

In the Indiana Court of Appeals

No. 45A03-0303-CV-86

PAULA JO WAGNER,)
)
 Appellant/Defendant,) Appeal from the Lake Circuit Court
) Cause No. 45C01-9908-CP-2000
)
 vs.) The Honorable Lorenzo Arredondo,
) Presiding Judge
)
 ROY E. SPURLOCK, JR., and)
 SUSAN ERWIN-TOMA,)
)
 Appellee/Plaintiffs.)

BRIEF OF APPELLEES

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STATEMENT OF ISSUES

I. Whether the Court of Appeals should dismiss the appeal because the appellant failed to state sufficient facts under Appellate Rule 46(A)(6), and failed to attach to her brief the trial court's findings of fact and conclusions required by Appellate Rule 46(A)(10)?

II. Whether the appellant waived all of her arguments selected for appeal because she never raised them in her response to the petition before the trial court?

III. Whether the trial court should be affirmed where its findings, conclusions and judgment show the appellant committed contempt of court which she has not appealed?

IV. Whether the Court of Appeals should reject appellant's new arguments because (1) accord and satisfaction does not apply; (2) the corporation never needed to be a party; (3) the grandchildren's trust had significant cash on hand; (4) alternative dispute resolution rule 2.10 permits attorney fees; (5) she failed to pay a final paycheck; (6) her delay gave her attorney an opportunity to extort a nuisance value settlement on the threat of a malicious prosecution claim that should have been released months earlier; and (7) the appellant and her attorneys committed fraud?

STATEMENT OF THE CASE

Roy E. Spurlock, Sr. (the “decendent”) died on June 2, 1998. He was a widower and survived by three children, appellees and plaintiffs Roy E. Spurlock, Jr. (“Roy”), Susan Erwin-Toma (“Susan”), and appellant defendant Paula Jo Wagner (“Wagner”). *Appellees Appendix, p.13*. On August 11, 1999 Roy and one of his sisters, Susan filed a complaint which they amended on September 13, 1999 against their sister Wagner and others for breach of trust, for conversion, negligence, and to rescind stock purchase agreements that gave her control of the decendent’s corporations, B & B Corporation (now known as Roy E. Spurlock, Inc.), Fabricators Corp., and Schererville Steel Corporation. *Id., p.12*. They also requested injunctive relief, including the appointment of a receiver. On October 18, 1999 Wagner answered. *Id., p.37*.

The day before mediation, on January 28, 2000, defendant R. Brian Woodward, Wagner’s former attorney, filed a motion for summary judgment (although he had never answered the complaint). *Appellees Appendix, p.7 (entry number 64)*. On January 29, 2000 the parties attended mediation and signed an agreement. *Id., p.682*. In February, 2000 the trial court continued the case, extended deadlines, and on March 1, 2000 ordered that the parties file a stipulation of dismissal with prejudice by June 7, 2000. *Id., p.6 (entry number 61)*.

On September 11, 2000 Roy and Susan filed their petition to enforce the mediation agreement, for sanctions, and to extend time to respond to Brian Woodward’s motion for summary judgment. *Id., p.676*. On September 27, 2000

Wagner responded. *Id.*, p.664. Roy and Susan replied on November 9, 2000. *Id.*, p.670.

On December 11, 2000 the trial court signed an “ORDER GRANTING PETITION TO ENFORCE MEDIATION AGREEMENT AND DEFERRING RULING ON MOTION TO DISMISS.” *Id.*, p.642. In conclusion the trial court stated:

“the Court hereby ORDERS the parties to complete and fulfill their respective obligations under the July 25, 2000 Settlement Agreement. The Court further order the parties to file a Status Report with the Court within thirty (30) days to confirm that said obligations have been met. The Court hereby defers entry of an order of dismissal of the Woodward defendants pending receipt of said status report showing all other obligations met. The Court also withholds ruling on Plaintiffs’ request for sanctions at this time, and may revisit the issue of sanctions upon receipt of said status report.”

Appellees Appendix, p.643. On January 17, 2001 the parties filed a joint motion to continue filing the status report until January 31, 2001, which the Court granted.

Id., p.644-46. On February 7, 2001 Roy and Susan filed a status report with the Court stating that:

“The plaintiffs have complied with the Court’s orders. The defendant, Paula Jo Wagner, however, has done nothing to comply. She should be held in contempt of the Court’s December 11, 2000 Order, and the Court should now visit the issues of sanctions previously held in abeyance.”

Id., p.648. Wagner never filed a response to this.

On February 27, 2001 the trial court set this matter for a preliminary and status conference which was held on June 27, 2001. *Id.*, pp.653-55. On October 1, 2001 the trial court found Wagner in contempt of Court in a related case, *In re*

the Matter of the Irrevocable Trust No. 90-101 of Roy E. Spurlock, Cause Number 45C01-9810-TR-005. Id., p.658. On October 5, 2001 and then on January 22, 2002 the trial court entered a summary judgment in favor of Brian Woodward. *Id., pp.3-4 (entry numbers 32 & 23).* The trial court found Wagner in contempt a second time on October 17, 2001 for failing to appear pursuant to a subpoena and deliver documents. *Id., p.659.*

The parties appeared for a bench trial in this matter on April 26, 2002, August 9, 2002, August 12, 2002, and October 4, 2002. *Appellees Appendix, pp.2-3.* On February 7, 2002 the trial court entered findings of fact, conclusions of law and judgment in favor of Roy and Susan. *Id., p.88.*

STATEMENT OF FACTS

On October, 29, 1990 the decedent signed a Will that called for distribution of his property into a testamentary trust for 15 years in equal shares to his three children. He also funded a 1990 irrevocable trust that contained majority control of B & B, which owned the real estate that Fabricators and Schererville Steel used. On December 30, 1992 the decedent signed an irrevocable trust for his grandchildren. From 1994 through 1997 he funded this with a little over 30 shares of Schererville Steel.

Shortly before his death in 1998, the decedent funded various trusts that in pertinent part gave Wagner the corporations for much less than their fair market value. Schererville Steel was worth at least \$2,464,983.00 and Wagner

bought it for \$1,294,995.00 with payment terms over the next 25 years at 8%. Fabricators was worth at least \$417,650.00 and Wagner bought it for \$150,000.00 under the same terms. For many years prior to his death, Wagner worked in the office and Roy worked full time in the shop.

Within four months of filing the complaint the parties appeared for mediation and signed a handwritten agreement, with settlement contingent on Wagner obtaining the financing necessary to pay Roy and Susan \$1,700,000.00. Wagner agreed to keep paying Roy his salary. Once Roy and Susan received their inheritance, however, Roy would resign or retire from Schererville Steel and drop his union grievance.

On July 25, 2000 the parties signed a typed settlement agreement and Wagner had transferred \$1,642,500.00 to Roy and Susan. Of this money Roy and Susan's attorney, Mr. Curtis E. Shirley, kept \$200,000.00 in his trust account in the event the federal government wanted more in estate taxes. Wagner also paid her attorney, Mr. David Woodward, to keep \$57,500.00 in his trust account so that she could redeem shares of Schererville Steel owned in trust for the benefit of Roy's children.

After Wagner transferred the \$1,700,000.00, the settlement agreement contained many provisions that required attention. Unfortunately, what could go wrong did. Roy and Susan filed a petition to enforce the agreement, and the trial court obliged. The trial court not only found which agreement controlled but also entered an order compelling the parties to comply.

