

RECENT DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

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During the survey period,¹ the Indiana Supreme Court and the Indiana Court of Appeals rendered decisions both changing fundamental principles of state procedural law and providing helpful interpretations of the Indiana Rules of Trial Procedure (“Rules” or “Indiana Trial Rules”). Amendments to the Rules were minimal during the survey period. Nevertheless, appellate interpretation of the Rules continued to effect an evolution of the manner in which the Rules are applied in practice.

I. INDIANA SUPREME COURT DECISIONS

A. *Personal Jurisdiction Reduced to One-Step Analysis*

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.”² Since the amendment, state and federal courts have disagreed whether the amendment reduced the personal jurisdictional analysis from two steps to one or whether the retention of specific, enumerated acts satisfying statutory long-arm jurisdiction evidenced an intent to retain a two-step jurisdictional analysis.³

In *LinkAmerica Corp. v. Albert*,⁴ the Indiana Supreme Court resolved the

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1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period—from October 1, 2004, through September 30, 2005, except where otherwise indicated—as well as amendments to the Indiana Rules of Trial Procedure that were ordered by the Indiana Supreme Court during the survey period.

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

3. *Compare* *Litmer v. PDQUSA.com*, 326 F. Supp. 2d 952, 955 n.3 (N.D. Ind. 2004) (finding that the 2003 amendment makes Indiana’s long-arm statute coextensive with the limits of due process, “allowing courts to collapse the prior two-prong analysis into a single inquiry: whether the exercise of personal jurisdiction comports with due process”), *with* *Pozzo Truck Ctr., Inc. v. Crown Beds, Inc.*, 816 N.E.2d 966, 969 n.2 (Ind. Ct. App. 2004) (concluding, based at least in part on the retention of the specific, enumerated acts in amended Rule 4.4(A), 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 in this state”), *and* Michael A. Dorelli, *Recent Developments in Indiana Civil Procedure*, 39 IND. L. REV. 817, 831 n.115 (2006) (“[T]he enumerated acts may have been included in the amended Rule as specific but non-exhaustive bases for a finding of constitutional due process.”).

4. 857 N.E.2d 961 (Ind. 2006). The *LinkAmerica* decision was rendered December 5, 2006, just outside the current survey period. However, the ruling is included given its significant,

issue, clarifying that the 2003 amendment to Rule 4.4(A), despite its retention of the specific, enumerated acts satisfying long-arm jurisdiction, collapses the personal jurisdictional inquiry into a single step:

The 2003 amendment to [Rule 4.4(A)] was intended to, and does, reduce analysis of personal jurisdiction to the issue of whether the exercise of personal jurisdiction is consistent with the Federal Due Process Clause. Retention of the enumerated acts found in Rule 4.4(A) serves as a handy checklist of activities that usually support personal jurisdiction but does not serve as a limitation on the exercise of personal jurisdiction by a court of this state.⁵

Following a recitation of federal due process rules and standards,⁶ the court in *LinkAmerica* recognized the presumption that the contacts of a wholly owned subsidiary with the forum state “are not attributed to the parent corporation for jurisdictional purposes.”⁷ The court explained that the presumption of separateness is overcome only upon “clear evidence” that “either (1) the parent utilizes its subsidiary in such a manner that an agency relationship can be

immediate impact on jurisdictional analysis.

5. *Id.* at 967.

6. The court in *LinkAmerica* recited the due process framework for jurisdictional analysis as follows:

The Due Process Clause of the Fourteenth Amendment requires that before a state may exercise jurisdiction over a defendant, the defendant must have certain minimum contacts with [the state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. If the defendant's contacts with the state are so continuous and systematic that the defendant should reasonably anticipate being haled into the courts of that state for any matter, then the defendant is subject to general jurisdiction, even in causes of action unrelated to the defendant's contacts with the forum state.

If the defendant's contacts with the forum state are not continuous and systematic, specific jurisdiction may be asserted if the controversy is related to or arises out of the defendant's contacts with the forum state. Specific jurisdiction requires that the defendant purposefully availed itself of the privilege of conducting activities within the forum state so that the defendant reasonably anticipates being haled into court there. A single contact with the forum state may be sufficient to establish specific jurisdiction over a defendant, if it creates a substantial connection with the forum state and the suit is related to that connection. But a defendant cannot be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts or of the unilateral activity of another party or a third person.

Finally, if the defendant has contacts with the forum state sufficient for general or specific jurisdiction, due process requires that the assertion of personal jurisdiction over the defendant is reasonable.

Id. at 967 (internal citations and quotation marks omitted) (alteration in original).

7. *Id.* at 968 (citing *Wesleyan Pension Fund, Inc. v. First Albany Corp.*, 964 F. Supp. 1255, 1261 (S.D. Ind. 1997)).

perceived; (2) the parent has greater control over the subsidiary than is normally associated with common ownership and directorship; or (3) the subsidiary is merely ‘an empty shell.’”⁸

The Indiana Supreme Court reversed the Indiana Court of Appeals’ finding that the presumption of “separateness” was overcome, discussing as significant the fact that the parent company and the subsidiary did not share common “operating personnel.”⁹ The supreme court in *LinkAmerica* evaluated the parent company’s observation of and adherence to “corporate formalities,” in addition to the contacts of common “operating personnel,” in resolving the jurisdictional issue.¹⁰ After evaluating the parent company’s adherence to corporate formalities, the court upheld the “separateness” of the parent from its subsidiary, concluding that the plaintiffs “have not provided anything to overcome the presumption that [the parent] and [subsidiary] are institutionally independent.”¹¹ Therefore, the court held, the subsidiary’s “contacts with the state cannot be attributed to [the parent].”¹²

B. Action Pending in Another Court

In *Kozlowski v. Dordieski*,¹³ the court discussed the frequent mischaracterization of a Rule 12(B)(8) defense—i.e., that “the same action is pending in another state court”—as “jurisdictional” and held that although the trial court possessed subject matter jurisdiction over the particular case before it, it properly refrained from exercising its authority under Rule 12(B)(8).¹⁴ In *Kozlowski*, the defendants had filed a writ of certiorari in Lake County Superior Court (as plaintiffs therein), challenging a decision by the Lake County Plan Commission approving a subdivision and a waiver of certain subdivision ordinance requirements.¹⁵ The superior court affirmed the commission’s decision, but the Indiana Court of Appeals reversed and remanded the matter back to the commission.¹⁶

8. *Id.* (citing *Wesleyan Pension Fund, Inc.*, 964 F. Supp. at 1261-62).

9. *Id.* at 969.

10. *Id.*

11. *Id.* at 970.

12. *Id.* Interestingly, the court recognized and addressed the similarities between personal jurisdiction analysis under the due process clause with the corporate veil-piercing doctrine. *Id.* The court recognized that

[p]iercing may, in some instances, be based on facts that also support the assertion of jurisdiction over the parent of a subsidiary. Otherwise stated, the same conduct of a foreign corporate defendant may in some cases expose it to both personal jurisdiction and liability under the laws of a particular forum.

Id.

13. 849 N.E.2d 535 (Ind. 2006).

14. *Id.* at 536-37.

15. *Id.* at 536.

16. *Id.*

Subsequently, the plaintiffs in *Kozlowski* filed a complaint for injunctive relief with the Lake County Circuit Court, seeking, among other things, an injunction against any further work.¹⁷ The circuit court entered summary judgment against the plaintiffs, stating that it did not have “subject matter jurisdiction” over the matter; rather, it concluded that the Lake County Superior Court had subject matter jurisdiction.¹⁸ The Indiana Court of Appeals affirmed the Circuit Court’s decision, holding that “the trial court correctly concluded that it lacked subject matter jurisdiction over these proceedings.”¹⁹

The Indiana Supreme Court affirmed the result reached by the court of appeals, but clarified that “subject matter jurisdiction was not the right reason.”²⁰ Recognizing that “the prevalence among this state’s bench and bar [is to] view[] various procedural defenses through a jurisdictional lens[,]”²¹ the court in *Kozlowski* analyzed the issue under Trial Rule 12(B)(8), even though at least one of the defendants alleged that the Circuit Court lacked “jurisdiction over the subject matter.”²² The court explained that under Rule 12(B)(8), “a defendant may assert as an affirmative defense that the same action is pending in another state court.”²³ Two actions are the “same if the parties, subject matter, and remedies sought are substantially the same in both suits.”²⁴ The court found that the only difference between the original certiorari petition and the later complaint for injunctive relief, for Rule 12(B)(8) purposes, “lies in [the] request in the second action to demolish the improvements, while the first action sought to prevent them from being made.”²⁵ Concluding that “[b]oth cases had substantially the same parties, subject matter, and remedies sought,” the court in *Kozlowski* held that “[t]he Lake Circuit Court was right to refrain from exercising authority over [the] case.”²⁶

17. *Id.*

18. *Id.* at 536-37.

19. *Id.* (quoting *Kozlowski v. Dordieski*, 831 N.E.2d 1270 (Ind. Ct. App. 2005)).

20. *Id.* at 537 (internal quotation marks omitted) (“[T]his case is not about subject matter jurisdiction, but rather priority.”).

21. *Id.* at 537 n.1.

22. *Id.* (quoting Appellee’s Appendix, *Kozlowski v. Dordieski*, 831 N.E.2d 1270 (Ind. Ct. App. 2005) (No. 45S05-0606-CV-223)).

23. *Id.* at 537.

24. *Id.* (quoting *Pivarnik v. N. Ind. Pub. Serv. Co.*, 636 N.E.2d 131, 134 (Ind. 1994)).

25. *Id.*

26. *Id.*; see also *Kentner v. Ind. Pub. Employers’ Plan, Inc.*, 852 N.E.2d 565, 575 (Ind. Ct. App. 2006) (reversing the trial court’s dismissal of state court complaint pursuant to Rule 12(B)(8) and principles of comity), *trans. denied*, 2007 Ind. LEXIS 130 (Ind. Feb. 22, 2007). The court in *Kentner* described “the way in which a 12(B)(8) motion should be evaluated”:

The determination of whether two actions being tried in different state courts constitute the same action depends on whether the outcome of one action will affect the adjudication of the other. The rule applies and an action should be dismissed where the parties, subject matter, and remedies are precisely or even substantially the same in both suits.

C. Waiver of Affirmative Defenses

In *Willis v. Westerfield*,²⁷ the court held that the “sudden emergency” doctrine is not an affirmative defense within the meaning of Rule 8(C) and, therefore, the defense was not waived due to the defendant’s failure to plead it as an affirmative defense in his answer.²⁸ In reaching its decision, the Indiana Supreme Court provided a helpful discussion of Rule 8(C) and the definition of an “affirmative” defense:

[Rule 8(C)] provides that “[a] responsive pleading shall set forth affirmatively and carry the burden of proving: [list of defenses] and any other matter constituting an avoidance, matter of abatement, or affirmative defense.” Pursuant to this Rule, a party seeking the benefit of an affirmative defense must raise and specifically plead that defense or it is waived. . . . The list of affirmative defenses contained in the Rule is not exhaustive.

. . . Whether a defense is affirmative “depends upon whether it controverts an element of a plaintiff’s prima facie case or raises matters outside the scope of the prima facie case.” . . . An affirmative defense is a defense “upon which the proponent bears the burden of proof and which, in effect, admits the essential allegations of the complaint but asserts additional matter barring relief.”²⁹

The court in *Willis* explained that “[s]udden emergency does not assert a matter outside the allegations of the plaintiff’s complaint.”³⁰ The fact that the proponent of the sudden emergency defense bears the burden of proof “does not in itself render the sudden emergency doctrine an affirmative defense.”³¹ In other words, according to the court in *Willis*, “the doctrine does not admit the allegations of the complaint but nevertheless excuse fault.”³² Rather, the doctrine “defines the conduct to be expected of a prudent person in an emergency

Kentner, 852 N.E.2d at 570-71 (quoting *Vannatta v. Chandler*, 810 N.E.2d 1108, 1110-11 (Ind. Ct. App. 2004)). The court in *Kentner* concluded that, in the case before it, “neither the parties, the subject matter, nor the remedies of the two lawsuits at issue [were] substantially the same[,]” nor would the outcome of one lawsuit have an “effect upon the outcome of the other.” *Id.* at 575. Regarding the trial court’s dismissal based on principles of comity, the court “applaud[ed] the trial court’s desire to respect the proceedings that [were] ongoing in its sister federal court[,]” but reiterated its conclusions on the Rule 12(B)(8) issue that there was “no need to dismiss the [state court] [l]itigation out of deference to the federal district court” *Id.* at 576.

27. 839 N.E.2d 1179 (Ind. 2006).

28. *Id.* at 1186.

29. *Id.* at 1185 (internal citations omitted).

30. *Id.*

31. *Id.*

32. *Id.*

situation.”³³

The Indiana Supreme Court disagreed with the Indiana Court of Appeals’ reasoning that “a mandatory pleading requirement for the sudden emergency doctrine would promote fairness by ‘minimizing the chances of trial by ambush’ and would allow for better preparation of suits, thereby promoting judicial efficiency.”³⁴ The Indiana Supreme Court explained that “[t]he same could be said for a number of other circumstances that may be claimed to explain conduct that may be seen as presumptively negligent. Discovery, not a pleading requirement, is the means the Rules provide to ferret these out.”³⁵

D. Judicial Notice of Admission in Answer

In *Lutz v. Erie Insurance Exchange*,³⁶ the court analyzed the appropriate procedure for using an admission in a party’s pleading to prove a fact at trial. Specifically, a third-party plaintiff requested judicial notice of the fact that a traffic light was red at the time of an accident, based on the third-party defendant’s admission of that fact in her answer to the third-party complaint.³⁷ The trial court declined the judicial notice request, the third-party plaintiff appealed and the court of appeals affirmed.³⁸

On transfer, the Indiana Supreme Court clarified that a trial court may take judicial notice of a party’s pleadings, but the facts recited in the pleadings may not be susceptible to judicial notice.³⁹ In *Lutz*, the court determined that whether or not a traffic light was red at a particular time is not the type of fact appropriate for judicial notice because it is “plainly not generally known or resolvable by resort to any unquestionable source.”⁴⁰ However, the court recognized that once the admission contained in the answer was judicially noticed, it became a “judicial admission as a matter of law.”⁴¹ The court explained the effect of an admission in a party’s pleading as follows:

Statements contained in a party’s pleadings may be taken as true as against the party without further controversy or proof. Unless a pleading is withdrawn or superseded, any admission contained in the pleading is conclusive as to that party. The reason for this is that pleadings are designed to narrow the issues required to be tried. Opposing parties

33. *Id.* (quoting *Brooks v. Friedman*, 769 N.E.2d 696, 699 (Ind. Ct. App. 2002)).

