

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/Cross-Appellee Joseph Goche's Resistance to
Defendant-Appellee/Cross-Appellant WMG, L.C.'s Application for
Further Review

Philip J. Kaplan (MN#0389351)
Anthony Ostlund Baer & Louwagie P.A.
90 South Seventh Street, Suite 3600
Minneapolis, MN 55402
Telephone: 612-349-6969
pkaplan@anthonyostlund.com

Wesley T. Graham AT 0011184
Duncan Green, P.C.
400 Locust Street, Suite 380
Des Moines, IA 50309
Telephone: 515-288-6440
wtgraham@duncangreenlaw.com

ATTORNEYS FOR PLAINTIFF-APPELLANT / CROSS-APPELLEE

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OPPOSITION TO FURTHER REVIEW

The Iowa Supreme Court should deny further review of this case. The Court of Appeals correctly decided the issues presented to it. And rehashing this indemnification dispute between two private parties is not worthy of this Court's valuable time and resources.

A. Procedural Background

The genesis of this appeal is Joseph Goche's request to be indemnified for legal expenses he incurred to defend his conduct as a former manager of WMG, L.C. In a Kossuth County lawsuit with the case number LACV026869, WMG made claims against Goche, asserting that he breached his fiduciary duties when he was serving as a WMG manager. WMG's claims against Goche, which were ultimately dismissed on summary judgment, triggered Goche's right to indemnification under Iowa Code § 489.408(1).

Goche sued WMG for indemnification in a separate lawsuit, LACV027056, in the same court. The district court in LACV027056 decided Goche was entitled to indemnification on summary judgment (Appendix Volume II, ("App. II") at 85-100, February 27, 2018 Order), then awarded Goche \$68,831.10 as indemnification after a bench trial (App. I at 207,

May 1, 2020 Order). However, the district court denied Goche's claim to recover the fees he incurred pursuing indemnification ("fees on fees"). (*Id.* at 210-11). Goche appealed the district court's "fees on fees" decision, and WMG cross-appealed the district court's underlying indemnification award to Goche.

The Iowa Court of Appeals agreed with Goche on all issues the parties raised. Specifically, the Court of Appeals affirmed the district court's indemnification award to Goche, but reversed the district court's denial of "fees on fees." The Court of Appeals remanded so the district court could determine an appropriate "fees on fees" award to Goche, which will be added to the indemnification award already entered. WMG now applies for further review by the Iowa Supreme Court.

B. None of the Issues Warrant Further Review

Although WMG presents four questions for further review, the case really boils down to three issues:

1. Did the Court of Appeals correctly affirm the district court's decision that Goche is entitled to indemnification from WMG?
2. Did the Court of Appeals correctly affirm the district court's calculation of Goche's indemnification award amount?

3. Did the Court of Appeals correctly reverse the district court's denial of "fees on fees"?

None of these issues warrants a decision from the Iowa Supreme Court.

These are not broadly applicable or unsettled issues of law that are so important they need to be resolved for the benefit of future litigants.

First, Goche's right to indemnification is unique to the facts of the case. In the district court, WMG argued that Goche should not be indemnified for two reasons: (a) according to WMG, the WMG Operating Agreement did not provide for indemnification; and (b) according to WMG, Goche's indemnification claim was barred by claim splitting, claim preclusion, and issue preclusion. WMG's arguments are not only wrong - they are also of no interest to anyone outside the two parties here. Both arguments turn on the uncommon facts in this lawsuit. Nobody needs the highest court in the State to re-review WMG's fact-specific arguments.

Perhaps recognizing that the arguments it made below do not merit Supreme Court review, WMG now raises a new defense to indemnification. In particular, WMG argues (incorrectly) that Iowa Code § 489.408(1) does not permit an LLC manager to be indemnified for attorneys' fees incurred while defending against claims by the LLC. WMG

did not make this argument to the district court. The Iowa Supreme Court should not review an argument that WMG did not even preserve for appeal. *See In re Estate of Frye*, 797 N.W.2d 622 (Iowa Ct. App. 2011) (“We will not consider issues raised for the first time on appeal.”).

Second, the amount of Goche’s indemnification award is not a legal issue. It is a pure fact issue that the district court properly resolved by reviewing the evidence presented at trial. This Court should reject WMG’s invitation to second guess the district court’s factual determinations.

