



ATTORNEY FOR APPELLANT

P. Michael Wilson
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IN THE
COURT OF APPEALS OF INDIANA

Michael Bousum,
Appellant-Petitioner,

v.

Amber Bousum,
Appellee-Respondent.

June 15, 2021

Court of Appeals Case No.
20A-DR-1834

Appeal from the Clinton Superior
Court

The Honorable Justin H. Hunter,
Judge

Trial Court Cause No.
12D01-1109-DR-372

Mathias, Judge.

[1] Michael Bousum (“Father”) appeals the Clinton Superior Court’s order awarding appellate attorney’s fees to Amber Bousum (“Mother”). Father argues that the trial court’s award of appellate attorney fees was barred pursuant to both res judicata and the law of the case doctrine.

[2] We affirm.

Facts and Procedural History

- [3] Mother and Father were married in 2007 and are the parents of one child, X.B, who was born in 2008. The parties' marriage was dissolved in October 2012. Over the last several years, the parties have continued to litigate custody and child support issues concerning X.B.
- [4] In June 2017, Father filed a petition to modify custody, parenting time, and child support. As a result of the issues involved, numerous continuances, and three days of hearings, the trial court did not issue findings of fact and conclusions of law on Father's petition until September 2018. The court issued an order denying Father's request to modify custody and addressing Father's child support arrearage. The trial court also awarded attorney's fees to Mother that she incurred in connection with Father's petition. Father filed a motion to correct error, which was denied.
- [5] Father appealed the trial court's denial of his petition to modify custody, the trial court's calculation of his child support obligation, and the fee award to Mother. *See Bousum v. Bousum*, No. 18A-DR-2786, 2019 WL 3070243, at *1 (Ind. Ct. App. July 15, 2019), *trans. denied* ("*Bousum I*"). Mother cross appealed and requested appellate attorney's fees pursuant to [Appellate Rule 66\(E\)](#). *Id.* at *13. While the appeal was pending, Mother also filed in the trial court a petition for award of appellate attorney's fees under [Indiana Code sections 31-15-10-1](#) and [31-16-11-1](#). Her request for fees also included fees incurred in responding to Father's motion to correct error. The trial court held Mother's

request in abeyance, determining that “no award of appellate fees will be granted until conclusion of the appeal.” Appellant’s App. p. 12.

[6] Thereafter, in *Bousum I*, our court affirmed the trial court’s September 2018 order but declined to award Mother appellate attorney’s fees under [Rule 66\(E\)](#), reasoning:

The discretion to award fees under this rule is limited to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay. To prevail on a substantive bad faith claim, the party must show that the appellant’s contentions and arguments are utterly devoid of all plausibility. Procedural bad faith occurs when a party flagrantly disregards the form and content requirements of the Rules of Appellate Procedure, omits and misstates relevant facts appearing in the record and files briefs written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court.

Mother argues that Father’s statement of facts was deficient, failed to include facts favorable to the judgment, and was argumentative, requiring Mother to spend time and expense to provide an appropriate statement of facts. Mother also argues, among other things, that Father failed to support many of his contentions with cogent argument or citations to caselaw or the record. As Father observes, while App. R. 66(E) provides this court with the discretionary authority to award fees on appeal, we must use extreme caution when exercising this power because of a potential chilling effect upon the exercise of the right to appeal. We conclude that, even if Father’s brief contained flaws, as Mother claims, any shortcomings were not so flagrant or significant as to constitute bad faith or vexatiousness.

Bousum, 2019 WL 3070243, at *13. Father subsequently filed a petition to transfer the appeal to our supreme court. The court denied Father’s petition on December 19, 2019.

[7] Approximately two months later, on February 25, 2020, Mother renewed her request for appellate attorney’s fees. Due to the filing of other motions not related to this appeal, and the COVID-19 pandemic, a hearing was not held on Mother’s petition until July 29.

[8] At the hearing, Father argued that Mother’s request for appellate attorney’s fees was barred by the doctrine of res judicata. The trial court disagreed and granted Mother’s request. Specifically, the trial court determined that a “reasonable fee for the services of [Mother’s] attorney in responding to [Father’s] Motion to Correct Error[] and post-hearing filings, preparation and filing the Appellee’s Brief before the Indiana Court of Appeals and Brief in Opposition to [Father’s] Petition for Transfer is the sum of \$15,000.00.” Appellant’s App. p. 112. Father was ordered to make minimum monthly payments to Mother’s attorney in the amount of \$1,500 per month until the attorney’s fees were paid in full.¹

¹ In its order, the trial court also addressed Mother’s motion to show cause and held Father in indirect contempt after finding that he willfully failed to make child support and arrearage payments as required by the child support order. Further, the court concluded that Mother incurred attorney’s fees enforcing the child support order and ordered Father to pay \$2,500 to Mother’s attorney for the fees directly attributable to those proceedings. The court also ordered Father to pay interest on the child support arrearage.

