DCA 2006))); *see also* Fla. R. Civ. P. 1.210(a) (identifying interested parties who should be joined in an action).

The Scherers, as the clients who hired ARP for services and in whose favor the monetary settlement was reached, are therefore indispensable to Austin Roe's claims related to its enforcement of the charging lien in this action. In fact, Austin Roe's lien was based on both the contingency fee agreement entered into with ARP by the Scherers and the occurring contingency—payment of settlement monies to the Scherers. They had every right to dispute the enforcement of Austin Roe's attorney's fee charging lien and, therefore, had standing. Our holding that the Scherers had standing to dispute the charging lien is also reflected in our analysis of the Scherers' substantive argument on appeal related to their right to retain Mr. Patsko as their counsel of choice and thereby end their relationship, and their contingency fee agreement, with ARP.

III.

We next address the Scherers' argument that the trial court erred in determining the apportionment of the attorney's fees between Austin Roe and Mr. Patsko. While the trial court relied on *Frates* to find that Mr. Patsko was entitled only to a portion of the attorney's fees equal to his equity share in ARP, as determined by the shareholder agreement between Mr. Patsko and ARP, the Scherers argue that Austin Roe's share of the attorney's fees should be calculated based on a quantum meruit determination under *Rosenberg*. We agree with the Scherers.

When Mr. Patsko and ARP parted ways, the circumstances of the contingency fee agreement entered into, whereby Mr. Patsko would represent the Scherers through ARP, necessarily changed. Pursuant to rule 4-5.8, ARP and Mr. Patsko were required to notify the Scherers and outline their three options going forward, which amounted to ending their relationship with ARP, ending the relationship with Mr. Patsko, or ending the relationship with both ARP and Mr. Patsko. The option selected by the Scherers effectively discharged ARP as the Scherers' firm of choice, thus allowing them to retain Mr. Patsko and his new firm as their attorney. The related

questions we therefore must address are what, if anything, remained of the obligations under the original contingency fee agreement following this decision by the Scherers and what any such obligations meant in regard to the new contingency fee agreement that the Scherers entered into with Mr. Patsko and his new firm.[8] For the reasons explained below, we conclude that ARP was discharged by the Scherers' decision following the rule 4.5.8 letter and that Mr. Patsko's obligations to represent the Scherers on behalf of ARP were also discharged—allowing for the entry of the

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[8] It is noteworthy that had the Scherers elected to retain an entirely new law firm and attorney, rather than continue with representation by Mr. Patsko at his new firm, then that decision clearly would have terminated the original contingency fee agreement with both ARP and Mr. Patsko, and both Austin Roe and Mr. Patsko would have been limited to a quantum meruit recovery under *Rosenberg*. *See Franklin & Marbin, P.A. v. Mascola*, 711 So. 2d 46, 50 (Fla. 4th DCA 1998) ("[W]here under a fixed fee or contingency contract the client discharges the lawyer who is without fault before full performance of the contract, under *Rosenberg* the client is obligated only for quantum meruit not to exceed the contract fee . . . ."). Likewise, had the Scherers elected to remain with Austin Roe, Mr. Patsko would have been discharged and unable to collect any portion of the contingency fee under the effect of that original agreement. *See id.*; *see also Faro v. Romani*, 641 So. 2d 69, 71 (Fla. 1994) (holding an attorney who voluntarily withdrew from contingency fee case before the contingency occurred was not entitled to any compensation for fees accruing after his withdrawal).

contingency fee agreement with Mr. Patsko's new firm, which was in effect when the contingency occurred.

We start our analysis with *Rosenberg*, a case focused on protecting a client's right to discharge an attorney and retain counsel of choice in contingency matters when the discharged attorney seeks compensation for services rendered before the discharge. 409 So. 2d at 1020. *Rosenberg* examined "whether the terms of an attorney employment contract limit the attorney's quantum meruit recovery to the fee set out in the contract" and, more broadly, "whether in Florida quantum meruit is an appropriate basis for compensation of attorneys discharged by their clients without cause where there is a specific employment contract." 409 So. 2d at 1018. The client hired the Rosenberg law firm to handle a matter on a fixed fee of $10,000, plus a contingent fee equal to fifty percent for amounts recovered in excess of $600,000. Prior to the resolution of the case, the client discharged Rosenberg without cause and later settled the case for $500,000 through the efforts of another law firm. Rosenberg filed a separate action against the client seeking fees based upon quantum meruit. The trial court awarded the Rosenberg law firm $55,000 based

upon a quantum meruit determination, and the district court affirmed the quantum meruit analysis but reduced the fee to $10,000—holding that the fee "could in no event exceed the amount which the attorneys would have received under their contract if not prematurely discharged." *Id.*

