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## SURVEY

### 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, the Indiana 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.<sup>1</sup> Instead, it focuses on the most significant decisions.

#### I. RULE AMENDMENTS

In December 2021, the Indiana Supreme Court issued an order that amended a number of Appellate Rules, as well as Appendix A to the Rules, to become effective January 1, 2022.<sup>2</sup> Specifically, within that order, the Indiana Supreme

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1. The survey period is between October 1, 2021, and September 30, 2022.

2. Order Amending Rules of Appellate Procedure, No. 21S-MS-19 (Ind. Dec. 16, 2021)

Court amended Appellate Rule of Procedure 28(C), titled “Submission of Electronic Transcript.”<sup>3</sup> The prior rule required the Court Reporter to “transmit the electronic Transcript to the trial court clerk through the IEFS”<sup>4</sup> if “e-filing is required in the trial court by Trial Rule 87(B)(1)”<sup>5</sup> and if “the documentary exhibits are in electronic form.”<sup>6</sup> The latter requirement was deleted.<sup>7</sup>

The Indiana Supreme Court also amended Appellate Rule of Procedure 29, which covers “Exhibits.”<sup>8</sup> Specifically, the court amended subsection (A), dealing with “Documentary Exhibits.”<sup>9</sup> Prior to the amendment, Rule 29(A) stated, in part, that: “The Court Reporter shall also prepare an index of the exhibits contained in the separate volumes, and that index will be placed at the front of the first volume of exhibits.”<sup>10</sup> The Rule now reads: “The Court Reporter shall also prepare an index of the exhibits contained in the separate volumes that conforms to the requirements of Appendix A(14).”<sup>11</sup> Appendix A(14)—part of Appendix A, “Standards for Preparation of Electronic Transcripts”—was likewise amended.<sup>12</sup> Appendix A(14) now provides details regarding the index of exhibits and reads:

The Court Reporter shall prepare an index of all of the exhibits. The index of exhibits shall be placed in the front of the first volume of exhibits and should not be included in any subsequent exhibit volumes. The index of exhibits shall identify each exhibit’s number or letter, the name of the party that offered the exhibits into evidence, and the exhibit volume and page number where the exhibit is located.<sup>13</sup>

Other subsections within Appendix A were also amended.<sup>14</sup> Specifically, Appendix A(2)(a) provides more clarity regarding page numbering and reads: “Each volume of the Transcript, including an exhibit volume, shall be

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[hereinafter December 2021 Order].

3. *Id.* at 1.

4. “IEFS” stands for “Indiana E-filing system.” IND. SUP. CT. OFF. OF JUD. ADMIN., E-FILING USER GUIDE, INDIANA STATEWIDE E-FILING SYSTEM 5 (May 13, 2021), <https://www.in.gov/courts/files/efiling-user-guide.pdf> [<https://perma.cc/Y46W-LD2Z>].

5. Trial Rule 87(B)(1) reads: “Unless otherwise permitted by these rules, documents submitted for filing in Indiana courts must be filed electronically with the clerk using IEFS. The e-filing of documents is controlled by the case number in the IEFS designated by the User.” IND. R. TRIAL P. 87(B)(1).

6. *See* December 2021 Order, *supra* note 2, at 1.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 3. Prior to this recent amendment, Appendix 14(A) had been deleted, effective January 1, 2017, and did not contain content. *See id.*

13. *Id.*

14. *Id.* at 2-3.

independently and consecutively numbered. All pages of the Transcript, including the front page (see Appendix A(12)), shall be consecutively numbered at the bottom. Each volume shall begin with numeral one on its front page.”<sup>15</sup> Appendix A(12) specifically addresses the “front page of each volume” and references “Form #App.R. 28-1.”<sup>16</sup> That form, in turn, provides a visual image of a “sample cover for transcript volumes.”<sup>17</sup>

Appendix A(11), also addressing transcript volumes, was amended.<sup>18</sup> Similar to the amendment of Appendix A(2), Appendix A(11) adds language that “[a]ll pages of the Transcript volume, including the front page (see Appendix A(12)), shall be consecutively numbered”<sup>19</sup> and continues to require that the numbering be placed at the bottom of each page, “starting with number one on each volume’s front page.”<sup>20</sup> Additionally, the Court provided more detail on dealing with multiple hearings in volumes.<sup>21</sup> Specifically, the underlined language was added to Appendix A(11):

Multiple hearings shall be combined into a single volume until the volume reaches no more than two hundred fifty (250) pages or fifty megabytes (50MB). A volume may be less than 250 pages to avoid splitting a hearing between volumes. If a single volume exceeds fifty megabytes (50MB), the number of pages may be fewer than two hundred fifty (250) pages. The table of contents volume shall note each such instance of reduced page count.<sup>22</sup>

Appendices (A)13 and (A)15 were likewise amended.<sup>23</sup> Appendix (A)13, covering “Table of Contents,” now explicitly directs the Court Reporter to prepare a table of contents “for the entire transcript.”<sup>24</sup> Additionally, the amendment adds: “Only one table of contents should be prepared even if multiple hearings are transcribed.”<sup>25</sup> The remaining portion of the Appendix 13 remains the same, apart from minor wording changes.<sup>26</sup> Appendix (A)15, which addresses,

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15. *Id.* at 2. Prior to this amendment, Appendix A(2)(a) read: “Each volume of the transcript shall be independently and consecutively numbered at the bottom. Each volume shall begin with numeral one of its front page.” *See id.*

16. *See* IND. R. APP. P. APPENDIX A(12).

