

IN THE SUPREME COURT OF IOWA

**Supreme Court No. 18-0817
Kossuth County No. LACV027056**

JOSEPH GOCHE,

Plaintiff-Appellant/Cross-Appellee,

v.

WMG, L.C., An Iowa Limited Liability Company,
Defendant-Appellee/Cross-Appellant

APPEAL FROM THE IOWA DISTRICT COURT
FOR KOSSUTH COUNTY
THE HONORABLE DAVID A. LESTER

**DEFENDANT-APPELLEE/CROSS-APPELLANT'S FINAL
BRIEF AND
REQUEST FOR ORAL ARGUMENT**

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFF WAS NOT ENTITLED TO RECOVER ATTORNEY FEES THAT HE INCURRED IN THIS CASE FOR EFFORTS TO RECOVER ATTORNEY FEES THAT HE INCURRED IN A DIFFERENT CASE.

Cases

Boyle v. Alum-Line, 773 N.W.2d 829, 832 (Iowa 2009)

Carr v. Bankers Trust, 546 N.W.2d 901, 903 (Iowa 1996)

D.D. v. Davenport Community Sch. Dist., 839 N.W.2d 676, 2013 WL 3864594, *4 (Iowa App. 2013)

Davis v. Comito, 204 N.W.2d 607, 608 (Iowa 1973)

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Harris v. Olson, 558 N.W.2d 408, 409 (Iowa 1997)

Johnston Equipment v. Industrial Idem.; 489 N.W.2d 13, 16, 17
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Marks v. Estate of Hartgerink, 528 N.W.2d 539, 544 (Iowa 1995)

Meade v. Ries, 642 N.W.2d 237, 241 (Iowa 2002)

Phillips v. Covenant Clinic, 625 N.W.2d 714, 717 (Iowa 2001)

Rick v. Sprague, 706 N.W.2d 717, 723 (Iowa 2005)

Schaffer v. Frank Moyer Constr., Inc., 628 N.W.2d 11, 23 (Iowa
2001)

Sifel v. Financial Corp. v. Cochran, 809 A.2d 555 (Del. 2002)

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**II. WHETHER THE DISTRICT COURT ERRED BY
AWARDING PLAINTIFF ANY ATTORNEY FEES ON HIS
INDEMNITY CLAIM.**

Cases

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2006)

Statutes

Iowa Code § 489.110

Iowa Code § 489.110(2)

Iowa Code § 489.110(7)

Iowa Code § 489.408

Iowa Code § 489.408(1)

III. WHETHER THE DISTRICT COURT ERRED BY MISCALCULATING ITS AWARD AND BY AWARDING PLAINTIFF ATTORNEY FEES THAT WERE NOT CONNECTED TO HIS INDEMNITY CLAIM.

Rules

Iowa R. Civ. P. 1.904

ROUTING STATEMENT

This case should be transferred to the Court of Appeals as it involves the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiff-Appellant, Joseph Goche (“Goche” or “Plaintiff”), appeals from a 5/1/20 Ruling that did not award him attorney’s fees that he incurred in this case to pursue an indemnity claim to recover the attorney fees that he incurred in a different case, namely: *Afshar v. Goche, et al.*, Kossuth County LACV026869 (“*Afshar*”). Defendant-Appellee WMG, L.C. (“WMG” or “Defendant”) asserts that all matters were disposed of in *Afshar* and Goche is precluded from bringing any further indemnity claims in this case. The relevant parts of the *Afshar* case were made part of the trial court record. Therefore, many of the *Afshar* pleadings are referred to in the Appellate briefs and appear in the appendix.

WMG cross-appeals from a 2/27/18 District Court Order granting summary judgment in favor of Goche on the liability part of his indemnity claim and the Court's 4/6/18 Order overruling WMG's Iowa R. Civ. P. 1.904 Motion to Enlarge. WMG also cross-appeals from the Court's 5/1/20 Ruling awarding Plaintiff's attorney fees on his indemnity claim, and from the Court's 5/19/20 Order overruling WMG's Iowa R. Civ. P. 1.904 Motion.

B. Course of Proceedings.

Afshar v. Goche, et al.

The appeal involves parallel lawsuits, namely: *Goche v. WMG*, Kossuth County LACV027056 (hereinafter "*Goche v. WMG*" or "this case"), and *Afshar v. Goche, et al.*, Kossuth County LACV026869, (hereinafter "*Afshar*"). On 12/29/16, before this case was initiated, the *Afshar* Court entered an order awarding Goche a total of \$51,455.27 against WMG on an indemnity claim seeking attorney fees for defense costs. (12/29/16 *Afshar* Ruling; App. I, 15-37). The *Afshar* ruling by the Hon. Don Courtney contains a detailed analysis of Goche's attorney fees claims, breaking them down as to what hours were approved, for what matters, and the approved hourly rate. The *Afshar* ruling

contained a clear calculus for its award. (12/29/16 Ruling, pp. 14-22; App. I, 28-36). At the time of the 12/29/16 Order, Goche was still seeking additional indemnity against WMG in *Afshar* based on WMG's 10/17/16 counterclaim against Goche. (10/10/17 Dismissal; 11/30/17 *Afshar* Ruling, p.p. 5-6; 1/9/18 *Afshar* Ruling, p. 4; App. I, 50, 19-20, 65).

Whether the *Afshar* Court's 12/29/16 award of \$51,455.27 constituted a final order was not fully resolved until that court entered an 11/30/17 Order on Summary Judgment and a 1/9/18 Ruling on WMG's Motion to Enlarge. (11/30/17 *Afshar* Ruling, p.p. 5=6; 10/20/17 Tr. 19:20-21:22; 1/9/18 *Afshar* Ruling; App. I, 19-20, 116-117, 62-68).

Goche v. WMG

On 4/3/17, Goche filed his Petition in this case requesting an award of damages against WMG for the same indemnity claims he was already alleging in *Afshar*. (Petition; 1/21/20 Tr. 43:11–44:11; 11/22/17 SOF ¶ 21; App. I, 68-78; App. III, 137-138; App. I, 97).

On 4/26/17, WMG filed its Answer asserting affirmative defenses of “issue preclusion, claim preclusion, res judicata, claim

splitting and/or the law of the case.” (Answer, p. 5; App. I, 83). WMG also asserted that Goche’s claims had been “compulsory counterclaims” in *Afshar. Id.*

Afshar v. Goche, et al.

On 6/14/17, the court in *Afshar* appointed attorney Larry Eide to act as Receiver for WMG and also “stayed all litigation related to WMG until September 13, 2017 so that the Receiver could become apprised of WMG’s status” (10/2/17 Appearance; 11/30 17 *Afshar* Ruling, p. 4; 1/21/20 Tr. 40:22-41:19; App. I, 86, 55; App. III, 134-135).

On 9/14/17, Goche filed a Motion for Summary Judgment seeking dismissal of WMG’s breach of fiduciary duty claim. (11/30/17 Ruling; p. 1; App. I, 92).

On 9/27/17, Receiver Eide filed a report with the court indicating it would not be resisting Goche’s Motion for Summary Judgment. (1/21/20 Tr. 42:6-44:11; 93:16-24; App. III, 136-138, 187).

