APPELLANT PRO SE:

JOSEPHINE SCHIMIZZI, M.D.,
Mishawaka, Indiana

ATTORNEYS FOR APPELLEE:

JAMES F. GROVES
DAVID E. BALLARD
South Bend, Indiana

IN THE COURT OF APPEALS OF INDIANA

JOSEPHINE SCHIMIZZI, MD.,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 71A03-0602-CV-60
	)	
RITA GLENN, THE CLERK OF THE CIRCUIT COURT,	)	
	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE ST. JOSEPH CIRCUIT COURT
The Honorable David T. Ready, Magistrate
Cause No. 71C01-0512-PL-00335

NOVEMBER 2, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

STATEMENT OF THE CASE

Appellant-Plaintiff Josephine Schimizzi, M.D. ("Schimizzi"), pro se, brings this interlocutory appeal from the trial court's order denying her combined motion for emergency temporary restraining order, motion for a preliminary injunction, and/or motion for safeguarding the original case file (collectively, "preliminary injunction motion") in which Schimizzi sought to have Rita Glenn ("Glenn"), the St. Joseph County Court Clerk, enjoined from destroying a case file—from a case that had been dismissed with prejudice two years earlier—during the pendency of her current lawsuit in which she sought a writ to have the original case file given to her. We affirm.[1]

ISSUE

Schimizzi appears to raise numerous issues; however, we consolidate and restate the relevant issue as whether the trial court abused its discretion by denying her preliminary injunction motion.[2]

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[1] In her reply brief, Schimizzi moved this court to strike: (1) Glenn's Appellee's Appendix, which contains the chronological case summary, complaint, stipulated motion to dismiss, and dismissal order from her dismissed case (cause number 71D06-9812-CP-01562) in which she seeks to obtain the original case file; and (2) pages two and three of Glenn's Appellee's Brief, which contains reference to the materials in Glenn's appendix. We deny Schimizzi's motion to strike.

[2] We note that Schimizzi's motion for an injunction and the trial court's order refer to the injunction as a "permanent" injunction. *See* Appellant's Appendix at 3, 30. However, the trial court analyzed the motion as a preliminary injunction, and Schimizzi claims that she is bringing this appeal under Indiana Appellate Rule 14(A)(5), which allows an appellant to file an interlocutory appeal as a matter of right from an order "refusing to grant . . . a preliminary injunction." Therefore, we review the trial court's order as a denial of Schimizzi's motion for preliminary injunction. *See Clay Tp. of Hamilton County ex rel. Hagan v. Clay Tp. Regional Waste Dist.*, 838 N.E.2d 1054, 1062 (Ind. Ct. App. 2005) (presuming that the trial court's order referencing the denial of the plaintiff's "permanent" injunction was a scrivener's error and treating the order as a denial of a preliminary injunction).

FACTS AND PROCEDURAL HISTORY[3]

This lawsuit is a continuation of litigation which began with an automobile accident that occurred in 1987.

In May 1987, Schimizzi was a passenger in an automobile that was rear ended by another vehicle. *See Schimizzi v. Illinois Farmers Ins. Co.*, 928 F.Supp. 760, 764 (N.D. Ind. 1996). The car in which Schimizzi was riding was insured by Illinois Farmers Insurance Company ("Illinois Farmers"). *Id.* The drivers saw no damage to the automobiles, and they parted ways without exchanging identification. *Id.* Soon thereafter, Schimizzi began to experience neck pain, sought medical treatment, and eventually stopped working as a physician. *Id.* Schimizzi and Illinois Farmers became engaged in a coverage dispute that eventually led to Schimizzi filing a federal lawsuit against Illinois Farmers in March 1993. *Id.* at 764-769.

In March 1996, after a nine-day trial, a jury awarded Schimizzi a $1,000,000 verdict, consisting of $400,000 in compensatory damages and $600,000 in punitive damages. *Id.* at 763. Illinois Farmers then sought judgment as a matter of law, amendment of the judgment, and/or a new trial, while Schimizzi moved for prejudgment interest and attorney fees. *Id.* The United States District Court for the Northern District of Indiana granted Schimizzi's motion for prejudgment interest but denied her motion for attorney fees. *Id.* at 763-764, 787-789. The Court denied Illinois Farmers' motion for

[3] We note that Schimizzi's Statement of Facts contains argument and facts not relevant to the resolution of the issue on appeal. Therefore, we direct Schimizzi's attention to Indiana Appellate Rule 46(A)(5), which provides that an appellant's Statement of Facts section "shall describe the facts relevant to the issues presented for review[.]"

