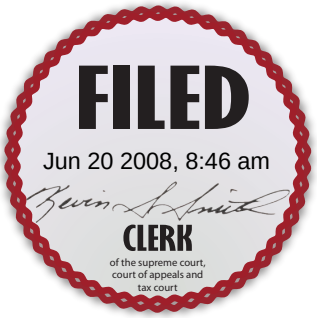

ATTORNEY FOR APPELLANT:

DAVID F. MCNAMAR
McNamar & Associates, P.C.
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

DAVID B. HONIG
ANGELA M. SMITH
Hall, Render, Killian, Heath & Lyman, P.C.
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

LEEPER ELECTRIC SERVICES COMPANY, INC.,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 29A02-0712-CV-1056
CITY OF CARMEL,	)	
Appellee-Defendant.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable William J. Hughes, Judge
Cause No. 29D03-0509-PL-1003

June 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Leeper Electric Services, Inc. ("Leeper"), appeals a trial court judgment awarding attorney's fees to the City of Carmel ("the City"). We affirm.

Issues

We restate the issues as follows:

I. Whether the trial court abused its discretion by awarding attorney's fees to the City; and

II. Whether the trial court abused its discretion regarding the amount of attorney's fees awarded.

Facts and Procedural History[1]

Leeper owns real property located on the northeast corner of U.S. Highway 31 and 131st Street in Carmel. In 1996, Leeper sought and was denied a building permit for the construction of a hotel on the property. On November 8, 1996, Leeper filed an action against the City in Hamilton County Superior Court No. 2 ("Hamilton I"). Following Leeper's motion for change of venue, the action was transferred to Hancock County Circuit Court ("Hancock I"), where Leeper amended its complaint, seeking damages for an alleged temporary taking of its property associated with the City's refusal to rezone the property.

In November 2002, the Hancock I court granted the City's motion for directed verdict on four of the five counts, including Leeper's civil rights claim under 42 U.S.C. § 1983. Leeper did not appeal the final judgment entered thereon. The remaining claim, for inverse condemnation, resulted in a jury verdict in favor of Leeper. On April 21, 2003, the Hancock

[1] Leeper has filed a motion for oral argument, which we deny in an order issued simultaneously with this decision.

I court entered final judgment awarding Leeper $1.12 million in damages plus prejudgment interest and expenses, and the City appealed. On March 18, 2004, this Court affirmed the inverse condemnation award ("*Leeper I*"), and the Indiana Supreme Court subsequently denied the City's petition for transfer.[2]

On June 8, 2005, Leeper petitioned the Hancock County Circuit Court for leave to file a second amended complaint ("Hancock II") containing allegations virtually identical to those previously disposed of on directed verdict in the same court in Hancock I. On July 21, 2005, the Hancock II court denied Leeper's petition to amend, and Leeper appealed. Meanwhile, on September 2, 2005, Leeper filed a civil action in Hamilton County Superior Court No. 3 ("Hamilton II" or "the trial court") with allegations virtually identical to those contained in the second amended complaint that had been denied in Hancock II. On May 15, 2006, this Court affirmed the Hancock II decision ("*Leeper II*"), and the Indiana Supreme Court denied Leeper's petition for transfer.[3]

On April 9, 2007, the City filed a motion to dismiss Leeper's Hamilton II action on the basis of res judicata and sought attorney's fees associated with defending against Leeper's repeated filings. On June 5, 2007, the trial court granted the City's motions. After an October 17, 2007 hearing, the trial court issued findings of fact and conclusions of law, which provide in pertinent part,

> In sum, every level of the judiciary in Indiana has had the chance to hear Leeper's argument. The trial court [in Hancock II] denied Leeper's attempt to refile what amounted to the same claim that had been judged on the

[2] *City of Carmel v. Leeper Elec. Servs., Inc.*, 805 N.E.2d 389 (Ind. Ct. App. 2004), *trans. denied*.

[3] *Leeper Elec. Servs., Inc. v. City of Carmel*, 847 N.E.2d 227 (Ind. Ct. App. 2006), *trans. denied*.

