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IN THE
COURT OF APPEALS OF INDIANA

IN RE:	)	
	)	
RUETH DEVELOPMENT COMPANY,	)	
an Indiana Limited Partnership.	)	
	)	No. 45A03-0811-CV-568
	)	
	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Kavadias Schneider, Judge
The Honorable Daniel J. Molter, Special Judge
Cause No. 45D01-9311-CP-01746

May 28, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellants-respondents Herbert, Robert, and Thomas Rueth (collectively, the respondents), appeal the trial court's reassertion of jurisdiction in a matter regarding the dissolution, winding up, and accounting of Rueth Development Company (RDC) after the action had previously been dismissed with prejudice. Specifically, the respondents argue that we should reverse because "this case has been dismissed with prejudice." Appellants' App. p. 12. The respondents also maintain that they are entitled to appellate attorney's fees because the petitioners' attack on their legal counsel in their cross-appeal is misleading and false.

The appellees-petitioners, Nancy, Claudia, Richard, Jerome, and Harold G. Rueth, Jr., (collectively, the petitioners), in their capacities as co-executors of the estate of Harold G. Rueth, deceased, general partners of RDC, or as limited partners of the company, contend that because they were served with summons in the action as parties, they were entitled to file a motion pursuant to Indiana Trial Rule 60(B) to set aside the trial court's order. Thus, they claim that the trial court properly reasserted its jurisdiction in the matter and set additional hearings pursuant to Trial Rule 60(B). The petitioners also cross-appeal, and allege that they are entitled to appellate attorney's fees because the respondents have brought this appeal in bad faith.

We conclude that the petitioners are "parties" in this action and that they properly filed a Trial Rule 60(B) motion. Moreover, the trial court's order to hold additional hearings in this matter pursuant to the petitioners' Trial Rule 60(B) motion was proper, and we dismiss this appeal. Finally, we deny both parties' requests for appellate attorney's fees.

FACTS

RDC was initially formed on January 20, 1956, as Timrick Development Company. The name was changed to RDC on December 28, 1961, and the stated purpose of the company was, among other things, "to engage in the general land development business, in the home and commercial construction business." Appellants' App. p. 55. Harold G. and Helen Rueth are the general partners of RDC. Additionally, there were at least nine limited partners, all of whom acted in the capacity as trustees for various family trusts.

On November 18, 1993, Harold filed an "application for judicial dissolution, winding up and accounting of limited partnership." Id. at 39, 52. Helen and several of RDC's limited partners appeared as the initial respondents. Harold alleged, among other things, that:

> 7. The two general partners have irreconcilable differences regarding the conduct of RDC's business and the furtherance of the purposes for which it was formed, rendering it impracticable to carry on RDC business in conformity with the Partnership Agreement.

Id. at 55.

On December 9, 1993, the law firm of Ruman, Clements, Tobin & Holub, P.C. (Ruman), entered an appearance for Helen and a number of the limited partners and beneficiaries of the limited partnership family trusts. William Tobin, who is the current counsel for the respondents, presented his appearance on behalf of his firm in the answer to the complaint, which was filed on January 10, 1994.

On August 31, 1995, the trial court granted leave for Harold to file an amended complaint. The amended complaint alleged that Helen and various limited partners of RDC had breached their fiduciary duties to the company. Thomas, Robert, Herbert, and Timothy Rueth owned H & H Rueth, Inc. (H & H) and were limited partners in RDC. H & H was in the residential development business and purchased lots from RDC and supplies and materials from Superior Lumber, which was another business that was owned by RDC.

During the course of the litigation, various parties and/or partners filed claims against each other and the trial court set separate trials and hearings on the claims. For instance, on April 30, 1998, the trial court scheduled a trial on RDC's contract and interest claims against H & H. The trial was originally scheduled for February 19, 1999.

On March 5, 2001, Ruman withdrew its appearance in the case, and Tobin appeared as counsel for Helen and all of the respondents who were previously represented by Ruman. The respondents appeared for trial on the contract interest issues.

