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IN THE
INDIANA SUPREME COURT

CASE NO. 22A-CT-01897

CHRISTINE COSME and ROY COSME,	)	
	)	Appeal from the Lake County
Appellants (Plaintiffs below)	)	Superior Court
	)	
v.	)	Trial Court Cause No.
	)	45D01-1803-CT-00039
DEBORAH A. WARFIELD CLARK, DAN CHURILLA, d/b/a Churilla Insurance, and ERIE INSURANCE,	)	
	)	Hon. John M. Sedia, Judge
Appellees (Defendants below).	)	

APPELLEE ERIE INSURANCE EXCHANGE'S BRIEF IN RESPONSE TO APPELLANTS' PETITION FOR TRANSFER

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QUESTIONS PRESENTED ON TRANSFER

1. Whether the Court of Appeals correctly affirmed the trial court's order granting the motion by Erie Insurance Exchange ("Erie") for judgment on the evidence.
2. Whether this Court's standard of review for judgments on the evidence requires clarification or modification.

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BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

On March 20, 2018, Appellants, Roy Cosme and Christine Cosme, filed a complaint against Appellees, Erie, Dan Churilla, d/b/a Churilla Insurance, and Deborah A. Warfield Clark, in a case relating to a cancelled insurance policy and subsequent automobile accident. (Appellants' App. Vol. II p. 39-44) On March 11, 2020, Appellants filed against Appellees what they titled the Second Amended Complaint. (Appellants' App. Vol. II p. 48) Against Erie, the Second Amended Complaint alleged claims for breach of contract and for the torts of negligence and breach of the duty of good faith and fair dealing, and it requested declaratory relief, compensatory damages and punitive damages. (Appellants' App. Vol. II p. 55-59)

A jury trial began on June 13, 2022. (Tr. Vol. II, p. 2) The evidence showed as follows. Erie sold Appellants, as the named insured, an automobile insurance policy that was to run from August 27, 2017 through August 27, 2018. (Tr. Vol. II, p. 228, ll.1-12; Trial Ex. 8; Trial Ex. 7, p. 2) Appellants' son, Broyce, 19 years old in 2017, was an additional listed driver on the policy. (Tr. Vol. II, p. 30, ll.1-15; Appellants' App. Vol. II p. 187) In February 2017, Broyce was arrested after police pulled over a vehicle and found marijuana inside. (Tr. Vol. II, p. 32, ll.9-16) The incident resulted in a suspension of Broyce's driver's license. (Tr. Vol. II, p. 32, ll.17-20; p. 34, ll.5-7)

In July 2017, Erie learned through an automatically generated report (and not from the Cosmes) that Broyce's license was suspended. (Tr. Vol. II, p. 229, ll.16-18) Erie recognized that a license suspension of a listed driver on a policy represents grounds under Indiana law for an insurer to cancel that automobile policy midterm.

(Tr. Vol. II, p. 199, ll.1-4; p. 223, ll.6-25) Erie does not cover drivers with a suspended license, and individuals with a suspended license are prohibited by law from driving. (Tr. Vol. II, p. 230, ll.10-25; p. 231, ll.1-8) On September 27, 2017, Erie sent a letter to Appellants informing Appellants that they were required to sign a form excluding Broyce from the policy or else Erie would exercise its right to cancel the policy. (Tr. Vol. II, p. 225, ll.17-25) The letter stated in relevant part:

> THIS IS A VERY IMPORTANT LETTER. PLEASE READ IT CAREFULLY. YOUR POLICY WILL BE CANCELLED IF YOU DO NOT RESPOND.
>
> * * *
>
> After careful consideration, we find it necessary to inform you that we will not be able to continue your automobile insurance policy unless we are permitted to exclude coverage for the above named individual(s).
>
> Unless the "No Coverage" form, properly signed and dated, is received in this Home Office in Erie, Pennsylvania by October 28, 2017, this is your notice your policy will cancel effective November 1, 2017.

