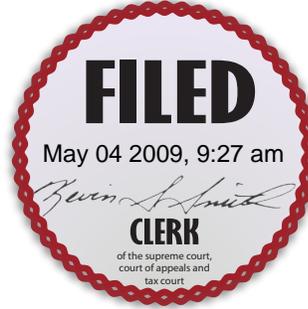


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DANIEL E. HOAGLAND, KAREN)
HOAGLAND and HOAGLAND FAMILY)
LIMITED PARTNERSHIP,)
)
Appellants - Plaintiffs,)

vs.)

No. 76A03-0810-CV-495

TOWN OF CLEAR LAKE, INDIANA;)
ROBERT T. TROLL; DEROLD H. COVELL;)
EMMA J. BROWN; WILLIAM GEIGER; JOE)
DRIVER and THOMAS REITH, Individually)
and in their official capacities as current)
former members of The Clear Lake Town Council)
and Plan Commission)
)
Appellees-Defendants.)

APPEAL FROM THE STEUBEN SUPERIOR COURT
The Honorable William C. Fee, Judge
Cause No. 76D01-0308-PL-396

May 4, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Daniel and Karen Hoagland and the Hoagland Family Limited Partnership (collectively, the Hoaglands) appeal the trial court's grant of summary judgment in favor of the Town of Clear Lake, Indiana (the Town), and Robert T. Troll, Derold Covell, Emma Brown, William Geiger, Joe Driver, and Thomas Reith, individually and in their official capacities as current and former members of the Clear Lake Town Council and Plan Commission. The Hoaglands present seven issues for our review, which we restate as:

1. Did the trial court abuse its discretion in denying the Hoaglands' motion to compel discovery?
2. Did the trial court abuse its discretion in denying the Hoaglands' motion for certification of interlocutory appeal of the denial of the Hoaglands' motion to compel?
3. Did the trial court err in failing to rule on the Hoaglands' motion to preserve evidence?
4. Did the trial court err in lifting the agreed-upon stay pending mediation to allow consideration of pending motions for summary judgment?
5. Did the Steuben Circuit Court Clerk err in its ruling on the Hoaglands' praecipe for withdrawal of jurisdiction?
6. Did the trial court err in granting summary judgment in favor of the individually named defendants?
7. Did the trial court err in granting summary judgment in favor of the Town?

We affirm.

The Hoaglands received permits from the Federal Aviation Administration (FAA) and the Indiana Department of Transportation to operate a helicopter on the Hoaglands' private property, which was located within the Town's limits. In 1999, the Town filed a complaint in the Steuben Superior Court under Cause 76D01-9908-CP-459 (Cause 459) seeking to

enjoin the Hoaglands from taking off and landing the helicopter. The litigation in Cause 459 also involved the Town's refusal to grant the Hoaglands a building permit as they had requested. The parties mediated their disputes and an agreement (the Settlement Agreement) was reached on April 14, 2000.

The Settlement Agreement provided that the Town would dismiss its complaint seeking an injunction against the Hoaglands prohibiting them from operating their helicopter within town limits and the Hoaglands agreed to certain restrictions on the use of the helicopter. The Settlement Agreement further provided that the Hoaglands would dismiss their counterclaims in the litigation upon payment of damages in a "sum to be negotiated" with the Town's insurance carrier.¹ *Appendix* at 32. The parties were unable to reach an agreement on the amount of damages, and the issue was eventually submitted to a jury. The jury entered a verdict determining damages to be \$14,716.91. The Town paid the judgment thereby bringing the case to a close.

On April 9, 2001, the Town enacted Ordinance 268, the adoption of which prompted the Hoaglands' filing of the instant action. Ordinance 268 provided, in pertinent part, as follows:

Any aircraft landing strip, pad, or space that is a non-conforming use at the time of passage of this Ordinance shall be discontinued within five (5) years of the date of the passage of this Ordinance or upon transfer, sale, or lease of the subject real estate, whichever is earlier. The owner of the real estate at the time of the passage of this Ordinance, upon which the aircraft landing strip, pad, or space is located may continue the use, limited to one aircraft, beyond five (5) years if proof of F.A.A. authority is submitted to the Zoning

¹ The Town also agreed to issue the building permit the Hoaglands had sought.

Administrator within sixty (60) days of passage of this Ordinance, and a copy of the results of any flight review within sixty (60) days of each flight review.

