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TRIBUTES

MY REFLECTIONS ON THIRTY YEARS OF JUDGING[1]

THE HONORABLE JANE E. MAGNUS-STINSON*

I begin by expressing my thanks to the *Indiana Law Review*[2] for publishing this tribute. It has prompted a long walk down memory lane, and much gratitude. I particularly express my thanks to my law clerk and former ILR Editor-in-Chief, Natalie Wichern, who worked mightily to shepherd this project. Natalie served as ambassador to the contributing authors, a former Indiana Governor/United States Senator, and six federal judges including me. Her grace, patience, and persistence in managing the process exemplify but a few of her many talents. The reader should remember her name, she will be a force for good and a stellar addition to the Indianapolis legal community.

In this reflection, I will share some observations about people, problems, and progress.

People.

Immediate Family. I begin by acknowledging the constancy of the love and support I receive(d) from my immediate family. My husband, Bill Stinson, has been my champion and anchor. His humor, pragmatism, and love have been my ballast throughout my judicial tenure. Bill had the strength and patience to be

1. My first term as a Marion Superior Court Judge began on March 5, 1995.

* Senior District Judge (2024–present), District Judge (2010–2024), Magistrate Judge, (2007–2010), United States District Court for the Southern District of Indiana; Judge, Marion Superior Court (1995–2007); J.D. *cum laude*, 1983, IU Robert H. McKinney School of Law, 1983; B.A. *cum laude*, 1979, Butler University.

2. I also thank the *Indiana Law Review* for overlooking my "dishonorable discharge" from the ILR editorial board in 1983. In March of that year, I was ordered by the senior editors—my classmates—to write a letter pledging to complete the remaining hours of cite-checking for which I was responsible. While normally an obedient rule follower (thank you, Sister Pius), I sensed a powerplay and while I refused to write such a letter, I did call the Editor-in-Chief. I explained that I had just completed the February Bar Exam and, that with only one upcoming final that semester, I would have plenty of time to complete the twenty-two or so hours owed. Nevertheless, I received a letter a few days later, firing me, and prohibiting me from ever claiming that I served on the editorial board because I "failed to demonstrate the requisite commitment." Unfortunately for me, the prior year's Editor-in-Chief, my wise friend Professor R. George Wright, had graduated. So, he was unable to champion my cause as I know he would have, and as he has done for over forty years. I hope this tribute bears testament to my work ethic and demonstrates my commitment to both public service and the rule of law.

the husband of the judge, exhibiting nothing but pride. As my classmate and best woman Monica Foster said at my investiture as a Magistrate Judge: "Bill Stinson, it takes a strong man to be married to such a strong woman." My husband is mighty. To my beloved daughters, now adult friends, the joy and pride you evoke are boundless. As I have said often, Bill is my best decision and you, my best work.

Family of Origin. I am the second of five children, raised in suburban Chicagoland in a very homogeneous – read White – suburb. As to siblings, the first four of us, Kari, Jane, Bob, and John, were born within seven years. We were a rambunctious, happy crew. Nine years later, my baby brother Michael, dubbed "Precious Perfect" by my mother, was born. The rest of us were pretty darn good, too, if I do say so. Thanks to my siblings who are now—like my girls—close friends.

My wonderful parents, Bob and Holly Magnus, instilled the values of family, friends, faith, and fun. My father taught honesty, the marvel of caramel corn, and singing with the radio. My mom taught laughter, harmonizing with the person singing with the radio or at Mass, and a boundless curiosity and interest in other people and their experiences. Around 1969, she brought into our home and family a young Black boy who was a ward of the State of Illinois living in a nearby Catholic Charities residential facility, Maryville. While he never lived with us, Albert Harris remains a sibling in our lives to this day.

Friends. I am blessed to have a personal board of directors who have been by my side through law school, parenting, and most or all of my thirty years of my judicial career. Separate from those recognized elsewhere, I thank my homies, Allison, Amy, Anne, Briget, Cathie, James, Jill, Kathleen, Karen, Kerry, Mary, Meg, Nancy, Shaun, Simone, and Susie. Bette Midler was right, ya got to have friends.[3]

Court Families. I have been blessed to have two court families. First, in the Marion Superior Court, I thank my two Master Commissioners Jane Barker and Judge Jeffrey Marchal. You were my first hires who are smarter than I am, and your work was outstanding. Thanks for sharing the workload of a busy major felony court. I also thank my bailiff Brenda Snorten, a kind, hard-working, and most competent co-worker.

It was both a shock and a profound honor when I was selected as a magistrate judge by the then-district judges of the Southern District of Indiana ("SDIN")—Sarah Evans Barker, Larry J. McKinney, John Tinder, David Hamilton, and Richard Young. The majority of those judges were appointed by Republicans, but they gave me—an elected democrat judge—a shot. I thank them for their trust, friendship, and patience with me through the years. My current district court colleagues include Judges Young and Barker as well as Chief Judge Tanya Walton Pratt and District Judges Jim Sweeney, JP Hanlon, and Matthew Brookman. I am proud to serve with them. Our court is also

3. BETTE MIDLER, *Friends* (Atl. Recording Studios, 1973) (written by Buzzy Linhart and Mark "Moogy" Klingman).

blessed with a cohort of magistrate judges who are brilliant jurists, effective mediators, and good friends. Tim Baker, Mark Dinsmore, Mario Garcia, Kellie Barr, Kendra Klump, Crystal Wildeman, and Craig McKee, thank you for your great work. You bring justice to the litigants we serve.

My Law Clerks. When I reached the federal court in 2007, I learned three new favorite words: my law clerks. I have grown my chosen family by eighteen during my time as a magistrate judge and district judge. Collaborating with these talented lawyers has been the greatest joy and blessing of my time in the Southern District. Their collective intellect and creativity have made me a better judge. And they are doing great things in the law. There is a line from Jon Batiste's song "Freedom" that I commend to my clerks: "Now it's your time, you can shine, if you do, Ima do too."[4]

I give special recognition to my two career law clerks, Magistrate Judge Kellie Barr and my current career law clerk Elena Gobeyn. Judge Barr was my wing woman for seven years, bringing her brilliant research, creative writing (she quoted Bruno Mars in an order and coined the term Stintern for our law student externs), and good humor to chambers making it a friendly, collaborative environment. How fortunate we are that Judge Barr has become a colleague and brings her many talents and her warm friendship to our court. I am deeply grateful for Judge Barr's contribution to this tribute, and its reflection of our shared commitment to service.

Elena Gobeyn has been by my side since 2012 and has been my career law clerk since 2017. That means we are sister wives in the workplace. What a blessing that she has chosen to work with me, knowing how I am, for all those years. She shares my commitment to the pursuit of excellence in our work, and often encourages me to tap the brakes when I am going too fast. Plus, she doubles as a private investigator, putting Google to use in ways that fascinate and amuse us.

By way of understatement, I recognize the stellar contributions of my Courtroom Deputy Clerk Michelle Imel to both my career and my life. Bequeathed to me by V. Sue Shields, Michelle Imel is the gift that keeps on giving. Not just my courtroom deputy clerk, she is my partner in all things work and life, she keeps me organized, sane, balanced, and laughing. She is thoughtful, proactive, and projects the expectation of excellence for the work of the court by her own excellent performance. In a recent performance evaluation, I paraphrased the old hymn: Michelle is my rock and my salvation. Thanks to her family for sharing her with me.

District Court Clerks During My Tenure as Chief Judge. I served as Chief Judge of SDIN from November 2017 through March of 2021. During those four and a half years, our court experienced: the deaths of two judges, a government shutdown, protracted judicial vacancies during burgeoning caseloads, the COVID-19 pandemic, and thirteen federal executions in Terre Haute between July 2020 and January 2021. It was a brutal experience only made tolerable

4. JON BATISTE, *Freedom* (Verve Records 2021).

because of the capable and dedicated service of the two District Court Clerks with whom I served, Laura Briggs and my former law clerk, Roger Sharpe. I thank you both. And I know that time was as difficult for you as it was for me.

Governor/Senator/Friend Evan Bayh & Bayh Colleagues. One of the most impactful career moves of my life was landing a position in the office of Governor Evan Bayh. Governor Bayh effected important changes in Indiana, not only in the policies and programs he sponsored, but also in the people he chose to implement them. For the first time, women and minorities assumed many positions of responsibility as Governor's staffers, agency heads, the Attorney General of Indiana, and as a justice of the Indiana Supreme Court. Governor Bayh's recognition of an individual's merit, even if the individual didn't look like him, brought diverse talent to the leadership of our state. It was an honor to serve with Governor Bayh and such wonderful people and community leaders as former mayor Bart Peterson, Fred Glass, Pamela Carter, Jean Blackwell, John Dillon, Bill Shrewsberry, Lacy Johnson, current Indianapolis Mayor Joe Hogsett, and Justice/Professor/Supermentor Frank Sullivan as well as his wife Cheryl. They are former trusted colleagues and current dear friends.

I take judicial notice that I wouldn't be a judge without Governor/Senator Bayh. He took a chance on appointing a civil litigator to a major felony criminal court in 1995 and took another when he recommended me as an Article III judge in 2010. I offer heartfelt thanks to Senator Bayh, Senator Richard Lugar, and President Obama for their trust in me. A bipartisan nomination, those were the days.

Finally, the Bayhs and the Stinsons became parents six months apart, and that shared experience enhanced our friendship and our lives. Thank you also, Evan, for taking the time to participate in this tribute with your son, a fabulous Stintern, Beau Bayh.

Problems.

Criminal Justice. After serving over thirty years as a judge with criminal jurisdiction, an observation I made in my first year on the bench sadly remains true: those in the criminal justice system are almost uniformly impacted by poverty, adverse child experiences, and substance abuse.

In both state and federal court, well over ninety percent of those charged with crime qualify for an appointed attorney at public expense—the public defender. That statistic alone demonstrates the link between poverty and the criminal justice system.

Since I first became a judge with criminal jurisdiction, the science surrounding childhood trauma and its impact on brain development has exploded. The term "adverse childhood experiences" had yet to be coined when I first started, and now we hear about it on the evening news. We know that those who face abuse and neglect suffer physiological effects on their brain

development, often impairing what might be called good judgment and/resulting in serious mental illness. Unfortunately, our underfunded social service systems are often unable to provide the services and interventions that these children need, or the services and interventions that their caregivers need. I imagine a world where interventions during childhood become a serious tool in crime prevention, avoiding both impact on victims of crime and the staggering costs of incarceration.

Speaking of incarceration, our correctional system suffers from a similar lack of funding and programming to make it truly rehabilitative. Certainly, effective programs exist within the Bureau of Prisons and the Indiana Department of Correction. But, due to lack of funding, participation is rationed, with inmates often being excluded. The result is unfortunate recidivism rates. Other nations do better, Indiana and the United States could too.[5]

Drug addiction is also a generational problem. People sometimes use drugs just to get high, but more often, drug use is a faulty coping mechanism resulting in poor decision-making or addiction. With too much frequency, I have seen defendants who were introduced to drug use and/or dealing by their parents or relatives, perpetuating the cycles of both criminality and addiction.

Civil Litigation. Poverty has an impact on civil litigation as well. Under-resourced litigants sometimes suffer if a defense strategy is to bury them with discovery. Our magistrate judges do an excellent job levelling that playing field when assessing the factors in FRCP 26(b)(1).

Perhaps the most abused Federal Rule of Civil Procedure is Rule 56. All too often I find myself quoting Judge David Hamilton in *Malin v. Hospira, Inc*.:[6]

> We close by noting our disappointment with Hospira's approach to summary judgment practice, which is such a common part of modern federal civil litigation and especially employment discrimination cases. Both in the district court and in this appeal, Hospira has misrepresented the record and Malin's legal arguments. . . .
>
> Hospira seems to have based its litigation strategy on the hope that neither the district court nor this panel would take the time to check the record. Litigants who take this approach often (and we hope almost always) find that they have misjudged the court. We caution Hospira and other parties tempted to adopt this approach to summary judgment practice that it quickly destroys their credibility with the court.

5. *See* Jill A. Stinson, *We've Got Some Work to Do: How the United States Could Benefit from Implementing Germany's Prison Employment Program*, 33 IND. INT'L & COMP. L. REV. 257 (2023), *available at* https://journals.indianapolis.iu.edu/index.php/iiclr/article/view/27372/24995.

6. 762 F.3d 552, 564–65 (7th Cir. 2014).

> This approach to summary judgment is also both costly and wasteful. If a district court grants summary judgment in a party's favor based on its mischaracterizations of the record, the judgment will in all likelihood be appealed, overturned, and returned to the district court for settlement or trial. This course is much more expensive than simply pursuing a settlement or trying the case in the first instance. Further, the costs incurred while engaging in these shenanigans stand a real chance of being declared excessive under 28 U.S.C. § 1927, even if the abusive party prevails at trial on remand. See *Administrative Committee v. Jay*, 135 F. Supp. 2d 941, 944 (N.D. Ill. 2001). Risking such pitfalls in the hope of avoiding a trial is a dramatic miscalculation of the risks and rewards of each approach.[7]

As my dad would say, "knock it off!"

Authorization of Judgeships. Regardless of any district's workload, the creation of new judgeships requires legislation. For the Southern District of Indiana, this means we have been under-resourced and operating in what the Administrative Office of the United States Courts terms a "judicial emergency." While the national average for weighted filings per judgeship in 2024 was 481, SDIN's average was 628, making us second in the Seventh Circuit and thirteenth in the nation. The nearly thirty percent above average caseload, staffed at the same level as courts with far fewer cases, can result in delay, stressed staff, and less service to the parties who litigate in our district as compared to those with lower caseloads. But make no mistake, we are a diligent and proud court working tirelessly to provide the justice the parties deserve.[8]

Progress.

"Her Honor." When I joined SDIN in 2007 as a magistrate judge, I was only the third woman to serve as a judicial officer, preceded by the iconic District Judge Sarah Evans Barker and SDIN's first woman Magistrate Judge, V. Sue Shields. When I became a District Judge in 2010, I was only the second woman appointed, but within two weeks, my dear friend and colleague Tanya Walton Pratt became the third woman and first African American to be chosen.[9]

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7. *Id.*

8. I commend Indiana Senator and IU McKinney graduate Todd Young, as well as his then General Counsel Jessica Helmers Barker, for their recognition of the need to address under-resourced courts and their dogged pursuit of the JUDGES Act of 2024. JUDGES Act of 2024, S. 4199, 188th Cong., 2d Sess. (2024). The JUDGES Act sought to add judges to districts where courts faced a judicial emergency as determined by the Administrative Office of the United States Courts. It provided for the staggered addition of judges over several presidential terms, avoiding any notion of court packing or partisanship. The Act passed the Senate unanimously in August of 2024. When it moved to the House, it was held until after the presidential election, and then passed the House with most Democrats opposed. The bill was vetoed by the President in December of 2024. The Act would have authorized a new judgeship for SDIN in 2025.

9. Credit again to Senators Bayh and Lugar for bringing this diverse perspective to SDIN.

By 2020, when I commissioned *Her Honor*, women numbered three of six district judges, and two of the five magistrate judges in SDIN. I found that progress, along with the 100th anniversary of women's suffrage, worth celebrating. I thank the "*Her Honor*" contributors, Circuit Judge Doris Pryor, Chief Judge Tanya Walton Pratt, District Judge Sarah Evans Barker, and retired Magistrate Judge Debra Lynch, for their dear friendship, their warm words, and their stellar service to the pursuit of justice.

REACH. Our dearly departed colleague, District Judge Larry J. McKinney, along with a team from across the criminal justice system, thought our court could do better to provide support for citizens returning to the community from prison. The Court's REACH program—Re-Entry and Community Help—helps individuals obtain access to housing, employment, and public assistance programs. The vital work performed by Professor Lahny Silva and her REACH/reentry clinic run through my alma mater, IU McKinney School of Law, has literally saved lives. Instrumental in the success of REACH are two of my heroes, Thomas Ridley and Jennifer Poltrock, who know well the plight of those they serve. They also run Thomas Ridley's "One Like Me" community-based re-entry program, whose mission is to reduce recidivism through supportive services and encourage desistance with opportunities. They, too, are having a positive impact on thousands of formerly incarcerated individuals.

Substance Abuse. The Chief Justice of the State of Indiana, Loretta Rush, is a dear friend and a mighty warrior. We were born twelve days apart and are sisters from another mother. Chief Justice Rush has invested her considerable talent and much time in addressing the issue of substance abuse, both in our state and the nation. She served as co-chair of the National Center for State Courts' National Judicial Opioid Task Force. The Task Force made multiple findings and recommendations including these two that struck home with CJ Rush: 1. The criminal justice system is the number one referral source to get somebody to treatment. 2. If you have opioid use disorder, you're thirteen times more likely to be involved in the criminal justice system. Further, as I noted earlier, and owing to her experience as a juvenile court judge, CJ Rush knew that the crisis has a significant impact on children. The Opioid Task Force ultimately recommended community-based and sometimes state-federal collaborative evidence-based models to address this national public health crisis. Thanks in part to the leadership of CJ Rush, Indiana's many county drug treatment courts are working to address addiction holistically in the hopes of preventing further criminal justice involvement of affected people.

Our court has learned from this research, and the dedicated and highly competent probation officers in SDIN provide the appropriate balance between treatment and accountability, ensuring that addicted clients are offered the appropriate treatment modality, and held to account on a progressive scale, if they relapse. My colleagues and I have been educated about the nature of this insidious disease, and we use that knowledge to implement effective treatment plans to curb recidivism.

Public Defense. I have served on many committees during my judicial tenure, but the one that impacted me most was my seven-year term on the Defender Services Committee of the Judicial Conference of the United States Courts ("DSC"). DSC's membership is comprised of a judge from each federal circuit, and I have served with magistrate judges, district judges, and appellate judges. The Committee "oversees" the operation of the Defender Services Office of the United States Courts ("DSO"). I use quotes because the dedicated and capable DSO staff are perfectly competent to manage themselves, more on that later.

My DSC tenure spawned a newfound respect and admiration for "the defense function"—the provision of competent legal representation to the indigent criminal accused. During my time on DSC, DSO was led by a remarkable team of dedicated individuals whose commitment to federal defendants was manifested by their provision of quality training of public defenders, their advocacy for adherence to the Sixth Amendment by the judicial system, and their sound fiscal management of their appropriation. Hats off to Cait Clarke, Pam Hamrim, Windy Venable, Martin Richey, Kim Lancaster, and the other talented DSO staff. DSO faces many challenges, including those I outlined, that confront many impoverished defendants. Most unfortunately, they also face challenges within the judiciary. Not in SDIN, but in other jurisdictions, judges interfere with representation by unreasonably limiting the scope of what defense counsel can do for their clients or by limiting the hiring of defense counsel within public defender offices, even when caseload warrants increased staffing. Some courts refuse to create a public defender office in contravention of Judicial Conference Policy and instead appoint local lawyers with limited and sometimes no criminal defense experience or training.[10] And some courts fail or refuse to have counsel present at a defendant's first appearance in court. These and other failings were chronicled in the 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act Program,[11] alternately known as the Cardone Report (named for the Committee's Chair, Judge Kathleen Cardone (W.D. Tex.), with whom I had the honor of serving on DSC).

Judicial Conference Policy was changed in response to the Cardone Report based on recommendations from DSC. However, a recently completed study by the brilliant Dr. Margaret S. Williams and other talented researchers at the Federal Judicial Center concluded that many recommendations adopted by the Judicial Conference were either not implemented by courts, and that most of the

10. *See* Charles Bethea, *Is this the Worst Place to Be Poor and Charged with a Federal Crime?*, THE NEW YORKER (Nov. 5, 2021), https://www.newyorker.com/news/us-journal/is-this-the-worst-place-to-be-poor-and-charged-with-a-federal-crime [https://perma.cc/MG87-KMRW].

11. CARDONE ET AL., AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT (2017), *available at* https://cjastudy.fd.org/sites/default/files/public-resources/2017-final-report-ad-hoc-committee-review-cja/ad-hoc-report-june-2018hyperlinked_1.pdf.

recommendations the Judicial Conference did not adopt, should be.[12] Significantly, in December of 2024, the Committee on Defender Services reported to the Judicial Conference of the United States that it "endorsed, in concept, an independent federal public defense program within the judicial branch but outside of the governance of the Judicial Conference and the AO."[13] This is a bold move by my DSC colleagues, and I admire their integrity and courage in making this recommendation. I note the federal judicial system in no way interferes or provides oversight to the operations or litigation strategies of the prosecutors in the United States Attorney's Office. Nor should it.

Many of my DSC colleagues have become treasured friends and role models from whom I learned much. During most of my DSC service, the committee was chaired by Judge Raymond Lohier of the Second Circuit. Judge Lohier is a masterful leader of great patience, perseverance, and passion. Chief Judge Landya McCafferty (D.N.H.) has become another "sister-in-law" and her weekly texts delight and inspire me. Finally, during my time on DSC, I came to know and be awed by then-Judge Ketanji Brown Jackson, who, when joining the committee, was a District Judge for the District of Columbia. She soon ascended to the United States Court of Appeals for the District of Columbia Circuit, and ultimately to the Supreme Court of the United States. Justice Jackson is a strategic thinker, a master communicator, and a delightful human being. I am amazed to call her a friend and thrilled she will be speaking in Indianapolis this summer.[14]

SDIN is well served by a highly competent Federal Community Defender Office ("IFCD"), led by its nationally renowned Chief Defender, Monica Foster. IFCD provides quality, reliable representation to the clients it serves, and both the Assistant United States Attorneys and the judges of this Court are grateful for their vigorous and quality representation. They are well aware of the challenges faced by their clients and do great work in not only sharing their clients' issues and struggles but also proposing rehabilitation plans in an effort to better their clients' chances at success and reducing recidivism.

Conclusion.

I have no particular judicial philosophy other than to thoughtfully consider the issues before me, find the facts fairly, and research and follow the law as

12. *See* WILLIAMS ET AL., EVALUATION OF THE INTERIM RECOMMENDATIONS FROM THE CARDONE REPORT (2023), https://cjastudy.fd.org/sites/default/files/news/Evaluation-of-the-Interim-Recommendations-from-the-Cardone-Report_9.7.23_NoID.pdf.

13. Nate Raymond, *US Judicial Panel Endorses Independence for Federal Public Defenders*, REUTERS (Dec. 19, 2024), https://www.reuters.com/legal/government/us-judicial-panel-endorses-independence-federal-public-defenders-2024-12-19/.

14. For event details, visit: *Lunch with U.S. Supreme Court Justice Ketanji Brown Jackson*, INDIANAPOLIS BAR ASSOC., https://www.indybar.org/?pg=Events&evAction=showDetail&eid=299831&evSubAction=listMonth&calmonth=202507.

justice requires. My goal in every endeavor for the good of the justice system has been to produce a deliverable that can be used by other judges and to make friends. A few appellate reversals aside, I am content.

HER HONOR: A TRIBUTE TO JUDGE JANE E. MAGNUS-STINSON

THE HONORABLE SARAH EVANS BARKER*
THE HONORABLE TANYA WALTON PRATT**
THE HONORABLE DORIS L. PRYOR***
THE HONORABLE DEBRA MCVICKER LYNCH****

It is with admiration and gratitude that we come together to honor Judge Jane E. Magnus-Stinson as she transitions to senior status. In celebrating her extraordinary career, we reflect not only on her professional achievements but also on her remarkable spirit, innate grace, and enduring friendships cultivated along the way. At the heart of this tribute is the painting *Her Honor,* a poignant and deeply meaningful work by Kyle Ragsdale, commissioned by Judge Magnus-Stinson in 2020.[1] This stunning piece depicts the four of us alongside Judge Magnus-Stinson, capturing a moment none of us anticipated until she unveiled it in an unforgettable gesture.

 [2]

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** Chief Judge, U.S. District Court, Southern District of Indiana.
*** Circuit Judge, U.S. Court of Appeals for the Seventh Circuit.
**** (Retired) Magistrate Judge, U.S. District Court, Southern District of Indiana.

1. *See* Marilyn Odendahl, *'Her Honor': New Painting Reflects Strength, Diversity of Women Judges on Southern Indiana District Court*, THE IND. LAW. (Sept. 30, 2020), https://www.theindianalawyer.com/articles/her-honor-new-painting-reflects-strength-diversity-of-women-judges-on-southern-indiana-district-court.

2. Kyle Ragsdale, *Her Honor* (photograph), (2020).

Her Honor now hangs outside of Judge Magnus-Stinson's courtroom on the second floor of the Birch Bayh Federal Building in Indianapolis. During her senior status celebration on June 28, 2024, Judge Magnus-Stinson shared that she was "donating the painting to our court . . . as the permanent reflection of [her] regard and respect for women's rights and [her] treasured colleagues."[3] While Judge Magnus-Stinson has openly shared that the painting was inspired by the centennial of women's suffrage and honors the female judges of our court, she has also revealed that the painting speaks to larger themes: the commitment required to change history for the better and pursue justice; the beauty and necessity of diversity and inclusion in advancing that change and justice; and the unshakable bonds of friendship. These themes, woven into the painting, are equally woven into the fabric of Jane's heart, her career, and the enduring legacy she leaves behind.

In the reflections that follow, each of us offers our own perspective on this painting and the special friendship it represents. Inspired by themes in *Her Honor,* we share our gratitude, celebrate Judge Magnus-Stinson's extraordinary career, and honor the legacy she leaves—as a distinguished judge, a beloved friend, and an inspiring force for justice.

I. HISTORY: SARAH EVANS BARKER

The stunningly dramatic portrait commissioned by Judge Jane Magnus-Stinson and elegantly produced by artist Kyle Ragsdale, timed to coincide with the one-hundredth anniversary of the passage of the Nineteenth Amendment and now on display in the foyer outside the ceremonial courtroom in the Birch Bayh Federal Courthouse, beautifully captures the likenesses of the distaff members of the Southern District of Indiana district court bench as the court was constituted in 2020 during Judge Stinson's tenure as Chief Judge.

Titled "*Her Honor*," the painting not only recognizes but imputes honor to the five women judges who are depicted there, of whom I am one. When friend Jane gathered us all together in her chambers on that afternoon to discover what had theretofore been her secret project in commissioning this portrait and to allow us to share the moment of its unveiling, we all to a person were left nearly speechless (what are the chances?)! The combined impact of the beauty of the artistic rendering itself along with the sense of honor we each felt in having been included in it, shown standing side by side as robed colleagues and "sisters in law," created an unforgettable moment for us! In a fashion reflective of Judge Jane's reputation for generosity as well as her gift for friendship, she had managed once again to make an indelible mark on our lives as well as on the history of our court.

This exquisite artistic rendering will likely exist as a treasured court family portrait for decades to come. As is often true of very good art, its careful study

3. Jane E. Magnus-Stinson, Judge, U.S. District Court, Southern District of Indiana, Address at the Senior Status Celebration in Honor of the Honorable Jane E. Magnus-Stinson (June 28, 2024).

reveals broader and deeper meanings that extend beyond the immediate reactions and, once discovered, enhance both its artistic value and its impact. Initial examination of the painting would reveal simply the impressionist figures of five women judges, shown there lined up horizontally, side by side in their judicial robes against a colorful but otherwise indistinct background. What eludes the eye is the fact that these women judges, despite their common vocation, are a wonderfully diverse group in terms of their race, religion, age, political background, and judicial rank (at the time, we constituted both Article III and Magistrate Judges). In terms of our shared professional calling, such individual differences among us don't matter, and so they remain hidden from view in the painting. In terms of our collegial relationships with one another, they are enriching and delighting details, the flavor in the stew.

While the subject matter of the *Her Honor* portrait perforce captures a single, specific moment in time (2020) and a particular place (our court located in Indianapolis and serving the southern federal judicial district of Indiana), it inexorably reaches back to and pulls forward the history that preceded this moment and hints at the future that is yet to be. One senses a flow of this history in viewing the painting. The explicit message of the painting is that this is a picture of five judges—five women judges. And that message matters, prompting the question of what it might be about five women judges that makes their images significant or at least worthy of capture.

What history reveals in answer to that pondering is that it was not all that long ago when all women were excluded from becoming lawyers and/or serving as judges—a history recent enough that some who are reading these words will recall such experiences of exclusion from their own lived experience; others will recognize and relate to this history based on their having heard those stories from people who experienced them. Still others may have acquired a knowledge of this history from recent encounters with its continuing vestiges that crop up even now as forms of prejudice and exclusion.

Among the five of us judges depicted in the painting, this shared history is never far from mind. It contextualizes both our work as judges as well as our relationships with one another, and helps explain the existence of the close ties of admiration and affection and respect among us. This shared history is the glue that connects us to one another as women, each of whom has succeeded in securing the opportunity of being entrusted with the responsibility and privilege of serving as a judge of our court.

A brief review of some of this shared sense of history illustrates the point. In addition to Chief Judge Stinson and myself, the other judges depicted there include Judges Tanya Walton Pratt (currently Chief Judge), Magistrate Judge Debra McVicker Lynch (now retired), and then Magistrate Judge Doris L. Pryor (now Circuit Judge for the United States Court of Appeals for the Seventh Circuit). Our respective bar admission dates span nearly 35 years, beginning in 1969 (mine), followed in 1983 (Stinson), 1984 (Pratt), 1986 (McVicker), and 2003 (Pryor). In terms of history, that alone covers a pretty impressive sweep of time!

As for our respective personal histories leading up to our appointments as judges, those details were recounted succinctly by journalist Marilyn Odendahl in her September 2020 article in *The Indiana Lawyer* reporting on the unveiling of *Her Honor*; she explained as follows:

> Barker was the first female district judge in Indiana. She was confirmed to the Southern District in 1984 and served for 30 years before taking senior status in 2014. Magnus-Stinson joined the court as a magistrate judge in 2007, filling the vacancy created by the retirement of Magistrate Judge V. Sue Shields, who was appointed as the court's first female magistrate judge in 1994. Magnus-Stinson was confirmed as a district judge in 2010 when the late Judge Larry McKinney took senior status. Walton Pratt was confirmed in 2010 and is Indiana's first African American federal judge.
>
> Lynch clerked for Barker from 1986 to 1988[,] then spent 20 years in private practice before becoming a magistrate judge in 2008. Pryor was appointed as a magistrate judge in 2018, continuing a career in public service that included working in the U.S. Attorney's Office for the Southern District of Indiana and for the State of Arkansas Public Defender Commission. [Judge Pryor was nominated by President Biden and confirmed in 2022 to a seat on the Seventh Circuit Court of Appeals, where she currently serves.][4]

For the first 138 years of the United States, there were a total of 740 judges, all male. The first woman judge was appointed in 1928 by President Calvin Coolidge to the U.S. Customs Court; a second woman was appointed in 1934. Sixteen years thereafter, a third woman was appointed, and twelve years thereafter, the fourth. As of August 1, 2024, there are 484 Article III federal judges who are women (active and senior), comprising 33% of all sitting Article III federal judges.[5] The percentage of women in the U.S. population is 50.5%.[6]

From 1950 to 1970, only 3% of all lawyers were women.[7] The percentage inched up gradually thereafter: "8% in 1980, 20% in 1991, 27% in 2000 and 41% in 2024."[8] Today, U.S. law schools award more juris doctor degrees to women than men every year, while older lawyers—predominantly men—are retiring.[9] (For historical perspective, recall that Justice Sandra Day O'Connor, the first woman appointed to the U.S. Supreme Court, graduated from Stanford

4. Odendahl, *supra* note 1.

5. *Women in the Legal Profession*, AM. BAR ASS'N, https://www.americanbar.org/news/profile-legal-profession/women/ (last visited Dec. 31, 2024).

6. *Id.*

7. *Profile of the Legal Profession 2024, Demographics*, AM. BAR ASS'N, https://www.americanbar.org/news/profile-legal-profession/demographics/ (last visited Dec. 31, 2024).

8. *Id.*

9. *Id.*

Law School in 1952 and joined the High Court in 1981. Justice Ruth Bader Ginsburg graduated from Columbia Law School in 1959 and was nominated by President Clinton to the Supreme Court and confirmed in 1993.)

When I (Judge Barker) graduated from law school in 1969, the total number of female students enrolled in JD programs throughout the U.S. was a mere 3,554;[10] by 1983, 1984 and 1986, the years when Judges Magnus-Stinson, Pratt and Lynch each graduated, the total enrollments of female JD students had climbed to some number between 46,000 and 47,000.[11] By the time Judge Pryor graduated in 2003, 65,179 female students were enrolled in JD programs. In 2014, the percentage of lawyers who are women increased from 36% to 41% a decade later in 2024.[12] Male attorneys still outnumber female attorneys (58% to 41%), but the gap is narrowing.[13]

In 1983, when Judge Stinson graduated from law school, I was serving as the United States Attorney for our district. Unbeknownst to anyone at the time, I was one year away from being nominated by President Reagan to serve as the first woman federal district court judge in Indiana, in which position I remained as the only woman judge of our court for 26 years, until 2010, when Judge Stinson was nominated by President Obama to serve as the second woman federal district court judge on our court.

Whether Jane had been paying attention to the slow pace of change on our federal district court during those years in terms of the appointment of women judges, only she could say, but, from 1991 until 1995, when as a member of Governor Evan Bayh's staff she had major responsibility for helping him identify and recruit and screen and appoint women to state court judgeships, we know she had become an expert on this subject. In 1995, about the same time Justice Myra C. Selby was appointed by Governor Bayh (presumably again with Jane's assistance) to be the first woman justice on the Indiana Supreme Court, Jane herself thereafter became a judge of the Superior Court of Marion County in the criminal division, where she served until 2007, when she was appointed a Magistrate Judge on our court.

The data referenced above well describes one aspect of this history of women as lawyers and judges. The fuller picture of these years comes from the personal stories told by the women who chose to seek entry into the legal profession when they would form both a small and often unwelcome minority. The well-documented biographical accounts of such challenges that were faced by Justices O'Connor and Ginsburg are consistent with what most other women lawyers/judges faced in their attempts to break through this glass ceiling: i.e., challenges that encompassed every aspect of their lives—the demands their work placed upon relationships within their families and marriages and with

10. *Review of Legal Education, Law Schools and Bar Admission Requirements in the United States*, AM. BAR ASS'N 20 (Fall 1968), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1968_review.pdf.

11. *Id.*

12. *See Women in the Legal Profession*, *supra* note 5.

13. *Id.*

children, in their workplaces (when they were successful in securing employment), on their social status and their political standing, within their religious communities, and even on their own health and well-being. Every woman lawyer and judge has stories such as these telling of the challenges they faced. Most will also note that they were able to survive the process because of the help of other women who were supportive of their efforts. Speaking personally, I have never forgotten that when I became the first woman appointed to be an assistant U.S. Attorney in our district back in late 1972 at the very beginning of my legal career, it was the judges' secretaries who were most open and helpful in lending me a hand, sometimes simply through their kind words and other times by sending messages to our babysitter (or my husband) when the trial sessions went long, throwing off my evening schedule. (We had no cellphones or social media then, of course.)

Judge Stinson's special gift throughout her extraordinary judicial and public service career has always been her ability and willingness to place herself into the flow of history—to establish relationships that are constructive and life-giving, to "do good work" (as Garrison Keillor says[14]) and to apply her strong intelligence and imagination for the common good, to advocate for and to express her strong commitment to just causes and moral behavior, and to beautifully synthesize her roles as wife/mother/daughter/sister/friend with her responsibilities as lawyer and judge—in short, to make her one precious life count, to borrow the words of the poet Mary Oliver.[15]

Judge Stinson has been able to achieve such wide-ranging success in large measure due to her remarkable capacity to see life whole, a capacity anchored in her clear sense of and respect for the history that has preceded her and now inspires and motivates her life-long commitment to hold the door open for others—all others, men and women alike—anyone who faces obstacles based on a deprivation of fundamental fairness or on withheld justice.

Throughout her grace-filled and productive life, she has gifted our state and our country, including our courts and educational and religious institutions and our civic enterprises, with her exemplary and honorable service. She has more than earned the tribute being paid to her here by her law school in dedicating their publication to *Her Honor*, and I will always be enormously grateful for and honored by the opportunity that has been mine to work side by side with her in the cause of justice.

— Sarah Evans Barker

14. *See* Garrison Keillor, *The Writer's Almanac for Tuesday, December 31, 2024*, GARRISON KEILLOR (Dec. 31, 2024), https://www.garrisonkeillor.com/radio/the-writers-almanac-for-tuesday-december-31-2024/ [https://perma.cc/4C96-69AY].

15. *See* Mary Oliver, *The Summer Day*, LIBR. OF CONG., https://www.loc.gov/programs/poetry-and-literature/poet-laureate/poet-laureate-projects/poetry-180/all-poems/item/poetry-180-133/the-summer-day/ [https://perma.cc/DN9K-XHB2] (last visited Jan. 2, 2025).

II. COMMITMENT: TANYA WALTON PRATT

Judge Jane Magnus-Stinson has inspired hundreds of women in the law and taught us that we must be responsible for our own success and unafraid to take chances. She commissioned and donated to the courthouse the painting *Her Honor*, to commemorate the achievement of women in the 100 years since the passage of the Nineteenth Amendment. The 2020 painting features the women judges in the Southern District of Indiana at that time and symbolically memorializes the achievements of women in the law and envisions their continued progress. I am proud and honored to be among the judges portrayed in *Her Honor*. Judge Magnus-Stinson, the focus of the painting, stands in the center, and she has graciously included her "sisters" on the bench. Each of us is portrayed standing tall and proud, amid a vibrant backdrop representing our diverse yet interwoven paths to the judiciary. And together, we appear to stride steadfastly forward, along the limitless path that each of us has forged for all women in the law. To me, *Her Honor* is a bright, beautiful celebration of Judge Magnus-Stinson's storied career, her efforts to uplift those around her, and her commitment to justice and the court.

Judge Magnus-Stinson has always striven to advance the progress of women in the law. Her commitment and good works have paved the way for many of the profound social changes that have altered women's place in Indiana's legal society. On an individual level, Judge Magnus-Stinson has been a mentor to several women in the legal community, including myself, and she has been a role model and inspiration to countless others. On an institutional level, she has contributed her valuable time and perspectives to numerous committees, conferences, and boards, always ensuring that women had, and will continue to have, a seat at the table. Her dedication to the progress of women in the law is evidenced every day by not only her own outstanding accomplishments, but also the exceptional successes of the many women she has championed.

Judge Magnus-Stinson's dedication to justice and the court likewise defines her legacy and drives her present works. Throughout her distinguished career, her commitment to the justice system, the advancement of women in the law, and the judiciary has been outstanding. She began her judicial career in the Marion Superior Court in November of 1996 and was overwhelmingly reelected to the Superior Court twice before ascending to the district court as a Magistrate Judge. While at the Marion Superior Court, she served as an Associate Presiding Judge of the executive committee and chaired and served on a multitude of committees and task forces for a variety of judicial administrative efforts, including supervising judge of the Marion County Probation Department, the Indiana Judicial Conference Board of Directors, the Education Committee Board of Managers of the Indiana Judges Association, and Chair of the Criminal Pattern Jury Instruction Committee.

Her work for the federal court has been equally impressive. Judge Magnus-Stinson was the Chair of the Facility/Courthouse Security Committee for the Southern District of Indiana from 2010 to 2016. She is the current Chair of the

National Remote Detention Working Group. She served on the Defender Services Committee of the Judicial Conference of the United States Court for seven years. She was the Chair of the Budget and Data Subcommittee for the National Pro Se Working Group for four years. She is a Member of the Seventh Circuit Criminal Pattern Jury Instructions Committee, the Seventh Circuit Advisory Committee on Rules, and the Seventh Circuit Committee on Supervised Release.

Her substantial service to the United States District Court as its Chief Judge lasted from November 23, 2016, to March 20, 2021, and her term was remarkable. She began her term serving as "chief comforter" as she helped the court family face its collective grief over the sudden and unexpected back-to-back deaths of two of its most beloved jurists: Magistrate Judge Denise LaRue passed away on August 2, 2017, and a little over a month later, on September 21, 2017, our beloved Senior Judge Larry McKinney passed away. While navigating the court through this emotionally difficult time, Judge Magnus-Stinson also resolved any uncertainties for court personnel by devising a plan to sustain the services of the late judges' law clerks and staff and to acquire a new Magistrate Judge position for the court.

Judge Magnus-Stinson never hesitated to ask why things were done a certain way and to determine if there was a better or more efficient way to do things. As Chief Judge, she was determined to get our busy court the resources it needed to efficiently serve the public. Her advocacy resulted in our district receiving an additional Magistrate Judge position and securing additional staff attorney positions, increasing the size of the court's staff attorney office—which assists in our *pro se* prison litigation—from five to fourteen lawyers. She was also able to acquire a Social Security law clerk position as well as modest caseload support from federal judges in Wisconsin and the Northern District of Indiana. Her tenacity and effectiveness in getting our district these much-needed resources were critical during those times when the Southern District of Indiana had the seventh-highest weighted case load in the country.

Judge Magnus-Stinson not only saw the court through several threats of sequestration and government shutdowns, but she also navigated our court family through unchartered waters when the nationwide pandemic struck in 2020. She found innovative ways to keep the court functioning, keep cases moving through the system, keep staff working through a very difficult and uncertain time, and maintain quality service to the public. For anyone who knows Judge Magnus-Stinson, it is easy to see the pride, dedication, joy, and unwavering loyalty embodied by *Her Honor*. On behalf of the entire court, and the thousands of citizens that you have served, Judge Magnus-Stinson, thank you for your absolute commitment to justice and to the judiciary.

— Tanya Walton Pratt

III. DIVERSITY AND INCLUSION: DORIS L. PRYOR

Mid-afternoon, I sometimes take walks through the courthouse to allow my mind to rejuvenate and refocus on the tasks ahead of me. The halls are adorned with plaques, murals, and other works of art that serve as reminders of the importance of the rule of law, fairness and equal access to justice—principles that are foundational to our democracy. I view the art as a call to action for all judges and courts commissioned to protect our American liberties and sacred rights.

Invariably, my walks include a stop to view the painting *Her Honor*, displayed on the second floor of the courthouse. The piece takes me back in time to when I received the phone call from then-Chief Judge Magnus-Stinson's office, requesting my presence in chambers. Unbeknownst to me, Jane would surprise us with the unveiling of *Her Honor*, which she had commissioned to celebrate the 100th anniversary of the Nineteenth Amendment. Standing in a semicircle around the covered art, Tanya, Sarah, Debra, and I watched with great anticipation as Jane removed the fabric panel. Immediately, we gasped with delight, simultaneously humbled by the significance of the moment. The artist had made the deliberate decision to not focus on the differences of height, age, or color of his five subjects—who are adorned in beautiful hues, basked in black robes, and standing as equals—but to draw the audience to their commonalities. Kyle Ragsdale, with the stroke of a brush, had masterfully captured the pathbreaking force these women played in ensuring fair, equitable, and bias-free justice.

It is only fitting that, after viewing *Her Honor*, my walk back to chambers leads me past Judge Magnus-Stinson's courtroom. I reflect on my time as a magistrate judge with the United States District Court for the Southern District of Indiana, when I watched then-Chief Judge Magnus-Stinson lead our court through challenging and unsettling times. She led our courthouse during a time of racial reconciliation following the murder of George Floyd. She guided and supported the court family following the loss of two legendary jurists: Judge Larry McKinney and Judge Denise LaRue. She paved the way in ensuring our courthouse remained accessible during an unprecedented global pandemic. All the while, she continued to strive for fair and equal justice under law in her courtroom by ensuring all voices are heard, and all people feel welcome; and by serving as a valued mentor and friend of young lawyers. Throughout her tenure, Judge Magnus-Stinson has remained a forward-leaning voice on issues of diversity and inclusion, criminal justice reform, and the access to justice pipeline.

There's a story about a little boy walking through his village with his father. The boy asks his dad, "which is more powerful, the warrior or the legacy of the warrior?" The father, without missing a beat, looks around, kneels down to his son, and whispers: "the legacy of course." You see, it's the legacy that lives long after the warrior has taken "senior status." Jane's legacy is the power of one woman using *her* voice, *her* influence, and *her* place to shape the country that

we all want, the community that we all want to live in, and the legacy that we all strive to leave behind. She lives out the charge given to us by Dr. Martin Luther King Jr.: "Make a career of humanity. Commit yourself to the noble struggle for equal rights. You will make a great person of yourself, a greater nation of your country, and a finer world to live in."[16]

Some conceptualize diversity as being invited to the party and inclusion as being asked to dance. Jane personified this concept when she formed and led the court's first diversity, inclusion, and equity committee. She did not restrict involvement to district judges; rather, she invited individuals from all divisions of our courthouse to contribute to the committee's work, including magistrate judges and employees working in the probation and clerk's offices. Most importantly, Jane worked to ensure that regardless of position, every person would be heard and every voice equally valued, cultivating an environment in which we all felt comfortable sharing our perspectives. We thank you, Judge Jane Magnus-Stinson, for letting us dance with you. We commend you for your exceptional professionalism, integrity, and service to our judicial system. And I personally thank you for all you have done to ensure that this courthouse and our legal profession reflect the unique community that we serve.

As jurists, may we continue to strive for fair and equal justice under the law. Thank you, Judge Jane Magnus-Stinson, for your remarkable service to our nation and to our Indianapolis community.

— Doris L. Pryor

IV. FRIENDSHIP: DEBRA MCVICKER LYNCH

Her Honor, like most good paintings, captures both a moment in time and some larger, transcendent themes or qualities. Discussions of art typically focus on the transcendent, but I would like to begin by describing the moment in time this painting captures for me, because that moment reveals much about Jane Magnus-Stinson's incomparable friendship, the friendship among the judges of our court, and the connection between friendship and justice.

The subjects of *Her Honor* did not pose for the artist, and its creation was a complete surprise to us. Thus, the moment in time it captures occurred a bit later. In June 2020—at the height of the pandemic—Judges Barker, Pratt, Pryor, and I received a curious summons from then-Chief Judge Magnus-Stinson to appear in her chambers on the prescribed date and time. And of course we did. This was, as we became so accustomed to hearing, an "unprecedented time." The work life of judges can be solitary in normal times, but we were now vastly more isolated. We had not interacted in person with colleagues, staff, lawyers, or litigants for months.

When we arrived at Judge Magnus-Stinson's chambers, we found that she had set out individually wrapped snacks and drinks, hand sanitizer, and five

16. Dr. Martin Luther King, Jr., Address at the Youth March for Integrated Schools, Washington, D.C., (Apr. 18, 1959), *in* 105 CONG. REC. 8696–97 (daily ed. May 20, 1959), *available at* https://www.congress.gov/86/crecb/1959/05/20/GPO-CRECB-1959-pt7-1-2.pdf.

chairs (all six feet apart, of course) arranged in a semi-circle surrounding the painting, which had a black cover over it. The painting was then revealed to just the five of us, and a long, lively conversation and catching-up among these five friends ensued. The painting, and this gathering itself, created a splash of color during the monochromatic days of the pandemic.

Judge Magnus-Stinson also gave us each a smaller print of the painting, and mine is framed and on my office wall at home. Every time I look at this print, that gathering resounds in my memory. The painting is a celebration of, among other things, the hundredth anniversary of women's suffrage and the number of women on our court—quintupled since Judge Barker was appointed in 1984. But what I recall most vividly is the celebration of the friendship of the women judges depicted in it. Busy professionals understand that thriving friendships require some planning and facilitation, and Jane Magnus-Stinson is a consummate planner and facilitator of friendship. Kyle Ragsdale was the painter, but the artist behind that celebration of friendship was Jane.

If we asked twenty casual observers of the painting to describe its transcendent themes or qualities, I suspect that approximately zero would mention friendship. That is perhaps because the robes draw attention to what we *do*, and friendship is not perceived as an essential feature of judging. The reality, though, is that the friendship among the judges of the Southern District of Indiana—and among the women judges in particular—sustains us and enhances our work. But beyond that, the transcendent qualities of friendship are modeled in the administration of justice. Justice, like real friendship, is not transactional, self-serving, or indiscrete. Faithfulness, compassion, service, and attentiveness are as important to doing justice as they are to "doing" friendship.

That Jane Magnus-Stinson would conceive of the *Her Honor* project, oversee its completion, share it with her dear friends depicted in it, and finally, gift it to the court, reveals exactly what sort of friend *and judge* she is. Though the painting itself has abstract elements, there's nothing abstract or ambiguous about how she approaches both friendship and judging: faithful, attentive, constant, energetic, compassionate, and generous. Unparalleled friend. Unparalleled judge.

— Debra McVicker Lynch

JUDGE JANE: BEYOND THE BENCH

THE HONORABLE KELLIE M. BARR*

I first "met" the Honorable Jane E. Magnus-Stinson in 2009 when she was speaking at an Indianapolis Bar Association event. Back then, she was a Magistrate Judge for the United States District Court for the Southern District of Indiana, and I was a new associate at a local law firm. While I still consider this to be our first meeting, we did not actually speak because I was too intimidated to talk to the legal legend commonly referred to as "Judge Jane." Instead, I sat in the audience and listened to her masterfully apply her personal stories and practical wisdom to complex legal topics in a way that made me feel like I truly knew her. I left that bar association event with such a positive impression of Judge Jane, the federal judiciary, and our legal community.

About a year later, the United States Senate unanimously confirmed Judge Magnus-Stinson to be a District Judge by a voice vote, which is a true testament to her qualifications for that role and the bipartisan support she received from both Senator Evan Bayh and Senator Richard Lugar.[1] I applied for a judicial law clerk position in her chambers, and I was thrilled when she selected me for that role. I spent almost seven years working for and learning from Judge Magnus-Stinson as her first Career Law Clerk. During that time, and in the many years since, I have learned key lessons from Judge Magnus-Stinson about how to have a significant impact in ways that do not involve your cases. This article sets forth three of those lessons, with examples of how Judge Magnus-Stinson exemplifies them in her own career.

Lesson one: Get involved in your local bar association.

The Indianapolis Bar Association ("IndyBar") was founded by former U.S. President Benjamin Harrison and other prominent local lawyers in 1878 "for the education and support of one another."[2] To this day, IndyBar "empowers its members to never stop learning, to make a difference in the community, to lead by example, to provide a voice for the profession and to build a network of professional and personal contacts."[3]

Anyone who has been involved at IndyBar with any regularity has surely crossed paths with Judge Magnus-Stinson there, too. She served as IndyBar's Vice President in 2004, the Chair of its Pro Bono Standing Committee from 2004–2006, the Co-Chair of its Professionalism Committee in 2007, as the

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* United States Magistrate Judge, U.S. District Court for the Southern District of Indiana (2022–Present); Judicial Law Clerk, Hon. Jane E. Magnus-Stinson (2010–2017).

1. 156 CONG. REC. S4587, S4608 (daily ed. June 7, 2010), *available at* https://www.congress.gov/congressional-record/volume-156/issue-84/senate-section/page/S4603-4608; *Confirmation Hearings on Federal Appointments Before the S. Comm. on Judiciary*, 111th Cong. 2nd Sess. (2010), *available at* https://www.govinfo.gov/content/pkg/CHRG-111shrg65688/html/CHRG-111shrg65688.htm.

2. *About the IndyBar*, INDIANAPOLIS BAR ASS'N, https://www.indybar.org/?pg=AboutHomePage [https://perma.cc/86JW-7YK8] (last visited Jan. 21, 2025).

3. *Id.*

Moderator of its Bar Leader Series both in 2008–2009 and 2023–2024, and she is currently serving as an At Large Member on its Board of Directors.[4]

In 2007, as Co-Chair of the Professionalism Committee, Judge Magnus-Stinson worked with a dedicated group of lawyers and judges to rewrite the Tenets of Professionalism, which had not been revised since the 1980s. Those standards were approved by the IndyBar Board and "reflect the need for maintaining the highest ethical conduct, civility in the practice of law and community involvement by the practicing bar."[5]

Judge Magnus-Stinson has made such meaningful contributions to IndyBar over the years that it has honored her with many prestigious awards. IndyBar first honored her in 1995 as a Distinguished Fellow, in 2002 with the Women & Law Division's Antoinette Dakin Leach Award,[6] and in 2006 with the President's Award for Service to the Profession. In 2012, IndyBar selected Judge Magnus-Stinson for its most prestigious award—the Hon. Paul H. Buchanan, Jr. Award of Excellence—which is meant to "acknowledge individuals with long records of excellence and unique service to the legal profession . . . whose attainments as a lawyer have been notable, whose contributions to [IndyBar] have been unique, and whose honorable service to the profession has extended over a significant period of time."[7]

Anyone who knows Judge Magnus-Stinson knows that she has not served IndyBar for more than three decades simply for the awards it has rightfully bestowed upon her. Rather, Judge Magnus-Stinson firmly believes that service to a local bar association is a clear way to strengthen our community and make a direct, positive impact on our profession.

Lesson two: Say yes to service and show up ready to make a difference.

Judge Magnus-Stinson's career is replete with examples of ways that she has served the community through her membership on and leadership of various courts, boards, committees, and working groups. Despite her busy calendar, Judge Magnus-Stinson does not hesitate to say "yes" to joining groups to help make a difference. And when she agrees to do something, Judge Magnus-Stinson is not a passive member who simply participates. Rather, to the surprise of no one who knows her well, she is quick to ask questions, brainstorm ideas,

4. *Judge Jane E. Magnus-Stinson*, U.S. DIST. CT., S. DIST. OF IND., https://www.insd.uscourts.gov/content/judge-jane-e-magnus-stinson [https://perma.cc/5H4X-WN8K] (last visited Jan. 21, 2025).

5. *See United States Senate Committee on the Judiciary, Questionnaire for Judicial Nominees (Jane Magnus-Stinson)*, SENATE JUDICIARY 34–35 (Jan. 18, 2010), https://www.judiciary.senate.gov/imo/media/doc/JaneMagnusStinson-PublicQuestonnaire.pdf.

6. *See Nominations Now Accepted for Antoinette Dakin Leach Award*, INDIANAPOLIS BAR ASS'N (June 17, 2015), https://www.indybar.org/?pg=IndyBarBlog&blAction=showEntry&blogEntry=3262 [https://perma.cc/A4YX-82LB].

7. *Judge Magnus-Stinson to Receive Buchanan Award*, INDIANAPOLIS BAR ASS'N (Jan. 17, 2012), https://www.indybar.org/?pg=IndyBarNews&blAction=showEntry&blogEntry=2498 [https://perma.cc/U5MW-BW77].

challenge the status quo when appropriate, and take on leadership roles to help the group meet its goals.

Judge Magnus-Stinson has held key leadership roles as a judge for the various courts on which she has served. Prior to joining the federal bench, Judge Magnus-Stinson was appointed and then twice elected as Judge of the Marion Superior Court, serving from 1995–2007.[8] She served as the Supervising Judge for the Marion Superior Probation Department from 1997–2001. In that role, she helped create the Youth Empowerment Program, providing volunteer mentors to young offenders.[9] Judge Magnus-Stinson also served as Associate Presiding Judge of the Marion Superior Court from 2005 until 2006.[10]

Judge Magnus-Stinson served as the Chief Judge of the United States District Court for the Southern District of Indiana from November 23, 2016, until March 20, 2021.[11] During her tenure as Chief Judge, Judge Magnus-Stinson effectively advocated to get the District additional resources it needed, including an additional Magistrate Judge position, multiple additional staff attorney positions, and caseload support from federal judges in Wisconsin, the Central and Northern Districts of Illinois, and the Northern District of Indiana. She has also served the District as the Chair of the Security Committee from 2010 until 2016; as the Chair of the District's Supervised Release Committee, which revised the District's conditions of supervised release in an effort to make them compliant with case law and statutory developments as well as more understandable for supervisees; and serves as the Chair for the District's Diversity Equity Inclusion and Accessibility Committee.[12]

Judge Magnus-Stinson has been a member of various committees for the Seventh Circuit Court of Appeals, including the Seventh Circuit Judicial Council; the Criminal Pattern Jury Instructions Committee, where she serves as Chair of the Indiana Subcommittee; the Advisory Committee on Rules; and the Committee on Supervised Release.[13] Her work on the Criminal Pattern Jury Instructions Committee helped accomplish a comprehensive rewrite of the Seventh Circuit's Criminal Pattern Jury Instructions in 2018.[14] Since then, the

8. *See Judge Jane E. Magnus-Stinson*, *supra* note 4.

9. *Judge Jane Magnus-Stinson to Take Senior Status in Summer 2024*, IU ROBERT H. MCKINNEY SCH. OF L. (Sept. 11, 2023), https://mckinneylaw.iu.edu/news/releases/2023/09/judge-jane-magnus-stinson-to-take-senior-status-in-summer-2024.html [https://perma.cc/4JGN-CM2L].

10. *See Judge Jane E. Magnus-Stinson*, *supra* note 4.

11. *See Magnus-Stinson, Jane Elizabeth*, FED. JUD. CTR., https://www.fjc.gov/history/judges/magnus-stinson-jane-elizabeth [https://perma.cc/9NKY-G5AZ] (last visited Jan. 21, 2025).

12. Interview with Judge Jane E. Magnus-Stinson, U.S. District Court for the Southern District of Indiana (Jan. 22, 2025).

13. *See Judge Jane E. Magnus-Stinson*, *supra* note 4.

14. *See 7th Circuit Seeking Public Comment on Jury Instructions*, THE IND. LAW. (Oct. 15, 2018), https://www.theindianalawyer.com/articles/48392-th-circuit-seeking-public-comment-on-jury-instructions.

Committee has continued to conduct periodic reviews to ensure the instructions remain aligned with evolving statutory and case law developments.[15]

On a national level for the federal courts, Judge Magnus-Stinson served on the National Pro Se Working Group of the Administrative Office of the United States Courts from 2019 through 2023.[16] She also served on the Defender Services Committee of the Judicial Conference of the United States Courts from 2015 to 2022, including three years as the Chair of the Budget and Data Subcommittee from September 2019 through September 2022. "The mission of the Defender Services program is to ensure that the right to counsel guaranteed by the Sixth Amendment, the Criminal Justice Act (18 U.S.C. § 3006A), and other congressional mandates is enforced on behalf of those who cannot afford to retain counsel and other necessary defense services."[17] By fulfilling its mission, the Defender Services program helps to "maintain public confidence in the nation's commitment to equal justice under the law" and also "ensure the successful operation of the constitutionally-based adversary system of justice by which both federal criminal laws and federally guaranteed rights are enforced."[18]

During Judge Magnus-Stinson's tenure on the Defender Services Committee, the 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act was released. This report is commonly known as the Cardone Report, named after the Honorable Kathleen Cardone, who was the Chair at the time of the Report's release.[19] Following two and half years of study, this comprehensive review of the Criminal Justice Act program made a unanimous recommendation to establish the federal system of public defenders as an independent entity, free from oversight by the Judicial Conference. While such a structural change requires congressional approval, the Cardone Report also outlined interim steps that the Judicial Conference could take to enhance the Sixth Amendment right to counsel without that approval. Although Congress has not yet acted on the Cardone Report's ultimate recommendation to establish the federal system of public defenders as an independent entity, the Judicial Conference has moved forward with several of the interim measures that do not require congressional approval. During Judge Magnus-Stinson's service, the Defender Services Committee played an integral role in helping to implement

15. *See* The Committee on Federal Criminal Jury Instructions of the Seventh Circuit, *The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit (2023 Ed.)*, U.S. CT. OF APPEALS FOR THE SEVENTH CIR. (2023), https://www.ca7.uscourts.gov/pattern-jury-instructions/Criminal_Jury_Instructions.pdf.

16. Interview with Judge Jane E. Magnus-Stinson, U.S. District Court for the Southern District of Indiana (Jan. 22, 2025).

17. *Mission – Defender Services*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/defender-services/mission-defender-services [https://perma.cc/H6U7-W4Q7] (last visited Jan. 21, 2025).

18. *Id.*

19. *See* CRIMINAL JUSTICE ACT REVIEW COMMITTEE, 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT (2018), *available at* https://cjastudy.fd.org/.

these recommendations, evaluating their impact, and continuing to advocate for the establishment of an independent federal defender commission.[20]

Judge Magnus-Stinson has also served as the Co-Chair of the Remote Detention Working Group for the federal courts. Formed in 2022, the Remote Detention Working Group "provides a forum for regular communication among stakeholders, including representatives from the Judicial Conference Committees on Criminal Law and Defender Services, the Office of the Deputy Attorney General, and the U.S. Marshals Service, as well as federal defenders, CJA panel attorneys, and probation and pretrial services officers."[21] The goal of the Group is to address the unique challenges posed by geographically remote detention facilities housing federal pretrial detainees, which can lead to limited pretrial access to legal counsel, restricted availability of discovery materials, and reduced opportunities to utilize important community services.[22] Under Judge Magnus-Stinson's leadership, the Remote Detention Working Group has raised awareness among various stakeholders regarding the challenges presented by remote detention and the impact on constitutional rights that all stakeholders have sworn to uphold.[23]

Judge Magnus-Stinson has also held impactful leadership roles outside of the judiciary. She served on the Board of Visitors for the Indiana University Robert H. McKinney School of Law from 1995 to 2024, when she transitioned to and remains an Emeritus Member.[24] During her nearly three decades of service, she collaborated with six deans, contributed to an ABA accreditation committee, and served on a Dean's Search Committee.[25] She has also long been a dedicated educator, teaching trial advocacy to judges and lawyers, both nationally and internationally through the National Institute for Trial Advocacy and law students at IU McKinney. On a national scale, she was recently elected to serve as a new member of the American Law Institute (ALI), which is an independent organization that produces scholarly work to modernize and

20. *See* FEDERAL JUDICIAL CENTER, EVALUATION OF THE INTERIM RECOMMENDATIONS FROM THE CARDONE REPORT (2023), *available at* https://www.fjc.gov/sites/default/files/materials/39/Evaluation-of-the-Interim-Recommendations-from-the-Cardone-Report-FJC-Website.pdf.

21. *Defender Services – Annual Report 2022*, U.S. CTS., https://www.uscourts.gov/data-news/reports/annual-reports/directors-annual-report/annual-report-2022/defender-services-annual-report-2022 [https://perma.cc/4GCK-MHQU].

22. Memorandum from Judge Jane E. Magnus-Stinson, Co-Chair of the Remote Detention Working Group, to Director Roslynn Mauskopf and Mr. Joshua Lewis, Seeking the Group's Extension for Another Year (Oct. 17, 2023) (on file with author).

23. *See id.*; Memorandum from Judge Robert J. Conrad, Jr., Director, and Judge Jane Magnus-Stinson, Chair AO-DOJ Remote Detention Working Group, on Formation of Local Detention Management Committees (Dec. 16, 2024) (on file with author).

24. *IU McKinney Board of Visitors*, IU ROBERT H. MCKINNEY SCH. OF L., https://mckinney.law.iu.edu/alumni/alumni-leadership/board-of-visitors/index.html [https://perma.cc/WCP2-E6SC] (last visited Jan. 21, 2025).

25. Interview with Judge Jane E. Magnus-Stinson, U.S. District Court for the Southern District of Indiana (Jan. 22, 2025).

improve the law, including publishing the Restatements of Law, Model Codes, and Principles of Law.[26]

Her extensive service extends to non-legal organizations as well. Judge Magnus-Stinson has served as the President of the Board of Big Brothers Big Sisters of Central Indiana, as a Member and Vice-Chair of the Wishard Memorial Foundation Board of Directors, and on the Board of Trustees of Butler University from 2013 to 2025.[27] In fact, the Butler University Alumni Association honored Judge Magnus-Stinson with the Robert Todd Duncan Alumnus Achievement Award in 2013.[28] In her capacity as a Trustee of Butler University, she was actively involved in committee work that supported both Butler students and faculty, and she initiated annual naturalization ceremonies on campus at Butler University's Clowes Memorial Hall.

As is apparent from this lengthy but incomplete list of examples, Judge Magnus-Stinson has had a career filled with impactful service to the state and federal courts, as well as to various boards, committees, and working groups. She has not let her busy docket prevent her from serving and leading. Instead, Judge Magnus-Stinson has intentionally made time to serve and lead groups that have allowed her to make a positive impact and create real change in a meaningful way.

Lesson three: Make time for mentorship.

Judge Magnus-Stinson has shown throughout her career that pouring time into others is always worthwhile. She has done this in an informal mentorship capacity with her judicial law clerks, her chambers interns (affectionately known as "Stinterns"), and even with attorneys who appear before her. Judge Magnus-Stinson does not hesitate to lend a listening ear or brainstorm ways to handle a tricky situation, when appropriate. It is clear to those who know her that she finds immense joy in watching other people find their true calling. Those who know Judge Magnus-Stinson well know that while she holds people around her to a high standard, the standard to which she holds herself is even higher. Her unique ability to form genuine and lasting connections with mentees is a true gift.

Judge Magnus-Stinson has also mentored newer attorneys in a more formal capacity by twice serving as the Moderator for IndyBar's Bar Leader Series, first from 2008–2009 and then again from 2023–2024. The Bar Leader Series is an intense year-long leadership development program designed specifically for early career professionals.[29] Participants must be in their third to tenth year of

26. *Elected Member, The Hon. Jane E. Magnus-Stinson*, THE AM. L. INST., https://www.ali.org/profile/6319 [https://perma.cc/GA9C-KRWQ] (last visited Feb. 4, 2025); *About ALI*, THE AM. L. INST., https://www.ali.org/about [https://perma.cc/SB5D-SPJF] (last visited Feb. 4, 2025).

27. *See Judge Jane E. Magnus-Stinson*, *supra* note 4.

28. *Board of Trustees*, BUTLER UNIV., https://www.butler.edu/about-butler/board-trustees/ [https://perma.cc/5JGP-MYER] (last visited Jan. 21, 2025).

29. *The Bar Leaders Series for Early-Career Professionals*, INDIANAPOLIS BAR ASS'N, https://www.indybar.org/?pg=BarLeaderSeries [https://perma.cc/D5XD-S5L4] (last visited Jan. 21, 2025).

practice, and the series prepares them "to take their places as both leaders in the legal profession and leaders in addressing needs of the community."[30] Anyone who is familiar with the Bar Leader Series knows that only the most esteemed legal professionals in our community are chosen to serve as the Moderator of the program. There have been twenty-one sessions of IndyBar's Bar Leader Series, and Judge Magnus-Stinson is the only person who has been chosen to serve as the Moderator for two separate classes. This alone is proof of the rare air she occupies as a beloved mentor throughout our legal community.

One powerful example of Judge Magnus-Stinson's widespread influence was apparent at the Senior Status Celebration that the federal court held to honor her on June 28, 2024. On that day, people gathered in the packed ceremonial courtroom of the Birch Bayh Federal Building and United States Courthouse to celebrate her tenure before she became a Senior District Judge on July 1, 2024. The ceremony was attended by an impressive number of judges, dignitaries from state and federal government, attorneys from throughout the community, court staff, family, and friends.

Seventh Circuit Court of Appeals Judge Doris L. Pryor gave particularly poignant remarks, sharing a story about a little boy walking through his village with his father. The boy asked his father, "Dad, tell me what's more powerful? Is it the warrior or is it the legacy?" The father leaned down to his son and whispered, "It's the legacy of course. Because that is what extends beyond the tenure of the warrior."[31]

Judge Pryor then asked those present in the courtroom to stand if they had ever served as a law clerk or chambers intern to Judge Magnus-Stinson; to stand if they had ever been coached by or hired because of Judge Magnus-Stinson; to stand if they had ever been tapped to speak, lead, or volunteer for an organization because of Judge Magnus-Stinson; to stand if they had ever called Judge Magnus-Stinson for advice and received just what they needed with nothing asked from her in return; and to stand if they had ever walked through a door of opportunity that would have been locked unless Judge Magnus-Stinson gave the key. By the end of those questions, almost every person in the packed courtroom was standing as sunlight streamed through the stained glass windows onto us. Many eyes held tears of joy and gratitude for the powerful visual showing Judge Magnus-Stinson's true legacy, proudly standing in human form for all to see. As Judge Pryor aptly concluded, "This is the power of using your voice, using your influence, using your place to shape the community that we want to be a part of, where we live and, more importantly, the legacy that all of us desire to leave behind."[32]

30. *Id.*

31. Hon. Doris L. Pryor, Circuit Judge, U.S. Court of Appeals for the Seventh Circuit, Address at the Senior Status Celebration in Honor of the Honorable Jane E. Magnus-Stinson (June 28, 2024) (cleaned up).

32. *Id.*

The legacy of Judge Magnus-Stinson will certainly extend far beyond her tenure. It extends through the countless lives she has touched and the significant impact she has made in ways that have nothing to do with the cases that were assigned to her. What an eternal gift that she has given us all. For that, Judge Jane, we give you our heartfelt appreciation and promise to use the lessons you have taught us to also strive to make a positive impact.

A LEGACY OF EXCELLENCE: A TRIBUTE TO JUDGE JANE E. MAGNUS-STINSON

BIRCH "EVAN" BAYH* and BIRCH "BEAU" BAYH**

I confess to feeling the full weight of my 69 years as I write. Where has the time gone? It seems like just yesterday that Jane Magnus, as she was then known, and I were young, idealistic lawyers starting our legal careers in Indianapolis. But while about a half-century has passed, our idealism and belief in our judicial system have never diminished. The journey has been a privilege and illuminating. To paraphrase Bob Dylan: "We were so much older then, we're younger than that now."[1]

Judge Jane E. Magnus-Stinson's transition to senior status marks the culmination of an extraordinary and inspiring career, one defined by her unwavering commitment to the law, unrivaled integrity, and tireless service to the state and federal judiciary. As someone who has had the privilege of working closely with her, I am deeply honored to join the *Indiana Law Review* in celebrating her remarkable legacy.

This tribute carries a personal significance, not only because of my admiration for Judge Magnus-Stinson but also because it provides me with an opportunity to collaborate with my son, Beau Bayh. Beau, who completed an internship in Judge Magnus-Stinson's chambers during his third year at Harvard Law School, witnessed firsthand the exceptional qualities that have defined her career. His insights and contributions have enriched this tribute, making it a shared effort that reflects the deep and lasting impact Judge Magnus-Stinson has had on all those who have had the privilege of working with her.

In this tribute, I seek to highlight the milestones that define her legacy of excellence: her achievements as a litigator, her contributions to Indiana's governance, and her exemplary service on the bench. It is my hope that these reflections will underscore the exceptional legal acumen and commitment to justice that have distinguished Judge Magnus-Stinson throughout her career. While her professional accomplishments are remarkable, it is equally important to celebrate the personal qualities that complement them. Judge Magnus-Stinson is a devoted wife, a loving mother to her two daughters, and a committed mentor who has strongly influenced the careers of many young lawyers, including my son, Beau. Her ability to inspire and uplift those around her is a testament to the depth of her character and the breadth of her impact.

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1. *See* BOB DYLAN, *My Back Pages*, *on* ANOTHER SIDE OF BOB DYLAN (Columbia Records 1964).

I.

Judge Magnus-Stinson's career began with a display of exceptional legal skill and a commitment to excellence. Fresh out of law school, she joined Lewis, Bowman, St. Clair and Wagner, LLP (now Lewis Wagner, LLP), where she quickly earned a reputation for handling complex insurance defense and commercial litigation matters. In her first seven years of practice, she tried an impressive thirty cases to either verdict or judgment, serving as sole counsel in nearly half of them.[2] This achievement was a testament to her extraordinary capability and composure under pressure. These qualities, evident from the start, would become the hallmarks of her distinguished career.

Jane Magnus-Stinson attributes much of her early success to the mentorship of Robert Wagner, whom she fondly recalls as an invaluable guide during her formative years. While having a great mentor certainly played a role, it is clear that Jane Magnus-Stinson's relentless work ethic, sharp wit, and unwavering determination were the true engines of her success. Robert Wagner, like anyone fortunate enough to work with her, undoubtedly recognized her exceptional abilities and felt inspired to support her growth. Her knack for connecting with people, combined with her impeccable taste in music, has always made her a joy to collaborate with—qualities that have remained constant throughout her career.

One case that illustrates Jane Magnus-Stinson's ingenuity and skill as a litigator is *Guffy v. Clinton Prairie School Corp., in which* she proposed a novel jury instruction based on Indiana's equal knowledge doctrine, a principle with limited precedent in the state's legal landscape at the time.[3] Her carefully crafted instruction was accepted and issued in the case, leading to a favorable verdict for her client. She then successfully defended both the instruction and the verdict on appeal, demonstrating her creativity, legal acumen, and ability to deliver results and setting the stage for her future accomplishments.[4]

II.

When the people of Indiana honored me with a second term as Governor in 1992, a few key positions within my administration needed to be filled. From the start, I sought individuals who, even without prior state government

2. BIOGRAPHY OF THE HONORABLE JANE MAGNUS-STINSON, INDYBAR 3 (on file with journal).

3. *See United States Senate Committee on the Judiciary, Questionnaire for Judicial Nominees (Jane Magnus-Stinson)*, SENATE JUDICIARY 34–35 (Jan. 18, 2010), *available at* https://www.judiciary.senate.gov/imo/media/doc/JaneMagnusStinson-PublicQuestonnaire.pdf. Indiana's equal knowledge doctrine provides that there is no liability for injuries arising from dangers equally known to both the plaintiff and the defendant. 57B AM. JUR. 2d *Negligence* § 789 (2024).

4. Guffy v. Clinton Prairie Sch. Corp., 478 N.E.2d 1258 (Ind. Ct. App. 1985) (mem.); *United States Senate Committee on the Judiciary, Questionnaire for Judicial Nominees (Jane Magnus-Stinson)*, *supra* note 3, at 34–35.

experience, demonstrated the vision, leadership, and capability necessary to build on Indiana's progress.

Initially, Jane Magnus-Stinson was considered for a position in one of our agencies based on her reputation as a skilled advocate and her ability to masterfully handle complex legal matters. However, my wife Susan, recognizing Jane Magnus-Stinson's exceptional qualities, suggested she join my staff. From there, it quickly became clear to me that Indiana would be best served by bringing Jane Magnus-Stinson into the heart of the administration.

Her impact was immediate. As Counsel to the Governor, she provided direct legal guidance and oversaw significant litigation involving the Governor, the State, and its agencies. Among her many contributions, Jane's stewardship of the *Tioga Pines Living Center v. State Board of Public Welfare* case stands out.[5] It was a class action lawsuit brought by the nursing home industry challenging the State's Medicaid reimbursement rates for providing care to indigent Medicaid recipients.[6] Thanks to her leadership and meticulous oversight, the State prevailed, with the Indiana Supreme Court reversing the trial court's adverse decision against the State.[7]

Jane Magnus-Stinson also played a vital role in the judicial appointment process—a responsibility we both regarded with the utmost gravity—by overseeing the initial vetting process. Thanks in no small measure to Jane Magnus-Stinson's dedication and foresight, the Bayh Administration succeeded in placing over forty exceptionally competent and highly qualified judges on benches throughout the State, including Myra Selby to the Indiana Supreme Court, the first woman and the first African-American to serve on the Indiana Supreme Court, and Patricia Riley to the Indiana Court of Appeals, the fourth woman to sit on the Indiana Court of Appeals.[8]

Lastly, Jane Magnus-Stinson's leadership extended well beyond her core responsibilities as Counsel to the Governor. Her ability to lead with determination and deliver results made her an invaluable asset in numerous roles. She served as my liaison to the Judiciary, the State Ethics Commission, the Office of the Attorney General, the Department of Insurance, the Alcoholic Beverage Commission, and the Hoosier Lottery. Additionally, she represented the Governor's Office on the Indiana Sexual Harassment Task Force, an initiative of the Bayh Administration aimed at drafting an anti-sexual harassment policy that could be easily adopted by small employers. Her efforts

5. *See* Indiana State Bd. of Public Welfare v. Tioga Pines Living Ctr., Inc., 622 N.E.2d 935 (Ind. 1993).

6. *Id.*

7. *Id.* at 947.

8. 141 CONG. REC. E152-53 (daily ed. Jan. 20, 1995) (extension of remarks, Tribute to Mrya Selby by Hon. Andrew Jacobs, Jr.), *available at* https://www.congress.gov/104/crec/1995/01/20/141/12/CREC-1995-01-20.pdf; *Court of Appeals of Indiana Judge Patricia A. Riley Announces Retirement*, IN.GOV (June 18, 2024), https://www.in.gov/courts/appeals/news/2024-0618/; *United States Senate Committee on the Judiciary, Questionnaire for Judicial Nominees (Jane Magnus-Stinson)*, *supra* note 3, at 36.

were instrumental—she recruited members, coordinated the drafting of the policy, and oversaw its dissemination to state and local businesses. She also represented the Governor's Office on the Indiana Code Revision Commission and the Indiana Women's Commission, ensuring that these critical initiatives benefitted from her insight and commitment to excellence.[9]

III.

In 1995, when Jane Magnus-Stinson approached me about a judicial vacancy in Marion County, I was thrilled—but not the least bit surprised. After serving with distinction as part of the heart of my administration for four years, she was ready to take the next step in her career and pursue her dream of serving as a trial court judge. Nominating her to fill the vacancy at the Marion Superior Court, Criminal Court Six, major felony division, was one of the proudest moments of my second term.

While Jane Magnus-Stinson's experience had not focused heavily on criminal law, the decision to nominate her was made with no hesitation. Her proven intellect, sound judgment, and approach to the law made her the obvious and unequivocal choice. The people of Marion County clearly saw the same qualities, reaffirming her appointment with their votes in both the 1996 and 2002 elections.[10] This resounding support was a testament to the deep respect and trust she had earned from the community she served with such dedication and integrity.

One highly publicized case that underscores Judge Jane Magnus-Stinson's legal acumen and poise under pressure is *State v. Albrecht*.[11] This two-week jury trial involved the defendant's prosecution for the brutal murder of his estranged wife—a case fraught with challenging evidentiary issues. If asked about her favorite area of law, Judge Magnus-Stinson might name the Rules of Evidence, a preference aptly demonstrated in this case, as well as *Walton*. With no physical evidence tying the defendant to the crime after five years of investigation, the prosecution relied entirely on circumstantial evidence. Witnesses testified about the defendant's inquiries into murder-for-hire, and the trial hinged on several pivotal evidentiary rulings made by Judge Magnus-Stinson—all of which were upheld by the Indiana Supreme Court.[12]

Key rulings included allowing testimony from an alibi witness who recanted years later, admitting to lying to protect the defendant. Over defense objections, Judge Magnus-Stinson permitted an FBI agent to testify about the victim's statement despite the loss of the agent's original notes. She excluded evidence of another potential suspect's polygraph test, preventing the defense from

9. *Id.*

10. *United States Senate Committee on the Judiciary, Questionnaire for Judicial Nominees (Jane Magnus-Stinson)*, *supra* note 3, at 16.

11. 737 N.E.2d 719 (Ind. 2000).

12. *Id.* at 734.

introducing its results. She also admitted statements the defendant made to police, a recorded conversation between the defendant and another individual, and a graphic autopsy photograph of the victim.[13]

Despite the lack of physical evidence, the jury convicted the defendant.[14] The Indiana Supreme Court later affirmed both the conviction and all of Judge Magnus-Stinson's rulings.[15] This case highlights her mastery of evidentiary law, judicial temperament, and ability to handle the most challenging legal landscapes with fairness and precision.

Lastly, one of Judge Magnus-Stinson's most impactful contributions during her time on the Marion County bench deserves special recognition. Reflecting her deep commitment to plain and accessible language—a hallmark of her judicial opinions—she served as Chair of the Indiana Judges Association Criminal Pattern Jury Instructions Committee from 1998 to 2002. In this role, Judge Magnus-Stinson led a dedicated group of judges from across Indiana in a comprehensive revision of the state's Criminal Pattern Jury Instructions. Over more than three years, Judge Magnus-Stinson guided the Committee in transforming the Criminal Pattern Jury Instructions, ensuring they would be more readily understandable for jurors. This ambitious undertaking and monumental achievement stand as a testament to her forward-thinking leadership and dedication to improving the judicial process for the benefit of all.

IV.

As her exceptional record demonstrates, it was no surprise that after twelve distinguished years serving the people of Marion County, Judge Magnus-Stinson transitioned in 2007 to a broader role as a United States Magistrate Judge for the Southern District of Indiana, where she continued to make an extraordinary impact. This new position allowed her to bring her expertise, dedication, and tireless commitment to an even larger community, further solidifying her reputation as a devoted public servant.

An even more significant milestone followed shortly thereafter. In November 2008, Judge Larry J. McKinney announced his decision to assume senior status, creating a vacancy on the United States District Court for the Southern District of Indiana. At that time, I had the privilege of representing Indiana in the United States Senate. With her extensive experience as a Federal Magistrate Judge and her twelve years of service as a state court major felony judge, Judge Magnus-Stinson emerged as the clear and most qualified candidate to fill the vacancy. She had my full and enthusiastic support from the start.

Several moments from her journey to the District Court bench stand out as personal favorites. One was the phone call I made to her on April 29, 2009, coincidentally her birthday, to share that I would be recommending her to the

13. *See id.* at 723–34.
14. *Id.* at 723.
15. *Id.* at 734.

White House for consideration. I still smile every time I think about that conversation. Another came on January 20, 2010, when President Obama formally nominated her to fill the vacancy—a testament to her excellent qualifications and commitment to public service.

A particularly noteworthy aspect of Judge Magnus-Stinson's confirmation process was the bipartisan support she received from Senator Richard Lugar.[16] His strong backing reaffirmed the respect that my father and I always had for him. This collaborative and bipartisan effort further underscored the esteem in which Judge Magnus-Stinson was, and continues to be, held across Indiana. On June 7, 2010, the Senate unanimously confirmed her nomination by a voice vote—a true testament to her credentials and widespread respect.[17]

It is worth taking a moment to reflect on the vision that Senator Lugar and I brought to judicial nominations, which stands in stark contrast to the partisan climate we often see today.[18] Together, we believed in evaluating judicial candidates based on their intellect, experience, character, and temperament—qualities Americans deserve from their judges—rather than on partisan considerations or predictions of how they might rule on contentious issues. Judge Magnus-Stinson's exemplary career embodies this vision, setting a high standard for judicial excellence. Her dedication to fairness, deep legal knowledge, and unwavering commitment to justice stand as a testament to the enduring value of selecting judges based on merit, not ideology.

Over the past 15 years, Judge Magnus-Stinson's record as a United States District Judge has been nothing short of extraordinary. Her work has been highly productive, marked by fairness, rigor, and a steadfast commitment to justice. She has earned the deep respect of her peers and the legal community nationwide.

Among her many noteworthy cases, one stands out as a testament to her firm adherence to her judicial oath, which states in part: *"I will administer justice without respect to persons, and do equal right to the poor and to the rich."*[19] The case of *Littler v. Martinez* exemplifies this principle.[20] Littler, a prisoner at Wabash Valley Correctional Facility, represented himself for most of the lawsuit. He brought a case against prison guards, alleging excessive use of force after being shot in the face with a pepper-ball gun at point-blank range

16. *Confirmation Hearings on Federal Appointments Before the S. Comm. on Judiciary*, 111th Cong. 2nd Sess. (2010), *available at* https://www.govinfo.gov/content/pkg/CHRG-111shrg65688/html/CHRG-111shrg65688.htm.

17. 156 CONG. REC. S4587, S4608 (daily ed. June 7, 2010), *available at* https://www.congress.gov/congressional-record/volume-156/issue-84/senate-section/page/S4603-4608.

18. *Confirmation Hearings on Federal Appointments Before the S. Comm. on Judiciary*, 111th Cong. 725 (2009) (prepared statement of Hon. Richard Lugar, U.S. Sen., Ind.) *available at* https://www.govinfo.gov/content/pkg/CHRG-111shrg65688/html/CHRG-111shrg65688.htm.

19. 28 U.S.C. § 453.

