# 1994 DEVELOPMENTS IN INDIANA APPELLATE PROCEDURE: OLD LESSONS REVISITED AND THE SCOPE OF THE COURT OF APPEALS' DISCRETION

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## INTRODUCTION

During 1994, Indiana appellate practice stayed its course. The Indiana Rules of Appellate Procedure received only minor amendments. The reported decisions from Indiana's appellate courts more often reminded appellate practitioners of the old but critical lessons that attend careful appellate practice, and only occasionally developed new law. The most interesting development in the case law relates to a vigorous debate among three districts of the Indiana Court of Appeals regarding the extent of the appellate courts' inherent authority to entertain appeals from administrative agency decisions wherein the appellant fails to include an assignment of errors in the record of proceedings.[1]

The composition of Indiana's appellate tribunals continues to evolve. However, at least in 1994, the case law did not offer much new guidance to the appellate practitioner. As it turns out, 1994 was an important year to revisit the lessons of the past. With so many potential developments looming on the horizon, it is perhaps best that 1994 was a year to stand relatively still and think critically about the current status of appellate procedure in Indiana.

Part I of this Article discusses briefly the minor amendments to the Indiana Rules of Appellate Procedure in 1994. Part II analyzes the decisions of Indiana's appellate courts in 1994 which revisit and emphasize the old lessons of appellate practice. Part III examines the debate regarding the significance of failing to make an assignment of errors and the larger implications of that debate. Part IV discusses what may lie ahead in 1995.

## I. AMENDMENTS TO THE INDIANA RULES OF APPELLATE PROCEDURE

The Indiana Supreme Court made only minor changes to the Indiana Rules of Appellate Procedure in 1994. Most of the amendments that became effective in 1994 were thoroughly reviewed in last year's Survey article on Indiana Appellate Procedure.[2]

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1. St. Amand-Zion v. Review Bd. of Ind., 635 N.E.2d 184, 185 (Ind. Ct. App. 1994) (holding that the "[f]ailure to file the assignment of errors must result in dismissal for lack of jurisdiction."); Claywell v. Review Bd. of Ind., 635 N.E.2d 181, 182 (Ind. Ct. App. 1994), *aff'd*, 643 N.E.2d 330 (Ind. 1994) (holding that "[t]he timely filing with this court of an assignment of errors . . . is a jurisdictional act."); Hogan v. Review Bd. of Ind., 635 N.E.2d 172, 174 (Ind. Ct. App. 1994) (holding that the requirement of filing an assignment of errors has been abolished).

2. George T. Patton, Jr., *1993 Developments in Indiana Appellate Procedure: Changes in Original Actions, Rehearing and Transfer*, 27 IND. L. REV. 843, 844-53 (1994) (discussing the amendments to the rules regarding original actions, petitions for rehearing and transfer, interlocutory appeals from the Tax Court, and shorter statements of the case).

One other substantive amendment in 1994 was the addition of the Civil Rights Commission to the list of specifically enumerated state agencies in Indiana Appellate Rule 4(C) over which the Indiana Court of Appeals has jurisdiction to review final decisions.[3] In addition, Indiana Appellate Rule 8.2(B)(2) was amended to add the proper citation form for reference in briefs to the Indiana Rules of Evidence.[4]

## II. Old Lessons Revisited: Important 1994 Decisions on Indiana Appellate Procedure

In a series of 1994 decisions,[5] the Indiana Court of Appeals and the Indiana Supreme Court reminded appellate practitioners about some of the critical principles that attend good appellate practice in Indiana. This section discusses several of those cases as they relate to the preservation of error, various waiver concerns, the prima facie error rule, and summary judgment practice.

### *A. Preserving Error*

Nothing is more fundamental to appellate practice than the preservation of error. This principle is clearly illustrated in two recent decisions by the Indiana Court of Appeals.

