MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

Marcie Gosnell,
Appellant-Defendant

v.

Matthew Gosnell,
Appellee-Plaintiff

April 30, 2024

Court of Appeals Case No.
23A-PL-2436

Appeal from the Madison Circuit Court

The Honorable Mark K. Dudley, Judge

Trial Court Cause No.
48C06-2304-PL-000039

Memorandum Decision by Judge Felix
Chief Judge Altice and Judge Bradford concur.

Felix, Judge.

Statement of the Case

[1] In 2023, Matthew Gosnell sued his sister Marcie Gosnell regarding a dispute over real estate they inherited from their mother. The trial court ordered the parties to mediate Matthew's partition causes of action, and that mediation was successful, with the parties signing a settlement agreement. That agreement in part required Marcie to convey certain real estate to Matthew and sell other real estate. After mediation, a disagreement arose regarding certain terms of the settlement agreement, and the parties were unable to resolve their differences. Because Marcie had yet to fulfill her obligations under the settlement agreement despite a looming tax sale of the real estate due to her repeated failure to pay real estate taxes, Matthew filed an emergency motion to enforce the terms of the settlement agreement. The trial court granted Matthew's motion and awarded him attorneys' fees under Indiana Alternative Dispute Resolution ("ADR") Rules 2.7(E)(3) and 2.10. Marcie now appeals, raising two issues for our review, which we restate as follows:

1. Whether the trial court clearly erred by enforcing the signed settlement agreement pursuant to ADR Rule 2.7(E)(3); and
2. Whether the trial court abused its discretion by sanctioning Marcie pursuant to ADR Rules 2.7(E)(3) and 2.10.

[2] We affirm, grant Matthew's request for appellate attorneys' fees, and remand for proceedings to determine appropriate fees.

Facts and Procedural History

[3] Matthew and Marcie are siblings and children of Marilyn Jo Gosnell and Lestes Gosnell. Lestes died intestate in 2005, and Marilyn Jo died testate in 2013. When she died, Marilyn Jo held title in fee simple to approximately 18 parcels of real property (the "Gosnell Properties"), including commercially farmed real estate, commercial real estate, residential rental real estate, and residential real estate. As the only beneficiaries of Marilyn Jo's estate, Matthew and Marcie each received a one-half interest in all of the Gosnell Properties.

[4] On January 26, 2023, Marcie filed a petition for a protection order ("PO") against Matthew in Cause 48C04-2301-PO-000074 relating to an ongoing disagreement concerning the Gosnell Properties (the "PO Cause").[1] On March 10, 2023, the PO court granted Marcie's petition and enjoined Matthew from communicating with Marcie or being near her until November 15, 2023.

[5] On April 5, 2023, Matthew sued Marcie, among others, in Cause 48C06-2304-PL-000039 (the "Real Estate Cause") for breach of fiduciary duty and theft, and he requested appointment of a receiver, an accounting, and partition and sale of the Gosnell Properties. Matthew alleged in his complaint that "[s]ince at least December 29, 2013, Marcie has exercised exclusive control, despite protest, over the Gosnell [Properties] and refused to provide Matthew with a proper

[1] Pursuant to Indiana Appellate Rule 27, we have taken judicial notice of the record in the PO Cause because neither party provides in their appendices any documents relating to the PO Cause despite their relevance to the issues on appeal. *See* Ind. Appellate Rule 50(A); Appellant's App Vol. II at 17–18; Appellant's Br. at 24–27; Appellant's Reply Br. at 10–11; Appellee's Br. at 7–8, 24–29.

accounting of the business dealings relating to the Gosnell [Properties]." Appellant's App. Vol. II at 23. Matthew also claimed that, among other things, Marcie failed or refused to timely pay real estate taxes on the Gosnell Properties, resulting in a total tax bill of more than $300,000 and at least one property being sold at tax sale.

