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IN THE
COURT OF APPEALS OF INDIANA

John D. Wilder,
Appellant-Plaintiff,

v.

DeGood Dimensional Concepts,
Inc.,
Appellee-Defendant

February 16, 2021

Court of Appeals Case No.
20A-PL-1100

Appeal from the Kosciusko Circuit
Court

The Honorable Michael W. Reed,
Judge

Trial Court Cause No.
43C01-1103-PL-00027

May, Judge.

[1] John D. Wilder appeals the trial court’s decision regarding the attorney fees due to his attorney, Ronald Weldy, under Indiana Code section 22-2-5-2. Wilder makes several arguments, which we consolidate and restate as:

1. Whether the trial court abused its discretion when it calculated the attorney fees due to Weldy under Indiana Code section 22-2-5-2 for his work at the trial court level; and
2. Whether the trial court abused its discretion when it calculated the attorney fees due to Weldy for his work at the appellate court level.

DeGood Dimensional Concepts, Inc. (“DeGood”) cross-appeals, asking us to reexamine the inclusion of certain hours in the amount awarded to Wilder’s attorney, Weldy, for certain trial work. We affirm in part, reverse in part, and remand.

Facts and Procedural History

[2] The facts of the claim underlying this attorney fee issue can be found in our earlier opinion *DeGood Dimensional Concepts, Inc., v. Wilder*, 135 N.E.3d 625 (Ind. Ct. App. 2019):

DeGood is a corporation in North Webster that manufactures and sells small orthopedic medical devices. The corporation is operated by Scott DeGood and his wife, Mary. Wilder had worked in sales and marketing with various businesses over the years, including other medical device companies.

At some point, Wilder approached the DeGoods about working for them in the sales division. After some negotiation, Wilder drafted an employment agreement (First Agreement) in December 2008. This contract provided that Wilder would earn an annual base salary of \$50,000 to be paid on a bi-weekly basis with ten days of paid vacation the first year, fifteen days the second year, and twenty days every year thereafter.

Wilder would also be paid a two percent commission on sales of pre-existing product sales [sic] from \$1 million to \$2 million, along with a two percent commission on sales of new products up to \$2 million. This payment schedule was attached to the First Agreement. Wilder was to work exclusively for DeGood from his residence at least forty hours per week, plus travel as required. The First Agreement further provided that Wilder would report to the plant in North Webster for a minimum of six hours every two to three weeks. Wilder was obligated to copy DeGood on emails, abide by the rules set forth in the employee handbook that Wilder received and acknowledged, report all sales activities and provide those records to DeGood, and maintain a call log. In the event of termination or resignation, a one-month notice was required and full compensation was to be paid during that period. Both parties signed the First Agreement, and Wilder was to commence employment on December 15, 2008. However, the parties subsequently agreed to a January 1, 2009 start date. The date was again mutually changed to January 15.

DeGood sustained a substantial decline in product sales during the last half of 2009. As a result, all of its employees' hours were reduced for a six-month period. Additionally, both parties agreed that Wilder's salary would be reduced by 25% from July 20, 2009, through March 12, 2010.

On August 1, 2010, the parties entered into a second employment agreement (Second Agreement) that provided for a

\$5000 increase in Wilder's salary. This contract was designed, among other things, to clarify some of the terms and rules that Wilder had not been following under the First Agreement. The Second Agreement also provided that termination/resignation notice was to be three months, and "all forms of compensation [were to be included] during this period." Appellant's Appendix Vol. II at 111-12.

The DeGoods conducted periodic performance reviews throughout Wilder's employment, including one on September 8, 2010, that culminated in an overall negative review of Wilder's work performance. All reviews had detailed Wilder's numerous violations of known and stated rules that were set forth in the employee handbook, including the prohibition against working for other companies, taking extended breaks, and working many less hours than what had been agreed upon. More specifically, Wilder had been incommunicative with the DeGoods for several months after commencing employment, and he did not meet with any customers from January 15, 2009, until April 2009. Wilder only made two trips to the plant during the first six months of 2009, failed to send sales reports, or copy DeGood on emails. Mary told Wilder at the September 8 meeting that he would be terminated in three months if his performance did not improve. The DeGoods and Wilder acknowledged and signed each review.

