

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE  
**Court of Appeals of Indiana**

County Materials Corp.,  
*Appellant-Defendant*

v.

Ryan Gookins,  
*Appellee-Plaintiff*



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April 2, 2024

Court of Appeals Case No.  
23A-PL-2308

Appeal from the Hancock Superior Court  
The Honorable Donald J. Davis, Judge

Trial Court Cause No.  
30D01-1806-PL-958

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**Memorandum Decision by Judge Crone**  
Judges Bailey and Pyle concur.

**Crone, Judge.**

## **Case Summary**

- [1] County Materials Corp. (County) appeals the trial court's denial of its motion to recover attorney's fees from Ryan Gookins. We affirm.

## **Facts and Procedural History**

- [2] Gookins was employed by Independent Concrete Pipe Company (ICPC). In 2014, County and its related management services corporation, Central Processing Corporation (Central), executed an agreement (Agreement) with ICPC to purchase ICPC's assets. Gookins was not a signatory to the Agreement. Pursuant to the Agreement, ICPC terminated Gookins's employment on December 9, and Central hired him effective December 10, when the transaction closed.
- [3] Five months later, Gookins left his employment with Central. Eventually, he joined with others to incorporate Indiana Precast (Precast). In February 2017, County and Central sued Precast, Gookins, and another Precast employee. The complaint asserted claims against Gookins for breach of confidentiality agreement, breach of fiduciary duty of loyalty, and tortious interference with contractual and business relationships. A jury trial began in October 2018. The trial court granted the defendants' motion for judgment on the evidence as to all of Central's claims and County's punitive damages claim, and the jury returned a defense verdict on County's remaining claims. The trial court entered final judgment for the defendants and awarded them over \$650,000 in attorney's fees

pursuant to Indiana Code Section 34-52-1-1. On appeal, the final judgment was affirmed as to both Central and County, and the fee award was affirmed as to Central and reversed as to County. *County Materials Corp. v. Ind. Precast, Inc.*, 187 N.E.3d 253 (Ind. Ct. App. 2022), *trans. denied*.

[4] In June 2018, while that lawsuit was pending, Gookins filed a complaint for declaratory judgment against County. Gookins alleged that he was a third-party beneficiary to the Agreement and requested a judgment declaring that County had a duty to indemnify him in the underlying lawsuit pursuant to the following provisions of the Agreement:

“Seller Parties” shall mean Seller [ICPC] and any officers, directors, employees, or agents, representatives and attorneys of Seller.

....

10.1 Buyer’s [County’s and Central’s] Covenants. Buyer hereby agrees to indemnify, defend, and hold harmless each of the Seller Parties from and against any and all Damages to the extent resulting from (a) any inaccuracy or breach of any representation, warranty, covenant or agreement on the part of Buyer contained in this Agreement or any Document, ... and (c) entry upon or inspection of the Property by any Entering Parties or activities of any Entering Parties in connection with the conduct of Buyer’s Due Diligence. The provisions of this Section 10.1 shall survive the termination of this Agreement or the Closing (as applicable).

Appellant’s App. Vol. 2 at 80, 94. Gookins filed a motion for summary judgment, and County filed a motion to dismiss for failure to state a claim. The trial court denied the former and granted the latter.

- [5] In December 2018, Gookins filed an amended complaint alleging that County had both a duty to defend and a duty to indemnify him in the underlying lawsuit as a third-party beneficiary to the Agreement. Gookins filed another summary judgment motion. In its response, County argued, among other things, that it was entitled to summary judgment because the claims asserted against Gookins fell outside the scope of the Agreement’s indemnification provision.
- [6] In August 2021, after a hearing, the trial court issued an amended order denying Gookins’s summary judgment motion and granting County’s summary judgment motion on the issues of defense and indemnification. The court noted that only a “person interested” under a written contract may obtain a declaratory judgment, Ind. Code § 34-14-1-2, and it found that because Gookins’s employment with ICPC was terminated prior to closing, “he was not an ‘interested person’ to the Agreement.” Appellant’s App. Vol. 3 at 123. This ruling was affirmed on appeal. *Gookins v. County Materials Corp.*, No. 21A-PL-1895, 2022 WL 2548907 (Ind. Ct. App. July 8, 2022), *trans. denied* (2023).
- [7] In March 2023, County filed a motion seeking attorney’s fees from Gookins pursuant to Section 15.1 of the Agreement, which provides, “In addition to any other remedy provided for herein, the non-prevailing party shall pay all costs and expenses, including reasonable attorneys’ fees and court costs, incurred by the prevailing party in successfully enforcing or defending any provision of this Agreement against such non-prevailing party.” Appellant’s App. Vol. 3 at 129. In July 2023, after a hearing, the trial court issued an order denying County’s

motion based on the rationale of its August 2021 order. *See* Appellant’s App. Vol. 2 at 36 (quoting order and concluding, “[a]s a result, the Court now holds that [Gookins] is not subject to or bound by Section 15.1 of the Agreement, and County cannot recover attorney fees under Section 15.1 of the Agreement against [Gookins].”).

[8] In August 2023, County filed a motion to reconsider, in which it argued for the first time that Gookins was a non-prevailing party under Section 15.1 of the Agreement because he had made binding judicial admissions that he was a third-party beneficiary to the Agreement. The trial court issued an order denying the motion and directing entry of final judgment pursuant to Indiana Trial Rule 54(B). This appeal ensued.

## **Discussion and Decision**

[9] County argues that the trial court erred in denying its motion for attorneys’ fees because Gookins made binding judicial admissions that he was a third-party beneficiary to the Agreement. Gookins contends that this argument is waived because County raised it for the first time in its motion to reconsider. We agree with Gookins. An argument raised for the first time in a motion to reconsider is not properly preserved for appeal. *New v. T3 Invs. Corp.*, 55 N.E.3d 870, 879 n.2 (Ind. Ct. App. 2016), *trans. denied*. Moreover, whereas judicial admissions are binding as to questions of fact, *Bank v. Huizar*, 178 N.E.3d 326, 336 (Ind. Ct. App. 2021), whether someone is a third-party beneficiary to an agreement is a question of law. *Town & Country Homecenter of Crawfordsville, Ind., Inc.*, 725

N.E.2d 1006, 1009 (Ind. Ct. App. 2000), *trans. denied*. Consequently, we affirm the trial court's judgment and deny County's request for appellate fees.

[10] Affirmed.

Bailey, J., and Pyle, J., concur.

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