Roy and Susan were supposed to receive \$200,000.00 when the IRS sent a closing letter showing that the estate owed no more in taxes. The IRS sent the letter on October 30, 2000, but Roy and Susan did not receive it until December 28, 2000. That two month delay is why the trial court awarded Roy and Susan interest of \$2,667. Also, during the two month time period Wagner sought to re-negotiate how to distribute the \$200,000.00. Because Wagner knew the estate taxes were final but kept this information from Roy and Susan, the trial court found that she and her attorney committed fraud and violated the December 11, 2000 court order. This led to a punitive judgment amount of \$8,001.00.

Until the \$1,700,000.00 changed hands, Wagner had agreed to continue Roy's paychecks of \$1,000.00 per week. All was well until it came time to pay the last one. Roy was owed \$2,098.80 which was payable by August 8, 2000. Wagner finally paid him on May 16, 2001. For breach of the agreement, the Wage Payment Statute, and violation of the December 11, 2000 court order, the trial court awarded Roy \$5,917.78 in penalties and interest, and \$5,000.00 in attorney fees.

The settlement provisions to divide the decedent's trust for his grandchildren required Wagner to purchase or redeem certain shares. On the first day of trial her attorney delivered a check in the amount of \$57,500.00 which is not at issue in this appeal. For the delay the trial court awarded the trust share for Roy's children \$7,667.00 in interest. The parties were also to docket the grandchildren's trust, pick new trustees, and divide the "cash on hand" or the property among the kids. The trial court awarded the trust for Roy's children \$59,239.20 as their share of the dividends that should have been (and perhaps are)

in the grandchildren's trust because it had held a little over 30 shares of Schererville Steel through the years.

After the parties signed the settlement agreement on July 25, 2000, and the trial court's order of December 11, 2000 to fulfill it, Wagner's former attorney, brother of her new attorney and co-defendant, Brian Woodward, threatened a malicious prosecution action against Roy and Susan and all of her attorneys. They paid Mr. Woodward \$6,000.00 to settle this. The trial awarded Roy and Susan the \$6,000.00 plus \$300.00 in interest because had Wagner complied with the settlement or the court's order to do so, Mr. Woodward would have signed a release as called for under the agreement and thus avoided all this.

Finally, in addition to the \$5,000.00 in attorney fees associated with Roy having to collect his final paycheck, the trial court awarded Roy and Susan another \$30,000.00 in attorney fees. Although Appellate Rule 46(B)(3) does not require it, Roy and Susan herewith attach the trial court's findings and judgment which support the recitation of these facts.

SUMMARY OF ARGUMENT

After Wagner paid \$1,700,000.00 to Roy and Susan, she failed to comply with the remaining provisions of the settlement agreement. On purpose. The trial court found her in contempt on three occasions, and now she ends up owing Roy and Susan \$72,885.78 and the trust share for Roy's children \$66,906.20. Even as of today interest and attorney fees are mounting against her.

On the one hand the Court of Appeals should affirm in a published decision as a lesson to all attorneys to take care of the details. Trial courts and parties alike do not appreciate having the settlement process take longer and involve more issues than if they had tried the case.

On the other hand the Court of Appeals should consider affirming in a non-published decision because the actions by Wagner and especially her attorneys in this case are so atrocious. Wagner thumbed her nose at Roy and Susan and the trial court. Attorneys Brian Woodward took \$6,000.00 and his brother David Woodward tried to take another \$100,000.00. In this case the trial court found that an attorney committed fraud. This is not something that an experienced trial judge would ever do lightly. But Wagner and her attorneys acted as they pleased. Having thrown gasoline on what started as a very small fire, they should not be heard to complain for getting burned.

ARGUMENT

I. The Court should dismiss the appeal.

Pursuant to Appellate Rule 46(A)(6), the appellant's statement of facts "shall describe the facts relevant to the issues presented for review." Wagner did not attempt to comply. This case involved a 4 day trial, took up 525 pages of transcript, and 3 volumes of exhibits. *Appellees Appendix, pp.104-1371*. The trial court entered 97 separate findings of fact that spanned 14 pages. *Id., pp.88-103*. Pursuant to Appellate Rule 46(A)(10), Wagner should have attached to her appellant brief the "findings of fact and conclusions thereon relating to the issues

raised on appeal.” For such failings this Court should dismiss the appeal.

II. Wagner has waived her arguments.

To obtain review Wagner must make cogent arguments with citations to authority in support of her assertions on appeal. If an appellant fails to do this, she waives any issue.¹

In addition to failing to raise a necessary argument on appeal, waiver also includes having failed to raise the argument in the trial court in the first instance.² If Wagner did not present an argument to the trial court, she waived any ability to argue it on appeal because Roy and Susan were denied the opportunity to have presented evidence on the matter.³ This includes attempts by Wagner to appeal evidence introduced at trial without raising any objection at the time.⁴ Trial courts are not there to give losing parties a do-over because they want to change tactics.

¹ *Doughty v. Review Board*, 784 N.E.2d 524 (Ind.App. 2003); *Davenport v. State*, 734 N.E.2d 622, 623 (Ind.App.2000) (“Failure to put forth a cogent argument acts as waiver of the issue on appeal.”); *Appellate Rule 46(A)(8)(a)* (“The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22.”).

² *Troxel v. Troxel*, 737 N.E.2d 745, 752 (Ind. 2000); *Evans v. Tuttle*, 645 N.E.2d 1119, 1121 (Ind.App.1995).

³ *Olcott v. Micro Data Base Systems*, 793 N.E.2d 1063, 1077 (Ind.App. 2003).

⁴ *Porter v. State*, 700 N.E.2d 805, 807 (Ind.App.1998).

On September 11, 2000 Roy and Susan filed their petition to enforce the settlement agreement and for sanctions. *Appellees Appendix, p.676*. On September 27, 2000 Wagner responded that she had not paid Roy his final paycheck because he “has failed to retire and resign from his employment with Schererville Steel.” *Id., p.665 (par.4)*. At trial the court found otherwise and on appeal Wagner has not raised anything of the sort; instead Wagner has played a shell game and made a new argument concerning the Wage Payment Statute.

In Roy and Susan’s petition to enforce, Exhibit G showed that to complete the settlement Mr. Martin needed “A list of the current assets of the [grandchildrens’] trust, including cash, corporate stock and any other assets”. *Id., p.707*. Wagner responded that “Through the discovery process, Paula Wagner believes that all items requested in the August 10 correspondence were given to Mr. Martin.” *Id., p.666*. On June 27, 2001 when the parties met for a case management conference, the trial court noted that “Plaintiffs await completion of corporate tax return to ascertain dividends due. Those returns are expected to be done by July 15, 2001. If parties are unable to agree on that calculation, they will need a hearing on that issue to complete the settlement agreement.” *Id., p.655*.

At all times prior to trial Wagner admitted the dividend information was relevant to comply with the settlement and argued only that she had already shared it. At trial the court found otherwise and on appeal Wagner has instead made a new argument concerning the impact of constructive dividends. The fact that Wagner would not produce the tax returns, and on October 24, 2001 the trial

court found her in contempt and set the enforcement of the settlement agreement for trial, only made matters worse. *Id.*, p.659.

If Wagner had filed anything in response to Roy and Susan's petition to enforce the settlement agreement that included any of the objections Wagner now raises on appeal, Roy and Susan could have easily furnished the trial court with additional evidence. Wagner should not be able to play Monday morning quarterback and decide with hindsight how to respond to Roy and Susan's petition.

