

RECENT DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

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

I. INDIANA SUPREME COURT DECISIONS

A. *Personal Jurisdiction*

In *Stewart v. Vulliet*,² the Indiana Supreme Court interpreted the provisions of the Uniform Child Custody Jurisdiction Law (UCCJL) in conjunction with a custody dispute between the child's mother, a Washington resident, and the child's father, an Indiana resident.³ The court concluded that, although Indiana and Washington had concurrent jurisdiction, it was within the trial court's discretion to dismiss the Indiana action and defer to the Washington court.⁴

Stewart (the father) and Vulliet (the mother) were married in Washington in August 1992 and moved to Indiana in May 2003.⁵ In November 2003, while Vulliet was pregnant with the couple's first child, she filed a petition for dissolution of the couple's marriage and subsequently returned to Washington.⁶ Stewart initiated proceedings in Indiana and obtained several orders pertaining to the child's custody in 2004 and 2005.⁷ In November 2005, Vulliet filed an action in a Washington court, seeking to establish a "parenting plan."⁸ The Washington court initially declined to exercise jurisdiction in light of the pending matter in Indiana.⁹ However, in January 2006, the Washington court granted Vulliet's motion to reconsider, as well as Vulliet's motion for default and entered a temporary parenting plan, which was made permanent in March 2006.¹⁰ In April 2006, Vulliet requested that the Indiana court dismiss the Indiana action,

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1. This Survey discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period—i.e., from October 1, 2007, through September 30, 2008—as well as amendments to the Indiana Rules of Trial Procedure, which were ordered by the Indiana Supreme Court during the survey period.

2. 888 N.E.2d 761 (Ind. 2008).

3. *Id.* at 764-69.

4. *Id.* at 768-69.

5. *Id.* at 763.

6. *Id.*

7. *See id.*

8. *Id.*

9. *Id.*

10. *Id.*

arguing that Indiana was an inconvenient forum.¹¹ The trial court granted Vulliet's motion;¹² however, the trial court premised its decision on its conclusion that Washington was better situated to manage the custody issues.¹³

The Indiana Supreme Court granted transfer and began its analysis with a discussion of the UCCJL, which is codified at the Indiana Code section 31-17-3-3 (2008).¹⁴ The court discussed the four factors a court must consider when conferring jurisdiction in a child custody matter and concluded that Indiana Code section 31-17-3-3(A)(4), which confers jurisdiction upon Indiana if the child has no home state and jurisdiction in Indiana is in the child's best interest, controlled.¹⁵ At the time Vulliet filed her petition for dissolution, the child had not yet been born and, therefore, had no home state.¹⁶ The court reasoned that, upon the child's birth, Washington became her home state, such that Indiana and Washington had concurrent jurisdiction with respect to child custody issues.¹⁷ The court further noted that, because custody proceedings were already pending in Indiana, Washington would not be able to exercise jurisdiction, unless the Indiana court first terminated or stayed the Indiana proceedings.¹⁸ However, the court concluded that the trial court properly exercised its discretion in determining that Washington was better suited to manage issues pertaining to the child's custody and visitation and dismissed the Indiana action.¹⁹

B. Preferred Venue

In *Randolph County v. Chamness*,²⁰ the court resolved a unique venue dispute, arising from an auto accident that occurred in two different counties.²¹

Chamness was a passenger in a vehicle traveling along Randolph County Road 300 North toward the Delaware County line.²² As the vehicle entered a curve, the driver lost control. The vehicle left the road, overturned, ejected Chamness and caused her serious injuries when she landed across the county line in Delaware County.²³ Chamness, a Randolph County resident, filed suit against Randolph County in Delaware Circuit Court, alleging that Randolph County had negligently constructed, maintained and supervised the portion of the roadway

11. *Id.*

12. *Id.*

13. *Id.* at 763-64.

14. *Id.* at 764-69.

15. *Id.* at 764-66.

16. *Id.* at 765.

17. *Id.* at 765-66.

18. *Id.* at 766.

19. *Id.* at 766-68.

20. 879 N.E.2d 555 (Ind. 2008).

21. *Id.* at 558.

22. *Id.* at 556.

23. *Id.*

on which the accident occurred.²⁴ Randolph County filed a motion for change of venue, arguing that Randolph County is the only preferred venue under Rule 75.²⁵ Following a hearing, the trial court denied Randolph County's motion.²⁶ The court of appeals reversed the trial court's decision, concluding that Rule 75(A)(3) provides that preferred venue is the county where the tortious conduct, i.e., the alleged negligence, occurred.²⁷

The Indiana Supreme Court granted transfer and affirmed the trial court.²⁸ The court began its analysis with the general proposition that "any case may be venued in any county in the state, subject to the right of an objecting party to request that the case be transferred to a preferred venue listed in Rule 75(A)."²⁹ The court further noted that there are often more than one preferred venues for any given case, and, if an action is filed in a preferred venue, the trial court may not grant a change of venue.³⁰ This case, the court noted, involved consideration of two preferred venue provisions in Rule 75(A).³¹ Rule 75(A)(5) places preferred venue in a county where one or more individual plaintiffs reside, if a government organization is a defendant, or where the principal of a governmental organization is located.³² Both the plaintiff and defendant governmental entity resided in Randolph County.³³ However, Rule 7(A)(3) provides for preferred venue in a county where a motor vehicle accident occurred.³⁴ The court noted that the determinative issue is whether Delaware County is a preferred venue as the county in which the accident occurred.³⁵

Citing the "spirit of convenience underlying the venue rules," the court concluded that Delaware County would be just as convenient a forum as Randolph County.³⁶ Further, aspects of the accident occurred in both Randolph County and Delaware County.³⁷ Accordingly, the court concluded that preferred venue would exist in either county, noting that, "if a car runs off the road in one county and lands in another, an injured plaintiff may file suit in either county."³⁸

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 556-57.

31. *Id.* at 557.

32. IND. TRIAL R. 75(A)(5); *see also Chamness*, 879 N.E.2d at 557.

33. *Chamness*, 879 N.E.2d at 557.

34. IND. TRIAL R. 75(A)(3); *see also Chamness*, 879 N.E.2d at 557.

35. *Chamness*, 879 N.E.2d at 557.

36. *Id.* at 558.

37. *Id.*

38. *Id.*

C. Discovery

In *Bridgestone Americas Holding, Inc. v. Mayberry*,³⁹ the court, in a matter of first impression in Indiana, adopted a three-part analysis to determine whether to protect trade secret information from discovery.⁴⁰

Following a fatal car accident, the plaintiff brought a product liability action against Bridgestone, alleging that the accident resulted from tire tread separation.⁴¹ During discovery, the plaintiff requested the “formula for the steel belt skim stock” for the tire involved in the accident.⁴² Bridgestone objected and moved for a protective order, claiming that this information constituted a trade secret.⁴³ The trial court declined to bar discovery of this formula and ordered that it be produced subject to certain restrictions as to its use and dissemination.⁴⁴

The Indiana Supreme Court granted transfer and formally adopted a three-part test to determine whether a party’s trade secret information could be protected from discovery.⁴⁵ The court reasoned that the Indiana legislature’s adoption of the Uniform Trade Secret’s Act shows a legislative “intent to apply trade secret law uniformly with other jurisdictions.”⁴⁶ In light of this legislative intent and the numerous other jurisdictions, including the federal courts, already employing it, the court formally adopted the three-part balancing test to determine whether trade secret information should be protected from discovery.⁴⁷

First, the party seeking to protect trade secret information bears the burden of demonstrating that the information is a trade secret, as defined by the Indiana Trade Secret’s Act.⁴⁸ The court concluded that Bridgestone had carried its burden and established that the formula in question constituted a trade secret.⁴⁹

Second, if the producing party establishes that the information at issue is a trade secret, the burden shifts to the requesting party to demonstrate that the information is both relevant and necessary.⁵⁰ To establish that the information is necessary, the requesting party bears the burden of establishing that “without discovery of the particular trade secret, the discovering party would be unable to present its case ‘to the point that an unjust result is a real, rather than merely possible, threat.’”⁵¹

Finally, if both parties have met their respective burdens, the court must

39. 878 N.E.2d 189 (Ind. 2008).

