INDIANA APPELLATE PROCEDURE IN 1998

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INTRODUCTION

During the survey period,[1] important judicial decisions applicable to appellate procedure were made which must be considered when working on an appeal before Indiana appellate courts. The survey period also marked the time period during which the Indiana Supreme Court implemented significant appellate rule changes.[2] Although the most significant of the 1998 amendments to the Indiana Rules of Appellate Procedure ("Appellate Rule(s)") were those found in Appellate Rule 2(C),[3] there has been no substantive discussion of those amendments in cases reported during the survey period. Of course, other procedural issues were considered by appellate courts during the survey period. Cases that offer insight into the Appellate Rules are addressed in Part I of this Article. Cases dealing with common law principles applicable to appellate procedure are addressed in Part II of this Article. Part III of the Article considers court interpretations of Indiana Trial Rules, to the extent those rules bear on appellate procedure.

I. CASES ADDRESSING THE APPELLATE RULES

A. Appellate Rule 2(A) and Indiana Trial Rules 23(B) and 59(C)

Last year's Article noted that the issue of what constitutes an "appealable final order" within the meaning of Appellate Rule 2(A) and Indiana Trial Rule 59(C) remained unsettled with respect to class action certification orders.[4] The court of appeals had, in *Martin v. Amoco Oil Co.*,[5] addressed the issue of whether a class certification order is a "final appealable order" even if it does not contain the "magic language" from Trial Rule 54(B); namely, an express determination that there "is no just reason for delay," accompanied by an express direction of entry of judgment.[6] In short, the court of appeals sought to revive application of

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1. October 1, 1997, to September 30, 1998.

2. *See*, Michael A. Wilkins & A. Richard M. Blaiklock, *Indiana Appellate Procedure in 1997*, 31 IND. L. REV. 669, 689-94 (1998) (reviewing those appellate rule changes).

3. *See* Wilkins & Blaiklock, *supra* note 2, at 689-91. In Appellate Rule 2(C), the pre-appeal conference has been eliminated and a "Notice of Appeal" filing requirement has been added.

4. *Id.* at 669-72. The procedures for class action certification are found in Indiana Trial Rule 23.

5. 679 N.E.2d 139 (Ind. Ct. App. 1997).

6. *Id.* at 144.

the "definite and distinct branch" doctrine in the context of determining whether a class certification order is a "final appealable order."[7] By attempting to revive the doctrine, the court of appeals created a significant amount of confusion on this issue, an issue that until that time seemingly fell within the purview of the clear language found in *Berry v. Huffman*,[8] in which the Indiana Supreme Court lucidly rejected the "definite and distinct branch" doctrine.[9]

As predicted in this Article last year,[10] the supreme court rejected the position taken by the courts of appeal in *Martin* and *Connerwood Healthcare*, and held that unless the "magic language" of Trial Rule 54(B) is included in a class action certification order, then the order is not automatically considered a "final appealable order" within the meaning of Appellate Rule 2(A) and Indiana Trial Rule 59(C).[11]

Central to the appellate court's analysis in *Martin* was that the ruling in *Berry*—in which the supreme court rejected application of the "definite and distinct branch" doctrine—did not apply to cases deciding motions for certification under Indiana Trial Rule 23, because the *Berry* decision dealt with a motion for partial summary judgment under Indiana Trial Rule 56(C).[12] The supreme court rejected that attempt to distinguish *Berry*, and reaffirmed that *Berry* "addressed the general appealability of orders under Trial Rules 54 and 56."[13] The court then quoted from its *Berry* decision, noting that: "'Judgments or orders as to less than all of the issues, claims, or parties remain interlocutory until expressly certified as final by the trial judge.'"[14] If the definite and distinct branch doctrine still had application in light of the Indiana Trial Rules, "'litigants would . . . be left to guess whether or not a given order was appealable. This [was] precisely the situation that [Trial Rule] 54(B) and 56(C) were drafted and adopted to prevent.'"[15] That "logic applies with equal force to class certification

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7. *Id.* Ultimately the *Martin* court found that the interveners had waived their right to challenge class certification. *Id. See also* Connerwood Healthcare, Inc. v. Estate of Herron, 683 N.E.2d 1322, 1325 n.2 (Ind. Ct. App. 1997).

8. 643 N.E.2d 327 (Ind. 1994).

9. *Id.* at 329.

10. Wilkins & Blaiklock, *supra* note 2, at 672. There, we observe that

> it is predicted that when the Supreme Court considers the issue of whether a class action certification order is a final appealable order, it will decide that unless the "magic language" of Trial Rule 54(B) is included in the order, then the order is not automatically considered a "final appealable order" within the meaning of Appellate Rule 2(A) and Indiana Trial Rule 59(C). Such a result is consistent with the predictability that was at the core of the *Berry* decision, and which is now lost because of the *Connerwood Healthcare* opinion.

Id.

11. Martin v. Amoco Oil Co., 696 N.E.2d 383, 386 (Ind. 1998).

12. *See id.* at 385.

13. *Id.*

14. *Id.* (quoting *Berry*, 643 N.E.2d at 329).

