

INDIANA APPELLATE PROCEDURE IN 1997

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INTRODUCTION

During the survey period¹ there were no landmark judicial decisions applicable to appellate procedure. However, there were important cases which addressed appellate procedures and, in some cases, changed appellate procedures. Those cases are addressed in Part I of this Article. During the survey period there were also some changes to the Indiana Rules of Appellate Procedure,² effective January 1, 1998. Those changes are addressed in Part II of this Article.³

I. CASES ADDRESSING APPELLATE PROCEDURE

A. *The Appellate Rules*

1. *Appellate Rule 2(A) and Indiana Trial Rules 23(B) and 59(C).*—The issue of what constitutes an “appealable final order” within the meaning of Appellate Rule 2(A) and Indiana Trial Rule 59(C) remains unsettled with respect to class action certification orders.⁴ At issue is the scope of the Indiana Supreme Court’s ruling in *Berry v. Huffman*,⁵ which seemingly rejected the “definite and distinct branch” doctrine, which previously governed the issue of whether a ruling constitutes an “appealable final order.”⁶ It is necessary to briefly discuss *Berry* in order to put the issue into context.

The issue in *Berry* was whether a summary judgment ruling on less than all of the issues, which did not expressly state that “there [was] no just reason for delay and expressly direct[ed] entry of judgment,”⁷ was an “appealable final order.” A determination of that issue rested on whether the supreme court would continue to recognize the “doctrine of finality employed prior to the adoption of

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1. October 1, 1996 to September 30, 1997.

2. Hereinafter “Appellate Rule(s).”

3. In James J. Ammeen, Jr., *Developments in Appellate Practice in 1996*, 30 IND. L. REV. 1165 (1997), a thorough analysis of the standards of review employed by appellate courts is found. *See id.* at 1178-1181. No significant changes to those standards occurred during the survey period. As a result, those standards will not be addressed in this Article.

4. The procedures for class certifications are found in Indiana Trial Rule 23.

5. 643 N.E.2d 327 (Ind. 1994).

6. *Id.* at 329.

7. *Id.*

the Indiana Rules of Trial Procedure in 1970,”⁸ pursuant to which “a judgment was final and appealable even if it did not dispose of all the issues as to all the parties, so long as it disposed of ‘a distinct and definite branch of the litigation.’”⁹ Because that “scheme . . . often left litigants uncertain whether to pursue an appeal that might be dismissed as premature or risk losing their right of appeal altogether,”¹⁰ Indiana adopted “Trial Rules 54(B) and 56(C) in an effort to provide greater certainty to the parties and to strike an appropriate balance between the interest in the speedy review of certain judgments and the inefficiencies of piecemeal appeals.”¹¹

Trial Rules 54(B) and 56(C) work as follows:

Trial Rule 54(B) defines the procedure for entering a final judgment as to less than all of the issues, claims, or parties in an action. According to this rule, a judgment as to less than all of the parties is final only when the court in writing expressly determines that there is no just reason for delay and expressly directs entry of judgment. The rule explicitly states that, absent certification, the judgment “shall not terminate the action as to any of the claims or parties” and “is not final.” Similarly, T.R. 56(C) states that partial summary judgments are interlocutory unless the trial judge expressly determines in writing that there is not just reason for delay and expressly directs entry of judgment as to less than all the issues, claims, or parties.¹²

Rejecting the argument that “the distinct and definite branch doctrine of finality survived the adoption of the Trial Rules,” the supreme court held “that the certification requirements of Trial Rules 54(B) and 56(C) supercede the distinct and definite branch doctrine.”¹³

Judgments or orders as to less than all of the issues, claims, or parties remain interlocutory until expressly certified as final by the trial judge. To the extent that *Richards* [v. *Crown Point Community School Corp.*]¹⁴ and other cases support the distinct and definite branch doctrine,

8. *Id.* at 328.

9. *Id.* “In multiparty litigation, this meant that an order finally determining all of the issues and claims raised by one of the parties was final. If that party failed to perfect a timely appeal from that judgment, he lost his right to appeal.” *Id.*

10. *Id.* at 328-29.

11. *Id.* at 329.

12. *Id.*

13. *Id.*

14. 269 N.E.2d 5 (Ind. 1971) (holding that a partial summary judgment settling a distinct and definite branch of the litigation was final and could be appealed if the party filed a motion to correct errors). The supreme court in *Berry* observed that “[w]hile the parties to that appeal did not raise the applicability of the new Trial Rules, effective only four months when that appeal was docketed, there was at least an implication that ‘distinct and definite’ might still be viable.” *Berry*, 643 N.E.2d at 329.

they are overruled. Were we to hold otherwise, litigants would again be left to guess whether or not a given order was appealable. This is precisely the situation that T.R. 54(B) and 56(C) were drafted and adopted to prevent.¹⁵

The holding in *Berry* seems clear.¹⁶ However, when applied in the class action certification context, that seeming clarity has been clouded. In *Martin v. Amoco Oil Co.*,¹⁷ the court of appeals discussed¹⁸ the issue of whether a class certification order is a “final appealable order” even if it does not contain the “magic language”—i.e., an express determination that there “is no just reason for delay” accompanied by an express direction of entry of judgment—from Trial Rule 54(B).¹⁹ Cases prior to *Berry* followed the decision in *Gulf Oil Corp. v. McManus*,²⁰ which held that “class certification orders were final and appealable because they disposed of a distinct and definite branch of the litigation.”²¹ The court in *Martin* wrote that “[t]hough we agree with the reasoning in *Gulf Oil* that class certification hearings and orders are the only ‘trial’ to be had on the issue of class certification and therefore should be final and appealable, we are constrained by *Berry* from simply so holding.”²²

Subsequent to Judge Garrard’s opinion in *Martin*, Judge Najam relied on *Martin* to “treat [a] class certification order as a final, appealable order.”²³ The court in *Connerwood Healthcare, Inc. v. Estate of Herron*²⁴ cited *Martin* for the proposition that resolution of the issue of whether class certification orders are “final appealable orders” is “uncertain after the supreme court’s decision in *Berry v. Huffman*”²⁵ Nonetheless, the court stated that it “agree[d with *Martin*] that class certification orders are final and appealable”²⁶ The court in *Connerwood Healthcare* failed to recognize that the court in *Martin*, despite

15. *Berry*, 643 N.E.2d at 329.

16. *See, e.g.*, *Hanson v. Spolnik*, 685 N.E.2d 71, 81 (Ind. Ct. App. 1997) (“our supreme court recently clarified when an order becomes final and appealable in *Berry v. Huffman*” (citation omitted)).

17. 679 N.E.2d 139 (Ind. Ct. App. 1997).

18. The court did not decide the issue, choosing instead to reach a decision on other grounds. *Id.* at 144 (“We decline to ground our holding on the sole premise that class certification orders are final and appealable interlocutory orders, because it is not clear after our supreme court’s decision in *Berry v. Huffman*, 643 N.E.2d 327 (Ind. 1994) whether class certification orders are final and appealable orders at the present time.”).

19. *See Berry*, 643 N.E.2d at 328-29.

20. 363 N.E.2d 223 (Ind. App. 1977).

21. *Martin*, 679 N.E.2d at 144.

22. *Id.*

23. *Connerwood Healthcare, Inc. v. Estate of Herron*, 683 N.E.2d 1322, 1325 n.2 (Ind. Ct. App. 1997).

24. *Id.*

25. *Id.*

26. *Id.*

questioning the decision in *Berry*, nonetheless recognized that it was “constrained by *Berry*” from ruling as the court did in *Connerwood Healthcare*.²⁷ By failing to exercise the same restraint as the court in *Martin*, the court in *Connerwood Healthcare* took *Martin* one step further by expressly stating that a class action certification order is a “final appealable order.”²⁸

The holding in *Berry* is written in clear and concise language: “We hold today that the certification requirements of Trial Rules 54(B) and 56(C) *supercede the distinct and definite branch doctrine*.”²⁹ The court expressly overruled other cases that recognized the “distinct and definite branch doctrine.”³⁰ Because the *Gulf Oil* decision, upon which the court in *Martin* rested its criticism of the *Berry* decision (and subsequently the court in *Connerwood Healthcare*), was based on the “distinct and definite branch doctrine,” it seems clear that *Berry* overrules the reasoning of the *Gulf Oil* decision. Indeed, the court in *Martin* recognized as much.³¹

Based on the above, it is predicted that when the supreme court considers the issue of whether a class action certification order is a final appealable order, it will decide that unless the “magic language” of Trial Rule 54(B) is included in the order, then the order is not automatically considered a “final appealable order” within the meaning of Appellate Rule 2(A) and Indiana Trial Rule 59(C). Such a result is consistent with the predictability that was at the core of the *Berry* decision,³² and which is now lost because of the *Connerwood Healthcare* opinion. In the meantime, practitioners are urged to treat a class action certification order as an “appealable final order,” and make the decision of whether, and when, to pursue an appeal accordingly. It is better to appeal and learn that the appeal is premature, than to not treat the order as a “final appealable order” and risk losing the right to appeal at a later time. Of course, the uncertainty can be avoided by ensuring that the “magic language” of Trial Rule 54(B) is included in any class certification order.

