SURVEY OF DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

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Indiana practitioners face an ongoing challenge staying current on civil procedure developments. This Article highlights major procedural changes during the survey period to assist in that regard.

I. PERSONAL JURISDICTION

In addressing personal jurisdiction issues, Indiana practitioners benefit from a well written long-arm statute found at Trial Rule 4.4(A). This rule was amended effective March 1, 1997, to add a new basis for asserting personal jurisdiction for "abusing, harassing, or disturbing the peace of, or violating a protective or restraining order for the protection of, any person within the state by an act or omission done in this state, or outside this state if the act or omission is part of a continuing course of conduct having an effect in this state."[1] This amendment is a welcome addition to the long-arm statute, and addresses a situation that arises most often in domestic violence cases.

II. PREFERRED VENUE

Indiana's preferred venue system under Trial Rule 75(A) is well-written and fairly straightforward, but nonetheless occasionally requires judicial interpretation for close cases. Such a situation arose in *Meridian Mutual Insurance Co. v. Harter.*[2] In *Harter*, plaintiffs were in an auto accident in Randolph County. They sued the other driver and obtained a judgment of $75,000, but the driver was only insured for $25,000. Plaintiffs then sued their insurer, Meridian Mutual, in Randolph County seeking the $50,000 of underinsurance.

Meridian Mutual moved to transfer the action to Marion County, asserting under Trial Rule 75(A)(4) that preferred venue lay in its county of its principal office (Marion County).[3] The trial court denied the transfer motion, agreeing with plaintiffs that the claim "related to" an accident occurring in Randolph County pursuant to Trial Rule 75(A)(3).[4] The Indiana Court of Appeals reversed, ruling that the claim arose under the insurance policy and that preferred venue was

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1. IND. TR. R. 4.4(A)(8).

2. 671 N.E.2d 861 (Ind. 1996).

3. Trial Rule 75(A)(4) provides for preferred venue in "the county where either the principal office of a defendant organization is located or the office or agency of a defendant organization or individual to which the claim relates or out of which the claim arose is located, if one or more such organizations or individuals are included as defendants in the complaint."

4. Trial Rule 75(A)(3) allows for preferred venue in "the county where the accident or collision occurred, if the complaint includes a claim for injuries relating to the operation of a motor vehicle or a vehicle on railroad, street, or interurban tracks."

proper only in Marion County.[5]

The Indiana Supreme Court granted transfer, vacated the court of appeals' decision, and held that preferred venue lay in Randolph County and Marion County. Writing for a unanimous court, Justice Boehm explained that there may be more than one county of preferred venue under Trial Rule 75(A).[6] Thus, Justice Boehm observed that the court of appeals correctly concluded that Marion County was a county of preferred venue under Trial Rule 75(A)(4) because Meridian Mutual had its principal office in Marion County.

However, transfer is available under Trial Rule 75(B) only if the court in which the action is commenced is not a court of preferred venue. Because Randolph County *was* a county of preferred venue under Trial Rule 75(A)(3) transfer out of Randolph County to Marion County was not authorized.[7]

In finding venue appropriate in the county where the accident occurred, the court reasoned that Trial Rule 75(A)(3)—which allows venue in "the county where the accident . . . occurred, if the complaint includes a claim for injuries relating to the operation of a motor vehicle"—does not require that the claim arise from the accident. The court wrote:

> All it demands is that the claim be (1) for injuries and (2) relate to the operation of a vehicle. Although less clear as a matter of the syntax of the rule, the term "the accident or collision" obviously refers to the nature of the claim and serves to impose a third requirement that the claim "relate to" and accident or collision occurring in the county. Plaintiffs' claim meets these tests. It is plainly a claim for injuries, and it relates to an accident or collision occurring in Randolph County involving the operation of a motor vehicle.[8]

The court further noted that its holding comports with "the underlying philosophy of preferred venue."[9] Justice Boehm explained:

> It is clear that the rule contemplates that people who operate vehicles in various parts of this state can expect to litigate any resulting accidents or collisions in those locales. Their insurers can expect to find themselves in litigation wherever their insured's vehicles take them. There is nothing unreasonable in permitting any resulting underinsured motorist issues to go forward where the accident occurred, which is presumably where the testimony of witnesses, obtaining of police reports, and jury views are most easily arranged. A contrary rule produces a lawsuit over an accident

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5. 663 N.E.2d 224 (Ind. Ct. App.), *vacated*, 671 N.E.2d 861 (Ind. 1996).

