

In the Supreme Court of Indiana

No. 53S00-0207-OR-_____

State of Indiana on the Relation of)
LEO E. HICKMAN, JR.,)
)
Relator,)
)
vs.)
)
The Monroe County Circuit Court,)
Pat Haley, as Clerk thereof, and)
The Honorable Viola J. Taliaferro,)
as Judge Thereof.)
)
Respondents.)

VERIFIED PETITION FOR WRIT OF MANDAMUS AND WRIT OF PROHIBITION

The Honorable Judge Viola J. Taliaferro is a distinguished jurist. Thomas M. McGlasson and Edward O. Delaney are experienced attorneys. But even the most distinguished and experienced of people make mistakes. This is not a petition about whether one or more of them may be disciplined. The Relator, Leo E. Hickman, Jr., (“Leo”) seeks a writ of mandate from the Supreme Court of Indiana so that he can get a fair and impartial judge. Leo also seeks a writ of prohibition, removing the judge of jurisdiction, and prohibiting the court from taking any action In the matter of the Guardianship of Josephine A. Hickman, Cause No. 53C07-0108-GU-60, until the Supreme Court assigns a special judge in this case.

Leo has two independent reasons that the Supreme Court should appoint a special judge. First, and the most serious, pursuant to Trial Rule 76(C)(6) Leo filed a verified application for change of judge because of Judge Taliaferro’s *ex parte* and

improper conduct in this case, which application she denied on July 24, 2002 (although a written order has not yet been signed). The inappropriate conduct started on June 25, 2002 when Joseph filed an *ex parte* motion for a temporary restraining order. Judge Taliaferro met and talked with Joseph's attorney, Mr. McGlasson, without Leo or any of his attorneys receiving any notice of the motion or the meeting. The judge signed a temporary restraining order that failed to comply with a prior order signed on August 28, 2001, failed to comply with virtually any requirement of Trial Rule 65, and stated that Leo and his attorneys had received notice and an opportunity to be heard before the judge signed it, which was not true.

Leo's affidavit more than supports a finding that Judge Taliaferro's impartiality might reasonably be questioned. It shows that this case is but another example of what the Supreme Court found improper in Kaufman v. Lake Circuit Court, 768 N.E.2d 431 (Ind. 2002); In the Matter of Wilder, 764 N.E.2d 617 (Ind. 2002); In the Matter of Anonymous, 729 N.E.2d 566 (Ind. 2000); and In the Matter of Jacobi, 715 N.E.2d 873 (Ind. 1999).

The second reason for a change of judge is that Leo filed a motion to dismiss the guardianship on March 20, 2002.¹ The trial court has never ruled on this, and

¹ On August 1, 2001 Joseph Hickman filed an *ex parte* petition for a temporary guardianship over his mother, Josephine A. Hickman, to which Leo objected. Joseph's petition did not include a request that a permanent guardian be appointed. After Leo was permitted notice and an opportunity to respond at a hearing, the trial court stayed Joseph's appointment as temporary guardian and set a further hearing for September 28, 2002, by which time he was supposed to have filed a petition for a permanent one. The Guardianship Code only permits a temporary guardian to be appointed for sixty (60) days. See Indiana Code Section 29-3-3-4. Joseph was asked by the trial court to file his petition for permanent guardianship so that a hearing could then be held on this matter

took four (4) months, not the thirty (30) days required under Trial Rule 53.1, to set it for hearing. On July 19, 2002, the court set Leo's motion to dismiss for hearing on July 24, 2002 and the motion to dismiss is now under advisement.

BACKGROUND

Josephine A. Hickman lives at Meadowood in Bloomington, Indiana. She has seven (7) children. One of her sons, Joseph Hickman ("Joseph"), filed an *ex parte* petition to be appointed her temporary guardian on August 1, 2001, which the trial court granted. After Leo objected, the trial court stayed Joseph's appointment. On August 29, 2001 the trial court signed an order that it would "not hear further evidence or issue further orders . . . until . . . further evidence can be heard." R.20. On March 19, 2002 Joseph filed a petition to be appointed Josephine's permanent guardian. Leo again objected, filed a counterclaim and a Jury request. R.7.

