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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 Court of Appeals of Indiana (“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 2024, the Indiana Supreme Court issued an order amending Rule 11 of the Indiana Rules of Appellate Procedure, to become effective January 1, 2025.² Rule 11 governs “Duties of Court Reporter” in appeals and covers the preparation of the transcript designated in the notice of appeal, the deadline for

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1. The survey period is between October 1, 2024, and September 30, 2025.

2. Order Amending Rules of App. Proc., No. 24S-MS-1 (Ind. Oct. 18, 2024).

filing the transcript with the trial court clerk or administrative agency, extensions of time to file transcripts, and motions to compel if the court reporter does not file the transcript within the time allowed.³ The prior version of Rule 11 required the court reporter to serve a copy of a motion for extension only on the parties to appeal and required the appellant to serve a copy of the motion to compel only on the court reporter.⁴ The current version amended subsection (C) and now “require[s] a court reporter to serve a copy of a motion for extension of time to file the transcript on the trial judge in addition to the parties to the appeal.”⁵ It also amended subsection (D), “requir[ing] the appellant to serve a motion to compel on the trial judge and parties to the appeal.”⁶ Indiana Appellate Rule 11 reads, in pertinent part:

Rule 11. Duties of Court Reporter

....

C. Extension of Time to File Transcript.

If the Court Reporter believes the Transcript cannot be filed within the time period prescribed by this rule, then the Court Reporter must promptly move the Court on Appeal designated in the Notice of Appeal for an extension of time to file the Transcript pursuant to Rule 35 (A) and must state in such motion the factual basis for inability to comply with the prescribed deadline despite exercise of due diligence. (See Form # App.R. 11-2). The Court Reporter must serve a copy of the motion on the trial judge and the parties to the appeal in accordance with Rule 24. Motions for extension of time in interlocutory appeals, appeals involving worker’s compensation, issues of child custody, support, visitation, paternity, adoption, determination that a child is in need of services, and termination of parental rights are disfavored and must be granted only in extraordinary circumstances.

D. Failure to Complete Transcript.

If the Court Reporter fails to file the Transcript with the trial court clerk within the time allowed, the appellant must seek an order from the Court on Appeal compelling the Court Reporter to do so. The motion to compel must be verified and

3. IND. APP. R. 11.

4. Order Amending Rules of App. Proc., *supra* note 2.

5. *Id.*

6. *Id.*

affirmatively state that the motion was served on the Court Reporter and that the appellant has complied with the agreement for payment made in accordance with Rule 9(H). The motion to compel must be served on the trial judge and parties to the appeal. Failure of appellant to seek such an order not later than seven days after the Transcript was due to have been filed with the trial court clerk must subject the appeal to dismissal.⁷

The order did not make any amendments to subsections (A) and (B) of Rule 11.

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

II. CASE LAW INTERPRETING APPELLATE RULES

The Court of Appeals and Supreme Court issued a number of decisions analyzing the Appellate Rules, including further developing Indiana's jurisprudence on issues such as the appealability of certain trial court orders, preserving an adequate record for appeal, and appellate court jurisdiction.

A. Appealability of Orders

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

In *M.K.D.-H. v. D.H.*, the trial court granted a biological grandfather's petition for visitation rights, and the adoptive parents challenged the order on appeal, asserting that the order was a final judgment.⁸ The Court of Appeals disagreed with the adoptive parents and dismissed the appeal.⁹

The Court of Appeals first explained the general principle that “[a] party may appeal from a final judgment and certain interlocutory orders.”¹⁰ And, under Indiana Appellate Rule 2(H), a judgment is a final judgment if any of the following are met:

- (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;

7. IND. APP. R. 11.

8. 247 N.E.3d 1233, 1234 (Ind. Ct. App. 2024).

9. *Id.* at 1237.

10. *Id.* at 1234 (citing IND. APP. R. 5, 9(A)).

- (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.¹¹

As to finality, the Court of Appeals held that while the trial court's order granted the grandfather's request for visitation, "the order did not dispose of all claims as to all parties."¹² Instead, the trial court's order directed the parties to mediation or to work with a parenting time coordinator to determine a visitation schedule, with provisions for a hearing if mediation failed to produce an agreement.¹³ Additionally, the panel emphasized that the trial court's order did not include the requisite language under Indiana Trial Rule 54 because it did not state there was "no just reason for delay."¹⁴ The Court of Appeals further rejected the adoptive parents' argument that the order constituted a final judgment because it disposed of "some distinct and definite branch of the proceedings."¹⁵ The panel explained that, under Indiana Supreme Court precedent, Indiana Trial Rules 54(B) and 56(C) had "superseded the distinct and definite branch doctrine of finality and that such appeals may now proceed only by leave of court."¹⁶

The Court of Appeals thus classified the trial court's order as interlocutory rather than final.¹⁷ First noting that parties may appeal certain interlocutory orders "as a matter of right" under Indiana Appellate Rule 14(A), the panel determined the trial court's order did not fall within any of those categories.¹⁸ The Court of Appeals then examined whether the adoptive parents had properly sought permission for a discretionary appeal under Indiana Appellate Rule 14(B) or whether an interlocutory appeal was provided by statute per Indiana Appellate Rule 14(D).¹⁹ The panel found "no indication that Adoptive Parents sought certification from the trial court or permission from [the Court of Appeals] to file a discretionary interlocutory appeal, and they [had] not stated a statutory right to appeal."²⁰

M.K.D.-H. reinforces important general principles regarding the

11. IND. APP. R. 2(H).

12. *M.K.D.-H.*, 247 N.E.3d at 1236.

13. *Id.*

14. *Id.*

15. *Id.* at 1235.

16. *Id.* (quoting *Berry v. Huffman*, 643 N.E.2d 327, 328 (Ind. 1994)).

17. *Id.* at 1236.

18. *Id.* (citing IND. APP. R. 14(A)).

19. *Id.* (citing IND. APP. R. 14(B), (D)).

20. *Id.* at 1236–37.

appealability of trial court orders and offers practitioners an important reminder on when—and how—interlocutory orders may be appealed. Had the adoptive parents properly sought certification from the trial court and permission from the Court of Appeals pursuant to Indiana Appellate Rule 14(B), it is possible that their appeal would have been heard on the merits, instead of being dismissed.

Bernacchi v. Lindborg is another Court of Appeals opinion dismissing an appeal.²¹ This case involved defendants moving for summary judgment on jurisdictional grounds, arguing that plaintiffs had failed to exhaust administrative remedies.²² The trial court denied summary judgment and purported to certify the order as a final judgment under Indiana Trial Rule 56(C), including “magic language” that there was no just reason for delay and directing the entry of judgment.²³ The defendants appealed the order as a final judgment under Indiana Appellate Rule 2(H)(2).²⁴

The panel analyzed whether the trial court’s order constituted a “final judgment” under Trial Rule 56(C).²⁵ To be properly certifiable under this rule, the “magic language” from Trial Rule 56(C) was not enough; rather, “a trial court order must possess the requisite degree of finality[] and must dispose of at least a single substantive claim.”²⁶ The Court of Appeals determined that the trial court’s denial of summary judgment failed both requirements.²⁷

Specifically, the panel held that “an order denying a motion for summary judgment cannot be a final appealable judgment because it does not foreclose any rights.”²⁸ Instead, such denial “merely places the parties’ rights in abeyance pending ultimate determination by the trier of fact.”²⁹ Accordingly, when a party seeks review of a denial of a summary judgment motion, the party must pursue an interlocutory appeal under Indiana Appellate Rule 14.³⁰

The Court of Appeals then acknowledged that while the order could not qualify as a final judgment, it potentially could be the subject of an interlocutory appeal under Appellate Rule 14(B), which permits appeals from “other

21. 260 N.E.3d 1006, 1008 (Ind. Ct. App.), *trans. denied*, 270 N.E.3d 954 (Ind. 2025).

22. *Id.*

23. *Id.* at 1008–09 (quoting *Ramco Indus., Inc. v. C & E Corp.*, 773 N.E.2d 284, 287–88 (Ind. Ct. App. 2002)).

24. *Id.* at 1009. Indiana Appellate Rule 2(H)(2) states that a judgment is final if 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[.]

IND. APP. R. 2(H)(2).

25. *Bernacchi*, 260 N.E.3d at 1009–10.

26. *Id.* at 1009 (alteration in original) (quotation marks omitted) (quoting *Ramco*, 773 N.E.2d at 288).

27. *Id.*

28. *Id.* at 1009–10 (citing *Anonymous Dr. A v. Sherrard*, 783 N.E.2d 296, 299 (Ind. Ct. App. 2003)).

29. *Id.* at 1010 (quoting *Sherrard*, 783 N.E.2d at 299).

30. *Id.*

interlocutory orders if the trial court certifies its order and the Court of Appeals accepts jurisdiction over the appeal.”³¹ However, the panel found that neither condition was satisfied in this case.³² Specifically, the trial court did not certify its order for interlocutory appeal, and the Court of Appeals did not accept jurisdiction over the appeal.³³ The Court of Appeals emphasized that “the Bernacchis never asked either court for its respective authorization.”³⁴

As with *M.K.D.-H.*, the *Bernacchi* panel reinforced some principles regarding finality of trial court orders—most importantly, that a summary judgment denial is interlocutory in nature because it does not resolve any claims but rather allows litigation to proceed toward trial. Appellants should be well aware that even if a trial court order denying summary judgment contains “magic language”—that there is no just reason for delay and directing the entry of judgment—that order is not appealable as a final judgment. Rather, appellants must pursue an interlocutory appeal and proceed under Indiana Appellate Rule 14.

Unlike either of the two cases described above, *City of South Bend v. Cao* involved appellants who had properly pursued a discretionary interlocutory appeal under Indiana Appellate Rule 14(B).³⁵

Cao was a breach of contract case where three companies and their owner (“companies”) alleged breach of contract against the city.³⁶ The trial court denied the city’s motion for summary judgment, and the city filed both a motion to reconsider the summary judgment denial and a motion to certify the denial for interlocutory appeal.³⁷ Four months later, the trial court entered an “order denying the motion to reconsider and certifying issues for interlocutory appeal[.]”³⁸ A few days after, the city filed a renewed motion requesting that the trial court certify for interlocutory appeal the trial court’s denial of the motion to reconsider.³⁹ The same day, the trial court granted the city’s renewed motion, and the city then petitioned the Court of Appeals to accept the interlocutory appeal, which was granted.⁴⁰

The companies cross-appealed and argued that the appellate court lacked jurisdiction, relying on *Wise v. State*⁴¹ as precedent for dismissing improperly

31. *Id.* (quoting IND. APP. R. 14(B)).

32. *Id.*

33. *Id.*

34. *Id.*

35. 267 N.E.3d 1029, 1042 (Ind. Ct. App.), *trans. denied*, 272 N.E.3d 956 (Ind. 2025). In *Cao*, the Court of Appeals unanimously determined that the appeal was properly in front of it. *Id.* However, the decision was split as to the merits of the appellate claim raised. *Id.* (Vaidik, J., concurring in part and dissenting in part).

36. *Id.* at 1031–32 (majority opinion).

37. *Id.* at 1036.

38. *Id.* (alteration in original).

39. *Id.*

40. *Id.*

41. 997 N.E.2d 411 (Ind. Ct. App. 2013).

certified appeals.⁴² In *Wise*, an appeal was dismissed for lack of jurisdiction when the trial court tried to grant certification after it had already been “deemed denied” under Indiana Appellate Rule 14(B)(1)(e).⁴³ Specifically, under Indiana Appellate Rule 14(B)(1)(e), if a trial court fails to rule on a motion for certification within thirty days, the motion is automatically deemed denied.⁴⁴

The companies argued that the same result as in *Wise* should follow because the city’s initial motion for certification had been deemed denied under Indiana Appellate Rule 14(B)(1)(e).⁴⁵ However, the *Cao* panel distinguished the case from *Wise* because the city had filed a renewed motion to certify.⁴⁶ The Court of Appeals found this procedurally proper under Indiana Supreme Court precedent that “held that even orders on a repetitive motion or a motion to reconsider fall within the broad ambit of Appellate Rule 14(B)’s authorization to appeal other interlocutory orders[.]”⁴⁷ The Court of Appeals then elaborated,

We attain jurisdiction so long as a party clears two discretionary judicial hurdles—certification by the trial court and acceptance by this court. The moving party must move for certification by the trial court within thirty days of the trial court’s entry of an order on the Chronological Case Summary, App. R. 14(B)(1)(a), and then petition this court for acceptance within thirty days of the trial court’s certification. App. R. 14(B)(2)(a).

On October 26, the trial court entered an order on its docket, and on October 30, the City asked the trial court to certify that order for interlocutory appeal. The trial court granted that motion on the same day. The City then asked this court to accept its interlocutory appeal on November 27, 2023, and we granted the City’s motion. As such, the City cleared both discretionary hurdles to our having jurisdiction, and we turn to the merits of the City’s appeal.⁴⁸

Cao is valuable precedent that emphasizes Indiana’s discretionary interlocutory appeal procedures under Indiana Appellate Rule 14(B). Appellants pursuing a discretionary interlocutory appeal should avail themselves of any

42. *Cao*, 267 N.E.3d at 1035–36.

43. *Id.* at 1036 (citing *Wise*, 997 N.E.2d at 413).

44. *See id.* Indiana Appellate Rule 14(B)(1)(e) states:

In the event the trial court fails for thirty (30) days to set the motion for hearing or fails to rule on the motion within thirty (30) days after it was heard or thirty (30) days after it was filed, if no hearing is set, the motion requesting certification of an interlocutory order shall be deemed denied.

IND. APP. R. 14(B)(1)(e).

45. *Cao*, 267 N.E.3d at 1036.

46. *Id.* at 1037.

47. *Id.* (alteration in original) (quotation marks omitted) (quoting *NCAA v. Finnerty*, 191 N.E.3d 211, 217–18 (Ind. 2022)).

48. *Id.* at 1037 (footnote omitted) (citation omitted) (quotation marks omitted).

appropriate opportunity to renew a motion for certification, as the city did in *Cao*, if an initial motion for certification is deemed denied by operation of Indiana Appellate Rule 14(B)(1)(e).

B. Preserving an Adequate Record for Appeal

During the survey period, the Court of Appeals of Indiana also addressed the importance of preserving an adequate record for appeal.

In *Maw v. Pringle*, after a hearing and within a written order, the trial court denied parenting time to an incarcerated father who had been convicted of child molesting.⁴⁹ During the hearing preceding the written order, both parties had appeared and presented evidence.⁵⁰

The father appealed the trial court's order, raising three "evidence-related arguments."⁵¹ The Court of Appeals, however, did not reach the merits of any of the arguments because they rested on information that the court lacked.⁵² Specifically, the father had failed to provide either a transcript of the hearing or any other record of the proceedings as required by Indiana Appellate Rule 9(F)(5).⁵³

The *Maw* panel noted that the father had filed a "Motion for Copy of Transcript" and "Motion to Compel Transcript"; however, the Court of Appeals had denied both because the father had not arranged to pay for the preparation of the transcript.⁵⁴ The Court of Appeals acknowledged that preparing transcripts can be expensive, especially for indigent appellants such as the father, but noted that this "does not dictate . . . the conclusion that indigent civil appellants are entitled to have a complete record of the proceedings, including a transcription, prepared for them at public expense."⁵⁵ Rather, Indiana Appellate Rule 31(A) provides an alternative procedure for appellants who cannot obtain a transcript due to unavailability, including unavailability due to indigency.⁵⁶

Specifically, under Indiana Appellate Rule 31(A), if no transcript is available, "a party or the party's attorney may prepare a verified statement of the evidence from the best available sources, which may include the party's or the attorney's recollection."⁵⁷ A party must "then file a motion to certify the statement of evidence with the trial court or Administrative Agency" and submit the statement of evidence with that motion.⁵⁸ The Court of Appeals noted that

49. 263 N.E.3d 790, 791–92 (Ind. Ct. App. 2025).

50. *Id.* at 792.

51. *Id.* at 791–92.

52. *Id.* at 793.

53. *Id.*

54. *Id.*

55. *Id.* at 793–94 (quoting *Campbell v. Criterion Grp.*, 605 N.E.2d 150, 160 (Ind. 1992)).

56. *Id.* at 794.

57. *Id.* (quoting IND. APP. R. 31(A)).

58. *Id.* (quoting IND. APP. R. 31(A)).

there was no indication that the father had attempted to produce such a statement of evidence or had demonstrated that preparing one would be inadequate to review the issues he raised.⁵⁹

The Court of Appeals thus applied the waiver doctrine: because it did not have the transcription of testimony or any record of the evidence presented, the panel was unable to analyze on appeal any of the father's claims, all of which relied on a review of the evidence presented at the hearing.⁶⁰ Accordingly, the Court of Appeals affirmed the trial court's order.⁶¹

Maw is an important reminder for appellants that meaningful appellate review can occur only when the appellate court has the necessary information to evaluate the appellate arguments raised. If appellants fail to provide the requisite information to the appellate court, they risk being subject to the waiver doctrine.

C. Appellate Court Jurisdiction

One case from the Indiana Supreme Court addressed, in part, appellate jurisdiction over discovery orders, as well as the effect of interlocutory appeals on trial court jurisdiction.

AMW Investments, Inc. v. Town of Clarksville's procedural history involved a prior appeal and trial court activity during the pendency of that prior appeal.⁶² The dispute between the town and the company began when the town suspended the company's adult entertainment license and imposed civil fines for violating local ordinances.⁶³ After further violations, the town revoked the company's license.⁶⁴

The company sought judicial review of the license revocation, and the town responded with counterclaims related to the ordinance violations and also obtained a preliminary injunction barring the company from operating the adult entertainment venue.⁶⁵ The town moved to impose additional fines, and the company appealed the preliminary injunction as a matter of right under Indiana Appellate Rule 14(A).⁶⁶ The trial court deferred its ruling on the pending fines motion, but "[n]either the trial nor appellate court stayed proceedings below while the appeal was pending."⁶⁷

During the pendency of the company's interlocutory appeal, the town served the company with written discovery requests.⁶⁸ After the trial court

59. *Id.*

60. *Id.*

61. *Id.*

62. 246 N.E.3d 1213, 1216 (Ind. 2024).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

granted the company an extension, the company initially responded by objecting only on jurisdictional grounds, claiming the pending appeal divested the trial court of jurisdiction over discovery matters.⁶⁹

The Court of Appeals ultimately affirmed the trial court's entry of the injunction, and the Indiana Supreme Court denied transfer.⁷⁰ Thirteen months after the town's initial discovery requests and three months after the injunction appeal had concluded, the company served another discovery response with unexplained redactions and numerous new boilerplate objections.⁷¹ Upon the town's motion to compel, the trial court ordered the company to respond to the town's discovery requests and to not withhold anything on the basis of any objection the company had failed to raise in its initial responses.⁷²

But the company "again asserted boilerplate objections . . . and withheld responsive documents."⁷³ The trial court ultimately held the company in contempt, imposing a \$30,000 sanction that the company could avoid if it fully answered the town's discovery requests and awarding attorney's fees and expenses to the town.⁷⁴ The company appealed.⁷⁵

After a divided Court of Appeals panel reversed, the Indiana Supreme Court granted transfer.⁷⁶ The Supreme Court first addressed whether parties appealing contempt sanctions may also challenge the underlying discovery order they violated.⁷⁷ The Court noted that the contempt sanction, as an order for the payment of money, was appealable as of right under Indiana Appellate Rule 14(A)(1); however, the discovery order was not.⁷⁸ The Court then held "as a matter of first impression that appealing a monetary sanction necessarily brings up for review the propriety of the underlying discovery order."⁷⁹

In so holding, the Supreme Court relied on *Allstate Insurance Co. v. Scrogan*, explaining that "a discovery sanction is improper if the underlying discovery order is erroneous"⁸⁰ because "[i]f the [discovery] order is invalidated, the contempt judgment falls with it."⁸¹ The Court further explained that "reviewing discovery orders during sanction appeals affords relief to parties from

69. *Id.*

70. *Midwest Ent. Ventures, Inc. v. Town of Clarksville*, 158 N.E.3d 787 (Ind. Ct. App. 2020), *trans. denied*, 166 N.E.3d 913 (Ind. 2021).

71. *AMW Invs.*, 246 N.E.3d at 1217, 1220.

72. *Id.* at 1217.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1217–18 (citing *AMW Invs., Inc. v. Town of Clarksville*, 227 N.E.3d 898, 899, 905 (Ind. Ct. App.), *trans. granted*, 235 N.E.3d 135 (Ind. 2024)).

77. *Id.* at 1218.

78. *Id.*

79. *Id.*

80. *Id.* (citing *Allstate Ins. v. Scrogan*, 851 N.E.2d 317, 322 (Ind. Ct. App. 2006)).

81. *Id.* (second alteration in original) (quoting *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 726 F.2d 1150, 1157 (7th Cir. 1984), *rev'd on other grounds*, 470 U.S. 373 (1985)).

particularly egregious and burdensome orders”⁸² and that appellate review prevents the “hollow victory” of winning an appeal after protected information has already been disclosed.⁸³

The Indiana Supreme Court then turned to the issue of the effect of the company’s interlocutory appeal on the trial court’s jurisdiction.⁸⁴ After noting that no court stayed proceedings pending the appeal, the Indiana Supreme Court explained that “appealing an interlocutory order through Rule 14 divests the trial court of jurisdiction over the subject of the interlocutory order, but not over the entire action.”⁸⁵ Consequently, “jurisdiction in the trial court remains over matters unrelated to the subject of the appeal.”⁸⁶ Applying this principle, the Court determined that the company’s injunction appeal “did not affect the trial court’s jurisdiction to oversee other matters unrelated to the injunction,” including discovery disputes.⁸⁷ The Supreme Court then reviewed the merits of the company’s appellate arguments, ultimately determining that the trial court’s discovery order and contempt sanction were not an abuse of discretion.⁸⁸

AMW Investments provides clarity to practitioners regarding the scope of appellate review when challenging contempt sanctions based on discovery violations. The Indiana Supreme Court case also emphasizes that discovery proceedings should continue in the normal course during interlocutory appeals unless those discovery proceedings are related to the subject of the appeal or specifically stayed by a court.

III. REFINING OUR APPELLATE PROCEDURE

During the survey period, Indiana’s appellate courts began dealing with the growing issue of parties likely using generative artificial intelligence to draft briefs and citing cases, statutes, and Trial Rules that do not exist or that do not support the cited proposition. When practitioners use artificial intelligence, they must ensure that the cited authorities both exist and support the cited proposition.

Appellate Rule 46(A)(8)(a) provides that “[e]ach contention must be supported by citations to the authorities[] [and] statutes . . . relied on.”⁸⁹ In *Williams v. Kirch*, Williams “cite[d] several ‘cases’ in his opening brief that do not exist.”⁹⁰ “As Kirch suggests, this may be the result of the use of ‘generative artificial intelligence,’ which can produce fictitious case citations.”⁹¹ “Citations

82. *Id.*

83. *Id.* (quoting *Allstate Ins.*, 851 N.E.2d at 322).

84. *Id.* at 1219.

85. *Id.* (citing IND. APP. R. 5(B); *Doe v. O’Connor*, 781 N.E.2d 672, 673 (Ind. 2003)).

86. *Id.*

87. *Id.*

88. *Id.* at 1220–23.

89. IND. APP. R. 46(A)(8)(a).

90. 268 N.E.3d 284, 288 (Ind. Ct. App. 2025).

91. *Id.*

to fictitious, AI-generated authority is a growing problem nationwide. Courts have sanctioned both attorneys and pro se litigants for including them in briefs.”⁹² The Court of Appeals “admonish[ed] Williams for citing fictitious cases in his brief.”⁹³ The court also “caution[ed] attorneys and pro se litigants alike against using AI to conduct legal research without independently verifying the citations generated. Judges must be able to rely on the authenticity of the authorities cited by the parties to make just decisions.”⁹⁴

Interestingly, Westlaw assigned the following “Editor’s Note” to the decision that the authors of this Article had never seen: “This decision contains discussion of citation references that are incorrect or do not actually exist. These invalid citations appeared in the original court opinion and have been preserved as written since they are part of the official record. Any links to these invalid citations have been removed.”⁹⁵

Similarly, in *Cingel v. Ferreri*, “Cingel cites 23 legal authorities in her Argument: 12 Indiana cases, 6 Indiana statutes, and 5 Indiana rules. Of those 23 legal authorities, 14 do not exist. The 14 nonexistent authorities include 11 cases, 2 statutes, and 1 trial rule.”⁹⁶ “Of the nine legal authorities Cingel cites that do exist, six are incorrectly cited or described.”⁹⁷ “Given Cingel’s citations to nonexistent legal authorities and to real legal authorities that have nothing to do with the propositions they purport to support, it is likely that Cingel used generative artificial intelligence to draft her brief, either in whole or in part.”⁹⁸ The Court of Appeals cautioned parties to verify citations generated by artificial intelligence.⁹⁹

IV. INDIANA’S APPELLATE COURTS

A. Case Data from the Indiana Supreme Court

During the 2024 fiscal year,¹⁰⁰ the Indiana Supreme Court disposed of 692 cases, including 319 criminal cases, 251 civil cases, 5 tax cases, 42 original actions, 0 board of law examiners case, 0 mandate of funds case, 69 attorney discipline cases, 2 judicial discipline cases, and 4 certified questions.¹⁰¹ The Court heard 50 oral arguments during the fiscal year, 42% of which were heard

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 284 (Westlaw editor’s note).

96. 269 N.E.3d 857, 859 (Ind. Ct. App. 2025).

97. *Id.* at 860.

98. *Id.* at 861.

99. *Id.*

100. The Indiana Supreme Court fiscal year ran from July 1, 2024, to June 30, 2025. *See* IND. SUP. CT., ANNUAL REPORT 2024–2025, at 11 (2025).

101. *Id.* at 11.

before the Court decided to grant transfer.¹⁰² The Court issued 50 majority opinions and 40 non-majority opinions.¹⁰³ Chief Justice Rush issued 8 majority opinions, Justice Massa issued 6 majority opinions, Justice Slaughter issued 11 majority opinions, Justice Goff issued 9 majority opinions, and Justice Molter issued 9 majority opinions.¹⁰⁴ The Court also issued 7 per curiam decisions.¹⁰⁵ The Court issued unanimous decisions 77% of the time.¹⁰⁶

B. Case Data from the Indiana Court of Appeals

During 2024,¹⁰⁷ the Court of Appeals disposed of 3,206 cases.¹⁰⁸ This is an increase from 2023, when the Court of Appeals disposed of 2,979 cases, and 2022, when the Court of Appeals disposed of 2,971 cases.¹⁰⁹ In 2024, the court disposed of 1,641 criminal cases, 1,029 civil cases, and 536 other cases.¹¹⁰ The Court affirmed the trial court 84.4% of the time, with the Court affirming 89.1% of criminal cases, 97% of post-conviction relief cases, and 69.1% of civil cases.¹¹¹ The average age of cases pending before the Court of Appeals at the end of 2024 was 1.9 months, compared with 2.1 months at the end of 2023.¹¹² In addition to deciding cases, the court issued 8,380 orders.¹¹³

C. Court of Appeals Elects Judge Tavitas Chief Judge

“The judges of the Court of Appeals of Indiana elected Judge Elizabeth F. Tavitas to serve a three-year term as Chief Judge starting on January 1, 2026.”¹¹⁴ She succeeds Judge Altice, “who served with distinction as Chief Judge of the Court of Appeals from January 1, 2023 to December 31, 2025.”¹¹⁵ “Judge Tavitas was appointed to the Court of Appeals by Governor Eric Holcomb and began her service on August 6, 2018.”¹¹⁶ “Prior to her appointment to the Court of Appeals, she served for more than twelve years as Judge of the Superior Court of Lake County, Civil Division from 2006-2018.”¹¹⁷ We look forward to Judge

102. *Id.* at 15.

103. *Id.* at 18.

104. *Id.*

105. *Id.*

106. *Id.*

107. The Indiana Court of Appeals 2024 annual report covers January 1, 2024, through December 31, 2024. *See* CT. OF APPEALS OF IND., 2024 ANNUAL REPORT 4 (2024).

108. *Id.* at 1.

109. *Id.*

110. *Id.*

111. *Id.* at 2.

112. *Id.*

113. *Id.*

114. *Court of Appeals Elects Elizabeth F. Tavitas as Chief Judge*, IND. JUD. BRANCH (Dec. 30, 2025), <https://www.in.gov/courts/appeals/news/2025-1230/> [<https://perma.cc/6XF4-D3PV>].

115. *Id.*

116. *Id.*

117. *Id.*

Tavitas' service as Chief Judge over the coming years.

D. Judge Scheele Sworn in at Indiana Court of Appeals

In December 2024, Governor Holcomb appointed Judge Stephen E. Scheele to the Indiana Court of Appeals, and he began service on January 8, 2025.¹¹⁸ Judge Scheele is a Lake County native, and he “earned his B.A. (International Studies/Political Science) from the University of Denver in 1993 and his J.D. from Indiana University’s Maurer School of Law in 1996.”¹¹⁹ “From 1996–1997, Judge Scheele participated in a year-long legal fellowship in Germany, which included an externship with the German Ministry of Justice and work at a Berlin law firm. He returned to Lake County in the fall of 1997 to practice law.”¹²⁰ “Throughout the next 20 years, Judge Scheele developed a wide-ranging legal practice in Indiana’s state and federal courts,” from “insurance defense” to “public defender work.”¹²¹ In 2016, Judge Scheele became “a magistrate in the Lake Circuit Court,” and “[i]n 2019, Governor Eric Holcomb appointed Judge Scheele to preside over Room 5 of the Lake Superior Court’s Civil Division.”¹²² We look forward to Judge Scheele’s service on the Court of Appeals for many years to come.

CONCLUSION

This survey period included one rule amendment, several decisions analyzing the appellate rules, and guidance regarding the pitfalls of using artificial intelligence to draft briefs. Keeping abreast of these rule changes, guidance provided through case law, and how to use emerging technology is key to a successful appellate practice.

118. *Judge Stephen E. Scheele*, IND. JUD. BRANCH, <https://www.in.gov/courts/appeals/judges/stephen-scheele/> [<https://perma.cc/YXY8-8XCF>] (last visited Feb. 2, 2026).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

BANKING, BUSINESS & CONTRACT LAW

FRANK SULLIVAN, JR. ^{*,**}

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INTRODUCTION

This Article surveys banking, business, and contract law decisions of the Indiana Supreme Court (“Supreme Court”) and Indiana Court of Appeals (“Court of Appeals”) between September 1, 2024, and August 31, 2025 (the “Survey Period”).¹

1. This Article marks the twelfth 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 eleven 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)

This Article will not itemize every Indiana banking, business, and contract law development during the Survey Period. Instead, it will illustrate some of the big-picture issues in these fields, situate where applicable those developments in national trends, and provide 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

During the Survey Period, Judge Stephen R. Bowers of Elkhart County retired.⁶ Judge Bowers was truly one of the founders of commercial courts in Indiana and made significant contributions to their establishment and growth. The Supreme Court appointed Judge Andrew Hicks to succeed Judge Bowers.⁷ The Supreme Court also established a new Commercial Court in Tippecanoe County and appointed Judge Daniel J. Moore to preside over it.⁸

It is very clear that the commercial courts are attracting significant and complex commercial litigation that would likely have been filed as diversity actions in federal court. Examples of two such cases follow: one, a securities fraud class action arising out of a \$1.275 billion public offering; the second, a dispute over insurance coverage for a mass toxic tort action in Taiwan.

(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); 57 IND. L. REV. 811 (2024) (covering 2022–2023); and 58 IND. L. REV. 741 (2025) (covering 2023–2024).

2. *Commercial Courts Committee*, IND. JUD. BRANCH, <https://www.in.gov/courts/iocs/committees/commercial-courts/> [https://perma.cc/V4QJ-CKL6] (last visited Sep. 23, 2025).

3. Sydney Byerly, *New state commercial courts are open in 10 Indiana counties*, THE STATEHOUSE FILE (Aug. 28, 2025), 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/P33M-T46G]; *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 [https://perma.cc/5V5D-34SS].

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.

6. IND. SUP. CT., ANNUAL REPORT 2024-2025, at 45 (2025), <https://www.in.gov/courts/supreme/files/2425report.pdf> [https://perma.cc/9SXG-K8FU].

7. *Id.*

8. *Id.*

The first case involves Elanco Animal Health Inc., an Indiana corporation, which is a global leader in animal health, manufacturing, and delivering products and services to prevent and treat disease in farm animals and pets. (Elanco was formerly a business unit of Eli Lilly and Company and became an independently incorporated company in 2018.) In January 2020, Elanco made a major public offering of its securities, selling approximately \$725 million of common stock and another \$550 million of a specialized security called “tangible equity units.”⁹

In October of that year, a shareholder class action lawsuit was filed in the Marion County Commercial Court of Indiana against Elanco, certain executives, and other individuals and entities, alleging that Elanco and certain of its executives made materially false or misleading statements and failed to disclose certain facts about Elanco’s relationships with third-party distributors and revenue attributable to those distributors in the January offering materials, causing investors in those offerings economic loss.¹⁰

The litigation was stayed during the pendency of parallel litigation in federal court. Following amendments to the complaint, the Commercial Court granted Elanco’s motion to dismiss on April 17, 2024, in an impressive forty-page order.¹¹ During the Survey Period, the Indiana Court of Appeals affirmed in all respects.¹²

The second case began nearly a decade ago, when a group representing over one thousand former workers sued a group of affiliated companies and alleged that they had been harmed by exposure to multiple toxic substances during their employment at numerous factories in Taiwan.¹³ The defendants are generally referred to in the litigation as “Technicolor” and include several affiliates, some of which are successors to companies that went by the names of “Thomson Consumer Electronics” and “RCA Corporation.”¹⁴

Technicolor subsequently filed suit in Marion Commercial Court against Allianz Global Risks US Insurance Company, a part of the largest insurance company in the world, seeking defense and indemnity for the claims in the Taiwan class action.¹⁵ The Commercial Court made a series of rulings in the litigation which were, for the most part, favorable to Technicolor. Some of these rulings were appealed but generally affirmed. The most recent developments included the Commercial Court entering an order on January 19, 2024, ordering

9. Order Granting Motion to Dismiss ¶ 39, *Safron Cap. Corp. v. Elanco Animal Health, Inc.*, No. 49D01-2010-CT-036760 (Marion Super. Ct. Apr. 17, 2024).

10. Class Action Complaint ¶¶ 40–79, *Safron*, No. 49D01-2010-CT-036760 (Marion Super. Ct. Oct. 16, 2020).

11. Order Granting Motion to Dismiss, *supra* note 9.

12. *Safron Cap. Corp. v. Elanco Animal Health Inc.*, 267 N.E.3d 463, 484 (Ind. Ct. App.), *reh’g denied*, Sep. 23, 2025.

13. Complaint for Damages and Declaratory Relief ¶ 9, *Technicolor USA Inc. v. Ins. Co. of N. Am.*, No. 49D01-1810-PL-040578 (Marion Super. Ct. Oct. 9, 2018).

14. *Id.* ¶¶ 1, 10.

15. *Id.* ¶ 6.

the payment of specified amounts of defense costs owed by Allianz to Technicolor.¹⁶ During the Survey Period, the Court of Appeals affirmed in all respects.¹⁷

As these two examples show, the Indiana Commercial Court project is achieving its purpose of allowing business and commercial disputes to be resolved with expertise, technology, and efficiency, ultimately enhancing economic development in Indiana by furthering the efficient, predictable resolution of business and commercial law disputes.

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.¹⁸ Debt collection cases where the creditor is other than a financial institution are reviewed in Part IV of this Article.

A. A Priority Contest Between a Mortgage and a Mechanic’s Lien

EdgeRock Development, LLC v. C.H. Garmong & Son, Inc. involved the financial tribulations of a commercial construction project called the “Trails of Westfield.”¹⁹

EdgeRock contracted with Garmong, Fox Contractors Corp., 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.²⁰ The two EdgeRock parcels were encumbered by a mortgage to secure the payment by EdgeRock of the purchase price of the two parcels.²¹ (This mortgage is referred to throughout the litigation as the “Acquisition Mortgage.”)²²

Work began on the project in 2017. 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.²³ In December 2018, following five months of nonpayment from EdgeRock, Garmong filed a notice of intention to hold a mechanic’s lien and recorded a mechanic’s lien in the amount of

16. Order on Defense Costs Owed by Allianz ¶ 49, *Technicolor*, No. 49D01-1810-PL-040578 (Marion Super. Ct. Jan. 19, 2024).

17. *Allianz Glob. Risks US Ins. Co. v. Technicolor USA, Inc.*, 266 N.E.3d 755 (Ind. Ct. App. 2025), *trans. denied*, 274 N.E.3d 934 (Ind. 2026).

18. See *infra* Part IV for a discussion of debt collection actions not involving financial institutions.

19. 261 N.E.3d 192, 198 (Ind.), *reh’g denied*, Aug. 20, 2025.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 200.

approximately \$2.1 million.²⁴

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.²⁵ (First Bank refers to this loan as a "refinancing," and it did, indeed, take out the earlier Acquisition Mortgage on EdgeRock's two parcels.) 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."²⁶

Garmong and Fox recorded and then sought to foreclose additional mechanics' liens.²⁷ 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.

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.²⁸ In September 2019, Garmong also recorded mechanics' liens—each in the approximate amount of \$1.0 million—against ZPS's two parcels and Edge Rock's two parcels.²⁹ This case was filed in December 2019, in which Garmong and Fox sought to foreclose on their mechanics' liens and damages for breach of contract and unjust enrichment.³⁰

Starting with the mechanic's lien issue, the trial court held Garmong was entitled to foreclose its mechanic's liens both on the EdgeRock parcels and on the ZPS parcels and that Fox was entitled to foreclose its mechanics' liens both on the EdgeRock parcels and on the ZPS parcels.³¹

The Court of Appeals vacated these two holdings, concluding that because the two contractors had filed mechanics' liens against the parcels of both EdgeRock and ZPS when they only had claims against one or the other, all of their liens were void.³²

The Supreme Court straightened this up, saying that "no reported case in Indiana has ever held [what the Court of Appeals did here], and this case should not be the first."³³ The court held that the liens filed against the properties with respect to which the two contractors did not have claims were, in fact, void, but

24. *Id.* at 214.

25. *Id.* at 201.

26. *EdgeRock Dev., LLC v. C.H. Garmong & Son, Inc.*, 227 N.E.3d 907, 916–17 (Ind. Ct. App. 2024), *aff'd in part and vacated in part*, *EdgeRock*, 261 N.E.3d 192.

27. *EdgeRock*, 261 N.E.3d at 201.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 201–02.

32. *Id.* at 202.

33. *Id.*

that this did not invalidate the liens against the properties with respect to which they had claims.³⁴ Based on the evidence at trial, the Supreme Court found that Garmong had a lien of \$520,000 against ZPS and that Fox had liens totaling approximately \$1.4 million against EdgeRock.³⁵

As to the priority of First Bank's mortgage, the trial court held that it had priority only for the approximately \$2.1 million of its loan that was paid to Garmong.³⁶ (This was not an issue in the Court of Appeals decision because it had vacated the competing mechanics' liens altogether.) The Supreme Court affirmed the trial court's judgment.³⁷

First, the bank claimed that the priority of a mechanic's lien dates from the date the lien was recorded, such that the bank's mortgage had priority here because it pre-dated the filing of the mechanics' liens.³⁸ The Supreme Court was extraordinarily firm rejecting this argument, saying that "more than 150 years' worth of cases from our Court and the Court of Appeals say otherwise," dropping a footnote citing ten Indiana cases to that effect and then saying that that case law "mirrors how courts around the country interpret these sorts of relation-back provisions in lien statutes."³⁹

Second, the bank argued that it enjoyed a statutory priority accorded to construction project financing by Indiana Code section 32-28-3-5(d).⁴⁰ This priority, the Supreme Court said, was available to the bank with respect to the approximately \$2.1 million that the bank loaned to EdgeRock to pay off the prior Garmong construction lien.⁴¹ But it was not available for the balance of the loan because those funds were not used for the project.⁴² Rather, those funds were used to pay off EdgeRock's investors' Acquisition Mortgage.⁴³ The court quoted with approval the finding of the trial court that "[t]he Bank knew that the lien it was paying off was for work already completed" and that "it was not funding a traditional construction loan where the bank provides acquisition funding that allows the project to proceed."⁴⁴

Third, the bank maintained that its mortgage was entitled to be equitably subrogated to the rights and obligations of the Acquisition Mortgage.⁴⁵ Equitable subrogation allows the refinancing lender to take the priority of the mortgage it pays off.⁴⁶ First Bank and Amicus Indiana Bankers Association pointed out that Indiana recognizes the doctrine of equitable subrogation in the refinancing

34. *Id.*

35. *Id.* at 209.

36. *Id.* at 217.

37. *Id.* at 219.

38. *Id.* at 215.

39. *Id.* at 215–16.

40. *Id.* at 214.

41. *Id.* at 217.

42. *Id.* at 218.

43. *Id.*

44. *Id.* at 218–19.

45. *Id.* at 214.

46. *Id.* at 219.

context generally, and they argued that there is no authority for not applying the doctrine when mechanics' liens are involved.⁴⁷ If anything, the contractors were better off, the bank said, because it was its loan that enabled EdgeRock to pay Garmong's outstanding invoices.⁴⁸

But the Supreme Court was quick to note that the doctrine of equitable subrogation sounds, in fact, in equity. Here, the "trial court found that the equities favored the contractors because the portion of the loan in dispute was not a traditional refinancing but a vehicle for the investors to retrieve their capital without paying the contractors that had improved the properties composing the project in which they had invested."⁴⁹ And that was enough for the Supreme Court: "While the trial court could have weighed the equities as the bank proposes, the court didn't have to. We cannot second-guess the court's judgment because the evidence supports its findings, and its findings support its conclusion."⁵⁰

The Supreme Court was undoubtedly correct on the issues of dating of the mechanics' liens and the statutory priority. As to the equitable subrogation issue, the question is one of equity and the trial court's reasoning is highly supportable. Furthermore, the timing of events in this drama was such that the bank, by not conditioning its making of the loan in the first place on obtaining the necessary protections from what happened, invited this result by its lack of diligence.

B. Renewing Unsatisfied Judgments

In a number of decisions over the years, Indiana Court of Appeals Judge Paul D. Mathias has explicated what he himself has called the "somewhat arcane legal history that is the background for collection of civil judgments under Indiana law."⁵¹ In a particularly helpful concurring opinion in *Lewis v. Rex Metal Craft, Inc.*, he points out two important statutory time periods affecting judgments: the ten-year judgment lien period and the twenty-year life of judgment period.⁵² As Judge Mathias stated:

During the eleventh through twentieth years after judgment, no lien exists as to the debtor's real estate. However, with the permission of the court, execution against real estate may still issue, albeit without the benefit of a judgment lien. Proceedings supplemental are also available to a judgment creditor during the second decade.⁵³

47. *Id.* at 219–20.

48. *Id.*

49. *Id.* at 220.

50. *Id.*

51. *Lewis v. Rex Metal Craft, Inc.*, 831 N.E.2d 812, 821 (Ind. Ct. App. 2005) (Mathias, J., concurring); *see also* *Converging Cap., LLC v. Steglich*, 234 N.E.3d 902, 904–06 (Ind. Ct. App. 2024).

52. *Lewis*, 831 N.E.2d at 822 (Mathias, J., concurring).

53. *Id.* at 823 (citations omitted).

However, Judge Mathias says, because of this 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.⁵⁴

In two extremely similar cases during the Survey Period, one from Marion County and the other from Lake County,⁵⁵ trial courts failed to understand the operation of such judgment renewals. In both cases, as the creditor’s unsatisfied judgment approached its tenth anniversary, the creditor filed a new complaint against the debtor to renew the original judgment and collect its amount plus interest.⁵⁶ This is the “judgment renewal” that Judge Mathias speaks of. The practical effect is to obtain a new ten-year judgment lien against the debtor’s property.

In both cases, the trial court dismissed the complaint.⁵⁷ In the Marion County case, the court said “the proper way to renew a judgment is to file a motion to renew in the original court . . . rather than in a new cause of action.”⁵⁸ In both cases, the Court of Appeals reversed, harkening back to a decision discussed in last year’s survey:

“To renew a judgment, before the end of the first ten-year . . . period[,] the judgment creditor *files a new case alleging that it owns the judgment at issue.*” Such a complaint enables the judgment creditor to obtain a new judgment against the debtor and, thus, a new judgment lien on the debtor’s property.⁵⁹

Accordingly, the creditors acted not only within their rights but prudently by filing their renewal complaint under a new cause number.⁶⁰

C. Some Shenanigans in a Bank/Lender – Borrower/Landlord – Tenant Relationship

The borrower in *Bob Evans Restaurants, LLC v. Bank OZK* used loan proceeds to purchase commercial real estate which was then leased to a tenant

54. *Id.*

55. *Autovest, L.L.C. v. Abner*, 245 N.E.3d 193 (Ind. Ct. App. 2024); *Autovest, LLC v. Bach*, 255 N.E.3d 1221 (Ind. Ct. App. 2025). As can be seen, both cases involve the same creditor. The second case was Judge Stephen E. Scheele’s first opinion for the Court of Appeals; in it, the court reversed his former court, the Lake Superior Court.

56. *Abner*, 245 N.E.3d at 194; *Bach*, 255 N.E.3d at 1222.

57. *Abner*, 245 N.E.3d at 194; *Bach*, 255 N.E.3d at 1222.

58. *Abner*, 245 N.E.3d at 194.

59. *Id.* at 195 (first alteration in original) (citations omitted) (quoting *Converging Cap., LLC v. Steglich*, 234 N.E.3d 902, 905 (Ind. Ct. App. 2024)).

60. *Id.*

for use as a restaurant.⁶¹ Included in the collateral for the loan was all of the borrower's interest as landlord under future and existing leases.⁶² Bank/lender, borrower/landlord, and tenant signed a standard subordination, non-disturbance and attornment agreement that subordinated the lease to the lien of the mortgage and authorized the bank to require that tenant pay rent directly to it.⁶³

Eventually tenant closed the restaurant, stopped paying rent, and defaulted on the lease.⁶⁴ Borrower then defaulted and the bank foreclosed on the property.⁶⁵ The bank also exercised its rights under the lease and subordination agreement to direct the tenant to pay rents directly to it.⁶⁶

Unbeknownst to the bank, the tenant and the borrower signed a settlement agreement where tenant agreed to pay the borrower \$225,000 in return for the borrower releasing the tenant from any obligations under the lease.⁶⁷

The bank obtained title to the property after the foreclosure sale and sued the tenant to enforce the lease.⁶⁸ The tenant responded that the lease had been terminated and so it was off the hook.⁶⁹

The Court of Appeals succinctly summarized the situation: "There is no dispute that Lender was not a party to the Lease Agreement and the Settlement Agreement between Tenant and Borrower. Lender, however, was a party to the Subordination Agreement executed by the three parties to protect each party's respective interest in the Property."⁷⁰ Judge Peter Foley does a nice job here of articulating how a mortgage, lease, and subordination agreement interact in such circumstances.

D. Rights of a Junior Lienholder Following Foreclosure

*Sanders v. US Bank Trust National Ass'n as Trustee for ABS Loan Trust VI*⁷¹ makes clear the rights of a junior lienholder in a mortgage foreclosure action. In this case, the sheriff's foreclosure sale yielded sufficient proceeds to pay the senior lienholder in full. The balance of the sale proceeds were held by the court's clerk, but when the junior lienholder (who, after all, had a valid judgment against the property) sought to be paid, the owner argued that the junior lienholder's "mortgage [lien] and claim based thereon was extinguished at the Sheriff's Sale" and did not attach to the sheriff sale proceeds.⁷² The Court

61. 245 N.E.3d 657, 2024 WL 4141625, at *1 (Ind. Ct. App. 2024) (unpublished table decision).

62. *Id.* at *1.

63. *Id.* at *2.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at *3.

68. *Id.* at *4.

69. *Id.*

70. *Id.* at *5.

71. 268 N.E.3d 803 (Ind. Ct. App. 2025).

72. *Id.* at 809.

of Appeals affirmed the trial court's judgment for the junior lienholder: "Indiana caselaw also provides that a lien of a junior mortgagee is transferred or attached to the surplus proceeds from the sale under a senior mortgage foreclosure."⁷³

E. A Mortgage Foreclosure Action Decided Against the Bank: Putative Mortgagee Failed to Designate Evidence Precluding Summary Judgment for the Owner

In *Servbank, SB v. RP2FISH LLC*, a bank claimed to be the successor-in-interest to the original mortgagee on some property in Indianapolis.⁷⁴ The owner took the position that the original mortgage had been released.⁷⁵ In the bank's foreclosure action, the owner sought summary judgment designating, among other things, the Mortgage, the Release, and an affidavit from the owner's manager indicating that the owner (1) paid \$285,000.00 for the property, (2) received a title commitment showing no unreleased mortgages, and (3) had no notice of any outstanding rights of others.⁷⁶ The court concluded that under the circumstances, that owner had made a prima facie showing of its entitlement to summary judgment, such that the burden shifted to bank to designate evidence establishing that a factual issue remained in the case.⁷⁷ The court then held that the bank had failed to designate evidence issue precluding summary judgment.⁷⁸ As such, the court affirmed the trial court's grant of summary judgment in favor of the owner.⁷⁹

F. Residential Property Foreclosure Cases

The author began writing these survey articles in the wake of the financial crisis of 2007–09. It was a time characterized by many residential foreclosures, a considerable number of which failed because of the inability of mortgagees to prove that they owned the debt. In the intervening decade, mortgagees have gotten their acts together, and it is rare to find a case in which the mortgagees cannot prove their entitlement to foreclosure. That was certainly the case during this Survey; cases in which foreclosure was achieved are set forth in the margin.⁸⁰

73. *Id.* at 814.

74. 266 N.E.3d 270, 2025 WL 1912094, at *1 (Ind. Ct. App. 2025) (unpublished table decision).

75. *Id.*

76. *Id.*

77. *Id.* at *3.

78. *Id.* at *4.

79. *Id.*

80. *Sims v. Bank of N.Y. Mellon as Tr. for Certificate Holders of CWABS, Inc., Asset-Backed Certificates, Series 2005-BC5*, 266 N.E.3d 267, 2025 WL 1903643 (Ind. Ct. App.) (unpublished table decision), *trans. denied sub nom.*, *Sims v. Bank of N.Y. Mellon*, 272 N.E.3d

One such case worthy of attention here is *Klunder v. Bank of New York Mellon as Trustee for CWHEQ Revolving Home Equity Loan Trust, Series 2007-A*.⁸¹ A promissory note evidencing a home equity loan was discharged in bankruptcy.⁸² Some years later, the note servicer sent information to the makers as to the amount outstanding on the note, including a caveat that if the note had been discharged in bankruptcy, the information did not constitute a demand for payment.⁸³ Ultimately, the property was foreclosed upon and the makers counterclaimed, arguing that the notices they had received violated the Indiana Deceptive Consumer Sales Act (DCSA).⁸⁴

The Court of Appeals does a good job walking through the law on how bankruptcy discharges the individual mortgagee's debt in a bankruptcy but that the lien on the property remains, citing what is probably the leading Indiana case on the subject: *McCullough v. CitiMortgage, Inc.*⁸⁵

As to the DCSA claim, the Court of Appeals says that "the DCSA does not apply to the alleged deceptive acts because the acts were permitted by law. Under federal law, for example, a creditor shall—to the extent applicable—furnish a consumer with a periodic statement disclosing several items, including some information particular to home-equity plans."⁸⁶

960 (Ind. 2025) (untimely petition to transfer has been filed) (land contract vendor defaulted on its mortgage on the property; mortgagee granted foreclosure; and contract vendee appealed but the Court of Appeals affirmed); *Deva v. Sec. Fed. Sav. Bank*, 267 N.E.3d 1075 (Ind. Ct. App.), *trans. denied*, 270 N.E.3d 958 (Ind. 2025) (trial court entered summary judgment in favor of Security Federal Savings Bank in this mortgage foreclosure action; the Court of Appeals affirmed); *Bonner v. Fifth Third Bank, Nat'l Ass'n*, 267 N.E.3d 1092, 2025 WL 2374892 (Ind. Ct. App. 2025) (unpublished table decision), *trans. denied sub nom.*, *Anderson v. Fifth Third Bank, Nat'l Ass'n*, 274 N.E.3d 936 (Ind. 2026) (Fifth Third sought to foreclose on the Bonner property because the Bonners had defaulted on their loan, which was secured by a mortgage on the property; Fifth Third designated the promissory note, the mortgage, and a sworn affidavit indicating the loan was in default; trial court held Fifth Third was entitled to foreclosure and the Court of Appeals affirmed); *Goodner v. M&T Bank*, 251 N.E.3d 558, 2024 WL 5116375 (Ind. Ct. App. 2024) (unpublished table decision), *trans. denied sub nom.*, *Ryan v. M&T Bank*, 257 N.E.3d 780 (Ind. 2025) (despite signing three sets of mortgage loan documents showing that she owed amounts exceeding \$90,000 for the home and despite making mortgage payments for over a decade, mortgagor claimed she had bought the property outright for \$10 cash and never owed anything to any lender; trial court rejected her arguments, and the Court of Appeals affirmed); *Bey v. Fifth Third Bank Nat'l Ass'n*, 253 N.E.3d 568, 2025 WL 289356 (Ind. Ct. App.) (unpublished table decision), *trans. denied*, 262 N.E.3d 819 (Ind. 2025) (Court of Appeals shows great patience here in considering the appeal from an order of foreclosure filed by an individual who described himself as the Grand Sheik of the Moorish Science Temple of America #27 Sol Temple; such respect for litigants is beyond admirable; Judge Elaine Brown wrote the decision, joined by Judges Altice and Tavitas).

81. 247 N.E.3d 789, 2024 WL 4602210 (Ind. Ct. App. 2024) (unpublished table decision).

82. *Id.* at *1.

83. *Id.*

84. *Id.*

85. 70 N.E.3d 820 (Ind. 2017). *McCullough*, in turn, cites *Long v. Bullard*, 117 U.S. 617 (1886), which established the principle.

86. *Klunder*, 2024 WL 4602210, at *3.

III. BUSINESS LAW

A. Andrew Nemeth Properties, LLC v. Panzica

After the close of the Survey Period, the Indiana Supreme Court decided *Andrew Nemeth Properties, LLC v. Panzica*,⁸⁷ a closely-watched case discussed at length in last year's Survey Article.⁸⁸

The reader is referred to that Article for the details of the dispute, including the conflicting outcomes in the trial court⁸⁹ and Court of Appeals.⁹⁰ In short, Andrew Nemeth and his company ("Nemeth") contended that he and three brothers named Panzica (the "Panzicas") orally formed a limited liability company (LLC) called "NP3, LLC" to pursue a business opportunity; that the Panzicas cut him out of the deal; and that he was entitled to share in the deal's profits, either as a member of NP3, LLC or under a theory of unjust enrichment.⁹¹ The Panzicas maintained that no LLC including Nemeth was ever formed (indeed, they argued that an Indiana LLC cannot even be formed orally) and that any claim Nemeth might have had for unjust enrichment was barred by the doctrine of "unclean hands" (a reference to an allegedly undisclosed real estate commission Nemeth received in connection with the deal).⁹² The trial court held that no LLC was ever formed, agreeing with the Panzicas that an Indiana LLC cannot be formed orally; conducted a bench trial on the unjust enrichment claim; and held it barred by the doctrine of unclean hands.⁹³ The Court of Appeals reversed, holding that an Indiana LLC can be formed by oral agreement; that issues of fact remained as to whether Nemeth and the Panzicas had formed such an agreement; that the issue of unjust enrichment is a question of law, not equity, such that it should have been tried to a jury; and that in such a jury trial, the Panzicas could not use the unclean hands defense as that is an equitable doctrine not available to defend against a legal claim.⁹⁴

Oral argument was held before the Supreme Court in the case on December 5, 2024, and the Court rendered its decision on November 6, 2025.⁹⁵ Amicus appeared in support of Panzica's position that an Indiana LLC can only be formed in writing and on both sides of the question of whether unjust enrichment

87. 271 N.E.3d 1100 (Ind. 2025).

88. 2023–2024 *Survey Article*, *supra* note 1, at 760–64.

89. *Andrew Nemeth Props., LLC v. Panzica*, No. 50C01-2202-PL-000002 (Marshall Cir. Ct. June 6, 2023).

90. *Andrew Nemeth Props., LLC v. Panzica*, 234 N.E.3d 183 (Ind. Ct. App. 2024), *vacated*, *Nemeth*, 271 N.E.3d 1100.

91. *Id.* at 185–86.

92. *Id.* at 187–88.

93. *Id.* at 188.

94. *Id.* at 191–93.

95. *Nemeth*, 271 N.E.3d 1100.

was a question of law or equity.⁹⁶

Justice Derek Molter's opinion for a unanimous Supreme Court resolved the major issues as follows. First, the Court agreed with Panzica that formation of an Indiana LLC requires a written operating agreement.⁹⁷ Second, although Nemeth could not therefore establish that he was a member of NP3, LLC, the court agreed with Nemeth that he could pursue a claim that the Panzicas breached an agreement that he had with them that he would become a member.⁹⁸ Third, the court agreed with Nemeth that his claim of unjust enrichment sounded in law, not equity, and that he was entitled to a jury trial on that issue.⁹⁹ Fourth, the court agreed with the Panzicas that their defense of unclean hands would be available to them in any such jury trial.¹⁰⁰

Assuming this Article's author is accurate in summarizing the court's decision in this way, it is apparent that each of the litigants won on two of the issues and lost on two of the issues. While the Supreme Court cut back on the decision of the Court of Appeals in Nemeth's favor, the court's decision was far more favorable to him than the result in the trial court.

Each of the four conclusions are extremely interesting and make a lot of new Indiana law. While this Article cannot exhaustively discuss the Court's analysis, a few points on each are warranted.

The issue of whether the formation of an Indiana LLC requires a written operating agreement is essentially a question of statutory interpretation. The battle is joined over the meaning of two sections of the act. First, a section defining the term "operating agreement" (the "Definition Section"):

"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.¹⁰¹

Second, a section describing the way in which a person becomes a member of an LLC (the "Member Section"):

(a) Subject to subsection (b), 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; and (2) in

96. Brief of Amici Curiae Ind. Bus. L. Att'ys, *Nemeth*, 234 N.E.3d 183 (No. 23A-PL-1383), 2024 WL 3816418, at *12; Brief of Amicus Curiae Def. Trial Couns. of Ind., *Nemeth*, 234 N.E.3d 183 (No. 23A-PL-1383), 2024 WL 3816414, at *9-12; Brief of Amicus Curiae the Ind. Trial Laws. Ass'n, *Nemeth*, 234 N.E.3d 183 (No. 23A-PL-1383), 2024 WL 3816422, at *9-11.

97. *Nemeth*, 271 N.E.3d at 1108.

98. *Id.* at 1108.

99. *Id.* at 1114.

100. *Id.* at 1116-17.

101. IND. CODE § 23-18-1-16 (2025).

the case of an assignee of an interest, as provided in section 4 or 4.1 of this chapter. (b) The effective time of admission of a member to a limited liability company is the later of the following: (1) The date the limited liability company is organized. (2) The time provided in the operating agreement, or if no time is provided, when the person's admission is reflected in the records of the limited liability company.¹⁰²

Nemeth's argument is that the Definition Section makes unambiguously clear that LLC operating agreements may be oral; the word "oral" itself is used in the statute.¹⁰³ As to the language in the Membership Section that requires a writing, Nemeth says that that applies only to members joining an LLC after its formation, not original members.¹⁰⁴

But the court, acknowledging that Nemeth's interpretation is reasonable, nevertheless agrees with the Panzicas that LLC operating agreements must be in writing to bind the parties.¹⁰⁵ In support of its imposing a statute of frauds requirement on LLC operating agreements, the court gives three reasons. First, it says that requiring operating agreements to be in writing "better aligns with other provisions [of the LLC] Act."¹⁰⁶ Second, it finds that interpretation consistent with what it calls the "more clearly written statutes" of other states.¹⁰⁷ In a nod to originalism, the court looks to the "original public meaning" but finds evidence thereof to be "limited."¹⁰⁸

The court also sets forth several reasons in support of its conclusion that the Member Section (and its writing requirement) applies to both original and new members. First, the act's "member" definition does not distinguish between original and new members, and the Membership Section's timing provision covers original members.¹⁰⁹ Second, the court says, the "legislature has not amended the [a]ct to track other model acts that have more recently been amended to distinguish between original and later-added members."¹¹⁰

The court's reasoning is sound and certainly is grounded in all of the policy reasons that support the existence of statutes of frauds.¹¹¹ Of interest well beyond the particular issues in this case is the variety of statutory techniques that the court applied in analyzing them. The decision seems to make clear that, in future cases of statutory interpretation of any kind, the court is open to such considerations as how the statutory language in question aligns with other provisions of the statute; whether an asserted interpretation is consistent with

102. IND. CODE § 23-18-6-1 (2025).

103. *Nemeth*, 271 N.E.3d at 1109.

104. *Id.* at 1111–12.

105. *Id.* at 1111.

106. *Id.* at 1109.

107. *Id.* at 1110.

108. *Id.*

109. *Id.* at 1111–12.

110. *Id.* at 1112.

111. *See, e.g.,* *DF Activities Corp. v. Brown*, 851 F.2d 920, 923 (7th Cir. 1988) (Posner, J.).

“more clearly written statutes” of other states; the statutory language’s “original public meaning”; and whether the legislature has amended the statutory language to track developments with respect to any similar model acts.¹¹²

Having deprived Nemeth of his claim to have been a member of NP3, LLC, the court nonetheless held that genuine issues of material fact remained as to whether he and the Panzicas had an agreement that he would become a member of the LLC, an agreement which would have required no writing.¹¹³ While the Panzicas argued that the evidence was undisputed that there was never any agreement to this effect, the court sternly rejects their contention: “those are hotly disputed facts.”¹¹⁴ With a nod toward the Supreme Court’s summary judgment lodestar, *Hughley v. State*,¹¹⁵ the court agrees that Nemeth is entitled to present this claim to a jury.¹¹⁶

The court next takes up the question of the proper forum for litigating Nemeth’s unjust enrichment claim and quickly concludes it to be a legal claim that juries can decide. Citing other Indiana cases¹¹⁷ and several treatises,¹¹⁸ the court makes the crucial distinction that the relief Nemeth seeks here is a judgment for money, rather than equitable relief.¹¹⁹ Given that a claim for a money judgment is a legal claim, the court says, the Indiana Constitution’s Right to Jury Trial Clause¹²⁰ entitles Nemeth to a jury trial.¹²¹

The last issue dealt with by the court is the Panzicas’ “unclean hands” defense.¹²² Recall that the trial court and Court of Appeals had opposing views on this issue: the trial court stated that it precluded Nemeth from recovery; the Court of Appeals stated that it could not be utilized to defend against a legal claim tried to a jury.¹²³

The Supreme Court concluded that unclean hands is a defense available for unjust enrichment regardless of whether the plaintiff seeks legal or equitable relief and held that its existence is a jury question.¹²⁴ The court’s discussion is quite illuminating, starting with an overview of the doctrine itself and then candidly admitting that courts and commentators are deeply divided about

112. *Id.* at 1109–13.

113. *Id.* at 1113.

114. *Id.* at 1114.

115. *Hughley v. State*, 15 N.E.3d 1000 (Ind. 2014).

116. *Nemeth*, 271 N.E.3d at 1113–14.

117. *Id.* at 1115 (citing *McKinney v. Springer*, 6 Blackf. 511, 514–15 (Ind. 1843); *Nehi Beverage Co. of Indianapolis v. Petri*, 537 N.E.2d 78, 85 (Ind. Ct. App. 1989)).

118. *Id.* (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 cmt. d (A.L.I. 2011); 1 CORBIN ON CONTRACTS § 1.20 n.8 (rev. ed. 2024); DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES 109 (3d ed. 2018); 1 AM. JUR. 2D *Actions* § 13).

119. *Id.* The Court gives examples of such equitable relief as a constructive trust, equitable lien, or subrogation. *Id.*

120. IND. CONST. art. I, §20.

121. *Nemeth*, 271 N.E.3d at 1115–16.

122. *Id.* at 1116–19.

123. *Id.* at 1106–07.

124. *Id.* at 1116.

whether the unclean hands defense is limited to equitable relief or whether it applies to legal relief as well.¹²⁵

After a review of the authorities on both sides of the question,¹²⁶ the court casts its lot in favor of the defense being available even when a plaintiff seeks a money judgment.¹²⁷ At bottom, the court says, consideration of whether Nemeth can prove the elements of unjust enrichment includes consideration of Nemeth's conduct, and that that consideration is the same as application of the unclean hands doctrine requires.¹²⁸

The last piece of the puzzle is whether the unclean hands question is also one to be decided by a jury.¹²⁹ The Panzicas had argued that not only were they entitled to present the unclean hands defense but that its availability barred Nemeth's unjust enrichment claim in the first place—and, indeed, the trial court had so held.¹³⁰ But finding the evidence on this issue to be conflicting, the court holds that the jury, rather than the judge, is required to consider the question.¹³¹

This is a most interesting and impressive opinion that will have influence far beyond business disputes like the one between Nemeth and the Panzicas.

B. Simon Property Group Leaves Delaware and Redomesticates in Indiana

Over a majority of both the Fortune 500 companies and the firms listed on the New York Stock Exchange (NYSE) are incorporated in one state, namely, Delaware. The state has long been considered the gold standard for corporate law in large part, at least in this Article's author's estimation, because of both its legislature and courts being deeply conscious of the interests of both corporations themselves and their investors. But things have gotten a little gnarly lately.

Proceedings were launched in a Delaware court to enforce by specific performance Elon Musk's agreement to purchase Twitter, prompting Musk to change his mind and consummate the deal.¹³² And the court also threw shade on Musk's Tesla pay packages.¹³³ Musk's control of Tesla was such that he caused it to be reincorporated in Texas, and other founder-managed companies either have or are considering doing the same.¹³⁴ In addition to Texas, Nevada has been

125. *Id.* at 1116–18.

126. *Id.* at 1118.

127. *Id.* at 1119.

128. *Id.* at 1120.

129. *Id.*

130. *Id.*

131. *Id.*

132. *See* Crispo v. Musk, 304 A.3d 567, 570–71 (Del. Ch. 2023).

133. Tornetta v. Musk, 310 A.3d 430 (Del. Ch. 2024), *rev'd sub nom.*, *In re* Tesla, Inc. Derivative Litig., No. 534, 2024, No. 10, 2025, No. 11, 2025, No. 12, 2025, 2025 WL 3689114 (Del. Dec. 19, 2025).

134. *See* Ball v. Tesla, Inc., No. 2024-0622-KSJM, 2025 WL 696598, at *1 (Del. Ch. Mar. 3, 2025).

particularly aggressive in holding out the welcome mat.¹³⁵

Here in Indiana, the publicly traded Simon Property Group, Inc., relocated from Delaware during the Survey Period.¹³⁶ It is worth drilling down on this development.

First, under Delaware corporate law, a Delaware corporation can change its state of incorporation through a statutory process called “conversion.”¹³⁷ At the same time, under Indiana corporate law, a corporation in another state can change its state of incorporation to Indiana through a statutory process called “domestication.”¹³⁸ Both conversion from Delaware and domestication into Indiana require shareholder approval.¹³⁹ Because Simon is a publicly traded corporation, the details of the redomestication plan were required by applicable securities laws to be set forth in a proxy statement.

Simon did this in connection with its annual shareholders meeting held on May 14, 2025.¹⁴⁰ Its proxy statement for the meeting was sent to shareholders on April 1, and it set forth detailed reasons why its Board of Directors recommended redomestication.¹⁴¹ Among the reasons cited were that the cost-savings of not being a Delaware corporation include avoiding (i) ongoing, future franchise tax obligations in Delaware of \$250,000 each year, and (ii) litigation expense in Delaware based on historical activity and its case law, litigation driven regime.¹⁴² Second, most real estate investment trusts (REITS) are incorporated in Maryland, not in Delaware.¹⁴³ While Simon said that the Company could have joined many of its peers in Maryland, it values its deep, historical ties to the state of Indiana.¹⁴⁴ Third, the Company, and its predecessors, have been headquartered in Indiana for over 60 years, a state where it has significant operations, a large employee base, and familiarity with local government leaders.¹⁴⁵ The incorporation in Delaware was a result of a merger in 1998, after incorporation in Maryland in 1993 in connection with the Company’s IPO, and the Board and management have evaluated the costs and benefits of incorporation in Delaware for many years.¹⁴⁶ In connection with redomestication, the Board of Directors and its Governance and Nominating

135. See, e.g., *Gunderson v. Trade Desk, Inc.*, 326 A.3d 1264 (Del. Ch. 2024), *as corrected* (Nov. 8, 2024).

136. Simon Prop. Grp., Inc., Current Report (Form 8-K) (May 15, 2025).

137. DEL. CODE ANN. tit. 8, § 266(a) (West 2025).

138. IND. CODE § 23-0.6-5-2 (2025).

139. IND. CODE § 23-0.6-5-3 (2025); § 266(b).

140. Simon Prop. Grp., Inc., Proxy Statement (Schedule 14A), at 1 (Apr. 1, 2025).

141. *Id.* at 82–113.

142. *Id.* at 85, 90.

143. Eric Orlinsky, Hannah Lee & Itamar Kofman, *DEXIT? The Case for Maryland over Texas or Nevada*, A.B.A. (Mar. 16, 2026), https://www.americanbar.org/groups/business_law/resources/business-law-today/2026-march/dexit-case-for-maryland-over-texas-nevada/ (“Over 70 percent of publicly traded REITs are incorporated or formed in Maryland.”).

144. Simon Prop. Grp., *supra* note 140, at 83.

145. *Id.* at 82–83.

146. *Id.* at 82.

Committee undertook significant efforts to evaluate the issue, including multiple presentations from third-party advisors and substantial diligence.¹⁴⁷

During the run-up to the shareholder vote, an organization called Institutional Shareholder Services (ISS), a proxy advisory firm, recommended that shareholders vote against the redomestication proposal.¹⁴⁸ Simon called this recommendation misguided and disappointing; said that the motivations appeared to be unrelated to promoting long-term shareholder value; and reported that ISS had not responded to the company's request to correct certain materially misleading statements and assertions contained in the report.¹⁴⁹ Finally, Simon said, another proxy advisory firm, Glass Lewis, had recommended voting for the redomestication proposal.¹⁵⁰

The shareholder vote on May 14, 2025, in favor of redomestication was strong: 174,001,954 in favor; 94,879,715 against; 389,867 abstain; and 19,824,019 not voting.¹⁵¹ Redomestication in Indiana became effective on May 15, 2025.¹⁵²

C. Agency

1. Vicarious Liability of Gig Economy Employers.—Among the major exceptions to the doctrine of respondeat superior or vicarious liability is that an employer is not responsible for the torts of an agent who is an independent contractor. *Black v. Shaffer* addresses the hot topic of the applicability of this exception to gig workers.¹⁵³

Gina Black sued Kaytlin Shaffer and DoorDash, Inc. (“DoorDash”) after Black’s and Shaffer’s vehicles collided near an intersection in Munster, Indiana.¹⁵⁴ Black sought to hold DoorDash vicariously liable for Shaffer’s alleged negligence, claiming Shaffer was acting as an employee of DoorDash at the time of the accident.¹⁵⁵ After discovery, DoorDash moved for summary judgment, contending it could not be vicariously liable for Shaffer’s actions because Shaffer was an independent contractor and not a DoorDash employee.¹⁵⁶ Alternatively, DoorDash claimed it was entitled to summary judgment even if Shaffer was its employee because Shaffer was not delivering for DoorDash at the time of the accident.¹⁵⁷

147. *Id.* at 82–113.

148. Simon Prop. Grp., Inc., Proxy Statement Amendment (Schedule 14A), at 1 (May 5, 2025).

149. *Id.*

150. *Id.*

151. Simon Prop. Grp., *supra* note 136.

152. *Id.*

153. 253 N.E.3d 565, 2025 WL 262772, at *1 (Ind. Ct. App. 2025) (unpublished table decision).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

At the time, Shaffer was a full-time college student enrolled at Purdue University Northwest and had been delivering for DoorDash for about six weeks.¹⁵⁸ DoorDash is “a company that provides an online marketplace connection using web-based technology that connects contractors, restaurants and/or other businesses, and consumers.”¹⁵⁹

Before she was eligible to deliver for DoorDash, Shaffer had to sign an “Independent Contractor Agreement” (the “Agreement”).¹⁶⁰ Here are several of the features of the Agreement:

- Shaffer was free to select timeframes in which she wanted to receive delivery opportunities from DoorDash and could accept or reject opportunities as she saw fit.
- Upon accepting a delivery opportunity, Shaffer had “the sole right to control the manner in which deliveries [were] performed and the means by which those deliveries [were] completed,” including the manner of pickup, delivery, and route selection.
- The Agreement did not limit Shaffer’s ability to work for other companies—including DoorDash’s competitors—when she was not delivering for DoorDash.
- Nor did the Agreement require Shaffer to use a particular mode of transportation, wear certain clothing, display DoorDash signs or logos, have a specific personal appearance, or pass performance evaluations.
- Shaffer was, however, required to provide any equipment needed to facilitate deliveries, procure her own car insurance, and maintain a satisfactory consumer rating and completion rate.
- DoorDash agreed to pay Shaffer per accurate delivery, but did not withhold income taxes.
- The Agreement expressly classified Shaffer as an independent contractor.¹⁶¹

The Court of Appeals held that “because Shaffer was an independent contractor as a matter of law and no exception to the general rule that a principal is not vicariously liable for the negligence of an independent contractor applies,

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* (individual provisions of the Agreement have been separated for clarity).

DoorDash was entitled to summary judgment.”¹⁶²

The Court of Appeals analysis, written by Judge Dana Kenworthy, is extremely thorough. It started by identifying ten factors to distinguish employees from independent contractors,¹⁶³ following *Moberly v. Day*.¹⁶⁴ It then analyzed each factor with respect to the Agreement and found the relationship to be that of an independent contractor.¹⁶⁵ The court then examined Indiana’s recognized exceptions to the general rule that a principal is not liable for the negligence of an independent contractor,¹⁶⁶ following *Bagley v. Insight Communications Co.*¹⁶⁷ Again it analyzed each of these exceptions as applied to this case and found none available to Black.¹⁶⁸

2. *Liability of a Corporation for Torts of an Employee in a Workplace Accident Where the Victim is an Employee of a Sibling Corporation.*—Theresa England, a driver for FedEx Express Corporation, a wholly owned subsidiary of FedEx Corporation, delivered a shipment to a business in Valparaiso.¹⁶⁹ She attempted to make her delivery at an office, but she was directed to the loading dock.¹⁷⁰ As she walked along the loading dock, another driver was backing a tractor-trailer into the loading dock.¹⁷¹ The tractor-trailer did not have an operating audible or visual warning system to alert others that the vehicle was being operated in reverse.¹⁷² The tractor-trailer was backed into England, pinning her between the vehicle and the loading dock; she suffered catastrophic injuries.¹⁷³

Indiana’s Workers’ Compensation Act provides the exclusive remedy for recovery of personal injuries “arising out of employment and in the course of employment.”¹⁷⁴ Although the law bars a court from hearing any common law claim brought against an employer for a workplace injury, it does permit an action for injury against a third-party tortfeasor provided the third party is neither the plaintiff’s employer nor a fellow employee.¹⁷⁵

Under this principle, one would have expected England to have a claim against the operator of the safety-featureless truck that crushed her.

