APPELLATE PROCEDURE

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INTRODUCTION

This Article surveys opinions, orders, and other developments in the area of state appellate procedure in Indiana during the most recent reporting period.[1] Part I examines rule amendments affecting Indiana appellate practitioners. Part II discusses matters occurring during the reporting period affecting or relating to matters of appellate procedure and practice. Part III discusses miscellaneous information relevant to Indiana appellate practice and procedure.

I. RULE AMENDMENTS

The changes to the Indiana Rules of Appellate Procedure discussed in subparts A, B, and C, below, were adopted on July 1, 2005, and became effective January 1, 2006.[2] They were largely the result of suggestions made by the Indiana State Bar Association's Appellate Practice Section.[3] The final change, discussed in subpart D, was adopted on October 25, 2005, and took effect immediately.

A. Appellate Rule 12(A)

Appellate Rule 12(A) was clarified to permit trial court clerks to charge a fee for making copies of all or any portion of the Clerk's Record:

> **Rule 12. Transmittal Of The Record**
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> **A. Clerk's Record.** Unless the Court on Appeal orders otherwise, the trial court clerk shall retain the Clerk's Record throughout the appeal. A party may request that the trial court clerk copy the Clerk's Record, or a portion thereof, and the clerk shall provide the copies within thirty (30)

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1. This Article resumes where its predecessor, *see* Kevin S. Smith, *Appellate Procedure*, 38 IND. L. REV. 883, 883 n.1 (2005), stopped, covering the time period from October 1, 2004 through September 30, 2005.

2. Order Amending Rules of Appellate Procedure (No. 94S00-0501-MS-19) (Ind. July 1, 2005), *available at* http://www.in.gov/judiciary/orders/rule-amendments/2005/app-r12;34;44-070105.pdf.

3. *See* Smith, *supra* note 1, at 886-88.

days, subject to the payment of any usual and customary copying charges.[4]

B. Appellate Rule 34(C)

Appellate Rule 34(C) was amended to extend the length of time for responding to non-routine motions from ten to fifteen days:

Rule 34. Motion Practice

. . . .

(C) Response. Any party may file a response to a motion within ~~ten (10)~~ fifteen (15) days after the motion is served. The fact that no response is filed does not affect the Court's discretion in ruling on the motion.[5]

C. Appellate Rule 44(D) & (E)

Appellate Rule 44 now specifies that transfer or rehearing briefs of intervenors or amici curiae must be limited to either ten pages or 4200 words:

Rule 44. Brief And Petition Length Limitations

. . . .

D. Page Limits. Unless a word count complying with Section E is provided, a brief or Petition may not exceed the following number of pages:

. . . .

Brief of intervenor or amicus curiae on transfer or rehearing: ten (10) pages

. . . .

E. Word Limits. A brief or Petition exceeding the page limit of Section D may be filed if it does not exceed, and the attorney or the unrepresented party preparing the brief or Petition certifies that, including footnotes, it does not exceed, the following number of words:

. . . .

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4. Order Amending Rules of Appellate Procedure, *supra* note 2.
5. *Id.*

Brief of intervenor or amicus curiae on transfer or rehearing: 4,200 words[6]

D. Appellate Rule 30(A)

Finally, Appellate Rule 30, which addresses the preparation of transcripts in electronic format, was cosmetically amended to direct practitioners to the appendix to the Rules, where technical standards can be found concerning the preparation of electronic transcripts:

Rule 30. Preparation of Transcript in Electronic Format Only

A. Preparation of Electronic Transcript. In lieu of or in addition to a paper Transcript as set forth in Rule 28, with the approval of the trial court, all parties on appeal, and the Court on Appeal, the court reporter may submit an electronically formatted Transcript in accordance with the following:

. . . .

(3) **Technical Standards.** Standards for CD-ROM and disk size, formatting, transmission and word processing software shall be determined by the Division of State Court Administration. The Division of State Court Administration shall publish the established standards and distribute copies of such rules to all trial court clerks and Administrative Agencies. See, Appendix. Standards for Preparation of Electronic Transcripts Pursuant to Appellate Rule 30.[7]

II. DEVELOPMENTS IN THE CASE LAW

A. Deadline for Filing Notice of Appeal

Appellate Rule 9(A) requires a party initiating a non-interlocutory appeal to file a Notice of Appeal "within thirty (30) days after *the entry of a Final Judgment*" or, if a party timely files a motion to correct errors, within thirty (30) days after either the court rules on the motion or "the motion is deemed denied."[8]

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6. *Id.*

7. Order Amending Rules of Appellate Procedure (No. 94S00-0501-MS-19) (Ind. Oct. 26, 2005), *available at* http://www.in.gov/judiciary/orders/rule-amendments/2005/110205-appellate.pdf. Although this cosmetic addition did not make it into the 2006 "Indiana Rules Of Court—State" book published by Thomson West, the actual appendix to which it refers has been a part of the Appellate Rules appendix for several years and can be found in the 2006 Thomson West book at page 228, or on the Internet at http://www.in.gov/judiciary/ rules/appellate/appellate.doc#appb.

8. IND. APP. R. 9(A)(1) (emphasis added).

In *Smith v. Deem*,[9] the court of appeals was called upon to determine what "entry of a Final Judgment"[10] means. The trial court's order granting summary judgment was signed and file-stamped on June 17; however, the trial court clerk did not enter the judgment in the Record of Judgments and Orders ("RJO") book until July 30.[11] Whether the appellant's Notice of Appeal was timely depended upon which date constituted the "entry" of the final judgment. The court of appeals' opinion extensively discussed cases that supported both dates,[12] leading the court to "acknowledge that it is not entirely clear as to which date from which the thirty-day time limit begins to run."[13] After reviewing the revisions of the appellate rules in light of the case law,[14] it held that, "as a general proposition, the 'entry' mentioned in Appellate Rule 9(A) is entry into the RJO."[15] The key phrase in the court's opinion, however, appears to have been "as a general proposition," because it further held that

> [i]n cases where, for whatever reason, there is a delay between the trial court's rendition of judgment and the entry into the RJO, ... [and] a party [has] notice of the trial court's ruling before its entry into the RJO, [then] we see no reason to justify allowing that party to delay filing a Notice of Appeal within thirty days of the date on which the party received notice simply because the clerk has not performed a ministerial task.[16]

This holding raises several thorny questions. In each individual case, how will counsel know which date (i.e., the RJO entry date or the date the appellant received notice of the judgment) is applicable? It seems the only way would be either to go on-line to look at the trial court's docket (if it has an on-line docket), or to call the trial court's clerk after learning of the final judgment to find out when the clerk entered it in the RJO.

Further, how much "delay" is required before the trigger date switches from the date of entry on the RJO to the date that counsel receives notice of the court's final judgment? For example, what if the delay is not several weeks, as in *Smith*, but rather is only a matter of days, such as when a clerk mails the trial court's order on Friday, goes on vacation the next week, and then enters the order in the RJO on the following Monday after returning from vacation? Would the appellant in such an instance use the RJO date or the date, a few days earlier, on which it received "actual notice"? Also, what sort of "notice" is adequate if sufficient delay is found? For example, if the court issues a final judgment in open court, is the judge's oral ruling enough to constitute "notice" under *Smith*,

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9. 834 N.E.2d 1100 (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006).
10. *See* IND. APP. R. 9(A)(1).
11. *Smith*, 834 N.E.2d at 1102.
12. *See id.* at 1105-08.
13. *Id.* at 1108.
14. *See id.* at 1108-09.
15. *Id.* at 1109.
16. *Id.* at 1110.

or may the appellant wait until it receives the written order in the mail?

Finally, if the date is tied to when the *appellant* receives notice, then how will the appellee know that date so that it knows whether to file a motion to dismiss? The appellee could guess, based on the date the appellee received its notice, but what if the appellant, for whatever reason, receives it on a different date? For example, if the court is in Vanderburgh County, the appellee's counsel is in Vanderburgh County, but the appellant's counsel is in Steuben County and the order is mailed in the middle of December, then there is a very real possibility that the appellant's counsel could receive notice in the mail several days later than the appellee's counsel. Given these questions, the result of this holding seems to be that Indiana is further from a bright line as to when the thirty-day period begins to run for filing the Notice of Appeal than before *Smith*, which may be problematic considering the Notice of Appeal deadline is jurisdictional.[17] A change to Appellate Rule 9(A) may be one way of resolving this problem.

B. Parties on Appeal

During the survey period, the Indiana Supreme Court published an order addressing who is a party on appeal. Specifically, in *Northern Indiana Public Service Co. ("NIPSCO") v. Minniefield*,[18] NIPSCO appealed the judgment of the trial court, but only one of the adverse parties below filed an appellee's brief and participated in the appeal before the court of appeals.[19] When NIPSCO filed a Petition to Transfer, the parties who had not participated in the appeal to that point (Minniefield and Woodson) filed a response. NIPSCO moved to strike their response, arguing Minniefield and Woodson were not "real parties in interest" and failed to participate before the court of appeals.[20] The supreme court denied the motion, stating:

> Ind. Appellate Rule 17(A) definitively states in relevant part, "A party of record in the trial court . . . shall be a party on appeal," and it is undisputed that Minniefield and Woodson were parties in the litigation before the trial court. Further, nothing in the Indiana Rules of Appellate Procedure precludes an appellee who did not file a brief before the Court of Appeals from seeking or responding to a Petition To Transfer following the Court of Appeals' ruling in the case. Rather, an appellee who does not file a Brief Of Appellee merely risks reversal of the trial court on a showing by the appellant of *prima facie* error, Ind. Appellate Rule 45(D). An appellee could assess the possibility of a showing of *prima facie* error so low as to not be worth the additional time, costs, and legal expenses involved in filing a brief. That same appellee, however,

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17. *See, e.g.*, WW Extended Care, Inc. v. Swinkunas, 764 N.E.2d 787, 791 (Ind. Ct. App. 2002) ("The timely filing of a notice of appeal is a jurisdictional prerequisite, and failure to conform within the applicable time limits results in forfeiture of the appeal."); IND. APP. R. 9(A)(5).

18. 823 N.E.2d 273 (Ind. 2005) (published order).

19. *See id.* at 273.

20. *See id.*

> would have every interest in defending a favorable Court of Appeals' decision if the appellant thereafter sought transfer of jurisdiction to this Court.
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> Further, when, as here, the appeal involves two appellees, one appellee could reasonably decide the other appellee's brief adequately addresses the issues such that an additional brief is unnecessary, but subsequently determine that the other appellee's Response to the appellant's Petition To Transfer is incomplete and in need of supplementation. Our desire to limit redundant argument and reduce the amount of paper flowing into our Court would be stymied were we to hold that an appellee, to preserve his right to file a Response to a Petition To Transfer, must file a brief before the Court of Appeals.[21]

Similarly, in *AutoXchange.com, Inc. v. Dreyer & Reinbold, Inc.*,[22] the appellants filed a motion to strike a brief filed by a party who had been involved in the trial but arguably had no issue in or interests that would be "affected by the outcome of [the] appeal," contending this party had no standing to file a brief.[23] The court of appeals denied the motion, noting that "Appellate Rule 17 clearly states that a party of record in the trial court shall be a party on appeal."[24]

C. Cross-Appeals

In *Family Video Movie Club, Inc. v. Home Folks, Inc.*,[25] the appellant wanted to purchase the building in which the appellee was a tenant. The appellant sent the appellee a written offer to pay the appellee $35,000 to vacate the premises well before its lease expired.[26] Before formal acceptance of the written offer, however, the building burned down. In litigation that followed, the appellee argued, and the trial court agreed, that a valid contract existed requiring the appellant to pay the appellee the $35,000.[27] The appellant appealed, arguing, among other things, that there was no valid contract.[28]

Despite having succeeded in the trial court, the appellee attempted to cross-appeal, contending the trial court had failed to make a finding of fact that a valid, oral contract existed between the parties.[29] The court of appeals dismissed the cross-appeal, holding "[n]o cross-appeal is available in this case because there is no appealable judgment or order against [the appellee]."[30] Rather, the appellee

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21. *Id.*
22. 816 N.E.2d 40 (Ind. Ct. App. 2004).
23. *Id.* at 44 n.1.
24. *Id.*
25. 827 N.E.2d 582 (Ind. Ct. App. 2005).
26. *See id.* at 583.
27. *Id.*
28. *Id.* at 583-84.
29. *Id.* at 585, 587.
30. *Id.* at 587.

was entitled to "argue the oral agreement as an alternative basis for affirming the trial court's judgment."[31]

