RECENT DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

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During the survey period,[1] both the Indiana Supreme Court and the Indiana Court of Appeals continued to address a broad range of procedural issues of significance to Indiana practitioners. Further, the Indiana Supreme Court ordered several amendments to the Indiana Rules of Trial Procedure, with immediate practical impact.

I. AMENDMENTS TO INDIANA RULES OF TRIAL PROCEDURE

A. Summary Judgment Hearing

A hearing is no longer mandatory upon the filing of a motion for summary judgment, due to a recent amendment to Rule 56 of the Indiana Rules of Trial Procedure ("Rules" or "Indiana Trial Rules"). Effective January 1, 2006, a hearing on a summary judgment motion is mandatory only if "any party" files a motion requesting the hearing *within ten days* after the summary judgment *response* "was filed or was due."[2] The new rule leaves open the question of when the request for hearing must be filed if the response is filed *before* it is due. Until clarification is attained, practitioners would be well advised to file the request for hearing within ten days of filing if the summary judgment response is filed early.

B. Documents or Information Excluded from Public Access

Effective January 1, 2005, Rule 5(G) was amended to require that documents excluded from public access pursuant to Indiana Administrative Rule 9(G)(1) must be filed on light green paper, and marked "Not for Public Access."[3] Rule 5(G) was amended further during the current survey period, effective January 1, 2006, to provide that whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper

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1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period—i.e., from October 1, 2004, through September 30, 2005—as well as amendments to the Indiana Rules of Trial Procedure, which were ordered by the Indiana Supreme Court during the survey period and became effective January 1, 2006.

2. IND. TRIAL R. 56(C). The above quoted text of Rule 56(C) appears as "was filed or due" in the 2006 Indiana Rules of Court publication. INDIANA RULES OF COURT—STATE 50 (Thomson West 2006).

3. IND. TRIAL R. 5(G)(1); *see also* Michael A. Dorelli, *Recent Developments in Indiana Civil Procedure*, 38 IND. L. REV. 919, 960-61 (2005) (discussing requirements of Rule 5(G) and enumerating categories of information excluded from public access pursuant to IND. ADMIN. R. 9(G)(1)).

"or have a light green coversheet attached to the document."[4] Further, documents or portions of documents excluded from public access must be marked either "Not for Public Access" or "Confidential."[5] Finally, the amended Rule no longer applies only to documents "prepared by a lawyer or party for filing." Rather, the Rule now applies to every document "filed" in a case.[6]

C. Temporary Appearance

Rule 3.1 was amended, effective January 1, 2006, to provide for the filing of a "temporary appearance" in the event an attorney "is temporarily representing a party in a proceeding before the court, through filing a pleading with the court or in any other capacity including discovery."[7] Pursuant to the amended Rule, the court is not required to act on the temporary appearance, "unless the new temporary attorney has not appeared at the request of a party's previously identified counsel."[8]

II. INDIANA SUPREME COURT DECISIONS

A. Administrative Law and Procedure

Under the provisions of the Administrative Orders and Procedures Act (the "AOPA"),[9] "[a] person may file a petition for judicial review . . . only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review."[10] Although Indiana courts "avoid applying the [exhaustion] doctrine in a mechanical fashion, [they] recognize its strong policy rationale and adhere to it closely."[11]

In *Johnson v. Celebration Fireworks, Inc.*,[12] the court held that because a fireworks wholesaler failed to exhaust its administrative remedies before seeking judicial review of the authority of the Indiana State Fire Marshal to require and issue certain permits and certificates, and to assess related fees, the trial court did not have subject matter jurisdiction to hear the suit.[13] After a general discussion

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4. IND. TRIAL R. 5(G)(1). The prior version of the Rule required that the entire document be tendered on light green paper.

5. IND. TRIAL R. 5(G)(1), (2). The prior version of the Rule required documents to be marked "Not for Public Access."

6. IND. TRIAL R. 5(G).

7. IND. TRIAL R. 3.1(H).

8. *Id.*

9. IND. CODE §§ 4-21.5 (2005).

10. Johnson v. Celebration Fireworks, Inc., 829 N.E.2d 979, 982 (Ind. 2005) (internal quotation marks omitted) (quoting IND. CODE § 4-21.5-5-4(a) (2004)).

11. *Id.* at 983.

12. *Johnson*, 829 N.E.2d 979.

13. *Id.* at 981, 984.

of the "exhaustion doctrine,"[14] the court addressed and rejected the wholesaler's argument that administrative review would have been "futile."[15]

The court in *Celebration Fireworks* explained the "futility" exception to the exhaustion doctrine as follows:

> While exhaustion of administrative remedies may be excused if the exercise would be futile, the exhaustion requirement . . . should not be dispensed with lightly on grounds of "futility." To prevail upon a claim of futility, one must show that the administrative agency was powerless to effect a remedy or that it would have been impossible or fruitless and of no value under the circumstances.[16]

The court stated that the "principal thrust" of the wholesaler's futility argument seemed to be that "it believes it to be inevitable that the agency would rule against it."[17] The court rejected the argument, explaining that "the mere fact that an administrative agency might refuse to provide the relief requested does not amount to futility."[18] The Indiana Supreme Court reversed the decision of the Indiana Court of Appeals and remanded the matter to the trial court, with instructions to dismiss the wholesaler's complaint for lack of subject matter jurisdiction.[19]

B. Summary Judgment

In *Monroe Guaranty Insurance Co. v. Magwerks Corp.*,[20] the court held that summary judgment was not warranted in favor of Magwerks, the moving party, even if Monroe Guaranty, the non-moving party, failed to timely designate materials in opposition to the summary judgment motion.[21] Magwerks moved for summary judgment, alleging, inter alia, that certain structural damage to its building caused by a period of heavy rain and snow caused its roof to "collapse"

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14. *Id.* at 982-83.

15. *Id.* at 984.

16. *Id.* (internal citations and quotation marks omitted).

17. *Id.*

18. *Id.*

19. *Id.* Before evaluating the wholesaler's "futility" argument, the court in *Celebration Fireworks* considered and rejected the wholesaler's argument that exhaustion was not required because the agency's actions were being challenged "as ultra vires and void." *Id.* at 983. The court distinguished its decision in *Indiana Department of Environmental Management v. Twin Eagle LLC*, 798 N.E.2d 839 (Ind. 2003), in which it held that "exhaustion . . . was unnecessary '[t]o the extent the issue turns on statutory construction, [and] whether an agency possesses jurisdiction over a matter [as that] is a question of law for the courts.'" *Id.* (alteration in original) (quoting *Twin Eagle*, 798 N.E.2d at 844). The court in *Celebration Fireworks* explained that "there is absolutely no question in the present case of the [agency's] legal authority to license fireworks wholesalers." *Id.*

20. 829 N.E.2d 968 (Ind. 2005).

21. *Id.* at 975.

in several areas.[22] As a result, Magwerks argued, the damages were covered by an insurance policy issued by Monroe Guaranty, which provided coverage for damage "involving collapse of a building or any part of a building."[23] The trial court granted Magwerks' summary judgment motion, the matter proceeded to trial, and, following a verdict in favor of Magwerks, Monroe Guaranty appealed.[24]

On transfer to the Indiana Supreme Court, Magwerks argued, in part, that the trial court's summary judgment order should be affirmed because Monroe Guaranty failed to timely file its designated evidence or submissions in opposition to the summary judgment motion.[25] Initially, the court in Magwerks recognized that "[w]hen a party fails to file a response [to a summary judgment motion] within thirty days, the trial court may not consider materials filed thereafter."[26] However, the court ruled that "even assuming Monroe Guaranty's submissions were untimely and thus inadmissible, Magwerks still [could not] prevail on this issue."[27] After discussing the materials designated by Magwerks in support of its summary judgment motion, the court explained a moving party's required burden as follows:

> A party moving for summary judgment bears the initial burden of showing no genuine issue of material fact and the appropriateness of judgment as a matter of law. If the movant fails to make this prima facie showing, then summary judgment is precluded *regardless of whether the non-movant designates facts and evidence in response to the movant's*

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22. *Id.* at 971.

23. *Id.*

24. *Id.*

25. *Id.* at 973-74.

26. *Id.* at 974 (citing Borsuk v. Town of St. John, 820 N.E.2d 118, 124 n.5 (Ind. 2005); Markley Enter., Inc. v. Grover, 716 N.E.2d 559, 563 (Ind. Ct. App. 1999); Carroll v. Jagoe Homes, Inc., 677 N.E.2d 612, 616 n.1 (Ind. Ct. App. 1997); Seufert v. RWB Med. Income Properties I Ltd. Partnership, 649 N.E.2d 1070, 1073 (Ind. Ct. App. 1995)); *see also* Fort Wayne Lodge, LLC v. EBH Corp., 805 N.E.2d 876, 883 (Ind. Ct. App. 2004); Desai v. Croy, 805 N.E.2d 844, 850-51 (Ind. Ct. App. 2004); Dorelli, *supra* note 3, at 950-51 (discussing the *EBH Corp.* and *Desai* decisions). *But see* Simon Prop. Group, L.P. v. Acton Enter., Inc., 827 N.E.2d 1235, 1239-40 (Ind. Ct. App.) (stating that "[t]he trial court, presented with successive motions for summary judgment and materials in opposition to summary judgment, relevant to the same factual circumstances, had discretion to grant [the non-movant] additional time to respond to the second summary judgment motion," where the non-movant had "timely responded" to a previous motion for judgment on the pleadings that was converted to a summary judgment motion), *trans. denied*, 841 N.E.2d 186 (Ind. 2005). The court in *Simon* explained that "the circumstances were not such that a party wholly failed to defend against summary judgment until the applicable time period for response had lapsed and then belatedly presented new factual opposition to the trial court." *Id.* at 1240. The *Simon* decision arguably supports an exception to the otherwise rigid mandate of Rule 56(I).

