

RECENT DEVELOPMENTS IN CIVIL PROCEDURE

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INTRODUCTION

In his January 2002 address to the legislature on the state of the judiciary, Chief Justice Shepard described the evolution of Indiana's court system as a process of "re-constructing courts so substantially that the change is a matter of kind and not of degree."¹ Courts now foster public policy not just by rendering decisions for discrete controversies, but by connecting vitally to the community through a series of innovative programs. It seems especially fitting in the wake of recent events that Indiana's judiciary should strive to promote the rule of law through a series of projects to modernize and humanize the delivery of legal services in the state. Many of these programs came to fruition in 2001, and many others have made substantial progress. They will affect the nature of civil practice substantially now and for the future.

For instance, after four years of work, the "Juries for the 21st Century

1. Chief Justice Randall T. Shepard, Address to the Indiana Legislature, State of the Judiciary, The Changing Nature of Courts (Jan. 16, 2002) [hereinafter "Address"], available at <http://www.in.gov/judiciary/supreme/02stjud.html>.

Project” has been completed, and the court has issued a coherent set of Indiana Jury Rules in response.² The Family Court Project has proved so successful that it has been extended to five additional counties.³ The Indiana Pro Bono Commission distributed its first funds to local communities to begin the delivery of legal services.⁴ In response to technological change and as part of a broader move to improve the statewide management of the courts, the Judicial Technology and Automation Committee (“JTAC”), headed by Justice Sullivan, is promoting the advantages of electronic communications and records for judges and lawyers. These are just a few of the efforts shaping the nature of courts in the state. Aside from these programs, the Indiana Supreme Court has promulgated important rule changes affecting not just juries but also the trial rules,⁵ administrative rules,⁶ and even rules for digital transcripts on appeal.⁷ In addition, it has revised the process of appeal from the Indiana Tax Court.⁸

The decisions rendered in 2001 by the Indiana Supreme Court itself are complex and cover a broad array of topics; throughout they show a keen sensitivity to the capacity of the judiciary to act as a “strong partner” with the executive and legislative branches.⁹ One of the most important themes underlying the court’s 2001 cases is the impact of civil litigation on governmental organizations and the need to mediate between the ability of citizens to curb improper official action with the freedom of public entities to function.

The Indiana Court of Appeals has been operating under the new appellate rules for a year and has issued numerous decisions. Many of them cover technical issues in civil procedure—for instance, in 2001 a remarkable number of appellate cases dealt with amendment of pleadings¹⁰—while others touch on some of the most controversial policy questions that a reviewing court could be asked to resolve.¹¹

At the federal level, court decisions and proposed legislation threatened increased barriers to plaintiffs’ ability to bring actions, particularly class actions.

2. IN Order 01-19 (Dec. 21, 2001). *See also* Citizens Commission for the Future of Indiana Courts, *Juries for the 21st Century: Reports of the Citizens Commission for the Future of Indiana Courts and the Judicial Administration Committee of the Indiana Judicial Conference*, [hereinafter *Reports*], available at <http://www.state.in.us/judiciary/citizen/>; and Comparison of Recommendation, available at <http://www.state.in.us/judiciary/citizen/comparison.html>.

3. Press Release, Indiana Supreme Court, Division of State Court Administration, Supreme Court Family Court Project Expands (Nov. 16, 2001), available at <http://www.in.gov/judiciary/supreme/press/pr111601.html>.

4. *See* Address, *supra* note 1.

5. *See infra* notes 644-67 and accompanying text.

6. *See infra* notes 665-67 and accompanying text.

7. *See infra* notes 668-69 and accompanying text.

8. *See infra* notes 663-64 and accompanying text.

9. *See* Address, *supra* note 1.

10. *See infra* Part II.A.

11. *See infra* Part II.C (regarding the plethora of asbestos cases).

Federalism continued as a theme in Supreme Court opinions as well. However, on the rulemaking level, less significant changes were made than in 2000.

I. INDIANA SUPREME COURT DECISIONS

A. *Decisions Clarifying Important Policies*

1. *Attorney's Fees*.—The decision by the Indiana Supreme Court with the largest policy implications may well be *State Board of Tax Commissioners v. Town of St. John*.¹² It rejects the “private attorney general” exception to the “American Rule” on fee shifting. Contrary to the legal regimes of other industrialized democracies—most notably England—the winner of a lawsuit in an American court is typically prohibited from recovering attorney’s fees from the loser, unless there is a specific statute or contract provision authorizing fee shifting.¹³ The rationale for this approach is that fee shifting would have a chilling effect on plaintiffs’ willingness to bring claims that deserve to be litigated but might still be lost. If the cost of failure would bring with it the risk of a hefty “fine” in the form of having to pay the winner’s fees, the strong commitment of the American legal regime to open access to the courts might be frustrated.¹⁴ Indiana follows the American Rule.¹⁵

Despite the American Rule, courts have developed common law exceptions to promote competing goals, most notably preventing unjust enrichment and sanctioning bad faith conduct in litigation. For instance, when litigation results in the generation of a common store of money to be distributed to a class, the “common fund” exception allows the court to award the named plaintiff attorneys’ fees from the fund. This prevents class members from being unjustly enriched by not having to pay their fair share of the costs of the litigation.¹⁶ Similarly, when litigation results in a nonmonetary common benefit that aids an ascertainable group, courts have applied various techniques to shift fees to the group for the same reason.¹⁷ Expenses for litigation frivolously initiated can be recovered in a separate suit for malicious prosecution, and fees are often awarded

12. 751 N.E.2d 657 (Ind. 2001).

13. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 257 (1975); see also John Yukio Gotanda, *Awarding Costs and Attorneys’ Fees in International Commercial Arbitrations*, 21 MICH. J. INT’L L. 1 (1999).

14. See Gotanda, *supra* note 13, at 38. n.172.

15. See *Gavin v. Miller*, 54 N.E.2d 277, 280 (Ind. 1944).

16. See DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 869-70 (2d ed. 1999).

17. See, e.g., *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970) (fees assessed against corporation and thus the cost of litigation that benefitted shareholders of the corporation derivatively shifted to them); *Cnty. Care Ctrs., Inc. v. Ind. Family & Soc. Servs. Admin.*, 716 N.E.2d 519 (Ind. Ct. App. 1999). As the Indiana Supreme Court noted in *Town of St. John*, sometimes the common benefit theory overlaps or is confused with the private attorney general exception. See *Town of St. John*, 751 N.E.2d at 658 n.3.

as a form of sanction against a party's misconduct in litigation as part of the courts' power to control the behavior of those who appear before them.¹⁸ The most controversial and least recognized common law exception to the American Rule is the idea that fees can be shifted when a litigant creates a public good by acting as a private attorney general.

One functions as a private attorney general when one initiates litigation that would normally be brought by the government to promote important public policies, but the government is either unable or unwilling to bear the enforcement burden involved.¹⁹ The private attorney general exception became extremely significant in the late 1960s and early 1970s—especially at the federal level—when it was used to justify the award of fees in public impact litigation.²⁰ However, the doctrine posed a substantial risk to public entities, for they were often the targets of such lawsuits.²¹ In 1975, the U.S. Supreme Court prohibited fee shifting in federal courts on a private attorney general theory through the landmark case, *Alyeska Pipeline Service Co. v. Wilderness Society*.²² This decision resulted from a challenge to the Alaska oil pipeline on environmental grounds. Pursuant to federalism principles, the case had no binding effect on the states, allowing them to retain the freedom to entertain common law exceptions to the American Rule for state-based claims litigated in state courts.²³ Until the Indiana Supreme Court's decision in *Town of St. John*,²⁴ it was not clear what the status of the private attorney general exception was in Indiana.

The fee issue in *Town of St. John* arose from the protracted litigation that

18. Indiana has codified fee awards based on the notion of "obdurate" litigation behavior. IND. CODE § 34-52-1-1 (1998).

19. See, e.g., *Serrano v. Priest*, 569 P.2d 1304 (Cal. 1977) (class action brought to reform California's method of public school financing justified fee shifting on private attorney general theory).

20. See, e.g., *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971) (fees shifted where private litigation successfully challenged racial discrimination in home sales).

21. To the extent constitutional rights were the subject of litigation, the state action requirement insured the presence of a governmental entity as a defendant. Moreover, when suits involved statutes or regulations, the governmental agency charged with their enforcement might be joined as a party. See, e.g., *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972) (litigants procured injunction prohibiting the Secretary of Transportation and others from violating housing displacement and relocation legislation and were awarded attorneys' fees), *aff'd*, 488 F.2d 559 (9th Cir. 1973).

22. 421 U.S. 240 (1975). In response to the holding of *Alyeska*, Congress passed the Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. § 1988. It allows for one-way fee shifting in civil rights cases.

23. Several federal circuit courts treat the issue of attorneys' fees as procedural under the *Erie* doctrine and so do not follow state practice on fees in diversity actions. This is apparently the position of the Seventh Circuit, at least where a Federal Rule of Civil Procedure conflicts with a state approach. See *Minnesota Power & Light Co. v. Hockett* 14, Fed. Appx. 703, 706 (7th Cir. 2001) (unpublished opinion) (declining to apply Indiana Trial Rule 65(C) as a basis for fees).

24. 751 N.E.2d 657 (Ind. 2001).

invalidated Indiana's method of property taxation.²⁵ The prevailing taxpayers requested an award of their attorneys' fees from the tax court and it granted the request. The State Tax Board sought review in the Indiana Supreme Court, which in an opinion by Chief Justice Shepard, rejected the private attorney general exception to the American Rule.²⁶

The court conceded that some Indiana appellate cases appeared to allow the private attorney general exception, but it characterized those opinions as involving mere dicta.²⁷ Thus, to allow the taxpayers' request would be to adopt the exception, not just retain it. Chief Justice Shepard canvassed those states that follow and reject the private attorney general exception. Those who allow it, do so to motivate private litigants to undertake complex litigation to vindicate important public policies, or, in the words of New Hampshire's supreme court, to insure funding for lawsuits designed to "guard the guardians."²⁸ On the other hand, states rejecting the doctrine are concerned with "unbridled judicial authority to 'pick and choose' which plaintiffs and causes of action merit an award . . . and would not promote equal access to the courts . . . [because] it lacks sufficient guidelines"²⁹ The exception would also impose a burden on judicial resources, for judges would have to revisit the merits of each case to determine whether it sufficiently promoted the public good.³⁰

In light of these competing concerns, Chief Justice Shepard characterized the private attorney general exception as a "double-edged sword," and concluded that there is "no proven need" in Indiana for it, given the numerous statutes that already allow for fee-shifting:

It is apparent that the General Assembly knows how to create statutory exceptions to the American rule, and that it has been willing to do so when it deems appropriate. Taking into account the plethora of statutory provisions already on the books, we are not persuaded that the judiciary needs to adopt a sweeping common-law exception to the American rule for all public interest litigation.³¹

Moreover the test commonly used for applying the doctrine gives rise to a "slippery slope,"³² for it injects subjective determinations as to what is socially important into judicial decisions, it expends judicial resources, and it raises the questions of how to determine what is a benefit and to whom the benefit should

25. *State Bd. of Tax Comm'rs v. Town of St. John*, 751 N.E.2d 657, 657, 658 (Ind. 2001).

26. *Id.* at 664.

27. *Id.* at 659-60.

28. *Id.* at 661 (quoting *Claremont Sch. Dist. v. Governor*, 761 A.2d 389, 394 (N.H. 1999)).

29. *Id.* (quoting *N.M. Right to Choose v. Johnson*, 986 P.2d 450, 459 (N.M. 1999)).

30. *Id.*

31. *Id.* at 662.

32. The test looks at "(1) the societal importance of the vindicated right; (2) the necessity for private enforcement and the accompanying burden; and (3) the number of people benefitting from the decision." *Id.*

be given, among other problems.³³

The court did not emphasize the oft-cited rationale for the private attorney general exception—that it is the only way to obtain enforcement of important rights and policies in the face of recalcitrant governmental entities that are unwilling, or unable, to act.³⁴ The court conceded that private litigation was necessary to force a change in the way the state assessed the value of property in the very case before it,³⁵ however, it was also concerned that the private attorney general justification could make Indiana a magnet for litigators who might be more motivated by the prospect of fees than vindicating rights.³⁶ It is fair to infer that one of the court's underlying concerns was the negative impact on governmental functioning that a geometric increase in public interest lawsuits might bring.

2. *The Indiana Tort Claims Act and Trial Rule 65(C)*.—Another decision that echoes a concern for the impact of procedure on governmental functioning is *Noble County v. Rogers*.³⁷ *Rogers* raised the issue of whether a governmental entity that has procured an invalid temporary restraining order or preliminary injunction is immune under the Indiana Tort Claims Act from paying the wronged party damages in compensation under Trial Rule 65(C). On its surface it looks quite different from the policies surrounding the private attorney general doctrine, but at a higher level of description, the questions are the same: to what extent and for what goals should civil litigation be allowed to affect—even burden—the activities of public entities?

The remedies for an improperly issued injunction specified in Indiana Trial Rule 65(C) are quite unique. In most jurisdictions public entities need not procure a bond in order to seek injunctive relief. In those jurisdictions,³⁸ when a preliminary injunction has been obtained by a government agency in error, there is no remedy for the wronged defendant for there is no bond to satisfy any claim for compensation and the governmental entity is typically exempted from

33. *Id.* at 662-64. In this discussion the court also included an intriguing comparison of the nature and importance of Indiana constitutional and statutory rights. *Id.* at 661-62. To remove some of the court's concerns about subjective evaluations of the public good that could be occasioned by the doctrine, the taxpayers had asked that the private attorney general concept be limited to constitutional rights. *Id.* at 662. But, according to Chief Justice Shepard, because statutory law is far more easily updated than constitutional law, in many areas it more accurately reflects current social priorities It does not belittle the rights embodied in the Indiana Constitution to say that we cannot presume that constitutional mention automatically equates to the degree of current social importance.

Id.

34. See *Serrano v. Priest*, 569 P.2d 1304, 1314 (Cal. 1977). See generally Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81 (2002).

35. *Town of St. John*, 751 N.E.2d at 663.

36. *Id.* at 662.

37. 745 N.E.2d 194 (Ind. 2001).

38. *Id.* at 201 (Boehm J., dissenting).

paying monies in the absence of a bond.³⁹ However, Indiana Trial Rule 65(C) specifically provides: “No such security [bond] shall be required of a governmental organization, but such governmental organization shall be responsible for costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.”⁴⁰ But, in *Rogers* the county argued that this rule violates the immunity granted to it by the ITCA,⁴¹ because the remedy given a defendant in the trial rule amounts to a tort. The court of appeals disagreed, characterizing the measure as procedural.⁴²

By a 3-2 margin and in an opinion crafted by Justice Sullivan, the court mediated between the need to protect government employees from “harassment by litigation or threats of litigation over decisions made while in the scope of their employment,”⁴³ and the need to preserve the courts’ power to sanction litigants for improper behavior.⁴⁴ The court chose not to explicitly characterize the rule as either one of procedure or one of tort—a difficult task since it shows traits of both and employs the term “wrongful.” Instead, Justice Sullivan limited the application of Rule 65(C) to injunctions procured by governmental entities acting in bad faith. Only in those cases would the ITCA fail to shield government entities from paying compensation. This was necessary in his view because, otherwise, the ITCA would be constitutionally infirm.⁴⁵

The majority noted that the legislature’s power to immunize government has “few limits.”⁴⁶ However, one of those limits stems from the courts’ ability to sanction those appearing before them, a capacity essential to the courts’ independent function in government.⁴⁷ Moreover, a long line of Indiana cases makes it clear that the government and its lawyers are subject to sanctions for litigation misconduct.⁴⁸ An accommodation through statutory interpretation was warranted:

The parties ask us to resolve this apparent conflict by applying either the Trial Rule or the ITCA to the exclusion of the other. This posture puts into tension the powers of coordinate branches of our state government by asking us to ignore the pronouncement of one such branch. However, we have long held that “if an act admits of two reasonable interpretations, one of which is constitutional and the other not, we

39. *Id.* at 202.

40. IND. TRIAL RULE 65(c).

41. IND. CODE §§ 34-13-3-1 to -25 (1998).

42. *Rogers*, 745 N.E.2d at 196.

43. *Id.* at 197 (quoting *Celebration Fireworks Inc. v. Smith*, 727 N.E.2d 450, 452 (Ind. 2000)).

44. *Id.*

45. *Id.* at 199.

46. *Id.* at 197.

47. *Id.* at 197-98.

48. *Id.* at 198-99.

choose that path which permits upholding the act.”⁴⁹

The key was the interpretation of the rule’s reference to “wrongfully.” The court explicitly construed the meaning of that term in Rule 65(C) to require compensation only when the government acts “with such bad faith and malice that their actions undermine the authority of the court issuing the restraining order or injunction.”⁵⁰ This holding created an appropriate “balance” between the legislative policy of the ITCA and the judiciary’s role and inherent power to sanction litigants. Thus, only in “rare cases” when the acts of government are so egregious as to “threaten the proper functioning of the court” would immunity be stripped and compensation would lie under Trial Rule 65(C).⁵¹

In an intriguing dissent joined by Justice Dickson, Justice Boehm argued that the remedial provisions of 65(C) ought to be definitively characterized because when identified, they sound in contract, not tort. Thus, Rule 65(C) compensation is totally outside the ICTA.⁵² After canvassing the practice of other jurisdictions on injunction bonds and governmental liability, as well as the histories of the ICTA and Trial Rule 65(C), Justice Boehm concluded that compensating a party affected by an erroneously issued injunction is a quid pro quo voluntarily undertaken by the plaintiff to obtain provisional relief.⁵³ Noting that in the past, Indiana law required governmental entities to post a bond, he asserted that:

The 1970 changes [to Trial Rule 65] merely replaced the bond requirement, which plainly directed a contractual obligation of the governmental entity with a simple requirement that the entity reimburse directly. Basic contract principles and the doctrine that statutes are to be construed in harmony . . . lead me to conclude that the action for “wrongful injunction” is not a tort If the legislature wants to change that rule of substantive law, it may do so, but the laws on the books do not provide the immunity Noble County claims.⁵⁴

This was because Noble County voluntarily accepted the arrangement imposed by the rule⁵⁵ when it sought a restraining order against Rogers. Moreover, in Justice Boehm’s view, removing governmental immunity solely for bad faith conduct still conflicts with the ITCA.⁵⁶

Regardless of which category best identifies the remedy of Rule 65(C), it is important to note that the majority’s holding is limited to governmental entities.⁵⁷ Where private parties are involved, compensation from a bond ought to be

49. *Id.* at 196, 197 (quoting *Price v. State*, 622 N.E.2d 954, 956 (Ind. 1993)).

50. *Id.* at 197.

51. *Id.* at 199.

52. *Id.* at 200, 201, 204 (Boehm, J. dissenting).

53. *Id.* at 202-04.

54. *Id.*

55. *Id.*

56. *Id.* at 205-07.

57. *Id.* at 197 n.4.

available whenever it is later determined that a temporary restraining order or preliminary injunction should not have issued.

3. *Compensation to Appointed Counsel in Civil Matters.*—Another opinion showing the tension statutory enactments can create over the power of courts as a separate and co-equal branch of government is *Sholes v. Sholes*,⁵⁸ decided in December 2001. It has far reaching significance for *pro bono* practice because it clarifies whether an indigent person must have counsel appointed in a *civil* matter and whether appointed counsel must be compensated.

Sholes involved a divorce sought by the wife of an inmate serving a life sentence in state prison.⁵⁹ He filed two requests to be allowed to proceed as a pauper and he also requested a free record.⁶⁰ The trial court made no findings on Sholes' indigency status and denied the request to furnish a record. A judgment was entered in which the wife received virtually all the marital property and all of Sholes' retirement funds. Sholes moved to have the judgment set aside and also requested appointment of counsel. The trial court did not set the judgment aside and denied the request for counsel without making findings. The court did, however, find that Sholes lacked sufficient funds to obtain an appellate transcript and ordered one at public expense.⁶¹ On review, the Indiana Court of Appeals reversed the trial court's decision not to set the judgment aside,⁶² basing its holding on Indiana Code section 34-10-1, which governs appointment of counsel for indigents.⁶³ It concluded that because Sholes had presented sufficient evidence of his indigency, the judgment should have been set aside.⁶⁴ Accordingly, all matters after the request for counsel were vacated.

On transfer, the Indiana Supreme Court stated that:

[I]n ruling on an application for appointment in a civil case, the trial court must determine whether the applicant is indigent, and whether the applicant, even if indigent, has means to prosecute or defend the case.

58. 760 N.E.2d 156 (Ind. 2001).

59. *Id.* at 157.

60. *Id.* at 157-58.

61. *Id.* at 158.

62. *Id.*

63. IND. CODE § 34-10-1-1 (1998) provides:

Sec. 1. An indigent person who does not have sufficient means to prosecute or defend an action may apply to the court in which the action is intended to be brought, or is pending, for leave to prosecute or defend as an indigent person.

Sec. 2. If the court is satisfied that a person who makes an application described in section 1 of this chapter does not have sufficient means to prosecute or defend the action, the court shall:

(1) admit the applicant to prosecute or defend as an indigent person; and (2) appoint an attorney to defend or prosecute the cause.

All officers required to prosecute or defend the action shall do their duty in the case without taking any fee or reward from the indigent person.

64. *Sholes*, 760 N.E.2d at 158.

If those criteria are met, and there is no funding source or volunteer counsel, the court must determine whether the mandate of expenditure of public funds is appropriate in the case.⁶⁵

The court reached this result through a complex series of arguments.

The first issue the court considered was whether appointment of counsel in a civil case is mandatory or discretionary under Indiana Code section 34-10-1. It noted that in 1999, the court of appeals had determined in *Holmes v. Jones*⁶⁶ that the plain language of the statute mandated appointment of counsel and did not leave the question to trial court discretion.⁶⁷ However, the process of appointment requires a multilevel inquiry. As Justice Boehm opined, appointment of counsel is not automatic upon indigency status but also requires that the indigent be without "sufficient means" to proceed.⁶⁸ How could one who is indigent have sufficient means? That might occur when the matter is one typically undertaken by nonindigents on a pro se basis (e.g., small claims matters), funded through a contingent fee, one to which a fee shifting statute applies, or is one for which a nonpaid volunteer attorney is available.⁶⁹ However, if both requirements are met—indigency and insufficiency—an attorney must be appointed. The question then becomes whether the attorney must be compensated. It is here that controversy arises and an element of court discretion is re-introduced.

According to the express terms of Indiana Code section 34-10-1-2 an appointed attorney is prohibited from collecting a "fee or reward from the indigent person."⁷⁰ In Justice Boehm's view, this language should not prohibit payment from other sources for several reasons. First, courts have inherent power to "incur and order paid all such expenses as are necessary for the holding of court and the administration of its duties,"⁷¹ which has been codified in Trial Rule 60.5.⁷² Second, no other legislation prohibits compensation. Third, if the

65. *Id.* at 157.

66. 719 N.E.2d 843 (Ind. Ct. App. 1999).

67. Notwithstanding that the legislature attempted to modify this result, these attempts were not successful, so in the court's view, the statute had to be taken at face value. *Sholes*, 760 N.E.2d at 159 n.2.

68. *Id.* at 161.

69. *Id.*

70. IND. CODE § 34-10-1-2 (1998).

71. *Sholes*, 760 N.E.2d at 164 (quoting *Knox County Council v. State ex rel. McCormick*, 29 N.E.2d 405, 413 (1940)).

72. Trial Rule 60.5(A) states:

Courts shall limit their requests for funds to those that are reasonably necessary for the operation of the court or court-related functions. Mandate will not lie for extravagant, arbitrary or unwarranted expenditures nor for personal expenditures (e.g., personal telephone bills, bar association memberships, disciplinary fees).

Prior to issuing the order, the court shall meet with the mandated party to demonstrate the need for said funds.

statute were read to require uncompensated appointment, then it would be unconstitutional for impressing the services of lawyers in violation of article 1, section 21 of the Indiana Constitution.⁷³

While Justice Boehm recognized that attorneys have a duty to provide pro bono services—a point that was central to the dissent—he characterized it as an obligation of the whole profession that could not be imposed on a single attorney without violating the Indiana Constitution. In reaching this conclusion, the majority characterized the long and complex history of Indiana's commitment to making counsel available to litigants quite differently from Justice Dickson's characterization in dissent. The majority alleged that early cases construing article 1, section 21 of the 1851 Indiana Constitution stand for the proposition that attorneys, like all other persons, cannot have their labor "conscripted" by the states without compensation. Although the populist view of the profession (one which had allowed any voter to function as an attorney) was eventually replaced with a regulatory view that includes pro bono service as an ethical requirement,⁷⁴ that change did not impliedly exempt lawyers from the prohibition of unpaid services contained in article 1, section 21.⁷⁵

In making this analysis, Justice Boehm had to confront *Board of Commissioners v. Pollard*,⁷⁶ which Justice Dickson read (along with other cases) to authorize mandatory unpaid representation.⁷⁷ Justice Boehm distinguished its facts, in that the *Pollard* attorney had already rendered the services in issue but had not been paid by the county. The *Pollard* court did not require the county to pay, distinguishing the payment obligation for criminal from civil cases. Nonetheless in dicta it stated, "An attorney at law cannot, in this state, be compelled by an order of a court to render professional services without compensation."⁷⁸ Noting that the *Pollard* court did not have to answer the question of what to do when no volunteer is available, Justice Boehm distinguished the case by concluding: "Although *Pollard* refused to hold that the statute required payment in civil cases, it also refused to press attorneys into uncompensated service."⁷⁹ Since *Pollard*, the inherent power of Indiana courts to order payment of monies to assist in the administration of justice has been established. Given this history, the *Sholes* majority found that when Indiana

Trial Rule 60.5(B), in relevant part, states:

Whenever a court . . . desires to order either a municipality, a political subdivision of the state, or an officer of either to appropriate or to pay unappropriated funds for the operation of the court or court-related functions, such court shall issue and cause to be served upon such municipality, political subdivision or officer an order to show cause why such appropriation or payment should not be made.

73. IND. CONST. art. 1, § 21.

74. *Sholes*, 760 N.E.2d at 163-64.

75. *Id.* at 164.

76. 55 N.E. 87 (Ind. 1899).

77. *Sholes*, 760 N.E.2d at 167 (Dickson, J., dissenting).

78. *Id.* at 162 (quoting *Bd. of Comm'rs v. Pollard*, 55 N.E. 87, 87 (Ind. 1899)).