2. *Appellate Rule 2(A) and Indiana Trial Rule 53.3*.—In *Marshall v. K & W Products*,³³ the court considered the issue of timely appeals when an appellant files a motion to correct errors. In *Marshall*, the plaintiff in a small claims action prevailed. Judgment was entered on August 28, 1995, in an amount of \$6.25,

27. In *Connerwood Healthcare*, the court noted that the appellee did not “challenge the propriety of [the court’s] review where . . . [the court] treat[ed] the class certification as a final, appealable order.” *Id.*

28. *Connerwood Healthcare*, 683 N.E.2d at 1325 n.2; *see also* Independence Hill Conservancy Dist. v. Sterley, 666 N.E.2d 978, 980 (Ind. Ct. App. 1996) (stating, without discussing the *Berry* decision, that “[a] class certification order is a final, appealable order.”).

29. *Berry*, 643 N.E.2d at 329 (emphasis added).

30. *Id.*

31. *Martin*, 679 N.E.2d at 144.

32. *See Berry*, 643 N.E.2d at 329 (“Were we to hold otherwise, litigants would again be left to guess whether or not a given order was appealable. This is precisely the situation that T.R. 54(B) and 56(C) were drafted and adopted to prevent.”).

33. 683 N.E.2d 1359 (Ind. Ct. App. 1997).

significantly less than the amount sought in his complaint.³⁴ The plaintiff filed a motion to correct errors on September 27, 1995. On October 11, 1995, a hearing on the motion was set for November 21, 1995, which was continued to December 15, 1995, at which time the court took the motion under advisement. On March 27, 1996, the court denied the plaintiff's motion. On April 19, 1996, the plaintiff filed his *praecipe*.

The main issue presented in *Marshall* was whether the failure of an appellant to personally serve the trial judge with a motion to correct errors, as mandated by Indiana Trial Rule 59(C), serves as an excuse³⁵ to the self-executing thirty-day time limitation to rule on a motion to correct errors³⁶ when the trial judge, despite not being personally served with a copy of the motion, has actual knowledge of its existence.³⁷

The court in *Marshall* first set forth a concise statement of the law interpreting the procedural interplay between Appellate Rule 2(A) and Indiana Trial Rule 53.3(A):

Indiana Appellate Rule 2(A) requires that every party seeking an appeal must first file a *praecipe* within thirty days of the entry of final judgment. When a party opts to file a motion to correct error, however, the *praecipe* must be filed within thirty days from either the date the trial court rules

34. The plaintiff, whose automobile transmission burned out because of a leak, sued the manufacturer of a product which promised to stop transmission leaks. The plaintiff sued under a breach of warranty theory, and sought damages for the expenses of repairing the car's transmission, towing, overnight accommodations caused by the fact that his car broke down out of state, and loss of use of his automobile. The small claims court entered judgment in favor of the plaintiff, but awarded him a refund in the amount of the cost of a can of the defendant's product, plus interest on that amount from the date of purchase. *Id.* at 1360.

35. Indiana Trial Rule 53.3(B)(1) states: "The time limitation for ruling on a motion to correct error established under Section (A) of this rule shall not apply where: (1) the party has failed to serve the judge personally. . . ."

36. Indiana Trial Rule 53.3(A) states:

In the event a court fails for forty-five (45) days to set a Motion to Correct Error for hearing, or fails to rule on a Motion to Correct Error within thirty (30) days after it was heard or forty-five (45) days after it was filed, if no hearing is required, the pending Motion to Correct Error shall be deemed denied. Any appeal shall be initiated by filing the *praecipe* under Appellate Rule 2(A) within thirty (30) days after the Motion to Correct Error is deemed denied.

37. The court also addressed the issue of whether "[j]udgments in small claims actions are 'subject to review as prescribed by relevant Indiana rules and statutes.'" *Id.* at 1360 (quoting IND. SMALL CLAIMS R. 11(A)). In particular, the issue in *Marshall* was whether the same procedures apply to motions to correct errors filed in small claims courts as in Indiana trial courts. The court in *Marshall* held that those procedures do apply, noting "[o]ur supreme court has held that 'the Rules of Trial Procedure apply in small claims court unless the particular rule in question is inconsistent with something in the small claims rules.'" *Id.* at 1361 (quoting *Bowman v. Kitchel*, 644 N.E.2d 878, 879 (Ind. 1995)).

on the motion to correct error or the date the motion is deemed denied. Failure to file the praecipe in a timely manner is a jurisdictional failure requiring dismissal of the appeal. Additionally, [Indiana Trial Rule 53.3(A)] limits the time available for a trial court to rule on a motion to correct error. If the trial court “fails to rule on a Motion to Correct Error within thirty (30) days after it was heard,” the motion “shall be deemed denied.” This rule is self-activating upon the passage of the requisite number of days.³⁸

The court then noted what the record did not indicate that the plaintiff had personally served the trial judge with a copy of his motion to correct errors, as required by Indiana Trial Rule 59(C).³⁹ Thus, on its face, it would seem that the Indiana Trial Rule 53.3(B)(1) exception to the time limits set forth in Indiana Trial Rule 53.3(A)⁴⁰ would excuse the plaintiff’s tardiness. However, the court went beyond the text of Indiana Trial Rule 53.3(B)(1) and considered its purpose, which is to ensure that a trial judge has actual knowledge of a motion to correct errors before the self-executing time requirements of Indiana Trial Rule 53.3(A) are triggered.⁴¹ The court in *Marshall* concluded that:

the exception for personal service of the judge only applies where the judge has no actual knowledge of the motion to correct error, such as where the motion would be deemed denied after 45 days for failure to set the motion for hearing. Where, as here, a hearing was held and the judge plainly had actual knowledge of the motion, the exception for personal service serves no purpose. We hold that the exception found in [Indiana Trial Rule 53.3(B)(1)] does not apply to [Indiana Trial Rule 53.3(A)] where the judge has actual knowledge of the motion to correct errors.⁴²

The court then dismissed the appellant’s appeal because “his praecipe was not timely filed and as a result, [the court of appeals] lack[ed] jurisdiction”⁴³ Clearly, based on *Marshall*, an appellate court will not allow a practitioner to use a technical reading of Indiana Trial Rule 53.3(B)(1) as an excuse for failing to

38. *Id.* at 1361 (citations omitted).

39. *Id.*

40. *See supra* notes 6-7.

41. *Marshall*, 683 N.E.2d at 1361.

42. *Id.*

43. *Id.* The court explained:

Here, the trial court held a hearing on Marshall’s motion to correct error on December 15, 1995. Thus, the trial court had until January 16, 1996 to rule on the motion. [January 14, 1996 fell on a Sunday, and the following day was a legal holiday]. Marshall’s motion was therefore deemed denied on January 16, 1996 and Marshall was required to file his praecipe by February 15, 1996. Because Marshall did not file his praecipe until April 19, 1996, his praecipe was not timely filed and as a result, we lack jurisdiction and must dismiss the appeal.

Id.

timely file a *praecipe* pursuant to Appellate Rule 2(A). If the record reveals that the trial judge had actual knowledge of the motion, an appellate court will not apply Indiana Trial Rule 53.3(B)(1) literally in order to vest itself with jurisdiction.

3. *Appellate Rule 2(A) and Indiana Trial Rule 72(E)*.—During the survey period there were two cases in which the interplay between Indiana Trial Rule 72(E)⁴⁴ and Appellate Rule 2(A) was addressed. In *Vaughn v. Schnitz*,⁴⁵ the trial court entered judgment against the defendant on April 3, 1995; the defendant filed a motion to correct errors on May 3, 1995; a hearing was set on that motion for July 24, 1995; and the defendant's motion was denied on July 31, 1995. Notice of the court's order was sent to plaintiff's counsel and to the defendant, but not to the defendant's counsel. The defendant never told his attorney about the ruling. The defendant's attorney waited until September 15, 1995 to check the court records, despite the fact that, pursuant to Indiana Trial Rule 53.3, the motion would have been deemed automatically denied on August 30, 1995. On October 6, 1995, defendant's counsel, relying on Indiana Trial Rule 72(E), filed a motion for an extension of time within which to file a *praecipe*. The trial court denied that motion and the defendant appealed, arguing that the trial court abused its discretion by so ruling because the defendant's attorney was without notice of the court's order denying the motion to correct errors.

