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 several decisions addressing principles of state procedural law and providing helpful interpretations of the Indiana Rules of Trial Procedure.

I. INDIANA SUPREME COURT DECISIONS

A. Standing

In *Thomas v. Blackford County Area Board of Zoning Appeals*,[2] the Indiana Supreme Court clarified the procedure for challenging a litigant's standing. In *Thomas*, Oolman Dairy requested and obtained a special exception to construct and operate a "confined animal feeding operation (CAFO) in an agricultural district in Blackford County."[3] Elizabeth Thomas, whose residence was approximately one-third of a mile from the CAFO, challenged the special exception.[4] Oolman Dairy responded with a Rule 12(B)(6) motion, arguing that Thomas was not an "aggrieved party" as defined by the applicable statute and thus lacked standing to challenge the special exception.[5] The trial court denied the motion but scheduled an evidentiary hearing on the standing issue.[6] Following the hearing, the trial court concluded that Thomas lacked standing and dismissed her challenge.[7]

The court of appeals reversed, holding that by receiving evidence outside the pleadings, the trial court converted Oolman Dairy's motion to dismiss into a motion for summary judgment.[8] Accordingly, the court remanded the matter to enable the parties to "complete their presentation of evidence."[9]

The Indiana Supreme Court granted transfer to consider the proper procedure for a challenge to a litigant's standing.[10] The supreme court began its analysis by noting that a party can challenge standing with a Rule 12(B)(6) motion to

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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, 2008, through September 30, 2009, as well as amendments to the Indiana Rules of Trial Procedure that the Indiana Supreme Court ordered during the survey period.

2. 907 N.E.2d 988 (Ind. 2009).

3. *Id.* at 990.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* (citing Huffman v. Ind. Office of Envtl. Adjudication, 811 N.E.2d 806, 813 (Ind. 2004)).

dismiss for failure to state a claim. But this would require that the lack of standing "be apparent on the face of the complaint."[11] Because resolution of the standing challenge in the instant case required consideration of evidence outside the pleadings, the court affirmed the trial court's dismissal of Oolman Dairy's Rule 12(B)(6) motion; however, because no "factual backup" had been supplied, the court held that the standing challenge could not be treated as a summary judgment motion under Trial Rule 56.[12]

The court concluded that a hearing related to a standing challenge where evidence must be received "like a hearing on a motion to dismiss for lack of personal jurisdiction . . . is a hearing at which factual issues may be resolved and factual determinations are reversed on appeal only if clearly erroneous."[13] The court concluded that it could not determine that the trial court's evaluation of conflicting evidence was clearly erroneous and, therefore, affirmed the trial court.[14]

B. Involuntary Dismissal

In *City of East Chicago v. East Chicago Second Century, Inc.*,[15] the court revisited the proper standard for ruling on a motion to dismiss for failure to state a claim pursuant to Trial Rule 12(B)(6). In 1996, Showboat Marina Partnership applied for and obtained a license to operate a riverboat casino in East Chicago, Indiana.[16] Showboat then entered into a local development agreement with the city of East Chicago, whereby Showboat agreed to make annual contributions based on a percentage of its gross receipts.[17] A portion of the contribution was to be directed to the for-profit corporation East Chicago Second Century, Inc.[18] Ownership of the casino was transferred several times between 1996 and 2005, until RIH Acquisitions IN, LLC acquired it in April 2005.[19] Shortly before of the transfer to RIH, Second Century filed an action seeking a declaration that RIH would be required to continue making payments to Second Century.[20] The Indiana Attorney General intervened and sought imposition of a constructive trust as to any funds paid to Second Century.[21] Second Century filed a motion to dismiss, which the trial court granted and the court of appeals affirmed.[22]

The Indiana Supreme Court granted transfer and reinstated many of the

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11. *Id.* (citing *Huffman*, 811 N.E.2d at 814).
12. *Id.*
13. *Id.* at 991 (citing Bagnall v. Town of Beverly Shores, 726 N.E.2d 782, 786 (Ind. 2000)).
14. *Id.*
15. 908 N.E.2d 611 (Ind. 2009).
16. *Id.* at 615.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 616.
21. *Id.*
22. *Id.*

dismissed claims, following a discussion of the proper standard for motions to dismiss under Trial Rule 12(B)(6).[23] Although decided approximately two years after *Bell Atlantic Corp. v. Twombly*,[24] in which the U.S. Supreme Court held that a complaint must allege sufficient factual allegations to demonstrate a "plausible" claim for relief,[25] the Indiana Supreme Court did not deter from the established principles of Indiana law governing motions to dismiss for failure to state a claim.[26] First, the court noted that a motion to dismiss for failure to state a claim is intended to "test[] the legal sufficiency of the claim, not the facts supporting it."[27] The court next explained that reviewing courts must view pleadings in the light most favorable to the non-movant, with every inference resolved in the non-movant's favor.[28] The court then explained:

> Inasmuch as motions to dismiss are not favored by the law, they are properly granted only "when the allegations present no possible set of facts upon which the complainant can recover." Put another way, a dismissal under Rule 12(B)(6) will not be affirmed "unless it is apparent that the facts alleged in the challenged pleading are incapable of supporting relief under any set of circumstances."[29]

The court then applied this standard to each of the claims asserted by the Attorney General and reinstated several of them.[30]

C. Consolidation

1. Consolidation Under Trial Rule 42(A).—In *Wagler v. West Boggs Sewer District, Inc.*,[31] the court considered the propriety of consolidation of actions under Trial Rule 42(A). West Boggs Sewer District, Inc. sought easements to construct facilities; however, when three property owners would not donate the easements and rejected West Boggs's offer of compensation, West Boggs brought condemnation actions against each of the three property owners.[32] West Boggs filed a motion for consolidation in one of the cases and served the motion on attorneys representing all three property owners.[33] West Boggs then filed a summary judgment motion, seeking summary judgment in all three cases.[34] Only

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23. *Id.* at 616-17.
24. 550 U.S. 544 (2007).
25. *Id.* at 555-56.
26. *E. Chicago*, 908 N.E.2d at 617.
27. *Id.* (citing Charter One Mortgage Corp. v. Condra, 865 N.E.2d 602 (Ind. 2007)).
28. *Id.*
29. *Id.* (quoting Mart v. Hess, 703 N.E.2d 190, 193 (Ind. Ct. App. 1998); Couch v. Hamilton County, 609 N.E.2d 39, 41 (Ind. Ct. App. 1993)).
30. *Id.* at 617-22.
31. 898 N.E.2d 815 (Ind. 2008).
32. *Id.* at 817.
33. *Id.* at 820.
34. *Id.*

one property owner responded.[35] The trial court granted summary judgment in favor of West Boggs as to the responding property owner.[36] On the trial court's instruction, West Boggs then filed summary judgment motions in each of the other cases, referencing the judgment in the first case.[37]

The court granted transfer to consider, among other issues, the trial court's consolidation of the three condemnation actions.[38] The property owners challenged the propriety of the trial court's consolidation under Trial Rule 42(A),[39] arguing that the actions did not involve common questions of law or fact because there were different parties and different property values involved.[40] But the court reasoned that, because each of the property owners raised a common legal defense, i.e., whether West Boggs made a good faith offer to purchase the easements, and because each of the property owners had ample notice of and opportunity to respond to the summary judgment motion, the trial court did not abuse its discretion in ordering the consolidation under Trial Rule 42(A).[41]

