

**[J-93-2008][M.O. - Baer, J.]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

MARJORIE R. MCMULLEN,	:	No. 103 MAP 2007
	:	
Appellant	:	
	:	Appeal from the Order of the Superior
	:	Court entered on 5/16/07 at No. 544 MDA
v.	:	2006, affirming the Order of the Court of
	:	Common Pleas of Cumberland County,
	:	Civil Division, entered on 2/21/06 at No.
	:	2000-4155
RONALD E. KUTZ,	:	
	:	
Appellee	:	ARGUED: May 14, 2008

**CONCURRING AND DISSENTING OPINION**

**MR. JUSTICE SAYLOR**

**DECIDED: December 28, 2009**

As the majority recognizes, appeal was allowed on a limited basis, solely to address a purported conflict between the Superior Court's decision in this case and its prior ones in Creeks v. Creeks, 422 Pa. Super. 432, 619 A.2d 754 (1993), and Profit Wize Mktg. v. Wiest, 812 A.2d 1270 (Pa. Super. 2002). The majority aptly determines that there simply is no conflict, and that neither decision has anything to do with a materially distinct question involving the courts' ability to consider reasonableness of attorneys' fees in assessing contractual fee-shifting matters where reasonableness is not a specific term of the agreement. See Majority Opinion, slip op. at 8-9. Nevertheless, the majority proceeds, beyond the limited grant of allocatur, to frame and address this extraneous question.

Certainly, the issue is of substantial significance to Pennsylvania jurisprudence and warrants this Court's attention. Nevertheless, I do not believe this case is an appropriate one in which to address the matter. This is so, not only because the question is not within the scope of the issue formally accepted for review, but also because the advocacy presented touches only on a very limited subset of the many considerations relevant to a reasoned development of governing principles.

The overarching subject of allocating attorneys' fees is a difficult one. On the one hand, as the majority observes, courts have settled upon the American Rule as the default approach. See Majority Opinion, slip op. at 10. However, application of this rule, under which parties must bear their own counsel fees regardless of faultlessness, can act as a restraint on contractual undertakings and/or discourage prosecution of meritorious actions. Thus, the American Rule is not sacrosanct and can be overridden at least by agreement or statute.

In the context of contractual fee-shifting, there are two strong policies in tension. First, freely negotiated agreements entered into at arms length are generally enforced according to their terms to allow parties the benefit of their bargains. See generally Snow v. Corsica Constr. Co., 459 Pa. 528, 531, 329 A.2d 887, 889 (1974) (explaining that "[i]nadequacy of price, improvidence, surprise, and mere hardship, none of these, nor all combined, furnish an adequate reason for a judicial rescission of a contract." (citation omitted)). When this policy is given priority, faultless parties can be made whole upon breach, according to the terms of their agreements, and the judicial non-interference in contractual affairs fosters certainty and stability in economic relations.<sup>1</sup>

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<sup>1</sup> Of course, any contractual provision is enforceable according to its terms only to the limits of unconscionability. See Salley v. Option One Mortgage Corp., 592 Pa. 323, 331-32, 925 A.2d 115, 119-20 (2007). Therefore, it is beyond dispute that an unconscionable fee-shifting provision, or a provision yielding unconscionable results, (continued . . .)

See, e.g., Res. Mgmt. Co. v. Weston Ranch and Livestock Co., 706 P.2d 1028, 1040 (Utah 1985) (“Although courts will not be parties to enforcing flagrantly unjust agreements, it is not for the courts to assume the paternalistic role of declaring that one who has freely bound himself need not perform because the bargain is not favorable.”). On the other hand, perhaps on account of unease with shifting costs over which a non-prevailing party had less control, see, e.g., Majority Opinion, slip op. at 10-11, many courts assume a more active role in reviewing contractual fee-shifting. See, e.g., Home Funding Group, LLC v. Kochmann, 2008 WL 4298325, at \*5 (D. Conn. Sep. 18, 2008) (indicating, in the setting of contractual fee-shifting, “attorney’s fees should be awarded ‘with an eye towards moderation’” (citations omitted)).

As the majority relates, in Pennsylvania, the Superior Court has found an implied reasonableness term in contractual fee-shifting provisions. See McMullen v. Kutz, 925 A.2d 832, 834 (Pa. Super. 2007) (citing Duffy v. Gerst, 286 Pa. Super. 523, 531, 429 A.2d 645, 650 (1981)). The underlying decision in Duffy, however, is not well reasoned, in that it does not develop the relevant policy considerations. Rather, Duffy summarily invoked two decisions which, like those relied upon by Appellant, have little to do with the question of reasonableness in fee-shifting.<sup>2</sup> The Superior Court’s McMullen

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should not be enforced according to its terms. The issue the majority undertakes to address here, however, is whether (and/or to what degree) the courts should engage in a more general reasonableness inquiry regardless of the specific terms of a contract.

