Filed: 11/19/2018 4:45 PM

IN THE COURT OF APPEALS OF INDIANA
**CAUSE NO.** 18A-PL-771

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| STATE OF INDIANA ex rel. CURTIS T. HILL, JR., ATTORNEY GENERAL OF INDIANA<br>*Appellant,* | ) | Appeal from the Lake Circuit Court |
| | ) | Case No.: 45C01-1705-PL-0051 |
| v. | ) | |
| WILLIAM J. PFISTER, RICHARD A., SOPKO, TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, WESTERN SURETY INSURANCE COMPANY, and OHIO FARMERS INSURANCE COMPANY<br>*Appellees* | ) | The Honorable Marissa McDermott, Judge. |

# BRIEF OF APPELLEES WILLIAM J. PFISTER AND RICHARD A. SOPKO

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## STATEMENT OF THE ISSUES

To begin, Appellees note that the State inaccurately asserts, in its "Statement of Issues," that "the legislature has given the Attorney General of Indiana the sole authority to bring an action to recover public funds once the State Board of Accounts has issued a report that discloses malfeasance, misfeasance, or nonfeasance in public office." Op. Br. at 5. The relevant statute actually grants sole authority to the Attorney General "[w]here the attorney general *has brought an action.*" Ind. Code § 5-11-5-5 (emphasis added.)

That all being said: The issue on appeal is whether the statute of limitations period for the State to bring an action to recover public funds (1) begins to run from the date a local entity discovers or should have discovered its injury where it is undisputed that the local entity approved the payments in public proceedings and the SBOA audited the local entity over the 15-year period; or, alternatively, (2) runs from the conclusion of the SBOA's biannual audit period where the State has conceded that the SBOA did not conduct an appropriate audit, per the plain language of the guiding statute, and, nonetheless, has not retained records that might otherwise indicate its diligence or approval of the payments at the time.

## STATEMENT OF THE CASE

The Defendants largely concur with the State's characterization of the case proceedings, with the following exceptions:

- Defendants dispute that the Trial Court's case management order of August 14, 2017 "directed that dispositive motions address *only* the statute of limitations issue." Op. Br. at 6 (emphasis added). The trial court did set a deadline for the submission for dispositive motions based upon the statute of limitations. (App. Vol. 3, p. 29.) However, the Order did not speak to whether other grounds for summary judgment could also be considered at that time. In fact, the

Trial Court noted in a January 25, 2018 Miscellaneous Order that "the court declines to find that its previous order necessarily limited the scope of any subsequent filings[.]"

- The State asserts in a footnote regarding the case *Robertson v. State*, Case No. 40D01-1705-PL-67 that "[i]n a similar case, the Jennings Superior Court found that an action to recover public funds was timely." There are material differences between the cases, and thus nothing incongruous between the *Robertson* decision and the Trial Court's decision here.

- On November 16, 2017, Defendants filed with the Trial Court a Motion to Compel the SBOA's Notes and Work Papers relating to six prior biannual audits. (App. Vol. 6, p. 109). The State objected on the grounds that the requested materials were irrelevant and would be unduly burdensome to produce. (App. Vol. 6, p. 191). Briefing by both parties followed, during the course of which the State acknowledged that it had destroyed a significant number of the documents requested. (App. Vol. 6, p. 196). In the Trial Court's January 25, 2018, Miscellaneous Order, it directed the State to bring to an oral argument on the Motion a "detailed privilege log as well as copies of the responsive documents it has not produced so that the court may conduct an *in camera* inspection of the same." (App. Vol. 10, p. 198). On April 17, 2018, the Trial Court issued an Order Granting Continuance indefinitely continuing the Motion to Compel hearing during the pendency of this appeal.

- Finally, the Defendants note that the Trial Court's Order addressed only the Trial Court's determination that the applicable statutes of limitation ran against the School Town of Munster and its discovery of its injury. The Defendants here and previously have asserted that the statute alternately also runs against the State Board of Accounts, which would also foreclose recovery.

## STATEMENT OF THE FACTS

### Complaint to Recover Public Funds

The Complaint to Recover Public Funds was brought by the State of Indiana on May 23, 2017, on the relation of the Attorney General of Indiana, pursuant to I.C. § 5-11-5-4 and 5-11-7-1, "for the benefit of the School Town of Munster." (App. Vol. 2, p. 47, ¶ 11). In all, the State alleges that Pfister collected an overpayment of $359,728.94 in his annuity (App. Vol. 2, p. 49, ¶ 20) and $463,922.75 overall (App. Vol. 2, p. 51, ¶ 33), and Sopko collected an overpayment of $311,198.75 in his annuity (App. Vol. 2, p. 53, ¶ 43) and $377,475.28 overall (App. Vol. 2, p. 55, ¶ 58). The State also seeks to recover $10,053.32 in audit costs. (App. Vol. 2, p. 51, ¶ 34; App. Vol. 2, p. 55, ¶ 59). Indiana Code § 5-11-7-1 describes the State of Indiana as a "nominal party" in such actions. (I.C. § 5-11-7-1).

### School Town of Munster

The governing body of the School Town of Munster is known officially as the Board of School Trustees of the School Town of Munster, as defined in Indiana Code § 20-18-2-5. (App. Vol. 3, p. 55). Under the School Town's Bylaws: "The supervision of this Corporation shall be conducted by the School Board[.]" (App. Vol. 3, p. 56). The Board is charged with the selection of the School Town Superintendent (App. Vol. 3, p. 57), and is directed to "annually, evaluate the performance of the Superintendent." (App. Vol. 3, p. 60). The Board is also charged with "determin[ing] the Superintendent's salary and benefit package." (App. Vol. 3, p. 61). Under the Bylaws, "[i]f the services of the Superintendent are found to be unsatisfactory to the Board, the Superintendent shall be notified in writing by the President, as approved by the Board, that his/her contract will expire upon the expiration date set forth in the contract." (App. Vol. 3, p. 62). Further, the Superintendent's contract can terminate on any date that is mutually agreeable

to the Board and the Superintendent." *Id.* In addition to the Superintendent, the Assistant Superintendent is considered an administrator in the School Town, and "[t]he Board shall approve the employment, fix the compensation and establish the term of employment for each administrator employed by [the school Town]." (App. Vol. 3, p. 63). The Board possesses the power to decline to renew the contract of the Assistant Superintendent. (App. Vol. 3, p. 65).

An administrator's contract "may be altered, modified, or rescinded in favor of a new contract at any time by mutual consent of the Board and the administrator if the contract, when reduced to writing, is consistent with Indiana law." (App. Vol. 3, p. 65). Section 1520 of the School Town's Administrative Guidelines sets forth the process by which administrator contracts, including those for both the Superintendent and Assistant Superintendent, are approved: "All contracts for the employment of administrators shall be approved by a majority of the full Board and after approval by the Board, they shall be signed by the Board President and Secretary or the Board Vice-President if either of these officers is unavailable for any reason." (App. Vol. 3, p. 66).

