RECENT DEVELOPMENTS IN INDIANA BUSINESS AND CONTRACT LAW

MICHAEL A. DORELLI*
PHILLIP T. SCALETTA**

During the survey period,[1] Indiana courts rendered a number of significant decisions affecting businesses, as well as their owners, officers, directors, and shareholders. These developments of interest to business litigators and corporate transactional lawyers, as well as business owners and in-house counsel, are discussed herein.

I. "PRE-EXISTING" DERIVATIVE CLAIMS

In *Long v. Biomet, Inc.*,[2] the court held that former shareholders of a corporation that merged with a second company lacked standing to continue their "pre-existing" or pre-merger derivative actions against former officers and directors of the "acquired" company, because they no longer owned shares in the company.[3] In doing so, the court of appeals engaged in a discussion of three significant Indiana Supreme Court decisions—*Gabhart*,[4] *Fleming*,[5] and *Galligan*[6]—applying those decisions to the issue of a former shareholder's standing to pursue a "pre-existing" derivative action.

The plaintiffs were shareholders of Biomet, Inc., an Indiana corporation and publicly traded company.[7] They "filed two substantively identical shareholder-derivative complaints" against Biomet officers and directors, alleging breaches of fiduciary duties relating to improper stock option backdating.[8] Biomet subsequently announced that it was merging—through a stock sale—to a consortium of private-equity investors.[9] A special committee of Biomet's board of directors ultimately concluded that pursuit of the derivative litigation was not in the company's best interests, and a tender off was completed under which

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* Partner, Hoover Hull LLP, Indianapolis, Indiana. B.S., 1994, Indiana University—Bloomington; J.D., 1998, *magna cum laude*, Indiana University School of Law—Indianapolis. The views expressed herein are solely those of the authors.

** Associate, Hoover Hull LLP, Indianapolis, Indiana. B.S., 2002, Purdue University—West Lafayette; J.D., 2008, *magna cum laude*, Indiana University Maurer School of Law—Bloomington.

1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period—i.e., from October 1, 2008, through September 30, 2009.
2. 901 N.E.2d 37 (Ind. Ct. App. 2009).
3. *Id.* at 43-44.
4. Gabhart v. Gabhart, 370 N.E.2d 345 (Ind. 1977).
5. Fleming v. Int'l Pizza Supply Corp., 676 N.E.2d 1051 (Ind. 1997).
6. Galligan v. Galligan, 741 N.E.2d 1217 (Ind. 2001).
7. *Long*, 901 N.E.2d at 38.
8. *Id.* at 39.
9. *Id.*

more than eighty percent of Biomet's shareholders were cashed out.[10] Biomet was merged with a corporate entity affiliated with the private-equity investors and the remaining Biomet public shareholders, including the plaintiffs, received a cash payment for their Biomet stock.[11]

The defendant officers and directors moved to dismiss the plaintiffs' claims, arguing that as a result of the sale, the plaintiffs no longer held any stock in the company and, as such, lacked standing to maintain the derivative lawsuit.[12] In response, the plaintiffs argued "that derivative claims brought before a merger could continue after the merger is consummated."[13] According to the plaintiffs, their remedy was not limited to the appraisal procedure found in the dissenters' rights statute, because they were not challenging the merger itself or whether they received "a fair price in light of Biomet's condition at the time of the merger."[14] The trial court agreed with the defendants and dismissed the plaintiffs' claims on standing grounds.[15]

On appeal, the court in *Biomet* first distinguished the Indiana Supreme Court's decision in *Gabhart v. Gabhart*,[16] which "'h[e]ld that a proposed merger which ha[d] no valid purpose' could be challenged 'by procedures other than those provided by statute for that purpose.'"[17] The court in *Biomet* quoted *Gabhart* as follows:

> [B]eing a shareholder of the corporation whose cause of action is to be enforced in a derivative suit is a prerequisite for standing to sue. . . . [W]hen a corporation is merged out of existence, . . . its assets and liabilities are transferred to the surviving corporation by operation of law, . . . and the shareholders' interests in the merged corporation come[] to an end. . . . Thus, any cause of action "passes to the surviving corporation along with the other assets of the merged corporation."[18]

The court in *Biomet* distinguished *Gabhart* in that the plaintiffs in the present case were not claiming that the Biomet sale was devoid of any "legitimate corporate purpose," nor did they allege that the purchasers had "participated in" the alleged wrongdoing.[19]

The court in *Biomet* then analyzed the Indiana Supreme Court's decision in *Fleming v. International Pizza Supply Corp.*,[20] which held: "[I]n a merger or asset sale, the exclusive remedy for the value of the shareholder's shares is the

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10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* (internal quotations omitted).
14. *Id.* at 41 (internal quotations omitted) (citing IND. CODE § 23-1-44-8(a)-(c) (Supp. 2009)).
15. *Id.* at 40.
16. 370 N.E.2d 345 (Ind. 1977).
17. *Long*, 901 N.E.2d at 40 (citing *Gabhart*, 370 N.E.2d at 356).
18. *Id.* (quoting *Gabhart*, 370 N.E.2d at 357).
19. *Id.* at 41 (quoting *Gabhart*, 370 N.E.2d at 357).
20. 676 N.E.2d 1051 (Ind. 1997).

statutory appraisal procedure [which remedy included] the ability of dissenting shareholders to litigate their breach of fiduciary duty or fraud claims *within the appraisal proceeding*."[21] The plaintiffs in *Biomet* argued for their continued standing in reliance, in part, on a footnote in *Fleming*, which provided "that the [Business Corporation Law] did not intend to restrict any claims of wrongdoing that a corporation or shareholder brings before the corporate action creating dissenters' rights occurs."[22] The court of appeals in *Biomet* disagreed, explaining that the plaintiffs' argument disregards the "subsequent statement [in *Fleming*] regarding resolution of a claim to recover money from a wrongdoing officer that 'is not yet resolved at the time the fair value of the dissenters' shares is established' in the dissenters' rights proceeding.'"[23]

Finally, the plaintiffs argued that they had standing to pursue their "pre-existing" derivative claim based on the Indiana Supreme Court's decision in *Galligan v. Galligan*,[24] which ruled that "'dissenters' rights are the exclusive remedy afforded for actions or omissions in a merger or asset sale, but failure to afford the dissenters' rights remedy is an independent wrong that is not itself subject to the dissenters' rights provision.'"[25] The court in *Biomet* again disagreed, explaining that "[h]ere, [p]laintiffs do not claim that [the officer and director defendants] breached a dissenters' rights statutory duty, as in *Galligan*."[26] The court also reasoned that "to find that *Galligan*'s reference to an 'independent wrong that is not itself subject to the dissenters' rights statute' created an exception so as to permit proceeding other than within the statutory framework would eviscerate the statute's expressed intent and the holding of [*Fleming*]."[27]

In summary, the court in *Biomet* ruled that plaintiffs with "pre-existing" derivative claims for breach of fiduciary duty—i.e., claims that pre-date a merger or other transactional disposition of their shares—do not retain standing to pursue their derivative claims following the merger or other transaction.[28] Rather, unless, as in *Galligan*, the plaintiffs are specifically denied their statutory dissenters' rights, their exclusive remedy lies with statutory appraisal:

> [D]espite [p]laintiffs' repeated and heated contention that they are not challenging the asset sale or claiming that their shares of stock were worth more than . . . they received at the time of the sale, they undeniably seek additional compensation for those shares, and our Supreme Court has clearly held that a claim as to the value of

21. *Long*, 901 N.E.2d at 42 (quoting *Fleming*, 676 N.E.2d at 1056, 1057 (emphasis added by *Biomet* court)).

22. *Id.* (quoting *Fleming*, 676 N.E.2d at 1057 n.9).

23. *Id.* at 43 (quoting *Fleming*, 676 N.E.2d at 1057 n.9).

24. 741 N.E.2d 1217 (Ind. 2001).

25. *Long*, 901 N.E.2d at 43 (quoting *Galligan*, 741 N.E.2d at 1225-26).

26. *Id.*

27. *Id.*

28. *Id.*

> shareholders' shares in an asset sale is a matter to be determined in the context of the appraisal process.[29]

The court of appeals affirmed the trial court's dismissal of the plaintiffs' derivative claims on standing grounds.[30]

II. CORPORATE, SHAREHOLDER, AND MEMBER LIABILITY

A. Liability of a Successor Corporation

In *Cooper Industries, LLC v. City of South Bend*,[31] the Indiana Supreme Court held that the defendant corporation was a corporate successor, potentially liable for its predecessor's environmental contamination in an environmental legal action (ELA), under either the "de facto merger" or "mere continuation" doctrines.[32] In *Cooper Industries*, the trial court entered summary judgment, on statute of limitations grounds, against the City of South Bend on the City's common law claims against Cooper alleging environmental damages.[33] But the trial court ruled that the City's ELA claim could not have accrued until the legislature enacted the statute in 1998 and, as such, it was timely.[34] Both parties moved for summary judgment on whether Cooper was the corporate liability successor of Studebaker Corp., which operated a manufacturing facility on the property when the environmental damage allegedly occurred.[35] The trial court granted the City's summary judgment motion on the issue of successorship.[36] Cooper appealed.[37]

The court in *Cooper Industries* recognized that "[u]nder Indiana law, where a corporation purchases the assets of another, the buyer does not assume the liabilities of the seller."[38] But the court concluded that the trial court properly granted summary judgment on Cooper's successor liability under the "de facto merger" or "mere continuation" doctrines.[39]

Applying Indiana law,[40] the court explained that "[c]ourts sometimes treat

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29. *Id.* (citing *Fleming*, 676 N.E.2d at 1057).
30. *Id.* at 44.
31. 899 N.E.2d 1274 (Ind. 2009).
32. *Id.* at 1291.
33. *Id.* at 1278.
34. *Id.* at 1278-79.
35. *Id.* at 1278.
36. *Id.*
37. *Id.* at 1279.
38. *Id.* at 1287 (citing Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228 (Ind. 1994)).
39. *Id.* at 1288.
40. *Id.* at 1290-91. The court in *Cooper Industries* described its rationale for choosing Indiana law over Delaware law, where Cooper was incorporated, as follows:

