**IN THE INDIANA SUPREME COURT**
**CAUSE NO. _____**

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| **CHRISTINE COSME and ROY COSME** | ) | **On Petition to Transfer from the Indiana Court of Appeals No. 22A-CT-1897** |
| **Appellants,** | ) | |
| **vs.** | ) | **Appeal from Lake Superior Court No. 1 Cause Number 45D01-1803-CT-000039** |
| **DEBORA A. WARFIELD-CLARK, DAN CHURILLA dba CHURILLA INSURANCE, and ERIE INSURANCE,** | ) | **Hon. John M. Sedia, Judge** |
| **Appellees.** | ) | |

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# *APPELLEE DAN CHURILLA d/b/a CHURILLA INSURANCE'S RESPONSE BRIEF ADDRESSING BRIEF OF AMICUS CURIAE INDIANA TRIAL LAWYERS ASSOCIATION*

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## SUMMARY OF ARGUMENT

There is nothing surprising in ITLA's observation that "no other jurisdiction in the country requires trial courts to use the *Purcell* standard," *Brief of Amicus Curiae Indiana Trial Lawyers Association* ("ITLA Brief") at 6. Anything unique about Indiana's two-step quantitative/qualitative standard for trial courts' rulings on Trial Rule 50(A) motions for judgment on the evidence exists because Indiana's rule's language not only characterizes such motions themselves in a manner materially distinct from the "motion for judgment as a matter of law" (JMOL) or "motion for directed verdict" (MDV) labels used elsewhere, but expressly calls for an evaluation of whether "issues in a case tried before a jury . . . are not supported by sufficient evidence[.]" Ind. Trial Rule 50(A) (emphasis added). Despite ITLA's conclusory assertion that "[t]he language of T.R. 50 does not justify Indiana being an outlier," ITLA Brief at 18, it is no mere coincidence that *Whitaker v. Borntrager*, 122 N.E.2d 734 (Ind. 1954) – the abandoned precedent to which ITLA advocates this Court return – predated Indiana's adoption of the Rules of Civil Procedure by a decade and a half. This Court's first articulation of the two-step quantitative/qualitative standard forty years ago framed the inquiry in terms of Rule 50's actual language, *i.e.*, as a determination of "whether or not evidence is sufficient for the purpose proffered[.]" *American Optical Co. v. Weidenhamer*, 457 N.E.2d 181 (Ind. 1983). And in *Purcell v. Old National Bank*, 972 N.E.2d 835 (Ind. 2012), this Court's reaffirmation of the two-step quantitative/qualitative standard expressly focused on and derived from the text of Trial Rule 50(A)'s "sufficient evidence" language. *Purcell*, 972 N.E.2d at 839.

ITLA's suggestion that the Trial Rule 50(A) standard that has prevailed for four decades is somehow inconsistent with the Indiana Constitution's jury-trial guarantees appears to be part and parcel of the type of political project of opposition to the civil-litigation procedures that came into more widespread use following their incorporation into the Federal Rules of Civil Procedure first effective in 1938, almost a century ago. The suggestion that a trial court's entry of judgment following the plaintiff's failure to prove a sufficient prima facie case during his, her, or its case in chief somehow unconstitutionally impairs the plaintiff's entitlement to a jury trial has been roundly and repeatedly rejected. And, although ITLA attempts to downplay the systemic efficiencies facilitated when trial courts appropriately enter judgments on the evidence, which arguments dwell primarily upon the potential downside(s) when Trial Rule 50(A) motions are erroneously granted, these motions have a proper role in modern civil litigation. The status quo procedures reflect a balanced perspective that places faith in Indiana trial court judges to account for all the variables baked into Rule 50(A) determinations, which already adequately encourage trial judges to judiciously exercise their discretion, including, without limitation, about when judgment should be entered at the close of a plaintiff's case in chief and when it might be more appropriate to defer such a ruling until after the jury's verdict, which has the potential to render the procedural-sufficiency challenge moot.

Ultimately, however, the Court's October 12, 2013 *Published Order Inviting Amicus Curaie Briefing and Setting Oral Argument* suggests that the Court is at least contemplating modification of the framework governing trial courts' Trial Rule 50(A) determinations and

appellate review of them. The considerations governing any such modifications would necessarily turn on policy determinations that only this Court can make. If, after carefully considering all the relevant policy considerations, the Court concludes that changes are necessary, Appellee Churilla respectfully submits that, instead of overruling decades of precedent consistently interpreting the "sufficient evidence" language utilized in Trial Rule 50, a more appropriate pathway to effectuate such changes and policy determinations would be for the Court to utilize Trial Rule 80's formal rulemaking procedures, including the solicitation of comments from the bench, bar, and public, by proposing to amend Trial Rule 50(A) to mirror Federal Rule of Civil Procedure 50(A), which has been in substantially its current form for more than thirty years. If, however, the Court chooses instead to effectuate changes within the framework of the existing Rule 50(A) language by overruling its clear past precedents, the Court should apply those changes only prospectively to prevent inequities inherent in a post hoc moving of the goalposts upon which the trial judge and litigants relied and understood to govern this question at the time of the trial court's ruling(s).

