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## SURVEY

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

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#### INTRODUCTION

The Indiana Supreme Court promulgates the Indiana Rules of Appellate Procedure (“Appellate Rules” or “Rules”), and Indiana’s appellate courts—the Indiana Supreme Court (“Supreme Court”), the Indiana Court of Appeals (“Court of Appeals”), and the Indiana Tax Court—interpret and apply the Rules. This Article summarizes amendments to the Rules, analyzes cases interpreting the Rules, and highlights potential pitfalls appellate practitioners should avoid. This Article does not cover every case interpreting the Rules that occurred during the survey period.<sup>1</sup> Instead, it focuses on the most significant decisions.

#### I. RULE AMENDMENTS

In December 2022, the Indiana Supreme Court issued an order, amending Rule 65(D) of the Indiana Rules of Appellate Procedure, to become effective

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1. The survey period is between October 1, 2022, and September 30, 2023.

January 1, 2023.<sup>2</sup> The prior version of Rule 65(D) stated that Court of Appeals memorandum decisions “shall not be regarded as precedent” and disallowed the citing of these decisions to any court except “to establish *res judicata*, collateral estoppel, or law of the case.”<sup>3</sup> Another subsection of Rule 65—specifically, subsection (A)—explains that a Court of Appeals memorandum decision is one that is “not published in the official reporter” because it neither “establishes, modifies, or clarifies a rule of law;” “criticizes existing law;” nor “involves a legal or factual issue of unique interest of substantial public importance.”<sup>4</sup> The current version of Rule 65(D) now allows citing to Court of Appeals memorandum decisions issued on or after January 1, 2023, while also providing additional clarity as to the precedential value of opinions and memorandum decisions.<sup>5</sup> It reads,

#### **D. Precedential Value of Opinions and Memorandum Decisions.**

(1) Published Opinions. A published opinion of the Supreme Court is binding precedent for all Indiana courts. A published opinion of the Court of Appeals is binding precedent for all Indiana trial courts.

(2) Memorandum decisions. Unless later designated for publication in the official reporter, a memorandum decision is not binding precedent for any court and must not be cited to any court except to establish *res judicata*, collateral estoppel, or law of the case. However, a memorandum decision issued on or after January 1, 2023, may be cited for persuasive value to any court by any litigant. But there is no duty to cite a memorandum decision except to establish *res judicata*, collateral estoppel, or law of the case.<sup>6</sup>

The Indiana Supreme Court also amended Indiana Rule of Appellate Procedure 9, which covers “Initiation of the Appeal,” to become effective January 1, 2024.<sup>7</sup> Specifically, the Court amended subsection (F)(8)(d), dealing with “Attachments” within the “Content of Notice of Appeal.”<sup>8</sup> Prior to the amendment, Rule 9(F)(8)(d) required the Notice of Appeal to include “[a] copy of the order from the Court of Appeals accepting jurisdiction over the interlocutory appeal, if proceeding pursuant to Rule 14(B)(3).”<sup>9</sup> Rule 9(F)(8)(d)

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2. Order Amending Rules of Appellate Procedure, No. 22S-MS-1 (Ind. Dec. 19, 2022) [hereinafter December 2022 Order].

3. *See id.* at 1 (italics in original).

4. IND. R. APP. P. 65(A).

5. *See id.*; December 2021 Order.

6. IND. R. APP. P. 65(A).

7. Order Amending Rules of Appellate Procedure, No. 23S-MS-10 (Ind. Apr. 3, 2023).

8. *Id.*

9. Indiana Rule of Appellate Procedure 14(B)(3) deals with discretionary interlocutory appeals and provides, “The appellant shall file a Notice of Appeal with the Clerk within fifteen

adds that this same attachment is required “if proceeding pursuant to . . . Rule 14(C)(5),” as well.<sup>10</sup> Rule 14(C)(5) covers the filing of a notice of appeal from orders granting or denying class action certification.<sup>11</sup>

The above two orders were the only ones amending the Indiana Rules of Appellate Procedure during the survey period.

## II. CASE LAW INTERPRETING APPELLATE RULES

The Court of Appeals and Supreme Court issued a number of decisions analyzing the Appellate Rules, including further developing Indiana’s jurisprudence on issues such as the interlocutory appeals, a trial court’s subject matter jurisdiction during pending appeals, the limited circumstances in which untimely appeals can be pursued, appellate jurisdiction, and appellate courts are not self-directed boards of legal inquiry.

### A. Interlocutory Appeals

The survey also included two interesting decisions involving interlocutory appeals—one from the Indiana Court of Appeals and one from the Indiana Supreme Court.

