MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Brown & Brown Attorneys-At-Law, P.C. and Greg Brown,

Appellants-Plaintiffs,

v.

Timothy S. Schafer, Schafer & Schafer, and Schafer & Schafer, LLP,

Appellees-Defendants.

August 17, 2023

Court of Appeals Case No. 23A-CT-12

Appeal from the Porter Superior Court

The Honorable Jeffrey L. Thode, Special Judge

Trial Court Cause No. 64D01-1907-CT-6478

Memorandum Decision by Judge Bradford
Judges Crone and Brown concur.

Bradford, Judge.

Case Summary[1]

[1] The instant matter, a disagreement relating to a fee-sharing contract that was entered into by two law firms, comes before us for the second time after the trial court, relying on the law-of-the-case doctrine, granted partial summary judgment in favor of Timothy S. Schafer, Schafer & Schafer, and Schafer & Schafer, LLP (collectively, "Schafer & Schafer"). On appeal, Greg Brown and Brown & Brown, Attorneys-At-Law, P.C. (collectively, "Brown & Brown") argue that the trial court erred in granting Schafer & Schafer's motion for partial summary judgment. Concluding that the trial court erred in granting Schafer & Schafer's motion for partial summary judgment, we reverse and remand to the trial court for further proceedings.

Facts and Procedural History

[2] In a decision from a prior appeal, we set out the facts relating to the underlying litigation as follows:

> In January of 2006, Terry Brown was driving a semi tractor-trailer for his employer, J.B. Hunt Transport, Inc. ("J.B. Hunt"). While traveling on I-65 in snowy conditions, he lost control of the semi, which ended up jackknifed and disabled in the median. An hour later, a vehicle in which Kristen Zak was a passenger slid off the same part of I-65 and crashed into the semi. As a

[1] Brown & Brown has filed a "motion for leave to file an oversize motion to strike or for alternative relief." In an order issued simultaneously with this memorandum decision, we deny Brown & Brown's motion as moot given that we did not rely on any of the statements or evidence challenged by Brown & Brown in resolving this appeal.

result of the accident, Zak suffered permanent, serious brain damage.

Zak, through her guardian, hired Brown & Brown as counsel on a contingency-fee basis to represent Zak against J.B. Hunt. The contingency-fee agreement entitled Brown & Brown to "40% of whatever sum may be recovered after suit is filed." Appellant's App. Vol. 2 p. 72. In October of 2006, Brown & Brown filed Zak's complaint for negligence. After several years of discovery and pretrial proceedings, in January of 2011 Brown & Brown made a written offer of settlement to J.B. Hunt. However, J.B. Hunt declined the offer, and, in February of 2011, the court held a jury trial on Zak's complaint. The trial ended in a mistrial.

In May of 2011, Zak hired Schafer & Schafer to represent her with Brown & Brown. The two firms initially had an oral agreement "to divide the [attorney] fees 50-50." Appellees' App. Vol. 2 p. 72. The court held a second jury trial in October of 2014. That trial also ended in a mistrial.

In March of 2015, Schafer & Schafer asserted to Brown & Brown that the services being performed by the two firms were no longer evenly divided. Brown & Brown then drafted a new, written agreement on the division of attorney fees, which Schafer & Schafer accepted. The written division-of-fees agreement stated, in relevant part, as follows:

> 1. The client retained and ... employed [Brown & Brown] as her attorneys ... pursuant to the parties' contingent fee agreement ....
>
> 2. Pursuant to the Rules of Professional Conduct, Rule 1.5, the attorneys have agreed to a division of the contingent fee between lawyers who are not in the same firm.
>
> 3. The attorneys agree to divide *any and all fees* up to

> a recovery of four (4) million dollars *through settlement, trial[,] or appeal* to be shared fifty percent (50%) to [Brown & Brown] and fifty percent (50%) to [Schafer & Schafer] from the recovery. Expenses of litigation shall be deducted after the contingent fee is calculated.
>
> 4. The attorneys agree to divide any and all fees from a recovery of all amounts greater than four (4) million dollars *through settlement, trial[,] or appeal* to be shared forty percent (40%) to [Brown & Brown] and sixty percent (60%) to [Schafer & Schafer] from the recovery. Expenses of litigation shall be deducted after the contingent fee is calculated.

Appellant's App. Vol. 2 p. 73 (emphases added). And Indiana Professional Conduct Rule 1.5(e) states:

> A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
>
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
>
> (3) the total fee is reasonable.

Zak's guardian also executed the division-of-fees agreement.