**Pfister's Contracts**

Defendant Pfister was the Superintendent of the School Town from August 12, 1991 to June 30, 2012. (App. Vol. 2, p. 46, ¶ 2). On July 1, Pfister executed a Superintendent's Contract with the School Town. (App. Vol. 3, pp. 67-71). The term of the agreement was three years, "commencing on the 1st day of July, 1999, and terminating on the 30th day of June, 2002, unless otherwise terminated as hereinafter provided or as provided by law." (App. Vol. 3, p. 67, ¶ 3). After the July 1, 1999 Contract, Pfister entered into eleven additional Superintendent's Contracts with the School Town, with the final one executed on February 1, 2009. (App. Vol. 3, pp. 72-136). While each contract was for a three-year term, each was superseded the following year by

a newly executed contract, except for Pfister's final contract. (*Id.*) The Board approved administrator contracts, including fringe benefits paid to administrators, in its ordinary course of business, at its regular, publicly held meetings. (App. Vol. 5, p. 162-Vol. 6, p. 56). Pfister's 1999 contract included the following benefit: "The School Corporation shall pay the Superintendent's annual contribution to the Indiana State Teachers' Retirement Fund." (App. Vol. 3, p. 69). Pfister's June 2000 and October 2000 contracts contained identical retirement fund contribution language to that of the 1999 contract. (App. Vol. 3, p. 69, ¶ 10; App. Vol. 3, p. 74, ¶ 10; App. Vol. 3, p. 80, ¶10). Pfister's June 27, 2001 contract included that same term, but with additional language. Specifically, the 2001 contract provided that: "The School Corporation shall pay the Superintendent's annual contribution to the Indiana State Teachers' Retirement Fund, *plus an additional 2% toward an annuity of his choice*." (App. Vol. 3, p. 85, ¶ 10) (emphasis added.) 2001 was the first year the phrase, "plus an additional 2% toward an annuity of his choice" was included in Pfister's contract. (App. Vol. 3, p. 69, ¶ 10; App. Vol. 3, p. 74, ¶ 10; App. Vol. 3, p. 80, ¶ 10; App. Vol. 3, p. 85, ¶ 10). The "plus an additional 2%" language regarding the retirement fund contribution was included in Pfister's next Superintendent's Contract, executed on June 27, 2002. (App. Vol. 3, p. 91, ¶ 10).

The 2003 contract again amended the retirement fund contribution language, which now read, "The School Corporation shall pay the Superintendent's annual contribution to the Indiana State Teachers' Retirement Fund, *plus each year* an additional 4% toward an annuity of his choice." (App. Vol. 3, p. 97, ¶ 10) (emphasis added). This 2003 contract contained two material changes: it increased the additional contribution to Pfister's annuity from 2% to 4%, and added the phrase "each year." (*Id.*) Pfister signed additional Superintendent's Contracts on June 29, 2004; June 29, 2005; June 29, 2006; June 29, 2007; June 30, 2008; and February 1, 2009. (App.

Vol. 3, pp. 101-136). Each of the six additional contracts included identical language to that of the 2003 contract; namely, that there would be an additional 4% contribution "each year" to an annuity of Pfister's choice. (App. Vol. 3, p. 103, ¶ 10; App. Vol. 3, p. 109, ¶ 10; App. Vol. 3, p. 115, ¶ 10; App. Vol. 3, p. 121, ¶ 10; App. Vol. 3, p. 127, ¶ 10; App. Vol. 3, p. 133, ¶ 10). From 1999 to 2003, Pfister's Superintendent Contracts were signed by the sitting President and Secretary of the School Town Board, per Administrative Guideline 1520. (App. Vol. 3, pp. 70, 76, 82, 87, 93, 99). Beginning in 2004 and every year subsequent, Mr. Pfister's Contracts were signed by each sitting member of the Board. (App. Vol. 3, pp. 105, 111, 117, 123, 129, 135).

Each of Pfister's Contracts also contained language that authorized payments in the other categories (Cash Bonus, Investment Allotments, Salaries/Stipends, and Community Relations) of which the State has sought recovery in this case. (See App. Vol. 3, p. 115, ¶ 10).

**Sopko's Contracts**

Defendant Sopko was the Assistant Superintendent and/or Treasurer of the School Town from July 1, 1998 to June 30, 2012, and Superintendent of the School Town from July 1, 2012 to June 30, 2014. (App. Vol. 2, p. 46, ¶ 3). On July 1, 1998, Sopko executed his initial Assistant Superintendent's Contract with the School Town. (App. Vol. 3, pp. 137-140). The term of the agreement was three years, "commencing on the 1st day of July, 1998, and terminating on the 30th day of June, 2001, unless otherwise terminated as hereinafter provided or as provided by law." (App. Vol. 3, p. 137, ¶ 3). Following the July 1, 1998 Contract, Sopko entered into thirteen additional Assistant Superintendent's Contracts – fourteen in all – with the School Town, with the last one executed on July 1, 2011. (App. Vol. 3, pp. 137-206). While each of Sopko's contracts was for a three-year term, each was superseded the following year by a newly executed contract. (*Id.*) Sopko's 1998 contract included the following benefit: "The School

Corporation shall pay the Assistant Superintendent's annual contribution to the Indiana State Teachers' Retirement Fund." (App. Vol. 3, p. 138, ¶ 10). Sopko executed contracts on July 1, 1999 and October 20, 2000, both of which contained language identical to the 1998 contract regarding the retirement fund contribution. (App. Vol. 3, p. 142, ¶ 10; App. Vol. 3, p. 146, ¶ 10). Sopko's June 27, 2001 Assistant Superintendent contract included that same term, but with additional language. (App. Vol. 3, p. 151, ¶ 10). Specifically, the 2001 contract provided that: "The School Corporation shall pay the Assistant Superintendent's annual contribution to the Indiana State Teachers' Retirement Fund, *plus an additional 2% toward his Indiana Teacher Retirement Fund.*" (*Id.*) (emphasis added.) The language reading "plus an additional 2% toward his Indiana Teachers' Retirement Fund" was added into Sopko's contract for the first time in 2001. (App. Vol. 3, p. 138, ¶ 10; App. Vol. 3, p. 142 ¶ 10; App. Vol. 3, p. 146 ¶ 10; App. Vol. 3, p. 151, ¶ 10). Sopko's June 27, 2002 contract language was changed to read, "The School Corporation shall pay the Assistant Superintendent's annual contribution to the Indiana State Teachers' Retirement Fund*, plus each year an additional 2%* toward an annuity of his choice." (App. Vol. 3, p. 156, ¶ 10) (emphasis added). This was the first appearance of the annuity contribution in his contracts.

The 2003 contract also added for the first time the language reading "*plus each year an* additional *3%* toward an annuity of his choice." (App. Vol. 3, p. 161, ¶ 10) (Emphasis added.) Sopko entered into additional Assistant Superintendent's Contracts on June 29, 2004; June 29, 2005; June 29, 2006; June 29, 2007; June 30, 2008; March 1, 2009; July 1, 2010; and July 1, 2011. (Vol. 3, pp. 165-206). Each of the eight contracts included identical language to the 2003 contract regarding the "additional 3 percent" contribution "each year" to an annuity of Sopko's choice. (App. Vol. 3, p. 171, ¶ 10; App. Vol. 3, p. 176, ¶ 10; App. Vol. 3, p. 181, ¶ 10; App.

