

Appellant-defendant Michael S. Fahlbeck appeals the trial court's award of attorney fees and costs to appellees-plaintiffs Bryan Bucklen, et al., (collectively, "the Homeowners"). Specifically, Fahlbeck asserts that the trial court erred in denying his motion to correct error because the language of the restrictive covenants regarding a residential subdivision does not permit the trial court's award of \$52,610 in attorney fees to the Homeowners for litigation expenses they incurred while enforcing the restrictive covenants. The Homeowners argue on cross-appeal that Fahlbeck's argument was not properly before the trial court and, therefore, is waived on appeal.

We conclude that Fahlbeck waived his argument on appeal because it was not properly asserted at the trial court level. Thus, we affirm the trial court's award of the Homeowners' attorney's fees

FACTS

On August 2, 2006, Fahlbeck purchased Lot 14 of Manor Estates, Section II, a residential subdivision in Elkhart County, where he laid a foundation to transfer a home that had been previously built onto that lot. Manor Estates features twenty-eight homes, all of which are subject to "Protective Restrictions, Covenants, Limitations, and Easements for Manor Estates PUD: Section II & III" (Restrictive Covenants). Appellant's App. p. 34, 105. The Restrictive Covenants were executed and recorded on June 22, 1987. A pertinent provision of the Restrictive Covenants states:

All the lots in said addition shall be subject to . . . the covenants . . . restrictions hereinafter set forth. . . . The provisions herein contained are for the mutual benefit and protection of the owners . . . or any and all lots in

said section; and they shall run with the land and inure to the benefit of and be enforceable by their respective legal representatives The . . . owners . . . of any land or lot included in said section shall be entitled to injunctive relief against any violation or attempted violation of the provisions hereof and also damages for any injuries resulting from any violation hereof.

Id. at 68.

An additional Restrictive Covenant provides that:

The right to enforce these provisions by injunction, together with the right to cause the removal by due process of law or any structure, is hereby vested in each owner of a lot in Manor Estates These covenants and restrictions may all be enforced by a civil action for damages and by any other appropriate remedy at law or in equity. If any person or persons shall violate or attempt to violate any of the covenants herein, it shall be lawful for any person or persons vested with the title to any of the lots hereinafter described . . . or the Developer, to proceed either in law or in equity, against such person or persons, violating . . . [the] covenants, and to enjoin them from so doing, to recover damages for such violations and to seek all other appropriate relief. In the event that the Developer should employ counsel to enforce any of the foregoing covenants and restrictions, all costs incurred in such enforcement, including reasonable attorney's fees, shall be paid by the owner of such lot or lots against whom such enforcement action is brought.

Id. at 75.

On April 20, 2007, the Homeowners filed a complaint and request for injunctive relief, alleging that Fahlbeck had failed to comply with the terms of the Restrictive Covenants. Specifically, the Homeowners alleged that Fahlbeck's home will be too small, is without a porch, has a metal chimney as opposed to one with brick and or stone, and is set too far back from the street. Following a hearing, the trial court granted the Homeowners' request for a preliminary injunction on June 7, 2007.

On May 16, 2008, the Homeowners filed a “Rule to Show Cause,” alleging that Fahlbeck was in violation of the preliminary injunction by undertaking further construction on his property. Id. at 76-77. In conjunction with their motion, Homeowners sought the recovery of their attorney’s fees as well as sanctions against Fahlbeck for his violation of the preliminary injunction. A hearing was conducted on the Homeowners’ motion on May 29, 2008, whereupon the trial court found Fahlbeck in violation of the preliminary injunction, but would not consider sanctions until the Homeowners filed a bond. Homeowners filed their injunction bond on July 1, 2008. On July 16, 2008, the Homeowners requested their attorney’s fees, which were compiled and submitted through the affidavit of their attorney, and sanctions against Fahlbeck. The trial court awarded the Homeowners \$2,210 in attorney’s fees on August 5, 2008. Fahlbeck was also ordered to pay an additional \$2,000 in sanctions that the trial court suspended.

The Homeowners filed a subsequent “Rule to Show Cause” motion on October, 28, 2008, wherein the Homeowners alleged Fahlbeck had not yet complied with the trial court’s order requiring him to pay the Homeowners’ attorney’s fees. Id. at 101-02. Following a hearing on the Homeowners’ motion, on December 19, 2008, the trial court found Fahlbeck in contempt for failing to pay the Homeowners’ attorney’s fees. The trial court reduced the previously awarded attorney fees and sanctions to a judgment of \$4,210 and ordered Fahlbeck to pay an additional \$400 in attorney’s fees that the Homeowners incurred while pursuing the Rule to Show Cause action.

