RECENT DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

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

I. INDIANA SUPREME COURT DECISIONS

A. Personal Jurisdiction Reduced to One-Step Analysis

In 2003, Indiana Trial Rule ("Rule") 4.4(A)—Indiana's "long arm" jurisdiction statute—was amended to include the following language: "In addition, a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States."[2] In *LinkAmerica Corp. v. Albert*,[3] the Indiana Supreme Court clarified that the 2003 amendment to Rule 4.4(A), despite its retention of other specific, enumerated acts satisfying long-arm jurisdiction, collapses the personal jurisdictional inquiry into a single step: "The 2003 amendment to [Rule 4.4(A)] was intended to, and does, reduce analysis of personal jurisdiction to the issue of whether the exercise of personal jurisdiction is consistent with the Federal Due Process Clause."[4]

B. Preferred Venue

Rule 75 governs venue requirements in Indiana.[5] Rule 75(A) contains ten subsections, each setting forth criteria for establishing "preferred" venue.[6] A complaint can be filed in any county in Indiana.[7] However, if the complaint is not filed in a preferred venue, the court is required to transfer the case to a preferred venue upon the proper request of a party.[8] Rule 75(A) "does not create

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1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period—October 1, 2006, through September 30, 2007—as well as amendments to the Indiana Rules of Trial Procedure, which were ordered by the Indiana Supreme Court during the survey period.

2. IND. TRIAL R. 4.4(A).

3. 857 N.E.2d 961 (Ind. 2006).

4. *Id.* at 967. The *LinkAmerica* decision is discussed in greater detail in last year's civil procedure survey. *See* Michael A. Dorelli, *Recent Developments in Indiana Civil Procedure*, 40 IND. L. REV. 705, 705-07 (2007).

5. IND. TRIAL R. 75.

6. IND. TRIAL R. 75(A).

7. *Id.*

8. *Id.*

a priority among the subsections establishing preferred venue."[9] Rather, if a complaint "is filed in a county of preferred venue, then the trial court has no authority to transfer the case based solely on preferred venue in one or more other counties."[10]

1. Location of Defendant Organization's "Registered Office."—Rule 75(A)(4) establishes preferred venue in "the county where . . . the principal office of a defendant organization is located."[11] Rule 75(A)(10) applies when the case is not subject to the requirements of subsections (1) through (9), or "if all the defendants are nonresident individuals or nonresident organizations without a principal office in the state."[12]

In *American Family Insurance Co.*, the court held that "the term 'principal office' as used in subsections (4) and (10) of Trial Rule 75(A) refers to a domestic or foreign corporation's registered office in Indiana."[13] American Family, as a Spencer County resident's subrogee, sued Ford in Marion County on negligence and breach of warranty claims. Ford, a Delaware corporation with its headquarters in Michigan, filed a motion to transfer venue to Spencer County.[14] Ford has no offices in Indiana, but maintains a registered agent—CT Corporation—in Marion County.[15] The trial court granted Ford's motion to transfer venue, and the Indiana Court of Appeals reversed, holding that "Marion County was a preferred venue under [Rule] 75(A)(10)."[16]

On transfer, based on a review of the history of Indiana's Business Corporation Act, the Indiana Supreme Court clarified that "subsection (4) of Trial Rule 75 establishes preferred venue in the county of the defendant organization's registered office."[17] Ford had designated CT Corporation, located in Marion County, as its registered agent; therefore, the court concluded that Marion County was a preferred venue under subsection (4) of Rule 75.[18]

The court in *American Family Insurance* also clarified that subsection (10) of Rule 75(A)—preferred venue in the county of plaintiff's "residence" or "office"—applies in two independent circumstances: "(1) when none of the preceding nine subsections establish preferred venue *or* (2) when all of the

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9. Am. Family Ins. Co. v. Ford Motor Co., 857 N.E.2d 971, 974 (Ind. 2006) (citing Bostic v. House of James, Inc., 784 N.E.2d 509, 511 (Ind. Ct. App. 2003)).

10. *Id.* (citing Meridian Mut. Ins. Co. v. Harter, 671 N.E.2d 861, 863 (Ind. 1996)).

11. IND. TRIAL R. 75(A)(4).

12. IND. TRIAL R. 75(A)(10).

13. *Am. Family Ins.*, 857 N.E.2d at 972.

14. *Id.* at 972-73.

15. *Id.* at 972.

16. *Id.* at 973 (citing Am. Family Ins. Co. v. Ford Motor Co., 848 N.E.2d 319 (Ind. Ct. App.), *vacated*, 857 N.E.2d 971 (Ind. 2006)).

17. *Id.* at 975.

18. *Id.*; *cf.* Coffman v. Olson & Co., 872 N.E.2d 145, 148-49 (Ind. Ct. App. 2007) (distinguishing *American Family Insurance* and holding that Rule 75(A)(4) established preferred venue in the county in which defendant maintained a "nonprincipal office," because the office was not merely a "mailing address").

defendants are nonresident individuals or nonresident organizations without a 'principal office in the state.'"[19] The court explained that "because Ford has a principal office in [this] state [i.e., via CT Corporation, its registered agent], subsection (4) applies and . . . so neither circumstance triggering the applicability of subsection (10) is present."[20]

2. Location of Damaged Chattels.—Rule 75(A)(2) provides, inter alia, that preferred venue lies in the county where "the chattels or some part thereof are regularly located or kept, if the complaint includes a claim for injuries thereto or relating to . . . such chattels."[21] Rule 75(A)(3) provides for preferred venue in "the county where the accident or collision occurred, if the complaint includes a claim for injuries relating to the operation of a motor vehicle."[22]

In *R & D Transport, Inc. v. A.H.*,[23] the court held that the "damage caused to chattels in an automobile accident is subsumed by [Rule 75(A)(3)], not authorized under [Rule 75(A)(2)] as a way for a plaintiff to be able to sue in the plaintiff's county of residence."[24] The plaintiff, a Porter County resident, filed suit in Porter County against a Hendricks County resident and a corporation with its principle place of business in Hendricks County. The complaint alleged personal, physical, and psychological injuries resulting from a vehicular accident, including damage, to plaintiff's "orthotic devices, clothing, and other chattels regularly located in Porter County."[25] The accident occurred in Dearborn County.[26] The defendants moved to transfer venue to either Hendricks or Dearborn County. The trial court denied the motion, and the Indiana Court of Appeals affirmed.[27]

The Indiana Supreme Court reversed, expressly disapproving of the prior Indiana Court of Appeals' decisions in *Swift v. Pirnat*[28] and *Halsey v. Smeltzer*,[29] in which the courts held that preferred venue lied in the county in which personal

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19. *Am. Family Ins.*, 857 N.E.2d at 977.

20. *Id.* The court in *American Family Insurance* also addressed the applicable standard of review on a trial court's order on a motion to transfer venue. *Id.* at 973. The court explained that "factual findings linked to a ruling on a motion under Rule 75(A) are reviewed under a clearly erroneous standard and rulings of law are reviewed de novo." *Id.* (*abrogating* Monroe Guar. Ins. Co. v. Berrier, 827 N.E.2d 158, 159 (Ind. Ct. App. 2005)). According to the court, however, "[i]f factual determinations are based on a paper record, they are also reviewed de novo." *Id.* (citing Equicor Dev., Inc. v. Westfield-Washington Twp. Plan Comm'n, 758 N.E.2d 34, 37 (Ind. 2001)).

21. IND. TRIAL R. 75(A)(2).

22. IND. TRIAL R. 75(A)(3).

23. 859 N.E.2d 332 (Ind. 2006).

24. *Id.* at 337.

25. *Id.* at 333.

26. *Id.*

27. *Id.*

28. 828 N.E.2d 444 (Ind. Ct. App. 2005), *disapproved by R & D Transport, Inc.*, 859 N.E.2d 336-37.

29. 722 N.E.2d 871 (Ind. Ct. App. 2000), *disapproved by R & D Transport, Inc.*, 859 N.E.2d 336-37.

property allegedly damaged in automobile accidents was "regularly located," under Rule 75(A)(2).[30] The supreme court stated that "[t]he language and structure of [Rule] 75(A) dictate that these cases were wrongly decided."[31] The court in *R & D Transport* identified three reasons for this conclusion:

> First, the focus of [Rule] 75(A)(2) is the location of the property or activity that gives rise to a claim. . . .
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> Second, consistent with the rule's stress on the location of the property or activity giving rise to a claim, we have long had special venue rules for motor vehicle accidents. . . .
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> Third, we note the rule's language about the relationship between plaintiffs and venue. Subsection (10) of the rule allows for the plaintiff's home county to be a preferred venue if "the case is not subject to the requirements of subsections (1) through (9) of [Rule 75(A)] or if all the defendants are nonresident individuals or nonresident organizations without a principal office in the state."[32]

The court explained that "[t]he text of subsection (10) suggests that, in most cases, the plaintiff's home county has secondary status when it comes to preferred venue."[33] The court concluded that the "decisions of the Court of Appeals in [*Swift*], [*Halsey*], and their companions are contrary to the intent of [Rule] 75(A) and are disapproved" and held that Porter County was not a county of preferred venue.[34]

C. Relation Back of Amendments to Pleadings

In *Porter County Sheriff Department v. Guzorek*,[35] the Indiana Supreme Court held that "an amended complaint adding the sheriffs' department as a defendant relate[d] back to the date of the original complaint [filed against the officer in his individual capacity] and [was] therefore not barred by the statute of limitations if the original action was timely filed."[36] In *Guzorek*, a county sheriffs' department officer had rear-ended plaintiff's vehicle. Nineteen days

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30. *R & D Transport*, 859 N.E.2d at 334 (citing *Swift*, 828 N.E.2d at 448-49; *Halsey*, 722 N.E.2d at 873-74).

31. *Id.*

32. *Id.* at 335-36 (quoting IND. TRIAL R. 75(A)(10)).

33. *Id.* at 336.

34. *Id.* at 336-37. The court reasoned that "[m]ost people 'regularly ke[ep]' their car and other chattels that travel with them in their cars in their home counties." *Id.* at 336. The court "decline[d] to allow [Rule] 75(A)(2) to serve as the means to bypass the clear intent of the rule's overall text." *Id.*

35. 857 N.E.2d 363 (Ind. 2006).

36. *Id.* at 366.

later, plaintiff sent a Tort Claims Act notice to various government agencies.[37] Five days before expiration of the two-year negligence statute of limitations, plaintiff filed a complaint naming the officer as the only defendant.[38]

The complaint did not mention the sheriffs' department or the officer's employment with the department. The officer moved for summary judgment claiming "no personal liability."[39] While the motion for summary judgment was pending, plaintiff moved for leave to amend the complaint to add the sheriffs' department as a defendant. The trial court granted summary judgment in favor of the individual officer, the trial court then granted leave to amend to add the department,[40] the department moved for summary judgment, on statute of limitations grounds, and the trial court denied the motion (finding that the amendment related back to the date of original filing for statute of limitations purposes).[41] The trial court certified the summary judgment denial for interlocutory appeal, the Indiana Court of Appeals reversed (directing that summary judgment be granted in favor of the department), and the Indiana Supreme Court granted transfer.[42]

Following a description of the evolution of Rule 15(C) and its federal counterpart,[43] the court in *Guzorek* paraphrased the relevant provision of the Rule:

> [I]n order for an amendment of a complaint to relate back under Trial Rule 15(C), no later than 120 days after the complaint is filed a defendant must receive notice of the pendency of the action and be aware that, but for a mistake, that defendant would have been named in the original complaint.[44]

Applying Rule 15(C) to the case, the court in *Guzorek* first analyzed the "notice" requirement of the Rule, explaining that:

> Notice of the lawsuit may be actual notice or constructive notice, which may be inferred based on either the identity of interest between the old and new parties or the fact that they share attorneys. An identity of interest may permit notice to be imputed to the added party when the

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37. *Id.*

38. *Id.*

39. *Id.*

40. The department was represented by the same counsel who had represented the officer. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 367-68. The court in *Guzorek* recognized that Rule 15(C) was modeled after Federal Rule 15(C) and that "[s]ubsequent amendments to the Indiana rule have conformed to changes in the federal rule." *Id.* at 367. Thus, the court concluded that it was "appropriate to consider federal authorities as guidelines in interpreting and applying the Indiana rule." *Id.* (citing Honda Motor Co. v. Parks, 485 N.E.2d 644, 649 (Ind. Ct. App. 1985)).

