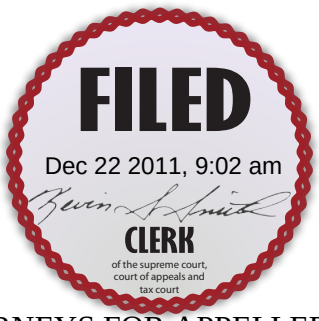

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IN THE
COURT OF APPEALS OF INDIANA

SENIOR MARKET DEVELOPMENT, LLC and AHREN BAUMGART,	)	
Appellants-Defendants,	)	
vs.	)	No. 82A01-1103-PL-138
TITAN FINANCIAL GROUP, LLC,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
Cause No. 82C01-1002-PL-76

December 22, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Senior Market Development, LLC ("SMD"), and Ahren Baumgart appeal the trial court's judgment awarding $11,712.48 in attorney's fees and expenses to Titan Financial Group, LLC ("Titan"), on Titan's complaint for breach of contract. On appeal, SMD and Baumgart contend that the trial court erred when it awarded attorney's fees to Titan despite concluding that Titan had failed to prove it suffered other damages as a result of the breach. Titan responds that a contract between the parties provides the legal justification for an award of attorney's fees under the circumstances presented. We agree with Titan and affirm the trial court's judgment. We remand to the trial court for an assessment of appellate attorney's fees against SMD and Baumgart.

Facts and Procedural History[1]

In March of 2008, Baumgart and Andrew Rice were co-owners of two separate entities, SMD and Titan, which operated as field marketing organizations ("FMOs"). An FMO markets products for companies with which it has contracted and recruits and trains brokers to sell products for the companies. SMD and Titan entered into a contract with US Healthcare Holdings, LLC (hereinafter referred to as "Welborn"),[2] pursuant to which SMD and Titan together agreed to act as the FMO for Welborn's Medicare Advantage healthcare

[1] We note that counsel for the Appellants included portions of the trial transcript in the Appendix submitted to this Court. We direct counsel to Indiana Appellate Rule 50(F), which provides, "Because the Transcript is transmitted to the Court on Appeal pursuant to Rule 12(B), parties should not reproduce any portion of the Transcript in the Appendix."

[2] Throughout the trial transcript, US Healthcare Holdings, LLC, is referred to as "Welborn" because Welborn Heath Plans was the underwriter of the US Healthcare Medicare plans. Accordingly, for clarity, we will also refer to Welborn rather than US Healthcare.

and prescription drug plans. Welborn agreed to pay SMD and Titan a commission of $200 the first year for each new customer's plan and $100 each plan year that a customer renewed.

In August of 2009, Baumgart and Rice decided to sever their business relationship. They entered into an "Agreement for Exchange of Limited Liability Company Interests" (the "Agreement") on August 6, 2009. Appellants' App. at 15-25. Pursuant to the Agreement, Baumgart would own 100% of SMD and Rice would own 100% of Titan. In addition, Titan assigned to SMD all of its right, title, and interest in the Welborn contract. As consideration for such assignment, SMD agreed to pay Titan 40% of the FMO commission received from Welborn for all members enrolled prior to March 31, 2010. Pursuant to Paragraph 4(f) of the Agreement, during the time period that net commission is owed to Titan, SMD agreed that it would neither terminate the current and future Welborn contracts nor take any action which would cause Welborn to terminate the contracts. *Id*. at 17.

On December 17, 2009, Baumgart, on behalf of SMD, sent a letter to Welborn resigning as FMO effective April 1, 2010. SMD was dissatisfied with Welborn and Welborn was dissatisfied with SMD for what was viewed as a "bad selling season." Tr. at 72. After SMD terminated the Welborn contract, Titan filed a complaint against SMD and Baumgart for breach of contract and seeking declaratory judgment on February 10, 2010.[3] In the breach of contract action, Titan sought damages for "the lost commission resulting from the breach

[3] We note that a copy of Titan's complaint is not included in the record on appeal. However, it appears that in addition to a breach of contract claim, Titan's complaint sought declaratory relief and provisional orders requiring the payment of commissions to the trial court until final resolution of the case. Titan also filed a "Motion for Emergency Hearing and to Set Expedited Trial." Although an emergency hearing date was initially set for February 26, 2010, the hearing never occurred. Appellants' App. at 36.

