

# Frivolous, Unreasonable or Groundless Litigation: What Shall the Standard Be for Awarding Attorney's Fees?

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## I. INTRODUCTION

Indiana Code section 34-1-32-1(b) gives a trial court the discretion to award attorney's fees as costs to the prevailing party if the opposing party:

- (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
- (2) continued to litigate the action or defense after the party's claim clearly became frivolous, unreasonable, or groundless; or
- (3) litigated the action in bad faith.<sup>1</sup>

The costs statute was amended in March of 1986 to reflect the foregoing language, but as yet there are no appellate opinions construing the amendment.<sup>2</sup> However, a case was decided in the survey period<sup>3</sup> which applied the obdurate behavior, or "bad faith," exception to the "American Rule," which reflects the judicial policy generally disfavoring awards of attorney's fees. That case had implications for the construction of subsection (b)(3) and will be discussed here from that standpoint with particular interest paid to continuing tensions in Indiana Law concerning the parameters of the general equitable power of the courts to award attorney's fees as sanctions.

Also, a significant trilogy of opinions concerning the award of attorney's fees on appeal, pursuant to Appellate Rule 15(G), were issued in tandem by the Supreme Court during the survey year.<sup>4</sup> The standards

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1. IND. CODE § 34-1-32-1(b) (1988).

2. An excellent overview of the statute and its relationship to the obdurate exception to the American rule can be found in Hull, *Attorney's Fees for Frivolous, Unreasonable or Groundless Litigation*, 20 IND. L. REV. 151 (1987). Wherever possible, this Article will avoid overlap with that review.

3. *Maggio v. Lee*, 511 N.E.2d 1084 (Ind. Ct. App. 1987).

4. *Orr v. Turco Mfg. Co.*, 512 N.E.2d 151 (Ind. 1987); *Posey v. Lafayette Bank & Trust Co.*, 512 N.E.2d 155 (Ind. 1987); *Leshner v. Baltimore Football Club*, 512 N.E.2d 156 (Ind. 1987).

developed in those cases for evaluating attorney's fees awards as sanctions for bringing a meritless appeal will be discussed as having predictive power for future constructions of subsections (b)(1) and (b)(2) of the statute. The legal standards of these cases will also be evaluated in terms of the legislative policies that appear to underlie the amendment of the statute.

## II. BAD FAITH LITIGATION

It has been suggested that subsection (b)(3) of the statute<sup>5</sup> is likely to be construed by the courts as a "codification" of the obdurate behavior exception to the American Rule.<sup>6</sup> There is some value to that view. It is almost unquestionably correct that interpretive standards developed in that common law context will inform construction of the statute. Bad faith is *the* "essential element in triggering the award of attorney fees"<sup>7</sup> under the equitable exception. Obviously, this is true of (b)(3) as well; bad faith is the core concept. It is also true that (b)(3), like the obdurate behavior exception, is relatively narrow in scope in that the statute expressly applies only to the conduct of litigation, and not to pre-litigation behavior, even conduct that makes litigation a virtual necessity.<sup>8</sup>

However, to view subsection (b)(3) as a "codification" of the obdurate behavior exception is perhaps an overly strong description of the relationship. There are two aspects of the new statute that make the statute a much broader exception to the American Rule than the obdurate behavior rule. First, the statutory language specifically applies both to defendants as well as to plaintiffs. This is an important innovation. In *Kikkert v. Krumm*,<sup>9</sup> the Supreme Court held that the obdurate exception provides a remedy only "for defendants who are dragged into baseless litigation."<sup>10</sup>

*Kikkert* dramatically reduced the potential scope of the obdurate behavior rule, particularly in comparison with the broad perspective of *St. Joseph College v. Morrison, Inc.*,<sup>11</sup> where the exception to the American rule was first announced by the Indiana Court of Appeals. The court in *St. Joseph College* took the view that when a "party's" conduct was vexatious and oppressive in the extreme, equity might compel an award of attorney's fees.<sup>12</sup> In that case, the plaintiff was denied

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5. IND. CODE § 34-1-32-1 (1988).