44. *Id.* at 368.

> original and added party "are so closely related in business or other activities that it is fair to presume that the added part[y] learned of the institution of the action shortly after it was commenced." Similarly, notice may be imputed based on shared legal counsel if it is reasonable to infer that the attorney for the initial party will have communicated to the added party that he, she or it may be joined in the action.[45]

The court found that notice was "fairly inferred,"[46] because the department was required to defend the officer and both the officer and the department were represented by the same counsel.[47]

The court next analyzed the "knowledge of mistake" requirement—an issue that sparked an interesting debate between the majority, authored by Justice Boehm, and the dissent, penned by Chief Justice Shepard. Per the majority, the "mistake" requirement is satisfied "in instances involving both mistakes of fact and mistakes of law."[48] According to the majority:

> "The 'mistake' condition does not isolate a specific type or form of error in identifying parties, but rather is concerned fundamentally with the new party's awareness that failure to join it was error rather than deliberate strategy." Contrary to the suggestion of the dissent, [Rule 15(C)] is not limited to misnomers: "In view of the history of the application of Rule 15(C), the phrase 'a mistake concerning the identity of the proper party' should clearly not be read to limit its usefulness to cases of misnomer." Specifically, a mistake of applicable law can constitute a "mistake" as that term is used in Trial Rule 15(C).[49]

The majority agreed with the dissent that "where there is a basis for the plaintiff to assert liability against the party named in the complaint, and there is no reason for another party to believe that the plaintiff did anything other than make a deliberate choice between potential defendants, the mistake requirement is not met."[50] The court further explained that "[i]t is not a reasonable assumption that an opponent's legal strategy was to sue a party who was provided immunity by statute and to omit the party designated as the proper defendant."[51] The court

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45. *Id.* at 369 (citations omitted). The court also found that the tort claim notice sent by the plaintiff to the sheriffs' department did not satisfy Rule 15(C)'s notice requirement, because it informed the department of the accident, but it "did not advise that a lawsuit had been filed." *Id.*

46. *Id.* at 371.

47. *Id.* at 369 (stating that "[e]ither of these may be sufficient to find notice to [the department] under some circumstances, but in concert they are conclusive under the facts of this case").

48. *Id.* at 371.

49. *Id.* (quoting *In re* Integrated Res. Real Estate Ltd. P'ship Sec. Litig., 815 F. Supp. 620, 644 (S.D.N.Y. 1993)).

50. *Id.* at 372.

51. *Id.* The court elaborated, stating that "[t]he dissent characterizes the [plaintiff's] decision to sue the individual officer rather than the sheriff's department as a legal or tactical choice." *Id.*

therefore concluded that "[s]uch a mistake of applicable law—suing the agency that is immune instead of the secretary who is not—is precisely the situation that gave rise to [the federal rule upon which Indiana Rule 15(C) is patterned]."[52] The court affirmed the trial court's ruling denying the department's summary judgment motion based on the relation-back of the plaintiff's amendment.[53]

As noted by the majority's opinion, Chief Justice Shepard offered a spirited dissent on the "mistake of identity" issue, opining that the majority's decision "is against the weight of federal and Indiana authority."[54] The Chief Justice explained that:

> Justice Boehm's opinion . . . swims upstream against both federal and Indiana authority about the meaning of "mistake of identity" by sweeping within Rule 15(C) any mistake, including legal bad calls about who among multiple possible defendants might be liable. His opinion acknowledges the principle that where a party makes a "deliberate choice between potential defendants, the mistake requirement is not met," but does not apply this principle to the facts before us. Justice Boehm reasons that the [plaintiff] could not have deliberately planned "to sue an immune party who was provided immunity by statute and to omit the party designated as the proper defendant." In effect, this focuses on the idea that the [plaintiff] made a legal mistake that could be remedied by Rule 15(C). Under such reasoning, virtually everyone who chooses to name a given defendant and later finds the choice an unhappy one could lay legitimate claim to "mistake of identity."[55]

In his dissent, Chief Justice Shepard explained that "the inquiry under Rule 15(C) does not focus on whether the claimant's lawyer botched the job, but rather whether the party sought to be added after the statute of limitations 'knew or should have known that but for a mistake concerning the identity of the proper party' he, she, or it would have been sued in the first place."[56] The dissent concluded with an implicit warning: "Rule 15[(C)] was amended to allow relation back where a plaintiff's honest error results in a mistake of identity. Rule 15[(C)] was not intended to save parties from the legal or tactical choices

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The majority, however, distinguished the cases cited in Chief Justice Shepard's dissent, stating that "[t]he cases the dissent cites are markedly different from the present one [in that] . . . [n]one involves a suit against a clearly immune party and all involve a rational decision to sue one party and not another." *Id.*

52. *Id.* at 373.

53. *Id.*

54. *Id.* (Shepard, C.J. dissenting) ("I see no reason why Indiana should be an outlier on this question, and the majority opinion does not undertake to provide a reason for placing us against the mainstream.").

55. *Id.* at 374.

56. *Id.* ("On this point, the majority opinion deals with the facts summarily and gets them wrong.").

made by their lawyers."[57]

D. Interpleader

In *Porter Development, LLC v. First National Bank of Valparaiso*,[58] the court interpreted and applied Indiana's Adverse Claim Interpleader Statute ("Statute"), which provides that "[i]f a depository financial institution pays . . . funds to the court, the depository financial institution *is entitled* to recover and collect the costs and expenses, including attorney's fees, incurred . . . in the interpleader action."[59] Specifically, a depository bank filed an interpleader complaint against a depositor and the depositor's secured creditor to resolve competing claims to a certificate of deposit.[60] The depositor counterclaimed against the bank, alleging abuse of process, and breaches of contract, trust, and fiduciary duty. Following cross-motions for summary judgment, the trial court ruled that interpleader was proper, but denied the bank's claim for attorney fees under the Statute, explaining that the Statute "reads 'is entitled,' not 'shall.'"[61] Cross-appeals followed, and the court of appeals affirmed.

On transfer, the Indiana Supreme Court disagreed with the court of appeals and reversed and remanded the matter for further proceedings.[62] Through statutory interpretation and a review of case law in other jurisdictions, the court in *Porter* agreed with and adopted the "prevailing approach" regarding whether and how attorney fees are recoverable by an interpleading depository institution, explaining as follows:

> [T]he prevailing approach is to allow the interpleading stakeholder [*i.e.*, the depository institution] to recover its attorney fees directly from the deposited fund before it is distributed to the prevailing claimant and, as between competing claimants, to require those claimants whose claims

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57. *Id.* at 375. Subsequently, Justice Boehm denied the department's petition for rehearing, reiterating that "the 'mistake' requirement of [Rule 15(C)] is satisfied when a plaintiff mistakenly sues an immune party if the proper party knows of the suit and knows that an error has been made." Porter Co. Sheriff Dep't v. Gozorek, 862 N.E.2d 254, 255 (Ind. 2007) (stating "[t]hat is one of the prototypical situations [Federal Rule 15(c)] was initially designed to address"). According to Justice Boehm, "[w]e see no reason to impose a penalty on a plaintiff for a mistake of law that has gained no advantage for the plaintiff and caused no disadvantage to the defendant." *Id.* at 256. In his dissent, Chief Justice Shepard argued that "[t]he petition for rehearing in this case further demonstrates the extent to which this Court's interpretation of Trial Rule 15(c)'s 'mistake of identity' requirement to allow relation back takes us outside the mainstream of authority." *Id.* (Shepard, C.J., dissenting). The dissent, on rehearing, argued that "mistakes of liability are not the type of 'mistakes' contemplated by Rule 15(C)." *Id.* at 257 (citing Hall v. Norfolk S. Ry. Co., 469 F.3d 590, 596-97 (7th Cir. 2006)).

58. 866 N.E.2d 775 (Ind. 2007).

59. IND. CODE § 28-9-5-3 (2004) (emphasis added).

60. *Porter*, 866 N.E.2d at 776-77.

61. *Id.* at 777.

62. *Id.* at 780-81.

to the fund are rejected to replenish the fund or reimburse the prevailing claimant.[63]

However, the court recognized that this approach may be inappropriate in certain "unusual circumstances, such as when the interpleading stakeholder incurs additional attorney fees and costs beyond the reasonable and ordinary expenses associated with the prosecution of an interpleader proceeding."[64]

The court in *Porter* concluded that the Statute is *mandatory*, extending to "all reasonable costs and expenses incurred by a depository financial institution with respect to the interpleader action or proceeding."[65] The court clarified, however, that "such right to recovery includes only those costs and expenses that are expended in bringing a proper interpleader, or successfully defending its use of interpleader."[66] If deposited funds are insufficient, the court "may impose such costs and expenses upon unsuccessful claimants whose claims led to the interpleader and deposit of funds with the court."[67]

E. "Lazy" Judge

Rule 53.2 provides that "[w]henever a cause . . . has been tried to the court and taken under advisement by the judge, and the judge fails to determine any issue of law or fact within ninety (90) days," upon the request of an interested party, the Clerk of the court must withdraw submission of all pending issues from the judge and seek appointment of a special judge by the Indiana Supreme Court.[68] An exception to the mandatory withdrawal of all issues by the Clerk applies where "[t]he parties who have appeared or their counsel stipulate or agree on record that the time limitation for decision set forth in this rule shall not apply."[69]

In *State ex rel. Hoffman v. Allen Circuit Court*,[70] the court held as a matter of first impression that "a trial court may not avoid its obligation to make timely decisions by issuing . . . an order presuming agreement to extend the time absent objection from the parties."[71] In *Hoffman*, the trial court conducted a bench trial on issues of child custody, parenting time, and child support.[72] The trial court ordered proposed findings of fact and conclusions of law, and instructed in its order that "[t]he time within which the Court is to rule on the issues shall not begin to run until said Findings of Fact and Conclusions of Law are filed unless

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63. *Id.* at 780.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. IND. TRIAL R. 53.2(A).
69. IND. TRIAL R. 53.2(B)(1).
70. 868 N.E.2d 470 (Ind. 2007).
71. *Id.* at 472.
72. *Id.*

either party files an objection . . . within five (5) days."[73] Neither party objected within the five day period. Instead, the parties agreed to successive extensions of their deadlines for the filing of findings and conclusions.[74]

On the ninety-first day after the conclusion of the trial, counsel for the father filed his Rule 53.2 praecipe, seeking removal of the case from the judge and appointment of a special judge.[75] Four days later, the trial court entered a final judgment, granting "legal custody to the mother, establish[ing] parenting time for the father, and order[ing] child support."[76] In a subsequent entry, the Clerk provided "notice" of her decision not to withdraw the case in response to the father's Rule 53.2 praecipe, "explaining that the father's failure 'to object and the multiple requests for extension of time may be deemed to be an agreement as to the Court's delay.'"[77] The father filed a petition for writ of mandamus, challenging the Clerk's failure to withdraw the case from the trial court.[78]

Despite denying the petition for writ of mandamus, the Indiana Supreme Court admonished similar "presumptions" of agreement to extend a trial court's timeline for ruling, explaining as follows:

> [W]e take this opportunity to disapprove future use of devices such as the order presuming agreement absent objection to extend a court's time for ruling. To provide guidance to the bench and bar, we hold that a trial court may not avoid its obligation to make timely decisions by issuing such an order presuming agreement to extend the time absent objection from the parties. The exception provided in the rule means exactly what it says. It applies only where the parties "stipulate or agree on record that the time limitation for decision set forth in this rule shall not apply." The failure of parties to object to a judicial declaration presuming their agreement does not satisfy this requirement that they stipulate or agree on the record.[79]

The court continued, explaining that "[t]he ninety-day requirement for judicial action operates irrespective of whether proposed findings and conclusions are contemplated."[80] According to the Indiana Supreme Court, "[r]eceiving proposed findings of fact and conclusions of law from the respective parties may be a judicial convenience, but it is not a necessity to a court's decision-making function."[81]

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73. *Id.* at 471-72.

