MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Donald L. Barriger, Jr., and Dianne Barriger,

Appellants-Petitioners,

v.

The Brown County Board of Health and the Brown County Health Officer,

Appellees-Respondents

February 7, 2024

Court of Appeals Case No. 22A-PL-2944

Consolidated Appeal from the Brown Circuit Court

The Honorable Mary Wertz, Judge

Trial Court Cause Nos. 07C01-1905-PL-191 07C01-2106-PL-227

Memorandum Decision by Judge Weissmann
Chief Judge Altice and Judge Kenworthy concur.

Weissmann, Judge.

[1] Dianne Barriger and her husband, Donald Barriger, Jr.,[1] sought judicial review of two successive Brown County Health Department orders requiring the Barrigers to clean and repair a piece of real estate they own in Nashville, Indiana (the Property). The trial court determined that the second order superseded the first, was lawfully issued, and is therefore enforceable. The Barrigers appeal pro se, raising a variety of claims, most of which are waived. Finding no merit to the Barrigers' remaining arguments, we affirm.

Facts

[2] The Property primarily consists of a two-story, partially remodeled residence and a large, fenced-in yard. The Barrigers last lived at the Property in 2014 but continued to store personal property there.

[3] In April 2019, the Health Department's Environmental Health Supervisor inspected the Property from outside its fence. Among other things, the Health Supervisor observed "significant overgrowth" in the yard and "damaged roofing" on the residence that "was vulnerable to weather." Appellants' App. Vol. II, p. 3. After the inspection, the Health Supervisor sent the Barrigers an "Order to Cleanse" (First Order), alleging that the residence was "unfit for human habitation" in violation of Indiana Code § 16-41-20-7 (Habitability

[1] On January 8, 2024, Dianne notified this Court that Donald died on December 29, 2023. We observe that "[t]he death or incompetence of any or all the parties on appeal shall not cause the appeal to abate." Ind. Appellate Rule 17(B).

Statute). *Id.* at 15. The Health Supervisor therefore ordered the Barrigers to either repair the residence or remove it from the Property.

[4] The Barrigers, pro se, sued the Health Department's Health Officer and the Brown County Board of Health (collectively, the Board), seeking a declaratory judgment that the First Order was unlawfully issued and therefore unenforceable. Among other things, the Barrigers argued that the Habitability Statute did not authorize the Health Supervisor to issue orders. *See* Appellants' App. Vol. II, p. 7.

[5] As part of the judicial review proceedings, the Health Officer and the Health Supervisor conducted an onsite inspection of the Property, including the interior of its residence. This inspection revealed rodent droppings inside the residence; holes in the residence's ceiling and walls that were large enough to allow raccoons, bats, and other vermin inside; and containers of stagnant water both inside and outside the residence. An environmental scientist would later testify that the overgrowth in the Property's yard and the "clutter" inside and outside the residence were "ideal living conditions" for disease carrying "pest[s] and vermin." Tr. Vol. II, pp. 122, 127. The scientist would also testify that the standing water was a breeding ground for mosquitoes that can transmit diseases.

[6] After the inspection, the Health Officer sent the Barrigers a "Superseding Order to Cleanse" (Second Order), alleging that there were conditions on the Property that "may transmit, generate, or promote disease" in violation of Indiana §

Code 16-20-1-25 (Disease Statute). Appellants' App. Vol. III, p. 83. The Health Officer therefore ordered the Barrigers to abate those conditions by cleaning and repairing the Property in specified ways. The Second Order also stated that the First Order would "have no further force and effect." *Id.* at 84.

[7] The Barrigers, pro se, again sued the Board, this time seeking a declaratory judgment that the Second Order was unlawfully issued and therefore unenforceable. Specifically, the Barrigers argued that the Second Order was:

- "improper because it was an attempt . . . to circumvent [the trial court's] authority regarding [the Barrigers'] appeal of the [First] Order";
- "improperly issued pursuant to [the Disease Statute] because the Property is not a dwelling"; and
- "improperly issued against [Dianne] since [Donald] was owner of the Property at the time it was issued."

Appellants' App. Vol. II, p. 7.

[8] The Barrigers' two lawsuits proceeded to a consolidated bench trial, after which the trial court concluded that their challenge to the First Order's enforceability was mooted by the issuance of the superseding Second Order. The court rejected the Barrigers' legal challenges to the Second Order and, finding an adequate factual basis for its issuance, determined the order was lawfully issued and enforceable. Accordingly, the Court entered judgment against the Barrigers and in favor of the Board on the Barrigers' consolidated claims for declaratory relief.