Goche v. WMG

On 10/2/17, Receiver Eide gave notice to the court that he had been appointed Receiver for WMG and that he, as the receiver, “was

directed to take control of all litigation involving WMG in this and all other cases.” (10/2/17 Appearance; App. I, 86).

Afshar v. Goche, et al.

On 10/10/17, Goche, in *Afshar*, filed a voluntary dismissal without prejudice of “all claims.” (10/10/17 Dismissal; App. I, 50).

On 10/20/17, the court held a hearing on Goche’s Motion for Summary Judgment and on other matters. (10/20/17 Tr. p. 1; App. I, 112).

On 11/30/17, the *Afshar* Court granted Goche summary judgment dismissing WMG’s breach of fiduciary duty claim, and clarified that its 12/29/16 ruling constituted a final order. (11/30/17 Order, p. 5; App. I, 56).

Goche v. WMG

On 11/22/17, Goche filed a Motion for Partial Summary Judgment, along with a Statement of Undisputed Material Facts and Memorandum of Authorities in Support of Plaintiff’s Motion for Partial Summary Judgment. (Motion PSJ; SOF; Memo; App. I, 92-111). Goche stated that he “dismissed his claim for indemnification [in *Afshar*] without prejudice . . . so he could continue to fight for

indemnification solely in the instant case.” (SOF ¶ 21; App. I, 97). Goche’s motion sought “fees and expense he has incurred in defending himself . . . through November 30, 2017 . . .” (12/21/17 Plaintiff’s Reply Brief, p. 6; App. I, 140).

On 12/15/17, WMG filed its Resistances, again asserting “WMG’s affirmative defenses of claim preclusion, issue preclusion, improper claim splitting and the law of the case” and urged that “the effect of the Court’s order and Goche’s dismissal [in *Afshar*] cancels Goche’s indemnification claim and/or prevents it from being relitigated in this case.” (Response to SOF ¶ 21; Memorandum, pp. 4-5; Resistance, SOF; App. I, 125, 130, 120, 121-123). WMG also asserted that its “Articles of Organization does not provide for any indemnification”. (WMG Memorandum, pp. 4-6; SOF ¶¶ 11-12; App. I, 129-131, 122-123).

On 1/11/18, WMG filed Defendant’s Supplement to Summary Judgment record attaching:

- the 12/19/16 *Afshar* Ruling on Goche’s indemnity claim for fees;
- Goche’s 10/10/17 Voluntary Dismissal in *Afshar*; and

- the 1/9/18 *Afshar* Ruling establishing that its 12/29/16 Ruling, awarding Goche a judgment for attorney fees, was a final order;

(1/11/18 WMG Supplement; App. I, 144-145).

During the 1/26/18 hearing on Goche's Motion for Partial Summary Judgment, his counsel conceded that the orders in *Afshar* had become final: "[t]hose issues have already been fully litigated." (1/26/18 Tr. 5:9-15; App. I, 171). WMG's counsel likewise agreed the *Afshar* orders were final, but asserted that Goche's claims were barred because when the *Afshar* court:

entered this order on November 30, 2017, that case is basically - - that whole case is a final order, and that cuts off Joe Goche's ability to ask for more indemnity. Everything on indemnity has been decided in Judge Courtney's case. What do you call it, res judicata, issue preclusion, claim preclusion, whatever, it's all been decided there? Joe Goche is entitled to about \$51,000. That's done. That case is over. It would be kind of like if a plaintiff in a personal injury case had a claim for medical expense and loss and intangible damages, and the medical expense are liquidated are cite [sic; "decided"] by summary judgment, and then before the trial date the plaintiff dismisses the rest of the case, you can't bring your - - you know, the plaintiff wouldn't be able to bring a claim for intangible damages in another case because that would be improper splitting of claims We did supplement the record. So - - - with these final orders by Judge Courtney. So I think it's pretty clear he's reduced all of

Joe Goche's claims to a specific amount. There is nothing left that can be litigated anywhere else.

(1/26/18 Tr. 12:13–13:14; App. I, 172-173).

On 2/27/18, the court, although acknowledging WMG's "affirmative defenses," nevertheless sustained Goche's Motion for Partial Summary Judgment on the liability portion of his indemnity claim. (Order, p. 5; App. I, 152). The trial court's 5/1/20 ruling characterized the summary judgment as concluding that "WMG was liable to Joseph for indemnification of attorney fees and expenses he incurred in defending claims that were brought against him by WMG for alleged breaches of his duties as then-manager of WMG." (5/1/20 Ruling, p. 2, App. I, 202).

On 3/13/18, WMG filed an Iowa R. Civ. P. 1.904 Motion to Reconsider, Enlarge or Amend the Court's 2/28/18 Ruling urging, in part, that issue preclusion from *Afshar* "prevents Goche from seeking fees he generated in *Afshar*" and asked the Court to enlarge its ruling to "address the issue preclusion effect of the *Afshar* ruling on the indemnification issue." (Motion, ¶ 7; App. I, 166). On 3/16/18, Goche filed his Resistance. (Resistance; App. I, 170). On 3/22/18, WMG filed its Reply Brief urging in part: "[t]he court should determine whether

the Afshar ruling – limiting fees – constitutes issue preclusion or claim preclusion.” (Reply Brief, p. 2; App. I, 183). On 4/6/18, the Court entered an Order overruling WMG's Iowa R. Civ. P. 1.904 Motion to Reconsider, Enlarge or Amend in its entirety. (Order; App. I, 185-186).

1/21/20 Trial

After a Trial on 1/21/20, the Court entered its 5/1/20 Ruling awarding Goche a total of \$68,831.10 for attorney fees on his indemnity claim against WMG. The trial court did not award Goche any “fees on fees” for legal work performed by his attorneys in this case. (5/1/20 Ruling, pp. 9-11; App. I, 209-211).

WMG’s IRCP 1.904 Motion

On 5/12/20, WMG filed its IRCP 1.904 Motion to Enlarge the 5/1/2020 Ruling, urging that the Court had miscalculated its award and/or it involved a scrivener’s error. (5/12/20 Motion; App. I, 213-235). WMG urged the Court to recalculate its award and reduce it to \$27,627.00 and/or \$23,633.50. (5/12/20 Motion; App. I, 215-217). On 5/18/20, Goche filed his Resistance. (5/18/20 Resistance; App. I, 236-237). On 5/19/20, the Court overruled WMG’s 1.904 Motion. (5/19/20 Order; App. I, 240).

On 6/3/20, Goche filed his Notice of Appeal. (Notice of Appeal; App. I, 243). On 6/9/20, WMG filed its Notice of Cross-Appeal. (Notice of Cross-Appeal; App. I, 246-247).

STATEMENT OF FACTS

Background – Afshar Lawsuit

WMG is an Iowa limited liability company whose members are Michael Goche, Jeanne Goche-Horihan, Joseph Goche, and Renee Afshar. (Petition, ¶ 2; App. I, 68).

