RECENT DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

DANIEL K. BURKE*
AMANDA L.B. MULROONY**

During the Survey Period,[1] the Indiana Supreme Court and the Indiana Court of Appeals rendered several decisions addressing principles of state procedural law and providing helpful interpretations of the Indiana Rules of Trial Procedure.

I. INDIANA SUPREME COURT DECISIONS

A. *Forum Non Conveniens*

In *Anyango v. Rolls-Royce Corporation*,[2] the supreme court affirmed the dismissal of a wrongful-death action based on *forum non conveniens* in favor of a British Columbia forum.[3] Relying on U.S. Supreme Court and prior state appellate case law, the court held that a forum is "adequate" for purposes of Trial Rule 4.4(C) "so long as the parties will not be deprived of *all* remedies or treated unfairly."[4]

The parents of Isaiah Otieno sued Bell Helicopter Textron Inc., Rolls–Royce Corp., and Honeywell International Inc. (collectively, the "Defendants") in Marion County for the wrongful death of their son after he was killed when a helicopter lost power and crashed on the ground in British Columbia.[5] The helicopter engine was manufactured in Indiana by a division of General Motors, which had sold its assets to a company later purchased by Rolls-Royce.[6] The helicopter's engine components were designed at Honeywell's Indiana facility.[7]

The Defendants filed a motion to dismiss pursuant to Indiana Trial Rule 4.4(C) on the ground that Indiana was an inconvenient forum compared to British Columbia and stipulated, pursuant to Trial Rule 4.4(D), that they would submit to the personal jurisdiction of British Columbia and waive any statute of

---

* Partner, Hoover Hull LLP, Indianapolis, Indiana. B.S., 1994, Indiana University—Bloomington; J.D., 1999, *cum laude*, Southern Methodist Dedman University School of Law. The views expressed herein are solely those of the authors.

** Associate, Hoover Hull LLP, Indianapolis, Indiana. B.A., 2004, *cum laude*, DePauw University; J.D., 2011, *summa cum laude*, Indiana University McKinney School of Law.

1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the Survey Period—i.e., from October 1, 2011, through September 30, 2012—as well as amendments to the Indiana Rules of Trial Procedure, which were ordered by the Indiana Supreme Court during the Survey Period.
2. 971 N.E.2d 654 (Ind. 2012).
3. *Id.* at 663.
4. *Id.* at 661 (emphasis added).
5. *Id.* at 655.
6. *Id.*
7. *Id.*

limitations defenses.[8] The trial court granted the Defendants' motion.[9]

The Otienos wanted their suit to proceed in Indiana, as opposed to British Columbia, because, under applicable British Columbia law, the only monetary compensation available would be the recovery of burial or funeral expenses, rather than an anticipated "significant seven figure value" if litigated in Indiana.[10] They argued to the Indiana appellate and supreme courts that dismissal of the Indiana suit was improper because British Columbia law provided them with "no adequate remedy."[11] Specifically drawing from the language of Trial Rule 4.4(C), they contended that it would not be "just" to require litigation in British Columbia where their action was not economically viable.[12]

Drawing from United States Supreme Court *forum non conveniens* case law and prior Indiana appellate court authority,[13] the Indiana Supreme Court held that "a forum is 'adequate' for purposes of Trial Rule 4.4(C) so long as the parties will not be deprived of all remedies or treated unfairly."[14] Like the plaintiffs in *Piper Aircraft*, although the parents of Otieno may not be entitled to rely on the same theories of liability and their potential damages award may be smaller, they were not in danger of being deprived of any remedy or treated unfairly.[15] Like the plaintiffs in *McCracken v. Eli Lilly & Co.*, the Otienos could not demonstrate "that the alternative forum is so inadequate or unsatisfactory that there is no remedy at all."[16] The court concluded there was "no basis for questioning the trial judge's exercise of discretion here [and] it is overwhelmingly clear [the judge] did exactly what Trial Rule 4.4(C) required of him."[17]

B. Discovery Sanctions

In *Whitaker v. Becker*,[18] the supreme court affirmed the trial court's dismissal of a case as a discovery sanction, finding that the plaintiff's failure to provide requested information and giving false and misleading information warranted dismissal.[19]

---

8. *Id.* at 655-56.
9. *Id.* at 656.
10. *Id.* at 658.
11. *Id.*
12. *Id.* at 657. Pursuant to Rule 4.4(C), which governs *forum non conveniens*, "[j]urisdiction under this rule is subject to the power of the court to order the litigation to be held elsewhere under such reasonable conditions as the court in its discretion may determine to be just." IND. T.R. 4.4(C).
13. *See id.* at 659-61 (discussing Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981); McCracken v. Eli Lilly & Co., 494 N.E.2d 1289 (Ind. Ct. App. 1986)).
14. *Id.* at 661.
15. *See id.* at 660.
16. *Id.* at 660-61 (quoting *McCracken*, 494 N.E.2d at 1293).
17. *Id.* at 663-64.
18. 960 N.E.2d 111 (Ind. 2012).
19. *Id.* at 116-17.

Rickey Whitaker sued Travis Becker to recover damages for personal injuries sustained from a car crash.[20] Becker's counsel sent Whitaker's counsel interrogatories and a request for document production, and Whitaker's counsel did not respond or request an extension within the required time.[21] Becker's counsel wrote to Whitaker's lawyer three separate times to remind him that the responses were overdue, citing to Trial Rule 26(f) in the third letter. After Whitaker's lawyer did not respond and Becker filed a motion to compel, the trial court entered an order compelling response to the discovery requests.[22]

The interrogatory responses that Whitaker ultimately served contained a number of "inaccurate and misleading" statements relating to Whitaker's medical treatment and surgery plans "that Whitaker knew . . . were false when his lawyer filed them."[23] Among other things, Whitaker stated that he had no surgery plans when, in fact, he had already arranged to have spinal surgery.[24] He alerted Becker of the surgery on the day it occurred, so that Becker was not able to obtain a pre-operative examination to determine the extent of spine injuries caused by the car accident, as opposed to the extent of preexisting degenerative spine damages.[25]

Becker's counsel requested outright dismissal as a sanction permitted under Trial Rule 37.[26] Becker's counsel argued that Whitaker's spine surgery "seriously undermined the value of a postoperative examination in helping to establish whether the accident or Whitaker's preexisting degenerative disc disease caused his bulging disc condition."[27] The trial court agreed, finding "significant and material prejudice" due to Whitaker depriving Becker of the chance for an independent medical examination prior to his spine surgery.[28] On appeal, the court of appeals reversed, reinstated the case, and required Whitaker to pay $625.00 of Becker's attorneys' fees as a sanction.[29]

Reasoning that tactics of "concealment and gamesmanship" are no longer "part and parcel of the adversarial process,"[30] the supreme court affirmed the trial court's dismissal of Whitaker's case.[31] The court reviewed a number of prior appellate court decisions and found that, "[a]lthough the regular practice is to fashion progressive sanctions leading up to a dismissal or default judgment when it is possible to do so, imposing intermediate sanctions is not obligatory when a

---

20. *Id.* at 112.

21. *Id.*

22. *Id.* at 112-13.

23. *Id.* at 113.

24. *Id.*

25. *Id.*

26. *Id.* at 114.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 115 (quoting Outback Steakhouse of Fla., Inc. v. Markley, 856 N.E.2d 65, 77 (Ind. 2006) (internal quotation marks omitted)).

31. *Id.* at 117.

party's behavior is particularly egregious."[32] The court, looking at the conduct of Whitaker and his counsel in total, concluded that the trial court "acted within the range of [its] discretion in making it clear to counsel that this type of behavior is unacceptable."[33]

C. Directed Verdict

In *Purcell v. Old National Bank*,[34] the Indiana Supreme Court affirmed the trial court's issuance of judgment on the evidence, finding the evidence insufficient to support fraud and tortious interference of contract claims asserted against a bank by a subordinated creditor.[35]

James Purcell sold his majority interest in Midwest Fulfillment to Richard Knight and Joseph Stein.[36] Under their redemption agreement, Purcell received a security interest in Midwest Fulfillment's assets and was provided with monthly and yearly financial statements.[37] If Midwest Fulfillment's assets-to-liabilities ratio (or "current ratio") fell below a certain level for three consecutive months, Midwest Fulfillment would be in default and Purcell would gain 100% ownership of the company.[38] Later that year, Midwest Fulfillment obtained a line of credit through Old National Bank ("Old National").[39] Old National, through loan officer Joseph Howarth, required Purcell to sign a subordination agreement that made Purcell's security interest in Midwest Fulfillment's assets subordinate to Old National's security interest.[40]

Midwest Fulfillment's current ratio fell below the level specified in the redemption agreement in February and March 2003.[41] The April financial statement included a "Misc. Billing to Customers" line item, which prevented the current ratio from falling below the level which would have led to Midwest Fulfillment's default and transfer of ownership to Purcell.[42] In July 2003, Midwest Fulfillment went out of business and turned remaining assets over to Old National.[43] The liquidated assets were insufficient to pay off the loans.[44]

Stein later admitted that the April 2003 balance sheet was not an accurate financial picture for Midwest Fulfillment; the "Misc. Billing to Customers" line item was falsified to prevent the current ratio from falling below the designated

---

32. *Id.* at 116.
33. *Id.* at 117.
34. 972 N.E.2d 835 (Ind. 2012).
35. *Id.* at 843.
36. *Id.* at 837.
37. *Id.*
38. *Id.* at 837-38.
39. *Id.* at 838.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*

level for the third month.[45] Thus, Purcell would have had the right to take over the company.[46]

