

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

DIANE ANN NGUYEN,

Appellee

v.

COLIN JAMES O'NEILL, DANIELLE  
PANZANO,

APPEAL OF: SIMON AND SIMON, P.C.

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 894 EDA 2013

Appeal from the Order February 25, 2013  
in the Court of Common Pleas of Philadelphia County  
Civil Division at No.: 110801662

BEFORE: GANTMAN, J., SHOGAN, J., and PLATT, J.\*

MEMORANDUM BY PLATT, J.

**FILED NOVEMBER 27, 2013**

Appellant, law firm Simon and Simon, P.C., appeals from the trial court's order distributing settlement funds in this motor vehicle accident case. We affirm.

On January 29, 2011, Appellee, Diane Ann Nguyen, was seriously injured during a motor vehicle accident with Colin James O'Neill, who was driving a car owned by Danielle D. Panzano. On August 8, 2011, Appellee retained Appellant to represent her in the personal injury action against O'Neill and Panzano, and she signed a representation and continent fee

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\* Retired Senior Judge assigned to the Superior Court.

agreement, providing for a forty percent contingent fee if the case settled.<sup>1</sup>

Specifically, the agreement reads, in pertinent part, as follows:

Dear [Appellee]

This letter is to confirm our agreement of representation. You are hereby retaining [Appellant] to represent you in connection with a personal injury action. It is agreed that the firm's representation of you will be upon the following terms and conditions.

It is agreed that the firm will represent you through trial of this case. For this, you will pay the firm a contingency fee of thirty-three and a third percent (33 1/3%) if the case resolves before a lawsuit is filed and forty percent (40%) if the case is resolved by settlement verdict or otherwise after a lawsuit is filed. It is further agreed that your Attorney will render all legal services and expend all funds required for costs, investigations, witness fess [sic] and all other required disbursements (including a flat fee for reproduction, telephone and postage in the amount of \$50.00 before commencement of suit and \$100.00 after commencement of suit) in the handling of my case. All such costs shall be reimbursed to your Attorney from any and all sums secured from any defendant in this case. If no money is secured from any defendant in this case, I shall not be responsible for the legal services rendered or expenses incurred by my Attorney and my Attorney shall have no claim against me for such services and costs.

You hereby assign to the firm the aforesaid percentage of any amount which may be recovered, as security for its fee, and authorize payment directly to the firm by appropriate obligor.

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<sup>1</sup> We note that Appellee is Vietnamese-American and cannot read English. (**See** Appellee's Brief, at 11; Trial Court Opinion, 5/13/13, at unnumbered page 2). Appellant did not translate the contingent fee agreement into Vietnamese. (**See** Trial Ct. Op., 5/13/13, at unnumbered page 2).

Should no proceeds be recovered by settlement, verdict or otherwise, the firm shall have no claim against you for any services rendered herein or for any expenses incurred.

You hereby authorize the firm to pay from any amounts recovered in this matter any sums which may be owed for medical expenses incurred by you. You also authorize the firm to negotiate, endorse, deposit and distribute to the appropriate persons any checks which it receives on your behalf[.] . . .

\* \* \*

Very truly yours,

[Appellant]

(Contingent Fee Agreement, 8/08/11, at 1-2) (emphasis omitted).

On August 3, 2012, Appellee settled the action against O'Neill and Panzano for a gross recovery of \$86,300.00. Appellant prepared a settlement distribution form which included a \$32,362.50 attorney fee, calculated based on the gross settlement proceeds without first deducting litigation costs and medical expenses.<sup>2</sup> Appellee consulted new counsel, who advised Appellant that Appellee would not sign the form, unless Appellant revised it to calculate its attorney fee based on the net settlement proceeds, after deducting litigation costs and medical expenses.

On September 21, 2012, Appellant filed a petition to enforce distribution of settlement funds. Following oral argument, the trial court entered its settlement distribution order on February 25, 2013. The court

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<sup>2</sup> The initial distribution form had a courtesy reduction in the contingent fee percentage to 37.5 percent.

calculated Appellant's attorney fee based on the net settlement proceeds, after deducting Appellee's costs and medical expenses from the gross recovery. This resulted in a \$19,745.00 attorney fee to Appellant and \$29,617.50 due to Appellee. This timely appeal followed.<sup>3</sup>

Appellant raises one issue for this Court's review, challenging the trial court's interpretation of the parties' contingent fee agreement:

Did the trial court abused [sic] its discretion and otherwise committed [sic] an error of law when it ruled that [Appellant's] fee was to be taken from the **net** recovery after both outstanding medical bills **and** litigation costs were deducted from the gross recovery, which is contrary to ***Rollins Outdoor Advertising v. W.C.A.B.***, 506 Pa. 592, 600, 487 A.2d 794 (1985); rather than being taken from either the **gross** recovery as set forth in the free [sic] agreement or the **net** recovery after **only** litigation costs were deducted?

(Appellant's Brief, at 6) (emphases in original).

Preliminarily, we note that the interpretation of the terms of a contract is a question of law. ***See McMullen v. Kutz***, 985 A.2d 769, 773 (Pa. 2009). Therefore, our standard of review is *de novo*, and our scope of review is plenary. ***See id.***

In the instant case, Appellant argues that the trial court erred in calculating the attorney fee based on the net settlement proceeds, after

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<sup>3</sup> Pursuant to the court's order, Appellant filed a timely statement of errors complained of on appeal on March 20, 2013. ***See*** Pa.R.A.P. 1925(b). The trial court entered its Rule 1925(a) opinion on May 13, 2013. ***See*** Pa.R.A.P. 1925(a).

deducting Appellee's litigation costs and medical expenses from the gross recovery. (**See** Appellant's Brief, at 10). In the alternative, Appellant contends that, even if the court properly determined that the attorney fee must be calculated based on the net recovery, it still incorrectly calculated the net recovery under our Supreme Court's decision in **Rollins Outdoor Adver., supra**. (**See id.** at 12). We disagree.