162. *Id.* at *8.

163. *Id.* at *3.

164. 757 N.E.2d 1007, 1009–10 (Ind. 2001).

165. *Black*, 2025 WL 262772, at *5.

166. *Id.*

167. 658 N.E.2d 584, 586 (Ind. 1995).

168. *Black*, 2025 WL 262772, at *8.

169. *England v. Siebe*, 249 N.E.3d 619, 621–22 (Ind. Ct. App. 2024), *trans. denied*, 255 N.E.3d 438 (Ind. 2025), *and cert. denied*, 146 S. Ct. 191 (2025). The author of this Article was consulted by England’s lawyers in this case.

170. *Id.* at 622.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 623 (quoting *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1285 (Ind. 1994)).

175. IND. CODE § 22-3-2-13 (2025).

Unfortunately for England, the tortfeasor was FedEx *Freight* Corporation, another wholly owned subsidiary of FedEx Corporation.¹⁷⁶ In *England v. Siebe*, the Court of Appeals held that FedEx Freight was a “joint employer” of England within the meaning of the Workers’ Compensation Act and, as such, was protected from suit by the exclusive remedy provision of the Act.¹⁷⁷

The backstory on this result starts thirty years ago when the Indiana Supreme Court decided *McQuade v. Draw Tite, Inc.*¹⁷⁸ In it, the victim of a workplace accident sued the parent company of the worker’s employer.¹⁷⁹ The court, viewing the parent and subsidiary as separate legal entities, held that the Act did not prevent an employee from suing the employer’s parent corporation for injuries sustained in the course of employment.¹⁸⁰ In doing so, the court carefully explained that

[s]uch actions must be based on the alleged breach of a duty of care separate and distinct from any vicarious liability attributable to a parent corporation for acts of its subsidiary under principles of agency law. What our decision is meant to prevent is a situation where an injured party would be deprived of his or her day in court by the purely fortuitous circumstance that the alleged tortfeasor is the corporate parent of the injured party’s employer.¹⁸¹

If *McQuade* was still good law, it clearly would be precedent for England’s claim to proceed. However, effective July 1, 2000, the General Assembly amended the definition of employer under the Act to provide that “[a] parent or a subsidiary of a corporation or a lessor of employees shall be considered to be the employer of the corporation’s, the lessee’s, or the lessor’s employees for purposes of [the exclusive remedy provision of the Act].”¹⁸² In 2001, the legislature further amended the definition of “employer” for purposes of the Act to provide “[a] parent corporation and its subsidiaries shall each be considered joint employers of the corporation’s, the parent’s, or the subsidiaries’ employees for purposes of [the exclusive remedy and a related provision of the Act].”¹⁸³

England held that these amendments to the Act’s definition of “employer” abrogated the holding in *McQuade* and applied to England’s situation as well, i.e., held that the new statutory language extended exclusive remedy not only to corporations that are parent and subsidiary, but also to sibling corporations

176. *England*, 249 N.E.3d at 624.

177. *Id.*

178. 659 N.E.2d 1016 (Ind. 1995). The author of this Article wrote *McQuade*.

179. *Id.* at 1017.

180. *Id.* at 1020.

181. *Id.* at 1020 n.7 (citation omitted).

182. Act of Mar. 15, 2000, Pub. L. No. 31-2000, § 7, 2000 Ind. Acts 322, 353 (codified at IND. CODE § 22-3-7-9(a) (2000)).

183. Act of May 10, 2001, Pub. L. 202-2001, § 8, 2001 Ind. Acts 1444, 1461 (codified at IND. CODE § 22-3-7-9(a) (2001)).

(corporations that are subsidiaries of a common parent).¹⁸⁴ Harkening back to the language of *McQuade*, poor England was “deprived of . . . her day in court by the purely fortuitous circumstance that the alleged tortfeasor is [a sibling corporation] of the injured party’s employer.”¹⁸⁵

3. *Personal Liability of an Agent for Torts Committed by the Agent in the Scope of the Agent’s Employment.*—*Dugan v. Stucker*¹⁸⁶ gives a different perspective on the agency issue than the foregoing. It focuses not on the liability of the employer but on the liability of the agent for torts committed by the agent in the scope of employment.¹⁸⁷

Reducing the facts to those relevant to this issue, the plaintiff here, Kelli J. Dugan, hired Thurston, Springer, Miller, Herd & Titak, Inc. (“Thurston Springer”) to provide her with financial and investment advice.¹⁸⁸ Thurston Springer employee J. Keith Stucker advised Dugan on her investments with Thurston Springer.¹⁸⁹

One of those investments turned out very badly, and Dugan sued Stucker for acts that were within the scope of his employment and sued Thurston Springer under the theory of respondeat superior.¹⁹⁰

After Dugan and Thurston Springer entered into a settlement agreement, they jointly moved to dismiss Thurston Springer with prejudice, which the trial court granted.¹⁹¹ “However, that dismissal was limited to only Thurston Springer. That left pending Dugan’s claims against Stucker, individually.”¹⁹² Additionally, the trial court entered summary judgment for Stucker.¹⁹³

Dugan argued that, while she released the employer, Thurston Springer, she did not release anyone else, and, thus, she may continue her action against the employee, Stucker, for acts that Stucker committed within the scope of his employment.¹⁹⁴ But, the Court of Appeals said, “By releasing Thurston Springer of respondeat superior liability, she conceded that her claims against Stucker could not have been within the scope of his employment; otherwise, under Indiana law, the ‘employer is liable.’”¹⁹⁵ “That is,” the court said, “there is no separate and independent employee liability to the plaintiff for acts within the

184. *England v. Siebe*, 249 N.E.3d 619 (Ind. Ct. App. 2024), *trans. denied*, 255 N.E.3d 438 (Ind. 2025), and *cert. denied*, 146 S. Ct. 191 (2025). In this respect, England followed *Hall v. Dallman Contractors, LLC*, 51 N.E.3d 261 (Ind. Ct. App. 2016), an earlier decision of the Court of Appeals to the same effect.

185. *McQuade*, 659 N.E.2d at 1020 n.7.

186. 262 N.E.3d 851, 2025 WL 1292412 (Ind. Ct. App.) (unpublished table decision), *trans. denied*, 267 N.E.3d 979 (Ind. 2025).

187. *Id.*

188. *Id.* at *1.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at *2.

194. *Id.*

195. *Id.* at *6.

scope of the employee's employment; such liability 'will be imputed' to the employer."¹⁹⁶

The court agreed with Dugan that her release of Thurston Springer did not release claims against Stucker in his personal capacity, meaning he was not released for acts not within the scope of his employment.¹⁹⁷ However, the court determined that Dugan did release her claims for acts within the scope of Stucker's employment because those acts are imputed to his employer.¹⁹⁸ And, the court continued, "Dugan's claims against Stucker were wholly based on acts that were within the scope of his employment. Those claims were therefore not claims 'against Stucker' personally but against Thurston Springer, and she had no remaining claims against Stucker."¹⁹⁹

In reaching its conclusion, the Court of Appeals synthesized the holdings of three Indiana precedents²⁰⁰ as follows:

- A plaintiff may file suit against both an employee and an employer for acts arguably within the scope of the employee's employment, and the plaintiff's release of the employee from liability for those acts is not a release of the employer from respondeat superior liability.²⁰¹
- The ability to sue both the employee and the employer for employment-related acts and to hold the employer liable under respondeat superior for those acts is not a theory of joint liability but a theory of imputed liability.²⁰²
- Filing suit against both the employee and the employer is not based on a theory of joint and several liability but on a theory of alternative liability—if the employee's act is in fact within the scope of the employment, "liability will be imputed" to the employer, and if the act is in fact not within the scope of employment, any judgment for the plaintiff would be "against the employee."²⁰³

The bottom line is that if a plaintiff files suit against both an employee and an employer for acts arguably within the scope of the employee's employment, the plaintiff's release of the employer from liability for those acts is also a release of the employee from liability because, by releasing an employer of respondeat superior liability, the plaintiff concedes that the claims against the employee could not have been within the scope of employment; otherwise, under Indiana law, the "employer is liable." That is, there is no separate and independent employee liability to the plaintiff for acts within the scope of the

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. The three cases are *Pelo v. Franklin Coll. of Indiana*, 715 N.E.2d 365 (Ind. 1999); *United Farm Bureau Mut. Ins. Co. v. Blossom Chevrolet*, 668 N.E.2d 1289 (Ind. Ct. App. 1996), *disapproved of by* *Pelo v. Franklin Coll. of Indiana*, 715 N.E.2d 365 (Ind. 1999); *Henry B. Steeg & Associates, Inc. v. Rynearson*, 241 N.E.2d 888 (1968).

201. *Dugan*, 2025 WL 1292412, at *6.

202. *United Farm Bureau*, 668 N.E.2d at 1291–92.

203. *Dugan*, 2025 WL 1292412, at *6.

employee's employment; such liability is imputed to the employer.

D. Changes to the Indiana Business Corporation Law Address Fraudulent Use of Business Entities and Reinstatement Following Involuntary Dissolution

The 2025 General Assembly adopted several amendments to the Uniform Business Organizations Administrative Provisions Act²⁰⁴ to reduce fraud susceptibility in business entity filings.²⁰⁵ The Business Services Division of the Office of Indiana Secretary of State Diego Morales is responsible for maintaining records on the existence of Indiana for-profit and non-profit corporations, limited partnerships, and limited liability companies.²⁰⁶ These business entities are required to make filings at the time they go into business and to update those filings biennially.²⁰⁷

Approximately thirty percent of new businesses are formed by using a third party service provider such as an Attorney, CPA, or Commercial Registered Agent to make their filings. These providers vary in their practice of maintaining a business record once it has been filed. For example, some registered agent service providers do not resign on the business registry if a client's business stops paying their monthly fee. These variable business practices can result in a loss of connectivity between a business and the government, especially when those service companies replace a client's business address information with their own in filings. Those business owners in turn lose access to compliance notifications, notifications of changes made to their records, and other resources that may be promoted on the INBiz platform or by the Business Services Division.

According to Business Services Division Director Anthony Willis, this lack of connectivity made the filing system susceptible to fraud where parties with no connection to a business entity at all take actions in the name of the entity. In testimony before the Senate Judiciary Committee in support of the new legislation, Willis said that in the previous year there had been 178 complaints of fraudulent filings and that he believed that literally thousands of others had been blocked under current policy review procedures.

Not only did this loss of connectivity provide opportunities for bad actors seeking to commit fraud, it also disconnected businesses from the helpful

204. IND. CODE § 23-0.5 (2025). Article 0.5 to Title 23 was passed by the General Assembly and signed into law by Governor Holcomb, consolidating in a single place in the Indiana Code and harmonizing certain administrative provisions that had previously been contained in five different business entity statutes. This consolidation and harmonization has the effect that, when administrative issues involving Indiana businesses arise, they need only be addressed in one place in the Indiana Code, rather than five. *See 2016–2017 Survey Article, supra* note 1, at 945.

205. Act of Apr. 16, 2025, Pub. L. No. 96-2025, 2025 Ind. Acts 1156.

206. *See Business Forms*, IND. SEC'Y OF STATE DIEGO MORALES, <https://www.in.gov/sos/business/division-forms/business-forms/> [<https://perma.cc/EG2Y-WPKC>] (last visited Mar. 11, 2026).

207. IND. CODE §§ 23-0.5-2-1, -13 (2025).

resources and staff of the Indiana Economic Development Corporation, the Indiana Small Business Development Center, and the SBA (SCORE mentors).

The new legislation addresses this loss of vital connectivity by ensuring third party filers know who they are filing for and mandating the collection of address information that is more conducive to making contact directly with the business entity, regardless of that business relationship with any third-party service. Specifically, the new legislation enhances the ability of the Business Services Division to prevent fraud in several ways.

First, the legislation expands and clarifies the statutory definition of “principal office address.” The new definition specifies that the principal office address is the usual place of business, headquarters, or other address at which executive functions occur.²⁰⁸ In addition, that definition is expanded to take into account the fact that online and certain other businesses do not have a traditional commercial address or storefront. In those situations, the residential address of an entity’s governing person is the principal office address. However, such addresses are protected from public disclosure.²⁰⁹

Second, the legislation requires third-party filers of biennial reports to verify the identity of the entity on behalf of which the third-party filer is submitting the biennial report.²¹⁰ It is anticipated that this will close a potential gap which can be exploited by malicious or fraudulent filers.

Third, the legislation creates requirements and procedures for businesses that offer “commercial mail receiving agency” addresses that are listed as the mailing address for a business entity in filings made with the Business Services Division.²¹¹ Those third parties that wish to offer those addresses in filings must file an “intent to file” form and commit to providing connectivity information to a governing person connected to that business. It is anticipated that these requirements and procedures will also help safeguard against malicious or fraudulent filers.

Connectivity is key to providing notices to businesses when filings are due, or changes to their records occur, and to build awareness of resources that may benefit them in their pursuit of growth in Indiana.

One of the provisions of business entity consolidation and harmonization legislation enacted in 2017 that has been the subject of debate is the five-year limitation for reinstatement of administratively dissolved business entities.²¹² On the one hand, the ability to reinstate a long-dormant business entity provided an opportunity for fraudulent misappropriation of the dissolved entity’s existence. On the other hand, for ongoing entities that were unaware of their dissolved status, not being able to achieve reinstatement often had serious

208. Act of Apr. 16, 2025, §§ 1–2, 2025 Ind. Acts at 1156 (codified at IND. CODE §§ 23-0.5-1.5-4.2, -29 (2025)).

209. *Id.* § 7, 2025 Ind. Acts at 1162 (codified at IND. CODE § 26-0.5-8-4 (2025)).

210. *Id.* §§ 3, 4, 2025 Ind. Acts at 1157–59 (codified at IND. CODE §§ 26-0.5-2-1(e), (f); 26-0.5-2-13(g), (h) (2025)).

211. *Id.* § 5, 2025 Ind. Acts at 1159–60 (codified at IND. CODE § 23-0.5-2.5 (2025)).

212. *See 2016–2017 Survey Article, supra* note 1, at 953.

consequences. Most commonly these are non-profit entities that may have rotating managing members and compliance contact gets overlooked.

The new legislation addresses these concerns by permitting reinstatement even after five years following dissolution but only by demonstrating clear connectivity between the dissolved entity and the party's seeking reinstatement.²¹³ The new legislation took effect January 1, 2026.²¹⁴ State Representative Matthew Carbaugh, Secretary of State Morales, and Business Services Division Director Willis deserve credit and thanks for these valuable changes.

E. Transfer of Restricted Shares

Meuth v. Ubelhor Trustee of Daniel J. Ubelhor Revocable Trust illustrates a number of the procedural issues that can arise with respect to the transfer of restricted shares of a corporation, which may then implicate the fiduciary duties of shareholders and directors in such situations.²¹⁵

The share transfer procedural issues are relatively straightforward. At the outset of this drama, Joseph and Roberta, the parents of five children, owned all of the 1,000 shares of a corporation.²¹⁶ (The children and their respective descendants are referred to as individual "family units.") Following the parents' death, each child owned 200 shares and each became a member of a five-member Board of Directors.²¹⁷ Two sisters, Mary and Sharon, were also the officers of the corporation.²¹⁸ Upon the death of one of the other of these five siblings, his four sons inherited fifty shares each and one of those sons replaced his father on the Board.²¹⁹

The share transfer issue arose when the four grandsons decided that they wanted out.²²⁰ The bylaws of the corporation contained several provisions directly relevant to the transfer of shares. First, that "[i]f any Shareholder desires to sell his or her shares of stock, the same shall be first offered for purchase to the Corporation."²²¹ Second, that if the Board elects to purchase the shares, the purchase price is to be its "book value . . . as determined by the accountant of the Corporation" with a carve-out from book value for "funds on deposit in the Endowment Fund shall not be considered in determining book value and may

213. Act of Apr. 16, 2025, § 6, 2025 Ind. Acts at 1160–62 (codified at IND. CODE § 23-0.5-6-3 (2025)).

214. *Id.* §§ 1–10, Ind. Acts at 1156–62.

215. 258 N.E.3d 270, 2025 WL 880405 (Ind. Ct. App.) (unpublished table decision), *trans. denied*, 265 N.E.3d 991 (Ind. 2025).

216. *Id.* at *1.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. Amended Brief of Appellees, *Meuth*, 258 N.E.3d 270 (No. 23A-PL-01870), 2024 WL 5695663, at *8 (alteration in original).

not be used to effect such purchase.”²²² Third, that the transfer of shares is restricted to only to “the lineal descendants” (natural children or their descendants) of Joseph and Roberta, the parents who founded the corporation.²²³

The four grandsons offered to sell the shares to the corporation, and the Board of Directors convened to consider the offer.²²⁴ At the Board’s request, the corporation’s accountant determined the corporation’s book value to be \$151.62 per share.²²⁵ However, the Board decided that a certain rental property should be excluded from the book value by operation of the “Endowment Fund” carve-out.²²⁶ With this deduction, the per share valuation was reduced to \$76.42.²²⁷ The grandsons did not tender their shares to the corporation but instead gifted them to a first cousin once removed.²²⁸ The corporation refused to register the transfer on the books of the corporation and instead continued to treat the four grandsons as shareholders of record.²²⁹

This stalemate continued from February 26, 2013, until February 21, 2019, when the two sisters, in their capacity as officers of the corporation, filed a declaratory judgment action naming the grandsons and the cousin as defendants.²³⁰ The corporation sought a declaration from the court that the grandsons were obligated to sell their shares back to the corporation at book value.²³¹ Regarding the book value, the complaint referred only to the \$76.42 amount, without explanation of how that value was determined.²³²

The trial court ruled in favor of the grandsons and cousin, holding that the cousin was the owner of the shares.²³³

First, the court held that the Board meeting at which the purchase price was set had not been duly called in accordance with the bylaws because the notice of the meeting had been sent by fax rather than “delivered or mailed” as required by the bylaws.²³⁴ Does a fax transmission constitute delivery for these purposes? This Article’s author would think so.

Second, the court held that the Board improperly excluded the rental property from the book value calculation as not qualifying for the “Endowment Fund” carve-out.²³⁵

Third, the court held the Board improperly made the determination of the purchase price when bylaws required the purchase price to be determined by the

222. *Id.* at *9.

223. *Meuth*, 2025 WL 880405, at *2.

224. *Id.* at *1.

225. *See id.*

226. *Id.*

227. *See id.*

228. *Id.* at *2.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at *3.

234. *Id.* *See also* Amended Brief, *supra* note 221, at *9.

235. *Meuth*, 2025 WL 880405, at *3.

corporation's accountant.²³⁶

The trial court was probably right on these two points, but the author does not think they were slam dunks. As to the endowment carve-out, the corporation's bylaws provided that the duties of the Board of Directors included "[c]reation and maintaining of an endowment fund to provide sufficient investment income to pay expenses of the Corporation."²³⁷ Because the income from the rental property was to be used to pay the expenses of the corporation, it does not seem that treating the rental property in this way was too far from the mark. And because the bylaws did allow for the Endowment Fund carve-out, it was arguably consistent with the bylaws for the purchase price to be the book value calculated by the accountants as adjusted by the Board for the Endowment Fund carved-out. Given these interpretations and the general deference given to Board decisions under the business judgment rule, it would have been plausible for the court to have ruled the other way.

Lastly, the trial court tied a bow around its conclusion by holding that the transfer of the shares to the cousin did not violate the bylaw provision limiting transfers to family members since the cousin fell within the bylaws definition of family members.²³⁸ Furthermore, the transfer from the grandsons to the cousin did not run afoul of another bylaw provision limiting membership on the Board to one member from each family unit since each of the family unit of the transferring grandsons and the family unit of the transferee cousin still only had one member each on the Board after the transfer.²³⁹

In any event, the corporation did not appeal the trial court's decision that the cousin duly owned the shares transferred from the grandsons.

Now onto stage II.

When the corporation filed a declaratory judgment action, the grandsons and cousin responded with a furious counterclaim against the two sisters—Mary and Sharon—who were officers of the corporation that directed that the declaratory action be filed.²⁴⁰ The counterclaim first alleged that the complaint in the declaratory judgment action was full of material misrepresentations and omissions, to wit: the defective meeting notice, the Endowment Fund and book value calculation methodology, and various disclosure omissions, including allegations of misuse of corporate funds.²⁴¹ The counterclaim then built upon these alleged material misrepresentations and omissions by contending that they constituted breaches of the sisters' fiduciary and statutory duties.²⁴² And the counterclaim further contended that the misuse of corporate funds constituted theft and conversion, entitling the counterclaim plaintiffs to damages under the

236. *Id.*

237. Amended Brief, *supra* note 221, at *8.

238. *Meuth*, 2025 WL 880405, at *3.

239. *Id.*

240. *Id.*

241. *Id.* at *3–4.

242. *Id.* at *4.

Crime Victim's Relief Act (CVRA).²⁴³

Now there are some pretty heavy-duty allegations here that should make corporate counsel sit up and take notice before recommending to a corporate client that it seek a declaratory judgment as to the legal effect of corporate action. Ordinarily, one would think that the business judgment rule would shield individual directors from a retaliatory counterclaim like this. And, as the sisters argued, the very fact that a declaratory judgment was sought would seem to indicate good faith on the part of the corporation; it could have just stonewalled the grandsons and cousin, requiring them to file suit.

The trial court nevertheless bought into the counterclaim plaintiffs' theory and awarded damages, including treble damages under the CVRA and attorney fees.²⁴⁴ But the Court of Appeals, found that the conduct complained of all related back to the decisions made at the time the grandsons tendered their shares, which had occurred more than six years before the filing of the counterclaim. As such, the counterclaim was time barred.²⁴⁵

F. A Common Law Gloss and a Procedural Gloss on the Indiana Corporate Dissolution Statute

1. *The Common Law Gloss.*—*Partenheimer v. Robling*²⁴⁶ reminds this Article's author of a common law gloss on the Indiana corporate dissolution statute about which he had forgotten.

Partenheimer and Robling were partners in three businesses that had a contract with the state to remediate or reclaim an abandoned coal mine, cleaning it so it could become useful land, in exchange for being allowed to sell remaining coal from the mine.²⁴⁷ Part of the contract required the businesses to post a bond as security for their reclamation efforts.²⁴⁸

This lawsuit was filed by Robling, contending that Partenheimer breached his fiduciary duties as a co-owner of the businesses in various ways, including a degree of self-dealing.²⁴⁹ Partenheimer failed to participate meaningfully in the litigation, and the trial court entered a default judgment in favor of Robling on the fiduciary duty issue.²⁵⁰ Because the trial court's ruling on fiduciary duty was more in the nature of a sanction for Partenheimer's failing to participate, rather than on the merits, the law of fiduciary duty is not really implicated here.

In subsequent proceedings, the trial court awarded damages to Robling which Partenheimer did contest.²⁵¹ The first damage award is what the Court of

243. *Id.*

244. *Id.* at *5.

245. *Id.* at *8.

246. 258 N.E.3d 279, 2025 WL 942973 (Ind. Ct. App. 2025) (unpublished table decision).

247. *Id.* at *1.

248. *Id.*

249. *Id.* at *2.

250. *Id.* at *3.

251. *Id.* at *4.

Appeals refers to as a “judicial buyout of Robling’s interests” in the businesses.²⁵² That’s probably a good way of describing it. The trial court valued the security bond and the businesses’ equipment and then awarded Robling 50% of that value.²⁵³ Partenheimer did not object to the buyout but did argue that the bond was not an asset of the businesses at all and that the equipment had been incorrectly valued.²⁵⁴ The Court of Appeals affirmed in all respects,²⁵⁵ and the author perceives no error here; the bond clearly was an asset of the businesses and the valuation was for the trial court to decide.

Partenheimer did argue that there should be some offset for the businesses’ remediation liability, but the Court of Appeals dismissed that argument, saying that whatever evidence there was on the amount of the liability, it was offset by evidence of the value of the coal left to be sold.²⁵⁶

The second damage award was for what the Court of Appeals refers to as “restitution,” an amount equal to the funds that Partenheimer misappropriated from the businesses.²⁵⁷ Partenheimer argues that Robling is entitled to no more than his pro rata share of that amount, but the Court of Appeals says that these are damages for self-dealing, not part of the judicial buyout of the businesses.²⁵⁸

All of this seems to be a good piece of work by both the trial court (Judge Celia M. Pauli) and the Court of Appeals (Judge Paul Felix).

What caught the author’s attention about this case, however, was an introductory sentence in the Court of Appeals discussion of the “judicial buyout.” Here the court says that the Indiana Supreme Court “has held that a forced sale of parties’ corporate interests may be an appropriate remedy under the circumstances.”²⁵⁹ In doing so, the trial court has “has full discretion to fashion equitable remedies that are complete and fair to all parties involved.”²⁶⁰ The citation here is to *G & N Aircraft, Inc. v. Boehm*,²⁶¹ to the author’s mind the single most important Indiana Supreme Court business law decision. And if not the most important, certainly the most comprehensive.

As in this case, the control person in *G & N Aircraft* was found guilty of breach of fiduciary duty.²⁶² The trial court had directed a forced sale of the company as the appropriate remedy.²⁶³ The business in *G & N Aircraft* was a corporation and so this remedy ran up against our corporate code, which does not provide judicial dissolution as a remedy for oppressive conduct.²⁶⁴ Indeed,

252. *Id.* at *8.

253. *Id.*

254. *Id.*

255. *Id.* at *9.

256. *Id.*

257. *Id.* at *10.

258. *Id.*

259. *Id.* at *8.

260. *Id.*

261. 743 N.E.2d 227, 243 (Ind. 2001).

262. *Id.* at 242–43.

263. *Id.* at 243.

264. IND. CODE § 23-1-47-1 (2025).

the official comment to the dissolution statute explains that the legislature intended to exclude it.²⁶⁵ But *G & N Aircraft* is quick to point out that that exclusion was made because of the “concern that it might be abused in a hostile takeover.”²⁶⁶ “[T]he reasons for omitting an express remedy of judicial dissolution for oppressive conduct are not relevant in the context of a close corporation,” the Court held.²⁶⁷ Rather, “traditional powers of equity courts are available to fashion a remedy for breach of a fiduciary duty in a close corporation.”²⁶⁸ There is a “need for more flexible remedies in the case of close corporations. Unlike shareholders in a publicly traded corporation, the oppressed minority in a close corporation does not have the option of voting with its feet by selling its shares in a public market for a presumptively fair price.”²⁶⁹

The Court, in other words, put a common law gloss on the language of the corporate dissolution statute.

Now the businesses in the case we have been talking about were not corporations, but two LLCs and a partnership. Both the LLC statute²⁷⁰ and the Indiana Uniform Partnership Act²⁷¹ explicitly give the court authority to dissolve the entity, as to LLCs when “it is not reasonably practicable to carry on the business,” and as to partnerships when “circumstances render dissolution equitable.”

2. *The Procedural Gloss*.—Ordinarily the author does not address issues in cases arising under the trial procedure, appellate procedure, or evidence rules but *421 Storage, LLC v. Bazinga Farms, LLC*²⁷² is an exception.

The authority of an Indiana court to dissolve a business entity is limited compared to that of courts in other states. A court “may decree dissolution of the limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.”²⁷³

421 Storage LLC was ordered dissolved apparently because of a deadlock between its two 50% owners—Bazinga Farms, LLC, and an individual named Dean Trennepohl.²⁷⁴ Under the dissolution statute, the managers are to wind up the affairs of the business unless, if a manager has engaged in wrongful conduct, the court of the county in which the business is located may do so.²⁷⁵ The court found Trennepohl had engaged in “unauthorized, unilateral conduct” related to

265. See IND. CODE § 23-1-47-1, cmt. 1 (West 2025).

266. *G&N Aircraft*, 743 N.E.2d at 243.

267. *Id.*

268. *Id.* at 244.

269. *Id.*

270. IND. CODE § 23-18-9-2 (2025).

271. IND. CODE § 23-4-1-32 (2025).

272. 251 N.E.3d 543, 2024 WL 4948813 (Ind. Ct. App. 2024) (unpublished table decision).

273. § 23-18-9-2.

274. *Bazinga Farms*, 2024 WL 4948813, at *1.

275. IND. CODE § 23-18-9-4 (2025).

the business and assumed authority to wind up 421 Storage's business affairs.²⁷⁶ The Court appointed Hanlin, who owned Bazinga.²⁷⁷ Trennepohl objected to this, asking that a "receiver" be appointed under the receivership statute.²⁷⁸ The trial court went ahead and entered an "Order Appointing Receiver" and appointed Hanlin.²⁷⁹ Trennepohl asked to have the order certified for interlocutory appeal, but the trial court refused.²⁸⁰

Now the interlocutory appeal rule permits an appeal of right from the appointment of a receiver,²⁸¹ and that's what Trennepohl is trying to do here. But Hanlin argues that even though the trial court's order denominates him as a "receiver," he was not a receiver at all but a person appointed to wind up the affairs of an LLC under the LLC statute.²⁸² The Court of Appeals says that "[t]he parties and the trial court used the term 'receiver' as a type of shorthand rather than in its strict legal sense. But Appellants did not request, and the trial court did not appoint, a receiver under Chapter 32-30-5."²⁸³ The Court says that "[a] more accurate descriptive term for a person acting under Indiana Code Chapter 23-18-9 might be 'agent' or 'liquidator.'"²⁸⁴

Because Hanlin was not a receiver, this was not an interlocutory appeal of right, and the Court of Appeals dismissed the appeal for lack of jurisdiction.²⁸⁵

G. "Piercing the Corporate Veil"

*Miller v. Lulinski*²⁸⁶ is a case which nicely and precisely illustrates the operation of what the author of this Article refers to as the "bedrock principle of limited liability." Under Indiana law, a corporation is a legal entity separate from its shareholders,²⁸⁷ and corporate shareholders are liable for corporate acts to the extent of their investment but are not personally liable for acts attributable to the corporation.²⁸⁸

Lulinski was standing on a scaffold in the course of his employment with Forest River, Inc., an RV manufacturer, when a guard rail failed.²⁸⁹ As a result, Lulinski fell from a height of approximately eight feet and sustained serious

276. *Bazinga Farms*, 2024 WL 4948813, at *1.

277. *Id.*

278. *Id.* The receivership statute is IND. CODE § 32-30-5-2 (2025).

279. *Bazinga Farms*, 2024 WL 4948813, at *2.

280. *Id.*

281. IND. R. APP. P. 14(A)(6).

282. *Bazinga Farms*, 2024 WL 4948813, at *2.

283. *Id.* at *3.

284. *Id.* at *3 n.3.

285. *Id.* at *4.

286. *Miller v. Lulinski*, 258 N.E.3d 249, 2025 WL 711181 (Ind. Ct. App.) (unpublished table decision), *trans. denied*, 265 N.E.3d 982 (Ind. 2025).

287. *See Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1231–32 (Ind. 1994) (citing *Benner-Coryell Lumber Co. v. Ind. Unemployment Comp. Bd.*, 29 N.E.2d 776, 778 (Ind. 1940)).

288. *See Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994).

289. *Miller*, 2025 WL 711181, at *1.

injuries, including multiple fractures to both feet.²⁹⁰ Precision Fabricating LLC had designed and manufactured the scaffold before selling it to Forest River.²⁹¹ At all times relevant to this appeal, Joseph J. Miller and his wife were the principal owners and operators of Precision, a limited liability company.²⁹² A jury entered judgment against both Precision and Miller and awarded Lulinski \$1.25 million.²⁹³ The jury found that Precision was 90% at fault and Miller was 10% at fault.²⁹⁴

Miller contended that the evidence shows that he acted only through the LLC and not personally.²⁹⁵ Citing *Five Star Concrete, L.L.C. v. Klink, Inc.*,²⁹⁶ *Brant v. Krilich*,²⁹⁷ and *Troutwine Estates Development Co., LLC v. Comsub Design & Engineering, Inc.*,²⁹⁸ the Court of Appeals correctly recited that a limited liability company provides individuals the same protection enjoyed by shareholders of a corporation through creation of a distinct legal entity.²⁹⁹ Thus, the Court said, individuals associated with a limited liability company are not personally liable merely because of their ownership in the entity, while at the same time, association with a limited liability company does not preclude liability for one's own actions or omissions.³⁰⁰

As such, it was Lulinski's burden to prove that Miller was personally liable for Lulinski's injuries. But Lulinski, the Court said, made no attempt to argue either a lack of "proper adherence to corporate formalities" or any of the factors that case law identified as grounds for "piercing the corporate veil."³⁰¹

In sum, the Court held, Lulinski did not prove that Miller was personally liable for his injuries and reversed the judgment against Miller.³⁰² And listen to this: the Court of Appeals said that because the jury found Precision 90% at fault and because Miller's actions and omissions were within the scope of his work as a member of the LLC, the 10% fault assigned to Miller should be reassigned to Precision.³⁰³ It therefore remanded with instructions to amend the judgment to find Precision 100% at fault.³⁰⁴

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at *2.

294. *Id.*

295. *Id.*

296. 693 N.E.2d 583 (Ind. Ct. App. 1998).

297. 835 N.E.2d 582 (Ind. Ct. App. 2005).

298. 854 N.E.2d 890 (Ind. Ct. App. 2006).

299. *Miller*, 2025 WL 711181, at *2.

300. *Id.*

301. *Id.* at *3.

302. *Id.* at *4.

303. *Id.*

304. *Id.*

IV. CONTRACT LAW

A. *Contracts for the Sale of Goods*

1. *An International Contract for the Sale of Goods Under the CISG.*—The United Nations Convention on Contracts for the International Sale of Goods (CISG) is a treaty to which approximately ninety nations are a party, including the United States and Canada.³⁰⁵ It operates as an analog to UCC Article 2 with respect to contracts for the sale of goods between commercial parties whose places of business are in different countries that are parties to the CISG. It is worth noting that because the CISG is a treaty, it operates as federal law under the Supremacy Clause and so preempts state law, including the UCC.³⁰⁶

Just prior to the Survey Period, the United States District Court for the Southern District of Indiana decided a straightforward contract interpretation case under the CISG.³⁰⁷ During the Survey Period, the Seventh Circuit reversed.³⁰⁸

The background facts are as follows. Overhead Door Company of Indianapolis contracted with Blue Giant Equipment Corporation, a Canadian company, for the purchase of multiple dock levelers, a device that bridges the gap between a trailer and the dock during the loading and unloading process.³⁰⁹ When issues with the levelers arose after installation, Overhead sued Blue Giant in the Southern District Court under diversity jurisdiction for breach of contract and warranty.³¹⁰ Blue Giant moved to dismiss, pointing to a provision in the standard terms listed on its website that requires parties to arbitrate disputes in Ontario, Canada.³¹¹

This Article's author has seen CISG disputes in which the parties have argued over whether the CISG applies³¹² and disputes involving the CISG's analog to UCC Article 2 "battle of the forms" provisions.³¹³ In this dispute, both parties agreed that they had a contract under the CISG.³¹⁴ Where they disagreed,

305. *CISG: Table of Contracting States*, INST. OF INT'L COM. L. (Dec. 9, 2024), <https://icclaw.pace.edu/node/30143> [<https://perma.cc/8QLA-26ZQ>].

306. *See Asante Techs., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001).

307. *Garage Door Sys., LLC v. Blue Giant Equip. Corp.*, No. 1:23-cv-02223-JMS-KMB, 2024 WL 3088833 (S.D. Ind. June 20, 2024), *rev'd and remanded*, 134 F.4th 953 (7th Cir. 2025).

308. *Garage Door Sys., LLC v. Blue Giant Equip. Corp.*, 134 F.4th 953 (7th Cir. 2025).

309. *Garage Door Sys.*, 2024 WL 3088833, at *2.

310. *Garage Door Sys.*, 134 F.4th at 956.

311. *Garage Door Sys.*, 2024 WL 3088833, at *1.

312. *See, e.g., Microgem Corp., Inc. v. Homecast Co. Ltd.*, No. 10 Civ. 3330(RJS), 2012 WL 1608709 (S.D.N.Y. Apr. 27, 2012); *Am. Biophysics Corp. v. Dubois Marine Specialties*, 411 F. Supp. 2d 61 (D.R.I. 2006).

313. *See, e.g., Roser Techs., Inc. v. Carl Schreiber GmbH*, No. 11cv302 ERIE, 2013 WL 4852314 (W.D. Pa. Sep. 10, 2013); *VLM Food Trading Int'l, Inc. v. Ill. Trading Co.*, 811 F.3d 247 (7th Cir. 2016).

314. *Garage Door Sys.*, 2024 WL 3088833, at *5.

as alluded to above, was whether a provision in Blue Giant's standard terms listed on its website that required the parties to arbitrate disputes in Canada had been incorporated by reference into the contract.³¹⁵

The District Court performed a very careful analysis, both of the facts and of relevant authority. The court's primary conclusion was based on the language of the contract. While there were several references to website "Terms and Conditions" in the correspondence of the parties that made up the contract, at no point did the language specify that the Terms and Conditions were part of the parties' agreement.³¹⁶ Acknowledgments of the orders "must have referred to 'the inclusion of standard terms' or have contained an incorporation clause referring to the website such that inclusion was clear to a reasonable person in order for the Terms and Conditions to be part of the parties' agreement," the court said, quoting an Advisory Opinion of the CISG Advisory Council.³¹⁷ There was no such language in the contract. The court buttressed its conclusion with citations to several cases including a decision from the Western District of Pennsylvania, *Roser Techs., Inc. v. Carl Schreiber GmbH*.³¹⁸ Based on this reasoning, the court concluded that the arbitration language was not part of the contract.³¹⁹

As noted, the Seventh Circuit reversed.³²⁰ To that court, the inclusion of incorporation by reference language was "unnecessary" because "standard terms [were] provided alongside the offer and [were] sufficiently conspicuous or noticeable to a reasonable person. . . . [P]arties need not expressly state their intent to incorporate separate standard terms when this intent is otherwise obvious."³²¹ The court said that the "reference [to the Terms and Conditions] was printed legibly in a text box at the very center of the Order Acknowledgment form, a place 'where a reasonable contractual party would have noticed [it].'"³²² The court said that "[u]nder these circumstances, Overhead was not entitled to simply ignore the terms nor Blue Giant's conspicuous reference to them."³²³

The decisions of both courts are defensible. A textualist will favor the District Court's opinion. But to a judge willing to look at the intent of the parties—which is somewhere between the text and purely extrinsic evidence—the Seventh Circuit's opinion is more appealing.

What is clear is that, in the global economy, American courts adjudicate disputes under the CISG without favor based on the nationality of the parties—

315. *Id.* at *1.

316. *Id.* at *9.

317. *Id.* at *7 (quoting CISG ADVISORY COUNCIL, CISG ADVISORY OPINION NO. 13 (2013), https://ciscg-online.org/files/ac_op/CISG_Advisory_Council_Opinion_No_13.pdf [<https://perma.cc/R3MU-MGFP>]).

318. *Roser Techs.*, 2013 WL 4852314, at *9.

319. *Garage Door Sys.*, 2024 WL 3088833, at *9.

320. *Garage Door Sys., LLC v. Blue Giant Equip. Corp.*, 134 F.4th 953, 960–61 (7th Cir. 2025).

321. *Id.*

322. *Id.* at 961.

323. *Id.*

a tribute to our cherished rule of law.

2. *A UCC Article 2 Contract.*—*Seawin Global, LLC v. CPM Construction Planning & Management, Inc.*,³²⁴ involves a contract for the sale of goods, raising several issues under Article 2 of the UCC.

As part of a hotel construction project, general contractor CPM Construction Planning and Management, Inc. (CPM) entered into an agreement with supplier Seawin Global, LLC, Seawin Hospitality, LLC, and/or Seawin Shower LTD (collectively Seawin) for Seawin to provide glass panels and materials for 102 shower doors.³²⁵ Following delivery, CPM filed a complaint against Seawin asserting that the glass panels were nonconforming and unusable.³²⁶

The original CPM purchase order that initiated the transaction did not specify dimensions for the glass panels but stated, in paragraph two, that “[a]ll materials must be submitted with product information, color samples & shop drawings for review and approval prior to fabrication/ordering/delivery.”³²⁷ There were several email exchanges that seem to indicate that the parties agreed that the glass panels would be 85-7/8 inches.³²⁸ However, when the panels arrived, they were only 85.0 inches which CPM deemed to be “useless.”³²⁹ After Seawin refused to replace the glass panels, CPM purchased 102 glass panels with a height measurement of 85 7/8 inches from another supplier for \$18,150.³³⁰

Litigation eventually ensued. Following a bench trial, the court entered judgment in favor of CPM, awarding \$18,150 in compensatory damages and \$14,530 in incidental and consequential damages.³³¹ The court also awarded \$102,605.73 in attorney’s fees, pursuant to Indiana Code section 26-1-2-721 (Section 721), Indiana’s Uniform Commercial Code (UCC) “Remedies for fraud” provision.³³² Later, the court granted CPM’s request to allow supplemental attorney’s fees in the amount of \$39,975, resulting in a total award of attorney’s fees in the amount of \$142,580.73.³³³

The first issue that the trial court had to resolve was whether Seawin had breached the contract by delivering nonconforming glass panels. Based upon the string of emails between it and CPM concerning the exact height measurement for the glass panel, the Court of Appeals concluded that the trial court’s determination that the contract had been breached was not erroneous.³³⁴

324. 253 N.E.3d 566, 2025 WL 274660 (Ind. Ct. App. 2025) (unpublished table decision).

325. *Id.* at *1.

326. *Id.*

327. *Id.*

328. *Id.* at *2.

329. *Id.*

330. *Id.*

331. *Id.* at *1.

332. *Id.*

333. *Id.* at *6.

334. *Id.*

Next up was the issue of damages. Article 2 provides that a buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages, but less expenses saved in consequence of the seller's breach.³³⁵

"Cover" is a "reasonable purchase of or contract to purchase goods in substitution for those due from the seller" that is made "in good faith and without unreasonable delay."³³⁶ Seawin argued that there was evidence that around half of the panels were in fact usable.³³⁷

The Court of Appeals found that the trial court was presented with evidence from which it reasonably could find that CPM incurred \$18,150 in damages to cover 102 nonconforming glass panels.³³⁸

Seawin also challenged the award of \$14,530 for incidental and consequential damages as unsupported by admissible evidence.³³⁹ Incidental damages include "expenses reasonably incurred in inspection, receipt . . . and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach."³⁴⁰ Consequential damages include "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise[.]"³⁴¹

The trial court's award was based on the CPM president's estimate of the hours that he and three other CPM employees spent, prior to litigation, addressing the problem with the glass panels delivered by Seawin.³⁴² Seawin claimed that the exhibit did not quantify the damages with reasonable certainty.³⁴³ But the Court of Appeals was satisfied that the trial court's award of \$14,530 in incidental and consequential damages was not erroneous.³⁴⁴

Lastly, Seawin appealed the trial court's decision to award attorney's fees to CPM.³⁴⁵ The general rule in Indiana is that each party bears its own fees unless a statute, agreement, or stipulation authorizes a fee award. Here, CPM had sought and recovered attorney's fees pursuant to a provision in Article 2 entitled "Remedies for Fraud," which provides, in part:

Remedies for material misrepresentation or fraud include all remedies available under this chapter for non-fraudulent breach. In all suits based

335. IND. CODE § 26-1-2-712(2) (2025).

336. § 26-1-2-712(1).

337. *Seawin*, 2025 WL 274660, at *7.

338. *Id.*

339. *Id.*

340. IND. CODE § 26-1-2-715(1) (2025).

341. § 26-1-2-715(2)(a).

342. *Seawin*, 2025 WL 274660, at *8.

343. *Id.*

344. *Id.*

345. *Id.*

on fraud or material misrepresentation, if the plaintiff recovers judgment in any amount, the plaintiff shall also be entitled to recover reasonable attorney fees[.]³⁴⁶

CPM argued to the trial court that its claims against Seawin included a component of fraud or misrepresentation.³⁴⁷ The trial court agreed, determining that Seawin had engaged in material misrepresentation or fraud in one or more ways.³⁴⁸

Seawin contended that the trial court's determination that CPM was entitled to an award of fees under the "Remedies for Fraud" section was clearly erroneous and the Court of Appeals agreed for several reasons:

- The Indiana Trial Rules require that fraud be pled with specificity.³⁴⁹ CPM's complaint did not include a fraud claim or assert allegations of such. Nor did it identify or even mention any misrepresentation, intentional or otherwise.³⁵⁰
- The record did not support the trial court's determination that fraud or misrepresentation was tried by express or implied consent of the parties.³⁵¹
- Even if fraud had been expressly pled or tried by implied consent, CPM failed to prove it as a matter of law. The trial court did not enter findings on those elements, nor did any witness testify to them—or to any misrepresentation generally.³⁵²

"In sum," the Court of Appeals said, "we agree with Seawin that this is a 'quintessential contract case,' not a fraud case, and [the "'Remedies for Fraud section of Article 2] is inapplicable."³⁵³

B. Relationship Between Contract and Tort Law

It is not unusual for cases to have tort and contract law issues in common, e.g., cases with both breach of warranty and product liability claims;³⁵⁴ requiring applicability of the economic loss rule.³⁵⁵ One place where the Venn diagrams of contract and tort law intersect is in respect of a claim of tortious interference with a contractual or business relationship. A tortious interference case with particularly odd facts, *Diamond Quality, Inc. v. Dana Light Axle Products, LLC*, resulted in the Indiana Supreme Court enunciating what it called a "per se rule"

346. IND. CODE § 26-1-2-721 (2025).

347. *Seawin*, 2025 WL 274660, at *9.

348. *Id.* at *9.

349. *Id.*; IND. TRIAL R. 9(B).

350. *Seawin*, 2025 WL 274660, at *9.

351. *Id.*

352. *Id.*

353. *Id.* at *10.

354. *Hyundai Motor Am., Inc. v. Goodin*, 822 N.E.2d 947 (Ind. 2005).

355. *Indianapolis-Marion Cnty. Pub. Libr. v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722 (Ind. 2010).

applicable to all future tortious interference cases.³⁵⁶

Dana Incorporated is a major manufacturer of certain kinds of equipment for motor vehicles. It operates through a network of subsidiaries, some of which manufacture or assemble various parts which are subsequently used by other subsidiaries.³⁵⁷ From time to time, one subsidiary alleges another supplied it with faulty parts. To determine which subsidiary is at fault in such situations, at least three Dana subsidiaries had contracts with Diamond Quality, Inc., an industrial inspection concern.³⁵⁸

In 2020, a Dana subsidiary in Fort Wayne (“Dana Fort Wayne”) alleged that it had received several defective parts from another Dana subsidiary (“Dana ETRAC”).³⁵⁹ Dana Fort Wayne, however, refused to allow Diamond Quality on its premises to conduct an inspection, instead hiring a third-party inspection service to do so.³⁶⁰ Diamond Quality filed this lawsuit, claiming that, by barring Diamond Quality from its premises, Dana Fort Wayne had tortiously interfered with Diamond Quality’s contract and business relationship with Dana ETRAC.³⁶¹

After reciting the elements of tortious interference claims and related factors (a quite good summary of the law in this regard),³⁶² the Court strikes a decidedly libertarian tone: it “announce[s] a per se rule that, absent a contractual or statutory duty, a property owner is always justified in excluding another from the owner’s premises.”³⁶³

Now the Court’s carveout for “contractual or statutory” duties is important, to be sure. The Court makes no attempt to examine whether any contractual or statutory duties are present in this case. Presumably there would be such a contractual duty had Diamond Quality’s contracts with each of the Dana subsidiaries contained covenants or other requirements on the part of the subsidiaries to participate or cooperate with Diamond Quality in any inspection conducted at a sibling subsidiary’s facility. A word to the wise in drafting such a contract but such an oversight is certainly understandable given the sibling subsidiary relationships.

The bottom line is that where the performance of a contract requires a party to enter a third party’s property, no claim for tortious interference will lie against the third-party for refusing such entry.

This case came to the Court not as an appeal but as a certified question from

356. 256 N.E.3d 529, 531 (Ind. 2025).

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* at 533 (citing, inter alia, *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng’g, Inc.*, 136 N.E.3d 208, 214 (Ind. 2019), and *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1235 (Ind. 1994)).

363. *Id.* at 531.

the United States District Court for the Northern District of Indiana.³⁶⁴ The certified question itself was more narrow than the question the court answered; it went to the specifics of whether a sibling subsidiary could refuse entry to its property under such circumstances.³⁶⁵ In rendering the decision it did, the Court was effectively saying that given the per se rule, it didn't matter whether the two corporations were related or not.

Justice Christopher Goff and the majority engage in a spirited debate over the scope and parameters of answering certified questions which the author commends to readers of this Article but that are beyond its scope.³⁶⁶ Justice Goff's dissent focuses on the narrower issue of liability among sibling subsidiaries and finds unresolved questions of fact for determination by the Federal District Court.³⁶⁷

C. Integration Clauses and the Parol Evidence Rule

In *Turner v. KLS Services, LLC*, Stephen Turner contacted Kenneth Shepherd, the principal in KLS Services, LLC ("KLC"), about building a house for Turner on the lot he owned in Greenfield.³⁶⁸ Shepherd made it clear to Turner that the amount due to KLS would be its actual costs to build the house plus ten percent.³⁶⁹ Three versions of a written construction contract were prepared and approved by the parties, with the final version listing the price for construction at \$180,000.00 but omitting the term regarding the ten percent in order to secure a loan to Turner in that amount from which KLS could draw to cover construction costs.³⁷⁰

Construction began in mid-2020 and was completed in August of 2021, and, while KLS received the entirety of the \$180,000.00 loan, its total costs ended up being approximately \$246,000, attributable mostly to pandemic-related, dramatic increase in the cost of building materials. KLS billed Turner for \$264,000.00, and Turner refused to pay. KLS sued Turner for breach of contract.³⁷¹

The Court of Appeals held that the evidence was sufficient to establish that parties' agreement was on a cost-plus basis rather than for a fixed amount.³⁷² In doing so, the court concluded that parol evidence was admissible to establish the cost-plus basis of the agreement because the final construction contract did not contain an integration clause clearly indicating that the contract embodied

364. *Id.* at 530–31.

365. *Id.* at 531.

366. *Id.* at 534; 535–36 (Goff, J., dissenting).

367. *Id.* at 536–38 (Goff, J., dissenting).

368. 254 N.E.3d 1082 (Ind. Ct. App. 2025).

369. *Id.* at 1085.

370. *Id.*

371. *Id.*

372. *Id.* at 1090.

the entire agreement between the parties.³⁷³

D. Mechanic's Lien Releases the Property, Not the Owner

In the contract dispute discussed in the preceding section, Turner also argued that KLS waived any claim it might have had against him when it executed a mechanic's lien waiver upon receiving the proceeds from Turner's loan. Here, the Court of Appeals quotes longstanding precedent that "[t]he common definition of 'lien' is a claim which one person holds on another's property as a security for an indebtedness or charge."³⁷⁴ The lien waiver executed by KLC read in relevant part as follows:

The Contractor, for and in consideration of the sum of [] \$180,000.00, and other good and valuable consideration, the receipt of which is hereby acknowledged, hereby waives and releases any and all liens, claims, or rights to lien of whatsoever kind or character on or against the Premises or the improvements located thereon, on account of labor, design, services, supplies, equipment and/or materials, furnished by the undersigned to or on account of the said Owner for the above described Premises.³⁷⁵

The court properly notes that, "[b]y its own terms, . . . KLS waived liens, claims, or rights against the House and/or improvements located thereon, not Turner."³⁷⁶ Conclusion: KLS did nothing more than waive any security interest in the property, something it was not seeking to enforce in this lawsuit.³⁷⁷

E. Arbitration Clauses

Arbitration has been a hot topic in contract law in recent years, and Indiana has followed the mainstream in holding that the pro-arbitration philosophy embodied in the Federal Arbitration Act makes arbitration clauses generally enforceable. One such case is *Kleinman v. Fifth Third Securities, Inc.*,³⁷⁸ but there are many others. But our policy favoring arbitration comes with a key qualification: "A party cannot be required to submit to arbitration unless it has agreed to do so."³⁷⁹ In *Decker v. Star Financial Group, Inc.* and *Land v. IU Credit Union*, the Indiana Supreme Court dramatically found that consumers

373. *Id.* at 1089–90.

374. *Id.* at 1088 (quoting *Hubble v. Berry*, 103 N.E. 328, 330 (1913)).

375. *Id.* at 1087–88.

376. *Id.* at 1088.

377. *Id.*

378. 68 N.E.3d 1130, 2016 WL 7189993 (Ind. Ct. App. 2016) (unpublished table decision).

379. *Decker v. Star Fin. Grp., Inc.*, 204 N.E.3d 918, 920 (Ind. 2023).

had not agreed to arbitrate!³⁸⁰

Teachers Credit Union v. Cripe,³⁸¹ is sort of an epilogue to the Indiana Supreme Court decisions in *Decker* and *Land*. Kimberly Cripe, a member of and a checking account holder with Teachers Credit Union (TCU) n/k/a/ Everwise Credit Union, filed a putative class action complaint against TCU regarding the assessment of fees related to overdraft transactions for checking accounts.³⁸² TCU filed a motion to compel arbitration and dismiss Cripe's complaint, arguing that Cripe agreed to arbitrate any and all disputes arising out of or relating to her account.³⁸³ The trial court denied this motion.³⁸⁴

Cripe's account with TCU included an agreement to receive all notifications by email. Some years after opening the account, TCU sent her and other checking account holders a notice informing them of the impending addition of an Arbitration and Waiver of Class Action provision to its standard terms and conditions.³⁸⁵ Prior to that time, there had been no dispute resolution provisions in the customer agreements.³⁸⁶ Included in the notice was a "right to opt-out," exercisable for sixty days after receiving the notice.³⁸⁷ The notice provided that, "If you fail to opt-out within this 60-day time, you will be deemed to have consented to the resolution of your Claims through binding arbitration. In the event you opt-out, it shall not affect other terms and conditions of your Account Agreement or your relationship with the Credit Union."³⁸⁸

In *Decker*, the Supreme Court had held that a customer had not agreed to the addition of an arbitration clause to the customer agreement because the original contract had only permitted "changes" to the original customer agreement and the arbitration clause constituted an addition to the agreement, not just change.³⁸⁹ "Words matter," Justice Slaughter wrote.³⁹⁰

In *Land*, the Supreme Court viewed an opt-out provision and adopted Restatement (Second) of Contracts § 69, which sets forth the conditions where a party's silence or inaction can be deemed to constitute acceptance.³⁹¹ Again, the court found that the customer had not agreed to the addition of the arbitration clause.³⁹²

380. 218 N.E.3d 1282 (Ind. 2023), *aff'd on reh'g*, 226 N.E.3d 194 (Ind. 2024); *Decker*, 204 N.E.3d 918.

381. 248 N.E.3d 1230 (Ind. Ct. App. 2024), *trans. denied*, 257 N.E.3d 776 (Ind. 2025) (transfer denied by a 3-2 vote; Justices Massa and Slaughter voted to grant transfer).

382. *Id.* at 1232.

383. *Id.*

384. *Id.*

385. *Id.* at 1233.

386. *Id.*

387. *Id.* at 1234.

388. *Id.* at 1234–35.

389. *Decker v. Star Fin. Grp., Inc.*, 204 N.E.3d 918, 921 (Ind. 2023).

390. *Id.*

391. *Land v. IU Credit Union*, 218 N.E.3d 1282, 1289 (Ind. 2023), *aff'd on reh'g*, 226 N.E.3d 194 (Ind. 2024).

392. *Id.* at 1290.

Here, the Court of Appeals said that *Decker* and *Land* were “at least instructive, and perhaps dispositive, in addressing whether TCU and Cripe agreed to arbitrate.”³⁹³ It went on to hold that the change of terms provision here and in *Decker* were in all material respects identical.³⁹⁴ The Court of Appeals did not explicitly apply *Land*, but it too seems to be identical.

The Supreme Court denied transfer, with both Justices Massa (who dissented in *Land*) and Slaughter (who authored *Decker*) voting to grant transfer.³⁹⁵ But the suggestion is that there are three pretty solid votes in favor of the Supreme Court’s near-sighted approach to determining whether a consumer has agreed to arbitrate.

F. Noncompete Covenants

As in the last two years, there has been an explosion of commentary and nonjudicial action on noncompete enforceability. This Article addresses three of these developments.

1. Indiana Legislation.—On July 1, 2025, Public Law 207-2025, passed as Senate Enrolled Act No. 475, took effect.³⁹⁶ The new law bans new noncompete agreements between physicians and covered health care entities entered into on or after July 1, 2025.³⁹⁷ The ban applies to hospitals, hospital systems, parent companies, and affiliated managers of a hospital.³⁹⁸

Over the last several years, the Indiana General Assembly has passed a series of laws limiting physician noncompete agreements. In 2023, for example, Public Law 165-2023 (Senate Enrolled Act No. 7) prohibited newly entered noncompete agreements with primary care physicians.³⁹⁹ In 2020, Public Law 93-2020 (House Enrolled Act 1004) required inclusion of a “buyout” provision in contracts with physicians, allowing the physician to avoid enforcement of the noncompete in exchange for paying the employer a reasonable amount.⁴⁰⁰ Public Law 207-2025 adds several new sections within the physician noncompete agreement provisions of Title 25 of the Indiana Code.

Beginning July 1, 2025, hospitals, parent companies of hospitals, affiliated managers of hospitals, and hospital systems are all prohibited from entering into noncompete agreements with physicians.⁴⁰¹ However, this noncompete ban does not apply to other physician employers, such as private practices or non-

393. *Cripe*, 248 N.E.3d at 1237–38.

394. *Id.* at 1242.

395. *Teachers Credit Union v. Cripe*, 257 N.E.3d 776 (Ind. 2025) (denying transfer by a 3-2 vote; Justices Massa and Slaughter voted to grant transfer).

396. Act of May 6, 2025, Pub. L. No. 207-2025, 2025 Ind. Acts 2754.

397. IND. CODE § 25-22.5-5.5-2.3(b) (2025).

398. IND. CODE § 25-22.5-5.5-1.3 (2025).

399. Act of May 4, 2023, Pub. L. No. 165-2023, § 3, 2023 Ind. Acts 1714, 1715–16 (codified at IND. CODE § 25-22.5-5.5-2.5 (2025)).

400. Act of Mar. 18, 2020, Pub. L. No. 93-2020, § 8, 2020 Ind. Acts 696, 710–11 (codified at IND. CODE § 25-22.5-5.5-2(a)(4) (2025)).

401. § 25-22.5-5.5-2.3(b).

hospital/non-hospital system-owned physician groups.

Unlike Indiana's prior noncompete ban, which only prohibited noncompete agreements with primary care physicians regardless of employer type, the new 2025 legislation does not make that distinction. Rather, it prohibits any covered entity from having a noncompete prohibiting the "practice of medicine" with any physician licensed to practice medicine in Indiana.⁴⁰²

One item of interest is that the new law does not apply to physician assistants or advanced practice providers. Another is that the "practice of medicine" does not include activities that: (i) are solely and exclusively executive or managerial, and (ii) do not involve direct patient care.⁴⁰³

The law provides the following examples of prohibited noncompete agreements:

1. Provisions that prohibit the physician from engaging in the practice of medicine with a new employer;⁴⁰⁴
2. Provisions that impose financial penalties, repayment obligations or require reimbursement of bonuses, training expenses or similar payments that:
 - are applied after at least three years of employment; and
 - are based solely or primarily on the physician's decision to continue engaging in the practice of medicine with a new employer;⁴⁰⁵
3. Provisions requiring the physician to obtain the employer's consent or submit to equitable relief;⁴⁰⁶ and
4. Provisions imposing indirect restrictions that limit or deter the physician's practice of medicine with a new employer.⁴⁰⁷

The law clarifies that the following are not considered noncompete agreements:

1. Nondisclosure agreements that protect confidential business information or trade secrets;⁴⁰⁸
2. Nonsolicitation agreements restricting the solicitation of current employees for one year after employment ends (so long as they do not restrict patient interactions, referrals, clinical collaboration, or professional relationships);⁴⁰⁹ and
3. Noncompete agreements entered into as part of a sale of a business entity where the physician owns more than 50% of the entity at the time of sale.⁴¹⁰

As stated above, P.L. 207-2025 took effect on July 1, 2025. It also provides that noncompete agreements entered into before July 1, 2025, will not be

402. See IND. CODE §§ 25-22.5-5.5-1.4, -2.3(b) (2025).

403. IND. CODE § 25-22.5-5.5-1.7 (2025).

404. § 25-22.5-5.5-1.4(a)(1).

405. § 25-22.5-5.5-1.4(a)(2).

406. § 25-22.5-5.5-1.4(a)(3).

407. § 25-22.5-5.5-1.4(a)(4).

408. § 25-22.5-5.5-1.4(b)(1).

409. § 25-22.5-5.5-1.4(b)(2).

410. § 25-22.5-5.5-1.4(b)(3).

invalidated, even if renewed or amended after that date.⁴¹¹

With the passage of P.L. 207-2025, Indiana joins Maryland,⁴¹² Pennsylvania,⁴¹³ and Louisiana⁴¹⁴ among states that have recently passed laws restricting noncompetes for health care-related professions. More than ten other states already have laws that prohibit or substantially limit physician noncompete agreements.⁴¹⁵

2. *Federal Trade Commission Regulation Which Would Have Banned Most Non-Compete Agreements Rescinded.*—The development in this regard that is of the greatest potential consequence was the Federal Trade Commission’s proposed regulation to ban most noncompete agreements altogether. President Biden issued an executive order in July, 2021, asking the Federal Trade Commission to “curtail the unfair use of non-compete clauses.”⁴¹⁶ The FTC issued a notice of proposed rulemaking in response to the President’s Executive Order which appeared in the Federal Register on January 19, 2023.⁴¹⁷

It expressly stated that noncompete agreements are an unfair method of competition and generally prohibited all employers from entering into, attempting to enter into, or maintaining a noncompete with a worker.⁴¹⁸ The proposed rule was broad by design, and it did not make any exceptions for particular industry, size of business, type of worker, or level of worker compensation. In other words, the proposed rule would have applied with equal force to a minimum-wage worker and a Fortune 500 CEO.

The rule even went so far as to requiring employers to rescind their outstanding noncompete agreements and to provide notice to workers formerly subject to such agreements that, upon the end of their employment, they could seek or accept a job with any company or any person—even a competitor—or establish their own competing business, or otherwise compete with their employer in any way.⁴¹⁹

The federal district court’s decision, *Ryan v. Federal Trade Commission*, reviewed the proposed noncompete rule through the prism of the Administrative Procedure Act (APA) as that statute governs judicial review of certain agency actions, findings, and conclusions.⁴²⁰

The court first addressed the statutory authority of the FTC to promulgate

411. IND. CODE § 25-22.5-5.5-2.3(a) (2025).

412. MD. CODE ANN., LAB. & EMPL. § 3-716 (West 2024).

413. Fair Contracting for Health Care Practitioners Act, Pub. L. 846, No. 74 (2024) (to be codified at 15 PA. CONS. STAT. § 4501 *et seq.*).

414. LA. STAT. ANN. § 23:921(M), (N), (O) (2025).

415. Charles F. Knapp & Erik A. Mosvick, *Top 10 Noncompete Developments of 2025*, FAEGRE DRINKER (Jan. 5, 2026), <https://www.faegredrinker.com/en/insights/publications/2026/1/top-10-noncompete-developments-of-2025> [https://perma.cc/NC9D-RMMG].

416. Exec. Order No. 14036, 86 Fed. Reg. 36987, 36992 (July 9, 2021).

417. Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

418. *Id.* at 3482.

419. *Id.* at 3483.

420. 746 F. Supp. 3d 369 (N.D. Tex. 2024).

the noncompete rule and found it lacking.⁴²¹ 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.⁴²²

The court next held that the rule was arbitrary and capricious because it was “unreasonably overbroad without a reasonable explanation.”⁴²³ 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.’”⁴²⁴ The court gave several reasons for this conclusion. First, 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.”⁴²⁵ Furthermore, the court said that the FTC had failed to consider the positive benefits of noncompete agreements and had disregarded the substantial body of evidence supporting noncompetes.⁴²⁶ And the court said that the FTC had failed “to sufficiently address alternatives to issuing the Rule.”⁴²⁷

Having determined that the FTC lacked statutory authority to promulgate the noncompete rule and that the rule was arbitrary and capricious, the court issued a nationwide injunction against the rule taking effect or being enforced.⁴²⁸

The Biden administration immediately appealed the ruling to the Fifth Circuit. However, following the change in administrations, the FTC voted 3-1 to dismiss its appeal and accede to the holding of the district court.⁴²⁹ In doing so, FTC Chairman Andrew N. Ferguson said that the “[r]ule’s illegality was patently obvious.”⁴³⁰ His sharply worded statement harshly criticized “Democrat [sic] partisans” for their support of the proposed rule.⁴³¹ Yet he struck a tone of hostility to noncompetes as well:

[N]oncompete agreements can be pernicious. They can be, and sometimes are, abused to the effect of severely inhibiting workers’ ability to make a living. That is why English law categorically

421. *Id.* at 384.

422. *Id.*

423. *Id.* at 388.

424. *Id.* (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.* at 389–90.

429. Press Release, Federal Trade Commission, Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule (Sep. 5, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/09/federal-trade-commission-files-accede-vacatur-non-compete-clause-rule> [<https://perma.cc/N6HG-PVCJ>].

430. Statement of Andrew N. Ferguson, Chairman, Fed. Trade Comm’n, Joined by Commissioner Melissa Holyoak, Comm’r, Fed. Trade Comm’n 1 (Sep. 5, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-holyoak-statement-re-noncompete-acceding-vacatur.pdf [<https://perma.cc/S53J-UD53>].

431. *Id.* at 2.

prohibited them until the eighteenth century. That is why all fifty States regulate them extensively, and why some outright ban them. And that is why Congress, through the FTC Act and the Sherman Act, gave us the authority to step in when they are onerous enough to become unlawful. The Commission should have been doing everything it could to find unlawful noncompete agreements and eliminate them.⁴³²

It will be interesting to see if the Commission under Ferguson does everything it can to find unlawful noncompete agreements and eliminate them. If so, the Biden administration will have lost the battle but won the war.

3. Norton-King's Daughters' Health, Inc. v. Jenkins.—*Norton-King's Daughters' Health, Inc. v. Jenkins*⁴³³ is a most interesting non-competition agreement case that surprisingly is not published.

The employee is a certified registered nurse anesthetist at a hospital in Madison, Indiana.⁴³⁴ The key provisions of the noncompete are as follows:

- A prohibition on working in competition with the hospital for a period of two years and within a radius of 30 miles.⁴³⁵
- The hospital is entitled to an injunction for any breach of the agreement.⁴³⁶
- “The parties agree that since no adequate remedy exists at law to enforce the covenant not to compete hereunder, injunctive relief may be sought to enforce the terms of Article VI. The parties furthermore agree that [Jenkins] may violate the terms of this covenant not to compete upon the payment to Hospital a lump sum of Fifty Thousand Dollars (\$50,000). Such amount is regarded by the parties hereto in good faith as liquidated damages, and the applicable sum may be paid by [Jenkins] in lieu of Hospital's right to injunctive relief, as liquidated damages in full.”⁴³⁷

The Court of Appeals first works through whether the covenant not to compete was enforceable. The law here is well established: “In arguing the reasonableness of a non-competition agreement, the employer must first show that it has a legitimate interest to be protected by the agreement. The employer also bears the burden of establishing that the agreement is reasonable in scope as to the time, activity, and geographic area restricted.”⁴³⁸ The Court considered whether the hospital had established a protectable interest and held that it had.⁴³⁹ It then went on to consider the reasonableness of the scope of the covenant. (The reasonableness of the time and geographic restrictions was not challenged.) The court reads the agreement “as a whole” and concludes that the noncompete clause only prevents the employee from performing CRNA services and that

432. *Id.*

433. 251 N.E.3d 566, 2024 WL 5165711 (Ind. Ct. App. 2024) (unpublished table decision).

434. *Id.* at **1.

435. *Id.*

436. *Id.*

437. *Id.*

438. Cent. Ind. Podiatry, P.C. v. Krueger, 882 N.E.2d 723, 729 (Ind. 2008).

439. *Jenkins*, 2024 WL 5165711, at **6.

that is not unreasonable in terms of scope.⁴⁴⁰

Where the case really gets interesting is when it turns to the hospital's attempt to collect the \$50,000 in liquidated damages. The facts of the case show that when the hospital sought its injunction against Jenkins, she stopped working at the competing hospital.⁴⁴¹ Then the hospital went after the \$50,000.⁴⁴² But, following the same analysis used by the trial court, the Court of Appeals said the following:

[T]he Agreement clearly and unambiguously provides that the Hospital's only remedy under the Agreement is to seek injunctive relief following a breach of the noncompete clause. Section 6.3 explicitly gives the Hospital the right to injunctive relief. There is nothing in that clause that allows the Hospital to seek liquidated damages. Similarly, Section 6.4 again provides that the Hospital can seek injunctive relief. But that section goes on to state that Jenkins can choose to pay \$50,000 to the Hospital in order for the Hospital to forgo its right to seek injunctive relief. . . .

Here, by the time the Hospital filed its claim, Jenkins had already ceased her employment with CCMH and was no longer in breach of the Agreement. Thus, the Hospital received the precise outcome contemplated by the Agreement—a cessation of Jenkins' employment at a competing hospital. Because the Hospital's only right under the Agreement was to seek injunctive relief and not liquidated damages, and because Jenkins has already left her employment at CCMH such that there is nothing left to enjoin, we affirm the trial court's grant of summary judgment in favor of Jenkins.⁴⁴³

G. Warranties

1. *UCC Article 2 and the Magnuson-Moss Warranty Act.*—Indiana Code section 26-1-2-314 implies a warranty of merchantability in Indiana contracts for the sale of goods if the seller is a merchant with respect to goods of that kind. The Code permits the seller to exclude the warranty but if the disclaimer is in writing, the writing must be “conspicuous.”⁴⁴⁴

In *Thomas v. Valpo Motors, Inc.*, Valpo Motors sold a vehicle to Mrs. McNally that allegedly was not merchantable.⁴⁴⁵ She sued for breach of the implied warranty of merchantability under not only the Indiana UCC but also

440. *Id.*

441. *Id.* at **2.

442. *Id.*

443. *Id.* at **7.

444. IND. CODE § 26-1-2-316(2) (2025).

445. 258 N.E.3d 236, 239 (Ind. 2025).

the federal Magnuson-Moss Warranty Act (MMWA).⁴⁴⁶ As the Seventh Circuit has said, “for all practical purposes, the MMWA operates as a gloss on . . . state law breach of warranty claims.”⁴⁴⁷ “The MMWA allows [a consumer] to bring federal claims premised on state law violations, but also requires them to” comply with certain requirements of the federal act in order to recover.⁴⁴⁸ One of those which figures prominently in this case is that the buyer must give the seller “a reasonable opportunity to cure.”⁴⁴⁹

Why go to the bother of complying with the MMWA? Why not just sue for damages under the UCC straight up? The answer is that if a consumer prevails in an action brought under the MMWA, then the court may award attorney’s fees to the prevailing consumer.⁴⁵⁰

The seller in this case had two defenses. First, it contended that its contract with the buyer had excluded the implied warranty of merchantability as a matter of law.⁴⁵¹ The trial court agreed and granted summary judgment, which the Court of Appeals affirmed over the dissent of Judge Felix.⁴⁵²

Second, the seller maintained that even if its warranty disclaimer was not effective, the buyer had not complied with one of MMWA’s requirements: that the seller be given a reasonable opportunity to cure.⁴⁵³ Given this failure, the buyer was not entitled to recover attorney’s fees under the MMWA.⁴⁵⁴

In a unanimous opinion by Justice Goff, the Supreme Court found as a matter of contract interpretation that the seller had not effectively disclaimed the implied warranty of merchantability as a matter of law!⁴⁵⁵ The court read the sales contract as creating an exception for the disclaimer if the buyer entered into a service contract, and there was evidence that the buyer had done so.⁴⁵⁶

This then brought the court to the question of whether the MMWA “opportunity to cure” requirement had been met, and there the court held that genuine issues of material fact remained.⁴⁵⁷ In this regard, the court laid down the following burden of proof for the buyer in such a situation:

[A] buyer need only show to the satisfaction of the factfinder that the seller had “a reasonable opportunity to cure” its failure to comply with its warranty obligations. And the buyer can meet this burden of proof

446. *Id.* at 239; 15 U.S.C. § 2301 *et seq.*

447. *Anderson v. Gulf Stream Coach, Inc.*, 662 F.3d 775, 781 (7th Cir. 2011).

448. *Id.*

449. *Id.* (quoting 15 U.S.C. § 2310(e)).

450. 15 U.S.C. § 2310(d)(2).

451. *Thomas*, 258 N.E.3d at 239.

452. *Thomas v. Valpo Motors, Inc.*, 235 N.E.3d 211, 2024 WL 1928643, at *1, *3 (Ind. Ct. App. 2024) (unpublished table decision), *vacated*, *Thomas*, 258 N.E.3d 236; *id.* at *3–*7 (Felix, J., dissenting).

453. *Thomas*, 258 N.E.3d at 240.

454. *Id.* at 240.

455. *Id.* at 238, 245.

456. *Id.* at 242.

457. *Id.* at 245.

by showing that he explicitly asked the seller to cure (i.e., repair, replace, or refund) or that he notified the seller of the purported defect and the seller proposed no remedy in response.⁴⁵⁸

2. *Whether a Disclaimer of Warranties Runs with the Goods.*—In *Poultry & Industry Suppliers, Inc. v. Incubacol, S.A.S.*,⁴⁵⁹ Incubacol, S.A.S., a Colombian company, sued Poultry & Industrial Suppliers, Inc. (“Poultry Suppliers”), a Florida company, and CTB, Inc., d/b/a Chore-Time, an Indiana company, for strict liability (manufacturing defect), negligence, and breach of implied warranty in Florida state court. Eventually, the case ended up in Indiana state court through a series of interesting procedural steps that are beyond the scope of this Article.⁴⁶⁰ An additional interesting procedural development was the decision that Florida law applies to the case, utilizing the Uniform Judicial Notice of Foreign Law Act.⁴⁶¹

Incubacol is involved in the poultry and egg business.⁴⁶² It placed orders with Poultry Suppliers for ventilation and related equipment to construct ten breeding houses.⁴⁶³ Poultry Suppliers then contracted with CTB to manufacture the equipment. This contract included a limited warranty in which CTB expressly disclaimed any implied warranties running in favor of Poultry Suppliers.⁴⁶⁴ Poultry Suppliers then distributed the equipment to Incubacol in Columbia.⁴⁶⁵ Of consequence, the equipment manufactured by CTB incorporated an alarm control panel, called the Mark 220 Informer, which was a part of the ventilation system.⁴⁶⁶ “CTB shipped the equipment, including the Mark 220 Informer, from Indiana, which then passed through Florida on its way to Colombia.”⁴⁶⁷

In April 2015, the equipment was installed for Incubacol.⁴⁶⁸ An agent of Poultry Suppliers installed the equipment, but Poultry Suppliers was still responsible for the final inspection and approval, which occurred in August.⁴⁶⁹ In December, 5,500 chickens died after the ventilation system in one of the breeding houses failed.⁴⁷⁰

458. *Id.* (citations omitted).

