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IN THE  
COURT OF APPEALS OF INDIANA

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Steven Church,

*Appellant,*

v.

State of Indiana,

*Appellee.*

June 28, 2021

Court of Appeals Case No.  
21A-CR-68

Appeal from the Marion Superior  
Court

The Honorable Lisa F. Borges,  
Judge

Trial Court Cause No.  
49G04-2003-F1-10092

**Tavitas, Judge.**

### Case Summary

[1] Steven Church faces multiple counts of child molesting, as Level 1 felonies, and attempted child molesting, as Level 4 felonies. He brings this interlocutory

appeal from the trial court’s denial of his petition to take the deposition of the child accuser. The trial court denied Church’s petition for deposition pursuant to the “Depositions of certain child victims or alleged victims of a sex offense” statute, Indiana Code Section 35-40-5-11.5 (“the Act”). Finding the Act impermissibly conflicts with the Indiana Trial Rules governing the conduct of depositions, we reverse and remand.

### **Issues<sup>1</sup>**

[2] Church raises four issues on interlocutory appeal, which we restate as follows:

- I. Whether the Act constitutes an impermissible retroactively-applied statute.
- II. Whether the Act impermissibly conflicts with the Indiana Trial Rules.
- III. Whether the Act violates the separation of powers provision of the Indiana Constitution.
- IV. Whether the Act denies Church fundamental due process.

### **Facts**

[3] On March 10, 2020, the State charged Church with two counts of attempted child molesting, Level 1 felonies, and four counts of child molesting, Level 4

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<sup>1</sup> Because we find Issue II to be dispositive, we need not address Issues I, III, and IV.

felonies.<sup>2</sup> On March 18, 2020, the Act, codified at Indiana Code Section 35-40-5-11.5, took effect.

[4] On or about July 29, 2020, Church petitioned for authorization to depose the child victim (“the Petition”). Following a hearing and the parties’ submission of briefs, the trial court denied the Petition on December 3, 2020. The trial court cited the Act as its basis for denying the Petition. On December 15, 2020, Church moved to certify the order for interlocutory appeal; the trial court granted the motion that same day. This Court accepted jurisdiction, and Church now brings this interlocutory appeal.

### **Analysis**

[5] Although we ultimately resolve this appeal on one dispositive issue, we acknowledge the competing interests of the defendant and the State that are implicated by the remaining issues. The enactment of the Act requires courts to thread a fine needle, weighing among other things: (1) a defendant’s constitutional rights; (2) the “plausible” event of a defendant “attempt[ing] to utilize depositions as a harassment technique, by forcing his or her victims to unnecessarily relive the experience without the defendant having any real expectation of obtaining new information[,]” *Hale v. State*, 54 N.E.3d 355, 359-60 (Ind. 2016); (3) the likelihood that the State will enjoy unfettered access to

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<sup>2</sup> The State subsequently added one count of child molesting, a Level 4 felony, and revised the timeline associated with the charged offenses.

the child accuser to the accused’s detriment; and (4) the potential for a trial court to arbitrarily grant or deny leave to take the deposition of a child accuser. Because we can resolve Church’s appeal based on the conflict between the Act and the Indiana Trial Rules, we leave for another day—and express no opinion on—the merits of the remaining issues.

[6] Church argues, inter alia, that the trial court abused its discretion in denying his Petition to depose the child victim because the Act impermissibly conflicts with Indiana Trial Rule 26 and Indiana Trial Rule 30, governing discovery and depositions. The standard of review in discovery matters is limited to determining whether the trial court abused its discretion. *Hale*, 54 N.E.3d at 357 (quotations omitted).