74. *Id.* at 472.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 471 (indicating that writ was denied on May 15, 2007, and that an "explanatory opinion" would follow).

79. *Id.* at 472-73 (citation omitted).

80. *Id.* at 473.

81. *Id.*

F. Relief from Judgment Due to "Misconduct" During Discovery and Trial

In *Outback Steakhouse of Florida, Inc. v. Markley*,[82] the court held that the plaintiffs' failure to identify a critical witness in response to defendants' discovery, "in concert with other acts and omissions attributable to plaintiffs' counsel, constituted misconduct requiring a new trial."[83] Plaintiffs were severely injured when the motorcycle they were riding was struck by the car of an intoxicated man who had been drinking at Outback Steakhouse. Plaintiffs sued Outback alleging various alcohol related statutory and common law violations, including a claim that Outback "knowingly served alcohol to a visibly intoxicated person."[84]

Outback served interrogatories on the plaintiffs, requesting that plaintiffs identify all facts supporting their contention that Outback provided alcoholic beverages to the man with knowledge that he was visibly intoxicated.[85] In response to the interrogatory, plaintiffs identified several individuals who were at Outback the night of the accident, but they failed to identify a waitress who had previously informed plaintiffs' counsel that the man was visibly intoxicated when she served him the night of the accident.[86] Outback later deposed the waitress. At her deposition, she testified that the man was not visibly intoxicated when she served him.[87]

During the trial, the waitress contacted counsel for plaintiffs and visited their office, informing counsel that she lied during her deposition and that she planned to testify at trial that the man was visibly intoxicated when she served him.[88] Plaintiffs' counsel did not inform the trial court or Outback of the meeting, nor did counsel seek to supplement the interrogatory answer.[89] When trial resumed, plaintiffs called the waitress as a witness and she testified that the man "was visibly intoxicated . . . , that she continued to serve him after she realized he was intoxicated, and that she felt guilty and responsible for the collision."[90] The jury returned a verdict in the amount of $60 million—$39 million of which was allocated to Outback.[91] Outback filed a motion to correct errors and a motion for new trial under Rule 60(B), characterized as being on the basis of "fraud, misrepresentation, or misconduct."[92] The trial court denied all post-trial relief,

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82. 856 N.E.2d 65 (Ind. 2006).

83. *Id.* at 70.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 71.

88. *Id.*

89. *Id.*

90. *Id.* at 71-72. Outback impeached the waitress with her deposition on cross-examination, but did not ask that her testimony be stricken or that a continuance be granted. *Id.* at 72.

91. *Id.*

92. *Id.* Outback conducted post-trial discovery pursuant to Rule 60(D), including a post-trial deposition of the waitress during which she revealed that she had informed plaintiffs' counsel

and the Indiana Court of Appeals affirmed.[93]

Using federal case law for interpretive guidance, the court in *Outback Steakhouse* determined that, for purposes of Rule 60(B)(3), "misconduct" includes "both negligent and intentional violations of Indiana's discovery rules."[94] The court explained that, before a new trial will be granted due to "misconduct" under Rule 60(B)(3), a movant must demonstrate that the misconduct "prevented the movant from fully and fairly presenting the movant's case at trial."[95] In addition, the moving party must demonstrate "a meritorious claim or defense."[96] The court explained that the "meritorious defense" requirement "merely requires a prima facie showing of a meritorious defense, that is, a showing that 'will prevail until contradicted and overcome by other evidence.'"[97] In summary, the court in *Outback Steakhouse* concluded that for Outback to prevail under Rule 60(B)(3), it must demonstrate:

> (1) the plaintiffs' discovery responses amounted to either fraud, negligent misrepresentation, or misconduct; (2) the fraud, misrepresentation, or misconduct prevented Outback from fully and fairly presenting its case at trial; and (3) Outback has made a prima facie showing of a meritorious defense as to liability or that the damages were excessive.[98]

The court in *Outback Steakhouse* found that the plaintiffs' failure to disclose the waitress "as a person with knowledge of the relevant facts was a negligent if not intentional breach of its discovery obligations."[99] The court first "readily conclude[d] that the initial omission [of the waitress's expected testimony from the plaintiffs' original interrogatory answer] was a violation of [Rules] 26 and 33 and therefore 'misconduct' within the meaning of Rule 60(B)(3)."[100] The court then explained that even if the plaintiffs' attorneys had a doubt about whether the waitress needed to be disclosed in response to the interrogatory, that doubt should have been "resolved by the obligation to construe an interrogatory fairly."[101] According to the court, "[i]nterrogatories should not 'be interpreted with excessive rigidity or technicality, but a rule of reason should be applied.'"[102]

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before trial that she knew the man was intoxicated when she served him. *Id.*

93. *Id.*

94. *Id.* at 73.

95. *Id.*

96. *Id.*

97. *Id.* (quoting Smith v. Johnson, 711 N.E.2d 1259, 1265 (Ind. 1999)).

98. *Id.* at 74.

99. *Id.*

100. *Id.* at 77.

101. *Id.* at 75.

102. *Id.* at 75-76 (quoting Pilling v. Gen. Motors Inc., 45 F.R.D. 366, 369 (D. Utah 1968)); *see also* Dotson v. Bravo, 321 F.3d 663, 667 (7th Cir. 2003) (cited in *Outback Steakhouse*, 856 N.E.2d at 76, for the proposition that "incomplete or evasive responses to interrogatories support dismissal of an action").

Next, the court found "misconduct" in the plaintiffs' failure to supplement their interrogatory answer once they decided to call the waitress at trial.[103] The court explained that the duty to supplement discovery responses under Rule 26(E) continues even after trial has begun.[104] In addition, the court rejected the plaintiffs' arguments that the waitress's expected testimony constituted protected attorney work product[105] and that Outback waived its objection to the plaintiffs' failure to supplement their discovery responses by cross-examining the waitress instead of moving for a continuance.[106] The court reasoned, in part, that Outback had no reason to move for a continuance when the waitress was called, because it had no reason to believe she would not adhere to her prior deposition testimony.[107]

The court also concluded that the plaintiffs' counsel's closing argument—during which he claimed Outback's counsel was disingenuous during opening statements when he represented that the waitress would testify that the man was not intoxicated—amounted to "misconduct" in light of the discovery violations.[108] The court proceeded to find that the misconduct prejudiced Outback's right to a fair trial—due in large part to plaintiffs' counsel's closing argument attack on Outback's counsel—and that Outback presented a "meritorious defense" sufficient to warrant relief under Rule 60(B)(3).[109]

G. Arbitration

In *Natare Corp. v. D.S.I., Duraplastec Systems, Inc.*,[110] the court held that an arbitrator did not exceed his authority in denying a prevailing party's attorney fees, despite a contract provision providing for an award of reasonable fees to the prevailing party.[111] In connection with the settlement of two lawsuits, Natare and D.S.I. agreed not to disseminate disparaging information about each other. The parties agreed to arbitrate any disputes "arising out of or relating to" their settlement agreement, and they agreed that if a party breached the agreement, the non-breaching party would be entitled to $5000 in liquidated damages, actual

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103. *Outback Steakhouse*, 856 N.E.2d at 77.

104. *Id.* at 77-78 (stating that "it may be reasonable and appropriate to modify the method of supplementing a discovery response if new information is discovered on the eve of or during trial").

105. *Id.* at 78 (noting that the work product privilege exists to protect "mental impressions or legal theories" of the attorneys or clients and that the waitress's statement did not reveal such impressions but were "simply potential evidence that enjoys no privilege").

106. *Id.* at 78-79.

107. *Id.* at 79.

108. *Id.* at 79-80.

109. *Id.* at 80-82. The court in *Outback Steakhouse* recognized "that the effect of ordering a new trial is once again to make the [plaintiffs] innocent victims, this time at the hands of their own lawyers." *Id.* at 81. But, the court explained, the plaintiffs "chose their counsel and this series of missteps by plaintiffs' counsel produced a severely unfair trial." *Id.* at 81-82.

110. 855 N.E.2d 985 (Ind. 2006).

111. *Id.*

damages "if shown," and reasonable attorney fees, costs, and expenses incurred pursuing the claim.[112]

Several years later, Natare claimed D.S.I. breached the non-disparagement agreement, causing actual damages.[113] After arbitration pursuant to the settlement agreement, the arbitrator found that D.S.I. breached the agreement, but that Natare failed to show actual damages.[114] The arbitrator awarded $5000 in liquidated damages, no actual damages, and no attorney fees or costs. Natare sought judicial review of the arbitrator's decision to award no attorney fees. The trial court upheld the award, and the Indiana Court of Appeals reversed, holding that the arbitrator exceeded his authority in failing to award reasonable attorney fees to Natare as the prevailing party.[115]

On transfer, the Indiana Supreme Court quoted the full text of the sections of Indiana's Uniform Arbitration Act,[116] pursuant to which an arbitration award may be set aside, and explained that "an arbitration award should not be set aside unless grounds specified in the Act have been shown, and appellate review of an arbitration award is limited to the determination of such a showing."[117] Regarding the arbitrator's "authority" to award no fees despite contract language providing for an award of fees to the prevailing party, the court in *Natare* explained as follows:

> [T]he arbitrator clearly had the authority not to award attorney fees under the terms of the settlement agreement if the arbitrator concluded that the amount of "reasonable attorney fees" to which Natare was entitled was zero. . . .
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> . . . .
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> . . . The facts and circumstances of this arbitration clearly point to the arbitrator having exercised his responsibility to consider whether the award of any attorney fees was reasonable here. Without indulging in speculation as to any particular reason or reasons, it is enough to say that there are a number of plausible explanations for why the arbitrator could conclude that the reasonable amount of attorney fees in this circumstance was zero.[118]

In short, the court in *Natare* held that an arbitrator acts within his authority if—despite a contract provision providing for an award of reasonable attorney fees to the prevailing party—he determines that a "reasonable" fee under the

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112. *Id.* at 985-86.
113. *Id.* at 986.
114. *Id.*
115. *Id.*
116. IND. CODE §§ 34-57-2-1 to -22 (2004).
117. *Natare Corp.*, 855 N.E.2d at 986.
118. *Id.* at 987-88.

circumstances is zero.[119]

H. Proceedings Supplemental

In *Rose v. Mercantile National Bank of Hammond*,[120] the Indiana Supreme Court discussed and evaluated proceedings supplemental generally, as well as changes of venue or judge, jury trial demands, fraudulent transfer, and "new" claims asserted in proceedings supplemental.[121] A "[j]udgment creditor pursued . . . two shareholders of the judgment debtor through a proceeding supplemental contending fraudulent transfer, then amended the complaint to bring a new [Crime Victim's Statute] claim, as well."[122]

The court in *Rose* explained that "[w]ith roots in equity, a proceeding supplemental offers the judgment creditor judicial resources 'for discovering assets, reaching equitable and other interest[s] not subject to levy and sale at law and to set aside fraudulent conveyances.'"[123] The court described the procedure for bringing and responding to proceedings supplemental, generally, as follows:

> A plaintiff may move for a proceeding supplemental in the court where judgment has been rendered by alleging that the plaintiff's judgment will not be satisfied and that the defendant or another party has property that ought to be applied toward the judgment. And while Trial Rule 69(E) declares "[n]o further pleadings shall be required," our caselaw teaches that "when a new issue arises in a proceeding supplemental, responsive pleadings are required." Nonetheless, even when no new issue arises, a responsive pleading is still permitted. The court must then allow discovery and conduct a hearing, after which certain property shall be "applied towards the judgment."[124]

Regarding change of venue or judge, the court in *Rose* affirmed "the rule that third-party defendants in proceedings supplemental may engage the change of venue provisions in Trial Rule 76."[125] The court explained that "[s]ince proceedings supplemental are merely the continuation of an original action, the original parties have already been afforded the chance to move the case to another court or judge."[126] In *Rose*, the "third parties" seeking change of judge were the two principles of the original defendant.[127] The court stated that

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119. *Id.* The court in *Natare* also concluded that "the issue of attorney fees was submitted to the arbitrator and that he clearly understood that it had been as he made a specific finding to that effect." *Id.* at 988.