## ARGUMENT

### A. Trial Rule 50(A)'s Text Compels the Two-Step Quantitative/Qualitative Standard.

This Court's *Purcell* opinion tethers its interpretative analysis to the specific language of Trial Rule 50(A) – the only such rule, for the record, that labels an at-trial evidentiary-sufficiency challenge a motion for "judgment **on the evidence**" (emphasis added) – and expressly distinguishes between the analysis Rule 50(A) contemplates and summary-judgment determinations:

> I. **Trial Rule 50(A)** Sufficiency Requirement
> . . . .
> This Court reviews a trial court's issuance of judgment on the evidence by applying the same standard that the trial court uses, looking only to the evidence and reasonable inferences most favorable to the non-moving party. **Thus, the Court turns to the text of Trial Rule 50, which provides the standard for judgment on the evidence**.
> **Trial Rule 50(A) states in relevant part**; "where some or all of the issues in a case tried before a jury . . . are not *supported by sufficient evidence* . . . the court shall withdraw such issues from the jury and enter judgment thereon. . . . A party may move for such judgment on the evidence." The purpose of a party's motion for judgment on the evidence under Rule 50(A) is to test the sufficiency of the evidence presented by the non-movant.
> In American Optical, this Court articulated the means by which a trial court may determine **whether evidence is "sufficient"** to survive a motion for judgment on the evidence. In that case, the Court stated that determining whether evidence as sufficient "requires both a quantitative and a qualitative analysis." Evidence fails quantitatively only if it is wholly absent; that is, only if there is no evidence to support the conclusion. If some evidence exists, a court must then proceed to the qualitative analysis to determine whether the evidence is substantial enough to support a reasonable inference in favor of the non-moving party.
> "Qualitatively, . . . [evidence] fails when it cannot be said, with reason, that the intended inference may logically be drawn

> therefrom; and this may occur either because of an absence of credibility of a witness or because the intended inference may not be drawn without undue speculation." The use of such words as "substantial" and "probative" are useful in determining whether evidence is sufficient under the qualitative analysis. Ultimately, the sufficiency analysis comes down to one word: "reasonable."
> . . . .
> **By its express language, Rule 50 acknowledges that a party must do more than simply present *some* evidence; in addition, that evidence must also be *sufficient* evidence**. **Unlike a motion for summary judgment under Rule 56, the sufficiency test of Rule 50(A) is not merely whether a conflict of evidence may exist, but whether there exists probative evidence, substantial enough to create a reasonable inference that the non-movant has met his burden**. The crux of the **qualitative failure analysis under Rule 50(A)** is "whether the inference the burdened party's allegations are true may be drawn without undue speculation." . . .

*Purcell*, 972 N.E.2d at 839-42 (italicized emphasis in original; all other emphasis added).

In contrast, following the 1991 amendments to it, the reciprocal federal rule (which is mirrored in at least a plurality of state courts' civil rules[1]), "articulates the standard for the granting of a motion for judgment as a matter of law[,]" Fed. R. Civ. P. 50, Advisory Committee Note (1991), that is materially different from Trial Rule 50's. The federal rule authorizes entry of "judgment as a matter of law" against a party where "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party." (emphasis added). And the language was intentionally worded the way it was to connect federal Rule 50 motion practice to federal summary-judgment motion practice, which the federal rule's framers viewed as "related." *See id.* ("The term 'judgment as a matter of law' is an almost equally

[1] The attached Ind. Appellate Rule 46(H) Addendum summarizes what Appellee Churilla and his undersigned counsel understand to be the relevant enactments in the other 49 states.

familiar term [to the abandoned "directed verdict"] and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules." (emphasis added)); *id.* ("Because this standard is also used as a reference point for entry of summary judgment under Rule 56(a), it serves to link the two related provisions." (emphasis added)).

As such, Indiana is the only jurisdiction that (a) conceptualizes an evidentiary-sufficiency challenge at trial as a "motion for judgment on the evidence" and (b) frames the standard as whether a party's claims are "supported by sufficient evidence." And, for decades, the Indiana appellate courts have recognized that the text of Trial Rule 50(A)'s calls for a specialized analysis distinct from a pre-trial summary-judgment determination under Trial Rule 56. *See, e.g.*, *Drendall Law Office P.C. v. Mundia*, 136 N.E.3d 293, 305 (Ind. Ct. App. 2019); *Carney v. Patino*, 114 N.E.3d 20, 30 (Ind. Ct. App. 2018); *Think Tank Software Dev. Corp. v. Chester, Inc.*, 30 N.E.3d 738, 745 (Ind. Ct. App. 2015) ("[T]he procedural standards for summary judgment and judgment on the evidence are fundamentally different."); *Dettman v. Summer*, 474 N.E.2d 100, 103-04 (Ind. Ct. App. 1985) (observing that *American Optical* brought clarity to inconsistent jurisprudence in the area by "announc[ing] a two-step process to be followed by trial courts when determining what action should be taken on T.R. 50(A) motions for judgment[.]").

