

# 1998 UPDATE OF FEDERAL CIVIL PRACTICE FOR SEVENTH CIRCUIT PRACTITIONERS\*

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## INTRODUCTION

Federal practitioners encountered continued changes during 1998 in federal civil practice. New opinions from the Seventh Circuit and the local district courts refined jurisdictional and procedural precedent, and local rule changes in the Southern District of Indiana effective January 1, 1999, will significantly impact local summary judgment practice. This Article outlines these important developments. For ease of future reference, topics are presented in the order they often arise in federal litigation.

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# I. PLEADINGS/EARLY MOTIONS PRACTICE

## A. Amount in Controversy

In *Herremans v. Carrera Designs*,<sup>1</sup> the Seventh Circuit reaffirmed that for determining the \$75,000-plus minimum amount in controversy for diversity jurisdiction, individual plaintiffs can aggregate their separate claims or counts to meet the minimum. This is because 28 U.S.C. § 1332(a) jurisdiction exists over “civil actions,” not over counts.<sup>2</sup>

## B. Diversity of Citizenship

In *51 Associates Ltd. Partnership v. Associated Business Telephone Systems*,<sup>3</sup> the Seventh Circuit requested jurisdictional memoranda addressing whether diversity jurisdiction existed. The court dismissed the appeal with instructions for the district court to dismiss the case as non-diverse.<sup>4</sup> Because the plaintiff was a limited partnership, the citizenship of every partner—general and limited—was necessary to establish diversity jurisdiction under the Supreme Court’s decision in *Carden v. Arkoma Associates*,<sup>5</sup> but because the record was silent as to the limited partners’ citizenship, dismissal was required.<sup>6</sup>

1. 157 F.3d 1118 (7th Cir. 1998).

2. See *id.* at 1121; 28 U.S.C. § 1332(a) (1994 & Supp. II 1996).

3. No. 98-2547, 1998 WL 911700 (7th Cir. Dec. 28, 1998).

4. *Id.* at \*1.

5. 494 U.S. 185 (1990).

6. *51 Assoc. Ltd. Partnership*, 1998 WL 911700, at \*1.

### *C. Transfer*

In *North Shore Gas Co. v. Salomon, Inc.*,<sup>7</sup> appellant asserted error in the district court's refusal to transfer the action to another district court pursuant to 28 U.S.C. § 1404. The Seventh Circuit quickly disposed of that argument, noting the issue "does not warrant extended discussion" because district courts have "broad discretion" on motions to transfer under § 1404(a), and reversal lies only for a clear abuse of that discretion.<sup>8</sup> This is an important reminder to practitioners seeking transfer, who are more often than not unsuccessful in these motions.

### *D. Joining Insignificant Employees as Defendants*

In *Latimore v. Citibank Federal Savings Bank*,<sup>9</sup> plaintiff sued Citibank and two of its employees under the Equal Credit Opportunity Act and Fair Housing Act. Summary judgment was granted for the defendants. On appeal, in the midst of a lengthy opinion addressing various substantive issues, Chief Judge Posner commented on the panel's "displeasure" that the plaintiff joined one of the individual defendants in the case.<sup>10</sup> Noting that there was no evidence supporting a claim against the individual, Judge Posner wrote:

But as the [defense] lawyers do not ask for sanctions for the filing of a frivolous claim against [the individual], we shall let the matter drop with a warning that this court does not look with favor on the promiscuous joinder of minor employees as defendants in cases against their employers.<sup>11</sup>

### *E. Affirmative Defenses*

In *Brunswick Leasing Corp. v. Wisconsin Central Ltd.*,<sup>12</sup> Brunswick, a semi-trailer manufacturer, sought to enforce a contract between its former distributor and its customer, Wisconsin Central. After Brunswick asserted that it was one of several undisclosed principals, Wisconsin Central moved for summary judgment on the grounds that the contract was unenforceable because multiple undisclosed principals existed.<sup>13</sup> Although the district court acknowledged that the multiple undisclosed principals argument looked promising, it held that Wisconsin Central had waived the argument by failing to plead it as an affirmative defense.<sup>14</sup>

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7. 152 F.3d 642 (7th Cir. 1998).

8. *Id.* at 648 n.3.

9. 151 F.3d 712 (7th Cir. 1998).

10. *Id.* at 716.

11. *Id.*

12. 136 F.3d 521 (7th Cir. 1998).

13. *See id.* at 525.

14. *See id.*

The Seventh Circuit reversed the district court's decision. At the onset, the Seventh Circuit noted that the multiple undisclosed principals rule is not one of the enumerated defenses under Federal Rule of Civil Procedure ("Rule") 8(c) and therefore must be one of the "'other' defenses" to which the rule refers.<sup>15</sup> After discussing the various analyses for determining whether a defense qualifies as one of the "'other' defenses" under Rule 8(c), the Seventh Circuit stated that it "need not decide which of the various analyses are 'correct,' because under any analysis the multiple undisclosed principals rule is not an affirmative defense: it is merely a part of the legal rule that permits some—but not all—undisclosed principals to enforce their agents' contracts."<sup>16</sup> Holding that the undisclosed principals rule completely defeated Brunswick's claims,<sup>17</sup> the Seventh Circuit reversed the district court's decision.

