[Cite as *Continental Tire N. Am. v. Titan Tire*, 2010-Ohio-1355.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

Continental Tire North America	Court of Appeals No. WM-09-010
Appellee	Trial Court No. 07 CI 298
v.	
Titan Tire Corporation of Bryan	**DECISION AND JUDGMENT**
Appellant	Decided: March 31, 2010

* * * * *

Michael G. Blair, Kimberly Moses and Zoe K. Carlisle, for appellee.

Thomas S. Kilbane, Steven A. Friedman and Christopher D. Panek, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals a judgment of the Williams County Court of Common Pleas, that interpreted a contract, denied reformation of the contract and awarded damages and attorney fees. For the reasons that follow, we affirm, in part, and reverse, in part.

{¶ 2} Appellant, Titan Tire Corporation of Bryan, and appellee, Continental Tire North America, are tire manufacturers. Prior to 2006, appellee owned a plant in Bryan, Ohio, that made tires for off road vehicles.

{¶ 3} In 2006, the parties entered into an asset purchase agreement for appellee to sell the Bryan plant to appellant. At the same time, the parties executed ancillary agreements to transfer the assets of the pension plan for certain active hourly employees remaining at the plant from appellee's pension plan and into appellant's plan.

{¶ 4} The transfer of employees' pensions was the topic of two agreements, drafted principally by appellant's counsel. In a document captioned "Pension Transfer Agreement," representatives of both parties agreed:

{¶ 5} "A. As soon as practicable after [July 31, 2006,] the actuary of [appellee's] plan shall determine, in accordance with section 414(l) of [Title 26, U.S.] Code, the amount of assets to be transferred to [appellant's] plan * * *.

{¶ 6} "B. Upon receipt of an opinion of [appellant's] counsel * * * that [appellant's] Plan satisfies the applicable requirements of [Section 401(a), Title 26, U.S. Code] as to form [appellee] shall cause the Trustee of [its] Plan to transfer [appellee's] Assets to [appellant's] Plan in the form of cash or other financial instruments * * *.

{¶ 7} "C. * * *

{¶ 8} "D. The amount of assets to be transferred will reflect the passage of time between [July 31, 2006] and the actual date of transfer, by increasing the amount of assets to be transferred by interest calculated at the same rate as the discount rate used to

value benefits for purposes of paragraph A or, if higher, by the actual rate of earnings on [appellee's] Plan's assets during such period."

{¶ 9} The second document concerning the pension assets transfer is captioned "Purchase Price Adjustment Agreement Related to Benefits" and is an addendum to the principal "Asset Purchase Agreement." In material part, this document provides:

{¶ 10} "2. Notwithstanding any provision of the Asset Purchase Agreement or any agreement related thereto, in the event that the *market value of the assets* transferred to [appellant's] Pension Plan from [appellee's pension fund] pursuant to the Pension Transfer Agreement referenced in the Asset Purchase Agreement exceeds $19,800,000 as of the date of such transfer, [appellant] will pay to [appellee] in cash the amount of such excess." (Emphasis added.)

{¶ 11} Each of the three documents controlling this transaction contains an integration clause providing that, "[t]his writing represents the entire agreement between the parties hereto and shall supersede all other written or oral understanding between the parties."[1] The documents were executed concurrently at a closing on July 31, 2006.

{¶ 12} On October 1, 2007, appellee transferred $24,455,186 from appellee's pension plan to appellant's plan. A subsequent adjustment resulted in an additional transfer of $756,634 for a total of $25,214,820. When appellee demanded a purchase price adjustment amounting to $5,414,820, appellant refused payment, instead remitting $1,700,000.

[1]The language in the Asset Purchase Agreement varies slightly, but carries the same import.