Plaintiff’s claim arises out of the events that occurred in a different lawsuit, *Afshar et al. v. Goche et al.* LACV026869, where Goche was required to defend a breach of fiduciary duty claim asserted by WMG. Goche’s defense ended 11/30/17 when the *Afshar* Court, by summary judgment, dismissed WMG’s claim. (11/30/17 *Afshar* Order; App. I, 52-61). In this case, Goche sought “fees and expenses he incurred defending . . . through November 30, 2017. . . .” (12/21/17 Goche Reply Brief, p. 6; 1/21/18 Tr. 20:15-25; App. I, 140, 174).

Disagreements among the Goche family members, WMG, and NCJC (a company owned by Joseph Goche) has resulted in several

lawsuits.¹ These litigations caused a breakdown of company management and as a result, on 6/14/17, the *Afshar* court appointed attorney Larry Eide to act as Receiver for WMG and also issued a “60-day stay of all litigation involving WMG”, which was later extended for another 30 days. (11/30/17 Ruling, p. 4; 1/21/20 Tr. 40:22– 41:19; App. I, 53; App. III, 134-135).

Since being appointed Receiver by the *Afshar* court, Mr. Eide has worked toward winding down the business of WMG. (10/20/17 Tr. 6:22–7:20, App. I, 113). As part of his duties, Mr. Eide has defended WMG in different lawsuits filed by Joe Goche or his company, NCJC.² (10/10/17 Motion to Consolidate; App. I, 87-91).

¹ *Afshar v. WMG, et al.*; United States District Court for District of Iowa; *Afshar et al. v. Goche et al.* LACV026869; *NCJC v. WMG*; LACV027055; and *Goche v. WMG* LACV027056. (5/1/20 Ruling, pp. 2-3; 10/10/17 Motion to Consolidate; App. I, 50-51).

² In this case, Goche also asserted a breach of warranty deed claim which was the subject the subject of an earlier appeal and reversal in favor of WMG. *Goche v. WMG, L.C., No. 18-793*. After a retrial, on 1/10/20, the Court found in favor of WMG and entered a decree reforming the disputed deed, from which Goche has not appealed. (Decree; App. I, 191-200). Another companion case and attorney fee dispute appear in *NCJC, Inc. v. WMG, L.C; 19-0241*. Both of these opinions provide some information about the parties and family dynamics.

Goche, both in this case and in *Afshar*, has alleged that his indemnity claim against WMG arises out of his being required to defend claims alleged in *Afshar*, namely: (1) breach of fiduciary duty claims alleged by Renee Afshar and Jeanne Goche-Horihan, and (2) a 10/16/16 breach of fiduciary duty claim alleged by WMG. (4/3/17 Petition; 1/26/18 Tr. 20:15-22; App. I, 68-78,174).³

In *Afshar*, Goche sought attorney fees and expenses from WMG totaling \$159,884.63 for defending claims brought against Goche by Rene Afshar and Jeanne Goche-Horihan. (12/29/16 Ruling, p. 3; App. I, 17). The Hon. Don Courtney disallowed much of Goche's claim and reduced the hourly rate charged by his chief counsel, Norm Baer, from \$560.00 hour to \$250.00/hour and arrived at an award of \$51,455.27. (12/29/16 *Afshar* Ruling, pp. 15 & 22; 1/21/20 Tr. 22:1– 24:12; App. I, 29,36; App. III, 116-118).

³ Goche also sought indemnity from WMG in both *Afshar* and in this case for being required to defend against breach of fiduciary duty claims alleged by Rene Afshar in a federal court lawsuit. The *Afshar* court declined to award Goche any indemnity for the federal court litigation and Goche later dismissed those counts in this lawsuit. (12/29/17 Order, pp. 16-17; Dismissal; App. I, 16-17, 146-147).

After this award, Goche still sought additional indemnity from WMG in *Afshar* for defending a 10/17/16 breach of fiduciary duty claim alleged by WMG. (10/10/17 Dismissal; 11/30/17 Ruling, p. 4, App. I, 50-51, 55).

Because the 12/29/16 *Afshar* Ruling only disposed of part of Goche's claims, neither party was sure whether that ruling was a final order until a 1/9/18 Ruling in *Afshar* confirmed that indeed it was. (11/30/17 Ruling, pp. 4-5; 1/9/18 *Afshar* Ruling; App. I, 55-56, 62-67).

On 4/3/17, while *Afshar* was still pending, but before Receiver Eide was appointed, Goche filed this lawsuit also seeking the same indemnity relief he was still seeking in *Afshar*, including relitigating the *Afshar* rulings. (Petition; 11/22/17 SOF ¶ 21; 1/26/18 Tr. 20:15-22; App. I, 97, 174). On 4/26/17, WMG filed an answer, giving notice to Goche, that WMG was asserting defenses of "issue preclusion, claim preclusion, res judicata, claim splitting and/or the law of the case." (Answer; App. I, 83).

Afshar v. Goche, et al.

On 9/14/17, in *Afshar*, Goche filed a Motion for Summary Judgment. (Motion for Summary Judgment; App. I, 92-93). About this

time, Receiver Eide made a business decision to switch counsel, forgo pursuing WMG's breach of fiduciary duty claim against Goche and not resist Goche's motion for summary judgment and claim for indemnity in *Afshar*. (10/2/17 Appearance; 10/20/17 Tr. 6:22-7:20; 1/21/20 Tr. 42:5-43:9; 11/30/17 Ruling, p. 4; App. I, 86,113, 58). At that point in time, the *Afshar* case was ripe for the court to adjudicate the amount of indemnity, if any, WMG owed Goche. (1/21/20 Tr. 42:6-44:11; 46:10-20; App. III, 136-140).

Considering that the *Afshar* court had issued a 90 day stay and only limited activity had occurred since WMG filed its 10/17/16 claim, Receiver Eide did not believe "that the exposure was too great." (1/21/20 Tr. 42:6-43:10; App. III, 136-137).

Then, on 10/10/17 in *Afshar*, Goche voluntarily dismissed his indemnity cross-claim against WMG, without prejudice. (Voluntary Dismissal; App. I, 50-51).

Goche v. WMG

After Goche dismissed his indemnity claims in *Afshar*, he continued with the same claims in this case. (4/3/17 Petition; 11/22/17 SOF ¶ 21; 1/26/18 Tr. 20:15-22; App. I, 68-78,97, 174). On 11/22/17,

after Goche had filed his 10/10/17 voluntary dismissal of all of his claims against WMG in *Afshar*, Goche filed a Motion for Partial Summary Judgment in this case. (Motion; App. I, 92-93). On 12/15/17 WMG resisted, again raising its affirmative defense of “claim preclusion, issue preclusion and improper claim-splitting.” (Memo, pp. 4; App.I, 130). WMG also objected to Goche splitting his claims . . .” and urged that “the effect of the Court’s order and Goche’s dismissal cancels Goche’s indemnification claim and/or prevents it from being relitigated in this case.” (Memo, p. 5; Response to SOF ¶ 21; App. I, 130, 125). WMG also urged that operating agreement did not provide for indemnity. (WMG Memo, pp. 4-6; App. I, 130 - 132).

Afshar v. Goche, et al.

On 11/30/17, the *Afshar* court granted Goche’s Motion for Summary Judgment dismissing WMG’s breach of fiduciary duty claim. (11/30/17 *Afshar* Ruling; App. I, 52-61.