120. 868 N.E.2d 772 (Ind. 2007).

121. *Id.* at 775-77.

122. *Id.* at 773.

123. *Id.* at 775 (quoting McCarthy v. McCarthy, 297 N.E.2d 441, 444 (Ind. App. 1973)).

124. *Id.* (citations omitted).

125. *Id.* at 776.

126. *Id.* at 775-76.

127. *Id.* at 776.

"[w]hile they were not parties to the original action in a strict sense, this form will not prevent us from recognizing the substance."[128] Therefore, the supreme court affirmed the trial court's denial of the principals' motion for change of judge.[129]

Finally, the court in *Rose* rejected the plaintiff's attempt to add an Indiana Crime Victim's Statute claim, stating that such a "claim does not fit the purpose for proceedings supplemental."[130] The court explained that

> allowing a new claim to be tacked on at this stage would be just as unfitting as opening up any other litigation to add new claims after judgment. Such an approach to collections would lay the groundwork for perpetual motion—a far cry from the timely and efficient system of conflict resolution the nation's judiciary strives to provide.[131]

The court concluded that "[p]roceedings supplemental are appropriate only for actions to enforce and collect existing judgments, not to establish new ones."[132]

II. INDIANA COURT OF APPEALS DECISIONS

A. Statute of Limitations

1. Discovery Rule and Continuous Representation Doctrine.—In *Bambi's Roofing, Inc. v. Moriarty*,[133] the court held that a plaintiff's negligence claim against an accounting firm was time-barred.[134] Specifically, the court held that the one-year statute of limitations imposed by the Accountancy Act of 2001[135] applied to the plaintiff's particular claim.[136] The claim was time-barred despite Indiana's "discovery rule," and the continuous-representation doctrine—which the court held as a matter of first impression applied to accounting negligence claims covered by the Accountancy Act—did not apply under the present circumstances as a statute of limitations tolling mechanism.[137]

In *Bambi's Roofing*, an accounting firm continuously provided accounting services to Bambi's from 1982 through 2003. In December 2000, Bambi's hired an individual as their "in-house accounting officer," at the accounting firm's

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128. *Id.*

129. *Id.* The court in *Rose* also addressed the propriety of a jury trial demand in a proceeding supplemental, explaining that "[w]hile juries are disfavored in proceedings supplemental for their tendency to prolong matters, where the pleadings form issues of fact that a jury could reasonably decide, the parties may demand a jury trial." *Id.*

130. *Id.* at 777.

131. *Id.*

132. *Id.*

133. 859 N.E.2d 347 (Ind. Ct. App. 2006).

134. *Id.* at 359.

135. IND. CODE §§ 25-2.1-1-1 to -15-2 (2004 & Supp. 2007).

136. *Bambi's Roofing*, 859 N.E.2d at 359.

137. *Id.*

recommendation.[138] One of the accounting firm's accountants trained the individual, while the firm continued to provide services to Bambi's.[139] On or before March 14, 2003, Bambi's discovered that the individual had embezzled more than $76,900. The individual was fired and ultimately convicted and sentenced.[140] On July 2, 2004, nearly one year and four months after the embezzlement was discovered, Bambi's filed a complaint against the accounting firm, generally alleging negligence.[141]

After determining that Bambi's claims implicated the one-year statute of limitations contained in the Accountancy Act,[142] the court in *Bambi's Roofing* addressed the statute of limitations accrual date under Indiana's "discovery rule," explaining as follows: "[T]he one-year limitations period is tolled until the date that the alleged negligence is discovered or should have been discovered by the exercise of reasonable diligence."[143] The court further noted that, "the discovery rule does not mandate that plaintiffs know with precision the legal injury that has been suffered, but merely anticipates that a plaintiff be possessed of sufficient information to cause him to inquire further in order to determine whether a legal wrong has occurred."[144] In other words, the court explained, "the discovery rule only postpones the statute of limitations by belated discovery of key facts, not by delayed discovery of legal theories."[145] Regarding the requirement that a party exercise "reasonable diligence," the court explained the following:

> The exercise of reasonable diligence means simply that an injured party must act with some promptness where the acts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist.[146]

The court concluded that "Bambi's had knowledge of pertinent facts that reasonably put them on notice that some claim might exist against the [accounting firm] at the moment they discovered [the] embezzlement."[147] The court explained that at that time, "they necessarily must have been aware that a

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138. *Id.* at 350.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 354-55 ("[W]e hold that Bambi's cause in negligence resulted from an agreement to provide professional accounting services and is therefore governed by the Accountancy's Act statute of limitations." (citing IND. CODE § 25-2.1-15-1 (2004))).

143. *Id.* at 355 (citing Crowe, Chizek, & Co. v. Oil Tech., Inc., 771 N.E.2d 1203, 1207 (Ind. Ct. App. 2002)).

144. *Id.* at 356 (citing Perryman v. Motorist Mut. Ins. Co., 846 N.E.2d 683, 689 (Ind. Ct. App. 2006)).

145. *Id.* (citing *Perryman*, 846 N.E.2d at 689).

146. *Id.* (citing *Perryman*, 846 N.E.2d at 689).

147. *Id.*

claim might exist against the [accounting firm]."[148] Explaining that "the law does not require a smoking gun in order for the statute of limitations to commence," the court concluded that, because the claim was filed more than one year after discovery of the embezzlement, Bambi's claim against the accounting firm was time-barred.[149]

Next, the court in *Bambi's Roofing* ruled, as a matter of first impression, that the "continuous-representation" doctrine applies to accounting negligence claims covered by the Accountancy Act, as a statute of limitations tolling mechanism.[150] In evaluating the continuous-representation doctrine under the facts before it, the court clarified that "the continuous representation must be in connection with the specific matter directly in dispute, and not merely the continuation of a general professional relationship."[151] According to the court, "the mere recurrence of professional services does not constitute continuous representation where the later services performed are not related to the original services."[152] The court explained the rationale for limiting application of the doctrine to cases in which the representation is "in the same, specific matter," as follows:

> The purpose of the [continuous-representation doctrine] is to give accountants an opportunity to remedy their errors, establish that there was not error, or attempt to mitigate the damage caused by their errors, while still allowing the aggrieved client the right to later bring a malpractice action, and not to circumvent the statute altogether by continuously representing the client.[153]

The court concluded that the doctrine did not apply to the present case, because the alleged "continuous" representation did not implicate the stated purposes of the doctrine.[154] In other words, according to the court, although the accountants' representation may have been "continuous," the alleged continuous representation did not give the accountants an opportunity to remedy their errors, establish that there was no error, or attempt to mitigate the damage caused by their alleged errors.[155]

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148. *Id.*

149. *Id. But see* Brinkman v. Bueter, 856 N.E.2d 1231, 1239-41 (Ind. Ct. App. 2006) (holding that patient could not reasonably have discovered, and limitations period for her medical malpractice claims therefore did not begin to run, until she became pregnant again and consulted with another obstetrician who provided high-risk obstetrical care), *vacated*, 879 N.E.2d 549 (Ind. 2008).

150. *Bambi's Roofing*, 859 N.E.2d at 356-57.

151. *Id.* at 357 (citing Ackerman v. Price Waterhouse, 683 N.Y.S.2d 179, 197 (App. Div. 1998)).

152. *Id.* (citing *Ackerman*, 683 N.Y.S.2d at 197).

153. *Id.* at 358 (citing Burns v. McClinton, 143 P.3d 630, 634-35 (Wash. Ct. App. 2006)).

154. *Id.* at 359.

155. *Id.*

2. Contractual Statute of Limitations and Alleged Third-Party Beneficiary.—In *Eckman v. Green*,[156] the court of appeals held that a contractual statute of limitations provision, contained in a modular home contract, did not apply to bar a claim by the purchasers against a third-party contractor.[157] Acknowledging that a "third party beneficiary may directly enforce a contract,"[158] the court explained the following:

> [An alleged] third-party beneficiary must show the following: (1) A clear intent by the actual parties to the contract to benefit the third party; (2) A duty imposed on one of the contracting parties in favor of the third party; *and* (3) Performance of the contract terms is necessary to render the third party a direct benefit intended by the parties to the contract.[159]

The court in *Green* concluded that the contractor failed "to meet the first criterion for establishing status as a third-party beneficiary."[160] According to the court, the contract "[did] not show clear intent to benefit [the contractor] as [the contractor was] neither named in the purchase agreement nor [did] the purchase agreement contain 'provisions which demonstrate an intent to benefit any other person.'"[161] Rather, the court explained, the contract "addresse[d] only the rights and obligations of the . . . contracting parties."[162]

3. Non-Resident Defendant and Due Process.—Indiana Code section 34-11-4-1 tolls the statute of limitations when there is no agent for service of process in the state of Indiana.[163] Rule 4.4(B) provides that Indiana's Secretary of State is deemed the agent for nonresidents who are subject to the jurisdiction of Indiana courts pursuant to Rule 4.4(A).[164] Rule 4.10 sets forth the procedures for service on the Secretary of State as agent for a nonresident.[165]

In *Cadle Co. II, Inc. v. Overton*,[166] the court held that Rule 4.10, allowing a summons for a nonresident defendant to be served "constructively" on the Indiana Secretary of State, did not violate the due process rights of a nonresident for purposes of the statutory exception to the general rule that the statute of

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156. 869 N.E.2d 493 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 216 (Ind. 2007).

157. *Id.* at 496-97.

158. *Id.* at 496 (citing Mogensen v. Martz, 441 N.E.2d 34, 35 (Ind. Ct. App. 1982)).

159. *Id.* "[T]he intent to benefit the third party is the controlling factor and may be shown by specifically naming the third party or by other evidence." *Id.* (quoting Luhnow v. Horn, 760 N.E.2d 621, 628 (Ind. Ct. App. 2001)).

160. *Id.*

161. *Id.* (quoting *Horn*, 760 N.E.2d at 628).

162. *Id.* (quoting *Horn*, 760 N.E.2d at 628).

163. IND. CODE § 34-11-4-1 (2004) ("The time during which the defendant is a nonresident of the state is not computed in any of the periods of limitation except during such time as the defendant by law maintains in Indiana an agent for service of process or other person who, under the laws of Indiana, may be served with process as agent for the defendant.").

164. IND. TRIAL R. 4.4(B)(2).

165. *See* IND. TRIAL R. 4.10.

