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 appellate practitioners should avoid. This Article does not cover every case interpreting the Rules that occurred during the survey period.[1] Instead, it focuses on the most significant decisions.

I. RULE AMENDMENTS

In recent years, there have been significant changes to the Appellate Rules due to the advent of electronic filing, which became mandatory for attorneys on July 1, 2016.[2] There were significantly fewer changes during this survey period.

The Indiana Supreme Court amended Appellate Rule 29(B) regarding Audio and Video Recordings used as exhibits. The rule as amended specifies that "CDs, DVDs, flash drives, or other physical medial shall be submitted in an envelope stabled into a conventional volume."[3] "Conventional" in this context refers to the defined term, "conventional filing," which means "the physical non-electronic presentation of documents to the Clerk or Court."[4]

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1. The survey period is between October 1, 2017, and September 30, 2018.

2. Press Release, Ind. Supreme Court, E-Filing Progress Continues with Certain Cases and Counties Requiring the Move Away from Paper (Apr. 12, 2016), http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2016&todate=12/31/2016&display=Month&type=public&eventidn=245063&view=EventDetails&information_id=241097 [perma.cc/4LLN-WTKF].

3. Order Amending Indiana Rules of Appellate Procedure, No. 18S-MS-141, at 3 (Ind. Jul. 26, 2018), https://www.in.gov/judiciary/files/order-rules-2018-0726-appellate.pdf [https://perma.cc/S74E-78CD] [hereinafter July 26, 2018 Order].

4. IND. R. APP. P. 2(Q).

The Indiana Supreme Court also amended Appellate Rule 14. Last year, the Indiana Supreme Court amended Rule 14(B)(3) to state that the appellant should file electronically, rather than conventionally, a notice of appeal for discretionary interlocutory appeals.[5] In contrast to "conventional filing," "electronic filing" or "e-filing" is defined as "a method of filing documents with the clerk of any Indiana court by electronic transmission using the Indiana E-Filing System."[6] "E-Filing does not include transmission by facsimile or by email."[7] In 2018, the Supreme Court removed these distinctions from the rules, leaving simply the words "file" or "filing."[8]

For example, the Supreme Court removed the word "electronically" from Rule 14(B) and (C), and the word "conventionally" from Rules 14(A) through (C) and 14.1(B).[9] Similarly, the Supreme Court removed the word "conventionally" from Appellate Rule 9 regarding the Initiation of the Appeal.[10] Appellate Rule 9(A) used to read that a "party initiates an appeal by conventionally filing a Notice of Appeal."[11] In its present form, Appellate Rule 9(A) states, "[a] party initiates an appeal by filing a Notice of Appeal."[12]

The Supreme Court made similar changes to Appellate Rule 16(H) regarding Appearances.[13] The rule formerly stated, "a party shall conventionally file an appearance," but the rule now no longer contains the word "conventionally."[14] Appellate Rule 63(C) received an identical revision regarding initiating a Petition for Review of a Tax Court decision.[15] These Petitions are no longer required to be filed "conventionally."[16] With these amendments, each of these rules simply instruct that steps should be taken "by filing," with Appellate Rule 68 generally requiring all attorneys to use e-filing.[17]

The Indiana Supreme Court made amendments to Appellate Rule 23(D), providing instruction for when a document is received, but is deemed not filed due to noncompliance with the Rules.[18] While the Court of Appeals and Tax

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5. Order Amending Indiana Rules of Appellate Procedure, No. 94S00-1701-MS-5, at 1 (Ind. Aug. 3, 2017), http://www.in.gov/judiciary/files/order-rules-2017-0803-appellate.pdf [https://perma.cc/9HM2-3WXH]; *See* IND. R. APP. P. 2(Q), 2(R).

6. IND. R. APP. P. 2(R).

7. *Id.*

8. July 26, 2018 Order, *supra* note 3, at 1-4.

9. *Id.* at 1-3.

10. *Id.* at 1.

11. *Id.*

12. *Id.*; IND. R. APP. P. 9(A).

13. July 26, 2018 Order, *supra* note 3, at 3.

14. *Id.*; IND. R. APP. P. 16(H).

15. July 26, 2018 Order, *supra* note 3, at 4.

16. *Id.*; IND. R. APP. P. 63(C).

17. IND. R. APP. P. 68(C); July 26, 2018 Order, *supra* note 3, at 1-4.

18. Order Amending Indiana Rules of Appellate Procedure, No. 18S-MS-141, at 1 (Ind. Nov. 29, 2018), https://www.in.gov/judiciary/files/order-rules-2018-1129-appellate.pdf [https://perma.cc/Q3ZU-UJ7R] [hereinafter Nov. 29, 2018 Order].