In May of 2015, the trial court held a third jury trial. That jury returned a verdict for Zak and awarded her damages from J.B. Hunt in the amount of $19.5 million. J.B. Hunt appealed, and, in July of 2016, we affirmed the jury's verdict. *J.B. Hunt Transp., Inc. v. Guardianship of Zak*, 58 N.E.3d 956, 974 (Ind. Ct. App.

2016), *trans. denied* ("*J.B. Hunt I*"). A few months later, Brown & Brown received a payment of $3,710,449 under the contingency-fee and division-of-fees agreements, which "represent[ed] payment in full ... for the jury trial and appeal of the verdict." Appellees' App. Vol. 2 p. 25.

In March of 2016, after the jury's verdict but while the appeal from that verdict was pending, Zak moved, for the first time, for an award of prejudgment interest. Indiana's Tort Prejudgment Interest Statute provides that a party is not entitled to prejudgment interest if, "within one (1) year after a claim is filed in the court, or any longer period determined by the court to be necessary upon a showing of good cause, the party who filed the claim fails to make a written offer of settlement ...." Ind. Code § 34-51-4-6 (2021). Because Brown & Brown had first made a written offer of settlement to J.B. Hunt in 2011, well past one year after the claim was filed, Schafer & Schafer argued in support of the motion for prejudgment interest that Brown & Brown's delay was with good cause. Brown & Brown provided Schafer & Schafer with discovery materials from the first several years of the proceedings, which Schafer & Schafer relied on in the motion. Schafer & Schafer, and not Brown & Brown, prosecuted the motion for prejudgment interest in the trial court.

In September of 2017, the trial court granted Zak's motion and awarded her $4.81 million in prejudgment interest. J.B. Hunt again appealed and argued, among other things, that Zak's motion was not timely under the statute because there was no good cause to extend the period for filing the written offer of settlement beyond one year. Schafer & Schafer, and not Brown & Brown, defended the trial court's judgment on appeal. In a memorandum decision, we affirmed the trial court's award of prejudgment interest. *J.B. Hunt Transp., Inc. v. Guardianship of Zak*, No. 45A03-1710-CT-2429, 2018 WL 3450523, at *1–3 (Ind. Ct. App. July 18, 2018), *trans. denied* ("*J.B. Hunt II*").

After our decision in *J.B. Hunt II*, Schafer & Schafer received full

payment of the prejudgment interest from J.B. Hunt. Brown & Brown then asserted to Schafer & Schafer that Brown & Brown was entitled to a share of the fees for the prejudgment interest as provided for under the division-of-fees agreement. Schafer & Schafer disagreed and asserted that, when they executed the division-of-fees agreement, the parties had not contemplated that it would include a division of fees for an award of prejudgment interest. Schafer & Schafer further argued that Professional Conduct Rule 1.5(e) applied to those fees and limited Brown & Brown's share in accordance with the proportion of services performed by Brown & Brown in obtaining that award. Schafer & Schafer estimated that Brown & Brown had rendered about three hours of work toward the prejudgment interest award; Brown & Brown estimated that it had put in "thousands of hours" toward "putting all the documents together" that were filed in support of the motion for prejudgment interest. Appellees' App. Vol. 2 p. 140.

Brown & Brown filed suit against Schafer & Schafer. Thereafter, Brown & Brown moved for partial summary judgment and argued that Schafer & Schafer was in breach of the plain language of the division-of-fees agreement. In response, Schafer & Schafer asserted that neither firm "contemplated or considered prejudgment interest at the time the [division-of-fees agreement] was signed," and, thus, there was no meeting of the minds between the parties to have that agreement apply to the prejudgment interest. Appellant's App. Vol. 3 p. 74. In support of that argument, Schafer & Schafer designated the affidavit of one of its partners, Timothy S. Schafer. In his affidavit, Timothy stated:

> 8. … [A]t no time prior to entering the [division-of-fees agreement] did I discuss or contemplate a claim or action for prejudgment interest nor did [Brown & Brown partner] Greg Brown ever discuss prejudgment interest.

> 9. Peggy Skaggs, [Zak's guardian], when she signed the contract with Greg Brown and myself[,] did not discuss or contemplate an action for prejudgment interest but retained the attorneys to assist in a jury trial and an appeal if necessary.
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> ***
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> 11. Greg Brown was not aware of the prejudgment interest statute and admitted he has never filed a claim for prejudgment interest in his entire legal career.
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> Appellees' App. Vol. 2 p. 25. Schafer & Schafer further argued that Professional Conduct Rule 1.5(e) applied to determine Brown & Brown's share of fees for the award of prejudgment interest. After a hearing, the trial court denied Brown & Brown's motion for partial summary judgment.