20. Littler v. Martinez, et al., No. 2:16-cv-00472-JMS-DLP (S.D. Ind.); *see, e.g.*, Littler v. Martinez, 2018 WL 4361636 (S.D. Ind. Sept. 13, 2018); Littler v. Martinez, 2018 WL 4591964 (S.D. Ind. Sept. 25, 2018); Littler v. Martinez, 2019 WL 1043256 (S.D. Ind. Mar. 5, 2019); Littler v. Martinez, 2020 WL 42776 (S.D. Ind. Jan. 3, 2020).

at the direction of the Assistant Superintendent of the prison. The allegations went further, revealing a subsequent cover-up that included multiple instances of dishonesty to the Court.[21]

Despite the challenges inherent in cases involving pro se litigants, Judge Magnus-Stinson approached the matter with her characteristic fairness and care. She held all parties—regardless of status—to the same high standards under the law. She issued numerous opinions throughout the life of the case, one of which was a striking 34-page opinion that meticulously documented the misconduct of the State defendants, exposing their unethical behavior and attempts to mislead the Court.[22] Through her incisive and thorough handling of the case, she ensured accountability from the State and affirmed her commitment to protecting the rights of even the most vulnerable litigants. Such dedication to justice, particularly for those who might otherwise be overlooked, stands as a defining feature of her judicial philosophy and approach to the bench.

One of the unique aspects of federal court is the wide variety of issues and areas of law that come before the bench. A particularly notable state law case under Judge Magnus-Stinson's purview was *Webster v. CDI Indiana, LLC*.[23] Judge Magnus-Stinson was tasked with resolving a question of Indiana law on an issue where the Indiana Supreme Court had not yet provided clear guidance.

True to her meticulous approach, Judge Magnus-Stinson demonstrated her remarkable ability to analyze complex legal questions and reach a sound conclusion. Cognizant of a district court's role in applying state law, she authored what the Seventh Circuit later described as "a well-reasoned and thorough opinion." Her decision artfully anticipated how the Indiana Supreme Court might resolve the issue, and in March 2022, that prediction was validated. Several years later, when the Indiana Supreme Court decided *Arrendale v. American Imaging & MRI, LLC*, it addressed the same legal question raised in *Webster* and praised Judge Magnus-Stinson's meticulous analysis, noting that it was "persuaded by many" of her observations.[24] Her thoughtful and precise reasoning served as a key piece of the Indiana Supreme Court's ultimate analysis, affirming her exceptional skill and insight.

Judge Magnus-Stinson's legacy also undoubtedly includes her outstanding ability to manage large, multifaceted cases with precision and clarity—an ability she demonstrated early on and honed to perfection over the course of her career. In fact, it was this very skill that cemented my confidence in her when she joined my administration as Counsel to the Governor. Throughout her judicial service, she applied this talent to some of the most complex and challenging cases, setting a standard for excellence in case management and decision-making.

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21. *Id.*; *see* Dale Chappell, *Federal Court Grants Default Summary Judgment in Favor of Indiana Prisoner as Sanction for State's Lies*, PRISON LEGAL NEWS (May 1, 2020), https://www.prisonlegalnews.org/news/2020/may/1/federal-court-grants-default-summary-judgment-favor-indiana-prisoner-sanction-states-lies/ [https://perma.cc/P49X-6QWS].

22. Littler v. Martinez, 2020 WL 42776 (S.D. Ind. Jan. 3, 2020).

23. 2017 WL 3839377 (S.D. Ind. Aug. 31, 2017).

24. 183 N.E.3d 1064 (2022).

On the criminal side, her skill was equally evident in a high-profile, multi-defendant drug conspiracy case involving Richard Grundy III and his extensive criminal network.[25] This case, involving over a dozen defendants, culminated in a three-week trial with five who exercised their right to a jury trial. The proceedings presented a range of intricate legal issues, including attorney conflicts of interest, attempted witness tampering, and even a mistrial. One of the most notable aspects of the case was Mr. Grundy's motion to represent himself after the mistrial but before the retrial—a decision that raised the often-complicated legal issue of self-representation in a criminal trial.

Judge Magnus-Stinson handled the motion with her characteristic diligence and care, holding a thorough hearing to ensure that Mr. Grundy's waiver of his right to counsel was knowing and intelligent. Ultimately, after her detailed discussion of the challenges of self-representation, Mr. Grundy withdrew his motion. Following his conviction and life sentence, he appealed, claiming that the court had unduly discouraged him from representing himself, thus violating his Sixth Amendment rights. As the Seventh Circuit aptly noted, self-representation places a trial judge in a "constitutional double-bind": either risk a claim that the right to counsel was improperly waived or face an argument that the court's warnings about the dangers of self-representation were overly persuasive.[26] The Seventh Circuit affirmed Judge Magnus-Stinson's handling of the matter, commending her approach as "important and responsible" and recognizing the careful balance she struck in navigating this difficult constitutional terrain.[27] Her thoughtful and meticulous management of the case exemplified her mastery of complex legal challenges and her commitment to justice.

One of Judge Magnus-Stinson's most endearing and unique traits, however, is her ability to infuse a touch of humanity into her writing. Tucked into a footnote or a passing sentence, one might find a clever pun or a reference to song lyrics that brings a smile to the reader's face.[28] These moments, while rare, reflect her warmth and sense of humor, reminding us all that the practice of law, while serious, need not always be devoid of levity. It is this combination of skill, compassion, and approachability that truly sets Judge Magnus-Stinson apart and defines her lasting impact on the world of jurisprudence.

Although my official work with Jane Magnus-Stinson ended when she ascended to the bench in 1995, I have had the privilege of witnessing her

25. *See* United States v. Vizcarra-Millan, 15 F.4th 473, 484 (7th Cir. 2021).

26. *Id.* at 485.

27. *Id.* at 491.

28. *See, e.g.*, Order at 2, Knowles v. Midwest Caulking, Inc., No. 1:24-cv-00272-JMS-MG (S.D. Ind. Feb. 13, 2024), ECF No. 7 (incorporating lyrics from *The Times They Are A-Changin'* by Bob Dylan); CSX Transportation, Inc. v. Zayo Group, LLC, 2024 WL 1743156, at *1 (S.D. Ind. Apr. 23, 2024) (quoting lyrics from *Midnight Train to Georgia* by Gladys Knight & The Pips and *Crazy Train* by Ozzy Osborne, among others); Indianapolis Motor Speedway, LLC v. Global Live, Inc., 2017 WL 3478985, at *5–6 (S.D. Ind. Aug. 14, 2017) (incorporating, in a case involving facts about a Rolling Stones concert, multiple Rolling Stones songs and lyrics).

enduring impact on the next generation. My son, Beau, was fortunate to complete an internship with Judge Magnus-Stinson during his final year at Harvard Law School. Over his winter break, Beau worked in chambers alongside Judge Magnus-Stinson and her dedicated team, gaining invaluable insight into the qualities that make her an exceptional jurist—her sharp intellect, her ability to inspire and lead, and her unyielding commitment to justice.

When I asked Beau about his time in Judge Magnus-Stinson's chambers, he described an environment marked by collegiality, intelligence, and a shared commitment to excellence. Under her leadership, a team of capable and kind individuals worked seamlessly together, embodying the values she has championed throughout her career. Beau spoke with admiration about Judge Magnus-Stinson's ability to foster a culture rooted in justice and excellence—a hallmark of her chambers and a testament to her own principles. He also highlighted her genuine kindness and her dedication to mentoring young attorneys, including himself, his co-intern, and all other "Stinterns," as they are fondly named, as she invested time and effort in nurturing their growth and expanding their understanding of the law.

One lesson Beau observed firsthand, which deserves particular recognition, is Judge Magnus-Stinson's commitment to adjudicating Social Security Administration cases with efficiency and compassion. These cases, often marked by medical complexities and intricate legal issues, present unique challenges—ask any federal law clerk. Yet Judge Magnus-Stinson approaches them with the same care and diligence she brings to all her work. By the time these cases reach federal court, the litigants have often endured years of delays and are frequently in poor health. Judge Magnus-Stinson ensures these cases receive the urgency they demand, embodying her unwavering dedication to justice for the most vulnerable and her profound respect for the judiciary's role in protecting those in need.

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Judge Magnus-Stinson's career has been a shining example of what it means to serve the public with intellect, integrity, and an unwavering commitment to justice. Her wit and warmth, combined with her brilliant legal mind, have made her an unparalleled colleague, friend, and mentor to young lawyers. She has left an indelible mark on the State of Indiana, the entire judiciary, the legal profession, and the countless lives she has touched, especially those who have had the privilege of working with her.

Thank you, Judge Magnus-Stinson, for your lifetime of service to Indiana, to our nation, and to the rule of law. Your dedication and integrity stand as a beacon of rare brilliance, illuminating the path of justice and excellence for all. There is no doubt that your senior years on the bench will be as distinguished and impactful as the remarkable career you have crafted thus far. But may this new chapter also bring you the opportunity to enjoy more time with family,

attend more concerts, and embrace the joys of life beyond the courtroom.

It has been an honor to work alongside you and to know you so well, but above all, it has been the privilege of a lifetime to call you a friend through all these years. For that, and for everything, thank you.

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SURVEY

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

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INTRODUCTION

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

I. RULE AMENDMENTS

In October 2023, the Indiana Supreme Court issued an order amending Rule 22(A) of the Indiana Rules of Appellate Procedure to become effective January 1, 2024.[2] Rule 22 governs the "citation form" for appellate filings, and the prior

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1. The survey period is between October 1, 2023, and September 30, 2024.

2. Order Amending Rules of Appellate Procedure, No. 23S-MS-10 (Ind. Oct. 4, 2023) [hereinafter October 2023 Order].

version allowed only the Bluebook citation form and required parallel citations for certain cases.[3] The current version of Rule 22 now allows the use of the Association of Legal Writing Directors (ALWD) Guide to Legal Citation, eliminates any requirement for parallel citations, and provides clarity as to citations of more recent memorandum decisions, pinpoint citations, and designations of disposition of petitions to transfer.[4] Indiana Appellate Rule 22(A) reads:

(A) Citation to Cases.

> (1) All published opinions must be cited by giving the title of the case followed by the volume and page of the regional reporter (or official reporter if no regional reporter exists), the court of disposition, and the year of the opinion. *E.g., In re Leach*, 34 N.E. 641 (Ind. 1893); *Todd v. Coleman*, 119 N.E.3d 1137 (Ind. Ct. App. 2019). Parallel citations to two or more reporters are not required.
>
> (2) Memorandum decisions issued after January 1, 2023, must be cited by giving the title of the case followed by the appellate case number, the court of disposition, and the month, day, and year of the opinion followed by "(mem.)." *E.g., Steele v. Taber*, No. 22A-CT-925 (Ind. Ct. App. Jan. 17, 2023) (mem.).
>
> (3) Pinpoint citations must be included to the specific page(s) on which information appears. *E.g., Livingston v. State*, 113 N.E.3d 611, 614 (Ind. 2018) (per curiam); *Martinez v. State*, No. 22A-CR-1196, at *4 (Ind. Ct. App. Jan. 26, 2023) (mem.), *trans. denied*.
>
> (4) Designation of disposition of petitions for transfer must be included. *E.g., State ex rel. Mass Transp. Auth. of Greater Indianapolis v. Ind. Revenue Bd.*, 242 N.E.2d 642 (Ind. Ct. App. 1968), *trans. denied by an evenly divided court* 244 N.E.2d 111 (Ind. 1969); *Coplan v. Miller*, 179 N.E.3d 1006 (Ind. Ct. App. 2021), *trans. denied*.[5]

The order did not make any amendments to subsection (B) of Appellate Rule 22, which addresses citations to Indiana statutes, regulations, court rules, and county-local court rules.[6]

The above order was the only one amending the Indiana Rules of Appellate Procedure during the survey period.

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3. *Id.*
4. IND. R. APP. P. 22.
5. *Id.*
6. *Id.*; *see* October 2023 Order, *supra* note 2.

II. Case Law Interpreting Appellate Rules

The Court of Appeals and Supreme Court issued a number of decisions analyzing the Appellate Rules, including further developing Indiana's jurisprudence on issues such as the appealability of certain trial court orders, contents for a notice of appeal, and the proper appellate remedy after a trial court issues a deficient dispositional order.

A. Appealability of Orders

The survey also included three decisions involving the appealability of trial court orders—all from the Indiana Court of Appeals.

In *Anonymous Provider 2 v. Estate of Askew*, the trial court denied the defendant's motion to dismiss a medical malpractice claim under Indiana Trial Rule 12(B)(1).[7] The trial court certified the denial order as a "final and appealable judgment" pursuant to Indiana Trial Rule 54(B).[8] The defendant then appealed the denial order, and the plaintiff filed a motion to dismiss the appeal.[9]

The Court of Appeals dismissed the appeal.[10] The appellate court first noted that "[a] party may appeal from a final judgment and certain interlocutory orders."[11] The Court of Appeals then held that the appealed order was not a final judgment under Indiana Appellate Rule 2(H)[12] because the order "did not dispose of the [plaintiff's] single claim"; the order "did not possess the requisite degree of finality to be certifiable under Trial Rule 54(B)"; and none of the other categories of Appellate Rule 2(H) were applicable.[13] In so holding, the appellate court relied on several of its past cases, which collectively held that Trial Rule 54(B)[14] does not apply to actions involving single claims and a trial court's use

7. 223 N.E.3d 727, 728–29 (Ind. Ct. App. 2023).

8. *Id.* at 729.

9. *Id.*

10. *Id.* at 732.

11. *Id.* at 730 (citing Ind. App. Rs. 2(H), 5, 9(A)).

12. Indiana Appellate Rule 2(H) reads in full: "A judgment is a final judgment if: (1) it disposes of all claims as to all parties; (2) the trial court in writing expressly determines under Trial Rule 54(B) or Trial Rule 56(C) that there is no just reason for delay and in writing expressly directs the entry of judgment (i) under Trial Rule 54(B) as to fewer than all the claims or parties, or (ii) under Trial Rule 56(C) as to fewer than all the issues, claims or parties; (3) it is deemed final under Trial Rule 60(C); (4) it is a ruling on either a mandatory or permissive Motion to Correct Error which was timely filed under Trial Rule 59 or Criminal Rule 16; or (5) it is otherwise deemed final by law." Ind. R. App. P. 2(H).

13. *Anonymous Provider 2*, 233 N.E.3d at 731–32.

14. Trial Rule 54(B) reads in full: "When more than one [1] claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which

of Trial Rule 54(B)'s "magic language" does not automatically make an order a final judgment.[15] The Court of Appeals further held that the defendant was not properly appealing from an interlocutory order because the defendant did not "assert the right to appeal from the interlocutory order under Appellate Rule 14(A)"; the defendant had not "sought certification from the trial court or permission from this Court to file a discretionary interlocutory appeal" under Appellate Rule 14(B); and the defendant did "not state[] a statutory right to appeal."[16]

Anonymous Provider 2 is an important reminder for practitioners to understand that Trial Rule 54(B) does not apply to "single claim action[s]," and a trial court's use of Trial Rule 54(B)'s language in certifying an order as a final and appealable judgment does not definitely render that order appealable under Indiana Appellate Rule 2(H)(2). In single claim actions where the order does not dispose of that single claim, practitioners must "follow the proper procedure for bringing an interlocutory appeal."[17] Pursuing an appeal without taking into consideration these established appellate principles will prove ineffective, leading to dismissal of the appeal, as in *Anonymous Provider 2*.

Anonymous Provider 2 was not the only case addressing the appealability of orders denying motions to dismiss. In *Chitwood v. Guadagnoli*, the Court of Appeals reiterated that "[a]bsent specific exceptions . . . this court has jurisdiction only over final judgments and appeals from interlocutory orders, and [g]enerally the denial of a motion to dismiss under T.R. 12(B)(6) is not itself a final appealable order."[18] The Court of Appeals explained, "To be a final appealable order, the order 'must dispose of all issues to all parties, ending the particular case and leaving nothing for future determination.'"[19] *Chitwood* reinforces important concepts regarding what constitutes a final judgment.

In a case involving a testator's will, *Gerth v. Estate of Bloemer*, the Court of Appeals addressed the appealability of a trial court's order directing "certain

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adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. A judgment as to one or more but fewer than all of the claims or parties is final when the court in writing expressly determines that there is no just reason for delay, and in writing expressly directs entry of judgment, and an appeal may be taken upon this or other issues resolved by the judgment; but in other cases a judgment, decision or order as to less than all the claims and parties is not final." IND. R. TRIAL P. 54(B).

15. *Id.* (citing and relying on Legg v. O'Connor, 557 N.E.2d 675, 676 (Ind. Ct. App. 1990); Cardiology Assocs. of NW. Ind., P.C. v. Collins, 804 N.E.2d 151, 153 (Ind. Ct. App. 2004)).

16. *Id.* at 732.

17. *Id.* at 731.

18. 230 N.E.3d 932, 939 n.4 (Ind. Ct. App. 2024) (second alteration in original) (citing IND. R. APP. P. 5; Sch. City of Gary v. Cont'l Elec. Co., Inc., 301 N.E.2d 803, 808 (Ind. Ct. App. 1973)). The bulk of the *Chitwood* opinion addressed issues not relevant to the subject matter of this law review article: judicial notice of certain court records and whether a default judgment had expired.

19. *Id.* (citing Ramsey v. Moore, 959 N.E.2d 246, 251 (Ind. 2012)).

assets be distributed as specific bequests" to the testator's mother.[20] The testator's sister appealed, "purport[ing] to appeal from a final judgment," and the estate argued that the appellate court lacked jurisdiction over the appeal.[21]

The Court of Appeals disagreed that it lacked jurisdiction. The appellate court noted that, under Indiana Appellate Rule 5, it had jurisdiction "in all appeals from final judgments and 'over appeals of interlocutory orders under Rule 14.'"[22] The Court of Appeals first determined that the relevant order was not "a final judgment as defined by Indiana Appellate Rule 2(H)" and that Indiana Appellate Rule 14(B), which governs discretionary interlocutory appeals, also did not apply.[23] However, the appellate court determined that Indiana Appellate Rule 14(A)—which governs appeals that may be taken as a matter of right from certain interlocutory orders, including those for the payment of money—applied.[24] The Court of Appeals determined that the trial court's interlocutory order was for the payment of money because it "directed the Estate to pay $119,312.80 to [the testator's mother]" and that this "order obviously work[ed] to the detriment of [the testator's sister], who would stand to inherit approximately $11,185.58 if those funds are considered part of the residuary estate."[25] Accordingly, the Court of Appeals denied the estate's request to dismiss the appeal.[26]

In so holding, the Court of Appeals recognized some uncertainty existed as to whether Indiana Appellate Rule 14(A)(1) requires that an order for the payment of money directs a party to pay a specific sum to another party or to the court by a "date certain."[27] Recognizing that certain uncitable memorandum decisions read such a "date certain" requirement into Appellate Rule 14(A)(1), the *Gerth* panel declined to do so because the plain language of the rule contains no such requirement.[28]

Gerth reinforces general principles regarding appealability of orders and provides an interesting and arguably unconventional example of an interlocutory order that is for the payment of money and thus an interlocutory appeal of right. And in a published opinion, the Court of Appeals put to rest some uncertainty caused by prior memorandum decisions that had improperly read a "date certain" requirement into Indiana Appellate Rule 14(A)(1).

20. 240 N.E.3d 702 (Ind. Ct. App. 2024).
21. *Id.* at 705.
22. *Id.* (quoting IND. R. APP. P. 5).
23. *Id.*
24. *Id.* at 705–06.
25. *Id.* at 706.
26. *Id.*
27. *Id.* at 706 n.1.
28. *Id.*

B. Contents of a Notice of Appeal

The Indiana Court of Appeals briefly addressed one of the requisite contents of a notice of appeal during the survey period.

In *Sumrall v. LeSEA, Inc.*, the Court of Appeals addressed an appeal of an order granting a motion for judgment lien on real estate.[29] The factual and procedural history of the case is complex but ultimately unnecessary to delve into for purposes of highlighting Sumrall's significant in interpreting the appellate rules.[30]

After recounting the case's history and dealing with a weighty substantive issue,[31] the Court of Appeals briefly addressed the procedural issue of whether, under Indiana Appellate Rule 9(F)(3)[32] and 9(F)(8)(a),[33] a party forfeited a right to appeal the denial of a motion for continuance because the party failed to identify and include the order in its notice of appeal.[34] Pointing out that the party had raised the continuance issue in his appellant's brief and appendix and that the opposing party had addressed the substance of the issue on appeal, the Court of Appeals determined the issue was not forfeited.[35]

While the party in Sumrall was excused for his failure to strictly follow the Appellate Rules, practitioners are well advised to understand and include the necessary contents of a notice of appeal to avoid appellate challenges on this basis.

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29. 234 N.E.3d 230, 232 (Ind. Ct. App. 2024).

30. *See id.* at 232–34.

31. *Id.* at 232–40.

32. Indiana Appellate Rule 9(F)(3) explains that a notice of appeal must include the following: "(a) [t]he date and title of the judgment or order appealed; (b) [t]he date on which any Motion to Correct Error was denied or deemed denied, if applicable; (c) [t]he basis for appellate jurisdiction, delineating whether the appeal is from a Final Judgment, as defined by Rule 2(H); an interlocutory order appealed as of right pursuant to Rule 14(A) or 14(D); an interlocutory order accepted for discretionary appeal pursuant to Rule 14(B) or 14(C); or an expedited appeal pursuant to Rule 14.1; and (d) A designation of the court to which the appeal is taken." IND. R. APP. P. 9(F)(3)

33. Indiana Appellate Rule 9(F)(8) describes the necessary attachments to a notice of appeal: "(a) [a] copy of the judgment or order being appealed (including findings and conclusions in civil cases and the sentencing order in criminal cases); (b) [a] copy of the order denying the Motion to Correct Error or, if deemed denied, a copy of the Motion to Correct Error, if applicable; (c) A copy of all orders and entries relating to the trial court or agency's decision to seal or exclude information from public access, if applicable; (d) [a] copy of the order from the Court of Appeals accepting jurisdiction over the interlocutory appeal, if proceeding pursuant to Rule 14(B)(3) or 14(C)(5); (e) The documents required by Rule 40(C), if proceeding *in forma pauperis*." IND. R. APP. P. 9(F)(8).

34. *Sumrall*, 234 N.E.3d at 241.

35. *Id.*

C. Appellate Remedy Following Deficient Dispositional Order

In *G.W. v. State*, a juvenile case, the Indiana Supreme Court addressed, in part, the proper appellate remedy after a trial court issues a deficient dispositional order.[36] In that case, the juvenile court issued a dispositional order committing the juvenile to the Department of Correction (DOC) but included no specific findings to support the juvenile's commitment, as required by statute. Ind. Code section 31-37-18-9(a).[37] On appeal, the Court of Appeals affirmed, finding no abuse of discretion in the trial court's commitment of G.W. to the DOC because the record revealed G.W.'s history of delinquent behavior and failure to rehabilitate.[38] The appellate court recognized that the trial court's order lacked the statutorily required findings and remanded the case "for an amended dispositional order which includes the written findings and conclusions required by the statute."[39]

After the Court of Appeals issued its decision—but before it certified it—the juvenile court amended its dispositional order, including the findings required by statute.[40] G.W. successfully sought transfer.[41]

In a split opinion, the Indiana Supreme Court that in these cases—"[w]hen a juvenile court fails to enter the requisite findings of fact in its dispositional order"—an appellate court should "remand the case under Indiana Appellate Rule 66(C)(8) while holding the appeal in abeyance."[42] The Court set forth detailed instructions on the procedure:

> Appellate Rule 66(C)(8) expressly permits a reviewing court to issue an order directing the trial court to enter findings or to modify a judgment under Trial Rule 52(B). Trial Rule 52(B), in turn, applies when (among other circumstances) the required "special findings of fact" by the trial court "are lacking, incomplete," or otherwise "inadequate in form or content."
>
> Pending remand, and unless the DOC deems otherwise, the appellate court should maintain the juvenile's placement in the DOC to avoid disruption of rehabilitation and to ensure the safety of others. To limit potential harm to the juvenile from the delay in proceedings, the appellate court should instruct the juvenile court to issue its findings promptly—typically within 30 days. Upon entry of those findings, the

36. 231 N.E.3d 184, 189 (Ind. 2024).

37. *Id.*

38. G.W. v. State, No. 22A-JV-3076, 2023 WL 3476513, at *2–3 (Ind. Ct. App. May 16, 2023).

39. *Id.* at *3.

40. *G.W.*, 231 N.E.3d at 188.

41. *Id.*

42. *Id.* at 189–90.

> clerk of the juvenile court must certify them to the clerk of the appellate court for inclusion in the record.
>
> During this time, the appellate court retains jurisdiction to see that its instructions are carried out. If the juvenile court fails to comply with the order on remand, whether intentionally or by mistake, the juvenile may promptly seek a writ of mandate from the Court issuing the order to enforce compliance with its terms. [43]

The Indiana Supreme Court determined that this process served three "important purposes": (1) adherence to the statutory requirements, which exist to balance the competing interests of imposing the least restrictive setting for the child, community safety, and the best interests of the child; (2) preserving the distinct roles of trial courts and appellate courts and recognizing that appellate courts are not properly equipped to make factual findings; and (3) justification of the cost of juvenile detention.[44]

The Court pointed out that, in this case, the trial court acted "prematurely" because it issued its amended dispositional order while it lacked jurisdiction.[45] That is, under Appellate Rule 8, the Court of Appeals had "acquire[d] jurisdiction on the date the Notice of Completion of Clerk's Record is noted in the Chronological Case Summary," which was December 8, 2022.[46] At that point, the trial court "los[t] its jurisdiction over the case, and any judgment it render[ed] at that point [was] void."[47] And while the trial court's order—issued on June 27, 2023—followed the May 16, 2023, issuance of the Court of Appeals' decision, the appellate decision had not yet been certified, meaning the juvenile court had lacked jurisdiction to issue its amended order per Appellate Rule 65(E), which prohibits a trial court from taking "any action in reliance upon the opinion or memorandum decision" until it is certified.[48]

However, in G.W.'s specific case, the Indiana Supreme Court used its discretion under Indiana Appellate Rule 1[49] and remanded to the juvenile court for entry of the amended order, without holding the appeal in abeyance.[50] The Court so proceeded because both G.W. and the State agreed that the trial court's amended dispositional order was sufficient for resolution of the case.[51]

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43. *Id.* at 190 (internal citations and quotation marks omitted).
44. *Id.* at 190–91.
45. *Id.* at 192.
46. *Id.* (citing IND. R. APP. P. 8).
47. *Id.* (citing Jernigan v. State, 894 N.E.2d 1044, 1046 (Ind. Ct. App. 2008)).
48. *Id.* (citing IND. R. APP. P. 65(E)).
49. Indiana Appellate Rule 1 states, "These Rules shall govern the practice and procedure for appeals to the Supreme Court and the Court of Appeals. The Court may, upon the motion of a party or the Court's own motion, permit deviation from these Rules." IND. R. APP. P. 1.
50. *G.W.*, 231 N.E.3d at 192–93 (majority opinion).
51. *Id.*

Justice Slaughter dissented.[52] The dissent agreed that the trial court committed an error by not including the requisite statutory findings but believed that the error was subject to a harmless error review. "Requiring an automatic remand in these circumstances strikes me as busywork. It prevents an appellate court from reviewing the trial record independently to determine whether the juvenile court abused its discretion in placing a juvenile with the department of correction."[53] Justice Slaughter continued, "Busy appellate judges can insist that juvenile courts do what the statute requires of them. But if an appellate panel opts to do the juvenile court's legwork for it, I would not hold that the panel's undertaking is necessarily inadequate."[54] The dissent pointed out that, in this case, the Court of Appeals was entitled to affirm the juvenile court's judgment "given G.W.'s extensive history of delinquent behavior and his failure to respond to prior attempts at rehabilitation."[55]

G.W. provided significant detail on appellate procedure when there is an appeal of a deficient dispositional order. But *G.W.*'s impact may prove more far-reaching than in just juvenile matters, as the opinion interprets several different appellate rules, including on appellate jurisdiction.

III. Refining Our Appellate Procedure

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

A. A Party Must First Seek an Appellate Stay with the Trial Court

The Indiana Supreme Court reminded parties that Appellate Rule 39 requires parties to first seek an appellate stay at the trial court. In *Morales v. Rust*, the trial court "judge blocked enforcement of the law, finding it unconstitutional for a variety of reasons, triggering direct appeal to this Court."[56] The Indiana Supreme Court "point[ed] out that, while the State originally requested a stay with our Court, it bypassed Appellate Rule 39, which provides that 'a motion for stay pending appeal may not be filed . . . unless a motion for stay was filed and denied by the **trial court**. . . .'"[57] "That condition was not satisfied. While we nonetheless stayed the trial court's order, we admonish the State to follow the proper procedures in the future."[58] The Court emphasized

52. *Id.* at 193–94 (Slaughter, J., dissenting).
53. *Id.*
54. *Id.* at 194.
55. *Id.*
56. 228 N.E.3d 1025, 1030 (Ind. 2024), *reh'g denied* (Apr. 22, 2024), *cert. denied,* No. 23-1369, 2024 WL 4426707 (U.S. Oct. 7, 2024).
57. *Id.* at 1030 n.2 (quoting Ind. R. App. P. 39(B)).
58. *Id.*

that "we did not grant the State's motion, but instead ordered a stay on our own accord."[59]

B. Briefing Concludes with the Reply Brief

The Court of Appeals reminded parties that the reply brief ends briefing and additional motions should not be filed to extend briefing. The proper remedy in such a circumstance is a motion to strike. Appellate Rule 42 provides the following:

> Upon motion made by a party within the time to respond to a document, or if there is no response permitted, within thirty (30) days after the service of the document upon it, or at any time upon the court's own motion, the court may order stricken from any document any redundant, immaterial, impertinent, scandalous or other inappropriate matter.[60]

In *Tempest v. Fifth Third Bank, National Ass'n*, "[a]fter Tempest filed his reply brief on December 4, 2023, Tempest filed various repetitive and defective motions seeking leave to file an amended brief and amended appendices."[61] "Tempest's motions are inappropriate because briefing concluded when he submitted his reply brief, and Tempest's effort to reopen and prolong the briefing period is fundamentally unfair to Fifth Third. Therefore, by separate order, we grant Fifth Third's motion to strike."[62]

C. Each Appellants' Brief Must Contain a Facts Section

In *Matter of R.L.*, different parents of a blended family challenged an order finding children in need of services.[63] One parent "filed his own brief in this appeal on October 6, 2023. His Statement of Case and Statement of Facts were largely confined to the facts and procedural history pertinent to the issue he raised."[64] The other parents "filed a joint brief on October 10, adopting and incorporating by reference the Statement of Case and Statement of Facts from O.A.'s brief."[65] The Court of Appeals noted that Appellate Rule 46 "allows an *appellee* to do this, there is no provision for an *appellant* to do so."[66] The

59. *Id*.
60. IND. R. APP. P. 42.
61. Tempest v. Fifth Third Bank, Nat'l Ass'n, No. 23A-MF-2245, 2024 WL 2747525, at *3 n.3 (Ind. Ct. App. May 29, 2024), *aff'd on reh'g*.
62. *Id.*
63. *In re* R.L., 237 N.E.3d 652, 655 (Ind. Ct. App.), *trans. denied sub nom.*, A.A. v. Indiana Dep't of Child Servs., 245 N.E.3d 1019 (Ind. 2024).
64. *Id.* at 659 n.8.
65. *Id.*
66. *Id*.

Court of Appeals reminded parties that the appellate rules require appellants to include facts and procedural history relevant to the issues they raise on appeal:

> But even if R.L. and Mother could adopt and incorporate O.A.'s Statements of Case and Facts to cut down on repetition, they did not add the facts or procedural history relevant to the unrelated issues they raise. Their failure to include the relevant facts and procedural history has hindered our review of their separate appeal, and we remind them the Appellate Rules require an Appellant's Brief to have a Statement of Case and Statement of Facts describing the course of the proceedings and the facts "relevant to the issues presented for review."[67]

D. Parties Need to Cite the Record in Accordance with Appellate Rule 46

The Court of Appeals reminded parties to cite the record in accordance with Appellate Rule 46.

Appellate Rule 46(A)(8)(d) provides that "[i]f the admissibility of evidence is in dispute, citation shall be made to the pages of the Transcript where the evidence was identified, offered, and received or rejected, in conformity with Rule 22(C)."[68] In *Taylor v. State*, the Court of Appeals reminded a party that they needed to cite the transcript where a challenged exhibit was admitted:

> Additionally, in violation of Appellate Rule 46(A)(8)(d), Taylor does not cite the pages of the Transcript where Exhibits 18, 19, 28, and 29 were identified or where the State offered and the trial court admitted Exhibits 28 and 29. We remind counsel that this court should not have to search the record to find a basis for a party's argument.[69]

Appellate Rule 46(A)(8)(e) provides that "[w]hen error is predicated on the giving or refusing of any instruction, the instruction shall be set out verbatim in the argument section of the brief with the verbatim objections, if any, made thereto." In *Hamilton v. State*, the Court of Appeals noted that "Hamilton did not provide Bohdan's verbatim objection to this jury instruction as required by Indiana Appellate Rule 46(A)(8)(e)."[70]

67. *Id.* (quoting IND. R. APP. P. 46(A)(5) & (6)).

68. IND. R. APP. P. 46(A)(8)(d).

69. Taylor v. State, 236 N.E.3d 700, 710 (Ind. Ct. App. 2024).

70. Hamilton v. State, 233 N.E.3d 461, 478 (Ind. Ct. App.), *trans. denied*, 241 N.E.3d 1128 (Ind. 2024).

E. Parties Need to Comply with the Appellate Rules and Maintain a Civil Tone

The Court of Appeals reminded parties to both comply with the Appellate Rules and to maintain a civil tone:

> Before addressing Mother's allegations of error, we must note our concerns about the brief and appendices filed by Mother's counsel.
>
> Counsel's filings fail to comply with the Appellate Rules in several respects. To mention but a few, the appendix contains the CCS, the appealed order, and exhibits that are already included in the transcript, but it contains no pleadings. *See* Ind. Appellate Rule 50(a)(2)(f), (h) (stating an appendix should include pleadings necessary for resolution of the issues and should not include record material already included in the transcript). In this particular case, at the very least Mother's two Notices of Intent to Relocate were necessary for resolution of the issues she raises. Also, the statement of the facts section of the brief—which is intended to be a vehicle for informing this Court—improperly contains self-serving statements and argument which prevented us from relying on it as an accurate representation of the proceedings. *See* App.R. 46(A)(6) (instructing that facts should be stated "in accordance with the standard of review").
>
> But we are most troubled by the tone and content of Counsel's brief. The brief includes many instances of inappropriate editorializing and unfounded characterizations of Father and the magistrate. We caution counsel to temper his language and avoid the generally inflammatory tone of this brief in future filings with this Court. *See Clark v. Clark*, 578 N.E.2d 747, 749 (Ind. Ct. App. 1991) (noting a brief should not be used "as a vehicle for the conveyance of hatred, contempt, insult, disrespect, or professional discourtesy of any nature") (quotation omitted); *see also WorldCom Network Servs., Inc. v. Thompson*, 698 N.E.2d 1233, 1236–37 (Ind. Ct. App. 1998) ("[O]verheated rhetoric is unpersuasive and ill-advised. Righteous indignation is no substitute for a well-reasoned argument.") (footnote omitted) (opinion on reh'g). And—as will be discussed below—Counsel relies on statutory language that was amended or removed altogether at least three years before the brief was filed in support of an argument. We remind counsel of his professional responsibility to provide competent representation to his client by, in part, "keep[ing] abreast of changes in the law[.]" Ind. Professional Conduct Rule 1.1, Cmt. ¶ 6. "A brief should not only present the issues to be decided on appeal, but it should be of material assistance to the court in deciding those issues." *Young v. Butts*, 685

N.E.2d 147, 151 (Ind. Ct. App. 1997). This brief fails to meet that standard.[71]

IV. INDIANA'S APPELLATE COURTS

A. Case Data from the Indiana Supreme Court

During the 2023 fiscal year,[72] the Indiana Supreme Court disposed of 735 cases, including 368 criminal cases, 254 civil cases, 0 tax cases, 35 original actions, 0 board of law examiners case, 0 mandate of funds case, 73 attorney discipline cases, 2 judicial discipline case, 2 certified questions, and 1 miscellaneous case.[73] The court heard 44 oral arguments during the fiscal year, 20% of which were heard before the court decided to grant transfer.[74] The court issued 47 majority opinions and 29 non-majority opinions.[75] Chief Justice Rush issued 9 majority opinions, Justice Massa issued 7 majority opinions, Justice Slaughter issued 6 majority opinions, Justice Goff issued 10 majority opinions, and Justice Molter issued 8 majority opinions.[76] The Court also issued 7 per curiam decisions.[77] The court issued unanimous decisions 60% of the time.[78]

B. Case Data from the Indiana Court of Appeals

During 2023,[79] the Court of Appeals disposed of 2,979 cases.[80] This is an increase from 2022, when the Court of Appeals disposed of 2,971 cases, and 2021, when the Court of Appeals disposed of 2,564 cases.[81] In 2023, the court disposed of 1,596 criminal cases, 917 civil cases, and 466 other cases.[82] The court affirmed the trial court 84.2% of the time, with the court affirming 90.4% of criminal cases, 92.5% of post-conviction relief cases, and 68.4% of civil cases.[83] The average age of cases pending before the Court of Appeals at the end

71. Pilkington v. Pilkington, 227 N.E.3d 885, 892 n.4 (Ind. Ct. App. 2024).

72. The Indiana Supreme Court fiscal year ran from July 1, 2023, to June 30, 2024. *See* IND. SUP. CT., ANNUAL REPORT 2023–2024 11 (2024).

73. *Id.* at 11.

74. *Id.* at 15.

75. *Id.* at 18.

76. *Id.*

77. *Id.*

78. *Id.*

79. The Indiana Court of Appeals 2023 annual report covers January 1, 2023, through December 31, 2023. *See* IND. CT. OF APPEALS, 2023 ANNUAL REPORT 4 (2023).

80. *Id.* at 1.

81. *Id.*

82. *Id.*

83. *Id.* at 2.

of 2023 was 2.1 months, compared with 1.7 months at the end of 2022.[84] In addition to deciding cases, the court issued 7,834 orders.[85]

C. Judge Riley Retires from Indiana Court of Appeals.

On June 18, 2024, Judge Patricia A. Riley announced she would retire "from the Court of Appeals of Indiana on August 30, 2024."[86] Judge Riley was the "fourth woman ever to be appointed to the Court," and she "was appointed in 1994 by Governor Evan Bayh."[87] "During her thirty-year tenure, she has authored approximately 4,232 majority opinions and participated in 439 oral arguments."[88] "Prior to serving on the Court of Appeals, Judge Riley served the public as a Deputy Prosecutor in Marion County and as a Public Defender in Marion and Jasper counties. She also served as a judge of the Jasper Superior Court from 1990 to 1993."[89] Interestingly, Judge Riley had "extensive international legal experience":

> In 2008, she cofounded the Legal Aid Centre of Eldoret, Kenya (LACE), which provides legal access to justice for HIV/AIDS patients in the AMPATH medical center. In 2011, Judge Riley traveled with the Washington, D.C.-based International Judicial Academy to The Hague, Netherlands, to observe the International Criminal Court and two International Criminal Tribunals hearing cases from Sierra Leone and the former Yugoslavia. Then, in 2012, she participated in the 3rd Sino-U.S. Law Conference, which was held in Beijing at the National Judges College of the People's Republic of China, which oversees all aspects of that country's judicial training, placement and promotion. In 2013, she attended the Justice Academy of Turkey where she presented her paper about Ethics Rules in the United States. In 2014, the Pentagon granted her and others from IU McKinney's Program in International Human Rights Law special "NGO Observer Status" to monitor hearings at Guantanamo Bay, Cuba.[90]

"For these reasons and many more, the Court of Appeals will always be a better institution because of the contributions and service of Judge Patricia A. Riley."[91]

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84. *Id.*
85. *Id.*
86. *Court of Appeals of Indiana Judge Patricia A. Riley Announces Retirement*, IND. JUD. BRANCH (June 18, 2024), https://www.in.gov/courts/appeals/news/2024-0618/ [https://perma.cc/YV4U-3QT8].
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*

We thank Judge Riley for her distinguished service and for her many contributions to the Indiana judiciary.

D. Judge Crone Retires from Indiana Court of Appeals

On September 3, 2024, Judge Terry A. Crone announced that he would "retire from the Court of Appeals of Indiana on November 5, 2024."[92] Judge Crone was raised in South Bend, and he is "a graduate of DePauw University and Notre Dame Law School."[93] "He was elected to three terms as judge of the St. Joseph Circuit Court before Governor Kernan appointed him to the Court of Appeals in 2004."[94] Judge Crone authored "over 2,988 majority opinions and participat[ed] in over 245 oral arguments."[95] Judge Crone "has spent his career helping remove barriers to justice for disadvantaged populations":

> He helped found a program in South Bend to familiarize minority high school students with the law and related fields and was a founding member of the South Bend Commission on the Status of African-American Males and the St. Joseph County Coalition Against Drugs. As Circuit Court judge, he also initiated the first Spanish-speaking program for public defenders in St. Joseph County.[96]

Judge Crone has been a "tireless advocate of elevating the quality of the practice of law," serving on many committees and frequently speaking "at legal education programs."[97] "'Judge Crone's tenure on the Court of Appeals has been marked by his tenacity, dedication, and good humor,' said Chief Judge Robert R. Altice, Jr., current Chief Judge of the Court of Appeals. 'He will be missed both as a quality judge and a first-rate colleague.'"[98] We thank Judge Crone for his distinguished career and many contributions to Indiana's appellate practice.

E. Judge DeBoer Sworn in at Indiana Court of Appeals

On October 14, 2024, Judge Mary A. DeBoer was sworn in as a judge on the Indiana Court of Appeals.[99] Judge DeBoer "grew up in Kalamazoo,

92. *Court of Appeals of Indiana Judge Terry A. Crone Announces Retirement*, IND. JUD. BRANCH (Sept. 3, 2024), https://www.in.gov/courts/appeals/news/2024-0903/ [https://perma.cc/XP6R-4CDL].

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Robing Ceremony of the Honorable Mary A. DeBoer*, IND. JUD. BRANCH (Nov. 14, 2024), https://www.in.gov/courts/appeals/news/2024-1114/ [https://perma.cc/5CSE-3T4D].

Michigan until she permanently relocated to Valparaiso, Indiana in 1990."[100] Judge DeBoer "graduated with honors from Western Michigan University in 1989 and Valparaiso University School of Law in 1993."[101] "Judge DeBoer served as a deputy prosecutor and then as magistrate for Starke and Porter Counties."[102] "From 2007 to 2010, her service as a deputy prosecutor was focused on domestic and family violence in Starke County."[103] "As a Porter Superior Court Magistrate, she started a family law facilitation program for indigent litigants to resolve dissolution issues."[104] "Governor Eric J. Holcomb appointed her to the Porter Circuit Court in 2019, and then to the Court of Appeals of Indiana in September 2024."[105] "Following her appointment to the Porter Circuit Court in 2020, she led the Domestic Violence Committee in Porter County until 2024, bringing together numerous community partners to collaborate on domestic and family violence issues."[106] We look forward to Judge DeBoer's service on the Court of Appeals for many years to come.

CONCLUSION

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

100. *Judge Mary A. DeBoer*, IND. JUD. BRANCH, https://www.in.gov/courts/appeals/judges/mary-deboer/ [https://perma.cc/5UPK-VCR5] (last visited Apr. 4, 2025).
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*

BANKING, BUSINESS, AND CONTRACT LAW

FRANK SULLIVAN, JR.[*,**]

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This Article surveys banking, business, and contract law decisions of the Indiana Supreme Court ("Supreme Court") and Indiana Court of Appeals

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[**] This Article is primarily adapted from remarks delivered on September 12, 2024, at the Annual Indiana Law Update CLE program organized by Justice Mark S. Massa and Judge Leanna K. Weissmann. The author thanks Justice Massa and Judge Weissmann for including him in this distinguished CLE program, and Megan Ward Esterline for her research in connection with those remarks. The author also attended and found extremely helpful the Indianapolis Bar Association 2024 Commercial Law Update Year in Review: State Court Commercial Law Cases (March 26, 2025) by Reynold T. Berry and Joshua W. Casselman, and the materials distributed in connection therewith.

("Court of Appeals") between September 1, 2023, and August 31, 2024 (the "Survey Period").[1]

This Article will not itemize every banking, business, and contract law case decided during the Survey Period. Instead, it will highlight cases illustrating some of the big-picture issues in these fields, as well as several practice pointers for both transaction lawyers and litigators. This Article also gives a brief update on the Supreme Court's commercial courts initiative.[2]

I. COMMERCIAL COURTS UPDATE

The Supreme Court established "Commercial Courts" in six Indiana counties in 2019 and added courts in four additional counties two years later.[3] Commercial courts seek to streamline a court's efficiency, educate judges and litigants, and create predictable business case law that encourages companies to incorporate or complete transactions within the state.[4] In this regard, the Court has enhanced the functionality of Odyssey, its statewide online court case management system, to include substantive order searches of commercial court dockets.[5]

Early in the Survey Period, Marion Superior Court Judge Heather A. Welch announced her resignation from the bench. Judge Welch was a leader in establishing commercial courts in Indiana and presided over the busiest commercial court in Indianapolis. Her contributions to the success of the commercial court project and her contribution to the state's business and commercial law cannot be overstated. She was replaced on the Commercial

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1. This Article marks the eleventh consecutive year that the author has surveyed Indiana banking, business, and contract law for the *Indiana Law Review,* and he is grateful to the Editors-in-Chief, other editors, and staff of the ILR for their support and assistance. He is grateful as well to Judge Margret G. Robb, who is the proximate cause of this effort. Prior Survey Articles are cited *passim* by year covered, e.g., "2022–2023 Survey Article." All the Articles are denominated "Banking, Business, and Contract Law." Here are the full citations for the prior ten Articles: 48 IND. L. REV. 1195 (2015) (covering 2013–2014); 49 IND. L. REV. 981 (2016) (covering 2014–2015); 50 IND. L. REV. 1179 (2017) (covering 2015–2016); 51 IND. L. REV. 945 (2018) (covering 2016–2017); 52 IND. L. REV. 635 (2019) (covering 2017–2018); 53 IND. L. REV. 821 (2021) (covering 2018–2019); 54 IND. L. REV. 783 (2022) (covering 2019–2020); 55 IND. L. REV. 461 (2022) (covering 2020–2021); 56 IND. L. REV. 669 (2023) (covering 2021–2022); and 57 IND. L. REV. 811 (2024) (covering 2022–2023).

2. *Commercial Courts Committee*, IND. JUD. BRANCH, https://www.in.gov/courts/iocs/committees/commercial-courts/ [https://perma.cc/9VZS-UNY7] (last visited Feb. 20, 2025).

3. Sydney Byerly, *New Commercial Courts are Open in 10 Indiana Counties*, The STATEHOUSE FILE (Sept. 14, 2022), https://www.thestatehousefile.com/briefs/new-state-commercial-courts-are-open-in-10-indiana-counties/article_edb29962-3472-11ed-a95c-9743a225094a.html [https://perma.cc/3HNW-E3ZS]; *Vigo County to Open a Commercial Court*, TERRE HAUTE TRIBUNE-STAR (Dec. 2, 2020), https://www.tribstar.com/news/local_news/vigo-county-to-open-a-commercial-court/article_fa8db806-1a13-5ce5-95a3-587f853e0a2b.html.

4. Tyler Moorhead, *Business Courts: Their Advantages, Implementation Strategies, and Indiana's Pursuit of Its Own*, 50 IND. L. REV. 397, 398 (2016).

5. TERRE HAUTE TRIBUNE-STAR, *supra* note 3.

Court by Judge Christina R. Klineman.[6] Another Commercial Court Judge who made important contributions to the project, Judge Cristal C. Brisco of St. Joseph County, was appointed by President Biden to the United States District Court for the Northern District of Indiana. She was succeeded on the Commercial Court by Judge Stephanie E. Steele.[7]

II. BANKING LAW

The mandate of this Article encompasses "banking," and the author includes within that charge litigation, including debt collection actions, between financial institutions and their borrowers.[8] In past Surveys, this has often been the smallest section of the Article. However, during this Survey Period there were more than a few cases of particular interest, resulting in this section being approximately equal in length to the others combined.

A. Accord and Satisfaction

Mayes v. Goldman Sachs Bank USA reviews the law of "accord and satisfaction" with a most-familiar fact pattern. [9]

The bank demanded payment of $9000 due on an installment loan.[10] The borrower's lawyer sent the bank a check for $200 in a letter saying that cashing the check would be considered payment in full.[11] The bank cashed the check and later sued to collect the remaining amount of the debt.[12] Borrower defended, arguing accord and satisfaction under UCC § 3-311: A "claim is discharged if . . . [t]he instrument or an accompanying written communication contained a conspicuous statement . . . that the instrument was tendered as full satisfaction of the claim."[13]

The trial court granted summary judgment for the lender and the Court of Appeals affirmed.[14] The Court of Appeals was correct.

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6. Alexa Shrake, *Klineman Appointed to Fill Welch's Upcoming Vacancy on Commercial Court*, IND. LAW. (Dec. 21, 2023), https://www.theindianalawyer.com/articles/klineman-appointed-to-fill-welchs-upcoming-vacancy-on-commercial-court [https://perma.cc/5WX6-NZYN].

7. *Judge Steele Appointed to Commercial Court*, IND. LAW. (Mar. 21, 2024), https://www.theindianalawyer.com/articles/judge-steele-appointed-to-commercial-court [https://perma.cc/FE32-PF25].

8. *See* discussion of debt collection actions not involving financial institutions discussed *infra* Part IV, CONTRACTS.

9. *Mayes*, 232 N.E.3d 1164 (Ind. Ct. App. Mar. 27, 2024).

10. *Id.* at 1165.

11. *Id.*

12. *Id.* at 1166.

13. *Id.* The U.C.C. § 3-311 has been adopted and codified in Indiana as IND. CODE § 26-1-3.1-311 (2024).

14. *Mayes*, 232 N.E.3d at 1166.

UCC § 3-311 deals with precisely this situation: the person against whom a claim like the bank asserts here:

> may attempt an accord and satisfaction of the disputed claim by tendering a check to the [bank] for some amount less than the full amount claimed. . . . A statement will be included on the check or in a communication accompanying the check to the effect that the check is offered as full payment or full satisfaction of the claim. Frequently, there is also a statement to the effect that obtaining payment of the check is an agreement by the claimant to a settlement of the dispute for the amount tendered.[15]

Before enactment of revised Article 3, the case law was in conflict over the question of whether obtaining payment of the check had the effect of an agreement to the settlement proposed by the borrower.[16]

Under the common law rule, a seller or lender, by obtaining payment of the check, accepted the offer of compromise by a buyer or borrower.[17] Under the common law rule, a seller or borrower could refuse the check or could accept it subject to the condition stated by the buyer or borrower, but the seller or lender couldn't accept the check and refuse to be bound by the condition.[18] Crucially, however, and directly applicable in this case, the rule applied only to an unliquidated claim or a claim disputed in good faith by the buyer or borrower.[19]

Section 3-311 "follows the common law rule with some minor variations that reflect modern business conditions."[20] It is based on a belief that the common law rule produces a fair result and that informal dispute resolution by full satisfaction checks should be encouraged.[21]

Official Comment 4 to Section 3-311 provides that:

> "Good faith" in subsection (a)(i) is defined in Section 3-103(a)(6) as not only honesty in fact, but the observance of reasonable commercial standards of fair dealing.[22] The meaning of "fair dealing" will depend upon the facts in the particular case. For example, suppose an insurer tenders a check in settlement of a claim for personal injury in an accident clearly covered by the insurance policy. The victim is in desperate straits and the amount of the check is very small in relationship to the extent of the injury and the amount recoverable under the policy. If the trier of fact determines that the insurer was taking

15. U.C.C § 3-111 cmt. 1 (AM. L. INST. & UNIF. COMM'N 2022).
16. *Id.*
17. *Id.* § 3-311 cmt. 2.
18. *Id.*
19. *Id.* (*citing* RESTATEMENT (SECOND) OF CONTRACTS § 281 cmt. d (AM. L. INST. 1981)).
20. *Id.*
21. *Id.* § 3-311 cmt. 3.
22. *Id.* § 3-311(a).

> unfair advantage of the victim, an accord and satisfaction would not result from payment of the check because of the absence of good faith by the insurer in making the tender.[23]

However, "Section 3-311 does not apply to cases in which the debt is a liquidated amount and not subject to a bona fide dispute."[24] This was what *Mayes* turned on: there was no bona fide dispute or question but that Mayes owed the entire amount to the bank.[25]

In conclusion, the person seeking the accord and satisfaction has the burden of proving that the requirements of subsection (a) are met.[26] If that person also proves that the statement required by subsection (b) was given, the claim is discharged.[27]

B. Proceedings Supplemental

Converging Capital, LLC v. Steglich discusses the application of—really the non-application of—statutes of limitations to proceedings supplemental.[28]

Resurgence Financial sued its debtor to collect an unpaid debt and received a money judgment of about $6300 in 2006.[29] The debt was never collected and ultimately sold or otherwise assigned to Converging Capital in 2013.[30] Converging Capital brought proceedings supplemental to collect the underlying debt in 2022.[31]

There are two statutes of limitations implicated here: the familiar 10-year statute of limitations on actions upon judgments of courts of record,[32] and a more obscure one that holds that leave of the court is required to obtain execution more than 10 years after entry of judgment.[33] On grounds that Converging Capital had waited too long in violation of these statutes, the trial court dismissed Converging Capital's claim.[34]

The Court of Appeals reversed.[35] The Court said that Indiana law does not impose any limitations period on the initiation of proceedings supplemental.[36]

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23. *Id.* § 3-311 cmt. 4.
24. *Id.*
25. *Id.* § 3-311, cmt. 4; *see also* Mayes v. Goldman Sachs Bank USA, 232 N.E.3d 1164, 1170 (Ind. Ct. App. Mar. 27, 2024).
26. *Mayes,* 232 N.E.3d at 1164.
27. *Id.*
28. Converging Capital, LLC v. Steglich, 234 N.E.3d 902 (Ind. Ct. App. May 1, 2024).
29. *Id.* at 903.
30. *Id.*
31. *Id.*
32. IND. CODE § 34-11-2-11 (2024).
33. *Id.* § 34-55-1-2(a).
34. *Steglich*, 234 N.E.3d at 903.
35. *Id.* at 906.
36. *Id.* at 904 (citing Lewis v. Rex Metal Craft, Inc., 831 N.E.2d 812, 818, 820–21 (Ind. Ct. App. 2005)).

This is "[b]ecause proceedings supplemental are a continuation of the original action, rather than an 'action' on a judgment of a court of record, they are not subject to the ten-year statute of limitations for actions for the payment of money."[37]

As to the execution statute, the court acknowledged that there is sometimes confusion regarding execution and the equitable remedy of proceedings supplemental.[38] The only issue presented in proceedings supplemental is that of affording the judgment-creditor relief to which the creditor is entitled under the terms of the judgment.[39] Because proceedings supplemental are neither an "action" nor an "execution," the judgment creditor "need not have obtained leave of the court for an action beyond ten years" in order to initiate supplemental proceedings.[40]

C. Repossession of Collateral After Default

Centier Bank v. 1987 Troy Road LLC, is a sharp reminder to secured creditors that they must not be dilatory in exercising their rights, including the right to take possession of collateral.[41] A bank held a security interest in the property of a construction company securing a loan commitment of approximately $6,000,000.[42] The debtor's property—the collateral—was located on premises leased from an unrelated third party.[43]

The debtor defaulted on its obligation to the bank and the bank's collection lawsuit sought to recover the debtor's property in which it had a security interest from the leased premises.[44] However, the bank did not name the owner of the premises as a party in its lawsuit.[45] This occurred in February 2021.[46]

The debtor also defaulted on the lease, which the property owner terminated.[47] The property owner took possession of the premises in May 2021, and then sold the premises to an unrelated third party who took possession of the premises, and personal property within, at the end of August 2021.[48]

In January 2022, the bank tried to amend its complaint to add the property owner as a party in an effort to recover the debtor's personal property in which

37. *Id.* (quoting Lewis v. Rex Metal Craft, Inc., 831 N.E.2d 812, 821 (Ind. Ct. App. 2005)).
38. *Steglich*, 234 N.E.3d at 905.
39. *Id.*
40. *Id.* at 905 (citing Lewis v. Rex Metal Craft, Inc., 831 N.E.2d 812, 817 (Ind. Ct. App. 2005)).
41. Centier Bank v. 1987 Troy Rd. LLC, No. 23A-MF-1261, 2024 WL 340327 (Ind. Ct. App. Jan. 30, 2024) (unpublished disposition); *see* U.C.C § 9-609(a)(1) ("After default, a secured party: (1) may take possession of the collateral.").
42. *Centier*, 2024 WL 340327, at *1.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*

it had had a security interest.[49] At the time that the property owner was terminating the lease, the bank's lawyer had advised the property owner that the bank believed all of its property would be removed from the premises by May 3, 2021.[50]

The trial court refused to permit the bank to amend its complaint and the Court of Appeals affirmed.[51] "The Property Owner voluntarily gave the Bank the time the Bank requested to get its property, and the Property Owner had no obligation to sit around indefinitely awaiting confirmation from the Bank."[52]

D. The Mortgage Electronic Registration System (MERS)

V.L. Davis Properties v. Deutsche Bank National Trust Co. as Trustee of Accredited Mortgage Loan Trust 2004-3 Asset Backed Notes is a nice reprise of a very significant Indiana Supreme Court decision from a dozen years before, *Citimortgage, Inc. v. Barabas,* written by Justice Mark Massa.[53]

During the last several decades of the twentieth century and first several of this, practice with residential mortgages has evolved to the point where it would be highly unusual if the originating lender did not almost immediately assign the mortgage to another commercial entity as part of a process known as "mortgage securitization."[54]

The problem the court addressed in *Barabas*—and which faced the court in *V. L. Davis*—is grounded in this evolution of practice. A homebuyer borrows money from a lender, securing the repayment obligation with a mortgage on the purchased residence.[55] In the olden days, the lender would be content to collect the principal and interest on the loan when due.[56] But today, the lender sells the loan and mortgage to financial intermediaries who "pool" the loans; the payments by the homeowner are forwarded to the mortgage pool. Interests in these mortgage pools—which are usually referred to as "mortgage-backed securities"—are sold to investors.[57] The homebuyers' payments are processed to follow the same chain so that the investors ultimately receive the payments of principal and interest in accordance with the terms of their investment.[58]

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49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at *2.
53. V.L. Davis Properties v. Deutsche Bank Nat'l Tr. Co., 243 N.E.3d 340 (Ind. Ct. App. 2024); Citimortgage, Inc. v. Barabas, 975 N.E.2d 805 (Ind. 2012).
54. *Id.* (citing Christopher L. Peterson, Foreclosure, *Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1367–68 (2009–2010)); David Messerschmitt, Note, *Overview of the Subprime Mortgage Market*, 27 REV. BANKING & FIN. L. 3, 3 (2007); and Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 WM. & MARY L. REV. 111, 116 (2011–2012).
55. *Barabas*, 975 N.E.2d at 809.
56. *Id.* at 808.
57. *Id.*
58. *Id.* at 808–09.

The problem is that each time a mortgage is assigned from a lender to a mortgage pool, the new mortgagee's priority is jeopardized unless the recording of the mortgage is updated.[59] To address this problem, a consortium of financial institutions created Mortgage Electronic Registration Systems, Inc. (MERS), in the mid-1990s.[60]

The idea was that instead of the lending financial institution being listed on a residential mortgage as the mortgagee, MERS is shown as both the mortgagee and the "nominee" of the lender.[61] The agreement among MERS members is that they can buy and sell loans and mortgages among themselves without recording an assignment of the mortgage.[62] In the event of default, MERS advises the member bank that currently owns the loan, and that bank can foreclose on the borrower.[63]

In *Barabas*, the holder of a second mortgage foreclosed and sent notice to the original lending bank, but not to MERS.[64] Only after the property had been sold at a Sheriff's sale did CitiMortgage—which by then was the owner of the first mortgage loan—try to intervene to protect its interest.[65] The Court concluded that the parties intended to designate MERS as the lender's agent for service of process in any foreclosure proceeding.[66] As MERS had not been served, the Court held that CitiMortgage was entitled to relief from the judgment of foreclosure.[67]

V.L. Davis was analogous to *Barabas*. When a homeowners' association foreclosed on the mortgagor, it gave notice to the lender but not to MERS.[68] When the bank later foreclosed, the court held that the bank retained its first mortgage lender status because MERS had not been sued or notified in the homeowners' proceeding.[69]

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59. *Id.* at 809.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* (citing Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 WM. & MARY L. REV. 111, 116 (2011); and Kevin M. Hudspeth, *Clarifying Murky MERS: Does Mortgage Electronic Registration Systems, Inc., Have Authority to Assign the Mortgage Note in a Standard Illinois Foreclosure Action?*, 31 N. ILL. U. L. REV. 1, 9 (2010)).

64. *Id.* at 814–15.

65. *Id.* at 811.

66. *Id.* at 816.

67. V.L. Davis Properties v. Deutsche Bank Nat'l Tr. Co., 243 N.E.3d 340 (Ind. Ct. App. Aug. 21, 2024).

68. *Id.*

69. *Id.* at 818.

E. "Who Owns the [Student Loan] Debt?"

King v. National Collegiate Student Loan Trust 2006-4 is a collection case in which the underlying debt was a student loan.[70]

In prior Survey Articles, the author has periodically discussed debt collection issues under the heading "Who Owns the Debt?"[71] This began in the wake of the Great Recession's mortgage foreclosure crisis, and many defendant mortgagors were challenging plaintiffs' documentation of their entitlement to recovery.[72] In fact, several mortgage loan servicers temporarily halted foreclosure proceedings in 2010 following allegations that the documents accompanying judicial foreclosures had been inappropriately signed or notarized.[73] Then, in 2011, a major study of the issue by the United States Government Accountability Office reported "pervasive problems with [mortgage servicers'] document preparation."[74]

The very first of these Survey Articles discussed a number of cases in which mortgagors were quick to demand evidence that parties bringing foreclosure actions against them were actually the successors in interest to their original mortgagees.[75] But mortgagors rarely prevailed, and by 2019, real estate lenders had pretty much gotten their act together on this.[76] Along the way, there were also cases where credit card lenders were denied summary judgment because they did not have their paperwork.[77] Finally, there were cases where lenders had difficulties collecting on student loans for exactly the same reason.[78]

It seems like the entire industry has gotten its act together, and *King* is an illustration of that. The trial court granted a student loan lender assignee's motion for summary judgment on unpaid student loans.[79] On appeal, the student challenged the plaintiff's evidence relying on one of those cases just alluded

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70. *King*, 232 N.E.3d 646 (Ind. Ct. App. Feb. 21, 2024).

71. *See 2013–2014 Survey Article*, *supra* note 1, at 1195.

72. *Id.*

73. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11–433, MORTGAGE FORECLOSURES: DOCUMENTATION PROBLEMS REVEALED NEED FOR ONGOING REGULATORY OVERSIGHT 1 (2011).

74. *Id.*

75. *2013–2014 Survey Article*, *supra* note 1, at 1195.

76. *2018–2019 Survey Article*, *supra* note 1, at 824-26.

77. *See, e.g.*, Menendez v. CACH, LLC, No. 29A02-1511-CC-2026, 2016 WL 4442487 (Ind. Ct. App. Aug. 23, 2016); Reef v. Asset Acceptance, LLC, 43 N.E.3d 652 (Ind. Ct. App. 2015), discussed in *2017–2018 Survey Article*, *supra* note 1, *but see* Yuan v. Wells Fargo Bank, N.A., 162 N.E.3d 481, 481 (Ind. Ct. App. 2020), *and* Taylor v. Public Serv. Credit Union, No. 20A-CC-2233, 2021 WL 2643646 (Ind. Ct. App. June 28, 2021), discussed in *2020–2021 Survey Article*, *supra* note 1, at 467-68.

78. *See* Jones v. Shenandoah Funding Tr., No. 20A-CC-553, 2020 WL 6040233 (Ind. Ct. App. Oct. 13, 2020), discussed in *2020–2021 Survey*, *supra* note 1, at 468-69; *but see* Nat'l Collegiate Student Loan Tr. 2006-4 v. Vance, No. 18A-CC-1061, 2018 WL 5316987 (Ind. Ct. App. Oct. 29, 2018), discussed in *2018–2019 Survey*, *supra* note 1, at 826–27.

79. King v. Nat'l Collegiate Student Loan Tr. 2006-4, 232 N.E.3d 646, 649 (Ind. Ct. App. Feb. 21, 2024).

to.[80] But the Court of Appeals found that that the lenders had met the standards found wanting that case and affirmed the trial court, using as supporting authority several more recent Court of Appeals decisions in which student loan lenders prevailed.[81]

The take-away here is that a borrower in an action foreclosing on a mortgage, credit card, or student loan debt, can hold the creditor's feet to the fire and make it prove it owns the debt. While most of the cases in recent years have found creditors able to do so, creditors have the burden of proof in doing so. This is appropriate in this day and age when originating lenders of all sorts of credits almost always sell or assign their debts to others, either for collection or as part of a securitization process, as illustrated by *Barabas*.[82]

F. Fair Debt Collection Practices Act (FDCPA)

The Court of Appeals decided two substantial cases under the Fair Debt Collection Practices Act during the Survey Period.

Rock Creek Capital, LLC v. Tibbett is a very serious and sophisticated piece of work by Judge Elaine Brown in a student loan case that implicates the Fair Debt Collection Practices Act (FDCPA).[83]

Brianna Tibbett enrolled in a proprietary higher education program and took out a student loan from the owner of the school, a company called Ross Education LLC.[84] It is alleged that the student loan went into default and that Ross sold the loan to Rock Creek Capital LLC.[85] The case on appeal is Rock Creek's lawsuit against Tibbett to collect.[86] Note that Ross *sold* the loan to Rock Creek; Rock Creek *owns* the debt; it's not just Ross's agent collecting the debt.[87]

Tibbett defended not by claiming that she didn't owe the money—nor by claiming that Rock Creek didn't own the debt.[88] Instead, she argued that Rock Creek was a rogue debt collector, collecting debts without complying with relevant consumer protection statutes governing debt collectors.[89]

Consider "repo" men who don't make any loans themselves but are hired to recover collateral from debtors who have defaulted. They are quintessential "debt collectors." At the other end of the spectrum is Old Reliable National Bank, which engages in commercial and consumer lending, and if one of its

80. *Id.* at 651 (discussing Holmes v. National Collegiate Student Loan Tr., 94 N.E.3d 722, 724 (Ind. Ct. App. 2018)).

81. *Id.* 651–52 (citing Smith v. National Collegiate Student Loan Tr., 153 N.E.3d 222 (Ind. Ct. App. 2020), *and* Akinlemibola v. National Collegiate Student Loan Tr. 2007-01, 205 N.E.3d 1014, 1017 (Ind. Ct. App. 2023)).

82. *See supra* notes 58–70 and accompany text.

83. Rock Creek Cap., LLC v. Tibbett, 231 N.E.3d 256 (Ind. Ct. App. Mar. 13, 2024).

84. *Id.* at 258.

85. *Id.*

86. *Id.*

87. *Id.* at 264.

88. *Id.*

89. *Id.*

customers defaults on the loan, Old Reliable sometimes has to go to court to collect. We don't think of Old Reliable as a debt collector.

But somewhere in between are enterprises like Rock Creek—on the one hand, they go to court to collect money owed them (in this respect, like Old Reliable but unlike the repo guys); on the other hand, they do not actually lend money to anyone (in this respect, like the repo guy but unlike Old Reliable). Is Rock Creek a debt collector?

Why does this matter? Well, for one thing, in Indiana, debt collectors have to have a license.[90] Compliance with that requirement is beyond the scope of this Article.

In addition, if a business is a "debt collector" under the FDCPA, significant responsibilities and potential liabilities are triggered. In general, the FDCPA provides that a debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.[91] This is as binary as it seems—if an entity is a debt collector, it is prohibited from engaging in any of these practices; if it is not, it is not prohibited from doing so.

Henson v. Santander Consumer USA Inc. is a relatively recent U.S. Supreme Court opinion bearing on this issue.[92] The decision turns on the policy choice that Congress made when it enacted the FDCPA.[93] As just noted, the statute prohibits false, misleading, and deceptive debt collection activities—many listed in the statute but in a non-exclusive list—but only when they are engaged in by a "debt collector."[94] What that means is that Old Reliable's activities collecting credit-card debts from its cardholders are wholly unregulated by the FDCPA, but if it hires a third party to collect those same debts, the activities of that third party will be subject to pervasive scrutiny under the FDCPA. As in *Rock Creek*, *Santander* involved a third fact scenario, relatively unusual at the time Congress adopted the statute, that arises when a creditor *sells* its debts for collection by a completely separate entity.[95]

Santander involved a series of car loans that CitiFinancial made to the petitioners, Ricky Henson and a group of other individuals.[96] Like *Rock Creek*, after the borrowers went into default Santander purchased the loans, which it was attempting to collect on its own account.[97]

Before 2015, most courts, including the federal appellate circuits, interpreted the definitions of creditor and debt collector in the FDCPA to be mutually exclusive—an entity must be either a creditor or debt collector but could not be both at the same time.[98] Under that analysis, whether an entity was

90. *See* IND. CODE § 25-11-1-4 (2024).
91. 15 U.S.C. § 1692e.
92. *Santander*, 582 U.S. 79 (2017).
93. *Id.* at 88.
94. 15 U.S.C. § 1692e.
95. *Santander*, 582 U.S. at 81.
96. *Id.*
97. *Id.*
98. *Id.*

a debt collector or creditor under the FDCPA depended solely on whether the debt was in default at the time of acquisition: if the debt was in default, the entity was a debt collector, and if it was not, it was a creditor.[99] The Federal Trade Commission ("FTC") and the Consumer Financial Protection Bureau ("CFPB"), the federal agencies charged with enforcing the FDCPA, also supported this interpretation.[100] The debt was in default when Santander bought it from Citi, and so under the previous line of cases, Santander would be a debt collector.[101]

A unanimous Supreme Court was of a different view. It held that a company may collect debts that it purchased for its own account, like Santander did, without triggering the statutory definition in dispute.[102] By defining debt collectors to include those who regularly seek to collect debts "owed . . . another," the Court held, the statute's plain language focused on third party collection agents regularly collecting for a debt owner—not on a debt owner seeking to collect debts for itself. Santander was not a debt collector.[103]

Rock Creek makes clear that reading *Santander* to say that a business that collects debts for its own account is not a debt collector goes too far.

Under the FDCPA's definition of "debt collector," there are two ways for a plaintiff to prove a defendant is a debt collector: either (1) its "principal purpose . . . is the collection of any debts," or (2) it "regularly collects or attempts to collect . . . debts owed or due . . . another."[104] *Santander* held—and only held—that when Santander purchased the debts and then sought to collect them for its own account, it did not fall under the second prong of the definition because that prong is limited to entities who regularly collect debts due a third party.[105]

Santander does not address the first prong of the definition: that an entity is a debt collector for purposes of the statute if its "principal purpose . . . is the collection of any debts."[106] That is dispositive here. *Santander* is one of the world's largest banks—many times bigger than Old Reliable!—and so there is no possible way that it would fall under the first prong of this definition—principal purpose of which is the collection of debts.[107]

How about Rock Creek Capital? There was a lot of evidence taken at trial to the effect that Rock Creek Capital's business was nothing more than buying debt that was in default and then trying to collect it.[108] Judge Brown found Rock Creek Capital to be, therefore, a debt collector within the meaning of the

99. *Id.*
100. *Id.*
101. *Id.* at 82.
102. *Id.* at 90.
103. *Id.* at 83.
104. 15 U.S.C. § 1692a(6).
105. *Santander*, 582 U.S. at 83.
106. *Id.* at 82.
107. *Id.* at 89–90.
108. Rock Creek Cap., LLC v. Tibbett, 231 N.E.3d 256, 258 (Ind. Ct. App. Mar. 13, 2024).

FDCPA.[109] She was on solid ground in so holding; there are at least two U.S. Circuit Court opinions decided after *Santander* consistent with her opinion,[110] and none that the author of this Article is aware of to the contrary. A very impressive piece of work.

In *Mercer Belanger Professional Corp. v. Gaeta*, there was no question that the defendant was a debt collector for purposes of the FDCPA; the question was whether the substantive prohibitions of the Act had been violated.[111] This was the third iteration of this case to reach the Indiana Court of Appeals.[112] In the prior proceedings, it had been established that Huntington National Bank had loaned Gaeta funds to purchase a residence, secured by a mortgage.[113] Because the loan was insured by the Federal Housing Administration ("FHA"), Huntington was subject to certain regulations,[114] one of which provided (with certain exceptions) that a "mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid."[115] And because Huntington had failed to comply with this requirement, it was precluded from foreclosing on the mortgage and a trial court's order of foreclosure was reversed.[116] However, the money judgment against Gaeta for the unpaid amount of the loan remained in full force and effect.[117]

At some point along the way, Huntington Bank engaged Mercer Belanger Professional Corp. to pursue collection from Gaeta. Mercer did so by obtaining a writ of execution to collect Huntington Bank's money judgment.[118] Gaeta's residence was sold, and Huntington Bank's judgment was satisfied.[119]

This brings us to the present litigation. Gaeta sued Mercer alleging various violations of the FDCPA, primarily arising out of the fact that Mercer had pursued foreclosure despite knowing that its client, Huntington Bank, had not complied with applicable federal requirements.[120] Implicated were the FDCPA

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109. *Id.* at 269.

110. *See* Tepper v. Amos Fin., LLC, 898 F.3d 364, 371 (3d Cir. 2018); McAdory v. M.N.S. & Assocs., LLC, 952 F.3d 1089, 1090 (9th Cir. 2020).

111. Mercer Belanger Prof'l Corp. v. Gaeta, 241 N.E.3d 1159 (Ind. Ct. App. 2024), *trans. denied*, 2025 WL 774932 (Ind. Mar. 6, 2025). For the reasons explained in the next footnote, this decision will be referred to as "Gaeta III."

112. An earlier iteration of this case was discussed in the 2018–2019 Survey Article as a mortgage foreclosure case that implicated the Servicemembers Civil Relief Act. Gaeta v. Huntington Nat'l Bank, No. 18A-MF-408, 129 N.E.3d 825, 2019 WL 2571993 (Ind. Ct. App. June 24, 2019) (unpublished disposition) ("Gaeta I"), discussed in 2018–2019 Survey Article at 825–26. Still, another iteration of this case was decided by the Indiana Court of Appeals in Gaeta v. Huntington Nat'l Bank, 164 N.E.3d 782 (Ind. Ct. App. 2021) ("Gaeta II").

113. *Gaeta I*, at *1.

114. *Id.*

115. 24 C.F.R. § 203.604 (1996).

116. *Id.* at *10.

117. *Gaeta II*, 164 N.E.2d at 787.

118. *Gaeta III*, 241 N.E.2d at 1155.

119. *Id.*

120. *Id.*

prohibitions on unfair or unconscionable attempts to collect a debt;[121] false and misleading representations in connection with debt collection;[122] improper communications with a party represented by counsel;[123] and improper disclosures in Mercer's initial communication.[124]

In the trial court, Mercer was successful in receiving grants of summary judgment on Gaeta's claims that Mercer had failed to cease collection efforts during a time period that it was prohibited from doing so;[125] that a "dunning letter" from Mercer to Gaeta was not misleading for failing to mention that Mercer might file a new lawsuit against Gaeta;[126] that the dunning letter was not an unfair or unconscionable attempt to collect a debt that Mercer was not expressly authorized to collect;[127] that the dunning letter was not an unlawful attempt to communicate with a consumer Mercer knew was represented by counsel;[128] and that Mercer did not unlawfully collect attorneys' fees.[129]

The foregoing items are set forth primarily to illustrate to the reader of this Article the range of substantive prohibitions that the FDCPA imposes on debt collectors. The central claim in this case was whether or not it was unlawful for Mercer to pursue foreclosure against Gaeta to execute on Huntington Bank's money judgment when Mercer knew that the Bank was not entitled to foreclose on the mortgage because the Bank had been held to have violated the Federal Housing Act's regulation on face-to-face meetings. The specific FDCPA violations alleged were falsely representing that foreclosure was permitted by law;[130] threatening to foreclose when foreclosure was not permitted by law;[131] and attempting to foreclose when not permitted by law.[132] On this most consequential issue, the trial court entered summary judgment in favor of Gaeta as to liability and set the matter for trial.[133] A jury assessed damages for Gaeta of $331,000 and a bench trial on fees and expenses added another $131,131, for a final judgment of $463,131.[134]

On the crucial issue as to whether Gaeta was entitled to summary judgment on the issue of liability, the Court of Appeals affirmed the trial court's conclusion.[135] It reviewed the purposes and text of the FDCPA setting forth Mercer's obligations, found that Gaeta had made a prima facie showing that

121. 15 U.S.C. § 1692f.
122. 15 U.S.C. § 1692e.
123. 15 U.S.C. § 1692c.
124. 15 U.S.C. § 1692g.
125. *Gaeta III*, 241 N.E.2d at 1166–67.
126. *Id.* at 1167.
127. *Id.*
128. *Id.*
129. *Id.*
130. 15 U.S.C. § 1692e(2)(A).
131. 15 U.S.C. § 1692e(5).
132. 15 U.S.C. § 1692f.
133. *Gaeta III*, 241 N.E.3d at 1167.
134. *Id.* at 1168.
135. *Id.* at 1170.

there were no genuine issues of material fact, and held that Mercer had not presented evidence establishing the existence of a material fact.[136] And because Mercer had not questioned the amount of damages found by the jury or trial court, the Court of Appeals affirmed the trial court's judgment.[137]

Taken together, *Rock Creek Capital, LLC v. Tibbett*[138] and *Mercer Belanger Professional Corp. v. Gaeta*,[139] demonstrate the viability of claims under the FDCPA. It is worth noting that both of these cases were litigated to successful conclusion by the plaintiffs in state court; that statutory attorneys' fees are available under the FDCPA;[140] and that oftentimes claims parallel to those available under the FDCPA are also available under the Indiana Deceptive Consumer Sales Act.[141]

G. A Priority Contest Between a Mortgage and a Mechanic's Lien

EdgeRock Development, LLC v. C.H. Garmong & Son, Inc., a case pending before the Supreme Court as of the date of this Article's publication, involves the financial travails of a commercial construction project called the "Trails of Westfield."[142]

EdgeRock Development LLC ("EdgeRock") contracted with C.H. Garmong & Son, Inc. ("Garmong"), Fox Contractors Corp. ("Fox"), and a third company to complete certain aspects of a retail and multi-family housing project spanning five different parcels of land, two of which were owned by EdgeRock, two by ZPS Westfield, LLC ("ZPS"), and one by a third party.[143] The two EdgeRock parcels were encumbered by a mortgage to secure the payment by EdgeRock of the purchase price of the two parcels.[144] (This mortgage is referred to throughout the litigation as the "Acquisition Mortgage.")[145]

Work began on the project in 2017.[146] ZPS contracted directly with EdgeRock for the work to be completed on its two parcels and paid its financial obligations outlined in its contract with EdgeRock in full.[147] In December 2018, following five months of nonpayment from EdgeRock, Garmong filed a notice

136. *Id.*
137. *Id.* at 1175.
138. 231 N.E.3d 256 (Ind. Ct. App. 2024).
139. 241 N.E.3d 1159 (Ind. Ct. App. 2024).
140. 15 U.S.C. § 1692k.
141. IND. CODE § 24-5-0.5-4(a) (2024).
142. EdgeRock Dev., LLC v. C.H. Garmong & Son, Inc., 227 N.E.3d 907 (Ind. Ct. App.), *trans. granted*, *vacated*, 235 N.E.3d 135 (Ind. 2024). Oral argument before the Supreme Court was held on September 5, 2024.
143. *EdgeRock Dev*., LLC, 227 N.E.3d at 913.
144. *Id.* at 916.
145. *Id.*
146. *Id.* at 915.
147. *Id.* at 913.

of intention to hold a mechanic's lien and recorded a mechanic's lien in the amount of approximately $2.1 million.[148]

Shortly thereafter, First Bank agreed to loan $4.9 million to EdgeRock, the proceeds of which were used to discharge the Garmong mechanic's lien (approximately $2.1 million), which was released; pay off the Acquisition Mortgage on EdgeRock's two parcels (approximately $2.0 million), which also was released; provide funds to EdgeRock (approximately $400,000); and other purposes. (First Bank refers to this loan as a "refinancing," and it did, indeed, take out the earlier Acquisition Mortgage on EdgeRock's two parcels.)[149] First Bank was not aware that Garmong "had an outstanding claim for work performed of over $1 million in addition to the Garmong mechanic's lien of $2.1 million that was being paid off at the closing."[150]

In August and September, 2019, Fox recorded mechanic's liens—each totaling approximately $1.7 million—against ZPS's two parcels and EdgeRock's two parcels.[151] In September, 2019, Garmong also recorded mechanic's liens—each in the approximate amount of $1.0 million—against ZPS's two parcels and Edge Rock's two parcels.[152] This case was filed in December, 2019, in which Garmong and Fox sought to foreclose on their mechanic's liens and damages for breach of contract and unjust enrichment.[153] Although there are other issues of interest in this case, only the validity of the Garmong and Fox mechanics' liens and the priority of the First Bank mortgage will be addressed.[154]

After trial, the court held:

- Garmong was entitled to foreclose its mechanic's liens both on the EdgeRock parcels and on the ZPS parcels.
- Fox was entitled to foreclose its mechanic's liens both on the EdgeRock parcels and on the ZPS parcels.
- First Bank only had priority for the approximately $2.1 million of its loan that was paid to Garmong.[155]

First Bank, ZPS, and EdgeRock all appealed.[156]

First Bank argued that while it certainly was entitled to priority the trial court had awarded it with respect to the $2.1 million of its loan that was paid the

148. *Id.* at 916.
149. *Id.*
150. *Id.* at 916–17.
151. *Id.* at 917.
152. *Id.*
153. *Id.*
154. Claims by another party in this litigation and in collateral litigation is beyond the scope of this Article.
155. *EdgeRock Dev.*, 227 N.E.3d at 919.
156. *Id.* at 913.

Garmong, it was for several reasons also entitled to priority as to at least the additional $2.0 million that was paid to extinguish the Acquisition Mortgage.[157] The trial court's determination that the bank was not entitled to priority as to the amount paid to retire the Acquisition Mortgage was grounded in its reading of the phrase "for the specific project" in Indiana Code section 32-28-3-5(d).[158] The relevant portion of that subsection provides:

> The mortgage of a lender has priority over all liens created under this chapter that are recorded after the date the mortgage was recorded, to the extent of the funds actually owed to the lender for the specific project to which the lien rights relate.

The trial court determined that funds loaned by First Bank to pay off the original investors in the real estate development venture, profit paid back to the developer, and interest and fees retained by First Bank were not "funds actually owed to the lender for the specific project to which the lien rights relate."[159] (It was because the $2.1 million paid to Garmong was "for the specific project" that the trial held that First Bank had priority to that amount.)[160]

First Bank challenged this interpretation as overly narrow. It argued that all of the proceeds of the $4.9 million loan were for the specific project—the refinancing of the purchase of the land and attendant expenses of the "Trails of Westfield" development.[161] Amicus Indiana Bankers Association adds a policy justification for this result: preventing mechanic's lienholders from interfering with construction financing. An interpretation of the statute that denies lenders that refinance an existing construction mortgage the priority enjoyed by lenders that provide the funds needed to acquire or clear title to the project land at the outset, gives junior mechanic's lienholders the power to control project refinancing.[162]

In addition to its holding in respect of the meaning of "specific project" in Indiana Code section 32-23-8-5(d), the trial court held that Garmong's and Fox's liens dated from the date work began rather than the date the mechanic's liens were recorded. The bank disputed this as well, relying on Indiana Code section 32-28-3-5(b) which provides in relevant part:

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157. Brief of Appellant First Bank Richmond at 21–22, EdgeRock Development, LLC v. C.H. Garmong & Son Inc., 227 N.E.3d 907 (Ind. Ct. App. Feb. 27, 2023) (No. 22A-PL-01968).

