

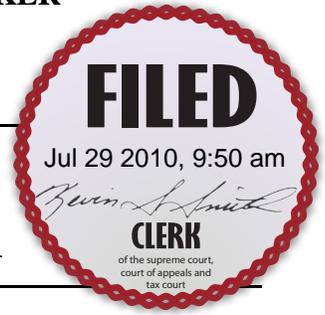
**Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**

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**IN THE  
COURT OF APPEALS OF INDIANA**

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SCOTT S. NOWATZKE,  
  
Appellant-Respondent,

vs.

LORINE L. NOWATZKE,  
  
Appellee-Petitioner.

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No. 46A05-0910-CV-611

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APPEAL FROM THE LAPORTE SUPERIOR COURT  
The Honorable Kathleen B. Lang, Special Judge  
Cause No. 46D02-0508-DR-190

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**July 29, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Scott Nowatzke appeals the division of property pursuant to the dissolution of his marriage to Lorine Nowatzke. He asserts the trial court should have continued the final hearing so he would have had time to obtain counsel, and should not have excluded certain evidence. We affirm.

### **FACTS AND PROCEDURAL HISTORY**

The parties' final dissolution hearing was first set for August 23, 2006, and was continued several times over a period of about three years. On May 12, 2009, Scott's counsel filed a motion to withdraw, and the trial court granted it. A final hearing was set for June 9, and Scott appeared at the hearing without counsel. He asked for a continuance and it was granted. The court set the final hearing for August 24, stated no further continuances would be granted, and directed the parties to submit a pre-trial statement of facts and issues with supporting documents attached two weeks before the hearing date. It ordered the parties to exchange all discovery by July 10 and stated any discovery not exchanged by that date would not be admitted. Lorine submitted a pre-trial statement of facts and issues with supporting documents attached, but Scott did not.

Scott appeared at the August 24 final hearing without counsel. The court reminded Scott that he "did not submit a Pretrial Statement of Issues and Facts which may limit what the court can consider [sic] the evidence that you might present," (August 24 Tr. at 5), told Scott he would be required to follow the rules of trial procedure and evidence even though he was *pro se*, and affirmed no documents Lorine or her counsel had not seen would be admitted

at trial because they had not been exchanged by the July 10 deadline. Scott replied “I understand that.” (*Id.*) Scott claimed he had talked to four attorneys and none would take his case because of the discovery deadlines the court had imposed and “[i]f there’s a ruling made today . . . then I’m going to appeal it.”<sup>1</sup> (*Id.* at 6.) That day, Lorine presented her case, then rested. Scott cross-examined her and interposed numerous objections during Lorine’s testimony.

On August 25, the second day of the hearing, Scott asked for a continuance. Scott said he had a police report from June 21 indicating his truck had been broken into and his briefcase containing appraisals and other information had been stolen. The trial court did not explicitly rule on Scott’s oral request for a continuance, but proceeded with the hearing after

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<sup>1</sup> Scott asserts that on the first day of the hearing he “indirectly” asked for a continuance and “indicated to the Court that he had spoken to four (4) attorneys, none of whom would take the case because of the deadline for the submission of discovery responses.” (Br. of Appellant at 15.) He directs us to “(Tr.p. 4).” The record includes separate transcripts of the August 24 and August 25 proceedings, and because the pages in the two transcripts are not numbered consecutively, each has a “page four.” We reviewed page 4 of both transcripts, and nothing on either of those pages reflects an “indirect” request for a continuance or otherwise supports Scott’s allegation he told the court he contacted four attorneys and none would take the case. (Lorine directed us to a page in the appendix where Scott’s allegation about his attempts to find counsel could be found.)

We recently addressed similar misstatements of the record, by the same attorney who represents Scott in this appeal, in *Vandenburgh v. Vandenburgh*, 916 N.E.2d 723, 730 (Ind. Ct. App. 2009):

Father asserts “[t]he evidence before the court was clear that Mark was starting college in the fall of 2008.” (Br. of Appellant at 13.) In support, he directs us to “(Tr.p.16).” *Id.* Later in his brief, Father offers a citation to the same page to support the statement “[w]hen the hearing was concluded on March 10, 2008, the parties knew that Mark would be attending Eastern Michigan on a full scholarship (Tr.p.16).” As explained above, the record includes transcripts of two different hearings and they are not sequentially numbered. Nothing on page sixteen of either transcript supports Father’s assertion, or even mentions Mark. As explained above, we are not obliged to undertake the burden of searching the record and stating Father’s case for him.