Court have been able to issue a "Notice of Defect" in prior years, the Court has given additional guidance on this topic.[19] Many of the bases for issuing a Notice of Defect are unchanged. For example, the Indiana Supreme Court continues to allow the Clerk to issue a Notice of Defect if one or more of the following items are missing, insufficient, or incomplete:

- A certificate of service, *see* Ind. Appellate Rules 24, 57(G)(7), 68(F);
- A word count certificate *see* App. Rs. 34(G)(2), 44(E) & (F), 54(E), 57(G)(6);
- A table of contents or table of authorities, *see* App. Rs. 46(A)(1) & (2), 46(B), 46(E)(1), 50(A)(2), 50(B)(1), 50(C), 57(G)(2);
- For a motion to proceed *in forma pauperis*, a copy of any affidavit supporting the request to proceed *in forma pauperis* that was filed with the trial court or an affidavit conforming to Form #App. R. 40-2; or a copy of the order setting forth the trial court's reasons for denying the *in forma pauperis* status on appeal;
- For an Appendix, a verification of accuracy, *see* App. Rs. 50(A)(2)(i), 50(B)(1)(f);
- For an Appellant's Brief, an accompanying copy of the trial court's written opinion, memorandum of decision, or findings of fact and conclusions relating to the issue(s) raised on appeal, *see* App. R. 46(A)(12);
- For an Appellant's Brief in a criminal appeal where the sentence is at issue, an accompanying copy of the sentencing order, *see* App. R. 46(A)(12);
- For a Petition to Transfer, a brief statement, set out by itself on the page immediately following the front page, identifying the issue, question presented, or precedent warranting transfer, *see* App. R. 57(G)(1); or
- For a Petition for Review or brief in response, a brief section entitled *Reasons for Granting or Denying Review*, set out by itself immediately before the Argument section, explaining why review should or should not be granted, *see* App. R. 63(I).[20]

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19. *Id.*; *see also In re* Documents Tendered for Filing that Fail to Comply with Certain Rules of Appellate Procedure, 83 N.E.3d 62 (Ind. 2017).

20. Nov. 29, 2018 Order, *supra* note 18, at 1-2.

The Court omitted certain conditions when a Notice of Defect may be issued,[21] and added the following new circumstances:

- For any document filed after the Notice of Appeal, a filing fee or material required by Appellate Rule 40; *see* App. Rs. 9(E), 40, 56(B), 63(P); and

- Document was tendered without first filing an appearance, *see* App. R. 16.[22]

The Clerk may issue a Notice of Defect for inclusion of any of the following prohibited items:

- For any Brief, any additional documents, other than the appealed judgment or order, *see* App. Rs. 46(F), 46(H); and

- For any document, information excluded from public access when the document is not accompanied by a Notice to Maintain Exclusion from Public Access, *see* App. R. 23(F)(3).[23]

Finally, the Clerk may issue a Notice of Defect if the document is otherwise defective because:

- Document Production issues exist, see App. Rs. 43(C), 51(A), and/or 54(F);

- Page numbering issues exist, see App. Rs. 23(F)(3)(b), 34(G), 43(F) and/or 51(C); or

- The document was conventionally filed but should have been electronically filed through the Indiana E-Filing System, see App. R. 68(C).[24]

The Indiana Supreme Court amended Indiana Appellate Rule 43(D), adding "Calisto MT" as an approved font for use in briefs and petitions, and removing

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21. *In re* Documents Tendered for Filing that Fail to Comply with Certain Rules of Appellate Procedure, 83 N.E.3d 62 (Ind. 2017). These include the following: a required signature and/or identifying information, *see* App. Rs. 23(E), 46(A)(9), 46(B), 68(H); for the first document filed after the Notice of Appeal by a party proceeding *in forma pauperis*, the material required by Appellate Rule 40(C); and for an Appearance, information required by Appellate Rule 16(B).

22. Nov. 29, 2018 Order, *supra* note 18, at 2.

23. *Id.* Argument or other material inappropriate for an Appendix is no longer a basis for a Notice of Defect, *see id.*

24. *Id.* One category was removed from this list: (1) One or more "form" violations exist, see App. Rs. 23(E), 34(G), 43, 51, 54(F), 63(I).

"Courier" and "Courier New" from the list of approved fonts.[25]

The Court also amended Appendix A regarding "Standards for Preparation of Electronic Transcripts."[26] In subsection (6), the Supreme Court eliminated the time limitation "beginning July 1, 2016 and ending on June 30, 2018," and further removed instructions for transcript font, font size, and font color.[27] In subsection (19), the Court relieved the Clerk of its duty to scan all files for malware, and removed wording requiring that such malware be rejected "by the Clerk and will not be processed."[28] However, it should be noted that the appellate courts still may reject files containing malware, and "[r]ejection of a filing because it contains malware will not necessarily excuse a late filing."[29]

The Supreme Court amended Indiana Appellate Rule 49(A), adding that "[a]ny party must seek leave of court to amend a filed appendix."[30] On the same day, the Supreme Court added to Indiana Appellate Rule 50(C), instructing that "[t]he Table of Contents shall be submitted as Appendix Volume 1 in accordance with Rule 51(F)."[31] Appellate Rule 51 governs the Form and Assembly of Appendices.[32]

Finally and significantly, the Supreme Court amended Indiana Appellate Rule 57(C) to extend the deadline for filing a Petition to Transfer to "forty-five days after the adverse decision if rehearing was not sought."[33] This is a deviation from the well-established thirty-day deadline that previously controlled.[34] Other time requirements in Appellate Rule 57 remain unchanged.

II. CASE LAW INTERPRETING APPELLATE RULES

The Indiana Court of Appeals and Indiana Supreme Court issued a number of decisions analyzing the Appellate Rules, including further developing Indiana's jurisprudence on the finality of judgment and other issues.

