



ATTORNEY FOR APPELLANT

Ronald E. Weldy
Fishers, Indiana

ATTORNEYS FOR APPELLEE

Nancy J. Townsend
Merrillville, Indiana

Matthew Branich
Carmel, Indiana

Libby Yin Goodknight
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Chris Gallo,
Appellant-Plaintiff,

v.

Sunshine Car Care, LLC,
Appellee-Defendant.

March 9, 2022

Court of Appeals Case No.
21A-CP-548

Appeal from the Porter Superior
Court

The Honorable Mary A. DeBoer,
Judge

Trial Court Cause No.
64D05-1812-PL-12200

Altice, Judge.

Case Summary

[1] Chris Gallo filed a complaint against Sunshine Car Care, LLC (SCC), his former employer, alleging violation of the Wage Claims Act (WCA), Ind. Code

chap. 22-2-9, and seeking unpaid wages, liquidated damages, and attorney fees. The parties filed cross motions for summary judgment, and the trial court denied Gallo's motion and granted SCC's motion. The trial court also awarded attorney fees to SCC in the amount of \$9,765, finding Gallo knowingly continued to litigate a groundless claim. On appeal, Gallo challenges the trial court's summary judgment rulings and the award of attorney fees. SCC cross appeals, arguing that the trial court abused its discretion when it failed to award the entirety of the attorney fees that SCC had incurred. SCC also asks for an award of appellate attorney fees pursuant to Ind. Appellate Rule 66(E).

[2] We affirm and remand.

Facts & Procedural History

[3] Gallo worked as an assistant manager at one of SCC's retail locations in Valparaiso, Indiana. SCC terminated Gallo's employment on November 2, 2018, for violation of company policies. Gallo and his manager, Gerry Barkey, filled out and signed an employee separation report that day. Gallo did not provide a forwarding address, though there was a section for this information on the form. His last day worked was October 28, 2018, and the next regular paycheck was to be issued on November 5, 2018, for the period covering October 14-27, 2018.

[4] On November 5, 2018, SCC issued a paycheck to Gallo in the amount of \$655.60 (compensation of \$796.94 less payroll withholdings). When Gallo did not come in to pick up the paycheck, SCC mailed it to his last reported address.

On November 8, 2018, Gallo contacted Barkey by text and asked about his check. Barkey responded that the check should be in the mail and that Gallo would receive it soon. Later, Gallo made additional inquiries of Barkey, as well as the district manager, but did not receive responses to his messages.

[5] Having yet to receive his paycheck, Gallo filed an application for wage claim with the Indiana Department of Labor (the DOL) on November 19, 2018. Thereafter, on November 28, the DOL mailed a letter to SCC's corporate office in Florida regarding the wage claim, along with a copy of the claim. The DOL asked SCC to either dispute the claim through the DOL by December 12, 2018, with documentation, or forward a check directly to Gallo and notify the DOL that payment was tendered.

[6] On November 24, 2018, the check that SCC had mailed was marked by the post office as undeliverable. After it was returned to SCC, SCC located an email address for Gallo and wrote him on December 19, asking where to send the check. Gallo did not respond. SCC alerted the DOL that it was trying to get the check to Gallo, and the DOL provided SCC with his current address, which was listed on the wage claim form previously sent to SCC. SCC then overnighted the check to Gallo, and he cashed it on January 16, 2019. This payment was made before SCC had been served with Gallo's complaint, which occurred on January 26, 2019.

[7] In the meantime, on December 26, 2018, Gallo signed a fee agreement with attorney Ronald Weldy (Attorney Weldy) to pursue his wage claim. The next

day, Attorney Weldy filed Gallo's complaint against SCC for unpaid wages, liquidated damages, and attorney fees. Attorney Weldy also sent a letter to the DOL seeking the referral of Gallo's wage claim. The Attorney General's Office referred the wage claim to Attorney Weldy on January 11, 2019. Thereafter, on January 30, Gallo's amended complaint was filed, indicating that the referral had since been made and omitting the fact that the wages had been paid by SCC. In addition to reasserting his state wage claim, Gallo included a claim based on the federal Fair Labor Standards Act (FLSA).