27. *Magwerks*, 829 N.E.2d at 974.

motion.[28]

The court in *Magwerks* found that the evidence designated by Magwerks, the moving party, failed "to eliminate a genuine issue of material fact" and that "even if Monroe Guaranty's designated materials were excluded from consideration as untimely, Magwerks' failure to carry its initial burden . . . is fatal to [its] coverage claim."[29] The court affirmed the opinion of the Indiana Court of Appeals, which reversed the trial court's grant of summary judgment in favor of Magwerks.[30]

C. Class Actions

Indiana Trial Rule 23(B) provides, inter alia, that:

> [a]n action may be maintained as a class action if . . . the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.[31]

The language of subsection (B)(3) stating that certain questions must "predominate over any questions affecting only individual members" is commonly referred to as the "predominance requirement," while the language requiring that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" is commonly referred to as the "superiority requirement."[32]

In *Associated Medical Networks, Ltd. v. Lewis*, the Indiana Supreme Court evaluated the "predominance" requirement for class certification under Rule 23(B)(3).[33] The plaintiffs in *Lewis*, a group of health care providers, brought an action to compel the defendant medical insurers to pay medical expenses under assignments executed by patients.[34] The plaintiffs sought certification as a class "to proceed on behalf of all other similarly situated health care providers."[35]

The trial court certified the class and, on interlocutory appeal, the Indiana Court of Appeals affirmed the certification order.[36] On transfer to the Indiana

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28. *Id.* at 975 (emphasis added) (citing Tankersley v. Parkview Hosp., Inc., 791 N.E.2d 201, 203-04 (Ind. 2003)).

29. *Id.*

30. *Id.*

31. Associated Med. Networks, Ltd. v. Lewis, 824 N.E.2d 679, 682 (Ind. 2005) (citing IND. TRIAL R. 23(B)(3)); *see also* Ind. Bus. Coll. v. Hollowell, 818 N.E.2d 943, 948-52 (Ind. Ct. App. 2004) (outlining "two-step procedure" for determination of propriety of class action certification under Trial Rule 23).

32. *See Lewis*, 824 N.E.2d at 682.

33. *Id.* at 681.

34. *Id.*

35. *Id.*

36. *Id.* at 682 (citing Associated Med. Networks Ltd. v. Lewis, 785 N.E.2d 230 (Ind. Ct. App.

Supreme Court, the defendants asserted that the trial court erroneously found that the plaintiffs satisfied the "predominance" and "superiority" requirements of Rule 23(B)(3).[37]

Rejecting the plaintiffs' argument that "predominance" is satisfied by a showing of a common course of conduct, the Indiana Supreme Court found that "there must be more than a mere nucleus of facts in common with the plaintiff class."[38] The court explained that "[p]redominance requires more than commonality. Predominance cannot be established merely by facts showing a common course of conduct, but the common facts must also actually 'predominate over any questions affecting only individual members.'"[39]

The court in *Lewis* discussed with approval the Indiana Court of Appeals decision in *Wal-Mart Stores, Inc. v. Bailey*,[40] in which the court of appeals explained that "just because the claims may arise from 'a common nucleus of operative facts' does not mean that the common claims necessarily predominate."[41] Further, because Indiana Trial Rule 23 is based upon Rule 23 of the Federal Rules of Civil Procedure, the court considered interpretations and discussions by federal courts and commentators, quoting extensively from one federal treatise:

> There is no precise test for determining whether common questions of law or fact predominate . . . . Instead, the Rule requires a pragmatic assessment of the entire action and all the issues involved. In making that assessment, courts have enunciated a number of standards, finding . . . predominance if:
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> [1] The substantive elements of class members' claims require the same proof for each class member;
> [2] The proposed class is bound together by a mutual interest in resolving common questions more than it is divided by individual interests.
> [3] The resolution of an issue common to the class would significantly advance the litigation.
> [4] One or more common issues constitute significant parts of each class member's individual cases.
> [5] The common questions are central to all of the members' claims.
> [6] The same theory of liability is asserted by or against all class members, and all defendants raise the same basic defenses.

2003), *vacated*, 824 N.E.2d 679 (Ind. 2005)).

37. *Id.*

38. *Id.* at 685.

39. *Id.* (quoting IND. TRIAL R. 23(B)(3)).

40. 808 N.E.2d 1198 (Ind. Ct. App. 2004), *reh'g denied, trans. denied*, 831 N.E.2d 742 (Ind. 2005); *see also* Dorelli, *supra* note 3, at 944-45 (discussing *Wal-Mart* decision).

41. *Lewis*, 824 N.E.2d at 685 (internal quotation marks omitted) (quoting *Wal-Mart*, 808 N.E.2d at 1204).

> Courts generally agree that the predominance of common issues does not mean that common issues merely outnumber individual issues. Nor should a court determine predominance by comparing the time that the common issues can be anticipated to consume in the litigation to the time that individual issues will require. Otherwise, only the most complex common issues could predominate, because only complex issues tend to require more time to litigate.[42]

The court in *Lewis* concluded that the defendants' conduct in directly paying patients of non-participating health care providers, rather than paying directly to the health care providers who have obtained assignment of benefits from the patients, "does not constitute a question of fact that predominates over the questions affecting only individual class members, as required by [Rule 23(B)(3)]."[43] The court reasoned that "[e]stablishing this common question will not establish any of the substantive elements of any of the class members' claims, nor will it advance the litigation in any respect."[44] Because the court perceived that "no economy of time, effort, or expense [would] be achieved" by maintaining the class, it reversed the trial court's certification order.[45]

D. Declaratory Judgment and Equitable Defense of Laches

In *SMDfund, Inc. v. Fort Wayne-Allen County Airport Authority*,[46] the court determined that the plaintiffs' request for declaratory relief—challenging the constitutionality of a statute creating the Fort Wayne-Allen County Airport Authority (the "Authority")—was equitable in nature and, therefore, subject to the equitable defense of laches.[47] Specifically, the plaintiffs in *SMDfund* filed a complaint (1) seeking a declaration, inter alia, that the Authority was invalid and that it had no control over the airports in Fort Wayne, and (2) seeking an injunction preventing the Authority from closing Smith Field.[48] The Authority moved for summary judgment, arguing that the claims were barred by the statute

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42. *Id.* at 686 (quoting 5 MOORE'S FEDERAL PRACTICE § 23.45[1], at 23-210 to 212).

43. *Id.*

44. *Id.*

45. *Id.* at 686-87. The court also rejected the plaintiffs' argument that predominance was satisfied by questions of law common to members of the plaintiff class. *Id.* Finally, because the court's conclusion on the predominance requirement was dispositive, the court did not separately address whether the "superiority" requirement was satisfied in the case. *Id.* at 687; *see also* Ind. Bus. Coll. v. Hollowell, 818 N.E.2d 943, 948-52 (Ind. Ct. App. 2004) (discussing the two-step analysis for determining the propriety of class action certification under Rule 23(A) and (B)(3), but providing limited analysis of the "predominance" and "superiority" requirements).

46. 831 N.E.2d 725 (Ind. 2005), *cert. denied sub nom.* Tocci v. Ft. Wayne-Allen County Airport Auth., 126 S. Ct. 1051, *and reh'g denied*, 126 S. Ct. 1459 (2006).

47. *Id.* at 728-29.

48. *Id.* at 727-28.

of limitations and by the equitable doctrine of laches.[49] The trial court granted the Authority's motion, based on the statute of limitations.[50] The plaintiffs appealed and sought transfer to the Indiana Supreme Court, bypassing the court of appeals pursuant to Rule 56(A) of the Indiana Rules of Appellate Procedure.[51]

On transfer, the Indiana Supreme Court first determined that the plaintiffs' claims were both "grounded in equity."[52] The court explained that "[a] declaratory judgment is not necessarily either equitable or legal."[53] Rather, the court continued, it "is a statutory creation, and by its nature is neither fish nor fowl, neither legal nor equitable."[54] The court described the test as follows: "The status of a declaratory judgment as legal or equitable is determined by the nature of the suit. The test is whether, in the absence of a prayer for declaratory judgment, the issues presented should be properly disposed of in an equitable as opposed to a legal action."[55]

The court in *SMDfund* found that the plaintiffs' request for a declaration that the Authority is invalid and has no control over the airports in Fort Wayne was "the functional equivalent of an injunction against the Authority's operation as an established airport authority."[56]

Because the court determined that the plaintiffs' action was equitable in nature, it proceeded to evaluate whether laches operated to bar the claim. The court explained that "[i]ndependently of any statute of limitation, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them."[57] To establish the defense of laches, a defendant must demonstrate: "(1) inexcusable delay in asserting a known right; (2) an implied waiver arising from knowing acquiescence in existing conditions; and (3) a change in circumstances causing prejudice to the adverse party."[58]

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49. *Id.* at 728. The Authority also argued that the Public Lawsuit Act deprived the court of jurisdiction over the plaintiffs' claims. *Id.* The trial court granted the Authority's motion on other grounds and, therefore, the Public Lawsuit Act was not addressed further by the Indiana Supreme Court.