D. Jurisdiction

1. Constitutionality of Marriage Statute.—In *Morrison v. Sadler*,[32] the appellants brought a state constitutional challenge against "Indiana's statutory limitation of marriage to opposite-sex couples."[33] One of the amici opposed to the appellants' petition argued "the General Assembly has 'plenary and exclusive' authority over the regulation of marriage, with the exceptions of it being prohibited by Article 4, § 22 of the Indiana Constitution from granting 'special' divorces and being subject to the requirements of the federal constitution," such that the issue raised by the appellants was "non-justiciable."[34] The court of appeals disagreed, noting, "We simply cannot accept, for example, that a ban on interracial marriages, while clearly violating the federal constitution, would not even present a justiciable claim under the Indiana Constitution," and considered the appellants' claims.[35]

2. Calculation of Workers' Compensation Lien.—Tack's Steel Corp. v. ARC Construction Co.[36] involved an appeal by a third-party defendant from an award of summary judgment requiring it to indemnify a third-party plaintiff concerning a work-related injury.[37] On appeal, the appellant asserted it was entitled to a worker's compensation lien.[38] The injured worker conceded a lien was appropriate and that he was responsible for repaying it, but contested the amount.[39] The appellant asked the court of appeals "to calculate the lien . . . and allow immediate set-off from its payment to indemnify [the third-party plaintiff]."[40] The court of appeals found it lacked the jurisdiction to do so, holding that "[w]hen agreement cannot be reached, a declaratory judgment is the appropriate vehicle for determination of the lien amount."[41]

E. Interlocutory Appeals

1. Orders Held Not Appealable "By Right."—Interlocutory appeals essentially fall into one of two categories: those a party may bring "as a matter

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31. *Id.*
32. 821 N.E.2d 15 (Ind. Ct. App. 2005).
33. *Id.* at 18.
34. *Id.* at 21 n.5.
35. *Id.*
36. 821 N.E.2d 883 (Ind. Ct. App. 2005).
37. *Id.* at 884-85.
38. *Id.* at 887; *see* IND. CODE § 22-3-2-13 (2005).
39. *Tack's Steel Corp.*, 821 N.E.2d at 890-91.
40. *Id.* at 891.
41. *Id.* (citing Dep't of Pub. Welfare, State of Ind. v. Couch, 605 N.E.2d 165, 168 (Ind. 1992)).

of right"[42] and those a party may bring only after securing leave from the trial court and acceptance by the court of appeals.[43] During the reporting period, the court of appeals issued two opinions providing further clarification of the rules governing into which category a particular case falls.

In *Whitezel v. Burosh*,[44] the appellant attempted to bring an interlocutory appeal from an order removing him as a trustee.[45] Appellate Rule 14(A)(3) states that an interlocutory appeal "as a matter of right" exists from an interlocutory order "[t]o compel the delivery or assignment of any securities, evidence of debt, documents or things in action."[46] The parties both contended that the court of appeals had jurisdiction over the appeal pursuant to Appellate Rule 14(A)(3), but the court of appeals disagreed and *sua sponte* dismissed the appeal.[47] It reasoned that "'[t]he matters which are appealable as of right under [Rule 14(A)] involve trial court orders which carry financial and legal consequences akin to those more typically found in final judgments: payment of money, issuance of a debt, delivery of securities, and so on.'"[48] Because the trial court was "simply ordering a new trustee [to] take over management of the Trust" and the "substance of the Trust [was] remaining in the Trust" rather than being sold, the court found the case to fall outside the bounds of Rule 14(A)(3).[49]

In *Rausch v. Finney*,[50] the appellant, a personal injury plaintiff in an automobile accident case, was ordered by the trial court to execute a medical records release.[51] She sought an interlocutory appeal as a matter of right under Appellate Rule 14(A)(2), which provides for interlocutory appeals of orders "[t]o compel the execution of any document."[52] She acknowledged that the court of appeals had already ruled against her position in the 1992 case of *Cua v. Morrison*,[53] but contended that the new Appellate Rules, adopted in 2001, overruled *Cua*. The court disagreed, finding that *Cua*'s holding survived the revisions to the appellate rules and that motions to compel the execution of medical records releases are not appealable as a matter of right.[54]

2. State Does Not Have Right to Interlocutory Appeal in Inverse Condemnation Cases.—In *Indiana Department of Natural Resources v. Lick Fork*

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42. IND. APP. R. 14(A).

43. IND. APP. R. 14(B).

44. 822 N.E.2d 1088 (Ind. Ct. App. 2005).

45. *Id.* at 1089.

46. *Id.* at 1090; IND. APP. R. 14(A)(3).

47. *Whitezel*, 822 N.E.2d at 1091.

48. *Id.* at 1090 (internal quotation marks omitted) (quoting State v. Hogan, 582 N.E.2d 824, 825 (Ind.1991)).

49. *Id.* at 1091.

50. 829 N.E.2d 985 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 181 (Ind. 2005).

51. *Id.* at 985.

52. IND. APP. R. 14(A)(2).

53. 600 N.E.2d 951, 953-54 (Ind. Ct. App. 1992).

54. *Rausch*, 829 N.E.2d at 986.

Marina, Inc.,[55] an inverse condemnation case, the appellee contended the State had waived its right to appeal by failing to bring an interlocutory appeal.[56] Citing forty-year-old Indiana Supreme Court precedent that held the "State does not have the right to an interlocutory appeal in an inverse condemnation case,"[57] the court of appeals disagreed with the appellee's waiver argument and considered the state's appeal on its merits.[58]

F. Appellate Standard of Review

1. Summary Judgment Awards.—In *Beta Steel v. Rust*,[59] the court of appeals addressed the seemingly contradictory statements that exist in Indiana case law concerning the appellate standard of review for summary judgment awards.[60] On the one hand, there are cases that state, "The party appealing from a summary judgment decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous."[61] On the other hand, cases also state, "On appeal from summary judgment, the reviewing court analyzes the issues in the same fashion as the trial court, *de novo*."[62] Concerning this seeming contradiction, the court in *Rust* noted, "We can understand why the parties might be confused as to how a trial court ruling can be reviewed de novo, while at the same time the appellant has the burden of demonstrating error."[63] The court resolved the matter as follows:

> To the extent opinions sometimes say that the appellant bears the burden of persuading the appellate court that the trial court's summary judgment ruling was erroneous, such burden is largely symbolic and nominal. All trial court rulings should be presumed to be correct, but in the context of summary judgment proceedings we will not hesitate to reverse a trial court's ruling if it has misconstrued or misapplied the law, failed to consider material factual disputes, or improperly considered immaterial factual disputes. We also give no deference to a trial court's ability to weigh evidence and judge witness credibility, because no such weighing or judging is permitted when considering a summary judgment motion. Instead, we view the designated evidence independently and with an eye

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55. 820 N.E.2d 152 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 745 (Ind.), *cert. denied*, 126 S. Ct. 386 (2005).

56. *Id.* at 156.

57. *Id.* (discussing Evansville-Vanderburgh Levee Auth. v. Towne Motel, Inc., 213 N.E.2d 705, 706 (Ind. 1966)).

58. *Id.*

59. 830 N.E.2d 62 (Ind. Ct. App. 2005).

60. *Id.* at 67-68.

61. Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 908 (Ind. 2001); *see also* Smith, *supra* note 1, at 902-03 nn.164-65 (discussing cases that state the trial court's summary judgment decision enters the appellate court "clothed [or cloaked] with a presumption of validity").

62. LCEOC, Inc. v. Greer, 735 N.E.2d 206, 208 (Ind. 2000).

63. *Beta Steel*, 830 N.E.2d at 68.

toward construing it most favorably to the nonmovant.[64]

In *Whinery v. Roberson*,[65] the court of appeals interpreted the meaning of the term "designated" in the context of the limitation on appellate courts "[w]hen reviewing the grant or denial of a motion for summary judgment, . . . [to] consider only those portions of the pleadings, depositions, or any other matter *'specifically' designated* to the trial court."[66] In *Whinery*, the defendant had moved for judgment on the pleadings, which the plaintiff converted to a summary judgment proceeding by so moving and tendering certain evidence, including deposition transcripts.[67] The defendant, in making its argument to the trial court, did not rely on the deposition transcript pages. On appeal, the defendant/appellee, in responding to arguments made by the plaintiff/appellant, attempted to cite some of the transcript pages that had been tendered by the plaintiff/appellant below, but the plaintiff/appellant argued the defendant/appellee was precluded from doing so because it had not designated those pages to the trial court.[68] The court of appeals agreed with the plaintiff/appellant, ruling that because the defendant/appellee did not specifically designate those particular pages to the trial court, the defendant/appellee had forfeited the ability to cite those pages in the Appellee's Brief, even though those pages had been part of the record below.[69]

2. *Trial Court's Use of Comity.*—According to Black's Law Dictionary, "judicial comity" is "[t]he principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect."[70] In *In re Arbitration Between American General Financial Services, Inc. and Miller*,[71] the court of appeals determined what standard of appellate review applies when a trial court bases a decision on comity.[72] Looking to prior precedent and the fact that "comity is a 'rule of convenience and courtesy,'"[73] the court concluded that "'as a principle which may or may not be applied at the discretion of the trial court, the use of comity should be reviewed for an abuse of that discretion.'"[74]

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64. *Id.* (internal citation omitted); *see also* Whinery v. Roberson, 819 N.E.2d 465, 471 (Ind. Ct. App. 2004) ("Though the trial court's decision is 'clothed with a presumption of validity,' a reviewing court faces the same issues that were before the trial court and analyzes them the same way." (quoting Kennedy v. Guess, Inc., 806 N.E.2d 776, 779 (Ind. 2004)), *trans. dismissed* (Ind. 2006).

65. 819 N.E.2d 465.

66. *Id.* at 471 (emphasis added).

67. *Id.* at 470-71.

68. *Id.* at 471.

69. *Id.* at 471-72.

70. BLACK'S LAW DICTIONARY 183 (6th ed. (abridged) 1991).

71. 820 N.E.2d 722 (Ind. Ct. App. 2005).

72. *See id.* at 724.

73. *Id.* (quoting Am. Econ. Ins. Co. v. Felts, 759 N.E.2d 649, 660-61 (Ind. Ct. App. 2001)).

74. *Id.* (quoting Appellant's Br. at 6).

3. Appropriateness of Sentence.—Appellate Rule 7(B) sets out the Indiana appellate courts' authority to "revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."[75] In *Neale v. State*,[76] the court of appeals, when discussing Appellate Rule 7(B), paraphrased it in the negative: "'A sentence that is authorized by statute will *not* be revised *unless* it is inappropriate in light of the nature of the offense and the character of the offender.'"[77] The supreme court took issue with this paraphrase, noting:

> While accurate as a matter of logic, *i.e.*, the rule does not authorize a sentence to be revised unless it is inappropriate in light of the nature of the offense and the character of the offender, we believe that phrasing the rule in the negative suggests a greater degree of restraint on the reviewing court than the rule is intended to impose. When we made the change to the language of the rule . . . , we changed its thrust from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied. *Cf.* App. R. 7(B) at 181 (West 2002) (repealed effective Jan. 1, 2001) ("The Court shall not revise a sentence authorized by statute unless the sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.") *with* App. R. 7(B) at 185 (West 2005) ("The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.").[78]

The court then revised the defendant's sentence downward by ten years.[79]

G. Mootness

It is well-known that "Indiana appellate courts' jurisdiction is not limited under the Indiana Constitution to actual cases and controversies," and therefore such courts may decide an arguably moot case on its merits if it involves a question of great public interest that is likely to reoccur.[80] During the reporting period, the Indiana Court of Appeals found several cases met this threshold. Such cases generally involved either involuntary inpatient commitment to a

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75. IND. APP. R. 7(B).

76. 826 N.E.2d 635 (Ind. 2005).

77. *Id.* at 639 (emphasis added) (quoting Neale v. State, No. 01A02-0311-CR-983, slip op. at 4 (Ind. Ct. App. June 11, 2004) (unpublished mem.), *vacated by* 826 N.E.2d 635 (Ind. 2005)).

78. *Id.*

79. *Id.* Justice Dickson dissented, "believing the 'due consideration of the trial court's decision' required by Indiana Appellate Rule 7(B) should restrain appellate revision of sentences to only rare, exceptional cases, and that this is not such a case." *Id.* (Dickson, J., dissenting).

