
**COURT IMPOSES REASONABLENESS STANDARD
ON ATTORNEY'S FEES PROVISION IN
PROPERTY SETTLEMENT AGREEMENT
BY AMY J. PHILLIPS, ESQUIRE**

McMULLEN v. KUTZ
925 A.2d 832 (Pa. Super. 2007)

In its May 16, 2007 decision, the Pennsylvania Superior Court (Todd, Bender and Colville, JJ) concluded that it was appropriate to impose a reasonableness standard on an attorney's fees provision set forth in the parties' Property Settlement Agreement even though the Agreement contained no such requirement. The Superior Court, per Todd, J., also affirmed the trial court's decision to consider the parties' settlement negotiations in ascertaining an appropriate and reasonable award of counsel fees for one party's breach of the Property Settlement Agreement. Judge Colville, however, filed a dissenting opinion disagreeing with the factors considered by the trial court to determine a reasonable award of counsel fees.

On July 7, 2000, Husband and Wife entered into a Property Settlement Agreement, which contained provisions for the payment of child support, the distribution of Husband's military pension as well as the payment of attorney's fees in the event either party breached the Agreement. Husband agreed to pay Wife child support in the amount of \$1,250.00 per month for the parties' five children through the age of 22 so long as the children pursued a college education on a full-time basis following their eighteenth (18th) birthday. The Agreement also provided that a party would be responsible for the payment of the other party's attorney's fees and costs incurred as a result of that parties' efforts to enforce his or her rights pursuant to the terms of the Agreement.¹

Wife filed a Petition to Enforce the parties' Agreement on September 13, 2005 claiming that Husband failed to pay child support for the parties' oldest son in July and August 2005 as well as her full share of Husband's military pension. Wife also sought \$2,931.99 for counsel fees and costs that she incurred to enforce her rights under the Agreement. Following a hearing, on December 22, 2005, the trial court (Cumberland County Judge Guido) directed Husband to pay the back child support and the remainder owed to Wife from his military pension, a total of \$781.82, but deferred the issue of any attorney's fees and costs owed to Wife for Husband's breach and Wife's enforcement of the parties' Agreement.

On February 21, 2006, the trial court awarded Wife \$1,200.00 in attorney's fees. Wife filed a timely appeal raising the following issues for the Superior Court's review:

- I. Did the trial court err in substituting its own judgment of reasonable attorney's fees when the contract, previously agreed to by both parties, required payment of legal fees and costs actually "incurred"?

II. Did the trial court err in considering settlement negotiations, or any lack thereof, as a factor in determining the reasonableness of the attorney's fees actually incurred?

In support of her argument that the trial court was required to award Wife the actual amount of attorney's fees and costs that she incurred to enforce the Agreement, Wife relied on the Superior Court's decision in *Creeks v. Creeks*, 619 A.2d 754 (Pa. Super. 1993) arguing that the terms of the parties' Agreement were clear and unambiguous. In other words, Wife argued that because the parties' Agreement did not specify that the fees must be reasonable, the court could not impose such a standard. Thus, Wife argued that Husband was obligated to reimburse her for the \$2,931.99, the amount of counsel fees and costs she actually incurred to enforce the parties' Agreement. The Superior Court, however, disagreed finding *Creeks* distinguishable. In distinguishing *Creeks*, the Superior Court reversed the trial court's conclusion that husband had not breached the agreement and wife was not entitled to counsel fees and costs. The Superior Court further distinguished *Creeks* finding that the attorney's fees provision at issue required the fees to be "reasonably expended."

Having distinguished *Creeks*, the Superior Court clarified that the issue at hand was whether the parties' Agreement implicitly required legal fees awarded in the event of a breach to be reasonable even though there was no such condition specified in the Agreement. In ruling upon this issue, the Superior Court relied upon its decision in *Duffy v. Gerst*, 429 A.2d 645 (Pa. Super. 1981) and the Maryland Court of Special Appeals decision in *Rauch v. McCall*, 761 A.2d 76 (Md. Spec. App. 2000). At issue in *Duffy* was a real estate contract wherein the buyer was awarded \$3,500.00 in attorney's fees after the seller defaulted. Finding that the real estate contract was silent as to the reasonableness of an award of attorney's fees, the Superior Court stated "[i]t may be assumed that implicit in this provision is the condition that the attorney's fee must be a reasonable fee."ⁱⁱⁱ *McMullen, supra.* (citing *Duffy*, 429 A.2d at 650). Similarly, the Maryland Court of Special Appeals addressed the issue of whether a trial court is precluded from appraising the reasonableness of a request for legal fees when the contract and/or agreement at issue does not impose such a requirement in *Rauch, supra.* The Maryland Court of Special Appeals found that the agreement in question implicitly required an award of counsel fees to be reasonable and that the trial court was permitted to review a request for counsel fees accordingly. This conclusion was ultimately adopted by the Maryland Court of Appeals in *Atlantic Contr. & Material Co., v. Ulico Cas. Co.*, 844 A.2d 460 (Md. 2004) (holding that when a contract permits recovery of attorney's fees and that contract is silent as to the reasonableness of those fees, the trial court must, nonetheless, examine the reasonableness of the request for fees).

Based on the prior holdings set forth in *Duffy*, *Rauch* and *Atlantic Contr. Co.*, the Superior Court concluded that when a contract permits a party to request attorney's fees from the other party and the contract does not explicitly provide that those fees must be reasonable, the trial court must evaluate the legal fees at issue for reasonableness all the same. In other words, a party is not necessarily entitled to recover the exact amount he or she expended to enforce the provisions of a contract/agreement. Rather, any fees recovered by the prevailing party must be reasonable. Applying this holding to the case at bar, the Superior Court concluded that the trial court did not err in awarding Wife only \$1,200.00 in attorney's fees, which was reasonable, even though Wife had expended \$2,931.99 to enforce her rights under the parties' Agreement.