Pursuant to the Homeowners' request for a permanent injunction, the trial court conducted an evidentiary hearing on February 19 and 20, 2009. On April 12, 2010, the trial court issued its findings of fact and conclusions of law, and entered a permanent injunction against Fahlbeck, directing him within thirty days, to "either remove the residence from Lot 14 or to relocate such residence to a location on such lot that complies with the set back provisions of the Restrictive Covenants as well as with all county ordinances or regulations." Id. at 144. Or, "if the residence remains on Lot 14, [Fahlbeck] shall comply with all Restrictive Covenants except the architectural control committee." Id.

On July 21, 2010, the Homeowners sought to enforce the judgment and requested an award of their remaining attorney's fees in the sum of \$70,297.06, which was compiled and submitted through an affidavit of the Homeowners' attorney, Christopher Riley. Id. at 146-51. Fahlbeck filed an objection to the request for attorney's fees on August 13, 2010. In particular, Fahlbeck objected to the fee award on the grounds that: (1) the trial court's order was a final judgment as of May 12, 2010; (2) neither party filed a motion to correct error nor an appeal of that order; (3) the Homeowners waived their rights to recover attorney fees; and (4) there was no evidence submitted at trial as to attorney fees. Id. at 153-54. On November 30, 2010, the trial court granted the Homeowners their attorney's fees in the amount of \$50,000. The trial court's order states that:

In this case the Restrictive Covenants agreement provides that ‘in the event that the Developer should employ counsel to enforce any of the foregoing covenants and restrictions, all costs incurred in such enforcement, including reasonable attorney’s fees, shall be paid by the owner of such lot or lots against whom such enforcement action is brought’ The agreement also provides that the right to enforce the covenants vests in each owner of a lot in Manor Estates, its successors and assigns. The plaintiffs are therefore entitled to reasonable attorney’s fees.

Id. at 24-25.

On December 23, 2010, Fahlbeck filed a motion to correct error, alleging that the trial court’s award of attorney fees was not supported by the evidence, that the Homeowners failed to preserve the issue, and that the award was “excessive and unreasonable under the circumstances.” Id. at 27. Following a hearing on January 28, 2011, the trial court issued an order denying Fahlbeck’s motion to correct error. Fahlbeck now appeals.

DISCUSSION AND DECISION

The Homeowners’ argument on cross-appeal that Fahlbeck has waived the argument regarding the award of attorney fees is dispositive. The Homeowners maintain that Fahlbeck never alleged at the trial court level that the Restrictive Covenants do not permit the award of attorney fees and costs incurred by the Homeowners.

We note that a party generally waives appellate review of an issue or argument unless that party presented that issue or argument before the trial court. GKC Ind. Theatres, Inc., v. Elk Retail Investors, LLC, 764 N.E.2d 647, 652 (Ind. Ct. App. 2002). More particularly, the rule that parties will be held to trial court theories by the appellate

courts means that substantive questions independent in character and not within the issues or not presented to the trial court shall not be made first on appeal. Dedelow v. Pucalik, 801 N.E.2d 178, 183-84 (Ind. Ct. App. 2003) (quoting Bielat v. Folta, 141 Ind.App. 452, 454, 229 N.E.2d 474, 475 (1967)). In other words, a party may not advance an argument made on appeal that is different from that raised at the trial court. In re J.C., 735 N.E.2d 848, 850 (Ind. Ct. App. 2000).

Here, Fahlbeck refutes the Homeowners' argument by noting that a motion to correct error is not a prerequisite for appeal, but for two exceptions¹, and that all other issues and grounds for appeal appropriately preserved during trial may be initially addressed in the appellate brief. Additionally, Fahlbeck relies on the presumption that because both the Homeowners and the trial court utilized the Restrictive Covenants during the course of the trial that his new argument, spawned on appeal, was appropriately before the trial court and, therefore, preserved.

Our review of the record indicates that Fahlbeck never asserted the issue of whether the terms of the Restrictive Covenants provided the Homeowners the right to recover their attorney's fees. Instead, Fahlbeck consistently maintained throughout the trial and in his motion to correct error that, "based upon the evidence submitted at trial

¹ Ind. R. Trial P. 59(A)(1)-(2): (1) Newly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days of final judgment which, with reasonable diligence, could not have been discovered and produced at trial; or (2) A claim that a jury verdict is excessive or inadequate.

that the amount of fee awarded is excessive and disproportionate to the relief that was granted by the court in this case.” Tr. p. 4. In Fahlbeck’s objection to the award of attorney fees, Fahlbeck asserts, “the requested attorney fees by [Homeowners] are not reasonable, were not necessary in all respects, and are excessive.” Appellant’s App. p. 153-54. Therefore, the argument Fahlbeck now makes on appeal as to whether attorney fees can be awarded to the Homeowners is a substantive issue that is independent in character from the argument he presented at trial, which referred to what attorney fees were reasonable under the circumstances.

Thus, we hold that Fahlbeck has waived his argument on appeal. Therefore, we affirm the trial court’s determination that the Homeowners are entitled to recover their attorney’s fees, and we decline to set that award aside.

The judgment of the trial court is affirmed.

MAY, J., and BRADFORD, J., concur.