<sup>2</sup> Duffy supported its single-sentence reasoning with citations only to Kuhn v. Princess Lida of Thurn & Taxis, 119 F.2d 704 (3d Cir. 1941), and In re Lohm’s Estate, 440 Pa. 268, 269 A.2d 451 (1970). Kuhn concerned a suit by an attorney against a former client based on an equitable quantum meruit theory, see Kuhn, 119 F.2d at 705, circumstances very different from contractual fee-shifting. Lohm’s Estate involved a claim for counsel fees asserted by an attorney for an estate against the estate, and adjustments reflecting a surcharge. The governing principle of law was stated narrowly (continued . . .)

decision relies on Duffy, which it also compared favorably with the approach of a single other jurisdiction. See McMullen, 925 A.2d at 834-35.

The Superior Court did not consider, and the parties do not presently discuss, the approach of a number of jurisdictions which substantially limit the level of judicial scrutiny pertaining to contractual fee-shifting. See, e.g., Student Mktg. Group, Inc. v. Coll. P'ship, Inc., 247 Fed. Appx. 90, 103, 2007 WL 2269440, at \*12 (10th Cir. 2007) (indicating that a trial court has "far less equitable discretion" in contractual as compared to statutory fee-shifting matters, and "the trial court is not responsible for independently calculating a 'reasonable fee' and should only reject the contractually-stipulated award if it is 'unreasonable or inequitable'" (citations omitted)); Carpenter Tech. Corp. v. Armco, Inc., 808 F.Supp. 408, 410 (E.D. Pa. 1992) (suggesting that, under Pennsylvania law, the "duty to scrutinize is less demanding when an award of counsel fees arises from a bargained-for contract clause rather than from a common fund or statute." (citations omitted)). In my view, such perspectives merit consideration in the reasoned development of our law. Indeed, I find troubling the prospect of Solomonic rulings by courts invested with broad discretion to dilute contractual fee-shifting, and I tend toward more limited judicial involvement.<sup>3</sup>

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as follows: "A court which has been requested to approve an amount of compensation for a fiduciary or his counsel sua sponte, may pass upon the reasonableness of the compensation claimed and, where appropriate, impose a surcharge by way of awarding a fee which is less than the customary minimum for an estate that size." Lohm's Estate, 440 Pa. at 273-74, 269 A.2d at 454. The Duffy court was not justified in relying on either of these decisions for a general proposition of law that reasonableness is an implied term of fee-shifting agreements, because neither supports any such proposition.

<sup>3</sup> I place the common pleas court's approach in this case within this category of troubling rulings. For example, as Judge Colville develops, the court gave substantial emphasis to its perceptions concerning Appellee's failure to pursue settlement. I agree (continued . . .)

In this arena, other issues arise. For example, there is a split of authority concerning whether attorneys' fees are merely an element of damages, to be determined by the fact-finder, whether judge or jury, in cases where the right to the fees is created by a contract. See Murphy v. Stowe Club Highlands, 761 A.2d 688, 700 (Vt. 2000). Moreover, it seems to me the appropriate frame of reference may depend, to some degree, on factors such as whether the contract arises in a consumer or commercial context, the degree of opportunity for arm's length bargaining, and whether fees are liquidated or unliquidated in the agreement.

For the above reasons, I join the majority opinion as it relates to the specific issue on which allocatur was granted, but I do not support its broader analysis and legal conclusions.<sup>4</sup> Instead, I would expressly leave for another day issues concerning the appropriate degree of judicial scrutiny of contractual fee-shifting, as well as the question

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( . . . continued)

with Judge Colville that the common pleas court was not justified in considering its finding of an absence of settlement negotiations as a substantial factor in its analysis, see McMullen, 925 A.2d at 837 (Colville, J., dissenting), since individuals should not be penalized for exercising their right of access to the courts to enforce their legal interests. Thus, in my view, a remand might be appropriate were this matter within the scope of the limited appeal to this Court.

Additionally, in my view, there are circumstances in which it is reasonable for parties to spend more for attorney services than the amount of their potential recovery in order to secure their rights against others. The alternative is to require parties to surrender their rights merely because enforcing them will be expensive, or to force attorneys to discount or shortcut their services.

<sup>4</sup> Although I would not address the matter here, however, I also would not disturb the Superior Court's existing decisions implying reasonableness into contractual fee-shifting terms. Thus, such law would remain the prevailing precedent of Pennsylvania unless and until addressed by this Court in a case in which this precedent is meaningfully questioned and the alternatives appropriately explored.

of whether (and/or under what circumstances) the reasonableness determination should be for a judge or the jurors in jury cases.