

DEVELOPMENTS IN INDIANA APPELLATE PROCEDURE: RULE AMENDMENTS, REMARKABLE CASE LAW, AND COURT GUIDANCE FOR APPELLATE PRACTITIONERS

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INTRODUCTION

The Indiana Supreme Court promulgates the Indiana Rules of Appellate Procedure (“Appellate Rules” or “Rules”), and Indiana’s appellate courts—the Indiana Supreme Court (“supreme court”), the Indiana Court of Appeals (“court of appeals”), and the Indiana Tax Court—interpret and apply the Rules. This Article summarizes amendments to the Rules, analyzes cases interpreting the Rules, and highlights potential pitfalls that appellate practitioners can avoid. The Article does not cover every case interpreting the appellate rules that has occurred during the survey period.¹ Instead, it focuses on the most significant decisions.

I. RULE AMENDMENTS

The supreme court amended the Appellate Rules, effective January 1, 2014, and the amendments affect Rules 23, 28, 30, and the sample forms.² First, and most significantly, the court amended Rule 30 to facilitate the use of electronic transcripts.³ The Rule previously required a trial court’s approval before appellants could use electronic transcripts on appeal,⁴ but now the trial court’s approval is no longer required.⁵ Under the amended Rule, with the consent of all parties and the court of appeals, the court reporter must “submit only an electronically formatted transcript.”⁶

Second, the supreme court amended Rule 28 to provide that in cases arising

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1. The survey period is between October 1, 2012, and September 30, 2013.

2. See Order Amending Indiana Rules of Appellate Procedure, No. 94S00-1301-MS-30 (Ind. Sept. 19, 2013), *available at* <http://www.in.gov/judiciary/files/order-rules-2013-0919-appellate.pdf>, *archived at* <http://perma.cc/4FBN-SHN7>; Order Amending Indiana Rules of Appellate Procedure, No. 94S00-1301-MS-30 (Ind. Sept. 13, 2013), *available at* <http://www.in.gov/judiciary/files/order-rules-2013-0913-appellate.pdf>, *archived at* <http://perma.cc/AB3Q-B7AG> [hereinafter Order].

3. Order Amending Indiana Rules of Appellate Procedure at 2, 94200-1301MS-30 (Sept. 13, 2013), *available at* <http://www.in.gov/judiciary/files/order-rules-2013-0913-appellate.pdf>, *archived at* <http://perma.cc/AY2C-T22V>.

4. *Id.*

5. *Id.*

6. *Id.*

under Ind. Trial Rule 60.5—Mandate of Funds—“the Transcript shall be in an electronic format,” as provided in Rule 30 or “as otherwise ordered pursuant to Rule 61.”⁷ Rule 61 provides that an appeal under Trial Rule 60.5 shall proceed in accordance with the orders of the supreme court.⁸ Third, the supreme court added language to Rule 23(C)(8),⁹ requiring parties to file an original and one copy of “any acknowledgement of the order setting oral argument.”¹⁰

Fourth, the court revised the sample forms.¹¹ The court revised the Notice of Appeal form to require appellants to specify their grounds for appeal, i.e., “[t]his is an appeal from an order declaring a statute unconstitutional.”¹² In addition, the “Certificate of Filing and Service” form now requires litigants to specify the means of service they used and specifically name the person served.¹³

Finally, as noted in the 2012 survey article, the court amended Appellate Rule 9(A), effective January 1, 2012, to require appellants to file the notice of appeal with the clerk of the appellate courts, as opposed to the trial court clerk as the Rule previously required.¹⁴ When the court amended the Rule, it included a grace period: until January 1, 2014, appellants who timely filed “the Notice of Appeal with the trial court clerk or Administrative Agency, instead of the Clerk as required by App. R. 9(A)(1),” were deemed to have timely filed the appeal and the appeal was not subject to forfeiture.¹⁵ The grace period expired on January 1, 2014, meaning that Notices of Appeal that are timely filed with the trial court clerk or Administrative Agency will not be deemed timely filed and will be subject to forfeiture.¹⁶

II. CASE LAW INTERPRETING APPELLATE RULES

Both the court of appeals and the supreme court issued opinions analyzing various Appellate Rules this year. The courts tackled a broad range of issues,

7. *Id.* at 1.

8. IND. R. APP. P. 61 (providing that “Supreme Court Review of cases involving the mandate of funds is commenced pursuant to the procedure in Trial Rule 60.5(B). The appeal shall thereafter proceed in accordance with such orders on briefing, argument and procedure as the Supreme Court may in its discretion issue.”).

9. IND. R. APP. P. 23(C)(8) (providing, “*Acknowledgement of Oral Argument*. An original and one (1) copy of any acknowledgment of the order setting oral argument. See Rule 52(C).”)

10. *See* Order, *supra* note 2, at 1.

11. *Id.* at 2.

12. *Id.* at 4.

13. *Id.* at 6-7.

14. Bryan H. Babb & Oni Harton, *Developments in Indiana Appellate Procedure: Rule Amendments, Remarkable Case Law, and Court Guidance for Appellate Practitioners*, 45 IND. L. REV. 959, 960 (2012).

