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 provided helpful interpretations of the Indiana Rules of Trial Procedure.

I. INDIANA SUPREME COURT DECISIONS

A. Subject Matter Jurisdiction

In *State ex rel. Zoeller v. Aisin USA Manufacturing, Inc.*,[2] the Indiana Supreme Court held that a trial court did not lack subject matter jurisdiction over the State's action to recover an erroneously issued tax refund from a corporate taxpayer.[3] The State brought an action based on claims of unjust enrichment, theft, statutory treble damages and constructive trust to recover more than one million dollars that was mistakenly issued as a refund check to Aisin USA Manufacturing, Inc. ("Aisin") due to several accounting and clerical errors within the Indiana Department of Revenue.[4] The trial court granted, and the court of appeals affirmed, Aisin's motion to dismiss pursuant to Indiana Trial Rule 12(B)(1) for lack of subject matter jurisdiction, finding that the matter fell within the exclusive jurisdiction of the Indiana Tax Court.

The Indiana Supreme Court determined that this case was not one that "arises under"[5] Indiana tax law and therefore it was not an original tax appeal over which the Indiana Tax Court had exclusive jurisdiction.[6] Affirming its prior interpretation of the term "arises under" as contained in Indiana Code section 33-26-3-1, the court stated that "a case arises under Indiana tax law if an Indiana tax statute creates the right of action or if the case principally involves the collection of a tax or defenses to the collection of a tax."[7] The court found that this case did not "principally" involve the collection of a tax or defenses to the collection of

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1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period—from October 1, 2010, through September 30, 2011—as well as amendments to the Indiana Rules of Trial Procedure, which were ordered by the Indiana Supreme Court during the survey period.

2. 946 N.E.2d 1148 (Ind. 2011), *reh'g denied*, 2011 Ind. LEXIS 789 (Sept. 13, 2011).

3. *Id.* at 1159.

4. *Id.* at 1150-51.

5. *See* IND. CODE § 33-26-3-1 (2011).

6. *Zoeller*, 946 N.E.2d at 1159.

7. *Id.* at 1154 (citing State v. Sproles, 672 N.E.2d 1353, 1357 (Ind. 1996)).

a tax[8]: none of the State's clerical or accounting errors were due to a misunderstanding of tax law; Aisin did not owe this money to the State due to outstanding tax liability, but rather because it was unjustly enriched by the refund; and "determining whether and to what extent mistakes were made ha[d] nothing to do with Indiana tax law."[9] Additionally, the court reasoned that the legislative purpose for the Indiana Tax Court's existence—ensuring the uniform interpretation and application of Indiana tax law—"would *not* be served by the [t]ax [c]ourt exercising jurisdiction over a case devoid of any tax-law issues."[10] The court concluded that the Jackson Superior Court had subject matter jurisdiction and remanded for proceedings on the merits of the State's claims.[11]

B. Service

In *Joslyn v. State*,[12] the supreme court held that a defendant's admission that he had notice of a protective order was sufficient to support convictions of stalking and invasion of privacy, despite the defendant's arguments that the protective order was not properly served under the Indiana Rules of Trial Procedure.[13] Stephanie Livingston obtained an ex parte protective order under the Indiana Civil Protective Order Act against Richard Joslyn.[14] Joslyn was served with a copy of the protective order by a sheriff's deputy who left a copy attached to the door of Joslyn's residence. The return of service, though, did not indicate whether a copy was also mailed to his last address as required under Indiana Trial Rule 4.1.[15] After Josyln violated the protective order and was convicted of stalking and invasion of privacy, he challenged the sufficiency of evidence to support his convictions based on improper service of the protective order.[16]

Granting transfer "to address the service of protective orders," the court held that Joslyn's testimony admitting receipt of the protective order was sufficient to sustain his convictions.[17] Affirming the reasoning of the appellate court, the court stated:

> [T]he purpose of the Indiana Civil Protection Order Act is to promote the protection and safety of all victims of domestic violence and prevent future incidents. It would run contrary to this purpose if we were to

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8. Whether the State's right of action was created by a tax statute was not at issue. *Id.*

9. *Id.* at 1155.

10. *Id.* at 1156.

11. *Id.* at 1159. Justice Rucker authored a dissent in which Justice Dickson concurred. *Id.* (Rucker, J., dissenting). Justice Rucker opined that this matter was one for the Tax Court, and that the State attempted to "end-run" a missed statute of limitations deadline applicable to a tax proceeding by filing the present action in the superior court. *Id.*

12. 942 N.E.2d 809 (Ind. 2011).

13. *Id.* at 812-14.

14. *Id.* at 810.

15. *Id.* (citing IND. TRIAL R. 4.1).

16. *Id.* at 812.

17. *Id.* at 811-12.

> embrace Joslyn's contention that a defendant does not violate the criminal code because of some defect in civil process even where the court had in fact issued a protective order and the defendant in fact knew it had done so.[18]

In *In re Adoption of L.D.*,[19] the supreme court remanded the denial of a mother's motion to set aside paternal grandparents' petition for adoption, finding that notice and service of process by publication was insufficient to confer personal jurisdiction over the mother because the grandparents failed to perform a "diligent search" as required by the Due Process Clause.[20] After the mother gave birth to a baby ("Child") while not married and incarcerated, a court appointed N.E. (who later adopted the Child, and therefore became the adoptive grandmother of Child) to be Child's guardian.[21] After an initial failed attempt at adoption, and various changes to the Child's custody and visitation arrangements, the Child's paternal grandparents filed a new petition to adopt Child. The paternal grandparents did not give notice to N.E., and filed an affidavit stating they did not have the mother's address or telephone number. The affidavit went on to say that they had attempted to obtain such from the Indiana Department of Correction and the Marion County Jail, and had learned that the mother was no longer incarcerated and had not contacted Child for two years.[22] Paternal grandparents filed "proof of service" of the adoption petition through publication.[23]

While the paternal grandparents attended the adoption hearing, they left Child in the care of N.E., but did not tell N.E. of the adoption petition or that they were attending a hearing to adopt Child. After the hearing, the paternal grandparents informed N.E. of the adoption, and within two weeks, the mother and N.E. asked the court to vacate the adoption and declare it void due to a lack of notice under Indiana Trial Rule 60(B).[24] At a hearing on the issue, the paternal grandmother testified that she had asked N.E. if she knew how to contact the [m]other, and N.E. said "no, not really,"[25] but N.E. testified that she did not remember such a conversation and that she had been able to contact the Child's mother.[26] The trial court denied the motion to set aside the adoption decree, and the court of appeals affirmed, finding that the mother had been adequately served.[27]

Although both Indiana's adoption statute and Indiana Trial Rule 4.13(A) allow for notice or service of process by publication "'if the . . . address of the

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18. *Id.* at 812.
19. 938 N.E.2d 666 (Ind. 2010).
20. *Id.* at 671.
21. *Id.* at 667-68.
22. *Id.* at 668.
23. *Id.*
24. *Id.*
25. *Id.* at 669.
26. *Id.* at 669 n.2.
27. *Id.* at 669.

person is not known,'"[28] a "diligent search" is required under the Due Process Clause and Rule 4.13(A) before attempting notice by publication.[29] After discussing several federal and Indiana opinions regarding the satisfaction of "diligence," the court concluded that, under the facts of the present case, the paternal grandparents failed to conduct the diligent search required by the Due Process Clause. The court focused its reasoning on the paternal grandparents' failure to discuss the adoption with N.E.:

> [The Paternal Grandparents] made only the most obtuse and ambiguous attempt to ask N.E. about [the m]other's whereabouts. They affirmatively concealed from N.E. the very fact that they were filing an adoption petition even though the most minimal diligence to find [the m]other would have involved N.E. One need look no further than the fact that N.E. and [the m]other filed their motion in court less than two weeks after [the p]aternal [g]randparents told N.E. that the adoption had been granted to see how little effort would have been required for Paternal Grandparents to find [the m]other had they involved N.E.[30]

The court remanded the case to the trial court and directed it to grant the mother's Trial Rule 60(B) motion to vacate the adoption decree.[31]

C. Pleadings

In *Avery v. Avery*,[32] the supreme court held that defendants to a will contest action were required to file an answer or other responsive pleading in accordance with Indiana Trial Rule 7, and affirmed the trial court's grant of default judgment in favor of the plaintiff because of defendants' failure to answer.[33] After Mary Avery passed away, her daughter, Trina Avery, opened an estate and was appointed personal representative.[34] After two of Mary's sons filed a petition to remove Trina as personal representative and the probate court's admission of a will naming one of the sons as personal representative, Trina filed a separate action to dispute the validity the will.[35] Notice was provided to the defendants, including the Avery sons, via summons instructing defendants that "[a]n answer or other appropriate response in writing to the Complaint must be filed . . . or a judgment by default may be rendered against you for the relief demanded by Plaintiff."[36] After the defendants failed to answer or otherwise respond to the

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28. *Id.* (quoting IND. CODE § 31-19-4.5-2(2) (2011) and citing IND. TRIAL R. 4.13(A)).
29. *Id.*
30. *Id.* at 671.
31. *Id.*
32. 953 N.E.2d 470 (Ind. 2011).
33. *Id.* at 472.
34. *Id.* at 470.
35. *Id.* at 470-71.
36. *Id.* at 471.

summons, the trial court entered a judgment by default against all defendants.[37]

The court rejected the defendants' contention that they were not required to file an answer because a will contest action is a "statutorily created cause of action" that must be brought within certain statutory provisions, which do not explicitly require an answer.[38] While the court acknowledged that some Indiana opinions authored prior to the 1970 adoption of the Indiana Rules of Trial Procedure held that an answer in a will contest was not necessary,[39] the court cited the "inclusive breadth"[40] of Trial Rule 1[41] and post-Rules case law (finding that the Trial Rules "take precedence over any conflicting statutes"[42] and specifically applying the Trial Rules to will contest actions)[43] to determine that a timely filing of an answer was required.[44] Failure to do so subjected the defendants to a default judgment, as contemplated under Trial Rule 55(A).[45]

D. Right to a Jury Trial

In *Lucas v. U.S. Bank, N.A.*,[46] the Indiana Supreme Court reversed the court of appeals determination that mortgagors were entitled to a jury trial on their legal claims asserted in response to a mortgage foreclosure action,[47] affirming the trial court's denial of the jury trial request.[48] The court drew from its prior teaching in *Songer v. Civitas Bank*[49] to formulate a "multi-pronged inquiry" as to whether a suit is "essentially equitable," thus drawing legal claims into equity and away from a jury.[50]

After U.S. Bank brought a mortgage foreclosure action against the Lucases,

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37. *Id.*

38. *Id.* at 472.