[6] On May 25, 2023, the trial court referred Matthew's partition causes of action to mediation. On June 2, 2023, Marcie filed a counterclaim against Matthew in the Real Estate Cause for breach of fiduciary duty, conversion and theft, and violation of the PO she obtained in the PO Cause; she also requested an accounting and a preliminary injunction to preserve the status quo. Matthew filed a motion to dismiss Marcie's cause of action for his alleged violation of the PO and her request for a preliminary injunction, and the trial court granted Matthew's motion.

[7] Matthew also filed a petition to convey certain parcels of the Gosnell Properties, and the trial court granted that petition after a hearing. Subsequently, on July 26, 2023, Marcie filed a Notice of Mandatory Interlocutory Appeal with this court in Cause 23A-PL-1738 (the "First Appeal").[2]

[2] Pursuant to Appellate Rule 27, we have taken judicial notice of the filing date of this Notice of Mandatory Interlocutory Appeal as Marcie fails to provide a copy of it in her appendix, *see* Appellant's App. Vols. I–IV, and Matthew provides only an unfiled copy of it in his appendix, Appellee's App Vol. II at 22–25.

[8] On August 3, 2023, the parties mediated the partition causes of action and eventually reached an agreement that was reduced to writing and signed by Marcie, Matthew, and their attorneys (the "Binding Agreement"). The relevant terms of the Binding Agreement are as follows:

> BINDING AGREEMENT AS TO MATERIAL TERMS
>
> Re: Gosnell v. Gosnell, et al.
>
> Cause No.: 48C06-2304-PL-000039
>
> The Parties concluded the mediation session with a compromise and settlement of all disputes arising from the above-referenced matter, as follows:
>
> 1. The Parties enter into this settlement intending it to be binding and to comply with ADR Rule 2.7E. Final drafting of formal settlement documents will be done forthwith by lawyers representing the parties.
>
> * * *
>
> 3. The Parties agree to each pay 50% of the mediation fees in this matter.
>
> 4. The Parties agree to sell Anderson Park as soon as possible, of which the sale proceeds shall be used in the following order:
>
> a. pay all outstanding property taxes/fees on Anderson Park;

b. pay off the mortgage related to Marcie's residence and farmland;

c. pay all outstanding property taxes/fees on the Hardware and Office properties;

d. split the remaining proceeds between Marcie and Matt with the exception that Marcie shall receive $10,000 of Matt's share.

If there are insufficient proceeds from the sale of Anderson Park to accomplish a–d above in their entirety, the balance of those payments shall come from the net proceeds from the sale of the Hardware properties discussed in Paragraph 5 below.

5. The Parties agree to sell the Hardware and Office properties as soon as possible and the net proceeds shall be split evenly between Marcie and Matt. Matt agrees that Marcie will sell the Hardware Store inventory separately and she will receive 100% of those proceeds.

6. The Parties agree to sell the 3rd Street vacant lot and the net proceeds shall be split evenly between Marcie and Matt.

7. Matt agrees that Marcie shall receive 100% of the following properties:

a. Marcie's residence (identified in the Complaint as "Parcel B");

b. Alexandria Park, including Matt's share of the tax sale parcel.

8. The Parties agree to split the remaining farmland as follows:

a. Marcie will receive the northside of the farmland, which is comprised of approximately 105 acres to the north side of 800 North;

b. Matt will receive the remaining farmland of approximately 173 acres.

9. Marcie agrees that Matt shall receive 100% of the following properties:

a. House at 609 Canal;

b. Duplex at 208 Willow;

c. Duplex at 2200 E. 1100;

d. Duplex at 601–603 Canal;

e. Duplex at 602–604 Canal;

f. Duplext [sic] at 606–608 Canal.

10. The Parties agree to a full, mutual release of any and all claims between them and/or alleged in the above-reference lawsuit.

11. The Parties agree to execute a stipulation of dismissal with prejudice in this matter upon consummation of the above settlement terms.

> The Parties agree and accept the above settlement terms this 3rd day of August, 2023.

Appellant's App. Vol. II at 19–20.

