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## SURVEY

### BE ADVISED: SWEAT THE SMALL STUFF

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A couple of decades ago, one of the best-selling books of the era was a little paperback self-help volume scarcely thicker than a Sunday Missal. Entitled *Don't Sweat the Small Stuff . . . and It's All Small Stuff*,<sup>1</sup> it was readily found on coffee tables and powder room vanities, providing transient readers with easily digestible bite-sized morsels of advice on how to keep little things from driving them crazy, one two-page chapter at a time. It was good guidance for life, but perhaps not for practicing lawyers. Indeed, recent decisions by Indiana appellate courts seem to send the opposite message: “Better Sweat the Small Stuff . . . Because It Can Turn Out to Be Big Stuff.”

As I have been given the honor of introducing this year's Survey Issue of the *Indiana Law Review*—a collection of legal scholarship by practitioners offering practical advice—this is the most obvious and practical observation that I can offer after two years on the appellate bench. Coming from a practice background that was mostly criminal, it has been sobering to see how often access to civil justice is denied, or at least delayed, by a failure to sweat the small stuff.

Imagine a person injured in a slip and fall denied her day in court because the postage on the envelope containing her lawsuit was seventeen cents short when it arrived at the clerk's office.<sup>2</sup> Or an injured motorist's case bounced because the check with the filing fee was two dollars light.<sup>3</sup> How about a medical malpractice

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The author wishes to publicly acknowledge and thank his law clerk, Lara Langeneckert (J.D. 2012, Indiana University Robert H. McKinney School of Law), a former editor of the *Indiana Law Review*, for her assistance and contributions to this Article.

1. RICHARD CARLSON, *DON'T SWEAT THE SMALL STUFF . . . AND IT'S ALL SMALL STUFF: SIMPLE WAYS TO KEEP THE LITTLE THINGS FROM TAKING OVER YOUR LIFE* (1st ed. 1997).

2. *Webster v. Walgreen Co.*, 966 N.E.2d 689, 691 (Ind. Ct. App.), *trans. denied*, 974 N.E.2d 476 (Ind. 2012).

3. *Hortenberry v. Palmer*, 992 N.E.2d 921, 923 (Ind. Ct. App. 2013), *trans. denied*, 4 N.E.3d

plaintiff losing on summary judgment in the trial court because a seven-dollar filing and processing fee was not mailed with the complaint to the Department of Insurance?<sup>4</sup> Or a malpractice plaintiff losing in the trial court because she used FedEx instead of the U.S. Mail?<sup>5</sup>

Believe it or not, my colleagues and I have wrestled with each of these scenarios over the past two years with varied outcomes but a common theme: the need to pay attention to even the smallest details. Appellate tribunals spent countless hours in oral arguments, reviewed piles of briefs, drafted, circulated, and published opinions parsing the language of our rules and precedents, all because a postage meter was perhaps not properly calibrated, a clerk wouldn't reach for two dimes in her pocket, or a paralegal wrote the wrong amount on a check just weeks after a two-dollar fee increase went into effect. These things really happened,<sup>6</sup> and in some cases, parties paid a dreadful price.<sup>7</sup>

Of course, I am hardly the first to note that the devil is often in the details. Benjamin Franklin expressed the same concept in his characteristic folksy style: "For want of a Nail the Shoe was lost; for want of a Shoe the Horse was lost; and for want of a Horse the Rider was lost, being overtaken and slain by the Enemy, all for want of Care about a Horse-shoe Nail."<sup>8</sup> In this article, I discuss four cases in which some procedural horse-shoe nail was wanting. In two cases, Poor Richard's wisdom proved true, and the kingdom—the substantive claim—was lost. In the other two, the omission was not ultimately fatal to the claim, but it did waste a great deal of time, energy, and money.

### I. LOST KINGDOMS

*Webster* and *Hortenberry* illustrate the importance of strict compliance with Trial Rule 3, which provides: "A civil action is commenced by *filing with the court a complaint* or such equivalent pleading or document as may be specified by statute, *by payment of the prescribed filing fee* or filing an order waiving the filing fee, and, where service of process is required, by furnishing to the clerk as many copies of the complaint and summons as are necessary."<sup>9</sup> As these two

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1188 (Ind. 2014).

4. *Miller v. Dobbs*, 991 N.E.2d 562, 563 (Ind. 2013).

5. *Moryl v. Ransone*, 4 N.E.3d 1133 (Ind. 2014).