of the Agreement by Baumgart and SMD" as well as "reasonable attorneys' fees." Appellants' Br. at 1. On April 12, 2010, SMD and Baumgart filed their answer and affirmative defenses, including the defense that Titan had not suffered any damage as result of their breach of the Agreement. The trial court held a bench trial on December 2, 2010. Thereafter, on December 30, 2010, the trial court entered the following judgment:

> The Court having heard the evidence and argument of counsel, and being duly advised, now finds that the Plaintiff proved by a preponderance of the evidence that the Defendants breached paragraph 4(f) of the August 6, 2009 Agreement. The Court further finds that the Plaintiff failed to prove damages by a preponderance of the evidence, with the exception of attorney fees and expenses.
>
> IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED BY THE COURT that the Plaintiff recover of and from the Defendants the amount of Eleven Thousand Seven Hundred Twelve Dollars Forty-Eight Cents ($11,712.48) in attorney fees and expenses.
>
> IT IS FURTHER ORDERED that the Defendants recover no attorney's fees or expenses.

Appellants' App. at 1. SMD and Baumgart filed a motion to correct error which the trial court denied following a hearing on March 8, 2011. This appeal ensued. We will state additional facts in our discussion when necessary.

Discussion and Decision

Here, the trial court entered a general judgment in favor of Titan. We will affirm a general judgment "if it can be sustained upon any legal theory consistent with the evidence." *UFG, LLC v. Southwest Corp.*, 784 N.E.2d 536, 543 (Ind. Ct. App. 2003), *trans. denied*. We do not reweigh the evidence or judge witness credibility, but we consider only the evidence

most favorable to the judgment along with all reasonable inferences that can be drawn therefrom. *Id*.

Moreover, our scope of review when considering a damage award in a breach of contract case is limited. *Coffman v. Olson & Co.*, 906 N.E.2d 201, 210 (Ind. Ct. App. 2009), *trans. denied.* We do not reweigh evidence or judge witness credibility, and will consider only the evidence favorable to the award. *Id.* The award cannot be based on speculation, conjecture, or surmise, and must be supported by probative evidence. *Id.* We will reverse the trial court's award only when it is not within the scope of the evidence of record. *Id.* at 210-11.

The parties do not dispute that SMD and Baumgart breached Paragraph 4(f) of the Agreement when SMD terminated the Welborn contract during the time period that net commission was owed to Titan. Nevertheless, SMD and Baumgart maintain that Titan cannot prevail on a claim for breach of contract, and consequently recover attorney's fees, merely because it proved breach of a term of the Agreement. Specifically, SMD and Baumgart contend that Titan was required to prove that it suffered damages as a direct result of the breach before Titan could also recover attorney's fees.

SMD and Baumgart correctly state that to recover for breach of contract, a plaintiff must prove that (1) a contract existed; (2) the defendant breached the contract, and (3) the plaintiff suffered damage as a result of the defendant's breach. *Collins v. McKinney*, 871 N.E.2d 363, 370 (Ind. Ct. App. 2007). Consequential damages may be awarded on a breach of contract claim when the non-breaching party's loss flows naturally and probably from the

breach and was contemplated by the parties when the contract was made. *Indianapolis City Market Corp. v. MAV, Inc.*, 915 N.E.2d 1013, 1024 (Ind. Ct. App. 2009). However, SMD and Baumgart erroneously assume that attorney's fees and expenses are not recoverable in this case in the absence of an award of other damages. Specifically, SMD and Baumgart argue that attorney's fees cannot be considered "damages arising from the defendant's breach." Appellants' Reply Br. at 3. Despite their urging, we need not decide whether the attorney's fees and expenses incurred by Titan in pursuing its breach of contract claim should be considered damages that flowed naturally and probably from the breach.[4] Instead, the Agreement of the parties specifically provided for the recovery of attorney's fees incurred in connection with any breach, nonfulfillment, or default in the performance of any covenant of the Agreement, and neither the trial court nor this Court need look any further than the Agreement itself.

