

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

WILDCAT DRILLING, LLC,

Plaintiff-Appellant/
Cross Appellee,

v.

DISCOVERY OIL AND GAS, LLC,

Defendant-Appellee/
Cross Appellant.

OPINION AND JUDGMENT ENTRY **Case Nos. 24MA0060, 24MA0066**

Civil Appeals from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2015 CV 01959

BEFORE:

Carol Ann Robb, Mark A. Hanni, Katelyn Dickey, Judges.

JUDGMENT:

Affirmed in Part, Reversed in Part, and Remanded.

Atty. Molly K. Johnson, Johnson & Johnson, for Wildcat Drilling, LLC and

Atty. David A. Detec, *Atty. Thomas F. Hull, II*, *Atty. Karly B. Johnson*, Manchester Newman & Bennett, LPA, for Discovery Oil & Gas, LLC.

Dated: January 8, 2025

Robb, P.J.

{¶1} This case stems from a 2014 contract to drill an oil and gas well between Appellant Cross-Appellee, Wildcat Drilling, LLC (Wildcat), and Appellee Cross-Appellant, Discovery Oil & Gas, LLC (Discovery). The trial court granted both parties summary judgment in 2016, and multiple appeals followed.

{¶2} In the instant appeal, both parties appeal the trial court’s June 18, 2024 judgment issued in response to Discovery’s motion for relief from interest and for an award of attorney’s fees. Wildcat argues the trial court committed reversible error by eliminating the parties’ contractually agreed upon interest. Discovery, on the other hand, contends it was entitled to an award of attorney’s fees under the indemnification clause, and thus, the trial court erred by denying this aspect of its motion.

{¶3} For the following reasons, we reverse the trial court’s judgment granting Discovery equitable relief from interest and affirm the trial court’s decision denying Discovery’s motion for attorney’s fees.

Trial Court Proceedings

{¶4} Wildcat Drilling, LLC (Wildcat) filed a one-count complaint for breach of contract against Discovery Oil & Gas, LLC (Discovery) for unpaid contract work in the amount of \$190,350.37. For its relief, Wildcat sought damages, 18% interest per year, attorney’s fees, and costs. (July 27, 2015 Complaint.) Wildcat attached the parties’ drilling contract to its complaint, which identifies Wildcat as the “Contractor” and Discovery as the “Operator.” (Complaint, Exhibit A.)

{¶5} Discovery filed its Answer and Counterclaim. Discovery alleged in part that Wildcat breached the parties’ drilling contract by negligently or intentionally using brine water in violation of Ohio law. Discovery alleged it was required to pay a \$50,000 fine as a result of Wildcat’s breach and that Discovery may incur additional damages as a result. Thus, Discovery sought indemnification under paragraph 17.9.1 of the parties’ agreement. Discovery also filed a claim seeking damages from Wildcat’s alleged criminal behavior. Among other things, Discovery sought compensatory damages, a setoff, and its costs and attorney’s fees. (September 28, 2015 Answer & Counterclaim.)

{¶6} Discovery's motion for summary judgment claimed in part it was entitled to damages in an amount not yet determined for Wildcat's violations of state law and breach of the parties' contract. In support, Discovery refers to the indemnification clause 17.9.1 in the parties' contract and sought indemnification in an undetermined amount. Discovery also claimed Wildcat's conduct constituted a material breach and that Discovery was entitled to punitive damages and attorney fees under R.C. 2307.60, providing a person injured by a criminal act with a civil remedy. (July 15, 2016 Motion for Partial Summary Judgment.)

{¶7} Wildcat's motion for summary judgment argued in part that Discovery was not entitled to be indemnified for the \$50,000 fine since Wildcat had no notice of the fine before Discovery paid it. Wildcat claimed the fine was akin to a settlement since it was denied the opportunity to defend the alleged violation. Wildcat also opposed Discovery's claim for damages as a civil fine for criminal conduct, contending its conduct did not constitute a criminal offense. In conclusion, Wildcat sought payment for its contracted work in the amount of \$190,350.37 plus 18% interest. Wildcat also asked the court to conclude Discovery's counterclaims lacked merit and to grant Wildcat judgment. (July 18, 2016 Motion for Summary Judgment.)

{¶8} In its opposition to Wildcat's summary judgment motion, Discovery contended in part Wildcat was the cause of the delay in the payment because it refused to acknowledge its duty to indemnify Discovery. Thus, Discovery alleged Wildcat was not entitled to the 18% interest. Discovery requested a hearing for the court to determine the full amount of its damages. (July 28, 2016 Discovery's Opposition.)

{¶9} In its response, Wildcat urged the court to conclude Discovery's claims lacked merit. It claimed the evidence regarding the testing and the alleged ODNR violations are in dispute; whether a criminal offense occurred is disputed; and whether the agreed upon fine was reasonable is also disputed, such that summary judgment was not warranted. (August 1, 2016 Wildcat's Response.)

