

INDIANA LAW UPDATE
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ADVOCACY TIP OF THE MONTH: Don't overuse acronyms.

NOTE: The contents of this handout consist primarily, but not completely, of words taken directly from the appellate court opinion with citations generally omitted. Anyone intending to rely upon the opinion should consult the published decision.

In the News: Emails and Flextime: Changing Expectations for Lawyers

From the ABAJournal.com, posted Oct. 19, 2009, by Martha Neil:

After doing a great job on a rush project, a relatively new associate at Quinn Emanuel Urquhart Oliver & Hedges made a mistake. He didn't check his e-mail. As a result, he missed a senior partner's instruction that he should send out a draft document for client review before calling it a day. Partner A. William Urquhart notes the mistake in an e-mail he sent the next morning to firm attorneys and exhorts the troops to pick up the pace as far as electronic message review is concerned.

Lawyers should be checking their e-mail hourly, unless they have a very good excuse for not doing so, Urquhart says, such as being in court, in a tunnel or asleep. "One of the last things you should do before you retire for the night is to check your e-mail. That is why we give you BlackBerries," he writes.

From Law.com, posted Oct. 27, 2009 by Sheri Qualters:

Retail giant Wal-Mart Stores Inc. plans to add evaluation of a law firm's flextime policies to its list of criteria for evaluating outside firms, according to a panelist at the Association of Corporate Counsel's annual meeting in Boston. Joseph West, associate general counsel at Wal-Mart, said the company plans to add flextime policies to its current list of law firm measures: cost-effectiveness, performance and diversity.

West said Wal-Mart plans to require firms to have flextime policies, which are generally defined as alternative working arrangements or hours, and require that "the policies themselves be flexible." Law firms and legal departments have typically implemented flextime policies to attract and retain working mothers. "We've found that even those firms that have flextime policies, they haven't communicated to attorneys in the firm that it's OK to use them without fear or shame," West said.

1. Motion for continuance: *Gunashekar v. Grose* (Ind.S.Ct. 10/27/09)(Shepard)

Rudrappa Gunashekar hired Kay Grose to repair fire damage to property. After Grose had completed the work, Mr. Gunashekar refused to pay from his insurance proceeds. Grose sued for the balance of the agreed price. She also alleged that Mr. Gunashekar had forged her name on the back of the insurance check and had written a check to her which was returned unpaid.

Attorney George Martin appeared on behalf of the Gunashekars. On June 2, 2007, about eight weeks before trial, Martin filed a motion to withdraw his appearance. On June 14, six weeks before the trial, the court granted Martin's motion, reiterating that the case "is set for Bench Trial on July 31, 2007 and August 1, 2007" and "No continuances will be granted."

On July 20, 2007, forty-five days after Martin filed to withdraw and eleven days before trial, Mr. Gunashekar sought a continuance *pro se*, stating “Defendants prays [sic] for grant sufficient time to hire counsel prior to the bench trial.” The trial court denied the motion.

The court conducted a half-day bench trial on July 31st. Grose was represented by counsel. The Gunashekars appeared *pro se*. The trial court ultimately entered a judgment for Grose awarding her \$147,337.04, for which the Gunashekars were jointly and severally liable, and an additional \$269,520.00 for treble damages and attorney fees, for which only Mr. Gunashekar was liable.

The Court of Appeals concluded that denial of the motion to continue was grounds for reversal and remanded for a new trial. We granted transfer.

Under the trial rules, 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 trial court’s 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. A denial of a motion for continuance is abuse of discretion only if the movant demonstrates good cause for granting it.

Much of our caselaw says that a *pro se* litigant is held to the same established rules of procedure that trained counsel is bound to follow. The Gunashekars said nothing to the trial judge to indicate whether they were diligent in trying to engage new counsel or whether they did nothing at all during the eight weeks after attorney Martin withdrew.

In ruling on the request to postpone, the trial court was entitled to consider how long the trial had been scheduled, the lack of explanation for eight weeks of apparent inaction, the relative simplicity of a three-witness bench trial, and the potential that the request was a conscious gaming of the system. Taken as a whole, we cannot say the court abused its discretion.

Rucker, J. dissenting: “With a potential exposure, and indeed an ultimate adverse judgment, of nearly a half million dollars, the Gunashekars needed the assistance of trained legal counsel. Fairness and equity required the trial court to afford the Gunashekars a reasonable delay to accomplish this end.”

Lessons:

1. The trial court has wide discretion in deciding whether to grant a motion for continuance.
 2. When counsel withdraws, the client should act immediately and diligently to employ replacement counsel and if that fails, provide proof of the efforts made to the trial court.
 3. The Indiana Supreme Court is willing to step in (at least sometimes) to protect the discretion of trial judges on matters as apparently minor as whether to grant a continuance.
- 2. Attorneys fees; default judgment for failure to respond to discovery; damages hearing after default judgment: *Fitzpatrick v. Kenneth J. Allen and Associates, P.C.*, 913 N.E.2d 255 (Ind.Ct.App. 9/10/09) (Vaidik)**

John Hill was seriously injured during the course of a hospitalization. Several lawsuits arose out of this injury, including a products liability suit against pharmaceutical companies and a medical malpractice suit against Hill’s physicians. Attorneys Kenneth J. Allen, David J. Fitzpatrick, and Mitchell Iseberg entered into a fee-sharing contract under which Fitzpatrick agreed to handle the products liability suit and Allen would handle the medical malpractice suit.

Allen, Fitzpatrick, and Iseberg, with the approval of Hill and his wife, agreed that Allen would receive 50% of any attorney fees generated by the two suits and Fitzpatrick and Iseberg would split the other half.

The clients later discharged Allen before the products liability suit settled for \$8.1 million, generating over two million dollars in attorney fees, which Fitzpatrick distributed to himself and Iseberg and did not share with Allen. Allen subsequently withdrew from the medical malpractice suit.

During protracted litigation over the fees, the trial court repeatedly ordered Fitzpatrick to disclose the settlement amount. Ultimately, Allen filed a motion for default judgment against Fitzpatrick, which the trial court granted due to Fitzpatrick's disobedience of its discovery orders. The trial court later entered judgment in Allen's favor in the amount of \$1,350,000, reflecting what the court believed to be 50% of the attorney fees. Fitzpatrick now appeals.

Fitzpatrick contends that the trial court erred by granting Allen's motion for default judgment. The trial court granted Allen's motion for default judgment due to "Fitzpatrick's continued refusal to comply with this Court's discovery process." Fitzpatrick had plenty of opportunity to disclose the settlement amount as ordered by the court, and he chose not to do so in spite of the trial court's determination in August 2004 that the information was discoverable. Given the trial court's earlier orders, Fitzpatrick's insistence that the evidence sought was not discoverable was in bad faith and in contumacious disregard of the trial court's discovery orders. We cannot say that the trial court abused its discretion by entering default judgment against Fitzpatrick for his blatant disregard of the trial court's discovery orders.

[Note: During the hearing on the motion for default (in 2006) and also in a written motion filed with the trial court, Fitzpatrick indicated that he would disclose the settlement amount to Allen if so ordered by the court.]

Fitzpatrick contends that, even if the trial court did not err in entering a default judgment against him, the trial court erred in computing the damages owed to Allen. Fitzpatrick argues that, pursuant to our Supreme Court's decision in *Galanis v. Lyons & Truitt*, 715 N.E.2d 858 (Ind.1999), Allen is entitled only to *quantum meruit* damages. Fitzpatrick contends that the *Galanis* ruling "means that a lawyer hired under a contingent fee contract but discharged prior to the contingency 'is limited to quantum meruit recovery for the reasonable value of the services rendered to the client, and may not recover the full amount of the agreed contingent fee.'" In fact, *Galanis* limits itself to situations "in the absence of express written fee agreements providing otherwise." *Galanis*, 715 N.E.2d at 860. Thus, *Galanis* is inapposite.