> evidence [in Hancock I]. The Indiana Court of Appeals [in *Leeper II*] examined the case and delivered a decisive opinion which addressed each of Leeper's arguments and still denied the appeal. The Indiana Supreme Court heard and denied Leeper's Petition for Transfer. Leeper's claim is therefore barred by *res judicata*, having already been decided on the merits as well as having been heard and denied on appeal.
>
> ….
>
> Sanctions are proper in this case because Leeper has continued to pursue litigation despite clear language from every level of the Indiana judiciary that its § 1983 claim cannot be pursued. Because the decisions of previous courts should have clearly signaled to the plaintiff that its claim was invalid for further litigation, this court finds that the plaintiff must pay all defendant's fees and costs in this case.

Appellant's App. at 145-46. The trial court awarded Carmel $10,850 in attorney's fees and $190.57 in related expenses. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Propriety of Awarding Attorney's Fees

Leeper challenges the trial court's decision to award attorney's fees. When reviewing a trial court award of attorney's fees, we apply a multi-tiered standard. First, we review the trial court's findings of fact to determine if they were clearly erroneous. *French v. French*, 821 N.E.2d 891, 897 (Ind. Ct. App. 2005). Then we "review de novo the trial court's conclusion as to whether attorney's fees are statutorily warranted." *Id*. "Finally, we review the trial court's decision to award attorney fees and the amount thereof under an abuse of discretion standard." *Kahn v. Cundiff*, 533 N.E.2d 164, 166 (Ind. Ct. App. 1989), *adopted on trans.*, 543 N.E.2d 627, 629 (Ind. 1989). An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law. *French*, 821 N.E.2d at 895.

As a general rule, parties to litigation bear their own attorney's fees. *Mitchell v. Mitchell*, 695 N.E.2d 920, 922 (Ind. 1998). However, Indiana Code Section 34-52-1-1(b) outlines circumstances in which a trial court may properly award attorney's fees:

> (b) In any civil action, the trial court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party:
> (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
> (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
> (3) litigated the action in bad faith.

A trial court is not required to find an improper motive to award attorney's fees under subsections (b)(1) or (b)(2). *Kahn*, 533 N.E.2d at 171. Rather, "a claim or defense is groundless if no facts exist which support the legal claim relied on and presented by the losing party." *Id.* It is "unreasonable if, based on a totality of the circumstances, including the law and facts known at the time of the filing, no reasonable attorney would consider that the claim or defense was worthy of litigation or justified." *Id*. at 170-71. A claim is frivolous

> (a) if it is taken primarily for the purpose of harassing or maliciously injuring a person, or (b) if the lawyer is unable to make a good faith and rational argument on the merits of the action, or (c) if the lawyer is unable to support the action taken by a good faith and rational argument for an extension, modification, or reversal of existing law.

Id. at 170.

The trial court in found that Leeper's Hamilton II action was barred by the doctrine of res judicata. This doctrine "prevents the repetitious litigation of that which is essentially the same dispute." *French*, 821 N.E.2d at 896. One of its branches, claim preclusion, "applies where a *final judgment on the merits* has been rendered which acts as a complete bar to a

subsequent action on the *same issue or claim between those parties* and their privies." *Id*. (emphases added).

Here, Leeper filed its initial action against the City in Hamilton County (Hamilton I), then obtained a change of venue to Hancock County (Hancock I), where it amended its complaint and lost on directed verdict on four of its five claims. It did not appeal that judgment. The City unsuccessfully appealed on the remaining issue. Two years later, Leeper attempted to relitigate the case in Hancock County (Hancock II) and lost. Leeper appealed and was unsuccessful both in this Court and in the Indiana Supreme Court. Instead of waiting for the results of the appeals process, Leeper again filed the same action against the same defendant in Hamilton County (Hamilton II). Having been sanctioned by the Hamilton II court, Leeper seeks redress in this Court.

The trial court correctly concluded that the doctrine of res judicata applies in this case. Leeper had received a judgment on the merits which operated as a complete bar to litigating the same claim against the same defendant. Moreover, Leeper's argument that it filed Hamilton II as a safeguard measure to preserve the claim that was made and defeated in Hancock II merely demonstrates its awareness of the repetitive nature of the action and the res judicata barriers associated with it.