In *Bik v. State*, a trial court denied a criminal defendant’s motion for discharge under Indiana Criminal Rule 4(C) that contended the State did not bring him to trial within one year.<sup>12</sup> In certifying the denial of the motion for interlocutory appeal, the trial court identified specific questions for appellate review.<sup>13</sup>

The Court of Appeals noted that “Indiana Appellate Rule 14(B) permits appeals from ‘interlocutory orders if the trial court certifies its order and the Court of Appeals accepts jurisdiction over the appeal.’”<sup>14</sup> The Court of Appeals stated that, while it was “often helpful” when a trial court identified a specific issue of law raised by the court’s interlocutory order, such identification was not required by the language of Rule 14(B).<sup>15</sup> Rather, “[t]he language of Rule 14(B) clearly identifies certification of an order, not of specific issues or questions.”<sup>16</sup>

Accordingly, “appellate courts are under ‘no obligation to accept the issue

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(15) days of the Court of Appeals’ order accepting jurisdiction over the interlocutory appeal.” IND. R. APP. P. 14(B)(3). The Rule continues, “The Notice of Appeal shall be in the form prescribed by Rule 9, and served in accordance with Rule 9(F)(10). The appellant shall also comply with Rule 9(E).” *Id.*

10. IND. R. APP. P. 9(F)(8)(d).

11. IND. R. APP. P. 14(C)(5). Indiana Rule of Appellate Procedure 14(C)(5)’s language mirrors the language found in Indiana Appellate Rule 14(B)(3). *See supra* text accompanying note 9.

12. *Bik v. State*, 211 N.E.3d 594, 596 (Ind. Ct. App. 2023).

13. *Id.* at 597.

14. *Id.*

15. *Id.*

16. *Id.* (quoting *State v. Keller*, 845 N.E.2d 154, 160 (Ind. Ct. App. 2006)).

as framed by the trial court or to answer it.”<sup>17</sup> In *Bik*, the Court of Appeals ultimately framed the issue more broadly than the trial court had identified in its certification order.<sup>18</sup>

*Bik* is an important reminder to practitioners that any certification order from a trial court that identifies specific issues of law will not restrict the Court of Appeals from reframing the issues should the Court of Appeals accept jurisdiction over the interlocutory appeal.

*Means v. State* is an Indiana Supreme Court opinion involving an order in limine excluding evidence in a criminal case.<sup>19</sup> *Means* involved a lengthy and informative discussion of how the motions panel and writing panel interact within the Indiana Court of Appeals; and the opinion answered, in part, two important questions.<sup>20</sup> First, is the Court of Appeals writing panel permitted to dismiss a discretionary interlocutory appeal, which the motions panel had already properly accepted, on non-jurisdictional grounds?<sup>21</sup> And, second, are orders in limine eligible for interlocutory review under Indiana Appellate Rule 14(B)?<sup>22</sup> The Indiana Supreme Court answered both questions in the affirmative.

The Court explained that, under Indiana Appellate Rule 14(B), “a party may obtain appellate review before a final judgment if a trial court first certifies its order for an interlocutory appeal and the Court of Appeals then exercises its discretion to accept the appeal.”<sup>23</sup> At the Indiana Court of Appeals, the decision whether to accept the appeal rests with the “motions panel,” which includes a rotating three-judge panel, which meets regularly to rule on motions.<sup>24</sup> If the motions panel does not accept a discretionary interlocutory appeal, then that decision is not reviewable.<sup>25</sup> However, if the motions panel accepts a

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17. *Id.* (quoting *State v. Keller*, 845 N.E.2d 154, 160 (Ind. Ct. App. 2006)).

18. *Id.* The trial court had specified the following legal issue in its certification order: Whether credit time (sic) should be counted for criminal rule 4 (CR4) purposes under the following factual basis:

a. The Court asked the Defense on the record during various pre-trial conferences if they are requesting a trial date (bench or jury) in the pending criminal case. The Defense informed the Court that they were not requesting a trial date (bench or jury) because of outstanding discovery.

b. The Defense had requested specific discovery from the State on various occasions (but no motion to compel was ever requested by the Defense). Eventually, the State provided the discovery but gave no reason as to the delay and did not provide the discovery until a substantial amount of time had elapsed in the age of the case. *Id.*

The Court of Appeals reframed the issue as follows: “whether the trial court erred in denying *Bik*’s motion for discharge under Indiana Criminal Rule 4(C).” *Id.*

19. *Means v. State*, 201 N.E.3d 1158 (Ind. 2023).

20. *See id.*

21. *Id.* at 1163.

22. *Id.*

23. *Id.*

24. *Id.* at 1163-64.

