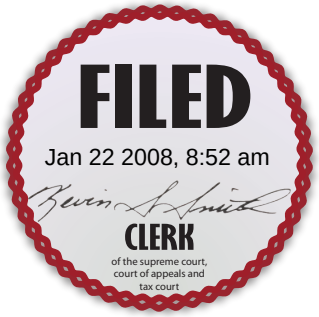

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IN THE
COURT OF APPEALS OF INDIANA

MARK P. CAMPBELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0703-CV-179
	)	
A.A.A. BAIL BONDS, INC., Agent for VERNON GENERAL INSURANCE COMPANY,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Thomas J. Carroll, Judge
Cause No. 49D06-0512-CP-046688

January 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

After Mark P. Campbell signed a bail agreement on behalf of David B. Laufman, A.A.A. Bail Bonds, Inc. sought reimbursement from Campbell for its expenses related to locating Laufman and facilitating his surrender to authorities. The trial court granted A.A.A. summary judgment. Finding that the trial court properly denied Campbell's motions to strike two affidavits that complied with the requirements of Indiana Trial Rule 56(E) and that the court properly granted A.A.A. summary judgment because Campbell raises no genuine issues of material fact, we affirm.

Facts and Procedural History

Sometime in early 2005, the State charged Laufman with invasion of privacy, and bail was set for $10,000. To secure Laufman's release from jail, on March 4, 2005, Campbell approached Fred Carter of A.A.A. and signed an Application for Appearance Bond, an Indemnity Agreement, a Promissory Note, and a Receipt and Statement of Charges for a $10,000 bail bond issued by Vernon General Insurance Company. A.A.A. and Carter were agents of Vernon General for the purpose of transacting surety bonds.

Laufman was ordered to appear before the court on May 18, 2005. After he failed to appear, the trial court sent Carter a notice requiring him to produce Laufman and informing him of the following:

> [Y]ou are notified and commanded to produce the said defendant in Court forthwith, or pay late surrender fees as provided by I.C. 27-10-2-12. Further, if you fail to produce said defendant within three hundred sixty-five (365) days of this date, the 23rd day of May, 2005, and pay all costs and late surrender fees and satisfy the Court the said defendant's absence was not with your consent or connivance, you are further notified that the Court shall declare a forfeiture and immediately enter judgment against you in the amount of 20% of $10,000 (original bond amount).

Appellant's App. p. 51. A.A.A. thereafter took steps to locate Laufman and facilitate his surrender to authorities. Laufman was ultimately taken into custody.

Thereafter, A.A.A. filed a complaint against Campbell to collect on the note and indemnity agreement. Anthony Widgery, an employee of A.A.A., filed an affidavit ("January 2006 Affidavit of Debt") with the trial court, listing Campbell's liability to A.A.A. as $3360.00. The trial court entered a default judgment against Campbell. Campbell filed a Motion to Set Aside Judgment, and with its response, A.A.A. attached an updated affidavit ("May 2006 Affidavit of Debt") that itemized A.A.A.'s expenses and listed Campbell's liability as $3037.23. The court subsequently set aside the default judgment, and A.A.A. filed an amended complaint. Campbell filed a motion for summary judgment, and A.A.A. filed a cross-motion for summary judgment. In support of its cross-motion, A.A.A. designated, among other things, an affidavit (the "Affidavit") from Vernon General's Managing General Agent Leslie Sebring, which details the agency relationship between Vernon General and A.A.A. Campbell filed a motion to strike portions of the Affidavit, which the trial court denied. A.A.A. then filed a Supplemental Affidavit from Sebring (the "Supplemental Affidavit") expanding upon the relationship between Vernon General and A.A.A.,[1] which Campbell moved to strike. The trial court denied the motion. The court granted A.A.A.'s cross-motion for summary judgment and calculated damages as follows: expenses in the amount of $3037.23,

[1] We note that although Sebring apparently signed and dated the Supplemental Affidavit on December 18, 2006, and several documents in the record, including the Appellant's Brief, claim that it was filed on that date, the document was not file stamped until January 12, 2007. This discrepancy has no bearing upon the issues in this appeal.

prejudgment interest in the amount of $900, and attorney's fees in the amount of $7261.25, for a total judgment of $11,198.48. Campbell now appeals.

