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**IN THE  
COURT OF APPEALS OF INDIANA**

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A.K. and JEFFRY G. PRICE, )

Appellants-Petitioners, )

vs. )

K.M.K., )

Appellee-Respondent. )

No. 34A05-1008-CT-522

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APPEAL FROM THE HOWARD SUPERIOR COURT  
The Honorable Thomas R. Lett, Special Judge  
Cause No. 34D02-0710-CT-1178

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**March 1, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellants-Petitioners A.K. and Jeffry Price appeal the trial court's denial of Price's request for attorney's fees from Appellee-Respondent K.M.K., following K.M.K.'s action against A.K., which the trial court dismissed. Upon appeal, Price contends that the trial court's denial of attorney's fees constituted an abuse of discretion. We affirm.

## **FACTS AND PROCEDURAL HISTORY**

The underlying facts in the parties' original appeal assist in our consideration of the instant appeal:

Mother [K.M.K.] and A.K. ("Father") are the biological parents of A.M.K. who was born out of wedlock on April 15, 2004. Mother and Father had been married, but they divorced prior to A.M.K.'s birth.<sup>1</sup> Mother had sole legal custody of A.M.K. following his birth. Price, a licensed Indiana attorney, was hired by Father to assist him in establishing paternity and gaining legal custody of A.M.K.

On February 1, 2007, Price filed a verified petition on Father's behalf with the Miami Superior Court ("custody court") seeking to establish Father's paternity of A.M.K. and requesting that the court grant Father temporary custody of A.M.K., who was then residing with Father. Price attached a proposed order establishing paternity and granting Father temporary custody pursuant to the paternity petition. The petition amounted to an *ex parte* communication between Price and the custody court because Price failed to give Mother proper notice of the aforementioned petition. On February 2, 2007, the custody court issued an *ex parte* order granting said petition without granting Mother proper notice of the court's order or an opportunity to present an argument in opposition to Father's petition. The custody court's order did not include any of the certifications required for emergency orders by Indiana Trial Rule 65.

Pursuant to Indiana law, a hearing regarding the emergency custody order was scheduled for April 16, 2007. Price requested a continuance of the April 16, 2007 hearing, which was granted by the custody court. On February 11, 2008, the custody court conducted a hearing regarding the emergency *ex parte* custody order at which time the emergency *ex parte* custody order was set aside and Mother was granted sole custody of A.M.K.

On December 10, 2007, Mother filed suit against Price, claiming that Price had violated her civil rights and that as a result, she was entitled to treble damages. Price filed a motion to dismiss and a request for attorney's fees on

February 4, 2008. The trial court subsequently granted Price's motion to dismiss but denied Price's request for attorney's fees.

On May 14, 2008, Mother filed the instant complaint claiming that Price had engaged in a civil conspiracy with the custody court, that Price, who Mother claimed acted under the color of state law, had violated her civil rights as protected by §1983, and that Mother was entitled to treble damages. Price again filed a motion to dismiss the claims against him as set forth in Mother's complaint. In support, Price asserted the following: (1) at all times relevant to the instant matter, Price was a private attorney and not a state actor under §1983; (2) Mother failed to allege that Price "was ever a state actor;" (3) Mother failed to allege any facts to support a finding that Price's actions "may be fairly treated as that of the State itself" or that Price had a "meeting of the minds" with a state official "towards a specific unconstitutional end;" (4) Mother failed to state a claim for relief under §1983; (5) Indiana law does not recognize an independent cause of action for civil conspiracy; and (6) Mother failed to sufficiently allege a claim for treble damages. Appellant's App. p. 55. Price again requested attorney's fees. The trial court subsequently granted Price's motion to dismiss and scheduled a hearing on Price's request for attorney's fees.

*K.M.K. v. A.K.*, 908 N.E.2d 658, 660-61 (Ind. Ct. App. 2009), *reh'g denied, trans. denied* (footnote omitted).