Similarly, in the case before us we decline to state Scott’s case for him and will not address Scott’s “indirect” request for a continuance.

noting there was a 20-day period between the date of the break-in and the discovery deadline: “So that would be more than enough time to get another copy from the appraiser after those things were stolen from your truck.” (August 25 Tr. at 6.) Scott replied, “Okay” (*id.*), then called his first witness.

Following the presentation of all evidence, the court received some additional documentation from the parties and then entered a dissolution decree.

### **DISCUSSION AND DECISION**

We note initially that Lorine’s brief does not comply with Indiana Appellate Rule 46. An argument must contain the contentions of the appellee on the issues presented, “supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on.” *See* App. R. 46(B) *with* 46(A)(8)(a). Compliance with that rule is crucial to this court’s ability to address an appeal. Lorine’s brief is devoid of legal authority, and in fact includes a page captioned “Table of Authorities,” *see* App. R. 46(A)(2), after which the only entry is “(NONE).” (Page attached to Appellee’s Br. at i.) Nor does she include a “concise statement of the applicable standard of review” for any of her issues as required by App. R. 46(A)(8)(b). A party generally waives any issue for which it fails to develop a cogent argument or support with adequate citation to authority and portions of the record, *Romine v. Gagle*, 782 N.E.2d 369, 386 (Ind. Ct. App. 2003), *reh’g denied, trans. denied*, and Lorine has accordingly waived every argument she attempted to assert.

As Lorine’s brief presents no argument that complies with our rules, we will treat this

appeal as one where no appellee’s brief was filed. In such cases, we need not develop an argument for her and we apply a less stringent standard of review. *Vandenburgh v. Vandenburgh*, 916 N.E.2d 723, 725 (Ind. Ct. App. 2009). We may reverse the trial court if the appellant is able to establish *prima facie* error, which is error at first sight, on first appearance, or on the face of it. *Id.* The appellee’s failure to submit a brief does not relieve us of our obligation to correctly apply the law to the facts in the record in order to determine whether reversal is required. *Id.*

Scott has not shown *prima facie* error. He notes nearly all the issues he raises on appeal stem from “the fact that Scott appeared *pro se* for a very complicated final hearing, and the court would not grant a further continuance,” (Br. of Appellant at 10), and he was “essentially prohibited from presenting a case because he was told upfront by the court that none of his exhibits would be admissible because he had not complied with the order to provide copies of everything to opposing counsel by July 10, 2009.” (*Id.*) Scott notes he “commented numerous times during the final hearing, in one form or another, that he did not know what he was doing . . . but the court still would not grant a continuance.” (*Id.*)

A litigant who proceeds *pro se* is held to the same established rules of procedure that trained counsel is bound to follow. *Smith v. Donahue*, 907 N.E.2d 553, 555 (Ind. Ct. App. 2009), *trans. denied, cert. dismissed*. One of the risks that a litigant takes when he decides to proceed *pro se* is that he will not know how to accomplish all of the things that an attorney would know how to accomplish. *Id.* When a party elects to represent himself, there is no

reason for us to indulge in any benevolent presumption on his behalf, or waive any rule for the orderly and proper conduct of his appeal. *Foley v. Mannor*, 844 N.E.2d 494, 502 (Ind. Ct. App. 2006).