80. Travelers Indem. Co. v. P.R. Mallory & Co., 772 N.E.2d 479, 484 (Ind. Ct. App. 2002).

mental health facility,[81] or juvenile delinquency commitments to the Department of Correction.[82]

H. Stare Decisis in the Court of Appeals

In *Kendall v. State*[83] and *Hardister v. State*,[84] majorities on different Indiana Court of Appeals panels reached opposite results on the same set of facts. Specifically, Kendall and Hardister were co-defendants who were tried jointly but appealed separately. At issue in both appeals was whether the trial court erroneously denied the defendants' motion to suppress evidence. In *Hardister*, the court of appeals reversed the trial court.[85] In *Kendall*, a majority of a divided panel affirmed.[86] In doing so, the *Kendall* majority wrote, "The left hand is aware of what the right hand is doing here. The parties never moved to consolidate their appeals, however, and two judges of this panel find themselves unable to agree with the result reached by Hardister's panel."[87]

Kendall and *Hardister* raise an interesting question concerning the extent to which the doctrine of stare decisis applies in the Indiana Court of Appeals. "The doctrine of stare decisis states that, when a court has once laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same."[88] Thus, is the Indiana Court of Appeals a single court bound by the doctrine (similar to a single federal circuit court of appeal, where panels are bound by the prior decisions of other panels[89]), or is each panel free to disregard rulings made by other panels on the same issue (akin to the federal circuit court of appeals system as a whole, where each circuit court of appeals determines the law for the states

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81. *See In re* Commitment of M.M., 826 N.E.2d 90 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 183 (Ind. 2005); *In re* Commitment of Steinberg, 821 N.E.2d 385, 387 n.2 (Ind. Ct. App. 2004).

82. *See* D.S. v. State, 829 N.E.2d 1081, 1083 n.1 (Ind. Ct. App. 2005).

83. 825 N.E.2d 439 (Ind. Ct. App. 2005), *trans. pending*.

84. 821 N.E.2d 912 (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 175 (Ind. 2005).

85. *See id.* at 915.

86. *See Kendall*, 825 N.E.2d at 456.

87. *Id.* at 451 n.9.

88. Emerson v. State, 812 N.E.2d 1090, 1099 (Ind. App. Ct. 2004).

89. *See, e.g.*, Eulitt *ex rel.* Eulitt v. Maine, Dep't of Educ., 386 F.3d 344, 349 (1st Cir. 2004) ("Ordinarily, newly constituted panels in a multi-panel circuit should consider themselves bound by prior panel decisions. This rule is a specialized application of the stare decisis principle." (internal citations omitted)); Milton S. Kronheim & Co. v. District of Columbia, 91 F.3d 193, 197 (D.C. Cir. 1996) (stating that panel was bound to follow prior published opinions of the D.C. Circuit); *In re* Smith, 10 F.3d 723, 724 (10th Cir. 1993) ("We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court."); 6TH CIR. R. 206(c) ("Reported panel opinions are binding on subsequent panels."); 3D CIR. INTERNAL OP. P. 9.1 ("It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels.").

within that circuit and is not bound by precedent issued by other circuits[90])?

In *Diesel Construction Co. v. Cotten*, [91] the Indiana Court of Appeals was faced with conflicting opinions issued by its First and Fourth Districts. One of the parties argued that the panel hearing the case, made up of First District judges, should apply First District precedent and disregard conflicting Fourth District precedent, "imparting that [First District judges were] not bound by decisions from [the] other districts."[92] "Contrary to [the party's] misapprehension," the panel responded, "the decisions of all five appellate districts are law governing all of Indiana, not just the district from which the decision was issued. Thus, we cannot simply disregard them."[93] Similarly, in *State ex rel. Shortridge v. Court of Appeals of Indiana*,[94] the Indiana Supreme Court stated, with regard to the court of appeals being divided into separate districts, that "[n]either the Constitution nor the General Assembly provides for . . . separate and independent courts [based on districts]."[95] Rather, "the jurisdiction of the [court of appeals is] according to subject matter and imposed sentence, not according to particular geographic districts or particular judges or panels of judges," and therefore jurisdiction "lies with the court as a whole, not with the statutorily-designated districts or the judges thereof."[96] Because the court of appeals is a single court whose various panels issue decisions binding on all lower Indiana courts, these cases would seem to suggest that the court of appeals is more analogous to a single federal circuit court of appeals, and therefore, for consistency, uniformity, and clarity, stare decisis should bind a court of appeals panel's decision to the same extent it binds a decision rendered by a panel within a federal circuit court.

On the other hand, two aspects of the Indiana Appellate Rules seem to suggest the court of appeals is more analogous to the federal circuit court of appeals system as a whole rather than a single circuit court of appeals. First, one stated ground for transfer to the Indiana Supreme Court is that "[t]he Court of Appeals has entered a decision in conflict with another decision of the Court of Appeals on the same important issue."[97] This seems to imply that a court of appeals panel is not required to follow a preceding decision by a different court of appeals' panel (although admittedly the word "panel" does not appear in the rule's text), and parallels the "circuit split" ground for a grant of certiorari to the

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90. *See, e.g.*, Abdulai v. Ashcroft, 239 F.3d 542, 553 n.7 (3d Cir. 2001) (stating the Third Circuit panel is not bound by decisions of other United States Circuit Courts of Appeals); U.S. v. Phillips, 210 F.3d 345, 352 n.4 (5th Cir. 2000) (same); U.S. v. Brame , 997 F.2d 1426, 1428 (11th Cir. 1993) (same).

91. 634 N.E.2d 1351 (Ind. Ct. App. 1994).

92. *Id.* at 1354.

93. *Id.*

94. 468 N.E.2d 214 (Ind. 1984).

95. *Id.* at 216.

96. *Id.*

97. IND. APP. R. 57(H)(1).

United States Supreme Court.[98] Second, there is no provision in our appellate rules for the Indiana Court of Appeals to review one of its panel's decision en banc. The Federal Rules of Appellate Procedure, on the other hand, specifically contemplate en banc review when a circuit panel's decision conflicts with prior precedent within that same circuit so that en banc decision resolving the conflict may "secure and maintain uniformity of the [circuit] court's decisions."[99] Thus, the placement of responsibility for resolving conflicting court of appeals' precedent in the supreme court, combined with the absence of any mechanism for en banc court of appeals review of conflicting panel opinions, suggests the court of appeals' panels are more analogous, in terms of autonomy and stare decisis, to the various federal circuit courts of appeal, rather than a single federal circuit court.

Procedurally and practically, there are likely pros and cons to each model, a discussion of which is well beyond the scope of this Article. The irreconcilable decisions in *Kendall* and *Hardister* during this reporting period, however, may indicate that the time has come for such a discussion among Indiana appellate court jurists and pundits.

I. Attorneys' Fees and Costs on Appeal

1. When Is an Appellate Decision "Final" for Purposes of Filing a Motion for Costs?—To secure appellate costs, the victorious party must file a motion "within sixty (60) days after the final decision of the Court of Appeals or Supreme Court."[100] In *Rogers Group, Inc. v. Diamond Builders, LLC*,[101] the court of appeals interpreted the meaning of "final" in this context.[102] Specifically, the court of appeals issued its decision in the appellant's favor on October 7, 2004. The appellee sought transfer, which the supreme court denied on March 10, 2005. The appellant filed a motion for costs on April 26, 2005, well within the time limit if the sixty-day period began to run on March 10, 2005, but well outside that time limit if the period began to run on October 7, 2004.[103] The appellee argued the motion was untimely, contending that because Appellate Rule 58(B) states the "denial of a Petition to Transfer shall have no legal effect other than to terminate the litigation between the parties in the Supreme Court,"[104] the sixty-day period began to run when the court of appeals issued its decision on October 7, 2004, rather than when the supreme court denied

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98. *See, e.g.*, SUP. CT. R. 10(a) (stating certiorari may be granted where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

99. FED. R. APP. P. 35(b)(1)(A).

100. IND. APP. R. 67(A).

101. 833 N.E.2d 475 (Ind. Ct. App. 2005).

102. *See id.* at 476-77.

103. *See id.*

104. *See* IND. APP. R. 58(A).

transfer.[105] The court of appeals disagreed, interpreting the word "final" to mean the date on which the Clerk of Courts certifies an opinion as "final" under Appellate Rule 65(E).[106] "It makes little sense," the court wrote, "for a party to seek appellate costs if the decision on which the party seeks costs is later reversed or modified on rehearing or transfer."[107]

This is an important ruling for appellate practitioners to understand. The issue presented was whether the transfer denial date or the date the court of appeals' decision is handed down triggered the start of the limitations period for filing a motion for costs. The court of appeals effectively held "neither," because the date on which the clerk certifies an opinion as final is typically about thirty or more days *after* the supreme court issues its order denying transfer.[108] Further, because the certification notice goes only to the trial court or administrative agency from which the appeal came,[109] parties will have to check the clerk's on-line docket or phone the clerk's office to find out the actual date on which an opinion is certified as final.

2. Contract Trumps Appellate Rule 67 Concerning Appellate Costs.—In *Walton v. Claybridge Homeowners Ass'n*,[110] the appellant argued the appellee was not entitled to costs incurred during the appellate process because the appellant had failed to file a motion for appellate costs within sixty days of the court of appeals' decision.[111] The court of appeals rejected this argument because "the costs in this case were sought under a provision of the [declaration of covenants and rights between the parties, or "DCR"], which has been recognized as a form of contract. Thus, the DCR, not the appellate rule, governed the [appellee's] right to recover costs."[112]

J. Waiver

1. "Void" Versus "Voidable" Orders.—In *In re Paternity of P.E.M.*,[113] the appellant contended the trial court could not use a 2003 order to reaffirm a ruling made in a 2001 order because the 2001 order was void for failing to contain

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105. *Rogers Group, Inc.*, 833 N.E.2d at 476.

106. *Id.* at 477.

107. *Id.*

108. *See id.*; IND. APP. R. 65(E) ("The Clerk shall certify the opinion or memorandum decision to the trial court or Administrative Agency only after the time for all Petitions for Rehearing, Transfer, or Review has expired . . . ."); IND. APP. R. 54(B) (stating Petition for Rehearing is due "no later than thirty (30) days after the decision"); IND. APP. R. 57(C) (stating Petition to Transfer is due "no later than thirty (30) days" after the court of appeals' adverse decision or disposition of a Petition for Rehearing).

109. *See* IND. APP. R. 65(E).

110. 825 N.E.2d 818 (Ind. Ct. App. 2005).

111. *Id.* at 823; *see* IND. APP. R. 67(A).

112. *Walton*, 825 N.E.2d at 823-24 (internal citation omitted).

113. 818 N.E.2d 32 (Ind. Ct. App. 2004).

necessary findings of fact and conclusions of law.[114] The court of appeals agreed that the 2001 order was deficient, but found the deficiency made the order "voidable" rather than "void."[115] Because the appellant did not raise the deficiency of the 2001 order in his first appeal, he had forfeited his ability to challenge the 2001 order directly and could not avoid that forfeiture by collaterally attacking the 2001 order through a challenge to the 2003 order.[116]

2. Issues Considered on Appeal That Were Not Raised in Trial Court.—Normally, a party's failure to raise an issue in the trial court waives its ability to raise the issue on appeal.[117] In a couple of cases, however, the court of appeals elected to consider such issues anyway.

In *Save the Valley, Inc. v. Indiana-Kentucky Electric Corp.*,[118] the Indiana Department of Environmental Management ("IDEM") had renewed Indiana-Kentucky Electric Corporation's ("IKEC's") license to operate a coal ash landfill.[119] Several groups challenged this. At the administrative level, IKEC challenged the groups' standing to bring their claim, but IDEM did not. On appeal, IDEM attempted to raise the standing issue and the groups objected, citing IDEM's failure to raise the issue below. The court of appeals allowed IDEM to proceed, even though it was raising the issue for the first time on appeal, because the groups had fair notice of the issue and an opportunity to defend it at the administrative level.[120]

In *Highler v. State*,[121] Highler objected to the prosecution's use of a peremptory challenge to strike an African-American minister from the venire, but only on the ground that the strike was racially discriminatory.[122] On appeal, he attempted to argue that the peremptory challenge violated constitutional requirements because it was based on the potential juror's religious affiliation.[123] The court of appeals agreed to consider the issue, although normally it would have been waived, because the court of appeals found the issue to be "of importance."[124] It also observed that the State had failed to make any waiver claim and instead had responded to the issue on its merits.[125]

3. "Waiver" Versus "Forfeiture."—In *Smylie v. State*,[126] the supreme court,

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114. *See id.* at 36.

115. *See id.* at 37.

116. *See id.* at 36-37.

117. *See, e.g.*, *In re* Estate of Highfill, 839 N.E.2d 218, 223 n.2 (Ind. Ct. App. 2005), *reh'g denied* (Ind. Ct. App. 2006); Ryan v. Brown, 827 N.E.2d 112, 118 (Ind. Ct. App. 2005).