6. See Hull, *supra* note 2, at 154-55.

7. State v. Hicks, 465 N.E.2d 1146, 1149 (Ind. Ct. App. 1984).

8. See Kikkert v. Krumm, 474 N.E.2d 503, 505 (Ind. 1985).

9. 474 N.E.2d 503 (Ind. 1985).

10. *Id.* at 505.

11. 158 Ind. App. 272, 279-80, 302 N.E.2d 865, 870 (1973).

12. *Id.*

attorney's fees, not because of his plaintiff status, but because the mechanics' lien attorney's fee statute did not apply, and because the defendant's conduct did not constitute bad faith.<sup>13</sup> No policy justification was offered in *Kikkert* in making the bad faith of defendants less sanctionable with attorney's fees than the bad faith of plaintiffs.<sup>14</sup> A defendant who conducts his defense maliciously would appear to be abusing the legal system no less than a plaintiff who initiates the action with the same motivation.

Second, subsection (b)(3) also differs from the obdurate behavior rule in that the statute would appear to apply to any bad faith litigation practice, at *any* point in a suit. This is also a significant change in the availability of attorney's fees sanctions. The application of the *Kikkert* rule was limited to the time of the bringing of a baseless claim, or the time that a party discovers that a claim is baseless and fails to dismiss it.<sup>15</sup> A case decided during the survey period is illustrative of these limitations of the *Kikkert* rule, and raises some related issues that remain unresolved.

In *Maggio v. Lee*,<sup>16</sup> the defendant sought, and was awarded by the trial court, a prospective award of attorney's fees because of a continuance sought by the plaintiff. The trial court's award was based on Trial Rule 53.5, which allows an award for actual expenses incurred from delay by an opposing party.<sup>17</sup> The Court of Appeals reversed, holding that Trial Rule 53.5 does not apply to awards of attorney's fees as costs. It was further noted that the decision could not be upheld under the obdurate behavior exception because the rule "clearly" did not apply to the circumstances of that case.

The court of appeals did not specify the factual basis for their decision in *Maggio*, but, if nothing else, the obdurate behavior exception could not come into play in that case because the plaintiff's seeking of the continuance was not a matter of filing or failing to dismiss a "knowingly baseless claim" as required by *Kikkert*.<sup>18</sup> The same result was not required by the statute. If a party's delay results in added attorney's fees for the other party, and the delay is a result of that party's litigating the action in bad faith, then an award of attorney's fees would seem to be mandated by subsection (b)(3), unlike the "equitable" rule. If the plaintiff's motion for a continuance in *Maggio* was

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13. *Id.*

14. 474 N.E.2d 503 (Ind. 1985).

15. *Id.*

16. 511 N.E.2d 1084 (Ind. Ct. App. 1987).

17. IND. R. TR. P. 53.5.

18. 474 N.E.2d 503 (Ind. 1985).

sought in bad faith, then an award of attorney's fees to the defendant was at least possible.

This legislative decision to make all bad faith litigation conduct liable for an award of attorney's fees appears eminently sensible. No litigant should be forced to endure the slings and arrows of outrageous litigation practices without compensation for the economic costs of dealing with them. There is no justification for allowing bad faith conduct in litigation to result in an added attorney's fees burden to the other party at *any* stage of litigation.

This is not to say that (b)(3) is an absolute paragon of logical consistency. Assume that the defendant in *Maggio* had been able to prove that he was indeed prejudiced by the plaintiff's delay, and that the plaintiff's seeking of the continuance was in bad faith. As under the *Kikkert* rule, an award under the statute would be permissible *only* if the defendant was the "prevailing party."<sup>19</sup> It is difficult to justify a failure to award attorney's fees solely because the "victim" of the bad faith does not prevail in the action. Like the obdurate behavior exception, the statute is founded on a model that bad guys never win.

