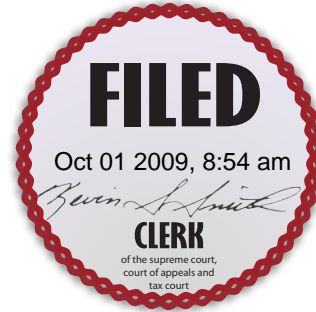


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE
COURT OF APPEALS OF INDIANA

XINGYA LIU and XIMING HUANG,)
)
Appellants-Defendants,)
)
vs.)
)
CITY OF WEST LAFAYETTE, INDIANA,)
)
Appellee-Plaintiff.)

No. 79A05-0803-CV-184

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0611-PL-00103

OCTOBER 1, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

Statement of the Case

Xingya Liu and Ximing Huang (collectively, the Landlords) appeal the trial court's grant of summary judgment and judgment in favor the City of West Lafayette (the City) in the City's action alleging that the Landlords' four-bedroom rental house in West Lafayette was over-occupied during the 2006-2007 Purdue University academic year in violation of a West Lafayette ordinance limiting occupancy of rental houses to three unrelated persons. We affirm in part and reverse in part.

Issues

The Landlords raise the following consolidated and restated issues for our review:

- I. Whether the trial court erred in granting summary judgment in favor of the City;
- II. Whether the trial court erred in granting judgment in favor of the City;
- III. Whether the trial court erred in admitting the tenants' testimony; and
- IV. Whether the trial court erred in awarding deposition transcription costs to the City.

Statement of the Facts

The facts reveal that the Landlords own a house at 702 N. Grant Street in West Lafayette, which they rent to Purdue University students. In December 2005, students LeighAnne Schwartz (Schwartz) and Amanda Kristy (Kristy), as well as sisters Anne (Anne) and Elizabeth (Elizabeth) Wirtz, signed a one-year lease for the house to begin in

August 2006. The lease cited the City's occupancy limitation ordinance and expressly incorporated the City's limitation of occupancy to three unrelated persons. In March 2006, Anne told the Landlords that she was moving to another state and would not be renting the house. Anne subleased her part of the lease to Stephanie Phillips (Phillips). Anne may have informed the Landlords that Phillips was her cousin; however, the Landlords never received any documentation that Anne and Phillips were related. The Landlords refunded Ann's deposit and accepted a deposit from Phillips. The Landlords accepted rent checks from Phillips beginning in August 2006. Schwartz, Kristy, Elizabeth, and Phillips each had her own room in the house.

In the late summer of 2006, Sarah Martin (Martin) moved into the basement of the house. Martin's basement bedroom contained a bed, a chair, a desk and a clothing rack. Huang spoke with Martin at the property the day she was moving in with her furniture. In September 2006, the Landlords asked the Tenants to complete a required written Occupancy Affidavit for the City. The Landlords told the tenants that only those tenants on the lease should sign the Affidavit. Elizabeth signed both her name and her sister Ann's name on the Affidavit, and Kristy and Schwartz also signed it. Phillips and Martin did not sign the affidavit.

In the fall of 2006, Huang entered Martin's basement bedroom in search of a raccoon that had entered the house. Martin told Huang she did not want the raccoon in the basement to ruin her clothes. Also that fall, the Landlords continued their annual

tradition of taking their tenants to dinner. In October 2006, the Landlords took Schwartz, Kristy, Elizabeth, Phillips, and Martin out to dinner.

In the fall of 2006, City Inspector Curtis Cunningham began noticing five vehicles parked at the Grant Street address on a daily basis. City Inspector Cunningham's subsequent investigation revealed that although there were five names on the mailbox – Schwartz, Kristy, Wirtz, Phillips, and Martin, only three of those names were on the Occupancy Affidavit. In addition, City Inspector Cunningham's review of a Purdue directory revealed that all five names on the mailbox were listed at the Grant Street address in the directory. Also, the vehicle registration information for the cars routinely parked at the address matched the names on the mailbox.

On November 1, 2006, the City filed a three-count complaint against the Landlords, Schwartz, Kristy, Elizabeth, Phillips, and Martin. In Count I, the City asked the trial court to permanently enjoin the Landlords and their tenants from permitting or allowing more than three unrelated persons to live at the Grant Street Address in violation of Section 117.08 of the City Ordinance. In Counts II and III, the City sought fines against the Landlords and the tenants pursuant to Section 117.20(e) of the Ordinance. Specifically, in Count II the City sought a \$200.00 per day fine for any period of overoccupancy from August 21, 2006, until the date on which overoccupancy ceased. In Count III, the City sought a \$1,000.00 fine against the Landlords and each of the tenants for submitting an incorrect Occupancy Affidavit in violation of the Ordinance.