15. *Id.* (quoting *Berry*, 643 N.E.2d at 329).

orders and, indeed, to all orders for judgments which are not 'final' under the requirements of Trial Rule 54(B). Were this not so, the rule would undoubtedly be swallowed by its own exceptions."[16]

The court then set forth a discussion of the genesis and purpose of Trial Rules 54(B) and 56(C):

> We adopted [Trial] Rules 54(B) and 56(C), based on the Federal model, in an effort to provide greater certainty to litigating parties and to strike an appropriate balance between the interests in allowing for speedy review of certain judgments and in avoiding the inefficiencies of piecemeal appeals. Unsatisfactory experiences with the common law "distinct and different branch of litigation" doctrine, which often lead to inefficient and unjust results, had much to do with the change.[17]

Accordingly, the court held that:

> A judgment or order as to less than all of the issues, claims, or parties in an action may become final only by meeting the requirements of Trial Rule 54(B). These requirements are that the trial court, in writing, expressly determine that there is no just reason for delay and, in writing, expressly direct entry of judgment.
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> The formalistic (but bright line) approach to which we now adhere removes uncertainties about when a party should appeal, thus minimizing the risk that an appeal will be dismissed as premature or that the right to appeal will be inadvertently lost. Further, the rules place the discretion of deciding when the facts indicate that a judgment should be deemed final in the hands of the individual best able to make such decisions—the trial judge.[18]

With respect to class action certification rulings in particular, unless a trial court certifies that such a ruling is final under Trial Rule 54(B), "it remains interlocutory."[19] The court thus expressly overruled the decision of the court of appeals to the extent it supported a continuation of the distinct and definite branch doctrine.[20] The court also overruled "other cases" that support continuation of that doctrine,[21] and "specifically disapproved" footnote two of the *Connerwood Healthcare* decision.[22]

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16. *Id. See also id.* ("The distinct and different branch doctrine, superceded by our adoption of the Indiana Rules of Trial Procedure as explicitly stated in *Berry*, would live on in practice if not in word.")
17. *Id.* (citations omitted).
18. *Id.* (citations omitted).
19. *See id.* at 385-86.
20. *Id.* at 385.
21. *Id.*
22. *Id.* at 385 n.3.

With its decision in *Martin*, the supreme court has most likely issued the death knell to the definite and distinct branch doctrine. However, it had seemingly already done so in *Berry*, only to find out that its clear pronouncements on the subject in *Berry* were not clear enough. Fortunately, the supreme court has further removed any uncertainty from the final appealable order issue, even though by doing so it had to subscribe to a "formalistic (but bright line) approach."[23] When it comes to procedural matters, such a formalistic approach should be welcomed by appellate practitioners.

B. Appellate Rule 2(A) and Post-Conviction Rule 2

In *Greer v. State*,[24] the Indiana Supreme Court decided whether "the Court of Appeals has subject matter jurisdiction over a belated appeal from a trial court's denial of credit time following revocation of probation."[25] "Effective January 1, 1994, an amendment to Indiana Post-Conviction Rule 2 [("P-C.R. 2")]created a limited avenue for permitting the filing of a belated praecipe."[26] In short, that amendment "authorizes trial courts to permit the filing of a belated praecipe, but only 'for appeal of [a] conviction.'"[27] In *Greer*, the supreme court strictly construed that exception, stating that:

> The 1994 amendments transformed P-C.R. 2(1) into a "vehicle for belated direct appeals alone." As such, P-C.R. 2(1) provides a method for seeking permission for belated consideration of appeals addressing conviction, but does not permit belated consideration of appeals of other post-judgment petitions. Here, [the defendant] was not appealing his conviction . . . . Instead, [the defendant] was appealing the trial court's denial of credit time following revocation of his probation, which is outside the purview of P-C.R. 2(1). The trial court erroneously permitted [the defendant] to file a belated praecipe.[28]

Accordingly, the supreme court concluded that the amendment to P-C.R. 2(1) did not invest the trial court with jurisdiction to permit the filing of belated praecipes for anything other than direct appeals of convictions.[29] P-C.R. 2(1), as amended, "removes the subject matter of other than direct appeals from the jurisdiction of the [Indiana] Court of Appeals, unless such appeals or petitions are brought pursuant to a timely praecipe."[30]

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23. *Id.* at 385.

24. 685 N.E.2d 700 (Ind. 1997).

25. *Id.* at 701.

26. IND. POST-CONVICTION RULE 2(1).

27. Neville v. State, 694 N.E.2d 296, 297 (Ind. Ct. App. 1998) (quoting IND. POST-CONVICTION RULE 2(1)).

28. *Greer*, 685 N.E.2d at 702 (quoting Howard v. State, 653 N.E.2d 1389, 1390 (Ind. 1995)).

29. *Id.* at 703.

30. *Id.*

It is evident that Indiana's appellate courts will continue to strictly construe Appellate Rule 2(A), even when given the opportunity for wiggle room via some express exceptions to the rule, such as P-C.R. 2(1). Any such exceptions, like Appellate Rule 2(A), will be strictly construed against expanding, or creating uncertainty in, the time period within which to file a praecipe.