[8] Nearly a year later, on January 19, 2020, Gallo moved to dismiss the FLSA claim and, with respect to the state wage claim, filed a motion for summary judgment. Gallo filed an affidavit with his motion for summary judgment, in which he averred that SCC should have paid him \$796.94 for the relevant pay period. Gallo did not indicate that he received these wages more than a year prior. On summary judgment, Gallo sought an award against SCC in the amount of \$796.94 in actual wages, \$1,593.88 in liquidated damages, and \$4,464.61 in attorney fees and costs, in addition to prejudgment interest.

[9] On February 18, 2020, SCC's counsel sent a strongly worded letter to Attorney Weldy demanding the dismissal of Gallo's lawsuit. SCC asserted that the amended complaint and summary judgment motion were frivolous and brought in bad faith. In support, SCC indicated that: 1) the amended complaint was filed nine days after SCC contacted Gallo to obtain his current address, as the prior mailing had been returned as undeliverable; 2) upon obtaining the correct address, SCC promptly sent the paycheck to Gallo and he cashed it on January

16, 2019; 3) in seeking summary judgment, Gallo had withheld the fact that he had already been paid his wages a year prior; and 4) Gallo had deposited the paycheck two weeks before filing the amended complaint and one year before the summary judgment motion. SCC warned that if the “contrived wage claim” was not dismissed, SCC would be forced to incur attorney fees to respond to the summary judgment motion and, thus, would accompany the response with a request for sanctions against Attorney Weldy and for “reimbursement of attorney fees for your baseless and unscrupulous filing.” *SCC’s Appendix* at 31. Attorney Weldy responded that Gallo would not be dismissing the wage claim.

[10] On February 26, 2020, SCC filed its response to Gallo’s summary judgment motion and a cross motion for summary judgment, along with designated evidence. SCC requested that the grant of summary judgment in its favor include an award of reasonable attorney fees for Gallo’s “frivolous, unreasonable, groundless pleadings and his refusal to dismiss them voluntarily.” *Id.* at 19. Under the circumstances, SCC argued that Gallo and Attorney Weldy should be held jointly and severally responsible for the attorney fees incurred by SCC to defend the claim.

[11] Though neither party requested a hearing, in March, the trial court sua sponte scheduled one for July 13, 2020. Thereafter, on April 17, 2020, Gallo designated additional evidence and filed a brief in opposition to SCC’s cross motion and in further support of his motion for summary judgment. This was the first filing in which Gallo acknowledged that he had received and deposited

the paycheck prior to filing the amended complaint. Thus, Gallo clarified that he was not seeking unpaid wages but that he was still claiming liquidated damages and attorney fees and costs. Attorney Weldy described SCC's contention that the wage claim was frivolous as "incomprehensible." *Id.* at 52.

[12] After filing an untimely answer to the amended complaint, SCC filed its reply in support of its cross motion for summary judgment on April 23, 2020. It argued, in part, that Attorney Weldy had not been authorized by the Attorney General to file the wage claim when he filed the initial complaint and that by the time he filed the amended complaint, with the required authorization, Gallo had been paid in full and could not seek statutory damages when no unpaid wages remained.

[13] On May 8, 2020, Gallo filed an unverified motion for leave to file a sur reply and asked that he be given until June 29, 2020, to do so, claiming that "some discovery is going to be needed to [] address new allegations and arguments" raised by SCC in its April reply. *Id.* at 75. SCC objected, noting that Gallo failed to include an affidavit as required by Ind. Trial Rule 56(F), failed to identify the alleged new facts and arguments asserted by SCC, and failed to explain what discovery might be needed. Further, SCC asserted that no additional discovery could change the "singular determinative fact" that, as admitted by Gallo, he was paid the wages at issue on or about January 16, 2019, prior to the filing of the amended complaint. *Id.* at 78. On May 20, 2020, Gallo filed a reply in support of his motion to file a sur reply, briefly identifying some issues he sought to respond to and anticipated needed discovery.