The case worked its way up to the Florida Supreme Court, which recognized that it had previously left open the issue of whether quantum meruit is the proper standard to use when determining the apportionment of attorney's fees under a contingency fee contract where one firm was discharged prior to the conclusion of the case. *Id.* at 1018-19 (citing *Milton Kelner, P.A. v. 610 Lincoln Rd., Inc.*, 328 So. 2d 193, 196 (Fla. 1976) ("Quantum meruit may well be the proper standard when the discharge under a contingent fee contract occurs [p]rior to the obtaining of the full settlement contracted for under the attorney-client agreement, with the cause of action accruing only upon the happening of the contingency to the benefit of the former client. That issue, however, is not factually before us and we do not make that determination in this cause.")). The court then analyzed the different possible theories of recovery in contingency fee cases where the client

discharges an attorney or law firm without cause before the contingency occurs: (1) the traditional contract rule; (2) quantum meruit rule; and (3) the limited quantum meruit rule discussed in *Chambliss, Bahner & Crawford v. Luther*, 531 S.W.2d 108, 113 (Tenn. Ct. App. 1975). *Rosenberg*, 409 So. 2d at 1019-21; *see also Chambliss, Bahner & Crawford*, 531 S.W.2d at 113 (expressing the need for a limit on any quantum meruit recovery and stating that "because a client has the unqualified right to discharge his attorney, fees in such cases should be limited to the value of the services rendered or the contract price, whichever is less"). The court in *Rosenberg* ultimately rested its conclusion on the limited quantum meruit rule because it least penalizes the client for exercising the right to choose an attorney, while at the same time affords the attorney the reasonable value of the attorney's fees expended through the discharge, but in no event does it allow for recovery of more than the amount negotiated under the contract. *Id.* at 1021-22.

> Accordingly, we hold that an attorney employed under a valid contract who is discharged without cause before the contingency has occurred or before the client's matters have concluded can recover only the

> reasonable value of his services rendered prior to discharge, limited by the maximum contract fee. We reject both the traditional contract rule and the quantum meruit rule that allow recovery in excess of the maximum contract price because both have a chilling effect on the client's power to discharge an attorney. Under the contract rule in a contingent fee situation, both the discharged attorney and the second attorney may receive a substantial percentage of the client's final recovery. Under the unlimited quantum meruit rule, it is possible, as the instant case illustrates, for the attorney to receive a fee greater than he bargained for under the terms of his contract. Both these results are unacceptable to us.

Id. at 1021 (emphasis added). In rejecting the traditional contract rule, the court held that a client who exercises the right to discharge an attorney before the contingency has occurred is not liable for damages to the attorney and thus cannot breach the contingency fee agreement because a cause of action for the fee does not accrue until the contingency has occurred. *Id.* at 1022 (hinging the accrual of any quantum meruit cause of action on the occurrence of the contingency, recognizing that if a contingency never occurs then a discharged attorney can never recover, and identifying the goal of preserving "the client's freedom to discharge"). "The *Rosenberg* rule has been applied strictly. Even

when the contingency has almost occurred at the time of the attorney's discharge, the fee awarded the attorney is limited to the capped quantum meruit amount provided in *Rosenberg*." *Trend Coin Co. v. Fuller, Feingold & Mallah, P.A.*, 538 So. 2d 919, 921 (Fla. 3d DCA 1989).

A decade after *Rosenberg*, the Florida Supreme Court decided *Searcy, Denny, Scarola, Barnhart & Shipley, P.A. v. Poletz*, 652 So. 2d 366, 367 (Fla. 1995), in which a client left with an associate of the Searcy law firm and terminated the relationship with the firm after the firm had accumulated 340 hours in preparing a personal injury case for trial. Searcy sought a substantial portion of the contingency fee claiming that the associate had improperly encouraged the client to discharge Searcy. The supreme court clarified the proper criteria for determining a quantum meruit recovery where an attorney is discharged without cause prior to the resolution of a client's case. *Id.* at 368-69.

> [A] quantum meruit award must take into account the actual value of the services to the client. Thus, while the time reasonably devoted to the representation and a reasonable hourly rate are factors to be considered <u>in determining a proper quantum meruit award, the court must consider all relevant factors surrounding the professional relationship to ensure that the award is fair</u>

> to both the attorney and client. *See Reid, Johnson, Downes, Andrachik & Webster v. Lansberry,* 68 Ohio St. 3d 570, 629 N.E.2d 431, 436-437 (1994) (totality of circumstances surrounding each situation should be considered in determining reasonable value of discharged contingent-fee attorney's services in quantum meruit). Application of the factors set forth in Rule Regulating The Florida Bar 4–1.5(b), may provide a good starting point. However, because the factors relevant to the determination of the reasonable value of services rendered will vary from case to case, the court is not limited to consideration of the [*Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985),] factors. The court must consider any other factors surrounding the professional relationship that would assist the court in fashioning an award that is fair to both the attorney and client. For example, the fee agreement itself, the reason the attorney was discharged, actions taken by the attorney or client before or after discharge, and the benefit actually conferred on the client may be relevant to that determination. The determination as to which factors are relevant in a given case, the weight to be given each factor and the ultimate determination as to the amount to be awarded are matters within the sound discretion of the trial court.