50. *Id.*

51. *Id.* IND. APP. R. 56(A) provides that

> [i]n rare cases, the Supreme Court may, upon verified motion of a party, accept jurisdiction over an appeal that would otherwise be within the jurisdiction of the Court of Appeals upon a showing that the appeal involves a substantial question of law of great public importance and that an emergency exists requiring a speedy determination.

52. *SMDfund*, 831 N.E.2d at 728-29.

53. *Id.* at 728.

54. *Id.* (internal quotation marks omitted) (quoting Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 824 (2d Cir. 1968)).

55. *Id.* (internal citations and quotation marks omitted).

56. *Id.*

57. *Id.* at 729 (internal quotation marks omitted) (quoting Penn Mut. Life Ins. Co. v. City of Austin, 168 U.S. 685, 698 (1898)).

58. *Id.* (internal quotation marks omitted) (quoting Shafer v. Lambie, 667 N.E.2d 226, 231 (Ind. Ct. App. 1996)).

The statute challenged by the plaintiffs in *SMDfund* was enacted in 1985, more than seventeen years before the plaintiffs filed suit.[59] The court stated that "[s]eventeen years is surely an unreasonable delay, but laches does not turn on time alone."[60] Rather, the court explained, "unreasonable delay which causes prejudice or injury is necessary."[61] "[I]f a party, with knowledge of the relevant facts, permits the passing of time to work a change of circumstances by the other party, laches may bar the claim."[62]

The court concluded that the Authority established that "it would be prejudiced if [the] suit were allowed to proceed."[63] Specifically, according to the court, the prejudice occurred "when the Authority in reliance on the statute issued bonds and again when it took over operation of Smith Field."[64] In support of its conclusion, the court quoted the U.S. Supreme Court in *Penn Mutual Life Insurance Co. v. City of Austin*: "[W]here a public expenditure has been made, or a public work undertaken, and where one, having full opportunity to prevent its accomplishment, has stood by and seen the public work proceed, a court of equity will more readily consider laches."[65] In light of the fact that the Authority had "incurred debt exceeding $44 [million] and has entered into a variety of leases, contracts, and other obligations, some of which extended for sixty-eight years into the future," the court "readily [found] laches in [the plaintiffs'] seventeen-year delay."[66]

III. INDIANA COURT OF APPEALS DECISIONS

A. Administrative Law and Procedure

In *Sun Life Assurance Co. of Canada v. Indiana Comprehensive Health Insurance Ass'n*,[67] the court rejected the plaintiff's argument that, pursuant to the doctrine of "primary jurisdiction," it was not required to exhaust its administrative remedies before seeking judicial review of an agency determination.[68] The doctrine of primary jurisdiction was explained by the

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59. *Id.*

60. *Id.* at 731.

61. *Id.* (internal quotation marks omitted) (quoting *Shafer*, 667 N.E.2d at 231).

62. *Id.* (internal quotation marks omitted) (quoting State *ex rel.* Att'y Gen. v. Lake Superior Court, 820 N.E.2d 1240, 1256 (Ind.), *cert. denied*, 126 S. Ct. 398 (2005)).

63. *Id.*

64. *Id.*

65. *Id.* (internal quotation marks omitted) (quoting Penn Mut. Life Ins. Co. v. City of Austin, 168 U.S. 685, 698 (1898)).

66. *Id.* Because the court found that laches barred the plaintiffs' claims, it did not address the statute of limitations issue, which was the basis of the trial court's original ruling reaching the same result. *Id.* at 732.

67. 827 N.E.2d 1206 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 186 (Ind. 2005).

68. *Id.* at 1213.

Indiana Supreme Court in *Austin Lakes Joint Venture v. Avon Utilities, Inc.*,[69] as follows:

> The doctrine [of primary jurisdiction] comes into play when a claim is cognizable in a court but adjudication of the claim "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of [an] administrative body . . . ."
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> [I]n order to determine whether a case is properly before the trial court, the court should examine each issue presented by the case. If at least one of the issues involved in the case is within the jurisdiction of the trial court, the entire case falls within its jurisdiction, even if one or more of the issues are clearly matters for exclusive administrative or regulatory agency determination. Where at least one of the issues or claims is a matter for judicial determination or resolution, the court is not ousted of subject matter jurisdiction by the presence in the case of one or more issues which arguably are within the jurisdiction of an administrative or regulatory agency.[70]

In *Sun Life*, the plaintiff was an insurer, seeking an injunction against the Indiana Comprehensive Health Insurance Association. The court found that the sole issue raised by the plaintiff—whether the plaintiff was a member of the Association—was an issue within the exclusive jurisdiction of the Association.[71] As explained by the court in *Austin Lakes*, "the doctrine of primary jurisdiction applies only when there is at least one issue before the court that is a matter of judicial determination."[72] The court, therefore, affirmed the trial court's decision to dismiss the plaintiff's complaint for lack of subject matter jurisdiction.[73]

B. Pleadings

1. Definition of "Pleadings."—In *Wachstetter v. County Properties, LLC*,[74] the court held that a subcontractor holding a mechanic's lien failed to satisfy the statutory requirement of filing a "complaint" within one year of the recording of the lien,[75] by filing a "motion to intervene" in a foreclosure action filed by a

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69. 648 N.E.2d 641 (Ind. 1995).

70. *Sun Life*, 827 N.E.2d at 1212 (alteration in original) (quoting *Austin Lakes*, 648 N.E.2d at 646).

71. *Id.* at 1213.

72. *Id.* (stating that "the trial court has to have subject matter jurisdiction over at least one claim before it can exercise jurisdiction and refer claims to an agency under the doctrine of primary jurisdiction").

73. *Id.*

74. 832 N.E.2d 574 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006).

75. Section 32-8-3-6 (2005) of the Indiana Code provides, in pertinent part, as follows:

> [a]ny person having such [mechanic's] lien may enforce the same by filing his

mortgagee against the property owner.[76] Specifically, the mortgagee filed its foreclosure suit against the property owner in July 1998.[77] On December 1, 1998, the subcontractor recorded its mechanic's lien.[78] On March 29, 1999, the subcontractor filed a motion to intervene, based on the mechanic's lien.[79] However, the subcontractor did not file a cross-claim against the property owner until October of 2000—almost two years after the mechanic's lien was recorded.[80] Later, after the trial court granted summary judgment for the mortgagee on the ground that the subcontractor failed to timely foreclose his lien, the subcontractor moved to amend his "pleadings" to include a mechanic's lien claim against the mortgagee's assignee.[81] The trial court denied the motion to amend.[82]

In rejecting the subcontractor's argument that his proposed amendment should relate back to the date of his motion to intervene, the court in *Wachstetter* explained that, pursuant to Indiana Trial Rule 7(A), "pleadings shall consist of: (1) a complaint and an answer; (2) a reply to a denominated counterclaim; (3) an answer to a cross-claim; (4) a third-party complaint . . . ; and (5) a third-party answer."[83] Further, the court recognized that a motion is "an application to the court for an order."[84] The court stated that "[t]o equate a motion to intervene with a complaint is to stretch the rules beyond reason."[85] Therefore, the court concluded that any amendment would have related back only to the date of the subcontractor's cross-claim, which "was filed too late to preserve a right to enforce his mechanic's lien."[86]

Practitioners often identify various filings as "pleadings" without regard to

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> *complaint* in the circuit or superior court of the county where the real estate or property on which the lien is so taken is situated, at any time within one (1) year from the time when said notice has been received for record by the recorder of the county . . . and if said lien shall not be enforced within the time prescribed by this section, the same shall be null and void.

Wachstetter, 832 N.E.2d. at 579 (quoting IND. CODE § 32-8-3-6 (2005)).

76. *Id.* at 578-79.

77. *Id.* at 576.

78. *Id.*

79. *Id.* at 577.

80. *Id.*

81. *Id.*

82. *Id.* The trial court also denied the subcontractor's motion to reconsider its requirement of strict compliance with the one-year enforcement period. *Id.*

83. *Id.* at 578 (quoting IND. TRIAL R. 7(A)).

84. *Id.* (quoting IND. TRIAL R. 7(B)).

85. *Id.*

86. *Id.* The court also rejected the subcontractor's arguments that summary judgment was improper, finding that (1) the motion to intervene did not satisfy the statutory requirement for the filing of a "complaint" within the one-year period; (2) the filing of the motion to intervene did not toll the one-year enforcement period; and (3) the filing of the motion to intervene did not constitute "substantial compliance" with the mechanic's lien statute. *See id.* at 579-81.

the express definition contained in Rule 7(A). The *Wachstetter* decision serves as a reminder that to do so may result in prejudice to the case—i.e., terminology and definitions within the Trial Rules should be more carefully considered.