Brown & Brown Att'ys-at-L., P.C. v. Schafer, 2021 WL 5349961 *1–3 (Ind. Ct. App. Nov. 17, 2021) ("*Schafer I*"), *trans. denied*.

[3] On appeal, we noted that it was undisputed that (1) "the division-of-fees agreement was a valid contract between the parties as to all fees collected in the underlying proceedings apart from fees for the prejudgment interest," (2) Brown & Brown was entitled to some share of the fees for the prejudgment interest, and (3) Brown & Brown had collected all fees owed to it other than its share of the fees for the prejudgment interest. *Id.* at *3. Given those undisputed facts, we further noted that the appeal turned "on whether the designated evidence demonstrates that the parties intended the division-of-fees agreement to apply to fees for the prejudgment interest." *Id.* We concluded that "the designated

evidence establishes a genuine issue of material fact with respect to whether the parties intended the division-of-fees agreement to apply to the fees for the prejudgment interest." *Id.* at *4. We further concluded that "the designated evidence supports the conclusion that the parties intended the division-of-fees agreement to split their fees in proportion to their expected services to be performed" and that

> the division-of-fees agreement provided in relevant part that the parties would divide "any and all fees ... through settlement, trial[,] or appeal ...." Appellant's App. Vol. 2 p. 73. *That language is ambiguous*. It could mean the fees due on a recovery obtained "by way of" a settlement, a trial, or an appeal. Alternatively, it could mean the fees due by "the conclusion of" a settlement, a trial, or an appeal. The latter reading would support a finding that the parties intended for division-of-fees agreement to apply only through the verdict against J.B. Hunt and the appeal of that verdict. *As Brown & Brown drafted the division-of-fees agreement, any ambiguities must be construed against Brown & Brown*.

Id. (emphases added). Given our conclusions that an issue of material fact remained regarding the parties' intent and that the contract was ambiguous, we affirmed the trial court's denial of Brown & Brown's motion for summary judgment, stating that

> In sum, a reasonable fact-finder could conclude from all of the circumstances that the intention of the parties at the time they executed the division-of-fees agreement was to have that agreement apply only to the fees for the verdict and the ensuing appeal from that verdict in *J.B. Hunt I*. That is, a reasonable fact-finder could conclude that the parties did not intend to have the

> division-of-fees agreement apply to the fees for later award of prejudgment interest. Therefore, a genuine issue of material fact precludes the entry of summary judgment on Brown & Brown's claim that Schafer & Schafer breached the division-of-fees agreement when it did not apply that agreement to the fees for the prejudgment interest, and the trial court properly denied Brown & Brown's motion for partial summary judgment.

Id. at *5.

[4] On remand, Schafer & Schafer moved for partial summary judgment, arguing that pursuant to the law-of-the-case doctrine, the parties' agreement was ambiguous and, as such, must be construed against Brown & Brown. On December 5, 2022, the trial court granted the motion, explicitly stating that "[i]n accordance with the Court of Appeals ruling and the law of the case doctrine, this Court grants [Schafer & Schafer's] Motion for Partial Summary Judgment as to [Brown & Brown's] claims … for attorney's fees for prejudgment interest based on the contingency fee contract." Appellants' App. Vol. II pp. 25–26. Brown & Brown filed a motion to correct error, which was denied by the trial court on January 31, 2023.

Discussion and Decision

[5] Brown & Brown appeal the trial court's order granting Schafer & Schafer's motion for partial summary judgment following the denial of their motion to correct error. "We review denial of a motion to correct error for abuse of discretion." *In re Paternity of V.A.*, 10 N.E.3d 65, 67 (Ind. Ct. App. 2014). "An abuse of discretion occurs if the trial court's decision is against the logic and

effect of the facts and circumstances before the court, or the reasonable inferences [drawn] therefrom." *Id.*

[6] When reviewing a grant of summary judgment, we use the same standard as the trial court: whether the pleadings and evidence demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. We construe the pleadings, affidavits, and designated materials in a light most favorable to the non-movant and give careful scrutiny to assure that the losing party is not improperly prevented from having its day in court. The party moving for summary judgment must shoulder the burden of establishing the lack of a material factual issue.

Tankersley v. Parkview Hosp., Inc., 791 N.E.2d 201, 203–04 (Ind. 2003) (internal citations omitted).

