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IN THE
COURT OF APPEALS OF INDIANA

Sophia Danley Edwards (Minor Child), by Next Friend Katherine Danley Glaser and Katherine Danley Glaser
Appellants-Plaintiffs,

v.

City of Carmel, Indiana
Appellee-Defendant

July 1, 2022

Court of Appeals Case No. 21A-CT-1823

Interlocutory Appeal from the Hamilton County Superior Court

The Honorable David Najjar, Judge

Trial Court Cause No. 29D05-1711-CT-10750

May, Judge.

[1] Sophia Danley Edwards (minor child), by next friend Katherine Danley Glaser, and Katherine Danley Glaser (collectively, "Plaintiffs") appeal the trial court's

order awarding attorney fees to the City of Carmel, Indiana ("City of Carmel"). Plaintiffs present multiple issues for our review, which we consolidate and restate as: whether the trial court abused its discretion when it awarded attorney fees to the City of Carmel. The City of Carmel cross-appeals asking us to award appellate attorney fees. We affirm the trial court's order awarding attorney fees to the City of Carmel, we grant the City of Carmel's request for appellate attorney fees, and we remand for the trial court to determine an appropriate award of appellate attorney fees.

Facts and Procedural History

[2] On November 28, 2017, Plaintiffs filed a complaint for damages against the City of Carmel alleging that, while attending a summer day care program operated by the Carmel/Clay Parks and Recreation Department, Sophia Edwards was "subjected to various forms of bullying and pseudo sexual assault by at least one other child who was also under the care, control, and supervision of CARMEL." (Appellee's App. Vol. II at 26) (emphasis in original). For each of the causes of action[1] in the complaint, Plaintiffs sought $700,000 in actual damages and punitive damages to be determined.

[1] The causes of action are not delineated in the complaint, though it would seem there were at least four.

[3] The City of Carmel filed a motion for summary judgment on September 11, 2019.[2] On January 28, 2020, the trial court held a hearing on the City of Carmel's motion for summary judgment. On February 4, 2020, the trial court denied the City of Carmel's motion for summary judgment in an order that found, in relevant part:

> [T]here is no factual dispute that there is a political entity known as Carmel/Clay Parks and Rec, that this entity is separate and distinct from the City of Carmel, Indiana, and Carmel/Clay Parks and Rec can sue and be sued in its own right. However, the Court does find a genuine issue of material fact as to whether Carmel funded, controlled, managed, or otherwise was involved in Carmel/Clay Parks and Rec and whether any of its employees were involved in the summer camp in question.

(*Id*. at 39.)

[4] On May 11, 2020, Plaintiffs sent the City of Carmel a copy of a subpoena Plaintiffs intended to send to Carmel Mayor James Brainard ("Brainard subpoena") that requested:

> [C]opies of all emails between the dates of June 1, 2017 and the current date, on your personal email address . . . which include the key words: Glaser, Edwards, Sophia, Danley, summer camp, sex, sexual, molestation, incident, parks, department, Carmel, summer, camp, investigate, DCS, CPS, police, video, investigation, or any other words and phrases that pertain in any

[2] The Appendices do not contain a copy of the City of Carmel's motion for summary judgment.

> way to this lawsuit and the allegations against City of Carmel in any way shape of form.

(*Id*. at 50.) Plaintiffs indicated they intended to send an identical subpoena to AOL, Brainard's email provider ("AOL subpoena").[3] On May 18, 2020, after the City of Carmel obtained new counsel, the City of Carmel objected to the subpoenas on the basis that they were "overly broad, unduly burdensome, harassing, and improperly seeking private communications." (*Id*. at 45.) The parties attended an attorney conference to resolve the discovery matter and were unable to come to an agreement. On July 2, 2020, the City of Carmel filed a motion to quash the Brainard subpoena and AOL subpoena in which the City of Carmel argued Plaintiffs' subpoenas were a "fishing expedition that can only be described as an attempt to harass an elected official" and Plaintiffs had forgone other "reasonable, less-intrusive discovery efforts" such as "interrogatories targeted at Mayor Brainard's knowledge [and] questioning persons involved in the alleged incident regarding Mayor Brainard's knowledge[.]" (*Id*. at 43.) The City of Carmel also asserted the subpoenas were not properly filed based on the relevant trial rules. The trial court scheduled a hearing on the matter for October 14, 2020.