In *Carter v. State*,[6] Defendant Carter's counsel filed a pretrial motion in limine to exclude anticipated testimony by the State's witnesses regarding Carter's alleged prior bad acts.[7] The trial court denied Carter's motion in limine, and Carter's counsel then requested that a continuing objection be noted on the record.[8] When the trial court admitted the testimony that was the subject of Carter's motion in limine, Carter's counsel made no further objection.[9] The court of appeals held that "[w]hile we approve the use of continuing objections, they are insufficient to preserve error for appeal. Carter should have renewed his objection at trial when the testimony was offered. Having failed to timely renew his objection, he waived this allegation of error."[10] As the court of appeals observed, "[i]t is well-settled that 'when a defendant does not properly bring an objection to the trial court's attention so that the trial court may rule on it at the appropriate time, he is deemed to have waived that possible error.'"[11]

*Trout v. Trout* offered an equally significant example of the risk of "sitting idly by."[12] *Trout* was a marital dissolution case. The trial court implemented a summary final dissolution hearing procedure. Under that procedure, counsel summarized their clients'

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3. Ind. App. R. 4(C).
4. Ind. App. R. 8.2(B)(2).
5. This Article addresses appellate decisions from November 1, 1993, through October 31, 1994.
6. 634 N.E.2d 830 (Ind. Ct. App. 1994).
7. *Id.* at 832.
8. *Id.*
9. *Id.*
10. *Id.* at 833 (citing Hobson v. State, 495 N.E.2d 741, 744 (Ind. Ct. App. 1986)).
11. Carter v. State, 634 N.E.2d 830, 833 (Ind. Ct. App. 1994) (quoting Ingram v. State, 547 N.E.2d 823, 829 (Ind. 1989)).
12. 638 N.E.2d 1306 (Ind. Ct. App. 1994).

testimony, and then the parties verified that the statements made by their counsel were in fact accurate summaries of the testimony that they would have offered.[13] Exhibits were entered into evidence by agreement.[14] Neither party objected to this procedure before or during the final hearing. After receiving the trial court's ruling, the husband filed a motion to correct error challenging the summary procedure.[15] On appeal, the court of appeals held:

> [A]ny challenges to the procedure utilized by the trial court were waived by Husband's failure to object to the format of the proceedings. A timely objection is a prerequisite to appellate review. "An appellant cannot sit idly by without objecting, await the outcome of trial, and thereafter raise an issue for the first time on appeal."[16]

In the realm of appellate practice, one who hesitates has truly lost the opportunity to seek appellate review. Where error is not timely preserved by objection, there simply is no reviewable error.[17] That lesson is the first and perhaps the most important of the old lessons revisited in 1994.

### *B. Other "Waiver" Concerns*

In addition to the critical importance of preserving error, the appellate courts discussed several other waiver issues on appeal. Foremost among these decisions were cases regarding dismissal for failure to file a timely praecipe,[18] waiver of issues that are raised for the first time on appeal,[19] waiver due to failure to address issues in the argument section of appellant's brief,[20] potential waiver arising from failure to present a narrative statement of facts,[21] and waiver of issues raised for the first time in the reply brief.[22] The Indiana Court of Appeals also reminded appellate practitioners that some matters, particularly subject matter jurisdiction,[23] cannot be waived.

Indiana Appellate Rule 2(A) provides, in relevant part, that "[t]he praecipe shall be filed within thirty (30) days after entry of a final judgment . . . . Unless the praecipe is

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13. *Id.* at 1307.

14. *Id.*

15. *Id.*

16. *Id.* (citing Archem, Inc. v. Simo, 549 N.E.2d 1054, 1060 (Ind. Ct. App. 1990) and quoting Cheek v. State, 567 N.E.2d 1192 (Ind. Ct. App. 1991)).

17. *See also* Levin v. Levin, 626 N.E.2d 527, 531 (Ind. Ct. App. 1993), *aff'd*, 645 N.E.2d 601 (Ind. 1994) (explaining that "[g]enerally, the failure to raise errors which existed at trial may not be remedied in a post trial motion to correct error").

18. Jennings v. Davis, 634 N.E.2d 810 (Ind. Ct. App. 1994).

19. Johnson v. Owens, 639 N.E.2d 1016 (Ind. Ct. App. 1994).

20. Hopping v. State, 627 N.E.2d 875 (Ind. Ct. App. 1994), *cert. denied*, 115 S. Ct. 578 (1994); J.C. Harbour v. Bob Anderson Pontiac, 624 N.E.2d 475 (Ind. Ct. App. 1993).

21. Levi v. State, 627 N.E.2d 1345 (Ind. Ct. App. 1994).

22. Hefty v. All Other Members Cert. Settlement, 638 N.E.2d 1284 (Ind. Ct. App. 1994); Mid State Bank v. 84 Lumber Co., 629 N.E.2d 909 (Ind. Ct. App. 1994).