{¶10} The trial court's judgment grants both parties' motions. The court found Discovery was in breach of the contract for failing to pay the \$190,350.37 invoice and that Wildcat breached the parties' contract for conduct during drilling resulting in a \$50,000 fine. Thus, Wildcat was entitled to payment for services rendered and Discovery was

entitled to indemnification and a setoff. The trial court rejected Discovery's claims for Wildcat's alleged criminal violations. It ordered Discovery to pay Wildcat \$190,350.37 minus Discovery's \$50,000 fine and \$14,150.09 expenses. Thus, Discovery was ordered to pay Wildcat \$126,200.28 plus interest from February 23, 2015 (the date the unpaid invoice was due to be paid). Each party was ordered to bear their own costs. (January 5, 2017 Judgment.)

Appellate History

{¶11} Wildcat I. Both parties appealed the January 5, 2017 judgment to this court. We affirmed the grant of summary judgment in Wildcat's favor but reversed the court's decision awarding Discovery summary judgment and a setoff. We found the indemnification requirements set forth by the Ohio Supreme Court in *Globe Indemn. Co. v. Schmitt*, 142 Ohio St. 595 (1944), applied but were not satisfied. We concluded Discovery was not entitled to indemnification because Wildcat was not notified of the ODNR meeting or given the opportunity to appear. Thus, we eliminated the setoff and increased the damages award in Wildcat's favor. *Wildcat Drilling, LLC v. Discovery Oil & Gas, LLC*, 2018-Ohio-4015, ¶ 69-71, (7th Dist.) "*Wildcat I*."

{¶12} Wildcat II. On appeal from our decision in *Wildcat I*, however, the Supreme Court via a plurality opinion reversed and remanded to the trial court for it to determine whether the contracting parties expressed a clear intent to abrogate the *Globe* requirements. *Wildcat Drilling, L.L.C. v. Discovery Oil & Gas, L.L.C.*, 164, 2020-Ohio-6821, "*Wildcat II*".¹

{¶13} Wildcat IV. The Ohio Supreme Court's most recent decision in this case, "*Wildcat IV*" issued September 27, 2023, is a four-to-three decision. *Wildcat Drilling, L.L.C. v. Discovery Oil & Gas, L.L.C.*, 2023-Ohio-3398. "*Wildcat IV*" does an about-face on the Supreme Court's lead decision in *Wildcat II*, the plurality opinion decided three years earlier. In *Wildcat II*, Justice Fischer dissented, and in *Wildcat IV* he wrote the majority opinion.

¹ Justice Kennedy concurred in judgment only in part and dissented in part; although a majority agreed on the judgment, i.e., reverse and remand, it did not render a majority opinion. A "majority opinion" is "[a]n opinion joined in by more than half the judges considering a given case." OPINION, *Black's Law Dictionary* (12th ed. 2024).

{¶14} *Wildcat IV* holds that *Wildcat II* was “wrongly decided” and that the Mahoning County Court of Common Pleas’ original judgment granting summary judgment, decided January 5, 2017 and appealed to this court in *Wildcat I*, was correct and should have been affirmed in full. *Wildcat IV* states in pertinent part:

[W]e find that the indemnification provision in the contract between Wildcat and Discovery evinces a clear intent by the parties to deviate from the common-law notice requirements for indemnification. Therefore, we reverse the judgment of the Seventh District Court of Appeals [*Wildcat I*], vacate the judgment of the trial court that was issued following this court’s decision in *Wildcat II*, and reinstate the trial court’s original determination, which was issued prior to this court’s decision in *Wildcat II*, that Discovery is entitled to indemnification from Wildcat for its payment of the fine imposed by ODNR.

Wildcat IV, *supra*, at ¶ 28. The final statement in *Wildcat IV* states: “Judgment reversed.” *Id.*

{¶15} Thus, *Wildcat IV* reinstates the trial court’s January 5, 2017 judgment and vacates the proceedings on remand after the Supreme Court’s December 22, 2020 decision in *Wildcat II*. *Id.*

{¶16} After the Supreme Court’s September 2023 decision in *Wildcat IV*, Discovery filed a motion with the trial court on November 27, 2023, captioned Motion for Attorney’s Fees and Request for Equitable Relief from Interest. Discovery alleged the Supreme Court in *Wildcat IV* validated the effectiveness of the indemnification clause and Discovery’s contractual right to be reimbursed by Wildcat.

{¶17} Discovery claimed that because the trial court’s initial 2017 indemnification award included some of its attorney’s fees, Discovery was entitled to recover its remaining attorney’s fees associated with and incurred in litigating its contractual right to indemnification. Discovery argued Wildcat’s continued failure to recognize its obligation to indemnify Discovery resulted in Discovery incurring significant legal expenses “accrued during the course of the litigation.” And Discovery claimed the indemnification clauses in paragraphs 17.9. and 17.11 of the parties’ agreement permit it to recover “any loss,” and Discovery “always” intended to seek the remainder of its attorney’s fees. Thus, Discovery

sought its attorney’s fees incurred during the eight years defending its contractual right to indemnification. (November 27, 2023 Motion.)

{¶18} The second aspect of Discovery’s motion asked the trial court to employ its “equitable powers” to relieve it from paying the 18% interest, which accrued during the six years of appeals. The original 2017 judgment ordered it to pay Wildcat “\$126,200.28 plus interest from February 23, 2015.” This was the amount owed for contract work minus the indemnification setoff. Because of the extreme duration of the appeals, Discovery claimed it will be responsible for more than \$197,889.04 in interest from February 23, 2015, which greatly exceeded the amount of the original judgment, if the 18% interest rate is enforced during the appeals. Thus, Discovery asked the trial court to amend the interest rate to the statutory rate or requested other relief the court deemed equitable and just. (November 27, 2023 Motion.)