15. Order Amending Indiana Rules of Appellate Procedure, No. 94S00-1101-MS-17 (Ind. Sep. 20, 2011), available at <http://www.in.gov/judiciary/files/rule-amends-2011-order-amend-2011-appellate.pdf>, archived at http://perma.cc/Q5CA-9J65_

16. *See id.*

such as when criminal defendants may appeal their convictions to which version of a published opinion controls and when the version published on the supreme court's website differs from West Publishing's version. But in the most important appellate procedure opinion during the reporting period, the court of appeals addressed when and how a third party may appeal a trial court's discovery order.

A. Third Party Appeal of Discovery Order

In a case with many procedural twists and turns, the court of appeals held that it lacked subject matter jurisdiction to hear the *Indianapolis Star's* ("The Star") appeal of a trial court's discovery order, which required *The Star* to disclose the identity of a person who had anonymously commented on *The Star's* website.¹⁷ This case began in 2010, when an anonymous commenter, under the pseudonym "DownWithTheColts," posted a comment to a story on indystar.com, insinuating that Junior Achievement's former president Jeffrey Miller had stolen funds.¹⁸ Miller sued for defamation and sought to obtain the identity of DownWithTheColts from *The Star* through non-party discovery.¹⁹ The trial court ordered *The Star* to disclose the commenter's identity.²⁰

The Star appealed the order, and Miller filed a motion to dismiss, arguing the court of appeals lacked subject matter jurisdiction.²¹ The court of appeals' motions panel summarily denied Miller's motion.²² The court then addressed the merits of *The Star's* appeal, without analyzing whether it had jurisdiction, and it remanded the matter back to the trial court.²³

On remand, the trial court once again ordered *The Star* to disclose the commenter's identity.²⁴ *The Star* once again appealed.²⁵ Despite the motions panel previously denying Miller's motion, and despite the court of appeals previously addressing the merits of *The Star's* appeal (*Miller I*), the court of appeals addressed whether it had subject matter jurisdiction.²⁶

The court looked to the Appellate Rules to determine whether it had jurisdiction.²⁷ Appellate Rule 5(A)²⁸ provides that the court of appeals has

17. *Ind. Newspapers, Inc. v. Miller (Miller II)*, 980 N.E.2d 852, 862 (Ind. Ct. App. 2012), *aff'd on reh'g, trans. granted, trans. vacated*.

18. *In re Ind. Newspapers, Inc. (Miller I)*, 963 N.E.2d 534, 538 (Ind. Ct. App. 2012).

19. *Id.* at 541.

20. *Id.* at 542.

21. *Miller II*, 980 N.E.2d at 855.

22. *Id.*

23. *Miller I*, 963 N.E.2d at 552-53.

24. *Miller II*, 980 N.E.2d at 855-56.

25. *Id.* at 856.

26. *Id.*

27. *Id.* at 857.

28. IND. R. APP. P. 5(A) (providing that "Appeals From Final Judgments. Except as provided in Rule 4, the Court of Appeals shall have jurisdiction in all appeals from Final Judgments of

jurisdiction in all appeals from final judgments.²⁹ Appellate Rule 2(H) provides, in pertinent part, that a judgment is final if “the trial court in writing expressly determines under Trial Rule 54(B) or Trial Rule 56(C) that there is no just reason for delay and in writing expressly directs the entry of judgment.”³⁰ Trial Rule 54(B) allows a trial court to “direct entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.”³¹ Alternatively, Appellate Rule 14(B) provides that upon a “motion by a party” an “appeal may be taken from other interlocutory orders if the trial court certifies its order and the court of appeals accepts jurisdiction over the appeal.”³²

The Star argued it could not appeal under Appellate Rule 2(H)(2) or 14(B)(1) because both rules refer to parties, and it was a non-party.³³ Therefore, *The Star* argued it could appeal under Appellate Rule 2(H)(5), which provides that a judgment is final if “it is otherwise deemed final by law.”³⁴ The court of appeals rejected this contention.³⁵ It noted that *The Star* had *jus tertii* standing, which allows a media entity to assert the First Amendment rights of unnamed defendants and to resist discovery as if the media entity “were itself a party.”³⁶ The court of appeals found that because *The Star* had third-party standing to assert the commenter’s First Amendment rights, it also had standing to pursue an appeal from the discovery order, as any other party would.³⁷ So, it needed to appeal the trial court’s order under either Trial Rule 54(B) or Appellate Rule 14(B), and it could not pursue an appeal under Appellate Rule 2(H)(5).³⁸

The court found that to hold otherwise “would mean that non-parties have greater rights than parties have to appeal from a discovery order.”³⁹ As such, parties must comply with Trial Rule 54 or Appellate Rule 14(B), whereas, under *The Star*’s argument, it could appeal, as a non-party, without complying with either rule.⁴⁰ The court concluded that a “non-party cannot have greater rights than a party would have to perfect an appeal by entry of a final judgment under Trial Rule 54(B) or a discretionary interlocutory appeal by certification under

Circuit, Superior, Probate, and County Courts, notwithstanding any law, statute or rule providing for appeal directly to the Supreme Court of Indiana. See Rule 2(H).”)