#### *F. More Definite Statement*

The decision in *In Re Rimsat, Ltd.*,<sup>18</sup> is an excellent example of the rare case in which a motion for a more definite statement under Rule 12 is appropriate. For those considering this procedural remedy in response to a complaint, the *Rimsat* decision is a good starting point.

#### *G. Dismissal for Failure to Prosecute: Standards for Appointed Counsel*

In *Dunphy v. McKee*,<sup>19</sup> the plaintiff filed a pro se civil-rights action challenging his conditions of incarceration. The district court appointed counsel to represent him, but counsel failed to prosecute the action. The district court dismissed the action for want of prosecution in a one-sentence order.<sup>20</sup> Plaintiff appealed, and the Seventh Circuit reversed and remanded.

The Seventh Circuit analyzed whether the standard for appointed counsel should be any different from retained counsel in this context. In the end, the court essentially followed the same standard, but noted that "[g]reater judicial oversight is . . . inevitable."<sup>21</sup> The court held that before dismissing an action for want of prosecution, the district court should consider four prophylactic measures: (1) the court should give due warning to counsel; (2) the court may consider giving notice to the actual plaintiff, but there is no ironclad requirement that this be done; (3) the court should analyze whether the plaintiff or counsel is at fault for the failure to prosecute; and (4) the court should consider less severe sanctions, taking into account the merits of the plaintiff's suit.<sup>22</sup>

Because it was unclear whether the district court had considered any of these

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15. *Id.* at 530 (quoting FED. R. CIV. P. 8(c)).

16. *Id.* (citation omitted).

17. *Id.* at 531.

18. 223 B.R. 345 (Bankr. N.D. Ind. 1998).

19. 134 F.3d 1297 (7th Cir. 1998).

20. *See id.*

21. *Id.* at 1302.

22. *Id.* at 1301.

factors, the Seventh Circuit reversed and remanded. In so doing, the Seventh Circuit suggested that the district court consider appointing substitute counsel if the dismissal were unwarranted.<sup>23</sup>

#### *H. Class Actions*

Rule 23 of the Federal Rules of Civil Procedure was amended by adding subdivision (f), allowing an appeal from a grant or denial of certification within ten days of the decision. The court of appeals has sole discretion whether to accept the appeal.<sup>24</sup>

For those defending class actions involving technical violations and modest damages, Judge Manion's decision for the Seventh Circuit in *Bailey v. Security National Servicing Corp.*,<sup>25</sup> could be of assistance. Judge Manion wrote:

Class actions can benefit plaintiffs by getting a lawyer interested in taking on what individually comes close to a small claims case . . . , but litigation is costly to all concerned and uses judicial resources as well. The law[, here the Fair Debt Collection Practices Act,] would be best served by challenging clear violations rather than scanning for technical missteps that bring minimal relief to the individual debtor but a possible windfall for the attorney.<sup>26</sup>

### II. DISCOVERY

#### *A. Self-Critical Analysis*

In *Jackson v. Preferred Technical Group Inc.*,<sup>27</sup> plaintiffs sought production of the employer's affirmative action plan in a race discrimination case. Defendant produced some portions of the plan, but resisted producing portions of the plan it deemed to be protected by self-critical analysis. Plaintiffs moved to compel, and Magistrate Judge Cosbey held that portions of the plan with subjective self-critical analysis were protected by the self-critical analysis privilege, while portions lacking subjective evaluative material were not privileged.<sup>28</sup> The opinion contains a good summary of law on the subject of self-critical analysis, and is useful for civil litigators in all contexts (not just for employment lawyers).

The key holdings of the opinion are: (a) the court recognized the self-critical analysis privilege; and (b) the court set forth the following criteria for its application: (1) whether the reports were prepared as a result of mandatory governmental requirements; (2) whether the material is subjective and evaluative

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23. *Id.* at 1302.

24. FED. R. CIV. P. 23.

25. 154 F.3d 384 (7th Cir. 1998).

26. *Id.* at 388.

27. No. 1:98-CV-21 (N.D. Ind. Oct. 21, 1998).

28. *Id.* at 5-8.

and protected or is it simply data and not protected; and (3) whether the policy favoring exclusion clearly outweighs plaintiff's need for the material.