Following the trial, Special Judge Molter issued the following Findings of Fact and Conclusions of Law "Regarding Accrual of Interest on Land Sales and Accounts Receivable," on June 22, 2001:

I. FINDINGS OF FACT

> 1. RDC as an Indiana LP owned and operated, among other things, Superior Lumber Company.
>
> 2. H & H Rueth, Inc. is an Indiana Corporation d/b/a a general contractor. The sole shareholders, officers and directors were Thomas M. Rueth, Herbert R. Rueth, Timothy J. Rueth, and Robert J. Rueth. Each of the

shareholders, officers and directors of H & H were also limited partners of RDC. Thomas M. Rueth and Robert J. Rueth were also paid by RDC to manage Superior Lumber, which was one of RDC's assets.

. . .

4. Harold G. Rueth and Helen L. Rueth became at odds over policies of RDC as it related to the operations of H & H[.] Harold, cognizant of his fiduciary duties to all of the limited partners, want[ed] to bring H & H within reasonable business guidelines and specific policies of Superior Lumber Company concerning the purchase of materials and the contractual format of RDC for the sale of lots.

. . .

9. The attempts to reform the partnership failed and, on or about July 9th, 1992 and after the failure, Harold G. Rueth notified both H & H and Superior Lumber that Harold, as General Partner expected strict compliance with good business practices on outstanding Accounts Receivables and Lot Contracts, that old outstanding balances due where [sic] to be brought current and that current payments would be applied to current accounts with any excess applied to the oldest debts first.

10. With the notification to both H & H and Superior Lumber, H & H began circumventing the direct instructions by approaching Helen L. Rueth to secure the necessary letters of direction for the transfer of lots so as to avoid the strict payment guidelines imposed by Harold. Such conduct is not in the best interests of RDC or Superior and constituted a breach of Helen L. Rueth's fiduciary duties to the partnership, as well as the general and limited partners.

11. From time to time H & H entered into contracts with RDC whereby H & H purchased vacant improved lots from RDC as well as lumber, goods, services, materials and supplies from Superior Lumber for its use in construction of residential projects.

. . .

24. Thomas M. Rueth and Robert J. Rueth were in particularly sensitive positions, being limited partners of RDC; officers, directors and stockholders of H & H; and co-managers of Superior Lumber.

. . .

51. Because two of the principals were also acting as managers of Superior Lumber, H & H was able to amass a sizable balance on the various accounts, which for substantial periods of time exceeded . . . $ 1,000,000.00, and on at least two occasions exceeded $1,400,000, of which . . . [$182,000] was a promissory note given by H & H to cover the bad checks delivered to Superior Lumber and accepted by Thomas J. Rueth.

52. Sometime during the early 1990's H & H wrote over [$182,000] worth of NSF checks to Superior which were applied to H & H's account and never "covered." The bad checks were converted to a promissory note sometime in 1991, but were carried on the books until the time of filing of this Dissolution.

. . .

54. In at least one case, H & H, to avoid incurring additional receivables due to Superior Lumber, began "bartering" services with third party contractors, with H & H promising to pay Superior Lumber for materials withdrawn by the third party contractor and then failing to do so. Such conduct could not have been undertak[en] without the duplicity of Thomas J. Rueth who was, at times, acting in the best interest of H & H rather than his principal Superior Lumber and contrary to his fiduciary responsibilities to the General and Limited Partners of RDC.

. . .

58. The financial difficulties of Superior Lumber through the 1990's were, in large part, the result of H & H payment policies or Thomas J. Rueth's collection policy, or lack thereof. While it is true that H & H was a major customer, the failure of Thomas J. Rueth to enforce Superior Lumber's credit policy collect accounts receivables did nothing other than to cause major cash flow deficits which had to be funded by RDC.

. . .

75. Without the authority of RDC, Thomas J. Rueth and/or Robert J. Rueth frequently waived Superior Lumber's mechanics liens to facilitate the closing of real estate transactions between H & H and its customers without receiving funds due on account to Superior Lumber. They also allowed H & H to remove building materials from Superior Lumber with little formality and issued invoices that contradicted Superior Lumber's written credit policy in that the invoices failed to incorporate Superior Lumber's rate of interest.

76. H & H's principals knew or should have known that Rob and Tom Rueth were acting adversely to the interests of Superior Lumber and RDC in attempting to relax the terms of the written credit policy or in issuing invoices that reflected no interest charges to H & H Rueth.