40. *Id.* at 194.

41. *Id.* at 190-91.

42. *Id.* at 191.

43. *Id.*

44. *Id.*

45. *Id.* at 191, 194.

46. *Id.* at 194.

47. *Id.*

48. *Id.*

49. *Id.* at 195.

50. *Id.*

51. *Id.* at 196 (quoting *In re Bridgestone/Firestone, Inc.*, 106 S.W.2d 730, 733 (Tex. 2003)).

balance the harm caused by disclosure of the trade secret against the requesting party's need for the information.⁵² Because the court concluded that the plaintiff had not met its burden of demonstrating that discovery of the trade secret information was necessary, however, the final step in the analysis was not necessary in this case.⁵³ Accordingly, the court reversed the trial court's protective order requiring that Bridgestone disclose its trade secret.⁵⁴

D. Summary Judgment

1. *Determination of Reasonable Care as a Matter of Law.*—In *Lean v. Reed*,⁵⁵ the court concluded that, in certain circumstances, the reasonableness of a party's conduct can be determined as a matter of law for purposes of summary judgment.⁵⁶ The plaintiffs, shareholders in a corporation, brought an action against the corporation's officers and directors, including Lean, alleging various violations of the Indiana Security Law.⁵⁷ The plaintiffs also sought to impose individual liability upon Lean in accordance with section 19(d) of the Act.⁵⁸ The plaintiffs moved for partial summary judgment as to liability only, with damages to be determined at trial.⁵⁹ Lean opposed summary judgment, arguing, in part, that he exercised reasonable care and, therefore, could not be liable under section 19(d).⁶⁰ The trial court rejected Lean's argument and entered partial summary judgment in favor of the plaintiffs.⁶¹

The Indiana Supreme Court granted transfer and affirmed the trial court.⁶² The court began its analysis by agreeing with Lean that "summary judgment is rarely appropriate as to a director's reasonable care."⁶³ The court further noted that reasonable care is ordinarily a fact issue, preventing summary judgment.⁶⁴ However, the court stated that "in extreme cases, conduct might be reasonable or unreasonable as a matter of law."⁶⁵ According to the undisputed facts in the record, Lean simply assumed the challenged transactions complied with applicable law;⁶⁶ however, he did not consult with anyone or review any

52. *Id.*

53. *Id.* at 197.

54. *Id.*

55. 876 N.E.2d 1104 (Ind. 2007).

56. *Id.* at 1113.

57. *Id.* at 1106.

58. *Id.*

59. *Id.*

60. *See id.*

61. *Id.*

62. *Id.* at 1107, 1114.

63. *Id.* at 1113.

64. *Id.*

65. *Id.*

66. *Id.* at 1113-14.

documents in reaching his conclusion.⁶⁷ The court concluded: “[B]lind assumption that all is well leaves the investing public in the same position as if there were no directors of the corporation. The statute places liability on the directors and officers to get their attention. If they respond with inattention, they proceed at their own risk.”⁶⁸

2. *Designation of Summary Judgment Evidence.*—In *Filip v. Block*,⁶⁹ the Indiana Supreme Court clarified requirements for designation of evidence in support of a motion for summary judgment.⁷⁰

The Filipis filed suit against their insurance agent for failing to secure adequate insurance coverage, resulting in substantial uncovered loss following a fire at the Filipis’ property.⁷¹ The insurance agent responded with a motion for summary judgment, in which she provided general designations of evidence in the motion and more specific designations of evidence in the memorandum in support of the summary judgment motion.⁷² The Filipis failed to file a response or designate evidence within the time limits specified in Rule 56(C).⁷³ The trial court limited the Filipis’ evidence in opposition to summary judgment to the specific designations contained in the insurance agent’s summary judgment memorandum.⁷⁴ The trial court granted the summary judgment motion.⁷⁵

The Indiana Court of Appeals reversed, concluding that the Filipis could rely on the designations of evidence contained in the insurance agent’s motion, not just the specific lines and paragraphs designated in the summary judgment memorandum.⁷⁶

The Indiana Supreme Court granted transfer and affirmed the trial court’s grant of summary judgment.⁷⁷ First, the court noted that Rule 56(C) does not require any particular form of designation but that it does require specificity.⁷⁸ Further, the court observed that the parties are free to choose the placement of the designation of evidence, e.g., in a summary judgment motion, in a memorandum in support of summary judgment or in a separate filing.⁷⁹ The court concluded, however, that a party’s designation of evidence must be contained in a single location.⁸⁰ In this case, the insurance agent’s designation appeared in both the

67. *Id.*

68. *Id.* at 1114.

69. 879 N.E.2d 1076 (Ind. 2008).

70. *Id.* at 1081-82.

71. *Id.* at 1079.

72. *Id.*

73. *Id.*

74. *Id.* at 1079-80.

75. *Id.* at 1080.

76. *Id.*

77. *Id.* at 1080, 1086.

78. *Id.* at 1081.

79. *Id.*

80. *Id.*

summary judgment motion and supporting memorandum.⁸¹ Moreover, if a party designates both specific lines or test and also designates a more general identification of the document containing specific lines or test, the court may limit the party to the more specific designations.⁸² However, the court concluded that a party opposing summary judgment may rely on any of the movant's designations of evidence, even if the evidence is inconsistently designated in separate places.⁸³ Accordingly, the Indiana Supreme Court affirmed the court of appeal's decision and reversed the trial court's grant of summary judgment.⁸⁴

E. New Trial

1. Motion for Judgment on the Evidence Distinguished from Motion to Correct Error.—In *Ho v. Frye*,⁸⁵ the court clarified the distinction between the proper remedy for a motion for judgment on the evidence and a motion to correct error.⁸⁶

The plaintiff filed a medical negligence action alleging that she sustained damages as a result of her surgeon's failure to remove sponges following an abdominal surgery.⁸⁷ The plaintiff filed a motion for partial summary judgment as to liability, with damages to be determined at trial.⁸⁸ The trial court denied the motion, and the jury returned a verdict in favor of the surgeon.⁸⁹ Following the trial, the plaintiff filed a Rule 50 motion for judgment on the evidence and, shortly thereafter, filed a motion to correct error pursuant to Rule 59(J).⁹⁰ The trial court ordered a new trial as to both liability and damages but made no special findings of fact and offered no explanation as to the basis for its order.⁹¹

The Indiana Supreme Court granted transfer and sought to clarify the situation.⁹² The court noted that, under Rule 50(C), the trial court may grant a new trial as to any or all of the issues and need not enter supporting findings.⁹³ The court reasoned that, in ruling on a Rule 50(C) motion, the court must consider only the evidence most favorable to the non-moving party and may grant relief only if there is no evidence with respect to an essential element of the claim.⁹⁴ However, in ordering a new trial under Rule 59(J), the trial court acts

81. *See id.* at 1079.

82. *Id.* at 1081.

83. *Id.*

84. *Id.* at 1086.

85. 880 N.E.2d 1192 (Ind. 2008).

86. *Id.* at 1195-97.

87. *Id.* at 1194.

88. *Id.* at 1195.

89. *Id.*

90. *Id.*

91. *Id.* at 1195.

92. *Id.* at 1194.

93. *Id.* at 1195.