39. *Id.* at 471 (quoting State *ex rel.* Brosman v. Whitley Circuit Court, 198 N.E.2d 3, 5 (Ind. 1964)).

40. *Id.* at 472 (citing Robinson v. Estate of Hardin, 587 N.E.2d 683, 685 (Ind. 1992)).

41. Indiana Trial Rule 1 states, in part, that "[e]xcept as otherwise provided, these rules govern the procedure and practice in all courts of the state of Indiana in all suits of a civil nature whether cognizable as cases at law, in equity, or of statutory origin." IND. TRIAL R. 1.

42. *Avery*, 953 N.E.2d at 472 (citing State *ex rel.* Gaston v. Gibson Circuit Court, 462 N.E.2d 1049, 1051 (Ind. 1984); *In re* Little Walnut Creek Conservancy Dist., 419 N.E.2d 170, 171 (Ind. Ct. App. 1981), *reh'g denied*; Augustine v. First Fed. Sav. & Loan Ass'n of Gary, 384 N.E.2d 1018, 1020 (Ind. 1979)).

43. *Id.* (quoting Robinson v. Estate of Hardin, 587 N.E.2d 683, 685 (Ind. 1992)).

44. *Id.*

45. *Id.*

46. 953 N.E.2d 457 (Ind. 2011), *reh'g denied*, 2012 Ind. LEXIS 6 (Jan. 9, 2012).

47. The court of appeal's opinion and rationale was discussed in last year's survey article. *See* Daniel K. Burke, *Recent Developments in Indiana Civil Procedure*, 44 IND. L. REV. 1087, 1105-06 (2011).

48. *Lucas*, 953 N.E.2d at 467.

49. 771 N.E.2d 61 (Ind. 2002).

50. *Lucas*, 953 N.E.2d at 465-66.

the Lucases responded by asserting various affirmative defenses, counterclaims, and a third-party complaint against the loan servicer.[51] The Lucases pled statutory and common law claims against the bank and loan servicer, claiming they were entitled to various forms of relief, including monetary damages, and demanded a jury trial "on all issues deemed so triable."[52]

The court cited *Songer* to explain:

> [A] court should look at the "essential features of a suit." If the lawsuit as a whole is equitable and the legal causes of action are not "distinct or severable," then there is no right to a jury trial because equity subsumes the legal causes of action. On the other hand, if a multi-count complaint contains plainly equitable causes of action and sufficiently distinct, severable, and purely legal causes of action, then the legal claims require a trial by jury.[53]

According to the supreme court, the court of appeals interpreted *Songer* to "require courts to engage in a case-by-case analysis of the various claims and not to use bright-line rules based on specific causes of action."[54] The court of appeals found that the Lucases' affirmative defense alleging that U.S. Bank failed to produce the original promissory note and properly executed assignments as proof of its security interest was "'so intertwined with a foreclosure action' that it was also a matter of equity."[55] However, on the other defenses, counterclaims, and third party claims, the court of appeals found they were "grounded in federal and state statutory law and state common law, and were all legal causes of action . . . request[ing mostly] money damages, a legal remedy."[56] The court of appeals also reasoned that the nature of these claims was different from the foreclosure action because the Lucases' claims were grounded partly in "consumer protection statutes designed to provide meaningful disclosure of information and to protect borrowers from abusive, unfair debt collection practices."[57] The court of appeals thus instructed the trial court to grant the Lucases' motion for a jury trial as to these legal claims.

The supreme court found *Songer* to require trial courts to

> engage in a multi-pronged inquiry to determine whether a suit is essentially equitable. . . . [W]e formulate that inquiry as follows: If equitable and legal causes of action or defenses are present in the same lawsuit, the court must examine several factors of each joined claim—its substance and character, the rights and interests involved, and the relief

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51. *Id.* at 459.

52. *Id.*

53. *Id.* at 460-61 (citations omitted).

54. *Id.* at 463 (citing Lucas v. U.S. Bank, N.A., 932 N.E.2d 239, 244 (Ind. Ct. App. 2010), *rev'd* 953 N.E.2d 457).

55. *Id.* at 463-64 (quoting *Lucas*, 932 N.E.2d at 244).

56. *Id.* at 464 (citing *Lucas*, 932 N.E.2d at 244).

57. *Id.* (citing *Lucas*, 932 N.E.2d at 244-45).

> requested. After that examination, the trial court must decide whether core questions presented in any of the joined legal claims significantly overlap with the subject matter that invokes the equitable jurisdiction of the court. If so, equity subsumes those particular legal claims to obtain more final and effectual relief for the parties despite the presence of peripheral questions of a legal nature. Conversely, the unrelated legal claims are entitled to a trial by jury.[58]

Applying this inquiry to the present case, the court found that the bank's foreclosure complaint invoked the equitable jurisdiction of the trial court, and that all of the Lucases' legal claims were "subsumed into equity."[59] The court reasoned that when "looking at the cause *as a whole*"[60] and comparing the core issues presented by the Lucases' legal defenses and claims[61] with the core issues presented by the foreclosure action,[62] it was clear that they were "closely intertwined with one another,"[63] so that equity took jurisdiction over the "essential features" of the suit, thus requiring denial of the Lucases' jury trial request.[64]

E. Judgment on the Evidence/Affirmance of General Verdict

In *TRW Vehicle Safety Systems, Inc. v. Moore*,[65] the Indiana Supreme Court determined that TRW's motion for judgment on the evidence should have been

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58. *Id.* at 465-66.

59. *Id.* at 466.

60. *Id.*

61. The court summarized the factual contentions underlying the Lucases' legal claims as follows:

> (1) U.S. Bank or Litton misled the Lucases on the terms of the loan documents and the handling of the Lucases' monthly payments; (2) U.S. Bank or Litton failed to properly account for and apply the Lucases' monthly payments to pay property taxes and insurance; (3) as a result of incorrectly calculating the Lucases' debt and misapplying the monthly payments, U.S. Bank or Litton declared the Lucases in default when in fact the Lucases were current and not liable for foreclosure; and (4) because the Lucases were current in their payments, U.S. Bank or Litton have wronged the Lucases by demanding payments the Lucases did not owe and by filing the present lawsuit when the Lucases were not in default.

Id.

62. The Court summarized the issues from the foreclosure action as:

> (1) the terms of the parties' agreement and the payments due under those terms; (2) the amount of the Lucases' payments; (3) the application of those payments; and (4) whether the Lucases failed to pay as agreed so that U.S. Bank could rightfully take steps to collect the debt the Lucases owed.

Id.

63. *Id.*

64. *Id.* at 467.

65. 936 N.E.2d 201 (Ind. 2010).

granted, vacating the judgment and five percent allocation of fault to TRW.[66] In affirming the verdict against co-defendant Ford, the court rejected Ford's contention that reversal with retrial was required if the court found any one, but not all, of plaintiff's liability theories to be based on insufficient evidence.[67]

Daniel Moore's estate brought a wrongful death action against Ford and seatbelt manufacturer TRW after Moore died from injuries sustained in a car accident in which he was ejected through the sunroof of his Ford Explorer, despite wearing his seatbelt, following a tire failure.[68] The jury found total damages to be $25,000,000 and allocated thirty-three percent fault to Moore, thirty-one percent fault to Ford, thirty-one percent fault to nonparty Goodyear Tire and Rubber Company, and five percent fault to TRW.[69]

The court determined that TRW's motion for judgment on the evidence should have been granted pursuant to Trial Rule 50(A) due to insufficient evidence. The court restated its previously-articulated standards when reviewing a motion for judgment on the evidence, examining the "evidence and the reasonable inferences drawn most favorable to the non-moving party,"[70] reversing "only when 'there is no substantial evidence supporting an essential issue in the case,'"[71] and requiring that the "evidence must support without conflict only one inference which is in favor of the defendant" to overturn a trial court's denial of a motion for judgment on the evidence.[72]