The appeals court rejected the appellant's argument:

[Appellant's] argument suffers from a fundamental error; the trial court does not have the authority to grant an extension of time within which to file a *praecipe*. [T]he timely filing of a *praecipe* is a jurisdictional prerequisite to an appeal and a precondition to the right to an appeal. [P]erfecting an appeal in a timely manner is a jurisdictional matter. . . . Thus, once the thirty day time limit of Appellate Rule 2 has expired, this court is without jurisdiction to hear the appeal and we must dismiss. To permit a trial court to grant an extension of time within which to file a *praecipe* would allow the trial court to revive this court's jurisdiction contrary to supreme court procedural rules. This a trial court cannot do. Accordingly, the trial court did not abuse its discretion when it denied

44. Indiana Trial Rule 72(E) states:

Lack of notice, or the lack of the actual receipt of a copy of the entry from the Clerk shall not affect the time within which to contest the ruling, order or judgment, or authorize the Court to relieve a party of the failure to initiate proceedings to contest such ruling, order or judgment, except as provided in this section. When the mailing of a copy of the entry by the Clerk is not evidenced by a note made by the Clerk upon the Chronological Case Summary, the Court, upon application for good cause shown, may grant an extension of any time limitation within which to contest such ruling, order or judgment to any party who was without actual knowledge or who relied upon incorrect representations by Court personnel. Such extension shall commence when the party first obtained actual knowledge and not exceed the original time limitation.

45. 673 N.E.2d 501 (Ind. Ct. App. 1996).

[appellant's] 72(E) motion.⁴⁶

The court went on to state:

However, this court, under its inherent power, has the authority to entertain an appeal after the time permitted has expired. This court will exercise its inherent power and grant equitable relief only in rare and exceptional cases, such as in matters of great public interest, or where extraordinary circumstances exist. Generic grounds such as lack of prejudice to the opposing party or lack of disadvantage to the reviewing court are insufficient to invoke this equitable relief.⁴⁷

The court refused to exercise that inherent power, holding that the facts in *Vaughn* were “not the type of extraordinary circumstances warranting equitable relief. Equity aids the vigilant, not those who sleep on their rights.”⁴⁸

The clear teaching of *Vaughn* is that an attorney has a proactive duty to check with the trial court to determine whether a ruling has been made on a motion to correct errors; the consequences for failing to timely do so cannot be alleviated by a motion for extension of time filed pursuant to Indiana Trial Rule 72(E). A trial court cannot expand the subject matter jurisdiction of Indiana's appellate courts.

In *Gable v. Curtis*,⁴⁹ the court of appeals again considered the interplay between Indiana Trial Rule 72(E) and Appellate Rule 2(A). In *Gable*, when the plaintiff's attorney initiated the action in the trial court, she listed a Greenwood, Indiana, address. Subsequent to filing the complaint, the plaintiff's attorney filed a notice of a change in her address with the clerk of the trial court. The Chronological Case Summary (CCS) contained a mention of that filing and the plaintiff's attorney's new Indianapolis address. On November 28, 1995, summary judgment was entered in favor of the defendant. On December 28, 1995, the plaintiff's attorney filed a motion to correct errors, at the bottom of which she listed her new Indianapolis address. The trial court denied the motion on January 5, 1996, with said denial evidenced in the CCS. The CCS also stated that the plaintiff's attorney was notified of that ruling on January 9, 1996. However, the notice that the motion to correct errors had been denied never made it to the plaintiff's attorney because it was mailed to her Greenwood address. An entry in the CCS reflected that failure, and noted that the mailing was returned because of “insufficient address.”⁵⁰

Because the plaintiff's attorney did not receive notification of a ruling on the plaintiff's motion to correct errors, she assumed that the motion had been automatically deemed denied by operation of Indiana Trial Rule 53.3. As a result, she filed a *praecipe* on March 11, 1996, within thirty days of the date she

46. *Id.* at 502 (citations omitted).

47. *Id.* (citations and quotations omitted).

48. *Id.* at 503.

49. 673 N.E.2d 805 (Ind. Ct. App. 1996).

50. *Id.* at 808.

thought her motion to correct errors had been deemed denied. After subsequently learning that the trial court had actually denied the motion to correct errors on January 5, 1996 (and thus, her *praecipe* filed on March 11, 1996 was untimely) plaintiff's attorney requested relief pursuant to Indiana Trial Rule 72(E). The trial court granted that motion, and the appellees argued to the court of appeals that the trial court abused its discretion by so ruling.

The appellees argued that the trial court abused its discretion because the CCS affirmatively evidenced that the notice of the denial of the motion to correct errors had been mailed. In support of their argument, the appellees cited *Collins v. Covenant Mutual Insurance Co.*,⁵¹ and *Minnick v. Minnick*,⁵² which have interpreted Indiana Trial Rule 72(E) "as providing that, where the CCS affirmatively evidences that notice of the final judgment has been mailed by the clerk, the trial court lacks the authority to relieve a party from the consequences of failing to timely file a *praecipe*."⁵³ The court in *Gable* held that those cases were "clearly distinguishable" because the CCS in *Gable* "demonstrates more than mere mailing of the notice by the clerk. The CCS affirmatively demonstrates that [plaintiff's attorney] did not receive the notice because it had been insufficiently addressed."⁵⁴ The court in *Gable* also noted that "the CCS affirmatively demonstrates that [plaintiff's attorney] had provided the clerk with her correct address as required under [Indiana Trial Rule 3.1(E)]."⁵⁵ The court held that to be "mailed" a pleading must be correctly addressed: "[o]bviously, when service is to be made by mail, the papers must be deposited in the United States mail *addressed to the person on whom they are being served*, with postage prepaid."⁵⁶ Therefore, "the clerk's mailing of notice of the denial of the motion to correct error with an insufficient address did not constitute a 'mailing' as contemplated under [Indiana Trial Rule 72(E)]."⁵⁷ Further, "the trial court did not err in giving [plaintiff] an extension in which to file the *praecipe* initiating [the] appeal . . ."⁵⁸

Gable is consistent with *Vaughn*.⁵⁹ Furthermore, *Gable* adds an element to the teaching of *Vaughn*. An appellate attorney, when being proactive in perfecting an appeal, should always, at a minimum, file a *praecipe* within the time requirements of Indiana Trial Rule 53.3. If an appellant has done all she/he can do to preserve her/his rights (as in *Gable*, but unlike in *Vaughn*) an appellate court will likely (and, indeed, should) conclude that it has jurisdiction over the appeal.

4. Appellate Rule 4(B)(5) and Indiana Trial Rule 76.—Appellate Rule

51. 644 N.E.2d 116 (Ind. 1994).

52. 663 N.E.2d 1226 (Ind. Ct. App. 1996).

53. *Gable*, 673 N.E.2d at 808.

54. *Id.*

55. *Id.*

56. *Id.* (emphasis added).

57. *Id.*

58. *Id.*

59. See *supra* notes 45-48 and accompanying text.

4(B)(5) expressly requires an interlocutory appeal of an adverse decision regarding preferred venue under Indiana Trial Rule 75, which sets forth the rules for preferred venue.⁶⁰ No mention of Indiana Trial Rule 76—which deals with motions for change of venue or judge—is found anywhere in Appellate Rule 4(B). Yet, the court in *Trojnar v. Trojnar*⁶¹ held that a ruling on a Trial Rule 76 motion must be treated like a Trial Rule 75 ruling: i.e., both require interlocutory appeals pursuant to Appellate Rule 4(B)(5).⁶²

The court in *Trojnar* based its decision on the following reasoning:

At the time of an adverse ruling under T.R. 76, the parties must perfect an appeal. Myriad reasons, including judicial economy and fairness to the parties, dictate that parties may not save an issue which would render all subsequent action moot, allowing litigation on the merits of a claim to the point of an adverse ruling and then appeal matters outside of the merits. To hold otherwise would be to condone a collateral attack on the judgment.⁶³

In a strongly worded dissent, Judge Staton criticized the majority for attempting to “promulgate a new Appellate Rule—a responsibility reserved to the Indiana Supreme Court under the Indiana Constitution.”⁶⁴ In response to Judge Staton’s dissent, the majority wrote:

The dissent’s myopic view of the law would lead to an absurd result. Allowing appeal of a change of judge ruling after the merits of the cause would allow an aggrieved party to wait through protracted proceedings including discovery, preliminary hearings, and trial to nullify all action after the ruling. Reversal of a cause after the decision on the merits based upon a procedural matter is tantamount to “two bites at the apple.” A party displeased with the judgment on the merits could have a second chance by saving an appeal ostensibly based upon the adverse change of judge ruling, but in reality wiping the slate clean on the merits as well.

....

