

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

TRINITY HIGHWAY
PRODUCTS, LLC,

CASE NO.: 48-2012-CA-013792-O
DIVISION: 43

Plaintiff,

COMPLEX BUSINESS
LITIGATION COURT

vs.

TRAVELERS CASUALTY AND
SURETY COMPANY OF AMERICA, and
DESIGN BUILD ENGINEERS
& CONTRACTORS, CORP.,

Defendants.

ORDER GRANTING TRINITY'S MOTION FOR ATTORNEYS' FEES AND COSTS

This cause came before the Court on the Motion for Attorneys' Fees and Costs dated July 19, 2013 (the "Motion") filed by Plaintiff, TRINITY HIGHWAY PRODUCTS, LLC ("Trinity"), against Defendants, TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA ("Travelers") and DESIGN BUILD ENGINEERS & CONTRACTORS, CORP. ("DBE&C") ("Defendants"). After the hearing on November 20, 2013 (the "Hearing"), and considering the testimony, the case file, the admitted evidence, argument, and the applicable law, including *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), it is hereby

ORDERED AND ADJUDGED THAT:

1. The Motion is GRANTED.
2. The Court finds that the rate charged by Trinity's counsel, \$390 per hour, and Trinity's paralegals, \$125 per hour, is reasonable, as testified to by Trinity's expert, *Trans.* 103:6-11,¹ and accepted by the Defendants. *Tr.* 161:13-19, 197:10-13.

¹ The cited transcript, abbreviated "Tr.," is from the Hearing.

3. Trinity paid all of the attorneys' fees and costs reflected in Trinity Exhibit 5. Trinity's counsel reviewed and edited these bills before they were paid, *Tr.* 58:13-23, as did Trinity's legal department. *Tr.* 47:11-15. Trinity has also paid, and is required to pay attorneys' fees for litigating the reasonableness of their amount. *Tr.* 25:20-23. There is no dispute that Trinity would benefit by an award of all of its attorneys' fees, costs and expenses. *Tr.* 26:4-6.

Part I – Hours Reasonably Expended Prior to Settlement of the Action.

4. This case involved highly technical factual issues which required extensive discovery. The Defendants alleged that Trinity manufactured and shipped defective guardrail posts that consisted of a weak steel alloy and improper galvanization, and that Trinity falsely certified its products as meeting Florida Department of Transportation standards. Those allegedly defective posts were installed along over 20 miles of highway. This complicated discovery.

5. Substantial sums were at issue in this action. DBE&C claimed over \$3,000,000 in damages. Trinity claimed over \$400,000. *Tr.* 39:1-7. Furthermore, there is uncontroverted testimony that the Defendants' allegations created a substantial risk to Trinity's business reputation which threatened over \$250,000,000 in annual nationwide sales. *Tr.* 38:7-13.

6. Time was of the essence to resolve the issues the Defendants raised. There is uncontroverted evidence that the Defendants' allegations raised immediate public safety concerns and posed substantial financial risks to Trinity. *Tr.* 38:14-24; 39:1-7. Trinity was informed of these risks by DBE&C on August 2, 2012, as evidenced by Trinity Exhibit 3.

7. The Court finds that Trinity completely prevailed on all claims and counterclaims.

8. From August 2, 2012 through July 18, 2013, Trinity's counsel reasonably expended 1318 hours, and Trinity's paralegals reasonably expended 949.3 hours², for an amount of \$632,682.50. Trinity is also entitled to \$14,819.40³ in interest on attorneys' fees paid.

² The court reviewed thousands of time entries and found inadvertent duplication of 2.0 hours of attorney time and 2.70 hours of paralegal time. The court found no hours as unnecessary or unreasonable.

Part II – Reasonable Hours Expended Post-Mediation Litigating Quantum.