77. Tom Rueth and Rob Rueth had a personal interest in H & H and, consequently, a potential conflict of interest from their involvement with transactions between Superior Lumber and H & H.

. . .

79. While supposedly acting as managers and agents for Superior Lumber, Tom and Rob Rueth issued waivers of mechanics liens to H & H's customers to enable H & H to close real estate transactions with its customers, even though H & H had not paid amounts due to Lumber.

80. While supposedly acting as managers and agents for Superior Lumber, Tom Rueth knowingly accepted worthless checks from H & H for goods, materials, and supplies.

. . .

82. RDC did not own H & H or any portion of it and H & H had no ownership interest in RDC. The only relationship between RDC and H & H was that the officers, directors, and shareholders of H & H were each and all limited partners in RDC.

. . .

II. CONCLUSIONS OF LAW

8. H & H's acceptance of payment for labor, services and materials without informing the buyers of the homes of the existing indebtedness to RDC for the cost of the lot and materials used in construction of the home would have constituted a Class D felony if RDC had enforced its right to place liens on those homes.

. . .

14. To the extent that Tom or Rob Rueth took actions to waive Superior Lumber's stated credit policy for the benefit of H & H, he committed an independent fraud for his own benefit and had therefore, ceased to act as an agent for Superior Lumber or RDC.

. . .

18. In their dealings with H & H, Tom and Rob Rueth clearly acted in their own self interest, in conflict with their integrity and in breach of their obligation to Superior Lumber. By doing so, they breached their contractual and tort duties as fiduciaries to act in good faith on behalf of Superior Lumber.

. . .

IT IS THEREFORE ORDERED ADJUDGED AND DECREED as follows:

. . .

8. The petitioners and respondents are ordered to review, together with the Court's expert, Mr. Charles Wolpert, the accounts receivable and lot

> contracts of H & H to reach agreement on amounts, dates, rates, and the total amount due and make due report to this Court.

Appellees' App. p. 38-77.

On May 14, 2002, the case was stayed when all of RDC's funds were frozen after the entry of a $4.5 million judgment in favor of the United States based upon RDC's violation of deadline provisions in an EPA consent decree. After several continuances, attorney Muenich withdrew his appearance on behalf of Harold and RDC on August 18, 2005.

On October 6, 2005, attorney Tobin entered his appearance in this matter for RDC and Harold. In March 2007, Helen died and was succeeded as general partner under the terms of the partnership agreement by her two sons, Herbert and Robert. Upon her death, Helen's entire interest in RDC automatically converted to a limited partner interest and transferred to another limited partner—the L. Herbert Rueth Residuary Trust—that was already a party respondent in the action. Herbert and Robert each held one vote in the management of RDC's affairs, and Harold held two votes.

On March 19, 2008, Daniel A. Medrea entered his "appearance on behalf of HAROLD G. RUETH and ALL PETITIONERS," although no petitioner other than Harold G. Rueth was identified by name or otherwise or had ever appeared of record in the case. Appellant's App. p. 11, 78.

On April 23, 2008, the trial court scheduled a trial for the purpose of completing the calculation of interest owed by H & H and/or its principles to RDC and/or Superior

Lumber. The trial was to commence on September 29, 2008, and a mandatory settlement conference was scheduled for July 22, 2008.

Harold died on August 15, 2008, and his son, Thomas, succeeded him under the partnership agreement as general partner in RDC. Harold's entire interest in RDC automatically converted upon his death to a limited partner interest and transferred to another limited partner—the Harold G. Rueth Residuary Trust. Thomas had been a respondent of record as a limited partner of RDC. Harold was also entitled to become a successor general partner, but until October 10, he declined to take that office and remained a limited partner in the company.

On September 16, 2008, the respondents—purportedly as the sole general partners of RDC—filed a stipulation to dismiss the case. The stipulation of dismissal provided in relevant part that

> 5. With all the current general partners of RDC thus in harmony, the fundamental condition precedent for the maintenance of this dissolution proceeding . . . no longer exists, since it is now "reasonably practicable to carry on the business [of RDC] in conformity with the partnership agreement." There is no statutory rationale for the Court to concern itself with the internal affairs of RDC.
>
> . . .
>
> 7. In addition, the remedy prayed for in the 1993 application for dissolution would result in the drastic diminution of RDC's two major remaining assets. . . . This proceeding has become, therefore, unavailing of and in fact[,] in derogation of its statutory purpose.
>
> . . .
>
> 10. All the parties of record therefore agree that it is in the best interest of RDC for this litigation to be dismissed with prejudice, and for RDC thereafter to devote its unified attention and limited resources to maximizing and realizing the value of the partnerships major remaining assets.