{¶ 13} On December 7, 2007, appellee sued on the contract. Appellant answered appellee's complaint, asserting that appellee misconstrued the earnings of the plan's assets as comprising part of the transferred plan assets. Appellant insisted that a proper computation of the transferred plan assets resulted in a real obligation of $1,700,000, which it had already paid. Alternatively, appellant maintained that, even if appellee's computations are correct, recovery should be barred by appellee's failure to timely transfer the funds. As another alternative, appellant sought reformation of the Purchase Price Adjustment Agreement to conform to the intent of the parties.

{¶ 14} Following discovery, appellee moved for summary judgment. Appellee noted that both parties were sophisticated business entities who were represented by competent counsel. Appellee argued that the contractual obligations of the parties were clear and unambiguous on the face of the agreements and should be enforced as written.

{¶ 15} Appellant responded with a memorandum in opposition, asserting that appellee's interpretation of the contracts did not comport with the agreement of the parties. It was never the parties' intent that post-closing earnings on the assets be included in the "market value of the assets," the excess of $19.8 million of which was to be returned to appellee. The intent of the parties was that the difference between the $19.8 million and the transfer amount dictated by the tax code - estimated at the time of closing to be $21.3 million – would be returned to appellee. Appellant supported this position by citation to depositions from the negotiators on both sides. Such evidence could be considered, appellant maintained, because the phrase "market value of the

assets" in the price adjustment agreement was ambiguous. Moreover, appellant suggested, independent of any ambiguity, such parol evidence should be considered under the equitable doctrine of reformation.

{¶ 16} The trial court ruled that the terms of the Pension Transfer Agreement and the Purchase Price Adjustment Agreement "are clear and unambiguous" resulting in the inclusion of earnings on the transfer amount after July 31, 2006. Nevertheless, the court concluded that, construing the evidence, including parol evidence, most favorably to appellant, a genuine issue of material fact existed as to whether the transfer agreement and the price adjustment agreement reflected the actual intention of the parties. Consequently, the court denied the motion for summary judgment on the equitable remedy of reformation of the contracts. The court ordered a bench trial on reformation and damages.

{¶ 17} At the conclusion of a trial at which extensive testimony and documentary evidence was presented, the trial court issued findings of fact and conclusions of law. In the end, the court concluded that, by the clear and unambiguous language of the contracts, appellant was required to tender back to appellee $5,414,820. Because the evidence showed that appellant had only paid $1,700,000 of this amount, the court found a breach of contract and damages in the amount of $3,714,820.

{¶ 18} With respect to appellant's defenses, the court found that appellant had failed to prove by clear and convincing evidence that by mutual mistake of fact the contracts did not reflect the intent of the parties and that appellant was without

negligence in failing to discover the mistake. The court concluded that, as a result, appellant was not entitled to reformation of the contracts. The court also found that appellee's purported delay in transferring the plan assets did not constitute a breach of the contracts, nor was the delay unreasonable. As a result, the court entered judgment on the damages, awarded prejudgment interest from October 26, 2007, until April 23, 2009, and post-judgment interest from April 24, 2009, until the judgment is paid. The court also awarded appellee attorneys' fees and expenses.

{¶ 19} From this judgment, appellant now brings this appeal. Appellant sets forth the following four assignments of error:

{¶ 20} "1. In its January 26, 2009 summary judgment ruling, the trial court committed reversible error by holding that the disputed language in section 2 of the parties' Purchase Price Adjustment Agreement Related to Benefits ('PPA') was clear and unambiguous, thus denying the Defendant-Appellant Titan Tire Corporation of Bryan ('Titan') its right to a jury trial and shifting to Titan the massive burden of proving to the bench by clear and convincing evidence that the PPA should be reformed to reflect the parties' true intent.

{¶ 21} "2. The trial court committed reversible error by not finding that Titan proved by clear and convincing evidence that the parties' contract should be reformed to require Titan to reimburse Continental Tire North America ('CTNA') only for the difference between $19,800,000 and $21,433,418 (the IRS § 414(l) assets) and not for the additional $3.8 million in earnings on those IRS § 414(l) assets.