(Trial Ex. 8)

Erie's letter further stated that the exclusion was being requested because of Broyce's license suspension. (Tr. Vol. II, p. 244, ll.8-9; Trial Ex. 8) After receiving the letter on or around October 3, 2017, Roy Cosme read it and understood it stated that, unless Broyce were excluded from the Policy, the policy would be cancelled effective at 12:01 a.m. on November 1, 2017. (Tr. Vol. II, p. 105, ll.7-18) He also saw that the letter stated that the signed no-coverage form excluding Broyce needed to be received at Erie's home office in Pennsylvania by October 28, 2017 in order for cancellation to be avoided. (Tr. Vol. II, p. 106, ll.6-9) Despite knowing of the October

28 deadline, Roy and Christine Cosme waited until October 26 – two days before the signed form was due in Pennsylvania – before speaking with their insurance agent for the first time about the letter. (Tr. Vol. II, p. 188, ll.21-24; p. 189, ll.3-4)

The agent recommended Appellants sign the exclusion form and later work on getting Broyce back on the policy. (Tr. Vol. II, p. 76, ll.18-23) On October 27, 2017, Erie spoke to the insurance agent and informed them that Broyce's license remained suspended. (Tr. Vol. II, p. 195, ll.2-8) On October 30 – two days after Erie's deadline to avoid cancellation –Broyce sent the receipt for his license reinstatement fee to the insurance agent. (Tr. Vol. II, p. 52, ll.16-23)[1]

On October 31, Erie emailed the insurance agent and explained that, while Broyce paid a fee to reinstate his license, reinstatement does not mean a suspension did not occur. (Tr. Vol. II, p. 198, ll.19-25) Erie further explained that Erie is permitted to execute a midterm cancellation for any license suspension during the policy term, regardless of whether the suspension remains in effect at the time of cancellation. (Tr. Vol. II, p. 199, ll.1-4) Nonetheless, Erie provided one last chance to avoid cancellation, telling the agent that, if Appellants signed and returned the exclusion form prior to midnight, the November 1 cancellation would be void. (Tr. Vol. II, p. 199, ll.10-14) Appellants never did sign the form on October 31. (Tr. Vol. II, p. 85, ll.12-13) As the original September 27 Erie letter warned, the consequence of the family's failure to sign the form was that the Policy did indeed cancel. (Tr. Vol.

[1] Broyce did eventually get the suspension expunged from his driving record, but the expungement did not occur until November 13, 2017, *after* the cancellation of the policy and after the November 4, 2017 motor vehicle accident referenced below. (Tr. Vol. III, p. 110, ll.6-10)

II, p. 85, ll.12-13)

On November 4, 2017, Appellants' van was rear-ended by a vehicle Ms. Warfield Clark drove. (Tr. Vol. II, p. 82, ll.15-25) On November 6, 2017, Erie's cancellation notice arrived in the mail and was opened by Christine Cosme. (Tr. Vol. II, p. 82, ll.15-25) Roy Cosme placed a call to their agent, who confirmed the cancellation. (Tr. Vol. II, p. 85, ll.10-14) Despite the November 1 cancellation, Appellants nonetheless submitted a claim under the cancelled policy for their damages stemming from the November 4 accident. (Trial Ex. 47) In a letter to Appellants' representative dated November 30, 2017, Erie stated that its records show the policy cancelled as of November 1, 2017. (Trial Ex. 47) Erie accordingly denied coverage for the accident because the policy was not in place at the time of the accident. (Trial Ex. 47) For the cancelled policy, Erie wrote Appellants a refund check for the portion of their premium unused prior to cancellation. (Trial Ex. 46)

