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CRIMINAL LAW ISSUES

DAVIS v. STATE, No. 34S02-0206-PC-305, ___ N.E.2d ___ (Ind. July 19, 2002).
SHEPARD, C. J.

Davis pled guilty to conspiracy to commit robbery, a class C felony. [Footnote omitted.] The trial court imposed a five-year sentence, with three years suspended and two years to run consecutively to a sentence imposed in a separate proceeding.

On September 5, 2000, Davis moved to correct his sentence, alleging that he did not intelligently and knowingly enter into his plea agreement. The trial court denied the motion on October 6th. To appeal this denial, Davis was required to file a praecipe within thirty days. He did not. Instead, he filed a notice of appeal on January 22, 2001. [Footnote omitted.] Because the appeal was not initiated within thirty days of the trial court's ruling, the State moved to show cause why the appeal should not be dismissed.

Davis argued that he did not receive notice of the trial court's ruling and then moved to file a belated appeal. [Footnote omitted.] The motions panel of the Court of Appeals reviewed the case and permitted Davis to pursue his appeal.

When the case was fully briefed on the merits, the Court of Appeals held *sua sponte* that Davis' sentence was void *ab initio* because the trial court lacked authority to impose consecutive sentences. Davis v. State, No. 34A02-0102-PC-107, slip op. at 5 (Ind. Ct. App. Dec. 5, 2001). The State sought rehearing, arguing as it had before the motions panel and in its Appellee's brief that the Court of Appeals lacked jurisdiction to hear the appeal. The Court of Appeals issued a second opinion, declining to revisit the ruling of its Motions Panel and reaffirming its authority to extend the period of time within which Davis could file his praecipe. Davis v. State, 764 N.E.2d 761, 761-62 (Ind. Ct. App. 2002). We granted transfer.

. . . .

We have held more than once that P-C.R. 2(1) is a "vehicle for belated direct appeals alone." [Citation omitted.] It provides petitioners with a method to seek permission for belated consideration of appeals addressing conviction, but does not permit belated consideration of appeals of other post-judgment petitions. [Citation omitted.] More specifically, the Court of Appeals lacks subject matter jurisdiction over appeals other than direct appeals, unless such appeals or petitions are timely brought. Greer [v. State, 685 N.E.2d [700] at 703 [(Ind. 1997)]. This contrasts with its authority on matters such as tardy briefs, for example, which merely "subject the appeal to summary dismissal." App. R. 45(D).

In this case, Davis appealed the denial of his motion to correct an erroneous sentence. In State ex rel. Gordon v. Vanderburgh Circuit Court, 616 N.E.2d 8, 9 (Ind. 1993) (per curiam), we analyzed motions to correct erroneous sentence and held that they "must be considered . . . petition[s] for post-conviction relief." As such, the Court of Appeals was without authority to hear Davis' appeal because P-C.R. 2(1) does not permit belated appeals of motions to correct erroneous sentences.[4]

. . . .

[4] As for Davis' claim about consecutive sentences, we recently observed in Games v. State, 743 N.E.2d 1132, 1135 (Ind. 2001), that defendants who plead guilty to achieve favorable outcomes "give up a plethora of substantive claims and procedural rights," such as challenges to convictions that would otherwise constitute double jeopardy. Striking a favorable bargain including a consecutive sentence the court might otherwise not have the ability to impose falls within this category.

BOEHM, DICKSON, and SULLIVAN, JJ., concurred.
RUCKER, J., concurred in the result without filing a separate written opinion.

SCOTT v. STATE, No. 35A05-0109-CR-395, ___ N.E.2d ___ (Ind. Ct. App. July 18, 2002).
SULLIVAN, J.

The Class A felony required proof that Scott inserted his finger into the external genitalia of K.L.S. in order for the jury to find that he committed deviate sexual conduct. [Citations omitted.] The Class C felony required that the jury find that Scott had fondled or touched either K.L.S. or himself. [Citation omitted.] In this case, there is no possibility that the jury relied upon the same evidence to establish the separate convictions for either of the two different episodes in which the molestation took place. . . .