Purcell sued Midwest Financial in a separate lawsuit due to the foregoing.[47] As part of that suit, Stein was asked via interrogatories to explain several balance sheet items, including the April 2003 "Misc. Billing to Customers" line item.[48] Stein answered that "[a]ll instances were adjustments made . . . in accordance with instruction from Joe Howarth at Old National Bank to remain in compliance with the loan documents between Midwest and Old National Bank."[49] Stein also answered that the inclusion of certain income as "Misc. Billing to Customers" "was done at the instruction of Joe Howarth at Old National Bank."[50]

Purcell then sued "Old National for negligence, constructive fraud, actual fraud, deception, and tortious interference with a contract."[51] At trial, Purcell argued that "Stein's sworn interrogatory response was proof that Howarth, on behalf of Old National, directed Stein to knowingly make the false statements."[52] When they testified at trial, "both Stein and Howarth denied that the April 2003 balance sheet was falsified at Howarth's direction."[53] Stein testified that "it was his decision to include the inaccurate $613,461 amount under 'Misc. Billing to Customers' and that Joe Howarth did not instruct Stein to make the entry."[54] Stein "disavowed" his interrogatory answers in the other suit.[55]

"[T]he trial court granted Old National's motion for judgment on the evidence on all claims," pursuant to Trial Rule 50(A), "[a]t the close of Purcell's case-in-chief."[56] The court of appeals reversed the trial court's judgment on the evidence as to Purcell's claims of fraud, deception, and tortious interference with contract";[57] the court of appeals found "that Stein's interrogatory answer constituted sufficient evidence to preclude an entry of judgment on the evidence, despite evidence to the contrary at trial, including an adamant denial from Stein that the interrogatory was incorrect."[58]

On appeal to the Indiana Supreme Court, the justices first reviewed the relevant language of Trial Rule 50(A): "Where all or some of the issues in a case tried before a jury . . . are not *supported by sufficient evidence* . . . the court shall withdraw such issues from the jury and enter judgment thereon . . . A party may

---

45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* (first alteration in original).
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 838-39.
54. *Id.* at 839.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* (citing Purcell v. Old Nat'l Bank, 953 N.E.2d 527, 532 (Ind. Ct. App. 2011)).

move for such judgment on the evidence."[59]

Pursuant to prior case law,[60] the court conducted both a "quantitative and qualitative analysis"[61] of the trial evidence to determine whether the evidence was "sufficient" to survive the motion for judgment on the evidence. According to the court,

> Evidence fails quantitatively only if it is wholly absent; that is, only if there is no evidence to support the conclusion. If some evidence exists, a court must then proceed to the qualitative analysis to determine whether the evidence is substantial enough to support a reasonable inference in favor of the non-moving party.[62]
>
> "Qualitatively, . . . [evidence] fails when it cannot be said, with reason, that the intended inference may logically be drawn therefrom; and this may occur either because of an absence of credibility of a witness or because the intended inference may not be drawn therefrom without undue speculation." The use of such words as "substantial" and "probative" are useful in determining whether evidence is sufficient under the qualitative analysis.[63]
>
> "Ultimately, the sufficiency analysis comes down to one word: 'reasonable.'"[64]

The court determined that the interrogatory answers from the other litigation on which Purcell relied to support his allegations of fraud, deception, and tortious interference with contract against Old National met "the quantitative element of the sufficiency inquiry . . . because there exists some evidence presented at trial that may, when viewed in isolation, lend support to Purcell's desired conclusion that Old National had a hand in Stein's preparation of the Midwest balance sheets."[65]

However, the court concluded that Purcell's evidence did not "meet the qualitative element of the sufficiency analysis" when reading the interrogatory responses in context with Stein's trial testimony.[66] "The only evidence presented linking Old National to the fraudulent entry complained of is a generalized, ambiguous interrogatory response, later explained at trial with the aid of direct

---

59. *Id.* (alterations in original) (quoting IND. T.R. 50(A)).

60. *Id.* (citing Am. Optical Co. v. Weidenhamer, 457 N.E.2d 181 (Ind. 1983)).

61. *Id.* at 840 (quoting *Am. Optical Co.*, 457 N.E.2d at 184).

62. *Id.* (citing *Am. Optical Co.*, 457 N.E.2d at 184; Dettman v. Sumner, 474 N.E.2d 100, 104-05 (Ind. Ct. App. 1985)) (discussing and applying the *American Optical* two-part analysis).

63. *Id.* (alteration in original) (citations omitted) (citing and quoting, in part, *Am. Optical Co.*, 457 N.E.2d at 184).

64. *Id.*

65. *Id.* at 840-41.

66. *Id.* at 841.

and cross-examination."[67] At trial, Stein "flat-out denie[d] that the bank directed him to make fraudulent entries."[68] More so,

> nowhere in Stein's interrogatory [did] he state that Old National told him to make fraudulent entries. . . . In fact, [his] response states that all of the . . . entries inquired upon . . . were made at the instruction of Old National, not just the "Misc. Billing to Customers" line item that contained the fraudulent amount.[69]

Finally, the court highlighted the language of Stein's interrogatory response that identified the bank's instruction "to remain in compliance with the loan documents between Midwest and Old National Bank," and Stein had submitted the same doctored financial statement to Old National Bank as part of Midwest's monthly reporting requirements.[70] "Purcell's reading of the interrogatory response would require the unreasonable inference that Old National instructed Stein that 'compliance with the loan documents' mandated the inclusion of fraudulent entries to balance sheets that would be submitted to the bank itself; this is absurd."[71] The court determined that any "perceivable conflict that may exist between Stein's interrogatory response and his trial testimony [was] minimal, at best."[72] The court concluded that, "[w]ithout more," it could not "say that the trial court abused its discretion in determining that Purcell's inference of fraud could not be found by a reasonable jury without engaging in undue speculation."[73]

D. Jury Instructions

In *LaPorte Community School Corporation v. Rosales*,[74] the court remanded for a new trial on the issue of liability after it concluded that a jury instruction could have misled the jury in a child wrongful death case.[75]

Maria Rosales filed a wrongful death action against the LaPorte Community School Corporation ("School Corporation") after her elementary school-aged son choked to death during lunch.[76] The jury awarded a $5 million verdict in favor of Rosales, "and judgment was entered in the sum of $500,000—the maximum amount then permitted under the Indiana Tort Claims Act."[77] On appeal, the School Corporation claimed that the trial court erred in presenting the jury with

---

67. *Id.* at 841-42 (footnote omitted).
68. *Id.* at 841.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 842.
74. 963 N.E.2d 520 (Ind. 2012).
75. *Id.* at 526-27.
76. *Id.* at 522.
77. *Id.* (citing IND. CODE § 34-13-3-4 (2013)).

Final Instruction 22:

> Plaintiff has the burden of proving three elements by preponderance of the evidence.
> First, that the Defendant was *negligent in any of the following ways*:
> > [A.] Failed to implement or monitor a system for the provision of health services and emergency care at Hailmann Elementary.
> > [B.] Failed to properly [sic] or train staff at Hailmann Elementary.
> > [C] Failed to assemble a first aid team at Hailmann Elementary.
> > [D.] Failed to prepare for a foreseeable medical emergency at Hailmann Elementary. Or,
> > [E.] Failed to supervise those who had the responsibility to provide health services and emergency care at Hailmann Elementary.
>
> Plaintiff need prove only one of these allegations above as negligence, not all of them.
> Second. That the negligence of the Defendant was a proximate cause of the claimed injuries; and,
> Third. That the Plaintiff suffered damages as a result of those injuries.
> As I have stated, the Plaintiff must prove these propositions. The Defendant has no . . . burden of disproving them.[78]

Because the jury instruction was challenged as an incorrect statement of the law, rather than as insufficiently supported by the evidence, the trial court applied a *de novo* standard to review the instruction.[79] The court reasoned that Instruction 22 was "akin to a comprehensive instruction enumerating the elements of the cause of action on which the plaintiff must sustain her burden of proof in order to prevail[,]" modeled after Pattern Instruction 9.03, and its successor Model Civil Jury Instruction No. 507, titled "Elements; Burden of Proof."[80] According to the court, "such 'elements' instructions provide a jury with a roadmap to guide decision-making. The correctness and comprehensibility of an elements instruction is thus particularly vital to a jury's ability to understand and apply the law to the facts in each particular case."[81]

The court agreed with the School Corporation that

> the language and phrasing of the instruction permitted the jury to infer that the factual allegations set forth in subparts A–E should be understood as factual circumstances identified by the court, based on the facts of the case, that *automatically* constitute negligence if proven by a preponderance of the evidence[,][82]

rather than explaining the plaintiff's burden proving the elements of negligence,

---

78. *Id.* at 523.

79. *Id.* (citing Wal–Mart Stores, Inc. v. Wright, 774 N.E.2d 891, 893-94 (Ind.2002)).

80. *Id.* at 523-24 (citing Ind. Pattern Jury Instruction–Civil 9.03; Ind. Model Civil Jury Instructions, Instruction No. 507 (Indiana Judges Association, 2010)).

81. *Id.* at 524 (citations omitted).