Between February 2007 and August 2007, the City entered into settlement agreements with the tenants. The agreements significantly reduced the tenants' fines in exchange for the tenants' cooperation with the City, including attending and testifying truthfully at trial. In August 2007, the City filed a summary judgment motion, which the trial court granted in part and denied in part. Specifically, the trial court granted summary judgment in favor of the City on Counts I and III, finding that the undisputed facts revealed the Landlords permitted or allowed the property to be overoccupied from August 20, 2006 to November 10, 2006, and that the Landlords submitted an incorrect occupancy affidavit. The court, however, denied the City's summary judgment on Count II to permit the Landlords to present evidence on the Ordinance's affirmative defense.

In December 2007, following a bench trial, the trial court issued a twenty-six page order granting injunctive relief, imposing fines against the Landlords, and concluding in part as follows:

9. If an owner permits or allows the dwelling unit to be occupied by more persons than the maximum allowable occupancy, that is a violation of the ordinance. Under Section 117.20(e) such a violation subjects the landlord to a fine of \$200.00 (for a first offense) for each day that the property is over-occupied. That landlord can escape liability for a fine under these provisions of the ordinance – but not an injunction – if he can prove an affirmative defense. . . .

* * * * *

30. Section 117.20(e) creates an affirmative defense with the burden of proof on the accused owner:

[H]owever, it is a defense to a violation under this subsection if the owner or agent was diligent in monitoring the

occupancy or the over-occupancy occurred without the owner's or agent's knowledge and the rent was reasonable for the permitted legal occupancy and the burden of proof of such defense shall be on the owner and/or agent. . . .

31. The first requirement of the affirmative defense is proof that the owner was diligent in personally monitoring to ensure against over-occupancy. By the terms of the occupancy affidavit, it was the duty of Huang and Liu to make diligent inquiry to determine who was living in the Property and, if there were more than three occupants, to determine their relationships. Huang and Liu should have followed up on Anne Wirtz's notice she was leaving. They should have insisted on meeting Phillips in person. They should have insisted on obtaining proof of any alleged relationship between occupants and should have insisted on witnessing the signatures of occupants on an occupancy affidavit prepared during the lease term. Handing the Occupancy Affidavit to a tenant and collecting it later from the tenant was insufficient to constitute diligent inquiry. In summary, Liu, through her agent Huang, and Huang personally, were not diligent in monitoring the occupancy of the property from August 20, 2006, and thereafter, including during the entire period of over occupancy.

* * * *

34. Liu and Huang have not carried their burden on all elements of the affirmative defense found in § 117.20(e) of the West Lafayette City Code.

35. Liu, through her agent Huang, and Huang personally had actual knowledge of the over occupancy of the property from August 20, 2006, and thereafter, including during the entire period of occupancy.

36. Further, Liu, through her agent Huang, and Huang, had constructive knowledge that the property was over occupied from August 20, 2006, through November 10, 2006, because Huang had, during this period of over occupancy, knowledge of facts sufficient to awaken inquiry and could have found out about the over occupancy in the exercise of ordinary care.

37. Pursuant to § 117.20(e), the fine for permitting or allowing overoccupancy in violation of § 117.08(d) is \$200, with each day a violation occurs or continues being a separate and distinct violation.

38. Liu, through her agent Huang, and Huang personally, committed 83 violations of § 117.08(d) and § 117.20(e) of the West Lafayette City Code, by permitting or allowing the property to be occupied by more than the maximum allowable occupancy from August 20, 2006, to November 10, 2006. Therefore the City is entitled to fines as civil penalties in the sum of \$16,600, jointly and severally, against Liu and Huang for these violations.

* * * *

41. As the Court has already ordered, the City is entitled to injunctive relief mandatorily and permanently enjoining Liu and Huang from permitting or allowing more than one (1) or more persons related by blood, marriage or adoption and (2) unrelated persons to live as a single housekeeping unit at the real estate at 702 N. Grant Street, West Lafayette, Indiana.

42. Huang signed and submitted an incorrect occupancy affidavit for the property to the City, in violation of § 117.05 and § 117.20(a), and the Court has already ordered that the City is entitled to a fine of \$1,000 against Liu and Huang as a result of this violation.