Appendix at 58. In the printed codification, however, the language of Ordinance 268 allowing the continued use after five years upon proof of FAA authority was inadvertently omitted. The omission was an error of the publishing company and was not due to any action of the Town. When the error was discovered, the Town took action by enacting Ordinance 288 to re-establish the omitted language.²

On August 22, 2003, the Hoaglands filed their complaint in the instant action, naming the Town as well as former and current members of the town council in both their individual and official capacities. On December 12, 2003, the Hoaglands filed a first amended complaint for damages including claims for direct breach of the Settlement Agreement in Cause 459, bad faith, and a request for declaratory judgment that the Town's zoning ordinances are invalid. On March 30, 2004, the individually named defendants filed a motion for summary judgment seeking judgment on the complaint with regard to the breach of the Settlement Agreement claim made against them. On June 2, 2006, all named defendants filed a motion for summary judgment on all claims of the Hoaglands' amended complaint. The Hoaglands filed a cross-motion for summary judgment on July 15, 2008 along with their response in opposition to the defendants' motions for summary judgment. A hearing on the summary judgment motions was held on July 28, 2008. On August 13, 2008, the trial court issued its order granting summary judgment in favor of all of the named

² Ordinance 288 was enacted on September 8, 2003.

defendants and denying the Hoaglands' cross-motion for summary judgment.

During the course of this action, the Hoaglands filed several motions that serve as the basis for the Hoaglands' remaining issues on appeal. On December 16, 2005, the Hoaglands filed a motion to compel concerning production of certain documents requested during discovery. On May 30, 2006, the trial court issued its order denying the Hoaglands' motion to compel. Shortly thereafter, on June 29, 2006, the Hoaglands filed a motion to certify the trial court's denial of their motion to compel for interlocutory appeal, which the trial court denied on July 21, 2006. On March 7, 2006, the Hoaglands filed their motion to preserve evidence, upon which the court did not enter a ruling prior to granting summary judgment in favor of all named defendants.

On July 20, 2006, a mediation session was held in an unrelated action during which the Town requested that mediation also take place in the instant action and that a combined mediation be continued to a later date. The parties reached a confidential mediation agreement in which they agreed that all pending matters in the instant action, save the matter of the interlocutory appeal, would be stayed. The trial court granted the parties' stipulation to stay proceedings pending mediation. A mediation session was eventually held on February 13, 2008, during which the parties did not address matters pertaining to the instant action. Thereafter, the mediator reported to the trial court that no agreement had been reached and the parties wished to proceed with the motions for summary judgment pending in this cause. On February 20, 2008, the trial court granted the defendants' request to lift the stay with

regard to the pending motions for summary judgment in order to proceed with consideration thereof.

On July 25, 2008, the Hoaglands filed their praecipe for withdrawal of jurisdiction pursuant to Ind. Trial Rule 53.1 with the Steuben Circuit Court Clerk (the Clerk). On August 12, 2008, the Clerk found there was no delay in any ruling and therefore declined to give notice of withdrawal of jurisdiction. The trial court's grant of summary judgment in favor of the defendants was entered the following day.

1.

The Hoaglands served sixty-five discovery requests (some in multiple parts) on the Town. The Town objected to thirty-nine of the requests as immaterial to the issues in the present case and/or as not reasonably calculated to lead to the discovery of relevant or material information. The trial court sustained the Town's objections and thereby denied the Hoaglands' motion to compel. On appeal, the Hoaglands challenge the trial court's ruling with respect to two of its discovery requests: Request Number 1, which sought a document signed by the town council authorizing the filing of the lawsuit in Cause 459, and Request Number 7, which sought the Master Streets and Thoroughfare Plan for the Town.³

We afford great deference to a trial court's discovery decisions. *Andreatta v. Hunley*, 714 N.E.2d 1154 (Ind. Ct. App. 1999), *trans. denied*. "We will interfere with a trial court's ruling on discovery matters only where an abuse of discretion is apparent." *Id.* at 1159. An

³ A challenge to Request Number 1 and 7 necessarily involves Request Numbers 3, 8, 9, and 10, as they involve the same subject matter.

abuse of discretion occurs when the trial court's decision is against the logic and circumstances of the case. *Andreatta v. Hunley*, 714 N.E.2d 1154.

In general, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the pending action. Ind. Trial Rule 26(B). The Hoaglands assert that the denial of their motion to compel with regard to Request Number 1 "effectively precluded Hoaglands from determining whether the lawsuit brought against them in Case 459 was properly authorized by the Town." *Appellants' Brief* at 13. With regard to Request Number 7, the Hoaglands maintain that the information sought was relevant to its claim that the Town's zoning ordinances were invalid and that the denial of its request precluded them from determining whether the statutory prerequisite for enactment of the ordinances were met.

