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. Subject Matter Jurisdiction

In *West v. Wadlington*,[2] the supreme court held that a court is not divested of subject matter jurisdiction over defamation and invasion of privacy claims simply because the defendant pleads a religious defense in reliance on the First Amendment Free Exercise Clause.[3]

Wadlington and West were both members of the Mt. Olive Missionary Baptist Church.[4] In October 2007, Wadlington sent an e-mail to members of the church's board of deacons and board of trustees, contending that West should be "dealt with" by being removed from certain influential church committees.[5] In a memo attached to her e-mail, Wadlington also alleged that West was a "one woman wrecking crew" and "anything but Christ-like."[6] Wadlington's memo also accused West of playing an inappropriate role in events leading to the dismissal of the church's former pastor and "possessing an 'evil spirit.'"[7] In February 2008, West filed a complaint alleging defamation and invasion of privacy.[8]

West responded with a motion to dismiss pursuant to Trial Rule 12(B)(1), arguing that "under the First and Fourteenth Amendments to the United States Constitution any adjudication of West's complaint would require excessive entanglement in the [c]hurch's politics and doctrine."[9] The trial court granted the motion and dismissed West's complaint with prejudice.[10] The court of appeals

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1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period—i.e., from October 1, 2009, through September 30, 2010—as well as amendments to the Indiana Rules of Trial Procedure, which were ordered by the Indiana Supreme Court during the survey period.
2. 933 N.E.2d 1274 (Ind. 2010).
3. *Id.* at 1275.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 1275-76.
8. *Id.* at 1276.
9. *Id.*
10. *Id.*

reversed the trial court.[11]

The Indiana Supreme Court granted transfer and affirmed the court of appeals, concluding that the mere assertion of a religious-based affirmative defense does not oust the court's subject matter jurisdiction.[12] In reaching this result, the court considered a line of cases standing for the proposition that a court retains subject matter jurisdiction over employment disputes, notwithstanding a religious defense.[13]

B. Statute of Limitations

In *Eads v. Community Hospital*,[14] the Indiana Supreme Court examined whether the Indiana Journey's Account Statute (JAS) would permit a medical malpractice plaintiff to avoid an otherwise time-barred complaint.[15]

On August 15, 2004, Eads's leg was placed in a cast; however, she was denied a wheelchair and had to exit Community Hospital on crutches.[16] Eads fell attempting to leave the hospital, and on August 8, 2006, she filed a premises liability complaint.[17] The hospital argued that Eads's complaint sounded in medical malpractice, but she had not filed her proposed complaint with the Indiana Department of Insurance (IDOI) as required by the state medical malpractice act (MMA).[18] Accordingly, the hospital moved to dismiss Eads's complaint for lack of jurisdiction.[19] On April 12, 2007, the trial court dismissed Eads's premises liability complaint.[20]

Approximately two weeks before the trial court was able to rule on the hospital's motion (but more than two years after her accident), Eads filed a proposed medical malpractice complaint with the IDOI, alleging the same facts as her premises liability complaint.[21] The hospital responded to this complaint with a summary judgment motion, arguing that Eads's complaint was barred by the MMA's two-year statute of limitations.[22] The trial court granted the hospital's motion, and Eads appealed, relying on the JAS[23] to support her argument that the IDOI complaint was a continuation of her original premises liability complaint.[24]

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11. *Id.*
12. *Id.* at 1277.
13. *See id.* at 1276-77.
14. 932 N.E.2d 1239 (Ind. 2010).
15. *Id.* at 1242.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. IND. CODE § 34-11-8-1(b) (2011).
24. *Eads*, 932 N.E.2d at 1242.

The court of appeals rejected this argument and affirmed the trial court.[25]

The supreme court granted transfer to consider whether the JAS would operate to enable Eads to avoid limitations.[26] As the court noted, the JAS applies when a plaintiff fails in the prosecution of an action for any reason other than "negligence in the prosecution."[27] Further, if the JAS applies, the plaintiff may bring a new action by the later of three years after the JAS was found to apply or the last date the action could have been brought under the statute of limitations applicable to the original action.[28] The court rejected the hospital's argument that Eads was negligent in the prosecution of the action for failing to appeal the trial court's dismissal of the premises liability complaint or mistakenly filing her malpractice claim as a premises liability claim.[29] The court next rejected the hospital's claim that the medical malpractice claim could not be a continuation of the premises liability complaint, concluding that Eads was not required to make such a showing and that the allegations contained in the premises liability complaint were sufficient to place the hospital on notice as to the nature of Eads's allegations.[30]

C. Continuance

In *Gunashekar v. Grose*,[31] the court reaffirmed the notion that a pro se litigant is to be held to same procedural rules as litigants represented by trained counsel.[32]

Grose filed suit against the Gunashekars, alleging that they failed and refused to pay for repair work completed at property the Gunashekars leased and forged her signature on a check made payable to Grose by the Gunashekars' insurance company.[33] Initially, the Gunashekars were represented by counsel, who filed an answer and counterclaim in response to Grose's complaint.[34] During a March 12, 2007 pretrial conference, the trial court advised the parties that there would be no continuances of the July 31 through August 1, 2007 bench trial.[35]

Approximately eight weeks before trial, the Gunashekars' attorney moved for leave to withdraw as their counsel.[36] The trial court granted this motion on June 14, 2007—six weeks before trial—and reiterated that there would be no continuances of the trial.[37] Nevertheless, on July 20, 2007—eleven days before

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25. *Id.*
26. *Id.* at 1243.
27. *Id.* (quoting IND. CODE § 34-11-8-1(a)).
28. *Id.*; *see* IND. CODE § 34-11-8-1(b).
29. *Eads*, 932 N.E.2d at 1244.
30. *See id.* at 1245-46.
31. 915 N.E.2d 953 (Ind. 2009).
32. *Id.* at 955.
33. *Id.* at 954.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*

trial—the Gunashekars, who were then proceeding pro se, requested a continuance to enable them an opportunity to retain counsel.[38] The trial court denied the motion and conducted the bench trial from July 31 to August 1, 2007.[39] After reviewing the parties' proposed findings of fact and conclusions of law, the trial court entered judgment in Grose's favor, awarding her $147,337.04 in damages plus $296,520 as treble damages and attorneys' fees.[40]

Following the court of appeals's reversal based on the denial of the continuance, the Indiana Supreme Court granted transfer and reversed the appellate court, concluding that a pro se litigant is bound to follow the same procedural rules applicable to represented parties.[41] In reaching this result, the court noted that Trial Rule 53.5 requires that the trial court grant a continuance upon "a showing of good cause established by affidavit or other evidence."[42] However, because the Gunashekars offered no evidence to indicate whether they had diligently sought new counsel, the court held that the trial court did not abuse its discretion in denying the motion for continuance.[43]

D. Disqualification to Act

In *State ex rel. Crain Heating Air Conditioning & Refrigeration, Inc. v. Clark Circuit Court*,[44] the court resolved an apparent conflict between Trial Rule 65(A)(3), which requires a ruling on a motion for preliminary injunction within ten days after the hearing, and Trial Rule 53.1, which is referenced in Rule 65(A)(3) but requires that a trial court must rule on a motion within thirty days of the hearing.[45]