9. The Court finds that Trinity is entitled to collect attorneys' fees for litigating the reasonable amount of attorneys' fees under several contractual provisions. Florida law recognizes contractual entitlement to these fees. *Waverly at Las Olas Condominium Association, Inc. v. Waverly Las Olas, LLC*, 386 So. 3d 88 (Fla. 4th DCA 2012) (awarding fees for litigating quantum under a contractual provision and distinguishing *State Farm Fire & Casualty Co. v. Palma*, 629 So. 2d 830 (Fla. 1993)).

10. "It is never the role of a trial court to rewrite a contract to make it more reasonable for one of the parties or to relieve a party from what turns out to be a bad bargain. A fundamental tenet of contract law is that parties are free to contract, even when one side negotiates a harsh bargain." *Barakat v. Broward County Housing Authority*, 771 So. 2d 1193, 1195 (Fla. 4th DCA 2000) (internal citations omitted).

11. Here, the parties entered into a settlement agreement, Trinity Exhibit 8. The Court finds that the phrase "incurred by Trinity in the Litigation" in Paragraph 4 of Exhibit 8 is unambiguous in that it is not reasonably susceptible to more than one meaning. *Herpich v. Estate of Herpich*, 994 So. 2d 1195, 1197 (Fla. 5th DCA 2006). Each party to Trinity Exhibit 8 was represented by counsel, and it also contains a valid merger clause in Paragraph 14. Thus, the Court examines only the four corners of Trinity Exhibit 8 to determine the parties' intent. *Id.*

12. Trinity Exhibit 8, Paragraph 4, states in pertinent part that Trinity is entitled to "attorneys' fees and taxable costs incurred by Trinity in the Litigation." In this context, "attorneys' fees and taxable costs" is the direct object of the transitive verb "incurred";⁴ the

³ Figured as follows: $\$632,682.50 \times .0475 \div 365 = \82.33 per day $\times 180$ days (7/18/13 through 1/14/14).

⁴ The Court notes that this clause is written in the passive voice, which requires the use of the past participle of the transitive verb "incurred." "The passive voice consists of a *be*-verb (or sometimes a form of *get*) combined with the past participle of a transitive verb...A *by*-prepositional phrase often accompanies the construction." Bryan

direct object is modified by the prepositional phrases “by Trinity” and “in the Litigation.” The prepositional phrase “in the Litigation” is of critical importance. The “Litigation” is defined in Paragraph 1, and refers to the ongoing activity in this action. Therefore, the plain language of Trinity Exhibit 8 shows that the intent of the parties was for Trinity to be compensated for fees “incurred” throughout the continuing “Litigation.” This is consistent with the generally accepted definition of “incurred,” which is “to become liable or subject to,” *Merriam-Webster*, <http://www.merriam-webster.com/dictionary/incurred> (last visited Nov. 5, 2013), as well as its common judicial interpretation: “defines ‘incurred’ for insurance purposes as ‘to become liable or subject to.’” *Metz v. United States Life Ins. Co.*, 662 F.3d 600, 602 (2d Cir. 2011); “‘Incurred’ means ‘to which one is subject’—not ‘already imposed.’” *U.S. v. Goncalves*, 642 F.3d 245, 252 (1st Cir. 2011). *See also Couch v. Commission on Ethics*, 617 So. 2d 1119, 1126-27 (Fla. 5th DCA 1993) (finding that the phrase “for the cost incurred by Orange County in defending her” included entitlement to fees that were continuing to be “incurred” up until a future hearing).

13. Trinity Exhibit 8, Paragraph 6, also states that the Defendants’ liability to Trinity for its fees ceases “[u]pon payment of...the attorney’s fees, costs and expenses awarded by the Court to Trinity in the Litigation...with all Parties to bear their own attorney’s fees and costs.” Thus, when Paragraph 6 is read in concert with Paragraph 4, the clear intent of the parties is that the Defendants’ liability to Trinity for payment of its fees and costs “incurred...in the Litigation” ends after dismissal of this action and full payment of the amount awarded by this Order. Thus, Trinity Exhibit 8 entitles Trinity to collect all of its reasonable attorneys’ fees from Defendants.