Vol. 3, p. 186, ¶ 10; App. Vol. 3, p. 191, ¶ 10; App. Vol. 3, p. 198, ¶ 10; App. Vol. 3, p. 203, ¶ 10). On July 1, 2012, Sopko entered a Superintendent's Contract. (App. Vol. 3, p. 207). The contract included no term regarding contributions to Sopko's retirement fund. (*Id.*)

From 1998 through 2005, Sopko's annual Assistant Superintendent's or Superintendent's Contract was signed by the current President and Secretary of the School Town Board, per Administrative Guideline 1520. (App. Vol. 3, pp. 139, 143, 148, 153, 158, 163, 168, 173). Beginning in 2006, Sopko's annual contract was signed by all current members of the Board. (App. Vol. 3, pp. 178, 183, 188, 193, 200, 205, 210). Each of Sopko's Contracts also contained language that authorized payments in the other categories (Cash Bonus, Investment Allotments, Salaries/Stipends, and Community Relations) of which the State has sought recovery in this case. (See App. Vol. 3, pp. 186-87, ¶10). The State has never argued that any category was not covered in the Appellees' contracts, but has solely argued that the amounts disbursed exceeded the calculations called for in the contracts.

**Accounts Payable Vouchers**

Each year, from 2003 through 2014, School Town Treasurer Janice Swanson signed a form entitled "Accounts Payable Voucher: School Town of Munster, Indiana." (App. Vol. 3, pp. 217, 222, 227, 232, 237, 243, 248; App. Vol. 4, pp. 5, 11, 17, 23, 29). "The Accounts Payable Voucher Registers were hand-delivered to each School Board member before the public meeting that was held to approve them." (App. Vol. 3, p. 214). Each of these annual Vouchers reported the total amount that was requested to be deposited that year into the retirement accounts of Sopko and Pfister. (App. Vol. 3, p. 215-App. Vol. 4 p. 31).

The Vouchers indicate that the School Town paid both Sopko and Pfister's additional annuity contributions by adding an additional percentage of each administrator's salary,

*compounded atop* the prior year's percentage amount. (*Id.*) Summaries attached to the Vouchers detail the total amount that Sopko and Pfister each received in account contributions. (*Id.*) By way of illustration, the 2003 Voucher and summary show that Pfister received an additional $17,354.96 in contributions, and Sopko received an additional $14,233.04 in contributions, that year. (App. Vol. 3, p. 217-18). By 2012, those amounts had grown to $74,802.00 and $51,032, respectively. (App. Vol. 4, pp. 17-19). The increase is due to the phrase "plus each year an additional __ percent" being construed to mean that the percentage was compounded each year. For example, "plus each year an additional 2%" was construed to mean that an additional 2% of the salary was contributed in the first year, then 4% the next year, then 6% the following year, etc., etc. Each of the 2003-14 Vouchers include the following language, signed by Swanson: **"I hereby certify that the attached invoice(s), or bill(s), is (are) true and correct and I have audited same in accordance with [Indiana Code] 5-11-10-1.6."** (App. Vol. 3, pp. 217, 222, 227, 232, 237, 243, 248; App. Vol. 4, pp. 5, 11, 17, 23, 29). I.C. § 5-11-10-1.6 states that "[t]he fiscal officer" of a governmental entity "may not draw a warrant or check for payment of a claim unless . . . the fiscal officer audits and certifies before payment that the invoice or bill is true and correct[.]" I.C. § 5-11-10-1.6(c)(4). Also from 2003-14, then-current members of the School Town of Munster Board signed a document annually attesting, **"We have examined the vouchers on the foregoing Accounts Payable Voucher Register consisting of __ pages and, except for vouchers not allowed as shown on the register, such vouchers are hereby allowed[.]"** (App. Vol. 3, pp. 216, 221, 226, 231, 236, 242, 247; App. Vol. 4, pp. 4, 10, 16, 22, 28).

Contemporaneous Board meeting minutes show that the Board voted to approve the annual Vouchers. (See App. Vol. 5, p. 162.)

**Bi-Annual Audits**

The State Board of Accounts ("SBOA") is a state agency with the responsibility of auditing the financial accounts and affairs of all public entities within the State of Indiana. Examinations are required to be conducted biennially for "municipalities" (§ 5-11-1-25(b)(1)), which include "school corporation[s]" (§ 5-11-1-16(a)).

Relevant to this case, the SBOA issued audit reports covering the following six periods:

- July 1, 2001 to June 30, 2003 (published May 14, 2004) (App. Vol. 4, pp. 38-82);
- July 1, 2003 to June 30, 2005 (pub. May 8, 2006) (App. Vol. 4, pp. 83-121);
- July 1, 2005, to June 30, 2007 (pub. March 31, 2008) (App. Vol. 4, pp. 122-178);
- July 1, 2007 to June 30, 2009 (pub. Feb. 15, 2010) (App. Vol. 4, pp. 179-227);
- July 1, 2009, to June 30, 2011 (pub. Feb. 8, 2012) (App. Vol. 4, p. 228-App. Vol. 5, p. 25); and
- July 1, 2011, to June 30, 2013 (pub. March 14, 2014) (App. Vol. 5, pp. 26-83).

According to Pfister's uncontroverted sworn affidavit, the SBOA requested and were provided Sopko's and Pfister's contracts for each of the Audit Reports. (App. Vol. 5, p. 84-85).

**SBOA Special Audit**

On July 24, 2015, attorney Kathleen M. Maicher, representing the School Town of Munster, wrote a letter to the Office of the Prosecuting Attorney of Lake County, as well as to the SBOA, to advise them of suspected misappropriation of School Town of Munster funds by past superintendents, Pfister and Sopko. (App. Vol. 4, pp. 32-36). The letter referenced potential irregularities regarding the "benefits and severance payments to be paid" under the Superintendent's contract. (*Id.* at 32). The letter includes several allegations reported second- or third-hand. For example, Maicher writes that: "Most of the School Board members thought that

the percentage identified in the contracts . . .would be a constant number multiplied each year against Mr. Pfister's and Mr. Sopko's increasing salary to calculate the amount of the Annuity Starter payment." (App. Vol. 4, p. 33). Ms. Maicher also writes that "[t]he members were not informed of the exact amount of the annuity contributions" (*Id.*), an assertion that the subsequent production of the Vouchers proved to be false. Following receipt of the letter, the SBOA, pursuant to I.C. § 5-11-1-9, performed an examination of the books, accounts, and records of the School Town of Munster, as outlined in SBOA Special Investigation Report B46414, dated June 8, 2016. (App. Vol. 5, pp. 134-161). The Special Report covered the period of July 1, 1999, to June 30, 2014. (*Id.* at 134). The Special Audit Report alleged malfeasance, misfeasance, or nonfeasance on the part of Pfister and Sopko (App. Vol. 5, pp. 139-140), and was placed by the State Examiner with the Attorney General's Office on June 8, 2016, pursuant to I.C. § 5-11-5-1(a). (App. Vol. 5, pp. 134, 137). In the course of producing the Report, the SBOA maintained related notes and work papers, which were included in its Preliminary Investigation Report. (App. Vol. 5, pp. 88-133). Within, the SBOA acknowledged that the School Town Board approved the annuity payments. (App. Vol. 5, p. 97).

On May 23, 2017, Plaintiff filed its Complaint to Recover Public Funds against the above-named Defendants. The Complaint alleges that the SBOA's Audit Report "disclosed malfeasance, misfeasance, and/or nonfeasance on the part of Pfister and Sopko, and was placed by the State Examiner with the Attorney General pursuant to I.C. § 5-11-5-1(a)." (App. Vol. 3, p. 38, ¶ 4). The Complaint asserts that the payments were issued "without the School Town Board's knowledge." (App. Vol. 3, p. 40, ¶ 18; p. 44, ¶ 42).