On September 13, 2010, Wilder emailed Mary, stating, "I will assume that on 9/8/2010, I received my 90 day notice for termination. If this is the case, how would you like to proceed?" Exhibits Vol. IV at 1. Mary's email response that same day provided:

It was just as we presented it to you, as a Formal Warning (not termination) from your employer that your job is in jeopardy, why it is in jeopardy, and what our expectations as your employer are in

moving forward to resolve any and all the problems discussed. We DID NOT give you a termination notice, and also stated that was NOT our intentions [sic] during the meeting as well. We did state that we wanted to work this out with you and hopefully have you working with the company for years to come.

Id. (Emphases in original). The response went on to state that

[b]ecause you have ignored numerous previous verbal warnings and e-mails, a written warning was presented to you that you now are on probation for 3 months, and will show us in those 3 months that you are willing to perform your job following the guidelines in the report that was given to you, and also discussed thoroughly during the meeting.

Id. at 6. The following day, Wilder emailed Mary again, stating, “No Termination notice regarding our agreement dated 2010. Your intention is not to terminate our agreement. Purpose for your summary & our discussions (“Employee Performance Review”) was to clarify areas of improvement & to make sure employer expectations were clear.” *Id.* at 6.

On December 6, 2010, Wilder emailed Mary explaining that he would be out for a half day because his back was “giving [him] trouble.” *Id.* at 135. Later that afternoon, Mary responded as follows: “The amount of work that you have missed in the last couple of weeks on top of all the previous problems that have been addressed regarding your absenteeism is completely out of control and I must present a *final warning* that it [sic] not going to be continued to be [sic] tolerated!” *Id.* (Emphasis added).

Another Performance Notification (Notification), bearing a handwritten notation that Wilder's employment with DeGood was being terminated, was issued to Wilder on January 5, 2011. The Notification detailed numerous policy violations that Wilder had committed throughout the course of his employment. Three prior formal written warnings were documented in the Notification, which stated that "[t]he employee has 'Willfully Neglected' the position of the Sales VP and terms stated in his employment contract, along with the disregard of previously stated warnings and the below performance notifications that the employee already has received to date." Appellant's Appendix Vol. II at 133. The Notification stated that Wilder had continued to bring in company reps not associated with DeGood after he was told to cease such behavior. DeGood also asserted that Wilder had misused the company telephone and used the business's ATM card for unauthorized personal situations.

DeGood observed in the Notification that "John Wilder was formally put on a 3 month PROBATION and was given notification in writing regarding the probation with all issues outlined on 9/8/10 which the employee acknowledged and signed and was given copies." *Id.* DeGood also made it clear in the Notification that

[Wilder] was notified with a detailed summary, that he was in bre[ach] of his employment contract and that the employee owed the company monies from being overpaid for hours that the employee had not worked and that the amount owed to company would be zeroed out and any new compensation for commissions would start over at the end of the 3 month probation with the understanding the employee needed to make a serious dedicated effort in resolving all the problems that were noted.

The needed [sic] effort needed by the employee was not achieved during this 3 month Probation. . . .

Id. (Emphasis added).

Wilder filed a complaint against DeGood on March 14, 2011, for unpaid salary, commissions, vacation and sick time, and bonuses. DeGood counterclaimed for damages and injunctive relief. DeGood claimed, inter alia, that it had acted in good faith in not paying Wilder a portion of the commissions, and that it could not be held liable for unpaid wages, attorney's fees, court costs, or liquidated damages. DeGood also alleged that Wilder had committed civil theft because he had taken excessive unauthorized time off and had not worked the minimum forty-hour week required under the First and Second Agreements.

