INDIANA JUDICIAL CENTER

CASE CLIPS

Selected decisions of the Indiana appellate courts abstracted for judges by the Indiana Judicial Center.

VOL. XXVIII, NO. 24 **July 20, 2001**

CRIMINAL LAW ISSUES

BAKER v. STATE, No. 66S04-0005-CR-345, ___ N.E.2d ___ (Ind. July 17, 2001).
SHEPARD, C. J.

With regard to his conviction for rape, Baker says the Court of Appeals [in an unpublished opinion] erroneously held that he failed to preserve his claim that the trial court wrongly excluded evidence about his prior sexual conduct with McCann. (Appellant's Petition To Transfer at 1-2.) We agree, and grant transfer to so hold. The convictions are otherwise affirmed.

. . . .

On October 7, 1998, before the trial began, Baker's attorney, Kevin C. Tankersley, filed a "Notice of Past Sexual Conduct – Rule 412" which stated that "evidence will be presented detailing a prior sexual relationship between the victim and the Defendant." [Footnote omitted.] (R. at 339.) Two days later, the prosecutor filed an objection, arguing that the proposed evidence was vague, irrelevant to the rape allegation, and unverifiable.

. . .

On October 9, 1998, Baker's attorney filed in open court a "Supplement to Defendant's Notice of Past Sexual Conduct" and asserted the defendant had "a prior sexual relationship" with the victim. (R. at 367.) He claimed Baker had "multiple prior sexual contacts" and an "on-going affair" with the victim. (Id.) On October 12th, the State filed a motion in limine seeking to keep the jury from hearing any evidence of the victim's past sexual conduct. At a pretrial hearing on October 14th, Baker testified he had sexual relations with the victim about twenty times, beginning May 5, 1998. (R. at 960-66.) McCann testified she never had consensual sex with Baker. (R. at 971-73.) [Footnote omitted.] The trial court granted the prosecutor's motion in limine.

On the day Baker was scheduled to testify at trial, his attorney filed "Defendant's Offer of Evidence Under Indiana Evidence Rule 412(a)(1)". The document asserted the defendant and the victim had "some twenty acts of consensual sexual intercourse in the months preceding the date of this alleged offense." [Citation to Record omitted.] It asked the court "to make a specific ruling either revoking its grant of the State's Motion in Limine or affirming that ruling." [Citation to Record omitted.]

. . . .

After the Court of Appeals issued its opinion, Baker's attorney filed a "Motion to Correct the Record of Proceedings" under Ind. Appellate Rule 7.2(C)(2). . . .

In an affidavit filed with this motion, Tankersley said he filed his written offer in the court's office while the judge was present and told the judge he was filing it to preserve the

prior sexual conduct issue for appellate review. He said he asked if the judge planned to change his mind and allow the evidence and the judge replied that he believed the evidence was more prejudicial than probative and would not allow the jury to hear it. Tankersley took that statement as a re-affirmation of the pretrial ruling.

In a hearing held February 29, 2000, on the motion to correct the record, the prosecutor countered that she was unaware of the foregoing events. She also pointed out that the defendant had several opportunities to make an offer of proof. At this hearing, Tankersley argued the important issue was whether the trial court considered Baker's "Offer of Evidence Under Indiana Evidence Rule 412(a)(1)," and whether or not the trial court re-affirmed its pretrial ruling. The trial court replied:

> We may have had a casual conversation. I honestly don't remember, you know, exactly what was said. I – I suppose my proper recollection is that, that I took this as your effort to preserve the issue since it was not going to be brought up in front of the jury.

[Citation to Supp. Record omitted.]

Later in the hearing the trial judge said:

> I will say I assumed that it was your effort to preserve the issue which I had already spoken to on, on the motion in limine. So, I never [went] further beyond ruled on (sic) that because I felt it was your effort to preserve the, the issue, and so I didn't make any effort to rule on it in open court.

[Citation to Supp. Record omitted.]

The prosecutor argued that there was never any offer of proof when she, the trial court and the defendant's attorney were all present. The defense argued that the sidebar colloquy, which occurred upon a prosecution objection, was an affirmation of the trial court's earlier decision to keep the issue of prior sexual conduct from the jury. Following this hearing, on February 29, 2000, the trial court entered an order stating, "[T]he Court remembers receiving the Defendant's Offer of Evidence Under Indiana Rule of Evidence 412(a)(1) and having made the same of record, outside the presence of the jury and off the record." (Supp. R. at 20.)

. . . Indiana Evidence Rule 103(c) states that "[i]n jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury." To comply with Evid. R. 103(c), practitioners use motions in limine, which seek "a protective order against questions or statements so as to keep prejudicial matters from the jury until the court has ruled at trial upon the admissibility

of such matters." Robert L. Miller, Jr., Courtroom Handbook on Indiana Evidence 12 (2001 ed.); Norton v. State, 273 Ind. 635, 650, 408 N.E.2d 514, 525 (1980).