166. 857 N.E.2d 433 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 455 (Ind. 2007).

limitations is tolled while a defendant is a nonresident.[167] The court in *Overton* affirmed the trial court's grant of summary judgment in favor of the nonresident defendant. Premised on expiration of the applicable statute of limitations, the court found that under the circumstances of the case Rule 4.10 does not violate constitutional due process, even if "actual notice" was not accomplished.[168]

B. Service of Process: "Substantial Compliance"

In *LePore v. Norwest Bank of Indiana, N.A.*,[169] the court held that a plaintiff "substantially complied" with Rule 4.1(A)(3) and (B) when plaintiff left a copy of the summons and complaint at the defendant's residence, but due to an error in identifying the defendant's correct name, follow-up service by *certified mail* was returned undeliverable.[170] Rule 4.1(A)(3) provides for service on an individual by "'leaving a copy of the summons and complaint at his dwelling house or usual place of abode.'"[171] Rule 4.1(B) provides that when service is made under subsection (A)(3), "the person making service also shall send by *first class mail*, a copy of the summons without the complaint to the last known address of the person being served."[172] The court explained that "even though [the plaintiff] did not technically comply with the rules [by attempting follow-up service by certified mail instead of first class mail], . . . an attempt was made to effectuate service."[173] The court concluded that the plaintiff's actions "substantially complied" with Rule 4.1(B) and "were reasonably calculated to inform [the defendant] that an action had been instituted against him."[174]

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167. *Id.* at 438.

168. *Id.* at 437-38.

169. 860 N.E.2d 632 (Ind. Ct. App. 2007).

170. *Id.* at 636.

171. *Id.* at 634 (quoting IND. TRIAL R. 4.1(A)(3)).

172. *Id.* (emphasis added) (quoting IND. TRIAL R. 4.1(B)).

173. *Id.* at 636 (distinguishing Barrow v. Pennington, 700 N.E.2d 477 (Ind. Ct. App. 1998), and Swiggett Lumber Constr. Co. v. Quandt, 806 N.E.2d 334 (Ind. Ct. App. 2004)).

174. *Id.* The court also rejected the defendant's argument that service was invalid because the certified mail attempt was returned undeliverable with a message stating "moved, left no address." *Id.* The court found that the defendant, in fact, lived at the address at which service was attempted and explained that "'[a] person who has refused to accept the offer or tender of the papers being served thereafter may not challenge the service of those papers.'" *Id.* (alteration in original) (quoting IND. TRIAL R. 4.16(A)(2)). *See also* Thomison v. IK Indy, Inc., 858 N.E.2d 1052, 1058-59 (Ind. Ct. App. 2006) (concluding service pursuant to Rule 4.1(A)(3) was valid despite failure to follow up with mail service, where defendant conceded that "the summons and complaint were delivered to her residence and ma[de] no argument that she did not receive the complaint" (citing Munster v. Groce, 829 N.E.2d 52, 63 (Ind. Ct. App. 2004) ("citing *Boczar* [v. Reuben, 742 N.E.2d 1010 (Ind. Ct. App. 2001)] as holding . . . 'failure to follow up delivery of a complaint and summons under Trial Rule 4.1(A)(3) with mailing of a summons under Trial Rule 4.1(B) does not constitute ineffective service of process if the subject of the summons does not dispute actually having received the complaint and summons'")).

C. Demand for Jury Trial

In *Daugherty v. Robinson Farms, Inc.*,[175] the court clarified an apparent conflict between Rule 6(B)—which allows the trial court discretion to grant a belated demand for a jury trial[176]—and Rule 38(D)[177]—which provides that once a party has failed to file a timely jury demand, the trial court may grant a jury trial only if the parties agree to it.[178] The court in *Daugherty* identified the potential conflict and explained its resolution as follows:

> When Trial Rules 6(B) and 38(D) are read together in *pari materia*, it is clear that the trial court has discretion to allow a belated demand for a jury trial under Trial Rule 6(B) and Trial Rule 38(D). Such discretion, however, follows only if the parties have entered into a written agreement, agreeing to a trial by jury. To allow the trial court to grant a belated jury trial demand under Trial Rule 6(B), without a written agreement by the parties, would render the written agreement requirement in Trial Rule 38(D) meaningless. Furthermore, Trial Rule 38(D), as the more specific rule, takes priority over the more general Trial Rule 6(B).[179]

The court in *Daugherty* concluded that the trial court erred when it granted the belated jury demand, because "the parties did not enter into a written agreement pursuant to Trial Rule 38(D)."[180]

D. Compulsory Counterclaim

In *New Albany Residential, Inc. v. Hupp*,[181] the court reversed the trial court's dismissal of the plaintiff's complaint, holding that the plaintiff's claim did not constitute a compulsory counterclaim in a prior action to which the plaintiff was not a party.[182] In the prior action, Hupp (now the defendant) had filed an action for breach of contract against her employer, a real estate firm, and its two shareholders.[183] However, she did not join the plaintiff in the current action as a defendant.[184] Several years later, the plaintiff in the current action filed an action against her for breach of the same contract.[185] The defendant moved for summary judgment, arguing that the plaintiff's claim should have been asserted

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175. 858 N.E.2d 192 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 455 (Ind. 2007).
176. IND. TRIAL R. 6(B).
177. IND. TRIAL R. 38(D).
178. *Daugherty*, 858 N.E.2d at 197.
179. *Id.*
180. *Id.*
181. 872 N.E.2d 627 (Ind. Ct. App. 2007).
182. *Id.* at 631.
183. *Id.* at 628.
184. *Id.*
185. *Id.*

as a compulsory counterclaim in the first lawsuit.[186]

The *Hupp* court began its analysis with Rule 13(A), which governs compulsory counterclaims and provides, in pertinent part:

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."[187]

The court noted that, while the rule does not define "pleader," the term has been interpreted as applying only to opposing parties.[188] The defendant, however, was not a party to—and did not take part in—the original action.[189] Consequently, the defendant could not have asserted a claim in that matter.[190] The court further noted that while the defendant could have been joined in the prior action, "that course of action was not required."[191]

E. Dismissal

1. Voluntary Dismissal.—In *Finke v. Northern Indiana Public Service Co.*,[192] the court affirmed the trial court's refusal to permit the plaintiffs to dismiss their complaint voluntarily pursuant to Rule 41(A), where the matter had been pending for nearly two years and the parties had already participated in a preliminary injunction hearing.[193] The court held that the plaintiffs' effort to dismiss their claim voluntarily at that juncture did not satisfy the requirements of Rule 41(A), noting that:

> "The purpose of the rule pertaining to the voluntary dismissal of an action was to eliminate evils resulting from the absolute right of a plaintiff to take a voluntary nonsuit at any stage in the proceedings before the pronouncement of judgment and after the defendant had incurred substantial expense or acquired substantial rights."[194]

2. Involuntary Dismissal.—In *Olson v. Alick's Drugs, Inc.*,[195] the court held that the trial court did not abuse its discretion in dismissing the plaintiff's complaint pursuant to Rule 41(E), where the plaintiff failed to prosecute his

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186. *Id.* at 628-29.

187. *Id.* at 629 (quoting IND. TRIAL R. 13(A)).

188. *Id.* at 630 (quoting Broadhurst v. Moenning, 633 N.E.2d 326, 333 (Ind. Ct. App. 1994)).

189. *Id.* at 631.

190. *Id.*

191. *Id.*

192. 862 N.E.2d 266 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 458 (Ind. 2007).

193. *Id.* at 272.

194. *Id.* at 270 (quoting Rose v. Rose, 526 N.E.2d 231, 234 (Ind. Ct. App. 1988)).

195. 863 N.E.2d 314 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 208 (Ind. 2007).

claims for over six months.[196] Specifically, the plaintiff filed an employment discrimination claim against the defendant, his former employer, in May 1998. The matter was still pending in June 2005, by which time four attorneys had been dismissed or had withdrawn from representing the plaintiff, and the plaintiff was proceeding pro se.[197] Following a period of approximately six (6) months with no apparent activity by the plaintiff, the defendant filed a motion to dismiss for failure to prosecute, which the trial court granted.[198]

On appeal, the court explained that the purpose of Rule 41(E) is "'to ensure that plaintiffs will diligently pursue their claims,' and to provide 'an enforcement mechanism whereby a defendant, or the court, can force a recalcitrant plaintiff to push his case to resolution.'"[199] The *Olson* court identified a number of factors the court must consider in determining whether dismissal pursuant to Rule 41(E) was a proper exercise of the trial court's discretion.[200] The factors identified by the court included:

> (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. The weight any particular factor has in a particular case depends on the facts of that case.[201]

In affirming dismissal, the court noted that it was not persuaded that lesser sanctions would be effective and determined that the plaintiff was "undoubtedly stirred to action by the threat of a dismissal as opposed to genuine diligence."[202] The court further concluded that the defendants had "undoubtedly been prejudiced as issues related to this cause of action [had] been hanging over their heads for nearly a decade."[203]

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196. *Id.* at 321-22.

197. *Id.* at 317-18.

198. *Id.* at 318.

199. *Id.* at 319 (quoting Belcaster v. Miller, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2004)).

200. *Id.* at 319-20.

201. *Id.* (citing Office Env't, Inc. v. Lake States Ins. Co., 833 N.E.2d 489, 494 (Ind. Ct. App. 2005)).

202. *Id.* at 320 (citing *Office Env't*, 833 N.E.2d at 494).

203. *Id.* at 321.

F. Class Actions—Scope of Certification

In *7-Eleven, Inc. v. Bowens*,[204] the Indiana Court of Appeals affirmed the trial court's class action certification where the trial court had limited the certification to issues of "liability and general causation."[205] The court began its analysis with the applicable language of Rule 23(C)(4)(a), which "provides that when appropriate, 'an action may be brought or maintained as a class action with respect to particular issues.'"[206] As the court observed:

> "The theory of Rule 23(c)(4)(A) is that the advantages and economies of adjudicating issues that are common to the entire class on a representative basis should be secured even though other issues in the case may have to be litigated separately by each class member. Accordingly, even if only one common issue can be identified as appropriate for class action treatment, that is enough to justify the application of the provision as long as the other Rule 23 requirements have been met."[207]

The plaintiffs proposed that, once "general causation" had been established, there would be a number of individual trials for the affected class members.[208] The court embraced this approach, noting that it is common in toxic tort litigation.[209] Accordingly, the court concluded that the trial court had not abused its discretion in certifying the class to limited issues.[210]

G. Discovery

1. Duty to Supplement Responses.—In *Hlinko v. Marlow*,[211] the court held that the plaintiff did not violate its duty to supplement its discovery responses where the plaintiff did not delay in advising the defendant regarding changes in the plaintiff's expert's opinion.[212] Following an automobile accident in which the plaintiff was injured, the plaintiff's medical expert examined her and prepared a report regarding his opinions as to the extent of the plaintiff's injuries.[213] Approximately three weeks before trial—and over three years after his initial examination—the plaintiff's medical expert reexamined her. In the second examination, the expert concluded that the plaintiff's condition had regressed and

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204. 857 N.E.2d 382 (Ind. Ct. App. 2006).

205. *Id.* at 388-89.

206. *Id.* at 388 (citing IND. TRIAL R. 23(c)(4)).

207. *Id.* (quoting Bank One Indianapolis, N.A. v. Norton, 557 N.E.2d 1038, 1041 (Ind. Ct. App. 1990)).

208. *Id.*

209. *Id.* at 389.

210. *Id.*

211. 864 N.E.2d 351 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 462 (Ind. 2007).

212. *Id.* at 354.