25. *Id.* at 1164.

discretionary interlocutory appeal, then a “writing panel”—another three-judge panel—is assigned to decide the case.<sup>26</sup>

In *Means*, the motions panel had accepted the criminal defendant’s discretionary interlocutory appeal, but “the writing panel reconsidered and dismissed the appeal as not ripe.”<sup>27</sup> The Indiana Supreme Court explained that such an act was within the Court of Appeals’ “inherent authority to reconsider its decisions up until the point when it loses jurisdiction over the appeal.”<sup>28</sup> And the Court pointed out that this concept—that a writing panel has authority to reconsider a decision of a motions panel—is recognized by other intermediate appellate courts, as well.<sup>29</sup> The Court cautioned, however, that the practice of reconsidering a motion panel’s decision to accept a discretionary interlocutory appeal is one that is disfavored.<sup>30</sup>

Here, while the writing panel did have authority to reconsider the motion panel’s decision, the writing panel improperly suggested that it *must* dismiss the discretionary interlocutory appeal because it was from an order in limine.<sup>31</sup> The Indiana Supreme Court explained that “while the Court of Appeals does not have to exercise its discretion to accept jurisdiction over discretionary interlocutory appeals of orders in limine, those orders are not categorically excluded from review under Appellate Rule 14(B).”<sup>32</sup>

*Means* explained that Appellate Rule 14(B) is broad—allowing “for early appellate review of ‘other interlocutory orders’ beyond those for which there is an early appeal as of right through Appellate Rule 14(A)” and not limiting “the orders subject to discretionary review.”<sup>33</sup> As long as the order in limine had trial court certification and acceptance from the Court of Appeals, it was reviewable as any other interlocutory order would be.<sup>34</sup>

*Means* is a great resource for understanding the innerworkings of the Indiana Court of Appeals when seeking acceptance of a discretionary interlocutory appeal. It also serves as a warning to litigants that, although a discretionary interlocutory appeal has been accepted by the motions panel, there is a chance, albeit slight, that the motion panel’s decision will be reconsidered by the writing panel.

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26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 1165 (citing 16 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3929 (3d ed. 2012)).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 1166 (quoting IND. R. APP. P. 14(B)).

34. *Id.*

*B. The Trial Court's Subject Matter Jurisdiction During Pending Appeals*

The Indiana Supreme Court issued an important decision explaining the significant limits of a trial court's jurisdiction during a pending appeal.

In *Conroad Associates, L.P. v. Castleton Corner Owners Association, Inc.*, the Indiana Supreme Court addressed Appellate Rule 8.<sup>35</sup> *Conroad* was the third appeal in the parties' dispute, and the issue before the Indiana Supreme Court was whether the trial court lacked subject matter jurisdiction to issue certain orders while the second appeal in the case was pending.<sup>36</sup>

The Indiana Supreme Court delved into a thorough discussion of "when, and to what extent, a trial court may amend a judgment that is pending on appeal" pursuant to Appellate Rule 8.<sup>37</sup> The Court first explained that "once judgment is entered, an appeal is filed, and the clerk's record is complete, Appellate Rule 8 divests the trial court of 'jurisdiction to act upon the judgment appealed from until the appeal has been terminated.'"<sup>38</sup>

However, as *Conroad* elaborated, a trial court does have authority over matters that "are independent of and do not interfere with the subject matter of the appeal," which include "reassessing costs, correcting the record, or enforcing the judgment."<sup>39</sup> *Conroad* also explained that, during an interlocutory appeal of an order that transfers or refuses to transfer venue, a trial court can continue with a trial.<sup>40</sup>

Additionally, and importantly, a party can use Appellate Rule 37 as a way to give the trial court jurisdiction during a pending appeal.<sup>41</sup> Specifically, a party can file a Rule 37 motion with the appellate court to request that the appeal is "temporarily stayed and the case remanded to the trial court . . . for further proceedings."<sup>42</sup> If the request is successful, the trial court then "obtain[s] unlimited authority on remand," unless the appellate court's order specifies otherwise.<sup>43</sup>

With those principles in hand, the Indiana Supreme Court analyzed whether the trial court had jurisdiction to issue certain orders.<sup>44</sup> The Court first noted that, during the orders' issuance, the Court of Appeals had acquired jurisdiction over a proceedings supplemental order and that neither party had filed an Appellate Rule 37 motion to request a stay of the appeal and a remand to the trial court.<sup>45</sup> Accordingly, under Appellate Rule 8, the trial court lacked

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35. *Conroad Assocs., L.P. v. Castleton Corner Owners Ass'n*, 205 N.E.3d 1001, 1003 (Ind. 2023).

36. *Id.* at 1004.

37. *Id.* at 1005.

38. *Id.* (quoting *Schumacher v. Radiomaha, Inc.*, 619 N.E.2d 271, 273 (Ind. 1993)).

39. *Id.* (quoting *Bradley v. State*, 649 N.E.2d 100, 106 (Ind. 1995)).

40. *Id.*

41. *Id.*

42. *Id.* (alteration in original) (quoting IND. R. APP. P. 37(A)).

43. *Id.* (alteration in original) (quoting IND. R. APP. P. 37(B)).

44. *Id.* at 1005-06.

45. *Id.*

jurisdiction to issue an order directing the court clerk to release a tendered payment in satisfaction of the judgment and an order vacating the original order in proceedings supplemental.<sup>46</sup> In other words, because these two orders interfered with the proceedings supplemental order—which was the subject of the pending appeal—the orders were void.<sup>47</sup>

*Conroad* allows practitioners to understand the very limited circumstances in which the trial court retains jurisdiction to act while an appeal of a final judgment is pending. The case also stresses the importance of filing a successful Appellate Rule 37 motion with the appellate court before requesting the trial court take any action that would implicate the subject matter of the pending appeal.

