MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

Robert L. Burkhart
Clifford R. Whitehead
L. Katherine Boren
Ziemer, Stayman, Weitzel, & Shoulders, LLP
Evansville, Indiana

ATTORNEYS FOR APPELLEES

Thomas S. Reynolds II
Jessica C. Mederson
John P. Shanahan
Bryan J. Cecil
Hansen Reynolds LLC
Milwaukee, Wisconsin

John R. Maley
Barnes & Thornburg LLP
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Ryan Gookins,
Appellant-Plaintiff,

v.

County Materials Corp., A1 Transit Corp., CMC-Maxwell, LLC, and CMC-Indianapolis, LLC,
Appellees-Defendants

July 8, 2022

Court of Appeals Case No. 21A-PL-1895

Appeal from the Hancock Superior Court

The Honorable D.J. Davis, Judge

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

Vaidik, Judge.

Case Summary

[1] Ryan Gookins worked for Independent Concrete Pipe Company ("ICPC"). In 2014, County Materials Corp. ("County") bought ICPC. Gookins became an employee of County and signed a confidentiality agreement. When Gookins later left County and founded his own company, County sued him for soliciting employees and disclosing confidential and trade-secret information. Gookins filed a separate declaratory-judgment action against County claiming County had to pay his defense costs in its lawsuit against him under an indemnification clause in the purchase agreement between ICPC and County. The trial court found Gookins was not entitled to defense costs from County under the purchase agreement. We agree and affirm.

Facts and Procedural History

[2] Since 2016, the parties have been embroiled in litigation in state and federal court at the trial and appellate level. *See Cnty. Materials Corp. v. Ind. Precast, Inc.*, No. 20A-PL-1683, 2022 WL 1132611 (Ind. Ct. App. Apr. 12, 2022), *reh'g denied*, *trans. pending*; *Cnty. Materials Corp. v. Ind. Precast Inc.*, 177 N.E.3d 433 (Ind. 2021); *Cnty. Materials Corp. v. Ind. Precast, Inc.*, 176 N.E.3d 526 (Ind. Ct. App. 2021), *trans. granted*; *Cnty. Materials Corp. v. Ind. Precast Inc.*, 1:16-cv-01456 (S.D. Ind.); *Gookins v. Cnty. Materials Corp.*, 1:19-cv-00867 (S.D. Ind). This appeal is the latest in the series.

[3] County is a Wisconsin corporation, and Central Processing Corp. ("Central") is a Florida corporation. County produces precast concrete structures for construction projects. Central is a "national human resource management company" that provides workers for several businesses, including County, under contract. Appellant's App. Vol. 10 p. 68. All of County's workers, including its executive officers, are employees of Central who have been assigned to County. County and Central are owned by members of the same family.

[4] In 2014, ICPC made precast concrete structures at its Indianapolis and Maxwell plants. Gookins was a salesperson for ICPC. On November 10, 2014, County[1] and ICPC entered into a Purchase and Sale Agreement ("Purchase Agreement") under which County bought ICPC's real property, personal property, intangible property (including "goodwill"), and records (including "customer records"). Appellant's App. Vol. 2 pp. 64-98. The deal was closed on December 10.

[5] According to the Purchase Agreement, ICPC's employees, including Gookins, were terminated on December 9. The next day, December 10, Gookins accepted employment with Central and was assigned to work for County as a sales manager. Gookins executed a Confidentiality Agreement, which restricted his disclosure of County's confidential and trade-secret information. *Id.* at 135.

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[1] There were additional buyers: A-1 Transit Corp., CMC-Maxwell, LLC, and CMC-Indianapolis, LLC. For simplicity, we use "County."

The Confidentiality Agreement also prohibited Gookins from soliciting employees "[f]or a period of two (2) years following [his] termination of employment." *Id.* at 136.

[6] In April 2015, Gookins quit working for Central. Later, Gookins and several others founded Indiana Precast ("Precast"), which also produces precast concrete structures.

[7] In 2016, Central and County noticed that several key employees had quit and were working at Precast. Central and County sued Gookins in federal court in June 2016, but that case was dismissed based on "forum non conveniens." *See Cnty. Materials Corp.*, 1:16-cv-01456. In February 2017, Central and County sued Gookins[2] in Hancock Superior Court. *See* No. 30D01-1702-PL-219 ("PL-219"). They asserted several claims against Gookins, including that he breached the Confidentiality Agreement by soliciting employees and disclosing confidential and trade-secret information.[3]

[8] A jury trial was held in October 2018. At trial, Central and County presented evidence that County had suffered $384,506.64 in damages. After Central and County's case in chief, Gookins moved for judgment on the evidence. The trial

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[2] Central and County also sued Richard Rectenwal and Precast. Because this appeal concerns only Gookins, we recite the facts relevant to him.

