IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GINGER RICHARDS and
KIMBERLY ARCHER, as Co-Managers
of the BLACKBURN FIRM, LLC

APPELLANTS

VS. **NO. 2017-CA-01775**

WALTER WENDELL FREEMAN, as
Executor of the ESTATE OF LEE
HOUSE BURFORD

APPELLEE

ON APPEAL FROM
THE CHANCERY COURT OF TATE COUNTY, MISSISSIPPI
CAUSE NO.: P15-3-0087(VD)

BRIEF OF APPELLANT

Harris H. Barnes, III (MSB# 2018)
James Williams Janoush (MSB # 103966)
BARNES LAW FIRM, P.A.
5 River Bend Place, Suite A
Flowood, MS 39232
Telephone: (601) 981 – 6336
Facsimile: (601) 981 – 7075
Attorney for Claimants

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

GINGER RICHARDS and
KIMBERLY ARCHER, as Co-Managers
of the BLACKBURN FIRM, LLC

APPELLANTS

VS. **NO. 2017-CA-01775**

WALTER WENDELL FREEMAN, as
Executor of the ESTATE OF LEE
HOUSE BURFORD

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

1. Hon. Vicki B. Daniels, Chancellor, Tate County, Mississippi, Third Chancery Court District, P.O. Box 1104, Batesville, Mississippi 38606

2. S. Gray Edmondson, Edmondson Sage Dixon, P.L.L.C., Attorney for the Appellant, 405 S. 11th St., Suite 104, Oxford, Mississippi 38655

3. James Williams Janoush, Barnes Law Firm, P.A., Attorney for the Appellant, 5 River Bend Place, Suite A, Flowood, Mississippi 39232-7618

4. John T. Lamar, III, Lamar & Hannaford, P.A., Attorney for Appellee, 214 S. Ward St., Senatobia, Mississippi 38668

By: s/ James Williams Janoush
James Williams Janoush (MSB #103966)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE ISSUES

This matter involves a probate claim filed by the Blackburn Firm, LLC (the "Claimant" or "Firm") against the Estate of Lee House Burford, Deceased (the "Estate") pursuant to a validly executed Employment Agreement (the "Agreement") by and among the Claimant and the deceased, while living (the "Claim). Prior to his death, Lee House Burford ("Burford") entered into that certain Employment Agreement dated June 8, 2008, the Agreement, with The Blackburn Law Firm, PLLC (the "Firm"), whereby the Firm would provide Burford with unlimited legal services related to Burford's estate planning, including but not limited to trust planning and estate administration. In return, Burford agreed to pay the Firm "Two Hundred Sixty-Five Thousand Dollars ($265,000.00)" for the legal services upon Burford's death. Barry C. Blackburn, Sr. ("Blackburn"), on behalf of the Firm, commenced and continued to provide legal services pursuant to the Agreement for nearly six (6) years until his death on March 21, 2014. The Estate objected to the Claim for various reasons; and, on April 11, 2017, a hearing took place before the Honorable Vicki B. Daniels in the Chancery Court of Tate County, Mississippi. After the hearing, the Chancery Court issued an *Order* dated August 31, 2017 awarding Claimant Nine Thousand and 0/100 Dollars ($9,000.00). On December 6, 2017, upon motion of Claimant, the Chancery Court issued its *Findings of Fact and Conclusions of Law*. Said *Findings of Fact and Conclusions of Law* made clear that the award was based on the premise of *quantum meruit*. Claimant contends that an award based on *quantum meruit* is not appropriate in this case, as the Agreement was for a fixed fee, as opposed to a contingency fee. Rather, the proper award is the full amount of the Agreement price less costs for any services needed to complete the Agreement, mainly the administration of Burford's estate; however, Claimant, via discovery requested information related to all such costs. No such information was provided.

STATEMENT OF THE CASE

A. PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Claimant, previously known as the Firm, filed the *Claim* on May 19, 2015. [Doc. 2]. The Estate filed its *Contest and Objection to Probated Claim* on November 11, 2016. [Doc 9]. A trial with respect to the Claim and the Estate's objection to same was held on April 11, 2017. During the trial, this Court requested each party submit briefs detailing each side's respective positions regarding the Claim. Said briefs were submitted on May 15, 2017.

On August 31, the Chancery Court issued an *Order* dated August 31, 2017 awarding Claimant Nine Thousand and 0/100 Dollars ($9,000.00). On December 6, 2017, upon motion of Claimant, the Chancery Court issued its *Findings of Fact and Conclusions of Law*. Claimant filed its *Notice of Appeal* on December 21, 2017.

B. STATEMENT OF THE RELEVANT FACTS

Prior to his death, Lee House Burford ("Burford") entered into that certain Employment Agreement dated June 8, 2008, the Agreement, with The Blackburn Law Firm, PLLC (the "Firm"), whereby the Firm would provide Burford with unlimited legal services related to Burford's estate planning, including but not limited to trust planning and estate administration. (R. at 33-34); *see also* R.E. 4.

In return, Burford agreed to pay the Firm "Two Hundred Sixty-Five Thousand Dollars ($265,000.00)" for the legal services upon Burford's death. *Id*. Per the Agreement, "[b]oth Client and Attorney agree[d] that all of the stipulations, promises and agreements in [the] employment agreement contained by or on behalf of Client and Attorney shall bind their *estates*, successors and assigns…" *Id.* (emphasis added).

Blackburn, on behalf of the Firm, commenced and continued to provide legal services pursuant to the Agreement for nearly six (6) years until his death on March 21, 2014. Burford passed away on February 7, 2015 at the age of eighty-seven (87).

SUMMARY OF THE ARGUMENT

In appealing the *Order*, Claimant contends it was improper for the Chancery Court to calculate the award based on *quantum meruit*. Mississippi law is clear that *quantum meruit* applies where there is no legal contract, and a party cannot recover the reasonable value of services rendered in *quantum meruit* if there is an express contract covering said services. Only in the absence of an agreement may the court resort to determining attorneys' fees according to principles of *quantum meruit* based on the factors laid out in Rule 1.5 of the Mississippi Rules of Professional Conduct. It is not disputed that an express legal contract exists here. The Agreement is valid and controlling. To the best of the knowledge of the undersigned, no Mississippi court has ever utilized *quantum meruit* where a valid written contract exists that was not based on a contingency fee – this makes sense, as *quantum meruit* is not a method for recovering contract damages. When there is a valid and enforceable contract, the parties are limited to recovering contractual damages and *quantum meruit* is not available. Additionally, by basing its award on the premise of *quantum meruit*, the Chancery Court impaired the Agreement, which is prohibited under the constitutions of both the State of Mississippi and the United States of America. Mississippi case law is clear, specifically in the case of a deceased attorney, that the proper award is the amount stated in the Agreement, reduced by any fees incurred to complete the Agreement after the death of the deceased attorney. During discovery, Claimant attempted to ascertain the amount of any possible reduction or setoff to the price per the Agreement via discovery to no avail. Therefore, the entire amount of the Agreement is owed Claimant. Alternatively, if *quantum meruit* is even appropriate, it should be based on the amount of the Agreement, as opposed to the hours documented.