In this case, the plaintiff's theory of liability against TRW was seatbelt design negligence.[73] However, Ford contracted with TRW to manufacture seatbelts according to Ford's specifications, and because "there [was] no evidence that TRW was authorized under its contract . . . to substitute and supply . . . an alternative seatbelt design,"[74] the evidence was "insufficient to establish that TRW . . . failed to exercise reasonable care under the circumstances in designing the seatbelt assembly involved in the incident."[75] As to TRW, the "mere availability of an alternative seatbelt design [did] not establish negligent design by a defendant that lacks the authority to incorporate it into the assembled vehicle."[76]

The court also determined that, because there was insufficient evidence for a jury to reach a product liability verdict as to Goodyear had it been a named party, there was insufficient evidence to support its allocation of fault as a

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66. *Id.* at 228.
67. *Id.* at 211.
68. *Id.* at 207.
69. *Id.*
70. *Id.* at 214 (quoting Kirchoff v. Selby, 703 N.E.2d 644, 648 (Ind. 1998)).
71. *Id.* (quoting *Kirchoff*, 703 N.E.2d at 648)).
72. *Id.* (quoting Ross v. Lowe, 619 N.E.2d 911, 914 (Ind. 1993)).
73. *Id.* at 215.
74. *Id.* at 216.
75. *Id.*
76. *Id.*

nonparty.[77]

In affirming the verdict against Ford, the court addressed and rejected Ford's argument that a finding of insufficient evidence to support *any*, but not *all*, of the plaintiff's theories of liability against Ford would require reversal with retrial because Ford was denied directed verdicts.[78] Ford cited a line of previous Indiana cases from when "code pleading" governed procedure to argue that appellate courts must "presume the general verdict was based on the bad theory . . . unless it affirmatively appears that the verdict rests upon the [good theory]."[79] While the court found Ford's request to modify Indiana's rule favoring affirmance of a general verdict "immaterial"[80] because both of the liability theories presented to the jury (seatbelt system design and sunroof defective design) were each supported by sufficient evidence, the court expressly declined to consider deviation from Indiana law recognizing that a general verdict will be affirmed where there is "any evidence" to support it.[81]

F. Motion to Correct Error

In *Walker v. Pullen*,[82] the supreme court held that the findings made by the trial court in granting a new trial to correct an error in prior proceedings were insufficiently general and failed to state whether the verdict was against the weight of the evidence or clearly erroneous.[83]

David Pullen won a jury verdict against Debra Walker following a car accident but sought a new trial, claiming that the amount of damages awarded to him was against the weight of the evidence.[84] Pullen sought total damages of $25,019.50, but the jury awarded him $10,070.00, indicating that this amount represented his physical therapy and initial medical assessment expenses.[85] In his motion to correct error, Pullen argued that the jury award did not fully reflect his physical therapy expenses and initial medical assessment.[86] In a three-paragraph ruling granting Pullen's motion, the trial court determined that:

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77. *Id.* at 226. While it could be "reasonably inferred that the rollover event was precipitated by the failure of a Goodyear tire," there was "no evidence establishing whether it resulted from a tire defect attributable to Goodyear or from normal wear and tear, underinflation, a slow leak, a road hazard or puncture, or any other cause." *Id.*

78. *Id.* at 211.

79. *Id.* (citation omitted) (alterations in original).

80. *Id.*

81. *See id.* (citing PSI Energy, Inc. v. Roberts, 829 N.E.2d 943, 950 (Ind. 2005); Epperly v. Johnson, 734 N.E.2d 1066, 1070 (Ind. Ct. App. 2000); Tipmont Rural Elec. Membership Corp. v. Fischer, 697 N.E.2d 83, 86 (Ind. Ct. App. 1998), *aff'd*, 716 N.E.2d 357 (Ind. 1999); Picadilly, Inc. v. Colvin, 519 N.E.2d 1217, 1221 (Ind. 1988)).

82. 943 N.E.2d 349 (Ind. 2011).

83. *Id.* at 352.

84. *Id.* at 351.

85. *Id.*

86. *Id.*

> The undisputed medical testimony in this case established that Plaintiff's medical bills . . . were for appropriate treatment of injuries suffered [as a result of Defendant's negligence]. . . . Those medical bills totaled $12,250.00. The jury's verdict was less than those medical bills. . . . There was also undisputed medical testimony that Plaintiff endured pain and suffering for a minimum of five months. The jury's verdict obviously contained no award for that, however minimal.[87]

Admonishing courts to tread "[c]arefully as the [t]hirteenth [j]uror,"[88] the court cited the language of Trial Rule 59(J) requiring "special findings of fact upon each material issue or element of the claim or defense upon which a new trial is granted" and determination as to whether the verdict was "against the weight of the evidence or . . . clearly erroneous as contrary to or not supported by the evidence."[89] The court affirmed its requirement of strict compliance with Trial Rule 59(J), reasoning that "[s]pecific findings are necessary to temper the use of the 'extraordinary and extreme' power to overturn a jury's verdict by assuring that the decision is based on a complete analysis of the law and facts."[90]

In reversing the finding of the trial and appellate court and directing that the jury verdict be reinstated,[91] the court cited the trial court's failure to state whether the verdict was "against the weight of the evidence or clearly erroneous."[92] The court briefly discussed potential reasoning for the jury awarding its determined amount,[93] and found that the trial court's statement that the evidence was "undisputed" as to damages was not a "sufficient special finding to justify supplanting the jury's verdict," nor did the findings suggest "that this was an unjust result."[94]

G. Review of Court's Findings and Judgment

In *In re I.A.*,[95] a father appealed the trial court's decision to terminate his parental rights.[96] The supreme court found that, when implementing the "clearly erroneous" standard of review set forth in Trial Rule 52(A) to determine whether to set aside a trial court's findings or judgment, the "clear and convincing" standard mandated by statute for parental termination proceedings should be used to determine whether the evidence supported the findings, and whether the

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87. *Id.*

88. *Id.* at 352.

89. *Id.* (quoting IND. TRIAL R. 59(J)).

90. *Id.* (quoting Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, 358 N.E.2d 974, 978 (Ind. 1976)).

91. *Id.* at 351.

92. *Id.* at 352.

93. *Id.* at 353.

94. *Id.*

95. 934 N.E.2d 1127 (Ind. 2010).

96. *Id.* at 1132.

findings supported the judgment. This harmonized the statutory burden of proof for termination proceedings with the language of Rule 52(A).[97] Thus, the court held that "to determine whether a judgment terminating parental rights is clearly erroneous, we review the trial court's judgment to determine whether the evidence clearly and convincingly supports the findings and the findings clearly and convincingly support the judgment."[98]

The trial court terminated the parental rights of both the child's mother and father, but only the father appealed.[99] The court determined that, with regard to the father, the Perry County Department of Child Services (DCS) failed to demonstrate by clear and convincing evidence that there was: (1) "a reasonable probability that the reasons for placement outside the home of the parents [would] not be remedied;" or (2) a reasonable probability that continuing the father-child relationship threatened the emotional or physical well-being of the child, as was required in order to terminate a parental relationship involving a child in need of services.[100] In this case, the child was initially removed from the mother's home and placed in foster care due to lack of supervision, but the father did not reside with the mother at that time. Neither the trial court's order nor the record indicated what led DCS to place the child in foster care, rather than with the father.[101] The trial court based its determination that the continuation of the parent-child relationship posed a threat to the child's well-being on a case manager's belief that there was a lack of bonding between the father and child, but the case manager did not testify specifically that continuation of the parent-child relationship *with respect to the father* posed a threat.[102] The court suggested that state's wardship of the child continue until the father had "a chance to prove himself a fit parent for his child,"[103] and concluded that "[t]he involuntary termination of parental rights is the most extreme sanction a court can impose on a parent . . . intended as a last resort, available only when all other reasonable efforts have failed."[104]

II. INDIANA COURT OF APPEALS DECISIONS

A. Service and Sufficiency of Process

In *Guy v. Commissioner, Indiana Bureau of Motor Vehicles*,[105] the court of appeals found that the trial court lacked personal jurisdiction over a plaintiff's petition for an order to renew his driver's license, where the plaintiff served the

97. *Id.*
98. *Id.*
99. *Id.* at 1132 n.4.
100. *Id.* at 1135-36; *see also* IND. CODE § 31-35-2-4(b)(2) (2011).
101. *In re L.A.*, 934 N.E.2d at 1134.
102. *Id.* at 1135-36.
103. *Id.* at 1136.
104. *Id.* (citations omitted).
105. 937 N.E.2d 822 (Ind. Ct. App. 2010).

Commissioner of the Bureau of Motor Vehicles but failed to serve the Attorney General as required by Indiana Trial Rule 4.6(A)(3) and the Indiana Administrative Orders and Procedures Act.[106]

The appellate court distinguished prior case law, *Evans v. State*,[107] where a plaintiff served the Governor and the Attorney General with a summons but failed to serve the head of the Indiana Family and Social Services Administration (FSSA) with the suit.[108] In that case, the court of appeals relied on Indiana Trial Rule 4.15(F) to cure the defective service made to the Governor as opposed to the secretary of the FSSA.[109] The *Guy* court distinguished *Evans* and found it not controlling: "Because there was no attempt at serving the [a]ttorney [g]eneral, Trial Rule 4.15(F) cannot be used in this case to cure any defective service to the [a]ttorney [g]eneral."[110] The court concluded that Guy's service of process was ineffective and that the trial court lacked personal jurisdiction over the BMV Commissioner such that it could not enter any order in the case, requiring the appellate court to vacate the lower court's denial of Guy's petition.[111]

In *Cotton v. Cotton*,[112] the court of appeals held that a summons served on a wife in a dissolution action was insufficient to satisfy due process because it did not contain a statement that if the wife failed to appear or otherwise respond, a decree could be entered without notice.[113] After Mr. Cotton filed his petition to dissolve the marriage, his wife was served with a summons that stated:

> You have been sued by the Petitioner in the Kosciusko Circuit Court . . . . The nature of the lawsuit and the demand made against you are stated in the Petition for Dissolution of Marriage which is served on you with this Summons.
>
> You *may personally appear* in this action or your attorney may appear for you. *You must appear before the Court if directed to do so pursuant to a Notice, an Order of the Court, or a Subpoena*. You *may file a response* to the Petition prior to submission of the Petition at final hearing which may be tried or heard after the expiration of sixty (60) days from the date of filing of the Petition for Dissolution of Marriage or from the date of the publication of the first Notice to a non-resident.[114]

Mrs. Cotton did not appear personally or by counsel and did not respond to the petition because she believed that the two were attempting reconciliation and

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106. *Id.* at 823.