158. Findings of Fact, Conclusions of Law, and Judgment at 64, C. H. Garmong & Son, Inc. v. EdgeRock Development, LLC, (Hamilton Super. Ct. 5 May 25, 2022) (No. 29D05-1912-PL-011500).

159. *Id.*

160. *Id.*

161. Brief of Appellant First Bank Richmond, at 31–35 EdgeRock Development LLC v. C.H. Garmong & Son Inc., 227 N.E.3d 907 (Ind. Ct. App. Feb. 27, 2023) (No. 22A-PL-01968).

162. Brief of Amicus Curiae Indiana Bankers Association at 20–21, EdgeRock Development, LLC, 227 N.E.3d 907 (Ind. Ct. App. May 10, 2023) (No. 22A-PL-01968).

> When the statement and notice of intention to hold a lien is recorded, the lien is created. The recorded lien relates back to the date the mechanic or other person began to perform the labor or furnish the materials or machinery. Except as provided in subsections (c) and (d), a lien created under this chapter has priority over a lien created after it.

The bank gives this section the same interpretation that the Court of Appeals did in *Robert Neises Const. Corp. v. Grand Innovations, Inc.*:

> [T]he the plain language of the statute provides that the lien is created 'when the statement and notice of intention to hold a lien is recorded[.]' Reading the statute as a whole and construing its terms to avoid an absurd result, the 'relation back' provision authorizes the claimant to claim compensation for labor and materials provided back to the date he began work on the project, but it does not give the lien priority at any time before the date of filing.[163]

Finally, the bank contended that the trial court had erred in determining that its mortgage was not entitled to be equitably subrogated to the rights and obligations of the Acquisition Mortgage. Here the trial court found that the

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163. Robert Neises Const. Corp. v. Grand Innovations, Inc., 938 N.E.2d 1231, 1235 (Ind. Ct. App. 2010). In holding that the Garmong and Fox mechanic's liens dated back to when work began, the trial court relied on an earlier Court of Appeals decision, Greyhound Fin. Corp. v. R.L.C., Inc., 637 N.E.2d 1325, 1327 (Ind. Ct. App. 1994). At the time of the Greyhound decision, the relevant statutory language provided: "All liens so created shall relate to the time when the mechanic or other person began to perform the labor or furnish the materials or machinery, and shall have priority over all liens suffered or created thereafter." IND. CODE 32-8-3-5, *repealed by* P.L. 2-2002, SEC. 128. The Greyhound court construed this language as follows: "Here, the only reasonable construction of the term 'created' as used in the mechanic's lien priority statute is that the term includes the act of recording the lien notice. It follows then that the next reference in the statute to a mechanic's lien's priority over all liens 'created thereafter' also means those liens recorded after a mechanic's lien claimant began to perform the labor or furnish the materials or machinery." *Greyhound*, 637 N.E.2d at 1327. Although Neises does not reference Greyhound, the two seemingly can be reconciled by noting that the language of the statute quoted in Neises differs from that quoted in Greyhound. And, indeed, this is the argument that First Bank makes to establish that the trial court erred.

The difficulty with this analysis is that the language quoted in Neises represented a *recodification* of, not an *amendment* to, the language quoted in Greyhound. As noted in the citation above, the language quoted in Greyhound was repealed in 2002 as part of a recodification of Title 32 of the Indiana Code. The language quoted in Neises is the recodified language. And P.L. 2-2002 (the recodification act) specifies that the changes to prior law enacted were for the purpose of "[recodifying] prior property law in a style that is clear, concise, and easy to interpret and apply." IND. CODE 32-16-1-2. Said differently, the purpose of the recodification was to clarify then-existing law, not enact substantive changes. *See* 36 Robert G. Solloway & Tanya D. Marsh, *Filling in the Gaps: The Continuing Evolution of Property Law in Indiana*, IND. L. REV. 1217, 1246–47 (2003). If this principle of recodification is honored, the two decisions cannot be reconciled.

Indiana mechanic's lien statute "abrogates the common law of equitable subrogation as applied to mechanic's liens."[164]

Equitable subrogation allows the refinancing lender to take the priority of the mortgage it pays off.[165] First Bank and Amicus Indiana Bankers Association point out that Indiana recognizes the doctrine of equitable subrogation in the refinancing context generally,[166] and argue that there is no authority for not applying the doctrine when mechanic's liens are involved.[167]

There was no answer from the Court of Appeals on any of these issues. Instead, the Court concluded that Garmong's and Fox's mechanic's liens against EdgeRock's property were invalid and as such, there was no question as to whether the liens had priority over First Bank's mortgage "because the liens no longer exist."[168]

The Court of Appeals first took up arguments relating to Garmong's and Fox's liens on ZPS's property. It found that the evidence at trial established that both Garmong's and Fox's liens filed against ZPS's property were "overstated" such that they included costs associated with work that had not been completed on ZPS's property.[169] The Court said that "mere mistake will not necessarily render [a] whole lien void when it is clear that no fraud was intended and that the claimant had not misled the defendant to his prejudice.[170] But here, the Court said, "the evidence demonstrates otherwise."[171] Garmong's and Fox's liens against ZPS's property were held to be void.[172]

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164. Findings of Fact, Conclusions of Law, and Judgment at 68, C. H. Garmong & Son, Inc. v. EdgeRock Development, LLC, (Hamilton Super. Ct. 5 May 25, 2022) (No. 29D05-1912-PL-011500).

165. *See* RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.6(a) (AM. L. INST. 1997)).

166. *See* Bank of New York v. Nally, 820 N.E.2d 644, 653 (Ind. 2005) ("We agree with the Restatement . . . [a] lender providing funds to pay off an existing mortgage expects to receive the same security as the loan being paid off.").

167. Brief of Appellant First Bank Richmond at 37–44, EdgeRock Development, LLC v. C.H. Garmong & Son Inc. 227 N.E.3d 907 (Ind. Ct. App. Feb. 27, 2023) (No. 22A-PL-01968); Brief of Amicus Curiae Indiana Bankers Association at 22–25, EdgeRock Development, LLC, v. C.H. Garmong & Son Inc., 227 N.E.3d 907 (Ind. Ct. App. May 10, 2023) (No. 22A-PL-01968).

168. *EdgeRock Dev., LLC*, 227 N.E.3d at 931.

169. *Id.* 926 (Garmong); 927 (Fox).

170. *Id.* at 926 (citing Abbey Villas Dev. Corp. v. Site Contractors, Inc., 716 N.E.2d 91, 100 (Ind. Ct. App. 1999)).

171. *EdgeRock Dev., LLC*, 227 N.E.3d at 926 (Garmong); 927 (Fox).

172. In holding the liens invalid, the Court of Appeals rejected Garmong's and Fox's argument interpreting the words "is connected" in IND. CODE 32-28-3-1(b)(2):

> A person . . . may have a lien separately or jointly . . . on the interest of the owner of the lot or parcel of land: (A) on which the structure or improvement stands; or (B) with which the structure or improvement *is connected*; to the extent of the value of any labor done or the material furnished, or both, including any use of the leased equipment and tools.

Garmong and Fox argued that "connected" be interpreted broadly but the Court agreed with ZPS and EdgeRock that for property to be connected, it must be under common ownership. *Id.* at 924–25 (citing Windfall Nat. Gas, Mining & Oil Co. v. Roe, 85 N.E. 722 (Ind. App. 1908), overruled by Cline v. Indianapolis Mortar & Fuel Co., 117 N.E. 509 (Ind. App. 1917).

Next the Court of Appeals took up the arguments relating to Garmong's and Fox's liens on EdgeRock's property. Like ZPS, EdgeRock maintained that the Garmong's and Fox's liens filed against its property improperly included costs associated with work done on property owned by others. Here, the two contractors lodged an additional argument: that EdgeRock's status as the developer for the project subjected it to liability for the entire contract amount.[173] The Court of Appeals concluded that the fact that while Garmong and Fox "could clearly have received, and in fact did receive, money judgments against EdgeRock for the unpaid amount due under the parties' contracts, it does not necessarily follow that Garmong and Fox could assert mechanic's liens for work done on another's property against EdgeRock's property."[174] The Court of Appeals went on to conclude that there was no authority to encumber EdgeRock's property for work done on another's property by virtue of its status as the project developer.[175] And with that issue disposed of, the court held Garmong's and Fox's liens against EdgeRock's property void for the same reason that it had so held their liens against ZPS's.[176]

III. BUSINESS LAW

A. Andrew Nemeth Properties, LLC v. Panzica

Andrew Nemeth Properties, LLC v. Panzica, a case pending before the Supreme Court as of the date of this Article's publication, is a dispute between a real estate developer named Andrew Nemeth and the principals in an architectural and construction company, three brothers named Panzica.[177] Although the parties' narratives ultimately diverge, they start in agreement that Nemeth played a central role in arranging for Nello, Inc. ("Nello"), to consolidate its manufacturing operations in the South Bend area.[178] Nemeth assisted Nello in obtaining economic development incentives from both state and local government.[179] Nemeth also negotiated an agreement to purchase real estate upon which Nello's manufacturing facility would be located.[180] While Nemeth was the buyer on this agreement, executed May 1, 2014, the understanding was that Nello would fund the purchase price and become the owner of the property.[181]

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173. *Id.* 928
174. *Id.*
175. *Id.*
176. *Id.* at 928–29.
177. Andrew Nemeth Props., LLC v. Panzica, 234 N.E.3d 183 (Ind. Ct. App. Apr. 17, 2024), *vacated*, *trans. granted*, 2024 Ind. LEXIS 643 (Ind. Oct. 10, 2024). Oral argument before the Supreme Court was held on December 5, 2024.
178. *Id.* at 186.
179. *Id.*
180. *Id.*
181. *Id.*

It is at this point that the parties' narratives begin to diverge. Painting with broad strokes, Nemeth contacted the Panzicas to solicit their interest in contracting with Nello to build the new manufacturing facility and that they were interested in the project.[182] Subsequently, Nello expressed a desire to have a third party own both the real estate and the manufacturing facility and then lease the property to Nello.[183] Nemeth and the Panzicas then discussed forming an LLC for this purpose, the name of which would be NP3, LLC (for Nemeth and three Panzicas).[184] Email correspondence among the men and with Nello and a financial institution discuss this arrangement.[185] Nemeth filed Articles of Organization for NP3, LLC, with the Indiana Secretary of State on September 12, 2014, although no names of members of the LLC are listed.[186] The next month, NP3, LLC, and Nello executed a lease for a term of fifteen (15) years, and that the lease specifically states that NP3's members included Nemeth and two of the Panzicas.[187] Nevertheless, no written operating agreement or other instrument was ever drafted or signed by the four men evidencing the creation of the LLC or their membership in it.[188]

In early November, to facilitate the financing of the project, Nemeth assigned the real estate purchase agreement to an entity owned by the Panzicas.[189] The real estate closing was held in December; the Panzicas funded the purchase with loan proceeds and a cash contribution; Nemeth signed a guaranty with respect to the loan.[190] Some months later, the property was transferred from the Panzica entity to NP3, LLC.[191] During the following year, an operating agreement and other documentation was prepared by the Panzicas showing the Panzica entity as the sole member of NP3, LLC.[192]

Nemeth takes the position that an LLC was formed by oral agreement of the four men at or around the time that the Articles of Organization were filed and the lease with Nello was signed and that the Panzicas breached the LLC contract when they subsequently expelled him from the LLC.[193] He maintains that the Panzicas were thereby enriched at his expense and seeks damages.[194]

182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 186–87. This disclosure was apparently required because the three men were licensed real estate brokers.
188. *Id.*
189. *Id.* at 187.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*

The Panzicas take the position that no LLC was ever formed with Nemeth as a member; that the entity owned by them is the only member that the LLC has ever had.[195]

In the background is the Panzicas contention that Nemeth deliberately withheld from them—even to the point of altering the purchase agreement—that he was to receive a $260,000 commission on the closing of the sale of the real estate.[196]

The trial court found in favor of the Panzicas on the breach of contract claim, holding that Nemeth had never been a member of NP3, LLC, because there was no written operating agreement naming him as a member and there is no written consent from all of the members of the LLC for him to become a member as is required by Indiana Code section 23-18-6-1(a)(1).[197]

As to the unjust enrichment claim, the trial court first ruled that the "essential features" of the requested relief and the affirmative defense asserted were equitable in nature and so Nemeth had no right to a jury trial on his claim.[198] After the bench trial, the court focused on the $260,000 commission in ruling for the Panzicas.[199] The court reasoned that Nemeth's use of the altered purchase agreement induced the Panzicas into participating in the project until it was too late to extricate themselves.[200] "Nemeth's intentional misconduct precludes him from successfully recovering under his equitable claim of unjust enrichment."[201]

The Court of Appeals reversed on both issues.[202]The breach of contract claim turned on a question of statutory interpretation.[203] A member of an LLC is "a person admitted to membership in a limited liability company under Indiana Code section 23-18-6-1 . . ."[204] That section of the statute provides, in pertinent part:

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195. *Id.*

196. *Id.* at 188.

197. Orders on Motions for Partial Summary Judgment, Andrew Nemeth Properties, LLC v. Panzica, No. 50C01-2202-PL-2 (Marshall Cir. Ct. Nov. 23, 2022). IND. CODE § 23-18-6-1(a)(1) provides in relevant part: "[A] person may become a member in a limited liability company: (1) in the case of a person acquiring an interest directly from the limited liability company, upon compliance with the operating agreement or if the operating agreement does not provide in writing, upon the written consent of all members." This provision will be discussed in greater detail infra.

198. Order Converting Jury Trial to Bench Trial, Andrew Nemeth Properties, LLC v. Panzica, No. 50C01-2202-PL-2, (Marshall Cir. Ct. Dec. 1, 2022) (citing Songer v. Civitas Bank, 771 N.E.2d 61, 68 (Ind. 2002)).

199. *Id.*

200. *Id.*

201. Judgment for Defendants at 19, Andrew Nemeth Properties, LLC v. Panzica, No. 50C01-2202-PL-2 (Marshall Cir. Ct. June 6, 2023).

202. *Panzica*, 234 N.E.3d at 186.

203. *Id.* at 188.

204. *Id.* at 189.

> [A] person may become a member in a limited liability company . . . in the case of a person acquiring an interest directly from the limited liability company, upon compliance with the operating agreement or if the operating agreement does not provide in writing, upon the written consent of all members.[205]

The Panzicas maintained that this provision dictates the exclusive method of becoming an LLC member, arguing that the language "precludes companies from having oral operating agreements that allow for oral admission to membership."[206]

Nemeth agreed that this section dictates how one becomes an LLC member, but argued that the Panzicas were reading the section incorrectly. He first pointed out that, under the plain language of the statute, an operating agreement can be either written or oral.[207] Given that fact, he posits that under the foregoing statute, he acquired his membership interest "directly from the limited liability company, upon compliance with the operating agreement."[208]

The Court of Appeals read the statute differently than either of the parties. It says that the statute "presupposes the existence of LLC members" and then concludes that "we see no reason why a pre-formation oral contract cannot be the means of establishing that membership."[209] For this reason, the Court held that the statute did not preclude Nemeth from being a member and that genuine issues of material fact remained as to whether he was.[210]

The Court of Appeals then turned to the question of unjust enrichment and the related issues of Nemeth's alleged misconduct in allegedly withholding information about his brokerage commission.[211] Indiana courts have a well-established methodology for analyzing whether a case in which both equitable and common law claims are asserted are to be tried entirely to the court, or whether the common law claims are to be tried separately by jury.[212] The trial court utilized that analysis in its decision that Nemeth was not entitled to a jury

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205. IND. CODE. § 23-18-6-1 (2024).

206. Brief of Appellees at 31–32, Andrew Nemeth Properties, LLC v. Panzica, No. 23A-PL-01383 (Marshall Cir. Ct. Oct. 9, 2023).

207. Brief of Appellants at 39, Andrew Nemeth Properties, LLC v. Panzica, No. 23A-PL-01383 (Marshall Cir. Ct. Sept. 7, 2023). "Operating agreement" means any written or oral agreement of the members as to the affairs of a limited liability company and the conduct of its business that is binding upon all the members." I.C. § 23-18-1-16.

208. Brief of Appellants at 38–39, Andrew Nemeth Properties, LLC v. Panzica, No. 23A-PL-01383 (Marshall Cir. Ct. Sept. 7, 2023).

209. *Panzica*, 234 N.E.3d at 189–90.

210. *Id.* at 190.

211. *Id.* at 192.

212. See the discussion of *Colvin v. Taylor infra* note 200 and accompanying text for a discussion of this methodology.

trial.[213] Perhaps because it saw this case as involving only a common law claim, the Court of Appeals did not engage in this analysis. Instead, it declared that Nemeth was entitled to a trial on his unjust enrichment claim, relying on three cases in which claims of quantum meruit were held to be entitled to jury trials.[214]

The Court then dealt with the Panzicas' argument that even had the case been tried to a jury, the trial court would have been required to enter judgment in their favor on grounds that Nemeth's "unclean hands" precluded his recovery.[215] ("Unclean hands" refers to Nemeth's alleged deception of the Panzicas with respect to his $256,000 real estate commission.) The Court held that this "harmless error" contention was not availing simply because "unclean hands" is an equitable doctrine that is not available as a defense to a legal claim in Indiana.[216]

The Supreme Court granted the Panzicas' Petition to Transfer and held oral argument on December 5, 2024.[217] The Court will be aided in its analysis by three amici: Defense Trial Counsel of Indiana and the Indiana Trial Lawyers Association arguing, respectively, against and for the entitlement to a jury trial on a claim of unjust enrichment; and an amicus styled as "Indiana Business Law Attorneys," four prominent business lawyers who maintain that the Indiana LLC Act does not permit a member by "oral contract."[218]

IV. CONTRACT LAW

The following discussion of contract law first reviews several cases interpreting and enforcing particular types of contracts before turning its attention to additional cases interpreting particular types of contract clauses.

A. A Major Construction Contract Dispute: Delay Clause; Unjust Enrichment; and Mechanics' Liens

Luse Thermal Technologies, LLC v. Graycor Industrial Constructors, Inc., is a dispute between a subcontractor and a general contractor and the subcontractor and property owner in respect of a very substantial industrial construction project: the construction and installation at BP's plant in Whiting of a processing unit that removes sulfur from gasoline to reduce environmental

213. *See* Order Converting Jury Trial to Bench Trial, Andrew Nemeth Properties, LLC v. Panzica, No. 50C01-2202-PL-2 (Marshall Cir. Ct. Dec.1, 2022) (citing Songer v. Civitas Bank, 771 N.E.2d 61, 68 (Ind. 2002)).

214. *Panzica*, 234 N.E.3d at 192 (citing Woodruff v. Ind. Fam. & Soc. Servs. Admin., 964 N.E.2d 784, 791 (Ind. 2012)); Nehi Beverage Co. v. Petri, 537 N.E.2d 78, 85 (Ind. Ct. App. 1989); and McKinney v. Springer, 6 Blackf. 511, 515 (1843).

215. *Id.* at 193.

216. *Id.* at 193 (citing Elwood v. Parker, 77 N.E.3d 835, 838 (Ind. Ct. App. 2017)); and Bayview Loan Servicing, LLC v. Golden Foods, Inc., 59 N.E.3d 1056, 1070 (Ind. Ct. App. 2016).

217. *Id.*

218. *Id.*

impact.[219] The overall contract was for $385 million, and the subcontract at issue here was for $6.5 million.[220] Three topics warrant attention in this dispute: the operation of a "delay clause" in the contract between the contractor and the subcontractor; the doctrine of unjust enrichment; and the availability of relief under the mechanic's lien statute.

1. At issue is a "Delay Claims" clause in the subcontract in which the subcontractor agreed that the contractor would not be liable to the subcontractor for any damages suffered because of delay in the construction project.[221]

The project fell behind schedule and then was completed at a greatly accelerated pace which caused the subcontractor to claim an additional $3.7 million in labor costs.[222] The subcontractor also filed a mechanic's lien against the owner for these costs.[223] This lawsuit is the subcontractor's attempt to foreclose the mechanic's lien.[224]

Of the $3.7 million claim, the Court of Appeals calculates that $1.6 million was attributable to project delay and therefore barred by the Delay Claims Clause.[225]

This part of the opinion includes an interesting discussion of the distinction between delay and acceleration. The issue is this: after the project was delayed through no fault of the subcontractor, the contractor and subcontractor agreed that the work would resume at an accelerated pace.[226] The subcontractor argued that because other aspects of the project had encountered delays, it was required to complete its work faster in order to comply with new deadlines.[227] As such, the expenses claimed were not damages for 'delay' at all but rather damages which were incurred due to a contractor-directed change to its work and "the adverse impacts incurred due first to [contractor]'s 'disruption' and then to [contractor]'s 'acceleration."[228]

The Court of Appeals was sympathetic to the argument but, in the end, rejected it.[229] "While we can support a distinction between delay and acceleration under certain circumstances, it would seem that in many cases, if not in most cases, the alleged 'acceleration' is, in fact, the result of 'delay,' or, to put it differently, because of delay caused by or attributable to the owner or a contractor, a contractor or subcontractor is of necessity forced to compress or

219. Luse Thermal Techs., LLC v. Graycor Indus. Constructors, Inc., 221 N.E.3d 701, 707 (Ind. Ct. App. 2023), *trans. denied*, 230 N.E.3d 893 (Ind. 2024).
220. *Id.*
221. *Id.*
222. *Id.* at 708.
223. *Id.* at 709.
224. *Id.*
225. *Id.* at 714.
226. *Id.* at 715.
227. *Id.* at 715–16.
228. *Id.* at 716.
229. *Id.*

speed up the work necessary to be completed before the contract completion date."[230]

2. The subcontractor asserted unjust enrichment claims against both the contractor and the owner.[231] A claim for unjust enrichment is a legal fiction that courts have conceived to permit recovery where the circumstances are such that "under the law of natural and immutable justice there should be a recovery."[232] "However, when the rights of parties are controlled by an express contract, recovery cannot be based on a theory implied in law."[233] The Court found that the circumstances underlying the unjust enrichment claim were covered by the express terms of the contract, thus precluding recovery for unjust enrichment.[234] The subcontractor tried to skirt this holding by arguing that the contractor had abandoned the contract given the changes to the project but the Court of Appeals found no basis for this argument.[235]

The subcontractor also asserted a claim of unjust enrichment against the owner of the project.[236] The general rule of law in this regard is that, in the typical owner-general contractor-subcontractor relationship, "the parties have voluntarily allocated the risks by contract, and the failure of the general contractor to perform does not generally give rise to an action for unjust enrichment against the owner."[237] However, Indiana courts have used the following four criteria to determine whether an owner has been unjustly enriched under those circumstances:

- Whether the owner impliedly requested the subcontractor to do the work.
- Whether the owner reasonably expected to pay the subcontractor, or the subcontractor reasonably expected to be paid by the owner.
- Whether there was an actual wrong perpetrated by the owner.
- Whether the owner's conduct was so active and instrumental that the owner "stepped into the shoes" of the contractor.[238]

The Court worked through each of these circumstances and found no genuine issues of material fact regarding at least two of the criteria necessary to assert a claim for unjust enrichment.[239]

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230. *Id.*
231. *Id.*
232. *Id.* at 718.
233. *Id.* (citing Keystone Carbon Co. v. Black, 599 N.E.2d 213, 16 (Ind. Ct. App. 1992)).
234. *Luse*, 221 N.E.3d at 718.
235. *Id.* at 719.
236. *Id.* at 722.
237. *Id.* at 722 (citing Indianapolis Raceway Park, Inc. v. Curtiss, 179 Ind. App. 557 (Ind. Ct. App. 1979)).
238. *Id.* (citing Stafford v. Barnard Lumber Co., 531 N.E.2d 202 (Ind. 1988); and Indianapolis Raceway Park, Inc. v. Curtiss, 179 Ind. App. 557 (Ind. Ct. App.1979)).
239. *Id.* at 722.

3. The decision contains an extremely consequential discussion of the mechanic's lien statute, which provides a remedy for a subcontractor who delivers goods and services on a construction project to establish liability on the part of the owner of the project for the amounts unpaid by the general contractor.[240]

This statute is often referred to as the "personal liability notice" ("PLN") statute because, in order for a subcontractor to acquire rights under it, the subcontractor must give the property owner "written notice particularly setting forth the amount of the person's claim."[241]

The Court of Appeals takes the position, consistent with its earlier *SLR Plumbing & Sewer, Inc. v. Turk*,[242] that for the notice to the owner to qualify under the mechanic's lien statute, it must make explicit reference to the statute. The subcontractor here asks for a less strict rule but the Court of Appeals adheres to precedent.[243]

B. A Student's Contract with a University

Florance v. Indiana University is an unusual breach of contract case with an unusual resolution.[244] A student dropped out of the IU Medical School soon after enrolling and sued the University for breach of contract, contending that it told him that he would not have to attend classes and then changed the attendance policy after he enrolled in reliance on that representation.[245] The trial court granted summary judgment for the University.[246]

The Court of Appeals was content to acknowledge the existence of a contract between the student and the University,[247] and, for summary judgment purposes, accepted that the "don't have to attend classes" representation was part of the contract.[248] But also part of the contract was the University handbook and the University handbook had a "reservation of rights clause" in it that allowed it to change University policies.[249] Because the University had the right to change its attendance policy, and did so; there was no breach. Summary judgment affirmed.[250]

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240. *Id.* at 720; *see also* IND. CODE § 32-28-3-9 (2024).

241. I.C. § 32-28-3-9; The notice must also set forth that the subcontractor's employer is indebted to the subcontractor and that the subcontractor holds the property owner responsible. *Id.*

242. SLR Plumbing & Sewer, Inc. v. Turk, 757 N.E.2d 193 (Ind. Ct. App. 2001).

243. *Luse*, 221 N.E.3d at 721–22.

244. *Florance v. Ind. Univ.*, No. 22A-CC-2653, 2023 WL 7410430 (Ind. Ct. App. Nov. 9, 2023), (unpublished disposition), *trans. denied*, 233 N.E.3d 400 (Ind. 2024).

245. *Florance*, 2023 WL 7410430, at *1.

246. *Id.* at *2.

247. *Id.* at *3.

248. *Id.* at *4.

249. *Id.*

250. *Id.* at *6.

C. Four Cases on the Sale and Financing of Real Estate

1. *Colvin v. Taylor* is another case like the *Nemeth v. Panzica* dispute *supra* that implicates the constitutional right to trial by jury.[251] Taylor, a land contract vendor, initiated foreclosure proceedings against Colvin, the land contract vendee.[252] Colvin counterclaimed for abuse of process and conversion of business and personal property, and demanded a jury trial.[253]

The Court of Appeals fully recognized that Article 1, § 20, of the Indiana Constitution guarantees that "[i]n all civil cases, the right of trial by jury shall remain inviolate."[254] At the same time, the court pointed out that this provision preserves the right to a jury trial only as it existed at common law, and that a party is not entitled to a jury trial on equitable claims.[255] The issue in *Colvin* was that while the foreclosure action was an equitable claim, the abuse of process and conversion claims were common law torts.[256]

The question of whether common law claims are entitled to be tried to a jury when the case also contains equitable claims is a frequently recurring one and its answer is complicated by the lack of alignment between the two principal Indiana Supreme Court decisions on the subject.

The first of these is *Songer v. Civitas Bank*, in which the Court started out by saying that recent practice and case law had narrowed the right to trial by jury by denying requests for jury trials whenever a complaint joined claims in law and equity.[257] The court explicitly disavowed the "theory" that any claim in equity "draws the whole lawsuit into equity."[258]

Instead, the *Songer* court conducted an exhaustive review of the cases, making two important observations along the way. The cases showed that where the essential features of a suit sound in equity, the entire controversy is drawn into equity, including incidental questions of a legal nature.[259] And, the Court said, the "inverse must also be true. Where equity does not take jurisdiction of the essential features of a cause, a multi-count complaint may be severed, and different issues may be tried before either a jury or the court at the same proceeding."[260] From this analysis, the Court formulated the following rule for the future:

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251. *See supra* note 78 and accompanying text.

252. *Colvin*, 233 N.E.3d at 499. In Indiana, a claim for breach of a land sale a land sale contract must be brought as a mortgage foreclosure action under the famous case of Skendzel v. Marshall, 261 Ind. 226 (Ind. 1973).

253. *Colvin*, 233 N.E.3d at 499.

254. *Id.* (citing IND. CONST. ART. I, § 20).

255. *Id.*

256. *Id.* at 500.

257. Songer v. Civitas Bank, 771 N.E.2d 61, 62 (Ind. 2002).

258. *Id.*

259. *Id.* at 66 (citing Field v. Brown, 146 Ind. 293 (Ind. 1896)).

260. *Id.*

> The appropriate question is whether the essential features of the suit are equitable. To determine if equity takes jurisdiction of the essential features of a suit, we evaluate the nature of the underlying substantive claim and look beyond both the label a party affixes to the action and the subsidiary issues that may arise within such claims. Courts must look to the substance and central character of the complaint, the rights and interests involved, and the relief demanded. In the appropriate case, the issues arising out of discovery may also be important.[261]

While the Court of Appeals in *Colvin v. Taylor* cited *Songer,* it relied primarily on a more recent Indiana Supreme Court decision, *Lucas v. U.S. Bank, N.A.*, which, while professing adherence to Songer, formulated the court's task as follows:

> If equitable and legal causes of action or defenses are present in the same lawsuit, the court must examine several factors of each joined claim—its substance and character, the rights and interests involved, and the relief requested. After that examination, the trial court must decide whether core questions presented in any of the joined legal claims significantly overlap with the subject matter that invokes the equitable jurisdiction of the court. If so, equity subsumes those particular legal claims to obtain more final and effectual relief for the parties despite the presence of peripheral questions of a legal nature. Conversely, the unrelated legal claims are entitled to a trial by jury.[262]

Is the *Lucas* standard a deviation from that set forth in *Songer*? Two justices thought so.[263] They argued:

> Instead of focusing simply on whether multiple causes of action are "distinct and severable," the standard prescribed in Songer, the majority superimposes a further test—whether the legal claims "significantly overlap" with the subject matter of the original equitable claim. In my view, this new test may often foreclose a defendant's right to a jury trial on distinct and severable legal claims.[264]

As just noted, the *Colvin* court closely follows *Lucas*'s mode of analysis and concludes that the "core legal issues overlap with the foreclosure issue to a considerable degree."[265] Because Colvin's counterclaims arose "wholly out of

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261. *Id.* at 68 (footnote omitted).

262. Lucas v. U.S. Bank, N.A., 953 N.E.2d 457, 465–66 (Ind. 2011).

263. *Id.* at 467 (Dickson, J., dissenting). Justice Robert Rucker joined Justice Dickson's dissent. The majority opinion was written by Justice Steven David and was joined by Chief Justice Randall Shepard and the author of this Article when he was a member of the Court.

264. *Id.*

265. Colvin v. Taylor, 233 N.E.3d 497, 501 (Ind. Ct. App. Apr. 18, 2024).

Taylor's complaint" and were "significantly intertwined with Taylor's action," the Court said that the essential features of the lawsuit were equitable and held that this pulled coven's legal claims into equity.[266]

The author of this Article agrees that Colvin was not entitled to a jury trial on his claims. But *Songer*, and the view of the dissent in *Lucas*, reminds that this will not always be the case; the standard set forth in *Songer* must be rigorously applied to assure that no litigant is deprived of the constitutional right to trial by jury provided by Article 1, § 20.

2. In *Zitzka v. Brogdon,* the buyers of a residence sued the sellers after the closing, alleging fraudulent misrepresentation based upon sellers' failure to disclose structural problem on the statutory disclosure form. [267] A jury trial was held, and the jury was instructed, in part, that the buyers were required to use reasonable care in guarding against fraud, meaning be careful and use good judgment and common sense.[268] The jury found for the sellers.[269]

When the case reached the Court of Appeals, it landed in the hands of the perfect judge to write it: Judge Nancy Vaidik.[270]

Indiana's residential real-estate sales-disclosure statutes require sellers of residential real estate to complete and provide to prospective buyers a form that discloses the condition of key parts of the property.[271] The buyers' main argument on appeal was that the disclosure statutes eliminated the element of reasonable reliance for fraudulent misrepresentation claims based on disclosure forms and that the trial court erred by instructing the jury that the buyers had to act reasonably.[272] The buyers offered in support of their position *Johnson v. Wysocki* in which the Indiana Supreme Court engaged in an extensive examination of the effect of the enactment of the real-estate sales-disclosure statute on the state's long-standing common law rule of caveat emptor with respect to the sale of property.[273] After that analysis, the court concluded that

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266. *Id.* The Court called this an application of the "equitable clean-up doctrine." *Id.* This expression only appears a few times in Indiana cases. In *Lucas*, Justice Steven David referred to it as "a doctrine that, under certain circumstances, involves drawing legal claims into equity, thus extinguishing the right to a jury trial on those legal claims." *Lucas*, 953 N.E.2d at 460. The only prior use of the term in an Indiana case that the author has been able to locate was in Morris v. Bank One, Indiana, N.A., 789 N.E.2d 68, 70 (Ind. Ct. App. 2003), where Judge Melissa May assigned it to the principle from *Field v. Brown* quoted in *Songer supra* note 208 and accompanying text: "Where equity takes jurisdiction of the essential features of a cause, it will determine the whole controversy, though there may be incidental questions of a legal nature." *Songer*, 771 N.E.2d at 66 (citing Field v. Brown, 146 Ind. 293 (Ind. 1896)). It is perhaps more than coincidence that Morris affirmed a trial court judgment rendered by Judge Steven David prior to his appointment to the Supreme Court.

267. Zitzka v. Brogdon*,* 222 N.E.3d 1025, 1026 (Ind. Ct. App. Oct. 31, 2023), *trans. denied*, 232 N.E.3d 634 (Ind. Mar. 5, 2024).

268. *Id.* at 1026.

269. *Id.*

270. *Id.*

271. IND. CODE §§ 32-21-5-1–13 (2024).

272. *Zitzka,* 222 N.E.3d at 1026.

273. *See generally* Johnson v. Wysocki, 990 N.E.2d 456 (Ind. 2013).

the disclosure statutes "create liability for sellers when they fail to fully or truthfully disclose the condition of those certain features of their property."[274]

In enunciating this new rule of Indiana property law, the Supreme Court adopted precisely the position advocated by Judge Vaidik in an earlier case.[275] There was likely no judge on the Court of Appeals in a better position than Judge Vaidik to assess whether the buyers in *Zitka* were entitled to relief under *Johnson v. Wysocki*.

Judge Vaidik concluded that the buyers misread *Johnson* when they contended that the disclosure statutes eliminated the element of reasonable reliance for fraudulent-misrepresentation claims.[276] Rather, under *Johnson*, reasonable reliance is an element of a fraudulent-misrepresentation claim based on a disclosure form, and there is a statutory presumption of reasonable reliance, but the seller can present evidence to rebut the presumption.[277] As such, the jury was properly instructed.[278]

3. In *Koy v. Armstrong Family Trust, LLC*, Koy acquired four parcels by "special warranty deed" in which the grantor made no warranties concerning the condition of the title of the properties prior to the date the grantor acquired title.[279] It turned out that the properties were encumbered and Koy sued for breach of contract.[280] The trial court granted summary judgment to the grantor and the Court of Appeals affirmed.[281]

Judge Dana Kenworthy's opinion contains a nice explanation of just what a "special warranty deed" is: a deed that limits the usual covenants—seisin, right to convey, freedom from encumbrances, quiet enjoyment, and warranty.[282]

Koy and Defendants did not dispute the deeds at issue here were special warranty deeds.[283] Nor could they. The deeds contained only the covenant of warranty: "Grantor shall warrant and defend title to the same unto the Grantee against every person lawfully claiming or to claim the whole or any part thereof by, through or under the Grantor, but not otherwise."[284] The deeds went on to provide: "Grantor makes no representations or warranties, of any kind or nature whatsoever, other than those set out above, whether expressed, implied, implied by law, or otherwise, concerning the condition of the title of the property prior to the date the Grantor acquired title."[285] As such, an absence of prior

274. *Id.* at 464–65.

275. *See* Dickerson v. Strand, 904 N.E.2d 711, 717–18 (Ind. Ct. App. 2009) (Vaidik, J., dissenting).

276. *Zitzka*, 222 N.E.3d at 1029.

277. *Id.* at 1029.

278. *Id.* at 1030.

279. Koy v. Armstrong Family Tr., LLC, 2024 WL 3824810, at *1 (Ind. Ct. App. Aug. 15, 2024) (unpublished disposition).

280. *Id.*

281. *Id.* at *4.

282. *Id.* at *3.

283. *Id.*

284. *Id.* at *1.

285. *Id.*

encumbrances had not been warranted by the deed and summary judgment in favor of the grantor was affirmed.[286]

4. *Chitwood v. Guadagnoli* is an illustration of the old adage: "Anything that can go wrong will go wrong."[287]

A creditor named Guadagnoli obtained a default judgment in July, 2006, against a debtor named Chitwood, giving Guadagnoli a judgment lien on Chitwood's real estate.[288] In October, 2008, Guadagnoli filed a complaint to foreclose the default judgment.[289] Two weeks later, Chitwood filed for bankruptcy, thereby staying the foreclosure action.[290] The bankruptcy was dismissed in July, 2012, approximately three years and nine months later.[291] Guadagnoli did not return to court to enforce its rights until April, 2019,[292] but soon thereafter, the proceedings were again placed in abeyance due to Covid.[293] The litigation finally got back on track in the spring of 2023 and in August, the trial court entered summary judgment to the effect that Guadagnoli was entitled to a decree of foreclosure.[294]

As the foregoing indicates, the delays here caused by Chitwood's bankruptcy, Covid, and Guadagnoli's own inaction meant that almost 17 years elapsed between the entry of the default judgment and the decree of foreclosure.[295] Were Guadagnoli's rights cut off because of the lapse of time? Here is what the Court of Appeals says:

> Guadagnoli's default judgment was granted on September 21, 2006. Because the default judgment constituted the recovery of money, the judgment lien expired on September 21, 2016. However, because Chitwood filed bankruptcy proceedings on October 31, 2008, 11 U.S.C. § 362(a) provided for an automatic stay, restraining creditors, like Guadagnoli, with an injunction from taking actions against Chitwood and the property. The bankruptcy proceeding was dismissed on July 24, 2012. Accordingly, as the proceedings were stayed for three years and nine months, Guadagnoli's lien on Chitwood's real property expired in June 2020.
>
> During the eleventh through twentieth years after judgment, no lien exists as to the debtor's real estate. I.C. § 34-55-9-2(2). However, with the permission of the trial court, execution against real estate may

286. *Id.* at *4.
287. Chitwood v. Guadagnoli, 230 N.E.3d 932 (Ind. Ct. App. 2024).
288. *Id.* at 935.
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.* at 936.
295. *Id.*

> still issue, albeit without the benefit of a judgment lien. I.C. § 34-55-1-2. . . .
>
> Here, while the judgment lien has expired, Guadagnoli's default judgment against Chitwood has not. And, as the designated evidence does not reflect that Guadagnoli renewed the judgment prior to the expiration of the judgment lien, he must obtain leave of the trial court in order to execute on the judgment.[296]

The bottom line is that the creditor could still go after the real estate, but must obtain the leave of the trial court to execute the judgment.[297] The author of this Article is tempted to ask whether an alternative available to the creditor here would have been to file proceedings supplemental where, as established by *Converging Capital, LLC v. Steglich* discussed above,[298] there is no statute of limitations?

D. Three Insurance Contract Cases

1. In *First Chicago Insurance Co. v. Jones*, an automobile insurance company denied coverage on grounds that the driver did not have a valid driver's license as required by the policy.[299] The driver did have a driver's license from Nigeria, and on that basis, the trial court ruled in favor of coverage.[300] However, the Court of Appeals cited Indiana Code section 9-24-1-7(a)(4) which provides that a new Indiana resident has sixty days after establishing her residency to obtain an Indiana driver's license and cannot legally drive with a license issued by another state or another country.[301] The driver had been in the country since 2016.[302] The Court directed that summary judgment be granted to the insurer.[303]

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296. *Id.* at 938–39 (citations omitted). Of interest, but not affecting the outcome, the Court also said:

> While a judgment may be renewed before the expiration of the lien, we are unaware of any requirement to renew. Rather, it has been noted that "[b]ecause of the confusing complexity of execution and proceedings supplemental, and the added uncertainty caused by the two attendant decade-long time periods, most sophisticated judgment creditors 'renew' their judgments shortly before the expiration of the first (and each successive) decade after judgment." Such renewal actions may take place ad infinitum.

Id. (citations omitted).

297. *Id.* at 939.

298. *See supra* note 28 and accompanying text.

299. First Chicago Ins. Co. *v.* Jones, 237 N.E.3d 1122, 1123 (Ind. Ct. App. June 4, 2024).

300. *Id.*

301. *Id.* at 1124.

302. *Id.* at 1123.

303. *Id.* at 1125.

2. *Pious Trans, Inc. v. Certain Underwriters at Lloyd's London* required the Court of Appeals to consider the meaning of "commercial driver's license" (CDL) in several related but different contexts.[304]

A trucker operating a large tractor-trailer owned by his employer, Pious Trans, Inc., was involved in a collision with another tractor-trailer.[305] Although both the trucker and the particular tractor-trailer involved in the accident had been added to Pious's physical-damage insurance policy, the carrier denied coverage.[306] Pious brought this action against the insurance company for breach of contract and bad-faith denial which was resolved on summary judgment in favor of the insurance company.[307]

At issue is a policy provision that required a covered driver to "[h]ave a minimum two (2) years (twenty-four (24) consecutive months) of Commercial Driver's License experience, at the time of policy inception or date of hire, whichever is the later, driving similar equipment to that insured under this Policy."[308] The driver did not meet this test but Pious made two arguments in favor of coverage.[309] First, the driver had held since 2002 a New York-issued Class E operator's license that was equivalent to a CDL and had operated vehicles similar to those insured by the policy.[310] Second, the policy's terms (specifically, "Commercial Driver's License" and "similar equipment") were ambiguous and should be construed in favor of coverage.[311]

The Court of Appeals held for the insurance company.[312] The Court found that "CDL" was a term of art with a specific statutory definition—not ambiguous—and that to interpret in accordance with the insured's argument would have taken the word "commercial" in the policy outside of its relevant context.[313] In fact, the Court of Appeals order goes the extra mile here to differentiate the experience that the driver had with that required by the policy.[314]

3. *Trustees of Purdue University v. American Home Assurance Co.* was an unsuccessful effort by Purdue to recover under a commercial insurance policy for loss of income during the Covid-19 pandemic, including losses stemming from cancellation of athletic events and conferences, lower rates of housing and

304. Pious Trans., Inc. v. Certain Underwriters at Lloyd's London, 233 N.E.3d 501 (Ind. Ct. App. Apr. 22, 2024).
305. *Id.* at 503.
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.* at 504.
310. *Id.*
311. *Id.*
312. *Id.* at 506.
313. *Id.* at 505.
314. *Id.* at 506.

campus hotel occupancy, and decreased sales of food, retail items, and health services.[315]

Purdue faced an uphill climb. In two recent cases brought by the Indiana Repertory Theatre ("IRT"), the Indiana Court of Appeals had rejected claims that commercial business interruption insurance covered loss of income due to Covid-19—and the Supreme Court had denied review in both cases.[316] The first of these decisions held that the policy at issue parties then presented argument to the trial unambiguously contemplated a physical loss or physical damage to trigger recovery;[317] the second, holding that the COVID-19 virus—which dies off—did not physically alter the insured's property.[318] Indeed, Purdue's carrier argued that these decisions were dispositive.[319]

Purdue maintained that its policy materially differed from the policy at issue in the IRT cases because Purdue was insured against the "risk" of physical loss or damage and the policy "doesn't require property to [be] repaired, rebuilt, [or] replaced."[320] Purdue also argued that the policy language was ambiguous and the policy's exclusion for damages from a "virus" lacked adequate specificity, implicating the *contra proferentem* doctrine. [321]

It was to no avail. The Court of Appeals gave a very close look at the language in Purdue's policy and found that it too required "physical alteration."[322] The court buttressed its conclusion with citations to holdings from other jurisdictions, including two from the United States Court of Appeals for the Seventh Circuit.[323]

E. Prejudgment Interest

Gotfried v. Popovich is a rather straightforward debt collection case but is noteworthy for an important reminder concerning the availability and calculation of "prejudgment interest." [324] While there is a statute on prejudgment interest,[325] its availability and calculation in a particular case is

315. Tr. Of Purdue Univ. v. Am. Home Assurance Co., 227 N.E.3d 986 (Ind. Ct. App. Feb. 28, 2024); Purdue was represented by Plews Shadley Racher & Braun LLP, cited in earlier Survey Articles for its advocacy on behalf of insureds. *See, e.g.*, *2022–2023 Survey Article, supra* note 1, at 852.

316. Ind. Repertory Theatre v. Cincinnati Cas. Co., 180 N.E.3d 403 (Ind. Ct. App. 2022); Ind Repertory Theatre, Inc. v. Cincinnati Cas. Co., 203 N.E.3d 555 (Ind. Ct. App. 2023).

317. *Ind. Repertory Theatre*, 180 N.E.3d at 405.

318. *Ind. Repertory Theatre, Inc.*, 203 N.E.3d at 557.

319. *Tr. of Purdue Univ.*, 227 N.E.3d at 989.

320. *Id.*

321. *Id.*

322. *Id.* at 995.

323. *Id.* at 994–95 (citing Stant USA Corp. v. Factory Mut. Ins. Co., 61 F.4th 524 (7th Cir. 2023); Sandy Point Dental P.C. v. Cincinnati Ins. Co., 20 F.4th 327 (7th Cir. 2021)).

324. Gotfried v. Popovich, No. 23A-CC-01666, 2024 WL 1828202 (Ind. Ct. App. 2024).

325. IND. CODE § 34-6-2-113 (2024).

sometimes a matter of dispute.[326] But in *Gotfried*, the underlying promissory note specified that prejudgment interest would be available at a rate of 10%.[327] Judge Peter Foley explains with care how the calculation is to be made according to the terms of the note and emphasizes the fact that the provision in the promissory note itself overrides any conflicting provisions in the statute.[328]

F. Non-Competition Clauses in Employment Agreements

The enforceability of non-competition clauses in employment agreements has been a front-burner issue for several years. The Indiana General Assembly's entry into what has historically been an arena reserved to the common law prompted extended treatment in last year's Survey Article.[329]

The prior year's Survey Article reported on the Federal Trade Commission (FTC) proposal to ban most non-compete clauses in employer-employee agreements nationwide.[330] During the Survey Period, the FTC finalized and promulgated the rule, effective September 4, 2024.[331] Legal challenges were swiftly lodged, beginning just hours after the FTC's vote approving the rule, and on August 20, 2024, a federal court set aside the rule and prohibited the FTC from enforcing it.[332]

The court's decision, *Ryan v. Federal Trade Commission*, reviewed the proposed non-compete rule through the prism of the Administrative Procedure Act (APA), as that statute governs judicial review of certain agency actions, findings, and conclusions.[333] The APA directs that, when reviewing an agency's action, it must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right, power, privilege, or immunity;" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[334]

The court first addressed the statutory authority of the FTC to promulgate the non-compete rule and found it lacking. The FTC asserted its authority under two sections of the Federal Trade Commission Act: §6(g) and § 18.

Under § 6(g), the FTC has the power to "classify corporations and (except as provided in section 57a(a)(2) of this title) to make rules and regulations for the purpose of carrying out the provisions of this subchapter."[335] "By a plain

326. *Gotfried*, 2024 WL 1828202, at *1.

327. *Id.*

328. *Id.* at *3 (citing Noble Roman's, Inc. v. Ward, 760 N.E.2d 1132, 1140 (Ind. Ct. App. 2002)).

329. *See 2022–2023 Survey Article*, *supra* note 1, at 836, 865.

330. *2021–2022 Survey Article*, *supra* note 1, at 699.

331. 16 C.F.R. Part 910.

332. Ryan LLC v. Federal Trade Commission, 46 F. Supp. 3d 369 (N.D. Tex., Aug. 20, 2024).

333. 5 U.S.C. § 706(2); Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 391 (2024).

334. 5 U.S.C. § 706(2)(A)–(C).

335. 15 U.S.C. § 46(g).

reading" of this language, the court said that § 6(g) does not grant the FTC "authority to promulgate substantive rules regarding unfair methods of competition."[336]

Under § 18, the FTC has the authority to prescribe "interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce."[337] However, the court says that § 18 limits the FTC's ability to make rules dealing with unfair or deceptive practices—not unfair authority to promulgate substantive rules regarding unfair methods of competition.[338]

While the court acknowledged that the FTC has some authority to promulgate rules precluding unfair methods of competition, it concluded that the FTC lacked the authority to create substantive rules through this method.[339]

The court next addressed the plaintiffs' contention that the non-compete rule was arbitrary and capricious under the APA.[340] It held that the rule was arbitrary and capricious because it was "unreasonably overbroad without a reasonable explanation."[341] The rule, the court said, imposed "a one-size-fits-all approach with no end date, which fails to establish a 'rational connection between the facts found and the choice made.'"[342] The court gave two reasons for this conclusion. First, it said that the record did not support the rule.[343] It looked at the materials that the FTC cited in support of the rule and found them to be "based on inconsistent and flawed empirical evidence."[344] Furthermore, the court said that the FTC had failed to consider the positive benefits of non-compete agreements and had disregarded the substantial body of evidence supporting non-competes.[345] Second, the court said that the FTC had failed "to sufficiently address alternatives" to issuing the rule.[346]

Having determined that the FTC lacked statutory authority to promulgate the non-compete rule and that the rule was arbitrary and capricious, the court declared that the rule would not take effect on its effective date, nor could it be enforced.[347] This order applies nationwide.[348]

336. *Ryan LLC*, 46 F. Supp. 3d at 384.
337. 15 U.S.C. § 57a.
338. *Ryan LLC*, 46 F. Supp. 3d at 384.
339. *Id.*
340. 5 U.S.C. § 706(2)(A).
341. *Ryan LLC*, 46 F. Supp. 3d at 388.
342. *Id.* (citation omitted).
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.* at 390.
348. *Id.*

The FTC appealed the court's decision while President Biden was still in office.[349] On March 7, 2025, the government asked the court to hold the appeal in abeyance for 120 days.[350]

Meanwhile, a decision of note involving a non-compete clause in an employment agreement was rendered by the Court of Appeals during the Survey Period: *Kesler v. Indiana Univ. Health Care Associates, Inc.*[351]

Kenneth Kesler, M.D. sought a declaratory judgment to relieve him from the restraints contained in a non-compete clause of his employment agreement with Indiana University Health Care Associates, Inc.[352] The employer responded with a request for a preliminary injunction enforcing the non-compete, which the trial court granted: Dr. Kessler was prohibited from treating patients within the restricted geographical area set out in the employment agreement.[353]

The Court of Appeals reversed, holding that two of the standards for a preliminary injunction had not been met: (1) that "the threatened injury to the movant outweigh[ed] the potential harm to the nonmoving party from the granting of an injunction" and (2) that "the public interest would not be disserved by granting the requested injunction."[354]

The case is intriguing because, as to the first of these factors, the employee was able to focus the court's attention on the geographic limitation and then persuade the court that if he were to simply move outside of the geographic limitation, all of his patients would follow him.[355] As such, he argued – and the court agreed – that the breach of the geographic condition did not cause the former employer any harm.[356]

Look for future litigation of non-competes to emphasize the relative harm to be suffered by the respective parties and the public interest by granting injunctive relief.

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349. *Id.*, *appeal docketed*, No.24-10951 (5th Cir. Oct. 24, 2024).

350. *Id.,* Motion to Hold Appeal in Abeyance for 120 Days, No. 24-10951 (5th Cir. Mar. 7, 2025).

351. Kesler v. Ind. Univ. Health Care Assocs., Inc., 234 N.E.3d 206 (Ind. Ct. App. Apr. 25, 2024), *reh'g denied* (June 24, 2024).

352. *Id.* at 208.

353. *Id.* at 209.

354. *Id.* at 211.

355. *Id.* at 213.

356. *Id.* It appears that the parties settled following the opinion of the Court of Appeals as they jointly petitioned to have the appeal dismissed, i.e., the parties effectively agreed that neither would seek transfer. Order Granting Motion and Dismissing Appeal with Prejudice, Kesler v. Ind. Univ. Health Care Assocs., Inc., 234 N.E.3d 206 (Ind. Ct. App. July 12, 2024) (No. 23A-PL-2111).

G. Arbitration Clauses: Supreme Court Decision

Illinois Casualty Co. v. B&S of Fort Wayne Inc. was decided by the Supreme Court during the Survey Period.[357] The Court of Appeals decision in this case was given extensive treatment in last year's Survey Article's discussion of insurance contracts.[358] One of several issues discussed there was the focus of the new Supreme Court decision—arbitrability—and so it is discussed this year under the heading of Arbitration Clauses.

The interested reader is referred to last year's Survey Article for the details on this litigation.[359] For purposes of this discussion, it is sufficient to say that an insurance company (Illinois Casualty Company ("ICC")) and the assignees of its insured (33 models ("Models")) disagree about the reach of arbitration language in some of the ten insurance policies at issue.

The Supreme Court described its task as follows:

> [ICC and the] Models contest on the surface whether arbitration is proper based on the assignment of several business insurance policies . . . . But on a deeper level, this case is about whether the parties agreed to have an arbitrator, rather than the courts, resolve whether their arbitration agreement requires arbitration. Here, two questions exist: First, does the incorporation of American Arbitration Association ("AAA") rules constitute "clear and unmistakable" intent to delegate arbitrability to an arbitrator? Second, did ICC . . . and the Models by way of assignment—agree to arbitrate arbitrability for the claims asserted by each Model?[360]

Some recent guidance from the U.S. Supreme Court is of consequence here. Its decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, held that in general, courts can determine whether an arbitration agreement "exists."[361] But, the Court said, when it comes to threshold arbitrability—the power to decide whether a dispute must be first resolved by arbitration—parties may choose to delegate that matter to an arbitrator through agreement.[362] And the Court imposed an additional interpretive rule that "clear and unmistakable evidence" is required to establish an intent to delegate arbitrability.[363]

Some factual background is also of consequence. As noted above, the Models were assignees of ten "Businessowners" insurance policies issued by ICC for coverage between 2014 and 2020. Each of the Policies contained similar language guaranteeing that ICC would pay the "sums" if its insured became

357. Illinois Cas. Co. v. B&S of Fort Wayne Inc., 235 N.E.3d 827 (Ind. 2024).
358. *2023–2024 Survey Article*, *supra* note 1, at 850–51.
359. *Id.*
360. *Illinois Cas. Co.,* 235 N.E.3d at 830.
361. Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63, 69 (2019)
362. *Id.* at 67–68.
363. *Id.* at 72.

"legally obligated to pay as damages" resulting from "bodily injury," "property damage," or "personal and advertising injury." ICC agreed to defend them "against any 'suit' seeking those damages."[364]

In 2016, ICC added a Cyber Protection Endorsement ("CPE") that limited the personal and advertising injury coverage. The CPE, relevant here, included the following arbitration clause:

> Notwithstanding any provision of this form or the Policy, any irreconcilable dispute between us and an "insured" is to be resolved by arbitration in accordance with the then current rules of the American Arbitration Association, except that the arbitration panel shall consist of one arbitrator selected by the "insured," one arbitrator selected by us, and a third independent arbitrator selected by the first two arbitrators. Judgment upon the award may be entered in any court having jurisdiction. The arbitrator has the power to decide any dispute between us and the "insured" concerning the application or interpretation of this form. However, the arbitrator shall have no power to change or add to the provisions of this form. The "insured" and us will share equally in the cost of arbitration. Because the CPE was added in 2016, it only applied to six of the ten Policies.[365]

The Supreme Court held, as a matter of first impression in Indiana, that an agreement to arbitrate in accordance with AAA or similar rules reflects "clear and unmistakable" evidence of an intent to delegate arbitrability to an arbitrator.[366] This question was left open by the Supreme Court in *Henry Schein*[367] but the Court's rule tracks most jurisdictions to have answered this question.[368] And it held that the language here was clear and unambiguous: ICC agreed to arbitration "in accordance with the then current rules of American Arbitration Association."[369] As such, the parties "agreed to arbitrate arbitrability."[370]

The Court went on to say that applying this rule to the policies at issue here "yields a nuanced disposition."[371] While for 2016 and later claims, the trial court must defer to the arbitrator because the agreement incorporates the AAA rules,

364. *Illinois Cas. Co.,* 235 N.E.3d at 831.
365. *Id.*
366. *Id.* at 837.
367. *Id.* at 835.
368. *Id.* at 836–37. *But see* Edward D. Jones & Co. v. Sorrells, 957 F.2d 509, 514 n.6 (7th Cir. 1992) (considering the NASD Code).
369. *Illinois Cas. Co.,* 235 N.E.3d at 839.
370. *Id.*
371. *Id.* at 830.

the Models could not compel arbitration for claims deriving before 2016, because no agreement to arbitrate existed between ICC and its insureds.[372]

Justice Christopher Goff made several interesting points in a separate opinion. To him, the reference to the AAA in the policy language was not sufficient itself to require that arbitrability be arbitrated.[373] Among the points he made was that the AAA rules in effect at the time the policy language was written were not as unequivocal as they are today on whether arbitrators had power to determine their own jurisdiction absent a prior judicial decision on the matter.[374] "It is difficult to credit contracting parties with the clear and unmistakable intent to conform to rules not yet known," Justice Goff wrote.[375]

Nevertheless, he found additional language in the policies that led him to conclude that ICC and its insureds had agreed to arbitrate arbitrability here.[376] As to the Court's decision on pre-2016 claims, Justice Goff was of the view that under Henry Schein, the question of arbitrability of those claims is a matter for the arbitrator alone.[377]

H. Arbitration Clauses: Court of Appeals Decisions

While reciting fealty to Indiana's "strong policy favoring arbitration agreements,"[378] the Court of Appeals set a different tone from the past during the 2021–2022 and 2022–2023 Survey Periods. Arbitration is no "magic wand" that prevails over the language of parties' contract, the Court said in one of the cases.[379] Nor can an arbitration requirement be "shoehorn[ed]" into an agreement where it does not reasonably fit, the court said in another.[380] In point of fact, during the 2021–2022 Survey Period, the Court of Appeals found arbitration clauses unenforceable in three separate cases;[381] one of those decisions was affirmed by the Supreme Court during the 2022–2023 Survey Period;[382] and another during the current Survey Period.[383]

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372. *Id.* The opinion was written by Justice Mark Massa and joined by Chief Justice Rush, Justice Geoffrey Slaughter, and Justice Derek Molter.

373. *Id.* at 841 (Goff, J., concurring in result and dissenting in part).

374. *Id.* at 841–42.

375. *Id.* at 842.

376. *Id.*

377. *Id.* at 842–43.

378. Haddad v. Properplates, Inc., 192 N.E.3d 219, 221 (Ind. Ct. App. 2022)

379. Fin. Ctr. First Credit Union v. Rivera, 178 N.E.3d 1245, 1253 (Ind. Ct. App. 2021).

380. *Haddad*, 192 N.E.3d at 221.

381. *Id.* at 219; Decker v. Star Fin. Grp., 187 N.E.3d 937 (Ind. Ct. App. 2022); Fin. Ctr. First Credit Union v. Rivera, 178 N.E.3d 1245 (Ind. Ct. App. 2021).

382. Decker v. Star Fin. Grp., 204 N.E.3d 918 (2023).

383. Land v. IU Credit Union, 201 N.E.3d 246 (Ind. Ct. App. 2022), *aff'd*, 218 N.E.3d 1282 (Ind. 2023), *aff'd on reh'g*, 226 N.E.3d 194 (Ind. 2024). Although decided after the close of the 2022–2023 Survey Period, these decisions were discussed at length in the *2023–2024 Survey Article, supra* note 1, at 839, and that discussion, therefore, will not be presented here.

There was another case involving an arbitration clause of note during the Survey Period, and that was *Sherratt v. Jefferson Capital Systems LLC*.[384] The defendant had defaulted on a car loan, and the creditor that owned the debt sued to collect.[385] The defendant debtor counterclaimed, alleging unfair debt collection practices.[386] At this point, the creditor filed a motion to compel arbitration of the counterclaims, invoking an explicit arbitration clause in the purchase agreement that provided for mandatory arbitration at the option of either party.[387] The trial court granted the motion, and the Court of Appeals affirmed.[388]

The underlying transaction in this case followed a common pattern in financing automobile purchases. The defendant purchased the automobile from a CarMax dealership on credit, and, pursuant to an assignment clause in the purchase agreement, CarMax immediately assigned its rights to a financial institution, Santander Consumer USA.[389] When the purchaser defaulted, Santander repossessed the vehicle, sold it, and then assigned its rights to collect a remaining deficiency to a collection agency.[390] The principal issue facing the court was whether the collection agency succeeded to the right of CarMax and Santander to invoke the arbitration clause.[391]

The relevant provision of the purchase agreement specifies that for purposes of the arbitration clause, the term "Seller" (i.e., CarMax) includes "its respective subsidiaries, affiliates, agents, employees and officers, or anyone to whom the Seller transfers its rights under the Contract."[392] The defendant argued that this language covered the assignment from CarMax to Santander, but, "since Santander was not 'the Seller,' Santander could not further assign the rights under the Arbitration Provision."[393] The Court rejected this analysis. It said that "Indiana law generally allows for the assignment of contractual rights unless the contract provides 'an expression of contrary intent.'"[394] The language of the contract does not express an intent to limit assignments. "Once 'the Seller' transfers its rights by assignment, the assignee possesses all rights under the agreement, including the ability to subsequently transfer contractual rights."[395]

384. Sherratt v. Jefferson Capital Sys. LLC, No. 23A-CC-1276, 2024 WL 1191831 (Ind. Ct. App. Mar. 20, 2024) (unpublished disposition).

385. *Id.* at *1.

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* For a good explanation of the auto financing system, see FEDERAL RESERVE SYSTEM, NUTS AND BOLTS OF TODAY'S AUTO FINANCE MARKET, 4 CONSUMER & CMTY. CONTEXT NO. 2, https://www.federalreserve.gov/publications/2023-november-consumer-community-context.htm [https://perma.cc/ZEW9-GLDB] (last updated Nov. 30, 2023).

390. *Sherratt*, 2024 WL 1191831, at *1.

391. *Id.*

392. *Id.*

393. *Id.* at *3.

394. *Id.* (citing Kuntz v. EVI, LLC, 999 N.E.2d 425, 429 n.5 (Ind. Ct. App. 2013).

395. *Id.*

The collection agency had the same set of rights that CarMax possessed when it executed the purchase agreement and could enforce the arbitration clause.[396]

I. Forum Selection Clauses

Sophisticated commercial contracts often include forum selection clauses and consents to jurisdiction.[397] At issue *Perdue Farms, Inc. v. L&B Transport, LLC* is the enforceability of a forum selection clause in a contract under which U.S. Security Associates, Inc., provided security guards for a Perdue Farms poultry-processing plant in Washington, Indiana.[398] Perdue sued U.S. Security Associates and three of its security guards in an Indiana state court, alleging the guards' negligence caused an industrial accident at the plant.[399] This was despite the fact that the contract had an explicit forum selection clause that designated the federal District Court in Maryland as the proper venue for disputes arising between them.[400]

U.S. Security moved to dismiss on the basis of the clause.[401] Perdue responded that trying the case in Maryland would violate Indiana public policy and that the three employee-defendants could not invoke the forum selection clause because they were not parties to the contract.[402]

The Court had little difficulty in holding that Perdue was bound by the forum selection clause with U.S. Security:

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396. *Id.*

397. Forum selection clauses often present interesting questions of commercial law. For example, forum selection clauses are regularly held to be "material alterations" under UCC § 2-207(2)(b) in "Battle of the Forms" litigation. *See, e.g.*, Nw. 1 Trucking Inc. v. Haro, 613 F. Supp. 3d 1081 (N.D. Ill. 2020); Bent Glass Design v. Scienstry, Inc., 2014 WL 550548 (E.D. Pa. Feb. 12, 2014); Barrette Outdoor Living, Inc. v. Vi-Chem Corp., 84 UCC Rep. Serv. 2d 158 (E.D. Tenn. July 21, 2014); Bent Glass Design v. Scienstry, Inc., 2014 WL 550548 (E.D. Pa. Feb. 12, 2014); *In re* Ebro Foods, Inc., 424 B.R. 420 (Bankr. N.D. Ill. 2010), *aff'd in part*, *rev'd in part*, 449 B.R. 759 (N.D. Ill. 2011).

Another example arises under the negotiability requirements of UCC Article 3, where the general rule is that the instrument may not state any undertaking or instruction by the person promising or ordering payment to do any act beyond the payment of money. U.C.C. § 3-104(a)(3). The recent 2022 Amendments to the UCC provide an exception to this general rule for forum selection clauses, i.e., the presence of a forum selection clause in an instrument will not destroy its negotiability. U.C.C. § 3-104(a)(3)(v); *see* Frank Sullivan, Jr., *New Law Amends the Uniform Commercial Code to Accommodate Emerging Technologies*, 57 IND. L. REV. 775, 781–82 (2024).

In the realm of business law, the Indiana General Assembly in its 2014 session adopted an amendment to the Indiana Business Corporation Law expressly authorizing Indiana corporations to adopt charter or by law provisions establishing exclusive jurisdiction in Indiana state courts for lawsuits on intra-corporate governance matters. IND. CODE § 23-1-22-2(16), as amended by P.L. 63-2014, § 3; *see 2013–2014 Survey Article*, *supra note* 1, at 1220.

398. Perdue Farms, Inc. v. L&B Transp., LLC, 239 N.E.3d 842 (Ind. 2024).

399. *Id.* at 845.

400. *Id.* at 844.

401. *Id.* at 846.

402. *Id.*

> We seldom relieve contracting parties from their agreed forum. Commercial parties seeking such relief face an especially onerous burden. They must show the chosen forum will be so burdensome as to deprive them of their day in court. We hold that Perdue has not met this burden. Thus, the forum selection clause is enforceable here. Perdue must litigate its claims against U.S. Security in the Maryland federal court.[403]

However, the Court went on to say that because the three U.S. Security employees were not parties to the contract, they were not subject to its terms—and that U.S. security failed to present a "viable argument" for applying the forum selection clause to the employees.[404]

The Court concluded that, while Perdue would have to pursue its claims against U.S. Security in Maryland, it could pursue its claims against the individual employees in Indiana.[405] It did so, saying that Perdue's suing the Indiana-based employees individually constituted "strategic pleading" to avoid the forum selection clause.[406]

V. CONCLUSION

Shortly after the conclusion of the Survey Period, the author of this Article was honored to be invited to participate on a panel with Chief Justice Loretta Rush, Justice Derek Molter, and Judge Heather Welch discussing the value of businesses organizing their enterprises under Indiana law. The audience was the Indiana chapter of the Association of Corporate Counsel, consisting of in-house counsel from Indiana businesses. The event was sponsored by the Barnes & Thornburg LLP law firm and the session moderated by Joshua Hollingsworth, a leading corporate lawyer.

There are many reasons for a business to incorporate or otherwise register in Indiana. First, our merit-based judicial selection process for our appellate courts removes partisan influences from judicial decision-making and gives lawyers and litigants confidence that their cases will be decided based upon the law and proven facts, and not extraneous factors. Second, as discussed at the outset of this Article, Indiana has developed a network of Commercial Courts with expertise in the prompt resolution of business and commercial disputes. Third, Indiana's technology infrastructure—both within the courts and the Office of the Secretary of State—leads the country, making readily available to businesses detailed information from court dockets, corporate law filings, and secured transactions financing statements. Fourth, fees associated with a business being incorporated or registered in Indiana are nominal.

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403. *Id.*
404. *Id.* at 846–47.
405. *Id.* at 844.
406. *Id.*

Such a discussion oftentimes causes people to compare incorporating or registering to do business in Indiana with incorporating or registering to do business in Delaware, which is home to more than half of the Fortune 500 and New York Stock Exchange companies. For the reasons set forth in the preceding paragraph, the author believes that incorporating or registering to do business in Indiana can compare favorably with Delaware. And indeed, the shareholders of Simon Property Group, Inc., will vote on May 14, 2025, to change the company's state of incorporation to Indiana from Delaware.[407]

During the Survey Period and since its conclusion, incorporation in Delaware has been the subject of national attention due to criticism by Elon Musk and some other leading figures in business of decisions by the Delaware courts unfavorable to them. A New York Times story in February reported that Tesla had moved its state of incorporation outside of Delaware, that Dropbox had received shareholder approval to do so, and that Meta was considering following suit.[408] The Times story says that the impetus for this exodus is a series of court decisions favoring shareholders who own a minority stake in corporations at the expense of founders like Musk who have controlling shares.[409]

As noted a moment ago, the author of this Article would be pleased to see more businesses incorporate or register here in Indiana, including businesses now organized under Delaware law. But he does not believe that businesses should leave Delaware because of a perception that Delaware law is too shareholder-friendly or, for that matter, too management-friendly. Delaware courts have long had the reputation of being the nation's most expert on questions of corporate and business entity law, and it is the author's perception that that reputation is well deserved. Beyond that, reasonable minds can debate the relative balance of power between controlling and minority shareholders, of course, and maybe the Delaware judges have been straying somewhat from precedent. The author's impression is that Delaware has always been protective of minority interests and that that has been good for businesses because it means that investors (especially the big pension funds and other institutional investors) are comfortable putting their money into Delaware businesses, since they know they will be protected.

407. 2025 Proxy Statement, Simon Property Group, Inc., (Apr. 1, 2025).

408. Lauren Hirsch, *Delaware Law Has Entered the Culture War*, N.Y. TIMES (Feb. 8, 2025), https://www.nytimes.com/2025/02/08/business/dealbook/delaware-law-has-entered-the-culture-war.html.

409. *Id.*

DEFINING THE LIMITS: THE RIGHT TO BRING A CONSTITUTIONAL CLAIM—2023–2024

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INTRODUCTION

The decisions from Indiana's appellate courts addressing Indiana Constitutional Law resulted in further definition around litigants' ability to bring constitutional claims. In a case involving claims that restrictions on abortion violated religious liberty, the Court of Appeals held that an organization has associational standing to assert claims on behalf of its members and that the plaintiffs did not need to be actually pregnant, or subject to criminal charges, to present ripe claims. The Supreme Court held that constitutional separation of powers, the Takings Clause, and the right to contract, did not prevent the General Assembly from enacting a statute that retroactively prohibited class action lawsuits against universities. Similarly, the Court of Appeals held that the General Assembly may amend statutes retroactively during the pendency of an appeal because the case had not yet reached finality. The Supreme Court issued a significant decision defining the contours of the right to a speedy trial in criminal cases, rejected an argument that the statute limiting the right of primary candidates to affiliate with a party violated equal privileges and immunities under Article 1, Section 23, and held that the right to a jury applies to civil forfeiture actions.

During the survey period (September 2023 to September 2024), Indiana appellate courts substantively addressed sixteen areas of Indiana Constitutional

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law.[1] The Court of Appeals addressed regular decisions regarding government searches, generally finding them permissible, and reversed addressed takings claims. The Supreme Court's new double jeopardy analysis continues to result in fewer appeals on that topic and limited defendants' ability to claim prosecutorial overreach in criminal cases.

I. ARTICLE 1, SECTION 9 – FREEDOM OF THOUGHT AND SPEECH

In *Ivankovic v. Ivankovic*, the Indiana Court of Appeals affirmed a trial court's denial of a wife's request to enjoin her ex-husband from harassing her by accusing her of criminal wrongdoing.[2] The court recognized a compelling government interest in protecting the best interests of minor children of divorced spouses by restraining former spouses from disparaging each other in front of their children.[3] It further agreed that the state has a compelling interest in "protecting and preserving a child's financial well-being."[4] However, because "allegations of criminal activity are public as a matter of course," and thus protected speech, the wife had to limit her legal recourse to asserting a defamation claim.[5] Because the allegations were likely to affect the children's financial well-being only if proven true, meaning that the ex-wife had, in fact, engaged in wrongdoing, the court affirmed the trial court's denial of the requested injunction.[6]

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1. The courts addressed eighteen topics in 2014, Jon Laramore & Daniel E. Pulliam, *Indiana Constitutional Developments: Small Steps*, 47 IND. L. REV. 1015 (2014); ten in 2015, Jon Laramore & Daniel E. Pulliam, *Developments in Indiana Constitutional Law: A New Equal Privileges Wrinkle*, 48 IND. L. REV. 1223 (2015); fourteen in 2016, Scott Chinn & Daniel E. Pulliam, *Minimalist Developments in Indiana Constitutional Law—Equal Privileges Progresses Slowly*, 49 IND. L. REV. 1003 (2016); twelve in 2017, Scott Chinn & Daniel E. Pulliam, *Emerging Federal Reliance—Continued State Constitutional Minimalism: Indiana State Constitutional Law Summaries—2015–2016*, 50 IND. L. REV. 1215 (2017); ten in 2018, Scott Chinn & Daniel E. Pulliam, *Emerging Federal Reliance—Continued State Constitutional Minimalism: Indiana State Constitutional Law Summaries—2016–2017*, 51 IND. L. REV. 993 (2018); thirteen in 2019, Scott Chinn, Daniel E. Pulliam, & Elizabeth M. Little, *Stuck in a Rut or Merely Within the Lines? Indiana State Constitutional Law Summaries—2017–2018*, 52 IND. L. REV. 689 (2019); fifteen in 2020, Scott Chinn, Daniel E. Pulliam, & Elizabeth M. Little, *Continued Progressions Toward Irrelevance? Indiana State Constitutional Law Summaries—2018–2019*, 53 IND. L. REV. 865 (2021); twelve in 2021, Scott Chinn, Daniel E. Pulliam, Stephanie L. Gutwein, & Elizabeth M. Little, *Practicing Pragmatism During A Pandemic: Indiana's Appellate Courts Practically Apply Indiana's Constitution In 2020*, 54 IND. L. REV. 827 (2022); twelve in 2022, Scott Chinn, Daniel E. Pulliam, Stephanie L. Gutwein, & Elizabeth M. Little, *Separation of Powers: Indiana Constitutional Law To The Forefront*, 55 IND. L. REV. 713 (2023); and twelve in 2023, Scott Chinn, Daniel E. Pulliam, Stephanie L. Gutwein, & Elizabeth M. Little, *Legislative Leeway: A Year of Indiana Constitutional Law Restraint—2022–2023*, 57 IND. L. REV. 871 (2024).

2. 228 N.E.3d 1143 (Ind. Ct. App. 2024)

3. *Id.* at 1148.

4. *Id.*

5. *Id.* at 1148–49.

6. *Id.*

II. Article 1, Section 11– Search and Seizure

In *Carter v. State*, the court held that law enforcement seizure of a gun found in a purse that was initially zipped up was reasonable because the defendant consented to the purse being unzipped and the gun was otherwise plainly visible without disturbing the bag's contents.[7]

Under the first *Litchfield* factor,[8] the defendant was under a degree of suspicion initially because his license was found suspended upon crashing his motorcycle and requiring medical attention.[9] Second, the defendant consented to the officer opening the purse by nodding his head when the officer offered to drop a set of beads into the bag.[10] Upon dropping those beads into the bag, the officer saw the handgun.[11] The degree of the intrusion was low because the defendant did not take steps to otherwise conceal the handgun within the purpose.[12] Finally, law enforcement needs were high as it was determined that an ambulance would transport him to a hospital where firearms had to be secured by law enforcement.[13]

In *Cobb v. State*, the Court of Appeals found that law enforcement lacked a considerable need to conduct a warrantless roadside search of a vehicle that consisted of a visual examination of the car's interior.[14] The vehicle's sole occupant was in police custody for operating the vehicle while intoxicated and there was not a high risk of the vehicle being driven away.[15] Nevertheless, the Court of Appeals found the search reasonable because under the other two *Litchfield* factors, the search was reasonable.[16] The officers merely looked at the surface areas of the car and did not intrude on the defendant's freedom as a result of the search because the defendant was already in custody for driving under the influence.[17] The degree of suspicion was also extremely high beyond just the defendant's operation of a vehicle while intoxicated—he had initially refused to exit his vehicle and he had broken free from the officers and lunged toward the door of the vehicle in a seeming attempt to block a search of the vehicle.[18]

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7. 223 N.E.3d 246 (Ind. Ct. App. 2023).

8. Under *Litchfield v. State*, the test for the reasonableness of a search or seizure under Article 1, Section 11 of the Indiana Constitution requires balancing of three factors: (1) the degree of concern, suspicion, or knowledge that a violation has occurred; (2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities; and (3) the extent of law enforcement needs. 824 N.E.2d 356, 361 (Ind. 2005).

9. *Carter*, 223 N.E.3d at 251.

10. *Id.* at 252.

11. *Id.*

12. *Id.*

13. *Id.*

14. 222 N.E.3d 373 (Ind. Ct. App. 2023).

15. *Id.* at 386.

16. *Id.*

17. *Id.*

18. *Id.*

In *Zuniga v. State*, the Court of Appeals found that the defendant lacked standing to challenge the validity of the arrest of a third party who provided evidence supporting a search warrant of the defendant's house.[19] The defendant had challenged the search warrant in the trial court on the basis of insufficient probable cause because the arrestee's statement was hearsay and uncorroborated.[20] The trial court found the statements sufficiently reliable.[21] On appeal, the defendant claimed the arrest itself was illegal but the Court of Appeals ruled that the defendant could not challenge the validity of the arrest for lack of standing.[22]

III. ARTICLE 1, SECTION 12 – SPEEDY TRIAL

In *Grimes v. State*, the Indiana Supreme Court held that a defendant was entitled to discharge of the criminal charges when the defendant makes a prima facie showing of no court congestion and the trial court fails to explain the basis for the trial's postponement.[23]

The State charged the defendant with felony theft, battery, unlawful possession of a firearm by a serious violent felon, and a habitual-offender enhancement.[24] After two continuances, the judge disclosed that he was the prosecutor in one of the defendant's underlying convictions.[25] Because of the conflict, the case was transferred to a new judge, who then continued the trial due to court congestion to a date that went beyond the limits imposed by the speedy trial deadlines in Criminal Rule 4.[26] The defendant objected, and without explanation, the trial court overruled the objection.[27] The defendant moved for discharge based on certified copies of the trial court's docket showing no other jury trials scheduled during those days and that no jurors were summoned for jury duty during that period.[28]

The Supreme Court found that a burden-shifting test determines whether a trial court's decision to move a trial date beyond the limits imposed by Criminal Rule 4 may be based on calendar congestion.[29] A trial court may continue a trial date based on congestion without further explanation but the defendant may

19. 237 N.E.3d 1168 (Ind. Ct. App. July 8, 2024).
20. *Id.* at 1171–72.
21. *Id.* at 1171.
22. *Id.* at 1174.
23. 235 N.E.3d 1224 (Ind. 2024).
24. *Id.* at 1229.
25. *Id.*
26. Generally, Article I, Section 12 of the Indiana Constitution does not confer due process rights to criminal defendants in the manner that the Due Process Clauses of the 5th and 14th Amendments of the United States Constitution do. IND. CONST. art 1, § 12. However, the Indiana Supreme Court has held that the speedy trial provision of Article I, Section 12 does apply in the criminal context and underpins Criminal Rule 4. *Grimes*, 235 N.E.3d. at 1229.
27. *Grimes*, 235 N.E.3d. at 1230–31.
28. *Id.*
29. *Id.* at 1228.

object and rebut at the "earliest opportunity" the lack of congestion and give the trial court the ability to still schedule the trial withing the Criminal Rule 4 limits.[30] This showing must show that the court congestion finding was "factually or legally inaccurate" at the time the trial was continued.[31] The trial court then has the opportunity to explain the congestion finding, which is subject to being shown by the defendant to be clearly erroneous.[32]

Here, the defendant was entitled to discharge because he satisfied his burden to show a prima facie case of no congestion when he submitted the docket showing no other scheduling conflicts with his trial.[33] This showing—which the court characterized as a "low bar"—shifted the burden to the court to explain the delay, which the court also characterized as a "low bar."[34] Because the trial court failed to give any reason, the court ordered the trial court to discharge the defendant.[35]

Justice Goff dissented on the basis that the defendant failed to submit a copy of the court's docket after the trial court moved the trial date.[36] Merely alleging without evidence that no jurors were summoned for duty the week of his trial was not sufficient.[37] The majority's holding effectively rejected the presumed validity of the court's initial finding of court congestion.[38]

In *Mirabal v. State*, the Court of Appeals found no violation of a defendant's speedy trial rights because the State's continuance of a murder trial beyond the one-year allotment allowed by Criminal Rule 4 was reasonably based on a detective's medical emergency. [39] Although the State should have provided more specific information regarding the detective's return to work, the continuance of the trial was well-founded.[40]

By contrast, in *Hoback v. State*, the Court of Appeals reversed a defendant's motion for discharge for the State's failure to bring the case to trial within the one-year limit imposed by Criminal Rule 4(C).[41] The trial court continued multiple trial dates after the one-year period because of entries and withdrawals of plea agreements, court congestion, and public health emergencies after the defendant was arrested on April 19, 2018.[42] The defendant failed to object but

30. *Id.*
31. *Id.* at 1231.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 1235 (Goff, J., dissenting).
37. *Id.* (Goff, J., dissenting).
38. *Id.* at 1235–36 (Goff, J., dissenting).
39. 237 N.E.3d 724 (Ind. Ct. App. June 25, 2024).
40. *Id.* at 731.
41. 225 N.E.3d 208 (Ind. Ct. App. 2023).
42. *Id.* at 210.

filed a motion for discharge on August 15, 2022.[43] A jury then found him guilty, and the court sentenced him to just under a year imprisonment.[44]

After finding that the defendant did not waive his speedy trial rights, the Court of Appeals found the trial court's record regarding the basis for the delay "woefully inadequate."[45] For example, one entry provided "other" as a description for the jury trial's cancellation.[46] Without an adequate record, the Court of Appeals found that it could not attribute any of the delays to the defendant.[47]

Judge Felix dissented.[48] He found that not every issue under Criminal Rule 4 raises constitutional rights and that his underdeveloped argument should result in waiver.[49] The defendant bore the burden to establish that the delays were not the defendant's responsibility and failed under the appellate rules to establish an argument on appeal showing that the delay was not attributable to the defendant.[50]

IV. ARTICLE 1, SECTION 12 – DUE PROCESS

In *Carter v. State*, the Court of Appeals determined that there was no indication of prosecutorial vindictiveness where the State refiled a previously dismissed murder charge after the defendant's first trial ended in a mistrial because of a deadlocked jury.[51]

The defendant was initially charged with murder, rape, three counts of felony criminal confinement, and felony carrying a handgun without a license.[52] The State amended the charging information to include two felony rape counts.[53] That State then moved to dismiss, without prejudice, the murder charges. After the third day of the trial, the State moved to dismiss the felony confinement charges.[54] The jury reached a verdict on the charge of carrying a handgun without a license, but was deadlocked on the remaining five charges, resulting in the trial court sua sponte declaring a mistrial.[55] The State then filed amended charges that included two felony rape charges, three felony criminal confinement charges, and murder charges.[56] Carter moved to dismiss the murder charges for vindictive recharging, on the basis that there had not been any newly

43. *Id.*
44. *Id.*
45. *Id.* at 213.
46. *Id.*
47. *Id.*
48. *Id.* at 213–14 (Felix, J., dissenting).
49. *Id.* at 214 (Felix, J., dissenting).
50. *Id.* (Felix, J., dissenting).
51. 235 N.E.3d 875 (Ind. Ct. App. 2024).
52. *Id.* at 880.
53. *Id.*
54. *Id.* at 881.
55. *Id.* at 883–84.
56. *Id.* at 882.

discovered evidence between the date of the mistrial and the date of the refiling of the charges.[57] The trial court denied the motion to dismiss.[58]

The court noted that the "Due Process clauses of Article 1, Section 12, of the Indiana Constitution and the Fourteenth Amendment to the United States Constitution prohibit prosecutorial vindictiveness," relying on a 2005 Indiana Court of Appeals decision.[59] As a textual matter, there is no due process clause in the Indiana Constitution although the Indiana Supreme Court has held that Section 12's guarantee that every person "shall have remedy by due course of law" provides various forms of procedural and substantive due process protection.[60] The Supreme Court has also noted that—apart from speedy trial claims, Article I, Section 12 applies only to civil and not criminal cases.[61] The *Carter* Court nevertheless analyzed whether the constitutional principal of "due process" applied to prosecutorial vindictiveness relying on a 2002 Indiana Supreme Court decision in *Warner v. State*,[62] which does not mention the Indiana Constitution. [63]

"[Prosecutorial] vindictiveness may be established by demonstrating that a prosecutor's charging decision was motivated by a desire to punish a defendant for doing something that the law allowed [the defendant] to do."[64] The Court of Appeals wrote that, "[w]ithout this doctrine, defendants would be discouraged from challenging the misdeeds of the State."[65] Here, Carter did not challenge any misdeed of the State—instead the trial court sua sponte declared a mistrial as a result of a hung jury, not some misdeed of the State.[66] The court held that the doctrine and its rationale have little application where a mistrial does not result from any improper conduct of the State.[67] Because the mistrial did not result from Carter's exercise of any statutory or constitutional right, but rather from a deadlocked jury, the court held that Carter's claim of prosecutorial vindictiveness failed.[68]

V. ARTICLE 1, SECTION 13 – RIGHTS OF ACCUSED, RIGHTS OF VICTIMS

In *Winans v. State*, the Court of Appeals reversed a conviction because the trial court failed to allow for a jury trial after the defendant's post-trial diversion agreement was terminated.[69] Under Article 1, Section 13 of the Indiana

57. *Id.*
58. *Id.*
59. *Id.* at 883 (quoting Owens v. State, 822 N.E.2d 1075 (Ind. Ct. App. 2005)).
60. McIntosh v. Melroe Co., 729 N.E.2d 972, 974 (Ind. 2000).
61. *Id.*
62. *See* Warner *v.* State, 773 N.E.2d 239 (Ind. 2002).
63. *Carter*, 235 N.E.3d at 883.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. 220 N.E.3d 558 (Ind. Ct. App. 2023).

