MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

INDY E CIGS LLC., et al.,
Appellants,

v.

Scott Bender and Jamie Bender,
Appellees.

April 27, 2023

Court of Appeals Case No. 22A-PL-1567

Appeal from the Marion Superior Court

The Honorable James B. Osborn, Special Judge

Trial Court Cause No. 49D21-1810-PL-40596

Memorandum Decision by Judge Brown
Judges Bailey and Weissmann concur.

Brown, Judge.

[1] Indy E Cigs LLC ("Indy E Cigs") and Patrick C. Badell (the "Appellants") appeal thirteen orders of the trial court. We dismiss and remand for a determination of attorney fees pursuant to Ind. Appellate Rule 66(E).

Facts and Procedural History

[2] On October 8, 2018, Scott Bender and Jamie Bender filed a complaint in the Marion Superior Court against 101 Vape, Inc., Naptown Vapors, LLC, and Indy E Cigs alleging that an e-cigarette exploded which seriously injured Scott. The e-cigarette and coil[1] were designed, manufactured, and packaged by Shenzhen IVPS Technology Co. Limited doing business under the name SMOK, the e-cigarette was sold by Naptown Vapors, and the coil was sold to Scott by Indy E Cigs. On November 5, 2018, Attorney Patrick Badell filed an appearance for Indy E Cigs. On May 17, 2019, the Benders filed a Motion for Leave to File Amended Complaint and attached a Second Amended Complaint alleging in part as to Indy E Cigs: Count II, negligent warning; Count V, negligence; Count VI, breach of the implied warranty of merchantability; and Count X, breach of the implied warranty of fitness for a particular purpose. On June 4, 2019, the court granted the Benders' Motion for Leave to File Amended Complaint.

[3] In the following years, the parties filed numerous motions, and the court entered multiple orders. On July 5, 2022, Indy E Cigs filed a Notice of Appeal.

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[1] The Benders asserted that a coil is "the component part of an e-cigarette that converts the fluid into vapor by heating it." Appellants' Appendix Volume II at 83.

On July 7, 2022, Indy E Cigs filed an Amended Notice of Appeal listing the following appealed orders: the September 9, 2021 Order on Outstanding Issues; the September 13, 2021 Amended Order on Outstanding Issues; the September 23, 2021 Order on Clarifications, Sanctions, and Trial Deadlines; the April 25, 2022 Order on Indy E Cigs's T.R.60(B)(3) Motion for Relief; the April 25, 2022 Order on Indy E Cigs's Motion to Dismiss Motion for Sanctions; the April 25, 2022 Order Denying Indy E Cigs's Motion to Strike Scott Bender Affidavit Pursuant to T.R.56(G); the April 25, 2022 Order Denying Indy E Cigs's Motion to Deny Sanctions; the April 25, 2022 Order Denying Motion for Findings of Fact and Conclusions of Law; the April 25, 2022 Order Denying Trial by Jury on Damages; the April 25, 2022 Order Denying Motion for Findings of Fact and Conclusions of Law on T.R.56(G) Motion to Strike Affidavit; the April 25, 2022 Order Granting Plaintiffs' Motion to Strike; the May 16, 2022 Order Granting Plaintiffs' Motion for Sanctions; and the June 15, 2022 Order Denying Indy E Cigs's Motion to Correct Error.

Discussion

[4] We begin by noting that the Benders argue, "[a]cross nearly one hundred pages, Indy E Cigs and Badell suffer the reader with arguments that vacillate between semantic and outrageous, supported by citations to cases that do not stand for the propositions for which they are cited." Appellees' Brief at 22. They point to thirteen alleged misrepresentations and request that this Court decline the Appellants' request for appellate review.

[5] The Benders' alleged misrepresentations include that the Appellants assert "[t]he Appellees . . . offered no evidence in support of their March 29, 2022, Motion for Sanctions, and rested on their unverified filings." Appellants' Brief at 72 (citing Transcript Volume II at 250). The March 29, 2022 Motion for Sanctions attached exhibits including an email and a letter from the Benders' counsel. *See* Appellants' Appendix Volume VIII at 208-209. And, at the April 20, 2022 hearing on the Motion for Sanctions, an email from Benders' counsel, which was attached to the Motion for Sanctions, was admitted by the trial court over objection by Attorney Badell.

