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. These rule amendments became mandatory for attorneys on January 1, 2020.[3]

The Indiana Supreme Court amended Indiana Appellate Rule 9(F)(5), regarding the initiation of the appeal and, more specifically, the appellant's request for transcript.[4] The rule provides that an appellant's notice of appeal shall contain a request for transcript, designating all portions of the transcript needed

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1. The survey period is between October 1, 2018, and September 30, 2019.

2. Press Release, Ind. Supreme Court, *E-Filing Progress Continues with Certain Cases and Counties Requiring the Move Away from Paper*, COURTS.IN.GOV (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 [https://perma.cc/4LLN-WTKF].

3. Order Amending Rules of App. Proc., (Ind. Oct. 19, 2019) (No. 19S-MS-41), 2 [hereinafter "Oct. 10, 2019 Order"].

4. *Id.* at 1.

to "present fairly and decide the issues on appeal."[5] If an appellant intends to argue that the trial court's findings of fact or conclusions were unsupported by the evidence or contrary to the evidence, the appellant must request the entire transcript, as all of it is necessary to decide the issues.[6] In so requesting, the appellant was formerly required to "include the email address of the Court Reporter" and to electronically transmit the notice of appeal to the court reporter.[7] The October 10, 2019, Order removed this language, so an appellant no longer needs to (a) include the email address of the court reporter or (b) send the notice of appeal to the court reporter by electronic transmission.[8]

The Indiana Supreme Court amended Indiana Appellate Rule 24(A) concerning service of documents.[9] Naturally, a notice of appeal must be served upon certain persons, including "all parties of record in the trial court or Administrative Agency."[10] The Supreme Court relieved a party filing a notice of appeal from contemporaneously serving copies upon three other categories of persons: "(b) the clerk of the trial court or Administrative Agency; (c) the Court Reporter; . . . [and] (f) the judge of the trial court or hearing officer of an Administrative Agency before whom the case was heard."[11] This change was likely due to the Indiana Supreme Court's amendment of Appellate Rule 26.

The Indiana Supreme Court amended Indiana Appellate Rule 26, adding subsection (D) which states as follows:

> Transmission of Notice of Appeal to Trial Court or Administrative Agency. The Clerk shall electronically transmit the Notice of Appeal to:
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> (1) the Court Reporters in the trial court county or Administrative Agency;
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> (2) the clerk of the trial court or Administrative Agency; and
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> (3) the judge of the trial court before whom the case was heard.[12]

Finally, the Indiana Supreme Court amended Indiana Appellate Rule 24(D), adding a requirement that any person tendering a document to the Clerk "certify that the service has been made ***or will be made contemporaneously with the filing***."[13] The language, "will be made contemporaneously with the filing," is new.[14] Additionally, under Appellate Rule 24(D)(2), the placement of the

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5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 2.
13. *Id.* (emphasis added).
14. *Id.*

certificate of service remains the same, but now it shall be grounds for rejecting a document for filing if the certificate of service is filed separately.[15]

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.

A. Dismissal for Appellant's Failure to Compel a Court Reporter to File the Transcript Is Discretionary

In *Marsh v. Town of Dayton*, the trial court dismissed Marsh's complaint for failure to state a claim, and Marsh appealed.[16] Marsh's notice of appeal contained a request that the court reporter prepare a transcript of the relevant hearing.[17] Indiana Appellate Rule 11 "provides that the court reporter has forty-five days after the appellant files the notice of appeal to file the transcript with the trial court clerk."[18] Appellate Rule 11(D) instructs that if the clerk does not file the transcript accordingly, "the appellant shall seek an order from the Court on Appeal compelling" the court reporter to file the transcript, and "[f]ailure of appellant to seek such an order not later than seven (7) days after the Transcript was due . . . shall subject the appeal to dismissal."[19] In *Marsh*, the court reporter did not prepare and file a transcript within the forty-five days, the appellant did not file a motion to compel before the deadline, and so the appellee moved to dismiss the appeal.[20] The Court of Appeals denied the appellee's motion to dismiss, and affirmed its decision on rehearing.[21] Comparing the situation to "the untimely filing of briefs," for which the Court is not mandated to dismiss, the Court of Appeals clarified that the language in Appellate Rule 11(D) is similarly "discretionary, rather than mandatory."[22]

B. Availability of Interlocutory Appeals

The court of appeals discussed its own jurisdiction over interlocutory appeals in various cases, and it considered the effect of untimely appeals and nonfinal judgments.