34. *Id.* at 1186.

35. *Id.*

36. 848 N.E.2d 675 (Ind. 2006).

37. *Id.* at 677.

38. *Id.*

39. *Id.* at 678.

40. *Id.* Pursuant to Indiana Evidence Rule 201(a), “[a] judicially-noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” IND. R. EVID. 201(a).

41. *Lutz*, 848 N.E.2d at 678.

prepare their case on the assumption that facts admitted by other parties require no proof. For this scheme to work properly, parties must be entitled to rely on trial courts to treat admissions in pleadings as binding on the party making the admission.⁴²

The court in *Lutz* held that the third-party plaintiff was “entitled to an instruction that as to [the third-party defendant] the light was red.”⁴³ The court questioned whether the third-party plaintiff requested such an instruction and determined that, because the jury was properly instructed on other issues that rendered the trial court’s omission of this instruction harmless, the third-party plaintiff was not prejudiced.⁴⁴

Using the *Lutz* decision as a guide, a plaintiff seeking to bind a party to an admission in a pleading should first request judicial notice of the pleading and, more specifically, the admission. Second, if the facts admitted are not subject to judicial notice under Indiana Rule of Evidence 201, the plaintiff should request an instruction regarding the admitted facts, based on the “judicial admission” of the facts in the pleading.

E. Mandatory Mediation

In *Fuchs v. Martin*,⁴⁵ the court held that a trial court “may require parties to engage in mediation as a prerequisite to contested court trials or hearings”⁴⁶ and that a court may, “in the exercise of sound discretion in discrete cases, order mediation as a prerequisite to the filing of requests for future proceedings therein.”⁴⁷ In support of its holdings, the court in *Fuchs* explained the policy supporting mandatory mediation:

The best interests of Indiana citizens and sound judicial administration are well-served when trial courts fully utilize and promote the use of mediation, which can be an enormously effective tool to facilitate the amicable resolution of disputes, to enable parties to meaningfully participate in crafting solutions that best serve their respective interests, to reduce points of contention that would otherwise require a court hearing, to minimize the destructive polarization that can accompany contested adversarial proceedings, to resolve disputes often more expeditiously and less expensively than by protracted litigation and trial proceedings, to equip parties with dispute resolution skills, and to relieve crowded trial dockets thus enabling courts to provide necessary trials

42. *Id.* (internal citations omitted).

43. *Id.*

44. *Id.*

45. 845 N.E.2d 1038 (Ind. 2006).

46. *Id.* at 1042.

47. *Id.* *Fuchs* involved a decree on a paternity petition, which included a provision that any post-decree matters would be mediated before the filing of any post-decree requests for relief.

more promptly.⁴⁸

Further, the court held that “the power of an individual trial court to order mediation in a specific case is not limited by [local rules authorizing mediation].”⁴⁹ Rather, the court explained, “[t]he fact that local rules may establish a general requirement for mediation in some situations does not limit a court from ordering it under other circumstances.”⁵⁰

F. *Third-Party Spoliation of Evidence—No Independent Cause of Action*

Spoliation of evidence is “the intentional destruction, mutilation, alteration, or concealment of evidence.”⁵¹ “If spoliation by a party to a lawsuit is proved, rules of evidence permit the jury to infer that the missing evidence was unfavorable to that party.”⁵² In 2005, the Indiana Supreme Court, answering a certified question from the United States District Court, held that “Indiana common law does not recognize an independent cause of action for either intentional or negligent ‘first party’ spoliation of evidence, i.e., spoliation by a party to the underlying claim.”⁵³ The Indiana Supreme Court “expressly held open the question whether Indiana law recognized a tort of spoliation by third parties, i.e., ‘persons that are not parties to litigation.’”⁵⁴

In *Gotzbach v. Froman*, the Indiana Supreme Court addressed that question and declined to recognize a claim for third-party spoliation—i.e., spoliation by persons that are not parties to the litigation—where an employee sought to impose a duty on his employer to preserve evidence of an industrial accident.⁵⁵ After reviewing prior case law from the Indiana Court of Appeals, including the court of appeals’ decision in the present case, the court in *Gotzbach* held that “existing case law and public policy dictate refusal to recognize an independent cause of action under the circumstances presented by [that] case.”⁵⁶

The court in *Gotzbach* rejected arguments that a “special relationship” was created between the employer and employee by the employer’s “knowledge of

48. *Id.* at 1041.

49. *Id.* at 1043.

50. *Id.*

51. *Cahoon v. Cummings*, 734 N.E.2d 535, 545 (Ind. 2000).

52. *Gotzbach v. Froman*, 854 N.E.2d 337, 338 (Ind. 2006).

53. *Id.* (quoting *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349, 355 (Ind. 2005) (concluding that “existing remedies were sufficient to outweigh the benefits of an independent tort action for first-party spoliation”)). In particular, the court in *Gribben* explained that “the remedies for destruction of evidence, including the inference that the destroyed evidence was unfavorable, criminal sanctions against the party, and professional sanctions for attorneys, were all available to deter and redress first-party spoliation.” *Gribben*, 824 N.E.2d at 355.

54. *Gribben*, 824 N.E.2d at 355.

55. *Gotzbach*, 854 N.E.2d at 339.

56. *Id.* (discussing *Thompson v. Owensby*, 704 N.E.2d 134 (Ind. Ct. App. 1998); *Murphy v. Target Prods.*, 580 N.E.2d 687, 690 (Ind. Ct. App. 1991), *abrogation recognized by City of Gary v. Smith & Wesson Corp.*, 776 N.E.2d 368 (Ind. Ct. App. 2002)).

[the] situation and the circumstances surrounding the accident”⁵⁷ and that “the foreseeability of harm caused by the failure to retain [the evidence] supports the recognition of a duty.”⁵⁸ In addition, the court determined that “policy considerations are the controlling factor in refusing to recognize spoliation as a tort under [the circumstances in the case].”⁵⁹ Rejecting the argument that the policy of deterring spoliation required recognition of an independent cause of action against third parties, the court explained the following:

We agree that evidentiary inferences are not available as a remedy for or deterrent to third-party spoliation. Many of the other remedies remain applicable, however. Criminal sanctions apply equally to third parties and first parties. Similarly, sanctions under the Indiana Rules of Professional Conduct are available if attorneys for the third party are involved in the misconduct. Courts also have the power to issue contempt sanctions against non-parties who frustrate the discovery process by suppressing or destroying evidence.⁶⁰

Finally, the court in *Glotzbach* reasoned that “[p]roving damages in a third-party spoliation claim becomes highly speculative and involves a lawsuit in which the issue is the outcome of another hypothetical lawsuit.”⁶¹ The court expressed concern that a “jury would be asked to determine what the damages would have been had the evidence been produced and what the collectibility of these damages would have been.”⁶² The court stated that “this exercise often could properly be described as ‘guesswork.’”⁶³

57. *Id.* at 339. The court reasoned that an employer will virtually always be aware of an injury occurring in the workplace. If that knowledge were sufficient to establish a special relationship, the practical effect would be that an employer always has a duty to preserve evidence on behalf of its employee for use in potential litigation

Id. at 339-40.

58. *Id.* at 340. The court explained that “the relationship of the parties, not foreseeability” was the central factor, and it ruled that “[m]ere ownership of potential evidence, even with knowledge of its relevance to litigation, does not suffice to establish a duty to maintain such evidence.” *Id.* at 340-41 (quoting *Reinbold v. Harris*, 2000 U.S. Dist. LEXIS 16643, at *8 (S.D. Ind. Nov. 7, 2000)).

59. *Id.* at 341.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* (citing *Petrik v. Monarch Printing Corp.*, 501 N.E.2d 1312, 1320 (Ill. App. Ct. 1986)) (“It would seem to be sheer guesswork, even presuming that the destroyed evidence went against the spoliator, to calculate what it would have contributed to the plaintiff’s success on the merits of the underlying lawsuit.”).

G. Deemed Denial of Motion to Correct Error

Pursuant to Indiana Trial Rule 53.3(A), a motion to correct error is “deemed denied” if (1) the court fails to set the motion for hearing within forty-five days, or (2) the court fails to rule on the motion within thirty days after it was heard or forty-five days after it was filed, if no hearing is required.⁶⁴ Further, Rule 53.3(A) provides that any appeal must be initiated within thirty days after the motion is deemed denied.⁶⁵

In *Garrison v. Metcalf*,⁶⁶ the Indiana Supreme Court held that a motion to correct error was deemed denied thirty days after a hearing on the motion, despite that the trial court belatedly granted the motion thirty-six days after the hearing.⁶⁷ More specifically, the court in *Metcalf* ruled that the trial court’s belated grant of the motion was invalid because the moving party failed to file a notice of appeal within thirty days after the date on which the motion was deemed denied.⁶⁸

The court in *Metcalf* distinguished its prior decision in *Cavinder Elevators, Inc. v. Hall*,⁶⁹ in which it ruled that a trial court’s belated grant of a motion to correct error could stand where the moving party filed a notice of appeal within thirty days of the date of the deemed denial.⁷⁰ In the present case, the moving party failed to file a notice of appeal. As such, the Indiana Supreme Court held that the motion was deemed denied pursuant to Rule 53.3(A) and the trial court’s belated grant of the motion was invalid.⁷¹

The court apparently recognized the harshness of its decision and the “peculiarity” of the seemingly meaningless act of filing a notice of appeal *after* a motion to correct error is belatedly granted:

We admit that it seems somewhat odd to require a notice of appeal to be filed after a motion to correct error has been belatedly granted in order to validate the grant of the motion to correct error. But this peculiarity is a function of the date on which the trial court belatedly ruled in this particular case; that will not always be so Eliminating the possibility of this peculiarity would effectively amend the deadline in Trial Rule 53.3(A) for ruling on motion to correct errors from 30 to 60 (or 45 to 75) days.⁷²

In short, under *Metcalf*, if a trial court belatedly grants a motion to correct error, the moving party must file a notice of appeal within thirty days after the

64. IND. TRIAL R. 53.3(A).

65. *Id.*

66. 849 N.E.2d 1114 (Ind. 2006).

67. *Id.* at 1116.

68. *Id.*

69. 726 N.E.2d 285 (Ind. 2000).

70. *Metcalf*, 849 N.E.2d at 1115 (discussing *Cavinder*, 726 N.E.2d at 289).

71. *Id.* at 1116.

72. *Id.*

“deemed denial” date in order to “validate” the trial court’s belated ruling. Whether the appeal must actually be litigated in order to effectuate the validation is not addressed in *Metcalf*. Further, the *Metcalf* decision implies that if a trial court belatedly *denies* a motion to correct error, the thirty-day deadline for filing a notice of appeal would run from the date on which the motion was deemed denied—i.e., not from the actual denial date.

H. Three Day Extension for Service by Mail

In *McDillon v. Northern Indiana Public Service Co.*,⁷³ the Indiana Supreme Court resolved “an apparent conflict among Indiana cases regarding the application of Rule 6(E) and its automatic three-day extension of time when court orders are mailed.”⁷⁴ Rule 6(E) provides as follows:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three [3] days shall be added to the prescribed period.⁷⁵

After analyzing prior decisions from the Indiana Court of Appeals interpreting Rule 6(E), sometimes with differing results, the court in *McDillon* clarified that Rule 6(E)’s three-day extension of time “applies only when a party has a right or is required to do some act within a prescribed period after the service of a notice or other paper.”⁷⁶ According to the court in *McDillon*, the Rule “does not apply to extend periods that are triggered by the mere *entry* of the order or the happening of an event other than the *service* of notice or other paper.”⁷⁷

I. Motion for Relief from Judgment

In *Allstate Insurance Co. v. Fields*,⁷⁸ the court clarified that Trial Rule 60(B), governing motions for relief from judgment, does not authorize a motion for relief from an interlocutory order.⁷⁹ The issue arose in the context of an attempted appeal from the trial court’s order denying a motion for relief from an order entering a default on liability but setting the case for trial on damages.⁸⁰

The court in *Fields* discussed prior amendments to Rule 60, as well as

73. 841 N.E.2d 1148 (Ind. 2006).

74. *Id.* at 1150-51.

75. IND. TRIAL R. 6(E).

76. *McDillon*, 841 N.E.2d at 1152.

77. *Id.* (emphasis added). The court in *McDillon* recognized that the trial court did not apply or interpret Rule 6(E) in reaching its decision—which involved the timeliness of a jury trial demand following an order setting aside a default judgment—nor was Rule 6(E) raised by either party on appeal. *Id.*

78. 842 N.E.2d 804 (Ind. 2006).

79. *Id.* at 806.