{¶ 22} "3. In its June 17, 2009 judgment, the trial court committed reversible error by awarding CTNA excessive damages by including all of the $981,103 in earnings for the period from August 3, 2007 to October 1, 2007, when all conditions precedent to CTNA's obligation to transfer to the Titan Pension Plan had occurred as of August 3, 2007 and therefore CTNA wrongfully benefited by that amount in delaying the transfer of the majority of the funds to the Titan Pension Plan until October 1, 2007 and a true-up payment of September earnings of $759,634 on October 26, 2007.

{¶ 23} "4. The trial court committed reversible error by awarding attorneys' fees when the Complaint never claimed breach of the July 31, 2006 Asset Purchase Agreement ('APA'), including its indemnification provisions, inadequate and prejudicial notice of such claim was given in CTNA's trial brief on the eve of trial, and the indemnification provisions do not apply in any event."

I. Contract Ambiguity

{¶ 24} Construction of a written contract is a matter of law to be reviewed de novo. *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, ¶ 9, *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph one of the syllabus. The object in construing any written instrument is to ascertain and give effect to the intent of the parties. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53. It is presumed that the intent of the parties rests in the language they chose to employ in the contract. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, paragraph one of the syllabus. "When the language of a written contract is clear, a court may look no

further than the writing itself to find the intent of the parties." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 11. "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander*, supra, at paragraph two of the syllabus.

{¶ 25} It is only when a contract is ambiguous that a court may look outside the four corners of the document to ascertain the parties' intent. Id. at ¶ 12; *Shifrin v. Forest City Enterprises, Inc.* (1992), 64 Ohio St.3d 635, 637, 1992-Ohio-28. "As a matter of law, a contract is unambiguous if it can be given a definite legal meaning" *Westfield* at ¶ 11. A contract is ambiguous if, after applying established rules of interpretation, the written instrument, "* * * remains reasonably susceptible to at least two reasonable but conflicting meanings, when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement * * *." 11 Lord, Williston on Contracts (4 Ed.1999) 39-41, Section 30.4.

{¶ 26} In its first assignment of error, appellant maintains that the phrase "market value of the assets" in the Purchase Price Adjustment Agreement is a term of art, referencing the amount actuarially determined to satisfy the tax code. The actuaries found that $21,433,418 was the amount necessary to satisfy Section 414(l), Title 26, U.S. Code on the date of the closing, July 31, 2006. It is the difference between this number and the $19,800,000 referenced in section 2, appellant contends, that was contractually

due appellee. In support of this position, appellant notes that the phrase "market value of the assets" is also used in Section 414(l).

{¶ 27} Alternatively, appellant suggests, the contract should be found ambiguous because it results in an "unjustified, unbargained-for bonanza [for appellee] and this is absurd." Citing *State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 104 Ohio St.3d 559, 564, 2004-Ohio-7102, appellant asserts that contracts which produce absurd results are inherently ambiguous. As a result, appellant insists, the trial court should have accepted parol evidence to determine the intent of the parties in this matter.

{¶ 28} Appellant has failed to direct our attention to any specific point in federal law or elsewhere that mandates that the term "market value of the assets" be a term of art in the manner appellant suggests. Our own review of Section 414(l) fails to reveal that the phrase, when it is used there, carries any meaning beyond the manner it is used in ordinary commerce. See, Black's Law Dictionary (6 Ed. Rev. 1990) 971. Moreover, there is nothing within the language of the contracts themselves suggesting any unusual usage.

{¶ 29} With respect to the absurdity argument, we fail to see in what manner *Reynolds* expands this exception. Indeed, *Reynolds* at ¶ 23, does no more than quote *Alexander v. Buckeye Pipeline*, supra, at paragraph two of the syllabus, that undefined words "* * * will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument."