Goche v. WMG

On 2/26/18, Goche voluntarily dismissed Counts I and II of his Petition. (Dismissal; App. I, 146-147). On 2/27/18, the Court entered an Order sustaining Goche's Motion for Partial Summary Judgment on

his indemnification claim and full summary judgment on Goche's breach of warranty deed claim. (2/27/18 Ruling; App. I, 148-163).

On 5/4/18, WMG filed its Notice of Appeal on the breach of warranty deed ruling and on 9/19/18, this Court stayed trial on the indemnification counts until the appeal and subsequent separate trial on the deed reformation issue was resolved. (9/19/18 Order; App. I, 188).

On 12/5/19, the court held a trial on the deed reformation issue and as part of a 1/9/20 decree reforming the disputed deed, the court held that the "operation of WMG is controlled and governed by an Operating Agreement." (1/9/20 Decree, p. 2; App. I, 192).

On 1/7/20, Goche filed his Amended Pre-Trial Brief characterizing his claims as, "his right to indemnification for fees he incurred to defend against WMG" in *Afshar*. (Plaintiff's Amended Pretrial Brief, p. 4; App. IV, 10).

1/21/20 Trial on Indemnity

After a trial on 1/21/20, the trial court entered its 5/1/20 Ruling awarding Goche a total of \$68,831.10 on his indemnity claim. (5/1/20 Ruling; App. I, 201-211).

The court's order does not establish a beginning or ending date for the hours it approved. (5/1/20 Ruling; pp. 4-8; App. I, 204-208). The order, in addition to failing to identify the "defense" time window for fees, does not set forth the number of hours approved or provide any kind of a formula such as "hours multiplied by hourly rate" to arrive at the court's award of \$68,831.10. *Id.*

WMG's 1.904 Motion

On 5/12/20, WMG filed its 1.904 Motion to Enlarge the 5/1/20 Ruling urging that the trial court miscalculated its award and/or there was a scrivener's error. (Motion to Enlarge; App. I, 213-235). WMG, multiplied court's own rate formula by the entire number of hours Goche's counsel spent on case during the 10/17/16 to 11/30/17 time window and calculated a total award of only \$27,627.00. (Motion to Enlarge; App. I, 215). WMG urged the court to reduce the award to \$27,627.00. *Id.* WMG further urged that Judge Courtney's ruling in *Afshar*, if not preclusive, should at least be given additional weight, and as a result the award should be recalculated and reduced to \$23,630.00. (Motion to Enlarge; App. I, 216). On 5/19/20, the Court overruled WMG's 1.904 Motion. (5/19/20 Order; App. I, 240). As part of the

ruling, the trial court held “the court does not give preclusive effect to Judge Courtney’s rulings nor is this court required to do by law.” *Id.*

On 6/3/20, Goche filed his Notice of Appeal. On 6/9/20, WMG filed its Notice of Cross-Appeal. (Notice of Cross-Appeal; App. I, 246-247).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT PLAINTIFF COULD NOT RECOVER ATTORNEY FEES THAT HE INCURRED IN THIS CASE.

A. Scope/Standard of Review And Preservation of Error.

Review of a Court’s grant of summary judgment is for correction of legal error. *Keokuk Ry. Co. v. IES Indus., Inc.*; 618 N.W.2d 352, 355 (Iowa App. 2016). Review of the Trial Court’s interpretation and application of Iowa Code §§ 489.102, 489.110, and 489.408 is for legal error. *Rick v. Sprague*, 706 N.W.2d 717, 723 (Iowa 2005); *Harris v. Olson*, 558 N.W.2d 408, 409 (Iowa 1997). “A successful party need not cross-appeal to preserve error on a ground urged but ignored or rejected in trial court.” *Johnston Equipment v. Industrial Idem.*; 489 N.W.2d 13, 16 (Iowa 1992). The trial court may be affirmed on

grounds upon which it does not rely. *Johnston Equipment*, 489 N.W.2d at 17.

The court reviews the record made on summary judgment in the light most favorable to the non-moving party. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001). A question of fact exists if reasonable minds could differ on a particular issue. *Walderbach v. Archdiocese of Dubuque, Inc.*, 730 N.W.2d 198, 199 (Iowa 2007).

If a jury or fact finder could reasonably enter a verdict for the non-moving party, then summary judgment should not be granted. *Carr v. Bankers Trust*, 546 N.W.2d 901, 903 (Iowa 1996). The court does not weigh the evidence; rather, it inquires whether a reasonable jury faced with the same evidence could return a verdict for the party opposing summary judgment. *Meade v. Ries*, 642 N.W.2d 237, 241 (Iowa 2002). Where a fact issue is generated by the pleadings, depositions, affidavits or other instruments before the court, a motion for summary judgment should not be sustained. *Davis v. Comito*, 204 N.W.2d 607, 608 (Iowa 1973).

Even if the underlying facts are largely undisputed, a summary judgment is still not proper if reasonable minds could draw different

inferences and conclusions from undisputed facts. *Marks v. Estate of Hartgerink*, 528 N.W.2d 539, 544 (Iowa 1995).

If there is substantial evidence in the record to support the decision, the appellate court is bound by the trial court's fact-findings. *Gosch v. Jeulfs*, 701 N.W.2d 90, 91 (Iowa 2005). However, the reviewing court is not bound by the trial court's application of legal principles. *Id.*

Review of a court's award of attorney fees is for an abuse of discretion. *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897 (Iowa 1990). "*Reversal is warranted only when the court rests its discretionary ruling on grounds that are clearly unreasonable or untenable.*" *Boyle v. Alum-Line*, 773 N.W.2d 829, 832 (Iowa 2009) quoting *Gabelmann v. NFO, Inc.*, 606 N.W.2d 339, 342 (Iowa 2000). A misapplication or misinterpretation of a statute constitutes abuse of discretion. *Gabelmann v. NFO, Inc.*, 606 N.W.2d 339, 342, 344 (Iowa 2000).

WMG preserved error by filing its 4/26/17 answer asserting affirmative defenses of issue preclusion, claim preclusion and claim

splitting, by resisting Goche's Motion for Summary Judgment on 12/15/17 and raising these affirmative defenses again, by filing its 1/11/18 Supplement to Summary Judgment record demonstrating that the *Afshar* Rulings were final, by arguing these affirmative defenses yet again at the 1/26/18 Summary Judgment hearing, by filing its 3/13/18 1.904 Motion to Enlarge, by defending Goche's claim at the 1/21/20 Trial, by filing its 5/12/20 1.904 Motion to Enlarge and by filing its Notice of Cross Appeal. (4/26/17 Answer; 12/15/17 Resistance to Motion for Summary Judgment; Response to Statement of Facts, Statement of Facts, Memorandum; 1/11/18 Supplement; 3/13/18 Motion to Enlarge; 1/26/18 Tr. 9:20-13:15; 5/12/18 Motion to Enlarge; App. I, 79-85, 12, 124-126, 121-123, 127-134, 144-145, 170-175, 172-173, 213-235).

B. The Trial Court Correctly Ruled That Plaintiff Was Not Entitled To Recover Attorney Fees Incurred in This Case To Pursue His Indemnity Claim for Fees That Were Incurred in A Different Case.

