

# RECENT DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

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During the survey period,<sup>1</sup> the Indiana Supreme Court handed down a number of significant decisions with implications for practitioners in state court, matters pending in small claims court, and litigants pursuing the alternative dispute resolution forum of arbitration. The court of appeals also addressed a broad range of procedural issues dealing with everything from service of process to the verdict of the jury, and beyond.

As it becomes increasingly difficult to anticipate every nuance or implication of often case-dispositive procedural rules, the courts continued during the survey period to provide invaluable direction to the Indiana practitioner toward a more refined understanding of the tenets of civil procedure and, more importantly, the manner in which those tenets are applied in practice.

## I. INDIANA SUPREME COURT DECISIONS

### A. *Conflict of Laws*—*Dépeçage* and *Lex Loci Delecti*

In a pair of decisions in less than three months, the Indiana Supreme Court ruled that Indiana does not permit *dépeçage*—the process of analyzing different issues within the same case separately under the laws of different states—nor has it adopted the Restatement (Second) of Conflict of Laws’ policy analysis in connection with the doctrine of *lex loci delecti*—which dictates application of the law of the state where the last event necessary to make an actor liable for the alleged wrong takes place.

In *Simon v. United States*,<sup>2</sup> the estates of individuals killed in the crash of a small private aircraft traveling from Pennsylvania to Kentucky brought a wrongful death action under the Federal Tort Claims Act (“FTCA”),<sup>3</sup> against the United States, for allegedly publishing an inaccurate landing approach chart, and against air traffic controllers in Indianapolis, for clearing the pilot for an approach that was out of service, as well as alleging other negligent acts or omissions.<sup>4</sup> Under the FTCA, a court applies “the whole law, including choice-of-law rules, of the place where the acts of negligence occurred.”<sup>5</sup> In *Simon*, acts of negligence occurred in both Indiana and Washington, D.C. (“D.C.”), thus

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1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period—i.e., from October 1, 2003 through September 30, 2004—as well as several significant amendments to the Indiana Rules of Trial Procedure, which were ordered by the Indiana Supreme Court during the survey period.

2. 805 N.E.2d 798 (Ind. 2004).

3. 28 U.S.C. §§ 2671-2680 (2000).

4. *Simon*, 805 N.E.2d at 800-01.

5. *Id.* at 801 (citing 28 U.S.C. §§ 1346(b), 2674; *Richards v. United States*, 369 U.S. 1 (1962)).

invoking the rule that “if there is a true conflict between the choice-of-law rules of the two jurisdictions, it will apply the law of the place where the last significant act or omission occurred, in this case[,] Indiana.”<sup>6</sup>

The court in *Simon* identified two “true conflicts” between Indiana and D.C. choice-of-law rules, which required analysis: “(1) the use of *dépeçage* and (2) the role of [underlying] policy.”<sup>7</sup> In addressing the use of *dépeçage* (and confirming the rationale for Indiana’s historical rejection of the doctrine), the court reasoned that “[b]y making separate determinations for each issue within a claim, the process amalgamates the laws of different states, producing a hybrid that may not exist in any state.”<sup>8</sup> Further, the court stated that “[d]épeçage may also produce unfair results because the hybrid law may be more favorable to one party than another, allowing a result that could not be reached if the laws of any one state were applied.”<sup>9</sup> Because D.C. recognizes *dépeçage*, the court found that a “true conflict” exists between the choice-of-law rules of D.C. and Indiana.<sup>10</sup>

Next, having ruled that Indiana choice-of-law rules applied, the court in *Simon* addressed whether the substantive law of Indiana or Pennsylvania would apply to the plaintiffs’ wrongful death claims.<sup>11</sup> In holding that Indiana law would apply, the court reaffirmed its ruling in *Hubbard Manufacturing Co. v. Greeson*,<sup>12</sup> where it held that if the relationship of the state in which the last act giving rise to tort liability was committed is insignificant to the action, a court should apply the law of the state with the most significant relationship to the

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6. *Id.*

7. *Id.*

8. *Id.* at 802.

9. *Id.* at 803 (explaining that a party “should not be allowed to put ‘together half a donkey and half a camel, and then ride to victory on the synthetic hybrid’”) (quoting Christopher G. Stevenson, Note, *Depeçage: Embracing Complexity to Solve Choice-of-Law Issues*, 37 IND. L. REV. 303, 320 (2003)).

10. *Id.* Regarding the second “true conflict” identified by the court in *Simon*, the court confirmed that Indiana “does not require that courts undertake the difficult and ultimately speculative task of identifying the policies underlying the laws of multiple states and weighing the potential advancement of each in the context of the case.” *Id.* According to the court, Indiana courts “simply look at the contacts that exist between the action and the relevant states and determine which state has the most significant relationship with the action.” *Id.* (citing *Jean v. Dugan*, 20 F.3d 255, 261 (7th Cir. 1994); *Cap Gemini Am., Inc. v. Judd*, 597 N.E.2d 1272, 1282 (Ind. Ct. App. 1992)).

11. Three areas were identified where Indiana law differed from that of Pennsylvania: “(1) ‘Pennsylvania allows joint-and-several liability and right of contribution, while Indiana does not;’ (2) unlike Pennsylvania, ‘Indiana does not permit recovery for *both* wrongful death and survival damages; and (3) unlike Indiana, Pennsylvania damages include the decedent’s conscious pain and suffering from the moment of injury to the time of death.’” *Id.* at 805 (internal citations omitted) (quoting *Simon v. United States*, 341 F.3d 193, 204-05 (3d Cir. 2003)).

12. 515 N.E.2d 1071 (Ind. 1987).

case.<sup>13</sup> In other words, the court in *Simon* confirmed Indiana’s “liberalized” *lex loci* analysis, in which a court must first determine whether the place where the tort was committed is significant to the action. If it is, that state’s law applies. If the state in which the tort was committed is insignificant to the action, the court must consider “what other contacts exist and evaluate them according to their relative importance to the litigation at hand.”<sup>14</sup>

The court in *Simon* found that the place of the tort—Kentucky, where the plane crashed—was insignificant to the action.<sup>15</sup> The court considered that the negligence at issue occurred in Indiana and D.C., and that none of the victims or the parties were residents of Kentucky.<sup>16</sup> In evaluating the second step of the *Hubbard* analysis, the court found that, between Indiana and D.C., the “conduct in Indiana was more proximate to the harm, and none of the parties [were] arguing that D.C. law should apply.”<sup>17</sup> Therefore, the court held that Indiana had a more significant relationship with the case and Indiana law would apply.<sup>18</sup>

In *Baca v. New Prime, Inc.*,<sup>19</sup> the defendant in a negligence action with multi-state connections asserted as an affirmative defense that “Indiana law would support a claim for injury due to wanton or willful behavior but not due to ordinary negligence.”<sup>20</sup> The trial court concluded that Indiana law governed. The plaintiff appealed, and the Indiana Court of Appeals affirmed.<sup>21</sup> The Indiana Supreme Court granted transfer.

The Indiana Supreme Court in *Baca* remanded the case to the trial court for further consideration in light of the decision in *Simon*.<sup>22</sup> The court confirmed that in *Simon*, it “re-affirmed [its] leading case on *lex loci delicti*, *Hubbard Manufacturing Co. v. Greeson . . .*, and indicated that [it] had elected not to adopt the Restatement (Second) of Conflict of Laws.”<sup>23</sup> Further, the court stated that in *Simon*, it “considered for the first time whether Indiana choice-of-law doctrine embraces *dépeçage*, the process of applying separately the law of different states within the same case.”<sup>24</sup> The court confirmed that it “declined to adopt *dépeçage*, saying [it] would not ‘separately analyze and apply the law of different jurisdictions to issues within each claim’ of a suit.”<sup>25</sup>

Recognizing that the holding in *Simon* would not necessarily lead to a

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13. *Simon*, 805 N.E.2d at 805-06 (discussing the two-step *Hubbard* analysis).

14. *Id.* at 806 (stating that the court will “apply the law of the state with the most significant relationship to the case”).

15. *Id.*

16. *Id.*

17. *Id.* at 807.

18. *Id.*

19. 810 N.E.2d 711 (Ind. 2004).

20. *Id.* at 712.

21. *Id.*

22. *Id.* at 713.

23. *Id.* at 712 (citations omitted).

24. *Id.* at 712-13.

25. *Id.* at 713 (citing *Simon*, 805 N.E.2d at 802).

different resolution than that reached by the trial court and the court of appeals in the case, the court in *Baca* noted that “neither party took into account the applicability or inapplicability of the doctrine of *dépeçage*” and remanded the case to “give the parties and those courts a chance to brief and consider the issues with [the] benefit of [the] recent decision.”<sup>26</sup>

*B. Amendment of Pleadings—Relation Back of Cross-Claim*

Under Trial Rule 15(A), “a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be given when justice so requires.”<sup>27</sup> In *Gill v. Pollert*,<sup>28</sup> a paving company that demolished a damaged hotel sued the hotel owners, their insurer and the insurance agency, seeking to recover payment and to foreclose on a mechanic’s lien.<sup>29</sup> The hotel owners filed a cross-claim against their insurer and agent. The insurer and agent argued that the cross-claim was barred by the applicable statute of limitations, because the owners had not sought and obtained leave of court before the limitations period expired.<sup>30</sup>

First, the court in *Gill* addressed whether the failure to request leave of court at the time the cross-claim was filed rendered the filing a “procedural non-entirety,” where leave was subsequently requested and granted.<sup>31</sup> The court ruled that the filing was valid, given the later request for leave and order “authorizing” the filing.<sup>32</sup>

Next, the court addressed the issue of whether the cross-claim “relates back to the date of the original pleading.”<sup>33</sup> According to the court, the “original pleading” for purpose of Rule 15(C) analysis was the original answer filed by the hotel owners to the plaintiff’s complaint. The answer admitted and denied various allegations of the complaint, which was based on the demolition services performed.<sup>34</sup> The court thus found that the cross-claim “arose out of the conduct, transaction, or occurrence” referred to in the answer.<sup>35</sup>

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26. *Id.*

27. IND. TRIAL R. 15(A).

28. 810 N.E.2d 1050 (Ind. 2004).

29. *Id.* at 1052-53.

30. *Id.* at 1053-54. The cross-claim was filed within the two-year statute of limitations. The cross-defendants waited eight months to file an answer or other response, apparently assuring counsel for the owners that a response would be filed. *Id.* at 1053. Finally, two days after the two-year period expired, the cross-defendants filed a motion to dismiss the cross-claim, arguing that the owners had not sought and obtained leave to file it and that, therefore, the cross-claim was barred by the statute of limitations. *Id.* Two days later, the owners filed a motion requesting “that their cross-claim . . . be allowed.” *Id.*

31. *Id.* at 1054-55.

32. *Id.*

33. *Id.* at 1055 (quoting IND. TRIAL R. 15(C)).

34. *Id.*

35. *Id.* (quoting IND. TRIAL R. 15(C)).

Pursuant to Rule 15(C), “[w]hen a claim asserted in an amended pleading arises out of the allegations of the original pleading,” an amendment

“changing the party against whom a claim is asserted relates back if . . . within the period provided by law for commencing the action against him, the party to be brought in by amendment” satisfies two conditions: [1] timely notice of the institution of the action and [2] actual or constructive knowledge of a mistake in identity.<sup>36</sup>

In *Gill*, the court recognized that the second factor—a mistake of identity—was not satisfied. However, the court clarified that the two conditions apply only as to a party “to be brought in” by the amendment.<sup>37</sup> Since the cross-defendants in *Gill* were not new parties, but were already in the case as co-defendants, relation back of the amended pleading was not limited by the timely notice and mistaken identity conditions of the Rule.<sup>38</sup> Thus, the court held that the cross-claim related back to the date of the original answer.<sup>39</sup>

### C. Arbitration

1. *Arbitration of Counterclaim.*—In *Theising v. ISP.com LLC* (the “Marion County case”),<sup>40</sup> and *ISP.com LLC v. Theising* (the “Hamilton County case”),<sup>41</sup> the Indiana Supreme Court ordered claims of a receiver on a promissory note to arbitration, despite that the promissory note did not contain an arbitration clause. The court’s rulings demonstrate that despite the absence of an agreement to arbitrate the primary claim, a defendant can require arbitration of the primary claim by asserting a counterclaim that provides an offset to the primary claim, if the counterclaim is subject to an arbitration provision.

In the Marion County case, the defendants (“ISP”) issued a promissory note in connection with the sale of the assets of IQuest, to the majority shareholder of IQuest, Robert Hoquim. Hoquim and ISP also entered into a Loan and Security Agreement and an Asset Purchase Agreement, which contained a mandatory

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36. *Id.* at 1055-56 (quoting IND. TRIAL R. 15(C)).

37. *Id.* at 1056 (emphasis in original).

38. *Id.*

39. *Id.* The court in *Gill* also clarified that a cross-claim against an existing party does not require additional service of process under Trial Rule 4(A). *Id.* Finally, the court ruled that an intervening judgment in favor of the insurer against the plaintiff did not constitute res judicata in connection with the cross-claim, since the judgment was “not between the same parties on the same claim.” *Id.* at 1056-57.

40. 805 N.E.2d 778 (Ind. 2004) (the “Marion County case”).

41. 805 N.E.2d 767 (Ind. 2004) (the “Hamilton County case”). In the Hamilton County case, the Indiana Supreme Court concluded that the provisions of the note and the Loan and Security Agreement did not override the undertaking to arbitrate disputes “relating to” the Asset Purchase Agreement, which contained the arbitration clause. *Id.* at 776-77. The court also held that the receiver had the rights and obligations of IQuest, but was not authorized to assert claims of creditors or third parties. *Id.* at 775.

arbitration provision.<sup>42</sup> After the transactions were completed, Hoquim died intestate and IQuest was placed in receivership. Hoquim's estate sued ISP and its guarantors on the promissory note. As IQuest's receiver, Theising obtained an order from the probate court directing that the note be transferred to him.<sup>43</sup>

ISP moved to compel arbitration, arguing that under the Asset Purchase Agreement, they were entitled to certain offsets against any amounts arguably owed under the promissory note. As such, ISP argued, the entire dispute must be arbitrated.<sup>44</sup> Specifically, the arbitration provision in the Asset Purchase Agreement required arbitration of disputes "relating to" the Asset Purchase Agreement.<sup>45</sup> In ruling that the entire dispute should be arbitrated, the supreme court explained the following:

The amounts due under the note are ultimately resolved by the degree to which ISP is entitled to set off "Indemnity Obligations" of IQuest and Hoquim against the amounts due under the note. Hoquim's rights under the note, and therefore the receiver's rights under the note, are dependent on resolution of those disputes. Hoquim and IQuest agreed to arbitrate those disputes, and that undertaking is binding on Theising as their successor in interest.<sup>46</sup>

The Indiana Supreme Court affirmed the trial court's ruling compelling arbitration.<sup>47</sup>

2. *Incorporation by Reference and Waiver.*—In *MPACT Construction Group, LLC v. Superior Concrete Constructors, Inc.*,<sup>48</sup> one of several subcontractors on a project filed an action to foreclose its mechanic's lien against the general contractor and property owner. The general contractor filed a cross-claim against the owner for breach of contract and to foreclose its mechanic's lien.<sup>49</sup> The general contractor then filed a motion to stay the litigation and compel arbitration, pursuant to an arbitration clause contained in the contract between the general contractor and the owner. The supreme court in *MPACT* analyzed two primary issues: (1) whether the language of the relevant

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42. *Theising*, 805 N.E.2d at 779.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 780.