94. *Id.* at 1196.

as the “thirteenth juror” and must “sift and weigh the evidence and judge witness credibility.”⁹⁵ Accordingly, a new trial under Rule 50(C) is only appropriate “when there is a glaring absence of critical evidence or reasonable inferences—a critical failure of proof.”⁹⁶ However, in ordering a new trial under Rule 59(J), the trial court must determine that the jury’s verdict is contrary to the weight of the evidence, which requires “careful sifting and evaluation.”⁹⁷ Rule 59(J) also requires that the court enter special findings.⁹⁸ The proper remedy for the trial court’s failure to do so is reinstatement of the verdict.⁹⁹

Not only did the trial court’s order not include special findings, but it also did not specify whether the new trial was ordered pursuant to Rule 50 or Rule 59.¹⁰⁰ However, the court concluded that, because the trial court’s order granted a new trial as to both liability and damages, the trial court must have intended to grant the Rule 59(J) motion.¹⁰¹ Nevertheless, because the trial court failed to enter specific findings in conjunction with its granting of a Rule 59(J) motion, its order for a new trial was reversed and the verdict reinstated.¹⁰²

2. *Newly Discovered Evidence.*—In *Speedway Superamerica, LLC v. Holmes*,¹⁰³ the Indiana Supreme Court held that a new trial was appropriate where evidence was disclosed for the first time on the first day of trial.¹⁰⁴

The plaintiff, Holmes, filed a premises liability action against Speedway, alleging that he slipped and fell on spilled diesel fuel at a Speedway’s truck stop.¹⁰⁵ Approximately ten days before trial, Holmes’ counsel learned that Holmes still had possession of the jeans and boots that he was wearing at the time of the accident.¹⁰⁶ Holmes’ counsel instructed Holmes to bring these items to the courthouse for trial but did not advise Speedway’s counsel regarding the existence of this evidence until the morning of the first day of trial.¹⁰⁷ At trial, Holmes attempted to introduce the jeans, which had a dark spot that could be diesel fuel, into evidence.¹⁰⁸ Speedway’s counsel objected because there was no way to know whether the dark stain on the jeans was, in fact, diesel fuel.¹⁰⁹ The trial court admitted the jeans into evidence but instructed that there would be no

95. *Id.* (quoting *Keith v. Mendus*, 661 N.E.2d 26, 31 (Ind. Ct. App. 1996)).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 1197.

101. *Id.*

102. *Id.*

103. 885 N.E.2d 1265 (Ind. 2008).

104. *Id.* at 1273-74.

105. *Id.* at 1266-67.

106. *Id.* at 1267.

107. *Id.*

108. *Id.*

109. *Id.* at 1267-68.

testimony or inference that the dark stain was in fact diesel fuel.¹¹⁰ The jury returned a verdict favorable to Holmes.¹¹¹

Following trial, Speedway filed a motion to correct error and for relief from judgment under Rules 59 and 60, arguing that testing of the jeans would reveal new evidence that could not be discovered and produced by Speedway in time for trial, i.e., whether the stain was actually diesel fuel and, if so, whether it was Speedway's diesel fuel.¹¹² The trial court granted Speedway's motion to test the jeans and, following testing, conducted a hearing.¹¹³ During the hearing, Speedway's chemist testified that the stain on the jeans was not diesel fuel, that the jeans had been laundered with detergent and, upon examination of the tags, the jeans had not been manufactured as of the date of Holmes' accident and, therefore, could not have been worn on that date.¹¹⁴ Nevertheless, the trial court denied Speedway's motion for a new trial.¹¹⁵

The Indiana Supreme Court granted transfer and reversed the trial court's denial of Speedway's motion for new trial.¹¹⁶ First, the court listed the requirements for a new trial based on newly discovered evidence.¹¹⁷ Specifically, the court concluded that a new trial would be warranted if:

(1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at trial.¹¹⁸

In the court's estimation, the only factor at issue was whether Speedway had exercised sufficient diligence in discovering the jeans in time for trial.¹¹⁹ Holmes argued that Speedway should have requested production of the jeans during discovery and performed necessary testing before trial or that Speedway should have requested a continuance of the trial to test the jeans.¹²⁰ The court rejected these argument in light of Holmes' conduct in concealing the existence of the jeans until the morning of the first day of trial.¹²¹ Accordingly, the court concluded that Speedway could not have discovered the existence of the jeans and conducted necessary testing even in the exercise of due diligence and,

110. *Id.* at 1268.

111. *Id.* at 1269.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 1270, 1274.

117. *Id.* at 1271 (quoting *Carter v. State*, 738 N.E.2d 668, 671 (Ind. 2000)).

118. *Id.* (quoting *Carter*, 738 N.E.2d at 671).

119. *Id.* at 1272.

120. *Id.* at 1272-73.

121. *Id.* at 1272-74.

therefore, concluded that a new trial was appropriate.¹²²

II. INDIANA COURT OF APPEALS DECISIONS

A. *Standing*

In *Vectren Energy Marketing & Service, Inc. v. Executive Risk Specialty Ins. Co.*,¹²³ the court affirmed the trial court's dismissal of the plaintiff's action for lack of standing.¹²⁴ The plaintiffs, the two members of a limited liability company (LLC), brought suit against the LLC's insurer, alleging breach of contractual obligations owed by the insurer to the LLC.¹²⁵ However, the court concluded that, while the plaintiffs were covered by the LLC's insurance policy, they lacked standing to assert the LLC's contractual claims against the insurer.¹²⁶

B. *Subject Matter Jurisdiction*

In *H.D. v. BHC Meadows Hospital, Inc.*,¹²⁷ the court reversed the trial court's dismissal of the Dosses' claim for lack of subject matter jurisdiction.¹²⁸

Upon finding what appeared to be a suicide note written by their daughter, the Dosses referred the matter to a school counselor.¹²⁹ The school counselor, in turn, referred the Dosses to the defendant adolescent psychiatric hospital.¹³⁰ The psychiatric nurse who met with the Dosses recommended that their daughter be admitted for treatment.¹³¹ The Dosses were reluctant, expressing concerns about how hospitalization might affect their daughter's reputation at school.¹³² The nurse assured them that their daughter's treatment would be kept confidential and further agreed that there would no communications with anyone at the school regarding their daughter's hospitalization or treatment.¹³³

However, the therapist treating the Dosses' daughter sent a letter by facsimile to the school therapist, thanking him for the referral and updating him as to the progress of treatment.¹³⁴ The therapist did not, however, send the fax to the counselor's direct fax line.¹³⁵ Rather, the fax was transmitted to the school's

122. *Id.* at 1274.

123. 875 N.E.2d 774 (Ind. Ct. App. 2007).

124. *Id.* at 779.

125. *Id.* at 776-77.

126. *Id.* at 777-79.

127. 884 N.E.2d 849 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1226 (Ind. 2008).

128. *Id.* at 856.

129. *Id.* at 851.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 851-52.

135. *Id.* at 852.

main fax line, where it was viewed by a number of faculty members.¹³⁶ The therapist also sent a second letter via fax to the school's main fax line.¹³⁷ The second letter contained a satisfaction survey relating to the Dosses' daughter's treatment and hospitalization.¹³⁸

The Dosses filed suit against the hospital, alleging invasion of privacy, negligent infliction of emotional distress, intentional/reckless infliction of emotional distress and violations of confidentiality obligations.¹³⁹ The hospital responded with a motion to dismiss, arguing that the Dosses' claims were subject to the Indiana Medical Malpractice Act, which requires that the claims first be submitted to a medical review panel prior to filing an action in an Indiana court.¹⁴⁰ The trial court granted the motion, and the Dosses appealed.¹⁴¹

The court acknowledged that a medical malpractice action must first be submitted to a medical review board before it can be filed in court.¹⁴² In other words, the court observed the Medical Malpractice Act grants subject matter jurisdiction to the medical review board first, and then to the trial court.¹⁴³ However, the court concluded that the therapist's transmission of information did not constitute "health care or professional services provided to a patient," so the communications did not constitute medical malpractice.¹⁴⁴ Therefore, because this was not a medical practice action, the Dosses were not required to first submit their claims to a medical review board, the trial court erred in dismissing the Dosses' claim for lack of subject matter jurisdiction.¹⁴⁵

C. Limitations

1. *Limitations in a Legal Malpractice Action.*—In *Ickes v. Waters*,¹⁴⁶ the court affirmed the trial court's entry of summary judgment where the applicable statute of limitations had run with respect to the plaintiff's legal malpractice action.¹⁴⁷

The defendant attorney assisted the plaintiff and her husband in transferring their assets into a trust, establishing the plaintiff's husband as the trustee and vesting him with sole power to amend or revoke the trust during his lifetime.¹⁴⁸

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 853.

