

IN THE SUPREME COURT OF IOWA

No. 20-0817

(Kossuth County No. LACV027056)

JOSEPH GOCHE

Plaintiff-Appellant / Cross-Appellee,

vs.

WMG, L.C.,

Defendant-Appellee / Cross-Appellant.

Appeal from the Iowa District Court in and for Kossuth County

The Honorable David A. Lester

Plaintiff-Appellant/Cross-Appellee's Final Reply Brief

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

Due to the nature of the issues presented in the parties' cross appeals, the most logical way for Appellant/Cross-Appellee Joseph Goche ("Goche") to organize this reply brief is to first respond to the two issues Appellee/Cross-Appellant WMG, L.C. ("WMG") raises in its cross-appeal, then reply to WMG's arguments about the single issue Goche raised in his appeal.

- A. Did the district court correctly decide Goche is entitled to indemnification from WMG?

Yes, the district court correctly decided Goche is entitled to indemnification from WMG.

Iowa Code § 489.408(1)

In re Internet Navigator Inc., 293 B.R. 198 (N.D. Iowa 2003)

Holden v. Constr. Mach. Co., 202 N.W.2d 348 (Iowa 1972)

Iowa Coal Min. Co. v. Monroe Cty., 555 N.W.2d 418 (Iowa 1996)

Venard v. Winter, 524 N.W.2d 163 (Iowa 1994)

Leuchtenmacher v. Farm Bureau Mut. Ins. Co., 460 N.W.2d 858 (Iowa 1990)

- B. Is the district court's calculation of Goche's indemnification award supported by the evidence presented at trial?

Yes, the district court's calculation of Goche's indemnification award is supported by the evidence presented at trial.

Raper v. State, 688 N.W.2d 29 (Iowa 2004)

Keppy v. Lilienthal, 524 N.W.2d 436 (Iowa Ct. App. 1994)

- C. Did the district court err in denying Goche's claim for attorneys' fees he incurred pursuing the indemnification he was entitled to recover from WMG?

Yes, the district court erred in denying Goche's "fees on fees" claim.

Iowa Code § 489.408(1)

Lynch v. City of Des Moines, 464 N.W.2d 236 (Iowa 1990)

STATEMENT OF THE CASE¹

The genesis of this appeal is Goche's request to be indemnified for legal expenses he incurred to defend against claims WMG asserted against him as a former WMG manager in LACV026869. Goche pursued this indemnification claim in a separate lawsuit, LACV027056, in the same court. The district court in LACV027056 decided Goche was entitled to indemnification on summary judgment (Appendix Volume I ("App. I") at 148, February 27, 2018 Order), then awarded Goche \$68,831.10 as indemnification after a bench trial (App. I at 201, May 1, 2020 Order). However, the district court denied Goche's claim to recover the fees he incurred pursuing indemnification ("fees on fees"). (*Id.*) Goche has appealed the district court's denial of "fees on fees," while WMG cross-appeals the district court's decisions to award Goche indemnification.

With respect to WMG's cross-appeal, this Court should affirm the district court's indemnification award. The district court correctly decided Goche is entitled to indemnification as a matter of law pursuant to Iowa Code § 489.408(1). WMG's Operating Agreement and Articles of Organization do not even mention – let alone "alter or eliminate" – Goche's statutory indemnification rights. And

¹ Goche already provided a Statement of the Case in his opening brief, but Goche is providing another Statement of the Case in this reply brief in order to address the issues raised in WMG's cross-appeal. For the Statement of Facts, Goche refers to his opening brief.

Goche did not violate any preclusion doctrines by pursuing indemnification in LACV027056 rather than LACV026869. The court in LACV026869 did not resolve any issue that would bar Goche from seeking indemnification in LACV027056. To ensure a clean separation between the cases, Goche voluntarily dismissed without prejudice any remaining indemnification claims in LACV026869 so he could litigate them in LACV027056 alone. On these facts, Goche was free to pursue indemnification in LACV027056. As for the amount of indemnification awarded to Goche in LACV027056, the district court's ruling was well within court's discretion and was supported by evidence presented at trial. This Court cannot re-weigh the evidence, as WMG requests, and there is no legal basis to disrupt the district court's award.