Further, the policy considerations at play in *Galanis* are not implicated here. In no way does enforcing a fee-sharing contract between lawyers impact a client's right to discharge an attorney, hold clients responsible for unbargained-for attorney fees, or hinder an attorney's right to be compensated for services rendered. *Galanis* and its policy considerations do not require us to ignore the terms of the fee-sharing contract.

Fitzpatrick next argues that Indiana Rule of Professional Conduct 1.5(e) prohibits Allen from collecting more than *quantum meruit* damages because to allow Allen to recover under the fee-sharing contract gives him an unreasonable fee. Fitzpatrick contends that to permit Allen to recover a full 50% of the contingency fee from the settlement would ignore the fact that he shared less than 50% of the work and professional responsibility in the case that produced the settlement, and in turn permit Allen to violate not only the fee-division rule, but Allen's ethical obligation to collect no more than a reasonable fee.

First, as our Supreme Court recently explained, the Rules of Professional Conduct "have

limited application outside of the attorney disciplinary process.” The Preamble to the Indiana Rules of Professional Conduct provides: “Violation of a Rule should not itself give rise to a cause of action against a lawyer, nor should it create any presumption in such a case that a legal duty has been breached.”

The flaw in Fitzpatrick's argument is that he focuses upon Allen's level of participation *in the products liability suit alone*. However, the proper way to view the duties required of Allen under the fee-sharing contract is not to examine what he did or should have done in the products liability suit by itself; rather, it is to recognize that the representation called for by the fee-sharing contract is of a broader scope encompassing both causes of action that arose from the same set of facts and allowing the attorneys to share the risk that neither, one, or both of the suits would generate any contingency fees. Because neither *Galanis* nor Rule of Professional Conduct 1.5(e) preclude the enforcement of the parties' contract, Fitzpatrick's claim that Allen is entitled only to *quantum meruit* damages fails.

Fitzpatrick argues that the trial court erred by entering a damages award without holding a damages hearing. Under the contract, Allen is entitled to 50% of the attorney fees generated by the Hills' products liability and medical malpractice suits. Once the amount of the attorney fees was provided to the trial court, the amount of damages owed to Allen was readily identifiable. After a default judgment, the trial court is not required to hold a hearing if a hearing is not necessary “to determine the amount of damages.” Instead, “where the action is for a sum certain and liquidated, the final judgment can be entered and no hearing on damages [is] necessary.” The trial court did not err by entering a damages award without a hearing.

Lessons:

1. When the court has ruled on a discovery issue, continuing to litigate the issue without complying will risk the sanction of default.
 2. Courts will enforce fee sharing agreements that provide more than *quantum meruit* damages.
 3. After a default judgment, a damages hearing is not required if the amount of damages is readily identifiable.
- 3. Attorney fees; wrongful death; footnotes as dicta: *Hillebrand v. Large*, 2009 WL 3270182. (Ind.Ct.App. 10/13/09) (Riley)**

On April 9, 2006, Charlotte Fern Large (Large) died as a result of a motor vehicle accident. On April 13, 2006, the probate court appointed a personal representative to administer her Estate. A wrongful death action was pursued by counsel appointed by the personal representative to the Estate and on February 28, 2008, a settlement was mediated. The settlement agreement provided that \$12,016.72 will be deposited into Large's Estate and \$47,983.28 will be paid to Hillebrand as Large's beneficiary in the wrongful death cause. Hillebrand is Large's sole surviving child.

In its Order on Petition for Instruction and Request for Additional Attorney's Fees and Additional Personal Representative's Fees, the probate court decreed “that the attorney fees ... in the amount of \$6,545.50 for pursuing the wrongful death action be deducted from the wrongful death settlement.” Hillebrand contends that the trial court erred in ordering counsel for Large's estate to be paid out of the wrongful death settlement funds. Specifically, he maintains that pursuant to I.C. 34-23-1-2(d), the proceeds from an adult wrongful death settlement, after payment of reasonable medical, hospital, funeral, and burial expenses, inure to the exclusive benefit of the nondependent child of the decedent.

On the other hand, the Estate argues that because the personal representative of the Estate

is entitled to pursue the wrongful death cause and employ counsel, it necessarily follows that the attorney will be compensated from the settlement. The only issue raised is whether the Estate can charge the attorney fees incurred in the pursuit of the wrongful death claim against the settlement funds instead of being paid from the probate estate.

Indiana Code section 34-23-1-2 provides, in pertinent part:

(c) In an action to recover damages for the death of an adult person, the damages:

(3) may include but are not limited to the following:

(A) reasonable medical, hospital, funeral, and burial expenses necessitated by the wrongful act or omission that caused the adult person's death.

(B) Loss of the adult person's love and companionship.

(d) Damages awarded under subsection (c)(3)(A) for medical, hospital, funeral, and burial expenses inure to the exclusive benefit of the adult person's estate for the payment of the expenses. The remainder of the damages inure to the exclusive benefit of a nondependent parent or nondependent child of the adult person.

Indiana Code section 34-23-1-1 provides:

When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefore against the latter, and the damages shall be in such an amount as may be determined by the court or jury, including, but not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings of such deceased person resulting from said wrongful act or omission.

Both sections of the wrongful death act list the damages as “may include but are not limited to the following.” Because this list of recoverable damages in a wrongful death action is expressly illustrative and not exclusive, we interpret the statute to allow in every situation—regardless whether the decedent leaves a widow or widower, dependents or dependent next of kin—the recovery of the reasonable costs of administering the decedent's estate and prosecuting or compromising the action, including attorney fees.

We also follow *Thomas v. Eads*, 400 N.E.2d 778, 782 n. 4 (Ind.Ct.App. 1980) by concluding that the Legislature intended any damages recovered for the costs of administering the decedent's estate or prosecuting or compromising the action to inure to the exclusive benefit of the estate for the payment of such costs. Thus, as attorney fees are to be treated similar to the “reasonable medical, hospital, funeral, and burial expenses,” the costs are to be taken from the settlement proceeds for the exclusive benefit of the estate and the estate is responsible for their payment.

We therefore hold today that the damages awarded in a wrongful death action may include the reasonable attorney fees necessary to pursue the action, and these damages inure to the exclusive benefit of the estate for the payment of such costs. The remainder of the damages inure to the exclusive benefit of a nondependent parent or nondependent child of the decedent in accordance with I.C. § 34-23-1-2(d). As a result, here, because the settlement already allocated the funds which inure to the exclusive benefit of the Estate for payment of the expenses, we direct that the attorney fees also be paid out of the \$12,016.72 that was expressly allocated to the Estate.

Based on the foregoing, we find that attorney fees in a wrongful death action pursuant to

I.C. § 34-23-1 are included in the reasonable damages that can be recovered in the action and inure to the exclusive benefit of the estate for the payment of these expenses.

Lessons:

1. Attorney fees are a recoverable damage in a wrongful death case.
2. Attorney fees are to be paid by the estate.
3. “A footnote's legal value is merely dicta at best.”

4. **Voter I.D. Law; Equal Privileges and Immunities Clause; uniformity in the regulation of elections: *League of Women Voters v. Rokita*, 2009 WL 2973120 (Ind.Ct.App. 9/17/09) (Riley)**

In 2005, the Indiana General Assembly passed a law requiring “citizens voting in person on election day or casting a ballot in person at the office of the circuit court clerk prior to election day to present photo identification issued by the government.” The Voter I.D. Law applies to voting in both primary and general elections. It does not apply, however, to voters casting absentee ballots by mail or those who happen to reside at a state licensed care facility where a precinct polling place is located.

The League contends that the Voter I.D. Law violates Article 1, Section 23 of the Indiana Constitution, otherwise known as the Equal Privileges and Immunities Clause, which provides: “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.” The analytical process for determining whether a statute which treats certain citizens differently than others passes muster under the Equal Privileges and Immunities Clause has been summarized as follows: “First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. Finally, in determining whether a statute complies with or violates Section 23, courts must exercise substantial deference to legislative discretion.”