{¶19} Wildcat opposed the motion and raised several arguments in opposition. First, it argued the trial court lacked jurisdiction to address Discovery’s motion since the Supreme Court’s most recent judgment did not include a remand order. And because the motion raised issues that were inconsistent with the Supreme Court’s latest decision, Wildcat claimed the trial court was precluded from addressing them. Wildcat also claimed the court was bound by the law of the case doctrine and/or res judicata since these issues have previously been raised and determined in prior proceedings between these parties. Last, Wildcat claimed that even if the motion were properly framed as a motion for relief from judgment, the trial court lacked authority to award appellate attorney’s fees and to modify its prior judgment. (December 6, 2023 Opposition to Motion for Relief from Judgment.)

{¶20} Discovery’s reply in support of its motion contends the trial court did not lack jurisdiction. Instead, Discovery claimed the court was empowered to clarify its prior judgment about the amount of interest awarded; to award Discovery its attorney’s fees; and to provide equitable relief from Wildcat’s claimed 18% post-judgment interest. Discovery emphasized the trial court’s reinstated judgment is silent as to the rate of interest. Discovery also highlighted Wildcat’s alleged concession that *Wildcat IV* essentially vacated six years of procedural and appellate history. Moreover, Discovery

claimed its application for appellate attorney's fees was not previously considered by the trial court. (December 13, 2023 Reply.)

{¶21} As stated, the trial court overruled Discovery's request for attorney's fees, but granted it equitable relief from interest during the appeals. The court found in part, "allowing interest to accrue during the prolonged appellate process is inequitable as the amount of interest exceeds the amount owed by Discovery." The trial court denied Discovery's request to modify the interest rate from 18% to a statutory interest rate. (June 18, 2024 Judgment.)

{¶22} Both parties appealed, and we consolidated the appeals. Wildcat raises four assignments of error and Discovery raises one.

Trial Court's Jurisdiction After Appeal

{¶23} Wildcat's first assignments of error asserts:

"The trial court lacked jurisdiction to rule upon Discovery's motion for attorney's fees and equitable relief from interest."

{¶24} Wildcat argues the trial court lacked subject matter jurisdiction over this case after the Supreme Court's decision in *Wildcat IV* because that decision reversed the judgment on appeal without also issuing an order remanding the matter. We disagree.

{¶25} Jurisdictional questions are a matter of law, which we review de novo. *Fraley v. Estate of Oeding*, 2014-Ohio-452, ¶ 11. "Subject-matter jurisdiction is the power of a court to entertain and adjudicate a particular class [or type] of cases." *Bank of Am., N.A. v. Kuchta*, 2014-Ohio-4275, ¶ 19. Courts of common pleas are courts of general jurisdiction, and the subject matter jurisdiction of common pleas courts "extends to 'all matters at law and in equity that are not denied to it.'" *Id.* at ¶ 20, quoting *Saxton v. Seiberling*, 48 Ohio St. 554, 558-559 (1891). Common pleas courts derive their subject matter jurisdiction from legislation, and "the power to define the jurisdiction of the courts of common pleas rests in the General Assembly." *Seventh Urban, Inc. v. Univ. Circle Property Dev., Inc.*, 67 Ohio St.2d 19, 22 (1981).

{¶26} Wildcat claims the trial court was without subject matter jurisdiction based on the appeal to the Supreme Court, and absent a remand order, the trial court lacked power to proceed and address Discovery's November 27, 2023 motion after the appeal concluded.

{¶27} As alleged, once an appeal has been perfected, the trial court generally loses jurisdiction to proceed during the appeal except for ancillary issues or those not inconsistent with the appellate court’s authority to review, affirm, modify, or reverse the appealed judgment. For example, a trial court could address issues such as contempt, injunctions, or the appointment of a receiver when these issues are not addressed on appeal. *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97 (1978).

{¶28} After an appeal has concluded, the reviewing court’s judgment controls on all matters or issues encompassed by the judgment. The conclusion of an appeal, however, does not conclusively end the trial court’s power or authority to act. Trial courts lose the power to revisit the judgment after the appeal has been decided. *Id.*; *Grissom v. Ohio Dept. of Job & Family Services*, 2020-Ohio-1608, ¶ 8 (8th Dist.).

{¶29} Wildcat relies on caselaw dealing with a trial court’s authority to act during the pendency of an appeal and seemingly conflates law addressing a trial court’s authority to proceed during an appeal with its power to proceed after an appeal ends. *Id.* (addressing collateral issues the court can address during the pendency of an appeal); and *State ex rel. State Fire Marshal v. Curl*, 87 Ohio St.3d 568, 570 (2000) (dealing with the court’s authority to address contempt or execute a judgment when the judgment is stayed pending an appeal).

{¶30} Contrary to Wildcat’s argument, the trial court did not lack or lose subject matter jurisdiction because an appeal was taken. Instead, Wildcat is seemingly invoking the appellate mandate rule.

