



SIGNED this 25 day of May, 2007.

A handwritten signature in cursive script that reads "Marcia P. Parsons".

**Marcia Phillips Parsons
UNITED STATES BANKRUPTCY JUDGE**

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE**

In re
PRO PAGE PARTNERS, LLC,

Debtor.

No. 00-22856
Chapter 7

MARY FOIL RUSSELL, Trustee,

Plaintiff,

vs.

Adv. Pro. No. 03-2042

CARLETON A. JONES, III,

Defendant.

MEMORANDUM

APPEARANCES:

Mark S. Dessauer, Esq.
Hunter, Smith & Davis, LLP
Post Office Box 3740
Kingsport, Tennessee 37664-0740
Attorney for Mary Foil Russell, Trustee

Maurice K. Guinn, Esq.
Gentry, Tipton, Kizer & McLemore
Post Office Box 1990
Knoxville, Tennessee 37901
Attorney for Carleton A. Jones, III

**MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE**

This adversary proceeding is before the court on the plaintiff's motion for summary judgment. For the reasons discussed below, the motion will be granted. This is a core proceeding. 28 U.S.C. § 157 (b) (2) (A).

I.

Pro Page Partners, LLC ("Pro Page") was a Tennessee limited liability company engaged in the business of marketing and selling paging and cellular communication services. Carlton A. Jones III ("Jones") was a member of Pro Page, holding a 30% membership interest. In connection with a restructuring and sale of the membership units of Pro Page, Jones entered into a Redemption and Indemnification Agreement dated December 30, 1998 (the "Indemnification Agreement"), whereby he, Pro Page, and two other individuals, jointly and severally, agreed to indemnify and hold harmless Joseph K. Reid and Lawrence H. Reid against all claims asserted against them as a result of the operation of Pro Page's business.

On October 23, 2000, almost two years after the execution of the Indemnification Agreement, Pro Page filed for bankruptcy relief under chapter 11, but subsequently converted the case to chapter 7 on September 4, 2001. Mary Foil Russell ("Trustee") was appointed chapter 7 trustee. On April 16, 2003, the Trustee obtained a judgment against Joseph K. Reid ("Reid") in the amount of \$319,699.05 in an adversary proceeding styled *Mary Foil Russell, Trustee v. Joseph K. Reid*, No. 02-2027 (the "Reid Adversary Proceeding"). This judgment was affirmed by the district court on August 20, 2003. By an assignment agreement dated June 30, 2003, Reid assigned his rights in the Indemnification Agreement to the Trustee. As a result of the assignment, the Trustee commenced the instant adversary proceeding against Jones on August 13, 2003.

Previously, by order entered March 25, 2005, this court granted summary judgment in favor of the Trustee and denied a motion by Jones for judgment on the pleadings. At issue in the Trustee's motion was Jones' contention that he was not bound by the Trustee's judgment against Reid because he was not given notice and an opportunity to defend himself in that action. According to Jones, because of this deficiency, the Trustee was required to allege in her complaint and prove that the judgment she obtained against Reid could not have been avoided. Without deciding whether reasonable notice had in fact been given, this court concluded as a matter of law that Jones was

bound by the judgment even if notice had not been given.

Upon appeal, in a memorandum opinion and order filed July 28, 2006, the district court affirmed this court's denial of Jones' motion but reversed the grant of summary judgment to the Trustee, concluding that:

Under Tennessee law, it would appear that reasonable notice to the indemnitor of an indemnity action is required before the action can be binding on the parties. Lack of notice does not bar a claim for indemnity, "but simply changes the burden of proof and imposes on the indemnitee the necessity of again litigating and establishing all of the actionable facts." 41 *Am. Jur. 2d Indemnity* § 53 (2d Ed. 2004).

(District Court Memo., 12-13.) In this regard the district court observed that "[r]easonable notice appears to require more than mere notice of the pendency of the suit but also an opportunity to defend." (Memo. at 13 n.3 (citing *Jones v. Bozeman*, 321 S.W.2d 832, 838 (Tenn. App. 1958)). Accordingly, the district court remanded this action "for a determination concerning whether reasonable notice of the adversary proceeding was afforded to Jones and such further proceedings as appropriate, if any, based upon the findings of the bankruptcy court." (Memo. at 15). The district court observed that this court "may also consider whether or not it is appropriate to exercise its discretion pursuant to Rule 15, *Fed. R. Civ. P.*, to allow the trustee to amend her complaint." (Memo. at 15 n.4.)

Following remand, the Trustee requested and was granted leave to file an amended complaint. In her amended complaint, the Trustee asserted that Jones was in fact given reasonable notice of and had the opportunity to defend the Trustee's action against Reid, and even participated in the defense of the Reid Adversary Proceeding by paying the attorney fees of Thomas Jessee, Reid's attorney in the adversary proceeding, and by retaining and paying his own attorneys, Margaret Fugate and David Lemke, to assist in Reid's defense. Alternatively, the Trustee alleged that the judgment against Reid in the Reid Adversary Proceeding was unavoidable. In his answer to the amended complaint, Jones generally denied the assertions of reasonable notice and an opportunity to defend. As to the allegations regarding Jessee, Fugate and Lemke, Jones admitted that Fugate served as his counsel in Pro Page's bankruptcy case and in a separate adversary proceeding against him during the time frame of the Reid Adversary Proceeding. Jones, however, objected to responding to the remaining contentions on the basis that "answering the allegations

could or would compel him to disclose information protected by the attorney-client privilege.”

Presently before the court is the Trustee’s current motion for summary judgment based on the assertion that “Jones had (1) reasonable notice of the Reid Adversary Proceeding, and (2) through his counsel, had the opportunity to defend and, in fact actively participated in the defense of Reid in the Reid Adversary Proceeding.” (Trustee Brief, 13.) The Trustee asserts that there is no genuine issue of material fact regarding this defense or elements of the Trustee’s claim and therefore, she is entitled to judgment as a matter of law. In support of her motion, the Trustee resubmits the affidavit of Thomas Jessee, previously submitted in connection with the Trustee’s prior summary judgment motion, and exhibits to that affidavit which consist of copies of Jessee’s correspondence to Fugate and to Fugate and Lemke. The Trustee also submits documents produced by Lemke and Fugate, some of which were produced voluntarily, some of which were produced pursuant to subpoenas duces tecum, and some produced in response to this court’s January 4, 2007 order, all of which are authenticated by the affidavit of Trustee’s counsel, Mark S. Dessauer. Jones has filed a response in opposition to the Trustee’s motion, supported by his personal affidavit dated February 8, 2007. Also before the court is the affidavit of Jones filed January 14, 2005, in response to the Trustee’s previous summary judgment motion.

II.

Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56 (c). The central issue is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512 (1986). “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). In considering a motion for summary judgment, the court must construe all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co.*, 475 U.S.

at 587.