Constitution and the Sixth Amendment to the U.S. Constitution, the right to a jury is guaranteed.[70] If a defendant demands a jury trial within ten days of the first scheduled trial date in a misdemeanor case, the court must schedule a jury trial.[71] Because the defendant made a timely request for a jury trial, and nothing in the record showed that the defendant waived the right to a jury trial, the trial court committed fundamental error in holding a bench trial.[72]

In *Cook v. State*, the Court of Appeals rejected an Article 1, Section 13 challenge to the evidentiary rule that criminal defendants have no right to confront a confidential informant whose statements are not admitted for the truth of the matters asserted.[73] The court determined that the confidential informant's statements were not hearsay because they were only necessary to facilitate the controlled buy.[74] The defendant also failed to develop a specific argument regarding the meaning of Article 1, Section 13, other than an unsupported reference to "populist, anti-government Jacksonian Democrats" from the 1850s.[75]

VI. ARTICLE 1, SECTION 14 – DOUBLE JEOPARDY

In *A.W. v. State*, the Indiana Supreme Court declined to decide whether Article 1, Section 14 prohibiting double jeopardy applies in juvenile proceedings under the doctrine of constitutional avoidance.[76] The court confirmed its holding in *Wadle v. State* that procedural and substantive double jeopardy claims are bifurcated.[77] Constitutional double jeopardy claims are reserved for "successive prosecutions for the same offense"—procedural claims.[78] Substantive claims of double jeopardy—"multiple convictions for the same offense in a single proceeding"—are governed by the non-constitutional doctrines present in the included-offense statute.[79]

In *Schoeff v. State*, the Court of Appeals applied the "actual-evidence" test from *Richardson v. State* to determine whether a subsequent prosecution for conspiracy to commit an offense violated ***procedural*** double jeopardy where jury convicted the defendant in the first trial of the offense underlying the conspiracy.[80] The state charged the defendant with felony aiding, inducing, or causing drug dealing resulting in death, and conspiracy to deal drugs.[81] The jury

70. U.S. CONST. amend. VI; IND. CONST. art. I, § 13.
71. *Winans*, 220 N.E.3d at 562.
72. *Id.*
73. 220 N.E.3d 72, 75 (Ind. Ct. App. 2023).
74. *Id.*
75. *Id.* at 76.
76. 229 N.E.3d 1060, 1066 (Ind. 2024).
77. *Id.* at 1062 (discussing Wadle v. State, 151 N.E.3d 227 (Ind. 2020)).
78. *Id.* at 1067.
79. *Id.* at 1068; *see* IND. CODE § 35-31.5-2-168 (2024).
80. Schoeff v. State, 242 N.E.3d 1080, 1087 (Ind. Ct. App. 2024) (applying Richardson v. State, 717 N.E.2d 32 (Ind. 1999)).
81. *Id.* at 1083.

found him guilty of the conspiracy charge but hung on the causing death charge.[82] On retrial, the jury convicted him of the causing death charge, but the trial court vacated his conspiracy charge as violating double jeopardy.[83]

On appeal, the majority held that conspiracy is not inherently included in the underlying crime because conspiracy charges rest on different statutory elements.[84] The court further found that there was no reasonable possibility that the evidence used to establish the conspiracy charge was also used to establish every single element of the underlying felony of aiding, inducing, or causing drug dealing resulting in death.[85]

VII. ARTICLE 1, SECTION 16 – PROPORTIONALITY / CRUEL AND UNUSUAL PUNISHMENT

In *Myers v. State*, the Court of Appeals rejected a challenge to convictions for neglect of a dependent on the basis that it violated the Proportionality Clause of the Indiana Constitution.[86] All "penalties shall be proportioned to the nature of the offense" under Article 1, Section 16.[87] An offense with identical elements to another offense that receives a different sentence violates the Proportionality Clause.[88] But the Proportionality Clause is not violated when the criminal penalty is graduated and proportioned to the nature of the offense.[89]

The defendant claimed that the enhancement for "serious bodily injury" in a neglect case violated the proportionality clause because the offenses did not have different elements.[90] But the enhancement required proof that the injury created a substantial risk of death or caused "serious permanent disfigurement, unconsciousness, extreme pain, permanent or protracted loss or impairment of the function of a bodily member or organ."[91] The offense can be further enhanced if the defendant is older than eighteen, the victim is under fourteen, and the injury is so severe that it impairs the victim's ability to live independently for at least one year.[92] Because the offenses graduated based on the level of the harm inflicted, the sentence did not violate the Proportionality Clause.[93]

Similarly, in *Kendall v. State*, the Court of Appeals rejected a Proportionality Clause challenge on the basis that the identity deception statute improperly raised a B misdemeanor to a level 6 felony when the defendant gave

82. *Id.* at 1084.
83. *Id.*
84. *Id.* at 1085.
85. *Id.*
86. 221 N.E.3d 694 (Ind. Ct. App. 2023).
87. IND. CONST. art. 1, § 16.
88. *Myers*, 221 N.E.3d at 699.
89. *Id.*
90. *Id.* at 700.
91. *Id.*
92. *Id.*
93. *Id.*

a false name to a police officer.[94] Here, the defendant used false information when he used the false information with intent to harm or defraud another person.[95]

In *Hancz-Barron v. State*, the Indiana Supreme Court affirmed four consecutive life without parole sentences as the defendant "massacred a family of four, including three young children, and inflicted horrific injuries on each victim."[96] The court rejected the defendant's argument that his young age, stunted brain development, and difficult youth and mental health history was an inappropriate "offender-based argument" not recognized by Article 1, Section 16.[97]

In *Kelly v. State*, the Court of Appeals rejected an Article 1, Section 16 argument that a 110-year sentence for two murders committed when the defendant was sixteen years old constituted cruel and unusual punishment. [98] Based on *Conley v. State*, life without parole does not constitute cruel and unusual punishment even if the defendant was a juvenile at the time of the offense.[99] The court also rejected an argument that the offense violated the Proportionality Clause because it addressed his personal characteristics and not the nature of the offense.[100]

VIII. ARTICLE 1, SECTION 19 – RIGHT TO HAVE JURY DECIDE LAW AND FACT IN CRIMINAL CASES

In *Applegate v. State*, the Court of Appeals declined to find a violation of the right to have a jury determine the law and facts of a habitual offender allegation under the Indiana Supreme Court's opinion in in *Harris v. State* because the argument rested on a section of *Harris* that only obtained two votes of the justices.[101] Justice Slaughter had declined to join a portion of Harris that determined that the habitual offender statute required a jury to determine habitual offender status because it was unnecessary to decide the issue in that case.[102] Although Justice Slaughter otherwise joined the opinion and "largely" agreed with the constitutional analysis, he did not support addressing constitutional questions when the case turned on other non-constitutional grounds.[103] Thus, the Court of Appeals declined to address whether the habitual

94. 225 N.E.3d 794 (Ind. Ct. App. 2023).
95. *Id.* at 804.
96. 235 N.E.3d 1237, 1250 (Ind. 2024).
97. *Id.*
98. 236 N.E.3d 716 (Ind. Ct. App. 2024).
99. 972 N.E.2d 864 (Ind. 2012).
100. *Kelly*, 236 N.E.3d at 729–30.
101. 230 N.E.3d 944, 953–54 (Ind. Ct. App. 2024) (declining to apply part I of Harris v. State, 211 N.E.3d 929, 935–38 (Ind. 2023)).
102. *Id.*
103. *Id.*

offender statute required the jury to determine the defendant's habitual offender status.[104]

IX. Article 1, Section 20 – Right to Trial by Jury in Civil Cases

In *State v. $2,435 in United States Currency*, the Indiana Supreme Court analyzed whether a claimant in an action brought under Indiana's civil forfeiture statute has a constitutional right to trial by jury.[105] The Indiana Constitution secures the right to a jury trial as it existed at common law in 1851, the time that Indiana adopted its current constitution.[106] Claims that are deemed equitable are not entitled to a jury trial.[107] To determine if a claimant has a right to a jury trial, courts evaluate (1) whether the cause of action existed in 1851, and, if not (2) whether the claim is analogous to one at law or in equity as those terms were understood in 1851.[108]

The court began its evaluation by first determining that the fact that just because a cause of action involves a special statutory proceeding, such as the Indiana's civil forfeiture statute, that does not alter the fundamental common-law character of the cause of action.[109] Therefore, causes of action arising from a special statutory proceeding that are essentially legal, rather than equitable, are triable by jury.[110] The court then analyzed whether *in rem* civil forfeitures are analogous to an action at law or to an equitable claim.[111] The court conducted historical analysis of colonial America, the early United States, and the state of Indiana and determined that Indiana had a common-law tradition of jury trials for the forfeiture of the instrumentality of a crime.[112] The court further concluded that even if no *in rem* forfeiture cause of action existed in 1851, *in rem* forfeiture of money as the instrument an proceeds of crime is readily analogous to the traditional common-law forfeiture of property used in violation of law, a legal action subject to the right to trial by jury.[113] Accordingly, a claimant in an action brought under Indiana's civil forfeiture statute has a constitutional right to trial by jury.[114]

In *Colvin v. Taylor*, the Court of Appeals analyzed whether a case, as a whole, is equitable in nature such that the equitable clean-up doctrine applies and brings the entire case into equity.[115] The Indiana Constitution guarantees the

104. *Id.*
105. 220 N.E.3d 542 (Ind. 2023).
106. *Id.* at 545.
107. *Id.*
108. *Id.* at 545.
109. *Id.* at 547–48.
110. *Id.*
111. *Id.*
112. *Id.* at 557.
113. *Id.* at 558.
114. *Id.*
115. 233 N.E.3d 497 (Ind. Ct. App. 2024).

rights to a jury trial as that right existed at common law and does not apply to equitable claims.[116] When a single case contains both equitable and legal causes of actions or defenses, the equitable causes of action or defenses are to be tried by the court while the legal causes of actions and defenses are to be tried by a jury.[117] However, where the lawsuit as a whole is equitable and the legal causes of action are not distinct or severable, equity subsumes the entire case and the equitable clean-up doctrine applies.[118]

In *Colvin*, the case began with Taylor's foreclosure against Colvin.[119] Foreclosure actions are equitable.[120] Colvin asserted counterclaims for abuse of process and conversions against Taylor based on Taylor's pursuit of immediate possession "based on Taylor's pursuit of immediate possession allegedly in violation of emergency orders, his failure to file a surety bond as required by Indiana Code section 32-30-3-6, and his removal of various personal and business items of Colvin's from the property."[121] The Court of Appeals determined that Colvin's counterclaims arose wholly out of Taylor's complaint and the actions taken by Taylor to preliminary possession of the at-issue property.[122] The court concluded that the essential features of the suit were equitable, and therefore, the equitable clean-up doctrine applies to pull Colvin's legal claims into equity.[123]

In *Cosme v. Clarke*, the Indiana Supreme Court analyzed whether, at the directed-verdict stage, the court may take on the jury's fact-finding role to weigh evidence and assess credibility at the close of the plaintiff's case.[124] The right to a trial by jury is protected by the Indiana constitution.[125] This gives parties the right to have a jury determine the credibility of witness and the weight that shall be given to the evidence and to decide the facts accordingly.[126] After a plaintiff rests his case, if there is insufficient evidence on any element of the plaintiff's prima facie case, a court may enter a directed verdict.[127] Therefore, at the directed verdict stage, an issue is withdrawn from the jury and given to the judge.[128] The court determined that to maintain the right to a jury trial, a judge cannot be permitted to preempt the jury's fact-finding function.[129] The court thus found that the judge is limited to viewing the evidence with all reasonable inferences for the nonmovant, and the court cannot assess witness credibility or

116. *Id.* at 499.
117. *Id.*
118. *Id.*
119. *Id.* at 500.
120. *Id.*
121. *Id.*
122. *Id.* at 500–01
123. *Id.* at 501.
124. 323 N.E.3d 1141, 1145 (Ind. 2024).
125. *Id.* at 1149–50.
126. *Id.*
127. *Id.* at 1145.
128. *Id.*
129. *Id.* at 1149–50.

weigh conflicting evidence, nor the conflicting inferences to be drawn from the evidence.[130] The court determined that this was in line with the historical approach.[131] The court then found that aspects of the trial court's entry of a directed verdict was improper because sufficient evidence supported certain of the Cosmes' claims.[132]

In *Abed v. ElSharif*, the Court of Appeals found that a claimant did not have a right to a jury trial where the essential features of his suit were equitable.[133] Article 1, Section 20 of the Indiana Constitution guarantees the right to trial by jury in civil cases as the right existed at common law in 1851 when the current version of the Indiana Constitution was adopted.[134] The right to a jury trial does not extend to equitable cases or claims.[135] Further, if the essential features of a suit as a whole are equitable, and any individual causes of action which are not equitable are not distinct or severable, a party does not have a right to a jury trial.[136] Thus, certain legal claims can be drawn into equity under the equitable clean-up doctrine.[137]

This case arose from a dispute involving an estate of a decedent, Seif, who died in testate.[138] His nephew, Abed, claimed that Seif transferred his property and businesses to Abed.[139] Seifs descendants disputed that this occurred.[140] The parties brought the following claims:

> In Counts 1 and 2, ElSharif seeks to quiet title to the Indiana Real Estate and asks the trial court to declare void the recorded quitclaim deeds. In Count 3, ElSharif requests a declaratory judgment that (1) the assignment of Seif's interest in Seif, LLC to Abed is a forgery and thus void, and (2) the estate is the rightful owner. In Count 7, ElSharif seeks declaratory judgment that (1) all other documents purporting to transfer Seif's assets are forgeries and void, (2) Abed has no right, title, or interest in Seif's assets, and (3) the estate is the rightful owner. ElSharif also demands injunctive relief preventing Abed or any of his associates from claiming any interest in Seif's assets. Finally, in Counts 4 through 6, ElSharif alleges Abed committed the crime of forgery and seeks damages, attorney fees, and expenses under the [Crime Victim Relief Act ("CVRA")].[141]

130. *Id.* at 1150.
131. *Id.*
132. *Id.* at 1154.
133. 234 N.E.3d 890 (Ind. Ct. App. 2024).
134. *Id.* at 897.
135. *Id.*
136. *Id.*
137. *Id.* at 898.
138. *Id.* at 893.
139. *Id.* at 894.
140. *Id.*
141. *Id.*

In Abed's two amended counterclaims, he seeks (1) damages from the sale of the Shannon Bridge lot, and (2) declaratory judgment he is the owner of all Seif's assets.[142]

But, the court determined that ElSharif's claims for damages under the CVRA and Abed's counterclaims are not sufficiently distinct from the equitable issues to be severable.[143] The court made this determination because it found that ElSharif's legal claims under the CVRA and Abed's counterclaims depend entirely on the resolution of the equitable claims—specifically whether Abed forged the quitclaim deeds and other transfer documents.[144] The court determined that Abed did not have a right to a jury trial because the essential features of the suit were equitable, and the legal claims so significantly overlapped with the equitable features of the suit to be subsumed by the equitable claims.[145]

X. ARTICLE 1, SECTION 21 – TAKINGS CLAUSE

In *City of Carmel v. Barham Investmentss, LLC*, the Indiana Court of Appeals analyzed a dispute over an appraisal for purposes of determining just compensation due to a landowner whose property failed to properly identify, and thus value, all of the owner's interests in the property that it was extinguishing.[146] In rejecting the landowner's claim that it was entitled to compensation for the taking of its ingress and egress easement over, under, and across a road adjacent to its property for pedestrian and vehicular traffic, the court reiterated two principles.[147] First, it confirmed that "the right of an abutting landowner to ingress and egress over the public roads is a cognizable property right," and the government's "substantial or material interference with this right . . . is a compensable taking."[148] Second, it observed that "an abutting landowner has no cognizable property right in the free flow of traffic past his property."[149]

But the court found that the City had not acquired the property interest as to which the landowner had an easement, so the landowner was not entitled to additional compensation for the alleged taking.[150] The court also explained that the City had extinguished the easement the landowner had held when the City condemned the public road that was the subject of the easement in an earlier inverse condemnation action.[151]

142. *Id.*
143. *Id.* at 900.
144. *Id.*
145. *Id.* at 902.
146. 222 N.E.3d 992, 994 (Ind. Ct. App. 2023).
147. *Id.* at 995–96.
148. *Id.* at 995.
149. *Id.*
150. *Id.* at 997.
151. *Id.* at 997–98.

In *Moriarity v. State*, the Court of Appeals rejected a claim for an alleged regulatory taking under Article 1, Section 21 by landowners who were ordered to remove an illegal dam they constructed on their property and claimed that complying with the order would further damage their property.[152] The court explained that "the government may affect a total regulatory taking without compensation where background principles of nuisance and property law independently restrict the owner's intended use of the property."[153] Because the landowners "never possessed a right to build an illegal dam . . . [t]hey [were] not entitled to compensation because the State forced them to remove or modify it."[154]

XI. Article 1, Section 23 and Article 2, Section 2 – Equal Privileges and Immunities and Voting Qualifications

In *Morales v. Rust*, the Indiana Supreme Court rejected an argument by an individual who sought the Republican nomination for U.S. Senate in 2024 that an Indiana statute, commonly referred to as the "Affiliation Statute," was unconstitutional.[155] Indiana law establishes primaries in which Indiana citizens may vote for various political candidates for office, including for the office of U.S. Senator.[156] The Affiliation Statute requires a would-be primary candidate to file a declaration of candidacy within a specific timeframe that establishes the candidate's party affiliation in one of two ways: by showing that they had voted for the party with which they were claiming affiliation in the two most recent primary elections in which they voted, or by filing a certification from the party chair of their county affirming the candidate's membership in the party.[157] The plaintiff could not satisfy either option. He had not voted for the Republican party in the last two primary elections in which he had voted.[158] And the chair of the Republican party in his county refused to certify his affiliation.[159] So, after announcing his candidacy anyway, the would-be candidate sued the county party chair and the State and claimed that the Affiliation Statute, which otherwise would have precluded his participation in the Republican primary, was unconstitutional.[160] The trial court agreed and found that the Statute was unconstitutional for many reasons.[161]

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152. 222 N.E.3d 1075, 1076–77 (Ind. Ct. App. 2023), *trans. denied*, 232 N.E.3d 641 (Ind. 2024).

153. *Id.* at 1078 (quotations and citation omitted).

154. *Id.*

155. *Id.* at 1030–31.

156. 228 N.E.3d 1025, 1031 (Ind. 2024), *trans. denied*, 2024 Ind. LEXIS 231 (Ind. Apr. 22, 2024), *cert. denied*, 2024 U.S. LEXIS 3722 (U.S. Oct. 7, 2024).

157. *Id.* at 1032 (discussing Ind. Code § 3-8-2-7).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 1033.

The Indiana Supreme Court reversed. The court observed that the right to associate, protected by the First and Fourteenth Amendments of the U.S. Constitution, includes "the corollary right not to associate" and that that right is particularly important in the context of political parties.[162] Relying on federal precedent, the court held that the Affiliation Statute's method of giving a would-be candidate the opportunity to determine party affiliation in the first instance through voting record, and then the party the opportunity to determine affiliation in the second instance through certification, was constitutional.[163] The court reasoned that while "[t]he First Amendment generally protects the rights of political parties and the rights of citizens to participate in the electoral system," the Affiliation Statute imposed, at most, "a minor impediment" on the would-be candidate's associational rights with the party of his choice and did not preclude him wholesale from running in the election.[164] It also agreed that the State had important regulatory interests in protecting political parties' associational rights that justified the minor restriction the Affiliation Statute imposes on candidates' First Amendment rights.[165] The court's analysis also served as its basis for rejecting the would-be candidate's vagueness and overbreadth challenges.[166] And because it concluded that the Affiliation Statute merely regulates "election procedures," and "does not substantively change the minimum qualifications for United States Senate," the would-be candidate's claim that the Statute violated the Seventeenth Amendment of the federal Constitution also failed.[167]

The court went on to reject the would-be candidate's claim that the Affiliation Statute, as it was being applied to him, violated his right to equal privileges and immunities under Article 1, Section 23 of the Indiana Constitution.[168] For this challenge, the would-be candidate cited to earlier versions of the Statute, which provided other, less-restrictive methods for a candidate to satisfy the party-association requirements for candidacy, than the current statute provides.[169] The would-be candidate argued that he was being treated differently than two groups of would-be candidates: those candidates who were able to able to be on the ballot before the latest version of the Statute was enacted, and those "who have a more reasonable party chair [who] certifies based on party membership alone."[170] The court found both proposed classifications invalid. It reasoned that the would-be candidate could not compare himself to candidates who proceeded under a different statute (*i.e.*, a prior version of the Affiliation Statute), and that the disposition of each party

162. *Id.* at 1034–35 (quotations and emphasis omitted).
163. *Id.* at 1035–36.
164. *Id.* at 1038–40 (emphasis omitted).
165. *Id.* at 1041–48.
166. *Id.* at 1049–50.
167. *Id.* at 1050–52.
168. *Id.* at 1052–53.
169. *Id.*; *see also id.* at 1032 (discussing earlier version of IND. CODE § 3-8-2-7).
170. *Id.* at 1052 (citations and quotations omitted).

chair was not basis the Affiliation Statute drew for classification of would-be candidates; instead, the Statute itself treated all potential candidates the same.[171] Consequently, it held the would-be candidate had not stated a valid equal privileges and immunities claim.[172]

The court declined to rule on the would-be candidate's challenge that the Affiliation Statute improperly amends the eligibility requirements for election to the General Assembly set forth in Article 4, section 7 of the Indiana Constitution because it found he lacked standing.[173] And it rejected his argument that the Affiliation Statute gives county party chairs no discretion to decide whether to certify candidates, instead finding that the Statute's plain language gives county party chairs "broad discretion" in deciding whether to do so.[174]

Justice Molter concurred with Justice Massa's opinion; he also wrote a separate concurrence, and Justice Slaughter concurred with Justice Massa's opinion and joined Justice Molter's.[175] Justice Goff wrote a dissent, which Chief Justice Rush joined, expressing his view that the Affiliation Statute violated the would-be candidate's First Amendment right of association.[176]

XII. Article 1, Section 24 – Ex Post Facto Clause

In *Shibli v. State*, the Court of Appeals held that a person required by another State to register as a sex offender for a specific period—including for life—may be required to by Indiana law to register for life under a 2007 amendment to the Sex Offender Registration Act.[177] Although the defendant's conviction was in 1998, when Indiana required 10-year registration, Florida had at the time required him to register for life.[178] And under the Indiana Supreme Court's holding in *Ammons v. State*,[179] requiring Indiana residents to register that Indiana resident was already required to register under another State's laws did not constitute an *ex post facto* violation because such registration requirements were non-punitive.[180]

The Court of Appeals also noted that because the defendant had signed a Florida form acknowledging that if he gained employment in another state or became a resident of another state, including Indiana, he must register in that state, he had entered a contract "similar to a plea agreement" and was thus even less of a punishment since he was already contractually bound to register.[181]

171. *Id.* at 1053.
172. *Id.*
173. *Id.* at 1053–54.
174. *Id.* at 1054.
175. *Id.* at 1055–66.
176. *Id.* at 1066–80.
177. 231 N.E.3d 280, 282 (Ind. Ct. App. 2024).
178. *Id.*
179. 50 N.E.3d 143 (Ind. 2016).
180. *Id.*
181. *Ammons*, 231 N.E.3d at 284.

XIII. ARTICLE 3, SECTION 1 – STANDING

In *Individual Members of Medical Licensing Board of Indiana v. Anonymous Plaintiff 1*, the Indiana Court of Appeals considered the intersection of two Indiana statutes: Indiana's abortion law, which criminalizes pregnant persons' obtaining abortions in Indiana except in narrow circumstances, and Indiana's Religious Freedom Restoration Act ("RFRA"), which permits the government to substantially burden an individual's religious exercise, including through a law of general applicability, only where the action is the least restrictive means of furthering a compelling governmental interest. [182] The putative class action was brought by individuals who were not, but could become pregnant and an organization, on behalf of themselves and similarly situated individuals, against members of Indiana's Medical Licensing Board and certain local Indiana county prosecutors.[183] In their pre-enforcement challenge, they alleged that Indiana's abortion law violated their and the putative class members' rights under RFRA because the law prohibited them from obtaining an abortion under circumstances in which their sincere religious beliefs would compel them to do so.[184] The plaintiffs preliminarily sought to enjoin the defendant officials from enforcing Indiana's abortion law against them, the putative class members, and the organization's members.[185] The trial court obliged, to an extent, and enjoined the defendant officials from enforcing Indiana's abortion law against the plaintiffs during the pendency of their suit.[186] It also certified a class of "[a]ll persons in Indiana whose religious beliefs direct them to obtain abortions in situations prohibited by [Indiana's Abortion Law] who need, or will need, to obtain an abortion and who are not, or will not be, able to obtain an abortion because of the [Law]."[187] The defendant officials appealed the trial court's orders.[188]

The Indiana Court of Appeals affirmed the trial court's orders, except that it directed the trial court to narrow its preliminary injunction.[189] It agreed with the trial court's finding that the organization had associational standing to assert the claims on behalf of its members, recognizing the doctrine's availability in Indiana.[190] It found that the organizations' members would otherwise have standing, that the interests the organization was seeking to protect were germane to its purpose, and that "neither the claim asserted nor the relief requested require[d] the participation of [the organization's] individual members in the lawsuit" because the members shared a "basic commonality of views" as to their

182. 233 N.E.3d 416, 428–29 (Ind. Ct. App.), *trans. denied*, 246 N.E.3d 271 (Ind. 2024).
183. *Id.* at 427.
184. *Id.* at 427, 429.
185. *Id.* at 430.
186. *Id.* at 431.
187. *Id.*
188. *Id.* at 427.
189. *Id.* at 428.
190. *Id.* at 433.

religious beliefs, even if there was not complete uniformity of views or interests among the organization's members.[191]

The court next agreed that the plaintiffs' claims were ripe because the adduced evidence presented "a real or actual controversy, or the ripening seeds of a real controversy."[192] The court disagreed that the plaintiffs needed to be pregnant to present ripe claims because they had "presented evidence to support a substantial burdening of the exercise of their sincere religious beliefs in the form of altered sexual and reproductive patterns."[193] The court also agreed that it was sufficient for the plaintiffs to have established "impending" criminal violations and that they did not need to wait to be prosecuted before they could assert ripe claims.[194]

Because the core religious beliefs of the members of the putative class were "uniform" in the way in which they were alleged to conflict with Indiana's abortion law, the appellate court next found that the class was sufficiently definite.[195] It rejected the proposed class as a "fail-safe," agreeing that a member's membership in the class did not turn on whether they had a valid claim.[196] And it found that the putative class demonstrated sufficient commonality of alleged harm, the named plaintiffs would be adequate class representatives and were asserting claims typical of those of the putative class's members, the class was sufficiently numerous, and that the plaintiffs were requesting a single injunction for the entire class.[197] It thus upheld the trial court's certification of the putative class.[198]

It also found the trial court did not abuse its discretion in preliminarily enjoining the defendants from enforcing the abortion law as to them during the pendency of the lawsuit.[199] The court held that having an abortion as presented by the plaintiffs fell within the definition of plaintiffs' "exercise of religion" under RFRA.[200] It rejected the government officials' argument that abortion was not a religious exercise because it was not "a mandatory religious ritual," as well as their argument that pregnancy termination should be characterized as "an enhancement to [the] [p]laintiffs' physical, emotional, mental well-being, rather than a religious exercise."[201] Surveying Indiana law on abortions, the court concluded that the landscape shows "the State lacks a compelling interest in potential life from the moment an egg is fertilized."[202] And it found the abortion law is not the least restrictive means through which the State could achieve its

191. *Id.* at 435–37.
192. *Id.* at 439 (quotations and citation omitted).
193. *Id.* at 440.
194. *Id.* at 441–42.
195. *Id.* at 443–44.
196. *Id.* at 444.
197. *Id.* at 444–47.
198. *Id.* at 459.
199. *Id.*
200. *Id.* at 449–51.
201. *Id.* at 449.
202. *Id.* at 452–54.

goals because, among other things, it permits abortions under certain narrow circumstances unrelated to religion but based on concerns of the same nature—to prioritize the mother's health over potential life.[203] The court thus concluded the plaintiffs had shown a preliminary likelihood of success on the merits. It rejected application of the rule that irreparable harm should be presumed because of its conclusions regarding the plaintiffs' likelihood of success that the abortion law violates RFRA because that conclusion was "vigorously contested."[204]

The court nonetheless agreed that the plaintiffs proved the loss of their religious liberties guaranteed by RFRA would cause them irreparable harm and that loss of access to needed abortions itself also may constitute irreparable harm.[205] The court reasoned the balance of the harms favored the plaintiffs because they stood to lose concrete rights while the opposing harm was the "conditional" loss of a potential life through a pregnancy that "may eventually result in a live birth."[206] Lastly, it upheld the trial court's finding that the public interest favored the plaintiffs because "statutory violations are against public interest and may support issuance of an injunction," and "injunctions protecting First Amendment freedoms are always in the public interest."[207] Because it agreed that the injunction, as entered, could be read to more broadly restrict the official defendants' right to enforce the abortion statute than was necessary to protect the plaintiffs' religious rights, the Court of Appeals remanded the case to the trial court to narrow the injunction to track the scope of relief to which it agreed the plaintiffs were entitled.[208]

In *Ehrlich v. Moss Creek Solar, LLC*, rejected an argument by a county council and a proposed development company that remonstrators lacked standing to challenge the council's resolution creating an Economic Revitalization Area and approving a tax abatement for the development company to develop a solar-power facility.[209] The council and development company acknowledged that the remonstrators had timely remonstrated in writing against the council's passage of the resolution.[210] But they argued that the remonstrators were not "aggrieved" by the council's decision, as necessary to establish standing.[211] Specifically, while the remonstrators asserted that the to-be-developed facility would decrease their property values, the council and the development company contended that any decrease in property values was a result of the local board's authorizing the development of the facility, and was

203. *Id.* at 454–55.
204. *Id.* at 457.
205. *Id.* at 457–58.
206. *Id.* at 459.
207. *Id.* at 458.
208. *Id.* at 459.
209. 219 N.E.3d 760 (Ind. Ct. App. 2023).
210. *Id.* at 763.
211. *Id.*

not a "direct" result of the council's decision.[212] Because the council's resolution was directed to only development of the facility, however, the Court of Appeals found that the resolution "was as necessary for the [f]acility as was any decision of the [local zoning board]," and thus found the remonstrators had standing to challenge the council's decision.[213]

In *Red Lobster Restaurants LLC v. Fricke*, the Indiana Supreme Court held that a rule it previously had applied in Chapter 7 bankruptcies extended to Chapter 13 bankruptcies, too: "a plaintiff-debtor's omission of a lawsuit from their bankruptcy asset schedule does not deprive them of standing to pursue that lawsuit, although the omission may mean they are not the real party in interest."[214] The plaintiff-debtor had filed a Chapter 13 bankruptcy proceeding in federal court years prior and had not disclosed as an asset in that proceeding any potential legal claim against the defendant (Red Lobster), though she later amended her bankruptcy asset schedule to disclose the personal injury action after she had already initiated it.[215] The defendant in the personal injury lawsuit argued the plaintiff lacked standing to pursue her personal injury claim in her individual capacity because the claim belonged to her bankruptcy estate.[216] It further argued that she was not pursuing the claim on behalf of her bankruptcy estate because she had failed to timely disclose the claim in the bankruptcy proceeding.[217] The court explained that the defendant was confusing "the concepts of standing and real party in interest," and that because the plaintiff had alleged "a demonstrable injury allegedly caused by" the defendant, the plaintiff had standing.[218] However, it agreed that the claim appeared to have belonged to the bankruptcy estate, such that the real party in interest was the one who would have been pursuing the claim on behalf of the estate—the bankruptcy trustee before the claim was disclosed, or the plaintiff, post-disclosure.[219]

XIV. Article 3, Section 1 – Separation of Powers

In *Rokita v. Tully*, Barbara Tully sued Indiana Attorney General Rokita alleging that the Office of Attorney General violated the Indiana Access to Public Records Act ("APRA") by declining to provide her with information relating to an informal advisory opinion issued by the Indiana Office of Inspector General ("OIG").[220] The trial court granted Tully summary judgment

212. *Id.* at 764.
213. *Id.*
214. 234 N.E.3d 159, 163 (Ind. 2024).
215. *Id.* at 163, 165.
216. *Id.* at 163, 167.
217. *Id.* at 168.
218. *Id.* at 168–69.
219. *Id.* at 169.
220. 235 N.E.3d 189 (Ind. Ct. App. 2024).

and Attorney General Rokita appealed.[221] While the appeal was pending, the Indiana General Assembly amended the statute relating to the Inspector General's duty and made that amendment retroactive.[222] The amendment made informal advisory opinions of the Inspector General confidential and excepted from disclosure under APRA.[223] The Court of Appeals considered whether the amended was unconstitutional under two provisions of the Indiana Constitution: Article 3, Section 1 (distribution of powers) and Article 4, Section 19 (single-subject requirement).[224]

First, the court found that the amendment did not violate Article 3, Section 1.[225] The Indiana Constitution commands that each branch of state government respect the constitutional boundaries of the coordinate branches.[226] Tully argued that the retroactive application of the General Assembly's amendment sets aside a final judgment of the court.[227] The court found that, once a decision reaches finality such that no further appeal may be taken, the legislature cannot declare retroactive legislation that the law applicable to that very case was something different than what the court said.[228] Here, the case had not reached finality, so no violation of separation of powers occurred.[229]

Second, the court found that the amendment did not violate Article 4, Section 19, which provides that an act should be confined to one subject. [230] The purpose of this provision is two-fold: (1) to prevent surprise or fraud in the Legislature by the title of a bill giving no information to a person who might be subject to the legislation under consideration; and (2) to prevent a combination of nonrelated subjects in the same act.[231] The test for determining if this provision is violated is liberal, and where there is a reasonable basis for grouping together various matters of the same nature, the act is valid.[232] Here, the title of the legislation passed by the General Assembly was "[a]n ACT to amend the Indiana Code concerning state and local administration and to make appropriation."[233] The court determined that the amendment to the Inspector General's duty to issue confidential informal advisory opinions had at least some rational connection to the general purpose of efficient state administration and appropriation.[234] The court determined that grouping the amendment with the

221. *Id.* at 192.
222. *Id.*
223. *Id.*
224. *Id.* at 197.
225. *Id.* at 198.
226. *Id.*
227. *Id.* at 199.
228. *Id.*
229. *Id.* at 200.
230. *Id.* at 201.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*

other provisions of the legislation seemed reasonable, as well, and, accordingly, found no violation of Article 4, Section 19.[235]

XV. ARTICLE 4, SECTION 1 – THE LEGISLATIVE POWER

In *Mellowitz v. Ball State University*, the Indiana Supreme Court considered the effect of statute the General Assembly passed after a former university student sought to pursue on behalf of himself and similarly situated students in connection with his university's response to the COVID-19 pandemic.[236] In the suit he initiated in spring of 2020, the student had alleged that the school breached a contract to him and others when it directed that they be taught virtually, rather than in-person, and that even if the school did not breach a contract, it was unjustly enriched by retaining the students' tuition and fees paid for services the school did not provide during the pandemic.[237] In April 2021, the State enacted a law, retroactive to March 1, 2020, before the student had filed suit, that prohibits class actions against certain entities, including the university, for claims including those the student had asserted.[238] In response to a request by the university, after intervention by the Indiana Attorney General, and over the student's objection, the trial court gave effect to the law by requiring the student to amend his complaint to remove any allegations related to a putative class and it denied class certification.[239] On interlocutory appeal, the Indiana Court of Appeals reversed that decision.[240] The Indiana Supreme Court then granted transfer.[241]

On transfer, the Supreme Court first rejected the student's argument that the statute violated the Indiana Constitution's separation of powers provisions.[242] While the judicial function the Indiana Constitution vests in the courts under Article 7, Section 1 includes the power to "promulgat[e] procedural rules for litigating disputes," the General Assembly is empowered to enact "substantive law[s]"—"laws which establish rights and responsibilities"—and those laws "supersed[e] our Trial Rules."[243] The legislature is thus empowered to "enac[t] laws with procedural means to achieve substantive policy objectives beyond ordinary dispatch of judicial business," so long as that legislation "predominately furthers [] public policy objective[s]," and does not "usur[p] the judicial prerogative of managing the courts."[244] To decide whether a statute satisfies this test, courts look at its "predominant purpose": "[i]f the statute

235. *Id.*
236. 221 N.E.3d 1214, 1218–19 (Ind. 2023), *reh'g denied* (Ind. Jan. 16, 2024).
237. *Id.*
238. *Id.* at 1219.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.* at 1221.
243. *Id.* (citations and quotations omitted).
244. *Id.* at 1222–23.

predominantly furthers judicial administration objectives, the statute is procedural," but if it "predominantly furthers public policy objectives involving matters other than the orderly dispatch of judicial business, it is substantive."[245] The class-action statute the student was challenging, the court concluded, was a valid, substantive legislative enactment because the statute and the context in which it was enacted showed the legislature acted narrowly to "twea[k] a procedural rule to predominately further a public policy objective."[246]

The court next dispatched with the student's argument that the statute effected an unconstitutional taking under Article 1, Section 21 of the Indiana Constitution and the Fifth Amendment of the United States Constitution. It explained that a "class action" is a mechanism for pursuing a cause of action, it is not, in itself, a cause of action.[247] Consequently, the court held that the student had "no property right to maintain a class action," and because the statute did not deprive him of his causes of action, his takings claim failed.[248]

The court also rejected the student's claim that the statute unconstitutionally impaired his rights under his contract with the university, contrary to Article 1, Section 24 of the Indiana Constitution and Article I, Section 10 of the United States Constitution, for the same reason.[249] Namely, the statute did not preclude the student from pursuing his claims against the university; it merely prohibited him from pursuing them on behalf of other students.[250] And because the student had no contractual right to pursue his claims on behalf of others, he had not showed that the statute impaired any contract he had with the university.[251]

XVI. ARTICLE 10, SECTION 1 – PROPERTY ASSESSMENT AND TAXATION

In *Osborn v. Schultz*, Steven Osborn challenged the Indiana Board of Tax Review's final determination affirming his 2020 and 2021 property tax assessments.[252] Osborn alleged that annual property tax assessments violate his natural and inalienable rights, as guaranteed by the U.S. Constitution.

Article 10, Section 1 of the Indiana Constitution states that "the General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal."[253] Subject to this restriction and the restriction in the U.S. Constitution, the General Assembly determined that all tangible property within the jurisdiction of the state is subject to

245. *Id.* at 1224 (quoting Church v. State, 189 N.E.3d 580, 589–90 (Ind. 2022)).
246. *Id.* at 1225, 1227.
247. *Id.* at 1228.
248. *Id.* at 1229.
249. *Id.* at 1229–30.
250. *Id.*
251. *Id.* at 1230.
252. 238 N.E.3d 730 (Ind. T.C. 2024) (quoting IND. CONST. art. 10, § 1).
253. *Id.* at 733.

assessment and taxation on an annual basis.[254] Osborn alleged that Indiana's annual property tax levy is void ab initio.[255] Because Osborn failed to firmly link the facts of his case to his alleged infirmities.[256] Thus, his claim failed.

In *Sawlani v. Lake Cnty. Assessor*, a case of first impression, the Indiana tax court analyzed whether the Indiana Constitution permits a statutory provision that limits the one percent tax cap on tangible property, including curtilage, used as a principal place of residence by an owner of the property to the one-acre of land surrounding a home.[257]

Article 10, Section 1 of the Indiana Constitution limits a taxpayer's property tax liability to 1%, 2%, or 3%, depending on the type of property, of the property's gross assessed value.[258] These limitations, referred to as "tax caps," are implemented by statute.[259] The Indiana Constitution applies a 1% tax cap to all tangible property, including curtilage, used as a principal place of residence by an owner of the property.[260] In *Sawlani v. Lake Cnty.*, home owners challenged an Indiana statute, which described the property eligible for the one percent cap as "homestead" property which consists of a dwelling and the real estate, not exceeding one acre, that immediately surrounds the dwelling.[261] The court examined the text of Article 10, Section 1 and determined that there is no reference to "homestead" nor any express limitation on the size or acreage of the property entitled to the one percent limitation.[262] The court then considered the meanings of the words "tangible property," "principal place of residence," and "curtilage."[263] Finding that no party contended that "tangible property" or "principal place of residence" impose a size or acreage limitation, the court focused on the term "curtilage."[264] The court determined that no definition of "curtilage" identified by the court reference fixed size or acreage limitations as a factor.[265] Therefore, the court found that the statutory one-acre limitation was not consistent with the text of the Indiana Constitution.[266] Accordingly, the Sawlani' successfully demonstrated that the statutory one percent cap may be unconstitutional as applied to the, and the Indiana Board of Tax Review's contrary decision was reversed and remanded.[267]

254. *Id.*
255. *Id.*
256. *Id.*
257. 240 N.E.3d 734, 735–36 (Ind. T.C. 2024).
258. *Id.*
259. *Id.* at 736.
260. *Id.*
261. *Id.*
262. *Id.* at 743.
263. *Id.* at 744.
264. *Id.*
265. *Id.* at 745.
266. *Id.*
267. *Id.* at 752.

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

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This survey of criminal cases decided between October 1, 2023, and September 30, 2024, focuses on Indiana Supreme Court opinions while also addressing some of the scores of published opinions of the Indiana Court of Appeals that provide significant direction in criminal cases from beginning (such as speedy trial requests and appointment of counsel) to end (sentencing and post-conviction relief).[1]

I. SPEEDY TRIAL

Defendants pursuing a speedy trial may ground their claim in either Indiana Criminal Rule 4 or the federal and state constitutions.[2] As summarized below, the Supreme Court decided a significant case regarding court congestion while the Court of Appeals grappled with a variety of Rule 4 claims.

A. Court Congestion

Criminal Rule 4(B) requires a trial within 70 days for incarcerated defendants who make a request.[3] One exception is court congestion.[4]

In *Grimes v. State*, a divided Indiana Supreme Court provided guidance about what parties and trial courts must do when continuing cases based on court congestion.[5] In *Grimes*, the defendant objected to the post-congestion trial date and filed a motion for discharge.[6] His motion included certified copies of the court's docket that showed no other jury trials were scheduled for the day of his original trial.[7] He also argued that no potential jurors had been summoned for the original date.[8] The supporting evidence was obtained nine days after the

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1. Some juvenile delinquency appeals are also included because they address issues that apply with equal force to adult criminal defendants. *See, e.g.*, A.W. v. State, 229 N.E.3d 1060 (Ind. 2024) (double jeopardy); W.H. v. State, 231 N.E.3d 900 (Ind. Ct. App. 2024) (sufficiency of evidence).

2. Constitutional speedy trial claims usually involve the Sixth Amendment and sometimes its Indiana constitutional analog of Article 1, Section 13. *See, e.g.,* Watson v. State, 155 N.E.3d 608, 614 n.2 (Ind. 2020).

3. IND. R. CRIM. P. 4(B).

4. *Id.*

5. 235 N.E.3d 1224, 1228 (Ind. 2024).

6. *Id.* at 1229.

7. *Id.*

8. *Id.*

continuance order.[9] The trial court denied the motion to discharge without explanation.[10]

The majority opinion authored by Justice Slaughter sets forth a straightforward, burden-shifting test. First, trial courts are given deference as to an initial finding of congestion.[11] "But if the defendant presents a prima facie case that the court's congestion finding is inaccurate," the burden shifts to the trial court to explain why its calendar required continuing the trial.[12] If the court fails to meet its burden, the defendant is entitled to have the State's charge against him dismissed.[13]

By submitting docket entries showing no other scheduling conflicts with priority over his criminal trial, Grimes met his initial burden.[14] The trial court was then required to explain the postponement but "failed to meet even this low bar" because "it gave no explanation when it denied the defendant's motion for discharge."[15] The case was remanded with instructions to discharge Grimes.[16]

Justice Goff, joined by Justice Massa, dissented. In their view, Grimes failed to carry his burden of showing that the trial court's congestion finding was inaccurate "at the time it continued the trial."[17] Emphasizing the presumed validity of a trial court's finding, they faulted Grimes for offering "a copy of the court's docket dated **nine days** after the court rescheduled trial" and "merely alleging, without testimony or affidavit from court staff, that 'no jurors were summoned for duty' the week of the original trial date."[18]

Nonetheless, the dissent concluded by acknowledging that future reversals should be rare as a trial court can "meet its low burden by offering a simple factual basis to support its congestion finding—e.g., noting the case and cause number requiring priority treatment—and thus avoid cases like this."[19]

B. Inadequate Trial Court Records

The inadequacy of trial court records also contributed to a reversal in *Hoback v. State*.[20] There, the defendant bore the burden under Criminal Rule 4(C) to show that he was not brought to trial within one year and that any delay

9. *Id.*

10. The current version of CR 4(B) refers to the dismissal of charges rather than to discharge of the defendant, but the Court observed that its opinion applied with "equal force" to both versions of the rule. *Id.* at 1230.

11. *Id.* at 1228.

12. *Id.*

13. *Id.*

14. *Id.* at 1231.

15. *Id.* at 1228.

16. *Id.* at 1235.

17. *Id.* (Goff, J., dissenting).

18. *Id.*

19. *Id.* at 1237.

20. 225 N.E.3d 208 (Ind. Ct. App. 2023).

was not caused by him, congestion of the court's calendar, or an emergency.[21] The Court of Appeals reiterated that delay cannot be charged to a defendant for "absent or missing" docket entries.[22]

The majority found the trial court's record for delay past one year "woefully inadequate"; docket entries, such as "[a]dditional dates requested" or that the trial was "cancelled" for the reason "[o]ther," did not specify which party sought the delay.[23] Moreover, the entry canceling the jury trial did not reset the trial date, which would have triggered an obligation to object on Rule 4(C) grounds if the new date was beyond the time limit.[24] Put another way, "Hoback did not waive his discharge claim by failing to object to the order setting a status conference outside the one-year time period."[25]

Judge Felix dissented. First, he would have found the claim waived based on a lack of cogent argument on some points and defense counsel's otherwise "significant noncompliance with Appellate Rule 46," which "substantially impede[d]" review of the claim.[26] Moreover, he believed the defendant "acquiesced in, if not requested, the delay."[27] Unlike an earlier reversal in which the Chronological Case Summary (CCS) did not "provide any insight as to why the case was reset," one entry was "signed by both counsel and at least three docket entries from the court explain[ed], albeit not in great detail, why the trial was cancelled and a status conference reset."[28]

One can hope for better clarity going forward. Beginning January 1, 2024, Criminal Rule 4.1 now requires: "When granting or ordering a continuance, the court must designate whether the delay is excluded from the Rule 4 time period due to the act of the defendant, court congestion, or emergency."[29]

C. Criminal Rule 4(A) & (C)

Criminal Rule 4 sets different deadlines and imposes different consequences for speedy trial violations depending on whether a defendant is in custody and whether a speedy trial is requested.

For example, as reiterated in *Ko v. State,* it is well-settled "that a defendant held in jail for more than six months is not entitled to discharge from prosecution or dismissal of charges under Criminal Rule 4(A); rather, the defendant is

21. *Id.* at 212.
22. *Id.* at 213.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 214–15.
27. *Id.* at 213–14.
28. *Id.* at 216.
29. IND. R. CRIM. P. 4.1(A)(4).

merely entitled to prompt release on his own recognizance."[30] Pursuing a writ is the proper procedure to secure a defendant's prompt release.[31]

But Ko waited until after his trial concluded to raise the issue, and the court of appeals found the "issue is moot as no effective relief can be granted."[32]

The defendant in *Crabb v. State*, however, brought a challenge under Rule 4(C), which "places an affirmative duty on the State to bring a defendant to trial within one year of being charged or arrested, but allows for extensions of that time for various reasons."[33] The State bears the burden of bringing a defendant to trial within a year; defendants have no obligation to remind the State of its duty or remind the trial court of that duty.[34]

Crabb involved a special judge, a request for a competency evaluation, and emails that included court staff, defense counsel, and the special judge.[35] The parties agreed that, as of October 25, 2022, the State had 118 days—or until February 20, 2023—to bring Crabb to trial.[36] The State argued from the "context" of a January 2023 email that defense counsel met with the special judge on January 23 and agreed to an October 2023 trial date.[37] But the State offered no evidence that the Rule 4(C) clock stopped running on January 23.[38] Moreover, the State took no action in the case between October 2022 and February 22, 2023, when a trial date was set.[39] Because the 4(C) time had expired, Crabb had no duty to object and was entitled to discharge.[40]

D. Speedy Trial Claim Waived

In a Criminal Rule 4(B) case, *Miller v. State*, the trial court entered a congestion order vacating Miller's trial three days before his scheduled trial date because of a trial in another case.[41] After his case was scheduled for a date beyond the seventy-day deadline, Miller moved for discharge.[42]

The Court of Appeals found his claim waived.[43] First, the court of appeals rejected Miller's claim that no objection was required because it was impossible

30. 243 N.E.3d 1153, 1158 (Ind. Ct. App.), *trans. denied*, 2024 Ind. LEXIS 721 (Ind. 2024).

31. *Id.* (citing S.L. v. Elkhart Superior Ct. No. 3, 969 N.E.2d 590, 591 (Ind. 2012) (granting "relief in part by ordering that Relator be promptly released on his own recognizance, though he still may be held to answer for the criminal charge against him")).

32. *Id.*

33. 242 N.E.3d 539, 542 (Ind. Ct. App. 2024).

34. *Id.*

35. *Id.* at 540–41.

36. *Id.* at 542.

37. *Id.* at 543.

38. *Id.*

39. *Id.*

40. *Id.*

41. 225 N.E.3d 790, 792 (Ind. Ct. App. 2023), *trans. denied*, 2024 Ind. LEXIS 383 (Ind. 2024).

42. *Id.*

43. *Id.* at 793.

to reschedule the trial within the Rule 4 deadline.[44] Rather, because the congestion order was entered a few days before Miller's speedy-trial deadline, he was required to object.[45] Second, Miller's pro se letters objecting "to any and all continuances" were immaterial because "once counsel is appointed, a defendant speaks through his counsel and the trial court is not required to respond to the defendant's pro-se requests or objections."[46]

E. Conflicting Local Rule Invalid

Finally, in *Ferman v. State*, the defendant alleged under Rule 4(C) that the trial court improperly charged two delays to him, resulting from neither party filing a request to "call a jury" as required by a Fayette County local court rule.[47] The Court of Appeals agreed that the local rule conflicted with Rule 4(C) because it places a duty on defendants to file a request to call a jury and, if a trial is continued, charges defendants with the delay.[48] Nevertheless, discharge was not required because, even considering the wrongfully attributed delays under the local rule, the State still had a week to bring him to trial when he requested discharge.[49]

II. APPOINTED COUNSEL REINSTATED IN HIGH-PROFILE CASE

In October 2022, Richard Allen was arrested and charged with murdering two teenage girls in Delphi, a case that had garnered national attention.[50] He was appointed two public defenders who worked diligently on the case for the next year.[51] But a year after their appointment, "the special judge lost faith in their ability to assist Allen with his defense effectively, so she ultimately disqualified them as counsel."[52] New trial public defenders were appointed, and appellate lawyers filed an original action with the Indiana Supreme Court to challenge the disqualification and replacement.[53]

The Indiana Supreme Court received responses from the special judge and Attorney General before scheduling the matter for oral argument.[54] Hours after

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44. *Id.*
45. *Id.*
46. *Id.*
47. 232 N.E.3d 133, 138 (Ind. Ct. App. 2024).
48. *Id.*
49. *Id.* at 139.
50. State *ex rel.* Allen v. Carroll Cir. Ct., 226 N.E.3d 206, 209 (Ind. 2024). *See, e.g.*, Christine Hauser & Derrick Bryson Taylor, *Indiana Man Is Charged in 2017 Killings of Two Girls*, N.Y. TIMES (Oct. 31, 2022), https://www.nytimes.com/2022/10/31/us/delphi-murders-indiana.html.
51. *Allen*, 226 N.E.3d at 208–09.
52. *Id.* at 209.
53. *Id.*
54. *Id.* at 208–09.

the oral argument, the court issued an order granting the writ and reinstating counsel.[55] Weeks later, the formal opinion followed.

The opinion began by acknowledging that original actions for writs of mandamus or prohibition are "an extraordinary remedy," for a "clear and obvious emergency," and not "substitutes for appeal."[56] But the court has "repeatedly reviewed through original actions . . . whether to disqualify counsel" and found it appropriate to do so in Allen's case considering the "extraordinary circumstances where denying a writ will result in substantial injustice" and the absence of an "adequate appellate remedy."[57]

Turning to the merits, the majority relied on the Sixth Amendment, noting the high stakes because the erroneous deprivation of the right to counsel "constitutes structural error, which, unlike other errors, entitles criminal defendants who are convicted to automatic reversal and a new trial."[58] Although "[c]ourts around the country are divided over whether the Sixth Amendment guarantees criminal defendants the *continuity* of court-appointed counsel, appellate courts have at least limited the authority of trial courts to remove court-appointed counsel.[59] Some courts have found that due process, rather than the Sixth Amendment, protects the right.[60]

Whatever the source, even the Attorney General acknowledged that the trial court's discretion to disqualify court-appointed counsel is significantly limited.[61] The majority adopted the following rule:

> [A] trial court cannot disqualify court-appointed counsel over the objection of both the defendant and appointed counsel unless (a) disqualification is a last resort; (b) disqualification is necessary to protect the defendant's constitutional rights, to ensure the proceedings are conducted fairly and within our profession's ethical standards, or to ensure the orderly and efficient administration of justice; and (c) those interests outweigh the prejudice to the defendant.[62]

Applying that rule, the Supreme Court found that disqualification was not a last resort. The special judge's concerns were "addressed through a combination of procedural rules and court orders, including the gag order and protective order she entered," and she retained "both statutory and inherent authority to compel compliance with [her] orders and the procedural rules through contempt

55. *Id.* at 211.
56. *Id.*
57. *Id.* at 212.
58. *Id.* at 213. The court also quoted Article 1, Section 13, but did not develop or apply a separate Indiana constitutional analysis. *Id.*
59. *Id.* at 214.
60. *Id.*
61. *Id.* at 215.
62. *Id.*

proceedings and sanctions that include fines and even jail."[63] Next, the special judge's concern that counsel could not effectively represent the defendant was outweighed by the decades of experience of both.[64] And finally, Allen faced substantial prejudice from substituting counsel more than a year after counsel had been working with investigators and experts and was ready for trial.[65] Moreover, Allen had "already been in jail for about a year and a half now, and substituting counsel require[d] a nine-month delay in the trial date with substitute counsel unsure whether they would even be ready by then."[66]

Justice Slaughter dissented, citing the familiar legal principles that "[o]riginal actions are for clear-cut cases that apply settled law, not for cases like today's that announce new legal rules. The latter is what appeals are for."[67]

III. JURY INSTRUCTIONS

In a pair of cases, the appellate courts applied long-standing principles in (a) ordering a retrial based on an instruction that used "and/or" and (b) affirming another case where no instruction on a topic was warranted.

A. Burden in Self-Defense "and/or" Defense of Dwelling

Whether pursuing self-defense or defense of dwelling,[68] the State must prove beyond a reasonable doubt "that the defendant's use of force was not justified."[69] The trial court in *Dunn v. State* determined that both self-defense and defense of dwelling were potentially at issue, but it instructed the jury that the State had to prove Dunn "did not act in self-defense **and/or** act in defense of her dwelling."[70]

The Indiana Supreme Court summarized criticisms of use of "and/or" language, which "is ambiguous and potentially imprecise."[71] The inclusion of "and/or" in the *Dunn* instructions

> opened the door to confusion, suggesting that the State bore the burden of proving only that Dunn did **not** act in **both** self-defense **and** defense

63. *Id.* at 216.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 219.
68. A person "is justified in using deadly force" and has no "duty to retreat" if "the person reasonably believes that that force is necessary to prevent serious bodily injury to the person" or "the commission of a forcible felony." IND. CODE § 35-41-3-2(c) (2024). A person is also "justified in using reasonable force, including deadly force," if "the person reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle." I.C. § 35-41-3-2(d).
69. Dunn v. State, 230 N.E.3d 910, 915 (Ind. 2024).
70. *Id.* at 916.
71. *Id.*

> of her dwelling. Or, to put it another way, the jury may have understood Final Instruction 7 as giving the State the burden of disproving either self-defense **or** defense of dwelling, rather than both.[72]

In ordering a new trial because the error was fundamental, the Supreme Court relied on several factors. The "and/or" language was used repeatedly in the instructions, which "nowhere told the jury that the State needed to disprove both defenses."[73] Moreover, in its closing argument, the State "reiterated—rather than clarified—the ambiguous burden of proof, infecting the most critical issues in the case."[74] Although defense counsel focused on defense of dwelling and opposed any instruction on self-defense, the trial court gave a self-defense instruction, which it should have crafted with particular care when given sua sponte and "contrary to the express strategy of the party whom the instructions were supposed to protect."[75] Finally, the Supreme Court found the defense presented a "strong case" for defense of dwelling.[76] Because it was "the jury's prerogative to evaluate the credibility of the witnesses, weigh the evidence, and resolve any conflicts," a new trial was warranted to allow the jury to perform its role "equipped with the correct legal standard."[77]

B. Jury Instruction on Parental Privilege Denied

The defense of parental privilege to discipline a child is grounded in the "legal authority" statute.[78] Relying on the Restatement of Torts, the Indiana Supreme Court has held as follows: "A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his [or her] child as he [or she] reasonably believes to be necessary for its proper control, training, or education."[79]

In *Ndiaye v. State*, a parent who threatened to cut off the hand of his daughter for stealing was charged with intimidation.[80] The Court of Appeals affirmed the trial court's refusal to instruct the jury on the defense of parental privilege because "reasonable parenting cannot, as a matter of law, include threatening to commit serious bodily injury to a child with a deadly weapon."[81]

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72. *Id.*
73. *Id.* at 917.
74. *Id.*
75. *Id.* at 918.
76. *Id.* at 919.
77. *Id.*
78. I.C. § 35-41-3-1.
79. Willis v. State, 888 N.E.2d 177, 182 (Ind. 2008).
80. 234 N.E.3d 906 (Ind. Ct. App. 2024).
81. *Id.* at 911 (footnote omitted).

IV. Crime or Not a Crime?

Indiana's appellate courts decided several cases regarding challenges to the validity of a specific charge. This section begins with an Indiana Supreme Court opinion that reversed convictions based on insufficient evidence of intent before turning to several decisions by the Court of Appeals addressing sufficiency claims for a variety of charges.

A. Insufficient Evidence of Intent

In *Teising v. State*, a township trustee was convicted of twenty-one counts of theft for each paycheck she cashed while leading "a nomadic life while continuing to work remotely" during the COVID-19 pandemic.[82]

A theft conviction requires proof that a person "knowingly or intentionally exert[ed] unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use . . . ."[83] Under long-standing precedent, "[t]he taking of property of another under a good faith claim of title or right to possession, or under circumstances consistent with honest conduct, is not larceny [(i.e., theft)], although the party charged with the crime might have been mistaken in [their] belief."[84] That is because "[t]he intent to steal property and a [bona fide] claim of right to take it are incompatible."[85]

Article 6, Section 6 of the Indiana Constitution requires that all township officers "shall reside within their respective . . . townships," and "they forfeit their position if they don't."[86] Teising was aware of the requirement to reside within the township when she "sold her home, bought a travel trailer, and left for a nomadic life while continuing to work remotely."[87] In the State's view:

> [T]hat lifestyle produced a chain of legal consequences: by leaving the township indefinitely, she stopped residing in the township as a matter of law; then by not complying with the constitutional requirement to reside within the township, she forfeited her office; and then by forfeiting her office, her paychecks became ill-gotten gains.[88]

The Indiana Supreme Court disagreed. The "State didn't prove Teising knew she forfeited her office," and "without knowing she wasn't supposed to be

82. 226 N.E.3d 780, 781 (Ind. 2024),
83. I.C. § 35-43-4-2.
84. Roark v. State, 130 N.E.2d 326, 328 (Ind. 1955).
85. *Id.*
86. *Teising*, 226 N.E.3d at 784.
87. *Id.* at 781.
88. *Id.* at 785.

receiving the paychecks, Teising could not have had the necessary criminal intent.[89]

The court also disagreed that Teising had inappropriately relied on a mistake of law defense. Teising could not "defend based on her ignorance of the *criminal* law . . . that she didn't know it was a crime to take other people's things without their permission," but she could "defend on the basis that she misunderstood the *civil* law to mean the allegedly stolen property was rightfully hers, because that misunderstanding negates her criminal intent."[90]

Without any evidence of intent, the court vacated the theft convictions, concluding the "only available remedies were civil."[91]

B. Perjury Conviction Reversed

Perjury occurs when a person "makes a false, material statement under oath or affirmation, knowing the statement to be false or not believing it to be true . . . ."[92] The statute is limited to "a statement of fact and not a conclusion, opinion, or deduction from given facts."[93]

In *Basso v. State*, a state trooper was injured after his vehicle was struck by a drunk driver.[94] During a pretrial deposition, he testified that he believed the driver "deserve[d] jail time."[95] The driver later pleaded guilty, and Basso testified at sentencing that he favored "home detention" instead of jail time.[96] An investigation ensued, and Basso was later charged with perjury.[97] He filed a motion to dismiss the charge, which was denied and then raised on interlocutory appeal.[98]

The Court of Appeals held that a crime victim does not commit perjury simply by changing his opinion about the proper punishment for the defendant.[99] Perjury can ordinarily not be based on a statement of opinion, which "is not a statement of fact that can be proven false in a perjury prosecution."[100] Acknowledging the important role that victims play in criminal prosecutions, the court explained that it is not unusual for crime victims to change their

89. *Id.* at 786.
90. *Id.* at 785.
91. Id. at 787.
92. I.C. § 35-44.1-2-1(a)(1).
93. Basso v. State, 244 N.E.3d 439, 443 (Ind. Ct. App. 2024) (citing references omitted).
94. *Id.* at 441.
95. *Id.*
96. *Id.* at 442.
97. *Id.*
98. *Id.*
99. *Id.* at 444.
100. *Id.*

opinion about punishment as "time passes, heated feelings cool, and old wounds heal."[101]

C. Website Citations Cannot Meet the State's Evidentiary Burden

Level 3 felony aggravated battery requires proof of a substantial risk of death to another person.[102] In *W.H. v. State*, the State offered evidence that W.H. shot the victim in the lower leg and general testimony from a detective about his experience with gunshot wounds.[103] The victim "was standing on one foot and was thereafter taken by ambulance to the hospital for his injury."[104] Although the State presented photographs of the wound, it "did not present any testimony or medical records explaining the specific nature of the injury or the treatment thereof."[105] Its reliance on "general or hypothetical questions" posed to a detective about his experience with gunshot wounds was not enough.[106] Nor could the State "fill the evidentiary gaps" of its failure to present evidence in the trial court with information from medical websites and journals on appeal.[107] The adjudication was vacated for lack of sufficient evidence.[108]

D. Felony Reduced to Misdemeanor Cannot Support SVF Conviction

A person convicted of certain felony offenses who possesses a firearm commits unlawful possession of a firearm by a serious violent felon (SVF), a Level 4 felony.[109] In *Brackenridge v. State*, the defendant's 2010 conviction for class D felony criminal confinement was reduced to a misdemeanor in 2016.[110] When charged with SVF in 2023, he sought dismissal. The Court of Appeals reversed the denial of his motion to dismiss because the SVF statute applies to felony convictions.[111] In addition to the plain statutory language, dismissal was warranted by the rule of lenity and by the purpose of Alternative Misdemeanor Sentencing (AMS) to reward good behavior.[112]

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101. *Id.* The appellate court also rejected the State's argument that Basso committed perjury by misrepresenting that his changed opinion was not based on a civil case he had filed against the driver. Rather, the "confusingly worded" question that Basso was asked was not what the State contends he was asked. *Id.*

102. I.C. § 35-42-2-1.5.

103. 231 N.E.3d 900, 904 (Ind. Ct. App. 2024).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 905. The opinion cites *Dolkey v. State*, which explained it "is axiomatic that appellate review of the factfinder's assessment is limited to those matters contained in the record which were presented to and considered by the factfinder." *Dolkey,* 750 N.E.2d 460, 462 (Ind. Ct. App. 2001).

108. *W.H.*, 231 N.E.3d at 905.

109. I.C. § 35-47-4-5.

110. 236 N.E.3d 684 (Ind. Ct. App. 2024).

111. *Id.* at 685.

112. *Id.* at 688–89.

E. HVSO Enhancement Supported by Either Felonies or Misdemeanors

A person is a habitual vehicular substance offender (HVSO) if "the person has accumulated three (3) or more prior unrelated vehicular substance offense convictions at any time."[113] A "vehicular substance offense" is "any misdemeanor or felony in which operation of a vehicle while intoxicated . . . is a material element" and includes "an offense under IC 9-30-5" (OWI offenses).[114]

In *Coonce v. State*, the defendant challenged his HVSO enhancement because it was based on both felonies and misdemeanors.[115] He pointed to Indiana Code section 9-30-15.5-2(b)(3), which mentions "(3) prior unrelated vehicular substance offense felonies." Considering other parts of the statute and the principle that courts should "avoid interpretations that depend on selective reading of individual words that lead to irrational and disharmonizing results," the court of appeals concluded that the "use of the word 'felonies' in the introductory clause of subsection (b)(3) is an anomaly and an error."[116] The prior offenses could be either misdemeanors or felonies.

Beyond grammar, the court reasoned that its interpretation was consistent with the purpose of the statute—"to provide enhanced sentencing for offenders who demonstrate a pattern of recidivism. It is the repetition, not the seriousness, of the offenses that establishes the habit. This is especially true in the context of HVSOs, because typically, OWI is a Class A or Class C misdemeanor offense."[117]

F. Identity Deception Conviction Upheld Under 2021 Statute

Under an earlier version of the identity deception statute, Indiana courts have reversed convictions when the defendant did not use identifying information of a real person, such as using a fictious name.[118] Although the defendant in *Kendall v. State*, relied on those cases, the court of appeals upheld his conviction under the statute, which was amended in 2021.[119]

Kendall told police his name was "Tyler Cliver," and his date of birth was "August 3, 1988."[120] Although the date of birth was correct, the name was not.[121] Under the amended statute, identity deception occurs when "a person who, with intent to harm or defraud another person, knowingly or intentionally obtains,

113. I.C. § 9-30-15.5-2(c).
114. I.C. § 9-30-15.5-1 (2016).
115. 240 N.E.3d 721 (Ind. Ct. App. 2024).
116. *Id.* at 725.
117. *Id.*
118. *See* Brown v. State, 868 N.E.2d 464 (Ind. 2007); Duncan v. State, 23 N.E.3d 805 (Ind. Ct. App. 2014).
119. 225 N.E.3d 794 (Ind. Ct. App. 2023).
120. *Id.* at 796.
121. *Id.*

possesses, transfers, or uses identifying information *to profess to be another person*."[122] The legislature also amended the definition of "identifying information" to include "information, *genuine or fabricated*, that identifies or *purports to identify* a person, including: (1) a name, address, date of birth . . . ."[123] Although the key terms are not defined in the statute, the court of appeals provided dictionary definitions of genuine, fabricate, and purport.[124]

Based on these amended statutes, the appellate court affirmed the conviction because it could not "say that the current version of the statute requires that the identifying information must coincide with any real person or an existing human being."[125]

V. INSANITY AND COMPETENCY

Although frequently raised together, insanity and incompetency are different; insanity looks to the mental state at the time of an offense, while competency considers the time of trial or other court proceedings.[126] The appellate courts addressed the insanity and competency statute in two different contexts—its inapplicability of insanity to contempt proceedings and the waiver of a competency challenge by defense counsel's words or actions.

A. Insanity Statute Does Not Apply in Contempt Proceedings

In *Finnegan v. State*, the defendant was found in indirect contempt of court because of his vulgar letters to the trial court.[127] His counsel's request for a mental health evaluation under the insanity statute was denied.[128] The court of appeals reversed, concluding that alleged indirect contempt defendants are "entitled to the same statutory protections afforded other criminal defendants," but the Indiana Supreme Court granted transfer.[129] It affirmed, "the trial court on the narrow ground that the insanity defense statutes, as codified in Indiana Code chapter 35-36-2, *et seq*., do not apply to indirect contempt proceedings."[130] Although "an alleged contemnor is always free to argue his mental state to excuse, explain, or mitigate his contemptuous behavior, the statutes simply do not compel a judge to treat him precisely like a criminal defendant."[131]

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122. *Id.* at 802 (quoting I.C. § 35-43-5-3.5(a)).

123. *Id.* (quoting I.C. § 35-43-5-1(i)).

124. The opinion includes definitions from American Heritage and from BLACK'S LAW DICTIONARY. In evaluating a vagueness claim in *Brown*, 868 N.E.2d at 467, "which hinges upon how ordinary people understand statutory language," the Indiana Supreme Court remarked that it preferred "to consult standard dictionaries, not a specialized legal dictionary as cited by the State."

125. *Kendall*, 225 N.E.3d at 803.

126. *Compare* I.C. § 35-36-2-1 (insanity) *with* I.C. § 35-36-3-1 (competency).

127. 240 N.E.3d 1265, 1268 (Ind. 2024).

128. *Id.* at 1268–69.

129. *Id.* at 1269.

130. *Id.* at 1270.

131. *Id.*

The majority carefully parsed statutory language to support its narrow holding. For example, criminal insanity statutes use the phrase "criminal case" to describe a defendant or trial,[132] but "the phrase 'criminal case' does not appear in the indirect contempt procedure statutes."[133] More broadly, the "General Assembly also distinguished the procedures governing indirect contempt by placing it under Title 34, which governs civil procedures, while Title 35 governs criminal proceedings."[134]

Nevertheless, the final words of the opinion signaled a looming and stronger argument for the future: whether the inability to raise insanity claims in contempt proceedings offends "due process must wait for a case where it is raised."[135]

Justice Goff dissented in part, signaling his support for greater protections when the issue next arises.[136] In his "view, indirect criminal contempt is a crime, and a defendant faced with such a charge is entitled to the same protections enjoyed by other criminal defendants, including the right to opinion testimony."[137]

B. Lack of Competency Hearing Was Invited Error

A trial court is required to hold a hearing on the issue of a defendant's competency "[i]f at any time before the final submission of any criminal case to the court or the jury trying the case *the court* has reasonable grounds for believing that the defendant lacks the ability to understand the proceedings and assist in the preparation of a defense."[138] In *Brunette v. State*, trial counsel representing a defendant charged with murder filed a motion to determine the defendant's competency to stand trial.[139] The trial court appointed two psychiatrists, who came to opposing conclusions about competency.[140] The court appointed a third psychiatrist, who concluded that the defendant was competent to stand trial.[141]

When the trial court asked whether defense counsel wanted "to have a full competency hearing," counsel declined "given the reports" and instead "stipulate[d] to competency."[142] The court of appeals concluded that any error in the trial court's failure to hold a competency hearing was invited error; nevertheless, "the better practice—and what the statute requires—is for the trial

132. I.C. §§ 35-36-2-1–2-2.
133. *Finnegan*, 240 N.E.3d at 1270–71.
134. *Id.* at 1271.
135. *Id.* at 1272.
136. *Id.* at 1272–79.
137. *Id.* at 1273.
138. I.C. § 35-36-3-1(a) (emphasis added).
139. 227 N.E.3d 982 (Ind. Ct. App. 2024).
140. *Id.* at 984.
141. *Id.*
142. *Id.*

court itself to determine whether there are reasonable grounds to question a defendant's competency . . . ."[143]

VI. Substantive Double Jeopardy Returns

In 2020, the Indiana Supreme Court overruled two decades of "constitutional tests in resolving claims of substantive double jeopardy" in *Richardson v. State*,[144] replacing it with "an analytical framework that applies the statutory rules of double jeopardy" in a three-part test in *Wadle v. State*.[145] Although the case was discussed in the constitutional law survey that year, the criminal law survey noted that "[t]he baton (or hot potato?) has been passed and will be part of the criminal law survey going forward."[146]

Although frequently raised in the years since, substantive double jeopardy challenges were usually resolved in unanimous, often unpublished, opinions from the Court of Appeals.[147] The Attorney General concedes error in many cases.[148] But two cases highlight challenges with the *Wadle* framework.

In *A.W. v. State*, the Supreme Court noted that courts "have since wrestled with applying the *Wadle* framework, and at times have misapplied its instructions by resurrecting a version of the 'actual evidence' test from *Richardson*—first in dicta, which then became part of a published decision."[149] The supreme court disapproved any opinion that relied on the actual evidence test and reiterated the *Wadle* test for resolving substantive double jeopardy claims, "albeit with a small but crucial adjustment at Step 2, where courts will now construe ambiguities from charging instruments in favor of defendants."[150]

As the Supreme Court explained, "if the prosecutor forgets to include—or perhaps even strategically omits—operative facts establishing that one offense is factually included in another, the defendant does not have **any** means to demonstrate the double jeopardy violation."[151] That approach would "undermine the fundamental objectives of *Wadle* in fashioning a neutral, coherent framework for analyzing substantive double jeopardy claims."[152]

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143. *Id.* at 986.

144. 717 N.E.3d 32 (Ind. 1999).

145. 151 N.E.3d 227, 235 (Ind. 2020).

146. Joel M. Schumm & Riley L. Parr, *Recent Developments in Indiana Criminal Law and Procedure*, 54 Ind. L. Rev. 851, 867 (2022).

147. *See, e.g.*, Boner v. State, 243 N.E.3d 354, 367 (Ind. Ct. App. 2024); Atkinson v. State, 2024 Ind. App. Unpub. LEXIS 1147 (Ind. Ct. App. 2024); Walls v. State, 2023 Ind. App. Unpub. LEXIS 1532 (Ind. Ct. App. 2023).

148. Mills v. State, 2024 Ind. App. Unpub. LEXIS 1699 (Ind. Ct. App. 2024) (concluding "the State now concedes that Mills's convictions constitute double jeopardy under *Wadle*, as clarified by *A.W.*"); Hutchison v. State, Ind. App. Unpub. LEXIS 427 (Ind. Ct. App. 2024) (noting "the State concedes that Hutchison's two convictions violate double jeopardy principles).

149. 229 N.E.3d 1060 (Ind. 2024).

150. *Id.*

151. *Id.* at 1070.

152. *Id.*

Finally, construing charging ambiguities against the State is consistent with principles of due process and the rule of lenity.[153] "In short, [A.W.] balances the scales by placing a defendant's rights 'beyond the reach' of unfair prosecutorial discretion, while securing the State's opportunity to later rebut a violation at Step 3" of *Wadle*.[154]

Applying the *Wadle* framework, the Supreme Court concluded that A.W.'s adjudications for possession of a machine gun and dangerous possession of a firearm violated double jeopardy.[155] First, neither statute permits multiple punishments.[156] Second, as charged, a child who possesses a machine gun necessarily possesses a dangerous firearm. And the extent to which there was factual ambiguity about whether the "means used" as presented in the charging instrument was the same weapon—a machine gun—to commit both offenses, the court construed the ambiguity in A.W.'s favor.[157] Third, considering the facts in the charging information and facts presented at trial, A.W. possessed the same weapon—a fully automatic Glock—for at least thirty seconds, which was "compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction."[158] The court, finding a double jeopardy violation, vacated A.W.'s adjudication for dangerous possession of a firearm.[159]

Justice Goff, the author of *Wadle*, concurred in the result. In his view, the majority's "well-intentioned" opinion "modifies the included-offense analysis in a manner that introduces ambiguity and inconsistency. It also undermines the stability of the law."[160] He pointed to "other devices in the 'legal toolbox,'" including (1) sentence revision under Appellate Rule 7(B); (2) an entitlement "to clear notice of the offenses charged" under Article 1, Section 13 of the Indiana Constitution; and (3) when "a charging instrument leaves it unclear whether two alleged offenses arise from the same facts, a defendant may move for a 'more definite statement' of the charges under Trial Rule 12(E)."[161] Finally, "a defendant may prefer ambiguity over whether a charged offense includes other offenses or not, hoping to leave the door open to conviction on a lesser, included offense."[162]

153. *Id.*
154. *Id.* at 1070–71 (footnote omitted).
155. *Id.* at 1072–73.
156. *Id.* at 1072.
157. *Id.*
158. *Id.*
159. *Id.* at 1073.
160. *Id.*
161. *Id.* at 1076.
162. *Id.*

B. More "Fine Tuning" Needed?

In *McGraw v. State*, Judge Bradford concluded that dual convictions for Level 5 felony and Level 6 felony domestic battery did not violate Indiana's prohibitions against double jeopardy under *Wadle*.[163] Judge Tavitas dissented, finding a violation under *Wadle*'s step three.[164]

Judge Crone wrote a concurring opinion lamenting "our supreme court's abandonment of the 'actual evidence' test from *Richardson* [] in favor of the *Wadle* test," which he believes did not provide clarity but "instead sowed confusion."[165] He concluded with the hope that the recent "fine tuning" of *Wadle* in *A.W.* continues in future cases.[166]

But *A.W.* may be all the fine-tuning in store for a while; the supreme court unanimously denied transfer in *McGraw*.[167]

VII. SENTENCING

Although most survey periods include notable opinions addressing sentence revisions under Appellate Rule 7(B), last year's survey noted that few published opinions from the Court of Appeals during the survey period addressed such claims, and the Indiana Supreme Court did not issue opinions in any 7(B) cases.[168] As summarized below, this year's survey includes a notable 3–2 opinion reversing a court of appeals' opinion that had reduced a lengthy sentence for several misdemeanor opinions. It also includes other 7(B) cases before turning to a variety of other sentencing claims, including the right to be present at sentencing, limits on fines and fees for cash bonds, and the alternative misdemeanor sentencing statute.

A. Consecutive Sentences for Multiple Misdemeanors

Both appellate courts addressed the imposition of lengthy sentences imposed for multiple misdemeanor convictions.

First, in *Lane v. State*, a 3–2 majority of the Indiana Supreme Court upheld an aggregate sentence of more than eight years for ten misdemeanor convictions of invasion of privacy based on the defendant "sending letters from prison to his former partner, while serving time after a domestic battery and in violation of a no-contact order."[169]

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163. 243 N.E.3d 394, 403 (Ind. Ct. App.), *trans. denied*, 2024 Ind. App. Unpub. LEXIS 711 (Ind. 2024).

164. *Id.* at 405.

165. *Id.* at 404.

166. *Id.*

167. 245 N.E.3d 1024 (Ind. 2024).

168. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 57 IND. L. REV. 891, 905 (2024).

169. 232 N.E.3d 119, 120 (Ind. 2024).