> The fact the successor corporation was incorporated in Delaware does not control. While the law of the state of incorporation may determine issues relating to the internal affairs of a corporation, different principles apply where the rights of third parties

asset transfers as de facto mergers where the economic effect of the transaction makes it a merger in all but name."[41] In determining whether a de facto merger has occurred, "[s]ome pertinent findings might include continuity of the predecessor corporation's business enterprise as to management, location, and business lines; prompt liquidation of the seller corporation; and assumption of the debts of the seller necessary to the ongoing operation of the business."[42]

In the present case, Studebaker and Worthington Corporation combined to form Studebaker-Worthington (S-W), after which both predecessors ceased to exist.[43] S-W expressly assumed Studebaker's liabilities, and both proxy statements and annual reports to shareholders showed that Studebaker's divisions, subsidiaries, and products became the divisions, subsidiaries, and products of S-W.[44] In 1979, McGraw-Edison Company ("McGraw") acquired all of S-W's shares.[45] In 2004, McGraw merged into Cooper.[46] The court held that, under these circumstances, the transaction at issue constituted a de facto merger.[47]

The court then evaluated Cooper's successor liability under the doctrine of "mere continuation," which "asks whether the predecessor corporation should be deemed simply to have re-incarnated itself."[48] A mere continuation analysis involves consideration of several factors, including "whether there is a continuation of shareholders, directors, and officers into the new entity."[49] In the present case, the stockholders, directors and officers of Studebaker and Worthington Corporation became the "respective players" in S-W.[50] After analyzing the transactions leading to S-W's ownership of "selected assets" of Studebaker, the court in *Cooper Industries* concluded that S-W was a "mere continuation of the earlier corporate forms."[51]

> external to the corporation are at issue.
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> . . .
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> This case is a claim about property damage. The injury occurred in Indiana. The law of the place of the wrong occurred (*lex loci delicti*) governs. In disputes such as this, particularly because it involves a third person, the law of the state with the most significant relationship to the dispute—here Indiana—applies.

Id. at 1290-91 (internal citations omitted).

41. *Id.* at 1288.
42. *Id.* (citations omitted).
43. *Id.* at 1289.
44. *Id.*
45. *Id.* at 1278.
46. *Id.*
47. *Id.* at 1290.
48. *Id.*
49. *Id.*
50. *Id.* (citations omitted).
51. *Id.* at 1290-91. The court in *Cooper Industries* also affirmed the trial court's ruling that the ELA claims could not have accrued until the statute was enacted and that, as such, the claims were not time-barred. *Id.* at 1286.

B. Personal Liability of LLC Member

In *Perkins v. Brown*,[52] the court of appeals held that an "outside accounting" of a limited liability company's (LLC) finances was required before the trial court could properly award damages in the company's dissolution matter, and that the trial court erred in imposing personal liability against one of the LLC's members in the absence of such an accounting.[53] In *Perkins*, disputes arose between the two members of an LLC regarding compensation, ownership, and communication issues.[54] This ultimately lead one member to file an action requesting a declaratory judgment as to the parties' respective ownership percentages, an equitable accounting of the company, and the dissolution of the company, followed by a distribution of the net remaining assets.[55]

At trial, the plaintiff-member "submitted evidence of what he believed to be an estimate of" the company's income, account receivables, and expenses, utilizing assumptions based on the company's "historical practice."[56] Ultimately, the trial court granted judgment in favor of the plaintiff and against both the company and the defendant-member, individually.[57] The defendant filed a motion to correct error, which the court denied. The defendant then appealed.[58]

On appeal, the defendant-member argued that no evidence was presented at trial supporting a veil-piercing analysis, or that he authorized unlawful distributions resulting in the company's insolvency—i.e., no evidence was presented supporting the imposition of personal liability against him.[59] The court agreed, explaining the statutory prerequisite to the imposition of personal liability on a member of an LLC as follows: "The Indiana Business Flexibility Act provides that a member of an LLC may be held personally liable to the LLC if the member 'votes for or assents to a distribution in violation of the operating agreement *or section 6 of this chapter*.'"[60] The court acknowledged that there was no evidence that the operating agreement governed the issue.[61] As such, the court turned to section 6, which provides essentially that "a member may authorize a distribution . . . as long as the distribution does not result in the LLC becoming insolvent."[62]

The court in *Perkins* found that the trial court erred when it determined the

52. 901 N.E.2d 63 (Ind. Ct. App. 2009).

53. *Id.* at 67.

54. *Id.* at 64-65.

55. *Id.*

56. *Id.* at 65.

57. *Id.*

58. *Id.*

59. *Id.* at 66.

60. *Id.* (quoting IND. CODE § 23-18-5-7(a) (1999) (emphasis added)).

61. *Id.*

62. *Id.* (citing IND. CODE § 23-18-5-6(a) (1999); Jackson v. Farmers State Bank, 481 N.E.2d 395, 403 n.7 (Ind. Ct. App. 1985)).

amount of damages "without ordering an outside accounting of the LLC's finances."[63] The court explained that

> [w]ithout any direct evidence regarding [the company's] finances or whether [the defendant-member] authorized any unlawful distributions . . . the trial court was unable to accurately determine if [the company] received all of the money that it was owed under its outstanding invoices, who the creditors of the LLC were, what [the company's] actual expenses were, and if [its] accounts receivables would have covered the expenses.[64]

According to the court of appeals, "[t]hese procedural steps were necessary to obtain an accurate, equitable accounting of [the company's] finances at the time of dissolution and to guarantee that each party is awarded its proper share of the assets."[65]

The court in *Perkins* reversed the trial court's orders and remanded the case "with instructions for the trial court to order and oversee an outside accounting of [the company's] finances in order to determine proper distribution to the LLC's creditors as well as to [the members]."[66] The court also ordered that after the accounting is completed, the trial court would "make an appropriate entry of damages due to each party, including any determination of personal liability … under the Indiana Business Flexibility Act."[67]

C. Corporate "Knowledge" of Sole Shareholder's Criminal Act

In *Cantrell v. Putnam County Sheriff's Department*,[68] the court held that a corporate officer and sole shareholder's knowledge of cocaine in a vehicle could be imputed to the corporation, supporting the State's forfeiture of the corporate-owned vehicle.[69] In November 2005, Cantrell, the president and sole shareholder of the defendant-corporation, went on a hunting trip, and drove a Cadillac Escalade owned by the corporation.[70] On his return from the trip, Cantrell was stopped by a police officer, who found six grams of cocaine in the Escalade.[71] Cantrell was convicted of possession of cocaine, and the State filed a complaint for forfeiture of the Escalade.[72] After a bench trial, forfeiture was granted, and the corporation appealed.[73]

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63. *Id.* at 67.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. 894 N.E.2d 1081 (Ind. Ct. App. 2008).
69. *Id.* at 1088.
70. *Id.* at 1083.
71. *Id.*
72. *Id.*
73. *Id.*

After rejecting the corporations argument that the trial court improperly "pierced the corporate veil" to reach the corporation's asset,[74] the court explained that the issue was whether "the Corporation 'knew or had reason to know that [the Escalade] was being used in the commission of [Cantrell's] offense.'"[75] According to the court:

> This raises the question: how can a corporation "know" or "have reason to know"? "A corporation cannot see or know anything except by the eyes or intelligence of its officer; and a corporate body, as a legal entity, cannot itself have knowledge." "If it can be said to have knowledge at all, that must be the imputed knowledge of some corporate agent."[76]

The court proceeded to describe the law regarding imputation of an agent's knowledge to a corporation:

> Indiana courts have held that, generally, the knowledge of an agent acquired while acting in the course of employment will be imputed to the corporation.
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> . . .
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> As an exception to the general rule, if an agent commits an independent fraud for his own benefit, or acts adverse to the interest of the principal, he ceases to act as an agent and his knowledge will not be imputed.
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> . . .
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> However, there is also an exception to the exception: where an adverse agent is also the sole representative of the principal in the transaction in question, the principal may once again be charged with the agent's knowledge.[77]

Concluding that the "exception to the exception" applied in this case, the court reasoned that "Cantrell, as sole shareholder and president of the Corporation, would directly benefit by a denial of the State's forfeiture request."[78] The court adopted the trial court's concern that if Cantrell's "logic is to be followed, then all people transporting drugs would just incorporate themselves for the avoidance of forfeiture actions."[79] Therefore, the court held "that, under these circumstances, Cantrell's knowledge of the cocaine should be

74. *Id.* at 1086 ("Here, the State was not attempting to pierce the corporate veil to recover from the shareholder, Cantrell. Rather, the state was attempting to seize the Corporation's vehicle as a result of Cantrell's actions.").

75. *Id.* (quoting IND. CODE § 34-24-1-4(a) (2008)).

76. *Id.* (internal citations omitted).

77. *Id.* at 1086-87 (internal citations omitted).

78. *Id.* at 1088.

79. *Id.* (internal quotations omitted).

imputed to the Corporation."[80]

III. Fiduciary Duties Owed to Former Shareholders and Members

In *Abdalla v. Qadorh-Zidan*,[81] the court held, as a matter of first impression, that a corporation and several LLCs owed fiduciary duties to their former shareholders and members regarding the preparation of tax returns for a period prior to the members' and shareholders' termination of their relationship.[82] Specifically, the corporation and LLCs prepared tax returns after the shareholders' and members' relationship terminated but for a pre-termination period.[83] The companies argued that applicable statutes, as well as language in their operating agreements and the settlement agreement (terminating the relationship), supported their position that the shareholders and members relinquished their rights as members and shareholders upon termination of the relationship.[84] The companies also relied on Seventh Circuit Court of Appeals authority, which provides that "'[a] partner is a fiduciary of his partners, but not of his former partners, for the withdrawal of a partner terminates the partnership as to him.'"[85]

The members and shareholders, on the other hand, argued that "while fiduciary duties generally terminate when a member of a LLC or a shareholder of a close corporation transfers his interest in the entity, fiduciary duties remain intact with respect to the resolution of pre-separation business."[86] The members and shareholders relied, in part, on a decision from the Ohio Court of Appeals, which provided that "'[t]ermination of the fiduciary relationship does not shield the fiduciary from its duties or obligations concerning transactions which have their inception before the termination of the relationship.'"[87]

The court in *Abdalla* stated the issue, which it recognized as one of first impression in Indiana, as follows: "[W]hether a company owes a continuing fiduciary duty to a former shareholder or member to fairly and accurately report the company's financial results to the IRS for a year in which the former shareholder held stock in the corporation or was a member of the LLC."[88]

The court agreed with the former shareholders and members, concluding that the corporation and LLCs "owed a fiduciary [duty] to [them] regarding the preparation of tax returns for the period during which [they] were members of the

80. *Id.*

81. 913 N.E.2d 280 (Ind. Ct. App. 2009), *trans. denied*, No. 49A04-0812-CV-707, 2010 Ind. LEXIS 60 (Jan. 14, 2010).