After a court has ruled on the admissibility of the evidence in question:

> To preserve a claim of error in a ruling excluding evidence, the proponent of the evidence must make the substance of the evidence known to the trial court by a proper offer of proof, unless the substance of the evidence was apparent from the context in which the questions were asked.

Miller, supra at 10 (citing Ind. Evid. R. 103(a)(2)). This technique gives the trial court "an opportunity to rule on its admissibility at that time." Miller v. State, 716 N.E.2d 367, 370 (Ind. 1999)(quoting Tyra v. State, 506 N.E.2d 1100, 1103 (Ind. 1987)). . . .

. . . .

The rule requiring an offer to prove serves a number of useful purposes, but there is such a thing as being too rigid about format. In the recent case of Vehorn v. State, 717 N.E.2d 869 (Ind. 1999), we concluded that the defense had come close enough. In Vehorn, the defendant challenged the admissibility of a witness' testimony at a pretrial evidentiary hearing by objecting to the testimony as hearsay. Id. at 872. The trial court heard argument and denied the defendant's motion to exclude the testimony. During the hearing, the trial court told both counsel that if there is "a close call" on the admissibility of the evidence and an objection is sustained, "I don't want the Jurors to have heard that . . . ." Id. At trial the defense did not object to the witness' testimony. Id. On appeal, the State argued that by failing to object at trial, the defense had waived any error. Id. However, this Court held:

> While the prudent lawyer will always provide a contemporaneous objection at trial so as to preserve an issue for appeal, there are occasional exceptions to this general rule. This case provides one of them. During the pretrial hearing, the judge provided explicit assurance that an objection as to [the witness'] hearsay testimony was preserved for appeal when it told defense counsel that "even if you don't object, the Court will find . . . that your objections to this type of evidence have been timely made."

Id. at 872-73. The trial court had effectively forbidden any objection in front of the jury, so we found the issue preserved. [Citation omitted.]

There are some obvious distinctions between Vehorn and Baker's case. Vehorn involved the failure to make an objection at trial while Baker's attorney failed to make an oral offer to prove at trial. In both cases, however, the issue originated with a motion in limine and the key question in both involves the preservation of the issue for appeal. The issues (hearsay in Vehorn and prior sexual history here) were addressed during pretrial. Id. at 872, (R. at 960-73). In Baker's case, a sidebar discussion of the issue occurred immediately before the witness was to testify and the court made its position plain. (R. at 1604.)

In Vehorn, the pretrial record showed the trial judge wanted to avoid an objection in front of the jury. Vehorn,717 N.E.2d at 872. In Baker's case, the sidebar conversation showed the court's similar intent, that any sexual history between the defendant and the victim should not be aired in front of the jury.

The trial judge's own recollection that he made no "effort to rule on it in open court," (Supp. R. at 40), because the defendant had already taken reasonable steps to preserve the issue further indicates the court had considered the matter and intended to enforce his earlier ruling. Finally, the trial court indicated he recalled receiving the defendant's offer of evidence. (Supp. R. at 20.)

The primary reasons for requiring an offer to prove were satisfied. The sidebar colloquy shows the trial court was aware of the evidence of sexual history and at least

implicitly re-affirmed his decision to exclude it. Given the clear-cut nature of the proposed testimony (he asserts a sexual relationship; she denies it), we find the issue sufficiently preserved for appeal.

. . . .

Where the charge was rape and the defense was consent and only the two parties were present, we find ourselves unable to say that prohibiting Baker from offering evidence of a recent and regular sexual relationship did not affect his substantial rights. [Citation omitted.]

. . . We therefore reverse the rape conviction and remand for a new trial. . . .

. . . .

BOEHM, DICKSON, SULLIVAN, and RUCKER, JJ., concurred.

CARTER v. STATE, No. 79S02-0107-CR-327, ___ N.E.2d ___ (Ind. July 17, 2001).
SHEPARD, C. J.

Appellant Darnell Carter faced multiple charges of drunk driving. These led to verdicts of guilty on all counts and a judgment of conviction for the crime of operating a vehicle while intoxicated, as a class D felony. The Court of Appeals rejected Carter's claims of error, but directed the trial judge to vacate the other two guilty findings. This was unnecessary.

. . . The State charged Carter in three separate counts: (1) operating a vehicle with at least ten-hundredths percent (0.10%) of alcohol by weight in grams in one hundred (100) milliliters of the person's blood, a class C misdemeanor; [footnote omitted] (2) operating a vehicle while intoxicated, a class A misdemeanor; [footnote omitted] and (3) operating a vehicle while intoxicated with a previous conviction of operating while intoxicated within the five immediately preceding years, a class D felony. [Footnote omitted.]

A jury found Carter guilty of Counts I and II. [Footnote omitted.] Carter then waived his right to a jury trial on the third charge. The court conducted a bench trial and found Carter guilty on Count III.

After a sentencing hearing, the court entered a judgment of conviction and sentence for Count III, the class D felony, only. [Footnote omitted.]

