



## Case Summary

B.L.H. (“Mother”) appeals the trial court’s denial of her motion for attorney fees and costs. We affirm.

### Issue

Mother raises one issue, which we restate as whether the trial court’s denial of her motion for attorney fees and costs is contrary to law.

### Facts

In October 2001, Mother gave birth to C.L.H. Mother lived with her parents, G.L.H. (“Grandfather”) and B.J.H. (“Grandmother”) during her pregnancy and until 2006, when she bought a house. Grandparents were C.L.H.’s primary caregivers when Mother went back to work after his birth. C.L.H. moved in with Mother in June 2007. Shortly thereafter, the relationship between Mother and Grandparents deteriorated significantly when Mother began a relationship with K.W., and all contact between Mother and Grandparents ceased in December 2007.

In April 2008, Grandparents filed a petition for visitation with C.L.H. pursuant to the Grandparent’s Visitation Act, Indiana Code Chapter 31-17-5. Following a hearing, the trial court awarded Grandparents extensive visitation with C.L.H. Mother appealed, and in June 2009, we reversed, holding that the trial court’s findings did not support the conclusion that visitation with Grandparents was in C.L.H.’s best interest. In re C.L.H., 908 N.E.2d 320, 329 (Ind. Ct. App. 2009).

After we handed down our decision, Mother filed a petition for attorney fees and costs with the trial court. In her motion, Mother sought attorney fees for the visitation

proceedings and the appeal, guardian ad litem fees, and trial transcript fees. After a hearing, the trial court issued an order denying Mother's request for attorney fees and costs.

### **Analysis**

The issue on appeal is whether the trial court's denial of Mother's motion for attorney fees and costs is contrary to law. The party requesting attorney fees has the burden of proof at trial, and the losing party on the issue appeals a negative judgment. Buschman v. ADS Corp., 782 N.E.2d 423, 431 (Ind. Ct. App. 2003). On appeal, we will not reverse a negative judgment unless it is contrary to law. Id. To determine whether the judgment is contrary to law, we consider the evidence in the light most favorable to the appellee together with all the reasonable inferences to be drawn therefrom. Id. We will reverse the judgment only if the evidence leads to but one conclusion and the trial court reached the opposite conclusion. Id. We will apply the same standard of review to Mother's motion for costs.

We begin by addressing Mother's request for attorney fees. Litigants must generally pay their own attorney fees. Davidson v. Boone County, 745 N.E.2d 895, 899 (Ind. Ct. App. 2001). An award of attorney fees is not allowable in the absence of a statute, agreement, or stipulation authorizing such an award. Id. Indiana Code Section 34-52-1-1 governs the award of attorney fees for litigating in bad faith or for pursuing frivolous, unreasonable, or groundless claims. This statute provides, in relevant part:

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.

Ind. Code § 34-52-1-1(b).

On appeal, Mother argues that Grandparents' action for visitation was frivolous, groundless, and made in bad faith. A claim is frivolous:

- (a) if it is taken primarily for the purpose of harassing or maliciously injuring a person, or (b) if the lawyer is unable to make a good faith and rational argument on the merits of the action, or (c) if the lawyer is unable to support the action taken by a good faith and rational argument for the extension, modification, or reversal of existing law.

Smyth v. Hester, 901 N.E.2d 25, 33-34 (Ind. Ct. App. 2009) (quoting Kopka, Landau & Pinkus v. Hansen, 874 N.E.2d 1065, 1074 (Ind. Ct. App. 2007)), trans. denied. A claim is groundless if no facts exist that support the legal claim relied on and presented by the losing party. Id. A claim or defense is not, however, groundless or frivolous merely because the party loses on the merits. Id. In the context of Indiana Code Section 34-52-1-1, we have held that bad faith is not simply bad judgment or negligence. Figg v. Bryan Rental Inc., 646 N.E.2d 69, 76 (Ind. Ct. App. 1995) (quoting Watson v. Thibodeau, 559 N.E.2d 1205, 1211 (Ind. Ct. App. 1990)), trans. denied. Rather, bad faith "implies the conscious doing of a wrong because of dishonest purpose or moral obliquity." Id. "It is

different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.” Id.

Mother fails to argue that no facts existed to support Grandparents’ request for visitation, that Grandparents failed to make a good faith and rational argument on the merits of the visitation action, or that Grandparents’ action required an extension, modification, or reversal of existing law.<sup>1</sup> Rather, she seems to argue that Grandparents’ action was frivolous because it was designed to harass or maliciously injure her and that Grandparents’ action was litigated in bad faith.