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25. Order Amending Indiana Rules of Appellate Procedure, No. 18S-MS-141, 1 (Ind. June 26, 2018), https://www.in.gov/judiciary/files/order-rules-2018-0626-appellate.pdf [https://perma.cc/H7D7-QE9U].

26. *Id.* at 1-2.

27. *Id.* at 1.

28. *Id.*

29. *Id.* at 2.

30. Order Amending Indiana Rules of Appellate Procedure, No. 18S-MS-141, 1 (Ind. Sept. 21, 2018), https://www.in.gov/judiciary/files/order-rules-2018-0921-appellate.pdf [https://perma.cc/2F9U-WM9R].

31. *Id.*

32. IND. R. APP. P. 51.

33. Order Amending Indiana Rules of Appellate Procedure, No. 18S-MS-141, 1 (Ind. July 30, 2018), https://www.in.gov/judiciary/files/order-rules-2018-0730-appellate.pdf [https://perma.cc/FK7F-L98T].

34. *Id.*

A. Premature Notice of Appeal from a Non-Final Decision Warrants Dismissal

In *D.J. v. Indiana Department of Child Services*, the Indiana Supreme Court discussed the timeliness of a notice of appeal.[35] The appellant filed its notice of appeal before the trial court entered a final judgment.[36] However, the trial court entered final judgment before the trial court clerk had filed the notice of completion of clerk's record.[37] The Indiana Supreme Court found that because the notice of completion of clerk's record is the document that terminates the trial court's jurisdiction, the trial court had jurisdiction to enter final judgment, and the appeal was appropriate.[38] "[P]remature notices of appeal did not deprive the Court of Appeals of jurisdiction to hear the appeal."[39] The Indiana Court of Appeals subsequently interpretted this to mean that "our supreme court ha[d] significantly relaxed procedural requirements in this regard."[40] However, in reviewing the Court of Appeals' decision, the Indiana Supreme Court dispelled this assumption, clarifying that where the record on appeal shows no final judgment, the proper remedy is dismissal of the appeal.[41] In 2018, the Indiana Court of Appeals continued to follow this rule.[42]

In *Matter of Guardianship of Hurst*, the Indiana Court of Appeals considered whether a trial court's ruling on a so-called "motion to correct error," was a final judgment.[43] The Court of Appeals found that the motion was not a "motion to correct error" as it had been "self-styled" by the appellant, but was "in fact a motion to reconsider."[44] Accordingly, the "trial court's ruling on that motion [could not] itself be considered a final judgment pursuant to Indiana Appellate Rule 2(H)(4)."[45] Lacking finality, the order could not properly be appealed.[46]

In *Severance v. Pleasant View Homeowners Association*, the trial court denied a motion for a permanent injunction and dissolved a previously-issued preliminary injunction, finding that the homeowners association ("HOA") did not

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35. 68 N.E.3d 574, 576-77 (Ind. 2017).

36. *Id.* at 577.

37. *Id.*

38. *Id.* at 580-81.

39. *Id.* at 581.

40. Town of Ellettsville v. DeSpirito, 78 N.E.3d 666, 672 n.3 (Ind. Ct. App.), *trans. granted, opinion vacated sub nom.*, Richland Convenience Store Partners, LLC v. DeSpirito, 92 N.E.3d 1090 (Ind. 2017), *and vacated*, 111 N.E.3d 987 (Ind. 2018).

41. Town of Ellettsville v. DeSpirito, 87 N.E.3d 9, 12 (Ind. 2017).

42. *In re* Guardianship of Hurst, 93 N.E.3d 790, 792 (Ind. Ct. App. 2018); Severance v. Pleasant View Homeowners Ass'n, Inc., 94 N.E.3d 345, 349 (Ind. Ct. App.), *trans. denied* 110 N.E.3d 1145 (Ind. 2018).

43. *In re Guardianship of Hurst*, 93 N.E.3d at 792.

44. *Id.*

45. *Id.*

46. *Id.*

have the corporate authority to bring the lawsuit.[47] The trial court did not decide the issue of damages, and a hearing was scheduled for a later date on this remaining issue.[48] Subsequently, the HOA filed a motion to reconsider, and informed the trial court that "a properly constituted board of directors was now in place and that the HOA's membership had voted to ratify and approve all prior actions . . . including institution of the current lawsuit."[49] The trial court denied the motion to reconsider, because "the court genuinely believed that it could not go back and reopen and consider the merits of its . . . order denying the permanent injunction because that order was a final judgment."[50] The Indiana Court of Appeals disagreed, stating "[t]his belief was mistaken."[51] Citing Indiana Appellate Rule 2(H), the Indiana Court of Appeals held that the trial court's order denying the permanent injunction "was not a final judgment because it specifically reserved the issue of damages for future determination and did not otherwise expressly direct entry of judgment as to fewer than all the claims between these parties."[52] Noting that the trial court had "inherent power to reconsider an order or ruling if the action remains *in fieri*, or pending resolution," the Indiana Court of Appeals found that the trial court's resolution of the case was clearly erroneous, and reversed and remanded "for an evidentiary hearing to consider the merits of issuing a permanent injunction."[53]