Although WMG urges that the court erred by granting Goche a 2/27/17 partial summary judgment on the indemnity issue, it does agree that the District Court correctly held that Goche could not recover fees

incurred in this case, which it referred to as “fees on fees”. (5/1/20 Ruling, pp. 9-11; App. I, 209-211). Also, there other grounds upon which the court did not rely that support the court’s ruling. In summary, because Goche had already asserted the same claims in *Afshar*, and which were ripe to be ruled on there, not only was this lawsuit completely unnecessary, his claims are now barred. WMG will address the additional grounds in Division II.

WMG begins by addressing the trial court’s rejection of Goche’s “fees on fees” claim, and the grounds upon which it does rely, which WMG urges is correct. It is well-established Iowa law that attorney fees are not to be awarded “in the absence of a statute or agreement expressly authorizing it. In order [for fees to be] taxed the case must come clearly within the terms of the statute or agreement.” *Van Sloun v. Agan Bros., Inc.*, 778 N.W. 2d. 174, 182 (Iowa 2010), quoting from *Thorn v. Kelley*, 134 N.W.2d 545, 548 (Iowa 1965). As the District Court correctly noted,

Joseph's attorneys neither cite, or has the Court found, any Iowa appellate court case where a fees on fees claim of the type alleged by Joseph in the present case has been addressed. Moreover, Joseph does not cite the Court to any provision of WMG’s Articles of Organization or operating agreement that would support such a claim.

(5/1/20 Ruling, p. 9; App. I, 209).

The District Court also correctly noted that:

there is presently no Iowa appellate authority interpreting Iowa Code § 489.408(1) as providing indemnification to the former member and manager of the limited liability company to recover attorney fees and expenses incurred in litigating an indemnification claim.

(5/1/20 Ruling, p. 10; App. I, 210).

Although Goche’s brief, p. 10, relies on Iowa Code § 489.408 in seeking an award of “fees on fees,” nowhere in that code section does the phrase “attorney fees” appear. Iowa Code § 489.408 does not “expressly” or “clearly” provide for attorney fees as required by *Van Sloun v. Agan Bros., Inc.*, 778 N.W.2d. 174 (Iowa 2010). The Court’s reasoning is correct and its decision to deny Goche any “fees on fees” should be affirmed.

Also, a party applying for attorney’s fees must show “that the services were reasonably necessary and the charges were reasonable in amount.” *GreatAmerica Leasing Corp. v. Cool Comfort Air Conditioning & Refrigeration, Inc.*, 691 N.W.2d 730, 733 (Iowa 2005), quoting from *Schaffer v. Frank Moyer Constr., Inc.*, 628 N.W.2d 11,

23 (Iowa 2001). Goche’s lawsuit fails this test because his lawsuit was neither “reasonable” nor “necessary.” Indeed, Goche provides no explanation as to why his claim for fees was not submitted to the *Afshar* court or why he even needed to file this lawsuit.

The reality is Goche was unhappy that the *Afshar* court reduced his fee request from \$159,884.63 to \$51,455.27. Goche did not believe the \$51,455.27 *Afshar* order was final and he proceeded to forum shop and initiate parallel litigation. (11/22/17 Statement of Facts, ¶ 21; App. I, 97). WMG gave Goche fair notice that it intended to rely on the affirmative defenses of “issue preclusion, claim preclusion, res judicata, [and] claim splitting” in this case to bar his claims. (Answer, p. 5; App. I, 83). Even though Goche’s indemnity claim was ripe for resolution in *Afshar*, he made a conscious choice to dismiss his claims there despite his knowledge of WMG’s claim-splitting defenses. In summary, this lawsuit not only was unreasonable, it was unnecessary. Goche’s claims here should be barred.

The Iowa cases cited by Goche, *Lynch v. City of Des Moines*, 464 N.W.2d 236, 240 (Iowa 1990) and *D.D. v. Davenport Community Sch. Dist.*, 839 N.W.2d 676, 2013 WL 3864594, *4 (Iowa App. 2013) are

distinguishable. *Lynch* and *D.D. v. Davenport Community Sch. Dist.*, both involve specific attorney fee shifting statute and contain elements of equitable relief. They also contain a component of furthering public policy – such as correcting hostile work environments or making public records available. In contrast, Goche’s claim involves a business dispute rather than a civil rights claim. Iowa Code § 489.408 is merely a general indemnity statute rather than one that specifically provides for recovery of attorney fees. Finally, Goche’s indemnity claim contains no component of equitable relief.

Goche also cites to several Federal opinions and one Delaware case, *Sifel v. Financial Corp. v. Cochran*, 809 A.2d 555 (Del. 2002). The Federal cases involve specific fee shifting statutes, like the Individuals with Disabilities Education Act (IDEA) and involve Federal law not Iowa law. The out-of-state cases cited by Goche do not stand for the proposition that a claimant who files an unreasonable and unnecessary lawsuit should be awarded fees. In summary, none of these authorities change the Iowa rule that “[i]n order [for fees to be] taxed the case must come clearly within the terms of the statute or

agreement.” *Van Sloun v. Agan Bros., Inc.*, 778 N.W. 2d. 174, 182 (Iowa 2010).

The Court’s decision denying Goche’s “fees on fees” claim should be affirmed.

II. THE DISTRICT COURT ERRED BY ITS AWARD OF ANY ATTORNEY FEES TO PLAINTIFF.

A. Scope/Standard of Review And Preservation of Error.

WMG repeats Division I(A).

B. The District Court Erred by Awarding Any Attorney Fees To Plaintiff On His Indemnification Claim Because WMG Gave Notice to Goche of WMG’s Claim-Splitting and Preclusion Defenses, *Afshar* Concluded with a Final Order and Goche is Precluded from Asserting the Same Claims Again in this Lawsuit.

The District Court erred in awarding any attorney fees to Goche because his lawsuit involves improper claim splitting. Goche had already asserted the same claims in *Afshar*. When Goche filed this lawsuit, WMG gave Goche notice that it would be asserting the affirmative defense of “issue preclusion, claim preclusion, res judicata, claim splitting” and “law of the case.” (Answer, p. 5; App. I, 83). Despite Goche’s knowledge of WMG’s defenses, he continued to forum shop and dismissed his indemnity claims in *Afshar*. Goche’s

counsel, at the 10/20/17 *Afshar* summary judgment hearing, acknowledged that that res judicata and collateral estoppel would be issues in this case:

And if there's an ongoing dispute about indemnification, then there will be arguments made and a decision made by the judge in front of -- who's hearing those arguments about their res judicata or collateral estoppel effect. That's not something that gets done by going back to the Judge that issued the order and say wipe out the order. We can't pretend that that history didn't happen. It happened. There's an order there. Judgment never got entered. The claim got dismissed. Now we're in front of another judge on another case. And the question is what is the res judicata or collateral estoppel effect of that order, of the other orders related to indemnification. And that's an issue that has to be decided

(10/20/17 Tr. 21:3-18; App. I, 117).

At that point in time, Goche still had 40 days until the 11/30/17 summary judgment order, to walk back his voluntary dismissal in *Afshar* and submit his proof seeking recovery on his remaining indemnity claim for attorney fees. Goche chose otherwise and his indemnity claim is now barred.