In *State v. Fahringer*, the Indiana Court of Appeals discussed whether the trial court had abused its discretion in finding good cause to permit a belated

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15. *Id.*

16. Marsh v. Town of Dayton, 115 N.E.3d 504, 505 (Ind. Ct. App. 2018), *reh'g denied* (Feb. 8, 2019), *trans. denied*, 127 N.E.3d 239 (Ind. 2019)

17. *Id.*

18. *Id.*

19. *Id.* at 505-06 (*quoting* IND. R. APP. P. 11(D)).

20. *Id.* at 506.

21. *Id.*

22. *Id.*

motion to certify an interlocutory order for appeal.[23] Ordinarily, "[a] motion for certification of an interlocutory order must be filed with the trial court within thirty days of the entry of the order on the [CCS] 'unless the trial court, for good cause, permits a belated motion.'"[24] In *Fahringer*, the trial court entered a suppression order, and the State did not file a request to certify the order for interlocutory appeal until months later, well outside of the thirty-day window.[25] The trial court nevertheless granted the State's belated request to certify the order for appeal, finding "good cause for doing so existed because the State had notified the trial court orally of its intention to pursue an appeal after the trial court initially orally granted" the motion to suppress.[26] In granting the request, the trial court also noted that the State had filed a motion to reconsider, which was denied, and that its request to certify for interlocutory appeal came within thirty days of the denial of the motion to reconsider.[27]

The court of appeals found that the trial court abused its discretion.[28] First, if the State's oral notification that it intended to pursue the appeal constituted the first request to certify, the court did not rule on it for thirty days, and so it was deemed denied pursuant to Indiana Appellate Rule 14(B)(1)(e).[29] Even if the oral notification was not the initial request, the court of appeals found that "to find such an oral notification to constitute good cause for a belated filing is to essentially allow a litigant to ignore the Rules of Appellate Procedure."[30] Finally, the State's motion to reconsider was deemed denied if not ruled upon within five days (Ind. T.R. 53.4(B)), and so this "did not toll the time within which the State was required to file a certification request" and "could not constitute good cause for a belated certification request."[31] The Court of Appeals clarified that "[a]lthough the failure to initiate a timely interlocutory appeal does not deprive this court of jurisdiction, it results in forfeiture of the right to appeal absent 'extraordinarily compelling reasons.'"[32] No extraordinarily compelling reasons were found in this particular appeal, and it was dismissed for "procedural default."[33]

A second case discussed an oral decision by the trial court. In *Town of Darmstadt v. CWK Investments-Hillsdale, LLC*, the Indiana Court of Appeals considered whether the time to seek judicial review following a decision by a zoning board should run from the date the board renders its decision orally at the

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23. State v. Fahringer, 132 N.E.3d 480, 484 (Ind. Ct. App. 2019).
24. *Id.* (quoting IND. R. APP. P. 14(B)(1)(a)).
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 485.
30. *Id.*
31. *Id.*
32. *Id.* at 486 (quoting Snyder v. Snyder, 62 N.E.3d 455, 458 (Ind. Ct. App. 2016)).
33. *Id.*

hearing, or a later date, when the board issues written findings.[34] The Town argued that requiring the petitioner to petition for judicial review "based only on the oral decision of the board" mandates "an appeal based on the scant information available from an oral decision."[35] The court of appeals responded, "[w]e do not disagree. But we must 'give effect to the intent of the legislature.'"[36] The court of appeals went on to explain that the legislature apparently intended for the time to run from the date the order was issued, even if that meant orally at hearing.[37] First, the court of appeals pointed out that Indiana Code section 36-7-4-1607(b) does not require a petitioner to include a copy of the findings of fact in its petition for judicial review.[38] Next, the court explained that "[a] board's written findings are merely a document 'expressing the decision,'" which suggests that the oral order was intended to be the decision.[39] Finally, the court of appeals interpreted the extension of time provisions in Indiana Code section 36-7-4-1613(b), for when the petitioner cannot obtain the record from the board within thirty days, to mean that "the General Assembly anticipated that the board might not complete its findings of fact within thirty days from the date the petitioner files for judicial review."[40] The court of appeals concluded, "[r]eading the relevant statutes together, it is clear that the legislature intended for a petitioner to file for judicial review of a board's decision within thirty days from the date the board made its decision at the hearing."[41]

Judge Crone dissented.[42] He pointed out that the Indiana Rules of Appellate Procedure do not require a party to file a notice of appeal from a trial court's judgment "until after the entry of the judgment or order . . . is noted in the [CCS]," regardless if the entry is accompanied by written findings or not.[43] Judge Crone would have found that "'the date of the zoning decision' for purposes of Indiana Code section 36-7-4-1605 should be interpreted as the date the board makes the written findings required by Indiana Code section 36-7-4-916."[44]

In *DuSablon v. Jackson County Bank*, Appellant DuSablon filed his first notice of appeal following the trial court's entry of a preliminary injunction.[45] He did not request that the proceedings be stayed, and so a month later, the trial court converted the preliminary injunction to a permanent injunction, "which DuSablon

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34. Town of Darmstadt v. CWK Investments-Hillsdale, LLC, 114 N.E.3d 11, 16 (Ind. Ct. App. 2018).