When interpreting the language of a contract, the intention of the parties is a paramount consideration. In determining the intent of the parties to a written agreement, the court looks to what they have clearly expressed, for the law does not assume that the language of the contract was chosen carelessly.

When interpreting agreements containing clear and unambiguous terms, we need only examine the writing itself to give effect to the parties' intent. The language of a contract is unambiguous if we can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends. When terms in a contract are not defined, we must construe the words in accordance with their natural, plain, and ordinary meaning. As the parties have the right to make their own contract, we will not modify the plain meaning of the words under the guise of interpretation or give the language a construction in conflict with the accepted meaning of the language used.

On the contrary, the terms of a contract are ambiguous if the terms are reasonably or fairly susceptible of different constructions and are capable of being understood in more than one sense. Additionally, we will determine that the language is ambiguous if the language is obscure in meaning through indefiniteness of expression or has a double meaning. Where the language of the contract is ambiguous, the provision is to be construed against the drafter.

**In re Jerome Markowitz Trust**, 71 A.3d 289, 301 (Pa. Super. 2013) (citation omitted). Contingent fee agreements are subject to careful scrutiny

by the courts, in order to ensure that they are reasonable, and that an attorney has not taken unfair advantage of a client. **See *Miernicki v. Seltzer***, 458 A.2d 566, 569 (Pa. Super. 1983), *affirmed*, 479 A.2d 483 (Pa. 1984).

In addition, pursuant to its authority under the Pennsylvania Constitution, our Supreme Court has adopted the Rules of Professional Conduct to regulate attorney conduct. **See *Beyers v. Richmond***, 937 A.2d 1082, 1089, 1091-92 (Pa. 2007). Relevant to the issue in the instant case is Rule 1.5(c), which addresses contingent fee agreements. **See** Pa.R.P.C. 1.5(c). Under the Rule, contingent fee agreements must specify whether an attorney will deduct litigation and other expenses from the recovery before calculating the contingent fee. It states, in relevant part:

A fee may be contingent on the outcome of the matter for which the service is rendered[.] . . . A contingent fee agreement shall be in writing and **shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.** Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Pa.R.P.C. 1.5(c) (emphases added).

Here, the parties' contingent fee agreement provides for reimbursement of litigation costs to Appellant from the recovery and authorizes Appellant to pay Appellee's medical expenses from the recovery.

(**See** Contingent Fee Agreement, 8/08/11, at 1-2). However, the agreement does not expressly state whether Appellant is required to deduct litigation and medical expenses from the recovery before calculating its attorney fee. (**See id.**). In addition, the record indicates that Appellee's understanding of the agreement was limited due to her inability to read English, and that she believed in good faith that Appellant would calculate the attorney fee based on the net recovery. (**See** Trial Ct. Op., 5/13/13, at unnumbered pages 2, 5).

After review, we agree with the trial court's determination that the contingent fee agreement is ambiguous, and that Appellant's failure to specify whether it would deduct litigation and medical expenses from the recovery before calculating its attorney fee is in contravention of the clear directive set forth in Rule 1.5(c). **See** Pa.R.P.C. 1.5(c). This ambiguity in the contingent fee agreement must be construed against Appellant as contract drafter, and the court correctly determined that the attorney fee must be calculated based on the net settlement recovery, after deduction of expenses. **See Jerome Markowitz Trust, supra** at 301; **see also Miernicki, supra** at 569.

We also note that Appellant's alternative argument, that the trial court incorrectly calculated the net recovery in this case under our Supreme Court's decision in **Rollins, supra**, is unpersuasive. (**See** Appellant's Brief, at 12). Specifically, Appellant claims that the **Rollins** Court "defined 'net

recovery' as being a gross recovery less the 'costs of recovery including attorney's fees and any other proper disbursements made to generate the gross recovery,'" and that Appellee's medical expenses are not "disbursements made to generate the gross recovery." (*Id.* at 10, 13; *see also id.* at 12). Appellant asserts that, under *Rollins*, the trial court must distribute the attorney fee from the gross recovery before deducting Appellee's medical expenses. (*See id.* at 13). This argument fails for several reasons.

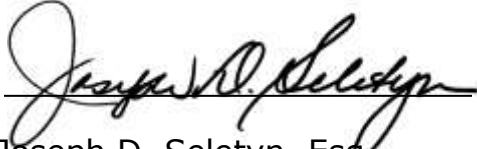
First, the *Rollins* Court discusses a particular plaintiff's recovery in a workmen's compensation matter involving subrogation issues on appeal from the Commonwealth Court, and the facts of that case are inapposite to the instant case. *See Rollins, supra* at 795, 798. Second, although Appellant claims that our Supreme Court defines the term "net recovery" in *Rollins*, this "definition" is, in fact, a citation to a portion of an algebraic formula used by the Workmen's Compensation Appeal Board in that case to compute a disability payments grace period. *See id.* at 798. Contrary to Appellant's assertion, the *Rollins* Court did not formulate an overarching definition of the term "net recovery" that conflicts with the trial court's distribution order in this case. *See id.* Therefore, Appellant's claim that the trial court incorrectly calculated the net recovery and the amount due to it in attorney fees under *Rollins* is meritless. Accordingly, we affirm the order entered by the trial court.



J-A29002-13

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 11/27/2013