

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-001417-MR

JOHN H. RUBY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MITCH PERRY, JUDGE  
ACTION NO. 12-CI-005222

MARCIA SCHERZER

APPELLEE

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART, AND REMANDING

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BEFORE: COMBS, JOHNSON, AND D. LAMBERT, JUDGES.

JOHNSON, JUDGE: John H. Ruby (“Ruby”) brings this appeal from an Order of the Jefferson Circuit Court entered August 23, 2016, granting his Motion for Attorney’s Fees in part. After reviewing the record in conjunction with the applicable legal authorities, we AFFIRM in part and REVERSE in part the Jefferson Circuit Court.

## BACKGROUND

While in the process of divorcing her now ex-husband, Scherzer entered into an Attorney/Client Agreement (“Agreement”) with Ruby on May 7, 2008, to represent her interests during her divorce. The four clauses of the Agreement relevant to the case at bar state:

2.) ATTORNEY’S FEES: . . . Client shall have thirty (30) days from the date of said Statement to pay Attorney for his services and any expenses and/or court costs incurred and if not paid within said thirty (30) day period, any unpaid portion of the balance due shall thereafter accrue interest at the rate of 1 ½ percent each month (18% annually) until paid in full.

. . . .

10.) WHOLE AGREEMENT OF PARTIES: This Agreement embodies the whole agreement of the parties. There are no promises, terms, conditions or obligations other than those contained herein; and this Agreement shall supersede all previous communications, representations or agreements, either verbal or written, among the parties.

. . . .

12.) MODIFICATION OF AGREEMENT: No part of this Agreement may be altered, modified, or changed in any way except in writing signed by the parties hereto or signed by the duly authorized representative of said parties.

13.) ATTORNEY’S FEES & COURT COSTS: If any action is brought by either Attorney or Client against the other relative to the enforcement of the terms, provisions, covenants, and conditions of this Agreement or in regard to any other matter relating to this Agreement, the party in whose favor final judgment shall be entered shall be

entitled to recover court costs incurred and reasonable attorney's fees.

Scherzer amassed thousands of dollars in debt to Ruby. Ruby and Scherzer reached an oral agreement wherein Scherzer would pay Ruby a certain amount each month and Ruby would waive interest on the debt. Further, Ruby marked the interest as waived on at least one of his billing statements to Scherzer.

Scherzer ceased making payments. Ruby then hired his current counsel to represent him in the present litigation against Scherzer seeking his attorney's fees and interest. The court held a bench trial on June 18, 2015. In its Opinion and Order of March 14, 2016, the court found that Ruby was owed \$12,023.63 for his legal representation of Scherzer but waived "any and all assessed pre-judgment interest in his dealings with Scherzer." The court based this finding on evidence that Ruby "waive[d] interest on his fees in an effort to expedite payment." The court assessed post-judgment interest at 12%.

Ruby then filed a Motion to Alter, Amend, or Vacate the court's March 14, 2016 Opinion and Order and in addition filed a Motion seeking Attorney's Fees for his appeal on August 23, 2016. The court issued an Opinion and Order wherein it denied Ruby's Motion to Alter, Amend, or Vacate, but granted his Motion for Attorney's Fees in part. The court found that since "the final judgment awarded to Ruby was roughly one-third of his claimed amount . . . this Court finds it equitable to award Ruby one-third of his claimed attorney's

fees.” The court then granted Ruby \$2,500.00 of the \$7,500.00 he sought for his litigating costs against Scherzer.

Ruby now appeals the Order of August 23, 2016, alleging the court improperly ruled he waived interest on Scherzer’s debt and alleging he should be granted the entirety of the \$7,500.00 in legal fees.

### **STANDARD OF REVIEW**

The standard of review for the awarding of attorney’s fees and decisions regarding whether and how to award attorney’s fees are within the discretion of the trial court. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 520 (Ky. 2001) (citations omitted). Therefore, we will not overturn the trial court’s decision on such matters absent an abuse of discretion. *Id.* Abuse of discretion occurs when a court’s decision is unreasonable, unfair, arbitrary or capricious. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994) (citations omitted). *See also Cassady v. Wolf Creek Collieries Employee Burial Fund, Inc.*, 390 S.W.3d 151, 152-53 (Ky. App. 2012).