459. 250 N.E.3d 448 (Ind. Ct. App. 2024), *trans. denied*, 257 N.E.3d 779 (Ind. 2025).

460. *Id.* at 450–51.

461. IND. CODE § 34-38-4-4 (2025). The controlling precedent here is *Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142 (Ind. 1999), a case better known for its holding on the vicarious liability of an employer of an independent contractor. See 2022–2023 Survey Article, *supra* note 1, at 862–63.

462. *Incubacol*, 250 N.E.3d at 451.

463. *Id.*

464. *Id.*

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.* at 451.

The issue of interest to us here is whether CTB's disclaimer of implied warranties running in favor of Poultry Suppliers also constituted a disclaimer by Poultry Suppliers of implied warranties running in favor of Incubacol. Both sides agreed that the UCC applied, which both Florida and Indiana have adopted in identical form.⁴⁷¹

An express warranty can exclude or modify an implied warranty:

[T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.⁴⁷²

Here, CTB, the manufacturer, had an express warranty that disclaimed any implied warranties:

THIS WARRANTY CONSTITUTES [CTB'S] ENTIRE AND SOLE WARRANTY AND [CTB] EXPRESSLY DISCLAIMS ANY AND ALL OTHER WARRANTIES, INCLUDING, BUT NOT LIMITED TO, EXPRESS AND IMPLIED WARRANTIES, INCLUDING, WITHOUT LIMITATION, WARRANTIES AS TO MERCHANTABILITY, FITNESS FOR PARTICULAR PURPOSE SOLD AND DESCRIPTION OR QUALITY OF THE PRODUCT FURNISHED HEREUNDER.⁴⁷³

As Poultry Suppliers argued, CTB's disclaimer of warranties applied to it because the disclaimer "was necessarily incorporated into the sales contract [between Poultry Suppliers and Incubacol] because it is the one and only contract for CTB equipment alleged to exist in the case."⁴⁷⁴ Incubacol responded by arguing that because Poultry Suppliers had no disclaimer of implied warranties in its contract, it was improperly attempting "to piggyback onto CTB's disclaimers of warranties that were included in its manuals," which it cannot do.⁴⁷⁵

The parties could not find any Indiana or Florida cases specifically addressing whether a seller can rely on a manufacturer's disclaimer of warranties—the issue in the case.⁴⁷⁶ The parties consequently cited federal district court cases.⁴⁷⁷ *Florists' Mutual Insurance Co. v. Lewis Taylor Farms*,

471. *Id.* at 457.

472. IND. CODE § 26-1-2-316(2) (2025); *see also* FLA. STAT. § 672-316 (2025).

473. *Incubacol*, 250 N.E.3d at 458.

474. *Id.* (alteration in original).

475. *Id.*

476. *Id.*

477. *Id.*

Inc.,⁴⁷⁸ a case cited by a party, in turn cites treatises.⁴⁷⁹ As one of the treatises states, “a manufacturer’s disclaimer of warranties does not run with the goods so as to protect any subsequent seller of them, and thus, each subsequent seller must make their own independent disclaimer in order to be protected from warranty liability.”⁴⁸⁰ Another treatise provides similarly, “In the usual case, a distributor or dealer must make his own disclaimer in order to be free from implied warranty liability. He cannot rely on a disclaimer used by the manufacturer even though he passes that documentation on to the ultimate buyer.”⁴⁸¹

Also contained in that treatise is the recognition of an exception when “the ultimate buyer kn[ows] that the seller was the manufacturer’s exclusive distributor and the buyer received the disclaimer directly from the seller and not from the manufacturer.”⁴⁸² If these conditions are satisfied, “the manufacturer’s disclaimer becomes part of the basis of the bargain between the buyer and the seller.”⁴⁸³ “Thus, the seller is not required to republish and restate the manufacturer’s disclaimer to disclaim the implied warranty himself.”⁴⁸⁴

The Court of Appeals agreed with the above authority. It said that “a manufacturer’s disclaimer of warranties does not run with the goods and thus each subsequent seller must make their own independent disclaimer to be protected from warranty liability. Here, Poultry Suppliers didn’t appear to do that. And while there is an exception, it’s unclear whether Poultry Suppliers was an exclusive distributor for CTB and how CTB’s warranty got passed to Incubacol. Because the record needs further development, judgment on the pleadings is inappropriate for the warranty count.”⁴⁸⁵

H. Attorney Fees

In *Osborne v. Small*, Osborne had a contract to sell some real property to a company called Results, LLC.⁴⁸⁶ Small represented himself as an agent of

478. No. 7:05-CV-50 (HL), 2008 WL 875493 (M.D. Ga. Mar. 27, 2008), *aff’d sub nom.*, *Florists’ Mut. Ins. Co. v. DL&B Enterprises, Inc.*, 322 Fed. Appx. 729 (11th Cir. 2009).

479. *Incubacol*, 250 N.E.3d at 458.

480. 63 AM. JUR. 2D *Products Liability* § 697, Westlaw (database updated Feb. 2026); *see also* 67A AM. JUR. 2D *Sales* § 598, Westlaw (database updated Feb. 2026).

481. 1 THE LAW OF PROD. WARRANTIES § 8:14, Westlaw (database updated Jan. 2026).

482. *Id.*

483. *Incubacol*, 250 N.E.3d at 459.

484. *Id.*; *see also* *Graham Hydraulic Power, Inc. v. Stewart & Stevenson Power, Inc.*, 797 P.2d 835, 838–39 (Colo. App. 1990) (holding that where the buyer knew the seller was the manufacturer’s “exclusive area distributor” and the buyer received the disclaimer of warranties directly from the seller and not from the manufacturer, the manufacturer’s disclaimer became “part of the basis of the bargain” between the buyer and the seller and therefore the seller was not required to restate the manufacturer’s disclaimer to disclaim warranty liability).

485. *Incubacol*, 250 N.E.3d at 459 (internal citation omitted).

486. 255 N.E.3d 496, 2025 WL 659051, at *1 (Ind. Ct. App. 2025) (unpublished table decision).

Results and perhaps is the managing member as well. The deal cratered and Results was found liable to Osborne for damages. In the purchase agreement was a provision that the prevailing party was entitled to attorney fees. This appeal involves Osborne's attempt to collect under that provision against both Results and Small.⁴⁸⁷

The Court of Appeals agrees that Results is liable under the contractual provision, but finds no basis to impose liability against Osborne who was not a party to the contract.⁴⁸⁸ This seems entirely correct.

Talley v. Cheswick Homeowners' Ass'n, Inc., was a dispute between an homeowners association ("HOA") and a homeowner, where the HOA prevailed both at trial and on appeal.⁴⁸⁹ The HOA covenants contained a provision entitling the prevailing party in any action against a defaulting homeowner to "reasonable attorneys' fees."⁴⁹⁰

"Fee-shifting provisions that do not distinguish between trial and appellate fees and costs unquestionably apply to both," the Court of Appeals declared.⁴⁹¹

Our Court has held that a statutory provision entitling a party to "reasonable attorneys fees" must include fees for services on appeal. [That decision] extended this holding to contractual provisions with identical language, finding "no . . . distinction between the scope of a statutory and a contractual provision for 'reasonable attorneys fees.'"⁴⁹²

The court held that this is still good law, and because the covenants provide for the prevailing party to recover attorney fees, it directed that appellate attorney fees be awarded.⁴⁹³

I. Statute of Limitations Defenses

Linda Rothrock Jurus was successful in resolving a dispute with a third party over whether she retained a life estate in some property conveyed to the third party's predecessor.⁴⁹⁴ The dispute arose because the title insurance company that prepared the deed conveying the property allegedly failed to reserve the life estate in accordance with the parties' intentions.⁴⁹⁵ Jurus spent \$26,979.51 in costs and attorney's fees in order to get the deeds reformed and

487. *Id.* at *1.

488. *Id.* at *3.

489. 255 N.E.3d 475, 2025 WL 636230 (Ind. Ct. App. 2025) (unpublished table decision).

490. *Id.* at *2.

491. *Id.* at *5.

492. *Id.* (footnote omitted) (citations omitted) (quoting *Parrish v. Terre Haute Sav. Bank*, 438 N.E.2d 1, 3 (Ind. Ct. App. 1982)).

493. *Id.* at *5–6.

494. *Hamilton Nat'l Title LLC v. Jurus*, 266 N.E.3d 233, 237 (Ind. Ct. App. 2025).

495. *Id.*

to defend an appeal.⁴⁹⁶

In *Hamilton National Title LLC v. Jurus*,⁴⁹⁷ the case resulting from the previous lawsuit, Jurus filed a complaint against Hamilton National Title. She alleged that Hamilton

“had a contractual duty. . . to prepare a deed that would convey the real estate to [the third-party] but reserve to her a life estate as provided in” the contract for the sale of the land. She further alleged that Hamilton had “breached its contract with Jurus when it omitted a reservation for her of a life estate from the deed it prepared for the closing[.]” And Jurus maintained that, “[o]n account of Hamilton’s breach of contract,” she “had been damaged in the amount of the legal expenses she had incurred in order to correct” the erroneous deed.⁴⁹⁸

Hamilton defended arguing that:

Jurus’ claim, while framed as one for breach of contract, “sound[ed] in legal malpractice because it involve[d] allegations that Hamilton negligently drafted the warranty deed.” And Hamilton asserted that legal malpractice claims are subject to a two-year statute of limitations, such that Jurus’ claim, which she filed seven years after she signed the warranty deed, was untimely.⁴⁹⁹

Finding Jurus’s designated evidence showed the existence of a contract, the Court of Appeals concluded that the applicable statute of limitations was ten years.⁵⁰⁰

J. Statute of Frauds Defense and Part Performance

The “Statute of Frauds” is a familiar affirmative defense to claims seeking to enforce purported oral contracts for the sale of land⁵⁰¹ and for the sale of goods for the price of \$500 or more.⁵⁰² *Travis v. V3 Express Carwash, LLC*,⁵⁰³ reminds that the Statute of Frauds applies to any agreement that is not to be performed within one year from the making of the agreement.⁵⁰⁴

Randall Travis, a mortgage broker at a financial institution, sued Leon Baine, who was in the carwash business. According to Travis, the two of them

496. *Id.*

497. *Id.*

498. *Id.* (alterations in original) (citations omitted).

499. *Id.* (alterations in original) (citations omitted).

500. *Id.* at 241.

501. IND. CODE § 32-21-1-1(4)

502. IND. CODE § 26-1-201(1).

503. 267 N.E.3d 440 (Ind. Ct. App. 2025).

504. IND. CODE § 32-21-1-1(5).

had orally agreed to partner in an enterprise in which Travis would locate properties suitable for development as carwashes; that Baine or a company he owned would acquire such properties; that Travis would assist Baine in developing the properties into carwashes; and that Travis would share both in the profits of the carwashes once they were in operation and in the profits from the sale of each of the properties sold after development.⁵⁰⁵

Baine interposed the Statute of Frauds defense that a person may not bring “[a]n action involving any agreement that is not to be performed within one (1) year from the making of the agreement,” “unless the promise, contract, or agreement on which the action is based . . . is in writing and signed by the party against whom the action is brought or by the party’s authorized agent.”⁵⁰⁶ Travis did not dispute that they had no written agreement but argued that their arrangement was not governed by the Statute because the contract could be performed within one year.⁵⁰⁷ The trial court had granted summary judgment in favor of Baine and the Court of Appeals found the designated evidence established that the development of the carwash sites could not be fully performed or completed within one year.⁵⁰⁸

Travis pursued several alternate theories of recovery and the court’s opinion is a good refresher of the elements and requirements of each.

To his contention that the Statute of Frauds defense was inapplicable because Travis “substantially performed,” the court held that the doctrine of part performance did not preclude the application of the Statute of Frauds in this case because the designated evidence did not articulate Travis’s specific duties pursuant to the alleged agreement. “[C]ontracts must be reasonably definite in their material terms so the intention of parties may be ascertained,” the court held.⁵⁰⁹

Equally unavailing was Travis’s contention that he had been the victim of fraud on the part of Baine.⁵¹⁰ Recovering for fraud in a breach of contract action requires allegation of a separate and independent tort of fraud resulting in injury distinct from that resulting from the breach of contract claim.⁵¹¹ Travis did not allege a separate and independent tort of fraud, the court held.⁵¹²

Travis also struck out in his claim that the purported oral contract was enforceable under the doctrine of promissory estoppel.⁵¹³ The court’s analysis on this point is particularly impressive. To recover, a claimant must show not only reliance but that the reliance injury “is independent from the benefit of the

505. 267 N.E.3d at 442–43.

506. IND. CODE § 32-21-1-1(5).

507. *Id.* at 445.

508. *Id.*

509. *Id.* at 446 (citing *Zukerman v. Montgomery*, 945 N.E.2d 813, 819 (Ind. Ct. App. 2011), citing in turn *Wenning v. Calhoun*, 827 N.E.2d 627, 629 (Ind. Ct. App. 2005)).

510. *Id.* at 447.

511. *Id.*

512. *Id.*

513. *Id.*

bargain and so substantial as to constitute an unjust and unconscionable injury.”⁵¹⁴ The designated evidence showed that Travis had neither changed anything with regard to his employment as a mortgage broker nor contributed any money to the acquisition or construction of any carwash site. As such, the court concluded, any reliance injury he may have suffered was not so substantial as to be unjust and unconscionable.⁵¹⁵

Travis fared better on his final claim of “quantum meruit” where courts “to avoid unjust enrichment . . . permit recovery of the value of the services rendered just as if there had been a true contract.”⁵¹⁶ Here the court says that the “deposition testimony reveals genuine issues of material fact regarding the services and benefits provided by Travis and accepted by Baine and his companies without compensation, and whether allowing Baine and his companies to avoid payment for Travis’s services would be unjust.” This was enough to reverse the summary judgment that had been entered in favor of Baine on this count.

This result required the court to tackle Baine’s argument that recovery in quantum meruit is only possible when no express contract exists, and that Travis himself had alleged the existence of a contract.⁵¹⁷ But here the court cited Indiana authority going back to 1841 “that one who has rendered services or transferred property under a contract voidable under the statute of frauds may recover the property or the value of such services or property under quantum meruit.”⁵¹⁸

*Adams v. Lazaro*⁵¹⁹ provides an interesting contrast from *Travis v. V3 Express Carwash, LLC*,⁵²⁰ discussed *supra*, as to the doctrine of “part performance.” As in *Travis*, the parties in *Adams* had a purported oral agreement that was unenforceable due to the Statute of Frauds. Specifically, Freddy Lazaro alleged that he and Bruce Adams had a “rent-to-own arrangement” pursuant to which Lazaro would purchase a house from Adams by making a down payment and a specified number of monthly payments in specified amounts thereafter.⁵²¹ There was evidence that Adams subsequently gave Lazaro documents reflecting these terms, but no evidence that either party ever signed them.⁵²²

Over the next several years, Lazaro made regular payments to Adams, made improvements to the house, and paid all utilities except for the sewer bill which

514. *Id.* at 448 (quoting *Spring Hill Devs., Inc. v. Arthur*, 879 N.E.2d 1095, 1103 (Ind. Ct. App. 2008)).

515. *Id.* at 448–49.

516. *Id.* at 449 (citing *inter alia* *Kelly v. Levandoski*, 825 N.E.2d 850, 860–61 (Ind. Ct. App. 2005)).

517. *Id.* at 449 n.3.

518. *Id.* (citing *Martin v. Martin*, 122 Ind. App. 241, 244, 103 N.E.2d 905, 906 (1952) (citing in turn *inter alia* *recovery Barickman v. Kuykendall*, 6 Blackf. 21, 24–25, 1841 WL 2535, at *2 (1841))).

519. 249 N.E.3d 661 (Ind. Ct. App. 2024).

520. 267 N.E.3d 440 (Ind. Ct. App. 2025).

521. *Adams*, 249 N.E.3d at 663.

522. *Id.* at 664.

he claimed he never received.⁵²³

Eventually, Adams sought to evict Lazaro for unpaid rent and failure to obtain insurance.⁵²⁴ Lazaro responded by suing Adams for breach of their purported agreement and asking the court to order Adams to convey the property to him.⁵²⁵ After a bench trial, the court held that Lazaro's claim for breach of contract failed because there was no written, signed contract. But the court concluded that the parties had orally agreed to sell the house, and the agreement was enforceable under the equitable doctrine of part performance. The court ordered Adams to convey the property to Lazaro, although it directed Lazaro to reimburse Adams for unpaid property taxes.⁵²⁶

As both the Court of Appeals says here and said in *Travis*, oral contracts subject to the Statute of Frauds, are voidable, not void, and may be enforced under the doctrine of "part performance."⁵²⁷ The facts that distinguish the part performance analysis in this case from that of *Travis* are apparent.⁵²⁸ Here there was evidence that pursuant to the oral agreement, Lazaro had made what he believed to be a rental payments in an amount that exceeded the agreed-upon purchase price; had paid all utility bills (other than the sewer bill of which he was not aware); and had made repairs to the house "inconsistent with simply renting it, including replacing appliances and the water heater, installing a new staircase and flooring, and painting the exterior."⁵²⁹ Thus, the Court of Appeals concluded in affirming the trial court, "Lazaro took extensive actions in reliance on his oral agreement with Adams."

K. Liquidated Damages

In *Derr Enterprises, LLC v. Union City Indiana Properties, LLC*, a commercial landlord sued after a tenant ceased paying rent and vacated premises six months before lease ended.⁵³⁰ The trial court's judgment of approximately \$120,000 included an award of \$9,950 in late fees of \$50 per day for 199 days

523. *Id.*

524. *Id.*

525. *Id.*

526. *Id.* at 665.

527. *Id.* at 666 (citing *Summerlot v. Summerlot*, 408 N.E.2d 820, 828 (Ind. Ct. App. 1980). *Cf. Travis v. V3 Express Carwash, LLC*, 267 N.E.3d 440, 445 (Ind. Ct. App. 2025) (citing *Spring Hill Devs., Inc. v. Arthur*, 879 N.E.2d 1095, 1104 (Ind. Ct. App. 2008) (in turn citing *Summerlot*, 408 N.E.2d at 828)) ("The part performance doctrine is based on the rationale that equity will not permit a party who breaches an oral contract to invoke the statute of frauds where the other party has performed his part of the agreement to such an extent that repudiation of the contract would lead to an unjust or fraudulent result.").

528. As discussed in text accompanying *supra* note 509, the *Travis* court held that the doctrine of part performance did not preclude the application of the Statute of Frauds in that case because the designated evidence did not articulate Travis's specific duties pursuant to the alleged agreement.

529. *Adams*, 249 N.E.3d at 666.

530. 253 N.E.3d 1129 (Ind. Ct. App. 2025).

(the unfulfilled term of the lease) and an additional \$53,750 in late fees of \$50 per day for 1,075 days from the day after the lease expired through the date of the bench trial.⁵³¹ On appeal, the tenant challenged the propriety of the late fees for the period beyond the term of the lease.⁵³²

The court framed the issue as whether the late fee provision in the lease was a valid liquidated damages clause or an unenforceable penalty.⁵³³ This issue has been given frequent and detailed consideration during previous Survey Periods.⁵³⁴

The court held that this determination is a pure question of law for the court, and it considered the facts, the intention of the parties, and the reasonableness of the provision under the circumstances of the case. Relying on an earlier decision of the court on the precise issue of whether a trial court had erred when it awarded a per diem late fee for the period between the expiration of the lease term and the date of judgment,⁵³⁵ the court said that when a sum stipulated in an agreement as liquidated damages is “grossly disproportionate” to the loss that may result from the breach, the courts will treat the sum as a penalty rather than as liquidated damages.⁵³⁶ This was the situation in this case, the court found. “These late fees are more than twice the amount of the unpaid rent of \$23,244.00 and are grossly disproportionate to [the landlord’s] actual loss from late rental payments. . . . [T]he daily late fee should not have continued to be assessed after the expiration of the term of the lease.”⁵³⁷

This decision is certainly consistent with precedent⁵³⁸ and carries the added weight of having been authored by Senior Judge Randall T. Shepard, the former long-serving Chief Justice of Indiana. But Indiana courts as a general rule do not let parties off the hook for the contracts they have made, and it continues to be something of a puzzle as to why liquidated damage clauses are different.⁵³⁹

531. *Id.* at 1133, 1136.

532. *Id.* at 1135–36.

533. *Id.* at 1136.

534. *See, e.g., 2020–2021 Survey Article, supra* note 1, at 496–98 (discussing *Symons v. Fish*, 158 N.E.3d 352 (Ind. Ct. App. 2020)); *2018–2019 Survey Article, supra* note 1, at 838–43 (discussing *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng’g, Inc.*, 136 N.E.3d 208 (Ind. 2019)).

535. *Derr Enters.*, 253 N.E.3d at 1136 (citing *Gershin v. Demming*, 685 N.E.2d 1125 (Ind. Ct. App. 1997)).

536. *Id.*

537. *Id.*

538. *See, e.g., Skendzel v. Marshall*, 301 N.E.2d 641 (1973); *Sterne v. Fletcher Am. Co.*, 181 N.E. 37 (1932); *Jaqua v. Headington*, 16 N.E. 527 (1888); *Olcott Int’l & Co. v. Micro Data Base Sys., Inc.*, 793 N.E.2d 1063 (Ind. Ct. App. 2003); *Symons v. Fish*, 158 N.E.3d 352 (Ind. Ct. App. 2020); *Gershin v. Demming*, 685 N.E.2d 1125 (Ind. Ct. App. 1997). *But see Raymundo v. Hammond Clinic Ass’n*, 449 N.E.2d 276 (Ind. 1983).

539. *Cf. Am. Consulting, Inc. v. Hannum Wagle & Cline Eng’g, Inc.*, 136 N.E.3d 208, 220 (Ind. 2019) (Slaughter, J., dissenting) (“[C]ourts should get out of the business of deciding whether the parties’ estimate of the harm underlying liquidated damages is reasonable.”); *Time Warner Ent. Co., L.P. v. Whiteman*, 802 N.E.2d 886, 894 (Ind. 2004) (“Despite the longstanding

L. Specific Performance

Although the Court of Appeals did not invoke Shakespeare's aphorism, "What's in a name? That which we call a rose by any other name would smell as sweet,"⁵⁴⁰ the Court's conclusion in *Farmhouse Investments, LLC v. Quattro Real Estate Holdings, LLC*,⁵⁴¹ is consistent with the Bard's.

Farmhouse Investments, LLC (Series B) ("Farmhouse") signed an agreement to purchase real estate from Quattro Real Estate Holdings, LLC ("Quattro").⁵⁴² The evidence showed that Farmhouse had planned to use the Property to grow marijuana, on the hopes that the Indiana General Assembly would legalize marijuana cultivation. When that did not occur, Farmhouse decided that it "w[as not] going to allocate funds to this project."⁵⁴³ Quattro sued for specific performance.⁵⁴⁴

Farmhouse's first defense was that the real estate purchase agreement named the seller as "Quattro, LLC," when, as indicated in the caption of this litigation, the seller was in fact Quattro Real Estate Holdings, LLC.⁵⁴⁵ Specifically, Farmhouse argued that the difference between the names violated various corporate law requirements as to the use of assumed business names,⁵⁴⁶ and raised a question of whether Quattro Real Estate Holdings, LLC, was "the proper party to enforce the Agreement."⁵⁴⁷

The Court found, in effect, that "Quattro LLC" smelled just as sweet as "Quattro Real Estate Holdings, LLC." First, the Court noted that the purchase agreement had been drafted by Farmhouse's counsel such that there was no apparent misrepresentation on Quattro's part.⁵⁴⁸ Second, Quattro Real Estate Holdings, LLC, was shown as owning title to the property in the title commitments issued in connection with the transaction.⁵⁴⁹ And third, the Court cited long-standing precedent that a contract mis-naming a party cannot be invalidated when the counterparty has "no question regarding the identity" of the mis-named party.⁵⁵⁰

Of greater significance, Farmhouse also argued that granting specific performance of the Agreement was not appropriate because Quattro had an

principles represented by [the cases cited in the preceding footnote] we are left with some unease over any decision where what appears to be the freely bargained agreements of the parties are set aside.").

540. WILLIAM SHAKESPEARE, *ROMEO & JULIET* 60 (Burton Raffel ed. 2004).

541. 268 N.E.3d 765 (Ind. Ct. App. 2025).

542. *Id.*

543. *Id.* at 770 n.1.

544. *Id.* at 770.

545. *Id.* at 772.

546. *Id.* The statutes alleged to be violated are IND. CODE §§ 23-0.5-3-4(e) and -1(a)(1).

547. *Id.*

548. *Id.*

549. *Id.*

550. *Id.* (quoting *Parker v. Rod Johnson Farm Serv., Inc.*, 179 Ind. App. 190, 192, 384 N.E.2d 1129, 1131 (1979)).

adequate remedy at law via monetary damages.⁵⁵¹ While the Court acknowledged the existence of at least one decision in which the court had declined to exercise its equitable discretion in awarding specific performance when adequate monetary damages were available,⁵⁵² the court here found that the parties had agreed in their contract that Quattro was entitled to seek specific performance.⁵⁵³ The case, therefore, is an important reminder that while we frequently speak of specific performance as an equitable remedy, it can be a contractual one as well if appropriate language is included in the contract.⁵⁵⁴

*Devlin v. de Gorter*⁵⁵⁵ is a case that could serve as a law school exam question on specific performance. At issue is whether David J. de Gorter had an oral agreement to purchase 2,010 shares of closely held stock in ClearPoint Federal Bank & Trust from Curragh Capital Partners II, L.P. (“Curragh”).⁵⁵⁶ The question turned on whether the stock sale agreement was part of de Gorter’s employment contract with the bank or whether it was a distinct and wholly separate arrangement from his employment package.⁵⁵⁷ Simplifying, if it was an employment contract, Curragh would win the litigation; if a stand-alone, de Gorter would win.⁵⁵⁸

The defendants in the case, Curragh and one of its directors, Michael H. Devlin, sought a directed verdict on the question.⁵⁵⁹ But the trial court found the evidence sufficiently conflicting that it allowed the question to go to trial.⁵⁶⁰ The jury found that Curragh had breached its agreement to sell 2,010 shares of ClearPoint stock to de Gorter.⁵⁶¹ The Court of Appeals agreed with this determination, finding that the subsequent trial demonstrated that both sides had evidence arguably supporting their respective positions.⁵⁶²

The trial court subsequently ordered specific performance, ordering that Curragh complete the stock sale once de Gorter had received all necessary approvals from the appropriate regulatory agency.⁵⁶³

Curragh argued that the trial court abused its discretion in awarding de Gorter specific performance of the stock sale, arguing that specific performance was unwarranted because an adequate remedy, i.e., monetary damages, was

551. *Id.* at 775–76.

552. *Id.* at 776 (discussing *Kesler v. Marshall*, 792 N.E.2d 893 (Ind. Ct. App. 2003)).

553. *Id.* at 776–77 (citing *Metro Holdings One, LLC v. Flynn Creek Partner, LLC*, 25 N.E.3d 141 (Ind. Ct. App. 2014)).

554. This is a lesson Elon Musk learned as well when he tried to renege on his contract to purchase Twitter, Inc., as alluded to in the text accompanying *supra* note 132.

555. 257 N.E.3d 807 (Ind. Ct. App.), *trans. denied sub nom.*, *Devlin v. DeGorter*, 265 N.E.3d 1000 (Ind. 2025).

556. *Id.* at 812.

557. *Id.*

558. *Id.*

559. *Id.*

560. *Id.*

561. *Id.*

562. *Id.* at 816.

563. *Id.* at 812.

available at law.⁵⁶⁴ The Court of Appeals reports that the trial court was “not persuaded” by the foreign authority relied on by Curragh and “instead applied relevant Indiana law.”⁵⁶⁵

In point of fact, the Court of Appeals had held in 1911 that closely-held stock is unique such that monetary damages may not be an adequate remedy for a breach of a sales agreement for closely-held stock.⁵⁶⁶ More recently, the Court reaffirmed that “[i]t is well settled in Indiana that a trial court sitting in equity has the authority to mold its decree to meet the case in the record when the plaintiff’s complaint contains a general prayer as well as a specific prayer for relief.”⁵⁶⁷

De Gorter had argued to the trial court that “shares in a closely-held, highly-regulated entity such as ClearPoint should be treated as unique property similar to real estate for the purposes of determining whether specific performance is appropriate.”⁵⁶⁸ The trial court agreed, finding that “the evidence shows that shares in ClearPoint are unique properties for which specific performance can be an appropriate remedy.”⁵⁶⁹

The Court of Appeals concluded:

Given our prior decisions indicating that specific performance may be appropriate in cases involving the sale of closely-held stock coupled with the facts and circumstances of this case, we cannot say that the trial court abused its discretion in finding that monetary damages would not be an adequate remedy in this case.⁵⁷⁰

Curragh also argued that the trial court abused its discretion in ordering specific performance because the sale could not be completed without approval from the Office of the Comptroller of the Currency (“OCC”), a federal banking regulator.⁵⁷¹ Generally, “[a] court may not grant specific performance when the subject matter of the contract no longer exists or is beyond the control of the parties.”⁵⁷²

The trial court in fact acknowledged that “[i]t is axiomatic that courts of equity will only order specific performance when the contract is capable of

564. *Id.* at 820.

565. *Id.*

566. *See* *Vernon, G. & R.R. Co. v. Washington Civil Twp.*, 95 N.E. 599, 602 (Ind. App. 1911).

567. *Krukemeier v. Krukemeier Mach. & Tool Co.*, 551 N.E.2d 885, 889 (Ind. Ct. App. 1990).

568. *Devlin*, 257 N.E.3d at 820.

569. *Id.* at 820–21.

570. *Id.* at 822.

571. The Court of Appeals said that for de Gorter to acquire ten percent or more of ClearPoint’s stock, with respect to which he would be deemed a “Control Party” under federal banking regulations, he was required to obtain approval from the OCC. *Id.* at 813.

572. *Id.* at 822.

being performed.”⁵⁷³ However, the trial court noted that de Gorter had previously obtained the required OCC approval, the approval for which only lapsed due to Curragh’s breach.⁵⁷⁴ As the Court of Appeals noted:

While the trial court acknowledged that de Gorter would have to re-obtain approval to become a Control Party from the OCC, it noted that “the ClearPoint shares at issue remain in the possession of Curragh,” and that it had the “authority to order Curragh to comply with an equitable remedy that results from this action, which can include the specific performance of its contract with [de Gorter].”⁵⁷⁵

The Court of Appeals agreed with the trial court that “it would be inequitable to deny de Gorter specific performance when he ‘had attempted to comply with the conditions of sale by obtaining OCC approval[,]’ only for that approval to lapse ‘due to the actions of [Curragh] in failing to follow through on the sale.’”⁵⁷⁶

The trial court also ordered that Curragh and Devlin be jointly and severally liable for payment of the attorneys fees incurred by de Gorter during the regulatory-approval process.⁵⁷⁷ Here’s what the Court of Appeals said:

While Devlin was not found personally responsible for any alleged breach of duty, it was alleged that he was the individual responsible for orchestrating Curragh’s breach. Given the trial court’s broad discretion in fashioning equitable remedies, coupled with the complete lack of any authority cited by Appellants supporting their claim of error, we conclude that the trial court did not abuse its discretion in this regard.⁵⁷⁸

It seems to this Article’s author that Devlin would be protected by both the bedrock principle of limited liability and the business judgment rule. However, the defendants did not raise this issue in their transfer petition which in any event was denied.⁵⁷⁹

M. Quantum Meruit

In *Menendez v. Hahn Surveying Group, Inc.*, Menendez had a contract with Hahn for Hahn to prepare a survey of some property, split the parcel into two

573. *Id.*

574. *Id.*

575. *Id.* (alteration in original).

576. *Id.* at 823 (first alteration in original).

577. *Id.*

578. *Id.*

579. *Devlin v. DeGorter*, 265 N.E.3d 1000 (Ind. 2025) (denying transfer).

tracts, and prepare a “secondary REPLAT certified drawing” for \$2,950.⁵⁸⁰ After doing the first survey, Hahn says he told Menendez that the property was too small to split into two tracts and that Menendez said he would look into it.⁵⁸¹ After some time passed, Hahn sent Menendez a bill for \$1,950.⁵⁸² This case is Hahn’s small claims case to collect.⁵⁸³ The Small Claims Court ruled in favor of Hahn, and the Court of Appeals affirmed.⁵⁸⁴

But Judge Mathias writes a strong dissent, arguing that the evidence is clear that Hahn never completed the second part of the contract and that the basis that the majority uses to provide Hahn with partial payment—the doctrine of quantum meruit—is not applicable here, saying that “the general rule in Indiana is that the *nonbreaching* party is the party with options for its remedies, including any quantum-merit [sic] recovery.”⁵⁸⁵

CONCLUSION

One issue of agency law that is a major focus of this Article’s author’s teaching is a business’s liability for torts committed by its agents. This is often called the doctrine of respondeat superior or vicarious liability, and for such liability to exist, the torts must be committed within the scope of the agent’s employment. The “scope of employment” requirement has often made it difficult to find an employer vicariously liable for its employee’s sexual assault precisely because of the difficulty of proving a sexual assault was within the scope of employment.

During the Survey Period, the prestigious American Law Institute enacted a new section of the Restatement of Torts at its 2025 annual meeting, providing a special rule on vicarious liability for sexual assault.⁵⁸⁶ The new section relies heavily on a decision of the Indiana Supreme Court, *Cox v. Evansville Police Dep’t*,⁵⁸⁷ written by Chief Justice Loretta Rush. The new rule provides as follows:

(a) Notwithstanding [the Restatement’s general rules on vicarious liability of employers for torts of employees committed within the scope of employment], a factfinder may find an employer vicariously liable for its employee’s sexual assault of a victim if:

580. 245 N.E.3d 676, 2024 WL 4285435, at *1 (Ind. Ct. App. 2024) (unpublished table decision).

581. *Id.*

582. *Id.*

583. *Id.*

584. *Id.* at *3.

585. *Id.* at *3–4 (Mathias, J., dissenting) (citing *Fischer v. Heymann*, 12 N.E.3d 867, 872–73 (Ind. 2014)).

586. *Torts: Miscellaneous Provisions Is Approved*, A.L.I. (May 19, 2025), <https://www.ali.org/news/articles/torts-miscellaneous-provisions-approved> [<https://perma.cc/L8LZ-MWC2>].

587. 107 N.E.3d 453, 464 (Ind. 2018).

- (1) the nature or conditions of the employee's employment creates a reasonably foreseeable risk of sexual assault;
- (2) the victim is particularly vulnerable, by reason of age, mental capacity, disability, incarceration, detention, confinement, medical need, or other similar circumstance;
- (3) the employer facilitates the sexual assault by providing the employee with substantial power, authority, or influence over the victim;
- (4) the sexual assault occurs when the employee is performing work assigned by the employer or engaging in a course of conduct subject to the employer's control.

If the plaintiff fails to satisfy Subparagraphs (1)-(4), whether an employer is vicariously liable for its employee's sexual assault is governed by § 5.

(b) Notwithstanding Subsection (a), an employer is not vicariously liable under this Section for a sexual assault committed by a supervisor on a subordinate. Whether an employer is vicariously liable for its employee's sexual assault of a fellow employee is governed by [the Restatement's general rule on vicarious liability of employers for torts of employees committed within the scope of employment].⁵⁸⁸

The Reporters' Note references *Cox* on several occasions. In particular, in explaining the rationale for the new rule, the Note starts with an extensive quotation from *Cox*:

The scope of employment extends beyond authorized acts for two key reasons. First, it is equitable to hold people responsible for some harms arising from activities that benefit them. When employees carry out assigned duties, those employment activities "further the employer's business" to an appreciable extent, benefiting the employer. But delegating employment activities also carries an inherent risk that those activities will naturally or predictably give rise to injurious conduct. When that happens, the employer is justly held accountable since the risk accompanies the employer's benefit.

Second, holding employers liable for those injurious acts helps prevent recurrence. Employers can take measures—like selecting employees

588. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 11 (A.L.I., Tentative Draft No. 4, 2025).

carefully and instituting procedures that lessen employment dangers—to reduce the likelihood of tortious conduct. Since employers have some control over the risk of injurious conduct flowing from employment activities, imposing liability on employers for that conduct encourages them to take preventive action.⁵⁸⁹

In explaining the relevance of the employee's power, authority, or influence over the victim, the Note again began by quoting *Cox* at some length:

Cities are endowed with the coercive power of the state, and they confer that power on their police officers. Those officers, in turn, wield it to carry out employment duties—duties that may include physically controlling and forcibly touching others without consent. For this reason, when an officer carrying out employment duties physically controls someone and then abuses employer-conferred power to sexually assault that person, the city does not, under respondeat superior, escape liability as a matter of law for the sexual assault.⁵⁹⁰

It is a source of great pride that our Supreme Court has made such a demonstrable contribution to the development of American common law in this extremely important area.

589. *Id.* § 11 reporters' note cmt. c (quoting *Cox*, 107 N.E.3d at 461–62).

590. *Id.* § 11 reporters' note cmt. j. (quoting *Cox*, 107 N.E.3d at 456).

**SUBTLE SHIFTS AND STEADY DOCTRINES:
A YEAR OF INDIANA CONSTITUTIONAL CLARIFICATION
2024–2025**

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INTRODUCTION

Indiana appellate courts alternately expanded and limited Hoosiers' rights under the Indiana Constitution during the survey period (September 2024 to September 2025). The Indiana Court of Appeals ("Court of Appeals") construed Indiana's abortion law to limit the medical procedure for pregnant women to circumstances only when the pregnant woman faces a threat to life or serious health risk consistent with the content of the constitutional right to the procedure. The Court of Appeals also held that a defendant's criminal charges of possessing or accessing simulated child abuse material violated the free speech clause. The Court of Appeals provided further definition around the impermissibility of *ex parte* communication with the jury and affirmed the permissibility of virtual video testimony by a witness during a murder trial because the witness was incarcerated eight hours away from the trial. A statute making a misdemeanor the carrying of a handgun upon indictment for felony

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charges was found constitutional because the limitation was rationally related to the State's police power. The Court of Appeals also affirmed a trial court's refusal to send a rescission claim to a jury. The Indiana Supreme Court ("Supreme Court") upheld the Indiana Disciplinary Commission's authority in attorney discipline proceedings, denying the Attorney General's motion to dismiss and declining to reach his arguments concerning separation of powers and freedom of expression. The Supreme Court also reiterated that the child's best interest remains paramount in children-in-need-of-services (CHINS) proceedings, holding that a trial court erred by adopting an adjudication by the Indiana Department of Child Services based on separation of powers concerns.

During the survey period, Indiana appellate courts substantively addressed fourteen areas of Indiana Constitutional law.¹ The Court of Appeals affirmed Indiana's limited abortion rights, generally found law enforcement needs outweighed individual claims in search and seizure cases, rejected a right-to-counsel challenge, and clarified jury trial rights in both criminal and civil proceedings. The Supreme Court rejected two separation of powers challenges.

I. ARTICLE 1, SECTION 1 – INALIENABLE RIGHTS

In *Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky, Inc. v. Members of the Medical Licensing Board of Indiana*, medical care providers appealed a judgment denying their as-applied challenges to Indiana's abortion ban.²

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); 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); and sixteen in 2024, Scott Chinn, Daniel E. Pulliam, Stephanie L. Gutwein & Elizabeth A. Charles, *Defining the Limits: The Right to Bring a Constitutional Claims—2023-2024*, 58 IND. L. REV. 787 (2025).

2. 267 N.E.3d 494, 507 (Ind. Ct. App. 2025) [hereinafter *Planned Parenthood II*]; IND. CODE § 16-34-2-1 (2022).

The Supreme Court held in *Planned Parenthood I* that Article 1, Section 1 of the Indiana Constitution's guarantee of inalienable rights protected a woman's right to an abortion when it "is necessary to protect her life or to protect her from a serious health risk."³ While the Supreme Court rejected a facial challenge to the legislature's abortion prohibition, the court left open the possibility of an as-applied challenge.⁴ On remand, the medical care providers amended their complaint to argue there are specific situations where the abortion ban would prohibit a woman from getting an abortion when her life or health is at serious risk, thereby violating the Indiana Constitution.⁵ The medical care providers also sought to enjoin the licensed-hospital requirement for abortion procedures.⁶

The trial court originally denied the providers' request for declaratory and injunctive relief.⁷ It identified several physical- and mental-health conditions that may entitle a woman to an abortion, but identified none that Article 1, Section 1 protects that the abortion ban prohibits.⁸ It also rejected the providers' request for injunctive relief because it found the enumerated medical risks likely would require treatment in a hospital and that increased costs and travel were insufficient to establish a material burden under Indiana law.⁹

The Court of Appeals then affirmed the trial court's denial of the providers' claims, but for slightly different reasons. First, it found that reasonable medical alternatives to abortion were available to treat the physical- and mental-health conditions the trial court had identified, such that abortion was not a *necessary* treatment for any of the conditions.¹⁰ And it refused to construe these conditions as falling within the Indiana Supreme Court's holding that women have a right to an abortion when necessary to protect their lives or to protect them from a "*serious health risk*."¹¹ It also found that, even under the abortion ban, abortion is lawful when the medical condition becomes so severe that abortion is the only way to save the woman's life or prevent serious health risks.¹² Second, it agreed that the "reasonable medical judgment" standard did not impair the constitutional right to an abortion because the constitutional right to an abortion exists only when it is *necessary*; a "reasonable medical judgment" must be made when this situation exists.¹³ Third, the court found that the providers had not shown that the hospital requirement imposed a material burden on the

3. *Members of the Med. Licensing Bd. of Ind. v. Planned Parenthood Great N.W., Haw., Alaska, Ind., Ky., Inc.*, 211 N.E.3d 957, 985 (Ind. 2023).

4. *Id.* at 966–77.

5. *Planned Parenthood II*, 267 N.E.3d at 498.

6. *Id.*

7. *Id.*

8. *Id.* at 501–06.

9. *Id.* at 501.

10. *Id.* at 508–09.

11. *Id.* (emphasis added).

12. *Id.*

13. *Id.*

constitutional right to an abortion because that right exists only when an abortion is necessary to prevent a risk to the life of or a serious health risk to a pregnant woman; in those circumstances, the woman would likely already be receiving hospital care.¹⁴

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

In *F.G. v. State*, the Court of Appeals held that an Indiana statute prohibiting possession of image of simulated sexual conduct of a child that did not actually exist was unconstitutional as applied to the defendant.¹⁵ The defendant argued that Indiana’s law prohibiting the possession or access of simulated child abuse material violates the First Amendment of the U.S. Constitution and Article 1, Section 9 of the Indiana Constitution.¹⁶ On appeal, the State agreed that the defendant’s motion to dismiss should have been granted.¹⁷ It conceded that it did not charge the defendant with possession of images of child abuse material that depicted “any actual, living and breathing children.”¹⁸ Rather, the images were of “cartoon caricatures of the ‘manga’ or ‘hentai’ variety, which originated in Japan.”¹⁹ Because the defendant asserted an as-applied challenge, and “federal precedent preclude[d] his prosecution for accessing or possessing obscene virtual child pornography within his own home,”²⁰ the court rejected the case on First Amendment grounds.²¹ The court thus declined to address the defendant’s arguments under Article 1, Section 9.²²

III. ARTICLE 1, SECTION 11 – SEARCH AND SEIZURE

In *Bradford v. State*, the Court of Appeals affirmed the defendant’s conviction over the defendant’s objection to a warrantless search of his vehicle based on the smell of marijuana.²³ The defendant was traveling from Illinois to Ohio, both of which have legalized marijuana.²⁴ Thus, the defendant argued that the smell of marijuana could not necessarily indicate the presence of illegal activity in the vehicle.²⁵ But the Court of Appeals held that because marijuana remains illegal in Indiana, its smell served as sufficient probable cause to justify the warrantless vehicle search.²⁶

14. *Id.*

15. 244 N.E.3d 972, 976 (Ind. Ct. App. 2024), *as amended*, (Mar. 5, 2025).

16. *Id.* at 973–74.

17. *Id.* at 974.

18. *Id.* at 973.

19. *Id.*

20. *Id.* at 974.

21. *Id.* at 976.

22. *Id.* at 976 n.2.

23. 246 N.E.3d 808, 819 (Ind. Ct. App. 2024), *trans. denied*, 250 N.E.3d 1061 (Ind. 2025).

24. *Id.* at 815.

25. *Id.*

26. *Id.* at 816.

In *State v. Baker*, the Court of Appeals reversed an order suppressing evidence seized from a vehicle without a warrant because although the defendant was in custody, law enforcement had reason to believe others had access to the vehicle and could move it.²⁷ This law enforcement need—based on the defendant’s statement that he was borrowing the vehicle from a friend—justified a minimal search of the vehicle that did not involve “tearing apart the seats or ripping out the dashboard.”²⁸ Further, a canine alerted to the presence of narcotics raising the level of suspicion and concern regarding illegal activity to “very high.”²⁹

Judge Mathias dissented. He agreed that the degree of suspicion was “high” but did not believe law enforcement needs justified skipping the process of obtaining a search warrant.³⁰ The defendant was handcuffed and in the backseat of a police vehicle with his vehicle’s keys secured by law enforcement.³¹ In Judge Mathias’s view, there simply were not facts justifying an immediate search of the vehicle with five law enforcement officers present on the scene.³²

In *Brooks v. State*, the Court of Appeals held that a warrantless ping of a cellphone’s geolocation did not violate Article 1, Section 11.³³ The degree of suspicion at the time of the search was moderate.³⁴ Law enforcement had found the pinged phone’s telephone number in the caller ID of a phone believed to have been used by a child who was reported missing at the time, and the number was unrecognized by the child’s parents.³⁵ The child’s home and the area around the home had been searched, and no one knew where the child had gone at 4:50 a.m.³⁶ Although there was no guarantee the telephone number related to the child’s disappearance, it was law enforcement’s only lead.³⁷

The court found that the degree of intrusion from pinging the cell phone’s geolocation was also moderate.³⁸ Learning a citizen’s location—without a warrant—invades a citizen’s privacy.³⁹ But the ping did not impede on the citizen’s movement.⁴⁰ The ping resulted in only a visit by law enforcement to the door of the defendant’s hotel room at 5:15 a.m. to ask if he had any information regarding the child.⁴¹ And law enforcement needs were “extremely high” because a thirteen-year-old girl went missing with no explanation in the

27. 246 N.E.3d 1236, 1249 (Ind. Ct. App. 2024).

28. *Id.* at 1248.

29. *Id.*

30. *Id.* at 1249 (Mathias, J., dissenting).

31. *Id.* at 1250.

32. *Id.*

33. 250 N.E.3d 1119 (Ind. Ct. App.), *trans. denied*, 259 N.E.3d 990 (Ind. 2025).

34. *Id.* at 1128.

35. *Id.* at 1124.

36. *Id.* at 1128.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

middle of the night, time was of the essence, and the location of that phone was the only police lead at the time.⁴²

Although suspicion and intrusion were both moderate, the extreme law enforcement need to track down the missing child made the warrantless ping of the defendant's cellphone constitutional under Article 1, Section 11.⁴³

In *State v. Hendricks*, the Court of Appeals affirmed a trial court's suppression of evidence obtained after an officer went through the side yard of the defendant's home and positioned himself near the back of the home.⁴⁴ This was not the typical route of ingress or egress, e.g., the sidewalk, and the officer approached the home at 11:30 p.m., which is not a time when people expect to receive visitors.⁴⁵ The officers also lacked anything but a low degree of concern, suspicion, or knowledge of criminal activity because the evidence regarding illegality was not tied to individuals living at that home, but instead to relatives.⁴⁶ Further, there was no emergency or other exigency justifying the law enforcement officers' actions to conduct a general search for a suspect.⁴⁷ Thus, the warrantless intrusion into the curtilage was unreasonable under the second *Litchfield* factor.⁴⁸

Judge Brown dissented on the basis that law enforcement officers were looking for a suspect in a recent shooting and an individual wanted on charges of escape.⁴⁹ Judge Brown thus viewed the law enforcement officers as justified in searching the curtilage of known associates of the suspects.⁵⁰

In *Ramos-Osario v. State*, the Court of Appeals reversed a trial court's admission of evidence from a traffic stop that resulted in a conviction for operating a vehicle while intoxicated.⁵¹ The stop was triggered by one officer hearing gun fire and assessing that the nearest location was from a truck driving by and seeing "muzzle flashes" coming from the truck.⁵² The officer initiated a traffic stop and removed three individuals from the truck and handcuffed them.⁵³

The evidence of the muzzle flashes and the gun fire sounding from near the truck was presented at only the suppression hearing.⁵⁴ At the bench trial, the State presented evidence that the stop was initiated only as part of an investigation into shots fired.⁵⁵ Thus, the Court of Appeals found that the level

42. *Id.* at 1129.

43. *Id.*

44. 254 N.E.3d 1127, 1132–33 (Ind. Ct. App. 2025).

45. *Id.* at 1132.

46. *Id.*

47. *Id.* at 1133.

48. *See id.* at 1132–33 (citing *Litchfield v. State*, 824 N.E.2d 356, 359–61 (Ind. 2005)).

49. *Id.* at 1133–34 (Brown, J., dissenting).

50. *Id.*

51. 257 N.E.3d 32, 36 (Ind. Ct. App. 2025), *reh'g denied*, (May 30, 2025).

52. *Id.* at 35.

53. *Id.* at 37.

54. *Id.* at 36.

55. *Id.* at 36–37.

of reasonable suspicion was low and thus favored the defendant.⁵⁶ Although the law enforcement need of investigating shots fired was of an utmost priority, the degree of the intrusion was also high, and thus, the Court of Appeals found that the evidence of the defendant's intoxication was admitted in violation of Article 1, Section 11.⁵⁷

In *Jackson v. State*, the Indiana Supreme Court denied a transfer petition on what two dissenting justices indicated was an issue of first impression.⁵⁸ The case concerned the reasonableness of an officer conducting a warrantless search of a car's locked trunk based on only the smell of burnt marijuana coming from the passenger compartment.⁵⁹ Chief Justice Rush's dissent, joined by Justice Molter, stated that the court's refusal to accept transfer avoids addressing an important opinion that misstates the record and fails to protect a State constitutional right against unreasonable searches by law enforcement.⁶⁰

The officer conducted an investigative stop of the defendant who was sitting in the driver's seat of his vehicle parked in a Carmel, Indiana hotel parking lot where he was staying with his girlfriend.⁶¹ His hotel key was on his lap when he opened the door to speak to the officer. The officer told the defendant he could "smell a little bit of weed" but did not care about it.⁶² Yet the officer called for backup based on the odor and made the defendant exit the vehicle, placing him in handcuffs and performing a search of the vehicle.⁶³ Finding nothing, the officer removed the keys from the ignition and opened the vehicle's trunk, finding a firearm.⁶⁴ The officer then learned that the defendant had been nervously banging on the windows during the search and had a felony carjacking conviction.⁶⁵ The defendant was then charged with unlawful possession of a firearm.⁶⁶

The dissent found the holding of the Court of Appeals, that it is reasonable for law enforcement to conduct a warrantless search of a car's trunk based only on the smell of burnt marijuana coming from the passenger compartment, to be one that had not been, but should be, decided by the Supreme Court.⁶⁷ Because the marijuana smell was not substantiated by a search of the vehicle, and there was no smell of marijuana emanating from the vehicle's trunk, the dissent would have found the search of the trunk unreasonable.⁶⁸ The dissent also found that handcuffing the defendant and placing him in a squad car was a high degree of

56. *Id.* at 39–40.

57. *Id.*

58. 246 N.E.3d 263 (Ind. 2024) (mem.).

59. *Id.* at 264 (Rush, C.J., dissenting).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 265.

68. *Id.* at 266.

intrusion.⁶⁹

In *State v. Poland*, the Court of Appeals reversed a trial court's order granting a motion to dismiss because exigent circumstances justified a blood draw.⁷⁰ Law enforcement arrived on the scene of a multivehicle accident on a state road with at least one person dead.⁷¹ A male, later identified as the defendant, was trapped inside his "completely demolished" vehicle.⁷² With law enforcement assistance, the defendant was removed from the vehicle and transported to a hospital.⁷³ The deputy spoke to other drivers involved in the accident, then reviewed a semitruck's dash camera footage and learned that the defendant's vehicle had lost control coming around a curve.⁷⁴ While the defendant was unconscious in the hospital, law enforcement sought and obtained a blood draw.⁷⁵

The Court of Appeals found that the degree of law enforcement suspicion was high because officers were responding to an accident involving a death and others injured.⁷⁶ The dash camera footage showed a pickup truck traveling quickly around a curve, swerving in and out of traffic, and losing control as it collided with other vehicles.⁷⁷ This gave law enforcement a basis to believe the defendant was impaired.⁷⁸ Because the defendant was receiving other medical care that necessitated the insertion of a line into his arm, the intrusion upon the defendant was minimal.⁷⁹ Finally, law enforcement needs were great given the need to remove intoxicated drivers from the road.⁸⁰ Thus, the blood draw was deemed reasonable under Article 1, Section 11.⁸¹

In *Owens v. State*, the Court of Appeals affirmed the trial court's admission of DNA evidence obtained from swabs taken from the defendant's hands and clothing without a *Pirtle* advisement.⁸² The defendant, who arrived at the hospital with injuries sustained in an attack on the victim, argued that the swabbing violated his right to counsel because he was not advised of his right to counsel prior to the collection.⁸³

The Court of Appeals explained that *Pirtle* advisements are required only when a defendant consents to a search while in custody, found the record unclear

69. *Id.*

70. 269 N.E.3d 1252 (Ind. Ct. App. 2025).

71. *Id.* at 1255.

72. *Id.*

73. *Id.*

74. *Id.* at 1255–56.

75. *Id.* at 1256–57.

76. *Id.* at 1268.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. 246 N.E.3d 1256, 1259 (Ind. Ct. App. 2024). *See Pirtle v. State*, 323 N.E.2d 634 (Ind. 1975).

83. *Owens*, 246 N.E.3d at 1260–61.

as to whether both conditions were met at the time of collection, and cited to numerous cases where courts have declined to apply *Pirtle* to certain types of searches, including in *Garcia-Torres v. State*, where the Indiana Supreme Court held that the collection of a cheek swab was not a search for which *Pirtle* advisements were required.⁸⁴ The Court of Appeals reasoned that the swabs were minimally intrusive, involving only samples from the surface of hands and clothing, and that the search was limited to the blood on the defendant for the purpose of determining whether the victim's DNA was present.⁸⁵ The Court of Appeals further reasoned that even if a *Pirtle* advisement was required, any error was harmless because the defendant later admitted during his interview with law enforcement that he attacked the victim, the victim identified him as her attacker both at the hospital and in court, and the defendant's blood was found at the crime scene.⁸⁶

IV. ARTICLE 1, SECTION 12 – DUE PROCESS

In *Minor v. State*, the Court of Appeals found that alleged errors at a jury trial did not cumulatively violate the defendant's right to complete justice under Article 1, Section 12.⁸⁷ The defendant claimed that the bailiff's *ex parte* communication with the jury—responding “no” to a question that the jury be given access to body camera footage in the jury room—deprived him of the right to be present and heard at all critical stages of his trial.⁸⁸ The trial court also did not involve the defendant and his lawyer in responding to a note from the jury regarding reaching a unanimous verdict.⁸⁹ Although the Indiana Supreme Court has recognized the defendant's right to be present when a jury makes a request for any additional guidance during deliberations, the denial of that right is subject to harmless error analysis.⁹⁰

The court concluded that the bailiff's brief communication with the jury regarding the request for the bodycam footage while placing evidence in the jury room before deliberations had begun in earnest triggered a critical stage where the defendant was required to be present and heard.⁹¹ The court separately observed that it would have been better practice for the defendant and his counsel to be called into the courtroom and a record established on the jury's note regarding a unanimous verdict.⁹² But because the court's response did not contain any new information regarding the facts or law of the case, the trial

84. *Id.* at 1262–63 (citing, among others, *Garcia-Torres v. State*, 949 N.E.2d 1229, 1239 (Ind. 2011)).

85. *Id.* at 1263.

86. *Id.*

87. 252 N.E.3d 979, 990 (Ind. Ct. App.), *trans. denied*, 259 N.E.3d 995 (Ind. 2025).

88. *Id.* at 986.

89. *Id.* at 987.

90. *Id.* (citing *Hernandez v. State*, 761 N.E.2d 845, 853 (Ind. 2002)).

91. *Id.*

92. *Id.* at 988.

court's error does not rise to the level of reversal.⁹³

In *Heitz v. State*, the Court of Appeals found that the State's failure to seek a trial date required the dismissal of felony identity theft.⁹⁴ The trial court had found that the defendant's failure to seek a trial date constituted a delay that absolved the State's obligation to take the case to trial within one year.⁹⁵ The Court of Appeals found the dispute centered on the trial court's policy of attributing delay to the defendant where the defendant failed to seek a trial setting, even when the State also declined to seek a trial setting.⁹⁶ Because local rules that conflict with the criminal rules are invalid, the shifting of the burden of prosecutorial timeliness to the defendant was deemed invalid.⁹⁷ Defendants must affirmatively extend the period of a trial setting for the delay to be deemed attributable to the defendant.⁹⁸ The State, not the defendant, carries the burden of ensuring timely prosecution.⁹⁹

Judge Felix dissented. Although agreeing with the disapproval of the trial court's practice, Judge Felix believed that the defendant acted to extend the one-year period by declining the court's offer to set a trial date.¹⁰⁰

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

In *Graff v. State*, the Court of Appeals addressed whether a suspect's statements to police, made after invocation of his right to counsel but before consultation with an attorney, constituted compelled testimony under Article 1, Section 14 of the Indiana Constitution, and whether his right to counsel under Article 1, Section 13 of the Indiana Constitution was violated during a polygraph examination.¹⁰¹ The court reaffirmed that, under Indiana precedent, a defendant seeking to suppress self-incriminating statements must establish that those statements were compelled.¹⁰² The record demonstrated that the suspect was repeatedly advised of his rights, was not in custody, voluntarily spoke with police, and voluntarily submitted to both a polygraph examination and subsequent interrogation during which he incriminated himself.¹⁰³ The court concluded that the suspect failed to establish a violation of the right against compelled self-incrimination.¹⁰⁴ Regarding the right to counsel, the Court of Appeals reiterated that, although Indiana's right to counsel is broader than its federal counterpart, it attaches only at arrest, and no Indiana Supreme Court

93. *Id.*

94. 263 N.E.3d 181, 195–96 (Ind. Ct. App. 2025).

95. *Id.* at 187.

96. *Id.* at 190.

97. *Id.* at 190–91.

98. *Id.* at 193.

99. *Id.* at 195–96.

100. *Id.* at 196 (Felix, J., dissenting).

101. 250 N.E.3d 497, 502–03 (Ind. Ct. App. 2025).

102. *Id.*

103. *Id.* at 503.

104. *Id.*

authority suggests that the right attaches prior to arrest.¹⁰⁵ Because the defendant was not under arrest at the time of the polygraph examination or when he made incriminating statements, the court held that his right to counsel had not attached and therefore was not violated.¹⁰⁶

In *Shabazz v. State*, the Court of Appeals considered whether allowing a prosecution witness to testify via virtual video platform in a murder trial—because the witness was incarcerated and the jail could not feasibly transport him for an eight-hour round trip—violated the defendant’s right to confrontation under the Indiana and U.S. Constitutions and Administrative Rule 14(C).¹⁰⁷ Administrative Rule 14, issued by the Indiana Supreme Court in January 2023, states: “[a] court must conduct all testimonial proceedings in person except that a court may conduct the proceedings remotely for all or some of the case participants for good cause shown or by agreement of the parties. Remote proceedings must comply with constitutional and statutory guarantees.”¹⁰⁸ Although “Indiana’s confrontation right is mostly ‘co-extensive’ with the federal right of confrontation,” it “differs from its federal counterpart in that it contemplates a face-to-face meeting in which the accused and the witness can see and recognize one another.”¹⁰⁹

The Court of Appeals held that permitting remote testimony under these circumstances did not violate Administrative Rule 14 or the defendant’s confrontation rights under either constitution.¹¹⁰ The court found that good cause existed to permit remote testimony based on the case-specific circumstances that made physical transport unfeasible and noted that the witness’s testimony was cumulative, relating to the defendant’s multiple jailhouse admissions, rather than being primary eyewitness testimony to the murder itself.¹¹¹ The court further noted that defendant’s right to confrontation was preserved because his counsel rigorously cross-examined the witness, and the record reflected that those in the courtroom could see and hear the witness clearly.¹¹²

In *Butler v. State*, the Court of Appeals reversed a conviction because the record lacked evidence of a personal waiver of the right to a jury trial.¹¹³ Although defense counsel signed and filed a written jury trial waiver, the defendant neither signed the waiver nor personally expressed a desire to proceed without a jury, and the trial court failed to confirm the defendant’s waiver before conducting the bench trial.¹¹⁴

105. *Id.* at 504.

106. *Id.*

107. 255 N.E.3d 533 (Ind. Ct. App. 2025), *vacated*, 274 N.E.3d 115 (Ind. 2026).

108. *Id.* at 541–42 (quoting IND. ADMIN. R. 14(C)).

109. *Id.* at 542 (quoting *Brady v. State*, 575 N.E.2d 981, 987 (Ind. 1991)).

110. *Id.*

111. *Id.*

112. *Id.*

113. 259 N.E.3d 362, 363 (Ind. Ct. App. 2025).

114. *Id.*

VI. 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 *Harris v. State* because the argument rested on a section of *Harris* that only obtained two votes of the justices.¹¹⁵ Although he had otherwise joined the opinion, Justice Slaughter did not join the discussion in *Harris* that the habitual offender statute requires a jury to determine habitual offender status.¹¹⁶ Because that portion of *Harris* was not supported by a majority of the Indiana Supreme Court, the *Applegate* court declined to address whether the habitual offender statute required the jury to determine the defendant’s habitual offender status and affirmed the trial court’s habitual offender designation.¹¹⁷

VII. ARTICLE 1, SECTION 20 – RIGHT TO TRIAL BY JURY IN CIVIL CASES

In *Zotec Partners, LLC v. Hulsey*, the Court of Appeals found that a company had no right to a jury trial for breach of sale agreement and rescission claims under the Indiana Uniform Securities Act (IUSA).¹¹⁸

When Zotec Partners, LLC (“Zotec”), negotiated to purchase Medical Management Professionals, LLC (“MMP”) from CBIZ Operations, Inc. (“CBIZ”), MMP’s CEO and President failed to disclose to CBIZ and Zotec that he had a financial interest in one of MMP’s software vendors, Technology Partners, Inc.¹¹⁹ The vendor sued over the transaction, and MMP’s CEO helped resolve the dispute between the vendor, MMP, and Zotec.¹²⁰ Zotec learned only later of the CEO’s interest in the vendor, and it sued the CEO and CBIZ for alleged fraud and contract breaches.¹²¹ CBIZ counterclaimed for Zotec’s alleged breach of the parties’ agreement.¹²² Ultimately, the trial court required Zotec to elect the remedy it would pursue for its IUSA claim: rescission of the purchase or money damages.¹²³ Because Zotec elected to pursue rescission, the court heard the claim through a bench, rather than jury, trial.¹²⁴

Zotec appealed the trial court’s decision to try the IUSA claim to the bench, arguing it should have been put to a jury.¹²⁵ The Court of Appeals disagreed. It

115. 230 N.E.3d 944, 953 (Ind. Ct. App. 2024) (citing *Harris v. State*, 211 N.E.3d 929, 935–38 (Ind. 2023)).

116. *Harris*, 211 N.E.3d at 956 (Slaughter, J., dissenting).

117. *Applegate*, 230 N.E.3d at 954.

118. 258 N.E.3d 1017, 1023 (Ind. Ct. App. 2025).

119. *Id.* at 1019–20.

120. *Id.*

121. *Id.* at 1020–21.

122. *Id.* at 1021.

123. *Id.*

124. *Id.*

125. *Id.*

found that the IUSA permitted Zotec to seek only rescission because Zotec still held the MMP stock.¹²⁶ And because rescission is equitable in nature, and equitable claims have no right to be tried to a jury, the bench trial was appropriate.¹²⁷ In reaching this conclusion and affirming the trial court, the court observed that Article 1, Section 20 of the Indiana Constitution provides the right to a jury for only those civil cases that were “triable by jury at the adoption of the current constitution in 1851,” or that are “essentially legal, rather than equitable, as those terms were understood in 1851, considering the complaint, the rights and interests involved, and the relief demanded.”¹²⁸

VIII. ARTICLE 1, SECTION 21 – TAKINGS CLAUSE

In *Slavick v. Christmas Lake Properties Ass’n, Inc.*, the Court of Appeals affirmed the trial court’s rejecting a claim of judicial taking by a property owner who failed to show exclusive ownership of four contiguous, non-waterfront lots.¹²⁹ The owner had acquired four contiguous lots in a Santa Claus, Indiana subdivision near a lake, all subject to homeowners’ association (“HOA”) governance.¹³⁰ A portion of the lots abutted an HOA-owned tract that had a boat dock.¹³¹ The owner used and maintained the dock when it came into possession of the lots and later attempted to expel individuals from the tract and otherwise assert exclusive rights to it.¹³² But covenants governed the tract’s use, confirmed the HOA’s control of that and other common areas, and addressed rights to control the areas between the lot lines and lake shorelines, and the HOA quickly notified owner that it had exclusive rights to the tract.¹³³

After the trial court determined that the owner did not have exclusive rights to the area or dock, the owner appealed and argued that the trial court’s ruling amounted to a judicial taking under Article 1, Section 21 of the Indiana Constitution.¹³⁴ Because the owner never sufficiently showed she had exclusive rights in the property she was claiming, the Indiana Court of Appeals rejected the owner’s claim.¹³⁵ It found any subjective belief the owner might have had concerning her purported exclusive rights to the tract were insufficient to support an established exclusive right to the property.¹³⁶

126. *Id.* at 1022.

127. *Id.* (citations omitted).

128. *Id.* (quoting *State v. \$2,435 in U.S. Currency*, 220 N.E.3d 542, 548 (Ind. 2023)).

129. 251 N.E.3d 592, 604 (Ind. Ct. App. 2025).

130. *Id.* at 596.

131. *Id.*

132. *Id.*

133. *Id.* at 596–97.

134. *Id.* at 598–99.

135. *Id.* at 603.

136. *Id.*

IX. ARTICLE 1, SECTION 23 – EQUAL PRIVILEGES AND IMMUNITIES

In *Peters v. Quakenbush*, the Indiana Supreme Court addressed whether a sex or violent offender under the Indiana Sex Offender Registration Act must register in Indiana for the period mandated by another jurisdiction as prescribed by Indiana Code section 11-8-8-19(f) (the “Jurisdiction Statute”), even if the individual committed no offense in the other jurisdiction that imposed the registration requirement.¹³⁷ Peters was convicted of criminal sexual abuse in Illinois in 2013, triggering a ten-year sex offender registration requirement, and upon moving to Indiana in 2016, he continued to comply with registration obligations there.¹³⁸ Peters later moved back to Illinois and vacationed in Florida in 2021.¹³⁹ Florida requires registration in the state for any temporary residence for a period of three days or more.¹⁴⁰ Peters complied and signed a form agreeing to lifetime registration under Florida law.¹⁴¹ Upon his return to Indiana in 2022, the Hamilton County Sheriff’s Department initially set his registration end date for 2023 but later changed it to lifetime registration, citing Florida law. Peters sued for declaratory judgment.¹⁴² The trial court and a divided Court of Appeals affirmed the lifetime requirement under Indiana’s Jurisdiction Statute, despite dissenting opinions arguing against such blanket enforcement for out-of-state obligations, and the Supreme Court granted transfer.¹⁴³

The Indiana Supreme Court held that Indiana’s Jurisdiction Statute applies to individuals residing, working, or attending school in Indiana, even if that person did not commit an offense in the jurisdiction that imposed the triggering registration requirement.¹⁴⁴ However, the court concluded that because Peters was not currently required to register in Florida, Indiana’s Jurisdiction Statute did not apply to him and reversed the trial court’s judgment.¹⁴⁵ In a concurring opinion, Justice Molter noted a potential constitutional issue under the Privileges and Immunities Clause of the Indiana Constitution, observing that two individuals convicted of the same Indiana crime may face unequal registration burdens if only one moves to a more stringent state before returning to Indiana.¹⁴⁶

In *Kelly v. State*, the Indiana Supreme Court rejected a juvenile offender’s constitutional challenges to his 110-year sentence for two murders committed at age sixteen, holding that neither the Indiana Constitution nor the U.S.

137. 260 N.E.3d 919, 921 (Ind. 2025).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 922.

143. *Id.*

144. *Id.* at 923–24.

145. *Id.* at 924–25.

146. *Id.* at 930–31 (Molter, J., concurring).

Constitution required a more lenient sentence.¹⁴⁷ The defendant asserted that his sentence was effectively life without parole (“LWOP”) and violated several provisions of the Indiana Constitution, including prohibitions against cruel and unusual punishment, disproportionate sentences, vindictive rather than reformatory punishment, and unnecessary rigor, as well as his right to equal privileges and immunities.¹⁴⁸

The court found no constitutional violation.¹⁴⁹ It emphasized that the defendant received a term-of-years sentence, not life, and noted recent legislative amendments now grant juvenile offenders the right to seek sentence modification after twenty years.¹⁵⁰ The court reasoned that Article 1, Section 16’s cruel-and-unusual punishment clause is concerned with the form of punishment—not its duration—and that Indiana’s sentencing framework allows for sufficient flexibility to address the unique circumstances and reform potential of juvenile offenders, defeating the offender’s disproportionality argument.¹⁵¹ The court rejected the argument under Article 1, Section 18’s requirement that the penal code rest on principles of reformation, not vindictive justice, because trial courts maintain discretion to consider youth as a mitigating factor, and offenders can pursue sentence modification under Indiana Code section 35-38-1-17.¹⁵² The court also held that Article 1, Section 15’s prohibition on “unnecessary rigor” bars only physical abuse and found no violation.¹⁵³ Finally, the court rejected the offender’s claimed deprivation of equal privileges and immunities in violation of Article 1, Section 23 because it found that the different statutory protections for those charged under the LWOP statute are reasonably related to the distinct characteristics of the classes, in that an LWOP sentence precludes eventual release.¹⁵⁴

X. ARTICLE 1, SECTION 24 – EX POST FACTO CLAUSE

In *City of Bloomington v. Smith*, the Court of Appeals rejected arguments that a 2019 Act unconstitutionally impaired the City’s contracts with landowners.¹⁵⁵ For years, the City had offered adjacent landowners access to the City’s sewer services in return for remonstrance waivers if the City ever decided to annex the adjacent property within City limits.¹⁵⁶ In 2017, under the authority of the remonstrance waivers, the City proposed annexing certain adjacent land

147. 257 N.E.3d 782, 790 (Ind. 2025).

148. *Id.* at 799.

149. *Id.* at 799–803.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 802 (quoting IND. CONST. art. 1, § 15).

154. *Id.* at 802–03.

155. 252 N.E.3d 951, 965–66 (Ind. Ct. App. 2025).

156. *Id.* at 955–56.

into the City limits.¹⁵⁷ The General Assembly, noting opposition from some members of the community, passed House Bill 1001 as Public Law 217-2017 (“2017 Act”) to prohibit Bloomington from annexing the area for at least five years.¹⁵⁸ However, the Indiana Supreme Court, in *Holcomb v. City of Bloomington*, held that the law was unconstitutional for singling out only Bloomington.¹⁵⁹ Before the Supreme Court could issue its ruling in *Holcomb*, though, the General Assembly passed House Bill 1427 as Public Law 257-2019 (“2019 Act”), which voided all remonstrations executed before July 1, 2003, and all remonstrations between June 30, 2003, and July 1, 2019, unless recorded before January 1, 2020.¹⁶⁰ The 2019 Act rendered more than 80% of the City’s remonstrations as void.¹⁶¹

In 2021, the City adopted annexation ordinances affecting approximately 10,000 acres and 15,000 people located adjacent to the city limits.¹⁶² The City mailed notice of annexation ordinances to affected landowners to initiate the remonstrations process, which voided the applicable annexation ordinance if at least 65% of affected landowners in the proposed annexation territory remonstrated and subjected the applicable annexation ordinance to judicial review if between 51% and 65% of the affected landowners remonstrated.¹⁶³ The Monroe County Auditor applied the 2019 Act to exclude many of the City’s remonstrations under the 2019 Act and, as a result, found five of the proposed annexations were void and the other two were subject to judicial review.¹⁶⁴

The City sued, arguing that the 2019 Act unconstitutionally impaired its rights under the Contract Clauses of the Indiana and U.S. Constitutions.¹⁶⁵ The trial court rejected the City’s claims because it found that the City, as a political subdivision, had no right to assert under either constitutional provision.¹⁶⁶ The Court of Appeals agreed that the City could not enforce the federal Contract Clause against the State.¹⁶⁷ The court then observed that, because the State creates municipalities and gives them their powers, the “real contracting party is the state,” and the State can release the sureties from a contract with a municipality.¹⁶⁸ The court thus rejected the City’s claim under the Indiana Constitution’s Contract Clause, too.¹⁶⁹ The court further observed that, even if the City had enforceable rights against the State under either provision, the 2019

157. *Id.* at 956.

158. *Id.*

159. 158 N.E.3d 1250, 1253 (Ind. 2020).

160. *Smith*, 252 N.E.3d at 957.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 958.

166. *Id.* at 959.

167. *Id.* at 961.

168. *Id.* at 963–64.

169. *Id.* at 965.

