DEVELOPMENTS IN INDIANA APPELLATE PROCEDURE: RULE AMENDMENTS, REMARKABLE CASE LAW, AND COURT GUIDANCE FOR APPELLATE PRACTITIONERS

BRYAN H. BABB*
ONI HARTON**

INTRODUCTION

In 2000, the Indiana Supreme Court adopted the Indiana Rules of Appellate Procedure ("Appellate Rules"). The Indiana Supreme Court, the Indiana Court of Appeals, and the Indiana Tax Court (collectively "appellate courts") apply, interpret, and update the Appellate Rules through appellate decisions and amendment orders. This Article tracks the developments in appellate procedure between October 1, 2010, and September 30, 2011. Specifically, this Article summarizes the rule amendments, examines court opinions affecting appellate procedure, and synthesizes case law in order to provide guidance to practitioners so that they may improve their appellate practice.

I. RULE AMENDMENTS

The Indiana Supreme Court issued its Appellate Rule amendments on September 20, 2011.[1] The court substantively amended Appellate Rules 2, 9, 10, 11, 14, 14.1, 15, 16, 23, 24, 25, 46, 62, and 63.[2] The court also made changes to Forms 9-1, 9-2, 14.1-1, 15-1, 16-1, and 16-2 in accordance with the rule changes.[3] These amendments took effect on January 1, 2012 and may be categorized as notice of appeal, trial court clerk or administrative agency service of documents, expedited appeal, appearances, general provisions, and supreme court proceedings.

A. Notice of Appeal

Some of the more substantive rule amendments relate to the notice of appeal, found in Appellate Rules 9, 14, and 15. In terms of initiating an appeal,

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* Partner, Bose McKinney & Evans LLP. B.S., 1989, United States Military Academy; M.S.B.A., 1994, Boston University; J.D., *cum laude*, 1999, Indiana University Maurer School of Law; Law Clerk to Justice Frank Sullivan, Jr. of the Indiana Supreme Court (1999-2000).

** Associate, Bose McKinney & Evans LLP. B.A., 2002, University of North Carolina at Chapel Hill; J.D., *magna cum laude*, 2008, Indiana University Robert H. McKinney School of Law; Law Clerk to Justice Frank Sullivan, Jr. of the Indiana Supreme Court (2008-2010). The authors greatly appreciate the research, analysis, and drafting assistance provided by Matthew R. Springer, third-year law student at Thomas M. Cooley Law School.

1. *See* Order Amending Indiana Rules of Appellate Procedure, No. 94S00-1101-MS-17 (Ind. Sept. 20, 2011), *available at* http://www.in.gov/judiciary/files/rule-amends-2011-order-amend-2011-appellate.pdf [hereinafter Sept. 20, 2011 Appellate Rules Order].

2. *Id.* at 1.

3. *Id.*

Appellate Rule 9 made significant changes to the filing of the notice of appeal and the content that must be included in such notice. Appellate Rule 9(A) changes the filing of the notice of appeal from the trial court clerk to the clerk of the appellate courts.[4] As for the content in the notice of appeal, Appellate Rule 9 previously provided fairly generalized content requirements. The new rule provides for additional content requirements, along with the previous content requirements.[5] The following are the comprehensive headings of the additional content requirements: party information, trial information, public access information, appellate alternative dispute resolution information, attachments, certification, and certificate of filing and service.[6] Each of these headings includes subsections detailing the court's requirements.[7] As for Appellate Rule 9(F)(3) regarding "designation of appealed order or judgment," the new amended rule adds four additional requirements: date and title of the judgment or order, date on which any motion to correct error was denied, the basis for appellate jurisdiction, and designation of court where appeal is taken.[8]

Acknowledging that the amendment concerning the notice of appeal constitutes a major procedural change that may be missed by attorneys, Appellate Rule 9(A)(5) allows a two-year grace period, until January 1, 2014, for appellants who mistakenly file the notice of appeal with the trial court clerk or the administrative agency, instead of the clerk of the appellate courts.[9]

Another major amendment to the Appellate Rules in Rule 15 abolishes the appellant's case summary.[10] Previously, Appellate Rule 15 governed the appellant's case summary and outlined who must file, date due, content, and attachments.[11] The information formerly required in the appellant's case summary must now be included in the notice of appeal.[12] As a result of the abolishment, Appellate Rule 2(B), the definition of "Appellant's Case Summary," was deleted.[13]

Yet another noteworthy change regarding the notice of appeal is found in Appellant Rule 14(B)(3). This rule mandates that the notice of appeal be filed with the appellate court clerk and served on the trial court clerk rather than the other way around.[14] The form requirements have changed as well pursuant to

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4. *Id.* at 1-2.

5. *See id.* at 3-6; *see also* IND. APP. R. 9(F).