C. Appellate Rules 3(A) and 4(B)

In *City of New Haven v. Allen County Board of Zoning Appeals*,[31] the court of appeals revisited the issue of what jurisdiction is retained by a trial court while an interlocutory appeal is pending before the court of appeals. According to Appellate Rule 3(A), "every appeal shall be deemed submitted and the appellate tribunal deemed to have acquired general jurisdiction on the date the record of the proceedings is filed with the clerk of the Supreme Court and the Court of Appeals."[32] In short, "[a]n appeal of a final judgment transfers general jurisdiction of the case to [the court of appeals], thereby suspending any further action by the trial court."[33]

In *City of New Haven*, the City of New Haven (the "City") filed the record of proceedings with the court of appeals relative to an interlocutory appeal.[34] Subsequent to the taking of that interlocutory appeal, other parties to the litigation (all other parties except the City), entered into an agreed judgment that was, after the taking of that interlocutory appeal, certified by the trial court under Indiana Trial Rule 54(B). Before getting into the substantive challenges to entry of that agreed judgment—e.g., that it was "corrupt"—the City challenged entry and certification of that agreed judgment on the grounds that the trial court was without jurisdiction to certify that judgment because the City had initiated its interlocutory appeal, thus divesting the trial court of jurisdiction to enter the agreed judgment.[35]

The court of appeals observed the following with respect to the entry and certification of agreed judgments:

> Absent a claim of fraud or lack of consent, a trial court must approve an

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31. 694 N.E.2d 306, 310 (Ind. Ct. App. 1998). The dispute between these two parties has once again given rise to an appellate issue worthy of comment in this Article. In last year's Article, we discussed the court of appeals' consideration of whether a permissive intervening party in the trial court may maintain an appeal of a judgment when the original parties to the dispute have settled their claims and dismissed the case as between themselves. Wilkins & Blaiklock, *supra* note 2, at 687-89 (discussing that opinion, and that issue). Despite the fact that these two parties have been litigating since February 23, 1993, and it has no doubt been expensive for both parties, they can take solace in the fact that through their appellate machinations they have provided appellate practitioners with insight into some interesting appellate issues. We anxiously await next year's installment.

32. IND. R. APP. P. 3(A).

33. *City of New Haven*, 694 N.E.2d at 310 (citing Appellate Rule 3(A)).

34. *Id.*

35. *Id.*

> agreed judgment. The trial judge has only the ministerial duty of approving the agreed judgment and entering it in the record. However, such a decree does not represent the judgment of the court. It is merely an agreement between the parties, consented to by the court.[36]

There are situations consistent with Appellant Rule 3(A) "in which a trial court may retain jurisdiction and act notwithstanding a pending appeal. Specifically, a trial court retains jurisdiction to perform such ministerial tasks as reassessing costs, correcting the record, or enforcing a judgment."[37] Indeed, a court called upon to make an entry of an agreed judgment "'is not called upon to perform a judicial act. . . . It does not purport to represent the judgment of the court, but merely records the agreement of the parties with respect to the matters in litigation.'"[38]

Therefore, although the trial court, pursuant to Appellate Rule 3(A), lost "general jurisdiction" when the record of the proceedings was filed with the Clerk of the court of appeals, the trial court still retained sufficient "jurisdiction" to enter an agreed judgment, i.e., the simple ministerial duty of ordering the agreement entered in the record.[39]

The court went on to reject the City's argument that the trial court should have reviewed the merits of the agreed judgment.[40] "Unlike the federal courts which appear to have discretion to review substantive provisions of the parties' agreed judgment, this state has repeatedly held that, absent fraud or lack of consent, a trial court *must* approve an agreed judgment."[41] Of Indiana law, the court wrote: "'If an appeal should be allowed from a consent decree, the appellate court would examine the record not to determine error, but to determine whether or not the parties erred in making the stipulation or in giving their consent thereto. Appellate courts do not have such authority.'"[42]

A duty to review the record in that regard is not imposed on a trial court if the person/entity objecting to the agreed judgment was not a party to that agreed judgment. In such cases, a trial court's only duty is to enter an agreed judgment.

D. Indiana Appellate Rule 3(B)

In *Montgomery, Zuckerman, Davis, Inc. v. Chubb Group of Insurance Cos.*,[43] the court of appeals had occasion to review application of Appellate Rule 3(B) which reads in relevant part, "the record of the proceedings must be filed with the clerk of the Supreme Court and Court of Appeals within ninety days from the

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36. *Id.* (citations omitted).
37. *Id.* (citations omitted).
38. *Id.* (quoting State v. Huebner, 104 N.E.2d 385, 387-88 (Ind. 1952)).
39. *See id.*
40. *Id.* at 311.
41. *Id.* (citation omitted) (emphasis added).
42. *Id.* (quoting *Huebner*, 104 N.E.2d at 388).
43. 698 N.E.2d 1251 (Ind. Ct. App. 1998).

date the praecipe is filed."[44] The court's concise review of that rule's application is worthy of inclusion in this survey:

> Filing of the record is a jurisdictional act, and the failure to timely file the record is clear grounds for dismissal of the appeal. Strict compliance with the ninety day time limit of [Appellate Rule] 3(B) is required and failure to do so results in the forfeiture of the right to appeal.[45]

Indiana appellate courts continue to strictly apply Appellate Rule 3(B).[46]