118. 820 N.E.2d 677 (Ind. Ct. App.), *on reh'g*, 824 N.E.2d 776 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 179 (Ind. 2005).

119. *See id.* at 678.

120. *Id.* at 679 n.3.

121. 834 N.E.2d 182 (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 191 (Ind. 2005).

122. *See id.* at 186.

123. *See id.* at 193-94.

124. *Id.* at 193 n.8.

125. *Id.*

126. 823 N.E.2d 679 (Ind.), *cert. denied*, 126 S. Ct. 545 (2005).

citing federal precedent, clarified the difference between "waiver" and "forfeiture." The court wrote:

> These terms are often used somewhat interchangeably, but they deal with distinct categories of non-appealable issues. Waiver indicates an "intentional relinquishment or abandonment of a known right." In contrast, forfeiture occurs when a party fails "to make the timely assertion of a right." Furthermore, while waiver generally precludes appellate review of an issue, in federal practice forfeiture permits appellate review, but limits such review to "plain error."[127]

4. Appellate Rule 48 May Not Be Used to Preserve Issue Not Raised in Appellant's Brief.—In *Chupp v. State*,[128] the appellant failed to raise a claim that arguably was available to him at the time his appellant's brief was filed. Rather than seeking to amend his brief, however, he attempted to submit a case in support of his argument as "supplemental authority" under Appellate Rule 48.[129] The court of appeals rejected a reading of the rule that would allow such a tactic and found the argument forfeited, stating:

> Surely it is not the intention of Appellate Rule 48 to allow a party who failed to present an issue in his appellant's brief to bypass the general rule that un-raised issues may not be presented for the first time in a reply brief by filing a citation to additional authority. Instead, as we read the Rule, where a party has properly presented an issue, he may supplement his brief by providing citations to additional authority to support the argument previously raised.[130]

5. Appellate Court May Affirm the Trial Court's Judgment on Any Theory Supported by the Record . . . Except Standing.—It has long been the law in Indiana that an appellate court may affirm a trial court's judgment on any theory supported by the evidence in the appellate record.[131] This general rule may conflict, however, with a more specific rule that says the State may not challenge a defendant's standing to contest the constitutional validity of a search for the first time on appeal.[132] In *Edwards v. State*,[133] the court of appeals resolved this conflict in favor of the defendant, holding the State may challenge a defendant's standing on appeal only if it did so below, even if the standing issue is an otherwise viable reason to affirm a trial court's judgment finding a search to be

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127. *Id.* at 688 n.13 (internal citations omitted).

128. 830 N.E.2d 119 (Ind. Ct. App. 2005).

129. *Id.* at 125-26.

130. *Id.* at 126.

131. Ratliff v. State, 770 N.E.2d 807, 809 (Ind. 2002); *see, e.g.*, Jester v. State, 724 N.E.2d 235, 240 (Ind. 2000); Dowdell v. State, 720 N.E.2d 1146, 1152 (Ind. 1999); Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997); Light v. State, 547 N.E.2d 1073, 1081 (Ind. 1989).

132. *See, e.g.*, Everroad v. State, 590 N.E.2d 567, 569 (Ind. 1992); Tumblin v. State, 736 N.E.2d 317, 320-21 (Ind. Ct. App. 2000).

133. 832 N.E.2d 1072 (Ind. Ct. App. 2005).

constitutionally valid.[134]

K. Problematic Appellate Performance

This survey period, as in previous years, saw several appeal-related problems deemed serious enough by the reviewing tribunal to warrant published comment. Many of those instances are discussed below.

1. Contents of Briefs and Petitions.—The survey period again saw repeated problems with appellate briefs, particularly concerning failing to include a table of authorities,[135] arguing facts not supported by the record evidence,[136] failing to use pinpoint citations,[137] failing to keep the Summary of the Argument "succinct,"[138] failing to give each argument within the brief's "argument" section its own separate heading,[139] missing Statements of Facts,[140] missing Statements of the Case,[141] and improper Statements of Fact or Statements of the Case (argumentativeness,[142] failing to state the facts in the manner commensurate with the applicable standard of review,[143] failing to state the standard of review,[144] reproducing the trial court's findings of fact in lieu of a written Statement of Facts,[145] failing to include necessary facts or proper record citations,[146] missing

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134. *Id.* at 1074-75.

135. Montgomery v. Bd. of Trs. of Purdue Univ., 824 N.E.2d 1278, 1279 n.3 (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 181 (Ind. 2005); LTL Truck Serv., LLC v. Safeguard, Inc., 817 N.E.2d 664, 670 n.3 (Ind. Ct. App. 2004).

136. Pelak v. Ind. Indus. Servs., Inc., 831 N.E.2d 765, 774 nn.10-11 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006); Long v. Barrett, 818 N.E.2d 18, 22 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 743 (Ind. 2005).

137. Goodwine v. Goodwine, 819 N.E.2d 824, 828 n.2 (Ind. Ct. App. 2004).

138. Troxel Equip. Co. v. Limberlost Bancshares, 833 N.E.2d 36, 37 n.1 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 189 (Ind. 2005).

139. Darling v. Martin, 827 N.E.2d 1199, 1202 n.2 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2005).

140. Allstate Ins. Co. v. Hennings, 827 N.E.2d 1244, 1246 n.1 (Ind. Ct. App. 2005).

141. Black v. State, 829 N.E.2d 607, 609 n.1 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 185 (Ind. 2005).

142. Fuerst v. Review Bd. of Ind. Dep't of Workforce Dev., 823 N.E.2d 309, 310 n.1 (Ind. Ct. App. 2005).

143. *Id.*

144. Mullins v. Parkview Hosp., Inc., 830 N.E.2d 45, 59 n.8 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2005), *reh'g denied* (Ind. Ct. App. 2006), *trans. pending*; Montgomery v. Bd. of Trs. of Purdue Univ., 824 N.E.2d 1278, 1279 n.3 (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 181 (Ind. 2005).

145. Gen. Motors Corp. v. Sheets, 818 N.E.2d 49, 51 n.1 (Ind. Ct. App. 2004), *trans. denied* (Ind. 2005).

146. Allstate Ins. Co. v. Hennings, 827 N.E.2d 1244, 1246 n.1 (Ind. Ct. App. 2005); Kendall v. State, 825 N.E.2d 439, 444 n.2 (Ind. Ct. App. 2005); *Montgomery*, 824 N.E.2d at 1279 n.3; Smith v. State, 822 N.E.2d 193, 204 n.7 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 741 (Ind. 2005).

Statement of the Case,[147] etc.). Indeed, in *Johnson v. State*,[148] the court of appeals expressed frustration with the appellant's counsel's repeated failure to provide compliant Statements of Facts. It wrote:

> We remind Johnson's counsel, *as we have on numerous prior occasions*, that a statement of the facts in an Appellant's Brief is *not to be a witness by witness summary of the evidence presented at trial.* Rather, it is to be a concise statement of the facts in the light most favorable to the judgment. *The statement should tell a coherent story, which Johnson's statement wholly fails to do.*[149]

The most recurrent briefing problem this year, however, was appellants failing "to include any written opinion, memorandum of decision or findings of fact and conclusions thereon relating to the issues raised on appeal" or, in criminal cases "a copy of the sentencing order," in their Appellant's Briefs.[150]

2. Appendices.—There were also several problems noted again this year with appellate appendices, including failing to file appendices,[151] failing to include documents in the appendices necessary for the appellate court's review of the trial court's ruling,[152] failing to number the appendix pages,[153] and

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147. Lewis v. Rex Metal Craft, Inc., 831 N.E.2d 812, 815 n.1 (Ind. Ct. App. 2005).

148. 831 N.E.2d 163 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 183 (Ind. 2005).

149. *Id.* at 166 n.2 (emphasis added) (citing IND. APP. R. 46(A)(6)(c)).

150. IND. APP. R. 46(A)(10); *see, e.g.*, Citizens Fin. Servs. v. Innsbrook Country Club, Inc., 833 N.E.2d 1045, 1046 n.2 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2005); Schmidt v. Mut. Hosp. Servs., Inc., 832 N.E.2d 977, 979 n.3 (Ind. Ct. App. 2005); *Johnson*, 831 N.E.2d at 167 n.3; Stokes v. State, 828 N.E.2d 937, 939 n.5 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 182 (Ind. 2005); Bloomington Country Club, Inc. v. City of Bloomington Water & Wastewater Utils., 827 N.E.2d 1213, 1218 n.1 (Ind. Ct. App. 2005); *In re* Paternity of H.J.B., 829 N.E.2d 157, 158 n.1 (Ind. Ct. App. 2005); McLemore v. McLemore, 827 N.E.2d 1135, 1138 n.1 (Ind. Ct. App. 2005); Illiana Surgery & Med. Ctr., LLC v. STG Funding, Inc., 824 N.E.2d 388, 392 n.1 (Ind. Ct. App. 2005); Fuerst v. Review Bd. of Ind. Dep't of Workforce Dev., 823 N.E.2d 309, 312 n.2 (Ind. Ct. App. 2005); *In re* Sale of Real Prop. with Delinquent Taxes or Special Assessments, 822 N.E.2d 1063, 1065 n.1 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 179 (Ind. 2005); Bloomington Area Arts Council v. Dept. of Workforce Dev., Unemployment Ins. Appeals, 821 N.E.2d 843, 845 n.1 (Ind. Ct. App. 2005); State v. Jones, 819 N.E.2d 877, 879 n.7 (Ind. Ct. App. 2004); Metro. Sch. Dist. of Lawrence Twp. v. M.S., 818 N.E.2d 978, 979 n.2 (Ind. Ct. App. 2004); Barclay v. State Auto Ins. Cos., 816 N.E.2d 973, 974 n.1 (Ind. Ct. App. 2004), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 745 (Ind. 2005); Combs v. Tolle, 816 N.E.2d 432, 433 n.1 (Ind. Ct. App. 2004).

151. Gibbon v. Estate of Gibbon, 829 N.E.2d 27, 28 n.1 (Ind. Ct. App. 2005); *Fuerst*, 823 N.E.2d at 310 n.1.

152. *Citizens Fin. Servs*, 833 N.E.2d at 1046 n.2; Rembert v. State, 832 N.E.2d 1130, 1131 n.2 (Ind. Ct. App. 2005); Cortez v. Jo-Ann Stores, Inc., 827 N.E.2d 1223, 1227 n.1 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2005); LTL Truck Serv., LLC v. Safeguard, Inc., 817 N.E.2d 664, 670 n.3 (Ind. Ct. App. 2004).

153. Everage v. N. Ind. Pub. Serv. Co., 825 N.E.2d 941, 943 n.1 (Ind. Ct. App. 2005).

including improper documents that were not designated to the trial court in the appendix.[154] Indeed, the latter problem resulted in one appendix being stricken in its entirety[155] and others having significant portions stricken.[156]

The failure to include necessary documents in an appendix can result in dismissal of the appeal or an adverse ruling on the merits against the party who failed to include the necessary document.[157] In *Glasscock v. Corliss*,[158] however, it did not. The issue surrounded the alleged excessiveness of a jury verdict, which, to be preserved for appeal, must have been challenged in the trial court by a motion to correct error.[159] Although the trial court's chronological case summary showed the appellant had filed a motion to correct error, he had not included it in his appendix; therefore, the court could not determine the motion's contents to see if the issue had been preserved.[160] Because the appellee had failed to argue that the issue was waived, however, the court "assume[d the issue] was properly preserved and address[ed] its merits."[161]

A similar result occurred in *Kelly v. Levandoski*,[162] which involved an appeal from a grant of summary judgment. The appellant included in his appendix only the documents he had designated to the trial court, rather than all the documents designated by both parties.[163] Noting that the appellant's appendix is required to "contain . . . copies of . . . pleadings and other documents from the Clerk's Record in chronological order that are necessary for resolution of the issues raised on appeal,"[164] the court of appeals acknowledged it recently had dismissed two appeals for this type of rule violation.[165] In this case, however, it chose not to dismiss the appeal, in part because the appellee had submitted the missing documents in its own appendix.[166] This result raises serious questions of strategy

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154. Binder v. Benchwarmers Sports Lounge, 833 N.E.2d 70, 73 n.1 (Ind. Ct. App. 2005); Shepherd v. Truex, 823 N.E.2d 320, 322 n.1 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2005); Ind. Bus. Coll. v. Hollowell, 818 N.E.2d 943, 952 n.5 (Ind. Ct. App. 2004); Long v. Barrett, 818 N.E.2d 18, 22 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 743 (Ind. 2005).

155. *See Ind. Bus. Coll.*, 818 N.E.2d at 952 n.5.