The majority opinion addressed important broad principles, but its ultimate holding was narrow. First, resolving a split in opinions from the court of appeals, the majority adopted the view of *Connor v. State*[170] that "the two prongs of Appellate Rule 7(B)—the nature of the offense and the character of the offender—are 'separate inquiries to ultimately be balanced in determining whether a sentence is inappropriate.'"[171] Reviewing courts "must consider" both factors, and revision may be warranted "where only one of the prongs weighs heavily in favor" of the defendant.[172] *Lane* rejected the approach of *Davis v. State*, which required the defendant to prove both "conditions" for relief.[173]

Moreover, the majority acknowledged that a lengthy aggregate sentence for misdemeanors is uncommon. The 1970 constitutional amendment that created the review-and-revise power was inspired by its "efficacious" use by the English Court of Criminal Appeals.[174] The English court recognized limiting principles, including (1) related and similar misdemeanor offenses committed close in time generally warrant concurrent sentences, and (2) separate misdemeanor offenses should not be punished "far in excess" of the most serious individual offense.[175] However, the majority declined "to adopt hard-and-fast directives under Indiana Appellate Rule 7(B) for sentences on multiple offenses."[176]

Rather, focusing on the 2014 criminal code reform, the majority concluded that "the essence of today's criminal justice system in Indiana is to distinguish dangerous, violent offenders from the rest and to provide for sentences that reflect all the pertinent circumstances."[177] Lane "committed repeated, similar offenses" that "reflected his longstanding pattern of domestic abuse, and he failed to stop committing crimes against the same victim despite imprisonment."[178]

The majority's affirmance is narrow and reiterates that trial courts should "use the full range of rehabilitation options when sentencing defendants for misdemeanors and low-level felonies."[179] In rare cases like *Lane*, "a lengthy sentence of incarceration for such offenses is necessary to protect victims and the community from an offender with a history of violence."[180]

Justice Molter, joined by Justice Massa, dissented. Largely agreeing with the helpful "guideposts for misdemeanor sentencing" in the majority opinion, the dissenting justices nevertheless concluded that the sentence was "an extreme

170. 58 N.E.3d 215, 218 (Ind. Ct. App. 2016).
171. *Lane*, 232 N.E.3d at 126.
172. *Id.*
173. 173 N.E.3d 700, 706 (Ind. Ct. App. 2021).
174. *Lane*, 232 N.E.3d at 129.
175. *Id.* at 129–30 (quoting D.A. Thomas, *Appellate Review of Sentences and the Development of Sentencing Policy: The English Experience*, 20 ALA. L. REV. 193, 202–03 (1968)).
176. *Id.* at 130.
177. *Id.*
178. *Id.*
179. *Id.* at 120.
180. *Id.* at 121.

outlier" considering the nature of the offense—sending "nonthreatening letters"—especially when compared to shorter sentences imposed for violent or "more egregious conduct."[181] They would have revised the sentence to no more than the "two-and-a-half-year maximum sentence for battery resulting in moderate bodily injury."[182]

Months later, in *Crum v. State,* the Court of Appeals summarized and applied *Lane* in a case involving a twelve-year sentence (with four years suspended) for twenty-four counts of Class A misdemeanor neglect of a vertebrate animal.[183] The opinion reiterated that *Lane* had emphasized the importance of distinguishing between offenders the community is "mad at" and those the community is "afraid of" when considering sentencing options, and it "deferred to the trial court's assessment that Lane was too dangerous to receive anything but a lengthy executed sentence."[184]

Each count in *Crum* related to one of the defendant's two dozen malnourished dogs. Unlike the defendant in *Lane*, "Crum did not perpetuate his offenses against the same victim, let alone repeatedly over a span of one and one-half years."[185] Moreover, even the trial court found that Crum's offenses "occurred under circumstances that are not likely to occur again," which led the court of appeals to characterize Crum as "a low-level offender the community is 'mad at,' not 'afraid of.'"[186] Finally, if Crum had instead been charged with multiple Level 6 felony offenses for mistreating his dogs, Indiana Code section 35-50-1-2(d)(1) would have limited the total of his consecutive terms of imprisonment to four years because his convictions were part of the same episode of criminal conduct.[187]

Concluding that Crum's twelve-year sentence was an outlier warranting revision under Appellate Rule 7(B), the Court of Appeals reduced his sentence to four years with one year suspended to probation.[188]

B. Sentenced Reduced for Sixteen-year-old Defendant

In the past decade, the Indiana Supreme Court has "reduced the life or de facto life sentences of at least five juveniles convicted of murder given their young ages and the emerging scientific research on adolescent brain development, notwithstanding the horrific nature of the crimes."[189] In *Banks v.*

181. *Id.* at 131 (Molter, J., dissenting).
182. *Id.*
183. 239 N.E.3d 858 (Ind. Ct. App. 2024).
184. *Id.* at 862 (quoting *Lane*, 232 N.E.3d at 123).
185. *Id.* at 863.
186. *Id.*
187. *Id.*
188. As explained in a footnote, "suspending one year of Crum's four-year sentence to probation resembles approximately the composition of Crum's sentence imposed by the trial court. In this respect, we defer to the judgment of the trial court." *Crum*, 239 N.E.3d at 863 n.6.
189. Banks v. State, 228 N.E.3d 528, 529 (Ind. Ct. App. 2024).

State, the court of appeals reduced a 220-year sentence for a sixteen-year-old convicted of a quadruple murder to 135 years.[190]

Acknowledging that 135 years is still a "de facto life sentence," the majority cited to Indiana Code section 35-38-1-17(n), which was added in 2023 to allow defendants convicted of a murder committed when they were less than eighteen years old to modify their sentence after serving twenty years.[191] The reduced sentence "gives him a more realistic chance, with good behavior, at some life outside prison in his later years should he seek to modify his sentence" under the statute.[192]

C. Increasing Sentences on Appeal

Indiana Appellate Rule 7(B) decisional law focuses almost exclusively on the potential downward revision of a sentence on appeal. A decade and a half ago, in *McCullough v. State*, the Indiana Supreme Court held that, when a defendant requests independent review of a sentence, appellate courts have the option either to affirm, reduce, or increase the sentence imposed.[193] Although individual judges have written dissents arguing for an increased sentence,[194] just one opinion by the court of appeals has increased a sentence, and that increase was swiftly vacated by the Indiana Supreme Court.[195]

Last year's survey noted the Supreme Court's denial of transfer by a 3–2 vote in *Thomas v. State*, where the State argued that "[f]urther guidance from this Court is necessary to explain when and under what circumstances upward sentence revisions are justified under Rule 7(B)."[196] Although the Supreme Court did not offer further guidance during this survey period, at least one judge on the court of appeals concurred in a refusal to reduce a sentence but lamented it was "very unfortunate that the State did not ask for a harsher sentence."[197] Considering the "egregious nature of the offenses and what is known of the extremely poor character of the offender," Judge Bailey "would have readily

190. *Id.* at 539.

191. *Id.* 530, 538–39.

192. *Id.* at 530.

193. 900 N.E.2d 745 (Ind. 2009).

194. *See, e.g.*, Holt v. State, 62 N.E.3d 462, 467 (Ind. Ct. App. 2016) (Bradford, J., dissenting) ("Consequently, due to the age of the victims and nature of his offenses, I see no basis for leniency. I would therefore invoke this court's authority to revise Holt's sentence upward to eight years for each conviction.").

195. Akard v. State, 937 N.E.2d 811 (Ind. 2010).

196. State's Petition to Transfer at 6, Thomas v. State, 2023 Ind. App. Unpub. LEXIS 430 (22A-CR-2086) (Ind. Ct. App. 2023).

197. Searing v. State, No. 24A-CR-721, Ind. App. Unpub. LEXIS 1175 (Ind. Ct. App. 2024) (mem.) (Bailey, J., concurring).

voted to affirm a maximum sentence."[198] However, in the absence of a request from the State for an upward revision, he concluded, "We will not do so."[199]

D. Right to be Present at Sentencing

Outside the Rule 7(B) realm of sentence revision, the Indiana Supreme Court issued a short, per curiam opinion about the importance of the right to be present at sentencing in *Williams v. State*.[200] While the defendant was in the hospital awaiting a leg amputation, the trial court, court reporter, prosecutor, and defense counsel traveled to the hospital on the day of his sentencing.[201] When asked by the trial court if the defendant "wants to stay in the hospital room and he does not want us to enter?," counsel responded affirmatively, explaining that "he wants to have sentencing somewhere else, but he's not in a position to do that."[202] The trial court proceeded to sentencing without the defendant, who then appealed.[203]

The Indiana Supreme Court reversed, holding that it was improper to hold the sentencing at the hospital when the defendant "did not waive his right to be physically present at sentencing."[204] The statement that he "want[ed] to have sentencing somewhere else" showed "he would have participated in the proceeding but for his hospitalization. In this context, Williams's purported waiver was equivocal at best and was not unambiguously knowing and intelligent."[205]

The court reasoned that, although Indiana Code section 35-38-1-4(a) requires that "[t]he defendant must be personally present at the time sentence is pronounced," there was "no apparent justification to hold court in a hospital."[206] Use of that venue also "potentially implicates a defendant's right to a public sentencing hearing, and may impede rights of the press and public."[207]

E. Retention of Cash Bonds for Fines and Fees

By statute, when a trial court "requires the defendant to deposit cash or cash and another form of security" equal to the bail amount, the court may require both the defendant and the person posting bail to sign an agreement authorizing the court to retain the cash "to pay publicly paid costs of representation and fines, costs, fees, and restitution that the court may order the defendant to pay if

198. *Id.*
199. *Id.* (citing Akard v. State, 937 N.E.2d 811 (Ind. 2010)).
200. 219 N.E.3d 729 (Ind. 2023).
201. *Id.*
202. *Id.*
203. *Id.* at 731.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* (internal citations omitted).

the defendant is convicted."[208] In *Spells v. State*, the Indiana Supreme Court held that the statute allows trial courts to retain all or part of the cash bail to cover the cost of a defendant's public defender.[209] "Cash bail may not, however, be retained to pay fines or most fees and costs *unless an indigency determination is made following a hearing*."[210] Under a different statute,[211] "the record of an indigency determination must disclose evidence of the defendant's assets, income, and necessary expenses, insofar as they bear on ability to pay."[212] Because the indigency determination in *Spells* was incomplete, the case was remanded for further proceedings.[213]

F. Mistaken Understanding of AMS Statute Requires Resentencing

Finally, the Court of Appeals decided a case involving eligibility for Alternative Misdemeanor Sentencing (AMS). The defendant in *Henderson v. State* requested AMS after his guilty plea to Level 6 felony resisting law enforcement in Marion County.[214] The State argued he was ineligible for AMS because, within the prior three years, he had committed a felony for which judgment would be entered as a misdemeanor.[215] Although Henderson anticipated AMS in a Hendricks County case, he had not yet received it.[216] The trial court entered the conviction as a felony while agreeing the issue should be left open for appeal.[217]

Indiana Code section 35-50-2-7(c)(1) proscribes AMS for a second felony within three years if "the person has committed a prior unrelated felony for which judgment *was entered* as a conviction of a Class A misdemeanor."[218] The trial court misconstrued the law in refusing to consider AMS because "[t]he

208. IND. CODE § 35-33-8-3.2(a)(1) (2024).
209. 225 N.E.3d 767, 780 (Ind. 2024).
210. *Id.* (emphasis added).
211. *Id.* at 778. As explained in *Spells*:

> In 2020, the General Assembly enacted a new statute governing indigency determinations in a criminal case. When making such a determination, a trial court "shall" consider a defendant's "assets," "income," and "necessary expenses." Pub. L. No. 140-2020, § 2, 2020 Ind. Acts 1284, 1285 (codified at I.C. § 35-33-7-6.5(a)). The court "may consider" a defendant's eligibility for SNAP, TANF, or "another need based public assistance program" as sufficient evidence of indigency. I.C. § 35-33-7-6.5(b). The court may make an "initial indigency determination" pending receipt of evidence. I.C. § 35-33-7-6.5(c). And, lastly, the court may "prorate" fines, fees, and costs to what a defendant "can reasonably afford." I.C. § 35-33-7-6.5(d).

Id.
212. *Id.* at 780.
213. *Id.*
214. 240 N.E.3d 718, 719 (Ind. Ct. App. 2024).
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.* at 720.

statute employs past tense, as opposed to prospective, terminology.[219] At the time of Henderson's sentencing, he had not received an AMS benefit within the preceding three years."[220]

Because the court of appeals could not "say with confidence that the trial court would [have] reject[ed] AMS in Henderson's case regardless of his eligibility," reversal and remand for resentencing was warranted.[221]

VIII. Post-Conviction Relief for Sentencing Appeals with Plea Waiver

As summarized in last year's survey, defendants have a constitutional right to appeal their sentences,[222] but they may waive that right so long as their waiver is knowing and voluntary under the 2008 *Creech v. State* opinion from the Indiana Supreme Court.[223] In the decade and a half since, many prosecutors have included such waivers in plea agreements, which have generally been upheld on appeal unless the language was ambiguous or the trial court gave conflicting advisements during the plea colloquy.[224]

That changed in 2023 in *Davis v. State*, where Justice Molter wrote for a three-justice majority that, even if a trial court made conflicting statements before accepting a guilty plea that may have misled a defendant, the "remedy is to vacate his conviction through postconviction proceedings, not to nullify his appeal waiver through a direct appeal."[225] Moreover, "the remedy of setting aside the conviction would result in Davis invalidating the entire plea agreement rather than allowing him to retain its benefits while escaping its burdens."[226]

Justice Goff, joined by Chief Justice Rush, dissented, concluding that the appeal waiver was unenforceable "because Davis was affirmatively advised by the trial court, before entry of his guilty plea, that he would retain the right to appeal."[227] Because appeal waivers can be severed from the rest of a plea agreement, the defendant "should be allowed his appeal, rather than having to make an 'all or nothing' challenge to his plea."[228]

Supported by Amicus, Davis sought rehearing, which was granted. The Supreme Court added the following footnote at its conclusion:

> To be sure, there remain circumstances where defendants may pursue a direct appeal of sentencing issues notwithstanding an appeal waiver.

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219. *Id.*
220. *Id.*
221. *Id.*
222. Ind. Const. art. 7, §§ 4, 6.
223. Creech v. State, 887 N.E.2d 73, 74 (Ind. 2008).
224. *See generally* Schumm & Parr, *supra* note 146, at 870.
225. 207 N.E.3d 1183, 1184 (Ind. 2023).
226. *Id.* at 1188.
227. *Id.* at 1190 (Goff, J., dissenting).
228. *Id.*

> For example, some sentencing appeal issues are nonwaivable. *See Crider v. State*, 984 N.E.2d 618, 619 (Ind. 2013) ("In this case we conclude that the waiver of the right to appeal contained in a plea agreement is unenforceable where the sentence imposed is contrary to law and the Defendant did not bargain for the sentence."). Other issues may also fall outside the scope of the waiver. *See Archer v. State*, 81 N.E.3d 212, 214, 216 (Ind. 2017) (holding that the defendant's appeal waiver did not cover her right to appeal the restitution amount). This appeal does not implicate those issues because Davis's transfer petition seeks to nullify the appeal waiver as not knowing and voluntary rather than to raise a nonwaivable sentencing issue or an issue outside the scope of his appeal waiver.[229]

In the year since, the Court of Appeals has dismissed several appeals in memorandum decisions, relying on *Davis*.[230] One exception was in a case where the plea agreement merely provided that the defendant "waive[d his] right to appeal."[231] The court of appeals held the purported "waiver was ambiguous and unenforceable," a conclusion not contested by the State on appeal.[232]

IX. LIFE WITHOUT PAROLE DIRECT APPEALS

Although the life without parole (LWOP) sanction is noteworthy, the issues raised on appeal often are not. The Indiana Constitution gives the Indiana Supreme Court exclusive jurisdiction over all death penalty cases,[233] and most LWOP cases go directly to the Indiana Supreme Court by court rule.[234] As suggested in recent surveys, the fairly routine nature of LWOP direct appeals may lead some to wonder if the cases are better suited for resolution in the court of appeals.[235]

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229. *Id.* at 1236.

230. *See, e.g.,* Harris v. State, No. 23A-CR-2491, 2024 WL 3825168 (Ind. Ct. App. Aug. 15, 2024) (mem.); Roberts v. State, No. 23A-CR-1787, 2024 WL 1155021 (Ind. Ct. App. Mar. 18, 2024) (mem.). These were memorandum decisions of the court of appeals. Other cases were likely dismissed by order in response to a motion to dismiss filed by the State. Unfortunately, there is no easy or reliable way to track those cases, although this author is aware of one such case litigated by the Appellate Clinic. Order, Anderson v. State, No. 24A-CR-1358, (Ind. Ct. App. Dec. 9, 2024) (dismissing an appeal with prejudice while one dissenting judge "would hold Appellee's Motion to Dismiss Appeal in abeyance for the writing panel").

231. Morales v. State, No. 24A-CR-503, WL 3594827 (Ind. Ct. App. July 31, 2024) (mem.).

232. *Id.* at 1 n.1.

233. IND. CONST. art. 7, § 4.

234. IND. R. APP. P. 4(A)(1). Life without parole is usually imposed through the same statutory procedure used in capital cases. *See* I.C. § 35-50-2-9. A seldom-used statute that was repealed in 2014 allowed imposition of LWOP for a third, especially serious felony. *See* I.C. § 35-50-2-8.5 (2013), *repealed by* P.L.158-2013, SEC.662, eff. July 1, 2014.

235. *See, e.g.,* Schumm, *supra* note 168, at 911–14.

Routing those appeals to the court of appeals would simply require an amendment to the Appellate Rules—not the Indiana Constitution. Notably, in July 2024, the Indiana Supreme Court posted for comment a proposed amendment to Appellate Rule 4(A)(1) to remove LWOP appeals from its mandatory jurisdiction.[236] As of the writing of this article, however, the proposal has not been adopted.

The relatively unremarkable nature of the three direct appeals of LWOP cases during this survey period arguably offers support for the amendment.

A. Intellectual Disability

A person with an intellectual disability cannot face a death or LWOP sentence in Indiana.[237] Such an individual is defined by statute as one "who, before becoming twenty-two (22) years of age, manifests: (1) significantly subaverage intellectual functioning; and (2) substantial impairment of adaptive behavior; that is documented in a court-ordered evaluative report."[238] The defendant must prove both these elements by a preponderance of the evidence, and appellate courts review the trial court's finding of whether the defendant is intellectually disabled for clear error.[239]

In *Russell v. State*, the Supreme Court found the case was "a close call" because the defense introduced "expert opinion that Russell is intellectually disabled, the State concedes Russell's intellectual function is diminished, and Russell is near the line for substantial impairment of his adaptive behavior."[240] But the standard of review led it to affirm the trial court's "finding that Russell did not satisfy his burden to prove intellectual disability because that finding is supported by evidence in the record, and it is not clearly erroneous."[241]

Justice Goff dissented. In his view, "the trial court rejected uncontradicted expert testimony" and "did not engage with the evidence tending to show Russell's deficits and ignored the impact of prison structure on his test scores."[242] Because the "order under review would not pass muster in a death-penalty case," Justice Goff concluded, "[n]or should it pass muster here."[243]

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236. *Proposed amendment to Indiana Rules of Appellate Procedure (July 2024)*, IND. JUD. BRANCH, https://www.in.gov/courts/files/rules-proposed-2024-july-ar4.pdf [https://perma.cc/3SG3-6JM9] (last visited Mar. 30, 2025).

237. As a preliminary matter, the Supreme Court rejected the State's argument that appellate jurisdiction should instead rest with the court of appeals because of references to a modification instead of resentencing: "In the joint motion, throughout the proceedings, and in the Order on Resentencing, the parties and the lower court repeatedly confirmed their understanding that the relief the parties agreed to in exchange for Russell dismissing his PCR petition was a resentencing." Russell v. State, 234 N.E.3d 829, 842–43 (Ind. 2024).

238. I.C. § 35-36-9-2.

239. *Id.*

240. 234 N.E.3d at 844.

241. *Id.* at 845.

242. *Id.* at 865–66 (Goff, J., dissenting).

243. *Id.* at 866.

B. Routine Claims Rejected

In *Hancz-Barron v. State*, the Supreme Court rejected routine trial and sentencing claims.[244] It found "circumstantial and direct evidence from which a reasonable jury could have found beyond a reasonable doubt that Hancz-Barron was the person responsible for murdering [the victim] and her three children."[245] The trial court did not abuse its discretion in permitting the State to recall a witness—and even if it had, the error was harmless and did not warrant reversal.[246] Third, the Supreme Court rejected claims that the "jury erred in determining that the aggravating circumstances outweighed the mitigating circumstances, his sentence is inappropriate under Appellate Rule 7(B), and his sentence is unconstitutional."[247]

Another case, *Cramer v. State*,[248] like most of its predecessors, was affirmed unanimously in a straightforward opinion. Challenges to the appropriateness of a sentence are frequently raised but seldom successful; revisions are reserved for "exceptional" cases.[249]

> It is up to the defendant to persuade the appellate court that his or her sentence has met the inappropriateness standard of review. The trial court's sentence is afforded considerable deference and will stand unless compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character).[250]

That standard was not met in *Cramer*, where the nature of the offense involved "extreme brutality," and even the defendant's modest criminal history—five juvenile adjudications, three of which are felonies if committed by an adult—weighed against relief under Rule 7(B).[251]

X. RECUSAL REQUIRED IN PCR CASES

Finally, the Indiana Supreme Court addressed the importance of recusal in *Seabolt v. State*.[252] The interlocutory appeal of four post-conviction relief cases all involved allegations of systemic police and prosecutorial misconduct in Elkhart County. The judge, a former Elkhart County deputy prosecutor, had

244. 235 N.E.3d 1237, 1245 (Ind. 2024).
245. *Id.* at 1245.
246. *Id.* at 1247.
247. *Id.*
248. 240 N.E.3d 693 (Ind. 2024).
249. *Id.* at 698.
250. *Id.* (cleaned up).
251. *Id.* at 699–700.
252. 240 N.E.3d 1249 (Ind. 2024).

earlier recused in another case "for one of, or a combination of, two reasons": (1) the petitioner "would be calling many witnesses—law enforcement officers, deputy prosecutors, and an elected prosecutor—with whom the judge worked when she was a deputy prosecutor and some of whom remained the judge's social acquaintances," which raised concern that she could "remain impartial either when evaluating so many of her friends' and former colleagues' credibility or when evaluating [his] allegations of systemic police and prosecutorial misconduct that spanned the judge's own time as a deputy prosecutor in Elkhart County"; or (2) the "judge's characterization of his attorney's comments" about an "epidemic" of wrongful convictions grounded in "systemic" police and prosecutorial misconduct as "defamatory," which "suggested she had pre-judged his allegations of systemic misconduct before hearing any evidence."[253]

In the four cases on appeal in *Seabolt*, the petitioners were represented by the same lawyers who allege the same sort of "systemic" misconduct and "intend to call as witnesses former law enforcement officers and prosecutors who are the judge's former colleagues and/or current social acquaintances."[254]

The Supreme Court held the judge was "disqualified from presiding over these cases because her determination that recusal was mandatory in [the first] case would lead an objective observer to reasonably question her impartiality" in cases that raise the same concerns.[255]

253. *Id.* at 1252.
254. *Id.* at 1253.
255. *Id.*

2024 DEVELOPMENTS IN INDIANA EVIDENTIARY PRACTICE

COLIN E. FLORA*

On January 1, 1994, the Indiana Rules of Evidence went into effect.[1] This survey period encompasses the thirtieth anniversary of the Rules' enactment.[2] As the rules enter their fourth decade of application, there remains no shortage of new insights into their application and reminders that there are yet more questions to answer in the years to come.

Consistent with prior surveys,[3] the format of this article tracks developments in order of the Indiana Rules of Evidence and then covers additional developments of common-law practices and statutes not included within the Indiana Rules of Evidence. As with last year's survey, where appropriate, this edition addresses memoranda decisions of the Indiana Court of Appeals.[4] Practitioners are reminded that citation to memoranda decisions of the Indiana Court of Appeals is only permitted for opinions decided after January 1, 2023.[5] Those seeking to cite a memorandum opinion to an Indiana court should use the format provided by Indiana Appellate Rule 22(A).[6]

I. GENERAL PROVISIONS: RULES 101 THROUGH 106

A. Rule 101: Scope of the Indiana Rules of Evidence

Although the Indiana Rules of Evidence generally "apply in all proceedings in the courts of the State of Indiana,"[7] there are exceptions.[8] The survey period highlighted that the rules of evidence do not extend to bail hearings,[9] sentencing

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1. Garnes v. State, 231 N.E.3d 239, 243 n.3 (Ind. Ct. App. 2024), *trans. denied*, 2024 Ind. LEXIS 310 (Ind. 2024); Cale J. Bradford, *The First Twenty Years of Rule of Evidence 702 and the Current State of Expert Testimony in Indiana*, 48 IND. L. REV. 1115, 1115 (2015); Jeffrey O. Cooper, *Recent Developments in Indiana Evidence Law*, 32 IND. L. REV. 811, 811 (1999).

2. The survey period covers October 1, 2023 through September 30, 2024.

3. *See, e.g.*, Edward F. Harney, Jr. & Jennifer Markavitch, *1995 Survey of Indiana Evidence Law*, 29 IND. L. REV. 887 (1996).

4. *See* Colin E. Flora, *2023 Developments in Indiana Evidentiary Practice*, 57 IND. L. REV. 917, 917 (2024) [hereinafter *2023 Survey*].

5. *See* IND. R. APP. P. 65(D)(2); Gerth v. Est. of Bloemer, 240 N.E.3d 702, 706 n.1 (Ind. Ct. App. 2024).

6. Willis v. Ringbauer, No. 23A-PL-1739, 2024 Ind. App. Unpub. LEXIS 56, at *4 n.2 (Ind. Ct. App. Jan. 23, 2024), *trans. denied*, 2024 Ind. LEXIS 307 (Ind. 2024); *see also* Joel Schumm, *Citation Matters: An Updated Guide to Correct Citation Form in Indiana*, 68 RES GESTAE 12, 15 (Dec. 2024). This survey's format does not adhere to the format required by Indiana Appellate Rule 22(A).

7. IND. R. EVID. 101(b).

8. IND. R. EVID. 101(d).

9. IND. R. EVID. 101(d)(2); *In re* Harris, 550 P.3d 116, 129 (Cal. 2024) (surveying state evidentiary rules).

hearings,[10] probation hearings,[11] and in determining "a question of fact preliminary to the admission of evidence, where the court determines admissibility under Rule 104(a)."[12]

Although the evidence rules do not apply to probation hearings, there are still limitations: "a trial court may consider 'any relevant evidence bearing some substantial indicia of reliability'"[13] but "may only admit hearsay evidence . . . when the hearsay evidence bears 'substantial trustworthiness.'"[14] Appellate courts prefer "that a trial court explains on the record why the hearsay is reliable, [but] a failure to do so is not fatal where the record supports such a determination."[15] In review of probation revocation hearings, the Indiana Court of Appeals upheld admission of hearsay testimony corroborated by the declarant's injuries,[16] hearsay statements made to an investigating officer,[17] and the results of a portable breath test.[18]

As with probation hearings, the rules of evidence do not extend to sentencing proceedings. Nevertheless, "the evidence before the trial court must [still] be reliable,"[19] and "'a defendant being sentenced must be given the opportunity to refute any information he claims is inaccurate.'"[20] In *Russell v. State*, the Indiana Supreme Court confronted the question of whether a resentencing court erred by excluding the results of a polygraph test the defendant sought to admit.[21] "In Indiana, polygraph results are generally inadmissible in criminal trials '[b]ecause of their inherent unreliability combined with their likelihood of unduly influencing a jury's decision.'"[22] Looking to guidance from the Georgia Supreme Court, which observed that

10. IND. R. EVID. 101(d)(2); Russell v. State, 234 N.E.3d 829, 858–59 (Ind. 2024), *cert. denied*, No. 24-5420, 2024 U.S. LEXIS 4406 (U.S. Oct. 21, 2024).

11. IND. R. EVID. 101(d)(2); Peterson v. State, No. 23A-CR-2041, 2024 Ind. App. Unpub. LEXIS 268, at *5–6 (Ind. Ct. App. Mar. 1, 2024).

12. IND. R. EVID. 101(d)(1); *see* Jordan v. State, No. 23A-CR-1798, 2024 Ind. App. Unpub. LEXIS 898, at *13 (Ind. Ct. App. July 15, 2024).

13. Jones v. State, No. 23A-CR-2779, 2024 Ind. App. Unpub. LEXIS 880, at *8 (Ind. Ct. App. July 9, 2024) (quoting Monroe v. State, 899 N.E.2d 688, 691 (Ind. Ct. App. 2009)).

14. Scott v. State, No. 23A-CR-2840, 2024 Ind. App. Unpub. LEXIS 452, at *9–10 (Ind. Ct. App. Apr. 10, 2024) (quoting Reyes v. State, 868 N.E.2d 438, 442 (Ind. 2007)).

15. *Peterson*, 2024 Ind. App. Unpub. LEXIS 268, at *6–7 (citing *Reyes*, 868 N.E.2d at 442); *accord Scott*, 2024 Ind. App. Unpub. LEXIS 452, at *10.

16. Sentell v. State, No. 23A-CR-1862, 2024 Ind. App. Unpub. LEXIS 277, at *5–6 (Ind. Ct. App. Mar. 5, 2024).

17. *Peterson*, 2024 Ind. App. Unpub. LEXIS 268, at *6–7.

18. Whitlock v. State, No. 23A-CR-1485, 2024 Ind. App. Unpub. LEXIS 459, at *6–7 (Ind. Ct. App. Apr. 12, 2024).

19. Wilkie-Carr v. State, No. 23A-CR-779, 2023 Ind. App. Unpub. LEXIS 1347, at *11 (Ind. Ct. App. Nov. 28, 2023) (citing Malenchik v. State, 928 N.E.2d 564, 573–74 (Ind. 2010)).

20. Johnson v. State, No. 24A-CR-32, 2024 Ind. App. Unpub. LEXIS 844, at *13–14 (Ind. Ct. App. June 28, 2024) (quoting Cloum v. State, 779 N.E.2d 84, 92 (Ind. Ct. App. 2002)).

21. Russell v. State, 234 N.E.3d 829, 858–59 (Ind. 2024), *cert. denied*, No. 24-5420, 2024 U.S. LEXIS 4406 (U.S. Oct. 21, 2024).

22. *Id.* at 858 (quoting Smith v. State, 547 N.E.2d 817, 820 (Ind. 1989)) (alteration in original).

introduction of "unstipulated polygraph test results as mitigation evidence" is left to "the trial court [to] exercise its discretion to determine whether those results are sufficiently reliable to be admitted," the Indiana Supreme Court held that it was not error to exclude the polygraph results.[23]

B. Rule 103: Preserving Evidentiary Rulings for Appeal

The method for preserving challenges to evidentiary rulings depends on whether the evidence was admitted or excluded. "Whenever the trial court's evidentiary ruling excludes evidence, a party preserves a challenge to that ruling only if the party 'informs the court of [the] substance [of the evidence] by an offer of proof, unless the substance was apparent from the context.'"[24] If the challenge is to the admission of evidence, then the party seeking exclusion "must lodge a 'contemporaneous objection at the time the evidence is introduced at trial.'"[25] "This procedure not only gives the trial court an opportunity to cure the alleged error, but also can result in 'enormous savings in time, effort and expense to the parties and the court.'"[26]

While the wholesale failure to object to evidence will constitute waiver on appeal,[27] as the survey period reminded, the objection must also be with sufficient specificity to preserve error. In *Jenkins v. State*, the Indiana Court of Appeals deemed a general objection insufficient to comply with the requirements of Rule 103(a)(1) but, preferring to resolve appeals on their merits, analyzed the ultimately unsuccessful challenge.[28] The defendants in *Ortiz v. State* and *Owens v. State* were not afforded the same leniency.[29]

Similarly, an offer of proof must be specific as to the proposed basis for the

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23. *Id.* at 859 (quoting Height v. State, 604 S.E.2d 796, 799 (Ga. 2004)) (formatting and emphasis omitted).

24. Cobb v. State, 222 N.E.3d 373, 388 (Ind. Ct. App. 2023) (quoting IND. R. EVID. 103(a)(2)) (alterations in original), *trans. denied*, 2024 Ind. LEXIS 147 (Ind. 2024); *see*, *e.g.*, Dehaai-Johnson v. State, No. 23A-CR-2110, 2024 Ind. App. Unpub. LEXIS 745, *8–9 (Ind. Ct. App. June 13, 2024) (appellate review waived for failure to make offer of proof); Kaluza v. State, No. 24A-CR-130, 2024 Ind. App. Unpub. LEXIS 948, at *12–13 (Ind. Ct. App. July 25, 2024) (same), *trans. denied*, 2024 Ind. LEXIS 626 (Ind. 2024); Ford v. State, No. 24A-CR-12, 2024 Ind. App. Unpub. LEXIS 1217, at *3–5 (Ind. Ct. App. Sep. 16, 2024) (same).

25. A.V. v. State, 228 N.E.3d 504, 508 (Ind. Ct. App. 2024) (quoting Brown v. State, 929 N.E.2d 204, 207 (Ind. 2010)), *reh'g denied*, 2024 Ind. App. LEXIS 141 (Ind. Ct. App. May 23, 2024), *trans. denied*, 2024 Ind. LEXIS 600 (Ind. 2024); IND. R. EVID. 103(a)(1).

26. Ryburn v. State, No. 22A-CR-2415, 2024 Ind. App. Unpub. LEXIS 182, at *18–20 (Ind. Ct. App. Feb. 16, 2024) (alteration in original) (quoting Durden v. State, 99 N.E.3d 645, 651 (Ind. 2018)), *trans. denied*, 2024 Ind. LEXIS 344 (Ind. 2024).

27. *A.V.*, 228 N.E.3d at 508; *see*, *e.g.*, Dierckman v. Dierckman, 225 N.E.3d 185, 194 n.5 (Ind. Ct. App. 2023), *trans. denied*, 2024 Ind. LEXIS 274 (Ind. 2024); Arellano v. State, No. 23A-CT-1884, 2024 Ind. App. Unpub. LEXIS 457, at *7–8 (Ind. Ct. App. Apr. 12, 2024).

28. Jenkins v. State, No. 23A-CR-1033, 2024 Ind. App. Unpub. LEXIS 330, at *11–12 (Ind. Ct. App. Mar. 18, 2024), *trans. denied*, 2024 Ind. LEXIS 377 (Ind. 2024).

29. Ortiz v. State, No. 23A-CR-1252, 2024 Ind. App. Unpub. LEXIS 624, at *7 (Ind. Ct. App. May 21, 2024); Owens v. State, No. 24A-CR-782, 2024 Ind. App. Unpub. LEXIS 1204, at *4 (Ind. Ct. App. Sep. 13, 2024).

evidence's admission. *Noel v. State* exemplified the pitfall in proposing to make an offer of proof on the wrong basis.[30] The proponent of character testimony made an offer of proof asserting that the testimony was reputation testimony under Rule 608(a).[31] On appeal, however, the proponent argued that the trial court erroneously applied the analysis of reputation testimony instead of opinion testimony, also under Rule 608(a).[32] The contradictory positions waived the challenge on appeal.[33]

The survey period also demonstrated that rulings on motions in limine, even when the motion is brought after trial has begun, do not necessarily preserve error.[34] Despite objecting to evidence outside the presence of the jury, the procedure required by the panel in *Finch v. State* was to reissue the same arguments at the time the evidence was sought to be admitted or to have requested a continuing objection at the time of the argument outside the presence of the jury.[35]

C. Rule 104: Conditional Admission of Evidence

Rule 104(b) allows a court to admit evidence on the condition that proof of a necessary fact to its admission will "be introduced later."[36] The survey period reminded that subsequent proof does not always come and an opposing party does not protect its rights to review without seeking remedial measures. In *Fuller v. State*, a challenge based on the failure to ultimately provide foundational evidence was deemed waived because the criminal defendant "never moved to strike [the] testimony on the basis that the State had failed to present the additional proof."[37] The court explained: "Where evidence is admitted subject to being connected up later, and no subsequent motion to strike the evidence is made, any error in the admission of the evidence is waived."[38]

30. Noel v. State, No. 23A-CR-2457, 2024 Ind. App. Unpub. LEXIS 1180, at *9–11 (Ind. Ct. App. Sep. 10, 2024).

31. *Id.* at *11.

32. *Id.* at *10–11.

33. *Id.* at *11. For distinction between opinion and reputation testimony under Rule 608(a), *see 2023 Survey*, *supra* note 4, at 933–34 (discussing Hayko v. State, 211 N.E.3d 483 (Ind. 2023)).

34. Finch v. State, No. 23A-CR-1394, 2024 Ind. App. Unpub. LEXIS 608, *7–9 (Ind. Ct. App. May 15, 2024), *trans. denied*, 2024 Ind. LEXIS 547 (Ind. 2024).

35. *Id.* at *8–9.

36. IND. R. EVID. 104(b); *see also* Fuller v. State, No. 23A-CR-2842, 2024 Ind. App. Unpub. LEXIS 776, at *9–10 (Ind. Ct. App. June 20, 2024) (citing Granger v. State, 946 N.E.2d 1209, 1215–16 (Ind. Ct. App. 2011)), *trans. denied*, 2024 Ind. LEXIS 545 (Ind. 2024).

37. *Fuller*, 2024 Ind. App. Unpub. LEXIS 776, at *10.

38. *Id.* (quoting *Granger*, 946 N.E.2d at 1215) (quotation marks omitted).

D. Rule 105: Limiting Instructions

Sometimes, evidence may be admissible for a discreet purpose.[39] Under Rule 105, it falls on the court to "restrict the evidence to its proper scope and instruct the jury accordingly."[40] But, as the survey period exemplified, the obligation for a court to issue a limiting instruction is dependent upon a "timely request."[41] When a party timely requests an admonition, "[t]he language of th[e] rule is mandatory."[42] If, however, a party could have but fails to request a limitation on the admission of certain evidence, the evidence is admitted without limitation and may be used accordingly.[43] And the failure to request a limiting instruction "waive[s] any [appellate] claim based on the trial court's failure to provide an admonishment."[44]

E. Rule 106: Completeness Rule

"Rule 106 encompasses the doctrine of completeness."[45] The rule generally allows a party to require the entirety of a document or recording be placed into evidence if any portion is presented by another party.[46] "The purpose of the doctrine of completeness 'is to provide context for otherwise isolated comments when fairness requires it.'"[47] To accomplish that purpose, Rule 106 "is a rule where a party may introduce additional evidence, not a rule under which a party seeks to exclude evidence."[48] "The omitted portions are still subject to the normal rules of admissibility, such that any portions found to be immaterial, irrelevant, or prejudicial must be redacted."[49]

Jackson v. State addressed whether it was error to exclude a portion of a

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39. Perry v. State, No. 23A-PC-544, 2023 Ind. App. Unpub. LEXIS 1346, at *6 (Ind. Ct. App. Nov. 28, 2023) ("It is undisputed that evidence may be admitted for a limited purpose."), *trans. denied*, 2024 Ind. LEXIS 295 (Ind. 2024).

40. IND. R. EVID. 105.

41. *Id.* "Rule 105 does not preclude trial courts from giving a limiting admonition or instruction *sua sponte* as a matter of discretion, but by its plain terms imposes no affirmative duty to do so." Humphrey v. State, 680 N.E.2d 836, 839 (Ind. 1997) (footnotes omitted).

42. Anderson v. State, No. 24A-CR-921, 2024 Ind. App. Unpub. LEXIS 1187, at *9 (Ind. Ct. App. Sep. 11, 2024).

43. *Perry*, 2023 Ind. App. Unpub. LEXIS 1346, at *6.

44. Gordillo-Cansigno v. State, No. 23A-CR-1352, 2024 Ind. App. Unpub. LEXIS 216, at *11–12 (Ind. Ct. App. Feb. 23, 2024) (citing IND. R. EVID. 105; Small v. State, 736 N.E.2d 742, 746 (Ind. 2000)), *trans. denied*, 2024 Ind. LEXIS 391 (Ind. 2024).

45. Hollifield v. State, No. 23A-CR-1014, 2023 Ind. App. Unpub. LEXIS 1379, at *12 (Ind. Ct. App. Dec. 1, 2023).

46. IND. R. EVID. 617(a); Douglas v. State, No. 23A-CR-1670, 2024 Ind. App. Unpub. LEXIS 98, at *11 n.1 (Ind. Ct. App. Jan. 30, 2024) (quoting Sweeney v. State, 704 N.E.2d 86, 110 (Ind. 1998)), *trans. denied*, 2024 Ind. LEXIS 304 (Ind. 2024).

47. Jackson v. State, 222 N.E.3d 390, 404 (Ind. Ct. App. 2023) (quoting Sanders v. State, 840 N.E.2d 319, 323 (Ind. 2006)).

48. *Hollifield*, 2023 Ind. App. Unpub. LEXIS 1379, at *12.

49. Shannon v. State, No. 23A-CR-2744, 2024 Ind. App. Unpub. LEXIS 1135, at *7–8 (Ind. Ct. App. Aug. 29, 2024).

recording following the completion of an officer's interview of a criminal defendant when the rest of the recording was admitted.[50] The Indiana Court of Appeals concluded that there was no error for two reasons. First, the omitted portion of the video, which demonstrated the defendant "talking to himself about the incident,"[51] was not part of the interview because it occurred only after the interview had concluded.[52] And second, the trial court indicated that the defendant could "present that portion of the recording in his case-in-chief" if he desired to do so.[53] Because the defendant did not choose to do so, he could not establish reversible error.[54]

II. JUDICIAL NOTICE: RULE 201

The doctrine of judicial notice, embodied in Rule 201, empowers courts to establish as true certain "matters of common and general knowledge" and about which there can be no "reasonable dispute" without requiring unnecessary formalities or obliging courts to "pretend to be more ignorant than the rest of mankind."[55] "'[T]he ultimate purpose of judicial notice is efficient consideration of uncontroversial facts . . . .'"[56] The survey period revealed a handful of notable aspects of judicial notice and provided further examples of when judicial notice is appropriate.

The survey period showed, on appeal, if the substance of a trial court's ruling makes clear that certain records were judicially noticed, the absence of a specific statement that the trial court has taken judicial notice will not prevent an Indiana appellate court from considering the judicially noticed materials in review of the underlying ruling.[57] Another point addressed during the survey period was that a challenge to overly expansive use of judicial notice will not be well taken on an appeal from a probation revocation hearing because "the flexibility of probation revocation procedures [makes] strict rules of evidence" inapplicable.[58]

Indiana appellate courts also approved use of judicial notice in the following circumstances: "house bills, public laws, joint resolutions, and other related

50. *Jackson*, 222 N.E.3d at 403–04.

51. *Id.* at 404 (citation and quotation marks omitted).

52. *Id.* ("Detective Shaffer did not leave and return. Rather, he completed his questioning and left.").

53. *Id.*

54. *Id.*

55. Page v. State, 139 N.E. 143, 144 (Ind. 1923) (citation and quotation marks omitted); IND. R. EVID. 201(a)(1)(A); *see also* Wachstetter v. State, 99 Ind. 290, 299 (1885) ("It is not reasonable to presume that courts or juries can be ignorant of a fact so well and widely known . . . .").

56. *In re* I.S., No. 23A-JC-1097, 2023 Ind. App. Unpub. LEXIS 1443, at *4 (Ind. Ct. App. Dec. 14, 2023) (quoting Horton v. State, 51 N.E.3d 1154, 1161 (Ind. 2016)) (alteration and ellipsis in original).

57. Chitwood v. Guadagnoli, 230 N.E.3d 932, 937 (Ind. Ct. App. 2024).

58. Holland v. State, No. 23A-CR-756, 2023 Ind. App. Unpub. LEXIS 1458, at *5 n.1 (Ind. Ct. App. Dec. 15, 2023).

source materials" cited in a brief;[59] notice of the fact of a criminal charge, but not the substance of the allegations;[60] records of another Indiana court;[61] prior order by same court awarding custody of child to father based on violence between child and mother;[62] records from CHINS cases involving a mother's other children;[63] existence of the federal-court PACER docket system;[64] order in a related case;[65] other criminal cases involving one or more parties;[66] and the trial setting of a case involving one of the lawyers to a proceeding.[67]

Easily the most-common use of judicial notice by Indiana appellate courts was to remedy deficiencies in the appellate record.[68] The ability for such notice is not, however, a panacea. As the Indiana Court of Appeals made clear in *Smith v. State*: "'[J]udicial notice may not be used on appeal to fill evidentiary gaps in the trial record.' [The court] will not take judicial notice of [a] prior conviction to satisfy the State's burden of showing [a defendant] is a sex offender required to register as such."[69]

There was one additional opinion of note, in which the Indiana Court of Appeals found a trial court's refusal to take judicial notice was error. *In re H.S.R.* arose from a grant of summary judgment in a child-support proceeding.[70] The mother, resisting summary judgment, requested judicial notice of the related paternity case.[71] The trial court declined to do so because "neither the court nor

59. Sawlani v. Lake Cnty Assessor, 240 N.E.3d 734, 747 n.18 (Ind. Tax Ct. 2024).

60. *In re* J.P., No. 23A-JC-476, 2023 Ind. App. Unpub. LEXIS 1170, at *14–15 (Ind. Ct. App. Oct. 4, 2023).

61. Turner v. State, No. 23A-MI-90, 2023 Ind. App. Unpub. LEXIS 1162, at *4 n.2 (Ind. Ct. App. Oct. 2, 2023) (citing Christie v. State, 939 N.E.2d 691, 693–94 (Ind. Ct. App. 2011)); *In re* Ale.A., No. 24A-JC-790, 2024 Ind. App. Unpub. LEXIS 1230, at *10 n.1 (Ind. Ct. App. Sept. 19, 2024).

62. Hoover v. Ferrell, No. 23A-DR-1116, 2023 Ind. App. Unpub. LEXIS 1271, at *11 (Ind. Ct. App. Oct. 31, 2023).

63. *In re* T.S., No. 23A-JT-2295, 2024 Ind. App. Unpub. LEXIS 403, at *24 n.2 (Ind. Ct. App. Mar. 28, 2024) (citing IND. R. EVID. 201(a)(2)(C)); *but see In re* J.P., No. 23A-JT-3003, 2024 Ind. App. Unpub. LEXIS 635, at *4 n.2 (Ind. Ct. App. May 23, 2024) (declining to take judicial notice of CHINS proceedings), *trans. denied*, 2024 Ind. LEXIS 569 (Ind. 2024).

64. Sisk v. State, No. 23A-CR-1834, 2023 Ind. App. Unpub. LEXIS 1370, at *9 n.4 (Ind. Ct. App. Nov. 30, 2023).

65. M.W. v. H.Y., 230 N.E.3d 359, 361 n.2 (Ind. Ct. App. 2024).

66. Kelly v. State, No. 23A-CR-2424, 2024 Ind. App. Unpub. LEXIS 357, at *4 n.1 (Ind. Ct. App. Mar. 21, 2024) (citing IND. R. EVID. 201(a)(2)(c)); *In re* I.S., No. 23A-JC-1097, 2023 Ind. App. Unpub. LEXIS 1443, at *4–8 (Ind. Ct. App. Dec. 14, 2023).

67. Swindler v. Swindler, No. 24A-DN-71, 2024 Ind. App. Unpub. LEXIS 1008, at *12 n.6 (Ind. Ct. App. Aug. 6, 2024) (citing IND. R. EVID. 201(a)(2)(c)).

68. *See*, *e.g.*, *In re* A.L., 223 N.E.3d 1126, 1135–36 (Ind. Ct. App. 2023), *trans. denied*, 2024 Ind. LEXIS 194 (Ind. 2024); Gosnell v. Gosnell, No. 23A-PL-2436, 2024 Ind. App. Unpub. LEXIS 542, at *3 n.1, *4 n.2, *7 n.3, *8 n.4, n.5, *14 n.7, *22 n.8 (Ind. Ct. App. Apr. 30, 2024).

69. Smith v. State, No. 24A-CR-153, 2024 Ind. App. Unpub. LEXIS 874, at *3–4 (Ind. Ct. App. July 8, 2024) (quoting Banks v. Banks, 980 N.E.2d 423, 426 (Ind. Ct. App. 2012)).

70. *In re* H.S.R., 233 N.E.3d 490, 491 (Ind. Ct. App. 2024), *trans. denied*, 238 N.E.3d 1290 (Ind. 2024).

71. *Id.* at 493.

the court staff were able to locate" the case.[72] The Indiana Court of Appeals observed: "Even if the trial court was unable to locate the file for the [ ] Paternity Case, the chronological case summary ('CCS') was still available. Accordingly, the trial court should have taken judicial notice of the CCS in the [ ] Paternity Case."[73]

III. RELEVANCY & ITS LIMITS: RULES 401 THROUGH 413

A. Rules 401 & 402: What Is and Is Not Relevant

"Evidence is relevant if it has 'any tendency to make a fact more or less probable' and is 'of consequence' in resolving the issue. If evidence is not relevant, it is inadmissible."[74] "[T]he standard for relevant evidence is a liberal one under Rule 401"[75] and presents "'a low bar.'"[76] During the survey period, two published opinions of the Indiana Court of Appeals provided useful insight into what is and is not relevant evidence.

Cobb v. State found phone calls from a criminal defendant to a witness that could be interpreted as requesting the witness alter her testimony were relevant because "[a]ny testimony tending to show an accused's attempt to conceal implicating evidence or to manufacture exculpatory evidence may be considered by the trier of fact as relevant."[77]

Garnes v. State affirmed exclusion of irrelevant evidence.[78] There, a criminal defendant sought to admit evidence of a guilty verdict for murder against a defendant in a related action.[79] The intention was "'to show that someone else' murdered" the victim.[80] The Indiana Court of Appeals rejected that attempt, extending to this circumstance precedent preventing the prosecution from using the conviction of a co-defendant and precedent that "make improper any attempt by a defendant to disclose the previous conviction or guilty plea of a co-defendant in hopes of establishing his innocence of the

72. *Id.* (formatting omitted).

73. *Id.* at 496 (footnote and citation omitted).

74. Garnes v. State, 231 N.E.3d 239, 243 (Ind. Ct. App. 2024) (quoting IND. R. EVID. 401; citing IND. R. EVID. 402) (footnote omitted), *trans. denied*, 2024 Ind. LEXIS 310 (Ind. 2024).

75. Hendrickson v. State, No. 23A-CR-999, 2024 Ind. App. Unpub. LEXIS 120, at *10 (Ind. Ct. App. Feb. 5, 2024) (quoting Jackson v. State, 712 N.E.2d 986, 988 (Ind. 1999)) (quotation marks omitted), *trans. denied*, 2024 Ind. LEXIS 245 (Ind. 2024).

76. Robinson v. State, No. 23A-CR-400, 2023 Ind. App. Unpub. LEXIS 1274, at *7–8 (Ind. Ct. App. Oct. 31, 2023) (quoting Snow v. State, 77 N.E.3d 173, 177 (Ind. 2017)).

77. Cobb v. State, 222 N.E.3d 373, 387 (Ind. Ct. App. 2023) (quoting Grimes v. State, 450 N.E.2d 512, 521 (Ind. 1983)) (quotation marks omitted; second alteration in original), *trans. denied*, 2024 Ind. LEXIS 147 (Ind. 2024).

78. *Garnes*, 231 N.E.3d at 242–44.

79. *Id.* at 242–43.

80. *Id.*

crime charged."[81]

B. Rule 403: Excluding Relevant Evidence for Prejudice, Confusion, or Other Reasons

Relevance is a threshold determination, in so much as irrelevant evidence is *per se* inadmissible,[82] but the mere fact that evidence is relevant does not guarantee its admissibility. "Under Rule 403, 'relevant evidence may be excluded if its probative value is substantially outweighed by the danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.'"[83] "Because 'all relevant evidence is "inherently prejudicial" in a criminal prosecution,' the weighing test under Evidence Rule 403 'boils down to a balance of probative value against the likely unfair prejudicial impact . . . the evidence may have on the jury.'"[84]

Two published opinions from the Indiana Court of Appeals provide particular insight into application of Rule 403 balancing. In *Jackson v. State*, the court affirmed admission of images depicting the victim who was still suffering the effects of a stabbing despite other testimony describing the victim's condition.[85] The decision adhered to prior precedent recognizing "that [g]enerally, photographs that depict a victim's injuries or demonstrate the testimony of a witness are admissible. Even gory and revolting photographs may be admissible as long as they are relevant to some material issue or show scenes that a witness could describe orally."[86]

In the other opinion, *Cobb v. State*, the court affirmed admission of jail phone calls that "reasonably indicate[d] that [the defendant] was conscious of his guilt and trying to manufacture exculpatory testimony."[87] In doing so, the court rejected the argument that the admission unfairly informed the jury that the defendant "had been incarcerated."[88] The appellate panel observed that the defendant cited "to no caselaw regarding the risk of prejudice arising from the jury's awareness that the accused was at one point incarcerated."[89] Authority applying Federal Rule 403 has found that the prejudice of a jury learning a

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81. *Id.* at 243 (quoting Jefferson v. State, 399 N.E.2d 816, 825 (Ind. Ct. App. 1980)) (quotation marks omitted). Despite the cited authority predating adoption of the Indiana Rules of Evidence, the cases remain authoritative. *Id.* at 243 n.3.

82. IND. R. EVID. 402.

83. Blattert v. State, 241 N.E.3d 29, 37 (Ind. Ct. App. 2024) (quoting Snow v. State, 77 N.E.3d 173, 179 (Ind. 2017)) (ellipsis in original).

84. Cobb v. State, 222 N.E.3d 373, 387 (Ind. Ct. App. 2023) (quoting Hall v. State, 177 N.E.3d 1183, 1194 (Ind. 2021)) (ellipsis in original), *trans. denied*, 2024 Ind. LEXIS 147 (Ind. 2024).

85. Jackson v. State, 222 N.E.3d 390, 403 (Ind. Ct. App. 2023).

86. *Id.* (quoting Jackson v. State, 973 N.E.2d 1123, 1127 (Ind. Ct. App. 2012)) (alteration in original; quotation marks omitted).

87. *Cobb*, 222 N.E.3d at 387.

88. *Id.*

89. *Id.*

criminal defendant had been incarcerated is "slight."[90]

C. Rule 404: Character Evidence, Crimes, Wrongs or Other Acts

Rule 404, like Rule 403, acts to exclude otherwise relevant evidence.[91] Subdivision (b) generally prohibits use of "[e]vidence of a crime, wrong, or other act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[92] "Evidence Rule 404(b) was 'designed to prevent the jury from assessing a defendant's present guilt on the basis of his past propensities, the so called "forbidden inference."'"[93] Rule 404(b), however, only excludes evidence used for the forbidden inference.[94]

During the survey period, in published opinions, the Indiana Court of Appeals approved admission into evidence of other criminal offenses in the following circumstances: text messages "to rebut [the defendant]'s claim of self-defense and show his motive and intent;"[95] social-media messages arranging uncharged drug deals that were subject to a limiting instruction;[96] and introduction of an arrest warrant used to establish motive.[97]

D. Rule 407: Subsequent Remedial Measures

Unless offered for a non-prohibited purpose, evidence of subsequent remedial measures may not be admitted "to prove: • negligence; • culpable conduct; • a defect in a product or its design; or • a need for a warning or instruction."[98] "Among the policies underlying [Rule 407] is a concern that admitting such evidence would 'deter a party from taking action that will prevent future injuries.'"[99] The Indiana Supreme Court addressed application of the rule in *Pennington v. Memorial Hospital of South Bend, Inc*.[100] In a classic application of the rule, the court affirmed exclusion of photographs taken of a

90. United States v. Obi, 239 F.3d 662, 668 (4th Cir. 2001); *see also* United States v. Allee, 299 F.3d 996, 1003 (8th Cir. 2002).

91. IND. R. EVID. 404; IND. R. EVID. 403.

92. IND. R. EVID. 404(b)(1).

93. Pittman v. State, 234 N.E.3d 874, 885 (Ind. Ct. App. 2024) (quoting Hicks v. State, 690 N.E.2d 215, 218–19 (Ind. 1997)).

94. Hardiman v. State, 222 N.E.3d 1049, 1056 (Ind. Ct. App. 2023) (citation and quotation marks omitted), *trans. denied*, 232 N.E.3d 639 (Ind. 2024); *see also* IND. R. EVID. 404(b)(2); Kendall v. State, 225 N.E.3d 794, 797 (Ind. Ct. App. 2023).

95. *Hardiman*, 222 N.E.3d at 1056.

96. Doyle v. State, 223 N.E.3d 1113, 1123–24 (Ind. Ct. App. 2023).

97. *Kendall*, 225 N.E.3d at 797.

98. IND. R. EVID. 407.

99. Pennington v. Mem'l Hosp. of South Bend, Inc., 223 N.E.3d 1086, 1096 (Ind. 2024) (citation omitted).

100. *Id.* at 1095–96.

pool a year after the personal-injury plaintiff was injured while swimming.[101] The photographs "show[ed] a subsequently installed floating lane-divider and padding on the exposed end of the wing-wall."[102] The court found exclusion warranted under Rule 407 because "[a] factfinder could infer that this apparatus was added to prevent further injuries—an action that could be interpreted as an implicit admission that the pool was previously unsafe."[103]

E. Rule 412: Victims' Sexual History

Rule 412, in conjunction with Indiana's Rape Shield Statute,[104] "reflects the principle that '[i]nquiry into a victim's prior sexual activity is sufficiently problematic that it should not be permitted to become a focus of the defense.'"[105] The survey period showed that "the insight of Indiana's Rape Shield Statute," reflected in Rule 412,[106] may provide some guidance in discovery. *Plouch v. State* saw the Indiana Court of Appeals affirm a trial court's conclusion to limit discovery under Indiana Trial Rule 26(C) despite the trial court relying on "the principles supporting" the Rape Shield Statute to do so.[107] In *Frye v. State*, however, a separate appellate panel[108] found invocation of rape-shield protections to limit discovery went too far when it became "tantamount to allowing the State to use our Rape Shield provisions 'both as a shield and a sword.'"[109]

The Indiana Court of Appeals also applied the Rape Shield Rule and Rape Shield Statute to prohibit: evidence that the victim "had allegedly participated in a game that had a possible sexual dimension";[110] evidence of a DCS investigation that would show the victim "allegedly engaged in other sexual behavior with someone other than" the defendant;[111] and evidence relating to whether the victim "had ever: (1) 'lied to her prior sexual partners about her age'; (2) 'traded sexual favors for drugs with her prior partners'; and (3)

101. *Id.*

102. *Id.* at 1095.

103. *Id.*

104. State v. Walton, 715 N.E.2d 824, 826 (Ind. 1999) ("Indiana Evidence Rule 412, the Rape Shield Rule, incorporates the basic principles of Indiana Code § 35-37-4-4." (footnotes omitted)); Francum v. State, No. 23A-CR-1227, 2024 Ind. App. Unpub. LEXIS 680, at *5 (Ind. Ct. App. May 31, 2024), *trans. denied*, 2024 Ind. LEXIS 516 (Ind. 2024).

105. Himes v. State, No. 22A-CR-3011, 2023 Ind. App. Unpub. LEXIS 1372, at *8 (Ind. Ct. App. Nov. 30, 2023) (quoting Williams v. State, 681 N.E.2d 195, 200 (Ind. 1997)) (alteration in original), *trans. denied*, 2024 Ind. LEXIS 121 (Ind. 2024).

106. *Francum*, 2024 Ind. App. Unpub. LEXIS 680, at *5.

107. Plouch v. State, 222 N.E.3d 357, 360–61 (Ind. Ct. App. 2023) ("During a hearing on Plouch's objection, the trial court stated that while the Rape Shield Statute does not operate as a privilege to preclude discovery, the principles supporting it are consistent with Ind. Trial Rule 26, which allows a court to limit discovery to protect a person's privacy.").

108. Judge Melissa May, who authored *Frye* was a member of the panel in *Plouch*.

109. Frye v. State, 240 N.E.3d 727, 734 (Ind. Ct. App. 2024).

110. *Himes*, 2024 Ind. App. Unpub. LEXIS 1372, at *5–10.

111. *Francum*, 2024 Ind. App. Unpub. LEXIS 680, at *4–6.

'claimed she had sex with other people.'"[112]

IV. PRIVILEGES: RULES 501 & 502

Rules 501 and 502 generally serve to facilitate and preserve privileges.[113] In Indiana, "[a] grant of privilege and the scope of that privilege are policy choices of the Legislature."[114] That allocation of power led the Indiana Court of Appeals to determine that a "trial court was not empowered to create a common law privilege that materials withheld in a FOIA request are non-discoverable due to a federal interest."[115] The flip side is also true: Indiana courts must respect statutory privileges. That fact led the Indiana Court of Appeals to affirm application of the privilege of Indiana Code section 31-33-18-1 to records of the Indiana Department of Child Services.[116]

Another privilege that was the subject of caselaw is the attorney-client privilege. Generally, the privilege must be waived in order to allow invasion.[117] Nevertheless, the Indiana Court of Appeals affirmed the invasion of the privilege by applying the crime-fraud exception of Indiana Rule of Professional Conduct 1.6(b)(2) because the communications "were made for the purpose of perpetrating a fraud on the State and trial court and for the purpose of committing the crime of obstruction of justice."[118]

In addition to generally applying rules of privilege, subject to exceptions, Rule 501(d) prohibits informing juries of the exercises of privileges.[119] The Indiana Court of Appeals addressed the propriety of how a trial court handled invocation of the Fifth Amendment privilege against self-incrimination in *Irwin v. State*.[120] Once the privilege is invoked, Rule 501(d) prevents the judge or counsel from commenting on the privilege and the proceedings are to be conducted in a manner to allow invocation of the "privilege without the jury's knowledge."[121] The criminal defendant sought to have the jury instructed

112. F.H. v. State, No. 23A-JV-2733, 2024 Ind. App. Unpub. LEXIS 650, at *5 (Ind. Ct. App. May 28, 2024).

113. IND. R. EVID. 501 & 502.

114. Goalsetter Sys., Inc. v. Est. of Gerwels, 230 N.E.3d 341, 346 (Ind. Ct. App. 2024) (quoting State v. Int'l Bus. Machines Corp., 964 N.E.2d 206, 210 (Ind. 2012)) (alteration in original; quotation marks omitted), *trans. denied*, 2024 Ind. LEXIS 393 (Ind. 2024); *see also* Pruitt v. State, 243 N.E.3d 416, 419–20 (Ind. Ct. App. 2024).

115. *Id.* at 348.

116. *Pruitt*, 243 N.E.3d at 419–20.

117. *See* Browne v. Waldo, No. 2:20-CV-196 JD, 2024 U.S. Dist. LEXIS 20422, at *11–12 (N.D. Ind. Feb. 6, 2024) (citing P.T. Buntin, M.D., P.C. v. Becker, 727 N.E.2d 734, 740 (Ind. Ct. App. 2000)).

118. Brook v. State, 221 N.E.3d 1239, 1253–55 (Ind. Ct. App. 2023), *trans. denied*, 2024 Ind. LEXIS 107 (Ind. 2024).

119. IND. R. EVID. 501.

120. Irwin v. State, 229 N.E.3d 567, 572–73 (Ind. Ct. App.), *trans. denied*, 2024 Ind. LEXIS 381 (Ind. 2024).

121. *Id.* at 572 (quoting IND. R. EVID. 501(d)(1); IND. R. EVID. 501(d)(2)).

regarding a witness's invocation of the Fifth Amendment privilege.[122] The appellate court rejected the argument that its precedent on circumstances in which a witness may be called to the stand despite the expectation that the privilege will be invoked mandated the giving of the desired instruction and otherwise found that the matter of instructing the jury was within the sound discretion of the trial court.[123]

V. WITNESSES: RULES 601 THROUGH 617

A. Rule 604: Oaths or Affirmations of Interpreters

Indiana law recognizes the indispensable role an interpreter plays for non-English speaking persons involved in the justice system.[124] Rule 604 requires "[a]n interpreter [to] be qualified and [to] give an oath or affirmation to make a true translation."[125] Indiana trial courts are tasked with "examin[ing] an interpreter on the record to confirm the interpreter is qualified and 'should also administer an oath or affirmation that the interpreter will make a true translation.'"[126] "Indiana precedent has 'long held' the form and manner of the examination of the interpreter is left to the trial court's discretion."[127] The survey period provided two examples as to what is an adequate examination and administration of oath by a trial court. In *Shar v. State*, the Indiana Court of Appeals approved of the following colloquy:

> THE COURT: And Mr. Yu, can you please raise your right hand? And do you swear or affirm under penalties for perjury that you will accurately [translate] in this case all the questions and the statements made to the defendant or the witnesses, as well as their responses?
>
> THE INTERPRETER: Yes, I do, Your Honor.[128]

Ceron v. State also provided an important example because it showed an acceptable means of rectifying the initial error to examine a translator and administer an oath.[129] There, upon discovering that the interpreter had not been administered an oath, the trial court immediately swore in the interpreter and

122. *Id.*

123. *Id.* at 572–73 (discussing Martin v. State, 179 N.E.3d 1060, 1068 (Ind. Ct. App. 2021)).

124. Martinez Chavez v. State, 534 N.E.2d 731, 737 (Ind. 1989).

125. IND. R. EVID. 604.

126. Shar v. State, No. 23A-CR-1596, 2024 Ind. App. Unpub. LEXIS 997, at *6 (Ind. Ct. App. July 31, 2024) (quoting Mariscal v. State, 687 N.E.2d 378, 382 (Ind. Ct. App. 1997)), *trans. denied*, 2024 Ind. LEXIS 665 (Ind. 2024).

127. *Id.* (quoting Cruz Angeles v. State, 751 N.E.2d 790, 795 (Ind. Ct. App. 2001)).

128. *Id.* at *6–7 (alteration in original; citation omitted).

129. Ceron v. State, No. 23A-PC-1444, 2024 Ind. App. Unpub. LEXIS 405, at *18–22 (Ind. Ct. App. Apr. 1, 2024), *trans. denied*, 2024 Ind. LEXIS 344 (Ind. 2024).

examined the interpreter by asking whether "the translations to that point had been 'honest[]' and 'fair[] . . . [a]s if [they] had been under oath.'"[130]

B. Rule 609: Can Error Be Preserved Without Accused Testifying?

Rule 609 governs the use of prior criminal convictions for impeachment.[131] When applied to stale convictions, in which ten years have passed since the later of the conviction or the release from the resulting incarceration, Rule 609 carries a "presumption against admissibility."[132] The survey period highlighted an important, unresolved question in applying Rule 609. In the non-precedential opinion of *Douglass v. State*, the Indiana Court of Appeals acknowledged that neither the court of appeals nor the Indiana Supreme Court have answered whether a criminal defendant waives appellate review of a trial court's decision to admit evidence under Rule 609 if the accused never testifies.[133] The appellate briefing highlighted the separate paths taken by the Supreme Court of the United States and some states.[134] The Indiana Supreme Court has denied transfer, so this question will remain for another day.

C. Rule 611: Courts Retain Discretion to Allow Recalling of Witnesses

Rule 611 reflects the broad powers and discretion afforded to trial courts to manage the presentation of evidence and examination of witnesses.[135] That power not only extends to matters such as allowing leading questions to certain witnesses[136] and consolidating evidentiary hearings,[137] but, as the Indiana

130. *Id.* at *20 (alterations in original; citation omitted).

131. IND. R. EVID. 609.

132. Allman v. State, No. 23A-CR-75, 2023 Ind. App. Unpub. LEXIS 1537, at *20 (Ind. Ct. App. Dec. 28, 2023) (citing Schwestak v. State, 674 N.E.2d 962, 964 (Ind. 1996)), *trans. denied*, 2024 Ind. LEXIS 196 (Ind. 2024).

133. Douglass v. State, No. 23A-CR-2766, 2024 Ind. App. Unpub. LEXIS 1199, at *26 (Ind. Ct. App. Sep. 12, 2024), *trans. denied,* 2025 Ind. LEXIS 22 (Ind. 2025).

134. Brief of Appellant at 39–42, Douglass v. State, No. 23A-CR-2766 (Ind. Ct. App. May 21, 2024) (*comparing* Luce v. United States, 469 U.S. 38 (1984) (requiring witness to testify), *and* State v. Hester, 703 P.2d 518 (Ariz. Ct. App. 1985), *and* Smith v. State, 778 S.W.2d 947 (Ark. 1989), *and* People v. Collins, 722 P.2d 173 (Cal. 1986), *with* People v. Contreras, 485 N.Y.S.2d 261 (1985), *and* State v. McBride, 517 A.2d 152 (N.J. Super. Ct. App. Div. 1986), *and* State v. Ford, 381 N.W.2d 30 (Minn. Ct. App. 1986)); *see also* Edward L. Raymond, Jr., *Requirement That Defendant in State Court Testify in Order to Preserve Alleged Trial Error in Rulings on Admissibility of Prior Conviction Impeachment Evidence under Uniform Rule of Evidence 609, or Similar Provision or Holding – Post*-Luce *Cases*, 80 A.L.R.4TH 1028 (1990).

135. IND. R. EVID. 611; J.K. v. State, No. 23A-JV-1772, 2024 Ind. App. Unpub. LEXIS 241, at *8 (Ind. Ct. App. Feb. 27, 2024) (citing *In re* S.E., 15 N.E.3d 37, 44 (Ind. Ct. App. 2014)).

136. IND. R. EVID. 611(c); *see*, *e.g.*, Moredock v. State, No. 23A-CR-2123, 2024 Ind. App. Unpub. LEXIS 536, at *16–17 (Ind. Ct. App. Apr. 30, 2024), *trans. denied*, 2024 Ind. LEXIS 441 (Ind. 2024); Orshonsky v. State, No. 23A-CR-982, 2024 Ind. App. Unpub. LEXIS 669, at *8–18 (Ind. Ct. App. May 29, 2024), *trans. denied*, 2024 Ind. LEXIS 554 (Ind. 2024).

137. *J.K.*, 2024 Ind. App. Unpub. LEXIS 241, at *7–10.

Supreme Court reaffirmed, also to the power to recall witnesses.[138] Adhering to precedent recognizing the power of courts to allow recalling witness "to correct or add testimony due to mistake or oversight,"[139] the court found no error in recalling a forensic biologist "'to provide additional explanation' about DNA recovered from . . . the crime scene."[140]

D. Rule 612: Refreshing a Witness's Recollection

"Indiana Evidence Rule 612(a) allows a questioner to refresh a witness's memory using a writing or similar device after the witness indicates she has no memory of the information sought."[141] Because "[t]he item used to refresh the witness's memory does not need to have been written by the witness," the Indiana Court of Appeals found it was error for a trial court to prevent an attempt at refreshing a witness's recollection with the letter of another person.[142] Similarly, it was not error to allow use of a statement given by the witness to a detective to refresh the witness's recollection.[143] But, to engage in refreshing a witness's recollection, a proper foundation must first be laid. That failure, in *Portillo v. State*, led the Indiana Court of Appeals to find Rule 612 was not satisfied where the witness "testified positively," albeit in contradiction to a prior statement.[144]

E. Rule 613: Once a Witness Is Impeached, Further ImpeachmentI May Be Limited

"The Indiana Rules of Evidence allow the impeachment of a witness, including through the use of extrinsic evidence."[145] Rule 613 governs the use of extrinsic evidence for impeachment.[146] In *Hall v. State*, the Indiana Court of Appeals affirmed a trial court's prohibiting of questions that would have served to further elicit evidence impeaching a witness.[147] On examination, the witness testified that two events had not occurred.[148] Later, testimony was elicited from

138. Hancz-Barron v. State, 235 N.E.3d 1237, 1245–47 (Ind. 2024).

139. *Id.* at 1245 (quoting Boyd v. State, 494 N.E.2d 284, 302 (Ind. 1986)) (quotation marks omitted).

140. *Id.* at 1246; *but cf. In re* A.L., 223 N.E.3d 1126, 1136 (Ind. Ct. App. 2023) (affirming refusal to allow recalling of witness), *trans. denied*, 2024 Ind. LEXIS 194 (Ind. 2024).

141. *A.L.*, 223 N.E.3d at 1135.

142. *Id.*

143. Yarbrough v. State, No. 23A-CR-2188, 2024 Ind. App. Unpub. LEXIS 493, at *3–5 (Ind. Ct. App. Apr. 24, 2024), *trans. denied*, 2024 Ind. LEXIS 469 (Ind. 2024).

144. Portillo v. State, No. 24A-CR-240, 2024 Ind. App. Unpub. LEXIS 815, at *6–8 (Ind. Ct. App. June 26, 2024).

145. Hall v. State, 231 N.E.3d 868, 873 (Ind. Ct. App. 2024) (citing IND. R. EVID. 607; IND. R. EVID. 613), *trans. denied*, 2024 Ind. LEXIS 395 (Ind. 2024) (citation omitted).

146. *Id.*

147. *Id.* at 873–74.

148. *Id.* at 874.

a detective that the witness had told him that both events had occurred.[149] "At th[at] point, the impeachment of [the witness] was complete because [the detective]'s testimony about [the witness]'s statements during the investigation directly contradicted her trial testimony."[150] Further testimony regarding the witness's actions was unnecessary for the purpose of impeachment.[151]

F. Rule 615: Separation of Witnesses

"Indiana Evidence Rule 615 allows litigants to move for separation of witnesses so they cannot hear each other's testimony."[152] The rule received consideration by the Indiana Court of Appeals in three memoranda decisions. In *Land v. State*, the court observed that the failure to include a separation order in the record made it "impossible" to determine whether coaching of a witness during a recess violated the order.[153] Notably, with respect to a criminal defendant, the Sixth Amendment prevents a trial court from prohibiting consultation between the defendant and counsel during an overnight recess but may allow it during a brief recess in testimony.[154]

Gilbert v. State concerned the propriety of requesting a separation of witnesses after testimony had begun.[155] The court observed: "Evidence Rule 615 does not address when such a motion must be made, although, ideally, it should be made before any testimony has been offered. Nevertheless, making a separation of witness motion after testimony has begun 'may be permissible as long as basic notions of fundamental fairness are not offended.'"[156] Despite the mandatory language of Rule 615, in the absence of any prejudice, the court found no error in the trial court denying a motion for separation of witnesses made after the first witness has testified.[157]

Easily overlooked, but arguably the most significant Rule 615 decision was *Estate of Lease v. Estate of Hershey*.[158] The contention on appeal was that the trial court exceeded its authority under Rule 615 by not only ordering exclusion of non-party witnesses from the courtroom but by taking the further step of prohibiting discussion of the matter between witnesses.[159] To many, the panel

149. *Id.*
150. *Id.*
151. *Id.*
152. Griffith v. State, 59 N.E.3d 947, 956 (Ind. 2016).
153. Land v. State, No. 22A-CR-2863, 2023 Ind. App. Unpub. LEXIS 1389, at *15–16 (Ind. Ct. App. Dec. 6, 2023), *trans. denied*, 2024 Ind. LEXIS 150 (Ind. 2024).
154. *See* Geders v. United States, 425 U.S. 80 (1976); Perry v. Leeke, 488 U.S. 272 (1989); Frierson v. State, 543 N.E.2d 669, 672–73 (Ind. Ct. App. 1989).
155. Gilbert v. State, No. 23A-CR-206, 2023 Ind. App. Unpub. LEXIS 1345, at *10–11 (Ind. Ct. App. Nov. 28, 2023), *trans. denied*, 2024 Ind. LEXIS 127 (Ind. Feb. 22, 2024).
156. *Id.* at *10 (quoting *In re* K.L., 137 N.E.3d 301, 306 (Ind. Ct. App. 2019)).
157. *Id.* at *10–11.
158. Estate of Lease v. Estate of Hershey, No. 22A-PL-2186, 2023 Ind. App. Unpub. LEXIS 1166, at *29–32 (Ind. Ct. App. Oct. 4, 2023).
159. *Id.*

of the Indiana Court of Appeals included, that challenge seems easily rejected. There is no shortage of authority that supports a judge's power to prevent discussion between witnesses under Rule 615.[160] Indeed, the Committee Commentary to Indiana Evidence Rule 615 from the 1994 enactment specifically states: "Rule 615 should also include conversations conducted outside the courtroom. Witnesses should be restricted from not only being in the courtroom at the same time, but also from discussing the substance of testimony which is being presented to the trier of fact."[161]

The problem arises because the rule was amended in September 2013.[162] Although the amendment is "substantially similar,"[163] there is one significant distinction between the 1994 iteration and the amended language. In relevant part, the pre-amendment language read: "At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses, and it may make the order on its own motion."[164] The post-2014 language no longer mentions discussions between witnesses: "At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony."[165]

Despite the Appellants' Brief addressing the amendment,[166] the panel's opinion did not.[167] Instead, the panel found the extension of the separation beyond the courtroom door was both consistent with the purpose of Rule 615 and was "simply" an extension of "the same prohibitions within the courtroom to discussions that may occur outside the courtroom while the trial was pending."[168] While that conclusion is consistent with the expansive view of separation orders espoused by some scholars[169] and the assertion by Judge Robert Miller's Indiana Evidence treatise that "[t]he conduct addressed by a witness separation order traditionally has been based on custom rather than the language of any rule,"[170] it is inconsistent with the presumption that a significant

160. *See*, *e.g.*, 13 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE: INDIANA EVIDENCE § 615.102 (3d ed. 2007); J. ALEXANDER TANFORD, INDIANA TRIAL EVIDENCE MANUAL § 33.02 (2022) ("The order should include a prohibition against discussing testimony outside the courtroom.").

161. MILLER, *supra* note 160, at 13.

162. *Order Amending Indiana Rules of Evidence*, No. 94S00-1301-MS-30, at 21 (Ind. Sept. 13, 2013), https://web.archive.org/web/20200925190811/https://www.in.gov/judiciary/files/order-rules-2013-0913-evidence.pdf [https://perma.cc/8E5Z-2H3T].

163. 30 JOHN J. DVORSKE, INDIANA LAW ENCYCLOPEDIA., *Witnesses* § 74 (2008 & Supp. 2015).

164. IND. R. EVID. 615 (2013) (emphasis added).

165. IND. R. EVID. 615 (2014).

166. Appellants' Brief at 34–37, Estate of Lease v. Estate of Hershey, No. 22A-PL-2186 (Ind. Ct. App. Dec. 6, 2022).

167. Estate of Lease v. Estate of Hershey, No. 22A-PL-2186, 2023 Ind. App. Unpub. LEXIS 1166, at *29–32 (Ind. Ct. App. Oct. 4, 2023).

168. *Id*. at *30–31.

169. *See* MILLER, *supra* note 160, at § 615.101 n.2; JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 50 (4th ed. 1992).

170. *Id.* at *30–31.

change in language indicates a change in meaning.[171] As a memorandum decision, *Estate of Lease* has not resolved the question.[172]

G. Rule 616: Evidence of Bias Not Always Admissible

"Indiana Evidence Rule 616 explicitly makes 'evidence of bias, prejudice, or interest of the witness for or against any party' relevant and admissible for impeachment purposes, as this evidence can impact the weight of the witness's testimony."[173] In *Keller v. State*, the Indiana Court of Appeals rejected the contention that "evidence of a witness' bias is 'always relevant' at trial because it 'may discredit the witness or affect the weight of the witness' testimony.'"[174] Instead, the alleged bias must be more than "'purely speculative'; it must be grounded in fact."[175] Moreover, as highlighted in *Moyes v. State*, it is not enough that a witness may have a bias or prejudice in general, the bias or prejudice must concern a party to the proceedings.[176]

H. Rule 617: Incomplete Electronic Recordings of Custodial Interrogations

First taking effect in 2011, for the first half-decade of its existence, Rule 617 "received very little attention from Indiana's appellate courts."[177] In more-recent years, Rule 617 has repeatedly drawn discussion in appellate opinions.[178] The rule requires "Electronic Recording" of "Custodial Interrogations"[179] used in support of felony criminal prosecutions.[180] Although the memorandum decision in *Andrade-Guiterrez v. State* did not establish new precedent as to the application of Rule 617, it did highlight an area in need of further clarification

171. *See* State *ex rel*. Socialist Labor Party v. State Election Bd., 241 N.E.2d 69, 74 (Ind. 1968); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 256–60 (2012) (Reenactment Canon); Durbois v. Deutsche Bank Nat'l Tr. Co., 37 F.4th 1053, 1059–60 (5th Cir. 2022) (applying Reenactment Canon to procedural rule).

172. IND. R. APP. P. 65(D)(2).

173. Konopasek v. State, 946 N.E.2d 23, 27–28 (Ind. 2011) (quoting IND. R. EVID. 616).

174. Keller v. State, No. 23A-CR-845, 2024 Ind. App. Unpub. LEXIS 13, at *6 (Ind. Ct. App. Jan. 11, 2024) (citation omitted).

175. *Id.* (quoting Tolliver v. State, 922 N.E.2d 1272, 1286 (Ind. Ct. App. 2010)).

176. Moyes v. State, No. 23A-CR-704, 2023 Ind. App. Unpub. LEXIS 1487, at *11–12 (Ind. Ct. App. Dec. 22, 2023).

177. Colin E. Flora, *2017 Developments in Indiana Evidentiary Practice*, 51 IND. L. REV. 1049, 1063 (2018).

178. *See id.* at 1063–65; Colin E. Flora, *2018 Developments in Indiana Evidentiary Practice*, 52 IND. L. REV. 715, 736–38 (2019); Colin E. Flora, *2019 Developments in Indiana Evidentiary Practice*, 53 IND. L. REV. 895, 921–22 (2021); Colin E. Flora, *2022 Developments in Indiana Evidentiary Practice*, 56 IND. L. REV. 763, 780–81 (2023).

179. Both "Electronic Recording" and "Custodial Interrogation" are terms defined within the rule. IND. R. EVID. 617(b).

180. IND. R. EVID. 617(a).

that is likely to spawn future appellate argument.[181] The criminal defendant "argue[d that] the recording of his interview violate[d] Rule 617 because the recording was not started until after [the detective] informed Andrade-Gutierrez of his *Pirtle* rights and obtained Andrade-Gutierrez's consent to search his apartment."[182] This, the defendant argued, violated the requirement of Rule 617(c) that "[t]he Electronic Recording must be a complete, authentic, accurate, unaltered, and continuous record of a Custodial Interrogation."[183] The matter was left unresolved because the appellate panel deemed any error harmless.[184] Nevertheless, by way of footnote, the Indiana Court of Appeals provided some guidance for future litigation of the question:

> Although we have found no reported cases discussing what constitutes a "complete" Electronic Recording, when the Indiana Supreme Court issued its order adopting Rule 617, it included a lengthy statement explaining the process and policy behind adding the rule. Neither party cited the Court's order, and given our resolution of this issue, we need not consider the Court's intention behind this aspect of the rule.[185]

Future litigants would be well-served to consult the Indiana Supreme Court's statement.[186] Because transfer to the Indiana Supreme Court was denied, *Andrade-Gutierrez* simply highlights what remains for another day.[187]

VI. OPINIONS & EXPERT OPINIONS: RULES 701 THROUGH 705

A. Rule 701: Opinion Testimony by Lay Witnesses

Rule 701 limits non-expert witnesses to opinions that are "(a) rationally based on the witness's perception; and (b) helpful to a clear understanding of

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181. Andrade-Gutierrez v. State, No. 22A-CR-2902, 2023 Ind. App. Unpub. LEXIS 1384, at *22–24 (Ind. Ct. App. Dec. 4, 2023), *trans. denied*, 2024 Ind. LEXIS 167 (Ind. 2024).

182. *Id.* at *23. "*Pirtle* rights" reflect the rights secured by "Article 1, § 11 of the Indiana Constitution, [which requires] 'a person who is asked to give consent to search while in police custody is entitled to the presence and advice of counsel prior to making the decision whether to give such consent.'" Meredith v. State, 906 N.E.2d 867, 873 (Ind. 2009) (citations omitted)).

183. IND. R. EVID. 617(c); *Andrade-Gutierrez*, 2023 Ind. App. Unpub. LEXIS 1384, at *23.

184. *Andrade-Gutierrez*, 2023 Ind. App. Unpub. LEXIS 1384, at *23–24. "No error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties." IND. R. APP. P. 66(A).

185. *Andrade-Guitierrz*, 2023 Ind. App. Unpub. LEXIS 1384, at *23 n.12.

186. *In re* Order Amending Rules of Evidence, No. 94S00-0901-MS-4 (Ind. Sept. 15, 2009), https://web.archive.org/web/20091119043248/http://www.in.gov/judiciary/orders/rule-amendments/2009/0909-evid617.pdf [https://perma.cc/76R7-3S32]; *see also* Jon Murray, *State Raising the Bar on Taped Interrogations*, INDIANAPOLIS STAR, Sep. 23, 2009, at A1.