6. IND. APP. R. 9(F).

7. *Id.*

8. IND. APP. R. 9(F)(3).

9. IND. APP. R. 9(A)(5) ("Effective until January 1, 2014, if an appellant timely files the Notice of Appeal with the trial court clerk or the Administrative Agency, instead of the Clerk as required by App. R. 9(A)(1), the Notice of Appeal will be deemed timely filed and the appeal will not be forfeited.").

10. *See* Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 14-17.

11. *Id.*

12. IND. APP. R. 9(F).

13. Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 1.

14. IND. APP. R. 14(B)(3). The prior rule required the appellant to file a notice of appeal with

Rule 14(C)(5), which states "[t]he Notice of Appeal shall be in the form prescribed by Rule 9, and served in accordance with Rule 9(F)(10)."[15]

B. Trial Court Clerk or Administrative Agency: Service of Documents

A few Appellate Rules were amended to change to whom, and how, the trial court clerk or the administrative agency should serve certain documents. Appellate practitioners would be well-advised to take note of these amended rules in order to comply with the Appellate Rules. Appellate Rule 10 requires service of notice on the parties to be consistent with Appellate Rule 24 with regards to the following documents: notice of completion of clerk's record, notice of completion of transcript, and extension of time to complete clerk's records.[16]

Appellate Rule 24, the rule pertaining to service of documents, outlines what parties should be contemporaneously served, contingent on the type of document being filed and the date of filing.[17] Three distinct categories give guidance for what should be contemporaneously served: notice of appeal, documents filed in the thirty-day period following the filing of notice of appeal, and all other documents tendered to the clerk for filing.[18]

For criminal appeals, an additional rule was added, Appellate Rule 24(A)(4).[19] This rule states, "in criminal appeals only, any [a]ppendix or [s]upplemental [a]ppendix need not be served on the Attorney General."[20]

As for the certificate of service, Appellate Rule 24(D) formerly required any attorney or unrepresented party to provide specific content in the certificate of service when tendering a document to the clerk for filing.[21] With the amendment, the filing content requirement is mandatory for anyone (not just attorneys or unrepresented parties).[22] The certificate of service must be placed at the end of the document.[23] An exception for the clerk to allow documents to be filed without a certificate of service no longer applies.[24]

C. Expedited Appeal

Pursuant to the amendments to Appellate Rule 14.1(B) regarding notice of expedited appeal, additional parties are required to be served notice.[25] Appellate Rule 14.1(B) requires the Department of Child Services (DCS) to provide notice

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the trial court clerk. Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 11.

15. IND. APP. R. 14(C)(5).
16. IND. APP. R. 10(C)-(E).
17. IND. APP. R. 24(A)(1)-(3).
18. *Id.*
19. *See* Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 22.
20. IND. APP. R. 24(A)(4).
21. *See* Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 23.
22. IND. APP. R. 24(D).
23. IND. APP. R. 24(D)(2).
24. Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 23.
25. *See id.* at 13-14.

to the clerk of the trial court and the court reporter (if a transcript, or any portion of a transcript, is requested) on the same day it files the notice of expedited appeal.[26] It is important to note that this rule amendment eliminates the requirement for the DCS to give notice to the trial court clerk.[27] All content that is part of the notice of expedited appeal must comply with the new amended Appellate Rule 9(F).[28]

D. Appearances

The new rule regarding appearances, Appellate Rule 16, though similar to the old rule, differs in three regards. First, the new rule expressly states that "filing . . . a [n]otice of [a]ppeal pursuant to Rule 9 or [n]otice of [e]xpedited [a]ppeal pursuant to Rule 14.1 satisfies the requirement to file an appearance."[29] The old rule required initiating parties to file an appellant's case summary; this is no longer applicable.[30] Second, the amended rule provides that "[p]arties shall promptly advise the [c]lerk of any change in the information previously supplied under this Rule and Rule 9."[31] Third, the new rule adds an entirely new section Rule 16(H) entitled "Appearances in Certain Interlocutory Appeals."[32] This section states: "In the case of an [i]nterlocutory [a]ppeal under Rules 14(B)(2) or 14(C), a party shall file an appearance setting forth the information required by Rule 16(B) at the time the motion requesting the [c]ourt on [a]ppeal to accept jurisdiction over the interlocutory appeal is filed."[33]

E. General Provisions

Some amendments to the Appellate Rules changed procedural aspects of the appellate process. Whether they allow court reporters to use their discretion for timeliness of filing a transcript, or dictate the number of copies of each record that must be filed, several amendments are worth mentioning.

