

Brief

1. The Plaintiff's Complaint against Rush Temporaries, Inc. was frivolous, unreasonable, or groundless under IC 34-52-1-1(b).
 - a. General rule regarding what constitutes a frivolous, unreasonable, or groundless claim:
 - i. IC § 34-52-1-1(b) (IC § 34-52-1-1) provides "an enforcement mechanism against improper and unwarranted litigation." Kahn v. Cundiff
 - ii. Therefore, we hold that a claim or defense is "frivolous" (a) if it is taken primarily for the purpose of harassing or maliciously injuring a person, or (b) if the lawyer is unable to make a good faith and rational argument on the merits of the action, or (c) if the lawyer is unable to support the action taken by a good faith and rational argument for an extension, modification, or reversal of existing law.
 - iii. Therefore, we hold that a claim or defense is unreasonable if, based on a totality of the circumstances, including the law and facts known *171 at the time of the filing, no reasonable attorney would consider that the claim or defense was worthy of litigation or justified.FN3
 - (1) FN3. We note that in examining the circumstances surrounding an attorney's conduct the court should consider: (a) the amount of time the attorney had to investigate the facts, research the law, and prepare the document; (b) the extent to which the attorney had to rely upon the client for the factual foundation; (c) the complexity of the factual basis and legal questions involved; (d) the ability to conduct a prefiling investigation, and the extent to which discovery was necessary and beneficial to the development of the factual basis; and (e) the plausibility of the arguments forwarded, including good faith efforts to extend or modify the law. See e.g., Brown v. Federation of State Medical Boards of U.S. (7th Cir.1987), 830 F.2d 1429, 1435; Wong v. Tabor (1981), Ind.App., 422 N.E.2d 1279, 1288 n. 9.
 - iv. Therefore, we hold that a claim or defense is groundless if no facts exist which support the legal claim relied on and presented by the losing party.
 - v. a finding of frivolousness and an award of attorney fees may be based solely upon the lack of a good faith and rational argument in support of the claim.
 - vi. Furthermore, given the totality of the circumstances Kahn's claim against Larry was also unreasonable. The facts and legal theories were not complex. Kahn did not have to rely on his clients to obtain a factual foundation. Also, although discovery would have been beneficial as to the facts surrounding Larry's involvement or liability, plenty of time existed*172 between the time suit was filed against Rachel and the time the statute of limitations ended. Thus, Larry could have been added as a defendant after initial discovery, assuming the facts discovered so warranted. Finally, the arguments forwarded by Kahn based on Larry's ownership and entrustment were not plausible absent evidence that Rachel was incompetent or that Larry knew of Rachel's incompetence. Also, no argument was made to change the law. Accordingly, we do not believe that any reasonable attorney would consider the claim worthy of litigation or justified. Finally, the lack of a factual basis makes Kahn's claim against Larry groundless. Therefore, the trial court could have awarded attorney fees under IC § 34-52-1-1(b).
 - b. The claims made against Rush
 - i. Trade Secrets under Indiana law has the following elements:
 - (1) Information
 - (2) which derives independent economic value
 - (3) is not generally known or readily ascertainable by proper means by
 - (4) is the subject of efforts reasonable under the circumstances to maintain its secrecy. *Prime Care Home Health v. Angels Of Mercy Home Health Care, LLC*, 824 N.E.2d 376

(Ind.Ct.App., 2005).

- ii. Tortious interference with contracts requires the following elements:
 - (1) the existence of a valid and enforceable contract;
 - (2) defendant's knowledge of the existence of the contract;
 - (3) defendant's intentional inducement of breach of the contract;
 - (4) the absence of justification; and
 - (5) (5) resulting damages. Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228 (Ind. 1994); Levee v. Beeching, 729 N.E.2d 215 (ind. Ct. App. 2000)." Indiana Health Centers, Inc., V. Cardinal Health Systems, Inc., 774 N.E.2d 992, 1000 (ind. App 2002).
- iii. Civil Conspiracy: Indiana law does not recognize civil conspiracy as an independent cause of action. Winkler v.. V. G. Reed & Sons, mc,638 N.E.2d 1228, 1234 (ind. 1994) citing to Indianapolis Horse Patrol, Inc. v. Ward (1966), 247 ind. 519, 522, 217 N.E.2d 626, 628. An underlying cause of action must exist for civil conspiracy. For this underlying cause of action, Plaintiff uses the allegations of misappropriation of trade secrets contained in Paragraphs 1 through 29.

c. and the evidence used by Bane.