Legislative classification becomes a judicial question only where the lines drawn appear arbitrary or manifestly unreasonable, and the challenger must negate every reasonable basis for the classification.

The crux of the League's contention is that mail-in voters are not required by law to execute an affidavit regarding their identity, but in-person voters are required to produce a government issued photo identification card which contains an expiration date. In *Horseman v. Keller*, 841 N.E.2d 164 (Ind. 2006), the trial court declared Indiana Code section 3-12-1-13 unconstitutional because it did not allow mailed-in absentee ballots lacking two sets of clerks' initials to be counted in a recount although ballots cast in-person, but lacking two sets of clerks' initials, could be counted in the recount. Our supreme court declared to the contrary that the statute was constitutional, because inherent differences make mailed-in ballots more susceptible to improper influences or fraud, and, therefore, “it is reasonable that the legislature believed it in the interest of Indiana voters to more stringently govern absentee balloting.” Because of this conclusion, the League contends that it is irrational for our legislature to require identification of in-person voters but not require an affidavit affirming the identity of mail-in voters. We agree. If it is reasonable to “more stringently govern absentee balloting,” then it follows that a statute that imposes a less stringent requirement for absentee voters than for those voting in person would not be reasonable. This is what the Voter I.D. Law does.

Indiana Code sections 3-10-1-7.2 and 3-11-8-25.1 provide that “[a] voter who votes in

person at a precinct polling place that is located at a state licensed care facility where the voter resides is not required to provide proof of identification before voting in” an election. The League contends that this preferential treatment violates both prongs of Section 23 analysis.

We conclude that the class created by Indiana Code sections 3-10-1-7.2 and 3-11-8-25.1 is based in part upon an arbitrary or unnatural characteristic which grants an unequal privilege or immunity to residents of state licensed care facilities which also happen to be polling places and fails to treat persons similarly situated uniformly. The nature of state licensed care facilities and the inherent natural characteristics of the residents who reside in them may make them subject to certain directed legislation, but the Voter I.D. Law’s grant of immunity from the identification requirement for in-person voters is not appropriately related to those characteristics. Therefore, we conclude that Indiana Code sections 3-10-1-7.2 and 3-11-8-25.1 violate the Equal Privileges and Immunities Clause.

The League also contends that the Voter I.D. Law runs afoul of another aspect of our governing election law: all voter qualifications must be uniform. In *Blue v. State ex rel. Brown*, 206 Ind. 98,188 N.E. 583 (1934), the Supreme Court quoted to COOLEY ON CONSTITUTIONAL LIMITATIONS (8th Ed.) vol. 2, for the following proposition: “All regulations of the elective franchise, however, must be reasonable, uniform, and impartial.”

We have no indication from our supreme court that the legal proposition requiring that the regulation of electors and elections be reasonable, uniform, and impartial has been subsumed by the two-prong Section 23 analysis, and, therefore, we must consider it to be a viable independent analysis from the Equal Privileges and Immunities Clause in spite of the fact that both address uniformity. All qualified voters must be treated uniformly and impartially. We fail to see how the Voter I.D. Law's exception of those residing in state licensed care facilities, which happen to also be a polling place, would be a uniform or impartial regulation. Furthermore, the Voter I.D. Law treats in-person voters disparate from mail-in voters, conferring partial treatment upon mail-in voters.

It seems that the inconsistent and impartial treatment favoring voters who reside at state care facilities which also happen to be polling places could be excised from the Voter I.D. Law without destroying the primary objectives of the Law. However, the same cannot be said for the inconsistent and partial treatment favoring absentee voters who choose to mail their votes without destroying the opportunity for mailing votes. There may be different ways in which the inconsistent and partial treatment of the Voter I.D. Law could be cured, but it is not our task to form suggestions for legislation. Therefore, we must reverse and remand, with instructions to the trial court that it enter an order declaring the Voter I.D. Law void.

Lessons:

1. To require in-person voters to produce a photo ID but allow absentee voters to vote without proof of identity violates the Equal Privileges and Immunities Clause of the Indiana Constitution.
2. To allow residents of the state licensed care facilities which also are polling places to vote without proof of identity while requiring proof of others similarly situated violates the Equal Privileges and Immunities Clause.
3. These provisions also violate the requirement that election regulations be uniform and impartial.

P.S. -- Indiana Governor Mitch Daniels called the ruling “an act of judicial arrogance” and “transparently partisan.” He added, “It’s a preposterous decision, an extreme decision and

came in this case from a judge who's been reversed before and I expect it to happen again. This decision will be a footnote to history, eventually." On October 20, 2009, the Indiana Attorney General filed a petition for transfer.

5. Tenant's rights after forfeiture and foreclosure: *Myers v. Leedy*, 2009 WL 3319677 (Ind.S.Ct. 10/15/09) (Rucker)

On August 13, 2002, Eli John Yoder and Keith Myers entered into a "Contract for the Purchase and Sale of Real Estate." Under terms of the eight-page document, Yoder purchased from Myers, in installments, 200 acres of farmland in Fulton County. The 200-acre farmland contained roughly 160 acres of tillable soil. And for the 2004 crop year Yoder entered a written agreement with Wesley C. Leedy to "cash rent" the 160 acres for a lump sum payment of \$16,000.00 representing \$100.00 per acre. In December 2004 Myers filed a complaint against Yoder in the Fulton Circuit Court for breach of the land sale contract. He did not join Leedy as a party to the action.

For the 2005 crop year Yoder again entered a written agreement to cash rent the 160 acres to Leedy. On March 1, 2006, Leedy entered into another lease agreement with Yoder. As with the two previous leases Leedy paid Yoder a lump sum of \$100.00 per acre for 160 acres to rent the land for the "2006 crop year." On May 17, 2006, the Fulton County litigation between Myers and Yoder was resolved when the trial court entered an order finding Yoder in default of the land sale contract and that forfeiture of Yoder's interest in the property was the appropriate remedy.

Three days later Leedy began farming the property and planted approximately sixty acres of soybeans that day. That evening Myers ordered Leedy off the property and directed him to remove his equipment. The next morning Leedy removed all of his equipment and did not return. Thereafter Myers rented the property to another party for \$125.00 per acre.

Claiming damages in the amount of \$36,760.00, Leedy filed a complaint against Myers for not allowing him to complete the farming of the property. After a bench trial, the trial court entered judgment in Leedy's favor finding among other things that "John Yoder had the right to cash rent the real estate in question to [Leedy] on March 1, 2006, as he did for two (2) years prior." In a memorandum decision a divided panel of the Court of Appeals reversed on grounds that the tenancy did not survive the forfeiture of the land sale contract because Leedy had both constructive and actual notice of the breach of contract action when he entered into the 2006 lease.

This case presents a matter of first impression, namely: whether a tenant's leasehold interest in property survives a land contract vendee's forfeiture when the tenant was not made a party to the forfeiture action and where the vendor had actual knowledge that the tenant was in possession of the property. To resolve the issue we are required to examine several principles. To begin, on the question of whether a tenancy survives a *foreclosure* where the tenant is not made a party to the action, there is a split of authority. However the weight of authority subscribes to the view that "a lease is terminated by the foreclosure of a prior mortgage if, and only if, the tenants are made parties to the foreclosure proceedings."

We adopt the majority view and hold that where at the time a mortgagee files suit for foreclosure it knows, or upon reasonable diligence should have known, that a tenant is in possession of the property, the tenant's leasehold interest survives the foreclosure action unless the tenant is made a party to the action. Of course this case involves forfeiture as opposed to foreclosure. For purposes of joining a tenant as a party to the litigation, we discern no logical

reason or legitimate rationale for treating a putative forfeiture defendant any differently than a foreclosure defendant.