It might seem a more rational approach to focus on the core concept of both subsection (b)(3) and the equitable exception—bad faith—as the *sole* basis for determining the award of attorney's fees in all cases. Language quoted in *St. Joseph College v. Morrison, Inc.*<sup>20</sup> suggests that awarding attorney's fees as a sanction against bad faith conduct by a litigant is well within the inherent powers of a court: "The *power* to grant attorney's fees springs from the equitable powers of the court."<sup>21</sup> Though a court's inherent power to award attorney's fees is normally described as limited to the prevailing party,<sup>22</sup> this view appears to be utterly inconsistent with the equitable basis for the rule.

Consistent with the latter view, Judge Sullivan expressed dissatisfaction with the limitations of the *Kikkert* rule in his concurrence in *Maggio*:

In any event, notwithstanding the "American Rule" and notwithstanding specific inclusion in other trial rules of attorney fees as recoverable, I am of the view that the courts have the inherent authority to award attorney fees where necessary to compensate a litigant who has been unduly burdened or prejudiced.<sup>23</sup>

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19. *Id.*

20. 158 Ind. App. 272, 302 N.E.2d 865 (1973).

21. *Id.* at 279, 302 N.E.2d at 870 (quoting *La Raza Unieta v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972)).

22. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-59 (1975).

23. 511 N.E.2d at 1086 (Sullivan, J., concurring).

Whatever the outer limits of the *power* of an Indiana court to award attorney's fees, because the new statutory language encompasses and expands the *Kikkert* common-law rule, it appears unlikely that Indiana courts will move far afield from the wording of the statute with expansive exercises of their equitable powers.

Future construction of the new statutory language may, to the degree that its language permits, continue the judicial policy of severely limiting awards of attorney's fees. The language selected by the amendments passed by the Indiana Legislature appear to point in an opposite public policy direction. In light of: (1) the well-established parameters of the obdurate behavior exception as propounded in *Kikkert*, and (2) the changes in the law effected by the statute, it would be difficult to argue that the amendments do not express a policy interest in widening the scope of valid awards of attorney's fees, both for bad faith and, as discussed below, baseless litigation. Had the legislature been satisfied with the *Kikkert* rule then there would have been no need for the statute. It would appear that a policy decision has been made that the courts should be less constrained in their awards of attorney's fees. Whether the courts will choose to enforce that policy when construing the statute is unclear.

### III. FRIVOLOUS, UNREASONABLE, OR GROUNDLESS LITIGATION

Unlike subsection (b)(3), application of the subsections (b)(1) and (b)(2) of the statute do not require a showing of bad faith.<sup>24</sup> The statutory language of (b)(1) and (b)(2) appears to express a legislative intention to create an "objective" standard for an award of attorney's fees, which

shifts the court's inquiry from a search for the improper motives of the losing party to a review of the legal and factual basis of the losing party's claim or defense. This inquiry into whether a party "brought the action or defense" or "continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable or groundless," is both a legal and factual inquiry that goes to the very merits of a claim or defense. The subsections place an obligation on litigants to investigate the legal and factual basis of the claim when filing and to continuously evaluate the merits of claims and defense as asserted throughout litigation.<sup>25</sup>

It could not be reasonably disputed, given the explicit requirement of bad faith in (b)(3) and the absence of the same requirement in (b)(1)

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24. IND. CODE § 34-1-32-1 (1988).

25. Hull, *supra* note 2, at 156.

and (b)(2), that a finding of bad faith is *irrelevant* as a *necessary* element to an appropriate application of subsections (b)(1) and (b)(2). The problem facing Indiana courts now is determining an appropriate legal standard with which to construe the language of those subsections. "Frivolous, unreasonable, or groundless" are not self-defining terms. Legal standards will have to be formulated by the courts. If it is true that the intention of the legislature was to stake out a policy favoring an award of attorney's fees when a party is burdened by litigation that is without legal or factual foundation, then it is a matter of some interest whether the courts will engraft a "strict standard" based on the *Kikkert*<sup>26</sup> rule onto this language. The standard employed by Indiana appellate courts to determine if a statutory award of attorney's fees is justified under (b)(1) and (b)(2) can either effectuate the policy goals of the statute or eviscerate them.

