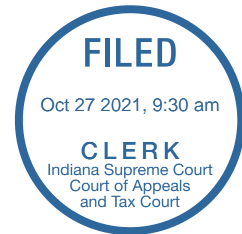

ATTORNEY FOR APPELLANTS

Mark J. Schocke
Highland, Indiana

ATTORNEY FOR APPELLEES

Minh C. Wai
Kopka Pinkus Dolin, P.C.
Crown Point, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Benjamin Bertucci, Individually and Next Best Friend of Ayana Bertucci, a Minor,

Appellants-Petitioners,

v.

Donald Bertucci and Anita Remijas,

Appellees-Respondents.

October 27, 2021

Court of Appeals Case No. 21A-CT-360

Appeal from the LaPorte Superior Court

The Honorable Jeffrey L. Thorne, Judge

Trial Court Cause No. 46D03-1806-CT-916

Pyle, Judge.

Statement of the Case

[1] In this interlocutory appeal, Benjamin Bertucci ("Father"), individually and as the next best friend of his daughter, Ayana Bertucci, ("Ayana"), appeals the trial court's order that granted Donald Bertucci's ("Grandfather") motion for partial summary judgment, granted Grandfather's cross-motion for attorney

fees and costs, and ordered Father to pay $3,000 of Grandfather's attorney fees pursuant to INDIANA CODE § 34-52-1-1(b).[1] Father argues that the trial court erred in granting Grandfather's summary judgment motion and abused its discretion when it granted Grandfather's motion for attorney fees and costs. Concluding that the trial court neither erred in granting Grandfather's summary judgment motion nor abused its discretion in granting Grandfather's cross-motion for attorney fees and costs, we affirm the trial court's judgment.

[2] We affirm.

Issues

1. Whether the trial court erred in granting Grandfather's summary judgment motion.

2. Whether the trial court abused its discretion in granting Grandfather's cross-motion for attorney fees and costs.

Facts

[1] In July 2017, Grandmother invited Anne Bertucci ("Mother") and her two daughters, Ayana and Lila, to visit Grandmother at her home in Long Beach,

---

[1] The trial court's grant of Grandfather's summary judgment motion only partially disposed of the litigation because Father's negligence claim against Anita Remijas ("Grandmother") is still pending. However, Indiana Appellate Rule 4(B)(1) provides for an interlocutory appeal as a matter of right from an order "for the payment of money." An order to pay attorney fees is an order for the payment of money, which triggers the application of Appellate Rule 4(B)(1). *See Skiles v. Skiles*, 646 N.E.2d 353, 355 (Ind. Ct. App. 1995), *trans. denied*. Further, the Indiana Supreme Court has stated that "an interlocutory appeal raises every issue presented by the order that is the subject of the appeal." *Tom-Wat, Inc. v. Fink*, 741 N.E.2d 343, 346 (Ind. 2001). Here, the trial court's order requiring Father to pay $3,000 of Grandfather's attorney fees also granted Grandfather's summary judgment motion. Accordingly, we address both issues. *See id*.

Indiana ("the Long Beach Property"). On July 6, 2017, Grandmother's seventy-pound mixed-breed dog named Milo ("Milo") bit one-year-old Ayana in the face and injured Ayana's eye. At the time of the incident, Grandmother and Grandfather, who jointly owned the Long Beach Property, were in the process of dissolving their marriage, and Grandfather was living in an apartment in Chicago.

[2] In June 2018, Father, represented by counsel Ana McNamara ("Counsel McNamara") filed a premises liability negligence action against both Grandmother and Grandfather. In his complaint, Father alleged that: (1) Grandmother owned Milo; (2) Grandmother and Grandfather owned the Long Beach Property; and (3) Grandmother and Grandfather controlled the Long Beach Property.

[3] Father's complaint further alleged that Grandmother and Grandfather owed a duty to Ayana "to operate their premises . . . so that . . . Ayana would not be injured." (Appellants' App. Vol. 2 at 84). Father's complaint further alleged that Grandmother and Grandfather had breached that duty when, among other things, they had "[c]arelessly and negligently . . . controlled [the Long Beach Property] on which [Milo] was housed" at the time Milo bit Ayana. (Appellants' App. Vol. 2 at 84). In addition, Father's complaint alleged that, as a direct and proximate result of this breach, Ayana had suffered injuries to her right eye and had suffered pain and mental anguish. Father's complaint asked for damages "in an amount in excess of one hundred thousand dollars ($100.000.00)[.]" (App. Vol. 2 at 86).

[4] In July 2018, Attorney Brooke Riffell ("Counsel Riffell") of Kopka Pinkus Dolin, P.C. entered an appearance on behalf of Grandmother and Grandfather. At the time, Counsel Riffell was working remotely from Missouri, where she had moved to assist her elderly mother. While Counsel Riffell was in Missouri, Counsel Minh Wai ("Counsel Wai"), also of Kopka Pinkus Dolin, P.C., assisted Counsel Riffell with Grandfather's case. Specifically, the two counsels discussed: (1) the facts of the case; (2) strategies in representing Grandfather; and (3) other matters related to the case.