Myers contends that regardless of whether Leedy should have been joined as a party to the breach of contract action, Leedy's leasehold interest was nonetheless extinguished because Leedy had both constructive as well as actual notice of the legal dispute between Myers and Yoder at the time Leedy entered a contract for the 2006 crop season. We have no quarrel with the general proposition that the commencement of a foreclosure action standing alone provides third parties with constructive notice of a pending lawsuit. But in our view it makes no sense to say that a *lis pendens* notice of a foreclosure proceeding should bind a tenant already in possession. Instead, we reiterate that the leasehold interest of a tenant in possession of property is not extinguished upon constructive notice of pending litigation involving the subject property.

But what of actual notice? Myers essentially contends that it is inappropriate to absolve Leedy of the binding effect of the forfeiture action when Leedy knew of the pending litigation and could have protected his interest by intervening in the lawsuit. First, we are of the view that actual notice may be relevant where a seller recaptures property without the aid of a court. But where, as here, a seller recaptures property through judicial action, the weight of authority holds that junior lessees must be joined for their interest to be affected.

SHEPARD, C.J., concurs in result with separate opinion: What we have here is an appeal involving a contract sale of 200 acres and a single tenant-farmer in a rural area. The court has used this case to alter the property interests of owners and lenders in billions of dollars of commercial and industrial real estate. There is no need for this sort of *sua sponte* expansiveness.

Lessons:

1. In a forfeiture or foreclosure case, join the tenant as a party if you seek to alter the tenant's rights.
2. Neither actual nor constructive notice will suffice.

P.S. "In the past, foreclosures invalidated existing leases, forcing tenants to move on short notice. However, the federal Protecting Tenants at Foreclosure Act of 2009 gives renters new rights. If you have a lease on a property that is foreclosed on, you are allowed to stay in the home until the lease expires, unless the new owner is planning to use the home as his or her primary residence. In that case, you must be given at least 90 days notice before being required to move. You must also be given 90 days notice if you are renting month to month."

6. IHSAA transfer rule; judicial review of administrative ruling; public interest exception to mootness rule: *IHSAA v. Watson*, 913 N.E.2d 741 (Ind.Ct.App. 9/24/09) (Baker)

Valerie Watson is a single mother supporting three children and one grandchild. Over the course of two years, her salary was nearly halved and her work hours dramatically curtailed because of the economic downturn experienced by the RV industry. As a result she was unable to make mortgage payments and received a notice of foreclosure. Valerie decided to move to South Bend from Elkhart because she was unable to locate a suitable home in Elkhart that would rent to her and because she had family members in South Bend who were able to help her care for her children. The IHSAA, however, found Valerie's daughter ineligible to play for South Bend Washington High School's basketball team because it concluded that the move and transfer occurred primarily for athletic reasons and because of improper undue influence. The trial court found that the IHSAA acted arbitrarily and capriciously and entered a preliminary injunction

prohibiting the IHSAA from enforcing its ineligibility decisions. We find that the trial court did not err by entering the injunction.

Jasmine attended Elkhart Memorial High School for her freshman, sophomore and junior years, and played for the high school basketball team all three years. She is a highly talented basketball player: she was a junior Indiana All-Star, was named to the 2009 All-Star team, and received recruiting inquires and letters from multiple NCAA Division I programs.

In September 2007, Valerie, Jasmine's mother, received notice from her employer that her hours would be reduced. In March 2008, Valerie's wages were garnished because of a judgment. Valerie was unable to make timely mortgage payments on the family home. In June 2008, Valerie received a foreclosure complaint. Valerie decided to begin looking for another place to live. She looked at multiple homes in Elkhart.

Among IHSAA eligibility rules are Rule 19 (the Transfer Rule) and Rule 20 (the Undue Influence Rule). Among other things, the Transfer Rule provides that students who transfer from one school to another with an accompanying change of residence are generally immediately eligible to participate in varsity sports. If, however, a student transfers for "primarily athletic reasons" or as a result of undue influence, the student will be ineligible to participate in interschool athletics for 365 days following enrollment at the new school.

In early August 2008, Valerie completed a transfer report for Jasmine, requesting that the transfer be approved based on the family's change of residence. The IHSAA Assistant Commissioner reviewed and investigated Jasmine's transfer request, finding Jasmine ineligible pursuant to the Transfer Rule. Jasmine and Valerie appealed the decision and requested a hearing before the IHSAA Review Committee. On October 17, 2008, the Review Committee issued a written decision upholding the Commissioner's determination that Jasmine was ineligible. On November 17, 2009, the Watsons filed a complaint seeking an injunction prohibiting the IHSAA from enforcing its October 17 decision. On December 17, 2008, the trial court granting a preliminary injunction.

Although the parties do not raise the issue, it is likely that many readers will wonder why this matter is anything other than moot, given that the 2008-09 basketball season concluded months ago and Jasmine has since graduated from high school. It is well established that "an otherwise moot case may be decided on the merits if the case involves a question of great public interest." The public interest exception applies to the instant case because the issue involves children and education, matters that are considered of great public concern, and our court has previously held that a challenge to an IHSAA eligibility rule is an issue of substantial public interest. While at first glance high school athletics may not seem to be of great public importance, according to the IHSAA, over 160,000 students statewide participate in sports under the IHSAA eligibility rules.

The trial court found that much of the "evidence" relied upon by the IHSAA in finding Jasmine to be ineligible was unsubstantiated hearsay and double hearsay. The IHSAA argues that hearsay evidence is admissible during administrative proceedings. The trial court did not find this evidence to be inadmissible, it evaluated the evidence and found it to be unsubstantiated and non-probative, which was well within its discretion. We agree that "the normal proscriptions against hearsay do not apply in an administrative proceeding," and have drawn no contrary conclusions herein. Evidence must be competent, however, and the trial court was well within its rights to find the type of hearsay and double hearsay evidence relied upon by the IHSAA to be incompetent evidence. In other words, the trial court did not reject the evidence as hearsay, it rejected it as incompetent.

The standard that the IHSAA applied to the Watsons was unreasonable, untenable, and unrealistic. Even if we assumed all of the IHSAA's evidence to be true, we cannot find that the trial court erred by concluding that the evidence in the record does not, in any way, establish that this move occurred for primarily athletic reasons. It is certainly possible that athletics played a role, but to say that athletics played a primary role is to ignore and disregard the evidence in the record that this family was struggling and that Valerie did what she believed to be the best thing for her children.

FRIEDLANDER, dissenting:

In my view, the Majority decision suffers the same flaws as did the trial court's – it employs an over-zealous review that does not accord the IHSAA decision sufficient deference. In my opinion, the trial court in this case exceeded the limits of its review in conducting a new evidentiary hearing.

What is the practical difference between excluding evidence on the basis that it is hearsay and deeming it incompetent on the basis that it is hearsay? None that I can detect. The result is the same either way.

Lessons:

1. Eligibility to play girls high school basketball is a matter of great public interest, sufficient to warrant appellate consideration even when otherwise moot.
2. The trial court may conduct an evidentiary hearing to determine whether to grant a preliminary injunction even when it is otherwise limited to the administrative record.
3. Hearsay, allowed at an administrative hearing, may be considered incompetent for purposes of judicial review.

7. Attorney's fees for frivolous defense; statement of facts: *IHSAA v. Schafer*, 913 N.E.2d 789 (Ind.Ct.App. 9/28/09) (May)

During the 1990-91 school year, Shane Schafer was a junior at Andean High School in Merrillville. He played on Andean's basketball team during the fall 1990 and spring 1991 semesters. Schafer withdrew from school in the spring of 1991, at the end of the regular basketball season and just before the sectionals, suffering from a serious sinus infection that may have started in September. Because the illness may have affected Schafer's academic performance throughout the school year, Andean permitted him to repeat his entire 1990-91 junior year in the 1991-92 school year.