29. *Miller II*, 980 N.E.2d at 857.

30. *Id.*

31. *Id.* (quoting IND. R. TRIAL P. 54(B)).

32. *Id.*

33. *Id.* at 858.

34. *Id.*

35. *Id.* at 859.

36. *Id.* at 858-59.

37. *Id.* at 859.

38. *Id.*

39. *Id.*

40. *Id.*

Appellate Rule 14(B).⁴¹ This holding leaves undecided whether a non-party without *jus tertii* standing must also, or even can, comply with Trial Rule 54(B) and Appellate Rule 14(B), which both refer to parties.

The Star, however, argued that the discovery order was “equivalent to a final order because it is ‘the beginning and the end’ of *The Star*’s involvement” in the case, and *The Star* is otherwise without meaningful remedy.⁴² In addition, Indiana Constitution Article VII, section 6, provides for “an absolute right to one appeal,” meaning *The Star* could appeal the trial court’s discovery order.⁴³ The court of appeals found that this was an attempt to resuscitate the long dead “distinct and separate branch of the litigation” doctrine, which “held that a judgment was final and appealable even if it did not dispose of all the issues as to all the parties, so long as it disposed of ‘a distinct and definite branch of the litigation.’⁴⁴ The court concluded that Trial Rule 54(B) provided *The Star* with an adequate remedy.⁴⁵

Finally, *The Star* argued that even if Appellate Rule 14(B) applied to it, despite the rule only applying to parties, then the Rule would not provide an adequate remedy because the right to appeal under the Rule is discretionary.⁴⁶ And a discretionary right to appeal, under Appellate Rule 14(B), cannot satisfy the Indiana Constitution’s guarantee of a right to appeal.⁴⁷ The court of appeals found that if *The Star*’s argument were correct, then “Appellate Rule 14(B), which governs discretionary interlocutory appeals, would be unconstitutional *per se* because such appeals are not appeals as of right but can only be perfected if the trial court certifies its order and the court of appeals accepts jurisdiction.”⁴⁸ The court refused to find Appellate Rule 14(B) unconstitutional, calling this a “bridge too far.”⁴⁹ Moreover, “if appellate subject matter jurisdiction included the absolute right of non-parties to appeal from interlocutory discovery orders, there would be no end to appeals from such orders, and the Court of Appeals would become entangled in discovery disputes.”⁵⁰

Judge Pyle dissented.⁵¹ He found the “majority ably argues that Trial Rule 54(B)” and the demise of the distinct and separate branch doctrine “permit shoehorning *The Star* into this litigation as a party.”⁵² But rather than trying to squeeze *The Star* into the litigation as a party, he would have concluded “the shoe

41. *Id.*

42. *Id.* at 859-60.

43. *Id.* at 860.

44. *Id.* (quoting *Guthrie v. Blakely*, 125 N.E.2d 437 (Ind. 1955)).

45. *Id.* at 861.

46. *Id.* 861-62.

47. *Id.*

48. *Id.* at 862.

49. *Id.*

50. *Id.*

51. *Id.* at 863.

52. *Id.*

does not fit.”⁵³ Judge Pyle found that *The Star* had a due-process interest in appellate review of the trial court’s order, it was a non-party, and as a non-party, it “seems unreasonable to expect” *The Star* “to seek appellate review using a Trial Rule designed for parties.”⁵⁴

The Star then petitioned for rehearing, and the court of appeals granted the petition.⁵⁵ *The Star* argued, in part, that the trial court failed to comply with Trial Rule 34(C), which requires the trial court to condition a discovery order for a non-party “upon the pre-payment of damages to be proximately incurred.”⁵⁶ Had the trial court complied with this rule, then *The Star* argued its appeal would have been as of right under Appellate Rule 14(A)(1).⁵⁷ Rule 14(A)(1) provides an interlocutory appeal may be taken as of right from an order “[f]or the payment of money.”⁵⁸ The court of appeals rejected this argument for two reasons.⁵⁹ First, *The Star* waived the argument by failing to raise it before the trial court.⁶⁰ Second, the court of appeals had previously rejected “the argument that a discovery order . . . is equivalent to an order for the payment of money appealable as a matter of right under Rule 14(A)(1).”⁶¹

Finally, *The Star* asserted that Appellate Rule 66(B) should save its appeal.⁶² The Rule provides that “[n]o appeal shall be dismissed as of right because the case was not finally disposed of in the trial court.”⁶³ *The Star* asserted that if Appellate Rule 66(B) “does not apply here[,] it does not apply anywhere.”⁶⁴ The court was not persuaded by *The Star*’s argument because it cited no source supporting that Appellate Rule 66(B) could be used to circumvent the requirements of Trial Rule 54(B).⁶⁵ This is because “[w]hile Rule 66(B) might cure a minor or insubstantial procedural defect, it will not salvage a total failure to comply with Trial Rule 54(B).”⁶⁶

In one final twist to this case, the Indiana Supreme Court initially granted transfer.⁶⁷ But after oral argument, the court decided to not assume jurisdiction over the appeal, thus reinstating the court of appeals’ opinion.⁶⁸ The court concluded that *Miller II* (*The Star*’s second appeal) did not undermine the merits

53. *Id.*

54. *Id.*

55. *Id.* at 863-64.