In August 2009, Crain filed a complaint for damages and injunctive relief against one of its competitors and several of its former employees who had gone to work for the competitor.[46] The trial court conducted a preliminary injunction hearing on August 20, 2009 and requested that the parties submit proposed findings of fact and conclusions of law by September 14, 2009—twenty-five days after the hearing.[47] On September 11, 2009, the trial court granted one of the defendants' request for an additional ten days to submit proposed findings and conclusions.[48] On September 17, 2009, Crain moved the trial court to reconsider the extension, arguing that it would "take the matter past the 30 days allowed in

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38. *Id.*
39. *Id.*
40. *Id.* at 955.
41. *Id.*
42. *Id.* (quoting IND. TRIAL R. 53.5).
43. *Id.* at 955-56.
44. 921 N.E.2d 1281 (Ind. 2010) (per curiam).
45. *Id.* at 1284.
46. *Id.* at 1282.
47. *Id.* at 1282-83.
48. *Id.* at 1283.

. . . [Trial Rule] 53.1."[49] On September 21, 2009, Crain filed a praecipe pursuant to Trial Rules 53.1 and 65(A)(3), requesting that the clerk determine that more than thirty days had passed since the preliminary injunction hearing.[50] The trial court denied Crain's motion to reconsider on September 22, 2009, and on September 29, 2009, the clerk determined that there had been no delay in the preliminary injunction ruling.[51]

On October 2, 2009, the trial court entered an order denying the motion for preliminary injunction and stating that the defendants were entitled to a hearing regarding their request to recover attorneys' fees incurred defending against Crain's preliminary injunction motion.[52] In response, Crain filed an original action in the Indiana Supreme Court, requesting a writ that would require (1) the clerk to withdraw the case from the trial court and transmit it to the Indiana Supreme Court for assignment of a special judge; and (2) the trial court to vacate its October 2, 2009 order.[53] The court granted the requested writ on December 9, 2009.[54]

The court began its analysis with the observation that if a trial court fails to rule on a motion within thirty days after it was heard, Trial Rule 53.1 provides for the removal of the cause from the trial court.[55] However, Trial Rule 65(A)(3) requires that the trial court rule within ten days of a hearing on a motion for preliminary injunction.[56] The court resolved this apparent inconsistency by holding that

> unless an order is entered within ten days after the hearing upon the granting, modifying, or dissolving of a temporary restraining order or preliminary injunction, there has been a delay in ruling and an interested party may immediately praecipe for withdrawal under the procedure provided in Trial Rule 53.1(E). . . . [I]t is not necessary for a party to await the thirty-day period described in Trial Rule 53.1(A) before filing a praecipe for withdrawal.[57]

E. Summary Judgment

1. Reiswerg v. Statom.—In *Reiswerg v. Statom*,[58] in a matter of first impression in Indiana, the supreme court held that a party responding to a motion for partial summary judgment on an issue or an element, but not as to liability, is

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49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* (citing IND. TRIAL R. 53.1(A)).
56. *Id.* at 1284.
57. *Id.* at 1284-85 (internal citation omitted).
58. 926 N.E.2d 26 (Ind. 2010).

under no obligation to present all of its affirmative defenses at the summary judgment stage.[59]

Statom filed a legal malpractice action against Reiswerg and another law firm arising from their failure to file a timely medical malpractice complaint against the Indiana Department of Veterans Affairs.[60] In response, both defendants asserted the affirmative defense that Statom had not filed her legal malpractice claim against them within the applicable statute of limitations.[61] In November 2006—approximately a year into the lawsuit—Statom moved for partial summary judgment, seeking a ruling that the defendants were "negligent as a matter of law."[62] Neither defendant raised the statute of limitations issue in opposition to Statom's summary judgment motion.[63] The trial court granted Statom's motion as to Reiswerg but denied it as to the other law firm.[64]

In July 2007, both defendants moved for summary judgment on statute of limitations grounds.[65] Statom responded by moving to strike both motions, arguing that the defendants had waived their statute of limitations defense by failing to assert it in response to Statom's summary judgment motion.[66] The trial court granted Statom's motion to strike.[67] The court of appeals affirmed as to Reiswerg but reversed as to the other defendant.[68]

The Indiana Supreme Court granted transfer and concluded that because Statom's motion for partial summary judgment was directed to the breach and factual causation elements of her legal malpractice claims, and because the motion did not address all issues bearing on liability, the defendants were not obligated to raise the statute of limitations defense in response to Statom's motion.[69] The court began with the notion that a "party responding to a motion for summary judgment is entitled to take the motion as the moving party frames it."[70] Consequently, a "non-movant is not required to address a particular element of a claim unless the moving party has first addressed and presented evidence on that element."[71] Because Statom's motion did not discuss the defendants' statute of limitations defense and did not seek to impose liability, the defendants were not obligated to raise their statute of limitations affirmative defense.[72] Moreover,

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59. *Id.* at 32.
60. *Id.* at 28.
61. *Id.*
62. *Id.* (citation omitted).
63. *Id.* at 28-29.
64. *Id.* at 29.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 30-31.
70. *Id.* at 30.
71. *Id.* (citing Jarboe v. Landmark Cmty. Newspapers, Inc., 644 N.E.2d 118, 123 (Ind. 1994)).
72. *Id.* at 31.

if Statom had desired to address the statute of limitations defense, she could have either confronted it directly in her summary judgment motion or broadened the scope of her motion to seek to impose liability on the defendants.[73]

2. Kroger Co. v. Plonski.—In *Kroger Co. v. Plonski*,[74] the court clarified that conflicting summary judgment evidence is not grounds to strike evidence submitted by a party.

Plonski was assaulted and robbed in a Kroger parking lot on October 2, 2003.[75] On September 30, 2005, she filed a complaint for damages against Kroger.[76] On March 26, 2007, Kroger moved for summary judgment, arguing that: (1) it owed Plonski no duty; (2) to the extent it owed her a duty, it did not breach it; and (3) Plonski's injuries were not proximately caused by Kroger's conduct.[77] In support of its summary judgment motion, Kroger submitted three affidavits, including affidavits by its risk manager and safety manager, who asserted that the Kroger location in question was in a low-crime area and that there had been only one crime reported within two years of Plonski's assault.[78] Following an extension, Plonski responded in opposition to the motion on May 25, 2007.[79]

In September 2007, Kroger produced sixty pages of police reports that reflected over thirty police responses to criminal activity occurring at the Kroger in question during the two years preceding Plonski's assault.[80] During the May 8, 2008 summary judgment hearing, the trial court declined to consider these reports as supplements to Plonski's summary judgment response; however (at the trial court's encouragement), Plonski made an oral motion to strike the affidavits submitted by Kroger and offered the police reports in support of her motion.[81] At the conclusion of the hearing, the trial court struck the affidavits and denied the summary judgment motion.[82] The court of appeals affirmed, holding that "Kroger's duty was established by evidence that Plonski was assaulted in the grocery store parking lot."[83]