Far from creating new law as asserted by the dissent, our construction of the trial and appellate rules is mandated by our basic tenets of law and judicial disdain for waste. The dissent does not question the basis for the rule in T.R.75 matters, and does not offer explanation as to how the

60. Appellate Rule 4(B)(5) states that an interlocutory appeal must be taken in cases “[t]ransferring or refusing to transfer a case pursuant to Trial Rule 75.” Indiana Trial Rule 75(E) states that: “An order transferring or refusing to transfer a case under this rule shall be an interlocutory order appealable pursuant to Appellate Rule 4(B)(5)”

61. 676 N.E.2d 1094 (Ind. Ct. App. 1997).

62. *Id.* at 1096.

63. *Id.* at 1096-97.

64. *Id.* at 1098 (Staton, J., dissenting).

same type of ruling in T.R. 76 proceedings should render a different result. Clearly, the explicit rule regarding interlocutory appeal of an adverse T.R.75 ruling applies with equal force to T.R.76 matters. Suffice it so say, the mandatory interlocutory appeal evolved to prevent parties from trumping judgments on the merits in the manner attempted here, and “two bites at the apple” has never been the law.⁶⁵

The holding in *Trojnar* must be recognized by appellate practitioners. The safe course of action is to treat a ruling on a Trial Rule 76 motion as a Trial Rule 75 order which “shall be an interlocutory order appealable pursuant to Appellate Rule 4(B)(5).”⁶⁶

5. *Appellate Rule 8.1.*—During the survey period it was re-affirmed an appellant’s failure to file a brief on time does not *automatically* result in “summary dismissal” of an appeal pursuant to Appellate Rule 8.1(A).⁶⁷ However, a court will most likely only forgive a practitioner’s tardiness if that tardiness is slight.

In *Howell v. State*, the appellant’s brief was filed one day late.⁶⁸ The court chose to consider the merits of the appeal anyway, writing:

Rule 8.1(A) does not mandate an automatic dismissal when an appellant has not timely filed its brief. Dismissal for the late filing of an appellant’s brief is within the discretion of this court, rather than mandatory. Because we prefer to decide a case upon its merits, we exercise our discretion to reach the merits when violations are comparatively minor.⁶⁹

The filing of an appellant’s brief on time is not a condition precedent to invocation of an appellate court’s jurisdiction as is the case with the timely filing of a *praecipe*.

6. *Appellate Rule 8.3.*—During the survey period there were several examples, both in Indiana Supreme Court⁷⁰ and court of appeals’ opinions,⁷¹ of cases in which the failure to comply with Appellate Rule 8.3 was both noted,⁷²

65. *Id.* at 1097 n.3.

66. IND. TR. R. 75(E).

67. *See* *Howell v. State*, 684 N.E.2d 576, 577 n.1 (Ind. Ct. App. 1997).

68. *Id.*

69. *Id.* (citations omitted).

70. *See, e.g.*, *Potter v. State*, 684 N.E.2d 1127 n.1, 1130 (Ind. 1997); *Williams v. State*, 681 N.E.2d 195, 203 (Ind. 1997); *Humphrey v. State*, 680 N.E.2d 836, 842 n.11 (Ind. 1997); *Steele v. State*, 672 N.E.2d 1348, 1351 (Ind. 1996).

71. *See, e.g.*, *Strowmatt v. State*, 686 N.E.2d 154, 158 (Ind. Ct. App. 1997); *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 158 n.4 (Ind. Ct. App. 1997); *Young v. Butts*, 685 N.E.2d 147, 149-51 (Ind. Ct. App. 1997).

72. *See, e.g.*, *Potter*, 684 N.E.2d at 1130 n.1; *Callis v. State*, 684 N.E.2d 233, 235 n.1 (Ind. Ct. App. 1997) (stating that “[c]ounsel for Appellant is advised to observe [Appellate Rule 8.3(A)(4)]”).

and resulted in the waiver of an otherwise valid argument.⁷³ Although it is within an appellate court's discretion to consider an appeal when a party substantially complies with the appellate rules,⁷⁴ exercise of that discretion remains the exception rather than the rule. Consideration of the purpose of Appellate Rule 8.3 provides insight into when a court might exercise that discretion. In *Young v. Butts*,⁷⁵ the court of appeals succinctly reminded practitioners of the purpose behind the many requirements of Appellate Rule 8.3:

[Appellate courts] demand cogent argument supported with adequate citation to authority because it promotes impartiality in the appellate tribunal. A court which must search the record and make up its own arguments because a party has not adequately presented them runs the risk of becoming an advocate rather than an adjudicator A brief should not only present the issues to be decided on appeal, but it should be of material assistance to the court in deciding those issues On review, [an appellate court] will not search the record to find a basis for a party's argument, . . . nor will [an appellate court] search the authorities cited by a party in order to find legal support for its position.⁷⁶

Clearly, Indiana's appellate courts have, and continue, to consider Appellate Rule 8.3 and other technical rules on briefing⁷⁷ as "gatekeepers" to their ability to impartially adjudicate an appeal. Failure to comply with those rules will, almost inevitably, lead an appellate court to forego the chance to adjudicate, rather than risk adjudicating (or the appearance of adjudicating) in an impartial manner. For that reason, practitioners must be sure to comply with the procedural safeguards found in Appellate Rule 8.3 while drafting substantive appellate arguments, lest those substantive arguments fall on deaf ears.

7. *Appellate Rule 15(G)*.—During the survey period, Indiana's appellate courts considered the issue of sanctions under Appellate Rule 15(G)⁷⁸ on at least five occasions,⁷⁹ awarding sanctions only once.⁸⁰ A review of those cases

73. See, e.g., *Williams*, 681 N.E.2d at 203. (noting that "[b]ecause [appellant] fails to make a cogent argument with appropriate citations to the record, he has waived this issue").

74. See *Mitchell v. Stevenson*, 677 N.E.2d 551, 555 n.1 (Ind. Ct. App. 1997) (stating that "[d]espite [appellant's] failure to comply with the appellate rules, we will address the merits of the issues before us").

75. 685 N.E.2d 147 (Ind. Ct. App. 1997).

76. *Id.* at 151 (citations omitted).

77. See, e.g., IND. APP. R. 8.1, 8.2 & 8.4.

78. Appellate Rule 15(G) states:

If the court on appeal affirms the judgment, damages may be assessed in favor of the appellee not exceeding ten percent (10%) upon the judgment, in money judgments, and in other cases in the discretion of the court; and the court shall remand such cause for execution.

79. See *Young v. Butts*, 685 N.E.2d 147, 150 (Ind. Ct. App. 1997); *SDL Enters., Inc. v. DeReamer*, 683 N.E.2d 1347, 1350 (Ind. Ct. App. 1997); *Mitchell v. Stevenson*, 677 N.E.2d 551,

provides insight into the type of conduct which will result in the imposition of sanctions pursuant to Appellate Rule 15(G).

In *Young v. Butts*,⁸¹ the court of appeals, pursuant to Appellate Rule 15(G), remanded the case to the trial court “for a determination of the appropriate amount of damages to be awarded” to the appellees for the defense of the appeal.⁸² In so ruling, the court in *Young* set forth the following succinct standards for imposition of sanctions under Appellate Rule 15(G):

Indiana Appellate Rule 15(G) provides that when we affirm a judgment, damages may be assessed in favor of the appellee. Such an award of damages is proper if the appeal is “permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay.”⁸³ The sanctions available under rule 15(G) are punitive, so they may not be imposed to punish lack of merit unless an appellant’s contentions and argument are utterly devoid of all plausibility.⁸⁴

The appellant in *Young* failed in several respects to comply with Appellate Rule 8.3.⁸⁵ Perhaps the linchpin of the court’s decision to remand for an award of sanctions was the fact that the arguments of appellant’s counsel were not only “devoid of plausibility,”⁸⁶ but were “based on remarkable mischaracterizations and blatant misstatements of the evidence in the record.”⁸⁷ The court found the appellant’s “number of affirmative misrepresentations of the evidence in the record” to be “particularly offensive because they would, if true, directly affect the propriety of the trial court grant of judgment on the evidence.”⁸⁸ For those reasons, the court found the “appeal to be frivolous, wholly without merit, and

565 n.7 (Ind. Ct. App. 1997); *Yanoff v. Muncy*, 676 N.E.2d 765 (Ind. Ct. App. 1997), *vacated by* 688 N.E.2d 1259 (Ind. 1997), 690 N.E.2d 1190 (Ind. 1997); *John Malone Enters., Inc. v. Schaeffer*, 674 N.E.2d 599, 607 (Ind. Ct. App. 1996); *Powers v. Lacny*, 671 N.E.2d 1215, 1217 (Ind. Ct. App. 1996).

80. *See Young*, 685 N.E.2d at 152.

81. *Id.*

82. *Id.* at 152.