156. *See Binder*, 833 N.E.2d at 73 n.1; *Shepherd*, 823 N.E.2d at 322 n.1.

157. *See, e.g.*, Yoquelet v. Marshall County, 811 N.E.2d 826, 827-30 (Ind. Ct. App. 2004); Hughes v. King, 808 N.E.2d 146, 147-48 (Ind. Ct. App. 2004).

158. 823 N.E.2d 748 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 183 (Ind. 2005).

159. *Id.* at 757 n.5 (citing IND. TRIAL R. 59(A)(2)).

160. *Id.*

161. *Id.*; *see also* Schrenger v. Caesars Ind., 825 N.E.2d 879, 881 n.5 (Ind. Ct. App.) (noting that both parties had failed to include indispensable documents in their respective appendices, but addressing the merits anyway because "neither party appears to dispute the facts"), *trans. denied*, 841 N.E.2d 178 (Ind. 2005).

162. 825 N.E.2d 850 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 179 (Ind. 2005).

163. *Id.* at 856.

164. *Id.* (quoting IND. APP. R. 50(A)(2)(f)).

165. *See id.* (citing Yoquelet v. Marshall County, 811 N.E.2d 826, 830 (Ind. Ct. App. 2004); Hughes v. King, 808 N.E.2d 146, 148 (Ind. Ct. App. 2004)).

166. *Id.*

that appellees must consider when faced with similar situations in the future. On the one hand, by submitting the necessary documents in an appellee's appendix, the appellee may ruin its chance for getting the appeal dismissed. On the other hand, if the appellee fails to submit the documents, will it risk losing the appeal on the merits if the court considers the merits without the appellee's necessary documents?

Finally, in *Rembert v. State*,[167] the court again showed leniency to an appellant who violated the Appellate Rules by failing to include a table of contents and a critical document in the appendix, going so far as to procure the necessary document from the trial court rather than dismiss the appeal[168] as it did in other cases.[169] The court wrote:

> Counsel's failure to provide an adequate table of contents impeded our review, as we had to pore through the appendix to determine which documents he had provided and where we might find them. As noted below, at least one document of substantial importance, Rembert's pre-sentence report, was conspicuous by its absence from the appendix. While we chose to obtain that information from the trial court, we remind Rembert's counsel it is an appellant's obligation to provide us with an adequate record that clearly shows the alleged error of which he complains. We admonish counsel to provide a complete appendix with a usable table of contents in future appeals brought before this court.[170]

3. Oral Argument.—In *Schriber v. Anonymous*,[171] the Indiana Supreme Court heard oral argument on a petition to transfer. During the oral argument, the attorneys on both sides provided evasive, non-responsive answers to direct questions from the panel.[172] Chief Justice Shepard responded with the following statement to the appellee's counsel:

> This has been a very bad morning. . . . We've spent thirty-five minutes in which a variety of the members of this Court asked you and [opposing counsel] rather ordinary questions . . . and get what appear to me to be intentional refusals to answer. . . . Justice Sullivan has asked you a very simple question. He's asked it three times. . . . I only conclude from that sort of response that . . . a direct answer to his question is adverse to your position. That's the inference I draw when a lawyer does that. . . . I'm not really sure which one of you has been more obstinate. . . . But,

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167. 832 N.E.2d 1130 (Ind. Ct. App. 2005).

168. *Id.* at 1131 n.2.

169. *See, e.g.*, cases cited at *supra* note 165.

170. *Rembert*, 832 N.E.2d at 1131 n.2 (internal citation omitted).

171. 810 N.E.2d 1119 (Ind. Ct. App. 2004), *vacated by* No. 49S04-0501-CV-30, 2006 WL 999969 (Ind. Apr. 18, 2006).

172. *See generally* Indiana Supreme Court Oral Argument in Schriber v. Anonymous (March 10, 2005, at 9 a.m.), *available at* http://www.indianacourts.org/apps/webcasts/default.aspx?view=table&yr=2005&court= SUP&sort=&page=5.

> unless you have an answer, and so far you have steadfastly refused to give one, I conclude that . . . the answer in your own mind is a negative. And if you have a positive, it would be to your client's benefit to offer it up.[173]

The take-away for appellate practitioners is to realize that by failing to address tough questions directly, you leave the panel believing the "real" answer, which you appear to be avoiding at all costs, to be one detrimental to your case. Thus, your failure to answer a question might itself be an "answer," but likely not the one you want to give the court.

Also, if practitioners have an oral argument before the Indiana Supreme Court and wish to watch their performance later, they can do so by logging onto the court's website.[174] Since 2001, the court has been archiving videotaped recordings of its oral arguments on its website, a point of which the court reminded citizens in a footnote in *Advantage Home Health Care, Inc. v. Indiana State Department of Health.*[175] Oral arguments are also available live on the website.[176]

4. Candor to the Tribunal.—As has been noted in this survey article previously,[177] the "baffling"[178] problem of litigants making claims about the record or precedent that the record or precedent do not support continued this survey period. In *Binder v. Benchwarmers Sports Lounge*,[179] the court of appeals "admonish[ed] Binder's counsel to pay closer attention to [Indiana's] appellate rules and his duties, particularly with regard to the accuracy of his [appendix] verification, as an officer of the court."[180] In *Milligan v. State*,[181] the court of appeals, after noting that "[t]he State's references to the transcript do not support its assertions," "remind[ed] the State's counsel of his duty of candor toward the tribunal."[182] In *Indiana Family & Social Services Administration v. Ace Foster Care & Pediatric Home Nursing Agency Corp.*,[183] the court criticized appellee's counsel for citing a court of appeals' opinion that had been vacated by a supreme court grant of transfer, "thereby negating its precedential value."[184] The court

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173. *Id.* at 31:33-32:38.

174. *See* Indiana Courts, Oral Arguments Online, http://www.indianacourts.org/apps/webcasts/ (last visited June 13, 2006).

175. *See* 829 N.E.2d 499, 502 n.2 (Ind. 2005).

176. *See supra* note 174.

177. *See* Smith, *supra* note 1, at 908; Douglas E. Cressler, *Appellate Procedure*, 36 IND. L. REV. 935, 949-50 & n.106 (2003); Douglas E. Cressler & Paula F. Cardoza, *A New Era Dawns in Appellate Procedure*, 34 IND. L. REV. 741, 776 & n.374 (2001).

178. Smith, *supra* note 1, at 908.

179. 833 N.E.2d 70 (Ind. Ct. App. 2005).

180. *Id.* at 73 n.1

181. 819 N.E.2d 115 (Ind. Ct. App. 2004).

182. *Id.* at 118 n.6 (citing IND. RULES OF PROF'L CONDUCT R. 3.3).

183. 823 N.E.2d 1199 (Ind. Ct. App. 2005).

184. *Id.* at 1204 n.5.

"remind[ed] [the appellee's] counsel of their duty of candor toward the tribunal under Indiana Professional Conduct Rule 3.3 and admonish[ed] them to check citations more carefully in the future."[185] This case serves to remind all practitioners of the importance of "Shepardizing" all citations in briefs and motions.

5. Incivility.—The recurring problem of incivility continued to rear its ugly head this survey period, again drawing censure from the court of appeals. In *Tobin v. Ruman*,[186] the court noted that the appellant's briefs were "filled with unnecessarily hostile descriptions of the opposing parties and the trial court."[187] After listing examples, the court stated that "[t]he generally offensive and inflammatory tone of the briefs does little to advance [the appellant's] position," and "caution[ed the appellant] . . . to adopt a more professional, appropriate, and respectful tone in all of his dealings with courts of law and other members of the legal profession in the future or face appropriate sanctions."[188]

Crosson v. Berry[189] also involved attorneys who could not maintain professional levels of civility. The court wrote:

> In her reply brief, Crosson moved to strike Berry's brief, and she suggested that "this case presents an opportunity for the Court to remind attorneys of . . . their responsibility to maintain the dignity and reputation of the profession." We hereby deny Crosson's motion to strike Berry's brief but would suggest that *the parties to this appeal, both of whom are attorneys, are the ones who need the reminder of the responsibility to maintain the dignity and reputation of the legal profession.*[190]

Judge Baker wrote a separate concurrence specifically to expound upon the majority's admonition and express his displeasure over what he viewed as a frivolous appeal. He wrote:

> I fully concur in the majority opinion. However, I write separately to highlight what the majority observed in the first footnote—the parties' responsibility to maintain the dignity and reputation of the legal profession.
>
> This matter should have been laid to rest when the Monroe County jury essentially told Crosson and Berry to put this litigation behind them by finding for Berry on the malicious prosecution claim but awarding him no damages. . . . In my view, by appealing this case that clearly should

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185. *Id.*

186. 819 N.E.2d 78 (Ind. Ct. App. 2004), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 747 (Ind. 2005).

187. *Id.* at 81 n.2.

188. *Id.*

189. 829 N.E.2d 184 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 186 (Ind. 2005).

190. *Id.* at 187 n.1 (emphasis added).

> have ended with the jury verdict, if not sooner, Crosson is now maintaining a frivolous, unreasonable, and groundless action. As such, I would remand this cause to the trial court for an award of attorney's fees to Berry for the maintenance of this action since the jury verdict, including the litigation of this appeal.[191]

Professor Crosson did not heed Judge Baker's advice, instead continuing the litigation by filing a petition to transfer, which the Indiana Supreme Court denied.[192]

Not all barbs at opposing counsel are viewed with disfavor, however, at least when packaged in humor rather than vitriol. In *Beta Steel v. Rust*,[193] the appellant "t[ook] issue with a footnote in [the appellee's] brief that compares [the appellant's] characterization of some of the designated evidence to 'the Wizard of Oz whose presence is uncovered by Toto but continues to shout into the microphone: Pay no attention to the man behind the curtain!'"[194] The court of appeals denied the appellant's request to strike the footnote, stating, "This is a unique characterization of an opposing party's position, but not one that we can label 'scandalous,' 'impertinent,' or 'immaterial.' We do not automatically condemn an attempt to place some light humor into a brief, albeit at the expense of opposing counsel . . . ."[195]

6. Appeals Warranting Sanctions.—At least two opinions during this reporting period held that the arguments advanced on appeal were so groundless as to warrant appellate attorneys fees as a sanction.

In *Gaddis v. McCullough*,[196] an election contest case, the trial court found against the unsuccessful candidates' claims. The trial court denied the successful candidates' motion for attorneys fees, but did so noting "the winning candidates presented 'a strong basis' for their attorneys' fee claim."[197] Undaunted, the unsuccessful candidates, except for one, appealed. On appeal, the successful candidates asked the court to reverse the trial court's denial of trial attorney's fees and to award appellate attorney's fees as well. The court of appeals granted the successful candidates' request, stating:

> The argument for appellate attorneys' fees is even stronger because the unsuccessful litigants persisted despite the trial court's warning of the futility of their cause. *The unsuccessful candidates should have heeded the trial court's alert that there was a "strong basis" for sanctions in the*

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191. *Id.* at 198 (Baker, J., concurring).

192. *See Crosson*, 841 N.E.2d 186.

193. 830 N.E.2d 62 (Ind. Ct. App. 2005).

194. *Id.* at 69 (internal citation and quotation marks omitted).

195. *Id.*

196. 827 N.E.2d 66 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 181 (Ind. 2005).

197. *Id.* at 70.

> *trial court. Trial courts rarely provide such warnings.* The trial court spelled out clearly for the unsuccessful candidates the problems with their claim.[198]

Still refusing to take "no" for an answer, the unsuccessful candidates petitioned the supreme court for transfer, which the court denied on August 25, 2005.[199]

In *Shepherd v. Truex*,[200] the court of appeals noted that there are two forms of "bad faith" warranting appellate attorneys' fees, "substantive"[201] and "procedural."[202] The court found both to exist in this case and awarded the appellees attorney's fees.[203]

It found substantive bad faith because, it held, "[t]he issues in this appeal [were] meritless, and the abundant underlying litigation amounts to harassment."[204] The court noted:

> Shepherd has filed three lawsuits surrounding the gun incident that occurred in 1999, and, in the present case, he has named as defendants those people that were witnesses in the criminal case against Truex. We cannot glean from the documents on appeal how Shepherd has been injured or damaged based upon his almost indecipherable claims, and we are furthermore unable to determine any plausible explanation for the need to continue to file lawsuits with regard to this incident.[205]

It also found procedural bad faith:

> based upon the inordinate time this Court was required to spend, first, deciphering Shepherd's unintelligible appellate claims, and second, formulating coherent determinations to make sense of Shepherd's assertions. Further, in presenting all of his six allegations of error, Shepherd completely failed to comply with Ind. Appellate Rule 46(A)(8)(a) which requires cogent reasoning as well as citations to authorities, statutes, and the appendix or the record on appeal.[206]

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198. *Id.* at 78 (emphasis added).