### *B. Fee Agreements*

In the same case, *Jackson v. Preferred Technical Group, Inc.*,<sup>29</sup> the defendants filed a motion to compel the disclosure of information regarding the plaintiffs' fee agreements with their counsel. The plaintiffs objected to providing such information on the grounds that it was protected from disclosure under the attorney-client privilege. The court granted the defendants' motion.<sup>30</sup> The court explained that "basic facts" relating to the attorney-client relationship, such as "the fact that an attorney was consulted, the nature of the services rendered by the attorney, and the details of the attorney-client fee arrangement, including the dates and amounts of payment," are not privileged.<sup>31</sup> The court further explained that the information was relevant to the plaintiffs' claim for attorneys' fees, and therefore discoverable.<sup>32</sup>

### *C. Medical Records*

Also in the *Jackson* case, the defendants' moved to compel release of the plaintiffs' medical records. The plaintiffs objected to providing the releases based on the physician-patient privilege. The court ordered the release of the plaintiffs' medical records subject to a protective order. The court held that the plaintiffs waived the physician-patient privilege by seeking emotional damages.<sup>33</sup>

### *D. Motions to Quash from Department of Workforce Development*

Local practitioners might have noticed that the Indiana Department of Workforce Development ("IDWD") is now moving to quash all subpoenas for unemployment records on the grounds that the records are confidential and cannot be disclosed without a court order. Several judges in the Southern District of Indiana have denied the IDWD's motions without even requiring a response from the defendant.<sup>34</sup> Until the Department alters its policy, it appears these motions to quash will continue to be filed and denied.

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29. No. 1:98-CV-21 (N.D. Ind. May 12, 1998).

30. *Id.* at 4.

31. *Id.* at 2.

32. *Id.* at 3-4.

33. No. 1:98-CV-21 (N.D. Ind. May 12, 1998) (minutes of hearing and order before Magistrate Judge Roger B. Cosbey).

34. *See, e.g.,* Ahrens v. Mead Johnson Nutritional, No. EV98-48-C-Y/H, slip. op. at 1 (S.D. Ind. June 25, 1998) (order from Magistrate Judge Hussman denying same); Skeen v. Hillhaven, No. IP98-0406-C-Y/G, slip op. at 1 (S.D. Ind. May 20, 1998) (order from Magistrate Judge Godich denying the IDWD's motion to quash subpoena and ordering the release of the requested information).

### *E. Discovery Responses*

In *Smith v. Howe Military School*,<sup>35</sup> defendants' interrogatory asked whether the plaintiff had ever undergone any psychological testing or assessments, and if so, to provide details. The plaintiff answered "no." In her deposition, plaintiff testified that she had, in fact, undergone such testing.<sup>36</sup> Defense counsel subsequently requested supplementation, and the plaintiff's counsel responded in writing indicating some additional details of the testing but indicating that no additional information had been located.

The defendants moved to compel supplementation of the interrogatory answer. Magistrate Judge Pierce granted the motion, holding that the defendants were "entitled to receive a formal answer to the [i]nterrogatory by [the plaintiff] herself, and they are entitled to an answer under oath, not an unverified representation by her counsel."<sup>37</sup> The court added, "The plaintiff must respond to the interrogatory fully and completely, supplying all information within her knowledge, possession, or control, including information available through her attorneys, investigators, agents, or representatives, and any information obtainable by her through reasonable inquiry."<sup>38</sup>

### *F. Third-Party Discovery*

Defendants often seek expansive third-party discovery of plaintiffs, including prior employment records, medical records, and educational records. In *Perry v. Best Lock Corp.*,<sup>39</sup> the defendant served nineteen non-party subpoenas upon past, present, and prospective employers of the plaintiff in an employment discrimination action. The plaintiff moved to quash the subpoenas. Judge Hamilton granted the motion, reasoning that under Federal Rule of Civil Procedure 26(b)(2) the defendant had not identified any specific concerns or targets for its "sweeping and intrusive discovery requests."<sup>40</sup>

## III. EXPERTS

### *A. Daubert Decisions*

In *Jones v. Royalton Food Service Equipment Co.*,<sup>41</sup> the plaintiff was injured while using a heated food cabinet, and sued the manufacturer and retailer for inadequate warnings and manufacturing defects. The defendants moved for summary judgment, and the plaintiff responded with an engineering expert to

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35. No. 3:96-CV-790RM, 1998 WL 175875 (N.D. Ind. Feb. 27, 1998).

36. *See id.* at \*1.

37. *Id.* at \*2.

38. *Id.*

39. No. IP98-936-C-H/G (S.D. Ind. Jan. 21, 1999).

40. *Id.* at 5.