- [14] On July 8, 2020, the trial court issued an order vacating the summary judgment hearing, denying Gallo's motion for summary judgment, and granting SCC's cross motion for summary judgment. The trial court made this determination upon reviewing its file and concluding that a hearing was not necessary. The court found two facts significant: 1) as of the date of the original complaint, Attorney Weldy had not obtained authority from the Attorney General to file the wage claim, and 2) Gallo had been paid the full amount of his wages prior to filing the amended complaint, though he continued to request these wages, liquidated damages, attorney fees, and costs in the amended complaint.
- [15] Two days later, SCC filed a motion for determination of fee award, indicating that the trial court had failed, in its order, to address SCC's request for attorney fees. SCC detailed the basis for an award of attorney fees and requested fees totaling \$9,765.
- [16] Gallo opposed SCC's motion and, on August 7, 2020, filed a motion to correct error (MTCE), arguing that the trial court erroneously failed to grant his motion to file a sur reply and/or to hold a summary judgment hearing, that he was entitled to file his complaint before obtaining a referral from the Attorney General, that he was entitled to summary judgment, and that the prosecution of his wage claim was not frivolous. Gallo asked the trial court to treat his motion as his sur reply and to set the matter for a summary judgment hearing.
- [17] SCC filed a thorough response to Gallo's MTCE on August 12, 2020. SCC asked the trial court to deny the motion without a hearing and grant its request

for attorney fees in the amount of \$9,765. Thereafter, Gallo filed a reply in support of his MTCE.

[18] On August 21, 2020, the trial court scheduled a hearing for December 14 to address Gallo's MTCE and SCC's request for attorney fees. At the hearing, Attorney Weldy was permitted to present all arguments against SCC's cross motion for summary judgment, including those that he had wished to present in the proposed sur reply. The trial court denied the MTCE and then turned to the issue of attorney fees, clarifying that it had yet to determine whether SCC was entitled to fees. The parties presented arguments regarding SCC's fee request, and the trial court took the issue under advisement.

[19] On December 16, 2020, the trial court issued an order in which it awarded attorney fees to SCC in the amount of \$9,765. After detailing the relevant procedural history, the timing of SCC's payment of wages, and Attorney Weldy's many years of experience in this area of law, the trial court made the following findings:

14. That notwithstanding, Attorney Weldy knew he was filing the lawsuit prematurely, but he did it anyway. He knew he could not legally recover liquidated damages and attorney fees under the wage claims statute, but he pursued them anyway. Attorney Weldy's continued litigation in this case required SCC to file motions and responses and appear for the December 14, 2020 hearing.

15. The Court finds that Gallo continued to litigate his claims despite knowing that they were clearly groundless. Attorney Weldy knew there were no facts in existence, **at the time when**

he filed his original complaint or amended complaint, to support the legal claim upon which he relied and presented.

Gallo's Appendix at 13 (cleaned up)(emphasis in original).

[20] Gallo and SCC each appeal. SCC also requests an award of appellate attorney fees. Additional information will be provided below as needed.

Discussion & Decision

Summary Judgment

[21] It is well settled that we review a trial court's summary judgment order de novo. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). Considering the designated facts and drawing all reasonable inferences in favor of the nonmovant, we will affirm a grant of summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* (citing Ind. Trial Rule 56(C)). Where material facts are not in dispute and only legal issues exist, summary judgment is a desirable tool. *Id.*

[22] Before reaching the merits of the summary judgment arguments, we address two tangential matters. First, we have an assertion by Gallo that he was denied due process when the trial court ruled on the summary judgment motions without holding the scheduled hearing or granting him leave to file a sur reply in order to respond to allegedly new arguments and evidence presented by SCC in its reply brief. In support of his due process argument, Gallo directs us to only one case – *Chandler v. Dillon*, 754 N.E.2d 1002 (Ind. Ct. App. 2001) – and that case is clearly distinguishable.

