



Scott Carbary appeals summary judgment in favor of Shawn Miller d/b/a Significant Cars. He raises the following issues:

1. Whether the trial court erred in denying Carbary's request to file a belated counterclaim;
2. Whether the trial court erred in granting summary judgment; and
3. Whether the trial court erred in awarding attorney's fees to Miller.

Miller also requests attorney's fees for time spent responding to Carbary's appeal. We affirm, award Miller appellate attorneys' fees, and remand for determination of the appellate attorneys' fees award.

### **FACTS AND PROCEDURAL HISTORY**

On June 19, 2008, Carbary, who resides in the State of Washington, and Miller, who lives in Indiana, entered into an Exclusive Listing and Marketing Agreement for Carbary's four classic vehicles. The contract gave Miller the exclusive right to list and market Carbary's vehicles for 180 days.<sup>1</sup> If a car was sold either during the listing or within sixty days after the listing ended, Miller would be paid "ten percent (10%) of the first Ten Thousand and 00/100 Dollars (\$10,000) and seven percent (7%) of any amount above Ten Thousand and 00/100 Dollars (\$10,000)." (App. at 68.) A forum selection clause required all litigation involving the contract be conducted in Marion County, Indiana.

The contract defined where Miller would list the vehicles for sale, including Ebay and various trade publications and websites. On September 24, 2008, Carbary attempted to

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<sup>1</sup> One hundred eighty days from June 19, 2008, was December 16, 2008.

terminate the contract because he was not satisfied with some of Miller's advertising. Miller then changed the listings on his Significant Cars website to indicate Carbary's vehicles had been sold.

On October 18, 2008, Carbary sold one of the vehicles, a 1935 Ford Deluxe Phaeton ("the Phaeton") for \$39,000. Unaware Carbary had already sold the Phaeton, Miller entered an agreement to sell the same car in January 2009 for \$49,600. Miller then sent Carbary an invoice for \$3,772 representing his commission for the sale of the Phaeton pursuant to the contract. Carbary refused to pay the commission, and Miller sued to collect it. After some procedural wrangling,<sup>2</sup> Carbary filed an answer to Miller's complaint.

Miller moved for summary judgment on February 12, 2010. On February 26, Carbary filed a motion for leave to file a belated counterclaim, then filed a cross-motion for summary judgment on March 15. The trial court denied Carbary's motion for leave on April 5. On April 29, the court granted summary judgment to Miller, awarded him \$3,030 in damages, and set a hearing for the determination of the amount of attorneys' fees due to Miller. After that hearing, the trial court ordered Carbary to pay Miller \$372.57 in pre-judgment interest and \$14,197.56 in attorneys' fees.

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<sup>2</sup> Carbary filed a Motion to Dismiss on Grounds of *Forum Non Conveniens* and Lack of Personal Jurisdiction, which the trial court in Marion County denied based on the forum selection clause in the contract. Carbary also sued Miller in Washington. In that complaint, Carbary alleged "unfair and deceptive practices in violation of the Washington Consumer Protection Act." (Br. of Appellant at 2.) The trial court in Washington dismissed that complaint.

## DISCUSSION AND DECISION

### 1. Denial of Motion to File Belated Counterclaim

The decision to grant or deny a motion to file a belated counterclaim is within the sound discretion of the trial court. *Freedom Exp., Inc. v. Merchandise Warehouse Co., Inc.*, 647 N.E.2d 648, 653 (Ind. Ct. App. 1995). We reverse its decision only for an abuse of that discretion. *Id.* An abuse of discretion occurs when the trial court’s decision is clearly against the logic and effect of facts and circumstances before the court or reasonable deductions to be drawn therefrom. *Id.*

“When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.” Indiana Trial Rule 13(F). Carbary claims “justice requires” he be permitted to file his counterclaim because he chose to sue Miller in Washington, rather than file a counterclaim in Indiana.<sup>3</sup> We disagree.

Carbary cites *Metropolitan Real Estate Corp. v. Frey*, 480 N.E.2d 267, 272 (Ind. Ct. App. 1985), where we held, “if a plaintiff is not prejudiced in the preparation of a defense against it, a compulsory counterclaim may be filed with leave of court after filing defendant’s first responsive pleading.” However, *Frey* is distinguishable.