We begin by recognizing that generally, Indiana follows the American Rule, which requires each party to pay his or her own attorney fees. *Steward v. TT Commercial One, LLC*, 911 N.E.2d 51, 58 (Ind. Ct. App. 2009), *trans. denied*. However, the parties may shift the obligation to pay such fees through a contract or agreement, and courts will enforce the agreements as long as they are not contrary to law or public policy. *Id.* We agree with Titan

[4] The weight of authority in Indiana provides that attorney's fees are not recoverable as consequential damages in a breach of contract action in the absence of an agreement, statute, or rule. *See Thor Electric, Inc. v. Oberle & Assocs.*, 741 N.E.2d 373, 382 (Ind. Ct. App. 2000) (citing *Indiana Ins. Co. v. Plummer Power Mower & Tool Rental, Inc.*, 590 N.E.2d 1085, 1093 (Ind. Ct. App. 1992)).

that Paragraph 10 of the parties' Agreement entitled "Indemnification" supports the trial court's award of attorney's fees to Titan in this case. Appellant's App. at 20.

Indemnity has been defined as "[t]he right of an injured party to claim reimbursement for its loss, damage or liability from a person who has such a duty." BLACK'S LAW DICTIONARY 784 (8th ed. 2004). Rights of indemnification can arise in three contexts: (1) express contractual obligation, (2) statutory obligation, or (3) common law implied indemnity. *Sears, Roebuck, & Co. v. Boyd*, 562 N.E.2d 458, 461 n.2 (Ind. Ct. App. 1990). Generally, an indemnity agreement involves a promise by one party (the indemnitor) to reimburse another party (the indemnitee) for the indemnitee's loss, damage, or liability. *Henthorne v. Legacy Healthcare, Inc.*, 764 N.E.2d 751, 756 (Ind. Ct. App. 2002). If the words of an indemnity agreement are clear and unambiguous, they are to be given their plain and ordinary meaning. *Id*. Thus, we will construe an indemnity agreement to cover all losses and damages to which it reasonably appears the parties intended to apply. *Id*.

Paragraph 10 of the Agreement provides in relevant part:

> (b) Baumgart and SMD shall indemnify and defend [TITAN] their independent contractors, agents, attorneys, and accountants, and their successors and assigns (collectively, the "TITAN Indemnities [sic]"), in respect of, and hold them harmless from and against, and shall pay (i) the full amount of any and all Losses (as hereinafter defined) suffered, incurred or sustained by any and/or all of the TITAN Indemnities [sic] (or to which any and/or all of the TITAN Indemnities [sic] may become subject) arising out of, resulting from, based upon, in connection with or relating to any breach of or inaccuracy in the representations and warranties, or any breach, nonfulfillment or default in the performance of any covenant or agreement, on the part of Baumgart and SMD contained in this Agreement, and (ii) the full amount of any and all Losses suffered, incurred or sustained by any and/or all of the TITAN Indemnities [sic] (or to which any and/or all of the TITAN

> Indemnities [sic] may become subject) arising out of, resulting from, based upon, in connection with or relating to the business or condition of SMD arising before or after the Effective Date [.]
>
> (c) As used in this section, "Loss" or "Losses" means any and all damages, fines, fees, penalties, deficiencies, diminution in value of investment, losses and expenses, including without limitation, interest, reasonable expenses of investigation, court costs, reasonable fees and expenses of attorneys, accountants and other experts or other expenses of litigation or other proceedings or of any claim, default or assessment (such fees expenses to include without limitation, all reasonable fees and expenses, including, without limitation, reasonable fees and expenses of attorneys incurred in connection with (i) the defense of any claims or (ii) asserting or disputing any rights under this Agreement against any party thereto or otherwise[)].

Appellant's App. at 20-21.