35. *Id.*

36. *Id.* (quoting 21st Amendment, Inc. v. Ind. Alcohol and Tobacco Comm'n, 84 N.E.3d 691, 696 (Ind. Ct. App. 2017)).

37. *Id.*

38. *Id.*

39. *Id.* (quoting language from IND. CODE § 36-7-4-1613(a)).

40. *Id.*

41. *Id.* at 17.

42. *Id.* at 17-20.

43. *Id.* at 19.

44. *Id.*

45. DuSablon v. Jackson Cty. Bank, 132 N.E.3d 69, 74 (Ind. Ct. App. 2019).

did not contest."[46] The trial court entered another order holding DuSablon in contempt for violations of the preliminary injunction.[47] The court also entered a fee order against DuSablon, at which point DuSablon filed a second notice of appeal, appealing the preliminary injunction, contempt order, and fees order.[48] The court of appeals "consolidated DuSablon's two interlocutory appeals."[49] DuSablon's appeal failed for multiple reasons.

As a preliminary matter, the court of appeals noted, "[t]here is no final judgment here . . . DuSablon's counter-claims remain pending in the trial court," citing Appellate Rule 2(H)(1).[50] Thus, the court of appeals considered whether it had interlocutory jurisdiction. No jurisdiction existed under Appellate Rule 14(B) or 14(C), because the trial court had not certified the order, and no statute allowed the appeal.[51] The court next considered whether it had jurisdiction under Appellate Rule 14(A)(1) or (5), due to the order for the payment of money and the grant of a preliminary injunction.[52] However, because the preliminary injunction "no longer exist[ed]," but had been converted into a permanent injunction, Appellate Rule 14(A)(5) did not apply, and DuSablon could not appeal on that basis.[53] The court next found that Appellate Rule 14(A) did not permit an appeal as of right from a contempt finding *per se*, because the contempt order "deferred '[s]anctions for violation of the preliminary injunction . . . for further hearing,'" which was "not an order for the payment of money."[54] The court acknowledged that the fees order was an order to pay a specific sum of money for purposes of Appellate Rule 14(A)(1). However, the court of appeals said, "DuSablon does not actually challenge the . . . Fees Order on appeal. Rather, he argues only that the entirety of the proceedings before the trial court were so infused with the trial judge's bias . . . that 'all orders' . . . are invalid as a matter of law."[55] This attack on the "proceedings as a whole and without regard to the order on appeal . . . defeat[ed] the purpose of allowing such interlocutory appeals."[56] The court held that "there [wa]s nothing 'presented by the order' for us to review," and dismissed the appeal.[57]

In an unpublished case, *Ivy v. Kilgore*, the court of appeals considered Indiana Appellate Rule 14(A)(8), which "permits interlocutory appeals as a matter of right for orders '[t]ransferring or refusing to transfer a case under Trial

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46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 75.
51. *Id.*
52. *Id.*; *see* IND. R. APP. P. 4(A)(1) and (A)(5).
53. *DuSablon*, 132 N.E.3d at 75.
54. *Id.* at 75-76.
55. *Id.* at 76.
56. *Id.*
57. *Id.*

Rule 75.'"[58] The appellant had moved to dismiss on the basis of Trial Rule 12(B)(6) and Trial Rule 75.[59] The trial court dismissed "seemingly" for improper venue, but the order was "exceedingly vague, directly referencing the improper venue ground," "saying nothing of the T.R. 12(B)(6) ground," and "the trial court did not order the case transferred."[60] The Court of Appeals concluded that the order was appealable pursuant to Appellate Rule 14(A)(8), and that the order required clarification and/or correction.[61] The Court of Appeals remanded, directing the trial court "to expressly determine whether preferred venue" lay in a different county, and if so, to transfer to that county.[62]

C. Post-Judgment Interest Date Running When Award Modified on Appeal

In *International Business Machines Corporation* ["IBM"] *v. State*, the Indiana Supreme Court considered "whether IBM [wa]s entitled to post-judgment interest on its $49.5 million damages award running from the date of the original judgment in 2012 or running from the judgment on remand."[63] The case had a long procedural history, which we will briefly summarize.