82. *Id.*

proximate cause, and damages.[83] Thus, Instruction 22 and subparts A-E could be interpreted to "effectively create[] new duties not recognized by the common law in Indiana," whereas "a public elementary school has only one duty at common law[:] the duty to exercise ordinary and reasonable care."[84] "[T]he existence of competing interpretations render[ed] the instruction ambiguous and confusing, and therefore erroneous."[85]

The court "conclude[d] that the language of Final Instruction No. 22 could have reasonably been interpreted and applied by the jury in a way that substantially misstated the plaintiff's burden of proof with respect to establishing negligence on the part of the School Corporation."[86] While an instruction error "does not warrant 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[,]'"[87] the court found reversible error because it left the jury in doubt as to the law on a material issue of the case:

> Instruction 22's lack of clarity as to the appropriate standard of care invited the jury to conclude that the School Corporation's omissions alleged by the plaintiff in subparts A–E must be considered negligence as a matter of law. Deciding the case in accord with such an instruction, the jury could have found the School Corporation liable for these omissions without determining whether such conduct constituted a breach of the standard of ordinary and reasonable care.[88]

The court remanded for a new trial only to the issue of liability; the prior judgment relating to damages would be given effect in the event liability was again determined against the School Corporation.[89]

E. Post-Judgment Petition for Attorneys' Fees

In *R.L. Turner Corp. v. Town of Brownsburg*,[90] the court held that a post-judgment petition for attorneys' fees is not a motion for relief from judgment or to correct error, and thus is not subject to the time limits for those motions.[91]

R.L. Turner Corp. ("Turner") filed suit against the Town of Brownsburg ("Town"), alleging tortious interference with a business relationship, tortious interference with a contractual relationship, quantum meruit, and two counts of breach of a duty to a third-party beneficiary.[92] The Town sought partial summary

---

83. *Id.*
84. *Id.* (citing Miller v. Griesel, 308 N.E.2d 701, 706 (Ind. 1974)).
85. *Id.*
86. *Id.* at 525.
87. *Id.* (quoting IND. APP. R. 66(A)).
88. *Id.*
89. *Id.* at 526-27.
90. 963 N.E.2d 453 (Ind. 2012).
91. *Id.* at 459-60.
92. *Id.* at 456.

judgment on the tortious interference with a business relationship claim and moved to dismiss the remaining claims.[93] "Arguing that Turner's claims were frivolous, unreasonable, and groundless, the Town" also requested Turner pay its attorneys' fees.[94] The trial court granted the Town's motions, but neither its order nor judgment expressly referred to payment of attorneys' fees; it only awarded costs to the Town.[95] Approximately sixty days after the Town obtained judgment in its favor, it "filed a renewed petition for attorneys' fees and costs" pursuant to Indiana Code sections 34-13-3-21 (award of attorney fees in frivolous, unreasonable, or groundless actions against a governmental entity) and 34-52-1-1(b) (award of attorney fees to prevailing party in frivolous, unreasonable, or groundless actions).[96] Turner argued, among other things, that the Town's petition for fees constituted an untimely motion to reconsider or correct error.[97] Pursuant to Trial Rule 59(C), the Town needed to seek fees within thirty days of the judgment.[98]

The court noted that "Indiana Trial Rule 54(D), which governs orders awarding costs to the prevailing party but does not expressly mention attorneys' fees, does not contain [a] time limit for filing a motion for costs."[99] "With a sideways glance to the Federal Rules of Civil Procedure," the court noted that the Federal Rules were amended in 1993 expressly requiring a prevailing party seeking attorneys' fees to "file [its] petition no later than fourteen days after the district court enters a final judgment."[100] The court looked to the United States Supreme Court's application of the pre-1993 Federal Rules to petitions for attorneys' fees as instructive.[101] In *White v. New Hampshire Department of Employment Security*, the U.S. Supreme Court held that the time limit for a motion to correct error did not apply to attorneys' fee petitions, as those petitions "presented an issue separate from the merits because [they] required an inquiry that could not commence until after one party 'prevailed.'"[102] The Supreme Court also suggested that a district court had discretion to deny an award "of attorneys' fees in cases [where] a post-judgment petition . . . unfairly surprised or prejudiced the losing party."[103]

Applying *White*, the Indiana Supreme Court concluded that the Town was not required to file its petition for attorneys' fees within thirty days from the entry of judgment, and instead instructed trial courts to

---

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 456-57.
97. *Id.* at 457.
98. *Id.* at 459.
99. *Id.*
100. *Id.* (citing FED. R. CIV. PRO. 54(d)(2)(B)(i)).
101. *Id.*
102. *Id.* at 459 (citing White v. N.H. Dep't of Emp't Sec., 455 U.S. 445, 451-52 (1982)).
103. *Id.* (citing *White*, 455 U.S. at 454).

> use their discretion to prevent unfairness to parties facing petitions for fees. A request for attorneys' fees almost by definition is not ripe for consideration until after the main event reaches an end. Entertaining such petitions post-judgment is virtually the norm. To be sure, a request for fees is in some sense an equitable petition, and it might be that an extremely tardy request should fall on deaf ears due to lack of notice or staleness.[104]

The court was unable to find unfair surprise or prejudice to Turner for the Town's post-judgment fee petition because Turner received "multiple warnings" that the Town sought payment of its attorneys' fees via pre-suit letters and three separate motions.[105]

F. Relief from Judgment

In *Ryan v. Ryan*,[106] the court found that an ex-husband was not entitled to relief under Trial Rule 60(B)(8), the catch-all provision governing relief from judgment, after the ex-husband sought modification of a divorce settlement.[107]

Sean and his ex-wife, Dee Anna, entered into a Property Settlement Agreement as part of their divorce, by which they agreed to sell their residence and lake house and pay off the mortgages.[108] Sean was to pay 75% of the applicable mortgage, taxes and insurance, and Dee Anna agreed to pay 25%.[109] The parties also executed a Private Agreement at the same time as the Property Settlement Agreement, in which Sean and Dee Anna agreed they could "bind" each other to accept a purchase price so long as the net proceeds of the residence was at least $1.1 million and the lake house was at least $300,000.[110] The Property Settlement Agreement was incorporated into the court's divorce decree.[111] Following the September 19, 2008 decree, the lake house was listed for sale at $349,000, and the residence was listed at $1,349,000.[112] Neither of the properties had sold as of May 14, 2010, and Sean filed a Motion for Relief from Judgment pursuant to Trial Rule 60(B)(8), seeking an order that the "properties be sold at 'prevailing fair market value and the Private Agreement be declared of no further force and effect.'"[113] The trial court denied Sean's motion, and the court of appeals reversed and remanded for the trial court to hold an evidentiary

104. *Id.* at 460.
105. *Id.*
106. 972 N.E.2d 359 (Ind. 2012).
107. *Id.* at 370.
108. *Id.* at 360.
109. *Id.*
110. *Id.* at 360-61.
111. *Id.* at 361.
112. *Id.*
113. *Id.*

hearing.[114] The Indiana Supreme Court granted transfer.

On review, the supreme court first affirmed the trial court's ruling that it had no authority to modify the parties' property distribution agreement, reversing the appellate court's holding that the trial court "enjoyed 'equitable jurisdiction . . . to modify a division of property.'"[115] Relying on Indiana Code[116] and prior case law,[117] the court concluded that the Ryans' "agreement disposed of property owned by them by an agreement in writing between them; was incorporated and merged into the divorce decree; and did not provide for, nor did the parties subsequently consent to, modification. As such, it was 'not subject to subsequent modification by the court.'"[118]

While courts do not have authority to modify a property settlement agreement, the Indiana Supreme Court reasoned that courts do have authority to resolve disputes regarding the *interpretation* of a property settlement agreement, as with any contract.[119] Applying general rules of contract interpretation, the court determined that there was no ambiguity in the language of the parties' agreement that would support a conclusion that Dee Anna was bound to agree to a property sale price that would produce net proceeds less than those stated in the agreement.[120]

The court then analyzed the propriety of Sean seeking relief "pursuant to Indiana Trial Rule 60(B)(8) under which a 'court may relieve a party . . . from a

---

114. *Id.* (citing Ryan v. Ryan, 946 N.E.2d 1191 (Ind. Ct. App. 2011), *reh'g denied*).

115. *Id.* at 363 (alteration in original) (quoting *Ryan*, 946 N.E.2d at 1196) (internal quotation marks omitted).

116. Indiana code section 31-15-2-17(c) provides,

> The disposition of property settled by an agreement [in writing between the parties to a marriage dissolution providing for the disposition of any property owned by either or both of them] and incorporated and merged into the decree is not subject to subsequent modification by the court, except as the agreement prescribes or the parties subsequently consent.

Id. at 361-62 (alteration in original) (quoting IND. CODE § 31-15-2-17(c) (2013)). "The orders concerning property disposition entered under this chapter [of the Indiana Code governing the disposition of property and maintenance] (or IC 31–1–11.5–9 before its repeal) may not be revoked or modified, except in case of fraud." *Id.* at 362 (alteration in original) (quoting IND. CODE § 31-15-7-9.1(a) (2013)).

117. Prior supreme court case law held that "the statutory proscription on revocation and modification of property-distribution agreements is 'unambiguous.'" *Id.* at 362 (quoting Voigt v. Voigt, 670 N.E.2d 1271, 1278 (Ind. 1996)).

118. *Id.* at 363 (quoting IND. CODE § 31-15-2-17(c) (2013)). More recently, the court held that Indiana code sections 31-15-2-17(c) and 31-15-7-9.1(a) require that '"property distribution settlements approved as part of a dissolution may be modified only where both parties consent or where there is fraud, undue influence, or duress.'" *Id.* at 362 (quoting Johnson v. Johnson, 920 N.E.2d 253, 258 (Ind. 2010)).

119. *Id.* at 363.