judgment as a matter of law but conditionally granted its motion for a new trial contingent upon Schimizzi's acceptance of a remittitur of $521,877.53, for an amended judgment of $478,122.47 plus interest. *Id.* at 782, 787, 789. Thereafter, Schimizzi accepted the remittitur. *See Schimizzi v. Townsend Hovde & Montross*, No. 71A03-0111-CV-363, slip op. at 6 (Ind. Ct. App. October 8, 2002).[4]

In December 1998, Illinois Farmers filed a complaint against Schimizzi in state court in St. Joseph County under cause number 71D06-9812-CP-01562. Illinois Farmers alleged that it had satisfied the judgment but that Schimizzi had refused to sign a satisfaction of judgment. Schimizzi filed a counterclaim against Illinois Farmers, and the Honorable Jenny Pitts Manier was later named to be the judge for the case. In August 1999, Schimizzi obtained summary judgment on Illinois Farmers' complaint. In December 2003, Schimizzi and Illinois Farmers settled Schimizzi's counterclaim and filed a stipulated motion to dismiss the counterclaim, and on December 4, 2003, Judge Manier entered an order of dismissal with prejudice.

Following the dismissal of her counterclaim, Schimizzi became concerned that when the case file in cause number 71D06-9812-CP-01562 ("case file") was to be destroyed pursuant to Indiana Administrative Rules[5] that it would be made into scrap paper to be used by county employees and the public. At some point, Schimizzi

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[4] *Schimizzi v. Townsend Hovde & Montross*, No. 71A03-0111-CV-363 (Ind. Ct. App. October 8, 2002) is an appeal from a contract dispute between Schimizzi and Frederick Hovde, who was one of the attorneys that represented Schimizzi in the federal lawsuit with Illinois Farmers.

[5] According to the Judicial Retention Schedules contained in Indiana Administrative Rule 7, records from a dismissed civil case are to be destroyed two years after dismissal.

apparently spoke with Ron Miller, the Director of Trial Court Management for the Indiana Division of State Court Administration. According to Schimizzi's petition for writ, Miller "indicated to Dr. Schimizzi that Administrative Rules 6 and 7 provide for return of original Court files to the party, and that it [was] agreeable to him that Dr. Schimizzi receive said original Court file." Appellant's App. at 8. Miller contacted Glenn about giving the original case file to Schimizzi, and Glenn indicated that she would not do so.

Schimizzi also contacted David Schanker, Chief of Staff for the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court, regarding her attempt to obtain the original case file from her dismissed St. Joseph County case. On November 7, 2005, Schanker sent Schimizzi a letter, which provides:

> Dear Dr. Schimizzi:
>
> At your request, I have prepared this statement regarding our office's efforts to facilitate the release to you of the case record in cause number 71D06-9812-CP-01562 from the St. Joseph County Clerk's Office. You contacted our office to assist you in this regard because we had released to you the appellate case record in cause number 71A03-0111-CV-363. It is the policy of this office, pursuant to order of the Indiana Supreme Court and Administrative Rules 6 and 7, to offer the parties in civil cases the opportunity to claim the case record after microfilming. I explained to you that while this procedure is applicable to the appellate clerk's office, it did not apply to county clerks.
>
> I received a telephone call from you on October 28, 2005, requesting assistance in receiving the case record in the above-referenced case (which had ended with a dismissal in 2003) from the St. Joseph Clerk's Office. Your concern was primarily that the case record, which contained your personal medical records, would be cut up and used as scrap paper in county offices, as you had been told had been done with other case records. You said that you had also seen scrap paper in the courthouse with case information on the reverse side. I telephoned the clerk's office to see if I

could be of assistance and allay your concerns, and spoke with Martha of that office, who asked me to put my request in writing and fax it to her. I did so, and subsequently spoke with the clerk of the St. Joseph courts, Rita Glenn, who informed me that it was the policy of their office to destroy case files and that only documents of an inconsequential, non-confidential nature were used as scrap paper.

I communicated this information to you, and you asked if I would contact the judge in the case to see if something could not be done to permit you to have the case record returned to you. I sent an e-mail to Judge Manier explaining the situation. Judge Manier responded that she had no objection to the case file being given to you if it would be otherwise destroyed and that she would communicate this to the clerk. On November 1, 2005, I received a follow-up e-mail from Judge Manier indicating that she was advised by the clerk that she was sticking by her procedure of destroying case files. The clerk stated, however, that she would offer you the opportunity to witness the case file being destroyed.