[9] After mediation, the parties began negotiating formal settlement documents as required by Paragraph 1 of the Binding Agreement, but a dispute arose regarding the terms of those documents and negotiations broke down. On September 14, 2023, Matthew filed an emergency motion to enforce the Binding Agreement pursuant to ADR Rules 2.7 and 2.10 (the "Emergency Motion"). As of that date, Marcie had not performed any of her obligations under the Binding Agreement, and the next tax sale was set for October 10, 2023. Due to the significant outstanding tax bill, which was to be satisfied in part by the sale of certain real estate pursuant to the Binding Agreement, Matthew alleged that he "face[d] the real and significant potential of losing more [of the Gosnell Properties] to tax sale." Appellant's App. Vol. II at 215. Matthew thus requested, among other things, the Court enter the Binding Agreement as a final judgment and order Marcie to pay Matthew's attorneys' fees associated with mediation, post-mediation negotiations, and the Emergency motion.

[10] On September 18, 2023, Marcie filed a written objection to the Emergency Motion.[3] On October 2, 2023, Marcie filed a motion to dismiss the First Appeal without prejudice.[4] Two days later, this court denied Marcie's motion, and Marcie refiled her motion but changed her request to dismissal with prejudice.[5] On October 5, 2023, the trial court held a hearing on the Emergency Motion. During that hearing, both Matthew and Marcie requested the trial court enforce the Binding Agreement as written. Tr. Vol. II at 36, 46, 48, 64, 68, 69, 73–74. On October 11, 2023, this court granted Marcie's motion and dismissed the First Appeal with prejudice.

[11] On October 13, 2023, the trial court granted the Emergency Motion. The trial court attached the Binding Agreement to its order, and it entered the following relevant findings and conclusions:

> Matthew and Marcie also have a protective order issued in cause number 48C04-2301-PO-74. . . . As of the date of Matthew's filing of [the Emergency Motion], Marcie had not dismissed her interlocutory appeal, nor the protective order case. . . .

---

[3] Pursuant to Appellate Rule 27, we have taken judicial notice of the filing date of Marcie's written response to the Emergency Motion because Marcie fails to provide a filed copy thereof in her appendix. *See* Appellant's App. Vol. IV at 9–13.

[4] Pursuant to Appellate Rule 27, we have taken judicial notice of the filing date of Marcie's first motion to dismiss the First Appeal because Marcie fails to provide a copy of it in her appendix, *see* Appellant's App. Vols. I–IV, and Matthew provides only an unfiled copy of it in his appendix, Appellee's App Vol. II at 28.

[5] Pursuant to Appellate Rule 27, we have taken judicial notice of our order denying Marcie's first motion to dismiss her First Appeal and her second motion to dismiss the same because both parties fail to include copies thereof in their appendices despite their relevance to the issues on appeal. *See* Ind. Appellate Rule 50(A); Appellant's Br. at 31–32; Appellee's Br. at 24–29.

* * *

In this case, Marcie failed to:

1. Transfer the six properties listed in paragraph 9.

2. Failed to dismiss the Court of Appeals case.

3. Failed to dismiss the protective order case.

4. Failed to put up for sale the hardware and office inventory.

5. Failed to pay her half of the mediation fees.

Marcie failed to perform her promises under the mediation agreement.

The court enters final judgment on the parties' [Binding] Agreement. The [Binding] Agreement is attached as Exhibit 1 to this order and final judgment. The court further orders:

1. Marcie is to pay Matthew 50% of the mediation fees within 3 business days.

2. Marcie is to transfer the six properties listed in paragraph 9 to Matthew within 10 days.

3. Marcie to dismiss the protective order case within 3 business days.

4. Marcie to put up for sale the hardware and office inventory within 10 days.

* * *

> 6. Marcie is to pay Matthew attorney fees related to the mediation and the filing of the [Emergency Motion]. The amount of fees is subject to further evidence and argument.

Appellant's App. Vol. II at 17–18 (footnote omitted). In a footnote, the trial court stated that it received notice after the October 5 hearing that this court dismissed the First Appeal. *Id.* at 17 n.1. Marcie now appeals from the trial court's October 13 order.