On June 20, 2002 the trial court set a trial date of August 8, 2002. Just five (5) days later, on June 25, 2002, Joseph filed a motion for a temporary restraining order, which Judge Taliaferro granted, *ex parte*.² On June 27, 2002 Leo responded,

within the sixty (60) day period. Rather than file the necessary petition, Joseph delayed filing his petition for permanent guardianship until March 19, 2002, a delay of over seven (7) months. Thus Joseph and the trial court have been able to continue a temporary guardianship proceeding for far more than the sixty (60) days allowed by the statute. This was the reason for Leo's first motion to dismiss.

² Since 1979 Josephine has been gifting all of her children an equal number of shares in Hoosier Outdoor Advertising Corporation. Leo has been the only one to receive voting shares and his siblings have received only non-voting shares. On July 19, 2001 Josephine made additional gifts to all of her children that gave Leo majority control of the Corporation. Leo immediately removed his siblings from the Board of Directors, who have never owned a single share of voting stock, and never can. Josephine's Will gives all of the voting shares to Leo, tax free. The only way for Leo's siblings to try and gain any voice in the Corporation is to obtain a guardianship over Josephine, and attempt to vote her stock (which is prohibited by the conflict of interest provisions in Indiana Code Section 29-3-8-5(a)(2)). When Leo's siblings were on the Board, they voted themselves

and moved the trial court to hold an immediate hearing on the matter. The judge never held a hearing on the temporary restraining order leaving the parties to appear on July 5, 2002 for a hearing on a preliminary injunction. The judge continued the temporary restraining order for another ten (10) days, and ultimately signed the preliminary injunction order on July 24, 2002.³

Joseph is represented in this matter by Mr. Thomas McGlasson, his firm of JONES, McGLASSON & BENCKART, Mr. Edward Delaney, Mr. Bart Karwath, Mr. Mark Crandley, and their firm of BARNES & THORNBURG. Leo is represented in this matter by Mr. Eric Allan Koch, his firm of APPLGATE, McDONALD & KOCH, and Mr. Curtis E. Shirley.

THE EX PARTE ORDER

To summarize the facts below, Judge Taliaferro met with Mr. McGlasson *ex parte*. Judge Taliaferro signed an *ex parte* temporary restraining order. Neither Joseph's attorneys nor Judge Taliaferro provided Leo or his attorneys with any

health insurance for life. Leo had the Corporation continue their health insurance (although they took the risk that the Plan would not pay any benefits because of a lack of an insurable interest) while everyone moved toward a possible settlement. After Joseph canceled the mediation, Leo agreed to pay their health insurance until the end of May, or until the end of June if they did not complain about that being the last month. R.99. The facsimile to Mr. McGlasson dated May 17, 2002 in the Record on page 99 shows more than just bad faith on the part of Joseph. **It shows that as of May 17, 2002 Joseph knew that Leo would not have the Corporation pay any additional health insurance premiums as of the end of June. Rather than file a motion with the trial court soon after May 17, 2002 so that everyone could appear for a hearing on the matter, Joseph waited until June 25, 2002 and created his own emergency to seek an *ex parte* temporary restraining order preventing Leo from cancelling his siblings' free health insurance.**

³ The primary reason for the length of time from the preliminary injunction hearing on July 5, 2002 until a ruling on July 24, 2002 was that on July 8, 2002 Leo removed the case to federal court because the injunctive relief involved ERISA matters. On July 19, 2002 the federal court remanded the case back to state court.

notice before she signed the restraining order. None of Joseph's attorneys provided the judge with any reason notice should not have been given. There is no allegation in the motion that immediate and irreparable injury would result if Leo or his attorneys were notified and given an opportunity to respond. Judge Taliaferro's order stated that "All adverse parties were given notice of the Petitioner's request for Temporary Restraining Order and this order is being granted with notice to all of the parties." This was not true. Joseph's attorneys delayed notice until after Judge Taliaferro had signed the temporary restraining order and after the Courthouse had closed.

In the cases of In the Matter of Wilder, 764 N.E.2d 617 (Ind. 2002), In the Matter of Anonymous, 729 N.E.2d 566 (Ind. 2000), and In the Matter of Jacobi, 715 N.E.2d 873 (Ind. 1999), the Supreme Court of Indiana held that these facts violated a variety of ethical canons and disciplined the attorneys and judges alike. This Court held that in addition to this conduct being improper, it challenges the very heart of our adversarial system of justice, undermines it, and threatens it. Wilder, Anonymous, and Jacobi hold that under the facts of the present case, Judge Taliaferro's actions created at the very least an appearance that she is not an impartial judge, that the resolution of the motion for a temporary restraining order was not a fair one, and that she did not respect or comply with the law (namely Trial Rule 65) such that Leo (and the public at large) has no confidence in her impartiality.