Following a bench trial on August 22, 2018, the trial court entered its judgment, finding that Wilder failed to prove that DeGood had committed material breaches of either Agreement, inasmuch as both parties had agreed to modify the Agreements in light of their conduct during the course of Wilder's employment. It determined that Wilder failed to show that he had not been paid his full salary during the employment period. The trial court also found that Wilder had made a valid claim for unpaid commissions under the First Agreement in accordance with the Wage Claim Statute for \$9287.48. However, the trial court denied Wilder's request for liquidated damages under the Wage Claim Statute in light of the parties' modifications of both Agreements, their bona fide disputes throughout the course of the employment period, and the lack of evidence that DeGood had acted in bad faith in withholding the commissions. The trial court also ordered DeGood to pay the costs of the action and Wilder's attorney's fees in the amount of \$15,250 pursuant to the Wage Claim Statute. With regard to DeGood's counterclaims, the trial court determined that DeGood failed to prove that it had overpaid Wilder's salary and that it was not entitled to damages

against Wilder on its claim that Wilder had stolen any wages. In the end, the trial court entered judgment for Wilder in the amount of \$24,537.48, together with statutory interest. However, the final judgment stated that court costs were assessed *against* Wilder.

Id. at 628-631 (emphasis in original).

- [3] DeGood appealed several portions of the trial court’s judgment regarding the amount due to Wilder, and Wilder cross-appealed regarding prejudgment interest and additional wages to which he claimed he was entitled. *Id.* at 631. We rejected all of DeGood’s arguments and left the trial court’s order intact relevant to those issues. *Id.* at 632-5. Regarding Wilder’s cross-appeal, we rejected Wilder’s argument regarding an additional \$32,300 in unpaid wages and commissions and regarding bad faith by DeGood. *Id.* at 635-7. However, we held the trial court erred when it ordered Wilder to pay the costs of the action and remanded for the imputation of costs to DeGood. *Id.* at 638. Further, we held Wilder was entitled to prejudgment interest on his “claims for unpaid commissions and salary[.]” *Id.* at 637. Therefore, we remanded “to the trial court with instructions that it amend the order to include an additional award for Wilder in the amount of \$3329 in unpaid wages” and further instructed the trial court to “calculate the costs of this matter, the amount of prejudgment interest that is owed, determine the additional award of reasonable attorney’s fees to which Wilder is entitled, and enter an order accordingly.” *Id.* at 638. We issued our opinion on November 12, 2019.

[4] On December 17, 2019, Wilder filed a “Motion for Supplemental Statutory Attorney Fees, Costs & Pre-Judgment Interest.” (Appellant’s App. Vol. II at 20.) Therein, he noted he had incurred \$57,940.00 in attorney fees on trial work prior to the appeal, \$17,070 in appellate attorney fees, and \$2,560.00 in attorney fees in preparation for the matters on remand. With the motion, Wilder filed a billing statement from Weldy of the hours he worked preparing for trial and appeal. He also presented affidavits from other attorneys who specialized in wage claims regarding their hourly rates, which ranged from \$385 per hour to \$500 per hour. On December 27, 2019, DeGood filed its motion in opposition, but did not file evidence in support of that response. On January 9, 2020, the trial court held a hearing on the issues on remand and Wilder filed additional evidence to support his argument regarding the rate of attorney fees due to Weldy.

[5] During the hearing, Wilder argued Weldy was due the attorney fees as requested. DeGood argued as follows regarding the hourly rate for appellate attorney fees:

[T]he Court has before it affidavits involving rates of 400 and \$500.00 per hour and I mention in my brief well that may be fine in Indianapolis Federal Court etcetera, New York City it’s 1,000. But that’s not a reasonable attorney fee rate in a state wage claim in Kosciusko County. In Christopher Myers [sic] Affidavit paragraph 4, I assume this was filed with the Court. I just got it this morning. It says my current billing rate for federal employment litigation not state court employment litigation is 400 to 450 and then he summarizes it at the end saying oh by the way they can be as much at 500 an hour. So, I think if the court

looks at what a, what the affidavit's impact as well as counsel for the Plaintiff's affidavit of attorney's fees . . . I think everything will, if the Court goes outside the, outside of the specific mandate of the Court of Appeals for reasonable attorney's fee then I think you're talking something on the order of . . . a rate of like 250, 300 bucks at most.

