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IN THE
COURT OF APPEALS OF INDIANA

Jordan Brewer, Mark Timmons,
and Josh Uitts, in Their Official
Capacities as Commissioners of
Clinton County,

Appellants-Defendants,

v.

Clinton County Sheriff's Office
and Richard Kelly, in his Official
Capacity as Sheriff of Clinton
County,

Appellees-Plaintiffs

March 9, 2023

Court of Appeals Case No.
22A-CP-117

Appeal from the Montgomery
Superior Court

The Honorable Samuel Swaim,
Special Judge

Trial Court Cause No.
54D01-2103-PL-257

Opinion by Judge May
Judges Crone and Tavitas concur.

May, Judge.

[1] Jordan Brewer, Mark Timmons, and Josh Uitts, in their official capacities as Commissioners of Clinton County (collectively, “the Commissioners”) appeal the denial of their motion to correct error filed following the trial court’s grant of summary judgment in favor of the Clinton County Sheriff’s Office and Richard Kelly, in his official capacity as Sheriff of Clinton County (collectively, “the Sheriff’s Office”). The parties present multiple issues for our consideration, and we find one dispositive: whether the Commissioners’ authority to enact an ordinance generally applicable to all county buildings is limited by the Sheriff’s duty to use reasonable precautions to take care of inmates housed in the jail. We affirm.¹

Facts and Procedural History

[2] In 2012, the Indiana Legislature sought to regulate smoking in some locations in Indiana. To that end, it enacted Indiana Code section 7.1-5-12-4, which states, in relevant part:

(a) Except as provided in section 5^[2] of this chapter, smoking is prohibited in the following:

(1) A public place.

¹ We held oral argument in this case on January 10, 2023, in the Court of Appeals Courtroom at the Indiana Statehouse. We thank counsel for their able advocacy.

² Indiana Code section 7.1-5-12-5 carves out exemptions for locations such as horse racing facilities, riverboats, and cigar bars.

(2) A place of employment.

(3) A vehicle owned, leased, or operated by the state if the vehicle is being used for a governmental function.

(4) The area within eight (8) feet of a public entrance to:

(A) a public place; or

(B) a place of employment.

As part of that chapter, “smoking” is defined as “(1) carrying or holding a lighted cigarette, cigar, or pipe or any other lighted tobacco smoking equipment; or (2) inhalation or exhalation of smoke from lighted tobacco smoking equipment.” Ind. Code § 7.1-5-12-3.

[3] On July 31, 2012, the then-empowered³ Commissioners of Clinton County enacted Order No. 2012-04 which stated, in relevant part:

**NOW, THEREFORE, IT IS ORDERED BY THE BOARD
OF COMMISSIONERS OF CLINTON COUNTY,
INDIANA, AS FOLLOWS:**

1. Smoking is prohibited in all county offices and places of employment.

³ The Commissioners named in the appeal before us are not the same Commissioners who were serving in 2012.

2. Smoking is prohibited within eight (8) feet of a public entrance to all county offices and places of employment.

* * * * *

6. This Order shall be in full force and effect for elected officers, department heads and employees of Clinton County immediately and shall be in full force and effect July 1, 2012, for all other persons upon placement of appropriate signs in accordance with the Act.

(App. Vol. II at 13-4) (emphasis and formatting in original). After Order 2012-04, the Clinton County Sheriff⁴ prohibited smoking in the County Jail.

[4] On January 29, 2019, the Sheriff’s Office received a certificate from the Indiana Alcohol and Tobacco Commission authorizing the Sheriff’s Office to sell e-cigarettes at the Clinton County Jail Commissary, and it began doing so shortly thereafter. After the Jail Commissary began selling e-cigarettes and nicotine pouches to inmates and the inmates began using the products while housed in the County Jail, the Sheriff’s Office reported “disciplinary incidents and property damages have significantly decreased.” (*Id.* at 9.) The Sheriff’s Office indicated the sales “also generated substantial income” for the Sheriff’s Office and, pursuant to Indiana Code section 36-8-10-21,⁵ the funds “have been used,

⁴ Sheriff Kelly was not the Clinton County Sheriff in 2012. Sheriff Kelly took office in 2019.

