

MEMORANDUM DECISION

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APPELLANT PRO SE

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ATTORNEY FOR APPELLEE

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IN THE COURT OF APPEALS OF INDIANA

Abhaya Deva and
Bluelight, Inc.,
Appellants-Plaintiffs,

v.

Bill Bauman and
Kroeger Funeral Home, Inc.,
Appellees-Defendants.

November 1, 2022

Court of Appeals Case No.
22A-CT-795

Appeal from the Cass Circuit
Court

The Honorable Stephen Roger
Kitts, II, Judge

Trial Court Cause No.
09C01-2101-CT-1

Weissmann, Judge.

- [1] Abhaya Deva asks this court to reverse an Anti-SLAPP judgment against him both on its merits and for procedural reasons. Because Deva was not given a meaningful opportunity to be heard at the hearing in violation of his due process rights, we reverse and remand for a new hearing.

Facts

- [2] Deva manages the Lincoln Motel in Logansport, Indiana.¹ Bill Bauman works at the Kroger Funeral Home located next door to the motel. Relations between the two businesses have been strained for years over the motel's trash disposal practices. The conflict came to a head during the COVID-19 pandemic.
- [3] One morning, Bauman arrived at the funeral home and saw the motel's dumpster overflowing with trash. He posted the following message on Facebook:

719 East Market Street. You know I could understand if it was the first time that I complained about this... or maybe even the second or third. BUT I have COMPLAINED about this more than a dozen times. This is the reason why people leave our community. This is the reason why no business has come to our community. Less than a city block from City Hall too. Glad I came into work over an hour early to make sure the outside flowers looked good for funerals for the next 4 days. Great neighbors at the Lincoln House aka Hamilton House...

¹ Bluelight, Inc. owns the motel and was Deva's co-plaintiff in the trial court proceedings. Though identified as an "appellant" in the caption above, Bluelight, Inc. has not appeared in and is not a party to this appeal.

Appellees' App. Vol. II, p. 72. A photo of the motel's dumpster overflowing with trash accompanied the post. Bauman tagged the city's mayor and several other city officials replied in the post's comment section. He also filed a formal complaint with the city. Bauman had formally reported the trash problem to the city government on two earlier occasions and had otherwise complained "at least a dozen times" over the past six years. Appellee's Br., pp. 8-9.

[4] Replying to a question about why the trash problem might be so bad, Bauman explained: "Monday is their trash day. They often have cars blocking it when the truck comes to dump it. Their parking lot is not large enough to handle the volume of cars needed for their busy prostitution business." Appellees' App. Vol. II, p. 75. This comment led Deva to file a defamation suit against Bauman and the funeral home. Bauman and the funeral home responded with a motion to dismiss the complaint under Indiana's "Anti-SLAPP" statute.²

[5] At a hearing on the motion to dismiss, counsel for Bauman and the funeral home, Jim Brugh, gave extensive argument on why Deva's defamation claim should be dismissed. After Brugh finished his argument, Deva asked for a continuance which the court summarily denied. But without hearing from Deva on the merits of either the Anti-SLAPP motion or the defamation claim, the

² Indiana's Anti-Strategic Lawsuit Against Public Participation Act "is intended to reduce the number of lawsuits brought to chill the valid exercise of free speech" by "provid[ing] a defense to a civil claim where the complained of act is made 'in furtherance of the person's right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana in connection with a public issue' and was 'taken in good faith and with a reasonable basis in law and fact.'" *Daly v. Nexstar Broad., Inc.*, 542 F. Supp. 3d 859, 867 (S.D. Ind. 2021) (quoting Ind. Code § 34-7-7-5).

hearing quickly ended with the trial court judge making clear his intention to rule in favor of Bauman and the funeral home, which the court did in an order issued two days later. Deva appeals, claiming he never had the opportunity to present his case. We agree.