Id. at 79-80.

The dismissal, in effect, purported to dismiss all of RDC's claims with prejudice against the owners of H & H Rueth for their self-dealing, fraud, and breach of fiduciary duty to RDC and its other partners and/or limited partners without their consent and without any payment for the funds owed to RDC and/or its wholly-owned business, Superior Lumber. On October 2, 2008, the trial court granted the motion and dismissed the cause with prejudice. However, on October 10, 2008, the petitioners—Nancy, Claudia, and Harold Rueth Jr., as co-executors of Harold's estate, Harold Rueth, Jr., as general partner, and Claudia, Richard, Jerome, and Harold Rueth Jr., as limited partners—filed a motion to vacate and set aside the judgment pursuant to Trial Rule 60(B). The motion alleged that the respondents who had filed the stipulation of dismissal were not general partners of RDC and had been previously found by the trial court to have breached their fiduciary duties to RDC and its limited partners, and to have defrauded RDC. Thus, the petitioners alleged that the respondents' act of attempting to dismiss the case involving RDC and its claims against them constituted a conflict of interest and a further breach of their fiduciary duties to RDC and the limited partners.

The petitioners also asserted that the mischaracterization of the authority of Herbert, Robert, and Timothy to dismiss the case as the sole general partners of RDC created a fraud on the court, which was acted upon by the court when it approved the dismissal. Finally, the petitioners alleged that a meritorious defense was apparent in light of the findings of fact and conclusions of law that the trial court had entered on June 22, 2001.

That same day—over attorney Tobin's objection—the trial court entered an order freezing RDC's accounts to preserve the assets until the court could rule on the Trial Rule 60(B) motion. In its ruling, the trial court observed that

> After reviewing the Motion to Vacate and Set Aside Judgment and particularly paragraph 32 alleging that Thomas Rueth, Robert Rueth and Herbert Rueth have acted as purported general partners when they may not have had authority to do so in stipulating to a dismissal of this lawsuit and in doing so, committed fraud on the Court, now finds that this Court can reassert jurisdiction for the purpose of determining the merits of this Motion.

Id. at 40. The trial court also set a hearing on October 14, 2008. However, the trial court continued the hearing because Tobin was unavailable. Moreover, the respondents filed objections to the hearing and moved to vacate the order freezing RDC's bank accounts.

On October 20, 2008, Tobin filed a notice of appeal on behalf of RDC's general partners regarding the freeze order that the trial court had entered on October 10. On October 22, 2008, the trial court vacated the prior freeze order and recused itself from the case. That order stated:

> The Court having examined all motions filed since October 10, 2008 and having considered the merits thereof finds that the Court's order granting emergency freeze of assets is defective and erroneous in these respects:
>
> Counsel Tobin asserts Petitioning counsel Medrea did not provide written or oral notice of the intent to seek an injunction or temporary restraining order freezing the accounts. Notwithstanding telephonic conference late Friday afternoon initiated by the Court, counsel Tobin was not given reasonable opportunity to be heard on the merits of the motion for the mere reason he had not been served with the motion and therefore unaware that Movants sought immediate emergency relief.
>
> The Court having granted the relief after telephonic conference failed to endorse the hour in which it was entered, failed to identify sufficient irreparable harm to be suffered by the Movants in the absence of Court

> intervention and enter finding thereon, failed to state an expiration date and time and failed to require Movants to post a bond or other security.

Id. at 48. Following this order, the trial court remanded the case to Lake Superior Court 1, with the Honorable Diane Kavadias Schneider (Judge Schneider) presiding.