41. No. 3:97-CV-128RP, 1998 WL 792184 (N.D. Ind. Sep. 15, 1998).

critique the dangers of the heated food cabinet.<sup>42</sup> The defendants moved to strike the expert's opinions as not complying with the expert witness standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>43</sup>

Magistrate Judge Pierce granted the motion to strike, reasoning: (a) the expert was outside his normal field of practice such that the court was "skeptical;" (b) the expert had no special knowledge or training to conclude that the cabinet was unreasonably dangerous beyond that which would be contemplated by the ordinary consumer; (c) the expert did not consult any outside materials nor investigate any standards; and (d) the expert's opinion was "little more than subjective opinion based on a few measurements."<sup>44</sup> Notably, Judge Pierce also referenced that the same expert (Ned C. Myers) had been stricken by Judge Sharp in a seat-belt case.<sup>45</sup>

In *Ancho v. Pentek Corp.*,<sup>46</sup> the plaintiff was seriously injured in an industrial accident and sued the manufacturer of the equipment. The defendant moved in limine to exclude the plaintiff's design expert. The district court granted the motion and allowed the plaintiff an opportunity to name a different expert, but the plaintiff re-submitted the same expert and moved to reconsider the limine ruling.<sup>47</sup> Defendant then moved for summary judgment, and the court denied the motion to reconsider and granted the motion for summary judgment.<sup>48</sup>

On appeal, in a lengthy discussion of *Daubert* principles, the Seventh Circuit rejected the plaintiff's argument that the district court erred in excluding the design expert. Applying the deferential standard of review of manifest error for *Daubert* rulings, the Seventh Circuit held that the district judge's ruling should be affirmed.<sup>49</sup> Notably, even though the expert critiqued the industrial conveyor at issue, the expert had not even visited the accident site to assess the situation. The Seventh Circuit essentially held that the plaintiff had the wrong expert, writing, "[The plaintiff] should have retained a qualified plant engineer to testify at trial and his failure to do so was a mistake in judgment for which he has no one to blame but himself."<sup>50</sup>

### *B. When Does a Treating Physician Become an Expert?*

In *Norwest Bank v. K-Mart Corp.*,<sup>51</sup> a personal injury case, the plaintiffs moved for reconsideration of Judge Miller's prior order denying their motion for leave to supplement the reports of plaintiff Deborah Frick's treating physicians.

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42. *See id.* at \*3.

43. 509 U.S. 579 (1993).

44. *Jones*, 1998 WL 792184, at \*6.

45. *Rogers v. Ford Motor Co.*, 952 F. Supp. 606, 613-16 (N.D. Ind. 1997).

46. 157 F.3d 512 (7th Cir. 1998).

47. *See id.* at 514.

48. *See id.*

49. *Id.* at 518-19.

50. *Id.* at 519.

51. No. 3:94-CV-78RM (N.D. Ind. 1998).



In support of their motion, the plaintiffs stated that the opinions of Frick's treating physicians had changed since their review of information that was unavailable to them at the time of their depositions.<sup>52</sup> The plaintiffs claimed that Frick's treating physicians had not reviewed the information before because the plaintiffs' prior counsel was inexperienced and had failed to provide the information to Frick's treating physicians. Recognizing its significance, the plaintiffs' current counsel provided the information to Frick's treating physicians as soon as he took over the lawsuit.<sup>53</sup> In their motion, the plaintiffs also sought to introduce opinions from Frick's treating physicians rebutting the defendant's experts' opinions and addressing Frick's future health needs.

Noting at the outset that a treating physician can become an expert subject to the requirements of Rule 26, the court denied the plaintiffs' motion for reconsideration.<sup>54</sup> First, the court held that the supplemental opinions of Frick's treating physicians were subject to exclusion under Rule 37(c)(1) because the opinions were not based upon their personal knowledge and treatment of Frick.<sup>55</sup>

The court explained:

[T]he plaintiffs have converted Mrs. Frick's treating physicians to expert witnesses for purposes of offering new opinions based on materials provided by the plaintiffs' counsel. These supplemental opinions clearly were developed in anticipation of trial to the extent that plaintiffs' counsel chose the materials that Drs. Diamond and Elliot needed to review. . . . That Mrs. Frick's treating physicians found these additional materials beneficial to her treatment is irrelevant. Had her physicians requested these materials as essential to Mrs. Frick's care and treatment, the court may have been inclined to conclude that the supplemental opinions were not "expert" opinions for purposes of Rule 26.<sup>56</sup>

The court also rejected the plaintiffs' request to supplement Frick's treating physicians' opinions to rebut issues raised by the defendant's experts' reports and to address Frick's future health needs, explaining that such opinions "fall[] into the realm of expert opinion under Rule 26."<sup>57</sup>

Second, after concluding that the supplemental opinions of Frick's treating physicians were expert opinions, the court held that Rule 37(b)(1) required their exclusion.<sup>58</sup> According to the court, the opinions were not disclosed in accordance with Rule 26(a)(2)(B), there was no substantial justification for the plaintiffs' failure to disclose the opinions, and the plaintiffs' lack of compliant disclosure was not harmless.<sup>59</sup>

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52. *See id.* at 4.

53. *See id.*

54. *Id.* at 2-3.

55. *Id.* at 4-5.

56. *Id.*

57. *Id.* at 5.

58. *Id.* at 6.

59. *Id.* at 6-7.

