

MEMORANDUM DECISION

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.



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IN THE COURT OF APPEALS OF INDIANA

A.G.,
Appellant-Defendant,

v.

M.S.,
Appellee-Plaintiff.

March 21, 2022

Court of Appeals Case No.
21A-PO-2420

Appeal from the Dearborn
Superior Court

The Honorable Carl H. Taul,
Senior Judge

Trial Court Cause No.
15D02-2108-PO-172

Bailey, Judge.

Case Summary

- [1] A.G. (“Respondent”) appeals the denial of her motion to correct error, which challenged the issuance of an order of protection in favor of M.S. (“Petitioner”). Petitioner asks that Respondent be ordered to pay appellate attorney’s fees. We affirm the order of protection. We deny Petitioner’s request for appellate attorney’s fees.

Issues

- [2] Respondent presents two issues for review:
- I. Whether the Dearborn Superior Court lacked jurisdiction to enter the order of protection; and
 - II. Whether there is sufficient evidence for an order of protection.

Petitioner presents the issue of whether she is entitled to appellate attorney’s fees.

Facts and Procedural History

- [3] Petitioner is the mother of J.W.’s two children (“Children”) and Respondent is J.W.’s girlfriend. Children participate in parenting time with J.W. at the residence he shares with Respondent.
- [4] On August 27, 2021, Petitioner filed a petition for an order of protection. She alleged that Respondent had: “taken control of a [Family Wizard Parenting]

app.,” stated her wish “that [Petitioner] be eliminated,” exited her residence “screaming something and charging down the driveway,” and was “emotionally abusing [Children] while they are there.” (App. Vol. II, pgs. 12-14.

- [5] On September 22, 2021, the trial court conducted a hearing and granted Petitioner the requested order of protection. Respondent filed a motion to correct error, which was summarily denied. Respondent appealed, and the court reporter in the cause notified this Court that Respondent had not made payment arrangements with regard to completion of the hearing transcript. On December 6, 2021, this Court issued an order stating that the court reporter was relieved of any obligation to prepare the hearing transcript because no transcript had been requested in the Notice of Appeal.

Discussion and Decision

Jurisdiction

- [6] Respondent states that she wishes to make a “primary argument” with regard to jurisdiction and she contends that “the events in question did not occur in the State of Indiana, but in the Commonwealth of Kentucky.” Appellant’s Brief at 9. Respondent does not develop a corresponding argument or point to a timely jurisdictional challenge of record.
- [7] Indiana Code Section 34-26-5-4(b)(1) provides that a petition for an order for protection may be filed “in the county in which the petitioner currently or

temporarily resides.” Petitioner asserts that she lives in Dearborn County, Indiana, and Respondent has not challenged this representation. Respondent has not shown a jurisdictional defect.

Sufficiency of the Evidence

[8] According to Respondent, “there was absolutely no evidence of domestic violence or threats by the [Respondent] against the [Petitioner]” and “the only evidence submitted for ‘harassment’ were text messages.” Appellant’s Brief at 4. Petitioner responds that she “presented text messages [from Respondent] stating vile and despicable comments towards [Petitioner].” Appellee’s Brief at 15. Petitioner also claims that she testified that Respondent attempted to come onto Petitioner’s property and Respondent “charged after [Petitioner] screaming and yelling at her.” *Id.*

[9] Indiana's Civil Protection Order Act has the express purpose of promoting the: “(1) protection and safety of all victims of domestic or family violence in a fair, prompt, and effective manner; (2) protection and safety of all victims of harassment in a fair, prompt, and effective manner; and (3) prevention of future domestic violence, family violence, and harassment.” Ind. Code § 34-26-5-1. Indiana Code Section 34-26-5-2(b) provides that “[a] person who is or has been subjected to harassment may file a petition for an order for protection against a person who has committed repeated acts of harassment against the petitioner.” In turn, Indiana Code Section 34-6-2-51.5 defines harassment for purposes of Ind. Code Section 34-26-5-1 as “conduct directed toward a victim that includes, but is not limited to, repeated or continuing impermissible contact: (1) that

would cause a reasonable person to suffer emotional distress; and (2) that actually causes the victim to suffer emotional distress.” “Harassment does not include statutorily or constitutionally protected activity[.]” I.C. § 35-45-10-2.

