

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SHIRLEY ANN JOHNSON,

Plaintiff/Counter-Defendant-  
Appellant,

v

TOM D. JOHNSON,

Defendant/Counter-Plaintiff-  
Appellee.

UNPUBLISHED  
August 28, 2008

No. 271129  
Jackson Circuit Court  
LC No. 02-003390-DO

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Before: Wilder, P.J., and Saad, C.J., and Smolenski, J.

PER CURIAM.

Plaintiff appeals by leave granted from a post-divorce judgment order of the trial court. We reverse and remand.

The parties' divorce was granted following a pro confesso hearing, during which plaintiff introduced into evidence, as her only exhibit, a comprehensive settlement agreement<sup>1</sup> reached by the parties following a successful mediation. The settlement agreement provides in relevant part that:

Security for Payment of Spousal Support

42. Husband shall irrevocably designate Wife as primary beneficiary, through Husband's age 65, of a portion of his Equitable policy no. 89043175 in the amount of \$700,000.00. He shall pay the premiums thereon. Notwithstanding the use of the term "security" in the heading of this paragraph, the proceeds to be paid to Wife upon Husband's death shall be the sum of \$700,000.00, no more, no less.

The trial court signed the judgment of divorce in this matter, and specifically noted that it approved the judgment because "under the circumstances [the agreement was] fair and equitable."

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<sup>1</sup> Titled "The Shirley A. Johnson and Tom D. Johnson Divorce Settlement Agreement," the agreement was signed by plaintiff on February 12, 2003 and by defendant on February 13, 2003.

After the entry of judgment, plaintiff filed a motion to enforce compliance with the life insurance provision of the settlement agreement. Plaintiff asserted that defendant had allowed the policy specified in the agreement to lapse, contrary to the terms of the agreement. Plaintiff requested the trial court to order defendant to again obtain life insurance designating plaintiff as the primary beneficiary, such that plaintiff would be paid \$700,000 if defendant should die before age 65. Plaintiff also requested an award of attorney fees and costs incurred in seeking compliance with the terms of the settlement agreement.

Defendant denied that he had allowed an insurance policy required by the settlement agreement to lapse, but admitted that the evidence would support the contention that he did not have life insurance that would pay plaintiff \$700,000 upon his death. Defendant asserted that the narrow purpose of the life insurance provision of the agreement was to secure the payment of his future spousal support obligation to plaintiff until he turned age 65. Defendant further contended that because the amount of future spousal support he was required to pay under the agreement would continue to decrease as he neared age 65, the amount of the required security for those payments was also intended to decrease as he neared age 65. Arguing that the agreement as written was ambiguous and inequitable as interpreted by plaintiff, defendant requested the trial court to modify the settlement agreement to clearly provide that his obligation to provide security for future spousal support payments would decrease proportionate to the amount of outstanding future payments of spousal support.

The trial court denied plaintiff's motion and modified the agreement as requested by defendant. The trial court concluded that, if defendant died before he turned 65, a payment of \$700,000 to plaintiff would constitute a windfall, thus rendering the original agreement of the parties one that was against public policy. Therefore, the trial court entered an order requiring that defendant maintain life insurance providing plaintiff a payment of only \$370,000 on defendant's death, and further providing that, going forward, defendant was required to have life insurance coverage only in an amount sufficient to cover the remaining spousal support payments to plaintiff. The trial court's order expressly permitted the amount of life insurance coverage with plaintiff as beneficiary to decrease consistent with the declining balance of spousal support owed. The trial court also denied plaintiff's request for an award of attorney fees.

Plaintiff first claims on appeal that the trial court erred when it failed to enforce the settlement agreement as written. We agree. A settlement agreement "is a contract and so is construed and applied as such." *MacInnes v MacInnes*, 260 Mich App 280, 289; 677 NW2d 889 (2004). "Judgments entered pursuant to the agreement of the parties are of the nature of a contract, rather than a judicial order entered against one party." *Id.* Contract interpretation is reviewed de novo, *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 141; 706 NW2d 471 (2005), lv den 475 Mich 875 (2006), including a trial court's determination whether a contract term is ambiguous, *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). An unambiguous contract must be enforced as written unless it is "contrary to law or public policy, or is otherwise unenforceable under recognized traditional contract defenses." *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 142; 706 NW2d 471 (2005). Public policy may only be used as a basis to void a contract provision where the policy in question is "clearly rooted in

the law” as “reflected in our state and federal constitutions, our statutes, and our common law.” *Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002). Traditional contract defenses include duress, waiver, estoppel, or unconscionability. *Clark, supra* at 142 n 1.

The primary goal in contract interpretation is to honor the intent of the parties. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). The intent of the parties is found in the words of the contract, and a court may not use extrinsic evidence to determine intent if the words are clear and unambiguous. *Id.* A contract is ambiguous if its terms may reasonably be understood in different ways. *Id.* Courts may not find ambiguity where none exists. *Id.* Words are to be construed according to their plain and ordinary meaning, avoiding technical or constrained constructions. *Id.* at 491-492.