A trial court shall grant a continuance upon motion and “a showing of good cause established by affidavit or other evidence.” Ind. Trial Rule 53.5. A 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. *Gunashekar v. Grose*, 915 N.E.2d 953, 955 (Ind. 2009). A denial of a continuance is abuse of discretion only if the movant demonstrated good cause for granting it. *Id.*

Scott did not establish “by affidavit or other evidence” good cause for a continuance. The unexpected and untimely withdrawal of counsel does not necessarily entitle a party to a continuance. *Hess v. Hess*, 679 N.E.2d 153, 154 (Ind. Ct. App. 1997). But the denial of a continuance based on the withdrawal of counsel may be error when the moving party is free from fault and his rights are likely to be prejudiced by the denial. *Id.* Among the things to be considered on appeal from the denial of a motion for continuance is whether the denial resulted in the deprivation of counsel at a crucial stage in the proceedings and whether a delay would have prejudiced the opposing party to an extent sufficient to justify denial of the continuance. *Id.*

In *Hess* we concluded Husband demonstrated good cause for a continuance of his trial date. Because of statements Husband made five days before trial during settlement

negotiations between the parties, Husband's attorney determined he could not continue representing Husband. Husband's attorney walked out of the settlement negotiations and filed a motion to withdraw his appearance, which was granted that day. That left Husband without counsel four days before trial. In his *pro se* motion for a continuance filed two days before trial, Husband asserted he asked counsel to file for a continuance on his behalf, but counsel's office staff told him counsel would not do so. Husband asked the court to consider the difficulty of finding proper representation on such short notice. Husband's request for a continuance was not denied by the trial court until March 13, the day of trial. Husband appeared without counsel and argued he had tried to procure counsel both over the weekend and just prior to filing his motion for continuance but was unable to obtain representation.

We found "nothing in the record to show that Husband intended or could foresee that counsel would withdraw at such a late hour. We also find it significant that the record does not demonstrate dilatory tactics on the part of Husband designed to delay coming to trial." *Id.* at 155. There, the trial court denied Husband's motion for a continuance on the ground it had not been furnished to Wife. We noted Husband was unexpectedly without representation four days before trial and his former counsel would not file a continuance on his behalf. Husband was left to file a *pro se* continuance but, in doing so, failed to serve Wife's counsel with a copy of his motion.

We recognized that *pro se* litigants are generally held to the same rules of procedure as licensed attorneys, but noted Wife's counsel was aware of counsel's untimely withdrawal

and “a motion for continuance could not have been unexpected. Accordingly, Husband’s mere failure to serve Wife’s counsel with a copy of his motion was insufficient to overcome the evidence of good cause and to justify the trial court’s denial of a continuance.” *Id.*

We also determined the denial of a continuance deprived Husband of counsel at the most crucial stage in the proceedings, the dissolution hearing itself. Aside from a brief and unsuccessful attempt at cross-examination, Husband presented no case-in-chief. “We cannot conclude that a brief continuance of the dissolution hearing in order for Husband to obtain representation would have been so prejudicial to Wife to justify deprivation of counsel to Husband during such a crucial stage of the proceedings.” *Id.* The trial court therefore abused its discretion when it denied Husband’s motion for a continuance. *Id.*

In the case before us we can find no such abuse of discretion. Scott’s counsel withdrew May 12. Scott asked for a continuance of the June 9 hearing date, and one was granted. The court informed the parties on June 9 that all discovery had to be exchanged by July 10, and it stated on June 15 that no further continuances would be granted in this dissolution proceeding that had been commenced almost four years earlier. Scott did not ask for a continuance until after Lorine had presented her case and rested at the final hearing, and he did not tell the court until the second day of the hearing that documents had been stolen from his truck over two months before.<sup>2</sup> The trial court noted Scott had twenty days between

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<sup>2</sup> Scott characterizes the materials he reported stolen from his truck as “all of his papers and documents related to this cause of action.” (Br. of Appellant at 16.) Apparently this information, related to a dissolution action

the theft and discovery deadline to obtain copies of the documents, “more than enough time to get another copy from the appraiser,” (August 25 Tr. at 6), and Scott did not argue otherwise or offer any response other than “Okay.” (*Id.*)

Nor can we find an abuse of discretion in the court’s exclusion of the evidence Scott offered at the final hearing<sup>3</sup> or in the court’s division of the marital estate. Division of the assets between divorcing parties is left to the trial court’s discretion. *Perkins v. Harding*, 836 N.E.2d 295, 299 (Ind. Ct. App. 2005). Even if the facts and reasonable inferences might allow us to reach a conclusion different than did the trial court, we will not substitute our judgment for that of the trial court unless its decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* We consider only the evidence favorable to the judgment. *Id.* We may not reweigh the evidence or reassess the credibility of the witnesses. *Id.* A party challenging a property division must overcome a strong presumption that the court considered and complied with the applicable statute. *Id.* We consider the court’s disposition of marital property as a whole, not item by item, and when we review the division, our focus is on what the court did, not what it could have done. *Id.*

Scott offers several arguments we are unable to address because of his non-

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that had been pending for some three years, was not provided to Lorine between the court’s June 9 order and June 21, the day the documents were reportedly stolen.