79. *Id.*

Code section 34-10-1 mandates a lawyer's appointment in a civil matter, the attorney must be compensated, unless she or he volunteers to serve without pay.⁸⁰ This, however, does not end the analysis.

As an additional tier of inquiry the court reasoned that when an appointed lawyer seeks payment under Trial Rule 60.5, payment is only justified when circumstances warrant the serious measure of a court ordering compensation from general public funds. This final level of inquiry re-introduces discretion in the trial court's process of determining whether counsel must be made available in a civil matter. This is permissible because appointment of counsel in a civil case is statutory, not constitutional, and so can be balanced against other concerns:

In most civil cases . . . we have only a statutory directive, and there is no constitutional requirement that counsel be appointed for indigent litigants As explained, before appointing counsel, the trial court is to consider the type of case presented to determine whether even an indigent applicant has "sufficient means" to proceed without appointed counsel. In addition, the trial court is obliged to consider whether any specific fiscal or other governmental interests would be severely and adversely affected by a Trial Rule 60.5 order requiring payment of any appointed counsel.⁸¹

The majority suggested several relevant factors for courts to consider, many of which involve the merits of the action at issue—whether, *inter alia*, the matter is "frivolous," whether it raises legal principles that are "insignificant," and whether it presents a "vendetta."⁸² The court ordered a remand in *Sholes* for a determination of all these issues but underscored that: "If no uncompensated attorney is willing to serve and the trial court finds itself unable to order payment, then . . . the statutory obligation to appoint counsel fails as an unconstitutional order to attorneys to work without compensation."⁸³ Justice Boehm argued that if the statute were interpreted to obviate courts' discretion at this level, it would be an unconstitutional intrusion on the judiciary's inherent powers to administer justice.⁸⁴ Thus, while the *Sholes* majority requires appointment of counsel in a proper civil case, an indigent's actual ability to obtain representation is by no means assured.

4. *Batson Challenges*.—A decision that directly connects constitutional rights with procedural issues is *Ashabraner v. Bowers*,⁸⁵ a case that underscores the concern for diverse juries emanating from the Indiana Jury Rules themselves. The sequence of events in *Ashabraner* is important. The lawsuit was between

80. *Id.* at 166.

81. *Id.* at 165-66.

82. *Id.* at 166.

83. *Id.*

84. *Id.*

85. 753 N.E.2d 662 (Ind. 2001).

two motorists whose cars collided.⁸⁶ During voir dire, the defendant's attorney exercised a peremptory challenge to the sole African-American potential juror. The plaintiff—who was not of the same race as the defendant—made a "*Batson*"⁸⁷ challenge to the striking of the juror, arguing that the juror's answers showed her to be neutral and intelligent; the inference was that the only basis for striking the juror must have been her race.⁸⁸ Defense counsel gave no real reason for the challenge⁸⁹ but simply assured the court it was not race-based. The trial court overruled the plaintiff's objection stating, "peremptory challenges can be utilized for any reason."⁹⁰ This statement indicated that the trial court had not followed the mandate of *Batson v. Kentucky*,⁹¹ which establishes a two-tiered procedure for questioning. First, a prima facie case must be made by the objecting party that a challenge is race-based. If that is accomplished, the burden shifts to the peremptory challenger to give a race-neutral reason for the challenge. *Batson* was extended to civil cases in *Edmonson v. Leesville Concrete Co.*⁹²

On review the court of appeals clearly applied *Batson*, but concluded that the plaintiff had not made a prima facie case that the challenge was race-based, so the defendant did not have to give a race neutral reason.

On transfer and by a 3-2 decision, the Indiana Supreme Court found the court of appeals' ruling erroneous. First, the court noted that *McCants v. State*⁹³ established that removing the sole juror of color from the venire is enough to establish prima facie racial discrimination—at least in a criminal matter. In the civil context, it is "evidence of discrimination that must weigh in the balance."⁹⁴ This evidence, coupled with the juror's neutral answers on voir dire and her apparent competency, was sufficient to shift the burden to the defendant to give a race-neutral explanation. The majority was particularly concerned that:

"[W]hen a *Batson* objection has been made, [the objecting party] is entitled to the benefit of the proposition that peremptory challenges allow those inclined to discriminate to do so." By finding that a party has established a prima facie case where the only minority juror gave "neutral" answers to jury selection questions but was removed anyway, we recognize that there may be an unconstitutional discrimination where

86. *Id.* at 664.

87. This is the informal reference to the requirement of *Batson v. Kentucky*, 476 U.S. 79 (1986), a criminal case, that when a pattern of peremptory challenges suggests racial bias, the challenger must provide a race-neutral explanation.

88. *Ashabraner*, 753 N.E.2d at 665.

89. Later, defense counsel explained that the strike was exercised in order to make room for another potential juror, a law student, whom the defense believed would be more understanding of the doctrine of *res ipsa loquitur*. *Id.* at 665 n.7.

90. *Id.* at 666.

91. 476 U.S. 79, 96-98 (1986).

92. 500 U.S. 614 (1991).

93. 686 N.E.2d 1281, 1284 (Ind. 1997).

94. *Ashabraner*, 753 N.E.2d at 667.

the venire contained a single or a small number of minority jurors. We believe it appropriate that trial courts make a *Batson* investigation into potential discrimination in such circumstances.⁹⁵

The Indiana Supreme Court concluded that the lower courts had not handled the first phase of *Batson*'s two-tiered procedure properly and remanded without reaching the second level of inquiry.⁹⁶ Nonetheless, it warned that an explanation for a challenge stating "I did not strike the juror because of race. I struck [the juror] because of the way I saw the jury panel being made up," is not sufficient under *Batson*'s mandate.⁹⁷ *Ashabraner* shows that the court will carefully scrutinize the compliance of Indiana's courts with the goal of removing racial discrimination in jury selection.

5. *Tolling the Statute of Limitations.*—With its decisions from *City of St. John* through *Ashabraner*, the court shows its clear willingness to confront difficult policy and theoretical questions,⁹⁸ yet its most significant recent opinions may be ones that impact the nuts and bolts of everyday civil litigation. Leading this group is *Ray-Hayes v. Heinemann*,⁹⁹ which resolves a split in the court of appeals over the steps to be taken to commence an action for purposes of tolling the statute of limitations. Moreover, because the court has determined that something more than mere filing with the clerk's office is required—a deviation from federal practice—the new requirements may pose a trap for the unwary.¹⁰⁰ A complete understanding of the Indiana requirements for commencement are essential to the litigator.

The ambiguity over what counts as the beginning of a case for purposes of tolling can be traced to the court's opinion in *Boostrom v. Bach*,¹⁰¹ a small claims matter in which the court held that payment of the filing fee, and not the mere tender of the complaint to the clerk, is necessary to "commence" an action.¹⁰²

95. *Id.* at 668 n.10 (quoting Henry F. Greenberg, *Criminal Procedure*, 44 SYRACUSE L. REV. 189, 226 (1993)).

96. Chief Justice Shepard and Justice Dickson dissented, asserting that the trial court's comments did not show definitively that it had not followed *Batson*. In addition, they concluded that the defendant had complied with the second aspect of *Batson* by *volunteering* a race neutral reason for striking the juror. At that stage, the dissenters argued that the explanation need not be "persuasive or even plausible," *id.* at 669 (Dickson, J., dissenting), but rather that *Batson* contemplates a third level of inquiry when the trial judge, taking into account that the objector has the ultimate burden of persuasion on racial motivation for the challenge, has met that challenge. *Id.* at 669-70.

97. *Id.* at 666.

98. See generally *id.* (clarifying *Batson* objections for racial discrimination to peremptory strikes of potential jurors); *State Bd. of Tax Comm'rs v. Town of St. John*, 751 N.E.2d 657 (Ind. 2001) (rejecting private attorney general doctrine as basis for award of attorneys' fees).

99. 760 N.E.2d 172 (Ind. 2002).

100. *Id.* at 174.

101. 622 N.E.2d 175 (Ind. 1993), *cert. denied*, 513 U.S. 928 (1994).

102. *Id.* at 176-77.

The rationale was that “the commencement of an action occurs when the plaintiff presents the clerk with the documents necessary for commencement of suit.”¹⁰³ In a footnote the court identified the necessary documents as the complaint, the summons and the filing fee.¹⁰⁴ Because *Boostrom* was a small claims case and turned on nonpayment of the filing fee, court of appeals’ decisions were in conflict over its applicability to summonses and its precedential value for larger controversies.

In *Fort Wayne International Airport v. Wilburn*,¹⁰⁵ the plaintiff timely tendered the complaint and fee to the clerk of the circuit court, but did not provide the summons until shortly *after* the running of the statutory period. The court of appeals concluded the action was time-barred and treated the footnote in *Boostrom* (identifying the summons as an essential document) as controlling.¹⁰⁶ However, the court of appeals decisions in *Ray-Hayes*,¹⁰⁷ and later, in *Oxley v. Matillo*,¹⁰⁸ limited *Boostrom* to its particular facts and judged its references to the summons as dictum. They also justified doing so because current Trial Rule 3 provides literally that commencement of an action occurs by “filing a complaint with the court.”¹⁰⁹ Thus it trumped the “dictum” in *Boostrom* so that the plaintiffs’ tendering of their summonses after the limitations period did not bar their claims due to untimeliness. The Indiana Supreme Court granted transfer in *Ray-Hayes* and made it clear that *Boostrom*—broadly read—is controlling.

In *Ray-Hayes*, the plaintiff timely filed an amended complaint to add Nissan Motor Company as a new defendant on a products liability claim, but she did not tender the summons to the clerk until more than four months after the two-year limitations period had run.¹¹⁰ On these facts, and by a 3-2 decision, the court found the action time-barred, citing *Boostrom*.¹¹¹ It also stated:

Requiring that the summons be tendered within the statute of limitations is also good policy, because it promotes prompt, formal notice to defendants that a lawsuit has been filed. This not only helps to prevent surprise to defendants, but it also helps to reduce stagnation that might otherwise occur if the claims could be filed only to remain pending on

103. *Id.* at 177.

104. *Id.* at 177 n.2.

105. 723 N.E.2d 967 (Ind. Ct. App.), *trans. denied*, 735 N.E.2d 237 (Ind. 2000).

106. *Id.* at 968.

107. 743 N.E.2d 777 (Ind. Ct. App.), *trans. granted sub nom.*, Nissan N. Am. v. Ray-Hayes, 2002 Ind. LEXIS 1 (Ind. 2001), *superseded by Ray-Hayes v. Heinemann*, 760 N.E.2d 172 (Ind. 2002).

108. 747 N.E.2d 1179 (Ind. Ct. App.), *trans. granted*, 2002 Ind. LEXIS 166 (Ind. 2001), *superseded by* 762 N.E.2d 1243 (Ind. 2002).

109. *Id.* at 1180; *see also* IND. TRIAL R. 3.

110. *Ray-Hayes*, 760 N.E.2d at 174.

111. *Id.*

court dockets without notified defendants.¹¹²

In addition to these policy concerns, imminent changes in Trial Rule 3 were a consideration for the majority.¹¹³ These took effect on April 1, 2002 and explicitly require tender of the complaint (or its equivalent), payment of the filing fee, if any, and "furnishing to the clerk of the court as many copies of the complaint and summons as are necessary" to effectuate service, where service is required.¹¹⁴ Now, to begin an Indiana action within any applicable limitations period, one must tender the complaint, the filing fee and the summons to the clerk.¹¹⁵

The issue of the steps needed to toll a statute of limitations is complicated by federal practice. The Federal Rules of Civil Procedure provide that an action is commenced on the filing of the complaint.¹¹⁶ Federal Rule of Civil Procedure 4 details the requirements of proper service as a separate matter, but it does provide that if the summons and complaint are not served on the defendant within 120 days from filing the case must be dismissed without prejudice or the court must order a specific time within which service must be accomplished.¹¹⁷ Federal cases establish that in federal matters, commencement occurs on the tendering of the complaint to the clerk,¹¹⁸ and the Seventh Circuit has held that the even the filing fee is not necessary.¹¹⁹ These differences in approach to tolling between the federal system and Indiana can cause confusion. This is especially true when a state claim is filed in federal court under diversity jurisdiction, and the federal court is confronted with the question of how to apply the *Erie* doctrine¹²⁰ in light of *Ray-Hayes*. The landmark case of *Hanna v. Plummer*¹²¹ established that where a Federal Rule of Civil Procedure directly governs in a diversity action, it prevails over contrary state practice so long as it is a validly promulgated rule

112. *Id.*

113. *See infra* notes 639-41 and accompanying text.

114. The new text of IND. TRIAL R. 3 provides:

A civil action is commenced by filing with the court a complaint or such equivalent pleading or document as may be specified by statute, by payment of the prescribed filing fee or filing an order waiving the fee, and, where service of process is required, by furnishing to the clerk as many copies of the complaint and summons as are necessary.

115. In a dissent, with which Justice Dickson concurred, Justice Rucker pointed out that given the ambiguity in the law existing at the time the claim in *Ray-Hayes* was filed, it was not clear that plaintiff should have had her action time-barred, under a proper construal of T.R. 41(E) (procedure on dismissals), and T.R. 12(B)(6) (dismissals for failure to state a claim for relief). *Ray-Hayes*, 760 N.E.2d at 175 (Rucker, J., dissenting).

116. FED. R. CIV. P. 3.

117. FED. R. CIV. P. 4.

118. *Henderson v. United States*, 517 U.S. 654, 657 n.2 (1996).

119. *See Robinson v. Doe*, 272 F.3d 921, 922-923 (7th Cir. 2001), *reh'g en banc denied by* 2002 U.S. App. LEXIS 585 (7th Cir. 2002); *see also* FED. R. CIV. P. 5(e).

120. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

121. 380 U.S. 460 (1965).

under the Rules Enabling Act,¹²² that is, so long as it is arguably procedural. However, in *Walker v. Armco Steel, Corp.*¹²³ the U.S. Supreme Court concluded that Federal Rule of Civil Procedure 3 does not speak directly to the issue of when a *state action* is commenced under the rule for purposes of tolling.¹²⁴ It held a case time-barred when the plaintiff had filed his tort claim within the state limitations period but did not achieve actual service on the defendant until after the statutory period ran.¹²⁵ These cases caution the litigator who practices both in Indiana and federal courts to pay attention to the possibility that the Indiana rule on tendering all essential documents, including the summons might not be applied in a diversity action.

6. *Nonparty Defendant Notice and Product Identification for Purposes of Summary Judgment.*—Another opinion with practical impact on everyday litigation decisions is *Owens Corning Fiberglass Corp. v. Cobb*.¹²⁶ It explores the proper standard for summary judgment when product identification is the issue, and it details the considerations governing timely notice of the nonparty defense.

In *Owens Corning Fiberglass* the plaintiff brought claims for products liability, negligence, strict liability and breach of warranty against thirty-three defendants in connection with his development of lung cancer from asbestos.¹²⁷ Owens Corning was one of the named defendants. It filed an answer presenting a plethora of affirmative defenses, including the nonparty defense and also reserved the right to object to the dismissal of any settling defendant and to amend its answer to identify such settling defendant as a nonparty.¹²⁸

A little more than a year later, plaintiff Cobb and Owens Corning filed cross-motions for summary judgment. The plaintiff sought partial summary judgment on Owens Corning's affirmative defenses and Owens Corning, in turn, sought summary judgment on the theory that plaintiff could not carry his burden to show that he had ever been exposed to Owen Corning's products.¹²⁹ The trial court denied the Owens Corning motion for summary judgment without comment.

A few days later, Owens Corning opposed plaintiff's motion by a two-part strategy: it moved for leave to amend its answer to specifically identify other asbestos-producing nonparties—some of which had settled with plaintiffs and some of which had not—and it filed a response to plaintiff's motion in which it cross-referenced to the new answer and designated evidence as to each nonparty.

122. 28 U.S.C. § 2072 (1999).

123. 446 U.S. 740, 752-753 (1980).

124. *Id.* at 748-51.

125. *Id.*

126. 754 N.E.2d 905 (Ind. 2001).

127. *Id.* at 907.

128. Following the Indiana Supreme Court's opinion last year in *Mendenhall v. Skinner & Broadbent Co.*, 728 N.E.2d 140 (Ind. 2000), a settling defendant must be identified as a nonparty after dismissal so that credit for sums paid in settlement in the context of comparative negligence is subject to the jury process.

129. *Owens Corning Fiberglass*, 754 N.E.2d at 908.

Owens Corning argued that it thereby created a material issue as to whether it could meet its burden of proof that the nonparties had contributed to plaintiff's condition. Cobb countered that Owens Corning had not met its burden on product identification for the nonparties. Moreover he claimed the answer should not be allowed because timely notice of nonparties had not been given. The trial court granted plaintiff's motion for partial summary judgment and denied the motion to amend.¹³⁰

Although the defendant had the burden of proof on the nonparty defense,¹³¹ the Indiana Supreme Court characterized the cross-motions for summary judgment as "mirror images"¹³² of each other. Both parties were attempting to exploit the paucity of evidence on product identification—Owens Corning alleged that plaintiff had not shown a triable issue as to whether its product caused his injuries; Cobb alleged that Owens Corning had not shown a triable issue as to whether any of the nonparties' products contributed to his condition. But in both instances, the court concluded that each had mustered enough evidence to avoid summary judgment¹³³ and that it need not apply *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*¹³⁴ Nonetheless, the issue of the timely identification of the nonparties was still central.

According to the court, the main purposes of notice are to allow the plaintiff an opportunity to join the nonparty as an additional named defendant prior to the running of the statute of limitations¹³⁵ and, secondarily, to apprise the plaintiff of defense strategy. Thus, Indiana Code section 34-4-33-10(c)¹³⁶ requires designation of nonparties with "reasonable promptness." But, the reasonability of notice depends on when the defendant becomes aware that there is a nonparty

130. *Id.* The trial court did allow amendment to name one entity as a nonparty, Rutland Fire Clay. As the Indiana Supreme Court noted, this was inconsistent with the ruling in plaintiff's favor granting summary judgment on all affirmative defenses. *See id.* at 912 n.11. After trial, the jury awarded almost \$700,000 in compensatory damages against Owens Corning and \$15 million in punitive damages, which the trial court remitted in conformity with Indiana legislation capping punitive damages. *Id.* at 908.

131. *See* Cornell Harbison Excavating, Inc. v. May, 546 N.E.2d 1186, 1187 (Ind. 1989); IND. CODE § 51-2-15 (1999).

132. *Owens Corning Fiberglass*, 754 N.E.2d at 913.

133. Cobb's testimony that he had seen defendant's product, Kaylo, in sites where he had worked was sufficient to create a genuine issue regarding whether Owens Corning's product were a cause of his lung cancer. Similarly, Cobb's testimony that he purchased and used various asbestos-containing goods from nonparty defendant, Sid Harvey, should have precluded summary judgment on Owens Corning's motion at least with regard to it. *Id.*

134. 644 N.E.2d 118, 123 (Ind. 1994). By the opinion in *Jarboe*, Indiana rejects the approach to summary judgment established for the federal courts in *Celotex Corp. v. Catnett*, 477 U.S. 317 (1986).

135. *See Owens Corning Fiberglass*, 754 N.E.2d at 913-14.

136. IND. CODE § 34-4-33-10(c) (1998) (repealed by P.L. 1-1988, Sec. 201) (current version at IND. CODE § 34-51-2-16 (1999)).

to be identified. In the case of a defendant who is dismissed,¹³⁷ this awareness can come late in the proceedings. Moreover, when the plaintiff has knowledge of the existence and identity of a potential nonparty—which is certainly the case with a settling defendant—the plaintiff cannot logically be prejudiced by delay in identifying the nonparty. Thus the court stated: “No violence is done . . . by permitting a defendant to assert a nonparty affirmative defense reasonably promptly after receiving notice that a named party defendant has been dismissed from the lawsuit.”¹³⁸ Because Owens Corning did not move to amend its answer as to certain nonsettling and nonjoined entities for more than one year after it knew or should have known their identities, the timeliness of notice was not met as to them. However with regard to one defendant that had settled with the plaintiff, notice was reasonably prompt and the motion to amend was not too late. Thus, the trial court committed reversible error when it granted plaintiff summary judgment on Owens Corning’s nonparty defense relating to that entity.

7. *Availability of Wrongful Death Remedies.*—The topic of remedies blurs the distinction between procedure and substance. In 2001, the Indiana Supreme Court decided a quartet of cases clarifying the remedies available under the wrongful death and child wrongful death statutes, primarily in regard to punitive damages. The most important of these is *Durham v. U-Haul International*.¹³⁹ It explicitly prohibits recovery of punitive damages for wrongful death and it overrules *Burk v. Anderson*,¹⁴⁰ which had excluded loss of consortium damages from the scope of the statute.

In *Durham*, a driver was killed in a head-on collision with a U-Haul truck. The driver’s husband and ex-husband sued for wrongful death as co-representatives on behalf of her estate. Her husband also filed an independent common law claim for loss of consortium. All plaintiffs sought punitive damages. On reconsideration, the trial court granted partial summary judgment in favor of all defendants on punitive damages, but denied summary judgment as to the loss of consortium claim. The court of appeals affirmed in part and reversed in part. Most importantly, it held that sound policy reasons support recovery of punitive damages in a wrongful death action, and so reversed on that ground. The Indiana Supreme Court granted transfer and, in an opinion written by Justice Boehm, identified three issues raised by the case—whether punitive damages are recoverable under the wrongful death statute; whether excluding them from recovery would be unconstitutional; and whether loss of consortium—and punitive damages premised on it—survives as an independent claim outside the purview of the statute.¹⁴¹

At common law, one who killed the victim of his or her tortious conduct

137. This is especially true where the dismissal is pursuant to settlement, and the nonparty should be identified pursuant to *Mendenhal v. Skinner & Broadbent Co.*, 728 N.E.2d 140 (Ind. 2000).

138. *Owens Corning Fiberglass*, 754 N.E.2d at 915.

139. 745 N.E.2d 755 (Ind. 2001).

140. 109 N.E.2d 407 (Ind. 1952).

141. *Durham*, 745 N.E.2d at 758.

outright could escape paying any compensation, because the victim's personal cause of action was extinguished by death.¹⁴² Wrongful death statutes were enacted to remove this injustice and provide deterrence. They have been strictly construed to give only a narrow remedy to dependents of the deceased to compensate them for the pecuniary losses caused by the death.¹⁴³ The Indiana General Assembly adopted the state's first wrongful death statute in 1852 and has repeatedly amended it.¹⁴⁴ In all its permutations, the statute has never explicitly mentioned the topic of punitive damages.¹⁴⁵ Relying on the doctrine of "legislative acquiescence," the court concluded that punitive damages are not available under the statute notwithstanding the statutory gap.

The plaintiffs argued that since the ban on punitive damages under the statute was judicially created, it could be judicially removed. Justice Boehm disagreed, positing that the legislature's long failure to amend the statute in the face of case law disallowing punitive damages expressed its agreement with the judicial interpretation. He noted that the legislative response to Indiana cases construing the child wrongful death statute shows how swiftly the legislature can act when it disagrees with the courts' interpretation¹⁴⁶ and he argued that the legislature's lack of action suggests it agreed with the conclusion of courts that punitive damages were not available.¹⁴⁷ In the majority's view, this, along with the doctrine of *stare decisis*, restricted its discretion to allow punitive damages as a element of recovery:

[I]f a line of decisions of this Court has given a statute the same construction and the legislature has not sought to change the relevant parts of the legislation, the usual reasons supporting adherence to

142. *Id.*; see also DAN B. DOBBS, LAW OF REMEDIES § 8.3(1) (2d ed. 1993).

143. See *Durham*, 745 N.E.2d at 758.

144. *Id.* at 758-59.

145. *Id.* at 758. Justice Boehm noted that, in contrast, the wrongful death statute governing unmarried adults does expressly prohibit punitive damages. *Id.* at 758-59. He also noted that the child wrongful death statute provides a specific, enumerated list of recoverable items and does not mention punitive damages. *Id.* at 759. See also *infra* text accompanying notes 166-74, discussing *Forte v. Connerwood Healthcare*, 745 N.E.2d 796 (Ind. 2001), in which the court construed the child wrongful death statute to prohibit punitive damages.

146. *Durham*, 745 N.E.2d at 761. One of the cases relied on was *Andis v. Hawkins*, 489 N.E.2d 78 (Ind. Ct. App. 1986). It held that recovery for love and affection was not available under the statute. The legislature immediately responded with an amendment making it clear that such items are recoverable. Justice Boehm argued that though this was an appellate opinion, it should be treated as if the appellate court were one of last resort due to the difficulty of civil cases making their way to the Indiana Supreme Court as a result of the requirement that the court review so many criminal cases. *Durham*, 745 N.E.2d at 760-61 & 761 n.2.

147. *Id.* at 761. The court cited *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979); *Herriman v. Conrail, Inc.*, 887 F. Supp. 1148 (N.D. Ind. 1995); *Kuba v. Ristow Trucking Co.*, 508 N.E.2d 1 (Ind. 1987); and *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045 (Ind. Ct. App. 1990) as the cases establishing judicial construction of the statute to preclude punitive damages.

precedent are reinforced by the strong probability that the courts have correctly interpreted the will of the legislature.¹⁴⁸

In addition, the court noted that since the wrongful death statute derogates the common law it should be strictly construed. Finally, the majority disagreed with the court of appeals' claim that Indiana law showed a general trend in favor of punitive damages.¹⁴⁹

Turning to the constitutional question, the court construed the issue under the Federal Constitution because the plaintiffs had not challenged the exclusion of punitive damages under the state constitution. The plaintiffs alleged that not allowing punitive damages violated the Equal Protection Clause.¹⁵⁰ The court scrutinized the statute using the "rational basis" analysis. Finding that the goal of the wrongful death statute is to compensate statutory beneficiaries for the pecuniary loss caused by the victim's death, the court did not punish the defendants. The court reasoned that the statute passed muster because it rationally advanced that goal.¹⁵¹ In addition, the court found that the statute reflects the "qualitative difference" between injuries to tort victims themselves and harms to their survivors caused by their deaths.¹⁵²

This left the third question to be addressed: what was the status of the husband's loss of consortium claim?¹⁵³ In resolving this question, the court gave the plaintiff half a loaf. Justice Boehm began the analysis by noting that loss of consortium is derivative of a victim's personal injury claim. Moreover, allowing such a claim to survive independent of the statute would promote easy circumvention of the ban on punitive damages.¹⁵⁴ Because these factors militated in favor of including consortium claims within the purview of the legislation, the court overruled *Burk v. Anderson*,¹⁵⁵ which had indicated that the cause of action for loss of consortium did survive outside the statute.

