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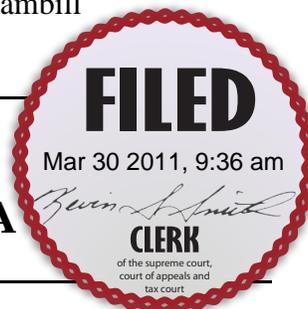
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**IN THE
COURT OF APPEALS OF INDIANA**



JAMES WHITAKER and)
SHARON (WHITAKER) ASHER,)
)
Appellants-Plaintiffs,)

vs.)

No. 60A04-1008-PL-463

SANDRA MASKELL, Individually and as)
PERSONAL REPRESENTATIVE OF THE)
ESTATE OF MILDRED I. WHITAKER,)
AS TRUSTEE OF THE REVOCABLE)
TRUST OF MILDRED I. WHITAKER,)
DENNY WHITAKER, AND BEVERLY)
WHITAKER,)
)
Appellees-Defendants.)

APPEAL FROM THE OWEN CIRCUIT COURT
The Honorable Frank N. Nardi, Judge
Cause No. 60C01-0908-PL-528

March 30, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

Plaintiffs James Whitaker (“James”) and Sharon (Whitaker) Asher (“Sharon”) appeal the trial court’s award of attorney fees to defendants Sandra Maskell (“Maskell”), individually, as personal representative of the estate of Mildred I. Whitaker, and as trustee of the revocable trust of Mildred I. Whitaker, and Denny Whitaker (“Denny”), following the trial court’s judgment against them in a will and trust dispute. James and Sharon raise one issue on appeal, which we restate as whether the trial court erred in awarding Maskell and Denny attorney fees as a result of finding that James and Sharon’s claims were frivolous, unreasonable, or groundless pursuant to Indiana Code section 34-52-1-1. Concluding the trial court did not err, we affirm.

Facts and Procedural History

On August 31, 2009, James and Sharon filed a verified complaint against Maskell, Denny, and Beverly Whitaker,¹ seeking to have their mother, Mildred I. Whitaker’s, will and trust declared void. On October 29, 2009, Maskell and Denny filed their answers. James and

¹ Beverly Whitaker does not participate in this appeal; however, pursuant to Indiana Appellate Rule 17(A), a party of record in the trial court remains a party on appeal.

Sharon failed to file a will contest bond as required by Indiana Code section 29-1-7-19, and on November 2, 2009, Maskell filed a motion to dismiss for failure to file a will contest bond. On November 5, 2009, Maskell filed another motion to dismiss, claiming that James and Sharon's cause of action was frivolous, unreasonable, groundless, and being litigated in bad faith, and requesting an award of attorney fees.

The trial court scheduled a hearing on Maskell's motions to dismiss for December 7, 2009. On December 4, 2009, James and Sharon filed a motion for continuance, and the trial court reset the hearing for March 1, 2010. The trial court also extended the time for James and Sharon to respond to Maskell's motions to dismiss to January 22, 2010. On February 16, 2010, James and Sharon filed another motion for continuance and for enlargement of time to respond to Maskell's motions to dismiss. That same day, the trial court again reset the hearing, this time to April 12, 2010, and extended the deadline for James and Sharon to respond to Maskell's motions to March 12, 2010. The chronological case summary and the distribution list for the trial court's February 16, 2010 order indicate the order was mailed to counsel for James and Sharon. James and Sharon failed to respond to Maskell's motions to dismiss and failed to attend the hearing on April 12, 2010.

At the hearing, the trial court granted Maskell's motion to dismiss and awarded attorney fees to both Maskell and Denny in an amount to be determined upon submission of affidavits of attorney fees. On April 21, 2010, Denny filed his affidavit of counsel, and on April 22, 2010, Maskell filed her affidavit of counsel. On April 23, 2010, James and Sharon filed a motion to dismiss their claims without prejudice. That same day, the trial court issued

an order noting James and Sharon's claims had been dismissed with prejudice and awarding attorney fees of \$19,210 to Maskell and \$7,500 to Denny. On April 27, 2010, James and Sharon filed a motion to reconsider the award of attorney fees. On July 2, 2010, the trial court held a hearing on the motion to reconsider and denied the motion in relevant part. James and Sharon now appeal.

Discussion and Decision

I. Trial Court's Award of Attorney Fees

In any civil action, the trial court may award attorney fees as part of the cost to the prevailing party, if the trial court finds that either party:

- (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
- (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
- (3) litigated the action in bad faith.

