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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 KnightBrook Insurance Company and
10 Knight Management Insurance Services,
LLC,

11 Plaintiffs,

12 v.

13 Payless Car Rental System, Inc.; PCR
14 Venture of Phoenix, LLC; ABC
Corporations I-X; XYZ Partnerships I-X.

15 Defendants.
16

No. CV-12-01671-PHX-DGC

ORDER

17 Plaintiffs have filed a motion for attorneys' fees. Doc. 380. Defendants have filed
18 a motion to alter or amend the judgment pursuant to Rules 52(b) and 59(e). Doc. 384.
19 The motions are fully briefed, and no party has requested oral argument. The Court will
20 grant Defendants' motion to amend the judgment and award attorneys' fees of \$41,145.

21 **I. Background.**

22 The parties in this case, KnightBrook Insurance Company and Knight
23 Management Insurance Services, LLC (collectively, the "Knight entities"), and Payless
24 Car Rental System, Inc. and PCR Venture of Phoenix, LLC (collectively, the "Payless
25 entities"), were originally sued by Robert and Lorraine McGill for negligence, negligent
26 misrepresentation, breach of contract, and bad faith, among other claims. The Knight
27 entities entered into a settlement with the McGills for \$970,000, and then asserted claims
28 against the Payless entities for breach of contract, negligent misrepresentation,

1 negligence, and equitable indemnification, among others. The Payless entities filed a
2 counterclaim against the Knight entities for insurance bad faith.

3 At the conclusion of a bench trial, the Court entered judgment in favor of the
4 Knight entities on their claim for equitable indemnification, finding the Payless entities
5 liable for the entire \$970,000. Docs. 376, 377. The Court ruled against the Knight
6 entities on all of their other claims, and found in favor of the Knight entities on the
7 Payless entities' claim for insurance bad faith. Doc. 376 at 7, 12, 24.

8 In its order awarding the Knight entities \$970,000, the Court also found that they
9 were entitled to recover some attorneys' fees:

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11 "The general rule is that attorney's fees and costs are recoverable as
12 part of the indemnification." *Schweber Electronics v. Nat'l Semiconductor*
13 *Corp.*, 850 P.2d 119, 125 (Ariz. Ct. App. 1992). There is, however, an
14 important limitation: "the right of indemnity includes a right to attorney's
15 fees incurred in defending the underlying claim, but does not include the
16 right to fees incurred in establishing the right of indemnity." *INA Ins.*, 722
17 P.2d at 983; *see also Howard P. Foley Co. v. Employers-Commercial*
18 *Union*, 488 P.2d 987, 990 (Ariz. Ct. App. 1971) ("[L]egal fees and
19 expenses incurred in connection with trial of the issue of indemnity are not
20 recoverable by the indemnitee."). The Knight entities will be awarded the
21 attorneys' fees they incurred in defending against the McGills' second
22 lawsuit, but not the fees incurred in pursuing their claim against the Payless
23 entities.

24 Doc. 376 at 23.

25 The Knight entities have now filed a memorandum seeking attorney's fees.
26 Doc. 380. They seek two categories of fees: \$107,424.00 incurred in defending against
27 the McGills' lawsuit and \$68,575.33 incurred in defending against the Payless entities'
28 counterclaim for bad faith. Doc. 389 at 9; Doc. 390 at 1. The Knight entities do not seek
to recover fees incurred in litigating their various claims – including their successful
claim for equitable indemnification – against the Payless entities. Doc. 380 at 5.

The Payless entities have filed a motion to alter or amend the Court's judgment.
They ask the Court to hold that the Knight entities cannot recover fees as part of their

1 damages in the indemnity claim because the Knight entities failed to include such relief
2 in the joint pre-trial order. Doc. 384. In response, the Knight entities clarify that they do
3 not seek to recover any fees as damages. Doc. 389 at 4 (“The issue regarding [the Knight
4 entities’] attorneys’ fees was not included in the [final pretrial order], and witnesses and
5 exhibits were not disclosed concerning proving-up attorneys’ fees as damages, because
6 they were not and are not sought in that context.”). Rather, the Knight entities seek both
7 categories of their fees under A.R.S. § 12-341.01. Doc. 389.

8 **II. Motion to Alter or Amend Judgment.**

9 As quoted above, the Court’s order awarding \$970,000 to the Knight entities also
10 held that they could recovery attorneys’ fees incurred in defending against the McGill
11 lawsuit. The Court found these fees to be recoverable as indemnification damages. The
12 Court relied on *Schweber Electronics v. Nat’l Semiconductor Corp.*, 850 P.2d 119 (Ariz.
13 Ct. App. 1992), which held that “attorney’s fees and costs are recoverable *as part of the*
14 *indemnification.*” *Id.* at 125 (emphasis added); Doc. 376 at 23.