This conclusion did not mean that the period for which recovery was

148. *Durham*, 745 N.E.2d at 759 (citing *Heffner v. White*, 47 N.E.2d 964, 965 (1943)).

149. *Id.* at 762-63. Justices Rucker and Dickson dissented. They argued that the legislative history cuts both ways—the failure of the legislature to speak on the issue of punitive damages at the same time that it responded specifically regarding the unmarried persons and child wrongful death statutes could just as easily lead to the inference that availability of punitive damages under the wrongful death statute itself was, at a minimum, an open question. *Id.* at 767-68 (Rucker, J. dissenting). Moreover, they asserted that the doctrine of legislative acquiescence was *not* applicable because it required legislative inaction in the face of a clear line of cases by the state's highest court—a factor not present here in their view. *Id.* at 768. Their dissent is especially significant because Justice Boehm himself noted that the policy arguments in favor of punitive damages under the wrongful death statute were persuasive had the court been writing on a clean slate.

150. *Id.* at 763-64.

151. *Id.*

152. *Id.* at 764.

153. *Id.*

154. *Id.* at 764-65.

155. 109 N.E.2d 407 (Ind. 1952).

available was similarly limited to the contours of the common law. Although most states treat consortium claims as covering only the period between the victim's injury and the date of death, the court concluded that simply because death extinguishes the common law claim for post-mortem consortium damages does not mean they are excluded under the wrongful death statute.¹⁵⁶ It held that damages for consortium thereunder can cover losses to the date of the surviving spouses's death in a proper case.¹⁵⁷ The court also noted that the traditional items of damage for consortium are included in the wrongful death claim; however, consistent with the main holding that the wrongful death statute does not support punitive damages, they are not available for the consortium elements as well.

*Bemenderfer v. Williams*¹⁵⁸ is a companion case with *Durham* and is also authored by Justice Boehm. It further refined how loss of consortium should be handled under the wrongful death statute and specifically addressed the problem of the death of a beneficiary which occurs after filing but before verdict. In *Bemenderfer*, the decedent's death was allegedly caused by a doctor's negligence.¹⁵⁹ The victim's elderly husband suffered from Alzheimer's disease, and she had cared for him at home. A lawsuit was filed naming the husband and decedent's daughter as plaintiffs.¹⁶⁰ Soon after the wife's death, the husband had to be put in a nursing home and he died relatively quickly. The inference that the wife's absence hastened his death was strong.¹⁶¹ His daughter was substituted as the party plaintiff in his place, but the doctor moved for summary judgment arguing that the husband's death precluded wrongful death recovery for the pecuniary loss to him and further, that his consortium claim only covered the three days between decedent's injury and her demise.¹⁶² The Indiana Supreme Court rejected both arguments.

Citing to *Durham*, the court reiterated that consortium claims are subsumed by the wrongful death statute.¹⁶³ In contrast to *Durham*, the court denied that any doctrine of legislative acquiescence applied to the issue of the effect of a beneficiary's death prior to verdict.¹⁶⁴ Consequently, the court was free to consider the policy questions directly. Recognizing that the death of the beneficiary can give a defendant a windfall, the court held that a beneficiary may recover damages from the decedent's death up to the beneficiary's death and that these damages are an asset of the beneficiary's estate.¹⁶⁵

In *Forte v. Connerwood Healthcare Inc.*¹⁶⁶ the issue was whether punitive

156. *Durham*, 745 N.E.2d at 765.

157. *Id.*

158. 745 N.E.2d 212 (Ind. 2001).

159. *Id.* at 214.

160. *Id.*

161. *Id.* at 214-15.

162. *Id.* at 215.

163. *Id.* at 216.

164. *Id.*

165. *Id.* at 218-19.

166. 745 N.E.2d 796 (Ind. 2001).

damages could be recovered under the child wrongful death statute. There a disabled child died within days of being admitted to a nursing home.¹⁶⁷ The child's mother filed an action for compensation under a complaint that was pled very generally. She also asked for punitive damages. Defendants moved for partial summary judgment, claiming that punitive damages are not recoverable under the Child Wrongful Death Act.¹⁶⁸ The plaintiff responded that punitive damages were allowable and that her complaint could be read to include an independent loss of consortium claim supporting punitive damages.¹⁶⁹ On interlocutory appeal, the court of appeals affirmed the trial court's conclusion that the mother had no statutory right to punitive damages, but treated the consortium argument as a claim for loss of the child's services that survived the wrongful death statute.¹⁷⁰

In an opinion by Justice Rucker, the court first reviewed the child wrongful death statute and noted that it contains a highly specific list of damages. This list does not include punitive damages.¹⁷¹ Because the statute is in derogation of the common law and therefore should be strictly construed, the court concluded that the statute did not include claims for punitive damages.¹⁷² However, in contrast to the analysis in *Durham*, the court allowed loss of services as an independent tort, but argued that the tort does not support punitive damages either.¹⁷³ Justice Rucker reached this conclusion on the premise that loss of services is derivative of the personal injury claims of the victim. In the absence of legislation and following the common law approach, the cause of action dies with the child.¹⁷⁴

Finally, in *Elmer Buchta Trucking, Inc. v. Stanley*¹⁷⁵ the court had to determine whether the 1965 amendments to the wrongful death statute dispensed with the requirement that the decedent's expenses be deducted from the damages to beneficiaries for pecuniary loss.¹⁷⁶ These amendments established three groups of beneficiaries and designated the personal representative of the estate as the proper party plaintiff.¹⁷⁷ The estate receives compensation for discrete pecuniary losses for funeral, medical, and hospital expenses and the beneficiaries receive the remainder of any recovery.¹⁷⁸ The statute does not expressly require a deduction for monies the decedent would have spent personally or for his or her own maintenance. Noting that the language dictating recovery for "lost earnings" could support interpretations both requiring and excluding the deduction, the

167. *Id.* at 798.

168. *Id.*

169. *Id.*

170. *Id.* at 798-99.

171. *Id.* at 800.

172. *Id.*

173. *Id.* at 802-03.

174. *Id.* at 803.

175. 744 N.E.2d 939 (Ind. 2001).

176. *Id.* at 940-41.

177. *Id.* at 941.

178. *Id.*

majority treated the statute as ambiguous.¹⁷⁹ Noting that cases construing the statute had characterized it as a remedy for pecuniary loss and being concerned with the over-compensation that would arise if a deduction was not made, the court stated: "That juries should account for actual financial loss has been held the object of the statute from the Nineteenth Century through to the last two decades. We cannot find legislative desire to alter that formula in the relatively general amendments adopted thirty-six years back."¹⁸⁰ The defendant should have been able to introduce evidence as to the expenses the decedent would have incurred during his lifetime.

B. Other Significant Indiana Supreme Court Decisions

1. *Appeals*.—The court used the controversy in *GKN Co. v. Magness*,¹⁸¹ as an opportunity to clarify the standard of appellate review when scrutiny of a Rule 12 motion to dismiss for lack of subject matter jurisdiction is the issue. There the question concerned whether the plaintiff cement truck driver was a dual employee for purposes of the worker's compensation statute.¹⁸² The trial court made its ruling on the basis of a paper record, and dismissed the case without making findings as to disputed facts.¹⁸³

In a unanimous opinion authored by Justice Rucker, the court established as a general principle that

a review of the case authority shows that the standard of appellate review for Trial Rule 12(B)(1) motion to dismiss is indeed a function of what occurred in the trial court. That is, the standard of review is dependent upon: (i) whether the trial court resolved disputed facts; and (ii) if the trial court resolved disputed facts, whether it conducted an evidentiary hearing or ruled on a "paper record."¹⁸⁴

Where no disputed evidence is at issue, the matter is a pure question of law and therefore the standard of review is *de novo*.¹⁸⁵ However, even if facts are disputed, where the trial court rules on a paper record and conducts no evidentiary hearing, the standard of review is also *de novo* because the appellate court is in the same position as the trial court to judge the evidence.¹⁸⁶ Justice Rucker reiterated that the trial court's ruling will be sustained on any applicable legal theory and that, in the case of a paper record review, "we will reverse on the basis of an incorrect factual finding only if the appellant persuades us that the

179. *Id.* at 942.

180. *Id.* at 943.

181. 744 N.E.2d 397 (Ind. 2001).

182. *Id.* at 400.

183. *Id.*

184. *Id.* at 401.

185. *Id.*

186. *Id.*

balance of the evidence is tipped against the trial court's findings."¹⁸⁷ The court went on to conclude that, applying the factors for dual employee status developed in *Hale v. Kemp*,¹⁸⁸ the trial court had correctly dismissed the action, despite the absence of findings.¹⁸⁹

In addition to the question of appellate review, the court also addressed burdens of pleading and proof. Despite the strong public policy of subsuming employee injury claims under the Worker's Compensation Act, Justice Rucker stated that coverage under the statute is an affirmative defense that must be raised by the defendant and that the defendant has the burden of proof on the question unless "the employee's complaint demonstrates the existence of an employment relationship Thus we disapprove of the language in those cases declaring that once an employer raises the issue of the exclusivity of the Act, the burden automatically shifts to the employee."¹⁹⁰

Tom-Wat, Inc. v. Fink,¹⁹¹ is an important case that sheds light on the court's standards for appellate review of personal jurisdiction challenges, the scope of appeal from interlocutory orders, and late affidavits on summary judgment, among other issues.

The case involved a trade debt between Tom-Wat, Inc. ("Tom-Wat"), a Connecticut corporation, and George Fink ("Fink"), an Indiana sole proprietor.¹⁹² When Fink failed to pay for goods ordered, Tom-Wat sued him in a Connecticut state court and obtained a default judgment.¹⁹³ In 1994, Tom-Wat filed an action to enforce this judgment in an Indiana state court, and Fink both answered and moved to dismiss the action for lack of personal jurisdiction over him in Connecticut.¹⁹⁴ Because he attached an affidavit to his motion to dismiss, the Indiana Supreme Court treated it as a motion for summary judgment based on invalidity of the Connecticut judgment. However, the affidavit gave no specific information as to the jurisdictional facts.¹⁹⁵ In the trial court, Tom-Wat had timely filed opposition and designated particular facts as creating genuine issues for trial. A month later, Tom-Wat filed its own cross-motion for summary judgment, which it supported by designations of facts and an affidavit.¹⁹⁶ In the summer of 1995, Tom-Wat requested a hearing on its motion for summary judgment and reiterated that request in 1997. A hearing was set, but Fink requested a continuance, which was granted. The matter was finally heard in March 1998.¹⁹⁷

187. *Id.*

188. 579 N.E.2d 63 (Ind. 1991).

189. *GKN*, 744 N.E.2d at 402.

190. *Id.* at 404.

191. 741 N.E.2d 343 (Ind. 2001).

192. *Id.* at 345.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

Two days before this hearing Fink filed a designation of material facts and two affidavits alleging, among other things, that he had never been to Connecticut and that he had contracted to buy the goods in a meeting in Louisiana. On the basis of this information, Fink's only connection with Connecticut was his purchase of goods from a Connecticut corporation while outside the state. Tom-Wat then moved to strike this material for lateness. No ruling on that motion was evident from the record and the transcript of the hearing on all motions was lost.¹⁹⁸ The trial judge denied both Fink's motion to dismiss and Tom-Wat's motion for summary judgment and then recused himself. Tom-Wat filed an interlocutory appeal from the order denying the motions for summary judgment, but alleged that the trial court had actually stricken Fink's new material.¹⁹⁹

The court tackled this procedural morass by first noting that on interlocutory appeal every issue entailed by the order appealed from must be reviewed. Although the cross-motions for summary judgment were mutually inconsistent, because the trial court denied both, the Indiana Supreme Court had to review the matters raised by each.²⁰⁰ Citing to *Anthem Insurance Co. v. Tenet Healthcare Corp.*,²⁰¹ which was decided just last year, Justice Boehm reiterated that "personal jurisdiction is a question of law and, as such, it either exists or does not."²⁰² Where there is no question as to the jurisdictional facts, the appellate court will make a "final determination" of the issue, taking into account the normal standard on review of summary judgment, that is, one which is the same as that which applies at the trial level. This standard construes all facts and reasonable inferences therefrom in favor of the nonmoving party and requires that the moving party show that no genuine issue of material fact exists to be resolved.²⁰³

From the court's perspective, there was no dispute over the operative facts regarding Fink's connection with Connecticut—"In sum, the facts established by both parties present a familiar pattern: Buyer . . . is never physically present in Seller's . . . state, but places an order . . . with Seller to be shipped from Seller's facility in Seller's state."²⁰⁴ To reach this characterization, the court had to consider the facts in Fink's late-filed affidavits. This is consistent with the court's opinion in *Indiana University Medical Center v. Logan*,²⁰⁵ which authorized trial court discretion to consider late-filed affidavits. It then treated the procedural history of the case as if the trial court had denied the motion to strike and found that this was not an abuse of discretion.²⁰⁶ The later-presented

198. *Id.*

199. *Id.* at 345-46.

200. *Id.* at 346.

201. 730 N.E.2d 1227 (Ind. 2000).

202. *Tom-Wat*, 741 N.E.2d at 346.

203. *Id.*

204. *Id.* at 347.

205. 728 N.E.2d 855 (Ind. 2000).

206. *Tom-Wat*, 741 N.E.2d at 347.

material was supplemental to the earlier conclusory affidavit of Fink and did not really present facts different from those relied on by Tom-Wat.²⁰⁷ This left the merits of the personal jurisdiction question for determination.

The court resolved this by asserting that under both federal and Indiana law, Fink had the burden of showing the invalidity of the Connecticut judgment due to lack of personal jurisdiction.²⁰⁸ It pointed out that the Connecticut approach to personal jurisdiction parallels the analysis adopted by Indiana in *Anthem*²⁰⁹—that is, in both states a defendant's activities must fit within the long arm statute of the jurisdiction and the long arm as applied must comport with due process.²¹⁰ For Justice Boehm, whether the Connecticut judgment should be enforced rested ultimately on federal principles, which require that the defendant's activities show minimum contacts with the forum and that jurisdiction not be so unfair as to be unreasonable.²¹¹ While under federal cases, one contact might be enough to satisfy the minimum contacts prong of the analysis, it would be too unfair to require a one time, out-of-state purchaser with no other connections to Connecticut to go there to defend himself. Based on the facts before it, the Indiana Supreme Court concluded that the Connecticut judgment could not be enforced.²¹² However, because it conceded that Tom-Wat might not have had an adequate opportunity to respond to Fink's late-filed affidavits, the court remanded the action to the trial court.²¹³ Again, the Indiana Supreme Court has shown that it will give parties opposing summary judgment every opportunity to show genuine issues for trial.

Finally, in *Bemenderfer v. Williams*,²¹⁴ previously discussed in connection with the wrongful death,²¹⁵ the court reviewed the proper procedure for appeal from a nonfinal order. In *Bemenderfer*, the trial court denied the defendant-doctor's motion for partial summary judgment.²¹⁶ Thereafter, rather than following the certification procedure for interlocutory appeals, a procedure which requires the court of appeals to accept jurisdiction before the appeal can proceed, the trial court signed an "Agreed Final Judgment and Agreement Preserving the Issue of the Appropriate Measure of Damages"²¹⁷ to create a final judgment pursuant to Rule 54(B).²¹⁸ The court of appeals then reviewed the decision and affirmed. On transfer, the Indiana Supreme Court pointed out that, as a private agreement between the parties, the "Agreed Judgment" was not an appealable

207. *Id.*

208. *Id.* at 348.

209. *Anthem Ins. Co. v. Tenet Healthcare Corp.*, 730 N.E.2d 1227 (Ind. 2000).

210. *Tom-Wat*, 741 N.E.2d at 348.

211. *Id.* at 348-50.

212. *Id.* at 350.

213. *Id.*

214. 745 N.E.2d 212 (Ind. 2001).

215. *See supra* notes 158-65.

216. *Bemenderfer*, 745 N.E.2d at 219.

217. *Id.* at 215 n.2.

218. IND. TRIAL R. 54 (B).

final judgment.²¹⁹ Because both the trial court and the court of appeals treated the matter as appealable and remanding for certification would only delay resolution of the merits, the court exercised its discretion to grant review.²²⁰ However, it is clear that the Indiana Supreme Court disapproved of this method of attempting to construct appellate jurisdiction.

2. *Attorney Solicitation.*—*In Re Murgatroyd*²²¹ is an interesting per curiam opinion that blends issues of personal jurisdiction and subject matter jurisdiction in the context of attorney discipline. It involved solicitation of potential Indiana clients by two out-of-state California lawyers. The lawyers sent targeted mail to families and victims of a 1992 Indiana airliner crash offering representation without following the Indiana professional conduct rules restricting such solicitation.²²² In prior litigation, the respondents had challenged Indiana's personal jurisdiction over them directly and lost.²²³ In the case before the court, the specific issue was the Indiana Supreme Court's regulatory power to impose discipline over out-of-state lawyers pursuant to an agreed judgment. Chief Justice Shepard wrote:

Notwithstanding the fact that the respondents hold no Indiana law licenses and therefore are not subject to this Court's usual disciplinary sanctions for licensed Indiana attorneys who engage in professional misconduct, any acts which the respondents take in Indiana that constitute the practice of law are subject to our exclusive jurisdiction to regulate professional legal activity in this state. By directing the solicitations to the prospective clients, the respondents communicated to those persons that they were available to act in a representative capacity for them in Indiana courts As such, they held themselves out to the public as lawyers in this state when neither was admitted to practice here. Those acts constituted professional legal activity in this state subject to our regulatory authority.²²⁴

The court concluded that while it may not directly subject the law license of another state to discipline, it can impose penalties on persons for professional misconduct that occurs *in Indiana*.²²⁵

3. *Corporate Privacy Rights and Injunctions.*—*Felsher v. University of Evansville*,²²⁶ is a significant torts and injunction case. Most important, it establishes as a matter of first impression that a corporation does not have a common law right of privacy where there is an alleged misappropriation of its name and likeness. It also reiterates that injunctive relief must be narrowly

219. *Bemenderfer*, 745 N.E.2d at 215 n.2.

220. *Id.*

221. 741 N.E.2d 719 (Ind. 2001).

222. *Id.* at 720.

223. *Id.*

224. *Id.* at 720-21 (footnotes omitted).

225. *Id.* at 722.

226. 755 N.E.2d 589 (Ind. 2001).

tailored.

The defendant, a former University of Evansville professor, created a website and e-mail accounts that purported to be those of the university and certain of its officials. He used these means to pursue a vendetta against the university and others. One of his activities was to nominate university personnel for positions with other institutions. The University of Evansville and several of the individuals he targeted sought an injunction against him for violation of their rights to privacy. Summary judgment was granted for all defendants and a permanent injunction issued.

On transfer, the supreme court rejected the privacy theory insofar as the university was concerned, holding that a corporation has no privacy right to vindicate and should pursue business-related causes of action for misappropriation. This had procedural implications, for although the court concluded that other state claims unrelated to privacy would authorize injunctive relief for the university, for example, state unfair competition, the injunction could not be affirmed as to the university on those grounds because they had not been presented in the pleadings. The court also stressed that in reviewing grants of summary judgment it will carefully scrutinize prior proceedings to insure that the nonmoving party has not been deprived of its day in court. Moreover, in passing on the more substantive issues raised by the case, the court noted that the defendant professor could not raise an issue for the first time on appeal by reply brief. Finally, the court found that the injunctive order issued was overbroad insofar as it prohibited the defendant from nominating individuals for positions in his own name and narrowed it to exclude this prohibition.

4. *Juries.*—*Rogers v. R.J. Reynolds Tobacco*,²²⁷ combined issues of harmless error and a trial judge's *ex parte* communication with a jury. The case involved claims brought by the widow of a smoker and had been previously appealed after the grant of summary judgment for defendants. In connection with the trial on remand, one of the jurors asked the bailiff whether the jury could hold a press conference after the verdict. The trial judge was informed and responded to the jury via the bailiff simply, "yes."²²⁸ On appeal, the Indiana Supreme Court found this to be harmless, although the process violated the requirement that when the jury has questions or requests of the court, the parties are to be notified so they may be present and have knowledge of the judge's response before it is communicated to the jury.²²⁹ The court suggested that one important factor for determining whether a judge's *ex parte* communication to a jury is harmful is to scrutinize the reaction of the jury, and particularly whether it returns a verdict shortly thereafter.²³⁰

5. *Law of the Case.*—In *City of New Haven v. Reichhart*,²³¹ the court was faced with an issue of first impression: whether the First Amendment right to

227. 745 N.E.2d 793 (Ind. 2001).

228. *Id.* at 795.

229. *Id.*

230. *Id.*

231. 748 N.E.2d 374 (Ind. 2001).

petition the government prohibits an official entity from bringing a malicious prosecution claim against a person who exercises a statutory right to challenge governmental action.²³² However, the court did not reach the constitutional question, determining that the dispute could be resolved on other grounds.²³³ In the case, the plaintiff-taxpayer was an employee of a business that would have been adversely affected by an annexation ordinance adopted by the city of New Haven. The employer funded a lawsuit brought to challenge the city's process as a violation of the Open Door Act and to challenge the ordinance itself. A temporary restraining order was granted to plaintiff on the Open Door grounds; thereafter the city rescinded the ordinance.²³⁴ However, it filed a counterclaim against plaintiff for abuse of process. The plaintiff sought summary judgment thereon, which was denied. The court of appeals reversed, finding that the plaintiff's suit was not improper and summary judgment should have been granted. While the interlocutory appeal was pending, the city amended its complaint on remand to present a claim for malicious prosecution.²³⁵ Later, the plaintiff argued that the court of appeals' ruling on abuse of process was the law of the case and presented other challenges to support a motion to dismiss the malicious prosecution claim. The motion was granted and then affirmed by the court of appeals, which held that its previous ruling on abuse of process was not the law of the case as to malicious prosecution, but that the First Amendment did bar such a cause of action.²³⁶

The Indiana Supreme Court affirmed, but on other grounds. It agreed with the court of appeals on the law of the case issue, pointing out that the elements of both theories are distinct, so that the city was not precluded by the prior ruling on the element of probable cause.²³⁷ Rather than reaching the constitutional question, the court concluded that no probable cause to bring the action existed on the facts of the case.²³⁸

6. *Local Rules.*—*Buckalew v. Buckalew*²³⁹ raised the issue of whether a trial court's failure to follow a local rule is jurisdictional, rendering its actions thereafter void. In a dissolution proceeding, the trial court allowed the filing of a financial disclosure form, although both parties were not represented by counsel as explicitly required by a Howard County local rule.²⁴⁰ The wife filed for relief from the judgment, which was denied. On appeal, she argued that the trial court's action was void.²⁴¹ Writing for a unanimous court, Justice Dickson

232. *Id.* at 378.

233. *Id.* at 379.

234. *Id.* at 376-77.

235. *Id.* at 377.

236. *Id.*

237. *Id.* at 379.

238. *Id.*

239. 754 N.E.2d 896 (Ind. 2001).

240. *Id.* at 897.

241. *Id.*

disagreed. Notwithstanding *Meredith v. State*,²⁴² which suggested that some local rules involving the substantive rights of the parties are mandatory and cannot be waived, Justice Dickson declared that the wife's attempt to characterize the question as one of jurisdiction was incorrect.²⁴³ He pointed out that there are only two requisites for trial court jurisdiction—competency over the subject matter and personal jurisdiction over the defendant. When both are present, there is no jurisdictional defect, although there may be reversible error in the manner in which the court employs its jurisdiction. In general, the failure to follow a local rule leads to error which might provide the basis for appeal, but does not render a judgment void *ab initio*.²⁴⁴

7. *New Trial Versus Judgment on Evidence*.—In *Neher v. Hobbs*²⁴⁵ the Indiana Supreme Court gave guidance as to the findings and procedures needed for a new trial motion to be properly granted. The case involved a collision between a van and an automobile. The van driver brought a claim for damages for his injuries and his wife presented a claim for loss of consortium and services. Although the jury found the automobile driver was at fault, it awarded the van driver no damages for his injuries and found for the automobile driver on the wife's claims. The plaintiffs filed a motion to correct error, which was granted and the trial court ordered a new trial. The car driver appealed, arguing that the trial court had not made the proper findings and followed the proper procedure in advance of giving the remedy of a new trial, especially one premised on the idea that the jury's verdict was against the weight of the evidence. The van driver filed a cross-appeal. The court of appeals reversed.

On transfer and in an opinion by Justice Dickson, the Indiana Supreme Court discussed the requirements of a new trial motion and distinguished between the findings necessary when the ground for granting such a motion is that it is against the weight of the evidence versus the ground that it is clearly erroneous. In the latter circumstance, the trial court does not have to set forth the evidence both supporting and opposing the verdict in findings. Disagreeing with the defendant, the court concluded that the basis for the new trial order was that the verdict was clearly erroneous and it concluded that the findings sustained the new trial relief. The defendant also argued that the court was required to show why it did not grant judgment on the evidence rather than ordering a new trial. The supreme court rejected this claim of error as well, noting that the explanation process under Indiana Trial Rule 59 is designed to assist the appellate court on review; in the case before it, the reasons for not using the judgment on the evidence procedure were clear from the trial court's findings—the verdict was clearly erroneous because no damages were awarded though the defendant was at fault. In that circumstance, the trial court could not assess damages itself and enter judgment. However, noting that when a motion for new trial is granted, the scope of retrial should be limited only to those issues affected by error, the court

242. 679 N.E.2d 1309 (Ind. 1997).

243. *Buckalew*, 754 N.E.2d at 897-98.

244. *Id.* at 898.

245. 760 N.E. 2d 602 (Ind. 2001).

limited the trial court's order so that only the issue of damages and the wife's right to recovery were subject to retrial and remanded for proceedings consistent with that limitation.