The Indiana Supreme Court granted transfer and also affirmed the trial court's judgment, but for different reasons.[84] The court first noted that trial courts have broad discretion regarding the admissibility of evidence and that this "discretion extends to rulings on motions to strike affidavits on the grounds that

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73. *Id.*
74. 930 N.E.2d 1 (Ind. 2010).
75. *Id.* at 3.
76. *Id.*
77. *Id.* at 3-4.
78. *Id.* at 4.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*

they fail to comply with the summary judgment rules."[85] However, Plonski did not argue—much less establish—that Kroger's affidavits failed to comply with summary judgment rules.[86] The court continued, "Affidavits submitted in support of or in opposition to a motion for summary judgment may be stricken for a variety of reasons. But a difference of opinion about what the facts are alleged to be is not one of them."[87]

The court concluded that where there is a competing claim regarding the facts, the remedy is not to strike a party's submissions; rather, when submissions demonstrate that material facts are in dispute, the solution is to deny the summary judgment motion.[88]

F. Preliminary Injunction

In *Leone v. Bureau of Motor Vehicles*,[89] the court held that although an Indiana resident is free to use any name he or she chooses, a government agency need not use a changed name without a court order certifying the name change.[90]

In 2005, the Indiana Bureau of Motor Vehicles (BMV) started the practice of verifying information through commercial databases.[91] In accordance with this approach, the BMV compared its records with those of the Social Security Administration (SSA) from May to October 2007.[92] After reviewing the results, the BMV sent letters to 199,562 individuals advising them that their names on file with the BMV did not match SSA records and that failure to update the information could result in the invalidation of their driver's licenses or identification cards.[93] In December 2007, the BMV mailed a second set of letters to 117,370 people who still had discrepancies between their BMV and SSA records.[94] This time, the BMV advised that if the information was not updated, the recipients' driver's licenses or identification cards "must be invalidated."[95] On February 28, 2008, the BMV sent a "final notice" stating that the recipients' driving privileges would "be revoked" until the BMV received updated information.[96]

Following the second letter, Leone filed suit seeking certification of a class under Trial Rule 23(A) and (B)(2), a declaratory judgment that the BMV's policy

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85. *Id.* at 5 (quoting Price v. Freeland, 832 N.E.2d 1036, 1039 (Ind. Ct. App. 2005)).

86. *Id.*

87. *Id.* (citing Hayes v. Trs. of Ind. Univ., 902 N.E.2d 303, 311 (Ind. Ct. App. 2009), *trans. denied*).

88. *Id.* at 5-6.

89. 933 N.E.2d 1244 (Ind. 2010).

90. *Id.* at 1254.

91. *Id.* at 1246.

92. *Id.*

93. *Id.*

94. *Id.* at 1247.

95. *Id.* (citation omitted).

96. *Id.*

was illegal, and a preliminary injunction preventing the BMV from enforcing its policy.[97] The trial court certified the class as those who were threatened with invalidation of their driver's licenses or identification cards based on discrepancies between BMV and SSA records.[98] However, the trial court denied the class's motion for a preliminary injunction.[99] On interlocutory appeal, the court of appeals concluded that the BMV's policy was lawful and that it had a rational basis, but it also determined that its procedures for resolving discrepancies violated the class members' due process rights.[100]

The court granted transfer and affirmed the trial court's denial of the class's motion for a preliminary injunction.[101] The court began its discussion with a recitation of the required elements a movant must establish in order to obtain a preliminary injunction and noted that "[f]ailure to prove any one of these elements requires denying the injunction."[102]

The class members sought to establish that they were likely to succeed on the merits of their claim (one of the requisite elements to obtain a preliminary injunction), arguing that the common law permits name changes by common usage and that with no clear definition of "full legal name," the BMV was required to use their commonly used names.[103] The court agreed with the class that "a person may lawfully change his or her name without resort to any legal proceedings where it does not interfere with the rights of others and is not done for a fraudulent purpose."[104] However, as the court concluded,

> While the courts have a unique power to certify a name change, Hoosiers still may refer to themselves by any name they like. They may not, however, demand that government agencies begin using their new names without a court order. This dual structure recognizes the reality that names serve multiple purposes, both private and public.[105]

II. INDIANA COURT OF APPEALS DECISIONS

A. Service of Process

In *Marshall v. Erie Insurance Exchange*,[106] the court held that service of

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97. *Id.*

98. *Id.* at 1248.

99. *Id.*

100. *Id.* at 1248-57.

101. *Id.* at 1248.

102. *Id.* (citing Apple Glen Crossing, LLC v. Trademark Retail, Inc., 784 N.E.2d 484 (Ind. 2003)).

103. *Id.* at 1250.

104. *Id.* at 1252.

105. *Id.* at 1254 (internal citations omitted).

106. 923 N.E.2d 18 (Ind. Ct. App.), *aff'd on reh'g*, 930 N.E.2d 628 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 830 (Ind. 2010).

process by mail is sufficient if delivery is acknowledged, even if the intended recipient does not personally acknowledge receipt.[107]

The Marshalls owned a vacant lot adjacent to Cain's property.[108] On December 31, 2006, a tree on the Marshalls' property fell onto Cain's house, causing significant damage.[109] Cain filed a claim with Erie, her insurance carrier, which reimbursed Cain for the cost of repairs and brought an action, as subrogee of Cain, against Marshall to recover the amount it had paid to Cain.[110] Erie served Mrs. Marshall with a summons and copy of its complaint via first class mail addressed to the post office box reflected in the tax records for the Marshalls' vacant lot.[111] Mr. Marshall appeared by counsel and answered Erie's complaint.[112] Following a two-day bench trial, the trial court entered judgment in favor of Erie.[113] Marshall appealed and argued, inter alia, that the trial court erred "by failing to address the issue of insufficient service of process."[114]

The court of appeals first explained that Trial Rule 4.1 permits service by "sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgment of receipt may be requested and obtained."[115] The court rejected Mr. Marshall's argument that Mrs. Marshall never personally received the summons and complaint, explaining that "service by mail is effective even if someone other than the intended recipient ultimately signs the return receipt."[116] Further, the Marshalls' attorney entered an appearance and answered Erie's complaint on Mrs. Marshall's behalf without ever challenging the sufficiency of service through a motion to dismiss or argument to the trial court.[117]

B. Statute of Limitations

In *Rieth-Riley Construction Co. v. Gibson*,[118] the court reversed the trial court's denial of summary judgment, declining to extend the discovery rule to toll limitations where the unknown information is the identity of a defendant, not the existence of an injury.[119] As an additional basis for its decision, the court also

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107. *Id.* at 26.
108. *Id.* at 21.
109. *Id.*
110. *Id.*
111. *Id.* at 21-22.
112. *Id.* at 22.
113. *Id.*
114. *Id.*
115. *Id.* (quoting IND. TRIAL R. 4.1).
116. *Id.* (citing Precision Erecting, Inc. v. Wokurka, 638 N.E.2d 472, 474 (Ind. Ct. App. 1994)).
117. *Id.* at 23.
118. 923 N.E.2d 472 (Ind. Ct. App. 2010).
119. *See id.* at 476-77.

