

AUSTGEN KUIPER & ASSOCIATES, P.C. REVIEW

PROVIDING BUSINESS, REAL ESTATE, LOCAL GOVERNMENT, AND ESTATE PLANNING SERVICES

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THE BRIEF CASE: A DIGEST OF RECENT NOTEWORTHY CASES*



FIDUCIARY RESPONSIBILITY AND LIMITED LIABILITY COMPANIES

Recently, the Indiana Court of Appeals considered the issue of manager liability in a limited liability company (LLC) in the case of *Purcell v. Southern Hills Investments, LLC*, 847 N.E.2d 991 (Ind. App. 2006). LLCs were first introduced in Indiana in 1993 through Indiana's Business Flexibility Act. LLCs have gained considerable popularity statewide due to the tax benefits they provide, and in this case, the Court examined the fiduciary responsibilities of LLC managers for the first time.

In *Purcell*, a co-manager of an Indiana LLC appealed the trial court's ruling that he had breached his fiduciary duty towards the company by withholding funds due to a partner company and using them to finance his company's project. The Court imposed a common law fiduciary duty on the co-manager because his company's operating agreement did not address the issue. The standard of conduct imposed by the fiduciary duty requires that a manager of an LLC not use funds for personal gain if the funds properly belong to the entity. Furthermore, a manager may become personally liable for damages if his or her misconduct constitutes willful and reckless behavior. In re-examining the evidence provided at trial, the Court upheld the lower court's ruling that the co-manager did knowingly appropriate entity funds for his personal benefit, and that his actions constituted willful and reckless misconduct.

The Court also addressed the issue of *standing*, which is the ability of a party to maintain a lawsuit. In *Purcell*, the co-manager argued that the partner company did not have standing to sue him personally for damages. The Court rejected this argument, however, stating instead that so long as a direct action does not unfairly expose the defendants to a multiplicity of actions, materially prejudice the interests of the creditors, or interfere with a fair distribution of the recovery among all interested parties, then the action can be sustained.

The Court concluded its analysis of the co-manager's liability for damages with a clear message: "...where the rights of third parties are implicated, the law approaches transactions between an entity and those in a position to control its acts with "a large measure of watchful eye." *Id.* at 1000.

NEW RESPONSIBILITIES FOR TRUSTEES OF ESTATES

In the recent decision of *Marshall & Ilsley Trust v. Woodward*, 848 N.E.2d 1175 (Ind. App. 2006), Robert G. Woodward, Jr. established an irrevocable trust funded by life insurance policies. Soon thereafter, he died, leaving his estate to his wife, three sons, and a named contingent beneficiary, Robert G. Woodward, Sr., in the event his children died without issue. Eventually, Robert G. Woodward, Sr. sought an accounting from the trustee because he was concerned about the administration of the trust. The trustee refused the request. Robert G. Woodward, Sr. filed a complaint for an accounting. The trial court granted summary judgment in his favor and found he was entitled to an accounting. On appeal, the appellate court found that pursuant to Ind. Code § 30-4-3-6(b)(7), trustees were required to provide named remote contingent beneficiaries with an accounting of a trust.

SIDEBAR

NEW RULINGS ON NEGLIGENCE

In *Munston v. School Town of Munster*, the plaintiff (Munston) was seated on the top row of school bleachers. The bleachers did not have a back support rail. As the plaintiff leaned back to relax, he fell off of the back of the top level of the bleachers. *Munston*, 849 N.E.2d 630 (Ind. 2006).

The school argued that Munston was negligent as a matter of law. The trial court agreed, and on review, so did the Supreme Court, ruling that his contributory negligence barred the action. He was negligent in some degree, and his negligence was one of the proximate causes of his injury.

The Court explained that while comparative negligence reduced the damages of a plaintiff who was no more than 50 percent negligent, the Act did not apply to the school, as it was a governmental entity. I.C. § 34-51-2-5, 6. Accordingly, the question of contributory negligence became one of law and was a bar to an action. The Court found that because Munston was able to see that there was no back rail, as a matter of law he had negligently and proximately contributed to his own injuries.

For more information you may contact one of the attorneys at Austgen Kuiper & Associates, P.C.