120. *Id.* at 364-65.

judgment.'"[121] Sean argued that Trial Rule 60(B)(8) "provides the trial court with broad power to grant relief to a party on equitable grounds where under all of the circumstances a need is clearly demonstrated."[122] Sean asked "that the court exercise that 'broad power' to order the properties sold at their 'prevailing fair market value.'"[123] Sean argued that Trial Rule 60(B)(8) provides a trial court with the authority to effect a modification despite the statutory prohibitions on modification.[124]

The court reviewed, and either rejected or distinguished, a number of appellate court opinions which Sean had relied upon in support of his argument that the court had authority under the equitable jurisdiction of Trial Rule 60(B)(8) to modify a division of property.[125] In the situation where Sean sought relief from something specifically and unambiguously covered within the parties' agreement—the right to reject a sale below specified minimums—such relief was prohibited by statute and not subject to relief via "'the inherent power of the court.'"[126]

The court reasoned that

> [w]hile courts sometimes say that Trial Rule 60(B) "gives courts equitable power," that is not strictly true. Rather, Trial Rule 60(B) gives the court a procedural mechanism to exercise power that it derives from substantive law: from equity, or from common law, or from a statute, or from a constitution. This is important because it means that a court's exercise of power under Trial Rule 60(B) is subject to the limitations of the substantive law itself.
>
> We think it unlikely that a court can invoke equity to overcome the mandate of a statute including, in particular, the statutory prohibitions on courts modifying settlement agreements and property-division orders that we have been discussing in this opinion. But this does not always oust the court from modifying a settlement agreement or property-division order; it only prevents the court from doing so in the exercise of equity. We think that the purpose of the statutory prohibitions on modification . . . requires a court to approach any dispute over a settlement agreement or property-division order as a contract dispute, subject to the rules of contract law. If there is an ambiguity in a contract, contract law provides the rules for resolving it. If there is a mutual mistake, contract law provides the rules for resolving it. If the contract becomes impossible to perform, contract law provides rules for handling the situation.[127]

---

121. *Id.* at 366 (alteration in original).

122. *Id.*

123. *Id.*

124. *Id.*

125. *See id.* at 366-69.

126. *Id.* at 367 (quoting Brownsing v. Brownsing, 512 N.E.2d 878, 882 (Ind. Ct. App. 1987) (Garrard, P.J., concurring)).

127. *Id.* at 370-71 (footnote omitted) (citation omitted).

G. Local Court Rules

In *Gill v. Evansville Sheet Metal Works, Inc.*,[128] the court determined that a pre-discovery entry of summary judgment should not have been granted in an asbestos tort case pursuant to a Marion County Local Rule because the case at hand involved a fact-sensitive issue requiring additional evidence.[129] As part of its reasoning, the court acknowledged the authority of local courts to set unique procedural rules in order to correct the appellate court's rationale that the local rule should not have been applied.[130]

Sharon Gill filed suit against sheet metal contractor Evansville Sheet Metal Works, Inc. ("ESMW") for contractor negligence and other claims based on her husband's death from lung cancer following an asbestos-related illness.[131] Gill alleged that her husband's exposure occurred during the course of his employment with Aluminum Company of America, which shared "a common worksite" with ESMW.[132] The suit was subject to local rules specifically applicable to cases placed on the Marion County Mass Tort Asbestos Litigation Docket.[133] Under those rules, "[t]he case was stayed . . . because it was neither exigent nor set for trial."[134] While the case was stayed, ESMW filed summary judgment motions pursuant to Marion County Local Rule 714, which, in a stayed case, permits a party to file "an 'initial summary judgment motion' . . . prior to engaging in any discovery."[135] "ESMW sought initial [pre-discovery] summary judgment on grounds that Gill's product-liability and contractor-negligence claims were barred by [each claim's ten-year statutes] of repose."[136] "The trial court granted ESMW's motion as to the product-liability claim," but it found "a genuine issue of material fact as to whether the [construction statute of repose ("CSoR")] applied."[137] ESMW filed a second pre-discovery motion for summary judgment, again arguing that the CSoR barred the contractor-negligence claim.[138] The applicability of the CSoR turned on whether ESMW's application or removal of the asbestos-containing products that caused injury to Mr. Gill constituted "an 'improvement to real property.'"[139] The trial court granted summary judgment

---

128. 970 N.E.2d 633 (Ind. 2012).

129. *Id.* at 645.

130. *Id.* at 646.

131. *Id.* at 635-36.

132. *Id.*

133. *Id.* at 636 (citing Marion Cnty. LR49–TR01–ASB Rule 700).

134. *Id.* (citing Marion Cnty. LR49–TR40 Rule 711(H)).

135. *Id.* (citing Marion Cnty. LR49–TR56 Rule 714).

136. *Id.* (citing IND. CODE § 34-20-3-1 (2013) (ten-year statute of repose for product liability actions); IND. CODE § 32-30-1-5 (2013) (ten-year statute of repose for construction claims)).

137. *Id.*

138. *Id.*

139. *Id. See also* IND. CODE § 32-30-1-5(d) (2013) ("An action to recover damages . . . for . . . construction of an improvement to real property . . . may not be brought . . . unless the action is

in favor of ESMW, holding "that the application or removal of asbestos-containing products or asbestos-insulated equipment by a contractor is an improvement to real property."[140] The court of appeals affirmed.[141]

The Indiana Supreme Court reversed and remanded, providing an in-depth analysis regarding the scope and coverage of Indiana Code section 32-30-1-5 and the first-impression issue of what "constitutes an improvement to real property."[142] The court ultimately concluded that

> an "improvement to real property" for purposes of the CSoR is (1) an addition to or betterment of real property; (2) that is permanent; (3) that enhances the real property's capital value; (4) that involves the expenditure of labor or money; (5) that is designed to make the property more useful or valuable; and (6) that is *not* an ordinary repair.[143]

Applying this definition, the court remanded because there was no evidence on record to determine whether ESMW's work "constituted an improvement to real property."[144]

The court also addressed the appellate court's "criticism of the trial court's local rule allowing pre-discovery motions for summary judgment."[145] The court believed "a response to this criticism is warranted to dispel any doubts that opinion may have cast on the trial court's application of its local rules."[146] The court emphasized that the Marion Circuit and Superior Courts have the authority to establish the local rules governing asbestos-related tort cases.[147] Such "local rules are procedural and 'are intended to standardize the practice within that court, to facilitate the effective flow of information, and to enable the court to rule on the merits of the case.'"[148]

Per the supreme court, the court of appeals incorrectly concluded "that the trial court should not have adhered to the local rule as it failed to achieve 'the ultimate end of orderly and speedy justice.'"[149] According to the court of appeals, the analysis of what constituted an "improvement to real estate" required detailed discovery, and, therefore, Local Rule 714 should not have been *applied*.[150] However, the supreme court maintained that nothing was improper about applying Local Rule 714 or allowing the pre-discovery initial summary judgment

---

commenced within . . . ten (10) years after the date of substantial completion.").

140. *Gill*, 970 N.E.2d at 636.

141. *Id.* at 636-37.

142. *Id.* at 638-39, 646.

143. *Id.* at 644.

144. *Id.*

145. *Id.* at 645.

146. *Id.*

147. *Id.* (citing IND. CODE § 34-8-1-4 (2013); IND. T.R. 81.18).

148. *Id.* at 646 (quoting Meredith v. State, 679 N.E.2d 1309, 1310 (Ind.1997)).

149. *Id.* (quoting Gill v. Evansville Sheet Metal Works, Inc., 940 N.E.2d 328, 333 (Ind. Ct. App. 2010), *vacated*, 970 N.E.2d 633 (Ind. 2012)).

150. *Id.* (citing *Gill*, 940 N.E.2d at 332-33).

motion.[151] Rather, since discovery was needed in order to determine whether ESMW's work "constitute[d] an improvement to real property," the trial court should have simply denied the initial motion.[152] "This is quite different from concluding, as the [c]ourt of [a]ppeals did, that the trial court should not allow a Rule 714 motion in the first place."[153] The supreme court reversed and remanded for further proceedings.[154]

II. Indiana Court of Appeals Decisions

A. Inadequate Service of Process

In *Norris v. Personal Finance*,[155] the court of appeals reversed the trial court's grant of default judgment in favor a lender, finding that the borrower's parents had no obligation to notify the clerk of court that the borrower did not live with them after the complaint was served at the parents' residence.[156] The fact that the borrower had knowledge of the lender's complaint against him for breach of a promissory note was insufficient to confer personal jurisdiction over him.[157]

Jim Norris failed to make payments on a loan from Personal Finance.[158] The sheriff delivered a copy of Personal Finance's notice of claim[159] to Norris's parents' address, and another copy was sent via first-class mail.[160] "Norris failed to appear at the hearing on Personal Finance's claim, and the trial court entered default judgment against him."[161] "The trial court denied Norris's motion for relief from judgment[,]" finding "that service to Norris's parents' address was adequate because Norris's parents had a duty under Indiana Trial Rule 4.16 to inform the court that Norris did not live with them."[162] During the hearing on Norris's motion, "Norris testified that he did not live at his parents' home in March and April of 2010 when service was made, had in fact lived there only a couple of weeks at the end of 2008, and had never given the Middletown address as his home address to Personal Finance."[163] Personal Finance presented evidence at the hearing demonstrating that Norris had received the notice of claim mailed to his parents' house.[164]

151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 646-47.
155. 957 N.E.2d 1002 (Ind. Ct. App. 2011).
156. *Id.* at 1009-10.
157. *Id.*
158. *Id.* at 1004.
159. *Id.* The suit was brought before the small claims court. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 1005.
164. *Id.*

On appeal, the court noted that Personal Finance did not file an appellee's brief.[165] Thus, Norris was required to present only a prima facie case that the trial court erred in denying his motion for relief from judgment.[166]

The court then turned to Norris's argument that the trial court lacked personal jurisdiction:

> Personal jurisdiction is a question of law. As with other questions of law, a determination of the existence of personal jurisdiction is entitled to de novo review by appellate courts. This court does not defer to the trial court's legal conclusion as to whether personal jurisdiction exists. However, personal jurisdiction turns on facts, and findings of fact by the trial court are reviewed for clear error. Clear error exists where the record does not offer facts or inferences to support the trial court's findings or conclusions of law.[167]

The court of appeals agreed with Norris that the trial court did not obtain personal jurisdiction over him because service to his parents' house was inadequate under Trial Rule 4.1.[168] Reversing the trial court, the court of appeals ruled that Rule 4.16 did not create a duty for Norris's parents to inform the clerk or sheriff that Norris did not live with them.[169] Pursuant to Rule 4.16(B):

