In the
Indiana Supreme Court

CASE NO. 53S00-1104-DI-244

IN THE MATTER OF	)
	)
DAVID E. SCHALK	)
Attorney Number 15551-53	)

AMENDED BRIEF OF RESPONDENT

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INTRODUCTION

This is not a typical case. I am not asking this Court to excuse my actions. I am not here just to preserve my livelihood and reputation. After enduring injustice after injustice, and twice being turned away from this Court on petitions to transfer, I am here at last, after five and half years, with an agenda extending beyond protecting my immediate family (me and my eleven-year-old son Alex) from financial ruin, and restoring my reputation in the community.

I am before this honorable Court seeking your affirmation of the constitutional prerogative of our state legislature to make laws. I am here asking this Court to say that the police in Indiana are not above the law. And I am here asking the Court to say something to encourage and embolden criminal defense attorneys throughout the state of Indiana to work harder on behalf of their clients, free from fear of arbitrary retribution. Put succinctly, I am respectfully asking this Court to reaffirm the rule of law in Indiana. The rule of law has been suspended in my case, and I I hope the Court will publish some comments in its Order advising Indiana's judiciary that this should not happen to other people in the future.

Parts of the hearing in my case were reminiscent of the Grand Inquisition, the blasphemy this time being to criticize the Indiana Court of Appeals. My information is anecdotal, but attorneys seem to be very fearful of being quoted as having said anything critical of the Indiana Court of Appeals. I think I gained some insight into this at my hearing. Counsel for the Disciplinary Commission asserted repeatedly in conversations that my conviction in the Monroe Circuit Court and its affirmation in *Schalk v. State*, 943 N.E.2d 427 (Ind. Ct. App. 2011), *trans. denied*, were dispositive evidence of a violation of Rule 8.4(b) of the Indiana Rules of Professional Conduct. I think the State's attacking me for doing for my client what the State did to his detriment reflects badly on our profession. But more on point here, I acted upon the reasonable, good faith belief

that my actions were lawful. My belief increasingly appears to be reasonable in light of the fact that no judge or attorney involved in my case so far has found a flaw in my reasoning, or offered a reasonable rationale for alleging or holding that my actions were unlawful. When I point out that the Opinion of the Court of Appeals in *Schalk, Id.* ignored my analysis and implied that I presented a meritless argument that the was easy to refute, I am accused of misconduct and my mentioning it is designated in the hearing officer's conclusions as an aggravating factor. When I explain that there was no way for me to foresee that my actions would be deemed unlawful in light of the fact that a definition had never before been held to be substantive law, and the *Schalk* opinion is internally inconsistent and makes no sense, the substance of what I say is once again ignored but my stating my case is found to be misconduct.

The Court of Appeals held that the definition of "law enforcement officer" is an exclusive list of categories of people who are authorized to enforce the law in Indiana and then, two paragraphs later, recited Ind.Code § 35-33-1-4 granting "any person" broad arrest powers. Of course I could not have anticipated the "reasoning" that affirmed my conviction, but my saying the opinion attributed to me an argument so meritless it would not have even crossed my mind, contained "facts" unsupported by the record, and unprecedented in transforming a definition into substantive law, is illogical and internally inconsistent, the Disciplinary Commission gives the hearing officer proposed findings, conclusions, and recommendations for him to sign telling this Court that my saying these things is misconduct. I have to say that I acted reasonably and in good faith with no way of anticipating that I would be arbitrarily convicted of a misdemeanor, and that the conviction would be affirmed in a published Opinion that makes no sense at all. The hearing officer told me he intended to prove facts based on facts stated in the Schalk opinion. The case did not turn on facts. Facts gratuitously inserted into the Opinion which were

irrelevant to my conviction or its affirmation were, I would think, nothing more than hearsay within hearsay. But the panel of the Court of Appeals that affirmed my conviction were the witnesses against me, so I subpoenaed them. That was determined to be more misconduct. My cover letters to the judges were, according to the findings and conclusions submitted to this Court, two more aggravating factors. The drain on my time and the dark cloud of pending disciplinary action have bankrupted me. I would like to lay my burden down now, and go on with my life. This Court has the power to make my five and a half years of struggle worthwhile.

