

# MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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# IN THE COURT OF APPEALS OF INDIANA

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Joseph Cline,  
*Appellant-Plaintiff,*

v.

FitzMark, Inc.,  
*Appellee-Defendant*

November 7, 2022

Court of Appeals Case No.  
22A-MI-777

Appeal from the Marion Superior  
Court

The Honorable John F. Hanley,  
Judge

The Honorable Christopher B.  
Haile, Magistrate

Trial Court Cause No.  
49D11-2004-MI-13750

**Crone, Judge.**

## Case Summary

- [1] Joseph Cline appeals the award of attorney's fees to FitzMark, Inc. FitzMark requests appellate attorney's fees. We affirm the trial court's award of attorney's fees and remand for a determination of an appropriate amount of appellate attorney's fees.

## Facts and Procedural History

- [2] In April 2020, Cline filed a complaint against FitzMark alleging that he had been employed by FitzMark and that FitzMark had failed to pay his wages. Relying on this factual basis, he alleged claims for unpaid wages, breach of contract, unjust enrichment, breach of the covenant of good faith and fair dealing, and conversion. FitzMark filed an answer denying Cline's factual allegations and legal claims and raising as affirmative defenses that Cline failed to state claims upon which relief can be granted.
- [3] As part of discovery, Cline requested the production of documents from FitzMark such as his personnel file and payroll records and FitzMark's compensation policies and employee handbook. FitzMark responded that it had no documents pertaining to Cline because he never was an employee of or never had a contractual relationship with FitzMark.
- [4] Cline then sought a second round of written discovery and requested additional documents. In April 2021, Cline filed a motion to compel discovery. FitzMark filed a response and a motion for a protective order. Following a hearing, the trial court denied Cline's motion to compel.

- [5] On May 26, 2021, FitzMark filed a motion for summary judgment on all counts and requested attorney's fees pursuant to Indiana Code Section 34-52-1-1. In support of its summary judgment motion, FitzMark argued that the undisputed material evidence established that it never engaged, hired, contracted with, or requested that Cline perform services and that Cline never actually performed services for FitzMark. FitzMark designated Cline's complaint, its discovery responses, and the affidavit of FitzMark's president, Scott Fitzgerald. Cline filed no response or opposition to FitzMark's summary judgment motion.
- [6] On June 30, 2021, FitzMark filed a motion for entry of judgment on its summary judgment motion. The same day, Cline filed a motion to dismiss the action without prejudice with each side bearing its own costs and expenses. FitzMark filed an objection to Cline's motion to dismiss. In August 2021, the trial court issued orders granting FitzMark's motion for summary judgment and denying Cline's motion to dismiss.
- [7] In September 2021, FitzMark filed a motion for attorney's fees pursuant to Section 34-52-1-1. Appellee's App. Vol. 3 at 2. FitzMark contended that Cline never had a factual basis to support his contention that he was an employee of FitzMark, knew or should have known that he was never employed by FitzMark, and if he had not known, he became aware of it when FitzMark responded to his first discovery requests, yet he continued to litigate the matter. FitzMark further asserted that it was compelled to file for summary judgment to bring the matter to a close, and Cline's failure to respond to it indicated that he had continued to litigate after it was clearly frivolous and groundless.

[8] Cline filed an opposition to the motion, arguing that an award of attorney’s fees was not appropriate because he had a good faith belief that FitzMark was the alter ego of FitzMark-Chicago, Inc., an Illinois company with whom he had been employed and that was involuntarily dissolved by the State of Illinois, and therefore FitzMark was liable to Cline for unpaid wages. *Id.* at 87. Cline declared that he had brought a claim for unpaid wages against FitzMark-Chicago, its former CEO Mark Hurley, and Does Defendants in federal district court in Illinois under the Fair Labor Standards Act and the Illinois Wage Payment and Collection Act. In support of his claim that FitzMark was the alter ego of FitzMark-Chicago, Cline attached exhibits including his affidavit, a letter dated March 20, 2020, from him to Scott Fitzgerald, an Illinois Certificate of Good Standing for FitzMark-Chicago, website screenshots of “LoadMatch” and Mark Hurley’s LinkedIn page, and his federal district court complaint. Appellant’s App. Vol. 2 at 9.