III. The trial court should be affirmed because of Wagner's contempt of court.

On December 11, 2000 the trial court granted Roy and Susan's motion to enforce the July 25, 2000 settlement agreement and held the matter of sanctions in abeyance. In its findings of fact and conclusions of law the trial court found Wagner in contempt for not complying and sanctioned her accordingly. The findings are replete with such references.

Roy requested a ruling on his "request for sanctions" and "that the Court hold Wagner in contempt". *Appellees Appendix*, p.89.

The trial court sanctioned Wagner for "breach and violation of the Court's December 11, 2000 order." *Id.*, (par.19).

"Wagner also violated the Court's December 11, 2000 order granting the petition to enforce the Agreement by attempting to take \$100,000.00 from Spurlock under new terms." (par.21).

"For breach of the Agreement, violation of the Court's December 11, 2000 Order, and under the Wage Payment Statute, the Court awards Spurlock \$10,917.78 in compensatory damages." (par.39).

“Wagner also did not comply with the Court’s October 17, 2001 order to attend a settlement conference.” (*par.64*).

“For breach of the Agreement, breach of trust, and failure to comply with the Court’s December 11, 2000 order granting the petition to enforce the Agreement, Wagner must pay \$7,667.00 to Spurlock as trustee of his childrens’ share of the grandchildrens’ trust in compensatory damages on the issue of interest.” (*par.77*).

“For breach of the Agreement, breach of trust, and failure to comply with the Court’s December 11, 2000 order granting the petition to enforce the Agreement, Wagner must pay to the trustee of the Spurlock childrens’ share of the grandchildrens’ trust the sum of \$59,239.20 in compensatory damages so that the grandchildren inherit what Spurlock, Sr. intended.” (*par.81*).

“Had Wagner complied with the Agreement, or this Court’s December 11, 2000 Order to comply with the Agreement, Mr. Shirley would not have had to pay Mr. R. Brian Woodward anything.” (*par.89*). “For breach of the Agreement, and failure to comply with the Court’s December 11, 2000 order granting the petition to enforce the Agreement, Wagner must pay Spurlock the additional \$6,000.00 as compensatory damages.” (*par.92*).

In reviewing a finding of contempt, the Court of Appeals does not reweigh the evidence or judge the credibility of the witnesses. The trial court is affirmed if any evidence and inferences therefrom support its judgment.⁵ Parties are not permitted to disobey court orders and so undermine the trial court’s “authority, justice, and dignity.”⁶

Nothing in Wagner’s appellant brief explains away her violations of several court orders, in particular the one dated December 11, 2000 requiring her to

⁵ *In Re Guardianship of C.M.W.*, 755 N.E.2d 644, 650 (Ind.App. 2001); *Srivastava v. Indianapolis Hebrew Congregation*, 779 N.E.2d 52, 60 (Ind.App. 2002).

⁶ *Carter v. Johnson*, 745 N.E.2d 237, 240 (Ind.App. 2001) (quoting *Hopping v. State*, 637 N.E.2d 1294, 1297 (Ind.1994), cert. denied, 513 U.S. 1017, 115 S.Ct. 578, 130 L.Ed.2d 493 (1994)); *Indiana Code Section 34-47-3-1*.

specifically perform the settlement agreement. Wagner should not be heard to argue that the terms are not ambiguous when it comes to what Roy and Susan deserve, yet argue that these same terms are so unclear that her failure to comply absolves her of contempt. The trial court has the inherent authority to compensate a party for losses and damages resulting from contemptuous actions, which includes compensation and attorney fees.⁷

IV. The Court of Appeals should reject Wagner's new arguments.

For obvious reasons mediation has succeeded in Indiana. If the parties reach a settlement, the Indiana judiciary benefits from less cases set for trial and the parties benefit from lower litigation expenses. The public policy of Indiana strongly favors settlement, and enforcing such agreements is a matter of great public concern.⁸ To the extent that this case involves the breach of a settlement, the trial court which approved it is the one with authority to enforce it.⁹

Generally, construction of a written contract is a question of law for which summary judgment is particularly appropriate.¹⁰ In this case, however, no party moved the trial court for summary judgment. The parties dispute whether

⁷ *Scoleri v. Scoleri*, 766 N.E.2d 1211 (Ind.App. 2002); *Adler v. Adler*, 713 N.E.2d 348, 355 (Ind.App. 1999); *Meade v. Levett*, 671 N.E.2d 1172, 1181 (Ind.App. 1996).

⁸ *Harding v. State*, 603 N.E.2d 176 (Ind.App. 1992); *Manns v. State*, 541 N.E.2d 929 (Ind. 1989); *Roberts v. Morgan Circuit Court*, 232 N.E.2d 871 (Ind. 1968).

⁹ *Brant Construction v. Lumen Construction* 515 N.E.2d 868 (Ind.App. 1987).

¹⁰ *Francis v. Yates*, 700 N.E.2d 504, 506 (Ind.App.1998).

the trial court ever had occasion to interpret the settlement agreement. But if it did, the parties agree that specific terms, absent any ambiguity, should be given their plain and ordinary meaning.¹¹

Wagner admits that this Court will set aside findings of fact and conclusions “only if they are clearly erroneous, that is that the record contains no facts or inferences supporting them.” *Appellant’s Brief*, p.6.¹² The trial court’s judgment is reviewed by considering only the evidence which supports it.¹³ This is a monumental hurdle. The trial court’s judgment is contrary to law only when the evidence is without conflict, and without conflicting inferences, and leads to but one conclusion opposite that of the trial court.¹⁴ With these standards of review in mind, Roy and Susan respond as follows:

1. Accord and Satisfaction does not apply.

Although Wagner used the words “accord and satisfaction” in the title of her first argument, she does not argue this. Rather, Wagner argued that certain language in the settlement agreement foreclosed “all future claims” and prevented Roy and Susan from seeking “additional claims against Paula.” *Appellant’s Brief*,

¹¹ *Barrington Management v. Draper*, 695 N.E.2d 135, 140 (Ind.App.1998); *Uzelac v. Guzik*, 663 N.E.2d 238, 240 (Ind.App.1996); *Citizens v. Indianapolis Auto*, 592 N.E.2d 1256 (Ind.App. 1992).

¹² *Citing Harco v. Plainfield Interstate*, 758 N.E.2d 931, 941 (Ind.App. 2001).

¹³ *Indiana v. Brown*, 439 N.E.2d 561 (Ind. 1982).

¹⁴ *Mayflower v. Davenport*, 714 N.E.2d 794 (Ind.App. 1999).

p.7. Any language involving releases, however, cannot be the basis of accord and satisfaction; especially where the trial court without dispute found that Wagner failed to pay the satisfaction.

The settlement agreement in this case included language releasing the parties against “all allegations which were or could have been raised”, and “from any, every and all claims, demands or causes of action accruing, arising, growing out of, or connected with the allegations made in the” cases involving the parties. *Appellees Appendix, p.692*. None of this language helps Wagner. (It should be noted that the settlement, paragraph 16, also stated that each party could enforce the agreement in accordance with its terms, and that the trial court would retain jurisdiction until “the transfers and actions provided for herein have been made”). *Id., p.700*.