The unambiguous language of Paragraph 10 of the Agreement indicates that SMD and Baumgart agreed to indemnify Titan for "the full amount of any and all Losses … arising out of, resulting from, based upon, in connection with or relating to … any breach, nonfulfillment or default in the performance of any covenant or agreement … contained in this Agreement." *Id*. The term "Losses" is defined to include "reasonable fees and expenses of attorneys, incurred in connection with … asserting or disputing any rights under this Agreement against any party thereto or otherwise." *Id.* There is no requirement in Paragraph 10 that Titan prove a textbook case of breach of contract and/or that Titan prove that it suffered additional damages or losses as a result of SMD and Baumgart's nonfulfillment of Paragraph 4(f) of the Agreement. Based upon the broad language used by the parties in Paragraph 10, it reasonably appears that the parties intended that the indemnity provision cover attorney's fees incurred by Titan in connection with its assertion of a breach of contract

claim against SMD and Baumgart.[5] Accordingly, we cannot say that the trial court erred when it awarded Titan its attorney's fees.

SMD and Baumgart make much of the fact that indemnification clauses generally provide coverage for the risk of harm sustained by a third party as opposed to harm suffered by the indemnitee. *See City of Hammond v. Plys*, 893 N.E.2d 1, 4 (Ind. Ct. App. 2008) (indemnity clause covers risk of harm sustained by third persons that may be caused by either indemnitor or indemnitee). Thus, they argue that the indemnification provision here was not meant to apply to a breach of contract action between the parties to the Agreement. To the contrary, the plain language of the indemnification provision here provides that SMD and Baumgart shall indemnify, defend, hold harmless, and pay Titan the full amount of any losses incurred in "asserting or disputing any rights under this Agreement against *any party thereto or otherwise*." *Id*. (emphasis added).[6] The provision specifically refers to a cause of action between the parties to the Agreement and does not require that the losses be incurred by a

[5] SMD and Baumgart contend that Titan cannot now rely on Paragraph 10 of the Agreement to justify the trial court's award of attorney's fees because Titan did not specifically rely upon that provision during trial. However, the entirety of the parties' Agreement was clearly in evidence before the trial court. We remind SMD and Baumgart that we will affirm a general judgment "if it can be sustained upon any legal theory consistent with the evidence." *UFG*, 784 N.E.2d at 543.

[6] SMD and Baumgart also maintain that the trial court's interpretation of Paragraph 10 of the Agreement to allow an award of attorney's fees would render Paragraph 20 of the Agreement meaningless. Paragraph 20 provides: "In the event any party incurs any costs, including reasonable attorney's fees to enforce the terms of this Agreement, the prevailing party in such action shall be entitled to recover such costs." Appellants' App. at 23. Although Paragraph 20 may be somewhat redundant of Paragraph 10, that is not to say that Paragraph 20 is rendered meaningless. Both provisions support an award of attorney's fees under different circumstances. We must accept an interpretation of the contract that harmonizes its provisions, as opposed to one that causes the provisions to conflict or be rendered meaningless. *See Four Seasons Mfg., Inc. v. 1001 Coliseum, LLC*, 870 N.E.2d 494, 501 (Ind. Ct. App. 2007).

third party. Again, we need look no further than the Agreement itself to determine the rights and liabilities of the parties.

Finally, SMD and Baumgart suggest that to allow an award of attorney's fees to Titan in the absence of proof of other damages is somehow unfair and would create an unnecessary likelihood of frivolous or oppressive lawsuits. We wholeheartedly disagree and emphasize that the parties here contracted to provide for such an award. Courts in Indiana have long recognized the freedom of parties to enter into contracts and have presumed that contracts represent the freely bargained agreement of the parties. *Trimble v. Ameritech Publ'g, Inc.*, 700 N.E.2d 1128, 1129 (Ind. 1998). SMD and Baumgart have given us no reason to question whether they, as sophisticated parties, should be bound by their Agreement with Titan.

In sum, the trial court did not err when it awarded Titan its attorney's fees pursuant to the Agreement. SMD and Baumgart do not challenge the amount of the award, and we find the award to be within the scope of the evidence presented. Additionally, Titan correctly asserts that, pursuant to the Agreement, it is entitled to reasonable attorney's fees incurred in defending this appeal. We therefore remand to the trial court for a hearing to determine Titan's appellate attorney's fees.

Affirmed and remanded.

