MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Joseph Oscar Mitson,

Appellant/Non-Party,

v.

Lutheran Health Network of Indiana, LLC, Lutheran Health Network Investors, LLC, and CHSPSC, LLC,

Appellees-Plaintiffs.

September 30, 2022

Court of Appeals Case No. 22A-MI-305

Appeal from the Allen Superior Court

The Honorable Jennifer L. Degroote, Judge

Trial Court Cause No. 02D03-1711-MI-1018

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Non-Party, Joseph Oscar Mitson (Mitson), appeals the trial court's Order on remand, which awarded him reasonable, pre-appeal attorney fees in the amount of $44,658.22, denied attorney fees incurred on appeal, and denied attorney fees incurred on remand against Appellees-Plaintiffs, Lutheran Health Network of Indiana, LLC; Lutheran Health of Indiana, LLC; Lutheran Health Network Investors, LLC; and CHSPSC, LLC (collectively, Lutheran).

[2] We affirm.

ISSUES

[3] Mitson presents this court with two issues on appeal, which we consolidate and restate as:

(1) Whether Mitson, as a non-party, is entitled to appellate attorney fees pursuant to Indiana Trial Rule 34(C)(3); and
(2) Whether Mitson is entitled to attorney fees on remand incurred while litigating the amount and reasonableness of his requested pre-appeal attorney fees.

FACTS AND PROCEDURAL HISTORY

[4] On November 2, 2017, Lutheran initiated a Complaint in a Tennessee state court against the former CEO of Lutheran Health Network, LLC (Lutheran Health), Brian Bauer (Bauer), and five John Does. Specifically, Lutheran alleged that Bauer and others, including former Lutheran Health employees,

attempted to force a sale of Lutheran Health without the knowledge of Community Health Systems, Inc., the corporate parent of Lutheran Health, and participated in a coordinated effort to defame, disparage, and damage Lutheran's reputation in order to decrease Lutheran Health's value while using confidential information. The Complaint alleged that the John Does were "a singular or group of anonymous online commenters that post on the social media Facebook network under the pseudonym 'Sajin Young' and that the Facebook profile was created for the purposes of: (1) falsely portraying Lutheran and Lutheran Health; and (2) intimidating and harassing Lutheran's employees and creating a hostile work environment to drive away qualified employees from Lutheran's businesses in Fort Wayne," Indiana. *Lutheran Health Network of Ind., LLC v. Bauer*, 139 N.E.3d 269 (Ind. Ct. App. 2019) (*Lutheran I*). The Complaint presented claims for breach of contract, defamation, trade and commercial disparagement, unfair and deceptive business practices, and tortious interference with existing and prospective business relationships.

[5] After the Tennessee court granted Lutheran's motion to expedite discovery, on November 6, 2017, Lutheran petitioned the trial court pursuant to Indiana Trial Rule 28(E) to commence an ancillary proceeding for the purpose of ordering the issuance of subpoenas approved by the Tennessee court. The trial court granted Lutheran's petition and issued an order authorizing Lutheran to serve subpoenas issued by the Tennessee court for testimony and production of documents on various Indiana non-parties, including Mitson, who was the

former Director of Government Relations at Lutheran Health and, at the time of service, employed by IU Health. Lutheran's subpoena to Mitson sought information related to thirteen categories of documents and required Mitson to appear for a deposition. Mitson, along with the other non-parties, filed motions to quash due to a pending motion to dismiss filed by Bauer in the Tennessee proceeding, and for protective orders as to Lutheran's subpoenas. On December 14, 2017, the trial court granted the motions to quash over Lutheran's objection. On February 14, 2018, the Tennessee court granted in part and denied in part Bauer's motion to dismiss. Because of the Tennessee court's partial denial of Bauer's motion to dismiss, Lutheran filed a motion to issue additional subpoenas with the trial court, renewing its request to serve subpoenas for testimony and documents to certain non-parties, including Mitson. The trial court granted the motion on April 18, 2018.

[6] Lutheran proceeded to serve a second subpoena on Mitson, requesting his appearance at a deposition and production of information related to Lutheran's allegations in the Tennessee proceedings. Mitson responded by filing an objection to Lutheran's motion to issue additional subpoenas, along with a motion to quash subpoenas or, in the alternative, a motion for protective order to limit Lutheran's requests for production. On June 22, 2018, the trial court conducted a hearing on various non-party objections, motions to quash, and motions for protective orders, including Mitson's filing. As to Mitson's pending motions, the trial court entered an order, requiring Mitson to attend a three-hour deposition and to respond to five of Lutheran's document requests.