Id. at 369 (emphasis added) (footnotes omitted).

At the time *Rosenberg* and *Poletz* were decided, there was no rule requiring formal notice to the client of their right to choose their own counsel when the client's lawyer leaves the law firm. Prior to rule 4-5.8, when lawyers decided to part ways with their old firms, they typically left and took their clients' files with them. *See, e.g., Frates*, 167 So. 2d at 79. Recognizing the need for a rule to

protect and safeguard clients' rights to choose their own lawyers, in 2005, the Florida Bar promulgated rule 4-5.8—Procedures for Lawyers Leaving Law Firms and Dissolution of Law Firms—which provides in pertinent part:

> **(a) Contractual Relationship Between Law Firm and Clients.** The contract for legal services creates the legal relationships between the client and law firm and between the client and individual members of the law firm, including the ownership of the files maintained by the lawyer or law firm. Nothing in these rules creates or defines those relationships.
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> **(b) Client's Right to Counsel of Choice.** Clients have the right to expect that they may choose counsel when legal services are required and, with few exceptions, nothing that lawyers and law firms do shall have any effect on the exercise of that right.
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> **(c) Contact With Clients.**
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> (1) **Lawyers Leaving Law Firms.** Absent a specific agreement otherwise, a lawyer who is leaving a law firm shall not unilaterally contact those clients of the law firm for purposes of notifying them about the anticipated departure or to solicit representation of the clients unless the lawyer has approached an authorized representative of the law firm and attempted to negotiate a joint communication to the clients concerning the lawyer leaving the law firm and bona fide negotiations have been unsuccessful.
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> (2) **Dissolution of Law Firm.** Absent a specific agreement otherwise, a lawyer involved in the dissolution of a law firm shall not unilaterally contact clients of the law firm unless, after bona fide negotiations, authorized

members of the law firm have been unable to agree on a method to provide notice to clients.

(d) Form for Contact With Clients.

(1) **Lawyers Leaving Law Firms.** When a joint response has not been successfully negotiated, unilateral contact by individual members or the law firm shall give notice to clients that the lawyer is leaving the law firm and provide options to the clients to choose to remain a client of the law firm, to choose representation by the departing lawyer, or to choose representation by other lawyers or law firms.

(2) **Dissolution of Law Firms.** When a law firm is being dissolved and no procedure for contacting clients has been agreed upon, unilateral contact by members of the law firm shall give notice to clients that the firm is being dissolved and provide options to the clients to choose representation by any member of the dissolving law firm, or representation by other lawyers or law firms.

(3) **Liability for Fees and Costs.** In all instances, notice to the client required under this rule shall provide information concerning potential liability for fees for legal services previously rendered, costs expended, and how any deposits for fees or costs will be handled. In addition, if appropriate, notice shall be given that reasonable charges may be imposed to provide a copy of any file to a successor lawyer.

See In re Amends. to Rules Regulating The Fla. Bar, 916 So. 2d 655, 702–03 (Fla. 2005); *see also Myers v. Siegel*, 920 So. 2d 1241, 1243 n.2 (Fla. 5th DCA 2006) ("[T]here is an overriding need to allow clients freedom to substitute attorneys without economic penalty as

a means of accomplishing the broad objective of fostering public confidence in the legal profession." (quoting *Rosenberg*, 409 So. 2d at 1021 (citing R. Regulating the Fla. Bar 4-5.8)). To be sure, the rule makes no distinction between an equity shareholder or partner from that of a nonequity shareholder or partner but provides that the client has the ultimate right to choose who will continue to represent them regardless of whether the client's lawyer leaves the law firm or the law firm dissolves. The rule recognizes that it is "[t]he contract for legal services [which] creates the legal relationships between the client and law firm and between the client and individual members of the law firm, including the ownership of the files maintained by the lawyer or law firm. Nothing in these rules creates or defines those relationships."[9] R. Regulating Fla. Bar 4-5.8(a).