107. 908 N.E.2d 1254 (Ind. Ct. App. 2009).

108. *Guy*, 937 N.E.2d at 824-25 (citing *Evans*, 908 N.E.2d at 1256).

109. *Id.* at 825 (citing *Evans*, 908 N.E.2d at 1258-59).

110. *Id.*

111. *Id.* at 826.

112. 942 N.E.2d 161 (Ind. Ct. App. 2011).

113. *Id.* at 163.

114. *Id.* at 164-65. The court also noted that the summons was typewritten and prepared by Mr. Cotton's attorney, not a form provided by the clerk. *Id.* at 165.

that her husband was not seeking a dissolution.[115] Because she never appeared, she was not notified of the final hearing, which her husband attended and resulted in the court entering a dissolution decree.[116]

In response to Mrs. Cotton's appeal challenging the sufficiency of process,[117] the court determined that due process requires that, "at a minimum, a respondent in a dissolution proceeding be notified of the risk of default for failure to appear or otherwise respond."[118] The court explained that the language of Trial Rule4 (C)(5)—providing that a summons "shall contain . . . [t]he time within which these rules require the person being served to respond, and a clear statement that in case of his failure to do so, judgment by default may be rendered against him for the relief demanded in the complaint"[119]—did not "squarely address" the circumstances of this case because responsive pleadings are not required in marriage dissolution proceedings.[120] However, "the command of Trial Rule 4(C)(5), grounded in due process, is that the respondent in a dissolution proceeding must be given notice in a 'clear statement' of the risk of default for failure to appear or otherwise respond because that risk is present regardless of whether a response is required."[121] Without a statement of the consequences for failing to appear or otherwise respond, the summons "did not satisfy due process or comply with the intent of Trial rule 4(C)(5)."[122] The court also rejected Mr. Cotton's argument that the savings provision of Trial Rule 4.15(F) made the summons sufficient to obtain personal jurisdiction over his wife.[123] The court reversed the dissolution court's entry of the dissolution decree.[124]

B. Pleadings

In *Quimby v. Becovic Management Group, Inc.*,[125] the court of appeals determined it was proper to dismiss a complaint seeking relief under the Indiana Wage Payment Statute where the plaintiff had already assigned her claim under

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115. *Id.* at 163.

116. *Id.*

117. The court paused to note the "not often addressed" distinction between a challenge of insufficient process and insufficient service of process: "[a] claim of insufficiency of process 'challenges the content of a summons; [insufficiency of service of process] challenges the manner or method of service.'" *Id.* at 164 (second alteration in original) (quoting Heise v. Olympus Optical Co., 111 F.R.D. 1, 5 (N.D. Ind. 1986)).

118. *Id.* at 165.

119. IND. TRIAL R. 4(C)(5).

120. *Cotton*, 942 N.E.2d at 165.

121. *Id.*

122. *Id.* at 166.

123. *Id.*

124. *Id.*

125. 946 N.E.2d 30 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 938 (May 18, 2011), *trans. denied*, 962 N.E.2d 1199 (Ind. 2012).

the Indiana Wage Claim Statute to the Indiana Department of Labor.[126]

After voluntarily leaving her employment with the defendant, plaintiff Quimby initially, and improperly, sought relief for allegedly unpaid wages under the Indiana Wage Claim Statute by submitting and assigning her claim to the Indiana Department of Labor.[127] She then filed suit seeking relief under the Indiana Wage Payment Statute.[128] Drawing from the two statutes and prior case law, the court explained that Quimby should have initially pursued her claim pursuant to the Wage Payment Statute rather than assign her claim to the Indiana Department of Labor because she voluntarily left her employment with defendant.[129] However, she effectively assigned her claim to the Department of Labor and therefore was no longer the real party in interest.[130] Because she was no longer the real party in interest, and the Department of Labor had not ratified, substituted, or joined in her action, dismissal for failure to state a claim pursuant to Trial Rule 12(B)(6) was warranted.[131]

C. Statute of Limitations

In *Holmes v. Celadon Trucking Services of Indiana, Inc.*,[132] the court of appeals reversed and remanded the trial court's determination that a cause of action for wrongful termination and conversion was time-barred, finding that the action was commenced within the statutorily allotted time pursuant to Indiana Trial Rules 3 and 5(F).[133]

In this case, it was undisputed that the statutorily allotted time period for the plaintiff to bring his claims against his former employer expired on May 11, 2009.[134] The plaintiff, by counsel, mailed his complaint, filing fee, and appropriate copies of the complaint and summons via certified mail on April 24, 2009, which served to commence the action pursuant to Indiana Trial Rules 3 and 5(F).[135] The court rejected Celadon's argument that "this court should instead rely on the Chronological Case Summary prepared by the . . . Clerk's office, which indicate[d] that the documents were received and filed by the Clerk's Office on May 12, 2009" in order to conclude that the documents were not timely

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126. *Id.* at 34.

127. *Id.* at 32.

128. *Id.*

129. *Id.* at 33-34 (discussing the Indiana Wage Payment and the Indiana Wage Claim Statute).

130. *Id.* at 34.

131. *Id.* at 33-34.

132. 936 N.E.2d 1254 (Ind. Ct. App. 2010).

133. *Id.* at 1257-58.

134. *Id.* at 1257.

135. *Id.* at 1255. "A civil action is commenced by filing with the court a complaint . . . , by payment of the prescribed filing fee . . . , and, where service of process is required, by furnishing to the clerk as many copies of the complaint and summons as are necessary." IND. TRIAL R. 3. Indiana Trial Rule 5(F) states that filing by certified mail "shall be complete upon mailing." IND. TRIAL R. 5(F).

filed.[136] The court also rejected Celadon's argument that the action was commenced outside the statute of limitations because the trial court did not receive plaintiff's counsel's appearance until May 12, 2009.[137] Although Trial Rule 3.1 and Marion County Local Rule 49-TR5-205(E) require that an appearance be filed by the initiating party "[a]t the time an action is commenced,"[138] as Celadon argued, the court concluded that Celadon

> failed to point to any authority which provides that an action is not commenced for the purposes of the statute of limitations until *both* Trial Rules 3 and 3.1 are satisfied, and we find none. While there may be some consequences for failing to timely file an appearance, nothing in the rules suggests that the delayed filing of an appearance has any impact on the commencement of the action for statute of limitations purposes.[139]

In *Raisor v. Jimmie's Raceway Pub, Inc.*,[140] the court of appeals held, as a matter of apparent first impression, that the 120-day time limit on the notice period for the relation back doctrine when amending a complaint to substitute a plaintiff operated *in addition to* the statute of limitations on a claim.[141]

On March 17, 2008, Raisor was allegedly assaulted at Fireman's Raceway Pub by another patron. One year later, Raisor and his wife sent a letter to the pub informing it that they had hired an attorney, and received a response from the pub's insurer denying coverage, listing the insured as FQC Group, Inc. ("FQC"), and instructing them to send future communication to FQC.[142] The Raisors filed their original complaint against the patron and FQC on October 20, 2009, sending a summons via certified mail to FQC based on their corporate office address listed with the Secretary of State.[143] However, the offices registered with the Secretary of State had been vacant since August 2008.[144] After the summons was returned to sender, the Raisors again attempted service via alias summons obtained through the court on December 16, 2009 and served by copy service on December 21, 2009. A courier attached the summons to the door of the vacated office.[145] On February 25, 2010, the Raisors sent a certified letter advising FQC they intended to seek a default judgment, and the mail carrier noticed the addressee included "FQC d/b/a Fireman's Raceway Pub."[146] Realizing that Fireman's was located two blocks away, the carrier delivered the letter to Fireman's and it was given to the president of Jimmie's Raceway Pub, the true

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136. *Id.* at 1257.
137. *Id.*
138. IND. TRIAL R. 3.1; *see also* MARION COUNTY LOCAL RULE 49-TR5-205(E) (2012).
139. *Holmes*, 936 N.E.2d at 1257 (emphasis added).
140. 946 N.E.2d 72 (Ind. Ct. App. 2011).
141. *Id.* at 80.
142. *Id.* at 74.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*

owner of Fireman's.[147]

