Recent Developments in Indiana Civil Procedure

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I. INTRODUCTION

During the survey period, the Indiana Supreme Court and Indiana Court of Appeals issued several significant decisions that contribute to the development of Indiana civil procedure. By this time, all Indiana practitioners should be aware of the recent changes in all areas of the Indiana Rules of Procedure for both trial and appellate practice. Because these changes already have received attention by commentators,[1] they will not be discussed in detail here. Instead, this Article will focus on recent Indiana case law that construed the rules and procedural statutes. Significant areas of development that will be discussed include limitation of actions, challenges to personal and subject matter jurisdiction, notice to opposing parties, discovery, pleading and practice under the Comparative Fault Act, and relief from judgment.

II. LIMITATION OF ACTIONS

The Indiana appellate courts decided several important issues concerning statutes of repose and limitations during the survey period. The most controversial of these was *Covalt v. Carey Canada, Inc.*,[2] in which the supreme court, in a 3-2 decision, construed Indiana's statute of repose for product liability actions based on theories of negligence or strict liability.[3] Pursuant to a question certified by the Seventh Circuit

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1. *See, e.g.*, Funk, *Survey of Recent Developments in the Indiana Rules of Trial Procedure in Civil Matters*, 23 IND. L. REV. 241, 257-59 (1990); Harvey, *Rules, Rulings for the Trial Lawyer*, 33 RES GESTAE 530 (1990); Harvey, *Rules, Rulings for the Trial Lawyer*, 32 RES GESTAE 480 (1989); Mulvaney, *Fundamental Changes in Indiana Appellate Procedure or What Happened to Motion to Correct Error?*, 32 RES GESTAE 472 (1989).

2. 543 N.E.2d 382 (Ind. 1989). *Covalt* was discussed in the last survey issue, *see* Rosiello & Klein, *Survey of Recent Developments in Indiana Products Liability Law*, 23 IND. L. REV. 617, 633-40 (1990), and sharply criticized. However, a discussion of the case is included in this Article for comparison purposes and to advise attorneys of opportunities that the holding presents for future cases.

3. IND. CODE § 33-1-1.5-5 (Supp. 1990). The statute provides as follows:

Statute of limitations

Sec. 5(a) This section applies to all persons regardless of minority or legal

Court of Appeals,[4] the court held that the statute of repose, which requires a plaintiff to file an action within ten years after delivery of the product to the initial user or consumer, does not apply to cases in which the plaintiff's injury is caused by a disease that may have been contracted as a result of protracted exposure to an inherently dangerous foreign substance.[5] In such cases, the court held, the action must be brought within two years after the plaintiff discovers, or should have discovered, the disease and its cause. This discovery rule was announced in *Barnes v. A.H. Robins Co.*[6] for determining when a cause of action for product liability accrues.

The court specifically distinguished *Dague v. Piper Aircraft Corp.*,[7] which held that in product liability actions, the legislature intended to create an outer limit of ten years from the date the product was first placed into the stream of commerce within which to file suit.[8] This distinction exists because asbestos is an inherently dangerous substance which causes a disease that does not manifest itself until many years after entering the body, whereas *Dague* involved a one-time occurrence resulting in immediate injury.[9] The most notable reason for the court's decision to make an exception to the bar created by the statute of repose in cases involving asbestos-related diseases is that "the primary purpose of statutes of repose, that of recognizing the improvements of product design and safety that come with time, is not served in cases involving asbestos and its related diseases"[10] because asbestos will not become any safer with time. The court also noted, for comparison purposes, as it had in *Barnes*, that the legislature provided for a discovery rule for

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disability. Notwithstanding I.C. 34-1-2-5, it applies in any product liability action in which the theory of liability is negligence or strict liability in tort.

(b) Except as provided in section 5.5 of this chapter, a product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer. However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

Id.

4. Covalt v. Carey Canada, Inc., 860 F.2d 1434 (7th Cir. 1988).
5. *Covalt*, 543 N.E.2d at 385.
6. 476 N.E.2d 84 (Ind. 1985).
7. 275 Ind. 520, 418 N.E.2d 207 (1981).
8. *Id.* at 525, 418 N.E.2d at 210.
9. *Covalt*, 543 N.E.2d at 386. In *Dague*, the plaintiff's husband died two months after his plane crashed. The crash occurred more than ten years after the plane was first placed in the stream of commerce. *Dague*, 275 Ind. at 522, 418 N.E.2d at 209.
10. *Covalt*, 543 N.E.2d at 386 (citing Knox v. A C & S, Inc., 690 F. Supp. 752, 760 (S.D. Ind. 1988)).

workers exposed to radiation who bring an action pursuant to the Occupational Diseases Act.[11]

The majority opinion in *Covalt* produced two vigorous dissenting opinions by Chief Justice Shepard and Justice Dickson.[12] Both dissenters found that the statute is unambiguous and clearly requires courts to bar any product liability actions sounding in strict liability or negligence that are not brought within the ten-year period of repose.[13] They contended that the majority was improperly rewriting the statute by creating an exception to the repose period for asbestosis victims.

Indiana lawyers should note that the holding of the *Covalt* majority has been superceded by statute.[14] For asbestos-related actions, the legislature expressly provided for an exception to the ten-year repose period and applied a discovery rule instead.[15] Therefore, *Covalt* is not necessarily significant for its holding as it relates specifically to asbestosis claims. The importance of *Covalt* is its potential future applicability to claims involving similar foreign substances that cause illness long after being introduced into the body. The majority acknowledged this possibility when it reasoned that "[a]sbestos *and naturally occurring substances like it* are not subject to design and safety improvements."[16] The other aspect of *Covalt* that lawyers should note is Justice Dickson's dissenting opinion, which suggests a willingness to re-examine the statute of repose for violations of the Indiana Constitution. Although noting that *Dague* held the statute did not violate Article I, section 12,[17] this opinion suggests that other opinions of the court appear to indicate some equivocation on constitutional issues. Additionally, Justice Dickson appears to be willing to examine the statute under Article I, section 23.[18] This analysis would appear to apply to all potential product liability plaintiffs, not just those suffering illnesses from exposure to substances similar to asbestos. Attorneys representing potential product liability plaintiffs, whose

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11. *Id.* at 384 (citing IND. CODE § 22-3-7-9(f)(2) (1988)).
12. *Id.* at 387-90 (Shepard, C.J., and Dickson, J., dissenting).
13. *Id.*
14. *See* IND. CODE § 33-1-1.5-5.5 (Supp. 1990).
15. *Id.*
16. *Covalt*, 543 N.E.2d at 386 (emphasis added).
17. Article I, § 12 of the Indiana Constitution states:

All courts shall be open; and every person, for injury done to him in his person property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

18. Article I, § 23 of the Indiana Constitution states:

The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.

claims would otherwise be barred by the statute of repose, might consider acting on this advice from Justice Dickson.

The court of appeals discussed the discovery rule as it applies to the statute of limitations in *Allied Resin Corp. v. Waltz*.[19] The issue in *Allied Resin* concerned when the "discovery" actually occurred for purposes of beginning the two-year statute of limitations of a product liability action. Waltz filed suit against two manufacturers for injuries he allegedly received from working with chemicals they manufactured. The evidence indicated that Waltz began feeling symptoms of nasal congestion and fatigue about one year after beginning work at the business that used the defendants' chemicals. His symptoms gradually worsened and he received various treatments over the next several years, including surgery and allergy injections. Although Waltz asked one doctor on June 20, 1984 whether exposure to the defendants' chemicals could have caused his symptoms, no conclusive diagnosis confirmed his suspicions until early 1986, approximately four years after he began working with the chemicals.

The court of appeals cited *Barnes v. A.H. Robins Co.*,[20] which stated that a cause of action accrues for purposes of the statute of limitations when the plaintiff discovers, or should have discovered, the injury and that it was caused by the product or act of another.[21] The court then concluded that Waltz did not discover his cause of action until the diagnosis in early 1986 which connected his symptoms with the chemicals manufactured by the defendants.[22]

An injured truck driver filing for benefits pursuant to the Worker's Compensation Act,[23] who attempted to apply the discovery rule to his case was not as fortunate. In *Ingram v. Land-Air Transportation Co.*,[24] a case involving a two-year statute of limitations, the court of appeals ruled that Samuel Ingram filed his claim for benefits too late when he submitted his claim more than two years following the accident in which he injured his shoulder. He was examined shortly after his accident, but doctors concluded he had no serious injury. After his pain worsened, he consulted another physician who discovered a disabling injury that would require corrective surgery. However, this diagnosis came almost three years after the accident. Ingram argued in favor of a discovery rule and that the time limitation for filing claims with the Worker's

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19. 559 N.E.2d 390 (Ind. Ct. App. 1990). This case also involved § 33-1-1.5-5, quoted *supra* note 3. *See also* Burks v. Rushmore, 534 N.E.2d 1101 (Ind. 1989). *Burks* was discussed in the previous survey issue. *See* Talley, *Survey of Recent Developments in Tort Law*, 23 IND. L. REV. 585, 610-11 (1990).