However, Scott also claims that we should apply a body of case law which is separate from the constitutional double jeopardy protections. In Pierce v. State, 761 N.E.2d 826, 830 (Ind. 2002), after determining that the Richardson double jeopardy test was not violated, our Supreme Court, in a unanimous opinion, noted that our courts "have long adhered to a series of rules of statutory construction and common law that are often described as double jeopardy, but are not governed by the constitutional test set forth in Richardson." Our Supreme Court then determined that Pierce's convictions violated the double jeopardy provisions which were in place before Richardson. Pierce, 761 N.E.2d at 830. Scott asks that we too apply the rules of statutory construction and common law which were in place before Richardson and determine that his convictions violate those prior prohibitions against double jeopardy.

Scott relies upon Watkins v. State, 575 N.E.2d 624 (Ind. 1991) (per curiam), Bowling v. State, 560 N.E.2d 658 (Ind. 1990), and Ellis v. State, 528 N.E.2d 60 (Ind. 1988) to support his contention that his convictions violate the pre-Richardson double jeopardy provisions. While Scott's argument may have merit under this line of cases, this court cannot address his contention under those cases. In Richardson, our Supreme Court explicitly stated that Ellis was superseded. 717 N.E.2d at 49. The holdings in both Watkins and Bowling were based upon the Supreme Court's prior decision in Ellis. Therefore, any "precedent" which may have existed to support Scott's contention is no longer controlling. While it does appear that our Supreme Court is willing to review double jeopardy claims under the rules of statutory construction and common law which were applicable before Richardson, this court does not have that ability regarding Scott's claim of double jeopardy. Absent some guidance from our Supreme Court in which it authorizes review of double jeopardy claims following multiple convictions for child molesting utilizing an analysis outside of the constitutional protections provided by Richardson, we may apply only the constitutional tests.

. . . .

BAKER, J., concurred.

DARDEN, J., concurred in the result without filing a separate written opinion.

CIVIL LAW CASES

ESTATE OF SEARS v. GRIFFIN, No. 71S05-0207-CV-207, ___ N.E.2d ___ (Ind. July 24, 2002).

SHEPARD, C. J.

Griffin's automobile struck Evan as he was installing a traffic counting strip in a roadway on August 2, 1999, and he died from his resulting head injuries eight hours later. On January 26, 2000, Evan's parents David and Martha (Marci) Sears signed a release discharging Griffin from all claims arising from the accident in exchange for the $50,000 limit of Griffin's liability insurance policy.

On May 8, 2000, Marci Sears sued Griffin as administratrix of Evan's estate, seeking survival and wrongful death damages. She also sought wrongful death damages as next friend of her daughter Elizabeth, who was twelve when Marci signed the release. . . .

. . . .

Indiana's general wrongful death statute ("WDS") allows personal representatives of decedents' estates to recover damages on behalf of surviving spouses, dependent children or next of kin, and service providers such as funeral homes. Ind. Code Ann. § 34-23-1-1 (West 1999). Our child wrongful death statute ("CWDS") allows parents or guardians to obtain damages for the wrongful death of unmarried children who had no legal dependents and were under twenty years of age (or under twenty-three and still in school). [Footnote omitted.] [Citation omitted.] . . .

. . . .

[T]he question whether Elizabeth qualified as a dependent is important in evaluating the estate's wrongful death claim because the determination of which statute applies (WDS or CWDS) turns on whether Evan died "without dependents." Ind. Code § 34-23-2-1(a).

. . . .

Although Elizabeth undoubtedly "depended" on her older brother in the everyday sense of the word, the legal definition is what matters here. The complaint alleged that Elizabeth was dependent on Evan for "love, affection, support, transportation, comfort, counseling, and guidance." [Citation to Record omitted.]

Although the record is not yet developed, it would be quite unusual for a twelve-year-old with both parents living to be dependent on her teen-age sibling for services and/or financial support that the parents could not or would not provide in that sibling's absence.

Services must go beyond merely helping other family members, even those who have relied on that assistance. . . .

The support must also be more than just a service or benefit to which the claimed dependent had become accustomed. . . .

We find no cases establishing dependency for purposes of the WDS based on purely emotional support, or on financial support and/or services that parents were capable of providing and would be obligated to provide in the absence of a deceased sibling. Unless more than this is proven on remand, Evan died without legal dependents and recovery for his wrongful death lies under the CWDS, not the WDS. [Footnote omitted.]