56. *Id.* at 866.

57. *Id.*

58. IND. R. APP. P. 14(A)(1).

59. *Miller II*, 980 N.E.2d at 866.

60. *Id.*

61. *Id.*

62. *Id.*

63. IND. R. APP. P. 66(B).

64. *Miller II*, 980 N.E.2d at 867.

65. *Id.*

66. *Id.*

67. *Ind. Newspapers, Inc. v. Miller*, 987 N.E.2d 70 (Ind. 2013).

68. *Ind. Newspapers, Inc. v. Miller*, 994 N.E.2d 731 (Ind. 2013).

of *Miller I* (*The Star*'s first appeal) because *Miller I* did not address whether the court of appeals had jurisdiction.⁶⁹

B. Appeal of Criminal Conviction Without a Restitution Order

The supreme court held that the court of appeals had jurisdiction to hear a criminal appeal, even when the trial court had not yet ordered restitution.⁷⁰ In contrast, the court of appeals had previously held that criminal defendants may not appeal their convictions until the trial court orders restitution because until then the conviction is not a final judgment.⁷¹

In *Alexander*, the trial court sentenced the defendant without ordering restitution, the defendant appealed, and the State moved to dismiss, arguing that *Haste v. State*⁷² held that the court of appeals did not have jurisdiction until the trial court ordered restitution.⁷³ The motions panel denied the State's motion, but it raised the issue again in its appellee's brief.⁷⁴ The court of appeals, relying on *Haste*, held that until a trial court orders restitution the sentence is not a final judgment under Appellate Rule 2(H)(1), so Appellate Rule 9(A)(1)⁷⁵ does not allow the defendant to appeal.⁷⁶ After determining that the defendant's appeal should be dismissed, the court admonished trial courts not to delay making restitution orders, in part because the "trial court is still subject to the ninety (90) day time limitation in Indiana Trial Rule 53.2 ('the lazy judge rule')."⁷⁷

The supreme court granted transfer and decided that the court of appeals should not have dismissed because of the "particular circumstances" of *Alexander*'s case.⁷⁸ The court noted that in the two years since *Alexander*'s conviction, no court had considered his appeal on the merits, and the trial court had still not ordered restitution.⁷⁹ The court then distinguished *Haste* because "here the trial court advised *Alexander* that any Notice of Appeal had to be filed

69. *Id.*

70. *Alexander v. State*, 4 N.E.3d 1169 (Ind. 2014).

71. *Alexander v. State*, 987 N.E.2d 182, 185 (Ind. Ct. App. 2013), *trans. granted*.

72. 967 N.E.2d 576 (Ind. Ct. App. 2012).

73. *Alexander*, 987 N.E.2d at 184.

74. *Id.* at 183-84.

75. IND. R. APP. P. 9(A)(1) provides for the following:

Appeals from Final Judgments. A party initiates an appeal by filing a Notice of Appeal with the Clerk (as defined in Rule 2(D)) within thirty (30) days after the entry of a Final Judgment is noted in the Chronological Case Summary. However, if any party files a timely motion to correct error, a Notice of Appeal must be filed within thirty (30) days after the court's ruling on such motion is noted in the Chronological Case Summary or thirty (30) days after the motion is deemed denied under Trial Rule 53.3, whichever occurs first.

76. *Alexander*, 987 N.E.2d at 185.

77. *Id.* at 186.

78. *Alexander v. State*, 4 N.E.3d 1169, 1170 (2014).

79. *Id.*

within thirty days” of the sentencing hearing.⁸⁰ “That advisement sufficiently put matters in a state of confusion about Alexander’s appeal deadline, we think, such that he is entitled to have his appeal decided on the merits now.”⁸¹ The court then remanded the matter to the court of appeals for a merits decision.⁸²

C. The Version of a Decision Published in West Publishing’s Reporter Controls, Even if the Version Published on the Indiana Supreme Court’s Website Differs

The court of appeals determined that when a version of a decision on the supreme court’s website differs from the version published by West Publishing, the West version controls.⁸³ When *J.M. v. Review Board of the Indiana Department of Work Force Development*⁸⁴ was initially published on the Indiana Supreme Court’s website, footnote one provided that the identities of a “claimant and employing unit” are generally confidential.⁸⁵ And in *T.B. v. Review Board of the Indiana Department of Work Force Development*⁸⁶ the court of appeals cited this version of the opinion.⁸⁷ But when *J.M.* was published in West’s Northeastern Reporter, the footnote had changed to provide that courts would only keep parties confidential upon an “affirmative request.”⁸⁸ The court of appeals found that the version in West’s Reporter controlled because Appellate Rule 22 “provides that all Indiana cases shall be cited by giving the volume and page of the regional and official reporter (where both exist).”⁸⁹

D. Court of Appeals Refuses to Dismiss Appeal for Appellant’s Failure to Fully Comply with Rule 10(F)

Rule 10(F) requires the trial court clerk to “issue, file, and serve a timely Notice of Completion of Clerk’s Record.”⁹⁰ If the trial court clerk fails to do so, an “appellant shall seek an order from the Court on Appeal compelling the trial court clerk . . . to complete the Clerk’s Record and issue, file, and serve its Notice

80. *Id.* at 1171.