[23] In *Chandler*, we found a due process violation where the trial court sua sponte rescinded its order granting the defendant additional time to respond to the plaintiff's summary judgment motion, struck the defendant's pleadings that had been timely filed pursuant to that order, and provided the defendant only one day's notice of the summary judgment hearing, resulting in the hearing being held without the defendant's counsel. Under the circumstances – that is, where the defendant was effectively denied any opportunity to respond to the summary judgment motion – we concluded that the defendant was improperly denied its day in court. *Id.* at 1006 (concluding that the defendant was “denied adequate notice of the trial court’s rescission of its prior order and a reasonable opportunity to make its argument,” when counsel received last-minute notice of the rescheduled hearing); *see also Harder v. Rafferty*, 542 N.E.2d 232, 233-34 (Ind. Ct. App. 1989) (finding a due process violation where “plaintiff was denied an opportunity to argue his case” when, contrary to its own orders, the trial court did not permit plaintiff’s counsel’s telephonic participation in the summary judgment hearing or a later written response to the arguments advanced by defendant at the hearing).

[24] Here, Gallo had ample opportunity to argue his case both in favor of his motion for summary judgment and in opposition to SCC’s cross motion, and he provides no authority, and little argument, for his claim that the trial court was required to grant his motion for leave to file a sur reply. Gallo’s reliance on *Chandler* is further misplaced because no hearing was held at which SCC, but not Gallo, was permitted to be present. Ind. Trial Rule 56(C) does not require

that the trial court hold a summary judgment hearing if one is not requested by the parties. *See Logan v. Royer*, 848 N.E.2d 1157, 1159 n.6 (Ind. Ct. App. 2006). While the trial court sua sponte scheduled a hearing in this case, it later determined that one was not needed. This was well within its discretion. Gallo has failed to establish a violation of due process. Moreover, we observe that he was eventually permitted to fully present his arguments at the MTCE hearing, which failed to persuade the trial court.

[25] Secondly, before reaching the merits, we address Gallo’s failure to provide us with an adequate appendix on appeal. Ind. Appellate Rule 50(A)(2)(f) requires an appellant’s appendix to include “pleadings and other documents from the Clerk’s Record ... that are necessary for resolution of the issues raised on appeal.” In other words, Gallo was required to include all documents, filed by both parties, relating to the disposition of the cross motions for summary judgment. *See, e.g., Webb v. City of Carmel*, 101 N.E.3d 850, 856 n.3 (Ind. Ct. App. 2018) (noting that when appealing a summary judgment ruling, it is not sufficient to include only some of the documents designated below); *Yoquelet v. Marshall Cty.*, 811 N.E.2d 826, 829-30 (Ind. Ct. App. 2004) (“[O]ur appellate rules as well as applicable case law clearly indicate that when appealing the grant or denial of a motion for summary judgment, the moving party must file with the appellate court those materials that were designated to the trial court for purposes of reviewing the motion for summary judgment.”).

[26] In his appendix, Gallo does not provide us with either party’s summary judgment motion or accompanying designation of evidence, nor did he provide

all of the documents that had been designated or any of his own summary judgment briefs. And he omitted his MTCE, as well as other relevant filings. Gallo's omissions have hindered our review and caused needless extra work to piece together and consider the extensive filings in this case, which was made possible only by SCC's attempt to fill in the gaping holes in Gallo's appendix with its own appendix. While we could certainly waive Gallo's appeal in light of these deficiencies, we choose to exercise our discretion and reach the merits.¹ *See Webb*, 101 N.E.3d at 856 n.3 (noting that we prefer to decide cases on the merits when possible and, thus, deciding not to dismiss the case where appellees provided the omitted documents in their appendix); *see also Hughes v. King*, 808 N.E.2d 146, 148 (Ind. Ct. App. 2004) (dismissing appeal when appellant failed to include the parties' motions for and responses to summary judgment and the evidence designated to the trial court).