The Iowa Supreme Court recently issued a comprehensive opinion analyzing claim preclusion and issue preclusion. *Lemartec Engineering & Construction v. Advance Conveying*, 940 N.W.2d 775,

779 (Iowa 2020). *Lemartec* explains that: "[c]laim preclusion is 'based on the principal that the party may not split or try his claim piecemeal A party must litigate all matters going out of his claim at one time and not in separate actions.'" (Citations omitted).

The *Lemartec* court also described issue preclusion:

2. *Issue preclusion.* Issue preclusion prevents a party "from relitigating in a subsequent action issues raised and resolved in [a] previous action." *Soults Farms, Inc. v. Shafer*, 797 N.W.2d 92, 103 (Iowa 1981). "[W]here a particular issue or fact is litigated and decided, the judgment estops both parties from later litigating the same issue." *Grant v. Iowa Dep't of Human Servs.*, 722 N.W.2d 169, 174 (Iowa 2006). Issue preclusion applies to both factual and legal issues raised and resolved in a previous action. See *Barker v. Iowa Dep't of Pub. Safety*, 922 N.W.2d 581, 587 (Iowa 2019).

The doctrine "serves a dual purpose: to protect litigants from 'the vexation of relitigating identical issues with identical parties' " and to further "the interest of judicial economy and efficiency by preventing unnecessary litigation." *Winnebago Indus. v. Haverly*, 727 N.W.2d 567, 571-72 (Iowa 2006) (quoting *Am. Family Mut. Ins. v. Allied Mut. Ins.*, 562 N.W.2d 159, 163 (Iowa 1997)). Issue preclusion "prevent[s] the anomalous situation, so damaging to public faith in the judicial system, of two authoritative but conflicting answers being given to the very same question." *Emp'rs Mut. Cas. v. Van Haaften*,

815 N.W.2d 17, 22 (Iowa 2012) (quoting *Grant*, 722 N.W.2d at 178).

Id.

Here, Goche's forum shopping and parallel litigations improperly split his claims, piecemealing them between *Afshar* and this case. WMG's 4/26/17 Answer gave fair notice to Goche that he was improperly splitting his indemnity claims between *Afshar* and this case. Goche, despite this knowledge, dismissed his remaining indemnity claims in *Afshar* and he is now precluded from relitigating them.

In summary, Goche's indemnity claims are barred under the doctrines of claim preclusion, issue preclusion, and claim splitting. The trial court erred in awarding any attorney fees to Goche. This court should reverse the District Court's award of fees and enter an order directing the District Court to dismiss this lawsuit at Plaintiff's costs.

C. Alternatively, Plaintiff Should Not Recover Fees Incurred in this Case Because Iowa Code § 489.408 Does Not Expressly Provide for Recovery of Attorney Fees and the WMG Operating Agreement Does Not Provide for Indemnity.

Although claim preclusion, issue preclusion, and improper claim splitting should bar Goche's claim, if this court holds that the *Afshar* rulings are not preclusive, then the court should also revisit the trial

court's rulings on whether Iowa Code § 489.408 even allows for recovery of attorney fees. Further, the court should reconsider whether the WMG operating agreement and articles of organization modify Iowa Code § 489.408 to preclude indemnity.

As discussed in Division I(B) above, Iowa Code § 489.408, although providing for indemnity, does not expressly provide for recovery of attorney fees *Van Sloun v. Agan Bros., Inc.*, 778 N.W. 2d. 174, 182 (Iowa 2010). Further, even if it did, Iowa Code § 489.110(7) allows the Operating Agreement to modify Iowa Code § 489.408 indemnity rule. WMG urges the court erred by holding that Iowa Code § 489.408(1) controls whether WMG is liable to Goche for indemnity, rather than Iowa Code § 489.110(7) and WMG's Operating Agreement. Limited liability companies like WMG are governed by their operating agreement. Iowa Code § 489.110. The trial court also agreed that "operation of WMG is controlled and governed by its operating agreement." (1/9/20 Decree, p. 2; App. I, 192).

The WMG Operating Agreement, in section 5.6, provides: "Indemnity of the Managers. The Managers shall be indemnified by the Company to the extent provided in the Company's Articles of

Organization.” (Operating Agreement, App. IV, 6). The WMG Articles of Organization do not provide for any indemnification. (Articles; App. IV, 4-5). The District Court erred by holding that these circumstances trigger Iowa Code § 489.110(2) which provides that when an operating agreement is silent on a topic, the statutory rule controls. (2/27/18 Ruling, p. 10; App. I, 157). The court is incorrect. Iowa Code § 489.110(7) provides that the Operating Agreement may alter or eliminate indemnification for a member. The WMG Operating Agreement is not silent on the issue of indemnification. It mentions indemnification, but does not provide for it. (Operating Agreement, Sec. 5.6; App. IV, 6, 4-5). The Court erred in applying Iowa Code § 489.408 to rule that indemnification applied.

In summary, if this Court decides that the *Afshar* rulings are not preclusive, this court should re-evaluate whether Iowa Code § 489.408 even provides for recovery of attorney fees. Further, the court should re-evaluate the combined effect of Iowa Code § 489.110(7) with the WMG Operating Agreement and its Articles of Organization. This court should reverse the District Court’s award of fees and enter an

order directing the District Court to dismiss this lawsuit at Plaintiff's costs.

III. THE DISTRICT COURT ERRED BY MISCALCULATING ITS AWARD AND BY INCORRECTLY AWARDING PLAINTIFF ATTORNEY FEES THAT WERE UNRELATED TO HIS INDEMNITY CLAIM.

A. Scope/Standard of Review And Preservation of Error.

WMG repeats Division I(A).

B. The Trial Court Erred By Miscalculating Its Award and By Awarding Plaintiff Attorney Fees That Were Unrelated To His Indemnity Claim.

The Court's 5/1/20 ruling awarding Goche \$68,831.10 on his indemnity claim held:

This court concluded as a matter of law that WMG was liable to Joseph for indemnification of attorney fees and expenses he **incurred to defend himself against the claims brought against him from WMG for alleged breach of his duties as then-manager of WMG.** (2/27/18 Ruling p.p. 7-11). By this reference, the Court now incorporates this section of its ruling on Plaintiff's Motion for Summary Judgment . . .

Emphasis supplied. (Ruling pp. 7 & 11; App. I, 208, 211).

The trial court erred, by awarding to Goche not only his defense costs, but also expenses unrelated to any defense costs.

The 5/1/20 ruling awards Goche “attorney fees and expense incurred to defend himself . . .” (Ruling, p. 2; App. I, 202). The ruling also acknowledges that Goche’s claim starts on 10/17/16 when “WMG alleged a claim against Joseph for breach of his duties” (Ruling, p. 3; App. I, 203). Also, Goche concedes that the end date for his claim is November of 2017. (12/21/17 Reply Brief, p. 6; 1/26/18 Tr. 20:15-22; App. I, 140, 174).