187. Andrade-Gutierrez v. State, 2024 Ind. LEXIS 167 (Ind. 2024).

the witness's testimony or to a determination of a fact in issue."[188] During the survey period, the Indiana Court of Appeals affirmed the admission of purely lay witness testimony that a criminal defendant had "shot at" a police-officer witness,[189] and a guardian *ad litem*'s opinion that bruising on a child "appeared to be injuries kids would receive from normal childhood activities."[190]

Unlike its federal counterpart,[191] Indiana Rule 701 allows a middle ground between purely lay opinions and expert opinions subject to Rule 702.[192] Such "[a] 'skilled witness' is a person with a degree of knowledge short of that sufficient to be declared an expert under [ ] Rule 702, but somewhat beyond that possessed by the ordinary jurors."[193] In *Bush v. State*, the Indiana Court of Appeals affirmed admission of a handwriting analyst to opine on whether a criminal defendant had been the actual author of an alibi statement.[194] Notably, under long-standing Indiana precedent, one need not have a special degree of skill or training to offer an opinion on handwriting anyway.[195] The Indiana Court of Appeals also upheld admission of the opinion of a paramedic as to whether an injury was consistent with a blow from a ball bat.[196]

B. Rule 702: Testimony by Expert Witnesses

For opinions that go beyond the limitations of Rule 701, a witness must be qualified as an expert under Rule 702.[197] The most notable decision from the survey period applying Rule 702 is *Zaragoza v. Wexford of Indiana, LLC*.[198] Seeking to resist summary judgment, the plaintiff put forward an "affidavit of a physician deploring the defendants' treatment decisions."[199] The opinion addressed two important applications of Rule 702. The first was the question of

188. IND. R. EVID. 701; *see also* Ryburn v. State, No. 23A-CR-2415, 2024 Ind. App. Unpub. LEXIS 182, at *20–21 (Ind. Ct. App. Feb. 16, 2024), *trans. denied*, 2024 Ind. LEXIS 344 (Ind. 2024).

189. Gentry v. State, No. 23A-CR-3048, 2024 Ind. App. Unpub. LEXIS 913, at *5–6 (Ind. Ct. App. July 17, 2024).

190. Deckard v. Deckard, No. 23A-DC-1796, 2024 Ind. App. Unpub. LEXIS 378, at *8–9 (Ind. Ct. App. Mar. 26, 2024), *trans. denied*, 2024 Ind. LEXIS 373 (Ind. 2024).

191. "Federal Rule of Evidence 701 now contains an additional requirement that the testimony 'not be based on scientific, technical, or other specialized knowledge within the scope of Rule 702.'" Cain v. Back, 889 N.E.2d 1253, 1258 n.4 (Ind. Ct. App. 2008) (quoting FED. R. EVID. 701).

192. *See* Bush v. State, 243 N.E.3d 405, 414–15 (Ind. Ct. App. 2024).

193. *Id.* at 414 (citation and quotation marks omitted).

194. *Id.* at 415–16.

195. *See id.* at 415 (quoting Spencer v. State, 147 N.E.2d 581, 583 (Ind. 1958)); *see also* IND. R. EVID. 901(b)(2). Handwriting analysts could also be qualified as experts under Rule 702. *Bush*, 243 N.E.3d at 416 n.4 (citing Riley v. State, No. 45A05-1708-CR-1821, 2018 Ind. App. Unpub. LEXIS 613, at *7–13 (Ind. Ct. App. May 25, 2018)).

196. Woods v. State, No. 22A-CR-2980, 2023 Ind. App. Unpub. LEXIS 1318, at *7–10 (Ind. Ct. App. Nov. 15, 2023).

197. IND. R. EVID. 702.

198. Zaragoza v. Wexford of Ind., LLC, 225 N.E.3d 146, 152–53 (Ind. 2024).

199. *Id.* at 149.

what constitutes an adequate expert affidavit at summary judgment.[200] The Indiana Supreme Court instructed:

> At the summary-judgment stage, [ ] an expert need only provide the trial court with enough information to proceed with a reasonable amount of confidence that the principles used to form the opinion are reliable." This does not always require a complete exposition of the expert's methodology. Still, to comply with Rule 702(b) at summary judgment, we would expect a medical expert's affidavit at least to provide enough information to enable the trial court to infer what the standard of care is and in what way the defendant's care fell short.[201]

Because "[t]he affidavit [ ] describe[d], in considerable detail, [the plaintiff]'s medical history, the treatment each doctor provided, and [the expert]'s views on what they should have done differently to comply with the standard of care," the affidavit was sufficient.[202]

The second question was whether the medical expert's opinion required "specialist expertise or experience with" the plaintiff's specific condition.[203] Consistent with precedent, the Indiana Supreme Court reminded that "Indiana case-law has not demanded specialist medical qualifications from experts who possess demonstrable professional knowledge of the relevant medical matters."[204] That reminder stands in contrast to a statement from the Indiana Court of Appeals' subsequent opinion in *Esposito v. Eppley*, which, despite reversing the exclusion of an expert medical affidavit, stated: "Defendants are correct in their contention that the mere fact that Dr. Burres is a physician was not sufficient to qualify him as an expert who possesses sufficient knowledge of the relevant medical matter . . . . "[205] Aside from running contrary to the Indiana Supreme Court's guidance in *Zaragoza*, that portion of *Esposito* is further suspect in light of the fact that Indiana "physicians receive unlimited licenses as to the entire medical field."[206]

Indiana appellate courts also affirmed the admission of numerous other experts during the survey period, including: a "'Risk and Safety Management Consultant' with experience managing 'aquatic facilities'" but who was not an architect or engineer to opine on the safety of a pool design because the claim was against the owner of the pool and not a claim applying an engineering professional's standard of care;[207] a fire marshal's opinion that a fire was started

200. *Id.* at 152–53.
201. *Id.* at 152 (citations omitted).
202. *Id.* at 152–53.
203. *Id.* at 153.
204. *Id.*
205. Esposito v. Eppley, 238 N.E.3d 680, 688 (Ind. Ct. App. 2024).
206. Faulkner v. Markkay of Ind., Inc., 663 N.E.2d 798, 801 (Ind. Ct. App. 1996).
207. Pennington v. Mem'l Hosp. of S. Bend, Inc., 223 N.E.3d 1086, 1095, 1101–02 (Ind. 2024).

by a marijuana cigarette;[208] the testimony of a doctor who specialized in general psychology offered during a civil-commitment proceeding;[209] and testimony establishing evidence of intoxication.[210]

C. Rule 704: Opinion on an Ultimate Issue

Rule 704 generally permits witnesses to testify "in the form of an opinion or inference" even if "it embraces an ultimate issue."[211] The rule serves to eliminate the historical practice that "witnesses were expressly prohibited from testifying about the ultimate issues facing the jury."[212] "Evidence Rule 704(b), however, 'draws a bright-line exception.'"[213] Rule 704(b) prohibits testimony of "opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions."[214]

The line between what is excluded by Rule 704(b) and what may come in under Rule 704(a) can be difficult to ascertain. This can be particularly problematic in criminal cases, wherein:

> [O]pinion testimony may include "evidence that *leads* to an [incriminating] inference, even if no witness could state [an] opinion with respect to that inference." "But an opinion must stop short of the question of guilt—because under Rule 704(b) and our constitution, that is one 'ultimate issue' that the jury alone must resolve."[215]

The published opinion in *Gillespie v. State* touched upon two of the categories prohibited by Rule 704(b).[216] The category prohibiting opinions as to

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208. Dunigan v. State, No. 24A-CR-83, 2024 Ind. App. Unpub. LEXIS 980, at *3–11 (Ind. Ct. App. July 30, 2024).

209. *In re* Civ. Commitment of N.H., No. 23A-MH-2828, 2024 Ind. App. Unpub. LEXIS 616, at *8–11 (Ind. Ct. App. May 16, 2024).

210. *See*, *e.g.*, Salgado v. State, No. 22A-CR-2738, 2023 Ind. App. Unpub. LEXIS 1160, at *10–12 (Ind. Ct. App. Oct. 2, 2023); Miller v. State, No. 23A-CR-1391, 2024 Ind. App. Unpub. LEXIS 287, at *9–11 (Ind. Ct. App. Mar. 8, 2024).

211. IND. R. EVID. 704(a).

212. Walker v. Soo Line R.R., 208 F.3d 581, 587 n.2 (7th Cir. 2000). "In interpreting [Indiana] Evidence Rule 704(b), [the Indiana Court of Appeals] has looked to the Seventh Circuit for guidance." See v. Curtis, No. 85A02-0604-CV-293, 2006 Ind. App. Unpub. LEXIS 205, at *5 (Ind. Ct. App. Nov. 21, 2006).

213. Ryburn v. State, No. 22A-CR-2415, 2024 Ind. App. Unpub. LEXIS 182, at *21 (Ind. Ct. App. Feb. 16, 2024) (quoting Williams v. State, 43 N.E.3d 578, 581 (Ind. 2015)), *trans. denied*, 2024 Ind. LEXIS 344 (Ind. May 23, 2024).

214. IND. R. EVID. 704(b); *see*, *e.g.*, Doe v. K.M.W., 230 N.E.3d 306, 321–22 (Ind. Ct. App. 2024) (affirming striking of assertions in expert affidavit "pertain[ing] to the legal conclusion the court should make about foreseeability in the context of duty").

215. *Ryburn*, 2024 Ind. App. Unpub. LEXIS 182, at *21–22 (quoting Williams v. State, 43 N.E.3d 578, 581 (Ind. 2015)) (second and third alterations in original).

216. Gillespie v. State, 244 N.E.3d 423, 436 (Ind. Ct. App. 2024).

guilt was easily found violated when a detective testified that "he was confident [the defendant] was a drug dealer."[217] The second category was the prohibition on opinions about whether a witness has testified truthfully.[218] Such "vouching" evidence is prohibited "because 'it is essential that the trier of fact determine the credibility of the witnesses and the weight of the evidence.'"[219] In *Gillespie*, a detective "vouched for the reliability of incriminating information provided by unnamed sources who did not testify at trial and were not subject to cross-examination."[220]

Although *Gillespie*'s authoring panel easily found Rule 704(b) should have prohibited the vouching testimony, last year's survey period shows that conclusion may not be as obvious as it was presumed.[221] Fourteen months before *Gillespie* was issued, the memorandum decision in *Treadwell v. State* remarked: "We first note that Rule 704(b) 'prohibits a witness from testifying about whether a witness *has testified* truthfully.' Here, [the detective]'s testimony involved the truthfulness of the witnesses' out-of-court statements to him, not their testimony."[222] The clear implication of that decision was that opinions on the truthfulness of non-testifying witnesses may not be barred by Rule 704. The panel in *Gillespie* applied Rule 704(b) to the detective's vouching for statements of "unnamed sources who did not testify at trial," without acknowledging any problem with the statements being out-of-court.[223] Despite the general rule that "a court won't normally accept as binding precedent a point that was passed by in silence,"[224] that the author of the unpublished *Treadwell* decision concurred in the published *Gillespie* opinion probably signals the *Gillespie* view is most likely to be repeated in the future.[225]

The most frequent challenges to vouching arise in the context of testimony concerning minor victims reporting sexual crimes. The survey period highlighted techniques for permitting the jury insight into why a child may delay reporting without crossing into proscribed vouching. *Pacheco v. State* reinforced that testimony does "not run afoul of Evidence Rule 704(b)" so long as it "merely describe[s] 'how victims of child molestation behave in general'

217. *Id.*
218. *Id.*
219. *Id.* (citation omitted).
220. *Id.* (citation omitted).
221. *2023 Survey*, *supra* note 4, at 940.
222. Treadwell v. State, No. 22A-CR-1857, 2023 Ind. App. Unpub. LEXIS 835, at *6 (Ind. Ct. App. July 24, 2023) (quoting Halliburton v. State, 1 N.E.3d 670, 680 (Ind. 2013)).
223. *Gillespie*, 244 N.E.3d at 436.
224. BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 229 (2016); *see*, *e.g.*, Payday Today, Inc. v. Defreeuw, 903 N.E.2d 1057, 1059 n.1 (Ind. Ct. App. 2009).
225. As Justice Oliver Wendell Holmes famously defined "law" for purposes of the so-called "bad man": "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897).

and d[oes] not opine on [the specific victim]'s veracity."[226] It does not matter that the testimony may be voluminous, because, as the *Pacheco* panel noted, "it is the content of the testimony that matters, not the extent."[227] Another technique that succeeded in *Finch v. State*, which may represent best practice when feasible, was to have such testimony provided by a qualified mental-health witness who "never interviewed [the victim] and did not know the facts of th[e] case."[228] That approach minimizes the risk of the testimony being deemed to vouch for the victim, because the witness has no involvement with the victim or the facts of the case from which to opine.

Other instances of vouching, like in *Gillespie*, are far less difficult to find running afoul of Rule 704(b). For example, a witness's answer to the prosecution's question of whether a victim's statements "'ma[de] sense' or 'seem[ed] incredible,'" "was effectively a comment on the truthfulness of [the victim]'s story, which is [impermissible] indirect vouching."[229]

The survey period also showed that not all instances of vouching are impermissible. The Indiana Court of Appeals also recognized scenarios in which otherwise impermissible vouching may become permissible when a door is opened to it. In *Merriweather v. State*, the criminal defendant was deemed to have opened the door for vouching evidence by questioning the witness as to the victim's "truthfulness and believability."[230] Another scenario in which the door was opened occurred in the trial closings of *Pearson v. State*.[231] There, the defendant's "attempt[] to impugn [the victim]'s credibility during his closing argument" opened the door to allow the prosecution to cross into vouching for the victim's credibility.[232]

Finally, practitioners are reminded that Indiana appellate courts look with favor on federal authority when interpreting Indiana Rules of Evidence. In *Kaluza v. State*, the Indiana Court of Appeals noted the Supreme Court of the United States' interpretation of Federal Rule 704(b) in *Diaz v. United States*.[233]

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226. Pacheco v. State, No. 23A-CR-2709, 2024 Ind. App. Unpub. LEXIS 771, at *7 (Ind. Ct. App. June 20, 2004) (quoting Baumholser v. State, 62 N.E.3d 411, 416 (Ind. Ct. App. 2016)); *see also* Henson v. State, 237 N.E.3d 1160, 1168 (Ind. Ct. App. 2024) ("[B]ecause Detective Anderson's testimony was about children generally rather than K.H. specifically, there was no vouching under our current precedent, and the trial court did not abuse its discretion in admitting Detective Anderson's testimony."), *trans. denied*, 244 N.E.3d 907 (Ind. 2024).

227. *Pacheco*, 2024 Ind. App. Unpub. LEXIS 771, at *7 n.1.

228. Finch v. State, No. 23A-CR-1394, 2024 Ind. App. Unpub. LEXIS 608, at *10–11 (Ind. Ct. App. May 15, 2024), *trans. denied*, 2024 Ind. LEXIS 547 (Ind. 2024).

229. Brooks v. State, No. 23A-CR-2421, 2024 Ind. App. Unpub.LEXIS 966, at *5, *8 (Ind. Ct. App. July 29, 2024), *trans. denied*, 2024 Ind. LEXIS 694 (Ind. 2024).

230. Merriweather v. State, No. 23A-CR-2400, 2024 Ind. App. Unpub. LEXIS 754, at *8 (Ind. Ct. App. June 14, 2024).

231. Pearson v. State, No. 23A-CR-1491, 2024 Ind. App. Unpub. LEXIS 384, at *24–26 (Ind. Ct. App. Mar. 27, 2024), *trans. denied*, 2024 Ind. LEXIS 694 (Ind. 2024).

232. *Id.* at *25–26.

233. Kaluza v. State, No. 24A-CR-130, 2024 Ind. App. Unpub. LEXIS 948, at *15 (Ind. Ct. App. July 25, 2024) (citing Diaz v. United States, 602 U.S. 526, 538 (2024)), *trans. denied*, 2024

D. Rule 705: Expert Opinions at Summary Judgment

"Rule 705 permits an expert to give opinion testimony without prior disclosure of the underlying facts or data."[234] That is, it "allows experts to present naked opinions."[235] The underlying purpose of the rule "is to avoid complex and time[-]consuming testimony by permitting an expert to state his opinion and reasons without first specifying the data upon which it is based."[236] In *Zaragoza v. Wexford of Indiana, LLC*, the Indiana Supreme Court looked to Rule 705's standard for expert testimony at trial to recognize that an expert's affidavit is sufficient to defeat summary judgment even if the affidavit includes bare and conclusory assertions.[237] As the court stated: "an expert may testify in the form of an opinion at trial without providing detailed factual explanations. We would not require greater substance on summary judgment than at trial. Nor do we wish to subject the affidavits of non-lawyers to unnecessary hurdles."[238]

VII. HEARSAY: RULES 801 THROUGH 806

A. Rules 801 & 802: Hearsay Generally Prohibited

Under Rule 802, "hearsay" is generally inadmissible unless subject to an exception.[239] Although the Rules of Evidence provide specific exceptions to Rule 802's prohibition,[240] before any analysis of those exceptions should commence, it must first be determined if a statement is "hearsay." Rule 801 generally defines "hearsay" as "a statement that: (1) is not made by the declarant while testifying at the trial or hearing; and (2) is offered in evidence to prove the

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Ind. LEXIS 626 (Ind. 2024). Notably, although *Diaz* considered "[a]n expert's conclusion that 'most people' in a group have a particular mental state" under Rule 704(b), long ago, the Indiana Supreme Court ruled that "what an ordinary man would likely do under a known state of affairs" is a matter subject to judicial notice. Bloom v. Franklin Life Ins. Co., 97 Ind. 478, 486–87 (1884).

234. Evers v. Gen. Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985). "Indiana Rule 705 is functionally identical to Federal Rule 705." A.J. STEPHANI & GLEN WEISSENBERGER, WEISSENBERGER'S INDIANA EVIDENCE 2024–2025 COURTROOM MANUAL 705 (2024).

235. Mid-State Fertilizer Co. v. Exch. Nat'l Bank, 877 F.2d 1333, 1339 (7th Cir. 1989).

236. Symbol Techs., Inc. v. Opticon, Inc., 935 F.2d 1569, 1576 (Fed. Cir. 1991) (citations and quotation marks omitted).

237. Zaragoza v. Wexford of Ind., LLC, 225 N.E.3d 146, 152–54 (Ind. 2024). The affidavit at issue was, in the court's esteem, considerably detailed. *Id.* at 152.

238. *Id.* at 154 (citing IND. R. EVID. 705; Dorsett v. R.L. Carter, Inc., 702 N.E.2d 1126, 1128 (Ind. Ct. App. 1998)).

239. IND. R. EVID. 802; J.G. v. State, No. 23A-JV-113, 2024 Ind. App. Unpub. LEXIS 94, at *8 (Ind. Ct. App. Feb. 1, 2024).

240. IND. R. EVID. 803; IND. R. EVID. 804. A party may also open the door to use of otherwise excludable hearsay evidence, *see*, *e.g.*, Turner v. State, No. 23A-CR-1487, 2024 Ind. App. Unpub. LEXIS 106, at *5–8 (Ind. Ct. App. Jan. 31, 2024), *trans. denied*, 2024 Ind. LEXIS 253 (Ind. 2024), or admission may be permitted by an "other law." *See*, *e.g.*, *Hobbs v. State*, No. 23A-CR-1092, 2024 Ind. App. Unpub. LEXIS 437, at *10 (Ind. Ct. App. Apr. 2, 2024) ("Protected Persons Statute is one such law.").

truth of the matter asserted."[241] But a statement may fall outside of that definition for many reasons, such as: it is not offered for the truth of the matter asserted,[242] it "does not assert a fact susceptible of being true or false,"[243] or it falls within Rule 801(d)'s list of items excluded from "hearsay."[244]

Rule 801(d)(1) allows use of a declarant witness's prior statement.[245] A prerequisite to applying Rule 801(d)(1)'s exclusion is that the declarant testifies.[246] *Davis v. State* found that the requirement the declarant testify is satisfied by the ability to call the declarant at trial.[247] Looking to *Goodner v. State,* the *Davis* panel observed that Rule 801(d)(1)'s "'mandate[ ] that the declarant testify at trial and be "subject to cross-examination concerning the statement," if the declarant has not already been cross-examined on the statement, [is satisfied by] his availability to be recalled for cross-examination.'"[248] Extending that view, the *Davis* panel found Rule 801(d)(1) applied because the declarant "had signed an agreement requiring her to provide truthful testimony; she had not been formally released from her subpoena to appear at [the] trial; and she was then in State custody."[249]

Another frequently litigated exclusion is Rule 801(d)(2)'s exclusion for statements of a party opponent.[250] Two published opinions from the Indiana Court of Appeals addressed application of the exclusion when applied to statements of co-conspirators.[251] "A statement made by a co-conspirator 'during

241. IND. R. EVID. 801(c).

242. Cook v. State, 220 N.E.3d 72, 75 n.2 (Ind. Ct. App. 2023) (citations omitted); *see*, *e.g.*, Keller v. State, No. 23A-CR-845, 2024 Ind. App. Unpub. LEXIS 13, at *8 (Ind. Ct. App. Jan. 11, 2024) (that declarant's cellphone was stolen at gun point offered to show why two persons "did not speak to each other" not to prove person "stole those items"); Heiny v. State, No. 23A-CR-1082, 2024 Ind. App. Unpub. LEXIS 355, at *10 (Ind. Ct. App. Mar. 21, 2024) ("Webb's statements to Heiny were not offered for their truth, but only to give context to Heiny's threats."), *trans. denied*, 2024 Ind. LEXIS 366 (Ind. 2024); *see also* Sincere v. State, 228 N.E.3d 439, 445 (Ind. Ct. App. 2024) ("Further, '[o]ut-of-court statements made to law enforcement are non-hearsay if introduced primarily to explain why the investigation proceeded as it did.'" (quoting *Blount v. State*, 22 N.E.3d 559, 565 (Ind. 2014)); *but see* Ingram v. State, No. 24A-CR-201, 2024 Ind. App. Unpub. LEXIS 886, at *4 (Ind. Ct. App. July 10, 2024) (eviction notice was hearsay to show more than identity when used to link personal belongings in bedroom where drugs found to defendant).

243. Jackson v. State, 222 N.E.3d 321, 331 (Ind. Ct. App. 2023) (citation omitted), *trans. denied*, 2024 Ind. LEXIS 80 (Ind. 2024).

244. IND. R. EVID. 801(d).

245. IND. R. EVID. 801(d)(1).

246. *Id.*

247. Davis v. State, No. 23A-CR-640, 2023 Ind. App. Unpub. LEXIS 1303, at *8–9 (Ind. Ct. App. Nov. 13, 2023).

248. *Id.* (quoting Goodner v. State, 714 N.E.2d 638, 643 (Ind. Ct. App. 1999)).

249. *Id.* at *9.

250. IND. R. EVID. 801(d)(2); Pennington v. Mem'l Hosp. of S. Bend, Inc., 223 N.E.3d 1086, 1095 (Ind. 2024); *see*, *e.g.*, J.R. v. Ind. Dep't of Child Servs., 233 N.E.3d 1069, 1076 (Ind. Ct. App.), *trans. denied*, 2024 Ind. LEXIS 524 (Ind. 2024); Bush v. State, 243 N.E.3d 405, 414 (Ind. Ct. App. 2024).

251. *See* Jackson v. State, 222 N.E.3d 321, 333 (Ind. Ct. App. 2023); Gillespie v. State, 244 N.E.3d 423, 436 (Ind. Ct. App. 2024).

and in furtherance of the conspiracy' is not hearsay."[252] The bar for admitting such testimony is "relatively low" and may be satisfied by either direct or circumstantial evidence.[253] *Jackson v. State* found sufficient evidence of a conspiracy where "testimony about typical gang behavior and the analysis of common 'symbology'" was provided along with social media links between the alleged co-conspirators.[254] *Gillespie v. State*, however, rejected application simply because there was no evidence of a conspiracy.[255]

B. Rule 803: Hearsay Exceptions Regardless of Declarants' Availability

Even if evidence falls within the definition of hearsay, it may still be admitted if it meets any of the exceptions found in Evidence Rules 803 and 804.[256] The survey period provided insightful opinions covering seven of Rule 803's twenty-two exceptions: excited utterances under Rule 803(2), then-existing state of mind under Rule 803(3), statements for medical diagnoses or treatment under Rule 803(4), recorded recollections under Rule 803(5), records of regularly conducted activity under Rule 803(6), public records under Rule 803(8), and judgment of a previous conviction under Rule 803(22).[257]

1. Rule 803(2) – Excited Utterances.—"Evidence Rule 803(2) provides that hearsay may be admissible if the statement is an excited utterance, which is '[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.'"[258] "The heart of the inquiry is whether the declarant was incapable of thoughtful reflection."[259] Most often, the arguments on Rule 803(2) turn on whether a declarant is still under the shock of the exciting event.

During the survey period, the Indiana Court of Appeals found sufficient continued excitement under the following circumstances: a declarant upset and crying in the aftermath of witnessing "her fiancé angrily wielding a firearm while yelling at her daughter and her son's girlfriend, followed swiftly by her fiancé having an armed confrontation with several officers, during which [the declarant] had told her fiancé to put down the handgun";[260] a declarant covered

252. *Jackson*, 222 N.E.3d at 333 (quoting IND. R. EVID. 801(d)(2)(E)), *trans. denied*, 2024 Ind. LEXIS 80 (Ind. 2024).

253. *Id.* at 333–34.

254. *Id.*

255. *Gillespie*, 244 N.E.3d at 435.

256. Kubsch v. State, No. 24A-CR-99, 2024 Ind. App. Unpub. LEXIS 856, at *4 (Ind. Ct. App. July 3, 2024); C.M. v. Ind. Dep't of Child. Servs. (*In re* De.M.), No. 23A-JT-2597, 2024 Ind. App. Unpub. LEXIS 646, at *15 (Ind. Ct. App. May 24, 2024), *trans. denied*, 241 N.E.3d 1129 (Ind. 2024).

257. IND. R. EVID. 803.

258. Applegate v. State, 230 N.E.3d 944, 950–51 (Ind. Ct. App. 2024) (quoting IND. R. EVID. 803(2)), *trans. denied*, 2024 Ind. LEXIS 385 (Ind. 2024).

259. *Gillespie*, 244 N.E.3d at 435 (citation and quotation marks omitted).

260. Morgan v. State, 228 N.E.3d 512, 517 (Ind. Ct. App.), *trans. denied*, 2024 Ind. LEXIS 262 (Ind. 2024).

in "quite a bit of blood," "physically shaking," and "crying really bad";[261] a declarant "crying, nervous, scared, stressed, and appear[ing] to be in and out of shock" with her "face, knees, and feet [ ] visibly injured";[262] a child declarant who was "upset" and "scared" after seeing father strike mother in the face;[263] a declarant still visibly "'upset' and 'crying'" following a shooting;[264] statements shortly after declarant was dragged from her vehicle and assaulted;[265] despite an unknown period of time passing, a declarant who had been struck in the face and was crying while making statements;[266] and statements from a child to mother after an attempted molestation of the child.[267]

The court of appeals also affirmed a trial court's rejection of the excited-utterance exclusion, where:

> [T]he evidence shows that when [Defendant] made the statements, he was distraught, confused, and worried about St Laurent. On the other hand, [Defendant] did not spontaneously offer the information. He made the statements in response to [a witness]'s question. He told [the witness] that he was fine. And before answering [the witness]'s question about what happened, he asked her whether she had seen the accident. These facts suggest that he was capable of rational thought and was aware that he could face significant legal consequences.[268]

2. Rule 803(3): Then-Existing Mental, Emotional, or Physical Condition.— Rule 803(3) covers "statement[s] of the declarant's then-existing state of mind (such as motive, design, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health)."[269] "The Indiana Supreme Court has identified three instances when statements are admissible under Evidence Rule 803(3): to respond when the defendant puts the victim's state of mind in issue, to explain the physical injuries suffered by the victim, and

261. *Applegate*, 230 N.E.3d at 951.

262. McGraw v. State, 243 N.E.3d 394, 399 (Ind. Ct. App. 2024).

263. *In re* D.L., No. 23A-JC-1900, 2024 Ind. App. Unpub. LEXIS 197, at *7–8 (Ind. Ct. App. Feb. 20, 2024).

264. Dennis v. State, No. 23A-CR-1395, 2024 Ind. App. Unpub. LEXIS 404, at *8–10 (Ind. Ct. App. Apr. 1, 2024); *see also* Muhammad v. State, No. 23A-CR-1509, 2024 Ind. App. Unpub. LEXIS 502, at *7–8 (Ind. Ct. App. Apr. 25, 2024); Starks v. State, No. 23A-CR-2105, 2024 Ind. App. Unpub. LEXIS 564, at *9–13 (Ind. Ct. App. May 6, 2024).

265. Green v. State, No. 23A-CR-1730, 2024 Ind. App. Unpub. LEXIS 807, at *11 (Ind. Ct. App. June 26, 2024), *trans. denied*, 2024 Ind. LEXIS 509 (Ind. 2024).

266. Kubsch v. State, No. 24A-CR-99, 2024 Ind. App. Unpub. LEXIS 856, at *4 (Ind. Ct. App. July 3, 2024).

267. Howard v. State, No. 23A-CR-2719, 2024 Ind. App. Unpub. LEXIS 978, at *9 (Ind. Ct. App. July 30, 2024).

268. Douglas v. State, No. 23A-CR-1670, 2024 Ind. App. Unpub. LEXIS 98, *14–15 (Ind. Ct. App. Jan. 30, 2024), *trans. denied*, 2024 Ind. LEXIS 304 (Ind. 2024).

269. IND. R. EVID. 803(3).

to show the intent of the victim to act in particular way."[270] Under that exception, the Indiana Court of Appeals affirmed admission of text messages that showed the victim's "intent to act in a particular way, *i.e.*, that she intended to meet with [the defendant] on the night she disappeared."[271]

3. Rule 803(4): Statement Made for Medical Diagnosis or Treatment.—"Statements made for the purpose of receiving medical treatment are an exception to the hearsay rule."[272] To satisfy Rule 803(4)'s exception, the proponent of the evidence must first establish that "the declarant [was] motivated to provide truthful information in order to promote diagnosis and treatment, and . . . the content of the statement [is] such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment."[273] "But more is required when the declarant is 'a young child brought to the medical provider by a parent.'"[274] That "more" is "evidence that the declarant understood the professional's role in order to trigger the motivation to provide truthful information."[275]

In *Wanke v. State*, the Indiana Court of Appeals found reversible error because the testifying nurse "provided no testimony that [the declarant] in particular, and on this occasion, understood [the nurse]'s role or the importance of being truthful to [the nurse] for the purpose of diagnosis or treatment."[276] The same conclusion was had in *Jordan v. State* due to the lack of "any evidence that [the declarant] understood that she was being questioned to reveal her injuries and develop a proper course of treatment."[277] Numerous memoranda decisions from the survey period exemplified proper laying of the requisite foundation.[278]

One other memoranda decision provided an important point:

> At trial, Hobbs objected to the admission of [a nurse]'s testimony under Evidence Rule 803(4) on the grounds that, based upon the length of time between the alleged offenses and the examination, the statements "were

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270. Fuller v. State, No. 23A-CR-2842, 2024 Ind. App. Unpub. LEXIS 776, at *15 (Ind. Ct. App. June 20, 2024) (citing D.R.C. v. State, 908 N.E.2d 215, 226 (Ind. 2009)), *trans. denied*, 2024 Ind. LEXIS 545 (Ind. 2024).

271. *Id.* at *16.

272. McGraw v. State, 243 N.E.3d 394, 400 (Ind. Ct. App. 2024) (citing IND. R. EVID. 803(4)), *trans. denied*, 2024 Ind. LEXIS 771 (Ind. 2024).

273. *Id.* (citation and quotation marks omitted).

274. Wanke v. State, 231 N.E.3d 878, 882 (Ind. Ct. App. 2024) (citation omitted).

275. *Id.* at 883 (citation and formatting omitted).

276. *Id.*

277. Jordan v. State, 244 N.E.3d 445, 460 (Ind. Ct. App. 2024).

278. *See*, *e.g.*, Blinson v. State, No. 22A-CR-2920, 2024 Ind. App. Unpub. LEXIS 78, at *27 (Ind. Ct. App. Jan. 30, 2024), *trans. denied*, 2024 Ind. LEXIS 300 (Ind. 2024); J.K. v. State, No. 23A-JV-1772, 2024 Ind. App. Unpub. LEXIS 241, at *14–18 (Ind. Ct. App. Feb. 27, 2024); Howard v. State, No. 23A-CR-2719, 2024 Ind. App. Unpub. LEXIS 978, at *13 (Ind. Ct. App. July 30, 2024); Hollins v. State, No. 24A-CR-145, 2024 Ind. App. Unpub. LEXIS 1190, at *8 (Ind. Ct. App. Sept. 11, 2024); Green v. State, No. 23A-CR-1730, 2024 Ind. App. Unpub. LEXIS 807, at *14 (Ind. Ct. App. June 26, 2024), *trans. denied*, 2024 Ind. LEXIS 509 (Ind. 2024).

> not made for any medical diagnosis or treatment" and because "no full and complete exam was done." Nothing in the language of Evidence Rule 803(4), however, requires that the person to whom the statements are made conduct a full, complete examination.[279]

4. Rule 803(5): Recorded Recollections.—A recorded recollection is exempt from the hearsay exclusion if the record: "(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and (C) accurately reflects the witness's knowledge."[280] *Wilson v. State* concerned a challenge to the use of a child's forensic interview on the assertion that it did not accurately reflect the child's recollection.[281] The challenge was rejected because the child vouched for the accuracy of the interview in a 2018 competency hearing and again during a 2022 bench trial.[282]

5. Rule 803(6): Records of a Regularly Conducted Activity.—Rule 803(6) is the business records exception.[283] "'[T]he basis for the business records exception is that reliability is assured because the maker of the record relies on the record in the ordinary course of business activities.'"[284] The survey period saw the Indiana Court of Appeals once again address the exception in the context of debt collection.[285] The primary challenge on appeal was to the affiant's lack of attestation of personal knowledge of the loan originator's practices.[286] Adhering to recent rulings in *Smith v. National Collegiate Student Loan Trust* and *Akinlemibola v. National Collegiate Student Loan Trust 2007-01* but distinguishing *Holmes v. National Collegiate Student Loan Trust*, the court of appeals affirmed admission of the affidavit.[287]

6. Rule 803(8): Public Records.—Rule 803(8) permits evidence of certain public records on the premise "that public officials perform their duties properly

279. Hobbs v. State, No. 23A-CR-1092, 2024 Ind. App. Unpub. LEXIS 437, at *21 (Ind. Ct. App. Apr. 2, 2024) (record citation omitted).

280. IND. R. EVID. 803(5).

281. Wilson v. State, No. 23A-CR-5, 2023 Ind. App. Unpub. LEXIS 1452, at *7–9 (Ind. Ct. App. Dec. 13, 2023).

282. *Id.* at *8–9.

283. IND. R. EVID. 803(6).

284. *In re* B.A., No. 23A-JT-1932, 2024 Ind. App. Unpub. LEXIS 264, at *11 (Ind. Ct. App. Mar. 1, 2024) (quoting *In re* E.T., 808 N.E.2d 639, 643 (Ind. 2004)), *trans. denied*, 2024 Ind. LEXIS 379 (Ind. 2024).

285. King v. Nat'l Collegiate Student Loan Tr. 2006-4, 232 N.E.3d 646, 650–53 (Ind. Ct. App. 2024).

286. *Id.* at 651.

287. *Id.* at 651–53 (analyzing Smith v. Nat'l Collegiate Student Loan Tr., 153 N.E.3d 222 (Ind. Ct. App. 2020); Akinlemibola v. Nat'l Collegiate Student Loan Tr. 2007-01, 205 N.E.3d 1014 (Ind. Ct. App. 2023); Holmes v. Nat'l Collegiate Student Loan Tr., 94 N.E.3d 722 (Ind. Ct. App. 2018)).

without motive or interest other than to submit accurate and fair reports."[288] "A document does not need to be open and available to the public in order to qualify for admission under the public records exception."[289] In the published opinion of *Hinkle v. State*, the Indiana Court of Appeals categorically found that service history entries on the Indiana Protective Order Registry[290] are matters covered by the public records exception.[291]

7. Rule 803(22): Judgment of a Previous Conviction.—Rule 803(22)(A) generally allows evidence of a conviction "entered after a trial or guilty plea."[292] It does not, however, exclude such evidence resulting from a "nolo contendere plea."[293] *Heffley v. State* observed that limitation of Rule 803(22)(A) does not prevent use of a *nolo contendere* plea under the public-records exception of Rule 803(8).[294]

C. Rule 804: Hearsay Exceptions for Unavailable Declarants

The primary difference between the exceptions of Rule 803 and those of Rule 804 is that the latter necessitates a showing that the declarant is unavailable to testify at trial.[295] As shown in *Lichtsinn v. State*, a declarant experiencing medical complications and subject to "conditions of rest and stress avoidance" is unavailable.[296] "[T]he plain language of Evidence Rule 804 does not include a requirement that the trial court must explore options for remote or delayed testimony."[297]

Another basis for finding a declarant unavailable is when "[a] statement [is] offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness for the purpose of preventing the declarant from attending or testifying."[298] In order to prove entitlement to the exception for forfeiture by wrongdoing, the proponent must establish both the wrongdoing and its result in the unavailability of the declarant by a preponderance of the evidence.[299] In *Doyle v. State*, the

288. Hinkle v. State, 241 N.E.3d 1154, 1157 (Ind. Ct. App. 2024) (citation and quotation marks omitted).

289. *Id.* (citation omitted).

290. "The Indiana Protective Order Registry is an Internet based electronic depository for protective orders that was established by the legislature and that is managed and maintained by the division of state court administration." *Id.* (citing IND. CODE §§ 5-2-9-1.4;-5.5 (2024)).

291. *Id.* at 1158. (citing IND. R. EVID. 803(8)(A)(i)(b); IND. R. EVID. 803(8)(A)(ii)).

292. IND. R. EVID. 803(22)(A).

293. *Id.*

294. Heffley v. State, No. 23A-CR-2724, 2024 Ind. App. Unpub. LEXIS 588, at *3–5 (Ind. Ct. App. May 9, 2024) (quoting Scott v. State, 949 N.E.2d 169, 178 (Ind. Ct. App. 2010)).

295. IND. R. EVID. 804(b).

296. Lichtsinn v. State, No. 23A-CR-2478, 2024 Ind. App. Unpub. LEXIS 494, at *6 (Ind. Ct. App. Apr. 24, 2024).

297. *Id.*

298. IND. R. EVID. 804(b)(5).

299. Doyle v. State, 223 N.E.3d 1113, 1121 (Ind. Ct. App. 2023) (citing White v. State, 978 N.E.2d 475, 480 (Ind. Ct. App. 2012)).

Indiana Court of Appeals easily affirmed a finding of forfeiture by wrongdoing where the criminal defendant learned that the witness had made incriminating statements regarding the defendant and the defendant called to arrange to have his stepson batter the witness.[300] In criminal matters, "a defendant forfeits th[e] right [to cross-examine witnesses] by engaging in the wrongdoing contemplated by Indiana Evidence Rule 804(b)(5)."[301]

VIII. AUTHENTICATION & IDENTIFICATION: RULES 901 THROUGH 903

A. Rule 901: Authenticating or Identifying Evidence

"Indiana Evidence Rule 901 requires the authentication or identification of 'an item of evidence' and directs that 'the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.'"[302] Highlighting the technological age, the two most common appellate challenges to authentication arose from introduction of social media posts and from evidence of surveillance cameras.[303]

Although videos and photographs may often be used purely as demonstrative evidence to help illustrate or facilitate a witness's testimony,[304] such evidence may also be offered "under the silent-witness theory . . . as substantive evidence."[305] To apply the silent-witness theory for videos or photographs, the proponent must lay the foundation of "a strong showing of authenticity and competency, including proof that the evidence was not altered."[306] In order to do so, "there must be evidence describing the process or system that produced the videos or photographs and showing that the process or system produced an accurate result."[307]

In *Irwin v. State*, a fractured panel produced three separate opinions, with the majority concluding that a sufficient foundation had been laid for admission

300. *Id.* at 1121–22.

301. Jordan v. State, No. 23A-CR-1798, 2024 Ind. App. Unpub. LEXIS 898, at *17 (Ind. Ct. App. July 15, 2024) (citing Crawford v. Washington, 541 U.S. 36, 62 (2004)).

302. King v. Nat'l Collegiate Student Loan Tr. 2006-4, 232 N.E.3d 646, 653 (Ind. Ct. App. 2024) (quoting IND. R. EVID. 901(a)).

303. H.O. v. C.L., No. 23A-PO-2644, 2024 Ind. App. Unpub. LEXIS 861, at *5–8 (Ind. Ct. App. July 3, 2024) (cellphone video); *In re* J.P., No. 23A-JC-476, 2023 Ind. App. Unpub. LEXIS 1170, at *8–9 (Ind. Ct. App. Oct. 4, 2023) (Facebook posts); Land v. State, No. 22A-CR-2863, 2023 Ind. App. Unpub. LEXIS 1389, at *11–13 (Ind. Ct. App. Dec. 6, 2023) (same), *trans. denied*, 2024 Ind. LEXIS 150 (Ind. 2024); Keller v. State, No. 23A-CR-845, 2024 Ind. App. Unpub. LEXIS 13, at *10–12 (Ind. Jan. 11, 2024) (same); Campbell v. State, No. 23A-CR-1759, 2024 Ind. App. Unpub. LEXIS 783, at *5–7 (Ind. Ct. App. June 21, 2024) (same).

304. Irwin v. State, 229 N.E.3d 567, 571 (Ind. Ct. App. 2024), *trans. denied*, 238 N.E.3d 640 (Ind. 2024); *see, e.g.*, Owens v. State, No. 24A-CR-782, 2024 Ind. App. Unpub. LEXIS 1204, at *5 (Ind. Ct. App. Sept. 13, 2024); Johnson v. State, No. 24A-CR-15, 2024 Ind. App. Unpub. LEXIS 1272, at *16–21 (Ind. Ct. App. Sept. 30, 2024).

305. *Irwin*, 229 N.E.3d at 571.

306. *Id.* (citation and quotation marks omitted).

307. *Id.* (citation and quotation marks omitted).

of surveillance video through the testimony of an officer that: "(1) the security system was located in a locked room; (2) the landlord was the only person with access to that room; (3) the landlord did not alter the footage; (4) [the officer] downloaded the Security system on the day of the arrest; and (5) there was no way the Security Footage could have been manipulated when [the officer] downloaded it from the security system."[308]

A point of disagreement between Judge Melissa May, who concurred only in the result, and Judge L. Mark Bailey, who concurred in Judge Paul Felix's lead opinion, was whether the 2023 opinion in *Kirby v. State*, which reached a similar result, inappropriately "amounts to a watering down of the authentication threshold."[309] Judge May's opinion would have required a sponsor for the evidence with greater familiarity with the security system—most likely, "the landlord, [who] was the one responsible for operating and maintaining the security system."[310] Because the Indiana Court of Appeals repeatedly purports to not be bound by horizontal *stare decisis*[311] and Indiana Appellate Rule 65(D)(1) is silent on the matter,[312] practitioners should recognize that a future appellate panel may adhere to Judge May's opinion and not that of *Kirby* or the *Irwin* majority.[313]

The Indiana Court of Appeals also found proper foundations laid in the following circumstance: a federal case filing accessed on the federal PACER docket system sponsored by an officer who was familiar with the PACER system;[314] text messages when the sponsor recognized the author based on the content, circumstances, and context;[315] a hand-written letter based upon the timing of a report made to police concerning the letter and testimony comparing writings;[316] and empty packaging based upon evidence that it was found within the store where the presumed theft of its contents was the underlying basis for confining a person suspected of stealing its contents.[317] The court of appeals did not find a sufficient foundation laid for tax documents at summary judgment

308. *Id.* at 571–72; *id.* at 573 (Bailey, J., concurring).

309. *Id.* at 573–74 (Bailey, J., concurring) (discussing Kirby v. State, 217 N.E.3d 575 (Ind. Ct. App. 2023)); *id.* at 576–77 (May, J., concurring in result).

310. *Id.* at 575–76 (May, J., concurring in result).

311. *See, e.g.*, Wellman v. State, 210 N.E.3d 811, 816 n.4 (Ind. Ct. App. 2023); *In re* J.J. v. B.B., 911 N.E.2d 659, 659 (Ind. Ct. App. 2009).

312. IND. R. APP. P. 65(D)(1).

313. The day before *Irwin* was issued, a memorandum decision authored by Judge Terry Crone and joined by Judge Bailey and Judge Rudolph Pyle upheld admission of surveillance video based on the testimony of police-officer sponsors. Dalton v. State, No. 23A-CR-984, 2024 Ind. App. Unpub. LEXIS 240, at *4–8 (Ind. Ct. App. Feb. 27, 2024).

314. Sisk v. State, No. 23A-CR-1834, 2023 Ind. App. Unpub. LEXIS 1370, at *7–9 (Ind. Ct. App. Nov. 30, 2023).

315. *In re* K.M.W., No. 23A-JT-2016, 2024 Ind. App. Unpub. LEXIS 266, at *13–16 (Ind. Ct. App. Mar. 1, 2024).

316. Jordan v. State, No. 23A-CR-1798, 2024 Ind. App. Unpub. LEXIS 898, at *14–15 (Ind. Ct. App. July 15, 2024).

317. Lane v. Menard, Inc., 242 N.E.3d 1060, 1068 n.11 (Ind. Ct. App. 2024), *trans. denied*, 2024 Ind. LEXIS 756 (Ind. 2024).

where the documents were not referenced in the party's affidavit.[318]

B. Rule 902: Self-Authenticating Evidence

Rule 902 allows certain items of evidence to be self-authenticating.[319] Among the items deemed self-authenticating are domestic public documents that are sealed and signed[320] and certified domestic records of regularly conducted activity.[321] For either to apply there must be a signature.[322] In *Smith v. State*, the Indiana Court of Appeals briefly addressed, although did not ultimately decide, whether initials in lieu of a signature were sufficient.[323] The panel noted that signatures may be accomplished in multiple ways and "that Bureau of Motor Vehicle documents bearing a stamped signature and computer-generated initials were properly authenticated under [Indiana] Trial Rule 44(A)."[324] Nevertheless, the panel declined to answer the question, instead finding any potential error harmless.[325] *In re B.A* similarly looked to the adequacy of a signature, observing that documents submitted without the signature of the affiant were improper, despite the party contesting admission possessing properly signed copies.[326]

IX. CONTENTS OF WRITINGS & RECORDINGS: RULES 1001 THROUGH 1008

Rule 1002 is frequently referred to as the "Best Evidence Rule."[327] As some courts have noted: "The phrase 'best-evidence rule' is something of a misnomer, as the rule does not demand that litigants furnish only the evidence that is categorically the 'best' in a qualitative sense of that term."[328] Instead, "[t]he rule is perhaps more accurately dubbed the original document rule, for instead of requiring the 'best' evidence in every case, the rule actually requires the

318. King v. Nat'l Collegiate Student Loan Tr. 2006-4, 232 N.E.3d 646, 653 (Ind. Ct. App. 2024).

319. IND. R. EVID. 902.

320. IND. R. EVID. 902(1).

321. IND. R. EVID. 902(11).

322. IND. R. EVID. 902(1)(B); Williams v. State, 64 N.E.3d 221, 225 (Ind. Ct. App. 2016) (Rule 902(11) inapplicable without signature of custodian or other qualified person).

323. Smith v. State, No. 24A-CR-153, 2024 Ind. App. Unpub. LEXIS 874, at *3–6 (Ind. Ct. App. July 8, 2024) (quoting Brewer v. State, 605 N.E.2d 181, 183 (Ind. 1993)).

324. *Id.* at *5.

325. *Id.* at *5–6.

326. *In re* B.A., No. 23A-JT-1932, 2024 Ind. App. Unpub. LEXIS 264, at *13–14 (Ind. Ct. App. Mar. 1, 2024), *trans. denied*, 2024 Ind. LEXIS 379 (Ind. 2024). The panel found the argument waived on appeal, however, due to failure to adequately object. *Id.* at *14.

327. *See, e.g.*, Kirby v. State, 217 N.E.3d 575, 584 n.4 (Ind. Ct. App. 2023); *In re* R.L., No. 24A-JT-414, 2024 Ind. App. Unpub. LEXIS 1248, at *23 (Ind. Ct. App. Sep. 25, 2024).

328. United States v. Chavez, 976 F.3d 1178, 1194 n.9 (10th Cir. 2020).

production of an original document rather than a copy."[329] During the survey period, the Indiana Court of Appeals found the rule satisfied by admission of exhibits on CD because "there [was] no evidence that the exhibits that were admitted in CD form were not exact duplicates of the original records reflected on the CD" and Rule 1003 permits use of a duplicate "'to the same extent as an original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.'"[330]

X. Statutory Evidentiary Procedures

Rule 101(b) preserves application of statutory evidentiary procedures that apply to matters not governed by the Indiana Rules of Evidence.[331] Some statutes dictate that certain evidence will be admissible in certain proceedings.[332] During the survey period, the Indiana General Assembly enacted one such statute, codified at Indiana Code section 9-19-11-8.5 that now mandates:

> In a civil action seeking to recover damages for personal injuries or death experienced by a plaintiff who:
>
> (1) was in a motor vehicle that was manufactured after September 1, 1986, and equipped with at least one (1) inflatable restraint system; and
>
> (2) was fifteen (15) years of age or older at the time the cause of action accrued;
>
> evidence that the motor vehicle was not operating in compliance with section 2 or 3.6 [IC 9-19-11-2 or IC 9-19-11-3.6] of this chapter may be admitted as proof of failure to mitigate damages.[333]

If the statute is deemed to be enforceable and not an impermissible procedural statute,[334] it supplants robust caselaw prohibitions on such evidence.[335]

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329. DeMarco v. Ohio Decorative Prods., Inc., No. 92-2294, 1994 U.S. App. LEXIS 3848, at *26–27 (6th Cir. Feb. 25, 1994); *accord* Guillermety v. Sec'y of Educ., 341 F. Supp. 2d 682, 689 n.5 (E.D. Mich. 2003).

330. *In re* R.L., 2024 Ind. App. Unpub. LEXIS 1248, at *24 (quoting IND. R. EVID. 1003).

331. IND. R. EVID. 101(b).

332. *See, e.g.*, *In re* N.E., 228 N.E.3d 457, 476 (Ind. Ct. App. 2024) (recognizing application of IND. CODE § 31-34-12-5 (2024) to CHINS proceedings); Gaddie v. State, No. 23A-CR-1059, 2023 Ind. App. Unpub. LEXIS 1366, at *4–5 (Ind. Ct. App. Nov. 29, 2023) (recognizing the procedures of IND. CODE § 9-30-3-15 (2023) in proving prior conviction for certain offenses); Setlak v. State, 234 N.E.3d 215 (Ind. Ct. App. 2024) (applying Indiana's Protected Persons Statute, codified at IND. CODE § 35-37-4-6 (2024)), *trans. denied*, 2024 Ind. LEXIS 455 (Ind. 2024).

333. IND. CODE § 9-19-11-8.5 (2024).

334. *See* Mellowitz v. Ball State Univ., 221 N.E.3d 1214, 1221 (Ind. 2023).

335. *See generally* City of Fort Wayne v. Parrish, 32 N.E.3d 275 (Ind. Ct. App. 2015).

XI. COMMON LAW RULES: *CORPUS DELICTI, RES IPSA LOQUITUR,* & SPOLIATION

The Indiana Rules of Evidence preserved common-law practices that were not otherwise covered by the Rules.[336] The common-law doctrines of *corpus delicti*, *res ipsa loquitur*, and *spoliation* each received further development during the survey period.

A. Corpus Delicti *Rule*

Indiana maintains the common-law principle "that the state cannot prove the commission of a crime by the extra-judicial confession alone of a defendant. . . . The crime or the *corpus delicti* must be established by some independent, additional, or corroborative evidence of probative value, aside from the confession alone."[337] In two opinions, the Indiana Court of Appeals reversed convictions due to the lack of independent admissible evidence apart from the defendant's own conviction. In *Fritz v. State*, after finding the state did not present sufficient evidence of a substance's THC concentration to indicate that it was unlawful marijuana and not legal hemp, the court of appeals ruled the conviction could not be supported by the defendant's admission alone.[338] Similarly, in *Neanover v. State*, the court of appeals reversed a conviction for possession of a firearm by a domestic batterer where the only evidence underlying the conviction was the defendant's confession that he had been shooting a weapon and a neighbor's testimony that she "heard what she believed to be gunshots coming from the neighboring property about two hundred yards away."[339] Because the neighbor never saw the defendant with a firearm and, upon the investigating officer's arrival, the defendant was "outside working on a motorcycle," "the evidence independent from [the defendant]'s statement was sparse."[340]

B. Res Ipsa Loquitur

Easily the most notable decision addressing the doctrine of *res ipsa loquitur* was the Indiana Court of Appeals' opinion in *Isgrig v. Trustees of Indiana University*, which held that the doctrine, when otherwise satisfied, applies to premises-liability cases.[341] This survey does not, however, cover the opinion in

336. IND. R. EVID. 101(b).

337. Hogan v. State, 132 N.E.2d 908, 910 (Ind. 1956).

338. Fritz v. State, 223 N.E.3d 265, 277–78 (Ind. Ct. App. 2023).

339. Neanover v. State, No. 23A-CR-603, 2024 Ind. App. Unpub. LEXIS 46, at *5 (Ind. Ct. App. Jan. 19, 2024).

340. *Id.* at *5–6.

341. Isgrig v. Trs. of Ind. Univ., 225 N.E.3d 781, 785–90 (Ind. Ct. App. 2023). Two other memoranda decisions arising from premises liability cases declined to address applicability of *res*

more detail because the Indiana Supreme Court has granted transfer, thereby vacating the decision of the court of appeals.[342] The only other opinion of note to address the doctrine was the Seventh Circuit's opinion in *Aluminum Recovery Technologies, Inc. v. ACE American Insurance Company*, in which the court reminded that the doctrine cannot be invoked when there are two distinct potential explanations.[343]

C. Spoliation

The common-law doctrine of spoliation of evidence allows a court to sanction the suppression of evidence by a party with exclusive possession of the evidence by affixing "an inference that the production of the evidence would be against the interest of the party which suppresses it."[344] The survey period provided two notable insights into the doctrine. The first, observed in two opinions from the Indiana Court of Appeals, is that there appears to be some debate over whether the spoliation doctrine is confined to civil actions or whether it extends to the criminal context.[345] In the later-decided opinion, the appellate panel remarked that it was "unaware of any[] [authority] applying the civil spoliation doctrine in the criminal context."[346]

The Indiana Supreme Court's opinion in *Cahoon v. Cummings*, issued in 2000, signals a contrary perspective.[347] Citing Judge Robert Miller's treatise on Indiana Evidence, the supreme court wrote: "Spoliation evidence arises more commonly in the criminal context, but is also relevant in civil cases."[348] A review of Judge Miller's treatise indicates it may be a semantic distinction. The treatise treats adverse inferences such as a "defendant's departure from the scene of the crime" as a "form[] of 'spoliation.'"[349] Nevertheless, that there may remain an open question is supported by the fact that courts outside of Indiana have reached contradictory views on applying spoliation in criminal

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ipsa loquitur because the doctrine was not invoked by the appealing party. Cholula v. Delta, No. 23A-CT-2456, 2024 Ind. App. Unpub. LEXIS 813, at *5 n.1 (Ind. Ct. App. June 26, 2024), *trans. denied*, 2024 Ind. LEXIS 634 (Ind. 2024); Indianapolis Airport Auth. v. Kennedy, No. 24A-CT-865, 2024 Ind. App. Unpub. LEXIS 1249, at *2 n.1 (Ind. Ct. App. Sept. 25, 2024), *trans. denied*, 2024 Ind. LEXIS 739 (Ind. 2024).

342. Isgrig v. Trs. of Ind. Univ., 235 N.E.3d 134 (Ind. 2024); IND. R. APP. P. 58(A).

343. Aluminum Recovery Techs., Inc. v. ACE Am. Ins. Co., 94 F.4th 561, 562–63 (7th Cir. 2024) (applying Indiana law).

344. Porter v. Irvin's Interstate Brick & Block Co., 691 N.E.2d 1363, 1364–65 (Ind. Ct. App. 1998).

345. Pigott v. State, 219 N.E.3d 808, 811 n.3 (Ind. Ct. App. 2023); Ko v. State, 243 N.E.3d 1153, 1158 n.3 (Ind. Ct. App. 2024), *trans. denied*, 2024 Ind. LEXIS 721 (Ind. 2024).

346. *Ko*, 243 N.E.3d at 1158 n.3.

347. Cahoon v. Cummings, 734 N.E.2d 535, 545 (Ind. 2000).

348. *Id.* (citing 12 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE: INDIANA EVIDENCE § 401.112 (2d ed. 1995)).

349. 12 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE: INDIANA EVIDENCE § 401.112 (3d ed. 2007).

proceedings.[350]

The second insight arises from the Indiana Supreme Court's resolution of *Safeco Insurance Company of Indiana v. Blue Sky Innovation Group, Inc*.[351] There, looking to the tort component of spoliation, the court limited third-party spoliation claims[352] to those in which "a special relationship exists between the parties."[353] Whether a special relationship exists depends upon the facts of a given case.[354] The court looked to illustrative circumstances in which a sufficient relationship exists but did not specifically define the boundaries for future litigation.[355] Finding that the relationship between a homeowner and fire investigation/remediation company standing alone insufficient to establish a special relationship, the court affirmed dismissal of the third-party spoliation action.[356]

XII. CONCLUSION

Thirty years of rules-based evidentiary practices in Indiana still shows that the only true certainty in the law is its ever-continuing uncertainty.

350. *See* United States v. Fey, 89 F.4th 903, 913–14 (11th Cir. 2023) (analyzing views of federal circuit courts); *compare* Commonwealth v. Kee, 870 N.E.2d 57, 66 n.10 (Mass. 2007) (declining to apply spoliation in criminal context), *and* Palmer v. State, 899 S.E.2d 192, 206 (Ga. 2024) (same), *and* State v. Macias, 469 P.3d 472, 480 (Ariz. Ct. App. 2020), *with* Thyen v. Hubbard Feeds, Inc., 804 N.W.2d 435, 439 (N.D. 2011) (recognizing application to criminal cases); Stuart v. State, 907 P.2d 783, 793 (Idaho 1995) (same).

351. Safeco Ins. Co. v. Blue Sky Innovation Grp., Inc., 230 N.E.3d 898, 901–06 (Ind. 2024).

352. "There are two types of spoliation claims: first-party spoliation and third-party spoliation. First-party spoliation 'refers to spoliation of evidence by a party to the principal litigation,' and third-party spoliation refers to the spoliation of evidence 'by a non-party.'" *Id.* at 902 (citation omitted). "Indiana does not recognize the tort of first-party spoliation of evidence." Kelley v. Patel, 953 N.E.2d 505, 509 (Ind. Ct. App. 2011).

353. *Safeco Ins.*, 230 N.E.3d at 904–06.

354. *Id.* at 904.

355. *Id.* at 904–05 (noting two examples of a special relationship: (i) doctor and patient; and (ii) insurance carrier and third-party claimant).

356. *Id.* at 905–07.

PRACTICING IN INDIANA 101

CARRIE HAGAN[*] [**]

INTRODUCTION

Frequently, even now, after decades of practice, I do not always know my Indiana geography as well as I should or what resources are out there to assist me as a practitioner. This guide will assist you in getting to know the layout of the state of Indiana, the types of courts and jurisdiction you will encounter, and where to find the governing rules and codes. You will also have an overview of understanding and deciphering what a case number represents so that you know where your action is located. Lastly, an introduction to the electronic filing system, working with law students, and expectations as to both will be provided.

I. KNOW YOUR STATE AND COUNTIES

The State of Indiana was the 19th state of the United States of America, with its first state capital in the city of Corydon until 1825, when the capital was moved to Indianapolis.[1] Indiana is commonly known as the "Hoosier state," with "Hoosiers" being the nickname for anyone from Indiana. What is a Hoosier? There is not a definitive answer to this question, but we get close when, in 1848, Bartlett's Dictionary of Americanisms defined "Hoosier" as "A nickname given at the west, to natives of Indiana."[2] While "Hoosier Daddy?" might have been a clever advertising slogan in recent years for DNA paternity testing, there is, in fact, no truth to the theory that Hoosier stands for "Who's your relative?"[3]

Indiana, as a state, has around seven million people at the time of printing and shares borders with Ohio, Kentucky, Illinois, and Michigan.[4] Marion County contains the capital city of Indianapolis, with the immediate surrounding counties (Boone, Hamilton, Hancock, Hendricks, Johnson, Morgan, and Shelby) being referred to as the "donut counties" as they can be seen to make the shape of a donut around Marion county.

There are ninety-two counties in Indiana, each named after a famous

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[**] This survey piece is meant as a practical guide. As such, matters of common knowledge within Indiana's legal community are not cited.

1. *Hoosier Facts and Fun*, IND. HIST. SOC'Y, https://indianahistory.org/education/education-resources/educator-resources/fun-facts/# [https://perma.cc/Q5AU-HJS6] (last visited Apr. 1, 2025).

2. JOHN RUSSELL BARTLETT, DICTIONARY OF AMERICANISMS: A GLOSSARY OF WORDS AND PHRASES USUALLY REGARDED AS PECULIAR TO THE UNITED STATES 201 (2022).

3. IND. HIST. SOC'Y, *supra* note 1.

4. *Quick Facts: Indiana*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/IN (last visited Apr. 1, 2025).

historical figure or place (i.e., Washington County is named after President George Washington, and Ohio County is named after the Ohio River)[5]:

Each county in Indiana has what's called a county "seat," and that seat is regarded as the main administrative location for that county, meaning that

5. *The Counties of Indiana*, THE HIST. MUSEUM, https://www.historymuseumsb.org/the-counties-of-indiana/ [https://perma.cc/9AMJ-LST] (last visited Apr. 1, 2025).

generally, that is where the courts and other county administrative offices are located.[6]

County governments typically are made up of a series of elected officials as laid out by the Indiana Constitution, Article 6, Section 2. According to the

6. *Boundary Maps*, STATS IND., https://www.stats.indiana.edu/maptools/boundary.asp (last visited Apr. 1, 2025) (click drop-down arrow titled "Counties and Regions;" then, clink link titled "Indian Counties and County Seats PDF").

Indiana Constitution, Article 6, Section 2, the following officers "shall be elected . . . a Clerk of the Circuit Court, Auditor, Recorder, Treasurer, Sheriff, Coroner, and Surveyor."[7] The offices of county council, board of county commissioners, and county assessor, however, are not constitutional offices. The General Assembly created these offices by statute.

Each county is also divided into "townships," which are small governmental allocations within the counties of a population of a certain area. "The Indiana Constitution provides for the existence of townships, and successive state laws have instituted township government and its officers. Within each county, the Board of County Commissioners may create or abolish townships and their boundaries upon the petition of a majority of its citizens."[8] Townships in prior years have had a variety of functions, but now primarily focus on township assistance (which provides financial support for housing, utilities) and certain medical or emergency services (such as fire departments). According to a 2023 report issued by the Indiana Township Association, the state's 1,002 townships typically distribute more than $20 million in township aid annually, along with other funding available from different sources.[9]

Depending on size and other factors, counties may operate differently from one other in how they establish and organize their townships. Marion County, as an example, is divided into nine townships: Pike, Washington, Lawrence, Wayne, Center, Warren, Decatur, Perry, and Franklin townships.[10] Trustees are elected for each township, and they are responsible for administering the financial support requests as described above. In addition, Marion County townships also operate small claims courts. Judges for the small claims courts are supervised by Marion County Circuit judges, and each court has a township constable responsible for enforcing any subpoenas, warrants, summonses, and orders issued by the small claims court.[11]

The existence of townships is not without controversy, as many regard them as creating an extra layer of unnecessary government, and there have been many movements that have sought to either abolish townships or merge their functions with county or municipal governments.

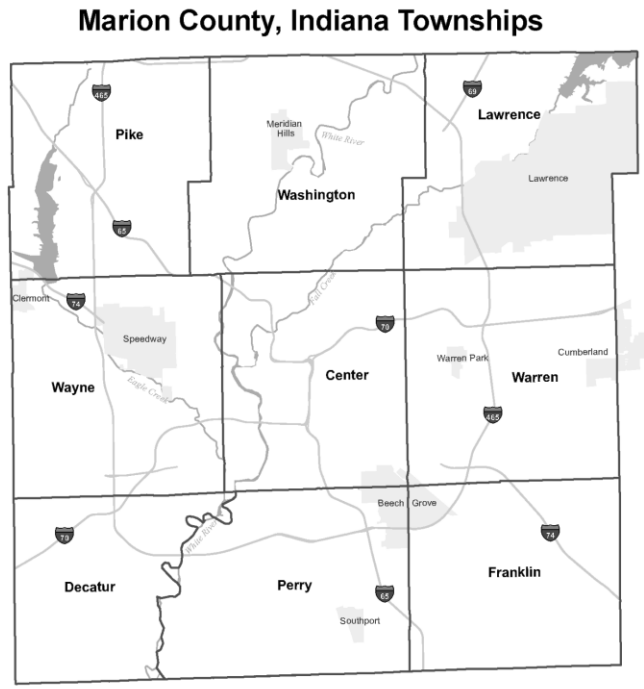
7. IND. CONST. art. 6, § 2.

8. Michelle Hale, *Townships*, https://indyencyclopedia.org/townships/ [https://perma.cc/SKQ7-YK6X] (last revised Jul. 2021).

9. Leslie Bonilla Muñiz, *Townships Hope to Prove Their Worth—and Get More Support—In New Report,* IND. CAP. CHRON., (Mar. 2, 2023) https://indianacapitalchronicle.com/2023/03/02/townships-hope-to-prove-their-worth-and-get-more-support-in-new-report/.

10. *Boundary Maps*, STATS IND., *supra* note 6 (click drop-down arrow titled "townships;" then, click link titled "Townships Maps, 2010").

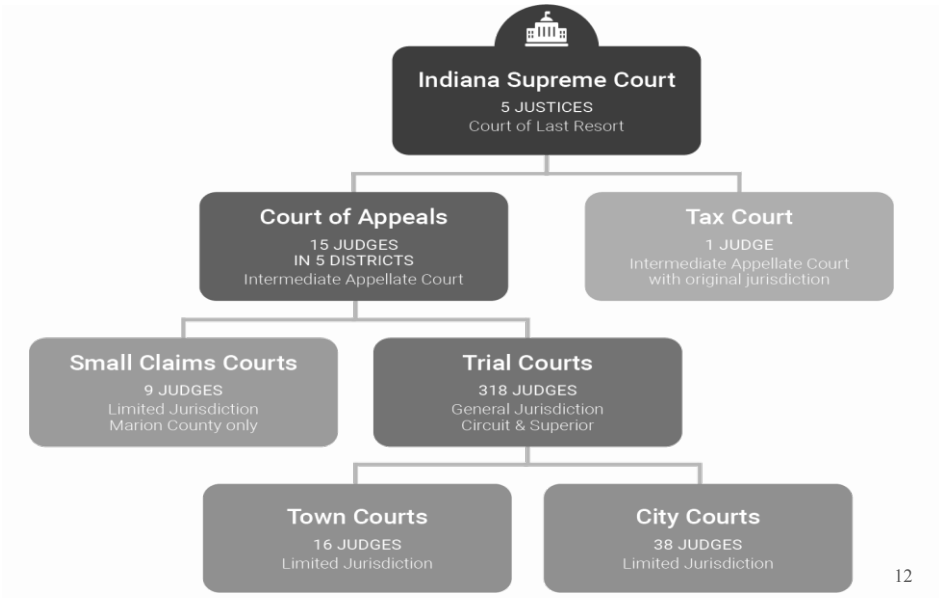
11. Hale, *supra* note 8.



II. KNOW YOUR COURTS

As a practitioner, you may be exposed to a number of judicial settings. As with every state, there is a hierarchy of judicial authority.

Structure of Indiana Courts



In Indiana, the lowest level courts are either city or town courts, and their jurisdiction typically is limited to town or city ordinance violations, misdemeanors, and infractions (traffic tickets). Just above those are the trial courts, which have civil and criminal jurisdiction for all cases in their jurisdiction. Trial courts also act as the appellate courts for city or town court appeals. There are a couple of main types of trial courts in Indiana, with the first being the circuit courts, which are courts of original jurisdiction. Circuit courts are presided over by judges who serve for a term of six years and must be admitted to the practice of law. In addition to circuit courts, the General Assembly has created superior courts that often handle similar types of cases to those of circuit courts.[13] In some cases, counties have more than one superior court."[14] Most of your cases will likely take place in either circuit or superior trial courts. Small claims courts are also considered to be trial courts.

Should one have an issue with a decision made by a trial court, an appeal may be made directly to the Indiana Court of Appeals, where a review of the record will take place; that record, consisting of the lower court's decision, briefs submitted by the parties, and an oral argument may or may not be scheduled by the Appellate Court. Appeals are heard and/or reviewed by a panel

12. *Learn About Indiana's Court System,* IND. JUD. BRANCH, https://www.in.gov/courts/about/ [https://perma.cc/JGQ6-LBPR] (last visited Apr. 1, 2025).

13. *Id.*

14. *Id.*

of three judges, and that panel may affirm or reverse the trial court or remand and send the case back to the lower court for further action. Should a party disagree with the decision of the Appellate Court, they may appeal to the Supreme Court of Indiana. Indiana also has a Tax Court that handles any cases arising out of Indiana tax laws or appeals from decisions made by the Department of State Revenue of the State Board of Tax Commissioners. Any appeals made on Tax Court cases are sent directly to the Supreme Court of Indiana.

The Indiana Supreme Court consists of five justices and is considered the state's final court of last resort. The Court has the power to review and revise decisions made by lower courts and retains original exclusive jurisdiction over areas such as attorney and judge discipline, unauthorized practice of law, admission to the practice of law, among others.[15]

As far as federal courts, Indiana has two federal district courts (federal trial courts): the Northern District and the Southern District. Each district court also has its own bankruptcy court. Any appeals from the district courts go to the Federal Seventh Circuit Court of Appeals, which covers all of Indiana.[16]

In Indiana, as in other places, most hearings and records are available to the general public, which means that should one not have practiced in a certain area before and want to observe proceedings, one is generally able to. Why observe? Not only will it give you a sense of the courtroom or hearing space that you will be in, but you will also be able to see how the various court officers go about their duties, where parties sit, where observers sit, where one checks in, and how judges interact with attorneys and their clients. You also get a sense of how the procedure goes in different settings—for instance, in some you check in at the office to let them know you are there for your hearing. In others you check in with the bailiff (who may or may not be sitting next to the judge in the courtroom) to let them know you are ready. When in doubt, never be afraid to ask the clerk in the office—and even if you ask at the wrong clerk's office, they will be able to direct you. Another thing you have freedom to do, is when you check in, should you have a time crunch, or maybe you are waiting for your client, or maybe you are ready to go with your client—always let the clerk know those things. This allows them to put you on the schedule in an order that makes sense for them and you—so if you have a time constraint, you can ask to go first (or as first as is practicable). If your client has not shown up yet, you can let them know when they do and get in line. Lastly, if you are ready to go, do not sit around and wait for them to call your case—let them know you are ready to go so that you can get things done.

What if you will be practicing in an area where hearings are not open to the public—juvenile paternity, for example, or child abuse and neglect cases? Never

15. *About the Court*, IND. JUD. BRANCH, https://www.in.gov/courts/supreme/about/ [https://perma.cc/9FFG-HYRZ] (last visited Apr. 1, 2025).

16. *Federal Courts in Indiana*, IND. JUD. BRANCH, https://www.in.gov/courts/directory/federal [https://perma.cc/NE2S-VREB] (last visited Apr. 1, 2025).

forget the power of asking and observation; the worst thing a clerk can say if you ask to observe is no. Not only will asking to observe familiarize you with court staff and their duties, but you may also be able to introduce yourself to the judge, make connections, and ask questions.

III. KNOW YOUR JUDICIAL OFFICIAL

Just as we saw with the hierarchy of authority and the different types of courts, there are a variety of judicial officers in Indiana, all of whom may have slightly different names, but perform similar functions. Here is a snapshot of the various types of judges one might see at their hearing, depending on where it is (note that the Court of Appeals, Supreme Court, and Federal Courts are not included here):

17

One additional judicial officer that may be conducting your hearing is known as a pro tempore (or "pro tem"). What is a pro tem? "Trial courts often use judges pro tempore, who are licensed attorneys appointed by the regular judges to perform judicial functions when regular judicial officers are not

17. 2020 FORWARD, JUD. CONF. OF IND. 13 (2020), https://www.in.gov/courts/iocs/files/2020-forward.pdf.

available."[18]

Trial court judges run for their spot in partisan elections and, if elected, serve a six-year term. They may then seek re-election for additional terms at future electoral races. Magistrates and Commissioners are officials appointed by the sitting judges in the court where they were elected, and perform the same functions as the judge (and each other), with the caveat that for any decision made by a magistrate or commissioner; the judge must give a final approval of said decision before it is final. While they do the same functions, magistrates and commissioners have different titles due to who their employer is. Magistrates are state employees, while commissioners are county employees. Referees, whether full or part-time, are typically court-appointed with a set list of duties that they have been asked to perform, and their duties include overseeing hearings and issuing orders. Lastly, "the small claims courts in Marion County are the only such courts in Indiana. Every township in the county has its own small claims court. Judges on the Indiana Small Claims Courts are elected in partisan elections to serve four-year terms, after which they must run for re-election to serve additional terms."[19] City and Town judges follow the same term and process as small claims judges—terms are four years, and they must run for re-election should they want to serve additional terms.

IV. KNOW YOUR STATUTES

All laws in Indiana are codified into the Indiana Revised Code. Proposed laws in Indiana are initially drafted as "bills" and go through a process of vetting by the two Indiana General Assembly houses—the Indiana House of Representatives and the Indiana Senate. Once a bill makes it through both houses successfully, it goes to the Governor of Indiana for signature. The Governor has seven days to take action, and may either sign the bill, veto it, or choose to do nothing. Both a signature and inaction cause the bill to become law (a signature creates law at the time of signature, while if no action has been taken for seven days, on the eighth day, the bill becomes law). A veto means that should the General Assembly choose not to act further, the bill dies. Should a veto occur, and the General Assembly want to take further action, with a proper majority and procedure the bill may be able to still become a law.[20]

The Indiana General Assembly does not meet year-round and is made up of individuals who perform their elected duties on a part-time basis. Depending on the year, the legislature will have either a long or short session. Long sessions occur in odd-numbered years, while short sessions occur in even-numbered years. Each type of session handles different tasks, with the long session

18. *Id*.

19. *Judicial Selection in Indiana*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_Indiana [https://perma.cc/6D4A-NYM3] (last visited Apr. 2, 2025).

20. HOW A BILL BECOMES LAW, STATE HOUSE TOUR OFF. 2, https://www.in.gov/gov/files/BillintoLaw.pdf.

specifically longer so that a two-year budget may be created for the state, while the short session is able to focus on other policy matters. Short sessions generally run from January to March, and long sessions run from January to the end of April.[21]

The Indiana Revised Code may be accessed by visiting the Indiana General Assembly's website. Digests and updates to laws passed during the legislative sessions are usually issued by a number of entities following the close of the long or short sessions, and as a practitioner, it is considered a best practice to keep up on current legislative changes to make sure that your work is in full compliance of the current laws.

V. KNOW YOUR STATE AND LOCAL RULES

In addition to making sure that you know the governing code for the actions that you are filing, one must always be sure to check both the State and Local rules for the jurisdictions that you are practicing in. In Indiana, there are several types of State rules that a practitioner must be familiar with, including the Indiana Rules of Trial Procedure, the Indiana Rules of Evidence, the Indiana Child Support Rules and Guidelines, and the Indiana Parenting Time Guidelines, among others. Not only will the State rules give guidelines on what is expected at the state level, but one must also check the local jurisdiction for where your case will be heard to make sure you comply with any relevant local rules. Local rules are published by each county where they exist, and may be located on the Indiana State's website, where one may search by individual county.[22]

Why are local rules important? Put simply, one must comply with the jurisdiction in which they find themself at all levels. Local rules can be organized in several different ways, but one common way is to create a list of the categories where rules have been organized by subject matter. For instance, in Marion County, local rules are in existence for criminal, civil, administrative, probate, family, mass torts, and small claims.

Let's take a look at what this reconciliation of rules looks like. Indiana Rules of Trial Procedure specify how one must conduct themselves prior to, during, and after any trial or filing. One such general overarching rule governs the discovery process that may take place in a case. Variations in allowances for discovery are a very common local rule adjustment that one must pay attention to rather than face an objection. One area where local counties like to differ is in regard to discovery practice. Generally, when unclear about what to do, consult the overarching state rule first, and then consult the county you will file in.

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21. *Legislative Priorities*, IND. CNTY. COMMR'S, https://www.indianacountycommissioners.com/legislation [https://perma.cc/TJ3Y-TFZE] (last visited Apr. 2, 2025).

22. *Trial Courts & Clerks by* County, IND. JUD. BRANCH, https://www.in.gov/courts/publications/local-rules/ [https://perma.cc/VDQ6-RUUU] (last visited Apr. 2, 2025).

Let's see how this works. You are getting ready to file a case in which you will need to request discovery, specifically interrogatories (written questions asking for responses) to the other party. But how do you do that, and what guidance is there about any limitations? You start with Indiana Trial Rule 33—Interrogatories to Parties:

Rule 33. Interrogatories to Parties

(A) Availability--Procedures for use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is an organization including a governmental organization, or a partnership, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

(B) Format of interrogatory and response. A party who serves written interrogatories under this rule shall provide, after each interrogatory, a reasonable amount of space for a response or an objection. Answers or objections to interrogatories shall include the interrogatory which is being answered or to which an objection is made. The interrogatory which is being answered or objected to shall be placed immediately preceding the answer or objection.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objections shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(C) Time for service, response, and sanctions. The party upon whom the interrogatories have been served shall serve a copy of the answers and objections within a period designated by the party submitting the interrogatories, not less than thirty (30) days after the service thereof or within such shorter or longer time as the court may allow. The party submitting the interrogatories may move for an order under Rule 37(A) with respect to any objection to or other failure to answer an interrogatory.

The party upon whom the interrogatories have been served may object to the failure to follow the Format requirements in subpart (B) by returning the interrogatories to the party who caused them to be served. If this objection is to be made, the interrogatories shall be returned to

> the party who caused them to be served not later than the seventh (7th) day after they were received. If the interrogatories are not returned in that time, then this objection is waived.
>
> (D) Scope--Use at trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(B), and the answers may be used to the extent permitted by the rules of evidence.
>
> An interrogatory otherwise proper is not objectionable merely because an answer to the interrogatory involves an opinion, contention, or legal conclusion, but the court may order that such an interrogatory be answered at a later time, or after designated discovery has been completed, or at a pre-trial conference.
>
> (E) Option to produce business records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.[23]

What we learn from the general state rule is that there are certain limitations and expectations about how we draft and submit interrogatories, and to whom. We know that an action (case) must be filed first to then move to asking for discovery, and that interrogatories may be served on any party in the case. Questions must have space following them to allow for an answer. Objections may be made as to certain questions, and no matter what the answering party must sign their responses and an attorney must sign for any objections. Responses are due no more than thirty days after receiving a request, and failure to do so can result in objections being waived as to questions. You may ask anything that may be inquired into pursuant to Indiana Trial Rule 6(B) (which lays out in more detail what is considered "scope" for requests) and lastly, one may also request business records, and there is a procedure for how to obtain those.

Let's say that you have a case in Vigo County, Indiana. You would like to

23. IND. TRIAL R. 33.

serve interrogatories on the opposing party. Indiana Trial Rule 33 gives you the general idea of how and what timeline one should follow, but is there anything else? There is. When one checks the Vigo local court rules, regarding discovery, here is what we find:

L84-TR33-10 INTERROGATORIES

(A) Form. Interrogatories shall be tailored specifically to each cause in which they are filed. No fill-in the blank or photocopied forms containing interrogatories shall be filed or served upon a party unless all interrogatories on such forms are consecutively numbered and applicable to the case in which the same are filed and served. The intent and purpose of this rule is to prohibit the filing of fill-in the blank or photocopied forms of interrogatories except where the nature of the case or the number of the parties makes the use of such forms necessary and feasible.

(B) Answers and Objections. Answers or objections to Interrogatories under Trial Rule 33 shall set forth in full the interrogatory being answered or objected to immediately preceding the answer or objection. Any objection to an interrogatory must clearly state in detail the legal basis upon which it is made, or the objection will be waived.

(C) Number Limited. The number of interrogatories shall be kept to a reasonable limit and shall not require the answering party to make more than one hundred twenty-five (125) responses. For good cause shown and upon leave of Court, additional interrogatories may be propounded if the Court finds this limitation would work a manifest injustice or would be impractical because of the complexity of the issues of the case. Interrogatories shall be used solely for the purpose of discovery and shall not be used as a substitute for the taking of a deposition.[24]

By taking the general Indiana Trial Rule and the Vigo local rule together, we now know that not only do we need to serve interrogatories in a certain way, but that Vigo County limits the number of responses that one may ask for. While 125 responses may seem like a large number, should a practitioner submit interrogatories with 126 or more responses due, compliance with that discovery is now objectionable based on the local rule, and the responding party need only answer 125 of what has been asked for.

While Vigo limits the number of responses to 125, remember that the same may not be true of other counties. Let's say one is filing the same sort of case

24. VIGO CTY. CT. R. L84-TR33-10.

again, but this time in Greene County, Indiana. We know to start again with the general Indiana Rule of Trial Procedure 33 and would check the local rules for Greene County to see whether there were any rules regarding discovery, and there happens to be one—and it is different.:

LR28-TR33-04 INTERROGATORIES

> **A. NUMBER OF INTERROGATORIES.** The number of interrogatories served pursuant to Rule 33 shall be limited to require the answering party to make no more than fifty (50) answers. This limitation may be waived by the Court upon a showing that such limitation would work a manifest injustice or would be impractical because of the complexity of the issues of the case
>
> **B**. **USE OF FORMS**: No duplicated forms containing interrogatories shall be filed or served upon a party unless all interrogatories on such forms are consecutively numbered and applicable to the case in which the same are filed and served. The intent and purpose of this rule is to prohibit the filing of duplicated forms of interrogatories except where the nature of the case or number of the parties makes the use of such forms necessary and feasible.
>
> **C**. **FORM OF ANSWERS OR OBJECTIONS:** Answers or objections to interrogatories shall set forth in full the interrogatory being answered or objected to immediately preceding the answer or objection.[25]

What does this tell a practitioner? One may only submit interrogatories to another party and require up to 50 answers—not 125 as in Vigo. So, should a practitioner attempt to use the same interrogatories in Greene that they used for Vigo, the answering party would be able to choose which of the 125 responses they wanted to give and only need answer 50.

Lastly, what happens when there is not a local rule? What then? Now we have a case to file in Posey County. When we check the local rules and scan the table of contents, we don't see anything about discovery:

25. GREENE CTY. CT. R. LR28-TR33-04.

LOCAL RULES

OF THE

POSEY CIRCUIT AND SUPERIOR COURTS

Updated - June 1, 2023

LR65-CR2.2-01	**Rule for the Assignment of Criminal Cases in the Posey Circuit and Superior Courts**
LR65-CR00-01	**Appointment of Pauper Counsel and Pauper Counsel Rate in Criminal and/or Juvenile Delinquent Cases**
LR65-AR1-02	**Rules for Assignment of Civil Cases in the Posey Circuit and Superior Courts**
LR65-AR1-03	**Rule for Random Assignment of Felony and Civil Cases**
LR65-CR2.2-04	**Special Judge Selection in Civil and Criminal Cases**
LR65-CR2.2-05	**Transfer of Cases**
LR65-TR00-01	**Appointment of Pauper Counsel and Pauper Counsel Rate in Civil Cases**
LR65-TR6-06	**Extension of Time to Answer Complaint**
LR65-TR16-07	**Settlement Conferences**
LR65-TR16-08	**Original and Post-Dissolution and Paternity Actions**
LR65-TR16-09	**Guardian Ad Litem**
LR65-AR15-10	**Court Reporters**
LR65-TR79-11	**Relief from Local Rules**

26

This means that we just need to comply with the Indiana Trial Rule 33 direction on interrogatories, and nothing else is required. Note that local rules change from time to time, and whenever one is filing in a new county, it is best practice to consult the local rules prior to filing anything to make sure everything is in order according to the current procedures.