{¶ 30} Section 2 of the Purchase Price Adjustment Agreement provides that, when the "market value of the assets" transferred pursuant to the Pension Transfer Agreement exceeds $19,800,000, appellant will pay to appellee the excess in cash. The Pension Transfer Agreement provides that the amount to be transferred is that amount determined by actuaries in conformity with the tax code as of July 31, 2006. Section D of the Pension Transfer Agreement also clearly states that "amount of assets" transferred will be increased by the greater of interest or actual earnings from July 31, 2006, until the actual transfer. There is nothing in either document to suggest that the words "market value" in the adjustment agreement and "amount" in the transfer agreement are not synonymous. Consequently, the market value of any amount transferred is the July 31, 2006 amount, plus interest or earnings.

{¶ 31} Viewing both instruments in the context of the time they were executed, see Restatement of the Law 2d, Contracts (1981) 87, Section 202, comment b, and employing the plain meaning of the language of the contracts, we find no manifest absurdity in the results. That, after the fact, the transfer of assets took an unanticipated amount of time or the assets in the transferred portfolio performed exceptionally well are circumstances outside the purview of our consideration.

{¶ 32} Accordingly, we concur with the trial court that on the face of these instruments there was no ambiguity and the agreements must be enforced as written. Appellant's first assignment of error is not well-taken.

II. Reformation of the Contract

{¶ 33} In its second assignment of error, appellant asserts that the trial court erred when it refused to reform the contract.

{¶ 34} The only grounds for reformation of a written instrument are fraud and mutual mistake. *Baltimore & O. R.R. Co. v. Bing* (1913), 89 Ohio St. 92. There is no allegation of fraud in this matter.

{¶ 35} Reformation of a contract for mutual mistake may be had when the instrument does not reflect the actual intention of the parties. *Amsbary v. Brumfield*, 177 Ohio App.3d 121, 2008-Ohio-3183, ¶ 13. "The purpose of reformation is to cause an instrument to express the intent of the parties as to the contents thereof, i.e., to establish the actual agreement of the parties." *Delfino v. Paul Davies Chevrolet, Inc.* (1965), 2 Ohio St.2d 282, 286. Reformation may be had only on clear and convincing evidence that the mistake regarding the instrument was mutual. *Patton v. Ditmyer*, 4th Dist. No. 05CA12, 2006-Ohio-7107, ¶ 28, citing *Stewart v. Gordon* (1899), 60 Ohio St. 170, paragraph one of the syllabus. "Clear and convincing evidence is that measure or degree of proof * * * which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶ 36} A "* * * 'mutual mistake' concerning the anticipated occurrence of a future event will not justify reformation of an instrument, 'So far as reformation of an instrument is concerned, a mistake exists only when the instrument, in its terms or legal

effect, is different from what the parties believed it to be at the time of its execution.' As one jurisdiction has noted, '[t]here can be no mutual mistake as to a fact to come into being in the future.'" *Snyder v. Monroe Twp. Trustees* (1996), 110 Ohio App.3d 444, 452 (Citations omitted.)

{¶ 37} The trial court heard testimony from the retired Chief Executive Officer of appellee's parent company and the current Chairman and Chief Executive Officer of appellant's parent company concerning their negotiation of these contracts. The court also heard from appellee's Vice President of Finance and its actuary. More than a hundred documents were introduced into evidence. At the conclusion of this trial, the court found that appellant had failed to carry its burden to present clear and convincing evidence that the contracts at issue were the result of a mutual mistake.

{¶ 38} Appellant's second assignment of error is, in essence, an assertion that the trial court's failure to find a mutual mistake was against the manifest weight of the evidence. Judgments supported by some, meaning any, competent credible evidence will not be overturned on appeal as against the manifest weight of the evidence. *C.E. Morris v. Foley Const. Co.* (1978), 54 Ohio St.2d 279, syllabus. The determination of the weight and credibility of the evidence presented rests primarily with the trier of fact and will not be disturbed on appeal. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶ 39} "This is a rigorous standard to overcome. A plaintiff, who is charged with the burden of proof, has little leave to complain if a finder of fact chooses not to believe

some or all of his proofs." *Fantozzi v. Sandusky Cement Products* (June 24, 1994), 6th Dist App. No. E-93-31; *In re Scott* (1996), 111 Ohio App. 3d 273, 276; *Jaworski v. Perz* (June 13, 1997), 6th Dist. No. L-96-334.