6. Or at least, some seemingly minor error or omission occurred—otherwise, the case would not have come before us as it did. It matters not whether, for instance, the postage meter was not properly calibrated or the attorney simply misread it; the important thing is that the deadline was missed.

7. See also *Am. Cas. Co. of Reading, Pa. v. Dep't of Licensing & Regulation, Ins. Div.*, 447 A.2d 484, 485 (Md. App. 1982) ("The colloquialism, 'a day late and a dollar short' took on a special significance to appellants when the Insurance Commissioner imposed a penalty of \$25,736.44 on them for filing one day late.").

8. BENJAMIN FRANKLIN, *POOR RICHARD'S ALMANAC* (U.S. Gov't Printing Office, facsimile ed. 2006) (1758).

9. IND. R. TR. PROC. 3 (emphasis added).

cases demonstrate, the lawsuit is not “commenced” until the requirements of Trial Rule 3 are satisfied. Thus, a plaintiff who makes any error or omission in the fulfillment of those requirements risks running afoul of the statute of limitations.

A. Webster v. Walgreens<sup>10</sup>

Melanie Webster alleged that she slipped and fell in front of a Walgreen’s store in Mooresville on December 17, 2008. Nearly two years later (just four days before the statute of limitations was to run), Webster’s lawyer placed a complaint, summons, appearance, and filing fee in an envelope to mail to the Morgan County Clerk for filing. He weighed the envelope himself on his postage scale, which indicated that the package weighed six ounces. The lawyer then used Stamps.com to determine that the appropriate amount of postage to send the lawsuit by certified mail was \$6.83. He printed the stamp in that amount and put the envelope in the mail. It reached the Clerk’s office within the statute of limitations.

A postal worker, however, must have reweighed the package and found it slightly heavier than six ounces, because when it arrived at the Clerk’s office, there was seventeen cents postage due. *Seventeen cents!* The clerk declined to cover the shortfall,<sup>11</sup> so the envelope was returned to the plaintiff’s lawyer on December 21, four days *after* the two-year statute ran. This time, the lawyer affixed sufficient postage and re-mailed the package on the same day. The clerk stamped the complaint filed when it arrived on December 22. Defendant Walgreens later moved for judgment on the pleadings, asserting the complaint was filed beyond the statute of limitations. The trial court agreed, the court of appeals affirmed, and we denied transfer.

The result in *Webster*, albeit harsh and unforgiving, was largely dictated by our precedent in *Boostrom v. Bach*, in which we held that a small claims action was not “filed” unless and until the filing fee was paid.<sup>12</sup> *Boostrom* predates the current version of Trial Rule 3, which was amended in 2001.<sup>13</sup> But even before we amended our rules to reflect its holding,<sup>14</sup> *Boostrom* established a bright line rule, at least in tort cases outside the scope of the Medical Malpractice Act. (More on this distinction in a moment.) The court of appeals found a lack of postage analogous to a delinquent fee, concluded both were within the plaintiff’s control, and thus held against Webster, a holding we declined to disturb.<sup>15</sup>

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10. 974 N.E.2d 476 (Ind. 2012).

11. Of course, the clerk was under no obligation to pay the deficiency out of her own pocket, although another civil servant might have done so.

12. *Boostrom v. Bach*, 622 N.E.2d 175 (Ind. 1993).

13. See Order Amending Rules of Trial Procedure (Ind. Dec. 21, 2001), *available at* <http://www.in.gov/judiciary/files/rule-amends-2001-trial.pdf>, *archived at* <http://perma.cc/8Z6P-L584>.

14. *Hortenberry v. Palmer*, 992 N.E.2d 921, 925 (Ind. Ct. App. 2013), *trans. denied*, 4 N.E.3d 1188 (Ind. 2014) (“Trial Rule 3 was later amended to reflect the holding of *Boostrom*.”).

15. *Webster*, 974 N.E.2d 476.

*B. Hortenberry v. Palmer*<sup>16</sup>

The rough justice of the *Boostrom/Webster* rule in common law torts prevailed again in *Hortenberry v. Palmer*, based upon an omission some might find equally trivial. Palmer and Hortenberry were involved in a car accident in Clark County on August 23, 2010. On August 10, 2012—thirteen days before the two-year statute would run—counsel for Palmer mailed the complete lawsuit package to the Clark Circuit Court for filing. A cover letter described the contents, including reference to a check for \$139, the filing fee as of July 1, 2012. However, the check was actually for only \$137, the fee amount prior to July 1.