Under the “mandate rule,” a lower court must “carry the mandate of the upper court into execution and not consider the questions which the mandate laid to rest.” *Sprague v. Ticonic Natl. Bank* (1939), 307 U.S. 161, 168, 59 S.Ct. 777 [83 L.Ed. 1184]; see, also, *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, 915 N.E.2d 633, at ¶ 32 . . . The lower court may, however, rule on issues left open by the mandate. *Id.* But when the mandate leaves nothing left to decide, the lower court is bound to execute it. *Id.*

Smith v. Summerville, 2017-Ohio-8919, ¶ 30 (7th Dist.), quoting *State v. Carlisle*, 2010-Ohio-3407, ¶ 16 (8th Dist.). The mandate rule is compulsory and preserves the hierarchy of the court system.

{¶31} Here, the lack of remand order is not determinative because the Supreme Court explicitly reinstated the trial court’s prior judgment and essentially affirmed it, albeit six years later.

{¶32} To “reinstate” means: “To place again in a former state or position; to restore <the judge reinstated the judgment that had been vacated>.” *Black’s Law Dictionary* (12th ed. 2024). Whereas “remand” is defined as: “To send (a case or claim) back to the court or tribunal from which it came for some further action <the appellate court reversed the trial court’s opinion and remanded the case for new trial>.” *Black’s Law Dictionary* (12th ed. 2024).

{¶33} While there was no remand order directing the trial court to take further action in this case, the trial court’s January 5, 2017 judgment was explicitly restored to its former position. Thus, whether the trial court could address the merits of Discovery’s motion in November of 2023 is not conclusively determined by the lack of remand order. Instead, it is decided by assessing what authority, if any, the trial court had at the time the 2017 judgment was decided, in light of the Supreme Court’s decision reinstating it. To answer this question, we must examine the claims, pleadings, and motions before the court in 2017 and what issues were “left open” by the Supreme Court’s reinstatement, if any.

{¶34} Accordingly, Wildcat’s first assigned error, claiming a lack of subject matter jurisdiction based on the lack of remand order, lacks merit.

Law of the Case & Res Judicata

{¶35} We address Wildcat’s second and third assignments of error collectively since they are interrelated. These assignments assert:

“[No. 2] Assuming, arguendo, that the trial court had jurisdiction, the law-of-the-case prohibited the trial court from removing Wildcat’s prejudgment contractual interest.”

“[No. 3] Assuming, arguendo, that the trial court had jurisdiction, and that the law-of-the-case does not apply, res judicata prohibited the trial court from removing Wildcat’s prejudgment contractual interest.”

{¶36} Wildcat’s second assignment contends the law-of-the-case doctrine and the appellate court’s mandate conclusively decided the legal interest of Wildcat’s prejudgment interest, and as such, the trial court was legally precluded from changing it. We disagree.

{¶37} The appellate mandate that Wildcat relies on for this assigned error, and the argument that the trial court was bound to impose the 18% contractual rate, is this court’s decision in *Wildcat I*.

{¶38} However, the Supreme Court in *Wildcat IV* reversed the judgment of the Seventh District Court of Appeals in *Wildcat I*; vacated the judgment of the trial court issued after the Supreme Court’s decision in *Wildcat II*; and reinstated the trial court’s original 2017 summary judgment determination.

{¶39} “Reversal” is defined in part as: “An annulling or setting aside; esp., an appellate court’s overturning of a lower court’s decision.” *Black’s Law Dictionary* (12th ed. 2024). Typically, an inferior court is not permitted to disregard the mandate of a superior court in a prior appeal in the same case. *Hopkins v. Dyer*, 2004-Ohio-6769, ¶ 15 (5th Dist.).

[T]he decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. . . .

. . .

[T]he doctrine functions to compel trial courts to follow the mandates of reviewing courts. . . . Thus, where at a rehearing following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court’s determination of the applicable law. . . . Moreover, the trial court is without authority to extend or vary the mandate given.

(Citations omitted.) *Nolan v. Nolan*, 11 Ohio St.3d 1 (1984).

{¶40} In this case, however, after *Wildcat IV* was decided, *Wildcat I* was no longer binding. Although *Wildcat I* and *Wildcat II* are still persuasive, neither is controlling.

{¶41} Similarly, Wildcat argues res judicata precludes the trial court from revisiting or considering the issue of prejudgment interest. The application of res judicata is a

question of law, which we review de novo. *Lycan v. Cleveland*, 2022-Ohio-4676, (8th Dist.), *recon. denied*, 2023-Ohio-554.

{¶42} The four elements of res judicata or claim preclusion are (1) a prior valid judgment on the merits; (2) a second action involving the same parties; (3) the second action raises claims that were or could have been litigated in the first; and (4) both actions arise out of the same transaction or occurrence. *Sheridan v. Metro. Life Ins. Co.*, 2009-Ohio-1808, ¶ 12 (10th Dist.), citing *Reasoner v. Columbus*, 2005-Ohio-468, ¶ 5 (10th Dist.), and *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381-382 (1995).

{¶43} The Supreme Court’s reversal of our decision in *Wildcat I*, reversal of its decision in *Wildcat II*, and the reinstatement of the trial court’s January 5, 2017 judgment eliminated those decisions as binding superior court judgments. Accordingly, to the extent Wildcat claims res judicata and/or the law of the case doctrine applies based on these superior court judgments, we disagree. Wildcat’s second and third assignments of error lack merit.

{¶44} We address to what extent the trial court has already determined the issues of interest and attorney’s fees under the remaining assigned errors.