82. *Id.* at 286.

83. *Id.* at 284.

84. *Id.*

85. *Id.* at 285-86 (quoting Bane v. Ferguson, 890 F.2d 11, 13 (7th Cir. 1989)).

86. *Id.* at 284.

87. *Id.* at 286 (quoting Thompson v. Cent. Ohio Cellular, Inc., f.k.a., Cellwave Inc., 639 N.E.2d 462, 470 (Ohio Ct. App. 1994)).

88. *Id.* at 285.

LLCs and shareholders of [the corporation]."[89] The court explained that although the returns were prepared after termination of the relationship, they were "nevertheless based on transactions that occurred before the termination of the parties' fiduciary relationship."[90] To hold otherwise, the court explained, would give the companies "the freedom to allocate tax burdens to [the former shareholders and members] and retain tax benefits for themselves without allowing [the former shareholders and members] any recourse to verify or rectify this allocation."[91]

IV. PARTNERSHIPS

A. Existence and Scope of Partnership

In *Gates v. Houston*,[92] the Indiana Court of Appeals described the statutory and common law considerations for determining the existence and scope of a partnership. The court concluded that one of the partners individually owned certain properties—i.e., that the properties were not owned by the partnership, despite the partnership's (and the other partner's) involvement in the repair and maintenance of the properties and the "split[ting]" of rents as compensation for that involvement.[93] Specifically, the defendant-partner "purchased various properties, many from tax sales."[94] The properties were purchased in the partner's name, individually, or in the name of his company.[95] The partnership "did a great deal of the repair work on the properties, for which it was compensated."[96] Further, the plaintiff-partner "individually worked on the properties and collected rents."[97] The defendant paid the plaintiff "by dividing equally with him the profits from rents generated by the properties."[98] A dispute arose regarding the plaintiff's accounting of rent due, after which the plaintiff filed a complaint, requesting a declaratory judgment declaring him to be co-owner of the properties.[99] The trial court entered judgment in favor of the defendant, and the plaintiff appealed.[100]

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89. *Id.* at 286.

90. *Id.*

91. *Id.* The court also held that to verify information provided in the tax returns, the former shareholders and members had a right to inspect corporate records relating to the pre-termination period. *Id.* at 287-88.

92. 897 N.E.2d 532 (Ind. Ct. App. 2008).

93. *Id.* at 535-37.

94. *Id.* at 534. "The parties dispute[d] the source of the funds used to purchase these properties." *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

The court of appeals first looked to Indiana Code section 23-4-1-6, which defines a partnership as "an association of two (2) or more persons to carry on as co-owners a business for profit."[101] Further, "Indiana Code section 23-4-1-7 (2006) lists rules for determining whether a partnership exists, including" the following:

> The receipt by a person of a share of the profits of a business is prima facie evidence that the person is a partner in the business, but no such inference shall be drawn if such profits were received in payment for the following: . . . (b) *As wages of an employee or rent to a landlord*.[102]

"To form a partnership, parties must join together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits."[103] Further, the relationship must include: "(1) [A] voluntary contract of association for the purpose of sharing profits and losses, which may arise from the use of capital, labor, or skill in a common enterprise; and (2) an intention on the part of the parties to form a partnership."[104]

The court in *Gates* held that the defendant-partner individually owned the properties.[105] The court reasoned that the defendant (according to his trial testimony) "acquired the properties of his own accord, with his own funds and credit, and that [the plaintiff] was not a party to [the] purchases or liable for their debt."[106] Further, the court considered that the defendant contributed money and credit to the partnership during the time that the partnership expended its own resources on the properties, which the court "presum[ed]" was as payment for the partnership's work on the properties.[107] Regarding the sharing of profits through the division of rent generated by the properties, the court found that such sharing "was in payment for [the plaintiff's] work in overseeing the properties and collecting the rents."[108] Finally, the court concluded that the plaintiff's contribution of labor and other work toward the properties did not constitute a "forfeiture," again, because the plaintiff (and the partnership) received "compensation" from the defendant for such work.[109]

B. Fraudulent Solicitation of Partnership "Investment"

In *Ruse v. Bleeke*,[110] the court of appeals affirmed the trial court's findings

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101. *Id.* at 535 (quoting IND. CODE § 23-4-1-6 (1999)).
102. *Id.* (quoting IND. CODE § 23-4-1-7 (1999)) (emphasis in original).
103. *Id.* (citing Copenhaver v. Lister, 852 N.E.2d 50, 58 (Ind. Ct. App. 2006)).
104. *Id.*
105. *Id.* at 536.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. 914 N.E.2d 1 (Ind. Ct. App. 2009).

that a partner committed conversion, theft by deception, fraud and breach of fiduciary duty in connection with the solicitation of the other partner's initial "investment" and subsequent contribution of capital, awarding damages under Indiana's Crime Victim's Relief Act, among other theories.[111] The defendant, Ruse, owned a bar called Pepperchinis, and had inquired about purchasing "Roaring Lion," an energy drink, to be sold at the bar.[112] Ruse informed the plaintiff, Bleeke, that he was considering becoming an Indiana distributor of Roaring Lion and asked whether Bleeke would be interested in becoming a sales representative.[113] After Bleeke indicated he was interested in a percentage of the distribution business, Ruse represented to Bleeke that he had paid $50,000 for the exclusive distribution rights, and that he would sell a fifty percent interest to Bleeke for $25,000.[114] Ruse and Bleeke also agreed to each contribute an additional $6000 to the partnership.[115] In reliance on Ruse's representations, Bleeke paid Ruse $31,000.[116] Subsequently, Bleeke discovered that Ruse had paid only $7150 for exclusive rights, accounts and product, and he contributed only $200—not $6000—to the partnership's account.[117] Bleeke also discovered various instances of Ruse's unauthorized use of partnership funds.[118] After the parties decided to "wind up" the partnership and Ruse negotiated a purchase of his interest by a third party, Bleeke filed suit against Ruse, alleging claims under the Crime Victim's Relief Act, fraud, and breach of fiduciary duty.[119] The trial court entered judgment for Bleeke, and Ruse appealed.[120]

The court of appeals explained that to prove theft by deception or conversion of partnership assets, Bleeke was required to prove "that Ruse exerted unauthorized control over his property."[121] A person exerts "unauthorized" control over property of another if control "is exerted without the other person's consent or by creating or confirming a false impression in the other person."[122] Further, "to prove theft by creating a false impression, Bleeke was required to establish that he relied upon the false impression."[123] Reliance need not be "reasonable."[124] "'The test is whether the representation deceived the person to whom made, not whether it would have deceived a person of ordinary

111. *Id.* at 9-10 (quoting and discussing IND. CODE §§ 34-24-3-1 (2008) and IND. CODE § 35-43-4-3 (2008)).

112. *Id.* at 5.

113. *Id.*

114. *Id.*

115. *Id.* at 6.

116. *Id.*

117. *Id.* at 6-7.

118. *Id.*

119. *Id.* at 7.

120. *Id.*

121. *Id.* at 8 (citing IND. CODE § 35-43-4-3 (2008)).

122. *Id.* (citing IND. CODE § 35-43-4-1(1) and (4) (2009)).

123. *Id.* at 9 (citing Dunnuck v. State, 644 N.E.2d 1275, 1278 (Ind. Ct. App. 1994)).

124. *Id.* (citing Snelling v. State, 326 N.E.2d 606, 609 (Ind. Ct. App. 1975)).

prudence.'"[125] Finally, the court noted that "representations creating the false impression must be of a past or existing fact."[126]

Ruse argued on appeal that Bleeke was estopped from claiming statutory damages under the Crime Victims' Act, because he "failed to perform any due diligence or inquire into the true status of the business into which he was buying."[127] The court disagreed, explaining that "'it is no defense [under the Indiana Crime Victims' Act] that the victim should have known better.'"[128]

Ruse also argued that the trial court's entry of judgment for common law fraud and breach of fiduciary duty, in the amount of the full $31,000 paid by Bleeke, was erroneous, because his representation that he would contribute $6000 for working capital was "at best . . . a misrepresentation of future conduct."[129] The court stated "[a]ctual fraud may not be based upon representations of future conduct, broken promises, or representations of existing intent that are not executed."[130] But the court of appeals, deferring to the trial court, disagreed, explaining that Ruse's misrepresentation regarding the amount of his initial investment was "enough . . . to support the trial court's legal conclusion that Ruse committed fraud."[131] The court concluded, then, that Bleeke's payment of $31,000 to Ruse was made in reliance on that misrepresentation.[132]

Finally, the court addressed the breach of fiduciary duty claim, explaining the fiduciary relationship among partners as follows:

> Partners owe a fiduciary duty to one another that continues until final termination of the business of the partnership. The fiduciary relationship between partners requires each partner to exercise good faith and fair dealing in partnership transactions and toward co-partners. The fiduciary relationship between partners prohibits a partner from taking any personal advantage touching the business aspects or property rights of the partnership.[133]

The court of appeals affirmed the trial court's conclusion that Ruse breached the fiduciary duties owed to his partner, Bleeke, by failing to make his $6000 contribution for working capital, and by using "the partnership checking account for his own purposes."[134]

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125. *Id.* (quoting Harwei, Inc. v. State, 459 N.E.2d 52, 57 n.7 (Ind. Ct. App. 1984)).

126. *Id.* (citing *Dunnuck*, 644 N.E.2d at 1278).

127. *Id.*

128. *Id.* (quoting *Harwei*, 459 N.E.2d at 57 n.7).

129. *Id.* at 10.

130. *Id.* (citing Bilimoria Computer Sys., LLC v. Am. Online, Inc., 829 N.E.2d 150, 155 (Ind. Ct. App. 2005)).