CLARIFICATION OF ERRONEOUS RESPONSE TO HEARING OFFICER

During a discussion of Article 1, § 19 of the Constitution of Indiana, the hearing officer asked me if I think juries have a right to disregard the law and/or the facts in reaching a verdict and I answered affirmatively, thinking this correct in the context of the discussion. I knew then, and I am now well aware of the fact that, " [i]t is improper for a court to instruct a jury that they have a right to disregard the law. Notwithstanding Article 1, Section 19 of the Indiana Constitution, a jury has no more right to ignore the law than it has to ignore the facts in a case." *Holden v. State,* 788 N.E.2d 1253, 1255 (Ind.2003) (quoting *Bivins v. State,* 642 N.E.2d 928, 946 (Ind.1994)). Here is the point I was trying to get across to the hearing officer:

> Simply advising the jury that it has the right to determine the law and the facts falls woefully short of explaining how this right may be exercised. In contrast, Walden's tendered instruction fills this void. Quoting Seay, the instruction is a correct statement of the law and gives express guidance to a jury on what it means to determine the law in the habitual offender context.
>
> This aspect of the statute was not covered by any of the trial court's other instructions. In like fashion, when requested, juries should be given similar guidance on its law determining function under Article 1, Section 19 in the guilt phase of trial. At a inimum this may be accomplished by advising the jury as follows:
>
> Even where the jury finds that the State has proven the statutory elements of the offense beyond a reasonable doubt, the jury still has the unquestioned right to determine whether in this case returning a verdict of guilty promotes fairness and the ends of justice.

Walden v. State, 895 N.E.2d 1182,1188-89 (Ind. 2008)(Rucker J., Dissenting).

> Third, the majority acknowledges that the rejected jury instruction was a correct statement of law, but declares that it would have been inappropriate to inform the jury of this legal principle because of the effect it might produce. As correctly stated in the requested but refused instruction, " Even where the jury finds the facts of the prerequisite prior felony convictions to be uncontroverted, the jury still has the unquestioned right to refuse to find the Defendant to be a habitual offender at law." Appellant's App'x at 253. But the majority concludes that the substance of this instruction was adequately communicated to the jury by the following instruction: " [Y]ou have the right to determine both the law and the facts. The Court's instructions are your best source in determining the Law." Id. at 261. I cannot agree that this latter, broad, unspecific, and opaque instruction was adequate to inform the jury of the legal principal embodied in the defendant's tendered instruction-a principal that was at the heart of the defendant's defense on the habitual offender count.

Walden v. State, 895 N.E.2d 1182,1190 (Ind. 2008)(Dickson J., Dissenting).

The tendered jury instruction is quoted from: *Seay v. State,* 698 N.E.2d 732, 734 (Ind.1998)

(citing *Duff v. State,* 508 N.E.2d 17, 24 (Ind.1987) (Dickson, J., separate opinion)).THE

ALLEGATIONS AGAINST DAVID SCHALK

I. The First Allegation – Rule 8.4(b).

It is alleged that I committed a criminal act that reflects adversely on my honesty, trustworthiness or fitness as a lawyer in other respects. The allegation of criminality for which I was convicted is set forth in Count 2 of an amended information filed in the Monroe Circuit Court on November 9, 2009 stating:

> Between June 23 and June 25, 2007 in Monroe County, State of Indiana, David E. Schalk, acting with culpability required to commit possession of marijuana, a Class A Misdemeanor, which is defined as: knowingly or intentionally possess (pure or adulterated) marijuana, did contact persons to obtain marijuana, meet with persons to coordinate the purchase of marijuana, obtain funds for the purchase of marijuana, provide funds for the purchase of marijuana, or provide an audio recorder to record the purchase of marijuana, all of which in (sic) contrary to Indiana Code 35-41-5-1 and Indiana Code 35-48-4-11(1).

My defense is that I acted in good faith upon my reasonable, sincere belief that my actions were lawful. If the Indiana Court of Appeals made a new law when it published its Opinion in

Schalk v. State, 943 N.E.2d 427 (Ind. Ct. App. 2011), *trans. denied*., and applied it to me *ex post facto*, then I didn't even break the law – at least not back then. I sincerely and reasonably believed I was acting lawfully and consistently with my duty to defend my client, Chad Pemberton.