### C. Untimely Appeals

The survey period also included an interesting Indiana Court of Appeals opinion on the intersection of two appellate rules and the limited circumstances in which untimely appeals can be pursued.

In *Gregory v. Koltz*, the Court of Appeals decided, before reaching the merits of an appeal, whether there was an abuse of discretion when the motions panel denied the appellee’s motion to dismiss the appellants’ appeal as untimely.<sup>48</sup> The Court of Appeals first recited the procedural history of the appeal: the trial court issued the relevant order on February 28, 2022, reflected on the Chronological Case Summary that same day; the deadline to appeal was thus March 30, 2022, under Appellate Rule 9(A); the clerk served the order on appellee’s counsel on March 1, 2022; and the clerk served the order on appellants’ counsel on April 13, 2022, after the appeal deadline had passed.<sup>49</sup> The appellants then filed their notice of appeal on March 13, 2022, which was within thirty days of service of the order but outside of the thirty days of the Chronological Case Summary entry of the order.<sup>50</sup>

The Court of Appeals acknowledged that, under Appellate Rule 9(A), “[u]nless the Notice of Appeal is timely filed, the right to appeal shall be forfeited[.]”<sup>51</sup> However, the Court of Appeals further noted that the Indiana Supreme Court had set forth an exception to this rule: “when ‘there are extraordinarily compelling reasons why this forfeited right should be restored.’”<sup>52</sup> And, under Appellate Rule 1, the Court of Appeals can, on its own motion or that of a party, “permit deviation” from the Appellate Rules.<sup>53</sup> Accordingly, “despite the ‘shall be forfeited’ language of Appellate Rule 9(A),

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46. *Id.*

47. *Id.* at 1006.

48. *Gregory v. Koltz*, 204 N.E.3d 256, 264 (Ind. Ct. App. 2003).

49. *Id.* at 264-65.

50. *Id.*

51. *Id.* at 265 (alteration in original) (quoting IND. R. APP. P. 9(A)(5)).

52. *Id.* (quoting *In re O.R.*, 16 N.E.3d 965, 971 (Ind. 2014)).

53. *Id.* at 266 (quoting IND. R. APP. P. 1).

the Rules themselves provide a mechanism allowing [an appellate] court to resurrect an otherwise forfeited appeal.”<sup>54</sup>

Given the particular facts of the case involving the belated service of the relevant order on the appellants, as well as the preference for deciding a case on the merits versus dismissing it on procedural grounds, the Court of Appeals decided that the motions panel did not err in reinstating the appellants’ appeal based on Appellate Rule 1.<sup>55</sup>

*Gregory* reminds practitioners that, while Appellate Rule 9’s requirement for filing a timely notice of appeal is stringent, there can be circumstances that allow an otherwise forfeited appeal to proceed. But these circumstances still must be “extraordinarily compelling,” so litigants should not expect, without the right set of facts, to successfully resurrect forfeited appeals under Appellate Rule 1.<sup>56</sup>

#### *D. Appellate Court Jurisdiction*

*In re Adoption of S.L.* is an informative Indiana Supreme Court opinion addressing appellate court jurisdiction.<sup>57</sup> In this case, the Court was faced with an appeal of a trial court’s denial of a biological father’s Trial Rule 60(B)(6) motion to set aside an order of temporary custody.<sup>58</sup>

The Indiana Supreme Court dismissed the appeal, finding that it had no appellate jurisdiction.<sup>59</sup> The Court first explained that, under Indiana Appellate Rule 5, “[a]ppellate jurisdiction is limited to final judgments, interlocutory orders, and appeals from agency decisions.”<sup>60</sup> And because the case did not involve either an interlocutory order or an agency decision, the Indiana Supreme Court evaluated whether the trial court’s denial of the biological father’s Trial Rule 60(B)(6) motion was a final, appealable judgment.<sup>61</sup>

The Court noted that, under Appellate Rule 2(H)(1), a final judgment is one that disposes of “all issues as to all parties, thereby ending the particular case” and that “leaves nothing for future determination.”<sup>62</sup> And a final judgment “end[s] the case at the trial level.”<sup>63</sup>

In *S.L.*, the trial court had consolidated two pending cases; at the time of consolidation, the case had two pending matters—a motion for temporary custody and a petition for adoption.<sup>64</sup> At the time the trial court issued its order

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54. *Id.*

55. *Id.*

56. *Id.* at 265 (quoting *In re O.R.*, 16 N.E.3d 965, 971 (Ind. 2014)).

57. *In re Adoption of S.L.*, 210 N.E.3d 1280, 1281 (Ind. 2023).

58. *Id.* at 1282.

59. *Id.* at 1282-84.