2. Consolidation Under Trial Rule 42(D).—In *State ex rel. Curley v. Lake Circuit Court*,[42] the court considered the propriety of consolidation of actions under Trial Rule 42(D). On October 2, 2008, John Curley, Lake County Indiana Republican Central Committee Chairman, filed an action in Lake County Superior Court relating to operation of "early voting sites."[43] Four days later, on October 6, 2008, a number of parties filed an action in Lake County Circuit Court regarding the same sites.[44]

Immediately following the filing of the superior court action on October 2, the defendant, Lake County Board of elections ("the Board"), removed the matter to the U.S. District Court for the Northern District of Indiana.[45] Nevertheless, the following day, the superior court entered a temporary restraining order, requiring that the Board not open early voting sites.[46] When the circuit court action was filed a few days later on October 6, the circuit court entered a temporary

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35. *Id.*
36. *Id.* at 822.
37. *Id.*
38. *Id.* at 817.
39. Indiana Trial Rule 42(A) provides:

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

IND. TRIAL R. 42(A).
40. *Wagler*, 898 N.E.2d at 821.
41. *Id.* at 821-22.
42. 899 N.E.2d 1271 (Ind. 2008).
43. *Id.* at 1271.
44. *Id.*
45. *Id.* at 1272.
46. *Id.*

restraining order directing that the Board open the early voting sites.[47] The federal district court remanded the superior court case back to the superior court.[48] The next day, on October 14, the circuit court entered a preliminary injunction directing that the Board open the early voting sites.[49]

In an original action, the court sought to untangle the situation.[50] Citing Trial Rule 42(D),[51] the court concluded that the circuit court case, as the later-filed matter, should be consolidated into the superior court action.[52] But the court also concluded that the preliminary injunction entered by the circuit court would remain in effect, pending any action by the superior court.[53]

D. Summary Judgment

In *Estate of Mintz v. Connecticut General Life Insurance Co.*,[54] the court reversed the trial court's entry of summary judgment, concluding that issues of proximate cause and whether defendants acted reasonably were issues the trier of fact had to resolve.

As a thirty-plus year Indiana University professor, Mintz received full and basic supplemental life insurance coverage under a group plan through Connecticut General Life Insurance Co. ("Connecticut General").[55] Mintz's coverage would be reduced substantially upon his sixty-fifth birthday, unless he contacted Gruber, Connecticut General's agent servicing Indiana University employees, to make arrangements to convert the group coverage to an individual policy.[56] Gruber advised Mintz that he would take care of everything.[57] But Gruber misquoted the premium amount, resulting in Mintz's failing to provide sufficient funds to convert to individual policies with the same coverage levels.[58]

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47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. Indiana Trial Rule 42(D) provides in pertinent part:

> When civil actions involving a common question of law or fact are pending in different courts, a party to any of the actions may, by motion, request consolidation of those actions for the purpose of discovery and any pre-trial proceedings. Such motion[s] may only be filed in the court having jurisdiction of the action with the earliest filing date and the court shall enter an order of consolidation for the purpose of discovery and . . . pre-trial proceedings unless good cause to the contrary is shown and found by the court to exist.

IND. TRIAL R. 42(D).

52. *Curley*, 899 N.E.2d at 1273.
53. *Id.*
54. 905 N.E.2d 994 (Ind. 2009).
55. *Id.* at 996.
56. *Id.*
57. *Id.*
58. *Id.* at 997.

Mintz sued and the jury returned a verdict in favor of Gruber on Mintz's negligence claim.[59] The court of appeals reversed and remanded based on an erroneous negligence instruction.[60] On remand, the trial court granted Gruber's motion for summary judgment as to Mintz's negligence claim, and the court of appeals affirmed.[61]

The court granted transfer and reversed the trial court's entry of summary judgment, noting, "summary judgment is generally inappropriate in negligence cases because issues of contributory negligence, causation, and reasonable care are more appropriately left for the trier of fact."[62] The court concluded that issues of whether Gruber acted reasonably under the circumstances and whether his negligence, if any, was the proximate cause of Mintz's injuries were issues that the trier of fact should determine.[63]

E. New Trial

In *Henri v. Curto*,[64] the court examined whether allegations of jury misconduct would warrant a new trial. Henri and Curto were students at Butler University when they met at a campus party in March 2004.[65] After consuming alcohol at the party, they left together and engaged in sexual intercourse in a dorm room.[66] Shortly thereafter, Henri sued Curto, alleging lack of consent.[67] Curto counterclaimed, alleging tortious interference with his contract with the university.[68] After trial, the jury found in favor of Curto and against Henri, awarding Curto $45,000 on his counterclaim.[69]

Following the denial of her motion for new trial pursuant to Trial Rule 59, Henri appealed, claiming jury misconduct.[70] Specifically, Henri claimed that the jury received improper external communications[71] because: (1) the bailiff answered a jury question without referring it to the judge; (2) the jury was improperly instructed as to the need for unanimity; (3) a juror answered a cell phone call during deliberations; and (4) an alternate juror improperly communicated with the regular jurors during the trial and deliberations.[72]

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59. *Id.* at 998.
60. *Id.*
61. *Id.*
62. *Id.* at 999 (quoting Coffman v. PSI Energy, Inc., 815 N.E.2d 522, 527 (Ind. Ct. App. 2004)).
63. *Id.* at 999-1000.
64. 908 N.E.2d 196 (Ind. 2009).
65. *Id.* at 199.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*

The court first addressed the issue of responding to a jury question without involving counsel.[73] The court observed that the "better practice" is for the judge to advise the parties and their counsel of the jury's question and that failure to adhere to this practice results in a rebuttable presumption of error.[74] In determining whether the presumption is rebutted, the court evaluated the nature of the communication to the jury and what effect it might have had on deliberations.[75] Because the trial court had previously instructed the jury that its verdict must be unanimous, the court's communication to the jury through the bailiff of this same information was neither new nor prejudicial to Henri.[76] Further, the court was unable to conclude that the bailiff's answer regarding the necessity of a unanimous verdict was "coercive, or that it resulted in juror coercion or deception, or that it resulted in an unfair trial."[77] The court next determined that, though undesirable and ideally avoided, the juror's cell phone use did not constitute sufficient juror misconduct to warrant a new trial, i.e., Henri could not show that the cell phone use constituted gross misconduct and that it probably harmed her.[78] Finally, the court concluded that the participation of an alternate juror, which primarily consisted of inappropriate gestures, was annoying but did not amount to jury misconduct.[79]

F. Preliminary Injunction

In *Roberts v. Community Hospitals of Indiana, Inc.*,[80] the court considered whether a trial court can consolidate a preliminary injunction hearing with a trial on the merits without notice to the parties—a matter of first impression in Indiana.[81] John Roberts, a former medical resident in Community Hospital's Family Medicine Residency Program, sought to enjoin the termination of his medical residency contract.[82] Following a number of difficulties, including unexcused absences, poor performance, and unprofessional behavior, Community terminated Roberts's contract.[83] Roberts filed suit, seeking a temporary restraining order and preliminary injunction reinstating him as a resident.[84] Following a hearing, the trial court requested that the parties submit proposed

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73. *Id.* at 200.