[5] Between July 2, 2020, and the trial court's hearing on October 14, 2020, the City of Carmel also filed, in addition to the earlier motion to quash, two

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[3] It is undisputed Mayor Brainard, on occasion, uses his personal AOL account to conduct City of Carmel business.

motions to compel in which the City of Carmel requested Plaintiffs respond to the City of Carmel's first and second sets of interrogatories; a motion for contempt; and a motion for protective order. After the October 14, 2020, hearing, the trial court entered its order on October 20, 2020. It granted the City of Carmel's motion to compel and ordered Plaintiffs to pay the City of Carmel $750.00 in attorney fees. The trial court denied the City of Carmel's motion for contempt and its motion for protective order. Regarding the City of Carmel's motion to quash, the trial court found:

> Based on the evidence and argument presented at the hearing, the Court denies the motion to quash. The Court notes that a motion to quash was perhaps premature as the subpoenas were not yet prepared in proper form. Nevertheless, Plaintiff[s] may proceed with this discovery. The Court, however, instructs Plaintiff[s] to re-issue the subpoena more narrowly tailoring the search terms for the e-mails of Defendant, Mayor Brainard and/or AOL to those matters which are relevant to this matter, including but not limited to the names of the Plaintiffs and their minor child, or any activities complained of in this suit. The subpoena must be limited in scope to those e-mails which were sent or received within 60 days of the actions complained of in this suit.

(Appellants' App. Vol. II at 7-8.)

[6] On January 19, 2021, Plaintiffs sent proposed language for the Brainard subpoena. The Brainard subpoena shortened the timeframe of emails requested but eliminated only the word, "Carmel[.]" (*Id.* at 40.) On January 22, 2021, the City of Carmel sent Plaintiffs an email suggesting specifically tailored words to be included in the new Brainard and AOL subpoenas. Plaintiffs replied on

January 25, 2021, to indicate those "terms [were] not acceptable" and Plaintiffs intended to remove only the word "Carmel" because that allegedly was the only word mentioned by the City of Carmel as objectionable during the October 14, 2020, hearing.[4] (*Id*. at 51.) Plaintiffs also stated in an email later that day that the AOL subpoena would contain identical language to the Brainard subpoena and Plaintiffs were "not required to provide [the City of Carmel] with a notice of the AOL subpoena since the Court already told [Plaintiffs' counsel] to 'proceed' and 'reissue[.]'" (*Id*. at 48.) On February 18, 2021, the City of Carmel emailed Plaintiffs to request a one-week extension to resolve the matter and indicated it would file a motion to quash the Brainard and AOL subpoenas on the same day if it did not hear back from Plaintiffs.

[7] On February 18, 2021, the City of Carmel filed a motion to quash the Brainard and AOL subpoenas. In the motion to quash, the City of Carmel argued Plaintiffs

> failed to fully comply with this Court's directive in its [October 20, 2020] order to narrow the search terms included in the Subpoenas. Indeed, the search terms are still not narrowly tailored, but instead include a list of generic terms ("video," "summer," "camp," "police," "sex," and "investigate") that are in no way reasonably targeted toward the incident. This request is not proportionate to the issues in this case, is unduly burdensome, and harassing.

[4] A transcript of that hearing is not included in the appellate record.

(*Id*. at 40-41.) The City of Carmel also asserted the AOL subpoena did not comply with the relevant trial rules. On February 19, 2021, Plaintiffs filed a motion for rule to show cause asserting the City of Carmel and Mayor Brainard failed to comply with the trial court's October 20, 2020, order and asking for attorney fees associated with the motion for rule to show cause. The same day, the trial court set a hearing on Plaintiffs' motion to show cause for April 7, 2021. The order required Mayor Brainard to appear at the hearing.

[8] On February 24, 2021, Plaintiffs filed their response to the City of Carmel's motion to quash. Plaintiffs asserted the City of Carmel filed its motion to quash "to avoid having to produce emails or documents about these horrific incidents that severely damaged an 8 year old [sic] child." (Appellee's App. Vol. II at 56.) Plaintiffs contended Mayor Brainard had almost a year to produce the emails and "has it within his control to sift through his emails and determine which emails pertain to this incident and could have done so many months ago." (*Id*.) "The City's newly appeared counsel agreed and saw this as a reasonably efficient way to end the discovery dispute over the Mayor's emails." (Br. of Appellee at 20.)

