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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001673-MR

CHARLES G. MIDDLETON III, INDIVIDUALLY
AND IN HIS CAPACITY AS CO-EXECUTOR OF
THE ESTATE OF LAWRENCE L. MIDDLETON, SR.;
AND LAWRENCE J. MIDDLETON, JR.,
IN HIS CAPACITY AS CO-EXECUTOR OF
the ESTATE OF LAWRENCE L. MIDDLETON, SR.

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 16-CI-002566

PNC BANK N.A., IN ITS CAPACITY AS PREDECESSOR
TRUSTEE FOR THE LAWRENCE L. JONES, SR.
TRUST UNDER AGREEMENT DATED DECEMBER
28, 1933; AND COMMONWEALTH BANK & TRUST
COMPANY, IN ITS CAPACITY OF
SUCCESSOR TRUSTEE FOR THE LAWRENCE
L. JONES, SR. TRUST UNDER AGREEMENT
DATED DECEMBER 28, 1933

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: DIXON, JONES AND K. THOMPSON, JUDGES.

DIXON, JUDGE: Appellants, Charles G. Middleton III and the Estate of Lawrence J. Middleton, Sr. (collectively “the Middletons”), appeal from orders of the Jefferson Circuit Court finding that they were obligated to indemnify a trust in the amount of \$1,081,293.61 plus prejudgment interest, such amount representing the attorneys’ fees and costs the Trust incurred in defending the Middletons’ failed action against then-trustee, PNC Bank. We affirm in part, reverse in part, and remand.

On December 28, 1933, Lawrence Jones, Sr., created an inter vivos trust (“the Trust”) for the benefit of his three daughters and their descendants. He established a similar trust for the benefit of his son, Lawrence Jones, Jr., and his descendants.¹ Those trusts became irrevocable in 1935 and became testamentary trusts in 1941 under Jones’s will. The Middletons are descendants of Lawrence Jones, Jr., who predeceased his father.

Throughout the years, there were ongoing issues involving the administration of the Trust. In 1996, those issues were raised and addressed in an arbitration proceeding and order. The order settled a number of longstanding issues, most notably regarding the continued validity of the Trust under the Rule Against Perpetuities and whether the descendants of the Trust established for

¹ The son’s trust is not at issue herein.

Lawrence Jones, Jr., including the Middletons, could be considered as remainder beneficiaries under the Trust. The arbitration order also required the trustee to institute a declaratory judgment action to confirm the agreement and award.

Consequently, in 2004, PNC, as trustee, instituted a declaratory judgment action in the Jefferson Circuit Court to determine, among other things, whether the descendants of Lawrence Jones, Jr., were included in the class of remainder beneficiaries under the Trust. The Middletons, as potential remainder beneficiaries, were named as parties to that action and eventually filed a counterclaim against PNC. In September 2006, the trial court ruled that Lawrence Jones, Jr.'s descendants were included in the class of remainder beneficiaries under the Trust. Both the Middletons and the descendants of Lawrence Jones Sr.'s daughter ("Daughter Descendants") appealed.

In October 2007, the Middletons brought a separate action against PNC asserting claims for breach of fiduciary duties arising from its improper delegation of investment management and failure to properly supervise investments. The Middletons also asserted that PNC's conduct while managing the Trust amounted to other violations of Kentucky law, PNC's internal policies, and the requirements of the Trust itself. The Middletons contended that PNC's actions caused losses to the Trust's investment portfolio during the period of July 2001 through October 2007.

Shortly after filing the 2007 lawsuit, the actual and potential beneficiaries of the Trust agreed to mediate and settle the 2004 declaratory judgment action. Pursuant to a 27-page “Settlement, Release and Indemnity Agreement,” the Daughter Descendants paid the Middletons \$3.95 million from the Trust in exchange for the Middletons giving up their rights as potential remainder beneficiaries of the Trust upon its termination. In addition, the Middletons reserved their right to maintain their individual action against PNC, and the Daughter Descendants disclaimed any interest they or the Trust might have in proceeds from that action. As further consideration, the Agreement contained the following provision:

Charles G. Middleton, III and Lawrence J. Middleton hereby covenant and agree to hold harmless and indemnify . . . [the Trust] . . . from any and all claims, causes of action, demands or suits of any kind arising directly or indirectly from any damages and/or claims asserted in *Middleton v. PNC*, including but not limited to, any claims for attorneys’ fees and costs and any claims by other Defendants in *Middleton v. PNC*.