8. *Proceedings to Vindicate Minority Shareholder Rights.*—*Galligan v. Galligan*²⁴⁶ presented procedural issues in the context of a lawsuit over alleged breaches of fiduciary duty owed to minority shareholders by a majority shareholder. The controversy arose from sales made of corporate assets to a third party. The trial court granted defendants partial summary judgment and denied plaintiffs partial summary judgment. The Indiana Supreme Court affirmed in part and reversed in part. In so doing, it stated that the failure to comply with statutory requirements of the corporations statutes does not automatically result in a breach of fiduciary duty as a matter of law; instead undisputed facts that the majority shareholder failed to act in the interests of the corporation were required. This precluded summary judgment for plaintiffs on that issue. The court also concluded that the minority shareholders' primary remedy came from their statutory rights to dissent to the transaction, but that they could pursue separate claims against the persons responsible for the violation of those rights due to the absence of required notice.²⁴⁷ Similarly, in *G & N Aircraft, Inc. v. Boehm*,²⁴⁸ the court again canvassed the remedies available to minority shareholders, holding among other things that the minority shareholder did not need to bring a derivative action where breach of fiduciary duty was the claim and that the primary remedy was the forced sale of the minority shareholder's interest. The court also rejected a claim for attorneys' fees, except insofar as the defendant had presented a frivolous counterclaim.

9. *Public Lawsuits.*—In litigation stemming from the controversy over the revitalization of Gary, the court clarified the bond requirement in the context of a "public lawsuit" as defined by Indiana Code section 34-13-5-2.²⁴⁹ *Hughes v. City of Gary*²⁵⁰ involved two members of the Gary Common Council who objected to the council's approval of a plan to use casino revenues as security for municipal bonds to finance the Genesis Center, a baseball stadium, waterfront redevelopment, and other matters. They filed a lawsuit to invalidate the action.²⁵¹

Under Indiana legislation governing "public lawsuits,"²⁵² one who sues to challenge public works projects must meet certain procedural hurdles not imposed in normal litigation.²⁵³ The purpose of these is to protect governmental entities from delay in and increased expense of public improvements caused by

246. 741 N.E.2d 1217 (Ind. 2001).

247. *Id.* at 1228.

248. 743 N.E.2d 227 (Ind. 2001).

249. IND. CODE § 34-13-5-2(b) (1998).

250. 741 N.E.2d 1168 (Ind. 2001).

251. *Id.* at 1170.

252. IND. CODE § 34-13-5-2 (1998).

253. They are to show in a preliminary hearing that one's action raises "substantial questions to be tried," and, if this showing cannot be made, to post a bond to avoid dismissal of the case. *Hughes*, 741 N.E.2d at 1170.

nonmeritorious litigation.²⁵⁴ The trial court certified the action as a public lawsuit and held an interlocutory hearing. At the hearing, the city presented evidence of the increased costs the projects might incur as a result of the lawsuit.²⁵⁵ The statute also required the plaintiffs to make a showing that would justify the issuance of a temporary injunction, despite the risk to the city from delay. The trial court made various conclusions (which the Indiana Supreme Court treated as findings) and determined that the plaintiffs had not met their burden. It ordered that they post a \$2.35 million bond to cover the minimum expenses the city might incur from the effects of the suit on the contemplated projects. Because plaintiffs did not then post the bond, the case was dismissed and they appealed.²⁵⁶

Under an unusual procedure, the Indiana Supreme Court granted emergency transfer from the court of appeals.²⁵⁷ In so doing, it held that the public lawsuit statute requires that "plaintiffs must introduce sufficient evidence that there is a substantial issue to be tried in order to avoid the bond requirement."²⁵⁸ It underscored that the legislation balances the right of citizens to challenge public improvements against unwarranted delay, frustration, and additional expense caused by "harassing litigation."²⁵⁹

In a concurring opinion joined by Justice Sullivan, Justice Rucker pointed out that Indiana "case authority does not make clear what is meant by a 'substantial question' in the context of a public lawsuit."²⁶⁰ However, the statute incorporates the standards for a temporary injunction. In 1970, in the case of *Johnson v. Tipton Community School Corp.*,²⁶¹ the court had established a multipart test for the necessary showing: that the question to be tried is substantial, that the status quo be maintained pending final determination (absent clear imminent injury); that there is no remedy at law, and that a bond be posted.²⁶² Justice Rucker asserted that when a plaintiff in a public lawsuit does *not* seek temporary injunctive relief, then only the first prong of *Johnson* should apply.²⁶³ He asserted further that when preliminary injunctive relief *is* sought in a public lawsuit, as it was in *Hughes*, *all* the *Johnson* factors should be part of the

254. *Indiana ex. rel. Habercorn v. DeKalb Circuit Court*, 241 N.E.2d 62, 65 (Ind. 1968).

255. *Hughes*, 741 N.E.2d at 1169-70.

256. *Id.* at 1170.

257. *Id.* See also IND. APPELLATE RULE 56(A), which authorizes such transfer when the supreme court determines that "an appeal involves a substantial question of law of great public importance and that an emergency exists requiring speedy determination."

258. *Hughes*, 741 N.E.2d at 1171. The court also reiterated that a trial court's findings are challenged under the "clearly erroneous" standard, which also applies to the procedural processes involved in filtering our nonmeritorious public lawsuits. *Id.* at 1172.

259. *Id.* (quoting *Johnson v. Tipton Cmty. Sch. Corp.*, 255 N.E.2d 92, 94 (Ind. 1970)).

260. *Id.* at 1175 (Rucker, J., concurring).

261. 255 N.E.2d 92, 94 (Ind. 1970).

262. *Id.*

263. *Hughes*, 741 N.E.2d at 1175 (Rucker, J., concurring).

plaintiff's showing, including maintenance of the status quo.²⁶⁴ Notwithstanding the justices' unanimous agreement on the result, at a minimum *Hughes* demonstrates the complexities and ambiguities surrounding the procedure for matters classified as "public lawsuits."

10. *Relief from Judgment Under Rule 60(B)*.—In *Clear Creek Conservancy District v. Kirkbride*²⁶⁵ the court had to determine whether landowners who filed untimely requests for exceptions to an appraiser's report governing their conservancy district assessment could obtain relief under Trial Rule 60(B)(1).²⁶⁶ Justice Sullivan concluded that if the principles of *Lehnen v. State*²⁶⁷ (governing eminent domain) extend to conservancy district matters, Rule 60 relief would not be available.²⁶⁸ While the court of appeals had distinguished *Lehnen* on the ground that the conservancy district legislation was not comprehensive, Justice Sullivan agreed with Judge Friedlander in the dissent below, that the rule of *Lehnen* requires that a statute's fixed procedure be followed: "[T]he Conservancy Act provides a definite procedure for interested landowners to follow when contesting an appraiser's report Allowing landowners to file untimely exceptions in the trial court is simply not authorized by the conservancy district statutory scheme."²⁶⁹ For the court, requiring landowners to follow the statute insures that a district's financial arrangements can proceed with finality.²⁷⁰ Allowing the use of Rule 60 to get around the requirement would "undermine the statutory scheme for fixing in place the financing arrangements of conservancy districts, and by extension, other governmental units operating under similar statutory arrangements."²⁷¹

*Allstate Insurance Co. v. Watson*²⁷² provides some welcome direction from the supreme court as to the standards for setting aside a default judgment under Indiana Trial Rule 60(B) in the context of settlement negotiations. In that case, the plaintiffs sought recovery from Allstate for uninsured motorists coverage and protracted settlement discussions ensued over several years. Originally, plaintiffs' lawyer represented that a default judgment would not be pursued while negotiations were pending. Later the lawyer made a settlement demand and represented that it would be held open for a time certain. Before the running of that time, the plaintiffs' lawyer took Allstate's default. The trial court denied Allstate's motion to set the default aside and the appellate court affirmed. In an opinion by Justice Dickson, the Indiana Supreme Court reversed and stressed again the disfavor in which default judgments are held. Although the court recognized that trial court rulings on Rule 60(C) motions are given deference,

264. *Id.* at 1175-76.

265. 743 N.E.2d 1116 (Ind. 2001).

266. *Id.* at 1118.

267. 693 N.E.2d 580 (Ind. Ct. App.), *trans. denied*, 706 N.E.2d 169 (Ind. 1998).

268. *Kirkbride*, 743 N.E.2d at 1118.

269. *Id.* at 1120.

270. *Id.*

271. *Id.*

272. 747 N.E.2d 545 (Ind. 2001).

that deference must be seen in the context of a public policy in favor of trial on the merits and the unique facts of each case, which bear on the justness of setting the judgment aside. Moreover, the court noted that an attorney's conduct might be technically correct under the trial rules and still violate the rules of professional responsibility. This bore on the case before the court, as the plaintiff's attorney did not honor his own representation. The opinion strongly suggests that where the granting of a default judgment rewards what is arguably attorney misconduct, all things being equal, the default should be set aside.

11. *Statute of Limitations*.—Revisiting issues similar to those involved in *Van Dusen v. Stotts*,²⁷³ the Indiana Supreme Court construed the application of the "discovery" rule for the running of the statute of limitations in *Degussa Corp. v. Mullens*.²⁷⁴ *Degussa Corp.* was an action based on negligence and products liability involving a worker who alleged lung injury from chemicals used in the making of animal feed. Defendants moved for summary judgment on the theory that plaintiff's claims were time-barred.²⁷⁵ The trial court denied the motion. On transfer, Justice Sullivan noted that the court has adopted a "discovery" rule to clarify the negligence and products liability limitation statute²⁷⁶ where injuries are caused by exposure to foreign substances.²⁷⁷ Even on defendant's theory, the action was commenced only eight days after the running of the period. Although plaintiff visited her doctor complaining of respiratory problems more than two years before she filed suit, she was only told then that there was a reasonable *possibility*, not a *probability*, that her condition was caused by exposure to defendants' products. Plaintiff diligently pursued further testing to "transform speculation into a causal link."²⁷⁸ Because that link had not been made in the eight days at issue in the case, the cause of action had not yet accrued and the trial court properly denied the motion to dismiss.²⁷⁹ The court's opinion suggests that although certainty is not necessary to trigger the running of the statute of limitations, the mere possibility that an injury is caused by a defendant's product is not sufficient either.²⁸⁰ Whether mere possibility has ripened into something

273. 712 N.E.2d 491 (Ind. 1999) (construing the issue of when a patient should be on inquiry notice regarding medical malpractice such that a cause of action accrues).

274. 744 N.E.2d 407 (Ind. 2001).

275. One defendant also moved to dismiss for lack of subject matter jurisdiction claiming exclusive worker's compensation jurisdiction. This motion was also denied by the trial court. Because the court was evenly divided on this question, the trial court's judgment was affirmed pursuant to Indiana Appellate Rule 59(B). In scrutinizing the questions raised regarding worker's compensation, Justice Dickson, writing for the dissenting members of the court, followed the analysis of *GNK Co. v. Magness*, 744 N.E.2d 397 (Ind. 2001), and reiterated that where the trial court rules on a paper record, the standard of review is *de novo*. *Degussa Corp.*, 744 N.E.2d at 415 (Dickson, J., dissenting).

276. IND. CODE § 33-1-1.5-5 (1998).

277. *Degussa Corp.*, 744 N.E.2d at 410.

278. *Id.* at 411.

279. *Id.*

280. *Id.* at 411-12.

more is a question of fact that will be determined on a case-by-case basis. In analyzing the case, Justice Sullivan explicitly stated that decisions under the Medical Malpractice Act are persuasive as to questions of when a plaintiff should have discovered a possible negligence or products liability cause of action.²⁸¹

12. *Summary Judgment.*—*Mangold v. Indiana Department of Natural Resources*²⁸² is an important torts decision involving governmental immunity and duty that also has significance for summary judgment. There a twelve-year-old boy returned home after watching a school-sponsored Department of Natural Resources (DNR) demonstration of firearm safety. He took apart a shotgun shell, struck it with a hammer and chisel and was injured when it exploded. An action was filed on his behalf against the school and the DNR. The school presented the affirmative defense that it owed no duty for injuries sustained off of school grounds and the DNR defended on grounds of governmental immunity. Contributory negligence was also interposed as a defense by each defendant. Both the school and the DNR moved for summary judgment, which was granted by the trial court and affirmed on appeal. The Indiana Supreme Court allowed transfer and held that a school's duty is not dependent on the plaintiff's injuries occurring on school property. It also reaffirmed that governmental immunity under section nine of the Indiana Tort Claims act should be narrowly construed, following *Hinshaw v. Board of Commissioners of Jay County*,²⁸³ so as to apply only where vicarious liability is premised on the acts of third parties other than government employees. Nonetheless, three of the members of the court, Chief Justice Shepard and Justices Sullivan and Boehm, found that summary judgment still should be affirmed due to the contributory negligence of the boy.

Several significant principles for summary judgment arise from the case. First, citing to the standards for summary judgment established in early 2001 by *Tom-Wat, Inc. v. Fink*,²⁸⁴ the court reiterated that summary judgment is only proper where there is no genuine issue of material fact in dispute, after all facts and reasonable inferences therefrom are construed in favor of the nonmoving party, and the movant is entitled to judgment as a matter of law. Second, although Justice Rucker noted that the *existence* of duty is normally a question of law for the court, not one of fact for the jury, he reiterated that *breach* of duty, "which requires a reasonable relationship between the duty imposed and the act alleged to have constituted breach is usually a matter left to the trier of fact."²⁸⁵ Finally, in Chief Justice Shepard's concurring opinion for the majority, he strongly suggested that because "even the slightest contributory negligence by the plaintiff bars recovery," it is much more likely for contributory negligence to succeed on summary judgment as an affirmative defense than the defense of comparative negligence.

281. *Id.* at 410-11.

282. 756 N.E.2d 970 (Ind. 2001).

283. 611 N.E.2d 637 (Ind. 1993).

284. 741 N.E.2d 343 (Ind. 2001). *See also supra* text accompanying notes 191-213.

285. *Mangold*, 756 N.E. 2d at 975 (citing *Delta Tau Delta, Beta Alpha Chapter v. Johnson*, 712 N.E.2d 968, 974 (Ind. 1999)).

II. SELECTED DECISIONS FROM THE INDIANA COURT OF APPEALS

As expected, the decisions from the court of appeals affecting Indiana civil procedure were extremely varied. Along with the usual crop of opinions grappling with Rule 12 and summary judgment motions, there were a surprising number of cases dealing with amendment of pleadings and attorneys' fees. One of the most significant cluster of decisions involved the application of Indiana's Product Liability Act to asbestos-related injuries. What follows is a description of selected court of appeals opinions, organized by topic.

A. *Amendment of Pleadings*

*SLR Plumbing & Sewer, Inc. v. Turk*²⁸⁶ involved an action by a subcontractor on a mechanic's lien. The court of appeals held that the denial of plaintiff's oral motion to amend to add a claim for homeowners' personal responsibility was harmless.²⁸⁷ This is because in ruling on the homeowner's motion for summary judgment, the trial court already scrutinized the key issue in the amended opinion—whether the subcontractor's letter gave notice of personal responsibility as required by Indiana Code section 32-8-3-9.²⁸⁸ The court also noted that the amendment of pleadings is within the broad discretion of the trial court and enjoys a deferential standard of review.²⁸⁹

In *Osterloo v. Wallar*,²⁹⁰ a car collided with a child on a sled. The case raised the same nonparty "Catch-22" that was resolved by the Indiana Supreme Court in *Owens Corning Fiberglass Corp. v. Cobb*.²⁹¹ The question was whether the defendant-motorist could amend his pleading to add as a nonparty the child's father, who had previously been a defendant but was dismissed from the action.²⁹² The problem was whether the amended pleading met the timeliness rules under the Comparative Fault Act.²⁹³ Relying directly on *Cobb*, the court of appeals determined that the purpose of the nonparty requirement—to apprise the plaintiff of potential defendants—was met where the plaintiff was surely aware of the potential nonparty's existence; thus the amendment was "reasonably prompt" under the statute and should have been allowed.²⁹⁴

*Davis v. Ford Motor Co.*²⁹⁵ showed the overlap of Indiana Trial Rules 12(B)(6) (dismissal for failure to state a claim) and 12(C) (motion for judgment on the pleadings). Rule 12(C) does not provide for amendment as an alternative to dismissal, but 12(B)(6) does. The issue was whether in a circumstance where

286. 757 N.E.2d 193 (Ind. Ct. App. 2001).

287. *Id.* at 197-98.

288. *Id.*

289. *Id.*

290. 758 N.E.2d 59 (Ind. Ct. App. 2001).

291. 754 N.E.2d 905 (Ind. 2001).

292. *Osterloo*, 758 N.E.2d at 61.

293. *Id.* at 63-64.

294. *Id.* at 64-65.

295. 747 N.E.2d 1146 (Ind. Ct. App. 2001).

a defendant strategically files a motion for judgment on the pleadings that could be characterized as a 12(B)(6) motion, the trial court should treat it as a 12(B)(6) request, thus affording plaintiff the opportunity to amend.²⁹⁶ Answering this question turned on the nature of the defect in the pleading. Quoting *Federal Practice and Procedure*,²⁹⁷ the court of appeals suggested that a Rule 12(B) motion goes to a plaintiff's failure to satisfy a "procedural" condition for his claim, such as insufficient particularity in the pleading.²⁹⁸ In contrast, a motion for judgment on the pleadings, which presumes an end to the pleadings, goes to the substantive merits.²⁹⁹ Where the defect is procedural, a trial court commits reversible error when it puts form over substance and treats the matter under 12(C), thereby preventing amendment.³⁰⁰ One problem with this approach is the difficulty of distinguishing between procedural and substantive defects. Another is that following Rule 12(C) could end the pleading stage prematurely by precluding amendments that might correct defects that are not easily classified in terms of these categories.

In *Russell v. Bowman, Heintz, Boscia & Vician, Inc.*,³⁰¹ an action brought under the federal Fair Debt Collection Practices Act,³⁰² the debtor amended his complaint to add his wife as a party-plaintiff and to add the assignee of the debt, Bowman, as a new defendant.³⁰³ Bowman filed a motion to dismiss the amended complaint, arguing that the husband's settlement with the assignor was fatal and that the amendment came too late. The trial court granted dismissal for lack of subject matter jurisdiction due to the settlement.³⁰⁴ The court of appeals reversed because no responsive pleading had been filed by the original settling defendant. Under the express terms of Indiana Trial Rule 15(A), the plaintiff has a right to amend without leave of court. Plaintiff could also add new claims and parties so long as the joinder rules were met.³⁰⁵ Finally, there was no subject matter defect because the action was still pending against the original defendant when the amendment was made.³⁰⁶ In contrast, the court concluded in *Kuehl v. Hoyle*³⁰⁷ that the amendment of right rule in 15(A) does not trump the relation-back requirements of Rule 15(C) simply because no responsive pleading is filed.³⁰⁸

296. *Id.* at 1148.

297. 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1369 (2d ed. 1990).

298. *Davis*, 747 N.E.2d at 1150.

299. *Id.*

300. *Id.* at 1149.

301. 744 N.E.2d 467 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d 420 (Ind. 2001).

302. Fair Debt Collection Practices Act, Pub. L. 95-109, 91 Stat. 874 (codified as amended in scattered sections of 15 U.S.C., ch. 41).

303. *Russell*, 744 N.E.2d at 469.

304. *Id.* at 469-70.

305. *Id.* at 471.

306. *Id.*

307. 746 N.E.2d 104 (Ind. Ct. App. 2001).

308. *Id.* at 108.

Thus, the statute of limitations may still bar amendment.³⁰⁹

B. Arbitration

*Mislenkov v. Accurate Metal Detinning, Inc.*³¹⁰ involved a claim of misappropriation of trade secrets by a former employee, Mislenkov, and that employee's second employer, Shoreland. Both defendants moved to dismiss, claiming an arbitration agreement between Mislenkov and Accurate Metal Detinning ("Accurate Metal") deprived the court of subject matter jurisdiction.³¹¹ The court of appeals applied a two-tiered test for arbitration: whether there is an enforceable agreement to arbitrate between the parties and whether the dispute falls within the scope of that agreement.³¹² Because Shoreland was not in privity on agreement, the company could not enforce it, so the first prong of the test was not met as to Shoreland.³¹³ Although there was an enforceable arbitration agreement between Mislenkov and Accurate Metal, it did not cover the whole employment relationship, but only matters occurring after a release had created a new contractual relationship. As to Mislenkov, the second tier of the analysis was not satisfied because the dispute related to pre-agreement actions.³¹⁴

C. Asbestos

Asbestos cases present difficult problems for issues relating to limitation of actions and product identification/causation. The diseases caused by asbestos take a very long time to develop. In the typical circumstance where a worker might be exposed, numerous companies could have produced the article creating the exposure. After many years, workers' memories fade and documentary evidence linking the asbestos of a particular defendant to a specific work environment is difficult to discover. Where asbestos is a component part of a product, a worker might never have been aware of the identity of the supplier of the asbestos in the first place. From a procedural perspective, these issues typically arise on summary judgment. Complicating matters, the ten-year repose period of the Indiana Products Liability Act³¹⁵ ("PLA") runs from the date a product is delivered to the initial user or consumer, regardless of when the claim

309. *Id.* at 108-09.

310. 743 N.E.2d 286 (Ind. Ct. App. 2001).

311. *Id.* at 288.

312. *Id.* at 289.

313. *Id.* at 290.

314. *Id.*

315. IND. CODE § 34-20-3-1 (1998) provides in part that:

[A] product liability action must be commenced:

(1) within two (2) years after the cause of action accrues; or

(2) within ten (10) years after the delivery of the product to the initial user or consumer.

However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

accrues as to a particular plaintiff. However, it does not apply to certain actions for asbestos exposure. Instead, where the requirements of Indiana Code section 34-20-3-2 (“the asbestos exception”) are met, a claim may be brought within two years from the date it accrues, regardless of when the product was put on the market.³¹⁶ The asbestos exception raises problems of statutory interpretation, and, depending on how they are resolved, exposes the PLA to constitutional infirmity under *Martin v. Richey*³¹⁷ and related cases.

*Black v. ACandS, Inc.*³¹⁸ may prove to be one of the most important decisions from the court of appeals in 2001 because it construes the asbestos exception broadly. It has already had an impact on the many asbestos-related actions brought in Indiana courts. *Black* arose from a suit brought by the widow and the estate of a blast furnace worker who worked in the Gary USX steel works. He died from asbestos-induced lung cancer.³¹⁹ The action came up for review after the Indiana Supreme Court granted transfer in *Owens Corning Fiberglass Corp. v. Cobb*,³²⁰ but before it issued its opinion. In *Cobb*, the supreme court affirmed the trial court’s determination that the plaintiffs had shown sufficient evidence linking defendant’s product to decedent to avoid summary judgment. It disagreed with the court of appeals that the evidence presented no issue of material fact for trial.³²¹

The *Black* trial court had granted summary judgment for two different groups of defendant-companies on two different grounds. For the first group, it concluded that the PLA ten-year repose period applied, not the two-year asbestos exception, because the defendants in this group were not *both* miners *and* sellers of asbestos.³²² Regarding the second group, the court found insufficient evidence on product identification.³²³

As to the first ground, the court of appeals construed the language “persons who mined and sold” in the statutory exception to determine whether it was meant in the conjunctive—so that *both* mining *and* selling were required of the same defendant—or the disjunctive—so that *either* mining *or* selling would suffice.³²⁴ Despite a line of previous cases that suggested both attributes were

316. *Id.* § 34-20-3-2. The statute provides, in pertinent part, that the exception is available as follows:

(d) This . . . [exception] applies only to product liability actions against:

(1) persons who mined and sold commercial asbestos; and

(2) funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims.

317. 711 N.E.2d 1273 (Ind. 1999).

318. 752 N.E.2d 148 (Ind. Ct. App. 2001).

319. *Id.* at 150.

320. 754 N.E.2d 905 (Ind. 2001).

321. *See supra* notes 126-38 and accompanying text.

322. *Black*, 752 N.E.2d at 156.

323. *Id.* at 157.

324. *Id.* at 151-52.

required,³²⁵ the court of appeals determined that “the construction [of the statute] urged by defendants is inconsistent with other provisions of the products liability act and with our supreme court’s precedent and would lead to an absurd result.”³²⁶ The “absurd result” would be that a company that mined but did not sell asbestos, and a company that sold but did not mine asbestos, would both be able to take advantage of the ten-year limit, despite causing the same harm to plaintiffs as companies that both mined *and* sold it. Moreover, this interpretation would not promote the purpose of giving plaintiffs in asbestos cases an adequate time from discovery of their condition to sue. This policy was suggested by the Indiana Supreme Court in *Covalt v. Carey Canada, Inc.*,³²⁷ a case that was decided prior to the asbestos exception statute. There the supreme court argued that the ten year limit ought not to apply “to cases involving protracted exposure to an inherently dangerous foreign substance which is visited into the body.”³²⁸ The court of appeals agreed with the distinction in *Covalt* between a regular product in the marketplace and asbestos, “a hazardous foreign substance which causes disease,”³²⁹ especially because the diseases it causes take a long time to develop. It reversed the trial court’s grant of summary judgment based on the PLA.³³⁰

In resolving the issue of product identification, the court of appeals was persuaded by the Seventh Circuit’s opinion in *Peerman v. Georgia-Pacific Corp.*³³¹ *Peerman* suggests that a plaintiff must come forward with facts showing the victim’s inhalation of a particular defendant’s asbestos to avoid summary judgment on product identification.³³² The court of appeals interpreted *Peerman* to mean that “concrete facts” would be required to show product identification, not speculative inferences.³³³ Although there was *some* evidence that the defendants’ products might have been in the firebricks or used as insulation where decedent worked, the court of appeals discounted it as speculative and inferential.³³⁴ It concluded that the trial court had not erred in granting the defendants summary judgment therefore. However, given the Indiana Supreme

325. See *Novicki v. Rapid-American Corp.*, 707 N.E.2d 322, 324 (Ind. Ct. App. 1999); *Sears Roebuck & Co. v. Noppert*, 705 N.E.2d 1065, 1068 (Ind. Ct. App. 1999); see also *Spriggs v. Armstrong World Indus.*, No. IP91-651, 1999 U.S. Dist. LEXIS 19874 (S.D. Ind. 1999).

326. *Black*, 752 N.E.2d at 152.

327. 543 N.E.2d 382 (Ind. 1989).

328. *Id.* at 385.

329. *Id.* at 386.

330. *Black*, 752 N.E.2d at 151, 154.

331. 35 F.3d 284, 287 (7th Cir. 1994) (applying Indiana law).

332. *Id.* at 286. Moreover, according to *Peerman*, no Indiana court had articulated a test for causation in asbestos cases.

333. *Id.* at 286-87. The reference to “concrete facts” comes from the court of appeals decision in *Owens Corning Fiberglass Corp. v. Cobb*, 714 N.E.2d 295, 303 (Ind. Ct. App. 1999), which was vacated when the Indiana Supreme Court granted transfer. See *Owens Corning Fiberglass Corp. v. Cobb*, 754 N.E.2d 905 (Ind. 2001).