6. 671 N.E.2d at 862 (citing 4 WILLIAM F. HARVEY, INDIANA PRACTICE § 75.2, at 552 (2d ed. 1991); Jasper County Bd. of County Comm'rs v. Monfort, 663 N.E.2d 1166, 1167 (Ind. Ct. App. 1996), *trans. denied*; Storey Oil Co. v. American States Ins., 622 N.E.2d 232, 235 (Ind. Ct. App. 1993)).

7. *Id.*

8. *Id.* at 863.

9. *Id.*

> in a remote county based solely on the location of the insurer's home office, notwithstanding that the insurer has frequently, as in this case, elected to do business with insureds throughout the state and routinely defends its insureds in many counties.[10]

Although the insurance defense bar probably does not like the ruling, the *Harter* decision does provide certainty on the venue of underinsurance actions arising from car accidents. And, the decision shows that the Indiana Supreme Court is willing to entertain transfer petitions on narrow procedural issues.

III. Change of Judge Rulings/Appealability

In *Trojnar v. Trojnar*,[11] the court of appeals addressed whether a ruling on a change of judge under Trial Rule 76 is immediately appealable. In a split opinion, a majority of the court said yes; Judge Staton dissented, concluding that an appeal from a change of judge ruling must be certified under Appellate Rule 4(B)(6). There is substantial logic behind the dissent's view, because Appellate Rule 4(B)(5) specifically allows interlocutory appeals of transfers under Trial Rule 75, but does not mention change of venue or change of judge rulings under Trial Rule 76. The majority is correct that judicial economy favors immediate appeal of a change of judge ruling, but the appellate rules do not expressly provide for such an immediate appeal without a certification under Appellate Rule 4(B)(6). Until the debate is resolved by the Indiana Supreme Court, practitioners who are dissatisfied with a change of judge ruling should follow *Trojnar*, which squarely holds: "At the time of an adverse ruling under T.R. 76, the parties must perfect an appeal."[12]

IV. Amendments/Relation-Back

Trial Rule 15(C) allows amended pleadings that name new parties to relate back to the original pleading—and thus satisfy the statute of limitations if the amendment post-dates the limitations period—if three tests are satisfied: (1) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading; (2) the new party brought into the action received such notice of the action, within the limitations period, that the new party will not be prejudiced in defending the action; and (3) the new party knew or should have known, within the limitations period, that but for mistaken identity the action would have been brought against them.[13] A straightforward application of this rule is found in *Fifer v. Soretore-Dodds*.[14]

In *Fifer*, plaintiff was injured in a car accident. The other car was driven by and registered in the name of Stephanie Soretore-Dodds, but was insured by

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10. *Id.*
11. 676 N.E.2d 1094 (Ind. Ct. App. 1997).
12. *Id.* at 1096.
13. Ind. Tr. R. 15(C).
14. 680 N.E.2d 889 (Ind. Ct. App. 1997).

Cecilia Soretore (the driver's mother). Three days before the statute of limitations was to expire, plaintiff sued the mother, who received service of the complaint five days after the limitations period. The mother promptly notified her daughter of the lawsuit. After discovery, plaintiff sought and was granted leave to amend to name the daughter as the proper party defendant. The daughter thereafter moved for summary judgment on the basis that the amended complaint did not relate back. The trial court agreed and dismissed the action.

The Indiana Court of Appeals affirmed, rejecting plaintiff's argument that the daughter had the same notice of the lawsuit as the mother (both five days after the limitations period). Plaintiff asserted that it would be illogical to disallow suit against the daughter where the suit was timely against the mother. The court of appeals, however, followed the plain language of Trial Rule 15(C). The new party—here the daughter—could be brought in under Trial Rule 15(C) only if *within the limitations period* she had notice of the action. She did not, so the claim against her was untimely.[15]

The *Fifer* decision is a painful reminder that there is great risk in filing actions shortly before the limitations period expires. When there is no choice but to file an action at such a late date, great care must be taken to properly name the parties: Trial Rule 15(C) is not a license to bring in new parties after the fact.

