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STATE OF WASHINGTON
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No. 1027613

SUPREME COURT
OF THE STATE OF WASHINGTON

SEATTLE TRUCK LAW, PLLC, a Washington
Professional Limited Liability Company,

Respondent,

v.

JAMES BANKS, an individual,

Petitioner.

MEMORANDUM OF AMICI CURIAE ATTORNEYS IN SUPPORT OF REVIEW

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IDENTITY AND INTEREST OF *AMICI*

Nicole Gainey graduated cum laude from the Seattle University School of Law in 2014. She is a licensed attorney in the State of Washington. She founded her own firm shortly after earning her law license. She currently represents plaintiffs on civil employment claims, but previously focused on personal injury claims, both almost exclusively on a contingent fee basis. She has co-counseled on cases and understands the ramifications of fee-split agreements, which in her view prejudice newer attorneys' ability to fairly practice law and benefit from their efforts, run contrary to the RPCs, and limit the public's choice of attorney representation.

Jenna Labourr graduated from New England Law | Boston in 2011. Ms. Labourr is an Eagle member of Washington State Association for Justice and the Washington Employment Lawyers Association. She has served on the WSAJ Awards Committee and the Latina/o Bar Association of Washington's Judicial

Evaluation Committee as a member and as Co-Chair. She is invited to speak locally and nationally on a range of topics including focus groups and trial techniques in the areas of Employment Law and Personal Injury litigation.

Ms. Labourr opened her own practice in 2012, just months after passing the Washington State bar exam, serving clients injured in motor vehicle crashes and workers' compensation matters. In 2013, Ms. Labourr added a partner to her practice and created a new firm, Washington Injury Lawyers, PLLC, which focuses on Employment Discrimination and Catastrophic Personal Injury matters. In over 10 years as a litigator, Ms. Labourr has handled more than one hundred cases, the vast majority on a contingent-fee basis. Ms. Labourr has always been a law firm owner and understands the business and legal side of running a law practice. Ms. Labourr has personal experience with fee-split agreements that affected her ability to freely practice law as a young lawyer.

STATEMENT OF THE CASE

After James Banks, a former associate-attorney employee of Seattle Truck Law, PLLC ("STL") left the firm, STL claimed that its employment contract with Banks entitled STL to a share of contingency fees he earned from eight former STL clients. CP 1–6. Banks argued the fee-split provisions were unenforceable. CP 9–23. The trial court disagreed with Banks and awarded judgment in STL's favor. CP 292–98, 375–79. Division One affirmed. *Seattle Truck Law, PLLC v. Banks* ("*STL*"), No. 84337-1-I, slip op., 2023 WL 7130561 (Wash. App. Oct. 30, 2023).

ISSUE PRESENTED

Does a law firm's employment contract with an associate attorney violate the public policies embodied in RPC 5.6(a) if the contract, as a condition to the firm's clients terminating the firm and hiring the associate if they leave the firm, requires the associate to pay 40-50% of the fees earned post-departure from those clients?

ARGUMENT IN SUPPORT OF REVIEW

I. The effects on the public interest can be weighed only by considering the aggregate effects of these fee-splitting provisions in law firms' contracts

This Court should grant review under RAP 13.4(b)(1) because this Court's precedent does not support Division One's approach for determining whether a law firm's contract violates the public policies embodied in RPC 5.6(a). Division One rejected the concerns we raised about these kinds of contracts. Brushing aside the "perils of fee-splitting provisions" that our *amici* brief described, the court insisted that "any theoretical impairment of a client's ability to select the attorney of their choice is not borne out by these facts." *STL*, 2023 WL 7130561, at *6. In other words, the broader implications did not matter: if these kinds of contracts proliferated statewide, they would endanger client choice and stifle professional freedom. Yet those hazards did not figure into Division One's analysis whether this particular contract violated RPC 5.6(a)'s

public policies. All that mattered to Division One was what happened in this particular case. *See STL*, 2023 WL 7130561, at *6.

That narrow inquiry runs afoul of this Court's teachings on how to determine whether a contract is void as against public policy. As this Court has reiterated before, "[t]the underlying inquiry when determining whether a contract violates public policy is whether the contract 'has a tendency to be against the public good, or to be injurious to the public.'" *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 86, 331 P.3d 1147 (2014) (quoting *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007)). By requiring only a "*tendency*" to harm the public interest, this test frames the search for policy violations broadly. *Id.* (emphasis added). Neither Division One nor any other Washington court should limit its inquiry to the actual facts of just the one case before it. What matters if the broad potential for public harm.