23. Albright v. Pyle, 637 N.E.2d 1360 (Ind. Ct. App. 1994). *See also* Coachmen Vans v. State Bd. of Tax Comm'rs, 639 N.E.2d 1066 (Ind. Tax Ct. 1994).

filed within such time period, the right to an appeal will be forfeited."[24] In 1994, the court of appeals provided another fitting example of the blunt significance of this rule. In *Jennings v. Davis*,[25] the trial court entered final judgment on August 16, 1993, and the defendant's counsel filed his praecipe on September 16, 1993.[26] Since August has thirty-one days, the praecipe was filed one day late. The court of appeals held that "[t]imely filing of a praecipe is a jurisdictional prerequisite and when the praecipe has not been timely filed we *must* dismiss the appeal."[27] Interestingly, Judge Rucker dissented,[28] declaring that the court of appeals has the inherent discretion to entertain untimely appeals and observing:

> In the case at hand appellant was merely one day late in filing his praecipe. The Record of Proceedings and Brief of Appellant were timely filed thereafter. I also observe that the appellee did not file a brief. Invoking a procedural rule in this case defeats rather than promotes the ends of justice. We would prejudice no one by entertaining the merits of this appeal.[29]

Once an appeal is timely perfected, the appellate courts will only consider the issues raised by the parties.[30] However, issues raised for the first time on appeal will not be considered.[31] In *Johnson v. Owens*, the plaintiffs pursued a negligent entrustment claim arising from an auto accident. On appeal, the plaintiffs/appellants argued for the first time that Indiana should adopt Section 390 of the *Restatement (Second) of Torts*, under which plaintiffs would not have been required to prove actual knowledge in order to succeed in their negligent entrustment claim.[32] The Indiana Court of Appeals rejected this novel argument, holding that "[t]he general rule . . . is that 'a party may not raise an issue on appeal which was not raised in the trial court. . . . This rule also applies to summary judgment proceedings.' The argument is waived."[33]

Indiana Appellate Rule 8.3(A)(7) provides, in relevant part:

> Each error that appellant intends to raise on appeal shall be set forth specifically and followed by the argument applicable thereto. . . . The argument shall contain the contentions of the appellant with respect to the issues presented, the reasons in support of the contentions along with citations to the authorities,

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24. IND. APP. R. 2(A).

25. 634 N.E.2d 810 (Ind. Ct. App. 1994).

26. *Id.*

27. *Jennings*, 634 N.E.2d at 810 (citing CNA Ins. Cos. v. Vellucci, 596 N.E.2d 926, 928 (Ind. Ct. App. 1992)) (emphasis added).

28. *Id.* at 811.

29. *Id.* This theme regarding the appellate court's discretion is analyzed in greater detail in Part III of this Article.

30. *In Re* Buck Creek Coal, Inc., 639 N.E.2d 668, 671 n.2 (Ind. Ct. App. 1994) ("Buck Creek has presented no argument on this exception [*i.e.*, the public interest exception to the mootness rule], and therefore, we will not consider it further.").

31. Johnson v. Owens, 639 N.E.2d 1016 (Ind. Ct. App. 1994).

32. *Id.* at 1022 n.5.

33. *Id.* (quoting Hardiman v. Governmental Ins. Exchange, 588 N.E.2d 1331 (Ind. Ct. App. 1992)).

> statutes, and parts of the record relied upon, and a clear showing of how the issues and contentions in support thereof relate to the particular facts of the case under review.[34]

In *J.C. Harbour v. Bob Anderson Pontiac*,[35] the Indiana Court of Appeals held that an issue had been waived when it was identified in the "Statement of the Issues" section of appellant's brief, but not addressed in the "Argument" section of the brief.[36] Similarly, in *Hopping v. State*,[37] the court of appeals held that several issues were waived when defendant failed to support the issues with any argument or citation to authority.[38]

Appellate Rule 8.3(A)(5) requires "[a] statement of the facts relevant to the issues presented for review, with appropriate references to the record."[39] In *Levi v. State*,[40] the appellant's statement of facts consisted of a summary of each witness's trial testimony.[41] The court of appeals admonished appellant's counsel, stating:

> We have repeatedly stated that the appellate rules contemplate a narrative statement of the facts; a witness by witness summary of the testimony is not a statement of facts within the meaning of [Indiana] Appellate Rule 8.3(A)(5). We admonish counsel that failure to abide by the rules of procedure may result in waiver of issues presented for review.[42]

Not only must arguments be properly raised in appellant's brief, but an issue cannot be raised for the first time in appellant's reply brief.[43] In *Mid State Bank v. 84 Lumber Co.*, the defendant appealed the trial court's entry of summary judgment in favor of the plaintiff in a breach of contract case. In its reply brief, the defendant argued for the first time that the trial court's summary judgment was unsupported by the evidence and contrary to law.[44] The court of appeals held that "[t]he law is well settled that grounds for error can only be framed in the appellant's initial brief and if addressed for the first time in the reply brief, they are waived."[45] Curiously, however, the court of appeals went on to say that "despite waiver we may review the issue if the noncompliance with the

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34. IND. APP. R. 8.3(A)(7).

35. 624 N.E.2d 475 (Ind. Ct. App. 1993).

36. *Id.* at 476 n.1.

37. 627 N.E.2d 875 (Ind. Ct. App. 1994), *cert. denied*, 115 S. Ct. 578 (1994).

38. *Id.* at 876 n.2.

39. IND. APP. R. 8.3(A)(5).

40. 627 N.E.2d 1345 (Ind. Ct. App. 1994).

41. *Id.* at 1347 n.2.

42. *Id.* (citing Hoover v. State, 582 N.E.2d 403 (Ind. Ct. App. 1991), *aff'd*, 589 N.E.2d 243 (Ind. 1992)).

43. Mid State Bank v. 84 Lumber Co., 629 N.E.2d 909 (Ind. Ct. App. 1994); *see also* Hefty v. All Other Members Cert. Settlement, 638 N.E.2d 1284 (Ind. Ct. App. 1994).

44. *Mid State Bank*, 629 N.E.2d at 911 n.1.

45. *Id.* (citing IND. APP. R. 8.3(A)(7) and Saloom v. Holder, 307 N.E.2d 890 (Ind. App. 1974)). *See also Hefty*, 638 N.E.2d at 1288 n.4.

Appellate Rules does not impede our review."[46] The court chose to review the waived issue.

Finally, while many issues on appeal can be waived by conduct, the appellate courts were quick to remind practitioners in 1994 that certain matters cannot be waived. Most notably, the subject matter jurisdiction of the trial court can be raised at *any* time in a case.[47] In fact, "[i]f the parties do not question it, the trial court or Court of Appeals is required to consider the issue *sua sponte*."[48]

For both appellants and appellees, avoiding the catastrophe of waiver can be like "tiptoeing through a minefield," especially when the decisions of the appellate courts *excusing* waiver are reviewed. The powerful defense of waiver is sometimes, and without any apparent consistency, cast aside by the prerogative of the appellate judges. On balance, however, the rules regarding waiver are known and predictable. A careful review of the decisions discussed above should assist all appellate practitioners in avoiding the wrath of waiver and focusing the appellate court on the merits of their appellate arguments.

### *C. The Prima Facie Error Rule*

During 1994, the Indiana Court of Appeals continued to develop the "prima facie error" rule.[49] The "prima facie error" rule is a less rigorous standard of review under which the appellate courts have the discretion to reverse if the appellee files no brief and the appellant's brief demonstrates prima facie error.[50] The court of appeals has observed that "[t]his rule was established for the protection of the court so that it might be relieved of the burden of controverting the arguments advanced for reversal where such a burden rests with the appellee."[51] In *Head v. State*, however, the court of appeals further held that "we are not compelled to apply the prima facie error standard but may, in our discretion, decide the case on the merits."[52] The court chose to address this appeal on the merits.

When will the appellate courts apply the prima facie error rule? In light of *Head v. State*, it is unpredictable. When the appellate courts elect to exercise their inherent discretion to review an appeal on the merits, the absence of appellee's brief may have no effect. There is, however, no principled reason to take this risk. The lesson of 1994 is that only one practice makes sense: Appellees should always file a brief. Appellees who fail to do so run the risk that their successes in the trial court will be the subject of a diluted standard of review on appeal.

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46. *Mid State Bank*, 629 N.E.2d at 911 n.1. This theme regarding the appellate court's discretion is analyzed in greater detail in Part III of this Article.