To withstand a motion for summary judgment the opposing party “may not rest upon the mere allegations or denials” in its pleadings, but must respond “by affidavits or as otherwise provided setting forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). “Mere conclusory allegations are not sufficient to withstand a motion for summary judgment.” *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir. 1990).

Cincinnati Bell Tel. Co. v. Allnet Commc’n Servs., Inc., 17 F.3d 921, 923 (6th Cir. 1994).

III.

In support of her contention that Jones was given both notice and an opportunity to defend the Reid Adversary Proceeding, the Trustee has submitted the affidavit of Thomas Jessee. Mr. Jessee states therein that he is an attorney licensed to practice law in the state of Tennessee and that he was counsel of record and represented Reid in the Reid Adversary Proceeding. According to Jessee:

During my representation of Reid in the Pro Page bankruptcy case and the Reid Adversary Proceeding, I was informed and believe that Carleton A Jones, III (“Jones”), the Defendant in this case, was represented by Margaret Fugate, an attorney in Johnson City, Tennessee. During the course of the Reid Adversary Proceeding, it is also my understanding and belief that Jones also retained the services of David Lemke to assist in the defense of the claims asserted against Reid in the Reid Adversary Proceeding. In fact, Mr. Lemke prepared and assisted in the preparation of briefs that were submitted on behalf of Reid in the Reid Adversary Proceeding.

During the course of my representation of Reid in the Reid Adversary Proceeding, I regularly spoke and corresponded with Ms. Fugate and then Mr. Lemke on the status and the ongoing progress of the proceedings in the case.

In his affidavit filed in opposition to the Trustee’s summary judgment motion, Jones does not deny that he had actual notice of the Reid Adversary Proceeding. Moreover, as previously noted, Jones admits in his answer that Fugate represented him in connection with the Pro Page bankruptcy case during the time frame of the Reid Adversary Proceeding, and no affidavit has been presented from Fugate denying that Jessee regularly spoke and corresponded with her regarding the Reid Adversary Proceeding. As pointed out by the Trustee in her memorandum of law, “it is clear that under Tennessee law, a client is implied to have notice of facts transmitted to his or her attorney

in the matter and course of the attorney's employment for the client." *Knox-Tenn Rental Co. v. Home Ins. Co.*, 2 F.3d 678, 683 (6th Cir. 1993). See also *Lane-Detman L.L.C. v. Miller & Martin*, 82 S.W.3d 284, 296 (Tenn. App. 2002) (knowledge of counsel is imputed to clients under basic agency theory). As stated by the Tennessee Court of Appeals in *Smith v. Petkoff*, 919 S.W.2d 595 (Tenn. App. 1995):

[A] person generally is held to know what his attorney knows and should communicate to him, and the fact that the attorney has not actually communicated his knowledge to the client is immaterial. So, the facts constituting knowledge, or want of it, on the part of an attorney, are proper subjects of proof, and are to be ascertained by testimony as in other cases; but when ascertained, the constructive notice thereof to the client is conclusive, and cannot be rebutted by showing that the attorney did not in fact impart the information so acquired.

Id. at 597-98 (quoting 7A C.J.S. *Attorney and Client* § 182 (1980)). Thus, because notice to Jones' attorney Fugate constituted notice to Jones, it is undisputed that Jones had actual notice of the Reid Adversary Proceeding.

Jones' opposition to the Trustee's motion is based on his contention that he did not have "reasonable" notice, along with the requisite "opportunity to defend" as defined by Tennessee law. According to Jones' affidavit filed January 14, 2005:

The first demand made upon me for indemnification under the [Indemnification Agreement] by or on behalf of [Reid] was on or after March 10, 2003. I was not asked, nor did I have the opportunity to participate in the Trustee's suit against [Reid]. I had no opportunity to defend the Trustee's suit against [Reid]. I did not know [Reid] would seek indemnification under the [Indemnification Agreement] until March 10, 2003.

In his more recent affidavit, filed February 13, 2007, Jones retreats from his earlier statement that demand for indemnification was made on him on March 10, 2003. Rather, Jones states that:

By letter dated March 10, 2003, Thomas C. Jessee wrote my attorney, Margaret Fugate, referencing the [Indemnification Agreement]. To my knowledge, Mr. Jessee has never informed Ms. Fugate that any judgment obtained by the Trustee against Mr. Reid would be binding on me, whether in his March 10, 2003 letter or otherwise. To my knowledge, Mr. Jessee has never informed Ms. Fugate that Mr. Reid would seek to be indemnified for any judgment received by the Trustee against Mr. Reid, whether in his March 10, 2003 letter or otherwise. I did not know until sometime after the Trustee obtained her judgment against Mr. Reid that Mr. Reid or the Trustee would seek to collect the judgment from me.

Jones precedes that statement with the following assertion:

Neither [Reid] nor his agents made personal demand upon me to defend Mr. Reid in the Trustee's suit against [Reid]. Likewise, neither [Reid] nor his agents informed me that I would be responsible for any judgment obtained by the Trustee against Mr. Reid.

Mr. Jones argues in his brief that Tennessee law sets forth four requirements in order for a judgment against an indemnitee to be conclusive against an indemnitor: "(1) notice of the suit against the indemnitee; (2) a request to defend the suit; (3) an offer of permission to defend the suit; and (4) notice that any judgment rendered against the indemnitee will be conclusive on the indemnitor." (Jones' Resp., 6, citing *Bozeman*, 321 S.W.2d. at 839, and Restatement (Second) of Judgments § 57 (2004)). Jones maintains that the evidence submitted by the Trustee only establishes the first element and fails to prove the last three elements.

In response, the Trustee states that these elements were not set forth in the district court's directive on remand, with the remand issue being limited to whether reasonable notice was given and the district court defining reasonable notice as simply notice and the opportunity to defend. The Trustee moreover denies that *Bozeman* requires elements 2 and 3, and contends that even if it does, these elements are present herein or are immaterial in that Jones did, in fact, defend Reid. Lastly, the Trustee rejects the assertion that *Bozeman* or any other applicable authority mandates the last element, that the notice must advise that any judgment rendered against the indemnitee will be conclusive on the indemnitor. In this regard, the Trustee notes that Jones signed the Indemnification Agreement and under applicable law is presumed to know and be bound by its contents, including the obligation therein for Jones to "defend, indemnify and hold [Reid] harmless from and against any and all liability, claims, demands, obligations, or debts asserted against [Reid] as a result of the operation of [Pro Page]"

In the *Bozeman* case,¹ judgments in seven lawsuits were entered against the sheriff of Knox

¹ As stated by the district court, "Whether notice of the adversary proceeding as an indemnification action was required is a question of Tennessee state law, and, as such, this court must look to the rulings of the Tennessee state courts." (District Court Memo., 10 (citing *United Servs. Auto. Assn. v. Barger*, 910 F.2d 321, 325 (6th Cir. 1990)). The district court recognized that the primary case dealing with this issue under Tennessee law is the *Bozeman* decision.