15 When the Court entered this order, it was not aware that the Knight entities had
16 failed to preserve their right to attorneys’ fees as indemnification damages in the final
17 pretrial order. Because a claim for damages not included in a final pretrial order is
18 waived, *Rockwell Intern. Corp. v. United States*, 549 U.S. 457, 474 (2007), the Court
19 will, by this order, amend its previous order’s suggestion that the Knight entities may
20 recover attorneys’ fees as indemnification damages. Such damages are not available
21 given the waiver in the final pretrial order. The Court must therefore consider whether
22 the Knight entities can recover the fees incurred in defending against the McGill lawsuit,
23 and in defeating the Payless entities’ bad faith claim, under A.R.S. § 12-341.01.¹

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25 ¹ As already noted, the Knight entities’ response to the motion to amend the
26 judgment does not argue that the Knight entities are entitled to recover their attorneys’
27 fees as indemnification damages. Doc. 389 at 4. The response instead asserts that they
28 can recover their fees under A.R.S. § 12-341.01. *Id.* To the extent that some of the
Knight entities’ other briefing could be read to argue that they can recover attorneys’ fees
as indemnification damages through post-trial briefing (*see, e.g.* Doc. 390 at 7), the Court
does not agree. Fees sought as indemnification damages must be proved at trial. *United*
States Indus., Inc. v. Blake Constr. Co. Inc., 765 F.2d 195 (D.C. Cir. 1985) (barring claim
for attorneys’ fees sought in indemnity because the claimant failed to present evidence of

1 **III. Motion for Attorneys' Fees.**

2 **A. Legal Standard.**

3 "In any contested action arising out of a contract, express or implied, the court
4 may award the successful party reasonable attorney fees." A.R.S. § 12-341.01(A). The
5 Court has discretion regarding an award of attorneys' fees. *See Wilcox v. Waldman*, 744
6 P.2d 444, 450 (Ariz. Ct. App. 1987).

7 **B. The Knight Entities' Claim for \$107,424.00.**

8 The Knight entities seek to recover \$107,424.00 in fees they incurred in defending
9 against the action brought by the McGills. Although these fees might have been
10 recoverable as indemnification damages if the Knight entities had preserved that claim,
11 the Court is not persuaded that they can be recovered under A.R.S. § 12-341.01.

12 When this case was first filed, the McGills were the plaintiffs the Knight and
13 Payless entities were defendants. Doc. 1-2 at 36. The Knight entities' answer to the
14 original complaint (Doc. 7) and their amended answer to the McGills' amended
15 complaint (Doc. 92) made no claims or allegations against the Payless entities. Rather,
16 the Knight and Payless entities asserted the same defenses against the McGills (Doc. 30
17 at 6) and even jointly filed a motion to dismiss the McGills' complaint (Doc. 57). It was
18 not until the Knight entities settled with the McGills for \$970,000, and the Payless
19 entities refused to contribute to the settlement, that the Knight and Payless entities
20 became adverse. The Knight entities moved under Rule 25 to be substituted as plaintiffs
21 in this action in place of the McGills and to assert a second amended complaint against
22 the Payless entities. Doc. 109. The Court granted the motion, realigned the parties, and
23 the litigation between the Knight and Payless began. Docs. 114, 116. Thus, the

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25 the attorneys' fees as damages during trial); *Carolina Power & Light Co. v. Dynege*
26 *Mktg. & Trade*, 415 F.3d 354 (4th Cir. 2005) (holding that legal costs sought under
27 indemnity constitute an element of damages to be proved at trial); *Federal Agricultural*
28 *Mortgage Corp. v. It's A Jungle Out There, Inc.*, No. C 03-3721 BZ, 2006 WL 1305212,
at *4 (N.D. Cal. May 9, 2006) (attorneys' fees must be proved as damages in connection
with a claim for indemnification). And to the extent the Knight entities suggest that Rule
54(d)(2)(A) permits them to seek fees as indemnification damages by motion, they are
wrong. That rule does not apply where the "substantive law requires those fees to be
proved at trial as an element of damages." Fed. R. Civ. P. 54(d)(2)(A).

1 \$107,424.00 was incurred by the Knight entities at a time when the Knight and Payless
2 entities were not adverse.

3 “In order for a party to recover attorneys’ fees under A.R.S. § 12–341.01, it is
4 necessary that the parties be adverse.” *Pioneer Roofing Co. v. Mardian Const. Co.*, 733
5 P.2d 652, 663 (Ariz. Ct. App. 1986) (citing *Nationwide Resources Corp. v. Ngai*, 630
6 P.2d 49, 55 (Ariz. Ct. App. 1981)). Adversity “is not determined solely from the parties’
7 alignment in the pleadings, but rather must be ascertained from the opposing positions or
8 interests of the parties.” *Id.* Before the Knight entities moved to be substituted as
9 plaintiffs in this action, they not only were aligned with the Payless entities as defendants,
10 they were also asserting a joint defense. The essence of that defense was that no contract
11 had been created between the Knight and Payless entities on one hand, and Bovre (the
12 McGills’ assignor) on the other hand. Doc. 30 at 6; Doc. 57. Because the Knight entities
13 were not adverse to the Payless entities while the \$107,424.00 in fees were incurred, they
14 cannot recover those fees under § 12-341.01.