[9] On March 5, 2021, the City of Carmel's

> Assistant Corporation Counsel, the City's IT Director, and outside counsel for the City, Phil Zimmerly, observed Mayor Brainard search his emails using the terms as set forth in Plaintiffs' most recent subpoena, and attorney Zimmerly provided a signed affidavit to Plaintiffs' counsel, explaining the

> search methodology and verifying that there were no responsive documents in the Mayor's AOL account.

(Appellee's App. Vol. II at 79.) The City of Carmel provided Zimmerly's affidavit on March 11, 2021. On March 12, 2021, Plaintiffs sent City of Carmel additional questions for Mayor Brainard. Mayor Brainard answered those questions and provided an affidavit containing his answers on March 18, 2021. On March 26, 2021, City of Carmel filed a request asking the trial court to amend its earlier order and excuse Mayor Brainard from attending the April 7, 2021, hearing regarding Plaintiffs' motion to show cause. The trial court granted the request the same day and excused Mayor Brainard from attending the April 7, 2021, hearing.

[10] On March 30, 2021, Plaintiffs filed a motion to withdraw their request for attorney fees and a motion to convert the show cause hearing to an attorney conference. In the motion to convert, Plaintiffs indicated, "[c]ertain matters of discovery regarding Mayor James Brainard have been resolved to a large extent no longer requiring a hearing at this time." (Appellee's App. Vol. II at 82.) The trial court granted Plaintiffs' motions on April 1, 2021. Also on April 1, 2021, the trial court issued an order withdrawing the City of Carmel's motion to quash.

[11] On April 7, 2021, the parties held the attorneys' conference before the trial court as scheduled. During that conference, Plaintiffs indicated:

> We have resolved the mayoral issue, for the most part, about 95 percent of it. They've produced affidavits saying that they've

> done their search. The only question I would have about the Mayor is in your order from October. You said that I should go ahead and reissue subpoenas. So I am going to issue a subpoena to America Online. I have not yet.

(Supp. Tr. Vol II at 4.) The City of Carmel argued that the Electronic Communications Privacy Act ("ECPA"),[5] 18 United States Code 121 sections 2701-2703 prohibits a third party such as AOL from disclosing emails in a civil action. In support, the City of Carmel cited *In re Subpoena Duces Tecum to AOL, LLC*, 550 F.Supp 2d 606, 611 (E.D. Va. 2008), which determined "the exceptions enumerated in Section 2702(b) [of the ECPA] do not include civil discovery subpoenas. Furthermore, Section 2702(b) does not make any reference to civil litigation or the civil discovery process." Based thereon, the District Court affirmed the magistrate judge's determination that the ECPA prohibits disclosure of emails in a civil action because a civil action or civil discovery is not one of the ECPA's enumerated exceptions. *Id.* at 612.

[12] On April 9, 2021, Plaintiffs' counsel sent an email to the City of Carmel indicating he did not believe the ECPA applied to the discovery of Mayor Brainard's emails from AOL. He told the City of Carmel that he intended to file a subpoena to compel AOL's disclosure of the relevant emails from Mayor Brainard's account in fifteen days. On April 12, 2021, Plaintiffs filed a motion to approve third-party subpoena and for protective order as to documents

[5] The ECPA is also referred to in the record as the "Stored Communications Act." (*See, e.g.*, Appellee's App. Vol. II at 89.)

received. The motion did not mention the ECPA, and stated, "Plaintiffs seek a process that protects the privacy rights of an individual but allow Plaintiffs to conduct discovery under the Indiana Trial Rules." (Appellee's App. Vol. II at 69.)

[13] On April 14, 2021, the City of Carmel filed its opposition to Plaintiffs' motions filed April 12, 2021. The City of Carmel also filed a motion to quash the third-party subpoena, motion for protective order, and request for attorney fees. In that motion, the City of Carmel cited precedent about the exceptions to the ECPA, which do not include civil actions or discovery in a civil case. Two hours later, Plaintiffs filed a response to the City of Carmel's objection to Plaintiffs' motion to approve the AOL subpoena in which Plaintiffs argued, without citation to legal authority, that the City of Carmel did not have standing to quash the AOL subpoena. Later the same day, the trial court issued an order stating:

> 1. Plaintiffs' Motion to Approve Third Party Subpoena and for Protective Order is DENIED;
>
> 2. Defendant's Motion for Protective Order and Motion to Quash Third-Party Subpoena is GRANTED;
>
> 3. Plaintiffs' proposed subpoena to AOL is quashed and Plaintiffs may not serve it, and this Court enters a protective order barring any further discovery into the Mayor of Carmel's AOL account[.]