On March 1, 2010, Fireman's president obtained a copy of the summons and complaint and sent a copy to FQC's president, who was not aware of the suit.[148] On March 3, 2010, FQC requested an enlargement of time to respond to the complaint, neither denying doing business as Fireman's nor mentioning Jimmie's.[149] On March 26, 2010, FQC sought dismissal because it was not the owner of Fireman's and identified Jimmie's as the entity doing business as Fireman's.[150] The Raisors filed an amended complaint substituting Jimmie's in place of FQC on April 28, 2010.[151] The trial court granted Jimmie's motion for summary judgment after Jimmie's argued that the action was "barred by the two-year statute of limitations for personal injury actions and that the amended complaint could not relate back to the original filing date because Jimmie's received notice of the action after the expiration of the 120-day period allowed under Indiana Trial Rule 15(C)."[152]

This appeal caused the court to examine how statutes of limitations work together with Indiana Trial Rule 15(C). Pursuant to Rule 15(C),

> [w]here no more than 120 days have elapsed since the filing of the original complaint and (1) where the claim arises out of the same conduct; (2) the substituted defendant has notice such that he is not prejudiced by the amendment; and (3) the substituted defendant knows or should know that but for the misidentification, the action should have been brought against him, then the amended complaint relates back to the date of the original complaint.[153]

Here, the Raisors did not officially substitute the true pub owner as defendant until more than 120 days after the complaint was filed and forty-two days after the statute of limitations expired.[154] However, Jimmie's found out that the Raisors had mistakenly named another party in the time period between the 120-day amendment expiration and the expiration of the statute of limitations.[155]

The court reasoned that the practical effect of Rule 15(C) is to provide a plaintiff who waits to file a complaint until the last day within the statute of limitations an additional 120 days following the expiration of the statute of limitations to substitute a party, so that had the Raisors waited until March 17, 2010—the day the statute of limitations expired—to file their complaint, they would have had until July 15, 2010 to substitute a party defendant.[156] The court

147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 75.
152. *Id.*
153. *Id.* at 76 (citing IND. TRIAL R. 15(C)).
154. *Id.*
155. *Id.* at 77.
156. *Id.* at 78.

decided that the fact that the Raisors filed their original complaint earlier within the statute of limitations "should not work to penalize them"[157] and that "where the statute of limitations is still running, the 120-day limit found in Trial Rule 15(C) cannot be permitted to operate prematurely to bar the claim."[158]

The court drew the conclusion that "where, before the statute of limitations expires, a substituted defendant gains knowledge of a lawsuit clearly intended to be filed against it . . . the 120-day limitation to the relation back doctrine cannot operate to shorten the time period in which a plaintiff who utilizes the entire limitations period would be afforded to file an amended complaint."[159] The court stressed that this conclusion was contingent on the fact that the notice requirements of Rule 15(C) were otherwise met within the statute of limitations.[160] "Thus, because the statute of limitations had not expired when Jimmie's discovered the Raisors' misidentification of the pub owner defendant, Jimmie's was not prejudiced by the trial court's action in granting the Raisors leave to file their amended complaint,"[161] and the trial court erred when it granted summary judgment in favor of Jimmie's.[162]

D. Discovery

In *In re Beck's Superior Hybrids, Inc.*,[163] the court of appeals held that Monsanto's use of Indiana Trial Rule 28(E) to compel compliance with a subpoena duces tecum was preempted by the Federal Arbitration Act, which requires an arbitration panel to petition the United States district court in which the panel sits to compel a nonparty to appear before it or produce documents.[164]

Monsanto initiated arbitration against Pioneer Hi-Bred International and its parent company, E.I. Dupont de Nemours & Company (collectively, "DuPont"), relating to corn and soybean license agreements which required arbitration in New York City, subject to the Federal Arbitration Act.[165] At Monsanto's request, the arbitration panel issued a subpoena duces tecum to Beck's Superior Hybrids, Inc. ("Beck's"), ordering Beck's to appear at a hearing in Indiana before one of the arbitration panel members, and to produce business records relating to Monsanto's claim. After Beck's counsel informed Monsanto that it would not comply, Monsanto utilized Indiana Trial Rule 28(E)[166] to file a petition to assist

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157. *Id.*

158. *Id.* at 79.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 80.

163. 940 N.E.2d 352 (Ind. Ct. App. 2011).

164. *Id.* at 368.

165. *Id.* at 354.

166. Indiana Trial Rule 28(E) provides, in part, that "[a] court of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things, allow inspections and copies and permit physical and mental

and obtain an order from the Hamilton County Superior Court requiring Beck's to comply and attend the hearing before one of the New York arbitrators in Atlanta, Indiana.[167]

Beck's argued, and the court of appeals agreed, that Section 7 of the Federal Arbitration Act preempts Indiana Trial Rule 28(E).[168] Section 7 of the Federal Arbitration Act states, in part, that:

> The arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. . . . [*I*]*f any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators* . . . .[169]

The court looked to federal case law to determine that an arbitration party seeking nonparty discovery via subpoena is limited to section 7 as the vehicle to enforce the subpoena and "must do so according to its plain text."[170] The court determined that the plain terms of Section 7 "requires the enforcement of an arbitration panel's nonparty subpoena to be brought in the federal forum" and that the "limited federal jurisdiction for enforcement is a reflection of Congress' desire to keep arbitration simple and efficient, 'to protect non-parties from having to participate in an arbitration to a greater extent than they would . . . in a court of law,' and not to burden state courts with incidental enforcement procedures."[171]

The court acknowledged that in this instance, where the district court of New York lacked jurisdiction over non-party Beck's, the FAA created a "gap in enforceability."[172] However, the court determined, based on federal case law, that such "'gaps' were an intentional policy choice by Congress," that "Monsanto may not use an Indiana trial rule to circumvent the jurisdictional and territorial limitations intended by Congress," and that "the trial rule must yield to the federal statute."[173] Monsanto's attempt to use Trial Rule 28(E) where a federal forum was unavailable frustrated Congress' intent "to limit these petitions to the federal courts,"[174] and the court concluded that the trial court' judgment for Monsanto on its petition to assist was in error, reversing and remanding with instructions to

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examinations for use in a proceeding in a tribunal outside this state." IND. TRIAL R. 28(E).

167. *Beck's Superior Hybrids, Inc.*, 940 N.E.2d at 354.

168. *Id.* at 361.

169. *Id.* at 358 (quoting 9 U.S.C. § 7 (2006)).

170. *Id.* at 359 (quoting Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 218 (2d Cir. 2008)).

171. *Id.* at 362-63.

172. *Id.* at 368.

173. *Id.*

174. *Id.* at 363.

dismiss the petition.[175]

E. Class Action Certification

In *Farno v. Ansure Mortuaries of Indiana, LLC*,[176] the court of appeals held that the trial court did not err in making its class certification ruling based on the factual and procedural posture of the case at the time, and that the trial court did not abuse its discretion when it denied class certification on superiority grounds pursuant to Indiana Trial Rule 23 based on other lawsuits involving different claims and parties, and the pending sale of the defendant cemetery.[177]

Angela Farno sought class certification of her suit against Ansure Mortuaries of Indiana, its former owner, Memory Gardens Management Corp., and other entities regarding alleged misappropriation of millions of dollars from statutorily-mandated cemetery trust accounts.[178] Prior to the filing of this complaint, as a result of an action by the Indiana Securities Commissioner alleging violations of the Indiana Securities Act, a receiver had been appointed to take control of the assets and operations of Ansure and Memory Gardens and to organize and account for the trust fund assets at issue.[179] Following Farno's complaint, the receiver filed a complaint asserting claims against many of the same parties as did Farno's, reciting many of the same facts, asserting many similar claims, and seeking reimbursement of the funds to the trust.[180] Prior to the ruling on class certification, the trial court dismissed certain claims relating to perpetual care cemetery services asserted by another representative plaintiff, leaving Farno as the only named plaintiff.[181]

The trial court denied Farno's motion for class certification, finding that this class action was "not superior to other available methods for the fair and efficient adjudication of the issues in controversy"[182] under Indiana Trial Rule 23(B)(3) based on the receiver's actions and proceedings "already ongoing to resolve or remediate the damage done to the Ansure Trusts."[183]

On appeal, the court first addressed and disregarded Farno's contention that the trial court improperly considered the merits of the class action claims when determining that the class action was not superior. Citing federal case law, the court stated that "'[i]t is a settled question that some inquiry into the merits at the class certification stage is not only permissible but appropriate to the extent that the merits overlap the Rule 23 criteria.'"[184]

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175. *Id.* at 368.
176. 953 N.E.2d 1253 (Ind. Ct. App. 2011).
177. *Id.* at 1255.
178. *See id.* at 1255-58.
179. *Id.* at 1257.
180. *Id.* at 1260-61.
181. *Id.* at 1263.
182. *Id.* at 1267.
183. *Id.*
184. *Id.* at 1270 (quoting *In re* New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d

Farno also argued that the trial court should not have considered the Indiana Securities Commissioner's or the receiver's actions in its superiority analysis on the grounds that "[n]o Indiana court has ever before held that actions brought by other parties are superior to a class action to adjudicate the controversy between class members and defendants, much less other actions relating to different claims, different damages, different defendants."[185] However, the court cited and quoted at length a Ninth Circuit opinion, *Kamm v. California City Development Co.*,[186] as the leading case supporting the proposition that actions brought by third parties—such as an Attorney General or State Commissioner—are superior to a class action suit.[187]

The court also affirmed that a court is not limited to the four factors enumerated in Trial Rule 23(B)(3) when determining the issue of superiority and that it was not error for the trial court to consider non-judicial methods, such as the pending receivership sale of the cemeteries, when addressing the issue of superiority.[188]

Concluding that the trial court did not abuse its discretion in denying the class certification on superiority grounds, the court surmised:

> Farno's stated purpose for requesting class certification was to "resolv[e] the customers' claims to restore the pre-need trust funds and to ensure that customers' pre-paid burial services and merchandise will be provided when they pass away." However, the Securities Commissioner's Action, the Receiver's Action, and the pending sale of the cemeteries were all geared toward restoring both the pre-need trust funds *and* the perpetual care trust funds, which would in turn ensure both that the customers' pre-paid burial services and merchandise will be provided when they pass away *and* that their burial sites will be cared for in perpetuity. As such, these alternative methods were clearly better suited for "handling the total controversy," in the words of the Federal Rules Advisory Committee.[189]

F. Voluntary Dismissal

In *Goldberg v. Farno*,[190] a companion case to *Farno v. Ansure Mortuaries of Indiana, LLC*, the court affirmed the trial court's preliminary approval of a settlement agreement reached between Farno and various defendants, over objection from defendant Goldberg.[191] While Farno sought an interlocutory

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6, 24 (1st Cir. 2008)).