I undertook these efforts on your behalf strictly as a courtesy to a pro se litigant and in an effort to facilitate the return of the case record to you if at all possible. The case with which you are concerned is not before the appellate courts and the disposition of the record is not within the purview of this office.

Id. at 24-25.

On December 1, 2005, Schimizzi received the following letter from Glenn:

Dear Dr. Schimizzi,

I have been contacted by several different groups of concerned individuals in regards to [the] dismissed case [in cause 71D06-9812-CV-01562]. I have talked to all the individuals directly, and as you have probably already heard from them, I am in total compliance [with] Administrative Rule 7. The procedure that I, Clerk of the Circuit Court of St. Joseph County, is to destroy, by shredding, all records after the 2 year period from dismissal. I realize that the procedure may vary in counties and even on the state level, but I will be sticking to the procedures that we have set. Please remember the invitation that I have extended to you. I and my archivist, Diane, will let you come in and make any/and all copies at the cost of .05 [cents] per page (by county ordinance) of anything from your flat file. I am keeping my promise to let you come in personally and with Diane, to destroy your file on January 3rd, 2006.

> If you have any future questions, please feel free to contact Diane or myself at 235-9635 to assist you.

Id. at 44.

On December 5, 2005, Schimizzi filed a complaint and petition for writ of mandate, seeking an order directing Glenn "to return the original file of Cause No. 71D06-9812-CP-01562 in its entirety to Dr. Schimizzi in lieu of its destruction and in lieu of its retention in the form of scrap paper." *Id.* at 6. Schimizzi contended that, pursuant to Administrative Rules 6 and 7, the case file could be given to her instead of being destroyed.[6] Schimizzi alleged that she wanted the original court file, which consists of "at least" 10,000 pages, "for [the] protection of confidential personal identifying information[,] protection of medical records and medical information and

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[6] Indiana Administrative Rule 6(K) provides:

> **Disposal of Records.** Court records which have been preserved in accordance with the standards set out in this rule may be destroyed or otherwise disposed but only after the court or its clerk files a "Destruction Certificate" with the Division of State Court Administration certifying that the records have been microfilmed or digitized in accordance with the standards set out in this rule, and the Division issues a written authorization for the destruction of such records. The Division of State Court Administration shall make available a form "Destruction Certificate" for this purpose.

Indiana Administrative Rule 7 provides:

> **Authority to Dispose of Records.** Clerks of Circuit Court, Judges and other court officers shall dispose of records in the manner set out in this Rule and in accordance with the retention schedules specified herein. The retention schedules set out in this Rule should be presented to the appropriate county records commission, one time only for informational purposes, before disposal of the records. Prior to disposal of judicial records not listed on this schedule, or if special circumstances necessitate the retention or disposal of judicial records in a manner not set forth in this Rule, a circuit court clerk, judge or other officer of the court must seek written authorization from the Division of State Court Administration to maintain or destroy such records.

protection of the diary of her life from May 8, 1987 the day of the car accident to December 4, 2003 the day the file was closed, and for her legal protection of having a copy of the entire file and having all original file marks." *Id.* at 22.

Also on December 5, 2005, Schimizzi filed her preliminary injunction motion in which she sought to enjoin Glenn from destroying the case file until the trial court ruled on her writ. Thereafter, Glenn filed a motion for summary judgment, and Schimizzi filed a cross motion for summary judgment.

The trial court held a hearing on Schimizzi's preliminary injunction motion, took the matter under advisement, and thereafter issued findings and conclusions ("injunction order"), which provide, in relevant part:

* * * * *

> 3. Defendant Glenn has indicated an intention to destroy certain files including that which is the subject matter of this litigation.
>
> 4. Plaintiff Schimizzi claims an interest in the Court file and contends that she needs these original records to protect herself against future litigation which might be initiated by [Illinois Farmers Insurance Company]. Plaintiff Schimizzi failed to provide any evidence of such a possible lawsuit.
>
> 5. Defendant Glenn has offered to provide Plaintiff Schimizzi with copies of the Court file to be made at [Schimizzi's] expense and estimated the copying cost to be approximately Two Hundred Dollars ($200.00).
>
> 6. Plaintiff Schimizzi admits that an offer to provide her copies of the Court file was made. Defendant [sic] Schimizzi has declined and continues to decline that offer. Defendant [sic] Schimizzi is willing to pay Two Hundred Dollars ($200.00) but only for the original Court file.

* * * * *

8. Plaintiff Schimizzi has not established that she has a legal right to possession of the Court file and [Schimizzi's] desire to possess the same does not give rise to such a right. Such a right, if it were to exist, (which it does not), could be no greater than the rights or interest of the other party to that lawsuit, being Illinois Farmers Insurance Company. [Schimizzi] has elected not to make Illinois Farmers a party herein. The Court can only speculate as to the litigation which might ensue if parties were found to have a vested right to possess Court files.