The position to be developed here is that the Indiana Supreme Court has already sent such a signal with the recent "trilogy" of opinions which will be discussed next in this Article. Although the three cases were specifically addressed to application of Appellate Rule 15(G),<sup>27</sup> they will be shown to have clear implications for future interpretation of subsections (b)(1) and (b)(2).

#### A. *Orr v. Turco Manufacturing Co.*<sup>28</sup>

In *Orr*, the plaintiff filed a products liability suit on behalf of her minor daughter. The defendant moved for summary judgment based on the statutory two-year limitations period. Defendant's motion was granted.<sup>29</sup> The plaintiff appealed, attacking both the applicability of the statute of limitations to a minor and the constitutionality of the statute. The judgment was affirmed by the court of appeals, but the court did not address the defendant's motion for attorney's fees pursuant to Appellate Rule 15(G). Transfer was denied, and thereafter the court of appeals granted the motion for attorney's fees in a second opinion.<sup>30</sup>

The rationale of the court of appeals for the attorney's fees award was that the challenge to the statute was "frivolous because wholly without merit, and, thus, presumptively taken in bad faith."<sup>31</sup> This perspective turned on: (1) the absolute clarity of the statutory language

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26. *Kikkert v. Krumm*, 474 N.E.2d 503 (Ind. 1985).

27. IND. R. APP. P. 15(G).

28. 512 N.E.2d 151 (Ind. 1987).

29. *Id.* at 152.

30. *Orr v. Turco Mfg. Co.*, 496 N.E.2d 115 (Ind. Ct. App. 1986), *vacated*, 512 N.E.2d 151 (Ind. 1987).

31. *Id.* at 118.

as to minority status, and (2) the failure of the plaintiff to distinguish ruling precedents of the Indiana Supreme Court which upheld the constitutionality of the statute. The court of appeals expressly recognized the potential problems with such an award, such as chilling appellate review, but it held that an appellate brief must contain some reasoned argument that raises at least a "faint glimmer of hope" that the appeal will be successful.<sup>32</sup> Otherwise, it was held, sanctions should be imposed. Sanctions in *Orr* were deemed appropriate by the court of appeals because:

To bring such an issue on appeal goes beyond mere speciousness and amounts to bad faith. To be specious, the issue must at least appear on its face to have some merit. This "issue" does not even have the slightest appearance of merit. It is totally and absolutely meritless.<sup>33</sup>

The Indiana Supreme Court granted transfer and reversed as to the motion for attorney's fees.<sup>34</sup> The court expressed concern that such sanctions might deter the proper exercise of a lawyer's responsibility to argue for modification or reversal of existing law and would also have a chilling effect upon the exercise of the right to appeal. Because such sanctions have the potential to "discourage innovation and inhibit the opportunity for periodic re-evaluation of controlling precedent,"<sup>35</sup> it was held that "punitive sanctions may not be imposed to punish lack of merit unless an appellant's contentions and argument are utterly devoid of all plausibility."<sup>36</sup>

Applying its announced test to the plaintiff's brief, the Indiana Supreme Court found, contrary to the view of the court of appeals, "concise cogent argument" in the plaintiff's brief which attempted to distinguish prior precedent.<sup>37</sup> It further noted citation of authority in support of plaintiff's argument that the trial court erred in excluding evidence of legislative history of the statute (an issue not addressed by the court of appeals in its opinion), and finally the court found:

no indication of bad faith, frivolity, harassment, vexationness, or purpose of delay. While the Court below found Appellant's contentions insufficient to prevail on appeal, we hold that Appellant presented plausible argument for clarification, modifi-

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32. *Id.*

33. *Id.*

34. *Orr v. Turco Mfg. Co.*, 512 N.E.2d 151, 153 (Ind. 1987).