47. *Id.* The Marion County case involved the trial court's refusal to set aside the original judgment ordering the dispute to arbitration. The receiver, Theising, failed to respond to the motion to compel arbitration, the trial court granted the motion, and Theising moved to set aside the judgment under Indiana Trial Rule 60(B). *Id.* The Indiana Supreme Court in *Theising* did not address the "excusable neglect" in the failure to respond to the motion to compel arbitration, since its ruling that arbitration was required rejected Theising's argument relating to any "meritorious defense." See IND. TRIAL R. 60(B).

48. 802 N.E.2d 901 (Ind. 2004).

49. *Id.* at 903. Several counterclaims and cross-claims for the foreclosure of mechanic's liens and for breach of contract were filed among the various parties. *Id.*

subcontracts sufficiently incorporated the arbitration clause of the general contract, thus requiring arbitration of the subcontractor's claims, and (2) whether MPACT waived its right to arbitrate by "participating in the litigation."<sup>50</sup>

In support of its argument that the subcontracts incorporated the general agreements, including the arbitration clause, the general contractor relied on language in the subcontracts stating that "[t]he contract documents are complementary and what is required by any one shall be as binding as if required by all."<sup>51</sup> In response, the subcontractor argued that the provisions of the general contract were incorporated "for the limited purpose of governing the work to be performed," emphasizing that the above-quoted language was "preceded and followed by sentences pertaining specifically to work, and that this limits the effect of [the quoted sentence]."<sup>52</sup>

The Indiana Supreme Court agreed with the subcontractor, finding that, at most, the language of the subcontracts was ambiguous. Applying the axiom of contract interpretation that "[w]hen there is ambiguity in a contract, it is construed against its drafter,"<sup>53</sup> the court found that it was "clear that arbitration was not sufficiently discussed by the parties."<sup>54</sup> The court concluded that "there was no meeting of the minds between the parties on the issue of arbitration" and "there was no agreement to arbitrate."<sup>55</sup>

On the issue of waiver, the court stated the general rule that "[w]hether a party has waived the right to arbitration depends primarily upon whether that party has acted inconsistently with its right to arbitrate."<sup>56</sup> In other words, a party may waive the right to arbitrate its dispute by "actively participating in the litigation."<sup>57</sup>

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50. *Id.* at 910. The court in *MPACT* preceded its analysis with the threshold question of whether the Federal Arbitration Act (the "FAA") preempted Indiana law to determine whether the subcontractors agreed to arbitrate their disputes, concluding that Indiana law applied to the determination. *Id.* at 904-06 (finding that the FAA, 9 U.S.C. §§ 1-16 (2000), which applies to written arbitration provisions contained in contracts involving interstate commerce, did not preempt Indiana law, since the FAA contained no express preemptive provision, it does not reflect a congressional intent to occupy the entire field of arbitration, and Indiana policy favors arbitrations). The court explained that "[i]f a court, fairly applying generally applicable state law contract principles and not singling out arbitration agreements for hostile treatment, finds that the parties did not agree to arbitrate, then federal law does not preempt." *Id.* at 906 (citing *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

51. *Id.* at 908.

52. *Id.*

53. *Id.* at 910 (citing *Philco Corp. v. "Automatic" Sprinkler Corp. of Am.*, 337 F.2d 405, 408 (7th Cir. 1964); *Smith v. Sparks Milling Co.*, 39 N.E.2d 125, 135 (Ind. 1942); *Bicknell Minerals, Inc. v. Tilley*, 570 N.E.2d 1307, 1313 (Ind. Ct. App. 1991)).

54. *Id.*

55. *Id.*

56. *Id.* (stating that the waiver issue "requires an analysis of the specific facts in each case") (citation omitted).

57. *Id.* (citing *Ernst & Young LLP v. Baker O'Neal Holdings, Inc.*, 304 F.3d 753, 757-58

In *MPACT*, the general contractor—the party alleged to have waived its right to arbitrate—filed a cross-claim against the property owner for breach of contract, and filed cross-claims and counterclaims against the owner and the various subcontractors to foreclose its mechanic’s liens.<sup>58</sup> It also participated in telephone conferences and a scheduling conference where summary judgment deadlines and a trial date were scheduled.<sup>59</sup>

The supreme court held that the general contractor’s “participation” in the litigation was insufficient to constitute a waiver of its right to arbitrate. The court recognized that “[a] party should not be held to have waived its right to arbitrate when, in response to a complaint filed against it, it raises counterclaims in order to preserve them.”<sup>60</sup> In other words, the court found that a party will not waive its right to arbitrate by asserting a compulsory counterclaim. Further, the court determined that arbitration was not waived, despite that the contractor also asserted cross-claims that were not compulsory. Significant to the court’s ruling was the fact that the contractor asserted its arbitration demand, and expressly stated that it was not waiving its right to arbitration, in its answer and affirmative defenses.<sup>61</sup>

The *Theising* and *MPACT* decisions do not address issues of first impression regarding enforcement of arbitration agreements against third-parties or whether a party may have waived its right to arbitrate a dispute by “participating” in the litigation. Nevertheless, because motions to compel arbitration often turn on close analyses of the relevant contract provisions and are inevitably extremely fact-sensitive, the supreme court’s decisions provide valuable guidance to practitioners in crafting arguments for their particular cases.

#### D. *Small Claims—Application of Trial Rule 12(B)*

In *Niksich v. Cotton*,<sup>62</sup> the Indiana Supreme Court analyzed the differences between pleading requirements in small claims court and those imposed on litigants in an ordinary civil action in state court, and held that a Notice of Claim in small claims court can be dismissed pursuant to Trial Rule 12(B)(6), when “it is apparent from the complaint that the pleader is not entitled to relief.”<sup>63</sup>

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(7th Cir. 2002); *St. Mary’s Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 589 (7th Cir. 1992)).

58. *Id.*

59. *Id.*

60. *Id.* at 910-11 (citing *Underwriting Members of Lloyds of London v. United Home Life Ins. Co.*, 549 N.E.2d 67, 71 (Ind. Ct. App. 1990)).

61. *Id.* at 911. The supreme court’s ruling on this issue also might be used to support arguments outside the context of arbitration (e.g., relating to personal jurisdiction or service of process)—that an issue or argument has been preserved, despite subsequent actions inconsistent therewith, by simply alleging the issue or argument in a conclusory fashion in the litigant’s first filing in the matter.

62. 810 N.E.2d 1003 (Ind. 2004), *cert. denied*, 125 S. Ct. 1073 (2005).

63. *Id.* at 1006.

*Niksich* involved an incarcerated individual, Niksich, who claimed that employees of the correctional facility damaged his television. Niksich delivered a Tort Claims Act notice, and then filed a notice of claim with the small claims court in Madison County.<sup>64</sup> The defendants moved to dismiss the notice of claim, pursuant to Trial Rule 12(B)(6).<sup>65</sup>

Overruling the court of appeals, the Indiana Supreme Court held that Rule 12(B) can apply to a small claims case, but that a lower pleading standard must be applied in small claims cases than that applied in ordinary civil actions.<sup>66</sup> The court explained that:

[A] small claims notice of the claim is not required to set forth facts establishing a right to recover. Rather, small claims courts are intended to be used by non-lawyers. A notice of claim is sufficient if it sets forth . . . a “brief statement of the nature of the claim.” This more relaxed standard may be met by setting forth facts sufficient to identify the dispute, even if facts essential to recovery are not alleged.<sup>67</sup>

The court concluded that “[a]lthough a small claims ‘notice of claim’ is granted substantial leeway, a motion to dismiss may nevertheless be appropriate in some cases.”<sup>68</sup> The court stated that “a small claims case may be dismissed when it is apparent from the complaint that the pleader is not entitled to relief.”<sup>69</sup>

The court in *Niksich* elaborated on its holding, directing that other Rule 12(B) motions are also permissible in small claims court:

Other Rule 12(B) motions may also be appropriate in small claims actions. Lack of personal or subject matter jurisdiction, insufficient process, and a host of other dispositive issues are properly asserted by motion. In sum, a 12(B)(6) motion may not dismiss a claim in small claims court when a plaintiff merely fails to plead the facts of a claim that would be required of a complaint subject to the Trial Rules. But if a dispositive issue is revealed by the notice of claim, a 12(B)(6) motion is available, just as other Rule 12 motions may be made in small claims actions.<sup>70</sup>

The court found that Niksich should have been granted leave to amend his notice

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64. *Id.* at 1004. *See generally* Indiana Torts Claims Act § 5(c), IND. CODE § 34-13-3-5(c) (2004) (describing required allegations in a complaint against a government employee in the employee’s individual capacity).

65. *Niksich*, 810 N.E.2d at 1005.

66. *Id.* at 1005-06.

67. *Id.* The court noted that a civil complaint subject to a Trial Rule 12(B)(6) motion for “failure to include essential facts may nonetheless be sufficient to present a claim in a small claims court.” *Id.* at 1006.

68. *Id.*

69. *Id.*

70. *Id.*

of claim to correct the deficiencies.<sup>71</sup> However, the court expressed an apparent disfavor for the claims, gratuitously stating that “[w]hether Nicksich can successfully establish any of his claims is, of course, another matter.”<sup>72</sup>

*E. Preservation of Issue for Appeal—Allegation in Complaint Insufficient*

In *Endres v. Indiana State Police*,<sup>73</sup> the plaintiff, an Indiana State Trooper, refused to accept an assignment as a gaming agent at a riverboat casino, asserting that the assignment conflicted with his religious convictions.<sup>74</sup> The plaintiff alleged both federal and state constitutional claims in his complaint. Regarding the state constitutional claims, the court found that the appendix submitted by the plaintiff was incomplete and that there was nothing in the materials submitted by either party to indicate that the plaintiff “offered any legal argument in support of his State constitutional claim until he filed his motion to correct error in the trial court.”<sup>75</sup>

The supreme court held that “the mere listing of a contention in a party’s complaint, with no further attempt to press the contention in the trial court, is insufficient effort to preserve the matter for appellate review.”<sup>76</sup> “At a minimum,” according to the court, a party “must show that it gave the trial court a bona fide opportunity to pass upon the merits of the claim before seeking an opinion on appeal.”<sup>77</sup>

*F. Administrative Law and Procedure*

*1. Standing to Seek Administrative Review.*—In *Huffman v. Indiana Office of Environmental Adjudication*,<sup>78</sup> the court clarified that “the rules for determining whether [a] person has ‘standing’ to file a lawsuit do not apply” to a petition for administrative review under the Administrative Orders and Procedures Act (“AOPA”).<sup>79</sup> Under the AOPA, to qualify for administrative review of an agency order, a person must state facts demonstrating that “[1] the petitioner is a person to whom the order is specifically directed; [2] the petitioner is aggrieved or adversely affected by the order, or [3] the petitioner is entitled to review under any law.”<sup>80</sup> This standard is lower than the standard for standing in a judicial proceeding, which requires a plaintiff to have a “justiciable interest

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71. *Id.* at 1008.

72. *Id.*

73. 809 N.E.2d 320 (Ind. 2004).

74. *Id.* at 321.

75. *Id.*

76. *Id.* at 322.

77. *Id.* The court in *Endres* stated that the policy reasons behind its ruling applied “with particular force where . . . the claim is a constitutional one.” *Id.*

78. 811 N.E.2d 806 (Ind. 2004).

79. *Id.* at 808.

80. *Id.* at 810 (quoting IND. CODE § 4-21.5-3-7(a)(1) (2004)).

in the controversy.”<sup>81</sup> The court in *Huffman* ruled that a property owner had standing to seek administrative review of the renewal of a permit issued to Eli Lilly by the Indiana Department of Environmental Management.<sup>82</sup>

The Indiana Court of Appeals also addressed the issue of standing under the AOPA during the survey period, and distinguished the facts in *Huffman*.<sup>83</sup> In *Indiana Ass’n of Beverage Retailers*, the court of appeals held that a non-profit industry association had standing under the AOPA to seek judicial review of an Alcohol and Tobacco Commission (“ATC”) order granting an application for a beer and wine permit to the owner of a gas station and convenience store.<sup>84</sup>

The court of appeals discussed its own decision in *Huffman v. Indiana Department of Environmental Management*<sup>85</sup> at length, and explained that the petitioner in *Huffman* alleged that she was “aggrieved or adversely affected” by the administrative agency’s decision.<sup>86</sup> In the present case, the court of appeals explained, the industry association “actively participated in the proceedings and remonstrated against [the owner’s] application for the alcohol permit.”<sup>87</sup> Further, the association “presented the testimony of witnesses at the hearings, and [the] administrative code specifically provides that [the association], as a remonstrator, is entitled to receive notice in these types of proceedings and may participate in appeals to the ATC.”<sup>88</sup> Thus, the court did “not find the *Huffman* rationale controlling” and concluded that the industry association had standing to petition for judicial review.<sup>89</sup>

2. *Use of Discovery in Administrative Proceedings.*—In *Board of School Commissioners v. Walpole*,<sup>90</sup> a divided supreme court held that Indiana Trial Rule 28(F), which addresses discovery proceedings before administrative agencies, does not apply to a school board when it decides whether to terminate a teacher’s contract under the Teacher Tenure Act.<sup>91</sup> The court reasoned that “when a school board acts to determine whether a teacher’s employment should be terminated, the board does not act as an administrative agency as that term is used in Rule

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81. *Id.*

82. *Id.* at 815-16.

83. *See* Ind. Ass’n of Beverage Retailers, Inc. v. Ind. Alcohol & Beverage Comm’n, 809 N.E.2d 374 (Ind. Ct. App. 2004).

84. *Id.* at 379.

85. 788 N.E.2d 505 (Ind. Ct. App. 2003), *vacated by* 811 N.E.2d 806 (Ind. 2004).

86. *Ind. Ass’n of Beverage Retailers, Inc.*, 809 N.E.2d at 379 (citing *Huffman*, 788 N.E.2d at 507). The *Indiana Association* decision was rendered in May 2004. The court of appeals recognized that the supreme court had granted transfer in *Huffman* as of the date of its decision, but determined that because the facts in *Huffman* were distinguishable, the ultimate ruling by the supreme court would not affect its decision. *Id.*

87. *Id.*

88. *Id.* (citing IND. AMIN. CODE tit. 905, r. 1-36-2, -3(b)).

89. *Id.*

90. 801 N.E.2d 622 (Ind. 2004).

91. *Id.* at 626.