Wife also argued that the trial court improperly considered the lack of settlement negotiations when evaluating the reasonableness of Wife's request for attorneys' fees. The Superior Court noted that Pennsylvania Rule of Evidence 408 renders offers of settlement or compromise of a disputed claim inadmissible as evidence to prove a party's liability or invalidity of a claim or amount.ⁱⁱⁱ The Superior Court nonetheless concluded that Rule 408 was inapplicable to the instant matter because the trial court was not considering the parties' negotiations in relation to Wife's underlying claim that Husband breached the parties' Agreement but in conjunction with ascertaining the reasonableness of Wife's claim for counsel fees of \$2,931.99.

In assessing the reasonableness of Wife's claim for counsel fees, the trial court considered the simple, straightforward nature of the breach alleged, the amount awarded on Wife's underlying claim as well as Wife's failure to try to resolve the issues outside of litigation. Specifically, the trial court noted that Wife's counsel did not address Husband's failure to pay the required child support or the shortfall in Wife's share of Husband's military pension outside of court. Rather, Wife's counsel's first contact with Husband was a cover letter accompanying Wife's Petition to Enforce. The trial court found that neither Wife nor her counsel made any effort to avoid litigation and, therefore, Wife's expenditure of \$2,931.99 to enforce the Agreement for \$781.82 was unreasonable. The Superior Court concluded that the trial court did not abuse its discretion in awarding Wife only \$1,200.00 in counsel fees despite the total amount incurred to enforce the Agreement.

Judge Colville, a Retired Allegheny County Senior Judge appointed to the Superior Court, filed a dissenting opinion as he disagreed with the factors considered by the trial court in assessing the reasonableness of Wife's claim for attorney's fees. Judge Colville did not challenge the majority's conclusion that the counsel fees award must be reasonable.^{iv} Rather, Judge Colville found that the trial court must consider the following factors in evaluating the reasonableness of a claim for counsel fees:

. . . the amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; . . . the degree of responsibility incurred; whether the fund involved was "created" by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a reasonable fee for the services rendered; *and*, very importantly, the amount of money or the value of the property in question. *McMullen, supra* [citing *Estate of Murray v. Love*, 602 A.2d 366, 370 (Pa. Super. 1992) (quoting *In re: Trust Estate of LaRocca*, 246 A.2d 337, 399 (Pa. 1968)] (emphasis in original).

Judge Colville concluded that the trial court failed to consider many of these factors and evaluated irrelevant factors such as the party's settlement negotiations. Judge Colville opined that the trial court's explanation for awarding Wife only \$1,200.00 in attorney's fees was insufficient. Therefore, Judge Colville would have remanded the instant matter to the trial court

for consideration of the above-cited factors in assessing the reasonableness of Wife's claim for attorney's fees as well as Husband's responsibility to pay the same.

CASE NOTE AUTHOR'S EDITORIAL COMMENTS: The *McMullen* decision is a reminder to us that we, as attorneys, not only need to be aggressive advocates and legal advisors on behalf of our clients but pragmatists as well. The lesson to be learned from this decision is to remain cognizant of the actual controversy at hand; the "big picture." In *McMullen*, Wife spent \$2,931.99 to gain \$781.82 in back child support and to make up the shortfall in Wife's share of Husband's military pension. Wife's counsel fees were almost four times the amount in controversy on her underlying cause of action. Further, this does not include any counsel fees Wife spent on her Superior Court appeal. Principally, Wife had every right to enforce and compel Husband's compliance with the parties' Agreement through court intervention. Realistically, however, Wife clearly loses. As the *McMullen* case demonstrates, some controversies may be best resolved through communication and negotiation keeping the larger picture in mind. In other words, it is better to win the battle *and the war*.

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ⁱ The parties' Agreement provided as follows with regard to counsel fees in paragraph 17:

BREACH: If either party breaches any provision of this Agreement, the other party shall have the right, at his or her election, to sue for damages for such breach or seek such other remedies or relief as may be available to him or her, and the party breaching this contract shall be responsible for payment of legal fees and costs incurred by the other in enforcing their rights under this Agreement. *McMullen*, 925 A.2d at *p2 (citing Separation and Property Settlement Agreement, 7/7/00, at ¶ 17).

ⁱⁱ In *Duffy*, the sales contract provided, in pertinent part: [i]n the event of the seller's default, the agreement of sale provided that the buyer could elect to:

(w)aive any claim for loss of bargain, in which event Seller . . . agrees to repay to Buyer the earnest money . . . and, in addition, reimburse Buyer for all direct, out-of-pocket costs and expenses (i.e., title examination, survey and attorney's fees) and to this end Seller does . . . authorize . . . any attorney . . . to . . . confess judgment . . . for said earnest money . . . and for said direct, out-of-pocket costs and expenses including an attorney's commission of 10% (but not less than \$200.00) together with costs of suit . . . *Duffy*, 429 A.2d at 649.

ⁱⁱⁱ Pennsylvania Rule of Evidence 408 provides as follows:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to provide liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiation is likewise not admissible.

This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias

or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. PA. R.E. 408.

^{iv} Despite agreeing with the majority's overall conclusion, Justice Colville, in a footnote, stated that if the agreement in question did not provide that counsel fees must be reasonable, then the trial court could not examine the reasonableness of a claim for counsel fees absent an objection as to those fees by the aggrieved party.