334. *Black*, 752 N.E.2d at 155-57.

Court's opinion in *Cobb*, this conclusion is in doubt.³³⁵

*Jurich v. Garlock, Inc.*³³⁶ also raised the question of how to construe the PLA in the case of a worker whose claim was filed more than ten years after he could have been exposed to defendants' products but within the asbestos exception. This panel of the court of appeals found the analysis of the exception statute in *Black* "reasonable" and followed it.³³⁷ However, it confronted a new interpretive problem—whether plaintiffs would have to show that defendants were miners or sellers of *commercial* asbestos, defined as asbestos in the raw processed form. If so, the exception would not apply to persons who sold products that contained asbestos as a component.³³⁸ In that circumstance, the PLA could be unconstitutional as applied for violating the Indiana Constitution open courts provision.³³⁹

The court of appeals reasoned that the word "commercial" was intended to have effect in the statute and not be mere surplusage. Moreover, it was persuaded by a regulation of the Environmental Protection Agency that "commercial asbestos" must be defined in terms of its raw state.³⁴⁰ Thus, the exception did not apply to defendants who only sold products incorporating asbestos. Therefore, the court had to reach the question of whether the PLA violates the Indiana Constitution open courts provisions in light of the Indiana Supreme Court's holdings in *Martin v. Richey*³⁴¹ and its progeny.³⁴² The court concluded that it might in two circumstances: where a person is injured by an asbestos product within the PLA ten-year period but does not gain knowledge of the injury until afterward; and where a person is injured prior to the passage of the PLA and the date of the product's delivery is unknown.³⁴³ This latter situation was presented by the facts of the case and the court held the PLA unconstitutional as applied to plaintiffs.

*Allied Signal, Inc. v. Herring*³⁴⁴ combined the issues raised by both *Black* and *Jurich*. There the defendants argued the plaintiff would have to show they were *both* miners *and* sellers of asbestos to prevail.³⁴⁵ A different panel of the court of appeals found the analysis in *Black* on that question compelling and adopted it.³⁴⁶ As in *Jurich*, the defendants also argued that plaintiffs would have to show they dealt in *commercial* asbestos.³⁴⁷ However, the court did not reach this issue,

335. See *supra* notes 126-38 and accompanying text.

336. 759 N.E.2d 1066 (Ind. Ct. App. 2001).

337. *Id.* at 1069-70.

338. *Id.* at 1070-71.

339. *Id.* at 1071; IND. CONST. art.12, § 1.

340. *Jurich*, 759 N.E.2d at 1070.

341. 711 N.E.2d 1273 (Ind. 1999).

342. See, e.g., *McIntosh v. Melroe Co.*, 729 N.E.2d 972 (Ind. 2000).

343. *Jurich*, 759 N.E.2d at 1071.

344. 757 N.E.2d 1030 (Ind. Ct. App. 2001).

345. *Id.* at 1032-33.

346. *Id.* at 1035-36.

347. *Id.* at 1036-37.

for it found that defendants had not raised it below and so waived it on appeal.³⁴⁸ This waiver also obviated the need to discuss constitutional questions raised by the PLA.

*Fulk v. Allied Signal, Inc.*³⁴⁹ is yet another asbestos case involving Allied Signal as a defendant. Judge Mattingly-May, who wrote the opinion in *Black*, used its analysis on the asbestos exception again in *Fulk*.³⁵⁰ The opinion also followed the same reasoning on product identification and affirmed the trial court's grant of summary judgment for a number of defendants where there was some evidence of decedent's exposure to their products, but it was not strong.³⁵¹ Once again, after *Cobb* the product identification aspect of this case is in doubt.³⁵²

*Parks v. A.P. Green Industries*³⁵³ again presented issues of product identification and the statute of repose. In *Parks* a boilermaker with lung cancer and his wife sued a variety of asbestos producers for products liability and loss of consortium.³⁵⁴ The defendants moved for summary judgment on the grounds that the plaintiffs had failed to bring their actions in time and that they had failed to muster sufficient evidence to link the boilermaker's lung cancer with inhaling their asbestos.³⁵⁵ Among its rulings, the trial court denied summary judgment to defendant Chicago Firebricks on the issue of product identification, but granted all defendants summary judgment for the plaintiffs' failure to bring their claims within the ten-year repose period of the PLA.³⁵⁶ The court of appeals affirmed denial of summary judgment as to Chicago Firebricks on product identification, but reversed as to a number of defendants on the timeliness issue following the analysis in *Black*.³⁵⁷

The cases from *Black* to *Parks* show an emerging consensus on whether a defendant must be *both* a miner *and* a seller of asbestos for the asbestos exception to the PLA to apply. However, the issue of whether "commercial asbestos" is limited to raw processed asbestos is an open question, as is the manner in which the court of appeals will interpret the showing necessary to avoid summary judgment on product identification after *Cobb*.

D. Attorneys' Fees

Former Appellate Rule 15(G) allowed appellate courts to assess damages when a judgment was affirmed on appeal. This award was informally referred

348. *Id.* at 1037.

349. 755 N.E.2d 1198 (Ind. Ct. App. 2001).

350. *Id.* at 1202-03.

351. *Id.* at 1203-06.

352. *See supra* notes 126-38 and accompanying text.

353. 754 N.E.2d 1052 (Ind. Ct. App. 2001).

354. *Id.* at 1054-55.

355. *Id.* at 1055.

356. *Id.*

357. *Id.* at 1059.

to as “appellate attorneys’ fees.”³⁵⁸ In *Kuehl v. Hoyle*,³⁵⁹ the court of appeals strictly construed the application of the rule to avoid a chilling effect on the taking of appeals. Even though the plaintiff in *Kuehl* waited more than eight years to amend her complaint, there had been two previous appeals in the action, and it was possible she was litigating matters that had been settled, the appellate court declined to award attorney fees.³⁶⁰ Sanctions for frivolous or bad faith appeals are now governed by Indiana Appellate Rule 66(E), which provides: “The Court may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court’s discretion and may include attorneys’ fees. The Court shall remand the case for execution.”³⁶¹

In *SLR Plumbing & Sewer, Inc. v. Turk*,³⁶² described above, the court of appeals reviewed the process for determining whether a prevailing party should be awarded fees under Indiana Code section 34-52-1-1 covering “groundless” claims. Citing *Emergency Physicians of Indianapolis v. Pettit*,³⁶³ the court described three steps for reviewing a fee award, two of which go to merit questions: a review of the trial court’s findings of fact under the clearly erroneous standard, a review de novo of the trial court’s legal conclusions, and a review of the trial court’s decision to award attorney fees under an abuse of discretion standard.³⁶⁴ Concluding that there were facts to support the subcontractor’s claim, but that the legal significance he gave them was incorrect, the court of appeals did not consider the action “groundless” and reversed the award of fees.³⁶⁵

*Stephens v. Parkview Hospital, Inc.*³⁶⁶ injects some confusion over the applicable standard of review on fees for it states:

We note that the trial court’s decision to grant or deny attorney fees will not be disturbed absent an abuse of discretion. When the trial court determines that attorney fees were not warranted under the statute permitting the award of attorney fees for bringing or pursuing a frivolous claim, we will review that conclusion de novo.³⁶⁷

In *Davidson v. Boone County*,³⁶⁸ the trial court awarded the county almost

358. See *Greasel v. Troy*, 690 N.E.2d 298, 304 (Ind. Ct. App. 1997).

359. 746 N.E.2d 104 (Ind. Ct. App. 2001).

360. *Id.* at 111.

361. IND. APPELLATE RULE 66(E).

362. 757 N.E.2d 193 (Ind. Ct. App. 2001). See *supra* notes 286-89 and accompanying text.

363. 714 N.E.2d 1111, 1115 (Ind. Ct. App.), *adopted on transfer*, 718 N.E.2d 753 (Ind. 1999).

364. *SRL Plumbing & Sewer, Inc.*, 757 N.E.2d at 201. IND. CODE §§ 34-52-1-1 (1998) provides: “In any civil action, the court may award attorney’s fees as part of the cost to the prevailing party, if the court finds that either party: (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless”

365. *SRL Plumbing*, 757 N.E.2d at 201-02.

366. 745 N.E.2d 262 (Ind. App. 2001).

367. *Id.* at 267 (citations omitted).

368. 745 N.E.2d 895 (Ind. Ct. App. 2001).

\$80,000 in attorneys fees without the county's requesting them.³⁶⁹ Plaintiffs had filed a claim against Boone County alleging discrimination and other constitutional violations stemming from its construction of a building without a permit. The court of appeals affirmed the trial court and also cited to *Emergency Physicians of Indianapolis*.³⁷⁰ It held that a trial court has the power under the statute to award fees sua sponte.³⁷¹ The facts were particularly egregious in the case before the court and it found that, among other things, the plaintiffs had brought their claims for purposes of harassment.

In *Grubnich v. Renner*,³⁷² the court of appeals concluded that, given the changes in Indiana case law and ambiguity as to the extent of retroactivity of relevant decisions, the question concerning whether the Medical Malpractice Act limited a defendant's liability for post-judgment interest was so complex it prevented his defense from being groundless.³⁷³ The decision includes a useful summary of the standards for the award of interest and review of an award of attorneys' fees. With regard to the latter, it follows the multistep process outlined by *Emergency Physicians of Indianapolis*.

*Major v. OEC-Diasonics, Inc.*³⁷⁴ presented a different fee question. There a law firm sought to foreclose on an attorney's fee lien and based the claim on unjust enrichment, an equitable remedy. The defendant alleged that the lawyer's professional misconduct in entering into an oral contingent fee modification, and other acts, prevented quantum meruit recovery due to unclean hands.³⁷⁵ He also argued that the lawyer must disgorge any fees as a result of ethical violations. The court of appeals disagreed and ruled these arguments were factors to be balanced, but were not complete barriers to recovery.³⁷⁶ Moreover, the risk to the firm of losing the case on which the firm had worked for more than a decade justified consideration of the oral contingent fee agreement. It supported the quantum meruit award, which included a \$650,000 bonus in addition to fees calculated on the firm's hourly rates.³⁷⁷

E. Bankruptcy Stay

In *Zollman v. Gregory*,³⁷⁸ plaintiffs filed a medical malpractice claim with the Indiana Department of Insurance after the doctor sought federal bankruptcy protection. Nonetheless, the federal bankruptcy court later allowed plaintiffs

369. *Id.* at 898.

370. *Id.* at 849. See also *Emergency Physicians of Indianapolis v. Pettit*, 714 N.E.2d 1111, 1115 (Ind. Ct. App. 1999).

371. *Davidson*, 745 N.E.2d at 900. See IND. CODE §§ 34-52-1-1 (1998).

372. 746 N.E.2d 111 (Ind. Ct. App. 2001).

373. *Id.* at 119-20.

374. 743 N.E.2d 276 (Ind. Ct. App.), *trans. denied*, 753 N.E.2d 15 (Ind. 2001).

375. *Id.* at 281-82.

376. *Id.* at 282-83.

377. *Id.* at 360-61.

378. 744 N.E.2d 497 (Ind. Ct. App.), *trans. denied*, 753 N.E.2d 17 (Ind. 2001).

relief from the stay to pursue their action.³⁷⁹ The court of appeals treated this relief as a *nunc pro tunc* order, although it was not labeled as such. The bankruptcy court had specifically directed that the plaintiffs be able to proceed with their action and described that action as “pending” in state court.³⁸⁰ Thus, the plaintiffs’ filing was not void and tolled the running of the statute of limitations on their claim.³⁸¹

F. Burden of Proof

In *B.E.I., Inc. v. Newcomer Lumber & Supply Co.*,³⁸² a lumber supplier sued a homeowner on a theory of account stated for building supplies delivered. The homeowner disputed certain charges and credits, despite the fact that the supplier had sent him invoices to which he never objected.³⁸³ The trial court entered judgment against him inferring that his nonresponse to the invoices showed his agreement that the amount claimed was correct.³⁸⁴ The court of appeals affirmed and approved the principle that “[a]n agreement that the balance is correct may be inferred from delivery of the statement and . . . failure to object . . . within a reasonable amount of time.”³⁸⁵ This creates a prima facie presumption that the debtor must rebut. The trial court’s findings of fact that the homeowner had a reasonable time to object and had not rebutted the presumption were not erroneous, given the deferential standard of review.

Under worker’s compensation law, the “odd lot” doctrine treats a worker as totally disabled, even though the worker is not completely unable to work, if the disability would prevent employment “in any well-known branch of the competitive labor marked absent superhuman efforts, sympathetic friends or employers, a business boom, or temporary good luck.”³⁸⁶ When raised, it can affect burdens of production. In *Schultz Timber v. Morrison*,³⁸⁷ the employer used the odd-lot theory to argue that it had rebutted the employee’s prima facie case of total disability before the Worker’s Compensation Board.³⁸⁸ The court of appeals declined to recognize the principle stating that in *Walker v. State, Muscatatuck State Development Center*,³⁸⁹ our supreme court “did not expressly adopt the odd lot doctrine.”³⁹⁰

379. *Id.* at 498.

380. *Id.* at 501-02.

381. *Id.*

382. 745 N.E.2d 233 (Ind. Ct. App. 2001).

383. *Id.* at 235-36.

384. *Id.* at 236.

385. *Id.* at 237 (quoting *Auffenberg v. Bd. of Tr. of Columbus Reg’l Hosp.*, 646 N.E.2d 328, 331 (Ind. Ct. App. 1995)).

386. See BLACK’S LAW DICTIONARY 559 (5th ed. 1983).

387. 751 N.E.2d 834 (Ind. Ct. App. 2001).

388. *Id.* at 837-38.

389. 694 N.E.2d 258 (Ind. 1998).

390. *Schultz Timber*, 751 N.E.2d at 838.

*United Farm Insurance Co. v. Riverside Autosales*³⁹¹ was a bailment action brought by the insurance company as subrogee of the insured over a fire that destroyed an automobile. The trial court granted the bailee, Riverside, judgment on the evidence as to breach of warranty, but allowed the case to go forward on negligence. Thereafter, the trial court made findings of fact and conclusions of law sua sponte and entered judgment for Riverside as to negligence.³⁹² In a bailment where the arrangement benefits both parties, and property is delivered to the bailee in good condition but is returned damaged, the inference arises that the bailee has been negligent.³⁹³ The court of appeals concluded that Riverside rebutted the inference by showing evidence of due care as reflected in the findings. Thus, plaintiff had the ultimate burden of proof on negligence.³⁹⁴ Finally, the trial court's sua sponte findings and conclusions resulted in the court of appeals treating the verdict as a general verdict and viewing the special findings as going only to the specific issues they covered.³⁹⁵

G. Discovery

*Davidson v. Perron*³⁹⁶ involved a wrongful termination action by a former police officer brought on the theory that he had been fired in retaliation. Under the authority of *Tyson v. State*,³⁹⁷ the trial court struck the affidavit of one of the officer's witnesses though he was proceeding pro se.³⁹⁸ The witness had not been listed for trial, the officer did not provide a witness list to defendant until after the discovery cutoff date, and the testimony was prejudicial.³⁹⁹ The court of appeals also upheld the trial court's disallowance of discovery regarding alleged retaliatory firings of other officers stating that the officer's claim had to stand on its own.⁴⁰⁰

*Potts v. Williams*⁴⁰¹ was a medical malpractice action brought by a minor child for injuries suffered during delivery.⁴⁰² The plaintiff obtained depositions and trial transcripts of testimony of the defendant's expert for cross-examination. The trial court denied the defendant's motion to compel discovery on the ground the materials were attorney work-product.⁴⁰³ The court of appeals agreed because the items were obtained in anticipation of litigation as required by Trial Rule

391. 753 N.E.2d 681 (Ind. Ct. App. 2001).

392. *Id.* at 684.

393. *Id.* at 685.

394. *Id.*

395. *Id.* at 684.

396. 756 N.E.2d 1007 (Ind. Ct. App. 2001).

397. 619 N.E.2d 276 (Ind. Ct. App. 1993).

398. *Davidson*, 756 N.E.2d at 1013.

399. *Id.* at 1014.

400. *Id.* at 1015.

401. 746 N.E.2d 1000 (Ind. Ct. App. 2001).

402. *Id.* at 1003-04.

403. *Id.* at 1005-06.

26(B)(3) and the defendant did not show substantial need overbalancing work product protection, because he had equal or better access to the previous testimony of his own expert.⁴⁰⁴

H. Findings

The court of appeals continues to distinguish the significance of trial court findings of fact when reviewing summary judgment rulings and judgments resulting from bench trials or trials with advisory juries. Indiana Trial Rule 52⁴⁰⁵ requires the trial court to make findings whenever a bench trial takes place or judgment is rendered with the help of an advisory jury. Those findings can result from a request by the parties or sua sponte. There is a two-part process for reviewing the findings—first, the appellate court must determine if the findings are supported by the evidence, and second, whether the judgment is supported by the findings. The appellate court will affirm the judgment on any legal theory supported by the findings, not just those theories “espoused in the trial court proceeding,”⁴⁰⁶ and will only reverse if the judgment is clearly erroneous.⁴⁰⁷ The Indiana Supreme Court reiterated this approach this year in *G & N Aircraft, Inc. v. Boehm*.⁴⁰⁸ Moreover, findings issued sua sponte are entitled to the same standard of review.⁴⁰⁹

In contrast, when a court makes findings in connection with a summary judgment motion, they are not entitled to the same deference given in the case of a bench trial or an advisory jury and they do not change the de novo standard of review on summary judgment. As the court explained it in *Ferrell v. Dunescape Beach Club Condominiums Phase I*:⁴¹⁰

Here, the trial court entered specific findings of fact and conclusions thereon, which would normally trigger the two-tiered appellate standard of review contained in Indiana Trial Rule 52. However, specific findings and conclusions entered by the trial court when ruling on a motion for summary judgment merely afford the appellant an opportunity to address the merits of the trial court’s rationale. They also aid our review by providing us with a statement of reasons for the trial court’s actions, but they have no other effect. Rather than relying upon the trial court’s findings and conclusions, we must base our decision upon the materials properly presented to the trial court under Indiana Trial Rule 56(C).⁴¹¹

404. *Id.* However, *Marshall v. State*, 759 N.E.2d 665, 669-70 (Ind. Ct. App. 2001), distinguished the applicability of *Potts* in a criminal case where the defendant did not seek information of his own expert.

405. IND. TRIAL R. 52.

406. *Mitchell v. Mitchell*, 695 N.E.2d 920, 924 (Ind. 1998).

407. *Shenvar v. Johnson*, 741 N.E.2d 1275, 1279 (Ind. App. 2001).

408. 743 N.E.2d 227, 234 (Ind. 2001).

409. *Klotz v. Klotz*, 747 N.E.2d 1287, 1190 (Ind. App. 2001). See also *supra* Part II.F.

410. 751 N.E.2d 702, 709 (Ind. App. 2001).

411. *Id.* (citations omitted).

I. Injunctions, Declarations, and Other Special Relief

To obtain injunctive relief, the plaintiff typically has to show “irreparable harm,” that is, that there is no adequate remedy at law to redress his or her injury. This usually means that compensatory damages will not make the plaintiff whole due to the uniqueness of the wrong involved.⁴¹² When an injunction is sought before disposition of a case on the merits, the plaintiff must show additional factors—that there is a likelihood of success on the merits, that the status quo will be maintained, that the balance of hardships is in favor of the plaintiff if an injunction is issued, and that the public interest is not harmed by issuance.⁴¹³ The court of appeals decided a number of injunction cases in 2001 illuminating the type of injury that satisfies the irreparable harm requirement.

Normally, irreparable harm is absent where plaintiff’s loss is purely economic,⁴¹⁴ but in *Barlow v. Sipes*⁴¹⁵ the court issued a preliminary injunction against an insurance adjuster who had accused a body shop of fraud. The body shop owners sued for defamation and intentional interference with business relationships.⁴¹⁶ Because they could not quantify the economic losses threatened and because intangible reputational harm to the business was involved, the remedy at law was inadequate.⁴¹⁷ The court of appeals affirmed, despite acknowledging that preliminary injunctive relief should be used sparingly.⁴¹⁸

In *Cohon v. Financial Plans & Strategies, Inc.*,⁴¹⁹ irreparable harm for the preliminary injunction was supplied by the presence of an enforceable covenant not to compete and the difficulty of ascertaining the loss to the former employer’s business goodwill from the employee’s breach.⁴²⁰

Indiana strictly construes covenants not to compete against enforcement. So to obtain an injunction based on one, the covenant must be reasonable in terms of the employer’s legitimate business interests and the geographic and chronological limits it imposes.⁴²¹ If it is enforceable, then the uncertainty as to the exact monetary losses associated with loss of goodwill—a property right—can support a finding of irreparable harm.⁴²² Moreover, the court of appeals gives deference to the trial court’s findings on these issues.⁴²³ Hence, the court of appeals affirmed the trial court’s injunction against the certified financial planner’s violation of a two-year long covenant not to compete. It also found that

412. See DOBBS, *supra* note 142, § 25(1).

413. *Id.*

414. *Id.*

415. 744 N.E.2d 1 (Ind. Ct. App.), *trans. denied*, 753 N.E.2d 16 (Ind. 2001).

416. *Id.* at 2.

417. *Id.* at 6-8.

418. *Id.* at 9-10.

419. 760 N.E.2d 190 (Ind. Ct. App. 2001).

420. *Id.* at 193.

421. *Id.* at 194.

422. *Id.* at 195.

423. *Id.* at 193-94.

the covenant was specific enough in terms of customers that this cured any geographic overbreadth.⁴²⁴

In contrast, in *Mercho-Roushdi-Shoemaker-Dillery-Thoraco-Vascular Corp. v. Blatchford*⁴²⁵ the trial court denied the issuance of a preliminary injunction sought by a group of physicians to enforce a noncompetition agreement.⁴²⁶ The court of appeals affirmed the denial because pure economic loss does not generally result in injunctive relief.⁴²⁷ Giving deference to the trial court, the appellate court stated the trial court had not erred in determining that plaintiffs failed to carry their burden to show that monetary losses were difficult to calculate.⁴²⁸

In *Indiana Family & Social Services Administration v. Legacy Healthcare, Inc.*,⁴²⁹ which focused on a dispute over the termination of a Medicaid provider agreement, the court of appeals agreed with the trial court that the operator of a nursing home did not show irreparable harm to itself or its mentally disabled residents. This was because the nursing home only alleged pure economic harm, even though in the form of threatened business failure.⁴³⁰ Moreover, because a receiver had been appointed to run the nursing home, the court found no irreparable harm to the residents who were being cared for under the control of the receiver.⁴³¹ The nursing home's reliance on pure economic harm to justify a stay was particularly ineffective because it had failed to exhaust administrative remedies.⁴³²

In *Reed Sign Service, Inc. v. Reid*,⁴³³ an important decision for TRO procedure, the court held that where a billboard owner who was ordered to dismantle a sign had actual notice of the order, but was not served after a number of service attempts, did not deprive the court of personal jurisdiction. This was the result because actual notice, coupled with the attempts at service, showed that notice reasonably calculated to inform the defendant of the proceeding was undertaken. Moreover, the failure to order a bond did not void the TRO and prevent a contempt citation where the TRO had dissolved and the defendant had not complied with the order.

In *Ferrell v. Dunescape Beach Club Condominiums Phase I, Inc.*⁴³⁴ the court discussed declaratory relief and also detailed the showing necessary for the issuance of a preliminary injunction. The case also provides a useful description of the differences between preliminary and injunctive relief. It emphasizes that

424. *Id.* at 195-96.

425. 742 N.E.2d 519 (Ind. Ct. App. 2001).

426. *Id.* at 521.

427. *Id.* at 526.

428. *Id.* at 523-24.

429. 756 N.E.2d 567 (Ind. Ct. App. 2001), *trans. denied*, 2002 Ind. LEXIS 254.

430. *Id.* at 571.

431. *Id.*

432. *Id.* at 571-72.

433. 755 N.E.2d 690 (Ind. App. 2001).

434. 751 N.E.2d 702 (Ind. App. 2001).

difference as one of timing—a preliminary injunction issues during the pendency of an action while a permanent injunction is a remedy given after a final determination. Finally, in *Malone v. Price*,⁴³⁵ the court canvassed the proper procedures to follow to establish entitlement to the statutory remedy of mandate, to declaratory relief, and to a writ of mandamus.

J. Instructions

Several appellate cases give good guidance on the standards for review of trial court instructions. Review of the appropriateness of an instruction is undertaken pursuant to an abuse of discretion standard. The appellate court determines abuse of discretion using a three-part test: whether the tendered instruction correctly states the law; whether there is evidence in the record to support giving the instruction; and whether the substance of the instruction is covered by other instructions that are given.⁴³⁶ Moreover, the harmless error doctrine is particularly applicable to the giving of an erroneous instruction, for one must show that it affected the outcome of the proceeding to gain reversal.⁴³⁷

K. Judgment on the Evidence

S.E. Johnson Co. v. Jack,⁴³⁸ another auto case, involved a dispute over whether a subcontractor should be liable to a motorist for an accident at a road construction site where asphalt had been removed leaving the yellow line marking the roadway obscured.⁴³⁹ The subcontractor's theory was that its work was accepted by the general contractor. Under *Hill v. Rieth-Riley Construction Co.*,⁴⁴⁰ "acceptance" eliminates the independent contractor's liability to third parties. But, such acceptance is subject to the fact-sensitive, multifactoral test of *Blake v. Calumet Construction Corp.*⁴⁴¹ The contractor moved for judgment on the evidence at close of all the evidence, which was denied.⁴⁴² The court of appeals asserted that there was sufficient evidence for the case to go to the jury when it was not clear that the Indiana Department of Transportation had accepted the work at the end of each day.⁴⁴³ The court strongly suggested that under *Blake*, it would be difficult to take a case from the jury.⁴⁴⁴

435. 755 N.E.2d 213 (Ind. App. 2001).

436. *Faulk v. Northwest Radiologists, P.C.*, 751 N.E.2d 233, 241 (Ind. App. 2001). See also *Kostidis v. General Cinema Corp. of Indiana*, 754 N.E.2d 563, 570 (Ind. App. 2001).

437. *Centennial Mortgage, Inc. v. Blumenfeld*, 745 N.E.2d 268, 278 (Ind. App. 2001).

438. 752 N.E.2d 72 (Ind. Ct. App. 2001).

439. *Id.* at 75.

440. 670 N.E.2d 940, 944 (Ind. Ct. App. 1996).