The *IBM* case was about an alleged breach of a master services agreement between the State of Indiana and IBM. The contract was originally supposed to last ten years, but the State terminated it at around three years due to IBM's alleged performance issues.[64] A bench trial resulted in a verdict for IBM, and the trial court held that the State did not prove that IBM materially breached the contract.[65] The Marion Superior Court awarded IBM damages, including termination payments and pre-judgment interest.[66] Both parties appealed, and the court of appeals reversed in part, holding that IBM did materially breach the master services agreement and reversing the termination payment and pre-judgment interest awards.[67] The court of appeals affirmed the trial court's award of assignment and equipment fees, totaling $49,510.795.[68] On remand, these damages ($49.5 million) were awarded as a credit against a judgment against IBM.[69] IBM requested post-judgment interest on the $49.5 million award, which the trial court denied.[70] Both parties appealed again, with IBM arguing for post-judgment interest, and the court of appeals concluded in relevant part that IBM

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58. Ivy v. Kilgore, No. 18A-MI-2840, 2019 WL 2440224, at *2 (Ind. Ct. App. 2019).
59. *Id.*
60. *Id.*
61. *Id.* at *3.
62. *Id.*
63. IBM v. State, 138 N.E.3d 255, 256 (Ind. 2018).
64. *Id.*
65. *Id.*
66. *Id.* at 257.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*

was entitled to post-judgment interest on the $49.5 million damages award.[71] Both parties sought transfer, which was granted "only to address the post-judgment interest issue."[72]

The court of appeals had concluded that IBM was entitled to post-judgment interest on the award due to *Beam v. Wausau Insurance Company*.[73] In *Beam*, the Indiana Supreme Court considered whether post-judgment interest on a modified award ran on the amount ***after*** the appellate court's modification or on the original award.[74] According to *Beam*, interest accrues on the date the trial court enters the new judgment, except "where a money judgment has been modified on appeal and the only action necessary in the trial court is compliance with the mandate of the appellate court, [in which case] interest on the judgment as modified runs from the date of the original judgment."[75] In *Beam*, the Indiana Supreme Court "modified the amount of damages, but did not reverse judgment," and so "interest ran from the date of the original verdict on the modified amount."[76]

The governing statute in *Beam* was Indiana Code section 24-4.6-1-101, but in *IBM*, the governing statute was Indiana Code section 34-13-1-6 because the sum of money due was from the State.[77] Thus, the Indiana Supreme Court found that *Beam* was not the instructive case, and "the relevant inquiry pursuant to Indiana Code section 34-13-1-6 [was] whether there was a final decree or judgment."[78] When the Indiana Supreme Court formerly remanded to the trial court, "all the issues were not disposed of."[79] "[W]hat was due and owed to IBM was necessarily contingent upon what damages were due the State from the Breach."[80] Accordingly, the Indiana Supreme Court held that "post-judgment interest going back to the original judgment [was] inappropriate," and that "interest due to IBM stem[med] from the judgment on remand."[81]

D. Indiana Trial Courts May Not Decide Issues Within Workers Compensation Proceedings

In *Matter of Guardianship of Lindroth*, the Indiana Court of Appeals

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71. *Id.*

72. *Id.*

73. *Id.* at 258 (citing Beam v. Wausau Ins. Co., 765 N.E.2d 524 (Ind. 2002)).

74. *Id.* (citing *Beam*, 765 N.E.2d at 534).

75. *Id.* (citing *Beam*, 765 N.E.2d at 534-35).

76. *Id.* (citing *Beam*, 765 N.E.2d at 534).

77. *Id.*

78. *Id.* at 258-59.

79. *Id.* at 259.

80. *Id.*

81. *Id.* (moreover, because Indiana Code section 34-13-1-6 states that "the judgment 'draw[s] interest at an annual rate of six percent (6%) from the date of the adjournment of the next ensuing session of the general assembly,'" post-judgment interest began running from March 14, 2018, the date the General Assembly adjourned in its next ensuing session).

considered whether Indiana trial courts have the authority to decide issues within worker's compensation proceedings.[82] Specifically, the issue was whether Indiana's Lake County Circuit Court had jurisdiction "to calculate the attorney fees due in [an] Illinois Worker's Compensation proceeding."[83] As a preliminary matter, the Court of Appeals noted that "Indiana courts only have jurisdiction to the extent that jurisdiction has been granted to them by the constitution or by statute."[84] It next clarified that "appeals from worker's compensation proceedings rest within the jurisdiction of the Court of Appeals," and "trial courts do not have authority to review or decide issues within worker's compensation proceedings."[85] The court acknowledged that "[u]nlike in Indiana, appeals of decisions from the Illinois Commission proceed to circuit courts," but found that the Lake Circuit Court did not qualify as a circuit court for purposes of Illinois's statute.[86] The Court of Appeals went still further, stating, "even if the Lake Circuit Court had jurisdiction . . . it should have abstained from interfering with the Illinois Worker's Compensation Arbitrator's authority to determine when and how attorney fees would be paid inside that Worker's Compensation action."[87]