[9] FitzMark filed a reply in support of its motion for attorney’s fees, contending that Cline’s opposition was unsupported by any evidence generated during the litigation and was based on a new legal theory that had not been advanced during the underlying proceedings. Appellee’s App. Vol. 3 at 128. On October 14, the trial court granted FitzMark’s motion for attorney’s fees. FitzMark filed a notice of submission of supplemental attorney’s fees.

[10] Cline then filed a motion for relief from the order awarding attorney fees. *Id.* at 146. FitzMark file a response to Cline’s motion. The trial court denied Cline’s motion for relief. FitzMark filed a motion for supplemental attorney’s fees and

for entry of final judgment. On March 8, 2022, the trial court issued an order granting FitzMark’s motion, entering final judgment in favor of FitzMark on all of Cline’s claims, and ordering Cline to pay FitzMark attorney’s fees of \$33,660.50. This appeal ensued.

## **Discussion and Decision**

### **Section 1 – The trial court did not abuse its discretion by awarding FitzMark attorney’s fees.**

[11] “Indiana follows the American Rule, whereby parties are required to pay their own attorney’s fees absent an agreement between the parties, statutory authority, or other rule to the contrary.” *Lockett v. Hoskins*, 960 N.E.2d 850, 852 (Ind. Ct. App. 2012) (citation and quotation marks omitted). Indiana Code Section 34-52-1-1(b) permits a trial court to award attorney’s fees to a prevailing party in a civil case if the losing 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.

Section 34-52-1-1(b) “places an obligation on litigants to investigate the legal and factual basis of the claim when filing and to continuously evaluate the merits of claims and defenses asserted throughout litigation.” *Staff Source, LLC*

*v. Wallace*, 143 N.E.3d 996, 1008 (Ind. Ct. App. 2020) (quoting *Landmark Legacy, LP v. Runkle*, 81 N.E.3d 1107, 1116-17 (Ind. Ct. App. 2017)).

[12] We review the trial court’s decision to award attorney’s fees for an abuse of discretion, which occurs “if the decision clearly contravenes the logic and effect of the facts and circumstances or if the trial court has misinterpreted the law.” *Purcell v. Old Nat’l Bank*, 972 N.E.2d 835, 843 (Ind. 2012). Here, the trial court granted FitzMark’s motion for attorney’s fees without making special findings of fact. In such cases, “we look to the basis of the prevailing party’s petition and view the court’s order as an implicit legal conclusion consistent with the main thrust of the petition—that the claim or defense at issue was frivolous, unreasonable, groundless, or litigated in bad faith.” *R.L. Turner Corp. v. Town of Brownsburg*, 963 N.E.2d 453, 461 (Ind. 2012). In its motion, FitzMark asserted that an award of attorney’s fees was warranted based on the first two prongs of Section 34-52-1-1(b), namely that Cline brought an action on claims that were frivolous, unreasonable, or groundless and continued to litigate the action after his claims clearly became frivolous, unreasonable, or groundless.

[13] FitzMark asserts that Cline’s legal claims were unreasonable and groundless. “A claim is unreasonable if, based upon the totality of the circumstances, including the law and facts known at the time, no reasonable attorney would consider the claim justified or worthy of litigation.” *Dunno v. Rasmussen*, 980 N.E.2d 846, 850-51 (Ind. Ct. App. 2012) (citation and quotation marks omitted). “A claim or defense is ‘groundless’ if no facts exist which support the

legal claim relied on and presented by the losing party.” *Kitchell v. Franklin*, 26 N.E.3d 1050, 1057 (Ind. Ct. App. 2015), *trans. denied*.