83. *Id.* at 151 (quoting *Orr v. Turco Mfg. Co., Inc.*, 512 N.E.2d 151, 152 (Ind. 1987)).

84. *Id.* (citing *Orr*, 512 N.E.2d at 153).

85. *See id.* at 149 n.2 (“We note that Young’s counsel failed to include in his Statement of the Case a verbatim statement of the trial court judgment as required by Ind. Appellate Rule 8.3(A)(4). Young’s Statement of the Case also includes argument, which is inappropriate in that section of an appellate brief.”); *Id.* at 150 (“Because Young’s counsel has not favored us with a cogent argument supported by legal authority and references to the record as our rules require, see Ind. Appellate Rule 8.3(A)(7), we are unable to consider his assertions on appeal.”); *Id.* at 151 (Failure to comply with Appellate Rule 8.2(B)(1) was found in that “there [was] not a single pinpoint citation to be found anywhere in counsel’s eight page argument.”).

86. *Id.* at 151.

87. *Id.* at 150.

88. *Id.* at 151.

brought in bad faith”⁸⁹

Contrast *Young* with three other opinions in which Appellate Rule 15(G) was considered.⁹⁰ In *SDL Enterprises v. DeReamer*,⁹¹ the appellee sought imposition of sanctions because the appellant “failed to include several documents in the record and made various misstatements in its brief.”⁹² Although recognizing that those deficiencies in fact existed, the appellate court held that those deficiencies “[did] not rise to the level warranting sanctions.”⁹³ In *DeReamer*, unlike in *Young*, the court noted that “[w]hen reviewing request for sanctions against [an] appellant, [an appellate court] must use extreme restraint to avoid causing a ‘chilling effect upon the exercise of the right to appeal.’”⁹⁴

In *John Malone Enterprises v. Schaeffer*,⁹⁵ like *DeReamer*, the appellee argued that the appellant’s misstatement of the record warranted imposition of sanctions.⁹⁶ The appellee contended that the appellant’s argumentative statement of facts, in conjunction with a misstatement of the record, was “procedural bad faith” sufficient to warrant the imposition of sanctions.⁹⁷ Without further analysis, the court held that “[b]ecause we cannot say that [appellant’s] arguments [were] utterly devoid of all plausibility, an award of damages pursuant to Appellate Rule 15(G) would be inappropriate.”⁹⁸ The court also addressed the appropriateness of an award of attorney fees pursuant to section 34-1-32-1 of the Indiana Code:⁹⁹

89. *Id.*

90. See *SDL Enters. v. DeReamer*, 683 N.E.2d 1347 (Ind. Ct. App. 1997); *John Malone Enters. v. Schaeffer*, 674 N.E.2d 599 (Ind. Ct. App. 1996); *Powers v. Lacny*, 671 N.E.2d 1215 (Ind. Ct. App. 1996). In *Mitchell v. Stevenson*, the appellees’ request for sanctions pursuant to Appellate Rule 15(G) was denied because appellant’s appeal was granted in part. 677 N.E.2d 551, 565 n.7 (Ind. Ct. App. 1997).

91. *SDL Enters.*, 683 N.E.2d at 1347.

92. *Id.* at 1350.

93. *Id.* The court did award the appellee costs in accordance with Appellate Rule 15(H). *Id.*

94. *Id.* (quoting *Orr v. Turco Mfg. Co.*, 512 N.E.2d 151, 152 (Ind. 1987)); accord *Schaeffer*, 674 N.E.2d at 606-07.

95. 674 N.E.2d 599 (Ind. Ct. App. 1996).

96. *Id.* at 606.

97. *Id.*

98. *Id.* at 607.

99. Section 34-1-32-1 states:

(a) In all civil actions, the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law.

(b) In any civil action, the court may award attorney’s fees as part of the cost to the prevailing party, if it finds that either party:

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

Procedural bad faith on appeal is present when a party flagrantly disregards the form and content requirements of the Rules of Appellate Procedure, omits and misstates relevant facts appearing in the record, and files briefs appearing to have been written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. However, conduct can constitute procedural as opposed to substantive bad faith even though the objectionable conduct falls short of being “deliberate or by design.” It depends upon the circumstances of the given case.¹⁰⁰

The court did not find the existence of such procedural bad faith in *Schaeffer*.¹⁰¹

In *Powers v. Lacney*,¹⁰² the appellees based their plea for sanctions on the lack of merit in the appellant’s argument.¹⁰³ There was no assertion, as in *DeReamer* or *Young*, that the appellant misstated the record. The court, without analysis, held that the “appellees [were] not entitled to an award of appellate attorney’s fees.”¹⁰⁴

Based on a review of the above cases, it is clear that appellate courts continue to adhere to the seminal case of *Orr v. Turco Manufacturing Co.*¹⁰⁵ when applying Appellate Rule 15(G). Additionally, at least based on the cases considered above, it appears that more than an occasional misstatement of the record must be present before an appellate court will impose sanctions pursuant to Appellate Rule 15(G). Indeed, courts appear reluctant, as set forth expressly in *DeReamer*¹⁰⁶ and *Schaeffer*,¹⁰⁷ to impose sanctions for fear of chilling the right to appeal.¹⁰⁸ However, that is not to suggest that an appellant can, in total disregard of the Appellate Rules and the appellate process, advance an appeal. Rather, it is simply a recognition that Indiana’s appellate courts allow an appellant wide latitude in constructing arguments; however, that latitude cannot be abused—if it is, appellate courts will not hesitate to impose sanctions.

8. *Appellate Rule 17(B)*.—In last year’s Article discussing this rule, it was observed that the amendment to Appellate Rule 17(B) eliminating the “no reasonable person” standard of review “has the potential for a tremendous impact

(c) The award of fees under subsection (b) does not prevent a prevailing party from bringing an action against another party for abuse of process arising in any part on the same facts, but the prevailing party may not recover the same attorney’s fees twice.

IND. CODE § 34-1-32-1 (1993).

100. *Schaeffer*, 674 N.E.2d at 607 (quoting *Watson v. Thibodeau*, 559 N.E.2d 1205, 1211 (Ind. Ct. App. 1990)).

101. 674 N.E.2d at 607.

102. 671 N.E.2d 1215 (Ind. Ct. App. 1996).

103. *Id.* at 1217.

104. *Id.*

105. 512 N.E.2d 151 (Ind. 1987).

106. 683 N.E.2d 1347, 1350 (Ind. Ct. App. 1997).

107. 674 N.E.2d 599, 606-07 (Ind. Ct. App. 1996).

108. *See supra* note 57.

in criminal appeals.”¹⁰⁹ That impact did not come to fruition during the survey period. However, one case does shed some light on the new Appellate Rule 17(B) standard. In *Mayo v. State*,¹¹⁰ the supreme court considered an appellant’s assertion that his sentence was manifestly unreasonable within the meaning of Appellate Rule 17(B). In considering that assertion, the court in *Mayo*, wrote as follows:

With respect to the claim of overall sentence unreasonableness, we will not revise a sentence authorized by statute unless we find it “manifestly unreasonable in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 17(B). While we recognize that the aggregate sentence is substantial [in this case], we do not find the degree of claimed unreasonableness so clearly apparent as to warrant our concluding that it is *manifestly* unreasonable. We find no sentencing error and decline to revise the sentence.¹¹¹

Therefore, it could be gleaned from *Mayo* that for a sentence to be deemed “manifestly unreasonable” pursuant to Appellate Rule 17(B), that unreasonableness must be “clearly apparent” before a sentence will be revised.¹¹² It is anticipated that during the upcoming year further refinements to Appellate Rule 17(B) will occur.

B. Common Law Appellate Procedural Jurisprudence

1. *Prima Facie Error*.—Indiana’s appellate courts applied the *prima facie error* rule¹¹³ in several cases during the survey period. However, the scope and application of the doctrine is difficult to extract from those cases, as has been apparent with cases considering the *prima facie error* rule in years past.¹¹⁴ Courts appear to apply the *prima facie error* rule in four ways: (1) application of the rule *sub silentio*; (2) failure to apply the rule *sub silentio*, despite acknowledging its applicability; (3) express application of the rule; and (4)

109. Ammeen, *supra* note 3, at 1172.

110. 681 N.E.2d 689 (Ind. 1997).

111. *Id.* at 695 (emphasis added).

112. *Id.*

113. The *prima facie error* rule was explained in *State v. Lamar*, 680 N.E.2d 540, 542 n.1 (Ind. Ct. App. 1997):

When only the appellant files a brief, [an appellate court] may reverse the trial court if the appellant makes a *prima facie* showing of error. This rule “protects [appellate courts] and relieves [them] from the burden of controverting arguments advanced for reversal, a duty which properly remains with counsel for the appellee.” *Prima facie error* is error at first sight, on first appearance or on the face of it.