Appellate Rule 11, pertaining to duties of the court reporter, allows court reporters to use their discretion when "the court reporter believes the transcript cannot be filed within the time period prescribed by this rule, then the court reporter shall move . . . for an extension of time to file the [t]ranscript pursuant to Rule 35(A)."[34] With respect to motions to compel, the court reporter who fails to file the transcript on time must "affirmatively state that service [as required] under Rule 24(A)(1) was properly made and that the appellant has complied with

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26. IND. APP. R. 14.1(B).
27. Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 13.
28. IND. APP. R. 14.1(B)(3).
29. IND. APP. R. 16(A).
30. *See* Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 18.
31. IND. APP. R. 16(E).
32. Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 19.
33. IND. APP. R. 16(H).
34. IND. APP. R. 11(C).

the agreement for payment made in accordance with Rule 9(H)."[35]

Appellate Rule 23, which discusses filing, requires the original and one copy of any appearance and notice of appeal to be filed.[36] The amended rule also eliminates all appellant's case summary requirements.[37] Additionally, Appellate Rule 25, which deals with computation of time, specifies the allowance of an automatic extension of time from three days to three calendar days from the date of deposit in the mail or with the carrier to file any response.[38]

F. Supreme Court Proceedings

Appellate Rule 62, regarding appeals pertaining to waiver of parental consent for abortion, and Appellate Rule 63, which discusses the review of tax court decisions, both contain minor changes. These rule amendments eliminate any reference to the appellant's case summary within each rule.[39]

II. CASE LAW INTERPRETING THE APPELLATE RULES

Decisions authored by the court of appeals provide most case law interpreting the Appellate Rules, as its volume presents it with more opportunities to construe the rules and refine appellate procedure. The supreme court and tax court also, on occasion, have the opportunity to construe and apply the Appellate Rules.

A. Calculation of Days

Parties must be concerned with the content and procedural requirements when filing a motion. In this regard, counting days represents but one area a practitioner must pay close attention to at the outset of the appellate process.

In *Bir v. Bir*,[40] the appellee served the appellant with the appellee's response to appellant's motion for emergency transfer on December 10, 2010.[41] Then, appellant attempted to file a "Verified Motion for Leave to File Verified Reply in Support of Appellant's Motion for Emergency Transfer" ("motion for leave") on December 21, 2010.[42] The appellant attached a "Verified Reply in Support of Appellant's Motion for Emergency Transfer."[43] The clerk refused to file the appellant's motion for leave because it was deemed untimely filed.[44] The next day, December 22, the appellant filed a motion entitled, "Unopposed Verified Request to File Belated Document," explaining appellant's belief that appellant

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35. IND. APP. R. 11(D).
36. IND. APP. R. 23.
37. *See* Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 19.
38. IND. APP. R. 25(C).
39. Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 26-27.
40. 939 N.E.2d 1096 (Ind.), *trans. denied*, 962 N.E.2d 641 (Ind. 2011).
41. *Id.* at 1097.
42. *Id.*
43. *Id.*
44. *Id.*

thought that Appellate Rules 25(C) and 34(D) would make December 22, 2010, the deadline for appellant's motion for leave.[45]

The Indiana Supreme Court clarified how Appellate Rules 25(B) and 25(C) work together with Appellate Rule 34(D) to determine the due date for seeking leave to file a reply.[46]

> [W]hen a response to a motion is served by mail, three calendar days are immediately added to the service date per appellate Rule 25(C) . . . . The five non-business days expressed in Rule 34(D) are then counted from that third calendar day if it is a business day, or are counted from the next business day if the third day of the "additional three days" falls on a "non-business day."[47]

Applying these rules to the situation presented in *Bir*, the appellee's response was served on the Appellant by mail on Friday, December 10, 2010. The court held that Rule 25(C) added three calendar days from December 10 to appellant's motion for leave time period, which made Monday, December 13, 2010, the start date for determining the deadline stated in Rule 34(D).[48] Following Rule 34(D), "five non-business days were then counted from Monday, December 13th (i.e., Tuesday, Wednesday, Thursday, Friday, and Monday), making Monday, December 20, 2010, the deadline for [a]ppellant's [m]otion for [l]eave."[49] As a result, the court granted appellant's "Unopposed Verified Request to File Belated Document."[50]

B. Authorization of Davis/Hatton Procedure

The use of the *Davis/Hatton* procedure[51] within Appellate Rule 37 is a valuable tool when a defendant needs to develop an evidentiary record in an effort to support a claim of ineffective assistance of trial counsel. In *Peaver v. State*,[52] the trial court found Peaver guilty of child exploitation. Peaver filed a timely notice of appeal but subsequently moved for leave to pursue post-conviction relief and to suspend or stay his direct appeal using the *Davis/Hatton* procedure.[53] The court of appeals dismissed Peaver's appeal and remanded to the

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45. *Id.*

46. *Id.*

47. *Id.* (citing IND. APP. R. 25(B) (providing that "[w]hen the time allowed is less than seven . . . days, all non-business days shall be excluded from the computation")).

48. *Id.* at 1098.

49. *Id.*

50. *Id.*

51. *See* Taylor v. State, 929 N.E.2d 912, 917 n.1 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 825 (Ind. 2010) ("The *Davis/Hatton* procedure involves a termination or suspension of a direct appeal already initiated, upon appellate counsel's motion for remand or stay, to allow a post-conviction relief petition to be pursued in the trial court." (internal citations omitted)).

52. 937 N.E.2d 896 (Ind. Ct. App. 2010), *trans. denied*, 950 N.E.2d 1212 (Ind. 2011).