81. *Id.*

82. *Id.*

83. *Albright v. Review Bd., Ind. Dep’t of Work Force Dev.*, 994 N.E.2d 745, 747 n.1 (Ind. Ct. App. 2013).

84. 975 N.E.2d 1283 (Ind. 2012).

85. *Id.*

86. 980 N.E.2d 341, 343 n.1 (Ind. Ct. App. 2013).

87. *Id.*

88. *J.M.*, 975 N.E.2d at 1285 n.1.

89. *T.B.*, 980 N.E.2d at 343 n.1. It should also be noted that the discrepancy has been resolved because the version of *J.M.* on the supreme court’s website now matches the version in the West Reporter. See *J.M.*, No. 93S02-1203-EX-138, at 2 n.1, available at <http://www.in.gov/judiciary/opinions/pdf/10171201shd.pdf>, archived at <http://perma.cc/CP5G-XMT5> (last visited May 13, 2014).

90. IND. R. APP. P. 10(F).

of Completion.”⁹¹ If an appellant fails to seek such an order within fifteen days after the Notice of Completion was due, then the appeal “shall” be subject to dismissal.⁹²

In *In re TP Orthodontics*, the trial court clerk issued and served the notice of completion, but she did not file it with the court of appeals.⁹³ The appellant did not seek an order from the court of appeals compelling the trial court clerk to file the notice, as Rule 10(F) requires.⁹⁴ On appeal, the appellees moved to dismiss for failure to comply with Rule 10(F), but the motions panel denied the motion.⁹⁵ The appellees raised the issue again before the court of appeals.⁹⁶ The appellants explained that “the trial-court clerk certified that she timely prepared the notice of completion and sent copies to the parties and the court of appeals clerk (as well as our Supreme Court and Tax Court) by United States mail, postage prepaid.”⁹⁷ Despite these efforts, the “notice was not immediately reflected on the appellate docket. However, after the [appellees] filed their motion to dismiss, the docket was updated to reflect the notice, with the certificate-of-service” timely dated.⁹⁸ The court found that the trial-court-clerk’s certification “entitled [appellant] to the presumption that the trial-court clerk had done her duty,” and “[b]ased on these facts,” the court would not overrule the motions panel.⁹⁹

III. REFINING OUR APPELLATE PROCEDURE

During the survey period, the supreme court and the court of appeals offered helpful guidance, enabling practitioners to avoid various appellate-rule pitfalls.

A. If the Trial Court Declares a State Law Unconstitutional, Appeal to the Indiana Supreme Court, Not the Court of Appeals

The supreme court twice reminded practitioners that when the trial court declares a statute unconstitutional, the supreme court has mandatory and exclusive jurisdiction.¹⁰⁰ Appellate Rule 4(A) provides that the “Supreme Court shall have mandatory and exclusive jurisdiction over the” appeal of a final judgment “declaring a state or federal statute unconstitutional in whole or in part.”¹⁰¹ In *Girl Scouts of Southern Illinois v. Vincennes Indiana Girls, Inc.*, the trial court declared an “Indiana statute limiting the duration of reversionary

91. *Id.*

92. *Id.*

93. 995 N.E.2d 1057, 1063 (Ind. Ct. App. 2013).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *M & M Inv. Grp., LLC v. Ahlemeyer Farms, Inc.*, 994 N.E.2d 1108, 1111-12 n.2 (Ind. 2013); *Girl Scouts of S. Ill. v. Vincennes Ind. Girls, Inc.*, 988 N.E.2d 250, 253 (Ind. 2013).

101. IND. R. APP. P. 4(A)(1)(b).

interests to 30 years” unconstitutional, and the Appellant initially filed the appeal “in the Court of Appeals.”¹⁰² The supreme court noted that Appellate Rule 4(A) gave it “mandatory and exclusive jurisdiction over the appeal,” so under Appellate Rule 6,¹⁰³ the case was transferred from the court of appeals to the supreme court.¹⁰⁴

Similarly, in *M & M Investment Group, LLC v. Ahlemeyer Farms, Inc.*, the trial court issued an order declaring an Indiana statute unconstitutional.¹⁰⁵ In an interesting twist, the losing party appealed to the court of appeals, and the court of appeals affirmed the trial court’s decision.¹⁰⁶ The supreme court granted transfer,¹⁰⁷ and it upheld the constitutionality of the statute.¹⁰⁸ The court found, under Appellate Rule 4(A)(1)(b), that the appeal to the court of appeals “was neither necessary nor proper under our Appellate Rules as this Court has ‘mandatory and exclusive jurisdiction’ over ‘Appeals of Final Judgments declaring a state or federal statute unconstitutional in whole or in part.’”¹⁰⁹