60. *Id.* at 1282 (citing IND. R. APP. P. 5).

61. *Id.* at 1282 n.1.

62. *Id.* at 1283 (quoting *Georgos v. Jackson*, 790 N.E.2d 448, 451 (Ind. 2003)).

63. *Id.* (citing *Georgos v. Jackson*, 790 N.E.2d 448, 451 (Ind. 2003)).

64. *Id.*



denying the biological father's motion to set aside the temporary custody order—an order which granted adoptive parents temporary custody of the child pending adoption—not all claims had yet been disposed.<sup>65</sup> This is because the petition for adoption was still pending.<sup>66</sup> Thus, the order that the biological father wished to appeal was not a final judgment.<sup>67</sup>

Additionally, the Indiana Supreme Court found that the order was not a final judgment under Appellate Rule 2(H)(2) because it lacked requisite language from Trial Rule 54(B).<sup>68</sup> The Court explained that “Trial Rule 54(B) requires a court's order to ‘expressly determine[] that there is no just reason for delay, and in writing expressly direct[] entry of judgment.’”<sup>69</sup> Here, however, the trial court's order denying the biological father relief from the temporary custody order did not have the “key phrase and state that there was ‘no just reason for delay’ or direct entry of judgment.”<sup>70</sup>

*S.L.* is an important addition to the number of appellate decisions that have thus far addressed what is—and what is not—a final appealable judgment. Practitioners who may confront temporary custody issues are well advised to study *S.L.*, as it is the seminal case on the appealability of orders denying motions to set aside temporary custody.

#### *E. Appellate Courts Are Not Self-Directed Boards of Legal Inquiry and Research*

In *Miller v. Patel*, the Supreme Court reminded parties that appellate courts are not legal research departments, but instead, resolve disputes as argued by the parties:

“The purpose of our appellate rules, Ind. Appellate Rule 46 in particular, is to aid and expedite review and to relieve the appellate court of the burden of searching the record and briefing the case.” *Dridi v. Cole Kline LLC*, 172 N.E.3d 361, 364 (Ind. Ct. App. 2021) (quoting *Ramsey*, 789 N.E.2d at 487). We will not step in the shoes of the advocate and fashion arguments on his behalf, “nor will we address arguments” that are “too poorly developed or improperly expressed to be understood.” *Id.* (quoting *Terpstra v. Farmers & Merch. Bank*, 483 N.E.2d 749, 754 (Ind. Ct. App. 1985), *trans. denied*). “The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research,” but instead are tasked with solving disputes “as arbiters of legal questions **presented and argued**

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65. *Id.* at 1282-83.

66. *Id.* at 1283.

67. *Id.*

68. *Id.*

69. *Id.* (alterations in original) (quoting IND. R. TRIAL P. 54(B)).

70. *Id.* (quoting IND. R. APP. P. 2(H)(2)).

by the parties before them.” *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) (emphasis added). The Indiana Supreme Court is no such board, nor do we “possess a roving commission to publicly opine on every legal question.” *TransUnion LLC v. Ramirez*, — U.S. —, 141 S. Ct. 2190, 2203, 210 L.Ed.2d 568 (2021) (Kavanaugh, J.). We do **not** exist to answer every legal question that may exist in the ether; rather, we resolve concrete issues properly tested through the adversarial process: adequate and cogent briefing is required for that process to live up to its potential.<sup>71</sup>

### III. REFINING OUR APPELLATE PROCEDURE

During the survey period, the Court of Appeals offered advice to practitioners to help them avoid various appellate-rule pitfalls.

#### *A. Parties May Now Cite Unpublished Decisions*

Indiana Appellate Rule 65(D) was amended effective January 1, 2023, to provide that memorandum decisions issued on or after January 1, 2023, may be cited as persuasive authority:

*Memorandum Decisions.* Unless later designated for publication in the official reporter, a memorandum decision is not binding precedent for any court and must not be cited to any court except to establish *res judicata*, collateral estoppel, or law of the case. However, a memorandum decision issued on or after January 1, 2023, may be cited for persuasive value to any court by any litigant. But there is no duty to cite a memorandum decision except to establish *res judicata*, collateral estoppel, or law of the case.<sup>72</sup>

In *Hobbs v. State*, the Court of Appeals noted that a party cited “additional authority pursuant to the recently amended Indiana Appellate Rule 65(D), which states that memorandum decisions are not binding precedent for any court and may be cited only for persuasive value.”<sup>73</sup>

#### *B. Contents of Briefs and Appendices*

Appellate Rule 46(A)(2) provides that the table of “authorities shall be listed alphabetically or numerically, as applicable.”<sup>74</sup> In *Neal v. Purdue Federal*

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71. *Miller v. Patel*, 212 N.E.3d 639, 657 (Ind. 2023) (formatting and alterations in original).