After the initiation of Appellants' lawsuit in 2018, Erie produced to Appellants' attorney a certified copy of the policy. (Tr. Vol. III, p. 111, ll.16-19) This certified copy showed the policy period as running from August 27, 2017 to August 27, 2018. (Tr. Vol. III, p. 110, ll.10-14) Records coordinator Julia Swanson signed the certification. (Tr. Vol. III, p. 97, l.19) At trial, Appellants called as a witness an insurance consultant named Elliott Flood. (Tr. Vol. III, p. 64, l.5-10) Flood testified that, looking at the certified copy of the Policy, one would get the impression that the Policy was still active at the time of the November 4, 2017 accident. (Tr. Vol. III, p. 98, ll.7-14) However, Flood acknowledged Ms. Swanson testified in an affidavit that

the date range on the certified copy was a "scrivener's error" and that the true policy period on the certified copy should show the end date as November 1, 2017. (Tr. Vol. III, p. 110, ll.22-25; p. 111, ll.1-4) Flood also acknowledged that, in handling an insurance claim, the first investigatory job on the checklist is to find out whether there is policy coverage, because, if there is no policy to enforce, the claim will not be covered. (Tr. Vol. III, p. 104, ll.1-10)

On June 15, 2022, after Appellants had concluded their case-in-chief, Erie and co-defendant Churilla filed motions for judgment on the evidence. (Tr. Vol. II, p. 163) The trial court issued an order granting both motions and entered final and appealable judgment in favor of Erie and Churilla and against Appellants. (Appellants' App. Vol. II p. 133) On July 13, Plaintiffs filed with the trial court a motion to correct error and demand for a new trial. (Appellants' App. Vol. II p. 134) On August 1, the trial court, finding that all theories of recovery were foreclosed, issued an order denying Plaintiffs' motion to correct error and denying their demand for a new trial. (Appellants' App. Vol. II p. 184)

On March 8, 2023, the Court of Appeals issued its memorandum opinion affirming the judgment of the trial court. *Cosme v. Warfield Clark*, No. 22A-CT-1897, 2023 WL 2397036, at *9 (Ind. Ct. App. March 8, 2023). Evaluating Appellants' appeal of the denial of their motion to correct error, in which Appellants argued Erie should not have been awarded judgment on the evidence as to breach of contract and bad

faith,[2] the Court of Appeals cited to Rule 50(A) of the Indiana Rules of Trial Procedure providing, "Where all or some of the issues in a case ... are not supported by sufficient evidence … the court shall withdraw such issues from the jury and enter judgment thereon … ." *Id.* at *4. The Court of Appeals cited to this Court's decision in *Purcell v. Old Nat. Bank*, 972 N.E.2d 835, 840 (Ind. 2012) for the standard of review of whether a trial court erred in granting a motion for judgment on the evidence, which is that, so long as some quantitative 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.'" *Id.* at *4.

The Court of Appeals ruled that the trial court correctly granted judgment for Erie on the breach-of-contract claim because "it cannot be said that the Cosmes' intended inference, i.e., that the Policy was in effect at the time of the Accident, can logically be made from the evidence presented during their case-in-chief." *Id.* at *8. The Court of Appeals ruled that the trial court correctly granted judgment for Erie on the bad-faith claim because, "based on the evidence presented in the Cosmes' case-in-chief, Erie could not have been found to have breached its duty by denying the Cosmes' claim resulting from the Accident because there was no contractual relationship in place between the Cosmes and Erie at the time of the Accident" and

[2] On appeal, Appellants did *not* challenge the trial court's entry of judgment for Erie on the negligence claim against Erie. (Brief of Appellants, p. 31-39) Because their brief did not explicitly address or argue the negligence claim against Erie, Appellants have waived any challenge on that ground to the trial court's granting of Erie's motion for judgment on the evidence. Even if Appellants had preserved this argument, it fails as a matter of law as insurance companies cannot be sued for negligence. *See Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515, 520 (Ind. 1993); *Travelers Indemnity Co. v. Johnson*, 440 F. Supp. 3d 980, 987-88 (N.D. Ind. 2020).

because Appellants presented no evidence that would allow a reasonable person to find Erie cancelled the policy in bad faith. *Id.* Finally, the Court of Appeals agreed with the trial court that Appellants were not entitled to punitive damages because punitive damages are not a cause of action and because Appellants "did not allege any meritorious tort claims against either Erie or Churilla" as would have been necessary for punitive damages to be available. *Id.* at *9.