80. *Id.*

interpretive case law, in reaching its conclusion that inclusion of the phrase “entry of default” in Rule 60(B) does not render the rule applicable to interlocutory orders of default that do not constitute final judgments.⁸¹ The court explained that “fairness and sound judicial administration do not favor granting an exceptional privilege of immediate appellate access to a party defaulted for failure to comply with applicable rules or court orders.”⁸²

The court elaborated on the intended function of Rule 60(B) and (C):

The function of Rule 60(B) is to permit parties to challenge a judgment at a point subsequent to the expiration of the time allowed for filing a motion to correct error or initiating an appeal. When a trial court denies such a 60(B) motion, a party aggrieved thereby must have an opportunity to appeal. Trial Rule 60(C) establishes that such a ruling constitutes a final judgment, thus permitting an appeal, and triggers the timing deadline for taking such an appeal.⁸³

According to the court in *Fields*, a motion to reconsider the entry of default on the issue of liability would have been the appropriate procedural mechanism for challenging the trial court’s ruling.⁸⁴ Because a motion to reconsider is not a request for relief under Rule 60(B), a denial of the motion would not be “deemed a final judgment” or otherwise appealable pursuant to Rule 60(C).⁸⁵

The court in *Fields* recognized that the trial court properly could have treated the Rule 60(B) motion as a motion for reconsideration.⁸⁶ Because the trial court denied the motion and no certification of the trial court’s interlocutory ruling was sought, the Indiana Supreme Court dismissed the appeal and remanded the matter to the trial court for further proceedings.⁸⁷

II. INDIANA COURT OF APPEALS’ DECISIONS

A. Venue

1. *Preferred Venue*—“*Sufficient Nexus Test*.”—In *Skeffington v. Bush*,⁸⁸ the court of appeals evaluated whether a “sufficient nexus” existed between land and the underlying action, such that venue was proper under Trial Rule 75(A)(2), which states that preferred venue lies in “the county where the land or some part

81. *Id.* at 807-08 (discussing *Pathman Constr. Co. v. Drum-Co Eng’g Corp.*, 402 N.E.2d 1 (Ind. Ct. App. 1980)).

82. *Id.* at 808.

83. *Id.* at 808-09.

84. *Id.* at 809.

85. *Id.*

86. *Id.*

87. *Id.* The supreme court explained that by granting transfer, the decision of the Indiana Court of Appeals was vacated, making dismissal and remand the appropriate procedural course. *Id.*

88. 846 N.E.2d 761 (Ind. Ct. App. 2006).

thereof is located or the chattels or some part thereof are regularly located or kept, if the complaint includes a claim for injuries thereto or relating to such land or such chattels.”⁸⁹

Specifically, in *Bush*, the plaintiff contracted with the Gary Community School Corporation to install new surfaces on five football fields located in Lake County.⁹⁰ The plaintiff subcontracted with the defendant to hydro-seed the football fields.⁹¹ When the grass did not grow as the defendant had guaranteed, the plaintiff “subcontracted with two other firms to install sod on three of the football fields.”⁹² The plaintiff then filed suit against the defendant, alleging breach of contract, breach of warranty and negligence in the performance of the work.⁹³ The defendant filed a motion to transfer venue to Porter County, where he resides and his business is located.⁹⁴ The motion was granted by the trial court, which concluded that there was “no nexus between the suit and the Lake County land of the Gary Community School Corporation.”⁹⁵

The court in *Bush* explained that “[a] claim relates to the land under [Trial Rule 75(A)(2)] if there is a sufficient nexus between the land and the underlying action.”⁹⁶ “The nexus test will be affected by such factors as, but not limited to, whether the acts giving rise to the liability occurred there, and whether examination of the site may be necessary to resolve the dispute.”⁹⁷

The court held that a “sufficient nexus” existed “between [the plaintiff’s] action and the football fields [the defendant] hydro-seeded for [the plaintiff’s] complaint to allege claims related to land.”⁹⁸ “Because the land is in Lake County, preferred venue lies there.”⁹⁹ The court of appeals reversed the trial court’s decision transferring venue to Porter County.¹⁰⁰

2. *Jurisdiction of Court upon Change of Judge.*—In *City of Gary v. Enterprise Trucking & Waste Hauling*,¹⁰¹ the court held that “the trial court did not have jurisdiction to enter a *permanent* injunction after it had already granted [a] change of judge motion.”¹⁰² “It is the general rule that once a proper and timely motion for change of venue is filed, the trial court is divested of jurisdiction to take further action except to grant the change of venue.”¹⁰³ The

89. *Id.* at 763 (quoting IND. TRIAL R. 75(A)(2)).

90. *Id.* at 762.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 763.

97. *Id.* (quoting *Diesel Constr. Co. v. Cotten*, 634 N.E.2d 1351, 1354 (Ind. Ct. App. 1994)).

98. *Id.* at 763-64.

99. *Id.* at 764 (citing IND. TRIAL R. 75(A)(2)).

100. *Id.*

101. 846 N.E.2d 234 (Ind. Ct. App. 2006).

102. *Id.* at 243 (emphasis added).

103. *Id.* at 241 (quoting *City of Fort Wayne v. State ex rel. Hoagland*, 342 N.E.2d 865, 869

court in *Enterprise* evaluated whether a request for a permanent injunction is an “emergency matter” within the meaning of Trial Rule 79(O), which provides “[n]othing in [Rule 79] shall divest the original court and judge of jurisdiction to hear and determine emergency matters between the time a motion for change of judge is filed and the appointed special judge accepts jurisdiction.”¹⁰⁴ Based primarily on a comparison of the appellate implications of preliminary and permanent injunctions, the court in *Enterprise* concluded that “a permanent injunction is not an emergency matter.”¹⁰⁵ As such, the court held that “the trial court did not have jurisdiction to enter [the] permanent injunction after it had already granted the . . . change of judge motion.”¹⁰⁶

B. Statute of Limitations

1. *Discovery Rule*.—The “discovery rule,” as it relates to the accrual of a statute of limitations, “provides that a cause of action accrues when a party knows or in the exercise of ordinary diligence could discover, that [a] contract has been breached or that an injury had been sustained as a result of the tortious act of another.”¹⁰⁷ In *Perryman v. Motorist Mutual Insurance Co.*,¹⁰⁸ the court held that “the discovery rule only postpones the statute of limitations by belated discovery of key facts and not by delayed discovery of legal theories.”¹⁰⁹

Specifically, the plaintiff in *Perryman* argued that his cause of action—an insurance coverage action based on a pollution exclusion in the policy—did not accrue when he became aware of his “injury,” in March 1994, but instead it accrued “in 2004 when he became aware of [the Indiana Supreme Court’s] decision in *American States Insurance Co. v. Kiger*,¹¹⁰ adopting, as an issue of first impression, the rule that an absolute pollution exclusion in an insurance policy . . . is ambiguous and unenforceable.”¹¹¹ In other words, the plaintiff in *Perryman* claimed that, although he was aware of his “injury,” he was unaware “of the purported accrual of his injury’s legal ramifications” until after he learned of the supreme court’s *Kiger* decision in 2004 (i.e., approximately eight years after the *Kiger* decision was rendered).¹¹² In that regard, the plaintiff requested “an expansion of the discovery rule to, not only awareness of a sustained injury,

(Ind. App. 1976)).

104. *Id.* at 242 (quoting IND. TRIAL R. 79(O)).

105. *Id.* at 243 (emphasis added).

106. *Id.* (citing *Justak v. Bochnowski*, 391 N.E.2d 872, 877 (Ind. Ct. App. 1979)).

107. *Perryman v. Motorist Mut. Ins. Co.*, 846 N.E.2d 683, 688-89 (Ind. Ct. App. 2006) (citing *Strauser v. Westfield Ins. Co.*, 827 N.E.2d 1181, 1185 (Ind. Ct. App. 2005)).

108. 846 N.E.2d at 683.

109. *Id.* at 689 (citing *Anderson v. Dean Witter Reynolds, Inc.*, 920 P.2d 575, 579 (Utah Ct. App. 1996); *Andres v. McNeil Co.*, 707 N.W.2d 777, 786 (Neb. 2005); *Troum v. Newark Beth Israel Med. Ctr.*, 768 A.2d 177 (N.J. Super. Ct. App. Div. 2001)).

110. 662 N.E.2d 945 (Ind. 1996).

111. *Perryman*, 846 N.E.2d at 688.

112. *Id.* at 689.

but also knowledge of his legal causes of action.”¹¹³

Rejecting the plaintiff’s argument, the court in *Perryman* described the general purpose of a statute of limitation as follows:

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.¹¹⁴

Recognizing that no Indiana cases supported its conclusion that the discovery rule does *not* encompass knowledge of a legal cause of action, the court in *Perryman* looked to foreign decisional authority:

[A] review of foreign case law supports our conclusion that the application of the discovery rule does not mandate that plaintiffs know with precision the legal injury that has been suffered, but merely anticipates that a plaintiff be possessed of sufficient information to cause him to inquire further in order to determine whether a legal wrong has occurred.¹¹⁵

The court in *Perryman* concluded that:

The exercise of reasonable diligence means simply that an injured party must act with some promptness where the acts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full blown theory of recovery developed.¹¹⁶

The court held that “the discovery of an injury, not the development of new case law, commences the running of the statute of limitations.”¹¹⁷ In other words,

113. *Id.*

114. *Id.*

115. *Id.* (citing *Healy v. Owens-Illinois, Inc.*, 833 N.E.2d 906, 910 (Ill. App. Ct. 2005); *Clare v. Saberhagen Holdings, Inc.*, 123 P.3d 465, 468 (Wash. Ct. App. 2005); *McIntosh v. Blanton*, 164 S.W.3d 584, 586 (Tenn. Ct. App. 2005)).

116. *Id.* (quoting *Mitchell v. Holler*, 429 S.E.2d 793, 795 (S.C. 1993)). “Stated more succinctly, the law does not require a smoking gun in order for the statute of limitations to commence.” *Id.* (citing *Giraud v. Quincy Farm & Chem.*, 6 P.3d 104, 109 (Wash. Ct. App. 2000)).

117. *Id.* at 690. The court in *Perryman* also ruled that the defendant was not equitably estopped from asserting the statute of limitations as a defense, due to its alleged “fraudulent concealment” of the change in the law resulting from the supreme court’s decision in *Kiger*. *Id.* at 691. Specifically, the court in *Perryman* declined to impose a duty to inform an insured plaintiff of a published decision, because the decision “was a matter of public record, equally available and accessible to [the insured].” *Id.* The court described its rationale for refraining from imposing such

the statute of limitations accrues upon knowledge of the pertinent facts—not upon discovery of the relevant case law or legal theory.

2. *Journey's Account Statute*.—In *Basham v. Penick*,¹¹⁸ the court analyzed the circumstances in which the “Journey’s Account Statute”¹¹⁹ applies to save an otherwise time-barred lawsuit (which was originally filed in another improper jurisdiction) and held that “the timeliness of the original filing [in the wrong jurisdiction] is measured by [the subsequent, proper jurisdiction’s] statute of limitations, not that of the foreign jurisdiction in which [the] complaint was erroneously filed.”¹²⁰

In *Basham*, two parties—an Indiana resident and a Kentucky resident—were involved in an automobile accident.¹²¹ Two years after the date of the accident, the Kentucky resident filed a complaint in Kentucky state court, alleging negligence resulting in both personal and property injuries.¹²² The defendant—the Indiana resident—moved for and was granted a dismissal for lack of personal jurisdiction.¹²³ “At the time the Kentucky court dismissed [the] suit, the Indiana statute of limitations on personal and property injury actions [i.e., two years] had run.”¹²⁴

Months later, the Kentucky plaintiff filed a complaint against the Indiana

an affirmative duty as follows:

By now attempting to shift responsibility of his duty to be aware of the law, [the insured] would have us not only create a new burden on insurance companies to keep abreast of developments in claims that have been rejected already but which are still viable within the statute of limitations’ term, but also reward plaintiffs who fail to diligently research Indiana law within the statute of limitations term in order to timely bring a claim. This we will not do.

Id.

118. 849 N.E.2d 706 (Ind. Ct. App. 2006).

119. IND. CODE § 34-11-8-1 (2004). The Journey’s Account Statute states, in relevant part:

(a) This section applies if a plaintiff commences an action and:

(1) the plaintiff fails in the action from any cause except *negligence in the prosecution of the action*;

....

(b) If subsection (a) applies, a new action may be brought not later than

(1) three (3) years after the date of the determination under subsection (a);

....

and be considered a continuation of the original action commenced by the plaintiff.

Id. (emphasis added).

120. *Basham*, 849 N.E.2d at 711; *see also* *Cox v. Am. Aggregates Corp.*, 684 N.E.2d 193, 195 (Ind. 1997) (“[T]he [Journey’s Account Statute] enables an action dismissed for lack of personal jurisdiction in one state to be refiled in another state despite the intervening running of the statute of limitations.”).

121. *Basham*, 849 N.E.2d at 708.