E. Appellate Rule 15

1. Appellate Rule 15(A).—In *WorldCom Network Services, Inc. v. Thompson*,[47] the appellant argued that because the court of appeals' opinion was not published, its chance of having a petition to transfer granted by the Indiana Supreme Court was diminished. In that way, the appellant argued, its due process rights were violated.[48] The court of appeals swiftly rejected that argument, noting that petitions to transfer are granted from both memorandum and published opinions.[49]

2. Jurisdiction to Award Attorneys Fees.—Before the court of appeals in *Montgomery, Zuckerman, Davis, Inc. v. Chubb Group of Insurance Cos.*[50] was the issue of whether it had jurisdiction to enter an award of appellate attorney fees under Appellate Rule 15(G). The court had ruled that it lacked jurisdiction to decide the merits of the appeal because of the appellant's failure to file a record with the clerk of court within ninety days of the timely filed praecipe.[51] Interestingly, the appellee requested an award of appellate attorney fees based on the appellant's conduct in prosecuting the appeal.[52] Appellate Rule 15(G) provides an appellate court with discretionary authority to award damages in favor of an appellee when judgment of the court below is *affirmed*.[53] The court recognized that "at first blush it would appear that [it] lack[ed] the authority to make such an award under the present circumstances under which [it] dismiss[ed]

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44. IND. R. APP. P. 3(B).
45. *Id.* at 1253 (citations omitted).
46. *See, e.g., id.*
47. 698 N.E.2d 1233 (Ind. Ct. App. 1998).
48. *See id.* at 1235.
49. *Id.* at 1242.
50. 698 N.E.2d 1251 (Ind. Ct. App. 1998).
51. *Id.* at 1254.
52. *See id.*
53. *See id.* Indiana Appellate Rule 15(G) states in relevant part:

> If the court on the appeal affirms the judgment, damages may be assessed in favor of the appellee not exceeding ten percent (10%) upon the judgment, in money judgments, and in other cases in the discretion of the court; and the court shall remand such cause for execution.

the appeal for lack of jurisdiction."[54] The court nonetheless held that it had "the inherent authority to make an award of appellate attorney fees under the present circumstances despite the language of App. R. 15(G)."[55] In short, if an appellant is successful in getting the court of appeals to take the time to entertain an appeal, even if the court does not have jurisdiction to rule on the merits of the case, the appellant subjects himself to the risk of being ordered to pay the appellee's attorney fees.

3. Attorney Fees Granted Pursuant to Appellate Rule 15(G).—In *Catellier v. Depco, Inc.*,[56] the court of appeals awarded appellate attorney fees based on the appellant's "procedural bad faith."[57] In doing so, the court set forth a short synopsis of the difference between procedural and substantive bad faith within the context of Appellate Rule 15(G):

> A litigant's bad faith on appeal may be classified as "substantive" or "procedural." Substantive bad faith "implies the conscience doing of a wrong because of dishonest purpose or moral obliquity." Procedural bad faith "is present when a party flagrantly disregards the form and contents requirements of the Rules of Appellate Procedure, omits and misstates relevant facts appearing in the record, and files briefs appearing to have been written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court." Conduct can be classified as procedural bad faith even if it falls short of being deliberate or by design.[58]

Upon examination of the appellant's brief, the *Catellier* court concluded that the appellant's appeal was "permeated with procedural bad faith."[59] The appellant: (1) "violated Appellate Rule 8.2(A)(4) by submitting an appellate brief that exceeds 30 pages;"[60] (2) wrote a defective statement of the case because it contained argument;[61] (3) violated Appellate Rule 8.3(A)(5) because his statement of the facts contained argument and was not presented in a light most favorable to the judgment;[62] (4) failed to provide pinpoint citation to the cases cited in the brief, in violation of Appellate Rule 8.2(B)(1);[63] (5) failed to

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54. *Id.*

55. *Id. See In re* Matter of Estate of Kroslack, 570 N.E.2d 117, 121 (Ind. Ct. App. 1991) (holding that the court has inherent equitable power to enter an award of attorney fees under the appropriate circumstances); State v. Nessius, 548 N.E.2d 1201, 1205 n.2 (Ind. Ct. App. 1990) (holding that the court of appeals has inherent authority under Appellate Rule 15(N)(6) to grant all appropriate relief on appeal).

56. 696 N.E.2d 75 (Ind. Ct. App. 1998).

57. *Id.* at 79.

58. *Id.* (quoting Watson v. Thibodeau, 559 N.E.2d 1205, 1211 (Ind. Ct. App. 1990)).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

provide cogent arguments in violation of Appellate Rule 8.3(A)(7);[64] and, (6) included unacceptable accusatory statements in the argument.[65] As for the latter, the appellant wrote that "'the trial court seemed determined to enter judgment in favor of [the appellee],' . . . the trial court 'was doing everything it could to fashion a judgment in favor of [the appellee], straining credulity in the process and fabricating legal theories and stretching legal concepts beyond any reason,'" and complained about "'the machinations of the [trial court's] reasoning.'"[66] The court was particularly perturbed with those accusatory statements directed at the trial court, noting that "'the appellate process is not an appropriate forum for these types of blanket accusations, and the accusations are not under any circumstances to be used . . . in place of arguments on the merits.'"[67]

In awarding appellate attorney fees, the court ruled that because of the nature of the procedural bad faith—for which the appellant's attorney was "alone" responsible—it was "appropriate that appellate attorney fees be assessed against [the appellant's] counsel."[68]

4. Appellate Rule 15(N).—In *WorldCom Network Services, Inc. v. Thompson*,[69] the Indiana Court of Appeals had occasion to provide a concise overview of the application of Appellate Rule 15(N).[70]

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64. *Id.*

65. *Id.*

66. *Id.* at 79-80 (quoting Brief of the Appellant, at 17, 31).