Mother spends a significant portion of her brief discussing Grandparents’ prior actions against each other and their failure to enter into a written contract with their attorney. We find neither fact relevant to whether their visitation action was frivolous or litigated in bad faith. Mother also focuses on one sentence in our opinion in the first appeal of this action in which we held:

The evidence shows that Mother continued her relationship with Grandparents, even after Grandfather blamed Mother for causing Grandmother’s stroke, but the discord escalated until their relationship became untenable for Mother. Mother tried for months to maintain her relationship with Grandparents in the face of their unwillingness to accept her relationship with K.W. and only gave up completely after she felt physically threatened by Grandfather on December 23, 2007. Grandparents did not have clean hands when they filed their petition for visitation. Confrontations initiated by Grandparents created unnecessary conflict and stress within the family. While they are entitled to their opinions concerning Mother’s relationship with K.W., Grandparents’

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<sup>1</sup> Mother appears pro se in this action, and we note that “pro se litigants are held to the same standard as are licensed lawyers.” Smith v. Indiana Dept. of Correction, 871 N.E.2d 975, 986 (Ind. Ct. App. 2007), trans. denied, cert. denied.

open hostility toward Mother created an unhealthy environment for C.L.H. In time, when civility is restored, Mother and Grandparents may reach a private reconciliation which enables Grandparents to visit with C.L.H., but under the circumstances Grandparents have failed to show that it is in the best interests of C.L.H. for the State to intervene and compel visitation against the well-founded concerns of Mother, who is a fit parent.

C.L.H., 908 N.E.2d at 329 (emphasis added). Focusing on our statement that Grandparents did not have clean hands, Mother asserts that their action was brought in bad faith. However, our comment that Grandparents did not have clean hands cannot be equated to a finding that Grandparents' visitation action was "the conscious doing of a wrong because of dishonest purpose or moral obliquity." Figg, 646 N.E.2d at 76. The comment was merely an observation that Grandparents bore some responsibility for the deterioration of their relationship with Mother.

Finally, Mother focuses on Grandparents' failure to exercise visitation with C.L.H. after January 2009. Grandparents testified that, after they were granted visitation by the trial court, Mother hired an armed security guard to transfer C.L.H. to and from Grandparents for their visitation, Mother and C.L.H. moved to North Carolina, Mother monitored telephone calls between Grandparents and C.L.H., Mother abruptly terminated telephone calls between Grandparents and C.L.H., and Mother appeared to be quizzing C.L.H. about his visitations. Grandparents decided in February 2009 to terminate the visitations with C.L.H. because they did not want him to be under stress and put him in the middle of their dispute with Mother. In applying our standard of review for a negative judgment, we must construe the evidence in a light most favorable to

Grandparents. Buschman, 782 N.E.2d at 431. Grandparents' actions after the trial court granted visitation do not establish that their visitation action was frivolous or made in bad faith.

In appealing a negative judgment, Mother bears a heavy burden, which she has failed to meet. Mother's argument that Grandparents' visitation action was frivolous, groundless, or made in bad faith is merely a request that we reweigh the evidence and judge the credibility of the witnesses, which we will not do. We recognize that Grandparents' visitation action resulted in financial strain on Mother. However, the fact that Mother was successful in her initial appeal does not mean that Grandparents' action was frivolous, groundless, or made in bad faith. We conclude that Mother has failed to demonstrate that the trial court's denial of her request for attorney fees was contrary to law.

As for Mother's request for costs, we note that "[c]osts were unknown at common law and may be awarded by a court only when they are authorized by statute." Van Winkle v. Nash, 761 N.E.2d 856, 861 (Ind. Ct. App. 2002). The statutory authority for the recovery of costs is found in Indiana Code Section 34-52-1-1(a), which provides: "In all civil actions, the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law." Costs are also addressed in Indiana Trial Rule 54(D), which provides, in relevant part: "Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs in accordance with any provision of law." "The term 'costs' is an accepted legal term of art that has been strictly interpreted

to include only filing fees and statutory witness fees.” Id. “Thus, in the absence of manifest contrary legislative intent, the term ‘costs’ must be given its accepted meaning which does not include litigation expenses.” Id.

In her Appellant’s Brief, Mother fails to explain the costs that she has incurred. In her Reply Brief, Mother contends that she has incurred filing fees for two appeals and witness fees. Mother has failed to provide a citation to the record regarding her appellate filing fees and has waived that issue.<sup>2</sup> See Ind. Appellate Rule 46(A). As for the witness fees, Mother cites only her expense of \$300 for an expert witness at the attorney fee hearing. An award of expert witness fees is not allowed under Indiana Code Section 34-52-1-1 in excess of statutory witness fees. Calhoun v. Hammond, 169 Ind. App. 39, 43, 345 N.E.2d 859, 862 (1976). Mother makes no argument that she is entitled to an award of statutory witness fees and has waived that argument. We conclude that the trial court’s denial of Mother’s request for costs is not contrary to law.

### **Conclusion**

The trial court’s denial of Mother’s motion for attorney fees and costs was not contrary to law. We affirm.

Affirmed.

FRIEDLANDER, J., and CRONE, J., concur.

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<sup>2</sup> Mother did not request relief under Indiana Appellate Rule 67 after the conclusion of the first appeal.