E. Appellate Court's Ability to Entertain Appeals

During the survey period, Indiana's appellate courts continued to reinforce what constitutes a final judgment pursuant to Indiana Appellate Rule 2(H), consistently advising that where cross claims remain pending, there is no finality of judgment.[88] This definition of "final judgment" also applies in *res judicata* analyses.[89]

The appellate courts also contemplated the timeliness of appeals. In *Dobson v. Dobson*, the appellee did not contest the timeliness of the appeal, and the court of appeals considered the appeal "despite considerations of timeliness," citing a 2014 Indiana Supreme Court Case instructing that a failure to file timely appeal "does not deprive the appellate courts of jurisdiction to entertain the appeal."[90]

F. Preserving Issues for Appeal

The Indiana Court of Appeals considered whether or not there was an

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82. Matter of Guardianship of Lindroth, 114 N.E.3d 916 (Ind. Ct. App. 2018).

83. *Id.* at 922.

84. *Id.* at 920 (citing In re Custody of M.B., 51 N.E.3d 230, 234 (Ind. 2016)).

85. *Id.* (citing IND. R. APP. P. 5(C)(1) & 9(A)).

86. *Id.* at 921.

87. *Id.* at 922.

88. *See, e.g.*, Bulmer v. Olson, 132 N.E.3d 926 (Ind. Ct. App. 2019) (order directing a guardian ad litem to assist in finding a parenting coordinator to review progression of a father's parenting time was not a final order disposing of all issues as to all parties, nor did trial court direct entry of judgment).

89. Edwards v. Edwards, 132 N.E.3d 391, 396-97 (Ind. Ct. App. 2019).

90. No. 18A-DR-1997, 2019 WL 1717097, at *4 n.3 (Ind. Ct. App. Apr. 18, 2019) (citing In re O.R., 16 N.E.3d 965, 971 (Ind. 2014)).

adequate basis for appeal where the appellant objected on the grounds that "key parts of the recordings, and the translation of same for the jury, were of sufficiently poor quality so as to be confusing and misleading to the jury."[91] The appellant carries the burden of presenting a record for sustaining his argument on appeal.[92] The court of appeals compared the situation to *House v. State*, wherein the Indiana Supreme Court "held that an objection made during an unrecorded sidebar conference was not preserved and that the defendant should have corrected any deficiency in the record according to the appellate rule allowing for reconstruction of allegedly missing portions of the transcript," pursuant to Appellate Rule 31.[93] The court of appeals concluded that Shoda "failed to preserve any claim of error because he failed to make a contemporaneous objection nor has he presented us with a record sufficient to demonstrate that he did preserve his claim of error."[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. Continued Emphasis on Format Requirements

The appellate courts continued to emphasize proper formatting of appellate briefs.

In *Adair v. Martin*, the Indiana Court of Appeals spent a significant portion of the opinion discussing the appellant's failure to comply with the Appellate Rules.[95] The Court noted that the appellant failed to include page references to the record on appeal or appendix in the statement of the case, violating both Indiana Appellate Rule 46 and Appellate Rule 22(C).[96] The appellant's statement of the case and statement of facts lacked citation to the record, and in fact, appellant did not file an appendix.[97] The court of appeals dismissed the appeal because the appellant "failed to advance his arguments with cogent reasoning or citations to relevant authority and the record," to the extent that "addressing his claims on the merits would require us to make and advance arguments for him."[98]

Violations of the Appellate Rules may not always be so fatal but may still result in a footnote admonishment. Indiana Appellate Rule 46(A)(8)(a) requires that "[e]ach contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on[.]" Likewise,

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91. Shoda v. State, 132 N.E.3d 454, 461 (Ind. Ct. App. 2019).
92. *Id.*
93. *Id.* (citing House v. State, 535 N.E.2d 103, 109 (Ind. 1989)).
94. *Id.*
95. No. 18A-JP-1674, 2018 WL 6519857, at *1 (Ind. Ct. App. Dec. 12, 2018).
96. *Id.*
97. *Id.*
98. *Id.* at *2.