With respect to Goche's appeal, this Court should reverse the denial of Goche's "fees on fees" claim and decide the district court has authority to grant "fees on fees" for the reasons set forth in Goche's opening brief. WMG argues in response that Goche's fees for pursuing indemnification in LACV027056 were unreasonable. WMG is wrong, but this Court should allow the district court to determine the reasonableness of Goche's "fees on fees" rather than deciding this issue for the first time on appeal.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DECIDED GOCHE IS ENTITLED TO INDEMNIFICATION FROM WMG [WMG'S CROSS-APPEAL]

A. Preservation of Error

The first issue in WMG's cross-appeal arises from the district court's (Judge Lester's) February 27, 2018 Order in LACV027056 entering partial summary judgment that Goche is entitled to indemnification from WMG. Although WMG opposed Goche's right to indemnification below, there is one argument WMG makes on appeal that it did not preserve. Specifically, WMG argues that Iowa Code § 489.408(1), the indemnification statute at issue, does not provide for the recovery of attorney fees. (WMG Proof Br. at 40.) WMG did not raise this argument with the district court. WMG cannot raise this argument for the first time on appeal. *See In re Estate of Frye*, 797 N.W.2d 622 (Iowa Ct. App. 2011) (“We will not consider issues raised for the first time on appeal.”).

B. Standard of Review

The Iowa appellate courts review summary judgment decisions for corrections of legal errors. *Deeds v. City of Marion*, 914 N.W.2d 330, 339 (Iowa 2018). “Summary judgment is proper if there is no genuine issue as to any material fact in dispute and the moving party is entitled to a judgment as a matter of law.” *Pecenka v. Fareway Stores, Inc.*, 672 N.W.2d 800, 802 (Iowa 2003).

In this case, no material fact disputes exist regarding Goche's entitlement to indemnification. WMG does not even try to identify any disputed facts. The issue is a purely legal question that the district court properly answered in Goche's favor on summary judgment.

C. Goche Has a Right to Indemnification Under Iowa Law

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

A limited liability company **shall reimburse** for any payment made **and indemnify for any debt, obligation, or other liability** incurred by a member of a member-managed company or the manager of a manager-managed company **in the course of the member's or manager's activities on behalf of the company**, if, in making the payment or incurring the debt, obligation, or other liability, the member or manager complied with the duties stated in sections 489.405 and 489.409.

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

It is undisputed that Goche meets the requirements for indemnification under the statute. WMG sued Goche for alleged "activities" he took as a WMG manager "on behalf of the company." (App. I at 156 ("[T]he court finds based upon the evidence in the summary judgment record, and WMG does not challenge, that the

alleged actions taken by Joseph [Goche] that WMG claimed to be violations of his fiduciary duty were taken while he was still serving in the role of one of the managers of WMG.”) (emphasis added). *See also* App. II at 21 (“The Court finds, and no party challenges, that the alleged actions taken by Joseph Goche and claimed to be violations of his fiduciary duty were in furtherance of his role as manager of WMG.”) (emphasis added).) Goche incurred significant legal fees defending his “activities on behalf of the company.” In effect, Goche’s litigation expenses were a cost of his service to WMG.

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

The district court correctly ruled that Goche’s indemnification claim satisfies the elements of Iowa Code § 489.408(1). WMG does not challenge this aspect of the district court’s summary judgment order on appeal.

D. Goche’s Right to Indemnification Includes Attorneys’ Fees

In its cross-appeal, WMG argues that Iowa Code § 489.408(1) does not provide for the recovery of attorney fees. (WMG Proof Br. at 40.) As stated above, WMG failed to preserve error on this issue.