Interest

{¶45} Wildcat’s fourth assignment contends:

“[No. 4] Assuming, arguendo, that the trial court had jurisdiction, and that neither the law-of the case nor res judicata apply, Discovery’s motion for attorney’s fees and equitable relief from interest fails on the merits.”

{¶46} We address the second prong of Wildcat’s fourth assigned error, concerning interest, first and separate from its argument about attorney’s fees.

{¶47} After the Supreme Court’s decision in *Wildcat IV*, Discovery moved the trial court for equitable relief from the 18% interest, which accrued during the years of appellate proceedings. Discovery asked the court to reduce the interest rate to the statutory rate or eliminate the interest during the protracted appeals. The trial court granted its request, stating in part: “allowing interest to accrue during the prolonged appellate process is inequitable as the amount of interest exceeds the amount owed by Discovery.” The trial court denied Discovery’s request to modify the interest rate from 18% to the statutory rate. (June 18, 2024 Judgment.)

{¶48} Interest in contract cases is not a penalty for wrongdoing; it is designed to ensure the judgment will be paid and to make the successful party whole. *Lovewell v. Physicians Ins. Co. of Ohio*, 79 Ohio St.3d 143, 147 (1997); *O'Nesti v. DeBartolo Realty Corp.*, 2005-Ohio-5056, ¶ 110 (7th Dist.).

{¶49} The award of interest as to claims arising out of breach of contract is governed by R.C. 1343.03. *C4 Polymers, Inc. v. Huntington Natl. Bank*, 2015-Ohio-3475, ¶ 82 (8th Dist.). R.C. 1343.03(A) states in part:

[W]hen money becomes due and payable upon any . . . instrument of writing, . . . and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of . . . a contract . . . , the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case *the creditor is entitled to interest at the rate provided in that contract.*

(Emphasis added.)

{¶50} Once liability for breach of contract has been established, that party is entitled to interest as a matter of law. *Fabrizi Trucking & Paving Co. v. City of Cleveland*, 2017-Ohio-531, ¶ 35-36 (8th Dist.). And once a judgment is rendered, the interest rate in the contract will continue to govern until the amount due is satisfied. *Ohio Neighborhood Fin., Inc. v. Adkins*, 2010-Ohio-3164, ¶ 10 (7th Dist.).

{¶51} While the court had the authority to clarify its reinstated judgment, it lacked the discretion to modify the parties' contractually agreed upon interest rate based on a plain reading of R.C. 1343.03. *Ohio Valley Mall Co. v. Fashion Gallery, Inc.*, 129 Ohio App.3d 700, 705 (7th Dist. 1998) (parties to a contract are legally bound to pay post-judgment interest at the percentage rate provided in a written agreement); *accord Cafaro Northwest Partnership v. White*, 124 Ohio App.3d 605, 608 (7th Dist. 1997).

{¶52} The trial court had previously ordered Discovery to pay Wildcat \$190,350.37 minus Discovery's \$50,000 fine and \$14,150.09 expenses. Discovery was ordered to pay Wildcat \$126,200.28 plus interest from February 23, 2015 (the date the unpaid invoice was due to be paid). Each party was ordered to bear their own costs. (January 5, 2017

Judgment.) The January 5, 2017 judgment does not state the rate of interest to be applied. Thus, the trial court had the authority to rule on issues left open by its 2017 judgment and the Supreme Court’s mandate in *Wildcat IV. Smith v. Summerville*, 2017-Ohio-8919, ¶ 30 (7th Dist.). Although the trial court had the authority to clarify its prior judgment, it lacked the authority to deviate from it.

{¶53} While we sympathize with the inequity of the Supreme Court’s diverging decisions years apart and the interest incurred during that time, the imposition of interest is required per the parties’ contract as well as R.C. 1343.03. The trial court lacked the discretion to deviate and grant equitable relief from the 18% interest rate the parties contractually agreed upon. We have no choice but to find the trial court erred by granting Discovery equitable relief.

{¶54} Thus, the second aspect of Wildcat’s fourth assigned error has merit. The trial court erred by affording Discovery equitable relief from the interest rate set forth in the parties’ contract.

Attorney’s Fees

{¶55} We address the first prong of Wildcat’s fourth assigned error and Discovery’s sole assignment of error collectively. Discovery’s assignment of error states:

“The trial court erred in denying Discovery’s motion for attorney’s fees where they are contracted for under the terms of the parties’ contract.”

{¶56} Discovery argues its attorney’s fees incurred during the appeals are a “loss subject to indemnification” under the broad indemnification clause in the parties’ contract. Discovery claims its arguments on appeal about its right to indemnification encompassed its right to recover attorney’s fees. Furthermore, Discovery claims the Supreme Court’s finding in *Wildcat IV* that Discovery had the right to be indemnified for “any loss” includes an award of its attorney’s fees incurred while defending its right to be indemnified before the trial court, as well as during the appeals.

{¶57} On the other hand, Wildcat’s fourth assigned error claims in part that Discovery’s motion for attorney’s fees fails on the merits. Wildcat claims the trial court denied Discovery’s request for attorney’s fees incurred during the trial court litigation when it ordered each party to pay their own costs in the January 5, 2017 judgment. Thus, Wildcat claims Discovery is precluded from seeking attorney’s fees now.

