MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Zachary S. Kester
Charitable Allies, Inc.
Indianapolis, Indiana

ATTORNEY FOR APPELLEE

Clifford M. Robinson
The Law Office of Clifford M. Robinson, LLC
Rensselaer, Indiana

IN THE COURT OF APPEALS OF INDIANA

Charitable Allies, Inc.,
Appellant-Nonparty,

v.

Down Syndrome Association of Northwest Indiana, Inc.,
Appellee-Plaintiff.

November 1, 2022

Court of Appeals Case No. 22A-PL-1111

Appeal from the Lake Superior Court

The Honorable Aleksandra D. Dimitrijevic, Special Judge

Trial Court Cause No. 45D12-2012-PL-821

Mathias, Judge.

[1] Charitable Allies, Inc. appeals the trial court's removal of Charitable Allies's notice of an attorney's lien in an underlying action between Charitable Allies's former client, Down Syndrome Association of Northwest Indiana, Inc.

("DSA"), and former officers of DSA. On appeal, Charitable Allies raises a single issue for our review, which we restate as the following three issues:

> I. Whether Charitable Allies's assertion that the trial court lacked subject matter jurisdiction over the notice of lien is supported by cogent reasoning.
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> II. Whether Charitable Allies's assertion that the trial court lacked personal jurisdiction over Charitable Allies to remove the notice of lien is supported by cogent reasoning.
>
> III. Whether the trial court erred when it removed Charitable Allies's notice of lien.

In response to Charitable Allies's appeal, DSA raises a fourth issue, namely, whether DSA is entitled to reasonable appellate attorney's fees. We agree with DSA that Charitable Allies's arguments on appeal are meritless and, thus, that DSA is entitled to an award of reasonable appellate attorney's fees. We therefore affirm the trial court's judgment and remand with instructions.

Facts and Procedural History

[2] Charitable Allies is a nonprofit legal-aid firm that charges below-market rates or provides pro bono legal services to its clients. In October 2019, Charitable Allies and DSA executed an attorney-client agreement.[1] According to that agreement,

[1] DSA has included this agreement in its appendix on appeal even though the agreement itself was not submitted to the trial court. While Charitable Allies complains in its Reply Brief about this inclusion in the record on appeal, Charitable Allies admits that the document is cumulative at least in part to the parties'

Charitable Allies would draft bylaws, membership qualifications policies, member meeting documents, "and similar documents necessary for a general governance cleanup" at DSA, which the agreement identified as the "Initial Legal Matter" to be addressed. Appellee's App. Vol. 2, p. 24. Charitable Allies would also "pursu[e] [a] former executive director for damages" and "provide general advice" relating to various matters, which the agreement identified as the "Second Legal Matter." *Id.* at 24-25.

[3] According to the agreement, Charitable Allies's fees would be as follows:

> a. Nature of Contract. This is a fee for service contract. The fee includes regular costs and expenses (i.e., travel expenses (mileage at the IRS current rate), computer assisted legal research, fees (court, filing, etc., if any), photocopies & priting ($0.05 per page), and postage, etc.), which Client shall reimburse. Client shall pay Allies for the services described herein payable in a timely manner upon being invoiced.
>
> b. Initial Legal Matter. Attorney estimates that the Initial Legal Matter will cost $4,000-$6,000 in professional fees, plus applicable costs and expenses. Client shall pay an initial retainer in the amount of $4,000 for the Initial Legal Matter.
>
> c. Retainer Usage and Additional Retainers. Allies will bill against any applicable retainers as the work is completed and the

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representations to the trial court regarding the document's contents. Reply Br. at 14. And Charitable Allies did not file a motion to strike DSA's appendix in whole or in part under Indiana Appellate Rule 42. We therefore consider the contents of the agreement as submitted.