213. *Id.* at 353.

that her injuries were more substantial than indicated in his earlier report.[214] Eleven days later, the expert faxed his notes to the plaintiff's attorney, who forwarded the notes to the defendant's counsel six days later.[215] On the first day of trial, the defendant moved to continue trial or, in the alternative, to bar the plaintiff's expert from testifying based on the plaintiff's failure to supplement its discovery responses. The trial court denied the defendant's motion.[216]

On appeal, the court concluded that, because the discovery responses at issue pertained to the subject matter of an expert's testimony, Rule 26(E) required supplementation.[217] The court further observed that the duty to supplement is "absolute" and that the trial court has discretion to exclude the witness' testimony if a party fails to comply with its obligations under Rule 26(E).[218] However, because the plaintiff's counsel provided the supplemental information to his adversary within a week of receipt, the court held that the plaintiff did not breach her duty to supplement her discovery responses.[219]

2. Dismissal as Sanction for Discovery Violation.—In *Brown v. Katz*,[220] the court of appeals upheld the trial court's dismissal of the plaintiff's complaint as a discovery sanction, even though lesser sanctions had not been previously imposed.[221] The plaintiff objected to the majority of the defendant's document requests, relying on vague, blanket assertions of "insured-insurer privilege, attorney-client privilege and work product."[222] The plaintiff also refused to answer approximately ninety questions posed to him during his deposition, again asserting attorney-client privilege and work product protection.[223] In response, the defendant filed a motion to dismiss the plaintiff's complaint pursuant to Rule 37(D).[224]

Following a hearing, the trial court ordered the plaintiff to supply a privilege log. However, the plaintiff failed to comply, providing what was determined to be an inadequate privilege log after the court-ordered deadline.[225] The trial court gave the plaintiff another chance to provide an adequate privilege log. The plaintiff again failed to comply.[226] Consequently, the trial court dismissed the plaintiff's claim.[227]

On appeal, the court noted that Rule 37(B)(2) permits the trial court to

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214. *Id.* at 354.
215. *Id.*
216. *Id.*
217. *Id.* (citing Everage v. N. Ind. Pub. Serv. Co., 825 N.E.2d 941, 951 (Ind. Ct. App. 2005)).
218. *Id.* (citing *Everage*, 828 N.E.2d at 951).
219. *Id.*
220. 868 N.E.2d 1159 (Ind. Ct. App. 2007).
221. *Id.* at 1161.
222. *Id.* at 1162.
223. *Id.* at 1163.
224. *Id.*
225. *Id.* at 1163-64.
226. *Id.* at 1164.
227. *Id.* at 1164-65.

sanction parties for failure to comply with discovery orders and the decisions regarding whether to impose a sanction and what sanction to impose are entrusted to the trial court's discretion.[228] The court concluded that, in light of the plaintiff's "indolence," the trial court did not abuse its discretion in imposing discovery sanctions.[229] Moreover, in affirming dismissal as the appropriate sanction, the court observed that "'Rule 37 has been substantially rewritten and no longer requires a trial court to impose a lesser sanction before dismissing an action or entering a default judgment, especially where the disobedient party has demonstrated contumacious disregard for the court's orders.'"[230]

3. Preservation of Pre-Litigation Witness Testimony.—In *United States Fidelity & Guaranty Insurance Co. v. Hartson-Kennedy Cabinet Top Co.*,[231] the court affirmed the trial court's order granting the appellee's petition to perpetuate the testimony of a witness pursuant to Rule 27(A).[232] In anticipation of an insurance coverage dispute, which had not yet ripened, the appellee petitioned the trial court to perpetuate the testimony of its sixty-nine-year-old accountant, who had reviewed the appellee's insurance policies and kept detailed notes of his review for over thirty years.[233] The court granted the appellee's petition.[234]

On appeal, the court determined that the threshold requirement for a Rule 27(A) petition is some impediment to bringing suit.[235] The court observed that the absence of such a requirement would "promote an abuse of the rule . . . [l]itigants could then use the rule as a 'fishing expedition' to discover grounds for a lawsuit, and, if found, to determine against whom the action should be initiated. These uses are not contemplated by Rule 27."[236]

Once the petitioner has established the existence of an impediment to bringing suit, the Rule 27(A) petition may be granted to "'prevent a failure or delay of justice.'"[237] Because it was uncertain when—or if—the appellee's coverage claim against the appellant insurer would ripen, and because the witness in question was an elderly gentleman and the exclusive source of information, the court concluded that granting the Rule 27(A) petition would prevent the failure or delay of justice and, therefore, affirmed the trial court.[238]

4. Recovery of Fees Incurred Attending Rule 37 Hearing.—In *M.S. ex rel.*

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228. *Id.* at 1165.

229. *Id.* at 1169.

230. *Id.* (internal quotation marks omitted) (quoting Benchmark at Fla., Inc. v. Star Fin. Card Servs., Inc., 679 N.E.2d 973, 978 (Ind. Ct. App. 1997)).

231. 857 N.E.2d 1033 (Ind. Ct. App. 2006).

232. *Id.* at 1035.

233. *Id.* at 1035-36.

234. *Id.* at 1036.

235. *Id.* at 1037.

236. *Id.* (quoting Sowers v. Laporte Superior Court, 577 N.E.2d 250, 253 (Ind. Ct. App. 1991)).

237. *Id.* (quoting *Sowers*, 577 N.E.2d at 252).

238. *Id.* at 1040.

Newman v. K.R.,[239] the court held that a trial court has discretion to award attorney's fees incurred in attending a hearing regarding a motion for a Rule 37 protective order.[240] Following a hearing regarding the petitioner's motion for protective order and the respondent's motion to compel discovery, the trial court granted the petitioner's motion, denied the respondent's motion, and awarded the petitioner its attorney's fees.[241]

On appeal, the court first noted that the entry or denial of a protective order carries with it the presumption that the trial court will also require reimbursement of the prevailing party's reasonable expenses.[242] Having concluded that the respondent failed to rebut this presumption,[243] the court held that, because Rule 37(A)(4) permits an award of expenses incurred in "staving off" the other party's discovery, "it logically follows" that the prevailing party should also recover for expenses incurred in preparing for and attending the expense award hearing.[244]

H. Summary Judgment

1. Summary Judgment Denial as Interlocutory Order.—In *Indiana Department of Transportation v. Howard*,[245] the court dismissed an appeal for lack of jurisdiction where the appellant failed to secure certification of an interlocutory order denying summary judgment.[246] The trial court initially granted the appellant's summary judgment motion; however, the trial court subsequently granted the appellee's motion to correct error, set aside its order granting summary judgment, and denied the appellant's motion for summary judgment.[247] The *Howard* court noted that, because a denial of summary judgment is not a final appealable order, a party seeking review must seek an interlocutory appeal pursuant to Indiana Rule of Appellate Procedure 14(B).[248] The appellant failed to seek certification from the trial court authorizing the appeal of the interlocutory order; therefore, the court held it lacked jurisdiction and dismissed the appeal.[249]

2. Admissibility of Summary Judgment Evidence.—In *Breining v. Harkness*,[250] the court affirmed the trial court's order striking portions of the

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239. 871 N.E.2d 303 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 215 (Ind. 2007).

240. *Id.* at 306, 311-12.

241. *Id.* at 309-10.

242. *Id.* at 311 (citing Munsell v. Hambright, 776 N.E.2d 1272, 1277 (Ind. Ct. App. 2002)).

243. *Id.* at 311-12.

244. *Id.* at 313.

245. 873 N.E.2d 72 (Ind. Ct. App. 2007), *vacated on other grounds*, 879 N.E.2d 1119 (Ind. Ct. App. 2008).

246. *Id.* at 74-75.

247. *Id.*

248. *Id.* at 75 (citing Cardiology Assocs. of Nw. Ind., P.C. v. Collins, 804 N.E.2d 151, 155 (Ind. Ct. App. 2004)).

249. *Id.*

250. 872 N.E.2d 155 (Ind. Ct. App. 2007).

plaintiff's affidavit in support of summary judgment, holding that "[i]nadmissible hearsay contained in an affidavit may not be considered in ruling on a summary judgment motion."[251] The plaintiff sought to oppose the defendant's summary judgment motion—directed toward the plaintiff's conversion claim—with an affidavit relating to the challenged transactions.[252] However, the court rejected this attempt, concluding that "[i]nasmuch as [the plaintiff] lacked personal knowledge of the transaction at issue, and attempted to introduce hearsay and legal conclusions through his affidavit, the substantive portions of his affidavit were properly stricken."[253]

3. Extension of Time to Respond to Summary Judgment Motion.—In *McGuire v. Century Surety Co.*,[254] the court affirmed the trial court's order denying an extension of time to respond to a summary judgment motion.[255] Appellants had filed a third-party claim against the appellee, the appellant's insurer, disputing the appellee's denial of coverage for damage sustained at the appellants' home.[256] In response to the appellee's summary judgment motion, the appellants sought an extension of time in which to file their opposition, contending that additional time was needed (1) to consult with the trustee in a related bankruptcy proceeding and (2) because of time constraints upon the appellant's attorney, who was also representing them in the bankruptcy proceeding.[257]

The court began its analysis with a review of Rule 56(I), which provides, "'For cause found, the Court may alter any time limit set forth in this rule upon motion made within the applicable time limit.'"[258] The court next observed that altering time limits on summary judgment is within the trial court's discretion, and, while the trial court could have granted the appellant's motion for additional time, it was not an abuse of discretion to deny it.[259] The appellants provided no explanation of the need to consult with the bankruptcy trustee.[260] Further, the court noted that "a general claim of being too busy to timely respond to another party's motion does not *require* a court to grant a motion for an extension of time to file a response, although it may *permit* a trial court to grant such a motion."[261]

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251. *Id.* at 158 (citing Newell v. Standard Land Corp., 297 N.E.2d 842, 846 (Ind. Ct. App. 1973)).

252. *Id.* at 157-58.

253. *Id.* at 158.

254. 861 N.E.2d 357 (Ind. Ct. App. 2007).

255. *Id.* at 359-60.

256. *Id.*

257. *Id.* at 360.

258. *Id.* (quoting IND. TRIAL R. 56(I)).

259. *Id.*

260. *Id.*

261. *Id.*

I. Relief from Judgment

1. "Excusable Neglect."—In *Shane v. Home Depot USA, Inc.*,[262] the court affirmed a trial court's order setting aside default judgment, holding that the defendant's failure to file a timely answer to the plaintiffs' complaint resulted from excusable neglect.[263] The *Shane* court first noted that, because each case has unique facts, the trial court has broad discretion in determining whether to set aside a default judgment.[264] Further, the court observed that, in light of the "preferred policy" to determine cases on their merits,[265] default judgments are disfavored, and "[a]ny doubt of the propriety of a default judgment should be resolved in favor of the defaulted party."[266]

Rule 55(C) provides that a default judgment may be set aside if the grounds articulated in Rule 60(B)—including excusable neglect[267]—are present.[268] Noting that "[t]here are no clear standards to determine what is and is not excusable neglect,"[269] the court opined that the determination must be based on a balancing of "'the need for efficient administration of justice with the preference for deciding cases on their merits and giving a party its day in court.'"[270]

In *Shane*, the defendant's failure to file a timely answer resulted from a breakdown in communications with his insurer.[271] The defendant provided prompt notice of the plaintiff's lawsuit; however, the insurer assigned the matter to an adjuster who had left the company.[272] Accordingly, the court concluded that it could not find error with the trial court's decision to set aside the default judgment where a miscommunication within the defendant's insurance company led to the default.[273]

2. "Extraordinary Circumstances."—In *Brimhall v. Brewster*,[274] the court addressed whether extraordinary circumstances existed such that the plaintiffs could be granted relief from entry of judgment pursuant to Rule 60(B)(8).[275] The trial court had dismissed the plaintiffs' complaint in accordance with Rule 41(E);

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262. 869 N.E.2d 1232 (Ind. Ct. App. 2007).

263. *Id.* at 1236.

264. *Id.* at 1234 (citing Anderson v. State Auto Ins. Co., 851 N.E.2d 368, 370 (Ind. Ct. App. 2006)).