The Court of Appeals correctly rejected all of the contentions Carter made on appeal. Carter v. State, 734 N.E.2d 600 (Ind. Ct. App. 2000). . . . The court then said:

> As a final point, although not raised by the appellant, we conclude *sua sponte* that both the operating while intoxicated conviction as a class A misdemeanor and the operating while intoxicated conviction with having a previous operating while intoxicated conviction within the past five years as a class D felony may not stand. The class A misdemeanor conviction is subsumed by the enhanced class D felony conviction. . . .

[Citation omitted.] It thus followed the practice adopted in Redman v. State, 679 N.E.2d 927, 932 (Ind. Ct. App. 1997), in which the Court of Appeals deemed it necessary to order vacating a lesser included offense on which there was no judgment and no sentence, while expressing concern that such a practice put the trial courts in a difficult position. . . .

. . . .

[A] guilty verdict and a judgment of conviction are two rather different things.

It is highly ordinary that a jury (or, as with Count III here, a judge in a bench trial) may hear evidence about multiple counts during a single trial and determine guilt on each of them. These findings of guilt do not mean that a defendant has faced multiple sentences or multiple judgments of conviction. Asking the jury to deliberate on all potential charges that are supported by the evidence is a sensible and efficient practice. A verdict of guilty can certainly be a significant legal event, but only if a court later enters judgment on it. . . .

. . . .

. . . In short, a jury verdict on which the court did not enter judgment for one reason or another (merger, double jeopardy, etc.) is unproblematic, as we recently observed in the double jeopardy context. [Footnote omitted.] [Citations omitted.] There is no particular reason to order a trial court to vacate the jury "conviction" on, say, counts one or two where the trial court entered a judgment only on count three. [Footnote omitted.]

. . . .

BOEHM, DICKSON, SULLIVAN, and RUCKER, JJ., concurred.

ANGELES v. STATE, No. 12A02-9912-CR-849, ___ N.E.2d ___ (Ind. Ct. App. July 16, 2001).
VAIDIK, J.

The issue of qualifying foreign language translators is likely to recur. [Footnote omitted.] We think both the defendant's rights and our judicial system would be better served if trial courts have guidelines to employ when appointing translators. First, a trial court should swear in the translator using the oath provided at Indiana Code § 34-45-1-5. [Footnote omitted.] Next, the court should consider several factors when determining whether an interpreter has the necessary qualifications. We suggest that trial courts ask the following questions to potential interpreters to evaluate an interpreter's qualifications: (1) Do you have any particular training or credentials as an interpreter? (2) What is your native language? (3) How did you learn English? (4) How did you learn [the foreign language]? (5) What was the highest grade you completed in school? (6) Have you spent any time in the foreign country? (7) Did you formally study either language in school? To what extent? (8) How many times have you interpreted in court? (9) Have you interpreted for this type of hearing or trial before? To what extent? (10) Are you a potential witness in this case? (11) Do you know or work for any of the parties? (12) Do you have any other potential conflicts of interest? (13) Have you had an opportunity to speak with the non-English speaking person informally? Were there any particular communication problems? (14) Are you familiar with the dialect or idiomatic peculiarities of the witnesses? [Citation omitted.] Although not an exhaustive list, after considering these types of questions, a trial court will be better able to determine whether or not an interpreter is properly qualified to translate.

. . . .

BROOK and ROBB, JJ., concurred.

HINOJOSA v. STATE, No. 45A05-0010-CR-450, ___ N.E.2d ___ (Ind. Ct. App. July 17, 2001).

DARDEN, J.

Ruben Hinojosa, ("Hinojosa"), appeals the trial court's denial of his Petition for Production of Grand Jury Transcripts.

We reverse.

. . . .

Thomas Hanna ("Hanna"), a lieutenant with the Hammond Police Department, went to the Calumet Tap to socialize with his coworkers and Mayor Duane Dedlow ("Dedlow"). At approximately 10:00 p.m., Hanna left in his department issued unmarked car and responded to a dispatch about shots fired near the Hammond High School. Hanna subsequently confronted a young man named LuJuan Jones ("Jones"), pointed his handgun at Jones, and verbally accosted him. A short time later, Hanna allegedly confronted Jamie Weems ("Weems") and assaulted him in a similar manner.

. . . [H]anna returned to the Calumet Tap. After he left, he drove north on Calumet Avenue where he collided with a parked Hammond police car with its emergency lights activated. The collision injured the officer in the police car and the motorist the officer was assisting.

Captain Steven Ridgley ("Ridgley") and Officer George Gavrilos ("Gavrilos") eventually arrived on the scene. . . . [R]idgley allegedly took Hanna to the police garage across the street where Hanna drank coffee for two hours before giving a breath test. Despite the fact that a certified breath test operator was on duty, it was alleged that Ridgley called Sergeant Ronald Gennarelli ("Gennarelli") in from home to administer the breath test. The test results revealed Hanna's blood alcohol content to be ".00 despite the fact [that] Hanna was visibly intoxicated and physically impaired only two hours" earlier. [Citation to Record omitted.] . . .