Indiana Appellate Rule 46(A)(5) provides that "[p]age references to the Record on Appeal or Appendix are required." Finally, Indiana Appellate Rule 46(A)(6)(a) provides that the Statement of Facts "shall be supported by page references to the Record on Appeal or Appendix." In *Utica Township Fire Department Incorporated v. Floyd County Board of Zoning Appeals*, the court of appeals noted that, in violation of the above-cited rules, "the argument does not include any citations to the record on appeal" and the "statement of the case and statement of facts do not include any citations to the record."[99] Similarly, in *Matter of D.H.*, the court of appeals noted in a footnote that the appellant's statement of the case was insufficient, in that it was "one brief sentence with no record citations."[100]

Appellate Rule 43(D) provides a list of approved fonts, including Arial and Time New Roman, that may be used in "12-point or larger." In *Walters v. State*, the Court of Appeals "note[d] the font used in Appellant's brief does not conform with the approved fonts or sizes listed in Indiana Appellate Rule 43(D)."[101]

In *Bock v. Bock*, the court of appeals stated that "we have found several deviations by both parties from the Indiana Rules of Appellate Procedure, e.g., including argument in the facts section of the brief, print and spacing issues, and reliance on outdated rules concerning word count," citing Indiana Appellate Rules 43 and 44(D).[102] In addition to governing font and font size, Indiana Appellate Rule 43 provides that "[a]ll text shall be double-spaced except that footnotes, tables, charts, or similar material and text that is blocked and indented shall be single-spaced. Single-spaced lines shall be separated by at least 4-point spaces."[103] Indiana Appellate Rule 44(D) provides page-count requirements for briefs. Finally, the court of appeals "admonish[ed] counsel to consult the current Rules of Appellate Procedure as well as the current edition of *The Bluebook, A Uniform System of Citation*."[104] Indiana Appellate Rule 22 provides that "[u]nless otherwise provided, a current edition of a Uniform System of Citation (Bluebook) shall be followed."

In *Company v. Review Board of Indiana Department Workforce Development*, the Court of Appeals "note[d] that Company submitted a brief that is single-spaced," in violation of Indiana Appellate Rule 43(E).[105] The Court of Appeals also reminded the parties to comply with "Appellate Rule 46(A)(1), which requires a table of contents to list each section of the brief, including the headings and subheadings of each section and the page on which they begin. Company failed to include the headings of its arguments section and the appropriate page numbers."[106] Finally, the Court of Appeals noted that Indiana

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99. 126 N.E.3d 912, 914, 914 n.3 (Ind. Ct. App. 2019).
100. 119 N.E.3d 578, 581 n.2 (Ind. Ct. App. 2019).
101. 120 N.E.3d 1145, 1147 n.2 (Ind. Ct. App. 2019).
102. 116 N.E.3d 1124, 1126 n.1 (Ind. Ct. App. 2018).
103. IND. R. APP. P. 43(E).
104. *Bock*, 116 N.E.3d at 1126 n.1.
105. 113 N.E.3d 1214, 1216 n.2 (Ind. Ct. App. 2018).
106. *Id.*

Appellate Rule 46(A)(6)(b) "requires that the facts 'be stated in accordance with the standard of review appropriate to the judgment or order being appealed.'"[107] "Company's brief blatantly disregards this standard of review; instead of presenting the facts in a light favorable to the Review Board's decision, Company presents only facts that favor its desired outcome and omits facts that support the Review Board's findings of fact and conclusions of law."[108]

On a related note, the courts continue to emphasize citing current versions of the rules and of the Indiana Code. In *Adamowicz v. Anonymous, M.D.*, the Indiana Court of Appeals reminded counsel that "[t]he 2018 version of the Indiana Code is freely available online" and should be referenced, rather than the "1998 version," which the appellant cited.[109]

B. Appellate Appendices and Addendums to Briefs

The court of appeals addressed record materials included as an addendum to a brief. In *Northcrest R.V. Park v. Lakeland Regional Sewer District*, the court of appeals instructed that, according to Appellate Rules 50(A)(2)(h) and 22(C), documents included in an addendum to a brief must also be in an appendix.[110] Citation to these materials should be to both "the Appendix or Transcript *and* to the Addendum to Brief."[111]

C. Do Not Cite Evidence in Appellate Record Not Admitted During an Evidentiary Hearing

Appellate Rule 42 provides that "[u]pon motion made by a party . . . the court may order stricken from any document any redundant, immaterial, impertinent, scandalous or other inappropriate matter."[112] In *B.D. v. Indiana University Health Bloomington Hospital*, IU Health sought the temporary involuntary commitment of B.D., and "the trial court held a hearing on the petition."[113] During the hearing, IU Health did not introduce into evidence a number of records that supported the application for immediate detention.[114] On appeal, IU Health referenced the records, which were not admitted into evidence, in its Appellee's brief.[115] B.D. moved to strike these documents, and "IU Health maintain[ed] that its references to the challenged documents were proper because they were filed according to statutory mandates."[116] The court of appeals granted the motion to strike "statements contained in those documents which were not admitted into

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107. *Id.* (quoting IND. R. APP. P. 46(A)(6)(b)).
108. *Id.*
109. No. 18A-MI-742, 2018 WL 4703057, at *3 n.5 (Ind. Ct. App. Oct. 2, 2018).
110. 117 N.E.3d 629, 632 n.2 (Ind. Ct. App. 2018).
111. *Id.* (emphasis in original) (quoting IND. R. APP. P. 22(C)).
112. IND. R. APP. P. 42.
113. 121 N.E.3d 1044, 1047 (Ind. Ct. App. 2019).
114. *Id.* at 1048.
115. *Id.*
116. *Id.*

evidence" because the court of appeals was unaware of "any portion of the civil commitment statute which relieves a petitioner from making evidence part of the hearing record in order for the trial court to consider it."[117]

D. Procedure for Correcting Clerk's Record

In *McMickle v. State*, the State argued that the appeal should be dismissed because McMickle's motion to correct error was filed one day late.[118] McMickle countered that his motion was timely filed, and that the CCS was simply incorrect.[119] The court responded, "[w]e direct McMickle's attention to Indiana Appellate Rule 32, which provides a procedure for correcting the Clerk's Record. Regardless, we decline to dismiss this appeal."[120]

E. Do Not Include a Transcript in the Appendices

During the review period, the court of appeals repeatedly reminded parties not to include the transcript in appendices. Indiana 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."[121] In *Rose v. Martin's Super Market L.L.C.*, the court of appeals noted that one of the party's the "appendix includes a complete transcript of the summary judgment hearing which is not necessary and is in fact, precluded by the Appellate Rules."[122] Similarly, in *Grdinich v. Plan Commission for Town of Hebron*, "Grdinich reproduced the transcript of this and the subsequent hearing in his appendix in contravention of Indiana Appellate Rule 50(F)."[123] In *In re Paternity of C.B.*, the court noted in a footnote that "both parties included copies of multiple exhibits in their appendices," violating Appellate Rule 50(F).[124] The court went on to instruct that "parties should not reproduce any portion of the Transcript in the Appendix," and noted that "Appellate Rules 50(A)(2)(g) and 50(A)(3) provide that appendices shall contain 'short excerpts from the Record on Appeal . . . , such as essential portions of a contract or pertinent pictures, that are important to a consideration of the issues raised on appeal."[125] Parties should not "include nonessential information in the appendix."[126]

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117. *Id.*
118. 135 N.E.3d 174, at *2 n.1 (Ind. Ct. App. 2019).
119. *Id.*
120. *Id.*
121. IND. R. APP. P. 50(F).
122. 120 N.E.3d 234, 234 n.2 (Ind. Ct. App. 2019), *trans. denied*.
123. 120 N.E.3d 269, 272 n.2 (Ind. Ct. App. 2019).
124. 112 N.E.3d 746, 749 n.1 (Ind. Ct. App. 2018).
125. *Id.*
126. *Id.*

F. Documents Included in an Addendum Must Also Be in the Appendices

"Indiana Appellate Rule 50(A)(2)(h) directs appellants to include in their appendices 'any record material relied on in the brief unless the material is already included in the Transcript.'"[127] Indiana Appellate Rule 22(C) then requires parties to cite all factual statements to either "'an Appendix' or to 'the Transcript or exhibits.'"[128] "If such a statement is additionally supported by material included in an addendum to a brief, the party's citation should be 'to the Appendix or Transcript *and* to the Addendum to Brief.'"[129] "Here, the Mobile Home Parks have included the documents from the first IURC action as well as the Kosciusko Superior Court's July 2017 order only in an addendum to their briefs and not also in their appendices, which is contrary to our appellate rules."[130]

G. Do Not Cite Unpublished Court of Appeals' Decisions

In *Hazelett v. Hazelett*, the court of appeals "direct[ed] counsel to Indiana Appellate Rule 65(D), which states: '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.'"[131] In *Hazelett*, a party cited an unpublished decision while "acknowledg[ing] there is limited case law interpreting" the relevant statute.[132] The court of appeals took the "opportunity to remind counsel that citation to unpublished opinions is inappropriate and prohibited by the appellate rules."[133]

IV. INDIANA'S APPELLATE COURTS

A. Case Data from the Indiana Supreme Court

During the 2019 fiscal year,[134] the Indiana Supreme Court disposed of 869 cases, including 443 criminal cases, 280 civil cases, 3 tax cases, 28 original actions, 106 attorney discipline cases, 1 board of law examiners case, 1 certified question, 1 mandate of funds case, and 5 judicial discipline cases.[135] The court heard fifty-one oral arguments during the fiscal year, 37 percent of which were

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127. Northcrest R.V. Park v. Lakeland Reg. Sewer Dist., 117 N.E.3d 629, 632 n.2 (Ind. Ct. App. 2018) (quoting IND. R. APP. P. 50(A)(2)(h)), *trans. denied*.