Mitson produced approximately 450 documents on July 17, 2018 and was deposed on October 25, 2018. On November 30, 2018, the Tennessee court entered an agreed order of voluntary dismissal, following a negotiated resolution between Bauer and Lutheran. That same day, Lutheran filed a notice of dismissal with the trial court, requesting the termination of the ancillary proceeding.

[7] On December 3, 2018, Mitson filed a petition for attorney fees pursuant to Indiana Trial Rule 34(C)(3), claiming to have incurred $39,680.05 in attorney fees while responding to Lutheran's subpoenas. Lutheran challenged Mitson's petition as improper, alleging that the trial court lacked jurisdiction, the petition was procedurally defective, and Mitson failed to demonstrate entitlement to the requested attorney fees. Mitson subsequently filed a supplemental request for $11,389.68 in attorney fees related to the briefing and argument associated with his December 3, 2018 petition for attorney fees. On March 8, 2019, the trial court awarded Mitson the entirety of his requested attorney fees—$51,069.73—without conducting a hearing on the reasonableness of the fees. Lutheran appealed the trial court's award.

[8] On appeal, Lutheran argued that the trial court lacked jurisdiction to enter the attorney fee award, the trial court improperly awarded fees pursuant to Indiana Trial Rule 34(C)(3), and the trial court abused its discretion by failing to conduct a hearing on the reasonableness of Mitson's attorney fees request. In opposition, besides replying to Lutheran's arguments, Mitson requested a remand to the trial court for determination of appellate attorney fees. On

December 30, 2019, a different panel of this court issued *Lutheran I*, in which we decided that the trial court held jurisdiction to award attorney fees and costs despite the dismissal of the Tennessee proceeding, and that the trial court properly determined that non-parties are entitled to attorney fees in accordance with Indiana Trial Rule 34(C)(3). However, we found remand to the trial court appropriate to give Lutheran an opportunity to challenge the reasonableness of Mitson's requested attorney fees. In its final footnote of the opinion, this court noted that:

> Mitson argues that we should also 'remand this matter to the trial court for a determination of appellate attorneys' fees to be awarded to [Appellees].' This argument is based on *Hastetter v. Fetter Properties, LLC*, 873 N.E.2d 679, 685 (Ind. Ct. App. 2007), which, as Mitson himself acknowledges, states that "one is entitled to attorney fees when provided for by statute or contract." Mitson cites no statute or contract to justify his request for appellate fees.

Lutheran I, 139 N.E.3d at 284, n.14 (internal reference to the record omitted). On January 29, 2020, Mitson filed a petition for rehearing with this court, requesting a clarification as to whether the opinion established that the trial court may not award appellate attorney fees following remand or, in the alternative, a reversal of its prior decision to hold that Mitson was, in fact, permitted to recover appellate attorney fees. The court of appeals denied Mitson's petition for rehearing by a 2-1 majority. Subsequently, Mitson filed a petition for transfer, requesting our supreme court to rule as to whether the court of appeals' determination not to order appellate attorney fees conflicted

with prior Indiana precedent. However, changing his mind and wanting the issue to be adjudicated by the trial court instead, Mitson filed a motion to withdraw his petition to transfer, to which Lutheran objected. On March 8, 2020, the Indiana supreme court granted Mitson's motion to withdraw, dismissed the transfer proceedings, declaring that the dismissal had "no legal effect other than to terminate the litigation between the parties in the [s]upreme [c]ourt," and certified *Lutheran I* as final, thereby remanding the case to the trial court. (Appellant's App. Vol. IV, p. 43).

[9] On remand, Mitson filed a second fee petition, informing the trial court that he had incurred an additional $80,923.80 in appellate attorney fees from March 7 2019 to March 5, 2020. Mitson also requested an award of attorney fees and costs for fees and costs incurred while pursuing the proceedings on remand and defending the reasonableness of the original fee award. During a status hearing on remand, the trial court ordered this matter to mediation, which was ultimately unsuccessful.