[5] In July and August 2018, Counsel Riffell corresponded by email with Grandfather, a Chicago attorney with more than fifty years of litigation experience. In August 2018, Grandmother and Grandfather filed an answer to Father's complaint. In their answer, Grandmother and Grandfather admitted that Grandmother had controlled the Long Beach Property at the time that Milo had bitten Ayana but denied that Grandfather had controlled this property at that time.

[6] Thereafter, the parties proceeded with the discovery process. During this time, Counsel Riffell continued to regularly correspond by email with Grandfather. Both Grandmother and Grandfather responded to separate interrogatories in January 2019. When Counsel Riffell returned the interrogatory responses to Father, Counsel Riffell included with the responses a proposed order dismissing Grandfather from the case. Counsel Riffell explained that she was asking Father to voluntarily dismiss Grandfather from the case based upon Grandfather's interrogatory responses that he had not controlled the Long

Beach Property at the time of the dog bite incident. Counsel Riffell also told Father that, if he did not voluntarily dismiss Grandfather from the case, Counsel Riffell planned to file a motion for summary judgment using the discovery responses to support Grandfather's claim that he did not owe a duty to Ayana. Father did not voluntarily dismiss Grandfather from the case.

[7] Counsel McNamara deposed Grandmother in July 2019. One month later, in August 2019, Counsel Riffell filed a motion to withdraw her appearance for Grandmother and Grandfather. Counsel Riffell filed this motion because she had decided to leave the practice of law and take over her mother's insurance agency in Missouri. Counsel Riffell's motion included a request to substitute Counsel Wai, who had continued to assist her on the case, as counsel for Grandmother and Grandfather. The trial court granted Counsel Riffell's motion, and Counsel Wai entered an appearance on behalf of Grandmother and Grandfather.

[8] In March 2020, counsel Mark Schocke entered an appearance on Father's behalf. Counsel McNamara remained on the case.

[9] Three months later, in June 2020, Grandfather filed a motion for partial summary judgment wherein he argued that he owed no duty to Ayana because he had not controlled the Long Beach Property at the time that Milo had bitten her. In support of his motion, Grandfather designated: (1) Grandmother's affidavit; (2) Grandfather's interrogatory answers; (3) selected pages from

Father's deposition; (4) Father's complaint; (5) selected pages from Grandmother's deposition; and (6) Grandmother's interrogatory answers.

[10] A review of the designated materials reveals that, in her affidavit, Grandmother stated that, at the time of the dog bite incident, she and Grandfather "were separated and going through a divorce and had not lived in the same household for three to four months prior." (App. Vol. 2 at 39). Also in the affidavit, Grandmother stated that the Long Beach Property had been her "sole principal residence for approximately three to four months prior to the occurrence." (App. Vol. 2 at 39). In addition, according to Grandmother, "[d]uring the three to four months prior to the occurrence of July 6, 2017[,] [Grandfather] had not been to the [Long Beach Property]." (App. Vol. 2 at 39). Grandmother also stated that, at the time of the dog bite incident, Grandfather had been living in an apartment in Chicago. Grandmother further stated that, at the time of the dog bite incident, Grandmother and Grandfather had owned the Long Beach Property as joint tenants. The designated evidentiary materials also revealed that Grandfather had not been present when Milo had bitten Ayana.

[11] In August 2020, before Father had filed a response to Grandfather's summary judgment motion, Father's counsel deposed Grandfather. At the deposition, Grandfather testified that he and Grandmother had married in 1988 and had purchased the Long Beach Property as joint tenants in 1989. According to Grandfather, he had filed a petition to dissolve his marriage to Grandmother in March 2017, and, at that time, Grandmother had "moved exclusively into the [Long Beach Property.]" (App. Vol. 2 at 107). Grandfather also testified that

after he had filed the dissolution petition, Grandmother had stayed periodically in their family home in Evanston and in another residence in Wilmette. Grandfather further testified that Grandmother had not worked outside the home for the past twenty years and that, in July 2017, he had paid the mortgage and utilities on the Long Beach Property. According to Grandfather, in July 2017, he had had clothing, tools, and a motorcycle at the Long Beach Property. In addition, Grandfather testified that he had been to the Long Beach Property two or three times between March and July 2017 to either pick up items that belonged to him or to take items to Grandmother. He further testified that there had been no court order in place prohibiting him from going to the Long Beach Property.

[12] Grandfather also testified that, when he and Grandmother had lived together, Milo had attacked and injured Grandmother's small dogs and had been aggressive when people had come to the front door of their residence. Grandfather had previously shared his concerns with Grandmother about Milo's aggressive behavior. In addition, according to Grandfather, he had not known that Ayana would be visiting Grandmother's home in July 2017. Grandfather further testified that, had he known that Ayana would be visiting Grandmother's home, Grandfather would have asked Grandmother to remove Milo from the home during the course of the visit because of his concern for Ayana. According to Grandfather, he had previously spoken about the case with Counsel Riffell and had first spoken about the case with Counsel Wai the day before the deposition. In addition, Grandfather testified that he had just

learned the day before the deposition that Counsel Wai had filed a summary judgment motion on his behalf.