[27] Now to the merits. Gallo contends that the trial court erred in granting summary judgment in favor of SCC. Rendered down, Gallo's arguments are that he was permitted to file his original complaint without a referral from the Attorney General and that, even though he was paid in full before the amended complaint was filed, he still had a statutory wage claim for liquidated damages and attorney fees. Gallo is wrong on both points.

¹ Though we reach the merits of Gallo's appeal, we observe that the shortfalls of his appendix will be relevant in our later discussion of SCC's request for appellate attorney fees.

[28] Our Supreme Court has made clear that wage claims under the WCA must be submitted to the DOL for administrative enforcement and exhaustion of the administrative remedy is required *before* filing a lawsuit. See *Naugle v. Beech Grove City Schools*, 864 N.E.2d 1058, 1062 (Ind. 2007); *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 705 (Ind. 2002); see also *Quimby v. Becovic Management Group, Inc.*, 962 N.E.2d 1199, 1200 (Ind. 2012) (Sullivan, J., dissenting to denial of transfer) (“It is also well settled that an employee who has a claim under the [WCA] must first exhaust an administrative remedy with the DOL before filing a lawsuit.”); *Lemon v. Wishard Health Servs.*, 902 N.E.2d 297, 301 (Ind. Ct. App. 2009), *trans. denied*.

[29] I.C. § 22-2-9-4 governs the DOL’s responsibilities regarding wage claims filed under the WCA and provides:

(a) It shall be the duty of the commissioner of labor to enforce and to insure compliance with the provisions of this chapter, to investigate any violations of any of the provisions of this chapter, and to institute or cause to be instituted actions for penalties and forfeitures provided under this chapter. The commissioner of labor may hold hearings to satisfy himself as to the justice of any claim, and he shall cooperate with any employee in the enforcement of any claim against his employer in any case whenever, in his opinion, the claim is just and valid.

(b) The commissioner of labor may refer claims for wages under this chapter to the attorney general, and *the attorney general may initiate civil actions on behalf of the claimant or may refer the claim to any attorney admitted to the practice of law in Indiana. The provisions of IC 22-2-5-2 apply to civil actions initiated under this subsection by the attorney general or his designee.*

(Emphasis supplied.). I.C. § 22-2-5-2, commonly referred to as the Wage Payment Statute, is a WCA claimant’s avenue to recover attorney fees and liquidated damages,² and the plain language of I.C. § 22-2-9-4(b) makes clear that only “the attorney general or his designee” may seek these statutory damages. *See Lemon*, 902 N.E.2d at 300. “To become the ‘designee’ of the attorney general, a claimant – or more specifically his or her attorney – must obtain a letter of referral.” *Id.*

[30] Here, while Gallo pursued administrative remedies through the DOL, he did not wait until those remedies were exhausted and, more importantly, he filed suit before Attorney Weldy obtained the required referral, which was a condition precedent to the existence of his WCA claim for attorney fees and liquidated damages recoverable under the Wage Payment Statute. In *Lemon*, we flatly rejected the argument (advanced by Attorney Weldy in that case) that putative class members in a proposed class action could obtain a letter of referral after the lawsuit was filed. We explained:

The plain language of the WCA requires that the letter be obtained – and the administrative process followed – before the lawsuit is filed. As aptly noted by Appellee, “granting permission to sue after suit has already been brought would be the emptiest of gestures.” Thus, to get the letter of referral after

² The Wage Payment Statute provides in relevant part:

The court shall order as costs in the case a reasonable fee for the plaintiff’s attorney and court costs. In addition, if the court in any such suit determines that the [employer] that failed to pay the employee ... was not acting in good faith, the court shall order, as liquidated damages for the failure to pay wages, that the employee be paid an amount equal to two (2) times the amount of wages due the employee.

the fact would be to render the statute a nullity, which we cannot and will not do.