The Agreement further contained a clause stating that “the Middletons hereby acknowledge and represent that they have carefully read all of the foregoing and understand all conditions contained herein”, as well as an integration clause memorializing that it was the complete statement of the parties’ agreement.

Thereafter, two hearings were held for the purposes of explaining the terms of the Agreement and obtaining court approval. During one of the hearings, Charles Middleton stated,

The indemnity provisions are clear. If the Trust has to pay the trustee's fees to defend [the PNC action], my brother and I have to pay it back. We recognize that obligation, we think we are good for it, and we have no question that if that occurs, we are going to have to write that check.

On January 29, 2008, the trial court approved the Settlement Agreement and dismissed the 2004 declaratory judgment action with prejudice.

The Middletons thereafter continued their action against PNC.

Shortly before the approval of the Settlement Agreement, they filed a motion to disqualify PNC's attorneys on the grounds that PNC's use of Trust funds to defend the action created a conflict of interest. Essentially, the Middletons argued that PNC could not use Trust funds to defend the action because PNC was not being sued in its capacity as trustee, but rather in its individual capacity. In denying the motion, the trial court observed,

Review of the Middletons' First Amended Complaint reveals that the claims are premised upon fiduciary duties that exist only by virtue of PNC's designation as Trustee and relate to actions taken by it as Trustee. As such, it does not appear that the Attorneys are representing PNC in its individual corporate capacity, but, instead, as Trustee.

Since KRS 386.810(3)(x) and (y) appear to provide a trustee the power to employ attorneys and to prosecute or defend actions, claims or proceedings for protection of the trust assets and of the trustee and the performance of his duties, it appears that PNC, as Trustee, has authority to employ and pay its counsel utilizing Trust funds.

Significantly, the trial court further noted,

The Court will note that, in the event that the Middletons establish PNC breached its fiduciary duty, it may be required to refund the Trust the attorneys' fees expended in its defense after the adjudication. Likewise, pursuant to the Settlement Agreement, the Middletons will be required to refund the Trust the attorneys' fees expended in PNC's defense, in the event that PNC prevails in the case at bar.

Following discovery, all parties filed motions for summary judgment.

On December 5, 2012, the trial court entered an opinion and order, denying the Middletons' motion and granting PNC's motion. The trial court found that even if genuine issues of material fact existed as to whether PNC's actions amounted to a breach of its fiduciary duties, the Middletons could not prevail on their claims because they had failed to demonstrate any injury. Thus, the trial court concluded that, even if PNC had breached its duties to the Trust beneficiaries and remaindermen, the Middletons had failed to show that the Trust had suffered a loss which would entitle them to recover from PNC.

PNC thereafter moved to alter or amend the trial court's order to clarify the procedure for enforcing the Middletons' indemnity obligation. The

Middletons responded that because the dismissal order did not contain any findings regarding whether PNC had breached its fiduciary duties, their indemnity obligation was not triggered. In an order entered March 7, 2013, the trial court ruled,

[T]he settlement agreement constituted an indemnification agreement binding the Middletons to reimburse the [Trust] for all attorneys' fees, expenses and costs paid on behalf of PNC in defending this lawsuit in the event that PNC prevails.

Since this Court found against the Middletons, PNC has prevailed in this action. The Court finds no merit in the Middletons' argument that PNC has not prevailed since there has been no adjudication of PNC's breach of fiduciary duty. As such, pursuant to the settlement agreement, the Middletons will have to reimburse the [Trust] for all attorneys' fees, expenses and costs paid on behalf of PNC in defending this lawsuit. That obligation will certainly follow the final disposition of any appeals.

The trial court further instructed that an application for an attorney fee award was not required and that, should the Middletons refuse to honor their indemnity obligation, the Trustee² was to file a separate action:

[T]he Trustee is to send a letter to the Middletons requesting payment of the attorneys' fees; and if the Middletons do not pay those fees in response to the letter, then the Trustee is to institute suit to recover those fees. As such, any request by [the Trustee] to reimburse the [Trust] and resulting action in the event that the Middletons do not pay would be separate and apart from the action before this Court.