72. IND. R. APP. P. 65(D) (formatting in original).

73. *Hobbs v. State*, 206 N.E.3d 419, 433 n.6 (Ind. Ct. App.), *trans. denied*. 211 N.E.3d 1002 (Ind. 2023)

74. IND. R. APP. P. 46(A).

*Credit Union*, the Court of Appeals reminded counsel of this requirement.<sup>75</sup>

Appellate Rule 46(A)(8)(a) requires that “[e]ach contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22.”<sup>76</sup> In *In re A.C.*, the “Parents also claim that their rights were violated under Article 1, Sections 2 and 3 of the Indiana Constitution,” but the Indiana Supreme Court “has held that federal jurisprudence does not govern the Indiana Constitution’s guarantees of religious protection and that the Indiana Constitution requires a separate analysis.”<sup>77</sup> “Although the Parents provide the text of the state constitutional provisions and the appropriate standard under which to analyze this claim, they fail to develop a cogent argument in support of it.”<sup>78</sup> The Court of Appeals concluded, under Ind. App. Rule 46(A)(8)(a), that this “waived their claim.”<sup>79</sup>

In *Q.H. v. State*, the Court of Appeals reminded parties that “[a]ppendices properly prepared under Indiana Appellate Rule 50 include only documents that are part of the Record on Appeal. App. R. 50(A)(2), (B)(1).”<sup>80</sup> The Court raised this issue because the “school and juvenile detention center records are included in Q.H.’s appendix but are not file marked or reflected on the CCS.”<sup>81</sup>

In *Simpson v. City of Madison*, the Court of Appeals addressed deficiencies in items included in appellate appendices:

We note that Simpson has provided minimal record materials for our review in this appeal. Specifically, in his Appellant’s Appendix, Simpson included only the chronological case summary (“CCS”) and the orders from Merit Board and trial court. He did not include any pleadings that had been filed with the Merit Board or the trial court. We direct Simpson’s attention to Indiana Appellate Rule 50(A)(1), which provides that the “purpose of an Appendix in civil appeals and appeals from Administrative Agencies is to present our Court with copies of only those parts of the Record on Appeal that are necessary for the Court to decide the issues presented.” Additionally, we direct Simpson to Appellate Rule 50(A)(2)(f), which provides that an Appellant’s Appendix “shall contain[.]” among other things, “pleadings and documents from the Clerk’s Record in chronological order that are necessary for the resolution of the issues raised on appeal[.]” We also note that Simpson failed to comply with Appellate Rule 22(C), which provides that “[a]ny record material cited in an appellate brief must be reproduced in an Appendix or Transcript or exhibits.” The City has

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75. *Neal v. Purdue Fed. Credit Union*, 201 N.E.3d 253, 260 n.3 (Ind. Ct. App. 2022).

76. IND. R. APP. P. 46(A)(8)(a).

77. *In re A.C.*, 198 N.E.3d 1, 15 n.5 (Ind. Ct. App. 2022), *trans. denied*, 208 N.E.3d 1259 (Ind. 2023), *petition for cert. filed*, No. 23-450 (Sept. 25, 2023).

78. *Id.*

79. *Id.*

80. *Q.H. v. State*, 216 N.E.3d 1197, 1201 n.2 (Ind. Ct. App. 2023)

81. *Id.*

included, in its Appellee's Appendix, the relevant pleadings filed with the Merit Board along with the transcript and exhibits from the Merit Board hearings. Neither party, however, has included the pleadings filed with the trial court on judicial review. For example, neither party's appendix contains the briefs filed by Simpson and the City in support of their arguments on judicial review.<sup>82</sup>

In *Community Construction LLC v. Posterity Scholar House, LP*, the Court of Appeals described an inadequate table of contents for appellate appendices:

We direct counsel to Indiana Appellate Rule 50(C), which provides that the table of contents for an appendix "shall specifically identify each item contained in the Appendix[.]" The Appendix in this case consists of nine volumes. Posterity's designation of evidence in support of its motion for partial summary judgment is comprised of thirty-two separate exhibits and is 1,146 pages long beginning in Volume 3 and continuing over the entirety of Volumes 4, 5, 6, and 7 and part of Volume 8. And yet the table of contents identifies only "Posterity's and BWI's Designation of Evidence" collectively with no further detail. Implicit in the directive to "specifically identify each item" in the appendix is that the table of contents assist this court in finding the documents contained therein. See *Harrison v. Veolia Water Indianapolis, LLC*, 929 N.E.2d 247, 248 n.1 (Ind. Ct. App. 2010) ("For future reference, tables of contents for appendices must be more detailed."), *trans. denied*. Looking through nearly 1,200 pages of documents to identify for ourselves where thirty-two exhibits began was burdensome and hindered our review of this appeal.<sup>83</sup>

### C. Parties Must Acknowledge and Attend Oral Argument

Appellate Rule 52(C) provides that "Counsel of record and unrepresented parties shall file with the Clerk an acknowledgment of the order setting oral argument no later than fifteen (15) days after service of the order."<sup>84</sup> In *Cain v. William J. Huff II Revocable Tr. Declaration Dated June 28, 2011*, "[c]ontrary to the Indiana Rules of Appellate Procedure, Sexton-Troy did not acknowledge our order setting oral argument."<sup>85</sup> "Further, without explanation, Sexton-Troy did not appear at the oral argument."<sup>86</sup>

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82. *Simpson v. City of Madison*, 213 N.E.3d 530, 533 n.1 (Ind. Ct. App. 2023).