In the months following this incident, Hinojosa alleged that certain members of the Hammond Police Department and city government had "covered up the drunk driving accident." [Citation to Record omitted.] Hinojosa's statements were printed in the local newspaper. Additionally, he picketed city hall, informed the city council, and solicited help from the Indiana State Police. As a result, a special grand jury was impaneled and testimony was taken from Hanna and other members of the department and city government. Hanna along with several other members of the department were indicted for their actions surrounding the October 21, 1997 incidents. . . .

. . . [T]he trial court found Hanna guilty of intimidation as a class A misdemeanor and reckless driving as a class B misdemeanor.

Approximately two weeks later, disciplinary charges were brought against Hinojosa. In order to establish his defense under Indiana's whistleblower statute, Hinojosa petitioned the trial court to release the transcripts of the grand jury testimony. [T]he trial court denied his petition finding that "there is no authority that permits" the release of the transcripts. [Citation to Record omitted.] . . .

. . . .

We review a trial court's grant or denial of a petition to release grand jury transcripts for an abuse of discretion. See State ex rel. Keller v. Criminal Ct. of Marion County, 317 N.E.2d 433, 262 Ind. 420 (Ind. 1974) (holding that it is within the discretionary power of trial courts to issue discovery order to produce grand jury transcripts). . . .

. . . .

[O]ur General Assembly has enacted a framework allowing for the release of grand jury transcripts; the relevant statute reads as follows:

> The transcript of testimony of a witness before a grand jury *may* be produced only upon order of the court which impaneled the grand jury but only after a showing of *particularized need* for the transcript.

Ind. Code § 35-34-2-10(b)(2)(A) (emphasis added). . . . [T]he issue here is whether the logic and effect of the facts and circumstances before the trial court show that Hinojosa had a particularized need for the grand jury transcripts.

. . . [T]he term "particularized need" has not been previously defined as used in this statute. [Citation omitted.] . . .

. . . .

. . . In his petition, Hinojosa argued that he is the subject of disciplinary proceedings seeking to terminate his 19 years of employment with the Hammond Police Department because he allegedly disseminated inaccurate allegations of corruption to the public. As a result, he argues that he needs the grand jury transcripts to prove that his statements were true. . . .

We find that Hinojosa established that he has a very important need for the

transcripts. . . .

Concerning whether he can reasonably obtain the substance of the testimony by other means, the record reveals that Hinojosa has attempted to obtain relevant information through interrogatories and requests for production from the Hammond Police Department. . . . The record suggests that Hinojosa's efforts are being thwarted at every turn and that he cannot reasonably obtain the substance of the testimony from any other source than the grand jury transcripts.

. . . Here, the logic and effect of the facts and circumstances before the trial court warrant the granting of Hinojosa's petition. Therefore, the ruling of the trial court is reversed and we order the trial court to grant Hinojosa's Petition for Production of Grand Jury Transcripts.

. . . .

NAJAM, J., concurred.

BARNES, J., filed a separate written opinion in which he dissented, in part, as follows:

> I respectfully dissent. Although I believe the trial court here was incorrect when it seemed to state that a non-party could never obtain grand jury transcripts, I am not persuaded that, at this point, Hinojosa has met his burden to show a "particularized need" for the transcripts. . . .
>
> . . . .

CIVIL LAW ISSUES

STATE BD. OF TAX COMM'RS v. TOWN OF ST. JOHN, No. 49S10-0009-TA-541, ___ N.E.2d ___ (Ind. July 18, 2001).

SHEPARD, C. J.,

> Having prevailed on the merits, Taxpayers asked for an award of attorney fees under a private attorney general theory. Town of St. John v. State Bd. of Tax Comm'rs, 730 N.E.2d 240, 242 (Ind. Tax 2000). The Tax Court granted the request and ordered the Taxpayers to submit their proposed award. [Citation omitted.] . . .
>
> . . . .
>
> The Bottom Line. Indiana's courts regularly tackle tough issues, as we have in this very case. At the end of the day we are not convinced, however, of either the need for or the wisdom of adopting the private attorney general doctrine.
>
> . . . We therefore reverse the decision of the Tax Court and direct that it deny the petition for fees.

DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

BOEHM, J., did not participate.

CHAFFEE v. SESLAR, No. 17A03-0011-CV-418, ___ N.E.2d ___ (Ind. Ct.. App. July 13, 2001).

ROBB, J.

> . . . Based on the foregoing, we hold that the trial court properly determined that the costs involved in raising a normal, healthy child conceived subsequent to an allegedly negligent sterilization procedure are recoverable. In addition, we hold that a healthcare provider faced with the award of child-rearing damages should be permitted to produce evidence of mitigation as in any other damage award in a negligence action.
>
> . . . .

DARDEN and RILEY, JJ., concurred.

CASE CLIPS is published by the Indiana Judicial Center
National City Center - South Tower, 115 West Washington Street, Suite 1075
Indianapolis, Indiana 46204-3417
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CASE CLIPS TRANSFER TABLE

July 20, 2001

This table lists recent grants of transfer by the Indiana Supreme Court for published decisions of the Court of Appeals. It includes Judicial Center summaries of the opinions of the Court of Appeals vacated by the transfers and of the Supreme Court's opinions on transfer.