Id. (citations omitted).

114. See William O. Harrington, 1994 *Developments in Indiana Appellate Procedure: Old Lessons Revisited and the Scope of the Court of Appeals’ Discretion*, 28 IND. L. REV. 985, 990 (1995).

failure to apply the rule despite the ability to do so.

The decision in *Jones v. Harner*¹¹⁵ is illustrative of a decision in which a court acknowledged the applicability of the *prima facie error* rule, then—without expressly exercising its discretion not to apply the rule¹¹⁶—appears to exercise that discretion *sub silentio*. In a footnote in *Jones*, the court merely stated the *prima facie error* rule that it “may reverse” the trial court’s judgment because the appellee failed to file a brief.¹¹⁷ Without any further mention of the *prima facie error* rule, the court appeared to address the appeal on its merits.¹¹⁸ The court affirmed and reversed in part the trial court’s entry of judgment.¹¹⁹ It did so without stating that the appellant had made a showing of *prima facie error*. From a review of the opinion, it appears that despite the court’s earlier pronouncement that the *prima facie error* rule “relieves the appellate courts from the burden of controverting the arguments advanced for a reversal,”¹²⁰ the court nevertheless reviewed the record to find evidence to support the non-briefing appellee’s position.¹²¹

Contrast *Jones* with *Kostuck v. Vincent D.*,¹²² in which the court analyzed the appellant’s arguments to ensure that he had established *prima facie error*. The appellate court then reversed the trial court’s decision, expressly stating that its decision to reverse rested on the appellant’s ability to demonstrate *prima facie error*.¹²³ In several other decisions where the *prima facie error* rule was mentioned, the court ordered reversal on appeal.¹²⁴ In these decisions, the appellate court made no express mention (as was done in *Kostuck*) that the appellant made a showing of *prima facie error*.

In *In re Marriage of Jackson*,¹²⁵ the court recognized the *prima facie error* rule. However, based on the proposition that “it is within [the court’s] discretion to decide a case on the merits,”¹²⁶ the court chose “to exercise that discretion”

115. 684 N.E.2d 560 (Ind. Ct. App. 1997).

116. See *infra* note 125.

117. *Jones*, 684 N.E.2d at 562 n.1.

118. *Id.* at 561-63.

119. *Id.* at 561.

120. *Id.* at 562 n.1.

121. *Id.* at 562 (“The record supports the trial court’s finding [against the appellant].”).

122. 684 N.E.2d 573 (Ind. Ct. App. 1997).

123. *Id.* at 576 (“Landlord has established *prima facie error* in the trial court’s award of damages based on the cost of alternative housing.”).

124. See *Newman v. Wilson*, 682 N.E.2d 1320 (Ind. Ct. App. 1997) (reversal of trial court judgment without controverting appellant’s arguments); *Kokomo Center Twp. Consol. School Corp. v. McQueary*, 682 N.E.2d 1305 (Ind. App. Ct. 1997) (stating the *prima facie error* rule, and reversing the trial court’s failure to enter summary judgment against the appellant without again mentioning the rule); *Taylor v. State*, 675 N.E.2d 1128 (Ind. Ct. App. 1997) (stating the *prima facie error* rule, and reversing revocation of appellant’s probation).

125. 682 N.E.2d 549 (Ind. Ct. App. 1997).

126. *Id.* at 551.

and hear the case on its merits.¹²⁷ The court rested its decision on *Head v. State*,¹²⁸ in which that court similarly exercised its discretion to hear a case on its merits, despite the absence of an appellee's brief.¹²⁹

In considering the differing applications of the *prima facie error* rule, there does not appear to be any consistent basis for how Indiana's appellate courts apply, or refuse to apply the rule. Indeed, because refusing to apply the rule is within the court's "discretion,"¹³⁰ a "bright line" test should not be expected. Nonetheless, the two cases in which the court refused to apply the *prima facie error* rule are interesting in that they both involved particularly sensitive issues: one involved children, the other adult entertainment.

In *Marriage of Jackson*,¹³¹ child support provisions of a divorce decree were at issue.¹³² Specifically, the father-appellant argued that the trial court erred when it ordered him to pay \$15,950 in child support arrearage.¹³³ The mother-appellee failed to file a brief.¹³⁴ The court decided to consider argument in contravention of father-appellant's position, but ultimately still reversed the trial court judgment.¹³⁵

In *Deja Vu*, the trial court entered a preliminary injunction enjoining a tavern/restaurant from operating, *inter alia*,¹³⁶ a part of its business that offered "cabaret style adult entertainment."¹³⁷ The trial court entered the injunction based on its finding that the cabaret style adult entertainment conducted in the tavern/restaurant was in violation of a city ordinance.¹³⁸ *Deja Vu* appealed, but the City of Lake Station failed to file an appellee's brief.¹³⁹

Based on *Marriage of Jackson* and *Deja Vu*, one could speculate that, when dealing with a particularly sensitive issue, an appellate court faced with the failure of an appellee to file a brief will nonetheless expressly opt out of applying the *prima facie error* rule and consider arguments counter to those proffered by an appellant. However, it is interesting that, despite their failure to apply the

127. *Id.*

128. 632 N.E.2d 749 (Ind. Ct. App. 1994); *see also* *Deja Vu of Hammond, Inc. v. City of Lake Station*, 681 N.E.2d 1168, 1170 (Ind. Ct. App. 1997) ("We exercise our discretion to consider the merits of the issue presented.").

129. *Head*, 632 N.E.2d at 750.

130. *Id.*

131. 682 N.E.2d 549 (Ind. Ct. App. 1997).

132. *Id.* at 550.

133. *Id.*

134. *Id.* at 551.

135. *Id.* at 552.

136. *Deja Vu of Hammond, Inc. v. City of Lake Station*, 681 N.E.2d 1168, 1173 n.5 (Ind. Ct. App. 1997). The trial court also enjoined the tavern/restaurant from using part of an addition as "storage building." *Id.* The tavern/restaurant did not appeal that part of the injunction. *Id.*

137. *Id.* at 1170. One might suggest that the *Deja Vu* was "asking for it" when they named the adult entertainment part of their premises the "Bare-ly Legal." *Id.*

138. *Id.*

139. *Id.*

prima facie error rule, the courts in both *Deja Vu* and *Marriage of Jackson* still ruled in favor of the appellants. What ultimately can be gleaned from those cases that considered the *prima facie error* rule in 1996 and 1997? File a brief.¹⁴⁰

2. *Subject Matter Jurisdiction.*—In *City of New Haven v. Chemical Waste Management of Indiana, L.L.C.*,¹⁴¹ the court of appeals considered an issue of first impression related to its subject matter jurisdiction: whether a permissive intervening party in the trial court may maintain an appeal of a judgment when the original parties to the dispute have settled their claims and dismissed the case as between themselves. A brief review of the relevant procedural background in *City of New Haven* is necessary to put the issue in context.¹⁴²

The city filed a complaint to enforce a zoning ordinance, naming the county board of zoning appeals and a chemical company as defendants, alleging that the chemical company was violating the zoning ordinance. The city sought a court order to have the chemical company cease operations. The county zoning administrator issued the injunction by entering several “stop work” orders. The zoning appeals board then filed a complaint for injunctive relief, seeking to enforce the stop work orders which the zoning administrator had entered, and the zoning appeals board affirmed.

Pursuant to Indiana Trial Rule 24(B)(2), the city filed a petition to intervene as a plaintiff in the zoning appeals board enforcement action. The trial court granted the petition and the parties then filed summary judgment motions. The trial court granted in part, and denied in part, the chemical company’s motion. The zoning appeals board, the zoning administrator, and the city filed a joint *praecipe* for appeal of the adverse rulings. Subsequent to the trial court’s order on the summary judgment motions, the zoning appeals board, the zoning administrator, and the chemical company reached a settlement agreement. The trial court then entered an agreed judgment in both cases dismissing all claims with prejudice. The city, not a party to that agreed judgment, remained the sole appellant.

On appeal, the chemical company argued that a permissive intervening plaintiff, such as the city, could not maintain an appeal once the original parties had been dismissed from the cause of action. “Essentially, [the chemical company asked the court of appeals] to question [its] jurisdiction to hear the . . . appeal.”¹⁴³ The court, in considering that assertion, framed the issue as follows:

Indiana law provides that an intervenor takes the case as he finds it and

140. *Accord* Harrington, *supra* note 114, at 990 (After noting that the developing *prima facie error* rule is “unpredictable,” concluding that: “Appellees should always file a brief. Appellees who fail to do so run the risk that their successes in the trial court will be the subject of a diluted standard of review on appeal.”).

141. 685 N.E.2d 97 (Ind. Ct. App. 1997).