Ind. Code § 34-52-1-1(b). On appeal, we employ a three-part standard of review of the trial court's decision. First, we review the trial court's findings of fact for clear error, neither reweighing the evidence nor judging the credibility of witnesses. Estate of Collins v. McKinney, 936 N.E.2d 252, 263 (Ind. Ct. App. 2010). Second, we review de novo the trial court's legal conclusions on whether the claim is frivolous, groundless, unreasonable, or litigated in bad faith. Id. at 264. A claim is "frivolous" if it is made primarily for the purpose of harassment, if the attorney cannot make a good faith and rational argument on the merits of the claim, or if the attorney is unable to support the claim by a rational, good faith argument for an extension, modification, or reversal of existing law. Chapo v. Jefferson

County Plan Comm'n, 926 N.E.2d 504, 509-10 (Ind. Ct. App. 2010). “A trial court is not required to find an improper motive to support an award of attorney fees; rather an award may be based solely upon the lack of a good faith and rational argument in support of the claim.” Id. at 510. Finally, we review the trial court’s decision to award attorney fees, as well as the amount of fees awarded, under an abuse of discretion standard. Estate of Collins, 936 N.E.2d at 264.

A. Trial Court’s Conclusion Claims Were Frivolous, Unreasonable, or Groundless

James and Sharon’s primary argument is that the trial court should not have awarded attorney fees because their claims were not frivolous, unreasonable, or groundless. We agree with James and Sharon that initially the claims raised in their complaint were not frivolous, unreasonable, or groundless. It is a settled principle that commencement of an action may often be justified on relatively insubstantial grounds, and that thorough representation will sometimes require an attorney to proceed against some party solely for the purpose of investigation through pretrial discovery. Kahn v. Cundiff, 543 N.E.2d 627, 629 (Ind. 1989). However, “[i]n such cases, counsel is expected to determine expeditiously the propriety of continuing such action and to dismiss promptly claims found to be frivolous, unreasonable, or groundless.” Id. A prevailing party may recover attorney fees if the other party failed to promptly dismiss such an action. See id. at 628-29 (affirming trial court’s decision to award attorney fees when claim against one party was not promptly dismissed and plaintiff’s counsel admitted on the morning of trial that there were no facts to support the claim).

During the course of the proceedings, James and Sharon did not expeditiously determine whether there were grounds to support their claims. As the trial court summarized at the July 2, 2010 hearing on the motion to reconsider, James and Sharon, despite receiving two extensions of time in which they could have investigated and substantiated their claims, never responded to Maskell's motions to dismiss. Despite receiving two continuances of the hearing on the motions to dismiss, and receiving notice of that hearing, they failed to attend the hearing. Neither did they respond to a discovery request that Denny sent them. Ultimately, James and Sharon moved to dismiss their claims without prejudice, but they filed that motion eleven days after the hearing and the trial court's grant of Maskell's motion to dismiss the claims with prejudice. Regardless of whether James and Sharon's claims were frivolous or groundless when initially asserted in their complaint, those claims became frivolous when James and Sharon neither promptly dismissed them nor supported them with any rational, good faith argument on the merits. Accordingly, the trial court properly concluded that an award of attorney fees was warranted under Indiana Code section 34-52-1-1.

B. Notice

Next, James and Sharon argue the trial court erred when it awarded Denny attorney fees because he did not provide them with notice that he intended to seek an award of attorney fees based on contract or statute. James and Sharon correctly point out that Denny did not file or join in the filing of Maskell's motions to dismiss and that in his answer, he did

not state a claim for attorney fees. Rather, in his answer, Denny requested “the costs of this action and . . . all other just and proper relief in the premises.” Appellants’ Appendix at 46.

We agree with James and Sharon that Denny’s answer did not put them on notice that he would seek an award of attorney fees. Indiana Code section 34-52-1-1(a) provides that “[i]n all civil actions, the party recovering judgment shall recover costs,” except as otherwise provided by law. Subsection (b) of the same statute provides that “the court may award attorney’s fees as part of the cost to the prevailing party, if the court finds that either party” brought or maintained a claim or defense that was frivolous, unreasonable, or groundless or litigated the action in bad faith. Thus, while the statute allows for attorney fees as “part of the cost to the prevailing party,” it also distinguishes attorney fees from costs by making attorney fees discretionary with the court and available only upon certain specified findings. Applying Trial Rule 41(E)’s provision for dismissal “at plaintiff’s costs,” this court has held that a defendant’s motion for dismissal with costs did not encompass a request for attorney fees or otherwise put the plaintiff on notice that the defendant would seek recovery of attorney fees. Caltram Equip. Co., Inc. v. Rowe, 441 N.E.2d 46, 47-48 (Ind. Ct. App. 1982). More recently we have stated that the term “costs” in Trial Rules 41(D) and 53.5 is not specific enough to permit recovery of attorney fees under those Rules. Srivastava v. Indianapolis Hebrew Congregation, Inc., 779 N.E.2d 52, 57-58 (Ind. Ct. App. 2002), trans. denied. Thus, Denny’s answer requesting costs did not provide James and Sharon with notice that Denny would also seek an award of attorney fees.