STANDARD OF REVIEW

The law is clear that "[a] chancellor's decision as to attorney's fees in *quantum meruit* is reviewed only for an abuse of discretion; it will not be disturbed on appeal if it is supported by substantial evidence." *In re Wilhite*, 121 So. 3d 301, 305 (¶9) (Miss. Ct. App. 2013) (citing *Ownby v. Prisock*, 243 Miss. 203, 208, 138 So. 2d 279, 281 (1962)). However, with respect to whether *quantum meruit* should have been applied at all, "[a] chancery court's interpretation and application of the law are reviewed *de novo*." *In re Guardianship of Duckett*, 991 So. 2d 1165, 1173 (¶15) (Miss. 2008) (citing *Weissinger v. Simpson*, 861 So. 2d 984, 987 (¶11) (Miss. 2003)). Upon appellate review, this Court will not reverse the chancellor's decision unless it was manifestly wrong or clearly erroneous, or the chancellor applied an erroneous legal standard. *Hill v. Southeastern Floor Covering Co.*, 596 So. 2d 874, 877 (Miss. 1992); see also *Willing v. Estate of Benz*, 958 So. 2d 1240, 1246 (¶10) (Miss. Ct. App. 2007).

INTRODUCTION

In appealing the *Order*, Claimant contends it was improper for the Chancery Court to calculate the award based on *quantum meruit*. Mississippi law is clear that *quantum meruit* applies where there is no legal contract, and a party cannot recover the reasonable value of services rendered in *quantum meruit* if there is an express contract covering said services. Only in the absence of an agreement may the court resort to determining attorneys' fees according to principles of *quantum meruit* based on the factors laid out in Rule 1.5 of the Mississippi Rules of Professional Conduct. It is not disputed that an express legal contract exists here. The Agreement is valid and controlling. To the best of the knowledge of the undersigned, no Mississippi court has ever utilized *quantum meruit* where a valid written contract exists that was not based on a contingency fee – this makes sense, as *quantum meruit* is not a method for recovering damages pursuant to an express contract. When there is a valid and enforceable contract, the parties are limited to recovering contractual damages and *quantum meruit* is not available. Additionally, by basing its award on the premise of *quantum meruit*, the Chancery Court impaired the Agreement, which is prohibited under the constitutions of both the State of Mississippi and the United States of America. Mississippi case law is clear, specifically in the case of a deceased attorney, that the proper award is the amount stated in the Agreement, reduced by any fees incurred to complete the Agreement after the death of the deceased attorney. During discovery, Claimant attempted to ascertain the amount of any possible reduction or setoff to the price per the Agreement via discovery to no avail. Therefore, the entire amount of the Agreement is owed Claimant. Alternatively, if *quantum meruit* is even appropriate, it should be based on the amount of the Agreement, as opposed to the hours documented.

I. Quantum Meruit is Not Appropriate to the Case at Bar.

The Chancery Court's *Conclusions of Law*, as laid out in its *Order*, are as follows:

CONCLUSIONS OF LAW

> There are, however, certain classes of events the occurring of which are said to excuse from performance because "they are not within the contract," for the reason that it cannot reasonably be supposed that either party would have so intended had they contemplated their occurrence when the contract was entered into, so that the promisor cannot be said to have accepted specifically nor promised unconditionally in respect to them. These three classes are: First, a subsequent change in the law, whereby performance becomes unlawful. Second, the destruction, from no default of either party, of the specific thing, the continued existence of which is essential to the performance of the contract. And, third, the death or incapacitating illness of the promisor in a contract which has for its object the rendering by him of personal services.

In re Guardianship of Lane, 994 So.2d 757, 763 (Miss.2008) (citing *Piaggio v. Somerville,* 119 Miss. 6, 80 So. 342, 344 (1919). The contract at issue clearly falls into the third category. Mr. Burford entered into a contract for personal services to be performed by Mr. Blackburn and The Blackburn Law Firm, PLLC. Mr. Blackburn's duties under the contract were clearly spelled out and he was unable to come close to performing those duties due to his death. Also, once The Blackburn Law Firm, PLLC was converted to The Blackburn Firm, LLC the legal entity that Mr. Burford entered into the contract with ceased to exist as it was a Professional Limited Liability Company that existed solely because of Mr. Blackburn and it was no longer able to render professional services. The contract was cancelled due to the impossibility of performance.

When a contract has been cancelled Mississippi law states "If recission or cancellation is warranted, the contractor is entitled to recover on a *Quantum Meruit* basis for the work performed." *Sumrall Church of Lord Jesus Christ v. Johnson*, 757 So.2d 311, 313 (Miss. Ct. App. 2000) *See Bevis Constr. Co. v. Kittrell*, 243 Miss. 549, 558-60, 139 So.2d 375, 378-79 (1962), (quoting *Standard Millwork & Supply Company v. Mississippi Steel & Iron Co.*, 205 Miss. 96, 38 So.2d 448 (1949)).

> "Quantum meruit recovery is a contract remedy which may be premised either on express or 'implied' contract, and a prerequisite to establishing grounds for quantum meruit recovery is claimant's reasonable expectation of compensation." *In Re Estate of Fitzner*, 881 So.2d 164, 173 (Miss.2003) (emphasis added) (citing *Estate of Johnson v. Adkins,* 513 So.2d 922, 926 (Miss.1987); *Estate of Van Ryan v. McMurtray,* 505 So.2d 1015 (Miss.1987); *Wiltz v. Huff,* 264 So.2d 808, 810-11 (Miss.1972)). The essential elements of recovery under a *quantum meruit* claim are: "(I) valuable services were rendered or materials furnished; (2) for the person sought to be

> charged; (3) which services and materials were accepted by the person sought to be charged, used and enjoyed by him; and (4) under such circumstances as reasonably notified person sought to be charged that plaintiff, * 515 in performing such services, was expected to be paid by person sought to be charged." *Id.* at 173-74 (citing *Reed v. Weathers Refrigeration & Air Conditioning, Inc.*, 759 So.2d 521, 525 (Miss.Ct.App.2000)).
>
> *Tupelo Redevelopment Agency v. Gray Corp., Inc.*, 972 So.2d 495, 514 (Miss. 2007). The Blackburn Firm, LLC has the authority to collect on fees owed to The Blackburn Law Firm, PLLC. In this case Mr. Blackburn and The Blackburn Law Firm, PLLC provided valuable services to Mr. Burford through meetings and drafting documents and estate planning. Mr. Burford was able to take advantage of those services until the demise of Mr. Blackburn and Mr. Burford was aware he had a contract for these services he would expect to be charged for them. Based upon the testimony the Court heard there was approximately 36 hours of work performed for Mr. Burford and The Blackburn Firm, LLC is entitled to collect those fees.
>
> The contract between Mr. Blackburn and Mr. Burford was for a flat fee that was to be collected from Mr. Burford's estate once Mr. Blackburn had completed the contract. Since the contract was cancelled due to impossibility and not fully performed the flat fee cannot be collected. The Court heard testimony that approximately 36 hours of work was performed so it must determine an appropriate hourly rate for the work performed. In determining an Attorney's fee the Mississippi Supreme Court has enumerated factors to take into consideration, "The fee depends on consideration of, in addition to the relative financial ability of the parties, the skill and understanding of the attorney employed, the nature of the case and novelty and difficulty of the questions at issue, as well as the degree of responsibility involved in the management of the cause, the time and labor required, the usual and customary charge in the community, and the preclusion of other employment by the attorney due to the acceptance of the case." *McKee v. Mckee,* 418 So.2d 764, 767 (Miss. 1982) Taking these factors into consideration the Court finds that a rate of $250.00 per hour is reasonable for the 36 hours of work performed, totaling up to an award of $9,000.00 to The Blackburn Firm, LLC for collection on work performed by The Blackburn Law Firm, PLLC upon a *Quantum Meruit* basis.