I freely admitted that on June 25, 2007 I met with persons to discuss the purchase of marijuana, provided funds for the purchase of marijuana, and provided an audio recorder to record the purchase of marijuana in Monroe County, Indiana. At my November 17, 2009 bench trial, the State needed to prove only one of these. The allegations regarding contacting persons and obtaining funds for the purpose of obtaining marijuana are false. I sought reimbursement after June 25, 2007, but providing funds was entirely a spur of the moment decision. No evidence supporting these two allegations was offered at my trial. I was found guilty and sentenced to three months incarceration, all suspended to unsupervised probation, and ordered to perform forty hours of public service. I enjoyed laboring for forty hours to improve the appearance of one of Bloomington's community gardens during the summer of 2010.

It is undisputed that my intention was for the purchaser of the marijuana to hand the contraband over to the police for safe keeping, to be used as evidence in the trial of Chad Pemberton which was scheduled to begin in one week. I had established that the police informant who claimed to have bought a small quantity of methamphetamine from Chad Pemberton was sent on a mission by the police to compromise Pemberton so he could be coerced into testifying against a man named Carlton White whose trial was imminent. Showing that the informant had an ongoing drug-dealing enterprise would show that he had a lot to gain and a lot to lose depending on how satisfied the police were with his performance on his mission; and it would also show that the he had access to illegal drugs that he could claim he obtained from Chad

Pemberton. The State was insisting on a Class A felony conviction with a fully executed twenty-year sentence, so it looked like a jury trial was not going to be avoided.

At the end of my trial, I argued that we cannot impute to the Indiana state legislature an intent to create an exception to the prohibition against possessing marijuana exclusively for the police. I pointed out there and in the previously filed briefs I incorporated by reference that where our legislature has spoken, law enforcement is everyone's prerogative. Some would say everyone's duty. Specifically, I pointed out that our legislature granted broad arrest powers for past and ongoing felonies and misdemeanors to "any person." I asked, how then can we impute to the legislature an intent to deny defense attorneys and their investigators the right to perform sting operations to obtain relevant evidence that the police want to keep hidden. No answer was offered by the judge or prosecutor. The implied answer was, "Because we say you can't."

Law enforcement officers are granted some exclusive powers, such as making traffic stops and serving arrest warrants. Nothing is said in our statutes or regulations about sting operations to obtain contraband that under most circumstances it is unlawful to possess. My thinking in this area has become more refined over the years, and I now see that we must not say that the police may do things which for others are illegal, just by virtue of their being the police. That places the police above the law. I hope this Court will say that the police of Indiana have no powers or immunities from criminal liability which are unique to law enforcement officers but not specified by legislative enactment or implementing regulations. That did not need to be said prior to the publication of *Schalk v. State,* 943 N.E.2d 427 (Ind. Ct. App. 2011), *trans. denied*.

I think I sensed this when I declined to claim any right to encourage and facilitate a marijuana sting operation by virtue of my status as a duly appointed and sworn deputy sheriff. The Schalk opinion held that people included in the definition of "law enforcement officer" have

an exclusive privilege to do be involved in that sort of thing, and said I waived the issue by not including it in the argument section of my brief. I couldn't have done that because no statute gives law enforcement officers that right, and if they can take for themselves, and themselves only, the right to violate the prohibition against possessing marijuana, then what next? Would an officer who committed residential burglary to obtain evidence have only to fear that what he found might be suppressed? Would that be an officer's only concern if he tortured a confession out of someone? I urge the Court to make it clear to the law enforcement officers and judges of Indiana that being included in the statutory definition of "law enforcement officer" can only be part of the grant of special powers and privileges, the other part being a substantive statutory provision. It feels strange to say what was too obvious to need saying before the publication of *Schalk v. State, Id.*

In my petition to transfer, attached as Exhibit "B," I addressed a public policy concern that our legislature might want to consider if it ever regulates sting operations. I wrote: "People accused of selling drugs will sometimes need the services of their attorneys' undercover investigators. Necessary discovery is not always available through channels. It would be sad and likely tragic if Indiana eventually enacts laws to regulate controlled buys and neglects to provide opportunities for defendants to gather necessary evidence." Wrongful convictions are often tragic. People living behind bars, children deprived of a parent, men and women struggling to support themselves and their dependents as virtually unemployable convicted criminals. These things happen. They are happening now. In imputing legislative intent, I think it is appropriate to consider this public policy concern.