clarified the operation of the relation back doctrine of Trial Rule 15(C).[120]

Gibson was involved in an auto accident with Schroeder on September 27, 2006.[121] Gibson filed a complaint against Schroeder on July 15, 2008.[122] Through discovery, Gibson learned that at the time of the accident, Schroeder was employed by Rieth-Riley.[123] Accordingly, on March 18, 2009, Gibson sought leave to amend his complaint by adding Rieth-Riley as a defendant.[124] Rieth-Riley filed a motion to dismiss, arguing that Gibson's claim against it was time-barred because it was filed more than two years after the accident.[125] The trial court treated Rieth-Riley's motion to dismiss as a summary judgment motion and denied it.[126] Rieth-Riley brought an interlocutory appeal.[127]

The court first observed that under Indiana's "discovery rule," a cause of action accrues and the applicable statute of limitations begins to run when the plaintiff knows—or, in the exercise of ordinary diligence, should have known—that he has sustained an injury.[128] The rationale behind this rule, the court reasoned, is that "it is inconsistent with our system of jurisprudence to require a claimant to bring his cause of action in a limited period in which, even with due diligence, he could not be aware of a cause of action."[129] On appeal, Gibson argued that his cause of action against Rieth-Riley did not accrue on the date of the accident (September 27, 2006), but when he learned through discovery that Rieth-Riley was a potential defendant by virtue of its employment of Schroeder at the time of the accident.[130] However, the court rejected this argument, noting that Gibson was aware of his injury on September 27, 2006 and declining "to extend the discovery rule to apply to cases like this one where the indeterminate fact is not the existence of any injury, but rather the identity of a tortfeasor."[131]

Next, the court rejected the notion that Gibson's claim against Rieth-Riley would "relate back" to the date of the original (and timely) filing against Schroeder pursuant to Trial Rule 15(C).[132] Rule 15(C) provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date

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120. *Id.* at 477-79.
121. *Id.* at 474.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 475 (citing Pflanz v. Foster, 888 N.E.2d 756, 759 (Ind. 2008)).
129. *Id.* at 476 (quoting Barnes v. A.H. Robbins Co., 476 N.E.2d 84, 86 (Ind. 1985)).
130. *Id.* at 475.
131. *Id.* at 476-77.
132. *Id.* at 477-79.

> of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within one hundred and twenty (120) days of commencement of the action, the party to be brought in by amendment:
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> > (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.[133]

As the party seeking relation back, Gibson bore the burden of establishing that the conditions of Trial Rule 15(C) had been satisfied.[134] However, while there was no dispute that the claim against Rieth-Riley arose out of the same accident as Gibson's claim against Schroeder, the court concluded that Gibson had failed to meet the remaining requirements of Trial Rule 15(C).[135] Specifically, Gibson presented no evidence to establish that Rieth-Riley had actual or constructive notice of the accident, the lawsuit, or its potential involvement within 120 days of the accident.[136] Further, Gibson failed to present anything to contradict Rieth-Riley's evidence that it had no knowledge of the accident until March 30, 2009.[137]

C. Pleadings

In *Hilliard v. Jacobs*,[138] the court affirmed the trial court's denial of a belated attempt to amend a complaint to add claims that had been available when the original complaint was filed.[139] The court also rejected the use of a reply counterclaim as a means of avoiding the trial court's refusal to permit the new claims.[140]

In litigation that had been pending for over three years, Hilliard sought leave to amend her complaint to add several claims following an adverse summary judgment ruling.[141] The court affirmed the trial court's denial of leave, concluding that the proposed claims were available to Hilliard when the original complaint was filed.[142] Specifically, the court determined that there was no

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133. IND. TRIAL R. 15(C).

134. *Rieth-Riley*, 923 N.E.2d at 478 (citing Crossroads Servs. Ctr., Inc. v. Coley, 842 N.E.2d 822, 824-25 (Ind. Ct. App. 2005)).

135. *Id.* at 478-79.

136. *Id.* at 478.

137. *Id.* at 478-79.

138. 927 N.E.2d 393 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 826 (Ind. 2010).

139. *Id.* at 401.

140. *Id.* at 403.

141. *Id.* at 397.

142. *Id.* at 398-99.

justification for not asserting all claims in the original complaint and that waiting for three years—and the failure of other claims—constituted undue delay and was prejudicial to Jacobs.[143]

Next, the court rejected Hilliard's attempt to bring the same claims as a reply counterclaim.[144] Jacobs had asserted a counterclaim against Hilliard seeking to recover attorneys' fees arising from Hilliard's breach of contract.[145] Hilliard sought to seize this as an opportunity to assert the claims she had been unable to bring in an amended complaint.[146] However, the court affirmed the trial court's rejection of this approach, concluding that the proposed reply counterclaims, which had (at best) a tangential relationship to the contract at issue in Jacobs's counterclaim, were permissive, not compulsory.[147] Accordingly, the court concluded that the reply counterclaim was properly stricken.[148]

D. Class Action

In *Perdue v. Murphy*,[149] the court affirmed the trial court's denial of class certification based on the lack of required definiteness of the proposed class.[150]

The plaintiffs filed suit, invoking the Americans with Disabilities Act of 1990 (ADA) and the Recovery Act of 1973 and seeking declaratory and injunctive relief, as well as certification of certain classes.[151] Included among the proposed classes was "Class B," which included disabled individuals (and their families) who, by reason of their disabilities, required certain accommodations in connection with applying for and receiving various welfare benefits but were denied benefits for failing to cooperate in the administrative process.[152] The trial court denied certification of Class B.[153]

On appeal, the court first noted that a proposed class must meet all the requirements of Trial Rule 23(A)—i.e., numerosity, commonality, typicality, and adequate representation—and at least one of the requirements of Rule 23(B).[154] Further, the court observed that there is an implicit "definiteness" requirement.[155] Specifically, the court stated:

> Because a judgment in a class action has res judicata effect on absent class members, a properly defined class is necessary at the outset. A

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143. *See id.*
144. *Id.* at 401-02.
145. *Id.* at 401.
146. *Id.*
147. *Id.* at 402.
148. *Id.* at 403.
149. 915 N.E.2d 498 (Ind. Ct. App. 2009), *reh'g denied.*
150. *Id.* at 511.
151. *Id.* at 503.
152. *Id.*
153. *Id.*
154. *Id.* at 504.
155. *Id.* at 505.