(Tr. Vol. II at 21.)

[6] On January 13, 2020, the trial court entered its order on the issues on remand. The trial court amended its original order to include the unpaid wages that the appellate court ordered were due to Wilder. It also ordered prejudgment interest and directed DeGood to pay all court costs. Regarding attorney fees, the trial court ordered:

5. Ronald E. Weldy is entitled to receive as an award of additional reasonable attorney fees incurred by the Plaintiff in obtaining the additional judgment for unpaid wages as awarded on appeal, all pursuant to I.C. 22-2-5-2, in the amount of \$3,329.00, effective as of October 24, 2018.

* * * * *

7. . . . [A]n additional award of reasonable appellate attorney fees should also be awarded to Ronald E. Weldy pursuant to I.C. 22-2-5-2, which should be awarded in general pursuant to the affidavit of Ronald E. Weldy, and as argued in open court, the Court specifically finding that the attorney fees which are reasonable should be awarded based on 33.8 hours of appellate and other work provided by Ronald E. Weldy since this matter was remanded to the Trial Court. A reasonable hourly rate for these services provided in Kosciusko County is \$300.00 per hour.

Accordingly, the additional award of appellate and related attorney fees to Ronald E. Weldy is \$10,140.00, effective this day.

(Appellant’s App. Vol. II at 18-9.)

[7] On February 13, 2020, Wilder filed a motion to correct errors¹ requesting “further attorney’s fees, statutory and appellate.” (Appellee’s App. Vol. II at 28.) DeGood responded thereto on February 28, 2020, and raised a separate issue regarding some of the entries on Weldy’s attorney fee invoice. On April 2, 2020, the trial court held a hearing on the motions to correct errors. Wilder argued the trial court erred when it set the hourly rate for appellate attorney fees at \$300:

[Wilder]: . . . You know, you held that \$300.00 an hour was a reasonable rate for [appellate work].

[Court]: In Kosciusko County.

[Wilder]: Correct. Correct.

[Court]: Right for Kosciuscko County legal work.

[Wilder]: Right. And you, and you –

¹ Wilder’s motion to correct errors is not in the record before us. Neither party makes an argument disputing any of the arguments made in those documents.

[Court]: Which is actually the highest rate I have ever used.
And –

[Wilder]: Oh is it really?

[Court]: Yes.

[Wilder]: Okay.

[Court]: And my colleagues believe that, down the hall that that's too high a rate. But that's what I used for Kosciusko County legal work. You're right. I used 300. Basically I mean it's pretty straight forward. I applied \$300.00 an hour to what I thought was the appropriate hours based upon what we talked about in the thing. So that's pretty straight forward. That's how your attorney fees were calculated that I entered the award on.

[Wilder]: and it's my recollection that during that course of the hearing, last hearing we had before you admitted the judgment that you asked counsel for defendant what he thought a reasonable rate was and he said between 300 and \$350.00 an hour.

[Court]: And he may have.

[Wilder]: Okay.

[Court]: I get to set the rate in Kosciusko County as far as I'm concerned.

[Wilder]: Okay.

[Court]: So that's where I'm coming from there.

[Wilder]: Okay. And –

[Court]: I don't know why that's not right? Why is that not in conformance with Indiana law that the attorney fees are set based on a reasonable attorney fee for the locale in, [sic] which the legal work was done?

[Wilder]: Well, your honor, you know, I don't know. I had this, I had this issue down in Miami County and I'm going to, in Miami County the judge down there said, he said \$200.00 an hour was the going rate and I said well how long has that been going, the going rate? He said for about the last 20 years. And, and I wish I would have had my computer. I would've pulled up my computer. Pulled up my phone. Got the internet and put in what \$200.00 20 years ago was worth. Because it's worth a lot more 20 years ago than the worth is today.