47. Albright v. Pyle, 637 N.E.2d 1360, 1363 (Ind. Ct. App. 1994); Coachmen Vans v. State Bd. of Tax Comm'rs, 639 N.E.2d 1066, 1067 (Ind. Tax Ct. 1994).

48. *Albright*, 637 N.E.2d at 1363.

49. Weinberg v. Bess, 638 N.E.2d 841 (Ind. Ct. App. 1994); Head v. State, 632 N.E.2d 749 (Ind. Ct. App. 1994); Phegley v. Phegley, 629 N.E.2d 280 (Ind. Ct. App. 1994).

50. *Weinberg*, 638 N.E.2d at 843 (citing Beck v. Mason, 580 N.E.2d 290, 291 (Ind. Ct. App. 1991)).

51. *Head*, 632 N.E.2d at 750 (citing Dusenberry v. Dusenberry, 625 N.E.2d 458, 460 (Ind. Ct. App. 1993)). *See also Phegley*, 629 N.E.2d at 282.

52. *Head*, 632 N.E.2d at 750.

### *D. Summary Judgment Practice*

Since the amendment of Trial Rule 56(C), effective January 1, 1991, the appellate courts have rendered a raft of decisions regarding summary judgment practice in Indiana.[53] Many of those decisions have related to the standard for appellate review. The reported decisions in 1994 have continued the evolution of summary judgment practice on appeal in Indiana.

As has long been known, the court of appeals applies the same standard as the trial court in reviewing a summary judgment motion.[54] The only variance between the trial court standard and the appellate standard is that the losing party in the trial court has the added burden of persuading the appellate court that the trial court's decision was erroneous.[55]

In 1991, Trial Rule 56(C) was amended to add the following requirement:

> At the time of filing the motion or response, a party shall designate to the court all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion. A party opposing the motion shall also designate to the court each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto.[56]

Subsequent to that amendment, the court of appeals has held that it "may consider only those parts of the record which have been designated by the parties in the motion or response. . . . [W]e, as a reviewing court, are no longer free to search the entire record to support the judgment of the trial court."[57] During 1994, the court of appeals fine-tuned its position with respect to what constitutes a proper designation of evidence. In *Holland v. Miami Systems, Inc.*, the court of appeals observed that "[d]esignating the entire record may be considered as failing to make the designation."[58]

The court of appeals has become very specific in its enunciation of the requirements of Trial Rule 56(C):

> Although [Trial Rule] 56(C) is silent as to the specificity required for designations, this Court in *Pierce* explained that a proper designation consists

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53. *See, e.g.*, Pierce v. Bank One—Franklin, NA, 618 N.E.2d 16, 19 (Ind. Ct. App. 1993) (explaining that the purpose of the amendments to IND. TRIAL R. 56 is to decrease the amount of evidentiary material trial courts are required to sift through in ruling on summary judgment motions); Midwest Commerce Banking Co. v. Livings, 608 N.E.2d 1010, 1012 (Ind. Ct. App. 1993) (holding that neither the trial court nor the court of appeals can look beyond the evidence specifically designated to the trial court).

54. Holland v. Miami Systems, Inc., 624 N.E.2d 478, 482 (Ind. Ct. App. 1994) (citing Inland Steel v. Pequignot, 608 N.E.2d 1378, 1381 (Ind. Ct. App. 1993)).

55. Schrader v. Eli Lilly & Co., 639 N.E.2d 258, 261 (Ind. 1994) (citing Oelling v. Rao, 593 N.E.2d 189 (Ind. 1992)). The review is not de novo. Summary judgments enter the process of appellate review cloaked with a presumption of validity. Indiana Dep't of State Revenue v. Bethlehem Steel Corp., 639 N.E.2d 264, 266 (Ind. 1994).

56. IND. TRIAL R. 56(C).

57. *Holland*, 624 N.E.2d at 482-83.

58. *Id.* at 483.