The following facts are not in dispute:

1. Joseph filed a motion for a temporary restraining order on June

25, 2002. R.8, 62.

2. One of Joseph's attorneys, Mr. Thomas McGlasson, met with The Honorable Judge Viola J. Taliaferro and handed her the motion. R.62 (and July 5, 2002 hearing still being transcribed).

3. Mr. McGlasson mentioned to Judge Taliaferro that Mr. Edward Delaney was also appearing for Joseph in this case; but the Judge denies that they otherwise talked about this case. Id.

4. Judge Taliaferro signed the temporary restraining order on June 25, 2002 before she provided Leo or any of his attorneys with any notice or an opportunity to be heard. R.8, 63.

5. The order that the Judge signed on June 25, 2002 states that "All adverse parties were given notice of the Petitioner's request for Temporary Restraining Order and this order is being granted with notice to all of the parties." This is not true.⁴ Id.

6. Neither Leo nor any of his attorneys were given notice of the request before the Court signed the Order. Leo had no opportunity to respond before the Court signed the Order. R.8, 63.

7. The first notice Leo or any of his attorneys received was a draft of the motion sent by Mr. Mark J. Crandley of BARNES & THORNBURG on June 25, 2002 at 6:31 p.m. by facsimile to Mr. Shirley, a copy of which is attached as Exhibit A hereto.

8. Then the next day, on June 26, 2002, Mr. Shirley received a hand delivery from Mr. Crandley that included a cover letter, filed stamped motion, and trial court orders, a copy of which is attached as Exhibit B hereto. It shows that Mr. McGlasson signed the motion and the Clerk file stamped it on June 25, 2002. It shows that Mr. McGlasson signed a certificate of service that he hand delivered a copy to Mr. Shirley on June 25, 2002, which is not true. It shows that BARNES & THORNBURG received all of this by facsimile from Mr. McGlasson on June 25, 2002 at approximately 5:00 p.m..

9. The unsigned draft attached as Exhibit A was not what was actually filed, and it was facsimiled by Mr. Crandley to Mr. Shirley over an

⁴ Even if Judge Taliaferro were to amend the restraining order to reflect that notice was not given, she would still have acted improperly because Trial Rule 65(B)(2) required her to state why she signed the restraining order without notice.

hour after BARNES & THORNBURG had received a file stamped original (of Exhibit B) from Mr. McGlasson because it was “misrouted” and Mr. Crandley “was unaware that it had been received.”

10. In any event, Exhibits A and B show that the soonest Mr. Shirley was to receive a copy of Joseph’s motion filed on June 25, 2002 and the trial court’s order signed that day was after the Court and Clerk’s offices had closed.

11. All of the effort to hand deliver or facsimile a copy of the motion for a temporary restraining order filed by Mr. McGlasson in Bloomington, Indiana to Mr. Shirley in Indianapolis, Indiana ignores the fact that Mr. McGlasson took no opportunity on June 25, 2002 to inform Mr. Koch, Leo’s other attorney, in his office there in Bloomington. Mr. McGlasson could have placed the motion in Mr. Koch’s mailbox at the Courthouse immediately after filing it with the Clerk. Or Mr. McGlasson could have walked the two blocks from the Courthouse to Mr. Koch’s office and hand delivered a copy. None of this was done. R.66.

12. Trial Rule 65(B)(1) required that Joseph’s motion for a temporary restraining order verify that irreparable injury will result to him “before the adverse party or his attorney can be heard in opposition”. This was not done. R.62-63.

13. Trial Rule 65(B)(2) required that one of Joseph’s attorneys certify to the Court “in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.” Neither Joseph nor any of his attorneys made any allegations concerning these requirements in the motion. Id.

14. During the hearing on July 5, 2002, in response to Mr. Shirley’s questions, Judge Taliaferro gave no explanation as to why the June 25, 2002 order was signed without notice to Leo or his attorneys. The judge gave no explanation as to why the Order states incorrect facts (namely, that it was signed after notice and an opportunity for Leo to be heard). The judge gave no explanation as to why she signed an order without specific findings of fact or conclusions of law. The judge gave no explanation as to why no bond was required. The judge gave no explanation as to why Leo’s motion to vacate the temporary restraining order was never set for hearing. If Judge Taliaferro had time to talk *ex parte* with Mr. McGlasson, she certainly had a few minutes’ time between June 27, 2002 and July 5, 2002 to have a similar discussion in the presence of all attorneys. R.68.