(Appellee's App. Vol. III at 21) (emphasis in original). The trial court also awarded the City of Carmel attorney fees and costs, and it set a hearing to determine the amount of those fees and costs for May 26, 2021.

[14] On May 19, 2021, "to make an appropriate and complete record," the City of Carmel filed its reply to Plaintiffs' response to the City of Carmel's April 14, 2021, motion to quash third-party subpoena, protective order, and request for attorney fees. (Appellee's Br. at 25.) On May 25, 2021, the City of Carmel filed the affidavit of Bryan H. Babb, setting forth his attorney fees accrued from February 2, 2021, through May 13, 2021, or the amount of time he had spent litigating the subpoena issue. Babb averred the City of Carmel incurred $15,800 in attorney fees related to the subpoena issue, from February 2, 2021, through May 13, 2021. On May 26, 2021, the trial court held a hearing on the attorney fee issue.

[15] On June 4, 2021, the trial court issued its order granting the City of Carmel's request for attorney fees. The trial court outlined the procedural history of the subpoena issue, awarded the City of Carmel $8,700 in attorney fees, and further found:

> The Court's Order of April 14, 2021 quashed Plaintiffs' proposed subpoena to AOL and entered a protective order "barring any further discovery into the Mayor of Carmel's AOL account". The Court finds such a sanction to be inappropriate given the circumstances of this case and the history of the parties with regard to the emails of Mr. Brainard. Therefore, the Court will modify such order at this time. The Plaintiffs may not issue a subpoena to AOL for Mr. Brainard's emails but may continue

> formal and informal discovery into the emails as permitted by law and as the parties have done in the past.
>
> The Court also finds that an award of attorney fees is appropriate as a sanction against Plaintiffs' unjustified actions in pursuing the AOL subpoena after the April 7, 2021 Pre-Trial Conference. The Court finds that Defendant has incurred reasonable attorney fees and costs of $8,200.00 in response to Plaintiff's [sic] pursuit of the AOL subpoena after the April 7, 2021 Pre-Trial Conference. The Court also finds that the Defendant incurred reasonable attorney fees in the amount of $500.00 for attending the hearing on May 26, 2021. These fees and costs should be reimbursed by the Plaintiffs as a sanction for their unjustified actions in pursuing the AOL subpoena.

(Appellants' App. Vol. II at 4.)

[16] Plaintiffs filed a motion for certification of the issue for interlocutory appeal on July 2, 2021. On July 2, 2021, the trial court granted Plaintiffs' request to certify. On July 6, 2021, the trial court stayed its order upon the City of Carmel's request and granted the City of Carmel ten days to file an objection to the trial court's order on Plaintiffs' motion to certify the issue for interlocutory appeal. The City of Carmel filed its objection on July 16, 2021, and Plaintiffs filed a response on July 22, 2021. The trial court entered its order granting

Plaintiffs leave to file an interlocutory appeal on July 26, 2021. On September 20, 2021, this court granted Plaintiffs' motion for interlocutory appeal.[6]

Discussion and Decision

1. Award of Attorney Fees

[17] Plaintiffs challenge the trial court's award of attorney fees.[7] The trial court has broad discretion in ruling on discovery issues, and we review its decisions for an abuse of discretion. *Hatfield v. Edward J. DeBartolo Corp.*, 676 N.E.2d 395, 399 (Ind. Ct. App. 1997), *reh'g denied*, *trans. denied*. An abuse of discretion occurs if the trial court's decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable and actual deductions flowing therefrom." *Id*. Further,

> [t]he rules of discovery are designed to allow a liberal discovery process, the purposes of which are to provide parties with information essential to litigation of the issues, to eliminate surprise, and to promote settlement. Discovery is designed to be

[6] We consolidated the cause number for Plaintiffs' appeal, 21A-CT-1823, with a subsequently filed appeal by Plaintiffs' attorney, Timothy Stoesz, on August 23, 2021. It is unclear from the record why Stoesz filed an appeal in his individual capacity.