On October 31, 2008, Judge Schneider entered an order setting a status conference for November 18, 2008. Thereafter, the trial court ordered counsel to submit briefs on the jurisdictional issues by February 24, 2009, and it scheduled an oral argument for March 3, 2009. However, the respondents submitted their appellate brief to this court on December 22, 2008, challenging the trial court's orders of October 10, 14, 22, 31, and November 18, 2008, and the right of the petitioners to file a Trial Rule 60(B) motion challenging the dismissal of the action.

DISCUSSION AND DECISION

I. Trial Court's Reassertion of Jurisdiction

The respondents argue that the trial court erred in reasserting its jurisdiction in the case to determine the merits of the petitioners' contentions. The respondents contend that every action taken by the trial court "since September 16th has been without jurisdiction" because the petitioners who filed the motion to set aside the judgment were not parties to the original action. Appellants' Br. p. 11. Therefore, the respondents maintain that the trial court was obligated to dismiss this case "out of hand" because the motion to reinstate was filed by nonparties to the action and the parties of record had stipulated to the voluntary dismissal of the case. Appellants' Reply Br. p. 1.

On the other hand, the petitioners maintain that the appeal should be dismissed because they are "directly interested in RDC as they are limited partners and/or general partners and were served with summons in the case." Appellees' Br. p. 10. As a result, the petitioners argue that the trial court correctly reasserted its jurisdiction over the case to conduct additional hearings on the Trial Rule 60(B) motion to set aside the judgment and there are no appealable issues.

In resolving this issue, we initially observe that an order reinstating a dismissed case "shall be deemed a final judgment, and an appeal may be taken therefrom as in the case of a judgment." Ind. Trial Rule 60(C). Jurisdictional issues are legal questions that are reviewed de novo. Nextel West Corp. v. Ind. Util. Regulatory Comm'n, 831 N.E.2d 134, 140-41 (Ind. Ct. App. 2005). Indiana Trial Rule 41(A)(1)(B) provides that when all parties who have appeared in an action file a stipulation of dismissal with prejudice, the action is dismissed with prejudice without the necessity of a court order. Our Supreme Court has determined that when a case has been voluntarily dismissed, "the situation is just as though the suit had never been filed." Burnett v. Camden, 253 Ind. 354, 254 N.E.2d 199, 201 (1970).

According to Trial Rule 41(F), a dismissal with prejudice may be set aside only in accordance with the provisions of Trial Rule 60(B), which provides that "[o]n motion and upon such terms as are just the court may relieve a party from a judgment, including a judgment by default." Moreover, until a final judgment is entered, a trial court can amend, modify, or change an earlier decision. Stewart v. Kingsley Terrace Church, 767

N.E.2d 542, 545 (Ind. Ct. App. 2002). As set forth in Allstate Ins. Co. v. Fields, 842 N.E.2d 804, 806 (Ind. 2006):

> A trial court judgment as to one or more or fewer than all of the claims or parties is a final appealable judgment only when the Court in writing expressly determines that there is no just reason for delay, and in writing expressly directs entry of judgment.

As noted above, the respondents maintain that the trial court had no jurisdiction to hear the Trial Rule 60(B) motion or to enter any orders. In support of this contention, the respondents rely primarily on this court's opinion in Greenfield v. Greenfield, 591 N.E.2d 1057, (Ind. Ct. App. 1992), which determined that the reinstatement of a marital dissolution case dismissed by joint stipulation was error. We observed that the application for reinstatement was made by nonparty attorneys and accountants, rather than by either of the parties, and determined that

> [T]he court reinstated the action to relieve the attorneys and accountants, not to relieve the Greenfields. . . . Neither . . . was a party to the Greenfields' action for dissolution of marriage, and neither became a party by filing a notice seeking payment of her or its fees. . . . Accordingly, neither TR 41 (F) nor TR 60(B) gave the trial court authority to reinstate the Greenfields' petition for dissolution of marriage after the Greenfields filed a stipulation of dismissal.

Id. at 1059.

In this case, the respondents point out that both the original and amended complaints were filed under the caption "In re Rueth Development Company, an Indiana Limited Partnership." Appellants' App. p. 52. Both complaints set forth the names of all general and limited partners. The documents also showed that these individuals had a direct interest in RDC. Indeed, it is apparent that Harold's counsel recognized that all

partners—general and limited—had a direct interest in the litigation. Thus, a summons was issued to each of them. The returns on the summonses show service upon each of the petitioners who filed the Trial Rule 60(B) motion to vacate the dismissal with prejudice in this case.

