Received: 11/16/2023 1:19 PM
Filed: 11/17/2023 2:46 PM

In the
Indiana Supreme Court

Cause No. _____

Christine Cosme and Roy Cosme, Appellants, v. Debora A. Warfield Clark, Dan Churilla d/b/a Churilla Insurance, and Erie Insurance Exchange, Appellees.	On Petition to Transfer from the Indiana Court of Appeals No. 22A-CT-1897 Appeal from the Lake Superior Court Cause No. 45D01-1803-CT-39 The Honorable Jon M. Sedia, Judge

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AMICUS CURIAE STATEMENT OF INTEREST

The Indianapolis Bar Association, Appellate Practice Section ("Appellate Practice Section"), is a nonpartisan section of the Indianapolis Bar Association, comprised of more than 150 appellate lawyers who are members of the Bar of this Court. The Appellate Practice Section was formed in 2006 and works generally to assist its members in practicing appellate law in the State of Indiana and elsewhere. The Appellate Practice Section represents the interests of its membership in matters implicating significant legal issues that affect attorneys, their clients, and the general public. As stated in the Appellate Practice Section's bylaws, "it shall be the purpose of this Section to[,] . . . when appropriate, be the voice of the local appellate bar."

The Appellate Practice Section wishes to participate as an *amicus curiae* in this appeal at the invitation of this Court to provide "briefing on the question of whether [Indiana] should clarify or modify the framework our Court articulated in Purcell v. Old National Bank, 972 N.E.2d 835 (Ind. 2012), as it relates to … the standard of review an appellate court should apply when reviewing the trial court's decision to grant or deny a T.R. 50(A) motion." Cosme v. Warfield Clark, 217 N.E.3d 1246, 1246 (Ind. 2023) (Published Order Inviting *Amicus Curiae* Briefing and Setting Oral Argument).

The Appellate Practice Section urges the Court to accept transfer and provide clarifying guidance on this issue.

The Appellate Practice Section is technically aligned with Appellants' position. However, the Appellate Practice Section takes no position on the case's underlying sub-

stantive controversy, the merits of the parties' respective substantive arguments, or the outcome of their dispute. The Appellate Practice Section's stated interest in this appeal is to obtain clarification from this Court on the issues the Section has identified.

SUMMARY OF ARGUMENT

In Purcell, this Court distinguished appellate review of a summary judgment proceeding from a directed verdict proceeding. This Court explained that the "sufficiency test" of Rule 50(A) is not merely whether a conflict of evidence may exist as in a Rule 56(C) analysis, "but rather whether there exists probative evidence, substantial enough to create a reasonable inference that the non-movant has met his burden." Case law since then has moved the Rule 50(A) analysis much closer to the Rule 56(C) analysis. Cases since Purcell have reviewed Rule 50(A) questions under a *de novo* review of record evidence – favorable only to the non-movant – for conflicting, competing inferences, which is the same analysis applied in Indiana on summary judgment. This Court should clarify the current state of Indiana law for the bench and bar alike.

ARGUMENT

As some Court of Appeals' opinions presently recognize, "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; Denman v. St. Vincent Medical Group, Inc., 176 N.E.3d 480, 492 n.5 (Ind. Ct. App. 2021), trans. denied. Appellate review standards for Rule 50(A) and Rule 56 are also considered different because appellate and trial courts apply the same

review standard. See Smith v. Baxter, 796 N.E.2d 242, 243 (Ind. 2003) (Rule 50(A)); LeMaster v. Methodist Hosp., 601 N.E.2d 373, 374 (Ind. Ct. App. 1992) (Rule 56(C)).

This belief in a fundamental difference between the two review standards is further rooted in this Court's opinion in Purcell that distinguished a summary judgment proceeding from a directed verdict proceeding: "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." 972 N.E.2d at 841. Accordingly, some cases hold that "the same evidence that allowed [a plaintiff] to defeat a summary judgment motion could be insufficient to overcome a motion for a directed verdict." Think Tank, 30 N.E.3d at 746; Denman, 176 N.E.3d at 492 n.5 (same). But other Indiana case law seems to state otherwise.