265. *Id.* (citing Walker v. Kelley, 819 N.E.2d 832, 837 (Ind. Ct. App. 2004)).

266. *Id.* (citing Coslett v. Weddle Bros. Constr. Co., 798 N.E.2d 859, 861 (Ind. 2003)).

267. IND. TRIAL R. 60(B)(1).

268. *Shane*, 869 N.E.2d at 1234 (citing Flying J, Inc. v. Jeter, 720 N.E.2d 1247, 1249 (Ind. Ct. App. 1999)).

269. *Id.* (citing *Jeter*, 720 N.E.2d at 1249).

270. *Id.* (quoting *Jeter*, 720 N.E.2d at 1249).

271. *Id.* at 1236.

272. *Id.*

273. *Id.*

274. 864 N.E.2d 1148 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205 (Ind. 2007).

275. *Id.* at 1153.

however, the plaintiffs did not receive notice of the dismissal, continued to prosecute their claims against the defendant, and obtained a default judgment.[276] Nearly a year later, the trial court sought to remedy the problem through a pair of *nunc pro tunc* orders.[277] The court of appeals rejected this approach.[278] Following the denial of transfer, the plaintiffs filed a motion for relief from the entry of judgment.[279]

Because more than a year had passed since the entry of judgment, relief under Rule 60(B)(1)-(4) was not available to the plaintiffs; rather, they were limited to seeking relief under Rule 60(B)(8), which required the plaintiffs to establish "exceptional circumstances justifying extraordinary relief."[280] Moreover, the court noted that, to meet their burden, the plaintiffs must do more than show that their failure to act was the result of "'an omission involving mistake, surprise, or excusable neglect. Rather some extraordinary circumstances must be demonstrated affirmatively.'"[281]

The *Brewster* court concluded that the trial court had not abused its discretion in determining that the plaintiffs had demonstrated the existence of extraordinary circumstances—including the trial court's failure to notify the plaintiffs of the dismissal and then permitting the case to proceed as if no dismissal had been entered.[282]

J. Motion to Correct Error

1. Distinguished from Motion to Reconsider for Appellate Purposes.—In *Citizens Industrial Group v. Heartland Gas Pipeline, LLC*,[283] the court held that an appellant must file a notice of appeal within thirty days of an administrative agency's order, regardless of whether the party petitions the agency to reconsider its ruling.[284] Twenty days after an order by the Indiana Utility Regulatory Commission ("IURC"), the appellant filed a petition with the IURC for reconsideration. The IURC denied the petition fifty-seven days later.[285] The appellant filed its notice of appeal thirty days after the IURC denied its petition for reconsideration—or 107 days after the IURC entered its order.[286]

On appeal, the court noted that, pursuant to Rule 53.4, a motion to reconsider

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276. *Id.* at 1150.

277. *Id.*

278. *Id.* 1150-51; *see also* Dorelli, *supra* note 4, at 739-41 (discussing Brimhall v. Brewster, 835 N.E.2d 593 (Ind. Ct. App. 2005), *trans. denied*, 855 N.E.2d 1005 (Ind. 2006)).

279. *Brewster*, 864 N.E.2d at 1151.

280. *Id.* at 1153 (citing Ind. Ins. Co. v. Ins. Co. of N. Am., 734 N.E.2d 276 (Ind. Ct. App. 2000)).

281. *Id.* (quoting *Ind. Ins. Co.*, 734 N.E.2d at 279-80)).

282. *Id.* at 1154.

283. 856 N.E.2d 734 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 453 (Ind. 2007).

284. *Id.* at 738.

285. *Id.* at 736.

286. *Id.*

will not toll a party's deadline to file a notice of appeal in the context of general civil litigation.[287] However, the court determined that, in an administrative proceeding, filing a motion to reconsider or for rehearing following an entry of a final order is tantamount to filing a motion to correct errors following a court's entry of final judgment.[288]

The court then contrasted Appellate Rule 9(A)(1), which provides that a party's notice of appeal must be filed within thirty days of the date on which its motion to correct errors is denied or deemed denied, with Appellate Rule 9(A)(3), which governs appeals from agency decisions.[289] As the court noted, Rule 9(A)(3) does not have "language regarding a petition for reconsideration, the administrative procedure's counterpart to a motion to correct error."[290]

The court suggested that "equity would seem to favor giving administrative agencies the same second chance to review their decisions as trial courts are afforded"; however, the court determined that it was "constrained by the language of the rules of appellate procedure."[291] Accordingly, the court held that, because the appellant had failed to file his notice of appeal within thirty days of the IURC order, the appellant failed to comply with Appellate Rule 9(A)(3) and dismissed the appeal.[292]

2. Deemed Denial and Impact on Appeal.—In *HomEq Servicing Corp. v. Baker*,[293] the court reversed the trial court's untimely order granting a motion to correct error, which had already been deemed denied.[294] Following the trial court's entry of summary judgment in favor of the defendant, the plaintiff filed a motion to correct error and set aside summary judgment. Thirty-eight days after the hearing on the plaintiff's motion, the trial court entered an order granting plaintiff's motion to correct error and setting aside the summary judgment order.[295] In light of the trial court's order, the plaintiff did not file a notice of appeal.[296]

On appeal, the defendant argued that the motion to correct error had been deemed denied pursuant to Rule 53.3(A), which provides that such a motion shall be deemed denied if the trial court fails to rule on the motion within thirty days after it is heard.[297] The *Baker* court agreed, holding that the motion to correct error was deemed denied.[298] Further, relying on the Indiana Supreme Court's

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287. *Id.* at 737.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 738.

292. *Id.*

293. 863 N.E.2d 1262 (Ind. Ct. App. 2007), *trans. granted, opinion vacated*, 883 N.E.2d 95 (Ind. 2008).

294. *Id.* at 1265.

295. *Id.* at 1263-64.

296. *Id.*

297. *Id.* at 1264.

298. *Id.* at 1265.

decision in *Cavinder Elevators, Inc. v. Hall*,[299] the court concluded that, because the plaintiff had not filed a notice of appeal within thirty days of the date on which their motion to correct error was deemed denied, the plaintiff could not argue the merits of its motion to correct error, i.e., that summary judgment should not have been entered in favor of the defendant, on cross appeal.[300]

3. Second Motion to Correct Error.—In *Peters v. Perry*,[301] the court of appeals confronted the issue of whether a second motion to correct error will further toll the movant's deadline to file a notice of appeal.[302] Following the trial court's entry of default judgment against the defendant, who proceeded in the action pro se,[303] on June 16, 2006, the defendant filed two motions to correct error—the first on June 19, 2006, and the second on July 17, 2006.[304] The trial court denied the first motion to correct error on July 5, 2006, but did not deny the second motion until October 23, 2006.[305] The defendant filed his notice of appeal on November 22, 2006.[306]

On appeal, the court held that, pursuant to Appellate Rule 9(A)(1), the defendant had thirty days from the denial of the *first* motion to correct error to file his notice of appeal.[307] The defendant's November 22, 2006 notice of appeal came well after this deadline had expired.[308]

K. Arbitration

1. Scope.—In *Walker v. DaimlerChrysler Corp.*,[309] in a matter of first impression, the court considered whether the Magnuson-Moss Warranty Act ("MMWA") permits binding arbitration agreements.[310] The plaintiff filed suit against the defendant automobile manufacturer, asserting (among other things) a claim for "breach of written warranty pursuant to the MMWA."[311] Because the

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299. 726 N.E.2d 285 (Ind. 2000). In *Cavinder*, the plaintiff's motion to correct error was deemed denied where the trial court failed to rule within thirty days of the hearing; however, the plaintiff filed its notice of appeal within thirty days. *Id.* at 286. Accordingly, the *Cavinder* court determined that the plaintiff had preserved its ability to argue the merits of its motion to correct error on appeal. *Id.* at 289.

300. *Baker*, 863 N.E.2d at 1265.

301. 873 N.E.2d 676 (Ind. Ct. App.), *reh'g*, 877 N.E.2d 498 (Ind. Ct. App. 2007).

302. *Id.* at 678.

303. The court noted that "'a litigant who chooses to proceed pro se will be held to the same rules of procedure as trained legal counsel and must be prepared to accept the consequences of his action.'" *Id.* (quoting Shepherd v. Truex, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004)).

304. *Id.* at 677.

305. *Id.*

306. *Id.*

307. *Id.* at 679.

308. *Id.*

309. 856 N.E.2d 90 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 455 (Ind. 2007).

310. *Id.* at 93.

311. *Id.* at 92.

written warranty agreement contained an arbitration clause, the trial court granted the defendant's summary judgment motion and entered an order dismissing the plaintiff's complaint and compelling arbitration.[312]

On appeal, the plaintiff argued that binding arbitration agreements are unenforceable under the MMWA.[313] Noting the presumption in favor of the enforceability of contractual arbitration provisions,[314] the court applied the test articulated by the United States Supreme Court in *McMahon* "to determine whether a specific statute allows binding arbitration."[315] Specifically, as the party opposing arbitration, the plaintiff bore the burden of establishing that Congress intended to preclude arbitration.[316] This intent would be evident from: "(1) the statute's text; (2) the statute's legislative history; or (3) an inherent conflict between arbitration and the statute's underlying purposes."[317]

The *Walker* court analyzed each of the three *McMahon* factors and determined that the plaintiff directed the court to no language in the MMWA and nothing in the legislative history of the MMWA prohibiting binding arbitration.[318] Further, the plaintiff did not identify any "inherent conflict between arbitration and the MMWA's underlying purposes."[319]

The court also rejected the plaintiff's argument that the Federal Trade Commission's ("FTC") interpretation of the MMWA as not permitting binding arbitration should guide the court's decision.[320] In reaching this result, the court found unreasonable each of the three bases supporting the FTC's interpretation.[321] First, the court asserted that the MMWA's provision for a judicial forum does not, as the FTC concluded, prohibit a binding arbitration agreement.[322] Second, the court noted that the "MMWA's provision for non-binding informal dispute resolution procedures does not preclude enforcement of a mandatory binding arbitration agreement."[323] Finally, the court rejected the FTC's concern that arbitration will not adequately protect consumers.[324]

Having rejected the FTC's interpretation of the MMWA as unreasonable and having determined that the plaintiff failed to carry his burden with respect to

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312. *Id.*

313. *Id.* at 92-93.

314. *Id.* at 93-94 (citing Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987)).

315. *Id.* at 94. This is referred to as the *McMahon* Test. *Id.*

316. *Id.* (citing *McMahon*, 482 U.S. at 226).

317. *Id.* (citing *McMahon*, 482 U.S. at 227).

318. *Id.* at 95.

319. *Id.*

320. *Id.* at 97.

321. *Id.* (employing the test articulated by the U.S. Supreme Court in Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984)). As a preliminary matter, the court noted that under *Chevron* Step 1, that Congress had not directly addressed the issue. *Id.* The court then noted that "Congress did not explicitly leave a gap for the agency to fill." *Id.*

322. *Id.* at 97-98.

323. *Id.* at 98.