{¶ 40} The trial court found that appellant failed to present evidence sufficient to clearly and convincingly demonstrate a mutual mistake in the formation of the contracts at issue. We have carefully reviewed the record of the proceedings and the evidence adduced at trial and find nothing that would warrant disturbing the court's findings. Accordingly, appellant's second assignment of error is not well-taken.

III. Damages

{¶ 41} Appellant, in its third assignment of error, insists that the trial court erred by awarding appellee excessive damages. According to appellant, the court should not have considered in its damage computation money transfers after August 3, 2007, because all the contractual conditions precedent for the fund transfer had been satisfied by that date. Considering any earnings accumulations after that date only rewards appellee for its own unwarranted delay, appellant maintains. Appellant calculates that between August 3, 2006, and the date of transfer, an additional $981,103 in earnings accumulated.

{¶ 42} Appellee responds that even though an opinion letter from appellant's attorney on the validity of appellant's pension plan was the last contractual condition antecedent to the fund transfer, other considerations intervened: the sale of real estate assets required a 60 day lead, financial information necessary to ascertain a transfer

amount was not available until mid-September, appellee did not accept the transfer amount or provide wire transfer instructions until September 28. According to appellee, the money was transferred within two business days of receiving wire transfer instructions and within two weeks of the receipt of August financial information. Consequently, appellee insists, the transfer of the pension fund was reasonably timely.

{¶ 43} The trial court found that appellant and appellee were both sophisticated parties, represented by competent counsel who could have, but did not, include in the contracts at issue a specific time within which the assets should be transferred. The court declined to imply such a provision. Moreover, the court concluded, even if such a provision was implied, appellant failed to prove that appellee was "delinquent or dilatory" in transferring the funds.

{¶ 44} Again, the essence of this assignment of error is that the trial court's findings were against the manifest weight of the evidence. Although the standard here is a preponderance of the evidence as opposed to clear and convincing, our review of this issue involves the same considerations as in appellant's second assignment of error. The trial court's decision will not be disturbed as long as it is supported by competent, credible evidence. *C.E. Morris v. Foley Const. Co.*, supra. Our review of the record reveals such evidence. Accordingly, appellant's third assignment of error is not well-taken.

IV. Attorney Fees

{¶ 45} In its remaining assignment of error, appellant complains that the trial court erred in awarding appellee attorney fees.

{¶ 46} Ohio adheres to the "American rule" concerning recovery of attorney fees: the prevailing party in a civil case may not recover attorney fees as a part of the costs of litigation. *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306 , ¶ 7. There are, however, exceptions to the rule. Attorney fees may be awarded when provided for by statute, when bad faith by the non-prevailing party is demonstrated or there is an enforceable contract that specifically provides for the non-prevailing party to pay the prevailing party's attorney fees. Id., citing *Nottingdale Homeowners' Assn., Inc. v. Darby* (1987), 33 Ohio St.3d 32, 33-34.

{¶ 47} Contract provisions which provide indemnification for attorney fees are subject to the ordinary rules of contract construction. As with most contracts of indemnity, such provisions are to be strictly construed and "* * * certainly given no greater scope than the language of the agreement clearly and unequivocally expresses." *Palmer v. Pheils*, 6th Dist. No. WD-01-010, 2002-Ohio-3422, ¶ 39; *Dingledy Lumber Co. v. Erie R.R. Co.*(1921), 102 Ohio St. 236, paragraph one of the syllabus. An agreement to indemnify another party for qualified legal expenses should be "express." *Worth v. Aetna Cas. & Sur. Co.* (1987), 32 Ohio St.3d 238, syllabus.