## IV. SUMMARY JUDGMENT

*A. Southern District Amends Local Rule 56.1 Effective January 1, 1999*

The Southern District of Indiana has been considering amendments to Southern District of Indiana Local Rule 56.1 (“Local Rule 56.1”) for several years. In March 1998, the court released for public comment a proposed version of Local Rule 56.1. Written comments were invited and received from the bar, and a public hearing was held on the proposed amendments in September. As a result of that public input, the Local Rules Advisory Committee recommended certain changes to the prior proposal, and transmitted those proposals to the court for consideration. Thereafter, in November the court considered Local Rule 56.1, modified certain provisions, and passed an amendment to Local Rule 56.1 by majority vote.

*B. The Key Changes*

The amendment to Local Rule 56.1 makes nine key changes from current summary judgment practice, as follows:

- Timing of filings—Motions shall be filed so as to be fully briefed at least 120 days before trial unless an earlier or later deadline is provided by order or case management plan. Response briefs will be due 30 days after the motion is filed, rather than 15 days under former practice; reply briefs will be due 15 days after the response brief, rather than the former 7 days.<sup>60</sup>
- Extensions—As before, extensions are available under the standards of Federal Rule of Civil Procedure 6 (for “good cause”), but must now specify the trial date, any other deadline or date that might be affected by the extension, and any previous extensions obtained.<sup>61</sup>
- Statement of Material Facts—As under former practice, the movant must file a Statement of Material Facts, either as part of the brief or as a separate filing. The statement, however, must now consist of “concise, numbered sentences with the contents of each sentence limited as far as practicable to a single factual proposition.” Each sentence must be supported by a citation to admissible evidence of record, with the citation by page and paragraph number, if possible.<sup>62</sup>
- Response to Statement of Material Facts—The non-movant must file

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60. S.D. IND. L.Rs. 56.1(c)-(e) (amended 1998).

61. S.D. IND. L.R. 56.1(e) (amended 1998).

62. S.D. IND. L.Rs. 56.1(b)(1), (f) (amended 1998).

a Response to Statement of Material Facts, which must be numbered to correspond to the sentence numbers in the movant's Statement of Material Facts. The non-movant may also submit a Statement of Additional Material Facts, which must consist of numbered sentences (starting with the next number after the last numbered sentence in the Statement of Material Facts), and citations to admissible record evidence.<sup>63</sup>

- **Reply To Additional Material Facts**—The movant may then file a Reply To Additional Material Facts, using the same numbering format described above. The movant may only supplement its prior evidence to the extent such evidence responds to the non-movant's Response to Statement of Material Facts or the non-movant's Statement of Additional Material Facts.<sup>64</sup>
- **Surreply**—In the event the moving party submits additional evidence with its reply brief or objects to evidence submitted by the non-movant, the non-movant has the right to file a surreply responding only to the moving party's new evidence and objections. Any surreply must be filed no later than 7 days after the reply brief. Otherwise no filings may be made post-reply brief without leave of court.<sup>65</sup>
- **Effect of Filings**—The court will assume that the facts claimed and supported by admissible evidence by the movant are admitted to exist without controversy except to the extent specifically controverted in the Response to Statement of Material Facts. The court will also assume that facts asserted by the non-movant are true to the extent they are supported by admissible record evidence.<sup>66</sup> The court may, in the interests of justice or for good cause, excuse failure to comply strictly with the terms of Local Rule 56.1.<sup>67</sup>
- **No Proposed Findings**—The amended rule no longer requires the filing of proposed findings and conclusions.
- **Pro Se Notice**—The amended rule delineates the notice required to be given to pro se non-movants against whom summary judgment motions are filed.<sup>68</sup>

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63. S.D. IND. L.Rs. 56.1(c), (f) (amended 1998).

64. S.D. IND. L.R. 56.1(d) (amended 1998).

65. S.D. IND. L.R. 56.1(d) (amended 1998).

66. S.D. IND. L.R. 56.1(g) (amended 1998).

67. S.D. IND. L.R. 56.1(j) (amended 1998).

68. S.D. IND. L.R. 56.1(i) (amended 1998).

The amended rule applies to motions for summary judgment filed on or after January 1, 1999.<sup>69</sup>

### *C. Effect of Local Summary Judgment Rules*

In *McGuire v. United Parcel Service*,<sup>70</sup> the non-moving party failed to comply with the court's local rule on summary judgment. Summary judgment was granted. On appeal, the Seventh Circuit added to the long list of cases supporting strict enforcement of summary judgment local rules. The panel wrote, "The district court strictly enforced the local rules against [the appellant], and we will do likewise."<sup>71</sup>

Similarly, in *Huey v. United Parcel Services, Inc.*,<sup>72</sup> the Seventh Circuit affirmed summary judgment for the defendant, based in part upon the plaintiff's failure to comply with the district court's local rule on summary judgment. The Seventh Circuit reaffirmed that district courts may add operational details to summary judgment practice, and that "judges need not paw over the files without assistance from the parties."<sup>73</sup>

