

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Hume Smith Geddes Green &  
Simmons, LLP,

*Appellant,*

v.

Paul S. Kruse and Parr Richey  
Frandsen Patterson Kruse,

*Appellees-Defendants,*

and

September 17, 2021

Court of Appeals Case No.  
21A-CT-414

Appeal from the Marion Superior  
Court

The Honorable John M.T. Chavis,  
II, Judge

Trial Court Cause No.  
49D05-1904-CT-13618

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Chad Shorter,  
*Plaintiff,*

and

James A. Ebert and James A.  
Ebert, LLC,  
*Defendants.*

**Altice, Judge.**

### **Case Summary**

[1] Chad Shorter, by counsel Michael Simmons of Hume Smith Geddes Green & Simmons, LLP (Hume Smith), filed a legal malpractice action against Paul Kruse and his law firm Parr Richey Frandsen Patterson Kruse (collectively, Kruse) regarding a time-barred tort claim. As an affirmative defense, Kruse named Hume Smith as a non-party who may have been responsible for Shorter's damages and served a Request for Production of Documents to a Non-Party on Hume Smith, asking it to produce Shorter's legal files, including the underlying tort suit that Hume Smith pursued on Shorter's behalf after Kruse did not. Hume Smith produced the requested documents and sought payment from Kruse pursuant to Ind. Trial Rule 34(C)(3) for approximately \$31,000 in damages for the cost to review and produce the documents. After Kruse refused to pay, Hume Smith filed a Non-Party Petition for Trial Rule 34(C)(3) Damages and Fees. The trial court denied the Petition, finding that, as Hume Smith produced its own client's file, it was not a true non-party and not

entitled to payment for costs and fees under T.R. 34(C)(3). Hume Smith appeals, claiming that the trial court abused its discretion when it denied the Petition.

[2] We reverse in part, affirm in part, and remand.

### **Facts & Procedural History**

[3] In January 2015, Shorter retained out-of-state attorney James A. Ebert to pursue a Federal Employers' Liability Act (FELA) claim for injuries Shorter sustained due to exposure to mold while working for National Railroad Passenger Corporation d/b/a Amtrak at a facility in Marion County, Indiana. In August 2017, Kruse agreed to represent Shorter as local counsel in the Amtrak suit. Pursuant to federal law, Shorter was required to commence his FELA claim within three years of the date that the cause of action accrued. *See* 45 U.S.C. § 56. Kruse and Ebert did not file a lawsuit against Amtrak within the three-year statute of limitations.

[4] Shortly thereafter, Shorter retained attorney Simmons of Hume Smith to (1) attempt to pursue the time-barred FELA claim against Amtrak, and (2) file a malpractice action against Kruse and Ebert and their respective firms. On October 24, 2017, Hume Smith filed Shorter's complaint for personal injuries against Amtrak, Cause No. 49D07-1710-CT-39800 (the Amtrak Litigation). In December 2018, Amtrak sought and received summary judgment in its favor on the basis that the statute of limitations expired on September 13, 2017, and final judgment was entered in favor of Amtrak.

[5] On April 4, 2019, Shorter, by counsel Simmons, filed in Marion Superior Court a complaint for legal malpractice, later amended, alleging that Ebert and Kruse failed to timely commence the action against Amtrak.<sup>1</sup> Kruse filed an answer to the complaint and asserted, among other things, various affirmative defenses, including a non-party defense that Shorter’s damages may have been caused in whole or in part by Simmons and Hume Smith.

[6] On September 30, 2019, Kruse served a “Request for Production of Documents to a Non-Party” (the Request) upon Hume Smith, asking for:

Your complete legal file involving Chad Shorter, including but not limited to any and all correspondence and communications with anyone that assisted the firm and Chad Shorter pertaining to his claim against National Railroad Passenger Corporation d/b/a Amtrak in the underlying cause (Cause Number 49D07-1710-CT-039800).

*Appellant’s Appendix Vol. II* at 52. The Request included the following provision: “You are entitled to security damages and payment of damages resulting from your response to this Request[.]” *Id.* at 53.

[7] Non-party Hume Smith did not oppose the Request, and on November 5, 2019, it produced the requested documents, which included both Shorter’s file against

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<sup>1</sup> Ebert and his firm, although defendants in the malpractice action, do not participate in this appeal.

Amtrak and his file against Kruse and Ebert.<sup>2</sup> Pursuant to T.R. 34(C)(3), which provides that non-parties may be entitled to damages for complying with non-party discovery, Hume Smith served Kruse with an invoice in the amount of \$31,474.40 “for the cost of locating, collating, reviewing, and copying the requested documents.”<sup>3</sup> *Id.* at 62. Kruse refused to pay, taking the position that, although its request for documents identified Hume Smith as a non-party, Hume Smith was Shorter’s attorney, both in the underlying FELA suit and the malpractice suit, and that Hume Smith should not be entitled to damages for time spent “producing its own client’s . . . file[.]” *Id.* at 193. Hume Smith hired attorney Patrick Olmstead to pursue recovery of the requested costs.