Here is my answer to the first allegations of a violations of the Rules of Professional Conduct in the Verified Complaint for DisciplinaryAction:

18. By his conduct in committing the crime of Attempt to Commit Possession of Marijuana, the respondent violated Rule 8.4(b) of the *Rules of Professional Conduct for Attorneys at Law*.

Answer: Deny. The Indiana Court of Appeals' Opinion may have made what I did in June of 2007 illegal by judicial fiat, but applying the holding to me violates due process of law and the prohibition against *ex post facto* laws stated in Article 1, § 24 of the Constitution of Indiana. The Court of Appeals could not say how I might possibly have known that my actions were illegal. It would not have occurred to me that being included in a statutory definition, with nothing more, would have any legal significance. Even if such an absurd thought had crossed my mind, I might also have noted that being a deputy sheriff means I am included in the definition of "law enforcement officer." I do not think being a law enforcement officer, in and of itself, endows a person with authority, privileges, defenses or immunities other than those specified in our statutes. That authority might have been abolished when the Magna Carta was issued in the year 1215, although the king still could do no wrong. At this stage of the development of our jurisprudence, it is well-established that we are a nation of laws, and no one is above the law. The notion that the police may break laws just because they are the police is an anachronistic concept that very unexpectedly showed up in the Opinion of the Indiana Court of Appeals in my case. Contrary to the implication of the Opinion, Indiana is not a police state. The rule of law has been suspended in my case, but I am confident that the situation is temporary and does not signify a new authoritarian trend in Indiana's courts. The Opinion has the force and effect inherent in such things, but it should have no effect on the Disciplinary Commission's opinion of me. Facts in the Opinion are misleading and unfounded, and the reason given for affirming the judgment of the trial court would get zero credit on the bar exam. It is devoid of merit.

II. The Second Allegation – Rule 8.4(d)

Here is the other allegation, along with my answer and prayer for relief:

19. By his conduct in conspiring with others to engage in his misconduct, by making requests of other persons to assist him in his criminal conduct, and thus to place third parties at risk of harm, and for engaging in criminal conduct as part of his representation" of a client, the respondent violated Rule 8.4(d) of the *Rules of Professional Conductfor Attorneys at Law*.

Answer: Deny. There was no conspiracy. There were no requests for assistance in criminal conduct. No third parties were ever placed in risk of harm. I did not engage in criminal conduct. The Court of Appeals pronounced my conduct illegal this year in an Opinion that is illogical, self-contradictory, and would have been impossible for me to anticipate. I tried to make the best of a very unexpected situation that arose on June 25, 2007. I did not think my conduct was illegal and now I am even more confident, if that is possible, that it wasn't. I did not ask any minors to buy drugs without police supervision. Not being illegal, my actions were consistent with my oath as an attorney and with my duty to help Chad Pemberton in his time of need.

WHEREFORE, I pray that I be exonerated in this matter on grounds that, notwithstanding the Opinion of the Indiana Court of Appeals, my actions were legal and consistent with my duties as an attorney. Applying the law created in the Opinion of the Court of Appeals to me would violate the prohibition against *ex post facto* application of laws. Now that the Opinion has been handed down, it would appear to be the case that, as applied to me on June 25, 2007, Indiana Code § 35-48-4-11(a) was void for vagueness.

I also request further relief that would encourage criminal defense attorneys throughout the state to more vigorously represent their clients, and help these defense attorneys realize that they are protected from baseless prosecutions in retribution for exposing the nefarious activities of witnesses who work for the police. A disposition of this case which praises me for diligence, perseverance, and steadfast adherence to duty in the face of some rather vicious, authoritarian adversaries would embolden criminal defense attorneys to work a little harder for their clients and be a little less afraid of the arbitrary and capricious wielding of power by prosecutors and trial court judges.