[7] The Indiana Supreme Court “has recognized on multiple occasions that the Indiana Trial Rules ‘are designed to allow liberal discovery.’” “Trial courts have broad discretion on issues of discovery.” [ ] Matters of statutory interpretation present pure questions of law and are thus reviewed de novo. *Matter of M.S.*, 140 N.E.3d 279, 282 (Ind. 2020) (citing *In re Adoption of B.C.H.*, 22 N.E.3d 580, 584 (Ind. 2014)). We “presume[ ] that the legislature intended for the statutory language to be applied in a logical manner consistent with the statute’s underlying policy and goals.” *Id.* (quoting *Rodriguez v. State*, 129 N.E.3d 789, 793 (Ind. 2019)).

*Sawyer v. State*, No. 20A-CR-1446, slip op. at 3 (Ind. Ct. App. May 19, 2021).

[8] The instant dispute arises from the denial, pursuant to the Act, of Church’s request to take the deposition of the child accuser. “The [Act] is part of an

article construed to preserve and protect the rights to which a victim is entitled ‘without interfering with the rights of the accused to receive a fair trial . . . .’” *Id.* at 4 (quoting Ind. Code § 35-40-3-1). Applicable only to criminal cases “involving a child less than sixteen years of age who is the victim or alleged victim of a sex offense[,]” the Act provides, in part, as follows:

(c) A defendant may depose a child victim only in accordance with this section.

(d) A defendant may not take the deposition of a child victim unless the defendant contacts the prosecuting attorney before contacting the child, and one (1) or more of the following apply:

(1) The prosecuting attorney agrees to the deposition. The prosecuting attorney may condition the prosecuting attorney’s agreement to the deposition upon the defendant’s acceptance of the manner in which the deposition shall be conducted.

(2) The court authorizes the deposition after finding, following a hearing under subsection (f), that there is a reasonable likelihood that the child victim will be unavailable for trial and the deposition is necessary to preserve the child victim’s testimony.

(3) The court authorizes the deposition after finding, following a hearing under subsection (g), that the deposition is necessary:

(A) due to the existence of extraordinary circumstances; and

(B) in the interest of justice.

(e) If the prosecuting attorney does not agree to the deposition, the defendant may petition the court for authorization to depose the child victim under subsection (d)(2), (d)(3), or both subsection (d)(2) and (d)(3). Upon receipt of the petition, the court shall notify the prosecuting attorney and set a hearing to determine whether to authorize a deposition of the child victim, and, if applicable, to determine the manner in which the deposition shall be conducted.

(f) The court shall authorize the deposition of a child victim under subsection (d)(2) if the defendant proves by a preponderance of the evidence that there is a reasonable likelihood that the child victim will be unavailable for trial and the deposition is necessary to preserve the child victim's testimony.

(g) The court may not authorize the deposition of a child victim under subsection (d)(3) unless the defendant establishes by a preponderance of the evidence that the deposition is necessary:

(1) due to the existence of extraordinary circumstances;  
and

(2) in the interest of justice.

I.C. § 35-40-5-11.5. This Court has found that the Act is a procedural law, meaning that “[it] prescribe[s] the manner in which . . . rights and responsibilities may be exercised and enforced in a court.” *Sawyer*, No. 20A-CR-1446, slip op. at 5.

[9] Church alleges the existence of a direct conflict between the Act and the Indiana Trial Rules, where the former: (1) “empower[s]” the prosecutor, “at the outset to determine whether a deposition will even occur and under what conditions a deposition may occur”; and (2) “impos[es] [ ] several burdens upon a defendant to request a hearing and prove that the deposition is necessary . . . .” Church’s Br. p. 16.

[10] Church identifies conflicts between the Act and Indiana Trial Rules 26 and 30. We have previously summarized Indiana Trial Rule 26 as follows:

Ind. Trial Rule 26 provides that parties may obtain discovery by “depositions upon oral examination or written questions,” and indicates that, “[u]nless the court orders otherwise under subdivision (C) of this rule, the frequency of use of these methods is not limited.” Ind. Trial Rule 26(C) deals with protective orders and states that, upon motion and for good cause shown, the court in which the action is pending or “alternatively, on matters relating to a deposition, the court in the county where the deposition is being taken,” may make “any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following,” and it lists several examples, including that the discovery “not be had,” “may be had only on specified terms and conditions, including a designation of the time or place,” “may be had only by a method of discovery other than that selected by the party seeking discovery,” or that “certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.”