Discussion and Decision

Standard of Review

[12] The trial court here entered findings of fact and conclusions of law sua sponte, so we review issues covered by the trial court's order for clear error, *Salyer v. Washington Regular Baptist Church Cemetery*, 141 N.E.3d 384, 386 (Ind. 2020) (citing *Town of Fortville v. Certain Fortville Annexation Territory Landowners*, 51 N.E.3d 1195, 1198 (Ind. 2016)), which involves "a two-tiered standard of review that asks whether the evidence supports the findings, and whether the findings support the judgment," *Steele-Giri v. Steele*, 51 N.E.3d 119, 123 (Ind. 2016) (citing *In re S.D.*, 2 N.E.3d 1283, 1287 (Ind. 2014)). We will set aside the trial court's findings and conclusions only if a review of the record leaves us "with the firm conviction that a mistake had been made." *Salyer*, 141 N.E.3d at 386 (citing *Fortville*, 51 N.E.3d at 1198). We review any issue not covered by the findings "under the general judgment standard," which means we will

affirm "on any legal theory supported by the evidence." *Steele-Giri*, 51 N.E.3d at 123–24 (citing *S.D.*, 2 N.E.3d at 1287). Additionally, we review questions of law such as contract interpretation de novo. *Land v. IU Credit Union*, 218 N.E.3d 1282, 1286 (Ind. 2023) (citing *Lake Imaging, LLC v. Franciscan All., Inc.*, 182 N.E.3d 203, 206 (Ind. 2022)), *aff'd on reh'g*, 226 N.E.3d 194 (Ind. 2024).

1. The Trial Court Did Not Clearly Err by Enforcing the Binding Agreement Pursuant to ADR Rule 2.7

[13] Marcie contends that the trial court erred when it granted the Emergency Motion. Notably, both at the hearing on the Emergency Motion and on appeal, Marcie states she has no objection to the trial court enforcing the Binding Agreement. Tr. Vol. II at 46, 48, 73–74; Appellant's Br. at 13, 15, 19. She also concedes that the Binding Agreement is unambiguous and that "[n]o parol evidence was offered or considered at the hearing which might have contradicted, varied or added to the terms of the [Binding Agreement]." Appellant's Br. at 16.

[14] As the Indiana Supreme Court has explained:

> Indiana strongly favors settlement agreements. *Scott v. Randle*, 697 N.E.2d 60, 65 (Ind. Ct. App. 1998). And it is established law that if a party agrees to settle a pending action, but then refuses to consummate his settlement agreement, the opposing party may obtain a judgment enforcing the agreement. *Klebes v. Forest Lake Corp.*, 607 N.E.2d 978, 982 (Ind. Ct. App. 1993); *Brant Constr. Co. v. Lumen Constr. Inc.*, 515 N.E.2d 868, 876 (Ind. Ct. App. 1988).

Georgos v. Jackson, 790 N.E.2d 448, 453 (Ind. 2003). This policy is embodied by ADR Rule 2.7(E)(3), which states, "In the event of any breach or failure to perform under the agreement, upon motion, and after hearing, the court may impose sanctions, including entry of judgment on the agreement."

[15] The parties entered into the Binding Agreement with the intention that it would be "binding" and that it "compl[ies] with ADR Rule 2.7(E)." Appellant's App. Vol. II at 19. ADR Rule 2.7(E) agreements "are governed by the same general principles of contract law as any other agreement." *Georgos*, 790 N.E.2d at 453 (citing *Ind. State Highway Comm'n v. Curtis*, 704 N.E.2d 1015, 1018 (Ind. 1998)). For instance, "[w]hen the parties to an agreement do not fix a concrete time for performance, the law implies a reasonable time." *Harrison v. Thomas*, 761 N.E.2d 816, 819 (Ind. 2002) (citing *Epperly v. Johnson*, 734 N.E.2d 1066, 1072 (Ind. Ct. App. 2000)). What constitutes a reasonable time is an issue of fact, *id.* (citing *In re Est. of Moore*, 714 N.E.2d 675, 677 (Ind. Ct. App. 1999)), that "depends on the subject matter of the contract, the circumstances attending performance of the contract, and the situation of the parties to the contract," *id.* (citing *Epperly*, 734 N.E.2d at 1072).