35. *Id.* at 152.

36. *Id.* at 153.

37. *Id.*

cation or reversal of existing law. Punitive sanctions are not justified in this case.<sup>38</sup>

Regrettably, there were no quotations from the plaintiff's appellate brief to justify the Indiana Supreme Court's perceptions of the plaintiff's briefing. Such quotations would have been useful since the court's reversal turned on an evaluation of the plaintiff's brief that was entirely contrary to the perception strongly held by the court of appeals, that the plaintiff had not attempted to distinguish prior precedents.

### B. *Lesh v. Baltimore Football Club*<sup>39</sup>

The plaintiffs in *Lesh* were football fans who had sent orders for season tickets, accompanied by prepayment, to the new Indianapolis Colts. In light of the requirement of prepayment, the plaintiffs were disgruntled by the lottery system instituted by Colts' management to handle the situation that the number of requests for season tickets vastly outnumbered the number of tickets available for that purpose. The plaintiffs sued the Colts on several theories.

The trial court granted summary judgment and the court of appeals affirmed, ordering the plaintiffs to pay the defendant's attorney's fees because the plaintiffs' contentions were without merit. As in *Orr*, the court of appeals indicated in *Lesh* that its decision took into account the strict standard for such an award, but was nevertheless convinced that an award was appropriate, expressing its annoyance "at having to devote our time and energy to an absolutely meritless claim for unnegotiated interest."<sup>40</sup>

The Indiana Supreme Court granted transfer and reversed as to the attorney's fees, based on the standard of *Orr*, because "there was no indication that the court found bad faith, frivolity, harassment, vexatiousness or purpose of delay. To the contrary, the appeal was expeditiously presented, the record and briefs were concise, and the issues were addressed with plausible argument."<sup>41</sup>

### C. *Posey v. Lafayette Bank and Trust Company*<sup>42</sup>

In *Posey*, the plaintiff sought appellate review of the trial court's decision terminating a decedent's guardianship and approving the guar-

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38. *Id.*

39. 512 N.E.2d 156 (Ind. 1987).

40. *Id.* at 157 (quoting *Lesh v. Baltimore Football Club*, 496 N.E.2d 785, 793 (Ind. Ct. App. 1986)).

41. 512 N.E.2d at 157.

42. 512 N.E.2d 155 (Ind. 1987).

dian's final report and various expenses and attorney's fees of the defendant law firms. There had been a prior interlocutory appeal of the trial court's orders naming the decedent's guardians, and the prior appeal involved many of the same issues as the later one. The court of appeals affirmed the trial court on the merits and awarded attorney's fees to the defendant because of the plaintiff's bad faith in (1) disregarding the form and content requirements of the Appellate Rules, (2) failing to disclose his previous appeal, which raised many of the same issues, (3) using factual omissions and misstatements of the record to raise his issue, and (4) writing his brief "in a manner calculated to require the maximum expenditure of time, both by [appellee] and by this court."<sup>43</sup>

Noting that it had reversed the court of appeals in *Orr* and *Leshner*, the Indiana Supreme Court granted transfer in *Posey* solely to address the attorney's fees issue "in order to provide guidance to the bench and bar as to the circumstances when such fees are appropriate."<sup>44</sup> The Supreme Court found the circumstances cited by the court of appeals to be:

significantly more grave than mere lack of merit. Gross abuse of the right to appellate review "crowds our court to the detriment of meritorious actions and should not go unrebuked." *Marshall v. Reeves* (1974) 262 Ind. 403, 404, 316 N.E.2d 288, 830 Ind.App. 297, 299, 89 N.E. 320).<sup>45</sup>