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[9] Our review here is limited to deciding the scope of Austin Roe's charging lien with respect to the funds held in escrow in this proceeding to collect under the terms of its agreement with the Scherers. To the extent that Austin Roe, or Mr. Patsko for that matter, have claims against one another arising out of their shareholder relationship, those issues are not before us, and we decline to entertain them. *See generally I.R.C. v. State*, 968 So. 2d 583, 588 (Fla. 2d DCA 2007) (recognizing that an appellate court is generally limited to considering those issues that were before the

In this case there is no dispute that the Scherers were provided the required notice under rule 4-5.8 and that ARP and Mr. Patsko jointly notified the Scherers of Mr. Patsko's imminent departure and their right to either stay with ARP or retain new counsel or continue with Mr. Patsko. The Scherers chose the latter and notified ARP sometime prior to February 1, 2017, of their decision to leave ARP and continue with Mr. Patsko's representation through his new firm; indeed, the Scherers only initially hired ARP because of Mr. Patsko. There is no dispute that ARP was discharged without cause prior to the contingency or that this discharge was the result of Mr. Patsko's decision to leave ARP and the Scherers' desire to continue having Mr. Patsko represent them in their lawsuit. Therefore, given the interplay between rule 4-5.8 and *Rosenberg*, ARP is entitled to no more than an award of attorney's fees based upon quantum meruit as limited by the terms of the contingency fee agreement, where the Scherers terminated

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trial court and were raised on appeal). Likewise, the express terms of the contingency fee agreement between the Scherers and ARP are not the subject of this appeal, and this opinion has no bearing on the construction or interpretation of the terms of the contingency fee agreement itself.

ARP *before* the contingency occurred. Our analysis does not end here, however, because Austin Roe argues that *Frates*, rather than *Rosenberg*, controls this case.

IV.

Austin Roe directs our focus away from its relationship with the Scherers to its former shareholder relationship with Mr. Patsko. Austin Roe argues that *Rosenberg* has no application where a lawyer holding an equity interest in the law firm leaves and takes the client with them. Instead, Austin Roe asks this court to apply *Frates*, 167 So. 2d 77, as expounded by *Buckley Towers Condominium, Inc. v. Katzman Garfinkel Rosenbaum, LLP*, 519 F. App'x 657 (11th Cir. 2013), and effectively hold that the contingency fee agreement between the Scherers and ARP survived based upon Mr. Patsko's continuing fiduciary duties to his old firm, thereby making the subsequent contingency fee agreement that the Scherers entered with Mr. Patsko's new firm a nullity.

While the facts in *Rosenberg* are not identical to the facts before us in the instant case, neither are the facts in *Frates*. In contrast to *Rosenberg* and the case before us, which both involve fee disputes between the client and the law firm following the

occurrence of contingencies, *Frates* involved a partnership dispute between the withdrawing and remaining partners of a dissolved law firm regarding their rights to contingency fees earned after the dissolution. 167 So. 2d at 79. Like *Rosenberg*, *Frates* was also decided prior to the adoption of rule 4-5.8.

In *Frates*, equity partner Frates left his firm with other members to form a new firm. Because the case predated Florida's adoption, in 1995, of its Revised Uniform Partnership Act, under chapter 620, Florida Statutes, Frates' departure resulted in the dissolution of the old firm.[10] The remaining members of the partnership formed a successor firm retaining the assets of the dissolved partnership. However, Frates took with him a number of pending contingency fee matters, and those clients signed new

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[10] Florida adopted the Uniform Partnership Act in 1972 and the Revised Uniform Partnership Act in 1995. As *Frates* was decided in 1962, prior to the adoption of either Act, the *Frates* court relied upon case law for the proposition that "the dissolution [of the law firm partnership] did not put an immediate end to the partnership, it continued for the purpose of winding up its affairs, and inasmuch as Frates had a duty to wind down the affairs of the partnership, his signing of a retainer agreement with an already existing client was without consideration and void." *Frates*, 167 So. 2d at 80 (citing *Price v. Drew*, 18 Fla. 670, 687 (1882)).

retainer agreements with his new firm. The *Frates* court, as a starting point, "determine[d] the outer limits of the controversy." *Id.* at 80 ("At the outset, in order to determine the outer limits of the controversy, we hold that the retainer agreements the clients signed with [Frates' new law firm] were a nullity.").[11]

The court then applied basic principles of partnership law, reasoning that Frates owed a fiduciary duty to his old firm in winding up the affairs of the dissolved partnership and that absent

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[11] Contrary to the facts in *Frates*, the trial court in this case made no finding of any kind that the contingency fee agreement between the Scherers and Mr. Patsko is a nullity. *See Nullity, Black's Law Dictionary* (11th ed. 2019) (defining nullity as "[s]omething that is legally void"). And in fact, it is inconceivable that the contingency fee agreement could be found a nullity given the joint letter of ARP and Mr. Patsko notifying the Scherers of their exclusive right under rule 4-5.8 to choose their own lawyer as a result of Mr. Patsko's departure. *Compare Frates*, 167 So. 2d at 80 ("It is true, as Frates contends, that these clients could have discharged the firm at any time and retained new lawyers, but that did not occur here. All these clients, who signed retainer agreements with Frates, did, was to manifest their intention of retaining Frates to fulfill the continuing obligation of the firm of Nichols, Gaither, Green, Frates & Beckham, to them." (footnote omitted)), *with* R. Regulating Fla. Bar 4-5.8(d) (requiring that when a lawyer leaves a firm the client be given the option of staying with the firm, staying with that lawyer, or retaining entirely new counsel and that when a law firm dissolves a client must be given the option of choosing to be represented by any member of the dissolving firm or retaining new counsel).