[16] Marcie argues that the trial court clearly erred by (1) ordering her to comply with Paragraph 9 of the Binding Agreement without also ordering Matthew to comply with Paragraph 7(a); (2) finding Marcie failed to dismiss the First Appeal; and (3) finding and concluding that Marcie was obligated to dismiss the PO Cause and that she failed to dismiss the PO Cause. She also argues the

issue of her failure to pay the mediator's fee is moot. We address each argument in turn.

[17] First, Marcie contends the trial court erred by requiring her to transfer the six properties to Matthew without also requiring Matthew to convey Marcie's house to her. Marcie does not support this argument with cogent reasoning, but we nonetheless choose to address its merits. *See Pierce v. State*, 29 N.E.3d 1258, 1267 (Ind. 2015). The Binding Agreement clearly requires Marcie to convey six specific properties to Matthew and clearly requires Matthew to convey Marcie's residence to her. By entering final judgment on the Binding Agreement, the trial court enforced both obligations. The only difference between these two obligations as a result of the trial court's order is Marcie now has a 10-day deadline to convey the six properties to Matthew, and Matthew has a reasonable time to convey Marcie's house to her, *see Harrison*, 761 N.E.2d at 819 (citing *Epperly*, 734 N.E.2d at 1072). Because Marcie does not challenge the trial court's deadlines for performance of these obligations, we cannot say the trial court erred by enforcing the Binding Agreement and expressly calling out certain terms with which Marcie needs to comply.

[18] Second, Marcie alleges the trial court erred by acknowledging in its order that this court dismissed Marcie's First Appeal yet still found she failed to do so. The trial court specifically found that as of September 14, 2023—the date Matthew filed the Emergency Motion—Marcie had not dismissed the First Appeal. In fact, the record shows that Marcie did not file her first motion to dismiss the First Appeal until October 2, 2023, nearly two months after the

parties signed the Binding Agreement and just three days before the Emergency Motion hearing. Marcie filed her second motion to dismiss the First Appeal the day before the Emergency Motion hearing. Accordingly, we cannot say the evidence does not support the trial court's finding that Marcie failed to dismiss the First Appeal.

[19] Third, Marcie alleges the trial court erred by (a) finding and concluding the Binding Agreement required Marcie to dismiss the PO Cause and (b) finding she failed to obtain that dismissal. Again, Marcie fails to support these arguments with cogent reasoning, but we choose to exercise our discretion to address their merits. *See Pierce*, 29 N.E.3d at 1267. Marcie agreed to release "any and all claims" against Matthew and "any and all claims" concerning this case. Appellant's App. Vol. II at 20. That clearly includes both the First Appeal and the PO Cause.[6] *See Bank One, Nat'l Ass'n v. Surber*, 899 N.E.2d 693, 702 (Ind. Ct. App. 2009) (quoting *Est. Spry v. Greg & Ken, Inc.*, 749 N.E.2d 1269, 1273 (Ind. Ct. App. 2001)) ("Language that releases 'all' people is clear unless other terms in the instrument are contradictory."). Thus, the trial court did not

[6] Marcie argues for the first time in her reply brief that the PO Cause "is not an action under which Marcie could prosecute to recovery of damages" such that it was included within the Binding Agreement's release provision. Appellant's Reply Br. at 11. Because Marcie did not make this argument in her opening brief, she has waived it. *See* App. R. 46(C); *Curtis v. State*, 948 N.E.2d 1143, 1148 (Ind. 2011) (citing App. R. 46(C)); *United States Gypsum, Inc. v. Ind. Gas Co.*, 735 N.E.2d 790, 797 n.5 (Ind. 2000) (citing *Gray v. State*, 593 N.E.2d 1188, 1191 (Ind. 1992)). We therefore assume without deciding that the PO Cause is subject to the Binding Agreement's release provision.

err by finding and concluding that the Binding Agreement required Marcie to dismiss the PO Cause.