Frey sought leave to file a counterclaim only one month after the original complaint was filed, and it was not clear from the record whether an answer had been filed. Carbary, on

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<sup>3</sup> Carbary does not argue his failure to file a counterclaim was due to “oversight, inadvertence, or excusable neglect.”

the other hand, waited over thirteen months after the original complaint was filed, and over seven months after he filed his answer, to file his motion for leave to file a compulsory counterclaim. We decline to hold the trial court abused its discretion based on *Frey*.

Carbary also claims he delayed filing the counterclaim because he instead filed an action in Washington State stemming from the same transaction. But the contract explicitly provides: “The parties agree that Indiana Law, without reference to conflict of law provisions shall govern this Agreement. The Parties further stipulate and agree that the exclusive jurisdiction and venue for any dispute arising hereunder shall be the Circuit or Superior Courts of Marion County, Indiana.” (App. at 68.)<sup>4</sup>

There was no abuse of discretion in the denial of Carbary’s motion.

## 2. Summary Judgment

When reviewing a summary judgment, we apply the same standard as the trial court. *Beatty v. LaFontaine*, 896 N.E.2d 16, 19-20 (Ind. Ct. App. 2008), *trans. denied*. Summary judgment is appropriate if the pleadings and evidence submitted demonstrate there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. T.R. 56(C); *Jacobs v. Hilliard*, 829 N.E.2d 629, 632 (Ind. Ct. App. 2005), *trans. denied*.

We construe the pleadings, affidavits, and designated evidence in the light most favorable to the non-moving party, and the moving party has the burden of demonstrating the absence of a genuine issue of material fact. *Beatty*, 896 N.E.2d at 20. The summary judgment comes to

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<sup>4</sup> As the explicit terms of the contract precluded the Washington action, we need not address Carbary’s claim he “promptly” filed his Counterclaim after the Washington court “disposed of all issues related to the dismissal of Carbary’s suit.” (Br. of Appellant at 20.)

us clothed with a presumption of validity, so the appellant must persuade us that error occurred. *Id.* If the summary judgment can be sustained on any theory or basis in the record, we must affirm. *Irwin Mort. Corp. v. Marion County Treasurer*, 816 N.E.2d 439, 442 (Ind. Ct. App. 2004). Even so, we must carefully review a grant of summary judgment in order to ensure that a party was not improperly denied his or her day in court. *Smither v. Asset Acceptance, LLC*, 919 N.E.2d 1153, 1156 (Ind. Ct. App. 2010).

Carbary argues he raised multiple genuine issues of material fact. A genuine issue of material fact exists where “facts concerning an issue that would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue.” *Wicker v. McIntosh*, 938 N.E.2d 25, 28 (Ind. Ct. App. 2010). A fact is “material” if it helps to prove or disprove an essential element of the plaintiff’s cause of action. *Lake States Ins. Co. v. Tech Tools*, 743 N.E.2d 314, 318 (Ind. Ct. App. 2001).

Carbary asserts there are genuine issues of material fact because Miller did not perform his obligations under the agreement, Carbary was fraudulently induced into entering the agreement with Miller, and Miller was conducting his business illegally when the parties entered into the contract.

a. Failure to Perform

The agreement provided Miller had the exclusive right to market Carbary’s vehicles, including the Phaeton, for 180 days. The trial court found:

It is undisputed that Miller had the exclusive right to sell the vehicle during the contract’s term and Carbary has admitted he sold the 1935 Ford Phaeton on

October 18, 2008, well within the contract's term. Significant Cars is, accordingly, entitled to its commission under the exclusive listing provision agreed to by Carbary.

(App. at 10.) The contract provides "Significant Cars will receive payment for its services hereunder as a percentage of the final sales price of the Vehicle based upon the following formula: 10% of the first Ten Thousand Dollars (\$10,000.00) and 7% of any amount about Ten Thousand Dollars (\$10,000.00)." (*Id.* at 68.) Thus, we cannot find error in the decision to award Miller commission pursuant to the terms of the contract for the sale of the Phaeton.

Carbary argues Miller is not entitled to compensation because Carbary terminated the contract before he sold the Phaeton. In his affidavit, Carbary indicated "On September 24, 2008, I terminated the agreement with Miller and disavowed any further actions by Miller on my behalf." (*Id.* at 155.)<sup>5</sup> The trial court found,

Carbary's purported "termination" of the contract prior to his admitted sale of the 1935 Ford Phaeton on October 18, 2008 occurred months before the contract's termination date of December 16, 2008. The contract was executory at the time Carbary purportedly "terminated" it, as something remained "still to be done on both sides." See Black's Law Dictionary 344 (8<sup>th</sup> Edition 2004). The contract did not provide any deadlines for Significant Cars to perform any of its assigned tasks at a particular point during the contract's 180 day term. Carbary's assertion of such non-performance therefore cannot constitute a justification for his premature "termination" of the contract.