> (B) *Anyone accepting service for another person is under a duty to*:
> (1) promptly deliver the papers to that person;
> (2) promptly notify that person that he holds the papers for him; or
> (3) within a reasonable time, in writing, *notify the clerk or person making the service that he has been unable to make such delivery of notice when such is the case*.[170]

Citing the Indiana Supreme Court's decision in *LaPalme v. Romero*, the court of appeals agreed with Norris "that Trial Rule 4.16 applies only to those with authority to accept service for another person and that his parents did not have such authority."[171] In *LaPalme*, the supreme court held that an employer who received service of process on behalf of an employee individually named in a lawsuit did not have a duty to inform the employee of the lawsuit, and, subsequently, service of process to the employee was inadequate.[172] Because neither parents of adult competent adults nor employers are listed in the trial rules as those with the authority to accept service, "such as the individual's agent, the Secretary of State, [or] an infant's next friend or guardian ad litem,"[173] "the trial

---

165. *Id.* at 1006.
166. *Id.* (quoting Fifth Third Bank v. PNC Bank, 885 N.E.2d 52, 54 (Ind. Ct. App. 2008)).
167. *Id.* (quoting Grabowski v. Waters, 901 N.E.2d 560, 563 (Ind. Ct. App. 2009)).
168. *Id.* at 1009.
169. *Id.* at 1008-09.
170. *Id.* at 1008 (quoting IND. T.R. 4.16(B)).
171. *Id.* (citing LaPalme v. Romero, 621 N.E.2d 1102 (Ind. 1993)).
172. *Id.* at 1008-09 (citing *LaPalme*, 621 N.E.2d at 1106).
173. *Id.* 1008 (citations omitted) (citing IND. T.R. 4.1(A)(4), 4.10 and 4.2)).

court erred in concluding that Trial Rule 4.16 applied to Norris's parents. Service by delivery to Norris's parents' address was not in compliance with Trial Rule 4.1 and thus was ineffective."[174] Finally, drawing from prior analogous appellate authority,[175] the court found that Norris's actual notice of the suit—having received the copy of the notice of claim from his parents—did not constitute adequate service.[176]

B. Filing Via Mail

In *Webster v. Walgreen Co.*,[177] the court of appeals held that a complaint was not "mailed" pursuant to Indiana Trial Rule 5(F) on the date it was placed in the mail without adequate postage and, thus, affirmed the defendant's motion for judgment on the pleadings on the ground that the complaint was untimely.[178]

Melanie Webster's attorney filed a complaint against Walgreen Co. on her behalf by certified mail, and it was initially returned due to insufficient postage.[179] The statute of limitations ran on Webster's claim by the time the complaint was re-mailed, and the trial court granted Walgreen's motion for judgment on the pleadings based on the expired statute of limitations.[180]

Webster argued that her complaint was filed the first time it was placed in the mail, despite the insufficient postage, pursuant to "a straightforward reading" of Trial Rule 5(F), which provides:

> The filing of pleadings, motions, and other papers with the court as required by these rules shall be made by one of the following methods:
>
> . . . .
>
> (3) Mailing to the clerk by registered, certified or express mail return receipt requested;
>
> . . . .
>
> Filing by registered or certified mail and by third-party commercial carrier shall be complete upon mailing or deposit.[181]

The court of appeals declined to accept Webster's interpretation of Rule 5(F), relying on prior case law requiring sufficient postage in order for a proposed medical malpractice complaint to be deemed "mailed" and filed with the Indiana Department of Insurance pursuant to the statutory language of the Indiana

---

174. *Id.* at 1009.
175. *Id.* (citing Hill v. Ramey, 744 N.E.2d 509, 512–13 (Ind. Ct. App. 2001)).
176. *Id.*
177. 966 N.E.2d 689 (Ind. Ct. App.), *trans. denied*, 974 N.E.2d 476 (Ind. 2012).
178. *Id.* at 690.
179. *Id.* at 691.
180. *Id.*
181. *Id.* at 692 (alterations in original) (quoting IND. T.R. 5(F)).

Medical Malpractice Act.[182] The court reasoned,

> Adequate postage is necessary for effective mailing, and it is in a matter within the plaintiff's control. In this case, [Webster's attorney] could have taken the envelope to the post office instead of relying on his own scale. Alternatively, if he had checked the track and confirm records online, he could have seen that it was rejected by the clerk and still would have had a few days to resend the complaint.[183]

The court concluded, "Although the result is harsh in this case, Webster has not persuaded us that the text of Trial Rule 5 or public policy favor amending the filing date of her complaint. Therefore, we affirm the judgment of the trial court."[184]

C. Venue

In *Salsbery Pork Producers, Inc. v. Booth*,[185] the court of appeals held that Marion County was not a preferred venue for a case involving a car-tractor crash in Tipton County because the State was improperly joined as a party to the case.[186]

Booth, a Tipton County resident, was seriously injured when riding as a passenger in a car that collided with a tractor.[187] Bergin, a Howard County resident, was driving on County Road 1100 in Tipton County with Booth as his passenger when Wilson, a resident of Tipton County, struck Bergin's car with a tractor.[188] Wilson was driving the tractor within the scope of his employment with Salsbery Pork Producers, Inc. ("Salsbery"), which was headquartered in Tipton County.[189] Booth filed suit in Marion County alleging negligence against Bergin, Wilson, and Salsbery.[190] Booth also alleged negligence against the State of Indiana and Tipton County with respect to "the design, maintenance, and signage of County Road 1100."[191] "[T]he County . . . moved to dismiss the case for improper venue, claiming that the State was 'joined solely for the purpose of establishing venue in Marion County' and requesting transfer of the case to Tipton County."[192] Tipton County submitted an affidavit asserting that the road was solely in its control on the date of the accident.[193] Salsbery and Wilson later

---

182. *Id.* (citing Comer v. Gohil, 664 N.E.2d 389 (Ind. Ct. App. 1996)).
183. *Id.* at 693.
184. *Id.*
185. 967 N.E.2d 1 (Ind. Ct. App. 2012).
186. *Id.* at 6.
187. *Id.* at 2.
188. *Id.*
189. *Id.*
190. *Id.* at 3.
191. *Id.*
192. *Id.*
193. *Id.*

joined the County's motion.[194] The court granted interlocutory appeal after the trial court denied transfer.[195]

The Tipton County defendants contended that Booth misjoined the State "as a sham for the purpose of obtaining a Marion County venue."[196] Pursuant to Trial Rule 21(B), "[w]here venue is dependent upon a particular claim or a claim against a particular party, and that claim 'appears from the pleadings, or proves to be a sham or made in bad faith,' the trial court 'may transfer the proceedings to the proper court.'"[197]

Given Tipton County's undisputed affidavit indicating that it (and not the State) had control over County Road 1100, the court of appeals "conclude[d] that the trial court abused its discretion when it did not order the State dropped from the case."[198] However, the court of appeals explained that the trial court did not abuse its discretion by failing to arrive at the conclusion "that Booth's joinder of the State was a sham or motivated by bad faith[,]" as was argued by the Tipton County defendants.[199]

Next addressing the question of venue, after determining that the State should be dropped from the case, the court reviewed the "numerous preferred venue[]" options set forth in Trial Rule 75.[200] Generally, there "may be multiple preferred venues in a given case, and a motion to transfer venue under Trial Rule 12(b)(3) cannot be granted when an action has been filed in a preferred venue."[201]

Based on the original parties to the suit, preferred venue was in either Tipton County—where the greatest percentage of the defendants resided or had their headquarters,[202] where the plaintiff resided,[203] and where the collision occurred[204]—or Marion County, where the State is headquartered.[205] But, because the State should have been dropped as a party, a Marion County venue was not appropriate.[206] The court remanded to the trial court for transfer to Tipton County.[207]

---

194. *Id.*
195. *Id.* (citing IND. APP. R. 14(A)(9)).
196. *Id.* at 4.
197. *Id.* (quoting IND. T.R. 21(B)).
198. *Id.* at 5.
199. *Id.*
200. *Id.* at 5 (citing IND. T.R. 75).
201. *Id.* (citing Meridian Mut. Ins. Co. v. Harter, 671 N.E.2d 861, 862–63 (Ind. 1996)).
202. *Id.* (citing IND. T.R. 75(A)(1)).
203. *Id.* (citing IND. T.R. 75(A)(4)).
204. *Id.* (citing IND. T.R. 75(A)(3)).
205. *Id.* at 5-6 (citing IND. T.R. 75(A)(5)).
206. *Id.* at 6.
207. *Id.*

D. Same Action Pending in Another State Court of This State

In *Bosley v. NIKTOB, LLC*,[208] the court of appeals held that a tenant's counterclaim to a landlord's ejectment action was the same as an already-pending lawsuit brought by the tenant and thus subject to dismissal.[209]

Industrial tenant NIKTOB, LLC leased a building from Bosley and, subsequently, sued Bosley in Marion Superior Court 7 (the "environmental court") for breach of contract and other environmental issues.[210] NIKTOB's suit also sought a declaration that Bosley's insurer was obligated to provide coverage for the environmental damages at issue.[211] While the environmental action was pending, Bosley brought an independent ejectment action against NIKTOB in Marion Superior Court 10 ("ejectment court"), alleging that the lease had expired, NIKTOB was a holdover tenant, and rent remained to be paid.[212] NIKTOB answered and later counterclaimed: "All of the allegations NIKTOB made in its ejectment counterclaim had already been asserted in the environmental action and were repeated virtually *verbatim* in the ejectment counterclaim."[213] The ejectment court denied Bosley's motion to dismiss the counterclaim and granted summary judgment in NIKTOB's favor on its counterclaim.[214]

As explained by the court of appeals, "Indiana Trial Rule 12(B)(8) permits the dismissal of an action when '[t]he same action [is] pending in another state court of this state.'"[215] This rule implements "a 'fundamental axiom of law' that courts of concurrent jurisdiction cannot exercise jurisdiction over the same subject at the same time . . . by allowing dismissal of one action on the ground that the same action is pending in another Indiana court."[216] An action should be dismissed pursuant to Rule 12(B)(8) "where the parties, subject matter, and remedies are precisely or even substantially the same in both suits."[217]

The court of appeals concluded that NIKTOB's environmental action was "at least substantially the same" as its counterclaim in Bosley's ejectment action; "[a]ll of the allegations NIKTOB made in the ejectment counterclaim previously had been asserted in the environmental action, and were repeated virtually *verbatim* in the ejectment counterclaim."[218] More so, "[b]oth actions involve the same parties (and their affiliates) and both actions involve claims relating to the

---

208. 973 N.E.2d 602 (Ind. Ct. App. 2012), *trans. denied*, 980 N.E.2d 841 (Ind. 2013).