324. *Id.*

demonstrating Congress' intent to prohibit arbitration, the court held that the "mandatory binding arbitration agreements are permissible under the MMWA."[325]

2. Waiver.—In *Tamko Roofing Products, Inc. v. Dilloway*,[326] the court of appeals affirmed the trial court's order denying the defendant's motion to dismiss and compel arbitration, holding that the defendant had waived its right to enforce a contractual arbitration provision.[327] The plaintiff brought a claim against the defendant, a manufacturer of roofing products, alleging breach of a written warranty. Because the warranty contained a binding arbitration provision, the defendant moved to dismiss the plaintiff's complaint and to compel arbitration.[328] However, because the defendant waited until after the plaintiff had presented his evidence at trial before making its motion to dismiss, the trial court denied the motion and determined that the defendant had waived its right to arbitrate.[329]

On appeal, the court first noted that, although arbitration agreements are generally "'valid and enforceable, the right to require such arbitration may be waived by the parties.'"[330] Moreover, waiver can "be implied by the acts, omissions or conduct of the parties."[331] When determining whether a party has waived its right to arbitrate, the court will consider a number "'of factors, including the timing of the arbitration request, if dispositive motions have been filed, and/or if a litigant is unfairly manipulating the judicial system by attempting to obtain a second bite at the apple due to an unfavorable ruling in another forum.'"[332]

The court concluded that, because the record indicated that the defendant took no action to compel arbitration until after the plaintiff had rested its case at trial, the defendant waived its right to arbitration.[333]

L. Attorney Fees

In *Reuille v. E.E. Brandenberger Construction, Inc.*,[334] the court of appeals affirmed the trial court's denial of an award of attorney's fees, holding that Indiana does not recognize the "catalyst" theory.[335] The plaintiff and defendant had entered into a contract, which included a provision whereby the "prevailing

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325. *Id.* at 99.

326. 865 N.E.2d 1074 (Ind. Ct. App. 2007).

327. *Id.* at 1080.

328. *Id.* at 1076.

329. *Id.* at 1077.

330. *Id.* at 1079 (quoting Safety Nat'l Cas. Co. v Cinergy Corp., 829 N.E.2d 986, 1004 (Ind. Ct. App. 2005)).

331. *Id.* (citing *Safety Nat'l Cas. Co.*, 829 N.E.2d at 1004).

332. *Id.* (quoting *Safety Nat'l Cas. Co.*, 829 N.E.2d at 1004).

333. *Id.* at 1079-80.

334. 873 N.E.2d 116 (Ind. Ct. App. 2007), *trans. granted, opinion vacated*, 888 N.E.2d 770 (Ind. 2008).

335. *Id.* at 120.

party" in any action to enforce the contract would be entitled to recover attorney's fees. The parties participated in mediation, during which they entered into a settlement upon favorable terms to the plaintiff.[336] The trial court determined that the plaintiff was not a "prevailing party" under the parties' agreement and, therefore, was not entitled to recover fees.[337]

On appeal, the plaintiff argued that the trial court did not interpret the term "prevailing party" correctly.[338] Plaintiff contended that he was the prevailing party by virtue of the "catalyst theory," whereby a plaintiff is considered a prevailing party if he achieves his desired result in that the "'lawsuit brought about a voluntary change in the defendant's conduct.'"[339] The court rejected this argument, holding that, at the time the parties executed their settlement agreement, Indiana law did not recognize the "catalyst theory."[340] Moreover, the court held that, "under current precedent," to be considered a "prevailing party," one must obtain a judgment or consent decree.[341]

M. Post-Judgment Security

In *Adams ex rel. Adams v. Sand Creek, Inc.*,[342] an attorney who had successfully represented the plaintiff in a personal injury action appealed the trial court's order directing him to post a bond relating to an attorney's lien filed by his co-counsel.[343] On appeal, the court held that Rule 64(A) and (B) provide the trial court with remedies to assist in securing satisfaction of judgments;[344] however, the court determined that these rules provide remedies to "the *plaintiff* in a lawsuit filed to recover money from another party."[345] However, because the appellant and appellee were not parties in the lawsuit, Rule 64(A) and (B) were inapplicable, and the court reversed the trial court's order.[346]

N. Small Claims Court

1. Res Judicata.—In *Moreton v. Auto-Owners Insurance*,[347] the court affirmed the trial court's denial of the defendant's summary judgment motion.[348]

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336. *Id.* at 117-18.

337. *Id.* at 118.

338. *Id.* at 119.

339. *Id.* at 119-20 (quoting Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 601 (2001)).

340. *Id.* at 121.

341. *Id.* at 122 (citing *Buckhannon Bd.*, 532 U.S. at 600; Daffron v. Snyder, 854 N.E.2d 52, 53, 56-57 (Ind. Ct. App. 2006)).

342. 860 N.E.2d 898 (Ind. Ct. App. 2007).

343. *Id.* at 899.

344. *Id.* at 902-03.

345. *Id.* at 903.

346. *Id.* at 903-04.

347. 859 N.E.2d 1252 (Ind. Ct. App. 2007).

348. *Id.* at 1255.

The plaintiff, an insurance company exercising its subrogation rights, brought a negligence action against the defendant, a contractor who had performed work on the plaintiff's insured's property.[349] Prior to the plaintiff's action, its insured successfully prosecuted a small claims action against the defendant for the uninsured portion of the loss arising from the defendant's work.[350] The defendant moved for summary judgment, arguing that the plaintiff's claims were barred by res judicata.[351] On appeal following the trial court's denial of the defendant's summary judgment motion, the defendant argued that res judicata barred the plaintiff from relitigating claims that were or could have been asserted in the prior small claims action.[352]

The *Moreton* court began its analysis with Small Claims Rule 11(F), which provides that "[a] judgment shall be res judicata only as to the amount involved in the particular action and shall not be considered an adjudication of any fact at issue in any other action or court."[353] Next the court examined the four elements necessary for a judgment to have res judicata effect, namely:

> 1) the former judgment must have been rendered by a court of competent jurisdiction; 2) the matter now in issue was, or might have been, determined in the former suit; 3) the particular controversy previously adjudicated must have been between the parties to the present suit or their privies; and 4) the judgment in the former suit must have been rendered on the merits.[354]

Relying on the Indiana Supreme Court's decision in *Chemco Transport, Inc. v. Conn*,[355] the court concluded that the plaintiff was not a party to the prior small claims action; furthermore, the plaintiff lacked control over its insured's actions in the prior action—and was apparently unaware of its insured's claim.[356] Accordingly, the court affirmed the trial court's order denying summary judgment.[357]

2. *Corporation Representation by Counsel.*—In *Stillwell v. Deer Park*

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349. *Id.* at 1253.

350. *Id.*

351. *Id.* at 1253-54.

352. *Id.* at 1253.

353. IND. SMALL CLAIMS R. 11(F).

354. *Moreton*, 859 N.E.2d at 1254 (citing Cox v. Ind. Subcontractors Ass'n, Inc., 441 N.E.2d 222, 225 (Ind. Ct. App. 1982)).

355. 527 N.E.2d 179 (Ind. 1988). In *Conn*, the supreme court held that an insurer's settlement and dismissal of a subrogation claim did result in res judicata as to the insured's claim against the same defendant for the same injuries because the insurer only partially compensated its insured for the loss and because the insured was not a party to the subrogation action and had no ability to control it. *Id.*

356. *Moreton*, 859 N.E.2d at 1254-55 (noting that even though "the rules of the insurer and the insured [were] reversed . . . the *Conn* reasoning leads . . . to the same result").

357. *Id.* at 1255.

Management,[358] the court concluded that it was error for the trial court to permit the corporate plaintiff to proceed in a small claims action unrepresented by counsel.[359] The plaintiff-appellee, a landlord, brought an action to recover unpaid rent from the defendant-appellant, a former tenant; however, the plaintiff did not appear in the action through an attorney during the pretrial proceedings, as required by Small Claims Rule 8(C).[360] However, the plaintiff was represented by an attorney at trial.[361] Following trial, judgment was entered in favor of the plaintiff, and the defendant appealed.[362]

On appeal, the court observed that the requirement that corporate parties be represented by counsel arises from the need "'to curtail unlicensed practice of law, the attendant ills of which can be exacerbated when one of the litigants is a corporation.'"[363] As the court continued, a corporation can only act through its agents, and "'[w]hen these agents are not attorneys, a lack of legal expertise combined with a failure to maintain a proper chain of communication between the agents at each level of the action may act to frustrate the continuity, clarity and adversity which the judicial process demands.'"[364] Accordingly, the court concluded that the trial court erred by permitting the plaintiff to proceed without an attorney until trial;[365] however, because the plaintiff was represented at trial, the trial court's error was not reversible.[366]

III. Amendments to Indiana Rules of Trial Procedure

In September 2007, the Indiana Supreme Court ordered a number of amendments to the Indiana Rules of Trial Procedure, which became effective January 1, 2008.[367]

A. Electronic Discovery

The most significant amendments to the Rules relate to the discovery of electronically stored information. Specifically, Rules 26, 34, and 37 were amended to include provisions relating to electronic discovery. For example,

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358. 873 N.E.2d 647 (Ind. Ct. App. 2007), *reh'g*, 877 N.E.2d 227 (Ind. Ct. App. 2008) (unpublished table decision).

359. *Id.* at 650.

360. *Id.* at 649.

361. *Id.* at 650.

362. *Id.* at 649.

363. *Id.* (quoting Yogi Bear Membership Corp. v. Stalnaker, 571 N.E.2d 331, 333 (Ind. Ct. App. 1991)).

364. *Id.* at 650 (alteration in original) (quoting *Stalnaker*, 571 N.E.2d at 333).

365. *Id.*

366. *Id.* at 651.

367. The most significant amendments to the Rules, effective January 1, 2008, are addressed below. For a complete description of revisions to the Rules, see the Indiana Supreme Court's Order Amending Rules of Trial Procedure, entered September 10, 2007, which is available at http://www.in.gov/judiciary/orders/rule-amendments/2007/trial-091007.pdf.

Rule 26(A), which identifies permissible "methods" of discovery, was amended to include production of "electronically stored information."[368]

Rule 34(A), governing requests for the production of documents or other materials, was amended to include "electronically stored information" among discoverable materials.[369] Rule 34(B) was amended to provide that a request for electronically stored information "may specify the form or forms in which electronically stored information is to be produced."[370] Rule 34(B) was also amended to provide that a responding party may object "to the requested form or forms for producing electronically stored information" and, further, "[i]f objection is made to the requested form or forms for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use."[371] Finally, Rule 34(B) was amended to guide a responding party when no "form" is specified in the request for production of electronically stored information:

> If a request for electronically stored information does not specify the form or forms of production, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. A party need not produce the same electronically stored information in more than one form.[372]

Rule 26(C), governing protective orders, provides that "[u]pon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[373] Rule 26(C) proceeds to enumerate various forms of relief available via protective order.[374] Rule 26(C)(9) was added, effective January 1, 2008, providing the following:

> [A] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause.

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368. IND. TRIAL R. 26(A)(3).

369. IND. TRIAL R. 34(A)(1). Rule 34(A)(1) was also amended by replacing the phrase "from which . . . intelligence can be perceived, with or without the use of detection devices" with the phrase "from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form." *Id.*

370. IND. TRIAL R. 34(B).

371. *Id.*

372. *Id.*

373. IND. TRIAL R. 26(C).

374. IND. TRIAL R. 26(C)(1)-(9).

The court may specify conditions for the discovery.[375]

In light of the amendments specifically providing for the discovery of "electronically stored information," Rule 37, which governs discovery sanctions, was amended to add a new subsection (E), providing: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system."[376]

B. Scope and Use of Discovery

Rule 26(B)(1) was amended to include the following:

> The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought or; (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(C).[377]

C. Claims of Privilege or Protection

Rule 26(B)(5) was added to affirmatively require a "privilege log" when documents are withheld based on a claim of privilege or other protection:

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.[378]

Additionally, regarding inadvertently produced privileged or otherwise protected information, Rule 26(B) now provides as follows:

> If information is produced in discovery that is subject to a claim or

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375. IND. TRIAL R. 26(C)(9).
376. IND. TRIAL R. 37(E).
377. IND. TRIAL R. 26(B)(1).
378. IND. TRIAL R. 26(B)(5)(a).

privilege of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.[379]

379. IND. TRIAL R. 26(B)(5)(b).