This point finds reinforcement in *Scott*, 160 Wn.2d

843, when this Court considered and struck down a class-action waiver in a cellular-phone company's subscriber contracts. When determining whether the waiver violated public policy, this Court did not look just at the one class-action waiver before it. *See id.* at 853-54. This Court instead considered the cumulative impact on the public interest if these waivers were upheld. *See id.* Class actions, this Court explained, were a "critical" mechanism for enforcing the Consumer Protection Act, ch. 19.86 RCW. *Id.* at 853. Rather than focusing on the individual parties' specific harms, the Court used a wider lens to consider what would happen if it allowed class-action waivers to proliferate in consumer contracts. Division One should have done so here. If it had, the court would have realized the broad danger that STL's contract poses, and there can be little doubt that other law firms will now model their employment contracts on the terms that Division One upheld.

II. Client choice is necessarily impaired if courts allow fee-splitting provisions that would require clients to pay to their former lawyers an unreasonable 40-50% of the attorney fees that were not earned until after termination of the former firm

RAP 13.4(b)(1) and (b)(2) further support review because Division One's opinion fails to account for an important component of contingency fees—lawyers do not earn a contingency fee until they achieve substantial performance toward a settlement or favorable judgment. This principle derives from cases such as this Court's decision in *Barr v. Day*, 124 Wn.2d 318, 329-30, 879 P.2d 912 (1994), and Court of Appeals decisions like *Taylor v. Shigaki*, 84 Wn. App. 723, 728, 930 P.2d 340 (1997), and *Barrett v. Freise*, 119 Wn. App. 823, 846, 82 P.3d 1179 (2003). When an attorney agrees to accept a contingency fee but "the attorney is discharged prior to the occurrence of the contingency," the rule has long been that "the measure of the fee is *not the contingent fee agreed upon*." *Barr*, 124 Wn.2d at 329 (emphasis added).

Rather, the discharged attorney is entitled only to "reasonable compensation for the services actually rendered." *Id.* That is, quantum meruit. *Id.* at 330.

The exception to this limited compensation rule arises only when the discharged attorney had "substantially performed the contingency" when the client terminated them. *Id.* at 329. "The purpose of the substantial performance exception is to prevent clients from firing their attorneys immediately prior to the occurrence of the contingency in order to avoid the contingency fee." *Id.* "A discharged lawyer has substantially performed his or her duties when the attorney's efforts make a settlement 'practically certain,' even if the settlement is consummated after the client fires the attorney." *Barrett*, 119 Wn. App. at 846 (quoting *Taylor*, 84 Wn. App. at 729).

These compensation rules in contingency-fee cases protect law-firm employers like STL when an associate-attorney employee leaves the firm and brings firm clients to a new firm. If the contingency fee already had

been earned at that point through substantial performance, then the terminated law-firm employer has the right to recover the entire contingency fee from the client under *Barr*, 124 Wn.2d at 329-30, *Barrett*, 119 Wn. App. at 846, and *Taylor*, 84 Wn. App. at 729. Even if the contingency had not yet been achieved, then the terminated law-firm employer still has the right to quantum meruit—receiving compensation for "the services actually rendered." *Barr*, 124 Wn.2d at 329. To protect these rights to compensation, the terminated law-firm employer may foreclose on an attorney lien under RCW 60.40. Thus, firms such as STL have ample recourse under the *Barr–Barrett–Taylor* compensation rule, which also deters attorney employees from engineering mass departures of contingency-fee clients when settlement or judgment is practically certain.

But STL's contract here, upheld by Division One, went too far because it entitled STL to 40-50% of the contingency fees from STL's former clients without regard to whether the contingency had been

substantially performed or not. In other words, STL drafted a contract that circumvents the compensation rules set out in *Barr*, 124 Wn.2d at 329-30, *Barrett*, 119 Wn. App. at 846, and *Taylor*, 84 Wn. App. at 729. STL wrote around those precedents to take a contingency fee that was earned only after its former clients left the firm and hired STL's former employee.