V. Discovery: Work-Product

The decision in *National Engineering & Contracting Co. v. C&P Engineering & Manufacturing Co.*,[16] presents a classic battle over work-product protection. The case arose from a contractor's construction work on a highway in Connersville. Two days after beginning work, the contractor noticed new cracks in an adjacent building. That day the contractor's field personnel took fourteen pictures of the site upon the "standing advice" of general counsel. Four days later the contractor's field personnel notified their corporate director of safety and loss control, who the next day met with the building owner. At the meeting, the building owner's attorney was also present, and he discussed his theory of liability against the contractor. That same day, at the advice of general counsel the contractor's director of safety and loss control took twenty-six more photos. Two days later, he took twenty additional pictures. Thereafter, when the building had been repaired the contractor's national construction superintendent took eleven more photos.[17]

Nearly two years later the tenant of the damaged building sued the contractor. In discovery, the tenant requested all photographs of the building. The contractor objected to producing the seventy-one photos asserting the work-product doctrine. The trial court ordered the contractor to produce all of the photos, and an

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15. *Id.* at 891. Although not specifically mentioned by the court, a key point in this context is that *filing* of an action tolls the statute of limitations.

16. 676 N.E.2d 372 (Ind. Ct. App. 1997).

17. *Id.* at 375.

interlocutory appeal ensued.[18]

The court of appeals, which affirmed in part and reversed in part, began by noting the deferential standard of review:

> The discovery rules are designed to allow a liberal discovery process, the purposes of which are to provide parties with information essential to litigation of the issues, to eliminate surprise, and to promote settlement. Due to the fact-sensitive nature of discovery matters, the ruling of the trial court is cloaked in a strong presumption of correctness on appeal. Our standard of review in discovery matters is limited to determining whether the trial court abused its discretion. This court will reverse only where the trial court has reached an erroneous conclusion which is clearly against the logic and effect of the facts of the case. There will be no reversal of a trial court discovery order without a showing of prejudice.[19]

With this background, the court of appeals then reviewed the applicable standards for the work-product doctrine. The court noted that Trial Rule 26(B)(3) defines the work-product doctrine to limit discovery of documents and tangible things that are prepared in anticipation of litigation or trial by or for another party or by or for that party's representative. If the doctrine applies, such materials may only be obtained by showing that the party seeking discovery has a substantial need for the materials, and is unable without undue hardship to obtain the substantial equivalent by other means.[20]

The court further explained that a document or tangible thing is gathered "in anticipation of litigation" if the "document or tangible thing can fairly be said to have been prepared or obtained because of the prospect of litigation and not, even though litigation may already be a prospect, because it was generated as part of the company's regular operating procedure."[21] The court continued:

> There is no clear-cut rule to determine whether the product of an investigation is discoverable; the determination whether the product is discoverable depends upon the facts of each case. The test has been articulated as "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." * * * In order for the material to constitute work product, the probability of litigating the claim must be substantial and imminent.[22]

With this legal framework at hand, the court then analyzed each set of

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18. *Id.*

19. *Id.* (citations omitted).

20. *Id.* at 376.

21. *Id.* at 377.

22. *Id.* (citations omitted). The court of appeals also rejected the plaintiff's argument that a blanket rule should be invoked deeming discoverable all photos depicting an event or scene immediately at or adjacent to the relevant time because the "determination of whether materials constitute work product necessitates a factual, case-by-case analysis." *Id.* at 376.

photographs. As for the pictures taken by field personnel at the time cracks were discovered, the court held that the probability of litigation at that time was neither substantial nor imminent such that the work-product doctrine did not apply. The contractor advised its employees to photograph damage as a matter of general company policy, and there was no showing that the building owner or tenant even knew of the damage at the time.[23]

As for the photos taken at or about the meeting with the building owner's counsel, the court of appeals ruled that the record did not show when the photos were taken (e.g., before or after the meeting). Accordingly, the court ruled that the contractor failed to meet its burden of proof, so the second photos were discoverable.[24]

As for the third and fourth sets of photos, even the plaintiff acknowledged that these were taken by the contractor after the discussions with the building owner's counsel. The court of appeals thus held that it is "apparent from the record that, after the meeting, the probability of litigation was substantial and imminent and that the final thirty-one photographs were taken in anticipation of litigation."[25] However, the plaintiff asserted a special need for the materials and undue hardship in obtaining the equivalent. The court of appeals rejected this argument, though, reasoning that these photos depicted the building after being repaired and thus in its current state. Accordingly, plaintiff could obtain the substantial equivalent with little difficulty, so the last sets of photos were not discoverable.[26]

The *National Engineering* decision is a must read for all civil litigators in Indiana. The opinion thoroughly reviews all major standards for work-product issues in Indiana, and then methodically and correctly applies those standards to a varying fact pattern.