Even if the Indiana Supreme Court had not expressly noted that it was sending the bar "a message," the juxtaposition of the three cases certainly would have communicated the same intent. It would be difficult for the court to have indicated any more clearly that awards of attorney's fees for meritless appeals are disfavored unless there are objective indices of bad faith present as well. In both *Orr* and *Leshner*, the court explicitly noted the good craftsmanship of the briefing and the lack of a finding of bad faith. In *Posey*, just the opposite was the case. It appears that mere speciousness of legal theory will not suffice to support an award of attorney's fees pursuant to Appellate Rule 15(G).<sup>46</sup>

This policy likely has implications for how subsections (b)(1) and (b)(2)<sup>47</sup> are to be construed. The goal of providing an environment which affords change in the law, which informed the opinion in *Orr*, is equally

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43. *Id.* at 156 (quoting *Posey v. Lafayette Bank & Trust Co.*, 496 N.E.2d 1355 (Ind. App. Dist 1986) (unpublished memorandum opinion)).

44. *Id.* at 155.

45. *Id.* at 156 (quoting *Vandalia R.R. v. Walsh*, 44 Ind. App. 297, 299, 89 N.E. 320 (1909)).

46. IND. R. APP. P. 15(G).

47. IND. CODE §§ 34-1-32-1(b)(1), (2) (1988).

applicable to actions on the trial court level. Also, there is no forthright basis to distinguish the statutory language from the "meritless" terminology at issue in the *Orr* trilogy. Finally, in *Orr* the Indiana Supreme Court specifically noted the new statute in a footnote without comment.<sup>48</sup> A reasonable inference to be drawn from all of this is that trial court awards of attorney's fees under the statute, as with awards pursuant to Appellate Rule 15(G), will not be well-received on the appellate level if the sole basis of the award is that the claim or defense is "frivolous, unreasonable or groundless." It follows that, unless a future opinion states otherwise, the "utterly devoid of all plausibility" standard for reviewing the merit of appeals for an award under Appellate Rule 15(G) was intended to apply, at least implicitly, to awards of attorney's fees under subsections (b)(1) and (b)(2) as well. The question is, if that be true, whether the judicial policy of *Orr* is consistent with the legislative intent in enacting the new amendments to Indiana Code section 34-1-32-1(b).

The language of the *Orr* standard was selected over a strongly worded objection in the concurrence of Justice DeBruler, which was joined by Chief Justice Shephard.<sup>49</sup> Justice DeBruler pointed out that the burden on a party who must oppose a meritless appeal should properly contribute to the equation of whether to award appellate attorney's fees. Justice DeBruler argued forcefully that the choice of language by the majority cut too deeply against the equitable objectives of Appellate Rule 15(G) and suggested a preference for the term "arguable" as a legal test for a meritless appeal.<sup>50</sup>

An "arguable point is one which is subject to rational dispute and debate."<sup>51</sup> It was the perspective of Justice DeBruler that the language chosen by the majority too readily afforded "an argument without substance, but with a very superficial appearance of validity or even gloss of attractiveness, must be tolerated and will preclude an assessment of damages under the Rule."<sup>52</sup> It was Justice DeBruler's idea that it was unfair to deny attorney's fees to a litigant forced to pay for the cost of opposing arguments that merely have a gloss of validity. Chief Justice Shepard, in a separate concurring opinion, elaborated on this equitable theme:

The parties who appear in our courts do so on an equal footing.  
For every citizen who files a frivolous pleading, there is a citizen

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48. 512 N.E.2d 151 (Ind. 1987).

49. *Id.* (DeBruler, J., concurring).

50. *Orr v. Turco Mfg. Co.*, 512 N.E.2d 151, 154 (Ind. 1987) (citing *Anders v. California*, 386 U.S. 738, 744 (1967)).