BAILEY, J., concurs

MATHIAS, J., dissents with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

SENIOR MARKET DEVELOPMENT, LLC and AHREN BAUMGART, Appellants,	)	
vs.	)	No. 82A01-1103-PL-138
TITAN FINANCIAL GROUP, LLC, Appellee.	)	

MATHIAS, Judge, dissenting

I respectfully dissent from the majority's conclusion that Titan is entitled to recover attorney fees and expenses pursuant to the parties' Agreement.

The majority concludes that Titan is entitled to attorney fees based on Paragraph 10 of the parties' Agreement. However, as noted by SMD and Baumgart, Titan did not argue to the trial court that it was entitled to attorney fees under Paragraph 10; instead, Titan based its trial argument solely on Paragraph 20 of the Agreement and did not argue about Paragraph 10 until its motion to correct error. "A party waives an issue by presenting it for the first time in a motion to correct error." Giltner v. Ivers, 954 N.E.2d 1035, 1040 (Ind. Ct. App. 2011).

But even considering Titan's argument regarding Paragraph 10 on the merits, I disagree with the majority. Contractual provisions allowing recovery of attorney fees should

be strictly construed. BKCAP, LLC v. Captec Franchise Trust 2000-1, 701 F. Supp. 2d 1030, 1035-36 (N.D. Ind. 2010) (citing Chicago Southshore & South Bend R.R. v. Itel Rail Corp., 658 N.E.2d 624, 634 (Ind. Ct. App. 1995)). And, strictly construed, Paragraph 10 is an indemnification agreement.

Indemnity "transfers liability from one who has been compelled to pay damages to another who should bear the entire loss." Henthorne v. Legacy Healthcare, Inc., 764 N.E.2d 751, 756 (Ind. Ct. App. 2002) (quoting 41 Am.Jur.2d Indemnity § 1, at 348 (1995)). Thus, indemnity agreements involve the promise of the indemnitor to reimburse the indemnity when the indemnitor is liable to a *third party*. See Morris v. McDonald's Corp., 650 N.E.2d 1219, 1222 (Ind. Ct. App. 1995) (noting that an indemnity clause covers the risk of harm sustained *by third persons* that might be caused by either the indemnitor or the indemnity by shifting the financial burden for the payment of damages from the indemnitee to the indemnitor).

Here, Paragraph 10 provides that SMD and Baumgart "shall indemnify and defend" Titan and pay "the full amount of any and all Losses[7] . . . suffered, incurred or sustained" by Titan "arising out of, resulting from, based upon, in connection with or relating to any breach of or inaccuracy in the representations and warranties, or any breach, nonfulfillment or default in the performance of any covenant or agreement on the part of Baumgart and SMD contained in this Agreement[.]" Appellants' App. pp. 20-21. The majority reads Paragraph

[7] As noted by the majority, Paragraph 10 defines "losses" to include "reasonable fees and expenses of attorneys." Id.

10 as providing Titan to recover attorney fees where a breach of the Agreement has harmed no one—neither a third party nor Titan. I respectfully disagree.

We must interpret the Agreement by reading the contract as a whole and attempt to construe the language so as to not render any words, phrases, or terms ineffective or meaningless. DLZ Indiana, LLC v. Greene County, 902 N.E.2d 323, 327 (Ind. Ct. App. 2009). Thus, we must accept an interpretation of the contract which harmonizes its provisions. Id. Moreover, in reading the terms of a contract together, we keep in mind that the more specific terms control. Id. at 328.

When read in context with Paragraph 20 of the Agreement, Paragraph 10 is clearly a traditional indemnification clause, i.e. providing that SMD and Baumgart would indemnify and defend Titan from suits brought by third parties against Titan as a result of SMD and/or Baumgart's failure to perform under the contract. Paragraph 20 provides, "In the event any party incurs any costs, including reasonable attorney fees to enforce the terms of this Agreement, *the prevailing party* in such action shall be entitled to recover such costs." Appellants' App. p. 23 (emphasis added). In contrast to Paragraph 10, Paragraph 20 is a more specific provision which provides the conditions for the recovery of attorney fees as a result of litigation over the contract *between the parties*, as opposed to a indemnification provision. It is thus no surprise that, at trial, Titan based its claim for attorney fees on Paragraph 20. Because Paragraph 20, not Paragraph 10, is applicable to claims of breach between the parties, the pertinent question is whether it can be said that Titan is the prevailing party in this action. The answer to that question is no.