[13] The day after Grandfather's deposition, Counsel Schocke sent Counsel Wai a one-page single-spaced email wherein Counsel Schocke pointed out that Grandfather had testified in his deposition that, at the time of the dog bite incident, Grandfather had been a co-owner of the Long Beach Property. Counsel Schocke further pointed out that Grandfather had testified that, in July 2017, Grandfather had paid for the mortgage and utilities on the Long Beach Property, and that there had been no court order issued that would have prohibited him from going to the Long Beach Property. In addition, Counsel Schocke pointed out that Grandfather had also testified that he had had clothing, tools, and a motorcycle at the Long Beach Property in July 2017. Lastly, and according to Counsel Schocke, most importantly, Grandfather had testified that he had not met Counsel Wai or learned that Counsel Wai had filed a summary judgment motion on his behalf until the day before the deposition.

[14] Based upon these facts, Counsel Schocke accused Counsel Wai of "ma[king] representations about [Grandfather] and on behalf of [Grandfather] in a pleading without ensuring the accuracy of th[o]se representations." (App. Vol. 2 at 154). Counsel Schocke directed Counsel Wai to Indiana Trial Rule 11, which provides that an attorney's signature constitutes his certificate that he has read the pleadings and that, to the best of his knowledge, "there is good ground to support it[.]" In addition, Counsel Schocke directed Counsel Wai to Indiana

Rule of Professional Conduct 1.4, which provides that a lawyer shall promptly inform the client of any decision that requires the client's informed consent, reasonably consult with the client about the means by which the client's objectives will be accomplished, and keep the client reasonably informed about the status of the case.

[15] At the end of the email, Counsel Schocke requested that Counsel Wai withdraw Grandfather's summary judgment motion. In addition, if Counsel Wai did not withdraw Grandfather's summary judgment motion, Counsel Schocke threatened to file a motion for attorney fees and expenses pursuant to INDIANA CODE § 34-52-1-1(b)(1) and (3), which authorizes a trial court to award attorney fees to the prevailing party if the trial court finds that either party brought the action on a frivolous, unreasonable or groundless claim or litigated the claim in bad faith.

[16] That same morning, Counsel Wai responded in an email that he would not be withdrawing Grandfather's summary judgment motion. Counsel Wai specifically noted that, in Grandfather's summary judgment motion, Grandfather had cited Grandfather's answers to interrogatories and Grandmother's affidavit. Counsel Wai further pointed out that, although he had first met Grandfather the day before the deposition, Counsel Wai's law firm had represented Grandfather for two years, and Grandfather had previously spoken to Counsel Riffell about the case. Counsel Wai advised Counsel Schocke that if Counsel Schocke filed a motion seeking costs, Counsel Wai would file a counter-motion seeking costs "in having to respond to [his]

ridiculous motion" because Counsel Wai had not violated Trial Rule 11 or any other ethical or statutory authority. (App. Vol. 2 at 156). Counsel Wai further pointed out that the summary judgment motion was "clearly in [Grandfather's] best interests as a runaway verdict would make him personally responsible for the excess." (App. Vol. 2 at 156). In addition, Counsel Wai told Counsel Schocke that Counsel Wai "would love to hear [Counsel Schocke] try to explain to a judge how a lawyer defending his client to the best of his abilities and based on information provided by the clients is an ethical violation." (App. Vol. 2 at 156).

[17] Counsel Schocke responded by email that, based upon Grandfather's deposition testimony, Grandfather's summary judgment motion was baseless. Counsel Schocke reiterated to Counsel Wai that "an attorney that continues to litigate matters without a good faith basis is subject to sanctions including but not limited to paying the responding party's attorney fees." (App. Vol. 2 at 157). In addition, Counsel Schocke cautioned Counsel Wai that he had filed for attorney fees after responding to frivolous summary judgment motions in the past. Counsel Schocke attached to his responsive email "a copy of [his] most recent order on the subject entered [the previous week.]" (App. Vol. 2 at 157).

[18] Counsel Wai responded by email that he was not withdrawing Grandfather's summary judgment motion and advised Counsel Schocke to let the trial court decide if the motion was baseless. Counsel Wai pointed out that, in the summary judgment motion, Counsel Wai had designated Grandfather's

answers to interrogatories in which Grandfather had stated that he had resided in an apartment in Chicago at the time of the dog bite incident. According to Counsel Wai, case law required control of the premises, which Grandfather had not had at the time of the dog bite incident.

