

IN THE SUPREME COURT OF IOWA

No. 20-0817

(Kossuth County No. LACV027056)

JOSEPH GOCHE

Plaintiff-Appellant / Cross-Appellee,

vs.

WMG, L.C.,

Defendant-Appellee / Cross-Appellant.

Appeal from the Iowa District Court in and for Kossuth County

The Honorable David A. Lester

Plaintiff-Appellant's Final Brief

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

- A. Did the District Court err in denying Appellant Joseph Goche's ("Goche's") claim for attorneys' fees he incurred pursuing the indemnification he was entitled to recover from WMG, L.C. ("WMG")?

Yes, the District Court erred in denying Goche's "fees on fees" claim.

Iowa Code § 489.408(1)

Lynch v. City of Des Moines, 464 N.W.2d 236 (Iowa 1990)

Stifel Financial Corp. v. Cochran, 809 A.2d 555, 560-62 (Del. 2002).

ROUTING STATEMENT

This appeal should be designated to the Iowa Court of Appeals because it does not present a fundamental and urgent issue of broad public importance requiring prompt determination by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(d).

STATEMENT OF THE CASE

Goche is a member and former officer of WMG, an Iowa limited liability company. In October 2016, WMG asserted claims against Goche for breach of fiduciary duty in a Kossuth County lawsuit (LACV026869). WMG failed to produce any evidence to support its claims, so the District Court dismissed them on summary judgment. Meanwhile, Goche demanded that WMG indemnify him for the legal costs he incurred to defend himself against WMG's claims. Two different judges of the District Court decided Goche was entitled to indemnification as a matter of law. But WMG did not reimburse Goche in full,

forcing him pursue his indemnification claim against WMG in a separate action (LACV027056). As part of his lawsuit to recover indemnification from WMG, Goche sought an award of fees he incurred to litigate the indemnification issue (so called “fees on fees”). Goche’s request for “fees on fees” is the subject of this appeal.

On January 21, 2020, the District Court held a bench trial on Goche’s remaining claims in LACV027056. In an Order dated May 1, 2020 (which was later confirmed in an Order dated May 19, 2020), the District Court awarded Goche \$68,831.10 as indemnification for attorneys’ fees and expenses he incurred in defending against WMG’s breach of fiduciary duty claims in LACV026869. But the District Court denied Goche’s claim for “fees on fees,” concluding that the court lacked authority to award these fees. Goche timely noticed this appeal to challenge the District Court’s “fees on fees” ruling.

The District Court erred because it actually does have the power to award Goche “fees on fees.” This case is no different than numerous other cases in which Iowa courts (and courts across the country) have awarded attorneys’ fees that a plaintiff incurs to pursue legal fees to which he is entitled. Without “fees on fees” awards, defendants who are obligated to pay fees would have no incentive to pay them, and plaintiffs who are forced to chase non-paying defendants would never be made whole. In this case, Goche paid more than \$35,699.88 in legal expenses in

LACV027056 in order to get WMG to indemnify him for fees he incurred in LACV026869. To make Goche whole, he must be allowed to recover his “fees on fees” in addition to his indemnification award. This Court should reverse the District Court’s decision to deny Goche’s “fees on fees” claim, and remand so the District Court can determine the proper amount of “fees on fees” to award Goche.

STATEMENT OF FACTS

A. Goche is Sued in his Capacity as Manager of WMG.

WMG is an Iowa limited liability company. (Appendix Volume I (“App. I”) at 68, ¶ 2; *id.* at 79, ¶ 2). The members of WMG are Goche and his three siblings, Michael Goche, Jeanne Goche-Horihan, and Renee Afshar (“Renee”). (*Id.*) Goche was also a manager of WMG from about 2010 until February 2017. (*Id.*)

On or about September 8, 2014, Renee Afshar started a lawsuit in Iowa federal court against WMG, Goche, Michael Goche, and Jeanne Goche-Horihan. (App. I at 68, ¶ 3; *id.* at 79, ¶ 3). Renee Afshar accused Goche of acting improperly in his capacity as a manager of WMG. (*Id.*) The federal court dismissed that action for lack of subject matter jurisdiction. (App. at 68, ¶ 4; *id.* at 79, ¶ 4; App. III at 129, Trial Tr. 35:21-:24).