67. *Id.* at 80 (quoting Garage Doors of Indianapolis, Inc. v. Morton, 682 N.E.2d 1296, 1305 (Ind. Ct. App. 1997)).

68. *Id.*

69. 698 N.E.2d 1233 (Ind. Ct. App. 1998).

70. Appellate Rule 15(N) states:

> (N) Order or Relief Granted on Appeal. An order or judgment upon appeal may be reversed as to some or all of the parties and in whole or in part. The court, with respect to all or some of the parties or upon all or some of the issues, may order:
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> (1) A new trial;
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> (2) Entry of final judgment;
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> (3) Correction of a judgment subject to correction, alteration, amendment or modification;
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> (4) In the case of claims tried without a jury or with an advisory jury, order the findings or judgment amended or corrected as provided in Rule 52(B);
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> (5) In the case of excessive or inadequate damages, entry of final judgment on the evidence for the amount of the proper damages, a new trial, or a new trial subject to additur or remittitur; or
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> (6) Grant any other appropriate relief, and make relief subject to conditions.
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> The court shall direct final judgment to be entered or shall order the error corrected without a new trial unless such relief is shown to be impracticable or unfair to any of the parties or is otherwise improper; and if a new trial is required it shall be limited only to those parties and issues affected by the error unless such relief is shown to be impracticable or unfair. A judgment may be affirmed on conditions. A verdict, finding, judgment, order or decision shall be reversed upon appeal as not supported by or as

> Indiana Appellate Rule 15(N) provides that this court may order the trial court to amend or correct its findings that a judgment may be affirmed on conditions. Although we affirmed the trial court's judgment, we were not obliged to adopt or approve its findings. A trial court finding that is not supported by or is contrary to the evidence may be reversed on appeal if clearly erroneous. The rules further allow us to order findings amended or corrected and to grant any other appropriate relief.[71]

II. COMMON LAW APPELLATE JURISPRUDENCE

A. Law of the Case

During the survey period there were several cases that considered the "law of the case" doctrine.[72] That doctrine "'mandates that an appellate court's determination of a legal issue binds both the trial court and the court on appeal in any subsequent appeal involving the same case and relevantly similar facts.'"[73] The purpose of the doctrine is to avoid the relitigation of issues already resolved by an appellate court.[74] To that end, relitigation is barred for all issues decided "directly or by implication in a prior decision."[75]

The extent to which an issue decided in a prior ruling is binding was examined in *Stepp v. Duffy*.[76] In *Stepp*, the court of appeals affirmed an award of trial attorney fees and remanded the case to the trial court for consideration of the underlying damage issue related to the merits of the case.[77] On remand, the trial court complied with the court of appeals directive on the damage issue, and reiterated its award of trial attorney fees. In addition, the trial court considered the appellee's post-appeal petition for post-judgment attorney fees, and awarded those fees to the appellee.[78] In the second appeal, the appellant argued that upon remand the trial court only had jurisdiction to decide the issue of damages, and that the "law of the case" doctrine precluded the trial court from awarding post-judgment attorney fees.[79] In summarizing the applicable law, the court in *Stepp*

> contrary to the evidence only when clearly erroneous, and due regard shall be given to the opportunity of the finder of fact to judge the credibility of witnesses.

71. *WorldCom Network Services*, 698 N.E.2d at 1237 (citations omitted).

72. *See* United of Omaha v. Hieber, 698 N.E.2d 869 (Ind. Ct. App. 1998); Hoovler v. State, 689 N.E.2d 738 (Ind. Ct. App. 1997); Stepp v. Duffy, 686 N.E.2d 148 (Ind. Ct. App. 1997).

73. *Hoovler*, 689 N.E.2d at 742 (quoting St. Margaret Mercy Healthcare Ctrs., Inc. v. Ho, 663 N.E.2d 1220, 1223 (Ind. Ct. App. 1996)).

74. *See id.*

75. *Id.* (quoting Certain N.E. Annexation Area Landowners v. City of Fort Wayne, 662 N.E.2d 548, 549 (Ind. Ct. App. 1993)).

76. 686 N.E.2d 148 (Ind. Ct. App. 1997).

77. *Id.* at 150.

78. *See id.* at 151.