[8] On May 28, 2020, Hume Smith, by counsel Olmstead, filed a Non-Party Petition for Trial Rule 34(C)(3) Damages and Fees (the Petition). The Petition asked the trial court to grant relief in three respects: (1) order Kruse to pay Hume Smith \$31,474.40 in damages for production of the documents, (2) order Kruse to pay Olmstead’s attorneys’ fees that were incurred in recovering those

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<sup>2</sup> Although Kruse states that the Request “sought only materials related to the Amtrak Litigation[.]” the Request directed Hume Smith to produce “your complete legal file involving Chad Shorter, *including but not limited to*” the Amtrak lawsuit. *Appellee’s Brief* at 7; *Appellant’s Appendix Vol. II* at 52 (emphasis added).

<sup>3</sup> Hume Smith produced approximately 3600 pages and describes that, in order to produce the requested documents, it “gathered its hard copy and electronic file materials (including e-mails and texts); conducted a privilege review; Bates labeled the documents; and then produced the Response” consisting of a 35-page table of contents, volumes of documents, and a privilege log. *Appellant’s Brief* at 6. Because [t]he information requested was protected . . . by the attorney-client privilege and attorney work product doctrine[.]” Hume Smith was required to “review each and every document in the case file to ensure all privileged information was appropriately redacted[.]” *Id.* at 12.

damages,<sup>4</sup> and (3) “order the posting of security before any further discovery[.]” *Id.* at 40.

[9] Following an August 2020 hearing,<sup>5</sup> the court issued an order on October 6, 2020, denying the Petition. The court found that the documents requested and produced – namely, Hume Smith’s legal files pertaining to its representation of Shorter – belonged to Shorter such that the documents “could validly have been requested directly from Shorter under Ind. Trial Rule 34(A)(1),”<sup>6</sup> in which case Hume Smith would not have been entitled to recover damages/fees for producing them. The trial court reasoned:

Hume Smith is so closely connected to Shorter, by virtue of its representation of Shorter in both the underlying lawsuit [against Amtrak] and this [malpractice] lawsuit, *that the Court does not consider it to be a true non-party to whom [T.R.] 34(C)(3) applies.*

*Id.* at 32 (emphasis added). Determining that “[t]he Kruse Defendants’ utilization of [T.R.] 34(C) as opposed to [T.R.] 34(A)(1) is far more a matter of

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<sup>4</sup> The Petition asked for \$4690 incurred in fees leading up to the hearing and an expected \$2100 preparing for and attending a hearing on the Petition.

<sup>5</sup> On Kruse’s Motion, the court bifurcated the issues of liability and damages associated with the Petition, such that the August 2020 hearing concerned only whether Kruse was liable for damages and fees incurred by Hume Smith related to the production of the documents.

<sup>6</sup> T.R. 34(A)(1) provides in pertinent part that any party may serve on any other party a request “to produce and permit the party making the request . . . to inspect and copy, any designated documents or electronically stored information . . . or to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(B) and which are in the possession, custody or control of the party upon whom the request is served[.]”

form than it is of substance[,]” the court concluded that Hume Smith was not entitled to damages/fees for time spent producing Shorter’s file. *Id.* at 31.

[10] The trial court also denied Hume Smith’s request for an award of attorneys’ fees. The court found that T.R. 34(C)(3) provides for recovery of “reasonable attorneys’ fees incurred in reasonable resistance and in establishing such [] damages[,]” and, here, Hume Smith produced the requested documents without objection or challenge. That is, Olmstead’s fees were incurred “in advocating for Hume Smith’s position as to its entitlement to recover fees for the time spent producing Shorter’s file” and “not in resistance to the Kruse Defendants’ subpoena.” *Id.* at 32-33. Thus, the trial court determined that T.R. 34(C)(3) did not provide for the recovery of Olmstead’s attorneys’ fees and “denied as moot” the request for security for future discovery. *Id.* at 33.

[11] Hume Smith filed a motion for entry of a final, appealable order, which the trial court granted. Hume Smith now appeals.