15. At the hearing on July 5, 2002 Joseph’s attorney, Mr. Delaney,

vigorously objected to Mr. Shirley's continued inquiries of Judge Taliaferro and she made no further effort to explain the nature of the *ex parte* meeting with Mr. McGlasson or the *ex parte* order previously signed. The judge has made no effort to assure Leo that what occurred on June 25, 2002 will not impact her rulings in this case. R.69.

All of the Supreme Court's criticisms of the attorneys and judges in Wilder, Anonymous, and Jacobi apply in the present case. At a minimum, Judge Taliaferro should have telephoned Mr. Koch or Mr. Shirley while Mr. McGlasson was there in person before signing the June 25, 2002 temporary restraining order, especially because of the extreme remedy it afforded, and from such an order there was no possible appeal.

TRIAL RULE 65 IGNORED

From In the Matter of Anonymous, 729 N.E.2d 566 (Ind. 2000), the Supreme Court of Indiana held that "lawyers seeking emergency relief must provide adequate notice to opposing parties or comply strictly with the provisions of Ind.Trial Rule 65(B)." This section will show that despite the problem of no notice and the *ex parte* nature of what occurred, Joseph's attorneys and Judge Taliaferro also ignored the requirements of Trial Rule 65(B). There was no attempt at strict compliance.

The following facts are not in dispute:

1. Trial Rule 65(B) states that "Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance." (Emphasis added). The temporary restraining order has no reference to the hour Judge Taliaferro signed it.⁵ See Exhibit B attached hereto.

⁵ This should not be seen as a minor oversight. Had this been done (or had the attorney who drafted the order placed a blank line for the time), everyone would have a better understanding of how much time the judge and Joseph's attorneys had to either deliver a copy of the motion to Mr. Koch's office two blocks from the Courthouse, or pick

2. Trial Rule 65(B) required the trial court to set the motion for a preliminary injunction for hearing “at the earliest possible time.” This was not done. The trial court set the hearing for July 5, 2002, at the end of the ten (10) day period and at the latest possible time. Id.

3. Leo served his response to Joseph’s motion for injunctive relief on June 27, 2002 requesting that the trial court dissolve the temporary restraining order. R.63-64. Judge Taliaferro never ruled on the motion or scheduled a hearing prior to July 5, 2002. R.9.

4. Trial Rule 65(C) required Joseph to give security, “for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.” Neither Joseph’s motion nor the judge’s order mentioned a bond, and none was posted.⁶ R.64.

5. Trial Rule 65(D) required that “Every order granting temporary injunction and every restraining order shall include or be accompanied by findings as required by Rule 52.” Judge Taliaferro did not do this. R.64.

6. Joseph filed the motion for a temporary restraining order in part alleging that Leo violated the trial court’s order dated August 28, 2001. R.64-65. Any problem with that order should have been addressed by a motion to show cause as to why Leo should not have been held in contempt. The judge’s order dated July 25, 2002 admits as much when she states that she

up the telephone and contact either of Leo’s attorneys.

⁶ The injunction was essentially about Leo’s siblings receiving free health insurance from Hoosier Outdoor Advertising Corporation. The fact that Joseph sought relief for his siblings who are not parties to this proceeding, and the fact that Joseph sought to affect the Corporation’s ERISA plan, which Corporation is also not a party to this proceeding is left for another day. What is important is that the order involving health insurance was simply about money. The damages would be the amount of the premiums, and the possible damages that could occur should the trial court’s order cause Principal Financial to cancel the Corporation’s benefit plan. See Ross v. Felter, 123 N.E. 20 (Ind. 1919). The bond would also have to be high enough so that Leo could recover any personal expenses and the loss of time spent on the matter, as well as include the amount of his attorney fees should the injunction at any time be dissolved or held improper. See Palace Pharmacy, Inc. v. Gardner & Guidone, Inc., 329 N.E.2d 642 (Ind.App. 1975); City of Elkhart v. Smith, 191 N.E.2d 522 (Ind.App. 1963). In hindsight, Joseph’s attorneys argued that his initial fiduciary bond filed on September 25, 2001 in the amount of \$75,000.00, see R.6, to act as temporary guardian should cover this as well. Leo obviously disputes this, but for current purposes it is important to note that Judge Taliaferro’s preliminary injunction signed on July 24, 2002 adopting Joseph’s findings of fact was the first time the trial court accepted this argument.

signed the order “to prevent a violation of this Court’s order of August 28, 2001.”⁷ See Exhibit B attached hereto.