{¶58} As detailed previously, Discovery's counterclaim sought indemnification under paragraph 17.9.1 of the parties' agreement. Among other things, Discovery sought compensatory damages, a setoff, and its costs and attorney's fees associated with the fine and compliance agreement resulting from Wildcat's use of brine water. (September 28, 2015 Answer & Counterclaim.)

{¶59} Discovery's motion for summary judgment claimed it was entitled to damages in an amount not yet determined for Wildcat's violations of state law and breach of the parties' contract. In support, Discovery refers to the indemnification clause 17.9.1 in the parties' contract and sought indemnification in an undetermined amount due to the uncertainty as to whether additional future damages could flow from the violation. (Motion for Partial Summary Judgment July 15, 2016.)

{¶60} In its opposition to Wildcat's summary judgment motion, Discovery contended in part Wildcat was the cause of the delay in the payment because it refused to acknowledge its duty to indemnify Discovery. Thus, Discovery alleged Wildcat was not entitled to the 18% interest. Discovery requested a hearing for the court to determine the full amount of its damages. (July 28, 2016 Discovery's Opposition.)

{¶61} Wildcat's summary judgment motion recites Discovery's answers to interrogatories regarding Discovery's damages. Interrogatory number five directed to Discovery by Wildcat states:

Interrogatory #5. What actual, out-of-pocket expenses, including legal fees, did you incur in your discussion/negotiations with ODNr related to the alleged improper brine use in the J. Klick #2 well?

ANSWER:

Objection . . .

Without waiving the above objection, attorneys' fees, travel expenses, lost time of E. Mike Ellenis and David Matak, which total approximately \$14,150.09 and the \$50,000 fee itself.

(July 18, 2016 Summary Judgment Motion, Ex. A.)

{¶62} As stated, the trial court's judgment granted both parties' motions. The court found Discovery was in breach of the contract for failing to pay the \$190,350.37 invoice and Wildcat breached the parties' contract for conduct during drilling, resulting in

a \$50,000 fine. Thus, Wildcat was entitled to payment for services rendered and Discovery was entitled to indemnification and a setoff. The trial court rejected Discovery's claims for Wildcat's alleged criminal violations. It ordered Discovery to pay Wildcat \$190,350.37 minus Discovery's \$50,000 fine and \$14,150.09 expenses. Thus, Discovery was ordered to pay Wildcat \$126,200.28 plus interest from February 23, 2015 (the date the unpaid invoice was due to be paid). Each party was ordered to bear their own costs. (January 5, 2017 Judgment.) The judgment does not state the rate of interest awarded or expressly address Discovery's request for attorney's fees.

{¶63} *Wildcat IV* reinstated the trial court's January 5, 2017 judgment and vacated the proceedings on remand after the Supreme Court's December 22, 2020 decision in *Wildcat II*. *Id.* The January 5, 2017 judgment found both parties had breached. It concluded in part: "Wildcat is in breach of the contract for causing Discovery to pay a fine to the State of Ohio as a result of its drilling activities on the well. Accordingly, Discovery is entitled to indemnification and a set-off on Wildcat's invoice for the loss to Discovery caused by Wildcat." The trial court included the attorney's fees, which Discovery incurred dealing with the state before the lawsuit was filed, in its indemnification award in Discovery's favor. (January 5, 2017 Judgment). The fees awarded were those listed in its Answer to Interrogatory Number Five.

{¶64} After the Supreme Court's September 2023 decision in *Wildcat IV*, Discovery filed a motion with the trial court on November 27, 2023, captioned Motion for Attorney's Fees and Request for Equitable Relief from Interest. Discovery alleged the Supreme Court in *Wildcat IV* validated the effectiveness of the indemnification clause and Discovery's contractual right to be reimbursed by Wildcat.

{¶65} Discovery argued Wildcat's continued failure to recognize its obligation to indemnify Discovery resulted in Discovery incurring significant legal expenses "accrued during the course of the litigation." Discovery claimed the indemnification clauses in paragraphs 17.9. and 17.11 of their agreement permit it to recover "any loss," and Discovery "always" intended to seek the remainder of its attorney's fees. Thus, Discovery sought its attorney's fees incurred during the years defending its contractual right to indemnification both during the original trial court proceedings and during the numerous appeals. (November 27, 2023 Motion.)

{¶66} Discovery claimed its application for attorney’s fees was not previously considered by the trial court. (December 13, 2023 Reply.)

{¶67} The trial court ultimately overruled Discovery’s request for attorney’s fees without analysis, stating: “Discovery’s Motion for Attorney’s Fees in addition to that awarded in the original judgment is overruled.” (June 18, 2024 Judgment.)

{¶68} As for Wildcat’s argument that the trial court’s decision directing each party to pay their own costs in its January 5, 2017 judgment, we disagree this is a decision explicitly overruling Discovery’s original request for attorney’s fees. See *Muze v. Mayfield*, 61 Ohio St.3d 173, 174-75 (1991) (the general rule in Ohio is that attorney fees are not included as costs). A prevailing party is generally not entitled to recover attorney’s fees as part of the cost of litigation. *Wilborn v. Bank One Corp.*, 2009-Ohio-306, ¶ 7. Thus, a decision indicating the parties must bear their own costs does not necessarily decide a parties’ request for attorney’s fees.