B. Propriety of Appealing Based on a Monetary Judgment, and Raising Only Other Issues

In *S.R.W. v. Turflinger*, the Indiana Court of Appeals discussed the propriety of an appeal taken pursuant to Indiana Appellate Rule 14(A)(1) as a matter of right from a money judgment, which did not seek review of the money judgment.[54] The appellant raised the sole issue of whether the trial court improperly denied the appellant's motion for change of judge.[55] Ultimately, the Indiana Court Appeals answered this question in the negative on the merits, but also discussed that such an appeal may be procedurally improper.[56] First, the court "acknowledge[d] that 'an interlocutory appeal raises every issue presented by the order that is the subject of the appeal.'"[57] The Court of Appeals went on to explain that "the purpose of allowing appeals for the payment of money is to

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47. *Severance*, 94 N.E.3d at 348.
48. *Id.*
49. *Id.*
50. *Id.*at 348-49.
51. *Id.* at 349.
52. *Id.*
53. *Id.*
54. 100 N.E.3d 285, 286 (Ind. Ct. App. 2018).
55. *Id.*
56. *Id.* at 289.
57. *Id.* (internal citations omitted) (quoting Tom-Wat, Inc. v. Fink, 741 N.E.2d 343, 346 (Ind. 2001)).

provide a remedy to parties compelled to part with money which is tied up awaiting litigation."[58] Here, the subject matter of the appeal was whether the appellant was wrongfully denied a change of judge; the appellant did not raise the issue of the monetary judgment.[59] Though the Court of Appeals did not hold that such a practice is prohibited, the opinion stated, "[i]t seems to us to defeat the purpose of allowing such interlocutory appeals if the party does not actually raise an issue regarding the payment of money."[60] The Court of Appeals "question[ed] whether [appellant's] appeal [wa]s proper."[61] While the Court of Appeals went on to address the merits of the appeal, this dicta suggests that an appeal from a money judgment, which is taken as a matter of right, may not allow an appellant to raise only issues unrelated to the non-monetary judgment.

C. An Appeal on an Agreed Judgment is an Impermissible Collateral Attack

In *Whitesell Precision Components, Inc. v. Autoform Tool & Manufacturing, LLC*, the parties had agreed to an order issuing a preliminary injunction.[62] Later on, but before the underlying litigation had concluded, the plaintiff moved to dissolve the preliminary injunction.[63] The Indiana Court of Appeals had considered a similar issue in *Kindred v. Townsend*, where it appeared that the appellant properly appealed the denial of a motion to dissolve the preliminary injunction as of right under Indiana Appellate Rule 14(A)(5).[64] However, in *Kindred*, the "motion to dissolve was 'not based on any new facts or circumstances that had arisen since the trial court's entry of the preliminary order.'"[65] The Indiana Court of Appeals had thus determined "that the Kindreds had pursued a belated, collateral attack on the trial court's initial decision."[66] In *Kindred*, the Indiana Court of Appeals explained,

> Appellate Rule 14(A)(5) provides for an interlocutory appeal as of right from orders denying a motion to dissolve a preliminary injunction. However, if read broadly, this would permit a party subject to a preliminary injunction to repeatedly bring motions to dissolve a preliminary injunction and repeatedly appeal such denials. Indeed, if we were to read Appellate Rule 14(A)(5) this broadly, a party who forfeited the right to appeal from the entry of the preliminary injunction could repeatedly resurrect their right to appeal by simply filing a motion to

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58. *Id.*; *see also* Ferguson v. Estate of Ferguson, 40 N.E.3d 881, 885 (Ind. Ct. App. 2015).

59. *Id.*

60. *Id.*

61. *Id.* (The Court also questioned whether appeal was proper in light of potential waiver of the arguments.)

62. 110 N.E.3d 380, 382 (Ind. Ct. App. 2018), *trans. denied*, 2019 WL 365090 (Ind. Jan. 24, 2019).

63. *Id.* at 384.

64. *Id.* at 384 (citing Kindred v. Townsend, 4 N.E.3d 793, 794 (Ind. Ct. App. 2014)).

65. *Id.*

66. *Id.* at 385.

> dissolve the injunction. Likewise, a party who forfeited the right to appeal a denial of a motion to dissolve a preliminary injunction could resurrect their appeal by filing a repetitive motion to dissolve the injunction. This would render the time limitations of Appellate Rule 14(A) meaningless.We therefore read Appellate Rule 14(A)(5) to mean that a party who wishes to challenge the entry of a preliminary injunction order (or the denial of a request for a preliminary injunction) must initiate their appeal within thirty days of the trial court's order granting or denying the request for a preliminary injunction.[67]

Similarly, the Indiana Court of Appeals found that the plaintiff in *Whitesell* had stipulated to the temporary restraining order and agreed to its duration.[68] Unlike *Kindred*, however, the plaintiff in *Whitesell* showed "that there had been a change in circumstances," which warranted the plaintiff asking the trial court to consider the ongoing necessity of injunction.[69] Nevertheless, the Indiana Court of Appeals found that the trial court order sufficiently considered the necessity of continuing the injunction, and noted that although the plaintiff "may feel aggrieved by this stance," the plaintiff could still be adequately compensated by monetary damages if it succeeded on the merits of the underlying litigation.[70] Because of this, the trial court's decision to deny the motion to dissolve the preliminary "[wa]s not clearly to the contrary to the facts and circumstances," and the Indiana Court of Appeals affirmed.[71]