43. The City is entitled to costs in this action pursuant to Trial Rule 54 and I.C. § 36-7-4-1014(f).

Trial Court's Order at 14, 22-24. The Landlords appeal.

Discussion and Decision

At the outset we note that although we prefer to decide cases on their merits, we will deem alleged errors waived where an appellant's noncompliance with the rules of appellate procedure is so substantial it impedes our appellate consideration of errors. *See Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004). The purpose of the appellate rules, especially Ind. Appellate Rule 46, is to aid and expedite review, as well as to relieve the appellate court of the burden of searching the record and briefing the case. *Id.* Indiana Appellate Rule 46(A)(8)(a) provides that the argument section of an

appellant's brief "must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on. . . ."

Id. It is well settled that we will not consider an appellant's arguments on appeal when the appellant has failed to present cogent argument supported by authority and references to the record as required by the rules. *Id.* If we were to address such arguments, we would be forced to abdicate our role as an impartial tribunal and would instead become an advocate for one of the parties. *Id.* This we cannot do. *Id.*

Here, the Landlords have filed a 34-page brief, which includes several issues that are utterly devoid of cogent argument. Put simply, the Landlords' arguments are too poorly developed and improperly expressed to be considered cogent argument as required by the rules of appellate procedure. As we have stated many times before, a litigant who chooses to proceed *pro se* will be held to the same rules of procedure as trained legal counsel and must be prepared to accept the consequences of his or her action. *Id.* The Appellants' issues that lack cogent argument are therefore waived. *See id.* We now turn to the merits of the appeal and those issues that the Landlords have preserved.

I. Permit or Allow the Overoccupancy

The City enacted Ordinance 117 because of widespread problems with overoccupancy of rental housing, especially the single-family homes converted to rental housing. *See City Ordinance Section 117.01.* This overoccupancy adversely impacted the City's residential neighborhoods through overcrowding, excessive traffic, demand for

too much parking and the diminution of the public welfare of the City's existing neighborhoods. *See id.* To combat these problems, the City instituted a maximum allowable occupancy of rental housing, particularly in single-family zoned neighborhoods. To that effect, the City adopted Section 117.08(d), which provides as follows:

It shall be the continuing duty of the owner and manager to personally monitor the occupancy of each dwelling unit and to ensure that it is not occupied by more persons than the maximum allowable occupancy. It shall be a violation of this chapter by the owner and/or occupants to exceed the maximum allowable occupancy or to hold the dwelling unit out for occupancy by more than the maximum allowable occupancy or permit or allow the dwelling unit to be occupied by more persons than the maximum allowable occupancy.

The Landlords first argue that the trial court erred in granting summary judgment in favor of the City on Count I, the overoccupancy count. Specifically, the Landlords contend that the trial court “disregarded the plain meaning of the Ordinance and improperly relieved the City from its burden of proving [the Landlords] had the *mens rea* for a ‘permit or allow’ violation.” Appellant’s Brief at 12.

The purpose of summary judgment is to terminate litigation about which there can be no material factual dispute and which can be resolved as a matter of law. *Cox v. Paul*, 805 N.E.2d 901, 903 (Ind. Ct. App. 2004). Summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

The gravamen of the Landlords' argument is that the City was required to prove that the Landlords intended to permit or allow the overoccupancy. However, this court has previously determined that the Ordinance does not include an intent element. *See Weida v. City of West Lafayette*, 896 N.E.2d 1218, 1224 (Ind. Ct. App. 2008). The Landlords' argument therefore fails.

The Landlords also argue that the City is not entitled to summary judgment as a matter of law because the designated evidence does not support the trial court's conclusion that the Landlords permitted or allowed the overoccupancy as a matter of law. Specifically, the Landlords argue that City failed to designate evidence that the Landlords "had a culpable state of mind." Appellant's Br. at 17. However because the Ordinance does not include an intent element, this argument fails as well.

We further note that the City has clearly demonstrated as a matter of law that the Landlords exceeded the maximum allowable occupancy at their rental property on Grant Street. In September 2006, City Inspector Cunningham observed five different names on the mailbox, whereas the occupancy allowance was limited to three unrelated individuals. When he returned to the office, City Inspector Cunningham confirmed that only three of these names were included in the occupancy affidavit the Landlords had submitted for the property. In addition, City Inspector Cunningham's review of a Purdue directory revealed that all five names on the mailbox were listed at the Grant Street address in the directory. Also, the vehicle registration information for the cars routinely parked at the address matched the names on the mailbox. Further, Huang spoke with Martin the day

she moved in with her furniture, and saw her bed, chair, desk, and clothing rack in the basement. Lastly, the Landlords took all five tenants to dinner when they had their annual tenant dinner. It is clear that, as a matter of law, the Landlords were on notice that a situation of overoccupancy existed on Grant Street. Nevertheless, instead of pursuing their monitoring duty to the fullest extent, the Landlords ignored the evidence that was in front of them. As such, they permitted the overoccupancy to occur and continue at the residence.¹ The trial court did not err in granting summary judgment in favor of the City.