53. *Id.* at 898.

trial court for post-conviction proceedings.[54] Peaver filed a petition, alleging he was denied the effective assistance of trial counsel.[55] The post-conviction court denied this petition.[56]

Peaver asserted three separate grounds to support his claim that he was denied effective assistance of trial counsel; however, Peaver only included one claim in his petition for post-conviction relief.[57] Accordingly, the state asserted that the two remaining grounds omitted from his petition for post conviction verdict should be waived.[58] Peaver argued "he is entitled to allege separate grounds for his ineffective assistance of counsel ('IAC') claim in the context of his direct appeal, which is now reinstated pursuant to the *Davis/Hatton* procedure."[59]

In its decision, the court addressed the *Davis/Hatton* procedure, authorized by Appellate Rule 37.[60] The *Davis/Hatton* procedure "is encouraged 'to develop an evidentiary record for issues that with reasonable diligence could not have been discovered before the time for filing a motion to correct error or a notice of appeal has passed.'"[61] Historically, the Indiana Supreme Court has held that IAC claims can only be alleged in one proceeding.[62] The court denied Peaver's attempt to utilize the *Davis/Hatton* procedure to simultaneously appeal the denial of his petition for post-conviction relief claiming IAC on one theory and asserting IAC on another theory in his direct appeal.[63] The court noted that "the defendant must decide the forum for adjudication of the issue—direct appeal or collateral review. The specific contentions supporting the claim, however, may not be divided between the two proceedings."[64]

C. Importance of Citations in the Argument

The argument portion of a brief must contain very specific content, but regardless of the amount of effort a party puts into the brief, it could all be futile if a party neglects to add appropriate citations to applicable legal authority. In *New v. Estate of New*,[65] Martha (the decedent) had died on September 7, 2006.[66] Martha's will named two of her children, Claudine and Robert, as co-representatives of her estate ("Estate").[67] After several disagreements between

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54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* (citing Allen v. State, 749 N.E.2d 1158, 1171 (Ind. 2001)).
59. *Id.*
60. *Id.* at 899.
61. *Id.* (quoting Schlabach v. State, 842 N.E.2d 411, 418 (Ind. Ct. App. 2006).
62. *Id.*
63. *Id.*
64. *Id.* (quoting Woods v. State, 701 N.E.2d 1208, 1220 (Ind. 1998) (emphasis omitted)).
65. 938 N.E.2d 758 (Ind. Ct. App. 2010), *trans. denied*, 962 N.E.2d 641 (Ind. 2011).
66. *Id.* at 760.
67. *Id.*

the siblings, Claudine petitioned the probate court to remove Robert as co-representative for the Estate, leaving Claudine as the sole personal representative.[68] On September 4, 2009, the court approved the Estate's third amended final accounting. On October 7, 2009, Robert filed a combined motion to correct error pursuant to Rule 59, motion for relief from judgment pursuant to Rule 60, and a motion for reconsideration of the court's September 4, 2009 order.[69] The court denied the motion and the appeal ensued.[70]

The Estate moved to dismiss the appeal.[71] The Estate also moved to assess attorney fees for procedural bad faith for violating Appellate Rule 46(A).[72] Appellate Rule 46(A) provides the standard for the appellant's briefs submitted to the court.[73]

The court explained that the purpose of Rule 46(A) is to "relieve courts of the burden of searching the record and stating a party's case for [them]."[74] If the issue is "advanced without citation to authorities or the record, that issue is waived when the appellant's failure in this regard impedes our review."[75] The court concluded that Robert and James did not comply with Rule 46(A)(8)(a), attributable to their flagrant failure to make citations and failure to cite legal authority.[76] The court found that the defects in the brief were substantial, and such noncompliance with Rule 46(A)(8) constituted procedural bad faith, which entitled the non-offending party to appellate attorney fees per Appellate Rule 66(E).[77]

D. Procedural and Substantive Bad Faith Claims

A claimant who brings a bad faith claim may be subject to penalties, such as paying the other party's attorneys' fees. Bad faith claims may be divided into areas: procedural bad faith claims and substantive bad faith claims. Each type of claim has its own set of factors, which must be present to effectively characterize a claim as bad faith.

In *Kelley v. Med-1 Solutions, LLC*,[78] Med-1 accused the debtors of bringing a bad faith motion. Med-1 requested appellate attorney fees pursuant to Appellate

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68. *Id.* at 761.

69. *Id.*

70. *Id.*

71. *Id.* at 762.

72. *Id.*

73. *Id.* ("The argument must contain the contentions of the appellant on the issues presented supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the [a]ppendix or parts of the [r]ecord on [a]ppeal relied on, in accordance with Rule 22." (quoting IND. APP. R. 46(A)).

74. *Id.* (quoting Vandenburgh v. Vandenburgh, 916 N.E.2d 723, 729 (Ind. Ct. App. 2009)).

75. *Id.*

76. *Id.*

77. *Id.* at 765.