51. *Id.*

52. *Id.*

who must spend money to respond. The threshold for frivolity should not be so low that it imposes a tax on responding parties, obligating them to spend money answering baseless claims as a way of encouraging others to be novel.<sup>53</sup>

Affirmative attempts to change the inequities caused by existing law, based on a perception that the law no longer has a sound social or economic foundation, are of obvious importance, even absolutely crucial, to the common-law legal system. The same cannot be said of claims that are merely "novel." The critiques of the *Orr* standard by Justice DeBruler and Chief Justice Shephard appear to be well taken. It has been suggested elsewhere that "whether or not a claim is frivolous . . . does not depend on its novelty before a specific court. Otherwise, any party raising an obscure but totally meritless argument for the first time in a court could be automatically shielded from paying attorneys' fees."<sup>54</sup> It should be noted in this context that Justice DeBruler concurred in *Orr* only because "the appeal before us is not utterly devoid of all plausibility, since this court had not previously addressed the question on the validity of this statute of limitation as it applies to children and incapacitated persons."<sup>55</sup>

*Orr* reflects a value that is almost beyond dispute; our legal system should seek to provide a high level of protection for a willingness to engage in corrective litigation. However, it can still be reasonably argued that a more moderate standard of review than that propounded by the Indiana Supreme Court, one that takes into account the equities of the parties who are *burdened* by meritless litigation, would have the capacity to protect the system equally as well. Many jurisdictions, which have statutory exceptions to the American rule when a claim or defense is "frivolous," have adopted the "reasonable lawyer test." The Wisconsin Supreme Court has indicated that the most appropriate level of inquiry to determine if an award of attorney's fees is appropriate is:

whether the attorney knew or should have known the position taken was frivolous as determined by what a *reasonable attorney* would have known or should have known under the same or similar circumstances . . . [which] does not require the highest level of competence or legal ability. It embraces "the objective standard of what a reasonable attorney would have done under the same or similar circumstances."<sup>56</sup>

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53. *Id.* (Shepard, C.J., concurring).

54. *Department of Revenue v. Arthur*, 153 Ariz. 1, 4, 734 P.2d 98, 101 (Ariz. Ct. App. 1986).

55. *Orr*, 512 N.E.2d at 155 (DeBruler, J., concurring).

56. *Radlein v. Industrial Fire & Casualty Ins. Co.*, 345 N.W.2d 874, 886 (Wis.

Interestingly, the Indiana Court of Appeals has applied such a standard for appellate review of judgments where the action was brought on a malicious prosecution theory.

We conclude that the objective standard which should govern the reasonableness of an attorney's action in instituting litigation for a client is whether the claim merits litigation. . . . The question is answered by determining that no competent and reasonable attorney familiar with the law of the forum would consider that the claim was worthy of litigation on the basis of the facts known by the attorney who instituted suit.<sup>57</sup>

The malicious prosecution case law was not even mentioned by the Indiana Supreme Court in *Orr*. This omission is difficult to understand, given the obvious conceptual link between the two areas of law. The "reasonable lawyer" standard is one that is easily understood and applied. It may not require the highly permissive standard of *Orr* to protect legitimate attempts to establish a new theory of law or good faith efforts to extend, modify, or reverse existing law. There is a point at which it should be clear to any lawyer that a given claim or defense should not be advanced at all. Whether a given claim or defense is "frivolous" under such a standard is not something that is utterly refractory to appellate review. In *Leshner*,<sup>58</sup> the Chief Justice appeared to be making a point when he observed in his dissent that:

Appellants' legal claims have been rejected unanimously by all three levels of Indiana's judiciary. Not a single judge has regarded even one argument as sufficiently worthwhile to survive summary judgment. Though losing a lawsuit hardly makes one's claims frivolous, I [will] mention just three of appellants' arguments to illustrate why the Court of Appeals order of fees should be allowed to stand.<sup>59</sup>

What followed was a somewhat scornful review of the arguments raised in *Leshner* by the plaintiff. The point Chief Justice Shephard seemed to be making is that the arguments were so lacking in objective merit on their face, if not "utterly devoid of all plausibility," that attorney's fees were appropriate.