[7] We note Plaintiffs' analysis of the law supporting this argument relies on Indiana Code section 34-52-1-1, which governs the award of attorney fees and reasonable costs for a "party recovering judgment." As the trial court's award of attorney fees occurred due to a discovery matter, rather than a final judgment, Indiana Code section 34-52-1-1 does not apply. *See, e.g., Poulard v. Lauth*, 793 N.E.2d 1120, 1124-26 (Ind. Ct. App. 2003) (deciding the issue of the award of attorney fees to prevailing party separately from the issue of an award of attorney fees as a result of a discovery dispute that occurred prior the disposition of the case).

> self-executing with little, if any, supervision or assistance by the trial court.

Id.

[18] Pursuant to Indiana Trial Rule 26(B)(1):

> The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought or; (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(C).

Under Indiana Trial Rule 26(C), as is relevant to the case before us:

> **(C) Protective Orders.** Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is being taken, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> * * * * *

> (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters[.]

(emphasis in original).

[19] When the trial court enters a protective order pursuant to T.R. 26(C), "a presumption arises that the trial court will also order reimbursement of the prevailing party's reasonable expenses." *Munsell v. Hambright*, 776 N.E.2d 1272, 1277 (Ind. Ct. App. 2002), *trans. denied*.

> This award of fees is mandatory, subject only to a showing that the losing party's conduct was substantially justified or that other circumstances make an award of expenses unjust. A person is "substantially justified" in seeking to compel or in resisting discovery, for purposes of avoiding the sanctions provided by T.R. 37(A)(4), if reasonable persons could conclude that a genuine issue existed as to whether a person was bound to comply with the requested discovery.

Id. (internal citations omitted). Indiana Trial Rule 37(A)(4) provides

> the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

[20] Here, the City of Carmel filed a motion to quash the AOL subpoena. In its motion, the City of Carmel noted the trial court, in its October 20, 2020, order, required Plaintiffs to narrow the search terms of the subpoenas of Mayor

Brainard's emails and Plaintiffs removed only the word "Carmel" from the search terms and left broader search terms such as "sex" and "video." (Appellee's App. Vol. II at 98.) Plaintiffs also added the term "Child Protective Services" though the trial court did not, in its order, permit Plaintiffs to do so. Despite Plaintiffs' non-compliance with the trial court's order, the City of Carmel, with the assistance of the City of Carmel's IT director, searched Mayor Brainard's emails, including any that had been deleted, using the broad terms listed on the subpoena and provided the results to Plaintiffs, who did not challenge those results.

[21] Despite Mayor Brainard's compliance with the subpoena, Plaintiffs continued to pursue the AOL subpoena, even after the City of Carmel made Plaintiffs and the trial court aware of a civil case in which the United States District Court of the Eastern District of Virginia determined the EPCA precluded a plaintiff's subpoena to access an opposing party's emails via a subpoena to AOL.[8] *In re AOL* explained:

> The statutory language of the Privacy Act must be regarded as conclusive because it contains plain and unambiguous language and a coherent and consistent statutory scheme. Section 2701 clearly establishes a punishable offense for intentionally accessing without or exceeding authorization and obtaining electronic

[8] Despite Plaintiffs' argument to the contrary, we need not decide whether to adopt *In re AOL* as Indiana law. We are reviewing whether the trial court abused its discretion when it determined there was no justification for Plaintiffs' continued pursuit of the AOL Subpoena because federal law prohibited AOL from releasing those emails. Federal law does not need to exist in Indiana to be binding on AOL or to impact the viability of Plaintiffs' requested subpoena.

> communications stored at an electronic communication service facility. 18 U.S.C. § 2701 (2000). Section 2702 plainly prohibits an electronic communication or remote computing service to the public from knowingly divulging to any person or entity the contents of customers' electronic communications or records pertaining to subscribing customers. *Id*. § 2702(a). Additionally, § 2702 lists unambiguous exceptions that allow an electronic communication or remote computing service to disclose the contents of an electronic communication or subscriber information. *Id*. § 2702(b-c). Section 2703 provides instances related to ongoing criminal investigations where a governmental entity may require an electronic communication or remote computing service to disclose the contents of customers' electronic communications or subscriber information. *Id*. § 2703. Protecting privacy interests in personal information stored in computerized systems, while also protecting the Government's legitimate law enforcement needs, the Privacy Act creates a zone of privacy to protect internet subscribers from having their personal information wrongfully used and publicly disclosed by "unauthorized private parties," S.REP. NO. 99–541, at 3 (1986), as reprinted in 1986 U.S.C.C.A.N. 3555, 3557.