78. 952 N.E.2d 817 (Ind. Ct. App. 2011), *trans. denied*, 963 N.E.2d 1121 (Ind. 2012).

Rule 66(E).[79] Appellate Rule 66(E) allows the court to assess damages when an appeal, petition, motion, or response is frivolous or brought in bad faith.[80] The court of appeals discussed the appropriateness of awarding attorneys' fees under Rule 66(E), and stated that the rule is "limited to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay. . . . we must use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal."[81]

The bad faith referenced in Rule 66(E) may either be substantive or procedural, and Med-1 accused the debtors of both.[82] Procedural bad faith entails the blatant neglect for the form and content requirements of the Appellate Rules.[83] Additionally, the omission and misstatement of relevant facts in the record, and filing "briefs appearing to have been written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court" constitute procedural bad faith.[84]

On the other hand, a claimant bringing a substantive bad faith claim must show "that the appellant's contentions and argument are utterly devoid of all plausibility."[85] Accordingly, "[s]ubstantive bad faith implies the conscious doing of wrong because of dishonest purpose or moral obliquity."[86] The court concluded that the debtors did not commit procedural bad faith because their acts were not flagrant or significant enough to warrant attorney fees.[87] The debtors did not commit substantive bad faith because the court reasoned that the arguments were not "utterly devoid of all plausibility."[88] Therefore, attorney fees were not awarded to Med-1 for a bad faith motion.[89]

In *Chaney v. Clarian Health Partners, Inc.*,[90] Chaney filed a purported class action complaint against Clarian.[91] Chaney, the only named member of the proposed class, negotiated a settlement with Clarian. Clarian moved to dismiss the case with prejudice for lack of a class representative, which the trial court granted.[92] The attorney on behalf of Chaney and the class ("Class Attorney") appealed the trial court's dismissal, specifically, the imposition of Trial Rule 37

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79. *Id.* at 831.

80. *Id.*

81. *Id.* (quoting Poulard v. Laporte Cnty. Election Bd., 922 N.E.2d 734, 737 (Ind. Ct. App. 2010)).

82. *Id.*

83. *Id.*

84. *Id.* (quoting Harness v. Schmitt, 924 N.E.2d 162, 168 (Ind. Ct. App. 2010)).

85. *Id.* (quoting *Harness*, 924 N.E.2d at 168).

86. *Id.* (quoting *Harness*, 924 N.E.2d at 168 (internal quotation omitted)).

87. *Id.*

88. *Id.* (citation omitted).

89. *Id.*

90. 954 N.E.2d 1063 (Ind. Ct. App. 2011), *modified on reh'g*, 2012 WL 966172 (Ind. Ct. App. 2012).

91. *Id.* at 1065.

92. *Id.*

sanctions against him.[93] The court of appeals affirmed the imposition of Trial Rule 37 sanctions against the Class Attorney.[94] Clarian then filed a motion for appellate fees and costs under Appellate Rules 66(E) and 67.[95] Appellate Rule 67 states, "[w]hen a judgment or order is affirmed in whole, the appellee shall recover costs. When a judgment has been reversed in whole, the appellant shall recover costs in the [c]ourt on [a]ppeal and in the trial court or [a]dministrative [a]gency as provided by law."[96]

The court first considered the Class Attorney's appeal against the Trial Rule 37 sanction.[97] The motion failed to include any statement concerning reasonable efforts to reach an agreement with Clarian about discovery.[98] The motion also failed to state the trial court's order staying any discovery of that nature.[99] The Class Attorney "ignored the plain context of Clarian's correspondence asking for an extension of time to respond to discovery that was not subject to the stay."[100] The Class Attorney refused to acknowledge the stay, and persisted in the theory on appeal, and in his petition to transfer, that Clarian had agreed to provide the requested discovery.[101] The court concluded that he had pursued the motion to compel in bad faith.[102] Consequently, regarding the Class Attorney's appeal on the Trial Rule 37 sanction, the court reasoned that Clarian was entitled to attorneys' fees under Appellate Rule 66(E) and costs under Appellate Rule 67.[103]

Next, the court considered Clarian's request for fees and costs "on the grounds that [the Class Attorney] did not cite any law in support of his position that the trial court had abused its discretion when it did not allow him discovery regarding additional potential class members."[104] The Class Attorney argued that he could not cite Indiana law directly to support his argument on appeal because the questions presented were matters of first impression.[105] The Class Attorney cited three cases in his petition for transfer and at oral argument that he claimed supported his legal position.[106] Though the court agreed with the Class Attorney's general premise that federal class action cases based on Federal Rule 23 could support his argument, the Class Attorney failed to provide the court with a single case under Federal Rule 23.[107] Independent research, however, revealed

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93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 1066 (quoting IND. APP. R. 67(C)).
97. *Id.*
98. *Id.* at 1067.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 1070.
104. *Id.* at 1067.
105. *Id.*
106. *Id.*
107. *Id.* at 1067-68.