441. 674 N.E.2d 167 (Ind. 1996).

442. *S.E. Johnson*, 752 N.E.2d at 75-76.

443. *Id.* at 78.

444. *Id.* at 77-78.

L. Jurisdiction

1. “*Jurisdiction over the Case.*”—*Georgetown Board of Zoning Appeals v. Keele*⁴⁴⁵ presented a dispute over a use variance granted by the Georgetown municipal zoning board for the construction of multifamily housing on agricultural land. Keele and other residents of the county sued to have the variance invalidated on the ground that the municipal board had no subject-matter jurisdiction to grant a variance, as the land was outside the city. The trial court agreed and the board and developer appealed.⁴⁴⁶ On review, the court of appeals distinguished lack of subject matter jurisdiction which cannot be waived from jurisdiction over the case, which can be waived. The court defined subject matter jurisdiction as “the power of [a tribunal] to hear and determine a general class of cases to which the proceeding before it belongs”⁴⁴⁷ and derives from a constitutional or statutory grant of power. It cannot be forgone by a party. In contrast, “jurisdiction over the case” is the authority to hear a specific case within a category of cases over which a court has subject matter jurisdiction.⁴⁴⁸ The court of appeals concluded that the board did have subject matter jurisdiction over the variance.⁴⁴⁹

First, the court noted that an Indiana statute allows municipalities to control zoning of land within a two mile fringe of city boundaries.⁴⁵⁰ Second, it stated that the board had subject matter jurisdiction over zoning variances. Thus, following the reasoning of *Board of Trustees v. City of Fort Wayne*,⁴⁵¹ the court concluded that even though the board did not fulfill the conditions of the statute, that failure went to jurisdiction over the case, not over the subject matter. Because Keele never raised his objections with the board originally, he and the other plaintiffs waived the defect.⁴⁵²

In matters involving the Uniform Child Custody Jurisdiction Act (“UCCJA”),⁴⁵³ a trial court must first decide if it has jurisdiction and then whether that jurisdiction should be exercised.⁴⁵⁴ *Christensen v. Christensen*⁴⁵⁵ raised the issue of whether the jurisdictional inquiry of the UCCJA goes to subject matter, personal jurisdiction, or something in between, that is, “jurisdiction over the case.”

Under classic principles of personal jurisdiction, a defendant can consent to

445. 743 N.E.2d 301 (Ind. Ct. App. 2001).

446. *Id.* at 302.

447. *Id.* at 303 (quoting *Santiago v. Kilmer*, 605 N.E.2d 237, 239-40 (Ind. Ct. App. 1992)) (alteration in original).

448. *Id.*

449. *Id.* at 304.

450. *See also* IND. CODE 36-7-4-205 (1998).

451. 375 N.E.2d 1112 (1978).

452. *Georgetown Bd. of Zoning Appeals*, 743 N.E.2d at 305.

453. IND. CODE § 31-17-3-3 (1998).

454. *See Ashburn v. Ashburn*, 661 N.E.2d 39, 41 (Ind. Ct. App. 1996).

455. 752 N.E.2d 179 (Ind. Ct. App. 2001).

a court's jurisdiction over his or her person, thereby waiving any defects in the geographic power of the court.⁴⁵⁶ One way for a defendant to consent is to seek affirmative relief from the court in question. In *Christensen*, the former wife filed a petition to enforce a foreign support decree in an Indiana court under the Uniform Reciprocal Enforcement of Support Act.⁴⁵⁷ Prior to the Indiana proceeding, she and her husband had shared legal custody, but she had been the primary custodial parent of the children, who lived with her in Virginia.⁴⁵⁸ The court enforced the support order, but thereafter the husband sought to domesticate the foreign decree and pursued a change in custody.⁴⁵⁹ The trial court domesticated the action on the assumption that both parties agreed and were proceeding pro se. Thereafter the wife sought to vacate the domestication and requested dismissal of the custody matters. The court denied this relief and eventually changed physical custody to the father.⁴⁶⁰

The court of appeals affirmed the trial court's jurisdiction to do so. First, under the authority of *Williams v. Williams*,⁴⁶¹ the court held that the jurisdictional requirement of the UCCJA did not, on the facts before it, go to subject matter. Instead, it raised the issue of jurisdiction over the case.⁴⁶² Using the same framework applicable to consent to personal jurisdiction, it held that the wife waived objection to the court's authority because she expressly consented to the trial court's power when she originally sought affirmative relief from the court.⁴⁶³ The court of appeals also justified this result in policy terms, arguing that failing to give effect to the trial court's ruling would promote forum shopping by parents unhappy with custody determinations in one jurisdiction.⁴⁶⁴

2. *Personal Jurisdiction.*—*Bartle v. HCFP Funding, Inc.*⁴⁶⁵ raised issues of preclusion and personal jurisdiction and also characterized choice of law provisions in the context of personal jurisdiction. The action was one to enforce a judgment obtained in a Maryland court proceeding against the Indiana guarantor of a sale of accounts receivable. The defendant defaulted in the action, so he never appeared and consented to the Maryland court's jurisdiction over him.⁴⁶⁶ The facts relating to personal jurisdiction were not actually litigated in the Maryland proceeding and so they did not give rise to issue preclusion on the jurisdictional questions. This meant that the guarantor could collaterally attack the validity of the Maryland judgment in the Indiana court.⁴⁶⁷

456. See *Pennoyer v. Neff*, 95 U.S. 714 (1877).

457. *Christensen*, 752 N.E.2d at 181.

458. *Id.* at 181-82.

459. *Id.*

460. *Id.*

461. 555 N.E.2d 142 (Ind. 1990).

462. *Christensen*, 752 N.E.2d at 183.

463. *Id.*

464. *Id.* at 184.

465. 756 N.E.2d 1034 (Ind. Ct. App. 2001).

466. *Id.* at 1035.

467. *Id.* at 1036.

The guarantor had no contact with Maryland other than his execution of the guaranty agreement. The plaintiff was not even a Maryland entity and there was no evidence the guarantor had any other connection with the jurisdiction.⁴⁶⁸ On the facts of the case, the court of appeals concluded that the guarantor's actions did not come within the Maryland long-arm statute which required that he transact business in the state. The threshold requirement for personal jurisdiction was not satisfied.⁴⁶⁹ Moreover, the court held that a choice of law provision is not the equivalent of a forum selection clause. Thus, the choice of law provision alone could not establish the guarantor's consent to Maryland jurisdiction.⁴⁷⁰

3. *Subject Matter Jurisdiction.*—*Lake County Sheriff's Corrections Merit Board v. Peron*⁴⁷¹ combined issues of mootness with failure to exhaust administrative remedies. In that case, a group of correctional officers sought a preliminary injunction to stay the merit board from holding disciplinary hearings before they could conduct discovery.⁴⁷² The officers were accused of leaving work without permission and falsifying time sheets, among other things. Notice was given to them only three days before the hearing.⁴⁷³ The trial court granted the injunction on the ground that the officers would be irreparably harmed and stayed proceedings for forty-five days. On appeal by one of the officers, the court ruled that the injunction had expired after forty-five days and the merit board granted an additional continuance, rendering the appeal moot.⁴⁷⁴ The court of appeals disagreed and held that the public interest exception to the mootness doctrine applied.⁴⁷⁵ It considered the issue raised—whether a stay of administrative proceedings is proper to allow discovery—to be one of great importance and likely to reoccur.⁴⁷⁶ The court also held that the trial court lacked subject matter jurisdiction because the officers aborted the administrative process and did not exhaust their administrative remedies. Thus, no special exception to the exhaustion requirement was made for discovery.⁴⁷⁷

In *Boone County Area Planning Commission v. Shelburne*,⁴⁷⁸ the question was whether the trial court abused its discretion when it ordered the planning commission to certify that it had no recommendation to make to the board of commissioners after it had a matter pending for many months. Construing Indiana Code section 36-7-4-608(b)⁴⁷⁹ and related statutes, the court of appeals held that a planning commission is statutorily required to initiate a public hearing

468. *Id.*

469. *Id.*

470. *Id.* at 1037-38.

471. 756 N.E.2d 1025 (Ind. Ct. App. 2001).

472. *Id.* at 1026-27.

473. *Id.* at 1027.

474. *Id.*

475. *Id.*

476. *Id.*

477. *Id.* at 1028-29.

478. 754 N.E.2d 576 (Ind. Ct. App. 2001).

479. IND. CODE § 36-7-4-608(b) (1998).

on a proposed zoning map amendment within sixty days.⁴⁸⁰ However, it is not required to complete all its information gathering within that time frame.⁴⁸¹ But, not only did the planning commission repeatedly delay concluding any hearing, it also decided not to take any action on the matter before it. Because the planning commission abandoned its role in the zoning process, it was not a violation of subject matter jurisdiction or an abuse of discretion for the trial court to mandate that the commission certify to the board of commissioners that it had no recommendation.⁴⁸²

In *Turner v. Richmond Power & Light Co.*,⁴⁸³ the court of appeals reversed the trial court's conclusion that it had no subject matter jurisdiction over an action brought against the Richmond Power and Light Company by a city employee. The dismissal had been made on the basis of the exclusive jurisdiction of the worker's compensation system, but the court of appeals found that the trial court had mischaracterized the nature of the utility.⁴⁸⁴ It concluded that, as a matter of law, it was not a city agency, but a hybrid entity, distinguishable enough from the city that the plaintiff was not its employee.⁴⁸⁵ The court of appeals reiterated this analysis on Petition for Rehearing⁴⁸⁶ and cited the Indiana Supreme Court's opinion in *GKN Co. v. Magness*.⁴⁸⁷ *GKN* holds that when an appellate court reviews a trial court's disposition of a case made purely on a written record, the trial court's findings of fact are not entitled to deference but are treated as issues of law.⁴⁸⁸

Grubnich v. Renner,⁴⁸⁹ discussed supra, involved an action for dental malpractice and questioned whether the trial court retained jurisdiction to grant post-judgment interest three years after entry of a judgment that did not mention interest.⁴⁹⁰ Noting that the post-judgment interest statute directs that interest accrues on the date of the verdict and that case law treats such interest as part of the money judgment, the appellate trial court found the court did have the power to assess interest when the plaintiffs sought to have their judgment enforced.⁴⁹¹

The Indiana Supreme Court has granted transfer and vacated the opinion of the court of appeals in *Green v. Hendrickson Publishers, Inc.*, which had concluded that certain counterclaims for failure to timely pay royalties were not

480. *Shelburne*, 754 N.E.2d at 581-82.

481. *Id.*

482. *Id.*

483. 756 N.E.2d 547 (Ind. Ct. App. 2001).

484. *Id.* at 558.

485. *Id.*

486. *See Turner v. Richmond Power & Light Co.*, 763 N.E.2d 1005 (Ind. Ct. App. 2002) (Petition for Rehearing).

487. 744 N.E.2d 397 (Ind. 2001).

488. *See Turner*, 763 N.E.2d at 1005.

489. 746 N.E.2d 111 (Ind. Ct. App. 2001); *see also supra* notes 372-73 and accompanying text.

490. *Grubnich*, 746 N.E.2d at 113.

491. *Id.* at 115.

copyright claims within the exclusive jurisdiction of the federal courts.⁴⁹²

*Sims v. Beamer*⁴⁹³ involved a § 1983 action traceable to a judge's denial of a request for default after the judge had entered an order changing venue. The court of appeals stated that when judicial immunity is in question, a court's jurisdiction will be broadly construed. This fosters the policy "to preserve judicial independence in the decision-making process Judicial decision-making without absolute immunity would be driven by fear of litigation and personal monetary liability."⁴⁹⁴

M. Limitation of Actions

*Allen v. Great American Reserve Insurance Co.*⁴⁹⁵ involved relating back an amendment of pleadings so as to satisfy the statute of limitations. There subagents sold tax-deferred annuities for a general life insurance agent.⁴⁹⁶ They brought actions against the general agent and the insurance company on numerous theories involving misconduct regarding misrepresentations about front-loading provisions of the annuities.⁴⁹⁷ The trial court granted the defendants partial summary judgment and the subagents appealed.⁴⁹⁸ The court of appeals concluded that the subagents' claims related back, but found that the agents did not reasonably rely on representations concerning the annuity provisions in question.⁴⁹⁹

Indiana Code section 22-3-3-27 imposes a one-year limit on modifying a worker's compensation award for permanent partial impairment awards.⁵⁰⁰ *Halteman Swim Club v. Duguid*⁵⁰¹ raised the question of whether this limit also applies to claims for medical expenses incurred after the permanent partial impairment award under Indiana Code section 22-3-3-4(c).⁵⁰² It showed again the courts' use of the doctrine of legislative acquiescence.

Twenty years previously, in *Gregg v. Sun Oil Co.*,⁵⁰³ the court of appeals had decided that claims for medical expenses can be brought if the claim "is filed within one year from the last day on which compensation was paid, whether under the original award or a previous modification."⁵⁰⁴ Thereafter in *Berry v.*

492. *Green v. Hendrickson Publishers, Inc.*, 751 N.E.2d 815 (Ind. App. 2001), *trans. granted*, 2002 WL 1397891 (Ind. Jun 27, 2002) (NO. 79S02-0206-CV-352).

493. 757 N.E. 2d 1021 (Ind. App. 2001).

494. *Id.* at 1024.

495. 739 N.E.2d 1080 (Ind. Ct. App. 2000).

496. *Id.* at 1081-82.

497. *Id.* at 1082.

498. *Id.* at 1083.

499. *Id.* at 1085.

500. IND. CODE § 22-3-3-27 (1998).

501. 757 N.E.2d 1017 (Ind. Ct. App. 2001).

502. IND. CODE § 22-3-3-27(c) (1998).

503. 388 N.E.2d 588 (Ind. App. 1979).

504. *Gregg*, 388 N.E.2d at 590.

Anaconda Corp.,⁵⁰⁵ the question was whether the one-year statute of limitations runs from the date of the last benefit payment or from the date of the last medical expense payment. The court concluded that the operative date was the last benefit payment date.⁵⁰⁶

In *Halterman Swim Club*, the court of appeals characterized the distinction between medical expenses and the permanent partial disability award as “a distinction without a difference” under *Gregg*.⁵⁰⁷ Therefore plaintiff would have to provide a significant reason for failing to follow *Gregg* and related cases. Because the claimant presented no justification for deviating from the legislature’s tacit agreement with the courts’ interpretation, the Worker’s Compensation Board erred when it denied the employer’s motion to dismiss.⁵⁰⁸

In *Rogers v. Mendel*⁵⁰⁹ and following *Boggs v. Tri-State Radiology, Inc.*,⁵¹⁰ the court of appeals concluded that the two-year, occurrence-based limitations of action under the medical malpractice statute was constitutional as applied where, in a lawsuit over alleged malpractice in connection with uterine cancer, the plaintiff discovered or should have discovered her possible claim within ten months of the running of the period. In contrast, in *Shah v. Harris*,⁵¹¹ the plaintiff was allowed to have the limitations period run from the date of discovery and not the occurrence, where seven years previously her doctor had misdiagnosed her multiple sclerosis as a vitamin deficiency and she gained no information within the two-year period to put her on notice of a potential claim.

In *Lusk v. Swanson*,⁵¹² the court of appeals concluded that the standard form letter sent to the plaintiff from the Indiana Department of Insurance concerning her medical malpractice claim and stated in hypothetical terms, for example, “If Indiana Code 34-18-1-1, et seq. is applicable to this claim,” did not toll the running of the statute of limitations on her action against a provider who was not covered by the Medical Malpractice Act.

N. Local Rules

In *Spudich v. Northern Indiana Public Service Co.*,⁵¹³ plaintiff Spudich was stringing lights on the trees at the East Chicago City Hall building. He was hurt by power from noninsulated lines owned by the Northern Indiana Public Service Commission (“NIPSCO”) while standing in an aerial bucket.⁵¹⁴ One issue that developed in the case was whether expert testimony would establish a duty on

505. 534 N.E.2d 250 (Ind. Ct. App. 1989)

506. *Id.* at 253.

507. *Halterman Swim Club v. Duguid*, 757 N.E.2d 1017, 1020 (Ind. Ct. App. 2001).

508. *Id.* at 1020.

509. 758 N.E.2d 946 (Ind. Ct. App. 2001).

510. 730 N.E.2d 692, 694 (Ind. 2000).

511. 758 N.E.2d 953 (Ind. Ct. App. 2001).

512. 753 N.E.2d 748 (Ind. Ct. App. 2001).

513. 745 N.E.2d 281 (Ind. Ct. App. 2001).

514. *Id.* at 284-85.

NIPSCO's part to insulate wires within a certain distance from the tree where Spudich was working. During discovery, NIPSCO asked Spudich to designate experts he would call at trial.⁵¹⁵ This information had not been provided when NIPSCO moved for summary judgment.⁵¹⁶ Spudich then filed supplemental interrogatory answers in which he designated an expert witness, and then opposed NIPSCO's motion, arguing, among other things, that NIPSCO had a duty to insulate lines within a certain distance from trees. He used the affidavit of the expert to support his opposition.⁵¹⁷

Lake County Local Rule 4 permits the moving party to file a reply to the nonmoving party's opposition. Conversely, Trial Rule 56 makes no mention of a reply. After deposing the expert, NIPSCO filed a reply in which it designated evidence in support of its motion that it had not previously used.⁵¹⁸ The trial court granted NIPSCO summary judgment and the plaintiff appealed. He argued that Local Rule 4 was in conflict with Rule 56.

The court of appeals stated that, as a general proposition, Indiana Trial Rules trump contrary local rules, although Trial Rule 81 itself allows for local rules to be promulgated.⁵¹⁹ The question is one of consistency. The test established by the Indiana Supreme Court is whether it is possible to apply both a trial rule and a local rule at the same time.⁵²⁰ In the case of Rule 56, a reply is neither authorized nor prohibited. However, the court of appeals noted that the rule contemplates supplemental information being provided, so that "additional evidence after initial filings is contemplated . . . and the Local Rule [4] merely provides a mechanism for filing that evidence not inconsistent with the Trial Rule."⁵²¹ Spudich also argued that even if Local Rule 4 were proper, the content of NIPSCO's reply still violated Rule 56(C),⁵²² which speaks of making evidentiary designations at the time the motion is filed. The court of appeals rejected this argument as well, again relying on that portion of Rule 56 which authorizes supplementation.⁵²³

O. Preclusion

*City of Anderson v. Davis*⁵²⁴ was a case that arose out of a police dog's attack of an officer.⁵²⁵ The plaintiff officer charged that the dog should not have been used because his propensity to attack was known. He also claimed excessive

515. *Id.* at 285.

516. *Id.*

517. *Id.*

518. *Id.*

519. *Id.* at 286.

520. *Id.* (citing *State v. Bridenhager*, 279 N.E.2d 794, 796 (Ind. 1972)).

521. *Id.* at 287.

522. *Id.* at 288.

523. *Id.* at 288-89.

524. 743 N.E.2d 359 (Ind. Ct. App. 2001).

525. *Id.* at 288-89.

force.⁵²⁶ The officer had previously filed a civil rights claim in federal court that was dismissed on summary judgment.⁵²⁷ The court of appeals held that the officer's argument concerning knowledge of the dog's propensity was a negligence claim barred by governmental immunity. While the court conceded that the status of an excessive force claim in the context of immunity is not clear, it concluded that the plaintiff was collaterally estopped by the federal case on that theory.⁵²⁸ Indiana recognizes the doctrine of collateral estoppel (issue preclusion) in an inter-system context between state and federal courts. Because the same issues were litigated in the federal action and the officer had a full and fair opportunity to develop them there, he was precluded from relitigating them in the Indiana court.⁵²⁹ The court also stated that appellate review of governmental claims of immunity is de novo and that no particular deference is given the trial court determination of the issue.⁵³⁰

*In re Adoption of A.N.S.*⁵³¹ involved the concurrent jurisdiction of a court determining paternity and a court authorizing adoption. The biological father notified the mother of his intention to contest the adoption of a child born out of wedlock, but did not begin a paternity proceeding until a few days after the time required by statute.⁵³² The mother contested paternity by a summary judgment motion, which argued that the father's notification came too late, but her motion was denied. Later she initiated a separate adoption action in another court of the same county and argued that the father should not be allowed to intervene because he had not objected to the adoption within the statutory period. The adoption court eventually allowed intervention and the mother appealed.⁵³³ The appellate court did not reach the merits of the case, but instead determined that the prior proceeding precluded relitigation of the issue of paternity, foreclosing the adoption. The court recognized the concurrent jurisdiction of both courts, but treated preclusion as dispositive.⁵³⁴

P. Real Party in Interest

*IDEM v. Jennings Northwest Regulatory Utilities*⁵³⁵ involved a dispute over the status of a water and sewage utility district. The Indiana Department of Environmental Management ("IDEM") originally established the utility such that

526. *Id.* at 361.

527. *Id.*

528. *Id.* at 366.

529. *Id.*

530. *Id.* at 362.

531. 741 N.E.2d 780 (Ind. Ct. App. 2001).

532. *Id.* at 782. See IND. CODE § 31-3-1-6.4 (repealed and reenacted as IND. CODE § 31-19-3-4 (1998)). The statute requires the putative father to establish paternity by action to contest an adoption within thirty days of notice.

533. *A.N.S.*, 741 N.E.2d at 784.

534. *Id.* at 787.

535. 760 N.E.2d 184 (Ind. Ct. App. 2001).

its board would be elected by customers and it would be independent of the county commissioners. Later, IDEM sought to change that structure by issuing an "Amended Order" to its previous final order of agency action.⁵³⁶ The utility filed a petition for judicial review of the Amended Order and IDEM defended on the bases that the utility lacked standing to sue and was not the real party in interest. The petition was dismissed, and the utility amended its petition, but only after the thirty-day period specified in the Administrative Orders and Procedures Act for judicial review. The trial court proceeded with the action and set aside the Amended Order. IDEM appealed on the ground of lack of subject matter jurisdiction.⁵³⁷

The court of appeals agreed with IDEM that the later petition could not relate back to the earlier one, in order to bring the utility's action within the time period for seeking judicial review of agency action. It thus rejected the argument that the dismissal should have been treated as a simple 12(B)(6) failure to state a claim that could be remedied.⁵³⁸ However, it disagreed that the original petition was subject to dismissal, for it found that the utility did have standing to sue and was the real party in interest. The utility had standing under Indiana Code section 4-21.5-5-3(a)(4) as an entity "aggrieved or adversely affected by the agency action."⁵³⁹ This was because the Amended Order removed the utility's independence, which was prejudicial. Moreover, there was standing because the utility should have received notice of the action as the entity created by the original order and would be affected by its amendment.⁵⁴⁰ For similar reasons, the utility was the real party in interest, for the right threatened—to be independent—was owned by the utility.⁵⁴¹

Q. Right to Counsel

In a decision that raised some of the issues the Indiana Supreme Court grappled with in *Sholes v. Sholes*,⁵⁴² the court in *Lattimore v. Amsler*⁵⁴³ held that the pauper statute creates an independent right to court-appointed counsel. The case involved a father who filed a pro se proceeding to establish paternity, which was dismissed. The court believed the opinion in *Holmes v. Jones*⁵⁴⁴ required the counsel, so that once the trial court found the father indigent and waived the filing fee, it had no discretion to deny him representation. How this opinion should be read in light of the Indiana Supreme Court's refinement of these issues in *Sholes* is an open question.

536. *Id.* at 186.

537. *Id.* at 186-87.

538. *Id.* at 187-88.

539. *Id.* at 188; *see also* IND. CODE § 4-21.5-5-3(a)(4) (1998).

540. *Jennings*, 760 N.E.2d at 188-89.

541. *Id.*

542. 760 N.E.2d 156 (Ind. 2001). *See also supra* notes 58-84 and accompanying text.

543. 758 N.E. 2d 568 (Ind. Ct. App. 2001).

544. 719 N.E.2d 843 (Ind. Ct. App. 1999).

R. Service/Notice

In a dispute over a permanent protective order issued against a father, the court of appeals construed proper service under Trial Rule 4.1(A)(3). In *Hill v. Ramey*,⁵⁴⁵ the father, Hill, was served with a temporary protective order and later with a permanent protective order by the sheriff leaving a copy of the papers with his parents at their home. However, Hill was living in Louisville, Kentucky, not with his parents, at the time of service.⁵⁴⁶ He requested relief from the default judgment leading to the permanent protective order on the grounds of lack of notice. This was denied.⁵⁴⁷ The court of appeals reversed and held that even if service was made at Hill's parents home on the theory that it was his last known address, this was not sufficient to satisfy the requirement that it be made at his "dwelling house or usual place of abode."⁵⁴⁸ Thus, no personal jurisdiction had ever been established over Hill, rendering the court's action void. This was true even if he had received actual notice of the proceeding. *Hill* is a good example of the fact that the procedures for service are strictly construed.⁵⁴⁹

*Boczar v. Reuben*⁵⁵⁰ involved a lawsuit by an attorney to collect his fee. The court of appeals made a number of points concerning personal jurisdiction and service. In that action, the plaintiff attorney used abode service to acquire jurisdiction over the defendants but did not follow it up by mailing a copy of the summons to them as required by Indiana Trial Rule 4.1(B). Distinguishing the decision in *Barrow v. Pennington*,⁵⁵¹ the court concluded that this failure did not deprive the court of personal jurisdiction over the defendants where they received actual notice and the "exigencies" of *Barrow* were not present.⁵⁵² In *Volunteers of America v. Premier Auto Acceptance Corp.*,⁵⁵³ the appellate court opined that in a garnishment action, a summons addressed simply to the employer and not to a specific officer or person is inadequate for service where the employer did not have actual notice of the proceeding.

S. Settlement

Last year in *Vernon v. Acton*, the Indiana Supreme Court established that a settlement agreement need not be in writing to be enforceable.⁵⁵⁴ The court of appeals applied this principle in a novel context in *In re Estate of Skalka*.⁵⁵⁵ The case involved a family dispute over real estate and an action to partition. During

545. 744 N.E.2d 509 (Ind. Ct. App. 2001).

546. *Id.* at 510.

547. *Id.* at 511.

548. *Id.*

549. *Id.* at 512.

550. 742 N.E.2d 1010 (Ind. Ct. App. 2001).

551. 700 N.E.2d 477 (Ind. Ct. App. 1998).

552. *Boczar* at 1015-16.

553. 755 N.E.2d 656 (Ind. Ct. App. 2001).

554. 732 N.E.2d 805, 809 (Ind. 2000).