9. In light of the foregoing, the Court cannot find that [Schimizzi] has established any harm to her by the proposed action of [Glenn].

10. The Court, on the basis of the record before it, cannot find that the public interest would be served by the issuance of a restraining order or injunction.

11. The Court, on the basis of the record before it, cannot and does not find that [Schimizzi] has demonstrated a reasonable likelihood of success at trial and does not find that [Schimizzi] has established a prima facie case on the merits.

* * * * *

For the reasons stated above, the Court now denies [Schimizzi's] Emergency Motion and declines to issue a restraining order or temporary injunction as against Defendant Rita Glenn.

In so ruling, the Court is not ordering the destruction of the Court file in Cause Number 71D06-9812-CP-01562 and, of course, is not ordering its retention.

However, in the event that the Defendant Clerk [Glenn] elects to proceed to destroy this file, the following shall be adhered to:

1. All administrative procedures shall be correctly followed.

2. No portion of this file shall be converted to scrap paper.

3. [Schimizzi] contends that the file contains certain medical records which she submitted in support of a motion to continue. Therefore, the Clerk is directed to cull this file for any medical records relating to [Schimizzi] and to return those records to [Schimizzi].

> 4. [Schimizzi] is given until the close of business on Wednesday, January 11, 2006 to reconsider [Glenn's] offer to be provided with copies of the entire file at [Schimizzi's] expense.

Id. at 3-5. Although the trial court's order provides that it "denie[d]" Schimizzi's injunction motion, it actually provided her with some relief sought by ordering Glenn to: (1) cull the file for all of Schimizzi's medical records and return them to her; and (2) not use any of the case file to make scrap paper.

Schimizzi then filed a motion to stay and a motion to reconsider the trial court's injunction order. In her motion to reconsider, Schimizzi argued that the trial court should have granted an injunction against Glenn because Glenn had failed to comply with Indiana Administrative Rule 10(B) by failing to follow Judge Manier and Miller's "directives" to "return the original file" to Schimizzi.[7] *Id.* at 111. The trial court held a hearing on Schimizzi's motions and thereafter issued an order denying both motions.

In a letter notifying the parties of a date for a summary judgment hearing, the trial court indicated that pending the summary judgment hearing and its decision therefrom, it was "requesting the Clerk Rita Glenn keep intact the Court file in question." *Id.* at 303. *See also id*. at 362. The trial court then held a hearing on Glenn's summary judgment motion, but before the trial court ruled on the motion, Schimizzi filed her notice of appeal

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[7] Indiana Administrative Rule 10(B) provides:

> Clerk Responsibilities. Each Clerk is responsible for the maintenance of court records in a manner consistent with the directives of the Supreme Court of Indiana, judge of court, and other pertinent authority. In all instances, the Clerk of the court must safeguard the integrity and security of all court records in his or her custody and diligently guard against any prohibited practice.

to file an interlocutory appeal, pursuant to Indiana Appellate Rule 14(A)(5), from the trial court's injunction order. Schimizzi then filed with this Court a motion to stay the enforcement of the trial court's injunction order pending her interlocutory appeal, and we granted the motion.

DISCUSSION AND DECISION

The sole issue is whether the trial court abused its discretion by denying Schimizzi's preliminary injunction motion. The grant or denial of a request for a preliminary injunction rests within the sound discretion of the trial court, and our review is limited to whether there was a clear abuse of that discretion. *Ind. Family and Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 161 (Ind. 2002). When determining whether to grant a preliminary injunction, the trial court is required to make special findings of fact and state its conclusions thereon. *Barlow v. Sipes*, 744 N.E.2d 1, 5 (Ind. Ct. App. 2001) (citing Ind. Trial Rule 52(A)), *trans. denied*. When findings and conclusions thereon are made, we must determine if the trial court's findings support the judgment. *Id.* We will reverse the trial court's judgment only when it is clearly erroneous. *Id.* Findings of fact are clearly erroneous when the record lacks evidence or reasonable inferences from the evidence to support them. *Id.* A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *CSX Transp., Inc. v. Rabold*, 691 N.E.2d 1275, 1277 (Ind. Ct. App. 1998), *trans. denied*. We consider the evidence only in the light most favorable to the judgment and construe findings together liberally in favor of the judgment. *Barlow*, 744 N.E.2d at 5. Moreover, "[t]he power to issue a preliminary injunction should be used sparingly,

and such relief should not be granted except in rare instances in which the law and facts are clearly within the moving party's favor." *Id.*