131. *Id.* at 11.

132. *Id.*

133. *Id.* (internal citations omitted).

134. *Id.*

V. JOINT VENTURES

In *DLZ Indiana, LLC v. Greene County*,[135] the court of appeals analyzed the standards for determining whether a "joint venture" exists, focusing on the "sharing of profits" and "mutual control" factors, and concluded that no joint venture was created in this particular case.[136] In 2001, the County entered into a contract "with [United Consulting Engineers, Inc. ("United")] and DLZ to design the expansion and renovation of the Greene County Courthouse."[137] The contract provided that United and DLZ would work "jointly and in collaboration."[138] DLZ and United also entered into a subcontract, which provided that DLZ was an independent contract and United would pay an hourly rate.[139] Before work was completed, the County filed suit against DLZ and United for breach of contract, breach of warranty, and negligence.[140] The complaint was later amended, alleging that DLZ and United are jointly liable "as a Joint Venture."[141] The trial court granted partial summary judgment in favor of the County on the joint venture issue, and DLZ appealed.[142]

The court outlined the law applying to the existence of a "joint venture" as follows:

> A joint venture has been defined as an association of two or more persons formed to carry out a single business enterprise for profit. . . . For a joint venture to exist, the parties must be bound by an express or implied contract providing for (1) a community of interests, and (2) *joint or mutual control, that is, an equal right to direct and govern the undertaking, that binds the parties to such an agreement*. . . . A joint venture is similar to a partnership except that a joint venture contemplates only a single transaction. . . . *A joint venture agreement must also provide for the sharing of profits*.[143]

The court also described the "contractual" nature of a joint venture:

> A joint venture will arise only from an express or implied contract. . . . That relationship might be expressly defined in a contract or it might be implied from the conduct of the parties, but a joint venture will not arise by operation of law. . . . Nor, notably, does merely calling a relationship a "joint venture" mean that a joint venture exists.[144]

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135. 902 N.E.2d 323 (Ind. Ct. App. 2009).

136. *Id.* at 331-32.

137. *Id.* at 325.

138. *Id.*

139. *Id.* at 326.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 328 (quoting Walker v. Martin, 887 N.E.2d 125, 138 (Ind. Ct. App. 2008) (internal citations omitted)).

144. *Id.* (internal citations omitted).

On the issue of "mutual control," the court found that the contract documents did not support a finding that a joint venture existed.[145] Specifically, the subcontract between DLZ and United designated United as "the principal" over the project, while "DLZ assumed responsibility and liability only for the services it provided to the County."[146] According to the court, "the provisions . . . allocating responsibility and liability between United and DLZ, and limiting DLZ's responsibility and liability, are incompatible with a joint venture."[147]

On the issue of "sharing of profits," the court described the required analysis as follows:

> In the context of a joint venture, before profit can be attributed to the joint venture, there must first be a community of interests or joint proprietary interest in the undertaking. An agreement to share the risk and the reward of the enterprise is an essential ingredient and condition precedent to shared profits. In a joint venture, profit means a net financial gain or return for the joint venture, not merely for the parties individually.[148]

The court found United paid DLZ an hourly rate for its services.[149] According to the court, "[t]he payment of professional fees to DLZ for services rendered at a predetermined contract rate is not a distribution of profit."[150] The court concluded that a "joint venture" was not formed, and it reversed the trial court's entry of summary judgment in favor of the County, with instructions to enter partial summary judgment in favor of DLZ on the issue.[151]

VI. TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP

In *Columbus Medical Services Organization, LLC v. Liberty Healthcare Corp.*,[152] the Indiana Court of Appeals evaluated proof of lost profits damages and causation as elements of a claim of tortious interference with a business relationship, including recovery of damages under Indiana's Crime Victims Relief Act by a "third-party" to the "crime." Specifically, Liberty Healthcare Corporation ("Liberty") and Columbus Medical Services Organization, LLC ("Columbus"), "competing medical recruiting and staffing companies," were among four bidders in response to a request for proposal (RFP) published by the Indiana Department of Administration (IDOA).[153] The bids were "for the

145. *Id.* at 330.

146. *Id.* at 329.

147. *Id.* at 330.

148. *Id.* at 331.

149. *Id.*

150. *Id.* (citing Walker v. Martin, 887 N.E.2d 125, 138 (Ind. Ct. App. 2008); Inland Steel v. Pequignet, 608 N.E.2d 1378, 1382 (Ind. Ct. App. 1993)).

151. *Id.* at 332.

152. 911 N.E.2d 85 (Ind. Ct. App. 2009).

153. *Id.* at 88. IDOA published the RFP on behalf of the Family and Social Services

provision of psychiatric medical staffing services at the Logansport State Hospital."[154]

Two other vendors, in addition to Liberty and Columbus, "submitted bids in response to the RFP."[155] Liberty quoted a price of $3,219,612, and Columbus quoted a price of $2,816,144.[156] Columbus's proposal included an appendix that concluded the curriculum vitae of candidates for employment, including Dr. Roger Jay Pentzien.[157] This, however, was inaccurate as "Columbus had not had contact with *any* of the physicians listed in its proposal."[158] Based on the initial proposals, the IDOA requested that Liberty, Columbus, and another bidder provide a "Best and Final Offer" (BAFO) in price.[159] In response, Liberty lowered its price to $3,098,004.[160] Columbus accepted certain other terms requested by the IDOA but declined to lower its price.[161] After evaluating the BAFO responses, the IDO sent Columbus and Liberty a second BAFO request, indicating that "the final decision . . . will be based on the lowest cost to provide all services requested."[162] This prompted both Liberty and Columbus to lower their prices. The state selected Columbus to begin contract negotiations.[163]

Soon after the state selected Columbus, Liberty learned of Columbus's misrepresentation regarding its "discussion" with Dr. Pentzien, the "services" he would be providing the Hospital, "and that Dr. Pentzien had shown an interest in providing services . . . if Columbus was selected as the successful bidder."[164] Dr. Pentzien was "outraged" and "wrote a letter . . . to the IDOA complaining about Columbus's actions."[165] After reviewing the materials, the IDOA's staff counsel "determined that Columbus's proposal should never have been scored at all by the evaluation team."[166] Liberty was later selected to enter into contract negotiations, but was apparently "stuck" at its second BAFO contract price.[167] Liberty and the State ultimately executed a contract at the second BAFO contract price, and "[t]he State paid Liberty $4.5 million over the life of the two-year contract."[168]

Liberty sued Columbus, alleging tortious interference with its "business

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Administration's Division of Mental Health and Addiction. *Id.*

154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 89.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 89-90 (internal quotations omitted).
165. *Id.* at 90.
166. *Id.*
167. *Id.*
168. *Id.* at 91.

relationship with the State by knowingly and intentionally including false information in its proposal . . . to gain an unfair business advantage over Liberty and other responsive bidders."[169] Liberty also "alleged that but for these false representations, the State would not have solicited two rounds of BAFOs and Liberty would have been awarded the contract based on its initial proposal rather than the lowered price in its Second BAFO."[170] Liberty further "sought treble damages and attorney's fees and costs under the Crime Victims Relief Act, alleging that Columbus's conduct constituted government contract procurement through false information."[171] After a four-day bench trial, the trial court ruled in favor of Liberty on its tortious interference claim, for $486,497, the difference between the revenue Liberty received and the revenue it would have received under the first BAFO.[172] The trial court also awarded fees and costs for $473,468.04, under the Crime Victims Relief Act.[173] Columbus appealed, arguing "that: (1) the trial court erroneously speculated in calculating Liberty's damages; (2) there is no causal connection between Columbus's actions and the damages suffered by Liberty; and (3) the court erred in applying the Crime Victims Relief Act."[174]

The court noted that "[t]he elements of tortious interference with a business relationship are" as follows:

1. the existence of a valid business relationship;
2. the defendants' knowledge of the existence of the relationship;
3. the defendant's intentional interference with that relationship;
4. the absence of justification; and
5. damages resulting from the defendant's wrongful interference with the relationship.[175]

Further, the court noted that the Indiana Supreme Court "has held that 'this tort requires some independent illegal action.'"[176]

The court in *Liberty* rejected Columbus's argument that the trial court's damages award was based on "pure speculation," concluding that the "damage[s] award to Liberty [was] within the scope of the evidence that was before the court."[177] The court explained that the law regarding recovery of tort damages,

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169. *Id.*

170. *Id.*

171. *Id.* (citing IND. CODE § 35-43-5-11 (2009)).

172. *Id.* at 91-92.

173. *Id.* at 94-95.

174. *Id.* at 95. Columbus did not challenge on appeal "the existence of a valid business relationship[,] even in the absence of a written contract," as well as its awareness of the relationship, its interference with the relationship, and the absence of justification. *Id.* at 95 n.7.

175. *Id.* at 94-95 (citing AutoXchange.com, Inc. v. Dreyer and Reinbold, Inc., 816 N.E.2d 40, 51 (Ind. Ct. App. 2004)).

176. *Id.* at 95 (quoting Brazauskas v. Fort Wayne-South Bend Diocese, Inc., 796 N.E.2d 286, 291 (Ind. 2003)).

177. *Id.*

including on a tortious interference claim, as follows:

> It is well-established that, "in tort, all damages directly traceable to the wrong and arising without an intervening agency are recoverable." Also, when "[i]t [is] the tortious act of [an] appellant which created this situation[,] . . . all doubts and uncertainties as to the proof of the exact measure of damages must be resolved against it . . . . The most elementary conception of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong created."[178]

Under Indiana law, the court continued, lost profits as a measure of damages need not "be ascertainable with absolute certainty."[179] Rather, courts "look to the 'fair and reasonable' inferences [that can be derived] from the evidence":

> [L]ess certainty is required to prove amount of loss than is required to prove the fact that profits were in truth lost. Evidence of profits is not open to the objection of uncertainty where there is testimony which, while not sufficient to put the amount beyond doubt, is sufficient to enable the [factfinder] to make a fair and reasonable finding with respect thereto.[180]

In the present case, the court reasoned that "it cannot be seriously questioned that Columbus's intentional, fraudulent participation affected the dynamics of the RFP process by enabling the State to bargain with what it thought were two responsible and responsive bidders."[181] The court found that "as a direct result of Columbus's tortious participation in the RFP process, Liberty reduced its contract proposal to the State, which bound Liberty in subsequent negotiations."[182]

Like the trial court,[183] the court of appeals apparently accepted the "assum[ption]" that the State would have accepted either Liberty's first proposed contract or its First BAFO: "While we cannot say with certainty what, if any, final contract price Liberty would have obtained without Columbus's tortious interference, the evidence strongly suggests that the State would not have been entertaining competitive bids and that Liberty would have been bidding against itself and not against Columbus."[184] According to the court, "Columbus should not be allowed to escape liability for Liberty's lost profits merely because the

178. *Id.* at 96 (internal citations omitted).