VI. KNOW YOUR CAUSE (CASE) NUMBER

In addition to the Civil, Trial, Criminal, and other rules, Indiana also has the Indiana Administrative Rules. These administrative rules give practitioners guidance on a variety of matters, but perhaps the most useful as a practitioner is Administrative Rule 8, which breaks down what an Indiana case number stands for:[27]

26. POSEY CTY. CT. R.

27. In Indiana, case assignments are generally referred to as Cause Numbers, instead of Case Numbers, but they are one and the same.

Rule 8. Uniform Case Numbering System

> (A) Application. All trial courts in the State of Indiana shall use the uniform case numbering system as set forth under this rule.
> (B) Numbering System. The uniform case numbering system shall consist of four groups of characters arranged in a manner to identify the court, the year/month of filing, the case type and the filing sequence.[28]

A case only receives a cause number once it has been filed and accepted. Once accepted by the clerk of the county where it was filed, a typical Indiana Cause number looks like this: 49D14-1011-DR-000123. Believe it or not, each character has an assigned purpose that tells you most of what you need to know about the case. Once one knows what to look for, you will know what type of case it is, when it was filed, where it was filed, and where it is located within the court system. Starting at the beginning, Administrative Rule 8 tells us that the first two characters represent the county in which the case was filed:

49D14-1011-DR-050225

First two characters represent the county where the action was filed:

01 Adams County
02 Allen County
03 Bartholomew County
04 Benton County
05 Blackford County
06 Boone County
07 Brown County
08 Carroll County
09 Cass County
10 Clark County
11 Clay County
12 Clinton County
13 Crawford County
14 Daviess County
15 Dearborn County
16 Decatur County
17 DeKalb County
…….
49 Marion County

Based on the above, we know that this case was filed in Marion County, Indiana. What's next? The letter D—also known as the third character:

28. IND. ADMIN. R. 8.

49D14-1011-DR-050225

The third character in the first group shall represent the court of filing employing the following code:

C	Circuit Court
D	Superior Court
E	County Court
F	Superior Municipal Division
G	Superior Court/Criminal Division
H	City Court
I	Town Court
J	Probate Court
K	Township Small Claims Court

Following the D is a 14. So, when we put the first group together, we know that we have a case out of Marion County, Superior Court, Civil Division 14.

49D14-1011-DR-050225

The last two characters of the first group shall distinguish between courts in counties having more than one court of a specific type. The following code sets forth the county and court identifier for all courts

49D01	Marion Superior Court, Civil Division 1
49D02	Marion Superior Court, Civil Division 2
49D03	Marion Superior Court, Civil Division 3
49D04	Marion Superior Court, Civil Division 4
49D05	Marion Superior Court, Civil Division 5
49D06	Marion Superior Court, Civil Division 6
49D07	Marion Superior Court, Civil Division 7
49D08	Marion Superior Court, Probate Division
49D09	Marion Superior Court, Juvenile Division
49D10	Marion Superior Court, Civil Division 10
49D11	Marion Superior Court, Civil Division 11
49D12	Marion Superior Court, Civil Division 12
49D13	Marion Superior Court, Civil Division 13
49D14	Marion Superior Court, Civil Division 14
49F07	Marion Superior Court, Criminal Division 7
49F08	Marion Superior Court, Criminal Division 8
49F09	Marion Superior Court, Criminal Division 9
49F10	Marion Superior Court, Criminal Division 10

Our next section consists of 1011:

49D14-1011-DR-050225

The second group of four characters shall represent the year and month of filing.

As shown above, digits one and two of this group denote the last two digits of the calendar year and digits three and four reflect the month of filing.

Now we have more information—not only is our case in Marion County Superior Civil Division 14, but we know that this case was filed in November (11) of 2010 (10). It feels a bit backward, but the key is to remember that the

first two digits represent the last two of the year it was filed, while the last two digits represent the month of that year it was filed.

DR represents the case types—and there are so many types of cases. Administrative Rule 8 contains them all, but for our purposes, here is a snapshot of what these codes represent:

49D14-1011-DR-050225

MR-- Murder
CF-- Criminal Felony (New CF case numbers shall not be issued after 12/31/2001. CF cases filed prior to 1/1/2002 shall continue to bear the CF case type designation.
FA-- Class A Felony (to be used for crimes committed on or before 6/30/2014)
FB-- Class B Felony (to be used for crimes committed on or before 6/30/2014)
FC-- Class C Felony (to be used for crimes committed on or before 6/30/2014)
FD-- Class D Felony (to be used for crimes committed on or before 6/30/2014)
F1-- Level 1 Felony (to be used for crimes committed on or after 7/1/2014)
F2-- Level 2 Felony (to be used for crimes committed on or after 7/1/2014)
F3-- Level 3 Felony (to be used for crimes committed on or after 7/1/2014)
F4-- Level 4 Felony (to be used for crimes committed on or after 7/1/2014)
F5-- Level 5 Felony (to be used for crimes committed on or after 7/1/2014)
F6-- Level 6 Felony (to be used for crimes committed on or after 7/1/2014)
PC-- Post Conviction Relief Petition

CM-- Criminal Misdemeanor
MC-- Miscellaneous Criminal
IF-- Infraction
OV-- Local Ordinance Violation
OE-- Exempted Ordinance Violation
CT-- Civil Tort
CP-- Civil Plenary (New CP case numbers shall not be issued after 12/31/2001. CP cases filed before 1/1/2002 shall continue to bear the CP case type.)
PL-- Civil Plenary (Civil Plenary cases filed after 1/1/2002--All Civil cases except those otherwise specifically designated)
CC-- Civil Collection
MF-- Mortgage Foreclosure
MI-- Miscellaneous (Civil cases other than those specifically identified--i.e. change of name, appointment of appraisers, marriage waivers, etc.)
CB-- Court Business record--i.e. court orders that refer to non-case matters such as the appointment of judge pro tem, drawing the jury, etc.
RS-- Reciprocal Support
SC-- Small Claim
DR-- Domestic Relation (New DR case numbers shall not be issued after 12/31/2016. DR cases filed before 1/1/2017 shall continue to bear the DR case type.)

DC-- Domestic Relations with Children (to be used for cases filed on or after 1/1/2017)
DN-- Domestic Relations No Children (to be used for cases filed on or after 1/1/2017)
MH-- Mental Health
XP-- Expungement Petition (for petitions filed under I.C. 35-38-9)
AD-- Adoption
ES-- Estate, Supervised
EU-- Estate, Unsupervised
EM-- Estate, Miscellaneous
GU-- Guardianship
TR-- Trust
JC-- Juvenile CHINS
JD-- Juvenile Delinquency
JS-- Juvenile Status
JT-- Juvenile Termination of Parental Rights
JP-- Juvenile Paternity
JM-- Juvenile Miscellaneous
PO-- Order of Protection
TS-- Application for Judgment in a Tax Sale
TP-- Verified Petition for Issuance of a Tax Deed

Now we know that the case type is that of a domestic relations case (divorce/dissolution).[29] So, what about the last six digits?

49D14-1011-DR-050225

The fourth group shall consist of six (6) characters assigned sequentially to a case when it is filed. It shall begin with a "000001" at the beginning of each year for each case classification (or for each docket book or case pool if more than one case classification is grouped within a single docket or case pool) and continue sequentially until the end of the year.

This means that the last six digits represent that this is the # of the type of case that has been filed that year. This is its own individual case number.

All told, this means that we have a divorce/dissolution case that was filed in November of 2010 in Marion County Superior 14. Superior 14 is where any hearings would be held, and where any filings or documents would be located.

29. Note that the case types for a dissolution have been changed from DR to two designations: DC (dissolutions with children) and DN (dissolutions without children) but DR is being used here just for purposes of outlining a cause number. *See* CASE TYPE QUICK REFERENCE GUIDE, IND. GOV., (Jan. 1, 2025), https://www.in.gov/courts/iocs/files/casetype-quick-reference.pdf.

VII. ELECTRONIC FILING SYSTEM (E-FILING/IEFS)

Indiana uses an e-filing system, which means that all records are kept and responded to electronically. This system is made up of three main parts: a court case management system, an e-filing service provider, and an e-filing manager.

The court case management system consists of a computer software program that allows courts to keep track of case events, documents, and parties. The main system that most Indiana Courts use is called Odyssey. Courts are able to reconcile multiple different court case management systems through the use of an e-filing manager, which makes sure that no matter what system is used, all results may be integrated.

In Indiana, every attorney must select and use an electronic filing service provider (IEFS). IEFS represents a "type of computer software (usually a website) that an attorney or litigant uses to start a case or respond to a case over the internet."[30] This service must be used to electronically file (e-file) anything case-related. As of the time of publication, Indiana has several options that one may choose from, the approved list and comparison chart is located on the Indiana Judicial Branch's website.[31]

No matter which provider you choose, all filings must be e-filed if you are an attorney pursuant to Indiana Rules of Trial Procedure Rule 87. Rule 87 states that:

> (A) Commencement of an Action.
>
> An action must be commenced:
>
> (1) By using the IEFS unless exempted under these rules;
> (2) By paying the filing fee unless the fee is waived by an order of the court or pursuant to Trial Rule 86(B)(2)(e); and
> (3) By filing the complaint or equivalent pleading and the required summons(es) in the form set out in Trial Rule 4(C).
>
> (B) Electronic Filing of Documents.
>
> (1) Unless otherwise permitted by these rules, documents submitted for filing in Indiana courts must be filed electronically with the clerk using the IEFS. The e-filing of documents is controlled by the case number in the IEFS designated by the User.
> (2) Attorneys who wish to be exempted from the requirement that they file electronically may file a petition for electronic filing exception. The petition must be filed in each pending

30. *How it works*, IND. JUD. BRANCH, https://www.in.gov/courts/efiling/how-it-works/. [https://perma.cc/LBV5-5KGY] (last visited Apr. 2, 2025).

31. *Compare Providers and Plans*, E-FILE IND., https://www.in.gov/courts/files/e-filing-efsp-comparison.pdf [https://perma.cc/FQG3-S28Y] (last visited Apr. 2, 2025).

> case to which these rules are applicable. The petition will be reviewed by the judicial officer assigned to that case and granted only upon a showing of good cause.
> (3) Until further order of the Supreme Court, unrepresented litigants are not required but are encouraged to file using the IEFS.[32]

Once you select a provider, you will create an account and register, and by doing so, you are agreeing to the terms and conditions of that respective provider. The email address you provide in creating your account registration will be where you agree to receive any notices and documents regarding your court cases. Indiana does provide a basic, free e-filing service in addition to the certified providers so that pro se and other individuals may have access to the filing system at no cost.

How you will file a case into your filing system will depend on the provider you choose, but most require you to specify the county where the case will be filed, the type of case you are filing (i.e., civil or criminal), and the specific case designation (i.e., custody). A quick reference chart to the types of designations used for cases is available on the Indiana Judicial Branch's website.[33] Once you enter all of the orienting information for your case (county, parties, etc.), you will then be directed to upload all of the pleadings and motions that you are ready to file. PDFs are generally the required format for any uploaded documents.

For each document you file, you will have the option to select whether that document should be confidential (as in the Notice of Confidential Information Form) or public record (generally, most things are public records). Anything marked as confidential will be accounted for by the clerk accepting the filing but not available publicly on the Internet. Anything noted as being open to the public will be publicly available on the internet. In using e-filing, it is your responsibility to ensure that information that is considered confidential under the Rules on Access to Court Records does not appear in public court documents. Should any confidential documents not be properly designated or redacted when filed, "they may be stricken and you may be sanctioned by the court or incur liability to third parties."[34]

After you upload all your filing documents, you will then have an opportunity to identify the service contacts for your case, meaning that you will have some sort of step to identify yourself and your role to the party you represent, and then select the opposing party's information so that they may also receive service. There are two main designations of service contacts, the first

32. IND. T.R. 87.

33. CASE TYPE QUICK REFERENCE GUIDE, IND. GOV., (Jan. 1, 2025), https://www.in.gov/courts/iocs/files/casetype-quick-reference.pdf.

34. E-FILING USER GUIDE, E-FILE IND. 9, (Mar. 29, 2023), https://www.in.gov/courts/files/efiling-user-guide.pdf.

being "firm service contacts" and the second being the "Public Service List." "The Public Service List is the directory of attorneys who have been established as a firm attorney within the Indiana E-filing System. Any attorney of record in an appellate or e-filing trial court case must appear on the Public Service List."[35]

What if the party on the other side is not an attorney, a pro se, or an attorney not yet on the Public Service List? The E-Filing User Guide provides:

> If a non-attorney party you wish to serve is not already listed as a service contact on the case, you must execute service conventionally. Likewise, if the attorney you wish to serve is not already added as a service contact in the case and is not yet on the Public Service List, you must serve them conventionally.[36]

Once you file all the documents and identify service contacts; if you are commencing an action, there will be a page where you may pay the filing fee for the type of action that you are filing. Typically, most e-filing service providers accept credit cards, with some accepting other forms of payment as well. There is typically a "convenience fee" added onto the filing fee cost for the ease of being able to electronically file (i.e., for filing an expungement for convictions, the filing fee is $157.00. E-file adds on a fee of $5.10 for using a credit card, making the total $162.10). Make sure to inform your client of this added cost, as that higher amount with the fee will show up on their credit card statement.

Once you pay the necessary fees, you will generally have to acknowledge all of what you filed, double-check that all the information appears as it should, and then you will submit. Once you submit, those documents will be electronically routed to the county clerk in which you filed, and you will receive an e-service notification email. Once the clerk receives your documents and formally accepts them, you will receive a Cause Number for your case, as well as file stamped copies emailed to the address you provided. Should you need to file anything into that particular case later on, you will e-file into an existing case, and provide your assigned Cause Number in order to do so.

Once your case has been filed, you will receive email notices of any documents you or your opposing party e-file, any orders issued by the court, and any other documents filed regarding your case. If you withdraw from a case, you must remove your contact information from the list of service contacts for that case.

VIII. Certified Legal Interns (CLI)

Many times, in a law firm or as an attorney, you will want some additional help, and that can come in the form of paralegals and law clerks, and also, in

35. *Id.* at 12.
36. *Id.* at 10.

Indiana, Certified Legal Interns (CLI). CLI status is the supervised temporary licensure vehicle for law students who are midway through their law school education. Graduate Legal Interns (GLI) have the same status as CLIs but have graduated from law school and have not received the results from the first bar exam they have taken (or when they pass, until they get sworn in). To be certified as a legal intern, students must have completed half of their required legal education (around 45 hours) and completed (or are currently enrolled in) an ethics /professionalism course.

Both CLIs and GLIs are authorized by the Indiana Rule for Admission to the Bar, Rule 2.1:

Rule 2.1. Legal Interns

Section 1. Requirements

(a) A law student may serve as a legal intern when the following requirements are met:

(i) The law student is enrolled in a school accredited as set forth in Rule 13(1)(a).

(ii) The law student has satisfactorily completed one-half of the educational requirements for a first professional degree in law.

(iii) The law student has received permission from the dean of the law school to participate in a legal intern program determined to be beneficial to the law student's training pursuant to the guidelines jointly developed by the law schools of this state.

(iv) The law student has completed or is enrolled in a legal ethics or professional responsibility course as set forth in Rule 13(1)(c).

(b) A law school graduate may serve as a legal intern when the following requirements are met:

(i) The law school graduate is eligible to take the bar examination under Rule 13.

(ii) The law school graduate has received permission from an attorney who is a member of the Indiana bar to serve as a legal intern under that attorney's direct supervision.

Section 2. Length of Intern Status

(a) A law student may serve as a legal intern until graduation from law school or for a lesser period if designated by the dean of the law school.

(b) A law school graduate may serve as a legal intern from the date of graduation until the graduate has taken and been notified of the results of the first bar examination for which the graduate is eligible under Rule 13, or if successful on that examination, until the first opportunity thereafter for formal admission to the Indiana bar.[37]

37. IND. ADMIS. DISC. R. 2.1.

CLIs and GLIs are certified by the law school they are attending/have graduated from with the law school certifying that they satisfy the requirements in Rule 2.1 (1) and (2) above. The second piece that is needed is for a volunteer supervising attorney who is a member of the Indiana Bar to notify the board of law examiners:

> **Section 3. Certification**
>
> (a) The dean of a law school sponsoring a legal intern program shall advise the State Board of Law Examiners of those students who qualify to be legal interns and the length of that internship.
>
> (b) An attorney who is a member of the Indiana bar and who wishes to sponsor and supervise a graduate as a legal intern shall advise the Board. And the dean of the law school from which the graduate received their first professional degree in law shall advise the Board of both the date of graduation and the date at which the graduate will be first eligible for examination under Rule 13.[38]

To become a CLI or GLI, students must fill out an application and then sign an agreement. Their supervising attorney and dean must also sign the agreement and then submit it to the Board of Law Examiners. This paperwork available online at the Indiana Board of Examiner's website.[39]

The scope of what a CLI/GLI may do is the same, in that both are able to practice law in Indiana as long as they are supervised by the attorney that signed off on their application and agreement.

Students who have been certified under one particular attorney may not then practice under any attorney anywhere, meaning should a student want to work with multiple attorneys not in the same firm, the student will need a separate application and form for each. As an example of what this means is when a student enrolls in an externship or a law school clinic course, students are usually certified as legal interns under the supervision of a professor attorney for those courses. Those class-related certifications do not qualify the student to then go and work for a law firm or another attorney without getting re-certified that someone at the firm or that attorney is acting as their supervisor. CLIs/GLIs can do everything a licensed attorney may do provided that their work is supervised, and whenever speaking in open court, has their supervising attorney present at that hearing:

> **Section 4. Scope of Conduct**
>
> Except as otherwise permitted in Section 4(b), a legal intern may practice law in Indiana, provided such practice is supervised and

38. *Id.* 3.

39. *Student Legal Internships*, IND. BOARD OF L. EXAMINERS https://myble.courts.in.gov/appinfo.action?id=4 (last visited Apr. 2, 2025) (click link titled "Browse Student Legal Internship Forms" to view various relevant forms).

> approved by an attorney who is a member of the Indiana bar. A legal intern shall inform each client of their intern status and that they are not a licensed attorney.
>
> (a) A legal intern shall not interview any person represented by an attorney without the express permission of such attorney. In no event may a person (including private corporations) be charged for the services of a legal intern acting in a representative capacity. The personal presence of a supervising attorney is required in any proceeding in open court.
> (b) A law school graduate serving as a legal intern under Section 2(b) who is otherwise qualified for admission and has been notified of their successful results on the Indiana bar examination may practice law in Indiana without the direct supervision of an attorney who is a member of the Indiana bar, including appearing in any proceeding in open court without the presence of a supervising attorney, if the law school graduate is employed in any of the following capacities:
>
> (i) A legal services organization or public defender office that provides legal assistance to persons of limited means.
> (ii) The Indiana Department of Child Services where the law school graduate is providing litigation services in child welfare cases.
> (iii) The office of a prosecuting attorney.[40]

The law school graduate's authority to practice law under this provision is limited to matters assigned in the course and scope of their employment with the employers listed above. Law school graduates practicing under this provision are not admitted to the Indiana bar until the admission ceremony set out in Rule 21.[41] Employers must allow law school graduates practicing under this provision time to attend the admission ceremony.

Should you want to employ a student as a CLI/GLI, you may want to contact the law school's offices that manage employment and externships to see if they can advertise your opportunity. Otherwise, if you are interviewing for a law clerk position and you want them to get certified as part of their work with you, you just need to make sure they meet the requirements and then you would submit a signed agreement and application along with them to the Board of Law Examiners.

When and if you have clients work with a CLI/GLI, you will want to make sure that the client is aware of and agrees to work with a law student. Typically, you can have the client sign a form acknowledging that they understood and agree, such as this one:

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40. IND. ADMIS. DISC. R. 4.
41. *Id.* 21.

[NAME OF YOUR FIRM]

CERTIFIED LEGAL INTERN

INFORMATION AND ACKNOWLEDGMENT

This form acknowledges your consent to allow a law student to represent and work with you on your case.

The Indiana Supreme Court certifies law students to practice law under the supervision of licensed attorneys who are admitted to practice law in Indiana. [STUDENT CLI NAME HERE], the person who has been assigned to represent you is a Law Student who is working as a legal intern directly under the supervision of our office attorneys.

In representing you, the Legal Intern may interview you to determine the nature of your legal issues, contact others to obtain further information, or negotiate with others to solve your legal problem. The Legal Intern may also appear on your behalf at administrative or court hearings. Everything you tell the Legal Intern is confidential, and will not be discussed outside the office without your permission.

If you have any questions that are not answered by the Legal Intern or wish to withdraw your consent to have the Legal Intern represent you, contact [ATTORNEY SUPERVISOR] at [CONTACT INFORMATION].

If you consent to be represented by a Legal Intern, please sign the bottom of this form as an acknowledgment and consent allowing the Legal Intern to represent and work with you.

_____

Client's signature

_____

Client's printed name

Dated: _____

Certification that a copy of form was given to client

_____

CLI Name/Date

Once you have the client acknowledge and give permission, you may then treat the CLI/GLI as any other young lawyer associate, remembering to supervise all their work and making sure to appear with them in any court setting.

CONCLUSION

Hopefully once you have made it this far in this article, you have a decent grasp on many of the basics one needs when starting to practice in Indiana. No

matter what, no matter where one practices, keep in mind the relationship between the layers of rules that exist to govern civil procedure. Also keep in mind that just as the law changes, rules and practices change, and it is a good idea to keep up with legislative amendments and rule changes as they occur. With this in mind, and many of the tools outlined here, one should be able to confidently have a starting framework for practicing in Indiana.

SURVEY OF INDIANA LAW OF PROFESSIONAL RESPONSIBILITY (2023–2024)

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SHILOH PERRY**
BAILEY STAJURA***

INTRODUCTION

From July 1, 2023, through July 1, 2024, the Indiana Supreme Court handed down five per curiam decisions imposing sanctions for violations of professional responsibility or judicial conduct rules.[1] The three attorney discipline decisions detail one lawyer's ethical transgressions involving widespread neglect, abandonment, and malfeasance of vulnerable clients;[2] another lawyer's misconduct in improperly questioning a represented witness without notifying the witness's counsel;[3] and a government lawyer's ethical violations in making a disparaging, public pretrial statement about a professional under investigation by the lawyer.[4]

In the two judicial discipline decisions, the Court discussed the factors warranting serious discipline and illuminated the ethical peril that arises when incoming judges fail to appreciate the obligations assumed with the new judicial role.[5] During the survey period, the Indiana Commission on Judicial Qualifications also resolved another matter with a Public Commission Admonitions in lieu of filing formal charges against a former judicial officer who acted outside the expectations of the judicial role.[6]

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1. *In re* Cichowicz, 213 N.E.3d 1022 (Ind. 2023); *In re* Rokita, 219 N.E.3d 733 (Ind. 2023); *In re* Moreno, 222 N.E.3d 948 (Ind. 2023); *In re* Trapp, 222 N.E.3d 940 (Ind. 2023); *In re* Norrick, 233 N.E.3d 403 (Ind. 2024).

2. *In re Moreno*, 222 N.E.3d at 948.

3. *In re Trapp*, 222 N.E.3d at 941–42.

4. *In re Rokita*, 219 N.E.3d at 734. Because a proceeding involving the same official is currently pending, this matter will be discussed in a future survey period when the new matter is concluded.

5. *In re Cichowicz*, 213 N.E.3d at 1024; *In re Norrick*, 233 N.E.3d at 406–07.

6. The Indiana Commission on Judicial Qualifications admonished a former judge for providing a loan to a litigant to pay a judgment on a legal matter that was pending before the judicial officer. PUBLIC ADMONITION OF FORMER JUDGE REX KEPNER OF THE BENTON CIRCUIT COURT, IND. COMM'N ON JUD. QUALIFICATIONS (May 17, 2024), https://www.in.gov/courts/ojar/files/jqc-admonition-kepner-2024-0517.pdf.

I. Attorney Discipline Cases

The Preamble to Indiana's Rules of Professional Conduct recognizes that"[l]awyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship."[7]

That relationship encompasses many roles for lawyers—client representatives, officers of the Court, and public citizens—and bestows on lawyers a "special responsibility for the quality of justice."[8] And while the Preamble does not create substantive requirements for lawyers, it sets the tone for attorney regulation in this State. Against this aspirational backdrop, the Rules of Professional Conduct divide lawyers' ethical responsibilities into eight sections.[9] The first five sections set forth lawyers' ethical responsibilities in the various roles they perform in the legal system: 1) as client representatives, 2) as advisors, 3) as advocates, 4) when interacting with third parties, and 5) as supervisors.[10] The remaining three sections pertain to public service, advertising, and misconduct, respectively.[11]

The Court's attorney discipline cases during this survey period specifically offer guidance to lawyers about the ethical duties owed to clients, third parties, and to the legal system as an advocate. But in a broader sense, the opinions cast the Court's beliefs regarding the factors that interfere with the quality of justice, which warrant public (and more severe) sanctions.

A. Duty to Clients – In re Moreno

Critical to fulfilling one's duty to a client are the lawyer's ethical responsibilities to provide competent and diligent representation,[12] to keep the client reasonably informed about the status of the legal matter,[13] and to not set an unreasonable fee.[14] In the most significant attorney discipline case during the survey period, *In re Moreno,* the Court found not only had the respondent lawyer failed to fulfill these basic duties for eleven immigration clients, but he also engaged in deceitful behavior and effectively abandoned his legal practice, leading to adverse consequences for several clients.[15] The Court determined that this conduct warranted the severest disciplinary sanction—disbarment.[16]

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7. Ind. Rules of Pro. Conduct pmbl., para 13 (2024).
8. *Id.* pmbl., para 1.
9. *See generally id.*
10. *Id.* 1–5.
11. *Id.* 6–8.
12. *Id.* 1.1, 1.3.
13. *Id.* 1.4.
14. *Id.* 1.5.
15. *In re* Moreno, 222 N.E.3d 948 (Ind. 2023).
16. *Id.*

Moreno was initiated after the Disciplinary Commission filed an eleven-count disciplinary complaint against the respondent lawyer, following its investigation of twelve grievances, by eleven clients and one attorney, who recounted multiple, similar episodes of the lawyer's neglect and unethical behavior towards clients and their legal matters.[17] During the investigation of those grievances, the lawyer failed to respond to the Disciplinary Commission's lawful demands for information about those grievances, leading to show-cause proceedings and, ultimately, an indefinite suspension for repeated noncooperation with the disciplinary process.[18]

The respondent lawyer's lack of cooperation continued during the litigation, as he failed to submit an Answer to the Disciplinary Commission's Complaint.[19] The hearing officer granted the Commission's motion for a judgment on the complaint, and the Court approved the hearing officer's report on the factual findings and conclusions of law.[20]

The Court determined that the respondent lawyer had engaged in a pattern of neglect and malfeasance in the immigration matters for eleven clients and had failed to cooperate with the disciplinary process.[21] The Court detailed in its opinion some of the more egregious situations:

- "Client 1," a Korean national who was married, retained the respondent to prepare a permanent residency application, paid him $5,410, and provided the respondent with all necessary documentation.[22] After that, Client 1 attempted without success to contact the respondent numerous times by email or phone for an update on her application's status.[23] During this time, the respondent changed his email address without notifying Client 1.[24] When she was unable to reach the respondent, Client 1 contacted the United States Citizenship and Immigration Services (USCIS) and learned that the respondent had not submitted her application.[25] Client 1 subsequently filed a grievance with the Disciplinary Commission and hired successor counsel.[26] A few days later, USCIS informed Client 1 that it received her application, even though her new attorney had not prepared or submitted any documentation to USCIS.[27] Later, USCIS requested additional

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 949.
26. *Id.*
27. *Id.*

evidence from Client 1 regarding her husband's signature on a form that he was not authorized to submit.[28] Successor counsel confirmed with Client 1's husband that he never signed nor submitted this form.[29] Successor counsel also contacted the respondent numerous times to obtain Client 1's file but was unsuccessful.[30]

- "Client 4" retained and paid the respondent $5,000 to draft U-visas for his family and for some temporary work visas.[31] Client 4's last contact with the respondent was in December 2021, when the respondent falsely told Client 4 that his pending applications were progressing with the USCIS.[32] However, the respondent never drafted or submitted any documents to the USCIS on Client 4's behalf.[33] Client 4 never heard from the respondent after December 2021.[34]

- "Client 7" was the respondent's landlord for his law practice.[35] Client 7 retained the respondent to represent his sister in an immigration matter on an oral flat fee agreement.[36] The respondent abruptly dissolved his law practice, resulting in a landlord-tenant lawsuit.[37] Upon receiving notice of the suit, the respondent threatened a "noisy withdrawal" from Client 7's sisters' case.[38] The respondent then sent Client 7 an invoice for additional fees of over $10,000.[39]

- "Client 8" agreed to pay the respondent $8,000 for legal services in immigration and consular matters involving the National Visa Center and made a deposit of $4,000.[40] Client 8 asked the respondent to prepare a written fee agreement, which the respondent agreed to draft but never provided to the client.[41] Also, Client 8 wished to renew his Employment Authorization Card and paid the respondent an additional $400 to prepare the application.[42]

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28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*

> Later, the respondent demanded an additional $1,050 for work that Client 8 already paid for.[43] Soon after, Client 8 lost all contact with the respondent and learned that the respondent had closed his practice.[44] Client 8 managed to arrange an in-person meeting with the respondent and learned that the respondent had not prepared any paperwork for his matters.[45] Shortly after that meeting, Client 8 learned that the respondent allegedly renewed Client 8's Employment Authorization Card and had his new card.[46] The respondent demanded an additional $4,225 in exchange for the card and further told Client 8 that if he did not pay the additional sum, the respondent would file a collections lawsuit and file a complaint with the USCIS.[47]

The Court found that the respondent's conduct towards these clients and seven others, as well as his conduct during the Commission's investigation, violated the following Indiana Professional Conduct Rules:

Rule 1.1: Failing to provide competent representation;

Rule 1.3: Failing to act with reasonable diligence and promptness;

Rule 1.4: Failing to keep a client reasonably informed about the status of a matter and respond promptly to reasonable requests for information;

Rule 1.5(a): Making an agreement for, charging, or collecting an unreasonable fee;

Rule 1.16(d): Failing to protect a client's interests upon termination of representation;

Rule 8.1(b): Failing to timely respond to the Commission's demands for information;

Rule 8.4(c): Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and

Rule 8.4(d): Engaging in conduct prejudicial to the administration of

43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*

justice.[48]

In its evaluation of the appropriate sanction, the Indiana Supreme Court focused on the harm caused by the respondent and his exploitation of vulnerable clients, noting that:

> Respondent wholly abandoned his law practice, neglected and lied to his vulnerable clients, retained unearned funds, repeatedly failed to cooperate with the Commission's investigations, and ultimately defaulted on his disciplinary proceedings.[49]

Such factors led the Court to conclude that the respondent was no longer entitled to the privilege to practice law, and the Court ordered him disbarred.[50]

B. Ethical Duties as Advocates and to Third Persons – In re Trapp

"As a representative of clients, a lawyer performs various functions . . . [a]s advocate, a lawyer asserts the client's position under the rules of the adversary system."[51] Although lawyers are expected to be skilled advocates for their clients, they also have duties to the legal system itself and to maintain the integrity of that system.[52] In balancing these interests, the Rules of Professional Conduct place some limits on advocacy to preserve the legitimacy of the legal system.[53]

Professional Conduct Rule 3.3 is one such rule, which requires candor from lawyers to tribunals.[54] Specifically, this rule prohibits lawyers from 1) knowingly "mak[ing] a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer;" 2) knowingly failing to disclose to the tribunal legal authority from the jurisdiction that is "directly adverse to the position of the client and not disclosed by opposing counsel;" and 3) "offer[ing] evidence the lawyer knows to be false."[55]

Additionally, besides the ethical duties owed to clients and to the legal system, lawyers, as officers of the Court, bear some ethical responsibilities to third parties to help maintain fairness and integrity in the legal system.[56] *In re Trapp* illustrates the consequences when a lawyer falls short of fulfilling these

48. *Id.* at 950.
49. *Id.*
50. *Id.*
51. IND. PROF. COND. R. 2.
52. *Id.* 5, 11, 12.
53. *See id.* 3.1–3.9.
54. *Id.* 3.3.
55. *Id.*
56. 222 N.E.3d 940 (Ind. 2023); *see* IND. PROF. COND. R. 4.1–4.4.

ethical responsibilities.[57]

In *Trapp*, the Court again had occasion to address misconduct involving a violation of Indiana Professional Conduct Rule 4.2.[58] Popularly known as the "attorney-bypass rule," Rule 4.2 prohibits a lawyer, when representing a client, from communicating with a person the lawyer knows to be represented by another lawyer about the subject matter of the representation unless the lawyer has the other lawyer's consent.[59] In 2021, the Indiana Supreme Court clearly defined the scope of Rule 4.2 *In re Martin*, holding that Rule 4.2's prohibition against questioning a represented individual is not limited to representation in a specific proceeding; rather, it applies to any related proceeding if the questioning pertains to the subject matter of the representation.[60] In *Trapp*, the Court reaffirmed that Rule 4.2 applies to collateral proceedings involving the same subject matter and discussed how a lawyer's attempts to conceal a violation through false statements warrant a more significant sanction.[61]

The respondent in *Trapp* was retained by "Husband" to represent him in a consolidated marital dissolution and protective order proceeding ("Divorce Case") and a criminal proceeding ("Criminal Case") arising from a domestic dispute with "Wife."[62] Husband and Wife each filed protective order petitions against one another, but Wife's protective order petition was the only one granted in April 2019.[63] An agreed provisional order was entered around the same time in the dissolution case, with some remaining issues to be decided, such as the valuation of marital assets and the division of the marital estate.[64] The marital assets included some firearms that allegedly had been used during the domestic dispute, but that had not been located by the police.[65]

Although the respondent was aware that Wife was represented by counsel in the Divorce Case, she subpoenaed Wife to submit to a taped statement for the Criminal Case without notifying Wife's counsel.[66] During the taped interview, the respondent questioned Wife about the domestic dispute and "asked her several questions about the firearms and other marital property over the objection of the deputy prosecutor, who referenced the Divorce Case and Wife's right to have her counsel present."[67]

Wife's counsel later confronted the respondent about her line of questioning at the interview, and the respondent stated, "We asked zero questions about the divorce case."[68] Wife's counsel then filed a motion for an order to produce the

57. *See In re* Trapp, 222 N.E.3d 940 (Ind. 2023).
58. *Id.* at 943.
59. IND. PROF. COND. R. 4.2.
60. *In re* Martin, 166 N.E.3d 345 (Ind. 2021).
61. *In re Trapp*, 222 N.E.2d at 943.
62. *Id.* at 942.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*

taped statement, to which the respondent filed an objection, incorrectly reporting that Wife's Counsel had received one month's notice of the statement and that the taped statement was not relevant to issues in the Divorce Case.[69] The trial court issued an order to produce the tape and informed the respondent that she "should be prepared to discuss Rule of Professional Conduct 4.2 and its comments at the final dissolution hearing."[70] The following day, the respondent emailed the recorded statement to Wife's counsel but remained on the Divorce Case.[71] Wife's new counsel filed a motion to disqualify the respondent from the Divorce Case due to the respondent's improper questioning of Wife without counsel present.[72] Before the trial court ruled on that motion, Husband retained successor counsel, and the respondent withdrew her appearance.[73]

The Disciplinary Commission filed a disciplinary complaint, alleging that the respondent violated Professional Conduct Rule 3.3(a)(1) (knowingly making a false statement of fact or law to a tribunal), Rule 4.2 (improperly communicating with a person the lawyer knows to be represented by another lawyer in the matter), and Rule 8.4(d) (engaging in conduct prejudicial to the administration of justice).[74] After an evidentiary hearing, the hearing officer found that the respondent had violated all three rules and recommended a thirty-day suspension with automatic reinstatement.[75]

The respondent filed a petition to review with the Court, challenging those findings. While acknowledging the Rule 4.2 violation, the respondent disagreed that the evidence supported the hearing officer's findings that she violated Rules 3.3(a)(1) and 8.4(d).[76] Specifically, the respondent argued the hearing officer gave insufficient credit to her testimony that she made a scrivener's error when she averred in a pleading that Wife's counsel had been given a month's notice of the taped statement.[77]

The Court found the respondent's argument unpersuasive, noting that it was disinclined to counter the hearing officer's determination that the respondent was not a credible witness.[78] The Court further pointed out the respondent failed to explain why she never corrected the false statement (caused by the alleged scrivener's error), "which Rule 3.3(a)(1) also required her to do."[79] As to the respondent's challenge of the hearing officer's findings that the respondent made other false statements to the trial court, the Court declined to reweigh testimony and noted that the respondent's argument had little circumstantial

69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 943.
77. *Id.*
78. *Id.*
79. *Id.*

support in the record and was "undercut by Respondent's contemporaneous pattern of deception in her communications with Wife's counsel."[80] The Court further went on in a footnote to rebuke the respondent for her argument that her dishonesty towards opposing counsel should have no bearing on the Rule 3.3(a)(1) violation.[81] The Court believed otherwise, stating:

> Respondent's argument that dishonesty toward opposing counsel is not encompassed within Rule 3.3, while true, misses the point. Respondent's broader pattern of deception is probative of her *mens rea* underlying the statements to The Court that are subject to Rule 3.3 and undercuts her assertions of inadvertence and lack of knowledge.[82]

Further, the Court found that the respondent's conduct caused prejudice to the administration of justice, thereby violating Rule 8.4(d), as her conduct unduly prolonged the Divorce Case, required the trial court and Wife's counsel to spend additional resources to produce the taped statement, and led Husband to have to find new counsel.[83]

While the Court recognized that it has typically imposed public reprimands for similar violations of Rule 4.2, the Court opined that the respondent's dishonesty warranted a more severe sanction.[84] The lasting message from *Trapp* for practitioners is that attempts to conceal an ethical violation, rather than address the transgression directly, will be considered by the Court and likely will result in a more severe sanction.

II. JUDICIAL DISCIPLINE CASES

Akin to Indiana's Rules of Professional Conduct, the Indiana Code of Judicial Conduct starts with a Preamble that sets the tone for the regulation of judicial conduct in the State.[85] The Preamble recognizes that:

> An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office

80. *Id.*
81. *Id.*
82. *Id.* at 943 n. 2.
83. *Id.* at 943.
84. *Id.* at 944.
85. *See* IND. PROF. COND. R. pmbl.

> as a public trust and strive to maintain and enhance confidence in the legal system.[86]

To maintain that confidence, judicial officers are reminded in the Preamble "to avoid both impropriety and the appearance of impropriety" and to aspire to conform their conduct to enhance public confidence in the judiciary's "independence, impartiality, integrity, and competence."[87] The two judicial discipline decisions issued during this survey period involved judges recently elected to their positions and highlight the damage to public confidence when judges fail to appreciate the heightened responsibilities of the judicial role. [88]

A. Failure to Supervise – In re Norrick

New judges and judicial officers taking on different responsibilities often face unanticipated challenges as they transition into these roles. Two such issues are navigating potential conflicts of interest and effectively supervising a new staff. There are, however, ethical implications if a judge shirks the responsibility to maintain public confidence in the impartiality of the judiciary or neglects supervision of staff in a manner that leads to incompetence in the processing of legal orders.[89]

In re Norrick illustrates the ethical harm that arises when a new judge fails to appreciate the responsibilities of the changed legal role.[90] In *Norrick*, the Indiana Supreme Court approved a Conditional Agreement for Discipline between the Indiana Commission on Judicial Qualifications and the respondent judge, imposing a forty-five-day suspension without pay on the judge for 1) failing to supervise staff in the processing of orders, which resulted in the appearance that the judge had presided over cases that he or his son was the attorney of record; 2) failing to supervise staff in the processing of criminal cases, which led to delays and the involuntary dismissal of sixteen criminal cases; and 3) issuing an ex parte change of custody order without giving the opposing party notice or an opportunity to respond.[91] As the Court detailed in its per curiam opinion, the judge's failures "began the day he assumed office, damaged the administration of justice and public trust in the judiciary," and "caused individual harm to dozens of alleged victims, witnesses, and criminal

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86.*Id.* pmbl., para. 1.

87. *Id.* pmbl., para. 2.

88. *See In re* Cichowicz, 213 N.E.3d 1022,1023–24 (Ind. 2023); *In re* Norrick, 233 N.E.3d 403, 406–07 (Ind. 2024).

89. *See* IND. PROF. COND. R. 1.2 (requiring a judge to act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary); *id.* 2.5 (requiring a judge to perform judicial and administrative duties competently, diligently, and promptly); and *id.* 2.12(A) (requiring a judge to ensure that court staff act in a manner consistent with the judge's obligations under the Code of Judicial Conduct).

90. *In re Norrick*, 233 N.E.3d at 403–04.

91. *Id.*

defendants whose cases were dismissed or delayed because Respondent, through his staff, failed to update warrants, set trial dates, and reflect the outcome of hearings."[92]

The judge was elected in November 2020, and took the Circuit Court bench on January 1, 2021.[93] Although the respondent had served as a town court judge for fifteen years before his election to Circuit Court, that judicial service was in a part-time capacity.[94] While serving as a town court judge, the respondent also maintained a private law practice in which he represented Landmark Accounts as a client.[95] After taking the Circuit Court bench, Respondent's attorney-son took over the representation of Landmark Accounts.[96]

Although the respondent had advised the Circuit Court 5 staff about the conflict of interest and instructed them to transfer cases involving Landmark Accounts or his son to a magistrate, between January 20, 2021, and April 13, 2022, electronic case dockets showed that the respondent presided over twenty-seven cases in which the respondent's son and Landmark Accounts was a client.[97] From those cases, sixty-six orders were signed using the respondent's signature stamp, including orders granting the respondent's withdrawal as Landmark Accounts' counsel.[98] Additionally, the chronological case summaries for several Landmark Accounts cases on the public online case docket listed the respondent as the presiding judicial officer even though the magistrate presided over the cases.[99]

The matter first came to the Judicial Qualifications Commission's attention in April 2022, following a complaint alleging that the respondent was presiding over cases in which his son served as counsel and in which the respondent previously served as counsel.[100] Two months later, the respondent submitted a self-report to the Commission, acknowledging that orders were issued reflecting that he presided over Landmark Accounts' cases and that he failed to take appropriate measures to prevent these errors by court staff.[101]

While the Judicial Qualifications Commission was investigating the Landmark Accounts matter, the Commission received a report that "there were criminal cases in Respondent's court with missing case entries and orders."[102]

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92. *Id.* at 404.
93. *Id.*
94. *Id.*
95. *Id*.
96. *Id*.
97. *Id.*
98. *Id.* Although the respondent was aware that his staff was using his signature stamp, he did not make any effort to review the staff's work to ensure that they were properly affecting orders disqualifying him from Landmark Accounts cases. *See* Disciplinary Complaint, *In re* Norrick, 233 N.E.3d 403 (Ind. 2024) (No. 24S-JD-35) (available on https://public.courts.in.gov/MyCase#).
99. *In re Norrick*, 233 N.E.3d at 404.
100. *Id.*
101. *Id.*
102. *Id*

Subsequent investigation by the Commission uncovered approximately forty criminal cases from January 1, 2021, to March 31, 2023 with missing entries and orders.[103] The missing materials included warrants that had not been updated accurately, jury trials that had not been set, and hearings in which there was no entry or order to indicate what occurred or whether a future hearing was needed.[104] The missing items and subsequent failure to set dates ultimately led to the dismissal of sixteen cases because the defendants were not tried within the deadlines set under Criminal Rule 4(C).[105]

During the investigation, the Judicial Qualifications Commission also discovered a pattern of delay in orders being issued on criminal cases in respondent's court.[106] The respondent received reports, from other judges and the prosecutor's office, notifying him about these delays and warning him that his lead criminal court reporter was four or five weeks behind in updating case entries.[107] Despite these notifications, the respondent "failed to undertake any efforts to review criminal cases, including whether an appropriate entry or order had been made or whether the matter had been scheduled for a future court date."[108] Delays in issuing warrants ranged from thirty days to sixteen months on cases involving allegations of various violent crimes against victims.[109]

In April 2023, the respondent submitted a second self-report about a court employee erroneously affixing the judge's electronic signature to an ex parte custody order.[110] In May 2022, the judge had ordered temporary joint legal and physical custody of the minor child to both parents, but, on April 12, 2023, one of the parties moved for emergency custody and requested an expedited hearing.[111] That same day, an order granting a modification of custody was issued, with the respondent's electronic signature affixed by court staff.[112] The respondent attempted to remedy the error by granting a motion to correct error five days later.[113] The April 2023 emergency modification of custody was, however, the second order erroneously issued by the respondent in that case.[114] Previously, he had issued an erroneous order in April 2022 that granted temporary custody to one party.[115]

The Judicial Qualifications Commission and Respondent Norrick agreed that Respondent's conduct was prejudicial to the administration of justice and violated the following rules of the Indiana Code of Judicial Conduct:

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103. *Id.* at 405.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 405–06.
111. *Id.* at 406.
112. *Id.*
113. *Id*.
114. *Id.*
115. *Id*.

> Rule 1.2: Requiring judges to avoid impropriety and to act at all times in a manner promoting public confidence in the judiciary's integrity;
>
> Rule 2.5(A): Requiring judges to perform judicial and administrative duties competently, diligently, and promptly; and
>
> Rule 2.12(A): Requiring judges to supervise court staff to act in a manner consistent with the judge's obligations under the Code of Judicial Conduct.[116]

In evaluating whether to accept the parties' proposed agreement to a forty-five-day suspension without pay, the Court noted that the scope of the respondent's misconduct was pervasive, "impact[ing] multiple facets of his caseload and management duties"[117] In addition to damaging the public's perception of the judiciary with the sixty-six erroneously issued orders in Landmark Accounts' cases (which gave the perception that the respondent was presiding over cases in which he or his son appeared), the respondent's pattern of failing to take action in criminal cases led to the dismissal of sixteen cases when defendants were not brought to trial in a timely fashion.[118] The Court stressed the significant harm caused by the respondent's neglect, remarking that:

> Not only does this harm the administration of justice generally, but it also individually harms the witnesses and alleged victims who cooperated in the prosecution of those actions. Several of the cases with missing entries involved domestic battery in the presence of a child, strangulation, and residential entry. And despite being made aware of these delays and omissions by multiple people, including his fellow judges, Respondent failed to take any corrective action until the Commission began receiving complaints.[119]

The Court noted that "[s]uspensions longer than thirty days 'reflect extremely serious judicial misconduct, just shy of what might warrant removal from office" and remarked that the respondent's actions and inactions warranted a severe sanction.[120] The Court then weighed the respondent's misconduct against the administrative failures and delays committed by the judges in *In re Kouros* (removal for possessing over 200 files with missing case entries after previous unsuccessful efforts by others to remediate situation),[121] *In re Hawkins* (sixty-day suspension for a pattern of excessive delays in PCR rulings, which

116. *Id.*
117. *Id.* at 406–07.
118. *Id.* at 407.
119. *Id.*
120. *Id.* at 406–07 (quoting *In re* Freese, 123 N.E.3d 683, 688 (Ind. 2019).
121. *In re* Kouros, 816 N.E.2d 21 (Ind. 2004).

led in one case to a two-year delay in releasing a defendant from prison),[122] and *In re Brown* (removal for various mismanagement, delays, and dereliction of duties on cases, including the delayed release from jail of ten defendants).[123]

Although the Court noted that the proposed sanction was less than the *Kouros, Hawkins,* and *Brown* sanctions after contested hearings, the Court credited the respondent for accepting responsibility.[124] The Court also pointed out that the other cases involved claims that the judges misled the Commission or failed to provide accurate information to the Court, which was not present in the respondent's matter.[125]

Ultimately, the Court approved the parties' agreement to a forty-five-day suspension but expressed grave concerns about the respondent's conduct.[126] The deciding factor for the Court appeared to be the respondent's willingness to attend additional education and to meet with a mentor judge to improve his case management and supervision skills.[127]

Two lasting impressions can be gleaned from *Norrick*. First, even if a judge is new to the role, pervasive and systemic administrative failures and lack of oversight can, and will, lead to a severe sanction, especially if actual harm results. Second, demonstrating a willingness to improve a deficient administrative skill (which led to the ethical violation), through additional training or mentoring, will be given serious consideration by the Court when deciding a sanction.

B. Failure to Shed Prior Roles Upon Taking Judicial Office – In re Cichowicz

If *In re Norrick* serves as a reminder to judges of the ethical peril arising from abdicating supervisory responsibilities, *In re Cichowicz* demonstrates the harm to public perception of the judiciary when an incoming judge fails to appreciate a judge's obligation to avoid even the appearance of impropriety.[128] In *Cichowicz*, the Court imposed a forty-five-day suspension without pay to the respondent judge for continuing to serve in a fiduciary position for a non-family member after taking office, failing to disclose his role as a trustee of a charitable foundation from which he ultimately obtained funds for court refurbishment projects, and abusing the prestige of office by employing a family member's business for some of those projects.[129]

Like the judge in *Norrick*, the respondent judge's misconduct in *Cichowicz* began when he took office.[130] Prior to taking the bench, the respondent began

122. *In re* Hawkins, 902 N.E.2d 231 (Ind. 2009).
123. *In re* Brown, 4 N.E.3d 619 (Ind. 2014).
124. *In re* Norrick, 233 N.E.3d at 408–09.
125. *Id.*
126. *Id.* at 409.
127. *Id.*
128. *In re* Cichowicz, 213 N.E.3d 1022, 1023 (Ind. 2023).
129. *Id.*
130. *Id.*

representing a wealthy, elderly man in 2013 on a marital dissolution matter.[131] The elderly man had two estranged adult children at the time and was the beneficiary of several valuable family trusts and the sole trustee of a 501(c)(3) charitable trust ("Cartwright Foundation").[132] In the years that followed, the client named the respondent as the client's attorney-in-fact and a co-trustee of the Cartwright Foundation.[133] The client subsequently resigned from the foundation, leaving the respondent as the sole trustee.[134] After consulting with independent counsel, the client also named the respondent as the beneficiary and successor trustee of the client's multimillion-dollar family trust.[135] The client later amended the trust to include the respondent's family as beneficiaries.[136]

Although the respondent took the Probate Court bench on January 1, 2019, he continued to act as the elderly client's attorney-in-fact and performed fiduciary duties on the client's behalf.[137] In February 2019, while he was still the sole trustee of the Cartwright Foundation, the respondent attended a meeting of a 501(c) charitable organization ("Friends of the JJC") created to raise funds to support the Probate Court and Juvenile Justice Center.[138] At that meeting, the respondent proposed renovating space in the Juvenile Justice Center to create a new courtroom, using funds from an anonymous source.[139] The respondent intended to use funds from the Cartwright Foundation to fund the project; the only member of the Friends of the JJC aware of the donation's source was an attorney who was newly elected to the board.[140]

In his role as trustee, the respondent issued a $100,000 check from the Cartwright Foundation's bank account in April 2019 to the attorney-board member's law firm, and the firm then issued checks totaling $100,000 to the Friends of the JJC.[141] At the respondent's recommendation, the Friends of the JJC then contracted with a general contractor to complete the renovation project without utilizing any formal bidding process.[142] At no point were the other board members of the Friends of the JJC or the county commissioners informed of the source of the donation or that the respondent served as the sole trustee of the charitable foundation making the donation.[143]

In the spring of 2019, the respondent sought to renovate breakrooms in the courthouse, using some of the funds the Cartwright Foundation had already

131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 1023–24.

donated to the Friends of the JJC.[144] Again, without engaging in a formal bidding process, the respondent asked his father if the father's tile company could complete the renovation.[145] Respondent's father agreed, and the father's ceramic company was paid approximately $24,800 from the Friends of the JCC.[146]

In 2020, the respondent sought to purchase new vehicles to be used by the Court Appointed Special Advocate program.[147] Employing the same plan he utilized for funding the courtroom project, the respondent issued a $60,000 check from the Cartwright Foundation to the attorney-board member's law firm, and the firm then issued a check to the Friends of the JJC.[148] The Friends of the JJC then purchased the vehicles from a car dealership owned and operated by the respondent's father.[149]

The Judicial Qualifications Commission and Respondent Cichowicz submitted a Conditional Agreement for Discipline for consideration by the Court, agreeing that the respondent violated the following Code of Judicial Conduct provisions by:

> Rule 1.2: Failing to avoid impropriety and to act at all times in a manner promoting public confidence in the judiciary's integrity;
>
> Rule 1.3: Abusing the prestige of office to advance the private interests of another;
>
> Rule 3.1(C): Engaging in extrajudicial activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality; and
>
> Rule 3.8: Serving in a fiduciary position for a person who is not a member of the judge's family.[150]

When considering whether to accept the parties' proposed Conditional Agreement, as with *Norrick,* the Court again placed great emphasis on the fact that the respondent's misconduct in *Cichowicz* "began as soon as he assumed judicial office."[151] The Court noted that the respondent's "misconduct permeated his entire four-year career as [a] probate judge" and "his act of keeping the source of funds anonymous suggest[s] the misconduct was willful, undermining the integrity of the judiciary."[152] Looking at prior disciplinary

144. *Id.* at 1024.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*

cases in which judges were disciplined for an inappropriate appointment to a friend,[153] improperly continuing a fiduciary relationship with a non-family member,[154] or engaging in judicial acts that gave the appearance of partiality to friends or family members,[155] the Court determined that the proposed forty-five-day suspension was within the range of sanctions previously given for similar misconduct.

The lasting impression from the *Cichowicz* case is a lesson about the danger of not appreciating the elevated ethical responsibilities of the judicial role. Although attorneys are often tasked with spearheading projects, negotiating deals, or bringing stakeholders together for capital projects, judges must be mindful of the duty to maintain judicial independence, integrity, and impartiality when considering close involvement in such projects. As illustrated in *Cichowicz,* funding a court improvement project through a plan to keep the source anonymous, especially when the judge holds the purse strings for the donating source, creates an appearance of impropriety. Such plans are similarly flawed when a judge utilizes the services/businesses of a family member or friend to complete a court project. Transparency is fundamental to maintaining a positive public perception of the judiciary, and *Cichowicz* demonstrates that attempts to circumvent such guardrails will be treated harshly in judicial discipline sanctions.

CONCLUSION

In the current survey period, the Indiana Supreme Court reaffirmed the ethical responsibilities lawyers bear to clients, to third parties, and to the judicial system. The attorney discipline decisions highlight that the breadth of harm caused and acts of deceit are two factors that the Court finds significantly aggravating to warrant more severe sanctions. The judicial discipline decisions show a similar trend, with the Court imposing severe sanctions, even on judges new to the bench, when the misconduct is widespread, causes actual harm to court participants, and seriously damages public perception of the judiciary.

153. *In re* Freese, 123 N.E.3d 683 (Ind. 2019) (suspending judge for 45 days without pay for appointing an unqualified friend as trustee of a trust and then was negligent when friend later stole over $500,000 of funds from the estate).

154. *In re* Hammond, 559 N.E.2d 310 (Ind. 1990) (suspending judge for 90 days without pay for partially maintaining a fiduciary relationship with a former client after taking the bench and used her judicial office to advance the interests of that former client).

155. *See In re* Funke, 757 N.E.2d 1013 (Ind. 2001) (suspending judge for 15 days without pay because of judge's actions regarding protective orders involving a company in which his parents had a property interest); *In re* Jacobi, 715 N.E.2d 873 (Ind. 1999) (suspending judge for 5 days without pay for granting an ex parte temporary restraining order when he was close friends with the requesting attorney and the attorney's family for many years).

RECENT DEVELOPMENTS IN INDIANA TAX CASE LAW: SURVEY 2024

ANDREW W. SWAIN*

I. INTRODUCTION

This survey article analyzes the tax decisions issued by the Indiana Supreme Court (Supreme Court) and the Indiana Tax Court (Tax Court) between December 1, 2023, and December 1, 2024. During this period, the Tax Court released twenty published opinions addressing substantive tax issues—seventeen related to real property tax, one involving income tax, one concerning sales tax, and one covering excise tax.[1]

While it does not cover every tax decision issued by the Tax Court during this time, this article highlights the most significant opinions rendered within the survey period.[1] The Tax Court decisions addressing substantive tax issues that are not discussed in detail include the following:

1. Camelot Co. v. Bartholomew County Assessor.[2]—Senior Judge Robb authored the opinion, deciding whether the Indiana Board of Tax Review ("IBTR") correctly determined that the taxpayer failed to challenge a decision issued by the Bartholomew County Property Tax Assessment Board of Appeals ("PTABOA") in a timely manner and whether the PTABOA used the correct land order to revalue and increase the taxpayer's taxable land value. [3]
2. Marion County Assessor v. Square 74 Assocs.[4]—Addressed whether the Indiana IBTR properly ruled against the Marion County Assessor by calculating a lower tax for the taxpayer's leasehold estate, thereby triggering Indiana's burden-shifting-and-reversion statute, Ind. Code section 6-1.1-15-17.2, and reverting the disputed assessment to the undisputed value from a prior tax year.[5]
3. Chevrolet of Columbus, Inc. v. Bartholomew County Assessor.[6]—Determined whether the IBTR exceeded the Tax Court's remand directive by allowing additional briefs from the parties and whether it acted arbitrarily and capriciously by upholding the taxpayer's property tax assessments without substantial and reliable evidence. The case was

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1. *See Tax Court Opinions*, IND. APP. DECISIONS, https://public.courts.in.gov/decisions?c=9550 [https://perma.cc/3U27-GYU9] (last visited Jan. 27, 2025).

2. 224 N.E.3d 1007 (Ind. T.C. 2023).

3. *Id.*

4. 228 N.E.3d 542 (Ind. T.C. 2024).

5. *Id.*

6. 230 N.E.3d 400 (Ind. T.C. 2024).

consolidated with *Bushmann, LLC v. Bartholomew County Assessor*,[7] as both cases involved identical facts, issues, and legal arguments, and the resolution of one was dispositive for the other.[8]

4. Ciceu v. Knox County Assessor.[9]—Decided whether the IBTR properly upheld the valuation of a property for tax assessment purposes and whether it ignored the taxpayer's claim that assessing officials failed to provide the required *Form 11*, Notice of Land and Improvements, as mandated by Indiana law.[10]
5. Osborn v. Schultz.[11]—Senior Judge Martha B. Wentworth authored the opinion, deciding whether the IBTR improperly upheld two years of property tax assessments, allegedly violating the taxpayer's natural and inalienable right to own real property as protected under the federal and Indiana constitutions. [12]
6. Convention Headquarters Hotels, LLC v. Marion County Assessor.[13]—Senior Judge Wentworth authored the opinion, addressing whether the county assessor selectively assessed only certain properties under construction within the county, thereby violating the taxpayer's federal and state constitutional rights by unfairly assessing its property under construction. [14]
7. Majestic Properties, LLC v. Tippecanoe County Assessor.[15]—Examined whether the IBTR correctly determined the "current use" of the property for tax assessment purposes and whether its decision to uphold the assessed value of the taxpayer's single-family home aligned with Indiana's legal standard for determining market value-in-use. [16]
8. Sparre v. St. Joseph County Assessor.[17]—Senior Judge Wentworth authored the opinion, considering whether the IBTR erred in upholding the property tax assessments for Sparre's home despite his claims that the Board's small claims procedures violated his constitutional rights and that the assessments violated the Equal Protection Clause.[18]

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7. 230 N.E.3d 407 (Ind. T.C. 2024).

8. *See generally* Chevrolet of Columbus, Inc. v. Bartholomew Cnty. Assessor, 230 N.E.3d 400; *Bushmann, LLC*, 230 N.E.3d at 407.

9. 232 N.E.3d 662 (Ind. T.C. 2024).

10. *Id.*

11. 238 N.E.3d 730 (Ind. T.C. 2024). On September 13, 2024, the taxpayer Osborn filed a Petition for Review with the Indiana Supreme Court. *See* Petition for Review, Osborn v. Schultz, No. 22T-TA-00012 (Ind. Sept. 13, 2024).

12. *Id.*

13. 236 N.E.3d 747 (Ind. T.C. 2024). On August 30, 2024, the taxpayer Convention Headquarters filed its Petition for Review with the Indiana Supreme Court. *See* Petition for Review, Convention Headquarters Hotels, LLC v. Marion Cnty. Assessor, No. 19T-TA-00021 (Ind. Aug. 30, 2024).

14. *Id.*

15. 241 N.E.3d 642 (Ind. T.C. 2024).

16. *Id.*

17. 242 N.E.3d 543 (Ind. T.C. 2024).

18. *Id.*

9. Bougie v. Chapman.[19]—Senior Judge Robb authored the opinion, addressing whether the IBTR erred in accepting the county assessor's valuation of Bougie's property using the sales comparison approach, determining that the second-floor addition constituted substantially finished living space, and issuing an entry order for inspection of the property that Bougie claimed violated his Fourth Amendment rights.[20]

10. Crandall v. Bartholomew County Assessor.[21]—Considered whether the IBTR erred in concluding that the repealed version of Indiana's burden-shifting statute, which required assessors to bear the burden of proof in property tax appeals where assessed values increased by more than 5%, did not apply to the Crandalls' appeals and, consequently, upholding the property assessments based on appraisals provided by the county assessor.[22]

The Tax Court also issued four decisions related to budgetary or land order issues. Because these cases do not involve the type of substantive tax issues that arise when a taxpayer directly challenges their own tax liability, they are not reviewed in this Article.[23]

During the survey period, the Indiana Tax Court issued more decisions than in prior periods—a development likely attributable to the involvement of several retired senior judges who presided over tax cases and issued final judgments. This increased reliance on senior judges is noteworthy, as their involvement in the Tax Court has historically been rare and typically limited to instances in which the regularly presiding Tax Court judge faced a potential conflict with the taxpayer or was temporarily unable to perform judicial duties. In addition to the decisions issued by the current Tax Court Judge, Justin McAdam,[24] several retired senior judges—former appellate court judges John Baker,[25] and Margret

19. 244 N.E.3d 987 (Ind. T.C. 2024).

20. *Id.*

21. 246 N.E.3d 350 (Ind. T.C. 2024)

22. *Id.*

23. The Tax Court decisions involving budgetary or land order issues decided during the survey period, but not reviewed in detail in this Article, include the following: Young v. Dep't of Loc. Gov't Fin., 237 N.E.3d 1175 (Ind. T.C. 2024) (Special Judge Robb authored the opinion); Luebke, et al. v. Ind. Dep't of Loc. Gov't Fin., 240 N.E.3d 186 (Ind. T.C. 2024) (Special Judge Welch authored the opinion); Luebke v. Ind. Dep't of Loc. Gov't Fin., 244 N.E.3d 976 (Ind. T.C. 2024) (Special Judge Welch authored the opinion); City of Carmel v. Ind. Dep't of Loc. Gov't Fin., 246 N.E.3d 832 (Ind. T.C. 2024) (Special Judge Baker authored the opinion).

24. *See* Andrew W. Swain, *Recent Developments in Indiana Tax Law: Survey 2023*, 57 IND. L. REV. 979, 1010 (June 2024) (discussing the appointment of the new Indiana Tax Court judge, Justin L. McAdam).

25. In July 2020, Judge Baker retired from the Indiana Court of Appeals and now serves as a senior judge. *See Judge John G. Baker*, IND. JUD. BRANCH, https://www.in.gov/courts/appeals/judges/john-baker/ [https://perma.cc/6VU9-SYX3] (last visited Jan. 27, 2025).

Robb,[26] retired Marion County Superior Court Judge Heather Welch,[27] and former presiding Tax Court Judge Martha Wentworth[28]—also contributed to the issuance of tax decisions during this period. For any case decided during the survey period mentioned in this article, readers should assume that the presiding Tax Court judge issued the decision unless otherwise noted in the text discussing the decision or in the footnote providing the case's citation.

Finally, the Indiana Supreme Court did not issue any tax-related opinions during this survey period, continuing a trend of limited activity in tax cases. In fact, the last time the Supreme Court issued tax decisions was in 2021, when it reversed the Tax Court in two cases: *Muir Woods Section One Association v. Marion County Assessor*[29] and *Southlake Indiana, LLC v. Lake County Assessor*.[30] Both of these cases involved real property taxes. However, tax cases are currently pending review before the Indiana Supreme Court, suggesting the potential for the Court to reassert its influence in Indiana tax law. These reviews will be identified within the context of the relevant decisions under review.

II. SIGNIFICANT INDIANA TAX COURT DECISIONS

A. Real Property Tax

1. Muir Woods Section One Association, Inc. v. Marion County Assessor.[31]—The issue before the Tax Court was whether the taxpayer appealing an assessor's assessment exhausted its administrative remedies before the IBTR before seeking an appeal before the Indiana Tax Court and if such a failure deprived the Tax Court of subject matter jurisdiction to hear and decide the appeal.[32]

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26. In February 2024, Judge Robb retired from the Indiana Court of Appeals and now serves as a senior judge. *See Judge Robb, '78, to Retire from Indiana Court of Appeals in Summer 2023*, IND. UNIV. ROBERT H. MCKINNEY SCH. OF L., (Feb. 10, 2023), https://mckinneylaw.iu.edu/news/releases/2023/02/judge-robb-78-to-retire-from-indiana-court-of-appeals-in-summer-2023.html [https://perma.cc/57HR-TRZT]; *Judge Margret G. Robb*, IND. JUD. BRANCH, https://www.in.gov/courts/appeals/judges/margret-robb/ [https://perma.cc/M7Z2-7BUD] (last visited Jan. 27, 2025).

27. In October 2023, Judge Welch retired from the Marion County Superior Courts in Indiana. *See* IL Staff, *Marion Superior Judge Welch to retire in February; applications open to fill vacancy*, IND. LAW. (Oct. 20, 2023), https://www.theindianalawyer.com/articles/marion-superior-judge-welch-to-retire-in-february-applications-open-to-fill-vacancy [https://perma.cc/4DAL-V25V]. The Indiana Supreme Court certified her as a special judge through December 31, 2024. Certification of Senior Judge, *In re* Cert. of Senior J. Heather A. Welch, No. 23S-MS-381 (Ind. Dec. 15, 2023).

28. *See* Swain, *supra* note 24, at 1011 (discussing the retirement of Judge Wentworth and her appointment as a special judge).

29. *Muir Woods (Muir Woods I)*, 154 N.E.3d 877 (Ind. T.C. 2020), *rev'd in part*, 172 N.E.3d 1205 (Ind. 2021).

30. 160 N.E.3d 1156 (Ind. T.C. 2020), *rev'd*, 174 N.E.3d 177 (Ind. 2021).

31. *Muir Woods II,* 225 N.E.3d 236 (Ind. T.C. 2023) (Senior Judge Robb authored the opinion).

32. *Id.*

This case marked the Tax Court's second consideration of a property tax dispute it initially decided in 2021 in favor of the Assessor. Muir Woods Section One Association, Inc., Muir Woods, Inc., Spruce Knoll Homeowners Association, Inc., and Oakmont Homeowners Association, Inc. are all homeowners' associations (the "HOAs") that own real property located in Marion County, Indiana.[33] In *Muir Woods I*, the Indiana Supreme Court subsequently reviewed that decision, partially reversing it and remanding the case to the IBTR. The Supreme Court held that while the assessor's initial determination of a property's base rate was subjective, the application of a mandatory discount for common areas was an objective requirement.[34] On remand, the IBTR was instructed to revise its decision to align with this reasoning.[35]

Following remand, the IBTR scheduled a hearing, despite the HOAs' requests for a case management plan and additional discovery time.[36] The HOAs filed motions, including for partial summary judgment, and a deposition notice, but the IBTR struck their filings for procedural noncompliance and dismissed their appeal after they failed to attend the remand hearing on December 15th.[37] The HOAs sought reinstatement of their appeal and eventually filed a petition with the Tax Court, asserting that the IBTR's dismissal contradicted Indiana law and procedural rules.[38]

To support their challenge, the HOAs argued that the IBTR's decision dismissing their administrative appeal contradicted the Indiana Rules of Trial Procedure and was invalid in all the ways that statutorily permit the Tax Court to grant relief from a final determination.[39] Specifically, the HOAs argued they had timely informed the IBTR it needed to conduct discovery before any remand evidentiary hearing and timely sought a case-management schedule that facilitated this.[40] Rather than logically grant those requests, the HOAs argued, the IBTR illogically ignored them, prematurely scheduled an evidentiary hearing, denied the HOAs' summary-judgment motion, and, when the HOAs failed to attend the hearing, dismissed their administrative appeal.[41]

In response, the Assessor asserted, in essence, that the HOAs' arguments were irrelevant because the Tax Court lacked subject matter jurisdiction to either consider them or decide the HOAs' tax appeal.[42] The Assessor argued that the Tax Court lacked subject matter jurisdiction because the HOAs had not received

33. *Id.* at 238.
34. *Muir Woods I*, 172 N.E.3d at 1205.
35. *Id.* at 1218.
36. *Muir Woods II*, 225 N.E.3d at 239.
37. *Id.*
38. *Id.* at 241.
39. *Id.* (citing IND. CODE § 33-26-6-6(e) (2017), which lists all the invalid forms an IBTR action can take that permit the Tax Court to grant a party relief from a final determination issued by the IBTR.).
40. *Id.*
41. *Id.*
42. *Id.* at 242.

a final determination from the IBTR that they could challenge before the Tax Court.[43] The Tax Court agreed with the Assessor's argument.

The Tax Court noted that it has exclusive subject matter jurisdiction to review all original tax appeals.[44] An original tax appeal is premised on the IBTR issuance of a final determination.[45] The Tax Court noted that this requirement "embodies the principle basic to all administrative law that a party seeking judicial relief from an agency action must first establish that all administrative remedies have been exhausted."[46] In other words, the court asserted that a party's failure to acquire a final determination from the IBTR equaled its failure to exhaust administrative remedies.[47] This failure prohibited an appeal to the Tax Court.[48]

The Tax Court said that, when the IBTR dismissed the HOAs' appeal, it had issued an appealable final determination.[49] Rather than appeal that determination, however, the HOAs sought a rehearing asking the IBTR to reconsider its final determination dismissing the appeal.[50] The IBTR took this rehearing request under advisement.[51] The Tax Court said that, pursuant to the relevant statute, if the IBTR grants a rehearing request:

> (1) it may conduct the additional hearings that it determines necessary, or it may review the written record without additional hearings; and
> (2) it shall issue a final determination not later than ninety days after notifying the parties that it will rehear the final determination.[52]

Furthermore, the court noted that a party's request for rehearing does not extend the date by which it must file a petition for judicial review unless the rehearing request is granted.[53] The Tax Court held that, pursuant to the unambiguous controlling Indiana statute (i.e., Indiana Code section 6-1.1-15-5(a)), once the IBTR granted a request for rehearing, "its original final determination cease[d] to carry any weight as the [IBTR] must issue a new final determination in the matter that either affirm[ed] or modif[ied] the original final determination."[54] Therefore, when the HOAs moved to vacate the IBTR's December 22, 2021

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43. *Id.*
44. *Id.* (citing I.C. §§ 33-26-3-1, -3 (2023)).
45. *Id.* (citing I.C. § 33-26-3-1(2) (2023)).
46. *Id.* (citing State Bd. of Tax Comm'rs v. Ispat Inland, Inc., 784 N.E.2d 477, 482 (Ind. 2003)).
47. *Id.* (citing State ex rel. Att'y Gen. v. Lake Superior Ct., 820 N.E.2d 1240, 1247 (Ind. 2005); *Ispat Inland, Inc.*, 784 N.E.2d at 482).
48. *Id.*
49. *Id.* at 243.
50. *Id.* (citing I.C. § 6-1.1-15-5(a) (2021), providing that once the IBTR issues a final determination, a party has fifteen days to request a rehearing).
51. *Id.*
52. *Id.* (citing I.C.§ 6-1.1-15-5(a) (2021)).
53. *Id.*
54. *Id.* (internal quotation marks omitted).

dismissal, and the IBTR took the motion under advisement and scheduled another remand hearing, the original dismissal order ceased to be an appealable final determination because the administrative review process had not yet been concluded.[55] The Tax Court deemed the IBTR's taking the HOAs' motion of a rehearing under advisement and its scheduling a new remand hearing as a renewal of the administrative review process that the HOAs failed to exhaust when they failed to wait for the IBTR to issue a final decision resolving the renewed administrative process.[56] The court cited no precedent to support this conclusion. Despite this, the Tax Court held that, because the HOAs prematurely sought an appeal before the Tax Court during the renewed administrative process, it must be dismissed.[57]

The way the Tax Court applied the tax statute it identified as controlling (i.e., Indiana Code section 6-1.1-15-5(a)) to the facts presented in this second *Muir Woods* case is questionable. On January 11th, according to the Tax Court's characterization of the case's facts, the IBTR did not "grant" the motion for rehearing. On that date, the IBTR merely took the motion "under advisement" and, rather than schedule a rehearing proceeding, rescheduled the remand evidentiary hearing for February 11, 2022 (the same hearing the IBTR had previously scheduled and rescheduled in the past). The IBTR said it would consider all remaining open matters at that hearing. The IBTR did not say it was conducting a rehearing as mandated in Indiana Code section 6-1.1-15-5(a). Also, according to Indiana Code section 6-1.1-15-5(a), the IBTR has fifteen days after receiving a petition for a rehearing to "determine whether to *grant* a rehearing." The IBTR did not make that determination on January 11, 2022, but merely delayed it to a later date (that is, February 11, 2022), one well beyond the fifteen-day determination deadline mandated by the statute. Finally, pursuant to § 5(a), the IBTR's failure "to grant a rehearing not later than fifteen . . . days after receiving the petition shall be treated as a final determination to deny the petition."[58]

According to the Tax Court, the IBTR's order dismissing the appeal it issued on December 22, 2021, constituted an appealable final determination. Pursuant to Indiana Code section 6-1.1-15-5(b), the HOAs had forty-five days to appeal the IBTR's December dismissal—that is, the HOAs' appeal of the dismissal was due on or before February 7, 2022. As the Tax Court correctly noted, a party's request for rehearing does not extend the time by which it must file a petition for judicial review unless the rehearing request is *granted*.[59] Accordingly, the HOAs' deadline for appealing the IBTR's December 2021 dismissal order was February 7, 2022—that is, the date on which the HOAs, in

55. *Id.*
56. *Id.*
57. *Id.* at 244.
58. *See* I.C. 6-1.1-15-5(a) (2021).
59. *Muir Woods II*, 225 N.E.3d at 243 (citing I.C.§ 6-1.1-15-5(a) (2021), which states that "[a] petition for a rehearing does not toll the time in which to file a petition for judicial review unless the petition for rehearing is *granted*" (emphasis added)).

fact, filed their appeal to the Tax Court. The IBTR did not decide to grant the rehearing within the statutorily mandated fifteen-day period, thereby rendering that omission itself an appealable final determination. Therefore, because the IBTR had not granted the rehearing within the statutorily mandated fifteen-day period, and because a mere request for rehearing did not toll the period in which the HOAs needed to file their original tax appeal with the Tax Court, the HOAs had no statutorily mandated choice but to file their appeal on February 7, 2022, the appeal deadline date.

According to Indiana Code section 6-1.1-15-5(a), "granting" a motion to rehear an otherwise appealable final determination eliminates that determination's appealability and renews the administrative review process that leads to a new superseding appealable final determination. According to that same section, section 5(a), taking a motion to rehear an appealable final determination "under advisement" does not affect the appealability of that determination. Granting a rehearing motion or taking the rehearing motion under advisement is not the same judicial action per the statute's verbiage. The Tax Court mistakenly equated them and did so without citing any legal authority. The HOAs correctly realized the lack of statutory equivalence between granting a rehearing motion and merely taking it under advisement and, in a timely manner, filed its appeal challenging the IBTR's appealable dismissal determination. Accordingly, it appears that the Tax Court erroneously dismissed the HOAs' statutorily valid appeal in ruling in the Assessor's favor.

2. Slatten v. Hamilton County Assessor.[60]—The issue before the Tax Court was whether the IBTR correctly interpreted the property tax statute governing the standard homestead deduction[61] to require that an individual purchasing residential real property under a contract record a memorandum of contract with the county recorder's office by December 31 of the assessment year to qualify for the deduction.[62]

On December 31, 2020, the taxpayer, Pamela Slatten ("Slatten"), contracted to purchase a home in Carmel, Indiana that she had lived in since October 2020.[63] Also on that date, she prepared and signed an application for Indiana's homestead deduction (i.e., the *Claim for Homestead Property Tax Standard/Supplemental Deduction*—State Form 5473 [or Form HC10]).[64] On January 5, 2021, Slatten recorded a memorandum of contract authenticating her residential land purchase in the Hamilton County Auditor's Office (the

60. 226 N.E.3d 270 (Ind. T.C. 2023). This marked Judge Justin McAdam's first ruling as the newly appointed Indiana Tax Court Judge.

61. During the 2020 assessment year, the standard homestead deduction removed from annual property taxation the first $45,000 of the assessed value of a taxpayer's residential property. *See* I.C. § 6-1.1-12-37(c)(2) (2020); *see also Slatten,* 226 N.E.3d at 272.

62. *Slatten,* 226 N.E.3d at 272.

63. *Id.*

64. *Id. See also* The Dep't of Local Gov't Fin., *Deduction Forms*, https://www.in.gov/dlgf/forms/deduction-forms/ [https://perma.cc/KF87-NP7N] (providing State Form 5473 (*i.e.*, Form HC10)).

"Auditor") and filed her completed Form HC10.[65] The Auditor granted Slatten the homestead deduction for the 2021 assessment year.[66] It denied, however, her the deduction for the 2020 assessment year because the Auditor believed that the relevant Indiana Tax Statute, 6-1.1-12-37, required Slatten to record her memorandum of contract by December 31, 2020, to be eligible for the deduction that assessment year.[67] Slatten challenged the Assessor's deduction denial for 2020 to the Hamilton County PTABOA.[68] Getting no favorable relief from the PTABOA, Slatten appealed her deduction's denial to the IBTR.[69] On February 1, 2022, the IBTR denied her appeal and ruled in the Assessor's favor.[70] Slatten filed an original tax appeal with the Indiana Tax Court in a timely manner.[71]

The method by which a homeowner taxpayer can claim a homestead deduction, which is at issue in this case, requires the taxpayer to complete and date the homestead deduction application form (i.e., the State Form 5473 [Form HC10]) on or before December 31 of the assessment year but file the form with the county auditor on or before January 5 of the next year.[72] As a part of this application and approval process, the taxpayer must establish that the real property for which he or she seeks the deduction is his or her homestead. If a taxpayer buys the real property in question via a land contract,[73] he or she establishes this property as a qualifying homestead property by recording the contract or memorandum of contract[74] that evidences the purchase in the county recorder's office.[75] In the context of defining what real property constitutes a homestead property, the homestead deduction statute specifies this recording requirement in the following manner:

> "Homestead" means an individual's principal place of residence . . . that . . . the individual is buying under a contract *recorded* in the county recorder's office, or evidenced by a memorandum of contract *recorded*

65. Slatten v. Hamilton Cnty. Assessor, 226 N.E.3d 270, 272 (Ind. T.C. 2023).
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *See* I.C. § 6-1.1-12-37(e) (flush language) (providing that "[t]o obtain the deduction for a desired calendar year in which property taxes are first due and payable, the statement must be completed and dated in the immediately preceding calendar year and filed with the county auditor on or before January 5 of the calendar year in which the property taxes are first due and payable.").
73. *See, e.g.*, I.C. § 24-9-2-9.5 (providing that a "'land contract" means a contract for the sale of real estate in which the seller of the real estate retains legal title to the real estate until the total contract price is paid by the buyer"); I.C. § 36-2-11-20(a) (providing that a "'contract' means an agreement for a seller to sell real estate to a purchaser that provides for the purchaser to pay the purchase price to the seller in periodic installments, with the seller retaining record title to the real estate and the purchaser acquiring equitable title to the real estate.").
74. *See, e.g.*, I.C. § 36-2-11-20(g) (describing the form that a memorandum of contract must take to replace the land contract for recording purposes.).
75. *See* I.C. § 6-1.1-12-37.

in the county recorder's office. . . .[76]

The specific question before the Tax Court was this: when must a taxpayer effect the recording of a land contract or memorandum of contract with the county recorder's office to qualify for the homestead deduction in a particular calendar year? More specifically, for Slatten to qualify for the homestead deduction in 2020, must she have presented the contract or memorandum of contract to the Hamilton County Recorder's Office (the "Recorder's Office") for recording on or before the last day of 2020 (i.e., December 31), or could she have presented the contract to the Recorder's Office for recording on or before the fifth day of the next year's first month (i.e., January 5) and remained eligible for the deduction for 2020? The answer to this question turns on the meaning of the word "recorded" as used in the homestead deduction statute—that is, Indiana Code section 6-1.1-12-37(a)(2)(B)(ii). The Tax Court answered this question in the IBTR's favor and upheld its final determination, rejecting Slatten's claim of entitlement to a homestead deduction for tax year 2020.[77] Was the court correct in taking this action? The short answer is no.

To answer the question at issue in her favor, Slatten first asserted a grammatical argument to the Tax Court. She argued that the term "recorded" as used in section 37(a)(2)(B)(ii) of the Indiana Code should be understood as a past participle and, therefore, as a "nonfinite verb that has no tense."[78] She concluded that "one cannot infer a deadline [i.e., December 31, 2020], a point in time by which an act must be completed, from a past participle."[79] In other words, she contended that her submitting the memorandum of contract on January 5, 2021 for recording was still timely for claiming the homestead deduction for the 2020 assessment year.

The Tax Court disagreed with Slatten's grammatical argument, saying that it "actually work[ed] against her."[80] The court said that, although past participles do not have a specific tense, they do convey a sense of completion because "they convey a perfective aspect."[81] The court explained that past participles such as "recorded" inherently signal that the action (in this case, the recording of the memorandum of contract) is completed.[82] Therefore, the Tax Court concluded that "[t]hese grammatical nuances confirm[ed] that the recording required by the homestead definition [statute] must be completed during the assessment year for which a deduction is sought" to qualify the real property as a "homestead."[83] The Tax Court's grammatically premised interpretive conclusion is arguably a

76. *Id.* (emphases added).
77. *Slatten,* 226 N.E.3d at 276.
78. *Id.* at 273.
79. *Id.* (brackets added by Tax Court omitted).
80. *Id.*
81. *Id.* (original quotation marks omitted).
82. *Id.* at 274.
83. *Id.*

non-sequitur and, therefore, questionable.[84]

A court's use of English grammar rules to interpret the meaning of a statute's wording to ascertain the statute's meaning is always problematic because it presumes the court correctly understands: (1) the rules' meanings, (2) the manner of their proper application, and (3) the message or messages those rules' application conveys to the statute's readers. Also, a court's understanding of the rules and its application of them will likely be heavily influenced by its subjective beliefs and preferences regarding what constitutes, rightly or wrongly, proper legal writing or proper writing in general.