County, Tennessee due to the unlawful and negligent conduct of two deputy sheriffs. *Bozeman*, 321 S.W.2d at 834. Thereafter, the sheriff filed suit against the deputy sheriffs and their surety in order to collect on an indemnity bond. In their defense to the indemnity action, the defendants argued that they had not been parties to the original actions against the sheriff, that they had no control over that litigation, and that they had not been represented in the litigation, although it was undisputed that the surety for the deputies had been fully apprised of the pendency of the lawsuits and counsel for the surety had even participated in at least two pretrial conferences concerning the defense to the seven lawsuits. The evidence indicated that counsel for the surety had disagreed with the defense strategy of counsel that was representing the sheriff, with the latter choosing to rely solely on a legal and technical defense going only to the sufficiency of the pleadings—a defense which proved unsuccessful—rather than presenting witnesses to dispute the factual basis of the lawsuits as desired by the surety’s counsel. *Id.* at 837. The chancellor concluded that the judgments obtained against the sheriff were not binding on the defendants, noting that because counsel for the sheriff had been in full charge of the litigation and none of the defendants had ever been requested or permitted to defend the lawsuits, the defendants never had the opportunity to appear and defend the charges. *Id.* at 834-35. Upon appeal, the Tennessee Court of Appeals affirmed, quoting with approval the following from the chancellor’s ruling:

It is an elementary principle of justice, that no one ought to be bound, as to matter of private right, by a judgment or verdict to which he was not a party, where he could make no defense, from which he could not appeal, and which may have resulted from the negligence of another, or may have even been obtained by means of fraud and collusion.

Id. at 838 (quoting *Stephens v. Jack*, 11 Tenn. 403 (1832)).

[T]he indemnitor must be given an opportunity to appear and to participate in the defense of the suit and that it is not enough that the indemnitor be advised or know of the facts and circumstances relating to the suit which has been instituted. The reason behind the holdings of these various Courts is summed up in the case of *Seat v. Cannon*, 20 Tenn. 471, as follows:

It is a well settled principle of law that no one who is not a party[,] or in the relation of a representative of a party, is estopped from enquiring into the merits of a judgment by which his rights are sought to be affected, for the plain [,] [] common sense reason that he shall not be judged without being heard. And surely no one can complain of this. It is not enough that the plaintiff has obtained a judgment by

the neglect or ignorance of the parties thereto, by which they are estopped and made liable for what they did not owe, without seeking thus to affect the innocent third persons who are no parties to the proceeding. 20 Tenn. 472 [corrections to reflect original text].

See Restatement of the Law Judgments, Chapt. 4, Sec. 7, Sub-Sec. E, as follows:

In order to bind the indemnitor in a subsequent action against him, the indemnit[ee] is not obliged necessarily to surrender the entire control of the defense; he must, however, request the indemnitor to participate, and if judgment is given against the indemnitee he must permit the indemnitor to take appellate proceedings. [Correction to reflect original text.]

In addition to the foregoing, the court of appeals also found two separate quotations from *American Jurisprudence* to be applicable:

Conclusiveness of Judgment Recovered against Indemnitee—It is a well-settled principle that where a person is responsible over to another, either by operation of law or express contract, and he is duly notified of the pendency of the suit against the person to whom he is liable over, and full opportunity is afforded him to defend the action, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he appeared or not. This principle finds frequent application in the case of indemnitors or persons primarily liable for a wrong for which another has been compelled to pay.

Bozeman, 321 S.W.2d at 839 (quoting 27 Am. Jur. *Indemnity* § 35).

Notice and Opportunity to Defend—The doctrine of conclusiveness of judgments as against persons liable over to the judgment debtor has been held or declared to be applicable where the former were duly given notice of the pendency of the action in which the judgment was rendered and had an opportunity to defend, and not to be applicable where the person ultimately responsible was not given such notice and such opportunity to defend. The effect of the omission of such notice and opportunity is that the judgment is not binding on the person liable over, who has a right to litigate again every essential fact necessary to support the judgment. . . .

Id. at 839 (quoting 30 Am. Jur. *Judgments* § 417).

After the foregoing recitation of the law in this area, the court of appeals concluded:

It appears to us from the record in the present case that the surety of the two deputies . . . had full and complete notice of the pendency of the suits in Circuit Court, was fully advised by the solicitor for Sheriff Jones and his surety of all developments in the case, but at all times the solicitor for the Sheriff and his surety was in full charge of the litigation. The deputies and their surety were never asked

to defend the suits, were never offered the permission to defend the suits and no notice was ever given to the deputies or their surety that any judgments rendered against the sheriff and his surety in the Circuit Court would be conclusive as against said deputies and their surety.

Under the authorities quoted above, we feel constrained to agree with the Chancellor that such judgments in the Circuit Court under the circumstances related above were not conclusive against the deputies . . . and their surety

Id. See also Clinchfield R.R Co., v. U. S. Fid. & Guar. Co., 160 F. Supp. 337, 340 (E.D. Tenn. 1958) (“Notice and an opportunity to defend the action against the indemnitee are necessary to render the judgment against the indemnitee conclusive of the indemnitor.”).

From a careful review of *Bozeman* and the authorities cited therein, this court is not convinced that *Bozeman* stands for the proposition that “demand on the indemnitor to defend” and “an offer of permission to defend” are absolute prerequisites that must be satisfied in order for a judgment to be conclusive on the indemnitor, as Jones maintains in the instant case.² The court’s focus in *Bozeman* was on whether the indemnitor was afforded “full opportunity . . . to defend the action,” with *full* meaning the opportunity to raise every defense and pursue every legal strategy that would be available if the indemnitor were an actual party to the proceeding, including the ability to appeal. *Bozeman*, 321 S.W.2d at 838 (quoting 27 Am. Jur. *Indemnity* § 35 (emphasis supplied)). See also 42 C.J.S. *Indemnity* § 56 (2007) (“liability for indemnification cannot be adjudicated without affording the indemnitor an opportunity to defend and contest every element entering into the cause of action”). Clearly, if the indemnitee in *Bozeman* had demanded that the indemnitor defend, or had given permission to the indemnitor to defend, the indemnitor would not have been denied the opportunity to pursue the legal strategy that it thought would be the most effective. Thus, *Bozeman* demonstrates that a demand or request to defend are simply means by which an indemnitee ensures that the indemnitor is given the necessary full opportunity to defend the action rather than being mandatory requirements that must exist in each case. This construction is supported by *The Restatement (First) of Judgments*, cited with approval in *Bozeman*. As stated therein, “There must be a tender of control either joint or full. . . .Such tender is not essential if the indemnitor indicates

² Any requirement that a notice both (1) “demand” that a indemnitor defend a lawsuit and (2) offer permission for a defense by the indemnitor, would be inconsistent, in a strict sense, since, by definition, the former is a “demand” while the latter is merely an “offer.”

that he would not participate and on the other hand is not essential if in fact the indemnitor does participate.” Restatement (First) of Judgments § 107 (1942), comment (e).