VI. Discovery Sanctions

In *Bankmark of Florida v. Star Financial Card Services*,[27] the Indiana Court of Appeals held that under Trial Rule 37(B), a trial court has the authority to assume personal jurisdiction over a defendant who fails to comply with discovery orders. The appeal arose from the trial court's denial of an out-of-state defendant's motion to dismiss for lack of personal jurisdiction. In the course of discovery on the jurisdictional issue, the defendant failed to comply with discovery orders. Relying on Trial Rule 37(B)(2)(b), the trial court denied the defendant's motion to dismiss on a sanction, and the court of appeals affirmed. Writing for the court, Judge Baker reasoned that both the text of the rule and federal authority[28]

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23. *Id.* at 378 & n.5.

24. *Id.* at 378.

25. *Id.* at 379.

26. *Id.*

27. 679 N.E.2d 973 (Ind. Ct. App. 1997).

28. Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee, 456 U.S. 694 (1982) (district courts have authority under Federal Rule of Civil Procedure 37(b)(2)(A) to presume personal jurisdiction over a party who fails to comply with a discovery order).

support the conclusion that violation of a discovery order can estop a defendant from asserting that personal jurisdiction is lacking.[29]

In another case involving discovery sanctions,[30] the plaintiff failed to appear for two properly noticed depositions. Defendant moved to dismiss as a result, and the court notified plaintiff that he had 14 days to respond to the motion. Plaintiff failed to respond, and the trial court dismissed the action with prejudice as a sanction under Trial Rule 37.[31]

On appeal, plaintiff contended that the trial court was required to hold a hearing prior to dismissal. The court of appeals disagreed, reasoning that while hearings are required default judgments as a sanction, dismissals under Trial Rule 37 do not require a hearing. Further, the court of appeals noted that plaintiff was given an opportunity to respond to the motion to dismiss but failed to do so.[32] The court of appeals also ruled that the trial court did not abuse its discretion in selecting dismissal as the sanction given plaintiff's failure to appear for two properly noticed depositions.[33] The decision shows that Indiana appellate courts are not tolerant of discovery abuses, and review sanctions orders deferentially, as they should.

VII. Summary Judgment

The decision in *Templeton v. City of Hammond*,[34] teaches that parties who fail to respond to summary judgment motions will have the movant's designated facts taken as true. However, that does not mean the movant is entitled to summary judgment. As the *Templeton* court explained in reversing in part a grant of summary judgment:

> [T]he amendments to Trial Rule 56 creating the requirement that material issues of fact and supporting evidence in opposition to summary judgment be designated did not alter the structural burden of summary judgment. The party moving for summary judgment still bears the burden of showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. If the movant fails to make this prima facie showing, then entry of summary judgment in favor of the movant is precluded, regardless of whether the non-movant did or did not designate facts and evidence in response to the motion for summary judgment.[35]

Non-movants should always respond to summary judgment motions, but when they fail to movants are only entitled to summary judgment if the designated facts

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29. *Bankmark*, 679 N.E.2d at 977.
30. Hatfield v. Edward J. DeBartolo, Corp., 676 N.E.2d 395 (Ind. Ct. App. 1997).
31. *Id.* at 397.
32. *Id.* at 400.
33. *Id.*
34. 679 N.E.2d 1368 (Ind. Ct. App. 1997).
35. *Id.* at 1371 (citations omitted).

(now taken as true) require judgment for the movant under governing substantive law.

In an unrelated case, the court of appeals held that a party who fails to raise evidentiary issues regarding summary judgment affidavits waives such arguments on appeal.[36] This is part of a trend in Indiana summary judgment practice in which the appellate courts have made clear that the battleground in summary judgment is principally at the trial court level.