17. IND. R. APP. P. 28-1. (This is within the Appendix of Forms.)

18. December 2021 Order, *supra* note 2, at 2.

19. *Id.*

20. *Id.*

21. *See id.*

22. *Id.*

23. *Id.* at 2-3.

24. *Id.* at 2.

25. *Id.*

26. *See id.* That portion now reads, “The table of contents shall list each witness and the volume and page where that witness’s direct, cross, and redirect examination begins. The table of contents shall identify each exhibit offered and shall show the Transcript volumes and pages at which the exhibit was identified and at which a ruling was made on its admission in evidence. The table of

“File Formatting and Size,” remains mostly the same apart from requiring that each transcript file “be no more than two hundred fifty (250) pages or fifty megabytes (50 MB)”<sup>27</sup> Previously, Appendix 15 stated that each transcript file “be limited in size to the lesser of two hundred fifty (250) pages or fifty megabytes (50 MB).”<sup>28</sup>

The Indiana Supreme Court also amended Indiana Rule of Appellate Procedure 51, “Form and Assembly of Appendices.”<sup>29</sup> Specifically, while the content of subsection (C) is mostly unchanged, wording changes provide more clarity as to the numbering of appendix volumes, especially the front pages, and includes an explicit reference to subsection (E) of the same Rule:

C. Numbering. Each Appendix volume shall be independently and consecutively numbered. All pages of the Appendix volume, including the front page (see Rule 51(E)), shall be consecutively numbered at the bottom starting with numeral one on each volume’s front page. The appendix page numbers should not obscure the page numbers exiting on the original documents.<sup>30</sup>

Rule 51(E) specifically addresses the front page of an appendix volume and refers to “Form #App.R. 51-1,”<sup>31</sup> which, in turn, provides a visual of a “sample cover for appendices.”<sup>32</sup>

The Indiana Supreme Court also provided more guidance regarding transfer briefs by amending Indiana Appellate Rule of Procedure 57.<sup>33</sup> Subsection (D) now explicitly covers both briefs in response to petitions to transfer, as well as notices regarding transfer and what those notices should—and should not—include.<sup>34</sup> The following sentences were added to Rule 57(D): “If a party does not intend to respond to the Petition, the party may file a Notice that no response will be filed. The Notice may not include any argument or other commentary on the merits of the petition or case. The Notice will be treated as a brief in response if it includes anything other than a statement that no response will be filed.”<sup>35</sup> Additionally, Rule 57(E), which covers reply briefs, explicitly states that the petitioner may file a reply brief “[i]f a brief in response is filed” but otherwise remains the same.<sup>36</sup>

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contents shall be a separate volume.” *Id.*

27. *Id.* at 3 (internal citation omitted).

28. *Id.* (internal citation omitted).

29. *Id.* at 1.

30. *Id.*

31. IND. R. APP. P. 51(E).

32. IND. R. APP. P. 51-1. (This is within the Appendix of Forms.)

33. December 2021 Order, *supra* note 2, at 2.

34. *Id.*

35. *Id.*

36. *Id.* Rule 57(E) states, in full: “If a brief in response is filed, the petitioning party may file a reply brief no later than ten (10) days after a brief in response is served. Rule 25(C), which provides a three-day extension for service by mail or third-party commercial carrier, may extend the due date;

The Indiana Supreme Court issued one other order within the survey period amending the Rules of Appellate Procedure.<sup>37</sup> In April 2022, the court amended Rule of Appellate Procedure 2 by adding the “Indiana Election Commission” into the definition of “Administrative Agency” within subsection (A).<sup>38</sup> The amendment became effective May 1, 2022; and Rule 2(A) currently reads, “Administrative Agency. An Administrative Agency is the Worker’s Compensation Board, Indiana Civil Rights Commission, Indiana Election Commission, Indiana Utility Regulatory Commission, or Review Board of the Department of Workforce Development.”<sup>39</sup>

## 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 issues such as appellate jurisdiction, when appeals are forfeited, and more.

### *A. Appellate Jurisdiction*

During this survey period, the Indiana Court of Appeals discussed its ability to exercise jurisdiction over appeals from certain orders.