[Court]: So, 250, I'm just telling you in this county \$250.00 per hour is a going rate that is fairly generous. Most of the other attorneys, 225, \$250.00 an hour for legal work in Kosciusko County. So I get what you're telling me. All right –

[Wilder]: Okay –

[Court]: - you go to Indianapolis. I go to Chicago, I go to New York it might be \$1,000.00 an hour but that's not where we're at. And so if that's not supported by the case law I want to see why it isn't. I want you to show me why that's not supported by the case law.

[Wilder]: And what I was saying, your honor, is that if the Defendant concedes to \$350.00 an hour as reasonable. [sic] I, I think that the record then, then supports \$350.00 an hour. That was my argument.

[Court]: All right. So, I, you know, I can't say that I don't remember that but I can't say for sure that I did but it sounds like something [defendant's counsel] might've said.

[Wilder]: Okay and so my argument was purely not that you're wrong and you don't know what the going rate for [sic] is here. My argument was if the Defendant concedes that \$350.00 is reasonable then I would've thought that that was a no brainer. It's \$350.00 an hour.

(Tr. Vol. II at 28-30.) Additionally, at the hearing on Wilder's motion to correct errors, DeGood presented argument that Weldy's billing statements were incorrect and thus the trial court erred in its calculation of attorney fees. On April 29, 2020, the trial court denied Wilder's motion to correct errors and DeGood's counterargument.²

Discussion and Decision

A. Wilder's Attorney Fees Issues

[8] Our standard of review regarding an award of attorney fees is well settled:

We review a trial court's award of attorney's fees, and the amount of any such award, for an abuse of discretion. *Daimler Chrysler Corp. v. Franklin*, 814 N.E.2d 281, 286 (Ind. Ct. App. 2004) (citing *Malachowski v. Bank One, Indpls., N.A.*, 682 N.E.2d 530, 533 (Ind. 1997)). "An abuse of discretion occurs when the trial court's award is clearly against the logic and effect of the

² The trial court's order denying both parties' motions to correct errors is not in the record, but neither party challenges findings and conclusions made in that order, if any.

facts and circumstances before the court.” *Id.* at 286-87. “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.” *Id.* at 287 (citing *Owen v. Vaughn*, 479 N.E.2d 83, 88 (Ind. Ct. App. 1985)). “We do not reweigh the evidence; rather, we determine whether the evidence before the trial court can serve as a rational basis for its decision.” *DePuy Orthopaedics, Inc. v. Brown*, 29 N.E.3d 729, 732 (Ind. 2015) (citation omitted).

R.L. Turner Corp. v. Wressell, 44 N.E.3d 26, 38 (Ind. Ct. App. 2015), *trans. denied*. Pursuant to Indiana Code section 22-2-5-2, when a claimant is successful in his claim under the Wage Claim Statute, “[t]he court shall order as costs in the case a reasonable fee for the plaintiff’s attorney[.]” The purpose of this provision is to “deter employers from playing ‘fast and loose with wage obligations’ by imposing treble damages and attorney’s fees for non-compliant employers.” *Wressell*, 44 N.E.3d at 38 (quoting *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 706 (Ind. 2002)).

1. Trial Attorney Fees

[9] In its order, the trial court awarded Wilder’s attorney, Weldy, \$3,329.00 in trial attorney fees based on his success on an additional claim on appeal. Wilder argues the trial court abused its discretion when awarding this amount because the amount “was neither proportionate to the claims asserted and won or indicative of hours worked” on the additional claim won. (Br. of Appellant at 11.) Wilder contends we should vacate the award of \$3,329.00 and instead

award \$15,250.00, which was the amount of attorney fees the trial court awarded him for the earlier trial work in its original order prior to appeal.

[10] In his request for additional attorney fees following remand, Wilder requested \$50,730.00 in attorney fees, both trial and appellate. Wilder's attorney, Weldy, submitted an affidavit indicating he had incurred \$57,940.00 in attorney fees during the trial court portion of the litigation and \$2,560.00 in attorney fees preparing for the hearing on remand. During the hearing on remand, Wilder argued he was successful in "four of the five" issues raised before the trial court and since "the award doubled[,] . . . I'd like to think the attorney's fees doubled." (Tr. Vol. II at 16.) The court reasoned, regarding the hours spent litigating the additional claim won on appeal, that while Wilder was successful on the additional claim on appeal, "[a]ll your hours were the same. All the work was the same." (*Id.* at 15.)

