

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

Midwest Entertainment Ventures, Inc. d/b/a Theatre X,
Appellant-Petitioner

v.

The Town of Clarksville,
Appellee-Respondent



March 21, 2024

Court of Appeals Case No.
23A-PL-967

Appeal from the Clark Circuit Court

The Honorable Marsha Owens Howser, Special Judge

Trial Court Cause No.
10C04-1905-PL-51

Memorandum Decision by Judge Crone
Judges Bailey and Pyle concur.

Crone, Judge.

Case Summary

- [1] Midwest Entertainment Ventures, Inc. d/b/a Theater X (MEV), appeals the trial court’s order finding it in contempt of a discovery order. MEV asserts that the trial court abused its discretion by concluding that MEV had not complied with the order. We conclude that MEV waived its argument and therefore affirm.

Facts and Procedural History

- [2] The following facts and procedural history have been provided almost entirely by the Town of Clarksville (the Town), the trial court’s August 2021 discovery order, and the unchallenged findings of the appealed order. MEV operates Theatre X on Highway 31 East in Clarksville. AMW Investments, Inc. (AMW), owns that property and leases it to MEV.¹ MEV and AMW share the same principal business address in Michigan.
- [3] In May 2019, the Town revoked MEV’s adult business license due to ordinance violations. MEV appealed the revocation of its license in the Clark Circuit Court. The Town filed an answer as well as counterclaims against MEV and AMW and sought a preliminary injunction to enjoin MEV and AMW from

¹ AMW is not a party to this appeal because the Town’s contempt motion underlying this appeal was filed against MEV only. The Town also filed a contempt motion solely against AMW. AMW’s appeal of the trial court’s order finding it in contempt was recently decided. *AMW Invs., Inc., v. Town of Clarksville*, No. 23A-PL-508, 2023 WL 203844 (Ind. Ct. App. Jan. 19, 2024), *trans. pending*.

operating Theatre X in violation of the ordinances. In November 2019, the trial court granted the Town’s motion for a preliminary injunction. On December 19, 2019, AMW and MEV filed an interlocutory appeal of the preliminary injunction.

[4] In May 2020, during the pendency of the appeal, the Town served its first set of interrogatories, requests for production, and requests for admissions on MEV and AMW. In June 2020, MEV obtained an extension of time to respond to the Town’s discovery requests. At the end of the extended period, MEV served its response, objecting to every one of the Town’s discovery requests on the basis that “discovery is premature and inappropriate during the pendency of appeal” and the trial court stated in a February 2020 order that it lacked “authority during the pendency of the Appeal.” Appellant’s App. Vol. 2 at 39-40.

[5] In August 2020, the Town filed a motion to compel MEV to substantively answer the discovery requests and sought a ruling that MEV “had waived any objection other than the jurisdictional one, by failing to raise them in [its] original” response. *Id.* at 40. In September 2020, MEV and AMW filed a joint response to the Town’s motion to compel, which is not in the record before us. The trial court notified the parties that it would “not rule on matters until the appeal had been decided.” *Id.* at 15.

[6] In October 2020, this Court affirmed the trial court’s order granting the Town’s motion for preliminary injunction. *Midwest Ent. Ventures, Inc. v. Town of Clarksville*, 158 N.E.3d 787 (Ind. Ct. App. 2020), *trans. denied* (2021). On March

18, 2021, our supreme court denied transfer. The Town then filed a motion to set a hearing on its motion to compel discovery, and the trial court set a pretrial conference for April 29, 2021.

[7] In April 2021, the Town filed a reply brief in support of its motion to compel. The Town reiterated that MEV had waived any objections by failing to raise them in its initial response. The Court set a hearing on the motion to compel for June 21, 2021, which was rescheduled to July 9, 2021.

[8] On June 28, 2021, three months after the Indiana Supreme Court denied transfer, MEV served supplemental answers to the Town's requests for admissions. Those answers are not in the record before us. MEV did not answer any interrogatories or produce any documents. On July 8, 2021, the Town filed a supplemental brief in support of its motion to compel, asserting that it was entitled to the relief it requested because MEV had not answered the Town's interrogatories or produced a single document.

[9] On July 9, 2021, the trial court held a hearing on the Town's motion to compel. The transcript of this hearing is not in the record before us. A notation in the chronological case summary indicates that the trial court took the matter under advisement and ordered proposed findings due by August 6, 2021.

[10] On August 12, 2021, the trial court issued the discovery order, finding that "MEV did not supplement its responses to the Town's interrogatories or requests for production[,] " "MEV has not produced a single document in response to the Town's requests for production[,] " and "MEV offered no

justification [at the July 9 hearing] for ignoring the Town’s discovery requests.” Appellant’s App. Vol. 2 at 41-42. The court also found that MEV could not rely on any objections that it failed to raise in its original response. *Id.* at 43. The court ordered MEV and AMW “to answer the Town’s discovery requests within thirty (30) days and to withhold nothing on the basis of any objection that they failed to raise in their initial responses.” *Id.* at 44.

[11] On September 21, 2021, MEV served a supplemental response to the Town’s interrogatories and requests for production, indicating that documents and records were “available for inspection and duplication” at Modern Bookkeeping in Durand, Michigan. Appellee’s App. Vol. 2 at 138, 144-46. Modern Bookkeeping is the bookkeeper for both MEV and AMW. When the Town attempted to obtain discovery, MEV advised the Town’s counsel that Modern Bookkeeping could not provide the documents electronically and directed him to travel to that office to inspect and copy MEV’s documents. When the Town’s counsel spoke with the president of Modern Bookkeeping, Angela Swank, at MEV’s counsel’s direction, she stated that she could provide the documents electronically but that privileged material would be withheld. On November 29, 2021, the Town’s counsel emailed MEV’s counsel and explained that MEV was in contempt of the August 2021 discovery order by not providing what the trial court had ordered it to provide. The Town’s counsel also informed MEV’s counsel that, contrary to the August 12, 2021 discovery order, Swank intended to withhold information on privilege grounds and

requested that MEV inform Swank, pursuant to that order, that the requested discovery could not be withheld on privilege grounds.