79. *See id.* at 152.

wrote:

> [A] trial court, once it has been divested of jurisdiction of a case, does not have jurisdiction to void its prior judgment. . . . [W]hether the trial court upon remand has jurisdiction to make additional factual inquiries or to hear new issues depends upon what issues are decided upon appeal and what issues are expressly or impliedly reserved upon remand. . . . [T]he general rule of "law of the case" is a discretionary rule of practice which, unlike the doctrine of *res judicata*, need not be uniformly and rigidly applied. The limitation upon a trial court's jurisdiction after a remand is based upon the expectation that the trial court will do what it was requested to do by the appellate court. An appellate court retains jurisdiction to see that its instructions are carried out.[80]

Accordingly, the appellate court determined that the trial court was not attempting to impermissibly void its prior judgment by ruling on the appellee's motion for post-judgment attorney fees, nor was consideration of that petition controlled by the "law of the case" doctrine.[81]

In *United of Omaha v. Hieber*,[82] the court of appeals decided an ERISA issue. The case then went to the trial court on remand, and came back up to the court of appeals a second time. Between the time of the first and second court of appeals' opinions, the Seventh Circuit Court of Appeals issued opinions bearing on the ERISA question decided in the first court of appeals' opinion.[83] In the second opinion, the court of appeals ruled that "[t]he law of the case doctrine allowed [it] to reconsider its [first] holding in light of the intervening Seventh Circuit decisions."[84]

B. New Argument on Appeal

In *Northern Indiana Commuter Transportation District v. Chicago Southshore*,[85] the supreme court considered the issue of whether a party can raise new constitutional arguments for the first time in a petition for rehearing, when the need to raise those arguments did not arise until after, and because of, the court of appeals' opinion. In short,[86] in *Chicago Southshore* the appellant did not raise Full Faith and Credit Clause arguments before the court of appeals until its petition for rehearing, even though it technically could have done so. The appellant did not do so because it did not perceive the need to do so. It was only upon issuance of the court of appeals' opinion that the real need for a

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80. *Id.* at 152 (citations and quotations omitted).

81. *Id.*

82. 698 N.E.2d 869 (Ind. Ct. App. 1998).

83. *See id.* at 874.

84. *Id.* at 874 n.4.

85. 685 N.E.2d 680 (Ind. 1997).

86. This decision has a complex procedural background. For details in addition to those provided, the reader is directed to the full opinion.

constitutional argument arose.[87]

The appellee argued that consistent with established Indiana appellate jurisprudence, "new claims or issues, including constitutional arguments . . . cannot be presented for the first time in a petition for rehearing."[88] The appellant responded by arguing that "it did not raise the issue until rehearing because under the procedural posture of [the] appeal it would have been premature to do so earlier."[89] The supreme court ruled in favor of the appellant, first noting that "[t]here are sound reasons for requiring a party to present all known arguments or claims to an appellate court before its decision is rendered. Rehearing opinions exhaust precious judicial resources that could be expended elsewhere."[90] However, a different standard must be applied when a litigant is claiming the deprivation of a federal constitutional right "due to a surprising and unforeseeable result on appeal."[91] To invoke this rule, the appellant must be able to convince the reviewing court that the ruling "could not have been anticipated and prevented [the appellant] from feeling the need to raise its federal constitutional issue at an earlier time."[92] In reaching its ruling, the supreme court stated:

> Where a state court acts in an unanticipated way to deprive a party of the opportunity to make an argument or present a valid defense based on the Federal Constitution, the issue is not waived for purposes of review by the Supreme Court of the United States. As Justice Cardozo succinctly summarized . . . "The settled doctrine is that when a constitutional privilege or immunity has been denied for the first time by a ruling made upon appeal, a litigant thus surprised may challenge the unexpected ruling by a motion for rehearing, and the challenge will be timely." This standard is met where the trial court disposed of the case on the basis of subject-matter jurisdiction and the appellate court not only reverses on that issue, but resolves the merits of the dispute without briefing or argument by the parties. Accordingly, this [c]ourt should entertain the issue as a matter of Indiana appellate procedure. Finding waiver here could needlessly present an incorrect decision on a matter of federal constitutional law to the Supreme Court of the United States.[93]

It will be interesting to see whether the *Chicago Southshore* decision is limited to those cases in which the litigant will be precluded from advancing a constitutional argument or whether the decision will serve as a springboard for expanded use of the decision in non-constitutional cases. Either way, the result

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87. *See Chicago Southshore*, 685 N.E.2d at 685-86.

88. *Id.* at 686 (citing City of Indianapolis v. Wynn, 159 N.E.2d 572 (Ind. 1959)).

89. *Id.*

90. *Id.* at 687.

91. *Id.*

92. *Id.*

93. *Id.* (quoting Herndon v. Georgia, 295 U.S. 441, 447 (1935) (Cardozo, J., dissenting), other citation omitted).

reached in *Chicago Southshore* preserves a fundamental principle of our judicial systems, namely: A party deserves his day in court to present his best argument.

C. Striking of Scandalous Brief

In *WorldCom Network Services, Inc. v. Thompson*,[94] the court of appeals took the unusual step of striking portions of an appellate brief. In *WorldCom*, the appellants, in their brief in support of rehearing, included what the court of appeals perceived to be an attack on the court of appeals itself.[95] The court distinguished the attack from appropriate advocacy, in which an "advocate can present his cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."[96] To that end, "[j]udges and attorneys are engaged in a common enterprise and have a joint obligation and privilege to improve the legal order."[97] The court of appeals determined that "[t]he incivility manifested in the [appellants'] petition and brief corrodes the judicial system."[98] The court noted that portions of the appellants' brief did present cogent argument; however, "the strident and offensive tenor of the remaining portions interferes with this court's due deliberation on the merits of those issues which the [appellants] ask us to consider on rehearing. Their overheated rhetoric is unpersuasive and ill-advised."[99] The appellants' "righteous indignation [was] no substitute for a well-

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94. 698 N.E.2d 1233 (Ind. Ct. App. 1998).