14. As to DBE&C, the Court finds that DBE&C is obligated to pay Trinity for attorneys’ fees for litigating the reasonable amount of its fees under its materials supply contract,

A. Garner, *The Redbook: A Manual on Legal Style* § 10.27 (2d ed. 2006). The Court also recognizes that the past participle of a verb may refer to actions not yet completed. The verb “incurred” is therefore properly used to refer to future liabilities.

Trinity Exhibit 2, which is governed by Texas law that awards these fees.⁵ The uncontroverted testimony shows that Trinity fully performed under Trinity Exhibit 2, and that its goods were accepted and paid for in full. *Tr.* 24:3-25:19, 52:10-53:2. Thus, Trinity Exhibit 2 entitles Trinity to all of its reasonable attorneys' fees from DBE&C.

15. As to Travelers, the Court finds that Trinity Exhibit 9 obligates Travelers to pay Trinity for all "amounts due" Trinity under Trinity Exhibit 2, as mandated by Section 337.18(1)(b), Florida Statutes. Florida law imposes no ban on an award of these fees because no such ban is in Section 337.18(1)(b), Florida Statutes. *See Schneider v. Schneider*, 32 So. 3d 151, 158 (Fla. 4th DCA 2010) ("However, no ban on fees for litigating fees, as a matter of law, is contained in...the statute...*Palma* simply does not apply to section 61.16 fee awards."). Thus, Trinity Exhibit 9 entitles Trinity to all of its reasonable attorneys' fees from Travelers.

16. The Court finds that the hours expended by Trinity from July 19, 2013 through the Hearing, are reasonable as testified to by Trinity's expert *Tr.* 103:14-22, and also in consideration of the fact that the Defendants took nine depositions. Trinity took one.

17. From July 19, 2013 through November 20, 2013, Trinity's attorneys reasonably spent 700.60 hours, and Trinity's paralegals reasonably spent 234.05 hours, in this Litigation, for an amount of \$302,490.25. Trinity is also entitled to \$2,164.80⁶ in interest on fees paid.

Part III - Expert Witness Testimony.

18. Expert witness testimony is persuasive but not binding on this Court. *In re Estate of Harrell*, 426 So. 2d 63 (Fla. 5th DCA 1983). Trinity and Travelers presented expert witnesses on the reasonableness of Trinity's fees. DBE&C did not.

19. Trinity's expert testified that the hours and rates charged by Trinity's counsel were reasonable. *Tr.* 103:6-22. The Court finds this testimony more persuasive than the

⁵ § 38.001, Tex. Civ. Prac. & Rem. Code; *Penhollow Custom Homes, LLC v. Kim*, 320 S.W. 3d 366, 375 (Tex. App. –El Paso, 2010) (awarding fees under the statute for litigating the reasonable amount of the fees).

⁶ Figured as follows: \$302,490.25 x .0475 ÷ 365 = \$39.36 per day x 55 days (11/20/13 through 1/14/14).

testimony of Travelers' expert.

WHEREFORE, the Court awards Trinity, jointly and severally against Travelers and DBE&C, attorneys' fees for a total of 2,018.60 hours, in an amount of \$787,254.00, paralegal fees for a total of 1,183.35 hours, in an amount of \$147,918.75, fees for Trinity's expert witness, Thomas G. Freeman, for a reasonable amount of 49.5 hours, at a reasonable rate of \$390 per hour, for an amount of \$19,305.00, Trinity's taxable costs in an amount of \$20,892.71, and \$16,984.20 in prejudgment interest for fees, totaling \$989,671.89. The Defendants have fifteen days from the entry of this Order to pay Trinity, failing which, this Court will enter Judgment.

DONE AND ORDERED at Orlando, Orange County, Florida this 14th day of January, 2014.

LISA T. MUNYON
Circuit Judge

Original Signed

JAN 14 2014

**LISA T. MUNYON
CIRCUIT JUDGE**