To obtain a preliminary injunction, the moving party has the burden of showing by a preponderance of the evidence that: (1) the movant's remedies at law were inadequate, thus causing irreparable harm pending resolution of the substantive action; (2) the movant has at least a reasonable likelihood of success at trial by establishing a prima facie case; (3) threatened injury to the movant outweighs the potential harm to appellant resulting from the granting of an injunction; and (4) the public interest would not be disserved. *Walgreen*, 769 N.E.2d at 161. The movant must prove each of these requirements to obtain the preliminary injunction. *Robert's Hair Designers, Inc. v. Pearson*, 780 N.E.2d 858, 863-864 (Ind. Ct. App. 2002). If the movant fails to prove even one of these requirements, the trial court cannot grant an injunction. *Mayer v. BMR Properties, LLC*, 830 N.E.2d 971, 978 (Ind. Ct. App. 2005).

Schimizzi argues that the trial court abused its discretion by denying her preliminary injunction motion. Among the trial court errors alleged by Schimizzi, she contends that the trial court erred by finding that she would not suffer irreparable harm.[8]

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[8] In her reply brief, Schimizzi contends that the trial court abused its discretion by not granting the preliminary injunction under the *per se* rule for irreparable harm because Glenn's "scrap paper 'procedure'" violated state and federal statutes. Appellant's Reply Br. at 4. In *Short On Cash.Net of New Castle, Inc. v. Dep't of Fin. Insts.*, 811 N.E.2d 819, 823 (Ind. Ct. App. 2004), we discussed the per se rule as follows:

> [W]here the action to be enjoined is unlawful, the unlawful act constitutes *per se* irreparable harm for purposes of the preliminary injunction analysis. When the *per se* rule is invoked, the trial court has determined that the defendant's actions have violated a statute and, thus, that the public interest is so great that the injunction should issue regardless of whether the plaintiff has actually incurred irreparable harm or whether the

Schimizzi contends that irreparable harm and loss will come to her if Glenn is not enjoined from destroying the case file (or as Schimizzi refers to it, Glenn should be enjoined from making trash out of Schimizzi's treasure). We disagree.

Here, Glenn offered Schimizzi the opportunity to make copies of all the records in the case file for a fee. Schimizzi contends that obtaining copies of the case file is not satisfactory because the file marks may not adequately appear on the copies and that she needs the case file with original file marks "for her protection to defend herself should any possible unfounded accusations be made by the ins. co. [Illinois Farmers] . . . that false file marks were made in the photocopying process as such possible accusation would not be out of character for them in view of what has already happened[.]" Appellant's Br. at 18. However, as the trial court noted, "Schimizzi failed to provide any evidence of such a possible lawsuit." Appellant's App. at 4. Here, Schimizzi has been provided the opportunity to make copies of the entire case file, and the trial court ordered Glenn to give Schimizzi all of her medical records that were contained in the case file. Therefore, Schimizzi has failed to meet her burden of showing that she will suffer irreparable harm from Glenn's action of destroying the case file. Accordingly, we

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> plaintiff will suffer greater injury than the defendant. Accordingly, invocation of the *per se* rule is only proper when it is clear that a statute has been violated.

(citations and quotation marks omitted). Neither in her preliminary injunction motion nor in her appellant's brief did Schimizzi argue or invoke the *per se* irreparable harm rule. Thus, such argument is waived. *See Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 977 (Ind. 2005) ("The law is well settled that grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived."); *Van Winkle v. Nash*, 761 N.E.2d 856, 859 (Ind. Ct. App. 2002) ("Failure to raise an issue before the trial court will result in waiver of that issue.").

conclude that the trial court did not abuse its discretion by denying Schimizzi's motion for preliminary injunction.[9]

CONCLUSION

For the foregoing reasons, we affirm the trial court's denial of Schimizzi's motion for preliminary injunction.

Affirmed.

SULLIVAN, J., and BARNES, J., concur.

[9] Because a movant for a preliminary injunction has the burden of establishing all four requirements before a trial court can issue a preliminary injunction and because we conclude that Schimizzi has failed to meet her burden of establishing the irreparable harm requirements, we need not review the other requirements. *See Mayer*, 830 N.E.2d at 978 (noting that a trial court cannot grant an injunction if the movant fails to prove even one of the four requirements). Thus, we will not review the reasonable likelihood of success at trial requirement and Schimizzi's arguments regarding whether Indiana Administrative Rules 6, 7, and 10 require Glenn to give Schimizzi the entire original case file.