> funds are earned. Additional retainers may be required . . . . Any unused retainer amount(s) shall be reimbursed.
>
> d. The lower end of the estimate ranges reflect the amount of attention and effort required for Allies to complete the associated Matter based on Allies'[s] skill, experience and knowledge. Successful substantial completion of the matter entitles Allies to such minimum amount regardless of hours worked, but[,] if hours exceed the minimum, then Allies shall bill hourly within the estimate range.
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> e. For matters other than those being done for a Flat Fee, Allies shall charge and Client shall pay an hourly rate of $130 to $245 for attorney and consultant time, $100 to $150 for graduate intern, legal intern and paralegal time, and $50 to $95 for legal assistant time. These rates are subject to change at any time, but typically do so only on an annual basis.
>
> f. Failure to make timely payment of fees and expenses may, upon notice, result in termination. In that event, Client will still be obligated to reimburse Allies for fees, costs and expenses incurred to the date of withdrawal.
>
> g. Attorney shall, where applicable, upon successful completion of the matter, pursue an award of attorneys' fees and costs from the Court against the government. Client agrees that any such fees and costs recovered belong to Attorney, sans any payment(s) made by Client to Attorney under this contract.

Id. at 25.

[4] On December 2, 2020, DSA filed a complaint against its former president and its former executive director, William Buckley and Dawn Buckley,

respectively.[2] Charitable Allies initially represented DSA in that lawsuit. Zachary S. Kester, Andrew D. Emhardt, and Mark J. Pizur were the attorneys who initially appeared for DSA on behalf of Charitable Allies. At the time, Clifford Robinson was also an attorney at Charitable Allies.[3]

[5] On May 13, 2021, Clifford Robinson entered his appearance for DSA. Approximately five months later, DSA terminated its attorney-client relationship with Charitable Allies. And, on October 20, Robinson filed a new appearance for DSA as a representative of The Law Office of Clifford M. Robinson, LLC. Charitable Allies's attorneys moved to withdraw their appearances in November, which motions the trial court granted.

[6] On January 11, 2022, Charitable Allies filed a notice of an attorney-fee lien in the underlying litigation. Specifically, Charitable Allies asserted as follows:

> 7. The terms and conditions of the [DSA-Charitable Allies] Agreement provides that Charitable Allies shall be entitled to pursue an award of fair market value attorney's fees upon resolution of the matter and that such fees recovered belong to Charitable Allies, less any payments made by DSA to Charitable Allies under the Agreement.

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[2] DSA's complaint states eleven claims including theft, conversion, deception, multiple counts of fraud, defamation, and breach of fiduciary duty.

[3] In its brief on appeal, Charitable Allies repeatedly attacks Robinson's character and professionalism. Charitable Allies provides no factual support for any of those statements. *See* Ind. Appellate Rule 46(A)(8)(a); *see also, e.g.*, Appellant's Br. at 9 (citing Charitable Allies's own unsupported assertions in its motion to the trial court). We therefore strike Charitable Allies's unfounded statements and do not consider them.

> 8. By this notice Charitable Allies hereby claims an equitable charging attorneys' fee lien on any amounts recovered in this action by DSA, up to and including $56,341.44, plus 8% interest per annum, or the highest available rate of interest.

Appellant's App. Vol. 2, p. 14. Charitable Allies did not attach exhibits to its notice in support of its allegations, such as the DSA-Charitable Allies Agreement or unpaid invoices. Instead, Charitable Allies only submitted emails from one of its attorneys to Robinson, in which Charitable Allies's attorney repeated Charitable Allies's assertions as if they were facts.[4]

[7] In response to Charitable Allies's notice, DSA requested the trial court to remove the notice of lien, stating:

> a. DSA has paid Charitable Allies in full for services rendered.
>
> b. The engagement between Charitable Allies and DSA does not state anything relating to fair market value of attorneys' fees or that DSA would seek the recovery of these fees for the benefit of Charitable Allies.
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> c. Charitable Allies provides no proof of the amount of money it seeks.
>
> d. Charitable Allies does not claim that DSA owes it any money based on any outstanding work already performed, but that

[4] Of course, the assertions of attorneys are not evidence. *See Bradford v. State*, 675 N.E.2d 296, 301 (Ind. 1996).