Id. at 302 (cleaned up); *see also Bragg v. Kittle’s Home Furnishings, Inc.*, 52 N.E.3d 908, 916 (Ind. Ct. App. 2016) (“[A] claim must work its way through the proper channels – the DOL and, if need be, the Attorney General – before it may be brought into court.”), *trans. denied*.

[31] Still, Gallo persists, directing us to *Fox v. Nichter Const. Co.*, 978 N.E.2d 1171 (Ind. Ct. App. 2012), to support his position that lack of a referral can be cured by obtaining one after filing the lawsuit. In *Fox*, another case involving Attorney Weldy, the pro-se claimant filed a lawsuit before the claim, which he had voluntarily assigned to the DOL, was assigned back to him.³ The trial court dismissed the suit with prejudice. Fox then retained counsel, who filed a MTCE and eventually obtained the required referral. On appeal from the denial of the MTCE, we held that the trial court erred by dismissing with prejudice based on lack of subject matter jurisdiction but that dismissal without prejudice was proper “under Indiana Trial Rule 12(B)(6) for failure to state a claim upon which relief can be granted, including the failure to name the real

³ Notably, Fox pursued his wage claim under the Wage Payment Act (WPA), Ind. Code chap. 22-2-5, rather than the WCA. These acts set forth different procedural frameworks for wage disputes based on the category of claimants. *See Steele*, 766 N.E.2d at 705 (the WCA applies to employees who have been involuntarily separated from work by their employer, while the WPA references current employees and those who have voluntarily left employment). The distinction is relevant because claimants under the WPA need not file with the DOL but rather can file their wage claim directly in court. *See id.* Although Fox voluntarily assigned his claim to the DOL, unlike Gallo, he had no statutory requirement to do so or to obtain a referral from the Attorney General. Thus, Gallo’s reliance, in the first place, on *Fox* seems misplaced.

party in interest.” *Fox*, 978 N.E.2d at 1182. Accordingly, we reversed and remanded for entry of a dismissal without prejudice and indicated that the claimant could “refile his claim setting forth the reassignment by the DOL.” *Id.*

[32] Once again, we find Attorney Weldy’s interpretation of *Fox* to be inaccurate. *See Bragg*, 52 N.E.3d at 918 (rejecting, in a different but related context, Attorney Weldy’s interpretation of *Fox*). *Fox* does not permit a claimant under the WCA to prematurely file a lawsuit – as a placeholder – and then obtain the required referral and, as Gallo did here, file an amended complaint hoping to relate back to the original filing date. *Fox* indicated that the proper procedure, under the facts of that case, was dismissal without prejudice and refiling. Here, however, before SCC could seek dismissal without prejudice, Gallo filed an amended complaint with the required authorization, which had the practical effect of refiling the action.

[33] All might have been well and good for Gallo’s lawsuit to proceed based on the amended complaint except for the fact that by that point, no wages remained owed by SCC. Indeed, before SCC had even been served with the original complaint, it had paid Gallo the wages due.

[34] In *Brown v. Bucher & Christian Consulting, Inc.*, 87 N.E.3d 22, 28 (Ind. Ct. App. 2017), *trans. denied*, we held that the claimant could not maintain suit under the Wage Payment Statute where, although sometimes late, all wages owed had been paid before he filed the lawsuit. *Id.* (“We cannot conclude that this scenario equates to the ‘unpaid wages’ referred to in [the Wage Payment

Statute]; nor can we conclude that Brown is entitled to maintain a lawsuit ‘to recover the amount due to’ him, as there is no amount that is, in fact, due.”).