### **ANALYSIS**

Ruby’s first issue on appeal concerns whether the court erred in not awarding him interest on the outstanding balance due him. Scherzer contends that Ruby waived any claim to pre-judgment interest based upon an oral agreement the two entered into. Ruby induced Scherzer to pay her attorney fees by agreeing to waive further interest charges, admitting that he modified their agreement in contravention of the signed contractual agreement between the parties forbidding

them to make such contractual arrangements absent executing a new, signed document. Further, he made the notation that interest was waived on one of his billing statements to Scherzer while she was still performing as they negotiated.

Ruby stated in his June 10, 2013 Interrogatory:

After [Scherzer] owed several thousand dollars for the legal services that I had provided to her, I offered to waive the monthly interest on the unpaid balance provided she paid \$500.00<sup>1</sup> a month towards her bill. When she stopped making this payment, I began charging her interest again per this agreement.

Ruby claims that he was entitled to continue tabulating interest once Scherzer failed to live up to their amendment. We disagree.

The trial court found:

This court finds Ruby's claimed interest unreasonable. There was significant evidence that Ruby, either verbally or through written communication, waived his claim to interest on Scherzer's attorney's fees. At the very least, there was ambiguity regarding whether interest on Scherzer's bill should accrue. "Our law is clear that the language of a contract, if susceptible to two meanings, will be construed against the drafter." *Weinberg v. Gharai*, 338 S.W.3d 307, 313 (Ky. App. 2011) (citing *Theatre Realty Co. v. P.H. Meyer Co.*, 48 S.W.2d 1, 2 (1932)). Although not in the original agreement, there is written and verbal evidence that Ruby either waived or effectively waived interest on Scherzer's fee. Given the settled law concerning ambiguities, it is proper to resolve this one against Ruby. Accordingly, Ruby's claim for interest against Scherzer must fail.

The court's decision here is not unreasonable, unfair, arbitrary or capricious. The two parties had conflicting interpretations of Ruby's offer to waive interest. Ruby

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<sup>1</sup> The court notes that Ruby testified that the amount was \$500.00 per month in his interrogatory but claims it was \$300.00 per month in his Brief.

willingly acted in direct contravention to the dictates of the Attorney/Client Agreement he himself devised by offering an oral inducement to Scherzer in order to collect his legal fees.

As the attorney, Ruby failed in his duty to clearly enumerate his expectations for their contractual arrangements beyond the written document each of them signed. Paragraph 12 of the Agreement is boilerplate language for most contracts and for good reason. Had Ruby initiated a second signed agreement clearly spelling out under what terms the interest was being waived and under what terms interest fees could be reinstated, per the dictates of the contract that **he** devised, this ambiguity between the parties would not exist. We will not overturn the decision of the trial court on this issue absent an abuse of discretion, and we find none.

As to Ruby's second issue on appeal, he argues that the trial court erred in awarding him only \$2,500.00 of the \$7,500.00 in legal fees he sought due to his own legal costs attempting to recover the attorney's fees owed to him by Scherzer. We agree with Appellant. As we found in *Cummings v. Covey*, 229 S.W.3d 59, 61 (Ky. App. 2007), "Kentucky has long followed the 'American Rule,' that in the absence of a statute or contract expressly providing therefor, attorney fees are not allowable as costs, nor recoverable as an item of damages." As the trial court stated, having acknowledged the "American Rule" as controlling on this issue:

In this case, a contractual clause provides that “the party in whose favor final judgment shall be entered shall be entitled to recover court costs incurred and reasonable attorney’s fees.” **There is no allegation in this case that the fees claimed by [Ruby’s counsel] in his representation of Ruby are unreasonable.**

(Emphasis added.)

The court ruled that one-third of the legal fees sought was an appropriate amount considering Ruby secured only a third of the judgment he originally sought against Scherzer. This decision is belied by the trial court’s own words. The court stated that the full amount of attorney’s fees was reasonable to claim but refused to award them. After having made the finding that there was nothing unreasonable about Ruby’s attorney’s fee, the appropriate remedy was to award the entirety of that amount to Ruby and failing to do so was an abuse of discretion.

## CONCLUSION

Based upon the foregoing, we AFFIRM in part and REVERSE in part the Jefferson Circuit Court and find that Scherzer owes Ruby the entire \$7,500 he sought for his legal fees pursuing his litigation against her. This case is remanded to the circuit court for entry of a decision consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:  
Steven A. Snow  
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BRIEF FOR APPELLEE:  
Stephen P. Imhoff  
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