. . . .

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

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

The issue in this case is whether there is a claim for the death of Evan Sears, age 18,

under the Wrongful Death Statute, or under the Child Wrongful Death Statute. There cannot be both. Either Evan did or did not have a "dependent" within the meaning of those statutes. If he did, a WDS claim is available to the personal representative of the decedent, but there is no CWDS claim. If he did not, a CWDS claim is available to his parents, but there is no WDS claim. His parents presented a CWDS claim, received the insurance limits in settlement, and executed the release of all claims described in Judge Baker's dissent. [Citation omitted.] His mother then turned around and, assuming the role of personal representative, presented a WDS claim on the inconsistent and wholly implausible theory that Evan's twelve-year-old sister was his dependent. I would affirm the trial court's dismissal of this claim on two grounds: (1) Evan's sister is not, as a matter of law under these pleadings, a dependent of Evan; and (2) his mother is estopped from presenting herself as a prospective personal representative to pursue this spurious claim after she sought and obtained recovery under an inconsistent theory.

R. L. McCOY, INC. v. JACK, No. 49S02-0112-CV-658, ___ N.E.2d ___ (Ind. July 24, 2002).
BOEHM, J.

In Mendenhall v. Skinner & Broadbent Co., Inc., 728 N.E.2d 140 (Ind. 2000), this Court held that under the Comparative Fault Act no credit should be given to non-settling defendants for amounts paid for the same injury by settling defendants who were not non-party defendants at trial. This case presents the question explicitly left unresolved by that opinion: under Indiana's comparative fault regime, where defendants are severally liable, does a defendant who goes to trial get credit for amounts paid by nonparty defendants who settled the plaintiffs' claims against them? We hold that they do not.

. . . .

Jack and his wife, Amy, sued the State of Indiana, Indiana Department of Transportation ("INDOT"), R.L. McCoy, Inc. ("McCoy"), the contractor hired by INDOT for the project, and S.E. Johnson Companies, a subcontractor of McCoy. [Footnote omitted.] Before trial, the Jacks and McCoy entered into a contract usually referred to as a "loan receipt" or "loan repayment" agreement. Under that arrangement, the Jacks released McCoy in return for a payment of $1.5 million. Repayment of a portion of that sum was governed by the following provisions:

> 7. The parties acknowledge that to the extent an as yet unquantified portion of the Settlement Payment would otherwise constitute a credit, setoff, or partial satisfaction to the benefit of any other defendant if it were not a loan, that as yet unquantified sum is a loan. Accordingly, to the extent that:
>
> a. The settlement payment exceeds a final non-party verdict (total damages suffered by the plaintiffs multiplied by the percentage at fault, if any, on the part of McCoy (against McCoy))
>
> AND
>
> b. If such excess of the settlement payment over the amount of the non-party verdict against McCoy would otherwise operate to reduce the amount which S.E. Johnson, Inc., the Indiana Department of Transportation, or the State of Indiana or any other defendant against whom a final jury verdict is rendered is obligated to pay as a result of the final verdict in said action, after all appeals have either been abandoned or exhausted, if it were not a loan,
>
> THEN
>
> The amount of the excess which would otherwise reduce the amount another defendant is obligated by a verdict to pay if the excess were not considered a

loan, must be repaid by Jack to McCoy.

The Jacks proceeded to trial against the State and Johnson. Pursuant to the Comparative Fault Act, Ind. Code § 34-51-2-14, Johnson asserted a nonparty defense against McCoy. The jury awarded Michael Jack $5,000,000 and Amy $400,000 before allocating the percentages of fault as follows: Michael Jack, 50 percent; State of Indiana, 25 percent; Johnson, 15 percent; and McCoy, 10 percent. The Jacks were precluded from recovery against the State because contributory negligence remains a complete defense to claims under the Tort Claims Act. I.C. § 34-51-2-2.