In his dissent (joined by Justice Dickson), Justice Rucker wrote in relevant part:

> To sustain a judgment for defendant on the evidence, ***the evidence must be without conflict and susceptible to but one inference in favor of the moving party;*** if there is ***any*** inference or legitimate inference therefrom tending to support at least one of plaintiff's allegations, a directed verdict should not be entered. See Bonnes v. Feldner, 642 N.E.2d 217, 220 (Ind.1994). Stated slightly differently, "If there is any probative evidence or reasonable inference to be drawn therefrom or if there is evidence which would allow reasonable people to differ as to the result, judgment on the evidence is improper." Wellington Green Homeowners' Ass'n v. Parsons, 768 N.E.2d 923, 925-926 (Ind. Ct. App. 2002). ***Based on the conflicting evidence*** before the jury in this case, reasonable people could (and in fact do) differ as to whether Old National or its agent Howarth induced Stein to include the false income figure on the April 2003 balance sheet.

Purcell, 972 N.E.2d at 845 (second original emphasis) (Rucker, J., dissenting).

Indeed, as numerous panels of our Court of Appeals have noted: "A motion for judgment on the evidence should be granted only in those cases where the evidence is not conflicting and susceptible to one inference, supporting judgment for the movant." Deaton v. Robison, 878 N.E.2d 499, 501 (Ind. Ct. App. 2007); CSX Transp., Inc. v. Kirby, 687 N.E.2d 611, 615-616 (Ind. Ct. App. 1997), trans. denied; TRW, Inc. v. Fox Development Corp., 604 N.E.2d 626, 629 (Ind.Ct.App.1992), trans. denied; Northern Indiana Public Service Co. v. Stokes, 493 N.E.2d 175, 178 (Ind. Ct. App. 1986), reh'g denied.

In fact, the Court of Appeals reasoned in Stokes as follows: "Consequently, we have determined that several conflicting inferences could reasonably be drawn from the evidence presented in this case, and that the trial court did not err by denying NIPSCO's T.R. 50 motion." 493 N.E.2d at 178. That sure sounds a lot like an appellate court engaging in a *de novo* review of an appellate record to resolve a summary judgment dispute:

> [W]e find the record supports conflicting inferences as to whether Community's disclosure of Z.D.'s private health information to Kendrick was communicated in a way that it would reach a large enough number of people such that it was sure to become public knowledge. As a result, Community is not entitled to summary judgment on Z.D.'s public-disclosure claim.

Z.D. v. Community Health Network, Inc., 217 N.E.3d 527, 537 (Ind. 2023). By digging into the record evidence and drawing conclusions about whether it supports conflicting inferences or a consistent narrative, Indiana courts are seemingly taking the same *de novo* approach in reviewing Rule 50(A) and Rule 56 determinations.

And at least one Court of Appeals' opinion states that Indiana's appellate courts "review an appeal from a directed verdict *de novo*, considering only the evidence most favorable to the nonmovant along with all reasonable inferences that may be drawn therefrom." Walgreen Co. v. Hinchy, 21 N.E.3d 99, 106 (Ind. Ct. App. 2014) (citing Deaton, 878 N.E.2d at 501); see also Warsaw Orthopedic, Inc. v. Sasso, 162 N.E.3d 1, 17 (Ind. Ct. App. 2020) (noting that appellate review of "a motion for a directed verdict" is "similar[]" to the *de novo* standard for a summary judgment review, which is that both can be granted "only if there is no substantial evidence or reasonable inference to be drawn therefrom to support an essential element of the non-movant's claim"), trans. denied; cert. denied.