### *D. Refinements to the Pilot Program*

Several judges of the Southern District of Indiana have been testing their Pilot Program for case management and summary judgment since September 1997. During 1998 the Pilot Program was slightly refined. For those operating under a Pilot Program case (which now includes any post-September 1997 civil case assigned to Chief Judge Barker, Judge McKinney, or Judge Young (Indianapolis cases only)), a current version of the revised Pilot Program guidelines are available from the Southern District Court's webpage<sup>74</sup> or from the Clerk. The revised guidelines are also distributed to the plaintiff upon filing or the defendant upon removal. The most significant change to the Pilot Program is a clarification that the only jury instructions required with the case management plan are those upon which the party bears the burden of proof (e.g., for a plaintiff in an age discrimination case, the basic "elements" instruction; for a defendant in a similar case, mitigation of damages). Instructions on burden of proof, credibility, and the like are not required.

### *E. Decisions Under the New Pilot Program*

In *Miller v. Town of Speedway*,<sup>75</sup> Judge McKinney quashed a plaintiff's subpoena for deposition for failure to comply with the new Pilot Program

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69. Order from the Southern District of Indiana, Dec. 17, 1998, enacting S.D. IND. L.R. 56.1.

70. 152 F.3d 673 (7th Cir. 1998).

71. *Id.* at 674.

72. 165 F.3d 1084 (7th Cir. 1999).

73. *Id.* at 1085.

74. [www.insd.uscourts.gov](http://www.insd.uscourts.gov)

75. No. IP97-1707-C-M/S, slip. op. at 1, (S.D. Ind. May 12, 1998).

summary judgment procedure. In *Miller*, defendant's counsel, in accordance with the Pilot Program's guidelines, sent plaintiff's counsel a proposed statement of undisputed facts one week before the parties' joint statement of undisputed facts was required to be filed with the court. The proposed statement included an affidavit from a key witness in support of the defendant's summary judgment motion.

The parties proceeded to file their statement of undisputed facts. One week before the deadline for filing fully-briefed summary judgment motions, however, plaintiff's counsel subpoenaed the witness for deposition. Defendant's counsel moved to quash the subpoena, arguing that the Pilot Program required the parties to designate all facts relevant to any motion for summary judgment prior to filing their joint statement of disputed and undisputed facts. The defendant's counsel asserted that the plaintiff was attempting to utilize the defendant's draft of the undisputed statement of facts to serve as a roadmap for his case in violation of the Pilot Program's guidelines.<sup>76</sup> Judge McKinney granted the defendant's motion to quash.

#### *F. Admissibility at Summary Judgment*

The decision in *Fischer v. American Telegraph & Telephone Corp.*,<sup>77</sup> shows that evidence must be admissible to oppose summary judgment. The plaintiff alleged retaliation for filing a charge of discrimination. Specifically, the plaintiff alleged that she had been given a negative job reference by AT&T after leaving its employment. Her only evidence of the negative job reference was her testimony that she had been told by an unidentified secretary at Hilton Hotels that a negative job reference had been given by an AT&T vice president.<sup>78</sup>

The district court granted summary judgment, finding no admissible evidence of any adverse action by AT&T.<sup>79</sup> The Seventh Circuit affirmed, holding that the plaintiff's

own testimony on the subject is based on the purported statement of an unidentified person in Hilton's executive office, informing [the plaintiff] that the offer of employment was revoked based on the negative reference given by [AT&T]. The substance of this conversation is inadmissible hearsay because it is an out-of-court statement "offered to prove the truth of the matter asserted."<sup>80</sup>

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76. See Pilot Program Guidelines stating:

We emphasize that the court will not condone inattention to discovery which has the effect of benefitting the opponent of a motion for summary judgment. In other words, a party should not lay back and wait for the proponent's road map to be set out in a summary judgment motion and then expect to do discovery to effect a detour.

77. No. 97-2456, 1998 U.S. App. LEXIS 2810 (7th Cir. Feb. 9, 1998).

78. *Id.* at \*2.

79. *Id.* at \*1-2.

80. *Id.* at \*5 (quoting FED. R. EVID. 801(c)).

The Seventh Circuit added, "The law is well established that 'a party may not rely upon inadmissible hearsay in an affidavit or deposition to oppose a motion for summary judgment.'"<sup>81</sup>

### *G. Contradictions at Summary Judgment*

In *Sullivan v. Conway*,<sup>82</sup> the Seventh Circuit explained the rules at summary judgment on witnesses contradicting themselves. The court clarified that no rule exists that if there is an inconsistency in an affidavit and deposition, the deposition prevails.<sup>83</sup> Instead, the rule is that a prior sworn statement (written or oral) cannot ordinarily be altered later by a subsequent sworn statement (oral or written).<sup>84</sup> Thus, if a witness executes a sworn affidavit, she may not later create a question of fact to defeat summary judgment by contradicting that affidavit in deposition. Likewise, and in the more common situation, if the witness testifies to certain facts in her deposition, she cannot create a fact issue by submitting a contrary affidavit.