In *Baker v. Pickering*, the Indiana Court of Appeals analyzed, in part, whether an order compelling arbitration constituted a final order under Indiana Appellate Rule of Procedure 2(H) that would allow it to exercise jurisdiction over the appeal pursuant to Indiana Appellate Rule 5.<sup>40</sup> After analyzing and distinguishing a few appellate decisions concerning orders compelling arbitration and their appealability, the court of appeals determined that the arbitration order at issue was not a final order under Rule 2(H).<sup>41</sup> Specifically, the panel determined that the arbitration order at issue was not a final order because the order neither “dispose[d] of all claims as to all parties,” Indiana Appellate Rule 2(H)(1), nor was it certified with the “magic language” pursuant to Trial Rule 54(B), Indiana Appellate Rule 2(H)(2).<sup>42</sup> Thus, the court of appeals determined it could not exercise jurisdiction over the appeal pursuant to Indiana Appellate Rule 5, which grants the appellate court jurisdiction over the majority of appeals from final judgments.<sup>43</sup> *Baker* provides important guidance to practitioners and parties

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however, no other extension of time shall be granted.” *Id.*

37. Order Amending Rules of Appellate Procedure, No. 22S-MS-1 (Ind. Apr. 20, 2022).

38. *Id.*

39. *Id.*

40. 178 N.E.3d 347, 351 (Ind. Ct. App. 2021).

41. *Id.* at 351-53 (analyzing and distinguishing the facts and holdings of *Angell Enters., Inc. v. Abram & Hawkins Excavating Co.*, 643 N.E.2d 362 (Ind. Ct. App. 1994); *Albright v. Edward D. Jones & Co.*, 571 N.E.2d 1329 (Ind. Ct. App. 1991); *Evansville-Vanderburgh Sch. Corp. v. Evansville Tchrs. Ass’n*, 494 N.E.2d 321 (Ind. Ct. App. 1986)).

42. *Id.* at 351, 353.

43. *Id.* at 351; *see also* IND. R. APP. P. 5A (“Except as provided in Rule 4, the Court of Appeals

interested in appealing orders compelling arbitration; the court's synthesis of decisions dealing with the appealability of orders compelling arbitration and its analysis of the specific order at issue clarify when appellate courts have subject matter jurisdiction to hear appeals from such orders.

The Indiana Court of Appeals also addressed its jurisdiction under Indiana Appellate Rule 5 in *Kenworthy v. Lyons Insurance & Real Estate, Inc.*<sup>44</sup> In that case, an employer had filed a complaint against an employer; and the employee asserted counterclaims.<sup>45</sup> Eventually, following denials of cross-motions for summary judgment and mediation, the employer settled all its claims against the employee; and the parties filed a stipulation of dismissal, with prejudice, on all of the employer's claims.<sup>46</sup> The employee also moved for voluntary dismissal of the counterclaims.<sup>47</sup> The trial court ultimately entered an order dismissing the employer's claims with prejudice and dismissing the employee's claims without prejudice.<sup>48</sup>

The employee then pursued an appeal—from several rulings by the trial court related to the employee's defense of claims brought by the employer and from the trial court's rulings related to the employee's counterclaims.<sup>49</sup> The Indiana Court of Appeals determined that it had no jurisdiction over any of the employee's appeal.<sup>50</sup> First, the panel determined that “[n]either the parties’ stipulation nor the trial court’s subsequent entry of an order of dismissal on the claims of [employer] was a final judgment from which appeal could be taken,” and thus, under Indiana Appellate Rule 5(A), the court of appeals did not have jurisdiction over the employee's appellate claims related to the employer's causes of action, dismissing those parts of her appeal.<sup>51</sup> Second, the panel determined that “a trial court’s grant of a plaintiff’s motion to voluntarily dismiss a suit ‘dissolves any and all interlocutory orders,’ puts the parties back into the position of the suit never having been filed, and renders any contested issues as to the dismissed claims moot.”<sup>52</sup> And, given that the counterclaim-related appellate claims did not involve a “question of great public importance that is likely to recur,” an exception to the mootness doctrine, the Indiana Court of Appeals dismissed the

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shall have jurisdiction in all appeals from Final Judgments of Circuit, Superior, Probate, and County Courts, notwithstanding any law, statute or rule providing for appeal directly to the Supreme Court of Indiana. See Rule 2(H).”). Additionally, the Indiana Court of Appeals determined that it did not have jurisdiction to hear the appeal pursuant to Indiana Appellate Rule 14, which governs interlocutory appeals. *Baker*, 178 N.E.3d at 354-55; see IND. R. APP. P. 14.

44. 185 N.E.3d 405 (Ind. Ct. App. 2022).

45. *Id.* at 407.

46. *Id.* at 407-09.

47. *Id.* at 409.

48. *Id.*

49. *Id.*

50. *Id.* at 412.

51. *Id.* at 411 (citing *Sartain v. Trilogy Healthcare of Hamilton II, LLC*, 137 N.E.3d 1050, 1052 (Ind. Ct. App. 2019)).

52. *Id.* (quoting *Fair Share Org. v. Kroger Co.*, 176 N.E.2d 205, 211 (1961)).

remaining portion of the employer’s appeal, as well.<sup>53</sup> *Kenworthy* highlights the important considerations, in regards to appellate jurisdiction, that parties and practitioners must consider when entering into a stipulation of dismissal or voluntarily dismissing claims.

### *B. Interlocutory Appeals*

The survey period also included two interesting decisions involving interlocutory appeals—one from the Indiana Court of Appeals and one from the Indiana Supreme Court.