a number of Indiana and federal cases involving class action lawsuits applying Federal Rule 23.[108] None of the cases the Class Attorney cited were applicable to his legal position, and two of the cases provided no analysis at all.[109]

The court went on to analyze the cases the Class Attorney cited and found that they failed to provide a basis for either the new construction of class action law he had requested, or an extension of the law to that end.[110] The court concluded that the Class Attorney's arguments and filings were "utterly devoid of all plausibility and, therefore, were pursued in bad faith."[111] Consequently, the court held that Clarian was entitled to fees and costs under Appellate Rules 66(E) and 67.[112]

E. Issues not Raised at Trial Cannot Be Raised on Interlocutory Appeal

In *Curtis v. State*,[113] the trial court granted Curtis's interlocutory appeal.[114] Curtis argued on interlocutory appeal "that the delay in bringing him to trial violates his right to a speedy trial as guaranteed by the United States and Indiana Constitutions."[115] The State countered Curtis's argument by asserting that Curtis forfeited his constitutional speedy-trial claims because the claims were raised for the first time on appeal.[116]

Appellate Rule 14(B) states, "[a]ny issues that were properly raised in the trial court in ruling on the trial court's [certified interlocutory] order are available on interlocutory appeal."[117] Conversely, issues not properly raised in the trial court are unavailable on interlocutory appeal.[118] Curtis's motion with the trial court did not include language to suggest that he was raising a constitutional speedy-trial claim.[119] Because Curtis failed to properly raise the speedy-trial issue in the trial court, Curtis was prohibited from arguing that issue in the interlocutory appeal.[120] The court explained that,

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108. *Id.* at 1068.

109. *See id.*

110. *Id.* at 1068-69.

111. *Id.* at 1070.

112. *Id.* Clarian's request for both attorney fees and costs was supported by the foregoing facts: (1) the Class Attorney failed to use the appropriate standard of review in the discovery matter that was appealed; (2) the Class Attorney failed to cite supportive law to his arguments on appeal; and (3) the Class Attorney failed to cite law supporting his argument in his petition to transfer. *See id.* at 1066.

113. 948 N.E.2d 1143 (Ind. 2011).

114. *Id.* at 1146.

115. *Id.* at 1147.

116. *Id.*

117. *Id.* (second alteration in original) (quoting Harbour v. Arelco, Inc., 678 N.E.2d 381, 386 (Ind. 1997)).

118. *Id.*

119. *Id.*

120. *Id.*

> specific questions of law presented by the order must have been, in the first place, properly raised by Curtis before the trial court. And the trial court must have considered those issues in ruling on its interlocutory order. . . . To hold otherwise would allow a party to circumvent the well-established rule that issues must be raised before the trial court or are unavailable on appeal.[121]

F. Appellant's Burden to Show Reversible Error

Appellate Rule 66(A) pertains to the relief available on appeal for harmless error:

> No error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.[122]

Thus, the appellant bears the burden of proving that the alleged error merits reversal.

In *Gibson v. Bojrab*,[123] Dr. Bojrab performed a procedure on Gibson. As a result of the procedure, Gibson suffered injuries.[124] Gibson filed a complaint, alleging that Dr. Bojrab was negligent during the procedure.[125] The primary issue at the jury trial was the admissibility of a panel's decision concerning another patient of Dr. Bojrab.[126] In the case involving the other patient, the panel found that Dr. Bojrab failed to meet the standard of care when he performed the same procedure he performed on Gibson.[127]

Dr. Bojrab wanted to exclude testimony by Dr. Beatty, one of the members of the panel that found that Dr. Bojrab failed to meet the standard of care when he performed the identical procedure on another patient. It was anticipated that Dr. Beatty would testify on Gibson's behalf.[128] The trial court decided that Dr. Beatty's testimony describing Dr. Bojrab's previous failure to meet his standard of care was inadmissible.[129] Gibson filed a motion to reconsider the admissibility of the evidence relating to the other procedure.[130] The trial court granted

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121. *Id.* at 1148 (citing Pigg v. State, 929 N.E.2d 799, 803 (Ind. Ct. App.), *trans. denied*, 940 N.E.2d 826 (Ind. 2010)).

122. IND. APP. R. 66(A).

123. 950 N.E.2d 347 (Ind. Ct. App. 2011).

124. *Id.* at 349.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

Gibson's motion to reconsider stating, "If Dr. Bojrab testifies as to the standard of care, he will be testifying as an expert. As such, he can be impeached with prior claims of malpractice."[131] After Dr. Bojrab testified, the trial court ruled that he had testified without opening doors to impeachment.