143. *Id.*

144. *Id.* at 854.

145. *Id.* at 856.

146. 879 N.E.2d 1105 (Ind. Ct. App.), *clarified by reh'g and reaff'd*, 886 N.E.2d 643 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1222 (Ind. 2008).

147. *Id.* at 1110.

148. *Id.* at 1107.

Upon his death, the trust would become irrevocable.¹⁴⁹ On May 7, 2001, the plaintiff and her husband met with the defendant and formally transferred their assets into the trust.¹⁵⁰ Following her husband's death on July 25, 2003, the plaintiff and her husband's daughter, the new trustee, disagreed regarding the plaintiff's income under the trust.¹⁵¹ The plaintiff filed a legal malpractice action against the defendant, who responded with a summary judgment motion based on the running of the applicable limitations.¹⁵²

On appeal, the court concluded that the applicable limitations period begins to run when the plaintiff knows of, or in the exercise of reasonable diligence could have discovered, the wrongful conduct.¹⁵³ Plaintiff argued that she became aware of the defendant's alleged negligence upon the death of her husband.¹⁵⁴ However, the court concluded that the limitations period begins to run when the tortious conduct occurs, not when damages are realized.¹⁵⁵ The court determined that the defendant's negligence, if any, occurred when the plaintiff and her husband transferred their assets into the trust, and limitations began to run from that date.¹⁵⁶ Because this transfer took place more than two years before the plaintiff filed her legal malpractice action, the claim was barred by limitations, and the court affirmed the trial court's entry of summary judgment in favor of the defendant attorney.¹⁵⁷

2. *Continuing Wrong and Fraudulent Concealment.*—In *Johnson v. Blackwell*,¹⁵⁸ the court affirmed the trial court's dismissal of the plaintiff's claims for civil rights violations, false imprisonment/false arrest, wrongful infliction of emotional distress and invasion of privacy by intrusion on limitations grounds.¹⁵⁹

The plaintiff's claims arose from his arrest and the search of his home on February 27, 2003.¹⁶⁰ Responding to an anonymous tip, police met with the plaintiff at his home and requested his permission to search the premises.¹⁶¹ Eventually, the plaintiff permitted the search and the police officers discovered crack cocaine.¹⁶² The police arrested the plaintiff and subsequently charged him with possession with intent to distribute crack cocaine.¹⁶³

Following the reversal of his conviction and dismissal of the indictment

149. *Id.*

150. *Id.*

151. *Id.* at 1107-08.

152. *Id.* at 1108.

153. *Id.*

154. *Id.* at 1107-08.

155. *Id.* at 1108-09.

156. *Id.* at 1109.

157. *Id.*

158. 885 N.E.2d 25 (Ind. Ct. App. 2008).

159. *Id.* at 33.

160. *Id.* at 27-28.

161. *Id.* at 28.

162. *Id.*

163. *Id.*

against him in 2006, the plaintiff filed a complaint asserting claims for civil rights violations, false imprisonment/false arrest, wrongful infliction of emotional distress and invasion of privacy by intrusion.¹⁶⁴

The court concluded that each of these claims, except for the civil rights claim, accrued on February 27, 2003, when the plaintiff was arrested and his home searched.¹⁶⁵ The court further concluded that the plaintiff's civil rights claim accrued for limitations purposes in March 2003, when the plaintiff was bound over for trial.¹⁶⁶ Because each of these claims was subject to the two-year limitations period for actions involving injury to person, the court held that the plaintiff's claims were time-barred.¹⁶⁷

The court rejected the plaintiff's argument under the continuing wrong doctrine, which tolls the running of limitations until the end of a continuing wrongful act.¹⁶⁸ The court noted that the continuing wrong doctrine does not apply where the plaintiff is aware of facts that should lead to the discovery of his cause of action, even if the defendant continues its wrongful conduct beyond that point.¹⁶⁹ Because the plaintiff was immediately aware of the acts upon which his claims were premised, i.e., his arrest and the search of his home, the continuing wrong doctrine did not apply.¹⁷⁰

The court also rejected the plaintiff's fraudulent concealment argument.¹⁷¹ Fraudulent concealment will toll the running of limitations if the liable party intentionally conceals the operative facts from the plaintiff.¹⁷² Again, however, because the plaintiff was fully aware of the facts upon which his claims were based as of the date he was arrested and his home was searched, there were no facts concealed from him.¹⁷³ Accordingly, the doctrine of fraudulent concealment did not operate to toll the running of the limitations period and the plaintiff's claims were time barred.¹⁷⁴

D. Service of Process

In *Goodson v. Carlson*,¹⁷⁵ the court reversed the trial court's motion to set aside a default judgment where service of process on the defendant was ineffective.¹⁷⁶

164. *Id.* at 29.

165. *Id.* at 30.

166. *Id.* at 31.

167. *Id.*

168. *Id.* at 32.

169. *Id.*

170. *Id.* at 31-32.

171. *Id.* at 32.

172. *Id.*

173. *Id.*

174. *Id.*

175. 888 N.E.2d 217 (Ind. Ct. App. 2008).

176. *Id.* at 222.

Following an automobile accident, Carlson filed suit against Goodson, alleging that he was negligent in the operation of his vehicle.¹⁷⁷ Carlson first sought to have Goodson personally served with process; however, because Carlson failed to provide Goodson's specific apartment number, the sheriff was unable to effect service.¹⁷⁸ Carlson took no further action for several months until requesting leave to file an alias summons in response to the trial court's notice of intent to dismiss for failure to prosecute.¹⁷⁹ Carlson continued to take no action until nearly a year later when Carlson requested permission from the court to serve Goodson with process by publication in accordance with Trial Rule 4.13(a).¹⁸⁰

On appeal, the court concluded that Carlson was not sufficiently diligent in attempting to ascertain Goodson's address before seeking leave to serve Goodson by publication.¹⁸¹ Carlson had merely attempted to obtain Goodson's address through Bureau of Motor Vehicles records.¹⁸² However, they did not attempt to get more accurate or specific information through Goodson's auto insurer or through the manager of the apartment building where Goodson resided.¹⁸³

E. Venue

In *Johnson County Rural Electric Membership Corp. v. South Central Indiana Rural Electric Membership Corp.*,¹⁸⁴ the court reversed the trial court's denial of the defendant's motion for automatic change of judge.¹⁸⁵

The plaintiff filed a complaint seeking a preliminary and permanent injunction preventing the defendant from removing the plaintiff's electric meters from the plaintiff's customer's homes.¹⁸⁶ Before the defendant filed an answer to the plaintiff's complaint, the trial court scheduled a preliminary injunction hearing.¹⁸⁷ Following the hearing, the trial court entered a preliminary injunction in favor of the plaintiff and scheduled a pretrial conference.¹⁸⁸ One day after the trial court entered the preliminary injunction, the defendant filed a motion for automatic change of judge pursuant to Rule 76(B).¹⁸⁹ The trial court denied the motion, and the defendant appealed.¹⁹⁰

177. *Id.* at 218.

178. *Id.* at 221.

179. *Id.*

180. *Id.*

181. *Id.* at 222.

182. *Id.* at 221-22.

183. *Id.* at 222.

184. 883 N.E.2d 141 (Ind. Ct. App. 2008).

185. *Id.* at 146.