**SBOA's Destruction of Prior Audit Notes and Work Papers**

On November 16, 2017, the Defendants filed a Motion to Compel the SBOA's Notes and Work Papers related to the six prior audits. (App. Vol. 6, pp. 109-122). Among other reasons, the Defendants sought the notes and work papers "to understand why the SBOA previously found no wrongdoing despite reviewing the same materials." (App. Vol. 6, p. 116). In response, the State acknowledged that it had destroyed the notes and work papers "accompanying four (4) of the prior audit reports[.]" (App. Vol. 6, p. 196). The State has refused to provide the requested Notes and Work Papers from the other two audits on the grounds that they are irrelevant and that production would prove "unduly burdensome." (App. Vol. 6, p. 191).

## SUMMARY OF THE ARGUMENT

The School Town Board repeatedly approved all of the payments – and the contracts they were based upon – at open meetings, and have produced records specific to the annuity payments which constitute the vast majority of the amounts that the State seeks to recover. It is black-letter law that a party is presumed to know the contents of an instrument he signs. Here, each Board approval of both the employment contracts and the payments to Pfister and Sopko began the statute of limitations period running for any attempt to recover on those payments. The Indiana Supreme Court long ago held that in such instances, the period runs against the local entity rather than the State. The subsequent statute authorizing the State to pursue such funds in its name merely codified that holding, as evidenced by the statute's plain language terming the State a "nominal party."

The limitations period also runs against the School Town Board as a result of the "discovery rule" and the principal-agency doctrine. Under the discovery rule, a cause of action accrues, and the period begins to run, when a claimant knows or in the exercise of ordinary

diligence should have known of the injury. Here, it is undisputed that the School Town Board approved the annuity payments annually. Under the principal-agency doctrine, that discovery is imputed to the SBOA and, then, to the Attorney General. The State has acknowledged the doctrine. The Indiana Code also explicitly requires local entities to report discovery of financial irregularities to the SBOA, and directs the SBOA to report the misappropriation of funds to the Attorney General upon discovery. Upon its facts, the federal *Pastrick* decision cited by the State may at most toll the statute to the conclusion of a single audit period, but any more than that would both subvert public policy and the plain language of the Indiana Code.

There was no "fraudulent concealment" that would serve to toll the statute of limitations, as was the case in prior cases in which the statute of limitations was held not to have run out. The payments here were approved openly and publicly, with the Board's full knowledge and unanimous assent. Therefore, Pfister and Sopko could not have had "actual knowledge" of a "wrongful act," as required under Indiana's fraudulent concealment law. They also cannot be deemed to have "intentionally concealed" any actions, as Indiana law states that it "asks too much" to hold that fraudulent concealment occurred where actions take place "in the full glare of the public arena."

The statute of limitations also began to run because the SBOA should have independently discovered the payments. The SBOA conducted six regular biannual audits during the relevant time period, and it is undisputed that it collected the contracts of both Pfister and Sopko as part of the process. The Indiana Code also directs the SBOA to "examine all accounts and all financial affairs of every public office and officer, state office, state institution and entity." To the extent that the State would want to show that the SBOA practiced "ordinary diligence," it has acknowledged the destruction of notes and work papers associated with four of the six audits.

In sum, the State seeks to rewrite history and overlook the fact that all payments at issue were publicly contracted for and publicly approved in open processes.

## ARGUMENT

### I. THE SCHOOL TOWN BOARD'S REPEATED APPROVALS OF THE PAYMENTS IN QUESTION TRIGGERED THE LIMITATIONS PERIOD

It is long-settled that "[a] party is presumed to know the contents of the instrument he signs." *New Albany & Salem R.R. Co. v. Fields*, 10 Ind. 140 (Ind. 1858).[1] Here, it is undisputed that the Munster School Town Board repeatedly reviewed and then unanimously approved the payments central to this case. (App. Vol. 3, p. 215-Vol. 4, p. 31). The Board did so by approving vouchers audited and attested to by School Town benefits coordinator Janice Swanson. (*Id.*). Those vouchers listed, to the penny, the amounts of the Defendants' annuity disbursements. (*Id.*). Although its Complaint alleged that the Board was unaware of the amounts (App. Vol. 3, p. 40, ¶ 18; p. 44, ¶ 42), the State, in fact, had already by that point acknowledged internally that the Board had approved the payments. (App. Vol. 5, p. 97). The law is clear here: the Board's knowledge and approval of the payments begins the statute of limitations clock. Therefore, the Trial Court properly granted summary judgment.

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[1] See also *Kemery v. Zeigler*, 176 Ind. 660 (Ind. 1912) ("Every man or woman, even though illiterate, is presumed to know the contents of a written instrument signed by him[.]"). Accord *Hoskins v. Dart*, 633 F.3d 541, 543 (7th Cir. 2010) ("There is no 'I didn't read it' defense to signed contracts"; accord *Snead v. Nationwide Prop. & Cas. Ins. Co.*, 653 F. Supp. 2d 823, 828 (W.D. Tenn. 2009) ("A party's signature binds him or her as a matter of law to the representations in the signed document"); *Wear v. Transom Life Ins. Co.*, 2007 U.S. Dist. LEXIS 81406 (E.D. Tenn. Nov. 1, 2007) (Plaintiff's claim she did not understand the questions posed in an insurance application is no excuse, as she should not have signed it under such circumstances); *Danner v. Int'l Freight Sys. of Wash.*, LLC, 90 Fed. R. Evid. Serv. (Callaghan) 411 (D. Md. Jan. 4, 2013) ("[o]ne is under a duty to learn the contents of a contract before signing it; if, in the absence of fraud, duress, undue influence, and the like he fails to do so, he is presumed to know the contents"); *Turner v. Herndon*, 269 S.W.3d 243 (Ct. App. Tex. 2009) ("Absent proof and determination of mental incapacity, a person who executes a document is presumed to have read and understood it.").

### A. **Indiana Law Expressly Sets the Start of the Statute of Limitations Period at the Point of the Local Entity's Discovery**

The Indiana Supreme Court long ago held that where the State is a nominal party, the "statute of limitations runs in the same manner and to the same extent as though both [real parties in interest] were natural persons." *State ex rel. Bd. Of Comm'rs v. Stuart*, 46 Ind. App. 611, 615 (Ind. Ct. App. 1910). As *Stuart* shows, this is the case regardless of whether the real party in interest is a private or public entity.[2] In *Stuart*, the State brought an action against a county auditor on behalf of the Board of Commissioners of that county. *Id.* at 613-14. Because "the right of recovery [was] in the county and not in the State," the court determined that the State was only a nominal party and thus the statute of limitations ran based upon the knowledge of the real party in interest, in that case the county. *Id.* at 615. See also *United States v. Beebe*, 127 U.S. 338, 346 (1888) (statute of limitations applicable against real party in interest rather than the State where "the Government, though in name the complainant, is not the real contestant party[.] . . . It has no interest in the suit, and has nothing to gain from the relief prayed for."); *State ex rel. Goodman v. Halter*, 149 Ind. 292 (Ind. 1897) (same); *Cablevision of Chicago v. Colby Cable Corp.*, 417 N.E.2d 348, 357 n.9 (Ind. Ct. App. 1981) (same).[3]

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[2] Because the law sometimes uses the same or similar terms of art to mean different things, the "real party in interest" concept can seem confusing. What the Defendants refer to here, and what applicable statutory and caselaw refer to, as the "real party in interest" is the party that stands to benefit from the action – here, as the Attorney General concedes in its Complaint, the School Town of Munster. On the other hand, the case *State v. Rankin*, 260 Ind. 228, 230 (Ind. 1973), for example, uses the term "real party in interest" simply to describe a party – like the State – that has the authority to bring suit in its name. *Rankin* does not overrule *Stuart*. (See App. Vol. 6, p. 133-34). It addresses a separate issue – whether the State had authority at all to bring the suit on behalf of a state university. (It did.)

