

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0933

September Term, 2020

ESTILL PROPERTIES, LLC, ET AL.

v.

MICHELLE D. SIMMONS

Fader, C.J.,
Wells,
Woodward, Patrick L.,
(Senior Judge, Specially Assigned)
JJ.

Opinion by Wells, J.

Filed: October 12, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellee Michelle Simmons filed a civil lawsuit in the Circuit Court for Prince George’s County, alleging breach of contract, among other things, against appellants Kenneth Estill and Estill Properties (hereafter, “Estill”), arising from Ms. Simmons’ purchase of a residential property. Later, the court entered summary judgment in Estill’s favor on all counts. Estill then requested attorneys’ fees under a fee-shifting provision in the parties’ residential sales contract. After a hearing, the court awarded Estill approximately 15% of the fees it requested. Estill appeals, arguing that because the court did not explain why it reduced what Estill maintains were reasonably incurred counsels’ fees, this Court should issue a remand to the circuit court “instructing it to enforce the [fee-shifting] provisions of Paragraph 35 of the Contract, including compliance with Maryland Rules 2-703, 2-705 and 2-706”

Because we do not know the basis for the court’s decision, we cannot discern whether the court abused its discretion in declining to award Estill the entire amount requested. Therefore, we vacate the award and remand the case to the circuit court so that it may explain the reasons for the award consistent with Maryland Rule 2-705(g).

FACTUAL AND PROCEDURAL BACKGROUND

At the end of 2014, Ms. Simmons purchased from Estill a residential property located in Upper Marlboro. After closing, Ms. Simmons claimed that she discovered “a myriad of significant issues within the house that were not disclosed to her” under the parties’ residential sales contract. Ms. Simmons filed a complaint and a guaranty fund claim against Estill with the Maryland Real Estate Commission (“MREC”).

An Administrative Law Judge (“ALJ”) conducted a hearing on Ms. Simmons’ claim and recommended that the claim be denied. Ms. Simmons filed exceptions, but a panel of the MREC affirmed the ALJ’s decision. Ms. Simmons next sought judicial review in the Circuit Court for Prince George’s County. The circuit court dismissed the claim because Ms. Simmons had failed to exhaust all available administrative remedies before seeking judicial review.

While the complaint and guaranty fund claim were still pending before the MREC, Ms. Simmons filed a complaint against Estill in the Circuit Court for Prince George’s County based on breach of contract, intentional misrepresentation, fraudulent inducement, and other theories. Estill filed its answer and counter-claimed for counsels’ fees, citing Rule 2-705. Estill also moved for summary judgment premised on an alleged violation of the statute of limitations. The court declined to rule on that motion until the parties had completed mediation. For reasons that are not explained in the record, the court never acted on Estill’s first motion for summary judgment.

After mediation failed, which coincided with a final administrative decision resolving Ms. Simmons’ MREC complaint, Estill filed a second motion for summary judgment, this time based on *res judicata*. After a hearing, the circuit court granted summary judgment for Estill on all counts.

Within two weeks, Estill moved for reimbursement of counsel fees, court costs, and other expenses associated with the circuit court action, totaling \$28,851.36. The request was predicated on a fee-shifting provision in the parties’ residential sales contract requiring the non-prevailing party in any action arising from the contract to bear the prevailing

party's attorneys' fees. Specifically, paragraph 35 of the parties' residential property sales contract states:

ATTORNEY'S FEES: In any action or proceeding between Buyer and Seller based, in whole or in part, upon the performance or non-performance of the terms and conditions of this Contract, including, but not limited to, breach of contract, negligence, misrepresentation or fraud, the prevailing party in such action or proceeding shall be entitled to receive reasonable attorney's fees from the other party as determined by the court or arbitrator. In any action or proceeding between Buyer and Seller and/or Buyer and Broker(s) and/or Seller and Broker(s) resulting in Broker(s) being made a party to such action or proceeding, including, but not limited to, any litigation, arbitration, or complaint and claim before the Maryland Real Estate Commission, whether as defendant, cross-defendant, third-party defendant or respondent, Buyer and Seller, jointly and severally, agree to indemnify and hold Broker(s) harmless from and against any and all liability, loss, cost, damages or expenses (including filing fees, court costs, service of process fees, transcript fees and attorneys' fees) incurred by Broker(s) in such action or proceeding, providing that such action or proceeding does not result in a judgment against Broker(s).