Act did not substantially impair the City's contracts because the contracts were for the operation of the City's sewer services to adjacent landowners, rather than for annexation, which the 2019 Act did not affect.¹⁷⁰

In *Rokita v. Board of School Commissioners for City of Indianapolis*, the Indiana Court of Appeals considered dueling challenges by the Indiana Attorney General and the Board of School Commissioners of the City of Indianapolis ("IPS") to IPS's attempt to sell two unused school buildings.¹⁷¹ The Attorney General asked a court to enjoin the sales because he argued they were subject to a 2023 law requiring public school corporations to make school buildings the corporations intended to close available to charter schools for lease or purchase for \$1 ("Dollar Law").¹⁷² IPS, conversely, argued that the sales were excepted from the Dollar Law's requirements and asked for relief permitting the sales to go forward.¹⁷³ At that time, the Dollar Law excepted from its requirements school corporations that "distribute[d] money . . . received as part of a tax levy collected under IC 20-46-1 . . . to an applicable charter school," and IPS argued it satisfied that exception because it had been distributing money from a 2018 tax levy to many applicable charter schools since at least 2021.¹⁷⁴

In November 2023, the trial court found that IPS was exempt from the Dollar Law and authorized it to proceed with the proposed sales.¹⁷⁵ It then stayed its order pending the Attorney General's appeal.¹⁷⁶ Shortly thereafter, IPS leased one of the two buildings to the proposed buyer, which no party argued violated the stay.¹⁷⁷

Then, in March 2024, after the proposed buyer had begun its lease, the General Assembly amended the Dollar Law.¹⁷⁸ The amendment, intended to apply retroactively, clearly precluded IPS from relying on the Dollar Law's exemption to the Law's requirements.¹⁷⁹ On appeal, the Attorney General argued that the amendment precluded IPS from relying on the Dollar Law's exemption.¹⁸⁰ IPS argued that applying the amended Dollar Law to IPS would "impair[] its vested contract rights in violation of Article 1, Section 24 of the Indiana Constitution" and effect a taking made unconstitutional by Article 1, Section 21 of the Indiana Constitution, and that the amendment was special legislation that violated Article 4, Section 23 of the Indiana Constitution.¹⁸¹

The court first rejected the Attorney General's argument that IPS could not

170. *Id.* at 966.

171. 262 N.E.3d 873 (Ind. Ct. App. 2025).

172. *Id.* at 879 (discussing IND. CODE ch. 20-26-7.1).

173. *Id.* at 877–78.

174. *Id.* at 880, 885 (quoting IND. CODE § 20-26-7.1-1).

175. *Id.* at 881–82.

176. *Id.* at 883.

177. *Id.*

178. *Id.* at 884.

179. *Id.* at 884–85.

180. *Id.* at 884.

181. *Id.* at 885.

raise constitutional challenges to regulatory acts by the State, reiterating that “local governmental entities may challenge the constitutionality of a statute if they have ‘a direct stake in the outcome of the litigation and will sustain direct injury if the statute is upheld.’”¹⁸² Next, the court found that applying the amended Dollar Law to IPS to invalidate its lease agreement with the proposed buyer would impermissibly retroactively impair IPS’s contractual rights and obligations, contrary to Article 1, Section 24 of the Indiana Constitution.¹⁸³ It thus found the amended Dollar Law void as to that transaction.¹⁸⁴ Because IPS had no existing contractual relationship at that point with the prospective buyer of the other building, however, the court found the amended Dollar Law did not violate Article 1, Section 24 as to that proposed transaction.¹⁸⁵

The court then rejected IPS’s other arguments as to that proposed sale, too. Relying on *Lake Ridge School Corp. v. Holcomb*, it found IPS could not assert a taking claim against the State under Article 1, Section 21 of the Indiana Constitution.¹⁸⁶ And because the Dollar Law, as amended, operated uniformly throughout the State, the court rejected IPS’s claim that it was special legislation that violated Article 4, Section 23 of the Indiana Constitution.¹⁸⁷ Finally, the court rejected IPS’s argument that the trial court abused its discretion when it stayed its judgment pending the State’s appeal.¹⁸⁸ It thus affirmed the trial court’s ruling as to the proposed transaction with the lessor, reversed the trial court as to the transaction with the second prospective buyer, and remanded with instructions that IPS dispose of the second property consistently with the Dollar Law, as amended.¹⁸⁹

XI. ARTICLE 1, SECTION 32 – RIGHT TO BEAR ARMS

In *Moore v. State*, the Court of Appeals affirmed that a trial court conviction for the misdemeanor unlawful carrying of a handgun did not violate his right to bear arms under the Second Amendment to the U.S. Constitution and Article 1, Section 32 of the Indiana Constitution.¹⁹⁰ The plaintiff had been indicted for felony charges when he wrecked his car.¹⁹¹ After a firefighter found a handgun and live ammunition in the car, the State charged the plaintiff with a Class A misdemeanor for unlawfully carrying a handgun while under felony indictment.¹⁹² The plaintiff argued that the State’s doing so violated his rights

182. *Id.* at 887 (brackets omitted) (quoting *City of Hammond v. Herman & Kittle Props., Inc.*, 95 N.E.3d 116, 135 (Ind. Ct. App. 2018)).

183. *Id.* at 888.

184. *Id.*

185. *Id.*

186. *Id.* (citing 198 N.E.3d 715 (Ind. Ct. App. 2022)).

187. *Id.* at 889.

188. *Id.* at 890.

189. *Id.*

190. 244 N.E.3d 934, 943–45 (Ind. Ct. App. 2024).

191. *Id.* at 938.

192. *Id.*; IND. CODE § 35-47-2-1.5(b)(6).

under the Second Amendment to the U.S. Constitution and Article 1, Section 32 of the Indiana Constitution.¹⁹³ The court rejected the plaintiff's claims.¹⁹⁴ Because the statute the State invoked had significant support from historical analogues, it satisfied the test the Supreme Court articulated in *New York State Rifle & Pistol Ass'n v. Bruen* for analyzing alleged Second Amendment violations.¹⁹⁵ And because the statute was rationally related to the State's exercise of its police power and handgun violence by alleged felons threatens a particularized harm the State can reasonably regulate without materially burdening individuals' constitutional right to bear arms, the court found the State's application of the law did not violate Article 1, Section 32 of the Indiana Constitution, either.¹⁹⁶

XII. ARTICLE 3, SECTION 1 – STANDING

In *Thomas v. Foyst*, the Indiana Supreme Court dismissed as moot a challenge to the 2023 election of a Republican to the Columbus City Council.¹⁹⁷ Because no Republican ran in the primary for that Council seat, the Republican Party held a caucus in July 2023 to select a vacancy-filling candidate for the general election that November.¹⁹⁸ Although the party did not timely notice that caucus meeting, the circuit court clerk accepted the party's filing, contrary to statute.¹⁹⁹ And days after the caucus, the party nominated the defendant, Foyst, as its candidate.²⁰⁰ Plaintiff Thomas, the county's Democratic Party chairman, then timely filed a pre-election challenge asserting that the candidate was ineligible because of the untimely caucus meeting, which the county election board granted, and Foyst was removed from the ballot.²⁰¹ But the Republican Party re-nominated Foyst, and he once again was selected as the party's candidate for the November election.²⁰² And then Thomas asserted another pre-election challenge to Foyst's candidacy.²⁰³ This time, however, the county election board declared Thomas's challenge untimely because it came after the deadline for pre-election challenges had passed.²⁰⁴

Rather than seek judicial review of that decision, Thomas separately pursued declaratory and injunctive relief in state court.²⁰⁵ But his claims were not adjudicated before the November 2023 election, which Foyst won, so Foyst

193. *Moore*, 244 N.E.3d at 937–38.

194. *Id.* at 945.

195. *Id.* at 942 (citing 597 U.S. 1 (2022)).

196. *Id.* at 945.

197. 260 N.E.3d 887, 889 (Ind. 2025).

198. *Id.*

199. *Id.* at 889–90.

200. *Id.* at 890.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 891.

205. *Id.*

moved to dismiss the suit.²⁰⁶ Although the Indiana Supreme Court agreed that Thomas had standing to pursue his claims on behalf of the county's Democratic Party, it nonetheless held that the only claim he had preserved before the trial court was mooted by the election.²⁰⁷ In particular, it held that there are only "two avenues for disputing a person's candidacy: an Article 8 pre-election 'challenge' and an Article 12 election 'contest'"—the former addressing who should appear on the ballot and the latter concerning disputes over election results.²⁰⁸ And because Thomas pursued only the first path, having disclaimed the second, and the election already had occurred, his challenge to who lawfully could have been on the ballot for that *past* election was moot.²⁰⁹ The court thus vacated the judgment below and remanded the case to the trial court with instructions to dismiss the suit as moot.²¹⁰

XIII. ARTICLE 3, SECTION 1 – SEPARATION OF POWERS

In *Matter of Rokita*, the Indiana Supreme Court denied the Indiana Attorney General's motion to dismiss a second complaint that the Indiana Disciplinary Commission filed against him resulting from public comments he made about an investigation his office had been conducting.²¹¹ As part of resolving the first complaint, the Attorney General had agreed to accept responsibility for violating certain rules.²¹² But the Commission alleged that the Attorney General rebuffed those obligations through later public statements he made in which he denied responsibility for the asserted rule violations, thereby prompting the Commission's second complaint.²¹³ The court denied the Attorney General's motion to dismiss the Commission's second complaint and, in doing so, declined to address the Attorney General's arguments that sanctioning him would violate the Indiana Constitution's separation of powers or his rights to freedom of expression.²¹⁴ Instead, it found his arguments would be "better considered in the normal course of attorney discipline litigation—first through hearing proceedings and then through review in [the] Court" and reiterated that he was "free to raise" the arguments during that process.²¹⁵

In *Matter of E.K.*, the Indiana Supreme Court reiterated the statutory requirements for children-in-need-of-services (CHINS) proceedings and remanded the case for further proceedings, after finding that the trial court erred

206. *Id.*

207. *Id.* at 893.

208. *Id.* at 894 (quoting *White v. Ind. Democratic Party ex rel. Parker*, 963 N.E.2d 481, 485 (Ind. 2012)).

209. *Id.* at 895.

210. *Id.* at 898.

211. 262 N.E.3d 823, 825 (Ind. 2025).

212. *Id.*

213. *Id.*

214. *Id.* at 830.

215. *Id.* at 829.

in deferring to the Indiana Department of Child Services (DCS) in the underlying CHINS proceedings.²¹⁶ During a fact-finding hearing, the trial court had adopted DCS's CHINS adjudication concerning a child over two alternative CHINS adjudications the child's adopted mother had proposed.²¹⁷ The court did so because it was concerned that rejecting DCS's adjudication would "violate the principle of power separation and [be] an abhorrence for judicial activism[.]"²¹⁸ Reiterating that the "critical consideration for a court in any CHINS proceeding" is "advancement of the child's best interests," which the legislature has empowered trial courts to aid in, the Supreme Court vacated the trial court's judgment and remanded for the court to proceed under applicable statute, including by conducting a hearing and observing the child's procedural due process rights.²¹⁹

XIV. ARTICLE 4, SECTION 19 – ONE SUBJECT PER ACT

In *City of Fishers v. Netflix, Inc.*, the Indiana Court of Appeals rejected a challenge by four Indiana cities to the constitutionality of an amendment to Indiana's Video Service Franchises Act that the General Assembly included in Public Law 236-2023.²²⁰ The Act required certain video service providers in Indiana to satisfy certain regulatory franchise obligations.²²¹ After the cities sued several national streaming companies for failure to comply with those requirements, the General Assembly amended the Act through Public Law 236-2023 to retroactively exempt the streaming companies from its requirements.²²²

The cities argued that the inclusion of the amendment in Public Law 236-2023 violated Article 4, Section 19, which generally prohibits acts from addressing more than "one subject and matters properly connected therewith" because the law was ostensibly about tax matters, not video services.²²³ But the Court of Appeals rejected that argument because it found that the amendment "ha[d] at least some rational connection to" the law's "general purpose of taxation."²²⁴ The court also found that the amendment was "general legislation" that did not violate the Indiana Constitution's prohibitions against local and special laws under Article 4, Sections 22 or 23.²²⁵ It observed that the amendment applied to all "similarly situated persons" and merely clarified the meaning of language in the original Act, rather than "singl[ing] out a group

216. *In re E.K. v. Ind. Dep't of Child Servs.*, 260 N.E.3d 901, 910–15 (Ind. 2025).

217. *Id.* at 904.

218. *Id.* at 918.

219. *Id.* at 919.

220. 264 N.E.3d 69, 80 (Ind. Ct. App. 2025).

221. *Id.* at 73.

222. *Id.* at 75.

223. *Id.* at 78–79 (quoting IND. CONST. art. 4, § 19).

224. *Id.* at 80.

225. *Id.* at 81.

smaller than the previously specified class to receive unique privileges.”²²⁶

CONCLUSION

Between September 2024 and September 2025, Indiana’s appellate courts navigated fourteen areas of Indiana’s constitutional landscape. They alternately expanded and limited Hoosiers’ rights to balance individual liberties against the preservation of State police powers. The courts consistently declined invitations to depart materially from precedent. From clarifying procedural rules in both civil and criminal proceedings, to rejecting various separation-of-powers challenges, the courts’ decisions demonstrate subtle shifts within steady doctrines. The jurisprudence of the past year reflects a judiciary responsive to the society of the times—providing necessary clarification while grounding its opinions in the foundational principles of the Indiana Constitution and prior decisions.

226. *Id.* at 83 (quoting *Alpha Psi Chapter of Pi Kappa Phi Fraternity, Inc. v. Auditor of Monroe Cnty.*, 849 N.E.2d 1131, 1137 (Ind. 2006)).

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

JOEL M. SCHUMM*

INTRODUCTION

This survey of criminal cases decided between October 1, 2024, and September 30, 2025, includes all Indiana Supreme Court opinions¹ 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 discovery) to end (sentencing, post-conviction relief).

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 court of appeals grappled with a variety of Rule 4 claims.

A. Competency Evaluation Tolls Rule 4 Clock

Criminal Rule 4(B) requires the discharge of an incarcerated defendant who requested a speedy trial if the defendant is held beyond seventy days from the date of the motion and moves for dismissal.³ Time is excluded, however, when “an act of the defendant delays the trial.”⁴

In *Bradley v. State*, the Indiana Supreme Court rejected the State’s argument that a trial court’s sua sponte order for a competency evaluation *extinguishes* the Rule 4(B) period.⁵ “So long as the defendant maintains a position reasonably consistent with his speedy-trial request, delays attributable to competency evaluations—whether requested by a party or ordered by the court on its own motion—simply *toll* the applicable deadline.”⁶ The opinion was grounded in the

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1. Juvenile delinquency cases sometimes address issues of broad applicability to criminal cases—after all, any criminal offense is also illegal for a juvenile to commit—but other juvenile delinquency appeals do not apply in the adult criminal realm. For example, *D.W. v. State*, 263 N.E.3d 151 (Ind. 2025), involved inadequate advisements at juvenile initial hearings, and *State v. B.H.*, 260 N.E.3d 953 (Ind. 2025), addressed whether the State could appeal from the trial court’s order denying approval of a delinquency petition. Those cases will not be summarized in this Article.

2. Constitutional speedy trial claims usually involve the Sixth Amendment and sometimes its Indiana constitutional analog of Article 1, Section 12. *See, e.g., Watson v. State*, 155 N.E.3d 608, 614 n.2 (Ind. 2020).

3. IND. CRIM. R. 4(B).

4. IND. CRIM. R. 4(B)(3).

5. 248 N.E.3d 563 (Ind. 2024).

6. *Id.* at 568 (emphasis added).

plain language of Rule 4(B), precedent, and the text of the competency statute.⁷ Although only eight days remained to try Bradley when he was deemed competent, the State had other options under Rule 4 to extend the deadline but pursued none of them.⁸

Nevertheless, reversal was not warranted. “If, before the applicable [Rule 4] deadline expires, a court sets the trial date beyond that deadline, the defendant—when he or she ‘is or should be aware’ of the scheduling error—must object ‘at the earliest opportunity’ so the court can cure its error by rescheduling trial ‘within the proper period.’”⁹ Relying on court of appeals’ precedent, the supreme court added the requirement that defendants must state the specific nature of their Rule 4 objection.¹⁰ By failing to demand a trial within the eight days left on the clock, “Bradley failed to put the trial court on notice of the specific error it was committing, namely restarting the seventy-day clock instead of tolling it.”¹¹

B. Trial Court Policies Contribute to Rule 4(C) Violation

Indiana Criminal Rule 4(C) sets a strict one-year deadline for the State to bring a defendant to trial.¹² This deadline may be extended only under limited circumstances, including when “[d]elays [are] caused by a defendant.”¹³ “Although Criminal Rule 4(C) imposes on the State the burden of bringing defendants to trial without creating any reciprocal duty by defendants to act to ensure their own timely trial, these roles were effectively reversed in” *Heitz v. State*.¹⁴

There, the State “struggled for 10 months to first collect and then share documents essential” to its identity theft prosecution, and the defendant “repeatedly declined to request a trial date.”¹⁵ Nor did the State request a trial date, which led the trial court, “in accordance with its own policy, to refrain from setting the case for trial.”¹⁶ A trial date was eventually scheduled fifteen months after charges were filed upon Heitz’s request.¹⁷ Although the trial court determined that Heitz was responsible for the delay and refused to discharge her, the court of appeals reversed, reasoning that “Heitz’s act of not seeking a trial date, which the State also did not request, did not extend the one-year deadline for her trial.”¹⁸ After all, the failure to request a trial date does “not

7. *Id.* at 568–70.

8. *Id.* at 572.

9. *Id.* at 573 (quoting *Little v. State*, 415 N.E.2d 44, 46 (Ind. 1981)).

10. *Id.* (citing *Todisco v. State*, 965 N.E.2d 753, 756 (Ind. Ct. App. 2012)).

11. *Id.* at 574.

12. IND. CRIM. R. 4(C).

13. *Id.*

14. 263 N.E.3d 181, 186 (Ind. Ct. App. 2025).

15. *Id.* at 186–87.

16. *Id.* at 187.

17. *Id.*

18. *Id.*

constitute ‘delays caused by a defendant’ within the meaning of Criminal Rule 4(C).”¹⁹ The remedy for a violation of Rule 4(C) is remand with instructions to grant the defendant’s motion to dismiss.²⁰

Although Judge Felix agreed with the majority’s “disapproval of the trial court’s policy of putting the onus on the defendant to request a trial date,” he nevertheless dissented because in his view one of Heitz’s requests was tantamount to asking for a delay in the proceedings.²¹ Thus, the motion for discharge on February 14 was premature and properly denied.²²

C. Emergency Surgery Justified Rule 4(D) Continuance

As noted above, Rule 4(C) generally requires a trial within one year.²³ But Rule 4(D) allows the State to request ninety additional days under limited circumstances after a defendant moves for dismissal under this rule.²⁴ Under Rule 4(D) the State must show:

- (1) there is evidence the state would be entitled to present at trial;
- (2) the evidence is presently unavailable;
- (3) a reasonable and diligent effort was made to procure the evidence in a timely manner prior to moving for an extension of time; and
- (4) the evidence can be obtained within ninety days.²⁵

The court of appeals has previously explained “when the unavailable evidence is a particular witness, the ‘reasonable effort’ requirement of [Rule 4(D)] is satisfied where the State is not at fault for the absence of the witness.”²⁶

The defendant in *Moore v. State* was charged with child neglect and battery, and the State planned to call a pediatrician to testify at trial.²⁷ But after being advised the witness had undergone emergency surgery and was “very unlikely” to be able to travel from Indianapolis to Evansville to testify, the State sought a continuance relying on Rule 4(D).²⁸ The trial court granted the continuance, and at a hearing several weeks later defense counsel sought to show noncompliance with Rule 4(D).²⁹ The trial court ultimately denied the motion for discharge, which was certified for interlocutory appeal.³⁰

19. *Id.*

20. *Id.*

21. *Id.* at 196, 198 (Felix, J., dissenting).

22. *Id.* at 198.

23. *See supra* Part I.B.

24. IND. CRIM. R. 4(D).

25. *Id.*

26. *Griffin v. State*, 695 N.E.2d 1010, 1013 (Ind. Ct. App. 1998).

27. 264 N.E.3d 94, 96 (Ind. Ct. App.), *trans. denied*, 267 N.E.3d 983 (Ind. 2025).

28. *Id.*

29. *Id.* at 96–97.

30. *Id.* at 97.

Although the pediatrician testified that she had worked a half day on the July 1 trial date, the court of appeals nevertheless upheld the trial court's ruling, explaining as follows:

First, there is no direct evidence as to whether she was or was not able to make the 6 hour round trip to Evansville to testify on July 1. Despite the Witness testifying at the discharge hearing, neither party asked her whether she deemed herself able to testify in the days leading up to July 1. Moreover, there was also no evidence presented as to when the Witness decided to return to work on July 1. Her testimony did establish that her vertigo resolved on July 1, but the Witness still could not drive, her brother had to drive her to work, and she only worked for half a day.³¹

D. Premature Motion for Discharge

Finally, in *Perry v. State*, defense counsel filed a Rule 4(C) motion for discharge after 317 days had passed, which was premature because the State still had 48 days to bring him to trial.³² Counsel had not miscalculated the days but rather had alerted the trial court that he had not received discovery the State had served on predecessor counsel and still needed to depose certain witnesses.³³ The resulting two-month delay, which was charged to the defense, rendered the motion to discharge he filed on day 373 premature.³⁴

A motion for discharge stops the Rule 4(C) clock, and defense counsel did not renew the motion.³⁵ Regardless, the entire delay after the motion for discharge was either attributable to Perry or court congestion.³⁶

II. DISCOVERY OF POLICE REPORTS

Prosecutors in most Indiana counties provide liberal discovery in criminal cases, but recent cases have addressed and invalidated some notable exceptions. In *Minges v. State*, a case from Dearborn County, the Indiana Supreme Court invalidated the prosecutor's blanket assertion of the work product privilege to police reports.³⁷ It concluded that Trial Rule 26(B)(3) provided "adequate guidance for the trial court to determine—on a case-by-case basis—whether a police report is protectible work product."³⁸

A July opinion from the court of appeals involved a different county and

31. *Id.* at 98.

32. 267 N.E.3d 20, 31 (Ind. Ct. App.), *trans. denied*, 271 N.E.3d 1099 (Ind. 2025).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. 192 N.E.3d 893, 897 (Ind. 2022).

38. *Id.* at 902.

practice—the Elkhart County Prosecutor’s Office’s policy of withholding from discovery police reports, under the Access to Public Records Act (APRA), unless counsel executes a Discovery Agreement.³⁹

In *Sanchez v. State*, the court of appeals held that APRA was not applicable in a criminal discovery matter.⁴⁰ It relied on Criminal Rule 2.5, which became effective in 2024.⁴¹ Although it “does not expressly list police reports among the mandatory disclosure items found in subsections (B)(2) through (B)(4), the rule’s clear intent is to facilitate liberal discovery and provide a criminal defendant with the maximum amount of relevant, unprivileged information within the State’s possession.”⁴² The appellate court reiterated that under “*Minges*, the State may not withhold police reports from a defendant in a criminal case as a matter of course; it must establish that the particular police reports at issue are privileged.”⁴³ Likewise, because the State had not “established any other applicable privilege, the trial court abused its discretion by denying Sanchez’s motion to compel disclosure of the police reports.”⁴⁴

III. JURY TRIAL ISSUES AND INSTRUCTIONS

Three cases from the court of appeals addressed issues related to jury trials: voir dire, jury instructions, and ex parte communication.

A. Additional Time for Voir Dire Warranted

Trial Rule 47(D) allows the court to “impose an advance time limitation” on the questioning of jurors by counsel.⁴⁵ But when time expires, “the court shall liberally grant additional reasonable time upon a showing of good cause related to the nature of the case, the quantity of prospective jurors examined and juror vacancies remaining, and the manner and content of the inquiries and responses given by the prospective jurors.”⁴⁶

In *Anderson v. State*, defense counsel asked whether any jurors “would want to hear from somebody arrested? Do you want them to take the stand and hear their version? Raise your hand?”⁴⁷ Several prospective jurors raised their hands, but the trial court called “[t]ime” while they were responding to the question.⁴⁸ Defense counsel requested additional time, which was denied.⁴⁹

39. *Sanchez v. State*, 264 N.E.3d 1223 (Ind. Ct. App. 2025).

40. *Id.* at 1230.

41. *Id.* at 1229–30.

42. *Id.*

43. *Id.* at 1230.

44. *Id.* at 1231.

45. IND. T.R. 47(D).

46. *Id.*

47. 251 N.E.3d 1066, 1083 (Ind. Ct. App. 2024), *trans. denied*, 255 N.E.3d 443 (Ind. 2025).

48. *Id.* at 1084.

49. *Id.*

Finding it “troubling that any prospective jurors revealed—at least preliminarily—they would look unfavorably on a defendant who did not testify,” the court of appeals concluded that Anderson had shown “good cause for the ‘liberal[] grant [of] additional reasonable time’ to question the panel further about their views.”⁵⁰ But counsel did not “ask to make a more specific record of which prospective jurors had raised their hands and which had elaborated on their views for purposes of appeal.”⁵¹

The convictions were affirmed because Anderson did not make for-cause challenges to the allegedly biased jurors or exhaust his peremptory challenges.⁵²

B. Trial Court Erred in Refusing to Give Residential Entry Instruction

In *Collins v. State*, the defendant returned to a man’s apartment demanding to see a woman who had been there at an earlier gathering.⁵³ The woman was not there, and the defendant grabbed a chain from the occupant’s neck, brandished a knife, demanded \$50, and then demanded to use the occupant’s phone.⁵⁴ The defendant was charged with burglary and other offenses.⁵⁵

A person commits burglary when the person “breaks and enters the building or structure of another person, with intent to commit a felony or theft in it[.]”⁵⁶ A person commits residential entry when the person “knowingly or intentionally breaks and enters the dwelling of another person[.]”⁵⁷ Decisional law has long established that “residential entry is a lesser-included offense of residential burglary, with the only difference in this scenario being whether the defendant intended to commit a felony or theft when entering the residence.”⁵⁸

The defendant tendered a residential entry instruction, which was refused.⁵⁹ A trial court must give a lesser-included offense instruction if there is a serious evidentiary dispute such that a jury could reasonably find the defendant committed the lesser offense but not the greater.⁶⁰ In refusing the defendant’s tendered residential entry instruction, the trial court found no substantial evidentiary dispute based on its misapprehension that the required intent “can form after you enter the premises.”⁶¹

However, “[a] criminal conviction for burglary requires proof beyond a reasonable doubt of a specific criminal intent which coincides in time with the

50. *Id.* (alteration in original).

51. *Id.*

52. *Id.* at 1085.

53. 252 N.E.3d 971, 974 (Ind. Ct. App. 2025).

54. *Id.*

55. *Id.* at 973.

56. IND. CODE § 35-43-2-1 (2025).

57. IND. CODE § 35-43-2-1.5 (2025).

58. *Collins*, 252 N.E.3d at 976.

59. *Id.* at 975.

60. *Id.* at 977.

61. *Id.* at 978.

acts constituting the breaking and entering[.]”⁶² Put another way, “a person who breaks and enters without any intent to commit an underlying [crime] is not guilty of burglary.”⁶³ The defendant entered with the intent to locate the woman and formed the criminal intent to forcibly rob the occupant of cash and steal his phone only after failing to find her.⁶⁴

Based on the instructional error, the burglary conviction was reversed and remanded for a new trial.⁶⁵

C. Ex Parte Communication with Jurors

In *Minor v. State*, the court of appeals rejected both common law and constitutional challenges to two separate ex parte communications during a jury trial.⁶⁶ First, the bailiff told jurors, “no,” when they asked “if they could have” the bodycam recording; second, the trial court answered a written question without the defendant or counsel present.⁶⁷

Although it found no reversible error, the opinion noted the Indiana Supreme Court’s heightened interest in ex parte communications “by regulating trial courts’ involvement with juries.”⁶⁸ The bailiff and trial court should have done things differently, but only the supreme court could “overturn longstanding precedent” under which the panel held reversal was not warranted.⁶⁹

IV. DEFENSE EVIDENCE ADMISSIBLE⁷⁰ REGARDING CIRCUMSTANCES OF POLYGRAPH

In *Graff v. State*, a defendant charged with child sex offenses agreed to a polygraph examination and made incriminating statements after being told he had failed it.⁷¹ The State filed a motion in limine to exclude evidence related to the polygraph examination and any expert testimony regarding the accuracy of polygraph examinations, which the trial court granted.⁷² The court of appeals

62. *Id.* at 977.

63. *Id.*

64. *Id.* at 977–78

65. *Id.* at 979.

66. 252 N.E.3d 979, 984 (Ind. Ct. App. 2025).

67. *Id.*

68. *Id.* at 988.

69. *Id.*

70. Other cases discussed the admissibility of evidence but mostly under the Rules of Evidence; thus, they are more appropriately included in that survey article. *State v. Brooks-Brown*, 246 N.E.3d 312 (Ind. Ct. App. 2024), *trans. denied*, 250 N.E.3d 1057 (Ind. 2025), generated three separate opinions in addressing the admissibility of expert testimony regarding human trafficking. The supreme court denied transfer by a 3-2 vote with Chief Justice Rush and Justice Molter dissenting, suggesting the issue(s) may arise in a future case.

71. 250 N.E.3d 497, 500 (Ind. Ct. App. 2025).

72. *Id.*

reversed that ruling on interlocutory appeal.⁷³

Decades earlier in *Crane v. Kentucky*,⁷⁴ the Supreme Court explained that

the physical and psychological environment that yielded [a] confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt. . . . Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.⁷⁵

The court of appeals agreed with Graff that *Crane* and similar cases give a defendant the right to present at least some evidence about his polygraph examination in support of his attempt to undermine the incriminatory value of his statement to police.⁷⁶ It reasoned that evidence "that the polygraph examination directly preceded the confession, occurred in the exact same room, and involved the same officer to which the confession was given, easily qualifies" as confession-related evidence admissible under *Crane*.⁷⁷ Preventing any evidence regarding the polygraph examination would deny Graff the chance to show that the circumstances surrounding the polygraph cast doubt on the credibility of his confession.⁷⁸

The holding was bolstered by Indiana Rule of Evidence 106, which allows an adverse party to require the introduction of a remaining part of a writing or recorded statement "that in fairness ought to be considered at the same time."⁷⁹ The polygraph examination, including its preliminary questioning, and the subsequent police interview "are all part of one recorded statement, and fairness dictates that neither party should be able to decide that the jury will hear only the parts of the statement it deems favorable to its case."⁸⁰

73. *Id.*

74. 476 U.S. 683 (1986).

75. *Id.* at 689.

76. *Graff*, 250 N.E.3d at 506.

77. *Id.* at 507.

78. *Id.*

79. *Id.*

80. *Id.*

V. PARTIAL GUILTY PLEAS NOT (CURRENTLY) ALLOWED

The Indiana Supreme Court adopted a comprehensive set of Criminal Rules, effective January 1, 2024.⁸¹ Following the progression of a criminal case from start to finish, they address several important topics that the previous rules did not.⁸² Rule 3.3(C)(1) states that a “defendant may plead guilty to all charged offenses without a plea agreement or to at least one of the charged offenses pursuant to a plea agreement negotiated with the state.”⁸³

In *Helvie v. State*, the defendant was charged with domestic battery and a variety of non-violent offenses: Level 6 felony methamphetamine possession, Level 6 felony maintaining a common nuisance, Class A misdemeanor interference with the reporting of a crime, and Class C misdemeanor paraphernalia possession.⁸⁴ He sought to plead guilty without a plea agreement to domestic battery and proceed to trial on the remaining charges.⁸⁵ The trial court refused, accepting the State’s argument that Rule 3.3(C)(1) prevents a defendant from pleading guilty to fewer than all of the charges against him in the absence of a plea agreement.⁸⁶ The trial court certified the issue for interlocutory appeal, and the court of appeals affirmed, concluding that the new rule’s “failure to mention the scenario presented by this case means that it is excluded, not permitted.”⁸⁷

Helvie sought transfer, arguing that partial or “subset pleas” (1) have been allowed for forty years under established practice, (2) are a useful tool for trial courts, and (3) Rule 3.3 does not abrogate forty years of common law.⁸⁸ “If a rule was intended to abrogate decades of substantive law, the rule should do so explicitly.”⁸⁹

Although the “established practice” point is debatable,⁹⁰ surely allowing a

81. *Order Amending the Rules of Criminal Procedure*, IND. SUPREME COURT (June 23, 2023), <https://www.in.gov/courts/files/order-rules-2023-0623-crim-proc.pdf> [<https://perma.cc/CR8W-5U8S>].

82. *Id.*

83. IND. CRIM. R. 3.3(C)(1).

84. 248 N.E.3d 615, 616 (Ind. Ct. App. 2024), *trans. denied*, 255 N.E.3d 443 (Ind. 2025).

85. *Id.*

86. *Id.* at 617.

87. *Id.*

88. Petition to Transfer, *Helvie*, 255 N.E.3d 443 (No. 24A-CR-01441).

89. *Id.* at 15.

90. Helvie’s petition cites *State v. Boze*, 482 N.E.2d 276 (Ind. Ct. App. 1985), but that case is more nuanced. There, the defendant was charged with attempted murder and battery and sought to plead guilty to battery. *Id.* at 277. The trial court accepted his guilty plea, and the defendant then moved to dismiss the attempted murder charge on double jeopardy grounds under the successive-prosecution statute (after promising he would not). *Id.* The court of appeals reversed the trial court’s dismissal of the attempted murder charge and wrote about the “tactic” as follows:

Today’s decision should make it clear the State has the power to charge more than one count and pursue all counts in a single trial. If a defendant wishes to dispose of one of the charges by pleading guilty, he may do so, but he cannot use his plea over the State’s

partial or subset plea could promote judicial economy. Much of Rule 3.3 appears to address established plea practice, unlike the earlier set of rules that said very little about plea practice.⁹¹ But allowing partial pleas without an agreement appears to have been an open question dealt with differently among the state's prosecutors and trial judges.

The Indiana Supreme Court's 3-2 vote denying transfer, with Justices Goff and Molter dissenting,⁹² suggests the issue is likely to resurface.

VI. CRIME OR NOT A CRIME?

Indiana's appellate courts decided several cases regarding challenges to the sufficiency of claims for a variety of charges, including intimidation, resisting law enforcement, reckless homicide, and child neglect.⁹³

A. Intimidation Conviction Reversed for Lack of Communication of True Threat

In *Lester v. State*, the defendant sent a Snapchat direct message to a group of about twenty others with whom he exchanged "dark humor" messages.⁹⁴ The message was a selfie with a bathroom shower behind him and included the caption: "Now that I've showered and washed my sins away I can go and shoot up a preschool."⁹⁵ Snapchat flagged the message and notified the FBI, which contacted local police.⁹⁶ Lester was later charged with and convicted of intimidation.⁹⁷

Intimidation requires the State to prove that the defendant communicated a

objection to divest the State of the power to fully prosecute or to determine which charges will, or will not, be pursued.

Id. at 279.

91. Criminal Rule 10 simply addressed the type of record that needed to be made. IND. CRIM. R. 10 (repealed 2024), <https://www.in.gov/courts/files/criminal-2021-0101.pdf> [<https://perma.cc/AD9L-M9MS>].

92. *Helvie*, 255 N.E.3d 443.

93. The cases discussed in this section are appellate challenges to the sufficiency of evidence brought after trial. Securing a pretrial dismissal of criminal charges is difficult and uncommon. In *State v. Dickens*, 261 N.E.3d 778 (Ind. Ct. App.), *reh'g denied* (June 27, 2025), *trans. denied*, 272 N.E.3d 952 (Ind. 2025), the court of appeals reversed a trial court's dismissal of two counts of possession with intent to deliver a controlled substance, Tetrahydrocannabinols ("THC"). The appellate court agreed with the State that dismissal was improper because the charging information, taken as true, alleged a valid criminal offense; it declined to look beyond the charging information itself and consider the probable cause affidavit. *Id.* at 783. Other panels have held otherwise when reviewing a motion to dismiss, noting they would "consider both the charging [i]nformation and the probable cause affidavit to determine whether the alleged facts constitute an offense." *J.R.B. v. State*, 244 N.E.3d 439, 443 (Ind. Ct. App. 2024) (alteration in original) (quoting *State v. Sturman*, 56 N.E.3d 1187, 1198 (Ind. Ct. App. 2016)).

94. 268 N.E.3d 1224, 1226 (Ind. Ct. App. 2025).

95. *Id.*

96. *Id.*

97. *Id.* at 1227.

threat, among other things.⁹⁸ The statute further defines “threat” as an expression by words or action of an intention to unlawfully injure the person threatened or another person.⁹⁹ Whether a statement is a threat is an objective question for the trier of fact.¹⁰⁰

In *Lester*, the appellate court focused primarily on communication, which requires that the statement was “transmitted in such a way that the defendant knows or has good reason to believe the statement will reach the victim.”¹⁰¹ Lester sent the message to a private Snapchat group of about twenty individuals, but there “was no evidence that anyone in that Snapchat group had a connection to any preschool.”¹⁰² Although law enforcement considered the message a “credible threat,” no one from any preschool “was in fact placed in fear by the message.”¹⁰³

Finally, the court rejected the State’s reliance on the reach of the online message in a public forum because “Lester did not post the message to a public forum and, rather, sent it directly to a private Snapchat group.”¹⁰⁴ Thus, although the message was “inappropriate and disturbing,” the State presented insufficient evidence to support an intimidation conviction.¹⁰⁵

B. Resisting Law Enforcement Conviction Reversed

Indiana courts have long held that a person “forcibly resists” law enforcement only “when strong, powerful, violent means are used to evade a law enforcement official’s rightful exercise of his or her duties.”¹⁰⁶ In *K.B. v. State*, the court of appeals reiterated that an “officer’s use of force in response to passive, or even some active, resistance is not evidence of forcible resistance.”¹⁰⁷ Although K.B. refused to turn around when directed by the officer, the officer was the one who used force to get K.B. to comply.¹⁰⁸ Without evidence of forcible resistance by K.B., his adjudication was vacated.¹⁰⁹

C. Resisting Law Enforcement Conviction Upheld

A person commits resisting law enforcement when he knowingly or intentionally “forcibly resists, obstructs, or interferes with a law enforcement

98. IND. CODE § 35-45-2-1 (2025).

99. § 35-45-2-1(c)(1).

100. *Lester*, 268 N.E.3d at 1227.

101. *Id.* at 1228.

102. *Id.*

103. *Id.*

104. *Id.* at 1229.

105. *Id.*

106. *Spangler v. State*, 607 N.E.2d 720, 723 (Ind. 1993).

107. 261 N.E.3d 290, 293 (Ind. Ct. App. 2025).

108. *Id.*

109. *Id.*

officer or a person assisting the officer while the officer is lawfully engaged in the execution of the officer's duties."¹¹⁰ In *Manuel v. State*, the defendant "reached for and grabbed a firearm after being instructed not to," and later ignored an officer's "instruction to drop the firearm."¹¹¹ The court of appeals affirmed the conviction, finding the act of reaching for and "attempting to pull" a loaded firearm¹¹² is undoubtedly more serious than advancing on officers with one's fists clenched as in *Walker v. State*,¹¹³ or displaying and refusing to drop a box cutter, which was sufficient in *Pogue v. State*.¹¹⁴

D. Reckless Homicide Convictions Affirmed

In *Rakhimov v. State*, the court of appeals affirmed two reckless homicide convictions against a truck driver who violated the federal safety regulations for commercial drivers.¹¹⁵ He drove his truck in a fatigued and distracted state, as evidenced by driving data and his slow reaction time in applying his brakes as he looked at his GPS while approaching a busy intersection at over fifty miles per hour.¹¹⁶

In *Weaver v. State*, the court of appeals affirmed a conviction against a driver who had been "whipping" his vehicle between lanes and approached the red light where the victim's vehicle was stopped at speeds of at least twenty miles over the speed limit, which was a "substantial departure from acceptable standards of conduct."¹¹⁷

E. Neglect Conviction Upheld Based on Child's Suicide

In *Dirig v. State*, the defendant was convicted of Level 1 felony neglect of a dependent for the suicide death of his girlfriend's son.¹¹⁸ The offense requires proof that he knowingly or intentionally placed the boy in a situation that endangered the boy's life or health, resulting in his death.¹¹⁹

The State made the requisite showing of "a subjective awareness of a high probability that he had placed [the boy] in a dangerous situation" when the defendant locked the boy in his room for more than an hour without supervision.¹²⁰ The defendant knew that the boy's emotionally reactive episodes presented suicide risks, including that the boy "had made repeated references to

110. IND. CODE § 35-44.1-3-1(a)(1) (2025).

111. 248 N.E.3d 624, 629 (Ind. Ct. App. 2024).

112. *Id.*

113. 998 N.E.2d 724, 726 (Ind. 2013).

114. 937 N.E.2d 1253, 1258 (Ind. Ct. App. 2010).

115. 260 N.E.3d 263, 264–66 (Ind. Ct. App. 2025).

116. *Id.* at 269.

117. 258 N.E.3d 1048, 1060 (Ind. Ct. App. 2025).

118. 268 N.E.3d 1239, 1243–45 (Ind. Ct. App. 2025).

119. IND. CODE § 35-46-1-4(a)(1), (b)(3) (2025).

120. *Dirig*, 268 N.E.3d at 1246.

and had engaged in repeated behaviors relating to suicide-by-strangulation.”¹²¹ The defendant knew that he and the boy’s mother needed to make the house safe from strangulation risks.¹²² The boy “was not to be left alone in his room for more than a few minutes and was to be monitored during that time.”¹²³ Nevertheless, he left the boy with “implements” in the room with which the boy “could strangle himself.”¹²⁴ Although suicide may be unpredictable in some instances and “suicide by children under ten is statistically rare in the United States,” the court concluded “the risk here was evident, and Dirig knowingly disregarded it.”¹²⁵

The appellate court also rejected Dirig’s argument that his actions or inactions were neither the cause-in-fact of the boy, T.C.’s, death nor the proximate cause of his death.¹²⁶ Rather, it found “for Dirig locking an emotionally reactive T.C. in a room by himself with strangulation implements and without any supervision, T.C. would not have died. And, given T.C.’s medical and behavioral histories and Dirig’s awareness of those histories, T.C.’s death was imminently foreseeable.”¹²⁷

F. Sufficient Evidence to Reject Defense of Property Claim

In *Norton v. State*, the defendant co-owned a home with his fiancée, whose college-aged daughter sometimes returned home.¹²⁸ One evening, Norton ordered the daughter’s boyfriend to leave the home and used force when he refused.¹²⁹

The court of appeals found sufficient evidence to rebut Norton’s claim of defense of habitation.¹³⁰ Although Norton claimed the boyfriend was a trespasser, his fiancée had given him permission to be in the home, which meant the boyfriend had a “‘fair and reasonable foundation for believing he ha[d] a right to be present’ and was not trespassing.”¹³¹ Moreover, Norton did not give the boyfriend reasonable time to leave the home and his use of force—grabbing the boyfriend by his arm and pushing him into a staircase banister, and attempting to push him down the stairs—“was not reasonable in light of the urgency of the situation, as [the boyfriend] was peacefully standing at the top of the stairs.”¹³²

121. *Id.*

122. *Id.* at 1247.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. 261 N.E.3d 794, 797 (Ind. Ct. App.), *trans. denied*, 265 N.E.3d 989 (Ind. 2025).

129. *Id.* at 798.

130. *Id.* at 801.

131. *Id.* (alteration in original) (quoting *Blair v. State*, 62 N.E.3d 424, 428 (Ind. Ct. App. 2016)).

132. *Id.*

VII. TWO UNUSUAL BUT SIGNIFICANT SELF-DEFENSE CASES

When amending Indiana's self-defense statute in 2012 in response to a highly publicized and poorly received Indiana Supreme Court decision, the General Assembly took the unusual step of including a purpose statement, which included the following:

By reaffirming the long standing right of a citizen to protect his or her home against unlawful intrusion, however, the general assembly does not intend to diminish in any way the other robust self defense rights that citizens of this state have always enjoyed. Accordingly, the general assembly also finds and declares that it is the policy of this state that people have a right to defend themselves and third parties from physical harm and crime.¹³³

In a pair of decisions during the survey period, Indiana's appellate courts tackled two unusual aspects of self-defense but in ways that continue to highlight Indiana's robust self-defense protections.

A. Hindsight May Justify Even Unreasonable Force

Indiana's self-defense statute has long been thought to focus on a defendant's understanding of the circumstances at the time force is used. The often-quoted language provides:

A person is justified in using reasonable force against any other person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force. However, a person:

- (1) is justified in using deadly force; and
- (2) does not have a duty to retreat;

if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony.¹³⁴

Indiana courts have long explained that this language

establishes both a subjective and an objective standard to evaluate the reasonableness of a defendant's belief that force was necessary to protect against the imminent use of unlawful force. Subjectively, the defendant must actually believe force is necessary, and objectively, that belief must be one that a reasonable person would form given the

133. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 46 IND. L. REV. 1033, 1034 (2013) (quoting IND. CODE § 35-41-3-2(a) (2013)).

134. IND. CODE § 35-41-3-2(c) (2025).

circumstances.¹³⁵

That all remains true, but the Indiana Supreme Court's opinion in *Turner v. State* focused instead on a different part of the statute—and created what some view as a new path to claiming self-defense in Indiana: “No person, employer, or estate of a person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting the person or a third person by reasonable means necessary.”¹³⁶ As a matter of first impression in Indiana, the court held that defendants retain “the *benefit* of hindsight when it reveals their conduct was necessary in self-defense, even though that necessity wasn't fully apparent in the moment[.]”¹³⁷

From its opening section, the opinion paints a compelling picture of a sympathetic defendant:

Antonio Turner was one of three students studying organic chemistry at a classmate's home, tucked away in a quiet neighborhood just outside of Indianapolis. While they were studying, the classmate's jealous love interest, Dequan Briscoe, repeatedly called her. And when he learned Turner was at her home, Briscoe twice threatened to “pull up” on Turner—to attack him—which Turner heard over the speakerphone. Shortly after hearing the threat, Turner walked outside to his car, and moments later, he sensed that the unfamiliar car screeching towards him down the sleepy street was an ambush. Since he didn't have time to reach the house and had nowhere to hide, he turned while running and fired four shots into the car, wounding Briscoe. Turner fired based on his intuition—he didn't recognize the car, couldn't see through its darkly tinted windows, and wouldn't have recognized Briscoe if he saw him. But that intuition proved prescient. It turns out Briscoe was aiming a handgun to shoot Turner just before Turner began firing.¹³⁸

Turner was charged with battery by a deadly weapon, a Level 5 felony.¹³⁹ Convicted at a bench trial, the trial court “agreed with Turner that, in hindsight, it was necessary for Turner to fire at Briscoe to avoid being shot. But the judge rejected Turner's self-defense justification because, without the benefit of hindsight, it was objectively unreasonable for Turner to fire at a car into which he couldn't see.”¹⁴⁰

Many, if not most, self-defense cases are tried to a jury, which simply accepts or rejects the defense by its guilty or not guilty verdict; juries do not

135. *Turner v. State*, 253 N.E.3d 526, 535 (Ind. 2025) (citation omitted).

136. *Id.* at 530 (quoting § 35-41-3-2).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

make any sort of findings regarding self-defense. Even when tried to the bench, judges are not required to, and often do not, explain the basis of their verdict. Here, though, the trial court specifically found that “Turner was telling the truth, and his conduct was necessary to protect himself.”¹⁴¹ As the supreme court put it, “Turner’s choices, in the judge’s view, were either to shoot or be shot, because Briscoe was lying when he testified, and he had drawn his gun to shoot Turner just before Turner shot him first.”¹⁴² Relying on the trial court’s factual determinations, the supreme court concluded that

Turner’s shooting was justified under Indiana law because (1) he was protecting himself from a threat of serious bodily harm; (2) the threat was imminent; (3) the threat required force for protection; and (4) the force Turner used was proportional to the threat—he shot at Briscoe to avoid being shot and then stopped shooting when Briscoe drove off. Turner’s use of force was justified not because his belief that he was about to be shot was *reasonable* but because that belief was *correct*, and force really was necessary to protect himself.¹⁴³

But how will *Turner* be applied in future cases, when trial courts are asked to give jury instructions or rule on the propriety of closing arguments? And how will defendants who are convicted at trial fare on appeal when asserting this theory without the benefit of favorable findings from the trial court? Distilled to a few sentences, the takeaway is as follows:

Under Indiana’s self-defense statute, justification for using force based on a *mistaken* belief about necessity depends on the reasonableness of the belief given the circumstances. But using defensive force based on an *accurate* belief is justified regardless of the belief’s reasonableness. In other words, using force for protection based on a belief that is both unreasonable and turns out to be wrong isn’t justified, but acting on a belief that is unreasonable, yet right, is justified.¹⁴⁴

The majority opinion goes to considerable lengths to suggest its decision comes from an “unusual fact pattern” and “is not a revision or expansion of Indiana’s self-defense law.”¹⁴⁵ It reiterates “several other important limits on the self-defense justification” left unchanged by the opinion, including:

- the defendant must be “in a place where he had a right to be” and have “acted without fault”;
- “a self-defense justification cannot be based on a mere verbal threat

141. *Id.* at 539.

142. *Id.*

143. *Id.*

144. *Id.* at 534.

145. *Id.* at 540.

because ‘oftentimes combatants make threats of violence which are never carried out’”;

- “[w]hen a defendant arms himself or herself with a weapon before an imminent threat exists in a premeditated strategy to retaliate for past violence (rather than to protect against the imminent use of unlawful force),’ self-defense does not justify using force”; and
- “[w]here a person has used more force than necessary to repel an attack the right to self-defense is extinguished, and the ultimate result is that the victim then becomes the perpetrator.”¹⁴⁶

Justice Goff concurred only in the judgment, expressing concern that the court’s new approach would create legal uncertainty and was unnecessary to give Turner relief.¹⁴⁷ Applying the traditional standard, he opined that the circumstances justified Turner’s actions because Turner

knew that Briscoe owned a gun; he overheard Briscoe make angry, profanity-laced remarks to Nyah (his study partner) over the phone; Briscoe threatened to “pull up on” Turner, which Turner understood to mean that he’d be “coming to harm” him; and, not long after that tense exchange, a vehicle sped up to Turner—its engine revving and tires squealing—just as Turner had walked away from his own car parked in the cul-de-sac of a suburban, residential neighborhood.¹⁴⁸

B. Burden Shifting in Self-Defense Bench Trial

Under Indiana’s self-defense statute, “[a] person is justified in using reasonable force against any other person to protect [himself] . . . from what [he] reasonably believes to be the imminent use of unlawful force.”¹⁴⁹

Indiana courts have long held that “a defendant claiming self-defense must first satisfy a threshold evidentiary requirement to place self-defense at issue.”¹⁵⁰ In cases that do not involve deadly force, “a defendant claiming self-defense must only show that he was protecting himself from what he ‘reasonably believe[d] to be the imminent use of unlawful force.’”¹⁵¹ Once the defendant has satisfied this initial requirement, the State then bears the burden of negating at least one of the elements beyond a reasonable doubt, which it may do so “by rebutting the defense directly, by affirmatively showing the defendant did not

146. *Id.* at 541–42 (alterations in original) (first quoting *Larkin v. State*, 173 N.E.3d 662, 670 (Ind. 2021); then quoting *Henson v. State*, 786 N.E.2d 274, 278 (Ind. 2003); and then quoting *Weedman v. State*, 21 N.E.3d 873, 892 (Ind. Ct. App. 2014)).

147. *Id.* at 545–48 (Goff, J., concurring in the judgment).

148. *Id.* at 548.

149. IND. CODE § 35-41-3-2(c) (2025).

150. *Cutler v. State*, 249 N.E.3d 1123, 1127 (Ind. Ct. App.) (citing *Larkin*, 173 N.E.3d at 670), *trans. denied*, 259 N.E.3d 998 (Ind. 2025).

151. *Id.* (alteration in original) (quoting *Dixson v. State*, 22 N.E.3d 836, 839 (Ind. Ct. App. 2014)).

act in self-defense, or by simply relying upon the sufficiency of its evidence in chief.”¹⁵²

In *Cutler v. State*, defense counsel referred to his initial burden of production, stating: “Once [Cutler] raises self-defense, the burden shifts back to [the State].”¹⁵³ The trial court then remarked: “Uh-huh. If you’ve proven it.”¹⁵⁴ Cutler then said: “Well, that’s his testimony.”¹⁵⁵ The trial court acknowledged Cutler’s point before turning to the State for rebuttal.¹⁵⁶

“Cutler focuse[d] on the trial court’s use of the word ‘proven,’ arguing that the trial court’s remark suggests that the court was requiring Cutler to satisfy the higher burden of ‘proof’ rather than the threshold burden of ‘production.’”¹⁵⁷ He relied on *Justice v. State*, where the court of appeals found reversal was warranted when the trial court issued a ruling stating that “[t]he State had met its burden of proof, and [the court] do[es] not find that the Defendant met the burden to -- for self-defense.”¹⁵⁸ The panel in *Justice* noted that the comments were made in connection with the trial court’s judgment and concluded that “the trial court unequivocally placed on [the defendant] the burden of proving self-defense[.]”¹⁵⁹

But in *Cutler* the court of appeals characterized the trial court’s remark as “imprecise” and distinguished *Justice* because the “remark was made well ahead of its legal ruling, there were intervening arguments directed toward the application of the accurate legal standard, and nothing about the ruling suggested a misapprehension or misapplication of the law.”¹⁶⁰ In upholding the bench verdict, the appellate court concluded that the record was not “clear or certain enough to disclose an unjustifiable risk that the trial court did not follow the law.”¹⁶¹

The defendant sought transfer in *Cutler*, arguing that decision conflicts with *Justice* because defense counsel’s remarks were similar and the verdict in *Cutler* was announced within a page of the trial court’s problematic remark.¹⁶² He urged the supreme court not to allow a “new exception” to the rule in *Justice*.¹⁶³ The Indiana Supreme Court denied transfer by a 3-2 vote with Chief Justice Rush and Justice Molter voting to grant transfer.¹⁶⁴

152. *Id.* (quoting *Larkin*, 173 N.E.3d at 670).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. 237 N.E.3d 1154, 1159 (Ind. Ct. App. 2024).

159. *Id.*

160. *Cutler*, 249 N.E.3d at 1128.

161. *Id.*

162. Petition to Transfer at 6–7, *Cutler v. State*, 259 N.E.3d 998 (Ind. 2025) (24A-CR-01458).

163. *Id.* at 7.

164. *Cutler*, 259 N.E.3d 998.

VIII. PROSECUTORIAL MISCONDUCT PRESERVATION CLARIFIED,
BUT EGGSHELL VICTIM DOCTRINE APPLIES

In *Konkle v. State*, the Indiana Supreme Court provided a detailed history of precedent regarding preservation of claims of prosecutorial misconduct, their purpose, and the modern views of other states.¹⁶⁵ It announced a new rule going forward:

where a defendant timely objects to alleged misconduct by the prosecutor and the trial court *overrules* the objection, nothing further is required to preserve the issue for appeal. However, while our decision here simplifies the requirements regarding overruled objections, we continue to hold that where a defendant objects and the trial court *sustains* the objection, our appellate preservation standard shall remain. That is to say, to preserve the issue for appeal following a *sustained* objection, the defendant must request an admonishment of the jury, and if further relief is required, move for a mistrial.¹⁶⁶

In *Konkle*, the supreme court found the claim of prosecutorial misconduct was preserved when defense counsel promptly objected to the State's closing argument that the eggshell skull doctrine applied.¹⁶⁷ The trial court immediately overruled this objection, and *Konkle* made no further requests.¹⁶⁸ "Given that *Konkle* made a timely objection to the prosecutor's statement, which was subsequently overruled, we find that he did all that was required of him."¹⁶⁹

Although the claim was preserved, it was unsuccessful. After an exhaustive review of the doctrine and other courts' consideration of it, the supreme court concluded that "the eggshell skull doctrine has traditionally dwelled within an analysis of causation—whether in tort or criminal law—our ruling today clarifies that this is where it should dwell hereafter."¹⁷⁰

The opinion further cautioned parties who invoke the doctrine in murder and voluntary manslaughter cases "to understand when and where the doctrine applies. To do otherwise is to do so at their own peril."¹⁷¹ The doctrine is irrelevant to proving the requisite mental state and does not alleviate that burden.¹⁷² "Should the doctrine be raised, it is strongly recommended that the doctrine be accompanied by a jury instruction adequately explaining the doctrine's scope and applicability."¹⁷³

165. 253 N.E.3d 1068, 1078–82 (Ind. 2025).

166. *Id.* at 1082 (footnote omitted).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1087.

171. *Id.*

172. *Id.*

173. *Id.*

Justice Goff concurred in part and dissented in part.¹⁷⁴ Although he agreed with the majority's "well-reasoned holding on the appellate-preservation rule," he disagreed with its resolution of "the merits of Konkle's claim."¹⁷⁵ In his view, the majority "unnecessarily expands the eggshell-skull doctrine to homicide cases requiring proof of a knowing or intentional *mens rea*, and—unnecessary expansion aside—it misapplies that doctrine to Konkle."¹⁷⁶

IX. SENTENCING

The notable sentencing developments this survey period were not from the traditional source of majority opinions. Rather, as summarized below, a dissent from the denial of transfer highlights the increased unlikelihood of a transfer grant to address a sentencing issue. Moreover, recent legislation offers an important reminder that, although trial courts generally have broad sentencing discretion, the General Assembly can change or limit it. Finally, an opinion from the court of appeals addresses and reiterates limitations on probation conditions.

A. Sentences for Youthful Defendants

The justices denied transfer 3-2 in *Lee v. State*,¹⁷⁷ a case involving a fourteen-year-old tried as an adult for murder and sentenced to the advisory term of fifty-five years.¹⁷⁸ Justice Molter, joined by Chief Justice Rush, dissented.¹⁷⁹ Justice Molter reiterated that appellate review of sentences under Rule 7(B) is intended, in part, to "identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes."¹⁸⁰

In the dissent's view, the case offered an opportunity to identify guiding principles for sentencing those convicted of committing murder in their youth, a topic on which current precedent sends "two conflicting messages": (1) "sentencing adults who commit murder and sentencing youths who commit murder both begin at the same starting point: the fifty-five-year statutory advisory sentence"; and (2) "[s]entencing considerations for youthful offenders . . . are not coextensive with those for adults,' so 'both at initial sentencing and on appellate review it is necessary to consider an offender's youth and its attendant characteristics.'"¹⁸¹ As to the second point, "children lack maturity and have an underdeveloped sense of responsibility;" "they are more vulnerable to negative influences and pressures;" and "their character is less developed than

174. *Id.* at 1094 (Goff, J., concurring in part and dissenting in part).

175. *Id.* at 1094–95.

176. *Id.* at 1095.

177. 265 N.E.3d 522, 523 (Ind. 2025).

178. *Id.* (Molter, J., dissenting).

179. *Id.*

180. *Id.* (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)).

181. *Id.* at 523–24 (quoting *Brown v. State*, 10 N.E.3d 1, 6–7 (Ind. 2014)).

that of adults.”¹⁸²

The dissent concludes by proposing the following guiding principle: “While the advisory sentence is the starting point, youth status presumptively warrants a sentence lower in the statutory range, although aggravating circumstances may overcome the presumption.”¹⁸³

B. The General Assembly Limits Consecutive Sentences for Multiple Misdemeanors, Adds New Aggravators and Mitigators

As summarized in last year’s survey, both appellate courts addressed the imposition of lengthy sentences imposed for multiple misdemeanor convictions.¹⁸⁴

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.”¹⁸⁵

The majority’s affirmance was narrow and reiterated that trial courts should “use the full range of rehabilitation options when sentencing defendants for misdemeanors and low-level felonies.”¹⁸⁶ 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.”¹⁸⁷

Justice Molter, joined by Justice Massa, dissented.¹⁸⁸ Largely agreeing with the helpful “guideposts for misdemeanor sentencing” in the majority opinion, the dissenting justices nevertheless concluded that the sentence was “an extreme outlier” considering the nature of the offense—sending “nonthreatening letters”—especially when compared to shorter sentences imposed for violent or “more egregious conduct.”¹⁸⁹ 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.”¹⁹⁰

Months later in *Crum v. State*, the court of appeals summarized and applied *Lane* in a case involving a twelve-year sentence (with four suspended) for twenty-four counts of Class A misdemeanor neglect of a vertebrate animal.¹⁹¹ The opinion reiterated that *Lane* had emphasized the importance of

182. *Id.* at 524 (quoting *Taylor v. State*, 86 N.E.3d 157, 166 (Ind. 2017)).

183. *Id.*

184. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 58 IND. L. REV. 813, 829–31 (2025).

185. 232 N.E.3d 119, 120 (Ind. 2024).

186. *Id.*

187. *Id.* at 121.

188. *Id.* at 130 (Molter, J., dissenting).

189. *Id.* at 130–31.

190. *Id.* at 131.

191. 239 N.E.3d 858, 860 (Ind. Ct. App. 2024).

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.”¹⁹²

Each count related to one of the defendant’s two-dozen malnourished dogs.¹⁹³ 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.”¹⁹⁴ The panel noted that 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.¹⁹⁵ Concluding that his 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.¹⁹⁶

These opinions surely spurred the General Assembly to impose limitations on consecutive misdemeanor sentences the following year during the 2025 session. Specifically, House Enrolled Act 1014 expanded the reach of Indiana Code section 35-50-1-2 to provide that the total of the consecutive terms of imprisonment to which the defendant is sentenced for convictions arising out of an episode of criminal conduct may not exceed the following:

- (1) If the most serious crime for which the defendant is sentenced is a Class C misdemeanor, the total of the consecutive terms of imprisonment may not exceed one (1) year.
- (2) If the most serious crime for which the defendant is sentenced is a Class B misdemeanor, the total of the consecutive terms of imprisonment may not exceed two (2) years.
- (3) If the most serious crime for which the defendant is sentenced is a Class A misdemeanor, the total of the consecutive terms of imprisonment may not exceed three (3) years.¹⁹⁷

The legislation also made other changes to Indiana’s sentencing statutes, including the addition of two new aggravating circumstances that trial courts can consider in imposing sentences:

- (13) The person is or has been an alien (as defined by 8 U.S.C.

192. *Id.* at 862 (quoting *Lane*, 232 N.E.3d at 125).

193. *Id.* at 860.

194. *Id.* at 863.

195. *Id.*

196. 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.” *Id.* at 863 n.6.

197. Act of May 6, 2025, Pub. L. No. 218-2025, § 23, 2025 Ind. Acts 3527, 3559 (H.E.A. 1014) (codified as amended at IND. CODE § 35-50-1-2(d) (2025)).

1101(a)) unlawfully present in the United States. A determination by the United States Department of Homeland Security that an alien has come to, entered, or remained in the United States in violation of law is evidence that the alien is or has been unlawfully present in the United States.

- (14) The offense involved dealing in a controlled substance under IC 35–48–4 and the person distributed the controlled substance to at least three (3) different individuals in a one hundred eighty (180) day period.¹⁹⁸

Finally, the legislation added a new mitigating circumstance to recognize and reward efforts toward substance abuse treatment:

- (15) The offense involved a controlled substance under IC 35–48–4 and the person:
- (A) sought treatment:
 - (i) in the three hundred sixty-five (365) day period preceding the date of the commission of the offense; or
 - (ii) on or after the date on which the person committed the offense, but before sentencing; and
 - (B) successfully completed treatment:
 - (i) in the three hundred sixty-five (365) day period preceding the date of the commission of the offense; or
 - (ii) on or after the date on which the person committed the offense, but before sentencing.¹⁹⁹

C. Probation Conditions

In *Delgado v. State*, a defendant convicted of battery and other offenses challenged three separate probation conditions: (1) to avoid “individuals of bad reputation” and to “not associate with anyone who is likely to influence me to commit any crime”; (2) to avoid “[f]ormer inmates of Penal Institutions”; and (3) to “always consult with my Probation Officer and obtain his/her written permission before obtaining a Driver’s License.”²⁰⁰

The court of appeals reversed all three.²⁰¹ The first condition did not “adequately define a person of bad reputation” or those who might “influence” the defendant to engage in criminal activity, thus suffering “from the same

198. *Id.* § 16, 2025 Ind. Acts at 3543 (codified as amended at IND. CODE § 35-38-1-7.1(a) (2025)).

199. *Id.* § 16, 2025 Ind. Acts at 3544–45 (codified as amended at IND. CODE § 35-38-1-7.1(b)(15) (2025)).

200. 246 N.E.3d 1276, 1290–91 (Ind. Ct. App. 2024), *trans. denied*, 253 N.E.3d 526 (Ind. 2025).

201. *Id.* at 1293.

subjectivity and lack of definition” that doomed conditions in earlier cases.²⁰² The second condition prohibiting him from associating with former inmates was struck because it could “hinder his rehabilitation by limiting his exposure to people who no longer engage in criminal activity and actively help others to do the same. As written, without any exceptions for incidental contact, the Inmate Condition is overly broad and thus not reasonably related to the goals of probation.”²⁰³ Finally, without a history of driving-related offenses, the court of appeals agreed with Delgado that “the opportunity to earn his driver’s license will be important as he reintegrates into society,” and limiting that opportunity was not reasonably related to his rehabilitation.²⁰⁴

The opinion also noted a split in panels regarding the need for defendants to object at sentencing to preserve challenges to probation conditions on appeal.²⁰⁵ The panel sided with what appears to be the majority view that failure to object to probation conditions or choosing to waive formal reading of the conditions does not forfeit appellate review.²⁰⁶ It found additional support from a recent decision from the Indiana Supreme Court that held that “[n]o objection was required to preserve a challenge to [the defendant’s] fine, because a fine, like restitution, is part of the sentence.”²⁰⁷ The court reasoned that the “same logic” should apply when probation conditions were part of Delgado’s sentence.²⁰⁸

X. POST-CONVICTION RELIEF

In *Kelly v. State*, the Indiana Supreme Court resolved a split in court of appeals opinions regarding whether trial courts, not the court of appeals, authorize amendments to post-conviction relief petitions.²⁰⁹ Sixteen years old at the time of the offenses, McKinley Kelly was sentenced to 110 years for two counts of murder committed in 1996.²¹⁰ After denial of his direct appeal, petition for post-conviction relief, and habeas petition, he filed a pro se successive petition for post-conviction relief in 2019 arguing that his sentence was

202. *Id.* at 1292.

203. *Id.*

204. *Id.* at 1293.

205. *Id.* at 1290.

206. *Id.* See also *Meunier-Short v. State*, 52 N.E.3d 927, 936 (Ind. Ct. App. 2016) (holding that the defendant did not waive appellate review by failing to object to a probation condition at sentencing); *Bratcher v. State*, 999 N.E.2d 864, 874 (Ind. Ct. App. 2013) (rejecting the State’s argument that failing to object to probation conditions at sentencing constitutes waiver of appellate review); *but see Patton v. State*, 990 N.E.2d 511, 514 (Ind. Ct. App. 2013) (holding that the defendant waived appellate review by failing to object to a condition of probation at his sentencing hearing).

207. *Spells v. State*, 225 N.E.3d 767, 771 n.5 (Ind. 2024) (citing *Bell v. State*, 59 N.E.3d 959, 962 (Ind. 2016)).

208. *Delgado*, 246 N.E.3d at 1290.

209. 257 N.E.3d 782, 796 (Ind. 2025).

210. *Id.* at 791.

unconstitutional under provisions related to sentencing juvenile offenders.²¹¹ The court of appeals authorized the successive petition, which was later amended by lawyers from the State Public Defender and ultimately denied by the trial court.²¹²

The Indiana Supreme Court resolved the panel split in concluding that post-conviction trial courts may permit amendments to successive petitions; the petitioner does not need to secure permission from the court of appeals to amend his or her claims.²¹³ It relied on the plain language of the post-conviction relief rule and efficiency concerns, noting that a post-conviction court will be more familiar with the matter.²¹⁴

The justices rejected Kelly's state and federal constitutional challenges and the claim that his sentence was inappropriate based on the nature of his offenses and his character.²¹⁵ Nevertheless, it pointed to a recent amendment to the sentence modification statute that permits "juvenile offenders like Kelly a right to have their sentences reexamined after twenty years," at which point the trial court will have evidence of his "rehabilitative successes or failures."²¹⁶

XI. 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,²¹⁷ and most LWOP cases go directly to the Indiana Supreme Court by court rule.²¹⁸ "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."²¹⁹

The relatively unremarkable nature of the latest direct appeal arguably offers support for such re-routing. During the survey period, the justices unanimously rejected two challenges to the convictions in *Crossland v. State*, a case involving no challenge to the sentence imposed.²²⁰

The court first considered Crossland's claim of a partial jury, rejecting her

211. *Id.* at 791–92.

212. *Id.* at 792.

213. *Id.* at 794.

214. *Id.* at 795.

215. *Id.* at 804, 806.

216. *Id.* at 790 (citing IND. CODE § 35-38-1-17(n) (2025)).

217. IND. CONST. art. 7, § 4.

218. IND. APP. R. 4(A)(1). Life without parole is usually imposed through the same statutory procedure used in capital cases. *See* IND. CODE § 35-50-2-9 (2025). A seldom-used statute that was repealed in 2014 allowed imposition of LWOP for a third, especially serious felony. *See* IND. CODE § 35-50-2-8.5 (repealed 2013), *repealed by* Act of May 6, 2013, Pub. L. No. 158-2013, § 662, 2013 Ind. Acts. 1155, 1605–06.

219. *See, e.g.,* Joel M. Schumm, *Recent Developments in Criminal Law and Procedure*, 57 IND. L. REV. 891, 911–14 (2024).

220. 256 N.E.3d 517, 524, 529 (Ind. 2025).

argument for a change of venue based on negative pretrial publicity because there was no evidence the jury was unable to render an impartial verdict.²²¹ Next, it found the defendant was not denied an impartial jury by the trial court's denial of several challenges for cause.²²² Each of the "prospective jurors who initially expressed reservations were rehabilitated through additional questioning."²²³ Therefore, the trial court did not "force" Crossland to use her peremptory challenges at the expense of removing a juror she found objectionable.²²⁴

Second, the court found no reversible error in the trial court's limitations on her ability to impeach a witness called by the defense.²²⁵ Although defendants have a constitutional right to present a complete defense, the right is limited by the rules of evidence.²²⁶ The hearsay nature of the evidence justified its exclusion, and any error in excluding the evidence was harmless based on the "overwhelming" evidence guilt.²²⁷

XII. DEATH PENALTY

After fifteen years without an execution, Indiana's death row inmate count shrunk from eight to five when three individuals were executed between December 2024 and October 2025.²²⁸ As summarized below, each of their final attempts for relief was different but unsuccessful, with at least one justice dissenting in each case.

A. Corcoran & Competency

The first execution occurred in December of 2024 with the lethal injection of Joseph Corcoran.²²⁹ Days before the execution, a divided Indiana Supreme Court denied two separate successive petitions for post-conviction relief and two accompanying stay motions filed by the State Public Defender.²³⁰

Although Corcoran personally wrote to the court stating he did not wish to

221. *Id.* at 525.

222. *Id.* at 526.

223. *Id.*

224. *Id.*

225. *Id.* at 528.

226. *Id.*

227. *Id.* at 528–29.

228. Casey Smith, *Indiana's death row dwindles to five — and future executions remain uncertain*, IND. CAP. CHRON. (Oct. 20, 2025, at 7:00 ET), <https://indianacapitalchronicle.com/2025/10/20/indianas-death-row-dwindles-to-five-and-future-executions-remain-uncertain/> [<https://perma.cc/4S8D-L2BV>].

229. See, e.g., Sophia Tareen & Rick Callahan, *Indiana completes first execution in 15 years as man convicted of quadruple homicide is put to death*, PBS NEWS (Dec. 18, 2024, at 11:15 EDT), <https://www.pbs.org/newshour/nation/indiana-completes-first-execution-in-15-years-as-man-convicted-of-quadruple-homicide-is-put-to-death> [<https://perma.cc/UCF2-XFZ5>].

230. *Corcoran v. State*, 246 N.E.3d 782, 785 (Ind. 2024).

pursue further litigation while acknowledging he would be executed, his attorneys argued that Corcoran's mental illness precludes his execution.²³¹ The majority concluded it could

only disregard Corcoran's decision to waive post-conviction remedies if he isn't competent to make that decision, and our Court previously concluded that he is. The State Public Defender again questions Corcoran's competency to waive post-conviction remedies, but she relies on the same evidence we considered the last time, and the minimal new evidence she identifies is offered only to confirm that Corcoran's condition is unchanged. Since Corcoran does not authorize the successive petitions on his behalf, we cannot authorize them either.²³²

In addition, the majority found no reasonable possibility that Corcoran was entitled to relief.²³³ Beyond concerns with standing and procedural default in the first petition, the second petition argued that Corcoran was not competent to be executed because he lacked a rational understanding of why the State was going to execute him.²³⁴ "But [the court] previously concluded he does; ample evidence, including his recent affidavit, further illustrates that; and the State Public Defender has not made the threshold substantial showing that anything has changed."²³⁵

Justice Goff, joined by Chief Justice Rush, dissented.²³⁶ They believed the Court should stay the execution to allow counsel to seek successive post-conviction relief or, at a minimum, stay the execution and order a psychiatric examination.²³⁷ "The evidence submitted by Corcoran's attorneys reveals a documented history of severe mental illness, an inability to cooperate with counsel, and a desire to be executed to escape prison—all of which raise substantial questions about his current mental capacity."²³⁸

B. Ritchie & Revisiting the Baum Standard

Next, Benjamin Ritchie was executed in May of 2025.²³⁹ Weeks earlier, by a 2-2 vote with Justice Massa not participating, the Indiana Supreme Court denied his request to file a successive petition for post-conviction relief.²⁴⁰

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 800 (Goff, J., dissenting).

237. *Id.* at 801.

238. *Id.*

239. Smith, *supra* note 228.

240. *Ritchie v. State*, 254 N.E.3d 1064 (Ind.), *reh'g denied*, 256 N.E.3d 539 (Ind. 2025), and *cert. denied*, 145 S. Ct. 2729 (2025).

Ritchie sought to raise several claims, asserting:

(1) his trial and post-conviction counsel provided ineffective assistance by (a) failing to investigate Fetal Alcohol Spectrum Disorders and (b) failing to analyze the effect of Ritchie's childhood exposure to excessive amounts of lead; (2) Ritchie was only twenty years old at the time of the crime and recent developments in the law require this Court to consider his age at sentencing; (3) the State engaged in prosecutorial misconduct throughout Ritchie's jury trial; and (4) developments in the law make *Baum v. State*, 533 N.E.2d 1200 (Ind. 1989), inadequate in meeting the heightened standard required for capital litigation due to insufficient review of post-conviction counsel's competency.²⁴¹

Justice Goff, joined by Chief Justice Rush, dissented in part, acknowledging significant changes in the due process landscape

in the fifteen years that have lapsed between the latest execution (2024) and the one before (2009). In 2019, we concluded that the *Baum* standard, which basically asks only whether the attorney was present, "provides too low a benchmark for measuring counsel's performance" in certain juvenile proceedings.²⁴²

C. Ward & Public Records

Finally, Roy Ward was executed on October 10.²⁴³ Weeks earlier, the Indiana Supreme Court denied his request to file a successive petition for post-conviction relief that raised claims including that

(1) the State's failure to answer Ward's public records requests about its lethal injection protocol and the drugs it intends to use to carry out his execution obstructs his ability to challenge the constitutionality of his execution; (2) the State's failure to respond to Ward's public records requests violates his procedural and substantive due process rights under the Fourteenth Amendment to the United States Constitution and Article 1, Section 12 of the Indiana Constitution; [and] (3) problems during Benjamin Ritchie's execution in May 2025 present a substantial risk that Ward will suffer severe pain during his execution in violation of the Eighth Amendment and Article 1, Section 16 of the Indiana

241. *Id.* at 1065.

242. *Id.* at 1069 (Goff, J., dissenting in part and concurring in the result) (quoting *A.M. v. State*, 134 N.E.3d 361, 365 (Ind. 2019)).