Third, there is no need for the Iowa Supreme Court’s guidance on Goche’s right to “fees on fees.” The Iowa Supreme Court has approved “fees on fees” in at least one other case where a party had a statutory right to fees. *See Lynch v. City of Des Moines*, 464 N.W.2d 236, 240 (Iowa 1990). The civil rights statute in *Lynch*, like Iowa Code § 489.408(1) here, did not explicitly provide for “fees on fees.” But the Court decided the plaintiff could recover “fees on fees” as a logical extension of the plaintiff’s underlying right to fees. *Id.* Goche is not aware of any Iowa Supreme Court case – and WMG cites none – in which the plaintiff was entitled to a fee award but was prohibited from recovering fees incurred to litigate that award. Outside of Iowa, there is persuasive authority that a corporate

officer is entitled to “fees on fees” to fight for his or her right to indemnification. See *Stifel Financial Corp. v. Cochran*, 809 A.2d 555, 560-62 (Del. 2002). Awarding “fees on fees” in this context is not controversial. On the other hand, a decision rejecting “fees on fees” would be an illogical outlier.

Moreover, Iowa litigants are not waiting with bated breath for this Court to decide if “fees on fees” are available in an indemnification lawsuit under Iowa Code § 489.408(1). Consider how unusual this case is. The legal issue here will arise again only if all the following facts are present: an Iowa LLC manager is entitled to indemnification; the LLC denies the manager indemnification, forcing the manager to sue for it; enough money is at issue that the indemnification claim is worth litigating; and the manager incurs significant fees fighting for indemnification. The Iowa Supreme Court does not need to weigh in on such a rare occurrence.

C. This is Not a “Companion Case” to Recent Iowa Supreme Court Decisions

The Iowa Supreme Court’s recent jurisprudence does not make this case a compelling candidate for review. This is not a “companion case” to the Iowa Supreme Court’s decision in *NCJC v. WMG, L.C.*, 2021 WL

2171604 (Iowa 2021), as WMG asserts. (AFR at 6 n.1.) The *NCJC* matter arose from a separate lawsuit (LACV027055) with a different plaintiff who made a claim for breach of a lease agreement. The appeal issues in *NCJC* related to the prevailing party's right to recover fees under the lease and various statutes that are not at issue in this case. The *NCJC* case had nothing to do with corporate indemnification or Iowa Code § 489.408(1). The mere fact that the Court previously reviewed *NCJC*'s breach-of-lease case is not a reason to take review of Goche's completely distinct indemnification case.

The Court's recent decision in *Guge v. Kassel Enterprises, Inc.*, 2021 WL 2483399 (Iowa 2021), is also far afield. The *Guge* case dealt with the Court's discretion to award fees in a corporate dissolution case under Iowa Code § 490.1434(5). Again, the *Guge* opinion does not even mention corporate indemnification or Iowa Code § 489.408(1). There is no connection between *Guge* and this case that would make it necessary to review them together.

ARGUMENT

If the Iowa Supreme Court grants further review here, it should affirm the Court of Appeals in all respects.

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT’S DECISION THAT GOCHE IS ENTITLED TO INDEMNIFICATION FROM WMG

The district court correctly decided on summary judgment that Goche is entitled to indemnification, and the Court of Appeals correctly affirmed that decision.

A. Goche Has a Right to Indemnification Under Iowa Law

Goche has a right to indemnification from WMG for the fees he incurred litigating against WMG in LACV026869. WMG is a limited liability company governed by the Revised Uniform Limited Liability Company Act (“RULLCA”). Section 489.408(1) of the RULLCA provides that indemnification of limited liability company managers in situations like this is mandatory:

A limited liability company shall reimburse for any payment made and indemnify for **any debt, obligation, or other liability** incurred by a member of a member-managed company or the manager of a manager-managed company in the course of the member’s or 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 489.405 and 489.409.

Iowa Code § 489.408(1) (emphasis added).

It is undisputed that Goche meets the requirements for indemnification under the statute. WMG sued Goche for alleged

“activities” he took as a WMG manager “on behalf of the company.”