* * *

This Paragraph shall apply to any and all such action(s) or proceeding(s) against Broker(s) including those action(s) or proceeding(s) based, in whole or in part, upon any alleged act(s) or omission(s) by Broker(s), including, but not limited to, any alleged act of misrepresentation, fraud, non-disclosure, negligence, violation of any statutory or common law duty, or breach of fiduciary duty by Broker(s). The provision[s] of this Paragraph shall survive closing and shall not be deemed to have been extinguished by merger with the deed.

The court held a remote hearing on the issue on the morning of September 14, 2020. At the hearing, Estill's counsel argued that the court should award it the full amount of the fees requested. In so doing, counsel addressed the twelve factors found in Rule 2-703 for determining the reasonableness of Estill's fee request. Ms. Simmons' counsel essentially argued that she had to maintain both the MREC and civil damages suit against Estill to

address what she believed were Estill’s material misrepresentations about the true condition of the property. The hearing concluded with these comments:

THE COURT: ...And I am reading the attorney’s fees (*sic*).¹ And actually it is any amount that I deem reasonable. It is not just your whole bill; right?

[COUNSEL FOR ESTILL]: Yes, Your Honor. But, of course, I would submit that my entire bill is reasonable.

THE COURT: Of course you would.

[COUNSEL FOR ESTILL]: (Indiscernible) reason.

THE COURT: (Laughter). But that is not what it says here. Very — it is called, “reasonable attorney’s fees.” (Laughter.)

So what I determine as reasonable, if any, I will be sending both of you a copy today. My A[dmistrative] A[ssistant] will send you a decision. And once you get that decision, [Counsel for Ms. Simmons], you can do with that as you seem — as you feel, you know — whatever it is the next step that you wish to take is fine with me. But I do love the word — and it always is the greatest reasonable attorney’s fees. I got you. No problem.

Anything else?

[COUNSEL FOR MS. SIMMONS]: Nothing further, Your Honor.

THE COURT: Another (*sic*) for you, sir?

[COUNSEL FOR ESTILL]: No, thanks, Your Honor.

THE COURT: And I thank you both very much....

¹ It seems that the court is referencing paragraph 35 of the parties’ contract.

On the afternoon of the day of the hearing, the court sent counsel its decision.² We reprint the verbatim text of the court’s order:

This Court received, reviewed and considered Defendants/Counterplaintiffs Kenneth A. (Alex) Estill’s And Estill Properties, LLC’s Motion For Attorneys’ Fees, Court Costs, And Other Costs And Expenses Pursuant To Maryland Rule 2-705, filed herein, and this Court having received, reviewed and considered any response or opposition thereto filed by any other party, and this Court having heard argument concerning said motion, and it appearing to this Court that good cause exists to grant said motion, it is hereby

ORDERED that the Defendants/Counterplaintiffs Kenneth A. (Alex) Estill’s And Estill Properties, LLC’s Motion For Attorneys’ Fees, Court Costs, And Other Costs And Expenses Pursuant To Maryland Rule 2-705, be, and hereby is, granted, and it is further

ORDERED that judgment in the amount of \$4200 be and hereby is entered in this matter in favor of defendants/counterplaintiffs/movants Kenneth A. (Alex) Estill and Estill Properties, LLC, and against plaintiff/counterdefendant Michelle D. Simmons, in the total amount of \$4200.

It is from this order that Estill appeals.