### V. COSTS: PRESUMPTIONS UNDER RULE 54(D)

In *Odom v. American Art Clay Co.*,<sup>85</sup> the employer obtained summary judgment against the employee in her employment discrimination claim. The employer filed a bill of costs pursuant to 28 U.S.C. § 1920, seeking recovery of \$1447.11 in costs. The employee plaintiff objected, asking the court to exercise its discretion not to order payment of costs because she would suffer "severe economic harm" and her lawsuit was neither frivolous nor malicious.<sup>86</sup>

Judge Hamilton denied the objection and granted the full costs award.<sup>87</sup> After noting that costs are recoverable by prevailing parties as a matter "of course" under Rule 54(d)(1), he noted that there is a "strong presumption" in the Seventh Circuit that the prevailing party will recover costs.<sup>88</sup> Judge Hamilton added: "Generally, only misconduct by a prevailing party worthy of a penalty or the losing party's inability to pay will suffice to justify denying costs."<sup>89</sup> Here, though, there was no indication of misconduct on the part of the employer, and the plaintiff failed to show that "the costs sought are beyond her ability to pay within a reasonable period of time."<sup>90</sup> The court concluded, "The costs awarded

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81. *Id.* at \*6 (quoting *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996) (citation omitted)).

82. 157 F.3d 1092 (7th Cir. 1998).

83. *Id.* at 1096.

84. *See id.*

85. No. IP97-1089-C-H/G (S.D. Ind. Feb. 11, 1999).

86. *Id.* at 1.

87. *Id.* at 2.

88. *Id.* at 1 (citing *Contreras v. City of Chicago*, 119 F.3d 1286, 1295 (7th Cir. 1997)).

89. *Id.*

90. *Id.* at 2.

here, it should be noted, are a minor fraction of the overall resources (including attorneys['] time and the court's time) devoted to plaintiff's lawsuit, which was without merit. If the case had been frivolous or malicious, of course, the consequences would have been quite different."<sup>91</sup>

## VI. SANCTIONS

In *Fries v. Helsper*,<sup>92</sup> the plaintiff—in his fifth unsuccessful action against the same defendants—alleged that the defendants conspired with a Wisconsin state court judge to obtain the dismissal of his fourth lawsuit in violation of his civil rights. The defendants filed a motion to dismiss and a motion for sanctions. Judge Crabb granted the defendants' motion to dismiss.<sup>93</sup> The following morning, a hearing on the defendant's motion for sanctions was held. The defendants submitted affidavits documenting and explaining their fees and expenses. Neither the plaintiff nor his lawyer attended the hearing, and as a result, no objections were made to the defendants' motion.<sup>94</sup> Judge Crabb granted the defendants' motion, imposing almost \$6000 in sanctions on the plaintiff and his lawyer for filing a frivolous lawsuit and enjoining the plaintiff from filing another lawsuit against the defendants.<sup>95</sup> The plaintiff appealed.

Noting that a district court's imposition of sanctions is reviewed for an abuse of discretion, the Seventh Circuit affirmed Judge Crabb's decision.<sup>96</sup> The Seventh Circuit held that the sanctions award, and the permanent injunction, were appropriate sanctions.<sup>97</sup>

## VII. APPEALS

### A. Waiver of Arguments

In *Massachusetts Bay Insurance Co. v. Vic Koenig Leasing*,<sup>98</sup> the Seventh Circuit noted the general rule that “we have no obligation to consider an issue . . . that is merely raised, but not developed, in a party's brief.”<sup>99</sup> Although the Seventh Circuit proceeded to address the choice-of-law issue that was raised but not developed by the parties, it warned, “[W]e must make abundantly clear to future litigants that this case does not stand for the proposition that a choice-of-law issue will always be preserved for appellate review if or whenever the parties

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91. *Id.*

92. 146 F.3d 452 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 337 (1998).

93. *See id.* at 456.

94. *See id.*

95. *See id.*

96. *Id.* at 458-59.

97. *Id.* at 459.

98. 136 F.3d 1116 (7th Cir. 1998).

99. *Id.* at 1122 (quoting *Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs*, 957 F.2d 302, 304 (7th Cir. 1992)).