[20] Nevertheless, Marcie claims she fulfilled her obligation to dismiss the PO Cause based on the trial court's July 2023 dismissal of her counterclaim against Matthew related to the PO Cause.[7] Our review of the record in the PO Cause reveals that Marcie never filed or made a motion to dismiss it. In fact, after the October 5 hearing in the Real Estate Cause, Marcie actually filed a motion to extend the protections of the PO beyond its November 2023 expiration date. Matthew was the one who notified the PO court of the trial court's October 13 order in the Real Estate Cause, and the PO court thereafter allowed the PO to expire on its own terms. Therefore, the evidence supports the trial court's finding that Marcie failed to dismiss the PO Cause.

[21] Finally, Marcie alleges that "[t]he payment of the mediator's fee is now moot." Appellant's Br. at 32. Marcie not only fails to support this argument with cogent reasoning, but she also fails to support with citations to authorities or the record, all of which violates Appellate Rule 46(A)(8)(a). However, we choose to address the merits of this claim. *See Pierce*, 29 N.E.3d at 1267. To the extent Marcie is attempting to challenge the trial court's finding regarding her failure to pay mediation fees, there is no evidence in the record that Marcie paid those fees prior to the hearing. In fact, Marcie's counsel conceded at the Emergency

[7] As noted above, pursuant to Appellate Rule 27, we have taken judicial notice of the record in the PO Cause because neither party includes relevant documents therefrom in their appendices. *See* App. R. 50(A).

Motion hearing that Marcie had not yet paid her portion of the mediator's fee. Tr. Vol. II at 53. Further, ADR Rule 2.6 provides that "[u]nless otherwise agreed, the parties shall pay their mediation costs within thirty (30) days after the close of each mediation session." There is no evidence in the record to suggest that Marcie made other arrangements with the mediator to extend the 30-day deadline.

[22] Nonetheless, Marcie attempts to argue on appeal that she has since paid her share of the mediator's fee, which renders the trial court's findings and conclusions thereon moot. Appellant's Br. at 13, 32. In support, she includes two statements in her Statement of Facts concerning her alleged payment of the mediator's fee in November 2023, but those statements are unsupported by citations as required by Appellate Rule 46(A)(6)(a). Even if Marcie had provided citations and included in her appendix evidence of her belated payment of the mediator's fee, we could not consider that evidence because it was not presented to the trial court, *see Haggarty v. Haggarty*, 176 N.E.3d 234, 239 n.1 (Ind. Ct. App. 2021) (citing *Morey v. Morey*, 49 N.E.3d 1065, 1073 n.3 (Ind. Ct. App. 2016); App. R. 27). Therefore, the issue of Marcie's payment of the mediator's fee is not moot, and the evidence supports the trial court's finding that she failed to pay that fee.

[23] Based on the foregoing, the trial court did not clearly err in entering final judgment on the Binding Agreement and making specific orders as to Marcie's performance thereunder.

2. The Trial Court Did Not Abuse Its Discretion by Sanctioning Marcie Pursuant to ADR Rule 2.7(E)(3)

[24] Next, Marcie claims the trial court erred by awarding Matthew attorneys' fees under ADR Rule 2.10. Marcie does not support this argument with cogent reasoning as required by Appellate Rule 46(A)(8)(a), but we choose to address it, nevertheless. *See Pierce*, 29 N.E.3d at 1267. We also observe that the trial court did not state its basis for awarding Matthew attorneys' fees pursuant, so we will affirm the trial court's decision based on any legal theory supported by the evidence, *see Steele-Giri*, 51 N.E.3d at 123–24 (citing *S.D.*, 2 N.E.3d at 1287).