20. 476 N.E.2d 84 (Ind. 1985).

21. *Allied Resin*, 559 N.E.2d at 393.

22. *Id.* at 394.

23. IND. CODE §§ 22-3-3-1 to -31 (1988).

24. 537 N.E.2d 532 (Ind. Ct. App. 1989).

Compensation Board should begin when the injury becomes manifest.

The court noted that in 1947, the Legislature changed the language of the time limitations provision in the Act so that the time which began to run from "the injury" now begins to run from "the occurrence of the accident."[25] This change in the statutory language, the court concluded, reflected legislative intent to require specifically that claims be filed within two years after the employee's accident.[26]

Although *Covalt* is considered by some to be an aberration of judicial legislation,[27] it demonstrates, along with *Allied Resin* and *Ingram*, when a discovery rule may be applied to a limitations statute and when it may not. When the statute uses language such as "when the cause of action accrues," a discovery rule appears to be applicable. This language appears in section 33-1-1.5-5 and in the general limitations statute.[28] Language using "occurrence of the accident" indicates that the discovery rule should not apply. In addition to the Worker's Compensation Act, the notice provisions of the Indiana Tort Claims Act[29] is an "occurrence" statute.

The supreme court considered three cases concerning timeliness of filing the notice of claim pursuant to the Indiana Tort Claims Act.[30] The Act requires notice to be filed with the appropriate government entity within 180 days after a loss[31] occurs for which the government is allegedly liable.[32] This notice must be sent by registered or certified mail or in person.[33] The first two cases, *Wallis v. Marshall County Commissioners*[34] and *Boger v. Lake County Commissioners*,[35] may be read together. In *Wallis*, the plaintiffs were injured in an automobile accident allegedly caused by the county's negligent maintenance of a stop sign. They mailed their notices of claims by certified mail on the 180th day after the accident occurred and the county received them the following day. The trial court granted the government's motion for summary judgment based on the conclusion that notice was not timely, and the court of appeals agreed.[36] The supreme court vacated the opinion of the court of appeals and reversed the trial court.[37]

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25. *Id.* at 533 (citing IND. CODE § 22-3-3-3 (1988)).
26. *Id.*
27. *See supra* notes 2, 12.
28. IND. CODE § 34-1-2-2 (1988).
29. *Id.* §§ 34-4-16.5-6 and -7.
30. *Id.* §§ 34-1-16.5-1 to -22 (1988 and Supp. 1990).
31. *Id.* § 34-4-16.5-2(e) (Supp. 1990).
32. *Id.* §§ 34-4-16.5-6 and -7 (1988).
33. *Id.* § 34-4-16.5-11.
34. 546 N.E.2d 843 (Ind. 1989).
35. 547 N.E.2d 257 (Ind. 1989).
36. Wallis v. Marshall County Comm'rs, 531 N.E.2d 1223 (Ind. Ct. App. 1988).
37. *Wallis*, 546 N.E.2d 843.

The supreme court recited the requirement contained in section 34-4-16.5-7 of the Act, which requires "filing" within 180 days of the occurrence, and noted that the Act does not define "filing."[38] The court did acknowledge, however, that some notices mailed within the 180-day period might not be received by county officials until after the 180th day.[39] The court then compared the language of the present Act with the language of its predecessor, which required notice "to be received by some such municipal official within sixty (60) days after the occurrence . . . ."[40] The court concluded that the new wording indicated legislative intent that "filing" occurred upon mailing in cases in which notices were mailed.[41]

In *Boger*, the plaintiff sued the county for injuries received in an automobile accident allegedly caused by the county's failure to remove a fallen tree within the right-of-way. She did not file her notice until 183 days after her accident. However, the 180th day was a Saturday and the 182nd day, Monday, was a legal holiday because it was the day after Christmas. Therefore, the next day after the 179th day to mail the notice would have been on the 183rd day. The court referred to Indiana Trial Rules 6(A)(3) and (4), which state that the time period for filing shall exclude the last day if it falls on a holiday or a day when the appropriate office for filing is closed.[42] Therefore, the court concluded, mailing on the 183rd day was timely in this case because the claimant was precluded by the holidays from mailing by the 180th day.

From *Wallis* and *Boger*, it appears that practitioners can safely conclude that "filing" of a tort claim notice against a government entity is done on the day the notice is mailed by certified or registered mail. If the last day of the 180-day period falls on a day when the receiving office is closed, such as a Saturday, Sunday, or legal holiday, then the claimant can mail the notice on the next day when the appropriate office is open, even if that day falls outside the 180-day period.

In *City of Lake Station v. Moore Real Estate*,[43] the supreme court analyzed the issue of when a loss occurs for purposes of beginning the 180-day period. Moore Real Estate applied for a building permit from the city's building commissioner, and the commission discussed the application at two of its meetings in March and April of 1985. At the second meeting, held on April 11, 1985, the commission decided to table

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38. *Id.* at 844.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Boger*, 547 N.E.2d at 258.
43. 558 N.E.2d 824 (Ind. 1990).

the permit application in order to discuss it with the city attorney. After contacting the city attorney several times over the next several months and receiving no action on the permit application, Moore filed a notice of claim on October 12, 1985. Moore then filed suit on October 18, 1985.

Finding that Moore's loss occurred on April 11, 1985, the date the commission tabled its application for a building permit, the court of appeals held that Moore did not timely file its notice of claim and that the trial court erred in failing to grant the city's motion to dismiss.[44] The supreme court disagreed and vacated the court of appeals's opinion.[45] The supreme court agreed with Moore that the city committed a "continuing wrong" because the commission never decided to grant or deny the application.[46] The actual date of the loss was incapable of being precisely determined. It did not appear that the commission would deny the application until sometime in October of 1985, when Moore's attorney learned from the city attorney that he was going to tell the commission that the proposed building did not meet certain building requirements. The court also noted:

> Accepting Lake Station's argument [that the loss occurred at the April 11th meeting] would permit government bodies to immunize themselves from tort claims simply by delaying a decision until the 180-day notice period expires. The notice provision is justified as a device providing a period for negotiation and possible settlement. It should not provide a method for evading responsibility through inaction.[47]

Realizing that it would be unfair to penalize Moore for the city's inaction, the court held that its notice of claim was timely filed on October 12, 1985.[48]

One issue remains unanswered by this case. If Moore had waited several more months before filing its notice of claim, assuming it acquired no knowledge of the possibility that its application might be denied, when would the loss be said to have occurred? Certainly, Moore had the responsibility of promoting action by the city at some point. The holding in this case should induce government entities to act quickly on requests such as this. If they do not, potential claimants should carefully maintain records of all communications with the government on such

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44. City of Lake Station v. Moore Real Estate, 537 N.E.2d 61, 62 (Ind. Ct. App. 1989).
45. *Lake Station*, 558 N.E.2d at 825.
46. *Id.*
47. *Id.* at 827.
48. *Id.*

matters and file their claims before an undue length of time passes, as Moore did here.

The appellate court also addressed, in *Barton-Malow Co. v. Wilburn*,[49] an issue of first impression concerning the effect an appointment of a guardian for an incompetent ward would have on the tolling of the statute of limitations for an action the ward might have against a defendant. The general statute of limitations, which applies to this case, requires a personal injury action to be brought within two years after the cause of action accrues.[50] However, those under legal disabilities may file actions within two years after their disabilities are removed.[51]

On March 18, 1985, Bill Wilburn suffered a work injury that rendered him incompetent to manage his own affairs. His wife, Janet, became his legal guardian on June 25, 1985, and filed suit on his behalf against Barton-Malow Company on September 2, 1988. Barton-Malow moved for summary judgment on the basis that the suit was not filed within the applicable two-year statute of limitations.

As the court of appeals noted, all parties agreed that the normal limitations period is two years and that the statute of limitations has a savings clause for those suffering a legal disability. This clause allows filing of suit within two years after the disability is removed. However, Barton-Malow contended that the legal disability was removed for purposes of tolling the statute of limitations when Janet was appointed as Bill's guardian, and therefore suit should have been filed within two years of that date, or by June 25, 1987. The court of appeals agreed with the defendant and held the suit was barred because it was not timely filed.[52] The court acknowledged that most jurisdictions hold that the appointment of the guardian does not remove the legal disability for purposes of their limitations statutes. However, the court noted Indiana's guardianship statute imposes an affirmative duty on the guardian to bring all necessary actions on the ward's behalf,[53] whereas the other state guardianship statutes are permissive.