an agreement otherwise, because the contingency fee agreement was an asset of the dissolved firm, the dissolved firm was entitled to the entire contingency fee less the departing partner's equity share in the partnership. *Id.* Frates, therefore, could receive no more than his equity share because, as a partner, he was not entitled to extra compensation for winding up the affairs of partnership business. Id. at 81 ("[T]he retention of a law firm obligates every member thereof to fulfilling that contract, and . . . upon a dissolution any of the partners is obligated to complete that obligation without *extra* compensation.").

Based upon the partnership dispute and holding in *Frates* it is not surprising that Florida courts have continued to apply *Frates* within the gamut of partnership dissolution cases, especially in cases decided prior to the creation of rule 4-5.8. *See, e.g., Sheradsky v. Moore*, 389 So. 2d 1206, 1207 (Fla. 3d DCA 1980) ("[A] law partner in dissolution owes a duty to his former firm to conclude the firm's business pending at time of dissolution and is not entitled to extra compensation for this activity in the absence of a specific agreement . . . ."); *Welsh v. Carroll*, 378 So. 2d 1255, 1257 (Fla. 3d DCA 1979) (determining that dissolution of professional

association did not terminate the parties' employment contracts, and so the income from pending cases, both contingent and fee, would be decided according to the percentages set forth in the employment contracts); *Kreutzer v. Wallace*, 342 So. 2d 981, 982–83 (Fla. 3d DCA 1977) (determining that in the absence of an agreement, members of a dissolved law firm are not entitled to extra compensation in winding up firm cases). *But see Parker Waichman LLP v. R.J. Reynolds Tobacco Co.*, 288 So. 3d 726, 730 (Fla. 4th DCA 2019) (declining to apply *Frates* rule where exiting limited partner neither had a duty to wind up the affairs nor breached any duties to the former law firm and therefore determining that former law firm was only entitled to quantum meruit fee in pending contingency fee matter when limited partner exited firm and client signed new contingency fee with the limited partner's new firm).

Our research has found no Florida state-court application of *Frates* other than within the framework of its limited holding—in partnership dispute dissolution cases. Nevertheless, Austin Roe does not see this limitation as an obstacle and asks us to adopt the reasoning in *Buckley Towers*, 519 F. App'x at 662–63, which extended the rule in *Frates* beyond partnership dissolution cases to

cases involving nondissolution and corporate-structured cases. *See also In re Health Support Network, Inc.*, 585 B.R. 202, 207 (Bankr. M.D. Fla. 2018) (applying *Buckley Towers* and *Frates* in holding that the former dissolved partnership was entitled to the entire contingency fee earned less the partner's interest in the law firm, where the contingency fee case was an asset of the dissolved firm that continued for the purpose of winding up its affairs).

While we note that *Buckley Towers* was indeed resolved within a charging lien dispute, we decline to take its leap and extend it to the facts of this case for the reasons we discuss below. Foremost, we are bound by neither *Buckley Towers* nor *Health Support Network*. *See State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976) ("Even though lower federal court rulings may be in some instances persuasive, such rulings are not binding on state courts."); *Bonilla v. Baker Concrete Constr., Inc.*, 487 F. 3d 1340, 1345 n.7 (11th Cir. 2007) ("Unpublished opinions are not controlling authority and are persuasive only insofar as their legal analysis warrants."). Moreover, *Buckley Towers*' reliance on *Frates* to construct its legal analysis is limited to its conclusions regarding which agreement

was in effect, but that discussion is ancillary to its actual holding, which necessarily relied significantly on *Rosenberg*.

In *Buckley Towers*, the charging lien dispute before the Eleventh Circuit involved multiple competing law firms representing *Buckley Towers* over the course of the litigation. For reasons not apparent from the opinion, the clients did not appear and the court concentrated on the relationship between the various attorneys and successor firms. In extending *Frates* to facts not equally similar, the court reasoned that it did not believe "Florida courts would allow attorneys to shirk fiduciary duties simply by choosing an alternate business entity for their law firm." 519 F. App'x at 663. In so doing, *Buckley Towers* relied upon two of the Rules Regulating the Florida Bar, rule 4-5.1 ("Responsibilities of Partners, Managers, and Supervisory Lawyers" related to ensuring that attorneys conform to rules of professional conduct and responsibility) and rule 4-5.8, neither of which existed when *Frates* was decided.[12] The *Buckley Towers* court noted that these Rules of Professional

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[12] Both of these rules are contained in chapter 4, entitled Rules of Professional Conduct, of the Rules Regulating the Florida Bar.