As indicated above, WMG urges that the trial court initially erred by granting Goche summary judgment on his indemnification claim. The trial court erred again, in its 5/1/20 ruling, by failing to provide any real calculus as to what hours it approved, for which tasks, or for what time periods. Also, the trial court erred by awarding Goche attorney fees that are unrelated to his defense of WMG’s breach of fiduciary duty claim in *Afshar* and outside the defense time period. The trial court erred by miscalculating the award based on its own holding. It also erred by failing to clarify its analysis by providing a full calculation and by failing to identify the number of hours approved so they could be multiplied by the approved hourly rate.

The District Court also abused its discretion in weighing the evidence based on the unusual facts of this case. The 5/1/20 ruling held that it:

is to be considered an expert on the issue of reasonable attorney fees, having had the benefit of observing the entirety of the proceeding, and therefore, being in an ideal position to judge the necessity of time and effort spent by counsel and the rationality of the relationship between the services rendered and the causes of action and other matters involved in the case.

(Ruling, p. 7; App. I, 207).

Under normal facts this rule would be correct, but the facts in this case are hardly normal. Goche, by filing a separate lawsuit, is asking this Trial Judge, the Hon. David Lester, to rule on and value fees for legal work performed in not only a different case, *Afshar*, but one even presided over and ruled upon by a different judge, the Hon. Don Courtney. Then Goche asks the trial court to follow a methodology different from what Judge Courtney has already decided upon and to award rates in excess of what Judge Courtney had approved. As a result, the trial court awarded fees that were not related to “defense” costs and others that had already been disallowed or circumscribed by Judge Courtney in *Afshar*.

The *Afshar* court had already performed all of the heavy lifting regarding evaluation of Goche's attorney fees. The 12/29/16 *Afshar* ruling contains a detailed analysis, developing a methodology for calculating Goche's attorney fees, determining what time to allow (hours for defense costs) and what the hourly charge should be (\$250.00/hour for high end).

The trial court also had the benefit of Receiver Eide's calculations. The *Afshar* court appointed Mr. Eide as receiver of WMG to manage this litigation. Mr. Eide is a court officer. He is a CPA. He has a background of being appointed by courts to act as a receiver for troubled companies embroiled in litigation. As a follow-up to the *Afshar* ruling, and as an intended aid for the trial court, Receiver Eide, performed a detailed and labor-intensive analysis of the time records submitted by Goche's counsel by applying the *Afshar* calculus to all of their time.

For purposes of Receiver Eide's analysis, he gave Goche the benefit of the doubt and started by accepting all hours for both cases, *Afshar* and LACV027056. (1/21/20 Tr. 25:6-26:4; App. IV, 119-120). He then deducted off the time for those matters that either Goche had

already submitted to the *Afshar* court or that Judge Courtney had rejected. (1/21/20 Tr. 50:21–53:18; Ex. S; App. III, 144-147, 9-29). Receiver Eide then multiplied the remaining hours by the rates established by Judge Courtney which calculates to a total of \$38,067.53. (1/21/20 Tr. 22:1–27:15; 49:15–53:18; App. III, 116-121, 143-147).

The \$38,067.53 figure is still high because it also includes the “fees on fees” time expended in LACV027056. Receiver Eide then testified that those hours Goche’s counsel expended in LACV027056, the “fees on fees” time were not necessary because the indemnity matter was already ripe and ready to be decided in *Afshar*. (Tr. 49:16–50:21; 56:12–57:14; App. III, 143-144, 150-151). Receiver Eide’s calculations were supported by exhibits used to explain his calculations. (Ex. S, U-1, V; App. III, 9-29, 88-89, 90-94).

In contrast to the *Afshar* ruling and Receiver Eide’s work, the trial court’s analysis of Goche’s fees is limited and incomplete. The trial court, despite all the work performed by both the *Afshar* court and Receiver Eide, abused its discretion by giving little or no weight to their efforts, calculations, and charts. Worse yet, the District Court’s ruling

provides no real explanation as to how it arrived at \$68,831.10. Although the ruling sets out approved hourly rates, it provides no explanation as to which hours were approved or for what time periods. The trial court ruling provides no kind of calculus or multiplication formula so the parties can understand how it arrived at an award of \$68,831.10. The *Afshar* court provides such an analysis. Receiver Eide provides such an analysis. The trial court provides no such analysis. The trial court erred.

The trial court also erred by awarding Goche fees that pertain to the administrative activities of the receivership and which are totally unrelated to defense costs. (5/19/20 Order; App. I, 240). The *Afshar* court had rejected these fees holding:

Joseph has the burden to prove his litigation expenses were related to his indemnification claim or fiduciary duty claims against him. The court could not possibly have been more explicit that Joe is not presently entitled to indemnity for litigation expenses to WMG's receivership claim. . . . Fees related to receivership are tangential to Joseph's indemnity claim.

(12/29/16 Ruling, p. 17; App. I, 31).

Because of a breakdown in the WMG management, the *Afshar* court appointed Larry Eide to act as receiver for WMG to manage the

various litigations filed by Goche. Had Receiver Eide walked off the job or been terminated as Goche sought, the court would have been left with a legally prostrate and basically pro se defendant. Even worse, no one would have been left to help WMG successfully appeal and reverse the trial court's incorrect ruling on breach of deed reformation claim or to successfully defend it on a claim brought by NCJC, Goche's company. (1/19/20 Decree; *Goche v. WMG, L.C.; No. 18-783; NCJC, Inc. v. WMG L.C. 19-01241*).

In summary, the trial court erred by awarding of fees to Goche unrelated to defense costs. This award not only conflicts with the court's own summary judgment holding, it conflicts with Judge Courtney's award and violates public policy. The trial court erred and its award of attorney fees should be reversed.

C. The Trial Court's Award Is Inconsistent with Its Holding and The Court Erred By Overruling Defendant's 1.904 Motion To Enlarge And By Its Failure To Clarify and Recalculate Its Award.

The court's 5/1/20 holding contains significant calculation errors, is inconsistent with its summary judgment holding, and the court erred in overruling WMG's 5/12/20 IRCP 1.904 Motion seeking

clarification and correction of its award. The court's 5/19/20 order overruling WMG's 1.904 Motion, in part, tersely held:

In reaching this conclusion, the court finds the affidavit of Attorney Kaplan was admitted in evidence at the time of trial, and therefore is properly considered by the court. Secondly, the court declines to accept the newly-raised start date/end date argument by the Receiver.

Thirdly, it is implicit in the court's Ruling that it rejected their Receiver's contention that the fees incurred by plaintiff in resisting and/or seeking termination of the receivership should not be considered as part of his defense of WMG's claims against him. Fourth, the court did not give preclusive effect to Judge Courtney's prior rulings nor is the court required to do so by law.

Finally, the court did not commit a calculation or scrivener's error in calculating the fees and expenses owed.

(5/19/20 Order; App. I, 240).

The trial court's 5/19/20 ruling erred in several respects. There can be no dispute that the beginning date for Goche's defense is 10/17/16 because that is when WMG filed its claim. There can be no dispute that end date for Goche's defense is 11/30/17, when WMG's claim was dismissed on summary judgment. (Plaintiff's Reply Brief, p. 6; Tr. 20:15-22; App. I, 140, 174). For the court to hold this issue is "newly-raised" is incorrect. Also, as discussed in III(B) above, the

court erred by awarding non-defenses fees.