<sup>3</sup> Scott presents as an independent allegation of error the exclusion of testimony by an appraiser he called to challenge Lorine’s evidence of the value of the marital residence. Scott offers various citations to pages in the transcript where he says this testimony was offered and excluded, but there is nothing on any of those pages in either transcript related to that testimony. As we explain at some length below, we will not search the record in order to build a case for Scott’s counsel.

compliance with our appellate rules. Scott first appears to argue the trial court erred in dividing the assets because the court improperly counted the value of some items twice. The pages of the record to which Scott directs us include no testimony or other evidence to that effect. Scott's counsel cites "Tr.p. 33" and "Tr.p. 35." (Br. of Appellant at 21.) As noted above, there are two transcripts, each with a page 33 and a page 35. Neither page in either transcript includes anything to support this allegation of error. Scott does provide accurate citations to an asset list Lorine offered as an exhibit at the final hearing and to an auctioneer's appraisal of certain items, but nothing on those pages supports an allegation the trial court counted the value of any items twice or otherwise improperly valued any items.

Scott also asserts the trial court erred when it "refused to allocate the parties [sic] interest in a food wagon because they had failed to place a value on that item (Tr.p. 44)." (*Id.* at 21.) Nothing on page 44 of either transcript supports that allegation of error, or even mentions that asset.

Next, Scott asserts he "raised the issue of Lorine's contempt of court [in the form of allegedly selling property in violation of a restraining order] and was prohibited from pursuing that (Tr.p. 32)." (*Id.* at 22.) Nothing on page 32 of either transcript addresses or even mentions that order or any assets that might have been sold in violation of the order, nor does it indicate Scott was "prohibited from pursuing" that question. Scott asserts the trial court "issued a provisional order which in part included a restraining order prohibiting the parties from transferring or disposing of any marital property or assets (Appellant's App. p.

71-72).” (*Id.*) Those pages of the appendix do contain a provisional order, but nothing in that order addresses whether the parties could transfer or dispose of any property.<sup>4</sup>

We remind Scott’s counsel that on review, we will not search the record to find a basis for a party’s argument.<sup>5</sup> *See Nealy v. American Family Mut. Ins. Co.*, 910 N.E.2d 842, 850 (Ind. Ct. App. 2009), *trans. denied*. As none of these arguments are supported by citations to the parts of the record relied on as required by App. R. 46(A)(8)(a), we decline to address them.

More importantly, we find some of these allegations by Scott’s counsel amount to “remarkable mischaracterizations and blatant misstatements of the evidence in the record” like those we addressed in *Young v. Butts*, 685 N.E.2d 147, 150 (Ind. Ct. App. 1997). There, based on Young’s misrepresentations of the record, we found Young’s appeal frivolous and in bad faith and, accordingly, directed the trial court to impose sanctions in the form of an award of damages to Young’s opponent.

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<sup>4</sup> In his reply brief Scott acknowledges for the first time that the provisional order to which he directed us, dated May 11, 2007, in fact included no restraining order. But he then urges us to find error based on a different provisional order the parties entered into almost two years earlier on September 29, 2005. We decline to do so. Both orders were stipulated by the parties. The 2005 order does include a restraining order, but otherwise it addresses exactly the same matters addressed in the 2007 order, which did not include a restraining order.

Scott’s allegation the trial court erred in declining to hear evidence about Lorine’s sale of the assets is premised on a Petition for Rule to Show Cause he filed January 23, 2008: “The court indicated that the issue was not before the court and that Scott should have filed a Rule to Show Cause. Scott had in fact filed a Rule to Show Cause, and the court CCS contains no disposition of that petition.” (Br. of Appellant at 22 (citations omitted).) Scott did file a Petition for Rule to Show Cause. But that Petition was explicitly premised on Lorine’s alleged violation of the 2007 provisional order, which did not include the restraining order provision.