Division One's analysis of the effect on client choice fails to account for this infringement on the compensation rule that is designed to protect contingency-fee clients from overreaching attorneys. Under the contract scheme that Division One has endorsed, personal-injury firms throughout the state can now bypass *Barr*, 124 Wn.2d at 329-30, *Barrett*, 119 Wn. App. at 846, and *Taylor*, 84 Wn. App. at 729, when their former clients hire a former firm employee. If the clients hire a different personal-injury lawyer unaffiliated with the former firm, then the clients would owe only quantum meruit under *Barr*, 124 Wn.2d at 329-30. But under these contractual fee-splitting

provisions, as endorsed by Division One, the clients would have to instead pay 40-50% of the contingency fee to the discharged firm if they hire a former firm employee. That stark difference limits clients' choice to stick with a departing lawyer rather than staying with the law firm or hiring some other external law firm. In short, clients would have no choice but to pay a contingency fee that the *Barr–Barrett–Taylor* compensation rule would not otherwise allow.

Besides infringing on client choice, these fee-splitting provisions also permit law-firm employers to collect unreasonable fees in violation of RPC 1.5(a). Division One erred in declining to consider the interplay between RPC 5.6(a) and RPC 1.5(a), the rule prohibiting attorneys from "collect[ing] an unreasonable fee." Division One's refusal runs counter to this Court's directive that the RPCs must be construed in "the context of the rule in which that provision is found, related provisions, and the RPC scheme as a whole." *State v. Nickels*, 195 Wn.2d 132, 149, 456 P.3d 795

(2020) (cleaned up). Even if the parties did not brief RPC 1.5(a) below, they had argued RPC 5.6(a) extensively. And in this setting, RPC 1.5(a) simply served as an authority for determining RPC 5.6(a)'s context and its role in the RPCs as a whole. As made clear by *Barr*, 124 Wn.2d at 329-30, *Barrett*, 119 Wn. App. at 846, and *Taylor*, 84 Wn. App. at 729, a contingency fee is not reasonable when, as here, the contingency has not been substantially performed.

Division One speculated about how much work had been done toward achieving settlements before Banks's departure. *STL*, 2023 WL 7130561, at *6. But the record, as far as we can tell, did not disclose the number of ours that STL attorneys and staff had worked on the files; what STL had done to gather medical records and expert opinions to support their then-clients' claims; how far along settlement negotiations had progressed; or anything else. On that record, Division One could only conjecture—which this Court's summary-judgment standard does not permit. STL had

to produce more than "speculation and conclusory statements," *Strauss v. Premera Blue Cross*, 194 Wn.2d 296, 301, 449 P.3d 640 (2019) (cleaned up), to show that it had earned a contingency fee rather than only quantum meruit.

In short, Division One applied RPC 5.6(a) in a way that allows law firms to circumvent the compensation rules for contingency-fee cases—at the expense of client choice.

III. This issue affects attorneys and their clients throughout Washington

The broad public impact not only shows why a contract like this one should be void as against public policy, but also why this Court should grant review under RAP 13.4(b)(4). Left unaltered, Division One's holding that such fee-split arrangements are enforceable will prevent many departing attorneys from taking on contingency-fee matters from their former firms. We speak from our own experiences and from those we have learned from colleagues. While Division

One noted that Banks would have earned about as much if he had stayed at STL, Division One overlooks the effects on client choice and professional freedom. When clients can offer only 50-60% of the usual contingency fee to a prospective attorney, clients will find few, if any, firms willing to take on the business risk. Also, Division One makes an inapt comparison because it fails to account for the business risk of an associate-attorney employee leaving to start a new firm. Banks's position was not unique. While the employer pays for office space, malpractice-insurance premiums, bar dues, CLE fees, support staff salaries, retirement benefits, and health insurance, all that overhead becomes the responsibility of early-career attorneys like Banks who would prefer to start their own firms. Such attorneys cannot take on the financial risks of all that new monthly overhead if they cannot receive the full share of the contingency fee that they earn from the clients who left with them. These problems are statewide, not confined to the private parties here, and will worsen if

Division One's decision stands unreviewed.

CONCLUSION

This Court should grant review.

This document contains 2,287 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 29th day of March 2024.

Respectfully submitted,

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