B. A Trial Court Must Enter a Finding that Appellant Has Shown Good Cause Before It May Certify an Order for Discretionary Interlocutory Appeal, When More Than Thirty Days Elapsed Since It Issued the Appealed Order

In *Pipkin v. State*, the State charged Pipkin with failing to register as a sex offender, and he moved to dismiss the charges.¹¹⁰ The trial court denied the motion on September 8, 2011.¹¹¹ On May 3, 2012, the trial court, at Pipkin’s request, certified the order for interlocutory appeal, and Pipkin filed his notice of appeal.¹¹² On appeal, the court of appeals sua sponte raised the issue of whether it had jurisdiction.¹¹³ The court raised the issue because Appellate Rule 14(B)(1)(a) provides that a “motion requesting certification of an interlocutory order must be filed in the trial court within thirty (30) days after the date of the

102. *Girl Scouts*, 998 N.E.2d at 253.

103. IND. R. APP. P. 6 provides the following:

If the Supreme Court or Court of Appeals determines that an appeal or original action pending before it is within the jurisdiction of the other Court, the Court before which the case is pending shall enter an order transferring the case to the Court with jurisdiction, where the case shall proceed as if it had been originally filed in the Court with jurisdiction.

104. *Girl Scouts*, 998 N.E.2d at 253.

105. *M & M Inv. Grp.*, 994 N.E.2d at 1111.

106. *M & M Inv. Grp., LLC v. Ahlemeyer Farms, Inc.*, 972 N.E.2d 889, 891 (Ind. Ct. App. 2012), *trans. granted*.

107. *M & M Inv. Grp., LLC v. Ahlemeyer Farms, Inc.*, 978 N.E.2d 752 (Ind. 2012).

108. *M & M Inv. Grp.*, 994 N.E.2d at 1125.

109. *Id.* at 1111-12 n.2.

110. 982 N.E.2d 1085, 1085-86 (Ind. Ct. App. 2013).

111. *Id.* at 1086.

112. *Id.*

113. *Id.*

interlocutory order is noted in the Chronological Case Summary unless the trial court, for good cause, permits a belated motion.¹¹⁴ When the trial court grants a belated motion and certifies the appeal, the Rule provides the trial court must “make a finding that the certification is based on a showing of good cause, and shall set forth the basis for that finding.”¹¹⁵

In *Pipkin*, the trial court had clearly failed to certify Pipkin’s request within thirty days of the appealed order, and it also failed to make a finding that good cause was shown.¹¹⁶ The court of appeals concluded that “[b]ecause the trial court failed to find good cause for belatedly pursuing an interlocutory appeal . . . Pipkin’s appeal was not properly perfected. We therefore lack jurisdiction over this matter, and must dismiss his appeal.”¹¹⁷

*C. If a Party Fails to Depose a Witness Before Trial, Then that Party May
Not Claim After Trial that the Witness’s Testimony
Is Newly Discovered Evidence*

In *State Farm Fire & Casualty Co. v. Radcliff*, a hailstorm damaged many homes in Indianapolis in 2006, and Radcliff’s company repaired the homes of numerous State Farm customers.¹¹⁸ State Farm then investigated Radcliff for fraud, and based on the company’s efforts, he was eventually arrested on fourteen felony counts, though the charges were later dropped as part of a diversion agreement.¹¹⁹ “State Farm then sued Radcliff . . . for fraud and racketeering,” and he counterclaimed for defamation.¹²⁰ After a six-week jury trial, Radcliff prevailed, and the jury awarded him \$14.5 million.¹²¹

State Farm appealed, and in its reply brief, it asked the court of appeals to grant its motion for limited remand under Appellate Rule 37.¹²² Appellate Rule 37(A) provides that any party may move to have “the appeal be dismissed without prejudice or temporarily stayed and the case remanded to the trial court . . . for further proceedings.”¹²³ Initially, the court of appeals noted that because State Farm only raised the issue in its reply brief, the issue was waived under Appellate Rule 46(C),¹²⁴ which provides that no “new issues shall be raised in the reply brief.”¹²⁵

Nevertheless, the court went on to address the merits of State Farm’s

114. IND. R. APP. P. 14(B)(1)(a).

115. *Id.*

116. *Pipkin*, 982 N.E.2d at 1086.

117. *Id.*

118. 987 N.E.2d 121, 125 (Ind. Ct. App. 2013), *trans. denied*.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 155.

123. IND. R. APP. P. 37(A).

124. *Radcliff*, 987 N.E.2d at 125.

