

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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JAMES J. FOSKETT, MARY CHRISTINE  
FOSKETT and PHYSICIANS' BENEFITS  
TRUST LIFE INSURANCE COMPANY,

Plaintiffs,

v.

MEMORANDUM AND ORDER  
06-C-503-S

GREAT WOLF RESORTS, INC. and  
GREAT BEAR LODGE OF WISCONSIN DELLS, LLC,  
and GREAT LAKES SERVICES, LLC,

Defendants and Third-Party Plaintiffs,

v.

NEUMAN POOLS, INC., WATER TECHNOLOGY, INC.,  
PROSLIDE TECHNOLOGY INC., LIBERTY SURPLUS  
INSURANCE CORPORATION, LEXINGTON INSURANCE  
COMPANY, NATIONAL SURETY CORPORATION,  
BLACK WOLF LODGE, LLC, TALL PINES RENTAL LLC,  
J&A REAL ESTATE VENTURE LLC, TALL PINES REALTY, LLC,  
TALL PINES DEVELOPMENT OF WISCONSIN DELLS, LLC  
ARCHITECTURAL DESIGN CONSULTANTS, INC. and  
PLANNING DESIGN BUILD, INC.

Third-Party Defendants.

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Plaintiff James Foskett, his wife and insurer (collectively "plaintiffs") commenced this personal injury action against defendant Great Wolf Resorts, Inc., Great Bear Lodge of Wisconsin Delles, LLC, and Great Lakes Services, LLC (collectively "Great Wolf") alleging that he was injured on a slide at Great Wolf's water park. Defendant Black Wolf Lodge, LLC, Tall Pines Rental LLC, J&A Real Estate Venture LLC, Tall Pines Realty, LLC, and Tall

Pines Development of Wisconsin Dells, LLC (collectively "Black Wolf"), prior owners of the property who sold it to Great Wolf, were joined by Great Wolf on a contributory negligence theory. Black Wolf asserted a cross claim for indemnification against Great Wolf based on provisions in the water park purchase agreement between the parties. Jurisdiction for the case arose under 28 U.S.C. § 1332(a)(1). Plaintiffs settled with all defendants leaving only the indemnification claim between Great Wolf and Black Wolf remaining in the action. The Court granted Great Wolf's motion for summary judgment finding that Great Wolf did not have to indemnify Black Wolf and dismissing Black Wolf's claim for indemnification. The matter is currently before the Court on Black Wolf's motion pursuant to Federal Rule of Civil Procedure 54(d)(1) that the Court review the clerk of court's tax of Great Wolf's bill of costs.

#### MEMORANDUM

In this case, the Court is presented with unique circumstances. Instead of the relatively common circumstance where you have a plaintiff and defendant disputing who is the prevailing party and what costs were reasonably necessary, this dispute is between a third-party plaintiff, Great Wolf, and a third-party defendant, Black Wolf. Because a settlement was reached between all parties in the principal action the only relevant claim for purposes of this analysis is Black Wolf's indemnification cross

claim against Great Wolf. Furthermore, that remaining cross claim involved a contractual issue that, as previously explained, only required consideration of the purchase agreement between Great Wolf and Black Wolf. (Ct. Order, Apr. 24, 2007.) Accordingly, for all intents and purposes there were two cases, i.e., plaintiffs' negligence action<sup>1</sup> and Black Wolf's cross claim for indemnification.

On the cross claim for indemnification Great Wolf is a "prevailing party" under the Supreme Court's definition of "prevailing party" because summary judgment was entered in its favor. Buckhannon Bd & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 at 603 (citation omitted). Furthermore, this determination creates a strong presumption that Great Wolf be entitled to recover its costs. However, the costs Great Wolf is entitled to are those costs incurred in its defense of Black Wolf's cross claim for indemnification and not those costs incurred in its defense of plaintiffs' negligence action.

Great Wolf's bill of costs incorrectly contained costs incurred in defense of plaintiffs' negligence action along with those incurred in defense of the cross claim for indemnification.

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<sup>1</sup>Plaintiffs' negligence action would also encompass Great Wolf's contributory negligence claims against all third-party defendants because those claims all involve determining liability for the underlying negligence, which is dissimilar from the indemnification claim because regardless of who was liable for the underlying negligence either Great Wolf would have to indemnify Black Wolf or it would not.

In fact, the majority of the bill of costs is related to defense of plaintiffs' negligence action. Of all the costs submitted by Great Wolf only some of the costs concerning copy charges would have been reasonably necessary in defending the purely contractual indemnification cross claim. Also, Great Wolf's copy charges in the amount of \$61,884.74 incorrectly included mostly costs incurred in defending the overarching negligence action. Based on the limited amount of copying that would have been reasonably necessary to defend the indemnification cross claim, the Court will grant Great Wolf ten percent of the copy charges submitted in its bill of costs. Accordingly, as the prevailing party in the indemnification cross claim Great Wolf is entitled to \$6,188.47 in costs from Black Wolf.

ORDER

IT IS ORDERED that Black Wolf's motion for review of the clerk's bill of costs decision is GRANTED.

IT IS FURTHER ORDERED that Great Wolf be AWARDED \$6,188.47 in costs from Black Wolf.

Entered this 5th day of October, 2007.

BY THE COURT:

/s/

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JOHN C. SHABAZ  
District Judge