95. *Id.* at 1236.

96. *Id.* at 1237.

97. *Id.*

98. *Id.* The extent to which the appellants "corroded" the judicial system is described by the court as follows:

> While the Thompsons profess to hold this court in "high esteem," significant parts of their petition and brief are condescending and permeated with sarcasm and disrespect. By way of illustration, they allege that our decision, if not corrected, "can only lead to ridicule, if not contempt, for this Court by the Thompsons and their many friends and neighbors," and that "[t]oo many citizens are already cynical, if not contemptuous, of the judiciary." They assert that our decision contains "glaringly incorrect statements of supposed fact," which are "obviously wrong." They imply that the court lacks experience in real estate matters.
>
> The Thompsons also accused the court of writing "with pens filled with the staining ink of innuendo," allege that portions of our decision give "the appearance of bias, prejudice and impropriety" and argue that "the decision will remain as a blemish on the record" of the court if those portions are not retracted. They assert that if this court were to disagree with a certain finding "it would be ridiculous," and then question the court's good faith and ethics. They demand an "apology" from the court. At one point, in rhetorical high gear, the Thompsons warn the court against reaching a particular conclusion and declare that such a ruling would be "blatantly erroneous."

Id. at 1236.

99. *Id.*

reasoned argument."[100]

Thus, relying on its general authority to strike scandalous or impertinent material, the court of appeals struck "the inappropriate portions of the [appellants'] petition and brief."[101] Even though the "offensive material [was] so interwoven with legitimate argument that the court considered striking the entire submission," the court acted mercifully and did not do so because it did not believe the appellants "should be denied consideration of their petition due to the excessive zeal of their attorneys."[102] Only the offensive portions were stricken, and the court admonished counsel that the use of impertinent material "disserves the client's interest and demeans the legal profession."[103]

WorldCom sets forth in no uncertain terms that directing frustration with an opinion believed to be wrong at the court itself, rather than to the substance of the opinion, is ill-advised and will not be looked upon lightly by Indiana's appellate courts.

D. Advisory Opinions

The court in *WorldCom* also held that it did not violate the constitutional rights of the parties for a court to issue an advisory opinion when, after remanding a matter in which an appeal had been taken from the denial of injunctive relief, it addressed other issues that were likely to recur on remand.[104] In so ruling, the court noted that it addressed only those issues that had been briefed by the parties before the trial court and on appeal.[105] Given the procedural posture of the case, the court felt it was in the interest of judicial economy to correct errors made by the trial court that were likely to recur on remand, citing Appellate Rule 15(N) for its authority to do so.[106]

E. Constitutional Right to Transfer

In *WorldCom* the court reaffirmed the proposition that the "Indiana [C]onstitution provides the right to one appeal, which is to the Court of Appeals."[107] Thus, "[t]here is no constitutional right of transfer to [the Indiana S]upreme [C]ourt."[108]

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100. *Id.* at 1236-37.
101. *Id.* at 1237.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 1242 (citing IND. CONST. art. VII, § 6).
108. *Id.*

III. INDIANA TRIAL RULES AND APPELLATE PRACTICE

In *Mitchell v. Mitchell*,[109] the supreme court made an extremely important ruling with respect to the standard of review applicable to cases in which Indiana Trial Rule 52(A) is utilized.[110] Until *Mitchell*, appellate courts in Indiana followed "the doctrine that where special findings are requested and entered under Trial Rule 52(A) the appellate court is not to affirm the trial court based on any legal theory, but rather is limited to the theory of law adopted by the trial court."[111] The supreme court noted that "the rationale for this doctrine has rarely been explained and its genesis is not entirely clear."[112]

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109. 695 N.E.2d 920 (Ind. 1998).

110. Indiana Trial Rule 52(A) states:

> (A) Effect. In the case of issues tried upon the facts without a jury or with an advisory jury, the court shall determine the facts and judgment shall be entered thereon pursuant to Rule 58. Upon its own motion, or the written request of any party filed with the court prior to the admission of evidence, the court in all actions tried upon the facts without a jury or with an advisory jury (except as provided in Rule 39[D]) shall find the facts specially and state its conclusions thereon. The court shall make special findings of fact without request
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> (1) in granting or refusing preliminary injunctions;
>
> (2) in any review of actions by an administrative agency; and
>
> (3) in any other case provided by these rules or by statute.
>
> On appeal of claims tried by the court without a jury or with an advisory jury, at law or in equity, the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, and answers to questions or interrogatories submitted to the jury shall be considered as findings of the court to the extent that the court adopts them. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions appear therein. Findings of fact are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(B) (dismissal) and 59(J) (motion to correct errors).

111. *Mitchell*, 695 N.E.2d at 922. "The [c]ourt of [a]ppeals understandably invoked this rule because it (or similar or variant rules) has been cited repeatedly by the [c]ourt of [a]ppeals, particularly in recent years." *Id.* (citing Castillo-Cullather v. Pollack, 685 N.E.2d 478, 481 (Ind. Ct. App. 1997), *trans. denied*; Showalter, Inc. v. Smith, 629 N.E.2d 272, 274 (Ind. Ct. App. 1994)).