28(F).”<sup>92</sup> “In that context,” the court explained, “the school board is not performing typical agency action, [such as] acting as a regulator, setting rates or issuing licenses, or otherwise affecting members of the public.”<sup>93</sup> Rather, the court concluded that the school board “is performing a managerial act, essentially acting as an employer dealing with the internal operations of its organization.”<sup>94</sup>

Justice Sullivan dissented, unable to reconcile Trial Rule 52(A)(2)’s application to judicial review of Teacher Tenure Act terminations with the majority’s holding that Rule 28(F), despite using the same “administrative agency” expression, does not apply to Tenure Act terminations.<sup>95</sup> Justice Sullivan cautioned that “[w]ithout the opportunity for discovery that [Rule] 28(F) provides, an accused teacher may not have the opportunity to place his or her side of the story in the record.”<sup>96</sup>

3. *Failure to Respond to Proposed Notice of Default.*—In *Breitweiser v. Indiana Office of Environmental Adjudication*,<sup>97</sup> the court held that while a party is not compelled under the Administrative Orders and Procedures Act (“AOPA”) to file a response to an administrative law judge’s proposed notice of default, the Act requires the judge to issue a default ruling if the party elects not to submit a response.<sup>98</sup> In *Breitweiser*, the defaulting party had filed a motion to disqualify the presiding judge. However, the pending motion to disqualify did not save the party from the statutory consequences of his failure to respond to the notice of default.<sup>99</sup>

## II. INDIANA COURT OF APPEALS DECISIONS

### A. Trial Rule Interpretation and Construction

1. *Procedural Rule Controls Over Conflicting Statute.*—In *Bowyer v. Indiana Department of Natural Resources*,<sup>100</sup> the court of appeals reaffirmed and applied the rule that when the provisions of a statute conflict with those of a trial procedural rule, the procedural rule controls. In *Bowyer*, the Department of Natural Resources (“DNR”) filed an action against a former landowner and

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92. *Id.* at 624-25.

93. *Id.* at 625.

94. *Id.*

95. *Id.* at 626.

96. *Id.* at 626-27 (“This is especially important where the administrative agency is the school board—which effectively operates as prosecutor, judge, and jury in teacher termination proceedings.”).

97. 810 N.E.2d 699 (Ind. 2004).

98. *Id.* at 702-03. Pursuant to Indiana Code section 4-21.5-3-24(b), a party “may” file a written motion against a proposed notice of default. However, section 4-21.5-3-24(c) provides that if a party fails to file a written motion under subsection (b), the administrative law judge “shall” issue the default order. *Id.* (citing IND. CODE § 4-21.5-3-24(b)-(c) (2002)).

99. *Id.*

100. 798 N.E.2d 912 (Ind. Ct. App. 2003).

purchaser of land, seeking to enjoin illegal dumping of debris into a lake.<sup>101</sup> After the trial court entered a judgment in favor of the DNR, the defendants continued to engage in objectionable construction activities.<sup>102</sup> Without notice to the defendants, the DNR filed for and the trial court entered a temporary restraining order, prohibiting construction activities until the “cause [was] fully determined.”<sup>103</sup>

The restraining order obtained by the DNR granted pursuant to section 14-26-2-19(b) of the Indiana Code which provides the following:

If a defendant continues to violate this chapter after the service of notice of the action and before trial, the plaintiff is entitled, upon a verified showing of the acts on the part of the defendant, to a temporary restraining order without notice. The temporary restraining order is effective until the cause has been tried and determined.<sup>104</sup>

On its face, the statute appears to dispense with many of the safeguards dictated by Trial Rule 65(B), which requires a showing that an attempt was made to provide prior notice to the defendant, that justification exists for any failure to provide prior notice, and that irreparable injury will result before the defendant can be heard in opposition.<sup>105</sup>

The court in *Bowyer* found that the statute relied upon by the DNR was “in direct conflict with Indiana Trial Rule 65(B).”<sup>106</sup> The court explained that the statute conflicted with the Trial Rule in that it did not require a party seeking a TRO to certify its efforts to contact the opposing party, it allowed the TRO to continue until the end of the litigation, and it required no hearing and no provision for dissolving the TRO.<sup>107</sup> Since the Trial Rules take precedence over a conflicting procedural statute, the court held that the defendants were not in contempt of the improperly issued TRO.<sup>108</sup>

2. *Three Day Extension for Service by Mail.*—In *In re Marriage of Carter-McMahon*,<sup>109</sup> the court held as a matter of first impression that Trial Rule 6(E) does not apply to extend Trial Rule 59(C)’s thirty-day deadline for filing a motion to correct errors.<sup>110</sup> Noting that “the rules of statutory construction . . . are applicable to the interpretation of trial rules,” the court explained that “as

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101. *Id.* at 914.

102. *Id.*

103. *Id.*

104. IND. CODE § 14-26-2-19(b) (2004).

105. *See Bowyer*, 798 N.E.2d at 916 (citing IND. TRIAL R. 65(B)).

106. *Id.*

107. *Id.* at 917.

108. *Id.* at 920. Because the defendants did not challenge the TRO until after the contempt hearing, the court evaluated the failure to comply with the order, ultimately finding that the order was “inherently ambiguous and highly indefinite” and that, therefore, the defendants could not be held in contempt for a purported violation. *Id.* at 917-20.

109. 815 N.E.2d 170 (Ind. Ct. App. 2004).

110. *Id.* at 177-78.

with statutes, [its] objective when construing the meaning of a rule is to ascertain and give effect to the intent underlying the rule.”<sup>111</sup>

Indiana Trial Rule 59(C) provides that a motion to correct error must be filed within “thirty days after *the entry of a final judgment* or an appealable final order.”<sup>112</sup> Rule 6(E) extends a deadline or prescribed period by three days, whenever the deadline or period begins to run “*after the service of a notice* or other paper . . . and the notice or paper is served . . . by mail.”<sup>113</sup>

The court in *Carter-McMahon* held that Rule 6(E) did not apply to extend the thirty-day deadline contained in Rule 59(C), because the thirty-day period begins to run upon the “entry” of the judgment, rather than after “service of a notice.”<sup>114</sup> The court reasoned that “to conclude that Indiana Trial Rule 6(E)’s three-day extension applies to a motion to correct error would be an unauthorized judicial interpretation of plain language.”<sup>115</sup>

### B. Service of Process

In *Swiggett Lumber Construction Co. v. Quandt*,<sup>116</sup> the court of appeals set aside a default judgment on the ground that service of process was inadequate and, therefore, the trial court did not have personal jurisdiction to enter the judgment.<sup>117</sup> The issue in *Swiggett* was whether defective service under Trial Rule 4.1(B)—copy service on an individual—could be cured by purported compliance with Trial Rule 4.15(F)—service “reasonably calculated to inform the person . . . that an action has been instituted.”<sup>118</sup>

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111. *Id.* at 175 (citing *Noble County v. Rogers*, 745 N.E.2d 194, 197 n.3 (Ind. 2001); *Turner v. Bd. of Aviation Comm’rs*, 743 N.E.2d 1153, 1161 (Ind. Ct. App. 2001)). The court also stated that “the Rules of Trial Procedure are to be construed together and harmoniously if possible.” *Id.* (quoting *Rumfelt v. Himes*, 438 N.E.2d 980, 983 (Ind. 1982)).

112. IND. TRIAL R. 59(C) (emphasis added).

113. IND. TRIAL R. 6(E) (emphasis added).

114. *Carter-McMahon*, 815 N.E.2d at 175, 177-78.

115. *Id.* at 176. The motion to correct error in *Carter-McMahon* was filed by an ex-wife in connection with a dissolution proceeding, and it was filed on the thirty-third day, in reliance on Rule 6(E). The court stated the following regarding its strict ruling: “We are mindful of the harshness of this result and reiterate the preference for deciding cases on their merits when possible. However, faced with this particular scenario, the trial court correctly dismissed as untimely [the] motion to correct error.” *Id.* at 177-78. The *Carter-McMahon* decision will likely be cited by litigants in various contexts to support arguments relating to procedural deadlines missed by short periods of time.

116. 806 N.E.2d 334 (Ind. Ct. App. 2004).

117. *Id.* at 338. In *Swiggett*, the plaintiff made several attempts at service, including leaving a copy of the complaint and summons in the mail slot to the defendant’s business and service on an unidentified employee of the defendant. These attempts were not, however, followed by mailing the summons to the defendant’s last known address as required by Indiana Trial Rule 4.1(B).

118. *Id.* at 337 (quoting IND. TRIAL R. 4.1, 4.15(F)). Rule 4.15(F) provides that no summons or service of process shall be set aside or adjudged insufficient if either is “reasonably calculated

In finding that the plaintiff's defective service was not saved by Rule 4.15(F), the court in *Swiggett* reiterated the proposition that Trial Rule 4.1(B) is "unambiguously mandatory" and that Rule 4.15(F) "will not excuse noncompliance."<sup>119</sup> While Indiana courts have held that "failure to technically comply with the trial rules will not defeat a trial court's jurisdiction so long as a party substantially complies with the trial rules,"<sup>120</sup> the court noted that in this case, "there was no attempt whatsoever to comply with [Rule] 4.1(B)."<sup>121</sup> Thus, *Swiggett* implies that had the plaintiff therein at least attempted to comply with Rule 4.1(B) by mailing the pleadings to the defendant's last known address, Rule 4.15(F) may have applied to cure any technical defects.

### C. Jurisdiction

1. *Jurisdiction over the Case.*—There are three types of jurisdiction: (1) jurisdiction of the person, (2) jurisdiction of the subject matter, and (3) jurisdiction over the particular case.<sup>122</sup> Subject matter jurisdiction refers to "the power of courts to hear and decide a class of cases."<sup>123</sup> The issue of subject matter jurisdiction is resolved by "determining whether the claim involved falls within the general scope of authority conferred on the court by the Indiana Constitution or by statute."<sup>124</sup> "When Courts lack subject matter jurisdiction, their actions are void *ab initio* and may be attacked at any time."<sup>125</sup> "However, jurisdiction over the particular case refers to a trial court's right, authority, and power to hear and decide a specific case within the class of cases over which a court has subject matter jurisdiction."<sup>126</sup> A judgment by a court that lacks jurisdiction over the particular case is "voidable and requires a timely objection or the lack of jurisdiction over the particular case is waived."<sup>127</sup>

In *Kondamuri v. Kondamuri*, a husband filed for dissolution of marriage and the wife filed a motion to dismiss, challenging the trial court's jurisdiction on the ground that the husband had not resided in Indiana for the six months prior to the filing of his petition.<sup>128</sup> The trial court granted the motion to dismiss, and the

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to inform the person to be served that an action has been instituted against him, the name of the court, and the time within which he is required to respond." IND. TRIAL R. 4.15(F).

119. *Swiggett*, 806 N.E.2d at 337-38 (citing *Barrow v. Pennington*, 700 N.E.2d 477, 479 (Ind. Ct. App. 1998)).

120. *Id.* at 338 (quoting *Pennington*, 700 N.E.2d at 479).

121. *Id.*

122. *See* *Kondamuri v. Kondamuri*, 799 N.E.2d 1153, 1156 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 799 (Ind. 2004).

123. *Id.*

124. *Id.* (citing *Adler v. Adler*, 713 N.E.2d 348, 352 (Ind. Ct. App. 1999)).

125. *Id.* (citing *In re Guardianship of K.T.*, 743 N.E.2d 348, 351 (Ind. Ct. App. 2001)).

126. *Id.*

127. *Id.* at 1156-57.

128. *Id.* at 1156. The residency requirements for a dissolution action are found in Indiana Code section 31-15-2-6, which provides that at the time of the filing of a petition, at least one of

husband appealed, arguing that the residency requirement implicates the court's jurisdiction over the particular case—not the subject matter jurisdiction of the trial court. As such, the husband argued, the wife waived her objection to jurisdiction by seeking “affirmative relief” from the trial court.<sup>129</sup>

The court of appeals in *Kondamuri* agreed that “the failure to meet the residency requirements for filing a dissolution action implicates a trial court's jurisdiction over a particular case rather than its subject matter jurisdiction.”<sup>130</sup> In this case, the husband argued that the wife's jurisdiction objection was waived because she “sought affirmative relief from the court.”<sup>131</sup> Specifically, the wife filed a motion to continue a hearing, and her motion included a request “for all other just and equitable relief in the premises.”<sup>132</sup> The court found that “seeking an extension of time is not the type of affirmative relief that waives a party's ability to impose a jurisdictional defense.”<sup>133</sup> Further, the court stated that the wife's request ““for all other just and equitable relief in the premises” . . . neither vitiated her motion to dismiss nor barred her pending objection to the trial court's jurisdiction.”<sup>134</sup> The trial court's order dismissing the petition was affirmed.<sup>135</sup>

2. *Subject Matter Jurisdiction.*—In *Borsuk v. Town of St. John*,<sup>136</sup> the court of appeals demonstrated that the defense of lack of subject matter jurisdiction cannot be waived, even under the extreme circumstances of that case. In *Borsuk*, landowners brought an action for certiorari, contending that the town's refusal to rezone certain land was arbitrary, capricious and unreasonable.<sup>137</sup> The trial court granted summary judgment in favor of the town and the landowners appealed. The court of appeals reversed the trial court's decision and remanded

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the parties “must have been . . . a resident of Indiana . . . for six (6) months immediately preceding the filing of the petition.” IND. CODE § 31-15-2-6 (2004).

129. *Kondamuri*, 799 N.E.2d at 1156.

130. *Id.* at 1158. The court recognized that “[u]nlike the lack of subject matter jurisdiction, the lack of jurisdiction over the particular case must be raised at the earliest opportunity possible or the objection is waived.” *Id.* at 1158-59. Further, a party shall be “estopped from challenging the court's jurisdiction where the party has voluntarily availed itself or sought the benefits of the court's jurisdiction.” *Id.* at 1159.

131. *Id.*

132. *Id.*

133. *Id.* (citing *Mills v. Coil*, 647 N.E.2d 679, 681 (Ind. Ct. App. 1995)).

134. *Id.* at 1160.

135. *Id.* at 1161. The court in *Kondamuri* noted several times that the wife's motion to dismiss was filed shortly after her attorney filed his appearance. *Id.* The court stated that “[b]ased on these facts, [it could] not find that [the w]ife's discovery hearing continuance eliminated her ability subsequently to challenge the trial court's jurisdiction.” *Id.* Had a longer period of time elapsed between the wife's motion for a continuance and her motion to dismiss, it is unclear whether the court's decision on waiver and timeliness would have been different.

136. 803 N.E.2d 1216 (Ind. Ct. App. 2004), *aff'd in part, vacated in part*, 820 N.E.2d 118 (Ind. 2005).