185. *Id.* at 1271.

186. 509 F.2d 205 (9th Cir. 1975).

187. *Farno*, 953 N.E.2d at 1272-74.

188. *Id.* at 1275.

189. *Id.* at 1275-76 (citation omitted).

190. 953 N.E.2d 1244 (Ind. Ct. App. 2011).

191. *Goldberg*, 953 N.E.2d at 1246.

appeal of the trial court's denial of class action certification,[192] she reached a settlement agreement with various defendants, and the trial court entered an order granting preliminary approval of the settlement and certifying the plaintiff class for settlement purposes.[193] Goldberg, who was alleged to have issued worthless debentures to the cemetery trust accounts at issue in order to conceal the alleged misappropriation of funds, did not participate in, and objected to, the settlement.[194]

The court adopted the "plain legal prejudice" standard applicable to Federal Rule of Civil Procedure 41(A)(2) to Indiana Trial Rule 41(A)(2) for determining "whether a non-settling defendant, such as Goldberg, has standing to challenge a partial settlement to which it is not a party, whether in 'a class action or simply ordinary litigation.'"[195] The court agreed with Farno that "Goldberg has failed to establish plain legal prejudice in this case. It is undisputed that the class settlement did not interfere with Goldberg's contractual rights or his 'ability to seek contribution or indemnification,' nor did it strip him of 'a legal claim or cause of action.'"[196] Finding that Goldberg did not have standing to challenge the trial court's ruling, the court affirmed the order approving the proposed partial settlement.[197]

G. Failure to Prosecute

In *Indiana Department of Natural Resources v. Ritz*,[198] the court of appeals determined that the trial court abused its discretion in dismissing a case for failure to prosecute pursuant to Indiana Trial Rule 41(E), reasoning that "the desirability of deciding this case on the merits is of particular import because of the alleged public interest in the disputed property,"[199] and the minimal prejudice in the delay of prosecution supported the reversal and remand.[200]

This dispute involved certain real estate of which both the Indiana Department of Natural Resources (DNR) and the Ritzes claimed ownership, and the DNR sought to develop as part of its park system.[201] As explained by the court of appeals, "[t]he procedural history of this case is rather complicated," and involved different causes of action: one of which was filed in 1991, dismissed

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192. *See supra* Part II.E.

193. *Goldberg*, 953 N.E.2d at 1246. The settlement parties stipulated that the "superiority" requirement of Trial Rule 23(B)(3), at issue in *Farno v. Ansure Mortuaries of Indiana, LLC*, was met. *Id.*

194. *Id.*

195. *Id.* at 1252-53 (quoting Agretti v. ANR Freight Sys., Inc., 982 F.2d 242, 247 (7th Cir. 1992).

196. *Id.* at 1253 (quoting *Agretti*, 982 F.2d at 247).

197. *Id.*

198. 945 N.E.2d 209 (Ind. Ct. App.), *trans. denied*, 962 N.E.2d 651 (Ind. 2011).

199. *Id.* at 211.

200. *Id.*

201. *Id.*

pursuant to Rule 41(E) in 1998, and reinstated in 2010; the other was filed in 2009, and dismissed on statute of limitations grounds and due to the (reinstated) pending case in another court.[202] After the 1991 case was (again) dismissed under Rule 41(E) for failure to prosecute, the court of appeals consolidated the two cases, addressing whether the trial court abused its discretion for dismissing for failure to prosecute.[203]

The court cited several factors considered when determining whether a trial court abused its discretion in dismissing an action for failure to prosecute:

> (1) the length of the delay; (2) the reason for the delay; (3) the degree of personal responsibility on the part of the plaintiff; (4) the degree to which the plaintiff will be charged for the acts of his attorney; (5) the amount of prejudice to the defendant caused by the delay; (6) the presence or absence of a lengthy history of having deliberately proceeded in a dilatory fashion; (7) the existence and effectiveness of sanctions less drastic than dismissal which fulfill the purposes of the rules and the desire to avoid court congestion; (8) the desirability of deciding the case on the merits; and (9) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff's part.[204]

The court further explained that the "weight any particular factor has in a particular case depends on the facts of that case."[205] In this case, the court focused on the desirability of deciding the case on the merits, finding it significant that the disputed property in this suit was being claimed on behalf of the public, as "a natural sanctuary for all Indiana citizens," which "underscore[d] and elevate[d] the desirability of deciding the validity of the parties' ownership claims."[206] Additionally, the court focused on the lack of prejudice on the part of the defendants, and reasoned that in this case, the defendants "actually may have received some value" in the delay, as it enabled them to exercise exclusive control over the property at issue.[207]

H. Summary Judgment

In *Farley v. Hammond Sanitary District*,[208] the court of appeals affirmed the trial court's decision to strike one statement of opinion within an expert's

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202. *Id.* at 211-12.

203. *Id.* at 213-14.

204. *Id.* at 215 (quoting Olson v. Alick's Drugs, Inc., 863 N.E.2d 314, 319-20 (Ind. Ct. App. 2007); Lee v. Pugh, 811 N.E.2d 881, 885 (Ind. Ct. App. 2004)).

205. *Id.*

206. *Id.*

207. *Id.* at 218.

208. 956 N.E.2d 76 (Ind. Ct. App. 2011), *reh'g denied*, *trans. denied*, 967 N.E.2d 1034 (Ind. 2012).

affidavit that was "permeated with a legal conclusion,"[209] but found that the lower court abused its discretion by excluding an expert's statement that was based on his experience, education and a review of evidence.[210]

Homeowners sued the Hammond Sanitary District after heavy rain caused a sewage backup into their basements.[211] The plaintiffs submitted an expert witness affidavit from a professional engineer in opposition to HSD's amended motion for summary judgment. The expert's first statement of opinion was that "HSD failed to properly clean its sewers resulting in accumulated obstructions . . . reducing sewer water carrying capacity, thereby causing these sewer water backups to all plaintiffs."[212] Within this opinion, the expert made repeated assertions regarding HSD's "duty" to clean the sewers.[213] The court found this statement of opinion to be "permeated with a legal conclusion" regarding the existence of a duty, and that it was not error for the trial court to strike this statement.[214]

However, the court of appeals determined it was error for the trial court to strike another statement of opinion by the same expert, in which he stated that "HSD failed to properly clean its non-scouring sewers and keep these sewers free of accumulated debris, thereby . . . causing these sewage backups."[215] The court found that this statement was based on his experience, education, and a review of the evidence, including maps of the sewer lines and evaluation of the sewer flow velocity.[216] Thus, the court abused its discretion by striking this statement of opinion.[217]

In *Booher v. Sheeram, LLC*,[218] the court of appeals held that the trial court did not have discretion to accept an untimely filed designation of evidence where opposing counsel agreed to an extension, but the attorney failed to file a formal request with the trial court for an extension of time.[219] After the defendant in this suit filed a motion for summary judgment, the plaintiffs filed, and the trial court granted, two separate extensions of time to file their answer to the motion.[220] Approximately two weeks prior to the extended deadline, plaintiffs' counsel requested, and received, a verbal three-week extension from defendant's counsel.[221] Plaintiffs' counsel failed to file a formal request with the trial court,

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209. *Id.* at 80.

210. *Id.* at 80-81.

211. *Id.* at 78-79.

212. *Id.* at 80.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 80-81.

217. *Id.* at 81.

218. 937 N.E.2d 392 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 87 (Jan. 18, 2011), *trans. denied*, 950 N.E.2d 1212 (Ind. 2011).

219. *Id.* at 392-93.

220. *Id.* at 393.