⁵ This statute indicates profit from commissary sales is separate from the county’s general fund and cannot revert to the general fund. Additionally, the statute sets forth the items for which commissary funds may be disbursed.

among other things, to purchase instructional materials for use in inmate educational programs, religious literature requested by inmates, and to provide additional training opportunities.” (*Id.*)

[5] On March 16, 2021, the Commissioners passed Order 2021-05, which sought to further clarify Order 2012-04. Order 2021-05 stated, in relevant part:

“Smoking, and the use of any tobacco product, including, but not limited to cigarettes, cigars, e-cigarettes, any type of smokeless tobacco or its synthetic equivalent and the like are prohibited in all county offices, places of employment, buildings and vehicles.” (*Id.* at 18.) In response, the Sheriff’s Office immediately ceased selling e-cigarettes and nicotine pouches.

[6] On March 19, 2021, the Sheriff’s Office filed a complaint for declaratory judgment in Montgomery County Superior Court. The Sheriff’s Office asked the trial court to determine whether the Commissioners had the requisite authority to enact Order 2021-05. The Sheriff’s Office argued the

“Commissioners’ attempt to regulate the conduct of inmates in the Clinton County Jail . . . exceeds the authority granted to the [C]ommissioners by Indiana law and unlawfully interferes with [the Sheriff’s Office’s] authority to administer the jail and regulate inmates’ conduct.” (*Id.* at 10.)

[7] The Commissioners filed their response to the complaint, which included legal argument in response to the Sheriff’s Office’s complaint on April 6, 2021. On April 7, 2021, the Commissioners filed their answer to the complaint, in which they admitted or denied specific allegations in the Sheriff’s Office’s complaint.

[8] On May 3, 2021, the Sheriff’s Office filed a motion for summary judgment. The Sheriff’s Office argued the “issue of who controls the commissary is a pure question of law that turns upon the commissary statute,⁶ the regulations charging the Sheriff with the obligation to establish policies and rules governing the Clinton County Jail, and the case law interpreting these provisions.” (*Id.* at 38.) On May 26, 2021, the Commissioners filed their response to the motion for summary judgment filed by the Sheriff’s Office. On the same day, the Commissioners filed a cross-motion for summary judgment. Therein, they argued the Commissioners had authority to enact Order 2021-05 pursuant to Indiana’s Home Rule Law.⁷ On June 25, 2021, the Sheriff’s Office filed a consolidated response in support of its own motion for summary judgment and in opposition to the Commissioners’ motion for summary judgment.

[9] On July 13, 2021, and September 7, 2021, the trial court held hearings regarding the competing motions for summary judgment. After the September hearing, the trial court asked the parties to submit proposed orders on summary judgment within ten days. On October 8, 2021, the trial court issued its order granting summary judgment in favor of the Sheriff’s Office. The trial court concluded:

1. The Clinton County Board of Commissioners serves as the County executive. Ind. Code § 36-2-2-2. Unlike the Office of

⁶ Ind. Code § 36-8-10-21.

⁷ The Home Rule Law is found in Indiana Code chapter 36-1-3.

Commissioner, the Office of Sheriff is established by the Indiana Constitution in Article 6, Section 2.

2. The powers and duties of both the Sheriff and the Board are established by statute.

3. Pursuant to Ind. Code § 36-2-2-27(a), the Board has the duty to “establish and maintain a county courthouse, county jail, and public offices for the county clerk, the county auditor, the county recorder, the county treasurer, the county sheriff, and the county surveyor.” This duty to “establish and maintain” the Jail extends only to building the Jail and keeping it open and in good repair. *Weatherholt v. Spencer County*, 639 N.E.2d 354, 356 (Ind. Ct. App. 1994). *Weatherholt* instructs that this duty to build and maintain the Jail does not establish a duty to administer the Jail. Once the county establishes and then reasonably maintains the jail, it is not responsible for administering the manner of an inmate’s incarceration. *Donahue v. St. Joseph Cty. ex rel. Bd. Of Comm’rs of St. Joseph Cty.*, 720 N.E.2d 1236, 1240 (Ind. Ct. App. 1999)[,] citing *Weatherholt* at 356.