(*Id.* at 9-10.)

The contract did not address early termination. Carbary claims he had the right to terminate the contract because of "Miller's non-performance" (Appellant's Br. at 9),

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<sup>5</sup> On Miller's motion, the trial court struck this statement from the record as an impermissible legal conclusion. As we review questions of law *de novo*, we consider the statement for the purpose of deciding whether the legal conclusion therein is correct, as the issue is central to this appeal.

specifically Miller's failure to take certain steps to advertise the Phaeton as enumerated in their agreement within a "reasonable time." The contract does not use the term "reasonable time," and a "reasonable time" requirement will be read into a contract only if a time for performance is not specified. *In re Estate of Moore*, 714 N.E.2d 675, 677 (Ind. Ct. App. 1999).

The contract indicated a time for performance of 180 days with no specific interim deadlines, and indicated with regard to the manner of performance:

The Parties agree that this initial fee pays for 2 Ebay Auctions, 2 months of ads in Hemmings Motor News, the construction of a separate web page on the SignificantCars.com website, and as many pertinent free on-line ads in appropriate Club websites and publications as is possible, in the discretion of Significant Cars. Significant Cars will also run other paid ads in other publications and websites as it deems appropriate on a case-by-case basis.

(App. at 65.) The only explicit deadline in the contract is that for the ads in the Hemmings Motor News, which should have been published at least two months prior to the end of the contract on December 16, 2008. As Miller had 180 days to complete the advertising requirements of the contract, Carbery did not demonstrate non-performance by Miller, and Carbery's early termination of the agreement was a breach.

b. Fraudulent Inducement to Enter Contract

Carbery argues there is a genuine issue of material fact regarding whether Miller defrauded Carbery into entering a contract. The elements of fraudulent inducement are the same as those for any action on fraud: "The elements of actual fraud are: (1) a material misrepresentation of past or existing facts; (2) made with knowledge or reckless ignorance of

falsity; (3) which caused the claimant to rely upon the misrepresentation to the claimant's detriment." *Massey v. Conseco Services, L.L.C.*, 879 N.E.2d 605, 611 (Ind. Ct. App. 2008), *trans. denied*.

There was no evidence Carbary relied on any misrepresentation Miller made. The trial court found:

even if it is assumed, arguendo, that Significant Cars' above representations were false, such has no bearing upon the issues in this case. It is undisputed that the vehicles subject to the contract never were going to be relocated from Washington State to Indiana, would not be part of an Indiana car auction, and would not be displayed in Miller's showroom. Under the contract's terms the seller was responsible for maintaining the vehicles in a location and under the possession and control of seller at all times (see Contract, paragraphs 11 and 13) and it was expressly stated that Significant Cars would not take possession of the vehicles. *Id.*

(App. at 9.) As there is no evidence Carbary relied on the allegedly false statements Miller made on his website, and the contract between Carbary and Miller specifically excluded the transportation of the Phaeton to an auction or showroom, Carbary was not fraudulently induced to enter into the contract.

c. Illegal Business Practices

Carbary argues his contract with Miller violates Indiana law because Miller was operating his business illegally. Carbary did not advance this argument before the trial court.<sup>6</sup> Generally, a party waives appellate review of an argument if that party did not present

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<sup>6</sup> Carbary did question the status of Miller's license to sell automobiles at the time of the contract, but that evidence was presented as support for his argument of fraudulent inducement.

that argument before the trial court. *City of Gary v. McCrady*, 851 N.E.2d 359, 364 (Ind. Ct. App. 2006). We accordingly need not address that argument.