243. Casey Smith, *Indiana executes Roy Lee Ward for 2001 murder of teenager Stacy Payne*, IND. CAP. CHRON. (Oct. 10, 2025, at 2:39 ET), <https://indianacapitalchronicle.com/2025/10/10/indiana-executes-roy-lee-ward-for-2001-murder-of-teenager-stacy-payne/> [https://perma.cc/4JNY-7PA2].

Constitution. . . .²⁴⁴

Justice Goff dissented.²⁴⁵ Quoting from a 2018 report of the Death Penalty Information Center, he wrote that “[t]o effectively ‘challenge experimental or demonstrably inappropriate drug protocols or other dangerous execution practices, prisoners need all relevant information about their executions.’ Lack of full transparency ‘frustrates the judicial process by unfairly limiting prisoners’ ability to prevent potentially unconstitutional executions.’”²⁴⁶

CONCLUSION

Beyond death penalty and LWOP direct appeal cases that must be heard by the Indiana Supreme Court,²⁴⁷ the justices have been increasingly less likely to grant transfer to exercise their discretionary ability to decide criminal cases.²⁴⁸ The supreme court took at least two dozen cases a decade ago, but the number of criminal transfers has dwindled to single digits in recent years.²⁴⁹ The survey period includes supreme court opinions addressing fairly narrow claims regarding the effect of competency evaluations on speedy trials (*Bradley*), and a previously uninterpreted sentence in the self-defense statute (*Turner*), while others address broader rules about amending post-conviction petitions (*Kelly*) and preserving claims of prosecutorial misconduct (*Konkle*).

But most criminal law in Indiana continues to come from the court of appeals, with 98% of its opinions denied transfer.²⁵⁰ Looking to 3-2 votes denying transfer provides some insight into issues likely to resurface, which include partial guilty pleas (*Helvie*), burden shifting in self-defense cases (*Cutler*), and sentence reductions for juvenile offenders (*Lee*). And, beyond supreme court opinions, advocates for criminal law reform may find success in the General Assembly, which recently limited consecutive misdemeanor sentences,²⁵¹ or through the supreme court’s rulemaking process, which regularly amends rules and sometimes adopts large-scale revisions.²⁵²

244. *Ward v. State*, 264 N.E.3d 637, 638 (Ind.), *reh’g denied*, 265 N.E.3d 527 (Ind. 2025).

245. *Id.* at 639 (Goff, J., concurring in part and dissenting in part).

246. *Id.* at 641 (citation omitted) (quoting ROBIN KONRAD, DEATH PENALTY INFO. CTR., BEHIND THE CURTAIN: SECRECY AND THE DEATH PENALTY IN THE UNITED STATES 7 (2018)).

247. IND. APP. R. 4.

248. Joel Schumm, *September Cases Address Intimidation, Neglect, Credit Time*, 69 RES GESTAE 30, 31 (2025).

249. *Id.*

250. *Id.*

251. *See supra* Part VII.B.

252. *See supra* notes 81–82 and accompanying text.

2025 DEVELOPMENTS IN INDIANA EVIDENTIARY PRACTICE

COLIN E. FLORA*

This survey period encompasses October 1, 2024, through September 30, 2025. Consistent with prior surveys,¹ 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 the last two surveys, where appropriate, this edition addresses memoranda decisions of the Indiana Court of Appeals.² Practitioners are reminded that citation to memoranda decisions of the Indiana Court of Appeals is generally permitted only for opinions issued after January 1, 2023.³

I. GENERAL PROVISIONS: RULES 101 THROUGH 106

A. Rule 101: Scope of the Indiana Rules of Evidence

Rule 101(b) makes the Indiana Rules of Evidence generally applicable to “all proceedings in the courts of the State of Indiana.”⁴ There are, however, exceptions, in which the rules do not strictly apply.⁵ The survey period provided examples of three of those exceptions, but also reminded that the lack of strict application does not leave those proceedings wholly lawless. In *Mayberry v. Indiana Dep’t of Correction*, the Indiana Court of Appeals reminded that the Indiana Small Claims Rules, though removing strict adherence to the rules of evidence, still require adherence to Rule 408’s limitation on evidence of settlement communications.⁶

Other common proceedings in which the rules of evidence are relaxed are post-judgment criminal proceedings, such as sentencing hearings,⁷ community corrections placement revocation hearings,⁸ and probation revocation hearings.⁹ The rationale for obviating the need to strictly adhere to the rules of evidence is

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1. See, e.g., Jeffrey O. Cooper, *Recent Developments Under the Indiana Rules of Evidence*, 30 IND. L. REV. 1049 (1997).

2. See Colin E. Flora, *2024 Developments in Indiana Evidentiary Practice*, 58 IND. L. REV. 841, 841 (2025) [hereinafter *2024 Survey*]; Colin E. Flora, *2023 Developments in Indiana Evidentiary Practice*, 57 IND. L. REV. 917, 917 (2024) [hereinafter *2023 Survey*].

3. See IND. R. APP. P. 65(D)(2); Tidd v. Tidd, 257 N.E.3d 846, 851 n.1 (Ind. Ct. App. 2025).

4. IND. R. EVID. 101(b).

5. See IND. R. EVID. 101(d).

6. No. 25A-SC-1483, 2025 LX 465816, at *10 (Ind. Ct. App. Sep. 30, 2025) (citing IND. R. SM. CL. 8(A)).

7. See, e.g., Saunders v. State, No. 24A-CR-981, 2024 LX 58415, at *17–18 (Ind. Ct. App. Dec. 30, 2024).

8. See, e.g., Riddle v. State, No. 25A-CR-118, 2025 LX 391119, at *6 (Ind. Ct. App. Aug. 12, 2025).

9. See, e.g., Thomas v. State, No. 24A-CR-2020, 2025 LX 82526, at *5 (Ind. Ct. App. Jan. 28, 2025).

that such matters “are not adversarial criminal proceedings.”¹⁰ Relaxation of evidentiary rules provides flexibility “to permit the court to exercise its inherent power to enforce obedience to its lawful orders.”¹¹ “Judges presiding over such proceedings ‘may consider any relevant evidence bearing some substantial indicia of reliability.’”¹²

As with small-claims proceedings, some evidentiary safeguards remain in the post-judgment criminal setting. The Indiana Court of Appeals reminded that trial courts may not admit hearsay evidence “willy-nilly in a probation revocation hearing.”¹³ Instead, hearsay evidence may only be considered if it “is ‘substantially trustworthy.’”¹⁴ The task of assessing reliability of hearsay is not one to be taken lightly. The Indiana Court of Appeals recognized that “[t]he absence of strict evidentiary rules places particular importance on the fact-finding role of judges in assessing the weight, sufficiency, and reliability of proffered evidence. This assessment, then, carries with it a special level of judicial responsibility and is subject to appellate review.”¹⁵ To facilitate appellate review, trial courts should address reliability of hearsay on the record.¹⁶

A third category of proceedings in which the rules of evidence do not strictly apply are “preliminary juvenile matters.”¹⁷ The survey period presented two cases in which the question of applicability in juvenile matters was addressed. *In re A.H.* permitted consideration of “uncertified medical record[s] for purposes of” a pre-adjudication placement hearing because the hearing constituted “a preliminary juvenile matter to which the rules of evidence do not apply.”¹⁸ *In re A.L.C.*, to the contrary, showed skepticism toward the proposition that the relaxation of evidentiary rules for “preliminary juvenile matters” extends to “a post-adjudication CHINS hearing.”¹⁹

10. *DePalma v. State*, 258 N.E.3d 1081, 1084 (Ind. Ct. App. 2025).

11. *White v. State*, No. 25A-CR-148, 2025 LX 283473, at *7 (Ind. Ct. App. July 17, 2025) (quoting *Terpstra v. State*, 138 N.E.3d 278, 287 (Ind. Ct. App. 2019)).

12. *Brown v. State*, No. 23A-CR-3104, 2024 Ind. App. Unpub. LEXIS 1437, at *5 (Ind. Ct. App. Oct. 31, 2024) (quoting *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999)).

13. *McCammon v. State*, No. 24A-CR-336, 2024 Ind. App. Unpub. LEXIS 1318, at *9 (Ind. Ct. App. Oct. 9, 2024) (quoting *Reyes v. State*, 868 N.E.2d 438, 440 (Ind. 2007)), *trans. denied*, 248 N.E.3d 1226 (Ind. 2024).

14. *Id.*; see also *E.A. v. State*, No. 24A-JV-2745, 2025 LX 63401, at *8 (Ind. Ct. App. May 14, 2025).

15. *Riddle v. State*, No. 25A-CR-118, 2025 LX 391119, at *6–7 (Ind. Ct. App. Aug. 12, 2025).

16. *McCammon*, 2024 Ind. App. Unpub. LEXIS 1318, at *9.

17. IND. R. EVID. 101(d)(2).

18. No. 24A-JC-2867, 2025 LX 232940, at *20 n.8 (Ind. Ct. App. July 17, 2025) (quoting *L.H. v. State*, 878 N.E.2d 425, 430 (Ind. Ct. App. 2007)).

19. No. 24A-JT-576, 2024 Ind. App. Unpub. LEXIS 1383, at *34 n.11 (Ind. Ct. App. Oct. 23, 2024).

B. Rule 103: Preserving Evidentiary Rulings for Appeal

One of the great frustrations for appellate advocates is the failure to properly preserve evidentiary rulings for appeal. The procedures for doing so are provided by Evidence Rule 103.²⁰ There are several ways in which trial-level missteps can foreclose meaningful appellate review.²¹ The survey period provided examples of many of the potential missteps, including failures to provide sufficient offers of proof, inadequate objections, and improperly timed objections.

Where the challenge arises from improper exclusion of evidence, the sponsoring party must “inform[] the court of [the evidence’s] substance by an offer of proof, unless the substance was apparent from the context.”²² A wholesale “[f]ailure to make an offer of proof results in waiver of the claim.”²³ Only where the sponsoring party explains the evidence’s substance, relevance, and grounds for admission, is an offer of proof sufficient.²⁴ Where, as in *Fitzwater v. Broadway Methodist Hospital*, an appellate court cannot find an offer showing the substance of the omitted testimony, its relevance, and the basis for its admission, no adequate offer of proof will be found.²⁵

As with offers of proof, a party’s failure to timely object to evidence that is admitted waives an objection on appeal.²⁶ To preserve an objection, it must be made at the time the evidence is offered, and the grounds for objection must be stated.²⁷ Where one basis for objection is stated at trial, a separate basis may not be argued on appeal.²⁸ Once a court rules on the objection, a party may register a continuing objection to preserve the same challenge when it arises again at trial.²⁹

A more nuanced issue is whether pre-trial rulings can play any role in preserving evidentiary rulings for appeal after trial.³⁰ In *Wells v. State*, the

20. IND. R. EVID. 103.

21. Rule 103(e) preserves challenge for fundamental error even absent proper preservation, but it is a considerably higher standard than a properly preserved evidentiary challenge. *Shepard v. State*, No. 24A-CR-567, 2025 LX 40719, at *5 (Ind. Ct. App. Jan. 28, 2025), *trans. denied*, 255 N.E.3d 439 (Ind. 2025).

22. IND. R. EVID. 103(a)(2).

23. *See, e.g.*, *Hodge v. State*, No. 24A-CR-281, 2024 Ind. App. Unpub. LEXIS 1367, at *6 (Ind. Ct. App. Oct. 18, 2024).

24. *See, e.g.*, *Lopez v. State*, No. 24A-CR-1411, 2025 LX 148570, at *3–5 (Ind. Ct. App. June 17, 2025), *trans. denied*, 270 N.E.3d 956 (Ind. 2025).

25. No. 24A-CT-3162, 2025 LX 243260, at *4–6 (Ind. Ct. App. July 11, 2025).

26. IND. R. EVID. 103(a)(1)(A); *see, e.g.*, *Stansel v. State*, No. 24A-CR-554, 2024 Ind. App. Unpub. LEXIS 1438, at *4–6 (Ind. Ct. App. Oct. 31, 2024).

27. IND. R. EVID. 103(a)(1)(B).

28. *See, e.g.*, *McFadden v. State*, No. 24A-CR-1857, 2025 LX 185586, at *8–9 (Ind. Ct. App. June 16, 2025).

29. IND. R. EVID. 103(b).

30. If pursued as interlocutory appeals, pre-trial evidentiary rulings may be addressed prior to trial. *Means v. State*, 201 N.E.3d 1158, 1165–67 (Ind. 2023); *see, e.g.*, *Graff v. State*, 250 N.E.3d 497, 506–07 (Ind. Ct. App. 2025).

Indiana Court of Appeals concluded that a party failed to preserve an objection based on a “standing objection” made in a pre-trial hearing.³¹ It did not matter that the hearing occurred on the same day as the trial.³² That does not, however, mean that what happens in the pre-trial setting stays in the pre-trial setting. In *Brawley v. State*, the Indiana Court of Appeals found that an objection at trial was sufficient to preserve the appellate challenge because the basis for the argument on appeal was stated in pretrial discussions and therefore could be considered, despite a more general objection being lodged at trial.³³

As with many past surveys,³⁴ this survey again bore witness to the trap for the unwary in Indiana Evidence Rule 103(b).³⁵ Contrary to federal procedures, in which motions in limine preserve evidentiary rulings for appeal,³⁶ Indiana’s Rule 103(b) requires objections to be registered “on the record at trial.”³⁷ Under Indiana’s current procedure:

A motion in limine is a preliminary ruling that, in itself, does not result in reversible error. Thus, “[i]n order to preserve an error for appellate review, a party must do more than challenge the ruling on a motion in limine.” Indeed, litigants generally must comply with Indiana Evidence Rule 103, which governs the preservation of evidentiary error. . . . Thus, as our Supreme Court has explained: “Absent either a ruling admitting evidence accompanied by a timely objection or a ruling excluding evidence accompanied by a proper offer of proof, there is no basis for a claim of error.”³⁸

Although the survey period did not see a caselaw shift in the role of motions in limine, it nevertheless witnessed a potential major step in bringing Indiana procedure in line with that of federal courts. Following yet another appellate decision in which a motion in limine was deemed insufficient to preserve error,

31. No. 23A-CR-2387, 2024 LX 52513, at *6–9 (Ind. Ct. App. Nov. 20, 2024), *trans. denied*, 259 N.E.3d 993 (Ind. 2025).

32. *Id.*

33. No. 24A-CR-3051, 2025 LX 319606, at *11–12 (Ind. Ct. App. Aug. 18, 2025), *trans. denied*, 267 N.E.3d 1107 (Ind. 2025).

34. See, e.g., Colin E. Flora, 2018 *Developments in Indiana Evidentiary Practice*, 52 IND. L. REV. 715, 716 (2019) [hereinafter 2018 *Survey*]; Colin E. Flora, 2019 *Developments in Indiana Evidentiary Practice*, 53 IND. L. REV. 895, 898 n.32 (2021) [hereinafter 2019 *Survey*]; Colin E. Flora, 2022 *Developments in Indiana Evidentiary Practice*, 56 IND. L. REV. 763, 764–66 (2023) [hereinafter 2022 *Survey*]; 2023 *Survey*, *supra* note 2, at 919; 2024 *Survey*, *supra* note 2, at 844.

35. See, e.g., *Lakes v. State*, No. 24A-CR-265, 2024 Ind. App. Unpub. LEXIS 1456, at *8–9 (Ind. Ct. App. Nov. 8, 2024).

36. See *Wilson v. Williams*, 182 F.3d 562, 564–67 (7th Cir. 1999) (en banc).

37. IND. R. EVID. 103(b); see, e.g., *Mauricio v. State*, No. 24A-CR-2009, 2025 LX 34655, at *7–8 (Ind. Ct. App. Apr. 21, 2025).

38. *McBride v. State*, 261 N.E.3d 274, 278–79 (Ind. Ct. App. 2025) (alteration in original) (citations omitted), *reh’g denied*, 2025 LX 293826 (Ind. Ct. App. July 3, 2025).

the appellant in *Miller v. Tran*³⁹ filed a petition to transfer to the Indiana Supreme Court. The appellant was joined by the Indiana State Bar Association's Litigation Section as amicus curiae.⁴⁰ The section's amicus brief was a continuation of its past efforts to seek amendment to Indiana Rule 103(b)'s language to bring Indiana's rule into conformity with the language of Federal Rule 103(b).⁴¹ The transfer petition was denied,⁴² but the Indiana Supreme Court directed a letter to the Chair of the Rules Committee,⁴³ stating: "Although the Court ultimately denied transfer, the Justices questioned whether Ind. Ev. R. 103(b) should be amended to match Fed. Ev. R. 103(b), which preserves objections before *and* at trial and is the majority view nationally."⁴⁴

On October 17, 2025, the Indiana Supreme Court published for public comment a proposed amendment to Indiana Evidence Rule 103(b), which would amend the rule to state:

Once the court rules definitively on the record at trial a party need not renew an objection or offer of proof to preserve a claim of error for appeal. The parties may request a definitive ruling be made on the record before trial, including upon consideration of a motion in limine, and a party need not renew an objection to or offer of proof to preserve a claim of error for appeal of that definitive ruling[.]⁴⁵

On March 6, 2026, the amendment was adopted, with an effective date of July 1, 2026.⁴⁶ The amendment finally disarms the perennial trap for the unwary that has been Rule 103(b)'s treatment of pre-trial evidentiary rulings.

C. Rule 105: Limiting Instructions

Even if evidence is properly admitted, it may be confined to a discrete use. "If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury

39. 253 N.E.3d 1138, 1144–45 (Ind. Ct. App.) (ruling on motion in limine, the morning of trial), *trans. denied*, 265 N.E.3d 991 (Ind. 2025).

40. Brief of the Litig. Section of the Ind. State Bar Ass'n, as Amicus Curiae, in Support of Appellant at 10–15, *Miller v. Tran*, No. 24A-CT-1187 (Ind. Ct. App. Apr. 7, 2025), 2025 IN S. CT. BRIEFS LEXIS 20.

41. *See 2022 Survey*, *supra* note 34, at 765 n.23.

42. *Miller*, 265 N.E.3d at 991.

43. *See* IND. R. EVID. 1101.

44. Letter from Elizabeth Daulton, Dir., Ind. Sup. Ct. Servs., to Hon. Marianne Vorhees, Chair Ind. Comm. on Rules and Proc. (July 22, 2025) (on file with author).

45. *Proposed amendment to Indiana Rules of Evidence (October 2025)*, IND. SUP. CT. (Oct. 2025), <https://www.in.gov/courts/files/rules-proposed-2025-october-evidence.pdf> [<https://perma.cc/H35E-SWUR>].

46. *In re Order Amending Rules of Evidence*, No. 26S-MS-8, 2026 LX 146384 (Mar. 6, 2026).

accordingly.”⁴⁷ As shown in *Burks v. State*, Rule 105’s dictate that an instruction must be given only applies “on timely request.”⁴⁸ A party that “fail[s] to request such an instruction” waives any challenge on appeal.⁴⁹ Put simply, “Rule 105 means what it says.”⁵⁰

D. Rule 106: Completeness Rule

Rule 106 “embodies the completeness doctrine.”⁵¹ “Under the doctrine of completeness, when one party seeks to admit a portion of a document or recorded statement into evidence, the opposing party can place the remainder of the statement into evidence.”⁵² “The purpose of this rule is to avoid misleading the jury by presenting statements out of context.”⁵³

It “may be invoked to admit omitted portions of a statement in order to (1) explain the admitted portion; (2) place the admitted portion in context; (3) avoid misleading the trier of fact; or (4) insure a fair and impartial understanding of the admitted portion.” “However, a court need not admit the remainder of the statement, or portions thereof, that are neither explanatory of nor relevant to the portions already introduced.”⁵⁴

“[T]he remainder of the writing or recorded statement is still ‘subject to the general rules of admissibility,’ such as the rule against hearsay.”⁵⁵ Accordingly, if the remaining portions are excludable hearsay⁵⁶ or impermissible character evidence,⁵⁷ they should still be excluded.

Two decisions from the survey period merit specific mention. The first is the memorandum decision in *Rand v. State*, in which the Indiana Court of Appeals affirmed admission of a redacted deposition transcript because confusion about the witness’s prior statements was created by cross-examination of the witness, and admission of the deposition was warranted to

47. IND. R. EVID. 105.

48. No. 24A-CR-3144, 2025 LX 335227, at *14–15 n.5 (Ind. Ct. App. Aug. 21, 2025).

49. *Id.*

50. *Humphrey v. State*, 680 N.E.2d 836, 840 (Ind. 1997).

51. *Hall v. State*, No. 24A-PC-1023, 2024 LX 96656, at *17 (Ind. Ct. App. Nov. 20, 2024) (internal quotations omitted), *trans. denied*, 250 N.E.3d 1058 (Ind. 2025).

52. *Rand v. State*, No. 24A-CR-893, 2025 LX 136882, at *11 (Ind. Ct. App. June 23, 2025).

53. *Brawley v. State*, No. 24A-CR-3051, 2025 LX 319606, at *13 (Ind. Ct. App. Aug. 18, 2025), *trans. denied*, 267 N.E.3d 1107 (Ind. 2025).

54. *Fox-Doerr v. State*, No. 24A-CR-1673, 2025 LX 12947, at *37–38 (Ind. Ct. App. May 1, 2025) (quoting *Lieberenz v. State*, 717 N.E.2d 1242, 1248 (Ind. Ct. App. 1999)), *trans. denied*, 265 N.E.3d 1006 (Ind. 2025).

55. *Perry v. State*, No. 24A-CR-2052, 2025 LX 33657, at *15 (Ind. Ct. App. Apr. 30, 2025) (quoting *Strunk v. State*, 44 N.E.3d 1, 6 (Ind. Ct. App. 2015)).

56. *See, e.g., id.*

57. *See, e.g., Brawley*, 2025 LX 319606, at *14.

allow the jury to understand the prior statements in context.⁵⁸

The other is the published decision in *Graff v. State*, in which the Indiana Court of Appeals found that the circumstances surrounding a polygraph examination prior to a confession fall within the purview of Rule 106's completeness doctrine:

Put another way, evidence that the polygraph examination directly preceded the confession, occurred in the exact same room, and involved the same officer to which the confession was given, easily qualifies as evidence regarding "the physical and psychological environment in which the confession was obtained." Preventing Graff from presenting any evidence regarding the polygraph examination would deny him the chance to show that the circumstances surrounding it cast doubt on the credibility of his confession, which was, as mentioned, given within minutes of the examination's completion.

Our conclusion is consistent with Indiana Rule of Evidence 106 The preliminaries to the polygraph examination, the examination itself, and the subsequent police interview are all part of one recorded statement, and fairness dictates that neither party should be able to decide that the jury will hear only the parts of the statement it deems favorable to its case.⁵⁹

II. JUDICIAL NOTICE: RULE 201

The power to exercise judicial notice in Indiana is embodied through three sources. In appellate proceedings, the Indiana Court of Appeals now routinely looks to Appellate Rule 27 as a basis for taking notice of court records relevant to the appeal.⁶⁰ In all other proceedings subject to evidentiary procedures,⁶¹ judicial notice is governed by Rule 201⁶² and the Uniform Judicial Notice of

58. No. 24A-CR-893, 2025 LX 136882, at *10–13 (Ind. Ct. App. June 23, 2025).

59. 250 N.E.3d 497, 506–07 (Ind. Ct. App. 2025) (footnote omitted) (internal citations omitted). "[I]n Indiana, 'polygraph results are generally inadmissible in criminal trials[.]'" and require meeting certain prerequisites for admissibility. *White v. State*, No. 24A-CR-1402, 2025 LX 94164, at *12–13 (Ind. Ct. App. Apr. 9, 2025) (citation omitted), *trans. denied*, 265 N.E.3d 1011 (Ind. 2025).

60. *See, e.g.*, *Stafford v. Stafford*, 256 N.E.3d 595, 597 n.1 (Ind. Ct. App. 2025); *Rosenbourgh v. State*, 268 N.E.3d 1255, 1260 n.1 (Ind. Ct. App. 2025); *cf. Benziger v. Radabaugh*, 267 N.E.3d 1149, 1154 n.4 (Ind. Ct. App. 2025). Invocation of Appellate Rule 27 is a fairly new development. Despite being in effect since 2001, it was not until 2024 that the Indiana Court of Appeals first indicated that it had "taken judicial notice . . . pursuant to Appellate Rule 27." *Haseman v. Peters*, No. 23A-DR-827, 2024 LX 243896, at *5 n.1 (Ind. Ct. App. Jan. 10, 2024).

61. *See Thomas v. State*, No. 24A-CR-2020, 2025 LX 82526, at *5 (Ind. Ct. App. Jan. 28, 2025) (Rule 201 inapplicable to probation revocation proceedings).

62. IND. R. EVID. 201(d).

Foreign Laws Act (“UJNFLA”).⁶³ During the survey period, Indiana’s appellate courts addressed both the UJNFLA and Rule 201.

The survey provided numerous examples of Rule 201 used to take judicial notice of records from courts,⁶⁴ ordinances,⁶⁵ and records in “the statewide protective order database maintained by the Indiana Supreme Court.”⁶⁶ As has become common since Indiana courts integrated the Odyssey case management system, one of the most frequent uses for judicial notice remained records of Indiana courts accessible on the Odyssey system.⁶⁷ Notably, Rule 201(b)(5) applies to both records of other courts throughout the state⁶⁸ and records from the same court in other cases.⁶⁹

The Indiana Court of Appeals provided an important reminder that the power of judicial notice is not a substitute for adherence to procedural requirements on appeal. Rule 201(d) permits the taking of judicial notice “at any stage of the proceeding[.]”⁷⁰ and the Indiana Court of Appeals routinely solves deficiencies in the appellate record through judicial notice.⁷¹ Nevertheless, that an appellate court “can sua sponte take judicial notice of the records of a court of this state . . . does not relieve the Appellant from the requirement to submit a complete Appendix on appeal.”⁷² The court of appeals also found that judicial notice cannot be used for the first time on appeal to “retroactively fulfill [an]

63. IND. CODE §§ 34-38-4-1 to -7 (2025).

64. *See, e.g.*, *Starsiak v. Starsiak*, 246 N.E.3d 1229, 1232 n.1 (Ind. Ct. App. 2024) (citing IND. R. EVID. 201(a)(2)(C)); *In re E.W.*, No. 24A-JC-1230, 2024 LX 58734, at *6–7 (Ind. Ct. App. Dec. 3, 2024) (same); *Hatch v. Roper*, 247 N.E.3d 1290, 1292 n.3 (Ind. Ct. App. 2024) (citing IND. R. EVID. 201(a)).

65. *Jasionowski v. Town of Whitestown*, 268 N.E.3d 288, 297 (Ind. Ct. App. 2025) (citing IND. R. EVID. 201(a)(2)(B), (b)(4), and (c)(1)); *Burbank v. Parsons*, No. 24A-CT-868, 2024 LX 44562, at *12 n.4 (Ind. Ct. App. Dec. 30, 2024) (citing IND. R. EVID. 201(b)(4)).

66. *In re Adoption of K.B.*, 247 N.E.3d 803, 806 n.5 (Ind. Ct. App. 2024) (citing IND. R. EVID. 201(b)(5)).

67. *See, e.g.*, *Lopp v. Lopp*, 270 N.E.3d 44, 48 n.2 (Ind. Ct. App. 2025); *A.B. v. State*, No. 24A-JV-2062, 2025 LX 90471, at *2 n.1 (Ind. Ct. App. Feb. 13, 2025), *trans. denied*, 265 N.E.3d 1011 (Ind. 2025); *Payne v. State*, 247 N.E.3d 815, 816 n.1 (Ind. Ct. App. 2024); *Pondo v. Waziri*, No. 25A-DN-632, 2025 LX 451998, at *3 n.1 (Ind. Ct. App. Sep. 22, 2025); *Matson v. State*, No. 24A-PC-2283, 2025 LX 85740, at *2 n.1 (Ind. Ct. App. May 1, 2025).

68. *See Hatch*, 247 N.E.3d at 1292 n.3.

69. *See, e.g.*, *Muir Woods Section One Ass’n, Inc. v. Marion Cnty. Assessor*, 254 N.E.3d 1158, 1162 n.1 (Ind. T.C.), *trans. denied*, 270 N.E.3d 960 (Ind. 2025); *In re Paternity of G.S.*, 267 N.E.3d 1061, 1065 (Ind. Ct. App. 2025).

70. IND. R. EVID. 201(d); *see, e.g.*, *Hyser v. State*, No. 24A-CR-2720, 2025 LX 93197, at *10 n.6 (Ind. Ct. App. Mar. 13, 2025), *trans. denied*, 267 N.E.3d 991 (Ind. 2025); *Garcia-Rodriguez v. State*, No. 24A-CR-2868, 2025 LX 73563, at *8 (Ind. Ct. App. Apr. 30, 2025) (requesting judicial notice in appellate reply brief).

71. *See, e.g.*, *In re B.R.*, 262 N.E.3d 169, 173 n.1 (Ind. Ct. App. 2025); *Omije v. Whilby-Omije*, 256 N.E.3d 539, 541 n.1 (Ind. Ct. App.), *trans. denied*, 265 N.E.3d 994 (Ind. 2025); *Williams v. State*, No. 24A-PC-2461, 2025 LX 208666, at *7 n.1 (Ind. Ct. App. July 9, 2025).

72. *In re G.S.*, 254 N.E.3d 1071, 1075 n.2 (Ind. Ct. App.), *trans. denied*, 262 N.E.3d 819 (Ind. 2025).

evidentiary burden.”⁷³ As another panel observed: “As an *appellate* court, we cannot open the record to receive additional evidence.”⁷⁴

In addition to examples of where judicial notice under Rule 201 was properly used, the survey period explored important limitations on notice. Rule 201(a) includes two subparts. The first allows judicial notice of a fact that is either “not subject to reasonable dispute because it is generally known within the trial court’s territorial jurisdiction, or [] can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”⁷⁵ The second only allows judicial notice of “the existence of: (A) published regulations of governmental agencies; (B) ordinances of municipalities; or (C) records of a court of this state.”⁷⁶ Because “records of a court of this state” falls into the second category for which only notice of the existence may be taken, problems can arise when courts rely upon such records for adjudicative facts. During the survey, the court of appeals highlighted limitations on notice of court records:

This Court has recently held that “[e]ven if court records may be judicially noticed, ‘facts recited within the pleadings and filings that are not capable of ready and accurate determination are not suitable for judicial notice.’” “Unless principles of claim preclusion apply, judicial notice should be limited to the fact of the record’s existence, rather than to any facts found or alleged within the record of another case.”⁷⁷

Those same concerns were also raised by Justice Derek Molter, joined by Chief Justice Loretta Rush, in dissenting to the denial of transfer in *Vlietstra v. State*.⁷⁸ In *Vlietstra*, Justice Molter examined the problem of mixing judicial notice with doctrines of preclusion.⁷⁹ Specifically, he found that a trial court not only taking notice of proceedings in another court, but issuing rulings “based on the ruling by the [other] court” exceeded the permissible bounds of judicial notice and entered into the territory of preclusion, without first meeting the requisite showings for preclusion to apply.⁸⁰ That is distinct from consulting another trial court’s opinion as authority. As Justice Molter continued:

73. *Jones v. State*, No. 24A-CR-2616, 2025 LX 214331, at *28 n.19 (Ind. Ct. App. July 18, 2025).

74. *Gordon v. State*, No. 25A-CR-23, 2025 LX 380310, at *18 n.6 (Ind. Ct. App. Aug. 22, 2025), *trans. denied*, 272 N.E.3d 955 (Ind. 2025).

75. IND. R. EVID. 201(a)(1).

76. IND. R. EVID. 201(a)(2).

77. *J.I. v. Ja.I.*, 250 N.E.3d 417, 425–26 (Ind. Ct. App. 2024) (alteration in original) (internal citations omitted) (quoting *In re P.B.*, 199 N.E.3d 790, 796–97 (Ind. Ct. App. 2022)), *reh’g denied*, 2025 LX 66791 (Ind. Ct. App. 2025), *trans. denied*, 259 N.E.3d 993 (Ind. 2025).

78. 248 N.E.3d 1227, 1227–30 (Ind. 2025) (Molter, J., dissenting from the denial of transfer).

79. *Id.*

80. *Id.* at 1228–29.

To be clear, there is nothing wrong with one trial court considering another trial court's decision as persuasive. . . . But what a trial court can't do—as the trial court did here—is treat another court's ruling as *conclusive* in a subsequent case on an issue where issue preclusion doesn't apply.⁸¹

In addition to opinions applying Rule 201, the survey also provided two rare opinions applying the UJNFLA. The opinions are the first Indiana appellate decisions to address the UJNFLA since 2019.⁸² Under the UJNFLA, “[e]very court in Indiana shall take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States.”⁸³ “[T]o enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken of the evidence, reasonable notice shall be given to the adverse parties, either in the pleadings or otherwise.”⁸⁴

In the absence of such notice to the adverse party or trial court, the court presumes that the law in the other jurisdiction is substantially the same as the law in Indiana. “In other words, if the adverse party is not given reasonable notice that the issue of another state’s law will be raised, then any choice of law question is waived and the trial court presumes that all law is the same as Indiana’s.”⁸⁵

In both decisions, application of the UNJFLA turned on whether adequate notice was provided. In *Shaling v. Biomet*, the trial court found that invoking Alabama law at summary judgment, four years into litigation, after discovery, and less than six months before trial was not reasonable notice;⁸⁶ the court of appeals affirmed.⁸⁷ In the other, *Poultry & Industrial Suppliers, Inc. v. Incubacol, S.A.S.*, reasonable notice was provided when Florida law was first asserted just five months after the relevant party was added to an otherwise six-year-old case and first made in response to a motion for judgment on the pleadings.⁸⁸

81. *Id.* at 1229 (internal citation omitted); *but see* Ind. Dep’t of Nat. Res. v. United Mins., 686 N.E.2d 851, 857 (Ind. Ct. App. 1997); Popovich v. Ind. Dep’t of State Revenue, 7 N.E.3d 406, 415 n.12 (Ind. T.C. 2014).

82. *Tavake v. State*, 131 N.E.3d 696, 702 (Ind. Ct. App. 2019).

83. IND. CODE § 34-38-4-1 (2025).

84. IND. CODE § 34-38-4-4 (2025).

85. *Poultry & Indus. Suppliers, Inc. v. Incubacol, S.A.S.*, 250 N.E.3d 448, 455 (Ind. Ct. App. 2024) (internal citation omitted) (quoting *Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142, 146 (Ind. 1999)), *trans. denied*, 257 N.E.3d 779 (Ind. 2025).

86. No. 71C01-1906-CT-216, 2024 LX 218518, at *5–7 (Ind. Cir. Ct. Feb. 7, 2024).

87. 254 N.E.3d 1118, 1123–24 (Ind. Ct. App.), *trans. denied*, 265 N.E.3d 1004 (Ind. 2025).

88. 250 N.E.3d at 454–56.

III. PRESUMPTIONS IN CIVIL CASES GENERALLY: RULE 301

Under Rule 301, “[i]n a civil case, unless a constitution, statute, judicial decision, or [evidence] rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption.”⁸⁹ Although the doctrine of *res ipsa loquitur* may be viewed “not [as] a presumption, but rather [as] an inference of negligence that survives the defendant’s evidence[.]”⁹⁰ the Indiana Supreme Court has viewed presumptions and inferences as both falling within the purview of Rule 301.⁹¹ Traditionally, this survey has addressed developments in *res ipsa loquitur* within the purview of common-law evidentiary procedures.⁹² This survey, however, opts to place the doctrine into the context of Rule 301 because the Indiana Supreme Court hinted at Rule 301’s relationship to *res ipsa loquitur* in *Isgrig v. Trustees of Indiana University*.⁹³

The doctrine of *res ipsa loquitur* is defined literally as “the thing speaks for itself.” Normally . . . negligence itself cannot be presumed from the mere fact that an accident occurs. However, *res ipsa loquitur* is a rule that permits “a qualified exception to the general rule that the mere fact of an injury will not create an inference of negligence.” “[T]his doctrine operates on the premise that negligence, like any other fact or condition, may be proved by circumstantial evidence.” It provides a vehicle for plaintiffs to infer that the defendants were negligent when evidence of causation is lacking.⁹⁴

In last year’s survey, the Indiana Court of Appeals’ opinion in *Isgrig* was easily the most notable decision to address *res ipsa loquitur*, “which held that the doctrine, when otherwise satisfied, applies to premises-liability cases.”⁹⁵ But, because transfer was granted for review by the Indiana Supreme Court, the intermediate appellate court’s opinion was supplanted by the supreme court’s opinion.⁹⁶ After a thorough review of the origins and history of the doctrine,⁹⁷ the Indiana Supreme Court also concluded that *res ipsa loquitur* applies to

89. IND. R. EVID. 301.

90. 13B ROBERT L. MILLER, JR., INDIANA PRACTICE: COURTROOM HANDBOOK ON INDIANA EVIDENCE 46 (2025–26 ed.).

91. See *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292, 296 (Ind. 2009) (quoting *Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 985 (Ind. 2006)) (“Evidence Rule 301 ‘authorizes a court to instruct the jury on permissible inferences that may be drawn from the basic facts that give rise to presumptions.’”).

92. See, e.g., 2024 Survey, *supra* note 2, at 876–77.

93. 256 N.E.3d 1238, 1247 (Ind. 2025).

94. *Id.* at 1246 (second alteration in original) (citations omitted).

95. 2024 Survey, *supra* note 2, at 876.

96. *Isgrig*, 256 N.E.3d at 1244.

97. *Id.* at 1244–51.

premises liability cases.⁹⁸

IV. RELEVANCY & ITS LIMITS: RULES 401 THROUGH 413

A. Rules 401 & 402: What Is and Is Not Relevant

“Generally, relevant evidence is admissible but irrelevant evidence is not.”⁹⁹ Under Rule 401, “[e]vidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence.”¹⁰⁰ That “liberal standard” “sets a low bar[.]”¹⁰¹ The survey period provided instances in which relevance was fairly straight-forward: a coroner’s testimony in a prior trial that was contrary to the expert witness in a subsequent trial was relevant to the coroner’s “credibility and competence[.]”¹⁰² and that yellow pills were found at a murder scene made the finding of yellow pills on the defendant relevant to show defendant had been at the scene.¹⁰³ In other cases, relevance was less obvious, such as the several where the Indiana Court of Appeals affirmed admission of photographs of weapons subject to the possession of a criminal defendant despite not necessarily being the weapons linked to the charged crimes.¹⁰⁴

The survey period also provided illustrative examples of evidence failing to meet the low bar for relevance. In *Montgomery v. State*, the Indiana Court of Appeals found testimony that the victim “had sought cocaine that night” was irrelevant to the defendant’s charge of rape because cocaine was not found in the victim’s system.¹⁰⁵ Similarly, in *Griffith v. State*, the court of appeals found “that someone somewhere at some time accused [the defendant] of forcing [a child other than the victim] to perform oral sex is not evidence that the [defendant] did, in fact, do so.”¹⁰⁶ Echoing the Indiana Supreme Court, *Griffith* instructed that “[t]he State may not parade past the jury a litany of potentially prejudicial [prior bad acts] that have been established or connected to the

98. *Id.* at 1244.

99. *Lee v. State*, No. 24A-CR-1801, 2025 LX 26804, at *4–5 (Ind. Ct. App. Apr. 8, 2025) (citing IND. R. EVID. 402), *trans. denied*, 265 N.E.3d 522 (Ind. 2025).

100. *Dirig v. State*, 268 N.E.3d 1239, 1245 (Ind. Ct. App. 2025) (citing IND. R. EVID. 401).

101. *Bess v. State*, No. 24A-CR-51, 2024 LX 10936, at *12 (Ind. Ct. App. Nov. 25, 2024) (internal quotations omitted) (quoting *Snow v. State*, 77 N.E.3d 173, 177 (Ind. 2017)), *trans. denied*, 253 N.E.3d 525 (Ind. 2025).

102. *Redding v. State*, 244 N.E.3d 477, 484 (Ind. Ct. App. 2024).

103. *Jones v. State*, No. 24A-CR-110, 2024 LX 29079, at *14 (Ind. Ct. App. Dec. 10, 2024), *trans. denied*, 255 N.E.3d 440 (Ind. 2025).

104. *Hatfield v. State*, No. 23A-CR-2780, 2024 Ind. App. Unpub. LEXIS 1352, at *11 (Ind. Ct. App. Oct. 16, 2024), *trans. denied*, 248 N.E.3d 1225 (Ind. 2024); *Lee*, 2025 LX 26804, at *5; *Perry v. State*, No. 24A-CR-2052, 2025 LX 33657, at *7–11 (Ind. Ct. App. Apr. 30, 2025); *cf.* *Alexander v. State*, No. 24A-CR-2432, 2025 LX 60104, at *10–11 (Ind. Ct. App. Apr. 30, 2025) (defendant’s access to murder weapon admissible).

105. 250 N.E.3d 478, 486–87 (Ind. Ct. App. 2024).

106. 259 N.E.3d 1025, 1033 (Ind. Ct. App. 2025).

defendant only by unsubstantiated innuendo.”¹⁰⁷ And, in *K.M. v. Indiana Dep’t of Child Services*, the court concluded that “[a]ccusations of child abuse that are expressly found by a court to be untrue are not relevant to the falsely accused person’s fitness to be around children.”¹⁰⁸

*B. Rule 403: Excluding Relevant Evidence for Prejudice,
Confusion, or Other Reasons*

Under Rule 403, relevant evidence may be excluded “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.”¹⁰⁹ It is not enough for evidence to be prejudicial—“[a]ll evidence that is relevant to a criminal prosecution is inherently prejudicial”—rather, the prejudicial value must be balanced against the probative value in light of “the issue to be proved by the evidence.”¹¹⁰ To be excluded, evidence must be “unfairly prejudicial.”¹¹¹ The considerations for whether unfair prejudice has occurred include “dangers (1) that the jury will substantially overestimate the value of the evidence or (2) that the evidence will arouse or inflame the passions or sympathies of the jury.”¹¹²

Trial courts have “wide” discretion in balancing prejudice and probative value.¹¹³ Numerous decisions from the Indiana Court of Appeals from the survey period highlight this deference. Some of the more notable takeaways were: the prejudicial value of otherwise unrelated criminal conduct may be considered in light of the discrepancy in severity between the uncharged and the charged conduct;¹¹⁴ where a photograph depicted multiple weapons in addition to the one associated with the crime, the prosecution could have “edit[ed] the photograph to remove the other [weapons] or use a stand-in firearm as a demonstrative exhibit[.]”¹¹⁵ playing a stabbing video in slow motion was not unfairly prejudicial because, “[i]n real time, the stabbing seemingly began in the blink of an eye[, b]ut in slow motion, the incident can easily be broken down[.]”¹¹⁶ potentially prejudicial evidence can be tempered by a properly

107. *Id.* (alteration in original) (internal quotations omitted).

108. 255 N.E.3d 1245, 1249 (Ind. Ct. App. 2025).

109. IND. R. EVID. 403.

110. *Redding v. State*, 244 N.E.3d 477, 484 (Ind. Ct. App. 2024).

111. *Jones v. State*, 258 N.E.3d 1063, 1078 (Ind. Ct. App.), *trans. denied*, 265 N.E.3d 995 (Ind. 2025); *see, e.g., Johnson v. State*, No. 24A-CR-1452, 2025 LX 44839, at *6 (Ind. Ct. App. Apr. 29, 2025).

112. *Perry v. State*, No. 24A-CR-2052, 2025 LX 33657, at *10 (Ind. Ct. App. Apr. 30, 2025).

113. *Scott v. State*, No. 25A-CR-193, 2025 LX 481411, at *11 (Ind. Ct. App. Sep. 22, 2025).

114. *Jones v. State*, No. 24A-CR-110, 2024 LX 29079, at *15–16 (Ind. Ct. App. Dec. 10, 2024) (“[P]ossession of a controlled substance is significantly weaker than . . . murder charges.”), *trans. denied*, 255 N.E.3d 440 (Ind. 2025).

115. *Saunders v. State*, No. 24A-CR-981, 2024 LX 58415, at *10 (Ind. Ct. App. Dec. 30, 2024).

116. *Muex v. State*, No. 24A-CR-1610, 2025 LX 30589, at *7 (Ind. Ct. App. Apr. 17, 2025).

issued limiting instruction, which the jury is presumed to follow;¹¹⁷ and evidence is not unduly prejudicial simply because a defendant concedes an issue.¹¹⁸

Although Rule 403 is generally spoken of in shorthand as applying to “unfair prejudice,” that is only one of the bases for exclusion. In *Devlin v. Gorter*, the court of appeals affirmed exclusion of a pleading, later superseded by amendment, because it would distract the jury from more important aspects of an otherwise complex case and added little probative value.¹¹⁹

C. Rule 404: Character Evidence, Crimes, Wrongs or Other Acts

Rule 404(b)(1) prohibits “[e]vidence of a crime, wrong, or other act” but only if it is used “to show that on a particular occasion the person acted in accordance with the character.”¹²⁰ “The rule is designed to prevent the jury from assessing a party on the basis of his past propensities, the so called forbidden inference.”¹²¹ For Rule 404(b)(1) to apply, the evidence must be of a crime other than the one charged¹²² and must actually constitute a crime or an otherwise bad act.¹²³

Such evidence, however, may be admissible for other purposes, such as “proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” The test for assessing the admissibility of 404(b) evidence is: (1) the court must determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant’s propensity to commit the charged act; and (2) the court must balance the probative value of the evidence against its unfair prejudicial effect pursuant to Indiana Evidence Rule 403.¹²⁴

The survey period showed: such evidence is admissible to show “a matter

117. See, e.g., *Perry*, 2025 LX 33657, at *11.

118. *Tate v. State*, No. 24A-CR-3022, 2025 LX 225404, at *8–9 (Ind. Ct. App. July 25, 2025).

119. 257 N.E.3d 807, 818 (Ind. Ct. App. 2025); see also *Allen v. State*, No. 23A-CR-2534, 2024 LX 52301, at *13–14 (Ind. Ct. App. Nov. 14, 2024) (affirming the exclusion of an *ex parte* protective order under IND. R. EVID. 403); *Rosen v. Cmty. Healthcare Sys.*, 257 N.E.3d 6, 16–17 (Ind. Ct. App. 2025) (affirming the exclusion of a hospital’s negligence investigation via a motion in limine prior to a fall), *vacated*, 2026 LX 129887 (Ind. 2026).

120. IND. R. EVID. 404(b)(1).

121. *Abbas v. Neter-Nu*, 261 N.E.3d 233, 249 (Ind. 2025) (internal quotations omitted).

122. See, e.g., *Planck v. State*, No. 24A-CR-2671, 2025 LX 275715, at *22 (Ind. Ct. App. June 27, 2025), *trans. denied*, 267 N.E.3d 990 (Ind. 2025).

123. See, e.g., *Alexander v. State*, No. 24A-CR-2432, 2025 LX 60104, at *11 (Ind. Ct. App. Apr. 30, 2025) (“[P]ossessing a firearm is not, alone, an illegal ‘bad’ act.”); *Jones v. State*, 267 N.E.3d 41, 45 (Ind. Ct. App. 2025); *Perry v. State*, No. 24A-CR-2052, 2025 LX 33657, at *9–10 (Ind. Ct. App. Apr. 30, 2025) (same).

124. *Carr v. State*, 255 N.E.3d 519, 527 (Ind. Ct. App.) (internal citation omitted) (quoting IND. R. EVID. 404(b)(2)), *trans. denied*, 262 N.E.3d 821 (Ind. 2025).

at issue other than [defendant]’s propensity to commit the crime[;]”¹²⁵ other uncharged criminal acts “occurring at the same time and under the circumstances as the crimes charged” are not barred by Rule 404(b);¹²⁶ before evidence of a prior act may be admitted, there must be sufficient evidence of its commission and an arrest or charge, standing alone, is insufficient;¹²⁷ and evidence of other crimes committed in the same way was admissible under Rule 404(b)(2) even if they were not committed in a signature way.¹²⁸ One other particularly notable observation was provided by footnote in *Dewitt v. State*: “[T]he trial court did not make a record of its balancing of the probative value and prejudicial effect of this exchange under Rule 403. While such balancing is a necessary step in the Rule 404(b) analysis, the trial court was not required to illustrate this analysis on the record.”¹²⁹

D. Rule 405: Methods of Proving Character

“Rule 405 allows testimony about a person’s character or character trait in the form of an opinion or in testimony about the person’s reputation, and the Rule provides that “[o]n cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person’s conduct.”¹³⁰ In *Griffith v. State*, the Indiana Court of Appeals ruled that a criminal defendant’s assertion that “he would never sexually hurt a child or make a child perform oral sex” did not open the door to evidence of specific instances of conduct, specifically examination regarding unsubstantiated allegations that he molested his stepdaughter.¹³¹

E. Rule 406: Habit; Routine Practice

Whether a person’s habits “may be admitted to prove that on a particular occasion the person . . . acted in accordance with the habit” is governed by Rule 406.¹³² To constitute “habit,” evidence must show a person’s “regular response to a repeated specific situation.”¹³³ It must be “more than a mere tendency to act in a given manner.”¹³⁴ The quintessence of a “habit” for purposes of Rule 406

125. *Kimbrough v. State*, 266 N.E.3d 1288, 1296 (Ind. Ct. App. 2025).

126. *Jones v. State*, 250 N.E.3d 1062, 1081 (Ind. Ct. App. 2024) (quoting *Kyle v. State*, 54 N.E.3d 439, 444 (Ind. Ct. App. 2016)), *trans. denied*, 255 N.E.3d 442 (Ind. 2025).

127. *Griffith v. State*, 259 N.E.3d 1025, 1033–34 (Ind. Ct. App. 2025).

128. *Jones v. State*, 258 N.E.3d 1063, 1078 (Ind. Ct. App.), *trans. denied*, 265 N.E.3d 995 (Ind. 2025).

129. No. 24A-CR-2789, 2025 LX 352272, at *8 n.3 (Ind. Ct. App. Aug. 21, 2025), *trans. denied*, 271 N.E.3d 1122 (Ind. 2025).

130. *Griffith*, 259 N.E.3d at 1035 n.4 (quoting IND. R. EVID. 405(b)) (alteration in original).

131. *Id.*

132. IND. R. EVID. 406.

133. *Abbas v. Neter-Nu*, 261 N.E.3d 233, 249 (Ind. 2025) (quoting *Lewis v. State*, 34 N.E.3d 240, 247 (Ind. 2015)).

134. *Id.* (internal quotations omitted) (quoting *Lewis*, 34 N.E.3d at 248).

is conduct that is “semi-automatic in nature.”¹³⁵ In *Abbas v. Neter-Nu*, the Indiana Supreme Court deemed evidence that a patient “removed his IVs seven times over the course of four hospitalizations” without evidence of “the total number of times [the patient] had received an IV” was insufficient to satisfy the requisite showing for a “habit” under Rule 406.¹³⁶

F. Rule 407: Subsequent Remedial Measures

Following an injury, evidence of subsequent remedial measures is generally inadmissible “to prove: • negligence; • culpable conduct; • a defect in a product or its design; or • a need for a warning or instruction.”¹³⁷ The general prohibition on such evidence is intended to allow dangerous circumstances and conditions to be remedied without fear of adverse use in judicial proceedings.¹³⁸ But, even when Rule 407 would otherwise apply, a party may open the door to evidence of subsequent remedial measures. That was exemplified in *Miller v. Lulinski*, in which examination on post-injury repair to scaffolding by the defendants’ counsel was deemed to have “clearly ‘opened the door’ to” further testimony of the post-injury repairs.¹³⁹

G. Rule 408: Compromise Offers and Negotiations

Indiana judicial policy favors settlements of disputes and, accordingly, “embrace[s] ‘a robust policy of confidentiality of conduct and statements made during negotiation and mediation.’”¹⁴⁰ Rule 408 embodies that policy¹⁴¹ and “bars admission of settlement-offer evidence ‘to prove or disprove the validity or amount of a disputed claim’ or for certain impeachment purposes except when exempted by the rule.”¹⁴² The rule is sufficiently important that it is applied in the otherwise informal setting of Indiana small-claims proceedings.¹⁴³ While the rule is easy to apply in the setting of traditional settlement offers, it can be complicated when something short of a monetary offer to release claims is involved.¹⁴⁴

135. *Id.* (internal quotations omitted) (quoting *Lewis*, 34 N.E.3d at 248).

136. *Id.*

137. IND. R. EVID. 407.

138. *Pennington v. Mem’l Hosp. of South Bend, Inc.*, 223 N.E.3d 1086, 1096 (Ind. 2024); see also G. Alexander Nunn, *The Incoherence of Evidence Law*, 99 NOTRE DAME L. REV. 1255, 1310–11 (2024).

139. No. 24A-CT-1719, 2025 LX 13013, at *13–16 (Ind. Ct. App. Mar. 5, 2025), *trans. denied*, 265 N.E.3d 982 (Ind. 2025).

140. *Berg v. Berg*, 170 N.E.3d 224, 228 (Ind. 2021) (citation omitted).

141. *Id.*

142. *Mayberry v. Ind. Dep’t of Corr.*, No. 25A-SC-1483, 2025 LX 465816, at *10 (Ind. Ct. App. Sep. 30, 2025) (quoting IND. R. EVID. 408(a)).

143. *Id.* (citing IND. R. SM. CL. 8(A)).

144. See, e.g., *Thomas v. Valpo Motors, Inc.*, 258 N.E.3d 236, 245 n.5 (Ind. 2025) (dispute

In *Mayberry v. Indiana Dep't of Correction*, the Indiana Court of Appeals found that Rule 408 was not violated when the Indiana Department of Correction mentioned that the plaintiff had declined to “to discuss potential resolution of [claimed overcharges.]”¹⁴⁵ The appellate court reasoned that the Department of Correction had already conceded the overcharge and all that remained in dispute was that the plaintiff disagreed with the amount of the overcharge.¹⁴⁶ That the plaintiff declined to discuss resolution was not, therefore, offered “to prove or disprove the validity or amount of a disputed claim[.]”¹⁴⁷ The conclusion is essentially the inverse of finding that Rule 408 does not bar evidence of a defendant’s refusal to make any offer of compromise.¹⁴⁸ In either instance, the only additional information is that the parties have a dispute, a fact already made known to a court by the existence of the litigation pending before it.

H. Rule 412: Victim’s or Witness’s Sexual Behavior or Predisposition

“The admission of evidence pertaining to a victim’s past sexual conduct is governed by Indiana Evidence Rule 412.”¹⁴⁹ The rule embodies “the insight of Indiana’s Rape Shield Statute—codified at Indiana Code § 35-37-4-4—that inquiry into a victim’s prior sexual activity is sufficiently problematic that it should not be permitted to become a focus of the defense.”¹⁵⁰ The rule acts to shield the alleged victim “from being placed on trial and to remove impediments to reporting sex crimes.”¹⁵¹ As the survey period showed, Rule 412 sometimes turns on context and language. In *Hunter v. State*, the Indiana Court of Appeals agreed with a trial court’s conclusion that “dating implied a sexual relationship,”¹⁵² which drew the evidence into Rule 412(a)(2)’s prohibition of “evidence offered to prove a victim’s or witness’s sexual predisposition.”¹⁵³

over whether “offer of a partial refund amounts to ‘inadmissible settlement correspondence’” under Rule 408).

145. 2025 LX 465816, at *9–11.

146. *Id.* at *10.

147. *Id.* (quoting IND. R. EVID. 408(a)).

148. See *Chopra v. Pendyala*, No. 03A01-1305-SC-00191, 2013 Ind. App. Unpub. LEXIS 1544, at *14 (Ind. Ct. App. Dec. 20, 2013) (“[T]he letter contained no offer of compromise, but rather, contained a firm statement that GEICO would not pay for any diminished value of Chopra’s car.”).

149. *Hunter v. State*, No. 23A-CR-2313, 2025 LX 279740, at *12 (Ind. Ct. App. July 7, 2025).

150. *Hartzburg v. State*, No. 24A-CR-1784, 2025 LX 218627, at *15–16 (Ind. Ct. App. July 3, 2025) (quoting *Johnson v. State*, 6 N.E.3d 491, 498 (Ind. Ct. App. 2014)), *trans. denied*, 267 N.E.3d 986 (Ind. 2025). “[T]o the extent there are any differences between the [statute and Rule 412], the Rule controls.” *Lopez v. State*, No. 24A-CR-1411, 2025 LX 148570, at *7 (Ind. Ct. App. June 17, 2025), *trans. denied*, 270 N.E.3d 956 (Ind. 2025).

151. *Hunter*, 2025 LX 279740, at *13 (quoting *Smith v. State*, 140 N.E.3d 363, 370 (Ind. Ct. App. 2020)).

152. *Id.*

153. IND. R. EVID. 412(a)(2).

Highlighting that certain language may be context specific was the conclusion in *Hamby v. State* that “in the abstract—‘inappropriate’ is not exclusively a synonym of ‘sexual.’”¹⁵⁴ But in *Hamby*, the witness used the word “inappropriate” to describe molestation by the defendant, which the court concluded strongly implied sexual touching.¹⁵⁵

V. PRIVILEGES: RULES 501 & 502

Rules 501 and 502 generally provide the mechanisms for preserving and handling privileges.¹⁵⁶ State-law privileges are not confined to state courts. In federal court proceedings under diversity jurisdiction, “where state law provides the substantive rule of decision, privileges are determined in accordance with the applicable state law.”¹⁵⁷ In a diversity case, the Southern District of Indiana examined Indiana’s insurer-insured privilege.¹⁵⁸ The court found the privilege did not apply because the documents were “not communications with an insurance company[,]” but rather were “forms completed by Defendant’s employees” and were not “completed at the request of an insurance company[.]”¹⁵⁹ Importantly, “the fact that those forms might later have been forwarded to an insurance company does not cloak them with privilege.”¹⁶⁰

VI. WITNESSES: RULES 601 THROUGH 617

A. Rule 602: Requirement of Personal Knowledge

“Evidence Rule 602 provides that ‘[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter’ and that ‘[e]vidence to prove personal knowledge may consist of the witness’s own testimony.’”¹⁶¹ The survey period highlighted the high degree of deference shown by Indiana appellate courts to trial courts in assessing personal knowledge. In four memoranda decisions, the Indiana Court of Appeals affirmed findings of personal knowledge where: a witness needed her recollection refreshed but had previously known what

154. No. 23A-CR-2017, 2025 LX 15184, at *14 (Ind. Ct. App. Mar. 28, 2025), *trans. denied*, 265 N.E.3d 987 (Ind. 2025).

155. *Id.* at *14–15.

156. IND. R. EVID. 501, 502.

157. *Compton v. Allstate Prop. & Cas. Ins. Co.*, 278 F.R.D. 193, 196–97 (S.D. Ind. 2011) (citing FED. R. EVID. 501).

158. *Daskalakis v. CP Indy DT, LLC*, No. 1:24-cv-00271-JPH-MJD, 2025 LX 112254, at *11–14 (S.D. Ind. May 30, 2025).

159. *Id.* at *12.

160. *Id.* at *13.

161. *Mullis v. State*, 256 N.E.3d 567, 581 (Ind. Ct. App.) (alterations in original) (quoting IND. R. EVID. 602), *trans. denied*, 259 N.E.3d 1002 (Ind. 2025).

occurred through personal knowledge;¹⁶² a criminal defendant “was asked if, within his personal knowledge, he might know of any such reason” the children victims might have had to lie, “and he answered accordingly”;¹⁶³ an employee with access to a facility’s systems testified that a person was not present at the facility on a day when the witness was also not present, based upon the witness seeing entries the following day on the facility’s record system;¹⁶⁴ and a witness who was shot by a criminal defendant “and just seconds later heard additional gunfire and [another victim]’s cries from the home” identified the defendant as the shooter, despite not specifically seeing the defendant shoot the other victim.¹⁶⁵

B. Rule 609: Impeachment by Evidence of a Criminal Conviction

Rule 609 governs use of a witness’s prior criminal convictions for impeachment.¹⁶⁶ The rule limits the requisite convictions for attacking credibility to convictions of “(1) murder, treason, rape, robbery, kidnapping, burglary, arson, or criminal confinement; or (2) a crime involving dishonesty or false statement, including perjury.”¹⁶⁷ Where a prior conviction does not meet the confines of Rule 609, it is not admissible for impeachment.¹⁶⁸ Rule 609(b) also generally limits the use of “stale” convictions after ten years have passed since the later of the conviction or release from confinement for the conviction.¹⁶⁹ In *Miller v. Tran*, the Indiana Court of Appeals held that the trial court had erred in instructing the jury that it could consider a witness’s prior criminal convictions because the convictions were both more than ten years in the past and not among the enumerated criminal offenses of Rule 609(a).¹⁷⁰

*C. Rule 611: Mode and Order of Examining Witnesses
and Presenting Evidence*

Rule 611 sets out three basic parameters for controlling the examination of witnesses.¹⁷¹ The first is that it gives the trial court broad authority to “exercise

162. *Flowers v. State*, No. 25A-CR-647, 2025 LX 307421, at *7–8 (Ind. Ct. App. Sep. 12, 2025), *trans. denied*, 272 N.E.3d 959 (Ind. 2025).

163. *Clark v. State*, No. 25A-CR-354, 2025 LX 338320, at *5 (Ind. Ct. App. Sep. 3, 2025), *trans. denied*, 272 N.E.3d 959 (Ind. 2025).

164. *Littlepage v. State*, No. 24A-CR-2595, 2025 LX 63991, at *4–7 (Ind. Ct. App. Apr. 17, 2025), *trans. denied*, 262 N.E.3d 820 (Ind. 2025).

165. *Day v. State*, No. 24A-CR-1273, 2025 LX 62199, at *9–11 (Ind. Ct. App. Feb. 11, 2025), *trans. denied*, 259 N.E.3d 990 (Ind. 2025).

166. IND. R. EVID. 609.

167. IND. R. EVID. 609(a).

168. *See, e.g., Myers v. State*, No. 25A-CR-212, 2025 LX 363263, at *13–14 (Ind. Ct. App. Sep. 9, 2025), *trans. denied*, 272 N.E.3d 968 (Ind. 2025).

169. IND. R. EVID. 609(b).

170. 253 N.E.3d 1138, 1147 (Ind. Ct. App.), *trans. denied*, 265 N.E.3d 991 (Ind. 2025).

171. IND. R. EVID. 611.

reasonable control over the mode and order of examining witnesses and presenting evidence[.]”¹⁷² The Indiana Court of Appeals found this provision appropriately followed when a trial court intervened to terminate repeated examination on essentially the same questions, only rephrased.¹⁷³ The second guiding parameter of Rule 611 governs the scope of cross-examination.¹⁷⁴ Although the scope of cross-examination is quite broad, it is still limited to those matters “put in dispute by the direct examination[.]”¹⁷⁵ As the Indiana Court of Appeals demonstrated in *Streeter v. State*, even if a trial court oversteps in limiting cross-examination, it may still be a difficult task to overturn on appeal because it must also have “affect[ed] the substantial rights of the defendant.”¹⁷⁶

The third parameter of Rule 611 pertains to when leading questions are permitted.¹⁷⁷ In *Tercero-Pacheco v. State*, the Indiana Court of Appeals addressed the nuances of what constitutes a leading question.¹⁷⁸ A common fallacy is that a leading question is any question which may be answered “yes” or “no.”¹⁷⁹ That is not, however, the definition of a leading question; rather, it is “one that suggests the desired answer to the witness.”¹⁸⁰ Applying the correct test for ascertaining leading questions, the Indiana Court of Appeals concluded that the question to a witness of “when [the defendant] took your clothes off, did he put his penis inside of you?” was not a leading question, despite calling “for a yes or no response.”¹⁸¹

D. Rule 612: Writing or Object Used to Refresh Memory

“When a witness is unable to recall information, Evidence Rule 612 authorizes a party to attempt to ‘refresh’ the witness’s memory using a ‘writing

172. IND. R. EVID. 611(a).

173. *Blanchard v. HRC Hotels, LLC*, 269 N.E.3d 1234, 1241–43 (Ind. Ct. App. 2025), *trans. denied*, 2026 LX 76950 (Ind. 2026).

174. IND. R. EVID. 611(b).

175. *Streeter v. State*, No. 24A-CR-821, 2024 LX 64692, at *15 (Ind. Ct. App. Nov. 21, 2024) (citation omitted), *trans. denied*, 253 N.E.3d 517 (Ind. 2025).

176. *Id.*

177. IND. R. EVID. 611(c).

178. No. 24A-CR-1363, 2025 LX 44684, at *4–8 (Ind. Ct. App. Jan. 15, 2025), *trans. denied*, 255 N.E.3d 437 (Ind. 2025).

179. *See* JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 6 (5th ed. 1999) (“It is sometimes supposed that any question which can be answered yes or no is ipso facto leading but that the neophyte attorney can always take refuge in neutral, alternative wording (‘State whether or not * * *’) to escape the charge of leading. However, quite frequently the former kind of question is not leading, and equally often the latter kind will be. The real issue is whether an ordinary witness would get the impression that the questioner desired one answer rather than another.”).

180. *Tercero-Pacheco*, 2025 LX 44684, at *7 (quoting *Stinson v. State*, 126 N.E.3d 915, 922 (Ind. Ct. App. 2019)).

181. *Id.*

or object[.]”¹⁸² “To refresh a witness’s recollection, ‘[t]he witness must first state that he does not recall the information sought by the questioner.’”¹⁸³ In *Abbas v. Neter-Nu*, the Indiana Supreme Court concluded that a witness could not be refreshed with a copy of an email because he “testified that he *did* recall the email.”¹⁸⁴

Use of a writing or object to refresh a witness’s recollection does not make the writing or object admissible.¹⁸⁵ In *Salinas v. State*, the Indiana Court of Appeals held that it was error for a trial court to prohibit refreshing of a witness’s recollection simply because the recorded interview sought to be used was not admitted into evidence.¹⁸⁶

“[T]here are few restrictions on the writing or object used to refresh a witness’s recollection.”¹⁸⁷ The writing or object need not have been created by the witness and may be work product.¹⁸⁸ As a result, in *Flowers v. State*, the Indiana Court of Appeals found that a police report could properly be used to refresh the recollection of a witness who did not author the report but did reflect statements made by the witness to the authoring officer.¹⁸⁹

E. Rule 614: Calling and Interrogation of Witnesses by Court and Jury

Rule 614 highly circumscribes the power of a trial court to call witnesses on its own accord.¹⁹⁰ It is most often invoked with respect to court-appointed experts.¹⁹¹ In *Saunders v. State*, the Indiana Court of Appeals found that a trial court did not commit fundamental error by calling a police officer as a witness in a sentencing hearing because Rule 614(a) does not govern sentencing hearings.¹⁹² Nevertheless, the appellate court “caution[ed] trial court judges against calling witnesses based on the Judicial Code of Conduct’s requirement of impartiality.”¹⁹³

182. *Salinas v. State*, 257 N.E.3d 17, 30 (Ind. Ct. App.) (alteration in original) (quoting IND. R. EVID. 612(a)), *trans. denied*, 262 N.E.3d 822 (Ind. 2025).

183. *Abbas v. Neter-Nu*, 261 N.E.3d 233, 250 (Ind. 2025) (alteration in original) (citation omitted).

184. *Id.*

185. *Salinas*, 257 N.E.3d at 30.

186. *Id.*

187. *Flowers v. State*, No. 25A-CR-647, 2025 LX 307421, at *6 (Ind. Ct. App. Sep. 12, 2025), *trans. denied*, 272 N.E.3d 959 (Ind. 2025).

188. *Id.*

189. *Id.*

190. IND. R. EVID. 614(a).

191. *Cf. In re A.H.*, No. 24A-JC-2867, 2025 LX 232940, at *20–23 (Ind. Ct. App. July 17, 2025) (rejecting appeal arguing court should have appointed an expert).

192. No. 24A-CR-981, 2024 LX 58415, at *17–18 (Ind. Ct. App. Dec. 30, 2024).

193. *Id.* at *18 (citing IND. R. JUD. CONDUCT 1.2).

F. Rule 615: Separation of Witnesses

“Rule 615 allows litigants to move for separation of witnesses so they cannot hear each other’s testimony.”¹⁹⁴ “[T]he rule ensures that memories are not ‘tainted by hearing others testify and denies witnesses the opportunity to shape their testimony to match or contradict what others have said.’”¹⁹⁵ Trial courts are afforded broad discretion in addressing and remedying violations of separation orders.¹⁹⁶ Exclusions of witnesses for violating separation orders is deemed an “extreme remedy,”¹⁹⁷ but was upheld on multiple occasions during the survey period.¹⁹⁸

But not every violation was deemed sufficient to warrant extreme sanction. In *Stoudimire v. State*, the court of appeals affirmed denial of a mistrial for violation of a separation order.¹⁹⁹ The panel observed that not every violation of a separation of witness order will warrant mistrial and, indeed, “a separation order does not require witnesses to refrain from all communication with other witnesses.”²⁰⁰ The most notable aspect of the decision was its distinguishing of precedent:

Stoudimire claims prejudice is presumed upon a violation of a witness separation order, citing *Stafford v. State*. We recognize *Stafford* does say that, relying on Justice Boehm’s dissent in *Hernandez v. State*. But *Hernandez* and *Stafford* apply when a trial court improperly determines a witness was an essential witness under Evidence Rule 615; they do not address the remedy for a witness’s violation of a trial court’s separation order. Substantial precedent indicates the party challenging the trial court’s decision in the latter case bears the burden of demonstrating prejudice.²⁰¹

194. *Neal v. State*, No. 24A-CR-820, 2024 Ind. App. Unpub. LEXIS 1303, at *8 (Ind. Ct. App. Oct. 8, 2024).

195. *Dunn v. State*, No. 24A-CR-1855, 2025 LX 11600, at *10 (Ind. Ct. App. Mar. 28, 2025) (quoting *Harris v. State*, 165 N.E.3d 91, 95 (Ind. 2021)), *trans. denied*, 265 N.E.3d 988 (Ind. 2025).

196. *Id.*

197. *Id.* at *12.

198. *See, e.g., id.* at *9–12 (witness present in courtroom during testimony); *Neal*, 2024 Ind. App. Unpub. LEXIS 1303, at *8–10 (defendant violated order by calling his mother, a witness); *Myers v. State*, No. 25A-CR-212, 2025 LX 363263, at *14–15 (Ind. Ct. App. Sep. 9, 2025) (same), *trans. denied*, 272 N.E.3d 968 (Ind. 2025).

199. No. 24A-CR-622, 2025 LX 86826, at *11–14 (Ind. Ct. App. Feb. 18, 2025).

200. *Id.* at *14.

201. *Id.* at *14–15 n.5 (internal citations omitted) (citing *Stafford v. State*, 736 N.E.2d 326, 330–31 (Ind. Ct. App. 2000); *Hernandez v. State*, 716 N.E.2d 948, 955 (Ind. 1999); *Hitt v. State*, 478 N.E.2d 65, 69 (Ind. 1985)).

G. Rule 617: Unrecorded Statements During Custodial Interrogation

Continuing a recent trend,²⁰² this survey again saw a meaningful decision addressing Rule 617.²⁰³ Taking effect in 2011,²⁰⁴ Rule 617 governs “admissibility of statements made during custodial interrogations[.]”²⁰⁵ In general, the rule requires custodial interrogations to be recorded in order to be admissible in felony criminal trials.²⁰⁶ The rule does not, however, require exclusion when “[t]he law enforcement officers conducting the Custodial Interrogation in good faith failed to make an Electronic Recording because the officers inadvertently failed to operate the recording equipment properly, or without the knowledge of any of said officers the recording equipment malfunctioned or stopped operating[.]”²⁰⁷ In *Payton v. State*, the Indiana Court of Appeals affirmed admission of a partial recording where the officer testified that the one-minute portion of missing video “was due to an equipment malfunction.”²⁰⁸ Because there was no showing of bad faith and the criminal defendant was permitted “to cross-examine [the investigator] about the unrecorded portion[.]” admission of the partial recording at trial did not violate Rule 617.²⁰⁹

VII. OPINIONS & EXPERT OPINIONS: RULES 701 THROUGH 705

A. Rule 701: Opinion Testimony by Lay Witnesses

Unlike some states and federal courts,²¹⁰ Indiana recognizes an intermediate level of opinion testimony above pure lay opinions and below that of experts:

“The Indiana Rules of Evidence contain two rules for opinion testimony—lay witness opinions under Rule 701 and expert witness opinions under Rule 702.” “A ‘skilled witness’ is a person with a degree of knowledge short of that sufficient to be declared an expert under Ind. Evid. Rule 702, but somewhat beyond that possessed by the ordinary jurors.” Evidence Rule 701 “encompasses both ordinary lay witness

202. Colin E. Flora, *2017 Developments in Indiana Evidentiary Practice*, 51 IND. L. REV. 1049, 1063–65 (2018); *2018 Survey*, *supra* note 34, at 736–38; *2019 Survey*, *supra* note 34, at 921–22; *2022 Survey*, *supra* note 34, at 780–81; *2024 Survey*, *supra* note 2, at 858–59.

203. *Payton v. State*, No. 24A-CR-1175, 2025 LX 65549, at *8–10 (Ind. Ct. App. Mar. 12, 2025).

204. *State v. Zuffante*, 576 P.3d 243, 271 (Haw. 2025) (Ginoza, J., dissenting) (discussing history of IND. R. EVID. 617).

205. *Payton*, 2025 LX 65549, at *8–9.

206. IND. R. EVID. 617(a).

207. IND. R. EVID. 617(a)(3).

208. *Payton*, 2025 LX 65549, at *8–10.

209. *Id.* at *9–10.

210. *See, e.g.,* *Compania Administradora de Recuperacion de Activos Administradora de Fondos de Inversion Sociedad Anonima v. Titan Int’l, Inc.*, 533 F.3d 555, 561 (7th Cir. 2008); *Hollingsworth v. Commonwealth*, 718 S.W.3d 738, 751 (Ky. 2025).

opinions and skilled witness opinions. ‘The difference between skilled witnesses and ordinary lay witnesses is their degree of knowledge concerning the subject of their testimony.’” The testimony of a skilled witness “is not a matter of ‘scientific principles’ governed by Indiana Evidence Rule 702(b); rather, it is a matter of the observations of persons with specialized knowledge.” Skilled witnesses may be permitted to testify both about their observations and their “opinions or inferences that are based solely on facts within their own personal knowledge.”²¹¹

During the survey period, the Indiana Court of Appeals upheld as skilled-witness testimony: opinions regarding cell phone location techniques by a detective “certified in analyzing ‘call detail records and geolocation analysis of mobile phones[.]’”²¹² that railing on scaffolding failed due to welding failures by a witness who had worked as a welder for a few years in the 1970s;²¹³ and testimony of a detective “concerning digital evidence, including Facebook Marketplace postings” based on “many hours of training to understand how to obtain and interpret data from electronic service providers, including data from Facebook, Instagram, TikTok, [and] IP addresses[.]”²¹⁴

B. Rule 702: Testimony by Expert Witnesses

“The admissibility of expert testimony is governed by Indiana Evidence Rule 702[.]”²¹⁵ “Any one or a combination of the factors listed in Evidence Rule 702(a) may serve as the basis for a witness qualifying as an expert.”²¹⁶ The touchstone of expert testimony is that it “is based on any ‘peculiar knowledge or experience not common to the world’ that may aid the finder of fact.”²¹⁷ Thus, an expert is a person who knows “more than the average person” on a topic at issue in the proceedings.²¹⁸ To fall under Rule 702, the testimony must constitute

211. *Jamerson v. State*, No. 24A-CR-2090, 2025 LX 229987, at *8–9 (Ind. Ct. App. July 9, 2025) (citations omitted); *accord* *Reed v. State*, No. 24A-CR-1313, 2025 LX 307100, at *8–9 (Ind. Ct. App. Aug. 28, 2025).