The Indiana Supreme Court vacated this holding of the court of appeals.[54] The court held that the phrase "under legal disabilities," as used in the savings clause, includes those of unsound mind and that appointment of a guardian does not change this fact of mental un-

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49. 547 N.E.2d 1123, 1124 (Ind. Ct. App. 1989), *aff'd in part and vacated in part*, 556 N.E.2d 324 (Ind. 1990).

50. IND. CODE § 34-1-2-2 (1988).

51. *Id.* § 34-1-2-5.

52. *Barton-Malow Co.*, 547 N.E.2d at 1125.

53. *Id.* (citing IND. CODE §§ 29-3-7-5, 29-3-8-1 (1988).

54. Barton-Malow Co., Inc. v. Wilburn, 556 N.E.2d 324 (Ind. 1990).

soundness.[55] Therefore, the appointment does not terminate the legal disability.[56] The court concluded that the suit on Bill's behalf was timely filed.

The supreme court agreed with the court of appeals that Janet's claim for loss of consortium was barred by the two-year statute of limitations.[57] The rationale of the court is that the claim for loss of consortium is a separate and independent cause of action that need not be joined with the injured spouse's claim.[58] Therefore, Janet's loss of consortium claim accrued, and the limitations period began to run, on March 18, 1985.[59]

The implications of the supreme court's holding for Indiana defendants is that they may remain potentially liable to some plaintiffs for many years after an accident occurs. To avoid the detrimental impact arising from such uncertainties, defendants should consider conducting early discovery while substantive facts remain fresh and settling cases involving incompetent potential plaintiffs. The goal is to resolve issues of liability in a more timely manner.

In another case of first impression in Indiana, the court of appeals addressed the effect of a conformity clause in a contract in which the parties agree to a limitations period for filing actions that is shorter than the statutory limitations period. In *Meridian Mutual Insurance Co. v. Cavaletto*,[60] the applicable statutory limitations period was ten years. By contract, the parties shortened the time limitation to one year. However, the contract also contained a conformity clause stating that all provisions in the contract that were in conflict with applicable state law were amended to conform with the state statutes. The question before the court was whether, for purposes of the conformity clause, the contractual limitations period was in conflict with the statutory limitations period.[61] The court followed a line of cases from other jurisdictions that held that no conflict exists in such situations.[62] Therefore, the conformity clause would not apply to change the limitations period unless the statute prohibits a contractual shortening of the limitations period.[63] Because Indiana's statute of limitations contains no

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55. *Id.* at 325 (citing IND. CODE § 34-1-67-1(6) (1988)).
56. *Id.*
57. *Id.*
58. *Barton-Malow Co.*, 547 N.E.2d at 1125-26.
59. *Id.*
60. 553 N.E.2d 1269 (Ind. Ct. App. 1990).
61. *Id.* at 1270.
62. *Id.*
63. *Id.* at 1271.

such prohibition, the parties were bound by the one-year limitations period contained in the contract.[64]

III. Jurisdiction

The Indiana appellate courts examined several cases in which one party challenged the trial court's *in personam* or subject matter jurisdiction. These challenges to the court's authority to act are generally brought as motions to dismiss under Indiana Trial Rule 12(B).[65] These motions do not convert to summary judgment motions when accompanied by affidavits or other supplemental information. Therefore, successful challenges to jurisdiction do not bar subsequent actions in courts with proper jurisdiction.[66]

A. Personal Jurisdiction

Indiana courts acquire personal jurisdiction over nonresidents pursuant to Indiana Trial Rule 4.4. Under this rule, Indiana courts are said to apply a two-step analysis: (1) whether the defendant's acts giving rise to the suit are among those listed in Rule 4.4(A)(1) to (7), and (2) whether an Indiana court's assertion over the nonresident complies with due process requirements.[67] The recent decisions on personal jurisdiction reflect a further refinement of the minimum contacts test to determine compliance with due process.[68] In *In re Support of Seligman*,[69] the court of appeals held that the father of a child who resided in Indiana and whose legal guardianship was established in her aunt in a separate action did not have sufficient contacts with Indiana for an Indiana court to obtain personal jurisdiction over him for purposes of issuing a child support order. The father, who originally resided in Florida with his daughter, apparently consented to the child's aunt becoming her legal guardian. After the Indiana court ordered guardianship in the aunt, the father wrote a letter to the court objecting to its order. The court set

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64. *Id.*

65. Ind. Trial Rule 12(B)(1) refers to lack of subject matter jurisdiction and 12(B)(2) refers to lack of personal jurisdiction. Ind. R. Trial P. 12(B)(1), (B)(2).

66. *See* 1 W. Harvey, Indiana Practice 587, 598, and Supp. 46 (West 1987 and Supp. 1990), and cases cited therein.

67. 1 W. Harvey, Indiana Practice 121, 153 (West 1987).

68. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (For court's personal jurisdiction over nonresident defendant to comply with due process, defendant must "have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (citations omitted)), *cited in* Tandy Computer Leasing v. Milam, 555 N.E.2d 174, 177 n.3 (Ind. Ct. App. 1990). *See also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980).

69. 542 N.E.2d 1030 (Ind. Ct. App. 1989).

a hearing on the matter, but the father never appeared. However, a few days later, the father sent a letter to the aunt authorizing her to tend to the child's medical needs and informing her of the child's medical insurance coverage. The father then cancelled that insurance without notice to the aunt, and the child later incurred significant medical costs. After paying the medical costs, the aunt filed an action for a support order requiring the father to reimburse her. The trial court denied the father's motion to dismiss for lack of personal jurisdiction over him and entered a support order.[70]

The court of appeals reversed. The court noted that the jurisdictional requirements for the guardianship differed from those for the child support order. To establish guardianship over the child's estate, the guardianship court did not need personal jurisdiction over the father because the child's Indiana domicile and her ownership of property in Indiana were legitimate bases for the court to have jurisdiction to act on such a matter.[71] The guardianship over the child's person must comply with the Uniform Child Custody Jurisdiction Act (UCCJA).[72] The UCCJA gives a court of the state in which the child resides authority to award custody to an in-state resident even if the court would not be able to exercise personal jurisdiction over one parent.[73] Therefore, as the trial court's personal jurisdiction over the nonresident father had not yet been established by the guardianship order, the court still had to find that the father had sufficient minimum contacts with Indiana in order to exercise long-arm jurisdiction.[74] Because he had none, the court held the trial court lacked jurisdiction to order him to pay child support.[75] The father's communications with the guardianship court and the aunt did not constitute such sufficient minimum contacts because the father had never been in Indiana and had no other contacts with the state. This case provides further guidance to Indiana attorneys practicing in the area of domestic relations, and establishes once again the separability of different aspects of divorce, child custody, and support. Although the case did not involve a divorce, its holding concerning jurisdictional requirements in support orders is applicable in those situations.

A unanimous court of appeals held that a nonresident defendant who is not subject to the jurisdiction of an Indiana court may waive jurisdiction by requesting some affirmative relief from that court. In

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70. *Id.* at 1031.

71. *Id.* at 1032.

72. *See* IND. CODE § 31-1-11.6-1 to -25 (1988 and Supp. 1990).

73. IND. CODE § 31-1-11.6-3 (1988). *See In re* Marriage of Hudson, 434 N.E.2d 107, 117 (Ind. Ct. App. 1982).

74. *See* IND. R. TRIAL P. 5.5(A).

75. *In re Seligman*, 542 N.E.2d at 1032.

Adams v. Budgetel Inns, Inc.,[76] Adams, an Indiana resident, sued Budgetel, which does no business in Indiana, in an Indiana court following an accident that occurred at a Budgetel Inn in Wisconsin. The court of appeals found that Budgetel waived the question of personal jurisdiction by voluntarily appearing in the action, requesting an extension of time to plead, and filing a motion for change of venue. Noting that the lack of *in personam* jurisdiction must be timely raised at trial or it is waived, the court held that Budgetel voluntarily submitted to the jurisdiction of the Indiana trial court by appearing and seeking affirmative relief.[77] The court of appeals also found that the trial court erred in attempting to divest itself of jurisdiction under Trial Rule 4.4(C)'s more convenient forum provision because the court had not obtained *in personam* jurisdiction under Trial Rule 4.4(A).[78] The court of appeals's narrow interpretation of Trial Rule 4.4(C) that Trial Rule 4.4(C) only applies when jurisdiction is established under Trial Rule 4.4(A) appears to be a new question of law in Indiana. In addition, the question of waiver of *in personam* jurisdiction by making a general appearance and requesting an extension of time and a change of venue appears to be in conflict with Trial Rule 12. Thus, the Indiana Supreme Court heard oral argument in this case on January 23, 1991.