The term "prevailing party" contemplates a trial on the merits *and entry of a favorable judgment*. Reuille v. E.E. Brandenberger Const., Inc., 888 N.E.2d 770, 771-72 (Ind. 2008) (citing Black's Law Dictionary 1188 (6th ed. 1990)); see also Allstate Ins. Co. v. Axsom, 696 N.E.2d 482, 486 (Ind. Ct. App. 1998) ("A 'prevailing party' is defined as a party who successfully prosecutes his claim or asserts his defense."). Here, Titan established a breach of the Agreement, but no resulting damages. Thus, Titan could did not truly prevail in its action for breach of contract because Titan did not successfully prosecute its claim. See Collins v. McKinney, 871 N.E.2d 363, 370 (Ind. Ct. App. 2007) (setting forth the three essential elements of breach of contract action).

Moreover, under either Paragraph 10 or Paragraph 20, I believe that permitting recovery of attorney fees where there are no actual damages is both inequitable and creates an incentive for unnecessary lawsuits. We have previously addressed this concern in Rauch v. Circle Theatre, 176 Ind. App. 130, 374 N.E.2d 546 (1978). In that case, the lessee breached the lease agreement. But when the lessor brought suit on the breach, the breach had caused no damage to the lessor. On appeal, the lessor claimed the trial court erred in failing to award him attorney fees pursuant to the lease agreement. The Rauch court rejected this argument, agreeing with an earlier case that a lessor may recover his attorney fees under a provision in the lease "only where he makes a successful recovery on the merits of his complaint[.]" 176 Ind. App. at 141, 374 N.E.2d at 554 (citing Taylor v. Lehman, 17 Ind. App. 585, 46 N.E. 84, 85 (1897)).

The Rauch court noted that a contractual provision allowing for the recovery of attorney fees is not by itself contrary to public policy, but "a construction of such a provision allowing a recovery in unsuccessful actions would create an unnecessary likelihood of frivolous or oppressive lawsuits." Id. The court explained:

> The purpose of allowing an award of attorney's fees in a civil action is to more fully compensate a party who has successfully enforced his legal rights in court rather than to merely provide that person with free access to the courts at the expense of his opponent. The allowance of attorney's fees to a party who has no enforceable claim for relief would not further this purpose.

Id.; see also Taylor, 17 Ind. App. 585, 46 N.E. at 85 (holding that when lessor failed to prove damages, no attorney fees could be awarded under lease).

The same is true in the case before us. Without any damages, Titan cannot and should not recover attorney fees. The facts before us also bear out the Rauch court's concern for frivolous or oppressive lawsuits. Titan incurred over $10,000 in legal fees pursuing a claim where it could not even prove damages. Although Indiana recognizes the freedom to contract, contractual provisions shifting the obligation to pay attorney fees through a contract will not be enforced if they are contrary to public policy. Steward v. TT Commercial One, LLC, 911 N.E.2d 51, 58 (Ind. Ct. App. 2009), trans. denied. Simply put, allowing a party who cannot prove damages to recover attorney fees is contrary to public policy. See Rauch, 176 Ind. App. at 141, 374 N.E.2d at 554; Taylor, 17 Ind. App. 585, 46 N.E. at 85. Otherwise, a party such as Titan, who could establish a breach of contract but no resulting damages, could prosecute a breach of contract action simply to "punish" the breaching party or to achieve a purely "moral" victory. However, if they were assured that they would have to foot

their own legal bill, such a party might think twice before pursuing a weak breach of contract claim.

In summary, I would first find that Titan has waived its argument for the award of attorney fees under Paragraph 10. On the merits I would hold that Paragraph 20, not Paragraph 10, is controlling. I would also hold that Titan was not the prevailing party below and therefore is entitled to neither trial nor appellate attorney fees under Paragraph 20. I believe that it is contrary to law and to public policy to permit a party who has no actual damages to recover attorney fees.