212. *Quail v. State*, No. 24A-CR-1501, 2025 LX 34668, at *3, 11–13 (Ind. Ct. App. Jan. 30, 2025), *trans. denied*, 259 N.E.3d 995 (Ind. 2025).

213. *Miller v. Lulinski*, No. 24A-CT-1719, 2025 LX 13013, at *10–13 (Ind. Ct. App. Mar. 5, 2025), *trans. denied*, 265 N.E.3d 982 (Ind. 2025).

214. *Jamerson*, 2025 LX 229987, at *7–11.

215. *Hallett v. State*, No. 24A-CR-1665, 2025 LX 85509, at *7 (Ind. Ct. App. Mar. 28, 2025).

216. *T.G. v. Cmty. Health Network*, 250 N.E.3d 490, 495 (Ind. Ct. App. 2025); *see* IND. R. EVID. 702(a) (“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.”).

217. *T.G.*, 250 N.E.3d at 495 (citation omitted).

218. *Id.*

an “opinion.”²¹⁹

When the expert seeks to offer scientific testimony, it must “rest[] upon reliable scientific principles.”²²⁰ During the survey period, the Indiana Court of Appeals rejected the assertion that there needed to be a consensus to a certain scientific methodology, finding a specific technique “universally accepted as a reliable scientific method” and the existence of “some variances among scholars” was insufficient to prevent satisfaction of Rule 702(b).²²¹ But, where a proffered expert both “admitted that he was not an expert in many, if not all, of the relevant fields and he largely, if not completely, failed to back up his opinions with citations to any reliable scientific principles[,]” his opinion was properly excluded.²²²

“Non-scientific expert evidence . . . is governed by Rule 702(a) and need not be proven reliable by means of ‘scientific principles’ under Rule 702(b).”²²³ In *Johnson v. State*, the Indiana Court of Appeals determined that expert “testimony to explain to the trier of fact the behavior of coaches and athletes, the complex social dynamics of that relationship, how that relationship might become abusive, and reasons why an athlete might delay reporting abuse” was non-scientific testimony subject only to Rule 702(a).²²⁴

The most notable Rule 702(a) decision in the survey period was *T.G. v. Community Health Network*, in which the Indiana Court of Appeals declined to provide a minimum threshold of work experience for a psychiatry resident who had not yet obtained board certification to offer psychiatric expertise.²²⁵ Looking to *K.K. v. Community Health Network, Inc.*, in which the expert had six months of residential experience, the defendant in *T.G.* argued that the expert’s sixteen days of experience was insufficient.²²⁶ The *T.G.* court, affirming the expert’s admission, found that *K.K.* “did not establish six months of residency as the minimum standard for qualifying a doctor as an expert in their field[.]”²²⁷

219. See *Salinas v. State*, 257 N.E.3d 17, 29 (Ind. Ct. App.) (“[S]tatistical evidence does not constitute ‘opinion[.]’”) (alteration in original)), *trans. denied*, 262 N.E.3d 822 (Ind. 2025).

220. IND. R. EVID. 702(b).

221. *Hallett v. State*, No. 24A-CR-1665, 2025 LX 85509, at *10–11 (Ind. Ct. App. Mar. 28, 2025).

222. *City of New Albany v. Ecosystems Connections, LLC*, 268 N.E.3d 1206, 1223 (Ind. Ct. App. 2025); see also *Hathaway v. State*, No. 24A-CR-944, 2024 Ind. App. Unpub. LEXIS 1342, at *9–16 (Ind. Ct. App. Oct. 15, 2024) (person unfamiliar with “Laboratory’s employee qualifications, . . . the Laboratory’s accreditation procedures, and did not know if the instrument used to test the materials had been certified or was regularly maintained” “was not qualified to give expert testimony on the results of the testing conducted”), *trans. denied*, 250 N.E.3d 1054 (Ind. 2025).

223. *Johnson v. State*, No. 24A-CR-2653, 2025 LX 305941, at *15 (Ind. Ct. App. Aug. 29, 2025), *trans. denied*, 272 N.E.3d 967 (Ind. 2025).

224. *Id.*

225. 250 N.E.3d 490, 495 (Ind. Ct. App. 2025).

226. *Id.* (citing *K.K. v. Cmty. Health Network, Inc.*, 215 N.E.3d 382, 385 (Ind. Ct. App. 2023)).

227. *Id.*

C. Rule 703: Bases of an Expert's Opinion Testimony

Rule 703 allows experts to incorporate facts and data from others, including otherwise inadmissible evidence, into their analyses.²²⁸ The leeway afforded to expert witnesses is not, however, a panacea for admitting otherwise inadmissible evidence. In *Abbas v. Neter-Nu*, the Indiana Supreme Court refused an attempt to use Rule 703 to introduce medical records.²²⁹

Second, the Providers argue they could use the medical records as the basis of an expert's opinion testimony under Indiana Evidence Rule 703. . . . We disagree. Rule 703 provides that "[e]xperts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field." Nothing in the rule explicitly allows the expert to mention the fact that they relied on the records when forming their opinion.²³⁰

Allowing experts to repeat medical records without using the records to form independent opinions also likely violates the proscription on using experts as conduits to admit the opinions of others.²³¹

D. Rule 704: Opinion on an Ultimate Issue

Rule 704(a) was enacted to replace "the once-prevailing common-law practice . . . many States applied . . . known as the 'ultimate issue' rule. That rule categorically barred witnesses from 'stat[ing] their conclusions on' any 'ultimate issue'—*i.e.*, issues that the jury must resolve to decide the case."²³² Still, Rule 704(b) provides some important limitations on opinion testimony: "Witnesses may not testify to 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."²³³

The survey period provided important decisions on three facets of Rule 704(b). One was the permissible scope of testimony abutting legal conclusions. The Indiana Court of Appeals recognized that lay opinion testimony does not amount to impermissible "legal conclusions" simply because the opinion is

228. IND. R. EVID. 703.

229. 261 N.E.3d 233, 249–50 (Ind. 2025).

230. *Id.* at 249 (second alteration in original) (citations omitted).

231. *See* *Hathaway v. State*, No. 24A-CR-944, 2024 Ind. App. Unpub. LEXIS 1342, at *12–14 (Ind. Ct. App. Oct. 15, 2024), *trans. denied*, 250 N.E.3d 1054 (Ind. 2025).

232. *Diaz v. United States*, 602 U.S. 526, 531 (2024) (third alteration in original) (quoting *United States v. Spaulding*, 293 U.S. 498, 506 (1935)); *see* IND. R. EVID. 704(a) ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable just because it embraces an ultimate issue.").

233. IND. R. EVID. 704(b).

given using terms that also hold legal significance.²³⁴ In *Hunt v. State*, the court found that even with a “subjective layperson’s statement that she did not believe she was raped, the jury would still have been free to decide whether there was force or imminent threat of force and whether [defendant] acted knowingly.”²³⁵ Looking to federal authority, the court recognized that “there can be a distinction between the colloquial use of a word from its legal meaning.”²³⁶ Though not referenced in *Hunt*, existing Indiana precedent also recognized that lay witnesses may use otherwise legally significant terms in colloquial senses without running afoul of Rule 704(b).²³⁷

The second notable facet of Rule 704(b) was “opinions concerning . . . the truth or falsity of allegations [and] whether a witness has testified truthfully[.]”²³⁸ Under that provision, an expert can opine generally about the frailties of eyewitness testimony, but may not offer the opinion that a specific witness’s testimony—specifically identification of a criminal defendant—was unreliable.²³⁹ More frequently, Rule 704(b) challenges arise to the testimony of one witness bolstering the veracity of another. So-called “[v]ouching testimony is generally prohibited under Indiana Evidence Rule 704(b)” because it “is considered an ‘invasion of the province of the jury in determining what weight they would place upon [a witness’s] testimony.’”²⁴⁰

The most frequent challenges to testimony as vouching occur in the setting of charges for child sexual abuse.²⁴¹ Indiana’s appellate courts “have ‘repeatedly found no Rule 704(b) violation where a witness testified about how child sexual-abuse victims behave in general without making a statement about the specific victim.’”²⁴² Such “cases are one of the rare times where the trial court may allow testimony explaining common reactions of victims or providing context for a

234. *Hunt v. State*, 269 N.E.3d 1223, 1230 (Ind. Ct. App.), *trans. denied*, 272 N.E.3d 966 (Ind. 2025).

235. *Id.*

236. *Id.* (citing *United States v. Baskes*, 649 F.2d 471, 478 n.5 (7th Cir. 1980)); *see also* *United States v. Bowling*, 952 F.3d 861, 869 (7th Cir. 2020) (“A witness’s informal use of a term that may also be legal in character does not inexorably turn that testimony into improper lay testimony.”).

237. *See* *Boyd v. State*, 425 N.E.2d 85, 87 (Ind. 1981) (“It is clear from the record that she used the word [‘robbery’] in its popular sense to summarize the entire incident which she had just described in detail. The use of the word did not invade the province of the jury.”).

238. IND. R. EVID. 704(b).

239. *Minor v. State*, 252 N.E.3d 979, 988–90 (Ind. Ct. App.), *trans. denied*, 259 N.E.3d 995 (Ind. 2025).

240. *Carr v. State*, 255 N.E.3d 519, 526 (Ind. Ct. App.) (second alteration in original) (citation omitted), *trans. denied*, 262 N.E.3d 821 (Ind. 2025).

241. *See, e.g.*, *Frey v. State*, No. 24A-CR-2886, 2025 LX 175385, at *4–9 (Ind. Ct. App. June 23, 2025); *Sawvell v. State*, No. 25A-CR-95, 2025 LX 359918, at *10–15 (Ind. Ct. App. Sep. 2, 2025).

242. *Alamos v. State*, No. 24A-CR-1074, 2024 LX 49167, at *5 (Ind. Ct. App. Dec. 6, 2024) (quoting *Henson v. State*, 237 N.E.3d 1160, 1166 (Ind. Ct. App.), *trans. denied*, 244 N.E.3d 907 (Ind. 2024)), *trans. denied*, 253 N.E.3d 520 (Ind. 2025).

victim's demeanor during their testimony.”²⁴³

Highlighting the reticence of appellate courts to find Rule 704(b) violations in child sexual-abuse cases was *MacKey v. State*, in which the court of appeals found Rule 704(b) was not violated when the aunt of child victims testified that she could tell when the victims were lying about other trivial matters.²⁴⁴ The defendant contended that the obvious “inference the State wanted the trial court to make was that Aunt knew Children were not lying when they said that [the defendant] molested them.”²⁴⁵ The court of appeals deemed the testimony to not be “the functional equivalent of Aunt saying she could tell Children were telling the truth when they disclosed to her Mackey’s sexual abuse” and that “[t]he complained of inference [wa]s too remote.”²⁴⁶

Also in the context of a child sexual-abuse case, but ostensibly having much broader application, was *Salinas v. State*.²⁴⁷ In affirming the introduction of statistical evidence that “less than 10% of children lie about sexual abuse[,]” the Indiana Court of Appeals not only deemed such evidence permissible in child sexual-abuse cases, but explicitly concluded that “[g]eneral statistics are not opinions, so Evidence Rule 704(b) simply does not apply to them.”²⁴⁸

The court of appeals also found no Rule 704(b) violation for admission of a witness’s plea offer, which contained a provision requiring truthful testimony because, “[w]hile the State’s plea offer was contingent on [the witness] testifying truthfully, the letter could not vouch for the truthfulness of her testimony because that determination could only be made after she testified.”²⁴⁹

Also at issue during the survey period was Rule 704(b)’s prohibition on “opinions concerning intent, guilt, or innocence in a criminal case[.]”²⁵⁰ “Witnesses are allowed to give opinion testimony, which may include ‘evidence that leads to an [incriminating] inference, even if no witness could state [an] opinion with respect to that inference.’ However, th[e] opinion must stop short of the question of guilt.”²⁵¹ In *Carr v. State*, the court found the testimony of a detective that “his investigation did not point to any suspect other than [the defendant]” did not violate Rule 704(b) because it was “not a statement regarding every element of the offense”—specifically, it did not address the defendant’s mental state—and the “testimony also focused on his investigation and the evidence collected for prosecution, not on [the defendant]’s guilt or

243. *Henson*, 237 N.E.3d at 1167.

244. No. 23A-CR-3029, 2024 Ind. App. Unpub. LEXIS 1446, at *7–8 (Ind. Ct. App. Nov. 6, 2024), *trans. denied*, 253 N.E.3d 517 (Ind. 2025).

245. *Id.* at *7.

246. *Id.* at *8.

247. 257 N.E.3d 17, 28–29 (Ind. Ct. App.), *trans. denied*, 262 N.E.3d 822 (Ind. 2025).

248. *Id.* at 28.

249. *Walter v. State*, No. 24A-CR-1786, 2025 LX 265330, at *10–11 (Ind. Ct. App. July 16, 2025).

250. IND. R. EVID. 704(b).

251. *Carr v. State*, 255 N.E.3d 519, 526 (Ind. Ct. App.) (alterations in original) (citation omitted), *trans. denied*, 262 N.E.3d 821 (Ind. 2025).

innocence.”²⁵²

There was, however, an example in which the statements covered all elements of the offense. In *Hatfield v. State*, the court found a mother’s recorded statement, upon finding a body in a pool of blood, “that she was ‘sure [her] son has done it’” violated Rule 704(b) because it “spoke to every element of the offense and did not stop short of the question of guilt[.]”²⁵³

As with any other line of inquiry, testimony that may otherwise run afoul of Rule 704(b) may become admissible if a party opens the door.²⁵⁴ In *Fox-Doerr v. State*, cross-examination of an investigating officer that “was clearly intended to create the impression that [the officer] did not think there was sufficient evidence to convict” opened the door to testimony that the officer believed the evidence sufficient to prove the defendant’s guilt beyond a reasonable doubt.²⁵⁵

*E. Rule 705: Whether an Expert’s Opinion Is Too Conclusory
Is an Issue for the Jury*

Rule 705 permits an expert to “state an opinion and give the reasons for it without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross examination.”²⁵⁶ In *Blanchard v. HRC Hotels, LLC*, the Indiana Court of Appeals looked to Rule 705 as guidance for assessing whether the alleged inadequacy of an expert’s opinion admitted at trial can be a basis for judgment on the evidence.²⁵⁷ Based upon the second sentence of Rule 705, the court found “[t]he way to attack the allegedly conclusory nature of an expert’s opinion is through cross-examination.”²⁵⁸ Through cross-examination, a party may “try to convince the jury to assign little or no weight to the expert’s opinion.”²⁵⁹ By trying to challenge an expert’s “opinion as conclusory” the challenge is one of weight of the evidence.²⁶⁰ Such a challenge is not, however, within the scope of a motion for judgment on the evidence because “a court presented with a motion for judgment on the evidence

252. *Id.* at 525–27 (citation omitted); *see also* *Houchin v. State*, No. 24A-CR-1080, 2024 LX 46778, at *9 (Ind. Ct. App. Dec. 23, 2024) (testimony that drug users generally do not carry large quantities of drugs but that drug dealers do “did not address the ultimate question of [] guilt, but rather was focused on the general tendencies of drug users and drug dealers”), *trans. denied*, 255 N.E.3d 433 (Ind. 2025).

253. No. 23A-CR-2780, 2024 Ind. App. Unpub. LEXIS 1352, at *8 (Ind. Ct. App. Oct. 16, 2024) (first alteration in original), *trans. denied*, 248 N.E.3d 1225 (Ind. 2024).

254. *Alamos v. State*, No. 24A-CR-1074, 2024 LX 49167, at *6 (Ind. Ct. App. Dec. 6, 2024), *trans. denied*, 253 N.E.3d 520 (Ind. 2025).

255. No. 24A-CR-1673, 2025 LX 12947, at *34–37 (Ind. Ct. App. May 1, 2025), *trans. denied*, 265 N.E.3d 1006 (Ind. 2025).

256. IND. R. EVID. 705.

257. 269 N.E.3d 1234, 1240–42 (Ind. Ct. App. 2025), *trans. denied*, 2026 LX 76950 (Ind. 2026).

258. *Id.* at 1241.

259. *Id.*

260. *Id.*

cannot weigh the evidence.”²⁶¹

VIII. HEARSAY: RULES 801 THROUGH 806

A. Rules 801 & 802: Hearsay Generally Prohibited

Absent an applicable exception, Rule 802 bans all hearsay.²⁶² “Rule 801(c) defines hearsay as an out-of-court statement that ‘is offered in evidence to prove the truth of the matter asserted.’”²⁶³ Some common circumstances easily fit the definition of hearsay, such as probable-cause affidavits.²⁶⁴ Other circumstances may appear on first glance to be hearsay, but are not within the proscription of hearsay under one of two categories of definitional exceptions.

The first category includes statements specifically excluded from the definition of hearsay by Rule 801(d). Two of the subcategories to Rule 801(d) drew meaningful attention during the survey period. Rule 801(d)(2), which applies to statements of party opponents, was shown to: apply to a defendant’s grand jury testimony;²⁶⁵ apply to statements made by the defendant in an arrest video;²⁶⁶ and not apply to allow a party to put its own statement into evidence.²⁶⁷ The other is Rule 801(d)(1)(B), which allows a prior statement of a witness who “testifies and is subject to cross-examination” that “is consistent with the declarant’s testimony, and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying[.]”²⁶⁸ In *Rand v. State*, the court recognized that Rule 801(d)(1)(B) is distinct from and operates in addition to the doctrine of completeness.²⁶⁹

The other category of definitional hearsay exceptions is comprised of statements offered for a reason other than “to prove the truth of the matter asserted.”

“If the challenged statement does not assert a fact susceptible of being

261. *Id.*

262. IND. R. EVID. 802; *Eichelburger v. State*, 251 N.E.3d 1106, 1110 n.3 (Ind. Ct. App. 2025).

263. *Eichelburger*, 251 N.E.3d at 1110 n.3 (quoting IND. R. EVID. 801(c)).

264. *McGhee v. State*, No. 24A-CR-1483, 2025 LX 86488, at *7 (Ind. Ct. App. May 15, 2025), *trans. denied*, 267 N.E.3d 979 (Ind. 2025).

265. *Fox-Doerr v. State*, No. 24A-CR-1673, 2025 LX 12947, at *9–11 (Ind. Ct. App. May 1, 2025), *trans. denied*, 265 N.E.3d 1006 (Ind. 2025).

266. *Delgado v. State*, 246 N.E.3d 1276, 1289 (Ind. Ct. App. 2024), *trans. denied*, 253 N.E.3d 526 (Ind. 2025); *see also* *Black v. Shaffer*, No. 23A-CT-2901, 2025 LX 85538, at *5 n.1 (Ind. Ct. App. Jan. 22, 2025) (statements made to officer following crash admissible).

267. *Castillo v. State*, No. 24A-CR-1616, 2025 LX 72046, at *6–7 (Ind. Ct. App. Feb. 25, 2025), *trans. denied*, 262 N.E.3d 814 (Ind. 2025).

268. IND. R. EVID. 801(d)(1)(B); *see, e.g.*, *Gordon v. State*, No. 25A-CR-23, 2025 LX 380310, at *9–13 (Ind. Ct. App. Aug. 22, 2025), *trans. denied*, 272 N.E.3d 955 (Ind. 2025).

269. No. 24A-CR-893, 2025 LX 136882, at *10–12 (Ind. Ct. App. June 23, 2025).

true or false, ‘it cannot be hearsay.’” “Further, if the statement is ‘offered to prove the fact of the utterance and not offered to prove the truth of the facts asserted, then there is no hearsay problem. . . . It is not hearsay at all.’”²⁷⁰

As to this category, the Indiana Court of Appeals found out-of-court statements to law enforcement are not hearsay when offered to explain why an investigation proceeded the way it did.²⁷¹

B. Rule 803: Hearsay Exceptions Regardless of Declarants’ Availability

Rule 803 provides a series of enumerated exceptions to the bar on hearsay.²⁷² This survey period provided noteworthy opinions from the Indiana Court of Appeals on four of Rule 803’s twenty-two exceptions: present-sense impressions, excited utterances, statements made for medical diagnoses or treatment, and recorded recollections.

1. Rule 803(1) – Present-Sense Impression.—Rule 803(1) provides the exception for present-sense impressions.²⁷³ “A present sense impression is a statement describing or explaining an event, condition or transaction, made while or immediately after the declarant perceived it.”²⁷⁴ During the survey period, the Indiana Court of Appeals found the exception applied to a 911 call that described an ongoing physical altercation²⁷⁵ and to a police officer’s listing of items found while searching a vehicle.²⁷⁶

2. Rule 803(2) – Excited Utterances.—“[T]he ‘Excited Utterance’ exception [is] set forth in Indiana Evidence Rule 803(2).”²⁷⁷

An excited utterance is “[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.” The party seeking admission of hearsay under this exception must show: (1) a startling event; (2) a statement made by the declarant while under the stress of excitement caused by the event; and (3) a relationship between the statement and the event. This “is not a mechanical test” and “turns on whether the statement was inherently

270. *Wynn v. State*, No. 24A-CR-2625, 2025 LX 346927, at *19–20 (Ind. Ct. App. Sep. 15, 2025) (alteration in original) (citations omitted), *trans. denied*, 272 N.E.3d 958 (Ind. 2025).

271. *Stevens v. State*, No. 24A-CR-1198, 2025 LX 50561, at *17–18 (Ind. Ct. App. May 21, 2025).

272. IND. R. EVID. 803.

273. IND. R. EVID. 803(1).

274. *Fisher v. State*, 264 N.E.3d 696, 705 (Ind. Ct. App. 2025) (citation and quotations omitted).

275. *Bloch v. State*, No. 25A-CR-192, 2025 LX 409943, at *9–11 (Ind. Ct. App. Sep. 23, 2025).

276. *Fisher*, 264 N.E.3d at 705.

277. *Jones v. State*, No. 24A-CR-110, 2024 LX 29079, at *11 (Ind. Ct. App. Dec. 10, 2024), *trans. denied*, 255 N.E.3d 440 (Ind. 2025).

reliable because the witness was under the stress of an event and unlikely to make deliberate falsifications.” Factors to consider in determining admissibility include the lapse of time between a statement and the startling event and whether a statement was made in response to questioning, though neither factor is dispositive.²⁷⁸

During the survey period, the Indiana Court of Appeals found the exception applied to: body-camera footage of an interview with the victim of physical violence, made upon the arrival of a police officer responding to a 911 call;²⁷⁹ a five-minute 911 call, which started “calmly” but shifted in tone “to anger, then sadness, then defeat, as [the declarant] both screams and whimpers about being pregnant and [the criminal defendant] hitting her in the head with an ashtray[.]”²⁸⁰ and statements of a victim made to police minutes after being punched in the face by the defendant, who “was still visibly upset and bleeding profusely[.]”²⁸¹ The court did not, however, find an abuse of discretion in declining to apply the exception where the declarant “gave his videotaped statement to police in a police interview room one hour after the shooting” and the declarant “appeared calm and unemotional while giving his statement to the detective.”²⁸²

3. *Rule 803(4): Statement Made for Medical Diagnosis or Treatment.*— Rule 803(4) provides an exception for “a statement made for purposes of medical diagnosis or treatment[.]”²⁸³ “This exception is ‘grounded in a belief that the declarant’s self-interest in obtaining proper medical treatment makes such a statement reliable enough for admission at trial.’”²⁸⁴ “A two-step analysis applies . . . : First, ‘is the declarant motivated to provide truthful information in order to promote diagnosis and treatment,’ and second, ‘is the content of the statement such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment.’”²⁸⁵ In *Wheeler v. State*, the court of appeals deemed statements made to a nurse, reflected in a report, fell within Rule 803(4), but the

278. *Quartier v. State*, 258 N.E.3d 1034, 1039 (Ind. Ct. App.) (alteration in original) (citations omitted), *trans. denied*, 265 N.E.3d 989 (Ind. 2025).

279. *Id.* at 1038–40.

280. *Simpson v. State*, No. 24A-CR-176, 2024 LX 62813, at *5–7 (Ind. Ct. App. Nov. 25, 2024); *see also* *Smith v. State*, No. 24A-CR-2253, 2025 LX 329048, at *8–10 (Ind. Ct. App. Aug. 11, 2025) (911 call that “conveyed shock and exasperation” immediately after a nearby shooting), *trans. denied*, 271 N.E.3d 1098 (Ind. 2025).

281. *Bueno v. State*, No. 24A-CR-3077, 2025 LX 230327, at *6–8 (Ind. Ct. App. June 30, 2025).

282. *Hardin v. State*, No. 24A-PC-579, 2025 LX 27292, at *27–28 (Ind. Ct. App. Feb. 3, 2025), *trans. denied*, 265 N.E.3d 987 (Ind. 2025).

283. *Ragan v. State*, No. 24A-CR-2460, 2025 LX 491903, at *8 (Ind. Ct. App. Sep. 17, 2025).

284. *Id.* at *9 (quoting *VanPatten v. State*, 986 N.E.2d 255, 260 (Ind. 2013)).

285. *Bueno*, 2025 LX 230327, at *8 (quoting IND. R. EVID. 803(4)).

report itself did not.²⁸⁶ Under Rule 805, such hearsay within hearsay is needed to meet an exception at each level of hearsay to permit admission.²⁸⁷

4. *Rule 803(5): Recorded Recollections.*—“Rule 803(5) defines the exception to the rule against hearsay for recorded recollections[.]”²⁸⁸ Among the requirements for admission under Rule 803(5) is that the statement “was made or adopted by the witness when the matter was fresh in the witness’s memory[.]”²⁸⁹ In *Griffith v. State*, the Indiana Court of Appeals addressed whether a forensic interview conducted within a week of a minor victim disclosing abuse allegations, but regarding circumstances occurring roughly one year earlier, fell within the exception.²⁹⁰ The court agreed with the prosecution that “[t]he plain language of the rule is not addressed to the timing of the event but rather to the freshness of the declarant’s recollection of the event[.]” and found the substance of the statement “included several details . . . which indicate[d] it was fresh in her mind at that time.”²⁹¹

C. Rule 804: Hearsay Exceptions for Unavailable Declarants

Like Rule 803, Rule 804 provides a series of enumerated hearsay exceptions.²⁹² But, unlike Rule 803, the Rule 804 exceptions only apply if the declarant is unavailable to testify at trial.²⁹³ The survey period shed light both on application of the Rule 804 exceptions and on the question of whether a declarant is unavailable.

Among the bases for deeming a declarant unavailable is that the declarant “testifies to not remembering the subject matter[.]”²⁹⁴ In *Quiroz v. State*, finding no Indiana precedent to resolve the question of “how much memory a witness must lack to be unavailable under Rule 803(a)(3),” the Indiana Court of Appeals looked to federal precedent to determine that “a witness is not available if he will not or cannot testify about the material portion of the subject matter of his out-of-court statement.”²⁹⁵ The survey period also found that a deceased

286. No. 24A-CR-2225, 2025 LX 108490, at *7–8 (Ind. Ct. App. June 5, 2025); *see also id.* at *8 (“Because Nurse Copp was not seeking medical diagnosis or treatment when she prepared her report, the report was not admissible as proffered by the State and argued on appeal.”).

287. *Id.* at *7 (citing IND. R. EVID. 805).

288. *Griffith v. State*, 259 N.E.3d 1025, 1038 (Ind. Ct. App. 2025).

289. IND. R. EVID. 803(5)(B).

290. *Griffith*, 259 N.E.3d at 1038.

291. *Id.* (first alteration in original).

292. IND. R. EVID. 804(b).

293. *Id.*; *see* IND. R. EVID. 804(a) (defining unavailability).

294. IND. R. EVID. 804(a)(3).

295. 265 N.E.3d 574, 579–80 (Ind. Ct. App. 2025) (quotations omitted).

declarant,²⁹⁶ a pregnant declarant deemed by a doctor to be unsafe to travel,²⁹⁷ a declarant who the prosecution has subpoenaed to testify but left the country,²⁹⁸ and a declarant who could not be located after searching a database and providing subpoenas to all listed addresses were each unavailable.²⁹⁹

Once a declarant is established as unavailable, then the exceptions of Rule 804(b) may apply. Of these exceptions, the survey period demonstrated: a pretrial deposition will usually satisfy Rule 804(b)(1)'s former testimony exception;³⁰⁰ a declaration may constitute a dying declaration, even if the declarant did not succumb until ten days later;³⁰¹ "[t]he statement 'Ight ima lyk wen I'm done bussin dese plays n if u want it so I can slide back' is not comprehensible, much less incriminating, on its face" and, therefore, "does not fall within the hearsay exception of Evidence Rule 804(b)(3)" for statements against interest;³⁰² and an inmate's refusal to testify coupled with evidence of messages indicating defendant had threatened harm on the witness was sufficient to constitute forfeiture by wrongdoing for admission under Rule 804(b)(5).³⁰³

IX. AUTHENTICATION & IDENTIFICATION: RULES 901 THROUGH 903

A. Rule 901: Authenticating or Identifying Evidence

"To lay a foundation for the admission of evidence, the proponent of the evidence must show that it has been authenticated. This generally requires extrinsic evidence 'sufficient to support a finding that the item is what the proponent claims it is.'"³⁰⁴ Rule 901(b) provides a non-exhaustive list of

296. *Bass v. State*, No. 24A-CR-2502, 2025 LX 198058, at *7 (Ind. Ct. App. June 20, 2025), *trans. denied*, 267 N.E.3d 983 (Ind. 2025); *Wright v. State*, No. 24A-CR-781, 2024 LX 71838, at *11 (Ind. Ct. App. Dec. 11, 2024).

297. *Davis v. State*, No. 24A-CR-2373, 2025 LX 25306, at *6–7 (Ind. Ct. App. Apr. 23, 2025).

298. *Hunt v. State*, 269 N.E.3d 1223, 1227–28 (Ind. Ct. App.), *trans. denied*, 272 N.E.3d 966 (Ind. 2025).

299. *Day v. State*, No. 24A-CR-1273, 2025 LX 62199, at *5–7 (Ind. Ct. App. Feb. 11, 2025), *trans. denied*, 259 N.E.3d 990 (Ind. 2025); *see also Dunn v. State*, No. 24A-CR-1855, 2025 LX 11600, at *14–15 (Ind. Ct. App. Mar. 28, 2025), *trans. denied*, 265 N.E.3d 988 (Ind. 2025).

300. *Bass*, 2025 LX 198058, at *7–10; *see, e.g., Davis*, 2025 LX 25306, at *7–9; *Quartier v. State*, 258 N.E.3d 1034, 1040 (Ind. Ct. App.), *trans. denied*, 265 N.E.3d 989 (Ind. 2025).

301. *Wright v. State*, No. 24A-CR-781, 2024 LX 71838, at *11–16 (Ind. Ct. App. Dec. 11, 2024). For discussion of history of dying declarations, *see Frank Sullivan, Jr. & Marianne L. Vorhees, The Legal Legacy of the Stephenson Case: Madge Oberholtzer's Final Testimony and its Impact on Indiana Law*, 69 RES GESTAE 12 (Nov. 2025).

302. *Perry v. State*, No. 24A-CR-2052, 2025 LX 33657, at *14–15 (Ind. Ct. App. Apr. 30, 2025); *see also Dunn*, 2025 LX 11600, at *14–15.

303. *Quiroz v. State*, 265 N.E.3d 574, 580–81 (Ind. Ct. App. 2025).

304. *Howard v. U.S. Bank Tr. Nat'l Ass'n*, No. 24A-MF-142, 2024 Ind. App. Unpub. LEXIS 1339, at *9 (Ind. Ct. App. Oct. 15, 2024) (quoting *Whetstone v. Menard, Inc.*, 161 N.E.3d 1274, 1282 (Ind. Ct. App. 2020); IND. R. EVID. 901(a)).

methods for authenticating evidence.³⁰⁵ Although the survey period produced classic examples of many of the enumerated methods for authentication, such as through personal knowledge of fingerprint cards,³⁰⁶ handwriting on letters,³⁰⁷ identification of text message authorship based on statements therein identifying the author,³⁰⁸ and identification of a recorded voice,³⁰⁹ the vast majority of decisions addressing authentication pertained either to authentication regarding social media accounts or application of the silent witness theory to visual recordings.

In four published decisions from the final quarter of 2024, the Indiana Court of Appeals affirmed authentication of social-media evidence. In *Harris v. State*, the court affirmed authentication of Instagram messages because the evidence showed the messages were found on the Instagram app on the defendant's phone and under the account number associated with the user name signed into the app.³¹⁰ In the related appeals of *Anderson*, *Jones*, and *Shields*, the court of appeals affirmed admission of Facebook messages consistent with Rule 901(b)(4),³¹¹ which allows authentication based upon "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances."³¹² An important aspect of *Anderson*, *Jones*, and *Shields* was rejection of the argument that there was no inherent link between Facebook URLs requested in a warrant and records produced by Facebook that used numeric identifiers for the corresponding accounts.³¹³

Rule 901(b)(9) allows authentication through "[e]vidence describing a process or system and showing that it produces an accurate result."³¹⁴ Although it applies to systems like weights and measurement devices,³¹⁵ it is usually used

305. IND. R. EVID. 901(b).

306. *Rosas v. State*, No. 24A-CR-416, 2025 LX 56554, at *5–6 (Ind. Ct. App. Feb. 25, 2025).

307. *Fox-Doerr v. State*, No. 24A-CR-1673, 2025 LX 12947, at *25–26 (Ind. Ct. App. May 1, 2025) (applying IND. R. EVID. 901(b)(2)), *trans. denied*, 265 N.E.3d 1006 (Ind. 2025); *see also* *King v. State*, No. 24A-CR-249, 2024 Ind. App. Unpub. LEXIS 1335, at *7–9 (Ind. Ct. App. Oct. 15, 2024) (applying IND. R. EVID. 901(b)(1) to authenticate through testimony of author of letter).

308. *Bess v. State*, No. 24A-CR-51, 2024 LX 10936, at *15–19 (Ind. Ct. App. Nov. 25, 2024) (applying IND. R. EVID. 901(b)(4)), *trans. denied*, 253 N.E.3d 525 (Ind. 2025).

309. *Mauricio v. State*, No. 24A-CR-2009, 2025 LX 34655, at *6–7 (Ind. Ct. App. Apr. 21, 2025) (applying IND. R. EVID. 901(b)(5)).

310. 245 N.E.3d 184, 190 (Ind. Ct. App. 2024), *trans. denied*, 259 N.E.3d 299 (Ind. 2025).

311. *Anderson v. State*, 251 N.E.3d 1066, 1085–88 (Ind. Ct. App. 2024), *trans. denied*, 255 N.E.3d 443 (Ind. 2025); *Jones v. State*, 250 N.E.3d 1062, 1081–84 (Ind. Ct. App. 2024), *trans. denied*, 255 N.E.3d 442 (Ind. 2025); *Shields v. State*, 248 N.E.3d 1246, 1265–68 (Ind. Ct. App. 2024), *trans. denied*, 255 N.E.3d 443 (Ind. 2025).

312. IND. R. EVID. 901(b)(4).

313. *Anderson*, 251 N.E.3d at 1087–88; *Jones*, 250 N.E.3d at 1083; *Shields*, 248 N.E.3d at 1268.

314. IND. R. EVID. 901(b)(9).

315. *See, e.g., Flaherty v. State*, No. 24A-CR-1148, 2024 LX 22561, at *12–14 (Ind. Ct. App. Dec. 19, 2024) (authentication of scale based on testimony "that the testing instruments are

for the silent-witness theory for visual recordings:

The foundation required for admitting a video depends on its use at trial. If the video is solely being used for demonstrative purposes, an adequate foundation only requires “testimony . . . that [it] accurately depict[s] the scene or occurrence as it appeared at the time in question[.]” Evidence offered for demonstrative purposes acts as an “aid[] that assist[s]’ in a human witness’s testimony.” But a video, including surveillance footage, can also be admitted as substantive, rather than demonstrative, evidence. “When surveillance videos . . . are admitted as substantive evidence, they serve ‘as silent witness[es] as to what activity is being depicted.’” This evidence triggers a heightened foundational requirement, including “a strong showing of authenticity and competency, including proof that the evidence was not altered.”³¹⁶

The rule applies equally to videos and photographs.³¹⁷ The silent-witness theory falls under Rule 901(b)(9) because it requires “evidence describing the process or system that produced the videos or photographs [to show] that the process or system produced an accurate result.”³¹⁸

During the survey period, the Indiana Court of Appeals applied the silent-witness theory to affirm authenticity of multiple surveillance videos where the sponsor of the video was able to provide explanations of the systems capturing and preserving the video.³¹⁹ Most notably, in the published decision in *Woodard-Ward v. State*, the court of appeals rejected the argument that “the State should have been required to call a witness from the jail’s IT department to testify about the functionality of the recording software” to authenticate jail surveillance video.³²⁰ The court found a sufficient foundation for authenticity was laid by testimony from “one of the limited group of persons with access to the recording [] that there was no way for him to manipulate or alter the recording” and “that he had reviewed the footage multiple times and that it had not been altered and was still the same footage as he had originally viewed a short time after the

validated by external vendors on a monthly or weekly basis, depending on the type of instrument, maintenance is performed annually, and log books are kept at the lab of calibration checks performed on the machines”), *trans. denied*, 255 N.E.3d 441 (Ind. 2025).

316. *McFadden v. State*, No. 24A-CR-1857, 2025 LX 185586, at *7–8 (Ind. Ct. App. June 16, 2025) (alterations in original) (footnote omitted) (citations omitted).

317. *Id.* at *7–8 n.5; *Mullis v. State*, 256 N.E.3d 567, 586–87 (Ind. Ct. App.), *trans. denied*, 259 N.E.3d 1002 (Ind. 2025).

318. *Mullis*, 256 N.E.3d at 587 (citation omitted).

319. *See Roberts v. State*, No. 23A-CR-3033, 2024 Ind. App. Unpub. LEXIS 1368, at *3–5 (Ind. Ct. App. Oct. 18, 2024); *Payton v. State*, No. 24A-CR-1175, 2025 LX 65549, at *6–8 (Ind. Ct. App. Mar. 12, 2025); *Boyd v. State*, No. 25A-CR-155, 2025 LX 331801, at *9–16 (Ind. Ct. App. Aug. 11, 2025), *trans. denied*, 270 N.E.3d 959 (Ind. 2025); *Cross v. State*, No. 24A-CR-2059, 2025 LX 395466, at *6–8 (Ind. Ct. App. Sep. 12, 2025), *trans. denied*, 272 N.E.3d 962 (Ind. 2025).

320. 268 N.E.3d 1266, 1272 (Ind. Ct. App.), *trans. denied*, 272 N.E.3d 952 (Ind. 2025).

battery.”³²¹

B. Rule 902: Self-Authenticating Evidence

Rule 902 acts as an exception to Rule 901’s need for authentication by classifying certain categories of evidence as self-authenticating.³²² “Self-authentication does not guarantee admissibility; rather, it relieves the proponent from providing foundational testimony.”³²³ Two of Rule 902’s twelve subparts were addressed by the Indiana Court of Appeals during the survey period. Rule 902(1), which deems domestic public documents that are sealed and signed as self-authenticating, was used in *Fisher v. State* to authenticate a packet from the Department of Correction to establish the criminal defendant’s status as a serious violent felon because the document bore “the seal of the State of Indiana, [wa]s attested to by the keeper of records, and was notarized.”³²⁴

The other subpart relied upon was Rule 902(11), which applies to a business record “that meets the requirements of Rule 803(6)(A)-(C)” and is attested to “by a certification under oath of the custodian or another qualified person.”³²⁵ A handful of notable observations can be taken from decisions by the Indiana Court of Appeals during this survey period. In *Jones v. State*, the court rejected a challenge to a certification under Rule 902(11), which contended that the certification affidavit required a notary’s signature to be valid.³²⁶ In *Quail v. State*, the court found that Rule 902(11) did not require both authentication of cellphone records and, separately, of the computer software used to generate those records.³²⁷

One other important lesson from the survey period is the need to avoid unforced errors in drafting certifications. In *Fox-Doerr v. State*, a challenge to the adequacy of a certification proved unfruitful based on waiver.³²⁸ A similar challenge, however, was sufficiently preserved and successful on appeal in *Howard v. US Bank Trust National Association*, in which the court of appeals found an attestation insufficient under Rule 902(11) that stated:

I have access to business records relating to mortgage loans that are

321. *Id.* at 1272–73.

322. IND. R. EVID. 902.

323. *In re A.B.*, No. 24A-JT-991, 2024 Ind. App. Unpub. LEXIS 1313, at *10 (Ind. Ct. App. Oct. 9, 2024) (quoting *Wells Fargo Bank, N.A. v. Hallie*, 142 N.E.3d 1033, 1038 (Ind. Ct. App. 2020)).

324. 264 N.E.3d 696, 706 (Ind. Ct. App. 2025) (applying IND. R. EVID. 902).

325. IND. R. EVID. 902(11).

326. 258 N.E.3d 1063, 1079 (Ind. Ct. App.), *trans. denied*, 265 N.E.3d 995 (Ind. 2025).

327. No. 24A-CR-1501, 2025 LX 34668, at *10–11 (Ind. Ct. App. Jan. 30, 2025), *trans. denied*, 259 N.E.3d 995 (Ind. 2025).

328. No. 24A-CR-1673, 2025 LX 12947, at *21–22 (Ind. Ct. App. May 1, 2025) (alteration in original) (calling into question attestation that the affiant “read the foregoing Affidavit and declare[d] that it is true and correct to the best of my knowledge”), *trans. denied*, 265 N.E.3d 1006 (Ind. 2025).

maintained in the ordinary course of the regularly conducted activity of mortgage loan servicing, including the business records for and relating to the mortgage loan of Howard. The statements I make in this Affidavit are based upon my review of those records relating to Howard's mortgage loan. The business records for Howard's mortgage loan were made at or near the time of the event, and by or from information transmitted from a person with knowledge.³²⁹

Consistent with *Speybroeck v. State*, the language was “merely a boilerplate recitation of the requirements of Evidence Rule 803(6) [that] certifies nothing under Evidence Rule 902(11).”³³⁰

X. CONTENTS OF WRITINGS & RECORDINGS: RULES 1001 THROUGH 1008

“The best evidence rule requires an ‘original writing, recording, or photograph’ to ‘prove its content.’”³³¹ The term “best evidence rule. . . is something of a misnomer. The 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 production of an original document rather than a copy.”³³² Regardless of its name, its purpose “is to ‘ensure that the best version of a particular item of evidence is presented—not that one item of evidence should be disregarded as being less reliable or somehow not as good as another.’”³³³

Although the heart of the rule is embodied in Rule 1002, it works in conjunction with other rules, including Rule 1003, which govern use of duplicates,³³⁴ and Rule 1004 which provides other circumstances in which the original is not required.³³⁵ Because these rules are interrelated, they are often argued in conjunction with one another when asserting a best-evidence-rule challenge.³³⁶ *Cobb v. State* was such a case in which Rules 1002, 1003, and 1004 were each raised as part of a best-evidence-rule challenge.³³⁷ There, the court of

329. No. 24A-MF-142, 2024 Ind. App. Unpub. LEXIS 1339, at *8–12 (Ind. Ct. App. Oct. 15, 2024).

330. *Id.* at *10–11 (discussing *Speybroeck v. State*, 857 N.E.2d 813, 817, 820 (Ind. Ct. App. 2007)).

331. *Straws v. State*, No. 24A-CR-929, 2024 LX 62258, at *8 n.2 (Ind. Ct. App. Dec. 3, 2024) (quoting IND. R. EVID. 1002).

332. *DeMarco v. Ohio Decorative Prods.*, No. 92-2294, 1994 U.S. App. LEXIS 3848, at *27 (6th Cir. Feb. 25, 1994).

333. *Straws*, 2024 LX 62258, at *8 n.2 (quoting *Swihart v. State*, 71 N.E.3d 60, 63 n.3 (Ind. Ct. App. 2017)).

334. IND. R. EVID. 1003.

335. IND. R. EVID. 1004.

336. *See, e.g., Stansel v. State*, No. 24A-CR-554, 2024 Ind. App. Unpub. LEXIS 1438, at *4–5 (Ind. Ct. App. Oct. 31, 2024).

337. No. 23A-CR-2907, 2024 Ind. App. Unpub. LEXIS 1443, at *10–18 (Ind. Ct. App. Nov. 4, 2024).

appeals held that it was error to allow five still images from a video and witness to testify as to the contents of the video in lieu of placing a copy of the video into evidence.³³⁸ What implicated Rules 1003 and 1004 was that the original security surveillance video no longer existed; instead, what remained was a re-recorded video captured using a cell phone.³³⁹

The appellate court rejected an argument under Rule 1003 that “the still photos were admissible as either originals or duplicates.”³⁴⁰ As the court explained:

Under Evidence Rule 1003, a duplicate is admissible to the same extent as an original unless “the circumstances make it unfair to admit the duplicate.” As our Supreme Court has observed, the introduction of “photos pulled from a video” raises interesting questions about the best evidence rule and whether such photos are duplicates within the meaning of Evidence Rule 1003. We, too, need not determine whether still photographs pulled from a video would constitute an original or a duplicate of the video, because the State never sought to introduce all 9,006 photos comprising the video. And regardless of classification, five photos and witness recollection of a video are an insufficient substitute for a video’s contents, especially where a video *still exists*. Under these circumstances, it was unfair to admit five select photos in lieu of the video itself.³⁴¹

Notably, had it been the defendant who sought to use the still photos, the best evidence rule would likely have not been an impediment. The video was not produced by the state in discovery.³⁴² Under Indiana Trial Rule 34,³⁴³ “[w]hen a party or witness in control of a writing or document subject to examination under this rule or Rule 9.2(E) refuses or is unable to produce it, evidence thereof must be allowed by other parties without compliance with the rule of evidence requiring production of the original document or writing as best evidence.”³⁴⁴ In this instance, Rule 34 would not apply, because it was the prosecution, not the defense, seeking to use the still images.

338. *Id.*

339. *Id.* at *10.

340. *Id.* at *14.

341. *Id.* at *14–15 (footnote omitted) (quoting IND. R. EVID. 1003; *D.Z. v. State*, 100 N.E.3d 246, 249 n.1 (Ind. 2018)).

342. *Id.* at *16–17.

343. Although the Indiana Trial Rules generally govern only civil proceedings, IND. R. TRIAL P. 1, the discovery rules are incorporated into Indiana criminal proceedings. *Minges v. State*, 192 N.E.3d 893, 897 (Ind. 2022) (citing IND. R. CRIM. P. 21 (2022)); IND. R. CRIM. P. 1.1 (2024); IND. R. CRIM. P. 2.5 (2024).

344. IND. R. TRIAL P. 34(H) (2026). The language quoted above is taken from the amended version of Rule 34, which took effect on January 1, 2026. Prior to amendment, nearly identical language was contained in Rule 34(D). *In re Ord. Amending Rules of Trial Proc.*, No. 25S-MS-5, 2025 LX 365814, at *23 (Ind. Sep. 9, 2025).

Although not addressed in *Cobb*, its holding is reminiscent of the Indiana Supreme Court's ruling in *Tobar v. State* that the best evidence rule dictates that the audio recording, when they exist, should be used in lieu of transcripts because "[t]he best evidence of the statement or conversation remains the tape itself."³⁴⁵ The rationale for preferring recordings over transcripts is the need to place statements into context.³⁴⁶ As with audio recordings, video stills strip context that only recordings can provide. It merits mention, however, that courts from beyond Indiana have held that stills of videos are duplicates of originals and satisfy the best evidence rule.³⁴⁷

XI. STATUTORY EVIDENTIARY PROCEDURES

Like common-law evidentiary procedures, Rule 101(b) preserves statutory evidentiary procedures that do not conflict with the Rules of Evidence.³⁴⁸ One such statute is codified at Indiana Code section 9-30-6-6, which governs the admission of blood-test results.³⁴⁹ One provision of that statute allows collection of samples by non-physicians "acting under the direction of or under a protocol prepared by a physician[.]"³⁵⁰ During the survey period, there were multiple challenges to whether there was sufficient evidence that samples were collected pursuant to a physician's protocol.³⁵¹ The Indiana Court of Appeals found a sufficient foundation laid where a nurse "testified that her hospital had a protocol for blood draws, that a physician approved the protocol, and that she was trained in and followed the protocol."³⁵² In a separate opinion, the court of appeals rejected a challenge based on the witness's inability to "articulate every step of the protocol verbatim in her testimony."³⁵³ Instead, the court noted, the witness "was not required to recite the hospital protocol verbatim in her testimony, nor was she required to be viewing the protocol at the time she completed the blood draw."³⁵⁴

345. 740 N.E.2d 106, 107 (Ind. 2000).

346. *See, e.g.,* *McBeth v. Nissan Motor Corp. U.S.A.*, 921 F. Supp. 1473, 1480 (D.S.C. 1996) ("However, since the remarks were clearly intended to be, and taken as humorous, and since humor is a matter of words, timing, and audience context, the best evidence of the remarks is an authentic audio recording.").

347. *See, e.g.,* *United States v. Perry*, 925 F.2d 1077, 1082 (8th Cir. 1991); *Est. of Pickett v. Howell*, No. A21-0960, 2022 Minn. App. Unpub. LEXIS 322, at *11–12 (Minn. Ct. App. May 23, 2022); *State v. Jennings*, No. 08-MA-181, 2009 Ohio App. LEXIS 5460, at *6 (Ohio Ct. App. Dec. 7, 2009).

348. IND. R. EVID. 101(b).

349. IND. CODE § 9-30-6-6 (2025).

350. IND. CODE § 9-30-6-6(a) (2025).

351. *See, e.g.,* *James v. State*, No. 24A-CR-378, 2025 LX 41972, at *3–6 (Ind. Ct. App. Mar. 25, 2025), *trans. denied*, 262 N.E.3d 816 (Ind. 2025).

352. *Howard v. State*, No. 24A-CR-1246, 2025 LX 41197, at *5 (Ind. Ct. App. Apr. 8, 2025).

353. *Martinez-Orta v. State*, 254 N.E.3d 1149, 1157 (Ind. Ct. App. 2025).

354. *Id.*

XII. COMMON LAW RULES: CORPUS DELICTI & SPOLIATION

Upon their adoption, the Indiana Rules of Evidence supplanted common-law practices, but only to the extent not reconcilable with a rule of evidence.³⁵⁵ The survey period provided important insights into two common law doctrines: the *corpus delicti* rule and spoliation.³⁵⁶

A. Corpus Delicti Rule

Under the *corpus delicti* rule, evidence solely of “a nonjudicial confession of guilt” is insufficient to support a criminal conviction.³⁵⁷ In order to sustain a conviction based upon a confession, “[t]here must be ‘independent proof of the corpus delicti’”³⁵⁸—i.e., the “body or substance of the crime.”³⁵⁹ “The corpus delicti rule requires only enough independent evidence to support an inference that someone committed the charged crime—a much lower bar than proving beyond reasonable doubt that a specific defendant committed the crime.”³⁶⁰ “This rule exists to prevent convictions based solely upon confessions to crimes that never occurred.”³⁶¹

The Indiana Court of Appeals twice analyzed the corpus delicti rule in the context of confessions. In *Smith v. State*, the court found sufficient independent evidence for a conviction of unlawful possession of a firearm where the criminal defendant had stipulated to his status as a felon and that a firearm was found in the vehicle in which the defendant was a passenger.³⁶² In *Womack v. State*, the court affirmed a conviction for neglect of a dependent, resulting in the death of a 28-day-old infant, based on evidence that a deceased infant died from suffocation and was found in a position consistent with that described by the defendant in his confession.³⁶³

B. Spoliation

During the survey period, the Indiana Court of Appeals issued an opinion

355. IND. R. EVID. 101(b).

356. Although not breaking new ground, the Indiana Court of Appeals opinion in *Turner v. KLS Servs., LLC*, 254 N.E.3d 1082, 1088–90 (Ind. Ct. App. 2025), provided a thorough summary to Indiana’s application of the common-law parol evidence rule, which would serve practitioners as a useful reference point for the standards governing its application.

357. *Womack v. State*, No. 24A-CR-3127, 2025 LX 162713, at *5 (Ind. Ct. App. June 20, 2025) (quoting *Shinnock v. State*, 76 N.E.3d 841, 843 (Ind. 2017)), *trans. denied*, 267 N.E.3d 982 (Ind. 2025).

358. *Id.* (quoting *Shinnock*, 76 N.E.3d at 843).

359. DAVID MELLINKOFF, MELLINKOFF’S DICTIONARY OF AMERICAN LEGAL USAGE 128 (1992).

360. *Smith v. State*, No. 24A-CR-1278, 2024 LX 33519, at *5 (Ind. Ct. App. Dec. 23, 2024).

361. *Id.* at *4.

362. *Id.* at *1–2, *5.

363. *Womack*, 2025 LX 162713, at *4–6.

that was viewed as a major victory for plaintiffs in applying the doctrine of spoliation.³⁶⁴ “Spoliation is a particular discovery abuse that involves the intentional or negligent destruction, mutilation, alteration, or concealment of physical evidence.”³⁶⁵ In *Rosen v. Community Healthcare System*, the appellate court held that refusal of a jury instruction on spoliation due to a hospital’s failure to preserve video evidence was an abuse of discretion.³⁶⁶ As the appellate court stated, “Whether intentional or negligent, Hospital’s failure to preserve additional footage from the camera facing the main entrance and the video recordings from other cameras in the area of the lobby was spoliation.”³⁶⁷

Although the opinion was notable, the Indiana Supreme Court granted transfer, thereby vacating the opinion of the court of appeals.³⁶⁸ On transfer, Justice Goff believed “the trial court should have had the parties present evidence on the destruction of the video footage, had the parties argue what inferences to draw from the destruction of evidence, and given Rosen’s proffered instruction.”³⁶⁹ The majority of the court, however, concluded that “the trial court’s evidentiary rulings were reasonable judgment calls within the trial judge’s discretion, and [that the court] must defer to those rulings.”³⁷⁰

364. *Rosen v. Cmty. Healthcare Sys.*, 257 N.E.3d 6, 12–16 (Ind. Ct. App. 2025), *vacated*, 2026 LX 129887 (Ind. 2026).

365. *Id.* at 12 (citation omitted).

366. *Id.* at 12–16.

367. *Id.* at 14.

368. *Rosen v. Cmty. Healthcare Sys.*, 265 N.E.3d 1002 (Ind. 2025); IND. R. APP. P. 58(A).

369. *Rosen v. Cmty. Healthcare Sys.*, No. 25S-CT-217, 2026 LX 129887, at *28 (Ind. Mar. 11, 2026) (Goff, J., dissenting).

370. *Id.* at *23 (majority opinion).

SURVEY OF INDIANA LAW OF PROFESSIONAL RESPONSIBILITY (2024–2025)

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INTRODUCTION

From July 1, 2024, through July 1, 2025, the Indiana Supreme Court decided a few noteworthy cases relevant to the law of professional responsibility. In *Matter of Wruble*, the court considered whether the “offensive personality” clause of the Oath of Attorneys may serve as a charging theory in attorney disciplinary cases.¹ In *Seabolt v. State*, the court discussed the objective observer standard for disqualification of judges.²

During the relevant period, the court issued three other disciplinary opinions. One of these opinions involved a significant judicial disciplinary matter. The other two were notable per curiam opinions, involving attorney disciplinary matters.

I. *WRUBLE*: OFFENSIVE PERSONALITY

In July 2024, the Indiana Supreme Court approved an agreement in which an attorney admitted to violating the “offensive personality” clause in the Oath of Attorneys.³ However, one member of the court dissented to the use of the

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1. 236 N.E.3d 677 (Ind. 2024).

2. 240 N.E.3d 1249 (Ind. 2024).

3. *Wruble*, 236 N.E.3d at 678; IND. ADMIS. DISC. R. 22. Under this rule, each applicant to the practice of law is required to “take and subscribe” to the following oath or affirmation:

I do solemnly swear or affirm that: I will support the Constitution of the United States and the Constitution of the State of Indiana; I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any action, proceeding, or defense which shall appear to me to be unjust, but this obligation shall not prevent me from defending a person charged with crime in any case; I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or

“offensive personality” clause as a charging theory,⁴ and three other members of the court indicated that they would be open to considering whether a disciplinary charge could be based solely on a violation of the Oath if the issue were presented in a case where the question would be decisive.⁵

In *Wruble*, the Indiana Supreme Court held that the respondent attorney violated the “offensive personality” clause of the Oath.⁶ After the respondent’s representation of his client ended, the client left a one-star review on the respondent’s Google page in which the client complained of poor communication and representation by the respondent.⁷ The respondent responded to this Google review by making multiple profane and derogatory demands that the client remove the one-star review.⁸ The client refused, and the respondent posted damaging information about the client relating to the subject of representation.⁹ The Commission charged the respondent with impermissibly revealing information relating to the representation under Rule 1.9(c) and violating the Oath of Attorneys under Admission and Discipline Rule 22.¹⁰ Ultimately, the Commission reached a conditional agreement with the respondent in which the respondent stipulated to violating both rules.¹¹ The Indiana Supreme Court accepted the conditional agreement.¹² Despite approval of the conditional agreement, three members of the court expressed reservations in a concurring opinion about using the Oath of Attorneys as a charging theory in attorney disciplinary cases.¹³ Further, one member of the court dissented against the use of the Oath of Attorneys as a charging theory in attorney disciplinary cases.¹⁴

In his concurring and dissenting opinion, Justice Slaughter agreed with the court that the conditional agreement between the Commission and the respondent attorney should be accepted for the respondent’s violation of Rule 1.9(c) because the respondent attorney impermissibly revealed a former client’s

law; I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself; I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will not encourage either the commencement or the continuance of any action or proceeding from any motive of passion or interest; I will never reject, from any consideration personal to myself, the cause of the defenseless, the oppressed or those who cannot afford adequate legal assistance; so help me God.

Id.

4. *Wruble*, 236 N.E.3d at 678–79 (Slaughter, J., concurring in part and dissenting in part).

5. *Id.* at 678 (Molter, J., concurring).

6. *Id.* at 677 (majority opinion).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 678 (Molter, J., concurring).

14. *Id.* at 678–79 (Slaughter, J., concurring in part and dissenting in part).

information related to the representation on social media.¹⁵ However, Justice Slaughter departed from the court's acceptance of the Oath of Attorneys as a stipulated disciplinary charge.¹⁶ Justice Slaughter explained:

To be clear, my objection is not that this charge lacks factual support; Wruble's personality during this episode was indeed offensive. I am concerned, rather, with interpreting our oath of attorneys to impose minimal standards that warrant sanctions for those whose conduct falls short. The oath is broad and aspirational, and it lacks the specific standards found in other rules—or in the myriad primary and secondary authorities refining those rules.¹⁷

Justice Slaughter conceded that the respondent attorney did in fact exhibit an offensive personality, but he concluded that the Oath of Attorneys should not be used as a disciplinary charge due to its “inherently subjective” nature.¹⁸ Justice Slaughter reasoned:

My specific concern is with the ever-present threat that lawyers will face charges for whatever the commission deems an “offensive personality”—an inherently subjective assessment that risks a dangerous slippery slope. The rules contemplate a wide range of permissible lawyer conduct that runs the gamut from amiable to aggressive, milquetoast to militant, passive to pugnacious. Unpopular lawyers or those with disfavored clients may be especially vulnerable to enforcement overreach. The better enforcement practice, in my view, is for the commission to avoid “offensive personality” charges altogether and to ground charges against those deserving of professional sanction (like Wruble) in one or more targeted professional-conduct rules.¹⁹

By emphasizing his concern of the Commission's potential “enforcement overreach,” Justice Slaughter highlights that the Disciplinary Commission's purpose is twofold. First, under Indiana Admission and Discipline Rule 23, the

15. *Id.* at 678. Indiana Rule of Professional Conduct 1.9(c) provides:

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) Use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
- (2) Reveal information relating to the representation except as these Rules would permit or require with respect to a client.

16. *Wruble*, 236 N.E.3d at 678–79 (Slaughter, J., concurring in part and dissenting in part).

17. *Id.*

18. *Id.* at 679.

19. *Id.*

Disciplinary Commission is given the power to protect the public, the courts, and other members of the bar from misconduct on the part of certain attorneys.²⁰ Second, the Disciplinary Commission has a duty to protect attorneys from “unwarranted claims of misconduct.”²¹ In his dissent to the use of the Oath of Attorneys as a charge, Justice Slaughter reminds the Commission that it should protect attorneys from “unwarranted claims of misconduct”²² that might be leveled against unpopular attorneys or attorneys who represent disfavored clients.²³

In the separate concurring opinion written by Justice Molter and joined by Chief Justice Rush and Justice Massa, Justice Molter agreed that the conditional agreement between the Disciplinary Commission and the respondent attorney should be accepted because “the parties’ agreement that Respondent [Attorney] violated Rule of Professional Conduct 1.9(c) is independently sufficient to support their agreed discipline on these facts.”²⁴ However, Justice Molter noted his openness to considering the question of whether an attorney could be sanctioned under the Oath of Attorneys.²⁵ In his concurring opinion, Justice Molter explained:

I remain open to considering the question Justice Slaughter’s partial dissent identifies. That is, whether an attorney can be sanctioned for violating the oath that Admission and Discipline Rule 22 requires attorneys “take and subscribe to,” including its promise to “abstain from offensive personality.” Or whether instead such a violation must be independently grounded in another rule ²⁶

These two concurring/dissenting opinions make clear that the majority of the Indiana Supreme Court remains open to addressing the question whether the “offensive personality” clause in the Oath of Attorneys should be used by the Disciplinary Commission as a charging vehicle in attorney disciplinary cases.

A. A Brief History of Offensive Personality in Indiana

In his concurring/dissenting opinion, Justice Slaughter cautions that the “offensive personality” charge risks a “dangerous slippery slope” toward

20. Indiana Admission and Discipline Rule 23(I)(1)(c) provides that “[t]he procedures set forth in this Rule shall be employed and construed to protect the public, the courts and the members of the bar of this State from misconduct on the part of attorneys, and to protect attorneys from unwarranted claims of misconduct.”

21. *Id.*

22. *Id.*

23. *Wruble*, 236 N.E.3d at 679 (Slaughter, J., concurring in part and dissenting in part).

24. *Id.* at 678 (Molter, J., concurring).

25. *Id.*

26. *Id.*

“enforcement overreach.”²⁷ As pointed out, Justice Slaughter’s warning aligns with the Disciplinary Commission’s duty to protect attorneys from unwarranted claims of misconduct. Before examining the question of whether the Commission should use the Oath as a vehicle for disciplinary charges against attorneys, it makes sense to examine how the use of the Oath in disciplinary charges came to be.

The first mention of “offensive personality” in Indiana cases dates back to the nineteenth century, but “offensive personality” was not used as a basis for attorney discipline at that time.²⁸ In 1964, the Indiana Supreme Court found that an attorney violated the Oath of Attorneys, and specifically, the “offensive personality” clause, in a case styled as *In re Disbarment of Holovachka*.²⁹ In this case, the court found that a prosecuting attorney failed to report income that the prosecuting attorney received in exchange for his protection, kickbacks, and bribes from illegal gambling and prostitution syndicates, and the court found that this prosecuting attorney failed to pay taxes to the federal government on these funds.³⁰ However, these activities were not the basis for the finding that the prosecuting attorney engaged in offensive personality. Instead, the court found the prosecuting attorney “was guilty of offensive personality” when he obstructed the investigation of a U.S. Senate Committee into his use of his office as prosecutor and his position as head of a syndicated gambling operation to harm a local labor union.³¹ In addition, the court found that the prosecuting attorney committed a violation of the offensive personality clause when he abusively refused “to honor the subpoena of the Commissioner [of the disbarment proceeding].”³² The *Holovachka* court concluded:

[The prosecuting attorney’s] own words, spoken in a rage, to the officer serving the legal process of the Commissioner appointed by this Court, were that he had no intention of honoring the subpoena to appear at the hearing. It is further uncontradicted that [the prosecuting attorney] ordered the officer serving the process off the premises. It would be hard to envision a more flagrant case of offensive personality than that here exhibited in utter definance [sic] of legal process and authority of this Court.³³

27. *Id.* at 679 (Slaughter, J., concurring in part and dissenting in part).

28. *See, e.g., Ex parte Walls*, 73 Ind. 95 (1880) (finding an attorney seeking readmission to the practice of law in Indiana engaged in “offensive personality” in the presentation of his case); *Redman v. State*, 28 Ind. 205 (1867) (upholding a criminal court’s ruling to prohibit attorney from cross-examining witness due to attorney’s violation of his duty to refrain from offensive personality and to maintain the respect due to the courts).

29. 198 N.E.2d 381, 393–94 (Ind. 1964).

30. *Id.* at 389.

31. *Id.* at 393.

32. *Id.* at 394.

33. *Id.*

The court concluded that the prosecuting attorney's refusal to cooperate with the United States Senate Select Committee's hearing (and thereby obstructing these Committee hearings) and the prosecuting attorney's utter defiance of the disbarment proceedings were flagrant examples of the prosecuting attorney's offensive personality.³⁴ Here, the Indiana Supreme Court's finding of offensive personality aggravates the underlying charges of failure to report and pay taxes to the federal government and adds weight to the court's finding that the prosecuting attorney was concealing his protection of illegal activity in exchange for kickbacks.

In 1971, the Indiana Supreme Court adopted Indiana Admission and Discipline Rule 23 and created the present-day Disciplinary Commission.³⁵ After *Holovachka*, the present-day Disciplinary Commission did not charge an attorney with violating the "offensive personality" clause of the Oath of Attorneys until after 1995. The Disciplinary Commission began to consider charging the "offensive personality" clause due to the Indiana Supreme Court's use of the "offensive personality" clause as a professional standard against an attorney who engaged in abusive, insulting behavior towards an opposing party in a case.³⁶ However, in *Burns*, the Disciplinary Commission did not charge the respondent attorney with violating the "offensive personality" clause. Instead, the Disciplinary Commission charged the respondent attorney with

using a means in representing a client that had no substantial purpose other than to embarrass, delay or burden a third party in violation of Ind. Professional Conduct Rule 4.4; committing a criminal act, to wit: Intimidation, that reflects adversely on his fitness as a lawyer, in violation of Prof.Cond.R. 8.4(b); and engaging in conduct prejudicial to the administration of justice, in violation of Prof.Cond.R. 8.4(d).³⁷

34. *Id.*

35. See Historical Notes to Indiana Admission and Discipline Rule 23. The Historical Notes to Rule 23 outlines that the Disciplinary Commission was created by Rule 23 on June 23, 1971. Before June 23, 1971, the attorney general of Indiana or a disciplinary commission appointed by the Indiana Supreme Court could institute an original action with the Indiana Supreme Court to disbar, suspend, or discipline attorneys in the state of Indiana. Rule 23 changed this procedure by creating a standing Disciplinary Commission that has the authority to investigate and prosecute attorneys for misconduct and to file a complaint for disciplinary action with the Indiana Supreme Court.

36. *In re Burns*, 657 N.E.2d 738 (Ind. 1995).

37. *Id.* at 739. Indiana Rule of Professional Conduct 4.4(a) provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." Rule 4.4 was amended in January 2005 to include a paragraph (b). Indiana Rule of Professional Conduct 8.4(b) states that "It is professional misconduct for a lawyer to . . . to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Indiana Rule of Professional Conduct 8.4(d) declares that "It is professional misconduct for a lawyer . . . to engage in conduct that is prejudicial to the administration of justice."

The Disciplinary Commission based these charges on statements that the respondent attorney made to the opposing party, a former attorney who was no longer practicing.³⁸ The former attorney represented himself during the lawsuit that the respondent handled for his client.³⁹ During a recess of a pre-trial conference, the respondent attorney threatened the former attorney:

Let me . . . let me warn you about something. If you file anything with the bankruptcy court against me, I'll be asking for attorney fees and punitive damages. You have my word on it, . . . And the next time you write my client a letter, I'm not going to file anything with the Court; I'm going to come over to your house and I'm going to hit you in the head with a baseball bat. Now, you may not be practicing law, but you know better than that. If I ever find out you wrote my client a letter again or sent him anything, you've got me to deal with. Do you understand: You better understand it right now, because I'm not going to tell you a second time. Now, that's my promise to you, right here on the record. I'm going to come over to your house and beat you half to death with a baseball bat.⁴⁰

According to the court, the respondent attorney continued to threaten the former attorney when the respondent attorney directed the former attorney to cease his direct communication with the respondent attorney's client:

BURNS [RESPONDENT ATTORNEY]: You'll communicate through me or you won't communicate at all. Do you understand me?

FORMER ATTORNEY: Are you threatening me physically?

BURNS: Oh, you've got it. You are exactly correct. I'm threatening you physically. You'll either follow the rules or you'll have to deal with me. Do you understand? And if I have to tell you that again, you're going to go out of here in a hospital van. Don't press your luck, . . . Don't press your luck. Because you're not going to like me if I'm angry. You won't walk away from it. I guarantee you. Don't look grave to me, because if you do, you're a . . . (obscenity). I swear to God.

FORMER ATTORNEY: You'd better kill me.

BURNS: Oh, believe me, I will. Believe me, I will. And I will get a medal for it.⁴¹

38. *Burns*, 657 N.E.2d at 739.

39. *Id.*

40. *Id.*

41. *Id.*

The Indiana Supreme Court found that the respondent attorney violated Rule 4.4 and Rule 8.4(d) but declined to find that the respondent attorney committed the crime of intimidation in violation of Rule 8.4(b).⁴² In discussing the appropriate sanction, the Indiana Supreme Court noted that the respondent attorney's conduct raised questions as to his fitness as an attorney, explaining:

[T]he aggressive nature of the comments and acts made by Respondent in this case clearly goes beyond acceptable standards of professionalism. It was contrary [to] the Oath of Attorneys which requires abstention from offensive personality; it undermines public confidence in and respect for the legal system; and it is prejudicial to the administration of justice. Respondent's professional misconduct warrants a period of suspension.⁴³

The court suspended the respondent attorney for a period of thirty days due to his "abusive, insulting, and threatening behavior."⁴⁴

After the Indiana Supreme Court's application of the "offensive personality" clause in *Burns*, the Disciplinary Commission began to see it as a possible charge in certain attorney discipline cases—not always with success. In 2001, the Indiana Supreme Court approved an agreement between the Disciplinary Commission and the respondent attorney in *Matter of Coons*.⁴⁵ In *Coons*, the respondent admitted he violated the Oath of Attorneys when he inquired about his client's sexual practices, inquired whether she had ever considered becoming a prostitute, suggested that she wear provocative clothing to the bar, and asked her to show him her breasts.⁴⁶

However, the court declined to find that two respondents violated the "offensive personality" clause in the Oath of Attorneys in *Matter of Britton*⁴⁷ and in *Matter of Carnahan*.⁴⁸ In *Britton* and *Carnahan*, the court did not comment on whether it approved or disapproved of the Disciplinary Commission's use of the "offensive personality" clause as a charging theory in attorney disciplinary cases. But it appears that the court only accepted the "offensive personality" clause charge when the respondent and the Disciplinary Commission agreed to the charge. It appears from these more recent cases that

42. *Id.*

43. *Id.* at 740 (suspending the respondent attorney for a period of thirty days).

44. *Id.*

45. 751 N.E.2d 678 (Ind. 2001).

46. *Id.* at 679.

47. See 131 N.E.3d 145 (Ind. 2019) (entering judgment for the respondent and finding Commission failed to prove violations of conduct prejudicial to the administration of justice under Rule 8.4(d) and violation of the offensive personality clause in the Oath of Attorneys under Indiana Admission and Discipline Rule 22).

48. See 163 N.E.3d 280 (Ind. 2021) (entering judgment for the respondent and finding Commission failed to prove that the respondent violated the offensive personality clause of the Oath of Attorneys under Indiana Admission and Discipline Rule 22).

the Indiana Supreme Court is reticent to use the “offensive personality” clause as grounds for a disciplinary charge, especially after its discussion on “offensive personality” as a charge in *Wruble*. Together, *Burns* and *Wruble* suggest that the court might be conflicted on the use of the “offensive personality” clause and should consider looking for another way to address the issue of character and fitness to practice in attorney disciplinary cases.

B. Fitness to Practice

After the *Wruble* discussion by the members of the Indiana Supreme Court, the question arises whether there is a better enforcement practice, as suggested by Justice Slaughter, “to avoid ‘offensive personality’ charges altogether and to ground charges against those deserving of professional sanction . . . in one or more targeted professional-conduct rules.”⁴⁹ The question is whether the Indiana Rules of Professional Conduct should include a new “more targeted” professional conduct rule. Such a rule could address when an attorney’s conduct “clearly goes beyond acceptable standards of professionalism” and “draws question as to his fitness as an attorney.”⁵⁰

There might be times when a lawyer’s conduct “clearly goes beyond acceptable standards of professionalism”⁵¹ and has not violated the current rules under the Indiana Rules of Professional Conduct. These fitness and character questions might not violate a specific rule in the Indiana Rules of Professional Conduct but run underneath certain attorney disciplinary cases because the attorney’s conduct “undermines public confidence in and respect for the legal system.”⁵²

In addition to attorney discipline cases, the court examines the character and fitness of lawyers in other contexts. The court examines the character and fitness of applicants to be admitted to the practice of law in Indiana.⁵³ The court also requires suspended attorneys seeking reinstatement to the practice of law in Indiana to demonstrate that the attorney “can safely be recommended to the legal profession, the courts and the public as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence”⁵⁴ In *Matter of Gutman*, the court reasoned that the fitness element in an attorney reinstatement includes an examination of the character and fitness of the attorney seeking reinstatement.⁵⁵ The *Gutman* court explained:

49. *In re Wruble*, 236 N.E.3d 677, 679 (Ind. 2024) (Slaughter, J., concurring in part and dissenting in part).

50. *In re Burns*, 657 N.E.2d 738, 740 (Ind. 1995).

51. *Id.*

52. *Id.*

53. IND. ADMIS. DISC. R. 12 (requiring applicants to the practice of law in Indiana to have the requisite moral character and fitness to be admitted to practice law in the state of Indiana).

54. IND. ADMIS. DISC. R. 23(18)(b)(3)(vii).

55. 599 N.E.2d 604 (Ind. 1992).