74. *Id.* at 200-01 (citing Rogers v. R.J. Reynolds Tobacco Co., 745 N.E.2d 793, 796 (Ind. 2001)).

75. *Id.* at 201 (citing Smith v. Convenience Store Distrib. Co., 583 N.E.2d 735, 738 (Ind. 1992)).

76. *Id.*

77. *Id.* at 202.

78. *Id.* at 202-03.

79. *Id.* at 203.

80. 897 N.E.2d 458 (Ind. 2008).

81. *Id.* at 468-69.

82. *Id.* at 460-61.

83. *Id.* at 461-62.

84. *Id.* at 462.

findings of fact and conclusions of law.[85]

Without notice to the parties, the trial court consolidated the preliminary injunction hearing with the trial on the merits in accordance with Trial Rule 65(A)(2), denied Roberts' request for a preliminary injunction, and entered final judgment in Community's favor.[86] Roberts filed a motion to correct errors, challenging the consolidation and asserting that he would have offered additional evidence if he had notice of the consolidation.[87] Roberts appealed, and the court of appeals reversed and remanded.[88]

The Indiana Supreme Court granted transfer to address the issue of first impression of whether—and under what circumstances—a trial court may consolidate a preliminary injunction hearing with a trial on the merits without notice to the parties.[89] The court began its analysis by noting that neither Trial Rule 65(A)(2), nor its federal counterpart, expressly require that a trial court provide notice in advance of consolidation.[90] Looking to decisions of various federal courts, the court concluded that "the prevailing federal rule has long been that consolidation without notice is not reversible error absent a showing of prejudice."[91] As to what would constitute a sufficient showing of prejudice, the court held:

> [P]rejudice requires more than simply identifying steps that might possibly produce evidence not adduced at the preliminary injunction stage. Bare assertions that discovery was incomplete or witnesses were not called will not suffice, at least where, as here, there was time for significant discovery. Rather, prejudice from a surprise consolidation ordinarily requires either admissible, material evidence that would be produced at trial and that would have likely changed the outcome on the merits, or a persuasive showing why available evidence was not accessible in the time between filing the complaint and the hearing.[92]

The court observed that Roberts had done no more than recite a list of actions he would have taken had the court notified him of the consolidation.[93] This, the court concluded, was not sufficient to show prejudice; therefore, the court held that the trial court's consolidation without notice was error, but not reversible error.[94]

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85. *Id.*

86. *Id.*

87. *Id.* at 462-63.

88. *Id.* at 463.

89. *Id.* at 464.

90. *Id.*

91. *Id.* at 465 (citing Eli Lilly & Co. v. Generix Drug Sales, Inc., 460 F.2d 1096, 1106 (5th Cir. 1972)).

92. *Id.* at 466.

93. *Id.*

94. *Id.* at 467-68.

II. Indiana Court of Appeals Decisions

A. Subject Matter Jurisdiction

In *Hart v. Webster*,[95] the court of appeals reversed the trial court's dismissal with prejudice of the plaintiff's claims against his former employer.[96] William Hart was a vice president for the Steak-n-Shake Company (SNS).[97] SNS requested that Webster, SNS's director of quality assurance, investigate Hart's activities, especially his dealings with vendors.[98] After Hart was cleared of all wrongdoing, he filed suit against SNS and Webster, alleging that Webster's disclosure of information concerning the allegations caused Hart severe mental, emotional, and physical harm.[99] SNS and Webster moved to dismiss pursuant to Trial Rule 12(B)(1), claiming the court lacked subject matter jurisdiction because Hart's claims, including physical injury and inability to work, fell within the exclusive province of the Workers Compensation Board.[100] The trial court ultimately granted the motion and dismissed Hart's complaint "with prejudice."[101]

The court of appeals noted on appeal that Hart amended his complaint, removing his allegations of physical injury and inability to work;[102] accordingly, the court determined that the trial court had subject matter jurisdiction over Hart's amended complaint.[103] Moreover, the court concluded a dismissal for lack of subject matter jurisdiction cannot operate as a dismissal with prejudice; therefore, the dismissal of his earlier pleadings did not bar him from filing an amended complaint.[104]

B. Personal Jurisdiction

In *Attaway v. Omega*,[105] the Indiana Court of Appeals affirmed the trial court's denial of a motion to dismiss for lack of personal jurisdiction.[106] Llexcyiss Omega and D. Dale York listed a Porsche for sale on eBay, and the Attaways were the winning bidders.[107] After taking delivery of the vehicle, the Attaways persuaded MasterCard to rescind payment to Omega and York,

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95. 894 N.E.2d 1032 (Ind. Ct. App. 2008).
96. *Id.* at 1036, 1038.
97. *Id.* at 1034.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 1036.
102. *Id.* at 1035.
103. *Id.* at 1037.
104. *Id.*
105. 903 N.E.2d 73 (Ind. Ct. App. 2009).
106. *Id.* at 76, 80.
107. *Id.* at 75.

contending that the vehicle was not as described on eBay.[108] Omega and York filed suit against the Attaways to recover the purchase price and other delivery costs.[109] The Attaways moved to dismiss, claiming that the court lacked personal jurisdiction, and the trial court denied the motion.[110]

On appeal, the court of appeals concluded that, in bidding on the vehicle, the Attaways could see that the vehicle was located in Indiana and likely considered that to be a factor, especially because the Attaways would be responsible for paying delivery expenses.[111] The court concluded that, by submitting a bid, thereby agreeing "to appear, in person or by representative" to take delivery of the vehicle, and by making arrangements to have the vehicle transported from Indiana to their home in Idaho, the Attaways purposefully availed themselves of "the privilege of conducting activities within the State of Indiana," and "could reasonably anticipate defending a lawsuit in Indiana related to this eBay purchase."[112]

C. Service of Process

In *Evans v. State*,[113] the Indiana Court of Appeals reversed the trial court's dismissal of Beulah Evans's petition for judicial review.[114] Evans sought judicial review of an administrative denial of Medicaid benefits.[115] She served a summons on the Indiana Attorney General and Governor Mitch Daniels, but did not serve the executive director of the Indiana Family & Social Services Administration (IFSSA).[116] Under Trial Rule 4.6(A)(3), service upon state governmental organizations requires service on both the attorney general and the executive officer of the organization.[117] But relying on Trial Rule 4.15(F),[118] the court concluded that service on the attorney general and the governor was sufficient to give the IFSSA notice of the suit and was reasonably calculated to inform the IFSSA of the action.[119]

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108. *Id.*

109. *Id.* at 76.

110. *Id.*

111. *Id.* at 79.

112. *Id.*

113. 908 N.E.2d 1254 (Ind. Ct. App. 2009), *reh'g denied.*, No. 21A01-0903-CV-152, 2009 Ind. app. LEXIS 1639 (Ind. Ct. App. Sept. 15, 2009).

114. *Id.* at 1255, 1259.

115. *Id.* at 1256.

116. *Id.*

117. *Id.* at 1258.