> Charitable Allies is entitled to these fees upon resolution in this matter.
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> e. The Notice unlawfully inhibits DSA's ability to resolve and prosecute the case.

Id. at 18. And, in response to DSA's request to remove the notice of lien, Charitable Allies asserted that the only way to challenge its notice of lien was by way of a declaratory judgment or replevin in a separate cause of action. Charitable Allies also moved to have Robinson disqualified as DSA's attorney in part on the ground that Robinson had a conflict of interest as a former Charitable Allies employee and also that he was now a "necessary witness" to the fee dispute. *Id.* at 45.

[8] The trial court held a hearing on the pending motions. After that hearing, the trial court concluded that Charitable Allies's request to disqualify Robinson and its notice of lien were improper, stating:

> [DSA is] entitled to hire counsel of [its] choosing when litigating [its] claim. The fact that Attorney Cliff Robinson previously worked on the case while employed with Charitable Allies, Inc., left the firm, and took [DSA] with him as [a] client[] is not in itself a basis for conflict. Further, the fact that Attorney Robinson is a necessary witness in a fee dispute does not bar him from representing [DSA]. There has been no valid legal basis for the Court to disqualify Attorney Cliff Robinson. The motion to disqualify is denied. As to the lien filed by Charitable Allies, Inc., the Court finds it to be improper and orders the lien removed instanter.

Id. at 11. Following the trial court's order, DSA and the Buckleys settled the underlying matter for an undisclosed amount, and, in August of 2022, the trial court dismissed DSA's complaint with prejudice. This appeal ensued.[5]

Discussion and Decision

I. Subject Matter Jurisdiction

[9] We first address Charitable Allies's assertion that the trial court lacked subject matter jurisdiction over the notice of lien and therefore had no authority to remove it. "Subject matter jurisdiction refers to a court's constitutional or statutory power to hear and adjudicate a certain type of case," and our review of the trial court's judgment on this issue is de novo. *D.P. v. State*, 151 N.E.3d 1210, 1213 (Ind. 2020). Unsurprisingly, Charitable Allies cites no authority in its brief for the proposition that a trial court lacks the power to hear claims for attorney's fees or liens relating to them. *See* Ind. Appellate Rule 46(A)(8)(a).

[10] Instead, Charitable Allies asserts that the trial court lacked subject matter jurisdiction for the following reasons:

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[5] Charitable Allies filed its notice of appeal on the premise that the trial court's removal of the notice of lien was an interlocutory order for the payment of money and thus appealable as a matter of right under Indiana Appellate Rule 14(A)(1). That premise was not correct. Rule 14(A)(1) applies only to orders for the payment of money that "carry financial and legal consequences akin to those more typically found in final judgments." *State v. Hogan*, 582 N.E.2d 824, 825 (Ind. 1991). Accordingly, to constitute an appealable interlocutory order for the payment of money, the order must require the payment of "a specific sum of money by a date certain[.]" *DuSablon v. Jackson Cnty. Bank*, 132 N.E.3d 69, 76 (Ind. Ct. App. 2019), *trans. denied*. Here, the trial court's order removed a notice of lien; it in no way directed the payment of a specific sum by a date certain. We further acknowledge that DSA moved to dismiss this appeal for lack of a proper, appealable judgment, but our motions panel denied DSA's request. In any event, the underlying matter has settled, and DSA does not now suggest that we should dismiss this appeal for lack of a final judgment.