186. *Id.* at 142.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

On appeal, the court determined that the defendant's motion for automatic change of judge was timely under Rule 76(C) and, therefore, reversed the trial court's denial.¹⁹¹ The court embraced the defendant's argument that, because the issues had not yet closed on the merits, the motion for automatic change of judge was timely under Rule 76(C).¹⁹² In reaching this conclusion, the court rejected the plaintiff's argument under Rule 76(C)(5), which provides that a party waives its right to an automatic change of judge if it does not make its request within three days of the trial court's order setting a trial date.¹⁹³ The court concluded that the trial court's order scheduling the preliminary injunction hearing did not constitute an order setting the trial; therefore, Rule 76(C)(5) did not apply, and the defendant did not waive its right to an automatic change of judge.¹⁹⁴

F. Pleadings

1. *Leave to Amend.*—In *Turner v. Franklin County Four Wheelers, Inc.*,¹⁹⁵ the court reversed the trial court's denial of the plaintiff's motion for leave to amend her complaint.¹⁹⁶

Due to either human error or a computer malfunction, the plaintiff's complaint did not include her attorney's signature.¹⁹⁷ The defendant filed a motion to strike the complaint in accordance with Rule 11(A) because it was not signed.¹⁹⁸ The plaintiff responded by moving for leave to amend the complaint.¹⁹⁹ However, because the limitations period had run by that time, the defendant moved to dismiss the complaint.²⁰⁰ Following a hearing, the trial court denied the plaintiff's motion for leave to amend and granted the defendant's motion to dismiss the complaint.²⁰¹

On appeal, the court noted that procedural rules are “extremely important,” but are “merely a means for achieving the ultimate end of an orderly and speedy justice.”²⁰² Moreover, the court observed that it should “never ignore the plain fact that the consequence of strict adherence to procedural rules may occasionally defeat rather than promote the ends of justice.”²⁰³ Accordingly, the court held that, because there was no undue delay, bad faith or dilatory motive by plaintiff and no repeated failure to cure pleading deficiencies, the trial court abused its

191. *Id.* at 143.

192. *Id.*

193. *Id.*

194. *Id.* at 144.

195. 889 N.E.2d 903 (Ind. Ct. App. 2008).

196. *Id.* at 908.

197. *Id.* at 904.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 905.

202. *Id.* (citations omitted).

203. *Id.* (quoting *Softwater Utils., Inc. v. Le Fevre*, 301 N.E.2d 745, 750 (Ind. 1973)).

discretion in refusing to allow the plaintiff to amend her complaint.²⁰⁴ The court remanded the matter to the trial court with instructions to permit the plaintiff to amend her complaint and that the amendment would relate back to the date of the original filing, thereby avoiding a limitations issue.²⁰⁵

2. *Amendment to Conform to Evidence.*—In *Bailey v. State Farm Mutual Automobile Insurance Co.*,²⁰⁶ the court affirmed the trial court's denial of the plaintiff's motion for leave to amend his complaint to conform with the evidence presented at trial.²⁰⁷

The court began its analysis by noting that the trial court should freely allow the parties to amend pleadings.²⁰⁸ However, in ruling on a motion for leave to amend pleadings to conform with the evidence presented at trial, the court must first determine whether sufficient evidence has been presented to support the elements of a particular claim or defense.²⁰⁹ The court concluded that, because Indiana does not recognize a cause of action for negligent entrustment of an automobile brought by a voluntarily intoxicated adult and because the evidence presented at trial would have been insufficient even if Indiana did recognize such a cause of action, the trial court properly exercised its discretion in denying leave to amend.²¹⁰

G. Voluntary Dismissal

In *Knightstown Banner, LLC v. Town of Knightstown*,²¹¹ the court affirmed the trial court's grant of the defendant's motion for voluntary dismissal of its counterclaim.

The court reasoned that Rule 41(A)(2) permits a claimant to dismiss a claim voluntarily—even after a summary judgment motion has been filed—but only upon a court's order.²¹² The court further noted that voluntary dismissals should generally be allowed, unless the adverse party would suffer prejudice as a result.²¹³ In this case, the plaintiff's primary claim of prejudice was its concern that the town could reassert the same claim at a later time.²¹⁴ However, upon reviewing the record, the court concluded that the voluntary dismissal was with prejudice, thereby eliminating the plaintiff's concern regarding relitigation of the

204. *Id.* at 907-08.

205. *Id.* at 908.

206. 881 N.E.2d 996 (Ind. Ct. App. 2008).

207. *Id.* at 1006.

208. *Id.* at 1000-01.

209. *Id.* at 1001.

210. *Id.* at 1005.

211. 882 N.E.2d 270 (Ind. Ct. App.) (finding trial court did not err when imposing joint and several liability upon insurers with respect to attorney's fees and costs), *supplemented by reh'g*, 889 N.E.2d 317 (Ind. Ct. App. 2008).

212. *Id.* at 274.

213. *Id.*

214. *Id.*

defendant's voluntarily dismissed counterclaim.²¹⁵

H. Involuntary Dismissal

1. *Failure to State a Claim.*—In *American Heritage Banco, Inc. v. McNaughton*,²¹⁶ the court affirmed, in part, the trial court's dismissal of the plaintiff's fraud claim for failure to state a claim.²¹⁷

The plaintiff sought to avoid dismissal of its fraud claim by arguing that one of the defendants executed a promissory note with the stated purpose of paying off a previous loan; however, the stated purpose was intentionally and knowingly false and, as a result, the defendant obtained a loan which remains unpaid.²¹⁸ However, as the court noted, the plaintiff attached a copy of the promissory note in question as an exhibit to its complaint.²¹⁹ As reflected in the exhibit, the express purpose for the loan stated in the promissory note contradicted the allegation in plaintiff's complaint.²²⁰ Accordingly, the court rejected the plaintiff's characterization of the challenged loan transaction and noted “[a] court should not accept as true allegations that are contradicted by other allegations in the complaint or exhibits attached to or incorporated in the pleading.”²²¹

2. *Want of Prosecution.*—In *Baker Machinery, Inc. v. Superior Canopy Corp.*,²²² the court affirmed the trial court's dismissal with prejudice pursuant to Rule 41(E).²²³

Following nearly two years of inactivity, the trial court entered an order pursuant to Rule 41(E), requiring that the plaintiff attend a hearing and show cause why the case should not be dismissed for want of prosecution.²²⁴ In considering the numerous factors bearing on whether to dismiss a claim for lack of prosecution, the Indiana Court of Appeals noted that “[a] lengthy period of inactivity may be enough to justify dismissal under the circumstances of a particular case, especially if the plaintiff had no excuse for the delay.”²²⁵ The plaintiff sought to justify its delay in prosecuting its claims by explaining to the

215. *Id.* at 274-275.

216. 879 N.E.2d 1110 (Ind. Ct. App.) (modifying, sua sponte, incorrect citations in its original opinion), *supplemented by* 2008 Ind. App. LEXIS 2553 (Ind. Ct. App. 2008).

217. *Id.* at 1118.

218. *Id.* at 1115.

219. *Id.*

220. *Id.*

221. *Id.* (citing *Augdon v. Premier Props. USA, Inc.*, 755 N.E.2d 661, 665 (Ind. Ct. App. 2001)).

222. 883 N.E.2d 818 (Ind. Ct. App. 2008) (modifying the incorrect trial court cause number on the cover page), *trans. denied*, 898 N.E.2d 1221 (Ind. 2008), *supplemented by* 2009 Ind. App. LEXIS 2 (Ind. Ct. App. 2009).

223. *Id.* at 825.

224. *Id.* at 820.