On or about October 5, 2015, Renee Afshar started a new lawsuit in Kossuth County, Iowa state court against the same defendants (LACV026869). (App. I at

69, ¶ 6; *id.* at 79, ¶ 6). In LACV026869, Goche was accused of acting improperly in his capacity as a manager of WMG. (*Id.*)

On or about June 7, 2016, Renee Afshar and Jeanne Goche-Horihan voluntarily dismissed their claims against Goche in LACV026869. (App. I at 69, ¶ 7; *id.* at 79, ¶ 7; App. III at 130, Trial Tr. 36:1-:13). They never provided any evidence that Goche violated any of his fiduciary duties as a manager of WMG.

B. Judge Courtney Awards Goche Partial Indemnification.

On July 21, 2016, the District Court (Judge Don E. Courtney) entered an Order in LACV026869, deciding Goche was entitled to indemnification from WMG for the legal expenses he incurred to defend against Renee Afshar and Jeanne Goche-Horihan's claims in state court. (App. II at 22-23). The District Court reaffirmed that decision in an Order dated September 22, 2016. (*Id.* at 25, 49). On December 29, 2016, the District Court entered an Order requiring WMG to pay Goche \$51,455.27 plus interest for indemnification related to Renee Afshar and Jeanne Goche-Horihan's claims. (*Id.* at 52-73). The award covered fees Goche incurred before September 7, 2016. (*Id.*) WMG has paid that award.

On October 17, 2016, while Goche was seeking indemnification for his defense of Renee Afshar and Jeanne Goche-Horihan's claims, WMG asserted counterclaims against Goche in LACV026869. (App. I at 69, ¶ 9; *id.* at 80, ¶ 9). WMG alleged that Goche acted improperly in his capacity as manager of WMG.

(*Id.*) On November 30, 2017, the District Court (Judge Courtney) entered summary judgment for Goche, dismissing WMG's counterclaims and deciding as a matter of law and undisputed fact that Goche did not violate any duty to WMG. (App. II at 81).

In all of these Orders in LACV026869, the District Court (Judge Courtney) did not resolve Goche's right to indemnification arising out of WMG's claims against him. The District Court's December 29, 2016 indemnification award was for Renee Afshar and Jeanne Goche-Horihan's claims only, (*see id.* at 60), and the District Court's November 30, 2017 summary judgment order addressed the lack of evidence for WMG's underlying claims, but not Goche's right to indemnification. (*Id.* at 81).

C. Goche's Remaining Claims for Indemnification.

On April 3, 2017, Goche started this lawsuit (LACV027056) against WMG. (App. I at 68). One of the purposes of this lawsuit was to resolve Goche's indemnification claims that Judge Courtney did not resolve in LACV026869. (*See id.* at 72, Count Three).

On February 27, 2018, the District Court (Judge David A. Lester) entered partial summary judgment for Goche in LACV027056. (App. II at 85-100). On the indemnification claims, the District Court decided Goche had a right to indemnification related to WMG's claims against him, which were not resolved in

LACV026869. The District Court reserved ruling on the amount of indemnification to be awarded to Goche. (*Id.* at 91, 94-95).

On January 21, 2020, the District Court (Judge Lester) held a bench trial on the two remaining issues in the case: (1) the amount of indemnification WMG was obligated to pay Goche for legal expenses he incurred to defend against WMG’s claims in LACV 026869; and (2) the amount WMG was obligated to pay Goche for legal expenses he incurred to prosecute his indemnification claims (“fees on fees”). On May 1, 2020, the District Court entered a Ruling on the claims that were tried. The District Court awarded Goche \$68,831.10 as indemnification for attorneys’ fees and costs he incurred in defending against WMG’s claims in LACV 026869. (App. I at 207). But the District Court denied Goche’s claim for “fees on fees.” (*Id.* at 210-11). The District Court explained that “no authority exists [under Iowa law] for it to grant [Goche’s] fees on fees claim.” (*Id.* at 210).

WMG filed a motion to reconsider the District Court’s indemnification award, which the District Court denied on May 19, 2020. WMG is appealing the indemnification award, and Goche appeals the denial of his “fees on fees” claim.