4. Not only does the Board have no duty to administer the Jail, it has no control over the actions of the Sheriff or his officers at all. *See Carver v. Crawford*, 564 N.E.2d 330 (Ind. Ct. App. 1990); *Waldrip v. Waldrip*, 976 N.E.2d 102, 119 (Ind. Ct. App. 2012) (“The law is well-settled that county commissioners do not have control over the acts of a sheriff.”)

5. Instead, the power to supervise a sheriff’s staff, administer jail programs and provide for the safety and security of a jail’s inmates, by statute, fall exclusively to the Sheriff. Like the Board’s duties, the Indiana General Assembly established the duties for Indiana sheriffs by statute and by regulations. Most applicable to this case is Ind. Code § 36-2-13-5(A) which states in part:

Sec. 5. (a) The sheriff shall:

(3) pursue and jail felons;

...

(7) take care of the county jail and the prisoners there[.]

6. In this case, the Sheriff has provided uncontested evidence supporting the decision to allow nicotine products to be sold [in the] commissary. The Sheriff's Jail Commander, Natasha Douglass, testified that allowing inmates to have access to nicotine products has reduced violence in the Jail. This evidence shows that the decision to allow nicotine products furthers the Sheriff's responsibility to "take care" of the Clinton County Jail's prisoners.

7. Indiana's jail standards further instruct that "[e]ach jail shall be managed by a jail administrator, supervised by the sheriff" and that "[e]ach sheriff shall develop and maintain a manual of policies and procedures that shall guide the operation of the jail." 210 IAC 3-1-2(a). These statutes and regulations simply provide no role for the Board in how the jail is operated and how inmates are to be provided for.

8. The Board's attempt to stretch the definition of "establish and maintain" in 36-2-2-27(a) so that it gives them the ability to tell the Sheriff what he can and cannot sell in commissary simply goes too far. Under the Board's logic, because the Board built and continues to maintain the courtroom and officers where the Clinton County Courts preside, they could direct how the Clinton County courts must perform their judicial duties. They could do the same for the Clinton County Auditor and Treasurer.

That is, the Board could direct the operations of *all* County officials, including court staff. That is simply not the law in Indiana where each elected county official is charged with his or her own duties by the Indiana General Assembly.

9. The Board claims that it has the power to pass ordinances under Indiana’s Home Rule statute, and that this home rule power lets them apply it to the Sheriff’s commissary operation. But under the Home Rule Act, the Board may exercise a power *only if* that power is “not expressly granted to another entity.” Ind. Code § 36-1-3-5(a)(2). Here, the authority to make decisions about what to sell [in the] commissary is vested with another entity – the Sheriff’s Office.

10. The Commissary statute, Ind. Code § 36-8-10-21, makes it clear that the Board has no role over commissary operations. That statute gives all Indiana sheriffs the authority to establish a commissary fund and sell items to inmates in order to generate operational revenue. Unlike most revenue sources, this money can be used for many purposes by an Indiana sheriff without the need for seeking appropriation by a county council, *i.e.*, a county’s fiscal body. In fact, the commissary statute gives the Board no role at all when it comes to the Commissary Fund. Only the council has a role, but that role is extremely limited and does not allow the council to tell the Sheriff what he can and cannot sell. Instead, all the Council can do is review the propriety of [the] Fund’s expenditures and disbursements.

11. The Board’s attempt to regulate the conduct of inmates in the Clinton County Jail through this ordinance, therefore, exceeds the authority granted to it by Indiana law and unlawfully interferes with Sheriff’s authority to administer the jail and regulate inmates’ conduct.

12. The Indiana Uniform Declaratory Judgment Act authorizes this Court “to declare rights, status, and other legal relations.” Ind. Code § 34-14-1-1.