<sup>5</sup> This is not the first time we have reminded Scott’s counsel of this standard and noted his misrepresentations of the record. *See Vandenburg*, 916 N.E.2d at 726 n.2.

Young and Butts were involved in an automobile collision. Young's counsel asserted on appeal that Butts was speeding at the time of the accident:

We address Young's argument only because it is based on remarkable mischaracterizations and blatant misstatements of the evidence in the record.

After noting that Butts testified she was driving 60 miles per hour, Young's counsel flatly asserts that the "speed limit in this area was posted at fifty-five (55) miles per hour." Brief of Appellant at 9. Young's counsel does not direct us to any evidence in the record in support of that assertion, and our independent search of the record does not reveal any. Rather, the testimony in the record, including that of the police officer who investigated the accident, was that the speed limit was 65 miles per hour.

Young's counsel compounds the effect of his misrepresentation of the evidence of the speed limit when he states that Butts "admitted in her testimony that she had been traveling at a rate of speed in excess of the limit for that particular area. (R. at 474). This admission, made under oath, is evidence that Defendant-Appellee, Beth Butts, was speeding." Brief of Appellant at 10. The page of the record to which Young's counsel directs us simply contains no such admission nor any statement which could be interpreted as such an admission.

*Id.* at 150-51.

We found the appeal frivolous and in bad faith because Young's counsel made a number of affirmative misrepresentations of the evidence in the record, which misrepresentations are particularly offensive because they would, if true, directly affect the propriety of the trial court grant of judgment on the evidence. Most notably, counsel's mischaracterization of the evidence as suggesting Butts was speeding might, by itself, provide a sufficient basis for reversal of the trial court's judgment on the evidence.

*Id.* at 151. Scott's misrepresentation of the provisional order as including "a restraining order prohibiting the parties from transferring or disposing of any marital property or assets," (Br. of Appellant at 22), is particularly offensive for the same reason.

Finally, Scott argues the court erred in awarding the marital residence to Scott but

providing he is “given ninety (90) days to refinance and put mortgage in his own name. If he is unable to do so, the property will be sold and the equity divided.” (App. at 188.) Scott asserts this order would “result in a very unequal division of assets because the decree contains no provision for modifying the cash payment amount from Scott to Lorine in the event that the marital residence has to be sold.” (Br. of Appellant at 24.)

We note initially that Scott’s brief was served on Lorine’s counsel February 26, 2010, well over ninety days after the dissolution decree dated October 2, 2009. His reply brief was served May 7, 2010. But Scott does not indicate in either his brief or reply brief whether he was able to refinance within the ninety days or whether it became necessary to sell the property. Courts on review do not engage in speculation, *Graycor Industrial v. Metz*, 806 N.E.2d 791, 800 (Ind. Ct. App. 2004), *trans. denied*, and we decline Scott’s invitation to speculate as to whether that contingency ever arose and if it did, whether the disposition of the marital property might have resulted in an unequal division.

At any rate, the order does not require the unequal division Scott asserts would necessarily occur should he be required to sell the property. Scott mischaracterizes the order as requiring him to “sell the marital residence and *give Lorine one-half (1/2) of the proceeds.*” (Br. of Appellant at 25) (emphasis supplied). But the order does not say that. It says “the property will be sold *and the equity divided.*” The court apparently intended an equal division, as its order provided for Scott to make a cash payment to Lorine “by way of property equalization between the parties.” (App. at 188.) In light of the court’s language

that the equity be “divided” without specifying the percentage Lorine would receive, we cannot say the provision was error. *See O’Connell v. O’Connell*, 889 N.E.2d 1, 14 (Ind. Ct. App. 2008) (addressing an order that the marital residence be sold and the proceeds divided between Husband and Wife “in such amounts necessary to achieve an equal division of the marital estate between the parties”).

We affirm the trial court.

Affirmed.

BAILEY, J., and BARNES, J., concur.