2. Notice Pleading.—In *Tobin v. Ruman*,[87] a minority shareholder in a law firm organized as a professional corporation filed a complaint against the firm and the firm's majority shareholder, alleging breach of an oral contract, fraud, and other claims.[88] In his motion for partial summary judgment, the plaintiff argued that the defendants' failure to pay him his share of the firm's retained earnings constituted, inter alia, "criminal conversion," entitling him to recover treble damages under Indiana's crime victim's statute.[89] In his complaint, the plaintiff had alleged that the failure amounted only to a breach of contract.[90] The trial court granted the plaintiff's summary judgment motion on the conversion claim and awarded him treble damages.[91] The defendants appealed, arguing, in part, that the plaintiff failed to plead a conversion claim or a claim under the crime victim's statute in his complaint.[92]

The court in *Ruman* disagreed, explaining that "in Indiana, plaintiffs need not identify any specific theory of recovery; rather, they must only state sufficient operative facts as to put defendants on notice as to their claims."[93] The court found that the plaintiff "stated sufficient operative facts . . . so as to put [the defendants] on notice as to his claims, and his failure to include a count specifying conversion and damages pursuant to the crime victim's compensation statute does not prevent him from recovering."[94]

C. Service of Process

1. Service on Former Director of Dissolved Corporation.—In *Munster v. Groce*,[95] the court of appeals held as a matter of first impression that "in the case of a dissolved corporation, it is appropriate to serve process upon a former director of the corporation [who was a director of the corporation] at the time of

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87. 819 N.E.2d 78 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 747 (Ind. 2005).

88. *Id.* at 83.

89. *Id.* at 88.

90. *Id.*

91. *Id.*

92. *Id.* at 89 n.7.

93. *Id.* (citing Binninger v. Hendricks County Bd. of Zoning Comm'rs, 668 N.E.2d 269, 272 (Ind. Ct. App. 1996)).

94. *Id.* The court in *Ruman* proceeded, however, to reverse the trial court's decision on the criminal conversion claim, finding that the defendants' "wrongful withholding of [the] funds from [the plaintiff] is, at most, the failure to pay a debt, which does not constitute criminal conversion as a matter of law." *Id.* at 89 (citing Huff v. Biomet, Inc., 654 N.E.2d 830, 836 (Ind. Ct. App. 1995)). Therefore, the court held that the crime victim's compensation statute did not apply and the plaintiff was not entitled to treble damages. *Id.*

95. 829 N.E.2d 52 (Ind. Ct. App. 2005).

its dissolution."[96] Recognizing that "[t]he question of how to serve a defunct corporation . . . has not previously been addressed by Indiana case law[,]" the court determined that "[t]he trial rules and Indiana Business Corporation Law . . . provide sufficient guidance for how to resolve [the] issue."[97]

The court found that service was proper at the former director's residence.[98] Rule 4.6(B) provides that service on a corporate representative generally cannot be made at the person's residence.[99] However, the court reasoned that in the case of a dissolved corporation, service at the director's residence was proper because the corporation "no longer has a business address."[100]

Finally, the court found that service was effective, despite that the summons was directed only to the dissolved corporation, not to the individual director "or any other person, such as a 'director' or 'officer' of [the corporation]."[101] The court distinguished its decision in *Volunteers of America v. Premier Auto*,[102] in which the court held that "service upon Volunteers of America ("VOA") was ineffective because none of the initial attempts were directed to a person; instead, the summonses were simply addressed to 'Volunteers of America.'"[103] The court in *Munster* distinguished the circumstances in *Volunteers of America*, explaining as follows:

> [*Volunteers of America*] concerned mailings to VOA's office that subsequently were never brought to the attention of a high-ranking corporate officer. Here, by contrast, the summons and complaint were delivered directly to [the director's] residence and he acknowledged receipt of them; there was no chance that the summons and complaint would fail to follow the proper internal corporate channels to a high-ranking officer or director because they were delivered directly to a director.[104]

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96. *Id.* at 62-63 (citing Warren v. Dixon Ranch Co., 260 P.2d 741, 743 (Utah 1953)).

97. *Id.* at 62.

98. *Id.* at 63.

99. *Id.* (discussing IND. TRIAL R. 4.6(A) & (B)).

100. *Id.* The court also found service proper, despite that the summons and complaint were left with the director's wife, and despite that it was not followed by service by mail to the director's residence. *Id.* With regard to follow-up service by mail, the court stated that "failure to follow up delivery of a complaint and summons under Trial Rule 4.1(A)(3) with mailing of a summons under Trial Rule 4.1(B) does not constitute ineffective service of process if the subject of the summons does not dispute actually having received the complaint and summons." *Id.* (citing Boczar v. Reuben, 742 N.E.2d 1010, 1016 (Ind. Ct. App. 2001)).

101. *Id.* at 63-64.

102. 755 N.E.2d 656 (Ind. Ct. App. 2001).

103. *Munster*, 829 N.E.2d at 63 (citing *Volunteers of Am.*, 755 N.E.2d at 660). The court in *Volunteers of America* also held that the defect in service was not saved by Rule 4.15(F), which provides that service will not be deemed insufficient, when it is "reasonably calculated to inform the person [being] served." *Id.* at 63-64.

104. *Id.* at 64.

The court found that "even if there was a technical defect in the summons . . . , the method of service by delivery at [the director's] residence still was reasonably calculated to inform [the dissolved corporation] of the pending lawsuit and, in fact, did provide such notice."[105] The court of appeals reversed the trial court's dismissal of the complaint as to the dissolved corporation.[106]

2. "Joint" Summons Ineffective.—In *Allburn v. State ex rel. Warrick County Sheriff's Department*,[107] the court applied a "bright line rule" that "[o]ne copy of a joint summons delivered to a residence where two parties to the suit reside does not constitute proper service."[108] Therefore, the court held that the trial court lacked jurisdiction to enter and enforce a judgment against a defendant, where a single summons was addressed to both the defendant and her husband, who was a co-defendant, at their residence.[109]

In *Allburn*, the defendant alleged that she never received a copy of the summons. The court's ruling arguably leaves open whether service on the *husband* was ineffective, despite his receipt of the summons, simply because the summons was jointly addressed to both defendants.

D. Personal Jurisdiction

In 2003, Rule 4.4(A)—Indiana's "long arm" jurisdiction statute—was amended to include the following language: "In addition, a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States."[110] In *Litmer v. PDQUSA.com*,[111] the U.S. District Court for the Northern District of Indiana determined that the 2003 amendment to Rule 4.4(A) makes Indiana's long-arm statute coextensive with the limits of due process, allowing the courts to collapse the prior "two-step analysis" into a single inquiry: whether the exercise of personal jurisdiction comports with due process.[112]

In *Pozzo Truck Center, Inc. v. Crown Beds, Inc.*,[113] however, the Indiana Court of Appeals disagreed with the court in *Litmer*, stating that Indiana courts will continue to apply the two-step analysis, "first determining whether the conduct falls under the long-arm statute and then whether it comports with the Due Process Clause as interpreted by the United States Supreme Court and courts

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105. *Id.*

106. *Id.*

107. 826 N.E.2d 682 (Ind. Ct. App.), *trans. denied sub nom.* Allburn v. Warrick County Sheriff's Dep't, 841 N.E.2d 181 (Ind. 2005).

108. *Id.* at 684-85 (internal quotation marks omitted) (quoting Idlewine v. Madison County Bank & Trust Co., 439 N.E.2d 1198, 1201 (Ind. Ct. App. 1982)).

109. *Id.* at 685.

110. IND. TRIAL R. 4.4(A).

111. 326 F. Supp. 2d 952 (N.D. Ind. 2004).

112. *Id.* at 955.

113. 816 N.E.2d 966 (Ind. Ct. App. 2004).

in this state."[114] The court explained that "if Indiana's long-arm statute was intended to be coextensive with the limits of personal jurisdiction under the Due Process Clause, the enumerated acts listed in Rule 4.4(A) could have been deleted and the Rule could have been rewritten with general language."[115]

The court in *Pozzo* first found that the defendant's contacts fell under Rule 4.4(A)(4), which provides that an organization "submits to the jurisdiction of the courts of this state as to any action arising from . . . having supplied or contracted to supply services rendered or to be rendered or goods or materials furnished or to be furnished in this state."[116] Without discussion of the facts in the case, the court apparently found that Rule 4.4(A)(4) applied, satisfying Indiana long-arm jurisdiction.

The court proceeded to "examine whether asserting jurisdiction violates the Due Process Clause of the Fourteenth Amendment."[117] In examining the issue, the court stated, "we must determine 1) whether there are minimum contacts between [the defendant] and Indiana, and 2) whether asserting personal jurisdiction over [the defendant] offends 'traditional notions of fair play and substantial justice.'"[118] The court found that the defendant established "minimum contacts" with the state of Indiana because it performed the work that was at issue in the case specifically for an Indiana corporation.[119] The court explained that the defendant "had full knowledge that [the plaintiff] was an Indiana corporation" and that the defendants contacts were such "that it should have reasonably anticipated being haled into an Indiana court to adjudicate a dispute over the work it performed for [the plaintiff]."[120]

Finally, the court in *Pozzo* found that asserting jurisdiction over the defendant comported "with traditional notions of fair play and substantial justice," because any inconvenience to the defendant was "outweighed by [the plaintiff's] interest in adjudicating the dispute in the forum where the damage was realized and [by] Indiana's interest in protecting its business owners from defective services."[121] The court also found it persuasive that there did "not appear to be more witnesses in the [defendant's home state] than in Indiana," that litigating in Indiana was no more expensive or inconvenient, and that "it [did] not appear that any substantive social policies [would] be affected by the outcome of this controversy."[122]

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114. *Id.* at 969 n.2.