179. *Id.*

180. *Id.* (quoting Jerry Alderman Ford Sales, Inc. v. Bailey, 291 N.E.2d 92, 106 (Ind. Ct. App. 1972)).

181. *Id.*

182. *Id.* at 96-97.

183. *Id.* at 95 (explaining that the trial court, in evaluating various damages calculation alternatives, "assumed the State would have accepted either Liberty's first proposed contract or Liberty's First BAFO").

184. *Id.* at 97.

complexities of the RFP process preclude the calculation of damages with mathematical certainty."[185]

The court also rejected Columbus's arguments that the ultimate negotiation of changes to certain contract terms (which were arguably more favorable to Liberty) "interrupt[ed] any causal connection between Columbus['s] actions and" Liberty's allowed damages.[186] Finally, the court upheld the trial court's finding that Liberty was entitled to recovery under the Crime Victims Relief Act, based on Columbus's provision of "false information to a governmental entity to obtain a contract from the governmental entity."[187] The court held that Liberty was entitled to recover the enhanced statutory damages, even though it was not the governmental entity to which false information was provided, because it suffered pecuniary loss because of Columbus's "crime."[188]

VII. NON-COMPETITION COVENANTS

In *Mercho-Roushdi-Shoemaker-Dilley Thoraco-Vascular Corp. v. Blatchford*,[189] the Indiana Court of Appeals held that non-competition clauses signed by doctor-employees were unenforceable.[190] Defendant MRSD was a physicians group performing cardiovascular services in Indianapolis and Terre Haute.[191] Plaintiff Doctors Blatchford and Cieutat ("plaintiffs") were married and former shareholders and employees of MRSD.[192] The stock purchase agreement entered between plaintiffs and the physician group contained a non-competition clause which prevented plaintiffs from practicing within fifty miles of the center of both Indianapolis and Terre Haute for three years after plaintiffs cease to be shareholders in MRSD.[193] The plaintiffs' employment agreements with MRSD also contained non-competition clauses prohibiting practicing within fifty miles of the center of Indianapolis, Terre Haute, and Vincennes (if MRSD opened a medical practice in Vincennes) for three years after the termination of doctors' employment.[194] Plaintiffs subsequently left employment (voluntarily and involuntarily) with MRSD and began practicing in Terre Haute.[195]

Plaintiffs filed a nine-count complaint against MRSD and its individual owner-directors.[196] Plaintiffs alleged various counts of waste and dereliction of

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185. *Id.*
186. *Id.* at 97-98 (internal quotations omitted).
187. *Id.* at 98 (quoting IND. CODE § 35-43-5-11 (Supp. 2009)).
188. *Id.* at 98-99.
189. 900 N.E.2d 786 (Ind. Ct. App.), *trans. denied*, 918 N.E.2d 604 (Ind. 2009).
190. *Id.* at 800-01.
191. *Id.* at 789 (citing Mercho-Rooshdi-Shoemaker-Dilley Thoraco-Vascular Corp. v. Blatchford (*Blatchford I*), 742 N.E.2d 519, 521-23 (Ind. Ct. App. 2001)).
192. *Id.* at 790 (citing *Blatchford I*, 742 N.E.2d at 521-23).
193. *Id.* at 790-91 (citing *Blatchford I*, 742 N.E.2d at 521-23).
194. *Id.* at 791 (citing *Blatchford I*, 742 N.E.2d at 521-23).
195. *Id.* at 791-92 (citing *Blatchford I*, 742 N.E.2d at 521-23).
196. *Id.* at 792.

duty against the other directors, wrongful termination, breach of fiduciary duty, and breach of contract, and sought declaratory judgments that the non-compete clauses in both the stock purchase agreements and employment agreements were unenforceable.[197] Among other claims, MSRD asserted a counterclaim for a preliminary injunction prohibiting doctors from competing with MRSD.[198] The trial court denied MRSD's motion for preliminary injunction on grounds that the non-compete clauses were unenforceable, which was affirmed on interlocutory appeal.[199] On remand, the parties cross-moved for summary judgment.[200] The trial court granted summary judgment for MRSD on plaintiffs' claims for waste, wrongful termination, breach of fiduciary duty, and breach of contract.[201] The trial court granted summary judgment for the doctors on their claims for declaratory judgment, finding the non-competition clauses unenforceable.[202] Both parties appealed.[203]

MRSD argued on appeal that the trial court incorrectly determined on summary judgment that the non-competition clauses were unenforceable.[204] The court began its analysis of the noncompetition clauses by noting that "there are two competing policies at play: freedom of contract and freedom of trade."[205] The court noted that because noncompetition agreements involving physicians implicate interest beyond those of the employer and employee, such as interests of the patient, such agreements "'should be given particularly careful scrutiny.'"[206] The reasonableness of a noncompetition agreement, which is a matter of law, turns on "three factors: (1) whether the agreement is wider than necessary for the protection of the employer in some legitimate interest (2) the effect of the agreement upon the employee; and (3) the effect of the agreement upon the public."[207]

The court found that the first element, the scope of the agreement, favored MRSD.[208] MRSD had a legitimate interest in the "effort, money and time" spent by MRSD to establish the Terre Haute practice before bringing in the plaintiffs.[209] The court found that the three-year and fifty-mile restrictions were reasonable in scope based largely on the plaintiffs' "fleeting argument, lacking

197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* at 793.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at 795.
205. *Id.*
206. *Id.* at 795-96 (quoting Cent. Ind. Podiatry, P.C. v. Krueger, 882 N.E.2d 723, 729 (Ind. 2008)).
207. *Id.* at 796 (citing Med. Specialists, Inc. v. Sleweon, 652 N.E.2d 517, 522 (Ind. Ct. App. 1995)).
208. *Id.* at 796-97.
209. *Id.* at 796 (internal quotations omitted).

citation to authority or the record, that the agreements are wider than necessary in terms of time and geography."[210]

The court found that the second element, effect on the employee, did not make the noncompetition clauses unreasonable, again because plaintiffs made a "passing argument" without citation to the record or authority.[211]

The court found that the third element, effect of the agreement on the public, favored the plaintiffs and, as a result, the noncompetition clauses were unenforceable.[212] Plaintiffs presented testimony of "seven Terre Haute doctors who believe that enforcement of the non-competition agreements would have tended to injure the Terre Haute community" because, among other things, the plaintiffs had unique skills in Terre Haute, the plaintiffs were the best-trained cardiovascular surgeons in the Terre Haute area, and without the plaintiffs able to practice many patients would be transferred to Indianapolis.[213] MRSD failed to designate any conflicting evidence.[214] Based on MRSD's failure to designate evidence to contradict the plaintiffs' showing "that enforcement of the non-compete clauses would have been contrary to public policy," the court affirmed the trial court.[215]

In *Coffman v. Olson & Co.*,[216] the court held that a noncompetition provision in an accountant's employment contract was enforceable,[217] but a liquidated damages provision in that contract was an unenforceable penalty.[218] Coffman is a certified public accountant formerly employed by Olson.[219] In every year of employment with Olson, Coffman signed an Agreement containing a provision barring competition for Olson's clients for a period of two years in Lawrence County and Monroe County.[220] The Agreement further did not allow Coffman to "divert or take away or attempt to divert or take away . . . [or] call upon or

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210. *Id.*

211. *Id.* at 797.

212. *Id.* at 797-99.

213. *Id.*

214. *Id.* at 799.

215. *Id.* On the plaintiffs' cross-appeal, the court held that the plaintiffs failed to show damages on their breach of fiduciary duty claim and affirmed summary judgment for the other shareholders. *Id.* at 800. Plaintiffs contended that the other shareholders in MRSD, characterized without objection as a close corporation, owed them fiduciary duties. *Id.* Plaintiffs alleged that the other shareholders breached their duty "by forming an unauthorized 'executive committee' and voting to terminate" plaintiff Dr. Blatchford's employment without participation by Drs. Blatchford and Cieutat. *Id.* Plaintiffs discussed their damages at length, but "fail[ed] to attach any specific damages to any specific claim," i.e., they did not demonstrate how the activities of the "executive committee" *caused* the alleged damages. *Id.*

216. 906 N.E.2d 201 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 555 (Ind. 2009).

217. *Id.* at 208.

218. *Id.* at 210.

219. *Id.* at 204.