> class definition must be specific enough for the court to determine whether or not an individual is a class member. Without a properly defined class, a class action cannot be maintained.[156]

However, relying largely on *Hohider v. United Parcel Service, Inc.*,[157] the court concluded that certification under Trial Rule 23(B)(2) or (B)(3) would require that the plaintiffs comprising the class be "qualified" to bring actions under the ADA; however, this would require inquiries that were too individualized and divergent to warrant class certification.[158]

E. Involuntary Dismissal

1. Conder v. RDI/Caesars Riverboat Casino, Inc.—In *Conder v. RDI/Caesars Riverboat Casino, Inc.*,[159] the court considered whether an employee who was allegedly injured in the course of her employment aboard a riverboat casino had standing to bring a claim as a "maritime worker."[160]

Conder worked aboard a riverboat casino as a card dealer.[161] During her employment, she sustained several flea bites, which required that she take large doses of steroids.[162] Conder contended that the steroids caused her to have a heart attack.[163] In 2005, Conder filed a complaint against Caesars, asserting claims under the Jones Act and under Indiana's worker's compensation laws as a "Sieracki seaman."[164] The trial court dismissed Conder's claims, and she appealed.[165]

On appeal, the court concluded that because the riverboat casino was permanently moored to the dock and functioned as a gaming establishment, not a seafaring vessel, Conder lacked standing under the Jones Act.[166] Similarly, the court rejected Conder's attempt to bring claims as a Sieracki seaman, which arises from the United States Supreme Court's decision in *Seas Shipping Co. v. Sieracki*.[167] In *Sieracki*, the Supreme Court held that a longshoreman injured as a result of a dangerous, defective condition while aboard a vessel could recover against the vessel's owner under the theory that the owner had breached the warranty of seaworthiness of the ship.[168] The court concluded that Conder could

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156. *Id.* at 505 (internal citations omitted).

157. 574 F.3d 169, 200 (3d Cir. 2009).

158. *See Perdue*, 915 N.E.2d at 508.

159. 918 N.E.2d 759 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 791 (Ind. 2010).

160. *Id.* at 762.

161. *Id.* at 761.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 762.

166. *Id.* at 763.

167. 328 U.S. 85 (1946), *superseded by statute as stated in* Yamaha Motor Corp. v. Calhoun, 116 S. Ct. 619 (1996).

168. *Id.* at 99-102.

not bring a claim as a Sieracki seaman because her work as a card dealer did not constitute maritime employment, i.e., she was not involved in the essential elements of loading and unloading a vessel.[169] Further, as with Conder's Jones Act claim, she lacked standing as a Sieracki seaman because the riverboat casino aboard which she was allegedly injured was not a vessel in navigation.[170]

2. Brightpoint, Inc. v. Pedersen.—In *Brightpoint, Inc. v. Pedersen*,[171] the court affirmed the trial court's dismissal of an action based on comity grounds.[172]

On March 23, 2009, Pedersen, the former European president of Brightpoint Europe A/S (BPE), initiated arbitration in Denmark, alleging that BPE had failed to make certain payments pursuant to a contract executed among the parties in connection with Pedersen's resignation from BPE.[173] On April 28, 2009, BPE and Brightpoint filed a complaint against Pedersen in Marion Superior Court, alleging that Pedersen had breached the parties' contract.[174] Without serving Pedersen with a copy of the Indiana complaint or otherwise notifying him that the action had been filed, BPE responded to Pedersen's arbitration complaint by arguing that the proper forum for the dispute would be a court of competent jurisdiction, as there was no binding arbitration agreement among the parties.[175] In response to this argument, Pedersen withdrew his arbitration complaint and initiated litigation in a Danish court.[176] After being served with the summons and complaint in the Indiana action, Pedersen moved to dismiss on comity grounds.[177] The trial court granted Pedersen's motion, and BPE and Brightpoint appealed.[178]

On appeal, the court began with a discussion of general comity principles, i.e., that "Indiana courts may respect final decisions of sister courts as well as proceedings pending in those courts."[179] Further, the court identified two factors to consider in determining whether to stay or dismiss an action on comity grounds: (1) whether the first suit is proceeding normally and without delay; and (2) whether there is a risk the parties may be subject to multiple or inconsistent judgments.[180] The court also considered cases interpreting Trial Rule 12(B)(8), "which expressly permits dismissal of a lawsuit where another action is pending in another *Indiana* state court."[181] Accordingly, the court also evaluated whether the two lawsuits involved the same parties and issues, whether the parties were

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169. *Conder*, 918 N.E.2d at 763.

170. *Id.*

171. 930 N.E.2d 34 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 829 (Ind. 2010).

172. *Id.* at 41.

173. *Id.* at 37.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 38.

178. *Id.*

179. *Id.* at 39 (citing George S. May Int'l Co. v. King, 629 N.E.2d 257, 260 (Ind. Ct. App. 1994)).

180. *Id.* at 40.

181. *Id.*

seeking the same remedies, and which litigation was initiated first.[182] The court concluded that the same parties (Pedersen and BPE) were involved in both matters, that the parties were litigating substantially the same issues (rights and obligations under the parties' contract), and that the Danish litigation had been initiated first.[183] Therefore, the court affirmed the trial court's dismissal on comity grounds.[184]

F. Discovery

1. White-Rodgers v. Kindle.—In *White-Rodgers v. Kindle*,[185] the court reversed the trial court's order compelling discovery related to experts retained in a prior lawsuit.[186]

Kindle brought a products liability action against White-Rodgers alleging certain defects in a water heater manufactured by White-Rodgers.[187] During pretrial discovery, Kindle moved to compel White-Rodgers to produce all expert-related material from a prior lawsuit in Missouri.[188] The trial court initially ordered White-Rodgers to produce all documents relating to experts from the Missouri action.[189] However, in response to White-Rodgers's motion to reconsider, the trial court amended its order, requiring White-Rodgers to produce documents relating to testifying experts but specifically exempting materials relating to consulting experts.[190] In light of this limitation, White-Rodgers took the position that it had nothing more to produce, explaining that it had designated no testifying experts in the Missouri action.[191] In response, Kindle moved for sanctions, arguing that White-Rodgers was playing semantics games and continuing to evade its discovery obligations.[192] The trial court granted the sanctions motion, finding that White-Rodgers had failed to establish that any of the experts retained in the Missouri action were intended to be solely consulting experts.[193]

On appeal, the court began with the requirement that "[i]n the case of an expert 'who is not expected to be called as a witness at trial,' a 'showing of exceptional circumstances' is required in order to go forward with discovery."[194] This, the court reasoned, is "to prevent a party from building his own case by

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182. *Id.*
183. *Id.* at 40-41.
184. *Id.* at 41.
185. 925 N.E.2d 406 (Ind. Ct. App. 2010).
186. *Id.* at 415.
187. *Id.* at 408.
188. *Id.*
189. *Id.* at 409.
190. *Id.*
191. *Id.*
192. *Id.* at 409-10.
193. *Id.* at 410.
194. *Id.* at 413 (quoting IND. TRIAL R. 26(B)(4)(b)).

means of his opponent's financial resources, superior diligence and more aggressive preparation."[195] Thus, "under Indiana law, a party's designation of a testifying expert is a crucial decision that directly affects the discovery protection provided by Rule 26(B)(4)(b).[196] Because White-Rodgers had not designated any testifying experts in the Missouri litigation, Kindle had to demonstrate "exceptional circumstances under which it . . . [was] impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."[197] Kindle failed in this respect; accordingly, the court concluded that White-Rodgers had complied with its discovery obligations and reversed the trial court's sanctions order.[198]

2. Dean v. Weaver.—In *Dean v. Weaver*,[199] the court affirmed the trial court's determination that it lacked jurisdiction to re-open a matter to resolve a dispute regarding expert witness fees where the trial court had opened the matter pursuant to Trial Rule 28.[200]

