IN THE INDIANA COURT OF APPEALS
and
THE INDIANA SUPREME COURT

CAUSE NO. 22A-CT-01897

CHRISTINE COSME and ROY COSME, Appellants-Plaintiffs, v. DEBORA A. WARFIELD CLARK, DAN CHURILLA dba CHURILLA INSURANCE, and ERIE INSURANCE, Appellees-Defendants.	Appeal from the Lake Superior Court The Honorable John M. Sedia, Judge Trial Court Cause No. 45D01-1803-CT-00039

APPELLANTS' REPLY IN SUPPORT OF APPELLANTS' PETITION TO TRANSFER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

INDIANA TRIAL RULES:

INDIANA RULES OF APPELLATE PROCEDURE

ARGUMENT

Appellants sought transfer to ask this Court to determine (1) whether the Court of Appeals decision conflicts with the Supreme Court's principals, rationale, and rulings articulated in *Purcell* and *Hughley* pursuant to Ind. R. App. P. 57(H)(2); (2) or, alternatively, whether the Court of Appeals decision necessitates clarification or modification of the Supreme Court's standard of review for T.R. 50(A) motion articulated in *Purcell* pursuant to Ind. R. App. P. 57(H)(5); (3) whether the Court of Appeals decision presents an undecided question of law related to the application of the principals, rationale, and ruling of *Hughley* to T.R. 50(A) motions pursuant to Ind. R. App. P. 57(H)(4); and (3) whether the Court of Appeals decision signifies a "significant departure from law or practice: pursuant to Ind. R. App. P. 57(H)(6).

Central to each question presented above and in Appellants' Petition to Transfer is a core query: what is the meaning of "abuse of discretion" under *Purcell* and how is that meaning, articulated in this Court's 2012 *Purcell* decision, affected by the principles of law and judiciary policy articulated in this Court's watershed decision in *Hughley*.

Purcell itself articulated that "if there is any probative evidence or reasonable interference to be drawn from the evidence in favor of Plaintiff or if there is evidence allowing reasonable people to differ as to the result, judgment on the evidence is improper." *Purcell v. Old Nat's Bank,* 972 N.E.2d 832, 840 (Ind. 2012). "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 come to competing conclusions." *Id.* at 842.

After *Purcell*, 2014 brought *Hughley v. State,* 15 N.E.3d 1000 (Ind. 2014). Although Appellees try to bifurcate the policies espoused by the two cases, the policies

and legal principles of *Hughley* unapologetically reference trial and the right to trial by jury in a case allowing a razor-thin-self-serving affidavit to serve as the progenitor of a jury summons to Indiana citizens. These principles include (1) that summary judgment is not a summary trial, (2) that Indiana consciously errs on the side of letting marginal cases proceed to trial, and (3) that summary judgment is not a substitute for trial. *Hughley*, *Id.* at 1003-4.

Appellants' point is precisely this: how can the principles that allow reed thin evidence to cause a jury trial to be necessary (such as was articulated in *Hughley)* simultaneously allow it to be canceled merely because that evidence is introduced in a different procedural posture (T.R. 56 motions vs. TR. 50(A) motions). In other words, what does "abuse of discretion" mean under *Hughley* read together with *Purcell?*

Appellants, and the very decisions being reviewed in the case at bar, ask these questions. Appellees do not explain the existence of these questions away; rather, Appellees' opposition to transfer begs these very questions. How can a "blunt instrument" that cancels the constitutional right to trial by jury be legally correct in one instance (judgment on the evidence) but impermissible in another (summary judgment)? It cannot. And that is where Appellees' logic fails.

This is illustrated by the rhetoric and argument of the Appellees in their briefs. Erie takes the following position:

> In other words, this Court announced one standard in *Purcell* (for motions for judgment on the evidence) and another in *Hughley* (for motions for summary judgment). As the appeal in *Cosme* involved a motion for judgment on the evidence, the Court of Appeals never had any reason to look to *Hughley* to begin with. Its decision does not conflict in any way with the completely inapposite *Hughley* case.

Brief of Erie at 15.

Similarly, Churilla make and equally question-begging argument:

> …Indiana trial courts' Rule 50(A) stage sufficiency of the evidence determinations are both procedurally and analytically distinct from their Rule 56/ summary judgment stage determinations. [Citations omitted].

Brief of Churilla at 11.

Similarly, Churilla argues:

> This Court has characterized a plaintiff's burden at the Rule 50(A) stage as "higher than at the summary judgment stage". *Denman v. St. Vincent Med. Group, Inc.* 176 N.E.3d 480, 492 n.5 (Ind. Ct. App. 2021).

These positions are equally problematic: Erie's brief merely makes a distinction without a difference: the standard is just different in summary judgment than in directed verdict. But how so? The same 7th amendment and Indiana Constitution jury trial rights are involved at the very core of both. And after the articulation of the policies of *Hughley,* there is even less distinction between the two situations, if that were possible.

Churilla's brief has a similar problem, but even more poignantly illustrated: Churilla again summarily positions a distinction without an analytical difference between summary judgment and judgment on the evidence, and then [mistakenly] asserts that *Denman* is "this Court's" characterization, which *Denman* is not this Court's assertion, but a Court of Appeals case post *Hughley* which asks the same questions this one does: what is the duty of a trial court under "abuse of discretion".

It simply cannot be the case that the inviolable constitutional right to a jury trial is slightly less inviolable under Trial Rule 50(A) than under Trial Rule 56. The Appellants urge this Court to grant transfer to so declare, and to find that there is an abuse of discretion where, as here, reasonable people could differ on the outcome, there

has been improper weighing of the evidence at the bench, and/or where evidence is considered other that that most favorable to the non-movant. Accordingly, the Appellants respectfully request that this Court grant transfer for the reasons stated in their Petition.

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WORD COUNT CERTIFICATE

I, Angela M. Jones, hereby verify that the foregoing Appellants' Petition to Transfer, excluding portions specified in Ind. Appellate Rule 44(C), contains no more than 1,000 words, as determined by the word-processing system on which it was prepared.

/s/ Angela M. Jones
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CERTIFICATE OF SERVICE

I certify that on the 20th day of July, 2023, service of a true and complete copy of the above and foregoing *Appellants' Reply in Support of Appellants' Petition to Transfer* was e-filed with the Clerk of the Court through the Indiana E-Filing System.

I further certify that on the 20th day of July, 2023, a copy of the foregoing *Appellants' Reply in Support of Appellants' Petition to Transfer* was served upon the following though the Indiana E-Filing System:

- Trevor Wells - twells@reminger.com
- James Strenski - Jstrenski@paganelligroup.com
- Christopher Goff - cgoff@paganelligroup.com

I further certify that on the 20th day of July, 2023, a copy of the foregoing *Appellants' Reply in Support of Appellants' Petition to Transfer* was served upon the following via U.S. Mail, in envelopes properly addressed, and with sufficient first-class postage affixed:

- Deborah A. Warfield Clark, 1314 175th St., Ste #D, Hammond, IN 46324

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