122. *Id.*

123. *Id.*

124. *Id.*

defendant in Indiana state court, again alleging both personal and property damages.¹²⁵ The defendant moved for judgment on the pleadings, arguing that the action was time-barred.¹²⁶ The trial court granted the defendant's motion and the plaintiff appealed, arguing that the Journey's Account Statute applied "to save her otherwise time-barred action."¹²⁷

The "unique factual situation presented by the [*Basham*] case" results from the fact that in Kentucky, "the statute of limitations for injury to one's person is one year."¹²⁸ In *Basham*, the original complaint "was untimely filed at least in part according to the applicable statute of limitations of the foreign jurisdiction in which [it was] erroneously filed, but would have been timely filed according to the applicable statute of limitations under Indiana law."¹²⁹ The court in *Basham*, therefore, was required to decide "whether the timeliness of [the plaintiff's] complaint [was] resolved according to Kentucky law [where the claim was originally filed], or, conversely, according to Indiana law."¹³⁰

The court in *Basham* followed the analysis utilized by the Indiana federal district court in *Abele v. A.L. Dougherty Overseas, Inc.*,¹³¹ which found that a "plaintiff should be protected by the Journey's Account Statute because [the] original . . . [untimely] action would have been timely if filed in [the proper jurisdiction]."¹³² The court in *Basham* stated that "for purposes of the Journey's Account Statute, the timeliness of the original filing is measured by Indiana's statute of limitations, not that of the foreign jurisdiction in which a complaint was erroneously filed."¹³³ Thus, the court in *Basham* explained, the plaintiff's "personal injury claim, untimely filed in Kentucky, would have been timely had it been filed in Indiana."¹³⁴ Reasoning that the defendant "had timely notice, under applicable Indiana law, that [the plaintiff] intended to maintain her rights before the courts" and considering the "broad and liberal purpose of the Journey's Account Statute, and the Supreme Court's admonition that the statute not be narrowly construed," the court in *Basham* held as follows:

[U]nder the facts of this case, the timeliness of [the plaintiff's] original complaint [filed in Kentucky], for purposes of the Journey's Account Statute, is determined by Indiana's statute of limitations. [The plaintiff's] original claim for personal injuries, therefore, was timely, and in that respect did not fail for negligence in prosecution of the

125. *Id.*

126. *Id.*

127. *Id.* at 708-09.

128. *Id.* at 711 (citations omitted).

129. *Id.*

130. *Id.*

131. 192 F. Supp. 955 (N.D. Ind. 1961).

132. *Basham*, 849 N.E.2d at 711 (discussing *Abele*, 192 F. Supp. at 955).

133. *Id.*

134. *Id.* at 711-12.

action.¹³⁵

3. *Relation Back Doctrine*.—In *Crossroads Service Center, Inc. v. Coley*,¹³⁶ the court held that a plaintiff's amended complaint did not “relate back” to the date of the original complaint, because the new defendant added via the amendment—“a completely different corporation”—did not know of the claim until it received the amended complaint, “which was after the 120 days [after commencement of the action] had passed.”¹³⁷ On December 24, 2002, the plaintiffs in *Coley* filed their original complaint, alleging premises liability for injuries incurred at a truck stop/service center on December 27, 2000.¹³⁸ Subsequently, the plaintiffs learned that the named defendant did not own the premises and that, in fact, the premises were owned by a completely different, unaffiliated entity.¹³⁹ On April 29, 2003, the plaintiffs filed their amended complaint naming the true owner of the premises as the defendant. The amended complaint was served on the new defendant on May 10, 2003.¹⁴⁰

The new defendant moved for summary judgment, alleging via affidavits of the defendant company's registered agent and its manager/accountant, that it had no knowledge of the claim until it was served with the amended complaint—i.e., 137 days after the original complaint was filed.¹⁴¹ Because the plaintiff “failed to designate any evidence which would contradict [the defendant's] assertions and would create a genuine issue of material fact necessary to defeat a motion for

135. *Id.* at 712. The court in *Basham* also rejected the defendant's argument that the plaintiff filed the original action in “bad faith” and “with knowledge of the lack of jurisdiction[.]” *Id.* at 712-13.

136. 842 N.E.2d 822 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1010 (Ind. 2006).

137. *Id.* at 826. Indiana Trial Rule 15(C) provides, in relevant part, as follows:

An amendment changing the party against whom a claim is asserted relates back if the . . . within one hundred and twenty (120) days of commencement of the action, the party to be brought in by amendment: (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and (2) knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against him.

IND. TRIAL R. 15(C). Rule 15(C) was amended effective April 1, 2002 and “gives a party attempting to have their amended complaint relate back to their original complaint an additional 120 days in which to give notice of the institution of the action.” *Coley*, 842 N.E.2d at 825 n.2 (“The prior version of the rule allowed relation back if the requirements were met ‘within the period provided by law for commencing the action against him.’”). The court in *Coley* was unaware of any prior Indiana cases applying the revised Rule. *Id.* at 825.

138. *Coley*, 842 N.E.2d at 823. Because the plaintiffs' cause of action involved personal injuries, the applicable statute of limitations was two years. *Id.* at 824 (citing IND. CODE § 34-11-2-4 (2004)).

139. *Id.* at 823.

140. *Id.*

141. *Id.* at 825.

summary judgment[.]”¹⁴² the court in *Coley* held that the plaintiffs failed to establish the “third requirement of Trial Rule 15(C), and the amended complaint [could] not relate back.”¹⁴³

C. Mootness—Public Interest Exception

In *Jones v. Womacks*,¹⁴⁴ the plaintiff, an individual who *rented* property within a school district, brought an action against the county auditor, claiming that a statute governing petition and remonstrance procedures for building projects proposed by political subdivisions was unconstitutional.¹⁴⁵ Specifically, the plaintiff claimed that the petition/remonstrance procedure violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, because it “restricts the right to participate in the petition/remonstrance process to *owners* of real property living within the political subdivision.”¹⁴⁶ The parties entered into a “Stipulation in Lieu of Preliminary Injunction,” which provided that the plaintiff would be allowed to sign a petition or remonstrance, which would then be sealed and would remain sealed unless and until the procedure resulted in a tie.¹⁴⁷ After the process (which did not result in a tie) was completed, the parties filed cross-motions for summary judgment, the court denied the plaintiff’s motion and granted the defendant’s motion, and, on appeal, the State of Indiana intervened to address the constitutionality of the statute.¹⁴⁸ On appeal, however, the State of Indiana argued only that “the matter is moot and should not be addressed.”¹⁴⁹

Recognizing that the case was moot “[i]n the true sense of the word,”¹⁵⁰ the court in *Womacks* explained that “although moot cases are usually dismissed, Indiana courts have long recognized that a case may be decided on its merits under an exception to the general rule when the case involves questions of ‘great public interest.’”¹⁵¹ “Cases found to fall within this ‘public interest exception’ typically contain issues likely to recur.”¹⁵² The court in *Womacks* noted that “earlier cases from this court [erroneously] had declared that an additional element was required to resolve a moot case on its merits: that the case must be likely to evade review.”¹⁵³ In other words, a case need not be “likely to evade review” under Indiana’s public interest exception to the mootness doctrine,

142. *Id.* at 826.

143. *Id.*

144. 852 N.E.2d 1035 (Ind. Ct. App. 2006), *trans. granted*, (Ind. May 21, 2007).

145. *Id.* at 1036.

146. *Id.* (emphasis added).

147. *Id.* at 1038-39.

148. *Id.* at 1039-40.

149. *Id.* at 1040.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* (discussing *In re Lawrence*, 579 N.E.2d 32, 37 (Ind. 1991)).

which, according to the court in *Womacks* is less stringent than the federal standard.¹⁵⁴

Among other things, the State argued that the plaintiff “effectively was allowed to participate[,]” because he was allowed to sign a petition or remonstrance pursuant to the parties’ stipulation.¹⁵⁵ The court disagreed, stating that “what [the plaintiff] was allowed to do by filing his sealed signature with the trial court was akin to filing a provisional ballot.”¹⁵⁶ Analogizing the disputed procedure to an election, the court stated that “the fact that the election was not close enough to be changed by the provisional ballots would not alter that the voters in the subset were denied their right to actually participate in the election.”¹⁵⁷ According to the court in *Womacks*, the plaintiff “seeks the right to participate, not change the ultimate result.”¹⁵⁸

Distinguishing cases in which “challenges were brought regarding elections, but Indiana appellate courts dismissed the cases as moot where the elections had been completed before the appellate cases were decided[,]”¹⁵⁹ the court explained that the particular issue in those cases “was unlikely to repeat, and addressing the merits even under a public interest exception would have been of little use.”¹⁶⁰ The court concluded that “the issue before [it]—whether those who do not own real property may participate in the petition/remonstrance process—is of great public importance.”¹⁶¹ The court, therefore, exercised its discretion to address the appeal on its merits.¹⁶²

Ultimately, the court in *Womacks* found that the petition/remonstrance procedure at issue amounts to a “*de facto* election or referendum.”¹⁶³ As such, the court held that “the State may not limit the right to participate to only those who own real property within the political subdivision without a showing of a compelling state interest . . . [which] has not been made here.”¹⁶⁴

The Indiana Supreme Court has granted transfer in *Womacks*, but as of the date of this publication, a decision has not yet been rendered.

154. *Id.* The court in *Womacks* explained that the federal standard—premised on Article III of the United States Constitution, limiting the jurisdiction of federal courts to “actual cases and controversies”—is stricter than the Indiana standard. *Id.* (“[T]he Indiana Constitution contains no similar restraint.”).

155. *Id.* at 1041.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 1043-44 & n.6.

160. *Id.* at 1044.

161. *Id.*

162. *Id.*

163. *Id.* at 1050.

164. *Id.* Recognizing that the case was moot and declining to “overstep [its] judicial role and attempt to re-draft [the statute,]” the court in *Womacks* stayed the effectiveness of its holding to allow the Indiana General Assembly an opportunity to “redraft or otherwise remedy the inadequacies of the [statute].” *Id.*

D. *Res Judicata*

1. *Claim Preclusion and Compulsory Counterclaims.*—In *Huber v. United Farm Family Mutual Insurance Co.*,¹⁶⁵ the plaintiff, a business owner, filed a complaint alleging breach of contract, breach of the duty of good faith and fair dealing and fraud against his insurer relating to the conduct of a prior appraisal proceeding conducted to resolve a fire damages claim.¹⁶⁶ Specifically, in connection with the prior appraisal proceeding, the parties were required to appoint an “umpire” to resolve any disputes regarding the appraisal.¹⁶⁷ The insurer filed a petition to appoint the umpire with the Montgomery Circuit Court.¹⁶⁸ The court appointed an umpire and, later, the plaintiff began to suspect that the umpire was not acting impartially.¹⁶⁹ An appraisal was issued, the appraisal proceeding was concluded and the plaintiff’s action against the insurer followed.¹⁷⁰

The trial court concluded that the plaintiff’s claims were barred by the doctrine of *res judicata*, because the claims “could have been brought in the previous proceeding.”¹⁷¹ On appeal, in reversing the trial court’s decision, the court in *Huber* explained that the plaintiff “is not barred from bringing those claims unless they were compulsory counterclaims in the earlier proceedings.”¹⁷² The court in *Huber* quoted Trial Rule 13, which distinguishes compulsory and permissive counterclaims, as follows:

[A party must raise] any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.¹⁷³

However, the court recognized that “a claim that accrues *after* a responsive pleading is not a compulsory counterclaim[.]”¹⁷⁴

Assuming the plaintiff (the business owner) was served in the prior appraisal proceeding on April 14, 2003, “and that a responsive pleading was required, [the plaintiff] had twenty days from that time to respond.”¹⁷⁵ Thus, any responsive

165. 856 N.E.2d 713 (Ind. Ct. App. 2006), *trans. denied*, (Ind. Feb. 22, 2007).

166. *Id.* at 715-16.

167. *Id.* at 715.

168. *Id.*

169. *Id.*

170. *Id.* at 715-16.

171. *Id.* at 716.

172. *Id.* (citing IND. TRIAL R. 13).

173. *Id.* at 716-17 (quoting IND. TRIAL R. 13).

174. *Id.* at 716 (emphasis added) (citing *Berkemeier v. Rushville Nat’l Bank*, 459 N.E.2d 1194, 1199 (Ind. Ct. App. 1984); *Hunter v. Milhous*, 305 N.E.2d 448, 452 (Ind. Ct. App. 1973)).

175. *Id.* at 717 (citing IND. TRIAL R. 6(C)).

pleading would have been due on May 5, 2003.¹⁷⁶ According to the plaintiff's affidavit, "he did not become concerned about [the umpire's] impartiality until June 20."¹⁷⁷ The court in *Huber* held that because the plaintiff's "claim did not exist at the time when a responsive pleading would have been due [in the prior matter] . . . it [was] not a compulsory counterclaim under Trial Rule 13."¹⁷⁸ As such, the claims were not "barred by the doctrine of *res judicata*."¹⁷⁹

2. *Successive Foreclosure Claims Not Barred by Res Judicata*.—In an apparent matter of first impression, the court in *Afolabi v. Atlantic Mortgage & Investment Corp.*¹⁸⁰ held that a second foreclosure action premised on subsequent defaults under a promissory note and mortgage was not barred by *res judicata*, where a prior foreclosure action, premised on separate, prior defaults, was dismissed for failure to prosecute.¹⁸¹ In *Afolabi*, the first foreclosure action was dismissed pursuant to Trial Rule 41(E) for failure to prosecute.¹⁸² After additional "defaults," a second foreclosure action was filed.¹⁸³ The defendant moved to dismiss, arguing that the Rule 41(E) dismissal of the previous foreclosure action, which was based on the same note and mortgage, was barred by the doctrine of *res judicata*.¹⁸⁴ The trial court denied the motion to dismiss and the defendant appealed.¹⁸⁵

The court in *Afolabi* explained that for claim preclusion to apply, four requirements must be met:

1. The former judgment must have been rendered by a court of competent jurisdiction;
2. The former judgment must have been rendered on the merits;
3. The matter now in issue was, or could have been, determined in the prior action; and
4. The controversy adjudicated in the former action must have been between the parties to the present suit or their privies.¹⁸⁶

In addition, "a dismissal with prejudice constitutes a dismissal on the merits."¹⁸⁷

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* The court in *Huber* also held that the *issues* raised by the plaintiff were not barred by *res judicata*, because the court in the first proceeding was "simply called upon to appoint an umpire." *Id.* The court was not asked to and "did not render any judgment as to [the umpire's] impartiality." *Id.* Because no "final judgment on the merits" was issued on the impartiality issue, issue preclusion did not apply. *Id.*

180. 849 N.E.2d 1170 (Ind. Ct. App. 2006).