This court affirmed the trial court's dismissal of K.M.K.'s action on June 30, 2009, but concluded that Price, whose request for attorney's fees had been denied following K.M.K.'s first action against him, was not barred from requesting attorney's fees in the instant action. This court denied rehearing on the matter on September 14, 2009, and the Indiana Supreme Court subsequently denied K.M.K.'s petition for transfer.

On March 25, 2010, Price petitioned for attorney's fees in the instant action pursuant to Indiana Code section 34-52-1-1(b) (2009) and 42 U.S.C. § 1988. Following a June 14, 2010 hearing, the trial court denied the petition. This appeal follows.

## DISCUSSION AND DECISION

### I. Trial Attorney's Fees

#### A. Indiana Code section 34-52-1-1(b)

Upon appeal, Price challenges the trial court's denial of attorney's fees under Indiana Code section 34-52-1-1(b). Section 34-52-1-1(b) provides as follows:

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.

In denying Price's request for fees, the trial court found that Price had introduced no evidence of meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay other than the evidence which had already been deemed inadequate to support a fee award in Price's first petition for attorney's fees. The trial court therefore concluded that Price had failed to establish fees were warranted under section 34-52-1-1(b) and denied his claim.

An award or denial of attorney's fees under Indiana Code section 34-52-1-1 is reviewed through a multi-step process. *Stoller v. Totton*, 833 N.E.2d 53, 55 (Ind. Ct. App. 2005) (citing *Grubnich v. Renner*, 746 N.E.2d 111, 119 (Ind. Ct. App. 2001)), *trans. denied*. First, we review the trial court's findings of fact under the clearly erroneous standard, and second we review de novo the trial court's legal conclusions. *Id.* Finally, we review the trial court's decision to award attorney's fees and the amount thereof under an abuse of discretion standard. *Id.*

A claim is “frivolous” (a) if it is made primarily to harass or maliciously injure another, (b) if counsel is unable to make a good faith and rational argument on the merits of the action, or (c) if counsel is unable to support the action by a good faith and rational argument for extension, modification, or reversal of existing law. *See Emergency Physicians of Indpls. v. Pettit*, 714 N.E.2d 1111, 1115 (Ind. Ct. App. 1999), *trans. granted, adopted and incorporated in relevant part, and vacated on other grounds*, 718 N.E.2d 753, 757 (Ind. 1999). 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. *See id.* A claim is “groundless” if no facts exist which support the claim relied upon and presented by the losing party. *See id.* We review a trial court’s determination regarding the frivolous, unreasonable, or groundless nature of a claim *de novo*. *See id.*

Ultimately, however, a trial court has discretion to award, or not award, attorney’s fees under section 34-52-1-1(b). *Wolfe v. Eagle Ridge Holding Co.*, 869 N.E.2d 521, 529 (Ind. Ct. App. 2007). It is axiomatic that the use of the permissive word “may” in a statute indicates a trial court is not required to act, but may do so within its discretion. *Id.* In the instant case, even if the trial court should have concluded that K.M.K.’s claim was frivolous, unreasonable, or groundless, it still would not have been required to award attorney’s fees to Price. *See id.*

Price contends that the trial court abused its discretion by denying his petition based upon the fact that he had presented no additional evidence—beyond that necessary to support

his first petition—that such fees were warranted. In Price’s view, no additional evidence was necessary. Price had moved to dismiss K.M.K.’s first § 1983 action against him on the grounds that he was not acting under color of state law, and the trial court had granted his motion.<sup>1</sup> In spite of this dismissal, K.M.K. filed a second claim also requiring that Price be acting under color of state law. Given the first dismissal of K.M.K.’s § 1983 claim, Price contends that K.M.K. would have been fully aware of the fatal deficiencies in the instant § 1983 claim, and her persistence in filing it demonstrates that the claim was frivolous and she was acting in bad faith. Price additionally points out that K.M.K. pursued her unsuccessful claim to its appellate limits, petitioning for both a rehearing from this court and transfer to the Supreme Court.