(App. II at 92, February 27, 2018 Order at 9 (“[T]he court finds based upon the evidence in the summary judgment record, and WMG does not challenge, that the alleged actions taken by Joseph [Goche] that WMG claimed to be violations of his fiduciary duty were taken while he was still serving in the role of one of the managers of WMG.”) (emphasis added); *see also* App II, at 20, July 21, 2016 Ruling on Pending Motions and Application, at 13 (“The Court finds, and no party challenges, that the alleged actions taken by Joseph Goche and claimed to be violations of his fiduciary duty were in furtherance of his role as manager of WMG.”) (emphasis added).) Goche incurred significant legal fees defending his “activities on behalf of the company.” In effect, Goche’s litigation expenses were a cost of his service to WMG.

It is also undisputed that Goche complied with Iowa Code §§ 489.405 (which prohibits a company from making distributions when the company is in the zone of insolvency) and 489.409 (which defines a manager’s fiduciary duties). No party submitted any evidence in either LACV026869 or LACV027056 that Goche violated his fiduciary duties to WMG. The statute therefore entitles Goche to indemnification.

B. Goche's Right to Indemnification Includes Attorneys' Fees

On appeal, WMG argued for the first time that Iowa Code § 489.408(1) does not provide for the recovery of attorney fees. As stated above, WMG failed to preserve error on this issue.

Regardless, WMG's argument is wrong because Iowa Code § 489.408(1) provides for indemnification of legal fees. On its face, the statute requires a limited liability company to reimburse "any debt, obligation, or other liability" incurred by a manager that satisfies the statute. The broad phrase "any debt, obligation, or other liability" necessarily includes attorneys' fees paid by a manager. The statute does not state that attorneys' fees are an exception to a manager's indemnification rights.

In fact, reimbursing attorneys' fees that a manager pays to defend himself in a lawsuit is the very purpose of corporate indemnification. Indemnification statutes "ensure that capable persons serve as officers, directors, employees, or agents of corporations by assuring that their reasonable legal expenses will be paid" if they are sued for their work on behalf of the company. *In re Internet Navigator Inc.*, 293 B.R. 198, 209 (N.D. Iowa 2003); *see also Holden v. Constr. Mach. Co.*, 202 N.W.2d 348, 367 (Iowa 1972) (individual officers and directors of corporation were entitled to

indemnification from corporation for reasonable attorneys' fees and expenses incurred in defense of shareholder lawsuit).

Although the cases cited above deal with corporate officers and not limited liability company managers, they are instructive. The indemnification statute for limited liability companies (Iowa Code § 489.408(1)) is roughly symmetrical to the indemnification statute for corporations (Iowa Code § 490.852). The two statutes should be interpreted consistently. There is no logical reason for a limited liability company manager to have less protection than a corporate officer in the indemnification context. Like an officer in a corporation, Goche is entitled to reimbursement for attorneys' fees he incurred to defend his actions as a WMG manager. *See* Iowa Code § 489.408(1).

C. The WMG Operating Agreement Does Not Eliminate Goche's Indemnification Rights

WMG also incorrectly argued that its Operating Agreement precluded Goche from seeking indemnification. WMG based its argument on Iowa Code § 489.110(7), which states that a limited liability company "operating agreement may alter or eliminate the indemnification for a member or manager provided by section 489.408, subsection 1." But the

WMG Operating Agreement does not “alter or eliminate” Goche’s statutory indemnification rights.

Section 5.6 of WMG’s Operating Agreement states that “[t]he Managers shall be indemnified by the Company to the extent provided in the Company’s Articles of Organization.” (Trial Ex. R.) The Agreement does not say the managers will only be indemnified to the extent provided in the Articles of Organization. The language in Section 5.6 of the Agreement is not limiting at all. Rather, the language requires WMG to indemnify its managers to the extent provided in the Articles of Organization, without regard to whether the managers may also have indemnification rights at law. The Operating Agreement does not explicitly (or even implicitly) “alter or eliminate” the indemnification provided by Iowa Code § 489.408(1).

WMG’s Articles of Organization, which are incorporated by reference into the Operating Agreement, do not “alter or eliminate” Goche’s indemnification rights, either. In fact, the Articles of Organization contain no provisions at all relating to indemnity. They are entirely silent on the issue. (Trial Ex. I.) Silence does not constitute an “alter[ation] or eliminat[ion].” See, e.g., *Prochelo v. Prochelo*, 346 N.W.2d 527, 529 (Iowa

1984) (deciding a divorce decree that was silent about allocation of debts between the parties did not change the parties' pre-existing legal liabilities to each other).