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

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

Although the cases cited above deal with corporate officers and not limited liability company managers, they are instructive. The indemnification statute for limited liability companies (Iowa Code § 489.408(1)) is roughly symmetrical to the

indemnification statute for corporations (Iowa Code § 490.852).² The two statutes should be interpreted consistently. There is no logical reason for a limited liability company manager to have less protection than a corporate officer in the indemnification context. Like an officer in a corporation, Goche is entitled to reimbursement for attorneys' fees he incurred to defend his actions as a WMG manager. *See* Iowa Code § 489.408(1).

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

WMG next incorrectly argues that its Operating Agreement precludes Goche from seeking indemnification. WMG bases its argument on Iowa Code § 489.110(7), which states that a limited liability company "operating agreement may alter or eliminate the indemnification for a member or manager provided by section 489.408, subsection 1." But the WMG Operating Agreement does not "alter or eliminate" Goche's statutory indemnification rights.

Section 5.6 of WMG's Operating Agreement states that "[t]he Managers shall be indemnified by the Company to the extent provided in the Company's

² The Iowa legislature adopted the RULLCA in 2008. *See* Iowa Code § 489.401, *et. seq.* Because the RULLCA is a relatively new statutory scheme, Iowa courts look to non-LLC-specific case law to aid in construction of the RULLCA. *See Moore v. Pioneer Estates, L.C.*, 843 N.W.2d 476, 2014 WL 69617, at *4 (Iowa Ct. App. 2014) ("Our supreme court has not evaluated the scope of this fiduciary duty; however, we look to our general rules of owner liability in business organizations to aid our construction."); *see also* 5 Ia. Prac., Business Organizations § 13:31, n.2.

Articles of Organization.” (December 5, 2020 Trial Ex. R.) The Agreement does not say the managers will only be indemnified to the extent provided in the Articles of Organization. The language in Section 5.6 of the Agreement is not limiting at all. Rather, the language requires WMG to indemnify its managers to the extent provided in the Articles of Organization, without regard to whether the managers may also have indemnification rights at law. The Operating Agreement does not explicitly (or even implicitly) “alter or eliminate” the indemnification provided by Iowa Code § 489.408(1).

WMG’s Articles of Organization, which are incorporated by reference into the Operating Agreement, do not “alter or eliminate” Goche’s indemnification rights, either. In fact, the Articles of Organization contain no provisions at all relating to indemnity. They are entirely silent on the issue. (December 5, 2020 Trial Ex. I.) Silence does not constitute an “alter[ation] or eliminat[ion].” *See, e.g., Prochelo v. Prochelo*, 346 N.W.2d 527, 529 (Iowa 1984) (deciding a divorce decree that was silent about allocation of debts between the parties did not change the parties’ pre-existing legal liabilities to each other).

When a limited liability company’s operating agreement is silent about a subject, the default provisions of the RULLCA control. Iowa Code § 489.110(2) (“To the extent the operating agreement does not otherwise provide for a matter described in subsection 1 [relating in part to the rights of managers], this chapter

governs the matter.”). In that sense, the RULLCA provisions “predominantly serve as gap-fillers, functioning as default provisions when the operating agreement fails to deal with one of RULLCA’s specified issues.” Patrick Shanahan, *Goodbye and Good Luck: Member Dissociation by Judicial Order Under Iowa’s Revised Uniform Limited Liability Company Act*, 61 Drake L. Rev. 535, 554 (2013). *See also Moore v. Pioneer Estates, L.C.*, 843 N.W.2d 476, 2014 WL 69617, at *4 (Iowa Ct. App. 2014) (applying procedure for withdrawal provided in the former version of Iowa’s LLC statutory scheme when the articles of organization were silent as to the procedure for withdrawal).