In re: Burford, Cause No. 15-CV-87 (Ch. Tate Co. Dec. 5, 2017); *see also* R.E. 3.

A party cannot recover the reasonable value of services rendered in *quantum meruit* if there is an express contract covering those services. *Redd v. L & A Contracting Co.*, 246 Miss. 548, 151 So. 2d 205, 208 (1963); *Litton Systems, Inc. v. Frigitemp Corp*., 613 F. Supp. 1377, 1382 (S.D. Miss. 1985); *Richard Goettle, Inc. v. Tennessee Valley Authority*, 600 F. Supp. 7, 11 (N.D. Miss. 1984). This is so because "an express contract precludes the implication of a contract in regard to

the same subject matter." *Richard Goettle, Inc. v. Tennessee Valley Authority*, 600 F. Supp. 7, 11 (N.D. Miss. 1984).

When there is a valid and enforceable contract, the parties are limited to recovering contractual damages and *quantum meruit* is not available. *Cope v. Thrasher Const., Inc*., 2016 WL 3523874 (Miss. Ct. App. 2016) (quoting *Ace Pipe Cleaning, Inc. v. Hemphill Const. Co., Inc*., 134 So. 3d 799, 806 (Miss. Ct. App. 2014)) (*quantum meruit* denied where contract existed between parties). This is true even if the party seeking recovery would be entitled to more money under a *quantum meruit* claim than a breach of contract claim. The justification is that the parties' agreed-to bargain should be enforced by a court even if one party made a bad deal, and courts should not use their equitable powers to impose additional obligations on contracting parties.

When setting an attorney's fee ***in the absence of an agreement***, or when the agreement is found to be invalid, the court should fix the fee according to the principles of *quantum meruit* and the eight factors set out in Rule 1.5 of Miss. Rules of Professional Conduct. *In re Estate of Gillies*, 830 So. 2d 640 (Miss. 2002).

Presently, the exists a valid, written contract – the Agreement. Claimant has materially and reasonably relied upon the clear and unambiguous terms of the Agreement. Claimant understood it would be compensated in accordance with the terms of the Agreement, which was a material factor in inducing the execution of the Agreement. Claimant had the right to rely upon said terms. To allow this Court to modify these terms would result in detrimental reliance by Claimant. Thus, is was improper for the Chancery Court to base its award on *quantum meruit*.

II. The Chancery Court, via its Order, Impaired the Agreement, which is Prohibited Under the Mississippi Constitution and the United States Constitution.

At the time the Agreement was signed, Burford had the authority to enter into contracts on his behalf. Under the clear and unambiguous terms of the Agreement, the Firm was to receive Two Hundred Sixty-Five Thousand Dollars ($265,000.00). Burford never alleged that the terms of the Agreement were ambiguous, unfair, or otherwise unenforceable; and other than the reasonableness of the fees, there have been no allegations by the Estate that the terms of the Agreement are ambiguous, unfair, or otherwise unenforceable.

When a contract is unambiguous, it must be enforced as written. *Miss. Transportation Commission v. Ronald Adams Contractor, Inc.*, 753 So. 2d 1077, 1087 (Miss. 2000). "A Court is *obligated* to enforce a contract executed by legally competent parties where the terms of the contract are clear and unambiguous." *Merchants and Farmers Bank of Kosciusko, Miss. v. State of Mississippi ex rel. Mike Moore*, 651 So. 2d 1060, 1061 (Miss. 1995) (emphasis added). "Contracts are solemn obligations and the Court *must* give them effect as written." *IP Timberlands Operating Company, Ltd. v. Denmiss Corp.*, 726 So. 2d 96, 108 (Miss. 1998) (emphasis added).

Even if this Court were to determine that the terms regarding attorney's fees in the Agreement were unreasonable in any manner, it would not have the authority to modify those terms so as to create terms it would consider "more" reasonable. "Absent mutual mistake, fraud or illegality, courts do not have the authority to modify the terms of a validly executed contract." *Miss. State Highway Commission v. Patterson Enterprises, Ltd*, 627 So. 2d 261, 263 (Miss. 1993). Again, no parties have made any allegations of mistake, fraud, or illegality regarding their execution of the Agreement. "A construction leading to an absurd, harsh or unreasonable result in a contract should be avoided, unless the terms are express and free of doubt." *Theobald v. Nosser*,

752 So. 2d 1036, 1040-41 (Miss. 1999). Because the terms of the Agreement are express and free of doubt, those terms have to be enforced by the Court as written, even if the Court feels like the result would be unreasonable. Where the terms of a contract are clear and unambiguous, a court should not enlarge those terms by "needless construction". *Farragut v. Massey*, 612 So. 2d 325, 328 (Miss. 1992) (citing *Wagner v. Mounger*, 253 Miss. 83, 90-91, 175 So. 2d 145, 147-48 (1965)). "A court of equity is bound by a contract as the parties have made it and has no authority to substitute for it another and different agreement." *The Estate of Reaves v. Owen*, 744 So. 2d 799, 802 (Miss. Ct. App. 1999) (citing *Koch v. H&S Development Co.*, 249 Miss. 590, 163 So. 2d 710, 727 (1964)).

In re Guardianship of Savell, 876 So.2d 308 (Miss. 2004) provides guidance. The facts of that case can be summarized in the following excerpt from the opinion:

> Daisy Pearl Savell executed a durable power of attorney in favor of her two daughters, Shirley Renfroe and Marguerite Jordan. Renfroe and Jordan entered into a contract of employment with Attorney David C. Dunbar to pursue a personal injury claim on Savell's behalf. A settlement offer was eventually made on this claim. Savell's mental capacity diminished after the power of attorney was executed, and, at the time of the settlement offer, she was no longer of sound mind; therefore, Dunbar petitioned the Scott County Chancery Court for approval of the proposed settlement. Chancellor H. David Clark, II, approved the settlement, but reduced Dunbar's attorney's fees from the 40% contingency fee as provided in the contract to a 33 1/3 % contingency fee. Dunbar appealed, and we assigned this case to the Court of Appeals, which in a divided decision affirmed the judgment of the chancery court. *In re Savell*, 856 So.2d 378 (Miss.Ct.App.2003). Dunbar's motion for rehearing was denied, and we granted Dunbar's petition for writ of certiorari. Finding that the chancellor abused his discretion in concluding that the terms of the contract were unreasonable, we reverse and render the judgments of both the Court of Appeals and the Scott County Chancery Court.

In re Guardianship of Savell, 876 So.2d 308, at ¶ 1 (Miss. 2004).

The attorney's argument in *Savell* can be summarized as follows:

> Dunbar argues that the Court of Appeals failed to consider the controlling constitutional provisions found at U.S. Const. Art. 1, § 10, cl. 1, and Miss. Const. Art. 3, § 16 (1890), which prohibit the impairment of the obligation of contracts. Dunbar further asserts that the unilateral actions of the chancellor in reducing the amount of attorney's fees set out in the contract of employment ex post facto impaired the obligations of those contracts. Finally, Dunbar contends that because there was neither evidence nor allegations of fraud, the chancellor was required to enforce the employment contract as written, and the Court of Appeals' opinion was thus in conflict with prior decisions of this Court.