### 3. Trial Attorneys' Fees

We review an award of attorneys' fees for an abuse of discretion. *Gerstbauer v. Styers*, 898 N.E.2d 369, 378 (Ind. Ct. App. 2008). The trial court has broad discretion in awarding and assessing attorneys' fees, and we will reverse only if the award is clearly against the logic and effect of the facts and circumstances before the court. *Id.* An abuse of discretion also occurs if the trial court misapplies the law. *Id.*

As attorneys' fees were awarded pursuant to the contract, we note "parties are permitted to enter into agreements containing fee-shifting provisions as long as the provision does not violate public policy." *Walton v. Claybridge Homeowners Ass'n, Inc.*, 825 N.E.2d 818, 824-25 (Ind. Ct. App. 2005). The purpose of an award of attorneys' fees pursuant to an agreement is "to more fully compensate a party who has successfully enforced his legal rights in court[.]" *Wilcox Lumber Co. v. Andersons, Inc.*, 848 N.E.2d 1169, 1172 (Ind. Ct. App. 2006) (quotations omitted).

The trial court awarded attorneys' fees pursuant to paragraph thirteen of the agreement. Carbary argues the clause applies only to those actions between a party to the contract and a third party based on an incident arising out of the contract. It is not so limited.

We review and interpret the language of a contract *de novo*. *Gerstbauer*, 898 N.E.2d at 379. When a contract is clear and unambiguous, the language must be given its clear meaning. *Id.* An ambiguity exists where a provision is susceptible to more than one

interpretation and reasonable persons would differ as to its meaning. *Id.* The goal of contract interpretation is to ascertain and enforce the parties' intent as manifested in the language of the contract. *Id.* We construe the contract as a whole and consider all provisions of the contract, not just the individual words, phrases, or paragraphs. *Id.* The interpretation of a contract, including an award of attorneys' fees pursuant to it, is a question of law. *Von Hor v. Doe*, 867 N.E.2d 276, 278 (Ind. Ct. App. 2007), *trans. denied*. We will reverse a summary judgment based on the interpretation of a contract for misapplication of the law. *Perryman v. Motorist Mut. Ins. Co.*, 846 N.E.2d 683, 687 (Ind. Ct. App. 2006).

Paragraph thirteen of the agreement reads as follows:

Seller agrees to indemnify and hold Significant Cars, its agents, representatives, successors, insurers and assigns harmless from any and all claims of any sort (including attorney fees) that Seller, the Purchaser, prospective purchasers, or any other person or entity may have as a result of this Exclusive Listing and Marketing Agreement and/or the use, operation, or possession of the Vehicle and/or the selling or attempted selling of the Vehicle including, but not limited to, Significant Cars' referral of any prospective purchaser to drive and/or inspect the Vehicle. Seller's agreement to indemnify extends to Significant Cars' own negligence.

(App. at 67.) The plain language of the clause indicates the agreement requires Carbary to indemnify, to the extent of paying attorney fees, Significant Cars from claims brought by the "Seller, the Purchaser, prospective purchasers, or any other person or entity." (*Id.*) Neither Miller nor Significant Cars is a "Seller, the Purchaser, [or] prospective purchaser," but both are included as "any other person or entity." The subject of such a claim may be "a result of this Exclusive Listing and Marketing Agreement[.]" (*Id.*) As Miller's claim arose from Carbary's breach of the "Exclusive Listing and Marketing Agreement," and Miller and

Significant Cars, are included as “any other person or entity” under the contract, the trial court did not err when it awarded Miller attorneys’ fees. Such an award was contemplated by the agreement.

4. Appellate Attorneys’ Fees

Miller requests attorneys’ fees “incurred in the defense of this appeal.” (Br. of Appellee at 21.) Indiana follows the general rule that each party must pay its own attorney fees in the absence of a statute, agreement, or rule to the contrary. *Masonic Temple Ass’n of Crawfordsville v. Indiana Farmers Mutual Ins. Co.*, 837 N.E.2d 1032, 1037-38 (Ind. Ct. App. 2005). Carbary agreed to indemnify Miller for “claims of any sort (including attorney fees) that Seller, the Purchaser, prospective purchasers, or any other person or entity may have as a result of this Exclusive Listing and Marketing Agreement[.]” (App. at 67.) As this appeal arose from the claim in which we affirmed the trial court’s award of attorneys’ fees, we accordingly award Miller appellate attorneys’ fees.

**CONCLUSION**

The trial court’s decision to deny Carbary’s Motion for Leave to File a Belated Counterclaim was not an abuse of discretion, the trial court properly granted summary judgment in favor of Miller, and Miller was entitled to attorney’s fees pursuant to the agreement. We award appellate attorneys’ fees to Miller pursuant to the contract and remand for determination of the appellate fee amount.

Affirmed in part and remanded in part.

FRIEDLANDER, J., and MATHIAS, J., concur.