555. 751 N.E.2d 769 (Ind. Ct. App. 2001).

the pretrial conference, the trial judge met with the parties without their attorneys present and reached a settlement.⁵⁵⁶ Thereafter, the plaintiffs' attorney reduced the settlement agreement to writing, but the parties never signed it. Later, the plaintiffs alleged that they had not entered into a settlement agreement. Nonetheless, the court enforced one and made supportive findings. Plaintiffs appealed, arguing among other things, that there was insufficient evidence they had agreed to settle, that the judge acted as a mediator in violation of the ADR rules, and that in meeting with them without their lawyers, the judge improperly pressured them to settle.

The court of appeals rejected all arguments. First, and given the deference accorded to trial court findings, it concluded that there was sufficient evidence to support the judge's opinion that there was a settlement, particularly because plaintiffs' own lawyer drafted an agreement incorporating it. That fact removed any concern over undue pressure. If the plaintiffs did not really agree to a settlement, their lawyer would not have drafted the document.⁵⁵⁷ Finally, the court rejected the notion that the judge functioned as a formal mediator in violation of the ADR rules. Although in remarks the judge spoke of "no longer going to be the mediator"⁵⁵⁸ this statement, in context, showed that he was simply attempting to assist the parties to reach settlement.

T. Standard of Review

In *Justiniano v. Williams*⁵⁵⁹ the court of appeals applied the principle that review of a paper record requires no special deference on findings in the context of a worker's compensation proceeding. In *Walker v. State*, the Indiana Supreme Court held that where there is no evidentiary hearing below, the facts are not in dispute, and review is of a documentary record, the questions on appeal are akin to legal ones.⁵⁶⁰ The court of appeals stated that in making such "legal analysis" under the Worker's Compensation Act, the doubts as to the Act's meaning should be construed in favor of coverage to foster the humane purpose of worker's compensation.⁵⁶¹

In *Justiniano*, a worker whose legs were injured in a single accident, argued that the board did not give him a large enough award because it used the wrong standard to judge his degree of impairment.⁵⁶² The court of appeals disagreed, noting that the award made was supported by the statement of plaintiff's own doctor as to the percentage of his impairment in terms of the "whole body standard."⁵⁶³ The board's hearing judge was not required to accept a stipulation

556. *Id.* at 770.

557. *Id.* at 772-73.

558. *Id.* at 772.

559. 760 N.E.2d 225 (Ind. Ct. App. 2001).

560. 694 N.E.2d 258, 266 (Ind. 1998).

561. *Justiniano*, 760 N.E.2d at 228.

562. *Id.* at 227.

563. *Id.* at 228-29.

that showed a larger injury, but could make independent inquiry into the matter by analyzing the claimant's medical records, which findings could then be adopted by the board.⁵⁶⁴

Although it ultimately reversed the trial court's disposition, *Homer v. Burman*⁵⁶⁵ reiterates that on appellate review, extreme deference is generally accorded the actions of the Small Claims Divisions of Indiana courts of general jurisdiction: "Indiana Small Claims Rule 8(A) provides for informal hearings with relaxed rules of procedure in order that speedy justice can be dispensed. As a result, we are particularly deferential to the trial court's judgment."⁵⁶⁶

U. Standard of Review Where No Appellee Brief

What should the response of the courts of appeals be when an appeal is taken but the winner below, the appellee, files no brief in opposition? Unfortunately, this is a frequently recurring situation. The appellate decisions are in agreement that in that circumstance, a lesser showing is required of an appellant to obtain a reversal. All that need be demonstrated is that there is a "prima facie" showing of error below. As the court explained in *Muncie Indiana Transit Authority v. Smith*,⁵⁶⁷

At the outset we note that Smith has failed to file an appellee's brief. When an appellee fails to submit a brief in accordance with our rules, we need not undertake the burden of developing an argument for the appellee. Rather, Indiana courts have long applied a less stringent standard of review with respect to showings of reversible error when an appellee fails to file a brief. Thus, we may reverse if the appellant is able to show *prima facie* error. In this context, "prima facie" is defined as "at first sight, on first appearance, or on the face of it."

As these cases show, this will continue to be the approach even under the new Appellate Rules.

V. Standing

*Cittadine v. Indiana Department of Transportation*⁵⁶⁸ presented the question whether a local Elkhart citizen could use the public standing doctrine to force the Indiana Department of Transportation (INDOT) to prevent a railroad from placing rolling stock on an interchange on Elkhart city streets. In general, the public standing doctrine allows a member of the public with no specific interest or injury at stake to initiate litigation to enforce a public right. Because of inquiries from acquaintances, plaintiff Cittadine sought a writ of mandamus

564. *Id.* at 229.

565. 743 N.E.2d 1144 (Ind. Ct. App. 2001).

566. *Id.* at 1146.

567. 743 N.E.2d 1214, 1216 (Ind. Ct. App. 2001) (citing *Robinson v. Valladares*, 738 N.E.2d 278, 280 (Ind. Ct. App. 2000)) (all other citations omitted).

568. 750 N.E.2d 893 (Ind. Ct. App. 2001).

requiring INDOT to interpret Indiana Code section 8-6-7.6-1 (governing obstructions of motorist views at railway-highway intersections) to prevent the railroad practice. He specifically relied on the public standing doctrine to sue.⁵⁶⁹ But according to the court of appeals, the Indiana Supreme Court has significantly narrowed the doctrine in *Pence v. State*,⁵⁷⁰ and now requires extreme circumstances to justify a lawsuit based solely on taxpayer or citizen status. The rationale for this approach is to protect state separation of powers. The court noted that there were legitimate reasons for the manner in which INDOT acted, and it exercised its executive branch power consistently with its authority, so the suit would not be allowed.⁵⁷¹

In *In re Guardianship of K.T.*,⁵⁷² the court of appeals reiterated that the fundamental principles of standing are whether the person seeking relief has a demonstrable injury in respect of the lawsuit and is the proper person to invoke the court's power for such relief. Under those guidelines, it concluded that the natural father and custodial parent of a child born out of wedlock had standing to seek a modification of the court order allowing visitation by the child's maternal grandparents, who had been the previous guardians of the child.

W. Summary Judgment

In *Board of Commissioners of the County of Harrison v. Lowe*,⁵⁷³ the trial court granted the county partial summary judgment on the ground it was "legislatively" immune from suit arising from an auto accident under the Indiana Tort Claims Act.⁵⁷⁴ However, the county was not totally immune because posting warning signs regarding road conditions is not statutorily mandated. On appeal, the county argued that summary judgment in its favor was still appropriate, because the plaintiff had not designated the warning issue as a material fact when opposing the motion.⁵⁷⁵ The court of appeals disagreed, citing to *Cavinder Elevators, Inc. v. Hall*,⁵⁷⁶ a 2000 decision of the Indiana Supreme Court that made it clear the nonmoving party has no obligation to present opposition evidence to avoid summary judgment, if the moving party has not first met its burden of showing no genuine issue of material fact.⁵⁷⁷ The case also contains an exhaustive discussion of the history of immunity under the Act and the legislative exception.⁵⁷⁸

569. *Id.* at 895.

570. 652 N.E.2d 486, 488 (Ind. 1995).

571. *Cittadine*, 750 N.E.2d at 896.

572. 743 N.E.2d 348 (Ind. Ct. App. 2001).

573. 753 N.E.2d 708 (Ind. Ct. App. 2001).

574. *Id.* at 710-11.

575. *Id.* at 720.

576. 726 N.E.2d 285, 290 (Ind. 2000).

577. *Lowe*, 753 N.E.2d at 720.

578. *Id.* at 716-19.

In *Steuben County Waste Watchers v. Family Development Ltd.*,⁵⁷⁹ the controversy was over whether a developer was required to obtain an improvement location permit before building a landfill. The county and environmental groups sued to require the permit. The developer moved for summary judgment, which the trial court granted.⁵⁸⁰ In opposition to the motion for summary judgment, plaintiffs attached affidavits that referred to the prior condition of the landfill and that also included statements from the county zoning administrator as to the steps by which the permit could be obtained.⁵⁸¹ On review, the Indiana Court of Appeals held that the trial court had properly struck these materials. The prior condition of the landfill was irrelevant to the building of a subsequent landfill, and the county zoning commissioner's comments represented a statement of legal conclusions, not facts.⁵⁸² In reviewing the adequacy of the administrator's affidavit, the court of appeals noted that, normally, not even expert witnesses are competent to testify as to legal conclusions.⁵⁸³ Although it agreed with the trial court's striking of the affidavits, the court reversed, stressing that a reviewing court gives no special deference to a trial court's interpretation of a statute.⁵⁸⁴

In *Chandler v. Dillon*,⁵⁸⁵ the trial court granted the plaintiff an extension of time to respond to a motion for summary judgment and then rescinded the extension, giving the plaintiff only one day to oppose the motion. Thereafter the trial court granted summary judgment.⁵⁸⁶ It gave numerous reasons for the rescission: that the extension was "inconsistent" with prior orders establishing a case management schedule; that the order had a stamped, not written, signature; and that the order was issued without a hearing.⁵⁸⁷ The court of appeals concluded that such a short time to respond after the grant of an extension deprived the plaintiff of due process.⁵⁸⁸ It also rejected the trial court's reasons for the rescission.⁵⁸⁹ It noted that under *State ex rel. Peacock v. Marion Superior Court, Civil Div., Room No. 5*,⁵⁹⁰ a stamped signature is given the same effect as a written one, absent specific evidence of irregularity.⁵⁹¹ Nothing in the applicable trial rules for enlarging time or granting summary judgment requires a hearing before an extension to respond to a summary judgment motion may be given.

579. 753 N.E.2d 693 (Ind. Ct. App. 2001).

580. *Id.* at 696.

581. *Id.*

582. *Id.* at 699.

583. *Id.* at 697-700.

584. *Id.*

585. 754 N.E.2d 1002 (Ind. Ct. App. 2001).

586. *Id.* at 1004.

587. *Id.* at 1005-06.

588. *Id.* at 1006.

589. *Id.* (citing *Harder v. Estate of Rafferty*, 542 N.E.2d 232, 234 (Ind. Ct. App. 1989)).

590. 490 N.E.2d 1094, 1096 (Ind. 1986).

591. *Chandler*, 754 N.E.2d at 1005.

*Azhar v. Town of Fishers*⁵⁹² involved a citizen lawsuit for violation of the Open Door Act against the town, town council, and an ad hoc committee of the town council. The trial court granted defendants summary judgment.⁵⁹³ The court of appeals concluded that the plaintiff was not prejudiced when the defendants' motion to dismiss was converted to summary judgment motion without express notice.⁵⁹⁴ This was because he was given adequate time to respond. Moreover, the obvious use of evidence outside the pleadings should have put the plaintiff on notice that the motion was actually a summary judgment request.⁵⁹⁵ However, summary judgment was unwarranted because genuine issues of material fact existed regarding whether the defendants had cured their previous violation of open door requirements.⁵⁹⁶

In *Deutch v. Fleming*⁵⁹⁷ the trial court granted summary judgment, but the court of appeals reversed concluding that there were genuine issues of material fact as to breach of duty, causation, and elements of *res ipsa loquitur*. In so doing, the court described what it characterized as ambiguity in the standards for granting summary judgment.⁵⁹⁸ The court was particularly critical of the Indiana Supreme Court's opinion in *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*,⁵⁹⁹ which prohibits a movant on summary judgment from meeting its *prima facie* burden by merely pointing out that a plaintiff has failed to produce evidence raising material issues of fact on essential elements of a claim. For the *Deutch* court, this created the following reality: "Thus, applying the standard as articulated in *Jarboe* permits a plaintiff who has no evidence supporting his claim to proceed to trial, thereby wasting the parties' time and money as well as judicial resources. One would hope that this anomaly would be addressed by the supreme court."⁶⁰⁰ Thus, it requested direction from the Indiana Supreme Court on these questions.⁶⁰¹

A number of appellate cases reiterate that simply because cross-motions for summary judgment are filed, this does not change the standard of review and each motion should be scrutinized on its own under the applicable requirements for summary judgment.⁶⁰²

592. 744 N.E.2d 947 (Ind. Ct. App. 2001).

593. *Id.* at 950.

594. *Id.* at 950-51.

595. *Id.*

596. *Id.* at 953.

597. 746 N.E.2d 993 (Ind. Ct. App. 2001).

598. *Id.* at 999-1000.

599. 644 N.E.2d 118, 123 (Ind. 1994).

600. *Deutch*, 746 N.E. 2d at 1000.

601. *Id.* at 1000.

602. *See, e.g.*, *Conseco Fin. Servicing Corp. v. Old Nat'l Bank*, 754 N.E.2d 997 (Ind. App. 2001); *Hoosier Ins. Co. v. Audiology Found. of Am.*, 745 N.E.2d 300, 306 (Ind. Ct. App. 2001).

X. Tort Claims Act

In *Indiana Department of Transportation v. Shelly & Sands, Inc.*,⁶⁰³ an action in which a contractor sued the Department of Transportation on theories of constructive fraud and estoppel, the court of appeals held that such claims, when grounded in tortious conduct, are still subject to the notice requirements of the Tort Claims Act.⁶⁰⁴

*Porter v. Fort Wayne Community Schools*⁶⁰⁵ involved a collision between a car and a school bus. On the advice of the school district's insurance adjuster, the driver's lawyer sent a letter to the defendant that included detailed information about the accident, fairly inferred that a lawsuit was contemplated, but did not formally state an intent to sue.⁶⁰⁶ The trial court granted summary judgment for failure to provide notice under the ITCA. The court of appeals reversed, concluding that the letter substantially complied with the notice requirements.⁶⁰⁷ In so holding, the court noted that compliance with the Act is a preliminary procedural issue that must be resolved prior to trial.⁶⁰⁸

III. INDIANA'S NEW JURY RULES

The "Juries for the 21st Century" project has culminated in the approval of new Indiana Jury Rules by the Indiana Supreme Court.⁶⁰⁹ It was undertaken jointly by the Citizens Commission for the Future of Indiana Courts ("CCFC") and the Judicial Administration Committee of the Judicial Conference (both collectively referred to as the "Commission")⁶¹⁰ to promote a number of goals. Among these were to make all rules affecting juries accessible in one place, to increase public understanding of the role of jurors in the trial process, to expand jury service, to diversify the jury pool, to increase respect for jurors, and to protect juror privacy and safety.⁶¹¹ The new rules take effect on January 1, 2003.

The Indiana Jury Rules introduce new matters and preserve features of current practice.⁶¹² Many of the Commission's recommendations became rules, though not all. The Commission felt strongly that virtually no exemptions from jury service should be granted. Instead, a process of deferral should be utilized when undue hardship, extreme inconvenience, or public necessity would support

603. 756 N.E.2d 1063 (Ind. Ct. App. 2001).

604. *Id.* at 1077.

605. 743 N.E.2d 341 (Ind. Ct. App. 2001).

606. *Id.* at 342-43.

607. *Id.* at 345.

608. *Id.* at 344.

609. Press Release, The Indiana Supreme Court Adopts Most Rules Proposed by Coalition of Citizens and Judges [hereinafter CCFC Press Release], copy on file with the *Indiana Law Review*. See also *Reports*, *supra* note 2.

610. See *Reports*, *supra* note 2, at 1.

611. See CCFC Press Release, *supra* note 609, at 1-2.

612. *Id.* at 1.

a delay in a citizen's participation.⁶¹³ The Indiana Jury Rules strictly limit exemptions from service to those specifically enumerated by statute. However, the Indiana Supreme Court felt that it did not have the power to eliminate the substantive right not to serve accorded to some citizens by the legislature.⁶¹⁴ As a compromise, where a specific exemption does *not* apply and burden is alleged to justify nonparticipation, rather than completely excusing a potential juror, service will be deferred.⁶¹⁵

Innovative rules to educate the jury on its role and to increase its understanding of the processes and substantive issues unfolding during trial will affect trial practice.⁶¹⁶ While these changes might improve functioning, they also allocate more responsibility to the trial judge and might alter the order of classic procedures such as the giving of final instructions. Juror understanding and efficiency could be being bought at the expense of the trial lawyer's ability to control the presentation of his or her case. For instance, upon welcoming the panel, the trial judge must now immediately introduce the jury to the case.⁶¹⁷ The introduction must include a description of the nature of the matter and applicable standards and burdens of proof, among other things.⁶¹⁸ At this early stage, and with the court's consent, the parties are allowed to present "mini" opening statements.⁶¹⁹ Carrying forward this same theme, Indiana Jury Rule 20 provides that the court shall again guide the jury before opening statements by reading instructions on the issues for trial, burdens of proof, credibility of witnesses and how to weigh evidence.⁶²⁰ The trial judge must also inform jurors that they themselves may seek to ask questions by giving the questions in writing to the judge.⁶²¹ Rule 23 authorizes the judge to issue to jurors a trial book which can include instructions, witness lists, and copies of all admitted exhibits.⁶²² The Commission also recommended a new chronology for final instructions. It would have had the trial judge give the instructions *prior* to closing arguments to provide jurors with a framework for the arguments.⁶²³ The Indiana Supreme Court did not mandate this sequence, but instead left it to the discretion of the trial judge.⁶²⁴ According to the Commission, the purpose of the repeated guidance of these rules is to increase jury understanding: "Repetition of complex legal issues, such as standards of proof, are [sic] expected to assist jurors to learn

613. *Compare Reports*, *supra* note 2, at 6, 34-37, 65-66, with IND. JURY R. 6 (effective Jan. 1, 2003).

614. See CCFC Press Release, *supra* note 609, at 1.

615. IND. JURY R. 7 (effective Jan. 1, 2003).

616. See *Reports*, *supra* note 2, at 49-55.

617. IND. JURY R. 14 (effective Jan. 1, 2003).

618. *Id.*

619. *Id.*

620. IND. JURY R. 20 (effective Jan. 1, 2003).

621. *Id.*

622. IND. JURY R. 23 (effective Jan. 1, 2003).

623. See CCFC Press Release, *supra* note 609, at 2.

624. IND. JURY R. 27 (effective Jan. 1, 2003).

unfamiliar concepts and apply them during deliberations."⁶²⁵

Another important topic and one allied to exemptions and excusals is the need to diversify the jury pool. Survey results obtained by the Commission⁶²⁶ and citizen comments at public hearings around the state showed that Indiana citizens are deeply concerned that jury panels become more demographically representative, not just in terms of race, but also in terms of vocation, life experience, and economic background.⁶²⁷ To achieve this, the Indiana Jury Rules direct that the jury pool be derived not just from voter registration lists, but also from lists of utility customers, property taxpayers, income tax form mailing lists, motor vehicle registrations and drivers' licenses, as well as city and telephone directories.⁶²⁸

The Commission recognized that the practice of peremptory challenges undermines jury diversity, but could not agree on a solution to the problem.⁶²⁹ Instead, it recommended that the court require documentation of juror disqualification, exemptions and deferrals,⁶³⁰ and that the process of jury selection be recorded, including sidebar conferences,⁶³¹ so that a study could be made. The court enacted these suggestions in Indiana Jury Rules 8 and 12.⁶³² It is interesting to note that in *Ashabraner v. Bowers*,⁶³³ just decided in 2001, the court insisted on strict adherence to the *Batson*⁶³⁴ doctrine, which is designed to reduce peremptory challenges motivated by racial bias.

On the issues of jury respect, privacy, and safety, a number of changes have been instituted. According to the Commission, respect for jurors is increased by Rule 4, which requires a minimum of two weeks notice of potential service; Rule 9, which limits service to one day or one trial; Rule 7, which allows deferrals for service whose timing works a hardship on the citizen (e.g., farmers in the growing season; accountants at tax time); and Rule 3, which prevents bystanders from being conscripted for jury service.⁶³⁵ Issues of juror privacy and safety can coalesce. Rule 10 provides that personal information obtained about jurors be kept confidential, unless discussed in open court.⁶³⁶ To reduce hostility to the jury, Rule 30 now requires that the verdict be read aloud by the judge, rather than the foreperson.⁶³⁷

625. See CCFC Press Release, *supra* note 609, at 2.

626. See *Reports*, *supra* note 2, at 26-31, 37-41.

627. See CCFC Press Release, *supra* note 609, at 2.

628. IND. JURY R. 2 (effective Jan. 1, 2003).

629. See *Reports*, *supra* note 2, at 37-41.

630. See CCFC Press Release, *supra* note 609, at 2.

631. *Id.*

632. IND. JURY R. 8, 12 (effective Jan. 1, 2003).

633. 753 N.E.2d 662 (Ind. 2001). See *supra* Part I.A.4.

634. 476 U.S. 79 (1986).

635. See *Reports*, *supra* note 2, at 30; CCFC Press Release, *supra* note 609, at 4.

636. IND. JURY R. 10 (effective Jan. 1, 2003).

637. IND. JURY R. 30 (effective Jan. 1, 2003).

IV. OTHER INDIANA RULE CHANGES

On April 1, 2002, a series of changes to the Indiana Trial Rules became effective. The most important of these involves Trial Rule 3 and parallels the Indiana Supreme Court's decision in *Ray-Hayes*,⁶³⁸ which required tender of the summons to the clerk of the court to commence an action. Now the rule expressly provides that a civil action is not begun unless the complaint is filed along with "payment of the prescribed filing fee or filing an order waiving the filing fee, and, where service of process is required, by furnishing to the clerk as many copies of the complaint and summons as are necessary."⁶³⁹ This change makes it clear that a litigant can no longer toll the statutes of limitations while, at the same time, delaying tender of the summons to the clerk of the court. Where practitioners initiate an action at the last moment, failure to tender the summons until after the statute has run will be fatal. Trial Rule 4(B) has also been amended to conform to the changes in Rule 3 and remove any ambiguity as to the required chronology.⁶⁴⁰

In response to changing technology, Rule 5(E), which defines "filing with the court," allows electronic filings not just by facsimile, but by all forms of electronic transmission. This is consistent with Indiana's recent adoption of the Uniform Electronic Transactions Act,⁶⁴¹ which contains provisions designed to encourage electronic records for governmental entities.⁶⁴² Recognizing the heavy use of express delivery services by attorneys, new Rule 5(E)(4) allows filing with the clerk by use of "any third-party commercial carrier" so long as service is to take place within three calendar days.⁶⁴³ Renumbered Rule 5(E)(5) makes third-party commercial carrier filing effective on deposit with the carrier. However, if any method of filing with the clerk other than personal delivery is employed, parties must retain proof of filing.⁶⁴⁴

Like the changes to Rule 3, amendments to Trial Rule 15(C) will impact the ability of parties to meet the statute of limitations. Previously, when a new party was to be added by amending a pleading, that amendment would not relate back to the date of commencement unless, within the limitations period, the new party both received notice of the lawsuit so as not to be prejudiced, and was or should have been aware that he or she was mistakenly omitted from the action.⁶⁴⁵ Now these requirements must be met within 120 days of "commencement of the action."⁶⁴⁶

638. 753 N.E.2d 662 (Ind. 2001).

639. IND. TRIAL R. 3 (amended 2001).

640. IND. TRIAL R. 4(B) (amended 2001).

641. IND. CODE § 26-2-8 (1998 & Supp. 2001).

642. *Id.*

643. IND. TRIAL R. 5(E)(4) (amended 2001).

644. IND. TRIAL R. 5(E)(5) (amended 2001).

645. IND. TRIAL R. 15(C) (amended 2001).

646. *Id.*

Last year in *Old Indiana Ltd. Liability Co. v. Montano*,⁶⁴⁷ the court of appeals strictly construed the language of Rule 35 on mental and physical exams to require all examinations thereunder to be performed by a licensed physician.⁶⁴⁸ This interpretation prevented important categories of professionals, such as psychologists, physical therapists, vocational specialists, and the like, from eligibility to conduct court-ordered examinations. Amended Rule 35 now specifies that a court may order an examination by any "suitably licensed or certified examiner."⁶⁴⁹

Trial Rule 53.1 imposes time limits on trial courts for ruling on motions.⁶⁵⁰ It has been amended to better accommodate the effects of alternative dispute resolution ("ADR") on the chronology of cases. Now, the time from the point when a matter is referred to ADR until the ADR report is submitted is excluded for purposes of computing the time when a judge must rule on a motion.⁶⁵¹

As the previous discussion of *Sholes v. Sholes*⁶⁵² shows, Indiana Trial Rule 60.5 is a unique provision that affords courts a procedure for mandating the expenditure of public funds for the operation of the court or court-related activities.⁶⁵³ The rule specifies that when a court seeks to mandate funds, an order to show cause why the appropriation should not be made shall issue and a bench trial should be undertaken, presided over by a special judge.⁶⁵⁴ Previously, the Indiana Supreme Court was to appoint such a judge from a panel of judges and former judges maintained by the court.⁶⁵⁵ Now, Rule 60.5 has been amended to dispense with the panel.⁶⁵⁶ Under the previous version of the rule, any determination that expenditure of funds should occur was automatically reviewed in the Indiana Supreme Court, unless the government entity waived review within two days after entry of the decree. The time for waiver is now extended to a full thirty days.⁶⁵⁷

Trial Rule 75 on venue has been amended to refer generally to "actions," not "causes" or "proceedings," and to impose the duty of paying the costs associating with transferring an action for improper venue within twenty days of the order of transfer.⁶⁵⁸ If this payment is not timely made, the action must be dismissed (though without prejudice) and attorneys' fees and costs must be awarded. Subdivision (E) of the Rule has also been changed to cross-refer to new Appellate Rule 14(A)(8) on interlocutory appeals.

647. 732 N.E.2d 179 (Ind. Ct. App. 2000).

648. *Id.* at 186-87.

649. IND. TRIAL R. 35 (amended 2001).

650. IND. TRIAL R. 53.1.

651. IND. TRIAL R. 53.1(B) (amended 2001).

652. 760 N.E.2d 156 (Ind. 2001).

653. *See supra* Part I.A.3.