Without unpaid wages, a claimant, as a matter of law, cannot recover attorney fees, costs, or liquidated damages under the Wage Payment Statute. *Id.* Again, Attorney Weldy was well aware of the holding in *Brown*, having represented the unsuccessful claimant.

[35] Gallo suggests that the *Brown* holding has created the following “malpractice quandary” for attorneys filing wage claims under the WCA:

If a lawyer takes a client who has not been paid and that client is paid shortly thereafter and prior to receiving the referral from the Attorney General’s Office, the attorney has committed malpractice for not getting the lawsuit filed. The *Brown* case has now made it a race to the Courthouse with the employee’s claims at stake.

Appellant / Cross-Appellee’s Reply Brief at 22. We fail to see the quandary. The attorney simply needs to advise his or her client that under the WCA no lawsuit may be filed unless and until the proper authorization is obtained and then only if the wages remain unpaid.

[36] The purpose of the administrative exhaustion requirement of the WCA is to create a barrier to claims being filed in court. *Lemon*, 902 N.E.2d at 301. It allows the DOL to work with parties to try to resolve the claim or to refer the matter to the Attorney General.

[T]hese actions can provide a benefit to the plaintiff. Further, we observe that in attempting to resolve matters, the DOL acts in a manner similar to a mediator and engages in efforts to help the parties resolve their dispute without the need for litigation. The DOL’s policies and procedures promote judicial economy by allowing all wage claimants the opportunity to resolve their wage disputes at the administrative level first before engaging in the often time-consuming and expensive process of litigation.

Bragg, 52 N.E.3d at 918. In other words, it is a win for a claimant to be paid in full through the administrative process, and there is simply no need for a race to the courthouse, particularly the premature race that occurred in this case. Of course, an attorney eyeing potential statutory attorney fees might feel otherwise about the race, but the check beating the complaint still results in payment of the wages to the claimant, which nullifies the need for a lawsuit and the punitive application of the Wage Payment Statute.

[37] As the trial court recognized, two critical, undisputed facts – the lack of authorization at the time of the original complaint and the lack of unpaid wages at the time of the amended complaint – control the outcome of this case. The trial court properly applied the law to these facts in granting summary judgment to SCC and denying Gallo’s summary judgment motion.

Attorney Fees Awarded by the Trial Court

[38] Gallo argues that the trial court erred by ordering him to pay a portion of SCC’s attorney fees. In doing so, however, Gallo does not set out a “statement of the applicable standard of review,” as required by Ind. Appellate Rule 46(A)(8)(b), nor does he provide us with the applicable statute or a discussion of relevant

caselaw, aside from one passing reference to a dated case. *See* App. R. 46(A)(8)(a) (requiring the contentions of the appellant to be “supported by cogent reasoning” and “citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on”). Despite these flagrant violations of the appellate rules, which have hindered our review, we will briefly address this issue.

[39] The trial court awarded attorney fees under Ind. Code § 34-52-1-1(b), which provides:

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.

Specifically, the trial court awarded attorney fees under the second subsection, finding that Gallo continued to litigate a groundless wage claim. “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).

We review a trial court’s award of attorney fees under the statute using a multi-level standard of review:

The trial court’s findings of facts are reviewed under the clearly erroneous standard and legal conclusions regarding whether the litigant’s claim was frivolous, unreasonable, or groundless are reviewed de novo. Finally, the trial court’s decision to award attorney fees and any amount thereof is reviewed for an abuse of discretion. 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.

Purcell v. Old Nat. Bank, 972 N.E.2d 835, 843 (Ind. 2012) (cleaned up).