[11] While it is unclear how the trial court calculated the additional attorney fees, we cannot say the trial court abused its discretion when it awarded Wilder \$3,329.00 in attorney fees rather than the amount he requested. Evidence was presented regarding Weldy's hourly rates and the hours worked during the original trial and in preparation for the hearing on remand. The trial court has considerable deference in this decision, and based on the evidence presented, we conclude the trial court did not abuse its discretion when it awarded Wilder \$3,329.00 in additional attorney fees on remand. See *Valdez v. R. T. Enterprises, Inc.*, 647 N.E.2d 331, 333 (Ind. Ct. App. 1995) (trial court did not abuse its discretion when it awarded less than the requested amount of attorney fees).

2. Appellate Attorney Fees

[12] In its order on remand, the trial court awarded Wilder \$10,140.00 in appellate attorney fees for “33.8 hours of appellate and other work” completed by Wilder’s attorney, Weldy. (Appellant’s App. Vol. II at 18.) The trial court also found a “reasonable hourly rate for these services provided in Kosciusko County is \$300.00 per hour.” (*Id.*) On appeal, Wilder argues the trial court abused its discretion when it awarded \$10,140.00 in appellate attorney fees because “[a]ppellate work is sophisticated work which requires adherence to a myriad of rules, very good writing skills and experience” and thus “\$500.00 per hour is reasonable for appellate work.” (Br. of Appellant at 11.)

[13] The trial court stated during the hearing on the parties’ motions to correct errors that it gets “to set the rate in Kosciusko County[.]” (Tr. Vol. II at 29.) Additionally, the trial court advised Wilder:

[M]aybe you ought to rethink how you make a living then because then you’re subject to having your fees set by a judge who may not be, which I think I am considerate of your needs and thoughts but who doesn’t actually care right. Maybe I should find it’s 100 bucks an hour. I don’t know.

(*Id.* at 33.) During that hearing, and the hearing on remand, there was no evidence presented to support a rate of \$300 per hour for appellate attorney fees. Based on the trial court’s statements, we thus infer the trial court took judicial notice of the reasonable appellate attorney fees in the local area. In the case *In re Lockyear*, 261 Ind. 448, 305 N.E.2d 440 (1974), our Indiana Supreme Court held that a trial court could take judicial notice of what constitutes a reasonable

amount of attorney's fees - meaning neither party had to provide evidence thereof, and the trial court could set the rate based on its judicial notice of the prevailing rate in the area. *Id.* at 460, 305 N.E.2d 447.

[14] However, in *Berkemeier v. Rushville National Bank*, 438 N.E.2d 1054, 1058 (Ind. Ct. App. 1982), our court held that judicial notice of reasonable attorney's fees should be limited to routine cases involving relatively small amounts. While the term "small amount" has not been precisely defined, a damages award of over \$20,000 is not a "small amount," nor is a total attorney fee award of over \$30,000 for a case encompassing almost a decade a "small amount." We therefore conclude the trial court could not take judicial notice of the prevailing rate for appellate services in the local area and there must be evidence on the record to support its decision. *See Lake County Trust Co. v. Gainer Bank, N.A.*, 555 N.E.2d 1356, 1362 (Ind. Ct. App. 1990) (noting attorney fees could not be awarded until evidence to support the amount is presented), *reh'g denied, trans. denied*.

[15] There was, however, evidence on the record to support other hourly rates for Weldy's appellate attorney fees. In his affidavit in support of his request for appellate attorney fees on remand, Weldy indicated he billed some of his appellate work, such as "appellate related matters that are routine in every appeal" at a rate of \$400.00 per hour. (Appellant's App. Vol. II at 23.) Weldy billed \$500.00 per hour for "appellate related matters [that] were caused by mistakes or omission of Defendant" and "working on the appellate briefs in this matter." (*Id.* at 24.) Weldy's fee invoice reflected these charges.