Under this verdict, Johnson was liable to the Jacks for $810,000 (15% of $5.4 million). Johnson moved for a setoff [footnote omitted] of $960,000 (the excess of McCoy's payment of $1.5 million over McCoy's liability of $540,000 under the jury's verdict). McCoy in turn moved for an order requiring the Jacks to repay this $960,000 to it. McCoy argued that this amount would constitute a credit benefiting Johnson if it were not a loan and thus must be repaid to McCoy, under the quoted paragraph 7 of the settlement agreement. The trial court denied both motions without discussion.

. . . .

Both parties agree that the condition for repayment to McCoy found in paragraph 7(a) of the settlement agreement was met by the jury's finding that McCoy was liable to the Jacks to the extent of $540,000, $960,000 less than the $1.5 million payment. The only issue is whether the additional condition found in paragraph 7(b) was also met. That issue turns on whether, in light of Indiana's Comparative Fault Act, that $960,000 would constitute a credit against Johnson's liability if McCoy had simply paid the amount to the Jacks in settlement, and had not entered into a loan receipt agreement. McCoy contends this issue was resolved in favor of credits in Mendenhall v. Skinner & Broadbent Co., Inc., 728 N.E.2d 140 (Ind. 2000). However, no party in Mendenhall raised the issue of the availability of credits generally under comparative fault. Mendenhall rejected credit for amounts from parties who are not named as nonparty defendants but, in footnote 2 of that opinion, expressly reserved the question of whether the Act "affects the traditional way in which our common law gives credits for settlement amounts when the settling defendant has been added as a nonparty." [Citation omitted.]

We have previously stated that credits, at common law, were a tool to avoid overcompensation of plaintiffs. [Citation omitted.] Equally important, credits were a tool to avoid a single defendant's bearing too much responsibility for the plaintiff's damages. These rules were developed in the pre-comparative fault era of joint and several liability. Under that common law regime, each defendant whose negligence contributed to the plaintiff's loss was liable for the entire amount of damages. Without credits for settlement payments by the other defendants, a defendant could be liable for an amount greatly in excess of its fair share, and the result was to overcompensate the plaintiff. . . .

In 1985, Indiana's comparative fault system addressed these problems in two respects. First, it replaced joint and several liability with several liability, leaving each defendant responsible only for its share of the total liability. [Citations omitted.] Second, it permitted the assertion of a nonparty defense, allowing a defendant to prove the negligence of an absent or settling tortfeasor. [Citation omitted.] Thus the jury's apportionment of fault now provides a more complete picture of the relative responsibility for the plaintiff's injuries.

All of this led us in Mendenhall to hold that credits were no longer warranted in cases where the remaining defendant at trial did not assert a nonparty defense against a settling tortfeasor. In Mendenhall we pointed out that the remaining defendant in that case already had "a potent tool" to limit its liability—the nonparty defense. [Citation omitted.] Allowing

that defendant to resort to a common law doctrine to further reduce its liability made little sense "in light of the modernization of tort law represented by the adoption of comparative negligence." [Citation omitted.] That same logic applies in this case as well.

. . . .

Were credits still available under comparative fault, Johnson would lower its liability to an amount less than the jury's determination. Indeed, had Johnson succeeded in its attempt to have the amount it described as McCoy's $960,000 "overpayment" credited in its favor, Johnson's liability would have been eliminated despite its being found at greater fault than McCoy. Thus, elimination of credit requires the comparative fault defendant to pay for its own share, but no more. Nor is the plaintiff "overcompensated." . . .

. . . .

Because Johnson would not have received a credit had the agreement between the Jacks and McCoy not been a loan, the remaining issue is whether the agreement requires repayment by the Jacks of the $960,000 that exceeded the jury's determination of McCoy's liability. We conclude that it does not.

McCoy contends that if credits did not survive the Comparative Fault Act, then the entire settlement agreement is meaningless because the repayment provision could never be triggered. It alludes to explanatory language in the contract to support its contention that the purpose of the contract was to eliminate any overpayment by McCoy. There may be circumstances when a plaintiff would enter into such an agreement even though it produces a "heads we lose, tails we break even" deal for them by capping the defendant's liability at the lesser of the jury award or the settlement amount. In any event, McCoy concedes that repayment, if it is to occur at all, depends wholly on the provisions of paragraph 7. The parties are bound to the terms of that paragraph, and this Court is not free to alter them to conform to McCoy's understanding of their legal effect. [Citation omitted.] By its terms, the contract contemplates repayment to McCoy only to the extent it comes out of Johnson's pocket, not the Jacks'. Therefore, the Jacks are not obligated to repay any amount to McCoy.