DEMOCRACY IN ACTION NEW AND PENDING LEGISLATION

NEW IDEM REQUIREMENTS FOR PROPERTY TRANSFERS

As of July 1, 2006, Senate Bill 146 (SB 146) and Indiana Department of Environmental Management (IDEM) have updated the requirements for the release of environmental hazard information during property transfers under the Responsible Property Transfer Law (RPTL). RPTL requires a seller to disclose information about environmental defects to all parties involved in a transaction. Specifically, a disclosure form must be filed for transfers of property that contain one (1) or more facilities subject to reporting under the Right-To-Know Act of 1986, which are the site of one (1) or more underground storage tanks for which notification is required, or that are listed on the Comprehensive Environmental Response, Compensation, and Liability Information System. The purpose of the disclosure form is to advise buyers of any environmental problems with the property that could not be discovered through a title search. Foremost, SB 146 introduces heightened requirements for details about environmental hazards. The bill requires the transferor to disclose regulatory information during the transferor's ownership, site information under other ownership, and certification that all information is true and accurate. Additionally, the changes in SB 146 remove the requirement of the disclosure form, leaving the prescription of the form to IDEM's discretion and rules. Also, a copy of the site plan is no longer required to be attached to the disclosure form. The deadline for submitting the disclosure form is no later than thirty (30) days before the date of transfer, unless the seller obtains a waiver from all parties. In that instance, a seller has until the final date of transfer to deliver the disclosure form.

JURY SELECTION EXEMPTIONS ELIMINATED

Recently, Senate Bill 232 was enacted to eliminate exemptions from jury service. Previously, a person would be excused from acting as a juror if the person was at least sixty-five (65) years old; an active service member of the armed forces; an elected or appointed official of the executive, legislative or judicial branches of the U.S., Indiana, or local
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CLERK'S CORNER

OHIO SUPREME COURT RULES ON EMINENT DOMAIN



Norwood, Ohio, was once popular for its active General Motors plant, known for its production of Camaros and Firebirds. Recently, however, the city attracted attention for a much different reason: the law of eminent domain. Norwood became involved in a complex court battle between several residents unwilling to sell their 10 acres of property, and Rookwood Properties, Ltd., which wanted to use the residential properties as part of a multi million dollar complex of offices, apartments and chain retail stores.

The city gave Rookwood permission to complete the project, on the condition that it purchase the 71 properties that had occupied the site since the 1920s. Rookwood successfully negotiated 66 of the purchases, but was unable to close on the remaining five (5) deals. The city eventually agreed to exercise its power of eminent domain and condemn the remaining five (5) properties.

As a prerequisite for the city's exercise of eminent domain for the purpose of urban renewal, the Norwood City Code and Ohio statutes required the city to find that the condemned areas were "blighted," slums, or deteriorating and at risk of becoming blighted. The city of Norwood hired a consulting firm, whose services were paid for by Rookwood. In its report, the consulting firm found that many of the areas were unsuitable for living, largely because Rookwood's construction was already underway.

At the trial level, the Judge held that the city could declare the neighborhood at risk for blight. The Supreme Court of Ohio took the case on appeal, and affirmed the trial court's finding in favor of the city. The Court issued its decision on the heels of the now infamous decision of the United States Supreme Court in *Kelo v. New London*, which sparked widespread legislation across the country, seeking to ban the government's ability to take private property solely for private development. See *Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006).

For more information you may contact one of the attorneys at Austgen Kuiper & Associates, P.C.

JURY EXEMPTIONS

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governments; a member of the general assembly; an honorary military staff officer appointed by the governor; an officer or enlisted person of the guard reserve forces; a licensed veterinarian; a member of the board of school commissioners of the city of Indianapolis; a licensed dentist; a member of a police or fire department; or would serve as a juror during a criminal trial and the person is an employee or spouse or child of an employee of the Department of Correction whose duties require contact with inmates confined in a Department of Correction facility.

SB 232 does, however, permit a person called for jury service to receive one (1) deferral for up to one (1) year if the juror selects an alternate date and the deferral is necessary due to hardship, extreme inconvenience, or necessity. SB 232 also prohibits employers from requiring or requesting employees to use annual vacation or sick leave for jury service

For more information on these regulations or to determine how your business might be affected, contact one of the attorneys at Austgen Kuiper & Associates, P.C.



DIRECT EXAMINATION: **AUSTGEN KUIPER &** **ASSOCIATES, P.C. EMPLOYEE SPOTLIGHT**

As a firm, we constantly strive to enhance the relationships with current clients and to develop new relationships. To that end, we would like to provide you with some background and personal information regarding individuals in our Law Firm who work to provide you with excellent legal services. This edition will feature Jaime Hornickel. Jaime is originally from Brook, Indiana, but now resides in Lowell with her husband, Bobby, their three sons, Darion (9), Dayton (7) and Dawson (5), and dog, J.J.