209. *Id.* at 605-06.

210. *Id.* at 603.

211. *Id.* at 604.

212. *Id.*

213. *Id.*

214. *Id.* at 604-05.

215. *Id.* at 605 (alterations in original) (quoting Beatty v. Liberty Mut. Ins. Grp., 893 N.E.2d 1079, 1084 (Ind. Ct. App. 2008)).

216. *Id.* (citation omitted) (quoting State *ex rel.* Am. Fletcher Nat'l Bank & Trust Co. v. Daugherty, 283 N.E.2d 526, 528 (Ind. 1972)).

217. *Id.*

218. *Id.*

parties' respective property interests in the Bosley property and the rights of the parties under the lease."[219] Because "NIKTOB should not have been permitted to amend its answer in the ejectment action to include a counterclaim on issues already pending before another court in the environmental action, Bosley's motion to dismiss the counterclaim should have been granted."[220]

E. Discovery Rule

In *Barrow v. City of Jeffersonville*,[221] the court of appeals found that the trial court erred in granting summary judgment in favor of the defendants, as the statute of limitations had not expired prior to the plaintiffs filing suit.[222]

The plaintiffs filed a suit seeking declaratory and injunctive relief against the City of Jeffersonville, the City's Planning and Zoning Department, Board of Zoning Appeals, Building Commission, a construction company, and a land company concerning a zoning interpretation and improvement location permit allowing for construction and operation of an asphalt plant.[223] The trial court granted summary judgment in favor of the defendants, finding that the statute of limitations on the plaintiffs' claims had expired.[224]
The statute of limitations at issue states,

> An action against:
>
> (A) a sheriff;
> (B) another public officer; or
> (C) the officer and the officer's sureties on a public bond;
>
> growing out of a liability incurred by doing an act in an official capacity, or by the omission of an official duty, must be commenced within five (5) years after the cause of action accrues. However, an action may be commenced against the officer or the officer's legal representatives, for money collected in an official capacity and not paid over, at any time within six (6) years after the cause of action accrues.[225]

The court first considered and confirmed the trial court's interpretation of an issue of first impression, finding that the City's Director of Planning and Zoning (who provided the disputed zoning interpretation) and Building Commissioner (who signed the building permit) were public officers within the meaning of the statute, and, thus, the above-cited five-year statute of limitations applied.[226]

---

219. *Id.* at 605-06.
220. *Id.* at 605.
221. 973 N.E.2d 1199 (Ind. Ct. App. 2012), *trans. denied*, 985 N.E.2d 738 (Ind. 2013).
222. *Id.* at 1206-07.
223. *Id.* at 1200.
224. *Id.* at 1202.
225. *Id.* at 1202-03 (quoting IND. CODE § 34–11–2–6 (2013)).
226. *Id.* at 1203-04.

The plaintiffs contended that, pursuant to the discovery rule, "their cause of action could not have accrued until they knew or, in the exercise of ordinary diligence, should have known of the injury alleged."[227] The plaintiffs argued that, as a result, neither the date that the Director of Planning and Zoning provided the zoning interpretation letter to the landowner (July 14, 2005), nor the date that the improvement location permit was issued (August 4, 2005), could be used as the statute of limitations accrual date because these actions were not public occurrences of which they could have learned.[228] The plaintiffs argued that the earliest date on which they could have learned of the construction of the asphalt plant was the date of the public hearing regarding a state environmental permit, November 30, 2005.[229] Thus, they maintained that their August 16, 2010 complaint was filed within the statute of limitations.[230]

The court agreed that, even though the improvement location permit forming the basis of the complaint was issued on August 4, 2005, the designated evidence did not establish that the public was made aware of the issuance of this permit on that date.[231] As a result, "even with the exercise of reasonable diligence, the [p]laintiffs could not have discovered this action . . . on August 4, 2005."[232] The court noted that it was unclear from the record when the notice of the November 30, 2005 public hearing regarding the required environmental permit was issued but concluded, as argued by plaintiffs, "that the earliest date on which the [p]laintiffs could have known of the injury on which they based their complaint was November 30, 2005, which is the date upon which their cause of action accrued."[233] Thus, the complaint was timely, and the trial court erred in granting summary judgment in the defendants' favor.[234]

F. Motion for Judgment on the Pleadings

In *Myers v. Deets*,[235] the court of appeals held that an insurer was not entitled to judgment on the pleadings, as had been granted by the trial court, because the complaint was sufficient to seek relief by way of a declaratory judgment.[236]

Myers filed suit against his former attorney's law firm and law firm's insurer, alleging the firm and insurer were liable for a debt owed by Myers's former attorney, Charles R. Deets, III, who was now deceased.[237] Myers also asserted

---

227. *Id.* at 1205.
228. *Id.* at 1205-06.
229. *Id.* at 1206.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.* at 1207.
235. 968 N.E.2d 299 (Ind. Ct. App. 2012).
236. *Id.* at 303.
237. *Id.* at 300-01.

various intentional tort claims against the firm.[238] The insurer, "Great American[,] moved for judgment on the pleadings," contending "(1) that it did not insure either Charles or the law firm at the time of the alleged misconduct; (2) that its policy specifically excludes the intentional conduct alleged in the complaint; and (3) that Myers is barred from bringing a direct action against Great American."[239]

With respect to the first and second arguments, Great American attached copies of the firm's respective insurance policies to its answer to show that it did not have a liability policy in effect with the attorney or firm at any time relevant to the facts set forth in the complaint, and its policies did not cover the intentional torts alleged by the plaintiff.[240] The court of appeals found that judgment on the pleadings was not warranted because, when moving for judgment on the pleadings, the moving party admits "'the untruth of [its] own allegations.'"[241] The court noted that had Great American introduced the policies into evidence for the court's consideration, rather than merely attaching them to its answer, the motion would have been converted to a summary judgment motion.[242] "But because the policies were attached to Great American's answer, they cannot be considered matters outside the pleadings."[243]

With respect to Great American's third argument, the court agreed "that the direct action rule bars a plaintiff from pursuing direct claims against an insurer where those claims are based on the actions of an insured"[244] and that "'an injured third party does not have the right to bring a direct action against a wrongdoer's liability insurer.'"[245] However, an "injured victim of an insured's tort has a legally protectable interest in the insurance policy before he has reduced his tort claim to judgment[,]"[246] which "support[s] standing under the [Indiana] [Uniform Declaratory Judgments] Act."[247] Although Myers did not expressly seek a declaratory judgment on the question of insurance coverage, the court found that Myers's complaint complied with Indiana's notice pleading system by adequately stating facts that would support a declaratory judgment action and, therefore, "sufficiently notified [Great American] concerning the claim so as to be able to

---

238. *Id.* at 301.

239. *Id.* at 301-02.

240. *Id.* at 302.

241. *Id.* (alteration in original) (quoting Midwest Psychological Ctr., Inc. v. Ind. Dep't of Admin., 959 N.E.2d 896, 902 (Ind. Ct. App. 2011)).

242. *Id.* at 302 n.2 (citing 1A WILLIAM E. HARVEY, INDIANA PRACTICE § 12.16 at 333-34 (1999)).

243. *Id.* (citing IND. T.R. 9.2).

244. *Id.* at 302.

245. *Id.* (quoting Wilson v. Cont'l Cas. Co., 778 N.E.2d 849, 851 (Ind. Ct. App. 2002)).

246. *Id.* (quoting Cmty. Action of Greater Indianapolis, Inc. v. Ind. Farmers Mut. Ins. Co., 708 N.E.2d 882, 885 (Ind. Ct. App. 1999)).

247. *Id.* (third alteration in original) (quoting *Cmty. Action of Greater Indianapolis, Inc.*, 708 N.E.2d at 885).

prepare to meet it."[248] The court again noted that "[h]ad Great American moved for summary judgment and designated evidence of the effective dates of coverage, policy exclusions, and the like, the trial court might have found that Great American is entitled to judgment as a matter of law." [249] However, because "a Rule 12(C) motion for judgment on the pleadings is to be granted *only* where it is clear from the face of the complaint that under no circumstances could relief be granted[,]" the court concluded that judgment on the pleadings was improper.[250]

G. Failure to Prosecute

In *United Brotherhood of Carpenters and Joiners of America, Local Union No. 2371 v. Merchandising Equipment Group*,[251] the court of appeals affirmed dismissal of a suit for failure to prosecute pursuant to Indiana Trial Rule 41(E) "after the case had been pending for eighteen years, the court failed to rule on the summary judgment motions for fourteen years, and the plaintiffs took no action to push the case to resolution for a decade."[252]

Former employees of Merchandising Equipment Group ("MEG") and their union brought suit against their former employer claiming they were owed $3.3 million in compensation as a result of MEG's failure to provide advance notice of the closure of its manufacturing facility in accordance with federal law.[253] After MEG declared bankruptcy, the employees filed statutory mechanic's and corporate employees' liens and filed a complaint against Barclays Business Credit, Inc. ("Bank"), Hewlett-Packard Company Financing and Remarketing Division ("HP"), and others, claiming that their statutory liens were superior to other security interests.[254]