[19] In September 2020, Father filed a response in opposition to Grandfather's summary judgment motion and a motion for attorney fees and costs. In his response to Grandfather's summary judgment motion, Father argued that Grandfather had controlled the Long Beach Property at the time of the dog bite incident and, therefore, owed a duty to Ayana. In his motion for attorney fees and costs, Father stated that Counsel Schocke had "warned [Counsel] Wai on two (2) separate occasions that he should withdraw the pending Ind. T.R. 56 motion for summary judgment because [Grandfather's] deposition testimony [had] contradicted and negated the basis for the motion." (App. Vol 2 at 146). Father argued that, at the conclusion of Grandfather's deposition, "it became quite clear that [Grandfather] was not even being remotely included in his own case, but instead his attorney [Counsel] Wai [had] unilaterally filed a motion to seek summary judgment on attorney [Grandfather's] behalf without [Grandfather's] knowledge, permission, or performing any due diligence." (App. Vol. 2 at 143). Father further argued that Counsel Wai had "continued to maintain the motion knowing full well that it was baseless and in bad faith." (App. Vol. 2 at 147). Father asked the trial court to order Counsel Wai to pay $500 to the trial court and $6,225 in attorney fees to Father. Father also asked the trial court to order Counsel Wai to "repay all hourly attorney fees charged

to his own clients in preparing the frivolous motion for summary judgment." (App. Vol. 2 at 147).

[20] In November 2020, Grandfather filed a twenty-one-page response to Father's motion for attorney fees and costs and a cross-motion for attorney fees and costs. In response to Father's argument that Counsel Wai had not included Grandfather in the case and had filed a summary judgment motion on Grandfather's behalf without Grandfather's knowledge, Grandfather pointed out that Counsel Riffell had had extensive contact with Grandfather at the beginning of the case and had discussed the strategy of the case with him. Specifically, Grandfather's July 2018 answer to Father's complaint alleged that Grandfather had not controlled the Long Beach Property at the time of the dog bite incident. In addition, when Counsel Riffell had submitted Grandfather's answers to interrogatories in January 2019, Counsel Riffell had asked Father to voluntarily dismiss Grandfather from the case based on Grandfather's lack of control of the Long Beach Property at the time of the dog bite incident. Counsel Riffell had further told Father that if he did not voluntarily dismiss Grandfather from the case, Counsel Riffell would file a summary judgment motion on Grandfather's behalf. Grandfather further pointed out that he is an attorney in Chicago with more than fifty years of litigation experience and that Counsel Wai had worked on the case with Counsel Riffell before Counsel Wai had taken over the case in August 2019.

[21] In response to Father's argument that Grandfather's deposition testimony had negated the basis for the summary judgment motion, Grandfather pointed out

that he had never denied that he had owned the Long Beach Property. However, he had always denied that he had controlled that property. Grandfather further pointed out that he had paid the mortgage and utilities for the Long Beach Property in July 2017 because Grandmother had not worked in twenty years and he was the sole breadwinner in the family. According to Grandfather, his continued payment for the property was a manifestation of his ownership, not his control, of the Long Beach Property. Regarding Grandfather's testimony that Grandmother had stayed a few days in their Evanston home and in a property in Wilmette, Grandfather pointed out that this testimony was not in conflict with Grandmother's affidavit wherein she averred that the Long Beach Property was her sole principal residence. In addition, regarding Grandfather's testimony that he had some personal items at the Long Beach Property and that he had visited the property two or three times from March until July 2017 to take things to Grandmother or to pick up his things, Grandfather argued that such minimal contacts with the property did not establish Grandfather's control over it.

[22] Based upon the foregoing, Grandfather argued that Father's motion for attorney fees and costs was groundless and frivolous. Grandfather further asked the trial court to impose "attorney[] fees and costs against [Father's] counsel for having to respond to [Father's] frivolous motion[.]" (App. Vol. 2 at 186).

[23] The trial court held a hearing on the parties' motions in January 2021. Following the hearing, in February 2021, the trial court issued a detailed six-

page order, which included findings of fact and conclusions thereon. In its order, the trial court concluded that Grandfather did not owe a duty to Ayana because he had not controlled the Long Beach Property at the time of the dog bite incident. Accordingly, the trial court granted Grandfather's summary judgment motion. The trial court further concluded that because Father was not a prevailing party, Father was not entitled to attorney fees pursuant to INDIANA CODE § 34-52-1-1(b). The trial court, therefore, denied Father's motion for attorney fees and costs. Regarding Grandfather's motion for attorney fees and costs, the trial court found and concluded as follows:

> 50. Certainly, [Grandfather] ha[s] the right to file a Motion for Partial Summary Judgment and [Father] ha[s] the right to oppose said Motion. A party does not violate I.C. 34-52-1-1(b) simply because it files a motion that is not granted or opposes a motion that is granted. The issue here is whether or not, in light of all of the information and documentation available to [Father] at the time [Father] filed [his] Motion for Attorney Fees and Costs on November 6, 2020, [Father], [himself] violated I.C. 34-52-1-1(b) by alleging [Grandfather's] violation of said statute.
>
> 51. [Father] had in [his] possession as of November 6, 2020, the following:
>
> A. Deposition of [Grandfather]
>
> B. [Grandmother's] Answers to Interrogatories
>
> C. [Grandfather's] Answers to Interrogatories
>
> D. [Grandmother's] Affidavit
>
> 52. In addition to the foregoing and in response to the various concerns raised by [Father's] counsel in support of [his]