Adams is distinguishable from *Alberts v. Mack Trucks, Inc.*,[79] in which the court of appeals held that serving interrogatories to the plaintiff does not waive personal jurisdiction by the defendant.[80] The reason for the distinction is that in *Adams*, the defendant sought some sort of affirmative relief from the trial court, and in *Alberts*, it did not. Because interrogatories do not need to be filed with the trial court, no action by the trial court had been requested. The defendant does not seek the court's assistance unless, for example, it files a motion to compel answers to interrogatories pursuant to Indiana Trial Rule 37.[81]

When analyzing *Seligman* in light of *Adams* and *Alberts*, one question arises that apparently was not raised by the aunt in *Seligman*. Did the child's father waive any challenge to the court's jurisdiction when, in the guardianship action, he sent a letter to the court objecting to the

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76. 550 N.E.2d 346 (Ind. App. 1990).

77. *Id.* at 348.

78. *Id.*

79. 540 N.E.2d 1268 (Ind. Ct. App. 1989). For a discussion of *Alberts* with regard to its holding on who carries the burden of presenting evidence when personal jurisdiction is challenged, Funk, *Survey of Recent Developments in the Indiana Rules of Trial Procedure in Civil Matters*, 23 IND. L. REV. 241, 251-53 (1990).

80. *Alberts*, 540 N.E.2d at 1272.

81. *Id.* The defendant can still preserve its jurisdictional defense by filing a T.R. 12(B)(2) motion to dismiss before seeking other relief from the court. *See* IND. R. TRIAL P. 12(B)(2).

guardianship order? It is true that the guardianship was established in a prior action and that the father never appeared in court even after sending his letter of objection. However, the letter could be interpreted as a request for affirmative relief which, in fact, induced the guardianship court to set the matter for a hearing. The court of appeals' opinion does not reveal whether such an argument was made.

A defendant can also consent by contract to a state's long-arm jurisdiction over him before suit arises. *Tandy Computer Leasing v. Milam*[82] involved an Indiana resident, Milam, who signed a computer leasing agreement with Tandy, a Texas corporation that has offices in Indiana. The agreement provided, in part, that Milam would submit to the Texas courts' jurisdiction. Tandy obtained judgment against Milam in a Texas court and was attempting to enforce it in Indiana. The court of appeals upheld this type of agreement so long as it is freely negotiated and not unreasonable or unjust.[83] The court remanded the case to the trial court to determine those issues. The court noted that absent the jurisdictional consent provision, Milam would not be subject to a Texas court's jurisdiction because his activities did not establish the certain minimum contacts required for a Texas court to assert jurisdiction over him. Therefore, this case turned on the validity of the contract provision at issue. Some of the factors used to determine the validity of forum selection clauses are the relative bargaining positions of the parties,[84] whether the clause is prominently set out or hidden in the contract,[85] and whether the evidence reveals that the parties actually negotiated the provision.[86]

In *Ryan v. Chayes Virginia, Inc.*,[87] the court of appeals discussed the application of the "fiduciary shield doctrine" when a plaintiff sues both a corporate defendant and, in their individual capacities, its non-resident officers. This equitable doctrine apparently has never been applied in Indiana state appellate courts. However, the court found sufficient authority from federal courts located in Indiana and courts of other jurisdictions discussing this issue.[88] In this case, Ryan sued CV, Inc., Indiana, the corporation, and its officers, Astromsky, Perelman, and

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82. 555 N.E.2d 174 (Ind. Ct. App. 1990).

83. *Id.* at 176 (quoting Burger King v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985)). *See also* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

84. *The Bremen*, 407 U.S. at 12-13; L.A. Pipeline v. Texas Eastern Products Pipeline, 699 F. Supp. 185, 188 (S.D. Ind. 1988) (disparity in size of parties does not necessarily invalidate clause).

85. *L.A. Pipeline*, 699 F. Supp. at 188; Tandy Computer Leasing v. Terina's Pizza, Inc. 784 P.2d 7, 8 (Nev. 1989).

86. *Terina's Pizza*, 784 P.2d at 8.

87. 553 N.E.2d 1237 (Ind. Ct. App. 1990).

88. *Id.* at 1239-40.

Bergman, for wrongful termination of employment, breach of contract, detrimental reliance, and fraud in the inducement. The trial court found that Perelman and Bergman were Pennsylvania residents and acted only within the scope of their corporate duties in their dealings with Ryan.[89] Under these circumstances, the corporate officers are not subject to the long-arm jurisdiction of the state in which they do not reside. The court of appeals noted that an exception to the fiduciary shield doctrine exists "if the corporation is a 'sham,' in that it lacks sufficient assets to respond in damages to a suit or is the defendant's alter ego."[90] This sounds somewhat similar to cases in which courts pierce the corporate veil in order to subject corporate officers to personal liability in appropriate cases. For example, in *Hyatt International Corp. v. Inversiones Los Jabillos*,[91] a federal district court refused to apply the "fiduciary shield" doctrine in a case in which a plaintiff alleged the defendant corporation was a mere instrumentality of the individual defendant to conduct the individual's personal business.[92] However, the Second Circuit Court of Appeals has cautioned that the fraud element required in corporate veil-piercing cases need not be present to apply the exception to the fiduciary shield doctrine.[93]

B. Subject Matter Jurisdiction

In an original action, *State ex rel. Hight v. Marion Superior Court*,[94] the Indiana Supreme Court examined a situation that represented the difference between subject matter jurisdiction to hear a general class of cases, the absence of which is not waivable, and subject matter jurisdiction to hear a particular case within that general class, the absence of which is waived if not timely raised. In 1984, after Nancy Hight filed a petition for dissolution of marriage from Mark Hight, the trial court entered a dissolution decree which noted that both parties agreed that Mark was not the biological father of Nancy's child, but Mark acknowledged the child to be his. The trial court then ordered Mark to provide child support for the child and ordered visitation rights for Mark and the child.[95] In 1989, Mark filed petitions with the Marion Superior Court

89. *Id.* at 1240.

90. *Id.* at 1240 n.4 (citations omitted).

91. 558 F. Supp. 932 (N.D. Ill. 1982).

92. *Id.* at 936. *See also* Bulova Watch Co. v. K. Hattori and Co., 508 F. Supp. 1322, 1348 (E.D. N.Y. 1981) ("fiduciary shield" doctrine should not apply if corporation lacks sufficient assets to respond or is mere shell used to conduct individual's personal business).

93. Marine Midland Bank v. Miller, 664 F.2d 899, 903 (2d Cir. 1981).

94. 547 N.E.2d 267 (Ind. 1989).

95. *Id.* at 268.

regarding his visitation rights, alleging Nancy wrongfully denied visitation. In response, Nancy filed a motion to dismiss, alleging the trial court lacked subject matter jurisdiction over the case because the child was not a child of both parties to the marriage[96] and, therefore, the trial court's visitation order constituted a void order incapable of enforcement. After her motion to dismiss was denied, Nancy filed a petition for a writ of prohibition with the Indiana Supreme Court to prevent the Marion Superior Court from hearing Mark's petitions.

The supreme court held that the Marion Superior Court was entitled to hear this case because the dissolution court had subject matter jurisdiction over this type of case, and its authority to act was not nullified by the fact that the child was not of both parties to the marriage as required by Indiana Code section 31-1-11.5-2.[97] Specifically, the court stated:

> Subject matter jurisdiction refers to the power to hear and determine a general class or kind of case. The absence of subject matter jurisdiction, an issue not subject to waiver, renders a judgment void and open to collateral attack. The parties by consent or agreement cannot confer subject matter jurisdiction on a court.
>
> [I]f a tribunal possesses the power to determine cases of the general class to which the particular case belongs, it possesses subject matter jurisdiction to consider the particular case, absent specific and timely objections to the jurisdiction of such particular case. . . . A judgment of a court without jurisdiction of the particular case within the [general] class is not a void judgment. Such jurisdiction can be waived and must be attacked by proper and timely motion.[98]

The court distinguished *State ex rel. McCarroll v. Marion Superior Court*,[99] cited by Nancy to support her theory, because in *McCarroll*, the trial court's authority was timely challenged.[100]

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96. *See* IND. CODE § 31-1-11.5-2(c) (1988).

97. *Hight*, 547 N.E.2d at 269.