The court of appeals provided helpful guidance on the importance of complying with appellate deadlines related to an interlocutory appeal, or risk forfeiting the appeal. In *Syndicate Claim Services, Inc. v. Trimmel*, a former employee had sued a former employer for breach of contract and violations of Indiana’s Wage Payment Act.<sup>54</sup> The trial court denied the former employer’s motion for partial summary judgment on the latter claim and certified its order for interlocutory review.<sup>55</sup> After the Indiana Court of Appeals accepted jurisdiction over the interlocutory appeal, the former employer failed to timely file its notice of appeal.<sup>56</sup> The former employer filed a motion to accept belated notice of appeal, explaining, in part, that the oversight was caused by lead counsel’s father breaking his arm while lead counsel was on vacation and lead counsel spending time finding care for his father.<sup>57</sup> The appellate court’s motion panel granted the motion, but the Indiana Court of Appeals reversed, relying on some recent guidance provided by the Indiana Supreme Court in *Cooper’s Hawk Indianapolis, LLC v. Ray*.<sup>58</sup>

The court of appeals explained that, once it accepts jurisdiction over a discretionary interlocutory appeal, and pursuant to Indiana Appellate Rules 9 and 14, the appellant has just fifteen days to file a notice of appeal or the appeal is forfeited<sup>59</sup>—unless the appellant can show “extraordinarily compelling reasons” to restore the appeal.<sup>60</sup> The *Syndicate* panel explained that “cases restoring appeals tend to fall in two categories” and that the Indiana Supreme Court, in *Cooper’s Hawk*, had endorsed these two categories, while also “leaving room to recognize others.”<sup>61</sup> Specifically, the court of appeals explained that cases involving “extraordinarily compelling reasons” to restore an appeal include cases

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53. *Id.* at 412.

54. 178 N.E.3d 1273 (Ind. Ct. App. 2021).

55. *Id.*

56. *Id.*

57. *Id.* at 1273-74.

58. *Id.* at 1274-75 (citing *Cooper’s Hawk Indianapolis, LLC v. Ray*, 162 N.E.3d 1097 (Ind. 2021) (per curiam)).

59. *Id.* at 1274 (citing IND. R. APP. P. 14(B)(3), IND. R. APP. P. 9(A)(5)).

60. *Id.* (citing *In re Adoption of O.R.*, 16 N.E.3d 965, 971 (Ind. 2014)).

61. *Id.*

implicating “fundamental liberty interests”<sup>62</sup> and cases involving an “‘obvious injustice’ . . . clear on the face of the trial court’s order.”<sup>63</sup> The court of appeals determined that the present case did not fall into either category—nor did it present any other extraordinary compelling reason to restore the appeal.<sup>64</sup> Given *Syndicate* and related case law, practitioners should be fully aware of the various deadlines imposed by the appellate rules.

Interlocutory appeals were also a subject of *National Collegiate Athletic Ass’n v. Finnerty*.<sup>65</sup> In that case, the trial court granted in part and denied in part the NCAA’s initial motion for a protective order and then failed to rule on the party’s Indiana Appellate Rule 14(B) motion to certify that order for appeal.<sup>66</sup> Because the trial court “did not rule on that motion within thirty days, it was deemed denied” under Rule 14(B)(1)(e).<sup>67</sup> The NCAA then filed a second motion for a protective order, which the trial court summarily denied but certified for discretionary interlocutory appeal under Rule 14(B).<sup>68</sup>

The Indiana Court of Appeals accepted jurisdiction over the matter and held that the NCAA’s second motion seeking a protective order was “nothing more than a motion for the trial court to reconsider its earlier ruling seeking a renewed opportunity to bring this issue to the appellate courts.”<sup>69</sup> Specifically, the panel determined that “[p]ursuant to Trial Rule 53.4(A) and Appellate Rule 14(B)(1),

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62. *Id.* (citing *Robertson v. Robertson*, 60 N.E.3d 1085, 1090 (Ind. Ct. App. 2016) (parent’s interest in custody of child); *Satterfield v. State*, 30 N.E.3d 1271, 1275 (Ind. Ct. App. 2015) (right to bail)).

63. *Id.* (citing *Cannon v. Caldwell*, 74 N.E.3d 255, 258-59 (Ind. Ct. App. 2017) (violation of child support guidelines)).

64. *Id.* at 1275. Interestingly, the Indiana Court of Appeals highlighted the trial court’s and the motions panel’s determinations that the “most efficient process for this case is an early review of the trial court’s analysis of the Wage Payment Statute”—something that was now delayed due to the dismissal of the interlocutory appeal. *Id.* Accordingly, noting that dismissal likely did not promote judicial economy, the court of appeals signaled to the Indiana Supreme Court that a change in the appellate rules could be wise and offered a solution: “[R]ather than requiring appellants in an interlocutory appeal to file a notice of appeal after we accept jurisdiction, appellants could be required to tender the notice of appeal with their motion to accept jurisdiction, and our order granting the motion could direct the clerk to file that notice so that there is no further action required of the appellant. But that would require a change in the Appellate Rules, and we lack authority to mandate those changes.” *Id.*

65. 191 N.E.3d 211 (Ind. 2022).

66. *Id.* at 215.