115. *Id.* Arguably, however, the enumerated acts may have been included in the amended Rule as specific but non-exhaustive bases for a finding of constitutional due process.

116. *Id.* at 969 (quoting IND. TRIAL R. 4.4(A)(4)).

117. *Id.* at 970.

118. *Id.* (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

119. *Id.* at 971.

120. *Id.*

121. *Id.*

122. *Id.*

E. Venue

1. Preferred Venue.—In *Monroe Guaranty Insurance Co. v. Berrier*,[123] the Indiana Court of Appeals held as a matter of first impression that the county in which a judgment is located is a county of preferred venue for a subsequent claim against the judgment defendant's insurer for failure to settle the underlying claim.[124] The plaintiff in the underlying matter sued the defendant in Porter County, for injuries sustained at a health club owned and operated by the defendant.[125] The Porter County court entered judgment on a jury verdict in the amount of $8.1 million.[126] Because the damages award exceeded the $1 million policy limits on the defendant's insurance policy, the defendant assigned the plaintiff its claims against the insurer.[127]

The plaintiff in the underlying litigation sued the insurer in Porter Superior Court, alleging bad faith in the insurer's failure to settle the prior litigation.[128] The insurer filed a motion to dismiss or, in the alternative, to transfer venue, arguing that preferred venue was in Hamilton County, where its principal office was located.[129] The plaintiff responded, arguing that under Indiana Trial Rule 75(A)(2), the underlying judgment was a "chattel" located in Porter County. The trial court agreed, denying the insurer's motion, and the insurer appealed.[130]

The appellate court initially recognized that "[i]t is possible that more than one county may be a county of preferred venue" and that Rule 75(A) creates no preference among the preferred venue criteria it enumerates.[131] "Thus, if suit is initially filed in a county of preferred venue, a trial court may not transfer venue."[132]

The court in *Berrier* explained that "actual damages are an essential element of a claim against an insurer for failure to settle" and that "[t]he excess liability constitutes the actual damages" in a such a case.[133] The court concluded that "the underlying judgment is essential to demonstrating the actual damages sustained, and thus, the current action relates to the chattel under the clear and unambiguous language of Rule 75(A)(2)."[134] In short, the court held that in a claim against an insurer for bad faith failure to settle the underlying matter, the county in which the underlying judgment is entered is a preferred venue, pursuant to Rule

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123. 827 N.E.2d 158 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 183 (Ind. 2005).
124. *Id.* at 161.
125. *Id.* at 159.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 160.
132. *Id.*
133. *Id.* at 161 (citing Allstate Ins. Co. v. Axsom, 696 N.E.2d 482, 485 (Ind. Ct. App. 1998)).
134. *Id.*

75(A)(2).[135]

2. *Jurisdiction of Court upon Change of Venue.*—In *Scott v. Consolidated City of Indianapolis*,[136] the Indiana Court of Appeals found that a trial court retained jurisdiction to reconsider its previously granted order for change of venue, which had been granted before the non-moving party had an opportunity to respond, because at the time jurisdiction was vacated, it "had not been vested in any other court."[137] The court in *Scott* rejected the movant's argument that the trial court was divested of jurisdiction to hear anything but "emergency matters" once the change of venue motion was filed and granted.[138] Specifically, the court affirmed the trial court's decision that an order for change of venue should be vacated "because the order was entered prior to the [non-moving parties] having an opportunity to respond as provided in the local rules."[139]

The court in *Scott* recognized that "[r]elatively few Indiana cases have addressed whether a trial court may entertain a motion to vacate a change of venue order, or even whether the issue may be addressed sua sponte."[140] In determining that the trial court properly reconsidered the order for change of venue, the court explained that: "[a] court has inherent power to control its own orders. It is therefore perfectly proper for a trial court to reconsider a previous order, and to vacate it, or make a modified or contrary order while the case is still in fieri."[141] The court of appeals affirmed that the trial court had jurisdiction to reconsider and vacate the order for change of venue.[142]

The court in *Scott* proceeded to analyze whether Trial Rule 76(A) mandated venue in a county other than Marion County, based on the argument that Marion County was a party to the action.[143] The court, addressing an issue of first impression,[144] found that Unigov legislation allowed the "continued existence of

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135. *See* IND. TRIAL R. 75(A)(2).

136. 833 N.E.2d 1094 (Ind. Ct. App. 2005), *trans. denied* (Ind. 2006).

137. *Id.* at 1098.

138. *Id.* at 1098 n.7. Rule 78 provides that once a certified copy of a change of venue order is filed in the court to which the change has been made, "such court shall have full jurisdiction of said cause." IND. TRIAL R. 78. Further, Rule 78 provides that "[n]othing in this rule shall be construed as divesting the original court of its jurisdiction to hear and determine emergency matters between the time that a motion for change of venue is filed and the time that the court grants an order for the change of venue." *Id.*

139. *Id.* at 1096. Marion Circuit and Superior Court Civil Division Rule 5.1(B) provided at the relevant time as follows: "Unless otherwise provided, a party shall have fifteen (15) days from the date of filing to file a response to a motion, other than a motion for a continuance or enlargement of time." Marion Circuit and Superior Court Civil Division Rule 5.1(B).

140. *Scott*, 833 N.E.2d at 1097.

141. *Id.* (alteration in original and internal quotation marks omitted) (quoting Metro. Dev. Comm'n of Marion County v. Newlon, 297 N.E.2d 483, 484 (Ind. Ct. App. 1973)).

142. *Id.* at 1098.

143. *Id.* at 1097 n.4 (noting that Trial Rule 76(A) provides that a motion for a change of venue "shall be granted only upon a showing that the county where suit is pending is a party").

144. *Id.* at 1099.

some government functions by the county such that the Marion County government is separate from the City."[145] As such, the court of appeals found that "[a]ccording to the plain reading of Trial Rule 76, . . . the trial court did not abuse its discretion in denying the change of venue."[146] In other words, the court found that, at least for purposes of Rule 76(A), Marion County maintains an identity separate from that of the City of Indianapolis, despite the creation and implementation of Unigov. Because the county was not a party to the litigation, change of venue was not automatic under Rule 76(A).[147]

F. Statute of Limitations—Equitable Estoppel

In *Binder v. Benchwarmers Sports Lounge*,[148] the court held that the defendant was equitably estopped from asserting a statute of limitations defense to a negligence claim, where the defendant's attorney led plaintiff's counsel to believe that the defendant would not contest the plaintiff's status as an "employee."[149] Prior to the expiration of the two-year statute of limitations on the negligence claim, counsel for the plaintiff delivered a letter to counsel for the defendant, asking whether the defendant was "denying [that the plaintiff] was an employee at the time of the alleged injury[.]"[150] Counsel for the defendant responded, stating that "it is my client's position that your client was not acting in the course and scope of his employment at the time of the alleged injury."[151]

After the statute of limitations had passed, the owner of the corporate defendant alleged for the first time, during a deposition in the worker's compensation proceeding, that the plaintiff was not an "employee" at the time of the incident.[152] The plaintiff subsequently filed its complaint in this matter, the defendant answered and raised the statute of limitations as a defense, and, ultimately, the trial court dismissed the complaint based on the statute of limitations.[153]

The court in *Binder* stated that "[i]t is apparent to us that [the defendant] was intentionally trying to conceal its position in the worker's compensation matter until the statute of limitations expired on any possible tort action."[154] In rejecting the defendant's contention that "[a] defendant has no obligation to disclose its

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145. *Id.* at 1101.

146. *Id.*

147. *See id.*

148. 833 N.E.2d 70 (Ind. Ct. App. 2005).

149. *Id.* at 73-74. The plaintiff in *Binder* was working in the bar and was injured during his attempt to break up a fight. The plaintiff timely filed an Application for Adjustment of Claim with the Indiana Worker's Compensation Board. *Id.* at 72.

150. *Id.* at 72.

151. *Id.*

152. *Id.*

153. *Id.* at 72-73.

154. *Id.* at 76.

defenses to a lawsuit, other than affirmative defenses[,] . . ."[155] the court stated that "[a] defendant does have an obligation not to make a material misrepresentation[,] [and] [e]ven more than that, [counsel for the defendant], as an attorney, is held to a higher standard."[156]

The court explained the rationale for such a standard as follows:

> We decline to require attorneys to burden unnecessarily the courts and litigation process with discovery to verify the truthfulness of material representations made by opposing counsel. The reliability of lawyers' representations is an integral component of the fair and efficient administration of justice. The law should promote lawyers' care in making statements that are accurate and trustworthy and should foster the reliance upon such statements by others.[157]

The court in *Binder* also rejected the defendant's contention that the plaintiff had access to the same factual information as the defendant regarding his employment status.[158] The court clarified that the material representation was *not* whether the plaintiff was an "employee." Rather, it was whether the defendant "would dispute whether [the plaintiff] was an employee or not."[159] The court concluded that counsel for the defendant "made a material representation to [the plaintiff's] counsel concerning whether [the defendant] would contest [the plaintiff's] status as an employee, causing [the plaintiff] to miss the statute of limitations deadline for his tort suit against [the defendant]."[160] Thus, the court held that the defendant was "equitably estopped from asserting the statute of limitations defense."[161]