225. *Id.* at 823 (quoting *Lee v. Pugh*, 811 N.E.2d 881, 885 (Ind. Ct. App. 2004)).

court that it lacked financial resources to engage in the litigation.²²⁶ The court acknowledged that lack of financial resources may present a practical impediment to the diligent prosecution of an action; however, the court held that this would not excuse nearly two years of inactivity and affirmed dismissal pursuant to Rule 41(E).²²⁷

3. *Same Matter Pending in Another Court.*—In *Beatty v. Liberty Mutual Insurance Group*,²²⁸ the court affirmed the trial court's dismissal of the plaintiff's claims pursuant to Rule 12(B)(8), because the same or a similar matter was already pending in another Indiana state court.²²⁹

Beatty filed two separate actions against Liberty Mutual.²³⁰ Beatty sued Liberty Mutual and two other defendants in Marion Circuit Court in 2005, alleging that Liberty Mutual acted in bad faith in denying coverage under a policy it had issued to Beatty.²³¹ In 2007, Beatty filed an action in Marion Superior Court against Liberty Mutual also alleging that Liberty Mutual breached its duty of good faith and fair dealing in denying coverage.²³²

On appeal, the court concluded that, for purposes of a Rule 12(B)(8) motion, complete identity of the parties is not necessary; rather, because both Beatty and Liberty Mutual were parties to both actions, the court held that the two actions were between the same parties.²³³ Further, the court concluded that there was a substantial overlap in the subject matter of the two actions.²³⁴ Finally, the court observed that Beatty sought the same remedy from Liberty Mutual in both courts.²³⁵ Accordingly, the court concluded that the actions filed by Beatty in Marion Circuit Court and Marion Superior Court were substantially the same and, therefore, affirmed the trial court's dismissal pursuant to Rule 12(B)(8).²³⁶

I. Discovery

1. *Duty to Supplement.*—In *Dennerline v. Atterholt*,²³⁷ the Indiana Court of Appeals affirmed the trial court's denial of the defendant's motion to strike the testimony of a belatedly disclosed witness.²³⁸

In support of his argument that the plaintiff should not be permitted to present the testimony of a belatedly disclosed witness, the defendant relied upon

226. *Id.* at 824.

227. *Id.* at 824-25.

228. 893 N.E.2d 1079 (Ind. Ct. App. 2008).

229. *Id.* at 1088-89.

230. *Id.* at 1086.

231. *Id.*

232. *Id.*

233. *Id.* at 1087.

234. *Id.*

235. *Id.*

236. *Id.*

237. 886 N.E.2d 582 (Ind. Ct. App. 2008).

238. *Id.* at 593, 603.

the Rule 26(E)(1) obligation to supplement discovery responses.²³⁹ Specifically, the defendant argued that, because the plaintiff had not disclosed the witness in its interrogatory answers or final witness list, the witness should not be permitted to testify.²⁴⁰ The court rejected this argument, as well as the defendant's argument that belatedly identified witnesses may be excluded at trial or a continuance may be granted to permit deposition of the witness.²⁴¹ The court concluded that there was no bad faith because the plaintiff had previously disclosed the witness's identity to the defendant's counsel and because the defendant made no showing that any additional discovery pertaining to this witness would have made any difference at trial.²⁴² As the court observed, the defendant's primary argument was not that he was surprised by the belatedly identified witness's testimony, "but only that it was devastating to his defense."²⁴³

2. *New Trial as a Discovery Sanction.*—In *Nature's Link, Inc. v. Przybyla*,²⁴⁴ the court affirmed the trial court's grant of a new trial in response to the plaintiff's discovery misconduct.²⁴⁵

In response to the plaintiff's interrogatories seeking identification of "all opinions and conclusions reached by any expert in the case," the defendants disclosed the content of its medical expert's anticipated testimony.²⁴⁶ Approximately two weeks before trial, the plaintiff's counsel deposed the expert with respect to his recently-produced revised report, and the expert testified that the revised report contained all of his opinions regarding the plaintiff's medical condition.²⁴⁷ However, after the plaintiff had rested his case-in-chief, the defendant's medical expert identified a new theory, i.e., that the plaintiff suffered from a genetic degenerative disorder that led to his medical condition.²⁴⁸ The expert conceded that he had not disclosed this condition in any of his reports or during his deposition; however, he asserted that he had reached the diagnosis just a few days before trial.²⁴⁹

The court began its analysis by noting that "Indiana's discovery rules are specifically designed to avoid surprise and a trial by ambush."²⁵⁰ The court concluded that the defendant breached its obligation to supplement discovery pursuant to Rule 26(E) because the defendant was aware of its expert's "materially revised medical opinion and subsequent change in intended testimony

239. *Id.* at 592.

240. *Id.*

241. *Id.*

242. *Id.* at 593.

243. *Id.*

244. 885 N.E.2d 709 (Ind. Ct. App. 2008).

245. *Id.* at 719.

246. *Id.* at 716.

247. *Id.* at 717.

248. *Id.*

249. *Id.*

250. *Id.* (quoting *Canfield v. Sandock*, 563 N.E.2d 526, 528 (Ind. 1990)).

the day before trial.”²⁵¹ As a consequence of this failure, the court concluded that the plaintiff was unable to fairly present his case at trial.²⁵² Accordingly, the court affirmed the trial court’s order for a new trial pursuant to Rule 60(B)(3).²⁵³

3. *Purpose of Sanctions*.—In *Fifth Third Bank v. PNC Bank*,²⁵⁴ the court reversed the trial court’s order imposing sanctions for discovery abuses, determining that the sanctions imposed did not effectuate the purpose of Rule 37 sanctions.²⁵⁵

Following the plaintiff’s failure to respond to document requests served by one of the defendants, the trial court entered an agreed order requiring that the plaintiff respond to the discovery requests within thirty days.²⁵⁶ However, the plaintiff again failed to respond, and approximately three months following the entry of the agreed order, the defendant moved to dismiss the plaintiff’s complaint for failure to comply with discovery.²⁵⁷ The trial court granted the motion to dismiss, noting that the plaintiff’s discovery conduct was “‘particularly egregious’” and “‘should not be without sanction.’”²⁵⁸ However, the trial court ordered that the dismissal apply only to one of the three defendants in the lawsuit.²⁵⁹

Upon appeal by the remaining defendants, the court first observed that one of the purposes underlying Rule 37 discovery sanctions is to punish or deter the violating party and thereby assure future compliance with the discovery rules.²⁶⁰ The court concluded that, by dismissing one of the three defendants but taking no other adverse action toward the plaintiff, the trial court’s sanctions order would have little, if any, deterrent effect.²⁶¹ Accordingly, the court reversed the trial court’s sanctions order and remanded with instructions that any sanctions order arising from the plaintiff’s discovery misconduct must punish the plaintiff.²⁶²

4. *Withdrawal of Deemed Admissions*.—In *Cross v. Cross*,²⁶³ the court affirmed the trial court’s grant to withdraw deemed admissions.²⁶⁴

The court observed that, under Rule 36, the failure to respond timely to requests for admissions results in those matters being deemed admitted and

251. *Id.* at 718.

252. *Id.*

253. *Id.* at 719.

254. 885 N.E.2d 52 (Ind. Ct. App. 2008).

255. *Id.* at 55-56.

256. *Id.* at 54.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 55.

261. *Id.*

262. *Id.* at 55-56.

263. 891 N.E.2d 635 (Ind. Ct. App. 2008).

264. *Id.* at 641, 645.

conclusively established.²⁶⁵ However, the court also observed that the party deemed to have made the admissions may move the court for withdrawal of the admissions under Rule 36(B).²⁶⁶ The trial court may not grant such a motion unless the withdrawal would “subserve the presentation of the merits” and would not result in prejudice to the party obtaining the admissions.²⁶⁷ The party seeking withdrawal bears the initial burden of establishing that presentation of the merits will be subserved by the withdrawal of the admissions.²⁶⁸ In this case, the court concluded that, because it was clear that the admitting party intended to dispute the issues raised in the request for admissions, she had made a sufficient showing that withdrawal of the admissions would subserve the presentation of the merits.²⁶⁹ Further, the court concluded that the party having obtained the admissions bears the burden of demonstrating that it will be prejudiced by withdrawal of the admissions.²⁷⁰ However, the party is not prejudiced merely by losing the benefit of the admissions at trial.²⁷¹ Rather, the party bears the burden of demonstrating that he has suffered a detriment in the presentation of his case, e.g., an inability to produce a key witness or present important evidence.²⁷² Because the party having obtained the admissions had approximately eighteen months to prepare his case, the court concluded that he had failed to show that he was prejudiced by withdrawal of the admissions.²⁷³ Accordingly, the court concluded that the trial court acted within its discretion in granting the motion to withdraw admissions.²⁷⁴

J. Summary Judgment

1. Summary Judgment Affidavits.—In *Guzik v. Town of St. John*,²⁷⁵ the court concluded that the trial court acted properly in striking portions of an affidavit submitted in support of summary judgment.²⁷⁶

Guzik, the former police chief of the Town of St. John, was asked to resign following the discovery of his numerous acts of misconduct.²⁷⁷ *Guzik* agreed to resign but subsequently brought suit against the town and its police commission, alleging that he had been coerced to resign.²⁷⁸ In response, the town and police

265. *Id.* at 639.