83. *Cnty. Constr. v. Posterity Scholar House*, 203 N.E.3d 1069, 1075 n.8 (Ind. Ct. App. 2023).

84. IND. R. APP. P. 52(C).

85. *Cain v. William J. Huff II Revocable Tr. Declaration Dated June 28, 2011*, 216 N.E.3d 456, 461 n.4 (Ind. Ct. App. 2023).

86. *Id.*

## IV. INDIANA'S APPELLATE COURTS

*A. Case Data from the Indiana Supreme Court*

During the 2022 fiscal year,<sup>87</sup> the Indiana Supreme Court disposed of 693 cases, including 340 criminal cases, 231 civil cases, 4 tax cases, 27 original actions, 1 board of law examiners case, 1 mandate of funds case, 85 attorney discipline cases, 3 judicial discipline case, and 1 miscellaneous case.<sup>88</sup> The court heard 40 oral arguments during the fiscal year, 23% of which were heard before the court decided to grant transfer.<sup>89</sup> The court issued 35 majority opinions and 23 non-majority opinions.<sup>90</sup> Chief Justice Rush issued 7 majority opinions, Justice David issued 1 majority opinion, Justice Massa issued 6 majority opinions, Justice Slaughter issued 5 majority opinions, Justice Goff issued 6 majority opinions, and Justice Molter issued 5 majority opinions.<sup>91</sup> The court also issued 5 per curiam decisions.<sup>92</sup> The court issued unanimous decisions 80% of the time.<sup>93</sup>

*B. Case Data from the Indiana Court of Appeals*

During 2022,<sup>94</sup> the Court of Appeals disposed of 2,971 cases.<sup>95</sup> This is an increase from 2021, when the Court of Appeals disposed of 2,564 cases, and 2020, when the Court of Appeals disposed of 2,853 cases.<sup>96</sup> In 2022, the court disposed of 1,537 criminal cases, 880 civil cases, and 554 other cases.<sup>97</sup> The court affirmed the trial court 82.7% of the time, with the court affirming 87.8% of criminal cases, 89.1% of post-conviction relief cases, and 66.5% of civil cases.<sup>98</sup> The average age of cases pending before the Court of Appeals at the end of 2022 was 1.7 months, compared with 1.2 months at the end of 2021.<sup>99</sup> In addition to deciding cases, the court issued 7,639 orders.<sup>100</sup>

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87. The Indiana Supreme Court fiscal year ran from July 1, 2022, to June 30, 2023. *See* IND. SUP. CT., ANNUAL REPORT 2022-2023 at 11 (2023).

88. *Id.* at 11.

89. *Id.* at 15.

90. *Id.* at 18.

91. *Id.* at 19.

92. *Id.* at 18.

93. *Id.*

94. The Indiana Court of Appeals 2022 annual report covers January 1, 2022, through December 31, 2022. *See* IND. CT. OF APPEALS, 2022 ANNUAL REPORT at 4 (2022).

95. *Id.* at 1.

96. *Id.*

97. *Id.*

98. *Id.* at 2.

99. *Id.*

100. *Id.*

*C. Judge Dana J. Kenworthy Appointed to the Court of Appeals*

In December 2022, Governor Eric “Holcomb named Judge [Dana J.] Kenworthy to succeed Justice Derek R. Molter, who was appointed to the Supreme Court in June 2022 and sworn in September 1.”<sup>101</sup> “Her appointment to the Court resulted in its first-ever female majority.”<sup>102</sup> “Judge Kenworthy strongly values education and is a first-generation college graduate.”<sup>103</sup> “In 2001, she graduated *summa cum laude* from Indiana University McKinney School of Law, while also working and commuting.”<sup>104</sup> “From 2001 to 2010, Judge Kenworthy served as a Grant County Deputy Prosecutor, concentrating on cases involving child abuse, sexual assault, domestic violence, computer-facilitated crimes, and juvenile delinquency.”<sup>105</sup> “In 2010, the Indiana Supreme Court appointed her Judge Pro Tempore of Grant Superior Court 2. She served in that capacity in 2012 and was reelected twice thereafter.”<sup>106</sup> “She presided over hundreds of bench trials and 82 jury trials: 74 criminal felonies and 8 personal injury cases.”<sup>107</sup> “Judge Kenworthy and her husband Alex have served as foster parents to fifteen children—infants to teenagers—from 2003 to 2006.”<sup>108</sup> We look forward to Judge Kenworthy’s service on the Court of Appeals in the coming years.