Defendant claims that the contract is ambiguous, leaving the trial court free to interpret it. The trial court did not claim the contract was ambiguous, but instead found that the contract could not be interpreted as written because it violated public policy by granting plaintiff a windfall if defendant died.

First, the settlement agreement provision was clearly *not* ambiguous. It is axiomatic that a court must construe a contract to give effect to every word, phrase, and clause in a statute and, as far as is practical, avoid interpreting a contract such that any part of it is rendered surplusage or nugatory. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). The agreement plainly and unambiguously provides that if defendant were to die before age 65, “...the proceeds to be paid to Wife upon Husband’s death shall be the sum of \$700,000.00, no more, no less.” Defendant’s assertion, that the heading of paragraph 42 of the agreement, “Security for Payment of Spousal Support,” renders the agreement provision ambiguous lacks all merit. The agreement itself makes clear that the payment of \$700,000 payment was to be made “notwithstanding the use of the term ‘security’” in the paragraph’s heading. Thus, the lump sum payment serves a dual function in the agreement. The payment might be regarded as “security” in the event defendant were to die shortly after the divorce judgment was entered, but if defendant were to die closer to and before he turned age 65, the payment might be treated as an additional lump sum compromise payment of spousal support. There is nothing ambiguous about a contract that provides for a negotiated, sliding scale of payments to be made under a variety of circumstances. If defendant survives to enjoy his 65<sup>th</sup> birthday, his obligation to make payments to plaintiff would be at one, lower amount, payable only over time; if defendant did not survive to his 65<sup>th</sup> birthday, he would pay a higher total amount to plaintiff, the installment payments *plus* the lump sum payment at his death.

We find no public policy violation in applying the agreement as written. First, we note that neither the trial court nor the defendant has identified a public policy that is violated by upholding the plain language of the agreement. “An appellant may not merely announce its position or assert an error and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position.” *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003).

Second, to the extent the trial court considered plaintiff’s so-called “windfall” to be in violation of public policy, we also note that “[c]ourts do not generally inquire into the sufficiency of consideration[.]” *Gen Motors Corp v Dep’t of Treasury*, 466 Mich 231, 239; 644 NW2d 734

(2002). The trial court's expressed concern that the agreement provided a windfall to plaintiff is a thinly-veiled inquiry into the sufficiency of the consideration received by defendant in exchange for his promise to provide plaintiff a \$700,000 payment upon his death before age 65, and not a public policy basis "clearly rooted in the law" that would warrant the modification of the parties' negotiated settlement agreement. Defendant also does not assert any traditional contract defense that would support the voiding or modifying of the agreement. Accordingly, we find no basis on the record to contradict the trial court's conclusion when it signed the judgment of divorce that "under the circumstances [the agreement was] fair and equitable," and the trial court erred in failing to enforce the contract as written. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005).

Plaintiff also claims that she is entitled to attorney fees incurred below and on appeal. We agree. As we have already noted, settlement agreements are treated as contracts, and contract interpretation is reviewed de novo. *MacInnes, supra* at 289; *Clark, supra* at 141.

"As a general rule, attorney fees are not recoverable as an element of costs or damages absent an express legal exception." *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007). A contractual clause providing that, in the event of a dispute between the parties, the prevailing party may recover reasonable attorney fees and costs, is a valid and judicially enforceable legal exception. *Id.*

Concerning attorney fees and costs, the settlement agreement provides in relevant part:

#### Default Attorney Fees

60. If either party fails to abide by any provision of this Agreement, the other party shall be entitled to recover, in addition to any other relief obtained, their attorney fees and expenses incurred, including reasonable attorney fees and costs, associated with any proceeding instituted to enforce any provision of this Agreement or the parties' Judgment of Divorce.

It is undisputed that defendant failed to comply with paragraph 42 of the agreement when he failed to maintain life insurance in the amount of \$700,000. Because both plaintiff's motion to enforce the agreement filed in the trial court and this appeal plainly qualify as proceedings instituted to enforce the agreement, pursuant to the parties' settlement agreement, plaintiff is entitled to reasonable attorney fees and costs incurred in these proceedings in the trial court and on appeal.

We reverse the order of the trial court that modified the settlement agreement of the parties, and remand for further proceedings consistent with this opinion. On remand, we further direct that the trial court award plaintiff reasonable attorney fees and costs incurred below and on appeal in an effort to enforce the terms of the settlement agreement. See *Wiley v Wiley*, 214 Mich App 614, 616; 543 NW2d 64 (1995).

We do not retain jurisdiction.

/s/ Kurtis T. Wilder  
/s/ Henry William Saad  
/s/ Michael R. Smolenski