67. *Id.* (citing IND. R. APP. P. 14(B)(1)(e)). Indiana Appellate Rule 14(B)(1)(e) states: “In the event the trial court fails for thirty (30) days to set the motion for hearing or fails to rule on the motion within thirty (30) days after it was heard or thirty (30) days after it was filed, if no hearing is set, the motion requesting certification of an interlocutory order shall be deemed denied.” IND. R. APP. P. 14(B)(1)(e).

68. *Finnerty*, 191 N.E.3d at 216.

69. *Nat’l Collegiate Athletic Ass’n v. Finnerty*, 170 N.E.3d 1111, 1120 (Ind. Ct. App. 2021), *vacated*, 191 N.E.3d 211.

the NCAA's time for seeking an interlocutory appeal of the trial court's ruling on its motion for protective order has long since passed, and the NCAA has forfeited its right to appeal."<sup>70</sup>

The Indiana Supreme Court disagreed.<sup>71</sup> The court explained that, under Rule 14(B), a party can appeal "'other interlocutory orders' if that party clears two discretionary judicial hurdles."<sup>72</sup> First, the party has to "timely move the trial court to certify an order for interlocutory appeal."<sup>73</sup> And, second, "if the trial court certifies the order, the party must timely and successfully move the Court of Appeals to accept jurisdiction over the appeal."<sup>74</sup> The Indiana Supreme Court noted that the NCAA did clear both these hurdles for the trial court's order denying its second motion; and, thus, the discretionary interlocutory appeal was proper.<sup>75</sup> In so holding, the supreme court determined that "a trial court's order on a repetitive motion or a motion to reconsider is an 'other interlocutory order' under Appellate Rule 14(B)."<sup>76</sup> Additionally, the court provided a fairly lengthy explanation of why its holding was not "undermine[d]" by Trial "Rule 53.4(A)'s mandate that repetitive motions and motions to reconsider cannot delay proceedings."<sup>77</sup>

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70. *Id.*

71. *Finnerty*, 191 N.E.3d at 217.

72. *Id.*

73. *Id.* (citing IND. R. APP. P. 14(B)(1)).

74. *Id.* (citing IND. R. APP. P. 14(B)(2)).

75. *Id.* at 217-18.

76. *Id.* at 214, 218. Two important points are worth noting here. First, the Indiana Supreme Court did not definitively decide whether the NCAA's second motion was, in fact, a repetitive motion or a motion to reconsider. *Id.* at 217 ("Even assuming the NCAA's second motion for a protective order is a repetitive motion or a motion to reconsider, we hold that the trial court's order denying that motion falls within Appellate Rule 14(B)'s broad ambit."). And second, the court's determination that an order on a repetitive motion or a motion to reconsider is an Appellate Rule 14(B) "other interlocutory order" led the court to explicitly disapprove of court of Appeals precedent holding otherwise. *Id.* at 218 n.3 (disapproving of *Kroger Ltd. P'ship I v. Lomax*, 141 N.E.3d 46, 49-50 (Ind. Ct. App. 2020); *State v. L.B.F.*, 132 N.E.3d 480, 484-85 (Ind. Ct. App. 2019)).

77. *Id.* at 218. The Court explained that Trial Rule 53.4 "explicitly applies to delays or extensions 'under these rules,' T.R. 53.4(A), i.e., the Indiana Rules of Trial Procedure. By contrast, interlocutory appeals are governed by our appellate rules. *See* App. R. 9(A)(2), 14. Yet, assuming without deciding that Trial Rule 53.4(A) is relevant to interlocutory appeals, we find it was not designed to prohibit the type of delay caused by a discretionary interlocutory appeal. Parties seeking review under Appellate Rule 14(B) cannot unilaterally extend or delay the proceedings. Instead, delay results only upon the satisfaction of two conditions, both of which are matters of judicial discretion. First, the trial court must—in its sole discretion—determine whether to certify the order for interlocutory appeal. App. R. 14(B)(1). Then, if certified, the Court of Appeals must—in its sole discretion—determine whether to accept jurisdiction over the appeal. App. R. 14(B)(2). And even when both hurdles are cleared, Rule 14(H) mandates that the appeal 'shall not stay proceedings in the trial court unless the trial court or a judge of the Court of Appeals so orders.' App. R. 14(H). We also note that trial courts 'certify *orders* for interlocutory appeal, not *issues*.' *Butler Univ. v. Est. of*

*Finnerty* decided an important matter of first impression in regard to the appealability of a trial court's order on a repetitive motion or a motion to reconsider.