² During the pendency of the PNC action, CB&T became successor trustee of the Trust.

The Middletons subsequently appealed to this Court. Significantly, however, they did not seek review of either the trial court's ruling that PNC, as Trustee, had the authority to employ and pay its counsel utilizing Trust funds, or that the Middletons would be liable under the indemnity provision to reimburse the Trust for expenses incurred in defending the PNC lawsuit in the event they did not prevail. Further, the Middletons did not challenge the trial court's outline of the procedure for enforcing the indemnity provision in the event the Middletons refused to honor their obligation. Following oral arguments, this Court affirmed the trial court's dismissal of the PNC action, *Middleton v. PNC Bank, N.A.*, 2012-CA-002142-MR, 2014 WL 5510872 (Ky. App. Oct. 31, 2014), and the Kentucky Supreme Court subsequently denied discretionary review. *Middleton III, et al. v. PNC Bank, N.A.*, 2014-SC-000702-D (Ky. Aug. 20, 2015).

On December 14, 2015, CB&T sent the Middletons³ a letter and supporting affidavit setting forth the amount of attorneys' fees and costs paid by the Trust in the PNC action, and requesting payment of those fees and expenses. The Middletons thereafter denied any obligation to indemnify the Trust.

³ During the pendency of the PNC case on appeal, Lawrence Jones Middleton, Sr., passed away. Charles Middleton and Lawrence Jones Middleton, Jr., were appointed co-executors of the Estate of Lawrence Jones Middleton, Sr.

On June 3, 2016, CB&T filed the instant action in the Jefferson Circuit Court to enforce the Middletons' indemnity obligation. The Middletons responded with a Rule 12 motion to dismiss. CB&T objected to the motion and filed a motion for partial summary judgment on the Middletons' liability. Following a hearing, the trial court entered an order on May 19, 2017, denying the motion to dismiss and granting CB&T's motion for partial summary judgment. With respect to the motion to dismiss, the trial court ruled that CB&T's complaint satisfied CR 8.01's pleading requirements and provided fair notice to the Middletons. In granting partial summary judgment, the trial court noted,

[T]his Court held in the [PNC] Action that PNC Bank's attorneys were representing PNC Bank as Trustee in the [PNC] Action and the Trust has authority to employ and pay its counsel utilizing Trust funds. The Court also held that the Settlement Agreement constituted an indemnification agreement binding the Middletons to reimburse the Trust for all attorneys' fees, expenses and costs paid on behalf of PNC Bank in defending the [PNC] Action; and that, pursuant to the Settlement Agreement, since PNC Bank prevailed, the Middletons had to indemnify the Trust for all attorneys' fees, expenses and costs paid on behalf of PNC Bank in defending the [PNC] Action. In this Case, Defendants argue that the Middletons sued PNC Bank in its personal capacity, as a professional trustee for its malfeasance or malpractice in its trusteeship of the Trust; that such fees and expenses were incurred for PNC Bank's personal defense against the Middletons' charges of its failure to follow statutory standards, federal regulations and its own internal policies and procedures on oversight and review of the trust investments as a professional trustee company, and not for the defense of the Trust; and that,

because PNC Bank was defending itself in its “job performance” and not defending the Trust itself, the Trust is not responsible for paying the attorneys’ fees and costs PNC Bank incurred in defending itself. The Middletons are essentially reasserting arguments that have previously been considered and determined by this Court in the prior litigation. Thus, the elements for issue preclusion are satisfied[.]

....

As noted earlier, this Court did previously rule in the [PNC] Action that “pursuant to the settlement agreement, the Middletons will have to reimburse the Daughters’ Trust for all attorneys’ fees, expenses and costs paid on behalf of PNC in defending this lawsuit.” . . . As noted previously in this opinion, that holding is the law of the case.

Further, in rejecting the Middletons’ argument that any claim for attorneys’ fees and costs should have been brought in the PNC action, the trial court stated,

The Court lost jurisdiction in the [PNC] Action when the case was appealed to the Kentucky Court of Appeals. When the Supreme Court denied discretionary review by Order, entered August 12, 2015, the case became final and was not remanded to the Court in the [PNC] Action for further proceedings. Thus, Plaintiffs could not have sought review of the attorneys’ fees and expenses before the Court in the [PNC] Action, since the Court no longer had jurisdiction over the case. Instead, as noted earlier, Plaintiffs followed this Court’s outline of the procedure for enforcing the indemnity obligations of the Middletons since they refused to indemnify the Trust for the attorneys’ fees, expenses and costs paid on behalf of PNC Bank in defending the Middleton Action.