Pursuant to Indiana Rule of Trial Procedure 4(a):

> The court acquires jurisdiction over a party or person who under these rules commences or joins in the action, is served with Summons or enters an appearance, or who is subject to the power of the court under any other law.

In construing the above, our Supreme Court determined in In re Travelers Ins. Co. v. Madison Sup. Court, 265 Ind. 287, 292, 354 N.E.2d 188, 191 (1976), that one becomes a party to an action when he commences or joins in the action, is served with a summons, enters an appearance, or is otherwise subjected to the power of the court under any other law. Also, in Matter of L.C., we determined that

> While, in a larger legal sense, the term "party" or "parties" has been defined as any or all persons who have a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if an appeal lies, the term "party or parties to the action" is generally used to designate the person or persons who are seeking to establish a right and a person or persons on whom it is sought to impose a corresponding duty or liability, and the term "party to a proceeding" in its ordinary legal meaning is held to embrace such persons only as are parties in a legal sense, and to have been made or become such in some mode prescribed or recognized by the law, so that they are bound by the proceeding.
>
> Whether a person is a party to an action must be ascertained exclusively by an inspection of the record. It can appear in no other way.

659 N.E.2d 593, 598 (Ind. Ct. App. 1996), (quoting Hepp v. Hammer, 445 N.E.2d 579, 581 (Ind. Ct. App. 1983)).

In examining the court rules set forth above and the reported cases, we can only conclude that the petitioners were parties to the action and the trial court could relieve them or their legal representatives from a judgment. Indeed, it would be inequitable in these circumstances to preclude the petitioners from filing a Trial Rule 60(B) motion and permit the respondents to dismiss with prejudice all of the claims against themselves, which the trial court had previously found as constituting breaches of fiduciary duty and fraud upon RDC and its limited partners. Even though the respondents were not specifically named as defendants in the caption of the proceedings regarding the dissolution, winding up, and accounting for RDC, serious allegations of wrongdoing were made against each of them.

As noted above, Count IV of the amended complaint specifically alleged breaches of fiduciary duty by Helen, Thomas, Robert, Herbert, and Timothy Rueth. These owners of H & H were also limited partners in RDC. And, as discussed above, H & H was a residential development business that purchased lots from RDC and supplies and materials from Superior Lumber, which was another business owned by RDC. Appellees' App. p. 38, 40. In a trial regarding purchase amounts and interest owed by H & H to RDC and Superior Lumber, the trial court entered findings of fact and conclusions of law that demonstrated the respondents' deliberate course of fraudulent conduct to obtain benefits for themselves to the detriment of RDC and Superior Lumber. As this court observed in Pinter v. Pinter, 641 N.E.2d 101, 103 (Ind. Ct. App. 1994):

> If a party establishers that an unconscionable plan or scheme was used to improperly influence the court's decision, and that such facts prevented the

> losing party from fully and fairly representing his case or defense, then fraud on the court exists.

In sum, it is apparent that this case was dismissed with prejudice solely because of the respondents' self-serving representations that they were the sole general partners of RDC. Those misrepresentations were potentially fraudulent, which permitted the trial court to set aside the prior dismissal. T.R. 60(B)(3). As a result, the trial court properly reasserted jurisdiction in this matter and set additional hearings in accordance with the petitioners' Trial Rule 60(B) motion. Thus, the respondents' argument that the trial court erred in reinstating the case because the petitioners were "nonparties" in the action, appellant's br. p. 8, fails.

II. Award of Appellate Attorney Fees

As noted above, both parties claim that they are entitled to an award of costs and appellate attorney's fees. The petitioners argue that the respondents have brought this appeal in bad faith and materially failed to comply with the appellate rules "regarding the preparation of [their brief]." Appellees' Br. p. 24. Moreover, the petitioners allege that they are entitled to appellate attorney's fees because the conduct of the respondents' legal counsel was "reprehensible [and it was] improper for him to present the dismissal with prejudice to the court for multiple reasons, including his own conflict of interest since he had previously appeared for Harold G. Rueth and RDC in this or a related matter." Id. at 30.