Discussion and Decision

[9] The Barrigers appeal pro se, raising a variety of issues, which we generally categorize as follows:

I. Whether the trial judge erred by not disqualifying herself under the Indiana Code of Judicial Conduct;

II. Whether the trial court erred in making or not making certain procedural and evidentiary decisions;

III. Whether the trial court erred in concluding that the Barrigers' challenge to the First Order is moot; and

IV. Whether the trial court erred in concluding that the Second Order is enforceable generally.

I. Judicial Disqualification

[10] Shortly after the Barrigers sought judicial review of the First Order, the trial judge notified the parties that, during her previous career as the Brown County Chief Deputy Prosecutor, the trial judge was involved in litigation between the Barrigers and the Health Officer. The judge ultimately determined that her involvement in this prior litigation did not warrant her disqualification from the case under the Indiana Code of Judicial Conduct. But she nonetheless advised the parties that she would disqualify herself upon request.

[11] Neither party requested that the trial judge disqualify herself due to her involvement in prior litigation between the Barrigers and the Health Officer. But after trial, while preparing for this appeal, the Barrigers allegedly learned that, as Chief Deputy Prosecutor, the judge was also involved in prior litigation

between the Health Officer and a third party. On this basis, the Barrigers now argue that the judge erred by not disqualifying herself under Rule 2.11 of the Code of Judicial Conduct.

[12] Rule 2.11 generally provides: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality[] might reasonably be questioned." Ind. Judicial Conduct Rule 2.11. But the Code of Judicial Conduct "do[es] not create freestanding rights of enforcement in private parties." *Mathews v. State*, 64 N.E.3d 1250, 1255 (Ind. Ct. App. 2016). "The Code's obligations are enforced by the individual judge against [herself] in the first instance, and in the last instance by disciplinary actions of our supreme court." *Id.* (internal quotations omitted). And "no decision of this court or our supreme court has granted relief solely on the basis of the Code's requirements absent an independent procedural vehicle for bringing the claim." *Id.*

[13] For this reason, we do not consider the Barrigers' freestanding claim that the trial judge erred by not disqualifying herself under Rule 2.11.

II. Procedural and Evidentiary Decisions

[14] The Barrigers next argue that the trial court erred by denying their motion for a continuance of trial; limiting the scope of Dianne Barriger's narrative testimony during trial; and "ignoring" an alleged discovery violation by the Board. Appellant's Br., p. 54.

A. Motion for Continuance

[15] One month before their June 2022 trial date, the Barrigers moved for a continuance of trial "based primarily on [their] ongoing health issues" and "the need for them to assist young family members in exigent circumstances." Appellants' App. Vol. III, p 189. In their motion, the Barrigers explained that they planned to travel to North Carolina from April through May, at least, to care for their toddler grandson. The Board objected to the requested continuance, and the trial court denied the Barrigers' motion. The Barrigers now claim the court's denial was in error.

[16] "A trial court's decision to grant or deny a motion to continue a trial date is reviewed for an abuse of discretion, and there is a strong presumption the trial court properly exercised its discretion." *Blackford v. Boone Cnty. Area Plan Comm'n*, 43 N.E.3d 655, 664 (Ind. Ct. App. 2015). "A denial of a motion for continuance is [an] abuse of discretion only if the movant demonstrates good cause for granting it." *Id.* "However, no abuse of discretion will be found when the moving party has not demonstrated that he or she was prejudiced by the denial." *Id.*

[17] The Barrigers contend they demonstrated good cause for a continuance, but they neither assert nor establish that they were prejudiced by the denial of one. The Barrigers simply state, "A continuance . . . would have allowed [them] to prepare properly for trial." Appellant's Br., p. 37. That alone is insufficient. *See Williams v. State*, 681 N.E.2d 195, 202 (Ind. 1997) ("Courts do not favor

continuances to allow more time to prepare for trial and should grant such motions only where good cause is shown and it is in the interests of justice.").

[18] Accordingly, the Barrigers have failed to establish that the trial court abused its discretion in denying their final motion for a continuance.