Gibson appealed, contending that,

> the trial court deprived her of the opportunity to demonstrate why Dr. Bojrab's methods and abilities were not fool-proof. . . . [and that] evidence of Dr. Bojrab's prior breach of the standard of care in performing a nearly identical procedure could have shaped the juror's minds, calling into question everything Dr. Bojrab detailed at trial.[132]

The court explained that "[t]o determine whether an evidentiary error requires reversal, we assess the probable impact upon the trier of fact."[133]

The court of appeals reviewed the record and concluded that Gibson was now asserting that the trial court denied her the opportunity to broadly question Dr. Bojrab regarding the other medical malpractice action.[134] But, the court reasoned, the scope of the impeachment evidence that the trial court would have permitted was significantly narrower than Gibson contended.[135] Gibson failed to provide the court with a complete transcript evaluating the possible effect the exclusion of the impeachment evidence had on the jury; therefore, Gibson failed to establish error requiring reversal.[136]

G. Parties on Appeal

In *American Family Home Insurance Co. v. Bonta*,[137] Bonta crashed his motorcycle into Morales's car.[138] As a result of the accident, Bonta filed two complaints: one against Morales for her negligence and the second against American, as Bonta's provider for uninsured motorist coverage. American answered Bonta's complaint, and a three day jury trial ensued. The jury returned a verdict finding Bonta fifty-five percent at fault in the accident. The jury verdict was taken under advisement pending any motions that would be filed.[139] Ten days before the trial court's advisement entry, Bonta filed a motion for judgment

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131. *Id.*

132. *Id.* at 352.

133. *Id.* at 351-52 (quoting Linton v. Davis, 887 N.E.2d 960, 965 (Ind. Ct. App. 2008)).

134. *Id.* at 352.

135. *See id.*

136. *Id.* The court noted, "it is a cardinal rule of appellate review that the appellant bears the burden of showing reversible error by the record, as all presumptions are in favor of the trial court's judgment." *Id.* (quoting Marion-Adams Sch. Corp. v. Boone, 840 N.E.2d 462, 468 (Ind. Ct. App. 2006)).

137. 948 N.E.2d 361 (Ind. Ct. App. 2011).

138. *Id.* at 363.

139. *Id.*

on the evidence.[140] American filed a response to this motion. The trial court found that though it could not enter a judgment in favor of Bonta, it could find that the jury's verdict was against the weight of the evidence.[141] The trial court ordered a new trial. American appealed and Bonta cross-appealed.[142]

On cross-appeal, Bonta challenged American's standing to appeal the trial court's order.[143] Specifically, Bonta contended that "American's anonymous participation at trial does not allow it to 'step into Morales'[s] shoes' and initiate an appeal where Morales herself did not file an appeal."[144] Bonta argued that American was not a proper party to appeal in the case.[145] The trial court explained that a judgment secured by an insured motorist against an uninsured motorist will bind the insurer on both liability and damages, as long as the insurer received notice of the underlying litigation.[146] Therefore, the insurer may defend the action against the insured and intervene if not named as a defendant.[147] Within the framework of the uninsured motorist coverage claim, the insurer can stand in the shoes of the uninsured motorist during litigation.[148] Additionally, Appellate Rule 17(A) states that "[a] party of record in the trial court or [a]dministrative [a]gency shall be a party on appeal."[149]

The court concluded that American filed its answer to Bonta's motion and participated during the trial.[150] American was bound by the jury verdict since Morales was an uninsured motorist and American was Bonta's insurance provider; therefore, American had standing to bring an appeal contesting the trial court's decision to grant Bonta a new trial.[151]

H. Notice of "Intent" to Appeal Is Not "Functionally Equivalent" to a Notice of Appeal

The Appellate Rules governing the notice of appeal contain substantive guidelines as well as equally important procedural guidelines. The appellate courts have stressed the importance of following the specific measures outlined in the Appellate Rules, which helps explain why filing a notice of "intent" to appeal will not be considered an acceptable substitute for a notice of appeal.

In *In re D.L.*,[152] the trial court issued two separate parental termination orders

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140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 363-64 (citation omitted).
145. *Id.* at 364.
146. *Id.* (citing Wineinger v. Ellis, 855 N.E.2d 614, 621 (Ind. Ct. App. 2006)).
147. *Id.* (citing *Wineinger*, 855 N.E.2d at 621).
148. *Id.* (citing *Wineinger*, 855 N.E.2d at 621).
149. *Id.* (quoting IND. APP. R. 17(A)).
150. *Id.*
151. *Id.*
152. 952 N.E.2d 209 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 646 (Ind. 2011).

against the parents of six children.[153] The trial court issued the first on August 20, 2010 (terminating parental rights to the five youngest children), and the other on August 23, 2010 (terminating parental rights to the oldest child). On August 30, 2010, the mother filed a notice of intent to appeal with the trial court. The notice generally advised the trial court that she wished to appeal the decision and requested the appointment of counsel for her appeal process.[154] On August 31, 2010, the father filed an identical notice. Then, on September 23, 2010, counsel for the mother and father filed a notice of appeal with respect to all six cause numbers.[155] The parents subsequently filed a motion requesting permission to file a belated notice of appeal with the trial court.[156] The trial court found it lacked the authority to grant such relief, and filed a notice to the appellate court of untimely notice of appeal.[157] The court of appeals held that the parents had forfeited their right to appeal because their notice of appeal was untimely filed pursuant to Appellate Rule 9(A)(1).[158] Failure to file within the thirty-day time limit will result in forfeiture of a right to appeal.[159]