137. *Id.* at 1217-18.

the case for further proceedings.<sup>138</sup> The town petitioned the court of appeals for rehearing, arguing for the first time that the court lacked subject matter jurisdiction, because the landowners were not entitled to certiorari review of the rezoning decision.<sup>139</sup>

The court in *Borsuk* found it “interesting” that

this [was] the first time during this litigation that the town addressed the issue of subject matter jurisdiction, even though the Town had an opportunity to attack the court’s jurisdiction at the trial court, in its submissions to [the court of appeals], and at oral argument before [the court of appeals].<sup>140</sup>

The court, in fact, implied that the town’s delay was intentional: “It is evident to us that the Town ‘engaged in a bit of “rope-a-doping” here—a term commonly used in the sport of boxing. In such instances, one fighter pretends to be trapped against the ropes while his opponent wears himself out throwing punches.”<sup>141</sup> The court stated that the “result is an appalling waste of judicial resources.”<sup>142</sup>

The court proceeded to rule that the court did have subject matter jurisdiction over the landowner’s claim. Specifically, the town acknowledged that the landowner could have brought a declaratory judgment action.<sup>143</sup> Because the landowner’s complaint contained “an invitation to declare that the town’s decision is arbitrary and capricious,” the court concluded that the complaint “makes out a request for a declaratory judgment based on the argument that the town’s decision was arbitrary.”<sup>144</sup>

3. *Personal Jurisdiction*.—In *Saler v. Irick*,<sup>145</sup> the court had an opportunity to interpret the “doing business” provision of Indiana’s long-arm statute and, in doing so, disagreed with the definition of “doing business” given in an earlier decision of the court of appeals.<sup>146</sup> In *Saler*, stepchildren brought an action against the beneficiaries of their deceased stepmother’s payable-on-death accounts and annuities.<sup>147</sup> None of the beneficiaries lived in Indiana, but they did come to Indiana when they attempted to collect on the payable-on-death accounts.<sup>148</sup>

The court began its discussion by outlining the two-step analysis followed by Indiana courts under the state’s long-arm statute:

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138. *Id.* at 1217.

139. *Id.* at 1216-17.

140. *Id.* at 1217.

141. *Id.* (quoting *Beauchamp v. State*, 788 N.E.2d 881, 894 (Ind. Ct. App. 2003)).

142. *Id.*

143. *Id.*

144. *Id.*

145. 800 N.E.2d 960 (Ind. Ct. App. 2003).

146. *Id.* at 965-66 & n.5 (citing *Bryan Mfg. Co. v. Harris*, 459 N.E.2d 1199, 1204 (Ind. Ct. App. 1984)).

147. *Id.* at 963-64.

148. *Id.* at 964-65.

In determining whether an Indiana court has personal jurisdiction, a court must proceed with a two-step analysis. First, the court must determine if the defendant's contacts with Indiana fall under the "long-arm statute," Ind. Trial Rule 4.4. If the contacts fall under Rule 4.4, the court must then determine whether the defendant's contacts satisfy federal due process analysis.<sup>149</sup>

The court determined that of the eight acts enumerated in Trial Rule 4.4 that will "render an individual to have submitted to the jurisdiction of Indiana[,] . . . the only one which may be applicable here is (A)(1)—"doing any business in this state."<sup>150</sup>

The stepchildren argued that they were not "doing business" in Indiana when they attempted to collect on the payable-on-death accounts, because their actions did not meet the definition of "business."<sup>151</sup> In their brief, they defined business as "a continuous or regular activity for the purpose of earning a livelihood."<sup>152</sup> The court noted that *Black's Law Dictionary* defines "business" as "[e]mployment, occupation, profession, or commercial activity engaged in for gain or livelihood."<sup>153</sup> The court stated that "business" for purposes of Rule 4.4 analysis is not limited to these definitions. Rather, the court favored "a more expansive definition of 'business'" when interpreting Rule 4.4.<sup>154</sup>

The court found that "[a] common meaning attributed to 'business' is that of an 'affair' or 'matter.'"<sup>155</sup> The court also noted that a "similar definition is that of 'a special task, duty, or function.'"<sup>156</sup> Reading Rule 4.4 in light of the more expansive definitions of "business," the court ruled that by coming to Indiana for the purpose of attempting to collect on the payable-on-death accounts the beneficiaries "maintained contacts such that they fall within the long-arm jurisdiction of Indiana."<sup>157</sup>

The court concluded that Indiana courts have personal jurisdiction over the beneficiaries on the payable-on-death accounts.<sup>158</sup> However, the court found that

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149. *Id.* at 965 (internal citations omitted).

150. *Id.* The court recognized that effective January 1, 2003, Rule 4.4 contains a provision that states, "a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States." *Id.* However, the new provision applies only to cases initiated after the announcement of the new rule. *Id.* (citing *Sneed v. Associated Group Insurance*, 663 N.E.2d 789, 795 (Ind. Ct. App. 1996), for the proposition that "new rules announced through a rulemaking process will only be applied to cases which arise after the new rule has been announced").

151. *Id.* at 965.

152. *Id.*

153. *Id.* (quoting BLACK'S LAW DICTIONARY 198 (6th ed. 1990)).

154. *Id.*

155. *Id.* at 966 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 302 (1976)).

156. *Id.* (citing WEBSTER'S NEW WORLD DICTIONARY 192 (2d college ed. 1982)).

157. *Id.*

158. *Id.* at 970.

the analysis did not apply to the claims against the beneficiaries relating to the annuities.<sup>159</sup> The court stated that “[t]he contacts which were made in Indiana that invoked application of the long-arm statute do not exist in relation to the annuities” and that “[t]here is no evidence that [the beneficiaries] did any acts within or connected to Indiana which were also related to the annuities.”<sup>160</sup> Therefore, the court held that “the prerequisite for an Indiana court obtaining specific personal jurisdiction under Trial Rule 4.4 does not exist.”<sup>161</sup>

#### *D. Preferred Venue*

In *Linky v. Midwest Midrange Systems, Inc.*,<sup>162</sup> the court found that a contractual venue-selection clause entered into by one defendant creates preferred venue as to other defendants.<sup>163</sup> In *Linky*, a former employer sued two former employees and their new employer, alleging violations of non-competition clauses.<sup>164</sup> Both employees had entered into employment agreements with their former employer, but only one of the agreements contained a venue selection clause, selecting Indianapolis as the venue for any actions.<sup>165</sup> None of the defendants resided in Indianapolis or in Marion County. Rather, they resided in Kosciusko County.<sup>166</sup>

The former employer filed a complaint in Marion County and the defendants filed a motion to transfer venue under Trial Rule 75, alleging that Marion County was not a preferred venue, and that preferred venue lies in Kosciusko County.<sup>167</sup> The court of appeals affirmed the trial court’s denial of the motion.<sup>168</sup> The court stated that “[i]t is clear from the record that venue properly lies in Marion County” based on the venue-selection clause in the employment agreement.<sup>169</sup> Further, the court concluded that “[i]f the venue in which the plaintiff files the case is preferred as to one defendant, then the venue is preferred as to all

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159. *Id.*

160. *Id.*

161. *Id.* at 971. Finally, the court found that Indiana courts could not maintain *in rem* jurisdiction over the decedent’s property. *Id.* at 971-72.

162. 799 N.E.2d 55 (Ind. Ct. App. 2003).

163. *Id.* at 58.

164. *Id.* at 56.

165. *Id.*

166. *Id.* at 55-56.

167. *Id.* at 56.

168. *Id.* at 58.

169. *Id.* at 57. Indiana Trial Rule 75(A)(6) provides that preferred venue lies in “the county or court fixed by written stipulations signed by all the parties named in the complaint or their attorneys and filed with the court before ruling on the motion to dismiss.” Despite that the employment agreement containing the venue-selection clause was not signed by *all* of the defendants, the court reasoned that “[i]t would simply constitute a waste of judicial resources to sever the action” against the other employee and transfer it to Kosciusko County, “only to have him subsequently joined as a party to the action . . . in Marion County.” *Id.* at 58.

defendants.”<sup>170</sup>

In *Lake Holiday Conservancy v. Davison*,<sup>171</sup> the court clarified that the county of a plaintiff’s residence is a county of preferred venue when a governmental organization is a defendant, regardless of whether the governmental organization has a principal office in the county.<sup>172</sup> Trial Rule 75(A)(5) provides that preferred venue may be located in:

[t]he county where either one or more individual plaintiffs reside, the principal office of a governmental organization is located, or the office of a governmental organization to which the claim relates or out of which the claim arose is located, if one or more governmental organizations are included as defendants in the complaint.<sup>173</sup>

In *Davison*, a boat passenger brought an action in Marion County against a conservancy district located in Montgomery County and others situated outside of Marion County, alleging that she was struck in the eye by a water balloon fired from a high-velocity slingshot while she was in a boat on a lake.<sup>174</sup> The conservancy district moved to transfer venue to Montgomery County arguing that Rule 75(A)(5) established preferred venue in the county in which the plaintiff resides only if the governmental organization also has a principal office in that county.<sup>175</sup>

Applying “the cardinal rule of statutory construction that ‘a statute clear and unambiguous on its face need not and cannot be interpreted by a court,’” the court ruled that the county of the plaintiff’s residence is a preferred venue, regardless of whether the governmental organization has a principal office in the county.<sup>176</sup> The court also recognized that the drafters of Rule 75(A) intended “to confer venue in the county where the plaintiff resides . . . only if the plaintiff chooses to sue a governmental entity, but not when the plaintiff sues only private defendants.”<sup>177</sup>

#### *E. Amendment of Pleadings*

Indiana Trial Rule 15(A) provides that after a responsive pleading has been filed to an initial complaint, the complaining party may then amend that complaint “only by leave of court or by written consent of the adverse party.”<sup>178</sup> Further, Rule 15(A) provides that “leave shall be given when justice so

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170. *Id.*

171. 808 N.E.2d 119 (Ind. Ct. App. 2004).

172. *Id.* at 123.

173. *Id.* at 122 (quoting IND. TRIAL R. 75(A)(5)).

174. *Id.* at 120.

175. *Id.* at 122.

176. *Id.* (quoting *Storey Oil Co. v. Am. States Ins. Co.*, 622 N.E.2d 232, 235 (Ind. Ct. App. 1993)).

177. *Id.* at 123.

178. IND. TRIAL R. 15(A).

requires.”<sup>179</sup>

In *Kelley v. Vigo County School Corp.*,<sup>180</sup> a former principal brought an action against the county school corporation and school officials alleging defamation relating to allegations of an extra-marital affair, as well as other claims.<sup>181</sup> After judgment on the pleadings and summary judgment were entered against the former principal, the former principal appealed. The court of appeals affirmed in part, but reversed and remanded the defamation claim.<sup>182</sup> After remand, the former principal filed a motion for leave to file a third amended complaint, proposing additional claims of defamation, but the motion for leave was denied by the trial court.<sup>183</sup>

The court of appeals affirmed the trial court’s ruling, finding that “it is not an abuse of discretion for the trial court to deny a motion to amend a pleading where such an amendment would be futile.”<sup>184</sup> First, applying the Indiana Supreme Court’s analysis in *McCarty v. Hospital Corp. of America*,<sup>185</sup> the court of appeals found that the proposed new allegations of defamatory conduct did not “relate back” to the date of the prior pleading.<sup>186</sup> Specifically, the court found that the new allegations did not arise “out of the conduct, transaction, or occurrence set forth . . . in the original pleading.”<sup>187</sup> Since the statute of limitations for a defamation claim in Indiana had passed, and the proposed amendment would not relate back to the date of the original pleading, the court found that the amendment would have been futile.<sup>188</sup>

#### F. Collateral Estoppel

Collateral estoppel “bars subsequent litigation of a fact or issue which was necessarily adjudicated in a former lawsuit if the same fact or issue is presented in the subsequent lawsuit.”<sup>189</sup> The former adjudication “will only be conclusive as to those issues which were actually litigated and determined therein.”<sup>190</sup>

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179. *Id.*

180. 806 N.E.2d 824 (Ind. Ct. App. 2004).

181. *Id.* at 826-27.

182. *Id.* at 833.

183. *Id.* at 829.

184. *Id.* at 830.

185. 580 N.E.2d 228 (Ind. 1991) (discussed in *Kelley*, 806 N.E.2d at 829-30).

186. *Kelley*, 806 N.E.2d at 829-30.

187. *Id.* at 829 & n.9 (quoting IND. TRIAL R. 15(C)).

188. *Id.* at 830 (noting that the statute of limitations for a defamation claim in Indiana is two years). The court in *Kelley* also found that the proposed amendments would have been futile on their merits, for a number of reasons. *Id.*

189. *Am. Family Mut. Ins. Co. v. Ginther*, 803 N.E.2d 224, 230 (Ind. Ct. App. 2004) (citing *Bartle v. Health Quest Realty VII*, 768 N.E.2d 912, 917 (Ind. Ct. App. 2002); *Mendenhall v. City of Indianapolis*, 717 N.E.2d 1218, 1225 (Ind. Ct. App. 1999); *Shell Oil Co. v. Meyer*, 705 N.E.2d 962, 968 (Ind. 1998)).

190. *Id.* (citing *Wedel v. Am. Elec. Power Serv. Corp.*, 681 N.E.2d 1122, 1131 (Ind. Ct. App.

The primary consideration in the use of collateral estoppel is whether the party against whom the former adjudication is asserted had “a full and fair opportunity to litigate the issue and whether it would be otherwise unfair under the circumstances” to permit the use of issue preclusion in the subsequent action.<sup>191</sup>

In *American Family Mutual Insurance Co. v. Ginther*, an insurer obtained a dismissal with prejudice against its insured in a declaratory judgment action regarding insurance coverage.<sup>192</sup> The claim involved injured motorists alleging personal injury claims against the insured.<sup>193</sup> The injured motorists later obtained a default judgment on their personal injury claims against the insured and filed a motion for proceeding supplemental against the insurer.<sup>194</sup> The insurer moved to dismiss the proceeding supplemental “on grounds that the coverage issue had previously been litigated in the declaratory judgment action.”<sup>195</sup> Significantly, neither the insurer nor the insured added the injured motorists as parties to the declaratory judgment action.<sup>196</sup>

The court in *Ginther* found that the injured motorists “were not parties in [the] declaratory action and therefore did not have a full and fair opportunity to litigate the coverage issue.”<sup>197</sup> The court rejected the insurer’s argument that the injured motorists “should have intervened in the declaratory judgment action[,]” quoting the following from Indiana’s Declaratory Judgment Statute: “When declaratory relief is sought, all persons shall be made parties who have or claim any interest that would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings [sic].”<sup>198</sup> Thus, the court confirmed that “it was the person seeking declaratory relief that should have joined the injured motorists, namely [the insured].”<sup>199</sup> Nevertheless, the court found recognized that the statute “clearly provides that the injured motorists shall not be prejudiced because they were not parties to the declaratory judgment.”<sup>200</sup> The court concluded that because the injured motorists were not

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1997)).

191. *Id.* (quoting *Sullivan v. Am. Cas. Co.*, 605 N.E.2d 134, 137 (Ind. 1992)).

192. *Id.* at 228.

193. *Id.*

194. *Id.*

195. *Id.* The motion to dismiss was treated as a motion for summary judgment, because the motion referred to matters outside the pleadings. *Id.* at 228 n.4. *See also* IND. TRIAL R. 12(B).

196. *Ginther*, 803 N.E.2d at 228.

197. *Id.* at 230.

198. *Id.* at 230-31 (quoting IND. CODE § 34-14-1-11).

199. *Id.* at 231.