[40] In determining that Gallo “continued to litigate his claims despite knowing that they were clearly groundless,” the trial court made a number of findings. *Gallo’s Appendix* at 13. In summary, the trial court noted Attorney Weldy’s extensive practice in this area of law and that, despite being well-versed in the law, he prematurely filed suit, seeking statutory damages, without the required authorization from the Attorney General. Further, he filed the amended complaint *after* Gallo had already been paid his wages and still claimed “wages owed.”⁴ *Id.* at 20. When Gallo’s motion for summary judgment was filed a year later, still seeking unpaid wages and statutory damages, counsel for SCC sent a detailed demand letter, setting out the baselessness of Gallo’s amended

⁴ On appeal, Gallo suggests that he never alleged in his amended complaint that the wages in question were still owed. The amended complaint was somewhat vague on this point, but the clear implication was that the wages remained unpaid. Indeed, Attorney Weldy admittedly assumed as much when he filed the later motion for summary judgment without reviewing his file regarding payment.

complaint and summary judgment motion and warning that if the claim was not dismissed SCC would seek attorney fees incurred going forward. Attorney Weldy, however, forged on with Gallo's wage claim.

[41] The trial court determined that Gallo continued to litigate clearly groundless claims as “there were no facts in existence, **at the time when he filed his original complaint or amended complaint**, to support the legal claim upon which he relied and presented.” *Id.* at 13 (emphasis in original). Indeed, in the prior section, we discussed the clear authorities, of which Attorney Weldy was keenly aware, requiring authorization prior to the filing of a lawsuit under the WCA and foreclosing the filing of suits under the Wage Payment Statute after wages have already been paid. Under the circumstances of this case, the trial court did not abuse its discretion in awarding attorney fees.

[42] On cross appeal SCC argues that the trial court abused its discretion by only granting the attorney fees incurred through July 8, 2020, rather than through the MTCE proceedings that lasted the rest of that year. There can be no doubt that SCC incurred additional attorney fees to defend against the MTCE but, unlike SCC, we are not “especially puzzl[ed]” by the limited award. *Appellee/Cross-Appellant's Brief* at 37. At the December 2020 hearing, SCC's counsel addressed the amount of fees requested:

[M]y client, he owns a small super lube oil shop in Valpo, and he's trying to make a go of it. And among all this he's had to pay me, it was 9,765 as of July 10th. That doesn't count the time that I have put in today to prepare for this and to come to this hearing, and all the time in between. But we would – we would

be satisfied with that \$9,000 figure that's in my Fee Request. \$9,765. And we would be satisfied with that.

Transcript at 25. Two days later, the trial court awarded fees in the amount of \$9,765. This was not an abuse of discretion.

Appellate Attorney Fees

[43] Finally, we address SCC's request for an award of appellate attorney fees under App. R. 66(E), which provides: "The Court may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees. The Court shall remand the case for execution." We limit application of this rule to "instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." *Wagler v. W. Boggs Sewer Dist., Inc.*, 29 N.E.3d 170, 174 (Ind. Ct. App. 2015). "[W]e must use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal." *Id.*

[44] In addition to clearly lacking merit, Gallo's appellate arguments were presented with procedural bad faith, including a woefully incomplete appendix,⁵ certain contentions made without support, and an argument section related to the trial

⁵ SCC notes that it spent time and resources to sift through and determine what necessary documents Gallo had failed to include in his appendix. See *Appellee / Cross-Appellant's Brief* at 41 ("SCC's Appendix includes 20 essential pleadings, consumes over 200 pages, and took considerable attorney time to assemble."). So too did this court expend significant time sorting through the record.

court's award of attorney fees asserted with flagrant disregard of the appellate rules. *See Staff Source, LLC v. Wallace*, 143 N.E.3d 996, 1012 (Ind. Ct. App. 2020) (discussing substantive bad faith – where contentions are “utterly devoid of all plausibility” – and procedural bad faith – where 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”). We conclude that SCC is entitled to appellate attorney fees under the circumstances and remand to the trial court to determine the proper amount of such fees.

[45] For the foregoing reasons, we affirm the trial court's orders, grant SCC's request for appellate attorney fees, and remand for a determination of SCC's reasonable appellate attorney fees.

[46] Judgment affirmed and remanded.

Mathias, J., concurs.

Bailey, J., concurs in result without opinion.