On May 22, 2023, the Court of Appeals issued a memorandum decision granting Appellants' petition for rehearing "for the limited purpose of correcting our factual error regarding the date on which Broyce's driver's license was reinstated." *Cosme v. Clark*, No. 22A-CT-1897, 2023 WL 3577944, at *2 (Ind. Ct. App. May 22, 2023). The Court of Appeals affirmed in all other respects its initial decision in this case, noting "the fact that Broyce successfully had his driving privileges reinstated on October 28, 2017, rather than November 13, 2017, has no bearing on the validity of Erie's September 27, 2017 cancellation notice because Broyce's license was in fact suspended on that date." *Id.* at *1-2.

ARGUMENT

As a preliminary matter, Rule 57(H) of the Indiana Rules of Appellate Procedure governs this Court's decision on whether or not it should grant a petition for transfer. Rule 57(H) provides that the grant of a transfer is a matter of judicial discretion. The principal considerations governing this Court's decision to grant transfer are as follows: "(1) Conflict in Court of Appeals' Decisions; (2) Conflict with Supreme Court Decision; (3) Conflict with Federal Appellate Decision; (4) Undecided

Question of Law; (5) Precedent in Need of Reconsideration; and (6) Significant Departure From Law or Practice." Ind. App. Rule 57(H)(1)-(6). "A petitioner must allege facts with ample particularity to bring his petition within one of the stipulated grounds for transfer." *Baker v. Fisher*, 296 N.E.2d 882, 883 (Ind. 1973) (cleaned up).

This Court should deny Appellants' petition for transfer because the Court of Appeals correctly affirmed the trial court's order granting Erie's motion for judgment on the evidence and because this Court's standard of review for judgments on the evidence does not require modification or clarification. As such, there is 1) no conflict between the Court of Appeals' decision and any decision of this Court, 2) there is no undecided question of law, 3) there is no precedent in need of reconsideration, and 4) there was no departure at all, let alone a significant departure, from law or practice.

Given that those appear to be the four statutory grounds for transfer that Appellants rely upon, Appellants fail to establish any basis under Rule 57(H) for transfer. Their petition should be denied as a result.

I. The Court of Appeals Correctly Affirmed the Trial Court's Order Granting the Motion by Erie Insurance Exchange for Judgment on the Evidence.

The Court of Appeals correctly found that there was no error by the trial court in granting Erie's motion for judgment on the evidence. The Court of Appeals decided this case properly and correctly because it followed established standards of review and because Appellants' case-in-chief presented insufficient evidence on essential elements necessary to sustain each of their claims against Erie.

A. The Court of Appeals applied the correct standards of review.

This Court should deny transfer as the Court of Appeals' decision, despite Appellants' claims, does not in any way conflict with a decision of this Court. Nor does the Court of Appeals' decision represent any departure, let alone a significant one, from existing law or practice. Appellants allege conflict with, and/or a significant departure from, two decisions: *Purcell* and *Hughley v. State*, 15 N.E.3d 1000 (Ind. 2014). Their allegation is wholly baseless.

At every turn, the Court of Appeals followed – even repeatedly cited and quoted – *Purcell*. In *Purcell*, this Court established that appellate review of a judgment on the evidence uses "the same standard that the trial court uses, looking only to the evidence and reasonable inferences most favorable to the non-moving party." 972 N.E.2d at 839. The Court of Appeals explicitly stated it would "use the same standard as the trial court: we must consider only the evidence and reasonable inferences most favorable to the non-moving party." *Cosme*, 2023 WL 2397036, at *4 (quoting *Drendall L. Off., P.C. v. Mundia*, 136 N.E.3d 293, 303-04 (Ind. Ct. App. 2019)).

Purcell, of course, cites to Rule 50 of the Indiana Rules of Trial Procedure, the rule that provides the standard for judgment on the evidence by stating, "Where all or some 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 or shall enter judgment thereon notwithstanding a verdict." *Purcell*, 972 N.E.2d at 839 (quoting Rule 50(A)). The Court of Appeals quoted that same language from Rule 50 just as this Court has. *Cosme*, 2023 WL 2397036, at *4.