181. *Id.* at 1175.

182. *Id.* at 1172.

183. *Id.*

184. *Id.* at 1172-73.

185. *Id.* at 1172.

186. *Id.* at 1173.

187. *Id.* (citing *Richter v. Asbestos Insulating & Roofing*, 790 N.E.2d 1000, 1002-03 (Ind. Ct.

Further, the court explained, “a dismissal with prejudice is conclusive of the rights of the parties and is *res judicata* as to any questions that might have been litigated.”¹⁸⁸

The court in *Afolabi* held that “the claim preclusion part of the doctrine of *res judicata* does not bar successive foreclosure claims, regardless of whether or not the mortgagee sought to accelerate payments on the note in the first claim.”¹⁸⁹ The court explained that “the subsequent and separate alleged defaults under the note created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action.”¹⁹⁰

Further, the court in *Afolabi* held that issue preclusion, or collateral estoppel, did not apply to bar the subsequent foreclosure action.¹⁹¹ The court described the law of issue preclusion as follows:

Issue preclusion, or collateral estoppel, bars the subsequent litigation of a fact or issue that was necessarily adjudicated in a former lawsuit if the same fact or issue is presented in a subsequent lawsuit. . . . However, the former adjudication will only be conclusive as to those issues that were actually litigated and determined therein. Collateral estoppel does not extend to matters that were not expressly adjudicated and can be inferred only by argument. In determining whether to allow the use of collateral estoppel, the trial court must engage in a two-part analysis: (1) whether the party in the prior action had a full and fair opportunity to litigate the issue and (2) whether it is otherwise unfair to apply collateral estoppel given the facts of the particular case.¹⁹²

The court held that “[b]ecause the [prior foreclosure] action was dismissed with prejudice pursuant to [Trial Rule 41(E)] for failure to prosecute the claim, no issue was actually litigated.”¹⁹³ Therefore, issue preclusion did not apply to bar the litigation of the second foreclosure action.¹⁹⁴

E. Motion to Intervene

In *Allstate Insurance Co. v. Keltner*,¹⁹⁵ the court clarified that a hearing is not required on a Trial Rule 24 petition to intervene:

It is true that in one opinion decided some time ago, this court held that although a party seeking intervention had not requested a hearing, the trial court committed reversible error by not holding a hearing on the

App. 2003)).

188. *Id.*

189. *Id.* at 1175.

190. *Id.*

191. *Id.* at 1176.

192. *Id.* at 1175-76.

193. *Id.* at 1176.

194. *Id.*

195. 842 N.E.2d 879 (Ind. Ct. App. 2006).

petition to intervene in light of the legal and factual questions in this case¹⁹⁶

In declining to rule that Rule 24 motions require a hearing, the court in *Keltner* noted that “nothing in Trial Rule 24 requires any type of hearing.”¹⁹⁷ Second, “the facts alleged in a petition to intervene must be taken as true and the decision on a motion to intervene turns on the sufficiency of the claim asserted.”¹⁹⁸ Third, the court reasoned that “allowing a party on appeal to request and obtain relief not asked of the trial court [*e.g.*, a hearing] would contravene the axiomatic principle that an argument or issue not presented to the trial court generally is waived.”¹⁹⁹ Finally, the court determined that, due to the “substantial briefing” of the relevant issues by the parties, “it does not appear . . . that a hearing was required to address any outstanding factual issues.”²⁰⁰ In other words, the trial court “was adequately informed on [the relevant] issues.”²⁰¹ Therefore, the court in *Keltner* concluded that no hearing was required on the “petition to intervene in the absence of a request by one of the parties to do so.”²⁰²

F. Discovery—Intentional Violation of Discovery Order as a Means to Immediate Appellate Review

In *Allstate Insurance Co. v. Scrogan*,²⁰³ the plaintiff moved to compel various discovery in connection with his bad faith action against his automobile insurer, resulting in a “hotly contested battle” over the requested discovery.²⁰⁴ Following an order compelling the production of documents that the insurer believed to be privileged, the insurer reiterated its objection, stating that it would “defer production of such protected documents that it believes should be protected by the request for a protective order until it has exhausted all avenues of appeal.”²⁰⁵ The trial court ultimately sanctioned the insurer for failing to comply with its discovery order and ordered it to pay \$10,000.²⁰⁶

The insurer then appealed the trial court’s order pursuant to Rule 14(A) of the Indiana Rules of Appellate Procedure, which “allows an interlocutory appeal as of right of orders requiring the payment of money.”²⁰⁷ The insured argued that

196. *Id.* at 882 (quoting *Lawyers Title Ins. Corp. v. C & S Lathing & Plastering Co.*, 403 N.E.2d 1156, 1160 (Ind. Ct. App. 1980)).

197. *Id.*

198. *Id.* (citing *United of Omaha v. Hieber*, 653 N.E.2d 83, 88 (Ind. Ct. App. 1995)).

199. *Id.* (citing *GKC Ind. Theatres, Inc. v. Elk Retail Investors, LLC*, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002)).

200. *Id.*

201. *Id.*

202. *Id.*

203. 851 N.E.2d 317 (Ind. Ct. App. 2006).

204. *Id.* at 319.

205. *Id.* at 320.

206. *Id.* at 321.

207. *Id.* “Through its appeal of the trial court’s imposition of sanctions, [the insurer] also

the court of appeals “should not consider the [merits or substance of the trial court’s discovery order] because [the insurer] intentionally engaged in misconduct, i.e., failing to comply with the trial court’s [order] in the hopes of being monetarily sanctioned, thus allowing an interlocutory appeal as of right.”²⁰⁸

The court in *Scroghan* explained that “[w]hile we do not condone the practice of intentionally violating discovery orders to obtain appellate review of those orders, we recognize that such a practice can act as an important ‘safety valve,’ which relieves parties from generally non-appealable discovery orders.”²⁰⁹ Recognizing that “no Indiana case law” has specifically addressed “the propriety of this method of obtaining [appellate] review,” the court in *Scroghan* noted that the Seventh Circuit Court of Appeals effectively explained it as follows:

Confining the right to get appellate review of discovery orders to cases where the party against whom the order was directed cared enough to incur a sanction for contempt is a crude but serviceable method, well established in case law, of identifying the most burdensome discovery orders and in effect waiving the finality requirements for them.²¹⁰

The court in *Scroghan* concluded that “while we certainly do not encourage parties to intentionally violate a discovery order so as to be sanctioned and thus obtain an interlocutory appeal as of right, we can see the narrow situations, such as this one, where such as strategy may be utilized.”²¹¹ The court recognized the limited options available to a party in the position of the insured in this case:

A party in [the insured’s] position has few options since complying with the court’s discovery order, proceeding through a trial, and ultimately winning on appeal would be a hallow victory indeed when the information sought to be protected would then already have been disclosed. In such situations, if a party is willing to incur possibly serious sanctions to obtain review of a discovery order, then the option should be available.²¹²

In short, according to the court in *Scroghan*, a party may intentionally violate a discovery order and, if a monetary sanction is imposed, obtain immediate appellate review of the interlocutory discovery order, including the “substance and merits” of the order.

request[ed] that [the court of appeals] review the underlying [d]iscovery [o]rder.” *Id.* at 322.

208. *Id.* at 322.

209. *Id.* (citing *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 726 F.2d 1150, 1157 (7th Cir. 1984)).

210. *Id.* (citing *Marrese*, 726 F.2d at 1157).

211. *Id.*

212. *Id.*

G. Judgment on the Pleadings

In *Fox Development, Inc. v. England*,²¹³ the court of appeals, deciding an apparent issue of first impression in Indiana, affirmed the trial court's order granting the defendants' Rule 12(C) motion for judgment on the pleadings, where the plaintiff—suing on an alleged oral contract—failed to anticipate the defendants' statute of frauds affirmative defense by pleading exceptions to the statute in its complaint.²¹⁴

In *England*, prospective purchasers of a home under construction expressed an interest in the home to the builder, but never executed a purchase agreement that had been prepared.²¹⁵ Nevertheless, the builder made improvements to the home based on the prospective purchasers' preferences.²¹⁶ The prospective purchasers subsequently informed the builder that they had purchased another home, the builder demanded \$10,000 in earnest money (which was provided in the unexecuted purchase agreement), the purchasers refused to pay and the builder sued.²¹⁷ The trial court granted the prospective purchasers' motion for judgment on the pleadings and the builder appealed, contending that the trial court should have treated the motion as one to dismiss under Rule 12(B)(6) or for summary judgment under Rule 56, as well as arguing the merits of the Rule 12(C) motion.²¹⁸

After concluding that the trial court properly treated the motion as one for judgment on the pleadings,²¹⁹ the court in *England* described the "test" to be applied in evaluating a Rule 12(C) motion:

The test to be applied when ruling on a Rule 12(C) motion is whether, in the light most favorable to the non-moving party and with every intendment regarded in his favor, the complaint is sufficient to constitute any valid claim. In applying this test, we may look only at the pleadings, with all well-pleaded material facts alleged in the complaint taken as admitted, supplemented by any facts of which the court will take judicial notice.²²⁰

213. 837 N.E.2d 161 (Ind. Ct. App. 2005).

214. *Id.* at 165-66.

215. *Id.* at 163.

216. *Id.*

217. *Id.*

218. *Id.* at 163-64.

219. *Id.* at 165. The court reasoned that neither party designated or relied on materials outside the pleadings and the "trial court did not give the parties notice that it would be treating the matter as one for summary judgment." *Id.* at 164 (citing IND. TRIAL R. 12(B)(8)) (noting that a trial court treating a motion to dismiss for failure to state a claim as one for summary judgment "shall" give the parties reasonable opportunity to present all pertinent material); *Kolley v. Harris*, 553 N.E.2d 164, 167 (Ind. Ct. App. 1990) (holding that grant of summary judgment was erroneous because trial court did not provide parties with notice that it intended to treat the motion as one for summary judgment)).

220. *Id.* at 165 (internal citation omitted).

The court agreed with the prospective purchasers' assertion that the builder "was required to plead exceptions to the statute of frauds [namely, part performance and promissory estoppel] in its complaint in order to survive a judgment on the pleadings."²²¹ Explaining that "[t]he statute of frauds does not govern the formation of a contract but only the enforceability of contracts that have been formed[,]"²²² the court in *England* concluded "that the parties entered into an oral contract for the sale of real estate."²²³ However, the purchasers "pleaded the statute of frauds as an affirmative defense with their answer."²²⁴ On appeal, the builder alleged that exceptions applied to remove its oral contract from the statute of frauds, but did not plead any exceptions in its complaint.²²⁵ Therefore, the issue was "whether [the builder] was required to plead an exception to the statute of frauds in order to survive a motion for judgment on the pleadings."²²⁶

The court explained that the "complaint alleged an oral contract for the sale of real property, which on its face is unenforceable under the statute of frauds."²²⁷ The court stated that "it was incumbent upon [the builder] to anticipate in the complaint, or to meet in an amended complaint, the [prospective purchasers'] affirmative defense that the breach of contract claim was barred by the statute of frauds."²²⁸ Therefore, to overcome the statute (and the motion for judgment on the pleadings), "the complaint or an amended complaint should have alleged exceptions to the statute of frauds in order to survive a motion for judgment on the pleadings."²²⁹ The court of appeals held "that the trial court did not err when it granted judgment on the pleadings in favor of the [prospective purchasers]."²³⁰

H. Summary Judgment

1. *Summary Judgment Prior to Class Certification.*—In *Reel v. Clarian Health Partners, Inc.*,²³¹ the court held as a matter of first impression that "Trial Rule 23 does not preclude [a] trial court from hearing [a defendant's] motion for summary judgment before addressing the certification of the class."²³² In *Reel*,

221. *Id.*

222. *Id.* (citing *Dupont Feedmill Corp. v. Standard Supply Corp.*, 395 N.E.2d 808, 810 (Ind. Ct. App. 1979)).

223. *Id.* at 166.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. 855 N.E.2d 343 (Ind. Ct. App. 2006). The *Reel* decision was rendered October 18, 2006—just outside the current survey period. The ruling is included herein given its immediate potential impact on class action litigation.

232. *Id.* at 356 (citing *Christensen v. Kiewit-Murdock Inv. Corp.*, 815 F.2d 206, 214 (2d Cir.

the defendant moved for summary judgment before a class certification determination was reached.²³³ The trial court set a hearing on the defendants' summary judgment motion and the plaintiffs responded by filing, among other things, a motion to certify the trial court's order setting the matter for a summary judgment hearing for immediate interlocutory appeal and to stay proceedings pending certification and appeal.²³⁴ The trial court certified the interlocutory order for immediate appeal and stayed proceedings, and the court of appeals accepted jurisdiction.²³⁵

On appeal, the "sole issue [was] whether the trial court erred by setting a hearing on [the defendant's] motion for summary judgment before addressing class certification."²³⁶ The court, recognizing that because "Trial Rule 23 is based upon Federal Rule of Civil Procedure 23," and "it is appropriate for [the court] to look at federal court interpretations of the federal rule when applying the Indiana rule[,]""²³⁷ the court in *Reel* analyzed several federal court decisions that had evaluated the issue.²³⁸

1987)).

233. *Id.* at 345.

234. *Id.*

235. *Id.* at 346.

236. *Id.*

237. *Id.* at 349 (citing *In re Tina T.*, 579 N.E.2d 48, 55 (Ind. 1991)).