*D. Judge Paul Felix Appointed to the Court of Appeals*

On June 29, 2023, Governor Holcomb selected “Hamilton County Judge Paul Felix as the next member of the Indiana Court of Appeals.”<sup>109</sup> “Judge Felix will replace retiring Judge Margret G. Robb.”<sup>110</sup> “Judge Felix was born in Elkhart.<sup>111</sup> He was raised in Greenwood and attended Whiteland schools.<sup>112</sup> He earned a B.A. in Political Science from Indiana University and received his J.D. from the Indiana University Maurer School of Law.”<sup>113</sup> “Following graduation, Judge Felix served as a Deputy Prosecuting Attorney in the Johnson County

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101. *Robing Ceremony of the Honorable Dana J. Kenworthy*, CT. OF APPEALS OF IND. (Feb. 22, 2023), <https://www.in.gov/courts/appeals/news/2023-0222/> [<https://perma.cc/4MDE-ZUAF>].

102. *Id.*

103. *Judge Dana J. Kenworthy*, CT. OF APPEALS OF IND., <https://www.in.gov/courts/appeals/judges/dana-kenworthy/> [<https://perma.cc/34RQ-JJCS>] (last visited Jan. 15, 2024).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Gov. Holcomb Selects Judge Paul Felix to Join Indiana Court of Appeals*, IND. GOVERNOR ERIC J. HOLCOMB (June 29, 2023), [https://events.in.gov/event/gov\\_holcomb\\_selects\\_judge\\_paul\\_felix\\_to\\_join\\_indiana\\_court\\_of\\_appeals](https://events.in.gov/event/gov_holcomb_selects_judge_paul_felix_to_join_indiana_court_of_appeals) [<https://perma.cc/8DQM-2NT2>].

110. *Id.*

111. *Judge Paul A. Felix*, CT. OF APPEALS OF IND., <https://www.in.gov/courts/appeals/judges/paul-felix/> [<https://perma.cc/E6Z4-E6TE>] (last visited Jan. 15, 2024).

112. *Id.*

113. *Id.*

Prosecutor's Office from 1995 to 2006.”<sup>114</sup> “In 2007, Judge Felix was appointed to the Carmel City Court by Governor Mitch Daniels. In 2009, he was elected to serve as the Hamilton Circuit Court Judge, where he served for 14 years.”<sup>115</sup> Judge Felix “helped create the Youth Assistance Program,” which “is one of the State’s only judicial programs that focuses on the prevention of crime by providing youth with mentors, tutors, and wrap-around services.”<sup>116</sup> Judge Felix “resides in Hamilton County with his wife and three children, and enjoys playing euchre, backgammon, and making beer, mead, and kombucha.”<sup>117</sup> We are excited as Judge Felix begins this new chapter in his judicial career.

#### *E. Judge Margret Robb Retires*

In 2023, Judge Margret Robb announced she would “retire from the court in summer 2023.”<sup>118</sup> “She was appointed to the court in 1998 by Governor Frank O’Bannon and was the first woman elected chief judge of the appellate court in its 110-year history.”<sup>119</sup> “Prior to her appointment to the Court, Judge Robb practiced law in Lafayette for 20 years and served as a Chapter 11, 12 and a standing Chapter 7 bankruptcy trustee for the Northern District of Indiana.”<sup>120</sup> “Judge Robb holds a B.S. and an M.S. in Business Economics from Purdue University, a Magna Cum Laude J.D. from Indiana University Robert H. McKinney School of Law, a graduate of the Graduate Program for Indiana Judges and the Indiana Judicial College.”<sup>121</sup> Judge Robb has won many awards, including “the Indiana University Robert H. McKinney School of Law Distinguished Alumni, *Indiana Business Journal* Woman of Influence, [and] Indiana State Bar Association ‘100 Years of Women in the Legal Profession.’”<sup>122</sup> Judge Robb “now serves as a Senior Judge.”<sup>123</sup> We thank Judge Robb for her distinguished service and look forward to her continued service as a Senior Judge.

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114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Judge Robb, ‘78 to Retire from Indiana Court of Appeals in Summer 2023*, IND. UNIV. ROBERT H. MCKINNEY SCH. OF L. (Feb. 10, 2023), <https://mckinneylaw.iu.edu/news/releases/2023/02/judge-robb-78-to-retire-from-indiana-court-of-appeals-in-summer-2023.html> [<https://perma.cc/NWA8-YB7F>].

119. *Id.*

120. *Id.*

121. *Judge Margret G. Robb*, CT. OF APPEALS OF IND., <https://www.in.gov/courts/appeals/judges/margret-robb/> [<https://perma.cc/43T5-9WNL>] (last visited Jan. 15, 2024).

122. *Id.*

123. *Id.*

## CONCLUSION

This survey period included a number of rule amendments and decisions analyzing the appellate rules. Keeping abreast of these rule changes, as well as the guidance provided through case law, is key to a successful appellate practice.