D. A Party Does Not Have Standing to Petition for Transfer on a Ruling Favorable to It

In *A.A. v. Eskenazi Health/Midtown CMHC*, "Eskenazi prevailed in both the trial and appellate courts."[72] "Both A.A. and Eskenazi sought transfer, and [the Supreme Court] granted both petitions."[73] Appellate Rule 57(B) provides that "[t]ransfer may be sought from adverse decisions issued by the Court of Appeals . . . ."[74] "Eskenazi believes the appellate decision is adverse because its rationale creates potential mischief in how Eskenazi may have to conduct future commitment proceedings. In other words, although Eskenazi completely won, it didn't like the **way** it won."[75]

The Supreme Court noted that "[o]ur rule of appellate standing from a trial court is clear. 'A party cannot appeal from a judgment favorable to him.'"[76] The

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67. *Kindred*, 4 N.E.3d at 796.
68. *Whitesell*, 110 N.E.3d at 385.
69. *Id.* at 386.
70. *Id.*
71. *Id.* at 387.
72. 97 N.E.3d 606, 610 n.1 (Ind. 2018).
73. *Id.*
74. IND. R. APP. P. 57(B).
75. *Eskenazi*, 97 N.E.3d at 610 n.1 (emphasis in original).
76. *Id.* (quoting Clark v. Stout, 105 N.E. 569, 569 (Ind. 1914), *abrogated on other grounds*

Supreme Court concluded that "[t]his same standing rule applies to litigants seeking transfer to this Court. To state it another way, what counts for standing purposes is the Court of Appeals' judgment and not the reasons underlying it. The appellate decision was thus not adverse to Eskenazi."[77] The Supreme Court, however, concluded that "Appellate Rule 56(B) does not limit the Court's **jurisdiction** to entertain Eskenazi's petition."[78] The Supreme Court concluded that "[t]ransfer is merely the process by which the Court fulfills its law-giving function, and the Court may choose to exercise that function even in cases that do not comply strictly with the letter of the appellate rules."[79]

E. Trial Court Lacks Jurisdiction Until Appellate Ruling Certified

In *State v. Larkin*, the State recorded a privileged communication between Larkin and his attorney during a break in a recorded interview.[80] Larkin sought to disqualify the prosecutor because of the recording.[81] The trial court suppressed the video, but denied the motion to disqualify.[82] "At Larkin's request, the trial court certified for interlocutory appeal the denial of Larkin's motion to disqualify the prosecutor's office, and stayed the proceedings pending resolution from the Court of Appeals."[83] The Court of Appeals dismissed the "appeal as moot since LaPorte County elected a new prosecutor," but the Court of Appeals "did not evaluate whether individual prosecutors should withdraw from the case."[84]

> Indiana Appellate Rule 65(E), provides in relevant part: '[t]he trial court . . . and parties shall not take any action in reliance upon the opinion or memorandum decision until the opinion or memorandum decision is certified.' Case law clarifies that if a trial court acts before certification, the action is considered a nullity . . . .[85]

Prior to the Court of Appeals certifying its decision, the State moved the trial court to withdraw two prosecutors and appoint a special prosecutor, and the trial court granted the motions.[86] Eventually, the trial court dismissed the case for failure to bring it to trial within the time limits of Criminal Rule 4(C).[87] The State appealed.[88]

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by Clark v. Stout, 183 Ind. 329, 108 N.E. 770 (1915)).

77. *Id.*
78. *Id.* (emphasis in original).
79. *Id.*
80. 100 N.E.3d 700, 702 (Ind. 2018).
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 704 (quoting IND. R. APP. P. 65(E)).
86. *Id.* at 702.
87. *Id.* at 703.
88. *Id.*

"In a split published opinion, the Court of Appeals affirmed."[89] "[T]he Court of Appeals majority found that the trial court reassumed jurisdiction and the State submitted itself to the trial court's jurisdiction due to a 'constructive' lift of the stay when the State moved for the appointment of a special prosecutor."[90] The Court of Appeals majority "found that the purpose of App. R. 65 was satisfied by the trial court and the State's actions; that is, they were acting in accord with the decision being final."[91] In his dissent, Judge Barnes noted three problems with Court of Appeals' majority's approach: "1) any action taken by the court prior to certification was potentially voidable; 2) the parties could have petitioned for transfer; and 3) the majority's outcome punishes the State for trying to move the case forward prior to the stay being lifted."[92] The State argued that using "any date prior to the date of certification is an inappropriate measure of when the clock restarts for 4(C) purposes, as it injects uncertainty and allows for potential game-playing by defendants."[93]

The Supreme Court "agree[d] with the State and Judge Barnes that until the interlocutory appeal was certified, the trial court did not have jurisdiction. As such, the period of delay during the pendency of Larkin's interlocutory appeal through the time the Court of Appeals opinion was certified is chargeable to Larkin."[94]

III. REFINING OUR APPELLATE PROCEDURE

During the survey period, the Indiana Supreme Court and the Indiana Court of Appeals offered advice to practitioners to help them avoid various appellate-rule pitfalls.