220. *Id.*

solicit or attempt to call upon or solicit any" Olson customers.[221] The Agreement also contained a liquidated damages clause for performing accounting services to any Olson client, setting damages at "two (2) times that client's most recent twelve months billings," and increasing damages to three times the most recent twelve months billings if Coffman failed to notify and pay Olson the damages within the specified period.[222] Coffman eventually left Olson and formed his own firm.[223] Coffman serviced seventeen Olson clients, although the clients independently contacted Coffman.[224] A bench trial was held, and the trial court found that the noncompetition provision in the Agreement was enforceable.[225] But the trial court found that the liquidated damages provision was an unenforceable penalty and awarded damages for the actual fees received from the Olson clients in question in the previous twelve months.[226] Both parties appealed.[227]

Coffman argued on appeal that the noncompetition provision in the Agreement was unenforceable because Olson lacked "a protectable interest under the Agreement."[228] The court stated the standard to be applied to noncompetition provisions:

> Noncompetition agreements are strictly construed against the employer and are enforced only if reasonable. Covenants must be reasonable with respect to the legitimate interests of the employer, restrictions on the employee, and the public interest. To determine the reasonableness of the covenant, we first consider whether the employer has asserted a legitimate interest that may be protected by a covenant. If the employer has asserted such an interest, we then determine whether the scope of the agreement is reasonable in terms of time, geography, and types of activity prohibited. The employer bears the burden of showing that the covenant is reasonable and necessary in light of the circumstances. In other words, the employer must demonstrate that the former employee has gained a unique competitive advantage or ability to harm the employer before such employer is entitled to the protection of a noncompetition covenant.[229]

The court recognized that Olson had a legitimate "protectable interest in the goodwill generated" with its customers, and that Coffman had gained a

221. *Id.*
222. *Id.* at 204-05.
223. *Id.* at 205.
224. *Id.*
225. *Id.* at 205-06.
226. *Id.* at 206.
227. *Id.* at 203.
228. *Id.* at 207.
229. *Id.* (quoting Pathfinder Commc'ns Corp. v. Macy, 795 N.E.2d 1103, 1109 (Ind. Ct. App. 2003)).

competitive advantage through "representative contact" with Olson clients.[230] Coffman also argued that the Olson clients had already terminated their relationships—the clients only knew about Coffman through the business relationship with Olson.[231] The court rejected Coffman's argument that the noncompetition clause was void as against public policy because accountants are similar to lawyers, pointing to Indiana Rule of Professional Conduct 5.6, which prohibits noncompetition agreements by lawyers.[232] The court, in rejecting this argument, simply stated that "there is no such ethical rule restricting employees and employers in the accounting profession from entering into noncompetition agreements."[233] Finally, the court found that the two-year time limit and the geographical limit to Lawrence County and Monroe County were reasonable, noting that *Ebbeskotte v. Tyler*[234] had upheld a noncompetition agreement with an accountant that contained *no* specific geographical or temporal limitations.[235]

After upholding the noncompetition provision, the court determined that the liquidated damages clause was an unenforceable penalty.[236] Olson argued that the liquidated damages clause was reasonable because evidence had been presented that "multiplying annual gross revenue by a factor of two or three" is a reasonable approximation of the value of an accounting practice.[237] The court rejected this argument, finding that the liquidated damages were imposed for the performance of any accounting service, regardless of the actual harm caused by the breach.[238]

Finally, the court stated "[i]n the absence of an enforceable liquidated damages clause, lost profits are an appropriate measure of damages in actions involving noncompetition provisions."[239] The court further stated "[i]n awarding lost profits, net profits, and not gross profits, are generally the proper measure of recovery."[240] The court affirmed the trial court's award of gross revenue from the Olson clients for the one-year period prior to Coffman's termination, holding that by limiting gross revenue to the prior year the trial court "[i]n a way . . . took into consideration the fact that gross revenue is not equivalent to lost profits" and that the trial court's damage award was "within the scope of the evidence."[241]

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230. *Id.*

231. *Id.* at 208.

232. *Id.* (citing IND. PROF'L COND. R. 5.6).

233. *Id.*

234. 142 N.E.2d 905, 909 (Ind. App. Ct. 1957).

235. *Coffman*, 906 N.E.2d at 208 (citing Ebbeskotte v. Tyler, 142 N.E.2d 905, 909 (Ind. Ct. App. 1957)).

236. *Id.* at 208-10.

237. *Id.* at 209.

238. *Id.* at 209-10 (citing Hahn v. Drees, Perugini & Co., 581 N.E.2d 457, 463 (Ind. Ct. App. 1991); Seach v. Richards, Dieterle & Co., 439 N.E.2d 208, 216 (Ind. Ct. App. 1982)).

239. *Id.* at 210 (citing Turbines, Inc. v. Thompson, 684 N.E.2d 254, 257 (Ind. Ct. App. 1997); *Hahn*, 581 N.E.2d at 463).

240. *Id.* (citing *Turbines*, 684 N.E.2d at 257).

241. *Id.* at 211.

Judge Crone dissented, disagreeing with the majority on whether Olson had a legitimate protectable interest in the clients who voluntarily followed Coffman.[242] In Judge Crone's view, "once the clients voluntarily ceased doing business with Olson, any goodwill that Olson enjoyed with respect to those clients ceased to exist."[243] Without that goodwill, Judge Crone argued, Olson's protectable interest "also ceased to exist."[244] Additionally, Judge Crone believed without a legitimate protectable interest, Olson could not prove actual damages; Olson could not reasonably expect revenue or continued client relationships after the clients voluntarily left.[245] Judge Crone finished by noting that without actual damages, there would be no basis for liquidated damages.[246]

VIII. CONTRACT PERFORMANCE AND BREACH

A. Certainty of Terms and Specific Performance

In *Conwell v. Gray Loon Outdoor Marketing Group, Inc.*,[247] the Indiana Supreme Court held that a contract for the design and hosting of a website, governed by the common law of contracts, was sufficiently definite and certain to be enforceable.[248] Piece of America (POA) hired Gray Loon to develop and host a website.[249] Gray Loon delivered the website and POA paid for it without issue.[250] Later, POA requested several changes to the website, "some of which required major programming work."[251] Gray Loon immediately began work on the changes.[252] POA "did not request a proposal or a quote, and Gray Loon did not provide one."[253] After the modifications were completed, Gray Loon sent an invoice to POA, which was not paid.[254] POA's contact person told Gray Loon that POA did not have any issues with the invoice, but that POA needed more time to pay.[255]

Gray Loon sued POA for nonpayment.[256] POA counterclaimed for conversion of the website, which had been taken offline for nonpayment.[257] The

242. *Id.* at 211-12 (Crone, J., dissenting).
243. *Id.* at 211.
244. *Id.*
245. *Id.* at 212.
246. *Id.*
247. 906 N.E.2d 805 (Ind. 2009).
248. *Id.* at 813.
249. *Id.* at 808.
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* at 808-09.
255. *Id.*
256. *Id.* at 809.
257. *Id.*

trial court entered judgment for Gray Loon and against POA, and the court of appeals affirmed.[258]

On transfer, the Indiana Supreme Court initially determined that the common law of contracts, and not the U.C.C., applied to the agreement in question.[259]

Under common law principles, the court affirmed the trial court's ruling that the contract for changes to the website was enforceable.[260] The court stated "[t]o be valid and enforceable, a contract must be reasonably definite and certain."[261] The court further noted "All that is required to render a contract enforceable is reasonable certainty in the terms and conditions of the promises made . . . ; absolute certainty in all terms is not required. Only essential terms need to be included to render a contract enforceable."[262] The court determined that the evidence, "such as it is," showed that the parties did not consider the price as an essential term of the contract.[263] POA did not inquire into how much the modifications would cost, and POA's representative accepted the price after receiving the invoice.[264] The court believed "[t]here was no evidence that Gray Loon participated in any unconscionable effort to 'strong-arm' POA into paying an unreasonable fee."[265] Finally, as to specific performance, the court noted that if POA paid the full invoice amount as ordered by the trial court, "POA would be entitled to the website as modified."[266]

B. Statute of Limitations on Contract and Related Claims

In *City of East Chicago v. East Chicago Second Century, Inc.*,[267] the Indiana Supreme Court held that the City of East Chicago stated a claim for breach of an economic development agreement against a for-profit corporation receiving

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258. *Id.*

259. *Id.* at 811-12 (holding that the "predominate thrust" of the contract was services because the arrangement "contemplated a custom design for a single customer and an ongoing hosting relationship").

260. *Id.* at 812-13.

261. *Id.* at 813 (citing Wenning v. Calhoun, 827 N.E.2d 627 (Ind. Ct. App. 2005)).

262. *Id.* (citing Illiana Surgery & Med. Ctr., LLC v. STG Funding, Inc., 824 N.E.2d 388 (Ind. Ct. App. 2005)).

263. *See id.* The court also determined that no written agreement was required because the original contract did not have a written change order requirement. *Id.* The request for changes to the website was treated as a new transaction rather than an expansion in scope of the original agreement. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 813 n.9. The opinion concludes with a discussion of copyright law, determining that POA's counterclaim for conversion failed because Gray Loon remained the owner of the website and POA only had a "nonexclusive license." *Id.* at 814-17. Justice Boehm concurred in result with separate opinion on the conversion issue. *Id.* at 817-19 (Boehm, J., concurring).

267. 908 N.E.2d 611 (Ind. 2009).

riverboat gambling revenue that refused to open its books for inspection.[268] This case is one of several appeals involving the East Chicago riverboat gaming license and various private entities receiving riverboat gaming revenue.[269] The initial applicant for the license, Showboat, entered a local development agreement with the City of East Chicago, which "was memorialized in" a series of letters with the Mayor and ratified by the East Chicago Common Council.[270]

> Under the arrangement, Showboat agreed to "contribute annually to and for the benefit of economic development, education and community development in the city" an amount of total contribution equal to 3.75% of its adjusted gross receipts (as defined by Ind. Code § 4-33-2-2) in the event Showboat received a license from the Indiana Gaming Commission and began operating a casino in East Chicago. Of that total contribution, 1% would be allocated directly to the City; 1% to the Twin City Education Foundation, a non-profit corporation; 1% to the East Chicago Community Foundation, another non-profit; and 0.75% to East Chicago Second Century, Inc., a for-profit corporation. The agreement also provided that Second Century would undertake development activities at sites within East Chicago, that all projects pursued by Second Century would conform to the City's development and master plans, and that all Second Century projects would require approval from the City.[271]

The procedural history of the case is complicated. Following several ownership changes of the East Chicago casino, which each required approval of the Indiana Gaming Commission, Second Century filed a declaratory judgment action seeking to establish that the new licensee would be required to continue making payments to Second Century.[272] Indiana's Attorney General intervened, seeking to impose a public trust "and an accounting for the money paid to Second Century."[273] Concerning Second Century's declaratory judgment action, the new licensee answered, counterclaimed, and filed a third-party complaint against the two non-profit Foundations and the City of East Chicago, seeking a declaration of which entities should continue to receive the gambling revenues.[274] The Foundations answered and asserted an intervening complaint, and the City answered, counterclaimed, and filed a third-party complaint.[275] The Foundations and Second Century "moved to dismiss the City's claims, and the City moved for

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268. *Id.* at 615.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 615-16.

273. *Id.* at 616. The ensuing appeal relating to the Attorney General's claims is discussed in *infra* Part VIII.C.