After the settlement, Roy and Susan never filed a new complaint against Wagner. They never had to. Roy and Susan never released Wagner from complying with the settlement agreement. And the releases cannot prevent Roy and Susan from filing a petition to enforce the agreement. Where Wagner failed to satisfy the terms of the settlement, the law estops her from arguing the release language as a separate accord.¹⁵

¹⁵ *Silkey v. Investors, 690 N.E.2d 329 (Ind.App. 1997); Chesak v. Northern Indiana Bank, 551 N.E.2d 873 (Ind.App. 1990); Harding v. State, 603 N.E.2d 176 (Ind.App. 1992); Manns v. State, 541 N.E.2d 929 (Ind. 1989); Brant v. Lumen 515 N.E.2d 868 (Ind.App. 1987); Roberts v. Morgan Circuit Court, 232 N.E.2d 871 (Ind. 1968).*

This Court should conclude that accord and satisfaction does not apply. Indiana courts have jurisdiction to address breaches of a settlement agreement.¹⁶ This includes the power to order specific performance.¹⁷ So if accord and satisfaction did apply, Wagner could not refuse to comply with the trial court's December 11, 2000 (unappealed) order that required the parties to carry out the terms of the agreement. Terms of an agreement never trump court orders.

2. The Corporation never needed to be a party.

Wagner argued that Roy and Susan improperly compelled a constructive dividend. *Appellant's Brief*, pp.11-12. This is not the case. The judgment does not mention Schererville Steel Corporation. The judgment does not compel any corporation to declare dividends.

The decedent, Roy E. Spurlock, Sr., established a trust for the benefit of his grandchildren in 1992. He appointed Wagner as trustee, who the law charges with vast fiduciary duties.¹⁸ Mr. Spurlock funded the trust with shares of

¹⁶ *Gary v. Peters* 583 N.E.2d 1213 (Ind.App. 1991) (action brought for breach of settlement agreement), 550 N.E.2d 828 (Ind.App. 1990).

¹⁷ *Germania v. Thermasol*, 569 N.E.2d 730 (Ind.App. 1991).

¹⁸ *E.g.*, *Indiana Code Section 30-4-3-6(b)(1)* (trustee has a duty to administer the Trust solely in the interests of the beneficiaries); *Indiana Code Section 30-4-3-6(b)(3)* (trustee must maintain control over Trust property); *Indiana Code Section 30-4-3-6(b)(5)* (a trustee shall make the Trust property productive for both the income and remainder beneficiary); *Indiana Code Section 30-4-3-6(b)(9)* (trustee must take whatever action is necessary to realize on claims constituting part of the Trust property); *Indiana Code Section 30-4-5-1* (a Trust shall be administered with due regard to the respective interests of income beneficiaries and remainderman). *Indiana Code Section 30-4-3-6(a)*; *Indiana Code Section 30-4-3-6(b)(6)* (a trustee must keep the Trust property separate from the trustee's individual property and from property subject to another Trust); *Indiana Code*

Schererville Steel Corporation, which has declared dividends (or should have declared dividends) since 1992. It is not disputed that the property in the grandchildren's trust belongs to the beneficiaries, not Wagner personally.

In the settlement Wagner agreed to divide the trust property equally among the grandchildren. The fact that she obligated herself does not mean that the Corporation needed to be a party. After the settlement Wagner became the majority shareholder and president of Schererville Steel Corporation, without any threat of the shares being returned to the estate and without the trial court having to appoint a receiver. *Appellees Appendix, p.697 (paragraph 6)*. Wagner cannot wear her corporation hat and refuse to comply with Wagner who wore her individual hat to sign the settlement. If any action needed to be brought to compel the corporation to declare a dividend, then Wagner as trustee had the ability and opportunity to bring it. The grandchildren should not be blamed for Wagner not suing herself.¹⁹

At the time of the settlement agreement, Roy, Susan and Wagner could not do anything to compromise the grandchildren's trust. *Appellees Appendix, pp.436-449* (discussing in great detail without objection how Wagner did not comply with the settlement or the court orders concerning the grandchildren's trust). That

Section 30-4-3-7(a)(1) (trustee must not loan funds to himself or an affiliate); *Indiana Code Section 30-4-3-7(a)(2)* (trustee must not purchase or participate in the purchase of Trust property from the Trust for the trustee's own benefit).

¹⁹ *Environmental Management v. RLG, 755 N.E.2d 556 (Ind. 2001); Peterson v. First State Bank, 737 N.E.2d 1226 (Ind.App. 2000); Loy v. Hurst, 182 N.E.2d 423, 425 (Ind. 1962)* (“an officer or agent of a corporation can not commence an action against said corporation by serving himself with process”); *Apple v. Apple 299 N.E.2d 239 (Ind.App. 1973)* (equity does not require the doing of a useless act).

would require Court approval pursuant to Indiana Code Section 30-4-7-et seq. Considering that the beneficiaries were minors, Roy, Susan and Wagner could not reduce the grandchildrens' share of anything. Considering that Wagner's children enjoyed the same treatment as Roy's, it is absolutely amazing that she wants the courts to diminish even her own kids' proper share.

A "constructive dividend" is a term of art used in tax matters.²⁰ A common example is where a C Corporation has sizeable earnings but retains them so that the shareholders do not have to pay income tax on the distributions.²¹ If the shareholders get away with it, they pay less in income tax and the value of the Corporation increases.²² Although Fabricators had a minimal value, it issued several times that amount in dividends over the years. Mr. Hansen testified without objection that "the dividends were structured as coming out of Fabricators in order not to have to pay dividends to shareholders of Schererville Steel." *Appellees Appendix, p.262.* The trial court certainly had discretion to infer that Wagner orchestrated the issuance of dividends from Fabricators instead of Schererville Steel to diminish the grandchildrens' inheritance.

²⁰ *Crowley v. IRS, 962 F.2d 1077 (1st Cir. 1992); Jaques v. IRS, 935 F.2d 104 (6th Cir. 1991).*

²¹ *Hedberg-Freidheim v. IRS, 251 F.2d 839 (8th Cir. 1958).*

²² In this case the grandchildrens' trust held shares of stock that paid dividends. The issue during and after settlement was the amount of those dividends. At trial it became apparent that Schererville Steel Corporation and Fabricators Corporation "shared" their books. *Appellees Appendix, p.257* (e.g., in 1999 Fabricators had a total net income of \$35,000 and yet paid out dividends of \$170,000.00); *id., p.258* (in 2000 Fabricators had a total net income of \$2,200 and yet paid out dividends of \$160,153.00); *id., p.259* (the three corporations "shares the same pockets").

Because Wagner refused prior to and during trial to quantify the property in the trust (whether cash or anything else), Roy and Susan were left with their only option – to show what should have been in the trust, so that the trial court could properly award the grandchildren their proper share. Roy and Susan were not compelling any Corporation to issue “constructive dividends”. They were using the corporate information to allow the trial court to infer what was or should have been in the trust because Wagner in her position as trustee could not be trusted to provide the precise information. Mr. Hansen testified without objection that it was correct to say that:

“in essence Paul rather than declare a dividend in the amount of retained earnings of the million two hundred sixty-one thousand four hundred and eighteen dollars that’s sitting in cash and investments, rather than do that, she instead had the corporation borrow the funds and leave the retained earnings there so that she had cash to pay her personal obligation”.

Id., p.263. Wagner’s own attorney waived any argument concerning this by asking Mr. Shirley in cross examination whether dividends were due from the corporation. He responded:

“The dividends are due from Paula. Paula was trustee of the grandchildren’s trust. Paula is a party to this agreement. Paula owes the money, Paula has to sign the check. Now, if she wants to take it from the corporation or from her personal checking account, I don’t care. It’s her signature and her agreement. She owes the money.”

Id.,p.473, also p.496, line 4 (Roy and Susan are “not taking any action to declare dividends.”).