Id., at ¶ 5. The *Savell* court acknowledged that the issues of that case involved Mississippi's Uniform Durable Power of Attorney Act. *Id*., at ¶ 7. While the Uniform Durable Power of Attorney Act is not applicable in this present case, the principles are the same, mainly that a person acting under a power of attorney when executing a contract is no different than the principal executing the contract, itself. The *Savell* court opined "Rule 6.12 is applicable in probate matters and is inapplicable to a case involving a durable power of attorney as in the case sub judice." *Id*. The court also noted that no prior court approval of its contract was required due to the valid durable power of attorney. *Id*. The *Savell* court also stated the following:

> The practical effect of the chancellor's refusal to enforce the terms of the contract entered into by Renfroe and Jordan was a judicial abrogation of the provisions of Miss.Code Ann. §§ 87-3-101 through 87-3-113. Revoking or invalidating the power of the attorneys-in-fact, Renfroe and Jordan, upon the disability of the principal, defeats the purpose of a durable power of attorney. ***An attorney in fact under a durable power of attorney is not intended to be encompassed within the "fiduciary" referred to in the Uniform Chancery Court Rules***.

Id., at ¶ 9 (emphasis added). The *Savell* court concluded with the following:

> …The attorney in fact and the fiduciary are clearly set out as two separate entities. Also, the statute states "[i]f" a court appoints a conservator, etc., thus clearly revealing that such an appointment is not required. Upon the court's own motion, the chancellor appointed Renfroe as guardian at the hearing on May 25, 2001, on the petition for authority to settle a doubtful claim. Further, as stated in Presiding Judge Southwick's dissenting opinion, the comment to the uniform power of attorney act says:
>
> > It is not the purpose of the act to encourage resort to court for a fiduciary appointment that should be largely unnecessary when an alternative regime has been provided via a durable power.

> UNIFORM DURABLE POWER ATTY ACT, § 3 CMT., 8A U.L.A. 322-23 (1993).
>
> *In re Guardianship of Savell*, 856 So.2d at 384, (Southwick, P.J., dissenting).
>
> ¶ 10. Renfroe and Jordan contracted for the employment of Dunbar not once, but twice, both times agreeing to the contingency fee of 40 %. There was never any objection to the contingency fee or claim by Renfroe and Jordan that it was improper. ***This was not a contract entered into pursuant to a traditional probate matter and this was not a contract within the parameters of*** *Uniform Chancery Court Rule 6.12*. The chancellor did not make any finding that the contract or the durable power of attorney was unenforceable or improper for any reason other than that he did not agree with the amount of the fee, which he said was arguably standard.
>
> ¶ 11. We find that the chancellor's imposition of his "general housekeeping rules" was improper. As so ably stated by Presiding Judge Southwick, "with all respect to the chancellor, he concluded that no contract was valid or reasonable unless it met his norms." ***The chancellor also failed to uphold the constitutional provision which prohibits the impairment of obligations of contracts***. Miss. Const. art. 3, § 16 (1890).

Id., at ¶¶ 9-11 (emphasis added). It's worth mentioning the *Savell* court noted, "[t]he chancellor also failed to analyze the reasonableness of the attorneys' fees by application of the eight factors listed under Miss. R. Prof'l Cond. 1.5, although the chancellor did state later that he thought such analysis would be proper." *Id*., at ¶ 7. However, the Supreme Court, in its opinion, did not state that such an inquiry into reasonableness was required when enforcing the contract, as written.

The *Savell* court repeatedly referenced the Court of Appeals' opinion, specifically its agreement with the dissent. *Id*., at ¶¶ 3, 6, 9, and 11. This dissent noted the "chancellor's holding in this case cancels the durable power of attorney for any of these stated actions, and all must be cleared through the chancellor. From these principles, the chancellor concluded that the contingent fee contract had to be approved ***even though there were no guardianship proceedings at the time that the contract was executed by the attorney-in-fact***." *In re Guardianship of Savell*, 856 So.2d 378, at ¶ 32 (Miss. Ct. Apps. 2003)(emphasis added). The lower court's dissent further noted the Uniform Durable Power of Attorney Act provided that "acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal ***have***

the same effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were competent and not disabled." *Id*., at ¶ 34 (citing Miss.Code Ann. § 87-3-107 (Rev.1999))(emphasis added). The dissent also stated the following:

> Though the court-named fiduciary may cancel the power, nothing suggests that prior actions of the holder of the durable power of attorney are canceled. That would trench on the validity of contracts that were properly executed prior to the naming of the guardian. Section 87-3-107 specifically says those acts are binding just as if the grantor of the power were competent. They do not later become unbinding just because someone decided to open a guardianship.

Id. "The holder of a durable power of attorney may bring litigation and settle it, in the same manner as could the grantor herself. No chancellor's authorization is needed." *Id*., at ¶ 37. The dissent continued with the following:

> ***Our case is no different on this point than if Mrs. Savell, the person who granted the power of attorney, had herself executed the contingency fee contract at a time when she was still competent to manage her own affairs***. The contract is valid, but the chancellor altered it all the same.

Id., at ¶ 39. The dissent noted "the chancellor must find an invalidity or else he has impaired vested contract rights." *Id*., at ¶ 40. Indeed, "[m]any kinds of contracts can exist that were validly executed by the individual prior to her incompetence: contracts for the purchase or sale of real property; promissory notes as borrower or lender; investments of other kinds. ***Many of these, though valid, may be less than optimal in their terms***." *Id*. (emphasis added). The dissent continued, "[p]erhaps most importantly, he failed to uphold the constitutional provision prohibiting the impairment of obligation of contracts." *Id*., at ¶ 43. "*Preexisting* valid contracts for employment of litigation attorneys must be accepted-whether the contract was executed by the principal or by her agent, whether executed by an agent before or after the incompetency of the principal under a durable power of attorney, and whether or not it was for more or less than the preferred percentage." *Id*., at ¶ 44. It's worth noting the Court of Appeals' opinion did not state

that any inquiry into reasonableness based on the factors listed in the Mississippi Rules of Professional Conduct was required.

In the present case, Burford and Blackburn, on behalf of the Firm, executed a valid contract, the Agreement. No party made any allegation that the contract should be held invalid for any reason whatsoever; and both parties continued to honor the terms of the Agreement until Barry C. Blackburn's death.

III. Claimant is Owed the Amount of the Agreement, Reduced by Amount Paid to Complete the Agreement; and No Reduction in the Amount Owed per the Agreement is Warranted.