118. Indiana Trial Rule 4.15(F) provides:

> No summons or the service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that an action has been instituted against him, the name of the court, and the time within which he is required to respond.

119. *Evans*, 908 N.E.2d at 1258-59.

D. Venue

In *Gulf Stream Coach, Inc. v. Cronin*,[120] Gulf Stream Coach, Inc. ("Gulf Stream") appealed the trial court's denial of its motion to transfer venue pursuant to Trial Rule 12(B)(3).[121] The Indiana Court of Appeals reversed the trial court's decision and remanded with instructions.[122]

The Cronins purchased a recreational vehicle (RV) from Gulf Stream and immediately began to suffer a litany of problems with the RV that Gulf Stream was not able to remedy.[123] The RV's owner's manual required that any warranty litigation be initiated in Indiana, so the Cronins parked the RV in a parking lot near their attorney's office in Madison County and filed suit against Gulf Stream in Madison County.[124] Gulf Stream moved to dismiss or transfer venue pursuant to Rule 12(B)(3), arguing that Elkhart County, the location of Gulf Stream's principal office, was the preferred venue under Rule 75.[125] The trial court denied the motion, reasoning that Madison County was also a preferred venue, and Gulf Stream appealed.[126]

The court of appeals first remarked that Elkhart County would be a preferred venue under Rule 75(A)(3) because it where Gulf Stream's principal office is located.[127] But the court also noted that there are often multiple preferred venue counties for a case, and, if a case is filed in a preferred venue county, the trial court cannot transfer venue to another preferred venue.[128] Accordingly, the court had to determine whether Madison County was also a preferred venue under Rule 75(A)(2), which would require that the RV was a chattel that was regularly located or kept in Madison County.[129] Finding no discussion of the term "regularly" in any Indiana appellate opinions, the court turned to the dictionary to define "regular" as "customary, usual, or normal."[130] Because the Cronins had no connection with Indiana other than this lawsuit, the court concluded that Madison County was not the location where the RV was regularly kept. Therefore, the trial court erred in denying the motion to transfer venue from a non-preferred venue to a preferred venue.[131]

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120. 903 N.E.2d 109 (Ind. Ct. App. 2009).
121. *Id.* at 110-11.
122. *Id.* at 110.
123. *Id.* at 111.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 112.
128. *Id.* at 111-12 (citing Randolph County v. Chamness, 879 N.E.2d 555, 556 (Ind. 2008)).
129. *Id.* at 112.
130. *Id.* at 113 (quoting WEBSTER'S II NEW COLLEGE DICTIONARY 934 (2001)).
131. *Id.*

E. Recusal

In *Ross v. Rudolph*,[132] the Rosses and their law firm, The Law Group of Ross and Brunner, (together "Ross") appealed the trial court's order setting aside a summary judgment previously entered in Ross's favor where the trial court judge sua sponte recused himself the same day.[133] The Indiana Court of Appeals affirmed.[134]

In 1994, a hexane gas explosion at a Central Soya facility in Indianapolis injured Rudolph and others (together "Rudolph").[135] Rudolph retained Ross to represent them in litigation against Central Soya.[136] Rudolph sued Ross for an accounting of the settlement Ross negotiated with Central Soya.[137] By orders dated January 24, 2008, and August 22, 2008, the trial court entered summary judgment in favor of Ross.[138] On January 6, 2009, the trial court entered an order setting aside the summary judgment in Ross' favor and sua sponte recused himself.[139] The chronological case summary does not reveal which order came first.[140] Ross appealed the order setting aside summary judgment.[141]

On appeal, the court of appeals framed the issue as whether the trial court had authority to set aside the summary judgment in light of the judges's recusal.[142] The court next observed that "a judge may not render a substantive ruling in a case where a recusal was issued simultaneously"; rather, once a judge has recused himself, he may not render any substantive ruling in the case.[143] But in this case, the record was unclear whether the trial court issued the order setting aside summary judgment before or after the judge recused himself.[144] Accordingly, the court presumed that the trial court did not set aside the summary judgment after the recusal and affirmed the trial court's order.[145]

F. Pleadings

1. Challenge to Execution of Instrument Attached to Pleadings.—In *Baldwin v. Tippecanoe Land & Cattle Co.*,[146] the Indiana Court of Appeals affirmed the

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132. 913 N.E.2d 218 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 560 (Ind. 2009).

133. *Id.* at 219.

134. *Id.* at 220.

135. *Id.* at 219.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 220.

141. *Id.*

142. *Id.*

143. *Id.* (citing Thacker v. State, 563 N.E.2d 1307, 1309 (Ind. Ct. App. 1990)).

144. *Id.*

145. *Id.*

146. 912 N.E.2d 902 (Ind. Ct. App. 2009), *trans. denied*, 2010 Ind. LEXIS 239 (Ind. Mar. 11, 2010).

trial court's entry of summary judgment.[147] The plaintiff mortgagee filed a complaint to foreclose a second mortgage on the defendant mortgagor's property and attached copies of a promissory note and mortgage.[148] The defendant responded with a general, unverified denial under Trial Rule 8(B).[149] The plaintiff moved for summary judgment, attaching the promissory note and mortgage to its designation of evidence.[150] The defendant opposed summary judgment, arguing that the mortgage was unenforceable because the note was not signed and was not attached to the mortgage.[151] The trial court granted summary judgment, and the defendant appealed.[152]

The court began its analysis with Trial Rule 9.2(B), which provides that the execution is deemed to be established where a document upon which a pleading is founded is attached to the pleading and execution is not denied under oath.[153] The court also noted that a general denial under Trial Rule 8(B) is subject to the provisions of Rule 11, and "Trial Rule 11(B) makes clear that, where a verification or oath is required, the person signing must acknowledge that his or her statements are true and made under penalty of perjury."[154] Reading these Trial Rules 8(B), 9.2(B) and 11(B) together, the court concluded that a general denial "does not constitute an oath by which the pleader denies the execution of an instrument attached to a claim."[155]

2. Amendment to Conform to the Evidence.—In *Deel v. Deel*,[156] the court of appeals affirmed that the trial court could modify the language of a divorce decree by interpreting it, but the court of appeals chose a different result from that of the trial court.[157] The wife filed a Rule to Show Cause why the court should not hold the husband in contempt for violating various provisions of the couple's divorce decree.[158] The wife argued that cash payments the husband was required to make were pursuant to a property settlement and did not constitute spousal maintenance. Therefore, the husband should not have been deducting the payments from his income tax return, and the wife should not have been required to pay income taxes on the payments.[159] The trial court declined to hold the husband in contempt for deducting the payments but clarified that the husband's cash payments were a property settlement, not spousal maintenance, and ordered

147. *Id.* at 903.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 904.
152. *Id.*
153. *Id.*
154. *Id.* at 905.
155. *Id.*
156. 909 N.E.2d 1028 (Ind. Ct. App. 2009).
157. *Id.* at 1032, 1035.
158. *Id.* at 1031.
159. *Id.*

the husband to modify his tax returns accordingly.[160]