A. Contents of Appellate Appendices

During the survey period, the Court of Appeals repeatedly addressed the proper contents of appendices.

Parties must file an appendix. In *Childress Cattle, LLC, v. Estate of Cain*, the Court of Appeals "note[d] that neither party filed an appendix."[95] "The purpose of an appendix in civil appeals is to present the Court with copies of the parts of record 'that are necessary for the Court to decide the issues presented.'"[96] The Court of Appeals then noted that Appellate Rule 49 requires the appellant to file an appendix on or before the date their brief is due, and Appellate Rule 22(C) requires parties to support factual statements with citations to the appendix,

89. *Id.*
90. *Id.* at 704.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. 88 N.E.3d 1121, 1124 (Ind. Ct. App. 2017).
96. *Id.* (quoting IND. R. APP. P. 50(A)(1)).

transcript, or exhibits.[97] The Court of Appeals then noted that "Childress Cattle did not file an appendix, instead submitting only the transcript of the hearing, the exhibits that the trial court admitted during the hearing, and the trial court's order."[98] "Childress Cattle should have filed an appendix that included all pertinent filings, especially the offers of proof that James and Bonnie submitted to the trial court and its invoices. Although both parties cite the offers of proof, no such documents are in the record."[99] The Court of Appeals "nonetheless endeavor[ed] to address the issue despite the lack of an appendix and supporting record."[100]

If appealing a ruling on summary judgment, the parties should include all designated evidence in appendices. Appellate Rule 50(A)(2)(f) provides that an appellant's appendix shall include "pleadings and other documents from the Clerk's Record in chronological order that are necessary for resolution of the issues raised on appeal."[101] "[W]hen appealing the grant or denial of a motion for summary judgment, it is not sufficient for the appellant to include in the appendix only those documents designated by it to the trial court."[102] "Rather, appellants should include in their appellant's appendix all documents relating to the disposition of the motion for summary judgment, including any documents that the appellee designated."[103] In *Webb*, "Webb's appendix d[id] not contain the Appellees' motion for summary judgment and designated evidence in support of the motion, nor does it contain Webb's response in opposition to the summary judgment motion, which all are documents necessary in determining the issues raised on appeal."[104] The Court of Appeals noted that "an appellant's claim may be deemed waived on appeal for failure to include documents designated to the trial court in its appendix."[105] But because the Court of Appeals "prefer[s] to decide issues on their merits when possible," and because "Appellees provided the documents in their Appellees' Appendix," the Court of Appeals would "decide the issue on their merits."[106]

Similarly, in *American Access Casualty Co. v. Cinncinnati Insurance Co.*, the Court of Appeals concluded that "American Access' Appendix falls woefully short as it omits the motion for summary judgment, the response thereto, the parties' respective memoranda, and the designated evidence."[107] While the appellee included the materials in its appendix, the Court of Appeals "caution[ed]

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97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. IND. R. APP. P. 50(A)(2)(f).

102. Webb v. City of Carmel, 101 N.E.3d 850, 856-57 n.3 (Ind. Ct. App. 2018) (quoting Kelly v. Levandaowski, 825 N.E.2d 850, 856 (Ind. Ct. App. 2005)).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. 103 N.E.3d 644, 649 (Ind. Ct. App. 2018).

American Access that it is the Appellant's obligation to present an adequate record on appeal to permit a fair and intelligent review of the issue before us."[108]

Parties *should not* include the transcript or exhibits in appendices. Appellate Rule 50(F) provides that "[b]ecause the Transcript is transmitted to the Court on Appeal pursuant to Rule 12(B), parties should not reproduce any portion of the Transcript in the Appendix."[109] In *Ruiz v. State*, a party's counsel "included a copy of the trial transcript in the Appellant's Appendix."[110] The Court of Appeals "direct[ed] counsel's attention to Indiana Appellate Rule 50(F), which provides that" the transcript should not be included in appendices.[111] In addition, Appellate Rule 2(K) defines the transcript to include "any exhibits associated therewith."[112] In *Mainstreet Property Group, LLC v. Pontone*s, the Court of Appeals reminded a party that an appendix should not contain "copies of exhibits" because the exhibits are included with the transcript.[113]

Parties *should* include the chronological case summary in the appendix. Appellate Rule 50(A)(2) provides that "[t]he appellant's Appendix shall contain . . . copies of the following documents, if they exist: (a) the chronological case summary for the trial court or Administrative Agency . . ." In *Freels v. Koches*, the Court of Appeals "note[d] that Freels' appendix on appeal does not include the trial court's chronological case summary, which is contrary to Indiana Appellate Rule 50(A)(2)(a)."[114]

B. Statement of Facts Should Comply with Appellate Rule 46(A)(6)

Appellate Rule 46(A)(6) provides that the statement of facts "shall describe the facts relevant to the issues presented for review."[115] In *In re Adoption of J.R.O.*, the Court of Appeals stated that the "issues that Father has presented for review are purely procedural, yet Appellees' brief needlessly contains numerous facts that are irrelevant to those issues."[116]