We conclude that the trial court's ruling with regard to these requests was not against the logic and circumstances of the case. With regard to Request Number 1, the Hoaglands have failed to demonstrate how the document sought is relevant to the instant action. To be sure, a document authorizing the filing of a complaint in an action which has been closed is not relevant or material to the claims in the instant action for breach of the Settlement Agreement, bad faith, or the validity of the Town's ordinances. In any event, in addition to challenging its relevancy, the Town stated that the document requested could not be found. With regard to Request Number 7, the relevant documents pertaining to such request are a matter of public record. We therefore conclude that the trial court did not abuse its discretion

in denying the Hoaglands' motion to compel the production of certain documents in response to its discovery requests (i.e., Request Numbers 1 and 7).

2.

The Hoaglands argue that the trial court abused its discretion in refusing to certify for interlocutory appeal the denial of their motion to compel. Appeals from interlocutory orders are governed by Appellate Rule 14. Rule 14(A) enumerates specified types of interlocutory orders that may be taken as a matter of right, and Rule 14(B) provides that other interlocutory appeals may be taken "if the trial court certifies its order and the Court of Appeals accepts jurisdiction over the appeal." "Certification is a matter of grace with the trial court." *Whitewater Valley Canoe Rental, Inc. v. Bd. of Franklin County Comm'rs*, 507 N.E.2d 1001, 1006 (Ind. Ct. App. 1987), *trans. denied*. Whether an order will be certified for appeal as an interlocutory order is a matter within the trial court's discretion. *Whitewater Valley Canoe Rental, Inc. v. Bd. of Franklin County Comm'rs*, 507 N.E.2d 1001.

As we concluded above, the documents sought by the Hoaglands are irrelevant and immaterial to the claims in the instant case or otherwise discoverable in the public domain. The Hoaglands therefore have not established that they were prejudiced by the denial of their motion to compel. Having addressed the Hoaglands' arguments and concluding that the trial court did not abuse its discretion in denying the Hoaglands' motion to compel, we fail to see any error on the part of the trial court in refusing certification of its denial of that motion. *See Morgan v. State*, 445 N.E.2d 585 (Ind. Ct. App. 1983).

3.

The Hoaglands argue that the trial court abused its discretion in failing to rule on their motion to preserve evidence. The Hoaglands filed their motion to preserve evidence on March 7, 2006, and the trial court heard arguments the same day. The trial court took the matter under advisement. The trial court did not rule on the motion before the notice was given to the court that, during mediation, the parties had agreed to stay all pending matters in the instant action. The trial court therefore noted on the chronological case summary that “being duly advised, ruling on Plaintiffs’ Motion to Preserve Evidence is stayed” *Appendix* at 10. On June 3, 2008, the trial court lifted the stay with respect to the pending summary judgment motions, but not with respect to the pending motion to preserve evidence. Because the stay was still in effect, the trial court did not rule on the Hoaglands’ motion to preserve evidence prior to entering summary judgment in favor of all defendants on August 13, 2008.

Notwithstanding the fact that the stay was still in affect with regard to the motion to preserve evidence, we note that a trial court’s failure to rule on a motion cannot serve as the basis for a finding of error on appeal. *Strutz v. McNagny*, 558 N.E.2d 1103 (Ind. Ct. App. 1990), *trans. denied*. The Hoaglands’ sole remedy on this issue is provided in Ind. Trial Rule 53.1. *See id.* The Hoaglands cannot therefore challenge the fact that the trial court did not rule on their motion to preserve evidence on appeal from the entry of summary judgment.

4.

The Hoaglands argue that the trial court abused its discretion in lifting the parties’ agreed-upon stay of proceedings to allow for consideration of the defendants’ pending

motions for summary judgment. The Hoaglands assert that they did not agree to lift the stay of proceedings in the instant cause and did not agree to move forward with consideration of the defendants' motions for summary judgment. The Hoaglands have failed to set forth a standard of review or cite any authority in support of their claim and their entire argument is simply a recounting of the timeline of events. We therefore find the Hoaglands have waived the issue. *See* Ind. Appellate Rule 46(A)(8)(a), (b).

Waiver notwithstanding, we find no abuse of discretion in the trial court lifting the stay of proceedings upon the defendants' request and after nearly two years since the request for stay was made. Further, we note that the agreement of the parties to stay the proceedings provided as follows:

The parties are mutually agreeing that all current motions and/or discovery and deadlines will be put on hold until following the November 14, 2006 mediation date with the exception of the interlocutory appeal matter in the breach case and the Town will not initiate a suit based on sewer billings or connections until after said date. *In the event the matter is not resolved at that point the parties will agree to ask the Court to reestablish a new schedule.*

Appendix at 260 (emphasis supplied). The mediation scheduled for November 14, 2006 was continued by the parties on more than one occasion. The mediation session eventually occurred on February 13, 2008. On February 15, 2008, the mediator reported to the court that an agreement in the instant matter was not reached. On February 20, 2008, the defendants therefore requested that the trial court establish a new schedule and set a hearing

on their summary judgment motions.⁴ This is precisely how the parties agreed this matter would proceed, and the trial court was wholly within its discretion to lift the stay and establish a new schedule upon the defendants' request.