266. *Id.*

267. *Id.* at 639-40.

268. *Id.* at 640.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 640-41.

273. *Id.* at 641.

274. *Id.*

275. 875 N.E.2d 258 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 47 (Ind. 2008).

276. *Id.* at 265-66.

277. *Id.* at 261.

278. *Id.* at 262.

commission moved for summary judgment, arguing that Kuzik's resignation had been voluntary, not coerced.²⁷⁹ The trial court struck several provisions of Kuzik's opposing affidavit and granted summary judgment for the town and police commission.²⁸⁰

On appeal, the court first noted that the trial court has broad discretion with respect to the admissibility of evidence and that this discretion extends to ruling on motions to strike affidavits that do not comply with summary judgment rules.²⁸¹ In other words, the court observed, "affidavits in support of a motion for summary judgment must present admissible evidence that should follow substantially the same form as though the affiant were giving testimony in court in order to comply with the requirements of Trial Rule 56(E)."²⁸² The court stated that the requirements of Rule 56(E) are mandatory, such that inadmissible information contained in summary judgment affidavits should be disregarded.²⁸³

The court held that the trial court properly struck numerous provisions of Kuzik's affidavits that did not constitute facts based on his personal knowledge; rather, the stricken provisions were speculative, conclusory and irrelevant.²⁸⁴

2. *Unreliable Summary Judgment Evidence.*—In *InsureMax Insurance Co. v. Bice*,²⁸⁵ the court affirmed the trial court's denial of summary judgment where the only evidence submitted by the movant could be disbelieved by a reasonable trier of fact.²⁸⁶

Following an automobile accident, Bice sued the owner of the responsible truck, Grahg, alleging Grahg's negligence caused the accident and Bice's resulting injuries.²⁸⁷ Grahg's insurer, InsureMax intervened and moved for summary judgment, arguing that Grahg was not the driver of the truck and that the truck had been taken without Grahg's permission.²⁸⁸ In support of the motion, InsureMax presented the deposition testimony of Grahg, as well as the affidavit of his aunt.²⁸⁹

The court held that summary judgment should not be entered where a reasonable factfinder could choose not to believe the movant's evidence.²⁹⁰ Moreover, the court concluded that the trial court should not "base summary judgment solely on a party's self-serving affidavit, when evidence before the court raises a genuine issue as to the affiant's credibility."²⁹¹ The court also

279. *Id.*

280. *Id.* at 263-64.

281. *Id.* at 265.

282. *Id.*

283. *Id.*

284. *Id.* at 265-67.

285. 879 N.E.2d 1187 (Ind. Ct. App.), *trans. denied*, 891 N.E.2d 50 (Ind. 2008).

286. *Id.* at 1190-91.

287. *Id.* at 1189.

288. *Id.*

289. *Id.*

290. *Id.* at 1190 (citing *McCullough v. Allen*, 449 N.E.2d 1168, 1172 (Ind. Ct. App. 1983)).

291. *Id.* (quoting *McCullough*, 449 N.E.2d at 1172).

observed that inconsistencies or evasive language in the movant's designated evidence justify the denial of summary judgment.²⁹²

The court concluded that Grahg's deposition was self-serving and that a reasonable trier of fact could choose not to believe his account.²⁹³ The court also concluded that the trier of fact could choose not to credit the affidavit submitted by Grahg's aunt, because she is related to him.²⁹⁴ Accordingly, because a reasonable fact finder could choose to disbelieve the evidence designated by InsureMax in support of its summary judgment motion, the trial court did not err in denying summary judgment.²⁹⁵

K. Judgment on the Evidence

In *Swan Lake Holdings, LLC v. Hiles*,²⁹⁶ the court affirmed the trial court's denial of the defendant's Rule 50 motion for judgment on the evidence following the presentation of the plaintiff's case-in-chief in a premises liability action.²⁹⁷

Hiles was injured when rotten wood gave way on the roof of a structure owned by Swan Lake.²⁹⁸ Following Hiles' presentation of his case-in-chief, Swan Lake moved for judgment on the evidence pursuant to Rule 50.²⁹⁹ The trial court denied the motion, and the jury returned a verdict in favor of Hiles.³⁰⁰

On appeal, the court reviewed the standard for granting a Rule 50 motion, i.e., the court must look “only to evidence and reasonable inferences drawn most favorable to the nonmoving party and the motion should be granted only where there is no substantial evidence supporting an essential issue in the case.”³⁰¹ The court concluded that there was evidence presented, i.e., testimony that the wood supports were wet and unpainted for an extended period of time, which the jury could have used to infer that Swan Lake was on notice regarding the danger to Hiles.³⁰² Accordingly, the court held that the trial court properly determined that there was sufficient evidence to support the essential elements of Hiles' claim and that judgment on the evidence pursuant to Rule 50 would be improper.³⁰³

292. *Id.*

293. *Id.*

294. *Id.* at 1190-91.

295. *Id.* at 1191.

296. 888 N.E.2d 265 (Ind. Ct. App. 2008).

297. *Id.* at 272.

298. *Id.* at 268.

299. *Id.*

300. *Id.*

301. *Id.* at 269 (quoting *E. Chicago Police Dep't v. Bynum*, 826 N.E.2d 22, 31 (Ind. Ct. App. 2005)).

302. *Id.* at 271.

303. *Id.* at 272.

L. Relief from Judgment

In *Bunch v. Himm*,³⁰⁴ the court affirmed the trial court's grant of relief from a default order where the movant was able to demonstrate excusable neglect.³⁰⁵

As part of their divorce decree, Bunch was awarded sole custody of his children with Himm, who was ordered to pay child support.³⁰⁶ While Himm was serving in the U.S. Marine Corps and preparing for deployment to Iraq, Bunch filed a petition to modify the decree and increase Himm's weekly support obligations in light of her increased income during her active duty period.³⁰⁷ The trial court entered a default order entering Bunch's requested modifications after Himm and her counsel failed to appear for the hearing.³⁰⁸

On appeal, the court observed that, to set aside a default judgment or order pursuant to Rule 60(B)(1), the movant must demonstrate that the failure to appear resulted from excusable neglect and that the movant would have been able to present a meritorious defense.³⁰⁹ Because Himm had made arrangements to receive and respond to her mail and her failure to receive adequate notice of the hearing date was due to a breakdown in communications, the court concluded that the trial court did not abuse its discretion in determining that Himm's failure to attend the hearing was a result of excusable neglect.³¹⁰

The court also noted that Himm's request for Rule 60(B)(1) relief required that she demonstrate a meritorious defense.³¹¹ "A meritorious defense is one that would lead to a different result if the case were tried on its merits."³¹² A party need not demonstrate absolutely the existence of such a defense; rather, a *prima facie* showing of the defense is sufficient.³¹³ In this case, the court noted at least two meritorious defenses Himm could have raise, i.e., Bunch's petition to modify the divorce decree was not verified and that it failed to allege a substantial and continuing change in circumstances rendering the original decree unreasonable.³¹⁴ Accordingly, the court concluded the trial court properly exercised its discretion in setting aside the default order pursuant to Rule 60(B)(1).³¹⁵

304. 879 N.E.2d 632 (Ind. Ct. App. 2008).

305. *Id.* at 636-37.

306. *Id.* at 633-34.