II. Affirmative Defense

The Ordinance provides that the first requirement of the affirmative defense is diligent monitoring of the overoccupancy. The trial court found that the Landlords were not diligent in monitoring their property. Specifically, the court found that it was the Landlords' duty to determine who was living at the house, and if there were more than three occupants, to determine their relationships. According to the trial court, the Landlords' should have followed up on Anne Wirtz's notice she was leaving and insisted on obtaining proof of any alleged relationship between the tenants. The court found the Landlords should also have insisted on witnessing the signature of the tenants on the occupancy affidavit.

The Landlords first claim that that the court's list of inquiries and actions exposes them to constitutional and tort liabilities. Therefore, they claim that the trial court's mandate runs afoul of privacy rights and the Fourth Amendment. We addressed this

¹ We further note that the trial court's order is supported without the use of *res ipsa loquitur*.

argument in *Weida*, 896 N.E.2d at 1218. There, we pointed out that the trial court's suggested events all focused on the landlord, not the tenant. We also noted that under no circumstance was the trial court asking the landlord to enter the property. As such, we found the trial court's list did not amount to an interference with the tenant's possessory interest or an intrusion upon the tenant's physical solitude or seclusion. *Id.* at 1226. We reach that same result in this case and find no error.

The Landlords also argue that the trial court erred in concluding that they were not diligent in monitoring the property. Where, as here, the trial court has entered findings of fact and conclusions of law, we apply a two-tiered standard of review considering whether the evidence supports the findings, and whether the findings support the judgment. *Weida*, 896 N.E.2d at 1223. The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences that support them. *Id.* A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id.*

Our review of the evidence reveals that when Anne Wirtz subleased her lease to Phillips, Anne may have informed the Landlords that Phillips was her cousin; however the Landlords never received any documentation that Anne and Phillips were related. In addition, the Landlords accepted Phillips deposit and rent checks without verifying the relationship. In the late summer of 2006, the fifth tenant, Martin, moved into the basement of the house with a bed, dresser, desk, and clothes rack. She spoke with Huang at the house the day she was moving her furniture into the house. Although five young

women were living in the house, only three of the women signed the Occupancy Affidavit, and the Landlords never followed up with the girls about this discrepancy. In Oct. 2006, the Landlords took all five tenants out to dinner for the Landlords' annual dinner with their tenants. Five vehicles were parked at the house every day, and five names were on the mailbox at the front of the house. The Landlords never checked out these signs of overoccupancy. This evidence supports the trial court's conclusion that the Landlords were not diligent in monitoring their property, and the trial court did not err in entering judgment in favor of the City.

III. Tenants' Testimony

The Landlords further argue that the trial court erred in admitting the tenants' testimony at trial. Specifically, they complain that a settlement agreement offering a reduction of fines contingent upon truthful testimony essentially amounts to payment to tell the truth. The Landlords contend that such payment is improper under the Rules of Professional Conduct and current case law. However, as the City points out, the Landlords did not raise this argument at trial.

A party may not present an argument or issue to an appellate court unless the party has raised that issue to the trial court. *GKC Indiana Theatres, Inc. v. Elk Retail Investors, LLC*, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002). This rule exists in part to protect the integrity of the trial court because it cannot be found to have erred as to an issue that it never had the opportunity to consider. *Id.* Consequently, an argument or issue not

presented to the trial court is generally waived for appellate review. *Id.* Because the Landlords did not raise this issue at trial, it is waived. *See Weida*, 896 N.E.2d at 1227.

IV. Award of Costs

Lastly, the Landlords argue that the trial court erred in awarding deposition transcription costs to the City. They are correct. In *Van Winkle v. Nash*, 761 N.E.2d 856, 861 (Ind. Ct. App. 2002), we explained that litigation expenses such as those for deposition transcription, medical records acquisition, photograph and diagram exhibits, and photocopying are not recoverable as costs. The trial court therefore erred in awarding these costs to the City, and we reverse the trial court's decision on this issue.

Affirmed in part and reversed in part.

MAY, J., and VAIDIK, J., concur.