

No. 19-_____

IN THE
SUPREME COURT OF THE UNITED STATES

Sabrina Graham,

Petitioner

v.

Thomas S. Wininger, deceased

Respondent

On Petition For Writ Of Certiorari
To the Court of Appeals of Indiana

PETITION FOR A WRIT OF CERTIORARI

Sabrina Graham, *pro se*
7210 E County Rd 700 N
Brownsburg, IN 46112
(812)583-0129

QUESTIONS PRESENTED

- 1) Whether Graham's substantial rights and right to procedural due process and fundamental fairness guaranteed by the Fourteenth Amendment were violated when the Indiana court in plain error affirmed the trial court judgment without having the trial court enter the required findings and conclusions pursuant to Rule 52 of the Indiana Rules of Trial Procedure, as requested; which decision conflicts with state and federal courts.
- 2) Whether the Indiana court, in affirming the trial court judgment, failed to properly discharge its appellate function under Rule 52 of the Indiana Rules of Trial Procedure, which specifies that when requested by the parties the trial court "shall find the facts specially and state its conclusions thereon", and "[t]he court's failure to find upon a material issue upon which a finding of fact is required by this subsection or this rule shall not be resolved by any presumption."
- 3) Whether the Indiana court violated procedural due process required by the Fourteenth Amendment and affected Graham's substantial rights with its failure to issue an opinion regarding Graham's entitlement to *quantum meruit/unjust enrichment* damages.
- 4) Whether the trial court violated the due process clause of the Fourteenth Amendment and affected Graham's substantial rights with its appearance of bias and failure to remain impartial.
- 5) Whether due process requires a ruling in Graham's favor on all applicable issues.

PARTIES TO THE PROCEEDING

Petitioner is Sabrina Graham, *pro se*. Respondent/Defendant is Thomas S. Wninger, now deceased. Wninger passed away on July 16, 2019 due to end stage cirrhosis.

Graham filed a motion for substitution of party with the Martin County Circuit Court of the State of Indiana on October 29, 2019 requesting that Michelle R. Wells, as Personal Representative of the Estate of Thomas S. Wninger be substituted as defendant in this matter. (App. 20a)

Indiana Probate Code, with respect to actions against the estate, Ind. Code § 29-1-14-2 provides:

[I]n instances where a cause of action was properly filed and commenced against a decedent prior to the decedent's death, the same shall be continued against the personal representative or successors in interest of the deceased, who shall be substituted as the party or parties defendant in such action.

David Smith, defendant's counsel of record, was granted leave to withdraw his appearance on November 12, 2019. (App. 21a)

At the date of printing this petition, Graham's motion for substitution of party remained pending.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING.....	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES.....	iv
PETITION FOR A WRIT OF CERTIORARI	1
INTRODUCTION.....	1
OPINIONS BELOW.....	2
JURISDICTION	3
CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED	3
STATEMENT	4
Required Findings and Conclusions were not Issued	5
<i>Quantum Meruit/Unjust Enrichment</i>	9
Contract Agreement	11
Unbiased Tribunal Required.....	13
Bias—Assumed Facts not in Evidence.....	14
Bias—Failure to Deem Ind. Trial Rule 36 Admission Conclusively Established.....	18
REASONS FOR GRANTING THE PETITION	21
A. The Indiana court decision, in affirming the trial court judgment without the required findings of fact and conclusions of law, is in conflict with state and federal courts.....	21
National importance	27
B. Proper appellate function and due process requires a determination on all issues	27
C. Due process requires an impartial and unbiased trier of fact.....	28

Bias—Assumed facts not in evidence.....	29
Bias—Failure to issue required findings and conclusions	30
CONCLUSION	31
APPENDIX	
Certification of the Court of Appeals of Indiana decision affirming the Trial Court judgment (October 9, 2019)..	1a
Memorandum Decision of Court of Appeals of Indiana Affirming the Trial Court judgment (July 2, 2019).....	2a
Order of the Court of Appeals of Indiana denying Petition for Rehearing (August 20, 2019)	17a
Order of the Indiana Supreme Court denying Petition for Transfer (October 3, 2019)	18a
Final Order of the Martin County Circuit Court of the State of Indiana (September 18, 2018).	19a
Motion for Substitution of Party in the Martin County Circuit Court of State of Indiana (October 29, 2019) ..	20a
Order of the Martin County Circuit Court of the State of Indiana Granting withdraw of defendants counsel of record (November 12, 2019).....	21a
Indiana Rules of Trial Procedure, Rule 36(relevant portions)	22a
Indiana Rules of Trial Procedure, Rule 52 (relevant portions)	23a

TABLE OF AUTHORITIES

Cases

<i>Arizona v. Fulminante</i> , 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).....	23
<i>Balicki v. Balicki</i> , 837 N.E.2d 532 (Ind. Ct. App. 2005)	24
<i>Barry v. State</i> , 850 S.W.2d 348 (Mo. banc 1993)	26
<i>Bayh v. Sonnenburg</i> , 573 N.E.2d 398 (Ind. 1991)	10, 27