VIII. CLASS ACTIONS

In *Hefty v. All Other Members of the Certified Settlement Class*,[37] the Indiana Supreme Court addressed complex issues under Trial Rule 23 governing class action settlements. In so doing, the court looked to federal cases interpreting Rule for guidance, citing more than 30 different federal opinions. Writing for the court, Justice Sullivan explained the reliance on federal decisions, writing, "Trial Rule 23 is based upon Fed. R. Civ. P. 23 and it is appropriate for courts to look at federal court interpretations of the federal rule when applying the Indiana rule."[38] Beyond the class-action lessons of *Hefty*, the decision serves as an important example of how Indiana practitioners can seek guidance from federal decisions on procedural issues.

The *Hefty* decision otherwise serves as the guidebook for settlements in class actions. The court announced a number of key principles, including:

- The mandate of Trial Rule 23(E) requires courts to certify classes more cautiously in settlements than in litigated class actions;[39]
- Trial courts must resolve whether to certify the class under the standards of Trial Rule 23(A) and (B) before determining the fairness of and approving class settlements;[40]
- Trial courts must require a showing of fairness before approving class settlements;[41]
- Trial courts may not give rubber stamp approval of proposed class settlements: the settlement must be "fair, reasonable, and adequate;"[42]
- To protect the interests of absentee class members, the trial court

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36. Bankmark of Fla., Inc. v. Star Fin. Card Servs., Inc., 679 N.E.2d 973, 980 (Ind. Ct. App. 1997).

37. 680 N.E.2d 843 (Ind. 1997).

38. *Id.* at 848 (citing *In re* Tina T., 579 N.E.2d 48, 55 (Ind. 1991)).

39. *See id.* at 849-50.

40. *See id.* at 850.

41. *See id.* at 851.

42. *Id.* at 849.

must "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished;"[43]

- The trial court should follow a two-step process in assessing fairness of settlement: (1) a preliminary evaluation of the fairness of the settlement; and (2) a formal fairness hearing where arguments for and against settlement are heard;[44]

- Indiana courts should employ six factors as a useful guide in structuring their opinions on fairness of class settlements: (1) the strength of the plaintiffs' case measured against the terms of the settlement; (2) the complexity, length, and expense of continued litigation; (3) the degree of opposition to the settlement; (4) the benefit of the settlement to class representatives and their counsel compared to the benefit of settlement to the class members; (5) the opinion of competent counsel as to the reasonableness of the settlement; and (6) the stage of the proceedings and the amount of discovery completed.[45]

Applying the six factors noted above, the Indiana Supreme Court determined that the trial court abused its discretion in approving the class settlement in *Hefty*.[46] The court noted that its analysis was not meant to constitute de novo review, but that it does "impose upon a trial court a high level of scrutiny when determining the fairness, reasonableness, and adequacy of a class action settlement."[47] The court added, "Where a trial court fails to make any findings of fact in this regard, an appellate court cannot determine whether the trial court has abused its discretion . . . ."[48]

The *Hefty* decision is a must read for any Indiana practitioner prosecuting or defending a class action, as well as for any trial judge handling such a case. The court's comprehensive, well-written opinion provides many answers to important class-action questions.

IX. Proceedings Supplemental

In *Borgman v. Aikens*,[49] a creditor obtained a judgment against a debtor in federal court. More than ten years later the judgment creditor initiated proceedings supplemental in an Indiana state court without first domesticating the

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43. *Id.* at 851.
44. *See id.*
45. *See id.*
46. *Id.* at 857.
47. *Id.*
48. *Id.*
49. No. 69A01-9611-CV-376, 1997 WL 269198 (Ind. Ct. App. May 22, 1997).

federal judgment.[50] The debtor moved to dismiss, and interlocutory appeal was taken.

The court of appeals reversed, holding that proceedings supplemental, which are governed by Trial Rule 69(E), are a continuation of the original action. As such, they are not subject to the ten-year limitations period on an action on a judgment. However, an Indiana court may only enforce a federal judgment or a judgment from another Indiana county through proceedings supplemental if the judgment is domesticated first. Further, any action to domesticate a judgment must be commenced within ten years from the date of judgment[51] These are important holdings for any practitioner engaged in collection of judgments.

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50. Domesticating a judgment is the process of filing an action in a local trial court on a judgment obtained from another state or federal court to obtain a local judgment. *Id.* at *1 n.1.

51. *Id.* at *4.