199. *See Gaddis*, 841 N.E.2d 181.

200. 819 N.E.2d 457 (Ind. Ct. App. 2004).

201. *Id.* at 464. "To prevail on a substantive bad faith claim, the party must show that the appellant's contentions and arguments are devoid of all plausibility." *Id.*

202. *Id.*

> [P]rocedural bad faith occurs when a party flagrantly disregards the form and content requirements of the appellate rules, omits and misstates relevant facts from the record, and files briefs written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. Even if the appellant's conduct is not necessarily deliberate, procedural bad faith can still be found.

Id. (internal citation omitted).

203. *Id.* at 465.

204. *Id.* at 464.

205. *Id.*

206. *Id.*

Unlike the appellants in *Gaddis*, Shepherd did not file a Petition To Transfer.

7. Failure to Present Cogent Argument.—Appellate Rule 46(A)(8)(a) requires the "argument" section of an appellate brief to "contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . . ."[207] The survey period saw a large number of appellate issues deemed waived for failure to abide by this requirement.[208] A few of those cases will be discussed here.

As alluded to above, in *Shepherd v. Truex* the court had much to say about why it found the appellant's argument waived for lack of cogency:

> "While we prefer to decide cases on their merits, we will deem alleged errors waived where an appellant's noncompliance with the rules of appellate procedure is so substantial it impedes our appellate

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207. IND. APP. R. 46(A)(8)(a).

208. *See, e.g.*, Edwards v. State, 832 N.E.2d 1072, 1080 n.13 (Ind. Ct. App. 2005); Gonzales v. State, 831 N.E.2d 845, 846 n.1 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 184 (Ind. 2005); Morfin v. Estate of Martinez, 831 N.E.2d 791, 800 n.5 (Ind. Ct. App. 2005); Liberty Mut. Ins. Co. v. OSI Indust., Inc., 831 N.E.2d 192, 198 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 190 (Ind. 2005); Mullins v. Parkview Hosp., Inc., 830 N.E.2d 45, 60 n.9 (Ind. Ct. App. 2005), *reh'g denied* (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2006), *trans. pending*; Nance v. Miami Sand & Gravel, LLC, 825 N.E.2d 826, 837 n.5, 839 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 180 (Ind. 2005); Haddix v. State, 827 N.E.2d 1160, 1162 n.1 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 187 (Ind. 2005); *In re* Involuntary Termination of the Parent-Child Relationship of A.I., 825 N.E.2d 798, 816 n.4 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 748 (Ind. 2005); Galligan v. Ind. Dep't of State Revenue, 825 N.E.2d 467, 480 n.16 (Ind. Tax Ct.), *trans. denied*, 841 N.E.2d 180 (Ind. 2005); Kendall v. State, 825 N.E.2d 439, 448 n.6 (Ind. Ct. App. 2005), *trans. pending*; Montgomery v. Bd. of Trs. of Purdue Univ., 824 N.E.2d 1278, 1279 n.3, 1282 n.8 (Ind. Ct. App.), *trans. granted*, 841 N.E.2d 181 (Ind. 2005); Harris v. State, 824 N.E.2d 432, 435 n.1 (Ind. Ct. App. 2005); Watson v. Auto Advisors, Inc., 822 N.E.2d 1017, 1028, 1029 n.13 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 749 (Ind. 2005); $100 & a Black Cadillac v. State, 822 N.E.2d 1001, 1006 n.6 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 748 (Ind. 2005); Smith v. State, 822 N.E.2d 193, 205 n.9 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 741 (Ind. 2005); Polk v. State, 822 N.E.2d 239, 245 n.5 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 743 (Ind. 2005); One Dupont Ctr., LLC v. Dupont Auburn, LLC, 819 N.E.2d 507, 516 n.5 (Ind. Ct. App. 2004); Woolum v. State, 818 N.E.2d 517, 521 n.1 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 735 (Ind. 2005); LTL Truck Serv., LLC v. Safeguard, Inc., 817 N.E.2d 664, 671 n.4 (Ind. Ct. App. 2004); Maggert v. Call, 817 N.E.2d 649, 650 n.1 (Ind. Ct. App. 2004). *But see* Ott v. AlliedSignal, Inc., 827 N.E.2d 1144, 1149 n.3 (Ind. Ct. App.) ("We choose to address Ott's argument on the merits despite the fact that it is unsupported by any citation to authority in her brief. *See* Ind. Appellate Rule 46(A)(8)(a)."), *trans. denied*, 841 N.E.2d 187 (Ind. 2005); AutoXchange.com, Inc. v. Dreyer & Reinbold, Inc., 816 N.E.2d 40, 44-45 (Ind. Ct. App. 2004) (addressing merits of appellants' claims, despite finding appellants' briefs "fail[ed] to address [the] court with cogent reasoning, [and] none of their contentions [were] supported by citations to authorities or relevant parts to [sic] the record and therefore [their briefs] amount[ed] to nothing more than mere rambling allegations").

> consideration of the errors." *The purpose of the appellate rules, especially Ind. Appellate Rule 46, is to aid and expedite review, as well as to relieve the appellate court of the burden of searching the record and briefing the case.* . . . It is well settled that we will not consider an appellant's assertion on appeal when he has failed to present cogent argument supported by authority and references to the record as required by the rules. If we were to address such arguments, we would be forced to abdicate our role as an impartial tribunal and would instead become an advocate for one of the parties. This, clearly, we cannot do.
>
> In the present case, Shepherd's argument on this last issue is utterly devoid of cogent argument. *He does cite to some authority, but he merely gives the cite, perhaps asserting what the cited authority allegedly states, and then wholly fails to explain in what way, if at all, the referenced authority affects or relates to the present case. Put simply, Shepherd's argument is too poorly developed and improperly expressed to be considered cogent argument as required by the rules of appellate procedure.*
>
> Moreover, Shepherd cannot take refuge in the sanctuary of his amateur status. As we have noted many times before, a litigant who chooses to proceed *pro se* will be held to the same rules of procedure as trained legal counsel and must be prepared to accept the consequences of his action. Thus, this issue is waived for lack of cogent argument.[209]

Lack-of-cogency findings during the survey period were not limited to pro se litigants. In *Whinery v. Roberson*,[210] the appellants, who were represented by one of the larger Indianapolis law firms, made the following argument in their appellant's brief concerning an Indiana Constitution claim:

> Alternatively, the Class is entitled to prospective injunctive relief under . . . the Indiana Constitution for the deprivation of property without due process. *See State v. Hayes*, 177 Ind. App. 196, 378 N.E.2d 924, 931 (Ind. Ct. App. 1978) (Art. I, § 21 of the Indiana Constitution provides cause of action for deprivation of property).[211]

The court of appeals found this argument waived for lack of cogency, noting that it "fail[ed] to articulate what constitutes a property deprivation, among other prerequisites, pursuant to the Indiana Constitution and [left] the task of developing their argument to this court."[212]

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209. Shepherd v. Truex, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004) (emphasis added) (internal citations omitted).

210. 819 N.E.2d 465 (Ind. Ct. App. 2004), *trans. dismissed* (Ind. 2006).

211. *Id.* at 479.

212. *Id.* at 479-80.

The appellant in *Goodwine v. Goodwine*,[213] who was an attorney proceeding pro se, fared little better. The court specifically cautioned him "to pay closer attention to the Rules of Appellate Procedure in the future," calling his brief "confusing, disorganized, and [failing to] comply with the Rules of Appellate Procedure."[214]

These latter instances mainly concern arguments raised by an appellant. When the appellee fails to make a minimally adequate argument, the result is not necessarily victory for the appellant on the issue, as it usually is for the appellee when an appellant who fails to present a cogent argument, finds its issue deemed waived. Rather, the court on appeal treats the issue as if no appellee's brief was filed addressing the issue and reviews the appellant's claim for prima facie error. The difference in "lack of cogent argument" treatment between the appellant and the appellee mirrors Appellate Rule 45(D), which states, "The appellant's failure to file timely the appellant's brief may subject the appeal to summary dismissal. The appellee's failure to file timely the appellee's brief may result in reversal of the trial court or Administrative Agency only on a showing of prima facie error."[215] The survey period saw at least two published opinions in which an appellee's failure to present cogent argument resulted in review for prima facie error.[216]

Finally, one other case deserves mentioning under the guise of "lack of cogent argument," not because the argument was unsupported by citations or was too confusing to follow, but because it just plain lacked any semblance of logic. In *E.L.C. Electric, Inc. v. Indiana Department of Labor*,[217] the Indiana Department of Labor ("IDOL") had found E.L.C. Electric, Inc. ("E.L.C."), a government contractor, to be in violation of the Common Construction Wage Act,[218] and issued letters to E.L.C.'s employees and others to that effect.[219] In the defamation lawsuit filed by E.L.C. that followed, the IDOL won summary judgment.[220] During the appeal, E.L.C. contended that the IDOL's "failure to submit ELC's records as to ELC's payment of wages and fringe benefits denied the trial court the ability 'to determine . . . whether there is or is not a factual dispute.'"[221] The court of appeals, calling the argument "perverse," stated, "[i]t is difficult to conceive of a circumstance where the failure to present the other party's evidence could be argued by the other party as a basis for staving off

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213. 819 N.E.2d 824 (Ind. Ct. App. 2004).

214. *Id.* at 826 n.1.

215. IND. APP. R. 45(D).

216. Gamble v. State, 831 N.E.2d 178, 184 n.4 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 184 (Ind.), *reh'g denied* (Ind. Ct. App. 2005); Simon Prop. Group, L.P. v. Brandt Const., Inc., 830 N.E.2d 981, 995 (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006).

217. 825 N.E.2d 16 (Ind. Ct. App. 2005).

218. *Id.* at 17 & n.1 (citing IND. CODE §§ 5-16-7-1 to -5 (2005)).

219. *Id.* at 18.

220. *Id.* at 19.

221. *Id.* at 19 n.8.

summary judgment."[222]

8. More Practice Pointers.—

a. Don't be cavalier concerning supreme court orders and practice.—DFS Secured Health Care Receivables Trust v. Caregivers Great Lakes, Inc.[223] involved a certified question from the Seventh Circuit Court of Appeals to the Indiana Supreme Court. The court accepted the certified question,[224] ordered briefing,[225] and set the matter for oral argument on December 20, 2004.[226]

The briefs were due on Monday, November 22, 2004.[227] However, on Friday, November 19, 2004, the appellants' counsel sent the Clerk of the Supreme Court a letter stating, "The parties have agreed to settle the above-referenced case. Accordingly, neither party will be filing briefs on November 22, 2004, as is currently required by the Court's scheduling order."[228] Following receipt of this letter, the Supreme Court's Administrator contacted the appellants' counsel and informed him that the Court needed something more formal from the parties concerning their desire not to continue with the case, such as a joint motion to dismiss.[229] The appellants' counsel responded that the appellee's counsel was unavailable and therefore the parties would not be able to submit such a motion until December 6, 2004, at the earliest.[230] With the oral argument less than two weeks away and no briefs on file, on December 7, 2004, the court's Administrator contacted the appellants' counsel to inquire about the status of the motion he said would be forthcoming. The appellants' counsel responded that he had been expecting the Administrator's call, the parties' settlement had "hit a snag," and he did not know when the parties would be filing a motion with the court requesting dismissal but hoped it would be soon.[231]

The supreme court had this to say about this sequence of events:

> The cavalier approach with which the parties have handled this matter is extremely troubling.
>
> First, this Court's order of October 13th specifically states, "The two

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222. *Id.*

223. DFS Secured Health Care Receivables Trust v. Caregivers Great Lakes, Inc., No. 94S00-0410-CQ-447 (Ind. 2004). Although this case did not involve a published order or opinion, what transpired, all of which is reflected in orders of the Indiana Supreme Court, is highly relevant to Indiana appellate practitioners and worthy of consideration by them.

224. *Caregivers Great Lakes*, No. 94S00-0410-CQ-447 (Ind. Oct. 13, 2004) (order accepting certified question).

225. *Id.* Briefs were initially due on November 15, but the deadline was extended by one week, making the new filing deadline November 22.

226. *Caregivers Great Lakes*, No. 94S00-0410-CQ-447 (Ind. Nov. 17, 2004) (order).

227. *Caregivers Great Lakes*, No. 94S00-0410-CQ-447 (Ind. Nov. 12, 2004) (order).

228. *Caregivers Great Lakes*, No. 94S00-0410-CQ-447 (Ind. Dec. 13, 2004) (order).