> Charitable Allies was deprived of all opportunity to avail itself when this judge, by impermissible fiat, unilateral action, took subject matter jurisdiction over a matter over which [sic] the Trial Court had no authority. The Trial Court judge in the Underlying Action is a special judge, typically presiding over small claims. Small claims judges are not permitted to rule on the merits of attorney fee liens above $10,000, and jurisdiction did not exist. . . . Had Robinson done what the law requires, such as filed a declaratory judgment action or replevin, the parties could have discussed the questions of jurisdiction and new judge. . . .
>
> Further, Ind. Trial Rule 79(D) establishes that all parties must agree to a special judge . . . . Charitable Allies never agreed to nor approved the appointment of a special judge over the matter of the Equitable Charging Lien. . . .

Appellant's Br. at 18-19.

[11] We conclude that Charitable Allies's arguments on this issue are not supported by cogent reasoning. App. R. 46(A)(8)(a). Further, Charitable Allies's citations to authority in no way support any of its assertions. *See id.* Accordingly, we hold that Charitable Allies has waived its argument regarding the trial court's purported lack of subject matter jurisdiction.

II. Personal Jurisdiction

[12] We next address Charitable Allies's assertion that the trial court lacked personal jurisdiction over Charitable Allies to hear any issue relating to the notice of lien. "Personal jurisdiction refers to a court's power to impose judgment on a particular defendant," and, again, our review of the trial court's judgment on this issue is de novo. *Boyer v. Smith*, 42 N.E.3d 505, 509 (Ind. 2015). It is well-

established that a claim that the trial court lacks personal jurisdiction is waived if not timely asserted in the trial court. *See, e.g.*, *Stidham v. Whelchel*, 698 N.E.2d 1152, 1155-56 (Ind. 1998).

[13] Charitable Allies's assertion that the trial court lacked personal jurisdiction over it is both bold and completely untenable. In the language of personal jurisdiction, Charitable Allies purposefully availed itself of the trial court's jurisdiction when it filed its notice of lien in the trial court—thereby demonstrating Charitable Allies's assent to the trial court's eventual resolution of the attorney's fee issue. Further, Charitable Allies is an Indiana nonprofit; it had filed notices of appearance on behalf of DSA in the underlying matter prior to filing its notice of lien; its attorneys who filed those appearances are Indiana-licensed attorneys; and, regardless, Charitable Allies never objected to the purported lack of personal jurisdiction in the trial court. For all of these reasons, Charitable Allies's assertion that the trial court lacked personal jurisdiction over it is meritless and not supported by cogent reasoning or authority. *See* App. R. 46(A)(8)(a).

III. Whether the Trial Court Erred when it Removed the Notice of Lien

[14] We thus turn to Charitable Allies's argument that the trial court erred when it removed the notice of lien. In removing the notice of lien, the trial court stated only that Charitable Allies's notice of lien was "improper," and the court based its judgment only on a paper record. Appellant's App. Vol. 2, p. 11. We interpret the trial court's judgment to be that Charitable Allies had no legal

basis for its notice of lien, and we review its judgment de novo. *See, e.g.*, *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006).

[15] We initially note that Charitable Allies's legal theory for its notice of lien is less than clear. Charitable Allies appears to proffer two distinct theories, although Charitable Allies discusses them interchangeably. *See* Appellant's Br. at 20-27. First, Charitable Allies states that its agreement with DSA expressly allows Charitable Allies to pursue the fair-market value of its fees from any recovery.[6] Second, Charitable Allies seems to suggest that it has a common-law right to seek a reasonable attorney's fee for its services from the proceeds of a recovery, regardless of the terms of its agreement with a former client. Neither the record nor Indiana law supports Charitable Allies's arguments.

