

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

Michael H. Michmerhuizen
Barrett McNagny LLP
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE

Shannon K. Connors
Paul R. Sturm
Shambaugh Kast Beck & Williams,
LLP
Fort Wayne, Indiana

IN THE COURT OF APPEALS OF INDIANA

David A. Anzelmo,
Appellant-Respondent,

v.

Elizabeth M. Warren,
Appellee-Petitioner.

June 14, 2023

Court of Appeals Case No.
23A-DR-225

Appeal from the Dekalb Superior
Court

The Honorable Douglas M. Fahl,
Special Judge

Trial Court Cause No.
17D02-1011-DR-323

Memorandum Decision by Judge Bradford
Judges Riley and Weissmann concur.

Bradford, Judge.

Case Summary

- [1] Elizabeth Warren (“Mother”) and David Anzelmo (“Father”) were previously married but divorced in 2010. Since that time, the parties have filed various motions and petitions relating to custody of the parties’ children. In December of 2016, Father filed a motion for a change of judge pursuant to Trial Rule 76(B). The trial court granted Father’s motion. In December of 2022, Father filed a second motion for a change of judge pursuant to Trial Rule 76(B). The trial court denied Father’s second motion and granted Mother’s request for attorney’s fees. Father challenges the denial of his motion and the award of attorney’s fees on appeal. We affirm.

Facts and Procedural History

- [2] Mother and Father were previously married and are the parents of two children, born in 2001 and 2006.

On October 1, 2010, Mother filed a petition for dissolution of marriage against Father. On January 26, 2012, the parties entered into a Mediated Marital Settlement (“the Settlement”). The Settlement provided, in relevant part, that the parties would have joint legal custody of their minor children, with Mother having primary physical custody. The Settlement also allowed Father parenting time with the children pursuant to the Indiana Parenting Guidelines, with the following additions: one overnight visit on weekdays, one extra weekday visit, and alternate weekends extended by one day. On May 2, the parties entered into a Stipulation for Court Order to Counsel and Mediate Child Issues, whereby the parties stipulated that, prior to seeking assistance from the Court, the parties would seek

counseling with Reverend Dr. Thomas Smith regarding issues associated with parenting time. The dissolution court accepted that stipulation (“the stipulation”).

Anzelmo v. Anzelmo, 2016 WL 4542162 *1 (Ind. Ct. App. August 31, 2016), *trans. denied*. The parties thereafter filed various motions and petitions, including a motion for a continuance, filed by Father, and a petition to modify custody, filed by Mother. *Id.* at *1–2. After denying Father’s motion for a continuance, the trial court granted Mother’s petition to modify custody to grant Mother “sole legal and sole physical custody of the parties’ minor children.” *Id.* at *2. Father appealed, arguing that the trial court had abused its discretion by denying his request for a continuance and by modifying custody. On appeal, we concluded that the trial court had not abused its discretion by denying Father’s request for a continuance but had abused its discretion by modifying custody. *Id.* at *4, *7.

[3] On December 20, 2016, Father filed a motion requesting a change of judge pursuant to Indiana Trial Rule 76(B). The trial court granted Father’s motion for a change of judge on January 4, 2017. A special judge was thereafter appointed on February 7, 2017, with the appointment order indicating that Father’s motion for a change of judge had been filed and granted “pursuant to Trial Rule 76B.” Appellee’s App. Vol. II p. 44. In the years following, the parties continued to file various motions and petitions relating to child custody and support.

[4] On December 2, 2022, Mother filed an emergency petition to modify custody and parenting time. On December 14, 2022, Father filed a second motion for a change of judge pursuant to Trial Rule 76(B). Mother moved to dismiss Father's motion for a change of judge, claiming that he had already received the one automatic change of judge allowed by Trial Rule 76(B) and, as such, was not entitled to another automatic change of judge. Mother also requested that Father be ordered to pay the attorney's fees she had incurred in connection with Father's second request for a change of judge.

[5] On December 15, 2022, the trial court denied Father's motion for a change of judge, finding "no basis for [Father's] request for a second change of Judge" in Trial Rule 76(B). Appellant's App. Vol. II p. 117. The next day, Father filed a response claiming that his prior request for a change of judge had been made pursuant to Trial Rule 76(C), and, as such, he had not yet received an automatic change of judge pursuant to Trial Rule 76(B). Father also claimed that Mother's request for attorney's fees should be denied. Mother filed a second petition for attorney's fees on December 19, 2022, in which she claimed that Father had "misstated the facts and/or procedural history in this case" and that Father's second motion for a change of judge pursuant to Trial Rule 76(B) was "frivolous, unreasonable[,] or groundless." Appellant's App. Vol. II pp. 122, 123. On January 3, 2023, the trial court issued an order denying Father's motion for a change of judge and ordered that Father "shall pay [Mother] an attorney fee award and judgment of \$2,560.00 for her reasonable attorney fees incurred to prepare this petition." Appellee's App. Vol. II p. 60.

Discussion and Decision

I. Denial of Father's Motion for a Change of Judge

[6] Father contends that the trial court erred in denying his request for a change of judge pursuant to Trial Rule 76(B). Generally, “[t]he interpretation of the Indiana Trial Rules is a question of law, which we review de novo.” *In re Paternity of V.A.*, 10 N.E.3d 61, 63 (Ind. Ct. App. 2014). “Our objective in construing their meaning is to give effect to the intent underlying the rule.” *Id.*

[7] Trial Rule 76(B) provides as follows:

In civil actions, where a change may be taken from the judge, such change shall be granted upon the filing of an unverified application or motion without specifically stating the ground therefor by a party or his attorney. Provided, however, *a party shall be entitled to only one [1] change from the judge.* After a final decree is entered in a dissolution of marriage case or paternity case, *a party may take only one change of judge in connection with petitions to modify that decree, regardless of the number of times new petitions are filed.* The Rules of Criminal Procedure shall govern proceedings to enforce a statute defining an infraction.