Notwithstanding the lack of notice, the trial court had authority to award attorney fees to Denny. This court has held that Indiana Code section 34-52-1-1 permits a trial court to award attorney fees sua sponte. Davidson v. Boone County, 745 N.E.2d 895, 900 (Ind. Ct. App. 2001). Therefore, even absent a prior request for attorney fees, the trial court did not err when it awarded Denny attorney fees based upon its finding that James and Sharon failed to support their claims with any rational, good faith argument. In short, we conclude the trial court did not abuse its discretion in its award of attorney fees to Maskell and Denny.²

II. Appellate Attorney Fees

Maskell requests that we award her appellate attorney fees as part of her costs for this appeal.³ Pursuant to Indiana Appellate Rule 66(E), we may assess damages if an appeal, petition, motion, or response is frivolous or in bad faith. If an appeal is frivolous or in bad faith, damages are in our discretion and may include attorney fees. Id. Our discretion, however, is “limited to instances when the appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay.” Graycor Indus. v. Metz, 806 N.E.2d 791, 801 (Ind. Ct. App. 2004) (quotation omitted), trans. denied. Bad faith in litigating an appeal may be characterized as substantive or procedural. Potter v. Houston, 847 N.E.2d 241, 249 (Ind. Ct. App. 2006). To prevail on a substantive bad faith claim, a party must show that the appellant’s contentions and argument are “utterly devoid of all plausibility.” Bozcar v. Meridian St. Found., 749 N.E.2d 87, 95 (Ind. Ct. App. 2001)

² On appeal, James and Sharon do not argue that the amount of attorney fees awarded was unreasonable.

³ Denny has not requested appellate attorney fees, so we address this issue only with respect to

(quotation omitted). “Procedural bad faith, on the other hand, 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.” Id. (quotations_omitted).

Maskell argues that James and Sharon’s brief contains numerous instances of procedural and substantive bad faith. Specifically:

James and Sharon’s brief does not state the relevant facts in a light most favorable to the judgment; contains allegations, which were never established as facts in the record, set forth as fact; contains false and/or misleading statements; appears to misinterpret and misapply the standard of review; and many citations to the Record do not support the purported statement contained in the brief; reasserts allegations of [their] Complaint rather than set forth a meritorious argument regarding the trial court’s error in finding that their Complaint was frivolous, unreasonable, groundless and/or litigated in bad faith; and contains accusatory statements not properly in an appellate argument.

Appellee Sandra Maskell’s Brief at 22-23. We agree with Maskell that James and Sharon violated the Appellate Rules throughout their brief. Most notably, their “Statement of Relevant Facts” is replete with argumentative factual and legal conclusions, such as “the Defendants . . . exerted undue influence over Mildred I. Whitaker, by isolating her from others including the Plaintiffs.” Appellants’ Brief at 7. Such statements are not supported by the record.

However, these violations do not rise to the level meriting damages in the form of appellate attorney fees. We “must use extreme restraint when exercising our discretionary

Maskell.

power to award damages on appeal because of the potential chilling effect upon the exercise of the right to appeal.” Carter-McMahon v. McMahon, 815 N.E.2d 170, 179-80 (Ind. Ct. App. 2004) (quotation omitted). Although James and Sharon drew unfounded legal conclusions in the “Statement of Relevant Facts” section of their brief, they clarified in the argument section of their brief that their allegations were drawn from their complaint, not from the record. Despite Maskell’s claim that James and Sharon wrongfully restated allegations of their complaint in the argument section of their brief, the content of those allegations was relevant to our consideration of whether James and Sharon’s claims were frivolous. Thus, notwithstanding their violations of the Appellate Rules, James and Sharon did not attempt to mislead us and did not exercise procedural bad faith. Moreover, our review of the briefs and the record reveals that despite their failure to prevail on appeal, James and Sharon had a plausible basis for appealing the trial court’s judgment; thus, neither did they exercise substantive bad faith.

Conclusion

The trial court did not err in awarding Maskell and Denny attorney fees. In addition, we do not award Maskell appellate attorney fees.

Affirmed.

RILEY, J., and BROWN, J., concur.