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

F. No Law Precludes Goche from Seeking Indemnification

WMG argues that, regardless of the merits of Goche’s indemnification claim, he cannot seek indemnification in this lawsuit under the doctrines of claim splitting, claim preclusion, and issue preclusion. (WMG Proof Br. at 37-40.) None of these doctrines bars Goche’s indemnification claim.

1. Claim Splitting and Claim Preclusion Do Not Apply

Claim splitting and claim preclusion are related concepts. *See Lemartec Eng'g & Constr. v. Advance Conveying Techs., LLC*, 940 N.W.2d 775, 779 (Iowa 2020). The basic rule is that a party cannot split a single claim and litigate pieces of the same claim in separate actions. *Id.* However, the rule does not bar a party from litigating a distinct claim in a new lawsuit, even if the claim could have been litigated in an earlier lawsuit. *Iowa Coal Min. Co. v. Monroe Cty.*, 555 N.W.2d 418, 444 (Iowa 1996); *Light v. Second Injury Fund of Iowa*, No. 01-0855, 2002 WL 1134262, at *2 (Iowa Ct. App. May 31, 2002).

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

Even if the plaintiff asserts the same claim in two lawsuits, claim splitting and claim preclusion do not apply if the plaintiff's first action is dismissed without prejudice. *Venard v. Winter*, 524 N.W.2d 163, 167 (Iowa 1994). "A dismissal without prejudice is not ordinarily res judicata of the merits of the controversy. A dismissal without prejudice leaves the parties as if no action had been instituted. It ends the particular case but is not such an adjudication itself as to bar a new action

between the parties.” *Id.*; *Windus v. Great Plains Gas*, 116 N.W.2d 410, 415-16 (Iowa 1962).

To explain why claim splitting and claim preclusion do not apply here, it helps to briefly review the history of LACV026869 and LACV027056. In LACV026869, Goche was initially sued by Renee Afshar and Jeanne Goche-Horihan, and Goche sought indemnification for his defense (the “Afshar/Goche-Horihan Claim Indemnification”). (Petition ¶ 6; Answer ¶ 6.) Afshar and Goche-Horihan dismissed their claims against Goche on June 7, 2016, after which Goche and WMG continued to litigate the Afshar/Goche-Horihan Claim Indemnification in LACV026869. (App. I at 69, ¶ 7; *id.* at 79, ¶ 7; App. III at 130, Trial Tr. 36:1-:13.)

On October 17, 2016, while the district court was still considering the Afshar/Goche-Horihan Claim Indemnification, WMG asserted new claims for breach of fiduciary duty against Goche. (App. I at 2, ¶ 9; *id.* at 80, ¶ 9.) Goche asserted a right to indemnification for defending WMG’s new claims as well (the “WMG Claim Indemnification”). But because of the procedural posture, the WMG Claim Indemnification would need to be decided separately from the Afshar/Goche-Horihan Claim Indemnification. On December 29, 2016, the district court (Judge Courtney) entered an award in LACV026869 for the Afshar/Goche-Horihan Claim Indemnification. (App. II at 52-74.) The district court did not

address the WMG Claim Indemnification because that issue was not yet before the court. (*See generally id.*)

On April 3, 2017, Goche started LACV027056 against WMG, asserting a claim for breach of a warranty deed and claims for indemnification that were not resolved in LACV026869, including the WMG Claim Indemnification. Goche then drew a clear distinction between the cases by voluntarily dismissing his unresolved indemnification claims in LACV026869, without prejudice, so he could litigate them in LACV027056 alone. (App. I at 87.)

With that background in mind, Goche's indemnification claim in LACV027056 is not barred by claim splitting or claim preclusion. The indemnification claims litigated in LACV026869 and LACV027056 were not the same. LACV026869 resolved the Afshar/Goche-Horihan Claim Indemnification, which was based on the claims Afshar and Goche-Horihan asserted against Goche and the legal fees he spent defending those claims. By contrast, LACV027056 resolved the WMG Claim Indemnification, which was based on the claims WMG asserted against Goche and the legal fees he spent defending those separate claims. The facts underlying Goche's two indemnification claims (i.e., the Afshar/Goche-Horihan action against Goche vs. the WMG action against Goche) and the relief Goche sought (i.e., the legal fees Goche spent fighting Afshar/Goche-Horihan vs. the legal fees he spent fighting WMG) were different.