We agree with the view that this examination is a balancing process in which on one side of the scale we place the seriousness of the misconduct and on the other, Petitioner's subsequent conduct and his present character. . . . The more serious the misconduct, the greater its negative impact on future rehabilitation and eventual reinstatement, the greater Petitioner's burden of proof to overcome the implication of unfitness which is conjured by the misconduct. . . . The seriousness of past misconduct is unquestionably an important consideration which cannot be eliminated by subsequent exemplary conduct.⁵⁶

Because character and fitness are integral parts of admission and discipline process in Indiana, the court should consider amending the Indiana Rules of Professional Conduct to include a rule directed at egregious types of character and fitness issues that are not covered by the current Indiana Rules of Professional Conduct. A rule amendment would emphasize that attorneys have a continuing duty to refrain from conduct that reflects adversely on their character and fitness to practice as lawyers.

Several states have a rule that targets a lawyer's "fitness to practice," including Alabama, Colorado, Kansas, Massachusetts, New York, Ohio, and Washington.⁵⁷ All of these states have similar language in their fitness-to-practice rules. Ohio Rule of Professional Conduct 8.4(h) provides that "It is professional misconduct for a lawyer . . . to engage in any other conduct that adversely reflects on the lawyer's fitness to practice law."⁵⁸

In 2013, the Ohio Supreme Court considered the use of Rule 8.4(h) when the charged misconduct, namely commingling funds, was covered by other provisions of the Ohio Rules of Professional Conduct.⁵⁹ In *Bricker*, the Ohio Supreme Court held:

Prof. Cond. R. 8.4(h) is a catchall provision. In order to find a violation

56. *Id.* at 608 (internal citations omitted).

57. See ALA. RULES OF PRO. CONDUCT r. 8.4(g) (prohibiting lawyers from engaging in any other conduct that adversely reflects on his fitness to practice law); COLO. RULES OF PRO. CONDUCT r. 8.4(h) (prohibiting lawyers from engaging in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law); KAN. RULES OF PRO. CONDUCT r. 8.4(g) (prohibiting lawyers from engaging in any other conduct that adversely reflects on the lawyer's fitness to practice law); MASS. RULES OF PRO. CONDUCT r. 8.4(h) (prohibiting a lawyer from engaging in any other conduct that adversely reflects on his or her fitness to practice law); N.Y. RULES OF PRO. CONDUCT r. 8.4(h) (prohibiting a lawyer from engaging in any other conduct that adversely reflects on the lawyer's fitness as a lawyer); OHIO RULES OF PRO. CONDUCT r. 8.4(h) (prohibiting a lawyer from engaging in any other conduct that adversely reflects on the lawyer's fitness to practice law); WASH. RULES OF PRO. CONDUCT r. 8.4(n) (prohibiting a lawyer from engaging in conduct demonstrating unfitness to practice law). See also Jon J. Lee, *Catching Unfitness*, 34 GEO. J. LEGAL ETHICS 355, 387 (2021) (for in-depth discussion of fitness-to-practice rules).

58. OHIO RULES OF PRO. CONDUCT r. 8.4(h).

59. *Disciplinary Couns. v. Bricker*, 997 N.E.2d 500 (Ohio 2013).

of Prof. Cond. R. 8.4(h), there must be clear and convincing evidence that the lawyer has engaged in misconduct that adversely reflects on the lawyer's fitness to practice law, even though that conduct is not specifically prohibited by the rules, or there must be proof that the conduct giving rise to a specific rule violation is so egregious as to warrant an additional finding that it adversely reflects on the lawyer's fitness to practice law.⁶⁰

Thus, the *Bricker* court placed two limits on the use of Ohio's fitness-to-practice rule under Rule 8.4(h). First, when the lawyer's misconduct reflects adversely on the lawyer's fitness to practice law and there is not a specific rule that prohibits this misconduct.⁶¹ Second, when the lawyer's misconduct (even though it is specifically prohibited by other rules) is so egregious that it "warrant[s] an additional finding" that the lawyer's misconduct reflects adversely on the lawyer's fitness to practice law.⁶²

Ten years later, the Ohio Supreme Court found that the respondent violated the Ohio fitness-to-practice rule under Rule 8.4(h) in *Disciplinary Counsel v. Blakeslee*.⁶³ As outlined previously in *Bricker*, the Ohio Supreme Court found that the respondent violated Rule 8.4(h) by engaging in conduct that adversely reflects on the lawyer's fitness to practice law, even though the respondent's conduct was not prohibited by any other rule.⁶⁴ In *Blakeslee*, the respondent put feces in an empty Pringles can, drove twenty minutes from his home to a victim-advocates center, and threw the Pringles can containing the feces into the parking lot of the victim-advocates center.⁶⁵ The Ohio Supreme Court found that the respondent committed a pattern of misconduct because the respondent admitted that he threw feces-filled Pringles cans on at least ten other occasions.⁶⁶ In addition, the court highlighted that the respondent's conduct was directed at the director of the victim-advocates center and her colleagues because the respondent knew the director for twenty years, the respondent drove past the clearly marked building twice before throwing the Pringles can, and threw the Pringles can on his way to a court hearing when the director of the victim-advocate center was likely to attend and ultimately, did, attend the hearing.⁶⁷

The Ohio Supreme Court concluded that the respondent intentionally put the Pringles can in the parking lot of the victim-advocate center and that the respondent, who viewed the whole incident as a "prank," lacked "sufficient insight into the motivation for his inappropriate behavior to effectuate positive

60. *Id.* at 506.

61. *Id.* at 505.

62. *Id.* at 506.

63. 235 N.E.3d 416 (Ohio 2023).

64. *Id.* at 419.

65. *Id.* at 418.

66. *Id.* at 419.

67. *Id.* at 423.

change.”⁶⁸ The Ohio Supreme Court suspended the respondent for one year with six months stayed on the condition he refrain from further misconduct.⁶⁹ The court explained that the respondent’s “admittedly bizarre behavior [] falls far short of the standard of conduct expected of lawyers and tends to bring the legal profession into disrepute.”⁷⁰ This case demonstrates that some attorney misconduct reflects adversely on the practice of law even when there is not another specific rule violation in the Rules of Professional Conduct.

Adoption of a rule like Ohio’s fitness-to-practice rule in Indiana would address the concerns raised by the Indiana Supreme Court by effectively putting attorneys on notice of conduct falling under the rule, and mirroring requirements on attorney conduct that already exist in Indiana. The Ohio Supreme Court’s first limitation of the fitness-to-practice rule in *Bricker* addresses Justice Slaughter’s concerns of “enforcement overreach” by limiting the use of the fitness-to-practice rule to situations that are not covered by other rules. The second limitation imposed by the Ohio Supreme Court—restricting application to situations in which violations of other Rules of Professional Conduct are “egregious”—would permit the Indiana Supreme Court to find that a lawyer engaged in conduct reflecting adversely on the lawyer’s fitness to practice law, as in *Burns*, where the lawyer threatened to beat an opposing party “half to death with a baseball bat.”⁷¹ If Indiana adopted a fitness-to-practice rule, these limitations could be outlined in comments to the proposed fitness-to-practice rule to guide attorneys and disciplinary authorities on the use of a proposed fitness-to-practice rule. In addition, an Indiana fitness-to-practice rule, analogous to Rule 8.4(h) of the Ohio Rules of Professional Conduct, would remind lawyers of their continuing duty to refrain from conduct that reflects adversely on their fitness to practice law in all situations.

II. *SEABOLT V. STATE*: DISQUALIFICATION

In August 2024, the Indiana Supreme Court explored the conflicting tension between the judicial officer’s duty to preside over a case and a judicial officer’s duty to disqualify.⁷² *Seabolt v. State* involved four petitioners who had filed for post-conviction relief before the same judge.⁷³ Each petitioner asked the judge to disqualify herself from hearing their respective post-conviction cases under Indiana Rule for Post-Conviction Remedies 1(4)(b)⁷⁴ because the judge had

68. *Id.*

69. *Id.*

70. *Id.*

71. *In re Burns*, 657 N.E.2d 738, 739 (Ind. 1995).

72. *Seabolt v. State*, 240 N.E.3d 1249 (Ind. 2024).

73. *Id.* at 1253.

74. Indiana Rule for Post-Conviction Remedies 1(4)(b) provides:

Within ten days of filing a petition for post-conviction relief under this rule, the petitioner may request a change of judge by filing an affidavit that the judge has a

previously granted a request to recuse in another post-conviction case with similar concerns.⁷⁵ The *Seabolt* petitioners claimed that their request to disqualify the judge involved the same issues as in *Royer*.⁷⁶ Despite these similarities, the judge denied all four petitioners' requests for her disqualification in their respective cases.⁷⁷ On appeal, the Indiana Supreme Court had to decide "whether a judge's decision to recuse from a prior case disqualifies her from presiding over these cases because they all present the same concerns that led her to recuse in the prior case."

A. Royer Disqualification

To set the stage for *Seabolt*, it is important to understand the judge's recusal in *Royer*. The Indiana Supreme Court summarized *Royer*:

Andrew Royer was the petitioner in the previous case, and he sought post-conviction relief to set aside his 2005 murder conviction. He alleged that "systemic" police and prosecutorial misconduct had produced an "epidemic" of wrongful convictions in Elkhart County, including his own. Shortly after Royer first made these allegations, his attorney held a press conference amplifying them through comments that the judge concluded violated the Rules of Professional Conduct. That led the judge, who is a former Elkhart County deputy prosecutor, to not only enjoin the attorney's further public comments about the case, but also to remark that the attorney's comments were "defamatory."⁷⁸

Royer filed a "Motion for Recusal Pursuant to Indiana Post-Conviction Rule 1 § 4(B)."⁷⁹ In this motion, Royer asked the judge to recuse herself for two reasons:

The first was that he would be calling many witnesses with whom the judge worked when she was a deputy prosecutor and some of whom remained social acquaintances. And she could not be expected to remain

personal bias or prejudice against the petitioner. The petitioner's affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be accompanied by a certificate from the attorney of record that the attorney in good faith believes that the historical facts recited in the affidavit are true. A change of judge shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice. For good cause shown, the petitioner may be permitted to file the affidavit after the ten day period. No change of venue from the county shall be granted. In the event a change of judge is granted under this section, the procedure set forth in Ind. Administrative Rule 21 shall govern the selection of a special judge.

75. *Seabolt*, 240 N.E.3d at 1254 (citing *State v. Royer*, 166 N.E.3d 380 (Ind. Ct. App. 2021)).

76. *Id.* at 1252.

77. *Id.* at 1253.

78. *Id.* at 1252.

79. *Id.* at 1254.

impartial either when evaluating their credibility or when evaluating Royer's allegations of systemic police and prosecutorial misconduct and spanned the judge's own time as a deputy prosecutor. Second, Royer believed the judge's characterization of his attorney's comments as "defamatory" reflected that she had rejected his allegations of "system[ic]" police and prosecutorial misconduct before she heard any evidence.⁸⁰

The judge granted Royer's motion to disqualify her from hearing his post-conviction relief petition, and the case was reassigned to a special judge who found that many of Royer's allegations of misconduct were well-founded.⁸¹ This special judge granted Royer's petition for post-conviction relief, vacating his conviction.⁸²

B. The Seabolt Petitioners

After Royer's successful overturning of his conviction, the four petitioners in the *Seabolt* case filed their respective petitions for post-conviction relief before the same judge who recused in Royer's case.⁸³ Royer's attorney also represented the four *Seabolt* petitioners, and like Royer, they alleged that "'systemic' misconduct" has caused "an 'epidemic' of wrongful convictions."⁸⁴ Their intended witnesses, "former law enforcement officers and prosecutors," previously worked or currently associate with the judge.⁸⁵

Like Royer, all four petitioners asked the judge to recuse under Indiana Rule for Post-Conviction Remedies 1(4)(b) and "gave essentially the same two overarching reasons for questioning the judge's impartiality as Royer argued."⁸⁶ The Indiana Supreme Court summarized their arguments for the judge's disqualification as:

First, they argued the judge—who was an Elkhart County deputy prosecutor from 1998 to 2002—is deeply entangled with the evidence they intend to develop and introduce. The petitioners all intend to call as witnesses many police officers and prosecutors with whom the judge worked—some of whom the petitioners believe remain the judge's social acquaintances—to prove the petitioners' wrongful convictions resulted from what they characterize as rampant police and prosecutorial misconduct that was ongoing during the judge's time as a deputy prosecutor. The petitioners also plan to seek discovery directly

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1253.

84. *Id.*

85. *Id.*

86. *Id.* at 1257.

from the judge and possibly call her as a witness related to her knowledge of facts . . . , whether she was involved in a *Brady* violation that Seabolt claims contributed to her wrongful conviction, and her general knowledge of the practices in the prosecutor's office that relate to the petitioners' claims of misconduct. The petitioners anticipate calling two of the judge's Elkhart County judicial colleagues as witnesses. And they intend to call the judge's ex-husband as a witness because they claim he was a former Elkhart County reserve officer with extensive knowledge of the misconduct they allege and has provided an affidavit and recorded interview alleging systemic misconduct.

Second, the petitioners argued that in Royer's case the judge characterized their theory of the case as "defamatory," which suggests that she has pre-judged their allegations of systemic misconduct leading to an epidemic of wrongful convictions before hearing any evidence.⁸⁷

The judge denied all four petitioners' requests to disqualify her and certified each order denying these requests for interlocutory appeal.⁸⁸ On interlocutory appeal, the Indiana Court of Appeals affirmed the judge's orders, denying the request for the judge to recuse.⁸⁹ The four petitioners sought transfer to the Indiana Supreme Court, which was granted.⁹⁰ The four cases were consolidated into a single Indiana Supreme Court opinion which would decide all four issues.⁹¹

C. Two Competing Duties: Duty to Preside vs. Duty to Recuse

The Indiana Supreme Court framed the discussion of the four interlocutory appeals as an exploration of "the interplay between the duty to preside and the duty to recuse."⁹² These competing duties are found in the Indiana Code of Judicial Conduct. Rule 2.7 of the Indiana Code of Judicial Conduct requires that "[a] judge shall hear and decide matters assigned to the judge, except when disqualification is required under Rule 2.11 or other law."⁹³ Comment One to Rule 2.7 provides:

Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must

87. *Id.*

88. *Id.* at 1257–58.

89. *Id.* at 1258.

90. *Id.*

91. *Id.*

92. *Id.*

93. IND. JUD. COND. R. 2.7.

be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.⁹⁴

To further explain the court's position on a judicial officer's duty to preside, the Indiana Supreme Court cited to *Zavodnik v. Harper*—a case involving a “prolific, abusive litigant.”⁹⁵ This “prolific, abusive litigant” represented himself in numerous cases at the trial and appellate level.⁹⁶ In this particular case, the trial court dismissed the litigant's claim for failure to prosecute the case under Indiana Trial Rule 41(E), and the Indiana Court of Appeals dismissed his appeal for failure to file a brief or pay the filing fee.⁹⁷ This litigant sought transfer to the Indiana Supreme Court, which was denied.⁹⁸ In its opinion denying transfer, the court provided some guidance on how to handle litigants who employ abusive tactics, including “unrelenting attempts” to remove judicial officers “for alleged bias, prejudice, or misconduct by the judge.”⁹⁹

In *Zavodnik*, the court made two observations on the issue of disqualification. First, the court pointed out that judicial officers have a duty to preside over cases unless disqualification is mandatory under Rule 2.11 of the Indiana Code of Judicial Conduct.¹⁰⁰ The court further explained that “judges presiding over a case are not required to disqualify themselves as a result of a litigant's unfounded accusations, abusive tactics, or attempts to manipulate the system.”¹⁰¹ Second, the court explained:

The law starts with the presumption that a judge is unbiased and unprejudiced. A judge's exposure to evidence through judicial sources is generally insufficient to establish bias. The fact that a litigant has appeared before a judge in prior cases does not establish bias or prejudice. Prejudice is not inferred from adverse judicial rulings. Mandatory disqualification requires a showing of a personal, individual bias against the litigant.¹⁰²

In *Seabolt*, the court further explained that this duty to preside is a default

94. IND. JUD. COND. R. 2.7 cmt. 1.

95. 17 N.E.3d 259 (Ind. 2014).

96. *Id.* at 262.

97. *Id.* at 261–62.

98. *Id.*

99. *Id.* at 269.

100. *Id.*

101. *Id.*

102. *Id.*

position for judicial officers:

That duty not only promotes efficiency by spreading cases more evenly among judges and avoiding a subsequent judge needlessly duplicating the work of a previous judge, but it also promotes public trust in our judicial system. . . . Without the duty to preside, the system may appear too easily gamed. Some judges might avoid difficult or controversial cases, and the parties may seem able to delay cases unfairly through judicial disqualification or to steer their cases to judges they perceive as more favorable.¹⁰³

Next, the court noted that the competing duty of mandatory disqualification was “just as important as the duty to preside” because a judicial officer “cannot preside over cases when recusal is mandatory.”¹⁰⁴ The *Seabolt* court pointed out that disqualification is mandatory “when either a judge subjectively doubts their impartiality, or, . . . when an objective observer, familiar with all the relevant circumstances, would have a reasonable basis for doubting the judge’s impartiality.”¹⁰⁵ In short, a judicial officer is required to recuse or disqualify in two circumstances involving personal bias or prejudice. First, the judicial officer must disqualify when the judicial officer has a subjective belief that the judicial officer cannot be impartial due to personal bias or prejudice.¹⁰⁶ Second, the judicial officer must disqualify when an objective observer (familiar with all the circumstances) has a reasonable basis to doubt the judicial officer’s impartiality due to personal bias or prejudice.¹⁰⁷ The *Seabolt* court, then, defines personal bias or prejudice as

one that “stems from an extrajudicial source—meaning a source separate from the evidence and argument presented at the proceedings[.]” A judge is not personally biased or prejudiced merely because they have formed judgments about proceedings over which they have presided. After all, that is their job.¹⁰⁸

D. Objective Observer Standard

The Indiana Supreme Court then applied the “objective observer” standard to address whether the judge who recused herself in Royer’s case had a mandatory duty to disqualify herself in the four *Seabolt* petitioners’ cases. Because the judge did not subjectively doubt her ability to be impartial and ruled

103. *Seabolt v. State*, 240 N.E.3d 1249, 1258 (Ind. 2024).

104. *Id.*

105. *Id.* (internal citation omitted).

106. *Id.*

107. *Id.*

108. *Id.* at 1259 (internal citation omitted).

accordingly, the court instead applied the “objective observer standard.”¹⁰⁹ The question for the court was whether an objective observer who was familiar with all the facts and circumstances would have a reasonable basis to doubt the judicial officer’s impartiality due to personal bias or prejudice.¹¹⁰

In answering this question of the “objective observer” standard, the *Seabolt* court first noted that the mere fact that a judge formerly worked as a prosecutor does not require recusal.¹¹¹ Second, the fact that a judge is acquaintances or friends with a party, attorney, or witness does not provide “a cognizable basis for questioning the ability of that judge to be impartial in presiding over that proceeding.”¹¹² Finally, the fact that a judge made a statement about the conduct of an attorney representing a party to a case before the judge as a violation of the Rules of Professional Conduct did not require recusal.¹¹³

However, the *Seabolt* court did not focus on these individual propositions as the reason the judge was required to disqualify herself in these four cases. Instead, the court held that the judge was required to disqualify in these four petitioners’ cases because she had made a determination in Royer’s case that recusal was mandatory on the same or similar concerns as were later raised by the four petitioners.¹¹⁴ The court explained:

What is different about these appeals—and this is critical to our holding—is that the judge already decided in Royer’s case that recusal was *mandatory*. So while viewing each of the petitioners’ various concerns in isolation may not warrant recusal, the judge herself already concluded that their overarching concerns about her entanglement with the evidence and her remark about their attorney’s comments do require recusal. And an objective observer who knows the judge previously concluded she had a duty to recuse could thus reasonably doubt her impartiality in these cases. That objective observer could reasonably ask: What changed since the judge decided she was required to recuse in Royer’s case?¹¹⁵

The lesson to be learned from *Seabolt* is that a judge who recuses from a case based on concerns, like systemic police and prosecutorial misconduct, might be required to recuse from other cases when the prior case involves these same issues and concerns. After *Seabolt*, the circumstances of a judge’s recusal may have important implications for future disqualification. A judge’s recusal in a prior case might now furnish a reason for future disqualification when the same concerns arise in other cases, unless the judge can provide an explanation

109. *Id.* at 1262–63.

110. *Id.* at 1263.

111. *Id.* at 1262.

112. *Id.* at 1263.

113. *Id.* at 1262.

114. *Id.* at 1263.

115. *Id.*

of how circumstances have changed that would satisfy the reasonable questions of an objective observer.

E. Application of Seabolt to Rule 2.11

The *Seabolt* court analyzed the recusal of judges under Indiana Rule of Post-Conviction Remedies 1(4)(b), which requires a judge to recuse when an objective observer has a “rational inference of bias or prejudice” on the part of the judge in a particular case.¹¹⁶ Rule 2.11 of the Indiana Code of Judicial Conduct provides similar language to Rule 1(4)(b) of the Indiana Rules of Post-Conviction Remedies and imposes a duty on judges to disqualify themselves, as outlined in *Seabolt*.¹¹⁷ Indiana Code of Judicial Conduct Rule 2.11(A)(1) provides:

A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances:

- (1) The judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding.¹¹⁸

Under the *Seabolt* analysis, Indiana judges should keep in mind that the objective observer standard applies to Rule 2.11 of the Indiana Code of Judicial Conduct.¹¹⁹ In other words, a judge who recuses from a prior case based on concerns about the judge’s personal bias or prejudice might have to recuse from subsequent cases when the prior case involves the same issues and concerns about the judge’s personal bias or prejudice when an objective observer who knows the judge previously concluded that he or she had a duty to recuse in the prior case could reasonably doubt the judge’s impartiality in subsequent related cases.

III. MISCELLANEOUS ETHICS CASES

The Indiana Supreme Court decided three other noteworthy misconduct cases in 2024 and 2025. *Matter of Hawkins* involved judicial misconduct and was resolved by an agreement between the respondent judge and the Indiana Commission on Judicial Qualifications with a thirty-day suspension from the bench.¹²⁰ The other two misconduct cases involved attorney misconduct. *Matter*

116. IND. P-C.R. 1(4)(b).

117. IND. JUD. COND. R. 2.11.

118. *Id.* 2.11(A)(1).

119. *See Seabolt*, 240 N.E.3d at 1259.

120. 251 N.E.3d 1062 (Ind. 2025) (per curiam).

of *Pearson* is an attorney misconduct case that was tried before a hearing officer and resulted in the disbarment of the attorney.¹²¹ The second attorney misconduct case, *Matter of Miller*, was resolved by an agreement between the respondent attorney and the Indiana Disciplinary Commission.¹²²

A. Judicial Misconduct—Matter of Hawkins

In February 2025, the Indiana Supreme Court decided *Matter of Hawkins*.¹²³ The court found that the respondent judge engaged in judicial misconduct when he sexually harassed court employees during his tenure as a judge.¹²⁴ In his agreement with the Indiana Commission on Judicial Qualifications, the respondent judge agreed that he had harassed one court employee (“Employee #1”) for over thirteen years by subjecting her to unwanted physical contact, including hugging and rubbing her shoulders, commenting on her physical appearance, and asking her “Shall we have a threesome?”¹²⁵

When the respondent judge introduced himself to another court employee (“Employee #2”), the respondent judge rubbed Employee #2’s shoulder without her consent and stared at her chest.¹²⁶ The following day, the respondent judge tried to hug, put his arm around, and kiss Employee #2.¹²⁷ Employee #2 physically pushed the respondent judge away.¹²⁸

The respondent judge harassed a third court employee (“Employee #3”) while she was kneeling to help set up equipment in the courtroom.¹²⁹ The respondent judge made a comment to Employee #3 about being “on her hands and knees.”¹³⁰ Employee #3 interpreted this comment as a sexual comment and felt uncomfortable with the respondent judge.¹³¹

Finally, the respondent judge harassed a fourth court staff member (“Employee #4”). In 2024, the respondent judge hugged and kissed Employee #4’s head or cheek when she returned from a trip overseas.¹³² According to the court, the respondent judge “habitually hugged people with whom he came into contact, including court staff and others around the courthouse” during his tenure as a judge.¹³³

The Indiana Supreme Court found that the respondent judge’s acts of sexual harassment violated three rules under the Indiana Code of Judicial Conduct:

121. 251 N.E.3d 535 (Ind. 2025) (per curiam).

122. 240 N.E.3d 155 (Ind. 2024) (per curiam).

123. *Hawkins*, 251 N.E.3d at 1062.

124. *Id.* at 1063.

125. *Id.*

126. *Id.* at 1064.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

- Rule 1.2, requiring judges to act all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and avoid impropriety and the appearance of impropriety;
- Rule 2.3(B), prohibiting judges from manifesting bias or prejudice or engaging in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status socioeconomic status, or political affiliation, in the performance of judicial duties; and
- Rule 2.8(B), requiring judges to be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity.¹³⁴

The court explained, “sexual harassment by a judge is particularly reprehensible because it abuses the power imbalance between judges and subordinate judicial employees.”¹³⁵ The court pointed out that the respondent judge’s sexual harassment spanned over sixteen years and, as a result, had a negative effect on the integrity of the judiciary.¹³⁶ But the court noted that there was a more specific harm than this to the integrity of the judiciary because the respondent judge’s sexual harassment was directed at “specific court employees” who were made to feel uncomfortable and violated by his actions.¹³⁷

The court concluded: “[O]ur own rules require judges to avoid even the appearance of impropriety. . . . Respondent’s misconduct was serious, included repeated physical advances toward employees despite their express rejections, and was an abject abuse of his position and power.”¹³⁸ For his misconduct, the court suspended the respondent judge for a period of thirty days.¹³⁹

134. *Id.* at 1064–65. Indiana Code of Judicial Conduct Rule 1.2 requires that judges “shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” Indiana Code of Judicial Conduct Rule 2.3(B) provides:

A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.

Indiana Code of Judicial Conduct Rule 2.8(B) reads: “A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge’s direction and control.”

135. *Hawkins*, 251 N.E.3d at 1065.

136. *Id.*

137. *Id.*

138. *Id.* at 1065–66.

139. *Id.* at 1066.

B. Attorney Misconduct—Matter of Pearson

In 2025, the Indiana Supreme Court disbarred an attorney in *Matter of Pearson* for his “sheer depravity” when the respondent engaged in improper sexual relations with three clients.¹⁴⁰ The court described that there is a spectrum of improper sexual relations with clients, ranging from an isolated exercise of poor judgment, which causes no harm beyond that inherent in an improper sexual relationship itself, to the predatory nature of attorneys who exploit vulnerable clients for their own sexual gratification.¹⁴¹

The respondent in *Pearson* had improper sexual relations with three vulnerable clients. In its opinion, the court summarized the respondent’s sexual encounters with these three clients as follows:

“Client 1,” an 18-year-old woman dealing with substance abuse disorder and a history of sexual abuse, was arrested on drug charges in late 2015. Respondent was appointed as her public defender in early 2016. Respondent’s visits with Client 1 initially occurred at the county jail, and later at Respondent’s home office after Client 1 was released on her own recognizance. Soon, Respondent began scheduling the meetings after business hours, and these meetings all followed the same general pattern. Respondent wore casual clothing such as shorts and a T-shirt, offered Client 1 bourbon from a fancy bottle—despite her being underage to consume alcohol—and told Client 1 that he was stressed and “horny” and needed a release. During the first such meeting, Respondent approached Client 1 with an erection visible through his clothing and stood close to her face. At Respondent’s urging, Client 1 performed oral sex on him. Subsequent after-hours meetings included oral and vaginal sex. Client 1 testified that, while none of these encounters involved an explicit use of force or lack of consent, she “felt compelled because of the situation.” Respondent and Client 1 also exchanged explicit photos and texts, including messages where Respondent asked Client 1 if she was interested in a “threesome” with another woman.¹⁴²

Client 2, like Client 1, was also battling a substance abuse disorder and some of the charges she faced involved drug possession. Respondent initially met with Client 2 and her husband at Respondent’s home office. About one week later, Client 2 met with Respondent a second time after hours at his solo practice office. Client 2 brought her two young stepchildren with her for that meeting because her husband was unable to go and she felt uncomfortable meeting with Respondent alone.

140. 251 N.E.3d 535, 538 (Ind. 2025) (per curiam).

141. *Id.*

142. *Id.* at 536.

Respondent placed the children in a nook with a television and offered Client 2 a glass of dark liquor poured from a fancy bottle, which Client 2 declined. Respondent briefly discussed the cases before quickly turning the conversation to sex, telling Client 2 “sex can relieve stress and I can help you with that.” . . . Respondent then led Client 2 to another room away from her children, sat Client 2 in a chair, removed his penis from his pants, placed his arms on the chair, and encouraged Client 2 to perform oral sex on him. Client 2 testified she was unable to stand up from the chair because of how Respondent was positioned. Client 2 proceeded to perform oral sex. She testified that she did so “[b]ecause I was a vulnerable drug addict that was in a lot of trouble and . . . I thought if I did that I would get out of some of my trouble.”¹⁴³

Unlike Client 1 and Client 2, the respondent and Client 3 started their intimate relationship prior to the representation.

In March 2017, Client 3—who also has a history of substance use and sexual abuse—was charged in an initial case with drug offenses. Client 3 retained Respondent, who was an associate with Starkes Law Office at the time, to represent her and paid a \$750 retainer. Client 3 was charged with additional drug offenses in a second case in April 2017. Respondent agreed to represent her in that case as well, and although no separate retainer was paid up front, Client 3 believed she would owe additional fees for that representation.

At some point thereafter, Client 3 met Respondent at his home. Respondent poured Client 3 a glass of brown liquor from a fancy bottle, which she drank. She has little memory of what happened next. Client 3 eventually woke up naked in Respondent’s bed and saw Respondent emerging naked from the bathroom and wiping his genitals with a towel. Client 3 believed intercourse had occurred because of how her own genitals felt. She asked Respondent if he would get in trouble for having sex with a client, and Respondent told her it was okay because they had been intimate prior to the representation.

Still later, after Respondent’s employment with Starkes Law Office ended, the office sent Client 3 a letter informing her that Respondent had left and that she still owed the firm \$739.78. Client 3 responded by writing a letter to Starkes evincing her belief that Respondent had written off these fees in exchange for Client 3 having sex with him. Starkes gave the letter to Respondent and told him to take care of it.¹⁴⁴

143. *Id.* at 536–37.

144. *Id.* at 537.

Based on these facts, the Indiana Supreme Court found that the respondent violated Indiana Rule of Professional Conduct 1.8(j) by having sexual relations with Clients 1 and 2 and violated Rules 1.7(a) and 8.4(d) “in connection with his representation of Client 3 by engaging in a concurrent conflict of interest and accepting sexual favors as payment for legal services.”¹⁴⁵ The court concluded that the respondent’s “pattern of predatory behavior and the sheer depravity” required that he be disbarred.¹⁴⁶ The court reasoned that some forms of improper sexual relations with clients are more “insidious” than others.¹⁴⁷

The court outlined a spectrum of cases involving improper sexual relations with clients.¹⁴⁸ The court described the low end of this spectrum as “isolated lapses in judgment that cause no additional harm beyond that inherent in the violation itself.”¹⁴⁹ The *Pearson* court pointed to the *Matter of Tsoutsouris* as an example of this end of the spectrum for improper sexual relations with a client.¹⁵⁰ The *Pearson* court explained that the lawyer in *Tsoutsouris* had a brief consensual sexual relationship with a client that did not harm the representation of the client, so the *Tsoutsouris* court only imposed a “thirty-day suspension with automatic reinstatement.”¹⁵¹

The *Pearson* court described the other end of the spectrum as “predatory.”¹⁵² The court pointed to several cases as examples of this predatory conduct:

For example, we suspended a criminal defense attorney for at least one year, without automatic reinstatement, after he attempted to arrange a tryst with a woman arrested for prostitution in order to trade sex for legal services.¹⁵³ We accepted the resignation (and its attendant five-year minimum suspension) of an attorney who solicited sexual favors

145. *Id.* at 538. Indiana Rule of Professional Conduct 1.8(j) prohibits lawyers from having “sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.” Indiana Rule of Professional Conduct 1.7(a) provides:

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Indiana Rule of Professional Conduct 8.4(d) declares that “It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.”

146. *Pearson*, 251 N.E.3d at 538–39.

147. *Id.* at 538.

148. *Id.*

149. *Id.*

150. *Id.* (citing *In re Tsoutsouris*, 748 N.E.2d 856 (Ind. 2001)).

151. *Id.*

152. *Id.*

153. *Id.* (citing *In re Hollander*, 27 N.E.3d 278, 279 (Ind. 2015)).

from a client in exchange for a discount on attorney fees and later offered to represent the client for free if she did not report his misconduct to Commission.¹⁵⁴ And we imposed the ultimate sanction of disbarment on an attorney who repeatedly exchanged legal services for sexual favors from vulnerable individuals, including a 17-year-old girl.¹⁵⁵

In disbarring the respondent in *Pearson*, the court concluded that the respondent's depraved conduct "align[ed] his case in severity" at the end of the spectrum with the latter case, *Matter of Wood*.¹⁵⁶

C. Attorney Misconduct—Matter of Miller

The final case discussed from the survey period is *Matter of Miller*.¹⁵⁷ The respondent in *Miller* worked for the Department of Child Services (DCS) as a staff attorney.¹⁵⁸ As such, the respondent prepared and filed Child in Need of Services (CHINS) petitions.¹⁵⁹ Between April 2022 and April 2023, the respondent signed thirty-eight CHINS petitions with the names of family case managers (FCMs) without their knowledge.¹⁶⁰ After discovering these false signatures, DCS terminated the respondent for his misconduct.¹⁶¹ The *Miller* court acknowledged that "Respondent drafted the petitions based on facts contained in documents prepared by the FCMs; the FCMs attended the initial hearings on the CHINS petitions with Respondent; and the FCMs testified regarding the information contained in the CHINS petitions."¹⁶² The respondent only falsified the FCMs' signatures.¹⁶³

The court found that the respondent violated Indiana Rule of Professional Conduct 3.3(a)(1) by knowingly making a false statement to a tribunal, Rule 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and Rule 8.4(d) by engaging in conduct prejudicial to the administration of justice.¹⁶⁴ He was suspended from the practice of law for 120

154. *Id.* (citing *In re Clark*, 201 N.E.3d 201, 201–02 (Ind. 2023)).

155. *Id.* (citing *In re Wood*, 489 N.E.2d 1189, 1190–91 (Ind. 1986)).

156. *Id.*

157. 240 N.E.3d 155 (Ind. 2024) (per curiam).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* Indiana Rule of Professional Conduct 3.3(a)(1) prohibits lawyers from "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." Indiana Rule of Professional Conduct 8.4(c) provides, "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Indiana Rule of Professional Conduct

days with automatic reinstatement.¹⁶⁵ The Indiana Supreme Court approvingly quoted the dissent from *Matter of Robison* to emphasize the severity of the respondent's misconduct in *Miller*:

Much of our legal system is predicated on the authenticity and reliability of signatures. For a lawyer to affix a false signature is a deception that gravely undermines public trust, respect, and confidence in the legal profession. Such inexcusable misconduct is not justified or excused by considerations of client convenience, expediency, or lack of personal gain. Affixing a false signature is manifestly dishonest and an absolute ethical transgression.¹⁶⁶

The *Miller* court noted that the respondent's false signatures on the CHINS petitions "had the potential for significant injury due to the fundamental interests at stake in CHINS proceedings."¹⁶⁷ Because of the pattern of misconduct for over a year, the court concluded that the respondent should receive a more severe sanction than in *Robison* and approved the agreement for a suspension of 120 days.¹⁶⁸

CONCLUSION

During this survey period, the Indiana Supreme Court addressed several interesting issues in judicial and attorney ethics. In *Wruble*, the court raised the question of whether "offensive personality" for the Oath of Attorneys is merely aspirational or whether it can be a basis for a disciplinary charge. In *Seabolt*, the court clarified when judicial officers must disqualify under the objective observer standard. In *Hawkins* and *Pearson*, the court found that sexual harassment and sexual misconduct cannot be tolerated by the Indiana bar. Finally, the court reiterated that any filing with the court must be trustworthy in *Miller*. The Indiana Supreme Court expects the members of the Indiana judiciary and the Indiana bar to maintain the highest standards of dignity and honor.

8.4(d) states that "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."

165. *Miller*, 240 N.E.3d at 156.

166. *Id.* (quoting *In re Robison*, 985 N.E.2d 336, 336 (Ind. 2013) (Dickson, C.J., dissenting)). In *Robison*, the respondent attorney received a public reprimand for signing the co-personal representative's name on a number of documents and forwarded these documents to be signed by the second co-personal representative. *Robison*, 985 N.E.2d at 336 (majority opinion). When confronted by the second co-personal representative, the respondent attorney admitted he signed for the first co-personal representative. *Id.*

167. *Miller*, 240 N.E.3d at 156.

168. *Id.*

RECENT DEVELOPMENTS IN INDIANA TAX CASE LAW: SURVEY 2025

ANDREW W. SWAIN*

INTRODUCTION

This survey article examines the tax decisions issued by the Indiana Tax Court (“Tax Court”) and the Indiana Supreme Court (“Supreme Court”) from December 1, 2024, to October 17, 2025. During this period, the Tax Court’s published opinions addressing substantive tax issues uniformly involved real property taxation.¹ In a rare occurrence in recent years, the Tax Court issued a series of unpublished opinions all addressing the same issues. Additionally, during this period, the Supreme Court issued one opinion involving real property tax.

I. PUBLISHED INDIANA TAX COURT DECISIONS

A. Madison County Assessor v. Kohl’s Indiana, LP

The issue before the Tax Court was whether the Indiana Board of Tax Review (IBTR) adequately provided the facts and rationale for its conclusion that the taxpayer’s appraisal evidence, despite identified flaws in each valuation approach, met the burden of proof to establish the subject property’s true tax value.²

Kohl’s Indiana, LP (“Kohl’s”) owned a retail store located in Anderson, Indiana.³ For the 2019, 2020, and 2021 assessment years, the Madison County Assessor (“Assessor”) assessed the property at \$4,513,400, \$4,517,000, and \$4,517,000, respectively.⁴ Kohl’s believed these assessments overstated the property’s true tax value and initiated appeals for all three years.⁵ The Madison County Property Tax Assessment Board of Appeals (“PTABOA”) affirmed the 2019 and 2020 assessments but took no action on the 2021 appeal.⁶ Kohl’s subsequently filed appeals for all three years with the IBTR.⁷

The IBTR conducted a week-long hearing at which both parties submitted appraisals using all three recognized valuation methodologies: the sales comparison approach, the income approach, and the cost approach.⁸ Kohl’s

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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. 1, 2026).

2. *Madison Cnty. Assessor v. Kohl’s Ind., LP*, 247 N.E.3d 845, 847 (Ind. T.C. 2024).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 847–48.

8. *Id.* at 848.

appraisal offered reconciled valuations of \$2,360,000 for 2020 and \$2,380,000 for 2021.⁹ The Assessor's appraisal, however, presented higher reconciled values of \$4,800,000 and \$4,900,000 for those same years.¹⁰

The IBTR issued its final determination, in which it provided a detailed critique of each of the three valuation approaches presented in Kohl's appraisal.¹¹ For the sales comparison approach, it found that all eight of the appraiser's selected comparable sales were flawed and insufficiently similar to the subject property.¹² It also noted that the adjustments applied to account for differences between those sales and the subject property were inadequately supported.¹³ Regarding the income approach, the IBTR found that four of the five leases used to estimate rental income were poor comparables and that the analysis failed to explain key adjustments made for various locational and economic attributes, including lease terms, size, traffic patterns, submarket demographics, and physical condition.¹⁴ For the cost approach, the IBTR criticized the use of an unsupported obsolescence adjustment.¹⁵ It expressed skepticism as to whether an obsolescence deduction was even appropriate, further noting that the adjustment was derived from the flawed conclusions of the other two approaches—rendering it inherently unreliable.¹⁶

Despite these critiques—and despite the IBTR finding that all three valuation approaches in Kohl's appraisal were weak and characterizing them as merely “minimally probative,” with the cost approach deemed the “least probative”—it nevertheless concluded, without explanation, that the appraisal was “sufficient to make a prima facie case.”¹⁷ A reference to a “prima facie case” typically pertains to the burden of production, which in Indiana property tax appeals is shaped by the state's burden-shifting statutes.¹⁸ Under those statutes, the initial burden of proving the correctness of an assessment may shift to the Assessor, departing from the general presumption of validity typically afforded to property tax assessments.¹⁹ The IBTR then stated that Kohl's

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. See, e.g., Andrew W. Swain, *Proving Equitable Apportionment: Where Do the Burdens Lie?*, 82 TAX NOTES (ST.) 513, 517–22 (2016) (discussing various attributes of the burden of proof at trial).

19. See, e.g., Brent A. Auberry, *Protecting Taxpayers: Indiana Shifts Burden of Proof to Assessor*, AM. PROP. TAX COUNS. (July 15, 2025), <https://www.aptnet.com/property-tax-resources/protecting-taxpayers-indiana-shifts-burden-of-proof-to-assessors> [<https://perma.cc/A9NK-L4TF>] (discussing Indiana's burden-shifting statute).

appraisal “ultimately tip[ped] the scales in Kohl’s favor.”²⁰ This phrase appears to invoke the burden of persuasion—the obligation borne by the party with the burden of proof to convince the trier of fact, by a preponderance of the evidence, that its claim is more likely than not true.²¹ The IBTR, therefore, accepted the valuations in Kohl’s appraisal—\$2,360,000 for 2020 and \$2,380,000 for 2021—and, using the trending formula outlined in the appeal management plan, set the 2019 assessment at \$2,312,800.²² The Assessor appealed the decision to the Indiana Tax Court.²³

On appeal, the Assessor contended that the IBTR’s determination constituted an abuse of discretion and was unsupported by substantial evidence, emphasizing that the IBTR failed to articulate the reasoning behind its conclusion that the taxpayer’s appraisal met the burden of proof.²⁴ In response, Kohl’s argued that the IBTR’s determination was supported by a “robust record.”²⁵ The Tax Court sided with the Assessor, reaffirming that a foundational principle of administrative law requires adjudicatory decisions to be accompanied by adequate findings of fact and a reasoned explanation.²⁶

Citing established Indiana precedent,²⁷ the court stressed that parties are entitled to understand the basis for the outcome of their case and that effective judicial review depends on a clear articulation of the evidence relied upon and the logical reasoning connecting that evidence to the agency’s conclusions.²⁸ This requirement is not merely procedural, the Tax Court explained—it serves to guard against arbitrary or careless decision-making by ensuring that the agency’s conclusions result from a careful evaluation of the evidence rather than from instinct or unsupported assumptions.²⁹ A well-reasoned explanation, the court added, enables both the parties and the reviewing court to assess the agency’s rationale meaningfully and avoids leaving them to speculate about the factual basis for the decision.³⁰

The Tax Court further noted that this principle of erudite and cogent disclosure, as espoused in prior case law, is rooted in the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which requires a detailed explanation of the reasons for an administrative agency’s adverse action

20. *Kohl’s Ind.*, 247 N.E.3d at 848. *See also* IND. CODE § 6-1.1-15-17.2(b) (2025) (providing in part that: “[u]nder this section, the county assessor or township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana board of tax review or to the Indiana tax court”).

21. *See, e.g.*, Swain, *supra* note 18, at 517–22.

22. *Kohl’s Ind.*, 247 N.E.3d at 848–49.

23. *Id.* at 849.

24. *Id.*

25. *Id.*

26. *Id.* (citing *Perez v. U.S. Steel Corp.*, 426 N.E.2d 29, 32 (Ind. 1981); *Rork v. Szabo Foods*, 436 N.E.2d 64, 69 (Ind. 1982)).

27. *See id.*

28. *Id.*

29. *Id.* at 849–50.

30. *Id.*

in order to protect against arbitrary decision-making and to facilitate meaningful judicial review.³¹ Accordingly, the Tax Court outlined the following requirements that agencies must meet when issuing findings in adjudicatory decisions, emphasizing that agencies must “provide findings that are specific enough to demonstrate to the court which facts the hearing judge relied upon and the reasoning used in reaching the ultimate decision”:

- **Explain the reasoning behind the decision:** The agency must clearly articulate the rationale that supports its ultimate conclusion.³²
- **Include evidentiary analysis:** The findings must set forth the evidentiary basis underlying the agency’s conclusions, rather than relying on conclusory statements.³³
- **Address relevant sub-issues and factual disputes:** The agency must explain not only its final determination but also “the various relevant sub-issues and factual disputes which, in their sum, are dispositive of the particular claim or ultimate factual question before [it].”³⁴
- **Match the level of detail to the complexity of the issues:** The more complex or technical the sub-issues or factual disputes, the greater the level of particularity required.³⁵
- **Provide a clear analytical roadmap:** The decision must serve as “a road map from which readers can clearly delineate the basis for [the] decision” in light of the evidence presented.³⁶

The Tax Court commended the IBTR for the clarity and structure of its initial factual findings regarding the flaws in each appraisal.³⁷ However, it emphasized that these findings “did not go far enough” because they lacked an analytical connection to the IBTR’s legal conclusion.³⁸ The court determined that the IBTR’s final determination failed to meet the requirements for adequate administrative reasoning, as it did not “adequately explain its findings and conclusions to allow the Court to properly review its decision.”³⁹ The court found that the IBTR’s final determination lacked the “connective tissue” between its criticisms of the appraisal and its ultimate conclusion.⁴⁰

The IBTR did not identify which aspects of the appraisal it deemed probative or explain how those elements, even if only minimally so, satisfied

31. *Id.* at 850.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 851 n.5.

38. *Id.*

39. *Id.* at 851–52.

40. *Id.* at 851.

the taxpayer's burden of proof.⁴¹ Moreover, its intermediate findings regarding the probative value of each valuation approach were neither adequately explained nor supported by basic underlying facts.⁴² Rather than articulating how Kohl's appraisal affirmatively proved the assessments incorrect, the IBTR appeared to rest its conclusion on a relative comparison—determining that the Assessor's appraisal was simply less persuasive.⁴³ The court noted that this approach failed to complete the reasoning process required by statute and case law.⁴⁴ It reiterated that Indiana Code section 6-1.1-15-4(j) mandates that final determinations include separately stated findings of fact along with a concise statement of the underlying facts supporting the IBTR's ultimate findings.⁴⁵ The court concluded that the IBTR's unexplained leap from detailed critique to a favorable outcome for the taxpayer undermined the integrity of the administrative process and precluded meaningful judicial review.⁴⁶ The Tax Court's rationale also appeared to reflect a broader concern about the adequacy of agency reasoning. The court's language implicitly conveys a deeper warning: even detailed factual findings may amount to little more than surface-level form if they are not integrated into a coherent and reasoned decision-making framework.⁴⁷

Accordingly, the Tax Court remanded the case to the IBTR with instructions to issue a final determination that includes findings sufficient to support both its intermediate and ultimate conclusions.⁴⁸ The court retained jurisdiction over the matter pending the IBTR's subsequent determination.⁴⁹

B. Lake County Assessor v. O'Day Holdings, LLC

The issue before the Tax Court was whether the IBTR erred in relying on appraisals that likely included personal property to reduce the taxpayer's real property assessments, and whether the IBTR misapplied the burden of proof by accepting those appraisals as sufficient to justify the reductions.⁵⁰

O'Day Holdings, LLC ("O'Day") owned a six-building complex in Hammond, Indiana, where it fabricated storage systems for big-box home improvement retailers.⁵¹ The facility included two buildings equipped with overhead cranes and craneways to move raw steel between fabrication

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 852.

49. *Id.*

50. Lake Cnty. Assessor v. O'Day Holdings, LLC, 249 N.E.3d 677, 679 (Ind. T.C. 2024).

51. *Id.*

workstations.⁵² The property was assessed between \$1,438,400 and \$1,605,400 for the 2014, 2015, 2018, 2019, and 2020 tax years.⁵³ O'Day appealed the assessments to the Lake County PTABOA, which adjusted the 2014, 2015, and 2018 assessments but took no action on the 2019 and 2020 assessments.⁵⁴ O'Day subsequently appealed all five years to the IBTR.⁵⁵

At the IBTR hearing, O'Day presented two appraisal reports covering the disputed years.⁵⁶ The appraisals employed both the cost and sales comparison approaches, but the appraiser gave primary weight to the sales comparison approach.⁵⁷ For 2014 and 2015, the appraiser selected five comparable sales (two of which included cranes), adjusted for differences, and arrived at a value of \$9.50 per square foot, concluding to \$870,000 per year.⁵⁸ For 2018 to 2020, using similar methodology and comparables (one of which had cranes), he settled on \$9.00 per square foot, concluding to \$800,000 annually.⁵⁹

During the Assessor's cross-examination of the appraiser, it was conceded that overhead cranes may be classified as either real or personal property depending on whether they are permanently affixed to the building.⁶⁰ He acknowledged that his sales comparison analyses did not distinguish between the two because such information is rarely disclosed in broker materials.⁶¹ When pressed, he admitted that the sales he relied upon may have included cranes but disclaimed any knowledge of how those assets were treated in the transactions.⁶² He further testified that the presence of cranes likely had minimal impact on sale prices, particularly when the cranes or buildings were older, stating that "[a] crane in a building that's 40 years old . . . is not worth a lot of money" and may "cost more to repair . . . than you get from the sale."⁶³

The IBTR ruled in O'Day's favor, holding that the appraisals likely included personal property—specifically cranes and craneways—and that this inclusion rendered them inadequate to precisely establish the true tax value of the real property.⁶⁴ Nevertheless, the IBTR concluded that the appraisals retained probative value and could be used to establish an upper limit on the property's market value-in-use.⁶⁵ Relying on that rationale, the IBTR reduced the

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 680.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* (citations omitted).

64. *Id.* at 680–81.

65. *Id.* The Indiana Code makes clear that "true tax value" does not equate to fair market value. *See* IND. CODE § 6-1.1-31-6(c) (2025). Instead, for real property other than agricultural

assessments to \$870,000 for 2014 and 2015, and \$800,000 for each of the years 2018 through 2020.⁶⁶ The Assessor appealed the IBTR's decision to the Indiana Tax Court.⁶⁷

On appeal, the Assessor contended that the IBTR erred in two respects: first, by relying on appraisals that included personal property, which the Assessor argued rendered them non-probative of real property value;⁶⁸ and second, by concluding that O'Day was not required to prove a specific alternative value to obtain an assessment reduction, thereby, in the Assessor's view, improperly relieving the taxpayer of its burden of proof.⁶⁹ The Tax Court rejected both arguments.

The court began with the Assessor's tainted valuation argument. The Assessor contended that the IBTR acted contrary to law by relying on appraisals that included personal property—specifically, overhead cranes and craneways—arguing that any such inclusion rendered the appraisals non-probative of real property value.⁷⁰ Because the purpose of the appeal was to determine the value of the real estate alone, the Assessor maintained that the presence of personal property, regardless of amount, fundamentally compromised the reliability of the valuation evidence.⁷¹

The Tax Court rejected the Assessor's tainted valuation argument, reaffirming that Indiana law does not impose a per se rule that appraisals lose all probative value simply because they include personal property.⁷² While real and personal property are assessed separately, the inclusion of personal property in valuation evidence affects the weight and reliability of the appraisal—not its admissibility or categorical probative value.⁷³ The court explained that an appraisal's relevance turns on its adherence to generally accepted appraisal

land, true tax value is defined as market value-in-use, which is determined under the rules of the Department of Local Government Finance (DLGF). The 2021 Real Property Assessment Manual defines market value-in-use as “[t]he value of a property for its current use, as reflected by the utility received by the owner or a similar user from the property.” IND. DEP’T OF LOC. GOV. FIN., 2021 REAL PROPERTY ASSESSMENT MANUAL 2, <https://www.in.gov/dlgef/files/2021-assessment-guidelines/Assessment-Manual.pdf> [<https://perma.cc/PT2S-WG6J>] (incorporated by reference at 50 IND. ADMIN. CODE 2.4-1-2(b) (2011) (amended 2020)). True tax value may be conceptualized as the price that would motivate a willing seller to sell and a willing buyer to purchase the property for continued use in its current capacity. *Id.* However, in markets in which sales are unrepresentative of the owner's utility—such as when owners are driven by non-market factors or when use value exceeds exchange value—true tax value may differ from traditional fair market value. *Id.* In such cases, market value-in-use incorporates a market value-in-exchange component only when regular market transactions take place for the property's current use. *Id.*

66. *O'Day Holdings*, 249 N.E.3d at 681.

67. *Id.* at 680.

68. *Id.* at 681.

69. *Id.* at 684.

70. *Id.* at 681.

71. *Id.*

72. *Id.*

73. *Id.*

standards and its utility in estimating the property's market value-in-use.⁷⁴ Valuation evidence may remain credible, even if imperfect, so long as the factfinder accounts for the presence of personal property when determining its overall evidentiary value.⁷⁵

In support of this conclusion, the court distinguished three earlier decisions:⁷⁶ *Hurricane Food v. White River Township Assessor*,⁷⁷ *Kooshtard Property I, LLC v. Monroe County Assessor*,⁷⁸ and *Mac's Convenience Stores, LLC v. Hendricks County Assessor*.⁷⁹ In *Hurricane Food*, the court permitted the deduction of a known personal property component from a sale price to isolate a valid real property value.⁸⁰ In *Kooshtard*, the court upheld the IBTR's use of an appraisal that employed all three valuation approaches, holding that the IBTR appropriately relied on the cost approach—which excluded personal property—even though other components of the appraisal did not.⁸¹ By contrast, in *Mac's*, the court rejected an appraisal where the inclusion of personal property was so pervasive and inseparable—fuel pumps, coolers, and other non-realty assets—that no reliable separation could be made.⁸² The appraisal in *Mac's* relied exclusively on the sales comparison approach, which further limited its reliability.⁸³

Although the Assessor invoked *Mac's* to argue that the inclusion of any personal property invalidates an appraisal, the court emphasized that the case must be read in context.⁸⁴ *Mac's* did not overrule *Hurricane Food* or *Kooshtard*, and nothing in the opinion announced a blanket prohibition on appraisals that include personal property.⁸⁵ Rather, the outcome in *Mac's* turned on the pervasiveness and inseparability of the non-realty assets.⁸⁶ Indeed, the court in *O'Day* noted that had the inclusion been de minimis, even *Mac's* might have come out differently, citing *Goshen Public Library of Elkhart County v. Department of Local Government Finance*⁸⁷ in support of that principle.⁸⁸

The IBTR acknowledged that the O'Day appraisals likely included some personal property and therefore could not be used to establish the property's precise true tax value.⁸⁹ Nonetheless, the IBTR concluded that the appraisals

74. *Id.* at 685.

75. *Id.* at 681–82.

76. *Id.* at 682–83.

77. 836 N.E.2d 1069 (Ind. T.C. 2005).

78. 38 N.E.3d 750 (Ind. T.C. 2015).

79. 191 N.E.3d 285 (Ind. T.C. 2022).

80. *O'Day Holdings*, 249 N.E.3d at 682 (citing *Hurricane Food*, 836 N.E.2d 1069).

81. *Id.* (citing *Kooshtard Property I*, 38 N.E.3d 750).

82. *Id.* at 682–83 (citing *Mac's Convenience Stores*, 191 N.E.3d 285).

83. *Id.* at 682.

84. *Id.* at 683.

85. *Id.*

86. *Id.*

87. 128 N.E.3d 574, 580 (Ind. T.C. 2019).

88. *O'Day Holdings*, 249 N.E.3d at 683.

89. *Id.*

were sufficient to demonstrate that the assessments exceeded the property's market value-in-use and could be relied upon to set a reasonable upper limit on value.⁹⁰ Unlike in *Mac*'s, the personal property component here was neither dominant nor irretrievable.⁹¹

Accordingly, the court affirmed the IBTR's use of the appraisals for this limited purpose, holding that evidence which cannot support an exact valuation may still be probative for showing over-assessment.⁹² The decision reinforces the principle that appraisal evidence containing personal property is not automatically disqualified in an assessment appeal—particularly when used not to fix a precise valuation, but to establish that the assessment exceeds the real property's likely value.

Turning to the burden of proof argument, the Tax Court addressed the Assessor's claim that O'Day failed to establish a "correct" value for the subject property.⁹³ The Assessor argued that the IBTR erred by reducing O'Day's assessments without requiring proof of a specific alternative value.⁹⁴ In her view, a taxpayer must satisfy a two-part burden: first, by showing the existing assessment is incorrect, and second, by proving what the "correct" assessment should be.⁹⁵ Drawing from the standard used in former burden-shifting cases, she contended that the taxpayer must present a valuation that is precise and free from error—essentially, proof of the property's true tax value.⁹⁶ Because O'Day offered appraisals that included personal property and did not isolate a specific real property value, the Assessor maintained that the IBTR improperly relieved O'Day of its burden by accepting evidence that merely suggested the assessments were too high.⁹⁷

The court rejected this contention, clarifying that in regular assessment appeals—not governed by the repealed burden-shifting statute, Indiana Code section 6-1.1-15-17.2⁹⁸—the taxpayer's burden is to demonstrate that the assessment is incorrect, not necessarily to prove the precise true tax value of the property.⁹⁹ Under the Department of Local Government Finance's regulations, taxpayers may submit any evidence relevant to a property's market value-in-use to rebut the presumption of correctness that attaches to an assessment.¹⁰⁰

The Tax Court clarified that while proving the true tax value of a property

90. *Id.* at 683–84.

91. *Id.* at 684.

92. *Id.*

93. *Id.*

94. *Id.* at 685.

95. *Id.* at 684.

96. *Id.*

97. *Id.*

98. *Id.* at 687.

99. *Id.* at 685.

100. *Id.* (citing 2002 REAL PROPERTY ASSESSMENT MANUAL 5 (2004 Reprint) (incorporated by reference at 50 IND. ADMIN. CODE 2.3-1-2 (2002 Supp.) (repealed 2010)); 2011 REAL PROPERTY ASSESSMENT MANUAL 3; 2021 REAL PROPERTY ASSESSMENT MANUAL 3 (incorporated by reference at 50 IND. ADMIN. CODE 2.4-1-2 (2020))).

is one method for demonstrating an incorrect assessment, it is not the exclusive means.¹⁰¹ Although Indiana precedent had often treated proof of true tax value and proof of incorrectness as coextensive, the court explained that they are analytically distinct and that a taxpayer may establish the latter without necessarily proving the former.¹⁰² The court noted that Indiana's assessment regulations require only that the taxpayer demonstrate the inaccuracy of the assessment itself and are silent on what value must replace it.¹⁰³

The Assessor conceded that the IBTR correctly found the assessments to be excessive but argued that O'Day was still required to prove a specific "correct" value—defined as one that is "precise and exact, free from error, or able to give a correct result"—to be entitled to a reduction.¹⁰⁴ The court rejected this argument, explaining that prior cases had not squarely addressed whether establishing true tax value was a legal prerequisite to securing relief in an appeal.¹⁰⁵ Instead, those cases turned on evidentiary insufficiencies or procedural defects and did not define the scope of the taxpayer's burden in regular appeals.¹⁰⁶

The court further held that the Assessor's reliance on the repealed burden-shifting statute, Indiana Code section 6-1.1-15-17.2, was misplaced.¹⁰⁷ That statute, which shifted the burden to the assessor in some instances involving significant increases in assessed value, did not apply to regular appeals and could not be read to impose a heightened "correctness" requirement on taxpayers in such cases.¹⁰⁸ The court emphasized that adopting the Assessor's position would invert the regulatory framework by requiring taxpayers to prove not only that the assessment was too high, but also the exact value that should be substituted in its place—something the regulations do not require.¹⁰⁹

Reaffirming that property valuation is "more art than science," the court endorsed the principle that a persuasive upper limit on true tax value—while not definitive—may justify relief when the evidence clearly establishes over-assessment.¹¹⁰ Drawing a parallel to the reversionary clause in the now-repealed statute, the court explained that in the absence of a precise valuation, a prior-year value—or in this case, a reasonable estimate based on credible evidence—may serve as an appropriate substitute.¹¹¹ Because the IBTR had found that the appraisals, though including some personal property, nonetheless set a credible upper limit below the assessed values, the court upheld the reductions as consistent with law and supported by the record.¹¹²

101. *See id.* at 685.

102. *Id.* at 686.

103. *Id.* at 685.

104. *Id.* at 684.

105. *Id.* at 686–87.

106. *Id.* at 686.

107. *Id.* at 687.

108. *Id.*

109. *Id.*

110. *Id.* at 688.

111. *Id.*

112. *Id.*

Accordingly, the Tax Court affirmed the IBTR's decision. The court's opinion in *O'Day* reflects a judicial philosophy underlying Indiana tax appeals: that the pursuit of an exact true tax value must yield to the broader aim of fairness. In the court's view, when credible evidence demonstrates that an assessment exceeds market reality, the law permits correction—even without perfect precision—because fairness in taxation is achieved not through mathematical exactness, but through reasonable judgment grounded in probative evidence.

C. Snyder v. Dearborn County Assessor

The issue before the Tax Court was whether the IBTR erred in upholding the 2022 assessment of the taxpayer's residential property, which the taxpayer claimed was excessive compared to prior-year assessments imposed on comparable properties.¹¹³

The taxpayer, Gabrielle Snyder ("Snyder"), owned a one-and-a-half-story residence in Guilford, Indiana, which contained 1,582 square feet of finished living area, a 1,034-square-foot unfinished basement, and was situated on a 1.64-acre lot.¹¹⁴ For the 2022 assessment year, the Dearborn County Assessor ("Assessor") assigned the property an assessed value of \$207,600, reflecting a 36.5% increase over its 2021 assessment of \$152,000.¹¹⁵ Snyder appealed the 2022 assessment, first to the Dearborn County PTABOA and then to the IBTR. Before the IBTR, the Assessor conceded that because the assessment increased by more than 5% over the prior year, the burden-shifting provision in Indiana Code section 6-1.1-15-20 applied.¹¹⁶

Before the IBTR, the Assessor presented a ratio study, an appraisal, and testimony from a licensed appraiser to support the 2022 assessment.¹¹⁷ The appraisal, prepared in accordance with the Uniform Standards of Professional Appraisal Practice, applied the sales comparison approach and valued the property at \$242,000 as of the 2022 assessment date.¹¹⁸ This valuation exceeded the actual assessed value in dispute by approximately \$35,000.¹¹⁹ Nonetheless, both the Assessor and the appraiser maintained that the \$207,600 assessment was reasonable, citing a sustained rise in countywide residential sale prices since 2019 and explaining that assessed values typically trail market values.¹²⁰

Snyder contested the validity of the Assessor's appraisal by arguing that the three comparable properties it relied upon were not truly comparable, as they featured superior amenities that her home lacked, such as lakefront locations,

113. Snyder v. Dearborn Cnty. Assessor, 248 N.E.3d 1277, 1279 (Ind. T.C. 2024).

114. *Id.*

115. *Id.* at 1279–80.

116. *Id.* at 1279.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

fireplaces, wraparound decks, outdoor kitchens, and finished basements.¹²¹ She also submitted her own evidence, including a realtor's valuation placing her home in the upper \$140,000s, online property data for similar homes assessed in the low \$150,000s, and information on newer or larger properties with additional features that were assessed similarly to hers.¹²² Additionally, she asserted that the assessment may have overstated her home's square footage and failed to account for substantial deferred maintenance and structural issues.¹²³ Finally, she challenged the assessment's fairness by highlighting its disproportionate increase: while most county properties saw increases of 6% to 9% from 2021 to 2022, her assessment surged by 36.5%.¹²⁴

The IBTR upheld the 2022 assessment, finding that the Assessor's appraisal offered a credible estimate of the property's value that Snyder did not meaningfully rebut.¹²⁵ While acknowledging the property's deficiencies and differences from the chosen comparables, the IBTR concluded that Snyder failed to show how these distinctions affected her home's market value-in-use.¹²⁶ It also rejected her claim of non-uniform treatment, determining that she had not provided sufficient evidence to support it.¹²⁷ Although the appraisal valued the property above the assessed amount, the IBTR left the assessment unchanged because the Assessor had not sought an increase.¹²⁸

Snyder filed a petition for rehearing with the IBTR, arguing that the Assessor failed to disclose the comparable properties used in the appraisal until the day of the hearing and that the appraiser had relied solely on "drive-by" visual inspections.¹²⁹ She reiterated her objections to the comparability of the cited properties, noting their superior features and locations in private communities.¹³⁰ Snyder also reasserted her earlier evidence, including a realtor's valuation, the absence of renovations to her home, and disparities in features and assessed value trends among other properties.¹³¹ The IBTR denied the petition, and Snyder initiated an original tax appeal before the Indiana Tax Court.¹³²

Snyder proceeded before the Tax Court *pro se*, reiterating the same concerns and arguments she presented before the IBTR.¹³³ These included objections to the comparability of the three properties used in the Assessor's appraisal, criticisms of the magnitude of the assessment increase, and emphasis on her

121. *Id.*

122. *Id.* at 1279–80.

123. *Id.* at 1280.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 1281.

property's physical deficiencies, deferred maintenance, lack of renovations, and a realtor's lower valuation.¹³⁴ She also challenged the appraisal's methodology, focusing on the appraiser's reliance on "drive-by" inspections and the late disclosure of comparable sales data.¹³⁵

The Tax Court emphasized that it serves as a "record-reviewing body" in appeals from IBTR decisions, not as a trier of fact. Citing its 2022 decision in *Gold Coast Rand Development Corp. v. Lake County Assessor*,¹³⁶ the Indiana Code,¹³⁷ and other Indiana Supreme Court and Tax Court precedents, the Tax Court reaffirmed that it may not reweigh evidence or assess witness credibility—functions reserved to the IBTR, whose administrative law judges observe witness demeanor and evaluate evidentiary persuasiveness.¹³⁸

The Tax Court concluded that Snyder merely sought a new evidentiary hearing before the tax court, something it could not grant her.¹³⁹ It found that Snyder had a full and fair opportunity to present her case during the administrative hearing. She submitted several exhibits, cross-examined witnesses, and offered her own testimony.¹⁴⁰ The IBTR credited the Assessor's USPAP-compliant appraisal, which valued the property at \$242,000, and determined that Snyder had not "significantly impeached" it.¹⁴¹ Although the IBTR acknowledged Snyder's concerns about her property's condition and the appraisal's comparables, it concluded that she failed to offer quantified or persuasive evidence demonstrating how these alleged differences materially affected the property's market value-in-use.¹⁴² The Tax Court held that the IBTR's findings were supported by substantial evidence—defined as "relevant evidence a reasonable mind might accept as adequate to support a conclusion."¹⁴³ Snyder's cross-examinations were limited and did not yield significant contradictions or admissions.¹⁴⁴ Although she identified differences between her property and the comparables, she did not present analysis or data establishing how those differences impacted valuation.¹⁴⁵

The court explained that it cannot substitute its judgment for that of the IBTR unless there is an abuse of discretion. Finding none, it concluded that Snyder's disagreement with the outcome, while understandable, did not warrant

134. *Id.*

135. *Id.*

136. 197 N.E.3d 1274 (Ind. T.C. 2022).

137. *Snyder*, 248 N.E.3d at 1281 (citing IND. CODE § 6-1.1-15-20(f) (2024)) ("In an appeal under [Chapter 15], the [IBTR] shall, as trier of fact, weigh the evidence and decide the true tax value of the property as compelled by the totality of the probative evidence before it.").

138. *See id.*

139. *Id.* at 1281–82.

140. *Id.* at 1282.

141. *Id.*

142. *Id.*

143. *Id.* (quoting *Clark-Pleasant Cmty. Sch. Corp. v. Dep't of Loc. Gov't Fin.*, 889 N.E.2d 762, 765 (Ind. T.C. 2008)).

144. *Id.*

145. *Id.*

reversal.¹⁴⁶ Accordingly, the court affirmed the IBTR's final determination upholding the 2022 assessment.¹⁴⁷

In many property tax appeals, as exemplified by *Snyder*, taxpayers present evidence they believe is persuasive—only to see it dismissed or disregarded by the county PTABOA or IBTR and upheld by the Tax Court. This persistent pattern raises a critical question: What more could the taxpayer have done?

The answer lies in the mismatch between taxpayer intuition and the IBTR's evidentiary standards. Taxpayers often cite conditions like deferred maintenance, interior deterioration, or disproportionately large assessment increases, assuming these facts alone warrant relief. However, the IBTR typically requires more than anecdotal or comparative evidence. It requires valuation-specific evidence that quantifies the impact of such differences on market value-in-use, rather than just observations or assertions of unfairness.

*D. Muir Woods Section One Ass'n, Inc. v.
Marion County Assessor (Muir Woods IV)*

The purported issue before the Tax Court was whether it had subject matter jurisdiction under Indiana Code section 6-1.1-15-5(g) to hear a direct appeal from the IBTR's summary dismissal of the taxpayer's administrative appeal for failure to appear, based on the taxpayer's claim that its objection to the dismissal constituted a petition for rehearing sufficient to trigger direct-appeal jurisdiction.¹⁴⁸

The litigation in *Muir Woods Section One Ass'n, Inc. v. Marion County Assessor* spans nearly a decade and includes multiple rulings by both the Indiana Tax Court and the Indiana Supreme Court. The litigation consists of the following four decisions:

- ***Muir Woods I***: *Muir Woods Section One Ass'n, Inc. v. Marion County Assessor*, 154 N.E.3d 877 (Ind. T.C. 2020).
- ***Muir Woods II***: *Muir Woods Section One Ass'n, Inc. v. Marion County Assessor*, 172 N.E.3d 1205 (Ind. 2021). The Indiana Supreme Court partially affirmed and partially reversed the Tax Court's decision in *Muir Woods I* and remanded the case to the IBTR for further proceedings.
- ***Muir Woods III***: *Muir Woods Section One Ass'n, Inc. v. Marion County Assessor*, 225 N.E.3d 236 (Ind. T.C. 2023). This decision followed the Indiana Supreme Court's remand to the IBTR.
- ***Muir Woods IV***: *Muir Woods Section One Ass'n, Inc. v. Marion County Assessor*. This decision represents the second Tax Court ruling issued after the Supreme Court's remand to the IBTR.

146. *Id.*

147. *Id.* at 1283.

148. *Muir Woods Section One Ass'n, Inc. v. Marion Cnty. Assessor (Muir Woods IV)*, 254 N.E.3d 1158, 1161 (Ind. T.C. 2025).

To provide essential context for understanding the Tax Court's ruling in *Muir Woods IV*, it is necessary to explain the Tax Court's decisions in *Muir Woods I* and *III*, as well as the Indiana Supreme Court's remand of the case to the IBTR in *Muir Woods II*.

1. *Muir Woods I and II*.—The *Muir Woods* litigation arose from property tax assessments imposed on common-area land owned by several homeowners' associations ("HOAs") in Marion County.¹⁴⁹ The HOAs challenged assessments for tax years 2001 through 2003, asserting that the assessments were legally erroneous and correctable through Petitions for Correction of an Error (Form 133).¹⁵⁰

After the Marion County PTABOA denied the petitions, the IBTR consolidated the matters and dismissed them without a hearing, concluding that the alleged errors were not correctable through Form 133 because they involved subjective valuation judgments rather than objective errors.¹⁵¹ The HOAs argued that the Marion County Assessor failed to apply an 80% base-rate discount mandated by the 1995 Marion County Land Valuation Order and the 2002 Indiana Assessment Guidelines when valuing their common-area property.¹⁵² Because application of the discount was required by law, the HOAs contended that the Assessor's failure to apply it constituted an objective error correctable through Form 133.¹⁵³ The Tax Court disagreed. Relying on its precedent, the court held that the assessment and valuation of real property is inherently subjective and therefore upheld the IBTR's dismissal of the claim.¹⁵⁴

In *Muir Woods II*, however, the Indiana Supreme Court reached a different conclusion. While agreeing that the initial determination of a property's base value is inherently subjective, the Supreme Court drew a critical distinction

149. *Muir Woods II*, 172 N.E.3d at 1206.

150. *Id.*

151. *Muir Woods I*, 154 N.E.3d at 879. As an aside, the Indiana General Assembly significantly revised the property tax appeal process in 2017. See Act of Apr. 28, 2017, Pub. L. No. 232-2017, § 10, 2017 Ind. Acts 2773, 2786–88 (enacting IND. CODE § 6-1.1-15-1.1). The legislation eliminated the longstanding "dueling form" problem by consolidating the so-called "subjective appeals" (formerly governed by IND. CODE § 6-1.1-15-1 and initiated with Form 130/131) and "objective appeals" (formerly governed by IND. CODE § 6-1.1-15-12 and initiated with Form 133) into a single process. See § 10, 2017 Ind. Acts at 2786–88. Under the new system, a taxpayer initiates an appeal by filing Form 130—Taxpayer's Notice to Initiate an Appeal—with the local assessing official (typically, the county assessor). *Id.* If the assessor denies the claim in whole or in part, the appeal is forwarded to the county's property tax assessment board of appeals ("PTABOA"). The PTABOA's decision may then be appealed to the IBTR via Form 131. *Id.* The IBTR's final determination may be appealed to the Indiana Tax Court by filing a petition and serving notice on the IBTR. See IND. CODE § 6-1.1-15-5(b)(1); IND. TAX CT. R. 4(B). A party may seek discretionary review of the Indiana Tax Court's decision by petitioning the Indiana Supreme Court. See IND. APP. R. 63(A). The revised Form 130 and related information are available at *Appeals Property Tax*, IND. DEP'T OF LOC. GOV. FIN., <https://www.in.gov/dlgf/appeals-property-tax/> [<https://perma.cc/5XH5-JGFT>] (last visited Mar. 27, 2026).

152. See *Muir Woods I*, 154 N.E.3d at 882.

153. *Id.*

154. *Id.*

between valuation and the application of mandatory legal directives affecting that valuation.¹⁵⁵ It held that whether the Assessor applied a required discount rate under the 1995 Marion County Land Valuation Order presented an objective inquiry.¹⁵⁶ Once a base rate is determined, the application—or nonapplication—of a prescribed discount is a binary, mechanical determination. Accordingly, the Supreme Court held that Form 133 was the proper vehicle for challenging the failure to apply the mandatory discount to common-area land.¹⁵⁷ It reversed the Tax Court’s dismissal of that claim and remanded the matter to the IBTR for further proceedings, while summarily affirming the remainder of the Tax Court’s decision.¹⁵⁸

2. *Muir Woods III*.—When the dispute returned to the Indiana Tax Court in *Muir Woods III*, the threshold issue was whether the court had subject matter jurisdiction to review the HOAs’ challenge to the IBTR dismissal of their administrative appeal.¹⁵⁹ The IBTR had dismissed the appeal after the HOAs failed to appear at a remand hearing, and the HOAs subsequently filed a motion to vacate that dismissal while also seeking reconsideration of a related procedural ruling.¹⁶⁰

The Tax Court concluded that it lacked subject matter jurisdiction.¹⁶¹ It reasoned that judicial review of an original tax appeal requires a final determination from the IBTR and that a party must exhaust all administrative remedies before invoking the court’s jurisdiction.¹⁶² Although the IBTR’s dismissal initially constituted an appealable final determination, the Tax Court held that the HOAs’ post-dismissal filings—together with the IBTR’s decision to take the matter under advisement and schedule further proceedings—meant that the administrative process had not yet concluded. In the court’s view, the dismissal therefore ceased to be a final determination, and the absence of final agency action deprived the court of subject matter jurisdiction.¹⁶³

On that basis, the Tax Court dismissed the appeal and remanded the matter to the IBTR for further proceedings. That jurisdictional conclusion—and its treatment of finality and exhaustion—forms the critical backdrop for the court’s subsequent analysis in *Muir Woods IV*.¹⁶⁴ The Tax Court’s jurisdictional rationale in *Muir Woods III* is difficult to reconcile with the case’s procedural record and to align with existing rules and precedent governing administrative

155. *Muir Woods II*, 172 N.E.3d at 1207.