### *C. Request to Proceed in Forma Pauperis Is Not a Notice of Appeal*

In *Beasley v. State*, the post-conviction court denied Beasley's petition for post-conviction relief on August 21, 2020.<sup>78</sup> "On September 10, 2020, Beasley filed a pro se request to proceed in forma pauperis on appeal . . . ."<sup>79</sup> "On September 27, 2021, Beasley filed his Notice of Appeal with this court . . . ."<sup>80</sup> The Indiana Court of Appeals rejected "that an Indiana Appellate Rule 40(D) petition to proceed in forma pauperis was the functional equivalent of a notice of appeal" because "Beasley's in forma pauperis motion did not refer to initiating his appeal."<sup>81</sup>

## III. REFINING OUR APPELLATE PROCEDURE

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

### *A. Court of Appeals Reminds Counsel to Keep Briefing Civil*

Appellate Rule 41(A) requires a motion to appear as amicus curiae to state why it "would be helpful to the court."<sup>82</sup> In *Mellowitz v. Ball State University*, amicus accused the plaintiff of "blatant forum shopping."<sup>83</sup> The Indiana Court of Appeals concluded that this "ad hominem attack against a third party is unprofessional and unwarranted," "not 'helpful,'" and it struck "all references to the federal lawsuit from the amicus brief."<sup>84</sup>

### *B. Contents of Briefs and Appendices*

Appellate Rule 46(A) dictates the contents of the appellant's brief.<sup>85</sup> In *Red Spot Paint & Varnish Co. v. Columbia Street Partners, Inc.*, the Indiana Court of Appeals "direct[ed] the parties' attention to Indiana Appellate Rule 46(A) regarding the proper content for the sections of an appellate brief, and we would

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Verdak, 815 N.E.2d 185, 192 (Ind. Ct. App. 2004). Thus, for purposes of Rule 14(B) review, whether the issues decided in an interlocutory order are based on a repetitive motion or a motion to reconsider is irrelevant." *Id.* at 218.

78. 192 N.E.3d 1026, 1028 (Ind. Ct. App. 2022).

79. *Id.*

80. *Id.*

81. *Id.* at 1030.

82. IND. R. APP. P. 41(A).

83. 196 N.E.3d 1256, 1258 n.1 (Ind. Ct. App. 2022).

84. *Id.* (quoting IND. R. APP. P. 41(A)).

85. IND. R. APP. P. 46(A).

remind the parties to include argument in the appropriate section.”<sup>86</sup>

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, in accordance with Rule 22.”<sup>87</sup> In *Eggers v. CSX Transportation, Inc.*, the Indiana Court of Appeals noted that “Eggers did not include CSX’s motion for summary judgment in the Appellant’s Appendix; thus, he is unable to support his assertion with citations to the record, as required under Indiana Appellate Rule 46(A)(8)(a).”<sup>88</sup>

Appellate Rule 46(C) provides that “[n]o new issues shall be raised in the reply brief.”<sup>89</sup> In *Willis v. Dilden Brothers, Inc.*, the Indiana Court of Appeals reminded the appellant that they could not raise a new issue in their reply brief, and the “Willises’ argument for circumventing waiver is unpersuasive.”<sup>90</sup>

In *Edwards ex rel. Glaser v. City of Carmel*, the Indiana Court of Appeals reminded the appellant of a number of appellate rules:

Additionally, we note Plaintiffs’ filings with this court violated several of our Appellate Rules. For example, two arguments were waived for failure to comply with Indiana Appellate Rule 4[6](A)(8)(a). *See supra* n.9 & n.10. Also, Plaintiffs’ appendix does not comply with Indiana Appellate Rule 50(A)(2)(a) because it does not include a chronological case summary. Finally, Plaintiffs’ appendix includes the transcript on the hearing on fees in violation of Indiana Appellate Rule 50(A)(2)(h). These errors further support an award of appellate attorney fees. *See Tipton v. Estate of Hofmann*, 118 N.E.3d 771, 778 (Ind. Ct. App. 2019) (awarding appellate attorney fees based on party’s noncompliance with Rules of Appellate Procedure).<sup>91</sup>

In *Gallo v. Sunshine Car Care, LLC*, the Court of Appeals reminded parties that appendices should contain summary judgment briefs, designated evidence, and motions necessary to decide the issues raised by the appeal:

In his appendix, Gallo does not provide us with either party’s summary judgment motion or accompanying designation of evidence, nor did he provide all of the documents that had been designated or any of his own summary judgment briefs. And he omitted his MTCE, as well as other relevant filings. Gallo’s omissions have hindered our review and caused needless extra work to piece together and consider the extensive filings in this case, which was made possible only by SCC’s attempt to fill in the gaping holes in Gallo’s appendix with its own appendix.<sup>92</sup>

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86. 198 N.E.3d 705, 707 n.3 (Ind. Ct. App. 2022).

87. IND. R. APP. P. 46(A)(8)(a).

88. 198 N.E.3d 688, 692 n.1 (Ind. Ct. App. 2022).

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

90. 184 N.E.3d 1167, 1185 n.19 (Ind. Ct. App. 2022).

91. 191 N.E.3d 900, 912 n.11 (Ind. Ct. App. 2022).

92. 185 N.E.3d 392, 399 (Ind. Ct. App. 2022).