Finally, the trial court ruled that under the plain language of the Settlement Agreement, the Middletons were required to indemnify the Trust:

Under the terms of the indemnity provision of the Settlement Agreement, the Middletons agreed to “hold harmless and indemnify” the Trust “from any and all claims, causes of action, demands or suits of any kind arising directly or indirectly from any damages and/or claims asserted in [the [PNC] Action], including but not limited to any claims for attorneys’ fees and costs and any claims by other Defendants in [the [PNC] Action].” While Plaintiffs will have to prove with affirmative evidence in this action that the Trust did indeed pay the amount being sought for attorneys’ fees, expenses and costs associated with the Middleton Action, there is no requirements under the Settlement Agreement that there must be a hearing or finding of reasonableness of those fees as argued by the Defendant.⁴

CB&T subsequently moved for summary judgment on damages, submitting affidavits showing that the Trust had expended \$1,081,293.61 in attorneys’ fees and costs during the PNC litigation. The Middletons did not dispute the affidavits and the trial court thereafter entered judgment in that amount with prejudgment interest. This appeal ensued.

Our standard of review on appeal of a summary judgment is “whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres*

⁴ After the trial court ruled the Middletons were liable under the indemnity provision, they filed a petition for a writ of mandamus in this Court requesting that we dismiss CB&T’s indemnification suit against them. By order entered July 13, 2017, we denied the petition. *Charles G. Middleton, III, et al v. Honorable Susan Schultz Gibson, Judge, Jefferson Circuit Court, et al.*, 2017-CA-000881-OA. The Middletons appealed to the Kentucky Supreme Court which dismissed the action on February 15, 2018. *Charles G. Middleton, III, et al v. Honorable Susan Schultz Gibson, Judge, Jefferson Circuit Court, et al.*, 2017-SC-000400-MR.

v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment shall be granted “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.03. The trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest v. Scansteel Serv. Ctr, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only “where the movant shows that the adverse party could not prevail under any circumstances.” *Id.*

Summary judgment is an extraordinary remedy that should be “cautiously applied and should not be used as a substitute for trial.” *Id.* at 483. Instead, summary judgment is only appropriate “to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.” *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985) (quoting *Roberson v. Lampton*, 516 S.W.2d 838, 840 (Ky. 1974)). “Impossible,” of course, should be interpreted in “a practical sense, not in an absolute sense.” *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

An appellate review of summary judgment does not involve fact-finding since only legal questions must be resolved. *Davis v. Scott*, 320 S.W.3d 87, 90 (Ky. 2010) (citing *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005)). Moreover, an appellate court need not defer to the trial court's decision on summary judgment and reviews the issue *de novo* because only legal questions and no factual findings are involved. *See Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

The Middletons first argue that the trial court was without subject matter jurisdiction and thus acted outside its power in entering a judgment in favor of PNC. The Middletons contend that the indemnity action herein is nothing more than an attempt to resurrect what PNC failed to do in the 2007 case, namely seek an award of attorneys' fees and expenses against the Trust. Accordingly, the Middletons believe that because the Trust was not a party to the PNC proceedings, it has no standing to bring the instant action. We disagree.

As previously noted, the Middletons filed a petition for a writ of mandamus in this Court mandating that the trial court dismiss CB&T's indemnification suit against them. Therein, the Middletons argued that the trial court was without jurisdiction over the matter or, in the alternative, was acting erroneously. In denying the writ, we noted,

The Middletons argue that the circuit court is acting outside of its jurisdiction because the bank lacks standing to raise the indemnity claim and because the cause of action is not ripe. However, “[i]n the context of the extraordinary writs, ‘jurisdiction’ refers not to mere legal errors but to subject matter jurisdiction, which goes to the court’s core authority to even hear cases.” *Lee v. George*, 369 S.W.3d 29, 33 (Ky. 2012). . . . CB&T brought suit to enforce an agreement between its predecessor trustee and the Middletons. As a court of general jurisdiction, the circuit court has subject-matter jurisdiction over contract disputes. See KRS 23A.010(1), Kentucky Constitution § 112(5). Furthermore, standing and ripeness are elements of “this case,” not “this kind of case,” which means the circuit court does have jurisdiction.