B. Narrative Testimony

[19] As a pro se litigant, Dianne provided narrative testimony in support of her and Donald's claims. While doing so, she attempted to testify about the Barrigers' efforts to clean and repair the Property in response to the First Order. The Board consistently objected to the relevance of this testimony, emphasizing that the Barrigers' compliance with the First and Second Orders were not issues being litigated. The trial court agreed and prohibited Dianne from testifying about the Barrigers' efforts.

[20] The Barrigers claim the trial court erred in concluding that Dianne's testimony was irrelevant.[2] "Evidence is relevant if it has "any tendency" to make "more or less probable" a fact that is "of consequence in determining the action." *Harris v. State*, 211 N.E.3d 929, 939 (Ind. 2023) (quoting Ind. Evidence Rule 401). Irrelevant evidence is generally inadmissible. *Id.* (citing Ind. Evidence Rule 402). And the admissibility of evidence is a determination entrusted to the trial

[2] The Barrigers also claim the trial court erred by excluding as irrelevant Dianne's testimony about the history of the Property and the circumstances that led to its poor condition. The Barrigers, however, make no argument concerning the relevance of these excluded facts. Therefore, they have waived the claim. *See Miller v. Patel*, 212 N.E.3d 639, 657 (Ind. 2023) ("We will not step in the shoes of the advocate and fashion arguments on [their] behalf.").

court's sound discretion. *ArcBest Corp. v. Wendel*, 192 N.E.3d 915, 926 (Ind. Ct. App. 2022). Therefore, we will reverse a trial court's evidentiary decision only when it is clearly against the logic and effect of the facts and circumstances before the court. *Id.*

[21] The Barrigers contend their efforts to clean and repair the Property in response to the First Order were relevant to the issue of their compliance with the Second Order because the two orders required abatement of some of the same conditions. As the trial court found, however, the enforceability of the Second Order was the only issue being litigated at trial. Thus, the Barrigers' compliance with the Second Order was not "of consequence in determining the action." Evid. R. 401. We find no abuse of discretion.[3]

C. Alleged Discovery Violation

[22] At trial, the Health Supervisor testified that his April 2019 inspection of the Property was prompted by a neighbor's oral complaint about its condition. On appeal, the Barrigers allege that the Board violated the rules of discovery by failing to disclose the neighbor's oral complaint in the Board's answers to the Barrigers' interrogatories. The Barrigers also allege that they objected to the

[3] The Barrigers further claim that the trial court erred by excluding as irrelevant Dianne's comments during her opening statement about the Barrigers' efforts to clean and repair the Property. As we find no error in the exclusion of Dianne's testimony about these efforts, there was no error in the corresponding limitation on her opening statement. *See Montgomery Ward, Inc. v. Koepke*, 585 N.E.2d 683, 687 (Ind. Ct. App. 1992), *amended on reh'g in part*, 591 N.E.2d 1035 ("[S]ince opening statements are not evidence and may not be taken as such by the jury, there appears to be little harm to the party absent serious restriction of his ability to state what the evidence will show.").

Health Supervisor's testimony on this basis, but the trial court denied them relief in the form of a mistrial or, alternatively, a continuance.

[23] Based on these allegations, the Barrigers now claim the trial court erred by ignoring the Board's purported discovery violation. But as the Barrigers acknowledge, their alleged objection does not appear in the record. Appellants' Br., p. 55 ("In reviewing both the audio record and the Transcript, the Appellants have been unable to find any transcribed record of that protest[.]"). We also find no request for a mistrial, continuance, or other relief during the Health Supervisor's testimony. Rather, the trial transcript shows that the Health Supervisor testified uninterruptedly about the neighbor's oral complaint. Tr. Vol. II, pp. 75-76. Moreover, the court reporter did not note any inaudible statements during the entire proceeding.

[24] The Barrigers contend their objection must have somehow been deleted from the record. However, the Barrigers did not avail themselves of Indiana Appellate Rule 31, which provides a procedure for litigants to supplement the record when "no Transcript of all or part of the evidence is available." Ind. Appellate Rule 31(A). "It is the appellant's duty to present an adequate record on appeal, and when the appellant fails to do so, [they are] deemed to have waived any alleged error based upon the missing material." *Cook v. Beeman*, 150 N.E.3d 643, 647 (Ind. Ct. App. 2020).

[25] Accordingly, the Barrigers have waived their claim that the trial court erred by purportedly ignoring the Board's alleged discovery violation.