<i>Berger v. United States</i> , 295 U.S. 78 (1935)	28
<i>Bowman v. Kitchel</i> , 644 N.E.2d 878 (Ind. 1995)	24
<i>City of Seattle v. Silverman</i> , 35 Wash.2d 574, 214 P.2d 180 (1950).....	30
<i>Crews v. State</i> , 7 S.W.3d 563 (Mo. App. 1999).....	26
<i>Dennis v. Denver & R.G.R.R.</i> , 375 U.S. 208 (1963)	23
<i>Dowdell v. State</i> , 720 N.E.2d 1146 (Ind. 1999)	24
<i>Estate of Prickett v. Womersley</i> , 905 N.E.2d 1008 (Ind. 2009).....	27
<i>Galloway v. State</i> , 938 N.E.2d 699 (Ind. 2010.)	15
<i>General Motors Corp. v. Aetna Cas. & Sur. Co.</i> , 573 N.E.2d 885 (Ind. 1991)	13, 18, 20
<i>In re Estate of Inlow</i> , 735 N.E.2d 240 (Ind. Ct. App. 2000).....	24
<i>In re Murchison</i> , 349 U.S. 133 (1955)	29
<i>In re Pers. Restraint of Breedlove</i> , 138 Wash.2d 298, 311, 979 P.2d 417 (1999)	25
<i>In re Visitation of M.L.B.</i> , 983 N.E.2d 583 (Ind. 2013)	24
<i>K.I. ex rel J.I. v. J.H.</i> , 903 N.E.2d 453 (Ind. 2009)	24
<i>Kelley v. State</i> , 988 S.W.2d 563 (Mo. App. 1999)	26
<i>Kent v. United States</i> , 383 U.S. 541, 86 S. Ct. 1045, 16 L.Ed.2d 84 (1966).....	30
<i>Lavender v. Kurn</i> , 327 U.S. 645 (1946).....	23
<i>Liljeberg v. Health Services Acquisition Corp.</i> , 486 U.S. 847, 108 S.Ct. 2194 (1988).....	28
<i>Love v. State</i> , N.E.2d 806, 810 (Ind. 2002).....	12, 9
<i>Mitchell v. Mitchell</i> , 695 N.E.2d 920 (Ind.1998)	22, 24
<i>Pfizer Inc. v. Lord</i> , 456 F.2d 532 (8th Cir. 1972)	28
<i>Pullman Standard v. Swint</i> , 456 U.S. 273 (1982).....	23, 25
<i>Romrell v. Zions First Nat. Bank, N.A.</i> , 611 P.2d 392 (Utah, 1980).....	23
<i>Schwartz v. Schwartz</i> , 773 N.E.2d 348 (Ind. Ct. App. 2002)	27
<i>Smith v. State</i> , 28 S.W.3d 889 (Mo. App. 2000)	25
<i>Spranger v. State</i> , 650 N.E.2d 1117 (Ind. 1995)	11
<i>State v. Charlie</i> , 62 Wn. App. 729, 815 P.2d 819 (1991)....	29
<i>State v. Deprow</i> , 937 S.W.2d 748 (Mo. App. 1997)	26

<i>State v. Head</i> , 136 Wash.2d 619, 624, 964 P.2d 1187 (1998)	24, 30
<i>State v. Helsel</i> , 61 Wash.2d 81, 377 P.2d 408 (1962)	30
<i>State v. Marchand</i> , 62 Wash.2d 767, 384 P.2d 865 (1963)	30
<i>State v. Naranjo</i> , 83 Wash.App. 300, 921 P.2d 588 (1996)	25, 30
<i>State v. Russell</i> , 68 Wash.2d 748, 415 P.2d 503 (1966)	30
<i>State v. Stanley</i> , 952 S.W.2d 327 (Mo. App. 1997)	26
<i>State v. Witherspoon</i> , 60 Wn. App. 569, 805 P.2d 248 (1991)	29
<i>State v. Wood</i> , 68 Wash.2d 303, 412 P.2d 779 (1966)	30
<i>Taylor v. O'Grady</i> , 888 F.2d 1189 (7th Cir. 1989)	28
<i>Thompson v. Thompson</i> , 286 N.E.2d 657 (Ind. 1972)	27
<i>United States v. Balistrieri</i> , 779 F.2d 1191 (7th Cir. 1985)	28
<i>United States v. Caro</i> , 597 F.3d 608 (4th Cir. 2010)	29
<i>United States v. Scheetz</i> , 293 F.3d 175 (4th Cir. 2002)	29
<i>Vanderburgh County Bd. of Comm'rs v. Rittenhouse</i> , 575 N.E.2d 663 (Ind. Ct. App. 1991)	22
<i>Ware v. State</i> , 560 N.E.2d 536 (Ind. Ct. App. 1990)	29
<i>Wehry v. Daniels</i> , 784 N.E.2d 532 (Ind. App. Ct. 2003)	19
<i>Willett v. Clark</i> , 542 N.E.2d 1354 (Ind. Ct. App. 1989)	23
<i>Woodruff v. Ind. Family & Soc. Servs. Admin.</i> , 964 N.E.2d 784 (Ind. 2012)	10
<i>Zedner v. United States</i> , 547 U.S. 489, 126 S. Ct. 1976 (2006)	25
<i>Zenith Radio Corp. v. Hazeltine Research, Inc.</i> , 395 U.S. 100, 89 S. Ct. 1562, 23 L.Ed.2d 129 (1969)	22
Rules	
<i>Fed. R. Civ. P.</i> 52(a)	22, 23
<i>Ind. Trial Rule</i> 36	passim
<i>Ind. Trial Rule</i> 52	passim
Constitutional Provisions	
<i>U.S. Const. amend. XIV</i> , § 1	passim

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sabrina Graham, *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Indiana in this case.

INTRODUCTION

This case presents an unsettled question of national importance involving a trial court's failure to follow procedural rules which are designed to ensure a fair and consistent application of due process. What course of action must an appellate court take when the trial court fails to issue specific findings and conclusions when procedurally required?

State and federal courts to consider this question have either 1) remanded the case back to the trial court to enter required findings and conclusions, or 2) reversed the judgment because of the appearance of unfairness.

The Indiana court followed neither remedy. Instead, it affirmed the judgment of the trial court without the required findings and noted “[a] better practice here would have been for the trial court to issue findings of fact and conclusions of law as required by Trial Rule 52, and we urge the trial court to issue the required findings of fact and conclusions of law in the future.” (App. 6a n.2)

Does allowing a trial court to disregard procedural requirements adversely affect substantial rights, violate fundamental rights, violate the Fourteenth Amendment constitutional right to procedural due process, and create the appearance of unfairness? Does this constitute plain error?

Because of the Indiana court's failure to properly discharge its appellate function, this Court should grant certiorari to review this case and provide direction to all courts on the proper course of action that is to be followed when a trial court fails to issue required findings and conclusions.

OPINIONS BELOW

Included in the attached appendix:

- Certification of the Indiana Court of Appeals Memorandum Decision affirming the trial court judgment, Graham v. Wininger, No. 1818A-PL-2262, dated October 9, 2019. (App. 1a)
- Graham v. Wininger, No. 18A-PL-2262, Memorandum Decision of the Court of Appeals of Indiana affirming the trial court judgment. Judgment entered July 2, 2019. (App. 2a)
- Graham v. Wininger, No. 18A-PL-2262, Order of the Court of Appeals of Indiana denying Graham's Petition for Rehearing. Judgment entered August 20, 2019. (App. 17a)
- Graham v. Wininger, No. 18A-PL-2262, Order of the Indiana Supreme Court denying Graham's Petition for Transfer. Judgment entered October 3, 2019. (App. 18a)
- Graham v. Wininger, No. 51C01-1512-PL-243, Final Judgment Order of the Martin County Circuit Court for the State of Indiana. Judgment entered September 18, 2018. (App. 19a)
- Graham v. Wininger, No. 51C01-1512-PL-243, Order of the Martin County Circuit Court for the State of Indiana granting Mr. Smith, counsel of record for defendant, leave to withdraw. Judgment entered November 12, 2019. (App. 23a)

Other orders of the of the Martin County Circuit Court for the State of Indiana, Graham v. Wininger, No. 51C01-1512-PL-243, not included in the appendix:

- Order Granting Wininger Leave to Withdraw Summary Judgment Motion, *post hearing*, over objection. Judgment entered July 28, 2017.