15 In addition, the fee statute permits an award of fees only to the “successful party.”
16 A.R.S. § 12-341.01. The Court cannot conclude that the Knight entities were successful
17 parties in the portion of the litigation that resulted in their paying \$970,000 to the
18 McGills. Although the Knight entities prevailed in the second half of the litigation when
19 they sued the Payless entities for indemnification, the Court cannot conclude that they
20 were the “successful party” within the meaning of the statute during the first portion.

21 For these reasons, the Court concludes that the Knight entities are not entitled to
22 recover their claimed \$107,424.00 in fees under § 12-341.01.

23 **C. The Knight Entities’ Claim for \$68,575.33.**

24 The Knight entities seek \$68,575.33 in fees they incurred in defending against the
25 Payless entities’ counterclaim for insurance bad faith. In litigating this claim, the parties
26 clearly were adverse and the Knight entities were successful. In addition, a claim of
27 insurance bad faith arises out of contract within the meaning of § 12-341.01. *See Sparks*
28

1 *v. Republic Nat. Life Ins. Co.*, 647 P.2d 1127, 1142 (1982).² Therefore, § 12-341.01
2 permits the Court to award reasonable attorneys' fees to the Knight entities.

3 In deciding whether to award attorneys' fees under § 12-341.01, courts consider
4 the merits of the unsuccessful party's claim, whether the successful party's efforts were
5 completely superfluous in achieving the ultimate result, whether assessing fees against
6 the unsuccessful party would cause extreme hardship, whether the successful party
7 prevailed with respect to all relief sought, whether the legal question presented was novel
8 or had been previously adjudicated, and whether a fee award would discourage other
9 parties with tenable claims from litigating. *Am. Const. Corp. v. Philadelphia Indem. Ins.*
10 *Co.*, 667 F. Supp. 2d 1100, 1106-07 (D. Ariz. 2009) (citing *Assoc. Indem. Corp. v.*
11 *Warner*, 694 P.2d 1181, 1184 (Ariz. 1985)).

12 Considering these factors, the Court concludes that the Knight entities are entitled
13 to a fee award for defending against the bad faith claim. Although not completely
14 meritless, the Court had little difficulty disposing of the claim. Doc. 376 at 19-20.
15 Indeed, the Court held that the Payless entities "clearly were not covered" by the
16 insurance contract with the Knight entities as alleged. *Id.* at 20. The Knight entities'
17 efforts were not superfluous in obtaining victory on this claim, assessing fees would not
18 cause extreme hardship to the Payless entities, the Knight entities prevailed completely
19 on this claim, the legal issues in the bad faith claim were not novel, and assessing fees
20 would not, in the Court's judgment, discourage companies like the Payless entities from
21 asserting their rights in court. *Warner*, 694 P.2d at 1184.

22 Counsel for the Knight entities states that he made an estimate of the time devoted
23 to the bad faith claim, but admits that it is not completely accurate given the combined
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25 ² As the Arizona Supreme Court held in *Sparks*, "the tort of bad faith cannot be
26 committed absent the existence of an insurance contract and a breach thereof. Because
27 the existence of the tort is so intrinsically related to the contract, we conclude that an
28 action alleging [an] insurer's bad faith is one 'arising out of a contract' within the
meaning of § 12-341.01(A)." 647 P.2d at 1142. In this case, as part of their bad faith and
other arguments, the Payless entities asserted that the Knight entities were their insurer
under an insurance contract. The Court ultimately rejected this argument (Doc. 376 at
19-20, 24), but it clearly was premised on a contract.

1 billing done on the several claims and defenses at issues in this case. Doc. 380-5 at 6.
2 He states that one-half of these combined time entries, including those for trial, were
3 attributed to the bad faith claim. *Id.* The Court views this as too high a percentage in
4 light of the number of other claims and defenses in this case and the amount of time in
5 trial devoted to other issues. Exercising its discretion, the Court will reduce the requested
6 amount by 25% because of this combined billing issue.

7 In addition, contrary to LRCiv 54.2(e)(1)(B), which requires separate time entries
8 for “each individual unrelated task,” many of the time entries made by counsel for the
9 Knight entities includes several tasks within a single block of time. The Court will
10 reduce the fee award by another 15% because of this failure to comply with the local
11 rules.

12 The Court views the resulting amount of \$41,145 (\$68,575.33 x 60%) to be a
13 reasonable fees award. In light of this substantial reduction, the Court finds the Payless
14 entities’ other arguments on reasonableness to be unpersuasive.³

15 **IT IS ORDERED:**

- 16 1. The Payless entities’ motion to alter or amend the judgment (Doc. 384) is
17 **granted.**
- 18 2. The Knight entities’ motion for attorneys’ fees (Doc. 380) is **granted in**
19 **part and denied in part.** The Knight entities are awarded fees of \$41,145.
- 20 3. The Clerk is directed to terminate this action.

21 Dated this 1st day of July, 2015.

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24 _____
25 David G. Campbell
26 United States District Judge

27 _____
28 ³ The Knight entities also seek \$1,807.55 in costs, but counsel’s affidavit attributes these costs to defense of the McGill claim, for which recovery is not allowed in this order. *See* Doc. 380-5 at 5.