. . .

The Middletons have not shown that the circuit court is acting outside its jurisdiction, that the circuit court is acting erroneously, or that success on appeal could not remedy any alleged error.

Slip op. pg. 5-6 (footnote omitted). Accordingly, we find the Middletons’ jurisdictional challenge to be without merit. Furthermore, because the Trust paid over \$1 million in legal fees and expenses, there can be no question that CB&T, as trustee, has a “real and substantial interest in the subject matter of the litigation” and has standing to pursue the current action. See *Interactive Gaming Council v. Commonwealth ex rel. Brown*, 425 S.W.3d 107, 112 (Ky. App. 2014).

The Middletons next contend that because they sued PNC individually and not in its capacity as Trustee, the Trust was not entitled to use Trust funds to defend the action. Furthermore, because the Trust was not a party to the PNC

action it could not have incurred any liability for the attorneys' fees and costs. In turn, because the Trust had no liability for the legal fees and costs, any payment by it was necessarily voluntary and not compelled. Again, we disagree and conclude that this argument is barred by collateral estoppel.

“[U]nder the doctrine of collateral estoppel, . . . a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.” *City of Louisville v. Louisville Professional Firefighters Association, Local Union No. 345, IAFF, AFL-CIO By and Through Gnagie*, 813 S.W.2d 804, 807 (Ky. 1991) (quoting *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 326, 75 S.Ct. 865, 867, 99 L.Ed. 1122 (1955)). The essential elements of collateral estoppel or issue preclusion⁵ are (1) identity of issues; (2) a final decision or judgment on the merits; (3) a necessary issue with the estopped party given a full and fair opportunity to litigate; and (4) a prior losing litigant. *Moore v. Commonwealth*, 954 S.W.2d 317, 319 (Ky. 1997). With respect to issue preclusion, our Supreme Court in *Yeoman v. Commonwealth*, 983 S.W.2d 459 (Ky. 1998) noted,

Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action. The issues in the former and latter actions must

⁵ “These two terms are often used interchangeably throughout the case law and, consequently, this opinion. However, the doctrine is more formally referred to as “collateral estoppel.” See Howard E. Frasier, Jr., Note, *Offensive Collateral Estoppel in Kentucky: A Deadly Weapon or a Paper Tiger?*, 76 Ky.L.J. 237 (1987-88).” *Moore*, 954 S.W.2d at 318 n.2.

be identical. The key inquiry in deciding whether the lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts. If the two suits concern the same controversy, then the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action.

Id. at 465 (citations omitted). In *Gregory v. Commonwealth*, 610 S.W.2d 598, 600 (Ky. 1980), our Supreme Court stated that “[c]ollateral estoppel, or issue preclusion, is part of the concept of res judicata and serves to prevent parties from relitigating issues necessarily determined in a prior proceeding.” *See also Sedley v. City of West Buechel*, 461 S.W.2d 556 (Ky. 1970).

In the PNC action, the Middletons specifically argued that PNC was prohibited from using Trust funds to defend the action against it because it had been sued in its individual capacity rather than as trustee of the Trust. The trial court rejected such argument, finding that all of the claims in the Middletons’ complaint were premised upon PNC’s alleged breach of fiduciary duties in its capacity as trustee. As such, the trial court concluded that pursuant to KRS 386.810(3)(x) and (y), PNC was specifically permitted to employ and pay counsel utilizing Trust funds.

We are of the opinion that the trial court properly found that all four elements of collateral estoppel were met. The Middletons’ argument herein is identical to that made in their motion to disqualify the attorneys in the PNC action,

and which the trial court specifically rejected. There can be no question that the issue was actually litigated and decided in the PNC action and that it was necessary to the trial court's decision. Notably, although the Middletons appealed the judgment in the PNC action, they did not raise this issue therein. Having already litigated and lost the issue of whether PNC was entitled to use Trust funds to defend the action, the Middletons are collaterally estopped from relitigating it herein.