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

2. Issue Preclusion Does Not Apply

Unlike claim splitting and claim preclusion, which prohibit re-litigation of the same claim, issue preclusion prohibits re-litigation of the same issue. *Leuchtenmacher*, 460 N.W.2d at 859-60. For issue preclusion to apply, all of the following elements must be present: (1) the issue in both cases is identical; (2) the issue was raised and litigated in the first lawsuit; (3) the issue was material to the disposition of the first lawsuit; and (4) the resolution of the issue was essential to

the resulting judgment. *Lemartec Eng'g & Constr.*, 940 N.W.2d at 779. The issue must actually be resolved in the first lawsuit in order to prevent further litigation of the issue in the second lawsuit. *Id.*

Goche's indemnification claim is not barred by issue preclusion. The district court in LACV026869 never decided whether Goche was entitled to the WMG Claim Indemnification. (*See generally* App. II at 52-74.) Goche was free to litigate that unresolved issue in LACV027056. *See Lemartec Eng'g & Constr.*, 940 N.W.2d at 779.³ The district court in LACV027056 correctly decided Goche is entitled to indemnification from WMG as a matter of law.

II. THE DISTRICT COURT'S CALCULATION OF GOCHE'S INDEMNIFICATION AWARD IS SUPPORTED BY THE EVIDENCE PRESENTED AT TRIAL [WMG'S CROSS-APPEAL]

A. Preservation of Error

The second issue in WMG's cross-appeal arises from the district court's (Judge Lester's) May 1 and May 19, 2020 post-trial Orders in LACV027056, awarding Goche \$68,831.10 to indemnify him for his defense of WMG's claims in LACV026869. With respect to this issue, WMG failed to preserve at least one of

³ If issue preclusion applied at all, it would prohibit WMG (not Goche) from re-litigating a number of legal issues WMG lost in LACV026869, including WMG's misinterpretation of the indemnification statute and WMG's Operating Agreement. But this Court need not decide WMG's arguments are barred by issue preclusion in order to reject WMG's positions on appeal.

its arguments for appeal. In its cross-appeal, WMG argues that the district court should have “disregarded” an Affidavit of Philip J. Kaplan, which was marked as Exhibit 40 at trial (the “Kaplan Affidavit”). (WMG Proof Br. at 51-53.) The Kaplan Affidavit, along with the other two attorney affidavits, was offered into evidence and read into the record without objection by WMG. (App. III at 101-02, Trial Tr. at 7:1-8:7.) It is far too late for WMG to object to the affidavit now. A party “cannot both object and consent to evidence if he expects to preserve error for appeal.” *State v. Schmidt*, 312 N.W.2d 517, 518 (Iowa 1981).

B. Standard of Review

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

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

The standards of review are dispositive of WMG’s appeal. WMG disagrees with the district court’s post-trial calculation of Goche’s indemnification award in LACV027056, but WMG identifies no abuse of discretion or legal error in the district court’s judgment. Instead, WMG asks this Court to review the evidence at trial and re-weigh it, which this Court is prohibited from doing. *Keppy*, 524

N.W.2d at 438. The district court’s indemnification award was supported by substantial evidence and does not constitute an abuse of discretion.