229. *Id.*

230. *Id.*

231. *Id.*

> main briefs and the appendix must be filed by November 15, 2004." Upon the parties' joint motion, this deadline was extended by one week, but the requirement that briefs in fact be filed remained. Appellant's counsel affirmed his awareness of the mandatory nature of this Court's orders when he acknowledged in his letter that the Court's orders "required" the filing of the parties' main briefs by November 22, 2004. Rather than *requesting* that those orders be stayed or revised, the parties presumptuously *informed* the Court of their intent to disregard its orders and placed the burden on this Court to tell the parties if anything more was required.
>
> Second, Appellants' counsel's letter informed the Court that the parties had "agreed to settle" the case and they desired the Court to "close its file." When contacted initially by the Administrator, Appellants' counsel did not indicate the parties' settlement was tentative or uncertain. When contacted on December 7, 2004, however, Appellant's counsel indicated he had been expecting the Administrator's call and, in effect, that the settlement negotiations were stalled and he could not state when a joint motion to dismiss the matter might be tendered. The parties should not have informed the Court that the case had settled and that the Court's file should be closed if they were not in a position to file a motion to dismiss. Further, the moment the parties "hit a snag," it was incumbent upon them to notify the Court immediately that their representations in the November 19 letter were incorrect, rather than waiting for the Court's Administrator to contact them to inquire about the status of the joint motion that they, through Appellants' counsel, had previously suggested would be forthcoming.[232]

Because the parties had failed to file any briefs, the court found it "impossible for the oral argument scheduled for December 20, 2004, to be of any value in this Court's determination of the questions certified to it by the Seventh Circuit."[233] Accordingly, the court vacated the oral argument set for that date. In its stead, however, the court ordered the parties' counsel to appear at the time the oral argument would have occurred "to show cause why they should not be held in contempt for failure to comply with this Court's scheduling orders."[234]

A show cause hearing was indeed held on that date, at which at least one of the parties' counsel was represented by his own attorney. Thereafter, the court determined not to hold the attorneys in contempt. In its order so stating, however, it advised the parties' attorneys, and the local attorney who had represented one of them at the hearing

> that the proper practice before this Court is to ask this Court, through a written motion filed in compliance with the Indiana Rules of Appellate

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232. *Id.*

233. *Id.*

234. *Id.*

> Procedure, for extension or continuance of court-imposed deadlines, rather than simply to tell this Court, through written or oral communication to this Court's Administrator, that the parties will not be complying with court-imposed deadlines.[235]

b. Don't repackage and refile losing motions.—In *Sanders v. State*,[236] Sanders was convicted of dealing in cocaine, maintaining a common nuisance, and possession of marijuana.[237] When arrested, he had $2496 in his possession, which the State seized pursuant to Indiana Code section 34-24-1-1.[238] Following his conviction, the State filed a "motion for release/application" under Indiana Code section 34-24-1-3[239] seeking to have the $2496 awarded to the State to reimburse it for the "law enforcement costs" that resulted in Sanders' arrest.[240] The trial court granted the motion, but the court of appeals reversed because the State's motion had been untimely filed.[241] The trial court then vacated its order. However, a few weeks later the State filed a "petition for reimbursement of investigative costs," seeking reimbursement for the costs for the investigation that led to Sanders' arrest.[242] The trial court granted the motion, and Sanders again appealed. The court of appeals reversed, noting:

> Although the State's second request was characterized as one for "investigative costs," it clearly was an action for reimbursement of law enforcement costs pursuant to Indiana Code Section 34-24-1-3. Moreover, it is substantively the same as the State's earlier motion. We have already concluded the trial court improperly granted the motion . . . .
>
> Despite our earlier ruling, the State refiled the same motion. The State provides no explanation for its actions and we cannot attempt to ascertain why it thought such a request would be permissible a second time around, especially given that almost an entire year had passed since it filed the first untimely motion. What was improper on direct appeal is still improper and the recaptioning of a petition cannot and does not change the relief requested in the petition.[243]

c. Give good reasons for requesting oral argument.—Appellate Rule 52

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235. *Caregivers Great Lakes*, No. 94S00-0410-CQ-447 (Ind. Feb. 24, 2005) (order).

236. 823 N.E.2d 1214 (Ind. Ct. App. 2005).

237. *Id.* at 1215.

238. *Id.*

239. *Id.* Indiana Code section 34-24-1-3 permits the State to seek "reimbursement of law enforcement costs" out of property lawfully seized under Indiana Code sections 34-24-1-1 and 2. IND. CODE § 34-24-1-3 (2005).

240. *See Sanders*, 823 N.E.2d at 1215.

241. *See id.*

242. *Id.*

243. *Id.* at 1215-16.

gives parties the opportunity to request oral argument on a pending matter via a timely filed motion.[244] When submitting such a motion, however, be sure to include all of the items listed in Indiana Appellate Rule 34(E) concerning the content of motions, rather than simply informing the court that oral argument is desired. In *Glasscock v. Corliss*,[245] the court of appeals, citing Indiana Appellate Rule 34(E)(1),[246] denied a motion for oral argument because the motion "stated no reasons supporting the motion."[247]

d. Make sure pro hac vice *counsel understands and complies with the appellate rules.*—The appellant in *HemoCleanse, Inc. v. Philadelphia Indemnity Insurance Co.*[248] was primarily represented by California counsel admitted *pro hac vice*.[249] California counsel apparently did not have a good grasp of Indiana's appellate rules, as the court of appeals noted, "We understand that California likely has different rules for the format of appellate briefs, but we caution counsel that it is always prudent to familiarize oneself with the appellate rules of the jurisdiction in which a brief is being submitted."[250] Of course, the appellant was also represented by local counsel.[251] If the appellant's brief was deficient enough to warrant comment by the court, one wonders why local counsel (who presumably is more familiar with Indiana's rules of procedure) did not review the brief before submission and inform lead counsel of its deficiencies?

e. List all of your issues on appeal in your brief's Statement of Issues.—Appellate Rule 46(A), which addresses the required contents of an Appellant's Brief, states the following when discussing the brief's Argument section: "The argument must contain the contentions of the appellant *on the issues presented*, supported by cogent reasoning."[252] The court of appeals interpreted this to mean that an appellant may not raise an issue in the brief's Argument section unless the issue was listed in the Statement of Issues[253] portion of the brief.[254]

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244. *See* IND. APP. R. 52(A), (B).

245. 823 N.E.2d 748 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 183 (Ind. 2005).

246. "[A] motion . . . shall contain . . . [a] statement particularizing the grounds on which the motion . . . is based . . . ." IND. APP. R. 34(E)(1).

247. *Glasscock*, 823 N.E.2d at 751 n.1.

248. 831 N.E.2d 259 (Ind. Ct. App. 2005), *reh'g denied* (Ind. Ct. App.), *trans. denied* (Ind. 2006).

249. *Id.* at 262 n.1.

250. *Id.*

251. *See* IND. ADMIS. DISC. R. 3 § 2(A)(1) (requiring member of Indiana bar to appear and act as co-counsel in case in which a foreign attorney is admitted *pro hac vice*).

252. IND. APP. R. 46(A)(8)(a) (emphasis added).

253. *See id.* 46(A)(4).

254. *See* Gonzales v. State, 831 N.E.2d 845, 846 n.1 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 184 (Ind. 2005). *But see* Buck v. Grube, 833 N.E.2d 110, 117 n.4 (Ind. Ct. App. 2005) (finding appellant failed to list an argument in her statement of the issues but holding the noncompliance "not so substantial as to impede [the court's] consideration of her arguments" and therefore addressing the argument on its merits).

f. When drafting a Statement of Facts, cite evidence, not the trial court's judgment or prior filings by the parties.—In *Kalwitz v. Estate of Kalwitz*,[255] the parties' Statements of Facts cited to the trial court's judgment, rather than to the transcript or any documentary evidence in the Record on Appeal.[256] The court of appeals made special note that such a practice, while technically compliant with Appellate Rule 46(A)(6)(a), is not appropriate "in a case where the factual findings of a judgment are challenged."[257] Rather, the court noted, "citations to the transcript would be far more helpful for [its] review."[258] Similarly, in *Beta Steel v. Rust*,[259] the court of appeals noted that "[i]t would have better facilitated [the court's] review if [the appellee] had cited [the court] directly to the designated evidence in her appellate brief, rather than to her trial court memoranda."[260]

g. Appellees, be careful when using Appellate Rule 46(B)(1).—Appellate Rule 46(B)(1) permits an appellee's brief to omit, among other things, "the statement of facts if the appellee agrees with the statements [of fact] in the appellant's brief."[261] Appellees should not use this option, however, if they intend to argue facts not articulated in an appellant's statement of facts, as noted by the court of appeals in *Williamson v. Williamson*:[262]

> We remind Mother that Ind. Appellate Rule 46(B)(1) permits an appellee's brief to omit the statement of facts if the appellee agrees with the statements in the appellant's brief. Here, Mother omitted the statement of facts and agreed with Father's statement of facts. However, in her argument regarding the modification of custody, Mother then presented numerous facts related to the modification that were not present in Father's statement of the facts. These facts would have been more appropriately presented for the first time in Mother's statement of facts rather than in the argument.[263]

h. Arguments in briefs should stand alone.—It is not uncommon for attorneys to attempt to satisfy briefing page limits, or simply save time, by attempting to "incorporate by reference" arguments made in previous filings rather than setting out the argument in their briefs. This practice is frowned upon by some appellate jurists, as noted in *Oxley v. Lenn*:[264]

> To support his claim that his failure to tender the summons with the

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255. 822 N.E.2d 274 (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 748 (Ind. 2005).
256. *See id.* at 276 n.2.
257. *Id.*
258. *Id.*
259. 830 N.E.2d 62 (Ind. Ct. App. 2005).
260. *Id.* at 68.
261. IND. APP. R. 46(B)(1).
262. 825 N.E.2d 33 (Ind. Ct. App. 2005).
263. *Id.* at 35 n.1.
264. 819 N.E.2d 851 (Ind. Ct. App. 2004).

> complaint did not constitute legal malpractice, Lenn "direct[s] this Court's attention" to the argument section of his summary judgment brief submitted to the trial court and asks us to incorporate by reference said argument. We refuse to do so. Ind. Appellate Rule 46(B)(2) provides that argument contained in an appellee's brief "shall address the contentions raised in the appellant's argument." Lenn may not evade this requirement by referring us to arguments found in a brief filed at some earlier point in the case. See *Pluard ex rel. Pluard v. Patients Compensation Fund*, 705 N.E.2d 1035, 1038-39 (Ind. Ct. App. 1999) (holding that an attempt to incorporate an entire argument raised and argued in the trial court by reference in a footnote does not comply with either the letter or the spirit of former Appellate Rules), *trans. denied*; *Greg Allen Const. Co., Inc. v. Estelle*, 762 N.E.2d 760, 778-779 (Ind. Ct. App. 2002) (finding that an appellant had waived an issue for appellate review where it had presented no argument for this court's review where the appellant had merely asked to incorporate by reference the appellant's argument made to the trial court), *aff'd in relevant part, vacated in part on other grounds by* 798 N.E.2d 171 (Ind. 2003).

i. Stating the Standard of Review.—The appropriate standard of review must be stated in an appellate brief.[265] That being said, practitioners should keep in mind that in most cases, Indiana appellate court jurists are very familiar with the applicable standard of review and do not need an extensive recitation on it. In *Troxel Equipment Co. v. Limberlost Bancshares*,[266] the court of appeals specifically made this point to appellant's counsel, noting:

> "[T]he argument must include for each issue a *concise* statement of the applicable standard of review . . . ." App. R. 46(A)(b)(6) (emphasis added). The total of seven pages that Troxel spent discussing the law of summary judgment is far from concise. We advise counsel to carefully consider to what use they put their allotted space in future appellate briefs.[267]

At the other end of the spectrum, the court admonished counsel in *Tobin v. Ruman*[268] for failing to include the standard of review. The attorney's brief stated that "the standards for deciding motions for summary judgment constitute such a familiar litany that they need no restatement here."[269] The court responded by

> direct[ing the attorney] to Indiana Appellate Rule 46(A)(8)(b), which requires the appellant to include a description of the applicable standard

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265. *See* IND. APP. R. 46(A)(8)(b).

266. 833 N.E.2d 36 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 189 (Ind. 2005).

267. *Id.* at 37 n.1.

268. 819 N.E.2d 78 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 747 (Ind. 2005).

269. *Id.* at 83 n.3.