## **Discussion & Decision**

[12] Hume Smith contends that the trial court abused its discretion when it denied its Petition. Trial courts have broad discretion in ruling on discovery issues. *IBM v. ACS Human Servs., LLC*, 999 N.E.2d 880, 885 (Ind. Ct. App. 2010) (addressing award of damages to non-party incurred in discovery process), *trans. denied*. Discretion is a privilege afforded a trial court to act in accord with what is fair and equitable in each case. *Gonzalez v. Evans*, 15 N.E.3d 628, 633 (Ind. Ct. App. 2014), *trans. denied* (quotations omitted). An abuse of discretion

occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or if it misinterprets the law. *Id.*

### *Damages Related to Production of Documents*

[13] Hume Smith argues that, as a then-named non-party,<sup>7</sup> it was entitled under T.R. 34(C)(3) to recover damages, *i.e.*, the costs it incurred to review and produce the requested documents. T.R. 34(C) applies to the production of documents by “[a] witness or person other than a party.” *IBM*, 999 N.E.2d 886 (citation omitted). It provides in relevant part:

(1) A witness or person other than a party may be requested to produce or permit the matters allowed by subsection (A) of this rule. Such request shall be served upon other parties and included in or with a subpoena served upon such witness or person.

\* \* \*

(3) The request shall contain the matter provided in subsection (B) of this rule. *It shall also state that the witness or person to whom it is directed is entitled to security against damages or payment of damages resulting from such request* and may respond to such request by submitting to its terms, by proposing different terms, by objecting specifically or generally to the request by serving a written response to the party making the request within thirty (30) days, or by moving to quash as permitted by Rule 45(B). . . . *Such*

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<sup>7</sup> According to the record before us, Kruse subsequently withdrew the non-party defense against Hume Smith. *Appellant's Appendix Vol. II* at 199; *Transcript Vol. 2* at 69.



*damages shall include reasonable attorneys' fees incurred in reasonable resistance and in establishing such threatened damage or damages.*

T.R. 34(C)(1), (3) (emphases added.)

[14] In this case, when Shorter sued Kruse for legal malpractice, Kruse elected to assert a non-party affirmative defense, alleging that Shorter's damages "may have been caused in whole or in part by non-parties, including but not limited to [] Attorney Michael Simmons . . . and Hume Smith . . . [.]” *Appellant's Appendix Vol. II* at 38. One week later, Kruse served upon Hume Smith the Request under T.R. 34(C). *Id.* at 52. To be clear, the Request was directed to Hume Smith, not Shorter, and it requested that Hume Smith respond within thirty days after service and produce and permit Kruse and Ebert to inspect and copy “Your complete legal file involving Chad Shorter[,]” including Shorter's claim against Amtrak. *Id.* The Request included the following paragraph: “You are entitled to security against damages and payment of damages resulting from your response to this Request[.]” *Id.* at 53.

[15] Kruse served on Hume Smith an accompanying Subpoena Duces Tecum, which directed that “[p]ursuant to Rule 45 of the Indiana Rules of Trial Procedure, the above named non-party is commanded to produce for inspection and/or copying, within thirty (30) days from the date of service . . . the documentation outlined in the attached ‘Request for Production of Documents to a Non-Party[.]’” *Id.* at 50. The Request and Subpoena arrived with a cover letter directed to Hume Smith's Records Custodian. The letter asked Hume Smith to make copies and send them to Kruse's attorney and stated, “We will,

of course, reimburse you for the reasonable cost of copying all requested documents.” *Id.* at 49.

[16] On appeal, Kruse acknowledges that the Request cites to T.R. 34(C) and not T.R. 34(A), but urges that the documents requested were “relevant to the . . . malpractice claim and were, in fact, the property of Shorter[,]” and that “because the documents [] technically belong to Shorter and were subject to discovery based on the nature of this action[,]” Hume Smith “had an obligation to cooperate in discovery as party counsel without promise of payment[.]” *Appellee’s Brief* at 9, 13. The trial court agreed with Kruse and determined that Kruse’s use of T.R. 34(C) as opposed to T.R. 34(A)(1) was “far more a matter of form than [] of substance.” *Id.* at 31. We disagree.

[17] Kruse, for whatever chosen reasons, elected to name Hume Smith as a non-party who might be liable for some or all of Shorter’s damages. That decision to name Shorter’s attorney and firm as non-parties, and thereby seek to limit Kruse’s own potential liability, came with a host of consequences for all involved.<sup>8</sup> As is relevant to this appeal, one of those was acceptance of the provisions of T.R. 34(C)(3) that allows for a non-party to recover damages incurred in producing the requested documents. It is not pertinent to our inquiry that Kruse was “blindsided” by the amount of time that would be

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<sup>8</sup> For instance, Shorter would have been faced with the decision of whether to seek new representation and name his attorney as a defendant or forego doing so at the risk of losing part of any recovery that the jury might find attributable to Hume Smith. Also, once it was named as a non-party to a legal malpractice action, Hume Smith likely needed to alert its malpractice insurance carrier.