The respondents claim that they should be awarded attorney's fees because the petitioners' attack on their legal counsel in their cross-appeal is "downright silly . . . deliberately diversionary, misleading and even false." Appellants' Reply Br. p. 32.

Indiana Appellate Rule 66(E) provides in pertinent part that "[t]he Court may assess damages if an appeal . . . is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorney's fees." Our discretion to award attorney's fees under this rule is limited to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay. Thacker v. Wentzel, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003).

Although Appellate 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. Estate of Carnes v. Carnes, 866 N.E.2d 260, 267 (Ind. Ct. App. 2007). 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. Manous v. Manousogianakis, 824 N.E.2d 756, 767-68 (Ind. Ct. App. 2005).

We have formally categorized claims for appellate attorney fees into "substantive" and "procedural" bad faith claims. Estate of Carnes, 866 N.E.2d at 267. 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. In other words, substantive bad faith "implies the conscious doing of a wrong because of dishonest purpose or moral obliquity." Wallace v. Rosen, 765 N.E.2d 192, 201 (Ind. Ct. App. 2002).

On the other hand, procedural bad faith 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. Manous, 824 N.E.2d at 768. Even if the appellant's conduct falls short of that which is "deliberate or by design," procedural bad faith can still be found. Potter v. Houston, 847 N.E.2d 241, 249 (Ind. Ct. App. 2006).

At the outset, we note that the respondents' statement of the issues concisely and particularly describes each issue presented for review. App. R. 46(A)(4). The nature of the case is set forth, the course of the proceedings is accurately presented, and the disposition of the issues by the trial court is properly included. Moreover, we cannot say that the respondents' statement of facts is "woefully lacking to the extent that it fails to provide us with any factual basis upon which to review the merits of their claims." Estate of Carnes, 866 N.E.2d at 268. Also, unlike the circumstances in Estate of Carnes, where we observed that the appellant's arguments on appeal amounted to an "incoherent and illogical tirade of accusations," which were "completely unsubstantiated by the record," id. at 268, we do not conclude the same here.

In our view, it is not apparent that the respondents' appellate brief is written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. Thus, we conclude that an award of appellate attorney's fees is not appropriate on the basis of procedural bad faith. See Graycor Indus. v. Metz, 806 N.E.2d 791, 801 (Ind. Ct. App. 2004) (holding that the appellee was not entitled to

appellate attorney fees even though the appellant's brief did not appropriately conform to the appellate rules, did not set out the facts in accordance with the standard of review, set out facts incorrectly, and based arguments upon less than a full consideration of the evidence presented at the hearing).

Regarding the petitioners' claim that they are entitled to appellate attorney's fees because the respondents engaged in substantive bad faith, there is no showing that the respondents have ignored any unfavorable factual determinations and rulings by the trial court. See Estate of Carnes, 866 N.E.2d at 268 (observing that the appellant was less than candid with the court when he "steadfastly" ignored a court's rulings regarding the validity of a power of attorney and a will). Moreover, while we are affirming the trial court's judgment and deciding issues adversely to the respondents, we cannot conclude that their appellate brief is fraught with baseless or unfounded accusations regarding the petitioners' conduct that would rise to the level of substantive bad faith. For all of these reasons, we conclude that the petitioners are not entitled to appellate attorney's fees.

Similarly, we reject the respondents' contention that we should grant their request for appellate attorney's fees. In apparent support of their claim, the respondents respond to—and counter—the statements that the petitioners set forth as a basis for their claim to the fees. Hence, the respondents merely conclude that "attorney's fees should be awarded by this court for misconduct of counsel, but the award should be assessed against appellees and their attorney for their repeated procedural and substantive bad faith." Appellants' Reply Br. p. 32. Although this appeal reflects a degree of bitterness among the parties and counsel, we do not believe that either party has made a strong

showing that the appeal is frivolous or that it was made in bad faith that rose to the level of egregiousness for which we would award appellate attorney's fees. Therefore, we deny both parties' requests for appellate attorney's fees and costs.

CONCLUSION

In light of our discussion above, we conclude that the trial court's order for further hearings in this matter pursuant to Trial Rule 60(B) was proper. Thus, we dismiss the appeal and deny the parties' requests for costs and appellate attorney's fees.

CRONE, J., and BROWN, J., concur.