The husband appealed, arguing that the wife's affidavit in support of her Rule to Show Cause filing did not discuss modification of the decree; accordingly, the husband argued he did not have adequate notice.[161] The court of appeals concluded that, because the husband's counsel did not object to—and agreed with—the wife's counsel's statement at the outset of the hearing that modification of the cash payment provision was an issue to be determined, the husband waived his right to object later.[162] The court concluded that, under Trial Rule 15(B), the issue had been tried by the express or implied consent of the parties, so the issue "shall be treated in all respects as if [it] had been raised in the pleadings."[163]

G. Intervention

In *In re Paternity of Duran*,[164] the Indiana Court of Appeals affirmed the trial court's denial of a motion to intervene pursuant to Trial Rule 24.[165] On January 15, 1985, Maria E. Duran ("Duran") was born out of wedlock to Maria I. Duran ("Maria") and Joseph Regalado ("Joseph").[166] Maria passed away two years later, and her parents sought to adopt Duran.[167] When Joseph was served with personal notice of the adoption proceedings and failed to respond, the trial court entered a default order terminating his parental rights and subsequently entered an order permitting Duran's grandparents to adopt her.[168]

In 1991, Joseph was severely injured during an altercation with Chicago police officers and was adjudicated a disabled person.[169] A guardianship estate was opened with Joseph's father, Baltasar Regalado ("Baltasar") appointed as Joseph's guardian.[170] On Joseph's behalf, Baltasar sued the City of Chicago and settled the case for $15 million.[171]

In 2000, Duran learned that Joseph, her biological father, was still alive and sought to establish a relationship with him.[172] Duran commenced a paternity action in Illinois in October 2003.[173] The day after Joseph's death on October 23,

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160. *Id.* at 1031-32.

161. *Id.* at 1033.

162. *Id.* at 1033-34.

163. *Id.* at 1033 (quotation omitted).

164. 900 N.E.2d 454 (Ind. Ct. App. 2009), *reh'g denied*, No. 64A03-0702-JV-66, 2009 Ind. App. LEXIS 1618 (Ind. Ct. App. May 14, 2009).

165. *Id.* at 466.

166. *Id.* at 456-57.

167. *Id.* at 457.

168. *Id.*

169. *Id.*

170. *Id.* at 458.

171. *Id.*

172. *Id.*

173. *Id.*

2004, the Illinois court determined it did not have jurisdiction.[174] Duran then field a paternity action in Indiana on October 26, 2004.[175] Approximately one year later, Baltasar sought to intervene in the paternity action, arguing that the determination that Joseph was Duran's biological father could affect Baltasar's status as the sole heir of Joseph's multi-million dollar estate.[176] The trial court denied Baltasar's motion.[177]

The court of appeals began its review with an analysis of the requirements for intervention as a matter of right under Trial Rule 24(A).[178] The court articulated a three-part test for determining whether intervention as of right is appropriate: "The intervenor must demonstrate: (1) that he has an interest in the subject of the action; (2) that disposition in the action may as a practical matter impede protection of that interest; and (3) that representation of the interest by existing parties is inadequate."[179] The court agreed with the trial court's determination that any interest Baltasar had in the paternity action was "merely indirect and derivative" and thus would not justify intervention as a matter of right.[180]

H. Involuntary Dismissal

In *In re M.D.*,[181] the Indiana Court of Appeals remanded a matter to the trial court with instructions that the trial court must supply written findings of fact and conclusions of law when requested by a party, even if the request is made by motion before an evidentiary hearing.[182]

A mother (B.D.) and father (H.D.) have three children, the youngest of whom (M.D.) was two months old on August 21, 2008.[183] On that date, when B.D. picked M.D. up from daycare, he seemed fussier than normal and continued to be fussy throughout the weekend.[184] The following Monday, B.D. took M.D. to the doctor's office and learned that he had suffered a broken leg, which the doctor determined had resulted from "non-accidental trauma."[185] A referral was made to the Indiana Department of Child Services (DCS), which took custody of all three children and filed Children in Need of Services (CHINS) petitions.[186]

Before the two-day evidentiary hearing regarding the CHINS petitions, both

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174. *Id.*
175. *Id.*
176. *Id.* at 459-60.
177. *Id.*
178. *Id.* at 466-67.
179. *Id.* at 467 (citing *In re* Paternity of E.M., 654 N.E.2d 890, 892 (Ind. Ct. App. 1995)).
180. *Id.* at 468.
181. 906 N.E.2d 931 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 551 (Ind. 2009).
182. *Id.* at 933.
183. *Id.* at 932.
184. *Id.*
185. *Id.*
186. *Id.*

parties filed motions requesting findings of fact and conclusions of law pursuant to Trial Rule 52(A).[187] Following the DCS's presentation of evidence in support of its CHINS petitions, the parents orally moved to dismiss the petitions pursuant to Trial Rule 41(B).[188] DCS appealed the trial court's dismissal of the petitions without providing written findings of fact or conclusions of law.[189]

On appeal, the court noted that Trial Rule 41(B) requires that, if requested at the time of the motion, the trial court must make findings of fact and conclusions of law when rendering judgment under Rule 41(B).[190] Here, the parties made their Rule 52(A) motions before the hearing, not at the time of the Rule 41(B) motion.[191] But the court concluded that the "best practice and policy for a trial court" is to issue findings of fact and conclusions of law in connection with granting a Rule 41(B) motion, even if the requests are made before the motion.[192] Accordingly, the court remanded the matter to the trial court with instructions to prepare findings of fact and conclusions of law supporting its grant of the parents' Rule 41(B) motion to dismiss.[193]

I. Discovery

In *May v. George*,[194] Dwight May sued Jerry George after sustaining injury caused by a tree that fell from George's property.[195] The Indiana Court of Appeals affirmed the trial court's grant of summary judgment in favor of George.[196]

May filed a complaint, alleging negligence against George, after a tree fell from George's property onto May's vehicle, damaging the truck and injuring May.[197] George moved for summary judgment, arguing that a "rural landowner does not owe a duty to protect others outside the land from physical harm caused by a natural condition of the land."[198] May opposed the summary judgment motion by presenting, among others, the affidavit of his son, Austin, who claimed that he was familiar with the area and that the tree was in noticeably poor condition.[199] The trial court granted George's motion to strike Austin's affidavit and granted summary judgment in George's favor.[200]

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187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 932-33.
191. *Id.* at 933.
192. *Id.*
193. *Id.*
194. 910 N.E.2d 818 (Ind. Ct. App. 2009).
195. *Id.* at 820.
196. *Id.*
197. *Id.* at 820-21.
198. *Id.* at 821.
199. *Id.* at 822.
200. *Id.*

The court of appeals affirmed the trial court's grant of summary judgment and held that the trial court did not abuse its discretion in striking Austin's affidavit.[201] Before his summary judgment motion, George had served May with interrogatories, requesting that May identify the "names and addresses of everyone who has relevant information."[202] May did not disclose Austin in his response and did not seasonably supplement his interrogatory answers as required by Trial Rule 26(E)(1)(a).[203] The court observed that, if a party fails to supplement discovery responses, the trial court has discretion to exclude the evidence.[204] The court held that it could not conclude that the trial court had abused its discretion in striking Austin's affidavit and therefore affirmed the trial court's decision.[205]

J. Summary Judgment

1. Specific Designations of Evidence Required.—In *Duncan v. M&M Auto Service, Inc.*,[206] Richard Duncan appealed the trial court's grant of summary judgment in favor of M&M Auto Service in connection with Duncan's claim that he was injured as a result of M&M's negligently installing a compressed natural gas system in Duncan's van.[207]

Duncan was employed by the Southwestern Indiana Regional Council on Aging, which owned a van equipped to run on natural gas.[208] M&M had installed the compressed natural gas system using a fuel conversion kit.[209] While Duncan was refilling the natural gas tanks on the van, gas escaped and caused an explosion, injuring Duncan.[210] Duncan sued M&M alleging that it negligently installed and maintained the compressed natural gas system.[211] M&M filed a motion for summary judgment that the trial court granted.[212]

On appeal, Duncan argued inter alia that M&M's designation of evidence in support of its summary judgment motion was not sufficiently specific.[213] The court agreed with Duncan that Trial Rule 56(C) requires a party to "designate an affidavit either by providing specific page numbers and paragraph citations, or by specifically referring to the substantive assertions relied on. In other words,

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201. *Id.* at 825-26.