> of: (1) a list of the factual matters which are or are not in dispute, (2) supported by a specific designation to their location in the record, and (3) a brief synopsis of why those facts are material.[59]

In an effort to make this standard even more clear, the court of appeals recently stated in *National Board of Examiners v. American Osteopathic Ass'n*:

> Specifically, we have held that a general reference to whole portions of the record, without a specific citation to relevant evidence does not constitute designation under Trial Rule 56(C). Our decisions in this regard have been numerous and our holdings unmistakable, yet we continue to receive cases on appeal in which the attorneys have not properly designated evidence.[60]

Since the court of appeals cannot reverse on the grounds that there is a genuine issue of material fact unless the relevant evidence has been specifically designated and since no specific designation was made in *American Osteopathic*, the court of appeals affirmed.[61]

Indiana's appellate courts made substantial strides in the development of appellate summary judgment procedure during 1994. Prudent practitioners should consult these most recent pronouncements before preparing their next motion for summary judgment. The court of appeals is presently wielding a rather heavy axe where the designation of evidence is not appropriately precise.[62] Take heed.[63]

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59. Kissell v. Vanes, 629 N.E.2d 878, 880 (Ind. Ct. App. 1994) (citing Pierce v. Bank One—Franklin, NA, 618 N.E.2d 16, 19 (Ind. Ct. App. 1993)).

60. 639 N.E.2d 317, 319 (Ind. Ct. App. 1994) (citation omitted).

61. *Id.*; *see also* IND. TRIAL R. 56(H).

62. *See, e.g.*, *American Osteopathic*, 639 N.E.2d at 319 (stating that appellee's "superficial effort to comply with Trial Rule 56(C) is intolerable and is not only contemptuous of the intent of the rule, but also to the courts of Indiana"). The suggestion of contempt certainly seems harsh. Why not simply state that the designation is inadequate under IND. TRIAL R. 56(C) and deny the motion for summary judgment?

63. As this Article was going to print, the Indiana Court of Appeals rendered its decision in National Bd. of Examiners v. American Osteopathic Ass'n, 645 N.E.2d 608 (Ind. Ct. App. 1994), vacating its prior decision. *See supra* note 61. In the new decision, the court of appeals relaxed its observation somewhat, holding:

> Some of our earlier holdings suggest that the evidentiary materials must be designated in a certain manner. However, we believe the language of the rule itself permits the parties to determine how to designate. What the rule requires is specificity, and we do not mean to suggest that we are relaxing that requirement. [IND. TRIAL R. 56(H)] prohibits this court from reversing a case because there is a genuine issue of material fact unless that fact has been "specifically designated" to the trial court. Thus, specificity is the mandate, and we agree with those cases which have held that the failure to make specific citations does not comply with the rule. Our holding is simply that how a party is to specifically designate material is not mandated by the rule.

*American Osteopathic*, 645 N.E.2d at 615 (citations omitted). The court of appeals then found that the parties' "designations" sufficiently apprised the trial court. *Id.* at 616.

## III. The Scope of the Court of Appeals' Discretion

Three 1994 decisions by three separate districts of the Indiana Court of Appeals place a special focus on the extent to which the appellate courts may either strictly apply the Indiana Rules of Appellate Procedure or assert their apparently inherent authority to disregard the clear import of the Rules on an ad hoc basis.[64] The debate among the districts is significant in and of itself as well as because of its larger implications.

### *A. The Debate*

Appellate Rule 7.2(A)(1) provides:

> The record of the proceedings shall consist of the following documents:
> (1) A copy of the praecipe and where used a copy of the Motion to Correct Error or an assignment of errors for reviews from administrative decisions taken directly to the Court of Appeals under Appellate Rule 4(C).[65]

Furthermore, Indiana Code section 22-4-17-12(f) requires that when appealing a decision of the Review Board of the Indiana Department of Employment and Training Services, "[t]he appellant shall attach to the transcript an assignment of errors."[66]

On three separate occasions in 1994, three different unemployment compensation claimants sought judicial review of the Review Board's decision pursuant to Appellate Rule 4(C).[67] In each of those cases, the appellant failed to comply with Appellate Rule 7.2(A)(1) and section 22-4-17-12(f) of the Indiana Code by not including an assignment of errors in the record of the proceedings.[68] In two of the cases, the court of appeals found this omission in the record of the proceedings to be a jurisdictional defect that warranted dismissal.[69] In a third decision, however, the appellate court found no jurisdictional defect and asserted its inherent authority to consider the merits of the appeal.[70] These three cases frame the debate.