When a limited liability company's operating agreement is silent about a subject, the default provisions of the RULLCA control. Iowa Code § 489.110(2) ("To the extent the operating agreement does not otherwise provide for a matter described in subsection 1 [relating in part to the rights of managers], this chapter governs the matter."). In that sense, the RULLCA provisions "predominantly serve as gap-fillers, functioning as default provisions when the operating agreement fails to deal with one of RULLCA's specified issues." Patrick Shanahan, *Goodbye and Good Luck: Member Dissociation by Judicial Order Under Iowa's Revised Uniform Limited Liability Company Act*, 61 Drake L. Rev. 535, 554 (2013).

In this case, WMG's Operating Agreement and Articles of Organization do not address indemnification, much less "alter or eliminate" indemnification rights. Thus, the RULLCA – specifically Iowa Code § 489.408(1) – fills the gap and entitles Goche to indemnification according to the statute.

D. No Law Precludes Goche from Seeking Indemnification

WMG argued that, regardless of the merits of Goche's indemnification claim, he could not seek indemnification in this lawsuit under the doctrines of claim splitting, claim preclusion, and issue preclusion. None of these doctrines bars Goche's indemnification claim.

1. Claim Splitting and Claim Preclusion Do Not Apply

Claim splitting and claim preclusion are related concepts. See *Lemartec Eng'g & Constr. v. Advance Conveying Techs., LLC*, 940 N.W.2d 775, 779 (Iowa 2020). The basic rule is that a party cannot split a single claim and litigate pieces of the same claim in separate actions. *Id.* However, the rule does not bar a party from litigating a distinct claim in a new lawsuit, even if the claim could have been litigated in an earlier lawsuit. *Iowa Coal Min. Co. v. Monroe Cty.*, 555 N.W.2d 418, 444 (Iowa 1996).

A key issue in the claim splitting and claim preclusion analysis is whether the plaintiff's claim in the first action is the same as his claim in the second action. *Leuchtenmacher v. Farm Bureau Mut. Ins. Co.*, 460 N.W.2d 858, 860 (Iowa 1990). The second claim may be "precluded if the acts complained of, and the recovery demanded, are the same, or when the same evidence will support both actions." *Id.* Even if the plaintiff asserts

the same claim in two lawsuits, claim splitting and claim preclusion do not apply if the plaintiff's first action is dismissed without prejudice. *Venard v. Winter*, 524 N.W.2d 163, 167 (Iowa 1994); *Windus v. Great Plains Gas*, 116 N.W.2d 410, 415-16 (Iowa 1962).

To explain why claim splitting and claim preclusion do not apply here, it helps to briefly review the history of LACV026869 and LACV027056. In LACV026869, Goche was initially sued by Renee Afshar and Jeanne Goche-Horihan, and Goche sought indemnification for his defense (the "Afshar/Goche-Horihan Claim Indemnification"). (App. I at 15.) Afshar and Goche-Horihan dismissed their claims against Goche on June 7, 2016, after which Goche and WMG continued to litigate the Afshar/Goche-Horihan Claim Indemnification in LACV026869. (*Id.*)

On October 17, 2016, while the district court was still considering the Afshar/Goche-Horihan Claim Indemnification, WMG asserted new claims for breach of fiduciary duty against Goche. (App. I at 11-12.) Goche asserted a right to indemnification for defending WMG's new claims as well (the "WMG Claim Indemnification"). But because of the procedural posture, the WMG Claim Indemnification would need to be decided separately from the Afshar/Goche-Horihan Claim Indemnification. On

December 29, 2016, the district court (Judge Courtney) entered an award in LACV026869 for the Afshar/Goche-Horihan Claim Indemnification. (App. I at 8-13.) The district court did not address the WMG Claim Indemnification because that issue was not yet before the court. (*See generally id.*)

On April 3, 2017, Goche started LACV027056 against WMG, asserting a claim for breach of a warranty deed and claims for indemnification that were not resolved in LACV026869, including the WMG Claim Indemnification. Goche then drew a clear distinction between the cases by voluntarily dismissing his unresolved indemnification claims in LACV026869, without prejudice, so he could litigate them in LACV027056 alone. (App. I at 49-51, October 10, 2017 Dismissal Without Prejudice of Claims, Kossuth County Case No. LACV 026869.)