112. *Id.* The supreme court stated:

> The decisional law, while on balance favoring the rule by rote citation to early authorities, is not uniform. One antecedent appears to be *Shrum v. Dalton*, 442 N.E.2d 366, 372 (Ind.Ct.App. 1982), a case involving sua sponte findings that declared without citation that "where special findings are made, this court may not affirm the judgment of the trial court on any ground which the *evidence* supports." This is a different proposition from whether an affirmance may rest on the facts as found but under a different legal theory. However, the former seems to have morphed into the latter in recent years. The *Shrum* rule was soon restated in *Orkin Exterminating Co. v. Walters*, 466 N.E.2d 55, 56 (Ind. Ct. App. 1984), a case eventually cited for the rule relied on by

The court was presented with an interesting application of that standard of review in *Mitchell*. In its Trial Rule 52(A) findings, the trial court adopted, and rested its ruling upon, an incorrect legal theory.[113] However, there was a legal theory other than that relied upon by the trial court upon which the court of appeals could have affirmed the trial court's decision, but for the traditional standard of review in cases involving Trial Rule 52(A). The supreme court, applying a common sense approach, found no reason why "a correct rule of law applied to facts found by the trial court may not result in affirmance of the judgment even if the trial court reached the same result through a different legal theory, particularly where the dispositive alternative theory was briefed by both parties on appeal."[114]

The supreme court held:

> Trial Rule 52(A) is a method for formalizing the ruling of the trial court, providing more specific information for the parties, and establishing a particularized statement for examination on appeal. These purposes are not inconsistent with affirming to reach the right result on appeal under the law applied to the facts as found. Accordingly, we hold that where a trial court has made special findings pursuant to a party's request under

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> the [c]ourt of [a]ppeals here. *See* Vanderburgh County Bd. of Comm'rs v. Rittenhouse, 575 N.E.2d 663, 665-66 (Ind. Ct. App. 1991) (citing inter alia *Orkin Exterminating Co.*[, 466 N.E.2d at 55]). Other early decisions setting forth the doctrine cited pre-Trial Rules cases, *see* National Fleet Supply, Inc. v. Fairchild, 450 N.E.2d 1015, 1019 (Ind. Ct. App. 1983) (citing Miller v. Ortman, [] 136 N.E.2d 17 (1956)), or decisions dealing with different issues altogether. *See* City of Hammond v. Conley, 498 N.E.2d 48, 52 (Ind. Ct. App. 1986) (citing *Orkin Exterminating Co.*[, 466 N.E.2d at 55;] *In re* Estate of Fanning, [] 333 N.E.2d 80 (1975) [(reject[ing] a general judgment standard of review under the facts presented but did not clearly involve review of special findings under Trial Rule 52)]), *overruled on other grounds by* Osler Institute, Inc. v. Inglert, 569 N.E.2d 636, 637 (Ind. 1991) (per curiam)[)]. In contrast, at least two decisions contain some language suggesting that affirmance on any legal theory supported by the trial court's findings is permissible. Lawyers Title Ins. Corp. v. Pokraka, 595 N.E.2d 244, 249 (Ind. 1992) (unclear whether findings were requested or entered sua sponte); Data Processing Services, Inc. v. L.H. Smith Oil Corp., 493 N.E.2d 1272, 1274-75 (Ind. Ct. App. 1986). Finally, one case involving requested special findings, without citation to authority or any apparent consideration of the *Shrum* line of decisions, applied a general judgment standard of review to the same issue presented here—an award of attorney's fees. United Farm Bureau Mut. Ins. Co. v. Ira, 577 N.E.2d 588, 597-98 (Ind. Ct. App. 1991).

Id. at 922 n.3 (citation format corrected).

113. *See id.* at 923.

114. *Id.* "Because no additional fact finding is needed, the appellate court is equally well positioned to address application of the alternative theory in the first instance. Indeed, it is routine in other context for appellate courts to affirm judgments on theories other than those adopted by the trial court." *Id.*

> Trial Rule 52(A), the reviewing court may affirm the judgment on any legal theory supported by the findings. Whether it is prudent to do so may turn on the extent to which the issue is briefed on appeal. In this case, both parties expressed their views on the correct rule of law in the [c]ourt of [a]ppeals. Under these circumstances, there is no surprise and no risk of the appellate court's introducing an unvetted legal theory. In addition, before affirming on a legal theory supported by the findings but not espoused by the trial court, the appellate court should be confident that its affirmance is consistent with all of the trial court's findings of fact and the inferences reasonably drawn from the findings.[115]

This ruling gives appellants wider latitude in framing arguments before Indiana appellate courts. Trial Rule 52(A) no longer has the limiting effect it once did. Accordingly, *Mitchell* must now be taken into consideration when making the decision at the trial court level about whether to request special findings under Trial Rule 52(A).

CONCLUSION

During the survey period, several opinions of importance were issued with respect to appellate practice. As always, appellate practitioners are urged to keep an eye on how Indiana's appellate courts interpret the Appellate Rules during the year. It is evident from our review of the cases during this survey period, and those of last year's survey, that the Indiana Supreme Court continues to issue opinions directed at making appellate practice consistent and predictable. Finally, Indiana's courts of appeal appear to be increasingly less tolerant of overzealous advocacy.

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115. *Id.* at 923-24 (citation omitted).