Therefore, we conclude that Leeper's continuous filings "crossed the boundary into unnecessary and unwarranted litigation." *French*, 821 N.E.2d at 898. "Our judicial system is not meant to provide a second bite at the apple for those who have sought adjudication of their disputes in other forums and are not content with the resolution they have received." *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 591 (7th Cir. 2001), *cert. denied*. The

trial court did not abuse its discretion in awarding attorney's fees after Leeper's attempt at a third bite.[4]

II. Amount of Fee Award

Leeper contends that the trial court abused its discretion regarding the amount of attorney's fees awarded to the City. Trial courts enjoy broad discretion in awarding attorney's fees. *Carrusco v. Grubb*, 824 N.E.2d 705, 712 (Ind. Ct. App. 2005), *trans. denied*. "An award of attorney's fees will be reversed on appeal as excessive only where an abuse of the trial court's discretion is apparent on the face of the record." *Daimler Chrysler Corp. v. Franklin*, 814 N.E.2d 281, 286 (Ind. Ct. App. 2004). A trial judge is considered an expert on the issue of what constitutes a reasonable fee. *Venture Enterprises, Inc. v. Ardsley Distributors, Inc.*, 669 N.E.2d 1029, 1033 (Ind. Ct. App. 1996).

Specifically, Leeper asserts that counsel for the City grossly overstated the amount of time spent in defending Hamilton II. To the extent that Leeper challenges as excessive the

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[4] To the extent that Leeper argues that its decision to file Hamilton II was based on the Hancock II court's "confusing and ambiguous order," *see* Appellant's Br. at 8 and Reply Br. at 4., we note that this Court specifically addressed this argument in *Leeper II*:

> [Leeper] counters that because the order notes that the section 1983 claim was 'premature,' Appellant's App. p. 32, the trial court was merely dismissing the claim without prejudice and holding it in abeyance for a later time.
>
> To begin with, in examining the language of the trial court's order it is clear that its dismissal of the claim rested on multiple grounds. The trial court did find that the section 1983 claim was premature, but it also found that: (1) Leeper's claim was not supported by the evidence because the evidence established that Leeper was not deprived of all economic benefit of its land; and (2) Leeper's claim was not well-pleaded, inasmuch as Leeper did not allege inverse condemnation and alleged only a deprivation of property, not a taking without just compensation. Appellant's App. p. 32. Consequently, even if, for argument's sake, we conclude that the trial court would have otherwise held Leeper's section 1983 claim in abeyance, it is clear that its grant of Carmel's motion for judgment on the evidence rested on multiple grounds and that the judgment was final and prejudicial.

847 N.E.2d at 231.

14.4 hours logged in conjunction with an experienced attorney's preparation and filing of the City's six-page motion to dismiss, the trial court heard evidence and was in a better position than we to judge the reasonableness of the charge. Based on the record before us, we cannot say that the trial court's decision to include the 14.4 hours in the fee award was clearly against the logic and effect of the facts and circumstances before it.

Leeper also challenges 8.0 hours logged in conjunction with the City's motion to consolidate, filed pursuant to Indiana Trial Rule 42. Because the motion was filed in the Hancock II court rather than in the Hamilton II court, Leeper asserts that it cannot properly be added to the cost of defending Hamilton II. We disagree. As counsel for the City argued before the Hamilton II court,

> The motion to consolidate was necessitated by the filing of this matter. This is the matter we were asking to consolidate. It was filed in Hamilton (sic) County Court because it had their earlier case number. And while it is true that there isn't a basis to consolidate, we were operating in new ground because it also wasn't a basis to file the exact same action that you'd already lost in a different county. We, part of the reason there was so much time spent, as I said, we struggled with a way to handle this. Because it was so unusual. I've never had a case that I've won in a county that venue was transferred to, and had to been asked to litigate it again in a county it was transferred from. The time was spent on this matter, it was filed in the other one, because it had to be. That's where it came from.

Tr. at 23-24.

Leeper's act of filing Hamilton II was the catalyst for the motion to consolidate. Moreover, the City's counsel, although experienced, was traversing uncharted territory. Given the uniqueness and complexity of this case, the fact that counsel's research of Trial Rule 42 failed to produce a legal basis to consolidate Hancock II and Hamilton II does not render the research an excludable expense. The trial court did not abuse its discretion in

concluding that the 8.0 hours logged in conjunction with the motion to consolidate were properly includable as an expense associated with defending Hamilton II.

Affirmed.

BARNES, J., and BRADFORD, J., concur.