Next, regardless of whether the 5/1/20 ruling contains a scrivener's error or miscalculation, the trial court does not explain its math. WMG's 1.904 Motion is not complicated. It simply redacts those time entries occurring before 10/17/16 and after 12/1/17, totals up the remaining entries and then multiplies those entries by the approved hourly rate to arrive at \$27,627.00, not \$68,831.10. (1.904 Motion; App. I, 213-235). WMG's math is correct. The trial court erred by failing to explain its calculation.

The Kaplan Affidavit – Exhibit 40 – Itemizes No Fees that Were Approved and Should be Disregarded

The Court miscalculated its award by using Exhibit 40 - attorney Phillip Kaplan's Affidavit and which only contains a summary of the total for Exhibits 39 & 41, attorneys Baer and Graham's time, rather than their actual time records. All fees which Goche incurred in *Afshar*, between 10/17/16 and 11/30/17 are itemized on Exhibit 39, part G (attorney Baer & Kaplan fees) and Exhibit 41, part D (attorney

Graham fees).⁴ The trial court miscalculated by using Exhibit 40 – the Kaplan summary, rather than the actual time records, because it includes time outside of the defense period and for matters unrelated to defense.

For example, Page 5 of the Kaplan Affidavit contains the following chart which list the numbers \$85,325.10 and \$9,888.00, which when added together total \$95,213.10.

<i>Afshar v. WMG, L.C., et al.</i>	AOBL	\$85,325.10 (Aff. of Philip J. Kaplan ¶ 11, Exs. C-D; Aff. of Norman J. Baer ¶ 12, Exs. F-G)
<i>Afshar v. WMG, L.C., et al.</i>	GEC	\$9,888.00 (Aff. of Wesley T. Graham ¶¶ 11-12, Exs. C-D)

This \$95,213.10 figure is the number that trial court use to begin its analysis. However, those figures again, are merely totals that Kaplan has drawn from Exhibit 39 and Exhibit 41 and includes time outside of the defense time frame. The rest of Kaplan’s Affidavit pertains to fees, which according to Kaplan himself, is for time he spent representing Goche during 2018 to present, well after the WMG case

⁴ Kaplan only spent 3.3 hours on *Afshar* and his time is already included in Exhibit 39.

against Goche had been dismissed. (Ex. 40, ¶¶ 6, 10-11; App. II, 202-204). In short, the Court's misuse of Kaplan's Affidavit caused it to miscalculate the award. The Court should have looked only to the affidavits of attorneys who actually handled the *Afshar* case, namely Exhibit 39 and Exhibit 41, to determine the number of hours they spent defending Goche in *Afshar*.

Actual Hours for Defense Time Period

The hours spent by Goche's attorneys during the defense time window of 10/17/16 to 11/30/17, total:

- Norm Baer: 66.45 hours;
- Shannon Finn (SLF- paralegal): 9.35 hours;
- Phillip Kaplan: 3.3 hours x \$290.00; and
- Wesley Graham: 23.2 hours.

(Redacted Ex. G and D attached to 1.904 Motion; App. I, 218-235).

The Court's 5/1/20 Ruling provides:

- Norm Baer's hourly rate is reduced from \$560/hour to \$300/hour;
- Mr. Graham's hourly rate is reduced to \$250 and Mr. Kaplan's hourly rate of \$290 is left unchanged; and

- Legal assistant Shannon Flinn's rate ("SLF") is reduced from \$185.00 hour to \$100.00 per hour.

(Ruling p. 8; App. I, 208).

By multiplying the Court's approved hourly rates by the hours spent between 10/17/16 and 11/30/17 defending WMG's claims in *Afshar*, the corrected total is \$27,627.00, and is broken down as follows:

- Norm Baer: 66.45 hours x \$300.00 = \$19,935.00;
- Shannon Finn (SLF-paralegal): 9.35 hours x \$100.00 = \$935.00;
- Phillip Kaplan: 3.3 hours x \$290.00 = \$957.00;
- Wesley Graham: 23.2 hours x \$250.00 = \$5,800.00.

(Redacted Ex. G and D attached to 1.904 Motion; App. I, 218-235).

The Court erred in its 5/19/20 Order by its declining to revise, correct or clarify its award.

WMG also urges that Judge Courtney, in LACV026869, was in the best position to value the services of Plaintiff's Counsel because Judge Courtney presided over the specific matter and services that are now in dispute. The Court also abused its discretion by providing

almost no explanation as to why it gave no weight to Receiver Eide's testimony, calculations and exhibits applying Judge Courtney's methodology. WMG also respectfully posits that it was error and/or an abuse of discretion for the trial court to give little or no deference to Judge Courtney's hourly rate findings and holdings without explanation.

Afshar Fee Calculation

Judge Courtney established the *Afshar* rates as follows:

- Norman Baer: \$250.00 per hour;
- Shannon Finn (SLF)(paralegal): \$60.00 per hour;
- Philp Kaplan: \$200.00 per hour;
- Wesley Graham: \$250.00 per hour.

By multiplying Judge Courtney's hourly rates by the time spent by Goche's lawyers during the defense time period one arrives at the following total:

- Norm Baer: 66.45 hours x \$250.00 = \$16,612.50;
- SLF (paralegal): 9.35 hours x \$60.00 = \$561.00;
- Phillip Kaplan: 3.3 hours x \$200 = \$660.00;
- Wesley Graham: 23.2 hours x \$250.00 = \$5,800.00;

- Total: \$23,633.50.

WMG also urges the Court to further revise and reduce any award for fees to the above calculus.

In summary, the court erred by declining to enlarge, clarify, revise and correct its ruling:

- A. to conform its award to the calculus of the hours and hourly rates stated above by reducing the award to \$27,627.00; and/or
- B. to further revise the Court's award by conforming to the calculus of the hours and hourly rate rates to those determined by Judge Courtney's and reducing the award to \$23,633.50.

CONCLUSION

The Trial Court correctly held that Goche was not entitled to recover attorney fees for pursuit of his indemnity claim in the present case. Further the Trial Court erred by awarding Goche any attorney fees because *Afshar* precludes any further indemnity claims by Goche. Further, the Trial Court erred by incorrectly awarding Goche attorney fees on matters that were not related to his indemnity claim. Further, the Trial Court erred by incorrectly awarding any attorney fees to Goche on his indemnity claim because defendant WMG was not required to indemnify Plaintiff.

The Court should:

- sustain the Trial Court's decision denying Goche any award for recovery of attorney fees to pursue his indemnification claim in the present case;
- reverse the Trial Court's order awarding Goche any attorney fees for his indemnity claim;
- reverse the Trial Court's decision awarding attorney fees to Goche on his indemnity claim and direct the Trial Court to reduce its award to \$27,627.00 or \$23,633.50; and
- for such other relief as the court deems just and equitable.

REQUEST FOR ORAL ARGUMENT

Appellee/Cross-Appellant WMG respectfully requests to be heard in oral argument on this matter.

ATTORNEY'S COST CERTIFICATE

There was no cost for printing this document as it was electronically filed with the Iowa Judicial System Electronic Document Management System.

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Dated: September 28, 2020.

RESPECTFULLY SUBMITTED,

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I certify that on September 28, 2020, I electronically filed the foregoing document with the 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:

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