. . . .

SHEPARD, C. J., and DICKSON, SULLIVAN and RUCKER, JJ., concurred.

HALEY v. HALEY, No. 87A01-0110-CV-392, ___ N.E.2d ___ (Ind. Ct. App. July 18, 2002).
SULLIVAN, J.

Mother also claims that the trial court erred in establishing her visitation schedule asserting that the trial court did not follow the Parenting Time Guidelines ("Guidelines") and that the established visitation was significantly less than Father had enjoyed without a specific order. . . .

We first note that a review of Indiana law reveals that no case has addressed the question of whether the Guidelines must be applied following a change of custody when the original custody determination was made before the Guidelines became effective. . . .

. . . .

A change in custody is not an act which requires the trial court to tweak an existing order by making a slight adjustment in the days one parent gets to visit with the child, or determine that weeknight visitation no longer is feasible because of a conflict with after-school activities. Instead, the change in custody results in the child being removed from one home and placed in another. The child's daily life will change with the adaptation to the new permanent surroundings and the various rules and strictures placed upon the child. It is the potential impact on the child from these changes which requires the showing of a substantial change in conditions before a trial court may entertain the request to change custody. It is also these reasons which demonstrate the similarity between a change in

custody and the entering of an original custody decree, which is subject to the Guidelines. Consequently, we hold that the Guidelines are applicable to a change in custody, even if the original custody determination was made before the Guidelines went into effect.

. . . .

BARKER and DARDEN, JJ., concurred.

INLOW v. ERNST & YOUNG, LLP, No. 49A05-0105-CV-225, ___ N.E.2d ___ (Ind. Ct. App. 2002).

DARDEN, J.

On May 21, 1997, Lawrence W. Inlow died as a result of a helicopter mishap. He died intestate, leaving a gross estate of approximately 180 to 185 million dollars, and was survived by a former wife and four children from his first marriage, as well as a wife and child from his second marriage. . . .

On June 4, 1997, Karl W. Kindig ("Kindig") was appointed as the successor personal representative for the estate of Lawrence W. Inlow. On August 24, 1999, the four Inlow children of the decendent's first marriage filed their complaint in Marion Superior Court. The Inlows alleged that Kindig hired Ernst & Young "to provide accounting services" for the estate; that Gooch, one of Ernst & Young's employees, was not a licensed certified public accountant "at the relevant times;" and that the accountants were negligent in that they did not "follow accepted accounting principles." [Citation to Brief omitted.] . . .

. . . .

On June 8, 2000, the trial court issued an order granting the accountants' motion to dismiss the Inlows' amended complaint, but it did not enter final judgment. On June 28, 2000, the Inlows filed their notice of appeal. On September 19, 2000, the trial court ordered the parties to enter into mediation.

While their appeal was pending, the Inlows and Kindig executed a mediated agreement on November 15, 2000. Under the agreement, (1) Kindig agreed to resign as personal representative; (2) the Inlows agreed not to sue Kindig; (3) the parties agreed to choose a successor personal representative; (4) Kindig and the successor personal representative would serve as co-administrators for a short period of time; (5) the successor personal representative would pay Kindig $200,000 for his past services rendered to the estate; and (6) Kindig and the successor personal representative would execute an assignment of rights, claims, and causes of action he may have had against the accountants in favor of the Inlows. . . .

. . . .

In support for their assertion that only the personal representative can bring suit against a professional hired by the estate, the accountants have cited numerous cases dating back before Indiana enacted its Probate Code in 1953. [Citations omitted.] . . .

. . . [T]he question remains: whether the enactment of the Probate Code prohibits heirs from bringing suit against professionals hired by the personal representative. . . .

. . . .

It is therefore clear that the Inlows, while potentially having a vested right of title in both real and personal property in the estate, have no right of immediate possessory interest in the real or personal property of the estate during its administration. This lack of immediate possessory interest and title in the estate brings into question whether the Inlows have standing and whether they are the real party in interest to bring this lawsuit. [Citation omitted.]