> demand that [Grandfather] withdraw [his] Motion for Partial Summary Judgment, [Father's] counsel was in possession of Attorney Wai's emails of August 13, 2020 and August 17, 2020 to Attorney Schocke wherein Attorney Wai identifies the good faith basis upon which he filed [Grandfather's] Motion for Partial Summary Judgment and addresses the other issues raised by [Father's] counsel.
>
> 53. In light of the foregoing, the Court finds that [Father's] filing of [his] Motion for Attorney Fees and Costs on November 6, 2020 was, itself, violative of I.C. 34-52-1-1(b) and that [Grandfather's] Cross Motion for Fees and Costs should be granted.
>
> 54. Based upon the Court's thirty-eight years of private practice prior to assuming the bench, as well as the Fee affidavits submitted by attorneys Schocke and McNamara, the Court takes judicial notice that a reasonable fee for the services necessarily provided on behalf of [Grandfather] by [Grandfather's] counsel responding to [Father's] Motion for Attorney Fees and Costs is $300 per hour, and that the reasonable amount of time required to be devoted by Attorney Wai to this matter is ten (10) [hours] and that a reasonable attorney fee award is in the amount of $3,000.00.

(App. Vol. 2 at 21).

[24] Father now appeals.

Decision

[25] Father argues that the trial court erred in granting Grandfather's summary judgment motion and in ordering him to pay $3,000 of Grandfather's attorney fees. We address each of his contentions in turn.

1. Summary Judgment

[26] Father argues that the trial court erred in granting Grandfather's summary judgment motion. When reviewing the grant of a summary judgment motion, our well-settled standard of review is the same as it is for the trial court. *Goodwin v. Yeakle's Sports Bar and Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). Specifically, we must determine whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. *Id*. The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id*. Once the moving party has met these two requirements, the burden shifts to the non-moving party to demonstrate a genuine issue of material fact by setting forth specifically designated facts. *Id*. In deciding whether summary judgment is proper, we consider only the evidence the parties specifically designated to the trial court. Ind. Trial Rule 56(C), (H). We construe all factual inferences in favor of the nonmoving party and resolve all doubts regarding the existence of a material issue against the moving party. *Carson v. Palombo*, 18 N.E.3d 1036, 1041 (Ind. 2014). "Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows there is no genuine issue of material fact and that the moving party deserves judgment as a matter of law." *Goodwin*, 62 N.E.3d at 386.

[27] In addition, we note that the trial court in this case entered findings of fact and conclusions of law in support of its judgment. Special findings are not required in summary judgment proceedings and are not binding on appeal. *Cruz v. New*

Centaur, LLC, 150 N.E.3d 1051, 1055 (Ind. Ct. App. 2020). However, such findings offer this Court valuable insight into the trial court's rationale for its review and facilitate appellate review. *Id*.

[28] "To prevail on a claim of negligence the plaintiff must show: (1) duty owed to plaintiff by defendant; (2) breach of duty by allowing conduct to fall below the applicable standard of care; and (3) compensable injury proximately caused by defendant's breach of duty." *Goodwin*, 62 N.E.3d at 386. (cleaned up). Issues of duty are generally questions of law for the court to decide. *Olds v. Noel*, 857 N.E.2d 1041, 1043 (Ind. Ct. App. 2006). "Summary judgment in a negligence case is particularly appropriate when the court determines that no duty exists because, absent a duty, there can be no breach, and therefore, no negligence." *Id*. (cleaned up). In addition, to prevail in a dog bite case, a plaintiff must show that the defendant retained control over the property when the dog bite occurred and had actual knowledge that the dog had dangerous propensities. *Baker v. Weather ex rel. Weather*, 714 N.E.2d 740, 741 (Ind. Ct. App. 1999).

[29] Father argues that the trial court erred in granting Grandfather's summary judgment motion because Grandfather "had a duty to Ayana because he owned and exerted control over the Long Beach [Property]." (Father's Br. 11). In support of his argument, Father directs us to Grandfather's deposition testimony, which Father believes "establishe[d] that [Grandfather] owned and exercised substantial control over the Long Beach [Property] during the time of and leading to the dog attack[.]" (Father's Br. 9).

[30] In a premises liability case, whether the defendant owes the plaintiff a duty depends primarily on whether the defendant was in control of the premises when the accident occurred. *Rhodes v. Wright*, 805 N.E.2d 382, 385 (Ind. 2004). "The rationale is to subject to liability the person who could have known of any dangers on the land and therefore could have acted to prevent any foreseeable harm." *Id*. Only the party who controls the land has the right to prevent others from coming onto it. *Id*. at 385-86. Further, "[l]iability for injury ordinarily depends upon the power to prevent injury." *Cox v. Stoughton Trailers, Inc.*, 837 N.E.2d 1075, 1081 (Ind. Ct. App. 2005).