202. *Id.* at 825.

203. *Id.*

204. *Id.* (citing Dennerline v. Atterholt, 886 N.E.2d 582, 592 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1230 (Ind. 2008)).

205. *Id.* at 825-26.

206. 898 N.E.2d 338 (Ind. Ct. App. 2008).

207. *Id.* at 340.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 341.

212. *Id.*

213. *Id.*

designating evidentiary materials in their entirety fails to meet the specificity requirement."[214] The court then noted that many of the factual assertions in M&M's summary judgment brief have no citation to the designation of evidence and that other designations refer to a M&M employee's affidavit as a whole.[215] As to M&M's failure to cite to designated materials, the court declined to search through the designated material on M&M's behalf.[216] But the court concluded that references the employee's entire affidavit were permissible because the affidavit was only three pages with ten numbered paragraphs, all of which was relevant to issues on summary judgment.[217]

2. Summary Judgment Affidavits.—In *Hayes v. Trustees of Indiana University*,[218] Gloria Hayes appealed the trial court's summary judgment order for the Trustees of Indiana University, and the court of appeals affirmed.[219]

The University employed Hayes in various capacities from June 1967 through March 2004.[220] On March 12, 2004, the University notified Hayes that her position had been eliminated, effective June 30, 2004, due to a reduction in force.[221] Hayes filed a complaint against the University, alleging inter alia that the University had breached an employment contract with her.[222] The University moved for summary judgment, arguing that Hayes's claim relied upon the University's employment manual, which cannot form the basis of a breach of contract action.[223] With her response, Hayes designated only her affidavit.[224] The University moved to strike portions of Hayes' affidavit.[225] The trial court granted the University's motion to strike and motion for summary judgment.[226]

Hayes argued on appeal that the trial court erred in striking portions of her affidavit.[227] The court of appeals began its analysis by noting that the decision to admit or exclude evidence rests within the trial court's discretion and that summary judgment affidavits are governed by Trial Rule 56(E), which requires that affidavits be made on personal knowledge, set forth facts as would be admissible in evidence and "show affirmatively that the affiant is competent to testify to the matters stated therein."[228] Further, the court noted that it "should

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214. *Id.* (quoting Boczar v. Reuben, 742 N.E.2d 1010, 1016-17 (Ind. Ct. App. 2001) (citations and quotations omitted)).

215. *Id.*

216. *Id.* at 342.

217. *Id.* at 341-42.

218. 902 N.E.2d 303 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 551 (Ind. 2009).

219. *Id.* at 304.

220. *Id.* at 304-06.

221. *Id.* at 306.

222. *Id.*

223. *Id.* at 306-07.

224. *Id.* at 307.

225. *Id.*

226. *Id.*

227. *Id.* at 309.

228. *Id.* (quoting City of Gary v. McCrady, 851 N.E.2d 359, 363 (Ind. Ct. App. 2006)

disregard inadmissible information contained in supporting or opposing affidavits."[229]

Turning to Hayes' affidavit, the court first determined that the trial court did not abuse its discretion in striking a paragraph based on Hayes' failure to establish foundation for having personal knowledge regarding other employees' seniority and compensation.[230] The court next agreed with the trial court that it was proper to strike portions of Hayes' affidavit that conflicted with her sworn deposition testimony.[231] Finally, the court concluded that it was not an abuse of discretion for the trial court to strike portions of Hayes' affidavit that relied upon or referenced documents that were not attached to the affidavit and had not been otherwise authenticated.[232]

3. Sham Affidavit.—In *Crawfordsville Square, LLC v. Monroe Guaranty Insurance Co.*,[233] Crawfordsville Square LLC (CS) appealed the trial court's grant of partial summary judgment in favor of Monroe Guaranty Insurance Co. ("Monroe"). The court of appeals affirmed the trial court.[234]

CS, which operated a shopping mall in Crawfordsville, Indiana, contracted to purchase a parcel of land adjacent to its mall.[235] Kleinmaier, a member of CS, sent a letter to the agent of the seller, insisting on the cleanup of environmental contamination at the parcel.[236] Following closing, CS sought to add the parcel to its existing commercial general liability insurance policy through Monroe; however, CS did not advise Monroe regarding the contamination—or suspected contamination—at the site.[237]

Several years later, the Indiana Department of Environmental Management (IDEM) sent CS a notice of contamination.[238] Monroe denied coverage and denied that it owed a duty to defend CS, and CS filed an action seeking a declaration that Monroe had a duty to defend.[239] The trial court granted Monroe's motion for partial summary judgment and CS appealed.[240]

The court first noted that the "known loss doctrine" will bar coverage if the "insured has actual knowledge that a loss has occurred, is occurring, or is substantially certain to occur on or before the effective date of the policy."[241] CS

(citations omitted)).

229. *Id.*

230. *Id.* at 310-11.

231. *Id.*

232. *Id.* at 311.

233. 906 N.E.2d 934 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 552 (Ind. 2009).

234. *Id.* at 935.

235. *Id.* at 936.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 936-37.

240. *Id.* at 937.

241. *Id.* at 938 (quoting Gen. Housewares Corp. v. Nat'l Sur. Corp., 741 N.E.2d 408, 413-14 (Ind. Ct. App. 2000)).

argued that a fact issue existed because there was a conflict between Kleinmaier's earlier letter concerning environmental clean-up expenses and his later deposition testimony where he denied having actual knowledge of the contamination when he wrote the letter.[242] The court analogized CS's efforts to a sham affidavit situation, in which courts routinely reject affidavits conflicting with prior deposition testimony in an effort to create a fact issue sufficient to avoid summary judgment.[243] Although the factual situation was somewhat different here, the court concluded that the same concept should apply.[244] Accordingly, the court concluded that Kleinmaier's subsequent deposition testimony should be disregarded and therefore no fact issue existed.[245]

K. Relief from Judgment

In *Heartland Resources, Inc. v. Bedel*,[246] Heartland Resources, Inc. ("Heartland") appealed the trial court's entry of default judgment against it and in favor of Ambrose and Catherine Bedel.[247] Heartland and the Bedels entered into a contract whereby the Bedels agreed to invest in Heartland's "gas well ventures" in Louisiana.[248] The contract contained a forum selection clause, requiring that any disputes be resolved in Warren County, Kentucky.[249]