200. *Id.* In reaching its conclusion, the court in *Ginther* discussed *Araiza v. Chrysler Insurance Co.*, 699 N.E.2d 1162 (Ind. Ct. App. 1998), and interpreted *Araiza* to hold that a “tortfeasor’s inattention to or disregard of tortfeasor’s insurer’s declaratory action did not prevent the accident victim from establishing the availability of liability coverage to satisfy their judgment against the tortfeasor.” *Ginther*, 803 N.E.2d at 231 (discussing *Araiza*, 699 N.E.2d 1162).

joined in the declaratory judgment action on coverage, they “did not have a full and fair opportunity to litigate the issue of [the insurer’s] obligation under their policy of insurance to [the insured].”<sup>201</sup>

To the extent an insurer seeks a declaration regarding coverage against its insured, or vice versa, *Ginther*, along with the cases discussed therein, directs that both parties—not only the plaintiff in the action—should consider joining the injured party as a defendant in the lawsuit if the intent is to later claim that the injured party had a “full and fair opportunity to litigate” the action. In *Ginther*, the court did not clarify whether the injured party was provided notice of the declaratory judgment action. However, given the court’s reliance on the mandatory language of the Declaratory Judgment Statute, it is likely that the result would have been the same either way. Finally, the *Ginther* decision at least implies that joinder of the injured party is not required to enforce a judgment entered against the insured in the injured party’s absence.<sup>202</sup>

In *Infectious Disease of Indianapolis v. Toney*,<sup>203</sup> the Indiana Court of Appeals held that collateral estoppel barred a plaintiff in a medical malpractice action from obtaining a second recovery from a subsequent health care provider for the same damages. However, the court allowed the suit to proceed against the second medical provider for the sole purpose of establishing liability.<sup>204</sup> In *Toney*, the plaintiff settled her claim with the first alleged tortfeasor, and obtained a judgment for her excess damages from the Indiana Patient’s Compensation Fund.<sup>205</sup>

The court in *Toney* found that the plaintiff had a “full and fair opportunity to litigate her total damages arising from [the second health care provider’s] malpractice” when she settled her claim with the first alleged tortfeasor and obtained an excess judgment against the Patient’s Compensation Fund.<sup>206</sup> Thus, the court ruled that the plaintiff was “collaterally estopped from seeking a second recovery for the same injuries from [the second alleged tortfeasor].”<sup>207</sup> However, the court held that “there is not an identity of issues—and therefore collateral estoppel does not apply—when it comes to establishing whether the second provider committed medical malpractice.”<sup>208</sup> The court stated that the plaintiff, “if she so chooses, should be permitted the opportunity to establish [her malpractice claim]” even though “there is no monetary incentive to pursuing a

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201. *Ginther*, 803 N.E.2d at 231.

202. *But see* *Am. Standard Ins. Co. v. Rogers*, 123 F. Supp. 2d 461, 468-69 (S.D. Ind. 2000) (holding that the injured party is a necessary and indispensable party to an insurer’s coverage action).

203. 813 N.E.2d 1223 (Ind. Ct. App. 2004).

204. *Id.* at 1231.

205. *Id.* at 1226. Under Indiana law, “the original tortfeasor is responsible for all the damages flowing from his negligence, even if some of those damages are attributable to malpractice in the treatment of the original injury.” *Id.* at 1230.

206. *Id.* at 1231.

207. *Id.*

208. *Id.*

claim.”<sup>209</sup> The implications of the court of appeals decision in *Toney* on damages as an essential element of a negligence claim are unclear.

### G. Judicial Comity

In *Cloverleaf Enterprises, Inc. v. Centaur Rosecroft, LLC*,<sup>210</sup> the court addressed as a matter of first impression “whether an Indiana trial court has the discretion to enjoin non-citizen parties, over whom it has jurisdiction, from litigating a similar issue in a sister court—and, if so, the extent to which such discretion should be exercised.”<sup>211</sup> In resolving the issue before it, the court looked to “the doctrine of comity, the policies underlying anti-suit injunctions, and the other jurisdictions that have addressed the issuance of such injunctions.”<sup>212</sup>

The court in *Cloverleaf* outlined the law of judicial comity as follows:

It is axiomatic that state courts have the power to enjoin litigation in sister state courts under the doctrine of comity. Indeed, under principles of comity, Indiana courts may respect final decisions of sister courts as well as proceedings pending in those courts. However, comity is not a constitutional requirement to give full faith and credit to the law of a sister state, but it is a rule of convenience and courtesy. The doctrine of judicial comity represents a willingness to grant a privilege, not as a matter of right, but out of deference and good will. Its primary value is to promote uniformity of decision by discouraging repeated litigation of the same question.<sup>213</sup>

The court ruled that an Indiana court has the discretion to enjoin non-citizen parties over whom it has jurisdiction from litigating a similar issue in a sister court, under a “somewhat restrictive approach in granting such injunctions” followed by a majority of jurisdictions.<sup>214</sup> Under this restrictive approach, a court must first evaluate whether the requirements for a preliminary injunction have been met.<sup>215</sup> Once the threshold requirements are met, an anti-suit injunction is

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209. *Id.* The court explained that “we must not totally discount an injured plaintiff’s desire to prove that she has been wronged by another to achieve a catharsis of sorts.” *Id.*

210. 815 N.E.2d 513 (Ind. Ct. App. 2004).

211. *Id.* at 518. The court discussed several appellate court decisions touching on the issue of “anti-suit injunctions,” but stated that none of the cases “squarely address the issue before [it], nor do they delineate the appropriate standard of appellate review for anti-suit injunctions.” *Id.* at 519 (discussing *Pitcairn v. Drummond*, 23 N.E.2d 21, 22 (Ind. 1939); *Abney v. Abney*, 374 N.E.2d 264 (Ind. App. 1978); *Hoehn v. Hoehn*, 716 N.E.2d 479, 481-82 (Ind. Ct. App. 1999)).

212. *Id.*

213. *Id.* (internal citations omitted).

214. *Id.* at 519-20.

215. *Id.* at 520-21. To obtain a preliminary injunction, the moving party has the burden of proving: (1) the movant’s remedies at law are inadequate, thus causing irreparable harm pending resolution of the substantive action; (2) a reasonable likelihood of success at trial by establishing

appropriate only in circumstances “where the foreign litigation would: (1) threaten the issuing court’s in rem or quasi in rem jurisdiction; (2) frustrate a policy of the forum issuing the injunction; (3) prevent a multiplicity of suits; and (4) be vexatious or oppressive.”<sup>216</sup>

The court in *Cloverleaf* found that the party seeking an anti-suit injunction failed to establish either the threshold preliminary injunction requirements or the enumerated factors specific to the anti-suit injunction analysis.<sup>217</sup> The court stated that “to prove irreparable harm,” the movant “must show that the [sister] court is biased or likely to misconstrue the governing law at issue.”<sup>218</sup> Further, the court found that the movant failed to prove the balance of harms, or that the public interest would be disserved.<sup>219</sup> Finally, the court found that the anti-suit injunction factors were not satisfied where the sister action did not threaten Indiana’s jurisdiction; it involved citizens, real estate, and law from the sister state; it did not infringe on Indiana’s jurisdiction or policies; and no showing was made that the sister action was “vexatious or oppressive.”<sup>220</sup>

#### H. Statute of Limitations—Fraudulent Concealment

“Fraudulent concealment is an equitable doctrine that operates to estop a defendant from asserting the statute of limitations as a bar to a claim whenever the defendant, by his own action, prevents the plaintiff from obtaining the knowledge necessary to pursue a claim.”<sup>221</sup> Further, Indiana’s Fraudulent Concealment Statute provides the following: “If a person liable to an action conceals the fact from the knowledge of the person entitled to bring the action, the action may be brought at anytime [sic] within the period of limitation after the discovery because of action.”<sup>222</sup> The doctrine of fraudulent concealment “is available to the plaintiff when the defendant ‘has either by deception or by a violation of a duty, concealed from the plaintiff material facts thereby preventing

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a *prima facie* case; (3) the threatened injury outweighs the potential harm to the non-moving party if the injunction is granted; and (4) the public interest would not be disserved. *Id.* (citing *Robert’s Hair Designers, Inc. v. Pearson*, 780 N.E.2d 858, 863 (Ind. Ct. App. 2002) (quoting *Ind. Family & Soc. Servs. Admin. v. Walgreen Co.*, 769 N.E.2d 158, 161 (Ind. 2002))).

216. *Id.* at 521. A court may also consider “whether separate adjudications could result in inconsistent rulings or a ‘race to judgment,’ and whether ‘adjudicating the issue in two separate actions is likely to result in unnecessary delay and substantial inconvenience and expense to the parties and witnesses.’” *Id.* (quoting *Seattle Totems Hockey Club, Inc. v. Nat’l Hockey League*, 652 F.2d 852, 856 (9th Cir. 1981)).

217. *Id.* at 521-22.

218. *Id.* at 521.

219. *Id.* at 521-22.

220. *Id.* at 522.

221. *Johnson v. Hoosier Enters. III, Inc.*, 815 N.E.2d 542, 549 (Ind. Ct. App. 2004) (quoting *Doe v. Shults-Lewis Child & Family Servs.*, 718 N.E.2d 738, 744 (Ind. 1999)).

222. *Id.* at 548-49 (quoting IND. CODE § 34-11-5-1).

the plaintiff from discovering a potential cause of action.”<sup>223</sup>

In *Johnson v. Hoosier Enterprises III, Inc.*, the personal representative of the estate of a former health care facility resident sued the entity he believed to be the owner and operator of the facility in a wrongful death action. The management company and true operator of the health facility failed to obtain a required license for the operation of the facility, or to disclose to the public that it operated the facility, as required by statute.<sup>224</sup> The personal representative learned that the management company was the operator of the facility, and amended the wrongful death complaint to name the operator, after the applicable two-year statute of limitations had expired.<sup>225</sup> The court in *Johnson* held that the operator “failed in its duty to disclose its identity to the public, thereby concealing its identity from anyone ‘entitled to bring’ an action.”<sup>226</sup> The court’s ruling demonstrates that the doctrine of fraudulent concealment applies when “concealment or misrepresentation of the party against whom a cause of action has arisen occurs[,]” in addition to when the concealment involves only the existence of the cause of action.<sup>227</sup>

### I. Class Action Certification

In *Wal-Mart Stores, Inc. v. Bailey*,<sup>228</sup> the court of appeals demonstrated the importance of a properly defined class and clarified the proper standard for determining whether common issues predominate over individual issues. The plaintiff in *Bailey* sued her former employer, Wal-Mart Stores, claiming that she was “subject to a corporate policy . . . which caused her to work off the clock and be uncompensated for her time.”<sup>229</sup> The trial court granted the plaintiff’s certification motion and defined the class as “[a]ll current and former hourly employees of Wal-Mart . . . in the State of Indiana during the period August 1, 1998 to present.”<sup>230</sup>

The court in *Bailey* instructed that “[a] properly defined class is necessary at the outset because a judgment in a class action has a res judicata effect on absent class members.”<sup>231</sup> Further, “[t]he class definition must be specific enough for the court to determine whether or not an individual is a class member.”<sup>232</sup> Since the class, as defined, included “members who never worked

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223. *Id.* at 549 (quoting *Doe*, 718 N.E.2d at 744).

224. *Id.* at 549-50 (discussing licensing and disclosure requirements of IND. CODE § 16-28-2-1 to -10).

225. *Id.* at 545.

226. *Id.* at 550 (quoting IND. CODE § 34-11-5-1).

227. *Id.* at 549 (quoting *Stephens v. Irvin*, 730 N.E.2d 1271, 1278 (Ind. Ct. App. 2000)).

228. 808 N.E.2d 1198 (Ind. Ct. App. 2004).

229. *Id.* at 1199.

230. *Id.* at 1200.

231. *Id.* at 1201 (citing *Independence Hill Conservancy Dist. v. Sterley*, 666 N.E.2d 978, 981 (Ind. Ct. App. 1998)).

232. *Id.* (citing *Sterley*, 666 N.E.2d at 981).

off the clock,” the court found that it included “members who have no interest in the lawsuit” and it “should not have been certified.”<sup>233</sup>

The *Bailey* court also found that the trial court applied the wrong standard when it determined whether issues common to the class predominated over individual issues.<sup>234</sup> Specifically, the trial court stated that a “[p]redominance of common questions is satisfied when ‘the claims of the individual plaintiffs are derived from a common nucleus of operative facts.’”<sup>235</sup> This standard, according to the defendant, does not require that common claims necessarily predominate. Otherwise, the predominance test for class certification would be no different than the commonality test.<sup>236</sup> The court of appeals agreed.<sup>237</sup>

The court explained that “while there is considerable overlap between the two, [Trial Rule] 23(A)(2) requires that common issues exist while [Trial Rule] 23(B)(3) requires that those issues predominate.”<sup>238</sup> Therefore, the court continued, “while a common nucleus of operative facts *may* satisfy the predominance requirement, such is not necessarily so.”<sup>239</sup>

#### *J. Discovery*

In *Airgas Mid-America, Inc. v. Long*,<sup>240</sup> an employer brought an action against its former employees and their new company for misappropriation of trade secrets and confidential information, and for breach of fiduciary duty.<sup>241</sup> The former employer served a subpoena duces tecum on the defendants’ accountant, seeking the accountant’s “entire file” concerning the defendants, and the accountant moved to quash the subpoena on the ground of accountant-client privilege.<sup>242</sup> The trial court granted the motion.<sup>243</sup>

The court of appeals held that the accountant’s “blanket privilege claim was insufficient to meet its burden of demonstrating that the information was privileged under the accountant-client privilege.”<sup>244</sup> Specifically, the court stated that “[c]laims of privilege ‘must be made and sustained on a question-by-question or document-by-document basis.’”<sup>245</sup> Because the accountant in *Long* “did not assert the privilege on a question-by-question or document-by-document

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233. *Id.* at 1204.

234. *Id.* (citing IND. TRIAL R. 23(B)(3)).

235. *Id.*

236. *Id.* (citing IND. TRIAL R. 23(A)(2) (commonality test) & 23(B)(3) (predominance test)).

237. *Id.*

238. *Id.* at 1206.

239. *Id.* (emphasis in original).

240. 812 N.E.2d 842 (Ind. Ct. App. 2004).

241. *Id.* at 844-45.

242. *Id.* at 844.

243. *Id.*

244. *Id.* at 846.

245. *Id.* at 845 (citing *Hayworth v. Schilli Leasing, Inc.*, 669 N.E.2d 165, 169 (Ind. 1996)).

basis[,]” the court reversed the trial court’s order granting the motion to quash.<sup>246</sup>

### *K. Failure to Prosecute*

In *Lee v. Pugh*,<sup>247</sup> the court examined a trial court’s discretion in granting a motion to dismiss for failure to prosecute, under Trial Rule 41(E).<sup>248</sup> In practice, attorneys often advise their clients that a Rule 41(E) motion might be denied if the plaintiff appears for the hearing on the motion. In other words, in many instances, a Rule 41(E) motion is more likely to prompt a plaintiff to take action than it is to dispose of the case. Nevertheless, the court in *Lee* provided a reminder that Rule 41(E) dictates the consequences of a plaintiff’s failure to pursue a case, and that the court of appeals will question the trial court’s decision only if it finds an abuse of discretion.<sup>249</sup>

In *Lee*, the court found that several factors, including more than ninety days of inactivity and the plaintiffs’ failure to respond to discovery,<sup>250</sup> supported the trial court’s decision to dismiss the case pursuant to Trial Rule 41(E).<sup>251</sup> The court also enumerated the factors to be balanced in determining whether a trial court has abused its discretion in dismissing a case for failure to prosecute:

- (1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff’s part.<sup>252</sup>

The court noted that “a lengthy period of inactivity may be enough to justify dismissal under the circumstances of a particular case, especially if the plaintiff has no excuse for the delay.”<sup>253</sup> The court affirmed the trial court’s dismissal, as

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246. *Id.* at 846. *See also* Howard v. Dravet, 813 N.E.2d 1217, 1221 (Ind. Ct. App. 2004) (stating that “[t]he claim of privilege must be made and sustained on a document-by-document basis” and holding that in camera review of privileged evaluation letter from insurer’s file was insufficient to establish privilege of entire claims file) (citing Petersen v. U.S. Reduction Co., 547 N.E.2d 860, 862 (Ind. Ct. App. 1989)).