- Order Denying Re-opening of Graham's case, judgment entered August 25, 2017.
- Order Granting Wninger an extension of time to respond to Graham's Summary Judgment Motion, judgment entered October 6, 2017.
- Order Granting Wninger Leave to Reopen Discovery to take Graham's deposition before responding to her Summary Judgment Motion. Judgment entered October 6, 2017.
- Order Denying Graham's request for certification of orders for interlocutory appeal; Denying Graham's request to reopen case; and Granting Wninger's request to take deposition of Graham. Judgment entered December 19, 2017.
- Order Denying Graham's motion for summary judgment. Judgment entered February 28, 2018.
- Order Denying Graham's motion for attorney fees and sanctions. Judgment entered June 13, 2018.

JURISDICTION

The Indiana Supreme Court denied Graham's request for Petition for Transfer ("Transfer Pet.") on October 3, 2019 (App. 18a), making Graham's petition due January 1, 2020. Because this day is a holiday, the petition is due, January 2, 2020. The Ind. Court of Appeals issued a Memorandum Decision and affirmed the trial court's judgment on July 2, 2019 (App. 2a) and the decision was certified on October 9, 2019 (App. 1a). The Court of Appeals of Indiana denied Graham's Petition for Rehearing ("Rehearing Pet.") on August 20, 2019 (App. 17a). This Court has jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The relevant portions of Indiana Trial Rule 36 and Trial Rule 52 are reproduced at App. 22a-23a.

Indiana Probate Code, with respect to actions against the estate, Ind. Code § 29-1-14-2 provides:

[I]n instances where a cause of action was properly filed and commenced against a decedent prior to the decedent's death, the same shall be continued against the personal representative or successors in interest of the deceased, who shall be substituted as the party or parties defendant in such action.

STATEMENT

This is an appeal from a final decision entered July 2, 2019 (App. 2a) by the Indiana Court of Appeals. The decision was certified on October 9, 2019 (App. 1a) after the Indiana Supreme Court denied transfer on October 3, 2019. (App. 18a)

This litigation involves a dispute over payment for services Graham provided to Wininger. Wininger was Graham's older brother. Graham, between 1998 and 2013, assisted Wininger with filing claims for veterans' benefits and social security benefits, arranging medication and healthcare, and building a house. (App. 3a ¶3) Graham's and witness' testimony supports a contact agreement between the parties to compensate Graham \$221,574 or 50% of Wininger's lump sum payment, which was to be paid to Graham in late 2013. (Appellant Br. 12) Provided by testimony:

With Graham's assistance, Wininger's nature of discharge was reversed – it went from less than honorable to honorable for VA purposes – progressing from no benefits to over a million

dollars'. While Wininger did have an attorney at his social security hearing and the DAV represented Wininger, Graham did all of the time consuming research and grunt work. Not to mention the fact that Graham fronted Wininger the money to build his house. Graham made the house blueprints and actually labored in the construction of Wininger's home. Graham accompanied Wininger to hundreds of doctor appointments, often requiring her to take off of work. Compensation for these services was the reason for the 50% contract agreement.

Appellant Br. 23, 32¹.

In June 2015, Graham filed a complaint against Wininger alleging the following claims: (1) conversion; (2) fraud; (3) constructive fraud; (4) promissory estoppel and misrepresentation; (5) unjust enrichment and *quantum meruit*; (6) breach of oral contract; and (7) implied, constructive or quasi contract. Graham also requested treble damages and attorney fees. Graham was represented by Attorney Gregory Black during the majority of the proceedings.

(App. 4a) Due to financial constraints, after Wininger voluntarily withdrew his motion for summary judgment *post hearing*, Graham requested that Mr. Black withdraw from the case and she proceeded *pro se*. (Appellant Br. 10)

Required Findings and Conclusions were not issued

Graham's counsel filed a written request for findings of fact and conclusions of law on all issues as required pursuant to the Indiana Rules of Trial Procedure, Rule

¹When quoted from the record most citations to the record have been removed.

52(A). (App. 6a no.2) The trial court requested that both parties submit proposed findings of fact and conclusions of law (“FFCL”), which is allowed, pursuant to T.R. 52(C), in any case where special findings are to be made. (App. 23a) The trial court requested the parties to not only electronically file their proposed FFCL but to email, in word form, their proposed FFCL so that she would be able to cut and paste from those and then add in her own FFCL. (Tr. Vol. 4, 93:11-94:23) The court questioned the parties if they would have any problem if she took up to ninety two days, after their proposed findings and conclusions were filed to issue her ruling. (*Id.*) The trial court on September 18, 2018, following the bench trial, entered the following order:

1. Judgment in favor of the Plaintiff, Sabrina Graham, in the amount of Six Hundred Dollars (\$600.00) and against Defendant, Thomas Wininger, for monies due and owing to the Plaintiff which she expended for the completion of the building of Defendant’s home.
2. Judgment in favor of Defendant, Thomas Wininger, and against Plaintiff, Sabrina Graham, for all other claims and relief requested in Plaintiff’s Complaint.