(Emphases added). Father acknowledges that, prior to December of 2022, he had previously requested, and had been granted, a change of judge, but claims that the order granting a prior change of judge “was not issued in conjunction with Father’s express rights under Trial Rule 76(B) to obtain [a] nondiscretionary, automatic change of judge.” Appellant’s Br. p. 19. We cannot agree.

[8] On December 20, 2016, Father filed a motion for a change of judge, which read as follows:

COMES NOW [Father], by counsel, ... and *pursuant to Trial Rule 76(B) of the Indiana Rules of Trial Procedure*, moves the Court for a change of judge. Pursuant to Trial Rule 79(F), [Father] requests the Court to name a panel of three (3) persons eligible to serve as a special judge for striking.

WHEREFORE, [Father], by counsel, ... moves the Court for a change of judge, for the naming of a panel of persons eligible to serve as special judge, and for all other just and proper relief in the premises.

Appellant's App. Vol. II p. 115 (emphasis added). The trial court granted Father's motion in an order dated January 4, 2017.

[9] Father now asserts that "[w]hile [his] First TR76 Motion cites to Trial Rule 76(B) as generally supporting his request for a change of judge, the Trial Court's related January 4, 2017, Order is silent regarding the specific Trial Rule 76 subsection and premises upon which the change of judge in fact occurred." Appellant's Br. p. 19 (emphasis omitted). While Father is correct that the trial court's January 4, 2017 order did not explicitly mention Trial Rule 76(B), Father's motion for a change of judge *did* explicitly cite Trial Rule 76(B) as the basis for his request. Moreover, the trial court's order explicitly stated that the "matter [was] before the Court on [Father's] Motion for Change of Judge" and that the trial court granted Father's motion. Appellant's App. Vol. II p. 116. In addition, the subsequent order appointing the new judge explicitly stated that

the change of judge had been made “pursuant to Trial Rule 76B.” Appellee’s App. Vol. II p. 44.

[10] To the extent that Father now argues that he had not previously requested a change of judge pursuant to Trial Rule 76(B) but rather pursuant to Trial Rule 76(C), the clear and plain language used in Father’s December 20, 2016 motion indicates that Father’s request was made pursuant to Trial Rule 76(B). In fact, Father’s motion only mentions Trial Rule 76(B) and makes no mention of any other subsection of Trial Rule 76. Again, the language of Trial Rule 76(B) provides that a party is entitled to only one automatic change of judge under the rule. The record clearly indicates that Father received his one automatic change of judge when the trial court granted Father’s December 20, 2016 motion for a change of judge. As such, we cannot say that the trial court erred in denying Father’s December 14, 2022 motion for a second change of judge pursuant to Trial Rule 76(B).

II. Award of Attorney’s Fees

[11] Father also challenges the trial court’s award of \$2560.00 in attorney’s fees to Mother. Indiana Code section 34-52-1-1(b)(1) provides that “[i]n 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[.]”

A claim is “frivolous” if it is made primarily to harass or maliciously injure another; if counsel is unable to make a good faith and rational argument on the merits of the action; or if

counsel is unable to support the action by a good faith and rational argument for extension, modification, or reversal of existing law. 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. A claim or defense is groundless if no facts exist which support the legal claim relied on and presented by the losing party. However, an action is not groundless merely because a party loses on the merits.

Dunno v. Rasmussen, 980 N.E.2d 846, 850–51 (Ind. Ct. App. 2012) (internal citations omitted). A trial court’s decision to award attorney’s fees is reviewed for an abuse of discretion. *Id.* at 851. “A trial court abuses its discretion if its decision clearly contravenes the logic and effect of the facts and circumstances or if the trial court has misinterpreted the law.” *Id.*

[12] In challenging the trial court’s award of attorney’s fees to Mother, Father argues that

[b]ecause the Trial Court lacked any appropriate legal basis to deny Father’s Second TR76 Motion under Trial Rule 76(B), and was therefore divested of further authority excepting narrow emergency matters, it consequently maintained no requisite jurisdictional authority upon which it could rightfully consider or enter judgment upon any non-emergency request by Mother for an award of attorney’s fees.

Appellant’s Br. p. 25. For her part, Mother asserts that the trial court did not abuse its discretion in awarding her attorney’s fees because Father had already “received his one automatic change of judge” pursuant to Trial Rule 76(B), his second motion was therefore “groundless,” and “the only reasonable

explanation in filing the second motion is to cause further delay and aid in dilatory practice.” Appellee’s Br. p. 13.

[13] As is stated above, the language of Father’s December 20, 2016 motion specifically requested relief pursuant to Trial Rule 76(B). That motion was granted. Trial Rule 76(B) clearly states that a party “may take *only one change of judge* in connections with petitions to modify that decree, *regardless of the number of times new petitions are filed.*” (Emphases added). Father was afforded his one automatic change of judge pursuant to Trial Rule 76(B) when his December 20, 2016 motion was granted. Father was not entitled to a second change of judge pursuant to Trial Rule 76(B). The trial court considered the parties’ arguments relating to whether Father’s second request for a change of judge was groundless or had been made in good faith and determined that an award of attorney’s fees was warranted. Based on the record before us, we cannot say that the trial court abused its discretion in reaching this conclusion.

[14] The judgment of the trial court is affirmed.

Riley, J., and Weissmann, J., concur.