221. *Id.*

and filed plaintiffs' material designation of facts in opposition to the summary judgment and an expert affidavit three weeks after the court-approved extension.[222] On defendant's motion, the court struck the late-filed documents and granted summary judgment in defendant's favor.[223]

Citing the Indiana Supreme Court's "bright line rule" for Trial Rule 56(I) summary judgment response extensions, the court of appeals affirmed that "the trial court was without discretion to accept the late-filed documents" where the plaintiffs failed to file an extension request,[224] even if the defendant had not objected to the late filing.[225] Although the court encouraged "collegiality among members of the legal profession and endeavor to promote cooperation and conflict resolution outside the walls of the courthouse, in certain circumstances parties must still seek formal relief directly from the trial court."[226] The court also recognized the "extraordinarily difficult circumstances" which caused the attorney to seek the informal extension: an expert who was out of the country and unable to finish his report, and the attorney's preparation to undergo a major surgery.[227] However, the court deemed its "proverbial hands . . . tied" regardless of the circumstances.[228]

In *Christmas v. Kindred Nursing Centers Ltd. Partnership*,[229] the court of appeals determined that a plaintiff failed to preserve his right to a summary judgment hearing pursuant to Trial Rule 56(C) where the court notified plaintiff's counsel that the previously-scheduled hearing was cancelled, and the plaintiff did nothing between that time and the trial court's ruling.[230] The trial court had set a hearing for defendant's motion before plaintiff's response was due and plaintiff did not request a hearing "because such a request would have been redundant."[231] The court of appeals found that "it was not a redundant act for [plaintiff] to request a hearing because without the request the trial court is always free to do what the trial court did in the present case—determine the efficacy of the summary judgment motion without a hearing."[232] The court also reasoned that plaintiff's redundancy argument was "further weakened by his failure to do anything after he learned that the trial court intended to rule on the filings."[233]

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222. *Id.*
223. *Id.* at 394.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* at 395.
228. *Id.*
229. 952 N.E.2d 872 (Ind. Ct. App. 2011).
230. *Id.* at 877.
231. *Id.*
232. *Id.*
233. *Id.*

I. Judgment Involving Multiple Parties

In *Forman v. Penn*,[234] the court dismissed the appeal before it because it had not been certified for interlocutory appeal, nor had it been authorized as an appeal from a final judgment pursuant to Trial Rule 54(B) by inclusion of the "magic language" contained in that rule.[235]

After teenager Phillip Forman was hospitalized from overdosing on methadone belonging to his friend's mother, he sued his friend (Bradley), the mother (Lisa), and the owner of the home (Penn) where he had ingested the methadone, alleging negligent supervision and negligence in caring for him after he could not be wakened.[236] The homeowner gave notice of Forman's claim to his home insurer, Western Reserve. Western Reserve intervened, seeking a declaratory judgment that it had no duty to provide a defense to Forman's complaint.[237] The trial court granted Western Reserve's motion for summary judgment, declaring that there was no coverage under the policy and no duty to defend.[238] Penn and Bradley treated the trial court's ruling as a final judgment by filing a motion to correct error. Western Reserve replied to that motion by citing Rule 59.[239] Penn and Bradley then appealed the grant of summary judgment to Western Reserve after forty-five days elapsed after their motion and the trial court failed to make a ruling on their motion.[240]

The Indiana Court of Appeals dismissed the appeal because it did not result from an order appealable as of right pursuant to Indiana Appellate Rule 14(A), nor had there been a request that the trial court certify its ruling for discretionary interlocutory appeal pursuant to appellate rules.[241] The court cited the "bright line" rule of past Indiana precedent enforcing strict compliance with Trial Rule 54(B), permitting appeals from order disposing of less than all claims in a lawsuit "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."[242] Even though the issue of Western Reserve's obligation to provide a defense were "at least in part distinct from the issues presented in the underlying lawsuit,"[243] case law addressing and rejecting the "'separate branch' doctrine . . . that permitted appeals of orders disposing of portions of lawsuits deemed sufficiently independent of the remaining issues"[244] and the "interest of certainty as to whether an appeal lies or

234. 938 N.E.2d 287 (Ind. Ct. App. 2010), *trans. denied*, 962 N.E.2d 639 (Ind. 2011).
235. *Id.* at 288-90.
236. *Id.* at 288-89.
237. *Id.*
238. *Id.* at 289.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.* at 289-90 (quoting IND. TRIAL R. 54(B)).
243. *Id.* at 290.
244. *Id.*

not,"[245] required the court to dismiss the appeal and affirm the rule that necessary "magic language" of Trial Rule 54(B) was required in the judge's order disposing of the claims as to one of the parties.[246]

J. Motion to Set Aside Default Judgment

In *Allstate Insurance Co. v. Love*,[247] the court of appeals held that an insured's attorney's failure to notify the insurer's counsel of a lawsuit before moving for default judgment did not constitute "misconduct" pursuant to Trial Rule 60(B)(3).[248] Love filed a complaint against his insurer, Allstate, asserting underinsured motorist benefits after he was injured by another driver in a car accident.[249] Prior to filing this suit, Love's attorney, Pierce, had been in regular communication with different Allstate claim representatives during the resolution of the claims between Love and the other driver.[250] Allstate never advised Pierce that it had retained defense counsel for the claim.[251] After Love and Allstate disagreed as to coverage regarding a lift chair to make Love's van accessible to him, Pierce received a call from Dietrick, informing him that Allstate had contacted Love regarding the issue. Dietrick then followed up by emailing Pierce case law regarding the issue of coverage as to the van lift chair.[252]

Pierce ultimately filed a complaint against Allstate on behalf of Love alleging breach of contract for failure to pay uninsured motorist benefits and obtained a $225,000 default judgment against Allstate.[253] When Pierce filed the complaint, he sent a filed marked courtesy copy to the claim representative he had most recent interactions with, and this claim representative forwarded the complaint to Allstate's Central Processing Unit in Ohio in order for defense counsel to be assigned to the case.[254] Dietrick ultimately appeared on behalf of Allstate after the court had entered default judgment.[255]

To the trial court and on appeal from the trial court's denial, Allstate argued that Pierce's failure to provide a notice of default judgment to Dietrick constituted "misconduct" under Trial Rule 60(B)(3),[256] which provides that a default judgment may be set aside for "fraud . . . , misrepresentation, or other misconduct of an adverse party."[257] The appellate court reviewed and discussed Indiana

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245. *Id.*
246. *Id.*
247. 944 N.E.2d 47 (Ind. Ct. App. 2011).
248. *Id.* at 52.
249. *Id.* at 50.
250. *Id.* at 49.
251. *Id.*
252. *Id.*
253. *Id.* at 50.
254. *Id.*
255. *Id.*
256. *Id.*
257. IND. TRIAL R. 60(B)(3).

Supreme Court precedent relied on by Allstate. In *Smith v. Johnston*,[258] the court looked to the Rules of Professional Conduct and determined that attorney misconduct under these Rules could serve as "misconduct" for purposes of Trial Rule 60(B)(3).[259] In *Smith*, the court determined that "'a default judgment obtained without communication to the defaulted party's attorney must be set aside where it is clear that the party obtaining the default knew of the attorney's representation of the defaulted party in that matter.'"[260]

The court of appeals distinguished *Smith* from the facts in this case to find that Pierce did not commit misconduct subject to relief under Rule 60(B)(3).[261] In *Smith*, the plaintiff's counsel "clearly knew" that the defense counsel represented the defendant doctor, as the two attorneys had worked together through the medical review panel proceedings prior to the civil suit, and the plaintiff's counsel had continued to communicate with the doctor's counsel after those proceedings.[262] Pierce, in contrast, "had no specific knowledge that Dietrick represented Allstate throughout the entire claim" and Dietrick's "involvement in the case was limited to the issue of payment of a lift chair for Love's van."[263] The interaction between Pierce and Dietrick was limited to one conversation and email exchange.[264] The court concluded that "because Pierce had no clear knowledge that Dietrick represented Allstate throughout the whole claim and because Allstate did not clearly advise Pierce that Allstate retained Dietrick for this claim, Pierce had no duty to provide notice to Dietrick before seeking a default judgment."[265]

K. Jury Instructions

In *Johnson v. Wait*,[266] the court of appeals noted that the trial court did not follow the proper procedure for hearing objections to jury trial instructions as set forth within Trial Rule 51(C), but found that there was no reversible error because the parties agreed to the procedure used by the court.[267] At trial, the court heard the objections after the jury had been instructed and retired to deliberate.[268] Citing prior case law interpreting Trial Rule 51(C), the court explained that the purpose of the rule governing jury instruction objections "is to guarantee counsel the opportunity to make objections which will afford the trial court the

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258. 711 N.E.2d 1259 (Ind. 1999).

259. *Allstate*, 944 N.E.2d at 50 (citing *Smith*, 711 N.E.2d at 1263-64).

260. *Id.* (quoting *Smith*, 711 N.E.2d at 1262).

261. *Id.* at 52.

262. *Id.* at 51 (citing *Smith*, 711 N.E.2d at 1261).

263. *Id.*

264. *Id.*

265. *Id.* at 52.

266. 947 N.E.2d 951 (Ind. Ct. App. 2011), *reh'g denied*, 2011 Ind. App. LEXIS 1202 (June 23, 2011), *trans. denied*, 962 N.E.2d 652 (Ind. 2011).

267. *Id.* at 957.