While the facts differ somewhat, *Clifton v. Clark*, 36 So. 251 (Miss. 1904) provides seems dispositive. In *Clifton*, a dispute arose when one (1) of two (2) attorneys, on behalf of their law firm, entered into an employment contract with a client and later died prior to the conclusion of the matter; and the surviving attorney attempted enter into a new contract with the same client after the death of his partner. *Clifton v. Clark*, 36 So. 251, at 251-252 (Miss. 1904). This particular case contained a detailed discussion regarding the obligation of the surviving partner to honor the contract as a member of that law firm, which is not relevant here, as this case involves the death of a solo practitioner; however, the following principles still apply:

> And so where a client enters into a contract with a firm of attorneys for certain legal services to be rendered, for a fee stated, or upon an implied promise to pay the value of the services rendered, and contracts, as here, for the services of both members, and one of that firm dies before the contract is finally completed; the client then has the option of abrogating the contract entirely by discharging the survivor, ***settling for services previously rendered***, and employing other counsel to conclude his pending litigation. This we understand to be the full extent of the decision of this court in *Dowd v. Troup*, 57 Miss. 204. It is there held that the client permitting the surviving partner to proceed with the services for which the firm had been previously fully paid could not be called on to pay any additional compensation to the individual member who had in fact performed the services.

Id., at 253 (emphasis added). "Nor could the client, with the intent of defeating the claim of the estate of the deceased partner, re-employ the survivor of the law firm, and thus, by making a new

contract, have the benefit, ***without making compensation therefor***, of the services rendered of the deceased partner, and by such contract only procure services to which he was already entitled." *Id*., at 255 (emphasis added). "***Nor can the client thus avail himself of the services rendered by the deceased attorney in his lifetime, and then refuse to pay the compensation agreed upon***, after, by reason of such services, the litigation has been brought to a successful termination." *Id*. Finally, in *Clifton*, the Court awarded the estate of the deceased attorney "the amount of the contingent fee due under the terms of the contract with [the law firm], after first deducting therefrom the [fees actually received by the surviving attorney] since the death of the [deceased attorney]." *Id*.

In *Dowd v. Troup*, 57 Miss. 204 (Miss. 1879), which involved a fixed fee contract, the Supreme Court of Mississippi stated the following with respect to the death of a partner in a law firm:

> But if the survivor, with the client's consent, continues in the case on the original retainer, the dissolution by death, after the fee has been paid, can make no difference. The client, on the death of a partner, may dissolve the contract. *Smith v. Hill*, 13 Ark. 173. The surviving lawyer has no such right, but is bound to carry out his contract, especially where he has been paid.

Dowd v. Troup, 57 Miss. 204, at 205 (Miss. 1879). The Court added, "If it be true that [the deceased attorney's] death terminated the contract, [client] should recover from [surviving attorney] all the fee advanced, except the part earned by the services of the firm. [Client] ***did not become liable to [surviving attorney] on a quantum meruit, because of the special contract***. *Bull v. St. Johns*, 39 Ga. 78." *Id*., at 206. It should follow that *quantum meruit* would not apply with respect to the deceased attorney, as well, especially considering the Firm continued to service the Agreement; and some value must be given with respect to the unlimited legal services.

It is worth noting, again, Barry C. Blackburn died on March 21, 2014. Burford died on February 7, 2015. One could argue that Burford was entitled to abrogate the Agreement upon

Blackburn's death; however, the Estate continued to employ the Firm to handle Burford's estate pursuant to the Agreement, albeit through Jason Bailey, who opened the Estate more than one (1) year after Blackburn's death; and the Estate expressly or impliedly acquiesced to Jason Bailey continuing to provide services pursuant to the Agreement. Only after Jason Bailey relocated to Birmingham, Alabama and withdrew as counsel, at the earliest, did the Estate need to retain new counsel. This Court allowed Jason Bailey to withdraw as counsel for the Estate and substituted John T. Lamar, III of the firm of Lamar & Hannaford, P.A. as counsel for the Estate on June 4, 2015. [Doc. 3]. Mr. Lamar remains counsel for the Estate to date.

Claimants attempted to ascertain the amount of any possible reduction or setoff to the price per the Agreement via discovery to no avail, e.g. any reduction or setoff for work performed after Jason Bailey withdrew as counsel for the Estate. The following contains excerpts from the Estate's responses to Claimant's *First Set of Interrogatories and First Requests for Production of Documents*:

> **INTERROGATORY NO. 10.** Identify all and describe any and all work performed by other advisors, attorneys, certified public accountants, or other professionals on behalf of Lee House Burford or his estate, as well as the fees associated with any such work, ***which would have been performed*** by the Blackburn Law Firm, PLLC pursuant to the Employment Agreement executed between Lee House Burford and The Blackburn Law Firm, PLLC on June 4, 2008 (the "Employment Agreement"), ***but for the death of Barry C. Blackburn, Sr. on March 21, 2014***.
>
> **ANSWER NO. 10.** The Executor's attorney objects to this Interrogatory as requesting privileged and/or confidential information and also as being overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. ***Without waiving said objection, the Estate has secured other professional legal and accounting services since the death of Barry Blackburn who have charged customary and reasonable fees for their services***.

INTERROGATORY NO. 11. Identify all and describe any and all work performed by other advisors, attorneys, certified public accountants, or other professionals on behalf of Lee House Burford or his estate, as well as the fees associated with any such work, ***which would have been performed*** by the Blackburn Law Firm, PLLC pursuant to the Employment Agreement, ***but for the failure of the Blackburn Law Firm, PLLC to perform such work during the life of Barry C. Blackburn, Sr.***

ANSWER NO. 11. The Executor's attorney objects to this Interrogatory as requesting privileged and/or confidential information and also as being overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. ***Without waiving said objection, the Estate has secured other professional legal and accounting services since the death of Barry Blackburn who have charged customary and reasonable fees for their services***.

…..

REQUEST NO. 8: Please produce copies of all documents, correspondence, records, reports, items, or things related to any and all work performed by other advisors, attorneys, certified public accountants, or other professionals on behalf of Lee House Burford or his estate, as well as copies of invoices, checks or other proof of fees associated with any such work, ***which would have been performed*** by the Blackburn Law Firm, PLLC pursuant to the Employment Agreement, ***but for the failure of the Blackburn Law Firm, PLLC to perform such work during the life of Barry C. Blackburn, Sr.***

8: The Executor's Attorney objects to this Interrogatory as requesting privileged and/or confidential information and also as being overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. ***Without waiving said objection, the Executor is unaware of any responsive documents***. The Executor may use any documents that were produced through discovery in this cause.

REQUEST NO. 9: Please produce copies of all documents, correspondence, records, reports, items, or things related to any and all work performed by other advisors, attorneys, certified public accountants, or other professionals on behalf of Lee House Burford or his estate, as well as copies of invoices, checks or other proof of fees associated with any such work***, which would have been performed*** by the Blackburn Law Firm, PLLC pursuant to the Employment Agreement, ***but for the death of Barry C. Blackburn, Sr. on March 21, 2014***.

> **9:** The Executor's Attorney objects to this Interrogatory as requesting privileged and/or confidential information and also as being overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. ***Without waiving said objection, the Executor is unaware of any responsive documents***. The Executor may use any documents that were produced through discovery in this cause.