98. *Id.* (alterations in original) (citations omitted). *See also* Matter of Adoption of H.S., 483 N.E.2d 777 (Ind. Ct. App. 1985) (court's general subject matter jurisdiction over adoption proceeding was not vitiated by errors in petition or proceedings concerning statutory requirements to be met before ordering adoption). *Compare In re* Marriage of Truax, 522 N.E.2d 402 (Ind. Ct. App. 1988) (A trial court acting pursuant to Uniform Reciprocal Enforcement of Support Act (URESA) has no subject matter jurisdiction to order termination of child support due to interference with visitation. Authority of court is specifically limited by statute to enforcement of support order and its lack of subject matter jurisdiction over other aspects of divorce is not waivable.).

99. 515 N.E.2d 1124 (Ind. 1987).

100. *Hight*, 547 N.E.2d at 270. In *McCarroll*, the husband filed an *ex parte* petition

The Indiana appellate courts also heard several cases during the survey period that challenged a trial court's subject matter jurisdiction to act when the plaintiff's claim was arguably within the coverage of the Medical Malpractice Act.[101] One case, *Methodist Hospital of Indiana, Inc. v. Rioux*,[102] in particular is applicable to this Article because it describes the respective burdens of producing evidence when the defendant challenges the jurisdiction of the trial court to act before the case is submitted to a medical review panel pursuant to the Act's requirements.[103] The court of appeals determined the Act covers

> any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury to another based on any act or treatment performed or furnished, or which should have been performed or furnished by the hospital for, to, or on behalf of a patient during the patient's medical care, treatment or confinement.[104]

In *Winona Memorial Foundation v. Lomax*,[105] a 1984 case, the court of appeals held that a claim against a hospital for injury from a trip and fall sounded in ordinary negligence and premises liability and, therefore, did not fall within those cases intended to be governed by the Medical Malpractice Act.[106]

In *Methodist Hospital of Indiana, Inc. v. Ray*,[107] the court of appeals relied on *Lomax* to affirm the trial court's denial of Methodist's motion to dismiss for lack of subject matter jurisdiction.[108] When Ray was a patient at Methodist, he became infected with the Legionnaire's Pneumonia Virus. Ray later filed a complaint against the hospital, alleging that it negligently allowed its premises to become infested with the virus, thereby causing his infection. The hospital's motion to dismiss was based

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requesting custody of the child, not his, to be given to the maternal grandmother. The Indiana Supreme Court agreed with the wife, the child's mother, that the trial court lacked jurisdiction to grant the relief requested by the husband because he was not the child's father. Because the wife timely challenged the trial court's jurisdiction, the supreme court issued the writ of mandamus and prohibition against the trial court. *McCarroll*, 515 N.E.2d at 1125.

101. IND. CODE § 16-9.5-1-1 to -10-5 (1988 and Supp. 1990).

102. 438 N.E.2d 315 (Ind. Ct. App. 1982) (construing IND. CODE § 16-9.5-1-1(a)(1)(g), (h) and (i)).

103. *Id.* § 16-9.5-9-2 (1988).

104. *Id.* at 316.

105. 465 N.E.2d 731 (Ind. Ct. App. 1984).

106. *Id.* at 740-42 (distinguishing *Rioux*, 438 N.E.2d 315).

107. 551 N.E.2d 463 (Ind. Ct. App. 1990), *aff'd*, 558 N.E.2d 829 (Ind. 1990).

108. IND. R. TRIAL P. 12(B)(1).

on its contention that, pursuant to the Act, Ray should have first submitted his claim to a medical review panel. The trial court denied the motion and the court of appeals affirmed because Ray's complaint, as in *Lomax*, sounded in ordinary negligence for premises liability rather than poor medical care.

The *Ray* opinion is particularly instructive with regard to respective burdens when Trial Rule 12(B)(1) motions are brought, based on the belief that the case should have been submitted to a medical review panel. The court stated the issue as follows:

> Our discussion turns upon who bears the burden on a 12(B)(1) motion and, more fundamentally, upon a determination of legislative intent with respect to the initial forum for complaints asserted by patients against health care providers. If the assumption is made that with the exception of some very limited circumstances all such cases were intended to be included within the Medical Malpractice Act (Act), then plaintiff must allege facts to take the claim outside the Act or suffer dismissal for failure to comply with the Act's jurisdictional prerequisite. On the other hand, if we begin with the assumption that only certain cases involving patients and providers were intended to come within the scope of the Act, then it is up to defendant-provider to demonstrate that a claim against the provider is within the Act and thus requires compliance with the Act's jurisdictional prerequisite.[109]

From the court's discussion of precedent[110] and the history of the Act, it appears that the court concluded that the first alternative reflects the legislative intent. Although Methodist, as the party challenging the court's subject matter jurisdiction, had the burden to establish the lack of it,[111] this burden does not arise if the face of the complaint reveals that the court lacked subject matter jurisdiction. Ray's complaint would have to allege facts sounding in ordinary negligence. Ray succeeded on this point by alleging Methodist "negligently and carelessly caused and permitted its premises to become infested and infected with the deadly Legionnella Pneumonia virus bacteria . . . ."[112] This shifted the burden to Methodist to produce facts that would bring this case within the Act's scope.[113]

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109. *Ray*, 551 N.E.2d at 465 (citation omitted).

110. *See id.* at 465-66.

111. *Id.* at 467 (citing Alberts v. Mack Trucks, Inc., 540 N.E.2d 1268, 1270-71 (Ind. Ct. App. 1989)).

112. *Id.* at 464.

113. *Id.* at 467 ("Methodist would be relieved of this burden only if a lack of

Methodist failed to carry its burden; therefore, the trial court's denial of its motion to dismiss was proper.

In the last part of its opinion, the court further discussed the purposes of the Act and the rationale for excluding ordinary negligence claims from its scope. This discussion focuses particularly on the medical review panel, and notes that its members' expertise is limited to medical malpractice.[114] This provides a rational basis for the line of decisions which refuse to hold that cases alleging ordinary negligence fall within the scope of the Act. However, it is still difficult to predict which future cases will fall under the Act and which cases will not. Although the *Ray* court found that prior cases represent a "consistent line of reasoning,"[115] it appears that the result of a particular case could depend on how a complaint is framed. The distinction made between *Rioux*[116] and *Lomax* was that in *Rioux*, the plaintiff alleged that the hospital "negligently and carelessly failed to properly provide appropriate care . . . to prevent [her] fall and injury,"[117] and in *Lomax*, the plaintiff alleged negligent maintenance of the floor area where she fell.[118] Had Rioux worded her complaint in terms alleging ordinary negligence, the result might have been different.[119]

Similarly, perhaps the *Ray* court would have concluded that Ray's complaint alleged medical malpractice if he had alleged a failure to provide a sterile environment because such a failure might be deemed to relate to medical care. The *Ray* court cautioned that plaintiffs may not circumvent the Act merely by "alleging that the Hospital or doctor is the owner of the premises upon or in which the injury was sustained."[120] However, in close cases, the resolution of this issue may depend on artful drafting of the complaint.[121]

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jurisdiction was apparent upon the face of the complaint. Ray's complaint, sounding as it does in ordinary negligence, does not relieve Methodist of its burden. The only factual matter of record other than the complaint is the affidavit stating that a panel opinion had not been rendered. This is insufficient to divest the court of jurisdiction in this case.").

114. *Id.* at 468.

115. *Id.* at 466 (citing Ogle v. St. John's Hickey Mem. Hosp., 473 N.E.2d 1055 (Ind. Ct. App. 1985)); *Lomax*, 465 N.E.2d 731; *Rioux*, 438 N.E.2d 315).

116. 438 N.E.2d 315.

117. *Id.* at 316.

118. 465 N.E.2d at 732.

119. Practitioners should note that in *Rioux*, the plaintiff did not respond to the defendant's motion for summary judgment with evidence showing her complaint fell outside the scope of the Act; whereas in *Lomax*, the plaintiff submitted an affidavit stating she was unattended by hospital employees at the time of her fall. *See Lomax*, 465 N.E.2d at 742.

120. 551 N.E.2d at 468 n.4.

121. *See, e.g.*, Harts v. Caylor-Nickel Hosp., Inc., 553 N.E.2d 874 (Ind. Ct. App. 1990).