274. *Id.*

275. *Id.*

partial summary judgment."[276] The trial court dismissed all of the City's claims on statute of limitations grounds except its breach of contract claim against Second Century.[277] The trial court "denied the City's motion for summary judgment."[278] The court of appeals affirmed in part and reversed in part, and the supreme court granted transfer.[279]

Second Century argued that the trial court erred by failing to dismiss the City's breach of contract count.[280] The court determined that the City stated a claim for breach of the economic development agreement or its related agreements.[281] The City asserted that Second Century and its principals breached the agreement "by failing to open its books and records to the City in order to permit the City to exercise the agreed upon oversight."[282] The related Confirmation Agreement allocated to the City "the sole responsibility for assuring that Second Century will perform the duties described in the development agreement."[283] The court affirmed the trial court, stating "[i]t is difficult to see how the City could adequately determine whether Second Century was using the funds entrusted to it under the letter agreement without viewing Second Century's financial records."[284]

C. Attorney General Oversight of For-Profit Corporations

In *Zoeller v. East Chicago Second Century, Inc.*,[285] the court held that the Attorney General had authority to oversee a private, non-profit corporation based on its receipt of funds intended for public benefit.[286] This case involved the East Chicago riverboat gaming license and associated local development agreement,

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276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.* at 617.
280. *Id.* at 622.
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.* Regarding the City's motion for summary judgment, the court held that the economic development agreement was not "terminable at will" but was rather "subject to periodic alteration (through the administrative processes of the [Indiana] Gaming Commission)." *Id.* at 623-24. Therefore, the City was not entitled to redirect funds from Second Century and the Foundations to the City. *Id.* Additionally, the court appeared to reject in part the RESTATEMENT (SECOND) OF CONTRACTS § 311 (1979), instead adopting the principal that a third party beneficiary acting in reliance on a contract should only be protected to the extent of the reliance. *Id.* at 624-25. The Foundations may have been third-party beneficiaries of the economic development agreement based on their justifiable reliance on gambling revenue, "that reliance should not be a permanent bar to altering the methods employed to further economic development in East Chicago." *Id.* at 625. Again, the Indiana Gaming Commission could revise the economic development agreement. *Id.*
285. 904 N.E.2d 213 (Ind. 2009).
286. *Id.* at 218-20.

which are discussed in more detail in Part VIII.B. In this portion of the case, the Indiana Attorney General intervened, seeking to impose a constructive trust and an accounting over the riverboat money paid to Second Century and its principals.[287] The trial court dismissed the Attorney General's claims, the court of appeals affirmed, and the supreme court granted transfer.[288]

The court held that the Attorney General had authority to bring its action against Second Century, a private, for-profit corporation, under the Attorney General's "broad common law and statutory authority . . . to protect the public interest in charitable and benevolent instrumentalities."[289] Second Century argued that the Attorney General's claim should be dismissed on grounds that, as a for-profit corporation, Second Century was outside the scope of the provisions of the trust code authorizing Attorney General supervision of charitable activity.[290] The Attorney General argued that the riverboat funds "were intended to benefit the public of East Chicago" through local economic development.[291]

The court noted the long-held common law view that the Attorney General had authority to enforce "[t]he people's interest in the rectitude of entities created in the name of public good, such as charities."[292] Indiana's trust code "did not abrogate the common law view of the Attorney General's authority, 'but rather codified it.'"[293] The trust code itself indicates that the courts should "liberally" treat "entities as falling under the protections of the trust code."[294] The trust code "covers multiple entities other than public charitable trusts," including trusts for "benevolent public purpose[s]."[295] Under this "broad common law and statutory authority," the court determined that the Attorney General's claim should not have been dismissed, reversing the trial court.[296]

287. *Id.* at 218.

288. *Id.*

289. *Id.* at 218-20.

290. *Id.* at 218.

291. *Id.*

292. *Id.* at 218-19.

293. *Id.* at 219 (quoting *In re* Pub. Benevolent Trust of Crume, 829 N.E.2d 1039, 1044 (Ind. Ct. App. 2005)).

294. *See id.* (citing IND. CODE § 30-4-2-1(b) (2009)).

295. *Id.* (citing IND. CODE § 30-4-5-12 (2000)).

296. *Id.* at 220. The court also held that the local development agreement between East Chicago and Showboat did not bar the Attorney General's action for unjust enrichment. *Id.* at 220-21. The Attorney General's claim for unjust enrichment was a claim based on a "constructive contract[]" implied by law. *Id.* at 221. "'When the rights of parties are controlled by an express contract, recovery cannot be based on a theory implied in law.'" *Id.* (quoting Keystone Carbon Co. v. Black, 599 N.E.2d 213, 216 (Ind. Ct. App. 1992)). The Attorney General, or the State, was not a party to the contract between East Chicago and Showboat, and therefore the action for unjust enrichment was not barred. *Id.*

D. Economic Loss Doctrine

In *Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.*,[297] the Indiana Court of Appeals held that the economic loss doctrine precluded the Indianapolis-Marion County Public Library from recovering on its claims relating to a renovation and construction project.[298] The case revolved around the renovation and expansion of the Library's main facility in Indianapolis.[299] Defendant Thornton Tomasetti Engineers (TTE) is an engineering firm hired by the architect to provide structural engineering services.[300] Defendant Burns "was a managing principal of TTE [and] affixed his engineer's seal to the designs."[301] Defendant CCL was an engineering firm hired to perform site inspections but not to perform engineering services.[302] The Library sued the defendants on several theories, including breach of contract, negligence, and gross negligence relating to defects in construction of the underground parking garage.[303] The trial court granted partial summary judgment for defendants, on grounds that the economic loss doctrine barred the negligence claims because there was no personal injury or physical harm to "other property."[304] The Library appealed.[305]

The court held "that the damages claimed by the Library [were] 'economic losses' . . . not recoverable in tort."[306] The court noted that "the economic loss doctrine developed as a way of enforcing the dictates of privity in product liability law and preventing tort remedies from eliminating the customary limitations involved in cases addressing the sale of goods."[307] The court further noted that the economic loss doctrine has three general purposes:

> (1) to maintain the fundamental distinction between tort law and contract law;
> (2) to protect commercial parties' freedom to allocate economic risk by contract; and
> (3) to encourage the party best situated to assess the risk [of] economic loss, the commercial purchaser, to assume, allocate, or insure against that risk.[308]

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297. 900 N.E.2d 801 (Ind. Ct. App.), *trans. granted*, 919 N.E.2d 547 (Ind. 2009), *aff'd*, 929 N.E.2d 722 (Ind. 2010).

298. *Indianapolis-Marion County Pub. Library*, 900 N.E.2d at 804.

299. *Id.* at 804.

300. *Id.*

301. *Id.* at 805.

302. *Id.* at 805-06.

303. *Id.* at 806-07.

304. *Id.* at 808-09.

305. *Id.* at 809.

306. *Id.* at 809-12.

307. *Id.* at 809 (citing Hydro Investors, Inc. v. Trafalgar Power, Inc., 227 F.3d 8, 18 (2d Cir. 2000)).

308. *Id.* at 810 (quoting 1325 N. Van Buren, LLC v. T-3 Group, Ltd., 716 N.W.2d 822, 831

The court stated "[i]n essence, the economic loss doctrine recognizes that contracts and torts encompass distinct areas of law that are intended to resolve different types of claims."[309]

"Economic loss" includes "consequential losses, such as lost profits, rental expense, diminution in value, and lost time."[310] Further, economic loss includes "'damage to the product itself, including costs of its repair or reconstruction . . . even though it may have a component of physical destruction.'"[311] Under the economic loss doctrine, "'contract is the sole remedy for the failure of a product or service to perform as expected.'"[312]

The court determined that the Library's damages were not recoverable in tort.[313] The Library contracted with the architect for the entire renovation project—the "product" in question was the entire completed project and not the "components" provided by subcontractors like TTE.[314] Therefore, no damage occurred other than to the property "within the scope of the project itself."[315] All of the Library's claimed damages were consequential losses arising from issues related to the design and construction of the property, and therefore were not recoverable in tort.[316]

The court rejected the application of several exceptions to the economic loss doctrine suggested by the Library.[317] The court determined that the economic loss doctrine covers design claims and that the lack of privity between the design professionals and the Library did not prevent application of the doctrine.[318] The exception for conditions imminently dangerous to third persons only applies when actual physical injury has occurred.[319] "Thus, in response to the Library's question as to whether it 'should . . . have waited until a catastrophic failure occurred and someone was seriously injured' prior to suing the appellees in *negligence*, the answer is 'yes.'"[320] Any "negligent misrepresentation" did not

(Wis. 2006)) (paragraph structure altered)).

309. *Id.* (citing E. River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866 (1986)).

310. *Id.* (citing Gunkel v. Renovations, Inc., 822 N.E.2d 150, 154 (Ind. 2005)).

311. *Id.* (citing *Gunkel*, 822 N.E.2d at 154).

312. *Id.* at 811 (quoting *Gunkel*, 822 N.E.2d at 152).

313. *Id.* at 812.

314. *See id.* at 811-12.

315. *Id.* at 812.

316. *Id.*

317. *Id.* at 812-17.

318. *Id.* at 812-14.

319. *Id.* at 815.