(R. at 196-197); *see also* R.E. 5. The discovery requests attempted to identify information related to any person or entities that performed work covered under the Agreement: 1) while Blackburn was alive; and 2) after Blackburn's death. In its response to Interrogatory No. 10, the Estate admitted it "secured other professional legal and accounting services ***since*** the death of Barry Blackburn who have charged customary and reasonable fees for their services." *Id.* Even though Interrogatory No. 11 requested the same information with respect work performed while Blackburn was alive, the Estate provided the same response. *Id.* Requests Nos. 9 and 10 requested documents related to fees for any such work covered under the Agreement: 1) while Blackburn was alive; and 2) after Blackburn's death. Without waiving the respective objections, which are identical, the Estate responded, in each case, it was "unaware of any responsive documents." *Id.*

Claimants contend the amounts of any fees paid, whether before or after Blackburn's death, are entirely relevant to the matter, as proof of any amounts paid may serve to reduce the fees owed the Firm per the Agreement. However, the Estate claims it is not aware of any such documents. No evidence, or proof of any such payments, was offered at the hearing before this Court; and no privilege log was supplied for any documentation or information contained under the alleged privilege asserted. Presumably, if the Estate has or had secured professional legal and accounting services since Blackburn's death, the Estate would have documentation related to these services and any fees paid for same, particularly present counsel for the Estate, who was substituted in place of Jason Bailey and has remained counsel for the Estate to date. However, if the Estate is unaware of any such documentation and failed to present any evidence or proof with respect to same via

discovery or at the hearing and failed to provide a privilege log, the Estate should be precluded from claiming any offset of the price per the Agreement, as the Firm was entitled to this information in order to pursue the Claim, including arguing against any offset alleged by the Estate. The bottom line is that the Estate has offered no proof as to any amounts paid either via discovery or at the hearing that this Court could consider as part of any offset. As such, the Firm should be paid the entire contract price per the Agreement without any reduction or offset.

Provided this Court would allow evidence of any such fees into the record for the purposes of offsetting any amounts owed the Firm and provided that the Agreement is held to be valid, there should be no reduction for fees generated for anything related to the Estate's challenging the validity and/or reasonableness of the fees per the Agreement. To do so would be considerably inequitable, particularly where the Agreement provides "[s]hould the Client's estate fail to pay Attorney for fees and expenses as provided within this agreement, Attorney may file suit to collect the balance due, shall be paid a reasonable attorney fee for his collection efforts and shall be reimbursed for all costs incurred." Similarly, Claimant should be reimbursed for all costs, fees, and expenses associated with arguing against the Estate's objection to the Claim.

With respect to fees incurred to complete the Agreement, Claimants would add, in the absence of this litigation, any such fees would be relatively nominal. After all, the Firm, albeit though Jason Bailey, opened the Estate. If not for the present dispute, services would only be needed to notice creditors, wait the applicable period, close the Estate, and other ancillary matters.

Claimants would add that the Chancery Court's award also failed to make any award with respect to work performed by Jason Bailey related to Burford's estate under the direction of the Firm after Blackburn's death, which included preparing and filing various pleadings, as well as any time other time spent by Jason Bailey in performing Claimant's obligations under the Agreement under Claimant's direction. (R. at 10-30); *see also* R.E. 6.

IV. Assuming Quantum Meruit is Appropriate, the Appropriate Standard is the Amount of the Agreement, as Opposed to the Hours Documented.

If this Court were to determine quantum meruit is, in fact, appropriate, Claimant contends it should be based on the amount of the Agreement, possibly based on a percentage with respect to time, as opposed to an hourly rate and time documented. In *In re Estate of Gillies*, 830 So.2d 640 (Miss. 2002), the Supreme Court acknowledged that "*quantum meruit* can also be assessed as a percentage, because as oftentimes, lawyers will take a contingency fee contract and not keep up with their hours." *In re Estate of Gillies*, 830 So.2d 640, at ¶ 20. (Miss. 2002)(citing *Tyson v. Moore*, 613 So.2d 817 (Miss.1992)). As the dissent noted, the majority opinion "relied heavily, almost completely," on *Mauck v. Columbus Hotel*, 741 So.2d 259 (Miss.1999), where the Supreme Court of Mississippi awarded fees based on and hourly basis, applying the lodestar factors, "even though there was a contingent fee arrangement." *In re Estate of Gillies*, at ¶ 43; see also *Mauck v. Columbus Hotel*, 741 So.2d 259, at 271-72 (Miss.1999). To be clear, the *Gillies* court noted that it wasn't entirely clear whether *Tyson* "endorse[d] a percentage-basis quantum meruit award." *In re Estate of Gillies*, at FN5. However, the facts of all cases referenced in this paragraph are clearly distinguishable from the case at bar, as these the cases involved, among other differing circumstances, contingency fee arrangements.

Mauck involved a party requesting an "enhancement fee" in addition to an award of attorneys' fees on the remand of a case involving a breach of a lease agreement pursuant to a contingency fee arrangement with a new attorney hired to prepare a motion for attorneys' fees on said remand, not the attorney(s) that tried the case or argued the appeal, hired to prepare a motion for attorneys' fees on said remand. *Mauck v. Columbus Hotel*, 741 So.2d 259 (Miss.1999).

In *Tyson*, a contingency fee arrangement was held to be unambiguous; however, the Supreme Court of Mississippi remanded the case to determine reasonable fees, finding the attorney

breached the agreement "overreaching and in misinterpreting the amount of his fee under their employment contract, and taking an adverse position to his client." *Tyson v. Moore,* 613 So.2d 817, at 828 (Miss.1992).

Finally, in *Gillies,* the Alcorn County Chancery Court approved a request by an estate, the decedent's mother as administratrix, to enter into a contingent fee contract with an attorney to pursue a legal malpractice claim. *In re Estate of Gillies,* at ¶ 2-3. Two years later, the decedent's wife brought an eventually successful action in removing the mother as administratrix and voiding the contingent fee contract. *Id*., at ¶ 5. "Because the contingency contract was not enforceable (i.e. no longer existed), the chancery court ordered [the attorney] to submit an itemized bill for the work actually performed." *Id*., at ¶ 14. "[The attorney's] bill listed 202 hours, at $275 per hour, for a total of $55,550. The chancellor accepted the number of hours submitted, but found the rate excessive based on Gillis's customary rate of $140 per hour and reduced the fee accordingly." *Id*. "The chancellor further reduced the award by one-fourth, the amount of time that would be attributable to his efforts solely on behalf of [the mother], because [the mother] had received one-fourth of the total damages paid by the [defendant law firm]." *Id*.

Interestingly, the attorneys representing the wife and the decedent's child from a prior marriage entered into a "letter agreement," whereby both parties agreed "they [would] not attack the validity of [the contingent fee agreement] beyond the issues presently before [the chancery court]," even though the wife's complaint included a "prayer that the contingent fee contract be voided." *Id*., at ¶ 16-17.

Even though the contingent fee contract was eventually voided, the dissenting opinion provided an analysis in favor of awarding attorneys' fees via quantum meruit based on a percentage fee:

¶ 37. The trial court erred in its blanket determination that the contingency contract was not enforceable. All parties and lawyers agreed not to challenge the validity of the fee arrangement beyond the issue presented to the Chancery Court of Alcorn County. They received the benefits of the services provided under the contingency fee contract and are now estopped from saying that it should not be enforced. Therefore, I would reverse the trial court decision to grant an hourly rate in lieu of the agreed upon contingency fee contract. Accordingly, I respectfully dissent.

