

[J-93-2008 MO: Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, JJ.

MARJORIE R. MCMULLEN,	:	No.103 MAP 2007
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court entered May 16, 2007, at No. 544
	:	MDA 2006, affirming the Order of the
v.	:	Court of Common Pleas of Cumberland
	:	County, Civil Division, entered February
	:	21, 2006, at No. 2000-4155.
RONALD E. KUTZ,	:	
	:	
Appellee	:	925 A.2d 832 (Pa. Super. 2007)
	:	
	:	ARGUED: May 14, 2008

DISSENTING OPINION

MR. CHIEF JUSTICE CASTILLE

DECIDED: December 28, 2009

I join the dissenting portion of Mr. Justice Saylor's Concurring and Dissenting Opinion, which ably articulates the deficiencies in the new rule summarily adopted by the Majority. I write separately to elaborate upon those points of disagreement and also to explain why, if we must decide the question the Majority poses, I would reverse the courts below.

The Majority adopts a new rule that adult parties to a contract, even those represented by counsel, cannot agree between themselves that, should one party breach the agreement, the breaching party must pay the non-breaching party's attorney's fees in full. The Majority concludes that courts are authorized to insert a requirement of reasonability of the fees due to the potential for abuse if one party knows the other will be paying the fee. Even if I shared the Majority's cynicism concerning the bar's charging

practices, I would not adopt the policy the Majority has adopted to undo arms' length contracts that are a quintessential expression of American free will.

Proper disposition of this appeal requires a proper framing, and there are three points that, I believe, provide necessary perspective. The first point is Justice Saylor's observation that this case is more momentous than the Majority would make it out to be, and the new rule summarily approved is rendered in a case where the briefing is not up to the task. See Saylor, J., Concurring and Dissenting Slip Op., 2. The parties' briefs, and particularly appellant's brief, present argument on the above issue but only as a secondary matter, not as the primary argument advanced. Instead, the parties appropriately devoted their arguments to the issue this Court actually agreed to hear regarding the potential conflict between different Superior Court panel decisions. In addition, the order granting allocatur was not framed in a manner to put other potentially interested parties, such as the organized bar, on notice that we might approve a rule which allows trial judges, in their discretion, to take it upon themselves to reduce contractually-based awards of attorneys' fees. And so we are left without the input of the practicing bar -- which knows more about the current financial pressures of practicing law than this Court does.

Second, and similarly, the Majority's easy approval of the trial court's *sua sponte* action should not obscure just how intrusive that action was. The Majority apparently credits appellee's argument that reasonableness inquiries are appropriate because Pennsylvania courts have inherent supervisory authority over Pennsylvania attorneys. This Court indeed has such supervisory authority, but the lower courts have that authority, in a matter such as this, only to the extent we have approved it. The trial court here acted without the imprimatur of approval from this Court, and the existing Superior Court authority is, as Justice Saylor has demonstrated, uniquely unreasoned. It is perfectly appropriate for the aggrieved party to seek review of such an action.

Third is the fact, also duly noted by Justice Saylor, that there is already existing protection against unconscionable contract provisions, which logically extends to “an unconscionable fee-shifting provision, or a provision yielding unconscionable results.” Saylor, J., Concurring and Dissenting Slip Op., 2-3 n.1 (citing Salley v. Option One Mortgage Corp., 925 A.2d 115 (Pa. 2007)). And so it is not accurate to conclude, as the Majority has, that failure to authorize *sua sponte* review for reasonableness will result “in no safety valve and courts would be required to award attorney’s fees even when such fees are clearly excessive.” Majority Slip Op., 11. Although the Majority’s rule is cloaked in terms of “reasonableness,” it will be an overly invasive rule, and difficult to define in a fashion that would promise any modicum of even and fair application.

Although, like Justice Saylor, I would prefer to leave the broader questions to a more suitable case, since the Majority proceeds to decision, I offer my own view here. I find persuasive appellant’s argument that, when the terms of a written contract are clear, a court should not re-craft the agreement to conflict with its plain language. Courts in Pennsylvania have long held that a contract is to be construed in accordance with the language chosen by the parties:

In interpreting the language of a contract, we attempt to ascertain the intent of the parties and give it effect. Crawford Central Sch. Dist. v. Commonwealth of Pennsylvania, 585 Pa. 131, 143, 888 A.2d 616, 623 (2005). When the words of an agreement are clear and unambiguous, the intent of the parties is to be ascertained from the language used in the agreement, Steuart v. McChesney, 498 Pa. 45, 49, 444 A.2d 659, 661 (1982), which will be given its commonly accepted and plain meaning, J.K. Willison, Jr. v. Consol. Coal Co., 536 Pa. 49, 54, 637 A.2d 979, 982 (1994).

LJL Transp., Inc. v. Pilot Air Freight Corp., 962 A.2d 639, 647 (Pa. 2009). See also Insurance Adjustment Bureau, Inc. v. Allstate Ins. Co., 905 A.2d 462, 468 (Pa. 2006) (where terms of contract are clear and unambiguous, intent of parties is ascertained from

document itself); Chen v. Chen, 893 A.2d 87, 93 (Pa. 2006) (meaning of contract is ascertained from contents alone where no ambiguity exists).