Discussion and Decision

Campbell challenges the trial court's entry of summary judgment in favor of A.A.A. Specifically, Campbell first argues that the trial court relied upon improper evidence, namely, Sebring's Affidavit and Supplemental Affidavit, in reaching its decision because the affidavits should have been stricken. He contends that the trial court erred in denying his motions to strike these affidavits because both were conclusory in nature and because the Supplemental Affidavit "d[id] not supplement any matter in AAA's original motion and designation." Appellant's Br. p. 7. He also contends that the trial court erred in granting summary judgment to A.A.A. because A.A.A. may not recover against Campbell under the contract at issue and because there is a genuine dispute as to the amount, if any, of damages incurred by A.A.A. We begin by addressing the evidentiary issue.

I. Motions to Strike Affidavits

Campbell argues that the trial court improperly considered testimony provided in two affidavits during the summary judgment proceedings. The decision to admit or exclude proffered testimony, including affidavits, is a matter of discretion for the trial court. *Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258, 1263 (Ind. Ct. App. 2002) (citation omitted), *trans. denied*. We will reverse the trial court's decision only if it is clearly against the logic and effect of the facts and circumstances before the trial court or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* (citation

omitted). Further, a court's ruling on a motion to strike will not be reversed unless prejudicial error is clearly shown. *Rausch v. Reinhold*, 716 N.E.2d 993, 999-1000 (Ind. Ct. App. 1999) (citing *Cua v. Ramos*, 433 N.E.2d 745, 752 (Ind. 1982)), *trans. denied*.

Campbell first contends that Sebring's Affidavit and Supplemental Affidavit both contain conclusory statements that should have been stricken from the trial court's consideration of the parties' summary judgment motions. Affidavits in support or opposition to summary judgment must only set forth such facts as would be admissible in evidence and must be made on personal knowledge by a competent affiant. Ind. Trial Rule 56(E). Where a statement contained in an affidavit is merely conclusory, the trial court should disregard it when ruling on a summary judgment motion. *Paramo v. Edwards*, 563 N.E.2d 595, 600 (Ind. 1990).

We begin by evaluating the challenged portion of the Affidavit. On appeal, Campbell renews his challenge to the following statements:[2]

> 18. Vernon compensates its agents for their services under a separate agreement between them.
> 19. Vernon is responsible for the costs, expenses, and fees incurred by A.A.A. Bail Bonds, Inc., and Fred Carter in honoring and performing its duties and obligations for the Indemnity Agreement signed by Mark P. Campbell.

Appellant's App. p. 102. The trial court denied the motion, and on appeal Campbell argues that these allegations "were simply conclusory in nature without explaining enough information to show that a valid contract existed and what its terms were, much less actually not having attached such a contract to the affidavit." Appellant's Br. p. 10. However, Sebring, the affiant, as Managing General Agent of Vernon General, has

[2] Campbell also asked the trial court to strike paragraphs thirteen, fifteen, and seventeen of the Affidavit. However, he makes no argument on appeal regarding these paragraphs.

personal knowledge of and is competent to testify regarding the business relationship of Vernon General with A.A.A. and Carter. We agree with A.A.A. that it is "unclear how the statements of Sebring in paragraphs 18 and 19 of his Affidavit[] are conclusory." Appellee's Br. p. 9-10. The trial court did not abuse its discretion in refusing to strike the challenged portions of the Affidavit.

We similarly find that the challenged portion of the Supplemental Affidavit is not conclusory. Campbell challenges the following statement from the Supplemental Affidavit: "6. I have also authorized and assigned Vernon's right to recover all costs, expenses, fees, orders, judgments, claims, demands, and liabilities related to a breach of the Bail Bond Agreement, Indemnity Agreement, and Promissory Note to A.A.A. Bail Bonds, Inc., and Fred Carter." Appellant's App. p. 104. Again, Sebring has personal knowledge of the relationship to which he is testifying, and there is no argument that he is an incompetent witness.

Campbell secondarily argues that the Supplemental Affidavit was not truly "supplemental" and was therefore not admissible under Indiana Trial Rule 56(E), which provides, in part: "The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." T.R. 56(E). In his appellate brief, Campbell asserts, "It cannot be said that this bald allegation of assignment [found in paragraph six] 'supplemented' any evidence in the record. This is the first alleged evidence of an assignment." Appellant's Br. p. 7-8. This is incorrect. To the contrary, Sebring's initial Affidavit provided:

> 7. Vernon authorizes and assigns certain duties and responsibilities to its agents to act on its behalf pursuant to Indiana law, including the pursuit of

> litigation to recover losses, fees, and costs of enforcing its Indemnity Agreements and Promissory Notes. . . .
> 9. Vernon appointed A.A.A. Bail Bonds, Inc., of Indianapolis, Indiana as an authorized agent of this company for the purpose of transacting, writing, and issuing surety bonds within the scope of the agents [sic] authority under an agreement between said agent and Vernon. A copy of the Agent's Certificate of Authority is attached hereto as Exhibit E1.
> 10. Vernon also appointed Fred Carter of Indianapolis, Indiana as an authorized agent for the purpose of transacting, writing, and issuing surety bonds insurance within the scope of the agent's authority under the agreements between said agent and Vernon. A copy of said Certificate [of] Authority is attached hereto as Exhibit E2.