Nevertheless, while it is true that past participles generally indicate completed actions, they do not inherently specify the *timing* of that completion. Past participles can refer to actions completed before, during, or after the time of reference.[85] Accordingly, the past participle nature of the word record—that is, recorded—could denote merely the general idea that the contract or memorandum of contract must be publicly published (i.e., undergo the recording process as defined by Indiana law) in the county recorder's office before the auditor can grant a homestead deduction pursuant to a timely filed deduction application (i.e., the State Form 5473 [Form HC10]) rather than denote the specific idea that it must be published (i.e., recorded) in the recorder's office "in the year" for which the deduction is sought. The use of the past participle "recorded" in the statute does not explicitly indicate that the recording must be completed within the assessment year.[86] The Tax Court does not explain why the more narrow and specific denotation of "recorded" is more compelling, and therefore controlling, than the broader, more general one. In other words, the court does not explain the legitimacy of its inference or cite any precedent supporting it. The Tax Court's conclusion that the word "recorded" mandates a specific completion due date (i.e., the "consequent" in logical reasoning) of the contract's recording does not match the past participle nature of the word "recorded" that merely denotes the general idea of completion (i.e., the antecedent), thereby rendering the inference underlying the consequential conclusion, and therefore, the conclusion itself, invalid.[87]

The Tax Court's deductive reasoning journey down the esoteric rabbit hole

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84. *See* Andrew W. Swain, *Pitfalls of Relying Only on Grammer for Statutory Interpretation*, 112 TAX NOTES (ST.) 641 (May 27, 2024) (explaining in detail how the Tax Court's mistaken application of the grammar canon of statutory construction, and its failure to consider other interpretive canons, resulted in a misreading of Indiana's homestead deduction statute; also explaining how The court misinterpreted the past participle "recorded" to imply a December 31st deadline, when in fact past participles do not specify when an action must be completed, but merely that it must be completed at some point—specifically, before the deduction is granted in this case).

85. *See, e.g.*, *In re* Roberts, 431 B.R. 914, 917–18 (Bankr., S.D. Ind. 2010) (stating that, "[a]s noted in one leading grammar treatise, both present and past participles can be used for referring to past[,] present[,] or future time and the past participle signifies perfectiveness or completion, but is not restricted to past time" (internal quotation marks omitted).).

86. IND. CODE § 6-1.1-12-37(a)(2)(B)(II) (2022).

87. *Slatten*, 226 N.E.3d at 274.

of English grammar and past participles caused it to lose sight of the real statutory interpretive question—that is, what is the substantive legal meaning of the word "recorded" under Indiana statutory law? Recording (including "record," "recording," and other permutations of the word "record") an instrument is merely the statutorily prescribed process by which a document eligible for recording is placed into official county records.[88] Recording legally significant instruments with a county recorder's office serves several important purposes. Recording primarily provides a public, reliable, and readily locatable historical record of legal transactions, property rights, or other legally significant actions that alert the public to the instruments' existence and any related rights or claims (e.g., establishing creditor priority, creating a chain of custody, or satisfying a legal requirement).[89] The recording process also gives the public access to the instruments.[90]

Recording the land contract or memorandum of contract as mandated in the homestead deduction statute, Indiana Code section 6-1.1-12-37(a)(2)(B)(ii) merely fulfills a legal requirement (i.e., recording the taxpayer's residential rights in the property he or she purchased by contract) that the taxpayer must satisfy *before* the county assessor grants the taxpayer a homestead deduction for whatever tax year the timely filing of their homestead deduction application qualified them.[91] In other words, the recording of the contract with the county auditor must be *completed* before the county auditor can grant a homestead deduction requested via a properly prepared and timely filed homestead deduction application. It is this general notion of "completion" to which the word "recorded" as the past participle form of "record" refers and mandates and not the exact date by which the recording must be completed. Accordingly, a more accurate interpretation of the homestead deduction statute's use of the word "recorded" focuses on whether the property meets the requirements for the homestead deduction at the time the deduction is sought via the timely filing of the applicable application rather than whether the statute imposes a rigid temporal requirement based solely on the form of the verb "recorded."

To further support her argument, Slatten noted Indiana Code section 6-1.1-12-45(f), which provides that:

> A person who is required to record a contract with a county recorder in order to qualify for a deduction under this article must record the

88. *See, e.g.*, IND. CODE § 36-2-11-8 (2024) (establishing the county recorder's duty to record "all instruments that are proper for recording); I.C. §§ 36-2-11-10, -12 through -14.5, -16, -22, -23, -25 (describing the various instruments eligible for recording and establishing the methods by which county recorders record those various instruments for public availability). *See also* Reid Kress Weisbord & Stewart E. Sterk, *The Commodification of Public Land Records*, 97 NOTRE DAME L. REV. 507 (2022) (discussing and describing the functions of recording instruments, particularly land deeds, with county recorder offices).

89. I.C. § 6-1.1-12-37(a)(2)(B)(II) (2022).

90. *Id.*

91. *Id.*

> contract, or a memorandum of the contract, *before, or concurrently with*, the filing of the corresponding deduction application.[92]

Slatten argued that the statute's verbiage allowed her until January 5, 2021, to record her memorandum of contract because that was the day she filed her homestead deduction application.[93]

The Tax Court rejected this argument. It said that section 45(f) of the Indiana Code established the sequence of actions (i.e., between recording and filing) required for obtaining a homestead deduction.[94] Though section 45(f) mandated that any required recording must be done before or concurrently with the filing of the deduction application, the statutory section did not extend the deadline for recording a memorandum of contract.[95] Instead, it placed a limit on the time allowed for recording by prohibiting recording after filing a deduction application.[96] The Tax Court said that Slatten's interpretation of Section 45(f) could only be accepted if the mandatory word "must" in section 45(f) is replaced with the permissive word "may."[97] In any case, assuming that section 45(f) did establish some deadline for when a taxpayer could submit a memorandum of contract to satisfy a condition for qualifying for the homestead deduction, The court said that a statute such as section 45(f) cannot override a deadline established by another statutory provision such as, in this instance, the recording deadline the court interpreted Indiana Code section 6-1.1-12-37(a)(2)(B)(ii) as establishing via its use of the past participle "recorded."[98]

The Tax Court appears to assert another *non-sequitur* argument. First, as previously explained, the homestead deduction statute at Indiana Code section 6-1.1-12-37(a)(2)(B)(ii) did not establish a date-certain deadline by which the taxpayer must submit the memorandum of contract for recording by the county recorder.[99] Therefore, there was no deadline for section 45(f) of the Indiana Code to override. Second, though the Tax Court correctly said that a property tax statute created a sequence of actions, that statute, however, was the homestead deduction statute, section 6-1.1-12-37(a)(2)(B)(ii), and not, as the court asserted, section 6-1.1-12-45(f).[100] This sequence of action is not between recording and filing, but between recording the memorandum of contract and, by effecting this recording, satisfying a prerequisite requirement that must be performed *before* the county assessor can consider granting the deduction.

The other requirement the taxpayer must satisfy is filing a homestead

92. *Slatten,* 226 N.E.3d at 275 (citing I.C. § 6-1.1-12-45(f) (emphases added)).
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*

deduction application on time.[101] Indiana Code section 6-1.1-12-45(f) provides that the taxpayer can submit the memorandum of contract "concurrently with the filing of the corresponding deduction application."[102] Because section 6-1.1-12-37(e) provides that a taxpayer can file the deduction application on or before January 5 of the next calendar tax year and still receive the deduction for the immediately preceding calendar tax year, and because section 6-1.1-12-45(f) provides that the taxpayer can submit the memorandum of contract to the county recorder for recording simultaneously with the filing of the corresponding deduction application with the county assessor, a taxpayer can seek recording the memorandum of contract with the county recorder on or before January 5th of the next calendar tax year and still receive the deduction for the immediately preceding calendar tax year.[103] Furthermore, the court's reliance on the term "must" in section 6-1.1-12-37(e) to support its interpretation is arguably misplaced.[104] The use of "must" does not necessarily indicate a strict deadline but rather emphasizes the requirement of recording the memorandum of contract before a county auditor can grant the deduction or consider doing so.

Because the Tax Court's decision did not invalidate the deduction statute on constitutional grounds or was premised on such grounds, the Indiana General Assembly could easily amend the homestead deduction statute found at Indiana Code section 6-1.1-12-37(a)(2)(B)(ii), and override the court's decision in *Slatten*. In fact, during the 2023–24 legislative session, that is what the Indiana legislature did. The 123rd Indiana General Assembly passed Indiana Enrolled Act number 1120, section 14, in which the legislature amended the deduction statute to clarify that taxpayer can, on or before January 15 of the next calendar tax year, file his or her homestead deduction application with the county assessor and satisfy the recording requirement on or before that same date.[105]

3. Shapiro v. Hamilton County Assessor.[106]—The issue before the Tax Court was whether the IBTR correctly determined that two taxpayers' Indiana property was ineligible for Indiana's homestead deduction during the 2017 through 2020 tax years.[107]

In 1991, Brian J. Shapiro and Sarah K. Shapiro ("Shapiros") bought a single-story home on one acre in Zionsville, Indiana ("Indiana Property"), titled in their joint names and serving as their marital home.[108] From 2017 to 2020, this property benefitted from Indiana's homestead deduction.[109] In June 1996,

101. *See* IND. CODE § 6-1.1-12-45(f) (2024).

102. *Id.*

103. *See* I.C. §§ 6-1.1-12-37(e), -45(f).

104. *See* I.C. § 6-1.1-12-37(e).

105. *See* IND. ENROLLED ACT NO. 1120, § 14 (2024) (amending I.C. § 6-1.1-12-37 and adding section (f)), effective Jan. 1, 2025).

106. 231 N.E.3d 291 (Ind. T.C. 2024) (Senior Judge Wentworth authored the opinion), *trans .denied*, 2024 Ind. LEXIS 25 (Ind. 2024) (Chief Justice Rush and Justice Slaughter voted to grant review).

107. *Id.*

108. *Id.* at 292.

109. *Id.*

Sarah Shapiro acquired property in Omena, Michigan, initially holding the title alone.[110] In January 2016, she refinanced and transferred the title to both her and her husband through a quitclaim deed, but later that year, they executed another quitclaim deed returning sole ownership to her.[111] From 2017 to 2020, she secured Michigan's *Principal Residence Exemption* ("Michigan PRE") for this property.[112]

In December 2020, after a review of the county's homestead deductions, the Hamilton County Auditor ("Auditor") notified the Shapiros that it had removed their homestead deductions for the years 2017 through 2019 because their Indiana Property was not their principal place of residence during that time.[113] The Assessor informed the Shapiros that they owed $12,319.57 in extra property taxes and penalties for the Indiana Property.[114] The Auditor also removed their Indiana homestead deduction for 2020.[115] The Shapiros challenged the Auditor's actions unsuccessfully to the Hamilton County PTABOA, then to the IBTR.[116]

Before the IBTR, Brian Shapiro testified that, since marrying in 1989, he and his wife had resided in Indiana, operating Shapiro's Delicatessen in Indianapolis, and consistently paid their Hamilton County property and Indiana income taxes.[117] He noted, however, that since 2016, his wife had lived in Michigan over 200 days a year, where she voted, paid taxes, and held a driver's license.[118] The Shapiros argued that their property had qualified for Indiana's homestead deduction[119] from 2017 to 2020 because the deduction differed from the Michigan PRE. The IBTR rejected the Shapiros' argument and upheld the Assessor's deduction denial and delinquent tax assessment.[120] It held that the Michigan PRE and Indiana's homestead deduction were substantially similar—each exempting a principal residence from property taxes based on its value.[121]

The Shapiros challenged the IBTR's decision to the Indiana Tax Court.[122] The court first considered the Shapiros' eligibility for Indiana's homestead deduction in 2017.[123] For the 2017 tax year, Indiana's homestead deduction statute provided that individuals are ineligible for multiple deductions and cannot receive a homestead deduction if they reside with someone who already

110. *Id.*
111. *Id.*
112. *Id. See also* MICH. COMP. LAWS §§ 211.7cc, 211.7dd (2018).
113. *Id.* at 292–93.
114. *Id.* at 293.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *See* IND. CODE § 6-1.1-12-37 (2017) (Indiana's homestead deduction statute).
120. *Shapiro*, 231 N.E.3d at 294.
121. *Id.*
122. *Id.*
123. *Id.* at 297.

has one.[124] There was a specific exemption if the individual's spouse claimed a similar deduction on an out-of-state residence, subject to certain criteria.[125] To qualify, an affidavit confirming that neither spouse has ownership in the other's primary residence must be filed with the county auditor within sixty days of the disqualification.[126] The Tax Court concluded that the administrative record showed that the Shapiros did not file such a qualifying affidavit in 2017 and could not file one because Mrs. Shapiro owned both the Indiana and Michigan Properties.[127] Accordingly, the Tax Court concluded that the Shapiros were ineligible for the deduction in 2017.[128]

The court turned next to the 2018 through 2020 tax years.[129] For those years, the applicable homestead deduction statute specified that individuals receiving a homestead deduction are disqualified if they also receive an *equivalent* deduction in another state.[130] Disqualified taxpayers must file a certified statement with the relevant county auditor within sixty days of becoming ineligible.[131] Though a married couple is typically limited to a single homestead deduction, Indiana's deduction statute allowed an exception when each spouse can claim a separate deduction on two distinct properties under certain conditions.[132] This exception applied if one spouse's property is outside Indiana.[133] To qualify, an affidavit must be filed with the applicable county auditor stating: (a) the out-of-state location where the other spouse is claiming a *substantially similar* deduction; (b) that each spouse has a separate principal residence; (c) that neither spouse holds ownership in the other's principal residence; and (d) that neither spouse has claimed a similar deduction on any other property in the same tax year.[134]

The Shapiros argued that the IBTR incorrectly interpreted the Indiana deduction statute by treating "equivalent" in the disqualification section (i.e., Indiana Code section 6-1.1-12-37(f)(2)(B) ("section 37(f)(2)(B)")) as synonymous with "substantially similar" in the exception section (i.e., Indiana Code section 6-1.1-12-37(n) ("section 37(n)")).[135] They claimed this confusion led the IBTR to overlook key differences between Indiana's homestead deduction and the Michigan PRE, thus wrongly concluding the two were equivalent.[136] The Tax Court concluded that the outcome of the parties' dispute turned on the meaning of the word "equivalent" as it is used in section

124. *Id.* (citing I.C. § 6-1.1-12-37(f)(2) (2017)).
125. *Id.* (citing I.C. § 6-1.1-12-37(n) (2017)).
126. *Id.* (citing I.C. § 6-1.1-12-37(f) (2017) (flush language)).
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* (citing I.C. § 6-1.1-12-37(f)(2)(B) (2018)).
131. *Id.* (citing I.C. § 6-1.1-12-37(f) (2018) (flush language)).
132. *Id.*
133. *Id.* at 295.
134. *Id.* at 295–96 (citing I.C. § 6-1.1-12-37(n) (2017)).
135. *Id.* at 296.
136. *Id.*

37(f)(2)(B).[137] The court said that the Shapiros claimed that the word "equivalent," as used in section 37(f)(2)(B), meant "virtually identical," while the Assessor asserted that it meant "substantially similar."[138]

The Tax Court said that WEBSTER'S DICTIONARY defined "equivalent" as "equal in force, amount, or effect" and "virtually identical," while BLACK'S LAW DICTIONARY echoes this with "equal in value, effect, or significance."[139] However, neither dictionary equates "equivalent" with "identical."[140] Conversely, "substantial" is defined as "considerable in amount or value,"[141] and "similar" means having common characteristics or being comparable.[142] This suggests, the court said, that while "equivalent" and "substantially similar" both serve as comparative standards, they convey different degrees of resemblance.[143] The distinct choice of "equivalent" in section 37(f)(2)(B) and "substantially similar" in "section 37(n) by Indiana's Legislature implies they are not intended to mean the same thing.[144] The court concluded that this intentional use of different terms across the statute indicates that "equivalent" in section 37(f)(2)(B) should be understood as "virtually identical," not merely "similar."[145]

The Shapiros argued that the Michigan PRE and Indiana's homestead deduction were not equivalent.[146] First, the Shapiros contended that they cannot be considered equivalent because the former is an exemption and the latter a deduction.[147] The Tax Court disagreed. It noted that, despite those technical differences, the core function of both the Michigan PRE and Indiana's deduction is essentially the same—that is, they both provide property tax relief for the homeowner's principal residence, indicating their equivalence in practice.[148]

Second, the Shapiros argued that the Michigan PRE and Indiana's homestead deduction were not equivalent because of key differences between them.[149] The Michigan PRE was narrower in scope, specifically eliminating liability for certain school taxes imposed by one taxing unit, local school districts, whereas Indiana's deduction was broader in scope, affecting county-wide tax revenues.[150] The Tax Court rejected this argument, holding that "[t]his

137. *Id.*
138. *Id.* at 297.
139. *Id.* at 298 (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 769 (2002 ed.), and BLACK'S LAW DICTIONARY 682 (11th ed. 2019)).
140. *Id.*
141. *Id.* (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 2280 (2002 ed.), BLACK'S LAW DICTIONARY 1728 (11th ed. 2019)).
142. *Id.* (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 2120 (2002 ed.)).
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 299.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*

distinction show[ed] that the two [were] not identical, but [did] not demonstrate that they [were] not equivalent because they both affect[ed] local school funding."[151]

Third, the Shapiros argued that the Michigan PRE was not equivalent to Indiana's homestead deduction because the Michigan PRE, unlike Indiana's deduction, did not influence state property taxes, property assessments, or the equalization process in Michigan.[152] The Tax Court rejected this argument, noting that those differences were misleading.[153] Like Michigan's property tax, Indiana's is assessed and collected locally, not at the state level.[154] Additionally, neither Indiana's homestead deduction nor the Michigan PRE altered the property's assessed value, though both reduced the property tax liability on a certain assessed value.[155] Furthermore, neither impacted the equalization processes in their respective states, which occurred before tax bills were issued.[156]

Finally, the Shapiros argued that recognizing a distinction between the Michigan PRE and Indiana's homestead deduction aligned with public policy goals of promoting home ownership in Indiana and ensuring tax revenue fairness across different household types.[157] They asserted that the Michigan PRE and Indiana's deduction, while both offering property tax relief, differ significantly in scope and impact, challenging the notion of their equivalence.[158] The Tax Court rejected this fourth argument, holding that the Shapiros did not provide any authoritative sources linking public policy to Indiana's homestead deduction and overlooked section 37(n), which equalized treatment for married and unmarried individuals under the subsection's terms.[159] Therefore, the Tax Court determined that the Michigan PRE and Indiana's homestead deduction were virtually identical, thus disqualifying the Shapiros from the Indiana homestead deduction on their Indiana property from 2018 to 2020.[160]

Accordingly, the court reversed the IBTR's decision that the terms "equivalent" in section 37(f)(2)(B) and "substantially similar" in section 37(n) were synonymous.[161] Despite this, though, the court upheld the IBTR's decision to deny the Shapiros' Indiana homestead deduction for tax years 2017 to 2020.[162]

4. Gilday & Associates, P.C. v. Marion County Assessor.[163]—The issue

151. *Id.*
152. *Id.* at 299–300.
153. *Id.* at 300.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 298.
159. *Id.* at 300.
160. *Id.* at 301.
161. *Id.*
162. *Id.*
163. 236 N.E.3d 1160 (Ind. T.C. 2024) (Senior Judge Robb authored the opinion).

before the Tax Court was whether a person who acquired real property through a sheriff's sale is entitled to a property tax refund resulting from a retroactive reinstatement of homestead deductions for taxes paid by the primary lender on behalf of the prior owner from 2014 through mid-2017 and by the new owner for the remaining 2017 liability.[164]

In 1987, Dr. Paul Terry Batties bought a single-family home in Lawrence Township, Marion County, Indiana, and used it as his personal residence.[165] He received Indiana's homestead deduction until it was revoked in 2013.[166] Before the revocation, Dr. Batties took out a mortgage with Green Tree Servicing, LLC ("Green Tree"), and a second mortgage with Gilday & Associates, P.C. ("Gilday").[167] After Dr. Batties defaulted on the first mortgage, Green Tree paid the property taxes from 2014 to 2016 and half of the 2017 taxes.[168] In September 2013, Green Tree filed for foreclosure in a Marion County Superior Court, naming Dr. Batties, Gilday, and others as defendants.[169] Gilday filed a counterclaim and crossclaim.[170] Eventually, Gilday and Green Tree entered into an Agreed Foreclosure Judgment, which the superior court approved.[171] The court also issued a separate foreclosure decree for Green Tree.[172] Approximately three years later, Gilday purchased the property for $375,000 at a sheriff's sale.[173] The Marion County Sheriff ("Sheriff") used $280,467.86 of those monies to settle Green Tree's judgment.[174] The Sheriff issued a deed to Gilday, and Dr. Batties vacated the property.[175]

Gilday paid the remaining 2017 tax liability and filed four appeals with the Marion County PTABOA to correct deduction errors from 2014 to 2017.[176] Gilday argued that the homestead deductions were wrongly removed, resulting in overpaid property taxes, and claimed entitlement to a refund for taxes paid directly and indirectly through the Sheriff's sale.[177] The PTABOA denied the appeals, stating that, as the new owner, Gilday could not retroactively claim an inactive deduction.[178] Gilday appealed to the IBTR, which dismissed the case for lack of standing.[179] Gilday appealed this decision to the Indiana Tax Court,

164. *Id.*
165. *Id.* at 1162.
166. *Id.*
167. *Id.*
168. *Id.* at 1163.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*

which found the dismissal improper and remanded the case.[180] On remand, though the IBTR held a hearing, it failed to issue a final determination within 90 days,[181] leading Gilday to file a second appeal and a motion for summary judgment with the Tax Court.[182]

The first question the Tax Court resolved was whether Gilday qualified as a taxpayer with the necessary standing to seek refunds under the administrative tax appeals process for 2017 taxes it paid directly and those 2014 to mid-2017 taxes paid by the primary lender, Green Tree, on Dr. Batties' behalf.[183] Indiana's administrative tax appeals process allows taxpayers to contest certain property tax assessment errors but does not clearly define "taxpayer."[184] The Tax Court had previously defined "taxpayer" as "a person who is subject to, or liable to pay, real property tax, under Indiana Code section 6-1.1-2-4."[185] It explained that its foundational definition of "taxpayer" established an entity's tax liability for real property taxes.[186] Consequently, an entity's status as a taxpayer depended on either property ownership or a contractual obligation to pay the taxes.[187] When Gilday acquired the property and the associated fiscal responsibilities in July 2018, it assumed responsibility for previously assessed yet unpaid taxes from earlier periods.[188] Accordingly, the court concluded that Gilday was a "taxpayer" with standing to claim refunds for the 2017 tax liabilities it directly paid.[189]

The Tax Court next considered the assessment period from 2014 to mid-2017.[190] During this period, Green Tree paid the property taxes on behalf of Dr. Batties, thereby fulfilling its contractual obligation and establishing itself as the taxpayer for that period.[191] The question before the Tax Court regarding this period was whether Gilday acquired "taxpayer" status for the same period through the rights transferred to him via either the agreed foreclosure judgment or the sheriff's deed.[192] The court determined that Gilday was not a taxpayer for this period.[193] First, The court concluded that neither the agreed foreclosure judgment nor Green Tree's separate foreclosure decree included any contractual

180. *Id.* (citing Gilday & Assocs., P.C. v. Marion Cty. Assessor, 176 N.E.3d 1000, 1004–06 (Ind. T.C. 2021)).

181. *Id.* (citing IND. CODE § 6-1.1-15-4(f) (2022) (providing that the IBTR shall issue a final determination ninety days after conducting a hearing)).

182. *Id.* at 1164.

183. *Id.*

184. *Id.* at 1165.

185. *Id.* (citing Marion Cty. Assessor v. Kohl's Ind., L.P., 179 N.E.3d 1, 6–9 (Ind. T.C. 2021).

186. *Id.*

187. *Id.*

188. *Id.* at 1166.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

provisions that discussed the right to claim tax refunds or transferred that right to Gilday.[194] Likewise, the court concluded that neither the Sheriff's deed nor the statutes governing such deeds transferred to Gilday all the rights and interests previously held by Green Tree in the property, including those related to past tax payments.[195] In other words, the Sheriff's deed did not confer taxpayer status to Gilday.[196]

The second question the Tax Court resolved was whether homestead deductions can be retroactively reinstated.[197] The Tax Court noted that Indiana's homestead deduction statute provided that a revoked deduction would be reinstated if "the taxpayer provides proof that the taxpayer is eligible for the deduction and is not claiming the deduction for another property."[198] The statute does not specify a time limit or method for proving eligibility. Furthermore, it does not clarify whether reinstatement relief can be applied retroactively or only prospectively.[199] Finally, the court said that nothing in Indiana's homestead deduction statute precluded using the Tax Court appeals process to retroactively reinstate the homestead deduction and the related benefits.[200]

The property at issue received the homestead deduction from 1987 to 2013, when the Marion County Auditor ("Auditor") revoked it because of determining Dr. Batties had failed to comply with the deduction's verification deadlines.[201] If not for this determination, the Tax Court noted, the homestead deduction would have reduced the 2017 property tax liability.[202] When Gilday paid those liabilities in 2018 after acquiring the property, it positioned itself to benefit from any adjustments due to reinstated deductions.[203] Since the homestead deduction statute permitted the retroactive reinstatement of the deduction and Gilday was a taxpayer for the 2017 period, the court concluded that it was entitled to seek and receive a refund for overpaid taxes if the deduction was reinstated.[204] Consequently, the Tax Court partially granted Gilday's summary-judgment motion and remanded the case to the IBTR to determine the eligibility for the deduction's reinstatement for the 2017 tax year.[205]

5. Clark County Assessor v. Dillard Department Stores, Inc.[206]—The issue before the Tax Court was whether the IBTR correctly reduced a county's department store assessments from 2018 through 2020 using the percentage-of-sales methodology.

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194. *Id.* at 1167.
195. *Id.*
196. *Id.* at 1167–68.
197. *Id.* at 1168.
198. *Id.* at 1168 (citing IND. CODE § 6-1.1-12-17.8(h) (2022)).
199. *Id.*
200. *Id.* at 1169.
201. *Id.*
202. *Id.* at 1169–70.
203. *Id.* at 1170.
204. *Id.*
205. *Id.*
206. 236 N.E.3d 771 (Ind. T.C. 2024).

Dillard Department Stores, Inc. ("Dillard") owned and operated a 204,500-square-foot, one-level retail anchor store on approximately thirteen acres of land in Clarksville, Indiana.[207] The Clark County Assessor ("Assessor") assigned the property a value of $9,850,200 for tax year 2018, $9,925,500 for tax year 2019, and $9,766,900 for tax year 2020.[208] Dillard challenged those assessments before the county PTABOA and then to the IBTR.[209]

Before the IBTR, Dillard and the Assessor presented competing appraisals prepared by professional appraisers.[210] Dillard's appraisal employed both the income and sales-comparison methods to determine the property's value.[211] It concluded that the property should have been valued at $5,200,000 for 2018 and $5,110,000 for both 2019 and 2020.[212] Dillard's appraisal did not use the cost approach, citing it as time-consuming and incapable of accurately determining the property's true value.[213] The Assessor's appraisal used all three approaches, giving the greatest weight to the cost-and-sales comparison methods.[214] It determined the property's value at $10,773,000 for 2018, $10,500,000 for 2019, and $10,332,000 for 2020.[215]

The IBTR ruled in Dillard's favor and adopted its valuation conclusions.[216] While it raised concerns about the valuation methods and conclusions of both parties, it leaned toward Dillard's approach as the most reliable estimate of the property's value among those presented.[217] The Assessor challenged the IBTR's decision before the Indiana Tax Court.[218]

Dillard's appraiser used a methodology he called the "percentage of sales method" to estimate the value of Dillard's property.[219] This involved applying the rent paid by comparable department stores against their corresponding retail sales to establish a percentage relationship between the two.[220] Upon analysis, the appraiser found that these stores typically paid rent ranging from 2% to 3% of their retail sales, yielding an average ratio of 2.5%.[221] This ratio was then applied to the estimated retail sales for the stores similarly situated to Dillard's store.[222] Consequently, the appraiser calculated market rent estimates for Dillard's property at $2.50 per square foot for 2018 and $2.40 per square foot

207. *Id.* at 773.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 774.
220. *Id.*
221. *Id.*
222. *Id.*

for both 2019 and 2020.[223]

Before the Tax Court, the Assessor raised three objections to the appraiser's methodology. First, it asserted that the percentage-of-sales method failed to comport with generally recognized appraisal principles.[224] Second, it argued that the estimate of retail sales improperly included intangible business value in Dillard's real property value.[225] Finally, the Assessor contended that the appraiser lacked sufficient evidence to substantiate the 2.5% ratio he used in estimating market rent and, consequently, the Dillard property's generated income and, ultimately, its value for tax assessment.[226]

Regarding the Assessor's first argument, the court noted that neither Indiana property tax statutes nor regulations list generally recognized appraisal principles, and lists of such principles were not collected in any other source.[227] The court said that recognized appraisal principles constantly evolve.[228] Accordingly, determining whether an appraiser's percentage-of-sales methodology comported with generally recognized appraisal principles was a question of fact for the court.[229] The Tax Court observed that the IBTR held that Dillard's appraisal complied with the *Uniform Standards of Professional Appraisal Practice* (USPAP),[230] the recognized ethical and performance standards for the appraisal profession in the United States.[231] The court also noted that the Assessor failed to present any evidence or legal or appraisal authorities negating the IBTR's determination of the validity of the appraiser's methodology.[232] Because of this failure and based on the Tax Court's other conclusions, the court rejected the Assessor's argument.[233]

The Tax Court next addressed the Assessor's second argument, which contended that the appraiser's retail sales estimate improperly included the intangible business value in Dillard's real property valuation. Indiana's standard of value for property taxation is "true tax value," which reflects the "value of a property *for* its use, not the value *of* its use" and excludes "business value, investment value, [and] the value of contractual rights."[234] The Assessor argued that Dillard's appraiser inserted intangible business value in the property valuation because retail sales vary according to the efficiency or inefficiency of

223. *Id.* at 775.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.* (citing *In re* Equalization Appeal of Walmart Stores, Inc., 513 P.3d 457, 476 (Kan. 2022)).
230. *Id.* at 775–76.
231. *Id.* at 776 n.4 (providing the URL to the USPAP).
232. *Id.* at 776.
233. *Id.*
234. *Id.* (citing Howard Cty. Assessor v. Kohl's Ind. LP, 57 N.E.3d 913, 917 (Ind. T.C. 2016)) (emphasis original).

a store's management.[235] The Tax Court rejected this. It noted that Dillard's appraiser specifically acknowledged the need to exclude business value from the property's value and explained what methods he used to accomplish this.[236] It also said that the Assessor failed to provide any evidence, legal authority, or other authority demonstrating that the appraiser's exclusion methodology insufficiently alleviated the risk of improperly including business value, conflicted with the law, or conflicted with recognized appraisal principles.[237] Finally, the court held that the Assessor failed to introduce any evidence that quantified the amount of any allegedly improperly included business value.[238]

Lastly, the Tax Court addressed the Assessor's third and final argument, which contended that, because Dillard's appraiser used "arbitrary data," he failed to substantiate his calculation of the 2.5% average rent-paid-in-relation-to-retail-sales ratio used in estimating market rent and, ultimately, the property's taxable value.[239] The Assessor cited two previous Tax Court decisions in which the court rejected an appraiser's selection of a percentage ratio used to calculate a property's tax value from an estimated range of ratios without the appraiser explaining the rationale for their selection.[240] The Tax Court rejected this argument but failed to provide a clear and persuasive explanation of why. It said that, when it looked at the entire evidentiary record before it, though Dillard's appraiser did not explain the reason for its ratio choice, there existed in the record "sufficient evidence . . . to permit a reasonable mind to accept the selection of 2.5%."[241] In other words, the court held that other evidence in the record corroborated the appraiser's unexplained decision and, therefore, relieved him of needing to explain his decision in order to substantiate it.[242] The court did not identify this evidence or explain how it corroborated the appraiser's ratio-choice decision. The court explained how the appraiser calculated the range of percentage ratios but not how he selected the 2.5% ratio.[243] Despite this explanatory omission, the court concluded that "the [IBTR's] determination on this point was supported by substantial evidence."[244] Because the Tax Court rejected all three of the Assessor's arguments, it affirmed the IBTR's decision in Dillard's favor.[245]

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235. *Id.*
236. *Id.*
237. *Id.* at 777.
238. *Id.*
239. *Id.* at 778.
240. *Id.* (citing Southlake Ind., LLC v. Lake Cty. Assessor, 181 N.E.3d 484, 493 (Ind. T.C. 2021); Marion Cty. Assessor v. Washington Square Mall, LLC, 46 N.E.3d 1, 11 (Ind. T.C. 2015)).
241. *Id.* at 779.
242. *Id.* at 778–79.
243. *Id.*
244. *Id.* at 779.
245. *Id.*

6. Sawlani v. Lake County Assessor[246]—The issue before the Tax Court was whether the Indiana General Assembly's statutory limitation of the constitutionally prescribed 1% tax cap to only one acre of land—curtilage—surrounding a taxpayer's principal place of residence was constitutional, given the absence of explicit verbiage in the relevant constitutional provision justifying such a limitation.

In *Sawlani*, Dr. Tulsi and Kamini Sawlani ("Sawlanis") owned a two-story home on 3.981 acres in Crown Point, Indiana.[247] For the 2019 tax assessment year, the Lake County Assessor (the "Assessor") classified their home and one acre of surrounding land as residential property subject to the 1% property tax cap, while classifying the remaining 2.981 acres as nonresidential property subject to the 3% tax cap.[248] Believing that the Indiana Constitution mandated their entire property eligible for the 1% tax cap, the Sawlanis challenged the Assessor's classifications to the Lake County PTABOA and then to the IBTR.[249] Both administrative agencies rejected their claim, with the IBTR denying the authority to resolve the constitutional issue.[250] The Sawlanis sought review before the Indiana Tax Court.[251]

Before the Indiana Tax Court, the Sawlanis noted that the Indiana Constitution applied the 1% tax cap (a cap often commonly referred to as a "circuit breaker" in Indiana) to all property used as a principal residence, including curtilage, without imposing an acreage limit.[252] However, the Sawlanis asserted that the statute limited the cap to homestead property, defined as a dwelling and its curtilage, with curtilage further defined by statute as one acre of land surrounding the homestead.[253] The Sawlanis argued that this statutory limitation was unconstitutional because Indiana's Constitution did not

246. 240 N.E.3d 734 (Ind. T.C. 2024). On October 1, 2024, the Lake County Assessor filed a Petition for Review with the Indiana Supreme Court. *See* Petition for Review, Sawlani v. Lake Cty. Assessor, No. 21T-TA-00044 (Ind. 2024). While the Supreme Court did not formally grant review, it issued an order stating that the case warranted an oral argument, scheduling it for late June 2025. *See* Order Setting Oral Argument and Inviting Amicus Briefing, Sawlani v. Lake Cnty,. No. 21T-TA-00044, Docket Entry No. 21T-TA-00044. Additionally, the court invited amicus briefs from interested parties. *Id.*

247. *Id.* at 736.

248. *Id.*

249. *Id.*

250. *Id. See also, e.g.*, Osborn v. Schultz, 238 N.E.3d 730, 734 n. 4 (Ind. T.C. 2024) (in which the Indiana Tax Court said that the IBTR, as an administrative agency, lacked the authority to declare a statute unconstitutional. Despite this, the court reminded the IBTR that, when litigants present claims beyond its authority to resolve, such as constitutional challenges to Indiana's assessment system, it should still make factual findings on the claims. This would allow the Tax Court to review and resolve the constitutional issues presented); Bielski v. Zorn, 627 N.E.2d 880, 887–88 (Ind. T.C. 1994) (providing that "[t]he [IBTR] and its subordinate local officers and agencies have no authority whatsoever to determine the constitutionality of a statute . . . [and that] . . . [a]llegations that a statute is unconstitutional are matters solely for judicial determination").

251. *Id.* at 736.

252. *Id.* at 736, 737.

253. *Id.*

impose such an acreage restriction on applicable curtilage.[254] The Assessor contended that the statutorily imposed limitation comported with the term "curtilage" as used in Article 10, section (1)(c)(4)(A) of Indiana's Constitution and the relevant statute's legislative history (i.e., Indiana Code section 6-1.1-12-37(a)(2)(A), (C)).[255] The Sawlanis did not contest any other aspect of Indiana's property tax scheme or their property's assessment.[256] Accordingly, the Tax Court was tasked with deciding if the statutory one-acre limitation was consistent with the constitutional mandate. If not, the limitation had to be set aside, allowing the additional 2.981 acres to qualify for the one percent tax cap.[257]

The Tax Court began its analysis by reviewing and comparing the phrases and words used in Article 10, section 1 of the Indiana Constitution with those in the cap's implementing statute, Indiana Code section 6-1.1-12-37(a)(2)(A) and (C), focusing on their definitions and meanings. The Constitution specified that the 1% cap applies to "[t]angible property, including curtilage, used as a *principal place of residence*."[258] However, the statute that administered the constitutionally mandated tax cap applied the 1% cap to "homestead" property that received a standard homestead deduction.[259] The statute defined a homestead as an "individual's principal place of residence" comprising a dwelling and one acre of surrounding real estate.[260] The excess land was subject to higher tax caps depending on the property type.[261]

The Tax Court noted that the constitutional text did not use the word "homestead" or impose size limits on eligible properties.[262] Its analysis of the phrases "tangible property" and "principal place of residence," as well as the word "curtilage," suggested no implicit size constraints.[263] The court explained that "tangible property" referred to physical property, while "principal place of residence" indicated the main home without fixed size restrictions.[264] The varying definitions of "curtilage," none of them including specific size limits, referred to the area surrounding a dwelling.[265] Therefore, the Tax Court concluded that the verbiage in Article 10, Section 1 of the Indiana Constitution, which mandated the 1% tax cap on a "principal place of residence", did not support the statute's limitation of that 1% cap to one acre of property

254. *Id.*
255. *Id.* at 737.
256. *Id.*
257. *Id.*
258. *Id.* (quoting IND. CONST. ART. 10, § 1(c)(4), (f)(1)) (emphasis added).
259. *Id.*
260. *Id.* at 737 (citing IND. CODE §§ 6-1.1-20.6-7.5(a)(1) (2019); I.C. § 6-1.1-12-37(a)(2) (amended 2024)).
261. *Id.* at 743.
262. *Id.* at 743.
263. *Id.* at 744–45.
264. *Id.* at 744.
265. *Id.* at 745.

surrounding the "principal place of residence."[266] Accordingly, the court held that the constitutional 1% tax cap in Article 10, Section 1 of the Indiana Constitution did not impose fixed size or acreage limitations; it allowed land eligible for the cap to be more than one acre based on that land's practical usage rather its size alone.[267]

The Tax Court continued its analysis, asserting that its conclusion regarding the 1% cap comported with the other two tax caps.[268] The court noted that Subsection 1(f)'s verbiage and overall structure describing the 1%, 2%, and 3% tax caps defined five distinct property classes. [269] Specifically, the 1% cap pertains to "tangible property" utilized as a principal place of residence, as outlined in Subsection (1)(c)'s paragraph (4).[270] Conversely, the 2% cap applied to "other residential property" and "agricultural land," both delineated by use rather than size. [271] "Other residential property" was described as property used for residential purposes but ineligible for the 1% cap, whereas "agricultural land" referred to land dedicated to agricultural use. [272] The 3% cap included "other real property" and non-residential personal property, defined through exclusion—that is, those properties not used for agricultural or residential purposes. [273] The Tax Court said the consistent drafting of the constitutional provision among these property classes suggested that the absence of a size or acreage restriction within the 1% cap was deliberate.[274] When interpreting a statute, courts should consider its overall structure and the plain meanings of its verbiage. [275] The explicit omission of size restrictions in other property classes indicated that such limitations would have been clearly articulated if the 1% cap had been intended.[276] The Tax Court concluded that, absent explicit language in Article 10, Section 1(f), imposing a one-acre restriction within the 1% cap would undermine the "stated [constitutional] goal of ensuring permanent property tax relief to homeowners."[277]

The Assessor argued that the 2008 statutory tax caps and the constitutional tax caps should be interpreted together, as they were enacted in the same legislative session.[278] The Assessor emphasized that the digests of the joint resolutions referred to "homestead property," suggesting a legislative intent to

266. *Id.*
267. *Id.*
268. *Id.* at 746–47.
269. *Id.* at 746.
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.* at 746–47.
274. *Id.* at 747.
275. *See id.* (citing Ernst & Ernst v. Underwriter's Nat'l Assurance Co. 178 Ind. App. 77, 81–82 (1978).
276. *Id.*
277. *Id.*
278. *Id.*

confine the constitutional tax caps to the same scope as the statutory tax caps.[279] However, the Tax Court found this argument flawed due to, in its opinion, the Assessor's fundamental misunderstanding of the constitutional tax caps.[280] The court noted that the defining verbiage of the constitutional 1% tax cap, specifically Subsection (1)(c)'s paragraph (4), originated in a 2004 constitutional amendment that expanded the General Assembly's power to exempt certain properties from taxation.[281] This amendment allowed exemptions for "[t]angible real property, including curtilage, used as a principal place of residence by an . . . owner of the property," reflecting broad legislative authority.[282] There is no evidence, the Tax Court said, that the 2004 amendment intended to restrict the scope to a statutory homestead definition or impose size limitations.[283] The verbiage in Subsection (1)(c)'s paragraph (4) was fixed when ratified by voters in 2004, with the only subsequent change in 2010 broadening its scope to include both real and personal property.[284] The court concluded that, if Subsection (1)(c)'s paragraph (4) were narrowly interpreted to align with the 2010 amendment, as the Assessor asserted, this would conflict with the broad legislative power granted in 2004, thereby creating tension between the provisions.[285] The Tax Court said that courts strive to interpret statutes harmoniously to reflect legislative intent, and the 2010 amendment did not indicate an intent to narrow the 2004 amendment.[286] Therefore, the Tax Court rejected the Assessor's interpretation, emphasizing that the legislative digests lack legal authority and should not outweigh the original language of Subsection (1)(c)'s paragraph (4).[287] The court concluded that the Assessor's reliance on the digests improperly elevated them to a status akin to constitutional amendments, contrary to Indiana's legislative process.[288]

The Assessor also argued that the ballot question presented to voters in 2010, which included the term "homestead," demonstrated that the 1% tax cap was intended to align with the statutory definition of "homestead."[289] However, the Tax Court found that this interpretation conflated the ordinary meaning of "homestead" with its statutory definition.[290] The ordinary meaning of "homestead" did not include the statutory one-acre limitation.[291] The court determined that the voters likely understood "homestead" in the ballot question

279. *Id.* (citing Digest of S.J. Res. 1, 115th Gen. Assemb., 2d Reg. Sess. (Ind. 2008); Digest of H.J. Res. 1, 116th Gen. Assemb., 2d Reg. Sess. (Ind. 2010)).
280. *Id.* at 748.
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.* at 748–49.
288. *Id.* at 749.
289. *Id.*
290. *Id.*
291. *Id.* at 750.

according to its everyday usage, not its technical legal sense.[292] Furthermore, the court held that allowing the ballot question to alter or limit the constitutional amendment's language would have violated the constitutional amendment process outlined in Article 16, Section 1 of the Indiana Constitution, which required ratification by voters after passage by two different Indiana General Assemblies separated by an intervening general election.[293] The court reasoned that, since the ballot question was passed like any other ordinary legislation, it could not modify the constitutional language or redefine "homestead" beyond what voters approved.[294] Therefore, the Tax Court concluded that the legal force lay in the constitutional amendment's verbiage, not the ballot question—a conclusion the court said followed the legal precedent that prioritized a ratified amendment's text over any legislative intent expressed in supplementary materials.[295]

The Tax Court concluded that the one-acre limitation imposed by the statutory 1% cap was not unconstitutional on its face because it could be constitutionally applied in some circumstances such as to residential properties with less than one acre.[296] However, the court found that the one-acre limitation was unconstitutional as applied to taxpayers such as the Sawlanis, who had residential properties exceeding that size.[297] Consequently, the Tax Court vacated the IBTR's determination that the Sawlanis were not entitled to the 1% tax cap credit on their residential acreage exceeding the one-acre limitation and remanded the case back to the IBTR for further evidentiary findings consistent with its opinion.[298] Lastly, the Tax Court explained the factual findings the IBTR must perform on remand.[299] The IBTR's inquiry need not address the eligibility of the Sawlanis' initial one acre of land for the 1% tax cap. Instead, it should focus on the remaining 2.981 acres and whether the Sawlanis used them as part of their principal place of residence.[300]

The Indiana Tax Court's decision in *Sawlani* to invalidate the General Assembly's statutory definition of curtilage for the 1% tax cap raises significant concerns about judicial overreach, strict textualism, and its broader implications for Indiana's tax framework. The court relied on a rigid interpretation of constitutional language, emphasizing precise textual alignment while disregarding the legislature's clear intent to operationalize constitutional provisions through statutory definitions. By rejecting the General Assembly's

292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.* at 751 (citing Meredith v. Pence, 984 N.E.2d 1213, 1218 (Ind. 2013), which held that a statute is unconstitutional on its face if there are no circumstances under which it can be constitutionally applied).
297. *See id.*
298. *Id.*
299. *Id.* at 752.
300. *Id.*

statutory framework—in which "curtilage" was defined as the one-acre surrounding a principal place of residence—the Tax Court introduced uncertainty into a system that relies on predictability, fairness, and uniformity.

The Tax Court's insistence on an ad hoc, case-by-case determination of curtilage's boundaries undermines legislative efforts to provide a clear and equitable framework. This approach creates administrative inefficiencies, risks inequitable tax treatment, and contradicts the constitutional mandate for uniform property tax assessment. Moreover, the Tax Court's decision dismisses well-established principles of legislative deference and the Indiana Supreme Court's doctrine of agency deference, which demand judicial restraint when reviewing statutory or regulatory interpretations by the legislature or administrative agencies.

The Tax Court's reasoning in *Sawlani* also contradicts its earlier recognition of the interconnectedness between the homestead deduction and the 1% tax cap. This decision not only nullifies the legislature's efforts to balance the competing interests of taxpayers and government revenue collection but also risks creating an effectively unlimited tax exemption. Such an outcome violates Indiana Supreme Court precedent, which emphasizes that constitutional protections like tax caps or exemptions must balance public policy considerations with operational limits to ensure fairness and sustainability.[301]

B. Income Tax

1. PENN Entertainment, Inc. (f/k/a Penn National Gaming, Inc.) v. Indiana Department of State Revenue.[302]—The issue before the Tax Court was whether the Department violated Indiana's statutory definition of adjusted gross income and the federal and Indiana constitutions when it required the taxpayer to add back to the Indiana taxable income payments it made to other state governments.[303]

The taxpayer, PENN Entertainment, Inc. ("PENN"), previously known as Penn National Gaming, Inc., is a Pennsylvania-based company that operates a casino in Indiana through a subsidiary.[304] PENN owned entities involved in gaming and entertainment in seventeen other states.[305] For the tax years 2015, 2016, and 2017, it filed Indiana adjusted gross income tax (AGIT) returns on

301. *See* Andrew W. Swain, *Overloading the 1% Circuit Breaker: The Indiana Tax Court Constitutionally Expands Curtilage*, 11 TEX A&M J. PROP. L. 491 (forthcoming 2025) (providing an in-depth examination of the flaws in the *Sawlani* decision, including a detailed critique of the Tax Court's rationale, its departure from established judicial principles, its implications for Indiana's tax system, and its broader ramifications for the state's legislative and judicial processes).

302. 230 N.E.3d 385 (Ind. T.C. 2024) (Senior Judge John Baker authored the opinion of the court).

303. *Id.* at 390.

304. *Id.*

305. *Id.* at 390–91.

which it reported and deducted the value of income taxes paid in other states from its federal returns but added those values back to its Indiana tax base.[306] The Indiana Department of State Revenue ("Department") audited PENN's AGIT returns for these years and concluded that other out-of-state tax payments by PENN should also be added back to its Indiana tax base.[307] This resulted in PENN's owing additional taxes for these years along with interest and penalties.[308] It protested the additional tax assessments, and after an administrative hearing, the penalties were dropped, but the Department otherwise denied the protest.[309] After the Department rejected PENN's rehearing request, PENN appealed to the Tax Court, before which the parties filed cross-motions for summary judgment.[310]

The Tax Court said the dispute before it centered on whether certain payments made by PENN to other state governments should be included in the calculation of its Indiana adjusted gross income ("AGI") as mandated by the statute defining Indiana AGI—that is, Indiana Code section 6-3-1-3.5 (2015).[311] Indiana AGI for businesses such as PENN is defined similarly to federal taxable income per section 63 of the Internal Revenue Code ("IRC"), which calculates federal taxable income as gross income minus allowable deductions.[312] A payment of state income taxes qualifies as an allowable federal deduction.[313] Pursuant to Indiana Code section 6-3-1-3.5(3)(b) (2015) (the "section (3)(b) add-back provision"), a taxpayer calculating its Indiana AGI must add back an amount equal to any deduction or deductions allowed by IRC section 63 for taxes paid to any U.S. state when those taxes were based on or measured by income.[314] PENN argued that the disputed payments were for "'un-apportioned excise taxes, privilege fees, and other non-tax payments' that are not measured by income" and, therefore, should not be added back.[315] Accordingly, the court noted that the dispute turned on the definition of the phrase "taxes based on or measured by income" as established by past Indiana legal precedents and whether the out-of-state taxes in question comported with that definition.[316]

The Tax Court stated that, in 1991, the Indiana Supreme Court determined in *Consolidation Coal Co. v. Indiana Department of State Revenue*, that West Virginia's Business and Occupation Tax ("B&O tax") was effectively measured by income and thus fell under the section (3)(b) add-back provision.[317] A B&O tax is commonly viewed as a gross receipts tax, which is based on the value of

306. *Id.* at 391.
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.* at 392 (citing IND. CODE § 6-3-1-3.5(b) (2015).
313. *Id.* (citing IRC § 164 (2014)).
314. *Id.* (citing I.C. § 6-3-1-3.5(b)(3).
315. *Id.*
316. *Id.*
317. *Id.* (discussing *Consolidation Coal Co.*, 583 N.E.2d 1199 (Ind. 1991)).

products, gross sale receipts, and gross income rather than net income determined after the application of tax deductions, exemptions, and credits.[318] The Supreme Court premised its determination on its conclusion that, though the B&O tax taxed the privilege of doing business in West Virginia, the state calculated the tax using gross proceeds of sales derived from tangible property rather than the value of property held.[319] The Supreme Court also concluded that the Indiana General Assembly used the phrase "based on or measured by income" to denote a broader inquiry than would be appropriate if the legislature had merely used the phrase "taxes on income" in the section (3)(b) add-back provision.[320] The Tax Court also noted that it had previously determined that Indiana's Riverboat Wagering Tax was subject to the section (3)(b) add-back provision because the tax was measured by adjusted gross receipts received from gaming operations—that is, income—even though the tax was an excise tax.[321] The Tax Court also noted that it had previously reached an opposite determination in *First Chicago NBD Corp. v. Department of State Revenue*.[322] There, the court found that that Michigan's Single Business Tax, a value-added tax, was not based on income because it measured the value the production process added to a product, not income derived from the product's sale.[323]

The Tax Court said that its analysis of PENN's payments to ten states involved a variety of taxes, many styled as fees or based on gaming revenues, akin to the privilege tax discussed in the Indiana Supreme Court's case *Consolidation Coal Co.*[324] Thus, the nature of the out-of-state taxes PENN paid would ultimately determine whether they would be included in Indiana's AGI under the section (3)(b) add-back provision.[325] The Tax Court analyzed the nature of these taxes, which involved considering taxes imposed by Illinois, Maine, Massachusetts, Mississippi, Missouri, Nevada, New Mexico, Ohio, Pennsylvania, and West Virginia.[326] The court concluded that these out-of-state taxes imposed on PENN included taxes on gross receipts from gaming activities, licensing fees calculated from gaming income, and other similar charges that suggested a closer alignment with income-based taxation addressed in the Indiana Supreme Court's *Consolidation Coal Co.* case than with the value-added measurements at issue in the Tax Court's *First Chicago NBD Corp.*

318. *See, e.g.*, BRUCE M. NELSON & JOHN C. HEALY, SALES AND USE TAX ANSWER BOOK Q22:1 (2020) (explaining in detail gross receipt and business and occupation taxes).

319. *PENN Ent., Inc*., 230 N.E.3d at 392 (citing *Consolidation Coal Co*., 583 N.E.2d at 1202).

320. *Id.* (citing *Consolidation Coal Co*., 583 N.E.2d at 1201).

321. *Id.*; *see also* Aztar Ind. Gaming Corp. v. Ind. Dep't of State Revenue, 806 N.E.2d 381, 386 (Ind. T.C. 2004).

322. *PENN Ent., Inc.*, 230 N.E.3d at 392-93; *First Chicago NBD Corp*., 708 N.E.2d 631 (Ind. T.C. 1999).

323. *PENN Ent., Inc.*, 230 N.E.3d at 392-93.

324. *Id.* at 393–94.

325. *Id.* at 393.

326. *Id.* at 393–94.

case.[327]

PENN also argued that the Department's assessment premised on its adding back the out-of-state tax payments pursuant to the section (3)(b) add-back provision violated its rights under the Commerce, Due Process, and Equal Protection Clauses of the U.S. Constitution.[328] The Tax Court noted that the Commerce Clause is violated when a taxing authority imposes a tax: (a) on an activity that lacked substantial nexus with the taxing state, (b) not fairly apportioned between states, (c) that discriminated against interstate commerce, or that (d) failed to fairly relate to the services the taxing state provided to taxpayers.[329] The court said that it was undisputed that PENN had a physical presence in Indiana and, therefore, substantial nexus with it because PENN owned and operated a casino in Indiana through a subordinate business entity.[330] PENN conceded that Indiana apportioned its fair share of interstate taxes after the add-back process was completed and, through this apportionment process, taxed only that value fairly attributable to Indiana.[331] The Tax Court also concluded that no evidence established that the state's application of the section (3)(b) add-back provision coerced taxpayers to conduct intrastate rather than interstate business.[332] Finally, the Tax Court concluded that it was undisputed that, after PENN's income was apportioned, it paid taxes on only Indiana's fair share of that income.[333]

Regarding PENN's due process claim, the Tax Court said that a two-step analysis is used to evaluate whether a state tax meets the Due Process Clause's requirements. First, there must be a significant link or minimal connection between the state and the entity, property, or transaction being taxed. Second, the income assigned to the state for taxation should be logically tied to the taxing state.[334] The first prong was not violated because the court had already determined that PENN had a substantial nexus with Indiana.[335] The second prong was not violated because the court had already determined that PENN paid taxes on only Indiana's fair share of its income.[336] Regarding PENN's equal protection claim, the Tax Court said that the clause is violated only if a taxpayer has been treated differently from similarly situated taxpayers.[337] The court concluded that PENN failed to identify any evidentiarily supported examples of the Department's applying the section (3)(b) add-back provision against another

327. *Id.* at 394.
328. *Id.* at 395.
329. *Id.* (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)).
330. *Id.*
331. *Id.* at 396.
332. *Id.* at 396–97.
333. *Id.* at 397.
334. *Id.* (citing North Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Fam. Tr., 588 U.S. 262, 269 (2019)).
335. *See id.* at 398.
336. *Id.*
337. *Id.* (quoting UACC Midwest, Inc. v. Ind. Dep't of State Revenue, 667 N.E.2d 232, 239 (Ind. T.C. 1996)).

taxpayer in a way that resulted in disparate treatment.[338]

Lastly, PENN argued that the Department's assessments violated the Due Course of Law Clause of Indiana's Constitution.[339] The Tax Court observed that Indiana courts use the same approach to assess alleged violations of procedural due process under Indiana's Due Course of Law Clause as the U.S. Supreme Court does when examining similar claims under the Due Process Clause of the U.S. Constitution.[340] PENN asserted that the Department applied the section (3)(b) add-back provision in neither a "rational" nor "fundamentally fair" manner.[341] The Tax Court disagreed. It held that Indiana had a "rational interest in ensuring that taxpayers' taxable income includes amounts that they deducted from their federal income taxes."[342] Furthermore, the court noted that PENN acknowledged this general point when it added back some amounts to its taxable Indiana income, reflecting payments of other states' income taxes.[343] Accordingly, the Tax Court granted the Department's motion for summary judgment, denied PENN's motion, and affirmed the Department's delinquent tax assessment.[344]

The rationale employed by the Tax Court to uphold the Department's position is, at best, tenuous and faces numerous obstacles. The central interpretive question in *Penn Entertainment* is whether the term "income" in the add-back statute under Indiana Code section 6-3-1-3.5(b)(3) refers exclusively to net income (i.e., profit after expenses and deductions) or extends to gross income/gross receipts (i.e., total revenue before expenses and deductions).[345] This distinction is critical as it directly affects the treatment of excise taxes, privilege fees, and license fees, determining which taxes fall within the scope of the add-back provision under Indiana law.

The Tax Court's decision disregards its own prior holding that the plain meaning of the word "income" in the context of Indiana's adjusted gross income tax refers to net income. In *Smith v. Indiana Department of State Revenue*, the Tax Court concluded that the AGIT statutory framework generally defines "income" as adjusted gross income (AGI)—a calculation rooted in net income.[346] Further reinforcing this interpretation, the U.S. Supreme Court has defined "income" as: "[G]ain derived from capital, from labor, or from both combined," provided it includes profit.[347] Similarly, the Federal Tax Code defines taxable income as "gross income minus deductions. . . ."[348] Finally,

338. *Id.* at 399.
339. *Id.* (citing IND. CONST. ART. 1, § 12).
340. *Id.* (citing Doe v. O'Connor, 790 N.E.2d 985, 988 (Ind. 2003)).
341. *Id.* at 400.
342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.* at 397.
346. Smith v. Ind. Dep't of State Revenue, 122 N.E.3d 489, 494 (Ind. T.C. 2019).
347. *E.g.*, Eisner v. Macomber, 252 U.S. 189, 206 (1920).
348. I.R.C § 63(a).

Indiana tax regulations also align with this understanding, frequently defining income in terms of net income.[349]

If the Department's broader interpretation of "income" to include gross receipts is correct, it introduces a significant new ambiguity: how can taxpayers and the Department consistently distinguish between excludable, unapportioned excise taxes, privilege fees, and other non-tax payments and taxes that must be added back? By adopting this broad definition, the Department essentially replaces one ambiguity—the meaning of "income"—with another: the method by which taxpayers are expected to differentiate between add-back taxes measured by income and other taxes measured by non-income factors. This shift erodes taxpayer certainty and undermines the repeatability necessary for a predictable and fair tax system.

The Indiana Supreme Court will now weigh in on this issue. On May 29, 2024, the taxpayer PENN filed its Petition for Review.[350] On November 6, 2024, the Supreme Court granted review and scheduled the case for oral arguments, offering a critical opportunity to resolve the interpretive challenges surrounding the scope of the term "income" in Indiana's add-back statute.[351]

C. Sales Tax

1. Indiana Finance Financial Corp. v. Indiana Department of State Revenue.[352]—The issue before the Tax Court was whether the Indiana Department of State Revenue ("Department") properly denied a taxpayer's sales tax refund claims premised on a taxpayer's calculation of a bad-debt deduction involving repossessed property.

The taxpayer, Oak Motors, Inc. ("Oak Motors"), an Indiana-based car dealership, sold cars via installment-sale contracts, financing all or part of the purchase price.[353] It remitted the sales tax to the Department.[354] Oak Motors'

349. *See, e.g.*, 45 IND. ADMIN. CODE 3.1-1-55 (2009) (describing income as the result of "income-producing activities" intended to obtain "gains or profit," explicitly distinguishing it from gross receipts); 45 I.A.C. 15-5-7(e) (defining income for Indiana's adjusted gross income tax (AGIT) purposes as adjusted gross income for the state's adjusted gross income tax and other similar tax schemes).

350. Petition for Review, PENN Entertainment, Inc. v. Dep't of State Revenue, (No. 22T-TA-00015), 2024 Ind. LEXIS 693 (Ind. Nov. 6, 2024).

351. *See* mycase.IN.gov, Chronological Case Summary—Order Granting Petition for Review, PENN Entertainment, Inc. v. Dep't of State Revenue (No. 24S-TA-00382), *accessible at* https://public.courts.in.gov/mycase/#/vw/CaseSummary/eyJ2Ijp7IkNhc2VUb2tlbiI6ImVzcFBBV0NDdVpVYjFWRlE5T0xwcEpqTkxpdXJsQkpocTlJNUROTW9tX2MxIn19 [https://perma.cc/3YX7-84L4]

352. 226 N.E.3d 276 (Ind. T.C. 2024) (Senior Judge Wentworth authored the opinion).

353. *Id.* at 277.

354. *Id.*

affiliate, Indiana Finance, purchased these contracts without recourse[355] for 65% or 70% of the original amount financed.[356] That is, it purchased the installment contracts at a 35% or 30% discount on their face values.[357] After several customers defaulted on their contracts, Indiana Finance repossessed and sold the vehicles at auction or directly back to Oak Motors.[358] Indiana Finance determined the fair market value of repossessed vehicles sold at auction using the auction proceeds, and used the Manheim Market Report ("MMR")[359] to establish the fair market value of vehicles sold to Oak Motors.[360] Indiana Finance also collected third-party insurance and warranty claim payments for some repossessed vehicles.[361]

Pursuant to Internal Revenue Code ("IRC") section 166's bad-debt deduction rules, and for federal and Indiana income tax purposes, Indiana Finance claimed bad-debt deductions on these defaulted contracts for the 2017 and 2018 tax years.[362] It also sought a refund for the sales taxes Oak Motors had remitted to the Department, which became uncollectable receivables following the customer defaults.[363] Indiana Finance asserted that its bad-debt calculations comported with Indiana Tax Court precedent.[364] Indiana Finance applied the Market Discount Rules under IRC sections 1276 through 1278 "to the value of repossessed vehicles, insurance claim payments, and warranty claim payments."[365] Consequently, it increased its basis in the installment sale contracts by the market discount recognized in gross income—specifically, 30% of the receipts, which represented the discount from the contracts' face value and constituted taxable profit for Indiana Finance.[366] Simultaneously, it reduced its basis in these contracts by 100% of all payments made.[367]

The Department approved the part of Indiana Finance's bad-debt

355. The term "without recourse" in the context of selling or transferring an asset, such as an installment-sale contract, indicates that the seller or transferor relinquishes any responsibility to collect on the debt or handle defaults associated with the asset. The buyer assumes the risk of non-payment or default by the end parties involved. This means the seller or original creditor cannot be pursued for compensation if the debtor fails to fulfill its financial obligation. This arrangement contrasts with "with recourse" transactions, in which the seller or original creditor retains some liability and can be approached to cover losses if the debtor defaults. *See, e.g.*, BLACK'S LAW DICTIONARY 1603 (6th ed. 1990); IRS, *Cancellation of Debt–Basics: Recourse vs. Nonrecourse Debt*, https://apps.irs.gov/app/vita/content/36/36_02_020.jsp?level=advanced [https://perma.cc/Q9M3-CLW4].

356. *Indiana Finance Financial Corp.*, 226 N.E.3d at 277.

357. *Id.* at 277–78.

358. *Id.* at 277.

359. *Id.* at 278 n.4 (The MMR provides values and wholesale prices for used vehicles).

360. *Id.* at 277–78.

361. *Id.* at 278.

362. *Id.*

363. *Id.*

364. *Id.* (citing SAC Finance, Inc. v. Ind. Dep't of State Rev., 24 N.E.3d 541 (Ind. T.C. 2014)).

365. *Id.*

366. *Id.*

367. *Id.*

calculations that applied the federal market discount treatment to installment payments, but it denied the same treatment for repossessed property.[368] The Department asserted that Indiana Finance needed to decrease its unpaid balances on the defaulted contracts by the total value of the repossessed property.[369] In simpler terms, the Department rejected the portion of Indiana Finance's two refund claims in which the Market Discount Rules were applied to the repossessed property. This reduced the uncollectible amount by only 70% instead of 100% of the repossessed property's value.[370] In summary, the Department approved the part of Indiana Finance's bad-debt calculations that applied the federal market discount treatment to installment payments, but it denied the same treatment for repossessed property.[371] The Department asserted that Indiana Finance needed to decrease its unpaid balances on the defaulted contracts by the full value of the repossessed property.[372]

Indiana Finance contested the Department's partial denial of its refund claims.[373] During the administrative protest, the Department maintained that Indiana Finance should have deducted the full amount of the repossessed property, while Indiana Finance argued that doing so would prevent any decrease in its basis due to the receipt of such property.[374] This would result in a higher contract basis than that stated in its refund claims, potentially leading to a larger sales tax refund than it had originally sought.[375] The Department rejected Indiana Finance's arguments and dismissed the protest.[376]

Indiana Finance sought a rehearing with the Department and submitted two supplemental refund claims for the 2017 and 2018 tax years, recalculating its bad-debt deductions as directed by the Department.[377] Although the Department granted the request for a rehearing, it denied the supplemental claims because they did not account for the value of the repossessed property in reducing the bad-debt deduction.[378] Accordingly, the Department adjusted Indiana Finance's tax basis by reducing the unpaid balances of its defaulted contracts by the entire value of the repossessed property.[379] Indiana Finance again administratively contested these refund denials, resulting in the Department once more denying its refund claims.[380] Indiana Finance initiated a tax appeal, disputing the Department's denials, which amounted to $163,044.00 from its original sales

368. *Id.*
369. *Id.*
370. *Id.*
371. *Id.*
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.*
376. *Id.* at 279.
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*

tax refund claims and $258,584.00 from its supplemental refund claims.[381] The parties filed cross-motions for summary judgment, and the Tax Court ruled in Indiana Finance's favor.[382]

The Tax Court began its opinion by reviewing the relevant Indiana sales tax law. In Indiana, a retail merchant must remit the entire amount of sales tax corresponding to an item's total purchase price during the reporting period in which a retail transaction occurred, even if an item's sales price and related sales tax had been financed over time and not yet fully collected by the retail merchant.[383] Indiana's bad-debt deduction statute, however, allowed a retail merchant (or its assignee) to deduct from the amount of sales tax due the amount of sales tax corresponding to the amount of its receivables written off as uncollectible debt under the federal bad-debt deduction statute, IRC section 166.[384] Indiana's bad-debt deduction statute provided, in relevant part, that the deduction amount shall be determined in the manner provided by IRC section 166 for bad debts but shall be adjusted to exclude repossessed property.[385] In 2004, the Indiana Supreme Court determined "whether an auto dealership that financed its customers' vehicle purchases, including the related sales tax, was required to deduct the total amount of repossessed collateral under" Indiana's bad debt deduction statute.[386] The Supreme Court held that an "auto dealership could deduct only that portion of its receivables equal to the amount written off for federal income tax purposes" because Indiana's Legislature "intended that only the net debt that cannot be collected may be deducted."[387] This has been called the "Net Debt Principal."[388] According to this principle, noted the Tax Court, the statutory exclusions specified in subsection (d) of Indiana's bad-debt deduction statute cannot be applied to allow "a taxpayer to write off more than the amount it actually paid for its uncollectible debt."[389]

The Tax Court next explored the application of Indiana's bad-debt deduction statute to repossessed property. Indiana Finance contended that it should receive summary judgment for its refund claims because it applied the Market Discount Rules to its bad-debt deductions.[390] Specifically, it excluded 70% of the face value of repossessed property when adjusting the basis in its installment contracts.[391] Indiana Finance argued that this approach aligned with subsection (d)'s requirements, which, according to it, did not mandate the subtraction of the full value of the repossessed property—only a portion of it,

381. *Id.*
382. *Id.* at 279, 286.
383. *Id.* at 280 (citing IND. CODE § 6-2.5-6-1(a) (2017)).
384. *Id.* (citing I.C. § 6-2.5-6-9).
385. *Id.* (quoting I.C. § 6-2.5-6-9(d)(2)(E)).
386. *Id.* at 281 (citing Indiana Dep't of State Revenue v. 1 Stop Auto Sales, Inc., 810 N.E.2d 686, 686–88 (Ind. 2004)).
387. *Id.*
388. *Id.*
389. *Id.* (citing I.C. § 6-2.5-6-9(d) (2017)).
390. *Id.*
391. *Id.*

excluding market discount income.[392] Conversely, the Department argued that Subsection (d) mandated the complete subtraction of the amount of the repossessed property, Market Discount Rules applying to installment payments, not repossessed property.[393] It also argued that the precedent the Indiana Tax Court established in *SAC Finance, Inc. v. Indiana Department of State Revenue* was incorrect and should be overturned. [394]

Though not fully explained in *Indiana Finance Financial Corp.*'s opinion, *SAC Finance, Inc.*'s precedent was this. In *SAC Finance, Inc.*, the Tax Court noted that, in *Indiana Department of State Revenue v. 1 Stop Auto Sales, Inc.,* the Indiana Supreme Court said that the mathematics of IRC § 166 must be used when calculating Indiana's bad-debt deduction under Indiana's bad-debt statute.[395] Accordingly, the Tax Court surmised, because "the mathematics of IRC section 166 depend[ed] on the content of other sections of the Internal Revenue Code," the court held that the Market Discount Rules contained in other Internal Revenue Service code sections were also a part of IRC section 166's mathematics and, therefore, available to taxpayers for calculating their Indiana bad-debt deduction.[396]

The IRS's Market Discount Rules apply to bonds bought at a price lower than their face value on the secondary market. If a bond is sold or matures, the market discount is treated as ordinary income rather than capital gains. The discount is recognized gradually over the period the bond is held, calculated using either the straight-line or the constant-yield method. Taxpayers have the option to defer recognizing this income until the bond is sold or redeemed, but they forfeit the capital gains treatment on the discount amount.[397] The Tax Court's deductive reasoning in *SAC Finance, Inc.* ignored the fact that, based on the Market Discount Rules' own statutory wording in the federal tax code defining them and establishing their scope and function, the rules applied to bonds but nothing else. For example, defaulted installment sales contracts or repossessed tangible property. In other words, though the Market Discount Rules might be one of many parts of IRC § 166's overall mathematical framework, this does not mean that one part of the section's mathematics applies to every calculation of a bad-debt deduction, including calculations of the deduction for defaulted installment sales contracts or repossessed tangible property.

Returning to *Indiana Finance Financial Corp.*, the Department argued that Indiana Finance incorrectly applied the Market Discount Rules to its repossessed property, as those rules applied only to installment payments

392. *Id.*

393. *Id.* at 282.

394. *Id.* (discussing SAC Fin. v. Ind. Dep't of State Revenue, Inc., 24 N.E.3d 541 (Ind. T.C. 2014).

395. *SAC Fin., Inc.*, 24 N.E.3d at 544 (citing Ind. Dep't of State Revenue v. 1 Stop Auto Sales, Inc., 810 N.E.2d 686 (Ind. 2004)).

396. *Id*.

397. *See* IRC §§ 1276–1278.

according to Tax Court precedent.[398] It asserted that, when Indiana Finance repossessed and resold a vehicle, the compensation came from a third party, such as an auction house or Oak Motors, rather than the defaulting customer.[399] This repossession and resale acted as a recovery of an account considered worthless.[400] During this process, Indiana Finance did not receive any principal payments; the last genuine principal payment received was the final payment made by the defaulting customer.[401] The Department argued that, according to the Tax Court's precedent in *SAC Finance, Inc.*, repossessed property and installment payments must be treated differently because the portion of each installment payment made by a customer and characterized as market discount income for federal income tax purposes is income that has actually been paid to the taxpayer.[402]

The Tax Court disagreed with the Department's argument, saying that the distinction made between installment payments paid to Indiana Finance by customers and repossessed property recovered by Indiana Finance from third parties was misleading and did not justify different treatment under the Market Discount Rules.[403] The court said that the way value is received is not critical; the essential point is that value should be consistently recorded as per the calculations specified in IRC section 166, which, according to its precedent in *SAC Finance, Inc.*, include the federal Market Discount Rules.[404] However, IRC section 166 and its accompanying regulations do not explicitly mandate that repossessed property be treated identically to installment payments.[405] The court said, though, that logically, they should be treated similarly.[406] However, it did not explain why logic mandated such a conclusion.

Indiana Finance acknowledged that its initial refund claims did not adhere strictly to the literal wording of subsection (d) of Indiana's bad-debt deduction statute, which provided that repossessed property should be excluded from the calculation.[407] However, Indiana Finance contended that its calculations aligned with the spirit of subsection (d), a position the Tax Court had previously upheld in *SAC Finance., Inc.*[408] Indiana Finance deemed its interpretation logical because it prevented what it described as the unreasonable outcome of diminishing sales tax refunds caused by excluding the market discount income from repossessed property.[409]

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398. *Indiana Fin. Financial Corp.*, 226 N.E.3d at 282.
399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.* (characterizing the Department's argument as "a red herring").
404. *Id.*
405. *Id.*
406. *Id.*
407. *Id.*
408. *Id.*
409. *Id.*

The Tax Court agreed with Indiana Finance's argument.[410] The court said rejecting this interpretation would disrupt the foundational Net Debt Principle, especially since Indiana Finance purchased the defaulted contracts at 70% of their face value.[411] If the market discount income also reduced the basis of these contracts, it could significantly jeopardize Indiana Finance's eligibility for a refund commensurate with its expenditures.[412] Therefore, the court concluded that the adjustment to include market discount income from Indiana's bad-debt calculation aligned with the Net Debt Principle, ensuring fairness in the treatment of amounts actually paid by Indiana Finance.[413]

The Department also argued that the value of a repossessed property should not be equated to an installment payment since it involved payment by a third party.[414] Relying on *Corbin on Contracts*, the Tax Court held that this distinction was irrelevant as there is a longstanding legal precedent that a third-party payment can satisfy someone else's obligation.[415] Furthermore, Indiana Finance had consistently treated installment payments and repossessed property similarly in its federal and state tax filings.[416] This practice was crucial because Indiana's bad-debt deduction statute merely stipulates that the bad debt must be deducted on federal tax returns without requiring proof of the deduction's validity.[417]

The Department's summary judgment motion asserted that the Tax Court wrongly decided its previous decision in *SAC Finance, Inc.* because the Market Discount Rules do not apply to repossessed property under Indiana's bad-debt deduction statute.[418] Consequently, income derived from market discounts

410. *Id.*

411. *Id.* at 282–83.

412. *Id.* at 283.

413. *Id.* The Tax Court's reasoning regarding the alignment appears questionable. A tax refund claim premised on tax exemptions or deductions shares their interpretive nature—that is, the refund is strictly construed in favor of taxation and against tax exclusion and repayment. *See, e.g.*, Ind. Dep't of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014) (holding that "if a statute authorizing a [tax] deduction is ambiguous, [the Indiana Supreme Court] must construe the deduction narrowly because an income tax deduction is a matter of legislative grace and . . . the burden of clearly showing the right to the claimed deduction is on the taxpayer [internal quotation marks and case reference omitted]"); *see also, e.g.*, Crystal Flash Petroleum, LLC v. Ind. Dep't of State Revenue, 45 N.E.3d 882, 886 (Ind. T.C. 2015); Mid-America Energy Resources, Inc. v. Ind. Dep't of State Revenue, 681 N.E.2d 259, 261 (Ind. T.C. 1997); Mechanics Laundry & Supply, Inc. v. Dep' of State Revenue, 650 N.E.2d 1223, 1227 (Ind. T.C. 1995); Indiana Dep't of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454, 456 (Ind. Ct. App. 1988); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974) (cases all asserting the proposition that tax exemptions are strictly construed favoring taxation). These cases and the precedent they represent appear to contradict the Tax Court's belief that its judicially created Net Debt Principle must comport with some overriding principle favoring sales tax refunds, but such a principle does not exist under Indiana tax law.

414. *Id.*

415. *Id.* (citing CORBIN ET AL., CORBIN ON CONTRACTS § 67.3 n.1 (13th ed. 2023)).

416. *Id.*

417. *Id.*

418. *Id.*

should not be factored into the calculation of a bad-debt deduction write-off.[419] To support its request that the Tax Court overrule its precedent in *SAC Finance*, the Department asserted that IRC section 166(e) and IRC section 165(g)(2)(C) mandated that the Market Discount Rules do not apply to securities.[420] Section 166(e) stated that it did not apply to a debt, which was evidenced by a security as defined in IRC section 165(g)(2)(C).[421] Section 165(g)(2)(C) defined a "security" as "a bond, debenture, note, or certificate, or other evidence of indebtedness, issued by a corporation or by a government or political subdivision thereof, with interest coupons or in registered form."[422] Because Indiana Finance's installment sales contracts constituted excluded securities, the Department asserted that the contracts could not be deducted under IRC section 166 and, therefore, must be excluded from the bad-debt deduction's calculation.[423] The Tax Court rejected the argument, labeling the Department's legal interpretation of the relevant federal tax statutes as merely a "conclusory argument" unsupported by any properly designated evidence demonstrating that the contracts were in registered form.[424] The Tax Court also said that the issuer of a bond or other proof of indebtedness is commonly understood as the borrower, not the lender.[425] The undisputed designated facts demonstrated that Oak Motors was a lender because it financed all or a part of a vehicle's cost, including the sales tax on its purchase price.[426] Accordingly, the Tax Court concluded that the installment sales contracts were not securities.[427]

Lastly, the Department argued that the Tax Court wrongly decided *SAC Finance, Inc.* because the inclusion of market discount income in Indiana's bad-debt calculation permitted taxpayers to claim a deduction amount greater than their uncollectible debt, thereby conflicting with subsection (d) of Indiana's bad-debt deduction statute, which excluded repossessed property, and distorting the meaning of a tax write-off.[428] The Tax Court rejected this argument because the Department failed to present any evidence, precedent, or persuasive authority to support its claim that Indiana Finance sought a deduction for an amount greater than their uncollectible debt.[429] The Tax Court also noted that the Department's argument invited it to ascertain the validity of Indiana Finance's federal bad-debt calculations and corresponding deductions.[430] The Tax Court said that its precedent mandated that the Indiana bad-debt deduction statute required that the taxpayer had deducted the bad debt only for federal income tax purposes, not

419. *Id.*
420. *Id.*
421. *Id.*
422. *Id.*
423. *Id.* at 283–84.
424. *Id.* at 284.
425. *Id.* (citing TREAS. REG. § 1.165-5(j), Ex. 3; TREAS. REG. § 1.446-5).
426. *Id.*
427. *Id.*
428. *Id.* at 284–85.
429. *Id.* at 285.
430. *Id.*

that the taxpayer had demonstrated the validity of the federal income tax deduction.[431] Therefore, the court rejected the Department's argument because it invited the court to scrutinize the validity of Indiana Finance's federal income tax calculations and deductions, an invitation the court had rejected in the past.[432] Accordingly, the Tax Court granted Indiana Finance's summary-judgment motion, denied the Department's motion, and remanded the case to the Department to effect corrective actions consistent with the court's decision.[433]

D. Excise Tax

1. B.L. Reever Transport, Inc., Charles Paar, d/b/a Sandman Services, and Leland Wilkins, d/b/a Lost River Trucking v. Ind. Department of State Revenue.[434]—The issue before the Tax Court was whether the Indiana Department of State Revenue ("Department") properly denied refund claims for excise taxes because it believed toll roads were highways subject to Indiana's motor fuel tax.

B.L. Reever Transport, Inc., Charles Paar (d/b/a Sandman Services), and Leland Wilkins (d/b/a Lost River Trucking) are three small business motor carriers ("Motor Carriers") that haul property on Indiana's highways, including its toll roads.[435] They paid Indiana's motor carrier fuel tax ("MCFT") during the 2016 and 2017 tax years.[436] The Motor Carriers sought tax refunds for amounts they claimed corresponded to their travel on toll roads.[437] Taxpayers Paar, Wilkins, and B.L. Reever sought refunds for their respective tax years: Paar requested $56.27 for 2016, Wilkins requested $7.47 for the same year, and B.L. Reever requested $8.02 for 2017.[438] The Department denied the refund claims, and the Motor Carriers filed an appeal with the Tax Court in a timely manner.[439]

The Department first sought to dismiss the Motor Carriers' appeal pursuant to Indiana Trial Rule 12(B)(1) and (6) asserting that: (a) the Tax Court did not have subject matter jurisdiction over the Motor Carriers' claims, and (b) the Motor Carriers failed to state a claim upon which they could receive relief in conjunction with their challenging the Department's denial of the claims for refund of toll road taxes they paid while traveling on toll roads in Indiana leased to a private company.[440] The Tax Court denied the Department's dismissal

431. *Id.* (citing Chrysler Fin. Co. v. Ind. Dep't of State Revenue, 761 N.E.2d 909, 916 n.17 (Ind. T.C. 2004)).

432. *Id.*

433. *Id.* at 286.

434. 226 N.E.3d 834 (Ind. T.C. 2024) (Senior Judge Wentworth authored the opinion).

435. *Id.* at 836–37.

436. *Id.* at 837.

437. *Id.*

438. *Id.*

439. *Id.*

440. *See* B.L. Reever Transport, Inc., et al. v. Ind. Dep't of State Revenue, 163 N.E.3d 968 (Ind. T.C. 2021).

motion.[441] The parties also filed cross-motions for summary judgment, which the Tax Court denied.[442] The parties subsequently filed their second cross-motions for summary judgment, disputing whether toll roads leased to a private company continued to be "publicly maintained" as required by the definition of "highway," a condition for subjecting the Motor Carriers to the MCFT.[443] In other words, the Motor Carriers claimed MCFT refunds because, they argued, the MCFT applied only to travel on highways, and, because toll roads were not publicly maintained, they were not highways for purposes of the MCFT.[444]

In support of their position, the Motor Carriers asserted two arguments—that the Department was bound by its prejudicial admissions about the nature of Indiana toll roads in a related federal case and that it should be barred from asserting claims regarding the nature of Indiana toll roads different from the one asserted in the refund case before the Tax Court. The Tax Court rejected both arguments.[445] Ultimately, the Tax Court granted the Department's summary-judgement motion and upheld its denial of the Motor Carriers' refund claims.[446] The court noted that the Indiana toll roads at issue were leased to a private entity that assumed responsibility for their upkeep.[447] The toll roads at issue were owned by the Indiana Finance Authority ("IFA") since May 2005.[448] In April 2006, the IFA leased the roads to a private entity, the ITR Concession Company LLC, for 75 years.[449] The lease provided that the lease transaction was contingent on its enabling legislation, which had been enacted into codified law.[450] The Tax Court concluded that the lease constituted a statutorily authorized public-private agreement. Along with its enabling legislation, it legally established that the toll roads in question were maintained as public highways throughout the relevant tax years and, therefore, subject to Indiana's MCFT.[451] Accordingly, the Tax Court affirmed the Department's denial of the Motor Carriers' refund claims.[452]

III. CONCLUSION

The 2024 survey of Indiana tax decisions highlights several critical trends in the state's evolving tax jurisprudence. The Indiana Tax Court has reaffirmed its firm commitment to textual interpretation, often relying heavily on dictionary

441. *Id.* at 974.
442. B.L. Reever Transport, Inc., 226 N.E.3d at 837 (citing *B.L. Reever Transport, Inc.*, 163 N.E.3d 968, 971 n.1).
443. *Id.*
444. *Id.*
445. *Id.* at 842, 844.
446. *Id.* at 844.
447. *Id.* at 838.
448. *Id.* at 839.
449. *Id.*
450. *Id.* (citing PUB. LAW NO. 47-2006, IND. CODE §§ 8-15.5-1-1–13-8 (2024)).
451. *Id.* at 844.
452. *Id.*

definitions. This approach continues to place significant pressure on the legislature to refine statutory language and eliminate ambiguities. However, cases like *Slatten*, *Sawlani*, and *Penn Entertainment* illustrate the ongoing tension between maintaining judicial consistency and navigating the practical realities of tax administration, all within the framework of prior Indiana tax precedents, state legislative and agency deference, and the principles of separation of powers. The increasing involvement of senior judges further underscores the importance of preserving institutional continuity and expertise within the Tax Court. As the Indiana Supreme Court prepares to review pivotal cases, its forthcoming decisions are poised to shape the contours of the state's tax policy for years to come. Ultimately, the dynamic interplay between the judicial, legislative, and administrative branches remains essential to ensuring fairness and predictability in Indiana's tax system. This survey emphasizes the need to closely monitor these developments to understand better their implications for taxpayers, practitioners, and policymakers alike.