Conduct drew no distinction between fiduciary duties owed to subordinates and clients and that therefore it was confident that Florida would "follow the majority of states and require the same fiduciary duties be owed to other attorneys and former law firms, whether the firm was a partnership or professional corporation." *Id.* at 663 ("[U]nder the common law, a lawyer who renders professional services owes a duty of care regardless of the fact that the lawyer is an associate or partner in a business entity that contracts to provide professional services to the injured party." (quoting *Moransais v. Healthman*, 744 So. 2d 973, 978 (Fla. 1999), *receded from on other grounds*, *Tiara Condo. Ass'n v. Marsh & McLennan Cos.*, 110 So. 3d 399 (Fla. 2013))). The court's reference to the "majority of states" was taken from the Second Circuit's opinion in *Santalucia v. Sebright Transportation, Inc.*, 232 F. 3d 293, 299 (2d Cir. 2000), which treated fiduciary duties of a partner the same as those of a shareholder. 519 F. App'x at 663. A thorough examination of *Santalucia*, as well as the cases from those "majority of states," reveals that each of those cases, like *Frates* and its progeny, involved the dissolution of either a partnership or professional corporation. *See Santalucia*, 232 F. 3d at 299 (citing

Hurwitz v. Padden, 581 N.W.2d 359, 362 (Minn. Ct. App. 1998) (partnership dissolution); *Fox v. Abrams,* 163 Cal.App.3d 610, 616–17 (Cal. App. 1985) (corporate dissolution); *Sufrin v. Hoiser,* 896 F.Supp. 766, 768–69 (N.D. Ill. 1995) (dissolved corporation)). More importantly, these "majority of states" cases do not address the issue before this court as it relates to the scope of the charging lien and the interplay of rule 4-5.8 and *Rosenberg*.

As an initial matter, we note that the court in *Buckley Towers* never actually reached the fee-award issue between the original firm and the exiting shareholder attorney—who, before the contingency occurred, took the client to two successive law firms—because the original firm dismissed its appeal before the opinion issued. 519 F. App'x at 659–60. Although it used its determination in regard to the relationship of the original firm and its exiting attorney to conclude that the first contingency fee agreement was the effective contract and the latter two were nullities, the remaining dispute that the court in *Buckley Towers* actually decided was, in fact, whether a quantum meruit award should be given to the first successor firm who took the contingency case when the client left the original firm but then also lost the client before the contingency

when the client again switched firms to follow their attorney to the second successor firm. *Id.* at 660, 664–65. Therefore, the *Buckley Towers* court's decision has no persuasive value here, where—despite its extensive analysis of the extension of *Frates* beyond partnerships to professional corporations—its actual holding was limited to the fee entitlement of attorneys at an interim firm where the exiting shareholder worked for a time before the contingency accrued. And although it focused on the contingency fee agreement with the first firm rather than the third by extending *Frates*, this holding, in essence, was based on *Rosenberg*. *See id.* at 664–65 (stating that because the attorneys at the interim firm were not shareholders in the original firm, they owed no fiduciary duty to the original firm and therefore were entitled to fees based upon quantum meruit where their relationship with the client had also ended before the contingency occurred).

Next, the court in *Buckley Towers* correctly postulates that Florida would not allow lawyers to "shirk their fiduciary duties" simply by forming a corporation as opposed to a partnership. *See In re The Fla. Bar*, 133 So. 2d 554, 556 (Fla. 1961) ("The individual practitioner, whether a stockholder in a corporation or otherwise,

will continue to be expected to abide by all of the Rules and Canons of professional ethics heretofore or hereafter required of him. The corporate entity as a method of doing business will not be permitted to protect the unfaithful or the unethical.").[13] However, it is important to note that Florida courts recognize that professional corporations are distinct from partnership organizations. *See Freedman v. Fox*, 67 So. 2d 692, 693 (Fla. 1953) (recognizing the distinction between corporations and partnerships in a case where the stockholders who were unable to obtain dissolution under corporate theories claimed the corporation was a partnership and noting that "[a]pparently it is only when dissension arises that the respondents become dissatisfied with their position as stockholders"); *see, e.g., Fernandez v. Yates*, 145 So. 3d 141, 142–43 (Fla. 3d DCA 2014) (involving distinctions between dissolution of partnership and dissolution of corporation).

[13] Lawyers may form professional service corporations for multitude of reasons, including tax reasons and liability protection. *See* R. Regulating Fla. Bar 4.8-6; *Porlick, Poliquin, Samara, Inc. v. Compton,* 683 So. 2d 545, 548 (Fla. 3d DCA 1996).