[10] On October 18, 2021, after approving discovery as to both parties and allotting time to respond, the trial court conducted a hearing on the reasonableness of Mitson's original fee request and his fee petition on remand. After a review of the case history and the invoices from Mitson's counsel, the trial court found that some fees were erroneously included in Mitson's original fee request, with Mitson's "attorneys offer[ing] no explanation at the hearing as to why their client was charged for work when no non-party request for discovery was outstanding," while other fees "were not proximately incurred in response to

Lutheran's subpoena nor were in reasonable resistance to it." (Appellant's App. Vol. II, p. 61). Additionally, the trial court noted:

> Mitson cannot show that his fees on remand were proximately incurred in response to Lutheran's subpoena because the majority of those fees resulted from Mitson's filings that effectively delayed the resolution of this matter, such as: (i) serving discovery on Lutheran (whose fees are not at issue) for no purpose other than potential shock value at the amount incurred by Lutheran; (ii) resisting Lutheran's discovery requests (which Lutheran served to further the sole purpose of remand); and (iii) demanding appellate fees in numerous filings despite the [c]ourt of [a]ppeals' express rejection of the availability of appellate attorneys' fees on remand.

(Appellant's App. Vol. II, p. 63). Based on these findings, the trial court concluded, in pertinent part, that "[i]n accordance with Indiana law and the Indiana [c]ourt of [a]ppeals' holding in this matter, Mitson is not entitled to an award of appellate attorneys' fees under Trial Rule 34(C)(3)." (Appellant's App. Vol. II, p. 68). With respect to an award of attorney fees on remand, the trial court held,

> 25. On remand, Mitson has submitted numerous filings requiring extensive briefing on issues that have already been decided, causing Lutheran to incur fees in response and, as already found by the [c]ourt, such was essentially a waste of time and resources and caused unnecessary delay in reaching a resolution. For example:
>
> > a. Mitson challenged Lutheran's discovery requests regarding the fee petitions underlying the initial fee awards, which are the sole subject of remand; and

> b. Mitson argued that Lutheran improperly submitted filings to the [c]ourt when Lutheran did so at the direct request of the [c]ourt.
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> 26. In accordance with Indiana law, the [c]ourt finds that Mitson is not entitled to any fees incurred on remand because he was primarily responsible for incurring such fees and his fees were not proximately incurred in responding to or reasonably resisting Lutheran's discovery requests. Rather the fees that Mitson has incurred on remand are the results of unnecessary arguments, motions, and discovery requests in furtherance of Mitson's efforts to seek fees on top of fees.

(Appellant's App. Vol. II, p. 71).

[11] Mitson now appeals. Additional facts will be provided if necessary.

DISCUSSION AND DECISION

I. *Appellate Attorney Fees*

[12] Mitson contends that the trial court on remand abused its discretion when it decided that he was not entitled to recover appellate attorney fees incurred during the appellate proceedings in *Lutheran I* when he defended his request for pre-appeal attorney fees and costs.

[13] We review the amount and reasonableness of an attorney fee award for an abuse of discretion. *Himsel v. Ind. Pork Producers Ass'n*, 95 N.E.3d 101, 112 (Ind. Ct. App. 2018). A trial court abuses its discretion if its decision clearly contravenes the logic and effect of the facts and circumstances or if the court has misinterpreted the law. *R.L. Turner Corp. v. Town of Brownsburg*, 963 N.E.2d

453, 457 (Ind. 2021). As such, we continue to review for clear error any findings of fact and *de novo* any legal conclusions on which the trial court based its decision. *Id*. Where the amount of a fee award is not inconsequential, there must be objective evidence of the nature of the legal services and the reasonableness of the fee. *Himsel*, 95 N.E.3d at 112.

[14] Milton focuses his argument on the application of Indiana Trial Rule 34(C)(3), which entitles a non-party to "reasonable attorneys' fees incurred in reasonable resistance [to a subpoena] and in establishing such threatened damage or damages." As he successfully defended the trial court's award of attorney fees incurred in the reasonable resistance to Lutheran's discovery requests in *Lutheran I*, Mitson maintains that, as the prevailing party on appeal, the incurred appellate attorney fees should have been awarded to him. In response, Lutheran relies on the doctrine of the law of the case and calls attention to this court's decision in *Lutheran I*, in which Mitson's request for appellate attorney fees was rejected and therefore cannot now be re-litigated.