## IV. INDIANA'S APPELLATE COURTS

*A. Case Data from the Indiana Supreme Court*

During the 2021 fiscal year,<sup>93</sup> the Indiana Supreme Court disposed of 633 cases, including 283 criminal cases, 232 civil cases, 4 tax cases, 40 original actions, 68 attorney discipline cases, 2 certified questions, 1 mandate of funds case, 1 unauthorized practice of law case, and 1 judicial discipline case.<sup>94</sup> The court heard 37 oral arguments during the fiscal year, 27% of which were heard before the court decided to grant transfer.<sup>95</sup> The court issued 56 majority opinions and 25 non-majority opinions.<sup>96</sup> Chief Justice Rush issued 9 majority opinions, Justice David issued 9 majority opinions, Justice Massa issued 9 majority opinions, Justice Slaughter issued 8 majority opinions, and Justice Goff issued 9 majority opinions.<sup>97</sup> The court also issued 12 *per curiam* decisions.<sup>98</sup> The court issued unanimous decisions 77% of the time.<sup>99</sup>

*B. Case Data from the Indiana Court of Appeals*

During 2021,<sup>100</sup> the Indiana Court of Appeals disposed of 2,564 cases.<sup>101</sup> This is a decrease from 2020, when the court disposed of 2,853 cases, and 2019, when the court disposed of 3,151 cases.<sup>102</sup> The court disposed of 1,249 criminal cases, 862 civil cases, and 453 other cases.<sup>103</sup> The court affirmed the trial court 82.7% of the time, with the court affirming 88.3% of criminal cases, 87.5% of post-conviction relief cases, and 68.4% of civil cases.<sup>104</sup> The average age of cases pending before the Indiana Court of Appeals at the end of 2021 was 1.1 months, compared with 1.4 months at the end of 2020.<sup>105</sup> In addition to deciding cases, the court issued 6,687 orders.<sup>106</sup>

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93. The Indiana Supreme Court fiscal year ran from July 1, 2021, to June 30, 2022. *See* IND. SUP. CT., ANNUAL REPORT 2021-2022 16 (2022), <https://www.in.gov/courts/supreme/files/2122report.pdf> [<https://perma.cc/FR3K-G7J6>].

94. *Id.* at 9.

95. *Id.* at 13.

96. *Id.* at 14.

97. *Id.*

98. *Id.*

99. *Id.*

100. The Indiana Court of Appeals 2020 Annual Report covers January 1, 2021, through December 31, 2021. *See* IND. CT. OF APPEALS, 2021 ANNUAL REPORT 14 (2021), <https://www.in.gov/courts/appeals/files/COA-2021-Annual-Report.pdf> [<https://perma.cc/UVL3-APPA>].

101. *Id.* at 1.

102. *Id.*

103. *Id.*

104. *Id.* at 2.

105. *Id.*

106. *Id.*

### *C. Justice David Retires*

In the fall of 2021, Indiana Supreme Court Justice Steven H. David announced he would retire in the fall of 2022.<sup>107</sup> Justice David

was born in Allen County, raised in Bartholomew County and has lived in Boone County for twenty-two years.

He graduated magna cum laude from Murray State University as a Distinguished Military Graduate on an R.O.T.C. scholarship. He earned his law degree from Indiana University's Robert H. McKinney School of Law.

Following his graduation from law school in 1982, he served in the United States Army Judge Advocate General's Corps on active duty until 1986 and reserve duty until 2010. . . . He served as trial counsel, defense counsel, Military Judge and Commander. . . .

Justice David's civilian legal career started in Columbus, where he focused on personal injury, family law, and civil litigation.<sup>108</sup>

Justice David then moved to Boone County where he "was elected Circuit Court Judge and named Boone County's Citizen of the Year, in 1999."<sup>109</sup> "As a trial court judge, he presided over civil, criminal, family and juvenile matters. He testified before the Indiana General Assembly on juvenile law and is a recipient of the coveted Robert Kinsey Award as the most outstanding Juvenile Court Judge in Indiana."<sup>110</sup> Justice David became "Indiana's 106th Supreme Court Justice in October 2010."<sup>111</sup> "During his career, he authored more than 200 opinions and served with 8 justices."<sup>112</sup> Justice David "step[ped] down from the bench" in August 2022.<sup>113</sup> We appreciate Justice David's years of service to the judiciary and look forward to his continued service as a senior judge.

### *D. Justice Molter Appointed to the Indiana Supreme Court*

On June 10, 2022, Governor Eric Holcomb appointed Court of Appeals Judge Derek R. Molter to the Indiana Supreme Court.<sup>114</sup>

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107. *Justice David, '82, to Retire from Indiana Supreme Court*, IU ROBERT H. MCKINNEY SCH. L. (Nov. 3, 2021), <https://mckinneylaw.iu.edu/news/releases/2021/11/justice-david-82-to-retire-from-indiana-supreme-court.html> [<https://perma.cc/V7AV-DRXF>].

108. *Hon. Steven H. David*, IND. SUP. CT., <https://www.in.gov/courts/supreme/justices/steven-david/> [<https://perma.cc/3ZJ4-Q57L>] (last visited Dec. 19, 2022).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Retirement Celebration to Honor Justice Steven David*, IND. JUD. BRANCH, IN.GOV (Aug. 18, 2022), <https://www.in.gov/courts/news/2022/0818/> [<https://perma.cc/T96Y-8KWZ>].

113. *Id.*

114. *Hon. Derek R. Molter*, IND. SUP. CT., IN.GOV, <https://www.in.gov/courts/supreme/justices/derek-molter/> [<https://perma.cc/S6JZ-CY7S>] (last visited Dec. 28, 2022).