128. *Id.* (quoting IND. R. APP. P. 22(C)).

129. *Id.* (quoting IND. R. APP. P. 22(C)) (emphasis in original).

130. *Id.*

131. 119 N.E.3d 153, 160 n.3 (Ind. Ct. App. 2019) (quoting IND. R. APP. P. 22(C)).

132. *Id.*

133. *Id.*

134. The Indiana Supreme Court 2018 fiscal year ran from July 1, 2018 to June 30, 2019. *See* IND. SUPREME COURT, INDIANA SUPREME COURT ANNUAL REPORT 2018-19, 1 (2019), https://www.in.gov/judiciary/supreme/files/1819report.pdf [https://perma.cc/HXM7-EJYT].

135. *Id.* at 9.

heard before the court decided to grant transfer.[136] The court issued sixty-five majority opinions and twenty-one non-majority opinions.[137] Chief Justice Rush issued ten majority opinions, Justice David issued eleven majority opinions, Justice Massa issued six majority opinions, Justice Slaughter issued eight majority opinions, and Justice Goff issued eight majority opinions.[138] The court issued unanimous decisions 67 percent of the time.[139]

B. Case Data from the Indiana Court of Appeals

During 2018,[140] the Court of Appeals disposed of 2,933 cases.[141] This the first year since 2015 where the Court of Appeals saw a decrease in this number.[142] The court disposed of 1,633 criminal cases, 847 civil cases, and 453 other cases.[143] The court affirmed the trial court 81.8 percent of the time, with the court affirming 85.9 percent of criminal cases, 91.7 percent of post-conviction relief cases, and 67.0 percent of civil cases.[144] The average age of cases pending before the court of appeals at the end of 2018 was 1.8 months.[145] In addition to deciding cases, the court issued 8,054 orders.[146]

C. Judge John G. Baker Retires from the Court of Appeals

In January Court of Appeals Judge John G. Baker announced he would retire in the summer of 2020.[147] Judge Baker was "Indiana's longest-serving judge and a 30-year veteran of the Indiana Court of Appeals."[148] Judge Baker was appointed to the appellate court in 1989 by Governor Evan Bayh, and served as chief judge of the court.[149] Judge Baker was called "the most prolific appellate jurist in Indiana history, having authored more than 5,000 written opinions."[150] Judge

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136. *Id.* at 15.

137. *Id.* at 16.

138. *Id.*

139. *Id.*

140. The Indiana Court of Appeals 2018 annual report covers January 1, 2018, through December 31, 2018. *See* IND. COURT OF APPEALS, INDIANA COURT OF APPEALS 2018 ANNUAL REPORT, https://www.in.gov/judiciary/appeals/files/2018-coa-annual-report.pdf [https://perma.cc/7YZF-ZAXR].

141. *Id.* at 1.

142. *Id.*

143. *Id.*

144. *Id.* at 2.

145. *Id.*

146. *Id.*

147. *Baker Announces Retirement from Indiana Court of Appeals*, THE INDIANA LAWYER (Feb. 11, 2020), https://www.theindianalawyer.com/articles/baker-announces-retirement-from-indiana-court-of-appeals [https://perma.cc/C83J-V4ZR].

148. *Id.*

149. *Id.*

150. *Id.*

Baker also formerly served as a trial court judge in Monroe County for over thirteen years.[151] He taught at the Indiana University School of Public and Environmental Affairs and at the IU McKinney School of Law for many years.[152] Judge Baker's long service to the court is remembered fondly and appreciated.

D. Judge Cale J. Bradford Elected as Chief Judge of Court of Appeals

Judge Cale J. Bradford was elected as the chief judge of the Indiana Court of Appeals, succeeding Judge Nancy Vaidik.[153] Judge Bradford's term began January 1, 2020.[154] He has served on the Court of Appeals for nearly thirteen years, after being appointed by Governor Mitch Daniels in 2007.[155] Prior to his appellate service, Judge Bradford served as judge of the Marion Superior Court for around ten years.[156] Members of the Court of Appeals elect their chief every three years.[157]

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 will see some changes in 2020.

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151. *Id.*

152. *Id.*

153. Katie Stancombe, *Bradford Elected COA Chief Judge, Succeeding Vaidik*, THE INDIANA LAWYER (Jan. 3, 2020), https://www.theindianalawyer.com/articles/bradford-elected-coa-chief-judge-succeeding-vaidik [https://perma.cc/J82P-UZ4G].

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*