[25] As our Supreme Court has explained:

> We review a trial court's award of attorney's fees for an abuse of discretion. *Purcell v. Old Nat'l Bank*, 972 N.E.2d 835, 843 (Ind. 2012). An abuse of discretion occurs when the court's decision either clearly contravenes the logic and effect of the facts and circumstances or misinterprets the law. *Id.* To make this determination, we review any findings of fact for clear error and any legal conclusions de novo. *Id.*
>
> * * *
>
> The general rule in Indiana, and across the country, is that each party pays its own attorney's fees; and a party has no right to recover them from the opposition unless it first shows they are authorized. *Loparex, LLC v. MPI Release Techs., LLC*, 964 N.E.2d 806, 815–16 (Ind. 2012). Known as the American Rule, this doctrine reflects a compromise between keeping courts open to all and allowing attorneys the freedom to contract with clients. *See id.* at 815.

> But the rule is not without exceptions. Statutes can authorize courts to award attorney's fees, and courts have carved out exceptions to the American Rule using their inherent equitable powers. *See* Ind. Code § 34-52-1-1 (2019); *State Bd. of Tax Comm'rs v. Town of St. John*, 751 N.E.2d 657, 658 (Ind. 2001).

River Ridge Dev. Auth. v. Outfront Media, LLC, 146 N.E.3d 906, 912 (Ind. 2020).

[26] As previously stated, ADR Rule 2.7(E)(3) allows a court to "impose sanctions" if one of the parties to an ADR Rule 2.7(E) agreement breaches or fails to perform under that agreement. Pursuant to ADR Rule 2.10, such sanctions may include "assessment of mediation costs and/or attorney fees relevant to the process." Here, the trial court found Marcie failed to perform under the Binding Agreement, and those findings are supported by the evidence such that they are not clearly erroneous. Therefore, the imposition of sanctions in the form of attorneys' fees was authorized by ADR Rules 2.7(E)(3) and 2.10, and we cannot say that the trial court abused its discretion by sanctioning Marcie in this manner.

3. Matthew is Entitled to Appellate Attorneys' Fees Pursuant to Appellate Rule 66(E)

[27] Finally, we address Matthew's request for an award of appellate attorney fees under Appellate Rule 66(E), which provides: "The Court may 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. The Court shall remand the case for execution." We limit application of Appellate Rule 66(E) to "instances when an appeal is permeated with

meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." *Gallo v. Sunshine Car Care, LLC*, 185 N.E.3d 392 (Ind. Ct. App.) (quoting *Wagler v. W. Boggs Sewer Dist., Inc.*, 29 N.E.3d 170, 174 (Ind. Ct. App. 2015)), *trans. denied*, 194 N.E.3d 599 (Ind. 2022). "We must use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal." *Id.* (alteration omitted) (quoting *Wagler*, 29 N.E.3d at 174). Thus, we do not impose sanctions to punish mere lack of merit; rather, we do so when faced with something more egregious. *Bousum v. Bousum*, 173 N.E.3d 289, 293 (Ind. Ct. App. 2021) (quoting *Troyer v. Troyer*, 987 N.E.2d 1130, 1148 (Ind. Ct. App. 2013), *trans. denied*).

[28] There are two categories of claims for appellate attorneys' fees: (1) substantive bad faith and (2) procedural bad faith. *Duncan v. Yocum*, 179 N.E.3d 988, 1005 (Ind. Ct. App. 2021) (citing *Boczar v. Meridian Street Found.*, 749 N.E.2d 87, 95 (Ind. Ct. App. 2001)).

> To prevail on a substantive bad faith claim, the party must show that the appellant's contentions 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 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. Even if the appellant's conduct falls short of that which is deliberate or by design, procedural bad faith can still be found.

Id. (internal citations and quotation marks omitted).

[29] As discussed above, Marcie challenges the trial court's decision to enforce the Binding Agreement as written despite repeatedly stating she has no objection to such enforcement. Tr. Vol. II at 46, 48, 73–74; Appellant's Br. at 13, 15, 19. Marcie even asks us to reverse the trial court's decision and "remand[] with instructions to enforce the parties' original written and signed mediated settlement agreement," Appellant's Br. at 33; Appellant's Reply Br. at 23, that is, the Binding Agreement. Aside from the imposition of some deadlines, which Marcie does not challenge on appeal, the trial court enforced the Binding Agreement as written. Marcie essentially asks this court to reverse the trial court's decision and remand with instructions for the trial court to enter essentially the exact same order concerning enforcement of the Binding Agreement.