As to Jones’ contention that *Bozeman* requires “notice that any judgment rendered against the indemnitee will be conclusive on the indemnitor,” it must be noted that neither the *Bozeman* court nor its cited authorities expressly state that this, or any other information, is an essential element of the required notice. *Cf.* 47 Am. Jur. 2d *Judgments* § 607 (2007) (“What is reasonable notice and a reasonable opportunity to defend is not governed by any fixed or arbitrary rules but depends upon the facts and circumstances of the case.”). Although the court did cite the failure to give such notice, the statement was made in a conclusory fashion at the end of the discussion, without any citation to authority, and none of the court’s previously cited authorities even mention such a requirement, much less state that it is essential. Moreover, the court also found that the indemnitor had “full and complete notice of the pendency of the suits” and “was fully advised . . . of all developments in the case.” Given that this type of statement is a legal conclusion, subject to debate and ultimate determination by a court of law, rather than a statement of fact, and that the *Bozeman* court’s focus was on whether the defendants were afforded the full opportunity to participate in the original action, this court rejects the assertion that notice is defective under *Bozeman* unless it contains the magic words “any judgment rendered against the indemnitee will be conclusive against the indemnitor.” *Cf.* 42 C.J.S *Indemnity* § 56 (2007) (“It is not necessary, in order that the judgment therein may be binding on the indmenitor, that the notice to him should be in writing or that any particular form of words should be used in giving notice; it is sufficient if he is fully and fairly informed of the claims, and that the action is pending, with full opportunity to defend or to participate in the defense . . .”). Nonetheless, the opportunity to defend is meaningless without knowledge of the necessity of presenting a defense. Considering the entire tenor of the court’s discussion regarding the fairness of binding a person to a judgment in which he had not been a party, “full opportunity to defend” appears to include the concept that the indemnitor be advised in some fashion that the indemnitee seeks to hold him liable under the indemnity agreement such that the indemnitor is placed on constructive notice that the failure to offer a full and complete defense may result in the finding of liability against him, the same as if he had been the original defendant.

In summary, this court rejects the assertion that *Bozeman* stands for the proposition that in order for a judgment against an indemnitee to be conclusive against an indemnitor, the indemnitee *must* request the indemnitor to defend the suit, the indemnitee *must* offer permission to the indemnitor to defend the suit, *and* the indemnitee *must* give notice that any judgment rendered against the indemnitee will be conclusive on the indemnitor. Rather, the *Bozeman* holding is that these are means by which the indemnitee may ensure that the indemnitor is afforded the full opportunity to defend or participate in the defense, and that absent *full* opportunity, as construed therein, a judgment against the indemnitee will not be binding on the indemnitor in a subsequent action.

IV.

Against this background, the court will examine whether Jones was afforded reasonable notice and the full opportunity to defend the Reid Adversary Proceeding. That proceeding was commenced on April 18, 2002. Eleven months later, on March 20, 2003, this court entered an order denying Reid's motion for summary judgment and granting summary judgment for the Trustee. On April 1, 2003, Reid filed a motion to reconsider, which the court denied by order entered April 16, 2003, and entered a judgment against Reid that same day.

Attached to Jessee's affidavit are copies of his correspondence to Fugate and to Lemke, which consist of eight letters to Fugate alone from May 2, 2002, through March 10, 2003, and four letters to both Fugate and Lemke between March 24, 2003, and April 24, 2003.³ In the first letter from Jessee to Fugate,⁴ which has a description line of "Joe Reid/Pro Page," Jessee states the following:

Per our discussion, Joe Reid received the complaint in the above referenced matter on May 1, 2002. Attached is a copy of the same. After reviewing the enclosed, give me a call. Please fax me over the case we discussed and I will go ahead and prepare a motion for summary judgment in this matter. We also need to discuss the monies

³ The files of both Fugate and Lemke reflect that they received the letters sent to them by Jessee, along with copies of the documents enclosed in the particular letters.

⁴ Each letter to Fugate is addressed "Dear Margaret." Similarly, Jessee's letters to Fugate and Lemke are addressed either "Dear Margaret and David" or "Dear David and Margaret."

due Joe from your client.⁵

In the next letter dated June 6, 2000, styled “In re Pro Page Partners, LLC v. Joseph K. Reid,” Jessee states to Fugate:

Per our discussion, enclosed please find a copy of our answer in the above matter. As we discussed, I intentionally did not bring your client in. You and I need to meet and reach an agreement to settle all claims between Mr. Reid and your client; otherwise, I obviously need to file something. . . .

In a followup letter dated June 24, 2002, Jessee writes:

It is my understanding you are going to try to get your client this week and let me know what his position is. Obviously, it is Joe’s position that your client should be responsible for my fees and costs in defending this case in bankruptcy. Also, there is still the issue of the money due Joe from the agreement. As I told you, I will be backed up in other things this week. I would like to hear back from you by the first of the week. We agreed that the summary judgment motion should be filed as quickly as possible. I will wait to do that until I hear back from you.

On August 29, 2002, Jessee writes Fugate the following letter:

Enclosed please find a copy of Mr. Dessauer’s letter and rule 26 disclosures. Per our discussion, it is my understanding that Mr. Jones has agreed to pay our fee provided he reviews the billing statement. I bill at \$200.00 per hour. I agree with you that a memo done by Neal & Harwell would be welcome. You and I need to address what monies are due from Carleton to Joe. I would like to wrap all of this up at the same time. I will be gone until the 9th and will call you when I get back.

By letter dated December 20, 2002, Jessee writes:

I have until mid-January to get my motion for summary judgment filed. Have you heard anything from your Nashville attorney/ you were also going to talk to your client about reaching a settlement with Joe. As we discussed, your client’s position has changed substantially as it relates to my client. I assume Mr. Reid expects to be indemnified and to be paid on his note. Give me a call.

In a letter dated February 6, 2003, Jessee writes:

Enclosed please find our recent letter to David Lemke. We have until next Friday to finalize our response. Also enclosed is a copy of Reid’s Affidavit. Margaret, I need an answer from you by the end of the next week about getting Joe paid on his note and the costs of his defense. I have probably about \$2,000.00 worth of time in it and you have never made an offer on what Carlton owes Joe. If I don’t hear something constructive by the end of next week, Joe has insisted that I file suit

⁵ The Indemnification Agreement provided, in addition to the indemnification provision, that Jones would execute a promissory note to Reid in the principal amount of \$52,107.17.

against Carlton. Obviously the printing issue doesn't exist any more.

By letter dated February 14, 2003, Jessee writes:

Enclosed please find copies of my letters to the clerk and to Mark [Dessauer] along with a copy of the defendant's response and cross motion for summary judgment and memorandum in support thereof. If you have any questions, please call.