This Court in *Purcell* instructed, "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." *Purcell*, 972 N.E.2d at 839. The Court of Appeals spelled out that same purpose. *Cosme*, 2023 WL 2397036, at *4. This Court has provided that the grant of a motion for judgment on the evidence is within the broad discretion of the trial court and will be reversed only for an abuse of that discretion. *Purcell*, 972 N.E.2d at 839. The Court of Appeals stated that it understood it could only reverse the trial court for an abuse of its discretion. *Cosme*, 2023 WL 2397036, at *4.

Finally, the Court of Appeals accurately conveyed, "The Indiana Supreme Court has held that a review of whether a trial court erred in granting a motion for judgment on the evidence 'requires both a quantitative and a qualitative analysis.'" *Id.* (quoting *Purcell*, 972 N.E.2d at 840). The Court of Appeals continued to quote *Purcell* by republishing *Purcell*'s guidance that, quantitatively, evidence may fail only where there is none at all, but, qualitatively, it fails when it cannot reasonably be said that the intended inference may logically be drawn therefrom. *Id.* In every respect, the Court of Appeals remained consistent with *Purcell* as to the appellate treatment of motions for judgment on the evidence.

Hughley, the second of the two decisions of this Court that Appellants claim are in conflict with the Court of Appeals' decision in *Cosme*, simply has nothing to do with this case. *Hughley* was about motions for summary judgment. 15 N.E.3d at 1005. This Court has already explained that motions for summary judgment and motions for judgment on the evidence are two very different things. *See Purcell*, 972 N.E.2d at 841 (noting, "*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 rather *whether there exists probative evidence*, substantial enough to create a reasonable inference that the non-movant has met his burden") (emphasis added). As the Court of Appeals later explained, "the procedural standards for summary judgment and judgment on the evidence are fundamentally different." *Think Tank Software Dev. Corp. v. Chester, Inc.*, 30 N.E.3d 738, 745 (Ind. Ct. App. 2015), *trans. denied*. Citing to *Purcell*, the Court of Appeals has recognized that there is "a higher burden" to defeat a motion for judgment on the evidence than there is to defeat a motion for summary judgment. *Denman v. St. Vincent Med. Grp., Inc.*, 176 N.E.3d 480, 492 (Ind. Ct. App. 2021), *trans. denied*.

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.

B. The Court of Appeals properly determined that Appellants' case-in-chief presented insufficient evidence on essential elements necessary to sustain each of their claims against Erie.

This case presents a textbook example of a meritorious motion for judgment on the evidence and involves nothing more than a straightforward application of the standards laid about above in Section A of Part I of this Argument. Appellants, in their case-in-chief, simply failed to provide substantial evidence that Erie breached the contract of insurance issued to them by Erie or that Erie breached its duty of good

faith and fair dealing.

Regarding Appellants' breach-of-contract claim, the Court of Appeals correctly concluded that Appellants presented insufficient evidence to show an essential element, that a contract was in place between Appellants and Erie at the time of the accident. *Cosme*, 2023 WL 2397036, at *8. Appellants read and understood Erie's September 2017 letter stating that their insurance policy would be cancelled unless they signed and returned, by October 28, 2017, a form agreeing to exclude Broyce Cosme from the policy. The Court of Appeals correctly recognized that Ind. Code § 27-7-6-4 is the relevant statute which allows for midterm cancellation of auto insurance if any driver named on the policy has a suspended driver's license during the term. *Id.* at *7. Therefore, Erie had a lawful basis when it cancelled the policy on November 1, 2017 due to Broyce Cosme's license suspension. Days later, Appellants received a notice of cancellation in the mail. Their insurance agent confirmed the cancellation. Erie refunded the unearned premium on the cancelled policy to Appellants. The only logical inference to be drawn from the evidence presented at trial was that the policy did indeed cancel and was no longer in place on November 4, 2017 when Appellants were in an automobile accident.