Discussion and Analysis

- [6] Deva argues that his due process rights were violated by the trial court's failure to provide a meaningful opportunity to be heard at the hearing. In their brief, Bauman and the funeral home fail to address this argument. Consequently, we review this issue for prima facie error. "An appellee's failure to respond to an issue raised in an appellant's brief is, as to that issue, akin to failing to file a brief." *Nance v. Miami Sand & Gravel, LLC*, 825 N.E.2d 826, 837 (Ind. Ct. App. 2005) (citing *Cox v. State*, 780 N.E.2d 1150, 1162 (Ind. Ct. App. 2002)). When the appellee fails to file a brief, "we will reverse the trial court's judgment if the appellant's brief presents a case of prima facie error." *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006). "Prima facie error in this context is defined as, 'at first sight, on first appearance, or on the face of it.'" *Id.* (quoting *Santana v Santana*, 708 N.E.2d 886, 887 (Ind. Ct. App. 1999)). We do not make arguments on behalf of the appellee. *Id.*

Procedural Due Process

- [7] Under a prima facie standard of review, the trial court denied Deva a meaningful opportunity to present his arguments at the hearing.

- [8] A bedrock principle of the constitutional right to procedural due process is the “opportunity to be heard at a meaningful time and in a meaningful manner.” *Perdue v. Gargano*, 964 N.E.2d 825, 832 (Ind. 2012) (citing *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970)). “An opportunity to be heard includes the right to present evidence, confront adverse witnesses, make arguments, and receive judicial findings based upon the evidence and arguments.” *Roy A. Miller & Sons, Inc. v. Indus. Hardwoods Corp.*, 775 N.E.2d 1168, 1171 (Ind. Ct. App. 2002) (citing *Anderson Fed. Sav. & Loan Ass’n v. Guardianship of Davidson*, 173 Ind. App 549, 364 N.E.2d 781, 784-85 (1977)).
- [9] Although due process does not always require a hearing, see *Hewitt v. Westfield Washington Sch. Corp.*, 46 N.E.3d 425, 433-34 (Ind. 2015), once a hearing is held “[a] party is denied due process when it is denied the opportunity to argue his case to the trial court” at the hearing. *Chandler v. Dillon ex rel. Estate of Bennett*, 754 N.E.2d 1002, 1006 (Ind. Ct. App. 2001). And when a hearing is held, both sides must be allowed to participate equally. See *Harder v. Estate of Rafferty*, 542 N.E.2d 232, 232-34 (Ind. Ct. App. 1989).
- [10] Both sides were not given the same opportunity to present their arguments. The trial court listened to extensive legal arguments from Bauman and the funeral home in favor of granting the motion to dismiss. See Tr. Vol II, pp. 5-17. Their attorney, Brugh, was allowed to explain why Bauman’s Facebook post was protected under Indiana’s Anti-SLAPP statute and the evidence supporting Bauman’s belief that his statement was true. Although his arguments and supporting facts were already before the court in his briefs and accompanying

affidavits, Brugh made full use of his opportunity to “make argument in person at the hearing.” *Chandler*, 754 N.E.2d at 1006 (quoting *Harder*, 542 N.E.2d at 234)).

[11] The same opportunity was not extended to Deva. *See* Tr. Vol II, pp. 17-19. He managed to raise one collateral, procedural issue before the trial court denied it and—without pausing—pivoted back to the merits of the case and decided that “[l]egally [Deva’s defamation claim is] dismissed because it has to be.” *Id.* at 19.

[12] The following exchange occurred after Brugh had finished his arguments and is the extent of Deva’s participation in the hearing:

COURT: Sir?

[DEVA]: Good morning, your honor. I’d like to request a continuance on this case because I just hired a counsel yesterday for Bluelight and myself to represent the corporation and myself. But he didn’t have enough time to file appearance yesterday as he was in the court until five o’clock (5:00 p.m.). So, I’d like to request a continuance, please.