[16] Wilder also included affidavits from three other attorneys who worked on wage-related claims regarding their rates for appellate work. One attorney indicated he charged “\$385.00 per hour, for both litigation and appellate legal work” in 2015. (*Id.* at 30.) Another attorney stated he charged \$400.00 per hour and that rate was “similar or slightly lower than other attorneys of similar levels of experience and skill who regularly represent plaintiffs in wage and hour litigation throughout the State of Indiana.” (*Id.* at 33.) A final attorney opined “that rates in between \$400.00 per hour and \$500.00 per hour for trial court work in . . . state trial courts throughout northern Indiana is customary and reasonable.” (*Id.* at 56.) DeGood did not present evidence regarding a reasonable hourly rate for appellate work in the area.³

[17] In the interest of judicial efficiency, we conclude, that the lowest current amount provided by the evidence was \$400.00 per hour. Therefore, we reverse the trial court’s award of \$10,410.00 in appellate attorney fees for 33.8 hours of work at a rate of \$300.00 per hour. We remand the matter to the trial court to enter an order awarding Wilder \$13,520.00 in appellate attorney fees for 33.8 hours of work at a rate of \$400.00 per hour. We also remand for calculation of the hours Weldy expended on the appeal before us, and order the trial court to award him appellate attorney fees for those hours at a rate of \$400.00 per hour.

³ DeGood argued during the hearing on remand that a reasonable attorney fee for appellate work was “250, 300 bucks at most.” (Tr. Vol. II at 21.) However, “argument of counsel is not properly designated evidence.” *McEntee v. Wells Fargo Bank, N.A.*, 970 N.E.2d 178, 183 n.2 (Ind. Ct. App. 2012).

B. DeGood's Issue

[18] In its response to Wilder's motion to correct errors, DeGood requested a credit against the judgment already paid and an order of reimbursement because "Weldy was not forthright with the Court and presented time entries upon which this Circuit Court awarded attorney's fees, at least in part, of which were not eligible to be reimbursed and should not be collected against DeGood in relation to the Wage Claim lawsuit." (Appellee's App. Vol. II at 30.) While allowing argument during the hearing on the motion to correct errors, the trial court denied DeGood's request to reexamine some of the entries alleged to be ineligible for reimbursement.

[19] On appeal, DeGood appeals the trial court's denial of its request. However, DeGood did not present its argument regarding individual entries in Weldy's billing invoices when attorney fees were discussed at any other part of the litigation process. Instead, DeGood waited until the last possible moment to do so, as part of the motion to correct error after remand from our Court. As a party may not present an argument for the first time as part of a motion to correct error, DeGood's argument is waived. *See Carmichael v. Separators, Inc.*, 148 N.E.3d 1048, 1058 (Ind. Ct. App. 2020) (it is well-settled that issues raised for the first time in a motion to correct error are waived), *trans. denied*.

Conclusion

[20] The trial court did not abuse its discretion when it awarded Wilder \$3,329.00 in additional trial attorney fees. However, the trial court abused its discretion

when it awarded Wilder's attorney, Weldy, \$10,410.00 in appellate attorney fees because there was no evidence to support the \$300.00 hourly rate the trial court used to calculate the appellate attorney fees award. Finally, DeGood has waived any argument regarding certain billing entries in Weldy's billing invoice because it presented that issue for the first time in a motion to correct error.

[21] We therefore affirm the trial court's award of additional trial attorney fees. We reverse the trial court's award of appellate attorney fees. We remand for the trial court to enter an order awarding Wilder \$13,520.00 in appellate attorney fees for 33.8 hours of work at a rate of \$400.00 per hour. We also remand for calculation of the hours Weldy expended on the appeal before us, and we order the trial court to award Wilder appellate attorney fees for those hours at a rate of \$400.00 per hour.

[22] Affirmed in part, reversed in part, and remanded.

Kirsch, J., and Bradford, C.J., concur.