[3] The counts relating to Gookins were as follows: Count I: breach of confidentiality agreement; Count III: breach of fiduciary duty of loyalty owed to employer; Count IV: tortious interference with contractual relationships; and Count V: tortious interference with business relationships. Appellant's App. Vol. 10 pp. 125-29.

court granted the motion as to Central but denied it as to County (because the alleged damage was to County, not Central). The jury later returned a verdict for Gookins on County's claims. Gookins requested attorney's fees on grounds that Central and County's claims were frivolous. In December 2019, the court determined that Central and County's claims were frivolous and that they were jointly and severally liable to Gookins for $655,642.66 in attorney's fees. Central and County filed a motion to correct error and a motion for relief from judgment, which the court denied in September 2020.

[9] Central and County appealed. In August 2021, this Court issued an opinion affirming the trial court. *See Cnty. Materials Corp.*, 176 N.E.3d 526. But the Indiana Supreme Court later granted transfer, vacated the opinion, and remanded the case to this Court for reconsideration. *See Cnty. Materials Corp.*, 177 N.E.3d 433. In April 2022, we affirmed the trial court's denial of Central and County's motion for relief from judgment. We also affirmed the attorney's fee award against Central because it made a judicial admission that "it had not suffered any damages as a result of [Gookins's] actions" yet continued to litigate the claims through trial. *Cnty. Materials Corp.*, 2022 WL 1132611, at *7. With no such judicial admission from County, we reversed the attorney's fee award against County because the claims, although unsuccessful, were not frivolous. Because County and Central didn't dispute that they were jointly and severally liable, we ruled that Central was "responsible for the full fee award and may not later argue that its liability for attorney's fees should be reduced."

Id. at *8. Gookins sought rehearing, which we denied, and County sought transfer, which is pending.

[10] Meanwhile, in March 2018, about six months before the jury trial in PL-219, Gookins made a demand to County to pay his defense costs (including attorney's fees) in PL-219 and the federal-court litigation under the Purchase Agreement's indemnification clause. County declined Gookins's demand. A couple of months later, in June 2018, Gookins filed a new action seeking a declaratory judgment that the indemnification clause required County to pay his defense costs. *See* Appellant's App. Vol. 9 p. 239 (amended complaint for declaratory judgment). This action was also filed in Hancock Superior Court. *See* No. 30D01-1806-PL-958.

[11] Several years of litigation ensued, with Gookins seeking summary judgment on his declaratory-judgment complaint. In August 2021, the trial court denied Gookins's motion for summary judgment and entered summary judgment for County, finding the indemnification clause does not require County to pay Gookins's defense costs.[4]

[12] Gookins now appeals.

[4] County filed counterclaims against Gookins, and Gookins moved to dismiss them. The trial court denied Gookins's motion to dismiss. The only issue in this appeal is the entry of summary judgment for County. The trial-court proceedings have been stayed pending this appeal.

Discussion and Decision

[13] Gookins appeals the trial court's entry of summary judgment for County on his declaratory-judgment complaint. We review such motions de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). That is, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C).

[14] Gookins contends County must pay his defense costs in PL-219 and the federal-court litigation under the indemnification clause in the Purchase Agreement, which provides:

> **10.1 Buyer'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, (b) claims made against Seller in respect of products produced by County following Closing in connection with the Business, 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 p. 84.[5] "Damages" is defined in part as "any and all damages, losses, liabilities, obligations, penalties, claims, litigation, demands, defenses, judgments, amounts paid in settlement, suits, proceedings, costs, disbursements or expenses (including, without limitation, reasonable attorneys' fees and experts' fees and disbursements) of any kind or of any nature whatsoever . . . ." *Id.* at 65.