¶ 38. The majority misses the crux of the matter in this case. While I agree that it was not error for the chancellor to remove Marietta as the representative of the estate, it was error for the chancellor to cancel the contingency fee contract which the attorneys labored under for almost two years, and then change the contract from a contingency fee to a quantum meruit. This puts the attorneys at an undue burden since no time records were required. Later the estate and heirs entered a new contract between Scott and Ruby Gillies and their attorneys and Gillis signed "in consideration of the services rendered for them by [Gillis], [that] they will not attack the validity of [Gillis's] fee arrangement beyond the issue presently before the [court] in Ruby Gillies' complaint ..." However, Ruby's petition was to primarily remove Marietta as administratrix. In effect, Scott and Ruby executed an amended settlement agreement by which they acquiesced and agreed to Gillis being retained on a contingency fee basis to negotiate and mediate a settlement.

¶ 39. Gillis fully performed the obligations under the contract by obtaining the lump settlement of $600,000. He settled the estate's claim for $450,000 and Marietta's individual claim for $150,000, which included the $50,000 contribution from the law firm. Gillis was paid a 40% contingency fee of $60,000 on Marietta's recovery pursuant to the contract approved by the chancellor. However, on July 28, 1999, the estate filed a petition seeking approval to compromise the estate's claims against the law firm for $450,000 and to establish Gillis's quantum meruit fee on an hourly rate basis.

¶ 40. All parties acknowledged that the Gillis did the majority of the work in negotiating and obtaining the settlement. In fact, the parties were so pleased with the settlement that they chose to write letters saying what a great job they had done. The attorney for the estate wrote Gillis a letter which states "you have done an excellent job in negotiating a settlement for the estate in the amount of $500,000...." A similar letter was sent from Ruby's attorney which states "I believe you have done an excellent job in getting the carrier to place $550,000 on the table." Gillis had completely resolved and finalized the professional malpractice claims to everyone's satisfaction. Yet, they sought to deny him payment on a contingency fee basis, after having acquiesced into that arrangement. The parties should be estopped.

¶ 41. The chancellor considered the eight factors delineated in Rule 1.5 of the Mississippi Rules of Professional Conduct and awarded a quantum meruit fee of $21,210, based on Gillis's customary hourly rate of $140 for 151.5 hours. Gillis had claimed 202 hours but the chancellor reduced that amount to 151.5 to compensate for Gillis's separate representation of Marietta. The chancellor found that it was admitted by all involved that Gillis did a commendable job in perfecting

the settlement involved in this matter. However, the chancellor did not award any expenses, costs or interest in the case.

¶ 42. The chancellor abused his discretion and reached an improper result in disregarding the 33 1/3 percent contingency fee contract to which all parties had acquiesced, and, instead, awarding quantum meruit attorneys' fees based on an hourly rate. After it was apparent that the 33 1/3 percent contingency fee arrangement was not going to be honored, Gillis requested payment of $275 per hour for 202 hours of work. Instead, the chancellor awarded Gillis $21,210. The chancellor calculated this amount "by taking his hours worked (151.5) at $140.00 per hour...."

¶ 43. ***At the heart of Gillis's complaint is the fact that the $21,120 quantum meruit award is such a small percentage (4.7%) of the total award, considering Gillis would have received 33 1/3 percent under the original contingency fee contract***. In many cases, whether a fee is reasonable absolutely depends on whether the fee charged resulted from a fixed fee contract or a contingency fee contract. This is one of the eight factors we noted should be addressed when determining the reasonableness of attorneys' fees. *See* Miss. R. Prof'l Conduct 1.5(8); *Mauck v. Columbus Hotel Co.,* 741 So.2d 259, 269 (Miss.1999). The majority relies heavily, almost completely, on *Mauck,* which is good law.

¶ 44. ***However, the award should reflect the fact that the original contract, under which Gillis rendered services, was a contingent fee contract. The reasonable quantum meruit fee in this case should be a reasonable percentage of the total settlement and not an hourly rate. The fact is that all affected parties agreed to and acquiesced in a contingency fee arrangement for the purposes of obtaining a settlement on the professional liability claim. Gillis received a $60,000 contingency fee from Marietta. This fact promotes the underlying issue that there was a general understanding that Gillis would receive his fee based on a percentage of the settlement or recovery***.

¶ 45. The chancellor should have awarded quantum meruit on a contingency fee basis. All parties knew the fee arrangement was on a contingency basis. We have said in *Tyson v. Moore,* 613 So.2d 817 (Miss.1992), ***that quantum merit can also be on a basis of percentage, because as oftentimes, lawyers will take a contingency *651 fee contract and not keep up with their hours. Since all parties were aware of and familiar with the contingency fee contract, they, in essence, acquiesced into it. The chancellor had previously approved the 33 1/3 percent contract. This fee is reasonable in this case and consistent with Rule 1.5 and Mauck. In light of the previous agreement, the chancellor should have made a quantum meruit award based on a percentage fee***.

¶ 46. There is no sufficient legal basis for the chancellor's determination that a quantum meruit contract should not have been based on a percentage of the award in this case. The chancellor and the majority overlook the simple fact that all along the understanding was that the fees were to be calculated on a percentage basis and further, that all parties acquiesced in this arrangement via their actions.

Id., at ¶ 37-46.

At trial, Claimant's witness and Co-Manager, Kimberly Archer ("Archer"), was present at the April 11, 2017 hearing and testified as follows without any contradiction whatsoever[1]:

> 1. Archer was identified as the notary public on the Agreement. (Trial Tr. 11:21 23, April 11, 2017).
> 2. Archer witnessed Burford signing the Agreement. *Id*., at 16:2-4.
> 3. The Agreement represented the "intentions of the parties." *Id*., at 17:22-18:2.
> 4. Archer understood, based on her "familiarity with the practices of the law firm," the Agreement placed an "unlimited obligation to perform the legal services [] explained in the contract on behalf of [Burford]." *Id*., at 18:18-15.
> 5. ***The scope of work under the Agreement was not limited by "any time, any amount of work, [or] any other factor other than just whatever [Burford] needed as long as he was alive."*** *Id*., at 19:1-5.
> 6. As of the time the Agreement was signed, there was no "expectation that [Blackburn] wasn't going to be able to be healthy and alive long enough to fulfill [the Agreement] as long as [Burford] wanted it." *Id*., at 20:1-5.
> 7. ***Burford was never refused any services.*** *Id*., at 20:17-22.
> 8. ***There were "regular" and "frequent" communications between Blackburn and Burford***. *Id*., at 20:23-25-21:1-6.
> 9. ***Burford "changed his documents quite a bit," perhaps "monthly."*** *Id*., at 21:7-15.
> 10. ***There were a "number of meetings, conferences, and phone calls" between Burford and Blackburn related to Burford's planning.*** *Id*., at 21:20-24.
> 11. Burford did not appear to be under any "incapacity" when executing the Agreement. *Id*., at 22:24-23:1.
> 12. At the time the Agreement was executed, "Burford [] was expected to have a taxable estate." *Id*., at 24:18-22.
> 13. ***Legal services provided by the law firm would be different for those with taxable estate compared with those who did not have taxable estates, and taxable estates would require more time***. *Id*., at 26:14-22.
> 14. ***Burford was not married and did not have any children, which resulted in multiple changes to his estate plan***. *Id*., at 27:10-21.
> 15. "Under Jason Bailey's instruction, [Archer] prepared the Petition in order to open the estate [of Burford], letters testamentary, [and] notice to creditors. The Firm paid those expenses [to open the estate] and then expensed it for the notice of creditors." *Id*., at 28:8-19.
> 16. The Firm ceased working on Burford's estate and instructed the present executor, Mr. Freemen, to locate new counsel once Jason Bailey relocated to Birmingham. *Id*., at 29:9-20.
> 17. ***Blackburn also handled a real estate closing and an insurance claim for Burford at "no charge" due to the Agreement***. *Id*., at 32:4-34:1-9.
> 18. ***Even though the real estate closing and car wreck / insurance claim were not***

[1] The trial transcript is contained within R. 283-346; *see also* R.E. 7.

covered under the literal terms of the Agreement, Blackburn undertook those matters due to the fact he was already engaged by Burford and would not have undertaken those matters if not for the Agreement. *Id*., at 59:17- 60:1.