320. *Id.* (citation omitted). Judge Brown, in dissent, would find that the economic loss doctrine should not bar recovery against TTE, because TTE owed a professional duty to provide a sound design, and there was "at least a question of fact as to whether TTE created a condition imminently dangerous to third persons." *Id.* at 818 (Brown, J., concurring in part and dissenting in part).

avoid the economic loss doctrine.[321] No Indiana authority supported a distinction where the defendant provided "services" as opposed to a "tangible product."[322]

E. Statute of Frauds

In *Indiana Bureau of Motor Vehicles v. Ash, Inc.*,[323] the court determined that a faxed document was an enforceable contract satisfying the statute of frauds, based on a handwritten "Post-It Fax Note" attached to the fax. Starting in 2000, Ash leased two commercial properties to the Indiana Bureau of Motor Vehicles (BMV) for ten years.[324] The terms of the lease for each property included a provision allowing cancellation upon sixty days' notice by BMV, and allowing modification by written amendment.[325] On January 15, 2003, BMV faxed a proposal to modify the leases to require Ash to make certain improvements to the properties.[326] In return, it was proposed that after the improvements were complete, the leases would be amended to exclude the cancellation clause.[327] The faxed document contained a note indicating "that the fax was sent to 'Butch' [owner of Ash] from 'Marsha' [representative of BMV]."[328] Ash's owner signed and returned the proposed terms.[329] BMV prepared a separate "License Branch Lease Amendment," but neither party ever signed the amendment.[330] Ash completed the proposed renovations to the property.[331] Afterwards, BMV notified Ash that it was cancelling the leases pursuant to the cancellation clause.[332] Ash sued for breach of contract, contending that the leases had been amended to eliminate the cancellation clause.[333] The trial court granted summary judgment for Ash and denied summary judgment for BMV, awarding damages for past rent due but not for future rent.[334] Both parties appealed.[335]

The court determined that the trial court properly concluded that the January 15, 2003 fax was a contract. The court first noted that "[t]he essential elements of a breach of contract action are the existence of a contract, the defendant's breach thereof, and damages."[336] Next, "[a]n offer, acceptance, consideration,

321. *Id.* at 816-17 (majority opinion).
322. *Id.* at 817.
323. 895 N.E.2d 359 (Ind. Ct. App. 2008).
324. *Id.* at 362-63.
325. *Id.*
326. *Id.* at 363.
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.* at 363-64.
334. *Id.* at 364-65.
335. *Id.* at 365.
336. *Id.* at 365 (quoting Berkel & Co. Contractors, Inc. v. Palm & Assocs., Inc., 814 N.E.2d

and a manifestation of mutual assent establish the existence of a contract."[337] The court held that BMV's fax of proposed terms to Ash constituted an offer.[338] The fact BMV's representative drafted the terms indicated BMV's assent.[339] Consideration existed because BMV agreed to remove the cancellation clauses from the leases in exchange for improvements made to the properties.[340] Ash accepted the offer when its owner wrote on the fax, "I accept the above conditions" and signed his name.[341] Because the January 15, 2003 fax was a contract, the trial court properly concluded that BMV breached the lease and that Ash suffered damages.[342]

The court went on to address the contentions made by BMV in its appellate brief but abandoned at oral argument. Among other arguments, BMV contended that the fax did not bind them because the fax did not comply with Indiana's Statute of Frauds, Indiana Code section 32-21-1-1.[343] The court disagreed, finding that the terms of the agreement, which was signed on January 15, 2003 and required Ash to complete all work by July 1, 2003, could have been performed within one year.[344] Additionally, the fax was in writing and was signed by the BMV's representative "Marsha" on the Post-It Fax Note on the bottom of the fax.[345]

With regard to Ash's cross-appeal on damages, the court affirmed the trial court's award of past lost rent payments only. The court reviewed the damage award for abuse of discretion.[346] The court noted that "[a] damage award must be supported by probative evidence and cannot be based on speculation, conjecture, or surmise."[347] Ash presented evidence of both lost rent payments and future rent payments under the lease.[348] But the trial court found that future lost rent payments were speculative because no evidence was presented concerning the *present value* of future rent payments *or* an appropriate discount rate.[349] Although noting that "evidence of present value is not essential to an award of

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649, 655 (Ind. Ct. App. 2004)).

337. *Id.* (quoting Ind. Dep't of Correction v. Swanson Servs. Corp., 820 N.E.2d 733, 737 (Ind. Ct. App. 2005)).

338. *Id.* at 366.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* at 367.

344. *Id.*

345. *Id.* For the same reason, the court determined that the fax satisfied both Indiana Code section 4-13-2-14.2(a), requiring all contracts with state agencies be in writing, and the provisions of the lease requiring modifications to be in writing and signed by both parties. *Id.* at 366.

346. *Id.* at 368.

347. *Id.* (citing Crider & Crider, Inc. v. Downen, 873 N.E.2d 1115, 1118 (Ind. Ct. App. 2007)).

348. *Id.*

349. *Id.*

damages," the court affirmed the trial court, finding it was within the trial court's discretion to determine damages were too speculative without evidence of present value.[350]

IX. Contract Interpretation

The Winterton, LLC v. Winterton Investors, LLC[351] involved two competing contracts for the sale of a multi-tenant office park.[352] The first contract was between Winterton as seller and Investors as purchaser.[353] Winterton and Brown entered the second contract, which was "intended to be a back-up to the first."[354] After no sale occurred under either contract, Investors sued Winterton for breach of contract, and Brown intervened, seeking a declaration that the second contract was effective.[355] The trial court granted partial summary judgment against for Investors, finding a breach of contract.[356] The trial court granted summary judgment against Brown, finding that the second contract was not effective.[357] After a bench trial, the court awarded damages to Investors for breach.[358]

The court of appeals addressed whether the trial court correctly found on summary judgment that Winterton breached the first contract by failing to provide "certificates of estoppel and subordination agreements" and by changing the closing date.[359] The court's determination turned on interpretation of the contracts and their amendments.

The court recited the rules of interpretation for a written contract:

> The construction of a written contract is a pure question of law. The court's duty is to interpret a contract so as to ascertain the intent of the parties. When interpreting a contract, we attempt to determine the intent of the parties at the time the contract was made by examining the language used in the instrument to express their rights and duties. Where the language of the contract is unambiguous, the parties' intent is determined from the four corners of the document. The unambiguous language of a contract is conclusive upon the parties to the contract as well as upon the court. We will neither construe unambiguous provisions nor add provisions not agreed upon by the parties.
>
> On the other hand, a contract is ambiguous when a reasonable person

350. *Id.*
351. 900 N.E.2d 754 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 988 (Ind. 2009).
352. *Id.* at 755.
353. *Id.* Technically, the contract was between Winterton and Jacob Acquisitions, LLC. *Id.* Jacob Acquisition's interest was later transferred to Investors. *Id.*
354. *Id.* at 755-56.
355. *Id.* at 756.
356. *Id.*
357. *Id.*
358. *Id.*
359. *Id.*

could find its terms susceptible to more than one interpretation.[360]

The court found that Winterton was not required to provide the estoppel certificates under the first contract. The Investor's lender initially required the certificates of estoppel and subordination agreements as a condition of financing.[361] The certificates required the tenants of the office park to provide information on the status of their leases and business operations.[362]

Because the first contract was not contingent on Investors securing financing, Investor's obligations to the lender did not transfer to Winterton.[363] The contract itself did not refer at all to estoppel certificates or subordination agreements.[364] The language of provisions requiring Winterton to provide information regarding the property and to provide documents necessary and usual to close the sale also did not require Winterton to provide estoppel certificates from the tenants.[365] The court found that such an interpretation would be unreasonable, because the interpretation "would impose on Winterton an obligation to require each of its tenants to execute a document the tenants had no obligation to sign," and because "compliance was beyond the control of Winterton to accomplish."[366]

The court further found that Winterton was not required to provide the estoppel certificates under the third amendment to the first contract. The amendment stated that closing was "subject to the receipt and review of estoppels and subordination agreements."[367] The third amendment's language provided that the "closing was subject to the receipt and review of the estoppels and subordination agreements, but it does not say whose obligation was to obtain them."[368] The court reversed the trial court, finding that the contract and amendment could not reasonably be read to impose the obligation on Winterton to obtain the estoppel certificates.[369]

The court further held that Winterton did not breach the contract by changing the closing date. The third amendment specified that the closing date was to be June 28, 2002.[370] The day before closing, counsel for Winterton informed Investors that the closing had been re-scheduled for July 1, 2002.[371] In response, counsel for Investors stated that Counsels could not commit to closing on July 1,

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360. *Id.* at 759.
361. *Id.* at 757.
362. *Id.*
363. *Id.* at 759.
364. *Id.*
365. *Id.* at 760.
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.* at 761. The court further noted that the existence of an express provision requiring estoppel certificates in the second, backup purchase agreement further demonstrated that no such requirement was intended in the first contract. *Id.*
370. *Id.*
371. *Id.*

2002 until it had received estoppels and subordination agreements from all tenants.[372] The court found that, although the agreement stated that time is of the essence, the actions of the parties showed that Investors waived the essence clause.[373] The court surmised that if Investors would not be ready to close on July 1, it would also not be ready to close on the original date of June 28.[374] Because Investors waived the essence clause, Winterton did not breach the contract by unilaterally changing the closing date.[375]

The court affirmed the trial court's ruling that the second, back-up purchase agreement did not come into effect.[376] Brown, purchaser under the second agreement, argued that the first contract had "terminated" and that the backup agreement was therefore in effect. The backup agreement itself was "*subject to the expiration or termination*" of the first contract.[377] But the backup agreement did not define "termination" or "expiration."[378] Therefore, the backup agreement "contemplates the termination or expiration of the Purchase Agreement either by its own terms or otherwise."[379] The Purchase Agreement itself contained no provision for termination.[380] Without guidance from the agreements themselves, the court determined that the Purchase Agreement was not "terminated."[381]

"For clarification," the court noted that

> termination of a contract is different from a breach of contract. Generally, when a contract is terminated, neither party has any further duties or obligations under the contract. On the other hand, when a party breaches a contract, that party may be required to compensate the other party for damages resulting from the breach.[382]

Thus, until "the breach is taken care of, the contract is not terminated."[383]

The court held that, although there was an alleged breach, there was no termination.[384] After the alleged breach, "the parties were continuing to discuss

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372. *Id.* at 761-62.
373. *Id.* at 762.
374. *Id.*
375. *Id.*
376. *Id.* at 762-64.
377. *Id.* at 762-63.
378. *Id.* at 763.
379. *Id.*
380. *Id.*
381. *Id.* at 763-64.
382. *Id.* (citing Orthodontic Affiliates, P.C. v. Long, 841 N.E.2d 219, 222 (Ind. Ct. App. 2006)) (citation omitted)).
383. *Id.*
384. *Id.*

terms under which the Purchase Agreement could proceed to closing" up until Investors filed suit.[385] Additionally, no termination could occur after Investors filed suit, because the parties were asking the court to determine their obligations under the agreement, and because Winterton could not sell property that was the subject of the lawsuit.[386]

385. *Id.*

386. *Id.* at 763-64. Additionally, the court determined that the back-up agreement had lapsed and was unenforceable because it set no time limit for the occurrence of the termination and a "reasonable time" had expired with no termination.