A CASE CLIPS transfer information feature was suggested by the Justices of the Indiana Supreme Court in response to trial court requests for more accessible information about grants of transfer. The table is prepared with assistance from the Supreme Court Administrator's Office, which sends the Judicial Center a weekly list of transfer grants.

A grant of transfer vacates the opinion of the Court of Appeals: "[i]f transfer be granted, the judgment and opinion or memorandum decision of the Court of Appeals shall thereupon be vacated and held for naught, except as to any portion thereof which is expressly adopted and incorporated by reference by the Supreme Court, and further, except where summarily affirmed by the Supreme Court." Indiana Appellate Rule 11(B)(3).

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Owens Corning Fiberglass v. Cobb	714 N.E.2d 295 49A04-9801-CV-46	Defense should have received summary judgment as plaintiff showed only that he might have been exposed to its asbestos	01-19-00	
Lockett v. State	720 N.E.2d 762 02A03-9905-CR-184	Officer's question whether motorist had any weapons in the car or on his person impermissibly expanded a legitimate traffic stop	3-29-00	5-21-01. No. 02-S03-0004-CR-00232. Question regarding weapons was justified by safety concern and did not materially expand stop so as to violate Fourth Amendment; argument Indiana Constitution might have provided more protection was waived.
Fratus v. Marion Community School Board	721 N.E.2d 280 27A02-9901-CV-12	(1) Indiana Education Employment Relations Board (IEERB) did not have jurisdiction over teachers' claim against union for breach of its duty of fair representation, and (2) IEERB did not have jurisdiction over teachers' tort and breach of contract claims against school board	5-04-00	6-06-01. 27S02-0005-CV-295. Teachers required to exhaust IEERB administrative review remedy for claimagainst union; doctrine of primary jurisdiction required court to hold actions against board in abeyance pending IEERB decision.
McCarthy v. State	726 N.E.2d 789 37A04-9903-CR-108	Reversible error in teacher's sexual misconduct prosecution to prevent his cross-examination of child's mother about her filing notice of tort claim against school and possible intent to sue defendant personally.	6-08-00	
Zimmerman v. State	727 N.E.2d 714 77A01-9909-CV-318	Cases hold no appeal lies from a prison disciplinary action, but here inmate could bring a civil mandate action to compel DOC to comply with a clear statutory mandate.	8-15-00	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Felsher v. City of Evansville	727 N.E.2d 783 82A04-9910-CV-455	University was entitled to bring claim for invasion of privacy; professor properly enjoined from appropriating "likenesses" of university and officials; professor's actions and behavior did not eliminate need for injunction; and injunction was not overbroad..	8-15-00	
Dow Chemical v. Ebling	723 N.E.2d 881 22A05-9812-CV-625	State law claims against pesticide manufacturer, with exception of negligent design, were preempted by federal FIFRA pesticide control act; pest control company provided a service and owed duty of care to apartment dwellers, precluding summary judgment.	8-15-00	
Sanchez v. State	732 N.E.2d 165 92A03-9908-CR-322	Instruction that jury could not consider voluntary intoxication evidence did not violate Indiana Constitution	9-05-00	
South Gibson School Board v. Sollman	728 N.E.2d 909 26A01-9906-CV-222	Denying student credit for all course-work he performed in the semester in which he was expelled was arbitrary and capricious; summer school is not included within the period of expulsion which may be imposed for conduct occurring in the first semester	9-14-00	
Poynter v. State	733 N.E.2d 500 57A03-9911-CR-423	At both pre-trials Court advised non-indigent defendant he needed counsel for trial and defendant indicated he knew he had to retain lawyer but was working and had been tired; 2nd pretrial was continued to give more time to retain counsel; trial proceeded when defendant appeared without counsel; record had no clear advice of waiver or dangers of going pro se - conviction reversed.	10-19-00	
Moberly v. Day	730 N.E.2d 768 07A01-9906-CV-216	Fact issue as to whether son-in-law was employee or independent contractor precluded a summary judgment declaring no liability under respondeat superior theory; and Comparative Fault has abrogated fellow servant doctrine.	10-24-00	
Shambaugh and Koorsen v. Carlisle	730 N.E.2d 796 02A03-9908-CV-325	Elevator passenger who was injured when elevator stopped and reversed directions after receiving false fire alarm signal brought negligence action against contractors that installed electrical wiring and fire alarm system in building. Held: contractors did not have control of elevator at time of accident and thus could not be held liable under doctrine of res ipsa loquitur.		