... cite authorities from different jurisdictions.”<sup>100</sup>

*B. Specification in Notice of Appeal*

In *Librizzi v. Children’s Memorial Medical Center*,<sup>101</sup> the appellee sought to dismiss the appeal asserting that the appellant’s notice of appeal specified the judgment of January 1997 rather than the order of March 1997 denying reconsideration as the order under review. The Seventh Circuit denied the motion, writing:

But this is entirely proper. It is never necessary—and may be hazardous—to specify in the notice of appeal the date of an order denying a motion under [Rules] 50 or 59. Identifying the final decision entered under Rule 58 as the “judgment, order, or part thereof appealed from” [Federal Rule of Appellate Procedure] 3(c) brings up all of the issues in the case. Pointing to either an interlocutory order or a post-judgment decision such as an order denying a motion to alert or amend the judgment is never necessary, unless the appellant wants to confine the appellate issues to those covered in a specific order. An appeal from the Rule 58 final judgment always covers the waterfront. The whole case is properly before us for decision.<sup>102</sup>

*C. Frivolous Appeals*

The decision in *Rumsavich v. Borislow*,<sup>103</sup> confirms that Seventh Circuit appeals—particularly those from bench trials—are not without risk. The appellant attempted to reverse the trial court’s judgment in a bench trial that involved significant credibility issues.<sup>104</sup> In affirming the judgment, Judge Easterbrook wrote:

A decision based on findings about the credibility of witnesses—as this was—is impossible to upset on appeal unless documentary or other objective evidence contradicts the credibility ruling. In this case the objective evidence strongly supports the credibility ruling. So the appeal had no hope of success—it is, in a word, frivolous.<sup>105</sup>

The panel proceeded to order appellant’s counsel to show cause under Federal Rule of Appellate Procedure 38 as to why sanctions should not be awarded for a frivolous appeal.<sup>106</sup>

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100. *Id.*

101. 134 F.3d 1302 (7th Cir. 1998).

102. *Id.* at 1306 (internal citations omitted).

103. 154 F.3d 700 (7th Cir. 1998).

104. *See id.* at 702-03.

105. *Id.* at 703 (internal citations omitted).

106. *Id.* at 704.



Similarly, in *Day v. Northern Indiana Public Service Corp.*,<sup>107</sup> the plaintiff appealed from Judge Lozano's grant of summary judgment, which had been granted in part based on the plaintiff's failure to follow the local rule on summary judgment. On appeal, the Seventh Circuit affirmed, and imposed sanctions of \$500 and a public reprimand against appellant's counsel.<sup>108</sup> The Seventh Circuit found such sanctions necessary because counsel had violated Circuit Rule 28(c) in his brief (requiring non-argumentative statement of facts supported by citations), and because the appeal otherwise was frivolous.<sup>109</sup>

#### *D. Ineffective Assistance of Counsel in Civil Cases*

In *Ellman v. Hentges*,<sup>110</sup> the Seventh Circuit held that "ineffective assistance of counsel, except in very limited circumstances that are not present here, cannot be grounds for reversal in a conventional civil case."<sup>111</sup>

### VIII. MISCELLANEOUS

#### *A. The New Judge*

The Honorable Richard L. Young of Evansville has filled the vacancy left by Judge Gene Brooks' retirement. Judge Young formerly served with distinction as Judge of the Vanderburgh Circuit Court. He was born in 1953 and is a native of Iowa. He attended Drake University for his undergraduate degree, and received his law degree from George Mason University School of Law. He was admitted to practice in 1980. He is married and has two children.

Although Judge Young will be responsible for the Evansville Division, he is devoting a substantial portion of his time to the Indianapolis Division as well. Indeed, numerous pending cases from the Indianapolis Division were initially reassigned to Judge Young, and he is otherwise drawing 40% of his caseload from the Indianapolis Division.

#### *B. Web Pages*

The Southern District of Indiana has a web page with invaluable information. The web address is: [www.insd.uscourts.gov](http://www.insd.uscourts.gov). The most useful section of the web page allows immediate, free access to docket sheets for all cases in the Southern District. The information is current as of the previous business day. Cases can be searched by docket number or by party name. Complete docket sheets are viewable and may be printed, at your office, home, or on the road—wherever you have web access through an Internet browser.<sup>112</sup>

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107. 164 F.3d 382 (7th Cir. 1999).

108. *Id.* at 385.

109. *Id.* at 384-85.

110. No. 97-3595, 1998 WL 560754 (7th Cir. Sept. 1, 1998).

111. *Id.* at \*3.

112. The website also provides useful information regarding the court. For instance, for the

A telephone directory for the court is also provided. Additional features include on-line access to the court's Local Rules, on-line access to the court's Attorneys' Handbook, and convenient hyperlinks to other federal resources, such as the U.S. Code, Supreme Court decisions, and the Federal Judicial Center. The court and the Clerk's office should be commended for this user friendly enhancement to serving the bar and the public. The Northern District also has a website: [www.innd.uscourts.gov](http://www.innd.uscourts.gov). It is not yet as complete as the Southern District's, but is undergoing enhancements during 1999.

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Evansville Division, the following basic information is listed:

United States District Court

304 U.S. Courthouse

101 Northwest MLK Boulevard

Evansville, IN 47708

Phone: (812) 465-6426 FAX: (812) 465-6428

Business Hours: Monday-Friday 8:30 AM - 5:00 PM

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