7. Judge Taliaferro also violated her own August 28, 2001 order. Therein the trial court stated that “The Court will not hear further evidence or issue further orders regarding the guardianship of Josephine A. Hickman until such time as a report from said appointees and further evidence can be heard.” (Emphasis added). R.20. On June 25, 2002 Judge Taliaferro did not comply with her own order and has never amended, vacated or otherwise changed its terms.

8. In addition to all of the problems identified above concerning the temporary restraining order signed on June 25, 2002, Judge Taliaferro violated many of the same rules in extending the temporary restraining order on July 5, 2002 for another ten (10) days. On July 5, 2002 Judge Taliaferro knew for certain that Trial Rule 65 required specific findings under Trial Rule 52. Yet none were signed on July 5, 2002. R.9-10, 69. The judge requested proposed findings for a ruling on a possible preliminary injunction, R.70, but they were needed on June 25, 2002 and on July 5, 2002 to extend the order. She also extended the temporary restraining order without requiring Joseph to post a bond. R.70.

Because of the *ex parte* events condemned in Wilder, Anonymous, and Jacobi, and because of the failure to comply with so many of the requirements under Trial Rule 65 in order to obtain such emergency relief, no reasonable person reviewing this case could believe that Judge Taliaferro is impartial. At a minimum Leo has a reasonable basis to question such impartiality.

The Supreme Court of Indiana should issue a Writ of Mandamus and appoint

⁷ In essence Joseph obtained an order from Judge Taliaferro finding Leo in contempt of the August 28, 2001 order, and she changed the terms of that agreed order, all without giving Leo or his attorneys notice or an opportunity to be heard. R.65. Indiana Code Section 34-47-3-5 required Joseph to have served Leo with the rule of court he allegedly violated, and “clearly and distinctly set forth the facts which are alleged to constitute such contempt”, including the time and place of such facts, with reasonable certainty, and the trial court must then set the matter for hearing so that Leo is extended a “reasonable and just opportunity to purge himself of contempt.” Nat. Educ. Ass’n. v. South Bend Schools, 655 N.E.2d 516, 522 (Ind.App. 1995); Bottoms v. B & M Coal Corp., 405 N.E.2d 82, 94 (Ind.App. 1980). Judge Taliaferro signed the June 25, 2002 (temporary restraining) order without such a hearing.

a Special Judge in this matter to accept jurisdiction as of Joseph's motion for a temporary restraining order filed on June 25, 2002. Leo deserves a fair hearing on the matter.

DELAY UNDER TRIAL RULE 53.1

Leo filed a motion to dismiss the guardianship on March 20, 2002. R.16. The trial court has never ruled on this, and took four (4) months, not the thirty (30) days required under Trial Rule 53.1, to set it for hearing. On July 19, 2002, the Court set Leo's motion to dismiss for hearing on July 24, 2002 and it is now under advisement. R.11. On April 4, 2002 the trial court ordered the parties to appear for mediation with Mr. Thomas R. Lemon on May 22, 2002. R.77. Joseph's attorney canceled the mediation, which is shown by Mr. Lemon's letter to the trial court filed on May 13, 2002. R.97. Leo filed a motion to hold Joseph in contempt for violating the mediation order, R.79, but the trial court summarily denied it on July 24, 2002.

The respondents will argue that the motion to dismiss need not have been set for hearing or ruled upon because the trial court had ordered the parties to mediation. Leo has three replies: (1) the Supreme Court of Indiana's amendment of Trial Rule 53.1(B) to be effective April 1, 2002 should not be applied in this case; (2) even if the mediation exception applies, Mr. Thomas R. Lemon sent a letter to all attorneys and the trial court stating that the mediation date had been canceled by Joseph's attorney (which is a "report ... submitted to the Court") that does not permit the trial court to ignore the outstanding motions; and (3) Joseph cannot be heard to assert any mediation exception when he violated the mediation order.