[10] Here, the trial court found “that repeated acts of harassment occurred sufficient to justify the issuance of [the order of protection].” Appealed Order at 2.

Indiana Code Section 34-26-5-9(g) provides that “[a] finding that domestic or family violence or harassment has occurred sufficient to justify the issuance of an order under this section means that a respondent represents a credible threat to the safety of a petitioner or a member of a petitioner's household” and that, “[u]pon a showing of domestic or family violence or harassment by a preponderance of the evidence, the court shall grant relief necessary to bring about a cessation of the violence or the threat of violence.”

[11] An order of protection is similar to an injunction and, therefore, a trial court must sua sponte make special findings of fact and conclusions thereon. *Fox v. Bonam*, 45 N.E.3d 794, 798 (Ind. Ct. App. 2015). Our standard of review of the trial court’s findings and conclusions is two-tiered: we first determine whether the evidence supports the findings and then whether the findings support the protective order. *Id.* In deference to the trial court’s proximity to the issues and the witnesses, we will only reverse where there is no evidence supporting the findings or the findings fail to support the order. *Id.* In addition, we do not reweigh the evidence or reassess the credibility of the witnesses. *Id.* The appellant bears the burden of establishing that the trial court’s findings are clearly erroneous. *Id.*

[12] Respondent has not timely tendered a transcript of the evidentiary hearing to facilitate our appellate review of the evidence. Thus, she is unable to satisfy the burden of establishing that the trial court’s findings are clearly erroneous.

Appellate Attorney’s Fees

[13] Petitioner contends that she is entitled to appellate attorney’s fees incurred in responding to Respondent’s appellate brief, pursuant to Indiana Appellate Rule 66(E). This Court’s discretion to award Rule 66(E) appellate attorney’s fees is limited to circumstances where the 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). “[T]he sanction is not imposed to punish mere lack of merit but something more egregious.” *Troyer v. Troyer*, 987 N.E.2d 1130, 1148 (Ind. Ct. App. 2013) (citation omitted), *trans. denied*. Accordingly, we exercise caution in awarding appellate attorney’s fees because of the “potentially chilling effect the award may have upon the exercise of the right to appeal.” *Holland v. Steele*, 961 N.E.2d 516, 528 (Ind. Ct. App. 2012), *trans. denied*.

[14] Claims for appellate attorney’s fees are categorized into “substantive” and “procedural” bad faith claims. *Boczar v. Meridian Street Found.*, 749 N.E.2d 87, 95 (Ind. Ct. App. 2001). To prevail on a substantive bad faith claim, the party must show that the appellant’s contentions are utterly devoid of all plausibility. *Id.* Procedural bad faith, on the other hand, 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. *Id.*

[15] Petitioner makes a claim of procedural bad faith here, arguing that Respondent “filed a brief egregiously in violation of the appellate rules.” Appellee’s Brief at 16. More specifically, Petitioner alleges that Respondent “did not concisely describe each issue for review,” failed to provide an accurate Statement of the Case, “inserted argument” into her Statement of the Facts, and provided no Appendix or “actual argument.” *Id.* at 16-17. According to Petitioner, “this made the preparation of an appellee’s brief exceedingly difficult to write.” *Id.* at 17.

[16] Although Respondent’s brief is not a model of compliance with Appellate Rule 46, which prescribes the arrangement and content of briefs, we are not persuaded that Respondent misstated facts or that her brief was written in a manner calculated to require the maximum expenditure of time. As such, we exercise restraint and decline to order Respondent to pay Petitioner’s appellate attorney’s fees.

Conclusion

[17] Respondent has not shown a jurisdictional defect. She has not established her claim of insufficiency of the evidence to justify issuance of a protective order. We decline to award Petitioner appellate attorney’s fees.

[18] Affirmed.

Mathias, J., and Altice, J., concur.