In his March 10, 2003 letter, Jessee writes:

I met with Joe and discussed with him the statement that Mr. Jones made to you that Mr. Jones felt that Joe had misled him in the Pro Page venture. Mr. Reid vehemently denies the same and points out that when the Reid brothers decided to get out of Pro Page they encouraged Mr. Jones to do so as well. Mr. Jones chose to side with the two individuals remaining in Pro Page and he now has to live with that decision.

In terms of the Indemnification and Redemption Agreement dated December 30, 1998, Mr. Jones is a guarantor and is indebted to Mr. Joe Reid in the amount of \$69,481.17 plus interest accruing at a rate of 8% per annum and the costs of the defense he has had to incur as the Trustee for Pro Page. For your convenience enclosed you will find a copy of the redemption and indemnification agreement. He proposes that Mr. Jones pay at least all of the interest, costs and attorney's fees that are due from the date of this letter, and that we enter into a written agreement the terms of which would reflect how Mr. Jones will pay the remaining balance off.

I realize that you and I had discussed waiting until the outcome of the bankruptcy case, however, Mr. Reid is quite upset over Mr. Jones' allegations and has requested that I move forward. As we both discussed when money is involved friendships deteriorate quickly.

I look forward to your quick response.

In a letter dated March 11, 2003, containing a description line of "Pro Page Partners, LLC, Mary Foil Russell, Trustee v. Joseph K. Reid, No. 02-2027," Jessee writes to Lemke:

Enclosed please find a copy of the response⁶ we received in the above matter. We have ten days or less to respond to the same and I will be out of town starting Friday at noon for a week. Please review the enclosed and give me a call today.

In his letter dated March 24, 2003, to Lemke and Fugate with the same description line, Jessee advises:

⁶ Attached to the letter was a copy of the Trustee's response to Reid's cross motion for summary judgment filed March 7, 2003.

Attached is the order we received this morning.⁷ We need to talk sometime in the next 24 hours to make a decision on how best to proceed. I look forward to hearing from you.

Jessee's next letter to Lemke and Fugate dated March 31, 2003, states:

Attached is the Statement in Support of Judgment Amount in the above matter. Please review the same. I would like to file an appeal on Wednesday. Can we do a conference call tomorrow afternoon at 3:00? Please call or email Darlene if you are available and whether that time is convenient.

By letter dated April 2, 2003, Jessee informs Lemke and Fugate:

I went back and looked at the opinion and order and decided that out of an abundance of caution I was going to file something before ten days ran on the memorandum opinion. Attached is what I filed. It is not the most eloquent but given the fact that it had to be filed yesterday, it will preserve our time. Also attached is a separate response that is going out today on Mr. Dessauer's proposed judgment. I was concerned that we could not wait until she entered the judgment in order to request a reconsideration and possibly an appeal. Send me any suggested changes and I will update my motion. I look forward to hearing from you.

In a letter dated April 9, 2003, to Lemke and Fugate, Jessee writes:

Enclosed please find a copy of the Response in Opposition to Motion of Defendant that we received from Mark Dessauer.

Please review and give me a call.

Similarly, in his brief April 24, 2003 letter to Lemke and Fugate, Jessee states:

Enclosed find a copy of the Judgment entered in the above matter. Please review and give me a call.

In addition to these copies of correspondence, the Trustee has submitted certain billing records of the Nashville law firm of Waller Lansden Dortch & Davis ("Waller Lansden") to Jones. The firm's first invoice dated March 18, 2003, reflects that its attorneys David Lemke and Katie Stenberg, during the week of February 6, 2003, through February 13, 2003, performed 23.60 hours of legal work for which it sought payment of \$4,451.00 plus expenses of \$28.84 for a total of \$4,479.84 for services in connection with the Reid Adversary Proceeding. These services included:

⁷ Attached to the letter was this court's order and memorandum opinion entered March 20, 2003, denying Reid's summary judgment motion and granting the Trustee's motion.

02/06/2003	Telephone call with T. Jessee; telephone call with M. Shugate [sic]; review of pleadings; review of research D. Lemke	1.50 hrs.	295.00/hr
02/06/2003	Discussion with D. Lemke concerning trustee's suit on guaranty against J. Reid; telephone call with T. Jessee; research of [redacted based on claim of attorney / client privilege] of issues (Westlaw headnotes, Am Jur, Lexis case research) K. Stenberg	4.60 hrs.	160.00/hr
02/07/2003	Review of plaintiff's motion for summary judgment in Pro Page adversary proceeding K. Stenberg	.40 hrs.	160.00/hr
02/10/2003	Pro Page matter – continued research concerning [redacted] for incorporation into motion in opposition to plaintiff's motion for summary judgment and memo and counter motion for summary judgment K. Stenberg	3.60 hrs.	160.00/hr
02/11/2003	Review of research re: [redacted] D. Lemke	.50 hrs.	295.00/hr
02/11/2003	Pro Page adversary proceeding against J. Reid- Completion of research on [redacted] motion for summary judgment and defendant's counter motion for summary judgment; drafting memo in support of defendant's motion K. Stenberg	4.60 hrs.	160.00/hr
02/12/2003	Review of and revise memo re summary judgment D. Lemke	2.00 hrs.	295.00/hr
02/12/2003	Pro Page [redacted] matter (J. Reid) Final research; drafting motion opposing plaintiff's motion for summary judgment and defendant's counter motion for summary judgment; drafting memo in support of defendant's motions; editing same K. Stenberg	4.60 hrs.	160.00/hr
02/13/2003	Revise and finalize summary judgment memorandum D. Lemke	1.00 hrs.	295.00/hr
02/13/2003	Pro Page matter - Editing summary judgment motion and memo K. Stenberg	.80 hrs.	160.00/hr
Dessauer's Exh. No. 4; Lemke 004-006.			

The bill from Waller Lansden to Jones dated April 17, 2003, sought payment for 9.10 hours of legal services from March 11, 2003, to March 31, 2003, for total fees of \$1,613.50 and expenses of \$591.77. These services included the following:

03/11/2003	Review of response brief D. Lemke	.50 hrs.	295.00/hr
03/11/2003	Review of Pro Page Trustee's reply to Defendant's response in opposition to motion for summary judgment; telephone call to T. Jessee K. Stenberg	.30 hrs.	160.00/hr
03/12/2003	Review of Reid's response filed to plaintiff's motion for summary judgment which triggered plaintiff's response and second motion K. Stenberg	.20 hrs.	160.00/hr
03/14/2003	Pulling cases outlined in Trustee's response to Reid's response to summary judgment motion; review of same; telephone call with T. Jesse K. Stenberg	.60 hrs.	160.00/hr
03/14/2003	Pull cited cases in pleading for K. Stenberg off Lexis-Nexis C. Cronk	1.00 hrs.	115.00/hr
03/16/2003	Review of plaintiff's reply to defendant's response and plaintiff's response in opposition to cross-motion for summary judgment filed by Trustee and each case cited by plaintiff; outlining potential legal arguments to assert against plaintiff K. Stenberg	2.10 hrs.	160.00/hr
03/17/2003	Drafting memo to T. Jesse and D. Lemke outlining legal issues addressed in plaintiff's response to our response to their motion for summary judgment; summary of case law and distinguishing facts as well as analysis of legal arguments presented in the plaintiff's brief K. Stenberg	2.20 hrs.	160.00/hr
03/17/2003	Review of plaintiff's brief; review of research in response; review of e-mail memo to T. Jessee re: same D. Lemke	1.00 hrs.	295.00/hr
03/24/03	Receipt of order denying defendant's motion for summary judgment and granting plaintiff's motion; telephone call to T. Jessee; telephone call with D. Lemke K. Stenberg	.20 hrs.	160.00/hr
03/25/2003	Telephone call with T. Jesse; review of order granting summary judgment for plaintiff K. Stenberg	.70 hrs.	160.00/hr
03/31/2003	Telephone call to T. Jessee; discussion with D. Lemke concerning questions of law not addressed in judge's order and/or which were incorrectly determined to raise on appeal K. Stenberg	.30 hrs.	160.00/hr
Dessauer's Exh. No. 4; Lemke 009-010.			

In an invoice to Jones dated May 19, 2003, Waller Lansden bills Jones for the following:

04/01/2003	Telephone call with M. Fugate and T. Jessee re: Court's opinion D. Lemke	.50 hrs.	295.00/hr
04/01/2003	Conference call with T. Jessee, M. Fugate and D. Lemke to discuss filing motion to reconsider K. Stenberg	.30 hrs.	160.00/hr
Dessauer's Exh. No. 4; Lemke 014.			

Also submitted were certain of Fugate's billing records to Jones that reflect the following time entries relative to communications with Jessee and/or matters related to the Reid Adversary Proceeding:

Professional Services		<u>Hrs/Rate</u>
03/11/2003	Review Memorandum Opinion	0.50 150.00/hr
	Review and forward letter to Tom Jessee with letter	0.30 150.00/hr
03/25/2003	Review Reid Court Order	0.50 150.00/hr
03/31/2003	Telephone conference with Tom Jessee	0.10 150.00/hr
04/01/2003	Fax Notice of Appeal to Tom Jessee	0.10 150.00/hr
04/02/2003	Conference call with Tom Jessee and David Lemke	0.30 150.00/hr
04/28/2003	Several telephone calls to Tom Jessee to get Notice of Appeal filed	0.50 150.00/hr
04/29/2003	Telephone conference with Mark Dessauer re: Appeal Review Motion	0.50 150.00/hr
06/09/2003	Telephone conference with Tom Jessee	0.20 150.00/hr
07/29/2003	Telephone conference with Waller, Lansden to inquire as to continued service	0.20 150.00/hr
Dessauer's Exh. No. 3; Fugate 005-006, 012.		

The documents submitted by the Trustee indicate that all of the invoices from Fugate to Jones and from Waller Lansden to Jones have been paid, although the payor is not identified.

In a letter to Fugate from Katie Stenberg of Waller Lansden dated August 15, 2003, regarding Jones, Stenberg states the following:

I assume your office has received no further instruction from Mr. Jones relative to the matter now pending in the U.S. District Court for the Eastern District of Tennessee . . . which arose out of the Pro Page Partners bankruptcy proceeding. Mr. Reid's appeal from the Bankruptcy Court decision in favor of the Chapter 7 Trustee is now before the District Court, and it appears that Mr. Reid intends to file suit against Mr. Jones. We have taken no action with respect to the appeal because we have not been instructed by Mr. Jones or your office to do so. Accordingly, unless and until we receive such instruction, we intend to take no further action on Mr. Jones' behalf in this case.

Ms. Stenberg indicates in her letter that copies of it were also being sent to both Lemke and Jones. Thereafter, on September 19, 2003, Fugate writes Lemke the following regarding "Russell v. Carleton Jones," the instant adversary proceeding:

Mr. Jones was served with this adversary proceeding and brought it to me today. He is interested in having "high-powered" counsel for this case and since it may go to the Sixth Circuit, I am encouraging him. This relates to the research that your firm did. The District Court upheld Judge Parsons. Please review and advise if your firm will represent him. If so, I will have him contact you to make the arrangements.

Based on the foregoing evidence, the Trustee asserts that Jones not only had notice of the Reid Adversary Proceeding from its inception, but also full opportunity to defend, and that he, in fact, actually defended the action against Reid. The Trustee notes that in Jessee's June 24, 2002 letter to Fugate, he advised her that it was Reid's position that Jones had a duty to indemnify him for his fees and expenses in defending the Reid Adversary Proceeding, and that in his August 29, 2002 letter to Fugate, Jessee relates his understanding from presumably an earlier conversation that Jones had agreed to pay Jessee's fee. The Trustee also points out that both the correspondence and the billing records of Fugate and Waller Lansden reveal that they were actively involved with Jessee in defending the Reid Adversary Proceeding. More specifically, she observes that Waller Lansden's invoices to Jones reflect that the firm first began work on Jones' behalf on February 6, 2003, a date after the Trustee's motion for summary judgment had been filed in the Reid Adversary Proceeding

but prior to Reid's response being due. These invoices indicate that the firm examined the Trustee's summary judgment motion, conducted research on the issues, and even drafted Reid's motion and supporting memorandum. The firm also researched and prepared the reply to the Trustee's responsive brief. Finally, the Trustee notes that the billing records of Fugate indicate that she helped Jessee with the filing of the notice of appeal, appealing the adverse decision of this court against Reid to the district court.

In his responsive memorandum in opposition to the Trustee's summary judgment motion, Jones argues that each of the letters from Jessee to Fugate prior to March 10, 2003, is insufficient to constitute the required notice because none contains an express demand for indemnification or indicates that any judgment against Reid would be binding on Jones. As to the March 10, 2003 letter, although Jones concedes that it references the Indemnification Agreement, he notes that the letter is dated only ten days before this court entered its order awarding summary judgment to the Trustee. Jones also observes that the focus of the letter was the costs of Reid's defense and nothing therein advised Jones that Reid intended to bind him to any judgment received by the Trustee. Moreover, Jones denies that he defended the Trustee's action against Reid and asserts that Reid was not adequately represented in the action as there were certain arguments which Reid could have but failed to raise.