Transfer is warranted to resolve the conflict in our decisional law on the standard of review an Indiana appellate court should apply when reviewing a trial court's decision to grant or deny a T.R. 50(A) motion. See App.R.57(H)(1)(2). Numerous Indiana opinions reviewing appeals from a directed verdict are conducting a *de novo* review of the record evidence – favorable to the non-movant – to determine if the evidence is not conflicting and susceptible only to one inference as it concerns an essential element of the non-movant's claim. If that is the case, a directed verdict will be affirmed. However, if the evidence is conflicting and susceptible to competing inferences, Indiana law holds that a directed verdict is improper.

Conducting a *de novo* review of record evidence – favorable only to the non-movant – for conflicting, competing inferences is the same analysis applied in Indiana on summary judgment. See Z.D., 217 N.E.3d at 537. It cannot be squared with Indiana

cases holding "the procedural standards for summary judgment and judgment on the evidence are fundamentally different." Think Tank, 30 N.E.3d at 745; Denman, 176 N.E.3d at 492 n.5. It also cannot be seemingly reconciled with Purcell's reasoning that "[u]nlike 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." 972 N.E.2d at 841. To be sure, under analyses in cases like Deaton, CSX Transp., TRW, Inc., and Stokes, see supra p.8, "the same evidence that allowed [a plaintiff] to defeat a summary judgment motion could" indeed be "[]sufficient to overcome a motion for a directed verdict," Think Tank, 30 N.E.3d at 746, because those Indiana opinions are reviewing record evidence for the existence of conflicting, competing inferences on essential elements of the non-movant's claim. A few other points merit discussion.

No Hoosier argues that a trial court has abused its discretion when ruling on a summary judgment motion. Based on the foregoing, query whether an abuse of discretion standard for reviewing a T.R. 50(A) motion ruling is proper, especially when an "abuse of discretion" standard does not require the same rigorous record review that is accorded a *de novo* review standard used to identify evidentiary conflicts. That T.R. 50(A) rulings are oftentimes first subject to T.R. 59 motions to correct error, which then superimpose an "abuse of discretion" standard for appellate review, exacerbates the inconsistency and likely further mutes a rigorous record review.

Notably, the federal standard for granting summary judgment mirrors the federal directed verdict standard under Federal Rule of Civil Procedure 50(a) (similarly rooted, like Indiana's, in a sufficient evidentiary basis), with both requiring the appellate court to affirm a grant of each respective motion where there can be but one reasonable conclusion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-251 (1986); Forrest v. Prine, 620 F.3d 739, 743 (7th Cir. 2010) ("The summary judgment standard … mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a).... [T]he genuine issue summary judgment standard is very close to the reasonable jury directed verdict standard.... [T]he inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.") (paragraph structure altered) (internal quotations omitted).

Finally, one of the recognized sins to avoid with our current standard for reviewing T.R. 50(A) directed verdict motions is that our appellate courts will not invade the province of the jury "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. While Indiana courts engage in some measure of evidence weighing in deciding both T.R. 50(A) and 56(C) motions – after all, speculative evidence will not create a material conflict on summary judgment – it seems that the 50(A) appellate review standard as stated in Purcell encourages a far greater degree of evidence weighing than a *de novo* standard of review looking for evidentiary conflicts: "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." Purcell, 972 N.E.2d at 841.

CONCLUSION

With these observations in mind, the Appellate Practice Section requests that this Court grant transfer to clarify whether the framework this Court articulated in Purcell as it relates to the standard of review an appellate court should still apply when reviewing the trial court's decision to grant or deny a T.R. 50(A) motion. The Appellate Practice Section takes no position on how any clarification might impact the result in this appeal.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify that this document contains no more than the 4,200 words permitted under Indiana Appellate Rule 44(E).

s/*Bryan H. Babb*
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CERTIFICATE OF SERVICE

I certify that on November 16, 2023, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS). I also certify that on that same date the foregoing document was served upon the following person(s) via IEFS:

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