I could have pointed out that I was not put on trial for conspiracy. I asked only one person, Chad Pemberton's sister, if she would be willing to purchase drugs from someone. That person was a man named Brandon Hyde. This was after the June 25, 2007 incident at issue here. I asked only if she would be willing to buy drugs from Brandon Hyde under the supervision of the police. When she agreed, I contacted a Bloomington Police Department drug investigation detective named Cody Forston to see if he was willing to supervise a drug buy from Brandon Hyde. He declined, saying among other things that helping my client would be a conflict for him. The man to whom I provided the recorded currency and digital voice recorder was already on his way to get marijuana from Brandon Hyde when I first met him a little past Noon on June 25, 2007.

CLARIFICATION OF MY ANSWER TO THE DISCIPLINARY COMMISSION

The Findings, etc. suggest that I lack insight into the fact that my actions were illegal. I therefore want to clarify my statement, "I did not think my conduct was illegal and now I am even more confident, if that is possible, that it wasn't." In light of the failure of the Court of

Appeals to provide a sensible rationale for affirming my conviction, and its ignoring the argument I made, substitution one so lacking in merit that it would not have even occurred to me, I am convinced more than ever that my case was wrongly decided. To some extent at least, the opinion even proclaims a police state in Indiana. Moreover, if I am correct in thinking the Court of Appeals in Schalk created a new law, applying it to me *ex post facto*, then I didn't break a law that existed on June 25, 2007. And, if I am not mistaken in believing that my credentials as a duly appointed and sworn deputy sheriff who shall remain a deputy sheriff until "a successor shall have been duly appointed and qualified to office" have been in full force and effect since I took my oath and was appointed by Monroe County Sheriff Jim Young in 1985, then the *Schalk* opinion granted me, ex post facto, the authority to lawfully do as I did. Deputy sheriffs are included in the statutory definition of "law enforcement officer."

However, I do not consider my misdemeanor conviction to be a nullity. I would very much like to see it reversed someday. If this honorable Court reconsiders its decision not to grant transfer, it could happen this year. A statement in the Court's Order in this matter saying the prohibition against possession marijuana was void for vagueness as applied to me on June 25, 2005, I could return to the trial court for post-conviction relief. For now, it is a fact that I am a convicted criminal, convicted on the basis of admitted facts. The Opinion that says those facts constitute a crime is the law of Indiana, and the conclusion that I committed a crime is an established fact.

This seems more like existential philosophy than legal analysis. I just want the Court to know that my insight into the issue of my committing a crime is reasonably acute. I am a convicted criminal, hoping to one day to regain the clean record I took for granted for so many years.

SOME FURTHER DISCUSSION AND ARGUMENT

This Court recently reiterated how it interprets statutes as follows:

> In interpreting a statute, our goal is to determine and give effect to the intent of the legislature. *Porter Dev.*, 866 N.E.2d at 778. In determining legislative intent, we " consider the objects and purposes of the statute as well as the effects and repercussions of" our interpretation. *Bushong v. Williamson*, **790 N.E.2d 467**, 471 (Ind.2003). " The legislative intent as ascertained from the provision as a whole prevails over the strict literal meaning of any word or term." *Id.* These precepts have guided us in statutory interpretation for over a century. *See, e.g., Parvin v. Wimberg*, **130 Ind. 561**, 30 N.E. 790, 793 (1892) (noting that when legislative intent is ascertained, " it will prevail over the literal import and the strict letter of the statute"). And where meaning is uncertain, " the courts will look also to the situation and circumstances under which [the statute] was enacted, to other statutes, if there are any upon the same subject, whether passed before or after the statute under consideration, whether in force or not, as well as to the history of the country, and will carefully consider in this connection the purpose sought to be accomplished." *Id. Cf. D & M Healthcare, Inc. v. Kernan*, **800 N.E.2d 898**, 911 (Ind.2003) (rejecting literal construction of Indiana Constitutional provision in light of history of the provision and subsequent practice).

State v. International Business Machines Corp., 964 N.E.2d 206,209 (Ind. 2012).