C. The District Court Did Not Err in Deciding Which Costs Were Subject to Indemnification

First, WMG argues that the district court erred by awarding Goche “expenses unrelated to any defense costs.” (WMG Proof Br. at 43, 45-49.) The fees WMG opposes were for Goche to fight WMG’s receivership LACV026869 (e.g., Goche’s opposition to the appointment of the Receiver and Goche’s attempt to terminate the receivership). (*Id.* at 48-49.) The district court heard argument and evidence about this issue at trial. The Court received the Receiver’s Exhibit S, which included the Receiver’s own calculation of fees that he thought were recoverable. (App. III at 9.) On Exhibit S, the Receiver excluded fees for “receivership issues” and “other issues.” (*Id.*) Goche’s counsel cross-examined the Receiver about the “receivership issues” and “other issues” listed on Exhibit S, and the Receiver acknowledged on the stand that opposing the receivership was part of Goche’s defense of WMG’s claims in LACV026869 and Goche’s attempt to recover indemnification. (*See* App. III at 184-85, 193-99, Tr. at 90:8-91:5, 99:14-105:16.)

WMG also argued at trial that the district court in LACV026869 had denied Goche’s right to be indemnified for “receivership issues,” but WMG was wrong. The decision WMG relied on was a December 29, 2016 Order in LACV026869

that was marked as Exhibit 28 in the bench trial in LACV027056. (App. II at 52; App. III at 191, Trial Tr. at 97:6-20.) As Exhibit 28 plainly shows, the district court made no decision in LACV026869 about indemnification for “receivership issues.” (App. II 68-69.) Rather, the district court wrote that, as of December 29, 2016, Goche was “not presently entitled to indemnity” for fighting the receivership and would “not be compensated for expenses related to the appointment of a receiver at this time.” (*Id.* (emphasis added).) The district court concluded “that it still reaches no decision concerning indemnification of [Goche’s] litigation expenses spent resisting WMG’s Petition to Appoint a Receiver because that question is not before the Court on WMG’s Motion to Reconsider or now.” (*Id.* (emphasis added).) When WMG’s Receiver was asked about these passages at trial in LACV027056, he admitted that the district court in LACV026869 did not outright reject Goche’s request to be indemnified for the receivership fight. (App. III at 193, Trial Tr. at 99:1-13.) WMG misleadingly omits all of this evidence from its brief.

After hearing both sides of the issue at trial in LACV027056, the district court awarded Goche indemnity for defending WMG’s claims in LACV026869, including amounts Goche spent opposing the receivership. The district court did not make an error or disregard any evidence in reaching this conclusion. Rather, the district court weighed the evidence and agreed with Goche’s position over the

Receiver's position. (*See* App. I at 240.) WMG argues that the district court "abused its discretion in weighing the evidence" (WMG Proof Br. at 45), but that is not a valid argument on appeal. This Court is prohibited from second-guessing the district court's weighing of the evidence. *See Keppy*, 524 N.W.2d at 438.

D. The District Court Did Not "Miscalculate" Goche's Award

Second, WMG argues that the district court "miscalculated" Goche's award and failed to clarify how it calculated the award. (WMG Proof Br. at 44, 49-51.) But the district court adequately explained its calculation. And WMG does not identify any mathematical or "scrivener's" error in the district court's calculation.

In calculating Goche's award, the district court started with the Kaplan Affidavit, Trial Exhibit 40. (App. I at 5-6.) The Kaplan Affidavit summarized the fees in LACV026869 for which Goche sought indemnification. (*See generally* App. II at 200.) As part of this summary, the Kaplan Affidavit incorporated information from two other affidavits signed by the attorneys who represented Goche in LACV026869: an Affidavit of Norman J. Baer marked as Trial Exhibit 39 (the "Baer Affidavit"); and an Affidavit of Wesley T. Graham marked as Trial Exhibit 41 (the "Graham Affidavit"). (*See id.* at 204, ¶ 13.) The three affidavits attached invoices and time entries for LACV026869, identifying the tasks each attorney completed, the amount of time spent on each task, and the attorneys' hourly rates. (*See generally id.* 100-214.)