In the appeal on the merits of the instant action, this court held that Price was not barred from requesting attorney’s fees but observed that there was no discernible basis in the record to warrant them. *K.M.K.*, 908 N.E.2d at 665-66. After Price petitioned for fees, the trial court found he had failed to provide further evidence justifying an award. The court therefore concluded, as it had when Price sought attorney’s fees following dismissal of K.M.K.’s first action, that fees were not warranted because K.M.K.’s pursuit of the § 1983 claim did not demonstrate bad faith.

The underlying facts of this case involve K.M.K.’s effort to seek a remedy for Price’s

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<sup>1</sup> In order to bring a valid cause of action under § 1983, a plaintiff must establish, among other factors, that the defendant acted under “color of law.” *K.M.K. v. A.K.*, 908 N.E.2d 658, 662 (Ind. Ct. App. 2009) (quoting *Fries v. Helsper*, 146 F.3d 452, 457 (7th Cir. 1998)), *reh’g denied, trans. denied*. “For an individual to act under color of law, there must be evidence of a concerted effort between a state actor and that individual.” *Id.* (quoting *Fries*, 146 F.3d at 457).

*ex parte* communications with a custody court resulting in K.M.K.’s loss of custody of her child without due notice or an opportunity to be heard. The question of whether Price was acting under “color of law” requires some factual and legal analysis, however brief, the answer to which is not so patently obvious that filing a claim premised on this ground or challenging it upon appeal must be in bad faith or frivolous. To the extent Price alleges that the dismissal of K.M.K.’s first § 1983 complaint demonstrates that the instant complaint, also alleging § 1983 grounds, was frivolous, the instant complaint alleged facts which the first complaint did not. We conclude that the trial court was well within its discretion in declining to award attorney’s fees pursuant to Indiana Code section 34-52-1-1(b).

#### **B. 42 U.S.C. § 1988**

Price additionally claims that the trial court abused its discretion in declining to award attorney’s fees under 42 U.S.C. § 1988. As a general matter, we review an award of attorney fees under this statute for an abuse of discretion. *Barker v. City of W. Lafayette*, 878 N.E.2d 230, 232 (Ind. Ct. App. 2007). “A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances before it.” *Id.* (internal quotation omitted). An abuse of discretion also occurs if the trial court misinterprets or misapplies the law. *Id.* A ruling based on an error of law is reversible, and the trial court has no discretion to reach the wrong result. *Id.*

42 U.S.C. § 1988(b) provides as follows:

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs, except that in any action brought against a

judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

Although the statute states that a court "may" award fees, it is generally accepted that fees should be awarded to a prevailing plaintiff "almost as a matter of course." *Barker*, 878 N.E.2d at 232 (citing *Davis v. Murphy*, 587 F.2d 362, 364 (7th Cir. 1978)).

Citing *Barker* and *Davis*, Price argues that he is a prevailing party and that fees should therefore be assessed to him "as a matter of course." But *Barker* and *Davis* explicitly state that fees be awarded as a matter of course to prevailing *plaintiffs*, not prevailing *parties*. Price was the defendant in the instant action. His reliance upon *Barker* and *Davis* is unavailing.

Indeed, a prevailing defendant should only be awarded attorney's fees where the action is found to be "vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983). Apart from his mistaken interpretation of *Barker* and *Davis*, Price does not argue that this standard differs materially from the standard under Indiana Code section 34-52-1-1(b). Having declined to find an abuse of discretion under the Indiana standard, we similarly decline to find an abuse of discretion under the federal standard.

## **II. Appellate Attorney's Fees**

In her Appellee's Brief, K.M.K. requests appellate attorney fees. Indiana Appellate Rule 66(E) allows us to assess attorney fees, in our discretion where an appeal is "frivolous or in bad faith." "Our discretion to award attorney fees under the rule is limited to instances

when the appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay.” *Inland Steel Co. v. Pavlinac*, 865 N.E.2d 690, 704 (Ind. Ct. App. 2007) (quotations and citations omitted). Having previously recognized that Price was not barred from requesting fees in the instant case, we will not now conclude that his appeal from the denial of those fees is in bad faith or totally frivolous. Accordingly, we decline K.M.K.’s request for appellate attorney fees.

The judgment of the trial court is affirmed.

KIRSCH, J., and CRONE, J., concur.