On August 22—one day before the statute ran—the clerk’s office called Palmer’s counsel to inform him that another two dollars was due. Instead of bringing two dollars to the clerk’s office, Palmer’s counsel mailed the \$2 check the next day. The complaint was file-stamped on August 27, 2012. By now, the reader can predict what ultimately occurred: following a series of motions and arguments, the trial court ruled that the complaint was timely filed. An interlocutory appeal ensued, however, and the court of appeals reversed. Just as in *Webster*, the Supreme Court denied transfer, this time by a 3-2 vote.

The court of appeals’ opinion specifically rejected Palmer’s argument that he had “substantially complied” with the filing requirement, noting the difficulty in fashioning a predictable and replicable standard if “substantial” compliance was all that was needed to satisfy the rule. Judge Crone summarized the competing interests in the opinion’s final paragraph:

While we recognize that following *Boostrom* produces a harsh result in this case, *Boostrom* thoroughly considered the competing policy arguments. *Boostrom* acknowledged our preference to decide cases on their merits, yet concluded that that preference “does not displace the legislative policy which undergirds the statute of limitations,” that is, to spare courts from stale claims and insure that parties are given seasonable notice that a claim is being asserted against them. As in *Boostrom*, payment of the applicable fee was wholly within the plaintiff’s hands. Although Palmer asserts that substantial compliance can be judged on a case-by-case basis, *he does not suggest any sort of workable standard for clerks or courts to determine what constitutes substantial compliance*. We think that our supreme court intended to create a bright-line rule for determining when an action has been commenced and has left us with no discretion in the matter.<sup>17</sup>

Judge Crone’s observation on substantial compliance goes to the heart of the matter: should courts decide cases like this using a “bright-line rule” or “on a case-by-case basis”? As he read *Boostrom*, it prescribed the former approach—at least for cases governed by Trial Rule 3.

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16. *Hortenberry*, 992 N.E.2d at 923.

17. *Id.* at 926 (emphasis added) (internal citation omitted).

## II. NARROW ESCAPES

*Miller* and *Moryl*, in contrast, deal not with Trial Rule 3 but rather with the administrative filing requirements of the Medical Malpractice Act.<sup>18</sup> Based on the language of that statute, we concluded the procedural defects in these two cases were not fatal to the plaintiffs' claims. Nevertheless, all parties to the litigation expended significant resources on this non-substantive issue.

A. *Miller v. Dobbs*<sup>19</sup>

In *Miller*, our more forgiving attitude toward failure to sweat the small stuff was grounded in statutory construction and our conclusion that the administrative filing fee requirements of the Medical Malpractice Act do not pack the same jurisdictional punch as those in Trial Rule 3. Before getting to this razor-thin parsing, we summarized the picayune realities of the case in the opening paragraph, saying, "In this case, the parties have spent five years disputing an issue which boils down to a seven-dollar fee paid three days late. The trial court found this delinquency fatal to the plaintiffs' claim. We reverse."<sup>20</sup>

These are the facts in greater detail: In late March 2006, Dr. Dobbs performed a cesarean section and tubal ligation on Mrs. Miller. Two weeks later, on April 3, she suffered a stroke resulting in permanent injury. Nearly two years later, on March 18, 2008, the Millers' attorney sent a proposed medical malpractice complaint to the Indiana Department of Insurance by certified mail.<sup>21</sup> The seven dollars in statutory filing and processing fees were omitted from this mailing, but the proposed complaint was nevertheless file-stamped (by the *Department*) "March 18." On March 31, 2008, the Millers then filed their lawsuit against Dr. Dobbs in the Dearborn Superior Court.

Ironically, on the same day the lawsuit was filed in the trial court, the Department of Insurance discovered the fee omission and sent the Millers' attorney a letter stating the mandatory seven dollars needed to be sent within thirty days and that the complaint would "not be considered filed with the Department until the filing fees were received."<sup>22</sup> The Millers' attorney promptly sent a seven-dollar check that arrived on April 7; three days after the statute of limitations would have run. The Department re-file-stamped the proposed complaint "April 7, 2008."

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18. IND. CODE art. 34-18.

19. 991 N.E.2d 562 (2013).

20. *Id.* at 563.