In June, 1991 Schafer wrote to IHSAA to ask that 1990-91 not count against his eligibility for interscholastic athletics. IHSAA refused Schafer's request. Andean appealed to IHSAA's Executive Committee and lost. Schafer challenged the ruling in court and Judge Kickbush enjoined the IHSAA from ruling Schafer ineligible or punishing Andean. The court concluded the IHSAA rules were "overly broad, overly inclusive, arbitrary, and capricious and do not bear a fair relationship to the intended purpose of the rules, and, accordingly, they are held to be in violation of equal protection and due process." The trial court certified the order for interlocutory appeal and we affirmed, except as to the open-ended nature of the injunction.

In the case now before us, Schafer brought an action to recover attorney fees. The trial court determined Schafer could recover fees for 160 hours expended in preparation for the declaratory judgment hearing and 332.75 hours expended in defending the declaratory judgment on appeal on the ground that during the declaratory judgment period "IHSAA did continue to litigate a defense that was frivolous, unreasonable, and groundless."

The purpose of findings of fact and conclusions of law is to provide the parties and reviewing courts with the theory on which the case was decided. The trial court's conclusory statements, presented as findings, that IHSAA brought and continued to litigate a defense that was unreasonable, frivolous, and groundless, leave us “to wonder how and why it reached this conclusion in light of” the evidence in the record. In *Carmichael v. Siegel*, 754 N.E.2d 619, 638 (Ind.Ct.App.2001), we remanded to the trial court for further consideration and explanation of its conclusion and we do the same here so the trial court may explain the basis for its conclusion Schafer was entitled to attorney fees.

We are unable to affirm the award of attorney fees because the trial court's findings do not support its judgment. But our result on that narrow ground must not be interpreted to condone IHSAA's actions, in either its “arbitrary and capricious” application of its rules to Shane, which application Judge Kickbush aptly described as “absurdity,” or its conduct of this litigation, which “degenerated to a goal to determine who would own the ship and who would paddle the oars.”

We have commented with disapproval on similar litigation tactics employed in the past by IHSAA. The case before us raises the same concerns that the IHSAA is trying “to send a message to parents and student athletes in Indiana about the great risk and expense involved in challenging a ruling, and thus discourage them from appealing a denial of eligibility.” The findings in this case are currently insufficient to support the judgment, but it appears the evidence in the record might. We accordingly remand so the trial court may further consider and explain its judgment with regard to its conclusion on the attorney fees issue.

Footnote 2: The statements of facts in both parties' briefs are rife with argument, which is inappropriate in that part of an appellate brief. Statement of Facts should be a concise narrative of the facts stated in accordance with the standard of review appropriate to the judgment or order being appealed, and should not be argumentative. The Schafer and IHSAA statements of facts are, by contrast, transparent attempts to discredit the opponents, and are plainly not intended to be a vehicle for informing this court.

Lessons:

1. Avoid argument in the statement of facts.
2. Provide specific factual findings to support the award of attorney's fees for a frivolous defense.
3. If you're litigating against the IHSAA and win, ask for fees. The IHSAA appears to have lost its credibility with the Court of Appeals.
4. Avoid overly aggressive tactics that cause the loss of credibility for yourself and your clients.

8. Statement of facts: *Ruse v. Bleeke*, 914 N.E.2d 1 (Ind.Ct.App. 9/29/09) (Kirsch)

Footnote 1: We note that Ruse's brief contains a Statement of Facts section which simply states that the Statement of Facts section had been placed in the Appellant's Appendix at Tab H. Indiana Appellate Rule 46(A)(6) provides that an appellant's brief shall contain a Statement of the Facts section which shall describe the facts relevant to the issues presented for review. Furthermore, a Statement of Facts should be a concise narrative of the facts stated in the light most favorable to the judgment and should not be argumentative. Both Bleeke and Parrish argue that the materials located at Tab H are a copy of Ruse's proposed findings of fact which were rejected by the trial court. Lastly, several documents may be included in an Appellant's Appendix, but a section of the contents of the Appellant's Brief is not among those listed.

Lesson: You can't incorporate a statement of facts by reference to proposed findings set forth in the appendix.

9. Medical malpractice; expert testimony based on customarily relied upon sources; redaction of "Dept. of Insurance" from panel opinion: *Spaulding v. Harris*, 2009 WL 3231432 (Ind.App.Ct. 10/8/09) (Vaidik)

Decedent Mattie Spaulding sustained a subdural hematoma shortly after receiving anticoagulation treatment from Dr. Erinn R. Harris at Wishard Memorial Hospital. Mattie's family filed this action alleging that Dr. Harris's and Wishard's negligence precipitated Mattie's brain injury. A jury found in favor of Dr. Harris and Wishard, and the Spauldings appealed.

In March 2002 Mattie Spaulding was diagnosed with congestive heart failure and underwent emergency aortic valve replacement surgery. After the procedure Mattie was placed on the blood thinner known as Coumadin. On May 7, 2002, she consulted Dr. Harris at Wishard's Blackburn Community Health Center for post-operative blood monitoring. Coagulation is measured using "protime" tests, which determine how long it takes sampled blood to clot. The standard unit of measurement for protime is the Internal Normalized Ratio (INR). Mattie's target INR after surgery was between 3 and 4. On June 23, 2002, paramedics brought her to Community Hospital where she was diagnosed with a subdural hematoma, an accumulation of blood inside the brain. Her INR level was greater than 16.

Mattie underwent a craniotomy to evacuate the hematoma. Neurological surgeon Dr. Michael M. Burt ordered her to remain off of her anticoagulant medication for two weeks to avoid the risk of bleeding. On July 12, 2002, Mattie suffered acute respiratory failure. She died the following day. An autopsy revealed the cause of death to be a pulmonary embolism, a blood clot that travels to the lungs and prevents oxygenation.

The Spauldings alleged that Dr. Harris failed to adequately monitor Mattie's coagulation and that Mattie developed her injuries as a result of Dr. Harris's negligence. A medical review panel heard the case. Panelist, Dr. Cheryle D. Southern, found that the evidence supported the conclusion that the defendants failed to comply with the appropriate standard of care. Wishard objected to Dr. Southern's causation testimony as being based on hearsay and lacking foundation. The trial court excluded portions of her testimony apparently because they were based in part on a medical article about unsafe INR levels. But Dr. Southern was a qualified expert and was at liberty to consult medical literature from her field to analyze the case and render an opinion.

An expert may rely on hearsay when she uses other experts and authoritative sources of information like treatises to aid her in rendering an opinion. Hearsay information customarily relied on by experts in the practice of their professions may be relied upon as a legitimate accumulation of that expert's knowledge. Dr. Southern was allowed to rely on professional publications as a "legitimate accumulation" of her knowledge and expertise. We therefore find that the trial court erred by excluding portions of Dr. Southern's causation testimony merely because they relied in part on a medical article. However, because the excluded testimony was cumulative of other evidence presented, we conclude that any error in the exclusion of Dr. Southern's statements was harmless.

Here the Spauldings sought to introduce a certified copy of the medical review panel opinion in accordance with Section 34-18-10-23. The opinion had a stamp, seal, and caption referring to the State of Indiana Department of Insurance, and Wishard moved to exclude any reference to the "Department of Insurance" under Rule 411. The trial court chose to exclude the words "Department of Insurance" and admit a redacted copy of the exhibit. We cannot say that

the trial court abused its discretion when finding that the probative value of bolstering the opinion's authenticity was outweighed by the prejudicial effect of indicating that Wishard was insured. The authenticity of the opinion was never disputed in the first instance, and the document bore the remainder of its official seal and the signatures of all panel members.

Lessons:

1. An expert can testify to hearsay information from sources on which the expert customarily relies including a medical article.
2. The trial court may redact "Department of Insurance" from a medical review panel opinion.