156. *Id.*

157. *Id.* at 1208.

158. *Id.*

159. *Muir Woods Section One Ass’n, Inc. v. Marion Cnty. Assessor (Muir Woods III)*, 225 N.E.3d 236, 238 (Ind. T.C. 2023).

160. *Id.* at 240.

161. *Id.* at 242–44.

162. *Id.* at 242 (citing IND. CODE §§ 33-26-3-1, -3 (2023)).

163. *See id.* at 243.

164. *Id.* at 244.

finality, rehearing procedures, and exhaustion of remedies. These issues are addressed in greater depth in prior commentary.¹⁶⁵

3. *Muir Woods IV*.—The *Muir Woods* litigation reached its fourth iteration in *Muir Woods IV*, following the Tax Court’s remand in *Muir Woods III*, as described in the previous section. In response to that remand, the IBTR issued an order scheduling a new hearing to address “all pending matters,” including the Motion to Vacate, the applicability of statutory deadlines for rehearing petitions, and the HOAs’ underlying assessment and taxation claims.¹⁶⁶ Before the scheduled hearing occurred—and before the IBTR ruled on the HOAs’ renewed request to vacate the dismissal—the HOAs filed a new appeal directly with the Tax Court.¹⁶⁷

In their petition, the HOAs argued that the IBTR’s failure to act on the Motion to Vacate within the time limits applicable to rehearing petitions under Indiana Code section 6-1.1-15-5(a) triggered the Tax Court’s direct-appeal jurisdiction under Indiana Code section 6-1.1-15-5(g).¹⁶⁸ Specifically, they contended that because the Tax Court had previously treated the Motion to Vacate as a petition for rehearing in *Muir Woods III*, the IBTR’s inaction within ninety days effectively activated the direct-review mechanism under subsection 5(g).¹⁶⁹ In other words, by failing to issue a new final determination within ninety days after taking the Motion to Vacate under advisement, the IBTR forfeited its exclusive jurisdiction.¹⁷⁰

Indiana Code section 6-1.1-15-5(g) permits a party to initiate judicial review before the Tax Court if the IBTR fails to issue a final determination within the time limits set by subsection 5(a) or by Indiana Code section 6-1.1-15-4(f)¹⁷¹—that is, within ninety days after granting a rehearing or by the extended deadline if the IBTR lawfully issues an extension order, not to exceed 180 additional days. If a final determination is not issued and judicial review is initiated in a timely manner, the Tax Court must resolve the matter de novo.

The Assessor responded with a motion to dismiss, arguing that the Motion to Vacate did not qualify as a statutory petition for rehearing under Indiana Code section 6-1.1-15-5(a), and thus the HOAs had not satisfied the statutory prerequisites for judicial review.¹⁷² Because the HOAs had allegedly failed to

165. See Andrew W. Swain, *When Courts Rewrite or Obfuscate Precedent Rather than Overrule It*, 116 TAX NOTES (ST.) 893, 897–901 (2025) (analyzing the court’s jurisdictional rationale in *Muir Woods III* and identifying significant procedural and statutory inconsistencies).

166. *Muir Woods Section One Ass’n, Inc. v. Marion Cnty. Assessor (Muir Woods IV)*, 254 N.E.3d 1158, 1163 (Ind. T.C. 2025).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. See IND. CODE § 6-1.1-15-4(f) (2025) (requiring the IBTR to issue a final determination within 90 days after the hearing, unless it issues an extension order, in which case the deadline may be extended by no more than 180 additional days).

172. *Muir Woods IV*, 254 N.E.3d at 1163.

exhaust their administrative remedies, the Assessor maintained that the Tax Court lacked subject matter jurisdiction over the appeal.¹⁷³

The Tax Court stated that the issue before it now was whether it had subject matter jurisdiction under Indiana Code section 6-1.1-15-5(g) to hear a direct appeal from the IBTR's summary dismissal of the taxpayer's administrative appeal for failure to appear, based on the taxpayer's claim that its objection to the dismissal constituted a petition for rehearing sufficient to trigger direct-appeal jurisdiction.¹⁷⁴ The court clarified that direct-appeal jurisdiction under subsection 5(g) arises only when the IBTR fails to issue a timely final determination after either: (1) granting a rehearing petition under subsection 5(a), or (2) exceeding the time limits set forth in section 4.¹⁷⁵ The threshold jurisdictional question, therefore, was whether the HOAs' Motion to Vacate constituted a petition for rehearing or, instead, an objection governed by the IBTR's failure-to-appear rule.¹⁷⁶ If the motion qualified as a rehearing petition and the IBTR failed to issue a new final determination within ninety days, subsection 5(g) would authorize judicial review.¹⁷⁷ If not, the HOAs were required to await a final determination under subsection 5(b) before appealing to the Tax Court. The court ultimately rejected the HOAs' jurisdictional theory.¹⁷⁸

The Tax Court's decision turned on a critical doctrinal distinction between two procedural mechanisms available to parties who disagree with or seek to overturn an IBTR action: the petition for rehearing under Indiana Code section 6-1.1-15-5(a) and the failure-to-appear objection process under 52 Indiana Administrative Code 4-9-4.¹⁷⁹ This administrative provision addresses the consequences of a party or its representative failing to appear at an IBTR hearing. If a party fails to appear, the IBTR will issue a default or dismissal order. The party has ten days to file a written objection to vacate the order, providing supporting facts for their non-appearance. The IBTR can then choose to vacate the order for good cause shown.¹⁸⁰ Both Indiana Code section 6-1.1-15-5(a) and 52 Indiana Administrative Code section 4-9-4, as stated by the Tax Court, are mechanisms for further administrative review; however, they serve markedly different purposes and operate under distinct timelines and procedural frameworks.¹⁸¹

The Tax Court explained that a petition for rehearing under subsection 5(a) must be filed within fifteen days after the IBTR issues its final determination—or after the time for issuing such a determination expires—and allows the IBTR

173. *Id.*

174. *Id.* at 1161.

175. *Id.* at 1165.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. See 52 IND. ADMIN. CODE 4-9-4 (2025).

181. *Muir Woods IV*, 254 N.E.3d at 1165.

to affirm or modify its final order.¹⁸² If the IBTR grants rehearing, the court noted, it must issue a new final determination within ninety days.¹⁸³ Critically, the court explained, subsection 5(g) permits a direct appeal to the Tax Court only when the IBTR fails to act on a valid rehearing request within that ninety-day window.¹⁸⁴ The rehearing process, the court emphasized, is narrow in scope: it does not permit new arguments or evidence but is confined to correcting errors in the IBTR's prior determination.¹⁸⁵

In contrast, the Tax Court continued, the failure-to-appear process exists entirely outside the statutory rehearing framework.¹⁸⁶ It is governed solely by administrative rule and is triggered when a party fails to appear at a scheduled hearing.¹⁸⁷ The rule permits the IBTR to dismiss the case but also allows the non-appearing party to file an objection within ten days explaining their absence and requesting that the dismissal be set aside for good cause.¹⁸⁸ This process is corrective in a different sense: it enables a party to restore its procedural standing in the appeal, rather than challenging the substantive merits of a final determination.¹⁸⁹

The Tax Court concluded that the HOAs conflated these two processes when they claimed that their Motion to Vacate—filed in response to a dismissal for failure to appear—was functionally equivalent to a rehearing petition.¹⁹⁰ The court rejected that argument, emphasizing that the motion did not reference subsection 5(a), did not challenge a substantive determination, and did not limit itself to the record already before the IBTR.¹⁹¹ Rather, it advanced new factual explanations and exhibits regarding the parties' failure to appear—conduct falling squarely within the failure-to-appear rule.¹⁹² Because the statutory ninety-day deadline applies only to valid rehearing petitions under subsection 5(a), and not to failure-to-appear objections, the court found no jurisdictional basis under subsection 5(g) to proceed with a direct appeal.¹⁹³ In this portion of the holding in *Muir Woods IV*, the court tried to draw a firm line that underscores the limited and exclusive nature of the Tax Court's statutorily conferred subject matter jurisdiction.

The Tax Court's reasoning in *Muir Woods IV* presents a number of unresolved doctrinal and procedural difficulties, particularly when viewed in light of its prior decision in *Muir Woods III*—issues examined in greater detail

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 1165–66.

187. *Id.* at 1166.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 1166–67.

193. *Id.* at 1167.

in prior commentary.¹⁹⁴ Despite these arguable deficiencies, on October 30, 2025, the Indiana Supreme Court denied review of the Tax Court's decision.¹⁹⁵

E. Gary II LLC v. Lake County Assessor

The issues before the Tax Court were whether the IBTR erred in upholding the Assessor's valuation of the taxpayer's properties despite the alleged use of improper methods, timing, and comparables, and whether the IBTR incorrectly applied the 3% non-residential property tax cap in contravention of Indiana law.¹⁹⁶

The taxpayer, Gary II LLC ("Gary II"), was a limited liability company that owned hundreds of property parcels in Calumet Township in Gary, Indiana.¹⁹⁷ Five of those parcels were located in neighborhoods that contained both vacant and improved land.¹⁹⁸ Gary II initially contested the assessed values of these five parcels for the 2014 and 2017 tax years.¹⁹⁹ After the Lake County PTABOA upheld the original assessments for four of the parcels and reduced the value of one, Gary II pursued further review by filing separate appeals with the IBTR.²⁰⁰ This resulted in five distinct administrative hearings—one for each parcel—before the IBTR.²⁰¹

At each of the administrative hearings, Gary II advanced two main arguments: first, that the Lake County Assessor ("Assessor") employed improper procedures, timing, and comparables in establishing base rates in Calumet Township; and second, that applying Indiana's 3% nonresidential property tax cap to its parcels was contrary to law.²⁰² To support these claims, Gary II introduced a range of evidence, including property record cards, parcel identification information, county treasurer tax records, GIS maps, appraisal reports for other properties, academic studies from Indiana University Northwest ("IU Northwest"), excerpts from the Real Property Assessment Manual, a county land order, and a page from a final determination in an unrelated case.²⁰³

The IBTR issued five nearly identical final determinations, concluding that, despite its evidentiary submissions, Gary II failed to present probative, market-based evidence to establish the market value-in-use of any of the parcels for the

194. Swain, *supra* note 165, at 901–08 (analyzing the Tax Court's shifting jurisdictional rationale across *Muir Woods III* and *IV* and the resulting implications for administrative finality and judicial review).

195. *See* *Muir Woods Sec. One Ass'n, Inc. v. Marion Cnty. Assessor*, No. 24T-TA-00008, 270 N.E.3d 960 (Ind. 2025).

196. *Gary II LLC v. Lake Cnty. Assessor*, 256 N.E.3d 600, 602 (Ind. T.C. 2025).

197. *Id.*

198. *Id.* at 602–03.

199. *Id.* at 603.

200. *Id.*

201. *Id.*

202. *Id.* at 603–04.

203. *Id.* at 604–05.

2017 assessment year.²⁰⁴ As a result, the IBTR held that Gary II had not made a prima facie case for reducing the assessments.²⁰⁵ The IBTR also rejected Gary II's argument regarding the 3% nonresidential property tax cap, holding that the applicable cap is determined by the plain language of the governing statutes—not by a property's zoning classification.²⁰⁶ Gary II initiated a pro se appeal in the Indiana Tax Court, challenging the IBTR's final determinations.²⁰⁷

The three issues addressed by the Tax Court on appeal were whether: (1) the process, timing, and comparables the Assessor used to establish the base rates underlying its assessments were faulty (i.e., the “base rate issue”);²⁰⁸ (2) the IBTR's rigid reading of the tax cap statutes was contrary to the Indiana Constitution's requirements for classifying properties for property tax cap purposes (i.e., the “contrary to law issue”);²⁰⁹ and (3) Gary II presented sufficient probative evidence to make a prima facie case, thereby triggering the Assessor's duty to support the assessments with substantial evidence (i.e., the “prima facie issue”).²¹⁰

Regarding the base rate issue, Gary II argued that the Lake County Assessor violated statutory requirements by reversing the proper order of responsibilities—asserting that, instead of the Assessor establishing base land rates and transmitting them to the Calumet Township Assessor (“Township Assessor”), the process was performed in contravention of the statutory sequence.²¹¹ Gary II further contended that, due to insufficient sales of vacant lots in Calumet Township, the Assessor was obligated under assessment regulations to obtain an opinion of value from a licensed real estate professional using truly comparable properties.²¹² The Tax Court rejected both claims as conclusory and unsupported.²¹³ It found that Gary II failed to offer probative evidence identifying who performed the base rate analysis, when it occurred, or how the statutory framework was violated.²¹⁴ The court also noted that, regardless of the order of operations, the Township Assessor is statutorily empowered to carry out assessment duties under Indiana Code.²¹⁵ As for the alleged failure to obtain an expert opinion, the court again emphasized the

204. *Id.* at 605.

205. *Id.*

206. *Id.*

207. *Id.* at 602.

208. *Id.* at 602–04.

209. *Id.* at 605.

210. *Id.* at 608.

211. *Id.* at 604 (citing IND. CODE § 36-6-5-3(a) (2017), which outlines the general duties of a township assessor, including the statutory responsibility to assess property for taxation under IND. CODE art. 6.1.1. This obligation applies unless those duties have been transferred to the county assessor pursuant to IND. CODE § 6-1.1-1-24 (2025) or IND. CODE ch. 15 of art. 2, tit. 36).

212. *Id.*

213. *Id.* at 605.

214. *Id.* at 604.

215. *Id.*

absence of any evidentiary support or analysis, concluding that Gary II's assertions lacked persuasive force.²¹⁶

In addition to challenging the process by which the Assessor established base rates, Gary II argued that the base rates applied to its 2017 assessments were untimely.²¹⁷ Specifically, Gary II contended that the relevant base rates had been submitted more than four years after they were due and were based on sales data from transactions that occurred up to four years after the base rates were supposed to take effect.²¹⁸ In Gary II's view, this rendered the assessments procedurally flawed.²¹⁹

The Tax Court rejected this argument, finding it rested on a misapprehension of the reassessment timing framework set forth in Indiana Code sections 6-1.1-4-4.2(a)(4) and (a)(7).²²⁰ The court clarified that the statutory four-year reassessment period does not prescribe the duration for which a particular base rate remains in effect; rather, it defines the cycle within which new land values must be determined once.²²¹ Accordingly, once base rates are determined, they apply prospectively to assessments for taxes first due and payable in the subsequent year, as specified in Indiana Code section 6-1.1-4-4.2(a)(7).²²² Here, the base rates applicable to Gary II's 2017 assessments derived from a 2012 land values determination, not from a later one conducted in or after 2018.²²³ In light of this statutory structure, the court found no procedural defect in the timing of the base rates used and concluded that Gary II's argument lacked merit.²²⁴

Lastly, with respect to the base rate issue, Gary II argued that the Assessor relied on flawed comparables in establishing the base land rates in Calumet Township.²²⁵ Specifically, Gary II contended that the Assessor commissioned appraisals of three representative parcels, but despite those appraisals yielding valuations that differed substantially from the then-existing assessed values, no subsequent adjustments were made to bring the assessments into alignment with the appraisal findings.²²⁶ Gary II further argued that the sales data used to

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* IND. CODE § 6-1.1-4-4.2(a)(4) is part of Indiana's statutory framework for cyclical reassessment of real property. It requires county assessors, as part of their reassessment plans, to divide all parcels into four distinct groups, with each group comprising approximately 25% of the parcels within each class of real property. The statute mandates that each group be reassessed once during every four-year cycle, ensuring that all real property is reassessed on a recurring and systematic basis. Subsection (a)(7) provides that the reassessed value for property in a reassessment group serves as the basis for property taxes payable in the year following the year in which the reassessment is scheduled to be completed.

221. *Gary II*, 256 N.E.3d at 604.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

develop the base rates predominantly reflected transactions involving improved properties rather than vacant land, owing to an insufficient number of vacant lot sales.²²⁷ To bolster this claim, Gary II submitted reports from IU Northwest discussing the difficulty of marketing certain vacant parcels—commonly referred to as “churners”—within the township.²²⁸

The Tax Court acknowledged that Gary II’s submissions raised general concerns about the Assessor’s methodology but found the legal challenge insufficient.²²⁹ Citing Tax Court precedent, the court emphasized that a taxpayer must present objectively verifiable, market-based evidence showing that its own parcels were over-assessed.²³⁰ Because Gary II failed to meet this evidentiary burden, the court concluded that the IBTR’s determinations were not arbitrary, capricious, or unsupported by substantial evidence.²³¹ Accordingly, the court resolved the base rate issue in the Assessor’s favor, declining to reverse the assessments on this ground.²³²

The Tax Court next considered the second issue—the contrary to law issue—regarding the proper application of Indiana’s property tax cap classifications.²³³ Before the IBTR, Gary II contended that the IBTR’s classification of its properties as ineligible for the 2% residential property tax cap was contrary to law and unsupported by substantial evidence.²³⁴ The statutory framework in effect at the time defined “residential property” narrowly, limiting the classification to (1) single-family dwellings not part of a homestead, along with up to one acre of underlying land; (2) buildings containing two or more dwelling units, together with associated land and common areas; and (3) land leased or rented for the placement of manufactured or mobile homes.²³⁵ The statute expressly excluded properties such as hotels, motels, and tourist cabins.²³⁶ As the Tax Court noted, the definition reflects a dwelling-centric approach: property qualifies as “residential” only if it contains, supports, or is being developed for the placement of residential dwellings.²³⁷

Applying this statutory definition, the IBTR found that Gary II’s properties did not contain dwelling units and were not leased for manufactured housing. Consequently, the IBTR concluded that the properties did not fall within the

227. *Id.*

228. *Id.* at 604–05.

229. *Id.* at 605.

230. *Id.* (citing *Piotrowski BK #5643, LLC v. Shelby Cnty. Assessor*, 177 N.E.3d 127, 133 (Ind. T.C. 2021), which held that, without objectively verifiable, market-based evidence, claims are mere conjecture).

231. *See id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* (citing IND. CODE § 6-1.1-20.6-2.5 (2017)).

236. *Id.*

237. *Id.*

scope of “residential property” as defined in Indiana Code section 6-1.1-20.6-4.²³⁸

Instead, the IBTR applied the statutory definition of “nonresidential real property.”²³⁹ That provision includes two categories: (1) improved property that is not a homestead or residential property, and (2) undeveloped land remaining after subtracting any portion of the parcel that qualifies as homestead or residential.²⁴⁰ Based on this latter prong, the IBTR concluded that Gary II’s parcels—lacking dwellings and not forming part of a homestead or residential development—were properly classified as “nonresidential real property.”²⁴¹ As such, the IBTR determined that the 3% nonresidential property tax cap, rather than the 2% residential cap, applied to the assessments in question.²⁴²

Before the Tax Court, Gary II argued that the IBTR’s rigid adherence to the statutory definitions of “residential property” and “nonresidential real property” failed to comport with the Indiana Constitution’s framework for classifying property for tax cap purposes.²⁴³ To contextualize the contrary-to-law issue, the court reviewed its precedent on statutory tax caps, noting that it had frequently addressed the meaning and application of the tax cap statutes in cases in which the classification of a property determined which cap applied.²⁴⁴ However, the court emphasized that *Gary II* marked only the second time Indiana’s statutory property tax cap scheme had been challenged on constitutional grounds.²⁴⁵ It cited *Sawlani v. Lake County Assessor*,²⁴⁶ as the first such case, which involved a constitutional challenge to the legislature’s decision to limit the 1% cap to the home and one acre of land—a restriction purportedly not found in the constitutional text.²⁴⁷ The *Gary II* case, by contrast, was one of first impression specifically addressing whether the statutory definition of “residential property”

238. *Id.*

239. *Id.* at 605–06 (citing § 6-1.1-20.6-2.5).

240. *Id.*

241. *Id.* at 606.

242. *Id.*

243. *Id.*

244. *Id.* (citing *Schiffler v. Marion Cnty. Assessor*, 184 N.E.3d 726, 729–31 (Ind. T.C. 2022) (holding that a carriage house and garage qualified for the 1% cap as extensions of the taxpayer’s principal residence); *Buckeye Hosp. Dupont, LLC v. O’Day*, 144 N.E.3d 850, 855–56 (Ind. T.C. 2020) (holding that statutory classification, not use, governed eligibility for the 2% cap); *Universal Health Realty v. Fluty*, 144 N.E.3d 857, 861–63 (Ind. T.C. 2020) (holding that property was ineligible for the 2% cap because it lacked multiple dwelling units or long-term care licensure); *Hamilton Square Invs., LLC v. Hamilton Cnty. Assessor*, 60 N.E.3d 313, 317–18 (Ind. T.C. 2016) (holding that common areas qualified for the 2% cap when shared by tenants)).

245. *Id.*

246. 240 N.E.3d 734 (Ind. T.C. 2024), *rev’d*, 267 N.E.3d 419 (Ind. 2025).

247. *Gary II*, 256 N.E.3d at 606. Reliance on *Sawlani* as persuasive precedent is problematic, as it is arguably a poorly reasoned decision. See Andrew W. Swain, *Overloading the 1% Circuit Breaker: The Indiana Tax Court Constitutionally Expands Curtilage*, 11 TEX. A&M J. PROP. L. 491 (2025) (critiquing the court’s rationale in *Sawlani*, its departure from judicial norms, and the decision’s negative implications for Indiana’s tax system and constitutional interpretation). Also, on October 7, 2025, the Indiana Supreme Court reversed *Sawlani*. See *infra* Part III.

accords with the constitutional requirement that tax cap classifications be based on property use.²⁴⁸

To resolve the dispute, the court examined the relevant constitutional and statutory provisions. In 2010, the Indiana Constitution was amended to require the General Assembly to classify real property for purposes of limiting tax liability to certain percentage caps based on use.²⁴⁹ Article 10, Section 1(f), as amended, limits a taxpayer's property tax liability to 1%, 2%, or 3% of a property's gross assessed value, depending on whether the property is used as a principal residence, for other residential purposes, for agricultural use, or for other purposes.²⁵⁰ These classifications are expressly tied to the *use* of the property, as confirmed by the definitional provisions in section 1(e) and section 1(c)(4) of the Constitution.²⁵¹

The court contrasted this use-based constitutional framework with the more restrictive and categorical statutory definitions. Indiana Code section 6-1.1-20.6-4 defines "residential property" in terms of specific physical characteristics—such as the presence of dwelling units, the type of structure, and the size of the parcel—rather than actual use.²⁵² Similarly, Indiana Code section 6-1.1-20.6-2.5 defines "nonresidential real property" primarily as either improved property not qualifying as a homestead or residential property, or undeveloped land.²⁵³ Neither provision acknowledges use as the governing criterion, despite its constitutional centrality.²⁵⁴

Recognizing this disconnect, the court held that the statutory definitions must be construed in a manner that conforms to the Indiana Constitution.²⁵⁵ Citing longstanding interpretive principles, the court reaffirmed that statutes must be presumed constitutional and interpreted to give full effect to constitutional requirements.²⁵⁶ Accordingly, the court found that a strict reliance on the statutory definitions was contrary to law because the definitions failed to encompass all property that, based on actual use, may qualify for the 2% or 3% caps under the Constitution.²⁵⁷

Moreover, the court concluded that the IBTR's classification of Gary II's properties as "nonresidential real property" was itself factually flawed. Although the IBTR characterized the properties as "undeveloped land," the court noted that they were, in fact, improved parcels with platted lots, paved

248. *Gary II*, 256 N.E.3d at 606.

249. *Id.*

250. *Id.* at 606–07 (quoting IND. CONST. art. 10, § 1(f)).

251. *Id.* at 607 (quoting IND. CONST. art. 10, § 1(c)(4), (e)).

252. IND. CODE § 6-1.1-20.6-4 (2025). Although the substance is unchanged, it is important to note that the Tax Court used the 2017 version of the Indiana Code in its decision.

253. IND. CODE § 6-1.1-20.6-2.5 (2025).

254. *Gary II*, 256 N.E.3d at 607.

255. *Id.*

256. *Id.*

257. *Id.* at 608.

roads, sidewalks, and public utilities.²⁵⁸ As such, the determinative inquiry was not whether Gary II's properties met the narrow statutory criteria for "residential property," but whether the record evidence demonstrated that the parcels were actually *used* for residential purposes, as required by the Indiana Constitution.²⁵⁹ The court then proceeded to the third issue—the *prima facie* issue—to evaluate the factual record in accordance with its interpretation of the constitutional standard.²⁶⁰

The Tax Court considered whether the IBTR erred in concluding that Gary II failed to present probative evidence sufficient to establish a *prima facie* case that its properties were used for residential purposes and thus entitled to the 2% tax cap under Article 10, Section 1 of the Indiana Constitution.²⁶¹ Gary II's evidentiary presentation focused on its Property Record Cards (PRCs), which uniformly classified the parcels as "residential" under the 2011 Real Property Assessment Manual and Guidelines.²⁶² The PRCs identified the parcels as "Property Class 500 – Vacant Platted Land," a subclass of residential property.²⁶³ The neighborhood and market model codes further reflected residential categorization, as did details about the parcels' infrastructure: paved streets, public utilities, and zoning consistent with residential development.²⁶⁴ The PRCs also included valuation tables that, with one exception, reflected classification as residential for assessment purposes.²⁶⁵ Gary II supplemented this with aerial GIS maps and PRC notations indicating that two parcels previously contained residences that had been destroyed, further suggesting residential use.²⁶⁶

The Tax Court emphasized that the Manual and Guidelines base classification on a property's predominant current use, a standard consistent with the Constitution's use-based framework for tax cap eligibility.²⁶⁷ Although the IBTR dismissed Gary II's argument as relying solely on zoning, the court found this characterization inaccurate.²⁶⁸ The Guidelines explicitly recognize zoning as relevant to classification and define residential land as land "utilized or zoned for residential purposes."²⁶⁹ The court concluded that the IBTR had failed to engage meaningfully with Gary II's broader evidentiary presentation or to articulate reasoning for disregarding it.²⁷⁰

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 609.

264. *Id.* at 609–10.

265. *Id.* at 610.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.* (quoting IND. DEP'T LOC. GOV'T FIN., REAL PROPERTY ASSESSMENT MANUAL AND GUIDELINES (2011)).

270. *Id.* at 611.

Reaffirming that probative evidence is that which tends to prove a material fact, the court held that Gary II's evidence collectively tended to prove residential use as of the 2017 assessment date.²⁷¹ It therefore constituted a *prima facie* case, shifting the burden to the Assessor to produce substantial evidence in rebuttal.²⁷² The Assessor failed to meet this burden, offering only conclusory statements and no contrary evidence.²⁷³ Because the IBTR did not address Gary II's evidence or make any reasoned findings in response, and because the Assessor's failure to rebut left Gary II's *prima facie* case un rebutted, the court found in Gary II's favor on this issue.²⁷⁴

Accordingly, the Tax Court affirmed the IBTR's determination regarding the base rates applied to Gary II's properties.²⁷⁵ However, it reversed its classification decision, holding that the statutory provisions governing property tax cap classifications must be applied in a manner consistent with the Indiana Constitution—namely, based on the property's actual use.²⁷⁶ Finding that each of Gary II's five properties qualified as residential under the constitutional use standard in 2017, the court remanded the case with instructions for the IBTR to direct the Assessor to apply the 2% tax cap accordingly.²⁷⁷

II. UNPUBLISHED INDIANA TAX COURT DECISION

A. Tippecanoe County Assessor v. May

The issue before the Tax Court was whether an elected county assessor, appearing without counsel, may represent the assessor's office in an original tax appeal.²⁷⁸

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 611–12.

277. *Id.* at 612.

278. Tippecanoe Cnty. Assessor v. May, No. 25T-TA-00016, 2025 WL 2945666, at *1 (Ind. T.C. Oct. 17, 2025) (not designated for publication). On the same day, the Indiana Tax Court issued nine additional decisions that were identical in all material respects, differing only in the named taxpayer. *See* Tippecanoe Cnty. Assessor v. Mock, No. 25T-TA-00015, 2025 WL 2945601 (Ind. T.C. Oct. 17, 2025); Tippecanoe Cnty. Assessor v. Lund-Mikkelsen, No. 25T-TA-00014, 2025 WL 2945600 (Ind. T.C. Oct. 17, 2025); Tippecanoe Cnty. Assessor v. Abbott, No. 25T-TA-00013, 2025 WL 2945625 (Ind. T.C. Oct. 17, 2025); Tippecanoe Cnty. Assessor v. Stewart, No. 25T-TA-00012, 2025 WL 2945620 (Ind. T.C. Oct. 17, 2025); Tippecanoe Cnty. Assessor v. D & J Black Second Ltd. P'ship, No. 25T-TA-00011, 2025 WL 2945630 (Ind. T.C. Oct. 17, 2025); Tippecanoe Cnty. Assessor v. D & J Black Second Ltd. P'ship, No. 25T-TA-00010, 2025 WL 2945699 (Ind. T.C. Oct. 17, 2025); Tippecanoe Cnty. Assessor v. D & J Black Second Ltd. P'ship, No. 25T-TA-00009, 2025 WL 2945658 (Ind. T.C. Oct. 17, 2025); Tippecanoe Cnty. Assessor v. Goergen, No. 25T-TA-00008, 2025 WL 2945598 (Ind. T.C. Oct. 17, 2025); Tippecanoe Cnty. Assessor v. Goergen, No. 25T-TA-00007, 2025 WL 2945661 (Ind. T.C. Oct. 17, 2025). All these companion decisions were likewise not designated for publication.

The appeal was filed by Tippecanoe County Assessor Eric Grossman, acting *pro se* and purporting to appear in his official capacity.²⁷⁹ Recognizing a potential defect, the Court *sua sponte* ordered the Assessor either to obtain counsel or brief why a non-attorney elected official may represent a governmental office before the Tax Court.²⁸⁰ After briefing—and in the absence of any response from opposing parties—the court concluded that the Assessor could not proceed without licensed counsel.²⁸¹

The Tax Court first examined whether any statute authorizes a county assessor to represent the assessor's office in Tax Court proceedings. Grossman relied primarily on Indiana Code sections 33-26-7-1 and 6-1.1-35.7-2. The court rejected both arguments. Indiana Code section 33-26-7-1 provides that a county assessor may elect either to retain private counsel or be represented by the Attorney General when the assessor is a defendant in a Tax Court proceeding. The court emphasized the parallel “may elect” language in subsections (a) and (b), explaining that the statute establishes a choice of counsel—not a choice between representation and self-representation.²⁸² Moreover, the statute did not apply on its own terms. Section 33-26-7-1 applies only when the assessor “is a defendant” in Tax Court. Because Grossman initiated an original tax appeal, the statute was inapplicable, and the court declined to expand it beyond its plain meaning.²⁸³

The Tax Court likewise rejected reliance on Indiana Code section 6-1.1-35.7-2, which defines “tax representative” for proceedings before a county's PTABOA and the Department of Local Government Finance (DLGF). That statute expressly excludes representatives of local government units from the definition of tax representative, but the court explained that exclusion from a definition governing administrative proceedings does not confer authority to practice law in court.²⁸⁴ The court analogized county assessors to other non-attorney employees who are excluded from the definition of tax representative but are nonetheless prohibited from representing organizations in court.²⁸⁵ The statute's limited scope could not be extended to authorize representation in the Tax Court.²⁸⁶

Turning from statutes to constitutional structure, the Tax Court emphasized that the Indiana Supreme Court has exclusive authority to regulate the practice of law, including who may appear on behalf of others in judicial proceedings.²⁸⁷ Under settled Indiana law, a natural person may appear *pro se* only on his or her own behalf; representation of another—whether an individual, corporation, or

279. *May*, 2025 WL 2945666, at *1.

280. *Id.*

281. *Id.*

282. *Id.* at *1–2.

283. *Id.* at *2.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* at *3.

governmental office—constitutes the practice of law and requires admission to the bar.²⁸⁸ The court reasoned that, like a corporation, a county assessor's office represents interests broader than the elected official personally, including those of the county and its taxpayers.²⁸⁹ The court further noted that when the Indiana Supreme Court permits non-attorney representation, it does so expressly and narrowly, as in Indiana Small Claims Rule 8.²⁹⁰ No comparable judicial rule authorizes a county assessor to appear without counsel in Tax Court.²⁹¹

Relying on Indiana Supreme Court precedent, the Tax Court also drew a clear distinction between technical expertise in property tax matters and the practice of law.²⁹² While non-attorneys may possess specialized knowledge relevant to valuation disputes in administrative forums, constitutional claims and procedural challenges fall squarely within the domain of legal practice.²⁹³ Because Grossman's petition raised constitutional due process claims, the court concluded that allowing him to proceed pro se would amount to permitting the unauthorized practice of law.²⁹⁴

The Tax Court identified an additional concern underscoring the risks of non-attorney representation. Grossman's brief cited *Hamilton County Assessor v. Allisonville Rd. Partnership*, 170 N.E.3d 1117 (Ind. Tax Ct. 2021), a case that, the court noted, does not exist.²⁹⁵ The court observed that the fictitious citation appeared likely the product of a generative artificial intelligence hallucination and cautioned litigants against relying on AI-generated legal research without independent verification.²⁹⁶ The Tax Court explained that other courts have sanctioned both attorneys and pro se litigants for citing fictitious precedents.²⁹⁷ For this reason, it admonished Grossman for citing a fictitious case in his brief and cautioned attorneys and pro se litigants from doing the same in future pleadings.²⁹⁸ The court ordered that counsel enter an appearance by a specified date or, alternatively, that the assessor document unsuccessful efforts to retain counsel.²⁹⁹

288. *Id.*

289. *Id.*

290. IND. SMALL CLAIMS RULE 8.

291. *May*, 2025 WL 2945666, at *3.

292. *Id.* at *2–3.

293. *Id.* at *2.

294. *Id.*

295. *Id.* at *4.

296. *Id.* at *4 n.1.

297. *Id.* at *4 (citing *Williams v. Kirch*, 268 N.E.3d 284, 287 (Ind. Ct. App. 2025) (discussing the award of attorney's fees as part of costs to the prevailing party when a court finds that the opposing party (1) brought a frivolous, unreasonable, or groundless claim; (2) continued to litigate after the claim clearly became frivolous, unreasonable, or groundless; or (3) litigated in bad faith); *In re Baby Boy*, 271 N.E.3d 524, 556 (Ill. App. Ct. 2025) (requiring an attorney who cited fictitious cases generated by AI in his briefs to pay monetary sanctions and directing that a copy of the opinion be sent to the Illinois Attorney Registration and Disciplinary Commission)).

298. *See id.* at *4 n.1.

299. *Id.* at *4.

Although unpublished,³⁰⁰ *May* is significant for two reasons. First, it reaffirms that no elected status or subject-matter expertise permits a non-attorney to represent a governmental office before the Indiana Tax Court absent express judicial or statutory authorization. Second, it provides an early and explicit judicial warning about the risks of unverified AI-generated legal research—an issue with direct implications for attorney discipline and professional responsibility.

III. INDIANA SUPREME COURT DECISION

A. Sawlani v. Lake County Assessor

The issue before the Indiana Supreme Court was whether the Indiana Tax Court had properly ruled that the Indiana General Assembly's statutory definition of curtilage as one acre of surrounding land was unconstitutional.³⁰¹

In 2024, in *Sawlani v. Lake County Assessor*, the Indiana Tax Court considered whether the Indiana General Assembly could constitutionally limit application of the 1% property tax cap to a single acre of land—the curtilage—surrounding a taxpayer's principal residence.³⁰² The Tax Court concluded that the legislature's statutory definition of curtilage as one acre of surrounding land was unconstitutional, reasoning that the relevant constitutional provision contains no language supporting such a limitation.³⁰³ The Tax Court's reasoning, however, is open to serious criticism.³⁰⁴ The decision represented a marked departure from established principles of constitutional interpretation and deference to legislative implementation, undermining legislative authority and introducing uncertainty into Indiana's property tax framework. On October 7, 2025, the Indiana Supreme Court reversed the Tax Court's decision in *Sawlani*.³⁰⁵ To appreciate the significance of the Supreme Court's ruling—and

300. Indiana designates certain memorandum decisions as “Not for Publication” (NFP). Under IND. APPELLATE RULE 65 (Opinions and Memorandum Decisions), NFP opinions “shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish *res judicata*, collateral estoppel, or law of the case.” The Indiana Supreme Court has explained that NFP opinions are posted online solely for public access and that their availability does not constitute publication for purposes of APP. R. 65. See *Not-for-Publication (NFP) Opinions*, IND. JUD. BRANCH, <https://www.in.gov/courts/public-records/nfp-opinions/> [https://perma.cc/L6YY-A62Q] (last visited Feb. 14, 2026).

301. *Sawlani v. Lake Cnty. Assessor*, 267 N.E.3d 419, 421–22 (Ind. 2025), *rev'g*, 240 N.E.3d 734 (Ind. T.C. 2024).

302. *Id.* at 421 (citing *Sawlani*, 240 N.E.3d 734).

303. *Id.*

304. See Swain, *supra* note 247 (providing an in-depth analysis of the Indiana Tax Court's rationale in *Sawlani* and critiquing its constitutional interpretation of the 1% tax cap and the Indiana legislature's authority to limit that cap to one acre of curtilage surrounding the taxpayer's domicile).

305. See *Sawlani*, 267 N.E.3d at 419.

its limitations—it is necessary to examine the Tax Court’s original opinion and expose the analytical flaws that prompted reversal.

1. *Indiana’s So-Called Property Tax “Circuit Breaker.”*—One of the significant early developments of residential property tax relief in the United States came with the introduction of the “circuit breaker.” First developed in 1964 by Wisconsin and then imitated by other states,³⁰⁶ a traditional circuit breaker is a property tax credit designed to prevent a household’s property tax burden from exceeding a certain proportion of its income.³⁰⁷ There are two main types: threshold and sliding scale. A threshold program gives the credit for taxes exceeding a set income percentage.³⁰⁸ In a sliding scale program, the credit amount decreases as income increases.³⁰⁹ Circuit breakers may be administered as an income tax credit or through a separate application process.³¹⁰

Indiana’s first statewide “circuit breaker” limited property taxes to 2% of assessed value for homesteads and 3% for all other properties.³¹¹ Since Indiana’s so-called circuit breaker is not based on a property owner’s income, commentators do not consider it a traditional circuit breaker but rather a tax cap.³¹² In 2010, the tax caps were modified to 1% for homesteads, 2% for other residential properties and farmland, and 3% for business properties.³¹³ In November 2010, Indiana voters approved incorporating these property tax caps into Indiana’s Constitution³¹⁴ via Article 10, Section 1. These tax limits are commonly referred to as “property tax caps,” “circuit breakers caps,” or a “Circuit Breaker tax credit.”³¹⁵

Indiana’s property tax caps are prescribed in Article 10, Section 1(f) of the Indiana Constitution, which provides the following:

306. See, e.g., Marc Bendick, Jr., *Designing Circuit Breaker Property Tax Relief*, 27 NAT’L TAX J. 19, 19 (1974).

307. Steven D. Gold, *Circuit-Breakers and Other Relief Measures*, 35 PROP. TAX & LOC. FIN. 148, 149 (1983).

308. *Id.*

309. *Id.*

310. *Id.*

311. See Lawrence A. Jegen III et al., *Recent Developments in Indiana Taxation*, 40 IND. L. REV. 1103, 1106–07 (2007).

312. See, e.g., John H. Bowman, *Property Tax Circuit Breakers in 2007: Features, Use, and Policy Issues* 45 (Lincoln Inst. of Land Pol’y, Working Paper No. WP08JB1) (discussing the 2006 Indiana law that ensured that Indiana property tax owners did not pay more than 2 percent of their property’s value in taxes). Despite the Indiana DLGF describing this protection as a circuit breaker, it is better viewed as a tax cap.

313. See Larry DeBoer, *What Do We Know About Indiana’s Property Tax Caps?*, IND. FISCAL POL’Y INST., Dec. 2015, at 5 (providing a detailed discussion of Indiana’s attempts to reform its property tax scheme and the development of circuit breakers or tax caps).

314. *Id.*

315. See *id.*; see also *County Homestead/LIT 1% Credit*, PORTER CNTY. IND., <https://www.portercountyin.gov/807/County-Homestead-Credit> [<https://perma.cc/2AXP-U6X4>] (stating that Indiana’s property tax caps are known as “the Circuit Breaker tax credit”).

- (f) This subsection applies to property taxes first due and payable in 2012 and thereafter. The General Assembly shall, by law, limit a taxpayer's property tax liability as follows:
- (1) A taxpayer's property tax liability on tangible property described in subsection (c)(4) may not exceed one percent (1%) of the gross assessed value of the property that is the basis for the determination of property taxes.
 - (2) A taxpayer's property tax liability on other residential property may not exceed two percent (2%) of the gross assessed value of the property that is the basis for the determination of property taxes.
 - (3) A taxpayer's property tax liability on agricultural land may not exceed two percent (2%) of the gross assessed value of the land that is the basis for the determination of property taxes.
 - (4) A taxpayer's property tax liability on other real property may not exceed three percent (3%) of the gross assessed value of the property that is the basis for the determination of property taxes.
 - (5) A taxpayer's property tax liability on personal property (other than personal property that is tangible property described in subsection (c)(4) or personal property that is other residential property) within a particular taxing district may not exceed three percent (3%) of the gross assessed value of the taxpayer's personal property that is the basis for the determination of property taxes within the taxing district.³¹⁶

Accordingly, section 1(f) amended Indiana's Constitution to limit real and personal property tax liability to 1%, 2%, or 3% of a property's gross assessed value, depending on the property's type and use classification.³¹⁷ The property tax caps were introduced to alleviate the property tax burden on taxpayers, with varying limits depending on the property type.³¹⁸ For homesteads, which are the taxpayer's principal place of residence, a 1% cap is applied.³¹⁹ Other residential properties, such as rental properties and agricultural land, are subject to a 2% cap.³²⁰ Finally, a 3% cap is applied to all other real properties, including commercial and industrial properties.³²¹ These differentiated caps ensure that the tax burden is more equitable across different property types.

Indiana's property tax caps provide property tax credits, ensuring taxpayers do not pay a tax exceeding a specific percentage of their property's assessed value. When taxpayers' property tax liability surpasses the designated cap, they

316. *See* IND. CONST. art. 10, § 1(f)(1)–(5).

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

receive a credit for the excess, reducing their tax liability to the capped limit. For example, consider a homestead property with a gross assessed value of \$200,000, which serves as the homeowner's principal place of residence. For this type of property, the applicable tax cap is 1%. The maximum property tax liability under the cap is 1% of the property's assessed value, \$200,000, resulting in a \$2,000 limit. If the actual property tax, based on local rates, amounted to, for instance, \$2,500, the taxpayer's liability exceeds the cap. In this scenario, the taxpayer receives a credit, bringing the property tax liability down to the \$2,000 cap. Consequently, the taxpayer pays \$2,000 in property taxes instead of the initially assessed \$2,500.

In another example, consider a rental property with a gross assessed value of \$300,000, subject to a 2% tax cap. The maximum property tax liability for rental properties (as well as agricultural land) is 2% of the property's assessed value, \$300,000, which equals \$6,000. If the calculated property tax based on local rates is \$7,500, the taxpayer's liability again exceeds the cap. Therefore, the taxpayer receives a credit that reduces his or her property tax liability to the capped amount of \$6,000. As a result, the taxpayer pays \$6,000 in property taxes instead of \$7,500.

In both examples, the implementation of tax caps essentially serves as an excess-tax credit, limiting taxpayers' property tax liability to a specified maximum percentage of their property's assessed value, thereby preventing excessive tax burdens. When these examples are examined in conjunction with the traditional definition of a circuit breaker, it becomes clear that Indiana's current circuit breaker functions, not in the conventional sense, but rather as a tax rate cap based on a property's assessed value rather than the taxpayer's ability to pay.³²²

Section 1(f)(1) of the Indiana Constitution provides that the "tangible property described in section (1)(c)(4)" may not exceed 1% of the gross assessed value of the property.³²³ Section (1)(c)(4)(A) defined the tangible property subject to the 1% cap as "[t]angible property, including curtilage, used as a principal place of residence by an . . . owner of the property."³²⁴ Because these tax caps were not self-implementing, Article 10's sections (1)(a), (1)(b), (1)(c), and (1)(f) required additional legislative measures to make them operational and enforceable.³²⁵ These sections mandated that the Indiana General Assembly enact legislation to define, clarify, and apply the constitutional limitations.

322. See Jegen, *supra* note 311, at 1106 n.21.

323. See IND. CONST. art. 10, § 1(f)(1).

324. See *id.* § 1(c)(4)(A).

325. See, e.g., *id.* § 1(a) ("Subject to this section, 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." (emphasis added)); *id.* § 1(c) ("The *General Assembly* may exempt from property taxation any property . . . [including] . . . [t]angible property, including curtilage, used as a principal place of residence by an . . . owner of the property[.]" (emphasis added)); and *id.* § 1(f) ("The *General Assembly* shall, by law, limit a taxpayer's property tax liability as follows[.]" (emphasis added)).

Accordingly, the section 1(f) amendment to Indiana's Constitution gave the Indiana General Assembly authority to further define and interpret the constitutionally mandated property tax caps. Indiana's legislature performed its obligation and, regarding the 1% cap on property used as a principal place of residence by its owner, defined the type of property eligible for this cap as "homestead" property.³²⁶ The legislature further defined "homestead" property as property granted a standard homestead deduction (i.e., Indiana Code section 6-1.1-12-37(k), the "Homestead Statute")³²⁷ and consisting of a dwelling located in Indiana, including one acre of real estate that "immediately surround[s] that dwelling."³²⁸ Finally, the legislature defined "dwelling" as a single house with a garage, a mobile home, or a manufactured home that an individual uses as his or her residence, regardless of whether the garage is attached or detached and whether the home is assessed as real property.³²⁹ The implementation of these property tax reforms, including the 1% tax cap, set the stage for a legal challenge concerning their application. That challenge arose in *Sawlani v. Lake County Assessor*, in which the Indiana Tax Court was asked to determine the constitutionality of the statutory limitations placed on the 1% cap.

2. *The Tax Cap Case Before the Tax Court.*—In *Sawlani*, Dr. Tulsi and Kamini Sawlani (the "Sawlanis") owned a two-story home on 3.981 acres in Crown Point, Indiana.³³⁰ 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.³³¹ 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.³³² Both administrative agencies rejected their claim, with the IBTR acknowledging its

326. See IND. CODE § 6-1.1-20.6-7.5(a)(1) (2025) ("homestead exceeds one percent (1%)").

327. See IND. CODE § 6-1.1-20.6-2(a)(1) (2025).

328. See IND. CODE § 6-1.1-12-37(a)(2) (2025) ("‘Homestead’ means an individual's principal place of residence . . . in Indiana . . . that consists of a dwelling and includes up to one (1) acre of land immediately surrounding that dwelling, and [specified] improvements . . .").

329. See § 6-1.1-12-37(a)(1).

330. See *Sawlani v. Lake Cnty. Assessor*, 240 N.E.3d 734, 736 (Ind. T.C. 2024), *rev'd*, 267 N.E.3d 419 (Ind. 2025).

331. *Id.*

332. *Id.*

lack of authority to resolve the constitutional issue.³³³ The Sawlanis initiated an original tax appeal to the Indiana Tax Court.³³⁴

Before the Indiana Tax Court, the Sawlanis noted that the Indiana Constitution applied the 1% tax cap to all property used as a principal residence, including curtilage, without imposing an acreage limit.³³⁵ 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.³³⁶ The Sawlanis argued that this statutory limitation was unconstitutional because Indiana's Constitution did not impose such an acreage restriction on applicable curtilage.³³⁷ 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)).³³⁸ The Sawlanis did not contest any other aspect of Indiana's property tax scheme or their property's assessment. 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 1% tax cap.

3. *The Tax Court's Analysis and Decision in Sawlani.*—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*."³³⁹ However, the statute that administered the constitutionally mandated tax cap applied the 1% cap to "homestead" property that received a standard homestead deduction. The statute defined a homestead as an *individual's principal place of residence* comprising a dwelling and one acre of

333. *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").

334. *Sawlani*, 240 N.E.3d at 736.

335. *Id.* at 736–37.

336. *Id.*

337. *Id.*

338. *Id.* at 737.

339. *Id.* at 743 (alteration in original) (emphasis added) (quoting IND. CONST. art. 10, § 1(c)(4), (f)(1)).

surrounding real estate.³⁴⁰ The excess land was subject to higher tax caps depending on the property type.

The court noted that the constitutional text did not use the word “homestead” or impose size limits on eligible properties. Its analysis of the phrases “tangible property” and “principal place of residence,” as well as the word “curtilage,” suggested no implicit size constraints.³⁴¹ The court explained that “tangible property” referred to physical property, while “principal place of residence” indicated the main home without fixed size restrictions.³⁴² The varying definitions of “curtilage,” none of them including specific size limits, referred to the area surrounding a dwelling.³⁴³ 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 surrounding the *principal place of residence*.³⁴⁴ 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 than its size alone.³⁴⁵

The Tax Court continued its analysis, asserting that its conclusion regarding the 1% cap comported with the other two tax caps.³⁴⁶ 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.³⁴⁷ Specifically, the 1% cap pertains to “tangible property” utilized as a principal place of residence, as outlined in Subsection (1)(c)’s paragraph (4). Conversely, the 2% cap applied to “other residential property” and “agricultural land,” both delineated by use rather than size.³⁴⁸ “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.³⁴⁹ 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.³⁵⁰ 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.³⁵¹ When interpreting a statute, the court said, courts should consider its overall structure and the plain

340. *See id.* (citing IND. CODE §§ 6-1.1-20.6-7.5(a)(1), 6-1.1-12-37(a)(2) (2019)).

341. *See id.* at 744–45.

342. *Id.* at 744.

343. *Id.* at 744–45.

344. *Id.* at 745 (emphasis added).

345. *Id.*

346. *Id.* at 746–47.

347. *Id.* at 746.

348. *Id.*

349. *Id.*

350. *Id.* at 746–47.

351. *Id.* at 747.

meanings of its verbiage.³⁵² 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.³⁵³ 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.”³⁵⁴

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.³⁵⁵ The Assessor emphasized that the digests of the joint resolutions referred to “homestead property,” suggesting a legislative intent to confine the constitutional tax caps to the same scope as the statutory tax caps.³⁵⁶ However, the Tax Court found this argument flawed due to, in its opinion, the Assessor’s fundamental misunderstanding of the constitutional tax caps.³⁵⁷ 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.³⁵⁸ 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.³⁵⁹

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.³⁶⁰ 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.³⁶¹ 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.³⁶² 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.³⁶³ Therefore, the Tax Court rejected the Assessor’s interpretation, emphasizing that the legislative digests

352. *Id.* (citing *Ernst & Ernst v. Underwriters Nat’l Assurance Co.*, 381 N.E.2d 897, 900 (Ind. Ct. App. 1978)).

353. *Id.*

354. *Id.*

355. *Id.*

356. *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)).

357. *See id.* at 748.

358. *Id.*

359. *Id.* (alteration in original).

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

lack legal authority and should not outweigh the original language of Subsection (1)(c)'s paragraph (4).³⁶⁴ 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.³⁶⁵

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."³⁶⁶ However, the Tax Court found that this interpretation conflated the ordinary meaning of "homestead" with its statutory definition.³⁶⁷ The ordinary meaning of "homestead" did not include the statutory one-acre limitation.³⁶⁸ The court determined that the voters likely understood "homestead" in the ballot question according to its everyday usage, not its technical legal sense.³⁶⁹ 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 requires ratification by voters after passage by two different Indiana General Assemblies separated by an intervening general election.³⁷⁰ Since the ballot question was passed like any other ordinary legislation, the court held that it could not modify the constitutional language or redefine "homestead" beyond what voters approved.³⁷¹ 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.³⁷²

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.³⁷³ However, the court found that the one-acre limitation may be unconstitutional as applied to taxpayers such as the Sawlanis, who had residential properties exceeding that size.³⁷⁴ Consequently, the Tax Court reversed the IBTR's determination that the Sawlanis were not entitled to the 1%

364. *Id.* at 749.

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.* at 750.

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.* (citing *Holcomb v. Bray*, 187 N.E.3d 1268, 1280–83 (Ind. 2022)).

373. *Id.* at 751 (citing *Meredith v. Pence*, 984 N.E.2d 1213, 1218 (Ind. 2013)) (holding that a statute is unconstitutional on its face if there are no circumstances under which it can be constitutionally applied).

374. *See id.* at 751–52.

tax cap credit on their residential acreage exceeding the one-acre limitation and remanded the case back to the IBTR.³⁷⁵

In remanding the case to the IBTR, the Tax Court directed it to make additional factual findings necessary to resolve the Sawlanis' as-applied constitutional claim.³⁷⁶ Because the IBTR had not developed a sufficient record to determine whether Indiana Code section 6-1.1-20.6-7.5(a)(1)—which limits the one-percent tax cap to one acre—was unconstitutional as applied, the Tax Court ordered further proceedings focused on the use of the Sawlanis' remaining 2.981 acres.³⁷⁷ The court explained that the inquiry on remand should not revisit the eligibility of the first acre, which all parties agreed qualified for the one-percent cap, but should instead determine whether the additional acreage was “used as part of the Sawlanis' principal place of residence,” consistent with both the constitutional and statutory frameworks.³⁷⁸ The Tax Court authorized the IBTR to take whatever actions were necessary to make that determination, including the possibility of a new evidentiary hearing to examine how the disputed acreage functioned in relation to the Sawlanis' home.³⁷⁹ In effect, the remand order implemented the Tax Court's new case-by-case approach, under which property owners with more than one acre could seek factual findings on whether their excess acreage constitutes “curtilage” eligible for the one-percent cap.

4. *Problems with the Tax Court's Rationale in Sawlani.*—The Indiana Tax Court's reasoning in *Sawlani* reveals several fundamental analytical and constitutional flaws. Although the court sought to protect the constitutional boundaries of the state's 1% property tax cap, its approach disregarded core principles governing legislative authority, judicial restraint, and uniform tax administration. Four primary errors illustrate the depth of the court's misjudgment: its disregard of the Constitution's enabling clauses, its adoption of an ad hoc approach that undermines uniformity, its misunderstanding of the non-self-executing nature of the 1% cap, and its continued rejection of the deference owed to legislative and administrative policymaking in tax matters.

a. *Enabling clauses ignored.*—The first and most fundamental error in the Tax Court's reasoning was its failure to recognize the enabling clauses embedded throughout Article 10, Section 1 of the Indiana Constitution.³⁸⁰ These clauses explicitly empower the General Assembly to operationalize the property tax system, including the tax caps. By disregarding those clauses, the court effectively stripped the General Assembly of its constitutionally delegated authority to enact statutes defining the contours of the 1% cap—such as the one-acre curtilage limitation.

375. *Id.* at 752.

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

380. IND. CONST. art. 10, § 1.

Article 10, Section 1(f) states that the “General Assembly shall, by law, limit” property tax liability,³⁸¹ while Section 1(c)(4) provides that the “General Assembly may exempt” certain property from taxation.³⁸² These provisions are classic enabling clauses that constitutionally mandate legislative implementation. The Tax Court’s decision to treat the 1% cap as self-operating ignored this structure and, by implication, nullified the legislature’s implementing authority. In doing so, the court substituted its own interpretive preferences for the constitutionally prescribed legislative process, undermining the very separation of powers the Constitution protects. The Tax Court also disregarded its own precedent³⁸³ issued just two years earlier, in which it acknowledged the codependency between the terms defined in the Homestead Deduction Statute and those used in the 1% tax cap provisions of Article 10, Sections 1(c)(4) and 1(f)(1) of the Indiana Constitution.³⁸⁴

b. Ad hoc vs. uniformity.—Second, the Tax Court’s insistence on a case-by-case determination of curtilage directly conflicts with Article 10, Section 1(a)’s requirement that Indiana’s property tax system be “uniform and equal.”³⁸⁵ The court’s ad hoc approach invites inconsistent outcomes among counties and assessors, depending on how each defines curtilage in the absence of a statutory rule. Uniformity and predictability are central to any equitable system of taxation. By rejecting the legislature’s clear, objective one-acre limitation, the Tax Court replaced certainty with subjectivity, thereby eroding taxpayer confidence and administrative consistency. This approach risks disparate tax treatment among similarly situated taxpayers—a result the constitutional uniformity clause was designed to prevent.³⁸⁶

c. Non-self-executing provision overlooked.—Third, the Tax Court failed to give effect to the well-established principle that Article 10, Section 1(f) is not self-executing. The Indiana Supreme Court has repeatedly held that constitutional provisions containing enabling language require implementing legislation before they can be enforced.³⁸⁷ Without such legislation, the 1% tax

381. *Id.* § 1(f).

382. *Id.* § 1(c)(4).

383. *See* Schiffler v. Marion Cnty. Assessor, 184 N.E.3d 726 (Ind. T.C. 2022).

384. *See* Swain, *supra* note 247, at 512–14, 524–25 (discussing the constitutional enabling clauses in Article 10, Section 1 and their delegation of authority to the General Assembly).

385. IND. CONST. art. 10, § 1(a).

386. Swain, *supra* note 247, at 527–38 (contrasting the legislature’s one-acre curtilage definition with the Tax Court’s ad hoc approach and explaining its conflict with Indiana’s constitutional requirement of uniform and equal taxation).

387. *See, e.g.,* Horner v. Curry, 125 N.E.3d 584, 599 (Ind. 2019) (quoting *State ex rel. Att’y Gen. v. Meyer*, 63 Ind. 33 (Ind. 1878)) (reaffirming that Article 8, Section 2 of the Indiana Constitution, establishing the Common School Fund, is not self-executing and therefore requires legislative enactment to give it operative effect, emphasizing that the judiciary cannot enforce the provision absent such legislation); *Solomon v. State*, 119 N.E.3d 173, 176–78 (Ind. Ct. App. 2019) (holding that Article 1, Section 1 is not self-executing because it expresses general principles lacking sufficient completeness for judicial enforcement without legislative implementation);

cap lacks operational effect. By invalidating the statute defining the cap's application to one acre of curtilage, the Tax Court effectively suspended the 1% cap's operation until the legislature acts again. This outcome contradicts both historical precedent and the doctrine of legislative discretion under non-self-executing provisions. In short, the court's ruling disabled the very taxpayer protection it purported to safeguard.³⁸⁸

d. Judicial overreach and the rejection of deference.—Finally, the *Sawlani* decision reflects the Tax Court's ongoing pattern of judicial overreach and disregard for the Indiana Supreme Court's deference doctrine. The court's refusal to defer to the legislature's or DLGF's reasonable interpretations echoes its reasoning in *Ingredion, Inc. v. Marion County Assessor*³⁸⁹ and similar cases, in which this refusal to acknowledge constitutionally mandated policymaking by the legislative and executive branches transforms the Tax Court from an adjudicative body into a quasi-legislative actor. Its absolutist textualism elevates judicial interpretation over statutory implementation, undermining the stability of Indiana's tax system and the constitutional balance of powers that sustains it.³⁹⁰

5. The Supreme Court's Reversal Rationale.—Following the Indiana Tax Court's decision favoring the Sawlanis, the Lake County Assessor petitioned the Indiana Supreme Court for review.³⁹¹ In a unanimous 5-0 opinion authored by Justice Christopher M. Goff, the court reversed the Tax Court's ruling.³⁹² While the decision reinstated the statutory one-acre limitation on the 1% tax cap, the court's analysis was notably narrow—and logically inconsistent—focusing exclusively on the taxpayers' failure of proof rather than addressing the deeper constitutional and interpretive questions the Tax Court had raised.

a. The constitutional and statutory framework for the 1% homestead tax cap.—The Supreme Court began its opinion by explaining how the Indiana General Assembly operationalizes the Indiana Constitution's property tax cap on a principal place of residence and by outlining the parties' opposing arguments. Under Article 10, Section 1 of the Indiana Constitution, “[t]he

Thomas v. Lauer, 86 N.E.2d 71, 73–74 (Ind. 1949) (concluding that Article 1, Section 21, concerning just compensation, is not self-executing and merely authorizes, but does not compel, legislative action to permit takings without prior payment); State Bd. of Tax Comm'rs v. Holliday, 49 N.E. 14, 15–16, 18 (Ind. 1898) (distinguishing between self-executing provisions, which operate as law without further legislation, and non-self-executing provisions, which remain dormant and unenforceable until the General Assembly enacts laws to effectuate them, thereby underscoring that invalidating an implementing statute leaves the underlying constitutional provision inoperative).

388. See Swain, *supra* note 247, at 514–24 (explaining that the 1% cap is non-self-executing and requires implementing legislation; otherwise, the constitutional exemption has no practical effect).

389. 184 N.E.3d 731 (Ind. T.C. 2022), *trans. denied*, 197 N.E.3d 822 (Ind. 2022).

390. See Swain, *supra* note 247, at 505–12 (criticizing the Tax Court's historical rejection of agency deference and strict textualist overreach).

391. *Sawlani v. Lake Cnty. Assessor*, 267 N.E.3d 419, 422 (Ind. 2025).

392. *Id.* at 420–21, 425.

General Assembly shall, by law, limit a taxpayer's property tax liability" in several ways, depending on the class of property involved.³⁹³ For "[t]angible property, including curtilage, used as a principal place of residence," a taxpayer's liability "may not exceed one percent (1%) of the gross assessed value of the property that is the basis for the determination of property taxes."³⁹⁴ This constitutional tax cap is implemented through the Indiana Code, particularly the Homestead Statute.³⁹⁵ The Homestead Statute defines a homeowner's "homestead," in pertinent part, as a "dwelling and the real estate, not exceeding one (1) acre, that immediately surrounds that dwelling" and is used as the homeowner's "principal place of residence."³⁹⁶ Under this definition, a person with a homestead is entitled to a credit against their property-tax liability in the amount that the tax exceeds one percent.³⁹⁷ In other words, "property taxes on a homeowner's homestead are effectively capped at one percent of assessed value."³⁹⁸

b. The term "curtilage" has no size limit.—The Sawlanis argued that, because Article 10, Section 1 caps property taxes at one percent for tangible property used as a principal place of residence, "including curtilage," and because some homeowners may use more than one acre as curtilage, "the Homestead Statute's one-acre limitation is unconstitutional as applied to them and others similarly situated."³⁹⁹ They contended that their entire 3.981-acre parcel in Crown Point, Indiana, functioned as curtilage of their home and therefore qualified for the one-percent cap.⁴⁰⁰ The Lake County Assessor, however, classified only one acre as homestead property subject to the one-percent rate and assessed the remaining 2.981 acres at the nonresidential three-percent rate, a determination upheld by the IBTR.⁴⁰¹ The resulting dispute before the Indiana Supreme Court thus turned on whether the statutory one-acre limit conflicted with Article 10's reference to "curtilage" and whether the taxpayers had proved that their additional acreage constituted part of their principal place of residence.⁴⁰²

The Sawlanis' argument continued, asserting that the plain meaning of "curtilage" had no inherent size limit.⁴⁰³ They maintained that, consistent with the common understanding of the framers and ratifiers of Article 10, Section 1, the term "curtilage" referred broadly to the area surrounding a home that is

393. *Id.* at 422 (alteration in original) (quoting IND. CONST. art. 10, § 1(c)(4), (f)(1)).

394. *Id.* (alteration in original) (emphasis omitted) (quoting IND. CONST. art. 10, § 1(c)(4), (f)(1)).

395. *Id.*

396. *Id.* (emphasis omitted) (quoting IND. CODE § 6-1.1-12-37(k)(1)–(2)).

397. *Id.* (citing IND. CODE § 6-1.1-20.6-7.5(a)).

398. *Id.*

399. *Id.*

400. *Id.* at 421.

401. *Id.*

402. *Id.* at 421–22.

403. *Id.* at 423.

intimately associated with domestic life.⁴⁰⁴ Citing definitions from well-renowned dictionaries, the Sawlanis emphasized that “curtilage” traditionally describes the grounds and outbuildings connected to a dwelling and “has no standard limits as to square footage or size.”⁴⁰⁵ They also pointed to property-tax cases from other states in which courts recognized that curtilage could extend well beyond a single acre when reasonably necessary for the enjoyment and use of a residence.⁴⁰⁶ Finally, relying on *United States v. Dunn*,⁴⁰⁷ the Sawlanis urged that the concept of curtilage depends not on acreage but on use—particularly proximity to the home, enclosure, purpose, and the degree of privacy maintained.⁴⁰⁸ From these sources, the Sawlanis concluded that the framers and ratifiers of the constitutional provision could not have intended a one-acre limitation and that the Homestead Statute’s restriction was therefore unconstitutional as applied to homeowners whose residential use extends beyond that boundary.⁴⁰⁹

c. The framers understood the tax cap could be limited.—The Assessor argued that the framers and ratifiers of Article 10, Section 1 intended the one-percent property tax cap to incorporate the contemporaneous statutory definition of “homestead,” including its one-acre limitation.⁴¹⁰ Amending the Indiana Constitution requires identical resolutions passed by two successive General Assemblies, separated by a general election, followed by voter ratification.⁴¹¹

In 2008, the General Assembly approved Senate Joint Resolution 1, proposing the current constitutional language and describing it as limiting a taxpayer’s liability on “homestead property” to one percent of assessed value.⁴¹² During that same session, it enacted Indiana Code section 6-1.1-20.6-7.5(a)(1), effective January 1, 2009, which applied the 1% tax cap to a “homestead” defined as a dwelling and “the real estate, not exceeding one (1) acre, that immediately surrounds that dwelling.”⁴¹³ Two years later, the identical resolution was reapproved by the succeeding General Assembly, and voters ratified the amendment at the 2010 general election.⁴¹⁴ Although the ballot

404. *Id.*

405. *Id.* (emphasis omitted) (citation omitted).

406. *Id.* (first citing *Bullis Sch., Inc. v. Appeal Tax Ct. for Montgomery Cnty.*, 114 A.2d 41, 42 (Md. 1955); then quoting *McTague v. Monroe Twp.*, 1 N.J. Tax 66, 68, 72 (N.J. Tax Ct. 1980); and then citing *Solebury Twp. Bd. of Supervisors v. Bucks Cnty. Bd. of Assessment & Revision of Taxes*, 1966 WL 226518, at *1 (C. P. Pa. Aug. 29, 1966) (unpublished)).

407. 480 U.S. 294 (1987) (holding that the Fourth Amendment protects the curtilage of a home from warrantless searches and identifying four factors—proximity to the dwelling, enclosure, use, and privacy measures—to determine whether an area constitutes curtilage).

408. *Sawlanis*, 267 N.E.3d at 423–24.

409. *Id.* at 424.

410. *Id.*

411. *Id.* (citing IND. CONST. art. 16, § 1(a)–(c); IND. CODE § 2-2.1-1-1(2) (2024)).

412. *See id.*

413. *Id.* (emphasis omitted) (citing Act of Mar. 19, 2008, Pub. L. No. 146-2008, §§ 115, 223, 2008 Ind. Acts 2307, 2414, 2538).

414. *See id.*

question referred simply to a “1% [cap] for an owner-occupied primary residence (homestead),” the Assessor maintained that lawmakers and voters understood the amendment as incorporating the one-acre limitation.⁴¹⁵ Relying on the contemporaneous statutory enactment, legislative digests, and public materials, the Assessor argued that the constitutional amendment codified the statutory definition of “homestead” into Article 10, Section 1.⁴¹⁶ Because this interpretation was consistent with the presumption of constitutionality, the Assessor urged that the Homestead Statute be upheld.⁴¹⁷

d. The Sawlanis’ burden of proof.—In rejecting the Sawlanis’ as-applied constitutional challenge, the Supreme Court reaffirmed that legislative enactments are presumed valid and that the challenger bears a heavy burden to show unconstitutionality.⁴¹⁸ Although the taxpayers argued that curtilage had no fixed size limit—citing dictionary definitions, property-tax precedents from other jurisdictions, and the U.S. Supreme Court’s decision in *Dunn*—the court held that the record contained insufficient evidence demonstrating that the additional acreage functioned as part of their residence.⁴¹⁹

The Supreme Court observed that the taxpayers’ property lacked physical demarcations or use patterns suggesting that the entire 3.981-acre parcel was used in connection with the home.⁴²⁰ There was no fencing, no clear boundary formed by trees, and no showing that the excess acreage was intimately associated with the activities of domestic life and “should be treated as the home itself.”⁴²¹ The court further noted that residence within a gated community does not, by itself, establish curtilage.⁴²² Because the taxpayers failed to prove that more than one acre of their property constituted curtilage, they did not overcome the statute’s presumption of constitutionality.⁴²³

e. The Supreme Court’s holding and remand.—The court declined to decide whether the Constitution permits the General Assembly to limit curtilage to one acre.⁴²⁴ Instead, it reiterated the strong presumption of constitutionality afforded to legislative enactments and emphasized the challenging party’s “high burden of proof” to rebut that presumption.⁴²⁵ Even assuming, as the Sawlanis contended, that “curtilage” may constitutionally extend beyond one acre, the court concluded that they failed to demonstrate that the additional 2.981 acres constituted curtilage.⁴²⁶ Because the Sawlanis did not meet their burden of

415. *Id.* (emphasis omitted).

416. *Id.* at 424–25.

417. *Id.* at 425 (citing *State Bd. of Tax Comm’rs v. Town of St. John*, 702 N.E.2d 1034, 1037 (Ind. 1998)).

418. *Id.* (quoting *St. John*, 702 N.E.2d at 1037).

419. *See id.*

420. *Id.*

421. *Id.*

422. *Id.* (citing *United States v. Powell*, 943 F. Supp. 2d 759, 786 (E.D. Mich. 2013)).

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

proving their constitutional claim, the court reversed the Tax Court's decision and remanded the case with instructions to affirm the IBTR's determination in favor of the Assessor.⁴²⁷

f. Problems left unresolved by the court.—The Indiana Supreme Court's remand follows the pattern typically expected when a reviewing court determines that a statute is constitutional on its face and the lower court erred in holding otherwise. Normally, if an appellate court declines to reach a constitutional question because the challenging party failed to develop a sufficient evidentiary record or preserve the issue for review, the proper course is to remand the case for further factual development. Such a remand would allow the challenger—here, the Sawlanis—to present evidence before the IBTR demonstrating that their residential use extended beyond one acre. In fact, this was the one aspect the Tax Court arguably got right—that is, its remand order properly directed the IBTR to determine whether the Sawlanis' use of the acreage exceeding one acre qualified as part of their principal residence. This alignment between the Tax Court's ruling and its remand order stood in contrast to the Supreme Court's decision, which, in this case, inexplicably did a little of both. It reversed the Tax Court's constitutional holding, thereby reinstating the statute, on the ground that the Sawlanis failed to factually establish an as-applied challenge to the Homestead Statute, while at the same time remanding the case with instructions to affirm the IBTR's determination in favor of the Assessor, as if the IBTR had correctly interpreted the Homestead Statute in the first instance.

This procedural outcome creates a logical inconsistency. The Supreme Court's opinion rests on the Sawlanis' failure to prove that their excess acreage was used as curtilage, yet its remand order leaves them no opportunity to make that evidentiary showing. Because the IBTR interpreted the Homestead Statute as limiting the 1% tax cap to one acre regardless of use, any evidence that a taxpayer's residential use extended beyond one acre would be deemed irrelevant. Without further guidance from the Supreme Court regarding the statute's proper interpretation, no taxpayer can ever develop the evidentiary record before the IBTR necessary to raise or preserve an as-applied constitutional challenge. In practical effect, the court's decision forecloses the very factual inquiry it faulted the Sawlanis for failing to make.

Equally significant, the Supreme Court avoided addressing the deeper constitutional and structural problems that underpinned the Tax Court's flawed decision. The court ignored the enabling clauses in Article 10, Section 1—provisions that expressly delegate to the General Assembly the authority to define and operationalize the 1% tax cap. It failed to reaffirm its own precedent holding that constitutional provisions containing enabling language are non-self-executing and have no operative effect without legislative implementation. By overlooking that doctrine, the court sidestepped the reality that the Tax

427. *Id.*

Court's invalidation of the Homestead Statute effectively nullified the 1% cap until the General Assembly enacted new legislation to restore it—a legislative action the Tax Court, in essence, held that the General Assembly could not take. Likewise, the Supreme Court left unaddressed the Tax Court's case-by-case "curtilage" approach, which directly conflicts with the constitutional requirement that Indiana's property-tax system be "uniform and equal." Nor did it confront the broader trend of judicial overreach in the Tax Court's jurisprudence—its recurring refusal to defer to reasonable legislative and administrative interpretations.

Ultimately, the Supreme Court's decision in *Sawlani* corrected the immediate outcome but left the underlying doctrinal errors untouched. The court was right to overturn the Tax Court's poorly reasoned opinion, but it did so for the wrong reason. Rather than clarifying the constitutional framework or reaffirming the legislature's authority under the enabling clauses, the court confined its analysis to the Sawlanis' evidentiary shortcomings. In doing so, it resolved the case while preserving the confusion. For now, the decision restores the General Assembly's ability to administer the 1% tax cap through the Homestead Statute, but it leaves unanswered the broader constitutional questions that the Tax Court's opinion raised—and that future litigants will inevitably raise again. In the end, *Sawlani* may stand as a rare instance in which two judicial wrongs managed to make a practical right: the Tax Court's flawed constitutional analysis and the Supreme Court's evasive reasoning together produced a result that, at least for now, allows the legislature to exercise the authority expressly granted to it by the Constitution's enabling clauses to interpret and administer the 1% tax cap.

CONCLUSION

Taken together, the decisions surveyed in this Article reveal a tax adjudicatory system under strain—not from a lack of doctrine, but from the manner in which doctrine is applied, explained, and, at times, resisted or ignored. Across cases involving valuation evidence, administrative finality, jurisdiction, and constitutional tax caps, the recurring fault line is not disagreement over outcomes so much as uncertainty about institutional roles. When agencies fail to articulate their reasoning, courts may assume corrective postures that risk substituting judicial policymaking for constitutionally assigned legislative policy choices and statutorily authorized administrative implementation. When courts, in turn, depart from established principles of deference, finality, and statutory coherence, they introduce instability into a system that depends on predictability to function equitably.

The deeper lesson of the 2025 survey period is that tax law does not tolerate ambiguity—procedural, jurisdictional, or constitutional. Indiana's property tax system is necessarily technical yet fundamentally structural, relying on clearly delineated responsibilities among assessors, administrative boards and agencies,

courts, and the legislature. When those boundaries blur, the consequences ripple outward, affecting not only litigants but also public confidence in the fairness and uniformity of taxation. The task ahead is therefore not merely to resolve individual disputes correctly but to reaffirm the disciplined allocation of authority that allows the system to operate coherently. Whether the next tax survey period will reflect a reassertion of that balance—or reveal further tensions in the system’s institutional design—will be an important development to watch.