[6] As another alleged misrepresentation, the Benders point to the following assertion by the Appellants: "Appellees filed on December 11, 2020, a 'Final Witness and Exhibit List'. Among twenty categories of Exhibits, the SMOK Email was identified on Appellees' Exhibit List by Bate Stamp only." Appellants' Brief at 63 (citing Appellants' Appendix Volume III at 142-145). The record reveals that the Plaintiffs' Final Witness and Exhibit List filed on December 11, 2020, identified the name of the item as well as the bate stamp. Specifically, the list stated: "Email to SMOK; Bender 00416-00418." Appellants' Appendix Volume III at 144.

[7] The Benders also point to the following assertion by the Appellants: "The Court on May 16, 2022, issued its *Order on Sanctions*. The Court did not make its own findings in its *Order*. The Court adopted the unverified argument set out in Appellees' 'Motion for Sanctions' as the Court's facts in its *Order*." Appellants' Brief at 55 (citing Appellants' Appendix Volume XV at 107-110). The May 16,

2022 Order Granting Plaintiffs' Motion for Sanctions consisted of four pages. The court observed the trigger for the Benders' most recent motion for sanctions occurred on March 17, 2022, the evening before the jury selection was to begin when Attorney Badell filed a motion for relief from judgment alleging fraud, misrepresentation, or other misconduct. The court found that, "[i]f anyone has committed fraud, misrepresentation, and misconduct in this case it is Mr. Badell." Appellants' Appendix Volume XV at 108. It stated that "Plaintiffs' factual recitation from its sanction motion, minus some argumentative and pejorative language, is accurate in all respects." *Id.* It also found Attorney Badell had "made factual and consequential misrepresentation several times," "routinely filed motions and responses long after deadlines had passed," had "been indolent in his discovery duties," and had "filed several frivolous motions to relitigate decided issues," and it found the motion for relief from judgment was the last in a long line of attempts to cover up his failure to timely respond to a summary judgment motion. *Id.* We cannot say that the trial court "did not make its own findings" in its May 16, 2022 order.

[8] The Benders also point to a conflict in how the Appellants cited *Prime Mortgage USA, Inc. v. Nichols*, 885 N.E.2d 628 (Ind. Ct. App. 2008). In its brief, Indy E Cigs asserted that the trial court based its May 16, 2022 order on *Prime Mortgage*, which is "a misapplication of the law." Appellants' Brief at 27. It stated that the trial court "could not enter a Sanction based on a discovery issue" and *Prime Mortgage* "does not apply to the case." *Id.* at 75. It later asserted that *Prime Mortgage* "dealt with the Court's inherent authority under

Trial Rule 37 to sanction parties for disobedience of discovery orders" and *Prime Mortgage* "has no application and provides no legal basis for the Court's imposition of Sanctions." *Id.* at 80. The Benders assert that Indy E Cigs's reliance on *Prime Mortgage* in the Appellants' Brief differs from how Indy E Cigs cited the case in its December 3, 2021 Motion to Strike "Release of Sanctions" and Renewed Motion for Stay of Proceedings, in which Indy E Cigs asserted:

> The Trial Court has the inherent and exclusive power to sanction parties in the course of "maintaining dignity, securing obedience to its process and rules, rebuking interference with the Court's business, and punishing unseemly behavior.["] *Prime Mortgage USA Inc. and Law vs. Nichols 885 N.E.*[2d] *628, 650 (Ind.* [*Ct.*] *App., 2008).* This power includes contempt citations, fines, awards of attorney fees . . . [] *Prime Mortgage supra, at 651.*

Appellants' Appendix Volume VI at 230.

[9] The Benders further point to Indy E Cigs's following assertion:

> [The Benders'] counsel on April 13, 2022, filed their "Supplemental Attorney Fees Claim and Attorney Fees Affidavit" in the amount of $156,168.53. *(Appendix Vol. X, pgs. 47-68).* The Affidavit did not contain the hourly rate or any other factors to support the reasonableness of Appellees' fee request. *(Appendix Vol X, pgs. 49).*

Appellants' Brief at 91. The record reveals that the Supplemental Attorneys' Fees Claim and Tender of Attorneys' Fees Affidavit, which was filed on April 13, 2022, included an affidavit of the Benders' counsel which asserted that "[t]he attached Exhibit A is a report generated from the billing software for the

purpose of demonstrating the time spent prosecuting the Plaintiffs' claims." Appellants' Appendix Volume X at 49. Exhibit A consisted of a nineteen-page Client Activity Report for the Benders with a date range of March 22, 2021, to April 13, 2022.

[10] While we find some of the assertions in Indy E Cigs's brief concerning, we deny the Benders' request to decline Indy E Cigs's request for appellate review on this basis.