268. *Id.*

opportunity to correct any instructions before giving it to the jury if it is erroneous."[269] The court cautioned against the court's practice as being "not the preferred procedure" but did not find reversible error due to the parties' acquiescence.[270]

The court also found that a jury instruction addressing contributory negligence was an incorrect and incomplete statement of the law by failing to inform that the defendants had the burden of proving all the elements, but found that the argument was waived as the defendants failed to raise this argument to the trial court.[271] The court declined to extend the "fundamental error" doctrine as argued by the defendants to avoid waiver of their argument.[272] The court explained that "'[t]he fundamental error doctrine is extremely narrow and applie[d] only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.'"[273] The court rejected the defendants' argument, concluding that the defendants "failed to show that the fundamental error doctrine should be extended to [civil] cases that do not involve liberty interests or parental rights."[274]

L. Local Court Rules

In *Baca v. RPM, Inc.*,[275] the court of appeals determined that a local court policy requiring indigent litigants to perform community service in exchange for filing a claim was an unenforceable "standing order" under Trial Rule 81, which governs the adoption of local court rules.[276] Tippecanoe Superior Court 4 had "implemented a practice of requiring indigent persons to perform community service in lieu of filing fees,"[277] notwithstanding Indiana Code section 33-37-3-2, allowing a person to bring a civil action after filing a sworn statement of indigency.[278] Upon challenge by an indigent civil litigant whose claim was permitted to be filed but hearing was held in abeyance until community service was performed, the court of appeals found that the court had not followed the procedure for local rules adoption as set forth in Trial Rule 81.[279] Specifically, the court found that the "practice" of the court was essentially a standing order, expressly prohibited in Rule 81(A): "Courts shall not use standing orders (that

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269. *Id.* (quoting Nelson v. Metcalf, 435 N.E.2d 39, 41 (Ind. Ct. App. 1982)).

270. *Id.*

271. *Id.* at 958.

272. *Id.* at 959.

273. *Id.* (quoting Lehman v. State, 926 N.E.2d 35, 38 (Ind. Ct. App. 2010), *reh'g denied*, 2010 Ind. App. LEXIS 1093 (June 16, 2010), *trans. denied*, 940 N.E.2d 824 (Ind. 2010)).

274. *Id.*

275. 941 N.E.2d 547 (Ind. Ct. App. 2011).

276. *Id.* at 548.

277. *Id.* at 549.

278. *Id.*

279. *Id.* at 550 (quoting IND. TRIAL R. 81(A)).

is, generic orders not entered in the individual case) to regulate local court or administrative district practice."[280]

III. AMENDMENTS TO INDIANA RULES OF TRIAL PROCEDURE

By order dated September 20, 2011, the Indiana Supreme Court amended Indiana Rules of Trial Procedure 3.1, 53.1, 59 and 81.1. The court amended Rule 3.1(A) and (B) by inserting "the attorney representing" and "or the party, if not represented by an attorney" regarding initiating and responding party appearances.[281] The court amended Rule 3.1(C) by inserting "the attorney representing" and "or the intervening party or parties, if not represented by an attorney" regarding intervening party appearances.[282] The court deleted from 3.1(E): "In a motion for leave to withdraw appearance, an attorney shall certify the last known address and telephone number of the party, subject to the confidentiality provisions of Sections (A)(8) and (D) above, before the court may grant such a motion."[283] The court added Rule 3.1(H), which states:

> An attorney representing a party may file a motion to withdraw representation of the party upon a showing that the attorney has sent written notice of intent to withdraw to the party at least ten (10) days before filing a motion to withdraw representation, and either:
>
> (1) the terms and conditions of the attorney's agreement with the party regarding the scope of the representation have been satisfied, or
> (2) withdrawal is required by Professional Conduct Rule 1.16(a), or is otherwise permitted by Professional Conduct Rule 1.16(b).
>
> An attorney filing a motion to withdraw from representation shall certify the last known address and telephone number of the party, subject to the confidentiality provisions of Sections (A)(8) and (D) above, and shall attach to the motion a copy of the notice of intent to withdraw that was sent to the party.
> A motion for withdrawal of representation shall be granted by the court unless the court specifically finds that withdrawal is not reasonable or consistent with the efficient administration of justice.[284]

Rule 3.1(I) now states:

> If an attorney seeks to represent a party in a proceeding before the court on a temporary basis or a basis that is limited in scope, the attorney shall file a notice of temporary or limited representation. The notice shall contain the information set out in Section (A)(1) and (2) above and a

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280. *Id.*
281. IND. TRIAL R. 3.1(A), (B).
282. IND. TRIAL R. 3.1(C).
283. IND. TRIAL R. 3.1(E).
284. IND. TRIAL R. 3.1(H).

> description of the temporary or limited status, including the date the temporary status ends or the scope of the limited representation. The court shall not be required to act on the temporary or limited representation. At the completion of the temporary or limited representation, the attorney shall file a notice of completion of representation with the clerk of the court.[285]

The court amended Rule 53.1(E) to state:

> Upon the filing by an interested party of a praecipe specifically designating the motion or decision delayed, the Clerk of the court shall enter the date and time of the filing in the Clerk's praecipe book, record the filing in the Chronological Case Summary under the cause, and promptly forward the praecipe and a copy of the Chronological Case Summary to the Executive Director of the Division of State Court Administration (Executive Director). The Executive Director shall determine whether or not a ruling has been delayed beyond the time limitation set forth under Trial Rule 53.1 or 53.2.
>
> (1) If the Executive Director determines that the ruling or decision has not been delayed, the Executive Director shall provide notice of the determination in writing to the Clerk of the court where the case is pending and the submission of the cause shall not be withdrawn. The Clerk of the court where the case in pending shall notify, in writing, the judge and all parties of record in the proceeding and record the determination in the Chronological Case Summary under the cause.
>
> (2) If the Executive Director determines that a ruling or decision has been delayed beyond the time limitation set forth under Trial Rule 53.1 or 53.2, the Executive Director shall give written notice of the determination to the judge, the Clerk of the trial court, and the Clerk of the Supreme Court of Indiana that the submission of the case has been withdrawn from the judge. The withdrawal is effective as of the time of the filing of the praecipe. The Clerk of the trial court shall record this determination in the Chronological Case Summary under the cause and provide notice to all parties in the case. The Executive Director shall submit the case to the Supreme Court of Indiana for appointment of a special judge or such other action deemed appropriate by the Supreme Court.[286]

The court removed "in the trial court" from Trial Rule 59(G) so that it states:

> If a motion to correct error is denied, the party who prevailed on that motion may, in the appellate brief and without having filed a statement in opposition to the motion to correct error in the trial court, defend

285. IND. TRIAL R. 3.1(I).

286. IND. TRIAL R. 53.1(E).

against the motion to correct error on any ground and may first assert grounds for relief therein, including grounds falling within sections (A)(1) and (2) of this rule. In addition, if a Notice of Appeal rather than a motion to correct error is filed by a party, the opposing party may raise any grounds as cross-errors and also may raise any reasons to affirm the judgment directly in the appellate brief, including those grounds for which a motion to correct error is required when directly appealing a judgment under Sections (A)(1) and (2) of this rule.[287]

The court created Trial Rule 81.1, "Procedures for Cases Involving Family or Household Members":

A. Definitions.
(1) An individual is a "family or household member" of another person if the individual:
(a) is or was a spouse of the other person;
(b) is or was living as if a spouse or a domestic partner of the other person, this determination to be based upon:
(i) the duration of the relationship;
(ii) the frequency of contact;
(iii) the financial interdependence;
(iv) whether the two (2) individuals are or previously were raising children together;
(v) whether the two (2) individuals are or previously have engaged in tasks directed toward maintaining a common household; and,
(vi) such other factors as the court may consider relevant.
(c) has a child in common with the other person;
(d) is related by blood or adoption to the other person;
(e) has or previously had an established legal relationship:
(i) as a guardian of the other person;
(ii) as a ward of the other person;
(iii) as a custodian of the other person;
(iv) as a foster parent of the other person; or,
(v) in a capacity with respect to the other person similar to those listed in clauses (i) through (v).
(2) "Family Procedures" entails coordination of proceedings and processes, and information sharing among cases in a court or courts involving family or household members.

B. Type of Cases. Courts using Family Procedures for a case may exercise jurisdiction over other cases involving the same family or a household member of the family. An individual case to which Family Procedures is being applied may maintain its separate integrity and

287. IND. TRIAL R. 59(G).

separate docket number, but may be given a common case number if multiple cases are being heard before one judge. Subject to applicable rules and statutes, the individual cases may all be transferred to one judge or may remain in the separate courts in which they were originally filed.

C. Notice. A court intending to use Family Procedures for a case must enter an order notifying all parties of the court's intention and, within thirty (30) days after a case is selected, the court shall provide each party with a list of all cases that have been selected to be heard using Family Procedures.

D. Designation by Court of Intent to Use Family Procedures and Change of Judge for Cause. Within fifteen (15) days after notice is sent that a case has been selected to be heard using Family Procedures, a party may object for cause to the designation or selection of a party's case.

> Once notice is sent to the parties that a case has been selected to be heard using Family Procedures, no motion for change of venue from the judge may be granted except to the extent permitted by Indiana Trial Rule 76. A motion for change of venue from the judge in any matter being heard in a court using Family Procedures, or any future cases joined in the court after the initial selection of cases, shall be granted only for cause. If a special judge is appointed, all current and future cases in the court proceeding may be assigned to the special judge.

E. Concurrent Hearings. A court using Family Procedures may, in the court's discretion, set concurrent hearings on related cases, take evidence on the related cases at these hearings, and rule on the admissibility of evidence for each case separately as needed to adequately preserve the record for appeal.

F. Judicial Notice. Indiana Evidence Rule 201 shall govern the taking of judicial notice in courts using Family Procedures.

G. Court Records Excluded from Public Access. In a court using Family Procedures, each party shall have access to all records in cases joined under this Rule, with the exception of court records excluded from public access pursuant to Administrative Rule 9. A party may seek access to such confidential records from another case joined under this Rule by written petition based on relevancy and need. Records excluded from public access shall retain their confidential status and the court using Family Procedures shall direct that confidential records not be included in the public record of the proceedings.[288]

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288. IND. TRIAL R. 81.1.