[15] The law of the case doctrine provides that an appellate court's determination of a legal issue binds both the trial court and the court on appeal in any subsequent appeal involving the same case and substantially the same facts. *Luchnow v. Horn*, 760 N.E.2d 621, 625 (Ind. Ct. App. 2001). The purpose of the doctrine is to minimize unnecessary relitigation of legal issues once they have been resolved by an appellate court. *Id*. Accordingly, under the law of the case doctrine, relitigation is barred for all issues decided "directly or by implication in a prior decision." *Id*. However, where new facts are elicited upon remand

which materially affect the questions at issue, the court upon remand may apply the law to the new facts as subsequently found. *Id*.

[16] In his appellate brief submitted to this court in *Lutheran I*, Mitson, in a single, half-page paragraph, and while referencing *Hastetter v. Fetter Properties, LLC*, 873 N.E.2d 679, 685 (Ind. Ct. App. 2007), requested an award of appellate attorney fees and a remand to the trial court for the determination of those fees. During the oral argument, Mitson clarified that he relied on Indiana Trial Rule 34(C)(3) in his quest for appellate attorney fees. Not only did the *Lutheran I* court refuse to remand the case for Mitson's requested purpose, it expressly ruled that Mitson cannot seek an award of appellate attorney's fees:

> Mitson argues that we should also 'remand this matter to the trial court for a determination of appellate attorneys' fees to be awarded to [Appellees].' This argument is based on *Hastetter v, Fetter Properties, LLC*, 873 N.E.2d 679, 685 (Ind. Ct. App. 2007), which, as Mitson himself acknowledges, states that "one is entitled to attorney fees when provided for by statute or contract." **Mitson cites no statute or contract *to justify* his request for appellate fees**.

Lutheran I, 139 N.E.3d at 284, n.14 (emphasis added) (internal reference to the record omitted). This court reaffirmed its ruling when it denied Mitson's petition for rehearing.

[17] Albeit decided in footnote, we do not consider the appellate court's denial of appellate attorney fees because Mitson could not legally justify his request to be dicta, as the ruling was unambiguous and was "necessary in the determination

of the issue[] presented." *See Dutchmen Mfg., Inc. v. Reynolds*, 891 N.E.2d 1074, 1082 (Ind. Ct. App. 2008). Accordingly, as the issue of appellate attorney fees was directly decided in *Lutheran I*, the court's refusal to grant the fees became the law of the case, binding both the trial court on remand and this court on remand. Thus, in the absence of new facts, the trial court did not abuse its discretion when it decided that Mitson was not entitled to recover appellate attorney fees.

[18] Even though Mitson now devotes a major part of his brief to an attempt to persuade us that the issue of appellate attorney fees was wrongly decided, we note that "even if the judgment [wa]s erroneous, it nevertheless becomes the law of the case and thereafter binds the parties[.]" *Am. Fam. Mut. Ins. Co. v. Federated Mut. Ins. Co.*, 800 N.E.2d 1015, 1019 (Ind. Ct. App. 2004). Admittedly, "a court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loath to do so in the absence of extraordinary circumstances." *Landowners v. City of Fort Wayne*, 622 N.E.2d 548, 549 (Ind. Ct. App. 1993). Here, we cannot find any extraordinary circumstances which would inspire us to revisit our decision in *Lutheran I*.

II. *Attorney Fees on Remand*

[19] Next, Mitson contends that the trial court abused its discretion when it refused to award him attorney fees on remand pursuant to Indiana Trial Rule 34(C)(3)

and maintains that he is entitled to attorney fees on remand which were incurred defending the reasonableness of his requested attorney fees.

[20] Again, we review the amount and reasonableness of an attorney fee award for an abuse of discretion. *Cavallo v. Allied Physicians of Michiana*, LLC, 42 N.E.3d 995, 1009 (Ind. Ct. App. 2015). Where the amount of a fee award is not inconsequential, there must be objective evidence of the nature of the legal services and the reasonableness of the fee. *Id.* An award of attorney fees to a nonparty in connection with a subpoena is governed by Indiana Trial Rule 34(C)(3) (emphasis added), which provides