The Bank and HP filed motions for summary judgment in 1995 and 1996, respectively, and the trial court held a hearing on these motions in May of 1996.[255] In August of 1996, "a special judge accepted jurisdiction" after the trial court judge disqualified himself because of a conflict of interest.[256] The parties re-argued their motions in January of 1997 "[b]ecause there was no transcript of the earlier summary-judgment hearing."[257] The parties stipulated that the thirty-day time limitation for a ruling on pending summary judgment motions, as set forth in Trial Rule 53.1(A), would not apply.[258] The special judge did not rule on

---

248. *Id.* at 303.
249. *Id.*
250. *Id.* (citing Murray v. City of Lawrenceburg, 925 N.E.2d 728, 731 (Ind. 2010)).
251. 963 N.E.2d 602 (Ind. Ct. App. 2012).
252. *Id.* at 604.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at 604-05.
257. *Id.* at 605.
258. *Id.*

the summary judgment motions from 1997 to 2011. During this time, the Chronological Case Summary "mainly show[ed] follow-ups to the summary-judgment motions and changes to the numerous attorneys involved in th[e] litigation."[259] In July of 2001, the Union requested a status conference, which did not occur, and "nothing of substance occurred in the case until September 2008, when the special judge set a status conference for the following month."[260] After that October 2008 status conference, nothing happened until HP filed a motion to dismiss for failure to prosecute pursuant to Trial Rule 41(E) in March of 2011.[261] The Union claimed that the lack of activity in the case was due to the parties' "understanding . . . that the [c]ourt was working on its ruling on the Motions for Summary Judgment."[262] After a hearing, the special judge granted the motion to dismiss and later denied the Union's motion to correct errors.[263]

On review, the court of appeals reasoned that

> "The burden of moving the litigation is upon the plaintiff, not the court. It is not the duty of the trial court to contact counsel and urge or require him to go to trial, even though it would be within the court's power to do so. Courts cannot be asked to carry cases on their dockets indefinitely and the rights of the adverse party should also be considered. [The defendant] should not be left with a lawsuit hanging over his head indefinitely."[264]

The court then reviewed the several factors balanced by appellate courts

> when determining whether a trial court abused its discretion in dismissing a case 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.[265]

"Although . . . generally viewed with disfavor and considered extreme remedies[,]" a "court need not impose a sanction less severe than dismissal where

---

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 606 (first alteration in original).

263. *Id.*

264. *Id.* (alteration in original) (citations omitted) (quoting Belcaster v. Miller, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003)).

265. *Id.* at 607.

the record of dilatory conduct is clear."[266]

The court reasoned that the delay in this case was "unprecedented."[267] "While most failure-to-prosecute cases are judged by inaction in months or sometimes days, this case is judged by inaction in decades."[268] The Union's (unsupported and disputed) argument did not persuade the court—that the parties had agreed not to undertake litigation efforts such as depositions until after certain issues were resolved by the pending summary judgment motions.

> [T]he Union could have requested (1) a ruling on the summary-judgment motions, (2) additional status conferences, (3) another summary-judgment hearing, (4) a pretrial conference (which it did *after* HP filed the motion to dismiss for failure to prosecute), or (5) a trial date. The Union did not request any of these measures for a decade. Although the Union asserts that it was ready, able and willing to proceed to trial, . . . its inaction belies this assertion. The pending summary-judgment motions did not relieve the Union of its duty to move the litigation.[269]

Altogether, "[t]he lengthy period of inactivity in this case coupled with the Union's excuse that it took no action because it was waiting (for fourteen years) on the special judge's summary judgment ruling justifie[d] the judge's dismissal . . . for failure to prosecute."[270]

H. Motion to Set Aside Judgment

In *Clements v. Hall*,[271] the court of appeals held that a plaintiff's attorney had an obligation to notify the defendant's counsel that it had filed a motion for summary judgment, even though the defendant's attorney had not entered an appearance in the suit.[272] The plaintiff's attorney's failure to do so provided grounds to set aside the judgment "under Indiana Trial Rule 60(B)(3) as 'misconduct of an adverse party.'"[273]

Beneficiaries, Kimberly Hall and Stanley Harmon, brought an action against trustee George Clements "for quiet title, constructive trust, and partition of the [real] [p]roperty," after Clements filed an allegedly improper deed on the trust property.[274] Hall and Harmon's attorney, Arivn Foland, filed the claim in August of 2010, which Clements received via certified mail.[275] In December of 2010, Hall and Harmon filed a motion for summary judgment, which the trial court

---

266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.* at 608 (citation omitted) (internal quotation marks omitted).
270. *Id.* at 607.
271. 966 N.E.2d 757 (Ind. Ct. App.), *trans. denied*, 974 N.E.2d 475 (Ind. 2012).
272. . *Id.* at 761.
273. *Id.* at 760 (quoting Smith v. Johnston, 711 N.E.2d 1259, 1262-63 (Ind. 1999)).
274. *Id.* at 758-59.
275. *Id.* at 759.

granted in February of 2011.[276] Clements's attorney, Alex Voils, subsequently filed an appearance and a motion for relief from judgment, which the trial court denied.[277]

On appeal, Clements contended that neither he nor Voils received notice of the motion for summary judgment until after judgment was entered by the court.[278] Hall and Harmon contended that, at the time they filed summary judgment, an appearance had not been entered by Clements or any attorney on his behalf.[279] Hall and Harmon also contended that Foland had previously discussed the claim with Voils and informed Voils generally that Hall and Harmon would be pursuing summary judgment.[280]

Relying on Indiana Supreme Court precedent, the court of appeals found that Foland's knowledge of Voils's representation of Clements created "an obligation to notify Voils" that the motion for summary judgment was filed.[281] While the court noted that Hall and Harmon did not have an obligation under Trial Rule 5(B) to serve the motion because no attorney had appeared in the case,[282] Foland's failure to notify Voils constituted "misconduct of an adverse party" pursuant to Trial Rule 60(B)(3).[283] The court, therefore, reversed the trial court's denial of Clements's motion for relief from judgment.[284] The court concluded that

> we are not excusing Voils's failure to enter an appearance; without Foland's knowledge of Voils's representation of Clements based on Foland's discussion with Voils, failing to notify Voils when Hall and Harmon moved for summary judgment would not have been prejudicial to the administration of justice because attorneys are generally obligated to appear.[285]

I. Timeliness of Appeal

In *Waldrip v. Waldrip*,[286] the court of appeals held that judgment was not final

---

276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.* at 759-61 (citing and discussing Smith v. Johnston, 711 N.E.2d 1259 (Ind. 1999)).
282. *Id.* at 760 n.1 (citing IND. T.R. 5(B)).
283. *Id.* at 760 (quoting IND. T.R. 60(B)(3)).
284. *Id.* at 761.
285. *Id.* For additional recent case law on this issue, see *Allstate Insurance Co. v. Love*, 944 N.E.2d 47 (Ind. Ct. App. 2011). There, the court found the plaintiff's attorney did *not* have an obligation to notify an attorney representing the defendant where the plaintiff's attorney did not have "clear" or "specific" knowledge of the attorney's representation. *Id.* at 51. *See also* Daniel K. Burke & Amanda L.B. Mulroony, *Recent Developments in Indiana Civil Procedure*, 45 IND. L. REV. 1011, 1036-37 (2012) (discussing *Allstate*).
286. 976 N.E.2d 102 (Ind. Ct. App. 2012).

for purposes of appeal until the trial court's ruling on all pending dispositive motions had been noted on the court's Chronological Case Summary ("CCS").[287]

Cody Waldrip ("Cody") filed suit against Monroe County, the City of Bloomington, and his then-wife Angela, alleging false imprisonment, false arrest, abuse of process, malicious prosecution, defamation, intentional infliction of emotional distress, tortious interference with child custody and/or parenting time, and civil perjury relating to alleged false charges and improper battery arrest.[288] Angela and Monroe County "filed motions to dismiss Waldrip's second amended complaint, and [the City of] Bloomington filed a motion for judgment on the pleadings."[289] "[T]he trial court signed three separate orders granting those motions and dismissing Waldrip's complaint in its entirety" on June 22, 2011, but "there was some confusion regarding the distribution of those orders."[290] Additionally, the court's CCS contained a June 27, 2011 entry granting the City of Bloomington's motion for judgment on the pleadings and a June 28, 2011 entry granting Monroe County's motion to dismiss.[291] The CCS did not reflect that Angela's motion to dismiss was granted until Cody requested the court to clarify "which of the [d]efendants' motions ha[d] or ha[d] not been ruled upon."[292] On November 29, 2011, one week following Cody's request,

> the trial court issued [a] . . . notice [and CCS entry], entitled "Clerical Mistake Corrected": The Court notes that on June 22, 2011 Special Judge Eric Allen issued an Order on Monroe County's Motion to Dismiss Pursuant To Trial Rule 12(b)(6), Order On City of Bloomington's Motion For Judgment On The Pleadings Pursuant to Trial Rule 12(C) AND Order On Angela Waldrip's Motion To Dismiss. Court issues all orders to parties of record.[293]

Cody then filed a motion to correct error on December 28, 2011, which Monroe challenged as "untimely because it was filed more than thirty days after final judgment was entered."[294] The trial court denied the motion to correct error, and Cody's appeal ensued.[295]

On appeal, the court addressed Monroe County's restated argument that the appeal should be dismissed as untimely.[296] "Monroe County contend[ed] that there was a final judgment on June 28, 2011, making [Cody's] motion to correct error in December 2011 and subsequent appeal . . . untimely."[297]

---

287. . *Id.* at 109.
288. *Id.* at 108.
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.* at 108-09.
295. *Id.* at 109.
296. *Id.*
297. *Id.*