[9] On August 17, Father filed a motion to correct error. The trial court did not issue a ruling on the motion, and therefore, it was deemed denied on October 1. See [Ind. Trial Rule 53.3\(A\)](#). Father now appeals.

Standard of Review

[10] Mother did not file a brief in this appeal. In these circumstances, we will not develop an argument on the appellee's behalf. See, e.g., [L.O. v. D.O.](#), 124 N.E.3d 1237, 140 (Ind. Ct. App. 2019). We may reverse the trial court's judgment if the appellant establishes prima facie error, which is error at first sight, on first appearance, or on the face of it. *Id.*

Discussion and Decision

[11] Father argues that the trial court erred when it awarded Mother appellate attorney's fees. Specifically, he contends that the attorney fee award was barred by the doctrines of res judicata and law of the case.

[12] Before considering the precise issue raised in this appeal, we observe that Indiana follows the American Rule, which provides a party must pay his or her own attorney's fees absent an agreement between the parties, a statute, or other rule to the contrary. [R.L. Turner Corp. v. Town of Brownsburg](#), 963 N.E.2d 453, 458 (Ind. 2012). As is relevant here, two statutes permit a deviation from the American Rule: [Indiana Code section 31-15-10-1](#) allows trial courts to award appellate attorney's fees in dissolution proceedings; and [Indiana Code section 31-16-11-1](#) allows trial courts to award appellate attorney's fees in child support

proceedings. See *Townsend v. Townsend*, 20 N.E.3d 877, 881 (Ind. Ct. App. 2014), *trans. denied*.

[13] To determine whether to award statutorily allowed appellate attorney’s fees, a trial court generally considers the financial circumstances of the parties, including their resources, economic condition, and ability to engage in gainful employment. *Eads v. Eads*, 114 N.E.3d 868, 879 (Ind. Ct. App. 2018); *Myers v. Myers*, 80 N.E.3d 932, 938 (Ind. Ct. App. 2017). The trial court may also consider any other factors that bear on the reasonableness of awarding attorney’s fees. *Eads*, 114 N.E.3d at 879; *Myers*, 80 N.E.3d at 938. A party’s misconduct that directly results in additional litigation expenses may also be considered. *Eads*, 114 N.E.3d at 879; *Myers*, 80 N.E.3d at 938. Consideration of these factors promotes the legislative purpose behind the award of attorney’s fees—to ensure that a party who would not otherwise be able to afford an attorney is able to retain representation. *Eads*, 114 N.E.3d at 879. When one party is in a superior position to pay fees over the other party, an award is proper. *Id.*

[14] [Appellate Rule 66\(E\)](#) authorizes our court to also award appellate attorney’s fees. Our court’s discretion to award [Rule 66\(E\)](#) appellate attorney’s fees is limited to circumstances where the appeal is “permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay.” *Thacker v. Wentzel*, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003). “[T]he sanction is not imposed to punish mere lack of merit but something more egregious.” *Troyer v. Troyer*, 987 N.E.2d 1130, 1148 (Ind. Ct. App. 2013) (citation omitted), *trans.*

denied. As such, our court exercises caution in awarding appellate attorney’s fees because of the “potentially chilling effect the award may have upon the exercise of the right to appeal.” *Holland v. Steele*, 961 N.E.2d 516, 529 (Ind. Ct. App. 2012), *trans. denied*. With the relevant legal framework in hand, we turn now to Father’s two bases for why the trial court erred in awarding Mother appellate attorney’s fees.

I. Res Judicata does not bar Mother’s award of attorney’s fees

[15] “Generally speaking, res judicata operates ‘to prevent repetitious litigation of disputes that are essentially the same, by holding a prior final judgment binding against both the original parties and their privies.’” *In re Eq. W.*, 124 N.E.3d 1201, 1208 (Ind. 2019) (quoting *Becker v. State*, 992 N.E.2d 697, 700 (Ind. 2013)). This doctrine applies “where there has been a final adjudication on the merits of the same issue between the same parties.” *Id.* (citations omitted).

[16] Father argues that Mother’s request is barred by res judicata because “the issue of appellate attorney’s fees has already been heard and decided in” *Bousum I*. Appellant’s Br. at 8. He is incorrect. Mother’s award of appellate attorney’s fees at issue in this appeal was not adjudicated in *Bousum I*.