[3] *Accord. Miller v. State*, 38 Ala. 600, 604 (Alabama 1863) ("The rule that the statute of limitations does not run against the State, has no application to a case where the State, though a nominal party on the record, has no real interest in the litigation, but its name is used as a means of enforcing the rights of a third person, who alone will enjoy the benefits of a recovery"); *New*

In response to this, the State has previously argued that § 5-11 *et seq.* functions as a legislative overrule of the *Stuart* doctrine. (App. Vol. 6, p. 133). But the opposite is true – the Indiana Code codifies the State's ability, recognized in *Stuart*, to act on behalf of a local entity. Indeed, the Complaint itself notes that it has been brought by the State of Indiana, "for the benefit of the School Town of Munster," pursuant to I.C. § 5-11-7-1. Further, that section of the Indiana Code expressly identifies the State as a "nominal party" in these actions. The State has argued that the State has a separate interest here – "an unquestionable compelling State interest for protecting public funds." (App. Vol. 6, p. 187). But this assertion contradicts settled law, without authority, as well as the plain language of the Indiana Code identifying the State as a "nominal party." Whether the legislature had *Stuart* explicitly in mind when it enacted § 5-11-7-1, there can be no doubt that it enshrined into the Code its primary tenet.

*Stuart* not only remains good law, but it has been absorbed into Indiana statutory law for more than a century. Under both the case and the related statute, the statute of limitations here bars the State from recovery of the amounts in question.

**B. <u>The Discovery Rule and Principal-Agency Doctrine Also Bar Recovery</u>**

Along with *Stuart's* explicit holding, two additional black-letter principles, the "discovery rule" and the principal-agency doctrine, also function to set the start of the statute of limitations clock at the School Town's discovery of the injury. Under the discovery rule, "a

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*Mexico Dep't of Labor v. Valdez*, 136 B.R. 874 (N.M. Bankrpt. Ct. 1992) (where "the state is only a 'nominal party of record and its name is used to enforce a right which enures solely to the benefit of the body corporate or politic, then the statute of limitations can be pled as a bar to the action."); *Herrmann v. Cissna*, 82 Wn 2d 1 (Wash. 1973) ("There is a qualification of the rule exempting the state from the operation of the statute of limitations, to the effect that the statute will apply when the state is a mere formal plaintiff in a lawsuit[.]"); *Richardson Assocs. v. Lincoln Devore*, 806 P.2d 790, 799 (Wy. 1991); *State ex rel. Fulton v. Bremer*, 130 Ohio St. 227, 238 (Ohio 1935); *State v. Burk*, 63 Ark. 56, 57 (Ark. 1896); *State v. Roy*, 41 N.M. 308, 312 (N.M. 1937).

cause of action accrues, and the statute of limitations begins to run, when a claimant knows or in the exercise of ordinary diligence should have known of the injury." *Landers v. Wabash Ctr., Inc.*, 983 N.E.2d 1169, 1172 (Ind. Ct. App. 2013).[4] The State itself quotes the unpublished federal case *Indiana v. Pastrick*, No. 3:04CV506 AS, 2006 U.S. Dist. LEXIS 54866 at *5 (N.D. Ind. June 19, 2016), as noting that "this Court must turn its attention to the Attorney General and determine when he *should have discovered* the injury." Op. Br. at 21 (emphasis added.)

In this matter, that key question of when the Attorney General should have discovered the injury is dictated by the principal-agency doctrine, a concept as entrenched in the law as the discovery rule. See Restatement (Second) of Agency § 272 ("The liability of a principal is affected by the knowledge of an agent concerning a matter as to which he acts within his power to bind the principal or upon which it is his duty to give the principal information."). See also *Southport Little League v. Vaughan*, 734 N.E.2d 261, 275 (Ind. Ct. App. 2000) ("[A] principal is charged with the knowledge of that which his agent by ordinary care could have known where the agent has received sufficient information as to awaken inquiry").

Although "[a]s a general matter, the knowledge of one agency of government is not imputed to another agency of that government," that principle changes where "there is some

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[4] See also See *Landmark Legacy, LP v. Runkle*, 81 N.E.3d 1107, 1117 (Ind. Ct. App. 2017); *Mizen v. State ex rel. Zoeller*, 71 N.E.3d 458, 466 (Ind. Ct. App. 2017); *Messmer v. KDK Fin. Servs.*, 83 N.E.3d 774, 780 (Ind. Ct. App. 2017); *Centier Bank v. Hurst (In re Hurst)*, 84 N.E.3d 1222, 1228 (Ind. Ct. App. 2017); *Gittings v. Deal*, 84 N.E.3d 749, 757-58 (Ind. Ct. App. 2017); *Szamocki v. Anonymous Doctor*, 70 N.E.3d 419, 427-28 (Ind. Ct. App. 2017); *Bellwether Props., LLC v. Duke Energy Ind., Inc.*, 87 N.E.3d 462, 465 (Ind. 2017); *Zelman v. Cent. Ind. Orthopedics, P.C.*, 88 N.E.3d 798, 802-03 (Ind. Ct. App. 2017); *Bellweather Props., LLC v. Duke Energy Indiana, LLC*, 59 N.E.3d 1037, 1042 (Ind. Ct. App. 2016); *DiMaggio v. Rosario*, 52 N.E.3d 896, 905 (Ind. Ct. App. 2016); *Myers v. Maxson*, 51 N.E.3d 1267, 1276 (Ind. Ct. App. 2016); *Nolan v. Clarksville Police Dep't*, 60 N.E.3d 1128, 1135 (Ind. Ct. App. 2016); *Schuchman/Samberg Invs., Inc. v. Hoosier Penn Oil Co.*, 58 N.E.3d 241, 250-51 (Ind. Ct. App. 2016); *Anonymous M.D. v. Lockridge*, 60 N.E.3d 249, 254 (Ind. Ct. App. 2016); *Myers v. Crouse-Hinds Div. of Cooper Indus.*, 53 N.E.3d 1160, 1170 n.4 (Ind. Ct. App. 2016).

relationship between the agencies – either some reason for the agency without knowledge to seek the information or a reason for the knowledgeable agency to transmit the information." *Massachusetts v. Mylan Labs.*, 608 F.Supp. 2d 1127 (D. Mass. 2008). There, "one agency's knowledge [will] be imputed to another." *Id.* See also *Baystate Med. Ctr. v. Leavitt*, 545 F. Supp. 2d 20, 45 (D. D.C. 2008) ("[I]nformation will be considered known to a government agency if there is some relationship between [the two] agencies – either some reason for the agency without knowledge to seek the information or a reason for the knowledgeable agency to transmit the information."). See also *Stump v. Indiana Equip. Co.*, 601 N.E.2d 398, 403 (Ind. Ct. App. 1992) ("Imputed knowledge is a tenet of agency law, and is based upon an underlying legal fiction of agency – the identity of principal and agent when the agent is engaged in the principal's business. Under this rule, the law imputes the agent's knowledge to the principal, even if the principal does not actually know what the agent knows"); *United States v. Currency Totaling $48,318.08*, 609 F.2d 210, 214-15 (5th Cir. 1980) ("In general, a principal is affected by an agent's knowledge of a matter where it is the agent's duty to give such information to the principal.").