21. Indiana's Medical Malpractice Act includes a pre-screening procedure; before they may file a complaint in the trial court, prospective plaintiffs must submit the complaint to the Indiana Department of Insurance for presentation to a medical review panel. IND. CODE § 34-18-8-4. That panel then issues an "expert opinion as to whether or not the evidence supports the conclusion that the defendant or defendants acted or failed to act within the appropriate standards of care as charged in the complaint." *Id.* § 34-18-10-22(a).

22. *Miller*, 991 N.E.2d at 563 (quoting Appellant's App. at 234).

The defendants raised the statute of limitations as an affirmative defense and won summary judgment in the trial court. That outcome seemed to be consistent with the draconian results in *Boostrom* and *Webster*. But we reversed. And we did so without undermining those precedents, focusing on the plain language of the Medical Malpractice Act's statute of limitations chapter, which, unlike Trial Rule 3, does not include fee payment in the definition of filing commencement. The Act provides that "a proposed complaint . . . is considered filed when a copy . . . is delivered or mailed . . . to the Commissioner."<sup>23</sup> The Millers' complaint was delivered to the Commissioner by certified mail on March 18, 2008; thus, according to the statute, it was considered filed on that date.

Our decision also noted that the filing and processing fees are located in a different chapter of the statute from which we inferred (perhaps most importantly), that "there are numerous methods by which to enforce effectively the payment of filing fees other than by couching such enforcement in jurisdictional terms."<sup>24</sup> In other words, the Department of Insurance might on occasion be forced to find another way to collect a delinquent fee, but denying a trial court jurisdiction to adjudicate the merits is not a deterrent sanction we will read into the statutory law.

#### B. *Moryl v. Ransone*<sup>25</sup>

In *Moryl*, the plaintiff sued the doctors who were caring for her husband upon his death on April 20, 2007. She sent her proposed complaint to the Department on April 19, 2009 via FedEx Priority Overnight service. It arrived on April 21, and the Department file-stamped it that day—one day after the statute of limitation had run.<sup>26</sup> The defendants successfully moved for summary judgment, and the plaintiff's appeal was unavailing.

We granted transfer to consider whether, as the plaintiff argued, the grant of summary judgment conflicted with Indiana Code section 1-1-7-1(a) regarding the use of private delivery services. That statute provides, in pertinent part:

If a statute enacted by the general assembly or a rule . . . requires that notice or other matter be given or sent by registered mail or certified mail, a person may use: (1) any service of the United States Postal Service or any service of a designated private delivery service (as defined by the United States Internal Revenue Service) that: (A) tracks the delivery of mail; and (B) requires a signature upon delivery . . . to

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23. IND. CODE § 34-18-7-3(b).

24. *Miller*, 991 N.E.2d at 565 (quoting *Boostrom v. Bach*, 622 N.E.2d 175, 176 (Ind. 1993)).

25. 4 N.E.3d 1133 (2014).

26. "A proposed complaint under IC 34-18-8 is considered filed when a copy of the proposed complaint is *delivered or mailed by registered or certified mail* to the commissioner." IND. CODE § 34-18-7-3(b) (2012)(emphasis added). Thus, a proposed complaint sent by registered or certified mail is considered filed on the date of mailing, but a proposed complaint sent by any other means—such as FedEx—is considered filed on the date of delivery.

comply with the statute or rule.<sup>27</sup>

We ultimately reversed the trial court, reasoning: “We see no substantive difference between a proposed medical malpractice complaint mailed via FedEx Priority Overnight, tracking and return receipt requested, and a proposed complaint mailed via USPS registered and certified mail. And neither does the Indiana General Assembly, as evident by their adoption of Indiana Code section 1-1-7-1.”<sup>28</sup> Thus, because Indiana Code section 34-18-7-3(b) provides a complaint is considered filed with the Department upon mailing, we harmonized that provision with Indiana Code section 1-1-7-1(a). As in *Miller*, Trial Rule 3 simply was not in the score.

### III. THE TAKEAWAY

So, in light of this issue’s practical purpose, what lesson should practicing lawyers take away from this line of case law? Some might argue the results are absurd and unfair: a common law negligence plaintiff’s seventeen-cent postage deficiency was fatal to the claim, but a medical malpractice plaintiff’s failure to remit seven-dollar fee was not. But the reason for this apparent inconsistency becomes clear upon a consideration of the statutory texts. Trial Rule 3 and the Medical Malpractice Act simply impose different procedural obligations upon plaintiffs. Others might suggest we adopt a more liberal interpretation of Trial Rule 3, so as to avoid the harsh results of *Webster* and *Hortenberry*. Such liberality, however, would be inconsistent with the plain text of the rule, and it would disserve two of the most important policies underlying our civil justice system: predictability and fairness.