*Sawyer*, No. 20A-CR-1446, slip op. at 6.

[11] Indiana Trial Rule 30 provides in part as follows:

**(A) When depositions may be taken.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of twenty [20] days after service of summons and complaint upon any defendant except that leave is not required:

- (1) if a defendant has served a notice of taking deposition or otherwise sought discovery; or
- (2) if special notice is given as provided in subdivision (B)(2) [a subdivision regarding the taking of a deposition by the plaintiff] of this rule.

The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45 . . . .

[12] Under Indiana law, where a statute and the Indiana Trial Rules are “incompatible to the extent that both could not apply in a given situation,” *Bowyer v. Ind. Dep’t. of Nat. Res.*, 798 N.E.2d 912, 917 (Ind. 2003), “the rule governs on matters of procedure.” *Garner v. Kempf*, 93 N.E.3d 1091, 1099 (Ind. 2018) (citation omitted). Additionally, our Supreme Court has stated, unequivocally, that trial rules supersede procedural statutes. *See A.C. v. Ind. Dep’t. of Child Servs.*, 140 N.E.3d 279 (Ind. 2020).

[13] In *Sawyer*, this Court reversed the denial of Sawyer’s petition to depose his child accusers on the following basis:

Considering [the Act] in light of the Indiana Trial Rules, we find that they are incompatible to the extent that both cannot apply in Sawyer’s situation. [The Act] contemplates that a defendant “may depose a child victim only in accordance with this section,” whereas Ind. Trial Rule 26 provides that, unless in the case of



protective orders, the frequency of use of the discovery methods including depositions “is not limited,” and Ind. Trial Rule 30(A) provides that “any party may take the testimony of *any person, including a party, by deposition upon oral examination*” after commencement of the action. (Emphasis added). [The Act] further conflicts with the Indiana Trial Rules when it necessitates the prosecutor’s permission, *compare* Ind. Code § 35-40-5-11.5(d), *with* Ind. Trial Rules 30 and 45(D), and when it requires a defendant to move for a hearing when the permission sought is not forthcoming and otherwise places the burden of proof on the defendant at the contemplated hearing. *Compare* Ind. Code § 35-40-5-11.5(e)-(g), *with* Ind. Trial Rule 26(C).

*Sawyer*, No. 20A-CR-1446, slip op. at p. 7 (internal citations omitted).

Concluding that, “[b]ecause the procedural provisions in the statute conflict with those of the Indiana Trial Rules, the provisions of the Indiana Trial Rules govern,” the *Sawyer* panel reversed the trial court’s denial of Sawyer’s request to depose the child victim. *Id.*

[14] Here, as in *Sawyer*, the process prescribed in the Act for a defendant’s deposition of a child accuser is incompatible with that enumerated in Trial Rules 26 and 30 to such extent that the Act and the Trial Rules cannot both apply to Church. In such a scenario, we are compelled to find that the Trial Rules govern, *see Bowyer*, 798 N.E.2d at 917; because the trial court erroneously resolved the conflict in favor of the Act, we conclude that the trial court abused its discretion in denying the Petition. Accordingly, we reverse and remand. *See* I.C. § 34-8-1-3 (“The supreme court has authority to adopt, amend, and rescind rules of court that govern and control practice and procedure in all the courts of Indiana. These rules must be promulgated and take effect under the rules

adopted by the supreme court, and *thereafter all laws in conflict with the supreme court's rules have no further force or effect.*") (emphasis added).

## **Conclusion**

[15] The trial court abused its discretion in denying Church's Petition to depose the child accuser. We reverse and remand for proceedings consistent with this opinion.

[16] Reversed and remanded.

[17] Najam, J., and Pyle, J., concur.