In March 2007, Kristine Weaver initiated a divorce action against Loren Weaver in St. Joseph County, Michigan.[201] During the proceedings, Loren indicated that Ronald Dean, who resided in Elkhart County, Indiana, might be used as an expert witness.[202] Accordingly, in July 2007, Loren filed a proceeding in Elkhart Superior Court seeking the trial court's assistance in conducting discovery in Indiana pursuant to Trial Rule 28(E).[203] Loren and Kristine thereby deposed Dean over several days.[204]

In January 2009, Loren and Kristine settled their dispute, and on February 6, 2009, the Michigan court entered a final order disposing of the matter.[205] On March 16, 2009, Dean invoiced Kristine for his time and attorneys' fees.[206] When Kristine refused to pay, Dean petitioned the Elkhart trial court to re-open the matter for the sole purpose of his fee claim.[207] The trial court re-opened the matter, but on December 9, 2009, it concluded that it lacked jurisdiction to consider Dean's request for fees and dismissed the action.[208]

On appeal, the court observed that Trial Rule 28(E) enables "Indiana courts to assist tribunals and litigants outside this state by providing a mechanism to

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195. *Id.* (quoting R.R. Donnelley & Sons Co. v. N. Tex. Steel Co., 752 N.E.2d 112, 132 (Ind. Ct. App. 2001)).

196. *Id.*

197. *Id.* (quoting IND. TRIAL R. 26(B)(4)(b)).

198. *Id.* at 414-15.

199. 928 N.E.2d 254 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 826 (Ind. 2010).

200. *Id.* at 258.

201. *Id.* at 255.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 256.

pursue discovery within Indiana's jurisdiction in a cause initiated outside Indiana's jurisdiction."[209] However, the court concluded that an Indiana court's jurisdiction under Trial Rule 28(E) is ancillary to the principal proceeding.[210] Accordingly, when the principal proceeding terminates, so does an Indiana court's ability to act pursuant to Rule 28(E).[211] Because the Michigan court had closed the principal divorce action between Loren and Kristine, the Elkhart trial court lacked jurisdiction to consider Dean's fee request.[212]

3. Huber v. Montgomery County Sheriff.—In *Huber v. Montgomery County Sheriff*,[213] the court determined that the trial court erred in failing to hold a hearing before imposing sanctions under Rule 37.[214]

Huber filed a tort action against the Montgomery County sheriff.[215] In response to what the sheriff believed to be incomplete, evasive discovery responses by Huber, the sheriff moved to compel and for sanctions.[216] Without first conducting a hearing, the trial court granted the motion to compel and imposed sanctions on Huber.[217]

On appeal, the court agreed with Huber that the trial court erred in imposing Rule 37 sanctions without first conducting a hearing.[218] The court noted that the purpose of Rule 37 sanctions is to "provide[] the trial court with tools to enforce compliance" with discovery obligations.[219] Further, the court observed that an "award of sanctions is mandatory subject only to a showing that the losing party's conduct was substantially justified, or that other circumstances make an award of sanctions unjust."[220] However, before the court may award sanctions under Rule 37, it must first conduct a hearing to determine both whether sanctions are appropriate and the appropriate amount of sanctions.[221] Accordingly, the court reversed and remanded with instructions that the trial court conduct a hearing to determine whether Huber's resistance to the sheriff's discovery was substantially justified.[222]

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209. *Id.* at 257.

210. *Id.*

211. *Id.* at 257-58.

212. *Id.* at 258.

213. 940 N.E.2d 1182 (Ind. Ct. App. 2010).

214. *Id.* at 1187.

215. *Id.* at 1183.

216. *Id.*

217. *Id.* at 1183-84.

218. *Id.* at 1185.

219. *Id.* at 1186 (citing M.S. *ex rel.* Newman v. K.R., 871 N.E.2d 303, 311 (Ind. Ct. App. 2007)).

220. *Id.* (citing Penn Cent. Corp. v. Buchanan, 712 N.E.2d 508, 513 (Ind. Ct. App. 1999)).

221. *Id.*

222. *Id.* at 1187.

G. Summary Judgment

In *State ex rel. Berkshire v. City of Logansport*,[223] the court relied on the Indiana Supreme Court's recent decision in *Reiswerg v. Statom*[224] in concluding that a summary judgment respondent did not waive its statute of limitations affirmative defense by failing to assert it in response to a summary judgment motion.[225]

In April 2009, Berkshire filed an action challenging Logansport's violation of conditions set forth in a will and deed transferring property on which Logansport operated a public park.[226] In June 2010, Berkshire moved for partial summary judgment as to his standing to assert his claims.[227] Logansport's response included seventy pages from the files of the individual who had donated the land; however, Logansport did not specifically identify any portion of these documents in support of its summary judgment position.[228] The trial court granted Berkshire's motion regarding his standing.[229] Shortly thereafter, Logansport moved for summary judgment, arguing that Berkshire's claims were barred by the statute of limitations.[230] The trial court granted Logansport's motion, and Berkshire appealed.[231]

On appeal, the court relied on *Reiswerg* for the proposition that a summary judgment respondent is not required to address issues unless the movant first addresses them and presents supporting evidence.[232] Because Logansport had asserted its statute of limitations defense in its answer to Berkshire's complaint, and because Berkshire's summary judgment motion did not implicate this defense, Logansport did not waive it by not raising it in opposition to Berkshire's summary judgment motion.[233]

H. Right to Jury Trial

In *Lucas v. U.S. Bank, N.A.*,[234] the court applied the test laid out by the Indiana Supreme Court in *Songer v. Civitas Bank*[235] to determine whether a right to a jury trial exists in a civil matter.[236]

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223. 928 N.E.2d 587 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 824 (Ind. 2010).
224. 926 N.E.2d 26 (Ind. 2010).
225. *Berkshire*, 928 N.E.2d at 597.
226. *Id.* at 592.
227. *Id.* at 593.
228. *Id.*
229. *Id.* at 594.
230. *Id.*
231. *Id.*
232. *Id.* at 596.
233. *Id.* at 597.
234. 932 N.E.2d 239 (Ind. Ct. App. 2010).
235. 771 N.E.2d 61, 63 (Ind. 2002).
236. *Lucas*, 932 N.E.2d at 243-45.