[16] Indiana follows the American Rule for attorney's fees. "Generally, the American Rule requires each party to pay its own attorney's fees." *River Ridge Dev. Auth. v. Outfront Media, LLC*, 146 N.E.3d 906, 911 (Ind. 2020). There are some exceptions, such as when a contract between the parties allocates

[6] Charitable Allies further asserts that DSA "has a separate contractual obligation with Charitable Allies to pursue attorney's fees" apart from the DSA-Charitable Allies Agreement. Appellant's Br. at 26. As with numerous other statements in its brief, in support of this purported "separate contractual obligation" Charitable Allies cites only its own statements to the same effect to the trial court. *See* Appellant's App. Vol. 2, p. 28. Charitable Allies has not included the purported additional contract in the record, and, thus, we conclude that Charitable Allies has not preserved this allegation and has not supported it with cogent reasoning, and we do not consider it further. *See, e.g.*, *Bradford*, 675 N.E.2d at 301 (noting that the statements of attorneys are not evidence).

attorney's fees to a prevailing party in an ensuing lawsuit, but Charitable Allies does not suggest any exceptions to the American Rule apply here. *See id.* at 912.

[17] As such, Charitable Allies's claim for fees derives from its attorney-client agreement with DSA. And that agreement expressly states the manner in which and the amount in which DSA was to pay Charitable Allies's fees. In particular, Charitable Allies's fee agreement with DSA provided for hourly billing at identified rates. Charitable Allies has no contract right against DSA beyond those terms. Thus, Charitable Allies's assertion that the DSA-Charitable Allies Agreement permits Charitable Allies to seek from DSA's future recovery in a lawsuit the fair-market value of Charitable Allies's fees is unfounded. As Charitable Allies cites no authority for its apparent proposition that it can state in writing the terms of a fee arrangement with a client but then seek to recover something else from that same client, we conclude that Charitable Allies's position is once again not supported by cogent reasoning or appropriate citations.

[18] The same is true of Charitable Allies's assertion that our case law permits it to recover a reasonable fee following DSA's recovery against the Buckleys. In support of this position, Charitable Allies relies on authority in which the attorney's fees were on a contingency basis, which is to say that the attorney-client agreements in those cases provided for the attorney to be paid not hourly but on the condition of a financial recovery by the client. Charitable Allies does not have a contingency-fee agreement with DSA, and its reliance on authority discussing payment of contingency fees is not supported by cogent reasoning.

[19] Nonetheless, part of Charitable Allies's notice of lien alleges unpaid invoices at the stated hourly rate, and so we will address whether the notice of lien may have been available to protect those alleged unpaid amounts. The parties do not dispute that Indiana law supports the existence of equitable charging liens. Such a lien "is the equitable right of attorneys to have the fees and costs due them for services in a suit secured out of the judgment *or recovery* in that particular suit." *Wilson v. Sisters of St. Francis Health Servs., Inc.*, 952 N.E.2d 793, 796 (Ind. Ct. App. 2011) (emphasis added). In contrast, a statutory lien for attorney's fees allows an attorney "practicing law in a court of record in Indiana [to] hold a lien for the attorney's fees o*n a judgment rendered* in favor of a person employing the attorney to obtain the judgment." Ind. Code § 33-43-4-1 (2022) (emphasis added). As DSA and the Buckleys settled DSA's complaint, there was no judgment entered on the merits of that complaint and thus the statutory lien was inapplicable.

[20] But equitable charging liens are more limited than they may appear. As we have explained, where, as here, the underlying lawsuit was on nonassignable causes of action alleging unliquidated damages, an attorney may not seek to recover on an equitable charging lien from a party who settled out of court with the attorney's former client. *See State Farm Mut. Auto. Ins. Co. v. Ken Nunn Law Office*, 977 N.E.2d 971, 977-80 (Ind. Ct. App. 2012). Thus, again, Charitable Allies's demand for payment lies only against its former client, DSA, and not against the Buckleys.