ARGUMENT

I. STANDARD OF REVIEW.

Because the case was tried at law and involves statutory construction, the Iowa Court of Appeals reviews the case for legal error. *Hardin County Drainage*

Dist. 55, Div. 3, Lateral 10 v. Union Pacific R. Co., 826 N.W.2d 507, 510 (Iowa 2013). Although the District Court’s findings of fact are binding on the appellate courts, the Court of Appeals is not “bound by the trial court’s legal conclusions.”

Id. The Court of Appeals gives no deference to the District Court’s conclusions of law. *In re Estate of Johnson*, 739 N.W.2d 493, 496 (Iowa 2007).

II. THE DISTRICT COURT ERRED IN DENYING GOCHE’S “FEES ON FEES” CLAIM.

The District Court erred as a matter of law in denying Goche’s “fees on fees” claim. Goche is entitled to “fees on fees” as part of his right to indemnification under Iowa Code § 489.408(1). The statute provides:

A limited liability company shall reimburse for any payment made and indemnify for any debt, obligation, or other liability incurred by a . . . manager of a manager-managed company in the course of the . . . manager’s activities on behalf of the company, if, in making the payment or incurring the debt, obligation, or other liability, the member or manager complied with the duties stated in sections 489.05 and 489.409.

Iowa Code § 489.408(1). The District Court properly interpreted the statute to require WMG to indemnify Goche for legal expenses he incurred to defend against claims related to his time as a WMG manager. As a logical extension, the statute also requires WMG to pay the costs for Goche to seek indemnification that WMG has denied him. Otherwise, there would be no consequence for WMG’s wrongful refusal to pay Goche, and Goche’s right to indemnification would be illusory.

Although the Iowa appellate courts have not addressed this precise issue, they have approved “fees on fees” in other types of cases. For example, the Iowa Supreme Court has decided a successful plaintiff in a civil rights action, who has a right to fees as the prevailing party, may also recover “fees on fees.” *Lynch v. City of Des Moines*, 464 N.W.2d 236, 240 (Iowa 1990). The Iowa Supreme Court reached this conclusion even though the local civil rights statute does not expressly provide for “fees on fees.” *See id.* Despite the lack of clear authority, the Court relied on logic for its decision: “No logical reason compels us to conclude that the legislature only intended the allowance of attorney fees for services in obtaining relief for the underlying civil rights violation.” *Id.* Similarly, in regards to Iowa’s Open Records Act, the Court wrote: “To be afforded the full relief contemplated by law, an attorney must be able to collect fees incurred while attempting to collect the fees guaranteed by law.” *D.D. v. Davenport Community Sch. Dist.*, 839 N.W.2d 676, 2013 WL 3864594, *4 (Iowa Ct. App., Sept. 18, 2013). The same logic applies to a plaintiff, like Goche, who incurs fees while suing to collect fees guaranteed by the corporate indemnification statute.

Outside of Iowa, there is persuasive authority supporting Goche’s claim for “fees on fees.” Courts across the country have awarded “fees on fees” in cases involving a variety of attorneys’ fee statutes that do not explicitly provide for “fees on fees.” *See, e.g., Jones v. MacMillan Bloedel Containers, Inc.*, 685 F.2d 236,

239 (8th Cir. 1982) (“It would be inconsistent with the purpose of the Fees Act to dilute a fees award by refusing to compensate the attorney for the time reasonably spent in establishing and negotiating his rightful claim to the fee.”) (quoting *Lund v. Affleck*, 587 F.2d 75, 77 (1st Cir. 1978)); *Garvin v. Gov’t of D.C.*, 910 F. Supp. 2d 135, 138 (D.D.C. 2012) (“[T]he unavailability of ‘fees on fees’ awards in IDEA cases would essentially render the attorneys’ fees provision of the IDEA unenforceable, causing a party to forfeit any outstanding balance due to the prohibitive cost of the litigation to recover it.”); *Bretford Mfg., Inc. v. Smith Syst. Mfg. Co.*, 421 F. Supp. 2d 1117, 1128 (N.D. Ill. 2006) (“An allowance of reasonable fees for presenting a successful fee petition [under the Lanham Act] is the only way a fee applicant can be made whole. If it must absorb the cost of proving the appropriate amount, it will be sacrificing part of the award.”); *Moore v. St. Paul Fire Mercury Ins. Co.*, 3 P.3d 81, 86 (Kan. 2000) (deciding “[f]ees incurred litigating the amount of attorney fees to be awarded are recoverable” under statute that provided for attorney fee award against insurer).