Appellant's App. p. 100. We find that the challenged portion of Sebring's Supplemental Affidavit expands upon the information provided in the initial Affidavit and that it is therefore supplemental in nature. *See Ind. Univ. Med. Ctr. v. Logan*, 728 N.E.2d 855, 859 (Ind. 2000) ("Dr. Schramm's affidavit expands on the reference to him and his opinion found in Logan's own timely filed affidavit. We therefore view the Dr. Schramm affidavit as merely a supplement to Logan's affidavit."). The trial court did not abuse its discretion in denying Campbell's motion to strike the Supplemental Affidavit.

II. Cross-Motion for Summary Judgment

We now turn to Campbell's assertions that the trial court erred in granting summary judgment to A.A.A. because (1) A.A.A. may not recover against Campbell under the Indemnity Agreement and (2) there is a genuine dispute as to the amount, if any, of damages incurred by A.A.A. Our standard of review when examining the grant or denial of summary judgment is well-settled:

> Summary judgment is appropriate when the designated evidentiary matter reveals that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. . . . In reviewing the grant or denial of a motion for summary judgment, we are bound by the same standard as the trial court. We consider only those facts which were

> designated to the trial court at the summary judgment stage. We do not reweigh the evidence, but rather, liberally construe all designated evidentiary material in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact. Even if the facts are undisputed, summary judgment is inappropriate where the record reveals an incorrect application of the law to the facts.

Zubrenic v. Dunes Valley Mobile Home Park, Inc., 797 N.E.2d 802, 804-05 (Ind. Ct. App. 2003) (citations omitted), *trans. denied*; *see also* Ind. Trial Rule 56(C). The trial court's order granting or denying summary judgment is "cloaked with a presumption of validity," and it is the appealing party's burden to persuade the appellate court that the decision was in error. *Ott v. AlliedSignal, Inc.*, 827 N.E.2d 1144, 1151 (Ind. Ct. App. 2005) (citations omitted), *trans. denied*.

A. Dispute Regarding A.A.A.'s Right to Recover

With some exceptions, a party to a contract may sue to enforce its terms and recover damages for its breach. However, generally "only those who are parties to a contract, or those in privity with a party have the right to recover under the contract." *Barth Elec. Co. v. Traylor Bros., Inc.*, 553 N.E.2d 504, 506 (Ind. Ct. App. 1990). Campbell contends that A.A.A. may not recover its own costs and expenses arising out of Laufman's failure to appear because it is not a party to the Indemnity Agreement and is not an agent or assignee of Vernon General. However, it is clear from the record that A.A.A. is a party to the Indemnity Agreement and may therefore recover under it.

The Indemnity Agreement provides in relevant part: "THIS AGREEMENT is made by and between the undersigned Defendant, Indemnitors, and VERNON GENERAL INSURANCE COMPANY, its agents and/or assigns through its duly authorized Agent _____." Appellant's App. p. 5. Carter is named in the upper right

corner of the document as the "Agent," followed by Carter's power of attorney number indicating his authority to enter into the Indemnity Agreement with Campbell. *Id.* Carter's and A.A.A.'s authority to contract with Campbell on behalf of Vernon General is further evidenced by two Agent's Certificates of Authority, which named both Carter and A.A.A. as "Authorized Agent[s]" of this Vernon General for transacting surety bonds. *Id.* at 8-9. We are also presented with a document entitled Power of Attorney from the Bail Bond Department of Vernon General that is signed by Carter as the Attorney-in-Fact, shows A.A.A. as the bail bond agency, and describes the signatory as Vernon General's "duly authorized officer." *Id.* at 7. We find that A.A.A. acted as a duly authorized agent of Vernon General when executing the Indemnity Agreement and that it was therefore a party to the contract and able to recover under it. There is no genuine issue of fact relating to A.A.A.'s right to recover under the Indemnity Agreement.