[21] However, when the parties to a lawsuit settle out of court, the cause of action between them is at an end, and the trial court cannot "allow the action to be prosecuted for the sole purpose of enabling the attorney to reap the benefits" of the attorney-client fee agreement.[7] *Id.* at 980 (quoting *Coughlin v. New York*, 71 N.Y. 443, 443 (1877)). But that is what Charitable Allies's continued prosecution of this matter does. DSA and the Buckleys have settled their lawsuit, yet Charitable Allies seeks to keep the action open for the sole purpose of prosecuting its equitable fee claim. Thus, even if Charitable Allies may have been permitted to file a notice of lien on the allegedly unpaid invoices, the matter having been settled makes the notice of lien moot. If Charitable Allies has a claim for breach of contract for the allegedly unpaid invoices, its right to relief is not by way of prosecuting its notice of lien in this case. Charitable Allies's position on appeal is thus contrary to Indiana law, and we cannot say that the trial court's removal of the notice of lien is reversible error.

IV. Appellate Attorney's Fees

[22] DSA asks that it be awarded appellate attorney's fees pursuant to Indiana Appellate Rule 66(E). As we have explained:

> Ind. Appellate Rule 66(E) provides that this 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

[7] We have recognized that an equitable charging lien is *especially* appropriate where the plaintiff and defendant have colluded to exclude an attorney from recovering his fees. *See Ken Nunn Law Office*, 977 N.E.2d at 979 (discussing *Miedreich v. Rank*, 40 Ind. App. 393, 82 N.E. 117, 119 (1907)). There is no suggestion that DSA and the Buckleys have colluded to exclude Charitable Allies from recovering any alleged fees.

> discretion and may include attorneys' fees." Our discretion to award attorney fees under Ind. Appellate Rule 66(E) 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). To prevail on a substantive bad faith claim, a party must show that the appellant's contentions and arguments are utterly devoid of all plausibility. *Id.* Procedural bad faith 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.* at 346-347.

Staff Source, LLC v. Wallace, 143 N.E.3d 996, 1012 (Ind. Ct. App. 2020).

[23] Meeting the standards of Rule 66(E) is a high burden for the requesting party, and we are reluctant to award attorney's fees under that Rule. *See Thacker*, 797 N.E.2d at 346. Nonetheless, we will do so upon a proper showing, and DSA has readily met that burden here.[8] As explained above, each of Charitable Allies's three issues on appeal is meritless and unsupported by the law and the record. Indeed, Charitable Allies's jurisdictional arguments in particular would seem to fit a textbook definition of "utterly devoid of all plausibility." Further,

[8] DSA also asserts that Charitable Allies's counsel has failed to meet the standards of the Indiana Rules of Professional Conduct. We express no opinion on those arguments and direct the parties to take any such disputes to the Indiana Supreme Court Disciplinary Commission, which has exclusive jurisdiction to discipline an attorney, where appropriate, for violations of the Rules of Professional Conduct. *See, e.g.*, *DuSablon*, 132 N.E.3d at 71 n.2.

Charitable Allies's brief is replete with statements that, as we have noted above, are unsupported by evidence or we otherwise will not consider.

[24] And Charitable Allies's response to DSA's request for fees proves the point. Charitable Allies asserts in its Reply Brief that DSA's request is "improper" and that a request for appellate attorney's fees must be made by separate motion under Indiana Appellate Rule 67. Reply Br. at 16. But Appellate Rule 67 speaks to an award of costs. DSA's requests for fees is proper and plainly stated under Appellate Rule 66(E). Appellee's Br. at 23. We therefore agree with DSA that the totality of Charitable Allies's work product to this Court demonstrates not just weak legal positions but positions utterly devoid of all plausibility. We therefore remand to the trial court with instructions for it to determine and award to DSA a reasonable amount for its appellate attorney's fees in this appeal.

Conclusion

[25] For all of the above-stated reasons, we affirm the trial court's removal of Charitable Allies's notice of lien, and we remand with instructions for the trial court to determine and award to DSA a reasonable amount for its appellate attorney's fees.

[26] Affirmed and remanded with instructions.

Bailey, J., and Robb, J., concur.