{¶ 48} Neither the Pension Transfer Agreement nor the Purchase Price Adjustment Agreement makes any provision for the allocation of attorney fees. Section 7.2 Asset

Purchase Agreement, however, contains a provision wherein the purchaser agrees to indemnify the seller "* * * against any Claim asserted against * * * any Seller Indemnified Party by reason of, resulting from or arising out of: * * * (b) any breach * * * of any covenant or agreement made by Purchaser in this agreement or any other document executed and delivered * * * at Closing with respect to the transactions contemplated by this Agreement [and] the reasonable costs and expenses related to enforcement of the indemnification rights under this Section 7.2." Appellee maintains that a "Claim" is defined in section 7.1 of the Asset Purchase Agreement to include reasonable attorney fees.[2]

{¶ 49} Appellant insists that appellee is barred from relying on the provisions of the Asset Purchase Agreement, as such agreement was not attached to the complaint and appellee's complaint itself expressly excludes consideration of this agreement.[3] According to appellant, although appellee's complaint made a perfunctory request for attorney fees in its prayer for relief, it was not until one week before trial that appellee introduced the provisions of the Asset Purchase Agreement as justification for an award

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[2]"**7.1 Indemnification by Seller**. Subject to the terms hereof, Seller agrees to defend, indemnify and hold Purchaser * * * harmless from and against any claim, liability, expense, loss or other damage (including reasonable attorney fees and expenses) (collectively, "Claims") asserted against, imposed upon or incurred by [the purchaser] resulting from [specified reasons, including breach.]"

[3]Paragraph three of the complaint states: "On July 31, 2006, [appellee] and [appellant] entered into an Asset Purchase Agreement ("APA"), pursuant to which [appellant] agreed to purchase certain assets of [appellee] in exchange for good and valuable consideration. (The terms of the APA are not at issue in this lawsuit, and therefore, [appellee] has not attached a copy of that agreement to this complaint.)"

of attorney fees. Appellant asserts that such justification was untimely and prejudicial. Appellant also maintains that the claim for indemnification was not in writing and with reasonable specificity as required by the Asset Purchase Agreement and that appellee's claim was not subject to indemnification by the terms of the Asset Purchase Agreement.

{¶ 50} Appellee responds that appellant could not have been prejudiced by any late insertion of consideration of the indemnity clause into the case. Appellee concedes that its argument for attorney fees based on the indemnity clauses was not raised until a week before trial. Appellee insists, however, that, since nearly two months followed the submissions of proposed findings and conclusions, appellee had ample time to analyze and respond to the claim. Appellee notes that the trial court specifically found that notice to appellant on this issue was adequate.

{¶ 51} With respect to the other arguments that appellant raises, appellee suggests that appellant waived these issues by failing to present them specifically to the trial court. Alternatively, appellee insists that the language of Section 7.2(i) of the Asset Purchase Agreement (indemnification for "the reasonable costs and expenses relating to enforcement of the indemnification rights under this section 7.2") is broad enough to encompass attorney fees.

{¶ 52} Appellant has failed to provide us with any authority which would estop a party from raising a contractual obligation to pay attorney fees when such an obligation is not included as a separate cause of action in the complaint, but only raised generally in a prayer for relief. Appellant's assertion that such a prayer is boiler plate that somehow

provides inferior notice is unpersuasive. Similarly, although the Asset Purchase Agreement was filed only shortly before the February 10, 2009 trial began, the decision on attorney fees was not entered until June 17, 2009. This would seem to be sufficient notice to allow appellant to analyze and respond to the request.