On February 12, 2007, the Bedels filed suit against Heartland, alleging securities fraud, common law fraud, constructive fraud, breach of fiduciary duty, and identity theft.[250] Heartland failed to file a timely answer, and, on March 29, 2007, the trial court entered default judgment against Heartland.[251] Nevertheless, shortly after entering default, the trial court granted Heartland an "extension of time" in which to respond to the Bedels' complaint.[252] On May 25, 2007, Heartland moved to dismiss the complaint for lack of personal jurisdiction based on the forum selection clause.[253] The trial court denied this motion on February 14, 2008.[254] On February 29, 2008, Heartland filed a motion to set aside the default judgment pursuant to Trial Rule 60(B) but did not argue that the trial court lacked personal jurisdiction by virtue of the forum selection clause.[255] The

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242. *Id.*
243. *Id.* at 939.
244. *Id.*
245. *Id.*
246. 903 N.E.2d 1004 (Ind. Ct. App. 2009).
247. *Id.* at 1005.
248. *Id.* at 1006.
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*

trial court denied this motion as well, and Heartland appealed.[256]

The court of appeals first noted that the trial court correctly denied Heartland's motion to dismiss because, because of the trial court's prior entry of default judgment, Heartland's motion to dismiss the complaint was a nullity.[257] The court also concluded that the trial court correctly denied Heartland's Rule 60(B) motion to set aside the default judgment because Heartland only argued that "mistake, surprise, or excusable neglect had caused it to not properly respond to the complaint."[258] But as the court noted, in addition to showing excusable neglect, a Rule 60(B) movant must also demonstrate the existence of a meritorious defense.[259] In other words, the movant must demonstrate that it has a defense that would lead to a different result on the merits.[260] The court also concluded that, because Heartland omitted its personal jurisdiction argument based on the forum selection clause, it had waived its personal jurisdiction challenge and failed to demonstrate the existence of a meritorious defense.[261]

L. Preliminary Injunction

In *Hay v. Baumgartner*,[262] Hay appealed the trial court's award of attorney's fees to the Baumgartners pursuant to Trial Rule 65(C).[263] The Indiana Court of Appeals affirmed in part and reversed in part.[264]

Steven Hay and Ronald and Gloria Baumgartner own adjoining lots, the previous owners of which apparently shared a driveway.[265] When the Baumgartners built a new home and garage on their property, they set about to remove the old shared driveway.[266] Hay filed a motion for temporary restraining order and preliminary injunction, seeking to stop the Baumgartners from removing the driveway based on his claim that he had an irrevocable license to use it.[267] The trial court entered a temporary restraining order and scheduled a preliminary injunction hearing; however, on the day before the hearing, the parties stipulated to converting the temporary restraining order into a preliminary injunction.[268] Following a bench trial on the merits, the trial court denied Hay's request for a permanent injunction.[269] Hay appealed and obtained an order

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256. *Id.*
257. *Id.*
258. *Id.* at 1007.
259. *Id.*
260. *Id.*
261. *Id.*
262. 903 N.E.2d 1044 (Ind. Ct. App. 2009).
263. *Id.* at 1046.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*

reinstating the preliminary injunction while the appeal was pending.[270] But the court of appeals concluded that Hay only had a revocable license.[271] Upon remand, the Baumgartners filed a motion to assess damages, and the trial court awarded $14,257.96, of which $13,488.19 represented the Baumgartners' attorney's fees.[272] Hay appealed.[273]

The court of appeals began its analysis by observing that a party is entitled to recover attorney's fees where a temporary restraining order or preliminary injunction is dissolved and not replaced by a permanent injunction.[274] The court further noted that a party's right to recover fees under Trial Rule 65(C) "arises when he proves that it has been finally or ultimately determined that injunctive relief was not warranted on the merits."[275] Hay conceded that the Baumgartners were entitled to recover fees incurred in litigating the temporary restraining order, but he argued that they should not recover fees incurred litigating the preliminary injunction because they stipulated to its entry.[276] The court agreed, holding that principles of judicial estoppel prevented the Baumgartners from stipulating to the entry of the preliminary injunction and then attempting to recover fees based on a claim that the injunction was wrongfully entered.[277] Accordingly, the court affirmed the trial court's award of attorney's fees incurred in litigating the temporary restraining order and during the time the preliminary injunction had been reinstated following the trial on the merits; however, the court reversed the trial court's award of fees the Baumgartners incurred in relation to the stipulated preliminary injunction.[278]

M. Attorney Fees and Costs

In *Indiana High School Athletic Ass'n v. Schafer*,[279] the Indiana High School Athletic Association (IHSAA) appealed the trial court's award of fees in favor of Schafer.[280] After considering the issues, the Indiana Court of Appeals remanded for further action by the trial court.[281]

In a prior action, Schafer successfully challenged the IHSAA's application of its athletic eligibility rules.[282] Schafer, who played for the Andrean High

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270. *Id.*

271. *Id.* (citing Hay v. Baumgartner, 870 N.E.2d 568 (Ind. Ct. App. 2007)).

272. *Id.*

273. *Id.* at 1047.

274. *Id.* (citing Bigley v. MSD of Wayne Twp. Schs., 881 N.E.2d 77, 81 (Ind. Ct. App. 2008)).

275. *Id.* (quoting Nat'l Sanitary Supply Co. v. Wright, 644 N.E.2d 903, 906 (Ind. Ct. App. 1994)).

276. *Id.* at 1048.

277. *Id.* at 1049.

278. *Id.* at 1049-50.

279. 913 N.E.2d 789 (Ind. Ct. App. 2009).

280. *Id.* at 791.

281. *Id.*

282. *Id.* at 792-93.

School basketball team, had to withdraw from school due to chronic illness before the end of the basketball season during his junior year.[283] Andrean High School permitted him to repeat his junior year, but the IHSAA refused Schafer's request that his abbreviated junior season not count against his athletic eligibility.[284] Schafer filed an action seeking to enjoin the IHSAA from ruling him ineligible or penalizing Andrean High School.[285] The trial court concluded that the IHSAA eligibility rules at issue were "overly broad, overly inclusive, arbitrary, and capricious and do not bear a fair relationship to the intended purpose of the rules" and, therefore, enjoined the IHSAA from ruling Schafer ineligible.[286] Schafer then brought an action to recover attorney's fees, and the trial court granted his request, concluding that the IHSAA continued to litigate "a defense that was frivolous, unreasonable, and groundless."[287]

The court of appeals first examined the statutory basis for the trial court's decision, Indiana Code section 34-52-1-1.[288] The court noted that a claim or defense is "frivolous" if:

> [I]t is taken primarily for the purpose of harassment, if the attorney is unable to make a good faith and rational argument on the merits of the action, or if the lawyer is unable to support the action taken by a good faith and rational argument for an extension, modification, or reversal of existing law.[289]