[11] To the extent Indy E Cigs filed an Amended Notice of Appeal listing thirteen appealed orders, we note that the basis for appellate jurisdiction listed in the July 7, 2022 Amended Notice of Appeal was an "Appeal from a Final Judgment, as defined by Appellate Rule 2(H) and 9(I)."[2] Amended Notice of Appeal at 2. Ind. Appellate Rule 2(H) provides that a judgment is a final judgment if:

> (1) it disposes of all claims as to all parties;
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> (2) the trial court in writing expressly determines under Trial Rule 54(B) or Trial Rule 56(C) that there is no just reason for delay and in writing expressly directs the entry of judgment (i) under Trial Rule 54(B) as to fewer than all the claims or parties, or (ii) under Trial Rule 56(C) as to fewer than all the issues, claims or parties;

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[2] Ind. Appellate Rule 9(I) provides: "**Administrative Agency Appeals.** In Administrative Agency appeals, the Notice of Appeal shall include the same contents and be handled in the same manner as an appeal from a Final Judgment in a civil case, notwithstanding any statute to the contrary. Assignments of error are not required. See Rule 9(A)(3). (See Form #App.R. 9-1)."

> (3) it is deemed final under Trial Rule 60(C);
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> (4) it is a ruling on either a mandatory or permissive Motion to Correct Error which was timely filed under Trial Rule 59 or Criminal Rule 16; or
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> (5) it is otherwise deemed final by law.

[12] Ind. Trial Rule 54(A) provides: "'Judgment', as used in these rules, includes a decree and any order from which an appeal lies." Ind. Trial Rule 54(B) provides that "[a] judgment as to one or more but fewer than all of the claims or parties is final when the court in writing expressly determines that there is no just reason for delay, and in writing expressly directs entry of judgment" and that "an appeal may be taken *upon this or other issues resolved by the judgment*; but in other cases a judgment, decision or order as to less than all the claims and parties is not final." (Emphasis added).

[13] "Trial Rule 54(B) certification of an order that disposes of less than the entire case must contain the magic language of the rule." *Georgos v. Jackson*, 790 N.E.2d 448, 452 (Ind. 2003), *reh'g denied*. "This is intended to provide a bright line so there is no mistaking whether an interim order is or is not appealable." *Id.* "[A]n order becomes final and appealable under Rule 54(B) 'only by meeting the requirements of T.R. 54(B). These requirements are that the trial court, in writing, expressly determine that there is no just reason for delay and, in writing, expressly direct entry of judgment.'" *Id.* (quoting *Martin v. Amoco Oil Co.*, 696 N.E.2d 383, 385 (Ind. 1998), *cert. denied*, 525 U.S. 1049, 119 S. Ct. 608 (1998)). "'The purpose of Trial Rule 54(B) is to avoid piecemeal litigation and

appeal of various issues in a case and to preserve judicial economy by protecting against the appeal of orders that are not yet final.'" *Front Row Motors, LLC v. Jones*, 5 N.E.3d 753, 757 (Ind. 2014) (quoting *Paulson v. Centier Bank*, 704 N.E.2d 482, 488 (Ind. Ct. App. 1998), *reh'g denied*, *trans. denied*).

[14] The May 16, 2022 Order Granting Plaintiffs' Motion for Sanctions contains the language mentioned in Rule 54(B). Specifically, the order states "there is no just reason for delay" and "default judgment [is entered] as a final, appealable, collectable judgment in favor of the Plaintiffs and against Indy E Cigs, LLC." Appellant's Appendix Volume XV at 110. Thus, the May 16, 2022 order could qualify as an appealable judgment under Ind. Appellate Rule 2(H)(2).[3] However, the May 16, 2022 order resulted in a default judgment. Ind. Trial Rule 55(C) provides: "A judgment by default which has been entered may be set aside by the court for the grounds and in accordance with the provisions of Rule 60(B)." The Indiana Supreme Court has held that "the proper procedure . . . for setting aside an entry of default or grant of default judgment thereon is to first file a Rule 60(B) motion to have the default or default judgment set aside." *Siebert Oxidermo, Inc. v. Shields*, 446 N.E.2d 332, 337 (Ind. 1983). The Appellants failed to follow the proper procedure as pronounced by the Indiana Supreme Court by failing to file a motion for relief from judgment under Rule

[3] We note that the Order Granting Motion for Leave to Dismiss a Portion of Outstanding Claims dated February 27, 2022, and filed March 9, 2022, found that Count V, Negligence, remained as to Naptown Vapors, LLC, and Count VI, Breach of the Implied Warranty of Merchantability, remained as to Naptown Vapors. The May 16, 2022 order did not address these counts.