- i. The court's judgment regarding Plaintiff's Motion for Preliminary is of importance in evaluating Rush Temporaries' under 34-52-1-1(b).
 - (1) The court ruled that there were no trade secrets.
 - (2) The Plaintiff proffered no evidence at the hearing on Rush's Motion for Summary Judgment that had not been proffered at the hearing on Plaintiff's Motion for Preliminary Injunction.
- ii. Plaintiff responded with the following argument:
 - (1) Tortious interference

As by Mr. Johnson's own admissions, Rush had knowledge that the customers, employees and contracts in question were Plaintiff's customers, employees and contracts prior to Mr. Johnson's decision to leave Plaintiff's employ, Plaintiff submits that Plaintiff has provided proof of branch one and two of the aforesaid test. Through the attached affidavit and his testimony at the aforesaid hearing, Mr. Bane has demonstrated that Mr. Johnson intentionally breached his contract with Plaintiff and as a direct and proximate cause Plaintiff suffered damage. While the affidavits attached to Rush's subject motion attempt to contradict said testimony, these affidavit merely suggest the existence of factual issues to be resolved by the trier of fact as opposed to a basis for summary judgment.

- (2) With its trade secrets argument, Plaintiff essentially followed the argument used at the preliminary injunction hearing. Plaintiff argued that since Plaintiff and Johnson had entered into an agreement regarding what was trade secrets. Plaintiff's relied again on a document this court had questioned at the time of the preliminary injunction hearing. Plaintiff also argued that Rush Temporaries' franchise agreement vindicated Plaintiff's claim that the information it sought to designate as trade secrets were in fact trade secrets. Plaintiff went onto argue Rush Temporaries must have been aware that these customer lists were trade secrets.

d. Why the Plaintiff's claims regarding tortious interference against Rush violated 34-52-1-1(b):

- i. As for the Plaintiff's claims against Rush Temporaries being groundless, : Plaintiff could have successfully fended off Rush's Motion Summary Judgment with an affidavit from Primex and/or Woodruff showing that Rush tortiously interfered with the contract between Plaintiff and those companies. One would assume that Plaintiff or its attorneys contacted these companies in order to obtain facts supporting its claim of tortious interference. One would further assume that the Plaintiff would seek such facts upon receiving Rush's Motion for Summary Judgment. Kahn notes that the use of discovery may stay the imposition of penalties under 34-52-1-1(b), but this defense should wither away when faced with a Motion for Summary Judgment. At this point, Plaintiff ought to have presented facts supporting its position. Instead, Plaintiff relied upon the same materials that had proven unsupportive when it sought a

preliminary injunction and Rex Johnson's testimony at the preliminary injunction hearing. Johnson's testimony brought nothing to light as to Rush Temporaries interfering with the Plaintiff's contracts. From this collection of facts, the only conclusion possible is that Plaintiff never had a factual basis for its claim against Rush for tortious interference with its contracts. Without a factual basis, Plaintiff's claim against Rush Temporaries fits clearly within Kahn's definition of a groundless lawsuit.

- ii. As to frivolousness, Plaintiff argued that since Johnson knew about the contracts, that Johnson breached his contract with Plaintiff, Plaintiff refuted the affidavits relied upon by Rush Temporaries. As previously mentioned, Plaintiff relied upon Rex Johnson's testimony at the preliminary injunction and Johnson's testimony brought nothing to light as to Rush Temporaries interfering with the Plaintiff's contracts. Surely, a good faith argument means more than blind faith in one's argument but bears a rational relationship to the facts of the case. A good faith argument could be made if one ignored the facts of the case but considering the facts the Plaintiff's argument was frivolous as well as groundless.

- (1) Even though her argument may be novel, the absolute lack of any supporting Indiana or out-of-state case law and the absence of a good faith argument after the trial court's repeated and consistent analyses, makes us hesitant to categorize Diane's actions as zealous advocacy. See Mitchell, 695 N.E.2d at 924. Rather, we conclude that with her continuous filings Diane crossed the boundary into unnecessary and unwarranted litigation.

French v. French, 821 N.E.2d 891 (Ind.App. 2005) rehearing denied

- iii. Unreasonable:

