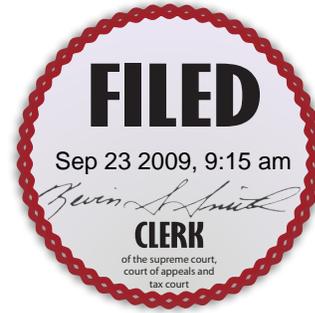


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEY FOR APPELLEE:

WILLIAM M. HAWKINS
Indianapolis, Indiana

G.R. PARISH, JR.
Zionsville, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM K. HENSON a/k/a)
WILLIAM J.K. HENSON, SR.,)

Appellant-Defendant,)

vs.)

No. 49A02-0903-CV-256

ABS AUTO SALES, INC.,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable S.K. Reid, Judge
Cause No. 49D14-0809-PL-40813

September 23, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

William J.K. Henson, Sr. appeals the trial court's order granting summary judgment in favor of ABS Auto Sales, Inc. ("ABS"). Henson raises three issues, which we consolidate and restate as whether the trial court properly granted ABS's motion for summary judgment.

We affirm.

FACTS AND PROCEDURAL HISTORY

Henson is the owner of two parcels of real estate located in Marion County that are commonly known as 204 Corrill Street ("Parcel 1") and 227 Corrill Street ("Parcel 2"). On August 11, 2008, Henson entered into a Purchase Agreement with ABS under which he agreed to sell to ABS Parcels 1 and 2 for \$20,000. That same day, Henson and ABS also entered into an Escrow Agreement with Lawyers Title Insurance Corporation ("Lawyers"), wherein Lawyers agreed to act as the parties' escrow agent in connection with the sale of the parcels. Pursuant to the Escrow Agreement, ABS delivered to Lawyers an earnest money deposit of \$1,000.

On August 29, 2008, the scheduled closing date, ABS tendered to Lawyers a cashier's check for \$17,414.47, which represented the remaining balance owed by ABS to purchase the parcels. Henson did not attend the closing and did not execute the necessary warranty deeds to transfer title of the parcels to ABS.

ABS filed a complaint against Henson on September 8, 2008 seeking specific performance of the Purchase Agreement. Henson filed an answer on October 6, 2008 in which he denied entering into the Purchase Agreement with ABS. On December 3, 2008, ABS filed a motion for summary judgment and designation of evidence. The certificate

of service for both of these documents indicates that each document was sent via first class mail to Henson's counsel. Henson did not file a response or designate any affidavits or other evidence in opposition to ABS's motion for summary judgment. Without holding a hearing, the trial court granted ABS's motion for summary judgment on January 15, 2009. The trial court specifically ordered Henson to prepare and tender to Lawyers the warranty deeds needed to transfer title of Parcels 1 and 2 to ABS.

Henson filed a motion for reconsideration/motion to correct error on February 13, 2009 in which he made the following arguments: (1) summary judgment was improper because unspecified genuine issues of material fact exist; (2) Henson did not file a response to ABS's motion for summary judgment because he did not receive the motion; and (3) summary judgment was improper because Henson had given power of attorney to his son, William J.K. Henson, Jr., on or about December 15, 2007. The trial court denied Henson's motion for reconsideration/motion to correct error on February 23, 2009. Henson now appeals.

DISCUSSION AND DECISION

Initially, we note, "It is well settled that the duty of presenting a record adequate for intelligent appellate review on points assigned as error falls upon the appellant, as does the obligation to support the argument presented with authority and references to the record pursuant to App. R. 46(A)(8)." *AutoXchange.com, Inc. v. Dreyer & Reinbold, Inc.*, 816 N.E.2d 40, 44 (Ind. Ct. App. 2004). Henson's appellant's brief, in large part, does not comply with the requirements of Indiana Appellate Rule 46(A)(8)(a), in that a majority of his contentions are not supported by cogent reasoning, or citations to

authorities and relevant parts of the record. Accordingly, as will be discussed further below, many of Henson's arguments are waived. *See Doughty v. Review Bd. of Dep't of Workforce Dev.*, 784 N.E.2d 524, 527 (Ind. Ct. App. 2003) (noting that failure to present cogent argument or citation to authority constitutes waiver of issue for appellate review). Waiver notwithstanding, when possible, we will attempt to address the merits of Henson's claims. *See AutoXchange.com*, 816 N.E.2d at 45 (noting that although court had authority to waive appellants' entire argument because appellants' brief did not comply with Ind. App. R. 46(A)(8), court would attempt to address merits of appellants' claims).¹

Henson appeals the trial court's order granting ABS's motion for summary judgment. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Cortez v. Jo-Ann Stores, Inc.*, 827 N.E.2d 1223, 1229 (Ind. Ct. App. 2005). We construe all facts and reasonable inferences from those facts in favor of the nonmovant. *Cortez*, 827 N.E.2d at 1230. Our review is limited to the evidence and materials designated to the trial court. *Id.*

The moving party bears the burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Once this burden has been met, the non-moving party must respond by setting forth specific facts demonstrating a genuine need for trial, and cannot rest upon the allegations or denials in the pleadings.

Myers v. Irving Materials, Inc., 780 N.E.2d 1226, 1228 (Ind. Ct. App. 2003).