The State knows all of this. In a December 18, 2017, brief opposing the Defendants' Motion to Compel, the State wrote: "[T]he Defendants are correct in stating that knowledge of an act is imputed between a state agency and the Office of the Attorney General[.]" (App. Vol. 6, p. 10, n.4). School corporations, such as the School Town of Munster, are state agencies.[5] Further, the State conceded in seeking this appeal that the "affirmative duty conferred to the School Town

[5] They are considered "municipalit[ies]" and "political subdivision[s]" and thus subject to SBOA regular audits. Indiana Code § 5-11-1-16(a). As well, "'public agency' is defined as any entity or office subject to an audit by the State Board of Accounts." *Indianapolis Conventions & Visitors Ass'n v. Indianapolis Newspapers, Inc.*, 577 N.E.2d 208 (Ind. 1991).

under I.C. § 5-11-1-27(j) is to *immediately* report any financial irregularities to the SBOA." 4/4/2018 Mot. Certification Partial Interlocutory Order at 17 (emphasis in original.) The SBOA is also an agency of the State. *State by Indiana State Board of Accounts v. Roseland*, 178 Ind. App. 661, 662 (Ind. Ct. App. 1978) ("State Board of Accounts . . . is the agency of the State of Indiana charged with the responsibility of examining the books and records of all public officers in the State"). The School Town's knowledge, undisputed here, is thus imputed to the SBOA, whose knowledge is imputed to the Attorney General. Indiana Code § 5-11-5-1, in fact, codifies this imputation. Section (d) establishes that if an individual conducting a special investigation discovers that "[a] substantial amount of public funds has been misappropriated or diverted," he or she "*shall* report the determination to the state examiner[.]" (emphasis added.) Subsection (e) states that "[a]fter receiving a preliminary report under subsection (d), the state examiner may provide a copy of the report to the attorney general," who then "may institute and prosecute civil proceedings against the delinquent officer or employee[.]"

Based upon both black-letter common law tenets and the Indiana Code's explicit direction, the law is clear here: the statute of limitations period begins to run at the time the School Town discovered or should have discovered the injury. Since the School Town's knowledge starts the statute of limitations period, it expired on the various payment periods as follows:

| **Date (Voucher Approval)**[6] | **Annuity Amount Approved**[7] | **CVRA two-year statute expired** | **Five-year public officer statute expired** |
|---|---|---|---|
| March 10, 2003 | $31,588 | March 10, 2005 | March 10, 2008 |
| February 9, 2004 | $29,121 | February 9, 2006 | February 9, 2009 |

[6] App. Vol. 3, p. 216, 221, 226, 231, 236, 242, 248; App. Vol. 4, p. 4, 10, 16, 22.
[7] App. Vol. 3, p. 217, 222, 227, 232, 237, 243, 249; App. Vol. 4, p. 5, 11, 17, 23.

| February 7, 2005 | $38,131 | February 7, 2007 | February 7, 2010 |
|---|---|---|---|
| February 6, 2006 | $50,066 | February 6, 2008 | February 6, 2011 |
| March 12, 2007 | $60,975 | March 12, 2009 | March 12, 2012 |
| March 10, 2008 | $76,163 | March 10, 2010 | March 10, 2013 |
| March 9, 2009 | $90,048 | March 9, 2011 | March 9, 2014 |
| March 8, 2010 | $104,520 | March 8, 2012 | March 8, 2015 |
| March 14, 2011 | $113,236 | March 14, 2013 | March 14, 2016 |
| April 9, 2012 | $125,834 | April 9, 2014 | April 9, 2015 |
| March 11, 2013 | $55,887 | March 11, 2015 | Statute did not expire prior to State's Complaint |

### C. The Cases Cited by the State Do Not Counsel Otherwise

The State cites *State ex rel. Pearson v. Brown*, 537 N.E.2d 534 (Ind. Ct. App. 1989) as supportive of its argument that no claim may accrue until the SBOA verifies its report and provides it to the Attorney General – even if that occurs many years after the local entity's discovery of the injury. However, this is not even the issue *Pearson* addresses. Rather, the *Pearson* court "emphasize[ed]" that it was addressing a "narrow issue": "whether the complaint states a claim for relief under I.C. § 5-11-5-1 when it fails to allege misfeasance, malfeasance, or nonfeasance by any public officer or employee." *Id.* at 535. *Pearson* merely held that the Attorney General could not bring a claim under § 5-11-5-1 unless it alleged "misfeasance, malfeasance, [or] nonfeasance." *Id.* Certainly there was a time here when the State could have brought its claim, as the SBOA's report *did* allege "misfeasance, malfeasance, or nonfeasance." The Defendants simply argue – and the Trial Court agreed – that such time has long passed.

The State's other primary case, *Pastrick*, is also materially distinguishable. There, the Northern District of Indiana thought it important that the SBOA is not enabled to file its own lawsuits upon discovery of misfeasance, malfeasance, or non-feasance, comparing it to the situation in which the statute of limitations is tolled for a minor who has suffered an injury. *Pastrick*, 2006 U.S. Dist. LEXIS 54866, *13-14. Thus, it held that, under the case's "*unique circumstances*" (emphasis added), "the SBOA's knowledge of an injury is insufficient to trigger the running of the statute of limitations because it had no authority to file a lawsuit to recover the misappropriated funds." Op. Br. at 21. Without knowing all of *Pastrick's* "unique" facts, it is impossible to know exactly why the court granted the SBOA a grace period before alerting the Attorney General and beginning the statute of limitations clock, despite the Indiana Code's enabling subsections ((d) and (e)), discussed above. It *seems* that a possible concern animating the decision was the period between the SBOA's actual discovery of an actionable injury and the certification of a report for the Attorney General. One thing is certain: *at most*, upon the slim facts we know, *Pastrick* applies to the time frame of a single audit period. (Even a minor's limitations period, though extended, has a finite shelf life.) But no such "no man's land" period exists in the instant case. It is undisputed that the Board knew of and approved the payments – then did it all over again and again. And unlike the SBOA, the School Town had standing to file its own action. Under I.C. § 20-26-5-4(a)(1), "[i]n carrying out the purposes of a school corporation, the governing body acting on the school corporation's behalf has the following specific powers: In the name of the school corporation, *to sue* and be sued and to enter into contracts in matters permitted by applicable law." (emphasis added.)

An Indiana case, *Montalvo v. State ex rel. Zoeller*, 27 N.E.3d 795, 801 (Ind. Ct. App. 2015), indicates that the State has previously understood its authority to pursue misappropriated

funds to expire at the end of a single audit period. In *Montalvo*, the State sought to recover recent payments to several members of the East Chicago Library Board. *Id.* at 797. In response, the defendant Board members argued that they had been openly receiving compensation for "many years," and that the SBOA nonetheless did not seek to recover said compensation after prior audits. *Id.* at 801. The Board members argued that the State was therefore estopped from pursuing it upon future audits, as well. *Id.* The court held that the SBOA's and Attorney General's prior decisions were irrelevant – the State had "unfettered discretion" to recover funds upon the current audit. *Id.* What the State did *not* do in the case was retroactively pursue the amounts discovered in the prior audit periods, as it now seeks to do.