(App. 19a) This order failed to meet the Ind. T.R. 52(A) procedural requirements, which required the trial court to find the facts specially and state its conclusions thereon, as requested. (App. 23a) Pursuant to Ind. T.R. 52(D) the only time a trial court may make special findings of fact upon less than all the issues in a case when they have been requested is if findings were only requested on specific issues and the court’s failure to find upon a material issue, upon which a finding of fact is required, shall not be resolved by any presumption. (App. 23a)

In Graham’s appellant brief she raised the following issues:

1. Whether the trial court was biased and failed to remain impartial. 2. Whether the trial court violated Graham's due process rights, constituting fundamental error. 3. Whether the trial court erred as a matter of law and/or abused its discretion by: A. refusing Graham the right to call Wininger as her first witness. B. failing to deem Wininger's admission conclusively established and excluding evidence and testimony essential to Graham's case-in-chief. C. granting Wininger leave to file for summary judgment after Graham's case-in-chief and before Wininger put forward his defense. D. granting Wininger leave to voluntarily withdraw his summary motion, after the summary judgment hearing, over objection. E. denying Graham's motion to re-open her case following Wininger's withdrawal of his summary motion and before Wininger had presented his case-in-chief. F. granting Wininger leave to reopen discovery (nearly a year after discovery had closed, and after he had already filed for summary judgment which he withdrew post hearing) to depose Graham before responding to her summary motion and granting enlargement of time. G. failing to grant summary judgment in favor of Graham. H. denying Graham's motion for attorney fees and sanctions. I. entering judgment in favor of Graham for only \$600 for monies owed to her and entering judgment in favor of Wininger on all other claims and relief requested in Graham's complaint.

(Appellant Br. 8-9) Graham informed the court that:
The parties moved for submission of findings of facts and conclusions of law ("FFCL") pursuant to Ind. Trial Rule 52, to which the

court agreed and submission dates were set. Both parties submitted proposed FFCL, yet the final judgment failed to contain findings.

(Appellant Br. 8) Regarding the failure of the trial court to issue the required Trial Rule 52 findings the Ind. Court of Appeals decision provided:

Graham very briefly mentions the trial court's lack of findings of fact and conclusions of law. Although Graham's counsel filed a written request for findings of fact and conclusions of law pursuant to Indiana Trial Rule 52 and the parties submitted proposed findings, the trial court failed to issue findings of fact and conclusions of law. A better practice here would have been for the trial court to issue findings of fact and conclusions of law as required by Trial Rule 52, and we urge the trial court to issue the required findings of fact and conclusions of law in the future. Graham, however, made no argument in her brief regarding this issue and cites no authority, and accordingly, the issue is waived.

(App. 6a no.2) The court affirmed the trial court ruling, providing that "[t]he trial court's judgment against Graham regarding the lack of existence of an oral agreement with Wninger was not contrary to law." (App. 16a)

However, on appeal Graham did raise the question as to whether the trial court judgment was in error. Further, Graham had informed the court of the trial court's failure to include the required findings and conclusions. (Appellant Br. 8) Graham included facts in evidence and testimony which supported a judgment in her favor (*Id.* 11-21) and she argued that the trial court erred in its ruling and that the evidence clearly supported a judgment in her favor. (*Id.* 28-56) Graham provided evidence of bias and instances of the trial court's failure to remain impartial (*Id.* 21-27, 38-51) and she argued that if the court determined there was

no contact agreement, she was entitled to *quantum meruit*/unjust enrichment for the services that she provided. (*Id.* 29, 37, 52) Throughout her brief she argued that the trial court committed fundamental error, abused its discretion, and violated her due process and substantial rights. Graham argued that the judgment was against the weight of the evidence. (Appellant Br. 2,10, 29-30, 41-42; Appellant Reply Br. (“Reply Br.”) 5, 8, 12, 15, 17; Rehearing Pet. 9, 11; Transfer Pet. 2, 9-13; Reply in support 4)

In Graham’s reply brief she argued that the trial court’s judgment was clearly erroneous, contrary to law and unsupported by the evidence (Reply Br. 5, 11) and she again told the court and argued that because of the trial court’s failure to issue the requested findings and conclusions as required pursuant to Ind. T.R. 52, that it would be “impossible to determine on what basis the court’s decisions were made. The court’s refusal to make FFCL is further evidence of the court’s bias against Graham” (*Id.* 8) Graham continued to argue that the trial court’s bias and failure to remain impartial violated her due process rights, constituting fundamental error. Graham argued that her substantial rights were violated and claimed the trial court erred as a matter of law and/or abused its discretion by entering judgment in favor her favor for only \$600 for monies owed to her and entering judgment in favor of Wininger on all other claims and relief requested in Graham’s complaint. (*Id.* 12, 15, and 24)

In Graham’s Rehearing Pet. at 6 and in her Transfer Pet. at 7, she again argued that the trial court erred in its failure to issue the required FFCL pursuant to Ind. T.R 52 and she argued that pursuant to T.R. 52 the proper standard of review was the “clearly erroneous” standard.

Quantum Meruit/Unjust Enrichment

The Court of Appeals restated Graham issues as:

- I. Whether the trial court’s judgment in favor of Wininger regarding the alleged oral agreement is contrary to law.

II. Whether the trial court properly conducted the summary judgment and bench trial proceedings.

(App. 3a ¶2) However, in Graham's briefs she questioned if she was entitled to payment under *quantum meruit*, promissory estoppel, or unjust enrichment if it was determined there was no valid contract, and she provided citation to authority to support her arguments. She also questioned if a determination on this issue was required to preserve her right to due process. (Appellate Br. 29, 37, Reply Br. 11, Rehearing Pet. 5, 13-15; Transfer Pet. 2, 6-7, 15-17; Reply in support 4-5)

Graham argued that to prevail in unjust enrichment one must confer a measurable benefit. **Graham did that.** It would be unjust to permit the defendant to retain the benefit without payment to plaintiff. **Winingar did this.** And plaintiff must have labored with expectation of payment. **Graham most assuredly did this.** *Woodruff v. Ind. Family & Soc. Servs. Admin.*, 964 N.E.2d 784, 791 (Ind. 2012) (citations omitted); *See also Bayh v. Sonnenburg*, 573 N.E.2d 398, 408 (Ind. 1991) (Appellate Br. 37; Rehearing Pet. 15; Transfer Pet. 17)

After the Indiana court issued its decision Graham petitioned for rehearing, raising the following issues, questioning whether the court of appeals erred in: 1) utilizing the negative judgment standard of review instead of using the clearly erroneous standard of review; 2) its determination that as a matter of law the trial court found there was not an oral agreement; 3) its determination that the trial court was not required to find the Ind. Trial Rule 36 admission conclusively established; 4) failing to determine that the trial court erred by excluding evidence testimony; 5) failing to determine whether the trial court's failure to rule in Graham's favor for unjust enrichment/*quantum meruit* was clearly erroneous. (Rehearing Pet. 5)

Graham argued the clearly erroneous standard of review should have been used since findings had been requested pursuant to Trial Rule 52.