238. *See id.* at 349-55 (discussing *Wright v. Schock*, 742 F.2d 541, 543-44 (9th Cir. 1984) (concluding that "[u]nder the proper circumstances—where it is more practicable to do so and where the parties will not suffer significant prejudice—the district court has discretion to rule on a motion for summary judgment before it decides the certification issue"); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 762 (3d Cir. 1974) (stating that "where [a defendant] . . . is willing to run the risk that the determination of liability, if he loses, will be given effect in favor of the class, with notice in the event of such determination, the district court must seriously consider that alternative, and should, absent other compelling circumstances, pursue that course"); *Ahne v. Allis-Chalmers Corp.*, 102 F.R.D. 147, 151 (E.D. Wis. 1984) (recognizing that "while the general rule against pre-certification review of the merits of a case remains the touchstone for resolving disputes like the present, the courts have carved out a limited exception for those defendants willing to forego the protections attendant on early determination of the class issue"); *Postow v. OBA Fed. Sav. & Loan Ass'n*, 627 F.2d 1370, 1382 (D.C. Cir. 1980) (finding that "a defendant may waive the protections Rule 23(c) offers and elect to have the merits decided before the class certification question and before notice is sent to the class when, as here, the defendant moves for summary judgment before resolution of the certification issue"); *Haas v. Pittsburgh Nat'l Bank*, 381 F. Supp. 801, 802-06 (W.D. Pa. 1974) (holding that "a district court may pass upon a motion for summary judgment prior to passing upon a motion for class determination or requiring that notice be sent to an already certified class")). The court in *Ahne* explained the risks and benefits of the "limited exception" as follows:

That exception . . . allows the defending party to exercise its option to waive the safeguard of *res judicata* implicit in Rule 23's requirement that the class question be addressed "[a]s soon as practicable after the commencement of an action." The risk to the defendant is, of course, that if he loses on the liability issue, that result will be given

The court in *Reel* stated that it found the reasoning of the federal court decisions “persuasive and applicable to this case.”²³⁹ The court explained:

[w]hen [the defendant] moved for summary judgment, it abandoned reliance on the preclusive effect of the judgment with respect to absent members of the class and cannot complain about either the treatment of the case as an individual action or the one way intervention that will result if the class should be certified at a later time. If the trial court grants [the defendant’s] motion for summary judgment, [the defendant] is not protected by res judicata from suits by potential class members. If the trial court denies [the defendant’s] motion for summary judgment, the [plaintiffs] could still seek certification of the class.²⁴⁰

The Indiana Court of Appeals affirmed the trial court’s order and set a hearing on the defendant’s motion for summary judgment prior to a class certification determination.²⁴¹

2. *Designation of Evidence in Opposition to Multiple Motions.*—In *Rood v. Mobile Lithotripter of Indiana*,²⁴² the court ruled—in opposition to one of two co-defendants’ summary judgment motions—that the non-moving plaintiff could not rely on evidentiary designations he filed in opposition to the second of the co-defendants’ motions to avoid the entry of summary judgment on the first defendant’s motion, in response to which no designations were timely filed.²⁴³

The plaintiff in *Rood* was injured in October 1999 “as he was transported into a mobile lithotripsy facility to treat kidney stones.”²⁴⁴ The plaintiff filed his claim with “the medical review panel[, which] unanimously concluded that neither the anesthesiologist, . . . nor [the hospital] failed to meet the applicable standard of care.”²⁴⁵ Notwithstanding the adverse medical review panel opinion, the plaintiff filed his complaint alleging negligence against both the anesthesiologist and the hospital.²⁴⁶

“The hospital filed a motion for summary judgment [premised] on the review panel’s [opinion].”²⁴⁷ The anesthesiologist filed a separate summary judgment motion days later.²⁴⁸ The plaintiff filed a timely response to the

effect as to a class of yet undefined numbers and composition; if he wins, he may still face subsequent prosecution by other potential class members whose claims might be barred only under the limited scope of the stare decisis doctrine.

Ahne, 102 F.R.D. at 151.

239. *Reel*, 855 N.E.2d at 355.

240. *Id.* at 355-56 (internal citations omitted).

241. *Id.* at 356.

242. 844 N.E.2d 502 (Ind. Ct. App. 2006).

243. *Id.* at 508.

244. *Id.* at 504.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

anesthesiologist's summary judgment motion, including certain "designated evidence in support of his opposition to summary judgment."²⁴⁹

Approximately two weeks later, the hospital sent a letter to counsel for the plaintiff, asking him to sign an agreed summary judgment entry due to the plaintiff's alleged failure to file a "specific response to [the hospital's] motion for summary judgment."²⁵⁰ The plaintiff proceeded to file a "designation of evidence in opposition to [the hospital's] motion for summary judgment[,] . . . [which] included the same evidence previously designated against [the anesthesiologist]."²⁵¹ The hospital filed a motion to strike the plaintiff's designation as untimely.²⁵² The trial court granted both the hospital's motion to strike and its motion for summary judgment, ruling that the plaintiff "failed to advance any expert testimony to contradict the opinion of the medical review panel."²⁵³

On appeal, the plaintiff argued that its designations in response to the anesthesiologist's summary judgment motion should have been considered in opposition to the hospital's summary judgment motion.²⁵⁴ The *Rood* court rejected the plaintiff's argument, explaining that parties must "strictly comply with the designated evidentiary matter requirement [of Rule 56(H)]."²⁵⁵ Because the plaintiff failed to timely designate specific evidence in opposition to the hospital's summary judgment motion, the *Rood* court held that the plaintiff did not satisfy the requirements of Trial Rule 56.²⁵⁶

In short, the plaintiff's "designation of evidence in opposition to [the anesthesiologist's] separate motion for summary judgment [was] simply insufficient to serve as a designation of evidence in opposition to [the hospital's] motion for summary judgment."²⁵⁷

3. *Designation of "Pleadings" Insufficient to Oppose Summary Judgment.*— In *McDonald v. Lattire*,²⁵⁸ the court ruled that allegations in a non-movant's pleadings did not constitute "designated evidence" sufficient to oppose a motion for summary judgment.²⁵⁹ In particular, the plaintiff alleged negligence-based claims against the defendant in connection with an automobile accident.²⁶⁰ The defendant moved for summary judgment on the issue of whether he had to

249. *Id.*

250. *Id.* at 506.

251. *Id.*

252. *Id.*

253. *Id.* (citation omitted)

254. *Id.* at 507 (arguing that "the trial court improperly allowed form to control over substance" in that the response to the anesthesiologist's motion was intended to be a response to both summary judgment motions—i.e., that "this was simply a captioning error").

255. *Id.*

256. *Id.* at 508.

257. *Id.*

258. 844 N.E.2d 206 (Ind. Ct. App. 2006).

259. *Id.* at 215-16.

260. *Id.* at 208.

“maintain a proper lookout” in connection with the incident and, if he did, whether he breached that duty.²⁶¹

In opposition to the defendant’s summary judgment motion, the plaintiff “submitted no additional evidence.”²⁶² Instead, the plaintiff relied “upon her complaint, which she asserts was designated by [the defendant].”²⁶³ According to the court in *McDonald*, “allegations” contained in a complaint do not constitute “testimony, affidavits, sworn statements, or evidence of any kind.”²⁶⁴ The court explained:

[O]nce a movant has designated evidence to support a prima facie showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law, the nonmovant may not rest upon the mere allegations of her pleadings; instead, she must designate to the trial court each material issue of fact which that party asserts precludes entry of summary judgment *and the evidence relevant thereto*.²⁶⁵

According to the *McDonald* court, the non-moving party “should have sought and submitted sworn affidavits from [its principals] if [it] wished to designate their statements as evidence of a genuine issue of material fact precluding summary judgment.”²⁶⁶

4. “New” Evidence on Reconsideration.—In *Liggett v. Young*,²⁶⁷ the court refused to consider new evidence offered by a third party plaintiff on “reconsideration” of a prior order granting partial summary judgment in favor of the third party defendant.²⁶⁸ The court rejected the third party plaintiff’s argument that he “was unable to introduce [the new] evidence at the partial summary judgment stage because the [third party defendants], who had all the relevant information, filed a motion for partial summary judgment before the information was revealed in discovery.”²⁶⁹ The court noted that the third party defendants “did not file their motion immediately after the [third party plaintiff] filed his complaint; to the contrary, they waited over two years to seek partial

261. *Id.* at 214.

262. *Id.*

263. *Id.*

264. *Id.* at 215.

265. *Id.* (emphasis in original) (citations omitted).

266. *Id.* The *McDonald* court also stated that the plaintiff was “free to depose [the defendant] in the hopes of uncovering contradictory testimony.” *Id.* at 216. Instead, “there was a total absence of evidence, expert or otherwise, that [the defendant] failed to maintain a proper lookout.” *Id.* According to the court, whether someone maintained a proper lookout under any set of circumstances would always create a question of fact. *Id.* Instead, “this particular case falls within the small percentage of negligence cases appropriately decided on summary judgment.” *Id.*

267. 851 N.E.2d 968 (Ind. Ct. App. 2006), *trans. granted*, (Ind. Mar. 1, 2007).

268. *Id.* at 975.

269. *Id.* at 974.

summary judgment.”²⁷⁰ The court admonished that the third party plaintiff “could—and should—have sought an extension to conduct discovery, but he chose not to do so.”²⁷¹ The court explained its reasoning as follows:

It was incumbent upon [the third party plaintiff] to provide evidence to defeat summary judgment, and if he had no such evidence, then he should have requested time to conduct discovery to develop that evidence. Having failed to do so, he may not apply this evidence retrospectively, regardless of its “importance” to his case. He is not entitled to a second bite of this apple.²⁷²

The court in *Liggett* explained that “Trial Rule 56(F) provides the procedure to obtain additional time to develop evidence to oppose a motion for summary judgment”²⁷³ and “no authority . . . would allow a party to designate ‘newly developed evidence’ in an effort to circumvent the specific requirements of [Trial Rule 56].”²⁷⁴ According to the court, “[t]o allow a party to attack a partial summary judgment after it has been granted by designating further evidence and raising additional issues would effectively nullify the provisions of Trial Rule 56.”²⁷⁵

The Indiana Supreme Court has granted transfer in *Liggett*, but as of the date of this publication, a decision has not yet been rendered.

5. *Alteration of Rule 56 Deadlines.*—In *Logan v. Royer*,²⁷⁶ the court of appeals held that the trial court abused its discretion when it shortened the time limit for a party to respond to a motion for summary judgment, pursuant to Trial Rule 56(I), *before* the summary judgment motion had been filed.²⁷⁷ Just over one month before the trial of a will contest, the decedent’s son filed a motion to shorten the time allowed to respond to a summary judgment motion, pursuant to Rule 56(I).²⁷⁸ The trial court granted the motion, allowing the non-moving party fifteen days from the date of filing to respond to the motion.²⁷⁹ Subsequently,

270. *Id.*

271. *Id.*

272. *Id.* (citing *Harris v. Chern*, 33 S.W.3d 741, 745 (Tenn. 2000)).

273. *Id.* at 975 (citation omitted).

274. *Id.* (citation omitted)

275. *Id.* (citation omitted). Ultimately, the court of appeals concluded that “the trial court properly found that it could not consider new evidence” and affirmed the trial court’s entry of partial summary judgment on the substantive issues involved. *Id.* at 978.

276. 848 N.E.2d 1157 (Ind. Ct. App. 2006).

277. *Id.* at 1161 (emphasis added).

278. *Id.* at 1159. Apparently, the Rule 56(I) motion was filed before the motion for summary judgment was filed in an attempt to save the moving party the time and expense of preparing and filing a motion that would not be heard and ruled upon before trial if the 56(I) motion was denied. *See id.* at 1162-63 (concurring opinion) (arguing that, under the circumstances and “faced with a difficult decision[,]” the trial court did not abuse its discretion in granting the pre-summary judgment filing Rule 56(I) motion).

279. *Id.* at 1159.

following certain disputes relating to discovery and other matters, the trial court granted the son's motion for summary judgment.²⁸⁰

The *Logan* court stated that “[a]lthough [Rule 56(I)] does not specify when a [Rule 56(I)] motion may be filed, it is axiomatic that before the time limits to respond to a motion for summary judgment can be altered, a motion for summary judgment must be filed.”²⁸¹ According to the court, “[w]ithout the motion for summary judgment before it, the trial court could not have properly evaluated [the] 56(I) motion to determine whether alteration of time was appropriate.”²⁸² The court reasoned that “[f]or a case, or an issue in a case, to be ripe for review, the facts must ‘have developed sufficiently to permit an intelligent and useful decision to be made.’”²⁸³ According to the court in *Logan*, “[w]hen a [Rule 56(I)] motion is filed before the motion for summary judgment, there are ‘no actual facts present upon which the Court can make a decision.’”²⁸⁴

6. *Summary Judgment Hearing by Cellular Phone.*—In *Bruno v. Wells Fargo Bank*,²⁸⁵ the court held that a party's due process rights were not violated when his attorney was required to participate in the hearing via cellular phone due to confusion over the start time of a summary judgment hearing.²⁸⁶ In *Bruno*, a “clerical error” led the non-movant's counsel to believe that the summary judgment hearing began at 9:30 a.m.,²⁸⁷ but movant's counsel was present on time at 8:30 a.m.²⁸⁸ When non-movant's counsel did not appear by 8:30 a.m., the trial court contacted counsel on her cellular phone.²⁸⁹ The “hearing” was conducted and both parties presented arguments, although apparently no transcript was created.²⁹⁰

Concluding that the summary judgment non-movant's due process rights were not violated by conducting the hearing via cellular phone, the court in *Bruno* noted that the non-movant “was given notice of the hearing, as well as an opportunity to present arguments to the trial court, albeit by cellular phone.”²⁹¹ The *Bruno* decision does not clarify whether the “clerical error” leading to the

280. *Id.*

281. *Id.* at 1160.