The Middletons next argue that they were denied due process when the trial court failed to determine whether the amount of claimed attorneys' fees and costs were necessary or reasonable. The Middletons point out that while the amount of a fee award is generally within the trial court's discretion, "a trial court should require parties seeking attorney fees to demonstrate that the amount sought is not excessive and accurately reflects the reasonable value of bona fide legal expenses incurred." *Capitol Cadillac Olds, Inc. v. Roberts*, 813 S.W.2d 287, 293 (Ky. 1991). Consequently, the Middletons contend that the trial court erred in granting summary judgment without "the mandatory due process hearings and the factual predicate of PNC establishing the reasonableness of [it's] fees and costs in the 2007 action." Here, we agree.

CB&T's position is that this matter is a breach of contract action, not simply a request for an award of attorneys' fees and costs. CB&T argues that the

Middletons voluntarily entered into a Settlement Agreement that obligated them to indemnify the Trust for “any claims” for attorneys’ fees and costs arising “directly or indirectly” from the PNC action. They note that the indemnity provision did not restrict the Middletons’ obligation to only fees and costs determined by the trial court to be reasonable as it contained no language limiting any award of legal fees and costs to only those proven to be reasonable and necessary.

“The interpretation of a contract . . . is a question of law for the courts[.]” *Neighborhood Investments, LLC v. Kentucky Farm Bureau Mutual Insurance Company*, 430 S.W.3d 248, 250 (Ky. App. 2014), and “[i]n the absence of ambiguity a written instrument will be enforced strictly according to its terms[.]” *Hazard Coal Corp. v. Knight*, 325 S.W.3d 290, 298 (Ky. 2010) (quoting *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003)). In *Enerfab, Inc. v. Kentucky Power Company*, 433 S.W.3d 363, 366 (Ky. App. 2014), a panel of this Court observed,

[G]eneral principles of contract construction apply equally to indemnification agreements. “The right of an indemnitee to recover of the indemnitor under a contract of indemnity according to the terms of such a contract is well recognized. Such a contract is not against public policy and will be enforced if the indemnitee has suffered loss thereunder and has complied with its terms.” *United States Fidelity & Guaranty Co. v. Napier Elec. & Constr. Co.*, 571 S.W.2d 644, 646 (Ky. App. 1978) (Quoting *National Surety Corp. v. Peoples Milling Co.*, 57 F.Supp. 281, 282 (W.D. Ky. 1944)); *Thompson v. The Budd Co.*, 199 F.3d 799, 807 (6th Cir. 1999) (holding that an

indemnitor's liability "shall be determined by the provisions of the indemnity agreement itself").

Nevertheless, while it is appropriate to interpret a contract strictly in accordance with its terms, this proposition does not signify that the Middletons' argument is without merit.

For example, as unequivocally stated by the Kentucky Supreme Court in *Capitol Cadillac Olds, Inc.*, 813 S.W.2d at 293 (emphasis added): "It should never be overlooked that *any* award of an attorney fee is subject to a determination of reasonableness by the trial court." In *Capitol Cadillac Olds, Inc.*, the Supreme Court considered whether a retail installment contract which provided for reasonable attorney fees which were defined as "an amount equal to fifteen percent (15%) of the amount due and payable under the contract" and the maximum allowed by statute, provided for attorney fees to be awarded based on that simple calculation. *Id.* at 292. In disallowing an automatic calculation of what fee was due and payable, the Court explained:

In many cases it would be unreasonable to allow the agreed-upon maximum In simple cases in which the debtor makes little or no defense and in default judgment cases where the time and skill required is minimal, to award the maximum may result in a windfall and constitute an abuse of discretion. In more difficult cases, however, and with due regard for the provisions of SCR 3.130 (Rule 1.5), the allowance of a maximum fee based on the amount due on the date of acceleration plus prejudgment interest may be appropriate. The trial judge is generally in the best position to consider all relevant

factors and require proof of reasonableness from parties moving for allowance of attorney fees. In exercising its discretion, a trial court should require parties seeking attorney fees to demonstrate that the amount sought is not excessive and accurately reflects the reasonable value of bona fide legal expenses incurred.

Id. at 293.