COURT: Mr. Brugh? I[’m] not, I mean, I’m not doing it, but go ahead and give your rebuttal or what anything else I need to know. Because I can tell you where I am on this right now.

[BRUGH]: I’m satisfied

COURT: And you’ll tell me if you think I’m wrong because that’s what, that’s what we do. Is it slander or libel if I call you a legal nerd?

[BRUGH]: No.

COURT: You just said it right?^[3]

[BRUGH]: Right.

COURT: I don't know how you build libel or slander based on something that is true. I don't know if that's dispositive to [the Anti-SLAPP motion to dismiss] or not but, I don't know how you build slander or libel based on a statement that is true. The last time I had to look into the law, truth is an absolute defense to these accusations. It's not slander or libel to go on Facebook and say, "Judge Kitts is tall". It's not slander or libel to go on Facebook and say, "Jim Brugh is a legal nerd", he said that for us Now, I'm sorry if someone's uncomfortable about the fact that that's been publicly said, but if anyone thinks that somehow a secret has been given out, that is one of the worst kept secrets in this town. . . . There's nothing for this to proceed on. I honestly don't have a recommendation as far as what you might do about it as far as not liking the fact that people say this about your business, except do something about the business because I hear about this on a weekly basis. Legally it's dismissed because it has to be. Mr. Brugh is going to give me an affidavit for his fees, which I am going to award. I don't believe you have anything else for me or anything else I can do for you this morning sir?

[BRUGH]: No, sir.

COURT: Thank you very much, that concludes the matter.

Id. at 17-19.

[13] On its face, this exchange shows that Deva was denied a meaningful opportunity to be heard. Although Deva chose to begin his argument at the

³ In his opening argument, Brugh described researching the definition of a "public issue" in connection with speech as "interesting for a legal nerd to look at." *Id.* at 11.

hearing by asking for a continuance, a procedurally valid request, he should not have expected the trial court sua sponte to raise the merits of the case and resolve the entire case before having another chance to speak. Indiana courts have consistently disapproved of hearings where both sides did not have an equal opportunity to present arguments. *See, e.g., Morton v. Ivacic*, 898 N.E.2d 1196, 1199-1200 (Ind. 2008) (noting the appellant “was not given an adequate opportunity” to respond to the allegations against him); *Chandler*, 754 N.E.2d at 1006; *Harder*, 542 N.E.2d at 232-34.

[14] But Deva did not have an equal opportunity to present his arguments. Right after Deva asked for the continuance, the Judge said to Brugh, “I mean, I’m not doing it, but go ahead and give your rebuttal or what anything else I need to know. Because I can tell you where I am on this right now.” Tr. Vol II, p. 17. The ‘it’ being referred to is clearly the request for a continuance and not the merits of either the Anti-SLAPP motion to dismiss or Deva’s defamation claim. Indeed, there was no need for Brugh to give a rebuttal argument about either of those issues because Deva had not even mentioned them. Yet the trial court never mentioned the continuance again and proceeded to launch into a discussion about the merits.

[15] With one final question to Brugh, asking if “there was anything else [the court] can do for *him*,” the hearing ended. *Id.* at 19 (emphasis added). The record reflects that Deva lacked a meaningful opportunity to be heard. This is a prima facie violation of procedural due process rights.

[16] Lastly, both parties request attorney's fees. There is no basis for awarding Deva attorney's fees. Additionally, Bauman and the funeral home do not receive appellate attorney's fees as they are the unsuccessful party in this appeal. Any final award of attorney's fees depends on the outcome of the Anti-SLAPP motion after the new hearing.

[17] Under a prima facie standard of review, Deva was denied the opportunity to be meaningfully heard at the hearing in violation of his procedural due process rights. We reverse the trial court's judgment and remand for a new hearing.⁴

Robb, J., and Pyle, J., concur.

⁴ Finding the due process issue dispositive, we need not address Deva's other arguments on appeal.