The parties' agreement in this instance was clear and unambiguous. It provided that: "the party breaching this contract shall be responsible for the payment of legal fees and costs **incurred by the other** in enforcing their rights under this Agreement" (emphasis added). There is nothing about "reasonableness" in the contract; there is nothing reposing the measure of reasonableness in a trial court's idiosyncratic judgment (as opposed to, for example, the parties' familiarity with each other); and there is nothing inherently unconscionable in the omission of the term.

Therefore, the meaning of the attorney's fees provisions should be divined from the language of the agreement itself, and not according to the trial court's imposition of a requirement that the attorney's fees be reasonable. To make matters worse, that "reasonableness" was then measured, without a relevant record, by the trial court's own idiosyncratic judgment. And that judgment, in turn, was suspect to the extent that the trial court factored in its disapproval of appellant for failing to pursue settlement in a case where she was the innocent and aggrieved party. There is no allegation that the parties' agreement was the result of anything other than arm's length negotiations. There is nothing on the face of the agreement, or in the amount of attorney's fees, that is unconscionable. Therefore, the parties should be held to the terms of the agreement they negotiated.

The result of the trial court's decision is that appellant is now forced to bear a substantial portion of the financial burden of appellee's unilateral breach of their agreement. The inclusion of the attorney's fees provision in the parties' agreement obviously was intended as a disincentive to breach the agreement. The trial court has removed that disincentive and, in effect, penalized appellant for appellee's breach. That is contrary to the

clear intent of the parties' contract and to Pennsylvania authority regarding contract interpretation.

Even assuming the trial court had the power to insert a requirement that the attorney's fees be reasonable, a fee of \$3,000 to prosecute a petition to enforce the terms of this marital settlement agreement is not self-evidently unreasonable. Appellee has not shown the fee award here to be out of line when compared to what family law practitioners generally charge. Moreover, appellee had his own self-help remedy to shield himself against such costs: he could have just honored his obligation, and when called to task for failing to do so, he should be bound by his contractual agreement.

I am also puzzled by the fact that the rule the Majority adopts provides that trial courts "may" consider the reasonableness of attorney's fees, without addressing the more salient question of whether they are authorized to do so *sua sponte* -- as actually happened here. Majority Slip Op., 12. Obviously, it is one thing to entertain issues actually raised by a party, and quite another thing to become a party's champion, uninvited. The Majority recognizes that appellant argues this very point, id. at 7, yet inexplicably leaves it undecided.

Equally inexplicable is the fact that the Majority denies appellant any opportunity to prove the reasonableness of the fee. The Majority merely purports to authorize reasonableness inquiries at the trial court level and then washes its decisional hands. Nor does the Majority provide any guidance as to just how that inquiry should proceed: There is no discussion of which party has the burden of proof, the party seeking fees or the party responsible for the fees; no suggestions regarding factors trial courts should consider in making the reasonableness assessment; or even any parameters or limits on the trial court's discretion. Would a trial court's inquiry necessarily be different in cases in rural communities than in urban locations where average attorney hourly rates are likely higher? Should trial courts treat family law matters differently or the same as other civil matters?

The Majority Opinion leaves all of these questions unanswered. In short, the Majority reaches out to “decide” an issue arguably not encompassed in our grant of review and one that the parties did not fully brief, and then approves a general and intrusive power without offering the bench and bar any clue concerning the actual exercise of this new, disruptive power.

There is nothing in the record before this Court to indicate that the trial court heard any evidence regarding the reasonableness of the fee. Notably, appellant has forwarded a very modest request that, if the intrusion be approved, this Court should remand to the trial court for just such a fact-finding. The Majority says no. The result is a judicial double-blow: The Majority unnecessarily reaches out to decide a broad question of policy in a case ill-suited to the task, announcing a new rule of law allowing trial courts to *sua sponte* look outside the language of an arms’ length contract and thereby drastically altering appellant’s expectations; and then denies appellant any opportunity to prove the reasonableness of the fees her counsel charged, leaving intact an unmoored and unexplained fee reduction.

I would not lose sight of the trial court action that the Majority lets stand. The attorney’s fee reduction below is bottomed upon an assumption that reasonable minds could not disagree that one cent more than \$1,200 would make the fee here “clearly excessive.” I do not believe that the trial court was equipped to render such a pronouncement, especially where there was no record. Any decision on the reasonableness of a fee is fact-bound. For wealthy litigants employing major law firm partners, for example, it is difficult to imagine that a fee of \$3,000 would be considered unreasonable for purposes of any litigation. I realize that the means of the parties here are more modest, but it is still difficult to see a \$3,000 fee for litigation services as manifestly excessive. There is no support for a conclusion that the fee is *per se* unreasonable, and the trial court’s 60% reduction of the actual fee was based, in part, upon an inappropriate punitive consideration. And so, if we must decide the abstract question the Majority

decides, I would also decide the actual case: and I would reverse since this fee-reduction is inherently suspect, it is unsupported by any factual record, it is uncabined by any defined parameters governing such interference, and the fee reduction, therefore, is essentially arbitrary. And that is unreasonable.

I respectfully dissent.