125. IND. R. APP. P. 46(C).

argument.¹²⁶ State Farm argued that “newly discovered evidence from a former” employee supported that “Radcliff committed fraud—this time” on the trial court.¹²⁷ The court of appeals declined to remand the case because State Farm did not depose the employee before trial, despite having a deposition scheduled.¹²⁸ Moreover, the employee had contacted State Farm with the fraud allegations before State Farm filed a motion to correct errors with the trial court.¹²⁹ “[Y]et State Farm did not include this information in its motion.”¹³⁰ Therefore, the court denied State Farm’s motion.¹³¹

D. Parties Must Cite the Record

In *Solms v. Solms*, Cherie Solms petitioned the trial court for an order for protection against her ex-husband, Michael.¹³² The trial court denied the petition, and Cherie appealed.¹³³ Michael filed a brief that did not include “any supporting citations to the appellate record or the appendices, contrary to the requirements of Indiana Appellate Rule 46(A)(6)(a),”¹³⁴ which requires facts to be supported by “page references.”¹³⁵ The court found that “Michael’s wholesale failure to follow our appellate rules has made his assertions unduly burdensome to verify. Accordingly, Michael’s brief carries no persuasive value and has the same effect as if no brief had been filed.”¹³⁶ Because the court considered Michael not to have submitted a brief, it applied a “less stringent standard of review,” meaning it would reverse if Cherie “establishe[d] prima facie error.”¹³⁷ The court found she cleared this lower hurdle and reversed the trial court.¹³⁸

IV. INDIANA’S APPELLATE COURTS

A. Case Data from the Supreme Court

During the 2013 fiscal year,¹³⁹ the supreme court disposed of 1005 cases,

126. *Radcliff*, 987 N.E.2d at 155.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. 982 N.E.2d 1, 2 (Ind. Ct. App. 2012).

133. *Id.*

134. *Id.*

135. IND. R. APP. P. 46(A)(6)(a).

136. *Solms*, 982 N.E.2d at 2.

137. *Id.*

138. *Id.* at 3.

139. The Indiana Supreme Court 2013 fiscal year ran from July 1, 2012 to June 30, 2013. See INDIANA SUPREME COURT ANNUAL REPORT 2012-13, at 1 (2013), available at <http://www.in.gov/judiciary/supreme/files/1213report.pdf>, archived at <http://perma.cc/ZK8P-M3CJ> [hereinafter 2013 ANNUAL REPORT].

heard seventy-two oral arguments, and handed down seventy-eight majority opinions.¹⁴⁰ The court's caseload consisted of the following types of cases: 52.6% criminal; 29.6% civil; 13.6% attorney discipline; 3.5% original actions; 0.3% judicial discipline; 0.2% tax; 0.1% mandate of funds; and 0.1% unauthorized practice of law.¹⁴¹ Despite civil and tax cases only comprising 29.8% of the court's case load, they accounted for 56.9% of oral arguments.¹⁴² In contrast, criminal cases comprise 52.6% of cases disposed of by the court, but only 41.7% of oral arguments.¹⁴³ This disparity arose because the court denied transfer on 486 out of 529 total criminal cases (91.8% denial rate), whereas the court only denied transfer on 252 out of 297 total civil cases (84.8% denial rate).¹⁴⁴

Chief Justice Dickson wrote sixteen majority opinions and three non-majority opinions; Justice Rucker wrote twelve majority opinions and nine non-majority opinions; Justice David wrote seventeen majority opinions and three non-majority opinions; Justice Massa wrote thirteen majority opinions and five non-majority opinions; Justice Rush wrote four majority opinions and two non-majority opinion; and Justice Sullivan wrote six majority and two non-majority opinions.¹⁴⁵ Justice Rucker led the court with seven dissents, which was half of the court's total number of dissents.¹⁴⁶ In comparison, Chief Justice Dickson, Justice David, and Justice Rush each only authored one dissent,¹⁴⁷ and 72% of the court's opinions were unanimous.¹⁴⁸

B. Court Welcomes Justice Rush

On November 7, 2012, at a private ceremony, Chief Justice Dickson swore in Justice Loretta H. Rush as the supreme court's 108th justice.¹⁴⁹ On December 28, 2013, Justice Rush's robing ceremony took place and she took her oath of administration.¹⁵⁰ Less than two months later, she handed down her first two

140. *Id.* at 14.

141. *Id.* at 15.

142. *Id.* at 18.

143. *Id.*

144. *See id.* at 16.

145. *Id.* at 20. Note that Justices Rush and Sullivan each only served a portion of the fiscal year.

146. *Id.* at 21.

147. *Id.*

148. *Id.*

149. Press Release, Ind. Sup. Ct., Loretta Rush to Be Sworn-In as 108th Indiana Supreme Court Justice (Nov. 2, 2012), http://www.in.gov/activecalendar/EventList.aspx?fromdate=10/1/2012&todate=1/30/&display=Month&type=public&eventidn=60017&view=EventDetails&information_id=121110, archived at <http://perma.cc/QJ85-3SYR>.