[31] In addition, the simple fact of ownership is not necessarily dispositive of the question of control and the duty that arises therefrom. *Reed v. Beachy Construction Corp.*, 781 N.E.2d 1145, 1150 (Ind. Ct. App. 2002), *trans. denied*. Rather, we have generally "required an owner of property to have some degree of actual control over the property – not merely constructive ability to control – in order for a duty to prevent injury to attach to the owner." *Cox*, 837 N.E.2d at 1082.

[32] For example, in *Reed*, 781 N.E.2d at 1145, Reed was injured while taking a "Parade of Homes" tour of a newly constructed house. Reed filed a premises liability action against both the home builder and the owners of the home, and the trial court granted summary judgment in favor of the homeowners. On appeal, we held that, as a matter of law, the homeowners owed no duty to Reed because, although they had already moved a few items into the home at the time of the accident, they were not living in the home. *Id.* at 1149. We

specifically explained that the homeowners had surrendered control of the home to the builder for purposes of the tour and, therefore, "did not control the premises to the extent a duty to Reed arose." *Id*. at 1150. Accordingly, we affirmed the trial court's grant of summary judgment in favor of the homeowners. *Id*.

[33] Similarly, in *Rider v. McCamment*, 938 N.E.2d 262 (Ind. Ct. App. 2010), Rider was seriously injured when she visited a house that was under construction, leaned over the railing of an unfinished deck, and fell to the ground. Rider filed a premises liability action against property owner and builder McCamment, and the trial court granted summary judgment in favor of McCamment. On appeal, we explained that "the mere fact that McCamment owned the premises [was] not dispositive of the question of possession or control and the resulting duty of care to Rider." *Id*. at 268. Specifically, we pointed out that McCamment had not been in actual possession of the property because he had not been present at the construction site when Rider had fallen off the deck. *Id*. Rather, McCamment had learned that Rider had fallen from the deck only after he had spoken on the telephone with one of the workers. *Id*. Further, McCamment had not been in control of the premises because he had not performed any work on it the day of the accident or any other day over the course of the construction. *Id*. We concluded that, absent the control element, McCamment prevailed on his summary judgment motion because Rider's negligence claim against him failed as a matter of law. *Id*. at 269. We therefore affirmed the trial court's grant of summary judgment in favor of

McCamment. *Id*. *See also Helton v. Harbrecht*, 701 N.E.2d 1265, 1268 (Ind. Ct. App. 1998), *trans. denied* (holding that the builder did not owe a duty of care to a visitor to a construction site because the builder did not exert control over the premises at the time of the visitor's injury; the builder was away from the site for approximately one month and the visitor's son was actually working on the premises on the day of the accident).

[34] Lastly, in *Risk v. Schilling*, 569 N.E.2d 646 (Ind. 1991), Risk was injured while visiting a workshop operated by C.W. Schilling. The workshop was located on property owned by Schilling Farms. Risk filed a premises liability action against Schilling Farms, and the trial court granted Schilling Farms' summary judgment motion. On appeal, the Indiana Supreme Court noted the undisputed fact that C.W. Schilling, not Schilling Farms, had controlled who had entered and exited the workshop at the time that Risk had been injured. The supreme court concluded that, although Schilling Farms owned the property, it owed no duty of care to Risk because it did not control the workshop. *Id.*

[35] Here, our review of the facts that Grandfather designated in support of his summary judgment motion reveals that, although Grandfather and Grandmother jointly owned the Long Beach Property, Grandfather did not have control over it at the time of the dog bite incident. Specifically, Grandfather had surrendered control of the home to Grandmother during the dissolution proceedings and was living in an apartment in Chicago. He also had no control over who entered the Long Beach Property at the time of the dog bite incident. In fact, Grandfather did not know that Ayana was visiting

Grandmother at the Long Beach Property in July 2017. In addition, we note that Grandfather's mortgage and utility payments for the Long Beach Property were a manifestation of his ownership, not his control, of the property. Lastly, Grandfather's storage of some personal items at the Long Beach Property and his minimal contacts with the property to take items to Grandmother or to pick up items were not sufficient to establish that Grandfather controlled the Long Beach Property. Because Grandfather did not have control over the Long Beach Property at the time of the dog bite incident, he did not have a duty to Ayana. Accordingly, the trial court did not err in granting Grandfather's summary judgment motion.

2. Attorney Fees

[36] At the outset, we note that "[p]rofessionalism and civility are not optional behaviors to be displayed only when one is having a good day. Professionalism and civility are the mainstays of our profession and the foundations upon which lawyers practice law. The public expects it. Fellow lawyers expect it. Our profession demands it." *Wisper v. Laney*, 984 N.E.2d 1201, 1203 (Ind. 2012). Filing a groundless request for attorney fees and costs is, in essence, a baseless accusation of unethical conduct aimed at a fellow lawyer. Indiana Rule of Professional Conduct 3.1 prohibits a lawyer from bringing a frivolous or groundless claim. Further, a frivolous or groundless claim may constitute conduct prejudicial to the administration of justice pursuant to Indiana Rule of Professional Conduct 8.4(d). *See In re Oliver*, 729 N.E.2d 582, 586 (Ind. 2000). *See also* Ind. R. Prof. Conduct 3.3 (requiring candor towards the tribunal).