> of review. Although Tobin is pro se, he is also an attorney who is licensed in Indiana and Illinois. We caution him to pay closer heed to the rules in the future.[270]

j. What do you do if your client dies?—In *Gard v. Gard*,[271] a dissolution case, the wife died during the pendency of the appeal. The court of appeals learned of her death by way of husband, who filed a report with the court notifying it of that fact four weeks after her death. At the time the court of appeals' opinion was handed down, however, no one had moved to substitute a successor party under Appellate Rule 17(B). The court noted, "In similar cases, we believe that the better practice would be for the deceased or incompetent party's counsel to file a motion for substitution as promptly as possible to avoid any complications that might arise."[272]

k. Amending briefs.—When seeking to amend a brief, litigants have *only* two options: (1) tender an entirely new brief and copies along with a motion; or (2) request permission to retrieve the original and copies and substitute the amended pages.[273] During the survey period, the court of appeals noted that litigants *cannot* submit an "amended" brief that only contains the "amended" material and then attempt to incorporate the remainder from the original brief.[274] Neither can they rely on the information conveyed in their motion for leave to amend as effectively "amending" their briefs.[275]

l. Judicial Notice.—In *In re Contempt of Wabash Valley Hosp., Inc.*,[276] the appellee submitted an appendix containing public records that were not part of the record on appeal.[277] The court of appeals found this improper, noting that, although a court can take judicial notice of public records, "the public record should be drawn to the court's attention by motion or, if publicly available, cited as authority. The appellate rules do not permit material to be included in a party's appendix that was not presented to the trial court."[278]

A different result occurred in *Beta Steel v. Rust*.[279] There, the appellee objected to a footnote in the appellant's brief containing "references to statistics regarding accidental deaths in the United States, including those attributable to electricity" because they were not designated to the trial court during the summary judgment proceedings.[280] The footnote, the court noted, "was added in

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270. *Id.*

271. 825 N.E.2d 907 (Ind. Ct. App. 2005).

272. *Id.* at 908 n.1.

273. *See* IND. APP. R. 47.

274. Everage v. N. Ind. Pub. Servs. Co., 825 N.E.2d 941, 943 n.1 (Ind. Ct. App. 2005).

275. Safety Nat'l Cas. Co. v. Cinergy Corp., 829 N.E.2d 986, 1006 n.11 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 187 (Ind. 2005).

276. 827 N.E.2d 50 (Ind. Ct. App. 2005).

277. *See id.* at 57 n.6.

278. *Id.* (citing IND. APP. R. 27 & 50(A)(1)).

279. 830 N.E.2d 62 (Ind. Ct. App. 2005).

280. *Id.* at 69.

response to [the appellee's] assertion . . . [in] its brief, alleging that '[t]his Court can take judicial notice that welding occurs literally thousands of times per day in the workplace without injury.'"[281] Thus, because the appellant's statistics were "simply a demonstration of why it would be improper to take judicial notice of [the appellant's] alleged fact regarding the safety of welding," the court declined to strike them.[282]

m. Notice of additional authorities may be used only to supplement arguments already made.—In *Williams v. State*,[283] the court of appeals took the appellant to task for attempting to use a Notice of Additional Authorities to introduce an argument that the appellant had not raised in the Appellant's Brief, calling the tactic "improper" and finding the argument waived.[284]

n. An objection at a deposition is not enough to preserve issue for appeal.—In *Beta Steel v. Rust*,[285] the appellant asked the court of appeals to strike portions of the appellee's brief that relied upon the deposition of an electrical engineer who, the appellant contended, was not qualified to give the opinions he gave.[286] Although the appellant purported to have objected to this testimony during the deposition, he cited nothing to the court of appeals showing he had asked the trial court to rule on his objection or to strike this testimony from the appellee's designated summary judgment evidence. Therefore, the court of appeals found the appellant's argument waived.[287]

o. Note related cases in the appellant's case summary.—In *Moore v. State*,[288] the criminal defendant/appellant had been tried jointly with a co-defendant who had appealed separately.[289] The same counsel represented both appellants in their separate appeals. When filling out the appellant's case summary in appellant Moore's case, however, counsel failed to mention the other case. The court of appeals "direct[ed] counsel's attention to Indiana Appellate Rule 15(C)(4)(c), which provides that an appellant's case summary shall include information regarding '[r]elated appeals (prior, pending or potential) known to the party[.]'"[290]

p. In extraordinary circumstances, Trial Rule 60(B) can resurrect an otherwise untimely appeal.—In *Town of Merrillville v. Shelhart*,[291] there were multiple claims raised in the plaintiff's complaint, but the parties' cross-motions

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281. *Id.*

282. *Id.*

283. 829 N.E.2d 198 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 187 (Ind. 2005).

284. *Id.* at 201 n.3.

285. 830 N.E.2d 62.

286. *Id.* at 68.

287. *Id.* at 69.

288. 827 N.E.2d 631 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 186 (Ind. 2005).

289. *Id.* at 636.

290. *Id.* at 636 n.3 (second and third brackets in original).

291. 834 N.E.2d 208 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 191 (Ind. 2005).

for summary judgment addressed only one. The trial court issued an order granting the defendant's motion and denying the plaintiff's.[292] Because the plaintiff viewed the order as interlocutory, given the other claims raised in its complaint, it moved to certify the order for interlocutory appeal under Appellate Rule 14(B)(1). The trial court, however, denied the motion, stating that its previous order had disposed of all claims between the parties. Further, it issued its order denying the motion to certify after the plaintiff's deadline for filing a notice of appeal,[293] thereby leaving the appellant no other opportunity to appeal.[294]

The appellant filed a Trial Rule 60(B) motion in the trial court seeking to have its judgment "opened up" and a new order issued that clearly disposed of all claims,[295] which essentially would have given the appellant a second chance to file a timely notice of appeal. Although the trial court denied the motion, the court of appeals reversed, stating:

> The town acted promptly in first seeking to appeal the trial court's order of November 5, 2004, and then to seek relief from an order that effectively foreclosed its appeal of that order. Equity aids the vigilant. Based upon the circumstances presented and upon equitable principles, we find that the trial court abused its discretion when it did not grant the Town's motion for relief and allow the action to continue *in fieri* to a final judgment on all claims.[296]

However, practitioners should remember that if they miss an appeal deadline because the trial court did not send them notice of its final judgment, then Trial Rule 72(E), not Trial Rule 60(B), is the appropriate vehicle to get clients' appeal rights reinstated.[297]

III. MISCELLANEOUS DEVELOPMENTS

A. Data from the Indiana Supreme Court[298]

The Indiana Supreme Court saw a thirteen percent decline in fiscal year 2005 in criminal transfer petitions transmitted from the Clerk's Office (511 in fiscal

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292. *Id.* at 212.

293. *Id.*

294. *Id.* at 214; *see* IND. APP. R. 9(A)(5).

295. *Town of Merrillville*, 834 N.E.2d at 212-13.

296. *Id.* at 214-15 (internal citation omitted).

297. *See In re* Sale of Real Property with Delinquent Taxes or Special Assessments, 822 N.E.2d 1063, 1067-69 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 179 (Ind. 2005).

298. The information contained in this subsection can be found in INDIANA SUPREME COURT ANNUAL REPORT JULY 1, 2004 – JUNE 30, 2005, at 30-32, and INDIANA SUPREME COURT ANNUAL REPORT JULY 1, 2003 – JUNE 30, 2004, at 30-32. The 2004-2005 Report is available at http://www.in.gov/judiciary/supremeadmin/docs/0405report.pdf. The 2003-2004 Report is available at http://www.in.gov/judiciary/supremeadmin/docs/0304report.pdf.

year 2005 versus 590 in fiscal year 2004) and a twelve percent rise in civil transfer petitions transmitted from the Clerk's Office (335 in fiscal year 2005 versus 299 in fiscal year 2004). The court's total dispositions followed a similar trend. In fiscal year 2005, the court disposed of 1063 cases that required a vote from each justice, fifty-one percent of which were criminal cases (a four percent decrease from fiscal year 2004) and thirty-two percent were civil, tax, or other cases not involving attorney discipline, judicial discipline, certified questions, original actions, or rehearings (a two percent increase from fiscal year 2004). The opposite of this trend, however, was reflected in the cases the justices selected for the issuance of majority opinions or dispositive orders. The court resolved 170 of the 1063 dispositions by majority opinion or published dispositive order, an increase of sixteen over the previous fiscal year's 154. Of these 170 opinions and published dispositive orders, thirty-five percent were criminal cases (a one percent increase from fiscal year 2004), and twenty-five percent of which were civil, tax, or other cases not involving attorney discipline, judicial discipline, certified questions, original actions, or rehearings (a ten percent decrease over fiscal year 2004). Thus, these statistics suggest the court took a greater interest in criminal matters over civil matters in fiscal year 2005, which is different than what has occurred in recent years.

Another interesting statistic is found in the number of non-dispositive opinions written by the Justices during fiscal year 2005 as compared to the previous fiscal year. In fiscal year 2004, the Justices issued thirty-eight non-dispositive opinions, sixteen of which were dissents. In fiscal year 2005, the Justices issued twenty-six non-dispositive opinions (a thirty-two percent decline over the previous year), eight of which were dissents (a fifty percent decline over the previous year).

Finally, the Indiana Supreme Court conducted sixty oral arguments during its fiscal year ending June 30, 2005 (down from seventy-six in fiscal year 2004).

B. Data from the Indiana Court of Appeals[299]

During calendar year 2005, the Indiana Court of Appeals continued its blistering pace to keep up with the ever-increasing number of cases filed with it. It disposed of 2373 cases, an increase of seventy-one dispositions over 2004, and heard eighty-four oral arguments, an increase of seventeen over 2004. Once fully briefed, the average age of a case in chambers of a judge was 1.7 months, a slight decrease from 2004. The court reversed the judgment of the trial court in about thirty-nine percent of the civil appeals and in about sixteen percent of the criminal (non post-conviction relief) appeals, and about twenty-seven percent of its opinions were published. During this time period, the Chief Judge handed down 7610 orders (an increase of 317 over 2004), of which 3163 pertained to

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299. The information contained in this subsection can be found in INDIANA COURT OF APPEALS, 2004 ANNUAL REPORT 1, 4, 12 (2005), and INDIANA COURT OF APPEALS, 2005 ANNUAL REPORT 1, 4, 12 (2006). The 2004 Report is available at http://www.in.gov/judiciary/appeals/docs/2004report.pdf. The 2005 Report is not available online as of publication of this Article.

various extensions of time (only twenty-six of which were denied), and 297 pertained to permissive interlocutory appeals (204 of which were denied).

C. The McHenry *Experiment—Update*

Last year's survey article discussed the Indiana Supreme Court's opinion in *McHenry v. State*,[300] in which the opinion's author, Justice Brent Dickson, "experiment[ed]" with a new style of opinion writing, namely the placement of "all citations unessential to the text . . . in footnotes, and substantive matter that otherwise might appear in footnotes . . . in the text."[301] Because such a "format does not meet with universal approval,"[302] the *McHenry* opinion invited "[t]he public, the bench, and the bar" to provide comments on the format to the Indiana Supreme Court Administrator.[303] Last year's survey article noted that thoughtful and well-reasoned responses had been arriving, invited more of the same, and foreshadowed a report on the results of the "*McHenry* experiment" in this year's Appellate Procedure survey article.

The results are in.[304] An overwhelming majority (seventy-one percent) opposed the placement of citations in footnotes. The responses typically listed one or more of the following reasons for their opposition: (1) citations in footnotes make reading the opinion's text more difficult, physically and conceptually, because they disrupt an attorney's reading from the text to the bottom of the page, and back up again, which is even more difficult when reading an opinion electronically rather than on paper; (2) citations in footnotes do not provide the full context for the cited authority and make it difficult to track which cases are being relied upon for a given legal proposition; (3) respondents are simply accustomed to the current format and do not desire a change; and (4) attorneys have more difficulty cutting and pasting quotes from electronic opinions and briefs when the citations are in footnotes, because "id." citations in the opinion must be readjusted in the document into which the quote is being pasted. Because of the responses, the Indiana Supreme Court decided to maintain the status quo, at least for now, and continue placing citations in text rather than in footnotes.

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300. 820 N.E.2d 124 (Ind. 2005).

301. *Id.* at 126 n.2; *see also* Merritt v. State, 829 N.E.2d 472, 473 n.3 (Ind. 2005); Dial X-Automated Equip. v. Caskey, 826 N.E.2d 642, 643 n.1 (Ind. 2005).

302. *McHenry*, 820 N.E.2d at 126 n.2 (citing Richard A. Posner, *Against Footnotes*, 38 CT. REV. 24 (Summer 2001)).

303. *Id.*

304. The results are on file with the author.