In *Claywell v. Review Board of Indiana*, Claywell did not file an assignment of errors, and the Review Board argued that the court of appeals did not, therefore, have jurisdiction to consider the appeal.[71] The court of appeals held that "[t]he timely filing with this court of an assignment of errors for appeals from the Review Board is a jurisdictional act."[72] The court of appeals observed that "the problem is that Claywell has failed to invoke the jurisdiction of this court to hear her appeal by failing to timely file an assignment of

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64. St. Amand-Zion v. Review Bd. of Ind., 635 N.E.2d 184 (Ind. Ct. App. 1994); Claywell v. Review Bd. of Ind., 635 N.E.2d 181 (Ind. Ct. App. 1994); Hogan v. Review Bd. of Ind., 635 N.E.2d 172 (Ind. Ct. App. 1994).

65. IND. APP. R. 7.2(A)(1).

66. IND. CODE § 22-4-17-12(f) (1993).

67. *See* cases cited *supra* note 64.

68. *See* cases cited in *supra* note 64.

69. *St. Amand-Zion*, 635 N.E.2d at 185-86; *Claywell*, 635 N.E.2d at 183-84.

70. *Hogan*, 635 N.E.2d at 178-79.

71. *Claywell*, 635 N.E.2d at 182.

72. *Id.* (citing South Madison Community Sch. Corp. v. Review Bd. of Ind., 622 N.E.2d 1042, 1043 (Ind. Ct. App. 1993)).

errors. Therefore, we must dismiss this appeal."[73] The court of appeals reached the same conclusions in *St. Amand-Zion v. Review Board of Indiana*.[74]

In *Hogan v. Review Board of Indiana*,[75] however, although presented with the same operative facts, Presiding Judge Sullivan, writing for the Second District of the Court of Appeals of Indiana, arrived at the opposite result. The court held that "[t]he jurisdictional predicate relied upon by the other panels is a relic of the past. The requirement has been abolished."[76]

In large part, the Second District's holding is founded upon a strained reading of *Lugar v. State*.[77] In *Lugar*, in response to appellant's petition to transfer, appellees argued that the appeal should be dismissed due to various procedural defects.[78] First, appellees argued that the court of appeals abused its discretion when it granted appellants' motion for an emergency extension of time to file their brief because that motion was not filed in compliance with Indiana Appellate Rule 14(A) (specifically, it was not accompanied by a separate sworn statement).[79] Appellees also argued that the appellants waived various arguments by failing to raise them in their motion to correct error.[80] Finally, appellees argued that appellants waived various errors by failing to comply with Indiana Appellate Rules 8.3(A)(5) and 8.3(A)(7).[81] The Indiana Supreme Court held:

> This Court has inherent discretionary power to entertain an appeal after the time allowed has expired. The Court of Appeals also has this power. However an appeal under such conditions is not a matter of right and will not be permitted in every situation. This Court will exercise such discretion "only in rare and exceptional cases, such as in matters of great public interest, or where extraordinary circumstances exist."[82]

The Supreme Court then found that because a matter of great public importance was at stake,[83] it was proper for the court of appeals to have heard the untimely appeal.[84]

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73. *Id.* at 183 (citing *South Madison*, 622 N.E.2d 1042).

74. *Id.* at 185-86.

75. 635 N.E.2d 172 (Ind. Ct. App. 1994).

76. *Id.* at 174.

77. 383 N.E.2d 287 (Ind. 1978).

78. *Id.* at 289.

79. *Id.*

80. *Id.* That *Lugar* was decided in 1978 when the filing of a motion to correct error was still a jurisdictional prerequisite for an appeal is noteworthy.

81. *Id.*

82. Lugar v. State, 383 N.E.2d 287, 289 (Ind. 1978) (citing State *ex rel.* Cook v. Howard, 64 N.E.2d 25 (Ind. 1945) and Lowe v. Gardner, 158 N.E.2d 808 (Ind. App. 1959) and quoting Costanzi v. Ryan, 368 N.E.2d 12, 16 (Ind. App. 1977)).

83. *Lugar* dealt with a mandate action relating to the inclusion of a clothing allowance in the computation of police pension fund benefits for former members of the Indianapolis Police Department, their widows, or next of kin.

84. *Lugar*, 383 N.E.2d at 289-90.