U.S. Bank brought a mortgage foreclosure action against the Lucases.[237] The Lucases responded by asserting counterclaims alleging that U.S. Bank violated the Truth in Lending Act (TILA) and the Real Estate Settlement and Practices Act (RESPA).[238] The Lucases also alleged that the bank had committed conversion and deception, thereby entitling the Lucases to recover under the Indiana Civil Damages Statute.[239] The Lucases also brought a third-party complaint against the loan servicer alleging violations of the TILA and RESPA, as well as conversion.[240] The Lucases also made a request for a jury trial, which the trial court denied.[241]

On appeal, the court applied the test established by the Indiana Supreme Court in *Songer*.[242] The court expressed the test as follows:

> [T]o determine whether a party has the right to a jury trial in a civil case, we must first consider whether the essential features of the suit are equitable. If we determine that they are, we must then decide if there are distinct and severable legal causes of action such that Rule 38(A) requires a jury trial on those claims. Only if this court determines that the essential features of the suit are equitable and that there are no distinct and severable legal causes of action will the right to a jury trial be summarily extinguished.[243]

The court noted that mortgage foreclosure is almost always equitable in nature.[244] However, the Lucases' claims for violations of the TILA and RESPA, as well as their conversion and deception claims, were distinct legal causes of action.[245] Accordingly, the court reversed the trial court, holding that the Lucases had a right to a jury trial with respect to their legal claims against U.S. Bank and the loan servicer.[246]

I. Motion to Correct Error

In *Menard, Inc. v. Comstock*,[247] the court reversed the trial court's decision to grant a motion to correct error and increase the amount of damages awarded by the jury.[248]

Comstock died from injuries he sustained when he slipped on ice outside a

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237. *Id.* at 242.
238. *Id.*
239. *Id.* at 242-43 (citing IND. CODE § 34-24-3-1 (2011)).
240. *Id.*
241. *Id.*
242. *Id.* (citing Songer v. Civitas Bank, 771 N.E.2d 61, 63 (Ind. 2002)).
243. *Id.* at 244.
244. *Id.*
245. *Id.* at 244-45.
246. *Id.* at 245.
247. 922 N.E.2d 647 (Ind. Ct. App.), *trans. denied*, 929 N.E.2d 795 (Ind. 2010).
248. *Id.* at 651.

Menard's retail establishment.[249] His wife brought wrongful death and survival actions against Menard.[250] After trial, the jury awarded $24,638.97 in gross damages but apportioned only 30% of the fault to Menard (with the remaining 70% split evenly between Comstock and his wife).[251] Accordingly, the jury awarded Comstock's widow $8,212.99.[252] Comstock filed a motion to correct error, requesting that the trial court increase the damage award.[253] The trial court granted the motion and entered final judgment with a damage award of $149,240.71.[254]

On appeal, the court noted that Trial Rule 59(J)(5) affords the trial court the discretion to remedy an inadequate or excessive damages award by entering final judgment on the evidence for the amount of proper damages or order a new trial.[255] However, the court cautioned that this option is only available when "the evidence is insufficient to support the verdict as a matter of law" and that "[t]rial courts must afford juries great latitude in making damage awards determinations."[256] Moreover, the trial court should only reverse a jury's damages determination "'when it is apparent from a review of the evidence that the amount of damages awarded by the jury is so small or so great as to clearly indicate that the jury was motivated by prejudice, passion, partiality, corruption or that it considered an improper element.'"[257]

The court considered the evidence available to the jury sufficient to support its verdict.[258] Accordingly, the court reversed the trial court's order granting the motion to correct error and reinstated the jury's verdict.[259]

J. Relief from Judgment

In *Butler v. State*,[260] the court reversed the trial court's denial of two motions to set aside a default judgment where the appellant had demonstrated mistake or excusable neglect and the existence of a meritorious defense.[261]

Butler received traffic citations for speeding and operating his semi truck outside far two right lanes of a public highway.[262] The hearing on Butler's citations was initially set for January 14, 2009; however, the officer who issued

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249. *Id.* at 648.
250. *Id.* at 648-49.
251. *Id.* at 649.
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.* at 649-50 (quoting IND. TRIAL R. 59(J)(5)).
256. *Id.* at 650 (citing Childress v. Buckler, 779 N.E.2d 546, 550 (Ind. Ct. App. 2002)).
257. *Id.* (quoting Dee v. Becker, 636 N.E.2d 176, 177 (Ind. Ct. App. 1994)).
258. *Id.* at 650-51.
259. *Id.* at 651.
260. 933 N.E.2d 33 (Ind. Ct. App. 2010).
261. *Id.* at 37.
262. *Id.* at 34.

the citations was unable to attend.[263] Accordingly, the trial court continued the hearing to March 16, 2009.[264] However, Butler alleged, the trial court's notice did not indicate the time for the hearing.[265] By letter dated March 1, 2009, Butler requested a continuance of the March 16 hearing or, in the alternative, confirmation of the time the hearing was to take place.[266] However, Butler received no response.[267] Finally, on March 13, 2009, Butler called the court and was informed that the hearing was set to commence at 1:00 p.m.[268] Therefore, Butler arrived at the courthouse at 12:50 p.m.—several hours too late for the hearing, which had actually started at 9:30 a.m.[269] In his absence, the trial court entered default judgment against him.[270] The trial court then denied Butler's two motions to set aside the default judgment.[271]

On appeal, the court observed that a trial court may set aside a default judgment where the affected party establishes that mistake, surprise, or excusable neglect led to the entry of the default judgment.[272] The party seeking relief from the default judgment must also establish that he would have a meritorious defense, i.e., a prima facie showing that "'the judgment would change and that the defaulted party would suffer an injustice if the judgment were allowed to stand.'"[273] Here, the court concluded that Butler had certainly demonstrated that the mistake, surprise, or excusable neglect led to the entry of the default against him.[274] Further, the court determined that because Butler had denied the allegations in the citations, and because Butler could have offered various viable defenses to the allegations, Butler had adequately alleged a meritorious defense.[275] Accordingly, the court reversed the trial court's denial of Butler's motions to set aside the default judgment entered against him.[276]

III. AMENDMENTS TO INDIANA RULES OF TRIAL PROCEDURE

By order dated September 21, 2010, the Indiana Supreme Court amended Indiana Rules of Trial Procedure 5, 9.2, 23, 39, 51, 53.1, 53.2, 53.3, 55, 59, 62, 72, 77 and 79 as follows:

1. The court amended Rule 5(B)(2) to change the phrase "on the

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263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.* at 34-35.
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.* (citing IND. TRIAL R. 60(B)(1)).
273. *Id.* at 36 (quoting Bunch v. Himm, 879 N.E.2d 632, 637 (Ind. Ct. App. 2008)).
274. *Id.*
275. *Id.*
276. *Id.* at 37.

chronological case summary" to "in the Chronological Case Summary."[277]

2. The court amended Rule 9.2(A) to provide, "When any pleading allowed by these rules is founded on an account, an Affidavit of Debt, in a form substantially similar to that which is provided in Appendix A-2 to these rules, shall be attached."[278]
3. The court amended Rule 9.2(F) to include "an Affidavit of Debt."[279]
4. The court amended Rule 23 by adding subsection (F), which reads:

   (1) "Residual Funds" are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the trial court from approving a settlement that does not create residual funds.
   (2) Any order entering a judgment or approving a proposed compromise of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of residual funds, unless otherwise agreed. In matters where the claims process has been exhausted and residual funds remain, not less than twenty-five percent (25%) of the residual funds shall be disbursed to the Indiana Bar Foundation to support the activities and programs of the Indiana Pro Bono Commission and its pro bono districts. The court may disburse the balance of any residual funds beyond the minimum percentage to the Indiana Bar Foundation or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of the members of the certified class.[280]

