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***American Power Products, Inc. v. CSK Auto Inc.*, No. CV-16-0133-PR, 2017 WL 2473261 (May 11, 2017)**

Where a contract does not define “prevailing party” for purposes of awarding attorneys’ fees, but provides that a prevailing party is entitled to attorneys’ fees, ARIZ. REV. STAT. §12-341.01(A) applies to determine the successful party.

American Power Products (“American”) and CSK Auto (“CSK”) entered an agreement for the sale of electric scooters and other items. The agreement provided that in any action arising out of the agreement, “the prevailing party shall be entitled to recover . . . reasonable attorneys’ fees.” The agreement did not define “prevailing party,” but did include a broad choice-of-law provision specifying that Arizona law governed the “rights and remedies” under the agreement.

American sued CSK for breach of contract and negligent representation, seeking more than \$5 million in damages. CSK asserted affirmative defenses and counterclaims, seeking approximately \$950,000.00. Nearly six years after the lawsuit was filed, CSK served a Rule 68 Offer of Judgment in the amount of \$1,000,001.00. American did not accept the offer and asked for \$10.8 million in damages at trial held several months later. The jury returned a verdict in the amount of \$10,773.00 in favor of American. The trial court later dismissed CSK’s counterclaims.

After the verdict, the trial court applied a totality-of-litigation test, and found that American was the “prevailing party” because it obtained some monetary relief while CSK obtained nothing. The trial court then awarded American \$775,000 in attorneys’ fees, plus costs and interest for a total judgment of nearly \$861,000. The trial court denied CSK’s request for Rule 68 sanctions finding them inapplicable.

The court of appeals affirmed the fee award stating “[w]hen attorneys’ fees are based on a contract – as here – the contract controls to the exclusion of A.R.S. §12-341.01(A).” The court of appeals disagreed with the trial court’s denial of Rule 68 sanctions, however, and remanded to the trial court to make the comparison required by Rule 68.

On review, the Arizona Supreme Court held that ARIZ. REV. STAT. §12-341.01(A) “applies to ‘any contested action arising out of contract’ to the extent it does not conflict with the contract.” The Supreme Court further held that: (1) because the parties’ agreement did not define “prevailing party” and expressly provided that Arizona law will govern “the rights and remedies of the parties,” and (2) because the second sentence of §12-341.01(A) does not directly conflict with the agreement’s attorney fee provision, the statutory provision is “incorporated by operation of law” into the agreement to define the successful party under these circumstances. The Court also noted that parties have the freedom to fashion contract provisions that are legal and enforceable. Parties can define “prevailing party” in their contracts, and even exclude certain aspects of Arizona law from applying to the contract. American and CSK did not do that here.

For these reasons, the Supreme Court reversed and remanded the case to the trial court for further proceedings to apportion attorney’s fees and costs between American and CSK.