Referring to the Kaplan Affidavit (Ex. 40), the district court correctly noted that Goche was seeking \$95,213.10 for his defense of WMG's claims in LACV026869. (App. I at 206. *See also* App. II at 204, Trial Ex. 40, ¶ 13 (\$85,325.10 + \$9,888.00 = \$95,213.10).) The district court then analyzed the reasonableness of these fees, which is a discretionary issue. (App. I at 206-09.) Ultimately, the district court decided to reduce the hourly rate of Norman J. Baer from \$560 to \$300 and the hourly rate of a paralegal down to \$100. (*Id.* at 208.) With that adjustment, the district court awarded Goche \$68,831.10 of the \$95,213.10 he sought. (*Id.*) Implicit in the district court's analysis is that the court awarded Goche fees for all of the work in LACV026869 that was identified in the three attorney affidavits. The district court simply applied lower rates to the attorneys' time entries. The district court did not need to further show its math. And the district court did not make a mathematical error.

E. The District Court Properly Considered the Affidavit of Philip J. Kaplan (Ex. 40)

Third, WMG argues that the district court should have "disregarded" the Kaplan Affidavit. (WMG Proof Br. at 51-53.) As stated above, WMG failed to preserve this issue for appeal.

Moreover, WMG does not identify any problem with the Kaplan Affidavit. WMG argues that the district court should have reviewed the actual time records from the Baer Affidavit and Graham Affidavit, rather than the summary in the

Kaplan Affidavit. There is no evidence in the record that the district court failed to review the underlying time entries, all of which were entered into evidence. (*See* App. II at 100-214, Trial Exs. 39, 41.) And there is no dispute that the Kaplan Affidavit accurately summarized the numbers shown in the time entries. WMG's real complaint is not about the accuracy or math in the Kaplan Affidavit; WMG's merely takes issue with the fact that the time entries include work fighting the receivership. Goche has already addressed this argument above. The district court did not err in considering the Kaplan Affidavit.

F. The District Court Did Not Err in Setting Reasonable Attorney Fee Rates

Finally, WMG argues that, in determining the reasonableness of hourly rates charged by Goche's attorneys, the district court in LACV027056 should have strictly followed the rates approved by the district court in LACV026869. (WMG Proof Br. at 55-56.) As explained above, the district court's decisions in LACV026869 about the Afshar/Goche-Horihan Claim Indemnification do not preclude the district court from reaching its own conclusions in LACV027056 about the WMG Claim Indemnification. The district court's decision that \$300 per hour was reasonable for Norman J. Baer and \$290 per hour was reasonable for Philip J. Kaplan was within the district court's discretion and should not be disturbed on appeal.

III. THE DISTRICT COURT ERRED IN DENYING GOCHE’S “FEES ON FEES” CLAIM [GOCHE’S APPEAL]

While this Court should affirm the district court’s indemnification award to Goche (WMG’s cross-appeal), the Court should reverse the district court’s decision to deny Goche “fees on fees” (Goche’s appeal). As explained in Goche’s opening brief, Goche is entitled to fees he incurred in pursuing his indemnification claim (“fees on fees”) as a necessary corollary to Goche’s right to an indemnification award. Denying Goche “fees on fees” would defeat the purpose of granting him indemnification in the first place.

A. The “Reasonableness” of Goche’s “Fees on Fees” is Not a Proper Subject for this Appeal

WMG argues that it was not reasonable or necessary for Goche to incur fees pursuing his indemnification claim in LACV027056, when he could have pursued the claim in LACV026869. (WMG Proof Br. at 34-35.) The district court did not rule on the reasonableness of these fees because the court decided there was no legal authority to grant any of them. Because the district court did not decide the reasonableness issue, it is not a proper subject for appeal. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (“It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.”). If this Court decides there is legal

authority to grant Goche “fees on fees,” the court should remand to the district court to determine the reasonable amount of “fees on fees” to award Goche.