[15] Indemnity provisions are "strictly construed," and "the intent to indemnify must be stated in clear and unequivocal terms." *L.H. Controls, Inc. v. Custom Conveyor, Inc.*, 974 N.E.2d 1031, 1047 (Ind. Ct. App. 2012) (quotation omitted). Indemnity agreements are subject to the standard rules and principles of contract construction. *Id.* Clear and unambiguous language must be given its plain and ordinary meaning and will be construed to cover all losses and damages to which it reasonably appears the parties intended it to apply. *Id.* Interpretation of an indemnity provision is a question of law. *Id.*

[16] Gookins first argues the Purchase Agreement applies to him because he is one of the "Seller Parties." "Seller Parties" is defined as "Seller and any officers, directors, **employees**, or agents, representatives and attorneys of Seller." Appellant's App. Vol. 2 p. 70 (emphasis added). The trial court found there was a genuine issue of material fact as to whether Gookins is one of the "Seller

[5] Although Section 10.1 addresses the duty to indemnify **and** defend, Gookins says he "does not assert a claim seeking indemnification for judgment liability" since the litigation in PL-219 was "resolved in [his] favor without assessing liability to him." Appellant's Br. p. 19.

Parties" since he was terminated from ICPC the day before closing (and therefore wasn't an employee of the seller on the day of closing). However, the court found that even if Gookins were one of the "Seller Parties," County didn't have to pay his defense costs under the indemnification clause. As explained below, we agree with the trial court and therefore need not decide whether Gookins is one of the "Seller Parties."

[17] Gookins next argues he is entitled to defense costs under Section 10.1(a) and (c). County responds that the plain language of these sections shows they simply don't apply. We start with Section 10.1(a), which provides that County agreed to defend 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." According to Gookins, "the [l]itigation resulted from County and Central's inaccuracies that Buyers[] [had] purchased" Gookins's "precast concrete industry knowledge, skills, know-how and business relationships he possessed in his brain and which he developed during his fifteen years at [ICPC]" when it had not actually purchased those things. Appellant's Br. pp. 15, 35 (citing Kerry Bartol's deposition testimony).

[18] County responds that Section 10.1(a) provides relief only when an inaccurate representation is "contained in the 'Agreement or any Document.'" Appellees' Br. p. 29. We agree with County that the inaccurate representation must be contained in the Purchase Agreement. Contrary to Gookins's argument, the inaccuracy can't "result from a person or entity filing a lawsuit mistakenly

claiming a Representation on the part of Buyers in the Agreement says 'X' when the Representation actually says 'Y'." Appellant's Reply Br. p. 15. Although Gookins cites several provisions in the Purchase Agreement, *see* Appellant's Br. pp. 34-35, he does not articulate any inaccuracies in these provisions. Instead, as County highlights, "Gookins' argument actually **presumes the accuracy** of the representations, warranties, covenants, and agreements" in the Purchase Agreement. Appellees' Br. p. 30. In other words, Gookins's argument is that County's **interpretation** of the Purchase Agreement is inaccurate. But the Purchase Agreement doesn't talk about inaccurate interpretation of representations. It talks about inaccuracy in the representations themselves.[6] Gookins is not entitled to defense costs under the plain language of Section 10.1(a). To the extent that Gookins makes other arguments under Section 10.1(a), there is no merit to them.

[19] Gookins also relies on Section 10.1(c):

> 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 . . . (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.

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[6] Gookins also argues "the [l]itigation resulted from a breach." Appellant's Br. p. 45. This argument fails for the same reason. *See* Appellees' Br. p. 38 ("Because Gookins' argument that he is entitled to relief due to [County's] alleged misunderstandings of the terms of the Agreement fails as a matter of law, his derivative argument that County breached the Agreement for the same reasons also fails.").

"Entering Parties" is defined as having "the meaning as described in Section 5.1(a)." Appellant's App. Vol. 2 p. 66. Section 5.1(a) provides, among other things, that during the Due Diligence Period, "Seller will allow Buyer and Buyer's Representatives (collectively, the **'Entering Parties'**) access to the Real Property upon reasonable prior notice at reasonable times for the purpose of conducting inspections of the Real Property . . . ." *Id.* at 75.

[20] Gookins claims that County sued him based in part on allegations that (1) he said he didn't want ICPC to be sold to County during County's Due Diligence Period and (2) Gookins's supervisor at County said Gookins allowed a backlog of orders to accumulate that was present at closing but that County didn't learn about during its Due Diligence Period. County responds that Section 10.1(c) is no help to Gookins because it is

> specifically focused on potential harm caused by Buyers or their representatives while they were actively engaged in conducting their due diligence on Independent Concrete's property prior to closing. Such activities have no connection to the decision by the County Parties to file the Underlying Claims against Gookins years after the due diligence was completed.

Appellees' Br. p. 41. We agree. Like Section 10.1(a), the plain language of Section 10.1(c) doesn't require County to pay Gookins's defense costs.