13. This Court hereby declares that the Board cannot regulate by ordinance the conduct of inmates housed in the Clinton County Jail and cannot restrict the right of the Sheriff to sell or of inmates in the Clinton County Jail to purchase and to use e-cigarettes and nicotine pouches that do not contain tobacco products within the confines of the Clinton County Jail.

(*Id.* at 162-5) (emphasis in original) (footnotes and citation to the record omitted).

[10] On November 5, 2021, the Commissioners filed a motion to correct errors and for relief from judgment based on newly discovered material evidence. In their motion, the Commissioners reiterated some of their original arguments and asserted there was newly discovered evidence that “shows that the sale of e-cigarettes was not solely for commissary revenue, but that [the Sheriff’s Office] acted based upon undisclosed personal pecuniary interests.” (*Id.* at 172.) On December 6, 2021, the Sheriff’s Office filed its opposition to the Commissioners’ motion. On December 15, 2021, the trial court denied the Commissioners’ motion.

Discussion and Decision

[11] The Commissioners appeal following the trial court’s denial of their motion to correct error. We review a trial court’s grant or denial of a motion to correct error for an abuse of discretion. *Inman v. Inman*, 898 N.E.2d 1281, 1284 (Ind.

Ct. App. 2009). An abuse of discretion occurs if the trial court’s decision is against the logic and effect of the facts and circumstances that were before the court. *Id.* Determining whether the court abused its discretion when it denied the motion to correct error requires us to review the propriety of the trial court’s underlying judgment. *In re Guardianship of M.N.S.*, 23 N.E.3d 759, 766 (Ind. Ct. App. 2014).

[12] The Commissioners contend the trial court erred when it granted the motion for summary judgment filed by the Sheriff’s Office because the trial court misapplied the relevant law.⁸ We review summary judgment using the same standard as the trial court: summary judgment is appropriate only where the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Rogers v. Martin*, 63 N.E.3d 316, 320 (Ind. 2016). All facts and reasonable inferences are construed in favor of the non-moving party. *City of Beech Grove v. Beloat*, 50 N.E.3d 135, 137 (Ind. 2016). Where the challenge to summary judgment raises questions of law, we review them de novo. *Rogers*, 63 N.E.3d at 320. That the parties have

⁸ The Commissioners also assert the trial court adopted the Sheriff’s Office’s proposed order verbatim and suggest we consider that alleged adoption when reviewing the trial court’s decision. To that point, they cite *Carpenter v. Carpenter*, 891 N.E.2d 587 (Ind. Ct. App. 2008), in which we stated that, while the “wholesale adoption” of a party’s proposed order is not prohibited, “we do not encourage trial courts to engage in this practice.” *Id.* at 592. Therein, we also indicated wholesale adoption of a party’s proposed order does not alter our standard of review, but “near verbatim reproductions may appropriately justify cautious appellate scrutiny.” *Id.* at 593 (quoting *Stevens v. State*, 770 N.E.2d 739, 762 (Ind. 2002), *cert. denied*, 540 U.S. 830 (2003)). However, the proposed order tendered by the Sheriff’s Office is not contained in the appendix filed by the Commissioners on appeal. Therefore, we cannot address the Commissioners’ argument and implore counsel to ensure in the future that the record contains the items upon which an argument is based.

filed cross-motions for summary judgment does not alter our standard of review. *Floyd Cnty. v. City of New Albany*, 1 N.E.3d 207, 213 (Ind. Ct. App. 2014), *trans. denied*.

[13] The party appealing a summary judgment bears the burden of persuading us that the trial court erred, but we still carefully scrutinize the entry of summary judgment to ensure that the non-prevailing party was not denied its day in court. *Grinnell Mut. Reinsurance Co. v. Ault*, 918 N.E.2d 619, 624 (Ind. Ct. App. 2009). The trial court here entered specific findings of fact and conclusions thereon. Although such findings and conclusions facilitate appellate review by offering insight into the trial court's reasons for granting summary judgment, they do not alter our standard of review and are not binding on this court. *Id.* at 625.