After citing *Lugar* for the proposition that "failure to file a timely Motion to Correct Errors did not deprive the appellate court of jurisdiction,"[85] the court of appeals in *Hogan* went on to hold:

> We do not unilaterally decide that an assignment of errors is no longer required on appeal. That requirement has been put in place by the legislature, and it is not our prerogative to abolish it. However, we do hold that failure to include such assignment does not deprive us of jurisdiction, nor prevent us from exercising our inherent power to hear this cause. We recognize that *pro se* litigants are held to the same requirements as professional attorneys. We also recognize that "[j]udges have no right, upon mere whim, to disregard rules or principles of law." However, given the compelling policy of deciding cases upon the merits rather than technicalities, we hold that this case should be reviewed and we proceed to do so.[86]

Then, without finding that Hogan's case was in any way "rare and exceptional," an express requirement under *Lugar*, the Second District considered the merits of his case on appeal. Curiously, after all of the gymnastics associated with the Second District's assertion of its inherent discretion to consider the merits of Hogan's appeal, the court of appeals found no merit and upheld the Review Board's findings.[87] The appellate panel in *St. Amand-Zion* criticized the *Hogan* court, and noted that "a case involving the denial of unemployment compensation is not the 'rare and exceptional case' which would warrant the exercise of inherent power to entertain an untimely appeal."[88]

### *B. The Implications of the Debate*

For the appellate practitioner, the Indiana Rules of Appellate Procedure form an arsenal that serves as the first line of defense for appellate argument. The expectation that procedural arguments drawn from that quiver may—or normatively, *should*—be fatal to the opponent's cause is bolstered by the frequent decisions from the appellate courts dismissing appeals due to various degrees of noncompliance with the procedural rules.[89] Decisions like *Hogan* cause practitioners to question the validity of this expectation, particularly since *Hogan* pays so little respect to the principle of *stare decisis* and the clear import of *Lugar*.

The narrow issue raised by *Claywell*, *St. Amand-Zion*, and *Hogan*—when and under what circumstances an assignment of errors is required—will eventually be resolved by the Indiana Supreme Court.[90] The broader issue—when practitioners should expect the

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85. Hogan v. Review Bd. of Ind., 635 N.E.2d 172, 176 (Ind. Ct. App. 1994).

86. *Id.* at 179 (quoting Baker v. State, 221 N.E.2d 432, 434 (Ind. 1966) (citations omitted)).

87. *Id.* at 180.

88. St. Amand-Zion v. Review Bd. of Ind., 635 N.E.2d 184, 186 (Ind. Ct. App.); *see also* Claywell v. Review Bd. of Ind., 635 N.E.2d 181, 183 (Ind. Ct. App. 1994), *aff'd*, 643 N.E.2d 330 (Ind. 1994) (explaining that "[t]he case before us today does not involve a matter of great public interest or extraordinary circumstances").

89. *See supra* Part II.

90. The Indiana Supreme Court addressed the issue shortly before this Article went to print in Claywell v. Review Bd. of Ind., 643 N.E.2d 330 (Ind. 1994). The court held that "[t]he Fifth District got it right";

appellate courts to circumvent precedent in search of substantial justice—will likely not be answered soon. So long as the appellate judiciary exists, it will have an occasional interest in doing something more than mechanically applying the rules of appellate procedure. For the appellate practitioner, what is lost in the realm of predictability will hopefully be gained in the joy of reading well-crafted appellate decisions.

The most important lesson of *Hogan* for the appellate practitioner is to never depend, solely, on the strength of appellate arguments that are founded upon procedural defects. The best appellate argument is based on the merits of the case.

## IV. INDIANA APPELLATE PROCEDURE IN 1995 AND BEYOND

Last year's Survey article predicted the development in 1994 of a standard of review under which the appellate courts would consider trial courts' application of the new Indiana Rules of Evidence.[91] The year did not bear any fruit in that regard. However, now that the Indiana Rules of Evidence have been in effect for over one year,[92] that such a standard will emerge in 1995 seems certain.

As happened in 1994, 1995 is bound to offer more old lessons. These lessons will serve as constant and helpful reminders to Indiana's appellate practitioners.

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perfecting a timely appeal is a jurisdictional matter, and the court of appeals was correct to decline Claywell's untimely appeal. *Id.* at 330-31.

91. Patton, *supra* note 2, at 860.

92. The INDIANA RULES OF EVIDENCE became effective on January 1, 1994.