DISCUSSION

Previously, we have said that “Maryland generally adheres to the common law, or American rule, that each party to a case is responsible for the fees of its own attorneys, regardless of the outcome.” *Royal Investment v. Wang*, 183 Md. App, 406, 456 (2008) (quotation marks and citation omitted). One exception to the American rule is where the parties have contracted for an award of attorneys’ fees under certain circumstances. *Id.* at 456-57 (citation omitted). Where the parties’ contract contains a provision providing that

² We do not know how the court relayed its decision to counsel. The judge signed the order on “9/14/20,” and it was docketed on “9.22.2020.”

the prevailing party in litigation “shall be entitled” to reasonable attorneys’ fees from the other party, “the trial court d[oes] not have discretion to refuse to award fees[.]” *Myers v. Kayhoe*, 391 Md. 188, 207-08 (2006). A court’s only area of discretion is in formulating the amount of the award. *Ochse v. Henry*, 216 Md. App. 439, 455, *cert. denied*, 439 Md. 331 (2014).³

This Court reviews a trial court’s decision to award attorneys’ fees and costs for abuse of discretion. *Pinnacle Group, LLC v. Kelly*, 235 Md. App. 436, 476 (2018) (quoting *Barufaldi v. Ocean City Chamber of Commerce, Inc.*, 196 Md. App. 1, 35–36 (2010) (“*Barufaldi I*”). Consequently, on review, we will not disturb an award of attorneys’ fees “unless the court exercised [its] discretion arbitrarily or [its] judgment was clearly wrong.”

³ We also noted in *Ochse*, 216 Md. App. at 456, that

the Court of Appeals has drawn a firm line between contractual fee-shifting cases, which arise out of a private agreement, and statutory fee-shifting cases, which involve some overriding public policy. Statutory fee awards generally make use of the lodestar approach, by which the court simply multiplies the time an attorney spent on a case by a reasonable hourly rate and then adjusts the result up or down to arrive at a reasonable award based on the circumstances of the case and after considering factors such as the twelve enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir.1974). See *Friolo v. Frankel*, 373 Md. 501, 528–30, 819 A.2d 354, 370–71 (2003).

By contrast, “a contractual fee-shifting provision is designed by the parties, not by the legislature. Such a provision is simply an agreement between private parties to pay the attorneys’ fees and costs reasonably incurred in the course of litigation. Thus, it usually serves no larger public purpose than the interests of the parties. And, therefore, while an award of attorneys’ fees and costs in a contractual fee-shifting case ‘may approach or even exceed the amount at issue,’ the ‘relative size of the award’ takes on added significance in such a case because the contractual provision lacks the ‘public policy underpinnings’ of a statutory fee-shifting provision.” *Ochse*, 216 Md. App. at 458 (quoting *Congressional Hotel Corp. v. Mervis Diamond Corp.*, 200 Md. App. 489, 505 (2011)).

Id. at 455-56 (quotation marks and citations omitted). *See also Wang*, 183 Md. App. at 457 (“[T]he trial court’s determination of the [r]easonableness of [attorneys’] fees is a factual determination within the sound discretion of the court and will not be overturned unless clearly erroneous.”) (quotation marks and citation omitted).

Prior to 2014, the Court of Appeals suggested that courts review the eight factors listed in Rule 1.5(a) of the Maryland Lawyer’s Rules of Professional Conduct to determine what constituted a reasonable attorneys’ fee award. With regard to those factors, in a footnote, the Court of Appeals stated: “We are not suggesting that courts must explicitly comment on or make findings with respect to each factor.” *Monmouth Meadows Homeowners Ass’n v. Hamilton*, 416 Md. 325, 337 n.11 (2010).

But after 2014 and with the adoption of Rules 2-703 and 2-705 that year, in assessing a request for attorneys’ fees under a fee-shifting provision in a parties’ contract, a court is required to

consider the factors set forth in Rule 2-703(f)(3) and the principal amount in dispute in the litigation and may consider the agreement between party seeking the award and that party’s attorneys **and any other factor reasonably related to the fairness of an award.**

(2) If the claim for an award of attorneys’ fees does not exceed the lesser of 15% of the principal amount found to be due or \$4,500, the court need not require evidence on all of the factors set forth in Rule 2-703(f)(3) if the party claiming the award produces evidence otherwise sufficient to demonstrate that the amount claimed is reasonable and does not exceed the amount that the claiming party has agreed to pay that party’s attorney. The evidence shall include at a minimum:

(A) a detailed description of the work performed, broken down by hours or fractions thereof expended on each task;

(B) the amount or rate charged or agreed to in writing by the requesting party and the attorney; and

(C) the attorney’s customary fee for similar legal services.