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1984) (quoting *In re Estate of Bilsie*, 100 Wis. 2d 342, 350, 302 N.W.2d 508, 514 (Wis. Ct. App. 1981) (quoting *Sonsmer v. Carr*, 99 Wis. 2d 789, 797, 299 N.W.2d 856, 860 (1981))).

57. *Wong v. Tabor*, 422 N.E.2d 1279, 1288 (Ind. Ct. App. 1981).

58. *Leshner v. Baltimore Football Club*, 512 N.E.2d 156, 157 (Ind. 1987).

59. *Id.* (Shepard C.J., dissenting).

## IV. CONCLUSION

Developing a jurisprudence that would on the one hand afford forbearance of good faith attempts at changing the law, but on the other hand still award attorney's fees for "frivolous, unreasonable or groundless" litigation would be a difficult task. But that is not to say that such a jurisprudence represents an impossible goal. Other jurisdictions have proceeded as if their courts, both trial and appellate, can detect the difference between a ground-breaking lawsuit and one that is merely without merit.<sup>60</sup> Indiana courts can make the distinction as well.<sup>61</sup> To make the attempt would be consistent with the clear intent to liberalize awards of attorney's fees.

Consistent with Justice DeBruler's concerns, the difficulty with the "utterly devoid of all plausibility" test is that the standard may leave the door wide open, free of sanctions, to claims and defenses that *any* "reasonable attorney" would reject as "frivolous, groundless or unreasonable." That is, a clearly frivolous claim might always have *some* plausibility, albeit obscurely so, in the hands of a careful lawyer, who could avoid the appellate improprieties that figured in *Posey*. Our legal system is *not* enhanced by the toleration of genuinely meritless litigation, even when it is conducted with minimal competence, solely on the ground that the system requires a fearless bar, ready and willing to extend the law. If Indiana Code section 34-1-32-1(b) is construed in that fashion, then the clear intent of the legislature will be contravened.

The important issue is, of course, not the specific language chosen to effectuate a policy but rather, what judicial policy is being enforced? How tolerant must an Indiana trial court be of claims and defenses that appear *objectively* to be "frivolous, unreasonable or groundless" when there are no indices of bad faith in the litigation? The definitive answer is yet to come. Taken together, the Orr trilogy would seem to indicate that, absent *some* indicia of bad faith in litigation, seeking an award of attorney's fees, pursuant to subsection (b)(1) or (b)(2),<sup>62</sup> will be, at best, an uphill task.

Presumably, if bad faith can be shown, then the chances for attorney's fees for the bringing or maintaining of a frivolous claim or defense will be greatly enhanced. Even under the *Orr* standard, a pleading

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60. *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984); *Radlien v. Indus. Fire & Casualty Ins. Co.*, 345 N.W.2d 874, 886 (Wis. 1984).

61. For example, in an opinion handed down during the survey period, but before *Orr*, the court of appeals declined to award attorney's fees pursuant to Appellate Rule 15(G) because of the lack of clarity in precedent. *Mack v. American Fletcher Nat'l Bank*, 510 N.E.2d 725, 741 n.14 (Ind. Ct. App. 1987).

62. IND. CODE § 34-1-32-1(b) (1988).

will perhaps not have to be "totally devoid of all plausibility" to justify an award if *some* showing of bad faith can be made. As a practical matter, after *Orr*, the standard for what constitutes "frivolous, unreasonable or groundless" may be so difficult to meet that a showing of bad faith may be required. Indiana attorneys must, therefore, be alert for frivolous claims and defenses and, when encountered, set about to create a "paper trail" (*e.g.*, sending copies of controlling cases to the opposing attorney<sup>63</sup>) that will make the bad faith of such pleadings manifest to the trial judge and, as part of the record, also make an award of attorney's fees sustainable on appeal.

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63. See *American Mut. Liab. Ins. Co. v. Zion & Klein, P.A.*, 399 Pa. Super. 475, 478-79, 489 A.2d 259, 261 (1985).