G. Dismissal

1. Voluntary Dismissal.—In *Principal Life Insurance Co. v. Needler*,[162] Fabias Shipman stabbed and robbed Needler after Needler had cashed a check at his bank.[163] Needler filed suit against the bank, alleging negligence in its failure to prevent the attack and failure to adequately train and supervise its employees.[164] Needler initially demanded $250,000 from the bank, but ultimately accepted $49,000, due to questions regarding liability.[165]

Principal Life, Needler's insurer, claimed "it was entitled to a lien against the

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155. *Id.* at 75.
156. *Id.*
157. *Id.* (citing Fire Ins. Exch. v. Bell, 643 N.E.2d 310, 313 (Ind. 1994)).
158. *Id.* at 76.
159. *Id.*
160. *Id.*
161. *Id.*
162. 816 N.E.2d 499 (Ind. Ct. App. 2004).
163. *Id.* at 501.
164. *Id.*
165. *Id.*

settlement amount, for . . . medical bills it had paid on Needler's behalf, less a pro rata share of attorney fees and litigation expenses."[166] Needler claimed "the amount of the lien should be reduced because he did not recover the full value of his total claim due to the settlement and an inability to collect from [the assailant]."[167] Thus, Needler filed a "Motion to Adjudicate Lien," pursuant to the Indiana Lien Reduction Statute.[168] The trial court held a hearing and after argument of counsel, "expressed its belief that a separate declaratory judgment action by Needler would be 'the most logical' way to resolve the dispute."[169] Needler's attorney made an oral motion to voluntarily dismiss the motion, which the trial court granted over Principal Life's objection.[170]

Rule 41(A)(2) "permits a plaintiff to voluntarily dismiss an action without prejudice after a responsive pleading or motion for summary judgment has been filed, but only pursuant to court order."[171] Generally, dismissal under Rule 41(A)(2) "should be allowed unless the defendant will suffer some legal prejudice other than the mere prospect of a second lawsuit."[172] Because Indiana's Rule 41(A) is identical to Rule 41(A) of the Federal Rules, the court in *Principal Life* looked to federal authority for guidance:

> Legal prejudice is shown when actual legal rights are threatened or when monetary or other burdens appear to be extreme or unreasonable . . . .
>
> [T]he factors most commonly considered on a motion for a voluntary dismissal are: (1) the extent to which the suit has progressed, including the defendant's effort and expense in preparing for trial, (2) the plaintiff's diligence in prosecuting the action or in bringing the motion, (3) the duplicative expense of relitigation, and (4) the adequacy of plaintiff's explanation for the need to dismiss. Other factors that have been cited include whether the motion is made after the defendant has made a dispositive motion or at some other critical juncture in the case and any vexatious conduct or bad faith on plaintiff's part.[173]

Further, "where a hearing has been conducted on an issue that goes to the merits of the controversy, voluntary dismissal is inappropriate."[174]

After finding that the hearing did not go to the merits of the controversy,[175]

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166. *Id.*

167. *Id.*

168. *Id.*; *see* IND. CODE § 34-51-2-19 (2005).

169. *Id.* at 502.

170. *Id.*

171. *Id.*

172. *Id.* (internal quotation marks omitted) (quoting Rose v. Rose, 526 N.E.2d 231, 234 (Ind. Ct. App. 1988)).

173. *Id.* at 503 (alterations in original) (quoting 8 MOORE'S FEDERAL PRACTICE § 41.40[6], at 41-140 to -142 (3d ed. 2003)).

174. *Id.* (citing *Rose*, 526 N.E.2d at 235).

175. *Id.*

the court in *Principal Life* affirmed the trial court's grant of Needler's oral motion to dismiss, ultimately finding that Principal Life failed to demonstrate legal prejudice.[176] The court rejected Principal Life's argument that it suffered prejudice by preparing for the hearing and because "it will be subjected to a second action."[177] The court stated that Principal Life failed to demonstrate "clear legal prejudice caused by the . . . dismissal, such as the nullification of favorable rulings or substantial expense beyond the creation of work product that should be transferable to the declaratory judgment action."[178] The court found that the trial court did not abuse its discretion in granting the plaintiff's motion to dismiss.[179]

2. *Involuntary Dismissal.*—In *Office Environments, Inc. v. Lake States Insurance Co.*,[180] the appellate court affirmed the trial court's dismissal of the case pursuant to Indiana Trial Rule 41(E) due to the plaintiff's failure to comply with a court order requiring mediation of the case.[181] The court reasoned that the "complaint had been on the court's docket for over three years," the "trial court first ordered the parties to mediate . . . over two and one-half years before it dismissed the case"; the plaintiff had caused the mediation to be rescheduled at least three times, during which time the jury trial was continued four times, and the plaintiff never sought relief from the order to mediate the case.[182]

In his dissent, Judge May commented on mandatory mediation, which is sometimes futile:

> Many counties require mediation in all civil cases, and I do not believe that is a good practice. Some cases simply cannot be productively dealt with through mediation. When mediation is imposed without any inquiry into whether that process suits the dispute or the litigants, parties will often be ordered into mediation when both sides (and perhaps the judge, as well) know the process will be futile. In some situations, like the one before us, a party alleges its financial difficulties are attributable to an act or omission by the other party. Forcing the financially challenged party into mediation, and forcing that party to pay mediation costs, will often be counter-productive.[183]

The majority agreed that mediation is not appropriate in all cases.[184] However, it noted that the plaintiff failed to avail itself of the available mechanism for being excused from court-ordered or otherwise mandatory

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176. *Id.* at 506.

177. *Id.* at 505-06.

178. *Id.* at 506.

179. *Id.*

180. 833 N.E.2d 489 (Ind. Ct. App. 2005).

181. *Id.* at 496; *see* Marion County Local Rule 16.3(c)(1) (mandating mediation for parties in civil cases who have "made a timely demand for jury trial").

182. *Id.* at 494-95.

183. *Id.* at 497 (May, J., dissenting).

184. *Id.* at 495 (majority opinion).

mediation contained in the Alternative Dispute Resolution rules.[185]

In *Rueth Development Co. v. Muenich*,[186] the court of appeals reversed the trial court's dismissal of an amended complaint for failure to comply with a court-ordered deadline.[187] Specifically, the trial court had ordered the plaintiffs to amend their complaint within twenty days after its order granting the defendant's motion for a more definite statement.[188] Because of a calendaring error by the plaintiffs' attorney, the amended complaint was filed either one or three days late, depending on whether Rule 6(E) applied to extend the deadline.[189]

The court in *Rueth* found that the various factors courts balance to determine whether a trial court has abused its discretion in dismissing a case under Rule 41(E) for failure to prosecute are also applicable to "failure to comply with the trial rule" cases under Rule 41(E).[190] Applying the factors, the court found that dismissal was inappropriate.[191] The court reasoned that the delay in filing was minimal, the "missed deadline resulted from a calendaring error, not from an intentional violation of the trial court's order," and "[l]ess drastic sanctions were available . . . , such as a verbal warning."[192] Finally, the court noted its preference for "deciding cases on their merits."[193] The court of appeals found that the trial court abused its discretion in dismissing the plaintiff's complaint.[194]

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185. *Id.*

186. 816 N.E.2d 880 (Ind. Ct. App. 2004), *trans. denied*, 831 N.E.2d 742 (Ind. 2005).

187. *Id.* at 882.

188. *Id.*

189. *Id.* at 882-83; *see also id.* at 883 n.2 (evaluating issue of proper application of IND. TRIAL R. 6(E), but refraining from deciding whether it applied because it was not determinative in this case and had not been argued to the trial court).

190. *Id.* at 884. The factors balanced by the court in evaluating a Rule 41(E) dismissal include

> (1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff's part.

Id. (citing Belcaster v. Miller, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003)). "The weight any particular factor has in a particular case appears to depend upon the facts of that case." *Id.* (internal quotation marks omitted) (quoting *Belcaster*, 785 N.E.2d at 1167).

191. *Id.* at 887.

192. *Id.* at 884-85.

193. *Id.* at 885.

194. *Id.* at 887.

H. Discovery—Request for Admissions

In *Fairland Recreational Club, Inc. v. Indianapolis Downs, LLC*,[195] the court of appeals affirmed the trial court's denial of sanctions for failure to admit a request for admissions where the request was "inartfully written."[196] The plaintiff in *Indianapolis Downs*, a landowner, brought an action against a nearby property owner, alleging that during construction on its property, the nearby property owner diverted underground water away from the landowner's property, draining a lake on the property.[197] During discovery, the landowner served requests for admissions on the defendant property owner, including a request which stated that the "de-watering activities" of the defendant "caused a decline in the water level of the lake."[198] The defendant responded that it was "without sufficient information to either admit or deny" the request.[199] Following a jury trial, the plaintiff was awarded compensatory and punitive damages.[200] The plaintiff then filed a request for costs and attorney fees relating to the defendant's denial of the request for admission.[201]

In affirming the trial court's denial of the landowner's request for fees and costs, the court in *Indianapolis Downs* agreed with the defendant that the request was "improperly vague and ambiguous, and unfairly increased the burden on the answering party."[202] The court explained that "[b]ecause the purpose of requests for admission is to conclusively establish facts, the requesting party bears the burden of artfully drafting a statement of facts contained in a request for admission in a manner that is precise, unambiguous, and not misleading to the answering party."[203]

In dicta, the court in *Indianapolis Downs* expressed disapproval with the

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195. 818 N.E.2d 100 (Ind. Ct. App. 2004).

196. *Id.* at 103-04.

197. *Id.* at 101.