Appellate Rule 46(A)(6)(b) provides that the "[t]he facts shall be stated in accordance with the standard of review appropriate to the judgment or order being appealed."[117] *U.S. Research Consultants, Inc. v. County of Lake, Indiana* involved an appeal from a grant of summary judgment, and the Court of Appeals reminded a party that the "statement of the facts" must be "in the light most favorable to the nonmovant."[118]

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108. *Id.*
109. IND. R. APP. P. 50(F).
110. 88 N.E.3d 219, 223 n.4 (Ind. Ct. App. 2017).
111. *Id.*
112. IND. R. APP. P. 2(K).
113. 97 N.E.3d 238, 243 n.11 (Ind. Ct. App. 2018).
114. 94 N.E.3d 339, 341 n.1 (Ind. Ct. App. 2018).
115. IND. R. APP. P. 46(A)(6).
116. 87 N.E.3d 37, 39 n.1 (Ind. Ct. App. 2017).
117. IND. R. APP. P. 46(A)(6)(b).
118. 89 N.E.3d 1076, 1080 n.1 (Ind. Ct. App. 2017).

C. Do Not Cite Not-for-Publication Decisions

Appellate Rule 65(D) provides the following: "Unless later designated for publication in the official reporter, a memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish *res judicata*, collateral estoppel, or law of the case."[119] In *City of Gary Police Civil Service Commission v. Robinson*, the Court of Appeals noted that "the Commission not only cites but substantially relies on a not-for-publication memorandum decision of this Court. We remind counsel for the Commission that such decisions 'shall not be cited to any court.'"[120]

D. The Argument Section of a Brief Must Include the Standard of Review

Appellate Rule 46(A)(8)(b) provides that the "argument must include for each issue a concise statement of the applicable standard of review."[121] In *Clemons v. State*, the Court of Appeals noted that "Clemons' brief includes no standard of review," and "Appellate Rule 46(A)(8)(b) provides the argument section of an appellant's brief must" include the standard of review.[122]

E. New Issues May Not be Raised for the First Time in a Reply Brief

In *EngineAir, Inc. v. Centra Credit Union*, "the Companies raise[d] for the first time the argument that the UCC does not bar Plaintiffs' right to seek relief" in their Reply Brief.[123] The Court of Appeals quoted Appellate Rule 46(C): "No new issues shall be raised in the reply brief."[124] "The law is well settled that grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived."[125] The Court of Appeals concluded the newly raised "issue is waived."[126]

F. An Untimely Appeal Cannot Succeed on the Merits

In *In re Estate of Hurwich*, the appellant sought review of the trial court's dismissal with prejudice under Indiana Trial Rule 12(B)(6).[127] The appellant argued that under Indiana Trial Rule 15, dismissal should not have been with prejudice, and that he should have been able to amend his complaint.[128] The Court of Appeals agreed, stating, "the probate court erred by dismissing his complaint with prejudice. But a dismissal with prejudice is a final judgment, and the time

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119. IND. R. APP. P. 65(D).
120. 100 N.E.3d 271, 277 n.2 (Ind. Ct. App. 2018) (quoting IND. R. APP. P. 65(D)).
121. IND. R. APP. P. 46(A)(8)(b).
122. 105 N.E.3d 1139, 1140 n.3 (Ind. Ct. App. 2018).
123. 107 N.E.3d 1061, 1074 n.16 (Ind. Ct. App. 2018) (internal quotation omitted).
124. *Id.* (quoting IND. R. APP. P. 46(C)).
125. *Id.* (quoting Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 977 (Ind. 2005).
126. *Id.*
127. 103 N.E.3d 1135, 1138-39 (Ind. Ct. App. 2018), *adhered to on reh'g*, 109 N.E.3d 416.
128. *Id.*

to appeal a final judgment is within thirty days after its entry is noted in the Chronological Case Summary."[129] Because the appellant waited nearly two years after the dismissal to initiate the appeal, his challenge was "untimely and unavailing."[130]

G. A Motion for Oral Argument May Not be Used for Additional Merits Briefing

In *Care Group Heart Hospital, LLC v. Sawyer*, "after transfer briefing was complete, Appellee's counsel filed a six-page 'Motion for Oral Argument' accompanied by 210 pages of 'exhibits' that were neither part of the Record on Appeal nor timely verified under Indiana Appellate Rule 35(F)."[131] "Though titled as a motion for oral argument, the document was in substance a surreply to the Appellants' transfer briefs."[132] The Indiana Supreme Court concluded that "[w]hile Indiana Appellate Rule 52(B) permits motions for oral argument, that permission must be read in light of Rule 57, which limits merits arguments on transfer to a petition to transfer, a brief in response, and finally a reply brief."[133] The Court concluded that "oral-argument motions may not be exploited as additional merits briefs by another name."[134]

IV. INDIANA'S APPELLATE COURTS

A. Case Data from the Indiana Supreme Court

During the 2018 fiscal year,[135] the Indiana Supreme Court disposed of 851 cases, including 430 criminal cases, 266 civil cases, 6 tax cases, 30 original actions, 111 attorney discipline cases, 4 board of law examiners cases, 2 certified questions, 1 mandate of funds case, and 1 judicial discipline case.[136] The court heard fifty-six oral arguments during the fiscal year, thirty-seven percent of which were heard before the court decided to grant transfer.[137] The court issued seventy-one majority opinions and fourteen non-majority opinions.[138] Chief Justice Rush issued eleven majority opinions, Justice David issued eleven majority opinions, Justice Massa issued ten majority opinions, Justice Slaughter issued eight

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129. *Id.* at 1139 (*citing* IND. R. TR. P. 9(A)(1)).