expended by Simmons and Hume Smith staff in reviewing Shorter’s legal files.<sup>9</sup> *Appellee’s Brief* at 15. Nor is it determinative that Kruse could have served the document request upon Shorter via mailing to his counsel. In our view, the trial court’s decision allowed Kruse to reap the benefits of naming a non-party and serving accompanying non-party discovery requests – which Kruse acknowledged “would yield more records than a request directed to Shorter” because “the reality is that Hume Smith possessed discoverable documents that Shorter did not” – but avoid the costs associated with that strategy. *Appellant’s Appendix Vol. II* at 199. We agree with Hume Smith that the trial court “ignored Kruse’s strategic decision” and effectively “rewrote history and changed facts in order to convert [Kruse’s] T.R. 34(C)(3) request to a Rule 34[A](1) request.” *Appellee’s Brief* at 10-11. We find that this was an abuse of discretion and that Kruse was liable for costs and fees that non-party Hume Smith incurred in responding to the Request. *See IBM*, 999 N.E.2d at 887-88 (affirming trial court’s order to reimburse non-party ACS for expenses incurred by third-party discovery software vendor and fees performed by outside counsel to review and redact documents for production and rejecting IBM’s claim that ACS was, in effect, a party to the litigation because ACS was in a “symbiotic” relationship with the State). We remand to the trial court to determine the

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<sup>9</sup> Since Kruse sought and received bifurcation of liability and damages related to the Petition, the issue of the amount of damages that Kruse is responsible for is not before us.

amount of reasonable damages related to the Request for which Kruse is responsible.

### *Attorneys' Fees*

[18] We next turn to the matter of Olmstead's attorneys' fees. Hume Smith argues that T.R. 34(C)(3) entitles it to reimbursement of Olmstead's fees and that the trial court abused its discretion when it denied Hume Smith's request for an award of those fees. We find no abuse of discretion.

[19] The relevant provision of T.R. 34(C)(3) states, "[D]amages shall include reasonable attorneys' fees incurred in reasonable resistance and in establishing such threatened damage or damages." This has been interpreted to mean that fees may be recoverable by non-parties who rely upon counsel to ensure compliance with or resist a subpoena. *See Gonzalez*, 15 N.E.3d at 634 ("Ultimately, we conclude that a non-party served with a subpoena for documents may be entitled to collect attorney fees strictly related to complying with the subpoena, but that any additional fees, including those incurred in fights over such fees, are not compensable unless the non-party had a reasonable basis for resisting the subpoena."). Furthermore, T.R. 34(C)(3) "does not . . . require the trial court to order payment for *all* damages a non-party might incur" and "equitable considerations are within the scope of the trial court's discretion in reaching decisions on discovery matters." *IBM*, 999 N.E.2d at 890 (emphasis in original).

[20] Here, Olmstead was not hired for purposes of complying with or resisting the discovery request; he was hired to pursue recovery of the amount Hume Smith believed it was owed for production of documents. On the facts of this case, we find that the trial court did not abuse its discretion when it declined to order Kruse to pay Olmstead's fees.

### *Security for Future Discovery*

[21] The Petition also asked the trial court to require Kruse to post security prior to future discovery. The trial court found that Hume Smith was not a true non-party, and, therefore, the court denied Hume Smith's request as moot. Hume Smith maintains that this decision was an abuse of discretion. While we agree with Hume Smith that it was a non-party, and thus the issue before the court was not moot, we nevertheless find no error in the denial of Hume Smith's requested relief.

[22] In asking that we require Kruse to provide "adequate security for additional, future discovery," Hume Smith relies on the language of T.R. 34(C)(3) stating that the person or entity receiving the discovery request "is entitled to security against damages . . . resulting from such request." *Appellant's Brief* at 16. Hume Smith argues, "Kruse has done nothing but prove they are unwilling to pay even the current fees Hume Smith has incurred, let alone further fees incurred by Hume Smith resulting from additional discovery" and suggests that "Hume Smith may be required to engage in additional litigation to recover any fees associated with Kruse's future non-party discovery requests." *Id.*

[23] As Hume Smith is no longer a named non-party in the legal malpractice suit, and thus presumably there will not be “future non-party discovery requests” directed at Hume Smith that it would need to comply with or resist. *Id.* Regardless, on the record before us, Hume Smith has not persuaded us that security for potential future discovery responses is warranted. Thus, we affirm the trial court’s denial of Hume Smith’s request that Kruse be ordered to provide security prior to commencing additional discovery. In sum, we reverse the trial court’s denial of damages for costs and fees of associated with the production of documents and affirm the trial court’s denial of attorneys’ fees and posting of security.

[24] Judgment reversed in part, affirmed in part, and remanded.

Bradford, C.J. and Robb, J., concur.