- (1) the amount of time the attorney had to investigate the facts, research the law, and prepare the document: Johnson left the Plaintiff's employment sometime in late February of 2005 (Plaintiff's Complaint, paragraph 12), Johnson became a Rush Temporaries' franchisee at approximately the same time, Plaintiff filed its Complaint on April 1, 2005, the court held the hearing on Plaintiff's Motion for Preliminary Injunction on April 5, 2005; and after Rush Temporaries filed its Motion for Summary Judgment on May 9, 2005, the Plaintiff had until June 6, 2005 to file its response to Rush Temporaries's Motion for Summary Judgment. The Motion for Summary Judgment was served upon the Plaintiff on April 5, 2005.
- (a) The Plaintiff had from approximately April 5, 2005 and June 9, 2006 to develop a case that would survive summary judgment.
- (b) Or Plaintiff had from late February to June 9, 2005 to ascertain the factual basis for its allegations.
- (2) the extent to which the attorney had to rely upon the client for the factual foundation
- (a) The Plaintiff could have easily trumped the Motion for Summary Judgment by obtaining from Primex and/or Woodruff affidavits that Rush Temporaries interfered with the contracts those companies had with Plaintiff.
- (3) Regarding the complexity of the factual basis and legal questions involved, there was no great complexity of facts or law here. Either Rush Temporaries improperly interfered with the Plaintiff's contracts as alleged in its Complaint or it did not.
- (a) Again, this issue could have been answered by conversing with someone at Primex and/or Woodruff.
- (4) As for whether Plaintiff had the ability to conduct a pre-filing investigation, one must assume that since the Plaintiff asserted this claim then the Plaintiff had information to support its claim. If Plaintiff did not have the factual basis fully secured, then discovery was available to it.
- (a) At the risk of being repetitious, Plaintiff never presented any evidence from Woodruff and/or Primex that would have shielded it from summary judgment.
- (b) If Plaintiff's counsel were not satisfied in their factual basis, Plaintiff's counsel had the opportunity to conduct discovery to secure their factual basis.

- (c) Plaintiff's counsel conducted no discovery to secure their facts.
- (5) As quoted above, Plaintiff's counsel argued that Rush Temporaries knew Johnson's temporary worker and employer clients were originally Plaintiff's client but Plaintiff simply ignored that for a successful claim of tortious interference there must be a wrongfulness in Rush Temporaries's actions in getting the contracts with Primex and/or Woodruff. On this point, Plaintiff's argument did even rise to implausibility as the wrongfulness of the interference became missing in action. The court specifically found that Plaintiff failed to support this element with any designated evidence in the court entry of summary judgment.
- (6) The Plaintiff had time, either before or after filing its Complaint, in which to determine whether or not it had a factual basis for its claim. Plaintiff received adequate notice that factual problems existed for their claims on April 5, 2005. In response to Rush Temporaries' Motion for Summary Judgment, Plaintiff did nothing more than regurgitate the same factual material it offered at its hearing on its Motion for Preliminary Injunction. The factual material submitted by the Plaintiff did not establish that Rush Temporaries had acted in a wrongful manner. Plaintiff did nothing to obtain the facts necessary to survive summary judgment. The only conclusion that one might draw from the Plaintiff's failure to pursue discovery or obtain affidavits from Primex and/or Woodruff is that Plaintiff had sufficient factual evidence supporting its claim. Yet, Plaintiff never presented any facts supporting its claims of misappropriating trade secrets or tortious interference with the contracts between Plaintiff and Woodruff and/or Primex.
- iv. As to the groundless prong of IC 34-52-1-1(b), counsel see in the foregoing arguments on the other prongs support for the conclusion that Plaintiff's claims against Rush Temporaries were groundless. The preceding arguments come down to the absence of a factual dispute and under Kahn there must be no factual grounds for the claim or defense to be groundless. Plaintiff presented no facts to support its claim that Rush Temporaries violated Plaintiff's trade secrets. Indeed, Plaintiff's argument on this issue avoided complying with long-standing factual criteria under Indiana law for trade secrets without presenting any cogent argument why Indiana precedent ought to be overturned in this case. As for the tortious interference claim, one might take the view that Plaintiff did all it could not to produce facts which might allow Plaintiff to survive summary judgment. I am hard pressed to think of any case that might be considered more groundless than this.
- e. Why the Plaintiff's claims regarding trade secrets and civil conspiracy against Rush violated 34-52-1-1(b)
- i. This court found that Plaintiff wholly failed to show that Plaintiff possessed any trade secrets.
- (1) While Plaintiff showed that there was evidence that there was evidence, the Plaintiff did nothing to show that this information constituted trade secrets under Indiana law.
- (2) This court had previously determined that Plaintiff possessed no trade secrets at the preliminary injunction hearing and Plaintiff pressed only a few inessential arguments and facts in support of this contention at the summary judgment hearing. Following the argument detailed above, the Plaintiff had as much time to develop facts in its opposition to Rush Temporaries' Motion for Summary Judgment as for the tortious interference claim and an even better idea of where the weakness lie in its argument from its loss at the preliminary injunction hearing. That Plaintiff failed to shore up its allegations of trade secrets as much as it failed to shore up the tortious interference claim. Therefore, the trade secrets argument was as frivolous, unreasonable and/or baseless as its tortious interference claim. However, Plaintiff had even less justification in pursuing its claim against Rush Temporaries considering the court's ruling on Plaintiff preliminary injunction without further development of the facts.
- (3) As civil conspiracy requires a predicate civil offense and since Plaintiff relied upon its

trade secrets claim for such a predicate, the absence of a factual basis for its trade secrets claim results in a lack of factual basis for its civil conspiracy claim.