282. *Id.* For example, the court noted, “without the motion for summary judgment before it, a trial court would be unable to consider the factual and legal complexity of the issues raised in the motion and make an informed decision as to whether the issues could be adequately addressed in a compressed time frame.” *Id.* at 1168 n.9.

283. *Id.* at 1160-61 (quoting BLACK'S LAW DICTIONARY 1328 (7th ed. 1999)).

284. *Id.* at 1161.

285. 850 N.E.2d 940 (Ind. Ct. App. 2006).

286. *Id.* at 949.

287. *Id.* at 948.

288. *Id.*

289. *Id.* at 948-49. There was conflicting evidence regarding whether the trial court gave counsel the option of rescheduling the hearing rather than proceeding with the hearing via cellular phone. *Id.* at 949.

290. *Id.* at 949.

291. *Id.*

confusion regarding the start time of the summary judgment hearing was that of the court's clerk or that of counsel for the non-movant.²⁹² Arguably, a clerical error by a trial court or its clerks should justify an exception to the otherwise strict mandates of procedural rules, to the extent the error reasonably resulted in a failure to adhere to a procedure or deadline. The *Bruno* decision also raises implications regarding the definition of a "hearing," as that term is used in Rule 56.

I. Motion to Set Aside Default Judgment

In *Anderson v. State Auto Insurance Co.*,²⁹³ the court of appeals affirmed the trial court's ruling that the defendants were not entitled to relief from a default judgment when they failed to make a proper showing of a "meritorious defense."²⁹⁴ In reaching its decision, the court in *Anderson* clarified that case law had not "abrogated" the "meritorious claim or defense" requirement of Trial Rule 60(B)(1), as argued by the defendants.²⁹⁵ Trial Rule 60(B)(1) provides, in relevant part, as follows:

On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default . . . , including a judgment by default, for the following reasons: (1) mistake, surprise, excusable neglect. . . . A movant filing a motion for reason (1) must allege a meritorious claim or defense.²⁹⁶

The court explained that "[p]rima facie evidence [of a meritorious defense] . . . was not presented at the hearing [on the motion to set aside the default judgment]."²⁹⁷ In fact, the court found from a review of the hearing transcript that "there was no such evidence before the trial court."²⁹⁸ The court of appeals held that (1) case law has not abrogated the requirement of establishing a

292. See *id.* at 944 (stating passively that "due to confusion concerning the time of the hearing, [non-movant's] counsel participated by cellular phone").

293. 851 N.E.2d 368 (Ind. Ct. App. 2006).

294. *Id.* at 372.

295. *Id.* at 370-72 (discussing *Dep't of Natural Res. v. Van Keppel*, 583 N.E.2d 161, 162 (Ind. Ct. App. 1991); *Bross v. Mobile Home Estates, Inc.*, 466 N.E.2d 467, 469 (Ind. Ct. App. 1984); *Kmart Corp. v. Englebright*, 719 N.E.2d 1249, 1258 (Ind. Ct. App. 1999); *Nwannunu v. Weichman & Assoc.*, 770 N.E.2d 871, 879 (Ind. Ct. App. 2002)). As an initial matter, the court in *Anderson* rejected the defendants' argument that the court of appeals' review should be *de novo*, because "they [were] attacking the trial court's legal conclusion—that a meritorious defense is absolutely required to be shown before a default judgment may be set aside." *Id.* at 370. In finding that the appropriate standard of review is abuse of discretion, the court explained that "the trial court's discretion is broad in cases involving setting aside default judgments because of the unique factual background of each case." *Id.*

296. *Id.* at 370 (quoting IND. TRIAL R. 60(B)(1)).

297. *Id.* at 371.

298. *Id.*

meritorious defense in addition to excusable neglect in connection with a Rule 60(B)(1) motion to set aside a default judgment, and (2) “the trial court did not err by concluding that [the defendants] were not entitled to relief for failure to make a showing of a meritorious defense.”²⁹⁹

J. Nunc Pro Tunc Orders

In *Brimhall v. Brewster*,³⁰⁰ the court addressed whether “a *nunc pro tunc* order was properly used to set aside the dismissal of the [plaintiffs’] complaint.”³⁰¹ At the trial court level, the plaintiffs’ complaint was dismissed *with prejudice*³⁰² pursuant to Trial Rule 41(E).³⁰³ Almost one month later, despite the order dismissing the complaint, the plaintiffs filed a verified application for default judgment, which, after multiple attempts by at perfecting service of process, was granted and entered by the trial court.³⁰⁴ Apparently, due to a

299. *Id.* at 372; *see also* *Ferguson v. Stevens*, 851 N.E.2d 1028, 1031 (Ind. Ct. App. 2006) (“A prima facie showing of a meritorious defense is evidence that, if credited, demonstrates that a different result would be reached if the case were retried on the merits and that it is unjust to allow the default to stand. It is one that will prevail until contradicted and overcome by other evidence.”). The court in *Ferguson* found that the defendant’s testimony at the hearing on her motion to set aside was sufficient to satisfy her burden of demonstrating a “meritorious defense” under Rule 60(B). *Id.* at 1031-32.

300. 835 N.E.2d 593 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1005 (Ind. 2006), *appeal after remand*, 864 N.E.2d 1148 (Ind. Ct. App. 2007).

301. *Id.* at 594.

302. The trial court’s dismissal order did not specify whether it was being entered “with prejudice” or “without prejudice.” *Id.* at 597. Trial Rule 41(E) provides, however, that unless otherwise specified, a Rule 41(E) dismissal, “other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits. Clearly, this means that unless the trial court indicates that the dismissal is without prejudice, it must be deemed to be with prejudice.” *Id.* (citing *Patton Elec. Co., Inc. v. Gilbert*, 459 N.E.2d 1192, 1194 (Ind. Ct. App. 1984)). The court in *Brewster* concluded that because “the order did not indicate that the dismissal was without prejudice[,] . . . it must be deemed that the order . . . was a dismissal with prejudice.” *Id.*

303. *Id.* at 595 (citing IND. TRIAL R. 41(E)). The court in *Brewster* noted that

[i]n the past this process [of a court setting matters *sua sponte* for a Rule 41(E) hearing] was often referred to as a call of the docket and was for the purpose of determining the status of inactive cases. Depending upon the circumstances the court may set a trial date, grant continuances, or dismiss the case.”

Id. at 595 n.3. Likewise, historically, a defendant’s motion to dismiss pursuant to Rule 41(E) was “more likely to prompt a plaintiff to take action than it [was] to dispose of the case.” Michael A. Dorelli, *Recent Developments in Indiana Civil Procedure*, 38 IND. L. REV. 920, 946 (2005) (stating that the Indiana Court of Appeals’ decision in *Lee v. Pugh*, 811 N.E.2d 881 (Ind. Ct. App. 2004), “provided a reminder that Rule 41(E) dictates the consequences of a plaintiff’s failure to pursue a case, and that the court of appeals will question the trial court’s decision [dismissing a case under Rule 41(E)] only if it finds an abuse of discretion”).

304. *Brewster*, 835 N.E.2d at 595-96.

“computer error,” the trial court did not realize the case had been dismissed until more than one year later.³⁰⁵ Upon realization of the “computer error,” the trial court issued two *nunc pro tunc* orders, providing, in essence, that (1) the Rule 41(E) dismissal was *without* prejudice, and (2) setting aside the dismissal.³⁰⁶

On appeal, the defendants argued that when the trial court dismissed the complaint pursuant to Rule 41(E), the dismissal was “with prejudice,” and, as such, it “could not be reinstated without the filing of a Trial Rule 60(B) motion.”³⁰⁷ Further, the defendants argued that “even though the [plaintiffs] filed a motion for default judgment, the trial court could not use a *nunc pro tunc* entry to amend the dismissal order.”³⁰⁸ The court of appeals agreed and reversed the trial court’s rulings.³⁰⁹

Practitioners do not frequently encounter situations in which a *nunc pro tunc* entry is the appropriate relief or remedy. The court of appeals’ decision in *Brewster* defined the unique relief and described the circumstances in which it should be allowed:

A *nunc pro tunc* order is “an entry made *now* of something which was actually previously done, to have effect as of the former date.” A *nunc pro tunc* entry may be used to either record an act or event not recorded in the court’s order book or to change or supplement an entry already recorded in the order book. The purpose of a *nunc pro tunc* order is to correct an omission in the record of action really had but omitted through inadvertence or mistake. However, the trial court’s record must show that the unrecorded act or event actually occurred.³¹⁰

In other words, the trial court cannot utilize a *nunc pro tunc* entry to correct a mistake recognized in hindsight.³¹¹ In addition, a “written memorial must form the basis for establishing the error or omission to be corrected by the *nunc pro tunc* order.”³¹² The court in *Brewster* explained that the requisite supporting written material must meet four requirements. Namely, it:

(1) must be found in the records of the case; (2) must be required by law to be kept; (3) must show action taken or orders or rulings made by the court; and (4) must exist in the records of the court contemporaneous

305. *Id.* at 596.

306. *Id.*

307. *Id.* (“A dismissal without prejudice may be set aside for good cause shown and within a reasonable time. On the other hand, a dismissal with prejudice may be set aside by the court for the grounds and in accordance with the provisions of Rule 60(B).”).

308. *Id.*

309. *Id.* at 595.

310. *Id.* at 597 (citations omitted).

311. *Id.* (“A *nunc pro tunc* entry can not be used as the medium whereby a court can change its ruling actually made, however erroneous or under whatever mistakes of law or fact such ruling may have been made.”) (quoting *Harris v. Tomlinson*, 30 N.E. 214, 216 (Ind. 1892)).

312. *Id.* (citing *Cotton v. State*, 658 N.E.2d 898, 900 (Ind. 1995)).

with or preceding the date of the action described.³¹³

In *Brewster*, the court concluded that the trial court's action of "deeming the dismissal to be without prejudice and allowing the proceedings to continue" could not be validated, despite the appellate court's "sympathetic" view toward the "trial court's attempt to rectify an apparent error."³¹⁴ The court explained the rationale behind its "reluctant" decision to uphold the "written memorial" requirement as follows:

[H]uman memory and recall is not perfect and some times will fail. Thus, a written memorandum made at the time ensures a more accurate basis for the later entry than does a mere recollection which may be dimmed by the passage of time and colored or altered by intervening events.³¹⁵

The court in *Brewster* held that the trial court "erred in entering the *nunc pro tunc* order which deemed the dismissal to be without prejudice in order to validate the later proceedings."³¹⁶ All rulings made after the date of the order dismissing the plaintiffs' complaint with prejudice were invalidated, "including the default judgment entered in favor of the [plaintiffs] on their claim."³¹⁷

K. Bifurcation of Trial

In *Jamrosz v. Resource Benefits, Inc.*,³¹⁸ the court held that the defendant failed to show "good cause for bifurcating the issues of liability and damages [at trial]."³¹⁹ The bifurcation of issues of liability and damages is governed by Trial Rule 42(C), which provides as follows: "The Court upon its own motion or the motion of any party for good cause shown may allow the cause to be tried and submitted to the jury in stages or segments including, but not limited to, bifurcation of claims or issues of compensatory and punitive damages."³²⁰ The court in *Jamrosz* explained that "[w]hile the avoidance of prejudice is a more than sufficient reason for a separate trial, a separate trial should not be granted solely upon the moving party's speculation that it might be prejudiced by certain testimony."³²¹

[W]hile the separation of trials can result in judicial economy when the

313. *Id.* (quoting *Stowers v. State*, 363 N.E.2d 978, 983 (Ind. 1977)).

314. *Id.*

315. *Id.* at 598.

316. *Id.*

317. *Id.* The court in *Brewster*, apparently recognizing some injustice in its result, gratuitously noted that "[i]t may well be appropriate for our Supreme Court to revisit the procedural matters presented by cases such as this and to effect some fine tuning of the law." *Id.*

318. 839 N.E.2d 746 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1011 (Ind. 2006).

319. *Id.* at 763.

320. *Id.* at 761 (quoting IND. TRIAL R. 42(C)).

321. *Id.* at 761-62 (citing *Frito-Lay, Inc. v. Cloud*, 569 N.E.2d 983, 990 (Ind. Ct. App. 1991)).

defendant prevails on the issue of liability (by obviating the need for a trial on damages), the defendant must first convince the court that it has a persuasive argument on the question of liability in order to justify the potential risk and expense of two trials.³²²

The court in *Jamrosz* found that “the issues of damages and liability are not intertwined in this case.”³²³ However, the court stated that “the proof of damages was not complicated and costly, and [the defendant] did not present an argument that judicial economy would have been served by bifurcation because he had a strong defense on the liability claim.”³²⁴ Therefore, even though the plaintiffs may not have been prejudiced by bifurcation, the court concluded that the defendant failed to show good cause for bifurcating the issues of liability and damages.³²⁵

L. Arbitration

1. *Validity of Arbitration Provision.*—In *Precision Homes of Indiana, Inc. v. Pickford*,³²⁶ the court of appeals held that an arbitration provision contained in a residential construction agreement was neither procured by fraud nor unconscionable.³²⁷ Recognizing that both the federal and state arbitration statutes favor “enforcement of agreements to arbitrate[,]”³²⁸ the court concluded first that the arbitration provision at issue was not procured by fraud as a result of a misstatement of applicable law within the provision.³²⁹ Specifically, the arbitration provision “substantively altered the statement required under [section 32-27-3-12 of the Indiana Code] by changing the word ‘lawsuit’ from the statute to the word ‘arbitration’ in the [c]ontract.”³³⁰ The court explained that, “[i]n general, a misstatement of the law cannot form the basis of fraud because everyone is presumed to know the law, and, therefore, the allegedly defrauded party cannot justifiably have relied on the misstatements.”³³¹ Noting that the plaintiffs were represented by counsel in connection with the negotiation of the relevant contract, the court concluded that “[t]he [plaintiffs] had no right to rely on [the defendant’s] statements regarding the law and therefore did not establish

322. *Id.* at 762 (quoting *Frito-Lay*, 569 N.E.2d at 990) (internal citation omitted).