ITLA's recognition that *American Optical* and *Purcell* "reflect the views of no other federal or state appellate court," ITLA Brief at 7, is thus no bombshell. In fact, it follows logically that the standards governing Indiana trial courts' Rule 50(A) rulings, although substantially similar, will be different from the standards utilized in other jurisdictions with

materially different rules provisions. Far more surprising is ITLA's suggestion that this Court should overturn decades of precedent, scrap the previously understood animating purpose behind Rule 50(A), and instead attempt to fall in line with other jurisdictions by shoehorning Indiana trial courts' motion-for-judgment-on-the-evidence rulings into standards that have evolved in connection with conceptually different rules. If the Court has changed its mind and now believes that Federal Rule 50(A)'s approach is the superior one, exercising its rulemaking authority under Trial Rule 80 would seem to be the better pathway to effectuate a change than upending the way the words of Rule 50(A) have been read since the early 1980s.[2]

B. Indiana's Long-Standing Trial Rule 50(A) Procedures are Fully Consistent with the Indiana Constitution.

There are now, always has been, and probably always will be people who reject – or are at least deeply suspicious of – any civil-litigation procedures that allow anyone other than juries to decide civil cases. Whether labeled as "directed verdicts" or "judgments as a matter of law" or something else, at-trial challenges to the sufficiency of plaintiffs' evidence draw fire, much like pre-trial adjudications like summary judgments, from those who view the civil jury system as one of the principal bulwarks against tyranny. *See, e.g.,* Jeffrey W. Stempel, A

[2] Independently, if the Court concludes that Rule 50(A) should be reinterpreted, any such holding should apply prospectively pursuant to the criteria that, in *Bayh v. Sonnenburg*, 573 N.E.2d 398 (Ind. 1991), it adopted from the *Chevron Oil. Co. v. Huson*, 404 U.S. 97 (1971). A decision to overrule *American Optical* and *Purcell* would plainly "establish a new principle of law . . . by overruling clear past precedent on which litigants may have relied[.]" *Bayh*, 573 N.E.2d at 406. And given that only a small fraction of the now existing bench and bar were even practicing prior to *American Optical*, the "inequity imposed by retrospective application" of a sea-change like this would appear to outweigh any concern that nonretroactivity would adversely impact the policy determinations underlying a new interpretation of an old rule. *Id.*

Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process, 49 Ohio St. L.J. 95 (1988) (contending that the Supreme Court, in a "violation of prudent rulemaking" and deviation "from the generally accepted understanding of the proper role of both summary judgment and directed verdict" "took liberties with accepted judicial practice to rewrite the rules in a manner that will ultimately produce less accurate adjudication."); Renee Lettow Lerner, The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938, 81 Geo. Wash L. Rev. 448 (2013) (arguing that, although the ascendance of summary judgment, "a device for taking a case away from a jury altogether[,]" has rendered substantially obsolete the role of directed verdicts as a method of jury control, "expanded use of directed verdict and judgment notwithstanding the verdict were important steps" in jury "reform" measures designed to limit the power of juries spearheaded by the railroads beginning in the mid-19th century). Notably, however, ninety years ago, the United States Supreme Court gutted the core complaint when it addressed – and rejected – the suggestion that the practice of directed verdict offends the Seventh Amendment. *See Galloway v. United States*, 319 U.S. 372 (1943).

ITLA's contention that the *American Optical* two-step quantitative/qualitative approach invades the jury's province and is incompatible with Indiana Constitution Art. I, §§ 12 & 20 comes from the same jaundiced perspective. And, more to the point, those contentions lack any substantial merit; identical claims have been expressly rejected in the past by the Indiana appellate courts, including *Purcell* itself:

> Our decision does not alter the critical, invaluable, and constitutionally protected role of the jury in Indiana's system of

> jurisprudence. It remains true that a court is not free to engage in the fact-finder's function of weighing evidence or judging the credibility of witnesses to grant judgment on the evidence, where fair-minded men may reasonably come to competing conclusions. Indeed the function of weighing evidence and judging witness credibility is one which has always been within the purview of the jury. That said, it is equally true that judgments, at times, may play a role in the ultimate determination of cases such as through judgment on the evidence or summary judgment. This process helps to ensure the proper administration of our laws with the added benefit of preserving judicial economy. Where, in a case such as this, the plaintiff fails to present sufficient, probative evidence as to a necessary element of a claim, the trial judge is within his or her discretion to issue judgment on the evidence pursuant to Rule 50(A).