*Pastrick* cannot be read to provide a blank check to the SBOA to let an injury go undiscovered or unreported in perpetuity by not reporting it up the chain to its principal, the Attorney General. As discussed above, subsections (d) and (e) of § 5-11-5-1 provide the SBOA with the mechanism by which to immediately inform the Attorney General of an injury. Whatever roles the Attorney General occupies, it certainly does not exist to re-characterize above-board payments as public corruption, many years after the fact, nor as a safety net when a local governmental entity suffers buyer's remorse for how it interpreted a contract provision. As the Trial Court's opinion noted, this would lead to an absurd result wherein local governmental entities and the SBOA could perpetually operate beyond the shadow of a statute of limitations. This cannot be what *Pastrick* prescribes, and it certainly not what § 5-11-5-1 envisions.

## II. THERE WAS NO FRAUDULENT CONCEALMENT BY THE DEFENDANTS

In cases decided under § 5-11-5-1 where the Indiana courts have determined the statute of limitations does *not* apply to bar the Attorney General's claim, it has always been undisputed that the defendants had fraudulently concealed their ill-gotten gains from the relevant local entity.

First, *Pastrick* arrived at the trial court on the defendants' motion to dismiss the Attorney General's civil cause of action based upon a federal RICO case, using the RICO statute's statute of limitations. 2006 U.S. Dist. LEXIS 54866, *17. Hence, the defendants were stuck at the dismissal stage with allegations, accepted as true, that they carried out a scheme that concealed their actions from the city, i.e. the local entity injured by their actions, falsifying documents. *Pastrick* is distinguishable for another reason, as well. Whereas in the instant case, the continuing employment of both Pfister and Sopko was in the hands of the Board, per the School Town's Bylaws, the East Chicago mayor and other defendants in the case answered to no one but the city's voters. In other words, there was no internal check on their concealment.

Another such case is *Mizen v. State ex rel. Zoeller*, 72 N.E.3d 458 (Ind. Ct. App. 2017). The defendant in *Mizen* argued that "irregularities" during audit periods should have alerted the SBOA that it had a cause of action during prior audits. *Id.* at 466. But the irregularities merely indicated that the local government unit "did a poor job keeping its records, that certain records were missing, and that there were questions over Mizen's salary and other benefits." *Mizen*, 72 N.E.3d at 467-68. "Although other audits had been performed concerning the time period in question, Mizen took steps to conceal his conduct[.]" *Id.* at 468. That Mizen fraudulently concealed his conduct was not in dispute – he pled guilty to a federal crime for his actions. *Id.* at 463. Finally, the *Robertson* trial court order referenced above and also currently awaiting decision in this Court has not yet proceeded past the dismissal stage, where the defendants' fraudulent concealment must be presumed, based upon the allegations in the complaint.

In the instant case, the State does not explicitly use the term "fraudulent concealment" in its brief, but it strongly suggests that this was what occurred:

> **Pfister and Sopko, as Superintendent and Treasurer of the School Town, had thorough knowledge of the administration's internal control and possible**

> **weaknesses. They would have known how to create a system resulting in overpayments to them that would not be detected through routine Board meetings or biennial SOA audits.**

(Op. Br. at 24-25). It has also expressly argued "fraudulent concealment" to the Trial Court. (App. Vol. 7, p. 17-19). The problem with this assertion is that it is unequivocally, unqualifiedly, undisputed that the School Town *did* know about the payments, *approved* them, and then repeatedly entered into new contracts containing an identically worded provision as a basis for the next year's payout.[8] See *Trimble v. Ameritech Publ'g*, 700 N.E.2d 1128, 1129 (Ind. 1998) ("[C]ourts in Indiana have long recognized the freedom of parties to enter into contracts and have presumed that contracts represent the freely bargained agreement of the parties."); see also *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1129 (Ind. 1995) ("[I]t is in the best interest of the public not to restrict unnecessarily a person's freedom of contract.").

In Indiana, successful assertion of fraudulent concealment requires that the defendant: (1) had actual knowledge of the wrongful act and (2) intentionally concealed it from the plaintiff (3) by making some statement or taking some action calculated to prevent inquiry or to mislead (4) upon which the plaintiff reasonably relied. *Lyons v. Richmond Cmty. Sch. Corp.*, 19 N.E.3d 254, 260-61 (Ind. 2014). The Defendants here simply could not have possessed "actual knowledge" of a "wrongful act" because they would have had no indication that the payments they were receiving were "wrongful." See *Olcott Int'l & Co. v. Micro Data Base Sys., Inc.*, 793 N.E.2d 1063, 1072 (Ind. Ct. App. 2003) (noting that "[t]he law narrowly defines concealment, and generally the concealment must be active and intentional."). In fact, the undisputed evidence indicates that they would have understood the opposite to be true – that their payments were

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[8] As noted above, the Defendants have also moved for summary judgment on "course of performance" grounds, but the Trial Court has stayed briefing on that argument until the statute of limitations issue is decided.

being properly and consistently carried out. Again, the initial compounding of the annuity rate occurred in the 2002-03 school year, and the Board unanimously approved those payouts to both Mr. Sopko and Mr. Pfister following School Town Benefits Coordinator Janice Swanson's annual internal audits. (App. Vol. 3, pp. 216-17). The School Town, with the Board's approval, then entered into materially identical contracts with both Mr. Sopko and Mr. Pfister a combined *14 times* from 2004 through 2011. In each instance, the superseding Contracts repeated verbatim the prior language describing the annuity calculation, changing only from time to time the percentage to be added. Evidenced by signed, publicly recorded Accounts Payable Voucher Registers executed each spring, the Board approved and signed the new contracts annually with full knowledge of how those contracts had been previously interpreted.

Neither can the State colorably assert, as the elements require, that the Defendants "intentionally concealed" acts from any potential plaintiff "by making some statement or taking some action calculated to prevent inquiry or to mislead." The payments were publicly reviewed and approved – the antithesis of concealment. Nonetheless, the State asks this Court to believe that the Defendants devised a "system" in which they would hide "overpayments" from the Board by having those overpayments presented to the Board by way of printed vouchers, audited by the School Town's benefits coordinator, then approved at an open, public forum. The State's expansive interpretation of "fraudulent concealment" would for practical purposes expunge the doctrine from Indiana law. In other words, if this is "fraudulent concealment," then truly *everything* is "fraudulent concealment." See *City of E. Chi. v. E. Chi. Second Century, Inc.*, 908 N.E.2d 611, 621-22 (Ind. 2009) (declining to toll limitations period for fraudulent concealment where plaintiff was "attacking the formation and confirmation of the original agreements" which occurred "ten or fifteen years ago in the full glare of the public arena. It simply asks too much to

embrace the idea that these were 'fraudulently concealed' from the City or anyone else.") (emphasis added.) Defendants do recognize that, as referenced in the Statement of the Facts, above, the payments approved via the vouchers make up the bulk, although not the entirety, of the amounts sought to be recovered. However, as the Trial Court noted in its Order, "there is no designated evidence that Pfister and Sopko took any steps to conceal the payments made to them." Summ. J. Order at 24. The State's sole argument regarding fraudulent concealment for *any* payments to Pfister and Sopko has been that they concealed payments by permitting them to be publicly approved under their publicly approved employment contracts.

Any "fraudulent concealment" argument advanced by the State rests on the premise that the Defendants concealed the payouts by way of a multiple-step, public approval system. The Supreme Court was correct in *E. Chi. Second Century, Inc.* – this "simply asks too much[.]"

## III. THE STATUTE OF LIMITATIONS ALSO BEGAN TO RUN BECAUSE THE SBOA INDEPENDENTLY SHOULD HAVE DISCOVERED THE PAYMENTS

So far, this Response has focused narrowly on the School Town's actual knowledge of the payments, which is undisputed. But the SBOA's actions also independently triggered the limitations period, regardless of the School Town's actions.