Ind.Code § 35-48-4-11 prohibits knowingly or intentionally possessing (pure or adulterated) marijuana and nowhere in the statutes of Indiana can one find the defense of obtaining marijuana for storage in a police locker, use as evidence in judicial proceedings, and subsequent destruction. Prosecutors, police officers, and their helpers routinely buy marijuana for these purposes and nobody has said that this is an ongoing, pervasive criminal enterprise. “And we do not presume that the Legislature intended language used in a statute to be applied illogically or to bring about an unjust or absurd result.” *City of Carmel v. Steele*, 865 N.E.2d 612,618 (Ind. 2007), quoting *State ex rel. Hatcher v. Lake Super. Ct., Room Three*, 500 N.E.2d 737, 739 (Ind.1986). Ignoring the fact that I am a law enforcement officer, I want to consider my actions in light of *State v. International Business Machines Corp., Id.* The purpose of Ind.Code § 35-48-4-11 is to minimize the use of marijuana. I tried to remove some marijuana from the stream of commerce. There is another statute we can look to for guidance, the citizen’s arrest statute discussed above.

Law enforcement is the prerogative, if not the responsibility, of every person in Indiana where our legislature has spoken.

When criminal statutes are involved, additional factors come into play, which this Court explained as follows:

> Several venerable due process principles--variously framed as the "void for vagueness doctrine," the "rule of lenity," and the "fair notice requirement"--bring us to this conclusion. "As generally stated, the void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). The purpose of the "fair notice" requirement is "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss,* 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954). The rule of lenity is premised on two ideas: First, " 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed' "; second, legislatures and not courts should define criminal activity. *United States v. Bass,* 404 U.S. 336, 347-348, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) (quoting *McBoyle v. United States,* 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1931)).

Healthscript, Inc. v. State, 770 N.E.2d 810, 815-16 (Ind. 2002), cited with favor in *George v. National Collegiate Athletic Assn.*, 945 N.E.2d 150 (Ind. 2011) at 154.

With reference to my argument that I acted in good faith, reasonably believing my actions to be lawful and appropriate, I quote a comment from the Rules of Professional Conduct. "A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law." Rule 8.4, Comment [3] of the Indiana Rules of Professional Conduct.

And finally, here is something familiar to the members of this honorable Court: "The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under

one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." Ind.Const art 1, § 3.

CONCLUSION

It has been truly said, and often repeated, that eternal vigilance is the price of liberty. Over the past five years, it has fallen upon me to choose between taking the easy way out, or standing firm in defense of the rule of law and the right of people accused of crimes to defend themselves. I accepted the burden laid on my shoulders, of remained firm in defense of these principles, thinking our judiciary would set things right, even if I had to go all the way to the Indiana Court of Appeals. I was naïve. The four judges on the two panels I encountered on the way here disappointed me, not as much with their conclusions as with their methods.

Janet Blue was Commissioner of the Court of Appeals when I wrote my first appeal. The outcome is published as *Yeager v. Bloomington Obstetrics*, 604 N.E.2d 598 (Ind. 1992). I was able to rely heavily on a dissenting opinion by Hon. Robert H. Staton in a similar case. This Court summarily affirmed the unanimous opinion of the Court of Appeals in *Yeager v. Bloomington Obstetrics*, 585 N.E.2d 696 (Ind.App. 1 Dist. 1992). That opinion states:

> Considering the vigorous manner in which the legislature has intervened in the area of medical malpractice, we believe it would be inappropriate for us to adopt a blanket no-duty rule which would disallow all medical malpractice claims based upon pre-conception tort theories in order to advance the very policies underlying the Indiana Medical Malpractice Act. We believe that the legislature has preempted this area and that all further "blanket" type protections designed to ensure that tort claims remain within manageable bounds should be implemented by our legislature.

ID, at 699. Summary judgment was reversed and Yeager was able to proceed with his claim for damages. The statement about the role of the legislature is be well-taken in this case.

I revered the Court of Appeals back then. It gives me no pleasure to inform this honorable Court of some of what I have endured over the past few years. I want with all of my heart to see

published appellate opinions on an even keel. I can't help but believe that this Court will view the *Schalk* opinion as a dangerous aberration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2013 I served a copy of this document by U.S. Priority Mail, postage pre-paid, and also as email attachments, upon the following people:

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