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
S.T. v. State	733 N.E.2d 937 20A03-9912-JV-480	No ineffective assistance when (1) defense counsel failed to move to exclude two police witnesses due to state's failure to file witness list in compliance with local rule and (2) failed to show cause for defense failure to file its witness list under local rule with result that both defense witnesses were excluded on state's motion	10-24-00	
Tapia v. State	734 N.E.2d 307 45A03-9908-PC-304	Reverses refusal to allow PCR amendment sought 2 weeks prior to hearing or to allow withdrawal of petition without prejudice	11-17-00	
Tincher v. Davidson	731 N.E.2d 485 49A05-9912-CV-534	Affirms mistrial based on jury's failures to make comparative fault damage calculations correctly	11-22-00	
Brown v. Branch	733 N.E.2d 17 07A04-9907-CV-339	Oral promise to give house to girlfriend if she moved back not within the statute of frauds.	11-22-00	
New Castle Lodge v. St. Board of Tx. Comm.	733 N.E.2d 36 49T10-9701-TA-113	Fraternal organization which owned lodge building was entitled to partial property tax exemption	11-22-00	
Gallant Ins. Co. v. Isaac	732 N.E.2d 1262 49A02-0001-CV-56	Insurer 's agent had "inherent authority" to bind insurer, applying case holding corp. president had inherent authority to bind corp. to contract	11-22-00	
Reeder v. State	732 N.E.2d 1246 49A05-9909-CV-416	When filed, expert's affidavit sufficed to avoid summary judgment but affiant's death after the filing made his affidavit inadmissible and hence summary judgment properly granted.	1-11-01	
Holley v. Childress	730 N.E.2d 743 67A05-9905-JV-321	Facts did not suffice to overcome presumption non-custodial parent was fit so that temporary guardianship for deceased custodial parent's new spouse was error.	1-11-01	
Cannon v. Cannon	729 N.E.2d 1043 49A05-9908-CV-366	Affirms decision to deny maintenance for spouse with ailments but who generated income with garage sales	1-11-01	
City of New Haven v. Reichhart and Chemical Waste Mgmt. of IN	729 N.E.2d 600 99A02-9904-CV-247	Challenge to annexation financed by defendant's employer was exercise of First Amendment petition right and 12(B)(6) dismissal of city's malicious prosecution claim was properly granted.	1-11-01	No. 90S02-0101-CV-35, June 7, 2001. First Amendment issue not reached; case resolved on grounds taxpayer's action not subject to malicious prosecution suit since taxpayer's Open Door challenge was based on "probable cause."