{¶69} However, because Discovery sought attorney’s fees during the original trial court proceedings as damages and that request was not granted, we agree with Wildcat’s assertion that this request was implicitly overruled. Where a trial court does not explicitly rule on a motion, we presume the motion was overruled. *State ex rel. the V. Cos. v. Marshall*, 81 Ohio St.3d 467, 469 (1998); *Wilson v. AIG*, 2008-Ohio-5211, ¶ 23 (12th Dist.), *Swinehart v. Swinehart*, 2007-Ohio-6174, ¶ 26 (5th Dist.) (presuming the trial court’s silence on the issue of attorney and expert fees was an implicit denial of the request).

{¶70} Further, as Wildcat argues, once a trial court issues a final judgment, a party can only seek relief from that judgment via a motion notwithstanding the verdict under Civ.R.50(B); a motion for a new trial pursuant to Civ.R.59; or a motion for relief from judgment under Civ.R.60(B). *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 379-380 (1981). Absent such a motion, a trial court lacks jurisdiction to reconsider a final judgment. *Slepski v. Borton*, 2024-Ohio-3381, ¶ 69 (7th Dist.). A motion for reconsideration filed after a final judgment is issued is a legal nullity. *Pitts v. Ohio Dept. of Transp.*, *supra*, at 381.

{¶71} Thus, to the extent Discovery now seeks to recover attorney’s fees it incurred while defending the indemnification clause during the trial court proceedings and

before the trial court's January 5, 2017 judgment was rendered, we find the trial court lacked authority to modify its prior final decision. *Id.*

{¶72} This is not necessarily true, however, for Discovery's appellate attorney's fee request. Discovery claims it is entitled to appellate attorney's fees pursuant to the indemnification clauses. Since the trial court had not previously addressed a request for appellate attorney's fees under the contract, it had the authority to do so after the Supreme Court reinstated the 2017 judgment.

{¶73} The prevailing party in a civil action is generally not entitled to recover attorney fees. *Nottingdale Homeowners' Assn., Inc. v. Darby*, 33 Ohio St.3d 32, 33-34 (1987). Yet, attorney's fees may be awarded when a statute or contract provides for the losing party to pay the prevailing party's attorney fees. *Nottingdale*, 33 Ohio St.3d at 34; *Wilborn v. Bank One Corp.*, 2009-Ohio-306, ¶ 7. Written agreements to pay another's attorney fees are generally "enforceable and not void as against public policy so long as the fees awarded are fair, just and reasonable as determined by the trial court upon full consideration of all of the circumstances of the case." (Citations omitted.) *Wilborn v. Bank One Corp.*, *supra*, at ¶ 8.

{¶74} The construction of contracts is a matter of law, which we review de novo and without regard to the trial court's holding. *Cent. Funding, Inc. v. CompuServe Interactive Servs., Inc.*, 2003-Ohio-5037, ¶ 42 (10th Dist.), citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph one of the syllabus. We must read the applicable contract in its entirety, give effect to each provision, and ascertain the intent of the parties from considering it as a whole. *Saunders v. Mortensen*, 2004-Ohio-24, ¶ 16 (6th Dist.) "Courts should attempt to harmonize provisions and words so that every word is given effect." *Christe v. GMS Mgt. Co.*, 124 Ohio App.3d 84, 88 (9th Dist.1997).

{¶75} When construing a contract, we must employ the plain meaning of the terms used, unless a manifestly absurd outcome results or if there is clear evidence of a different meaning when reviewing the agreement in total. *G.A.I. Capital Group LLC v. Lisowski*, 2023-Ohio-4802, ¶ 29 (7th Dist.) citing *Alexander v. Buckeye Pipeline Co.*, 53 Ohio St.2d 241, 245 (1978).

{¶76} Discovery alleges the trial court found it had the right to be indemnified and permitted it to recover the \$50,000 fine in addition to the \$14,150.09 in expenses, which

included Discovery's attorney's fees incurred in negotiating with the ODNR as a result of Wildcat's illegal drilling practices. Thus, Discovery claims this award shows the trial court viewed attorney's fees as a "loss" for which Wildcat was required to indemnify Discovery.

{¶77} Discovery also claims the Supreme Court's most recent decision in *Wildcat IV* supports this contention.

{¶78} Wildcat attached the parties' ten-page drilling contract to its complaint, which identifies Wildcat as the "Contractor" and Discovery as the "Operator." The December 2014 contract states in pertinent part:

17. Responsibility for Loss or Damage.

. . .

17.9. Pollution and Contamination – Notwithstanding anything in this Contract to the contrary, . . . it is understood and agreed by and between Contractor and Operator that the responsibility for pollution and contamination shall be as follows:

17.9.1 Contractor Liability -- Contractor [Wildcat] shall assume full responsibility for and shall defend, indemnify, and hold Operator [Discovery] and its joint owners harmless from and against any loss, damage, expense, claim, fine and penalty, demand, or liability for pollution or contamination, including control and removal thereof, that originates on or above the surface of the land or water from spills, leaks, or discharges of motor fuels, lubricants, and oils; pipe dope; paints and solvents; ballast, bilge, sludge, and garbage; and other liquids or solids in possession and control of Contractor. These obligations are assumed without regard to the negligence of any party or parties.

. . .