323. *Id.* at 763.

324. *Id.*

325. *Id.*

326. 844 N.E.2d 126 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 586 (Ind. 2006).

327. *Id.* at 132.

328. *Id.* at 131 (quoting 9 U.S.C. § 1 (2000); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); IND. CODE § 34-57-2-1 (2004); *Homes By Pate, Inc. v. DeHann*, 713 N.E.2d 303, 306 (Ind. Ct. App. 1999)).

329. *Id.*

330. *Id.*

331. *Id.* at 132. (citing *Am. United Life Ins. Co. v. Douglas*, 808 N.E.2d 690, 703 (Ind. Ct. App. 2004)).

that the arbitration agreement was fraudulently induced.”³³²

Regarding the argued unconscionability of the arbitration provision, the court noted “that to be unconscionable, a contract ‘must be such as no sensible man not under delusion, duress or in distress would make, and such as no honest and fair man would accept.’”³³³ In reaching its conclusion that the provision at issue was not unconscionable, the court in *Precision Homes* reasoned that the plaintiffs were “represented by counsel during the contract negotiations[,] . . . [they] and their counsel had every opportunity to read and understand the arbitration agreement[,] . . . and if they entered into the contract without knowledge of its terms, that was of their own doing.”³³⁴

2. *Prohibitive Costs of Arbitration.*—In *Roddie v. North American Manufactured Homes, Inc.*,³³⁵ the plaintiffs argued, *inter alia*, that the arbitration agreement was “unconscionable because they [could not] afford the arbitration process.”³³⁶ The court quoted the United States Supreme Court’s rule of law on the issue as follows: “[W]here, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.”³³⁷

Although the plaintiffs “introduced evidence of their monthly budget[,]”³³⁸ they offered “no evidence of the potential cost to [them] of arbitration.”³³⁹ Again quoting the United States Supreme Court, the court in *Roddie* concluded that “the risk that the [plaintiffs] ‘would be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement’ because there is no evidence of the cost of arbitration to them.”³⁴⁰

3. *Deadline for Seeking Confirmation of Arbitration Award.*—In *MBNA America Bank v. Rogers*,³⁴¹ the court held that “section 9 of the [Federal Arbitration Act (the “FAA”)]³⁴² imposes a one-year statute of limitations on the filing of a motion to confirm an arbitration award under the FAA.”³⁴³ Section 9

332. *Id.*

333. *Id.* (citing *Progressive Constr. & Eng’g Co. v. Ind. & Mich. Elec. Co.*, 533 N.E.2d 1279, 1286 (Ind. Ct. App. 1989)).

334. *Id.* The court in *Precision Homes* proceeded to find that the plaintiffs’ claims, including claims of assault, battery, and false imprisonment, were within the scope of the arbitration provision. *Id.* at 132-133.

335. 851 N.E.2d 1281 (Ind. Ct. App. 2006).

336. *Id.* at 1285.

337. *Id.* (quoting *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000)).

338. *Id.*

339. *Id.*

340. *Id.* (quoting *Green Tree*, 531 U.S. at 91). The court in *Roddie* also rejected the plaintiffs’ argument that the contract was illusory and it found that the disputed matter was “the type of claim that the parties agreed to arbitrate.” *Id.* at 1286-87.

341. 835 N.E.2d 219 (Ind. Ct. App.), *reh’g*, 838 N.E.2d 475 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1005 (Ind. 2006).

342. 9 U.S.C. § 9 (2000).

343. *Rogers*, 835 N.E.2d at 222 (quoting *Photopaint Tech., LLC v. Smartlens Corp.*, 335 F.3d

of the FAA provides, in pertinent part:

If the parties in their agreement have agreed that a judgment of the Court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time *within one year after the award is made* any party to the arbitration *may* apply to the court so specified for an order confirming the award³⁴⁴

The court in *Rogers* rejected the argument of the party seeking belated confirmation that “the foregoing provision is not intended as a statute of limitations[,]”³⁴⁵ but rather that the use of the “permissive word ‘may’ preceding the word ‘apply[.]’ . . . afford[s] a discretionary one year time period to a party wishing to confirm an award.”³⁴⁶ Relying on federal authority for the proposition that “[a] one year limitations period is instrumental in achieving [the] goal [of establishing conclusively the rights between the parties,]”³⁴⁷ the court in *Rogers* ruled that the party seeking confirmation “failed to seek confirmation of the award within the one-year statute of limitations[,] . . . [and, therefore,] the trial court properly dismissed [the] complaint for judgment upon [the] arbitral award.”³⁴⁸

M. Attorney Fees

In *Masonic Temple Ass’n v. Indiana Farmers Mutual Insurance Co.*,³⁴⁹ the court adopted the “third-party litigation exception” to the “general rule that each party to a litigation must pay his own attorney fees.”³⁵⁰ The court in *Masonic Temple* described the third-party litigation exception as follows:

When the defendant’s breach of contract caused the plaintiff to engage in litigation with a third party to protect its interests and such action would not have been necessary but for defendant’s breach, attorney fees and litigation expenses incurred in litigation with a third party may be recovered as an element of plaintiff’s damages from defendant’s breach of contract. These attorney fees and litigation expenses are foreseeable damages³⁵¹

According to the court in *Masonic Temple*, the “elements” of the third-party litigation exception are: “The plaintiff became involved in a legal dispute

152, 158 (2d Cir. 2003)). Because the dispute in *Rogers* involved a “loan contract,” the Indiana Uniform Arbitration Act, Indiana Code section 34-57-2-1, did not apply. *Id.* at 221.

344. *Id.* at 221 (emphasis added) (quoting 9 U.S.C. § 9 (2000)).

345. *Id.*

346. *Id.*

347. *Id.* at 222 (quoting *In re Consol. Rail*, 867 F. Supp. 25, 31 (D.D.C. 1994)).

348. *Id.*

349. 837 N.E.2d 1032 (Ind. Ct. App. 2005).

350. *Id.* at 1037-39.

351. *Id.* at 1039.

because of the defendant's breach of contract or other wrongful act; (2) the litigation was with a third party and not the defendant; and (3) the fees were incurred in that third-party litigation."³⁵² Finally, it is "not a requirement that the litigation with the third party caused by the defendant's wrongful act be in a separate action."³⁵³ "The test of recoverability of attorney fees is not whether they were incurred in a separate action, but whether they were incurred in an action against a third party."³⁵⁴

N. *Proceedings Supplemental*

In *Commercial Credit Counseling Services, Inc. v. W.W. Grainger, Inc.*,³⁵⁵ the court ruled that a party seeking to void an alleged "fraudulent transfer" to a creditor through proceedings supplemental need not plead fraud with particularity or specificity in order to properly place the creditor on notice of the claim.³⁵⁶ The court explained that "because proceedings supplemental are summary in nature, no formal pleadings are contemplated, and such specificity is not required."³⁵⁷ Specifically, the court explained the following:

"Proceedings supplemental are not an inappropriate vehicle to employ to set aside alleged fraudulent transfers" because these proceedings "originated in equity as remedies to the creditor for discovering assets, reaching equitable and other interest[s] not subject to levy and sale at law[,] and to set aside fraudulent conveyances."³⁵⁸

As such, the court concluded that the creditor's argument regarding lack of proper "notice" was "meritless," because "the trial courts' consideration of the [allegedly fraudulent] transactions was a near certainty."³⁵⁹

III. AMENDMENTS TO INDIANA RULES OF TRIAL PROCEDURE AND ADOPTION OF LOCAL RULES

A. *Indiana Trial Rule Amendments*

In August 2006, the Indiana Supreme Court ordered several relatively minor

352. *Id.*

353. *Id.*

354. *Id.* at 1039-40. In *Masonic Temple*, the court held that because an insurance company's breach of contract caused its insured to engage in litigation with a third party to protect its rights, "the attorney fees and litigation expenses incurred in the litigation with the third party may be recovered as an element of [the insured's] damages." *Id.* at 1040.

355. 840 N.E.2d 843 (Ind. Ct. App. 2006).

356. *Id.* at 851.

357. *Id.* (citing IND. TRIAL R. 69(E); *Coak v. Rebber*, 425 N.E.2d 197, 200 (Ind. Ct. App. 1981)).

358. *Id.* (quoting *Stuard v. Jackson & Wickliff Auctioneers, Inc.*, 670 N.E.2d 953, 955 (Ind. Ct. App. 1996)).

359. *Id.* (citing *Coak*, 425 N.E.2d at 200).

amendments to the Indiana Rules of Trial Procedure, effective January 1, 2007. Rule 12(B) was amended to provide that “[i]f a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading,” then defenses of lack of personal jurisdiction, incorrect venue, insufficiency of process, insufficiency of service of process or the same action pending in another state court of this state are “waived to the extent constitutionally permissible unless made in a motion within twenty [20] days after service of the prior pleading.”³⁶⁰

In addition, Rule 63—addressing disability and unavailability of a judge—was amended to enumerate the procedure for the appointment of a judge pro tempore.³⁶¹ Finally, Rule 81—governing the proposal and adoption of local rules—was amended to expand its application to “administrative districts,” in addition to local courts.³⁶²

B. Adoption of Local Rules

Before January 2005, Rule 81 passively provided that “[e]ach local court may from time to time make and amend rules governing its practice not inconsistent with these rules.”³⁶³ Effective January 2005, Rule 81 was amended to “strongly encourage” the courts to adopt local rules “not inconsistent with—and not duplicative of—these Rules of Trial Procedure or other Rules of the Indiana Supreme Court.”³⁶⁴ In addition, the January 2005 amendment provided that local courts will be “required” to adopt a set of local rules “for use in all courts of record in a county” after January 1, 2007—i.e., that the adoption of local rules by January 1, 2007 is *mandatory*.³⁶⁵ January 2007 arrived and the local courts complied.³⁶⁶

However, notably lacking is uniformity among the various counties. For example, counties differ with regard to the amount of time allowed to file a response in opposition to a motion, as well as other briefing requirements. In Marion County, a response to a motion is due within fifteen days of the motion’s filing.³⁶⁷ No “reply” is authorized by the Marion County Local Rule.³⁶⁸ In Porter County, the “opposing brief” is due within ten days of service of the movant’s

360. IND. TRIALR. 12(B). The prior version of the Rule provided that “If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at trial any defense in law or fact to that claim for relief.”

361. IND. TRIAL R. 63(B).

362. IND. TRIAL R. 81.

363. *Id.* (pre-January 2005 version).

364. *Id.* (January 2005 amendment).

365. *Id.*

366. See INDIANA RULES OF COURT—LOCAL (Thomson West 2007) (compiling local rules for 19 Indiana counties). A comprehensive list of counties that have adopted local rules is available at the Indiana Courts web site, <http://www.in.gov/judiciary/rules/local/>.

367. Marion County LR49-TR5 R. 203.

368. *Id.*

brief.³⁶⁹ Any reply is due within five days thereafter.³⁷⁰ In Vigo County, a response to a motion is due within fifteen days and a reply is due within seven days thereafter.³⁷¹ Vigo County also imposes a twenty page limit on all initial or response briefs and a ten page limit on any reply brief.³⁷² In Hamilton County, any authorities relied upon in any brief or memorandum “which are not cited in the Northeastern Reporter system shall be attached to counsel’s brief.”³⁷³

Regarding written discovery, in Marion County, “[i]nterrogatories shall be limited to a total of [25] including subparts and ... shall not be used as a substitute for the taking of a deposition.”³⁷⁴ In Boone County, “[n]o party shall serve on any other party more than 30 interrogatories *or requests for admissions*”³⁷⁵ In Madison County, interrogatories are limited to a total of fifty and “shall NOT be used as a substitute for taking of a deposition.”³⁷⁶ In Vigo County, interrogatories “shall be kept to a reasonable limit and shall not require the answering party to make more than one hundred twenty-five (125) responses.”³⁷⁷

In Clark County, caption headings must be centered at the top of the filing and must use the word “Case” in presenting the “number assigned to the action”—as opposed to the word “Cause,” for example.³⁷⁸ In Lake County, the filing of a timely appearance effects an automatic thirty day enlargement of time to respond to a complaint, without the need for a further filing.³⁷⁹ In Wayne County, an initial enlargement of time to file a responsive pleading is “granted summarily”—upon the filing of a motion—“for up to forty-five (45) days.”³⁸⁰

In short, practitioners should review the local rules for each county in which a new matter is undertaken *early* to become familiar with the particular court’s guidelines, deadlines and other procedures ranging from font style and size, format of pleadings, limits on written discovery and deadlines for responding to motions.³⁸¹

369. Porter County LR64-TR05 R. 3300.

370. *Id.*

371. Vigo County LR84-TR7 R. 4.

372. Vigo County LR84-TR7 R. 4(D)(2).

373. Hamilton County LR29-TR00 R. 203.10.

374. Marion County LR49-TR33 R. 213.

375. Boone County LR06-TR26-BLR R. 6 (emphasis added).

376. Madison County LR48-TR33 R. 24 (“NOT” is capitalized in the actual text of the Rule).

377. Vigo County LR84-TR33 R. 10.

378. Clark County LR10-AR00 R. 7.

379. Lake County Local R. 7(D).

380. Wayne County Local R. 8(B).

381. See Michael W. Hoskins, *Juggling the Rules—Attorneys Fret over Differing Local Court Regulations*, IND. LAW., Mar. 21, 2007, at 1 (discussing colorful examples of new local court rules and practices).