The Supreme Court's pronouncement in *Capitol Cadillac Olds, Inc.* that *any* award of an attorney fees is subject to a determination of reasonableness was not a new interpretation of Kentucky law but was instead a recitation of the existing and longstanding law in Kentucky. For instance, in *Fid. & Cas. Co. of New York v. Mauney*, 273 Ky. 400, 116 S.W.2d 960, 962 (1938), the Court, in interpreting an indemnity agreement, considered it a given that the attorney fees the agreement provided for had to be reasonable. This was determined to be true even though the indemnity agreement (like the one at issue before us) did not contain the word "reasonable." In *Mauney*, the agreement instead stated that the indemnitor was bound by a "clear and explicit contract to indemnify the [surety] company against any 'costs, charges or expenses it may sustain, incur or become liable for in consequence of' the bond." The Court stated, "[i]t would seem unnecessary to say that under such a contract of indemnity the indemnitee must act reasonably and in good faith and with due diligence." *Id.* The Court then explained that under the circumstances of the case, the surety company's retention of legal representation and payment of costs was "not only reasonable but

necessary” but to qualify for reimbursement “[t]he amount of expenses incurred must likewise be deemed reasonable and proper.” *Id.*

The Court in *Mauney* ultimately agreed with the surety company that because there was *no dispute* regarding the evidence that the surety company’s attorney fees and costs were properly incurred and reasonable, it should have received a directed verdict in its favor. In contrast, the Middletons *do dispute* that the attorney fees and costs were reasonable and, thus, the trial court should have assessed whether they were indeed reasonable and proper.

While the amount of attorney fees to be awarded is left within the discretion of the trial court, such discretion is not unlimited. *A & A Mech., Inc. v. Thermal Equip. Sales, Inc.*, 998 S.W.2d 505, 514 (Ky. App. 1999). A trial court cannot escape its responsibility to determine whether attorney fees are reasonable or not and simply order payment. *See Baker v. Motorists Ins. Companies*, 695 S.W.2d 415, 417 (Ky. 1985) (holding that even statutorily required attorney fees should not be ordered where they are not reasonable and determining that “where no benefit is conferred, a reasonable fee is no fee.”)

Instead, “a trial court should require parties seeking attorney fees to demonstrate that the amount sought is not excessive and accurately reflects the reasonable value of bona fide legal expenses incurred.” *A & A Mech., Inc.*, 998 S.W.2d at 514. “Reasonableness of an attorney fee must encompass the time

involved, the task assigned, and the degree of difficulty of the work under the circumstances.” *Dingus v. FADA Serv. Co.*, 856 S.W.2d 45, 50 (Ky. App. 1993).

The well-established factors for determining whether the attorney fees requested are reasonable include:

- (a) Amount and character of services rendered.
- (b) Labor, time, and trouble involved.
- (c) Nature and importance of the litigation or business in which the services were rendered.
- (d) Responsibility imposed.
- (e) The amount of money or the value of property affected by the controversy or involved in the employment.
- (f) Skill and experience called for in the performance of the services.
- (g) The professional character and standing of the attorneys.
- (h) The result secured.

Mo-Jack Distrib., LLC v. Tamarak Snacks, LLC, 476 S.W.3d 900, 910 (Ky. App. 2015) (quoting *Axton v. Vance*, 207 Ky. 580, 269 S.W. 534, 536-37 (1925)).

While the attorneys representing PNC Bank provided a skilled representation and obtained an outstanding result for PNC, it is nevertheless the trial court’s responsibility to determine if the attorney fees and expenses were reasonable under all the relevant factors, and it was improper for the trial court to defer to the contractual provision in the indemnity agreement to determine an appropriate award.

As to the Middletons' argument that the indemnification provision was only triggered upon a finding of actual legal liability or a judgment against the Trust for payment of the attorneys' fees and costs, they are bound by the provisions of the contract. The Settlement Agreement contained no such conditions or requirements. Furthermore, the trial court specifically ruled that a fee petition in the PNC case was not necessary to enforce the indemnity provision and that the trustee was only required to file the instant action to enforce the Middletons' obligation in the event they refused to pay. The Middletons did not appeal that ruling and cannot now be heard to object to the employed procedure.

For the reasons set forth herein, the orders of the Jefferson Circuit Court are affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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Michael J. O'Connell
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