2. The Appeal and Fees

- a. Counsel feels it necessary to address the issue of the "appeal" filed by the Plaintiff.
 - i. While Kahn says that bad motive is not necessary for an award of attorney fees, Kahn does not say that bad motive is not to be considered.
 - ii. Mr. Reiling advised this court that he had filed a motion for extension of time. At this same time, Rush Temporaries' counsel informed the court that the online docket of the Indiana Court of Appeals showed nothing filed by the Plaintiff in that court. In response, Plaintiff's counsel slighted the use of the online docket. Rush Temporaries' counsel was taken aback when, at the last meeting before this court, Mr. Arnold suggested that it would have been better for Rush Temporaries' counsel to have used the online docket.
 - iii. I think it has been clearly established that not only did Plaintiff's counsel not file any motions with the Indiana Court of Appeals, there was no appeal ever perfected with the Court of Appeals.
 - iv. The Plaintiff's counsel asserting that an appeal had been perfected had the effect of delaying consideration of Rush Temporaries' fee motion for the better part of a year.
 - v. Even a cursory reading of Indiana's Rules of Appellate Procedure ought to have informed Plaintiff's counsel that they had not perfected an appeal. By my calculations they ought to have filed their Brief on or about January 18, 2006. Surely by August of 2006, they knew that no appeal existed and there was no jurisdictional bar upon this court hearing Rush Temporaries' fee motion. One would think they would be obligated to inform this court that no appeal existed and that the reason given by Plaintiff for not hearing this motion was groundless.
 - vi. Yet Plaintiff's counsel never acknowledged that no appeal existed in this case. Even when confronted with the affidavit of the Clerk of the Appellate Court, Plaintiff's counsel tried arguing that somewhere, somehow an appeal did exist.
 - vii. Plaintiff's counsel's objected to the increase of my billing since the first filing. However, the majority of that increase relates solely to the issue of the bogus appeal. This matter could have been terminated months ago if the Plaintiff's counsel had acknowledged that the Court of Appeals' online docket was correct in that they had no case in that court. They did not do so.
 - viii. The appeal indicates the bad faith of the Plaintiff in presenting its claims against Rush Temporaries. Plaintiff's counsel constantly and consistently presented as existent a non-existent appeal.
 - (1) At this point, the repeated statements of Plaintiff's counsel that they were proceeding with an appeal were clearly groundless after January of this year.
 - (2) The only purpose I can see in making this claim of a live case in the Indiana Court of Appeals was to further harass Rush Temporaries in attempt to keep this court from hearing its fee motion for as long as possible.
 - (3) This so-called appeal being groundless seems all of a piece with the groundlessness of Plaintiff's original Complaint.
 - ix. Mr. Arnold seemed to raise the issue of whether I was asking for appellate fees. I see the expenses incurred for Plaintiff's non-existent appeal essential to getting this court to hear the fee motion. Certainly as no appeal was filed, the appellate fees do not apply nor do I wish to argue that they might be applicable here. The Plaintiff asserting that an appeal was pending delayed proceedings in this matter before this court. As I have mentioned, the majority of the fees are directly related to getting the fee motion heard by this court. (The smaller portion of the fees are related to hearings and travel to and from the court.) I believe I am on solid ground arguing that the behavior of Plaintiff's counsel reinforces the original argument regarding the frivolousness, unreasonableness, and/or groundlessness of the original Complaint. Additionally, I believe the claim of Plaintiff's counsel that an appeal had been filed when they knew that none had been perfected is also subject to sanctions under § 34-52-1-1(b).

- x. As for the reasonableness of the fees, I think that the court will see that there is nothing of fluff here. I do not think that there is any excessive time spent on this matter considering that this matter has been going on for over a year and that a good deal of my time for the past nine months is attributable to chasing the Plaintiff's will-o'-the-wisp appeal. I have practiced almost 19 years now and do not think that my hourly rate is unreasonable. I am asking that the court add to the total amount of my fees, those amounts for this month. Clearly, these amounts are directly related to the original motion. I have found nothing in any of the cases which state that the fees that can be awarded under § 34-52-1-1(b) terminate upon a judgment against the party sanctioned under that statute. Moreover, one must admit that issue of the non-existent appeal adds a level of complexity to this matter. I am unaware of any similar case. In particular, the statutory language contained in § 34-52-1-1(b)(2) possesses an open-ended flavor. Specifically, the language of "continued to litigate" supports the contention that the possibility of fees did not end at the entry of judgment the Plaintiff. Certainly, the purported appeal constitutes a continuation of the underlying litigation.
- xi. While not claimed in the original motion, my view of the phony appeal has become such that I think that fees could also be based § 34-52-1-1(b). "In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party litigated the action in bad faith." (West's A.I.C. 2006).