The appropriate standard of review following a bench trial is simply that prescribed by Ind. Trial Rule 52(A), which provides that findings or judgment will be set aside if clearly erroneous. *Spranger v. State*, 650 N.E.2d 1117, 1119 (Ind. 1995). "This 'clearly erroneous' standard is a review for sufficiency of evidence." *Id.* (citation omitted). The parties moved for submission of findings of facts and conclusions of law pursuant to Trial Rule 52; yet in err, the trial court provided none.

Rehearing Pet. 5; Transfer Pet. 7.

Contract Agreement

Graham argued that she disagreed with the Indiana court finding there was no agreement, because the trial court's order did not say there was no agreement and given that the trial court failed to issue the required findings, there were no findings to support the judgment. (Rehearing Pet. 6-9, Petition to transfer 7-9)

For the trial court to determine there was no agreement, it means it found Wininger's testimony credible, and all of Graham's witnesses² incredible and evidence submitted false. However, the trial court found Graham's evidence credible such that it (1) ruled in favor of Graham regarding money she expended for the completion of Wininger home; (2) took judicial notice of the fact that Graham "spent many hours working to obtain the benefits, working with the [sic] her brother, Mr.

² Graham's witnesses were related to the parties in the same way.

Winingar, to obtain the benefits"; (3) and said "I don't think anybody is denying and I believe [Winingar's counsel] is supporting what you said in your statement that if it hadn't had been for [Graham], [Winingar] wouldn't have the money.". This ruling, the judicial notice and the statement by the trial court indicate that it found Winingar's testimony incredible. Winingar's testimony included that: Graham never fronted him money for his house construction; all Graham did when building the house was sit in the attic and drink beer; he didn't trust Graham enough for her to assist him; and Graham never did anything to help him.

It is obvious Winingar was less than truthful.

(Rehearing Pet. 8-9) The court during testimony stated "[a]t this point we've not had anything to controvert your witness' testimony. I have no doubt that she spent a lot of time working on this. I'm done with looking at the cumulative evidence. I've heard it multiple times, what she's done over the years, when it started and when it ended." (Tr. Vol. 3, 101:1-8)

Graham argued that the statements by the trial court indicated that it determined that Winingar was insane and unable to enter into a contact agreement, which statements by the trial court were unsupported by the facts in evidence. (Rehearing Pet. 6-8; Transfer Pet. 7-9) (discussed *infra*) However, this belief by the court would explain why the court ruled against Graham.

Following the denial for rehearing, Graham filed a Petition to Transfer to the Indiana Supreme Court, questioning:

1. Whether the precedent regarding "incredibly dubious" or "inherently unbelievable" testimony should also apply in civil cases? *See* Ind. Appellate Rule 57H(5).

The Court of Appeals followed the Ind. Supreme Court ruling in *Love v. State*, N.E.2d 806, 810 (Ind. 2002), regarding “incredibly dubious” testimony, finding that this rule did not apply in civil actions. 2. Whether the Court of Appeals opinion that admissions obtained under Ind. Trial Rule 36 are not automatically admissible at trial was in conflict with Ind. Supreme Court decision in *General Motors Corp. v. Aetna Cas. & Sur. Co.*, 573 N.E.2d 885, 888 (Ind. 1991), which held that matters admitted to under T.R. 36 be deemed “conclusively established”, eliminating the need to prove them at trial? *See* App. R. 57H(2). 3. Whether the clearly erroneous standard of review was required in this case? 4. Whether a determination was required regarding Graham’s entitlement to unjust enrichment/*quantum meruit*? 5. Whether the trial court’s statements support its belief there was an agreement/contract, but in error believed that Wininger was insane and unable to enter into the contract? 6. Whether the trial court’s exclusion of Wininger’s admission and exclusion of testimony regarding the admission affected Graham’s substantial rights?

Transfer Pet. 2.

Unbiased Tribunal Required

Throughout Graham’s briefs she claimed bias and failure to remain impartial by the trial court, claiming that many trial court comments assumed facts not in evidence and were unsupported, which prejudiced Graham’s case and denied her the required due process. (Appellant Br. 21-24; 39-47; Reply Br. 8-14; Transfer Pet. 9) She also argued that her substantial right had been adversely affected.

(Appellant Br. 41; Reply Br. 15; Rehearing Pet. 9, 11; Transfer Pet. 2, 10-11)

In Graham appellant brief she informed the court that she filed a motion requesting certification of orders for interlocutory appeal after the trial court granted Wininger's motion: 1) to withdraw his motion for summary judgment, *post hearing*; 2) for enlargement of time, allowing him a total of 120 days to respond to Graham's motion for summary judgment; and 3) to reopen discovery to depose Graham before responding to her motion for summary judgment; despite Wininger having already filed for summary judgment and withdrawing his motion post hearing. One of the questions to be determined was whether the trial court was biased and failed to remain impartial violating Graham's due process rights. (Appellant Br. 10, 41) However, the trial court denied Graham's interlocutory request.

The trial court abused its discretion and showed bias out the gate because it refused Graham's counsel the right of calling Wininger as the first witness when presenting Graham's case in chief (Tr. Vol. 2, 16:12-13), affecting his planned presentation of the case.

Bias Assumed facts not in evidence

In Graham's briefs she argued that the trial court was biased and made multiple unsupported comments, which inferred that Wininger could not enter into a contact agreement because he was insane, which belief was unsupported by the facts in evidence. (Appellant Br. 22-24; 39-47; Reply Br. 8-14; Rehearing Pet. 6-8; Transfer Pet. 7-9; Reply in support 3-5)