After careful consideration of all the evidence submitted in support of the Trustee's motion, Jones' affidavits, and the arguments of counsel, the court concludes that summary judgment in favor of the Trustee is appropriate. The correspondence by Jessee to Fugate and/or Lemke, along with the conduct of Jones and his attorneys Fugate and Lemke, establish that Jones was given reasonable notice and afforded the full opportunity to defend the Reid Adversary Proceeding, and that he did in fact fully participate in the defense of the proceeding as the Trustee maintains. Jessee states in his affidavit that he regularly spoke with and corresponded with Fugate and Lemke on the status and ongoing progress of the Reid Adversary Proceeding. Jessee also states that Jones retained the services of Lemke to assist in the defense of the proceeding and that Lemke "prepared and assisted in the preparation of briefs that were submitted on behalf of Reid in the Reid Adversary Proceeding." These statements are completely supported by Jessee's correspondence to Fugate and/or Lemke and by the billing records of Fugate and Waller Lansden, and are not denied by Jones

in his affidavits, the only two items of evidence offered by him in opposition to the Trustee's motion.

While no single one of Jessee's letters prior to March 10, 2003, can be read as a clear and unequivocal demand for indemnification, all of the letters together convey not only an understanding that Reid was looking to Jones for indemnification and for defense assistance, but also that Jones through his attorney was an active participant in defending the adversary proceeding. Jessee's first letter to Fugate, Jones' attorney, sent two weeks after the filing of the complaint, includes a copy of the complaint,⁸ references an earlier conversation that the two had regarding the subject, asks her to give him a call after she has had time to review the complaint and to fax over a copy of a case which they had discussed, and informs her that he will prepare a motion for summary judgment in the adversary proceeding. In the second letter sent a month later, Jessee sends Fugate a copy of the answer and reminds her, "[a]s we discussed, I intentionally did not bring your client in." In his third letter two weeks later dated June 24, 2002, Jessee states "[o]bviously it is Joe's position that your client should be responsible for my fees and costs in defending this case in bankruptcy."⁹ Along the

⁸ In that complaint, the Trustee sought to recover from Reid \$245,562.98 plus interest and attorney fees pursuant to his personal guaranty of Pro Page's indebtedness and obligation to Message Express Paging Company. Concerning the adequacy of the notice, comment (e) to The Restatement (First) of Judgments § 107 (1942) provides that the notice "must be given so that the indemnitor will have a reasonable time in which to make a defense," the notification "must be given by either by actual communication to the indemnitor or by delivering to his home or place of business a notification under such circumstances that it would normally be read," and the "notification must contain full information about the proceeding" The comment then goes on to state:

Where the relation between the indemnitee and the indemnitor is such that it is clear that indemnity would necessarily result from the payment of the claim by the indemnitee, a request to defend and a tender of control can normally be inferred upon a seasonable notification of the pendency of the action, since such notification would obviously be only for the purpose of inviting in the indemnitor.

The relationship between the indemnitee and indemnitor represented by this quotation would appear to be present where the indemnity is provided by contract as is the case between Reid and Jones herein, rather than based in tort. Consistent with the foregoing, the only logical inference that the court can draw for Jessee furnishing a copy of the complaint to Jones' counsel is that Reid was looking to Jones to indemnify him if the Trustee was successful in the action.

⁹ In his response to the Trustee's summary judgment motion, Jones notes that this letter does not mention why Jones should be responsible for Reid's fees and costs in defending the case and posits that "[p]erhaps Mr. Reid believed the promissory note provided the basis for his claim." (Jones' Resp., 9.)
(continued...)

same line, in his letter dated August 29, 2002, when he forwards other documents in connection with the case, Jessee states “[p]er our discussion, it is my understanding that Mr. Jones has agreed to pay our fee provided he reviews the billing statement. I bill at \$200 per hour. I agree with you that a memo done by Neal & Harwell would be welcome.” In his letter dated December 20, 2002, Jessee writes, “I have until mid-January to get my motion for summary judgment filed. Have you heard anything from your Nashville attorney . . . I assume Mr. Reid expects to be indemnified . . . Give me a call.” When considered collectively, the correspondence between these two attorneys clearly indicates that they were working together in defending the action against Reid because of Reid’s indemnity claim against Jones.

With regard to the March 10, 2003 letter which specifically addresses the Indemnification Agreement but which Jones dismisses because of its timing, it must be observed that this letter can not be read in isolation but must be read in the context of the continuing dialogue evidenced in the previous letters and what was otherwise taking place by Jones’ attorneys in defending the Reid Adversary Proceeding. Specifically, although Jones argues that he was not provided with timely notice of the necessity of participating in the Reid Adversary Proceeding because it was not until March 10, 2003, that Jessee provided Jones’ counsel with a copy of the Indemnification Agreement, it is undisputed that more than a month prior to the March 10, 2003 letter, Jones’ attorneys Waller Lansden was extensively engaged in defending the Trustee’s summary judgment motion and in pursuing summary judgment for Reid’s behalf. The docket of the Reid Adversary Proceeding reflects that the Trustee’s motion for summary judgment was filed on January 10, 2003, and that the only other activity in the case prior to that time, other than the filing of a complaint and the answer, both of which had been timely provided to Jones’s counsel, was a scheduling conference. After the Trustee’s summary judgment motion was filed, Reid then submitted a couple of agreed orders extending the time for filing his own dispositive motion and a response to the Trustee’s. Waller Lansden’s time records reflect that during this period of time, it was researching the issues raised

⁹(...continued)

However, there is no indication from the record before the court that the promissory note owed by Jones to Reid had any connection whatsoever with the Reid Adversary Proceeding. Thus, even construing the evidence in the light most favorable to Jones as this court must do, the argument has no factual basis.

in the adversary proceeding and preparing Reid's response to the Trustee's motion and Reid's cross motion for summary judgment along with a brief that was filed in Reid's name on February 18, 2003.¹⁰ From this activity, it is clear that rather than the first demand for indemnification, the March 10, 2003 letter was merely a continuation of the ongoing dialogue that had begun when the Reid Adversary Proceeding was first filed.

Mr. Jones' suggestion in his response that Jesse's letters only establish that the sole remedy Reid was seeking from Jones was the payment of his attorney fees is without merit. If that were the case, why would Jones hire his own attorneys to research the issue and prepare a response to the Trustee's motion and Reid's motion for summary judgment along with a brief on Reid's behalf, in effect doubling the amount of fees which he would have to pay? If that were the case, why would Fugate make several telephone calls to Jesse to get the notice of appeal filed, thus continuing to incur the accrual of attorney fees to defend the action? The only logical answer to these questions is that Jones understood that he would be liable for any judgment against Reid and that therefore it was necessary to do all that he could to ensure that a judgment was not entered, including not only getting his own attorneys to research and prepare motions and responses in the Reid Adversary Proceeding, but also appeal the unsuccessful outcome.

