

**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.**

ATTORNEY FOR APPELLANT:

**W. CHRISTIAN MEYER**  
Lafayette, Indiana

ATTORNEY FOR APPELLEE:

**ROGER L. MILLER**  
Frankfort, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

JOHN H. MEYER, M.D., )

Appellant-Plaintiff, )

vs. )

No. 79A04-0511-CV-643

CAROL CUPP, )

Appellee-Defendant. )

---

APPEAL FROM THE TIPPECANOE SUPERIOR COURT  
The Honorable Gregory J. Donat, Special Judge  
Cause No. 79D06-0112-CP-527

---

**November 30, 2006**

**OPINION ON REHEARING - NOT FOR PUBLICATION**

**ROBB, Judge**

Dr. John Meyer appealed the trial court's grant of summary judgment in favor of

Carol Cupp on Dr. Meyer's complaint for fees, interest, and costs for medical services rendered to Cupp's adult son. In a memorandum decision, we affirmed the trial court's grant of summary judgment. Meyer v. Cupp, 79A04-0511-CV-643 (Ind. Ct. App., July 28, 2006).

Dr. Meyer has petitioned for rehearing and has filed a motion to publish the memorandum decision. Cupp has filed a motion requesting costs and attorney fees pursuant to Appellate Rule 66(E). We grant Dr. Meyer's petition for rehearing for the sole purpose of clarifying our earlier opinion. We also hereby deny Dr. Meyer's motion to publish and Cupp's motion for fees.

#### I. Dr. Meyer's Petition for Rehearing

Dr. Meyer's petition for rehearing raises the following issues: whether we erred in affirming the trial court's grant of summary judgment when he "presented a genuine issue of material fact as to the value of services provided by [Dr. Meyer] to Cupp's son and/or Cupp, and . . . presented a viable theory of relief in equity." Appellant's Petition for Rehearing at 2.

We grant the petition to clarify our decision. Even assuming there is a question of fact with respect to what the value, if any, of the services Dr. Meyer provided is, value is not a "material fact" if legally he is not entitled to recover, whether his theory of recovery is legal or equitable. No one contests that Dr. Meyer provided a service of value when he operated on Cupp's adult son in an emergency situation. However, absent the Consent that Cupp signed, there is no basis in law or equity for Dr. Meyer to recover that value from Cupp. Dr. Meyer's avenue of recourse runs through Cupp's son. That Dr. Meyer is unable to recover from him is unfortunate, but it does not entitle him to cast a wide net in an attempt to recover. Subject to the clarification that there is no viable theory of recovery against Cupp, we

reaffirm our original opinion.

## II. Cupp's Motion for Fees

Cupp's motion for attorney fees pursuant to Appellate Rule 66(E) contends that the petition for rehearing was filed in bad faith, allegedly in an attempt to avoid a hearing set in the trial court. Indiana Appellate Rule 66(E) provides that this 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." Although Rule 66(E) provides this court with discretionary authority to award damages on appeal, we must use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal. Helmuth v. Distance Learning Systems Indiana, Inc., 837 N.E.2d 1085, 1094 (Ind. Ct. App. 2005). A strong showing is required to justify an award of appellate damages, and the sanction is not imposed to punish mere lack of merit, but something more egregious. Id.

Bad faith on appeal may be classified as "substantive" or "procedural." Gabriel v. Windsor, Inc., 843 N.E.2d 29, 49 (Ind. Ct. App. 2006). Substantive bad faith "implies the conscious doing of a wrong because of dishonest purpose or moral obliquity." Id. (quoting Wallace v. Rosen, 765 N.E.2d 192, 201 (Ind. Ct. App. 2005)). Procedural bad faith "is present 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 appearing to have been written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court." Id.

Cupp seems to allege Dr. Meyer is acting in substantive bad faith. His only allegation,

however, is that the trial court's file "is rife with examples of Motions being filed by [Dr. Meyer's] counsel when faced with a jury trial date and/or pre-trial conference, or other trial deadlines or the filing of an amended complaint. Such is the case here. . . . [T]his Petition for Rehearing is in bad faith and another attempt to continue this matter, all to the prejudice of [Cupp]." Motion for Award of Costs and Attorney's Fees to Appellee Under Appellate Procedure Rule 66 E at 1, 3. Attached to Cupp's motion is an order from the trial court dated August 7, 2006, setting a hearing on Cupp's motion for award of costs and fees for September 11, 2006. Our opinion was handed down on July 28, 2006. Dr. Meyer's time for filing a Petition for Rehearing did not expire until August 28, 2006. Appellate Rule 65 provides that "[t]he trial court . . . shall not take any action in reliance upon the opinion or memorandum decision until the opinion or memorandum decision is certified." Ind. Appellate Rule 65(E). An opinion is not to be certified until after the time for all petitions for rehearing, transfer, or review has expired. Id. Therefore, the trial court should not have set any hearings on this matter with which a timely filed petition for rehearing would interfere.

Although we have reaffirmed our earlier opinion and do not agree with the points raised in Dr. Meyer's petition for rehearing, we cannot say that Dr. Meyer's petition for rehearing was frivolous or filed in bad faith. He is entitled, pursuant to our rules, to file a petition for rehearing and we will not punish him for availing himself of that potential avenue of relief. Cupp has not alleged the kind of facts that would justify an award of damages pursuant to Rule 66, and her motion is therefore denied.

#### Conclusion

We grant Dr. Meyer's petition for rehearing, reaffirming our opinion in all respects.

We deny Dr. Meyer's motion to publish. We also deny Cupp's motion for costs and attorney's fees.

SHARNACK, J., and NAJAM, J., concur.