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Davidson v. State	735 N.E.2d 325 22A01-0004-PC-116	Ineffective assistance for counsel not to have demanded mandatory severance of charges of "same or similar character" when failure to do so resulted in court's having discretion to order consecutive sentences.	1-17-01	
Leshore v. State	739 N.E.2d 1075 02A03-0007-CR-234	(1) Writ of body attachment on which police detained defendant was invalid on its face for failure to include bail or escrow amount, and (2) defendant's flight from detention under the writ did not amount to escape.	1-29-01	
Rogers v. R.J. Reynolds Tobacco	731 N.E.2d 6 49A02-9808-CV-668	(1) trial court committed reversible error by making ex parte communication with deliberating jury, in which jury was advised that it could hold a press conference after its verdict was read, without giving notice to parties; (2) denial of plaintiff's motion for relief from judgment, which was based on public statements by director of one of manufacturers, was within court's discretion; (3) jury was properly instructed on doctrine of incurred risk; (4) evidentiary rulings were within court's discretion; and (5) leave to amend complaint was properly denied	2-09-01	
Mercantile Nat'l Bank v. First Builders	732 N.E.2d 1287 45A03-9904-CV-132	materialman's notice to owner of intent to hold personally liable for material furnished contractor, IC 32-8-3-9, sufficed even though it was filed after summary judgment had been requested but not yet entered on initial complaint for mechanic's lien foreclosure	2-09-01	
State Farm Fire & Casualty v. T.B.	728 N.E.2d 919 53A01-9908-CV-266	(1) insurer acted at its own peril in electing not to defend under reservation of rights or seek declaratory judgment that it had no duty to defend; (2) insurer was collaterally estopped from asserting defense of childcare exclusion that was addressed in consent judgment; (3) exception to child care exclusion applied in any event; and (4) insurer's liability was limited to $300,000 plus post-judgment interest on entire amount of judgment until payment of its limits.	2-09-01	
Merritt v. Evansville Vanderburgh School Corp	735 N.E.2d 269 82A01-912-CV-421	error to refuse to excuse for cause two venire persons employed by defendant even though they asserted they could nonetheless be impartial and attentive	2-09-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
IDEM v. RLG, Inc	735 N.E.2d 290 27A02-9909-CV-646	the weight of authority requires some evidence of knowledge, action, or inaction by a corporate officer before personal liability for public health law violations may be imposed. Personal liability may not be imposed based solely upon a corporate officer's title.	2-09-01	
State v. Gerschoffer	738 N.E.2d 713 72A05-0003-CR0116	Sobriety checkpoint searches are prohibited by Indiana Constitution.	2-14-01	
Healthscript, Inc. v. State	724 N.E.2d 265, *rhrg.* 740 N.E.2d 56249A05-9908-CR-370	Medicare fraud crimes do not include violations of state administrative regulations.	2-14-01	
Vadas v. Vadas	728 N.E.2d 250 45A04-9901-CV-18	Husband's father, whom wife sought to join, was never served (wife gave husband's attorney motion to join father) but is held to have submitted to divorce court's jurisdiction by appearing as witness; since father was joined, does not reach dispute in cases whether property titled to third parties not joined may be in the marital estate.	3-01-01	
N.D.F. v. State	740 N.E.2d 574 49A02-0006-CR-383	Juvenile determinate sentencing statute was intended to incorporate adult habitual criminal offender sequential requirements for the two "prior unrelated delinquency adjudications"; thus finding of two prior adjudications, without finding or evidence of habitual offender-type sequence, was error	3-02-01	
Smith v. State	734 N.E.2d 706 49A02-0005-CR-300	Retaining defendant's DNA profile from a prior unrelated case and using it in new case no violation of state or federal Constitutions or of DNA database statute.	3-27-01	3-27-01. 744 N.E.2d 437. Retaining defendant's DNA profile from a prior unrelated case and using it in new case no violation of state or federal Constitutions. Retention not authorized by database statute, but lack of authorization not a basis for invoking exclusionary rule.
Robertson v. State	740 N.E.2d 574 49A02-0006-CR-383	Hallway outside defendant's apartment was part of his "dwelling" for purposes of handgun license statute.	3-09-01	
Bradley v. City of New Castle	730 N.E.2d 771 33A01-9807-CV-281	Extent of changes to plan made in proceeding for remonstrance to annexation violated annexation fiscal plan requirement.	4-06-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
King v. Northeast Security	732 N.E.2d 824 49A02-9907-CV-498	School had common law duty to protect student from criminal violence in its parking lot; security company with parking lot contract not liable to student under third party beneficiary rationale.	4-06-01	
State v. Hammond	737 N.E.2d 425 41A04-0003-PC-126	Amendment of driving while suspended statute to require "validly" suspended license is properly applied to offense committed prior to amendment, which made "ameliorative" change to substantive crime intended to avoid supreme court's construction of statute as in effect of time of offense.	4-06-01	
Terrell v. State	745 N.E.2d 21982A049912-CR-537	Motion to set aside verdict filed after trial but prior to sentencing, based on newly discovered evidence, did not preserve issue for appeal, as motion to correct error was required.	4-11-01	745 N.E.2d 219. When evidence is discovered while case is still before trial court, either a pre-judgment motion to the court, as used here, or a post-judgment motion to correct error preserves issue for appeal.
Wilson v. State	727 N.E.2d 725	Patdown search justified prior to officer's placing motorist in police car to perform nystagmus screen test.	4-16-01	55D01-9901-CM-013. Putting driver in squad car so as to be able to make patdown search, when patdown would not otherwise be justified, violates 4th Amendment.
McCann v. State	742 N.E.2d 998 49A05-0002-CR-43	Photo array not improper; no prosecutorial misconduct; no error in attempted rape instruction; no error in sentencing refusal to rely on pregnancy of victim as not shown defendant knew of pregnancy.	4-12-01	
Dewitt v. State	739 N.E.2d 189	Trial court's failure to advise a defendant of his *Boykin* rights (trial by jury, confrontation, and privilege against self-incrimination) requires vacation of his guilty plea	4-26-01	
Pennycuff v. State	727 N.E.2d 723 49A02-9902-CR-117	Ineffective assistance for counsel to fail to object to State's references to defendants silences in response to police questions about entries on his calendar, when references violated *Doyle v. Ohio*		49S02-0104-CR-213. no *Doyle* violation to put in evidence of defendant's silences about calendar questions after defendant had presented evidence he cooperated fully with authorities, including answering calendar questions
Buchanan v. State	742 N.E.2d 1018 18A04-0004-CR-167	Admission of pornographic material picturing children taken from child-molesting defendant's home was error under Ev. Rule 404(b).		