[14] When construing ordinances, we apply the rules applicable to statutory construction. *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825, 828 (Ind. 2011). “Statutory interpretation is a function for the courts, and our goal in statutory interpretation is to determine, give effect to, and implement the intent of the legislature as expressed in the plain language of its statutes.” *Clark Cnty. Drainage Bd. v. Isgrigg*, 966 N.E.2d 678, 681 (Ind. Ct. App. 2012). “When a statute is clear and unambiguous, we apply the rules of statutory construction and interpret statutory language in its plain, ordinary, and usual sense.” *Cnty. of Lake v. Pahl*, 28 N.E.3d 1092, 1104 (Ind. Ct. App. 2015), *reh’g denied, trans. denied*. “However when a statute is susceptible to more than one interpretation it is deemed ambiguous and thus open to judicial construction.” *City of N.*

Vernon v. Jennings Nw. Regional Utils., 829 N.E.2d 1, 4 (Ind. 2005). When construing a statute, “we do not presume that the Legislature intended language used in a statute to be applied illogically or to bring about an unjust or absurd result.” *Id.* at 5. We do, however, presume the language in a statute was “used intentionally” by the Legislature. *See, e.g., Burks v. Bolerjack*, 427 N.E.2d 887, 890 (Ind. 1981) (“The language employed in a statute is deemed to have been used intentionally.”).

[15] The Commissioners contend the trial court erred when it determined they exceeded their authority when enacting Order 2021-05 because they had authority to enact that Ordinance under the Home Rule Act.⁹ The Home Rule Act, found at Indiana Code chapter 36-1-3, grants “units all the powers that they need for the effective operation of government as to local affairs.” Ind. Code § 36-1-3-2. A “unit” is defined by statute as a “county, municipality, or township.” Ind. Code § 36-1-2-23. Pursuant to Indiana Code section 36-1-3-4(b), a unit has “(1) all powers granted to it by statute; and (2) all other powers necessary or desirable in the conduct of its affairs, even though not granted by

⁹ The Commissioners also challenge Conclusion 3 of the trial court’s order, which cites Indiana Code section 36-2-2-24(a). That statute dictates the Commissioners have a duty to “establish and maintain a . . . county jail[.]” Based thereon the trial court concluded, “[o]nce the county establishes and then reasonably maintains the jail, it is not responsible for administering the manner of an inmate’s incarceration.” (App. Vol. II at 163.) The Commissioners contend Order 2021-05 does not address the manner of an inmate’s incarceration and instead it regulates, in relevant part, the use of e-cigarettes by all county employees and the public who visit county buildings. However, it is well-settled that while county commissioners are “statutorily required to build and maintain a county jail[,] . . . this duty only extends to keeping the jail open and in good repair.” *Waldrip v. Waldrip*, 976 N.E.2d 102, 188-9 (Ind. Ct. App. 2012) (internal citation omitted). Thus, as the regulation of the behavior of inmates in the jail is not part of “keeping the jail open and in good repair” the trial court did not err when it entered Conclusion 3.

statute.”¹⁰ Thus, under the Home Rule Act, the Commissioners are permitted to pass an ordinance of general applicability that prohibits the use of e-cigarettes in county buildings as they have done with Order 2021-05. *See, e.g., State, By and Through Indiana State Bd. Of Accounts v. Town of Roseland*, 178 Ind. App. 661, 667, 383 N.E.2d 1076, 1080 (1978) (while State law could control general maximum speed limits, the legislature “empower[ed] each local authority to pass ordinances which established speed limits, taking into account particular local problems and conditions”), *reh’g denied*; and *see* Ind. Code § 7.1-5-12-13(a) (“This chapter does not prohibit a county, city, town, or other governmental unit from adopting an ordinance more restrictive than this chapter.”).

[16] However, the Home Rule Act also sets limits on the Commissioners’ authority. A “unit may exercise any power it has to the extent that the power: (1) is not expressly denied by the Indiana Constitution or by statute; and (2) is not expressly granted to another entity.” Ind. Code § 35-1-3-5(a).¹¹ Specific to the case before us, the county sheriff shall “take care of the county jail and prisoners there[.]” Ind. Code § 36-2-13-5(a)(7) (hereinafter “Take Care Provision”). Indiana precedent has interpreted the Take Care Provision to require the Sheriff “to take reasonable precautions under the circumstances to preserve the life, health and safety of the prisoner.” *Johnson v. Bender*, 174 Ind.