{¶ 53} The language of the indemnification provisions in the Asset Purchase Agreement is more problematic. Appellee relies on Section 7.1 to define "Claims" as including attorney fees, see fn 1, supra, but Section 7.1 relates to indemnification by the seller, appellee. There is nothing in that section to suggest that Section 7.1's "Claims" definition has any import elsewhere in the document. Indeed, the closing paragraph of each section speaks solely "* * * of the indemnification rights under this Section 7.1" or "* * * this Section 7.2," suggesting that the provisions are to be viewed independently. Moreover, Section 7.2, which concerns indemnification by the purchaser, contains language that is not parallel to Section 7.2 and does not expressly include attorney fees as being part of a "Claim."[4]

[4]"**7.2 Indemnification by Parent and Purchaser.** Subject to the terms hereof, [appellant] and [its parent company] jointly and severally agree to defend, indemnify and hold [Appellee] and its directors, officers, Affiliates and Representatives (the "Seller Indemnified Parties") harmless from and against any Claim asserted against, imposed upon or incurred by any Seller Indemnified Party by reason of, resulting from or arising out of: * * * (b) any breach * * * of any covenant or agreement made by Purchaser in this agreement or any other document executed and delivered * * * at Closing with respect to the transactions contemplated by this Agreement [and] the reasonable costs and expenses related to enforcement of the indemnification rights under this Section 7.2."

{¶ 54} A rule of construction appears applicable: "expressio unius est exclusio alterius, or the expression of one thing implies the exclusion of another thing * * *." *Cincinnati v. Cincinnati Reds* (1984), 19 Ohio App. 3d 227, 230. Section 7.1 demonstrates that the drafters of this contract knew how to include language that would include attorney fees within "Claims" subject to indemnification with respect to the seller. The absence of such language in a parallel provision relating to purchaser indemnification exhibits an intention that a reciprocal obligation does not exist.

{¶ 55} Appellee's alternative argument is that, if Section 7.1(b) is insufficient to warrant an award of attorney fees, Section 7.2(i)[5], quoted at 17, supra, contains language sufficiently broad to support a contractual attorney fees award. Appellee, citing *Norfolk Southern Ry. Co. v. Toledo Edison Co.*, 6th Dist. No. L-06-1268, 2008-Ohio-1572, and *Auber v. Marc Glassman*, 8th Dist. No. 80283, 2002-Ohio-2749, insists that phrases such as an indemnification for "costs and expenses" and "any and all damages, costs and/or expenses" are sufficient to grant a judgment on attorney fees.

{¶ 56} *Auber* is easily distinguishable as the case involved an indemnification agreement between a landlord and tenant concerning the lease allocation of costs for defending a tort claim from a third party. See *Auber* at ¶ 23. Attorney fees were deemed "other expenses" arising out of the claim, not a transfer of the fees from the prevailing to the non-prevailing party. Id. at ¶ 25.

[5]The section was most likely intended to be Section 7.2(j), as it is actually the second Section 7.2(i) in the Asset Purchase Agreement.

{¶ 57} In *Norfolk Southern*, the railroad's equipment was damaged when a high voltage line fell across tracks over which the railroad had granted the power company an easement. The easement provided that "[Toledo Edison] assumes sole responsibility for, shall indemnify, save harmless, and defend (at Grantor's option) Grantor from and against all claims, actions, *or legal proceedings* arising in whole or in part, from (i) the failure of Grantee to comply with any obligations imposed on it by this Easement agreement * * *." *Norfolk Southern* at ¶ 61 (emphasis added.)

{¶ 58} In this matter, reference to "attorney fees" or "legal proceedings" is noticeably absent in Section 7.2. Without the inclusion of such express language, appellee's claim for attorney fees must fail. Accordingly, appellant's fourth assignment of error, insofar as it asserts the inapplicability of the indemnification provision of the Asset Purchase Agreement, is well-taken.

{¶ 59} On consideration whereof, the judgment of the Williams County Court of Common Pleas is affirmed, in part, and reversed, in part. This matter is remanded to said court for further proceedings consistent with this decision. The parties are ordered to share equally the court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE