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]

Though not directly an amendment to the Indiana Appellate Rules, the Indiana Supreme Court made significant changes to Administrative Rule 9 which had an impact on the Appellate Rules. Instead of a reference to Indiana Administrative Rule 9, the Appellate Rules now contain numerous citations to the newly-issued Rules on Access to Court Records, rather than Administrative Rule 9, including Appellate Rules 2(N), 9(F)(9)(b), 9(J), 23(F)(1)-(4), 28(F), 29(D), 53(H), and 65(F).[4] The Order Creating Indiana Rules on Access to Court Records

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1. The survey period is between October 1, 2019, and September 30, 2020.

2. Press Release, Ind. Supreme Court, E-Filing Progress Continues with Certain Cases and Counties Requiring the Move Away from Paper (Apr. 12, 2016), https://events.in.gov/event/supreme-e-filing-progress-continues-with-certain-cases-and-counties-requiring-the-move-away-from-paper [https://perma.cc/4LLN-WTKF].

3. Order Amending Indiana Rules of Court, No. 19S-MS-41, at 1 (Ind. Dec. 19, 2019).

4. *Id.* at 1, 15-19.

("Access Rules") was entered on December 19, 2019.[5] The purpose of the Access Rules was to govern public access to, and confidentiality of, Court Records.[6] Pursuant to the new rules, access to Court Records is to be governed by the Indiana Access to Public Records Act.[7] Rule 7(B) addresses the transcript on appeal, and provides that if an oral statement memorialized in the transcript on appeal is to be excluded from Public Access, then during hearing or trial, the Court Reporter shall be given notice of the exclusion and the basis.[8] Rule 7 also instructs, "[T]he Court Reporter shall comply with Appellate Rules 28(F) and 29(D) when preparing the transcript on appeal."[9]

The Indiana Supreme Court amended Indiana Appellate Rule 11(D), which addresses the duties of the Court Reporter and the failure to file a complete transcript.[10] This rule discusses what an appellant shall do when the Court Reporter fails to file a transcript as required, and directs the appellant to file a motion to compel, which shall be verified and shall state that "the motion was served on the Court Reporter," replacing the former language that "service as required under Rule 24(A)(1) was properly made."[11]

The Indiana Supreme Court amended Indiana Appellate Rule 22(B), citation form for "Citations to Indiana Statutes, Regulations, Court Rules, and County Local Court Rules."[12] This amendment modified what the Court prefers for the long and short form of various citations, and now reads as follows:

INITIAL	**SUBSEQUENT**
Ind. Code § 34-1-1-1 (20 xx)	I.C. § 34-1-1-1
34 Ind. Admin. Code 12-5-1 (2004)	34 I.A.C. 12-5-1
29 Ind. Reg. 11 (Oct. 1, 2005)	29 I.R. 11
Ind. Access to Court Records Rule 7	A.C.R. 7
Ind. Administrative Rule 7(A)	Admin. R. 7(A)
Ind. Admission and Discipline Rule 23(2)(a)	Admis. Disc. R. [23](2)(a)
Ind. Alternative Dispute Resolution Rule 2	A.D.R. 2
Ind. Appellate Rule 8	App. R. 8
Ind. Child Support Rule 2	Child Supp. R. 2
Ind. Child Support Guideline 3(D)	Child Supp. G. 3(D)
Ind. Crim. Rule 4(B)(1)	Crim. R. 4(B)(1)
Ind. Evidence Rule 301	Evid. R. 301
Ind. Judicial Conduct Rule 2.1	Jud. Cond. R. 2.1

5. Order Creating Indiana Rules on Access to Court Records, No. 19S-MS-41 (Ind. Dec. 19, 2019).

6. *Id.* at 2-3.

7. *Id.* at 2.

8. *Id.* at 11.

9. *Id.*

10. Order Amending Rules of Appellate Procedure, No. 20S-MS-1 (Ind. July 10, 2020).

11. *Id.* at 1.

12. *Id.*

Ind. Jury Rule 12	J.R. 12
Ind. Original Action Rule 3(A)	Orig. Act. R. 3(A)
Ind. Post-Conviction Rule 2(2)(b)	P-C.R. 2(2)(b)
Ind. Professional Conduct Rule 6.1	Prof. Cond. R. 6.1
Ind. Small Claims Rule 8(A)	S.C.R. 8(A)
Ind. Tax Court Rule 9	Tax Ct. R. 9
Ind. Trial Rule 56	T.R. 56[13]

The Indiana Supreme Court amended Indiana Appellate Rule 29 regarding exhibits.[14] In subsection A, Documentary Exhibits, the rule now states that "testimony in written form . . . shall be included in separate volumes that conform to the requirements of Appendix A(1), (2)(a), (11), and (12)," eliminating "and (14)."[15] Subsection B concerning audio and visual recordings now includes that

> [a]udio or video recordings submitted on physical media in criminal cases shall be returned to the trial court five (5) years after the appellate case is concluded. Audio or video recordings submitted on physical media in civil cases shall be returned to the trial court sixty (60) days after the appellate case is concluded.[16]

Subsection C concerning nondocumentary and oversized exhibits now includes that

> [n]ondocumenatry and oversized exhibits sent to the Court in criminal cases shall be returned to the trial court five (5) years after the appellate case is concluded. Nondocumentary and oversized exhibits sent to the Court in civil cases shall be returned to the trial court sixty (60) days after the appellate case is concluded.[17]

The Indiana Supreme Court added to Indiana Appellate Rule 49(C), concerning "Retendered Appendices," that "[i]f an appendix is received but not filed in accordance with Appellate Rule 23(D), all volumes of the Appendix shall be retendered."[18]

The Indiana Supreme Court also amended the Appendices to the Indiana Appellate Rules. Section 11 of Appendix A was amended to provide that "[a] transcript volume shall be a single PDF . . . file consisting of no more than two hundred fifty (250) pages."[19] Each volume should contain the volume number on the first page, and every page of each volume should be numbered.[20] Multiple hearings should be combined into a single volume, capped at either "two hundred

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13. *Id.* at 1-2.
14. *Id.* at 3.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*

fifty (250) pages or fifty megabytes (50MB)," whichever is greater.[21] The table of contents to the appendix should note if a page count is reduced because the volume hits fifty megabytes.[22]

Appendix B was modified to add that "[a] Notice of Defect may be issued if . . . . [, f]or a non-public access version of a document, a conspicuous designation of 'Not for Public Access' or 'Confidential'" is not on the first page, pursuant to Indiana Appellate Rule 23(F).[23] A Notice of Defect will not be issued if hyperlinks appear in a color other than black, which is permitted.[24]

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. Indiana Supreme Court Orders Addressing the Global COVID-19 Pandemic

The Indiana Supreme Court issued numerous orders in 2020 responding and providing guidance to courts as a result of the global COVID-19 pandemic.[25]

> On March 6, 2020, Governor Holcomb in Executive Order 20-02 declared a public health emergency in Indiana relating to the 2019 novel coronavirus (COVID-19); . . . and on March 25, Governor Holcomb issued Executive Orders 20-08 and 20-09, ordering Hoosiers to remain in their homes . . . and closing State government offices, including the Indiana Statehouse and Government Center campuses, to the general public.[26]

Initially, the Court tolled through April 6, 2020

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21. *Id.*

22. *Id.*

23. *Id.* at 4.

24. *Id.*

25. *In re* Admin. Rule 17 Emergency Relief for Ind. Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), 141 N.E.3d 389 (Ind. Mar. 23, 2020) (mem.) [hereinafter *March 2020 Order*]; *In* re Admin. Rule 17 Emergency Relief for Ind. Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), 142 N.E.3d 426 (Ind. Apr. 7, 2020) (mem.) [hereinafter *April 7, 2020 Order*]; *In* re Admin. Rule 17 Emergency Relief for Ind. Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), 143 N.E.3d 297 (Ind. Apr. 30, 2020) (mem.); *In* re Admin. Rule 17 Emergency Relief for Ind. Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), 144 N.E.3d 716 (Ind. May 19, 2020) (mem.); *In* re Admin. Rule 17 Emergency Relief for Ind. Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), 146 N.E.3d 922 (Ind. June 19, 2020) (mem.); *In* re Admin. Rule 17 Emergency Relief for Ind. Trial Courts Relating to the 2019 Novel Coronavirus (COVID-19), 147 N.E.3d 1019 (Ind. July 2, 2020) (mem.).

26. *April 7, 2020 Order*, 142 N.E.3d at 426.

> all laws, rules, and procedures setting time limits for appellate filings . . . , including . . . Notices of Appeal, Ind. Appellate Rule 9(A)(1); assembly of the Clerk's Record and filing of Transcript, App. Rs. 10-11; copying the Clerk's Record, App. R. 12(A); interlocutory appeals, App. R. 14; expedited appeals . . . , App. R. 14.1; all briefs, appendices, petitions for rehearing, petitions to transfer, and petitions for review of Tax Court decisions, App. Rs. 45(B), 49(A), 54, 57, & 63; and motions to tax costs, App. R. 67.[27]

The Indiana Supreme Court suspended in-person filing options under Indiana Appellate Rule 23(A)(1), ordering that e-filing continue pursuant to Indiana Appellate Rule 68.[28] Parties unable to e-file with an emergency appellate matter were directed to contact Supreme Court Services.[29] The Court then tolled all laws, rules, and procedures in all civil and criminal matters in the State of Indiana, including appellate matters.[30] In subsequent orders, the Indiana Supreme Court directed parties that if they had any difficulties in meeting deadlines, they should move for extensions of time "notwithstanding any contrary provision of Appellate Rules 9(A)(5), 35(C), 54, 57, or 63" or should move "for leave to file their document belatedly pursuant to Appellate Rule 1."[31]

On May 21, 2020, the Indiana Supreme Court held its first ever completely virtual oral argument, where all of the justices and advocates appeared by video.[32]

B. Finality of Judgments

The Indiana Court of Appeals discussed its ability to hear cases based on the finality of judgments. In *City of Hammond v. Rostankovski*, the appellee argued that the Court of Appeals was not an appropriate court of review for the appeal of an order from City Court under Indiana Code section 33-35-5-10.[33] The Court noted that the statute, which sets out the procedure for appeal from certain city court decisions, is silent as to the issue of the Court of Appeals' jurisdiction over such cases.[34] Appellee argued that the silence should be taken as a lack of jurisdiction, but the Court of Appeals determined that it represented a conflict between the procedural statute and the Indiana Supreme Court's procedural

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27. *March 2020 Order*, 141 N.E.3d at 390.

28. *Id.*

29. *Id.*

30. *Id.*

31. *See, e.g.*, *April 7, 2020 Order*, 142 N.E.3d at 427.

32. Olivia Covington, *'The Wheels of Justice Must Go On': Indiana Supreme Court Hears First Remote Arguments*, IND. LAW. (May 14, 2020), https://www.theindianalawyer.com/articles/the-wheels-of-justice-must-go-on-indiana-supreme-court-hears-first-remote-arguments [https://perma.cc/2NZG-UKTB].

33. City of Hammond v. Rostankovski, 148 N.E.3d 1165, 1168 (Ind. Ct. App. 2020).

34. *Id.*

rules.[35] In such instances, the Court of Appeals held that "the supreme court rule takes precedence and the conflicting statute is nullified."[36] Accordingly, to the extent the statute was silent on jurisdiction and this posed a conflict, the Indiana Appellate Rules took precedence.[37] Indiana Appellate Rule 5 states that "the Court of Appeals shall have jurisdiction in all appeals from Final Judgments of Circuit, Superior, Probate, and County Courts," and Indiana Appellate Rule 4 establishes when "the Indiana Supreme Court has mandatory and exclusive jurisdiction."[38] The City's appeal did not fall into a category requiring the Indiana Supreme Court's exclusive jurisdiction, and so it was held that the Court of Appeals had jurisdiction over the appeal.[39] The Court of Appeals also noted that the trial court's order contained the language required under Indiana Appellate Rule 2(H) that there was no just reason for delay and that the order was a final and appealable order.[40]

C. Trial Rule 41(F) Is Not a Substitute for a Timely Appeal

In *Smith v. Franklin Township Community School Corp.*, plaintiff Smith filed a lawsuit nine days prior to the statute of limitations expiration.[41] The school corporation moved to dismiss the complaint, for failure to provide a required pre-suit notice.[42] Smith did not respond, and when the trial court dismissed the case, Smith did not appeal.[43] Months later, Smith made a "series of Trial Rule 41(F) filings that requested reinstatement of the case."[44] The Indiana Supreme Court vacated the trial court order, holding that Smith had attempted an impermissible collateral attack on the dismissal, that "a motion for reinstatement is not a substitute for a direct appeal," and that Smith could not "delay raising available arguments and later rely on Trial Rule 41(F) to lodge a collateral attack against the merits of a trial court's decision."[45] The Court explained that the decision disposing of the complaint was a final appealable order under Indiana Trial Rule 2(H)(1), and was effectively a dismissal without prejudice due to the expiration of the statute of limitations.[46] Smith could have filed a timely notice of appeal (App. R. 9(A)(1)) but did not, forfeiting his right to appellate review.[47] The Court stated that accepting Smith's arguments "would essentially allow him limitless

35. *Id.*
36. *Id.*
37. *Id.* at 1168-69.
38. *Id.* at 1169.
39. *Id.*
40. *Id.*
41. Smith v. Franklin Twp. Cmty. Sch. Corp., 151 N.E.3d 271, 272 (Ind. 2020).
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 273-74.
46. *Id.* at 274.
47. *Id.*

appeals," and instead, "Smith's request was actually an impermissible collateral attack on the trial court's dismissal order."[48]

D. Guidance on Interlocutory Appeals

The Indiana Court of Appeals showed a willingness towards flexibility in the timing of filing an interlocutory appeal. In *State v. McFarland*, the State missed its deadline to file a motion for interlocutory appeal with the Court of Appeals by one day.[49] The Court of Appeals acknowledged that in the past, it had instructed that the failure to perfect an interlocutory appeal forfeits the opportunity to pursue the appeal, but chose to address the appeal on the merits anyway in this case.[50]

The Indiana Court of Appeals discussed the ability of parties to bring an interlocutory appeal as a matter of right under Indiana Appellate Rule 14(A)(1) in an appeal that purported to be as a matter of right because it originated from an order "for the payment of money."[51] The Court of Appeals noted that the Indiana Supreme Court has observed that this language requires a party to pay a specific amount at a specific time, while the trial court order in the case at hand did not, choosing instead to incorporate the parties' agreement by reference.[52] The agreement compelled certain parties to "execute a mutual release."[53] The Court of Appeals found that this requirement was sufficient to confer an immediate right to appeal not under Appellate Rule 14(A)(1), but under Rule 14(A)(2), "to compel the execution of any document."[54]

In *Kroger Limited Partnership I v. Lomax*, the Indiana Court of Appeals reiterated that a motion to reconsider shall not extend the time for proceeding under the Appellate Rules.[55] Appellant Kroger had served requests for admissions which were not timely answered, but the trial court granted relief to the recipient of the requests for admissions on December 13, 2018 and January 23, 2019.[56] Kroger filed a motion to reconsider, which was denied on March 12, 2019 (the "MTR Order").[57] For the same reasons, the trial court denied Kroger's motion for

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48. *Id.* at 274-75.

49. State v. McFarland, 134 N.E.3d 1027, 1030 n.3 (Ind. Ct. App. 2019).

50. *Id.*

51. City of Plymouth v. Michael Kinder & Sons, Inc., 137 N.E.3d 312, 315 n.3 (Ind. Ct. App. 2019); *see also* First Chi. Ins. Co. v. Collins, 141 N.E.3d 54, 64 n.9 (Ind. Ct. App. 2020) (where order stating party must make money "available" to recipient, the order was one for the payment of money and therefore appealable as a matter of right). Parties may also bring appeals as a matter of right when the court issues an order for the delivery of the possession of real property. Vic's Antiques & Uniques, Inc. v. J. Elra Holdings, LLC, 143 N.E.3d 300, 303 n.2 (Ind. Ct. App. 2020).

52. *City of Plymouth*, 137 N.E.3d at 315 n.3.

53. *Id.*

54. *Id.*

55. Kroger Ltd. P'ship I v. Lomax, 141 N.E.3d 46, 50 (Ind. Ct. App. 2020).

56. *Id.* at 48-49.

57. *Id.* at 49.

summary judgment on March 12, 2019.[58] On March 26, 2019, Kroger sought to certify for appeal the MTR Order and the summary judgment order, which the trial court granted and the Court of Appeals accepted.[59] However, the Court of Appeals ultimately held that in certifying the MTR Order, Kroger was actually seeking appeal of the trial court's December 13, 2018 and January 23, 2019 orders, which were outside of the thirty day limit of Appellate Rule 14(B)(1)(a), and that a motion to reconsider could not extend the time to certify those orders for interlocutory appeal.[60] Additionally, the Court of Appeals found the appeal of the motion to reconsider to be untimely because a motion to reconsider is automatically deemed denied after five days.[61] Accordingly, the Court of Appeals declined to consider the arguments related to the December 13, 2018 and January 23, 2019 orders, which were not properly before the court.

In *Battering v. State*, the Court of Appeals discussed Indiana Appellate Rule 14(H), which provides that the general rule is that an interlocutory order does not stay proceedings in the trial court unless the trial court or Court of Appeals so orders.[62] The Court of Appeals emphasized that a plain reading of this rule was required, and rejected the State's argument that it had constructively or substantially complied with the spirit of the rule.[63] The Court of Appeals held that the State did have an appropriate remedy available, to request a stay, and it failed to do so.[64]

E. Parties on Appeal

The Indiana Court of Appeals discussed Indiana Appellate Rule 17 in *Kelley v. Kelley*.[65] The Court of Appeals declined to reach the merits of the appeal because the appellant was a nonparty who had moved to quash a nonparty subpoena, which was denied.[66] The trial court had characterized the nonparty as an intervenor, but the Court of Appeals disagreed.[67] The Court of Appeals held that the appellant was not a party of record nor an intervenor, which would give him equal standing with the parties, and therefore he did not have standing to appeal.[68]

On the other hand, the Court of Appeals continues to note that in accordance with Indiana Appellate Rule 17(A), all named parties will be named on appeal by virtue of being named below, regardless of whether or not they are involved in

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58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 50.
62. Battering v. State, 150 N.E.3d 597, 602 (Ind. 2020).
63. *Id.*
64. *Id.*
65. Kelley v. Kelley, 158 N.E.3d 396, 399 (Ind. Ct. App. 2020).
66. *Id.* at 397-98.
67. *Id.* at 399.
68. *Id.* at 400.

the appeal.[69] Indeed, even parties who were dismissed at the trial court level are appropriately named on appeal.[70]

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 continue to emphasize the need for counsel to adhere closely to the formatting requirements set out in the Indiana Appellate Rules. In *Kindred v. Indiana Department of Child Services*, the Court of Appeals "admonish[ed] counsel to be more diligent in the preparation of the appellate record in the future," where counsel included documents in the record which were irrelevant to the proceedings, and included matters outside of the record pertaining to a different case.[71] The Court of Appeals also noted that counsel's citations to the record in their brief and reply briefs were "frequently incorrect."[72]

The Court of Appeals cares that litigants include correct citations. In *DSG Lake, LLC v. Petalas*, the Court of Appeals noted that the appellant had failed to include pinpoint citations for many cases referenced in its brief, which violated Indiana Appellate Rule 22 and the current edition of the Bluebook, "to which that rule refers."[73] The Court of Appeals stated, "On review, we will not search through the authorities cited by a party to try to find legal support for its position."[74] Parties are thus well-advised that their arguments may appear unsupported by authority absent proper citations.

In addition to the substantive requirements in the Indiana Appellate Rules, the Court of Appeals continues to emphasize the necessary structure of briefing. Indiana Appellate Rule 46(B)(1) provides:

> The appellee's brief may omit the statement of Supreme Court jurisdiction, the statement of issues, the statement of the case, and the statement of facts if the appellee agrees with the statements in the

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69. *See, e.g.*, Miller v. Patel, 160 N.E.3d 1111, 1111 n.1 (Ind. Ct. App. 2020); Whetstine v. Menard, Inc., 161 N.E.3d 1274, 1274 n.1 (Ind. Ct. App. 2020); Ind. Family & Soc. Servs. Admin. v. Anderson by Everroad, 155 N.E.3d 621, 621 n.1 (Ind. Ct. App. 2020); Estate of King by Briggs v. Aperion Care, 155 N.E.3d 1193, 1193 n.1 (Ind. Ct. App. 2020); Abbott v. Individual Support Home Health Agency, Inc., 148 N.E.3d 1091, 1091 n.1 (Ind. Ct. App. 2020).

70. *See, e.g.*, Stewart v. McCray, 135 N.E.3d 1012, 1012 n.1 (Ind. Ct. App. 2019) (noting that Sheneen Haley was dismissed before the trial court, but her name appears in the caption).

71. Kindred v. Ind. Dep't of Child Servs., 149 N.E.3d 304, 306 n.2 (Ind. Ct. App. 2020).

72. *Id.*

73. DSG Lake, LLC v. Petalas, 156 N.E.3d 677, 688 n.10 (Ind. Ct. App. 2020).

74. *Id.*

> appellant's brief. *If any of these statements is omitted, the brief shall state that the appellee agrees with the appellant's statements*.[75]

In *Gilley's Antique Mall v. Sarver*, the Court of Appeals noted that the appellee's brief lacked a statement of the case and a statement of facts, nor did it indicate that such sections were omitted because appellee agreed with appellant's statement of the case and statement of facts.[76] The Court of Appeals noted also that appellee's references to factual material lacked citations to the record, which Appellate Rule 22(C) requires.[77] This problem was also highlighted in *Casino v. Dusan*, where the Court of Appeals noted that "both parties fail[ed] to cite to the specific exhibit volume and page number as required by Indiana Appellate Rule 22(C)" when referring to exhibits.[78]

Similarly, the Court of Appeals noted in *Peele v. State* that

> Appellate Rule 46(B) permits the omission of a Statement of Facts from an appellee's brief 'if the appellee agrees with statements in the appellant's brief' and so states. Key facts are missing from the record on appeal, including the date of Peele's conviction in Shelby County. A conforming Statement of Facts from the State, or an affirmative statement that the State adopts Peele's Statement of Facts, would have aided our review."[79]

In *Cross-Road Farms, LLC v. Whitlock*, the Court Appeals directed a party's "attention to Indiana Appellate Rule 46(A)(6)(c), which provides that an appellant's Statement of Facts 'shall be in narrative form' and Appellate Rule 50 regarding the required contents of an Appellant's Appendix."[80] In *Turkette v. State*, the Court of Appeals reminded a party that "pursuant to Indiana Appellate Rule 46(A), the appellant's brief is required to set forth the statement of the facts before the standard of review."[81]

B. Guidance on Correcting the Transcript

The Court of Appeals provided some guidance related to the Indiana Appellate Rules concerning the preparation of transcripts. In *Wilson v. State*, the Court of Appeals noted that the transcript contained multiple indications of "inaudible," and that the appellant had not filed a statement of evidence pursuant to Appellate Rule 31 or a motion to correct or modify the transcript pursuant to Appellate Rule 32.[82] Accordingly, the Court of Appeals had no choice but to

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75. IND. R. APP. P. 46(B)(1) (emphasis added).

76. Gilley's Antique Mall v. Sarver, 157 N.E.3d 549, 551 n.2 (Ind. Ct. App. 2020).

77. *Id.*

78. Casino v. Dusan, 159 N.E.3d 21, 34 n.8 (Ind. Ct. App. 2020).

79. Peele v. State, 141 N.E.3d 838, 840 n.2 (Ind. Ct. App.), *trans. denied*, 145 N.E.3d 107 (Ind. 2020) (quoting IND. R. APP. P. 46(B)).

80. Cross-Road Farms, LLC v. Whitlock, 157 N.E.3d 555, 557 n.1 (Ind. Ct. App. 2020).

81. Turkette v. State, 151 N.E.3d 782, 784 n.1 (Ind. Ct. App. 2020).

82. Wilson v. State, 160 N.E.3d 222, 226 n.2 (Ind. Ct. App. 2020).

conclude that the appellant had made no objection or challenge to the trial court on an issue.[83] While these rules are often unused, advocates should use the mechanisms available in Appellate Rules 31 and 32 where a transcript is incomplete, especially if the defective section relates to a material issue on appeal.

The Court of Appeals discussed this further in *Cook v. Beeman*.[84] The parties disputed whether counsel for Cook had moved for a mistrial during a sidebar.[85] While Cook had filed a motion with the trial court to certify his statement of evidence pursuant to Indiana Appellate Rules 31 and 32, he did so after he had already filed his reply brief before the Court of Appeals.[86] "Accordingly, the trial court lost jurisdiction to rule on Cook's motion the same day Cook filed" it under the language of Indiana Appellate Rule 32(A).[87] The Court of Appeals deemed Cook's failure to timely supplement the record "particularly consequential in this case," because the Court of Appeals could not determine whether he had moved for a mistrial, on what basis, whether and what the appellee's objection was, and "what the trial court had said in issuing its ruling."[88] The Court of Appeals had no choice but to conclude that "Cook had waived any issues on appeal based on the arguments he made during the inaudible sidebar conference."[89]

The Indiana Appellate Rules were used to correct a transcript in *Back v. State* in a post-conviction proceeding.[90] The transcript from the trial court hearing indicated that Back agreed that he did *not* possess a destructive or explosive device.[91] When the post-conviction court listened to the audio of the hearing, it found there was a discrepancy between the audio and the written transcript, set the matter for a hearing, and ultimately entered an order amending the transcript after the State so moved under Appellate Rule 32.[92] The Court of Appeals found this to be consistent with Appellate Rule 8, which permits a trial court to correct errors prior to the Notice of Completion of Clerk's Record, and affirmed that the court had the authority to correct the transcript of the hearing.[93]

The Court of Appeals will not, however, allow parties to take advantage of immaterial mistakes the trial court may have made. For example, in *Moriarty v. Moriarty*, the trial court had adopted a party's proposed findings and conclusions.[94] On appeal, the other party argued that the order was clearly

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83. *Id.* at 226.

84. Cook v. Beeman, 150 N.E.3d 643 (Ind. Ct. App. 2020).

85. *Id.* at 646.

86. *Id.*

87. *Id.* (noting that if the trial court were to rule on the motion, it would have been *ultra vires*).

88. *Id.* at 646-47.

89. *Id.* at 647.

90. Back v. State, 162 N.E.3d 593, 596 (Ind. Ct. App. 2021).

91. *Id.* at 599.

92. *Id.*

93. *Id.* at 602-03.

94. Moriarty v. Moriarty, 150 N.E.3d 616, 620 n.1 (Ind. Ct. App. 2020).

erroneous because citations in the trial court order did not correspond with the official transcript on appeal, apparently because the parties had obtained their own copy of a certified transcript which had different pagination.[95] But of the order's more than 250 findings and conclusions, it was only argued that one footnote of one finding was unsupported by the record.[96] The Court of Appeals declined to find the order as erroneous, because this footnote was immaterial to the resolution of the issues on appeal, because the findings relied upon were accurately represented in the transcript on appeal, and because the requesting party had failed to make her request as a motion, as required by Appellate Rule 34.[97]

C. Arguments Must Be in Brief, not Cross-Referenced

"Indiana Appellate Rule 46(A)(8) provides that the argument section of an appellant's brief 'shall contain the appellant's contentions why the trial court . . . committed reversible error.'"[98] In *DSG Lake*, the appellant "attempt[ed] to incorporate 'by reference its arguments made in [its] amended response to the motion for summary judgment and motion to reconsider.'"[99] The Court of Appeals held that DSG "may not evade this requirement by referring us to arguments found in a brief filed at some earlier point."[100]

D. Word Limits are No Excuse for Not Complying with the Appellate Rules

In *Bergal v. Bergal*, a party gave "a broad, vague summary of her objections to Instructions," and she stated that "'due to word constraints' she was 'unable to maintain strict compliance with Indiana Appellate Rule 46(A)(8)(e).'"[101] The Court of Appeals rejected this argument because

> [i]t is for parties to evaluate their arguments and decide how to allocate their space in appellate briefs. Linda decided not to offer specific arguments related to these instructions—she also failed to cite any authority related to these arguments—and we decline to articulate and analyze arguments on her behalf.[102]

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95. *Id.*

96. *Id.*

97. *Id.*

98. DSG Lake, LLC v. Petalas, 156 N.E.3d 677, 687 n.9 (Ind. Ct. App. 2020) (alteration in original) (quoting IND. R. APP. P. 46(A)(8)).

99. *Id.* (alteration in original) (quoting Second Amended Brief of Appellant at *22, *DSG Lake*, 156 N.E.3d 677, 2020 WL 9456417, at *22).

100. *Id.* (quoting Dave's Excavating, Inc. v. City of New Castle, 959 N.E.2d 369, 376 (Ind. Ct. App. 2012)).

101. Bergal v. Bergal, 153 N.E.3d 243, 259 n.19 (Ind. Ct. App. 2020), *trans. denied*, 166 N.E.3d 904 (Ind. 2021) (alteration in original) (quoting Brief of Appellant at *51, *Bergal*, 153 N.E.3d 243, 2020 WL 9437397, at *51).

102. *Id.*

E. Statement of Facts Must Conform to Standard of Review

In *Dow v. Hurst*, the Court of Appeals "remind[ed] counsel for Dow that the Statement of Facts contained in an Appellant's Brief must be 'stated in accordance with the standard of review appropriate to the judgment or order being appealed.'"[103] "Dow's statement of facts is replete with references to evidence that is favorable to his position, e.g., his own trial testimony, but which is not favorable to the judgment reached by the trial court."[104]

F. Appendix Table of Contents Should Be Detailed

> Indiana Appellate Rule 50(C) provides that an appendix's "table of contents shall specifically identify each item contained" in the appendix. For nine of the County's eleven appendix volumes, the table of contents identifies only the administrative record volume number, which has made searching for specific documents unnecessarily burdensome.[105]

The Court of Appeals reminded the party that in the future, the table of contents should be more detailed.[106]

IV. INDIANA'S APPELLATE COURTS

A. Case Data from the Indiana Supreme Court

During the 2020 fiscal year,[107] the Indiana Supreme Court disposed of 874 cases, including 476 criminal cases, 269 civil cases, 4 tax cases, 29 original actions, 90 attorney discipline cases, 1 certified question, 1 mandate of funds case, and 4 judicial discipline cases.[108] The court heard 44 oral arguments during the fiscal year, 33% of which were heard before the court decided to grant transfer.[109] The court issued 57 majority opinions and 23 non-majority opinions.[110] Chief Justice Rush issued 10 majority opinions, Justice David issued 10 majority opinions, Justice Massa issued 7 majority opinions, Justice Slaughter

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103. Dow v. Hurst, 146 N.E.3d 990, 993 n.1 (Ind. Ct. App.), *trans. denied*, 152 N.E.3d 584 (Ind. 2020) (quoting IND. R. APP. P. 46(a)(6)(b)).

104. *Id.*

105. Miami Cty. v. Ind. Dep't of Nat. Res., 146 N.E.3d 1027, 1029 n.5 (Ind. Ct. App.), *trans. denied*, 159 N.E.3d 569 (Ind. 2020) (quoting IND. R. APP. P. 50(C)).

106. *Id.*

107. The Indiana Supreme Court 2020 fiscal year ran from July 1, 2019 to June 30, 2020. *See* IND. SUPREME COURT, ANNUAL REPORT 2019–2020 at 1 (2020), https://www.in.gov/courts/supreme/files/1920report.pdf [https://perma.cc/7G7X-2GVM].

108. *Id.* at 11.

109. *Id.* at 18.

110. *Id.* at 19.

issued 4 majority opinions, and Justice Goff issued 6 majority opinions.[111] The Court also issued 20 per curiam decisions.[112] The court issued unanimous decisions 62% of the time.[113]

B. Case Data from the Indiana Court of Appeals

During 2020,[114] the Court of Appeals disposed of 2,853 cases.[115] This is a decrease from 2019 when the Court of Appeals disposed of 3,151 cases.[116] The court disposed of 1,507 criminal cases, 866 civil cases, and 480 other cases.[117] The court affirmed the trial court 83.4% of the time, with the court affirming 88.7% of criminal cases, 92.5% of post-conviction relief cases, and 67.7% of civil cases.[118] The average age of cases pending before the Court of Appeals at the end of 2020 was 1.4 months.[119] In addition to deciding cases, the court issued 6,595 orders.[120]

C. Judge Leanna K. Weissmann Appointed to Court of Appeals

Judge Leanna K. Weissmann "was appointed to the Court of Appeals by Governor Eric Holcomb and began her service on September 14, 2020."[121] She was appointed after Judge John G. Baker retired on July 31, 2020, and became a Senior Judge.[122]

> Judge Weissmann graduated cum laude from Indiana University in 1991 with dual Bachelor of Arts degrees in Journalism and English. . . . She then earned her law degree from Indiana University Robert H. McKinney School of Law in 1994, graduating cum laude. [Following,] she served as an appellate law clerk for Justice Robert D. Rucker (then judge for the Court of Appeals of Indiana).
>
> Before joining the Court of Appeals, Judge Weissmann maintained a solo law practice in Lawrenceburg, Indiana for more than 20 years,

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111. *Id.*

112. *Id.*

113. *Id.*

114. The Indiana Court of Appeals 2020 annual report covers January 1, 2020 through December 31, 2020. *See* IND. COURT OF APPEALS, 2020 ANNUAL REPORT at *4 (2020), https://www.in.gov/courts/appeals/files/2020-coa-annual-report.pdf [https://perma.cc/AN47-MPKJ].

115. *Id.* at 1.

116. *Id.*

117. *Id.*

118. *Id.* at 2.

119. *Id.*

120. *Id.*

121. *Judge Leanna K. Weissmann*, COURT APPEALS IND., https://www.in.gov/courts/appeals/judges/leanna-weissmann/ (last visited Nov. 6, 2021) [https://perma.cc/4T3T-EA4H].

122. IND. COURT OF APPEALS, 2020 ANNUAL REPORT, *supra* note 114, at *6.

> representing criminal defendants and civil litigants in appellate litigation. . . . [S]he briefed more than 400 appeals and participated in more than 20 oral arguments before the Indiana Court of Appeals and the Indiana Supreme Court.
> . . . .
> . . . [Judge Weissmann] is an adjunct professor at Ivy Tech Community College.[123]

Judge Weissmann brings a wealth of experience to the Court of Appeals, and she is a welcome addition.

CONCLUSION

As everyone is aware, 2020 was certainly a challenging year in many regards. The Indiana appellate courts, however, continued analyzing, interpreting, and applying the Appellate Rules. It was also a year of firsts with the first ever remote oral argument.

123. *Judge Leanna K. Weissmann*, *supra* note 121.