[7] In granting Schafer & Schafer's motion for partial summary judgment, the trial court concluded that Brown & Brown's "claims against [Schafer & Schafer] for attorney's fees for prejudgment interest based on the contingency fee contract" were barred by the law-of-the-case doctrine. Appellants' App. Vol. II p. 26. Under the law-of-the-case doctrine, "the decision of an appellate court becomes the law of the case and governs the case throughout all of its subsequent stages, as to all questions which were presented and decided, both directly and indirectly." *Maciaszek v. State*, 113 N.E.3d 788, 791 (Ind. Ct. App. 2018).

> The purpose of the doctrine is to minimize unnecessary relitigation of legal issues once they have been resolved by an appellate court. [*Dutchmen Mfg., Inc. v. Reynolds*, 891 N.E.2d 1074, 1082 (Ind. Ct. App. 2008), *trans. denied*]. This doctrine is

> based upon the sound policy that once an issue is litigated and decided, that should be the end of the matter. *Godby v. Whitehead*, 837 N.E.2d 146, 152 (Ind. Ct. App. 2005), *trans. denied*. However, unlike the doctrine of res judicata, the law of the case doctrine is a discretionary tool. *Reynolds*, 891 N.E.2d at 1082. To invoke this doctrine, the matters decided in the earlier appeal must clearly appear to be the only possible construction of an opinion. *Id.* at 1082–83. Thus, questions not conclusively decided in the earlier appeal do not become the law of the case. *Id.* at 1083.

Murphy v. Curtis, 930 N.E.2d 1228, 1234 (Ind. Ct. App. 2010), *trans. denied*. Moreover, the law-of-the-case doctrine does not apply "[w]hen additional information distinguishes the case factually from the case decided in the first appeal." *Parker v. State*, 697 N.E.2d 1265, 1267 (Ind. Ct. App. 1998).

[8] We note that Brown & Brown argues that the law-of-the-case doctrine should not be applied to the instant matter because the parties relied on different designated evidence than was designated and considered in *Schafer I*. In arguing that the law-of-the-case doctrine should apply, Schafer & Schafer asserts that "there is no new evidence before this Court" that would render the law-of-the-case doctrine inapplicable. Appellee's Br. p. 14. Upon review of the parties' submissions, we must agree with Schafer & Schafer as we are unable to determine what additional information was designated by the parties that sufficiently factually distinguished the instant case from *Schafer I* such that the law-of-the-case doctrine could not apply. Thus, we conclude that the law-of-the-case doctrine can apply to the instant appeal, even if the parties have designated some additional evidence in this case, as we cannot say that such

evidence "distinguishes the case factually from" *Schafer I*. *See Parker*, 697 N.E.2d at 1267.

[9] Looking to our prior decision, the law of this case is as follows: (1) a genuine issue of material fact exists regarding the question of whether the parties intended for the division-of-fees agreement to apply to the fees for the prejudgment interest, (2) the division-of-fees agreement was ambiguous as to whether the agreement included a post-judgment award of prejudgment interest, and (3) any ambiguity in the contract must be construed against Brown & Brown. *Schafer I*, 2021 WL 53349961 at *4–5. In granting Schafer & Schafer's motion for partial summary judgment, the trial court stated that

> [the trial court] being duly advised in the premises now finds the Indiana Court of Appeals has held the division-of-fees agreement is ambiguous as to prejudgment interest, that Brown & Brown drafted the division-of-fees agreement and any ambiguities must be construed against Brown & Brown which restricts fees to fees obtained through the verdict against JB Hunt and appeal of that verdict in the amount of $3,710,449 which [Brown & Brown] has been paid. In accordance with the Court of Appeals ruling and the law of the case doctrine, this Court grants [Schafer & Schafer's] Motion for Partial Summary Judgment as to [Brown & Brown's] claims against [Schafer & Schafer] for attorney's fees for prejudgment interest based on the contingency fee contract.

Appellants' App. Vol. II pp. 25–26. The trial court, however, appears to have misread our prior decision, which clearly stated our conclusion that an issue of material fact exists as to the parties' intent. That conclusion is every bit as much a part of the law of the case as is our conclusion that the division-of-fees

agreement is ambiguous. As such, given our explicit conclusion that a genuine issue of material fact exists as to intent, we must conclude that the trial court erred by granting partial summary judgment to Schafer & Schafer based on the law-of-the-case doctrine.

[10] We reverse the judgment of the trial court and remand the matter for further proceedings consistent with this memorandum decision.[2]

Crone, J., and Brown, J., concur.

[2] We note that it does not appear to be disputed that Brown & Brown are entitled to compensation for the work they completed in relation to the motion for prejudgment interest. Thus, even if the factfinder determines that the division-of-fees agreement does not include an award of prejudgment interest, Brown & Brown will still be entitled to compensation for the work they completed.