The court next observed that a claim or defense can be considered "unreasonable" if: "based on the totality of the circumstances, including the law and the facts known at the time of filing, no reasonable attorney would consider that the claim or defense was worthy of litigation."[290] The court further explained that a "groundless" claim or defense exists where "no facts support the legal claim presented by the losing party."[291] Finally, the court observed that a trial court need not find an improper motive to award fees under section 34-52-1-1; rather, the court need only find a lack of good faith and a rational argument to support the claim.[292]

But the court concluded that the trial court's written findings of fact were insufficient to support an award of fees.[293] Specifically, the court found the trial court's conclusory assertions that the IHSAA continued to litigate a "frivolous,

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283. *Id.* at 792.
284. *Id.*
285. *Id.*
286. *Id.* at 792-93.
287. *Id.* at 793.
288. *Id.*
289. *Id.* at 794 (citing Kahn v. Cundiff, 533 N.E.2d 164, 170 (Ind. Ct. App.), *aff'd* 543 N.E.2d 627 (Ind. 1989)).
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.* at 795-96.

unreasonable and groundless" defense unhelpful because the trial court did not explain how or why the IHSAA's defense met this description.[294] The court also concluded that the trial court's characterization of the IHSAA rules in question as "arbitrary and capricious" was insufficient because it related to conduct preceding the lawsuit, not the conduct of the litigation itself.[295] Accordingly, the court remanded the matter to the trial court with instructions to explain the basis for its conclusion that Schafer was entitled to an award of fees.[296]

III. Amendments to Indiana Rules of Trial Procedure

By order dated January 6, 2009, the Indiana Supreme Court amended Indiana Rule of Trial Procedure 59 by adding the following:

> (K) Orders regarding services, programs, or placement of children alleged to be delinquents or alleged to be in need of services. No motion to correct error is allowed concerning orders or decrees issued pursuant to Indiana Code sections 31-34-4-7(e), 31-34-19-6.1(e), 31-37-5-8(f), or 31-37-18-9(b). Appeals of such orders and decrees shall proceed as prescribed by Indiana Appellate Rule 14.1.[297]

By order dated February 4, 2009, the Indiana Supreme Court amended Indiana Rule of Trial Procedure 60.5 such that it now reads as follows:

> **Rule 60.5. Mandate of funds**
>
> **(A) Scope of mandate.** Courts shall limit their requests for funds to those which are reasonably necessary for the operation of the court or court-related functions. Mandate will not lie for extravagant, arbitrary or unwarranted expenditures nor for personal expenditures (e.g., personal telephone bills, bar association memberships, disciplinary fees). Prior to issuing the order, the court shall meet with the mandated party to demonstrate the need for said funds. At any time in the process, the dispute may be submitted to mediation by agreement of the parties or by order of the Supreme Court or the special judge.
>
> **(B) Procedure.** Whenever a court, except the Supreme Court or the Court of Appeals, desires to order either a municipality, a political subdivision of the state, or an officer of either to appropriate or to pay unappropriated funds for the operation of the court or court-related functions, such court shall issue and cause to be served upon such municipality, political subdivision or officer an order to show cause why such appropriation or payment should not be made. Such order to show cause shall be captioned "Order for Mandate of Funds". The matter

294. *Id.* at 796.
295. *Id.* at 795-96.
296. *Id.* at 798.
297. Ind. Trial R. 59(k).

shall be set for trial on the merits of such order to show cause unless the legislative body, the chief executive officer or the affected officer files a waiver in writing of such a trial and agrees to make such appropriation or payment. The trial shall be without a jury, before a special judge of the court that made the order. There shall be no change of venue from the county or from the special judge appointed by the Supreme Court. The court shall promptly notify the Supreme Court of the entry of such order to show cause and the Supreme Court shall then appoint as special judge an attorney who is not a current or former regular judge and who does not reside nor regularly practice law in the county issuing the Order of Mandate of Funds or in any county contiguous thereto. If the appointed judge fails to qualify within seven [7] days after he has received notice of his appointment, the Supreme Court shall follow the same procedure until an appointed judge does properly qualify. Unless expressly waived by the respondent in writing within thirty (30) days after the entering of the trial judge's decree, a decree or order mandating the payment of funds for the operation of the court or court-related functions shall be automatically reviewed by the Supreme Court. Promptly on expiration of such thirty (30) day period, the trial judge shall certify such decree together with either a stipulation of facts or an electronic transcription of the evidence to the Supreme Court. No motion to correct error nor notice of appeal shall be filed. No mandate order for appropriation or payment of funds made by any court other than the Supreme Court or Court of Appeals *shall direct that attorney fees be paid at a rate greater than the reasonable and customary hourly rate for an attorney in the county. No mandate order* shall be effective unless it is entered after trial as herein provided and until the order has been reviewed by the Supreme Court or such review is expressly waived as herein provided.[298]

By order dated September 15 2009, the Indiana Supreme Court amended a number of Rules of Trial Procedure, including Rules 3.1, 43 and 79.

The Court amended Rule 3.1(A) to add the following language:

(9) In a proceeding involving a mental health commitment, except 72 hour emergency detentions, the initiating party shall provide the full name of the person with respect to whom commitment is sought and the person's state of residence. In addition, the initiating party shall provide at least one of the following identifiers for the person:

(a) Date of birth;

(b) Social Security Number;

(c) Driver's license number with state of issue and date of expiration;

(d) Department of Correction number;

(e) State ID number with state of issue and date of expiration; or

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298. IND. TRIAL R. 60.5.

(f) FBI number.

The Court amended Rule 43 to add the following language:

(E) Public Access. Information filed or introduced in court proceedings is confidential to the extent provided by statutes, rules of court and Indiana Administrative Rule 9(G).

The Court amended Rule 79 such that it now reads as follows:

Rule 79. Special judge selection: circuit, superior, and probate courts

(A) Application. When the appointment of a special judge is required under Trial Rule 76, the provisions of this rule constitute the exclusive manner for the selection of special judges in circuit, superior, and probate courts in all civil and juvenile proceedings. Trial Rule 79.1 constitutes the exclusive manner for the selection of special judges in all actions in city, town, and the Marion county small claims courts.

(B) Duty to notify court. It shall be the duty of the parties to advise the court promptly of an application or motion for change of judge.

(C) Disqualification or recusal of judge. A judge shall disqualify and recuse whenever the judge, the judge's spouse, a person within the third degree of relationship to either of them, the spouse of such a person, or a person residing in the judge's household:
(1) is a party to the proceeding, or an officer, director or trustee of a party;
(2) is acting as a lawyer in the proceeding;
(3) is known by the judge to have an interest that could be substantially affected by the proceeding; or
(4) is associated with the pending litigation in such fashion as to require disqualification under the *Code of Judicial Conduct* or otherwise.
Upon disqualification or recusal under this section, a special judge shall be selected in accordance with Sections (D), (E), and (H) of this rule.

(H) Selection under local rule. In the event a special judge does not accept the case under Sections (D), (E) or (F), or a judge disqualifies and recuses under Section (C), the appointment of an eligible special judge shall be made pursuant to a local rule approved by the Indiana Supreme Court which provides for the following:

(1) appointment of persons eligible under Section J who: a) are within the administrative district as set forth in Administrative Rule 3(A), or b) are from a contiguous county, and have agreed to serve as a special judge in the court where the case is pending;[299]

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299. IND. TRIAL R. 79.