- [12] On December 6, 2021, the Town's counsel was planning to travel to Modern Bookkeeping's office when Swank began sending him emails with attached documents. MEV's counsel informed the Town's counsel that production of documents would continue by email and that their meeting at Modern Bookkeeping's office was cancelled. MEV's production was heavily redacted, and it also withheld entire documents.
- [13] On January 18, 2022, the Town filed a motion for contempt, alleging that MEV had violated the August 12, 2021 discovery order by delaying its production for months when it could have provided it in electronic format, concealing information by redacting it, and intentionally withholding some documents entirely. MEV did not file a response.
- [14] In July 2022, the Town deposed Swank. She stated that she would be redacting MEV's production and that no one had instructed her to refrain from doing so. She also stated that she withheld certain documents at MEV's direction. The Town also deposed Theatre X's manager, who stated that no one had ever asked him to pull any records from Theatre X despite the fact that he entered sales reports for Theatre X on a daily basis and corresponded with Doug Marks, MEV's sole officer, via email and text message. At his deposition, Marks testified that he used his home computer and phone to convey information

regarding work matters relative to Theatre X but had never conducted a search of his devices or files.

- [15] On March 20, 2023, the trial court held a hearing on the Town’s contempt motion. On April 4, 2023, the trial court issued its order finding MEV in contempt of the August 12, 2021 discovery order. MEV appeals.

Discussion and Decision

- [16] MEV asserts that the trial court abused its discretion by ruling in its August 12, 2021 discovery order that MEV had waived any objection to the Town’s discovery requests that MEV had not presented in its initial response, including relevance, attorney-client privilege, and accountant-client privilege, and by finding MEV in contempt for not fully complying with that order.
- [17] The Town argues that MEV waived its assertions that relevance and privilege objections were not waived “because MEV never presented these arguments—or even the objections themselves—to the trial court.” Appellee’s Br. at 20. “Issues not raised at the trial court are waived on appeal.” *Cavens v. Zaberdac*, 849 N.E.2d 526, 533 (Ind. 2006). “In order to properly preserve an issue on appeal, a party must, at a minimum, ‘show that it gave the trial court a bona fide opportunity to pass upon the merits of the claim before seeking an opinion on appeal.’” *Id.* (quoting *Endres v. Ind. State Police*, 809 N.E.2d 320, 322 (Ind. 2004)). The Town states that MEV did not assert any relevance or privilege objections in its September 2021 supplemental response to interrogatories and requests for production, did not file a response to the Town’s contempt motion,

and did not raise these contentions at the March 2023 hearing. We note that although MEV filed a reply brief, it did not respond to the Town's assertion that it never presented the arguments or objections to the trial court. As such, we conclude that MEV's arguments are waived on appeal because they were not presented to the trial court.

[18] The Town also asserts that MEV has waived its arguments for lack of cogency. We agree. Indiana Appellate Rule 46(A)(8)(a) requires that the appellant's contentions be supported by cogent reasoning and citations to authorities, statutes, and the appendix or parts of the record on appeal relied on. "A party generally waives any issue for which it fails to develop a cogent argument or support with adequate citation to authority and portions of the record." *Carter v. Indianapolis Power & Light Co.*, 837 N.E.2d 509, 514 (Ind. Ct. App. 2005) (quoting *Romine v. Gagle*, 782 N.E.2d 369, 386 (Ind. Ct. App. 2003), *trans. denied*), *trans. denied* (2006). MEV has four sections in its argument. The first section contains the standard of review for discovery rulings. The second section provides legal support for this Court's authority to review both the contempt order and the order compelling discovery. The third section consists of Indiana Trial Rule 26 and a paragraph from a federal case regarding why irrelevance cannot be waived. The last section of MEV's brief includes one paragraph of legal support for the importance of the attorney-client privilege, one sentence asserting that "waiver of the attorney-client privilege is not [sic] be assumed lightly[,] " and one sentence asserting that "[u]nder Michigan statutory law ... the accountant-client privilege is also not to be taken lightly and cannot

be waived without the express consent of the CPA’s client.” Appellant’s Br. at 12.

[19] MEV does not explain how the authorities it cites apply to the facts of this case or demonstrate that the trial court abused its discretion. We conclude that MEV has waived its arguments for lack of cogency. *See Carter*, 837 N.E.2d at 514 (finding that party waived argument for lack of cogency where party made only a passing reference to authority); *Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (finding argument waived for lack of cogency where party failed to explain how duty of good faith and fair dealing applied to facts of case), *trans. denied*.² Accordingly, we affirm.

[20] Affirmed.

Bailey, J., and Pyle, J., concur.

² MEV’s statement of the case and statement of the facts also fail to comply with our appellate rules. MEV’s statement of the case informs us only that this action involves a discovery dispute in an administrative appeal. This does not comply with Indiana Appellate Rule 46(A)(5), which requires that the statement of the case describe “the course of the proceedings relevant to the issues presented for review, and the disposition of these issues.” In its statement of the facts, MEV informs us that the Town filed a motion to compel and that the trial court granted it following a hearing. MEV asserts that it “did its best to respond to interrogatories and to production of documents—producing more than 9,000 pages of documents[.]” Appellant’s Br. at 6, but the provided citation does not support its assertion. MEV also briefly discusses Swank’s deposition. This is inadequate for compliance with Appellate Rule 46(A)(6), which requires that the statement of the facts contain the facts relevant for review.

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