Campbell further argues that only damages actually suffered by Vernon General can be recovered under the Indemnity Agreement. According to Campbell, because there is no evidence in the record that Vernon General incurred or paid any expenses pursuant to Laufman's failure to appear, A.A.A. may not recover under the contract. This argument is unavailing. We have already determined that the trial court properly considered the contents of the Affidavit and Supplemental Affidavit submitted by A.A.A. and designated in support of its cross-motion for summary judgment. In his Affidavit, Vernon General Managing General Agent Sebring explained that A.A.A. was permitted to incur expenses and liabilities and that Vernon is responsible for the payment of those expenses:

> 16. Vernon authorized its agents, A.A.A. Bail Bonds, Inc., and Fred Carter, to incur expenses, costs, and fees in attempting to locate and produce David Laufman to the criminal court as ordered. . . .
> 19. Vernon is responsible for the costs, expenses, and fees incurred by A.A.A. Bail Bonds, Inc., and Fred Carter in honoring and performing its duties and obligations for the Indemnity Agreement signed by Mark P. Campbell.

Id. at 101-02. In Sebring's Supplemental Affidavit, he clarified that Vernon General assigned its right to recover those expenses and liabilities against Campbell to A.A.A. and Carter: "I have also authorized and assigned Vernon's right to recover all costs, expenses, fees, orders, judgment, claims, demands, and liabilities related to a breach of the Bail Bond Agreement, Indemnity Agreement, and Promissory Note to A.A.A. Bail Bonds, Inc., and Fred Carter." *Id.* at 104. The record contains no contradictory information. Campbell has failed to show a genuine issue of fact.

B. Dispute Regarding Damages

Campbell next contends that the trial court erred in granting A.A.A.'s cross-motion for summary judgment because there is a genuine issue of fact regarding the amount of damages incurred by A.A.A. He cites to two exhibits in the record that he argues contain irreconcilable calculations of damages. First, he points to the January 2006 Affidavit of Debt, which lists the sums due as "principal of $3000.00 and interest of $360.00 for a total of $3360.00" but contains no mention of attorney fees or a description of what comprises the "principal." *Id.* at 68.[3] He then compares this amount to the one provided in the May 2006 Affidavit of Debt. This affidavit itemizes the costs borne by

[3] We note that there is an obvious typographical error in Widgery's affidavit. Specifically, his calculation of expenses purports to list the sums due as of May 18, 2005, while that was actually the date upon which Laufman failed to appear. We can infer that Widgery intended to testify to the amount of expenses incurred by A.A.A. as of January 25, 2006, the date of the affidavit. *See* Appellee's Br. p. 18-19.

A.A.A. and calculates the company's total cost related to Laufman's failure to appear as $3,037.23. However, it does not include interest.

These affidavits are not necessarily incompatible. This is for the simple reason that neither document appears to be a complete documentation of A.A.A.'s expenses and liabilities pertaining to Laufman. The January 2006 Affidavit provides a concrete total for a principal amount owed and interest as of January 25, 2006. This affidavit, however, makes no mention of attorneys' fees. While it does provide, "I am not aware of any setoffs, counter-claims, or other credits that would be due and owing to the defendant by the plaintiff," *id.* at 91, this does not shield Campbell from liability for subsequent or then-unknown legal fees. Similarly, while the May 2006 Affidavit of Debt does include in its total "Fees to file Motion (Atty.)," it does not mention other attorneys' fees possibly incurred by A.A.A., nor does it include any mention of interest. *Id.* at 55.

Stripping away interest, the difference between the amounts calculated by A.A.A. is a mere $37.23. Campbell argues that this discrepancy of $37.23 leads to an inference that A.A.A. incurred no expenses at all. Appellant's Br. p. 12. We fail to see how this could be the case. The trial court was free to note the incompleteness of the two documents and conclude that there was no genuine issue of fact regarding the amount of damages suffered by A.A.A. Indeed, the trial court examined the record and awarded A.A.A. the lower of the two amounts put forward during the pendency of this action. Campbell does not argue that the amount rejected by the trial court is the proper calculation of damages; rather, he only argues that no expenses were incurred at all. The materials contained in the record and designated by the parties make clear that expenses

were, in fact, accrued. Campbell designates absolutely no evidence to dispute specific expenses. His contention that there were no expenses as opposed to the $3037.23 found by the trial court does not convince us that there is a genuine issue of fact regarding damages.

Conclusion

We conclude that the trial court did not abuse its discretion in denying Campbell's motions to strike portions of two affidavits because the affidavits comported with Indiana Trial Rule 56(E). Further, we conclude that the undisputed facts show that A.A.A. is permitted to recover under the Indemnity Agreement and that the record does not support Campbell's contention that there are no damages. Summary judgment in favor of A.A.A. is appropriate. We affirm.

BAKER, C.J., and BAILEY, J., concur.