5. The court amended Rule 39 to change the phrase "upon the chronological case summary" to "in the Chronological Case Summary."[281]
6. The court amended Rule 51 to read as follows:

   (A) Preliminary Instructions. When the jury has been sworn the court shall instruct the jury in accordance with Jury Rule 20. Each party shall have reasonable opportunity to examine these preliminary instructions and state his specific objections thereto out of the presence of the jury and before any party has stated his case. (The court may of its own motion and, if requested by either party, shall

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277. IND. TRIAL R. 5(B)(2).
278. IND. TRIAL R. 9.2(A).
279. IND. TRIAL R. 9.2(F).
280. IND. TRIAL R. 23(F).
281. IND. TRIAL R. 39(A).

reread to the jury all or any part of such preliminary instructions along with the other instructions given to the jury at the close of the case. A request to reread any preliminary instruction does not count against the ten [10] instructions provided in subsection (D) below.)
The parties shall be given reasonable opportunity to submit requested instructions prior to the swearing of the jury, and object to instructions requested or proposed to be given.
(B) Final Instructions. The judge shall instruct the jury as to the law upon the issues presented by the evidence in accordance with Jury Rule 26.
(C) Objections and requested instructions before submission. At the close of the evidence and before argument each party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. No party may claim as error the giving of an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection. Opportunity shall be given to make the objection out of the hearing of the jury. The court shall note all instructions given, refused or tendered, and all written objections submitted thereto, shall be filed in open court and become part of the record. Objections made orally shall be taken by the reporter and thereby shall become a part of the record.
(D) Limit upon requested instructions. Each party shall be entitled to tender no more than ten [10] requested instructions, including pattern instructions, to be given to the jury; however, the court in its discretion for good cause shown may fix a greater number. Each tendered instruction shall be confined to one [1] relevant legal principle. No party shall be entitled to predicate error upon the refusal of a trial court to give any tendered instruction in excess of the number fixed by this rule or the number fixed by the court order, whichever is greater.
(E) Indiana Pattern Jury Instructions (Criminal)/Indiana Model Jury Instructions (Civil). Any party requesting a trial court to give any instruction from the Indiana Pattern Jury Instructions (Criminal)/Indiana Model Jury Instructions (Civil), prepared under the sponsorship of the Indiana Judges Association, may make such request in writing without copying the instruction verbatim, by merely designating the number thereof in the publication.[282]

7. The court amended Rule 53.1(C) to read as follows:

(C) Time of ruling. For the purposes of Section (A) of this rule, a

282. IND. TRIAL R. 51.

court is deemed to have set a motion for hearing on the date the setting is noted in the Chronological Case Summary, and to have ruled on the date the ruling is noted in the Chronological Case Summary.[283]

8. The court amended Rule 53.1(E) to change references from "chronological case summary" to "Chronological Case Summary."[284]
9. The court amended Rule 53.2(C) to read as follows: "For the purpose of Section (A) of this rule, a court is deemed to have decided on the date the decision is noted in the Chronological Case Summary."[285]
10. The court amended Rule 53.3(C) to read as follows:

    (C) Time of ruling. For the purposes of Section (A) of this rule, a court is deemed to have set a motion for hearing on the date the setting is noted in the Chronological Case Summary, and to have ruled on the date the ruling is noted in the Chronological Case Summary.[286]

11. The court also amended Rule 53.3(D) to require that a trial court's extension of time to rule on a motion to correct error must be noted in the Chronological Case Summary before expiration of the initial period for ruling.[287]
12. The court amended Rule 59(C) to provide that a motion to correct error must be filed within "thirty (30) days after the entry of a final judgment is noted in the Chronological Case Summary."[288]
13. The court amended Rule 62(A) to provide that "[e]xecution may issue upon notation of a judgment in the Chronological Case Summary."[289]
14. The court amended Rule 62(D) to include "other form of security approved by the court" as acceptable security for a stay upon appeal of a judgment.[290]
15. The court amended Rule 72(D) to require notice of an order or judgment immediately upon notation in the Chronological Case Summary.[291]
16. The court amended Rule 77(B) to read as follows:

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283. IND. TRIAL R. 53.1(C).
284. IND. TRIAL R. 53.1(E).
285. IND. TRIAL R. 53.2(C).
286. IND. TRIAL R. 53.3(C).
287. IND. TRIAL R. 53.3(D).
288. IND. TRIAL R. 59(C).
289. IND. TRIAL R. 62(A).
290. IND. TRIAL R. 62(D).
291. IND. TRIAL R. 72(D).

> (B) Chronological Case Summary. For each case, the clerk of the circuit court shall maintain a sequential record of the judicial events in such proceeding. The record shall include the title of the proceeding; the assigned case number; the names, addresses, telephone and attorney numbers of all attorneys involved in the proceeding, or the fact that a party appears pro se with address and telephone number of the party so appearing; and the assessment of fees and charges (public receivables). Notation of judicial events in the Chronological Case Summary shall be made promptly, and shall set forth the date of the event and briefly define any documents, orders, rulings, or judgments filed or entered in the case. The date of every notation in the Chronological Case Summary should be the date the notation is made, regardless of the date the judicial event occurred. The Chronological Case Summary shall also note the entry of orders, rulings and judgments in the record of judgments and orders, the notation of judgments in the judgment docket . . . and file status (pending/decided) under section (G) of this rule. The Chronological Case Summary may be kept in a paper format, or microfilm, or electronically. The Chronological Case Summary shall be an official record of the trial court and shall be maintained apart from other records of the court and shall be organized by case number.[292]

17. The court amended Rule 79(D) to provide that the parties may have seven (7) days from notation in the Chronological Case Summary of the order granting a change of judge or an order of disqualification to agree to an eligible special judge.[293]
18. The court amended Rule 79(N)(4) to read as follows:

> (4) All decisions, orders, and rulings shall be noted promptly in the Chronological Case Summary and, where appropriate, the Record of Judgments and Orders of the court where the case is pending and shall be served in accordance with Trial Rule 72(D). It is the duty of the special judge to effect prompt execution of this rule. A court is deemed to have ruled on the date the ruling is noted in the Chronological Case Summary.[294]

By order dated October 28, 2010, the Indiana Supreme Court amended the first sentence of Indiana Rule of Trial Procedure 55(B) to read as follows:

> In all cases the party entitled to judgment by default shall apply to the court therefor; but no judgment by default shall be entered against a person (1) known to be an infant or incompetent unless represented in the

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292. IND. TRIAL R. 77(B).
293. IND. TRIAL R. 79(D).
294. IND. TRIAL R. 79(N)(4).

> action by a general guardian, committee, conservator, or other such representative who has appeared therein; or (2) entitled to the protections against default judgments provided by the Servicemembers Civil Relief Act, as amended (the "Act") . . . unless the requirements of the Act have been complied with. See Ind. Small Claims Rule 10(B)(3).[295]

Finally, by order dated September 21, 2010, the Indiana Supreme Court amended Indiana Rule of Trial Procedure 79 to provide that "a person serving as a full-time judicial officer" is eligible to appointed as a special judge.[296]

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295. IND. TRIAL R. 55(B).

296. IND. TRIAL R. 79(J).