¹⁰ Because that second clause regarding “all other powers” does not explicitly list any powers, “the omission of [any] power from such a list does not imply that units lack that power.” Ind. Code § 36-1-3-5(c).

¹¹ The statute provides exceptions to this rule, but the exceptions are not relevant here.

App. 638, 642, 369 N.E.2d 936, 939 (1977). Over the years, Indiana courts have clarified the actions to be taken by the Sheriff under the Take Care Provision. See *Lake Cnty. Bd. of Comm'rs. v. Martinez*, 199 N.E.3d 366, 373 (Ind. Ct. App. 2022) (under Take Care Provision, Sheriff can enter into “jail-related contracts”); *Alexander v. Marion Cnty. Sheriff*, 891 N.E.2d 87, 93 (Ind. Ct. App. 2008) (Sheriff can enter contracts with entities providing telephone service under the Take Care Provision), *reh'g denied, trans. denied*; *Trout v. Buie*, 653 N.E.2d 1002, 1008 (Ind. Ct. App. 1995) (Take Care Provision requires Sheriff provide appropriate medical care to prisoners), *trans. denied*; *Weatherholt v. Spencer County*, 639 N.E.2d 354, 357 (Ind. Ct. App. 1994) (duty to provide bottom bunk to a prisoner reporting a medical condition making top bunk unsafe falls to the Sheriff under the Take Care Provision) *reh'g denied*; and *Health & Hosp. Corp. of Marion Cnty. v. Marion Cnty.*, 470 N.E.2d 1348, 1360 (Ind. Ct. App. 1984) (pursuant to the Take Care Provision, Sheriff is required to pay for medical treatment), *reh'g denied, trans. denied*.

[17] In circumstances like those before us, where the Sheriff's Office is required to take reasonable precautions to protect the life, safety, and health of an inmate in the county jail, “county commissioners do not have control over the acts of a sheriff.” *Robins v. Harris*, 740 N.E.2d 914, 919 (Ind. Ct. App. 2000), *trans. granted*, summarily affirmed in relevant part by *Robins v. Harris*, 769 N.E.2d 586, 587 (Ind. 2002). While the Commissioners have the power to enact a general ordinance governing the use of e-cigarettes in county buildings under the Home Rule Act, the Commissioners do not have the authority to regulate the use of e-

cigarettes in the county jail because that power is entrusted in the Sheriff's Office pursuant to the Take Care Provision. Based thereon, we conclude the trial court did not err when it granted summary judgment in favor of the Sheriff's Office and, thus, did not abuse its discretion when it denied the Commissioners' motion to correct error.¹²

Conclusion

[18] While the Commissioners had authority under the Home Rule Act to enact Order 2021-05 as a general ordinance governing the use of e-cigarettes in county buildings, Indiana Code section 36-2-13-5(a)(7) expressly gives the Sheriff's Office the power to "take care" of prisoners. Therefore, Order 2021-05 does not apply to the activity of prisoners in the county jail. Based thereon, we conclude the trial court did not err when it granted summary judgment in favor of the Sheriff's Office and did not abuse its discretion when it denied the Commissioners' motion to correct error. Accordingly, we affirm.

[19] Affirmed.

Crone, J., and Tavitas, J., concur.

¹² In their motion to correct error, the Commissioners asserted they were entitled to a relief from judgment based on newly discovered material evidence, specifically that "the sale of e-cigarettes was not solely for commissary revenue, but that Plaintiffs acted based upon undisclosed personal pecuniary interests." (App. Vol. II at 172.) However, we need not consider any alleged newly discovered evidence creating a question of material fact because we have concluded the Sheriff's Office is expressly granted the authority to control the care of prisoners in the jail under the Take Care Provision as a matter of law.