Even if Schererville Steel Corporation needed to be a party, Wagner as its president cannot use that fact to refuse to comply with the trial court’s

December 11, 2000 order that she specifically perform the obligations of the settlement. Excuses are not well received in the face of a third finding of contempt.

3. The grandchildren's trust had significant "cash on hand".

Wagner argued that Roy and Susan have attempted to "get around the settlement" by claiming that cash on hand included a cause of action against Schererville Steel Corporation for constructive dividends. *Appellant's Brief, p.12*. Not so. Wagner would have to scour the law books to show a cause of action for constructive dividends. Roy and Susan never alleged one, and they did not make one up in this case.

Whether a corporation declares dividends is up to its board of directors. The board, in turn, is compelled to act in accordance with the articles of incorporation, bylaws, and any need to possibly retain earnings. If the board refuses to declare dividends then the Internal Revenue Service may impose a hefty accumulated earnings tax.²³ An individual shareholder may also seek to compel what should have been done.²⁴

Again, in this case Roy and Susan were not compelling any corporation to issue dividends, constructive or otherwise. They were using the corporate information to allow the trial court to infer what was or should have been in the trust.

²³ *IRS Code Sections 531 & 532.*

²⁴ *Cole Real Estate v. Peoples Bank, 310 N.E.2d 275 (Ind.App. 1974).*

Curiously Wagner argued on appeal that “The division of ‘cash on hand’ in the Settlement Agreement was limited to ready money – assets that are liquid, on hand and available for delivery”. *Appellant’s Brief*, p.13. Wagner has tried to assert that the settlement agreement’s terms concerning “cash on hand” cannot be construed using extrinsic evidence. Whatever the rule, Wagner’s attorney waived it and permitted the trial court to rely on extrinsic evidence by asking Mr. Shirley what the parties meant and relied upon. In response to Wagner’s questions Mr. Shirley testified, without objection and without a motion to strike, that “cash on hand” included whatever property was in the grandchildren’s trust, no matter some technical definition in a legal treatise. *Appellees Appendix*, p.480 (lines 7-9), p.481 (lines 17-20), p.483 (lines 10-19), pp.489-90 (... *We’re just trying to figure out a way to treat these grandkids equally so they get what their grandfather gave them. ...*), pp.496-97.

There is no dispute that the grandchildren’s trust had such cash on hand. The settlement agreement mentioned it. The more important question was to determine the amount. On several occasions Wagner was specifically asked what property was in the grandchildren’s trust. Her answers were evasive and designed to try and deceive the trial court into finding no “cash”.

When asked if Wagner kept “any records for the grandchildren’s trust”, she answered that she “kept the trust itself” but did not recall what was in the file. *Appellees Appendix*, p.191. In response to two letters from Roy and Susan’s attorneys concerning the current assets of the grandchildren’s trust, Wagner’s

attorney stated that he would provide them. *Id.*, p.719. The trial court acted within its discretion when it determined the “cash” based upon dividends that could have, should have been, and/or were distributed to the trust, especially where Wagner as president and Wagner as trustee ran both operations.

Wagner testified that she had provided full disclosure of the information. *Appellees Appendix*, pp.215 & 246. Mr. Hansen testified, however, without objection, that he and Mr. Shirley reviewed all of the documents she produced, which contained absolutely no information concerning the grandchildren’s trust. *Id.*, pp.278-79. Mr. Shirley testified, without objection, that Roy and Susan had never received the information necessary to determine the amount of cash that was or should have been in the grandchildren’s trust. *Id.*, p.390.

Concealing information under such circumstances calls for a mandatory inference that Wagner had evidence to hide, favorable to Roy and Susan. The law permits trial courts wide latitude in finding the most negative of inferences where persons act in such a manner.²⁵

The trial court had the ability to rule in favor of Roy and Susan so long as they introduced a scintilla of evidence to support the judgment.²⁶ "In Indiana,

²⁵ *Harris v. C.I.R.*, 461 F.2d 554 (5th Cir. 1972); *Marcus v. Marcus*, 394 A.2d 727 (Conn. 1978); *Fried v. Bradley*, 52 So.2d 247 (La. 1950); *In re McFadden*, 108 A.2d 247 (Pa.Sup.Ct. 1954); *Bayou v. Baillio*, 312 S.W.2d 705 (Tex.App. 1958). See *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551 (1976); *Ingram v. Indianapolis*, 759 N.E.2d 1144, 1149 (Ind.App. 2001); *Moore v. Liggins*, 685 N.E.2d 57, 65 (Ind.App. 1997); *Gash v. Kohm*, 476 N.E.2d 910, 912 (Ind.App. 1985).

the exclusive possession of facts or evidence by a party, coupled with the suppression of the facts or evidence by that party, may result in an inference that the production of the evidence would be against the interest of the party which suppresses it."²⁷

In addition, Wagner should be held liable as trustee of the grandchildren's trust for the benefit of her own children and Roy's children for the following reasons presented to the trial court. *Appellees Appendix, pp.17-19.*

First, the \$148,098.00 is what should be in the trust and is not. That means Wagner as trustee could transfer "cash" into the trust right now and not have such an argument available.

Second, the Agreement never attempted to and could not compromise benefits due the grandchildren.

Third, the language "All cash on hand" is not the only reference to the property the parties agreed to divide. The opening sentence of paragraph seven (7) of the Agreement calls for the parties to "divide the decedent's trust for the benefit of the grandchildren, one half for the benefit of Paula's children and one half for the benefit of Roy's children." A simple petition to divide the trust could mean to divide into two (2) separate trusts with the same terms but with different trustees. But when the sentence used the words "one half for the benefit of ...", that sentence only can be interpreted to mean that the parties agreed to divide the value of the property that was or should have been in the trust.

²⁶ *Gash*, 476 N.E.2d at 915; *Aubrey v. State*, 310 N.E.2d 556 (Ind. 1974); *Loomis v. Ameritech*, 764 N.E.2d 658, 662 (Ind.App. 2002).

²⁷ *Cahoon v. Cummings*, 734 N.E.2d 535, 545 (Ind. 2000), citing *Porter v. Irvin's Interstate*, 691 N.E.2d 1363, 1364-65 (Ind.App. 1998), *Great Am. Tea Co. v. Van Buren*, 33 N.E.2d 580, 581 (Ind. 1941). *Morris v. Buchanan*, 44 N.E. 2d 166 (Ind. 1942) ("Many of the facts about which there is uncertainty were peculiarly within the knowledge of the appellant and such a situation may give rise to an inference that if these had been fully disclosed they would have been unfavorable. While this rule will not be carried to the extent of relieving a party of the burden of proving his case, it may be considered as a circumstance in drawing reasonable inferences from the facts established"), citing *Van Buren*, 33 N.E.2d at 581. See *Westervelt v. National Mfg.*, 69 N.E. 169 (Ind.App. 1903).

Fourth, even if the Agreement meant to divide only cash, that does not mean Wagner gets to pocket dividends that were or should have been paid into the grandchildren's trust. The equitable law of unjust enrichment prevents such a result.

Fifth, the grandchildren, most of whom are minors, never agreed to permit Wagner to keep their trust property as a windfall, which is the result she requests.

Sixth, if in paragraph 7(C) of the Agreement "cash" means only "cash", then that entire sentence is rendered meaningless by Wagner's current position that there was never any cash. See American Family v. Federated Mutual, 775 N.E.2d 1198 (Ind.App. 2002) (contracts are construed so as not to render any terms meaningless).