Filing a groundless request for attorney fees and costs is, quite simply, an example of incivility, which is prohibited by the rules of professional conduct, and, as here, can result in fees being assessed against those asserting groundless claims.

[37] We note that Father does not appeal the trial court's denial of his motion for attorney fees and costs. Rather, his sole argument is that the trial court abused its discretion in granting Grandfather's cross-motion for attorney fees and costs and ordering him to pay $3,000 of Grandfather's attorney fees.[2] However, although Father acknowledges that the trial court awarded attorney fees pursuant to INDIANA CODE § 34-52-1-1(b), Father does not set forth the statute in his appellate brief. Father also fails to cite any cases interpreting the statute in support of his argument that the trial court abused its discretion. Father has, therefore, waived appellate review of this issue. *See e.g., Pierce v. State*, 29 N.E.3d 1258, 1267 (Ind. 2015) (explaining that a litigant who fails to support his arguments with appropriate citations to authority and record evidence waives those arguments for appellate review).

[38] Waiver notwithstanding, we find no abuse of the trial court's discretion. The trial court ordered Father to pay Grandfather's attorney fees pursuant to INDIANA CODE § 34-52-1-1, which provides as follows:

---

[2] Father does not challenge the reasonableness of the attorney fees.

> (b) In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the 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.

[39] The trial court's decision to award attorney fees pursuant to INDIANA CODE § 34-52-1-1 is subject to a multi-level review. *In re Moeder*, 27 N.E.3d 1089, 1101 (Ind. Ct. App. 2015), *trans. denied*. First, we review the trial court's findings of fact under the clearly erroneous standard. *Id.* Next, we review *de novo* the court's legal conclusions regarding whether the parties' claim was frivolous, unreasonable, or groundless. *Id*. Finally, we review the trial court's decision to award attorney fees for an abuse of discretion. *Id*. at 1101-02. A trial court abuses its discretion if its decision is clearly against the logic and effect of the facts and circumstances or if the trial court has misinterpreted the law. *Id*. at 1102.

[40] A claim or defense is "frivolous" if it is taken primarily for the purpose of harassment, if the attorney is unable to make a good faith and rational argument on the merits of the action, or if the lawyer is unable to support the action taken by a good faith and rational argument for an extension, modification, or reversal of existing law. *Id*. A claim or defense is "unreasonable" if, based on the totality of the circumstances, including the law

and facts known at the time of filing, no reasonable attorney would consider that claim or defense was worthy of litigation. *Id*. A claim or defense is "groundless" if no facts exist which support the legal claim presented by the losing party. *Id.* Bad faith is affirmatively operating with furtive design or ill will. *Id*. A claim or defense is not groundless or frivolous merely because a party loses on the merits. *Id.*

[41] Broadly stated, INDIANA CODE § 34-52-1-1 strikes a balance between respect for an attorney's duty of zealous advocacy and the important policy of discouraging unnecessary and unwarranted litigation. *Mitchell v. Mitchell*, 695 N.E.2d 920, 924 (Ind. 1998) (citing a prior version of the statute). Subsections (b)(1) and (b)(2) of the statute focus on the legal and factual basis of the claim or defense and the arguments supporting the claim or defense. *Id.* On the other hand, subsection (b)(3), by its terms, requires scrutiny of the motive or purpose of the non-prevailing party. *Id.* Further, because the statute lists the grounds for awarding attorney fees in the disjunctive, a party is required to demonstrate the existence of only one ground in order to justify an award of attorney fees. *Moeder*, 27 N.E.3d at 1102.

[42] Here, although the trial did not specify the statutory subsection that it relied upon to award Grandfather attorney fees, we note that Grandfather argued that Father's motion for attorney fees and costs was groundless because no facts existed to support it. Our review of the trial court's order reveals that the trial court specifically found that Father had in his possession the designated materials supporting Grandfather's summary judgment motion as well as

Counsel Wai's emails, which supported the good faith basis upon which Grandfather had filed the motion. These findings support a conclusion that Father's motion for attorney fees and costs was indeed groundless. Accordingly, the trial court did not abuse its discretion when it granted Grandfather's cross-motion for attorney fees and costs and ordered Father to pay $3,000 of Grandfather's attorney fees.

[43] Affirmed.

Bailey, J., concurs in part and dissents in part in separate opinion.

Crone, J., concurs.

IN THE

COURT OF APPEALS OF INDIANA

Benjamin Bertucci, Individually and Next Best Friend on Ayana Bertucci, a Minor, *Appellant-Petitioners,* v. Donald Bertucci and Anita Remijas, *Appellee-Respondents*.	Court of Appeals Case No. 21A-CT-360

Bailey, Judge, concurring in part and dissenting in part.