Rule 2-705(f) (emphasis supplied).⁴ Further, Rule 2-705(g) obligates the court to “state on the record or in a memorandum filed in the record the basis for its findings and conclusions regarding the denial or issuance of an award.”

Here, the circuit court offered no explanation upon which of Rule 2-703(f)(3)’s twelve considerations it relied in reducing the award from the amount Estill requested. Our review of relevant appellate authority has found no reported case in which a trial court’s reduction of an award of attorneys’ fees under a contractual fee-shifting provision has been discussed, or more importantly, affirmed, where the court gave no reason whatsoever to support the reduction. Each reported case we have reviewed reveals that the circuit court placed its basis for reducing an award of attorneys’ fees on the record, particularly where the moving party obtained a substantial, but not total victory at trial.

For example, in *Ochse*, the circuit court granted the Ochses a “proportionate award” of attorneys’ fees rather than the full amount they requested after prevailing in a long-running boundary dispute with their neighbors. *Ochse*, 216 Md. App. at 459. The Ochses argued the court fatally erred in not awarding them all of their requested counsel fees, even though they did not prevail on one of their claims, because all of their claims arose from a “common core of facts.” *Id.* See also *Weichert Co. of Maryland, Inc. v. Faust*, 191 Md. App. 1, 15-19 (2010), *aff’d*, 419 Md. 306 (2011). For our purposes, the key point is that the trial court engaged in some sort of fact-finding in reaching the “proportionate award.”

⁴ And we observe that the Committee Note to Rule 2-705(f)(1) states that this Rule “follows the approach set forth in *Monmouth Meadows v. Hamilton*, 416 Md. 325 (2010), for contractual fee-shifting cases generally.”

We found that the court did not abuse its discretion in adopting the approach that it did. *Id.* at 459. We remanded, however, because we feared that the court overlooked the Ochses’ supplemental motion for fees. *Id.* at 470-71.

Similarly, in *Plank v. Cherneski*, 469 Md. 548 (2020), a case concerning a lawsuit by members of a sock manufacturing corporation against the business’ founder, the members claimed that the founder violated the business’ operating agreement and breached certain contractual and fiduciary duties. *Id.* at 563. The opinion is notable because the Court of Appeals recognized an independent cause of action for a breach of a fiduciary duty. *Id.* at 597. The Court also affirmed the circuit court’s award of attorneys’ fees to the prevailing party, Cherneski, under the fee-shifting provisions of the parties’ operating agreement. The Court noted that in reaching its award, “the [circuit] court discussed each factor enumerated under Maryland Rule 2-703(f)(3), as required by Rule 2-705, and determined the fees to be fair and reasonable.” 469 Md. at 616. After concluding that the circuit court had properly interpreted the language in the fee-shifting provision, the Court held it did not abuse its discretion in awarding Cherneski the entirety of the fees he requested, as he prevailed on the significant claims, where all claims arose from a “common core of facts.” *Id.* at 624-25.

Unlike cases such as *Osche* and *Cherneski* where a party prevailed on *some* claims but not others, Estill prevailed on *all* of Ms. Simmons’ claims. But without explanation, the court reduced the attorneys’ fees requested by 85%. We stress that under Rule 2-703(f)(3), the circuit court’s task was to determine “an award of attorneys’ fees [for Estill] attributable to litigation” under paragraph 35 of the parties’ contract, and under subsection

Rule 2-705(g) articulate on the record or in a writing its basis for so doing. Unfortunately, the court did neither.

Therefore, we vacate the judgment and remand to the circuit court so that in accordance with Rule 2-703(f)(3), in considering an award of attorneys' fees for Estill, the court may consider the factors listed there. And, consistent with Rule 2-705(g), the court shall state the basis for its findings on the record or in the form of a written memorandum.

**JUDGMENT OF THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY VACATED.
CASE REMANDED FOR FURTHER
PROCEEDINGS NOT INCONSISTENT WITH
THIS OPINION. APPELLEE TO PAY THE
COSTS.**

The correction notice(s) for this opinion(s) can be found here:

<https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0933s20cn.pdf>