142. There was a “complex procedural background” in *City of New Haven*, which the court of appeals provided in a “somewhat simplified version . . .” *Id.* at 99. The procedural version set forth in this Article is even more simplified; readers are referred to the opinion for more details.

143. *Id.* at 100.

cannot change the issues or raise unrelated issues. Accordingly, one should not be granted permissive intervention if the effect of granting the motion would be to open up new areas of inquiry or raise unrelated issues. Although one who has been granted permissive intervening status cannot later interject new areas of inquiry or raise unrelated issues, the question remains as to what rights the intervening party has to continue to pursue issues raised by the original parties where those parties have decided to settle and/or dismiss the case as between themselves.¹⁴⁴

Because of the lack of Indiana authority on point, the court turned to federal cases that had addressed the same issue under Federal Rule of Civil Procedure 24. Accordingly, the court noted that “[t]he weight of authority in the United States Court[s] of Appeals supports the principle that an intervenor can continue to litigate after dismissal of the party who originated the action.”¹⁴⁵ However:

Most of the circuits that have reached that conclusion have set standards for determining under what circumstances an intervening party may continue to litigate after dismissal of the original party and have generally adopted, *inter alia*, the approach that an intervenor may continue provided that an independent basis for jurisdiction exists.¹⁴⁶

The chemical company urged the court of appeals to find that it lacked independent jurisdiction over the appeal, and thus to dismiss the appeal.¹⁴⁷ The court rejected that argument. Recognizing the difference between federal and state subject matter jurisdiction, the court stated: “The power of this court to hear appeals is not limited by the same parameters as the federal circuit courts of appeals.”¹⁴⁸ In Indiana, “[p]rovided that certain procedural requirements are met, appeals may be taken by either ‘party’ from all final judgments and from interlocutory orders under specified circumstances.”¹⁴⁹

The court then held that although

one who is not a party or has not been treated as a party to a lawsuit has no right to appeal from a judgment rendered therein . . . one who is not an original party to a lawsuit may of course become a party and, in effect, gain the right to appeal, by intervention, substitution or third-party practice.¹⁵⁰

Therefore, because the city was a proper intervenor, and because there was no

144. *Id.* at 100-01 (citations omitted).

145. *Id.* at 101 (quoting *Benavidez v. Eu*, 34 F.3d 825, 830 (9th Cir. 1994) (second alteration in original)).

146. *Id.* (emphasis added).

147. *Id.*

148. *Id.* at 102.

149. *Id.* (citing IND. APP. R. 4(A) & (B)).

150. *Id.*

indication the city failed to meet the appellate procedural requirements to bring an appeal, the city had a right to appeal the trial court's judgment "to the extent that it [was] adverse to those interests which made intervention possible in the first place."¹⁵¹

II. RULE CHANGES EFFECTIVE JANUARY 1, 1998

Effective January 1, 1998, the supreme court amended Appellate Rules 2, 2.1, 4, 7.2, 8.2, 11, 14, and 15.

A. Appellate Rule 2

1. *Appellate Rule 2(C)*.—Certainly the most significant of the 1998 amendments to the Appellate Rules are the changes found in Appellate Rule 2. Sub-parts 2(A) and 2(B) to Appellate Rule 2 remain unchanged from their 1997 form. However, the 1997 form of sub-part 2(C)—“Court of Appeals Pre-Appeal Conference”—has been eliminated. The new sub-part 2(C)—“Court of Appeals Notice of Appeal”—requires that:

Any party seeking an appeal or review by the Supreme Court or the Court of Appeals, shall file a notice of appeal with the Clerk of the Supreme Court, Court of Appeals and Tax Court. The filing of a notice of appeal will satisfy the requirement to file an appearance pursuant to Appellate Rule 2.1.¹⁵²

Douglas E. Cressler, the Administrator of the Indiana Supreme Court, has written that “the principal purpose for the new [Rule 2(C)] is to provide the appellate courts a basis for case management.”¹⁵³ The notice *shall* be filed within “fourteen (14) days of the filing of the praecipe or, in the case of an interlocutory appeal under Appellate Rule 4(B)(6), with the petition to the Court of Appeals requesting permission to file an interlocutory appeal . . .”¹⁵⁴ The notice must set forth the following information: Party Information;¹⁵⁵ Trial Information;¹⁵⁶

151. *Id.*

152. IND. APP. R. 2(C).

153. Douglas E. Cressler, *Appellate Practice From Inside The Indiana Supreme Court Administrator's Office*, THE APPELLATE ADVOCATE, Spring 1998, at 5.

154. IND. APP. R. 2(C)(1).

155. *Id.* The following must be included in the required “Party Information”:

(a) Name, address and telephone number of the parties initiating the appeal or review; (b) Name, address, attorney number, FAX number, telephone number and computer address, if any, of the attorneys representing the parties initiating the appeal or review; and (c) Whether the attorney is requesting service of orders and opinions by FAX pursuant to Appellate Rule 12(F).

Id.

156. *Id.* The following must be included in the required “Trial Information”:

(a) Title of case; (b) Trial court or other tribunal; (c) Case number; (d) Name of trial judge; (e) Date case initially commenced; (f) Date of judgment or order; (g) Whether

Record Information;¹⁵⁷ and Appeal Information.¹⁵⁸ The following documents must be attached to that notice of appeal:

- (a) In civil cases, a copy of the judgment or order appealed from, to include findings of fact and conclusions, where made; (b) In criminal cases, a copy of the judgment or order appealed from, to include any sentencing order; (c) A copy of any motion to correct errors filed in the trial court; and (d) A copy of the praecipe.¹⁵⁹

If a party fails to file the notice of appeal, then “[t]he Clerk of the Supreme Court and Court of Appeals shall not accept for filing any record, motion, or other documents of the proceedings, until the notice of appeal has been filed.”¹⁶⁰ Thus, the filing of a notice of appeal is, in effect, a condition precedent to the timely filing of the record.¹⁶¹

It is interesting to note that the ramifications for failing to timely file the notice of appeal are not couched in absolute terms. That is, although the notice of appeal has to be filed “within fourteen (14) days of the filing of the *praecipe*” or an interlocutory petition,¹⁶² Appellate Rule 2(C)(2) states only that the various filings will not be accepted “until the notice of appeal has been filed.”¹⁶³ Appellate Rule 2(C)(2) does *not* state that the various filings shall

trial was by judge or jury; (h) Synopsis of judgment and sentence, if applicable; and (i) Case type using classification in Administrative Rule 8(B)(3).

Id.

157. *Id.* The following must be included in the required “Record Information”:

- (a) Date praecipe was filed; (b) Date record is due to be filed; and (c) The following transcript information: 1) Name, address and telephone number of court reporter responsible for preparing transcript; 2) Date ordered (or reason it has not been ordered); 3) Payment arrangements; 4) Estimated length of transcript; 5) Estimated time required for preparation; and 6) Estimated completion date.

Id.

158. *Id.* The following information must be included in the required “Appeal Information”:

- (a) A short and plain statement of the anticipated issues on appeal; provided, however, that the statement of anticipated issues shall not prevent the raising of any issue on appeal; (b) Prior appeals in same case; (c) Related appeals (prior, pending or potential) known to the party; (d) Indication whether a request for oral argument is anticipated; (e) Pre-appeal conference request; if desired, include purpose of proposed conference; (f) Criminal cases—status of defendant (i.e. on bond, incarcerated and, if so, where); (g) Civil cases—whether Alternative Dispute Resolution has been used and whether it should be used on appeal; and (h) Certification that case does or does not involve issues relating to custody, support, visitation or parental relationship of a child.

Id.

159. *Id.*

160. IND. APP. R. 2(C)(2).

161. *See* IND. APP. R. 3(B) (time within which the record must be submitted).

162. IND. APP. R. 2(C)(1).

163. IND. APP. R. 2(C)(2).

never be accepted if the notice of appeal is not filed within that fourteen day period.¹⁶⁴

Implicitly, then, Appellate Rule 2(C)(1) could be read to allow a party who fails to submit the notice of appeal within the fourteen day period to have up until the eve of the deadline(s) for submitting the record¹⁶⁵ in which to submit the notice of appeal. It will be interesting to see how the appellate courts apply Appellate Rule 2(C) if (and when) that situation arises, and whether failure to strictly adhere to the Appellate Rule 2(C) deadline will mean that the appellate courts will refuse to hear an appeal, as is the case when an appellant fails to comply with, for example, Appellate Rule 2(A).¹⁶⁶

In response to the question “What happens if no notice of appeal is filed?”, Douglas Cressler, Administrator of the Indiana Supreme Court, has written:

The rule itself, as amended, provides that “[t]he Clerk of the Supreme Court and Court of Appeals shall not accept for filing any record, motion, or other documents of the proceedings, until the notice of appeals has been filed.” App.R.2(C)(2)(1998). [T]hat provision is only being enforced if the praecipe was filed in 1998. If the praecipe was filed in 1998 and a motion or record is tendered without a notice of appeal having been previously or contemporaneously submitted, the appellate courts are allowing such materials to be “received” rather than filed. Counsel for the appellant will then be contacted by the Clerk’s office about the deficiency. Once the notice of appeal is filed, the previously received documents will be shown as “filed” and processed accordingly. The courts may (and probably will) decide to adopt a more rigid interpretation of the rule after it has been in effect for awhile.¹⁶⁷

Thus, it appears that Indiana’s appellate courts will not strictly construe Appellate Rule 2(C) *yet*. As it is unclear from the above when that lenient construction of the Rule will be lifted, practitioners are cautioned not to rely on the above as persuasive authority for avoiding whatever consequences may lie for failing to comply with Appellate Rule 2(C).