The SBOA is required under Indiana Code § 5-11-1-9 to: "examine *all accounts* and *all financial affairs* of every public office and officer, state office, state institution and entity" (I.C. § 5-11-1-9(a)); inquire upon "[t]he financial condition and resources of each municipality, office, institution, or entity" (I.C. § 5-11-1-9(d)(1)); inquire upon "[w]hether the laws of the state and the uniform compliance guidelines of the state board of accounts established under section 24 of this chapter have been complied with" (I.C. § 5-11-1-9(d)(2)); and inquire upon "[t]he methods and accuracy of the accounts and reports of the person examined." (I.C. § 5-11-1-9(d)(3)). (emphases added.)

The State has conceded that its prior audits "disclose internal deficiencies and risk assessment for the School Town, namely pertaining to the School Town's capital investments, school bus transportation fees, and school lunch fund" (App. Vol. 6, p. 193), but "did not examine defendants' chosen annuity accounts" (*Id.* at 13). As detailed above, the statute guiding the SBOA's audits commands that it "examine all accounts and all financial affairs of every public office and officer[.]" The Defendants' contracts were a matter of public record, and it is undisputed by the State that the SBOA requested and were provided, during each audit period, both Defendants' contracts. (App. Vol. 5, p. 84-85).

If "ordinary diligence" under the discovery rule means anything, it seems that it should at least mean here that the SBOA was required to have followed its own statutory commands. The State concedes that it did not. The State's fact section explains that, instead, the SBOA "plans and performs its audits to obtain reasonable rather than absolute assurance about whether the financial statements are free from" actions that may serve as the premise of a cause of action for malfeasance, misfeasance, or nonfeasance. Op. Br. at 12. The State also explains that the "SBOA does not perform a detailed examination of all transactions because of the inherent limitations of an audit[.]" *Id.* This may be the case, but these "limitations" are something that the State should take up with the Indiana legislature. The plain language of its guiding statute directs the SBOA to perform the kind of examination that would surely reveal payments publicly approved under the contracts that it is undisputed that the SBOA itself collected.

But even if the SBOA's "limitations" grant it some dispensation, the State has another, bigger problem. The State long ago conceded that "the work papers and notes accompanying SBOA Audit Reports B22572, B26869, B31765, and B35784 were previously destroyed pursuant to the Records and Retention Schedule." (App. Vol. 6, p. 196-97). Statutes of

limitations exist in the law "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Stephan v. Goldinger*, 325 F.3d 874, 876 (7th Cir. 2003). Because the State destroyed any evidence that might indicate whether ordinary diligence was or was not undertaken, this case makes a textbook example of why statutes of limitation exist and are enforced. Records that would potentially evidence any diligent efforts no longer exist. See *Doe v. United Methodist Church*, 673 N.E.2d 839, 844 (Ind. Ct. App. 1996) ("to avoid the time-bar imposed by the statute of limitations under the doctrine of fraudulent concealment, the plaintiff must show that he used due diligence to detect the fraud").

To be sure, Defendants maintain that the SBOA's independent discovery is a moot point – the School Town's knowledge triggered the start of each limitations period. However, assuming for the sake of argument that the limitations period began to run with the publication of each regular audit, the periods would expire as follows:

| **Date of Publication**[9] | **Two-year CVRA period expired** | **Five-year public officer period expired** |
|---|---|---|
| May 14, 2004 | May 14, 2006 | May 14, 2009 |
| May 8, 2006 | May 8, 2008 | May 8, 2011 |
| March 31, 2008 | March 31, 2010 | March 31, 2013 |
| February 15, 2010 | February 15, 2012 | February 15, 2015 |
| February 8, 2012 | February 8, 2014 | February 8, 2017 |
| March 14, 2014 | March 14, 2016 | Statute of limitations not expired at time of State's Complaint |

[9] The publication dates are available via searches at the SBOA's website, https://www.in.gov/sboa/5076.htm.

Finally, of note, the State uses the occasion of its Opening Brief to boast that in one recent week,"15 public employees faced charges in a statewide corruption crackdown." Op. Br. at 24. It is difficult to square this kind of ferocious enforcement with the notion that appellees Mr. Sopko and Mr. Pfister hid payments in plain sight for more than 15 years.

## IV. I.C. § 5-11-5-1(c) IS NOT RELEVANT TO THE STATUTE OF LIMITATIONS

The State cites I.C. § 5-11-5-1(c) for the following language: "[I]t is unlawful for any person, before an examination report is made public as provided by this section, to make any disclosure of the result of any examination of any public account[.]" It follows, argues the State, that "[t]he Attorney General would not have learned of a potential action involving the School Town until the office received the Audit Report from SBOA." Op. Br. at 22.

This may all be true, but it has nothing to do with this case. The discovery rule here applies to identify when the Attorney General *should have* discovered the School Town's injury. Defendants have already discussed three mechanisms by which that should have occurred: (1) Although the more sensible action would seem to be simply not approving the payments or not contracting to make the same payments again, the School Town should have either brought suit on its own, as authorized by statute, or reported the shortfall to the SBOA, as required by statute; (2) the SBOA should have reported the injury to the Attorney General, as directed by subsections (d) and (e) of § 5-11-5-1; and (2) the SBOA should have independently discovered the injury during its biannual audit process. The State argues that §§ (d) and (e) "involve[] extraordinary circumstances . . . which do not apply to this case." But it cites no authority for this assertion, and it is certainly not supported by the plain language of §§ 5-11-5-1(d)-(e), which appear to provide a mechanism for the examiner to alert the Attorney General in *precisely* this situation.

At *most*, as discussed above, *Pastrick* upon its facts applies to the time frame of a single audit period, giving the SBOA has the breathing room to complete its report without the statute of limitations period beginning its march. Under the State's interpretation of *Pastrick*, however, the SBOA can simply sit on its findings for as long as it desires before turning them over and finally beginning the limitations period. If this were the case, the SBOA could literally accumulate decades of annual or biannual findings before finally turning over the findings to the Attorney General's office. The State attempts to meet this concern with a policy argument, asserting that "there is no reason to believe the SBOA would unnecessarily delay" because "[d]elay of the publication of the report would subvert the attempt to collect . . . funds." Op. Br. at 23. But there is a *heavy* incentive for the State to delay an investigation, and it is evident in this case – the State's penchant for seeking treble damages under the Indiana Crime Victims Relief Act. See Op. Br. at 25-26. Regardless, it is not the Defendants' burden to justify the application of statutes of limitation. They are uncontroversial in the law.

Section (c) does not trump the discovery rule and grant the SBOA a perpetual license to either ignore or overlook malfeasance, misfeasance, or nonfeasance. As well, it directs the examiner to the exceptions established under subsections (d) and (e). It is of no relevance here.

## CONCLUSION

The Trial Court correctly granted summary judgment to the Defendants because the statute of limitations ran against the School Town under the undisputed facts of this case, not the State. Regardless, the SBOA has not and cannot show that it exercised due diligence to discover the payments during six biannual audits, and the Attorney General should have discovered . The Trial Court's decision should be AFFIRMED, and the case remanded to resolve the remaining claims not foreclosed by the applicable statutes of limitations.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on November 19, 2018, I electronically filed the foregoing document using the Indiana E-filing System ("IEFS").

I also certify that on November 19, 2018, the foregoing document was served upon the following counsel of record by IEFS:

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