Graham submits the trial court's statements support its belief there was an agreement. However, it believed Wininger was insane and could not enter into an agreement with Graham. (Appellant Br. at 22). In the absence of findings, this Court failed to properly consider these statements, which are reflective

of the trial court's fundamental misunderstanding of the evidence. The trial court stated "*He can't be insane for them to get 400 and something thousand dollars, but then say, oh no, I want control of my firearms. That's scary.*" (Tr. Vol. 3, 202:1-2) "But you can't say that he's saying [sic; read "sane"] to enter a contract [and] that he's insane in order to get the money. *But you turn around and said, no, no, he's not insane.*" (Id. 202:2-4) (emphasis added). "*I didn't see anything in here that said, he's insane so we can have the money, but once he gets the money, no, he's not insane. Not as you consider him to be insane.*" (Id. 202:15-16) "*But she's not an expert to say military insanity is different than daily insanity.*" (Id. 204:14-15) (The record shows Graham was only reciting information regarding "VA insanity" that was taken directly from VA and BVA decision documents. (See Tr. Exhibits 40-42, 65)) "*And the whole reason that he's not insane is because she wrote a letter and said, oh yeah, that's not true.*" (Id. 204:22-23) "*Then how come we're calling him sane now? What's her basis*" (Id. 205:3). "*She got him - it wasn't good enough to get him monthly benefits. She knew she could get him declared insane so that there could be a huge lump sum.*" (Id. 210:14-15) Given the absence of findings, these trial court statements support the conclusion the trial court believed there was an agreement but Wininger could not enter into it because he was insane. Appellant Br. at 22. Regarding insanity, a trier of fact's decision "must be based on probative evidence, which means [e]vidence that tends to prove or disprove a

point in issue.” *Black's Law Dictionary* 639 (9th ed.2009). *Galloway v. State*, 938 N.E.2d 699, 711 (Ind. 2010). There are no facts in evidence to support any inference of medical insanity or support the comments by the trial court regarding insanity.

(Rehearing Pet. 6-8; Transfer Pet. 7-8) In Graham's briefs she elaborated providing evidence that Wininger was not medically insane.

In 2006, the VA determined that in 1979 Wininger's *actions leading to his discharge* met the VA definition of insanity (See 38 C.F.R. §3.354(a)). In 1979 Wininger received an “other than honorable” discharge because he got into trouble for being in the women's barracks, misappropriated a military taxi, disobeyed law enforcement, possessed marijuana and stole a boat. The VA insanity determination upgraded his discharge to “honorable”, thereby removing the bar to VA compensation benefits. Once this bar was removed, Wininger was *eligible to receive disability compensation because of his service-connected seizure disorder* that resulted from a non-combat service injury.

(Rehearing Pet. 7-8; Transfer Pet. 9) At Wininger's summary judgment hearing, which motion he withdraw post hearing, the trial court also made multiple comments against the evidence, indicating she did not think that Graham was a registered nurse and that Graham was not qualified to make a determination regarding Wininger's sanity. (Appellant Br. 23)

The trial court denied Graham's motion to reopen her case to answer the questions raised by the court regarding her credentials and to address the court's misstatements and misunderstanding regarding Wininger's sanity. (Appellant Br. 23-24)

Graham indicated that she is a registered nurse and the VA knew she was a registered nurse. When Graham added her credentials in communications with the VA, she signed RN, BSN, COHN(Registered Nurse, Bachelor of Science in Nursing, Certified Occupational Health Nurse)

Court: "Now when you asked her or it was either you or Mr. Smith, said, "Where did you do your residency", she was like, "What? I guess at Vincenz (phonetic)" So I'm not exactly sure what her qualifications are to be talking about the definition of insanity versus military versus public."

Graham's testimony regarding sanity quoted information from VA documents Graham's did not testify as an expert nor did she or Wninger attempt to designate Graham as such, the court expressed concerns about Graham using her "expert" credentials and concluded Graham wanted to get paid for her expertise

Seeking to clarify these unexpected issues, Graham filed a motion to reopen her case to address the court's concerns. Failing that, Graham filed for summary judgment and clarified that she became a registered nurse in 1987, obtained certification in occupation health in 1997, she maintains an active nursing license and to become a registered nurse, nurses do *clinical training, not residency*.

(App. Vol. 4, 25-26¶¶55-64)

Bias—Failure to deem Ind. Trial Rule 36 admission conclusively established

The trial court, in violation of Ind. Trial Rule 36 (App. 22a), refused to admit into evidence and deem conclusively established an admission obtained pursuant to Ind. T.R. 36. Wninger admitted he sent Graham the following voicemail message on 11/18/2013:

Bina, I got your second letter. I didn't even bother reading your third one--I threw your second one in the trash can just like the other one--you can either sign a receipt that I write for \$200,000 or we can do it in a money transfer--let me know by the end of the day--by the end of the business hour--which will be 4 o'clock-- or I am sending you a cashier's check.

(Appellant App. Vol. 2, 231 no.3) The Indiana court held that admissions obtained under Ind. T.R. 36 are not automatically admissible at trial. (App. 11a ¶20) Graham argued that this holding was in direct conflict with Ind. T.R. 36 and in conflict with Ind. Supreme Court decision in *General Motors Corp. v. Aetna Cas. & Sur. Co.*, 573 N.E.2d 885, 888 (Ind. 1991), which held that matters admitted to under T.R. 36 be deemed "conclusively established", eliminating the need to prove them at trial. (Appellant Br. 55)

The Indiana court determined that if the voicemail admission was admissible, its exclusion was harmless because the voicemail was merely cumulative of other evidence presented at the bench trial. (App. 11a ¶21) Graham argued that while Wninger's admission, of sending the voice mail in which he admits to owing Graham \$200,000, does not explicitly say he owed Graham this money because of a contract agreement, it proves that Wninger knew was obligated to Graham for this amount. The testimony of witnesses indicates that Wninger knew he owed Graham this money because of an agreement to

pay for the services that Graham provided at his request. (Appellant Br. 31, 39-41) Graham argued:

The admission of leaving the voicemail was the *only* evidence from Wininger indicating that he knew he was obligated to Graham and that he owed her money. Why otherwise would Wininger be obligated to Graham if not for a clear contractual obligation? Obviously, there was an agreement. The court in *Wehry v. Daniels*, 784 N.E.2d 532, 535-36 (Ind. App. Ct. 2003) held that:

There is an admission ... when there is a manifestation that fairly communicates the concept that the party had admitted the existence of the contract. It is not necessary that there be an express declaration that the party admits the making of an oral contract. It is sufficient that his words or conduct reasonably lead to that conclusion.... The fact that the party does not appreciate or understand that the subsidiary facts admitted by him have the effect of creating a contract or that he is unwilling to state that they did does not negate the fact that a 'contract' has been admitted. and the only remaining task is to ascertain the precise terms of the contract.

Id. (citations omitted). The voicemail is clearly sufficient to lead to the conclusion there was a contract and the voicemail was an acknowledgment of an obligation to Graham. The only remaining task for the trial court was to ascertain the precise terms of the contact. *See Id.*

(Rehearing Pet. 12) The Indiana court decision provided that Graham cited no relevant authority to demonstrate the Trial Rule 36 admission by Wninger was admissible. (App. 11a ¶20) However, Graham cited *Corby v. Swank*, 670 N.E.2d 1322 (Ind. Ct. App. 1996) as support for the voicemail admission being conclusively established.