150. Press Release, Ind. Sup. Ct., Robing Ceremony for Justice Rush December 28th (Dec. 19, 2012), http://www.in.gov/activecalendar/EventList.aspx?fromdate=10/1/2012&todate=1/30/2013&display=Month&type=public&eventidn=60918&view=EventDetails&information_id=12

majority opinions,¹⁵¹ *Sickels v. State*¹⁵² and *K.W. v. State*.¹⁵³ During her first year on the high court, none of her opinions has sparked a dissenting or concurring opinion.¹⁵⁴

Indiana University Robert H. McKinney School of Law Professor Joel Schumm declared her first year a success: Justice Rush “wowed the legal community and beyond with her thoughtfully crafted and impactful opinions, incisive questions at oral argument, and her many speaking engagements and administrative work.”¹⁵⁵ He was impressed with her opinions:

A lawyer, local generalist newspaper reporter, or high school drop-out litigant can easily understand the Court’s rationale without investing much time or energy. As law students (and even some law professors) lament, the same cannot be said of every court opinion, some of which provoke head-scratching and confusion even after multiple readings.¹⁵⁶

One of your authors had the honor of clerking for Justice Rush during her first year at the supreme court, and her passion, energy, and intellect are an inspiration to all attorneys.

C. Case Data from the Court of Appeals

During 2013,¹⁵⁷ the court of appeals disposed of 3362 cases.¹⁵⁸ This continued a six-year trend of declining case loads, with the court’s case load dropping from 4121 in 2008.¹⁵⁹ The court disposed of 1843 criminal cases, 980 civil cases, and 539 other cases.¹⁶⁰ The court affirmed the trial court 80.4% of the time, with the court affirming 86% of criminal cases, 91.2% of post-conviction relief cases, and 63.4% of civil cases.¹⁶¹ The court of appeals manages its case load with impressive speed, with each case pending for one month on average.¹⁶²

2937, archived at <http://perma.cc/CDX5-L983>.

151. 2013 ANNUAL REPORT, *supra* note 139, at 26.

152. 982 N.E.2d 1010 (Ind. 2013).

153. 984 N.E.2d 610 (Ind. 2013).

154. Joel Schumm, *A Remarkable First Year for Justice Loretta Rush*, IND. LAW BLOG (Nov. 4, 2013), http://indianalawblog.com/archives/2013/11/ind_courts_a_re_3.html, archived at <http://perma.cc/7LTG-4PE8>.

155. *Id.*

156. *Id.*

157. The court of appeals 2013 annual report covers January 1, 2013 through December 31, 2013. See INDIANA COURT OF APPEALS 2013 ANNUAL REPORT (2013), available at http://www.in.gov/judiciary/appeals/files/2013_Court_of_Appeals_Annual_Report.pdf, archived at <http://perma.cc/FD2Q-V44P>.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 2.

162. *Id.*

In addition to deciding cases, the court issued almost 7000 other orders.¹⁶³ It published 25.4% of its opinions and had seventy-two dissenting opinions during the year.¹⁶⁴

D. Pilot Project for Expedited Transcripts

The court of appeals determined “that Indiana should explore some of the ways used by other jurisdictions to improve court reporting services.”¹⁶⁵ The court ordered a pilot project using “expedited transcripts by professional transcription experts,” which are already used in several other jurisdictions.¹⁶⁶ This order was the second of three orders in the special court reporting project,¹⁶⁷ and it followed an order by the supreme court last year establishing a pilot project to explore the use of an audio/visual record on appeal.¹⁶⁸ The goal of the court reporting project is to present the record on appeal “in a more timely, efficient, and cost-effective manner.”¹⁶⁹

The expedited transcript pilot project will involve twenty transcripts generated in Hamilton, Lake, Madison, Tippecanoe, and Vanderburgh counties.¹⁷⁰ The judges in those counties will select four cases to participate in the pilot project, and alternative appellate procedures will be utilized.¹⁷¹ The alternative procedures require the transcription service to certify the transcript and file it with the trial court clerk within 30 days of the filing of Notice of Appeal.¹⁷² The appellant then has forty five days after the date the trial court clerk serves its Notice of Completion of Transcript to file the appellant’s brief.¹⁷³ This contrasts with the thirty days that an appellant has under Appellate Rule 45(B)(1). Similarly, the appellee is given forty-five days to file its brief under the alternative procedures,¹⁷⁴ whereas, under Appellate Rule 45(B)(2) it has thirty days. The alternative procedures also provide that “[a]ll briefs, appendices, addendums, and petitions filed with the court on appeal . . . shall be filed in paper format as required under the Rules of Appellate Procedure.”¹⁷⁵

163. *Id.*

164. *Id.* at 5.

165. *In re Pilot Project for Expedited Transcripts*, 977 N.E.2d 1010, 1010-11 (Ind. Ct. App. 2012).

166. *Id.* at 1011.

167. *Id.*

168. *In re Pilot Project for Audio/Visual Recordings*, 976 N.E.2d 1218, 1218 (Ind. 2012).

169. *Id.* at 1219.

170. *In re Pilot Project for Expedited Transcripts*, 977 N.E.2d at 1011.

171. *Id.*

172. *Id.*

173. *Id.* at 1011-12.

174. *Id.* at 1012.

175. *Id.*

CONCLUSION

During the survey period, the Indiana appellate courts analyzed, interpreted, and applied the Appellate Rules. The amendments to the Rules will help move the courts closer to an electronic future. And the appellate court decisions will guide the future application of the Rules, helping practitioners to more effectively practice before the courts. Finally, with the addition of Justice Rush to the supreme court, it has one more new face, after so many years of familiar ones.