Appellants' only evidence that the policy remained active on that date – a certified copy of the policy produced years later in litigation and the testimony of their expert, Flood – does not support a reasonable inference that the policy was not cancelled. As Flood conceded, the woman who signed the certified copy of the policy testified that the certification contained a scrivener's error that did not properly show

cancellation. Moreover, the existence of a contractual relationship between Appellants and Erie *prior* to the accident does not save their claim, for that contractual relationship was properly and lawfully terminated. Erie, as mentioned, had a legal basis to cancel: a listed driver's license suspension. No authority forbade Erie's consideration of other facts known to it in deciding to exercise its discretion to cancel the policy once it had a legal basis to do so. Because their contract with Erie was lawfully terminated before the accident, Appellants lack any viable contract on which to launch a breach-of-contract claim.

The Court of Appeals correctly ruled that, without a contractual relationship in place at the time of the accident, Appellants' claim that Erie breached the duty of good faith and fair dealing fails, too. *Id.* at *8. Erie owed Appellants no duty of good faith and fair dealing because Erie was no longer in a contract with Appellants. Such a duty of good faith, the Court of Appeals noted, flows only from a contract between an insurer and its insured. *Id.* (citing *Erie Insurance Co. v. Hickman by Smith*, 622 N.E.2d 515, 519 (Ind. 1993)). Appellants could not sustain a claim for breach of a duty that was no longer owed. Even if the duty were still owed in November 2017, which it was not, the Court of Appeals correctly determined no reasonable person could find Erie cancelled the policy in bad faith, given that Indiana law does not allow drivers on public roadways without a valid license. *Id.*

Finally, the Court of Appeals correctly recognized that Appellants lack any basis to receive punitive damages and that, accordingly, judgment on the evidence for Erie was appropriate on the claim for punitive damages. First, despite Appellants'

pleading of punitive damages as if they are somehow a cause of action, this Court has made clear punitive damages are not a cause of action. *Id.* at *9 (citing *Crabtree ex rel. Kemp v. Est. of Crabtree*, 837 N.E.2d 135, 137-38 (Ind. 2005)). Second, while punitive damages are sometimes an available *remedy*, this Court has made clear a meritorious tort claim is a prerequisite to that remedy. *Id.* (citing *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975, 981 (Ind. 1993)). Appellants made no tort claim that survived judgment on the evidence and, as a result, could not recover punitive damages.

In conclusion, on all claims against Erie, using standards of review set forth by this Court, the Court of Appeals correctly found that Appellants presented insufficient evidence to survive Erie's motion for judgment on the evidence. Therefore, the Court of Appeals' decision is not in conflict with any decision of this Court, and it is perfectly in line with this state's law and practice.

II. This Court's Standard of Review for Judgments on the Evidence Does Not Require Clarification or Modification.

This Court's decision in *Purcell* offers lucid guidance to trial courts and the Court of Appeals as to how to apply Rule 50 of the Rules of Trial Procedure and how to review grants of motions for judgment on the evidence. Appellants highlight no point of confusion in *Purcell*. This case features no unusual application of law or fact such that clarification or modification of *Purcell* would be necessary. In addition, the Court of Appeals' opinion does not cover an undecided question of law related to *Hughley* that would need to be incorporated into Rule 50 case law. The Court of

Appeals' main opinion here adheres to Rule 50 by allowing it to serve its purpose in testing the sufficiency (or lack thereof, in this case) of evidence presented at trial.

Appellants serve up a puzzling rationale for transfer. They ask this Court to clarify the standard in *Purcell* for judgment on the evidence. (Trans. Pet. p. 14) Yet every single one of their requested clarifications are pronouncements already explicitly made by both this Court and the Court of Appeals. They ask that this Court "articulate that the Court has abused its discretion if it grants a T.R. 50(A) motion … where there is any substantial evidence or reasonable inference supporting an essential element of a claim … ." (Trans. Pet. p. 12) This Court has already said exactly that. *Purcell*, 972 N.E.2d at 840. Appellants call for an announcement that, where there is evidence of record such that reasonable people could differ as to the result of the case, judgment on the evidence is improper. (Trans. Pet. p. 12) That is already established law. *Wellington Green Homeowners' Ass'n v. Parsons*, 768 N.E.2d 923, 925-26 (Ind. Ct. App. 2002). Appellants want it known that it is an abuse of discretion to grant judgment on the evidence where there is any evidence of record logically sufficient to support a verdict for the non-movant. That proposition is already well-known. *Teitge v. Remy Const. Co. Inc.*, 526 N.E.2d 1008, 1010 (Ind. App. Ct. 1988). Appellants claim there is a need to clarify that judgment on the evidence should not be granted where the trial court has improperly engaged in the fact-finder's function of weighing evidence, where the trial court has improperly engaged in the judging of credibility of witnesses or evidence, where fair-minded people may come to competing conclusions based on the evidence, where the trial court has not

considered only the evidence favorable to the non-movant, where there is not a complete failure of proof on the part of the non-movant and where there is any probative evidence or reasonable inference which would allow the fact-finder to find for the non-movant. (Trans. Pet. p. 12) *Purcell* itself clearly articulates each and every one of those edicts. 972 N.E.2d at 839-42. No clarification of the *Purcell* standard should be deemed necessary when the clarifications Appellants want are already written in this state's case law in black and white.

It is equally inexplicable that Appellants argue the Court of Appeals' opinion addresses an undecided question of law relating to *Hughley*. (Trans. Pet. p. 14) As mentioned, *Hughley* is a Rule 56 case. Appellants acknowledge that Erie *did* file a Rule 56 motion for summary judgment in this case that was *denied*, just as this Court held in *Hughley* that summary judgment was improper there. 15 N.E.3d at 1006. In other words, Appellants have already obtained the full benefit of *Hughley*. They survived Erie's motion for summary judgment, and *Hughley* promised them nothing more than their day in court. Appellants received three days in court with which to present evidence at trial. It is not the fault of case law that Appellants did not make the most of those three days and presented insufficient evidence. The proposed extrapolations they claim the Court of Appeals should have made from *Hughley*, (Trans. Pet. p. 15-16), would not have made any difference because those proposed extrapolations are just regurgitated summaries of Appellants' proposed clarifications of the *Purcell* standard that already have their firm place in our state's case law.

Far from a significant departure from law or practice, the Court of Appeals'

opinion aligns closely with *Purcell* where this Court affirmed the grant of a motion for judgment on the evidence. 972 N.E.2d at 843. Most importantly, Appellants present no clarification or modification of Rule 50 standards that would cause the trial court's judgment in this case to be viewed as an abuse of discretion. The award of judgment on the evidence for Erie, as insufficient as Appellants' evidence was, is a sign that Rule 50 is working as intended and that the lower courts are able to grasp and apply this Court's standards.

CONCLUSION

This Court should deny transfer as the Court of Appeals was well within its authority under Rule 50 of the Indiana Rules of Trial Procedure and prior precedent to grant Erie's motion for judgment on the evidence, no clarification or modification of Rule 50 standards is necessary, and Appellants fail to present any basis for granting transfer under this Court's principal considerations for granting transfer.

Respectfully Submitted,

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WORD COUNT CERTIFICATE

Pursuant to Rule 44(E) of the Indiana Rules of Appellate Procedure, I certify that this Brief in Response to Petition For Transfer contains fewer than 4,200 words, excluding the items listed in Rule 44(C), as counted by Microsoft Word, which was used to prepare the brief.

/s/ James P. Strenski

CERTIFICATE OF SERVICE

Pursuant to Rule 24 of the Indiana Rules of Appellate Procedure, I certify that, on July 11, 2023, the foregoing document was filed electronically via the Indiana E-filing System (IEFS) and contemporaneously served upon registered-user counsel (listed below) via the Indiana E-Filing System (IEFS) and/or by first-class U.S. Mail, postage prepaid, where indicated:

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