[17] In *Bousum I*, this court only issued a final adjudication on Mother’s request for attorney’s fees under [Appellate Rule 66\(E\)](#). But while that appeal was pending, the trial court stayed Mother’s request for attorney’s fees under [Indiana Code sections 31-15-10-1](#) and [31-16-11-1](#). And the trial court issued a final

adjudication on Mother’s request under those statutes—for the first time—when it issued the appealed order in this case.

[18] In short, the *Bousum I* court’s adjudication of Mother’s Rule 66(E) appellate attorney’s fees request did not operate as “a final adjudication on the merits” of Mother’s alternative request in the trial court.² Cf. *Evergreen Shipping Agency Corp. v. Djuric Trucking, Inc.*, 996 N.E.2d 337, 340 (Ind. Ct. App. 2013) (concluding that res judicata did not bar a freight carrier’s award of attorney’s fees under an agreement allowing the prevailing party to recover attorney’s fees where the trial court had previously entered a final judgment denying the carrier’s request for statutory attorney’s fees). Mother’s award of appellate attorney’s fees under Sections 31-15-10-1 and 31-16-11-1 therefore is not barred by the doctrine of res judicata. The same is true under the law of the case doctrine.

II. The Law of the Case Doctrine does not bar Mother’s award of attorney’s fees

[19] The law of the case doctrine provides that an appellate court’s determination of a legal issue binds both the trial court and the appellate court in any subsequent appeal involving the same case and substantially the same facts. *Dutchmen Mfg., Inc. v. Reynolds*, 891 N.E.2d 1074, 1082 (Ind. Ct. App. 2008), *trans. denied*. The

² Furthermore, Mother could not request appellate attorney fees under Indiana Code section 31-15-10-1 and 31-16-11-1 in the appellate court because authority to award statutorily allowed attorney fees rests in the trial court. Likewise, only the appellate court can award attorney fees pursuant to Appellate Rule 66(E).

purpose of the doctrine is to minimize unnecessary relitigation of legal issues once they have been resolved by an appellate court. *Id.* 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.

[20] As noted above, our court determined in *Bousum I* that Mother was not entitled to an award of appellate attorney’s fees only under [Appellate Rule 66\(E\)](#). *Bousum*, 2019 WL 3070243, at *13. This court made no determination under [Indiana Code sections 31-15-10-1](#) or [31-16-11-1](#). Mother appropriately withheld argument under those statutory provisions in her cross appeal for two reasons: (1) both statutes grant the trial court, not appellate courts, discretion to award attorney’s fees; and (2) Mother’s motion in the trial court requesting fees under those statutory provisions was stayed pending appeal. *See Townsend v. Townsend*, 20 N.E.3d 877, 881 (Ind. Ct. App. 2014) (noting that “jurisdiction rests with the trial court to determine if an award of appellate attorney[’s] fees is appropriate” under [Indiana Code section 31-15-10-1](#)), *trans. denied*. Conversely, Mother could not have requested appellate attorney’s fees under [Rule 66\(E\)](#) in the trial court because that rule allows only the appellate courts to assess damages.

[21] Consequently, in *Bousum I*, our court’s consideration of Mother’s request for appellate attorney’s fees was limited to whether Father engaged in misconduct significant enough to warrant an award of attorney’s fees under [Rule 66\(E\)](#). The trial court has broader discretion to award appellate attorney’s fees under the statutes at issue and may issue an award solely for economic reasons. In fact, in this case, the trial court awarded appellate attorney’s fees because “[Father] has substantially greater earnings than” Wife. Appellant’s App. p. 112. For these reasons, we conclude that the law of the case doctrine does not bar the trial court’s consideration of Mother’s request for appellate attorney’s fees under [Indiana Code sections 31-15-10-1 and 31-16-11-1](#). *Cf. Townsend*, 20 N.E.3d at 881 (citing *Wagner v. Spurlock*, 803 N.E.2d 1174, 1185 (Ind. Ct. App. 2004) (noting that “[s]imply because attorney[’s] fees may not be appropriately awarded by this court under our appellate rules, a trial court is not precluded from awarding reasonable fees for an appeal based upon another statute, rule, or agreement allowing for such an award”).

Conclusion

[22] Mother’s request for appellate attorney’s fees is not barred by res judicata or by the law of the case doctrine. We therefore affirm the trial court’s order awarding appellate attorney’s fees to Mother.

[23] Affirmed.

Riley, J., and Crone, J., concur.