The parents argued that their notices of intent to appeal were "functionally equivalent" to the required notice of appeal and, therefore, should have been considered timely filed.[160] But the court rejected this argument.[161] The court reasoned that

> the [n]otices of [i]ntent to [a]ppeal filed by [p]arents in this case do not fulfill the purpose of the notice of appeal requirement—to serve as a mechanism to alert the trial court and the parties of the initiation of an appeal and to trigger action by the trial court clerk and court reporter, setting in motion the filing deadlines imposed by the Appellate Rules.[162]

The last termination order was issued on August 23, 2010, and thirty days from that date would be September 22, 2010 (the last day to timely file).[163] The parents' notice of appeal was filed on September 23, 2010, a day after the thirty

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153. *Id.* at 211.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 213. At the relevant time in question for this case, Appellate Procedure Rule 9(A)(1) provided: "A party initiates an appeal by filing a [n]otice of [a]ppeal with the trial court clerk . . . within thirty (30) days after the entry of a [f]inal [j]udgment is noted in the [c]hronological [c]ase [s]ummary." *See* Sept. 20, 2011 Appellate Rules Order, *supra* note 1, at 1. As previously discussed, the Rule amendments make significant changes to the filing requirements for the notice of appeal, which took effect on January 1, 2012.

159. *In re D.L.*, 952 N.E.2d at 212 (citing Bohlander v. Bohlander, 875 N.E.2d 299, 301 (Ind. Ct. App. 2007)).

160. *Id.*

161. *Id.* at 213.

162. *Id.*

163. *Id.*

day filing requirement; therefore, the parents forfeited their right to appeal.[164]

III. INDIANA SUPREME COURT

A. Case Data from the Indiana Supreme Court

In total, during the 2011 fiscal year,[165] the supreme court disposed of 1037 cases and issued 156 majority opinions and published dispositive orders.[166] The supreme court "accepted jurisdiction and issued opinions in approximately 8.7% of all transfer cases (11.3% in civil cases and 7.2% in criminal cases)."[167] The Indiana Supreme Court denied review of the remaining 91.3% resulting in the appellate court decision becoming final.[168]

This year, the case makeup was similar to that of the previous fiscal year, with the number of attorney discipline cases remaining high, totaling 40% of the majority opinions and published dispositive orders.[169] Approximately 27% of this year's opinions were criminal cases; 24% were civil; 3% were original actions; 1% were certified questions; 1% were tax; and the remainder of the cases consisted of judicial discipline cases, Indiana Board of Law Examiners cases, and rehearings.[170] The court heard oral argument in seventy-seven cases; with thirty-two coming from criminal cases, forty-two coming from civil cases, and three from certified questions.[171]

B. Chief Justice Shepard's Retirement from the Indiana Supreme Court

On December 7, 2011, Chief Justice Randall T. Shepard announced that he would leave the bench in March 2012 after a quarter century as leader of Indiana's judiciary.[172] Chief Justice Shepard served as the 99th justice of the Indiana Supreme Court and the longest serving state court chief justice in the United States.[173] During his career, Chief Justice Shepard authored nearly 900 civil and criminal opinions and wrote sixty-eight law review articles.[174] Additionally, he developed many practical solutions, improving the way the

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164. *Id.* Because the court recognized the constitutional dimensions of a termination case, the court reviewed the record for clear error, despite the untimely notice of appeal. *See id.* at 214.

165. The supreme court's 2011 fiscal year ran from July 1, 2010 through June 30, 2011. *See* IND. SUPREME COURT, 2010-2011 ANNUAL REPORT 3 (2011), *available at* http://www.in.gov/judiciary/supreme/files/1011report.pdf.

166. *Id.* at 48-49.

167. *Id.* at 4.

168. *Id.*

169. *Id.* at 49.

170. *Id.*

171. *Id.* at 50.

172. Press Release, Ind. Supreme Court, Chief Justice Shepard Will Retire from Supreme Court (Dec. 7, 2011), *available at* http://www.in.gov/judiciary/press/2011/1207.html.

173. *Id.*

174. *Id.*

courts do business.[175] One particularly noteworthy reform early in his career gave the supreme court discretion over the cases it hears.[176] Prior to such reforms, the supreme court devoted most of its time to criminal appeals.[177] These reforms allowed for a more balanced caseload, where the court hears both civil and criminal appeals, and has adequate time to conduct research and analysis.[178] Chief Justice Shepard's contributions to the judiciary of Indiana cannot be overstated. He will be missed.

CONCLUSION

This year marked another opportunity for the Indiana appellate courts to shape Indiana's appellate procedure practice. In the decade since the supreme court adopted the Appellate Rules, the decisions of the appellate courts and the Appellate Rule amendments have improved our judicial system for the bench, bar, and citizens of Indiana.

175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*