B. Goche Did Not “Forum Shop”

If this Court considers the reasonableness issue (which it should not), the court should reject WMG’s argument that Goche’s fees were somehow unreasonable as a matter of law. WMG falsely accuses Goche of “forum shopping,” a bizarre accusation that is unsupported by any evidence in the record. As the Receiver admitted at trial, WMG fought Goche’s claims for indemnification in both LACV026869 and LACV027056. (App. III at 168-69, Trial Tr. at 74:13-75:2.) No matter what forum or lawsuit he was in, Goche was forced to spent legal fees litigating with WMG. (*Id.* at 169, Trial Tr. at 75:3-18.) There is no evidence that Goche would have saved money pursuing his remaining indemnification claims in LACV026869 or that he incurred more fees by litigating these claims in LACV027056 instead.

Moreover, although Goche’s motives for starting LACV027056 are irrelevant to the questions before this Court, Goche’s actions were understandable considering the positions WMG took in LACV026869. When Goche sought indemnification in LACV026869, WMG argued that the district court no longer had jurisdiction to award Goche indemnification in that lawsuit. (*See* App. II at

18.) By asserting indemnification claims in LACV027056, Goche mooted any objection WMG may have had to the court's jurisdiction in LACV026869.

WMG's "forum shopping" theory is not only counterfactual – it defies logic. LACV026869 and LACV027056 were in the same court, albeit with different judges assigned (Judge Courtney in LACV026869 and Judge Lester in LACV027056). Goche had no reason to believe he would fare better with Judge Lester in LACV027056 than he fared with Judge Lester's colleague Judge Courtney in LACV026869. WMG's argument that Goche was "unhappy" with Judge Courtney's fee award and therefore started a new lawsuit in the same court is pure conjecture and makes no sense.

C. The Receiver for WMG Has Increased the Litigation Costs

In addition, to the extent this Court considers the reasonableness of Goche's "fees on fees" requests, the court should account for the ways the Receiver for WMG has driven up the cost for Goche to pursue indemnification. In all the years this litigation has been pending, the Receiver has never made a single offer to settle Goche's indemnification claims, instead choosing to fight Goche tooth and nail through multiple motions, a trial, and appeal. (*See* App. III at 183-84, Trial Tr. at 89:5-90:4.) The Receiver also rejected Goche's proposal to resolve Goche's indemnification claim on the briefs, which would have saved the parties the time and expense of a live trial. (*Id.* at 209, Trial Tr. 115:10-21.) The Receiver's

calculation of Goche's recoverable fees fails to consider any of the ways Goche tried to decrease costs while WMG increased costs. (*Id.* at 209-10, Trial Tr. 115:22-116:5.)

D. The Cases Cited in Goche's Opening Brief Are Instructive

In his opening brief, Goche cited a number of cases in which courts (including Iowa courts) have awarded "fees on fees" in other contexts, despite the lack of any reference to "fees on fees" in the governing statutes. WMG responds that all these cases involved equitable relief or public policy concerns. (WMG Proof Br. at 35-36.) These distinctions make no difference. Regardless of the specific details of each case, they all stand for the logical proposition that a party who is entitled to recover fees should also recover the cost to pursue those fees. This Court should follow the same logic to conclude that Goche may recover "fees on fees" for pursuing his indemnification claims here.

CONCLUSION

With respect to WMG's cross-appeal, this Court should affirm the district court's indemnification award to Goche. With respect to Goche's appeal, this Court should reverse the district court's denial of "fees on fees" to Goche, and remand so the district court can decide a reasonable amount of "fees on fees" (including the costs of this appeal) to award Goche.

Respectfully submitted,

Dated: September 24, 2020

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/s/ Wesley T. Graham
Wesley T. Graham

September 24, 2020
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CERTIFICATE OF FILING AND SERVICE

I, Wesley T. Graham, hereby certify that I electronically filed the foregoing document with Clerk of the Supreme Court of Iowa using the Iowa Judicial System Electronic Document Management System, which will send notification of such filing to the counsel below on the 24th day of September, 2020.

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