With that background in mind, Goche's indemnification claim in LACV027056 is not barred by claim splitting or claim preclusion. The indemnification claims litigated in LACV026869 and LACV027056 were not the same. LACV026869 resolved the Afshar/Goche-Horihan Claim Indemnification, which was based on the claims Afshar and Goche-Horihan asserted against Goche and the legal fees he spent defending

against those claims. By contrast, LACV027056 resolved the WMG Claim Indemnification, which was based on the claims WMG asserted against Goche and the legal fees he spent defending against those separate claims. The facts underlying Goche's two indemnification claims (i.e., the Afshar/Goche-Horihan action against Goche vs. the WMG action against Goche) and the relief Goche sought (i.e., the legal fees Goche spent fighting Afshar/Goche-Horihan vs. the legal fees he spent fighting WMG) were different.

Moreover, to the extent there was some initial overlap in Goche's pleadings in LACV026869 and LACV027056, Goche eliminated that overlap. Goche voluntarily dismissed without prejudice the WMG Claim Indemnification in LACV026869, before the district court made any ruling on that claim. And any claims regarding the Afshar/Goche-Horihan Claim Indemnification in LACV027056 were dismissed long before that case went to trial. Goche did not violate the rule against claim splitting by pursuing the WMG Claim Indemnification to a conclusion in LACV027056. *See Leuchtenmacher*, 460 N.W.2d at 860; *Venard*, 524 N.W.2d at 167; *Windus*, 116 N.W.2d at 415-16.

2. Issue Preclusion Does Not Apply

Unlike claim splitting and claim preclusion, which prohibit re-litigation of the same claim, issue preclusion prohibits re-litigation of the same issue. *Leuchtenmacher*, 460 N.W.2d at 859-60. For issue preclusion to apply, all of the following elements must be present: (1) the issue in both cases is identical; (2) the issue was raised and litigated in the first lawsuit; (3) the issue was material to the disposition of the first lawsuit; and (4) the resolution of the issue was essential to the resulting judgment. *Lemartec Eng'g & Constr.*, 940 N.W.2d at 779. The issue must actually be resolved in the first lawsuit in order to prevent further litigation of the issue in the second lawsuit. *Id.*

Goche's indemnification claim is not barred by issue preclusion. The district court in LACV026869 never decided whether Goche was entitled to the WMG Claim Indemnification. (*See generally* App. II at 51-73, Trial Ex. 28.) Goche was free to litigate that unresolved issue in LACV027056. *See Lemartec Eng'g & Constr.*, 940 N.W.2d at 779. The district court in LACV027056 correctly decided Goche is entitled to indemnification from WMG as a matter of law.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S CALCULATION OF GOCHE'S INDEMNIFICATION AWARD AMOUNT

After deciding on summary judgment that Goche is entitled to indemnification, the district court held a bench trial to determine the amount of Goche's indemnification award. The district court awarded Goche \$68,831.10 based on the evidence at trial. The Court of Appeals correctly affirmed the district court's indemnification award. WMG simply wants a do-over, which this Court should not grant.

The standard of review is dispositive of this issue. To the extent WMG challenges the reasonableness of attorneys' fees the district court awarded to Goche, this Court reviews for abuse of discretion. *See Lee v. State*, 874 N.W.2d 631, 637 (Iowa 2016); *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897 (Iowa 1990). The Court "will not find an abuse of discretion unless it is shown 'that such discretion was exercised on grounds . . . clearly untenable or, to an extent clearly unreasonable.'" *Lynch v. City of Des Moines*, 464 N.W.2d 236, 238 (Iowa 1990) (quoting *State v. Morrison*, 323 N.W.2d 254, 256 (Iowa 1982)). *Accord GreatAmerica Leasing Corp. v. Cool Comfort Air Conditioning & Refrigeration*, 691 N.W.2d 730, 732 (Iowa 2005).