[30] This request is likely due to Marcie's mistaken belief that the trial court enforced a modified version of the Binding Agreement. Marcie's primary argument on appeal is that "Mathew is attempting to enforce an altered mediated settlement of all parties without the consent of one of the parties, Marcie." Appellant's Br. at 18. At the hearing on the Emergency Motion, Matthew repeatedly asked the trial court to enforce the Binding Agreement as written. Tr. Vol. II at 36, 64, 68, 69. Even if Matthew did seek to enforce a modified version of the Binding Agreement, the trial court enforced the Binding Agreement as written, *id.* at 18, so what exactly Matthew allegedly tried to enforce is irrelevant. Nevertheless, Marcie devotes the majority of the Argument sections of her brief and reply brief to addressing the parties' post-

mediation negotiations. Appellant's Br. at 18–30; Appellant's Reply Br. at 13–21. The substance of these negotiations is irrelevant to the issues on appeal, especially in light of Marcie's concession that no extrinsic evidence (which would include the content of the parties' post-mediation negotiations) was introduced at trial, Appellant's Br. at 16.

[31] Marcie fails to include relevant facts in her Statement of Facts as required by Appellate Rule 46(A)(6). Marcie fails to provide record citations in support of statements of fact in her Statement of Case as required by Appellate Rule 46(A)(5), in her Statement of Facts as required by Appellate Rule 46(A)(6)(a), and in her Argument as required by Appellate Rule 46(A)(8)(a). As aforementioned, Marcie fails to support her arguments concerning the alleged disparate enforcement of the Binding Agreement, her failure to dismiss the PO Cause, the alleged mootness of the mediator's fee, and the attorneys' fee sanction with cogent argument as required by Appellate Rule 46(A)(8)(a).

[32] Marcie also fails to include numerous documents in her appendix that are relevant to the issues on appeal. *See supra* notes 1–5, 7. In fact, Marcie relies on this court to take judicial notice of the record in her First Appeal, Appellant's Br. at 5 n.1,[8] instead of including the relevant documents in her appendix as

---

[8] In her opening brief, Marcie asks us to take judicial notice of the record in the First Appeal pursuant to Indiana Evidence Rule 201(b)(5). Appellant's Br. at 5 n.1. This rule allows a *trial* court to take judicial notice of certain documents. *Horton v. State*, 51 N.E.3d 1154, 1161–62 (Ind. 2016). As an appellate court, we cannot open the record to receive additional evidence, *see Haggarty*, 176 N.E.3d at 239 n.1 (citing *Morey*, 49 N.E.3d at 1073 n.3; App. R. 27), so we take judicial notice of the Record on Appeal pursuant to Appellate Rule 27.

required by Appellate Rule 50(A). While a party's failure to include an item in an appendix does not waive an issue or argument for our review, App. R. 49(B), where, as here, we have to take judicial notice of the record in other causes to adequately address the claims on appeal, the party's failure to abide by Appellate Rule 50(A)'s requirements entails a much greater expenditure of this court's time and resources than if those documents had been included in the appendix.

[33] All of this together amounts to procedural bad faith, and in light thereof, we conclude that Matthew is entitled to appellate attorneys' fees, and we remand to the trial court to determine the proper amount of those fees.

Conclusion

[34] In sum, the trial court did not clearly err by enforcing the Binding Agreement as written and did not abuse its discretion by imposing ADR Rule 2.10 sanctions on Marcie. We therefore affirm the trial court on all issues raised. Moreover, because Matthew is entitled to Appellate Rule 66(E) attorneys' fees, we remand for further proceedings to determine an appropriate amount of attorneys' fees.

[35] Affirmed and remanded.

Altice, C.J., and Bradford, J., concur.

ATTORNEY FOR APPELLANT

Ralph E. Sipes
Anderson, Indiana

ATTORNEYS FOR APPELLEE

Ian T. Keeler
Sean T. White
Clapp Ferrucci
Fishers, Indiana