[W]here an admission has been obtained pursuant to T.R. 36, and not properly modified or withdrawn, the issue of whether such admission may be used at trial is not a matter within the trial court's "discretion"; rather, the party obtaining the admission is entitled to have the fact deemed conclusively established, and a trial court ruling to the contrary is error.

Corby at 1325. Appellant Br. at 41. Moreover, she cited the Indiana Supreme Court decision *General Motors Corp. v. Aetna Cas. & Sur. Co.*, 573 N.E.2d 885, 888 (Ind. 1991), which provides that matters admitted to under T.R. 36 are deemed "conclusively established", eliminating the need to prove them at trial. Appellant Br. at 55. Graham argued that the trial court's refusal to deem this admission conclusively established showed further bias and affected her substantial rights and denied her due process rights. (Reply Br. 8) The Indiana court held that Graham's claim of bias or prejudice failed. (App. 10a ¶18)

On October 3, 2019 the Indiana Supreme Court denied Graham's Petition to Transfer (App. 18a); the Indiana Court of Appeals Memorandum Decision issued on July 2, 2019 (App. 2a) was certified on October 9, 2019. (App. 1a) Graham has preserved her right to have these issues considered by this Court – Graham informed the appellate court of the trial court's failure to issue the required findings (Appellant Br. 8) and she argued that because of the trial court's failure to issue the requested findings and conclusions as required pursuant to Ind. T.R. 52, that it would be impossible to determine on what grounds the trial court's judgment was based(Reply Br. 8); Graham claimed

the trial court judge failed to remain impartial and was biased against her and the trial court's failure to deem an admission obtained pursuant to Ind. T.R. 36 as conclusively established affected her substantial rights and due process rights. (Appellant Br. 41-42; Reply Br. 12, 15; Rehearing Pet. 9, 11; Transfer Pet. 2, 9-11,13) Further, Graham argued that without a determination on her entitlement to *quantum meruit* or unjust enrichment for the compensation due to her for services she provided at Wininger's request, she was denied due process. Graham argued the wrong standard of review was used (Rehearing Pet. 5-6, 13-15; Transfer Pet. 7, 15-17) and that the trial court judgment did not say there was no oral agreement, but statements by the trial court indicated that it believed there was an agreement but that Wininger was insane and unable to enter into an agreement. (Rehearing Pet. 6-8; Transfer Pet. 7-10)

REASONS FOR GRANTING THE PETITION

A. The Indiana court decision, in affirming the trial court judgment without the required findings of fact and conclusions of law, is in conflict with state and federal courts.

Courts that have addressed the issue in which the trial court has failed to issue findings and conclusions as required found the necessary course of action was to remand back to the trial court for the required findings and conclusions or reverse the judgment. When procedurally required, the trial court was mandated to issue findings and conclusions.

The question is whether the Indiana court failed to properly discharge its appellate function when it affirmed the trial court ruling without the required findings? Was it plain error by the appellate court to affirm the judgment without the required T.R. 52 findings and conclusions? Did this failure affect Graham's substantial rights, violate her fundamental rights and violate her Fourteenth Amendment constitutional right to procedural due process?

The Utah Supreme Court held that although the parties did not address the issue of the absence of findings of fact and conclusions of law, that the absence "is a fundamental defect that makes it impossible to review the issues that were briefed without invading the trial court's fact-finding domain", making remand necessary. *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987) (However, the trial judge had retired. Under the unusual circumstances, the case was retried.)

Since Graham filed a written request for findings and conclusions pursuant to T.R. 52 the issuance of finding and conclusions was not optional, but a mandatory processing rule that must be enforced. "The real impact of special findings under T.R. 52(A) is that the trial judge must 'cross all the Ts and dot all the Is' for us to affirm." *Mitchell v. Mitchell*, 695 N.E.2d 920, 922 (Ind. 1998) (citation omitted)

The "requirement" that a party file a written request for findings has two effects: first, a written request **mandates** the trial court to enter specific findings; second, the presence or absence of a written request is determinative of our standard of review. This latter effect, i.e., the rule that *sua sponte* specific findings lead to appellate review under the general judgment standard, is as old as it is well-settled.

Vanderburgh County Bd. of Comm'rs v. Rittenhouse, 575 N.E.2d 663, 668 n.1 and 2 (Ind. Ct. App. 1991), trans. denied (citation omitted). Pursuant to Trial Rule 52, the judgment will be reversed if it is clearly erroneous, and the judgment is clearly erroneous when it is unsupported by the findings of fact and conclusions of law. *See Capps v. Abbott*, 897 N.E.2d 984, 986 (Ind. Ct. App. 2008)

Without the required findings the Indiana court had nothing but **presumption** to base its decision on. Pursuant to Ind. T.R. 52(D) the court's failure to find upon a material issue upon which a finding of fact is required **shall not** be

resolved by any presumption. (App. 23a)

This Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S. Ct. 1562, 23 L.Ed.2d 129 (1969) granted certiorari to consider whether the Court of Appeals properly discharged its appellate function under Rule 52 (a) of the Federal Rules of Civil Procedure, which specifies that the findings of fact made by a District Court sitting without a jury are not to be set aside unless clearly erroneous. *Id.* at 108. In *Zenith* this court provided “[i]n applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*”. *Id.* at 123.

Petitions for certiorari have also been granted in other cases to consider if appellate function was properly discharged. See *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *Lavender v. Kurn*, 327 U.S. 645, 647 (1946); *Dennis v. Denver & R.G.R.R.*, 375 U.S. 208, 209 (1963); *Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982) (granted certiorari to consider whether a court of appeals is bound by the "clearly erroneous" rule of Federal Rule of Civil Procedure 52(a). Reversing and remanding for further proceedings, concluding that the court of appeals erred in the course of its review)

In the instant case the trial court had the responsibility to make findings of fact and conclusions of law as requested pursuant to Ind. T.R. 52(a), which states in part:

Upon . . . the written request of any party filed with the court prior to the admission of evidence, the court in all actions tried upon the facts without a jury . . . **shall** find the facts specially and state its conclusions thereon. . . .