Seventh, Ms. Prasco testified that "cash" means petty cash, savings accounts, checking accounts, and money market accounts, and that "cash" does not mean mutual funds. Wagner never testified as to what amounts were in the grandchildren's trust, only that it now involved a mutual fund. The original funding of the trust, however, was (or should have been) a dividend check from Schererville Steel Corporation to Wagner as trustee. She cannot thereafter use her position as trustee to alter the character of that property so as to change the effect of the Agreement. There was no evidence as to the status of the trust accounts at the time the parties signed the Agreement; Wagner testified only that the current account involved an unknown amount of mutual funds.

Eighth, if "cash" meant only "cash", Mr. Woodward would not have told Mr. Martin that he wanted to meet and "finalize the numbers". Exhibit 34. All of the written correspondence between the parties shows that they knew that all property in the trust had to be divided. If that calculation has always been zero, as Wagner now maintains, all of her correspondence is either a waiver or done for some other reason that does not excuse performance.

Over objection which has not been raised on appeal, Mr. Hansen testified that "My opinion is that based on either the constructive dividend, or if you look at strictly an excess accumulated earnings approach to it plus the dividends that were paid, that dividends are due to the grandchildren's trust in approximately

a hundred and forty-eight thousand dollars.” *Appellees Appendix, p.267*. Even if the trial court should have sustained an objection to this particular answer, Mr. Hansen gave similar testimony on numerous occasions that Wagner never objected to. *Id., pp.268-271*. Wagner’s attorney also admitted this same information during his cross examination of Mr. Shirley. *Id., pp.524-33*. For any one of the above reasons, the trial court acted properly to require Wagner to comply with the settlement agreement to divide the grandchildren’s trust, and to comply with the trial court’s December 11, 2000 order. To rule otherwise would give Wagner a \$59,239.20 tip. This is money that has been, should have been (and according to the trial court) will be available for Roy’s children.

4. A.D.R. Rule 2.10, not Rule 2.1, applies.

Indiana Alternative Dispute Resolution Rule 2.7(E)(3) states that “in the event of any breach or failure to perform under the agreement, upon motion, and after hearing, the court may impose sanctions, including entry of judgment on the agreement.” Such sanctions may include attorney fees. Indiana Alternative Dispute Resolution Rule 2.10 states that “the court may impose sanctions against any attorney, or party representative who fails to comply with these mediation rules, limited to assessment of mediation costs and/or attorney fees relevant to the process.”

Perhaps Wagner’s appellate attorney has made an honest mistake by trying to steer the Court of Appeals to Rule 2.1 when Rule 2.10 has been the issue

all along. Not only does Rule 2.10 support the judgment, the trial court also had discretion (which was not appealed) that Wagner violated the court's December 11, 2000 order by not specifically performing the agreement.

5. Wagner failed to pay Roy his wages.

Wagner argued that the settlement agreement did not provide for "wages" to Roy as defined by Indiana Code Section 22-2-5-et seq., and that in any event Wagner was not his employer. *Appellant's Brief, pp.17-18.*

Without a doubt the settlement agreement contained an employment agreement for Roy. Wagner remarks that Roy was a consultant as if that was not a job. But consultants get paid just like everyone else, especially where they have a written contract. Sports is a good example. Team owners pay their players according to contract terms whether or not they sit on the bench. Just because Wagner chose not to consult with Roy does not mean he was free to refuse should she have called. In any event, the trial court could review the settlement terms and conclude that Paula was to keep Roy's paychecks current without resorting to negative inferences from extrinsic evidence that Wagner wants to raise for the first time. Wagner admitted in her own testimony that she understood that she was to send Roy a paycheck once a week until she paid the settlement amount. *Appellee Appendix, p.202.*

Wagner cites *Wank v. St. Francis College, 740 N.E.2d 908 (Ind.App. 2000)*. But that case supports Roy's position. The issue there was whether the

disputed amount was a wage or bonus. In this case pursuant to the agreement reached at mediation Roy was to continue receiving his wages until Wagner finalized and funded the settlement. The purpose was continued employment so that if Wagner did not finalize or fund the settlement, Roy had not waived any right to continued employment, benefits, and the resolution of grievance through the Teamsters Union.

In contrast to *Wank*, in this case Roy had an employment agreement with Wagner.²⁸ She signed the mediation agreement obligating herself to see to it that Roy continued to receive his paycheck and benefits, on a “regular and periodic basis”. (Common buzz words in the cases). Wagner as president of Schererville Steel Corporation gave her the ability to require it. Had she sold Schererville Steel prior to Roy receiving full payment, nothing released her from the obligation and she remained personally liable. Schererville Steel did not need to sign off on any mediation agreement where Wagner personally guaranteed performance. His final paycheck was not “something extra” as defined by *Wank*, but a regular paycheck he had been receiving for a very long time.²⁹ The settlement agreement on its face shows that Wagner should have continued paying Roy his wages. Nothing in the Wage Payment Statute prevents a third party (such as Wagner) from guaranteeing that a corporation which she wholly controls continues to pay a particular employee.

²⁸ *Highhouse v. Midwest Orthopedic*, 782 N.E.2d 1006 (Ind.App. 2003), transfer granted, August 29, 2003; *Gurnik v. Lee*, 587 N.E.2d 706, 709 (Ind.App.1992).

²⁹ *St. Vincent v. Steele*, 766 N.E.2d 699 (Ind. 2002); *Sallee v. Mason*, 714 N.E.2d 757 (Ind.App. 1999).

The Court of Appeals should note that Wagner does not dispute on appeal that she owed Roy \$2,098.80 on or before August 8, 2000. *Appellees Appendix, p.700*. It is also undisputed that Wagner received a reminder letter on August 9, 2000. *Id., p.755*. Yet Roy could not cash his paycheck until May 16, 2001. *Id., p.790*.

The trial court did not make a mistake in enforcing the contract terms concerning Roy's paycheck.³⁰ In addition, Wagner cannot win on the Wage Payment Statute alone, where it is clear from the trial court's findings that it entered judgment on this issue because she also violated the December 11, 2000 order to specifically perform the agreement. Double damages and attorney fees is a lot better than having to spend 5 months in jail (which was the length of time that she refused to comply with the court's order), or 9 months (which was how long Roy had to wait to cash his final paycheck). In any event, Wagner's attorney waived any argument that the final paycheck was not a wage when he asked Mr. Shirley on cross examination: "Was the two thousand ninety-eight dollars ultimately paid in wages?" To which Mr. Shirley responded without objection and without a motion to strike, "yes". *Appellees Appendix, p.510 (lines 16-18)*.

³⁰ *Mortgage Consultants v. Mahaney, 655 N.E.2d 493 (Ind. 1995)*.

6. Wagner's delay damaged Roy and Susan.

Wagner argued that the trial court erred in holding her liable "to reimburse Roy's attorney, Mr. Shirley, for sums he paid to Paula's attorney to settle a claim of malicious prosecution against Mr. Shirley." *Appellant's Brief, p.19*. This is not accurate. The findings of fact and conclusions of law, and more importantly the judgment, never calls for Wagner to reimburse Mr. Shirley. Wagner must pay Roy and Susan the \$6,000.00.

In the beginning Roy and Susan sued R. Brian Woodward and his law firm for his negligent representation of the decedent. Wagner then hired Brian's brother, David Woodward, to defend and ultimately settle the case. After the settlement, Brian again started representing Wagner and indeed did so at trial. Just before the first trial date, Brian sent a threatening demand to Mr. Shirley, which he and his clients ultimately settled for nuisance value.