19. ***"Exhibit BLF13" did not include all meetings between the law firm and Burford; and Blackburn and Burford routinely met after hours and outside the office***. *Id*., at 36:14-37:6.

20. This type of Agreement was used by the law firm for other clients, even if not used for every estate planning client. *Id*., at 49:24-50:11.

21. ***Burford consistently traveled to Blackburn's office, essentially any time he was in Olive Branch, Mississippi***. *Id*., at 60:10-18.

22. ***Due to circumstances with Burford's relationships, Burford "would want to change his [estate planning] documents every time he changed his clothes."*** *Id*., at 62:1-7.

Recall, the Chancery Court determined Blackburn performed thirty-six (36) hours of work for Mr. Burford based on the testimony and documents provided by Claimant with respect to work performed for Mr. Burford. However, Archer's testimony was that these records, in no way, included all work performed for Mr. Burford; rather, those records only included meetings that were formally calendared at the office and estimations as to time necessary to prepare various documents based on a review on when various documents were prepared. Additionally, the Chancery Court's award does not sufficiently or equitably address the fact that, pursuant to the Agreement, Blackburn agreed to perform ***unlimited*** legal services for Mr. Burford. Based on the fact that Blackburn was required to provide unlimited services, coupled with the flat fee per the Agreement, it was not necessary for Blackburn to keep up with all time spent working on Mr. Burford's matters. Per the Chancery Court's *Order*, Blackburn, as consideration, obligated himself to nearly six (6) years of unlimited legal work; yet, he is only compensated for thirty-six (36) hours of work performed based on records and testimony, even though the uncontradicted testimony made clear that the records were not indicative of all actual work performed. The Chancery Court's Order failed to award and compensation whatsoever for the work Blackburn performed with respect to an automobile accident and a real estate closing despite uncontradicted testimony that Blackburn provided those services pursuant to the contract, even though such

services were not considered to be estate-related under the agreement. Still, the Chancery Court's decision to place no value whatsoever on Blackburn's obligation to provide unlimited legal services for nearly six (6) years, whether Burford utilized such services or not, is highly inequitable. Thus, Blackburn has not been fully compensated for services rendered. In summation, Claimants contend the more appropriate award, based on the facts and circumstances, would involve some percentage of the amount in the Agreement in the event *quantum meruit* is even warranted.

V. The Fees Per the Agreement are Reasonable, and Claimant has Materially and Reasonably Relied Upon the Terms of the Agreement.

Blackburn / The Firm / Claimant, materially and reasonably relied upon the clear and unambiguous terms of the Agreement it entered into with Burford. The fact that the Firm understood it would receive the fees referenced therein was a material factor in its decision to provide Burford with ***unlimited*** legal services over a term of years unknown at the time the Agreement was executed; and legal services were, in fact, provided over many years. The mutually agreed upon terms per the Agreement were fair and reasonable; thus, Claimant had the right to rely upon the clear and unambiguous terms of the Agreement. Therefore, Claimant has the right to rely upon said terms. *Reaves*, 744 So. 2d at 801 (parties have the right to rely upon the mutually agreed upon terms and conditions of a contract). To allow this Court to modify these terms would result in detrimental reliance by Claimant.

Each party to the Agreement provided consideration, and each party assumed any and all risks associated with the Agreement; the deceased received ***unlimited*** legal work related to estate planning and administration, and the Firm was required to perform all such work, even though the monetary value of the work performed could potentially exceed the bargained-for consideration. Indeed, the Agreement was signed in 2008; and the years following saw many substantial changes

in the law related to estate planning. For example, the federal estate tax exclusion rose from $2,000,000.00 in 2008 to $3,500,000.00 in 2009; the estate tax was completely repealed in 2010; and the exclusion amount was $5,000,000.00 in 2011 due to a last-minute action by Congress, although it was set to revert to $1,000,000 that year prior to Congress acting – something Blackburn was aware of when the Agreement was signed in 2008. There have been numerous other changes in the relevant law. There could have been numerous changes in Burford's family, assets, wealth, planning desires, etc. With any such change, the Firm would have been obligated to perform legal work for Burford, even if substantial and regular changes or planning strategies were required. There was no guarantee the estate would have the funds or assets needed to satisfy the Agreement; not to mention, the attorney deferred payment for all work until the death of the client, a date that was impossible to ascertain. As such, the attorney lost the time value of money he would have received had the attorney been paid, for example, by the hour. Throughout the engagement, the Firm prepared multiple estate planning documents for Burford, many of which were continually revised or restated; and Burford and Blackburn met multiple times.

VI. Claimant is Entitled to Reasonable Attorneys Fees and All Costs Per the Agreement.

Again, the Agreement provides "[s]hould the Client's estate fail to pay Attorney for fees and expenses as provided within this agreement, Attorney may file suit to collect the balance due, shall be paid a reasonable attorney fee for his collection efforts and shall be reimbursed for all costs incurred." Therefore, Claimant should be reimbursed for all costs, fees, and expenses associated with arguing against the Estate's objection to the Claim, including the costs, fees, and expenses related to this appeal.

CONCLUSION

Claimant contends the Chancery Court in awarding attorneys' fees based on quantum mareuit, as quantum meruit is not appropriate in the case at bar. Further, by failing to honor the Agreement, the Chancery Court has impaired the Agreement in violation of the Mississippi Constitution and the United States Constitution. Claimant contends the entire amount of the Agreement is owed, less any fees or expenses incurred by the Estate to complete the Agreement; however, without any proof as to any such fees and expenses presently before the Court, no such reduction is warranted. This is in keeping with the contract rule, as the full contract price is arguably the most proper measure of damages, as it reflects the value Claimant and Burford placed on the services contemplated per the Agreement and avoids having to set a monetary value on Blackburn's partially completed work. Alternatively, assuming *quantum meruit* is warranted, the appropriate standard should be based on the amount referenced in the Agreement, as opposed to time documented, as it would be more equitable and in line with what both parties bargained for in executing the Agreement and the unlimited nature of the services rendered under the Agreement. Additionally, Claimant has relied on the Agreement to its detriment based on the Chancery Court's award. Finally, Claimant is entitled to any and all attorneys' fees in pursuing its claim based on the express terms of the Agreement.

CERTIFICATE OF SERVICE

I, James Williams Janoush, attorneys of record for Appellant, Blackburn Firm, LLC, certify that I have this day electronically filed this *Brief of Appellants* and *Record Excerpts* with the Clerk of this Court using the MEC system, which sent notification of such filing to the following:

John T. Lamar, III
Lamar & Hannaford, P.A.
214 S. Ward St.
Senatobia, Mississippi 38668

SO CERTIFIED, this the 21st day of May, 2018.

By:s/ James Williams Janoush
James Williams Janoush (MSB #103966)