[21] Nevertheless, Gookins argues that even if the litigation doesn't "clearly" fall "within the coverage of the Indemnification Provision," he still has a right to defense costs because the duty to defend is broader than the duty to indemnify. Appellant's Br. p. 25. Gookins notes that appellate courts have "repeatedly

construed duty to defend provisions in insurance contracts as broader than a duty to indemnify" and asks us to apply the same rule "in non-insurance contracts." *Id.* at 18. Gookins asserts that because "the purpose of a duty to defend is to provide defense relief at the beginning of a lawsuit, one need only establish the **possibility** of coverage to invoke the duty to defend." *Id.* at 25 (emphasis added).

[22] We don't have to decide this issue because, as County argues, even if a lesser standard applied, Gookins has failed to establish even a mere possibility of coverage. Thus, his claim would still fail.

[23] County says that notwithstanding Gookins's arguments under Section 10.1(a) and (c), there is another reason why it doesn't have to pay Gookins's defense costs, that is, it sued Gookins in PL-219 (even though it lost) **for Gookins's own acts**. In Indiana, "one party may contract to indemnify the other party **for the other party's** own negligence." *Henthorne v. Legacy Healthcare, Inc.*, 764 N.E.2d 751, 757 (Ind. Ct. App 2002). "However, this may only be done if the indemnitor knowingly and willingly agrees to such indemnification." *Id.* Such clauses indemnifying the indemnitee for the indemnitee's own negligence are strictly construed and will not be held to provide indemnification "unless it is stated in clear and unequivocal terms." *Id.* "We disfavor these indemnity clauses because we are mindful that to obligate one party to pay for the negligence of another is a harsh burden that no party would lightly accept." *Id.*

[24] *Avant v. Community Hospital*, 826 N.E.2d 7 (Ind. Ct. App. 2005), *trans. denied*, is a case in which the indemnitor knowingly and willingly agreed to indemnify the indemnitee for the indemnitee's own acts. In that case, Arnold Avant joined Fitness Pointe Health Club and signed a release stating that he agreed to release and indemnify Fitness Pointe and its employees for "all claims, demands, rights and causes of action of any kind, **whether arising from [Avant's] own acts or those of Fitness Pointe**." *Id.* at 11. Avant later sued Fitness Pointe alleging that a program a personal trainer had developed for him caused him injuries. The trial court entered summary judgment for Fitness Pointe, and this Court affirmed. Specifically, we held that according to the plain meaning of the release, "Avant knowingly and willingly agreed to provide indemnification" for negligent acts by Fitness Pointe employees. *Id.*

[25] Here, the Purchase Agreement doesn't contain language like that in *Avant* stating that County agreed to indemnify or defend Gookins for his "own acts." Gookins, however, notes that "Damages" is defined broadly as "claims" and "litigation" "of any kind or of any nature whatsoever" and asserts that this language is broad enough to cover any tort or breach-of-contract claims against him. *See* Appellant's Reply Br. p. 15. While "Damages" is defined broadly, they are only recoverable "to the extent resulting from" the circumstances listed in 10.1(a), (b), or (c). None of these sections provides that County agreed to indemnify or defend Gookins for his own acts. Clauses indemnifying the indemnitee for the indemnitee's own acts are strictly construed and will not be held to provide indemnification "unless it is stated in clear and unequivocal

terms." *Henthorne*, 764 N.E.2d at 757; *see also L.H. Controls*, 974 N.E.2d at 1047-48.[7] Because Section 10.1 doesn't state in clear and unequivocal terms that County agreed to indemnify or defend Gookins for his own acts, Gookins is not entitled to defense costs from County. We therefore affirm the trial court's entry of summary judgment for County.

[26] As a final matter, we note County asks for appellate attorney's fees under Indiana Appellate Rule 66(E) based on substantive and procedural bad faith by Gookins. Finding that County has failed to meet the high hurdle for an award of these fees, we deny its request.

[27] Affirmed.

Najam, J., and Weissmann, J., concur.

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[7] Gookins says this line of authority applies only to indemnification, and not defense costs, which he seeks. According to the Purchase Agreement, the scope of the duty to indemnify and defend is the same. *See* Appellees' Br. p. 28 ("There is nothing in the Indemnification Provision or the rest of the Agreement to suggest that the contracting parties intended that Buyers would have a duty to defend some types of claims, and a duty to indemnify other types of claims.").