10. Product liability; preemption; adequacy of warnings: *Cook v. Ford Motor Company*, 913 N.E.2d 311 (Ind.Ct.App. 9/21/09) (Robb)

Peter and Lori Cook, as parents and next friends of Lindsey Jo Cook, filed a products liability lawsuit against Ford Motor Company following a motor vehicle accident in which eight-year-old Lindsey suffered serious brain injuries when the airbag in the Cooks' 1997 Ford F-150 pickup truck deployed and struck her in the head. The Cooks alleged that Lindsey's injuries were caused in part by Ford's defective instruction and warnings with respect to the front passenger seat airbag and airbag deactivation switch.

The trial court granted summary judgment to Ford on the Cooks' failure to warn claim. We address first Ford's contention that the Cooks' failure to warn claim is pre-empted by federal law. The National Traffic and Motor Vehicle Safety Act (the "Safety Act") contains the following preemption clause:

When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of the State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.

The Safety Act also contains a state common law savings clause, however, stating that "[c]ompliance with a motor vehicle safety standard under this chapter does not exempt a person from liability at common law." Reading the preemption clause and the savings clause together, common law tort actions are not expressly preempted.

In *Wyeth v. Levine*, --- U.S. ----, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009), the Court held that a state law claim of failure to warn of a specific risk associated with a prescription drug was not preempted. For many of the same reasons *Wyeth* found no preemption, we hold that the duty the Cooks seek to impose neither actually conflicts with Standard 208 nor stands as an obstacle to the accomplishment and execution of federal objectives regarding airbag warnings. Therefore, preemption was not a basis on which to grant summary judgment to Ford.

Ford contends that the Cooks' admitted failure to read the entire owner's manual defeats their claim. It is true that "[w]here warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." In Indiana, there is a presumption that an adequate warning would have been read and heeded. However, the Cooks contend that even if they had read all the instructions pointed to by Ford, the instructions as a whole were inadequate to inform them of the dangers airbags pose to children other than those in rear-facing child seats. Their failure to read all instructions is not fatal to their claim that the

instructions were inadequate to begin with.

Ford argued to the trial court on summary judgment that the Cooks' failure to designate expert testimony regarding an alternate warning was fatal to their claim. Although evidence of an alternate adequate warning may be required, an expert is not necessarily the sole source of such evidence. There was testimony at the first trial that if the owner's manual had stated that airbags pose a danger to all children, not just those in a rear-facing child seat, or that airbags do not make the front seat safer than the backseat, the Cooks would not have placed Lindsay in the front seat or would not have left the airbag on.

Lessons:

1. Not all airbag warnings claims are preempted by federal law.
2. Failure to read warnings is not always fatal to a warnings claim.
3. Expert testimony of an alternative warning is not always required.

11. Public Standing Doctrine: *Liberty Landowners Assoc. v. Porter County Commissioners*, 913 N.E.2d 1245 (Ind.App.Ct., 9/29/09) (Baker)

Appellant-plaintiff Liberty Landowners Association, Inc. (Liberty Landowners) appeals the trial court's order dismissing its complaint for declaratory judgment that it filed against the appellees-defendants Porter County Commissioners (Commissioners) regarding the decision to rezone certain real property in Porter county, which permitted Appellee-intervenor Northwest Indiana Health Systems, LLC (Northwest Health) to construct a hospital on the property. Specifically, Liberty Landowners argues that the trial court erred in concluding that it lacked standing to proceed with the action.

Liberty Landowners is a voluntary not-for-profit community association that owns no property and pays no taxes. The organization incorporated in Indiana in 1983 with the stated purpose of protecting and preserving property, including its natural and aesthetic values. Thereafter, Liberty Landowners filed a complaint for declaratory judgment against the Commissioners. The determination of whether a plaintiff's complaint should be dismissed for lack of standing is properly treated as a motion to dismiss under Indiana Trial Rule 12(B)(6)—the failure to state a claim upon which relief may be granted.

Although Liberty Landowners acknowledges that it did not have standing as a private individual, it contends that the doctrine of "public standing" permits it to proceed with its claims. Standing is a judicial doctrine that focuses on whether the complaining party is the proper party to invoke the trial court's jurisdiction. With regard to zoning cases, it is well settled that standing to challenge a rezoning ordinance requires a property right or some other personal right and a pecuniary injury not common to the community as a whole.

The "public standing doctrine" is an exception to the general requirement that a plaintiff must have an interest in the outcome of the litigation different from that of the general public. The public standing doctrine or the availability of taxpayer or citizen standing is limited to extreme circumstances and should be applied with "cautious restraint."

The public standing doctrine, which applies in cases where public rather than private rights are at issue and in cases which involve the enforcement of a public rather than a private right, continues to be a viable exception to the general standing requirement. However, persons availing themselves of the public standing doctrine nevertheless remain subject to various limitations. Even when public standing is asserted, claimants must still have some property right or some other personal right and a pecuniary interest. Liberty Landowners has no legal right—personal or pecuniary—that

has been put in jeopardy by the Commissioners' decision. In other words, Liberty Landowners has not alleged any direct harm and has not been denied any rights. As a result, Liberty Landowners's claims fail.

Lessons:

1. Lack of standing is raised by 12(b)(6) motion.
2. To assert the public standing doctrine, a plaintiff must have some property right or some other personal right and a pecuniary interest.

12. LLC fiduciary duties; the right to inspect company books; summary judgment and self-serving opinion affidavits: *Abdalla v. Qadorh-Zidan*, 913 N.E.2d 280 (Ind.App.Ct. 9/10/09) (Riley)

In 2003 and 2004, the Abdallas and Zidans formed six new companies to own, operate, and manage apartment properties. Each family owned a fifty percent interest in the LLCs. The Abdallas and Zidans were also the sole directors and shareholders of Q Realty Group, Inc. In June of 2005, the Abdallas filed a Complaint against the Zidans, alleging breach of fiduciary duty and usurpation of corporate opportunities. On August 4, 2006, pursuant to a confidential settlement agreement, the Zidans sold their membership interests in the LLCs and their shares in Q Realty to the Abdallas.

In the Fall of 2007, Raed Zidan received tax returns, including K-1 Schedules, for the companies for the year which ended August 4, 2006. On January 3, 2008, the Zidans filed a Complaint claiming breach of fiduciary duty, negligence, and seeking declaratory relief to inspect the books and records of the LLCs and Q Realty for the period the Zidans were members of the LLCs and shareholders of Q Realty for the purpose of verifying the accuracy of the K-1 Schedules. On February 25, 2008, the Abdallas filed a motion for summary judgment arguing that they did not owe the Zidans any duties in connection with their preparation of the tax data and that the Zidans are not entitled to inspect the companies' books. The parties' main argument focuses on whether a fiduciary duty exists between the companies and the former members of the LLCs and former shareholders of the corporation.

In Indiana, there is little case law regarding LLCs and hardly any case law concerning fiduciary duties in the LLC context. In light of this limitation, we decided in *Purcell v. Southern Hills Investments, LLC*, 847 N.E.2d 991, 997 (Ind.Ct.App.2006), that "common law fiduciary duties, similar to the ones imposed on partnerships and closely-held corporations, are applicable to Indiana LLCs." Shareholders in a closely-held corporation, such as Q Realty, owe each other fiduciary duties. In such a corporation, "[t]he fiduciary must deal fairly, honestly, and openly with his corporation and fellow stockholders. He must not be distracted from the performance of his official duties by personal interests."

We find that the Abdallas owed a fiduciary claim to the Zidans regarding the preparation of tax returns for the period during which the Zidans were members of the LLCs and shareholders of Q Realty. Although the tax returns were compiled after the Zidans separated from the companies, these returns are nevertheless based on transactions that occurred before the termination of the parties' fiduciary relationship. Thus, as the tax incurring actions took place during the existence of the fiduciary relationship, a fiduciary duty is owed regardless as to when the tax returns were actually completed. To hold otherwise would give the Abdallas the freedom to allocate tax burdens to the Zidans and retain tax benefits for themselves without allowing the Zidans any recourse to verify or rectify this allocation.