Mr. Jones' argument that the Reid judgment is not binding on him because Reid was not adequately defended in the Reid Adversary Proceeding is similarly without merit. Presumably, Jones' contention in this regard is that he did not have the full opportunity to defend the Reid Adversary Proceeding. However, unlike the situation in *Bozeman*, there is no indication that there was any disagreement between Reid's attorney and Jones' attorneys as to legal strategy or that Jones did not have the full opportunity to raise in the Reid Adversary Proceeding every argument that he or his counsel wanted to make at the time. Not only does the undisputed evidence indicate that Jesse discussed legal strategy and relevant case law with Fugate from the beginning, but the billing records of Waller Lansden indicate that the firm spent 23.60 legal hours from February 6, 2003, through February 13, 2003, researching all of the issues in the case, preparing a response in

¹⁰ As an aside, the court notes that the format of this motion and response is different than any of the other documents filed by Jesse. Additionally, the other documents state in the left margin, "Prepared by Jesse & Jesse"; the motion and response filed on February 18, 2003, do not.

opposition to the Trustee's summary judgment motion and preparing Reid's own motion for summary judgment with supporting memorandum. Similarly, after the Trustee filed a reply to Reid's motion, the Waller Lansden firm spent another 9.10 hours, reviewing and researching the cited cases and even drafting a research memo outlining potential legal arguments to assert in the response. In fact, the billing entry on March 17, 2003, even refers to the Reid's response to the Trustee's summary judgment motion as "our response."

The bottom line is this regard is that there is simply no indication that Jones did not have the full opportunity *at the time* to pursue every defense that he wanted to make. Any choices in strategy in addressing the Trustee's summary judgment motion that now in hindsight seem questionable are as much attributable to Jones as to Reid, due to the role Jones' counsel played in helping defend the Reid Adversary Proceeding. Any suggestion that there are other arguments that could have been made appear to be no more than Jones' desire to have a second bite at the defense apple now that he has different counsel.¹¹

Carefully scrutinized, Jones' affidavits presented in opposition to the Trustee's summary judgment are either legal conclusions or self-serving statements refuted by the evidence or both. *See Galindo v. Precision Am. Corp.*, 754 F. 2d 1212, 1216 (5th Cir. 1985) ("Unsupported allegations or affidavits setting forth ultimate or conclusory facts and conclusions of law are insufficient to either support or defeat a motion for summary judgment."). Mr. Jones states in his January 14, 2005 affidavit that he did not have the opportunity to participate in or defend the Trustee's suit against Reid. However, this statement is refuted by the fact that Jones employed and paid attorneys who

¹¹ Comment (e) to the Restatement (Second) of Judgments § 57 (1982), entitled "Effect On Indemnitor Of Judgment Against Indemnitee," states that the "notice must be timely in that it must not come so late that the indemnitor is prejudiced in preparing the defense" As aptly noted by the Alabama Supreme Court in *Burkes Mech., Inc. v. Ft. James-Pennington, Inc.*, 908 So.2d 905 (Ala. 2004), "[c]onversely, tardiness without prejudice provides no defense." *Id.* at 911 (indemnitor failed to show any prejudice where it was aware of the action against the indemnitee, but demand for indemnification was tardy). Other than the Monday morning quarterbacking assertion by Jones' new counsel as to arguments which should have been made but were not, the affidavits by Jones are profoundly silent as to any prejudice suffered by him due to the manner in which Reid notified him of the Reid Adversary Proceeding and invited his participation.

fully participated in and defended the Trustee's suit on Reid's behalf.¹² Similarly, Jones' statement in his February 13, 2007 affidavit that he did not know until sometime after the Trustee obtained her judgment that Reid or the Trustee would seek to collect the judgment from him is contradicted, as discussed above, by his retention of attorneys to assist in Reid's defense and by his efforts to see that the judgment was appealed.¹³

Plainly, this would have been a much cleaner case if counsel for Reid had written Jones' counsel at the beginning of the Reid Adversary Proceeding, stated in no uncertain terms that Reid was looking to Jones to indemnify him as required by the Indemnification Agreement, and demanded that Jones defend Reid in the proceeding. Nonetheless, notwithstanding the absence of a singular communication conveying all of this information, it was evident from all of the facts and circumstances in this case that Jones was given reasonable notice and afforded the full opportunity to contest every single element of the Trustee's action against Reid, including appeal of an unsuccessful outcome, thus satisfying the requirements of *Bozeman*. Moreover, not only was Jones offered the opportunity to fully participate, he in fact fully participated in the defense of the Reid Adversary proceeding. The self-serving, conclusory affidavits submitted by Jones to the contrary are insufficient to create a genuine issue of material fact in this regard. As such, the judgment against Reid is conclusive as to Jones and summary judgment in favor of the Trustee is appropriate.

V.

Lastly, the Trustee asserts that she is entitled to summary judgment on her claim for

¹² Jones argues in his response that there is no evidence in the record that he agreed to pay or actually paid Mr. Reid's attorney's fees. Regardless of whether Jones paid Reid for services performed by Jessee, the unrefuted evidence is that the Waller Lansden firm, and to some extent Fugate, actively participated in and helped formulate Reid's defense on Jones' behalf. Although there is no direct evidence that Jones paid these firms, their bills were addressed to Jones, they admit that they have been paid for the services rendered on Jones' behalf, and Jones does not deny in his affidavits that he paid them.

¹³ Additionally, Jones' statement in his February 13, 2007 affidavit that "I did not know until sometime after the Trustee obtained her judgment against Mr. Reid that Mr. Reid or the Trustee would seek to collect the judgment from me" is contradicted by his January 14, 2005 affidavit, in which he states: "The first demand made upon me for indemnification under the [Indemnification Agreement] by or on behalf of [Reid] was on or after March 10, 2003. . . . I did not know [Reid] would seek indemnification under the [Indemnification Agreement] until March 10, 2003."

reasonable attorney fees and expenses incurred in this action. The Indemnification Agreement provides in Section 8(d) the following:

If any action shall be commenced among the parties hereto pertaining to the interpretation of, or the obligations of, or the obligations of any party under the terms hereof, then the party substantially prevailing in such action shall be entitled to recover its reasonable attorney's fee in an amount to be fixed by the person or entity which shall hear and decide such dispute.

As noted by the Trustee in her memorandum of law, a prevailing party is entitled under Tennessee law to recover attorney fees if authorized by statute, contract, or some other recognized equitable ground. *See State v. Brown and Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000); *Kultura, Inc. v. S. Leasing Corp.*, 923 S.W.2d 536, 540 (Tenn. 1996). Undisputably, the Indemnification Agreement is a contractual authorization for the recovery of attorney fees incurred by the Trustee in enforcing the Indemnification Agreement. No argument has been raised by Jones that the Trustee is not entitled under the Indemnification Agreement to recover the fees incurred by her in this adversary proceeding. Accordingly, the Trustee is entitled to summary judgment on her claim for attorney fees and expenses. The amount of the award is reserved for later determination by the court.

VI.

The court will enter an order in accordance with this memorandum opinion, granting the Trustee summary judgment in all respects. The order will also direct the Trustee to submit by affidavit within ten days a statement of attorney fees and expenses incurred by her. Jones will have ten days thereafter to object to the reasonableness of the fees and expenses sought. In the event an objection is filed, the court may set the matter for hearing or take the matter under advisement.

###