Applying Delaware’s corporate indemnification statute, Del. Code Ann. tit. 8, § 145, which is similar to Iowa’s indemnification statute, the Delaware Supreme Court has held that a director is entitled to recover legal expenses incurred in successfully prosecuting an indemnification claim against the company. *Stifel*

Financial Corp. v. Cochran, 809 A.2d 555, 560-62 (Del. 2002). The court explained:

. . . An attorney representing a former director who is being denied statutorily authorized indemnification must seek compensation from his client or remain uncompensated, a result “inimical to the interests” of the former director and contrary to the express purpose of [the indemnification statute] to protect directors from personal liability for corporate expenses. . . .

. . .

We hold that indemnification for expenses incurred in successfully prosecuting an indemnification suit are permissible under [the indemnification statute], and therefore “authorized by law.” Allowing indemnification for the expenses incurred by a director in pursuing his indemnification rights gives recognition to the reality that the corporation itself is responsible for putting the director through the process of litigation. Further, giving full effect to [the indemnification statute] prevents a corporation from using its “deep pockets” to wear down a former director, with a valid claim to indemnification, through expensive litigation. Finally, corporations will not be unduly punished by this result. They remain free to tailor their indemnification bylaws to exclude “fees on fees,” if that is a desirable goal.

Id. at 561-62. For the same reasons, Goche should recover the fees he has spent prosecuting his indemnification claim against WMG.

This case presents a textbook example of why “fees on fees” awards are necessary. Goche did not start this fight. He is merely reacting to claims that were filed against him, first by his sisters, then by WMG. Goche successfully defeated all of their bogus claims. He has a statutory right to indemnification from WMG for having to defend himself against claims involving his role as a former WMG

manager. Goche spent tens of thousands of dollars on his defense, which he is entitled to collect. But WMG did not pay him in full. So, Goche had to spend tens of thousands of dollars more trying to collect indemnification payments from WMG.

Excluding bills that had not been issued by the date of trial, Goche incurred over \$46,000 in this action to pursue his indemnification claims against WMG. (App. II at 204, ¶ 13). Many of those fees were spent on Goche's successful partial summary judgment motion and trial preparation. Goche's attorneys had to gear up for trial on the amount of his indemnification award three times – February 2018, September 2018, and January 2020. Goche's attorneys asked WMG's attorneys to stipulate to submit the attorney fee issues on the briefs, in lieu of trial, which would have saved everyone a lot of time and money. WMG's attorneys refused to submit the matter on briefs. (App. III at 209, Trial Tr. 115:10-:21). The parties went to trial because WMG insisted on it. After trial, Goche won a significant indemnification award.

Goche tried to limit his legal expense, but WMG forced him to continue spending more and more money to pursue indemnification that the District Court repeatedly ordered WMG to pay. It is unfair and contrary to the purpose of the indemnification statute for the District Court to award Goche indemnification for

fees he incurred defending himself against WMG's claims, but deny Goche an award of fees he incurred to enforce his indemnification rights.

CONCLUSION

The District Court committed legal error when it denied Goche's "fees on fees claim." This Court should reverse and remand with instructions to enter judgment in favor of Goche and against WMG on Goche's "fees on fees" claim, in an amount to be determined by the District Court.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rules 6.903(i) and 6.908(1) of the Iowa R. App. P., Appellant hereby requests oral argument.

Respectfully submitted,

Dated: September 24, 2020

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/s/ Wesley T. Graham
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September 24, 2020
Date

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I, Wesley T. Graham, hereby certify that I electronically filed the foregoing document with Clerk of the Supreme Court of Iowa using the Iowa Judicial System Electronic Document Management System, which will send notification of such filing to the counsel below on the 24th day of September, 2020.

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