654. IND. TRIAL R. 60.5.

655. *Id.*

656. IND. TRIAL R. 60.5 (amended 2001).

657. *Id.*

658. IND. TRIAL R. 75(1)(2) (amended 2001).

Finally, Rule 79 governing the appointment of special judges in conjunction with provisions such as Rule 60.5 has been amended to allow a judge who has granted a change of venue to serve as a special judge in the same matter in its new location. This is conditioned on agreement of the parties and the sending and receiving judges of the respective counties.⁶⁵⁹ Subdivision (K) has also been changed to specifically include special judges appointed pursuant to Indiana Code section 34-13-5-4 on public lawsuits.⁶⁶⁰ Part (P) has been modified to provide a special fee for senior judges who serve as special judges and the last sentence of that section, mandating that their payment be determined by the fee schedule of the Director of the Division of State Court Administration, has been deleted.⁶⁶¹

Effective January 1, 2002 are revisions to Tax Court Rules 1 through 9, and 16 through 20.⁶⁶² These changes are in response to the new Indiana Board of Tax Review, established in 2001 by Indiana Code section 6-1.5-2-1 and provide procedures for appeal in state tax matters, among other things.⁶⁶³ In addition, a new form, entitled "Verified Petition for Judicial Review of a Final Determination of the Indiana Board of Tax Review" has been added. While state tax court procedure is beyond the scope of this Article, tax practitioners should take care to familiarize themselves with the rule amendments and their focus on the requirement of exhausting administrative remedies. This is found in the constant references to the "final determinations" of taxing authorities in the new rules.

Changes to three Indiana Administrative Rules will become effective on various dates. Rule 5 governing senior judges has been amended to afford them state insurance benefits and entitlements, effective January 1, 2002.⁶⁶⁴ Administrative Rule 8 immediately institutes a new type designation for the case numbering system affecting civil plenary matters—"PL" for all cases filed after January 1, 2002, not "CP."⁶⁶⁵ In conformity with the concern for juror privacy and safety expressed in the reports of the Commission, Administrative Rule 9 has been amended so that, effective January 1, 2003, personal information about jurors and prospective jurors that is not disclosed in open court will be kept confidential from public dissemination.⁶⁶⁶ Finally, pursuant to Appellate Rule 30, the Indiana Supreme Court has promulgated technical standards for digital transcripts to be used on appeal.⁶⁶⁷ Among these standards is the requirement that all eligible documents be converted into the Adobe Portable Document

659. IND. TRIAL R. 79(J)(1) (amended 2001).

660. IND. TRIAL R. 79(K) (amended 2001).

661. IND. TRIAL R. 79(P) (amended 2001).

662. See <http://www.in.gov/judiciary/research/amend02/tax.pfd> (last visited May 21, 2002).

663. *Id.*

664. IND. ADMIN. R. 5 (amended 2001).

665. IND. ADMIN. R. 8.

666. IND. ADMIN. R. 9(L) (amended 2001; amendment effective 2003).

667. <http://www.in.gov/judiciary/research/amend02/digital.pfd>.

Format by the court reporter for transmission to the court of appeals.⁶⁶⁸ Civil practitioners should also review changes to the Rules for Small Claims Court,⁶⁶⁹ the Rules of Judicial Conduct,⁶⁷⁰ and the Rules of Evidence.⁶⁷¹

V. FEDERAL PRACTICE

The year 2001 proved a particularly discouraging one for the plaintiff's bar insofar as federal practice was concerned. The U.S. Supreme Court decided a number of cases that reduce the incentives for taking civil litigation or make access to court trials more difficult. Both Congress and the federal rulemakers seem intent on restricting state class actions by federalizing them using minimal diversity or erecting obstacles to class action status or attorney compensation. The changes to the Federal Rules of Civil Procedure ("FRCP") for this rulemaking cycle were less extensive than in 2000, although proposed rule changes in the pipeline are controversial. What follows is a brief review of some of the developments affecting civil practice in the federal courts.

A. Procedural Legislation

1. *Resident Aliens and the Diversity Statute.*—The Federal Court Improvements Act of 2001⁶⁷² would repeal the provision of 28 U.S.C. § 1332 that deems a resident alien a citizen of the state of her/his permanent residence and replace it with a rule that prohibits federal jurisdiction for disputes involving such persons.

2. *Multiparty, Multiforum Litigation.*—In March 2001, the U.S. House of Representatives passed the Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001.⁶⁷³ It permits federal jurisdiction on minimal diversity in mass tort cases where at least twenty-five persons have died or been injured and each plaintiff claims damages in excess of \$150,000.⁶⁷⁴ However, it also mandates that federal courts abstain from exerting this jurisdiction where a substantial portion of plaintiffs and primary defendants are from the same state. Likewise, that state's law will govern the conflict. It also legislatively overrules *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*,⁶⁷⁵ which had allowed a judge who had received a case pursuant to 28 U.S.C. § 1407 (multidistrict litigation) to retain the case for trial.⁶⁷⁶

3. *Class Actions.*—Several bills are pending in Congress that affect class actions and parallel attempts from the FRCP rulemaking process ("FRCP") to

668. *Id.*

669. Available at <http://www.in.gov/judiciary/research/rules.html>.

670. *Id.*

671. *Id.*

672. H.R. 2522, 107th Cong. (2001).

673. H.R. 860, 107th Cong. (2001).

674. H.R. 860, 107th Cong., § 3 (2001).

675. 523 U.S. 26 (1998).

676. H.R. 860, 107th Cong., § 2 (2001).

rein in state class actions.⁶⁷⁷ S.1712⁶⁷⁸ expands the provisions of H.R. 2341, the Class Action Fairness Act of 2001.⁶⁷⁹ The House bill, if passed, would provide federal subject matter jurisdiction over state-based class actions where there is minimal diversity among class members, there are at least 100 such members, and the amount in controversy exceeds \$2 million. H.R. 2341 also regulates the adequacy of class notice and the attorneys' fees that are recoverable. In addition, it heightens pleading requirements for such classes and stays discovery until motions to dismiss can be heard. S. 1712 goes beyond this proposed legislation because it allows removal to federal court of matters not formally designated as class actions in two situations, any public interest lawsuit not filed by a state attorney general and claiming monetary relief and any claim for monetary relief tried jointly with 100 or more persons.

4. *Television in the Courtroom.*—In the fall of 2001, the Senate Judiciary Committee approved the Sunshine in the Courtroom Act, S. 986. It gives federal judges the discretion to allow television broadcasting of proceedings, even though the Judicial Conference of the United States has been opposed to this move.⁶⁸⁰

5. *Electronic Communications.*—The E-Government Act of 2001, S.803, would require all federal courts to establish a website where detailed information about cases and other matters would be available.⁶⁸¹

6. *Government Lawyers.*—S. 1437, introduced by Senator Leahy and entitled the Professional Standards for Government Attorneys Act of 2001, would require federal rulemakers to regulate the conduct of government lawyers, especially insofar as their ability to contact represented persons is concerned. It would also authorize government lawyers to act in "sting" operations.⁶⁸²

7. *Terrorism.*—S. 1751, the Terrorism Risk Insurance Act of 2001, would use the multidistrict litigation approach to put all matters stemming from a terrorist incident in one federal forum. It would also preclude punitive damages for actions under the act.⁶⁸³ A similar approach is taken in the Terrorism Risk Protection Act, H.R. 3210.⁶⁸⁴ Finally, the Air Transportation Safety and System Stabilization Act of 2001,⁶⁸⁵ introduced in response to the September 11 disaster, would limit the liability of airlines, but provide new causes of action to litigants.

B. U.S. Supreme Court and Seventh Circuit Decisions

In 2001, the decision that will most affect civil practice is one that spans the

677. See *infra* text accompanying notes 741-43.

678. S. 1712, 107th Cong. (2001).

679. H.R. 2341, 107th Cong. (2001).

680. S. 986, 107th Cong. (2001). H.R. 2519 is the companion House bill.

681. S. 803, 107th Cong. (2001).

682. S. 1437, 107th Cong. (2001).

683. S. 1751, 107th Cong. (2001).

684. H.R. 3210, 107th Cong. (2001).

685. H.R. 2926, 107th Cong. (2001).

categories of substance and procedure. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*⁶⁸⁶ introduces a stunning reconception of the nature of a jury's determination of punitive damages. In so doing it revolutionizes the standard of appellate review to be applied. Normally, the award of punitive damages is a matter within the purview of the states, because the ability to recover monies in a civil matter to punish a defendant's bad behavior is a creature of common law. This makes it difficult to "constitutionalize" a jury's assessment of punitive damages so as to reach the federal forum. Nonetheless, the U.S. Supreme Court has decided a number of significant punitive damages cases.⁶⁸⁷ One of the most controversial questions about those decisions is whether they involve substantive due process, or whether they are procedural due process decisions.⁶⁸⁸ This is because the fundamental question inherent in all of them is this: When is the amount of punitive damages simply too large to be constitutional, regardless of any other factor?

To add to the controversy, issues of punitive damages have historically been treated as questions of fact within the sound province of the jury to answer, curbed by the ability of courts to review an assessment for excessiveness under a deferential standard.⁶⁸⁹ In *Cooper*, the Supreme Court has struck at the heart of this classic allocation of functions between judge and jury, and trial and reviewing courts, by holding that punitive damage assessments are not matters of fact, but are moral evaluations.⁶⁹⁰ Thus, an appellate court is now authorized to use a *de novo* standard of review in scrutinizing them. Previously, when a trial judge left the jury's verdict intact, the reviewing court was required to use an abuse of discretion standard. Now, the court of appeals is free to make its own determination of the jury's results as if it were deciding a question of law. This view runs counter to a long history of allocating punitive damage issues to juries, in part from the founders' concern that government can oppress a defendant by fining in a civil context, almost as easily as by pursuing criminal prosecution. The jury was to be a bulwark against political retaliation worked by this device. Moreover, the Court's own opinions on the right to jury trial have treated as especially jury-worthy any remedy that involves a penalty or fine.⁶⁹¹ And, the classic factors a jury must consider for fixing punitive damages in most jurisdictions plainly involve issues of fact—for example, given the defendant's financial condition, what amount of damages is effective to deter?

By expressing its analysis in terms of the standard of review, the Court has neatly finessed many of the difficult substantive issues raised by punitive

686. 532 U.S. 424 (2001).

687. See, e.g., *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559 (1995) (holding award of \$4 million in punitive damages as unconstitutionally "excessive").

688. See, e.g., *id.*

689. *Cooper*, 532 U.S. at 437.

690. One of the great debates in philosophy is whether there are any objectively verifiable moral "facts" or whether when one makes an ethical judgment, one is merely expressing an opinion or an emotion.

691. See, e.g., *Tull v. United States*, 481 U.S. 412 (1987).

damages. However, as Justice Ginsberg suggested in *Gasperini v. Center for Humanities*,⁶⁹² making it easier for appellate courts to undo jury verdicts can function as an indirect cap on damages.⁶⁹³ There is also the practical issue of how to define and demarcate this new category of “moral” assessment. For all these reasons, *Cooper* is a troubling opinion. Its new conceptual framework could have a far-reaching impact not just on jury determinations of punitive damages, but also on any jury verdict that requires judgments about intangible items such as pain and suffering and emotional distress.

*Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*⁶⁹⁴ is another decision that significantly affects plaintiffs. It rejects the “catalyst of reform”⁶⁹⁵ theory for shifting fees under two fee-shifting statutes, the Fair Housing Act and the Americans with Disabilities Act (“ADA”).⁶⁹⁶ One of the difficult questions raised by an award of fees is whether a litigant is a “prevailing party” for purposes of fee shifting. In many instances, especially when the defendant is goaded to change its behavior by litigation, but a full merits determination is not made, “prevailing party” status is not clear. Nine of the circuit courts had authorized an award of fees on the theory that, if the litigation provoked significant change, it was a catalyst of reform and should count as a win for the plaintiff. The Court ignored this consensus and interpreted the Fair Housing Act and the ADA to prohibit fee shifting for this reason. This case could have implications for any fee-shifting statute.

Not only in *Cooper* and *Buckhannon*, but in a variety of other cases the U.S. Supreme Court has affected civil practice. *Circuit City Stores, Inc. v. Adams*⁶⁹⁷ will also negatively treat plaintiffs, for it holds that the Federal Arbitration Act applies to all employment agreements, except those of transportation workers.⁶⁹⁸ This carries forward the Court’s trend of vigorously applying the Act, but it discounts the policy argument that it is inappropriate to force arbitration when civil rights and other policy questions are raised in an employment context.⁶⁹⁹ Continuing the same general theme, restricting plaintiff lawsuits, the Supreme Court concluded in a 5-4 decision that there is no private right of action to enforce regulations promulgated under Title VI of the Civil Rights Act dealing with the disparate impact of state action.⁷⁰⁰ This was the question in *Alexander*

692. 518 U.S. 415 (1996).

693. *Id.* at 425 (Ginsburg, J., dissenting).

694. 532 U.S. 598 (2001).

695. *See Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978) (holding fees appropriate when plaintiff’s lawsuit is causally linked to defendant’s change in behavior and there is some legal basis for plaintiff’s claim).

696. *Buckhannon Bd. & Care Home, Inc.*, 532 U.S. 598 at 605.

697. 532 U.S. 105 (2001). This decision overrules *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999).

698. *See, e.g., Craft*, 177 F.3d at 1094.

699. *See also Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2001).

700. 42 U.S.C. § 2000d-1 (1999); 28 CFR § 42.104(b)(2) (1999). *See also* 49 CFR §

v. *Sandoval*,⁷⁰¹ which challenged the State of Alabama's requirement that one show proficiency in English in order to obtain a driver's license.

In *Becker v. Montgomery*,⁷⁰² by a unanimous opinion, the Court held that a party's failure to sign a notice of appeal is not a fatal defect. This is because the substance of the notice made it clear who the parties involved in the appeal were, so that absence of a signature was a technical problem that did not go to the reviewing court's appellate jurisdiction. *Thomas v. Chicago Park District*⁷⁰³ emanated from the Seventh Circuit Court of Appeals and raised significant First Amendment questions about parade permits. It held that because Chicago's requirements do not constitute a content-based regulation, access to prompt judicial review under the procedural requirement of *Freedman v. Maryland*⁷⁰⁴ governing prior restraints did not apply.⁷⁰⁵

Finally, important cases pending before the Court include *Mathias v. Worldcom Technologies, Inc.*⁷⁰⁶ and *Verizon Maryland, Inc. v. Public Service Commission of Maryland*.⁷⁰⁷ These represent a circuit split over the appealability of state commissions' actions regarding interconnection agreements. Among other questions, they address whether prospective relief against such commissions for violation of the Telecommunications Act of 1996 are permissible under the *Ex parte Young* doctrine.⁷⁰⁸ In *Devlin v. Scardelletti*,⁷⁰⁹ the Court will determine whether a nonintervening class member has standing to appeal, even after the motion to intervene was properly denied. *Dusenbery v. United States*,⁷¹⁰ orally argued in late October and decided in January 2002, held that the proper standard for notifying a prisoner of a civil forfeiture proceeding is designated by the "reasonable under the circumstances test" of *Mullane v. Central Hanover Bank & Trust Co.*⁷¹¹ not the more stringent test of *Mathews v. Eldridge*⁷¹² for notice and opportunity to be heard where provisional remedies are sought.⁷¹³ Another pending case just decided in 2002 is *Raygor v. Regents of the University of Minnesota*.⁷¹⁴ It holds that the Eleventh Amendment is violated by the thirty-day statute of limitations tolling provision of the federal supplemental

21.5(b)(2) (2000).

701. 532 U.S. 275 (2001).

702. 532 U.S. 757 (2001).

703. 122 S. Ct. 755 (2001).

704. 380 U.S. 51 (1965).

705. *Thomas*, 122 S. Ct. at 778-80.

706. U.S. No. 00-878, reported below as *Illinois Bell Telephone Co. v. Worldcom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999), cert. granted, 532 U.S. 903 (2001).

707. U.S. No. 00-1531.

708. 209 U.S. 123 (1908).

709. U.S. No. 01-417.

710. 534 U.S. 161 (2002).

711. 339 U.S. 306 (1950).

712. 424 U.S. 319 (1976).

713. *Dusenbery*, 534 U.S. at 669.

714. 122 S. Ct. 999 (2002).

jurisdiction statute, § 28 U.S.C. 1367. This occurs where a state-based claim filed against a nonconsenting state in federal court is subsequently dismissed on Eleventh Amendment grounds and then refiling is sought in state court.⁷¹⁵

The U.S. Court of Appeals for the Seventh Circuit has decided a number of cases important to civil practice matters. A cluster of them were concerned with arbitration agreements. For instance, in *George Watts & Son v. Tiffany & Co.*,⁷¹⁶ the Seventh Circuit Court of Appeals held that the “manifest disregard of the law” principle is not available to justify court intervention into arbitration on the issue of attorneys’ fees, because, although a Wisconsin statute authorized fees, it did not prevent parties from agreeing to bear their own legal expenses and there was no agreement to the contrary between them.⁷¹⁷ In *IDS Life Insurance Co. v. Royal Alliance Ass’n*⁷¹⁸ the Seventh Circuit stated that an arbitration award need not be correct or reasonable to be binding, continuing the theme of *George Watts & Son*. However, in *Penn v. Ryan’s Family Steak Houses, Inc.*,⁷¹⁹ a case from Indiana, the court concluded that an arbitration agreement that allowed the employer to modify its terms without notice and included other one-sided provisions lacked contractual mutuality and was unenforceable.

Other opinions from the Seventh Circuit of interest to civil practitioners are *Downey v. State Farm Fire & Casualty Co.*⁷²⁰ (no federal subject matter jurisdiction in an action against a private insurer that issued federal flood insurance; consent judgment preserves the right to appeal where expressly reserved); *Ester v. Principi*⁷²¹ (when an agency decides the merits of a complaint without addressing the question of timeliness of exhaustion of remedies, it has waived the defense in subsequent lawsuits); *Thompson v. Alzheimer & Gray*⁷²² (abuse of discretion in racial discrimination case not to dismiss juror for cause when juror could not assure court that, given her background, she could be impartial); *Hetreed v. Allstate Insurance Co.*⁷²³ (when appealing decision on merits litigant must file notice of appeal covering award of costs to appeal such award); *Indiana Civil Liberties Union v. O’Bannon*⁷²⁴ (preliminary injunction against erection of stone monument with the Ten Commandments on statehouse grounds proper because likelihood of success on merits showing violation of Establishment Clause); *Isaacs v. Sprint Corp.*⁷²⁵ (no conditional grant of class certification); *United Air Lines, Inc. v. International Ass’n of Machinist &*

715. *Id.* at 1004-05.

716. 248 F.3d 577 (7th Cir. 2001).

717. *Id.* at 581.

718. 266 F.3d 645 (7th Cir. 2001).

719. 269 F.3d 753 (7th Cir. 2001).

720. 276 F.3d 243 (7th Cir. 2001).

721. 250 F.3d 1058 (7th Cir. 2001).

722. 248 F.3d 621 (7th Cir. 2001).

723. 135 F.3d 1155 (7th Cir. 2001) (unpublished opinion).

724. 259 F.3d 766 (7th Cir. 2001).

725. 261 F.3d 679 (7th Cir. 2001).

*Aerospace Workers*⁷²⁶ (federal court had jurisdiction to issue injunction against labor union despite Norris-LaGuardia Act because union actively promoted work slowdown); *Kalan v. City of St. Francis*⁷²⁷ (where parties stipulate to specifically identified magistrate judge, different magistrate judge cannot preside without their consent); *Lockwood International B.V. v. Volm Bag Co.*⁷²⁸ (paying a plaintiff to replead a complaint does not eliminate the liability of the insurer to defend its insured); *National Organization for Women, Inc. v. Scheidler*⁷²⁹ (private party may obtain civil injunctive relief under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), in disagreement with Ninth Circuit on same issue); *Szabo v. Bridgeport Machines, Inc.*⁷³⁰ (when ruling on class certification, a court does not have to accept the allegations in plaintiff's complaint as true); *In re Synthroid Marketing Litigation*⁷³¹ (gives detailed guidance on notice of appeal for would-be intervenors who oppose class settlement; requires trial court to estimate market rates to set fees; concludes incentive awards not available where party does not become class representative until after success is likely).

C. Rules Changes

1. *The Federal Rules of Civil Procedure ("FRCP")*.—Proposed changes to the FRCP became effective December 1, 2001. Rule 5(b)(2)(D) allows for electronic service and service through court facilities.⁷³² To conform with this change, Rule 6(e) extends the time for response to documents so served for three days.⁷³³ Rule 77(d) provides the clerk of the court with more alternatives for notifying parties of entry of an order or judgment, including facsimile and computer transmission. Rule 65 adds a new subdivision (f) to govern copyright impoundment.⁷³⁴ Finally, Rule 81(a)(1) clarifies that the FRCP apply in bankruptcy proceedings, mental health proceedings, and copyright proceedings.⁷³⁵

In September 2001, the Judicial Conference Committee on Rules of Practice and Procedure approved changes previously proposed for comment. New Rule 7.1 would be added to require disclosures that will assist judges in avoiding conflicts of interest. Among other things, it would require the disclosure of corporate parties' financial interests, including the disclosure of parent

726. 243 F.3d 349 (7th Cir. 2001).

727. 274 F.3d 1150 (7th Cir. 2001).

728. 273 F.3d 741 (7th Cir. 2001).

729. 267 F.3d 687 (7th Cir. 2001).

730. 249 F.3d 672 (7th Cir. 2001).

731. 264 F.3d 712 (7th Cir. 2001).

732. FED. R. CIV. PROC. 5(b)(2)(D), available at <http://www.house.gov/judiciary/civil2001.pfd>.

733. FED. R. CIV. PROC. 6(e), available at <http://www.house.gov/judiciary/civil2001.pfd>.

734. FED. R. CIV. PROC. 65, available at <http://www.house.gov/judiciary/civil2001.pfd>.

735. FED. R. CIV. PROC. 81(a)(1), available at <http://www.house.gov/judiciary/civil2001.pfd>.

corporations and stock interests of at least ten percent held by public corporations.⁷³⁶ Rule 58 will be changed to clarify when the time runs for filing an appeal.⁷³⁷ Section (b) thereof specifically designates the time of entry of judgment and includes a provision that keys off of the date when a separate document setting forth the court's action must be filed under proposed Rule 58(a)(1). That subsection makes it clear that, except for orders for disposing of motions for judgment under Rule 50(b), to amend or make findings of fact under Rule 52(b), for attorneys' fees under Rule 54(d)(2)(B), for new trial or to alter or amend the judgment under Rule 59, and for Rule 60 relief, *all* judgments, even amended ones, must be entered on a separate document.⁷³⁸ The rule also makes it clear entry of judgment may not be delayed or the time for appeal enlarged due to motion to tax costs or for fees and conforms the procedure for ruling on motion for attorneys' fees to Appellate Rule 4. To be consistent with these changes, Rule 54 would also be amended to delete the requirement of service before the submission of a motion for attorneys' fees and to delete the requirement of a separate judgment therefor.⁷³⁹ Rule 81(a)(2) would also be amended to remove a conflict between the FRCP and the Rules Governing 2254 Cases and Rules Governing 2255 Proceedings. Finally, certain amendments to Supplemental Rule C on Admiralty are proposed that would govern interrogatories in civil forfeiture proceedings and other matters.

The advisory committee has also published for comment proposed changes to Rules 23, 51, 53, 54(d)(2), and 71(a). The proposed changes to Rule 23 are significant. They are designed to address the general concerns for fairness of class procedure for unnamed class members raised by the U.S. Supreme Court's opinion in *Anchem Products Inc. v. Windsor*.⁷⁴⁰ In addition, like the proposed class action legislation pending in Congress, they include measures that will affect the ability of parties to bring class actions in state forums. Two particularly controversial topics are measures to enjoin overlapping class actions filed in multiple state courts and appointment and reimbursement of class counsel.⁷⁴¹ Among other changes are those requiring notice to class members at the certification stage, appeals by nonintervening class members, and the preclusive effects of class certification and settlement.

2. *Seventh Circuit and Local Rule Matters.*—Effective December 1, 2001, the Seventh Circuit amended a number of its Rules—22.2(a) (disclosure statements of prior proceedings and other matters), 26.1 (disclosure statements

736. Proposed FED. R. CIV. PRO. 7.1(a)(1)(A).

737. See Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on the Federal Rules of Civil Procedure, to Honorable Anthony J. Scircia, Standing Committee on Rules of Practice and Procedure, at 91 (May 2000) (on file with the *Indiana Law Review*).

738. *Id.*

739. *Id.*

740. 521 U.S. 59 (1997). See also BNA LEGAL WEEK, May 8, 2001, at 2684.

741. See Civil Rules Committee Hears Testimony on Proposals to Amend Class Action Rule, BNA LAW WEEK, Dec. 18, 2001, at 2366; *Senators Offer New Class Action Legislation Similar to Bill Approved Earlier by Committee*, BNA LAW WEEK, Dec. 18, 2001, at 2367.

of identity of nongovernmental attorneys), 31(e) (digital briefs), 32(a) (brief lie flat rule), and 34(h) (argument by law students).⁷⁴² It also included in its Internal Operating Procedures a provision concerning the sealing of records. It requires a court order for records to be sealed, unless a statute provides to the contrary.⁷⁴³ Notice has also been given by the Administrative Office of the U.S. Courts that interest rates on judgments in the federal courts have been changed pursuant to statute, effective on all judgments entered on or after December 21, 2000.⁷⁴⁴

On January 2, 2002, a series of changes to the Local Rules for the U.S. District Court for the Northern District of Indiana became effective⁷⁴⁵ and a new fee schedule was introduced.⁷⁴⁶ The U.S. District Court for the Southern District of Indiana has also effectuated changes to certain of its Local Rules, effective January 1, 2002.⁷⁴⁷ In addition, all cases filed on or after November 16, 2001 must submit a Case Management Plan, unless otherwise exempted, that complies with the Instructions for Preparing Case Management Plans promulgated by the Southern District pursuant to its Local Rule 16.1.⁷⁴⁸

742. See <http://www.ca7.uscourts.gov/webnote.htm> (last visited Mar. 15, 2002).

743. See <http://www.ca7.uscourts.gov/Rules/rules.htm> (last visited Mar. 15, 2002).

744. Current rates are available at <http://www.federalreserve.gov/releases/H15/Current>.

745. See Local Rules 5.1(c), 1(f), 1(g), 1(h), 8.2, 16.1(b), 16.3, 24.1(a), 1(b), 1(c), 47.3, 72.1(d), 1(e), 1(f), 1(g), 1(i), 1(j), 72.2(a), 79.1, 83.7(a), 7(c), 200.1 and Rule III of the Rules of Disciplinary Enforcement, available at <http://www.innd.uscourts.gov/localrules.html>.

746. See <http://www.innd.uscourts.gov/feeinfo.html>.

747. See Local Rules 4.6, 16.1(b), 1(c), 24.1, 72.1, 72.3, 76.1, 81.2, 83.5, available at http://www.insd.uscourts.gov/pub_main.htm.

748. See http://www.insd.uscourts.gov/whats_new_main.htm.