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IN THE
INDIANA SUPREME COURT

CASE NO. 22A-CT-01897

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

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APPELLEE ERIE INSURANCE EXCHANGE'S
RESPONSE TO AMICUS BRIEFS

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I. INTRODUCTION

The Court should deny transfer because the plain meaning of Rule 50 of the Indiana Rules of Trial Procedure mandates the current standard for a trial court's evaluation of a motion for judgment on the evidence, because Indiana's standard for awarding judgment on the evidence is substantively the same as a plethora of other states, including our neighbors in Ohio and Illinois, and because this Court's guidance in *Purcell v. Old Nat. Bank*, 972 N.E.2d 835 (Ind. 2012) has not caused confusion or inconsistency in how trial courts and the Court of Appeals deal with Rule 50.

II. ARGUMENT

The standard for granting or denying a motion for judgment on the evidence is derived from the Rules of Trial Procedure, not from common law or case law. Rule 50 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)). While ITLA's Brief of *Amicus Curiae* might represent an argument for altering Rule 50, ITLA's brief does not represent a persuasive basis for granting transfer in this case because the language of Rule 50 *requires* the standard this Court has already instructed trial courts to employ when considering motions for judgment on the evidence. Rule 50 itself cannot be altered through adjudication of this case, and nothing less than an alteration of the rule would be necessary to wind up at ITLA's preferred destination.

The phrase "sufficient evidence" carries operative meaning, and its presence in Rule 50 requires the trial court, as this Court has said, "to test the sufficiency of the evidence presented by the non-movant." *Purcell*, 972 N.E.2d at 839. It is axiomatic that evidence cannot be sufficient without first existing, hence the "quantitative" prong of the *Purcell* analysis, but, in order to be

sufficient, it must also permit a reasonable jury to draw the evidentiary proponent's intended inference, hence the "qualitative" prong. *Id.* at 840. ITLA calls for this Court to turn back the clock to 1954, but *Whitaker v. Borntrager*, 122 N.E.2d 734, 735 (Ind. 1954) was decided prior to the adoption of Rule 50 and was not interpreting Rule 50. It is true that *Whitaker* does not mention "sufficient" evidence or conduct an explicit quantitative-and-qualitative analysis, but the *Whitaker* Court was not bound by the present-day Rules of Trial Procedure that do impose upon courts a duty to test the sufficiency of the evidence when confronted with a motion for judgment on the evidence. Although ITLA implies that the current Rule 50 violates Article 1, Section 20 of the Indiana Constitution by permitting courts to weigh conflicting evidence, this Court has already barred trial courts from doing so. *Purcell* made clear, "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." *Purcell*, 972 N.E.2d at 842. Rule 50's language naturally mandates a higher level of evidentiary scrutiny than is required of a trial court considering a motion for summary judgment under Rule 56, but this additional scrutiny is not so much greater as to invade Hoosiers' right to a trial by jury. Indeed, a motion for judgment on the evidence may only be granted, as it was here, after the non-moving party has had its opportunity to present its evidence to a jury.

Moreover, Indiana's standard for granting judgment on the evidence, far from being an outlier nationwide, finds ample support in other jurisdictions. ITLA erroneously insists "no other court, state or federal, employs a test anything like *Purcell*'s." Right next door, Ohio states, "In reviewing a directed verdict motion, the evidence must be construed most strongly in favor of the nonmovant. Directed verdict is improper if reasonable minds could come to different conclusions on any determinative issue. The court merely considers the law and the *sufficiency of the evidence*;

the court does not weigh the evidence or consider witness credibility." *Audia v. Rossi Bros. Funeral Home*, 748 N.E.2d 587, 588-89 (Oh. Ct. App. 2000) (emphasis added). That is not substantively different than *Purcell*, which holds that, if there is any probative evidence or reasonable inference to be drawn from the evidence in favor of the plaintiff or if there is evidence allowing reasonable people to differ as to the result, judgment on the evidence is improper. *Purcell*, 972 N.E.2d at 840.

To Indiana's west, Illinois states, "The standard for entry of a directed verdict is a high one and is not appropriate if reasonable minds may differ as to inferences or conclusions to be drawn from the facts presented." *Perfetti v. Marion Cnty.*, 985 N.E.2d 327, 331 (Ill. Ct. App. 2013). This Court, in *Purcell*, similarly wrote, "Ultimately, the sufficiency analysis comes down to one word: 'reasonable.'" *Purcell*, 972 N.E.2d at 840 (citing *Raess v. Doescher*, 883 N.E.2d 790, 793 (Ind. 2008) (noting, "A motion for judgment on the evidence should be granted only when there is a complete failure of proof because there is no substantial evidence or reasonable inference supporting an essential element of the claim")). Accordingly, Indiana's standard for awarding judgment on the evidence is substantively the same as Ohio's, Illinois' and plenty of other states' standards, and *not* outside the mainstream of American law as ITLA inaccurately contends.[1]

Finally, no need exists for this Court to clarify the *Purcell* guidance. While the IBA's Brief

[1] Even if the trial and appellate standards for judgment on the evidence were altered to suit the wishes of ITLA and the IBA, respectively, Erie would still prevail in this case. Appellants, in their case-in-chief, simply failed to provide any evidence that a contract with Erie was in place at the time of the alleged breach, a failure which doomed their breach-of-contract claim. That meant the claim that Erie breached the duty of good faith and fair dealing failed, too, since this duty of good faith flows only from a contract between an insurer and its insured. *Erie Insurance Co. v. Hickman by Smith*, 622 N.E.2d 515, 519 (Ind. 1993).

On appeal, Appellants did *not* challenge the trial court's entry of judgment for Erie on Appellants' 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 Hickman*, 622 N.E.2d at 520; *Travelers Indemnity Co. v. Johnson*, 440 F. Supp. 3d 980, 987-88 (N.D. Ind. 2020).

of *Amicus Curiae* might identify isolated instances of Indiana courts varying in their descriptions in written opinions of the standard for judgments on the evidence, the IBA noticeably points to no tangible impact on those courts' jurisprudence. The IBA does not point to any example of a case that turned out differently as a result of confusion over what *Purcell* requires. Nor does the IBA underscore any compelling reason to modify the appellate standard of review for grants or denials of judgment on the evidence. And while it is true that the majority of states employ a *de novo* review of judgments on the evidence, it is not true that Indiana is a lone wolf. For example, the Wisconsin Supreme Court has said that an appellate court should not overturn a directed verdict unless the record reveals that the lower court was "clearly wrong" in its decision. *Marquez v. Mercedes-Benz USA, LLC*, 815 N.W.2d 314, 326 (Wis. 2012). Indiana's similar appellate review for abuse of discretion in judgment on the evidence is well-understood and was plainly articulated by this Court in *Purcell*. *Purcell*, 972 N.E.2d at 837. No clarification or modification is necessary, especially in light of the fact that trial courts are in the best position to evaluate live evidence.

III. CONCLUSION

For the foregoing reasons, Erie respectfully opposes the amicus briefs submitted by ITLA and the IBA, notes that the outcome in this case would not change based on any of the proposed changes to Indiana's law for judgments on the evidence, and asks that the Court deny transfer.

Respectfully Submitted,

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WORD COUNT CERTIFICATE

Pursuant to Rule 44(F) of the Indiana Rules of Appellate Procedure, I certify that this Response to Amicus Briefs 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
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CERTIFICATE OF SERVICE

Pursuant to Rule 24 of the Indiana Rules of Appellate Procedure, I certify that, on December 6, 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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