IV. Notice

In several cases during the survey period, Indiana appellate courts considered the question of adequate notice under the Indiana Tort Claims Act[122] and under the Trial Rules.[123] The Tort Claims Act, governing claims against the government, specifies facts concerning the claimant and his alleged loss that must appear in the notice of claim.[124]

In *Collier v. Prater*,[125] the supreme court, in a case that presented an issue of first impression, examined the question of what constitutes adequate notice pursuant to the Tort Claims Act when the content of the notice is challenged. Collier sued the City of Indianapolis and two of its police officers for injuries allegedly received when the officers arrested him. Within 180 days after his arrest, Collier sent his notice of claim to the city legal department, the clerk, and the chief of police. The notice recited Collier's intent to seek damages for injuries received during his arrest and identified the officers involved. However, the notice did not specify the date of the arrest or the place it occurred. Collier also did not describe the circumstances surrounding his arrest that caused his injury. Despite these deficiencies, the supreme court, in a 3-2 decision, held that Collier substantially complied with the requirement of the Act.[126]

The court noted that strict compliance with the content requirements is not necessary if the notice substantially complies with those requirements. The court then recited the standard for determining substantial compliance with the notice requirements of the Act:

> In general, a notice that is filed within the 180-day period, informs the municipality of the claimant's intent to make a claim and contains sufficient information which reasonably affords the municipality an opportunity to promptly investigate the claim satisfies the purpose of the statute and will be held to substantially comply with it.[127]

The city argued that the notice must at least contain the name of the party injured, the date and place of injury, and the nature of the claim.

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122. Ind. Code §§ 34-4-16.5-1 to -22 (1988 and Supp. 1990).

123. Ind. R. Trial P. 4 to 4.17.

124. Ind. Code § 34-4-16.5-9 (1988).

125. 544 N.E.2d 497 (Ind. 1989).

126. *Id.* at 499. Section 9 of the Act requires the notice to describe in a short and plain statement the facts on which the claim is based. The statement shall include the circumstances that brought about the loss, the extent of the loss, the time and place the loss occurred, the names of all persons involved if known, the amount of the damages sought, and the residence of the person making the claim at the time of the loss and at the time of filing the notice. Ind. Code § 34-4-16.5-9 (1988).

127. *Collier*, 544 N.E.2d at 499.

The court rejected this argument as requiring too formalistic an approach, favoring instead an inquiry that examines whether the city had sufficient information to determine its liability and prepare a defense.[128] The court held the omission of the place and date of the loss was not fatal here because the city easily could contact the two officers involved and have them determine when and where the incident occurred. The notice was held to contain sufficient information for the city to investigate Collier's claim and prepare an adequate defense.

The holding in *Collier* appears to be a departure from its previous ruling in *City of Indianapolis v. Satz*.[129] The court distinguished that case because Satz merely sent a letter to the mayor of Indianapolis, complaining about an incident involving a police officer. The letter did not state an intent to file a claim, nor did it contain a description of the incident. The court found that the notice given by Collier differed because it indicated an intent to seek damages and it stated that the injuries arose out of an arrest involving two officers whom Collier named. The court emphasized that the information given was sufficient for the city to conduct an investigation and prepare a defense. However, in *Satz*, the city also had sufficient information to conduct an investigation because it did just that,[130] but Satz's suit was dismissed because he failed to describe the incident in his letter.[131]

The conclusion to be drawn from an analysis of *Satz* and *Collier* is that if the plaintiff notifies the appropriate authorities of an intent to file a claim, and if the plaintiff fails to describe the incident in sufficient detail in his notice of claim but shows that the government had enough facts to induce it to investigate the claim, the plaintiff may be able to successfully ward off a motion to dismiss for failure to follow the notice requirements of the Act. Pursuant to *Collier*, it appears that the notice of *intent* to file a claim is more important than providing the date and place of the incident. Practitioners should be aware, however, that this may not be true of every type of loss suffered because of an act or omission of the government. For example, an injury suffered because of a poorly maintained sidewalk may be a situation in which more precise information, such as location, will be required. As the court stated, the issue of substantial compliance with the Act's notice provisions, although a question of law, is fact sensitive.[132]

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128. *Id.* at 500 (citation omitted).

129. 268 Ind. 581, 377 N.E.2d 623 (1978). *See also* Geyer v. City of Logansport, 267 Ind. 334, 370 N.E.2d 333 (1977).

130. 268 Ind. at 583, 377 N.E.2d at 625.

131. *Id.*

132. *Collier*, 544 N.E.2d at 500.

Also examined during the survey period was Indiana Trial Rule 4.15(F) which saves a party from dismissal of his suit for a defect in summons when that party's service "is reasonably calculated to inform the person to be served that an action has been instituted against him. . . ."[133] In *Storm v. Mills*,[134] the facts show that the plaintiff used all reasonable means to inform the defendant of her suit against him. She attempted to serve him at one address, but the summons was returned unserved showing the defendant was not found. Service at another address was achieved by the sheriff who left the summons and complaint with a woman who later turned out to be the defendant's daughter. The trial court entered a default judgment against the defendant after he failed to appear. In response to the defendant's subsequent motion to vacate the default judgment, the plaintiff stated in an affidavit that she had personal knowledge that the defendant conducted business at the address where service was made. The court of appeals held that the plaintiff's attempted service on the defendant was reasonably calculated to inform him of the pending action against him.[135] Therefore, default judgment was proper. Practitioners should note that Rule 4.15(F) focuses on the conduct of the plaintiff to inform the defendant of an action against him, not on whether the defendant has knowledge that suit has been filed against him.[136]

Trial Rule 4.10, which must be read in some cases in conjunction with Rule 4.4,[137] provides for the manner of service upon the Secretary of State. A court of appeals case, *Morrison v. Professional Billing Services, Inc.*,[138] construes an attempt to rely on Trial Rule 4.10. In *Morrison*, the court of appeals held that the plaintiff did not use notice reasonably calculated to inform the defendant of the action pending against her. The defendant, Morrison, showed by affidavit that an employee of the billing company had been to her two residences in Illinois. Morrison also stated that she maintained a post office box in Michigan City next to the billing company's box and that officers of the company were aware of this. The billing company did not serve process at either of these addresses. Instead, it attempted service by

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133. IND. R. TRIAL P. 4.15(F).

134. 556 N.E.2d 965 (Ind. Ct. App. 1990).

135. *Id.* at 967-68 (citing Glennar Mercury-Lincoln, Inc. v. Riley, 167 Ind. App. 144, 338 N.E.2d 670 (1975)).

136. *Storm*, 556 N.E.2d at 967-68 (citing *Glennar*, 167 Ind. App. at 151-53, 338 N.E.2d at 675).

137. Indiana Trial Rule 4.4(B)(2) provides that a nonresident defendant whose acts subject him to jurisdiction in Indiana under Rule 4.4 is deemed to have appointed the Secretary of State as his agent for service of process.

138. 559 N.E.2d 366 (Ind. Ct. App. 1990).

certified mail at an office address in Illinois which evidence later revealed Morrison had vacated. When that letter was returned unclaimed, the company served the Indiana Secretary of State, pursuant to Indiana Trial Rule 4.10, and published notice in a local newspaper. From these facts, the court of appeals held that the plaintiff failed to use the best method available to it to give Morrison notice of the pending action against her.[139] This is consistent with supreme court precedent requiring the best possible notice permitted under the circumstances. This requirement was aptly stated in *Mullane v. Central Hanover Bank & Trust Co.*,[140] in which the Court required notice to be more than "a mere gesture."[141] Obviously, when considering this fact-sensitive issue, the Indiana appellate courts show an unwillingness to accept perfunctory attempts to serve process on a party to a pending action.

V. Discovery

Pretrial discovery is governed generally by Indiana Trial Rule 26 which provides for the scope of discovery[142] and for protective orders if an attempt at discovery impinges on information that, for some reason, should not be revealed.[143] The courts will not, however, grant mere "blanket" claims of privilege.[144] During the survey period, the appellate courts continued to define the scope of discovery pursuant to Indiana Trial Rule 26 in the face of challenges based on privileges, work product, and trade secrets.[145]

In *Indiana Department of Transportation v. Overton*,[146] the court of appeals discussed a privilege claim based on the trial rule and federal statutory law. Following the death of his son in a car/train collision at a railroad crossing, Overton filed suit and then requested information from the Indiana Department of Transporation (INDOT) pertaining to certain railroad crossings in Indiana. INDOT resisted the request on the basis of 23 U.S.C. § 409 which prohibits admission at trial of information

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139. *Id.* at 368.

140. 339 U.S. 306 (1950).

141. *Id.* at 315 ("The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.").

142. Ind. R. Trial P. 26(B).

143. *Id.* at 26(C).