Wagner set out in her appellant's brief a passage from the transcript quoting Mr. Walker and then Mr. Woodward concerning what Mr. Shirley testified to. *Appellant's Brief, p.20*. Wagner assumes (without any citation to authority because there is none) that Mr. Woodward's objection that "I was going to sue them come hell or high water" is evidence. It is not. Brian Woodward never took the witness stand. Roy and Susan were never given the opportunity to cross examine him. Any comments by an attorney in making an objection never constitute facts upon which a trial court can render a decision.

Wagner argued that “Appellees offered no evidence as to how Paula’s alleged delay in complying with the Settlement Agreement forced Mr. Shirley into committing the tort of malicious prosecution.” *Id.*, p.20. Yes they did. Wagner has not argued that any of the following trial court findings were clearly erroneous:

“83. The Agreement called for Spurlock to dismiss the defendants R. Brian Woodward and R. Brian Woodward & Associates, P.C., so long as they agreed to mutual dismissals and a release.

84. The testimony was not disputed that at the mediation held on January 29, 2000, Mr. R. Brian Woodward told his brother, Mr. David Woodward (who then told Mr. Shirley and Mr. Martin) that they agreed to release Spurlock in this case.

85. Contrary to the Agreement, Wagner did not prepare a release for Spurlock to sign.

86. On October 4, 2001, Mr. Shirley (on behalf of Spurlock) agreed on the telephone with Mr. Cockrum (on behalf of R. Brian Woodward and his former lawfirm) to mutual dismissals and releases.

87. On February 25, 2002, shortly before trial in this case, Mr. R. Brian Woodward threatened a lawsuit against Spurlock and many of his attorneys for malicious prosecution.

88. On March 25, 2002 Mr. Shirley and Mr. R. Brian Woodward signed a written release, and Mr. Shirley paid an additional sum of \$6,000.00.

89. Had Wagner complied with the Agreement, or this Court’s December 11, 2000 Order to comply with the Agreement, Mr. Shirley would not have had to pay Mr. R. Brian Woodward anything.

90. After obtaining the \$6,000.00 payment, Mr. R. Brian Woodward appeared in this case for Wagner and served as her primary trial counsel.

91. At trial, neither Wagner nor any witness presented any testimony nor evidence contrary to Mr. Shirley’s testimony.

92. Wagner presented no evidence contesting her liability for this matter. For breach of the Agreement, and failure to comply with the Court's December 11, 2000 order granting the petition to enforce the Agreement, Wagner must pay Spurlock the additional \$6,000.00 as compensatory damages. The Court will also award prejudgment interest at the statutory rate off eight percent (8%), For the period of March 25, 2002 to November 8, 2002 the interest amount is \$300.00."

Appellee's Appendix, p.100-101.

Roy and Susan showed that at the time of the settlement agreement, Mr. Woodward and his law firm agreed to mutual dismissals and releases. Had Wagner not delayed her compliance with the settlement, or had she complied with the trial court's December 11, 2000 order to specifically perform, Mr. Woodward and his lawfirm would have signed a written release rather than send a letter threatening to file another lawsuit.

Wagner argued that Mr. Shirley "is not a party to this litigation, his claim is not properly before the court." *Appellant's Brief, p.21.* Just because Mr. Shirley actually wrote the \$6,000.00 check to Mr. Woodward does not mean that he has to file a separate lawsuit or that Wagner can get away with violating the settlement agreement. Attorneys have the right to act for their clients.³¹ In this case the trial court properly attributed Mr. Shirley's actions to Roy and Susan.³²

Just because an attorney writes a check does not give rise to an inference that it was his own personal funds, especially where the testimony and the trial court's findings call for Wagner to reimburse Roy and Susan (not Mr.

³¹ *Kmart v. Englebright, 719 N.E.2d 1249 (Ind.App. 1999); Gravens v. Auto-Owners, 666 N.E.2d 964 (Ind.App. 1996).*

Shirley). If Wagner could succeed on such an argument, court reporters wanting to get paid for transcripts or clerks needing a filing fee would have to insist on receiving checks from clients rather than attorneys. What nonsense. Even attorneys that act in a negligent manner (such as by filing a claim subject to malicious prosecution) render the clients liable for harm caused to third parties.³³

7. Wagner and her attorneys committed fraud.

Wagner argued that the trial court found fraud out of thin air, and that its “finding of fraud is without basis in law or fact”. *Appellant’s Brief, p.27*. The only specific finding that Wagner challenges as clearly erroneous is finding of fact number 6 on page 3. *Id., p.22*. That finding states that “Wagner told Ms. Stephanie Gerdes at the Bank not to disclose any information concerning the IRS closing letter to Spurlock or his attorneys.” Wagner also argued that the trial court committed error in admitting a letter from Mr. James Martin that he wrote to Mr. George Carberry on December 22, 2000 that referenced a conversation Mr. Martin had with Ms. Gerdes “that Paula did not want my clients, Susan and Roy, to receive any information regarding the status of the audit.” *Id., p.24 (and referencing Exhibit 63, Appellees Appendix, p.924)*.

Wagner’s attorney objected to Mr. Martin’s testimony concerning this based upon hearsay. The objection was properly overruled because Wagner’s own

³² *Farm Credit v. Estate of Decker, 624 N.E.2d 491 (Ind.App. 1993)*.

³³ *Koval v. Simon-Telelect, 979 F.Supp. 1222 (N.D.Ind. 1997), certified question answered, 693 N.E.2d 1299 (Ind. 1998)*.

statement is not hearsay under Evidence Rule 801(d)(2). Wagner made no objections concerning the hearsay within hearsay rule, which in any event the trial court would have properly overruled under Evidence Rule 805.³⁴ Wagner testified in this case but took no opportunity to deny her statements to Ms. Gerdes.

More importantly, whether or not the Court of Appeals concludes that the trial court abused its discretion in finding number 6 or in admitting Exhibit 63, other abundant evidence at trial supports the judgment of “\$2,667.000 for lost interest, and a punitive amount of \$8,001.00 because of the issues involving the \$200,000.00 held in escrow.” *Appellees Appendix, p.102*. In fact, this same information came in when Wagner introduced the parties’ correspondence in her own Exhibit A, which included Mr. Shirley’s letter to David Woodward dated January 2, 2001 showing the facts of fraud. *Id., p.1354*. Wagner’s own attorney in cross examination of Mr. Shirley introduced the same facts into the record (without objection and without any motion to strike as non-responsive): “Paula specifically told the bank not to disclose [the clearance letter] to us. We suffered two months of having that two hundred grand in my trust account when it should have been distributed.” *Id., p.505, lines 7-11*.

Wagner has not challenged the following findings of fact concerning this portion of the judgment:

“3. Concerning the following issues, Spurlock contends that Wagner committed breach of contract, constructive fraud, breach of

³⁴ *U.S. v. Dotson, 821 F.2d 1034, 1035 (5th Cir. 1987) (cited in Miller, Courtroom Handbook on Indiana Evidence, 2002 Edition, p.317).*

trust and contempt of this Court's December 11, 2000 Order: The Agreement called for Spurlock's attorney to escrow \$200,000.00, which Spurlock was to receive if the estate did not owe additional estate taxes. The Agreement called for Spurlock to receive wages in the amount of \$1,000.00 per week. The Agreement called for the parties to divide the grandchildren's trust. And finally, the Agreement called for Spurlock to dismiss the defendants R. Brian Woodward and R. Brian Woodward & Associates, P.C., so long as they agreed to mutual dismissals and a release. Spurlock asks for compensatory damages, punitive damages, specific performance, that the Court hold Wagner in contempt of court, and such other proper relief.