307. *Id.* at 634.

308. *Id.*

309. *Id.* at 635.

310. *Id.* at 636.

311. *Id.* at 637.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

M. Motion to Correct Errors

In *Paulsen v. Malone*,³¹⁶ the court reversed the trial court's grant of a motion to correct error.³¹⁷ The defendant in a personal injury action filed a timely motion to correct errors following an adverse jury verdict.³¹⁸ The trial court held a hearing and requested that the parties provide supplemental briefing for the court's consideration.³¹⁹ The parties complied and submitted supplemental briefing within twenty-four days of the hearing.³²⁰ The trial court granted the motion to correct errors twenty-two days later, which was forty-six days after the hearing.³²¹ Relying on the plain language of Rule 53.3(A), which requires that the thirty-day period in which the trial court must rule on a motion to correct errors begins when the motion is heard, and the fact that the trial court did not continue the hearing, the Indiana Court of Appeals concluded that, under Rule 53.3(A), the motion to correct errors would be deemed denied if not ruled upon within thirty (30) days of the hearing.³²²

N. Attorney Fees and Costs

1. *Costs Do Not Include Attorney's Fees.*—In *Wiley v. McShane*,³²³ the court reversed the trial court's dismissal of a will contest for the plaintiff's failure to post a bond in the amount set by the trial court.³²⁴ The court concluded that the bond set by the trial court was intended to cover the estate's litigation expenses, e.g., deposition fees, court reporter costs and attorney's fees.³²⁵ However, as the court explained, the term "costs" is a term of art and must be given its specific legal meaning.³²⁶ Because "costs" did not include litigation expenses, including attorney's fees, the court remanded for a proper costs determination and reinstatement of the will contest.³²⁷

2. *Frivolous or Groundless Litigation.*—In *Knowledge A-Z, Inc. v. Sentry Insurance*,³²⁸ the court affirmed the trial court's award of attorney's fees to the prevailing party under Indiana's "frivolous litigation statute."³²⁹ Although Indiana generally adheres to the "American Rule," whereby each party pays its own attorney's fees and costs, "[a] court may award attorney's fees to the

316. 880 N.E.2d 312 (Ind. Ct. App. 2008).

317. *Id.* at 315.

318. *Id.* at 313.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.* at 314-15.

323. 875 N.E.2d 273 (Ind. Ct. App. 2007).

324. *Id.* at 278.

325. *Id.* at 276-77.

326. *Id.* at 276.

327. *Id.* at 277.

328. 891 N.E.2d 581 (Ind. Ct. App. 2008).

329. *Id.* at 586; *see also* IND. CODE § 34-52-1-1(b)(2) (2008).

prevailing party if the court finds that a party either continued to litigate after its 'defense clearly became frivolous, unreasonable or groundless' or 'litigated the action in bad faith.'"³³⁰ The court further observed that "[a] defense is unreasonable if, based on the totality of the circumstances, including the law and facts known at the time, no reasonable attorney would consider it justified or worthy of litigation."³³¹ Although the trial court did not enter specific findings of fact in connection with its order of attorney's fees, the defendant was trying to relitigate a matter already concluded by the trial court and affirmed by the appellate court; accordingly, the court concluded that the trial court did not abuse its discretion in awarding attorney's fees to the prevailing party.³³²

3. *Wrongfully Entered Injunction.*—In *Bigley v. MSD of Wayne Township Schools*,³³³ the court affirmed the trial court's award of attorney's fees following the dissolution of a temporary restraining order that was not replaced by a preliminary injunction.³³⁴ In accordance with Rule 65(C), the court reasoned that a party is entitled to recover attorney's fees incurred defending against a preliminary injunction as damages.³³⁵

III. AMENDMENTS TO INDIANA RULES OF TRIAL PROCEDURE

By order dated September 2007,³³⁶ the Indiana Supreme Court amended a number of Rules of Trial Procedure, including Rules 4.11, 26, 34, 37, 42, 55, 56, 63, 72, 77, 79.1 and 80, as follows:³³⁷

1. The court amended Rule 4.11 to allow for return of service by electronic transmission, in addition to transmission by mail.³³⁸

2. The court amended Rule 26(A)(3) to include request for production of electronically stored information among the accepted methods of discovery.³³⁹

3. The court amended Rule 26(B)(1) concerning the general scope of permissible discovery by adding the following paragraph:

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

330. 891 N.E.2d at 585 (quoting IND. CODE § 34-52-1-1(b)(2), (3) (2008)).

331. *Id.* at 586.

332. *Id.*

333. 881 N.E.2d 77 (Ind. Ct. App. 2008).

334. *Id.* at 81-82.

335. *Id.*

336. Order Amending Indiana Rules of Trial Procedure, No. 94S00-0702-MS-49 (Ind. Sept. 10, 2007).

337. The Indiana Supreme Court also amended Trial Rules 60, 76, and 77 by order dated September 9, 2008. These amendments have been omitted from this Survey.

338. IND. TRIAL R. 4.11.

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

seeking discovery has had ample opportunity by discovery in the action to obtain the information sought or; (iii) the burden of 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).³⁴⁰

4. The court amended Rule 26(B) by adding the following section:

(5) Claims of Privilege or Protection.

(a) **Information withheld.** 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.

(b) **Information produced.** If information is produced in discovery that is subject to a claim of privilege or 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 the 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.³⁴¹

5. The court amended Rule 26(C) concerning protective orders by adding the following section (9):

Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where a deposition is being taken, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

....

340. IND. TRIAL R. 26(B)(1).

341. IND. TRIAL R. 26(B)(5).

(9) that 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. The court may specify conditions for the discovery.³⁴²

6. The court amended Rule 34 to include production of electronically stored information, as well as sound recordings, and images.³⁴³

7. The court also amended Rule 34(B): (a) to permit a party requesting production of electronically stored information to specify the form or forms of production; (b) to require the requesting party to state the form or forms it intends to use if the requesting party does not specify a particular form; and (c) to require that the responding party produce electronically stored information in a "reasonably usable" form if the requesting party does not specify a particular form.³⁴⁴

8. The court amended Rule 37 by adding section (E), which provides: "(E) **Electronically stored information.** 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."³⁴⁵

9. The court amended Rule 42 concerning consolidation to change a statutory reference from "IC 34-1-13-1" to "IC 34-35-1-1."³⁴⁶

10. The court amended Rule 55 to clarify that a party failing to plead or otherwise comply with procedural rules may be defaulted "by the court."³⁴⁷

11. The court amended Rule 63(E) concerning judge pro tempore to change a reference from "Rule 79(14)" to "Rule 79(P)."³⁴⁸

12. The court amended the final sentence of Rule 72(C) to read as follows:

All motions and applications in the clerk's office for issuing process, including final process to enforce and execute judgments, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but the clerk's action may be suspended or altered or rescinded by the court upon cause shown.³⁴⁹

342. IND. TRIAL R. 26(C)(9).

343. IND. TRIAL R. 34.

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

345. IND. TRIAL R. 37(E).

346. IND. TRIAL R. 42.

347. IND. TRIAL R. 55.

348. IND. TRIAL R. 63(E).

349. IND. TRIAL R. 72(C).

13. The court amended Rule 77(B) concerning court records by deleting the last paragraph, which discussed requirements for the chronological case summary.³⁵⁰

14. The court amended Rules 79.1(G)(1) and 79.1(H) to change a statutory reference from “IC 33-11.6-7” to “IC 33-34-5-6.”³⁵¹

15. The court amended Rule 80(E) concerning comments to the bench, bar, and public by changing the mailing address for the Committee’s Executive Secretary from “115 W. Washington Street, Suite 1080” to “30 South Meridian Street, Suite 500” and made the same change to Appendix B concerning Appearance by an Attorney in a Civil Case.³⁵²

350. IND. TRIAL R. 77(B).

351. IND. TRIAL R. 79.1(G)-(H).

352. IND. TRIAL R. 80(B); IND. TRIAL R. app. B.