[14] Cline argues that the award of attorney’s fees is inappropriate because he had a good faith belief that FitzMark was the successor in interest of FitzMark-Chicago and thus was liable for his unpaid wages. Cline did not advance the legal theory that FitzMark was the alter ego of FitzMark-Chicago or proffer evidence in support of that theory until after the case was decided on the merits and FitzMark moved for attorney’s fees. Cline does not point to any authority to support the notion that his new legal theory and the exhibits offered in support should be considered after a determination on the merits.<sup>1</sup>

[15] All Cline’s legal claims were based on the allegation that he was an employee of FitzMark. In its answer, FitzMark denied that Cline was ever its employee. In its discovery responses, FitzMark maintained that Cline was never an employee. FitzMark was compelled to move for summary judgment on the basis that Cline was never an employee of FitzMark and designated evidence supporting that factual assertion. Cline did not respond to FitzMark’s motion, and only then filed a motion to dismiss, but did not provide any reason for the motion. Thus, during the proceedings on the merits of the action, Cline knew or should have known that he had not been an employee of FitzMark, yet he continued to litigate. Further, Cline produced no evidence to support his legal

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<sup>1</sup> Further, whether the exhibits constitute admissible evidence has not been established.

claims. Accordingly, the trial court’s implicit finding that Cline’s claims were unreasonable and groundless does not clearly contravene the logic and effect of the facts and circumstances. We conclude that the trial court did not abuse its discretion by awarding FitzMark attorney’s fees. *See In re Moeder*, 27 N.E.3d 1089, 1102-03 (Ind. Ct. App. 2015) (concluding trust beneficiary’s breach of fiduciary duty claim against trustee was groundless because beneficiary presented no evidence of legal wrongdoing), *trans. denied*; *Staff Source*, 143 N.E.3d at 1011 (concluding that claims of breach of contract and tortious interference with a business relationship were groundless because there was no evidence that employee agreement was in effect).

## **Section 2 – Appellate attorney’s fees are warranted.**

[16] In its brief, FitzMark asks this Court to award it attorney’s fees for defending against Cline’s appeal. Indiana Appellate Rule 66(E) authorizes this Court to “assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court’s discretion and may include attorneys’ fees.” Generally, “a discretionary award of damages has been recognized as proper when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay.” *Orr v. Turco Mfg. Co.*, 512 N.E.2d 151, 152 (Ind. 1987). “In considering a request for appellate attorney’s fees, we use extreme restraint because of the potential chilling effect upon the exercise of the right to appeal.” *Moeder*, 27 N.E.3d at 1103.



[17] Indiana appellate courts have formally categorized claims for appellate attorney fees into substantive and procedural bad faith claims. *Landmark*, 81 N.E.3d at 1119.

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, 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 fact[s] 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. Even if the appellant's conduct falls short of that which is deliberate by design, procedural bad faith can still be found.

*Id.* (citations and quotation marks omitted).

[18] FitzMark asserts that Cline's contentions are devoid of plausibility. As he did in his opposition to FitzMark's motion for attorney fees, Cline argues on appeal that an award of attorney fees is improper because he had a good faith belief that FitzMark was the alter ego of FitzMark-Chicago. Yet, the law is clear that a groundless claim is one where no facts exist which support the legal claim relied on and presented by the losing party. Prior to the ruling on the merits of his claims, he did not advance his alter ego argument as a basis for liability or introduce evidence to support it. On appeal, he presents no argument or citations to authority that a party may present a new legal theory and new evidence in support of that legal theory after a ruling on the merits to avoid an

award of attorney's fees. Accordingly, Cline's argument is devoid of plausibility.

[19] We also note that Cline has violated numerous appellate rules. His brief is in violation of Indiana Appellate Rule 46(A) because the statement of the case does not set forth the course of the proceedings relevant to the issue presented and there is no statement of the facts. He merely sets forth the factual background to support his legal theory that FitzMark is the alter ego of FitzMark-Chicago. His appendix is in violation of Appellate Rule 50 because it does not include any of the required contents; rather, it contains only the exhibits he submitted in support of his opposition to FitzMark's motion for attorney fees. FitzMark provided the chronological case summary and the pleadings, motions, and rulings that were necessary for the resolution of the issue on appeal. We find that attorney's fees are warranted based on both substantive and procedural bad faith. We remand this cause to the trial court for a determination of reasonable appellate attorney fees to be awarded to FitzMark.

[20] Affirmed and remanded.

May, J., and Weissmann, J., concur.