130. *Id.*

131. 93 N.E.3d 743, 743 (Ind. 2018) (mem. decision).

132. *Id.*

133. *Id.* at 744.

134. *Id.*

135. The Indiana Supreme Court 2018 fiscal year ran from July 1, 2017 to June 30, 2018. *See* IND. SUPREME COURT, INDIANA SUPREME COURT ANNUAL REPORT 2017-2018 (2018), https://www.in.gov/judiciary/supreme/files/1718report.pdf [https://perma.cc/LK2V-84D8].

136. *Id.* at 11.

137. *Id.* at 16.

138. *Id.* at 18.

majority opinions, and Justice Goff issued six majority opinions.[139] The court issued unanimous decisions eighty-four percent of the time.[140]

B. Case Data from the Indiana Court of Appeals

During 2017,[141] the Court of Appeals disposed of 3,187 cases.[142] This was the second year in a row that the court's caseload increased, increasing from 2015, when the court disposed of 2,920 cases, and 2016, when the court disposed of 3,047 cases.[143] The court disposed of 1,807 criminal cases, 961 civil cases, and 370 other cases.[144] The court affirmed the trial court 80.7% of the time, with the court affirming 85.5% of criminal cases, 85.7% of post-conviction relief cases, and 66.1% of civil cases.[145] The average age of cases pending before the Court of Appeals at the end of 2017 was 1.7 months.[146] In addition to deciding cases, the court issued 7,304 orders.[147]

C. Judge Michael Barnes Retires from the Court of Appeals

In January 2018, Court of Appeals Judge Michael Barnes announced he would retire on June 1, 2018.[148] Judge Barnes "was appointed to the bench by Gov. Frank O'Bannon in May 2000."[149] Judge Barnes "authored more than 2,800 opinions during his appellate court career."[150] In addition to being a judge, "Barnes has served as an adjunct faculty member at the Indiana University Maurer School of Law."[151] "Prior to ascending to the bench, Barnes worked as the St. Joseph County prosecutor and served as president of several associations, including the National District Attorneys Association, the American Research Institute, the Indiana Prosecuting Attorneys Council and the Indiana Prosecuting Attorneys Association."[152] "Judge Barnes personally tried more than 25 murder

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139. *Id.*

140. *Id.*

141. The Indiana Court of Appeals 2017 annual report covers January 1, 2017 through December 31, 2017. *See* IND. COURT OF APPEALS, INDIANA COURT OF APPEALS 2017 ANNUAL REPORT, https://www.in.gov/judiciary/appeals/files/2017-coa-annual-report.pdf [https://perma.cc/9CGM-XQT3].

142. *Id.* at 1.

143. *Id.*

144. *Id.*

145. *Id.* at 2.

146. *Id.*

147. *Id.*

148. Olivia Covington, *Barnes to Retire from Court of Appeals in June*, IND. LAW., (Jan. 11, 2018), https://www.theindianalawyer.com/articles/45861-barnes-to-retire-from-court-of-appeals-in-june [https://perma.cc/XV3A-WRUV].

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

and other major felony cases while overseeing a staff of 12 to 15 deputy prosecutors."[153] Judge Barnes now serves as a Senior Judge for the Court of Appeals.[154] While Judge Barnes continues to serve the Court of Appeals as a Senior Judge, his long service to the court is remembered fondly and appreciated.

D. Judge Elizabeth F. Tavitas Appointed to the Court of Appeals

Judge "Elizabeth F. Tavitas was appointed to the Court of Appeals by Governor Eric Holcomb and began her service on Aug. 6, 2018."[155] Judge Tavitas received both her undergraduate and law degrees from the University of Notre Dame.[156] "Prior to her appointment to the Court of Appeals, Judge Tavitas served for more than 12 years as Judge of the Superior Court of Lake County, Civil Division."[157] Prior to becoming a judge, "Judge Tavitas served as a deputy prosecutor in the Lake County Prosecutor's Office; served as a juvenile public defender in the Lake Superior Court, Juvenile Division; and maintained a private practice."[158] "In 1998, she was appointed to the position of referee in the Lake Superior Court, Juvenile Division, where she served until 2006. During that time, Judge Tavitas served on the Juvenile Benchbook Committee."[159] We look forward to watching the newest member of the Court of Appeals for years to come.

CONCLUSION

During the survey period, the Indiana appellate courts analyzed, interpreted, and applied the Appellate Rules. After several years of change, during this survey period, the Supreme Court's membership did not change, but the Court of Appeals saw the addition of Judge Tavitas and the retirement of Judge Barnes.

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153. *Judge Michael P. Barnes*, IND. CT. APPEALS, https://www.in.gov/judiciary/appeals/2455.htm [https://perma.cc/W4P4-DLZG].

154. *Id.*

155. *Judge Elizabeth F. Tavitas*, IND. CT. APPEALS, https://www.in.gov/judiciary/appeals/2624.htm [https://perma.cc/N3VJ-2AZA].

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*