17.11 Indemnity Obligations – Except as otherwise expressly limited in this Contract, it is the intent of the parties hereto that *all indemnity obligations* and/or liabilities assumed by such parties under the terms of this Contract *be without limit* and without regard to the cause or causes thereof (including pre-existing conditions), strict liability, or the negligence of any

party or parties, whether such negligence be sole, joint or concurrent, active or passive.

(Emphasis added.) (Complaint, Exhibit A.)

{¶79} Discovery claims the parties’ contract allows Discovery to recover its attorney’s fees incurred in conjunction with its right to indemnification and it would be an injustice to disallow its fees incurred in defending Discovery’s right to indemnification during the protracted appeals.

{¶80} Discovery relies on the Supreme Court’s holding in *Wildcat IV*, which analyzes the applicability of the common-law notice requirements set forth in *Globe Indemn. Co. Wildcat Drilling, L.L.C. v. Discovery Oil & Gas, L.L.C.*, 2023-Ohio-3398, ¶ 1 (7th Dist.). In explaining the plain language of the contract evinced a clear intent to abrogate the notice requirements, the *Wildcat IV* Court stated:

Indemnity “is the right of a person, who has been compelled to pay what another should have paid, to require complete reimbursement.” . . . *When the indemnitor expressly agrees to indemnify an indemnitee, the indemnitor is obligated to do so under the terms of the agreement or contract.* . . . Therefore, when parties have entered into an agreement or contract that includes an indemnification clause, unless that clause is ambiguous or otherwise unlawful, it will be applied as written because the agreement or contract governs the rights of the parties.

(Emphasis added.) (Citations omitted.) *Id.* at ¶ 16-17.

{¶81} The Supreme Court in *Wildcat IV* also comments on the exact language relied on here for Discovery’s request for attorney’s fees:

Wildcat’s duty to indemnify Discovery is broad. In paragraph 17.9.1 of the contract, the parties agreed that Wildcat “shall assume full responsibility for and shall defend, *indemnify*, and hold [Discovery] harmless from and against *any loss, damage, expense, claim, fine and penalty, demand, or liability* for pollution or contamination.” (Emphasis added.) And in paragraph 17.11, the parties agreed that “all indemnity obligations *and/or liabilities*” are “*without limit* and without regard to the cause or causes thereof.” (Emphasis added.) The terms in neither of these

paragraphs required Discovery to provide Wildcat with notice of the ODNR claim or its intent to enter into a voluntary settlement with ODNR.

Id. at ¶ 21. The *Wildcat IV* Court also emphasized “the phrase ‘[a]ny loss’ as used in the contract means exactly that—*any* loss—and the contract does not contain conditions or qualifiers regarding the type of loss.” (Emphasis sic.) *Id.* at ¶ 22. Thus, it concluded the parties’ decision not to include a notice provision in the indemnification clause showed they chose not to have notice as a condition precedent to indemnification. *Id.* at ¶ 25.

{¶82} Discovery now relies on the Supreme Court’s analysis and broad reading of the indemnification clause to support its argument that the words “any loss” show an award of attorney’s fees is required under the contract. We disagree.

{¶83} Again, “[i]ndemnity . . . is a right of a person who has been compelled to pay what another should pay in full to require complete reimbursement.” *Travelers Indem. Co. v. Trowbridge*, 41 Ohio St.2d 11, 13-14 (1975), *overruled on other grounds by Motorists Mut. Ins. Co. v. Huron Rd. Hosp.*, 73 Ohio St.3d 391 (1995).

{¶84} This case involves express indemnity since the parties have a written agreement setting forth promises to indemnify one another under certain circumstances. When the indemnitor expressly agrees to indemnify an indemnitee, the indemnitor is obligated to do so under the terms of the agreement or contract. Thus, the scope or the extent of the liability is determined by the language expressed in the writing and adopted by the parties. *Wildcat IV*, *supra* at ¶ 17.

{¶85} The contract states in part: “Contractor [Wildcat] shall assume full responsibility for and shall defend, indemnify, and hold Operator [Discovery] and its joint owners harmless from and against any loss, damage, expense, claim, fine and penalty . . . for pollution or contamination . . .” (Complaint, Exhibit A.). The right to indemnify is qualified by the words “for pollution or contamination.”

{¶86} The parties’ agreement does not state Wildcat is required to pay for Discovery’s attorney’s fees in the event of a breach of the duty to indemnify or for a breach of contract. The contractual right to be indemnified here requires indemnification for the losses or expenses incurred as a result of the contamination or pollution. The parties were capable of including an attorney’s fee provision in the contract if they had desired one.

{¶87} Based on a plain reading of the provision, we conclude the trial court did not err in denying this aspect of Discovery's motion. We affirm the trial court's decision denying Discovery's request for attorney's fees.

Conclusion

{¶88} We reverse the trial court's judgment granting Discovery equitable relief from interest and affirm the trial court's decision denying Discovery's motion for attorney's fees. The trial court's decision is affirmed in part, reversed in part, and remanded.

Hanni, J., concurs.

Dickey, J., concurs.

For the reasons stated in the Opinion rendered herein, it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, granting Discovery equitable relief from interest is reversed, and affirm the trial court's decision denying Discovery's motion for attorney's fees. The trial court's decision is affirmed in part, and reversed in part. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.