What *Buckley Towers* does not adequately consider is that the fiduciary duty that is the underpinning of *Frates* arises solely because of the partnership's dissolution, where a partner owes a fiduciary duty to the partnership to wind up the assets and affairs of the dissolved partnership. 167 So. 2d at 80 ("[T]he proposition is universally accepted that a law partner in dissolution owes a duty to his old firm to wind up the old firm's pending business . . . ."). In fact, this fiduciary duty is codified in section 620.8404(1) of Florida's Revised Uniform Partnership Act, which sets forth the exclusive list of fiduciary duties owed by a partner. *See* § 620.8404(1) Fla. Stat. (2016) ("The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care, as set forth in subsections (2) and (3).").[14] Importantly, there is no statutory corollary to chapter 620's

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[14] The fiduciary duty of the partner to the partnership to wind up the partnership affairs is one of the exclusive statutory duties owed by a partner to the partnership. § 620.8404(1), (2)(a); *see also Swann v. Mitchell*, 435 So. 2d 797, 800 (Fla. 1983) ("Where some or all of the partners retain possession of any of the assets after dissolution of the partnership, whether their purpose is to use those assets to continue the business in another form or otherwise, they should be required to account to the partnership for the value of those assets at the time of dissolution." (citing § 620.66(1), Fla.

fiduciary duty owed by partners to one another under chapter 621, which governs shareholder duties in the corporate context. *Cf.* ch. 607, Fla. Stat. (2016) (relating to Florida corporations and similarly containing no fiduciary duty like that found in chapter 620). Rather, officers and directors owe fiduciary duties to the corporation and its shareholders and "must act in good faith and in the best interest of the corporation." *Rehab. Advisors, Inc. v. Floyd*, 601 So. 2d 1286, 1288 (Fla. 5th DCA 1992); *see also* § 607.0830(1); *Pruyser v. Johnson*, 185 So. 2d 516, 521 (Fla. 2d DCA 1966) (explaining that as fiduciaries, officers, or directors may not "make a private profit from his position or, while acting in that capacity, acquire an interest adverse to that of the corporation" (citing *Seestedt v. S. Laundry, Inc.*, 5 So. 2d 859 (Fla. 1942))); *Wulsin v. Palmetto Fed. Sav. & Loan Ass'n*, 507 So. 2d 1149, 1151 (Fla. 3d

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Stat. (1981))); *Frye v. Manacare, Ltd.*, 431 So. 2d 181 (Fla. 2d DCA 1983) (same); *Hilgendorf v. Denson*, 341 So. 2d 549, 551 (Fla. 1st DCA 1977) (same). While partners also owe a fiduciary duty in the conduct of the partnership business, that fiduciary duty ceases when partners terminate their relationship through a transfer of all of their shares. *See Rakita v. Rose*, 547 So. 2d 154, 157 (Fla. 3d DCA 1989).

DCA 1987) ("[T]he limited partner is like a corporate shareholder or a trust beneficiary to whom a fiduciary duty is owed.").

And contrary to what the *Buckley Towers* opinion suggests, *Rosenberg* did not frame or limit the issue it decided in terms of fiduciary duties. *Compare Buckley Towers*, 519 F. App'x at 664–65 ("When a firm with no fiduciary duties to wind up another firm's affairs works on a matter for a contingency fee, and the contingency occurs during another firm's representation, the amount of the firm's fee in the matter is determined by quantum meruit." (citing *Rosenberg*, 409 So. 2d at 1021)), *with Rosenberg*, 409 So. 2d at 1021 ("It is our opinion that it is in the best interest of clients and the legal profession as a whole that we adopt the modified quantum meruit rule which limits recovery to the maximum amount of the contract fee in all premature discharge cases involving both fixed and contingency employment contracts." (emphasis added)). The issue of fiduciary duties between lawyers was never raised by the parties or discussed in *Rosenberg*. Thus, the idea of fiduciary duty as controlling to the issue of summary judgment here is a red herring.

While we need not decide whether *Frates* remains good law in the context of partnerships, we readily conclude that it cannot be extended to the facts of this professional service corporation case based on *Buckley Towers*.

Austin Roe also relies on the bankruptcy case *Health Support Network*, 585 B.R. 202, in support of the application of *Frates* to this case. *Health Support Network*, which involved the winding up of a dissolved partnership law firm, applied *Frates* and *Buckley Towers* to determine how a contingency fee should be split between partners of a dissolved firm. In *Health Support Network*, the chapter 7 trustee, who had retained Jennis & Bowen on a contingency fee basis, chose to follow one of the partners to his new law firm Jennis Law Firm after the trustee was noticed that Jennis & Bowen was dissolving but before the contingency occurred. The dissolution was a consequence of the partners deciding to practice separately. *Id.* at 203. The dissolved firm argued that because the partner voluntarily withdrew before the contingency accrued, the partner had forfeited any right to the fee. *See Faro v. Romani*, 641 So. 2d 69, 70-71 (Fla. 1994) (concluding that firm's withdrawal from contingency fee case before the contingency occurs forfeits all rights