Throughout history, “uncertainty has been regarded as incompatible with the Rule of Law.”<sup>29</sup> In the criminal context, it is clear that no citizen can hope to conform his conduct to the law if he cannot determine what the law is.<sup>30</sup> Our founding fathers enshrined this concept in our Constitution; our federal colleagues have said a statute offends the Due Process Clause of the Fifth Amendment if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”<sup>31</sup> And we have done the same in our turn.<sup>32</sup>

This principle is no less applicable to the civil context. Assuming a statute is not vague in its language, courts have a responsibility to enforce it as written;

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27. IND. CODE § 1-1-7-1(a).

28. *Moryl*, 4 N.E.3d at 1139.

29. Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

30. *United States v. Brewer*, 139 U.S. 278, 288 (1891) (“Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid.”).

31. *United States v. Williams*, 553 U.S. 285, 304 (2008).

32. *See, e.g., Bleeke v. Lemmon*, 6 N.E.3d 907, 921 (Ind. 2014) (finding certain parole conditions so vague that they violated the Fourteenth Amendment of the United States Constitution).

otherwise, it will become vague by application. “In fact, should a court confound . . . legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest.”<sup>33</sup> Justice Markman of the Michigan Supreme Court expressed this concept colorfully:

When, to use a mundane illustration, the law requires that a person must file a certain type of lien within “thirty days,” and when “thirty days” means thirty days, that law remains relatively accessible to the ordinary citizen. He or she can read the law and more or less understand their rights and responsibilities under this law. When, on the other hand, “thirty days” means “thirty-one days” if there has been an intervening holiday, “thirty-two days” if your car has broken down on your way to the registration office, “thirty-three days” if you have been in the hospital, and “thirty-four days” if you are a particularly sympathetic character, then the only way to understand this law and its various unwritten exceptions is to consult an attorney. That is, to read the law consistently with its language, rather than with its judicial gloss, is not to be “harsh” or “crabbed” or “Dickensian,” but is to give the people at least a fighting chance to comprehend the rules by which they are governed.<sup>34</sup>

As the above illustrates, “unless judges are prepared to announce these rules in advance and apply them in a *consistent* fashion, it is something other than the rule of law that they are administering.”<sup>35</sup>

Courts cannot foster predictability in the law without applying it consistently.<sup>36</sup> Only “by assuring that equivalently situated persons are treated in a reasonably equivalent manner” can we, “promote the equal rule of law.”<sup>37</sup> Indeed, both the federal and state constitutions require us to do so.<sup>38</sup> Thus, even when a plaintiff is particularly sympathetic, or when the procedural failure seems particularly minor, it is important that we apply the law the same way we would if the plaintiff were unsympathetic or the default more significant—thirty days should mean the same thing for each.<sup>39</sup>

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33. Robinson v. City of Detroit, 613 N.W.2d 307, 321-22 (Mich. 2000).

34. Stephen J. Markman, *Resisting the Ratchet*, 31 HARV. J.L. & PUB. POL’Y 983, 985 (2008).

35. *Id.*

36. Stephen Markman, *Precedent: Tension Between Continuity in the Law and the Perpetuation of Wrong Decisions*, 8 TEX. REV. L. & POL. 283, 283 (2004) (“The law must be applied consistently, for it is only in this way that the law is applied fairly.”).

37. Stephen Markman, *Originalism and Stare Decisis*, 34 HARV. J.L. & PUB. POL’Y 111, 113 (2011).

38. See U.S. CONST. amend. XIV; IND. CONST. art. 1, § 23.

39. Markman, *supra* note 36, at 285 (“If a statute, for example, states that some legal action, say filing a lawsuit, must be undertaken within sixty days in order to be in compliance with the statute of limitations, there is considerable virtue in sixty days meaning sixty days, even if in the past—in the interest of preserving the lawsuits of “sympathetic” parties—a court has insisted on reading the statute to mean sixty days with a grace period so long as you tried very hard to file it within sixty days.”).



In light of these two principles, the take-away for practitioners becomes “always sweat the small stuff—and do it early.”<sup>40</sup> Read the rules, follow them scrupulously, and you will never have to worry that your client’s kingdom will be lost for want of a horse-shoe nail.

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40. It is significant that all four of the cases I discuss herein could have been avoided had the lawyers involved filed even one week further in advance of the deadline.