4. On October 30, 2000 the Internal Revenue Service sent a closing letter to the executor, Mercantile National Bank, indicating no additional estate tax, penalty or interest was due.

5. On October 31, 2000 the Bank sent the closing letter by facsimile to Paula Wagner and her attorney David Woodward. At the time no one sent a copy of the closing letter to Spurlock or any of his attorneys.

...

7. On November 1, 2000 Wagner sent a new settlement proposal to Spurlock regarding how to dispose of the funds held in escrow.

8. Of the \$257,500.00 held in escrow by the attorneys for the benefit of Spurlock and the grandchildren, Wagner wanted to be paid \$100,000.00 and in exchange "Roy, Jr. and Susan will not be responsible for any increase in the net estate taxes, interest or penalties." By then Wagner (but not Spurlock) knew there would be no increase in estate taxes, interest or penalties.

9. At trial Wagner contended that the November 1, 2000 settlement proposal was sent before Wagner knew of the October 30, 2000 IRS closing letter.

10. Wagner did know of the IRS closing letter by December 20, 2000 when she mailed a follow up letter asking for a response by "the end of the year".

11. On December 22, 2000 Mr. Martin sent a letter to the Bank asking for the status of the IRS closing letter.

12. On December 28, 2000 the Bank sent Mr. Martin a copy of the closing letter, which concealed the date the IRS sent the letter and the date the Bank received it.

13. After Mr. Martin telephoned the Bank about why he received a copy of the IRS closing letter with the dates concealed, later that day the Bank sent him a copy which showed the IRS sent the letter on October 30, 2000, and that the Bank had received it on October 31, 2000.

14. On January 2, 2001 Mr. Shirley sent a letter to Mr. Woodward which included the statement that these actions meant “you not only breached the settlement agreement, but that you and the Bank conspired to defraud Roy and Susan.” Mr. Woodward never responded to this accusation.

15. Had the Bank or Wagner notified Spurlock that the IRS closing letter had been received, Spurlock would have received his \$200,000.00 on November 1, 2000. Instead, he received it on January 4, 2001.

16. Wagner caused a sixty four (64) day delay in Spurlock receiving his funds. There is no evidence indicating Spurlock caused any of the delay in being able to distribute the \$200,000.00.

17. Based upon the foregoing facts the Court finds that Wagner breached the Agreement by failing timely to notify Spurlock of the IRS closing letter, and failing timely to inform Spurlock that he could receive the \$200,000.00 without restriction.

18. The delay in receiving the \$200,000.00 in escrow caused Spurlock to be damaged at eight percent (8%) interest for sixty four (64) days, or \$2,667.00.

19. For this breach and violation of the Court’s December 11, 2000 order the Court awards Spurlock \$2,667.00 in compensatory damages.

20. Based upon the foregoing facts the Court finds that Wagner defrauded Spurlock by failing to inform him of the IRS closing letter, by sending settlement proposals which attempted to compromise the \$200,000.00 amount on the assumption that the estate taxes could be in dispute when they were already settled, and by telling the Bank not to disclose information to Spurlock.

21. Wagner also violated the Court's December 11, 2000 order granting the petition to enforce the Agreement by attempting to take \$100,000.00 from Spurlock under new terms.

22. For this fraud Wagner is assessed punitive damages of three (3) times the amount of compensatory damages, or an additional \$8,001.00."

Appellees Appendix, pp.89-92. Wagner also did not appeal the trial court's admission of the following exhibits which supported these findings:

The settlement agreement called for Roy and Susan's attorney to escrow \$200,000.00, which they were to receive if the estate did not owe additional estate taxes. *Appellees Appendix, p.743 (Exhibit 21, p.4, par.3).* On October 30, 2000 the Internal Revenue Service sent a closing letter to the executor, Mercantile National Bank, indicating no additional estate tax, penalty or interest was due. *Id., p.920 (Exhibit 60).* On October 31, 2000 the Bank sent the closing letter by facsimile to Paula Wagner and her attorney David Woodward. *Id., pp.922-23 (Exhibits 61 & 62).* On November 1, 2000 Wagner sent a new settlement proposal to Spurlock regarding how to dispose of the funds held in escrow. *Id., p.758 (Exhibit 28).*

The trial court did not commit error (and Wagner does not contend so) when it inferred that Wagner sent a new proposal on November 1, 2000 for Roy and Susan to receive \$100,000 at a time when she already knew that they were entitled to \$200,000.00 under the agreement. The trial court did not commit error (and Wagner does not contend so) when it found that Wagner failed to comply with the trial court's December 11, 2000 order to specifically perform the agreement when

she instead recommended new terms with Roy and Susan.

Even if Wagner did not know of the IRS closing letter on October 30, 2000 when she offered new terms on November 1, 2000, without contradiction Wagner knew that Roy and Susan were entitled to the \$200,000.00 held in escrow when Wagner sent a letter to them on December 20, 2000 asking for a response. *Appellees Appendix, p.760 (Exhibit 29)*.

Even if the trial court did not correctly admit Exhibit 63 which shows that on December 22, 2000 Mr. Martin sent a letter to Mercantile Bank asking for the status of the IRS closing letter, Wagner does not dispute that on December 28, 2000 the Bank sent Mr. Martin a copy of the closing letter, which concealed the date the IRS sent the letter and the date the Bank received it. *Id., p.925 (Exhibit 64)*. After Mr. Martin telephoned the Bank about why he received a copy of the IRS closing letter with the dates concealed, later that day the Bank sent him a copy which showed the IRS sent the letter on October 30, 2000, and that the Bank had received it on October 31, 2000. *Id., p.928 (Exhibit 66)*. The trial court correctly inferred from the Bank's concealment that fraud was afoot. Wagner's own attorney in questioning Mr. Shirley asked whether Roy and Susan relied "upon any representation that there was no closing letter?" Mr. Shirley responded "Certainly", which is enough to condemn any argument from Wagner on appeal that the trial court could clearly and erroneously ignore such evidence. *Id., p.466*.

Because the Mercantile Bank had nothing to gain by concealing the date when the IRS sent the closing letter or the date that the Bank received it, the

trial court could properly infer from this alone that Wagner (who did have something to gain) had the dates concealed so that Roy and Susan would not learn they had been entitled to the \$200,000.00 held in escrow for quite some time.

Wagner argues that “Appellees, by and through their counsel, were completely empowered with the authority to contact the IRS or any other person to inquire as to the status of the IRS audit, but chose not to do so.” *Appellant’s Brief, p.26*. This is not true. Mr. Martin did inquire of “any other person” when he asked the Bank about it. *Appellees Appendix, p.924 (Exhibit 63)*.

In a rather sarcastic argument, Wagner attempts to displace blame upon Roy and Susan by asserting “That Paula paid attention to matters and took care of her own affairs does not amount to fraud. To find that it does would be to punish those who take affirmative actions and reward those who rest on their rights.” *Appellant Brief, p.27*. Wagner forgets that the trial court ordered her on December 11, 2000 to specifically perform the terms of the settlement agreement. When she learned that the IRS had cleared the Form 706, under the settlement agreement Roy and Susan without dispute were entitled to \$200,000.00. Wagner used her knowledge of this (and the fact that Roy and Susan did not know this) as an opportunity to extort another \$100,000.00 from them. The trial court properly labeled this as fraud, and in any event properly sanctioned this as contempt.

CONCLUSION

The Court of Appeals should AFFIRM the trial court and remand this case for the assessment of additional appellate attorney fees and interest pursuant to the trial court's judgment.