[44] In affirming summary judgment in favor of Grandfather, the majority relies on the premise that, "to prevail in a dog[-]bite case, a plaintiff must show that the defendant retained control over the property when the dog bite occurred[.]" Slip op. at 17. To be sure, certain claims turn on whether the defendant controlled the premises at the time of the injury, and I agree with the majority that Grandfather demonstrated entitlement to summary judgment as to those claims of premises liability. However, I cannot say that Grandfather has shown that he should be dismissed from the litigation at this early juncture. That is

because Indiana law also recognizes tort liability for Negligent Entrustment, a legal theory that turns on the defendant's relationship to the instrumentality of the harm—here, the dog—rather than the place where the harm occurred. *See generally Brewster v. Rankins*, 600 N.E.2d 154, 158-59 (Ind. Ct. App. 1992).

[45] *Hardsaw v. Courtney* was a dog-bite case wherein this Court affirmed a judgment against dog owners who had negligently entrusted the care of their dog to a child. 665 N.E.2d 603 (Ind. Ct. App. 1996). In identifying sufficient evidence to support the judgment, this Court noted that, "[u]nlike most cases involving dog bites," Negligent Entrustment "is not based upon a pure negligence theory or upon premises liability." *Id.* at 606. Rather, to prevail under this theory, a plaintiff must show "an entrustment; to an incapacitated person or one who is incapable of using due care; with actual and specific knowledge that the person is incapacitated or incapable of using due care at the time of the entrustment; proximate cause; and, damages." *Brewster*, 600 N.E.2d at 158-59 (involving a claim of negligent entrustment of a golf club). An entrustment is created when a person "give[s] (a person) the responsibility for something[.]" *Entrust*, Black's Law Dictionary (11th ed. 2019). Moreover, tort law recognizes liability for Negligent Entrustment because "[t]here are many situations in which the hypothetical reasonable person would be expected to anticipate and guard against the conduct of others," *i.e.*, "[a]nyone with normal experience is required to have knowledge of the traits and habits of common animals and of other human beings, and to govern accordingly." W. Page Keeton et al., *Prosser and Keeton on Torts* 197-98 (5th ed. 1984) (footnote omitted). Furthermore, as

this Court explained in *Hardsaw*, these types of claims are "fact sensitive and must be resolved by the trier-of-fact on a case-by-case basis." 665 N.E.2d at 608.

[46] In the instant complaint, the Plaintiffs broadly allege that Grandfather and Grandmother "[c]arelessly and negligently failed to leash the dog or otherwise prevent it from attacking the minor plaintiff when [they] knew that the dog would constitute an immediate hazard to the plaintiff[.]" App. Vol. 2 at 56. The Plaintiffs further allege that the Defendants "[c]arelessly and negligently failed to confine their dog" and "[w]ere otherwise careless and negligent[.]" *Id.* These claims encompass a theory of Negligent Entrustment. Moreover, on appeal, the Plaintiffs maintain that the dog was a marital asset and that Grandfather had a sufficient relationship with the dog—with knowledge of the dog's aggressive tendencies—such that he owed a duty of care to the victim. *See, e.g.*, Br. of Appellant at 10 (asserting that Grandfather "controlled . . . [the dog] sufficiently to proscribe [*sic*] a duty of care to his . . . granddaughter[.]").

[47] Here, Grandfather has not shown an absence of triable issues as to whether he took adequate steps to prevent the attack based upon his relationship to the dog and his special knowledge of both the dog and of Grandmother. Indeed, based upon the designated evidence, a fact-finder could determine that Grandfather is liable because (1) the dog was marital property, (2) Grandfather was aware of the dog's aggressive tendencies, having lived with the dog for more than six years; (3) Grandfather had voiced concerns to Grandmother about the aggression; (4) Grandfather and Grandmother had only recently separated; and

(5) Grandfather allowed the dog to live with Grandmother despite knowing that Grandmother could not control the dog. Notably, Grandfather stated that, had he known the victim would be visiting Grandmother, he would have intervened to protect the child, telling Grandmother to bring the dog to his residence.

[48] Of course, a fact-finder could instead determine that Grandfather exercised due care under the circumstances, or that any entrustment was too remote to be the proximate cause of the injuries. Regardless, these are fact-sensitive inquiries that must be reserved for trial. *See, e.g.*, *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014) (noting that "Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims"). Here, liability cannot be established or avoided as a matter of law.

[49] Ultimately, our Supreme Court has cautioned that "[s]ummary judgment is rarely appropriate in negligence cases[.]" *Kramer v. Catholic Charities of Dicoese of Fort Wayne-South Bend, Inc.*, 32 N.E.3d 227, 231 (Ind. 2015). This case is no exception. All in all, although I concur that Grandfather is entitled to partial summary judgment as to claims of premises liability, for the foregoing reasons, I respectfully dissent from the decision to wholly affirm summary judgment.[3]

---

[3] As to fees and costs, under my approach, there would be no justification for the award to the Defendants. The court stated that it was awarding fees and costs under Indiana Code Section 34-52-1-1, which permits such an award only to the prevailing party. Neither Grandfather nor Grandmother are prevailing parties.