5.

The Hoaglands contend the Steuben Circuit Court Clerk erred in ruling on their praecipe for withdrawal of jurisdiction pursuant to T.R. 53.1. In concluding their argument, however, the Hoaglands state that “the trial court abused its discretion in determining that it had jurisdiction of this case” after the Hoaglands filed their praecipe on July 25, 2008. *Appellants' Brief* at 19. The Hoaglands have again failed to provide a standard of review or cite any authority in support of their contention. They have therefore waived the issue for review.

Waiver notwithstanding, we observe that the proper remedy for challenging the denial of a Trial Rule 53.1 motion is to seek a Writ of Mandate from the Indiana Supreme Court to compel the clerk to give notice and disqualify the judge. *Strutz v. McNaghy*, 558 N.E.2d 1103. By failing to utilize the proper remedy, the Hoaglands have waived any error. *See id.*

6.

The Hoaglands contend that the trial court erred in entering summary judgment in favor of the individually named defendants on the Hoaglands' claim for breach of the Settlement Agreement.

⁴ At a hearing on June 3, 2008, the Town informed the trial court that the instant matter would not be settled and that mediation would be a waste of time, money, and resources. The Hoaglands did not disagree with the Town's assessment.

When reviewing the propriety of a ruling on a motion for summary judgment, this court applies the same standard as the trial court. *Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154 (Ind. 2005). A party seeking summary judgment must show “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Ind. Trial Rule 56(C); *see also Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154. The review of a summary judgment motion is limited to those materials designated to the trial court. T.R. 56(H); *Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154. We will accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmoving party, and resolve all doubts against the moving party. *Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154. A trial court’s grant of summary judgment is clothed with a presumption of validity, and the appellant bears the burden of demonstrating that the grant of summary judgment was erroneous. *Spears v. Brennan*, 745 N.E.2d 862 (Ind. Ct. App. 2001).

The trial court correctly concluded that the individual defendants in their personal capacity were not parties to the Settlement Agreement and therefore, as a matter of law, could not be held liable for breach of the Settlement Agreement. In fact, William Geiger, Joe Driver, and Thomas Reith did not even sign the Settlement Agreement. Further, it is clear that Robert Troll, Derold Covell, and Emma Brown signed the Settlement Agreement only in their capacity as members of the town council, as evidenced by their designation as such on their signature lines. *See Grott v. Jim Barna Log Systems-Midwest, Inc.*, 794 N.E.2d 1098, 1104 (Ind. Ct. App. 2003) (“as a general rule, when the designation by a person’s signature indicates that he is an officer or agent of an organization, without more, his status with

respect to the document is that of a representative”), *trans. denied*. The asserted issues of fact relied on by the Hoaglands in opposition to summary judgment do not in any way relate to the status of the individual defendants as non-parties to the Settlement Agreement.⁵ We therefore conclude there is no error in the trial court’s grant of summary judgment in favor of the individual defendants in their personal capacity on the Hoaglands’ claim for breach of the Settlement Agreement.

7.

The Hoaglands also challenge the trial court’s grant of summary judgment in favor of the Town and the “remaining defendants”. *Appendix* at 20. In considering the Hoaglands’ arguments, we keep in mind our standard of review as set forth above.

In arguing that summary judgment was improperly granted, the Hoaglands assert that there are genuine issues of material fact. Specifically, the Hoaglands assert there are genuine issues of material fact about “(1) whether the enactment of an [sic] restrictive ordinance by a Town after entering into a Settlement Agreement constituted a breach of that agreement; (2) whether the conduct of Town Officials and other representatives constituted “bad faith”; or (3) whether the Town followed the law in enactment of its zoning ordinances” *Appellants’ Brief* at 22. We begin by noting that the asserted genuine issues of fact are actually matters of law about which the Hoaglands presented no citation to authority. Moreover, to the extent the Hoaglands argue there are genuine issues of material fact, the Hoaglands do not direct us to designated evidence establishing such. By failing to present us

⁵The Hoaglands rely on their asserted issues of fact, which we noted are unrelated to the issue at hand, and cite

with any cognizable argument in support of their position that the trial court erroneously granted summary judgment in favor of the defendants, the Hoaglands have waived the issue for review. *See* App. R. 46(A)(8)(a); *Romine v. Gagle*, 782 N.E.2d 369 (Ind. Ct. App. 2003), *trans. denied*.

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.

no authority controverting the individual defendants' legal argument.