247. 811 N.E.2d 881 (Ind. Ct. App. 2004).

248. *Id.* at 884.

249. *Id.* at 884-85.

250. *Id.* at 885-86.

251. *Id.* at 887.

252. *Id.* at 885 (quoting Belcaster v. Miller, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003)).

253. *Id.* (quoting Belcaster, 785 N.E.2d at 1167).

well as its denial of the plaintiffs' motion to reinstate their complaint.<sup>254</sup>

#### *L. Default Judgment*

In *Comer-Marquardt v. A-1 Glassworks, LLC*,<sup>255</sup> a former employer brought an action against its former employee and the employee's solely-owned business, on a respondeat superior theory, alleging that the employee converted funds from the employer.<sup>256</sup> The employee answered, pro se, but the employee's business failed to separately answer the complaint.<sup>257</sup> The employer moved for and was granted a default judgment against the employee's business.<sup>258</sup>

On appeal, the court held that "if the liability of a defaulting defendant is completely dependent upon the liability of a non-defaulting codefendant, a final judgment should not be entered against the defaulting defendant unless the codefendant has been found liable."<sup>259</sup> In this case, because the business was potentially liable under only a theory of respondeat superior, the court found that a default could not be entered against the business unless judgment was first entered against the primary obligor, the former employee.<sup>260</sup>

The ruling in *Comer-Marquardt* has implications not only for cases involving respondeat superior, but also for any case in which a defendant's liability is contingent on that of a codefendant—e.g., indemnity, surety, or guaranty obligations in which the obligations are not joint and several.

In *Whitt v. Farmer's Mutual Relief Ass'n*,<sup>261</sup> the plaintiff filed a complaint to foreclose on a real estate contract. In response to the complaint, the defendant, the proposed purchaser of the property, filed a pro se letter with the trial court, denying the allegations in the complaint.<sup>262</sup> The plaintiff filed a motion for default judgment, which was granted by the trial court.<sup>263</sup> In reliance on the default judgment, the plaintiff transferred title of the property to a third party.<sup>264</sup> The defendant filed a motion to set aside the default judgment, pursuant to Trial Rules 55(C) and 60(B), nearly one year after the default judgment was entered, arguing that the letter filed with the court constituted an "answer" to the plaintiff's complaint.<sup>265</sup>

Initially, the court in *Whitt* clarified that even when a motion to set aside a

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254. *Id.* at 888.

255. 806 N.E.2d 883 (Ind. Ct. App. 2004).

256. *Id.* at 885.

257. *Id.*

258. *Id.*

259. *Id.* at 888 (quoting *Rothman v. Hebebrand*, 720 So. 2d 595, 596 (Fla. Dist. Ct. App. 1998)).

260. *Id.*

261. 815 N.E.2d 537 (Ind. Ct. App. 2004).

262. *Id.* at 538.

263. *Id.* at 538-39.

264. *Id.* at 539.

265. *Id.*

default judgment must be filed within one year pursuant to Trial Rule 60(B), the motion must still be filed within a “reasonable” time.<sup>266</sup> The court in *Whitt* found that the defendant’s motion was not filed within a reasonable time, because title to the property had already been transferred and the motion was filed nearly one year after the judgment was entered.<sup>267</sup> Further, as evidenced by the defendant’s letters to the trial court, the defendant was aware of the complaint. Having offered no basis for his delay in moving to set aside the default judgment, the court held that the trial court did not abuse its discretion by denying the defendant’s motion to set aside the default judgment.<sup>268</sup>

#### *M. Motion to Dismiss Treated as Summary Judgment*

When a motion to dismiss “is sustained for failure to state a claim under [Trial Rule] 12(B)(6), the pleading may be amended once as of right.”<sup>269</sup> However, on a 12(B)(6) motion to dismiss if “matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment.”<sup>270</sup>

In *Robbins v. Canterbury School, Inc.*, the mother of a student at a private school brought an action requesting copies of documents supporting the school’s investigation regarding its decision to expel the student.<sup>271</sup> The school filed a motion to dismiss under Trial Rule 12(B)(6). In response to the motion, the mother submitted a number of exhibits, and at the hearing on the motion, the mother “failed to object to the trial court’s consideration of matters outside the pleadings.”<sup>272</sup> The trial court dismissed the mother’s petition, with prejudice.<sup>273</sup> The mother appealed, arguing “that the trial court improperly dismissed her petition with prejudice without affording her the opportunity to amend it.”<sup>274</sup> The court of appeals in *Robbins* found that the trial court properly treated the school’s motion as a motion for summary judgment.<sup>275</sup> The court held that there was “no

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266. *Id.* at 540 (stating that “[t]here may be cases where a two week delay was unreasonable, and others where an eleven month delay was reasonable”) (quoting *Henderson v. Am. Optical Co.*, 418 N.E.2d 549, 553-54 (Ind. Ct. App. 1981)).

267. *Id.* at 541.

268. *Id.* Because the court decided the case on other grounds, it did not address whether the pro se letter constituted an “answer” sufficient to avoid a default judgment. Notably, the trial court granted the default judgment despite the filing of the pro se letter, at least implying that the particular letter did not constitute an “answer” under the Trial Rules.

269. *Robbins v. Canterbury Sch., Inc.*, 811 N.E.2d 957, 959-60 (Ind. Ct. App. 2004) (citing *Baker v. Town of Middlebury*, 753 N.E.2d 67, 74 (Ind. Ct. App. 2001)).

270. *Id.* at 960 (citing *Benthall v. City of Evansville*, 674 N.E.2d 580, 583 (Ind. Ct. App. 1996); *Dixon v. Siwy*, 661 N.E.2d 600, 603 (Ind. Ct. App. 1996)).

271. *Id.* at 959.

272. *Id.* at 960.

273. *Id.* at 959.

274. *Id.*

275. *Id.* at 960.

error in not affording [the mother] the opportunity to amend her complaint.”<sup>276</sup>

The court’s decision in *Robbins* does not address the trial court’s characterization of its order as a dismissal, with prejudice, rather than as an order granting summary judgment as directed by the Trial Rule. An accurate characterization by the trial court may have avoided the issue completely. Nevertheless, the *Robbins* decision serves as a caution to a plaintiff opposing a motion to dismiss. While the substance and merits of the motion may warrant the submission of materials outside the pleadings, the plaintiff must weigh the risk of a dispositive ruling, without the opportunity to amend the pleading.

#### N. Summary Judgment

1. *State Standard Compared to Federal Standard.*—In *Van Etten v. Fegaras*,<sup>277</sup> the court compared the federal standard for summary judgment with the Indiana state standard.<sup>278</sup> In *Van Etten*, an intoxicated restaurant patron filed an action against the restaurant and the restaurant’s manager, alleging negligence and assault.<sup>279</sup> In his second summary judgment motion, the plaintiff cited a case from the Southern District of Indiana that stated that “[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.”<sup>280</sup>

The court in *Van Etten* stated the summary judgment standard in state court as follows:

[S]ummary judgment is appropriate when no designated genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. . . . A party appealing the denial of summary judgment carries the burden of persuading this court that the trial court’s decision was erroneous. The movant must demonstrate the absence of any genuine issue of fact as to a determinative issue and only then is the non-movant required to come forward with contrary evidence. This court may not search the entire record but may only consider the evidence that has been specifically designated. All pleadings, affidavits, and testimony are construed liberally and in a light most favorable to the

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276. *Id.* The court in *Robbins* proceeded to rule that the trial court did not err on the merits of the claim, which involved the interpretation of a statute allowing equal access to a child’s school records for custodial and noncustodial parents. *Id.* at 960-61 (discussing IND. CODE § 20-10.1-22.4-2).

277. 803 N.E.2d 689 (Ind. Ct. App. 2004).

278. *Id.* at 691-92.

279. *Id.* at 691. The plaintiff in *Van Etten* became intoxicated while celebrating his birthday at the restaurant. He apparently engaged in an altercation with other restaurant patrons and was ultimately escorted out of the restaurant. *Id.* at 690. As the manager of the restaurant escorted him out, he was allegedly struck in the leg with a large statue of a Native American. *Id.* The restaurant manager contended that the plaintiff slipped and fell on ice outside the restaurant. *Id.*

280. *Id.* at 691 (quoting *Sedwick v. Togo West*, 92 F. Supp. 2d 813, 815 (S.D. Ind. 2000)).

nonmoving party.<sup>281</sup>

In contrast, the court in *Van Etten* encapsulated the federal standard as follows:

If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. A mere scintilla of evidence does not suffice to defeat summary judgment. Not every factual dispute creates a barrier to summary judgment. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.<sup>282</sup>

Under the federal standard, “if it appears unlikely that the non-movant will win the case, summary judgment may be granted.”<sup>283</sup> However, under the Indiana standard, “[i]t is entirely the burden of the movant to demonstrate the absence of any genuine issue of fact as to a determinative issue, and only then is the non-movant required to come forward with contrary evidence.”<sup>284</sup> Under the Indiana standard “there is no requirement that the non-movant produce sufficient contrary evidence to allow the possibility that he will win his case. He merely must show that there is *some* admissible evidence that creates a genuine issue of material fact to prevent the trial judge from granting summary judgment.”<sup>285</sup> The court held that the plaintiff presented sufficient evidence to avoid summary judgment under the Indiana standard.<sup>286</sup> In addition to his affidavit, the plaintiff submitted an ambulance report and the report of a police officer at the scene, both supporting his claim.<sup>287</sup>

2. *Strict Adherence to Thirty-day Response Deadline.*—In *Fort Wayne Lodge, LLC v. EBH Corp.*,<sup>288</sup> the court affirmed the trial court’s sua sponte ruling that it would not consider material filed in opposition to a motion for summary judgment, where the material was filed after the thirty-day deadline dictated by Rule 56.<sup>289</sup> The court explained that:

Trial Rule 56(C) requires that an adverse party designate evidence and material issues of fact in its “response,” which must be filed within 30 days after the motion is served. If the non-moving party does not respond to a properly supported motion by setting forth specific facts showing a genuine issue for trial, then [Trial Rule] 56(E) mandates that

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281. *Id.* (quoting *Little Beverage Co. v. DePrez*, 777 N.E.2d 74, 77-78 (Ind. Ct. App. 2002)).

282. *Id.* (quoting *Sedwick*, 92 F. Supp. 2d at 816).

283. *Id.* at 692.

284. *Id.* (citing *Little Beverage Co.*, 777 N.E.2d at 77-78).

285. *Id.* (emphasis in original).

286. *Id.* at 692-93.

287. *Id.* at 692. Regarding the plaintiff’s affidavit, the court stated the rule that “[a] non-movant may not create issues of fact by pointing to affidavit testimony which contradicts the witness’s sworn testimony in a prior deposition.” *Id.* (quoting *Keesling v. Baker & Daniels*, 571 N.E.2d 562, 568 (Ind. Ct. App. 1991)).

288. 805 N.E.2d 876 (Ind. Ct. App. 2004).

289. *Id.* at 883.

summary judgment, if appropriate, be entered against him.<sup>290</sup>

Recognizing that Rule 56(I) allows the court, for cause shown, to “alter any time limit set forth in [Trial Rule 56,]” the court of appeals nevertheless concluded that the untimely response should not have been considered.<sup>291</sup>

In *Desai v. Croy*,<sup>292</sup> the court of appeals clarified that a trial court lacks discretion to allow a party to file a response to a motion for summary judgment if the response is not filed within the thirty-day time limit established by Trial Rule 56(C).<sup>293</sup> The court in *Desai* followed the rule established in *Seufert v. RWB Medical Income Properties I Ltd. Partnership*,<sup>294</sup> that the remedies provided by Rules 56(F) and (I) are “not available to a nonmoving party who has failed to oppose or respond to the motion within the thirty-day limit established by [Trial Rule] 56(C).”<sup>295</sup> Following *Seufert*, the court in *Desai* held that:

where a nonmoving party fails to respond within thirty days by either (1) filing affidavits showing issues of material fact, (2) filing his own affidavit under Rule 56(F) indicating why the facts necessary to justify his opposition are unavailable, or (3) requesting an extension of time in which to file his response under 56(I), the trial court lacks discretion to permit that party to thereafter file a response.<sup>296</sup>

In other words, according to the court in *Desai*, unless the nonmoving party has responded or sought an extension within thirty days from the date the moving party filed for summary judgment, the trial court lacks discretion to alter the time limits under Trial Rule 56(I).<sup>297</sup>

3. *Findings by Commissioner.*—In *Cummins v. McIntosh*,<sup>298</sup> the court of appeals explained the role and obligations of the master commissioner when ruling on a summary judgment motion. In *Cummins*, a medical malpractice plaintiff filed suit against a physician, based on the physician’s treatment of the plaintiff’s broken femur.<sup>299</sup> Based on the recommendation of the master commissioner, the trial court granted summary judgment in favor of the physician.<sup>300</sup> The plaintiff appealed, arguing that the master commissioner failed to provide adequate findings to support the court’s judgment.

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290. *Id.* at 883 n.1 (citing *Kissell v. Vanes*, 629 N.E.2d 878, 880 (Ind. Ct. App. 1994)).

291. *Id.* at 883. *See also* *Coleman v. Charles Court, LLC*, 797 N.E.2d 775 (Ind. Ct. App. 2003) (stating that affidavit is required to support motion for enlargement of thirty-day deadline, under Trial Rule 56(F)).

292. 805 N.E.2d 844 (Ind. Ct. App. 2004).

293. *Id.* at 850-51.

294. 649 N.E.2d 1070 (Ind. Ct. App. 1995).

295. *Desai*, 805 N.E.2d at 848.

296. *Id.* at 850.

297. *Id.*

298. 803 N.E.2d 1155 (Ind. Ct. App. 2004).

299. *Id.* at 1156.

300. *Id.* at 1159.