Id. at 609-10. Further, *In re AOL* determined:

> Applying the clear and unambiguous language of § 2702 to this case, AOL, a corporation that provides electronic communication services to the public, may not divulge the contents of the Rigsbys' electronic communications to State Farm because the statutory language of the Privacy Act does not include an exception for the disclosure of electronic communications pursuant to civil discovery subpoenas.

Id. at 611.

[22] Based thereon, the trial court found, in its order on the City of Carmel's request for fees on June 4, 2021, that there was "no substantial justification" for Plaintiffs' continued requests for discovery as relevant to the AOL subpoena. (Appellants' App. Vol. II at 2.) Additionally, the trial court found:

> The undersigned judicial officer presides over both criminal and civil cases and has on many occasions issued subpoenas for online entities such as AOL. All of those occasions were in criminal matters and the issue of a subpoena duces tecum being issued to AOL in a civil matter was, and is, a matter of first impression with this judicial officer. As the issue of a federal law prohibiting such a subpoena in this case was not raised prior to April 7, 2021, this Court was unprepared and uninclined, *sua sponte*, to deny the Plaintiffs' requests on those grounds, particularly in light of the fact that both parties continued to pledge to work informally to resolve the issues.
>
> When Defendant raised the legality of such a subpoena on April 7, 2021, it became the professional duty of this Court to investigate such claim. A similar duty was placed on the Plaintiffs. The Court finds the law is clear in this area. 18 U.S.C. § 2702(a)(1) provides that an "entity providing any electronic communication service to the public shall not knowingly divulge to any person or entity the contents of the communications." Exceptions are made for criminal investigations, where the records are disclosed to a governmental entity. The statute and subsequent case law, as outlined in Defendant's brief filed April 14, 2021, is clear and unambiguous that in a civil case such as this, a subpoena to AOL as proposed by the Plaintiffs is simply not permitted.

(*Id.* at 4.)

[23] Thus, Plaintiffs were on notice that their subpoena would be fruitless because the ECPA did not allow AOL to divulge information regarding Mayor Brainard's emails in a civil action. As there was no way Plaintiffs would be able to successfully subpoena AOL to discover the information sought, we conclude there is no genuine issue of fact regarding whether the actions were substantially justified and the trial court did not abuse its discretion when it awarded the City of Carmel reasonable expenses[9] associated with the litigation of the AOL subpoena discovery issue.[10] *See M.S. ex rel. Newman v. K.R.*, 871 N.E.2d 303, 312 (Ind. Ct. App. 2007) (party's "fervent pursuit" of discovery of

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[9] In its order requiring Plaintiffs to pay the City of Carmel $8,700 in attorney fees, the trial court found:

> The Court also finds that an award of attorney fees is appropriate as a sanction against Plaintiffs' unjustified actions in pursuing the AOL subpoena after the April 7, 2021 Pre-Trial Conference. The Court finds that Defendant has incurred reasonable attorney fees and costs of $8,200 in response to Plaintiff's [sic] pursuit of the AOL subpoena after the April 7, 2021 Pre-Trial Conference. The Court also finds that the Defendant incurred reasonable attorney fees in the amount of $500.00 for attending the hearing on May 26, 2021. These fees and costs should be reimbursed by the Plaintiffs as a sanction for their unjustified actions in pursuing the AOL subpoena.

(Appellants' App. Vol. II at 4.) Plaintiffs argue the award is unreasonable but do not cite case law to support this contention, nor do they provide this court with the appropriate standard of review; such omissions are violations of Indiana Appellate Rule 46(A)(8)(a) that result in waiver of an issue for appeal. *See, e.g., Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (failure to present argument in compliance with Indiana Appellate Rule 46(A)(8)(a) results in waiver of issue), *reh'g denied*.

Additionally, before the trial court, Plaintiffs did not argue the amount of attorney fees submitted by the City of Carmel was unreasonable. Nor did Plaintiffs argue before the trial court that the City of Carmel was requesting fees for too long a timeframe. Thus, Plaintiffs also waived their argument on appeal by failing to present these arguments to the trial court as it was determining the amount of fees to award. *See, e.g., GKC Indiana Theatres v. Elk Retail Investors, LLC*, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002) ("a party may not present an argument or issue to an appellate court unless the party raised that argument or issue to the trial court").