198. *Id.* The request at issue provided as follows:

> REQUEST NO. 7: Admit or deny that from March 2002 through the present, Indianapolis Downs, its agents, employees, or contractors working for it or under its direction and control, in the course of de-watering activities associated with the construction work on the site, have caused a decline in the water level of the lake located on the property owned and operated by the Fairland Recreation Club.

Id.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 102. The defendant argued that (1) the specific dates in the request on which the water level declined were at issue during trial, (2) the language of the request "required it to admit facts giving rise to a legal theory of liability under respondeat superior[,]" (3) it did not know who owned the property, and (4) the determination of whether its de-watering "caused a decline in the water level . . . was a materially disputed issue of fact that required the expertise of a hydrologist and/or engineer." *Id.* at 102-03.

203. *Id.* at 103 (citing Weldy v. Kline, 652 N.E.2d 107, 110 (Ind. Ct. App. 1995)).

manner in which the defendant answered the request for admission.[204] Specifically, the court noted that the defendant "neither attempted to object to the request . . . nor indicated that it had conducted a reasonable inquiry to obtain information or that doing so would be unreasonably burdensome[,]" as required by Rule 36(A).[205] The court stated that the defendant "could have, and should have, put forth a greater effort to answer the request with whatever clarification was necessary to answer accurately."[206] The court "warn[ed] counsel in future litigation to be more careful in complying not only with the black letter of this rule, but also the spirit of it."[207] Nevertheless, the court in *Indianapolis Downs* found that "[a]lthough Trial Rule 36 provides a procedure for clarifying and objecting to requests for admission that should have been followed, [the defendant] should not be sanctioned for failing to admit [the landowner's] request."[208]

I. Consolidation of Actions

In *Bodem v. Bancroft*,[209] the court distinguished the "common question of law or fact" standard for granting a consolidation of proceedings under Indiana Trial Rule 42, from the more stringent "same transaction or occurrence" standard for permissive joinder under Rule 20.[210] In *Bodem*, an injured plaintiff sought consolidation of two actions she had filed against two separate defendants, relating to two separate rear-end collisions. The plaintiff sought consolidation of the two actions, arguing that if the two trials proceeded separately she would not "get a fair determination of what her damages are, and who in fact caused them" because each defendant could point the finger at the non-party.[211] The trial court granted consolidation and one of the defendants appealed.[212]

Rule 42, governing consolidation of proceedings, provides as follows:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.[213]

The defendant in *Bancroft* argued that consolidation of the two actions was improper because the two defendants were "neither required nor permitted to be

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204. *Id.*
205. *Id.*; *see* IND. TRIAL R. 36(A).
206. *Id.*
207. *Id.*
208. *Id.* at 103 n.3.
209. 825 N.E.2d 380 (Ind. Ct. App. 2005).
210. *Id.* at 383.
211. *Id.* at 382.
212. *Id.* at 381.
213. IND. TRIAL R. 42; *Bodem*, 825 N.E.2d at 383.

joined under the rules and case law governing joinder."[214] In rejecting the defendant's argument, the court explained the difference between the standard under Rule 42 and that under Rule 20, which governs permissive joinder:

> For consolidation to be proper, it is only necessary that the actions involve a common question of law or fact. Trial Rule 42 does not contain the "same transaction or occurrence" requirement as is found in the rule governing joinder. We cannot deny that if presented with an issue under [Rule 20], we would conclude . . . that joinder of [the two defendants] in the same action would have been improper as there is no logical relationship between the two accidents, except for injury to the same plaintiff. Nevertheless, here, we must only review the trial court's determination that there is a common issue of law and fact sufficient to justify consolidation.[215]

The court found that the "commonality and overlap in alleged injuries presents a common question of fact sufficient to justify consolidation."[216] Therefore, the court of appeals affirmed the ruling by the trial court, consolidating the two actions.[217]

J. Settlement—Fraudulent Inducement to Settle Lawsuit

In *Siegel v. Williams*,[218] which involved a legal malpractice action, the court of appeals affirmed the trial court's finding that the attorney-defendant—who was also counsel of record on his own behalf—fraudulently induced a settlement of the malpractice lawsuit by falsely representing to the plaintiff that he lacked assets to pay any judgment in excess of $25,000 and that if any judgment was entered in excess of that amount, he would file bankruptcy.[219] The underlying malpractice case had settled, an agreed judgment was filed with the trial court, and, ultimately, a satisfaction and release of judgment was filed court.[220]

Approximately two years later, counsel for the plaintiffs in the malpractice action encountered the defendant outside the Marion County court building. The defendant told counsel for the plaintiffs that he "'pulled one over on [the plaintiffs,]' because he could have paid a judgment of 'three hundred, four hundred, five hundred thousand dollars, and [he] got out of it for twenty-five.'"[221]

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214. *Bodem*, 825 N.E.2d at 383.

215. *Id.* at 383-84.

216. *Id.* at 382.

217. *Id.* at 382-83.

218. 818 N.E.2d 510 (Ind. Ct. App. 2004).

219. *Id.* at 512-13. After analyzing the elements of both fraud and constructive fraud, the court ruled that "because [defendant] was an attorney of record, [plaintiffs'] attorneys had 'a right to rely upon any material misrepresentations that may have been made by opposing counsel . . . as a matter of law.'" *Id.* at 516 (quoting Fire Ins. Exch. v. Bell, 643 N.E.2d 310, 313 (Ind. 1994)).

220. *Id.* at 513.

221. *Id.*

The plaintiffs in the malpractice case proceeded to file a second complaint against the attorney-defendant, "alleging fraud and misrepresentation which induced [them] to settle the attorney malpractice claim."[222] The attorney-defendant filed a motion to dismiss for lack of jurisdiction, arguing that "the complaint was actually a Trial Rule 60 motion to set aside the prior judgment."[223]

In rejecting the defendant's argument that the plaintiffs' complaint alleging fraud and misrepresentation was an impermissible collateral attack on the "judgment" resulting from the settlement, the appellate court in *Siegel* found that "agreed judgments do 'not represent the judgment of the court. The court merely performs the ministerial duty of recording the agreement of the parties.'"[224] Therefore, the court held, Trial Rule 60(B)—dictating the grounds for setting aside a judgment—"is inapplicable to the modification of a pre-existing agreed judgment agreed to by the parties to that judgment."[225]

The court in *Siegel* viewed the second complaint as a separate action for fraud in the inducement rather than an attack on the prior judgment.[226] The court explained that a party bringing an action for fraud in the inducement of a settlement agreement, including a settlement resulting in an agreed judgment, has an election of remedies: "[H]e may stand upon the contract and seek damages, or rescind the contract, return any benefits he may have received, and seek a return to the status quo ante."[227] Therefore, the court of appeals held that the trial court properly denied the attorney-defendant's motion to dismiss for lack of subject matter jurisdiction.[228]

The trial court had found that the plaintiffs' claim would have been worth between $100,000 and $150,000, entered judgment against the defendant for $100,000, and reduced the award by $30,000 to account for the prior settlement.[229] The court of appeals affirmed the trial court's rulings and damages calculation.[230]

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222. *Id.*

223. *Id.*

224. *Id.* at 514 (quoting State *ex rel.* Prosser v. Ind. Waste Sys., Inc., 603 N.E.2d 181, 186 (Ind. Ct. App. 1982)).

225. *Id.* (internal quotation marks omitted) (quoting *Prosser*, 603 N.E.2d at 186).

226. *Id.*

227. *Id.* (internal quotation marks omitted) (quoting A.G. Edwards and Sons, Inc. v. Hilligoss, 597 N.E.2d 1, 3 (Ind. Ct. App. 1991)); *see also* Auto. Underwriters, Inc. v. Rich, 53 N.E.2d 775, 777 (Ind. 1944) ("He can keep what he has received and file suit against the ones perpetrating the fraud and recover such amounts as will make the settlement an honest one.").

228. *Siegel*, 818 N.E.2d at 515. The court of appeals also affirmed the trial court's finding of fraud and damages calculation. *Id.* at 517.

229. *Id.* at 513.

230. *Id.* at 517.

K. Scope of Arbitration Provision

In *Blimpie International, Inc. v. Choi*,[231] a franchisee sued the franchisor, alleging common law fraud and violation of state franchise statutes.[232] The franchisor moved to dismiss or stay proceedings pending arbitration of the claims, pursuant to an arbitration provision contained in the parties' franchise agreement. The provision provided for mandatory arbitration of "any dispute or agreement between [the parties] with respect to any issue arising out of or relating to this Agreement, its breach, its interpretation or any disagreement between [the parties]."[233] Further, an addendum to the franchise agreement provided that "[t]he waiver of a right to a jury trial will not apply to claims under the Indiana Deceptive Franchise Practices Act or the Indiana Franchise Disclosure Law."[234]

The appellate court reversed the trial court's denial of the franchisor's motion, holding that the addendum provision regarding the right to jury trial did not remove the claims relating to the franchise statutes from the scope of the arbitration provision.[235] The court discussed the decision of the Indiana Supreme Court in *ISP.com LLC v. Theising*,[236] which recognized that "the mere existence of a provision addressing procedures outside arbitration does not necessarily demonstrate an 'affirmative intention . . . to undo the arbitration covenant[.]'"[237]

As explained by the court in *Theising*:

> It is not uncommon to find both arbitration and forum selection clauses in agreements. Several considerations may lead to the inclusion of both. First, and obviously, arbitration may be waived by the parties. If they choose, they may prefer to litigate, but be required to do so in a designated forum.[238]

The court in *Blimpie* concluded that "reference to the waiver of jury trial right [did not] demonstrate[] the parties' intent that actions brought under the [franchise statutes] would not be arbitrated.[239] The court explained that "like the parties in [*Theising*], the parties to the agreement before us are presumably free to waive arbitration; should they choose to litigate, they could agree that jury trial would be available."[240]

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231. 822 N.E.2d 1091 (Ind. Ct. App. 2005).