60(B) of the court's May 16, 2022 order. We conclude that the Appellants failed to preserve this issue for appeal. *See Expert Pool Builders, LLC v. Vangundy*, 203 N.E.3d 508, 512-513 (Ind. Ct. App. 2023) (observing that "after the entry of the default judgment against it, [the defendant], instead of filing a motion to set aside default judgment pursuant to T.R. 60(B), filed a motion to correct error pursuant to T.R. 59," the defendant "then filed its notice of appeal following the denial of his motion to correct error, again without filing a motion to set aside default judgment," and concluding that "as [the defendant] failed to follow the proper procedure to contest the trial court's entry of default judgment, as clearly announced in *Siebert*, [the defendant] failed to preserve the issue and we dismiss his appeal"), *trans. pending*.

[15] To the extent the Amended Notice of Appeal listed the September 9, 2021 Order on Outstanding Issues, the September 13, 2021 Amended Order on Outstanding Issues, the September 23, 2021 Order on Clarifications, Sanctions, and Trial Deadlines, the April 25, 2022 Order on Indy E Cigs's Motion to Dismiss Motion for Sanctions, the April 25, 2022 Order Denying Indy E Cigs's Motion to Strike Scott Bender Affidavit Pursuant to T.R.56(G); the April 25, 2022 Order Denying Indy E Cigs's Motion to Deny Sanctions; the April 25, 2022 Order Denying Motion for Findings of Fact and Conclusions of Law; the April 25, 2022 Order Denying Trial by Jury on Damages; the April 25, 2022 Order Denying Motion for Findings of Fact and Conclusions of Law on T.R.56(G) Motion to Strike Affidavit; and the April 25, 2022 Order Granting Plaintiffs' Motion to Strike, the Appellants do not assert that any of these orders

were appealable as final judgments or under Ind. Appellate Rule 14, which governs interlocutory appeals, or were timely appealed.

[16] To the extent the Appellants listed the April 25, 2022 order on Indy E Cigs's motion for relief from judgment in their Amended Notice of Appeal and Ind. Appellate Rule 2(H)(3) mentions a judgment being "deemed final under Trial Rule 60(C)," we note that Ind. Trial Rule 60(C) provides: "A ruling or order of the court denying or granting relief, in whole or in part, by motion under subdivision (B) of this rule shall be deemed a final judgment, and an appeal may be taken therefrom as in the case of a judgment." The April 25, 2022 order with respect to Indy E Cigs's Motion for Relief from Judgment stated: "Neither granted nor denied. The Court finds the motion to have been improper." Appellants' Appendix Volume XV at 88. We cannot say that the April 25, 2022 order was a final judgment under Ind. Trial Rule 60(C) or Ind. Appellate Rule 2(H)(3).

[17] With respect to the Benders' request for appellate attorney fees, we note that Ind. Appellate Rule 66(E) provides in pertinent part that this Court "may assess damages if an appeal . . . is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees." Our discretion to impose damages 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) (citing *Orr v. Turco Mfg. Co., Inc.*, 512 N.E.2d 151, 152 (Ind. 1987)). In addition, while Ind. 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. *Id.* (citing *Tioga Pines Living Ctr., Inc. v. Ind. Family & Soc. Serv. Admin.*, 760 N.E.2d 1080, 1087 (Ind. Ct. App. 2001), *aff'd on reh'g*, *trans. denied*). Indiana appellate courts have classified claims for appellate attorneys' fees into substantive and procedural bad faith claims. *Id.* (citing *Boczar v. Meridian St. 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 and arguments 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, or files briefs written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. *Id.* at 346-347. Even if the appellant's conduct falls short of that which is "deliberate or by design," procedural bad faith can still be found. *Id.* at 347.

[18] As detailed above, the Appellants made a number of misrepresentations in their brief. Further, we note that the Appellants do not include a statement of issues in their ninety-eight-page brief. We remind them that Ind. Appellate Rule 46(A) provides that "[t]he appellant's brief shall contain the following sections under separate headings and in the following order . . . (4) *Statement of Issues.* This statement shall concisely and particularly describe each issue presented for

review." Under these circumstances, we conclude that an award of appellate attorney fees is appropriate.

[19] For the foregoing reasons, we dismiss the appeal and remand for a determination of reasonable appellate attorney fees.

[20] Dismissed and remanded.

Bailey, J., and Weissmann J., concur.