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
McCary v. State	739 N.E.2d 193 49A02-0004-PC-226	Failure to interview policeman/probable-cause-affiant, when interview would have produced exculpatory evidence, was ineffective assistance of trial. Counsel on direct appeal was ineffective for noting issue but failing to make record of it via p.c. proceeding while raising ineffective assistance in other respects. Post-conviction court erred in holding res judicata applied under *Woods v. State* holding handed down after direct appeal..	5-10-01	
Equicor Development, Inc. v. Westfield-Washington Township Plan Comm.	732 N.E.2d 215 No. 29A02-9909-CV-661	Plan Commission denial of subdivision approval was arbitrary and capricious, notwithstanding it was supported by evidence, due to Commission's prior approvals of numerous subdivision having same defect.	5-10-01	
Progressive Insurance Co. v. General Motors	730 N.E.2d 218 56A03-9812-CV-534	Fires, which did not result in injury to any person, or damage to other property belonging to owners of vehicles, did not result in "physical harm" to the user or consumer or to the user or consumer's property, and thus could not provide basis for recovery under Indiana Products Liability Act	6-06-01	Products Liability Act does not permit recovery when claimed damage is to the defective product itself.
Martin v. State	744 N.E.2d 574 No 45A05-0009-PC-379	Finds ineffective assistance of appellate counsel for waiving issue of supplemental instruction given during deliberations on accomplice liability.	6-14-01	
Segura v. State	729 N.E.2d594 No. 10A01-9906-PC-218	Notes possible effect of Williams v. Taylor, 529 U.S. 362 (2000) on Indiana cases on ineffective assistance of counsel for failure to advise correctly of penal consequences of guilty plea, while affirming conviction.	6-05-01	6-26-01. No. 10S01-0009-PC-515. Assesses effect of federal decisions on Indiana caselaw and concludes "in the case of claims related to a defense or failure to mitigate a penalty, it must be shown that there is a reasonable probability that a more favorable result would have obtained in a competently run trial. However, for claims relating to penal consequences, a petitioner must establish, by objective facts, circumstances that support the conclusion that counsel's errors in advice as to penal consequences were material to the decision to plead."
Catt v. Board of Comm'rs of Knox County	736 N.E.2d 341 (Ind. Ct. App. 2000)	County had duty of reasonable care to public to keep road in safe condition, and County's knowledge of repeated	6-14-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
	No. 42A01-9911-CV-396	washs-outs of culvert and its continued failure to repair meant that wash-out due to rain was not a "temporary condition" giving County immunity.		
Ind. Dep't of Environmental Mgt. v. Bourbon Mini Mart, Inc.	741 N.E.2d 361 No. 50A03-9912-CV-476	(1) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against automobile dealership; (2) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against gasoline supplier pursuant to pre-amended version of state Underground Storage Tank (UST) laws; (3) amendment to state UST laws, which eliminated requirement that party seeking contribution toward remediation be faultless in causing leak, did not apply retroactively so as to allow contribution for response costs that were incurred before its effective date; and (4) third-party plaintiffs' action against gasoline supplier to recover ongoing remediation costs was not time barred.	6-14-01	
In re Ordinance No. X-03-96	744 N.E.2d 996 02A05-0002-CV-77	Annexation fiscal plan must have noncapital services estimates from a year after annexation and capital improvement estimates from three years after annexation.	7-18-01	
Corr v. Schultz	743 N.E.2d 1194 71A03-0006-CV-216	Construes uninsured motorist statutes to require comparison of what negligent party's insurer actually pays out with amount of insured's uninsured coverage; rejects prior Court of Appeals decision, *Sanders*, 644 N.E.2d 884, that uninsured statutes use comparison of negligent party's liability limits to uninsured coverage limit ("policy limits to policy limits" comparison); notes that not-for-publication decision from same accident, *Corr v. American Family Insurance*, used *Sanders* to hold that the correct analysis was to "compare the $600,000 per accident bodily injury liability limit under the two policies covering Balderas [negligent driver] to the $600,000 per accident underinsured motor vehicle limit of the policies under which Janel [Corr] was an insured; transfer also granted 7-18-01 in this unreported *Corr* case.	7-18-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Buckalew v. Buckalew	744 N.E.2d 504 34A05-0004-CV-174	Interprets local rule "no final hearing may be scheduled and no decree of dissolution of marriage or legal separation shall be entered unless and until the prescribed [financial] disclosure form is filed" to be "jurisdictional" so that trial court which made the rule had no authority to conduct a hearing or enter a decree without the required disclosure forms or a waiver by both parties.	7-18-01	
Friedline v. Shelby Insurance Co.	739 N.E.2d 178 71A03-0004-CV-132	Applies Indiana Supreme Court cases finding ambiguity in liability policies' exclusions for "sudden and accidental" and "pollutant" as applied to gasoline to hold that "pollutants" exclusion as applied to carpet installation substances was ambiguous and that insurance company's refusal to defend, made with knowledge of these Supreme Court ambiguity decisions, was in bad faith.	7-18-01	
St. Vincent Hospital v. Steele	742 N.E.2d 1029 34A02-0005-CV-294	IC 22-2-5-2 Wage Payment Statute requires not only payment of wages at the usual frequency (e.g., each week, etc.) but also in the correct amount, so Hospital which relied on federal legislation and federal regulatory interpretation for its refusal to pay physician contract compensation amount was liable for attorney fees and lliquitdated damages undre Statute.	7-18-01	
Smith v. State	748 N.E.2d 895 29A02-00100PC-640	Error to find PCR laches when petition was filed within 27 days of sentencing and all ensuing delays due to Public Defender; guilty plea to six theft counts, for stealing a single checkbook containing the six checks, was unintelligent due to counsel's failure to advise of "single larceny" rule; the theft of the checkbook and ensuing deposits of six forged checks at six different branches of the same bank in the same county "within a matter of hours" were a "single episode of criminal conduct" subject to limits on consecutive sentencing and counsel's failure to discuss the single episode limit also rendered plea unintelligent.	7-19-01	

V