164. In a preliminary draft of the revised Appellate Rule 2(C), monetary sanctions would have been imposed if an appellant failed to file the notice of appeal. *See*, Ammeen, *supra* note 3, at 1186 n.115. Under that version of the rule it would appear that the notice of appeal is not a jurisdictional requirement. However, such a clear cut “sanction” is not found in the 1998 version of Appellate Rule 2(C), leaving the issue open to interpretation.

165. *See* IND. APP. R. 3(B).

166. *See* Jennings v. Davis, N.E.2d 810 (Ind. Ct. App. 1994) (finding that filing of praecipe 31 days after entry of final judgment resulted in dismissal of appeal); Koons v. Great Southwest Fire Ins. Co., 530 N.E.2d 780 (Ind. Ct. App. 1988) (failure to timely file the record results in dismissal because of lack of subject matter jurisdiction); *see also* Ammeen, *supra* note 3, at 1186. (“Substantial issues still must be resolved before a docketing statement can be instituted. For example, should filing the docketing statement be jurisdictional or simply a notice?”).

167. Cressler, *supra* note 153, at 6.

2. *Appellate Rule 2(D)*.—The only substantive change¹⁶⁸ to Appellate Rule 2(D) is that parties may now request a preappeal conference.¹⁶⁹ In the 1997 version of Appellate Rule 2(D), it was only the court of appeals that had the ability to “direct” such a conference.¹⁷⁰ Under the new Appellate Rules, the court of appeals has retained that power, only now, in addition, the conference can be requested by an appealing party.¹⁷¹

B. *Appellate Rule 2.1(A)*

Two changes are found in the 1998 version of Appellate Rule 2.1(A). First, it is no longer a requirement that “[i]n the case of an interlocutory appeal under Appellate Rule 4(B)(6), the appearance form shall be filed with the petition to entertain jurisdiction.”¹⁷² Second, “[t]he filing of a notice of appeal pursuant to Appellate Rule 2(C) will satisfy the requirement to file an appearance” under Appellate Rule 2.1(A).¹⁷³ Thus, the notice of appeal has a dual purpose.

C. *Appellate Rule 4(C)*

Appellate Rule 4(C) has been the subject of some interesting appellate decisions over the last few years.¹⁷⁴ The court in *Sneed v. Associated Group Insurance*¹⁷⁵ held that the procedures in the Appellate Rules take precedence over conflicting statutory procedures.¹⁷⁶ At issue in *Sneed* was whether the failure to file an assignment of errors, which was not required by the Appellate Rules¹⁷⁷ (but was required by statute¹⁷⁸), meant that the appellate court did not have jurisdiction to consider the merits of the appeal.¹⁷⁹ At the time of the *Sneed* decision, Appellate Rule 4(C) stated that “[i]t shall be unnecessary to file a separate assignment of errors in the court of appeals to assert that the decision of any board, agency, or other administrative body is contrary to law.”¹⁸⁰ The 1998 version of Appellate Rule 4(C) states that “[i]t shall be unnecessary to file an

168. The internal numbering of the rule has changed. IND. APP. R. 2(D).

169. *Id.*

170. *Id.*

171. *Id.*

172. *See* IND. APP. R. 2.1 (amended 1998).

173. *Id.*

174. For an excellent discussion of those cases, see Harrington, *supra* note 114, at 993-96; Ammeen, *supra* note 3, at 1173-74.

175. 663 N.E.2d 789 (Ind. Ct. App. 1996).

176. *Id.* at 794.

177. The court in *Sneed* held that, although the version of Appellate Rule 4(C) in effect at the time of an appeal required the filing of an assignment of errors, the subsequently amended version of Appellate Rule 4(C), which did not require the filing of an assignment of errors, nonetheless applied. *Id.* at 797.

178. IND. CODE § 22-3-4-8 (1993).

179. *Sneed*, 663 N.E.2d at 791.

180. IND. APP. R. 4(C) (amended 1998).

assignment of errors in the court of appeals to assert that the decision of any board, agency, or other administrative body is contrary to law.”¹⁸¹ Although the change is subtle—from “a separate assignment” to “an assignment”—the change can be read to implicitly clarify and affirm the *Sneed* decision. The 1998 version removes language that could be read to acknowledge the possibility that a party needs to file “a separate” assignment, even if such an assignment is required by a conflicting statutory provision, as in *Sneed*.

D. Appellate Rule 7.2(B)

The 1998 version of Appellate Rule 7.2(B) has been amended in two respects: the first substantive; the second stylistic. The first change to Appellate Rule 7.2(B) requires the appellant, rather than the trial court clerk, to “transmit the whole record to the court on appeal.”¹⁸² This change firmly places the burden on an appellant to ensure that an appellate court has the whole record.

The second change is an elimination of the italicized portion of the following:

Neither party shall request parts of the record or a transcript of the proceedings which are not needed for the issues to be asserted upon appeal, *including without limitation the following: The pleadings or parts thereof not related to a claimed error; the verdict, when the form, language or its scope is not in issue; evidence or parts thereof which is not involved in the appeal or related to the error claimed; instructions, tendered instructions, findings or proposed or omitted findings which are not in issue; evidence, other instructions or findings or pleadings or parts thereof which are not particularly related to instructions, tendered instructions, findings, or proposed or omitted findings claimed to be erroneous; or motions and orders or rulings thereon not connected with the error claimed.*¹⁸³

Clearly, the supreme court believes that, with respect to the specificity of Appellate Rule 7.2(B), less is better. The change is not substantive, as it simply removes the “including without limitation” clause and leaves a less-detailed, albeit substantively the same, mandate.¹⁸⁴ Regardless of the form and specificity of Appellate Rule 7.2(B), a party is still required to submit to the court of appeals those parts of the record or transcript which are needed for the issues on appeal.¹⁸⁵

181. IND. APP. R. 4(C).

182. Compare IND. APP. R. 7.2(B) (1997), with IND. APP. R. 7.2(B) (1998).

183. Compare IND. APP. R. 7.2(B) (1997), with IND. APP. R. 7.2(B) (1998).

184. Perhaps all that can be gleaned from the change is that the supreme court wants to remove from an appealing party the argument that one of the formerly enumerated parts of the record or transcript was not requested because the 1997 Appellate Rule 7.2(B) explicitly stated that that part of the record was “not needed for the issues to be asserted upon appeal.”

185. IND. APP. R. 7.2(B).

E. Appellate Rule 11(B)

The requirements for a petition for transfer continue to evolve. Three changes to Appellate Rule 11(B) are effective in 1998. The first change is the addition of the following italicized language:

Within thirty (30) days from an adverse decision in the Court of Appeals or, in the event a petition for rehearing *from an adverse decision* is filed in the Court of Appeals, within thirty (30) days from the disposition of such petition, a party may petition the Supreme Court to transfer the case.¹⁸⁶

The second change is the addition of the following language:

A published opinion, an unpublished memorandum decision, or an order dismissing an appeal issued by the Court of Appeals may be considered an adverse decision for purposes of petitioning for transfer. Any other order issued by the Court of Appeals, including an order denying a petition for interlocutory appeal under Appellate Rule 4(B)(6), shall not be considered an adverse decision for purposes of petitioning for transfer, regardless of whether rehearing is sought.¹⁸⁷

Finally, the court has reduced the length of the petition to transfer from 1400 to 1000 words.¹⁸⁸

CONCLUSION

During the survey period, Indiana's appellate courts continued to refine and, in some cases, re-define, appellate procedure. The Indiana Supreme Court continues to refine the Appellate Rules. While in some cases these changes have added clarity to the appellate process, other changes have, in fact, clouded the process. However, as long as appellate practitioners are aware of the changes, then the murkiness of certain rules can be factored in to any procedural decisions so that an appellant or appellee's rights are not forfeited due to procedural errors.

186. IND. APP. R. 11(B).

187. *Id.*

188. *Id.*