. . . Here, the Inlows are heirs at law to share in an estate worth 180 to 185 million dollars, and they have alleged a loss in value to the estate through the alleged malpractice and negligence of the accountants engaged by the personal representative. The Inlows'

status as heirs is evidence of their personal stake in the lawsuit, and the potential devaluation of their shares as a result of the alleged conduct of the accountants places them in immediate danger of sustaining a direct injury. Therefore, we find that the Inlows have standing.

However, we must now consider whether they are the real party in interest. Indiana Trial Rule 17(A)(1) reads as follows:

> (A) Every action shall be prosecuted in the name of the real party in interest.
>
> . . . .

We have held that "a real party in interest is the person who is the true owner of the right sought to be enforced. . . .

. . . [K]indig, as personal representative of the estate, is the real party in interest because, during the administration of the estate, he is the "true owner of the right sought to be enforced." [Citation omitted.] . . .

. . . .

BAILEY, J., concurred.

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

I respectfully dissent. I agree with the majority that pursuant to Trial Rule 17(A), Fifth Third Bank, as personal representative of the Estate, must be given a reasonable time to be substituted for the Inlows as plaintiff before the trial court can dismiss the action. However, I do not agree with some of the majority's reasoning, and I believe we must address the trial court's denial of the Inlows' second motion to amend the complaint to allow them to proceed as assignees of the claims of the personal representative against the defendants.

First, I think it is necessary to emphasize that "the Inlows" as referred to in the majority opinion and in this dissent are not <u>all</u> of the heirs of the intestate decedent. Rather, "the Inlows" are the four children of the decedent by his first marriage. His other heirs are his second wife and a child of his second marriage. Pursuant to Ind. Code § 29-1-2-1, the second wife is entitled to one-half of the Estate, while the five children are entitled to share equally the other half of the Estate. Consequently, the Inlows who brought this action collectively are entitled to four-tenths of the decedent's intestate Estate. By their action here, the Inlows seek to recover the entire amount by which the Estate allegedly has been reduced by the failings of the defendants. Any damage to an estate has its effect on all heirs according to their respective shares. Some of them should not be entitled to recover what is due to all of them. . . . I do not see that the Inlows have standing. . . .

. . . .

It is inconsistent with the regime established under the Probate Code to give standing to heirs, and most particularly only some heirs, to bring claims for damages to the property of the Estate when there is a personal representative charged with the obligation to bring such claims and subject to removal or liability for not meeting that obligation. [Citations omitted.] Consequently, I conclude that the Inlows have no standing to sue the Accountants for any shortcomings in their work for the personal representative of the Estate. [Citation omitted.] Having no standing, the Inlows also are not the real parties in interest under Ind. Trial Rule 17 to bring this lawsuit against the Accountants.

[T]he standing issue cannot be fully resolved unless we deal with whether the trial court erred by denying the Inlows' motion to allow the second amended complaint. In the second amended complaint, the Inlows asserted that the assignment of rights by the personal representatives, Kindig and Fifth Third Bank, gives them standing to sue the Accountants. If the assignment from the personal representatives is valid, the Inlows have standing on remand of this cause to pursue this claim as assignees of the estate's claim

against the Accountants, and the current personal representative would no longer be the real party in interest, having assigned its "interest" to the Inlows. If on the other hand, the assignment of rights is invalid, the Inlows remain without standing to pursue the claim against the Accountants, and the current personal representative remains the real party in interest who could proceed upon remand of this cause. . . .

. . . .

[A]ny loss or damage to the Estate caused by any acts or omissions of the Accountants was loss or damage to the Estate as a whole, affecting all heirs. Any claim for that loss or damage belonged to the Estate and could be brought by the personal representative. Kindig promised to assign the Estate's right to sue the Accountants to the Inlows upon the Inlows promise not to sue Kindig personally for his failings as personal representative. In essence, Kindig traded an asset belonging to the Estate for his own personal benefit. . . . Consequently, the agreement between Kindig and the Inlows is void, and the assignment of rights must be set aside. [Citations omitted.]