to compensation under the contingency fee agreement). The bankruptcy court rejected this argument because it ignored the circumstances which gave rise to the withdrawal—the break-up of the firm—and therefore found *Frates* and *Buckley Towers* controlling. Although, it distinguished its facts from *Buckley Towers* in one respect—recognizing that the lawyers at the new law firm owed a fiduciary duty to the *client* since they had previously worked at the dissolved firm. *Id.* at 207. *Health Support Network* is easily distinguishable from the instant case because it was another partnership dissolution case, as was *Frates*. The client in *Health Support Network* was displaced by the dissolution of the partnership. Because the client's contingency fee case was not completed it remained an asset of the dissolved partnership to be wound up by the receiver. *Id.* at 206–07. Here, there is no business to wind up because there is no dissolution of any kind. Therefore, these facts are plainly not present in this case, and we are not additionally swayed by *Health Support Network*.

There is a key difference between when a law firm dissolves versus when a lawyer decides to leave a firm. In the former situation, a client does not have the option of remaining with the

dissolved law firm that no longer exists. However, when a client's lawyer leaves a firm, that client is granted the exclusive right to choose the lawyer who will continue representing the client and that choice includes the situation that confronts us—continuing with the departing lawyer. Gone are the days where a lawyer picks up in the middle of the night and takes the clients' files to a new firm. *Rosenberg*, the only precedential case to which the instant facts are bound, and rule 4-5.8 both clearly establish that clients hold the right to decide where their files travel, and in exercising that right, clients may terminate the initial lawyer or law firm without cause before the contingency fee arises. When this occurs prior to the contingency, the discharged law firm is entitled only to an award vis-à-vis quantum meruit.

Assuming arguendo that the Scherers had decided to stay with ARP, the law would have imposed no continuing duty or obligation on Mr. Patsko to continue assisting in the litigation of the Scherers' case because there is no duty imposed by common law or statute that requires a former shareholder to assist in the wind up of ongoing corporate business. Mr. Patsko as the exiting attorney, and absent any agreement to the contrary, would have then forfeited

any right to fees where his departure occurred before the contingency fee was earned by Austin Roe, regardless of how many hours he spent working on the case. And if partnership law truly controls this case as Austin Roe insists, then the transfer of all Mr. Patsko's shares to ARP would have extinguished his fiduciary duties together with any claims Austin Roe and Mr. Patsko had against each other related to partnership property. *See Rakita v. Rose*, 547 So. 2d 154, 157 (Fla. 3d DCA 1989) (recognizing that the transfer of all partner's shares terminated the partners' fiduciary duties to each other and thus carried with it all claims the former partner had to partnership property). For all of these reasons, we see *Buckley Towers* as an outlier with no persuasive value.

V.

We are mindful that it was Mr. Patsko's departure that triggered rule 4-5.8 and the clients' termination of their relationship with ARP rather than a situation where the clients on their own terminated the relationship with the law firm. However, this is a distinction of no matter. In the instant case, faced with what amounts to a classic situation under rule 4-5.8 of a lawyer leaving his firm, ARP and Mr. Patsko jointly wrote the Scherers a letter in

compliance with the rule and gave them the option of deciding whether to stay with ARP, to terminate their relationship with ARP and go with Mr. Patsko, or to terminate their relationship with ARP and go with a third law firm. The Scherers ultimately chose Mr. Patsko and, with that election, terminated their relationship with ARP before the contingency occurred—as was their right. *Rosenberg* clearly holds that the client should not be penalized for having to make a choice when firm matters arise. 409 So. 2d at 1017.

Therefore, we conclude that *Rosenberg* controls this equitable attorney's fee charging lien proceeding and that the trial court's entry of partial summary judgment in favor of Austin Roe, which resulted in application of the *Frates* methodology to the award of the contingency, was error. Likewise, it was error to fail to consider the Scherers' competing motion for partial summary judgment seeking to limit the fee award to a quantum meruit calculation. It was only as a result of these errors that the second motion for summary judgment—related to the application of Mr. Patsko's percentage of shares to the *Frates*-based calculation—was granted such that the final summary judgment was entered. Accordingly,

the final summary judgment is reversed and remanded to the trial court to instead grant the Scherers' motion for partial summary judgment and award attorney's fees to Austin Roe based upon the modified quantum meruit rule set forth in *Rosenberg*. On remand, in calculating the appropriate fee, the trial court shall take into consideration the criteria set forth in *Poletz*. *See Poletz*, 652 So. 2d at 369 (explaining that the court may consider "any other factors surrounding the professional relationship that would assist the court in fashioning an award that is fair to both the attorney and the client").

Reversed and remanded with instructions.

MORRIS and BLACK, JJ., concur.

Opinion subject to revision prior to official publication.