> The [subpoena] 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). Any party, or any witness or person upon whom the request properly is made may respond to the request as provided in subsection (B) of this rule. If the response of the witness or person to whom [a subpoena] is directed is unfavorable, if he moves to quash, if he refuses to cooperate after responding or fails to respond, or if he objects, the party making the request may move for an order under Rule 37(A) with respect to any such response or objection. In granting an order under this subsection and Rule 37(A)(2) the court shall condition relief upon the prepayment of damages to be proximately incurred by the witness or person to whom the request is directed or require an adequate surety bond or other indemnity conditioned against such damages. **Such damages shall include reasonable**

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

[21] We have previously held that "[n]on-parties subjected to subpoenas . . . may reasonably be expected to consult with counsel to ensure compliance with the subpoena without unnecessarily divulging privileged information or to determine whether there is any legal basis to object to the subpoena." *Gonzalez v. Evans*, 15 N.E.3d 628, 633 (Ind. Ct. App. 2014), *trans. denied.* We further explained that under Trial Rule 34(C)(3), a subpoenaed non-party is entitled to "'damages . . . proximately incurred by the witness or person'" and that such damages "may include attorney fees directly related to complying with a subpoena, regardless of whether there was a basis for resisting it." *Id*. (citing *Int'l Bus. Mach. Corp. v. ACS Human Servs., LLC*, 999 N.E.2d 880, 885 (Ind. Ct. App. 2013), *trans. denied*). Furthermore, Trial Rule 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. Notably, courts may, in their discretion, consider the "responsibility of the parties in incurring the attorney fees" to determine whether a party's requested fees are awardable under Trial Rule 34(C)(3). *Himsel*, 95 N.E.3d at 113.

[22] *Lutheran I* affirmed the trial court's award of attorney fees to Mitson and remanded the case to the trial court with the specific instruction to give Lutheran an opportunity to challenge the reasonableness of Mitson's originally, requested attorney fees. To that end, the trial court on remand awarded the

parties some leeway "pertaining to discovery into the reasonableness of the allegedly incurred fees." (Appellant's App. Vol. II, p. 61). After approving discovery as to both parties and providing time necessary to respond to the discovery, the trial court on remand conducted a hearing on the reasonableness of the fee award. It awarded most of the pre-appeal fees originally requested and awarded to Mitson, but denied Mitson's requested attorney fees on remand because the majority of those fees resulted from Mitson's filings that effectively delayed the resolution of this matter or were duplicative of earlier discovery requests.

[23] Mitson is now requesting us to grant him "an award for attorney's fees incurred on remand defending the reasonableness of his [original] attorney fee request." (Appellant's Br. p. 38). While Mitson's original attorney fee request was related to Mitson's reasonable resistance to Lutheran's subpoenas, his attorney fees incurred during the trial court proceedings on remand are a far cry from defending himself from "Lutheran's abusive discovery," as no defense against subpoenas was involved, as required by Indiana Trial Rule 34(C)(3), and the Tennessee action which prompted these subpoena requests in the first place had concluded years earlier. In essence, Mitson's request for these attorney fees on remand amounts to nothing more than a request for fees on top of fees, as extensive discovery conducted on remand only inquired into the amount and reasonableness of the pre-appeal attorney fees and was not "directly related to complying with a subpoena." *See IBM*, 999 N.E.2d at 885.

[24] Granting Mitson's request for attorney fees on remand would stretch the limited fee provision set forth in Indiana Trial Rule 34(C)(3) in a manner that would allow non-parties who receive a request for discovery to engage in virtually any conduct for an unlimited period of time thereafter and invoice their opponent for all attorney fees incurred in the process, without discrimination as to whether these attorney fees were directly related to a reasonable defense against a subpoena. Indiana Trial Rule 34(C)(3) was not intended to be an all-inclusive fee award for non-party counsel. Rather, as expressly provided in the Trial Rule, the attorney fees are limited to counsel fees directly related to the reasonable resistance by a non-party of having to comply with a subpoena and are not intended to make a party whole in every case. *See IBM*, 999 N.E.2d at 890. As the trial court has discretionary power with respect to the amount and reasonableness of an attorney fee award, and we do not find an abuse of that discretion, we affirm the trial court's denial of Mitson's request for attorney fees on remand. *See Cavallo*, 42 N.E.3d at 1009.

CONCLUSION

[25] Based on the foregoing, we hold that Mitson, as a non-party, is not entitled to appellate attorney fees based on the law of the case doctrine and that Mitson is not entitled to attorney fees on remand.

[26] Affirmed.

[27] Bailey, J. and Vaidik, J. concur