[10] Plaintiffs also argue "Sanctioning an Attorney for Filing a Motion in good faith is against Public Policy." (Br. of Appellant at 11) (formatting omitted) (errors in original). However, they bring this argument for the first time on appeal, and thus, it is waived. *See GKC Indiana Theatres*, 764 N.E.2d at 651 ("a party may not present an argument or issue to an appellate court unless the party raised that argument or issue to the trial court").

issue not before the trial court and "vehement opposition" of opposing party's discovery motions were not substantially justified, and thus the trial court did not abuse its discretion when it awarded reasonable expenses to opposing party under Trial Rule 37), *trans. denied.*

2. Appellate Attorney Fees

[24] On cross-appeal, the City of Carmel asks us to award it appellate attorney fees. Our standard of review concerning the award of appellate attorney fees is well-settled:

> Indiana Appellate Rule 66(E) provides, in pertinent part, "[t]he Court may assess damages if an appeal . . . is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorney's fees." Our discretion to award attorney fees under Indiana Appellate Rule 66(E) is limited, however, to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay. *Orr v. Turco Mfg. Co., Inc.*, 512 N.E.2d 151, 152 (Ind. 1987). Additionally, while Indiana 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. *Tioga Pines Living Ctr., Inc. v. Indiana Family and Social Svcs. Admin.*, 760 N.E.2d 1080, 1087 (Ind. Ct. App. 2001), *trans. denied*.

Thacker v. Wetzel, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003). In *M.S.*, our court awarded appellate attorney fees in a case similar to the one before us and reasoned:

> It logically follows that an award of reasonable expenses pursuant to Rule 37(A)(4) includes the reasonable expenses incurred by the party in defending the award on appeal. *See City of Hammond v. Marina Entm't Complex, Inc.*, 681 N.E.2d 1139, 1145 (Ind. Ct. App. 1997) (holding that a statutory provision entitling a successful party to reasonable attorney fees includes "legal services incurred defending a fee award" on appeal). Furthermore, the Seventh Circuit Court of Appeals, when construing Federal Rule of Civil Procedure 37(A)(4), has held that when a district court awards reasonable expenses to a prevailing party that obtained a protective order, "the costs of defending the award on appeal are added to that award as of course." *Rickels v. City of South Bend*, 33 F.3d 785, 788 (7th Cir. 1994). While we acknowledge that the *Rickels* court's ruling was based on the federal counterpart to Indiana Rule 37, we have previously held that Federal Rule 37 is "essentially identical" to our version. *Ledden v. Kuzma*, 858 N.E.2d 186, 190 (Ind. Ct. App. 2006).

871 N.E.2d at 315-6. Based thereon, we hold the City of Carmel is entitled to reasonable appellate attorney fees and remand to the trial court for computation and award of appropriate appellate attorney fees.[11]

Conclusion

[11] Additionally, we note Plaintiffs' filings with this court violated several of our Appellate Rules. For example, two arguments were waived for failure to comply with Indiana Appellate Rule 48(A)(8)(a). *See supra* n.9 & n.10. Also, Plaintiffs' appendix does not comply with Indiana Appellate Rule 50(A)(2)(a) because it does not include a chronological case summary. Finally, Plaintiffs' appendix includes the transcript on the hearing on fees in violation of Indiana Appellate Rule 50(A)(2)(h). These errors further support an award of appellate attorney fees. *See Tipton v. Estate of Hofmann*, 118 N.E.3d 771, 778 (Ind. Ct. App. 2019) (awarding appellate attorney fees based on party's noncompliance with Rules of Appellate Procedure).

[25] The trial court did not abuse its discretion when it ordered Plaintiffs to pay $8,700 in attorney fees to the City of Carmel, and we thus affirm the trial court's order. Plaintiffs' public policy argument and their contention that the amount of attorney fees awarded was unreasonable are waived for failure to comply with appellate rules and/or for improper presentation of an issue for the first time before the appellate court. Additionally, we award appellate attorney fees to the City of Carmel. We remand to the trial court for a hearing regarding the appropriate award of appellate attorney fees.

[26] Affirmed and remanded.

Brown, J., and Pyle, J., concur.