Because the agreement between Kindig and the Inlows by which Kindig traded the estate's assets for his own benefit is void, that agreement could not give rise to a valid assignment of rights by which the Inlows would have standing to sue the Accountants. . . .

. . . .

WYZARD v. WYZARD, No. 33A04-0109-CV-401, ___ N.E.2d ___ (Ind. Ct. App. July 18, 2002).

DARDEN, J.

Husband's expert further testified that based upon mortality tables and investment return rates, he valued Husband's current "vested pension benefits" from the Fund at $340,897.49. [Citation to Transcript omitted.] That value did not include any possible future cost-of-living increases in benefits. Wife's expert, who did include possible future cost-of-living increases in benefits, valued the pension at $518,174. . . .

The trial court found the value of Husband's pension to be $32,409.53, "as of July 1, 1999," based on
the following:

(a) [] Husband was eligible to retire as of the date of separation because he had completed 20 years of active service.

(b) [] Husband was not eligible to receive retirement benefits as he had not yet reached 55 years of age as of the date of separation.

(c) [] Husband's contributions to his retirement fund totaled $32,409.53 as of the date of separation. He is fully vested in this amount.

(d) [] Husband is on active duty and is not retired. [] Husband is not required to retire. If he dies prior to retirement, his survivors, or his estate would only receive his contributions, plus accumulated interest;

(1) If he has no survivors eligible for benefits under the retirement fund, his contributions, plus accumulated interest will be refunded to his estate.

(2) If he has survivors eligible for survivor benefits and the survivor benefits paid do not exceed his total contributions plus accumulated interest, the difference would be paid to his estate.

(e) [] Husband's benefits are exempt from attachment, garnishment, judicial process such as a Qualified Domestic Relations Order and he may not transfer, assign or sell his benefits.

(f) There is no pre-retirement survivor benefit annuity in the event that [] Husband would die prior to retirement.

(g) [] Husband will not be eligible to receive Social Security retirement benefits upon

retirement except through his part-time job.
(h) [] Wife will be eligible to receive Social Security retirement benefits upon retirement.
[Citation to Brief omitted.]
The trial court determined that the other marital assets totaled $165,172.50, resulting in a total marital estate of $192,582.03. The trial court then concluded that an equal division of the marital estate would not be just and reasonable and awarded 63% of the assets to Wife and 37% to Husband.

. . . .

Wife argues that the trial court abused its discretion when it found that Husband's pension as of July 1, 1999 had a value of only $32,409.53. We agree.

. . . .

It is undisputed that (1) at the time of the dissolution order, Husband was entitled to vested pension benefits from the Fund, [footnote omitted] and (2) the right to receive pension benefits was not contingent upon Husband's continued future employment. [Citation omitted.] It is also undisputed that the evidence before the trial court as to the value of Husband's pension plan, based upon the definition of how such a value is determined as explained by Husband's and Wife's experts, ranged between $340,897.49 and $518,174. Therefore, given the absence of any evidence to support the valuation given Husband's pension plan by the trial court, we find that the trial court abused its discretion when it did not value Husband's pension plan within the range of the evidence presented.

As to Husband's arguments that (1) if he "died prior to retirement the only funds that his estate would receive would be his contributions plus accumulated interest," and (2) he was "not eligible to receive Social Security benefits upon retirement except through a part-time job, but . . . [Wife] would be eligible to receive Social Security retirement benefits," Husband's Br. at 7, such may be proper considerations for the trial court in determining a just and reasonable division of the marital estate, [footnote omitted] but are *not* relevant to a determination of the value of Husband's vested and non-forfeitable pension plan.

. . . .

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

I respectfully dissent and part ways with the majority's decision to reverse this case because the trial court valued Joe's pension at $32,409.53. Although the trial court did not value Joe's pension plan within the range of the parties' expert testimony, the record shows that the trial court considered the amount of non-forfeitable funds and essentially awarded Bobbie a share of those benefits even though Joe would not be entitled to them in a lump sum at present, and would not be automatically entitled to those funds at the time of retirement. Thus, I cannot agree that there was an "absence of any evidence to support the valuation." [Citation omitted.]

. . . .