Pursuant to then sections 33-4-7-4 through 33-4-7-8 of the Indiana Code, “master commissioner *shall report the findings in each of the matters before the master commissioner in writing* to the judge or judges of the division to which the master commissioner is assigned or as designed [sic] by rules of the court.”<sup>301</sup> Further, a “magistrate shall report findings in an evidentiary hearing, a trial, or a jury’s verdict to the court.”<sup>302</sup>

The court in *Cummins* recognized that “a commissioner acts as an instrumentality to inform and assist the court by conducting hearings and reporting facts or conclusions to the trial court; however, only the court has inherent authority to make binding orders or judgments.”<sup>303</sup> In *Cummins*, the commissioner found only that the summary judgment motion should be granted, without “informing the trial court judge of the facts upon which her decision was based.”<sup>304</sup> The court of appeals held that the commissioner’s finding “was insufficient to inform or assist the trial court judge in determining whether there was a genuine issue as to any material fact” and, therefore, the case was remanded for more specific findings.<sup>305</sup>

4. *Order Denying Summary Judgment Is Interlocutory.*—In *Cardiology Associates of Northwest Indiana, P.C. v. Collins*,<sup>306</sup> the court clarified that regardless of the trial court’s characterization of an order denying summary judgment as a final, appealable order, the order is interlocutory and the proper procedures for bringing an interlocutory appeal must be followed.<sup>307</sup> The court in *Collins* explained that “to be a final judgment . . . , a judgment must possess the requisite degree of finality and must dispose of at least a single substantive claim.”<sup>308</sup> According to the court, “an order denying a motion for summary judgment is not a final appealable order, as no rights have been thereby foreclosed.”<sup>309</sup>

The denial of a summary judgment motion “merely places the parties’ rights in abeyance pending ultimate determination by the trier of fact.”<sup>310</sup> Thus, the court in *Collins* ruled that “a party seeking review of a denial of a motion for

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301. *Id.* (emphasis in original) (quoting IND. CODE § 33-4-7-8(a) (repealed by Act of Mar. 19, 2004, § 164, 2004 Ind. Acts 98)). The text of former Indiana Code section 33-4-7-8(a) can be found at Indiana Code section 33-33-49-16(e).

302. *Id.* (quoting IND. CODE § 33-4-7-4(14) (repealed by Act of Mar. 19, 2004, § 164, 2004 Ind. Acts 98)). The text of former Indiana Code section 33-4-7-4(14) can be found at Indiana Code sections 33-33-49-16 and 33-23-5-9(a).

303. *Id.* at 1160 (quoting *Creedon v. Asher Truck & Trailer, Inc.*, 535 N.E.2d 148, 149 (Ind. Ct. App. 1989)).

304. *Id.*

305. *Id.*

306. 804 N.E.2d 151 (Ind. Ct. App. 2004).

307. *Id.* at 154-55.

308. *Id.* at 154 (citing *Legg v. O’Connor*, 557 N.E.2d 675, 676 (Ind. Ct. App. 1990)).

309. *Id.* at 154-55 (citing *Keith v. Mendus*, 661 N.E.2d 26, 35 (Ind. Ct. App. 1996)).

310. *Id.* at 155.

summary judgment must do so by way of interlocutory appeal.”<sup>311</sup>

*O. Final Pre-Trial Order*

In *Rust-Oleum Corp. v. Fitz*,<sup>312</sup> the court addressed the binding nature of a final pre-trial order. In *Rust-Oleum*, a consumer injured while using a can of spray paint brought an action against the marketer of the product, alleging products liability and negligence.<sup>313</sup> The marketer filed a third-party complaint against the manufacturer, seeking indemnification.<sup>314</sup>

In the pre-trial order, entered approximately one week before trial commenced, the marketer contended that “the can was not defectively manufactured, was not the subject of a design defect, and was filled and tested within D.O.T. specifications.”<sup>315</sup> The pre-trial order also stated that the marketer “added [the manufacturer] as a party to this lawsuit to assist in defending against the claims made by the plaintiffs.”<sup>316</sup> At trial, the consumer plaintiff filed a motion to remove the manufacturer from the case and the trial court granted the motion.<sup>317</sup>

In affirming the trial court’s order removing the manufacturer from the case, the court of appeals recognized the “binding effect of a pre-trial order,” but noted that a pre-trial order need not “be rigidly and pointlessly adhered to at trial.”<sup>318</sup> Nevertheless, the court found that the pre-trial order did not include a claim for indemnification against the manufacturer, which was the claim that allowed the manufacturer to be “properly impleaded in the first place.”<sup>319</sup> With the third-party claim gone, the court held that the manufacturer was no longer a proper party to the litigation.<sup>320</sup> Significant to the court’s ruling was its finding that “[a]lthough the third-party complaint may have properly impleaded [the manufacturer], a pre-trial order delineating the issues of the case supplants the allegations raised in the pleadings and controls all subsequent proceedings in the case.”<sup>321</sup> According to the court, the “issues become those contained in the pre-trial order.”<sup>322</sup>

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311. *Id.* (citing IND. APP. R. 14).

312. 801 N.E.2d 754 (Ind. Ct. App. 2004).

313. *Id.* at 755.

314. *Id.*

315. *Id.* at 756.

316. *Id.*

317. *Id.*

318. *Id.* at 758 (citing *Whisman v. Fawcett*, 470 N.E.2d 73, 76 (Ind. 1984)).

319. *Id.* at 759.

320. *Id.*

321. *Id.* at 758 (citing *Marotta v. Iroquois Realty Co.*, 412 N.E.2d 797, 799 (Ind. Ct. App. 1980)).

322. *Id.*

*P. Jury Verdicts*

A “compromise verdict is one in which a jury, ‘although determining that the defendant is liable, nonetheless awards either zero damages or damages which are inconsistent with the facts introduced at trial.’”<sup>323</sup> In *Cortner v. Louk*, a motorcyclist was injured when his motorcycle collided with another vehicle.<sup>324</sup> The motorcyclist and his wife brought a personal injury action against the driver of the vehicle and a jury trial was held.<sup>325</sup> During deliberations, the jury sent several questions to the trial court, asking whether they could find that the defendant was at fault, but award nominal or no damages.<sup>326</sup> The jury eventually returned a verdict in favor of the defendant.<sup>327</sup> The plaintiffs moved for mistrial and the trial court granted the motion, indicating that the jury’s decision was a compromise verdict.<sup>328</sup>

The court in *Louk* reversed the trial court, holding that “it was legally impermissible, and thus an abuse of discretion, to rely upon notes sent by the jury during its deliberations to cast doubt upon the validity of its final verdict.”<sup>329</sup> The court explained that “[i]t has long been established in Indiana that a jury’s verdict may not be impeached by the testimony of the jurors who returned it.”<sup>330</sup> Further, the court stated that “using the jury’s deliberation questions and statements to vacate a facially valid verdict that conforms with the evidence arguably erodes ‘the inviolate right to a jury trial provided by section 20 of the Indiana Bill of Rights.’”<sup>331</sup> According to the court, it is of “no moment . . . that the questions/statements were made by the jury voluntarily and while it was still

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323. *Cortner v. Louk*, 797 N.E.2d 326, 329 (Ind. Ct. App. 2003) (quoting *Archer v. Grotzinger*, 680 N.E.2d 886, 888 (Ind. Ct. App. 1997)).

324. *Id.* at 328.

325. *Id.*

326. *Id.* The two relevant notes read, “If we find the defendant more at fault than the plaintiff and we find the damages to be one penny will you can you [sic] throw out the award/verdict?” and “If we assign fault to the defendant and assign damages of zero \$0.00 dollars by rule of law can the award be changed, modified or overridden by anyone.” *Id.* The trial court responded to each note with a statement that “You have all of the law and all of the facts you are permitted to consider in arriving at your verdict.” *Id.*

327. *Id.*

328. *Id.* After the order granting a mistrial, the trial court entered an amended order, indicating that the court learned during a post-trial conversation that the jurors “felt the defendant was more responsible,” but that “they believed the plaintiff’s expenses had been covered by his insurance.” *Id.* No evidence that the plaintiff’s damages had been covered by insurance had been introduced at trial. *Id.*

329. *Id.* at 330.

330. *Id.* (citing *Ward v. St. Mary Med. Ctr. of Gary*, 658 N.E.2d 893, 894 (Ind. 1995)). According to the court in *Louk*, the most frequently cited policy reasons for this rule are that “(1) there would be no reasonable end to litigation, (2) jurors would be harassed by both sides of litigation, and (3) an unsettled state of affairs would result.” *Id.*

331. *Id.* (quoting *Ward*, 658 N.E.2d at 895).

impaneled.”<sup>332</sup>

The plaintiffs in *Louk* also argued on appeal that upon receiving the questions from the jury, the trial court “was required to ‘poll the jury regarding any improper influence.’”<sup>333</sup> The court disagreed, finding that “in this case the jury’s potential confusion over a point of law did not require a polling of the jury because there is no claim or evidence here that an ‘adventitious, potentially influential event’ prompted its questions.”<sup>334</sup> The court concluded that the “jury’s facially valid verdict could not be impeached by questions asked before it was entered or statements made thereafter by the jurors.”<sup>335</sup>

### *Q. Arbitration*

A party seeking to compel arbitration “must satisfy a two-pronged burden of proof.”<sup>336</sup> First, the party

must demonstrate the existence of an enforceable agreement to arbitrate the dispute. Second, the party must prove that the disputed matter is the type of claim that the parties agreed to arbitrate. Once the court is satisfied that the parties contracted to submit their disputed to arbitration, the court is required by statute to compel arbitration.<sup>337</sup>

In making the determination, the court applies “ordinary contract principles governed by state law.”<sup>338</sup>

*1. Privity of Contract and Third-Party Beneficiary Theory.*—In *Daimler Chrysler Corp. v. Franklin*, a car purchaser brought an action against the manufacturer of the vehicle for breach of warranties, “revocation of acceptance, and a violation of the Indiana Motor Vehicle Protection Act.”<sup>339</sup> The

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332. *Id.*

333. *Id.* at 331.

334. *Id.* at 331-32. The court noted that the plaintiffs cited no case, and the court’s research revealed none, that “requires a jury to be polled whenever it asks a question that reflects a potential misunderstanding of or confusion over the law.” *Id.* at 331. The court analogized *Anderson v. Taylor*, 289 N.E.2d 781 (Ind. Ct. App. 1972), which rejected a plaintiff’s argument that a jury, after being denied a request for access to a dictionary during its deliberations, should have been called into open court and questioned as to why they wanted a dictionary, and then given “further clarifying instructions to correct any misunderstandings they might have had.” *Id.* (citing *Taylor*, 289 N.E.2d at 786-87).

335. *Id.* at 333.

336. *Daimler Chrysler Corp. v. Franklin*, 814 N.E.2d 281, 284 (Ind. Ct. App. 2004) (citing *Mislenkov v. Accurate Metal Detinning, Inc.*, 743 N.E.2d 286, 289 (Ind. Ct. App. 2001)).

337. *Id.* (citations omitted). See also IND. CODE § 34-57-2-3(a) (2004) (“On application by a party showing an agreement described in section 1 of this chapter, and the opposing party’s refusal to arbitrate, the court shall order the parties to proceed with arbitration.”).

338. *Daimler Chrysler*, 814 N.E.2d at 284-85 (citing *Showboat Marina Casino P’ship v. Tonn & Blank Constr.*, 790 N.E.2d 595, 598 (Ind. Ct. App. 2003); *Mislenkov*, 743 N.E.2d 289).

339. *Id.* at 284. See also Indiana Motor Vehicle Protection Act, IND. CODE §§ 24-5-13-1 to

manufacturer moved to dismiss the complaint and compel arbitration, relying on the arbitration provision contained in the purchaser's retail installment contract with the dealer.<sup>340</sup> The trial court denied the motion, the case proceeded to jury trial and the jury decided in the purchaser's favor.<sup>341</sup> The manufacturer appealed.<sup>342</sup>

The court in *Daimler Chrysler* found that the manufacturer was not in privity of contract with the purchaser, and it was not an intended third-party beneficiary of the contract between the dealer and the purchaser.<sup>343</sup> Therefore, the court held that the manufacturer could not enforce the arbitration provision against the purchaser.<sup>344</sup>

On the issue of privity, the court recognized that "only those who are parties to a contract or those in privity with a party have the right to enforce the contract."<sup>345</sup> Privity has been defined as "mutual or successive relationships to the same right of property, or an identification of interest of one person with another as to represent the same legal right."<sup>346</sup> Noting that in Indiana, "privity between the buyer and seller is generally required to maintain a cause of action on an implied warranty of merchantability claim[.]" the court proceeded to find that the dealer in this case was not an "agent of the manufacturer" and the manufacturer did not "participate[] significantly in the sale of the [vehicle]."<sup>347</sup> Because "the mere existence of a manufacturer-dealer relationship is insufficient to make the dealer an agent of the manufacturer for purposes of the privity requirement[.]" the manufacturer was not in privity with the purchaser and could not enforce the arbitration provision on that basis.<sup>348</sup>

Finally, the court in *Daimler Chrysler* found that the manufacturer was "not an intended third-party beneficiary of the contract."<sup>349</sup> The court explained that to "enforce a contract under [a third-party beneficiary] theory, the claimant must show 1) a clear intent by the parties to the contract to benefit the third party, 2) a duty imposed on one of the contracting parties in favor of the third party, and 3) performance of the contract."<sup>350</sup> The court stated that "the body of the contract and the arbitration agreement between [the dealer] and [the purchaser] does not

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340. *Id.* at 283-84.

341. *Id.* at 284.

342. *Id.*

343. *Id.* at 285-86.

344. *Id.* at 286.

345. *Id.* at 285.

346. *Id.* (quoting *Riehle v. Moore*, 601 N.E.2d 365, 371 (Ind. Ct. App. 1992)).

347. *Id.*

348. *Id.* at 285-86 (quoting *Hyundai Motor Am., Inc. v. Goodin*, 804 N.E.2d 775, 787 (Ind. Ct. App. 2004)).

349. *Id.* at 286.

350. *Id.* (citing *Angell Enters., Inc. v. Abram & Hawkins Excavating Co.*, 643 N.E.2d 362, 365 (Ind. Ct. App. 1994)).

reference [the manufacturer] and does not show a clear intent to benefit it.”<sup>351</sup> Thus, according to the court, the manufacturer “could not have been an intended third-party beneficiary of the contract, and it may not rely on the arbitration provision.”<sup>352</sup> The court affirmed the trial court’s denial of the manufacturer’s motion to dismiss and compel arbitration.<sup>353</sup>

2. *Unconscionable Contract Containing Arbitration Provision.*—In *Sanford v. Castleton Health Care Center, LLC*,<sup>354</sup> the court determined as a matter of first impression in Indiana that “an admission agreement between a nursing home facility and a prospective admittee may contain an arbitration clause.”<sup>355</sup> In *Sanford*, the personal representative of a patient’s estate brought a wrongful death and survival action against the nursing home.<sup>356</sup> The nursing home moved to compel arbitration, pursuant to a mandatory arbitration provision contained in the admission agreement.<sup>357</sup> The trial court entered an order compelling mediation and, if necessary, arbitration.<sup>358</sup> The estate appealed, arguing, *inter alia*, that the admission contract is “an unconscionable adhesion contract.”<sup>359</sup>

According to the court in *Sanford*, an “adhesion contract—i.e., ‘a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it’—is not per se unconscionable.”<sup>360</sup> Rather, the court stated, “a contract is unconscionable if a great disparity in bargaining power exists between the parties, such that the weaker party is made to sign a contract unwillingly or without being aware of its terms.”<sup>361</sup> To be unconscionable, “[t]he contract must be ‘such as no sensible man not under delusion, duress or in distress would make, and such as no honest and fair man would accept.’”<sup>362</sup>

The court in *Sanford* found that the estate failed to show that the contract containing the arbitration clause was signed “unwillingly and without being

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351. *Id.*

352. *Id.*

353. *Id.*

354. 813 N.E.2d 411 (Ind. Ct. App. 2004).