Joseph filed his petition for guardianship on August 1, 2001. From then until April 1, 2002, Trial Rule 53.1(B) did not include any provision excluding days from computation based upon mediation. The Supreme Court of Indiana changed Trial Rule 53.1(B) effective April 1, 2002. But the Supreme Court of Indiana has also held that these amendments do not apply retroactively. See e.g., Ray-Hayes v. Heinemann, 768 N.E.2d 899 (Ind., May 29, 2002). Considering that Joe filed his original petition and Leo filed his motion to dismiss prior to the April 1, 2002 amendment of Trial Rule 53.1, any mediation exception should not apply in this case.

Even if the new Trial Rule 53.1 applied, the mediator, Mr. Thomas Lemon, did report to the trial court concerning the mediation by his letter dated May 8, 2002. R.98. The Clerk noted the receipt of this letter on the CCS entry dated May 13, 2002. R.8. Once Mr. Lemon reported to the trial court, any extension under Trial Rule 53.1 no longer applied. The trial court could have extended its order dated April 4, 2002, but it expired by its very nature on May 22, 2002 (when the trial court ordered the parties to mediate). Mr. Lemon's letter cannot serve as a court—ordered continuance.

From the trial court's perspective, on April 4, 2002 there is an order to mediate on a specific date, May 22, 2002. R.77. Such an order is self executing. Once May 22, 2002 came and went either the order would have been obeyed or another motion or order would have to be signed in its stead. When the mediator reported to the trial court that mediation did not occur, R.97, this did not then somehow excuse everyone from the April 4, 2002 order. Mr. Lemon's report was not

a motion to continue the mediation. From May of 2002 until today Joseph has made no attempt to reschedule the mediation. But the important point is that after May 22, 2002 mediation was no longer a requirement. At the very least on that date the time limits under Trial Rule 53.1 should continue or restart.

The motion to dismiss was filed on March 20, 2002. R.16. By the April 4, 2002 mediation order, fourteen (14) days had passed. After the trial court received the report of mediation on May 13, 2002, another forty six (46) days passed before Leo filed his Praecipe. The trial court had time to rule on a petition to set a trial date, which was granted, and had time to rule on an *ex parte* motion for a temporary restraining order, which was granted. The trial court certainly had time to either rule on Leo's motion to dismiss or set it for hearing. Leo filed his praecipe with the Clerk on June 28, 2002. R.13. The Clerk denied it on July 5, 2002. R.61.

The Supreme Court should consider that the parties have not mediated this case.⁸ Joseph delayed mediation under the auspices of rescheduling it until June or July when he talked with Mr. Lemon, R.97, and rescheduling it in August when he wrote his next letter about it, R.98. Joseph never sought leave of the trial court to continue the mediation, and indeed has made no attempt to reschedule the mediation with Mr. Lemon. Such self serving delay cannot permit him to respond to any Trial Rule 53.1 motion with clean hands. This was the reason for Leo's motion for show cause as to why Joseph should not be held in contempt. R.79.

⁸ At the recent hearing on July 24, 2002, Leo's attorneys asked that the Court order another mediation date, but Joseph's attorneys objected and Judge Taliaferro declined to order it.

LEO MEETS ALL REQUIREMENTS OF AN ORIGINAL ACTION

Pursuant to the Rules of Procedure for Original Actions (specifically Orig. Act. R. 3(A)), Leo herewith states all facts necessary for the Court's consideration:

(1) The Supreme Court has jurisdiction over the application as an original action: First, this matter involves the refusal by the trial court to grant a change of venue from the judge pursuant to Trial Rule 76(C)(6). Original Action Rule 2(A) shows that "original actions involving a change of venue from the judge or county" are permitted even where Leo's motion was either "denied or not ruled upon timely". The Supreme Court of Indiana has exclusive jurisdiction over the supervision of judges (Appellate Rule 4(B)(2)), and the supervision of courts (Appellate Rule 4(B)(3)). The Supreme Court of Indiana reviewed a similar writ in Kaufman v. Lake Circuit Court, 768 N.E.2d 431 (Ind. 2002), where the relator challenged the trial Court's refusal to preclude an attorney's appearance because of a possible violation of the Indiana Code of Judicial Conduct. In Trojnar v. Trojnar, 698 N.E.2d 301, 303 (Ind. 1998), this Court agreed with The Honorable Judge Staton's dissenting opinion at 676 N.E.2d 1094, 1097 (Ind.App. 1997), which stated that "Under T.R. 76, an adverse ruling on a change of judge motion should be challenged by a petition for a writ of mandate to the Indiana Supreme Court." See Harvey, Indiana Practice, VI.4, Rule 76, pocket part p.174 (referring to the Court of Appeals opinion in Trojnar, "The dissent correctly states that an adverse or incorrect trial court ruling on a change of judge motion should be challenged by a petition for a writ of mandate in the Supreme Court").