*Purcell*, 972 N.E.2d at 839-42. *See also Dettman,* 474 N.E.2d at 105 (explaining how the witness-credibility-weighing function contemplated within *American Optical*'s two-step quantitative/qualitative analysis does not run afoul of constitutional jury-trial guarantees).

C. Indiana's Long-Standing Trial Rule 50(A) Procedures Have Significant Utility.

In general, Rule 50-style procedures have a couple of complementary purposes. They operate "as a tool for speeding litigation of civil jury trials" and "provide notice to the trial court and to opposing counsel of any deficiencies in the opposing party's case before it reaches the jury, while deficiencies still may be corrected." 9 James Wm. Moore, et al. Moore's Federal Practice § 52.02[2]&[3] (Matthew Bender, 3d ed.). ITLA's Brief does not appear to touch upon the second such basis. Instead, ITLA argues, based in part upon unevidenced generalizations about trial practices, that (a) the judicial-efficiency gains from granting Rule 50(A) relief are minimal because such motions will be made after most of the time, energy, and money has already been committed to a trial and (b) when judgment on the evidence is erroneously

granted, there are significant net externalities in terms of administrative efficiency and judicial economy in connection with appeals and retrials.

But although it is undeniable that an erroneously granted Rule 50(A) motion is systemically inefficient under just about any metric, it is difficult to see what relevance that fact has with regard to either the disposition of this case or the evaluation of the broader policy issues. The Court solicited amicus input related to the standards governing trial and appellate courts' consideration(s) of Rule 50(A) motions; but (hopefully, anyway) no one is proposing or advocating for the complete elimination of a trial court's authority to enter judgment on the evidence, in whole or in part, at the close of a plaintiff's case in chief.

ITLA's Brief provides no explanation or logic underlying its assertion that Indiana's *abuse-of-discretion review* of Rule 50(A) "counterproductively supports a practice that should be discouraged." ITLA Brief at 18. To the best of Appellee Churilla and his undersigned counsel's knowledge, information, and belief, the Indiana civil justice system is not facing a rash of erroneous premature terminations of civil cases at the Rule 50(A) motion stage. To the contrary, anecdotal experience in the near-decade since *Hughley v. State*, 15 N.E.3d 1000 (Ind. 2014), suggests that the trial bench is fully aware of the Indiana appellate courts' belief that trial judges should "consciously err[ ] on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims." *Id.* at 1004. And ITLA has produced nothing to suggest that the Indiana trial bench plays faster and looser with Rule 50(A) motions than they do with Rule 56 motions because of some misguided belief that the more deferential standard on review (which the IBA Appellate Practice Section's Amicus Brief

suggests exists in name only and is not actively in use) would cut them some extra slack if their Rule 50(A) judgments are appealed. In fact, the far safer assumption is that Indiana trial judges are well-aware of the risk that a reviewing court might disagree with their evidentiary-sufficiency determinations, which would result in the case plopping back in their courtrooms for a do-over. And, as such, one would reasonably expect them to enter a judgment on the evidence at the close of a plaintiff's case in chief only when they were extremely certain in their assessment, *i.e.*, in a case like this one, where the debate over the Rule 50(A) standards is academically interesting, but unlikely to make any difference in the disposition of the dispute between the parties themselves. This Court need not make any changes to the Rule 50(A) standards to make the Indiana trial bench aware that, if they are on the fence about whether to enter judgment on the evidence at the close of the plaintiff's case, the safe and conservative play is to provisionally deny (or reserve ruling) on the motion, allow the case to proceed to verdict, and to enter judgment if the jury returns a verdict the trial judge believes to be not supported by sufficient evidence and/or clearly erroneous as contrary to the evidence. As such, ITLA's attempted take-down of the purported efficiency benefits associated with Rule 50(A) ultimately reads like a non sequitur.

## CONCLUSION

Accordingly, Appellees Churilla and Erie respectfully requests that this Court DENY the *Petition to Transfer* and, if it deems it appropriate, utilize its rulemaking authority to make any changes to Rule 50(A) it believes to be appropriate.

Respectfully submitted,

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## WORD-COUNT CERTIFICATE

I verify that this Brief contains fewer than 4,200 words.

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## CERTIFICATE OF SERVICE

Pursuant to App. R. 46(A)(11) and 24(D), I certify that on November 30, 2023, I electronically filed this *Response Brief of Appellees* with the Clerk via the Indiana E-File System (IEFS) / DoxPop, and served a true and complete copy of it via IEFS upon the following registered-user counsel (listed below, with email addresses) and upon the unrepresented Appellee by First-Class U.S. Mail, postage-prepaid as indicated:

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