The court first reviewed the timing requirements applicable to motions to correct error and appeals and the "final judgment" requirement as defined within Indiana Trial Rule 59(C) and Indiana Appellate Rule 9(A)(1):

> An appeal must be initiated within thirty days of a final judgment, or alternatively within thirty days of a motion to correct error being denied or deemed denied, or the right to appeal is forfeited. A motion to correct error likewise must be filed within thirty days of a final judgment. As expressly stated in both Trial Rule 59(C) and Appellate Rule 9(A)(1), a judgment is "final" when it is noted in the CCS. Moreover, a final judgment is one that disposes of all claims as to all parties, ending the case and leaving nothing for future determination. This definition of "final judgment" applies in the context of both appeals and motions to correct error.[298]

The court concluded that there was no "final judgment" until November 29, 2011, when the court entered its ruling in the CCS regarding Angela's motion to dismiss. "It was only at that time that there was a final judgment . . . that resolved *all* claims as to *all* parties and it was only at that time that the thirty-day clock for filing a motion to correct error or notice of appeal began to run."[299] As a result, Cody's motion to correct error was timely, and his appeal was not subject to dismissal.[300]

III. AMENDMENTS TO INDIANA RULES OF TRIAL PROCEDURE

By Order dated September 7, 2012, the Indiana Supreme Court amended Indiana Rules of Trial Procedure 3.1, 5, 6, 26, 34, 53.1, 72, 77, 79, and Appendix B.[301]

The court amended Trial Rule 3.1 to require an initiating party to include in its appearance a statement that the party will or will not accept service from other parties and the court via e-mail.[302] The court amended Appendix B (the uniform appearance form) in order for a party to indicate whether it will accept service via e-mail.[303] The court amended Trial Rule 3.1(G) to state, "The Clerk of the Court shall use the information set forth in the appearance form for service by mail, FAX, and e-mail under Trial Rule 5(B)."[304]

The court amended Trial Rule 5 to state:

> (B) Service: How made. Whenever a party is represented by an attorney of record, service shall be made upon such attorney unless service upon

---

298. *Id.* (citations omitted).

299. *Id.*

300. *Id.*

301. Order Amending Indiana Rules of Trial Procedure, No. 94S00-1205-MS-275 (Ind. Sept. 7, 2012), *available at* http://www.in.gov/judiciary/files/order-rules-2012-94s00-1205-ms-275e.pdf.

302. IND. T.R. 3.1(A)(4).

303. *Id.* App. B.

304. *Id.* R. 3.1(G).

> the party himself is ordered by the court. Service upon the attorney or party shall be made by delivering or mailing a copy of the papers to him at his the last known address, or where an attorney or party has consented to service by FAX or e-mail as provided in Rule 3.1(A)(4), by faxing or e-mailing a copy of the documents to the fax number or e-mail address set out in the appearance form or correction as required by Rule 3.1(E).
> . . . .
> (3) Service by FAX or e-mail. A party who has consented to service by FAX or e-mail may be served as follows:
> a. Service by e-mail shall be made by attaching the document being served in .pdf format. Discovery documents must also be served in accordance with Trial Rule 26(A).
> b. Service by FAX shall be deemed complete upon generation of a transmission record indicating the successful transmission of the entire document, except as provided in subparagraph d.
> c. Service by e-mail shall be deemed complete upon transmission, except as provided in subparagraph d.
> d. Service by FAX or e-mail that occurs on a Saturday, Sunday, a legal holiday, or a day the court or agency in which the matter is pending is closed, or after 5:00 p.m. local time of the recipient shall be deemed complete the next day that is not a Saturday, Sunday, legal holiday, or day that the court or agency in which the matter is pending is not closed.[305]

The court amended Trial Rule 6(E) to clarify that service by mail within the meaning of the rule—allowing three extra days for a party to act or proceed when served with a notice or other paper by mail—to mean "United States mail."[306]

Rule 26(A.1) now states,

> (A.1) Electronic Format. In addition to service under Rule 5(B) or a .pdf format electronic copy, a party propounding or responding to interrogatories, requests for production or requests for admission shall comply with (a) or (b) of this subsection.
> (a) The party shall serve the discovery request or response in an electronic format (either on a disk or as an electronic document attachment) in any commercially available word processing software system. If transmitted on disk, each disk shall be labeled, identifying the caption of the case, the document, and the word processing version in which it is being submitted. If more than one disk is used for the same document, each disk shall be labeled and also shall be sequentially numbered. If transmitted by electronic mail, the document must be accompanied by electronic memorandum providing the forgoing identifying information.
> or

305. *Id.* R. 5(B).
306. *Id.* R. 6(E).

> (b) The party shall serve the opposing party with a verified statement that the attorney or party appearing pro se lacks the equipment and is unable to transmit the discovery as required by this rule.[307]

The court corrected a grammatical error in Rule 34(B).

The court amended Rule 53.1(E) instructing a Clerk how to proceed upon receipt of a praecipe addressing a judge's failure to rule on a motion:

> (E) Procedure for withdrawing submission. 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 on the praecipe, record the filing in the Chronological Case Summary under the cause, which entry shall also include the date and time of the filing of the praecipe, 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.[308]

The court replaced references of "mail" and "mailing" in Trial Rule 72(D) ("Notice of Orders or Judgments") and (E) ("Effect of Lack of Notice") with "service," which will allow the clerk to provide notice via email or fax as specified on a party's appearance form.[309]

Rule 77(B) now states,

> (B) Chronological Case Summary. For each case, the clerk of the circuit court shall maintain a sequential record of the judicial events in such proceeding. The record shall include the title of the proceeding; the assigned case number; the names, addresses, telephone and attorney numbers of all attorneys involved in the proceeding, or the fact that a party appears pro se with address and telephone number of the party so appearing; and the assessment of fees and charges (public receivables). The judge of the case shall cause Chronological Case Summary entries to be made of all judicial events. Notation of judicial events in the Chronological Case Summary shall be made promptly, and shall set forth the date of the event and briefly define any documents, orders, rulings, or judgments filed or entered in the case. The date of every notation in the Chronological Case Summary should be the date the notation is made, regardless of the date the judicial event occurred. The Chronological Case Summary shall also note the entry of orders, rulings and judgments in the record of judgments and orders, the notation of judgments in the judgment docket (IC 33-32-3-2), and file status (pending/decided) under section (G) of this rule. The Chronological Case

---

307. *Id.* R. 26(A.1).
308. *Id.* R. 53.1(E).
309. *Id.* R. 72.

> Summary may be kept in a paper format, or microfilm, or electronically. The Chronological Case Summary shall be an official record of the trial court and shall be maintained apart from other records of the court and shall be organized by case number.[310]

Rule 79, addressing the selection of special judges, now states,

> (D) Agreement of the parties. Within seven (7) days of the notation in the Chronological Case Summary of the order granting a change of judge or an order of disqualification, the parties may agree to an eligible special judge. The agreement of the parties shall be in writing and shall be filed in the court where the case is pending. Alternatively, the parties may agree in writing to the selection of an eligible special judge in accordance with Section (H). Upon the filing of the agreement, the court shall enter an order appointing such individual as the special judge in the case and provide notice pursuant to Trial Rule 72(D) to the special judge and all parties or appoint a special judge under Section (H).
>
> A judge appointed under this section shall have seven (7) days from the date the appointment as special judge is noted in the Chronological Case Summary to decide whether to accept the case. The filing of an acceptance vests jurisdiction in the special judge. An oath or additional evidence of acceptance of jurisdiction is not required.
>
> This provision shall not apply to criminal proceedings or election contests involving the nomination or election of the judge of the court in which the contest is filed.[311]

The court deleted Rule 79(E), (F), and (G). Rule 79(H) and (I) now state,

> (H) Selection under local rule. In the event a judge disqualifies or recuses under Section (C), or does not accept the case under Section (D), the appointment of an eligible special judge shall be made pursuant to a local rule approved by the Indiana Supreme Court which provides for the following:
>
> (1) appointment of persons eligible under Section J who: a) are within the administrative district as set forth in Administrative Rule 3(A), or b) are from a contiguous county, and have agreed to serve as a special judge in the court where the case is pending;
>
> (2) the effective use of all judicial resources within an administrative district; and
>
> (3) certification to the Supreme Court of Indiana of cases in which no judge is eligible to serve as special judge or the particular circumstance of a case warrants selection of a special judge by the Indiana Supreme Court.
>
> A person appointed to serve as special judge under a local rule must accept jurisdiction in the case unless the appointed special judge is

---

310. *Id.* R. 77(B).

311. *Id.* R. 79(D).

disqualified pursuant to the Code of Judicial Conduct, ineligible for service under this rule, or excused from service by the Indiana Supreme Court. The order of appointment under the local rule shall constitute acceptance. An oath or additional evidence of acceptance of jurisdiction is not required.[312]

(I) Discontinuation of service or Unavailability of special judge.
(1) In the event a special judge assumes jurisdiction and thereafter ceases to act for any reason, including the timely granting of a motion for change of judge, a successor special judge shall be appointed in accordance with Sections (D) and (H) of this rule.
(2) In the event that a special judge assumes jurisdiction and is thereafter unavailable for any reason on the date when a hearing or trial is scheduled:
a. the special judge may, as appropriate, appoint a judge pro tempore, temporary judge, or senior judge of the court where the case is pending, provided such judge is otherwise eligible to serve and has not previously had jurisdiction of the case removed from them pursuant to the Rules of Trial Procedure, or b. the regular judge of the court where the case is pending may assume temporary jurisdiction, provided such judge is otherwise eligible to serve and has not previously had jurisdiction of the case removed pursuant to the Rules of Trial Procedure.
If the regular judge, judge *pro tempore*, temporary judge, or senior judge does not assume jurisdiction under this section, such hearing or trial shall be reset to a date when the special judge is available.[313]

312. *Id.* R. 79(H).
313. *Id.* R. 79(I).