Regarding the inspection of records claim, the Abdallas contend there is no genuine issue of material fact that the Zidans are prohibited access to the companies' books as they no longer are members or shareholders. The Zidans, however, limited their request to inspect the books to certain, specified records and to the tax year 2006-when the Zidans were still members of the LLCs and shareholders in the corporation. Their specific goal was to ensure the correctness of the K-1 Schedules. Although the Zidans' request might inconvenience the Abdallas, this inspection is to the greater benefit of the companies and all parties. Accordingly, we conclude that the Zidans should be allowed limited access to the records, as this request covers a time while the Zidans had an interest in the companies.

Lastly, the Abdallas argue that the trial court erred by not granting them summary judgment with respect to the Zidans' negligence claim. Specifically, they asserted in their motion that the Zidans' claim sounds in ordinary negligence while corporate directors and members can only be held liable in case of willful misconduct or gross negligence. In support of their claim, the Abdallas designated Mike Abdalla's affidavit, asserting that it established that the record did not support a finding of willful misconduct or gross negligence.

The party moving for summary judgment bears the initial burden of making a prima facie showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Here, in support of its claim for summary judgment that there is no genuine issue of material fact that the Abdallas did not commit willful misconduct or gross negligence, they only designated Mike Abdalla's affidavit. It is well-established that "[a] self-serving opinion is insufficient to meet the burden in a summary judgment proceeding." As the Abdallas failed to designate any other evidence, their claim necessarily fails.

Lessons:

1. LLCs owe some fiduciary duties to former members.
2. A former member of an LLC has a right to inspect company books for years in which he was a member.
3. An affidavit expressing self-serving opinions will not satisfy a movant's burden to make a prima facie showing for summary judgment.

13. Piercing corporate veil; treble damages for deception: *Longhi v. Mazzoni*, 2009 WL 3231456 (Ind.Ct.App. 10/8/09) (Brown)

Thomas Longhi argues that the evidence does not support the trial court's finding that Schema Inc. was undercapitalized for purposes of the trial court's decision to pierce the corporate veil. "Inadequate capitalization" means capitalization very small in relation to the nature of the business of the corporation and the risks attendant to such businesses. The adequacy of capital is measured by evaluating the amount of capital the company had at the time of its formation, unless the company at some point substantially expands the size or nature of its business with an attendant increase in business hazards. The record reveals that Schema Inc. had raised "somewhere in the range of \$150,000 to \$300,000" in initial capital for the Project. According to Longhi, Schema needed to raise "around \$400,000" in capital in order to finance a real estate development project the size of the Project.

Based upon the fact that Schema did not have the amount of capital needed to finance the Project based upon its lender's capital requirements and the in-depth market analysis that it had performed at the time of Schema Inc.'s formation or the Project's initiation, and the fact that Longhi repeatedly testified that the Mazzonis' \$50,000 payment to Schema Inc. constituted an

investment in the Project, we cannot say that the trial court's conclusion that the evidence showed that Schema and the Project were undercapitalized at the time Schema Inc. was formed was clearly erroneous.

Longhi argues that the evidence does not support the trial court's determination that he used Schema to promote fraud. The record reveals that Longhi testified that he was indeed raising investment capital from the Mazzonis. Specifically, Longhi testified that what he “presented to the Mazzonis was ... for an investment in the project of \$50,000.” Indeed, the evidence reveals that the Mazzonis' earnest money payment was deposited into Schema Inc.'s account and used to finance development of the Project. The record also reveals that the Mazzonis did not believe they were investing in Schema or the Project, but believed they were making an earnest money deposit on a house. The record reveals that Louis testified that he and Longhi never discussed investing in the Project or investing in Schema Inc., DRPDC, or Schema LLC. Louis testified he “was not an investor,” that he was “buying a home,” and that the \$50,000 payment “was a down payment, not an investment.” Based upon this evidence, we cannot say that the trial court's findings or conclusion regarding Longhi's use of Schema to promote fraud were clearly erroneous.

Ind.Code § 34-24-3-1 provides:

“If a person suffers a pecuniary loss as a result of a violation of IC 35-43, IC 35-42-3-3, IC 35-42-3-4, or IC 35-45-9, the person may bring a civil action against the person who caused the loss for the following:

(1) An amount not to exceed three (3) times the actual damages of the person suffering the loss....”

Ind.Code § 35-43-5-3(a) provides:

“A person who:

(2) knowingly or intentionally makes a false or misleading written statement with intent to obtain property; [or]

(3) misapplies entrusted property, property of a governmental entity, or property of a credit institution in a manner that the person knows involves substantial risk of loss or detriment to either the owner of the property or to a person for whose benefit the property was entrusted;

commits deception, a Class A misdemeanor.

Given the evidence and findings above, we conclude that there was sufficient evidence to support the trial court's conclusion that Longhi either “knowingly or intentionally ma[de] a false or misleading written statement” to obtain the Mazzonis' \$50,000 payment under subsection (2) of Ind.Code § 35-43-5-3(a) or “misapplie[d] entrusted property” in a manner that he knew “involve[d] substantial risk of loss” under subsection (3) of Ind.Code § 35-43-5-3(a). Therefore the trial court's judgment awarding the Mazzonis treble damages under Ind.Code § 34-24-3-1 was not clearly erroneous.

Longhi testified that his share interest in Schema Inc. and his membership interest in Schema LLC was “[a] little over one percent.” Courts have pierced a corporate veil to find an individual liable even where the individual was not a shareholder/member of a corporation/company. See *Fairfield Dev., Inc.*, 768 N.E.2d at 473 (imposing liability on an individual who was not a shareholder of a corporation on the basis that the individual's personal conduct promoted injustice where the individual was the principal figure in the corporation's

dealings with the appellee party and was intimately involved in the corporation's construction project).

Lessons:

1. Undercapitalization is measured at the time of formation or expansion.
2. Treble damages are available for fraud by use of a false or misleading written statement.
3. The corporate veil may be pierced to hold small shareholders and even non-shareholders liable.

14. Infomercials; contempt; sanctions: *Federal Trade Commission v. Trudeau*, 2009 WL 2615822 (7th Cir. 8/27/09) (Tinder)

If you have a problem, chances are Kevin Trudeau has an answer. For over a decade, Trudeau has promoted countless “cures” for a host of human woes that he claims the government and corporations have kept hidden from the American public. Cancer, AIDS, severe pain, hair loss, slow reading, poor memory, debt, obesity—you name it, Trudeau has a “cure” for it. To get his messages out, Trudeau has become a marketing machine. And the infomercial is his medium of choice. He has appeared in dozens of them, usually in the form of a staged, scripted interview where Trudeau raves about the astounding benefits of the miracle product he's pitching. But Trudeau's tactics have long drawn the ire of the Federal Trade Commission (“FTC”). By promoting his cures, Trudeau claims he is merely exposing corporate and government conspiracies to keep Americans fat and unhealthy. But the FTC accuses Trudeau of being nothing more than a huckster who preys on unwitting consumers—a 21st-century snake-oil salesman. For years Trudeau has dueled with the FTC in and out of court.

Trudeau's latest run-in concerns his cure for weight loss, which he explains in his book, *The Weight Loss Cure “They” Don't Want You to Know About*. By the time Trudeau began promoting the book, courts had sharply curbed his marketing activities. A consent decree banned Trudeau from appearing in infomercials for any products, except for books, provided that he did not “misrepresent the content of the book.”

That proviso forms the basis for this latest lawsuit. The FTC claimed that Trudeau's *Weight Loss Cure* infomercial misled consumers by describing a weight loss program that was “easy,” “simple,” and able to be completed at home, when in fact it was anything but. The program requires a diet of only 500 calories per day, injections of a prescription hormone not approved for weight loss, and dozens of dietary and lifestyle restrictions. The district court sided with the FTC, concluded that Trudeau had misrepresented his book, and held Trudeau in contempt. As sanctions, the court ordered Trudeau to pay \$37.6 million and banned Trudeau from appearing in any infomercials, even for books, for the next three years.