Inasmuch as Indiana has not squarely addressed the issue presented here regarding entitlement to social security benefits, a number of jurisdictions have recognized that, under certain circumstances, a trial court may consider reducing the present value of a pension by the amount that a person would have received under Social Security benefits as if the party had participated and contributed to that program.

. . . .

Thus, as recognized by our colleagues in Ohio, it is apparent to me that future payment of social security benefits should be subject to a trial court's evaluation when considering the distribution of the marital assets in an equitable fashion.

. . . .

It was agreed that Joe's estate might receive only $32,0000. [Citation to Brief omitted.] Moreover, it was established that Joe could not transfer his pension under the Fund to his heirs or a subsequent spouse as in the case of a typical pension.

Bobbie, however, could designate a beneficiary for her retirement benefits without fear that her heirs would receive no benefit of those funds. She also has social security benefits that provide monthly survivor benefits for a spouse in the event that she might remarry at a future date. Both parties recognized that the Fund was not subject to a Qualified Domestic Relations Order, [citation to Brief omitted], and the only value that Joe would receive might be the value of his own contributions at the time of his death.

Given such evidence, it is apparent to me that the trial court determined, based upon the totality of the circumstances, that a 50-50 division of the property between the parties was not appropriate. . . . [I]t is my view that the trial court's award to Joe of his firefighter pension under the Fund, in light of his ineligibility for social security benefits for his service as a firefighter, was not erroneous. I would affirm the trial court's judgment.

DREYER & REINBOLD, INC. v. AUTOXCHANGE.COM., INC., No. 49A02-0201-CV-19, ___ N.E.2d ___ (Ind. Ct. App. July 19, 2002).

BAKER, J.

[D]reyer & Reinbold claims that because AutoXchange failed to timely respond to its counterclaim, all matters alleged therein should have been deemed admitted pursuant to Ind. Trial Rule 8(D), and that AutoXchange's untimely Answer should have been stricken in accordance with Ind. Trial Rule 12(F). Concluding that motions under Ind. Trial Rules 8(D) and 12(F) are inappropriate avenues for relief when a responsive pleading is untimely filed, we affirm.

. . . .

[T].R. 8(D) states that averments are deemed admitted if not denied in the responsive pleading. However, the rule does not refer to the situation where a responsive pleading denying the averments is filed, but in an untimely manner. Put another way, the rule does not address the ramifications of a party's failure to comply with the trial rules. In contrast, Ind. Trial Rule 55, which governs default judgments, does address the appropriate remedy for such noncompliance, and provides, in relevant part:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise comply with these rules and that fact is made to appear by affidavit, or otherwise, that party may be defaulted.

(emphases supplied). [Footnote omitted.] Inasmuch as T.R. 8(D) does not similarly state that it applies to situations where a party has failed to comply with the requirements of the trial rules, we decline to extend its application beyond the plain language of the rule.

[T]he four cases that Dreyer & Reinbold relies upon to support its argument that the averments of AutoXchange's untimely answer should have been deemed admitted, are distinguishable from the situation presented here. . . . [T]hese cases are distinguishable from the case at bar because they involve situations where the party entirely failed to file a responsive pleading, rather than where the party responded but in an untimely manner. [Citations omitted.] While we do not condone untimely filing and failure to comply with the trial rules, we will not read into the rule that which does not appear. Accordingly, we construe T.R.8(D) as applicable only where no responsive pleading is filed whatsoever, or where such pleading is timely filed but fails to deny all of the averments contained in the pleading to which it responds.

Dreyer & Reinbold also contends that the trial court erred in denying its T.R.12(F) Motion to Strike AutoXchange's untimely Answer. . . . According to Dreyer & Reinbold, AutoXchange's late filing renders its Answer "insufficient" as a matter of law and subject to striking. However, the language permitting the trial court to strike "any insufficient claim or defense," is properly construed as providing a means to redress the legal insufficiency of the content or substance of the claim or defense, not the untimeliness of a pleading. [Footnote omitted.] Thus, a T.R.12(F) motion to strike was not the proper avenue for relief in this instance. Rather, as previously indicated, "[t]he proper procedure for challenging the timeliness of a pleading is to apply for default under Trial Rule 55, before the pleading is filed." [Citation omitted.]

. . . .

DARDEN and SULLIVAN, JJ., concurred.

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