144. Peterson v. U.S. Reduction Co., 547 N.E.2d 860 (Ind. Ct. App. 1989).

145. One case concerning the scope of discovery is DeMoss Rexall Drugs v. Dobson, 540 N.E.2d 655 (Ind. Ct. App. 1989), which rejected an insurer's claim that statements given to an insurer by an insured should not be discoverable. *DeMoss* was discussed in great detail in the last survey issue, *see* Funk, *Survey of Recent Developments in the Indiana Rules of Trial Procedure in Civil Matters*, 23 Ind. L. Rev. 241, 246-51 (1990), and was criticized for the harsh results it poses for insurance carriers.

146. 555 N.E.2d 510 (Ind. Ct. App. 1990).

compiled for the purpose of evaluating safety aspects of potential accident sites, hazardous roadway conditions, or railroad crossings. In addition to prohibiting its admission at trial, the statute states that such information may not be "considered for other purposes in any action for damages . . . ."[147] INDOT construed this language to mean discovery of such information is also prohibited. The court disagreed and held that such information was discoverable.[148] The court noted that the phrase "considered for other uses" implies use by a finder of fact and might include use for impeachment purposes.[149] The court concluded that pursuant to Trial Rule 26, as long as the sought-after information seemed reasonably calculated to lead to admissible evidence, it was discoverable.[150]

The issue of discoverability of alleged trade secrets does not appear to have arisen in Indiana until the case of *Vibromatic Co. v. Expert Automation Systems Corp.*[151] Vibromatic sued a corporation formed by some of its former employees for using trade secrets obtained while at Vibromatic to solicit sales from Vibromatic's customers. To test the validity of Vibromatic's claim that its trade secrets were used to compete for sales, the defendants sought to have outside experts examine the processes that Vibromatic alleged to be trade secrets. Because the proposed experts were also competitors, Vibromatic sought a protective order under Trial Rule 26(C). The court of appeals noted the dilemma of a trial court facing this situation:

> An attempt to protect a trade secret would be futile if meritorious litigation would result in the disclosure of the trade secret. . . . The trial court, in exercising its discretion, faces an arduous task. While preserving the confidentiality of the trade secret, the trial court must strike a balance which ensures that a defendant is provided sufficient information to present a defense yet permits the trier of fact sufficient information to resolve the dispute on the merits.[152]

The court then held that the trial court abused its discretion in denying the request for protective order without conducting a complete evidentiary hearing on the matter.[153] Further proceedings should reveal what Vibromatic specifically would have to prove to receive a protective order.

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147. 23 U.S.C. § 409 (1987).

148. *Overton*, 555 N.E.2d at 512 (citing Martinolich v. Southern Pacific Transp. Co., 532 So. 2d 435 (La. App. 1988)).

149. *Id.*

150. *Id.*

151. 540 N.E.2d 659 (Ind. Ct. App. 1989).

152. *Id.* at 661-62.

153. *Id.* at 662.

In *Pioneer Hi-Bred International, Inc. v. Holden's Foundation Seeds, Inc.*,[154] a case construing Federal Rule 26(c), the Federal District Court for the Northern District of Indiana noted that courts generally resist ordering disclosure of trade secrets unless a clear showing of immediate need is shown.[155] They generally require the party seeking production to show the trade secrets are relevant and that there is a specific need for them to prepare for trial.[156] The burden of proof is on the party seeking production.[157] However, this burden does not arise unless the party seeking the protective order shows: (1) that what it seeks to protect is a trade secret, and (2) its disclosure might be harmful.[158]

VI. Pleading and Practice Under Indiana's Comparative Fault Act

The Indiana Supreme Court construed Indiana's Comparative Fault Act in two companion cases decided during the survey period. These cases concern the procedure for pleading and proving the nonparty defense and what happens when certain defendants are dismissed before the end of trial. The legislature enacted the Comparative Fault Act[159] in 1983 to allow for allocation of fault among more than one defendant and other potentially liable parties and the plaintiff, if contributorily negligent. Damages are assessed according to a party's percentage of fault.[160] The nonparty defense,[161] added by the legislature in 1984, enables a defendant to assert as a defense that the claimant's injuries may have been caused in whole or in part by an unnamed party. The burden of pleading and proving the nonparty defense is on the defendant.[162]

In *Cornell Harbison Excavating, Inc. v. May*,[163] the supreme court discussed what happens if the defendant fails, or is unable, to specifically name the nonparty. The Mays sued Cornell Harbison after their automobile swerved into a ditch and hit the drainage and sewer pipe that was stored there. The Mays swerved into the ditch to avoid hitting a dog, and Cornell Harbison tried to name the "unknown owner of the

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154. 105 F.R.D. 76 (N.D. Ind. 1985).
155. *Id.* at 81-82 (citing 4 Moore's Federal Practice 26.60(4), pts. 25-212).
156. *Id.* at 82 (citations omitted).
157. *Id.*
158. Centurion Indus., Inc. v. Warren Steurer and Associates, 665 F.2d 323, 325 (10th Cir. 1981).
159. Ind. Code §§ 34-4-33-1 to -13 (1988 and Supp. 1990).
160. *Id.* §§ 34-4-33-3 to -5 (1988).
161. *Id.* § 34-4-33-10.
162. *Id.*
163. 546 N.E.2d 1186 (Ind. 1989).

dog'' as a nonparty. The trial court granted the Mays' motion to strike the defense, and the appellate courts affirmed.[164] The supreme court rejected the defendant's contention that the statute requires only a general identification of the nonparty sufficient to distinguish it from other persons.[165] Instead, the court held that the plain meaning of the statute requires more than a mere generic description of the nonparty when it states that the verdict must disclose "the name of the nonparty."[166]

This holding is consistent with the rest of the Act because, as the supreme court noted, the burden of pleading and proving the fault of the nonparty is on the defendant.[167] However, in cases such as the present one, in which it is practically impossible to determine the identity of a party who appears to be liable to the plaintiff, and that unnamed party's fault might be significantly greater than that of the named defendant, some inequities will result. However, the statute, as interpreted by the court, reflects a policy that, as between the plaintiff and the defendant who is partly at fault, the defendant should bear the burden of these inequities. The court also held that a Trial Rule 12(F) motion to strike is the proper mechanism to challenge the defendant's nonparty defense that fails to identify the nonparty.[168]

In a more controversial case, *Bowles v. Tatom*,[169] the supreme court held that parties originally joined as defendants, but dismissed at the close of the plaintiff's case, cannot become nonparties for purposes of allocating a percentage of fault to them. Bowles and Tatom were involved in an automobile accident after Bowles failed to stop at a stop sign that she alleged was obscured by foliage. Under these circumstances, Bowles's insurer refused to pay Tatom's claim and Tatom then sued Bowles, the city of Bedford, and its mayor. The answers of the city and the mayor named the adjacent property owners as nonparties, and Tatom then added them as defendants. After viewing photographs of the scene and other evidence presented by Tatom in his case in chief, the trial court granted motions to dismiss the property owners, the city, and the mayor. Bowles did not object to the photographs Tatom used, which apparently showed the stop sign unobstructed, nor did she oppose the other defendants' motions to dismiss. Instead, she presented photographs showing the stop sign obscured by foliage. At the close of her

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164. Cornell Harbison Excavating, Inc. v. May, 530 N.E.2d 771 (Ind. Ct. App. 1988), *aff'd*, 546 N.E.2d 1186 (Ind. 1989).

165. *Cornell Harbison*, 546 N.E.2d at 1187.

166. *Id.* (citing IND. CODE § 34-4-33-6 (1988)).

167. *Id.* (citing *Cornell Harbison*, 530 N.E.2d at 773).

168. *Id.*

169. 546 N.E.2d 1188 (Ind. 1989) vacating in part, Bowles v. Tatom, 523 N.E.2d 458 (Ind. Ct. App. 1988).

case in chief, the trial court found Bowles one hundred percent at fault, and allocated damages accordingly. The court of appeals held that the trial court should have considered the percentage of fault of the other defendants even though they were dismissed.[170]

The supreme court vacated this portion of the court of appeals' decision, and affirmed the trial court's allocation of one hundred percent fault to Bowles. The court reviewed the applicable portions of the statute, particularly the definition of "nonparty" and the procedure for pleading and proving the nonparty defense which places the burden of proof on the defendant. The court noted that the city, the mayor, and the property owners could not be named as nonparties because the definition only includes those who have not been joined in the action as defendants.[171] The court also stated that allocating fault to the city, the mayor, and the property owners as nonparties would contradict the statute's intent that the burden of proving fault of nonparties be on the defendant.[172] These two conclusions posed a dilemma that the court said was resolved by considering the 1984 amendment which substituted the phrase "a party or nonparties" for "persons who are not parties to the action" in Indiana Code section 34-4-33-5(a)(1) and (b)(1).[173]

One commentator suggested that the court's decision in *Bowles* was incorrect.[174] The commentator suggested that a defendant in Bowles's position has no statutory basis, although unable to name the other defendants as nonparties, to object to their dismissal because the plaintiff's evidence was insufficient to sustain his case against them. The result of the court's opinion was to shift the burden of producing evidence against these dismissed defendants to the remaining defendant, which is contrary to the statute because it placed such a burden on the plaintiff as against named defendants.