III. Mootness of First Order Challenge

[26] Turning to the Barrigers' substantive arguments, they first claim the trial court erred by concluding their challenge to the First Order's enforceability was moot. "A case is moot when the controversy at issue has been ended, settled, or otherwise disposed of so that the court can give the parties no effective relief." *E.F. v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 188 N.E.3d 464, 466 (Ind. 2022). "But Indiana recognizes a public interest exception to the mootness doctrine, which may be invoked when the issue involves a question of great public importance which is likely to recur." *Id.* (internal quotation omitted).

[27] The Barrigers seem to contend that the trial court erred by not invoking the public interest exception to consider their otherwise moot challenge to the First Order. But they never raised the public interest exception at trial. A trial court "cannot be found to have erred as to an issue or argument that it never had an opportunity to consider." G*KC Ind. Theatres, Inc. v. Elk Retail Invs., LLC.*, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002). "Consequently, an argument or issue not presented to the trial court is generally waived for appellate review." *Id.*

[28] Because the Barrigers could have, but did not, argue the public interest exception to the trial court, they have waived the claim.

IV. Enforceability of Second Order

[29] As for the enforceability of the superseding Second Order, the Disease Statute under which it was issued provides: "A person shall not institute, permit, or maintain any conditions that may transmit, generate, or promote disease." Ind.

Code § 16-20-1-25(a). The Barrigers argue this statute does not apply to the Property and that the Health Officer was not authorized to issue the Second Order. They also argue, alternatively, that the Second Order can only be enforced against the Property's titleholder.

A. Statute Applicability

[30] The Barrigers claim the Disease Statute does not apply to the Property because the Property does not contain a "dwelling," as defined by the Indiana Health Code. *See generally* Ind. Code § 16-18-2-104 (defining "dwelling" as "any part of any building or the building's premises used as a place of residence or habitation or for sleeping by a person"). The Disease Statute, however, does not use the term "dwelling."[4] *See* Ind. Code § 16-20-1-25(a). Thus, the Barrigers' claim is without merit. *See Ind. Bell Tel. Co. v. Ind. Util. Regul. Comm'n*, 715 N.E.2d 351, 354 (Ind. 1999) ("Nothing may be read into a statute which is not within the manifest intention of the legislature as ascertained from the plain and obvious meaning of the words of the statute." (cleaned up)).

B. Health Officer Authority

[31] In conjunction with their challenge to the trial court's mootness determination, the Barrigers seem to claim that the Health Officer was not authorized to issue the Second Order because the Indiana Health Code, in general, does not allow

[4] In contrast to the Disease Statute, the Habitability Statute under which the First Order was issued expressly applies to a "dwelling." Ind. Code § 16-41-20-1 (authorizing a local health officer to order, among other things, the repair of a "dwelling . . . that is found to be unfit for human habitation").

the issuance of superseding orders. Appellants' Br., pp. 38, 45 (describing the trial court's conclusion that the Second Order superseded the First Order as "a breach of the doctrine of the separation of powers"). The Barrigers, however, do not direct us to any statutory provision prohibiting a local health officer from issuing superseding orders.[5] Therefore, they have waived their claim. *See Miller v. Patel*, 212 N.E.3d 639, 657 (Ind. 2023) ("We will not step in the shoes of the advocate and fashion arguments on [their] behalf.").

C. Non-Titleholder Enforcement

[32] Finally, the Barrigers argue that the Second Order is not enforceable against Dianne because she did not hold title to Property when the order was issued. In support of this claim, they point to Indiana Code § 16-41-20-8, which generally provides: "An order issued under this chapter shall be served on the tenant and the owner of the dwelling or the owner's rental agent." We note that this statute only expressly concerns the "service" of an order issued under Article 41, Chapter 20 of the Indiana Heath Code. Ind. Code § 16-41-20-8. But assuming it also concerns the enforceability of such an order, as Dianne claims, the statute does not apply to the Second Order, which was issued under Article 20, Chapter 1. *See* Ind. Code § 16-20-1-25(a). The Barrigers' claim is therefore without merit.

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[5] We note that Indiana Code § 16-20-1-19(a) broadly provides: "Local health officers shall enforce the health laws, ordinances, orders, rules, and regulations of the officer's own and superior boards of health."

Conclusion

[33] Because the Barrigers' claims are either waived or without merit, we affirm the trial court's judgment.

Altice, C.J., and Kenworthy, J., concur.