Jaime began working for the Firm in October 2005, and she has already become a valuable member of the support staff. Jaime's primary duties at the Firm are to assist Attorney David Austgen with filing, dictation, Wills and Trusts, Personal Injury Cases, and his daily tasks and follow-ups. When asked what she likes most about her job, Jaime says "I learn something new everyday, and no two (2) days are alike."

Jaime spends most of her time with her family at sporting events, but when she does have free time, she enjoys reading, scrapbooking, painting and using the computer.

THE FIRM

AUSTGEN KUIPER & ASSOCIATES, P.C. is a progressive and growing Law Firm currently comprised of four (4) attorneys and is located in Crown Point, Indiana. Austgen Kuiper & Associates, P.C. was formed in 1993, but attorneys in the Law Firm have been practicing in this area for more than 25 years. The Firm represents private and municipal clients in Indiana and Illinois. The Firm is a Business law firm which provides legal representation in the areas of Municipal and Government Law, Real Estate/Land Use, Estate Planning/Elder Law, Probate, Corporate/Business Law, Family Law, Criminal Law, Bankruptcy, and Collections. The following is a listing of representative clients: Town of Cedar Lake, Indiana (Civil Town, Board of Zoning Appeals, Plan Commission, Police Commission, Redevelopment and Sewer Utility); Hanover Township, Lake County, Indiana; Town of Schererville, Indiana (Civil Town, Redevelopment, Sanitary & Water Utilities); Town of St. John, Indiana (Civil Town, Plan Commission, Board of Zoning Appeals, Parks and Recreation Board and Police Commission); Meijer, Inc.; Calumet Breweries, Inc.; McDonald's Corporation; Village of Beecher, Illinois; Vulcan Materials Company; Saco Industries, Inc.; Hallmark Construction; Superior Environmental Remediation, Inc.; Van Prooyen Builders, Inc.; Superior Petroleum Products, Inc.; Standard Bank; Centier Bank; Discount Tire, Inc.; Hallmark Properties, LLC; Tri-Creek Lumber, LLC; Apple Valley Utilities, Inc.; and Crown Rentals, Inc.

NEWS & EVENTS

The Law Firm is pleased to announce it has won a favorable decision on appeal, published as *Town of Cedar Lake Bd. of Zoning Appeals v. Vellegas*, 853 N.E.2d 123 (Ind. App. 2006).

The Law Firm is happy to announce that Attorney **Jaime C. Parsons** joined the Firm as an Associate. He was sworn in by the Indiana Supreme Court on October 20, 2005, and began work on October 23, 2006.

Receptionist **Shirley Rebenak** is scheduled to attend a Continuing Education Class, "The Outstanding Receptionist," on December 2, 2006. The half-day event will be held at The Avalon in Merrillville.

Attorneys **Joseph Svetanoff** and **Danette Garza** attended a Continuing Legal Education event in Indianapolis, at the Midwest Employment Institute, on June 7-8, 2006. The course focused on various aspects of employment and labor law.

Attorney **David Austgen** attended the 23rd annual Indiana Municipal Lawyers Association Seminar in Indianapolis, on June 29-30, 2006. The Seminar covered major local government issues.

**CLOSING STATEMENT: COURT CLARIFIES BOARD OF ZONING APPEALS' ROLE IN LAND USE
DISPUTES**

In *Green v. Hancock County Bd. of Zoning Appeals*, the Indiana Court of Appeals reviewed a county board of zoning appeals' (BZA) ability to interpret the meaning of its own zoning ordinance, and further defined the limits of the BZA's statutory authority. *Green*, 851 N.E.2d 962 (Ind. App. 2006). The case involved a group of neighbors appealing a BZA decision to grant a property owner a special exception to construct a banquet hall on land zoned for agricultural use. The BZA determined that the banquet hall satisfied the requirements of a "commercial recreational use," an exception specifically provided in the zoning ordinance. On appeal, the court considered the issue of whether the BZA had exceeded its authority in interpreting the meaning of "commercial recreational use" with respect to the zoning ordinance. The court ruled that although a BZA is limited by its authorizing statute, in the present case, the BZA did not perform an illegal quasi-legislative function because it limited its review of the zoning ordinance to resolve an existing controversy geared towards determining the rights of a specific person. The court affirmed the BZA and the trial court's decision to grant the exception. As a result of the decision, it is clear that a BZA is not acting illegally when it interprets the provisions of a zoning ordinance, so long as its review is limited to give effect to the statute's underlying purpose and is aimed at resolving a specific controversy or determining an individual's rights.

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