355. *Id.* at 417.

356. *Id.* at 415-16.

357. *Id.*

358. *Id.* at 416.

359. *Id.* at 417.

360. *Id.* (quoting *Pigman v. Ameritech Pub., Inc.*, 641 N.E.2d 1026, 1035 (Ind. Ct. App. 1994), *overruled on other grounds*, *Trimble v. Ameritech Pub., Inc.*, 700 N.E.2d 1128 (Ind. 1998)).

361. *Id.* (citing *White River Conservancy Dist. v. Commonwealth Eng’rs, Inc.*, 575 N.E.2d 1011, 1017 (Ind. Ct. App. 1991)).

362. *Id.* (quoting *Progressive Constr. & Eng’g Co. v. Ind. & Mich. Elec. Co.*, 533 N.E.2d 1279, 1286 (Ind. Ct. App. 1989)). In other words, “[a] contract is not unenforceable merely because one party enjoys advantages over another.” *Id.* (citing *Dan Purvis Drugs, Inc. v. Aetna Life Ins. Co.*, 412 N.E.2d 129, 131 (Ind. Ct. App. 1980)).

legally aware of its terms.”<sup>363</sup> In affirming the trial court’s decision to compel arbitration, the court in *Sanford* found that the arbitration provision was not buried or hidden in the contract, and that it was immediately followed by a signature line, which bore the personal representative’s signature.<sup>364</sup> Further, the court stated that there is no requirement that an arbitration provision “describe in detail the process of arbitration.”<sup>365</sup> Finally, the court noted that the parties were not precluded from asking questions regarding the process of arbitration or from reading the entire contract, including the arbitration provision.<sup>366</sup>

#### R. Attorney Fees

1. *Offer of Settlement.*—In *Shepherd v. Carlin*,<sup>367</sup> following the entry of judgment on a jury verdict for an amount less than the defendant’s previous offer of settlement, the defendant filed a motion for an award of attorney fees under Indiana’s offer-of-settlement statute.<sup>368</sup> The trial court entered an order granting the motion for attorney fees, awarding \$1.00 in attorney fees, costs and expenses.<sup>369</sup> The court in *Carlin* reversed the trial court’s order and held that under the offer-of-settlement statute, the trial court “is required to award the attorney’s fees, costs, and expenses actually incurred by the offeror. Put another way, the trial court does not have discretion to enter a nominal award.”<sup>370</sup>

2. *Frivolous Litigation.*—In *Inlow v. Henderson, Daily, Withrow & DeVoe (“Inlow I”)*,<sup>371</sup> the heirs of an estate brought an action against various insurers for negligence and breach of contract, and against the law firm representing the personal representative of the estate, as well as its individual partners, alleging negligence, “intermeddling,” and legal malpractice.<sup>372</sup> The defendants moved to dismiss the heirs’ complaint on various grounds and the trial court granted the motion. The heirs appealed.<sup>373</sup>

In May 2002, the insurers filed motions for attorney fees with the trial

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363. *Id.* at 418.

364. *Id.*

365. *Id.*

366. *Id.* The court in *Sanford* also found that the arbitration clause did not violate the Federal Arbitration Act, it did not unconstitutionally deprive the parties of their right to a jury trial, and regardless of whether the personal representative was a party to or in privity with a party to the contract, the disputes at issue did “arise out of or relate to” the contract. Therefore, the claims were governed by the arbitration clause. *Id.* at 418-22.

367. 813 N.E.2d 1200 (Ind. Ct. App. 2004).

368. *Id.* at 1201-02. *See also* IND. CODE § 34-50-1-6 (2004).

369. *Carlin*, 813 N.E.2d at 1202.

370. *Id.* at 1204.

371. 804 N.E.2d 833 (Ind. Ct. App. 2004) (“*Inlow II*”).

372. *Id.* at 836-37. The court of appeals ultimately affirmed the trial court’s dismissal of the heirs’ complaint. *See Inlow v. Henderson, Daily, Withrow & DeVoe*, 787 N.E.2d 385 (Ind. Ct. App. 2003) (“*Inlow I*”).

373. *Inlow II*, 804 N.E.2d at 837.

court.<sup>374</sup> In June 2002, the trial court clerk filed a notice of completion of record for appeal, regarding the heirs' appeal of the trial court's dismissal of their complaint.<sup>375</sup> In July 2002, the trial court denied the motions for attorney's fees, on the ground that it lacked jurisdiction to consider the motions under Indiana Appellate Rule 8, "which provides that [the Indiana Court of Appeals] acquires jurisdiction when the trial court clerk issues the notice of completion of the record."<sup>376</sup> The insurers filed motions to correct error, alleging that the trial court retained jurisdiction to award attorney fees, and the trial court granted those motions, ultimately awarding the insurers their attorney fees.<sup>377</sup> The heirs appealed.<sup>378</sup>

The court in *Inlow II* affirmed the trial court's award of attorney fees.<sup>379</sup> The court explained that a claim is frivolous

if it is made primarily to harass or maliciously injure another; if counsel is unable to make a good faith and rational argument on the merits of the action; or if counsel is unable to support the action by a good faith and rational argument for extension, modification, or reversal of existing law.<sup>380</sup>

Further, a claim is "unreasonable" if, based upon the "totality of the circumstances, including the law and facts known at the time, no reasonable attorney would consider the claim justified or worthy of litigation."<sup>381</sup> Finally, a claim is "groundless" if "no facts exist which support the claim relied upon and supported by the losing party."<sup>382</sup>

The court in *Inlow II* found that the heirs failed to show that they sustained any damages as a result of the insurers' alleged breaches of contract.<sup>383</sup> Further, the court in *Inlow II* recognized its determination in *Inlow I* that the heirs "brought this action in the wrong forum, and [stated that] the trial court could

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374. *Id.*

375. *Id.*

376. *Id.* (citing IND. APP. R. 8).

377. *Id.*

378. *Id.* at 838.

379. *Id.* at 841-42. The court in *Inlow II* first addressed the heirs' argument that the trial court "did not have jurisdiction to award attorney fees, since the court of appeals acquired jurisdiction before those awards were granted." *Id.* at 838. The court found that the trial court's "awards were premature under the circumstances." *Id.* However, the court recognized that the court in *Inlow I* affirmed the decision to dismiss the complaint. *Id.* Therefore, the court in *Inlow II* stated that "the principles of judicial economy dictate that [it] address the merits of this appeal." *Id.*

380. *Id.* at 839 (citing *Commercial Coin Laundry Sys. v. Enneking*, 766 N.E.2d 433, 441 (Ind. Ct. App. 2002)).

381. *Id.*

382. *Id.*

383. *Id.* at 841-42 (citing *Fowler v. Campbell*, 612 N.E.2d 596, 600 (Ind. Ct. App. 1993), for the proposition that damages are an essential element of a breach of contract claim).

have awarded attorney's fees on that basis alone.<sup>384</sup> The court in *Inlow II* also concluded that an award of appellate attorney fees was appropriate and remanded the case to the trial court for a hearing to determine appellate fees.<sup>385</sup>

### III. AMENDMENTS TO INDIANA RULES OF TRIAL PROCEDURE

Just before the end of the survey period—in September 2004—the Supreme Court of Indiana ordered various amendments to the Indiana Rules of Trial Procedure, effective January 1, 2005.<sup>386</sup>

#### A. Documents or Information Excluded from Public Access

A significant amendment, in terms of its immediate practical impact, is found in Trial Rule 5(G), which now provides that documents excluded from public access pursuant to Indiana Administrative Rule 9(G)(1)<sup>387</sup> must be filed

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384. *Id.* at 842 (citing *Inlow I*, 787 N.E.2d at 390-91). See also *St. Mary Med. Ctr. v. Baker*, 611 N.E.2d 135, 138 (Ind. Ct. App. 1993) (holding that failure to bring action in proper forum rendered action frivolous and justified attorney fee award) (cited in *Inlow II*, 804 N.E.2d at 842).

385. *Inlow II*, 804 N.E.2d at 842.

386. Amendments to the Indiana Trial Rules *effective during* the survey period were minimal. See IND. TRIAL R. 5(C) (required certificate of service at end of filed document), 34(C) (formatting amendments), 43(A), (B)-(D) (simplification of subparagraph relating to form and admissibility of evidence, and deleting subparagraphs relating to scope of cross-examination and record of excluded evidence), 44 (proof of official records governed by Indiana Rules of Evidence), 79 (special judge selection, place of hearing). These amendments were ordered by the Indiana Supreme Court in July 2003, effective January 1, 2004.

387. Indiana Administrative Rule 9(G)(1) excludes from public access the following documents and information:

1. Information excluded from public access pursuant to federal law;
2. Information excluded from public access pursuant to Indiana statute or other court rule, including but not limited to certain medical, mental health or tax records, adoption records, paternity records, certain arrest warrants, indictments, informations and other records relating to juvenile or criminal proceedings, and mediation, mini-trial or summary jury trial proceedings;
3. Information excluded from public access pursuant to specific court order;
4. Social Security Numbers;
5. Certain personal, identifying information (excluding names) of witnesses or victims in criminal or other specific proceedings, or information identifying the place of residence of judicial officers, clerks or other employees of courts and clerks of court;
6. Account numbers of specific assets, liabilities, accounts, credit cards, and personal identification numbers (PINs);
7. All orders of expungement entered in criminal or juvenile proceedings;
8. All personal notes and e-mail, and deliberative material, of judges, jurors, court staff and judicial agencies, and information recorded in personal data assistants (PDA's) or organizers and personal calendars.

on light green paper, and marked “Not for Public Access.”<sup>388</sup> When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), the information must be omitted or redacted from the filed document.<sup>389</sup> The excluded or redacted information must be included in a separate accompanying document – again, on light green paper and “conspicuously marked ‘Not for Public Access.’”<sup>390</sup> The separate document must also identify the caption and number of the case, as well as the “document and location within the document to which the redacted material pertains.”<sup>391</sup>

Rule 5(G) also applies to information contained in an appearance form filed pursuant to Indiana Trial Rule 3.1,<sup>392</sup> as well as to judgments or orders issued by a court.<sup>393</sup> Further, Rule 5(G) has been incorporated by reference into the Indiana Rules for Small Claims and the Indiana Rules of Procedure for Original Action. Both sets of procedural rules now include provisions dictating that “[d]ocuments and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G).”<sup>394</sup>

### B. Summary Judgment

Indiana Trial Rule 56(I) was amended, effective January 1, 2005, to provide that “[f]or cause found, the Court may alter any time limit set forth in this rule upon motion made within the applicable time limit.” The prior version of the Rule did not expressly require a motion “within the applicable time limit.” The amendment appears consistent with the Indiana Court of Appeals’ rulings in *Fort Wayne Lodge, LLC v. EBH Corp.*,<sup>395</sup> and *Desai v. Croy*,<sup>396</sup> which found that a trial court properly refused—and, in fact, lacked discretion—to consider a response or a motion for an extension of time to respond to a summary judgment

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*See* IND. ADMIN. R. 9(G)(1). On or about February 4, 2005, the Indiana courts website added a helpful “Frequently Asked Questions” document, answering various common questions relating to confidentiality under Administrative Rule 9. *See* Ind. Supreme Court, Div. of State Court Admin., *Frequently Asked Questions About Administrative Rule 9* (Feb. 2004), available at <http://www.in.gov/judiciary/admin/accesshandbook-faq.pdf>.

388. IND. TRIAL R. 5(G)(1).

389. IND. TRIAL R. 5(G)(2).

390. *Id.*

391. *Id.* Rule 5(G) does not apply to records sealed by the court pursuant to Indiana Code section 5-14-3-5.5 “or otherwise,” nor does it apply to “records to which public access is prohibited pursuant to Administrative Rule 9(H).” IND. TRIAL R. 5(G)(4).

392. IND. TRIAL R. 3.1(D).

393. IND. TRIAL R. 58(C) (directing that “[e]very court that issues a judgment or order containing documents or information excluded from public access pursuant to Administrative Rule 9(G)(1) shall comply with the provisions of Trial Rule 5(G)”).

394. IND. SMALL CLAIMS R. 2(E) (commencement of action); IND. ORIGINAL ACTION R. 3 (J) (application papers). Both Rules became effective January 1, 2005.

395. 805 N.E.2d 876 (Ind. Ct. App. 2004).

396. 805 N.E.2d 944 (Ind. Ct. App. 2004).

motion unless the response or motion for an extension is filed within the thirty-day time limit.<sup>397</sup>

### C. Selection of Special Judge

Trial Rule 79, governing the appointment and selection of a special judge, was amended, effective January 1, 2005, to specify the deadlines for each party to strike from the panel of judges.<sup>398</sup> Specifically, the moving party must strike from the panel within “seven (7) days from the day the clerk mails the panel to the parties.”<sup>399</sup> The nonmoving party (or the clerk of the court in an ex parte proceeding) must make the final strike within “seven (7) days from the date of the first strike.”<sup>400</sup> If the *nonmoving party* fails to strike within seven (7) days after the moving party strikes, “the moving party shall have seven (7) days from that time to make the final strike.”<sup>401</sup> If the *moving party* fails to strike within the time period proscribed by the Rule, “the judge who submitted the panel shall resume jurisdiction of the case.”<sup>402</sup>

### D. Adoption and Amendment of Local Rules

Prior to January 1, 2005, Trial Rule 81 passively provided that “[e]ach local court may from time to time make and amend rules governing its practice not inconsistent with these rules.” In its September 2004 Order, effective January 1, 2005, the Indiana Supreme Court amended Rule 81, “strongly encouraging” the courts to adopt local rules “not inconsistent with—and not duplicative of—these Rules of Trial Procedure or other Rules of the Indiana Supreme Court.”<sup>403</sup> Further, amended Rule 81 provides that the courts will be “required” to adopt a set of local rules “for use in all courts of record in a county” after January 1, 2007.<sup>404</sup> The amended Rule provides a detailed procedure for the proposal, adoption and amendment of local rules, as well as recommending the periodic review and amendment of local rules to account for “changes in statutes, case law, or [the] Rules of Trial Procedure or other Rules of the Indiana Supreme Court.”<sup>405</sup>

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397. See *supra* Part II.N.2 (discussing *Fort Wayne Lodge and Desai*).

398. IND. TRIAL R. 79(F).

399. IND. TRIAL R. 79(F)(2).

400. *Id.* The prior version of Rule 79 provided that “[t]he parties shall have not less than seven (7) days nor more than fourteen (14) days from the time the clerk mails the panel to the parties to strike as the court may allow.”

401. IND. TRIAL R. 79(F)(3).

402. IND. TRIAL R. 79(F)(4).

403. IND. TRIAL R. 81(A).

404. *Id.*

405. IND. TRIAL R. 81(B)-(J).