Second, this matter involves the Clerk failing to comply with Trial Rule 53.1(E) (commonly known as the “lazy judge” rule), which can only be challenged by writ of mandamus. See Williams v. State, 716 N.E.2d 897, 900 (Ind. 1999); Weber v. Electrostatic Engineering, Inc., 465 N.E.2d 1152, 1153-1154 (Ind.App.1984); Strutz v. McNagny, 558 N.E.2d 1103, 1109-1110 (Ind.App.1990).

(2) This application is being made expeditiously after the jurisdiction of the respondent court became an issue. As to the first issue, the trial judge met *ex parte* with Joseph’s attorney on June 25, 2002. On July 1, 2002 Leo responded to Joseph’s motion for injunctive relief and moved for the judge to recuse herself. At the preliminary injunction hearing on July 5, 2002 the trial court refused to recuse herself. At that hearing Leo discovered more of the extent of the problem. After the case was removed to federal court on July 8, 2002 and remanded to the state court on July 19, 2002, Leo filed his verified petition for change of judge under Trial Rule 76(C)(6) on the next business day, July 22, 2002. The court denied the motion for change of judge on the morning of July 24, 2002 and signed the preliminary injunction at 5:00 p.m.

As to the second issue, Leo filed his praecipe to the Clerk of the Court to remove the case on the basis of Trial Rule 53.1 on July 2, 2002. The Clerk denied any change of judge on July 5, 2002. This writ is timely as to both matters.

(3) The respondent court has exceeded its jurisdiction and the respondent Clerk has failed to act when they were under a duty to act. The judge should have granted the Trial Rule 76 motion, and the clerk should have notified the judge and the Supreme Court that the case was withdrawn.

(4) The respondent court denied the motion for change of judge on July 24, 2002, and the respondent Clerk denied the Praeceptum to withdraw the case on July 5, 2002.

(5) The denial of the application will result in extreme hardship. As the Supreme Court stated in In the Matter of Jacobi, 715 N.E.2d 873, 875 (Ind. 1999), what occurred under similar facts “created a significant appearance of impropriety and potentially threatened the public’s confidence in the judicial system.” Leo should not have to face another day of the current trial judge’s jurisdiction in this case. The petition for guardianship has been pending since August 1, 2001. Yet since the judge has met *ex parte* with Joseph’s attorney and signed an *ex parte* temporary restraining order, trial in this matter is set for September 3, 2002. On July 24, 2002 the judge has signed a preliminary injunction order that will be the subject of a separate appeal, unless the Supreme Court of Indiana issues its writ effective as of June 25, 2002, permitting a special judge to hear any motion for injunctive relief.

(6) The remedy available by appeal will be wholly inadequate. In fact, should the Court not issue the writs, there can be no appeal of a

violation of Trial Rule 53.1(E). See again, Williams, 716 N.E.2d at 900 (and cases cited therein). As to the issue of change of judge for cause under Trial Rule 76, the writ is still proper so as to prevent Leo from having to proceed through a trial under these circumstances. Should the Supreme Court require an appeal of this issue through normal channels, then Leo will have to face trial before a judge he knows to be impartial, and on appeal Joseph could argue that Leo should have petitioned for mandamus as his only remedy because participating in the trial might waive Leo's right to appeal or otherwise permit him "two bites at the apple".

Pursuant to Original Action Rule 3(C) the record is included with this petition, along with a brief in support, proposed orders and proof of service. Attached to this petition (Exhibits A & B) are true and accurate copies of the correspondence Mr. Shirley received from Joseph's attorneys on June 25 and June 26, 2002.

WHEREFORE Leo E. Hickman, Jr., by counsel, requests that the Supreme Court of Indiana assign a Special Judge in this matter effective as of June 25, 2002 so that he or she has an opportunity to re-hear all motions that the trial court heard on that date, those that remain for ruling, and trial in this case.

I AFFIRM UNDER THE PENALTY OF PERJURY THAT THE FOREGOING STATEMENTS ARE TRUE AND CORRECT, this July 29, 2002.

Mr. Curtis E. Shirley, #15845-49