232. *Id.* at 1093.

233. *Id.* at 1094.

234. *Id.* at 1095.

235. *Id.* at 1096.

236. 805 N.E.2d 767 (Ind.), *reh'g denied* (Ind. 2004).

237. *Blimpie*, 822 N.E.2d at 1095 (alteration in original) (quoting *Theising*, 805 N.E.2d at 776).

238. *Id.* at 1095-96 (quoting *Theising*, 805 N.E.2d at 776-77).

239. *Id.* at 1096.

240. *Id.* The court in *Blimpie* also analyzed previous versions of the franchise agreement and, in particular, a general waiver of jury trial provision contained in a prior version that cross-

L. Attorney Fees

1. Contractual Attorney Fees Provision.—Indiana generally follows the "American rule" regarding payment of attorney fees, which dictates that "each party [to a lawsuit] is ordinarily responsible for paying his or her own legal fees in the absence of a fee-shifting statutory or contractual provision."[241] Where an award of attorney fees "is premised on a contractual provision, the agreement will be enforceable only in accordance with its terms and only if it does not violate public policy."[242]

In *H&G Ortho, Inc. v. Neodontics International, Inc.* ("*H&G Ortho II*"), the court of appeals affirmed the trial court's enforcement and application of a contractual attorney fee provision and refused to apply the doctrine of "proportionate reduction" to reduce the amount awarded.[243] Specifically, the trial court had awarded $572,689.73 in attorney fees to the plaintiff, the buyer of an orthodontic supply business, which had obtained a judgment against the seller of the business relating to an alleged breach of a covenant not to compete.[244]

The court in *H&G Ortho II* rejected the defendant's argument that the fee should be reduced because the plaintiff was not successful on every issue presented in the litigation.[245] In so ruling, the court distinguished *Olcott International & Co. v. Micro Data Base Systems, Inc.*,[246] in which the court of appeals found that "where the plaintiff achieved only limited success, the district court should award only the amount of fees that is reasonable in relation to the results obtained."[247] The court in *H&G Ortho II* explained that—unlike the circumstances in *Olcott*—the underlying judgment had not been reduced, the trial

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referenced the jury trial addendum at issue in the case. *Id.* The court found that this "extrinsic evidence" resolved any ambiguity in the franchise agreement and that reading the addendum as a modification of the general jury trial waiver "attributes meaning to every portion of the franchise agreement." *Id.*

241. H&G Ortho, Inc. v. Neodontics Int'l, Inc. (*H&G Ortho II*), 823 N.E.2d 734, 737 (Ind. Ct. App. 2005) (citing Barrington Mgmt. Co. v. Paul E. Draper Family Ltd. P'ship, 695 N.E.2d 135, 142 (Ind. Ct. App. 1998)).

242. *Id.* (citing Steiner v. Bank One Ind., N.A., 805 N.E.2d 421, 428 (Ind. Ct. App. 2004)).

243. *Id.* at 738-39.

244. *Id.* at 736. In *H&G Ortho, Inc. v. Neodontics International, Inc. (H&G Ortho I)*, 823 N.E.2d 718 (Ind. Ct. App. 2005), the court resolved the propriety of the trial court's award of damages for breach of contract and the issuance of an injunction regarding the alleged breach of the covenant not to compete. *Id.* at 733-34.

245. *Id.* at 738.

246. 793 N.E.2d 1063 (Ind. Ct. App. 2003).

247. *Id.* at 1080 (internal quotation marks omitted) (quoting Hensley v. Eckerhart, 461 U.S. 424, 440 (1983)); *H&G Ortho II*, 823 N.E.2d at 738. In *Olcott*, an original judgment in the amount of $438,850 was reduced to approximately $5450. *Olcott*, 793 N.E.2d at 1079. Because the amount had been so substantially reduced, the court remanded the case to the trial court for reconsideration of the attorney fee award. *Id.*

court decided nine of eleven issues at either summary judgment or trial in favor of the plaintiff, over ninety percent of the motions filed by the plaintiff were granted, and the plaintiff was successful defeating every aspect of the defendant's summary judgment motions.[248] Therefore, the court found "the concept of 'proportionate reduction' inapplicable in these circumstances."[249]

2. Frivolous Litigation.—In *Stoller v. Totton*,[250] the court of appeals affirmed the trial court's award of attorney fees in favor of the plaintiff, an injured motorist who had brought a negligence action against a truck driver, alleging damages resulting from a collision of their vehicles.[251] Specifically, the court in *Stoller* affirmed the trial court's ruling that the defendant truck driver's "affirmative defense [of comparative fault] was frivolous, unreasonable, and groundless," so costs were properly assessed against him.[252]

The court stated that "[i]n any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party . . . brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless."[253] Further, the court defined the statutory terms as follows:

> A defense is "frivolous" (a) if it is made primarily to harass or maliciously injure another, (b) if counsel is unable to make a good faith and rational argument on the merits of the action, or (c) if counsel is unable to support the action by a good faith and rational argument for extension, modification, or reversal of existing law. A defense is "unreasonable" if, based upon the totality of circumstances, including the law and facts known at the time, no reasonable attorney would consider the defense justified or worthy of litigation. A defense is "groundless" if no facts exist which support the defense relied upon and supported by the losing party.[254]

In affirming the trial court's award of approximately $8800 in fees and expenses, the court in *Stoller* explained that "not only did [the defendant] have no evidence to support his theory [of comparative fault]," but he actually admitted facts during discovery that refuted the defense.[255] Further, the defendant maintained the defense "until after three witnesses testified at trial,

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248. *H&G Ortho II*, 823 N.E.2d at 738.

249. *Id.* The court in *H&G Ortho II* proceeded to examine the "reasonableness" of the attorney fees awarded by the trial court. *Id.* at 738-39. After evaluating the testimony of experts presented by both sides, the court concluded that "[t]he evidence presented at the hearing justified the amount of the award as well as its reasonableness." *Id.* at 739.

250. 833 N.E.2d 53 (Ind. Ct. App.), *trans. denied*, 841 N.E.2d 189 (Ind. 2005).

251. *Id.* at 54.

252. *Id.* at 56.

253. *Id.* at 55 (quoting IND. CODE § 34-52-1-1 (2005)).

254. *Id.* (quoting Grubnich v. Renner, 746 N.E.2d 111, 119 (Ind. Ct. App. 2001) (internal citations and quotations omitted)).

255. *Id.* at 56.

despite repeated attempts on [the plaintiff's] part to settle the issue of liability."[256]

In *Northern Electric Co. v. Torma*,[257] the court cited the Indiana Supreme Court's approval of the above definition of the relevant statutory terms and added that "a claim or defense is neither groundless nor frivolous merely because a party loses on the merits."[258] The court in *Torma* recognized that the frivolous litigation statute "strikes a balance between respect for an attorney's duty of zealous advocacy and 'the important policy of discouraging unnecessary and unwarranted litigation.'"[259] The court explained that "the legal process must invite, not inhibit the presentation of new and creative arguments to enable the law to grow and evolve."[260] As such, the court continued, "application of the statutory authorization for recovery of attorneys' fees . . . must leave breathing room for zealous advocacy and access to courts to vindicate rights."[261]

The court in *Torma* reversed the trial court's award of attorney fees in favor of the defendant, a former employee who was accused of misappropriating his former employer's trade secrets.[262] The court found that "the most [the plaintiff] can be accused of here is zealous advocacy."[263] The court explained the following:

> Our review of the trial court's proceedings and the party's briefs reveal a well-argued and supported arguments on the merits. Even though some issues are new to this jurisdiction, this alone should not preclude a party's unbridled access to the courts and expose it to sanctions; instead, it should be lauded by the courts as a way for Indiana's case law to evolve.[264]

The court reversed both the trial court's conclusions on the merits of the case and its award of attorney fees, stating that "considering the totality of the circumstances, including the law and facts known at the time of filing this action, a reasonable attorney could well have found [the plaintiff's] claim worthy of defending."[265]

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256. *Id.*

257. 819 N.E.2d 417 (Ind. Ct. App.), *reh'g denied* (Ind. Ct. App.), *trans. denied*, 831 N.E.2d 748 (Ind. 2005).

258. *Id.* at 430-431 (citing Kahn v. Cundiff, 533 N.E.2d 164, 171 (Ind. Ct. App.), *aff'd*, 543 N.E.2d 627, 629 (Ind. 1989)).

259. *Id.* at 431 (quoting Mitchell v. Mitchell, 695 N.E.2d 920, 924 (Ind. 1998)).

260. *Id.*

261. *Id.*

262. *Id.* at 420-21, 432.

263. *Id.* at 432 (citing *Mitchell*, 685 N.E.2d at 924).

264. *Id.*

265. *Id.* (citing IND. CODE § 34-52-1-1 (2004)).