To the extent WMG challenges other aspects of the district court's findings after the bench trial, this Court reviews for correction of errors at law. *Metro. Prop. and Cas. Ins. Co. v. Auto-Owners Mut. Ins. Co.*, 924 N.W.2d 833, 839 (Iowa 2019). Under this standard of review, the district court's factual findings are binding on this Court if they are supported by substantial evidence. *Miller v. Rohling*, 720 N.W.2d 562, 567 (Iowa 2006). "When a reasonable mind would accept the evidence as adequate to reach a conclusion, the evidence is substantial." *Raper v. State*, 688 N.W.2d 29, 36 (Iowa 2004). "Evidence is not insubstantial merely because we may draw different conclusions from it; the ultimate question is whether it supports the finding actually made, not whether the evidence would support a different finding." *Id.* In deciding whether substantial evidence supports the district court's ruling, this Court views the evidence in the light most favorable to the district court's judgment, and the Court is "prohibited from weighing the evidence." *Keppy v. Lilienthal*, 524 N.W.2d 436, 438 (Iowa Ct. App. 1994) (emphasis added).

WMG fails to establish any abuse of discretion or errors of law in the district court's calculation of Goche's indemnification award – much less any errors that warrant Iowa Supreme Court review. The best WMG can

muster is an argument that the award contained “limited and incomplete” analysis and unidentified “miscalculations.” WMG is wrong for the reasons set forth in the Court of Appeals’ opinion, and WMG does not raise a proper appeal issue anyway. The amount of Goche’s indemnification award is a fact issue best left to the district court that reviewed the trial evidence. The Iowa Supreme Court should not re-weigh the evidence or overturn the district court’s well-considered award (which the Court of Appeals affirmed).

III. THE COURT OF APPEALS CORRECTLY REVERSED THE DISTRICT COURT’S DENIAL OF “FEES ON FEES”

While the district court’s indemnification award was entirely proper, the district court erred when it denied Goche the fees he incurred to litigate the indemnification award (so called “fees on fees”). The Court of Appeals corrected the district court’s error by reversing on this issue and remanding for a determination of the amount of “fees on fees” to be awarded to Goche. This Court should deny review of the Court of Appeals’ decision.

Goche is entitled to “fees on fees” as part of his right to indemnification under Iowa Code § 489.408(1). As explained above, the district court and Court of Appeals both correctly 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 necessary corollary, 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*, 464 N.W.2d at 240. 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.* The same logic applies to a plaintiff, like Goche, who incurs fees while suing to collect fees guaranteed by the LLC indemnification statute, Iowa Code § 489.408(1).

Outside of Iowa, there is persuasive authority supporting Goche's claim for "fees on fees" in the indemnification context. Applying Delaware's similar corporate 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*, 809 A.2d at 560-62. 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.

Applying similar reasoning, courts across the country have decided “fees on fees” are available when enforcing a variety of other fee-shifting statutes. *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). For the same reasons set forth in all of these cases, 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 meritless claims that WMG filed against him in his capacity as a former WMG manager. Goche fought WMG’s claims – and won. WMG was legally obligated to indemnify Goche for his successful defense. But WMG refused to satisfy its obligation. So, Goche had to spend tens of thousands of dollars more pursuing indemnification payments from WMG. And Goche won again. It is only fair that WMG – whose conduct triggered Goche’s indemnification rights and forced him to spend “fees on fees” to enforce those rights – cover Goche’s litigation expenses.

CONCLUSION

The Court of Appeals correctly affirmed the district court’s indemnification award to Goche, and correctly decided Goche is entitled to “fees on fees” in addition to his indemnification award. This Court should deny WMG’s application for further review.

Respectfully submitted,

Dated: July 12, 2021

ANTHONY OSTLUND BAER
& LOUWAGIE P.A.

By: /s/ Philip J. Kaplan
Philip J. Kaplan (MN #0389351)
Admitted Pro Hac Vice
90 South Seventh Street, Suite 3600
Minneapolis, MN 55402
Telephone: (612) 349-6969
pkaplan@anthonyostlund.com

DUNCAN GREEN, P.C.
By: /s/ Wesley T. Graham
Wesley T. Graham (IA #AT0011184)
400 Locust Street, Suite 380
Des Moines, IA 50309
Telephone: (515) 288-6440
wtgraham@duncangreenlaw.com

ATTORNEYS FOR PLAINTIFF-
APPELLANT JOSEPH GOCHE

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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 12th day of July, 2021.

Thomas W. Lipps
Peterson & Lipps
6 East State Street, P.O. Box 575
Algona, Iowa 50511
ATTORNEYS FOR DEFENDANT-APPELLEE

/s/ Wesley T. Graham