To succeed on a contempt petition, the FTC must “demonstrate by clear and convincing evidence that the respondent has violated the express and unequivocal command of a court order.” At the heart of this case is the court's command in its 2004 Consent Order that “the infomercial for any such book ... must not misrepresent the content of the book.”

Trudeau, however, outright lied. In one infomercial, Trudeau claimed the protocol was “not a diet, not an exercise program, not portion control, not calorie counting, ... no crazy potions, powder or pills....” None of that is true. Dieters “MUST” eat only 100% organic food, walk an hour a day, eat six meals per day, eat only 500 calories per day for up to 45 days, drink organic raw apple vinegar cider, and take probiotics, krill oil, Vitamin E, digestive enzymes, and Acetyl-

L Carnitine. Consequently, we conclude Trudeau violated the 2004 Consent Order by misrepresenting the content of his book.

Contempt sanctions come in two forms—criminal and civil. The differences between criminal and civil contempt sanctions are not always easy to discern. In terms of monetary sanctions, civil sanctions fall in two categories. They can *compensate* the complainant for his losses caused by the contemptuous conduct. Or they can *coerce* the contemnor's compliance with a court order. As the order stands now, Trudeau has no opportunity to purge any of the \$37.6 million judgment by representing his books truthfully from here on out. Without a purge provision, the order is not coercive.

So for the sanction to stand, it must “compensate the complainant for losses sustained.” The court's order gives little indication of how the court arrived at the award it did. Perhaps more importantly, we're left clueless as to how or why the award ballooned from around \$5 million in the original order to over \$37 million. Though we can guess where the \$37,616,161 figure comes from (that's the amount the FTC in its original remedies brief argued was attributable to book sales of 1.6 million from infomercials less returned books), the order contains hardly any findings to substantiate it. In other words, the district court failed to sufficiently “calibrate the fines to damages caused by [Trudeau's] contumacious activities.”

Consumer loss is a common measure for civil sanctions in contempt proceedings and direct FTC actions. Indeed, some courts, including ours, have held that in certain cases consumer loss is a more appropriate measure than ill-gotten gains. Nonetheless, we have held, in both contempt proceedings and direct FTC actions, that the defendant's profits can be a proper measure for sanctions.

Finally, Trudeau challenges the district court's three-year ban on Trudeau appearing in infomercials for any product, including books and other publications. He assails the infomercial ban on two grounds, but we need only address the first. We agree with Trudeau that the court erred in imposing the ban as a sanction for civil contempt because it fails to give Trudeau an opportunity to purge. The ban runs for three years regardless of Trudeau's compliance with the underlying order not to misrepresent his books.

Lesson: Permissible sanctions for civil contempt must be either:

- (1) compensatory to the victim, or
- (2) coercive with an opportunity to purge.

15. FRCP Changes on the Horizon (Effective December 1, 2009)

Rule 56 has been amended to reflect a new process for filing a motion for summary judgment. Under the new rule, any party may move for summary judgment at any time until 30 days after the close of discovery. The party defending against summary judgment in turn has 21 days to file a responsive brief. A reply by the moving party is due 14 days after the response is served.

New Rule 6 defines that the “last day” ends, for electronic filing, at midnight in the court's time zone.

ADVOCACY TIP OF THE MONTH: Don't overuse acronyms.

David Sills, presiding justice of California's Fourth District Court of Appeals, writes in *National Paint & Coatings Association Inc. v. South Coast Air Quality Management District*, G040122 (9/29/09):

It is possible to write an opinion in the area of air pollution control law without descending into an alphabet soup of jargon-based acronyms familiar only to practitioners who live and, er, breathe this area of the law. This point is of some substantive importance because the use of acronyms tends to obscure, certainly in the reader's mind and sometimes even in the writer's, the underlying reality of a case, and the legal issues on which it must turn.

For example, the case before us essentially revolves around two words widely used in federal and state air pollution control statutes, "available," and "achievable." But when the words are incorporated into the widely used acronyms "BACT" -- for "best available control technology" or "BARCT" -- for "best available retrofit control technology" -- their full significance is obscured. "BACT" and "BARCT" take on a life of their own, severed from the actual statutory language.

Besides which, the literature in this area tends to be more difficult to read (at least for a non-specialist) because of the heavy use of acronyms. Consider, for example, this sentence, committed on page 32 of the appellant's opening brief: "In June 22, 2000, CARB adopted an SCM for AIM coatings." Huh? Even if one can figure out that "CARB" means "California Air Resources Board" and "AIM" means "architectural and industrial maintenance coatings," one scurries around the brief looking for the first use of "SCM," which, one finds from a passage about 11 pages before, means "suggested control measure." (Well, the use of acronyms is at least one way to force judges to re-read passages from the brief.)

It is all needlessly confusing. (See Scalia & Garner, *Making Your Case: The Art of Persuading Judges* (Thomson West 2008) p. 120 ["Acronyms are mainly for the convenience of the writer or speaker. Don't burden your reader or listener with many of them, especially unfamiliar ones."].) We will therefore, in this opinion, in order to maintain a modicum of readability and register our small protest against the further uglification of the English language, avoid the further use of acronyms in this opinion.

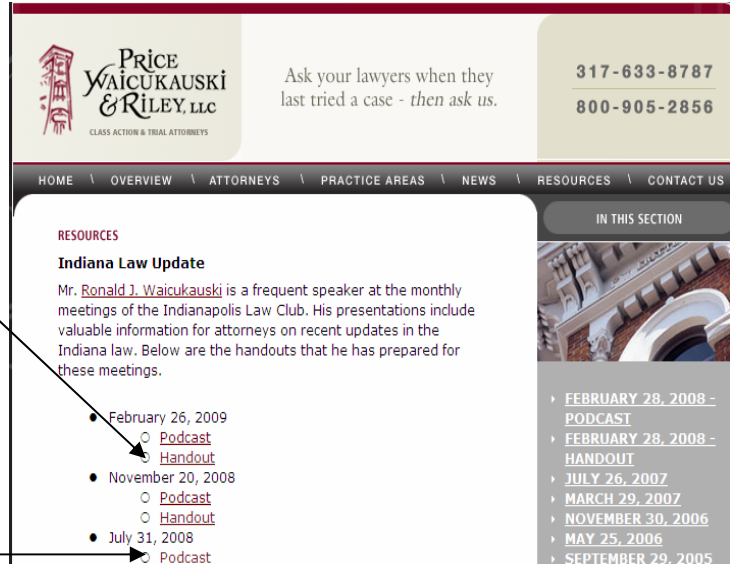
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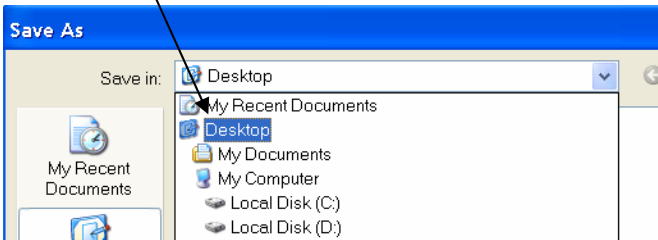
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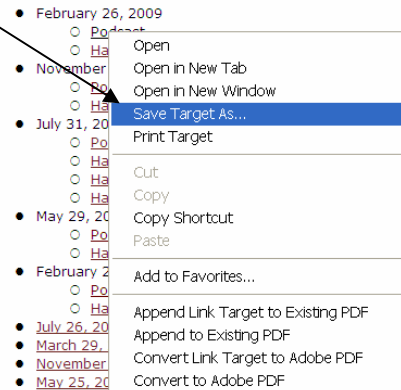
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