¹ We also note that Henson's appendix does not comply with Indiana Appellate Rule 50(A)(2)(a) in that it does not include the chronological case summary.

Henson first argues that the trial court erred in granting ABS's motion for summary judgment because ABS failed to establish that there were no genuine issues of material fact. Henson does not specify what genuine issues of material fact remain for trial, nor does he support his argument with citation to authorities or parts of the record. Therefore, this argument is waived. *See* Ind. App. R. 46(A)(8)(a); *Doughty*, 784 N.E.2d at 527 (lack of cogent argument and citation to authority results in waiver of issue).

Waiver notwithstanding, ABS filed its motion for summary judgment and designation of evidence on December 3, 2008. Henson did not file a response or designate any affidavits or other evidence in opposition to ABS's motion for summary judgment, nor did he seek an extension from the trial court to file a response. Because Henson did not come forward with specific evidence in opposition to ABS's motion for summary judgment, we accept ABS's designated evidence as true. *Myers*, 780 N.E.2d at 1228.

The evidence designated by ABS indicates that Henson and ABS entered into the Purchase Agreement on August 11, 2008. Under the Purchase Agreement, Henson agreed to sell to ABS Parcels 1 and 2 for \$20,000. On the scheduled closing date, ABS tendered to Lawyers the remaining balance owed to purchase the parcels. Henson breached the Purchase Agreement by not executing the warranty deeds needed to transfer title of the parcels to ABS. The evidence designated by ABS indicated that there were no genuine issues of material fact and supported the entry of summary judgment in ABS's favor.

Because ABS carried its burden of showing that there were no genuine issues of material fact, Henson could no longer rest upon the allegations or denials in the pleadings and was obligated to respond “by setting forth specific facts demonstrating a genuine need for trial” *Id.* Trial Rule 56(E) specifically notes:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Accordingly, because Henson did not specifically designate evidence creating a genuine issue of material fact, the trial court properly granted ABS’s motion for summary judgment. *See Myers*, 780 N.E.2d at 1229 (holding that trial court properly granted motion for summary judgment because non-moving party failed to specifically designate evidence creating genuine issue of material fact).

Next, Henson argues that “[t]he trial court erred in granting Summary Judgment in favor of [ABS] when [Henson] had given Power of Attorney to his son; [sic] prior to entering into any contract between the parties ([Henson] was both mentally and physically incapable in [sic] contracting with any party).” *Appellant’s Br.* at 9. Henson has waived this argument by failing to support it with citation to authority. *See Ind. App. R. 46(A)(8)(a); Davis v. State*, 835 N.E.2d 1102, 1113 (Ind. Ct. App. 2005) (observing that failure to present cogent argument or citation to authority constitutes waiver of issue for appellate review), *trans. denied*.

Waiver notwithstanding, as we have already noted, Henson did not designate any evidence in opposition to ABS's motion for summary judgment. Henson, though, has included in his appendix a copy of the document that he alleges gave his son power of attorney over his affairs. As previously noted, our review of a summary judgment motion is limited to those materials designated to the trial court. *Cortez*, 827 N.E.2d at 1230. Because Henson's document purporting to give power of attorney to his son was not designated to the trial court, it is not properly before us for review.

Furthermore, Trial Rule 56(H) provides that no judgment rendered on a motion for summary judgment "shall be reversed on the ground that there is a genuine issue of material fact unless the material fact and the evidence relevant thereto shall have been specifically designated to the trial court." Because Henson did not designate to the trial court the evidence that indicates he gave power of attorney to his son, we cannot reverse the trial court's order granting ABS's motion for summary judgment on this ground.

Additionally, we note that in order for a power of attorney to be valid it must "[b]e signed by the principal or at the principal's direction in the presence of a notary public." Ind. Code § 30-5-4-1(4). The power of attorney document included in Henson's appendix is invalid because there is no indication that Henson signed it in the presence of a notary public. Because Henson's power of attorney document is invalid, his assertion that the trial court's order granting ABS's motion for summary judgment should be reversed because he gave power of attorney to his son is without merit.

Henson also contends that the trial court erred "by not allowing [Henson] the right to respond to [ABS's] Motion for Summary Judgment after becoming aware that

[Henson] did not receive any notice of [the] Motion for Summary Judgment.” *Appellant’s Br.* at 9. Henson has waived this argument by failing to support it with citations to authority or the record. *See* Ind. App. R. 46(A)(8)(a); *Davis*, 835 N.E.2d at 1113 (observing that failure to present cogent argument or citation to authority constitutes waiver of issue for appellate review).

Waiver notwithstanding, ABS filed its motion for summary judgment and designation of evidence on December 3, 2008. Pursuant to Trial Rule 5, both of these documents have a certificate of service that indicates that each document was sent via first class mail to Henson’s counsel. Henson never filed a response to ABS’s motion for summary judgment, did not seek an extension to file a response, and did not request permission to file a belated response. Thus, because Henson never asked the trial court for permission to file a response to ABS’s motion for summary judgment, it cannot be said that the trial court refused to allow Henson to file a response. Therefore, we cannot say the trial court erred in this regard.

In sum, we conclude that the trial court properly granted ABS’s motion for summary judgment.

Affirmed.

NAJAM, J., and BARNES, J., concur.