He was previously appointed to the Court of Appeals by Governor Eric Holcomb and began his service on October 1, 2021. . . .

[Justice] Molter received his B.A., with High Distinction, from Indiana University in 2004. . . . He earned his J.D., *magna cum laude*, from Indiana University Maurer School of Law in 2007. While in law school, he was the Executive Notes & Comments Editor for the *Indiana Law Journal* and a member of the Order of the Coif.<sup>115</sup>

After law school, Justice Molter was “a law clerk for the Honorable Theresa Springmann with the United States District Court for the Northern District of Indiana.”<sup>116</sup>

“Before joining the Court of Appeals, [Justice] Molter was a partner in the Litigation Practice Group at Ice Miller in Indianapolis. He led the appellate practice and handled appeals in state and federal courts throughout the United States.”<sup>117</sup> We look forward to Justice Molter’s service at the Indiana Supreme Court for years to come.

#### *E. Judge Peter R. Foley Appointed to the Court of Appeals*

On October 11, 2022, Governor Eric Holcomb appointed Peter R. Foley to the Court of Appeals.<sup>118</sup>

Judge Foley earned B.A. degrees in History and Criminal Justice from Indiana University, Bloomington in 1993, and his J.D. degree from the Indiana University McKinney School of Law, Indianapolis, in 1997. After law school, Judge Foley returned to his hometown of Martinsville, Indiana, to join his father in the practice of law at Foley, Foley & Peden. . . .

In 2014, Judge Foley was elected to serve as judge of the Morgan Superior Court 1. He served as a trial court judge from 2015 until his appointment to the Court of Appeals. During that time, Judge Foley conducted over 35 jury trials, ranging from misdemeanors to murder and civil matters. . . .

Judge Foley continues to reside in Martinsville with his wife and children and remains active in his community and church. In his free time, Judge Foley enjoys traveling with his family, golf, and running, having completed 5 marathons and several half-marathons.<sup>119</sup>

Judge Foley was appointed to replace Judge Edward Najam.<sup>120</sup> We look

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115. *Id.*

116. *Id.*

117. *Id.*

118. *Judge Peter R. Foley*, IND. CT. APP., IN.GOV, <https://www.in.gov/courts/appeals/judges/pete-foley/> [<https://perma.cc/YR9X-S6ZD>] (last visited Dec. 19, 2022).

119. *Id.*

120. *See Two IU McKinney Alumni Under Consideration for Indiana Court of Appeals*, IU

forward to Judge Foley's service on the Indiana Court of Appeals in the coming years.

#### *F. Judge Najam Retires*

Edward W. Najam Jr. "attended Indiana University-Bloomington, where he earned a B.A. in political science, with Highest Distinction, in 1969."<sup>121</sup> "[H]e was elected to Phi Beta Kappa and was elected Student Body President" while at IU, and he received "the Herman B Wells Senior Recognition Award for academic excellence and campus leadership."<sup>122</sup> After graduating from IU, "Judge Najam earned his J.D. from Harvard Law School and was admitted to the Indiana Bar in 1972."<sup>123</sup> "After his admission to the Bar, Judge Najam served as Administrative Assistant to the Mayor of Bloomington for two years and was a practicing attorney with a general civil and trial practice for eighteen years before joining the Court."<sup>124</sup>

Governor Evan Bayh appointed Judge Najam to the Indiana Court of Appeals in 1992, and he was "retained by the electorate in 1996, 2006, and 2016."<sup>125</sup> Since that time, "Judge Najam has authored over 4,000 majority opinions for the Court."<sup>126</sup> In the summer of 2022, Judge Najam announced he was retiring.<sup>127</sup> Judge Najam said he was "grateful" for the privilege of being a judge, "[a]nd I just feel that I am so very lucky to have had this opportunity."<sup>128</sup> On June 10, 2022, Judge Najam was certified as a senior judge.<sup>129</sup> The appellate bar is grateful for Judge Najam's distinguished service and looks forward to his continued service as a senior judge.

#### CONCLUSION

This survey period included a number of rule amendments and decisions analyzing the appellate rules. Keeping abreast of these rule changes, as well as the guidance provided through case law, is key to a successful appellate practice.

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ROBERT H. MCKINNEY SCH. L. (July 12, 2022), <https://mckinneylaw.iu.edu/news/releases/2022/07/two-iu-mckinney-alumni-under-consideration-for-indiana-court-of-appeals.html> [<https://perma.cc/YPQ7-9ETH>].

121. *Judge Edward W. Najam, Jr.*, IND. CT. APP., IN.GOV, <https://www.in.gov/courts/appeals/judges/edward-najam/> [<https://perma.cc/CJK6-6AKJ>] (last visited December 19, 2022).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Katie Stancombe, "I am Grateful": Najam Recounts Rich Judicial Career Ahead of COA Retirement, IND. LAW. (July 6, 2022), <https://www.theindianalawyer.com/articles/i-am-grateful-najam-recounts-rich-judicial-career-ahead-of-coa-retirement> [<https://perma.cc/YX7Q-YZBD>].

128. *Id.*

129. Certification of Senior Judge, No. 22S-MS-187 (Ind. June 10, 2022).