The commentator correctly noted that the court's holding appears to shift the burden of proof to the remaining defendant to prove the fault of other defendants he fears might otherwise be dismissed due to the plaintiff's lack of proof. On the other hand, although the court strictly construed the Act, its opinion seems to be correct. The nonparty is specifically defined as one who may be liable to the plaintiff but was not joined in the action as a defendant. This excludes those joined but later dismissed. Therefore, no fault can be allocated to these parties under Indiana Code section 34-4-33-5 because that section only allows allocation to the plaintiff, the defendant, and the nonparties.

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170. *Bowles*, 523 N.E.2d at 461.
171. *Bowles*, 546 N.E.2d at 1190.
172. *Id.* (citing IND. R. TRIAL P. 8(C) and IND. SMALL CLAIMS R. 4(A)).
173. *Id.*
174. Harvey, *Rules, Rulings for the Trial Lawyer*, 13 RES GESTAE 530, 532 (1990).

If the stop sign was, indeed, obscured, Bowles may not have been negligent at all, in which case it was wrong to allocate any percentage of fault to her. Of course, fault cannot be allocated to Tatom if he was not at fault either. However, the statute requires the allocation percentages to total one hundred percent unless the factfinder concludes a nonparty is at fault. Because there were no nonparties here, the trial court was forced to allocate fault to either Tatom, Bowles, or both. This case exposes a defect in the statute that must be corrected so that a nonparty includes defendants joined but later dismissed. That way, the initial burden would remain on the plaintiff who should recover nothing if he cannot present sufficient facts to prove his case. Then, if the remaining defendant wanted to prove that the dismissed defendants were at fault, she could do so and have fault allocated to them as nonparties.

In the meantime, practitioners should follow the advice of the supreme court. In the present case, Bowles should have objected to Tatom's photographs on the basis that they did not accurately represent the accident scene as it existed the day of the accident. Further, Bowles should have opposed the motions to dismiss or asked the court to withhold its decision on the motion until the end of her case in chief.

VII. Relief From Judgment

Under Trial Rule 60, a party may obtain relief from judgment in the case of clerical mistake, mistake by a party, excusable neglect, newly discovered evidence, or other reasons listed in the rule.[175] There is a one-year time limit for obtaining relief from judgment in cases in which parties request relief for reasons listed in Trial Rule 60(B)(1) through (4) and a limit of reasonable time in which parties request relief for reasons listed in paragraphs (5) through (8). Relief pursuant to a Rule 60(B)(8) motion will be granted only if the movant presents the court with extraordinary circumstances.[176]

The Indiana appellate courts were faced with the question of what is a "reasonable time"[177] after judgment for filing a Trial Rule 60(B) motion for relief from judgment in *Fairrow v. Fairrow*.[178] On February 7, 1975, Joe and Mary Fairrow obtained a divorce decree that determined

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175. Ind. R. Trial P. 50(A), (B).

176. Shotwell v. Cliff Hagan's Ribeye Franchise, Inc., 553 N.E.2d 204, 207 (Ind. Ct. App. 1990), *transfer pending*.

177. *See* Ind. R. Trial P. 60(B) ("The motion shall be filed within a reasonable time for reasons (5), (6), (7), and (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), and (4).").

178. 543 N.E.2d 649 (Ind. Ct. App. 1989), *vacated*, 559 N.E.2d 597 (Ind. 1990).

that Joseph D. Fairrow, born June 7, 1974, was a child of the marriage. Paternity of Joseph was not disputed at this time and the decree ordered Joe to pay child support. By the time Joseph was about twelve years old, Joe discovered that it was impossible that he could be Joseph's father because Joseph had the trait for sickle cell anemia and neither Joe nor Mary carried this trait. Because she was tested sometime between 1974 and 1976, Mary knew she did not have the sickle cell trait. However, Joe was not tested until 1986, when Joseph experienced symptoms of sickle cell anemia. Shortly after this discovery, but eleven years after the date of the decree, Joe filed a Trial Rule 60(B)(8) motion to terminate support. The trial court denied relief. After two additional motions and still no relief, Joe appealed the trial court's decision.

Although Joe did not file a motion to correct errors after the trial court's first alleged error, the court of appeals did not rely on waiver of the right to appeal to deny Joe relief.[179] Instead, the court denied relief on the basis that eleven years after judgment was not a "reasonable time," as required by the Rule, in which to later challenge that judgment.[180] The court held that in order for the eleven years to be considered a reasonable time, Joe would have to present facts or circumstances other than that he is not Joseph's biological father.[181] The reason for requiring a showing of additional circumstances, the court found, is that by "conduct or circumstances, one who is not a biological father of a child may have become obligated to a continuing duty of support for that child."[182] The conduct or circumstances applicable in this case were that Joe paid support for eleven years as if Joseph had been his natural son. Judge Buchanan, dissenting, noted that a substantial change in circumstances did occur, that change being Joe's later awareness, through medical tests, that he was not Joseph's biological father.[183]

On transfer, the Indiana Supreme Court vacated the court of appeals's opinion.[184] Also holding that Joe did not waive his right to an appeal,[185] the court proceeded to the merits of the 60(B) motion. The court held that eleven years was a reasonable time after which to file

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179. *Id.* at 651 n.2 (holding that the pre-appeal order had determined substantive issue to be preserved).

180. *Id.* at 653.

181. *Id.* at 652.

182. *Id.* at 653 (citing R.D.S. v. S.L.S., 402 N.E.2d 30 (Ind. Ct. App. 1980)).

183. *Id.* at 653-54 (Buchanan, J., dissenting) (citing IND. CODE § 31-1-11.5-17(a) (1988), which allows a child support order to be modified upon a showing of changed circumstances).

184. *Fairrow*, 559 N.E.2d 597 (Ind. 1990).

185. *Id.* at 598.

a Trial Rule 60(B)(8) motion, noting that Joe had no reason to question the divorce court's paternity determination until his doctor suggested, eleven years later, that he undergo testing for the sickle cell trait.[186] Although granting Joe relief, the court warned against the potential abuse of the courts in future divorce proceedings:

> Although we grant Joe relief, we stress that the gene testing results which gave rise to the prima facie case for relief in this situation became available independently of court action. In granting relief to a party who learned of his non-parenthood through the course of ordinary medical care, we do not intend to create a new tactical nuclear weapon for divorce combatants. One who comes in to court to challenge a support order on the basis on non-paternity without externally obtained clear medical proof should be rejected as outside the equitable discretion of the trial court.
>
> In sum, we strongly discourage relitigation of support issues through T.R. 60(B)(8) motions in the absence of highly unusual evidence akin to the evidence presented in this case.[187]

The question inevitably arising from the circumstances of this case is whether putative fathers, during initial divorce proceedings, will raise an excess of unmerited claims that they did not father the children of their marriages. Certainly, if left alone, the court of appeals decision would have the potential to cause an increase in such claims. Faced with uncontroverted evidence that Joe was not Joseph's biological father, the court nevertheless held against him because of the lapse of time between the original decree and the filing of his first motion to terminate support. This would have had the effect of inducing husbands to question paternity at the original divorce proceedings to assure that they would not be precluded from raising such an issue later. The result also could have led a few unscrupulous husbands and their attorneys to raise unmerited issues concerning paternity at the outset of such proceedings, under the guise of valid disputes, in order to harass their opponents/spouses. The supreme court has at least provided those with valid paternity disputes an opportunity to come forward with newly discovered medical evidence that establishes nonpaternity years after the decree is entered. However, the warning quoted above reveals the court's intention to have its holding applied to a limited number of cases. Certainly, attorneys whose clients have valid concerns of whether the children of marriages are the fathers' biological children would be wise to have such

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186. *Id.* at 599.
187. *Id.* at 600.

concerns resolved early in the proceedings to assure themselves of preserving this issue.

VIII. Conclusion

Although every written opinion involves an issue concerning procedural law, this Article highlights the more significant issues discussed during the survey issue. These issues appear in construction of the trial rules as well as procedural sections of various Indiana statutes. Practitioners should keep in mind that the rules and statutes are constantly undergoing revisions that supercede case law. However, they may also provide new opportunities for trial lawyers.