(App. 23a) Regarding findings of fact and conclusions of law required by procedural rules, the Utah Supreme Court in *Romrell v. Zions First Nat. Bank*, N.A., 611 P.2d 392 (Utah, 1980) held, “[t]his requirement is mandatory and may not be waived.” *Id.* at 394. (citations omitted)

It was incumbent on the court to issue findings, since Graham requested findings on all the issues and the appellate court was not to infer a negative finding from the trial court's failure to find any facts on Graham claims. *See Willett v. Clark*, 542 N.E.2d 1354, 1358 (Ind. Ct. App. 1989) In the absence of the required findings, "it is impossible to give the court's judgment any meaningful review." *Id.* (case was remanded for specific findings to be issued)

"Special findings must contain all facts necessary to recovery by a party and the ultimate facts from which the court has determined the legal rights of the parties." *In re Estate of Inlow*, 735 N.E.2d 240, 250 (Ind. Ct. App. 2000). Further, "Trial Rule 52(A) 'is a method for formulating the ruling of the trial court, providing more specific information for the parties, and establishing a particularized statement for examination on appeal.'" *Mitchell v. Mitchell*, 695 N.E.2d 920, 923 (Ind. 1998) (quoting *Bowman v. Kitchel*, 644 N.E.2d 878, 879 (Ind. 1995)). When requested, a trial court *is required* to make complete special findings sufficient to disclose a valid basis under the issues for the legal result reached in the judgment. *Balicki v. Balicki*, 837 N.E.2d 532, 536 (Ind. Ct. App. 2005)(citations omitted).

It was not optional for the trial court to issue findings and conclusions; it was required. Case law supports that the standard of review, in cases, where a party has requested findings and conclusions under Ind. Trial Rule 52(A) is well-settled, the appellate court was required to use a two-tiered standard of review. First, determining whether the evidence supports the findings, and second, whether the findings support the judgment; Setting aside findings of fact and conclusions of law only if they are clearly erroneous. A judgment is clearly erroneous when the record contains no evidence supporting the findings, the findings fail to support the judgment, or when the trial court applies an incorrect legal standard to properly found facts. *See In re Visitation of M.L.B.*, 983 N.E.2d 583, 585 (Ind. 2013) (remanded giving the trial court opportunity to

cure its defect for its failure to issue findings and conclusions); *K.I. ex rel J.I. v. J.H.*, 903 N.E.2d 453, 457 (Ind. 2009); *Balicki v. Balicki*, 837 N.E.2d 532, 535 (Ind. Ct. App. 2005); *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999) (remanded because the trial court's lack of findings were insufficient to allow appellate review); *State v. Head*, 136 Wash.2d 619, 624, 964 P.2d 1187, 1190 (1998) (supreme court refused to address issues raised on appeal in the absence of required findings and conclusions; holding that this failure requires remand for entry of findings and conclusions); *In re Pers. Restraint of Breedlove*, 138 Wash.2d 298, 311, 979 P.2d 417 (1999) (remedy for trial court's failure to issue findings of fact and conclusions of law is remand for entry of the findings and conclusions); *Zedner v. United States*, 547 U.S. 489, 126 S. Ct. 1976 (2006) (because the trial court failed to issue the required findings, the judgment was reversed, and the case was remanded for further proceedings). *Pullman-Standard v. Swint*, 456 U.S. 273, 289, 102 S. Ct. 1781, 1790, 72 L.Ed.2d 66 (1982) (the court of appeals erred in its course of its review; the judgment was reversed and remanded for further proceedings.)

Reversal is required where there is a complete absence of any written findings of fact and conclusions of law. *See State v. Naranjo*, 921 P.2d 588, 590 (Wash. Ct. App 1996) (distinguished between inadequate findings, which it reasoned could be remedied by remand for entry of additional findings, total disregard for procedural requirements create an appearance of unfairness and that remanding for entry of findings after an appeal had been briefed is inherently prejudicial).

A complete disregard for a rule requiring written findings and conclusions nevertheless requires reversal because the disregard for procedure creates an appearance of unfairness. *See State v. McCrorey*, 70 Wash. App. 103, 115-116, 851 P.2d 1234 (1993) (the case was reversed for total disregard for procedure)

If an appellate court's review of a trial court's ruling is restricted by an inadequate record of the basis for the trial court's ruling, it is necessary to remand the case so that the trial court can express its findings of fact and conclusions of law as required. *State v. Cullen*, 195 S.W.3d 696, 699 (Tex. Crim. App. 2006)

When procedurally required, the trial court is mandated to issue findings of fact and conclusions of law on all issues presented. *See e.g. Smith v. State*, 28 S.W.3d 889, 890 (Mo. App. 2000); *Barry v. State*, 850 S.W.2d 348, 349-50 (Mo. banc 1993); *State v. Stanley*, 952 S.W.2d 327, 330 (Mo. App. 1997); *see also Crews v. State*, 7 S.W.3d 563, 568 (Mo. App. 1999) (discussion of exceptions to the general rule). "There is no ambiguity is [sic] this directive and its requirements are not a mere formality." *Kelley v. State*, 988 S.W.2d 563, 564 (Mo. App. 1999) (quoting *State v. Deprow*, 937 S.W.2d 748, 751 (Mo. App. 1997)). In this case at bar, pursuant to Ind. T.R. 52, the trial court was mandated to issued findings and conclusions as requested.

Because of the trial court's fundamental error, for its failure to issue the required findings and conclusions, the Indiana Court of Appeals' failure to properly discharge its appellate function in making its decision and because its decision squarely conflicts with multiple other court's decisions regarding the proper procedure to follow when required findings and conclusions are not provided, this Court should accept this case for review.

Procedural rules are designed to ensure a fair and consistent application of due process. By allowing this decision to stand, Graham will be denied fair due process. Graham's constitutional right to procedural due process and her substantial rights have been violated. Further, despite this case involving a memorandum decision, the Indiana courts will likely make this same procedural error in the future, which will continue to affect individuals' substantial rights and violate their constitutional right to procedural due process.

National importance

The number of courts, provided *supra*, that have considered the issue presented evokes the question: What is the proper appellate function when required findings and conclusions have not been issued? 1) Should the court remand back to the lower court to enter the required findings, or 2) should the judgment be reversed because of the court's failure to follow procedural requirements which creates an appearance of unfairness?

Is the appellate court allowed, as in this case, to disregard proper appellate function and affirm a judgment without required findings to support the judgment? There is no reason to wait to resolve the question presented, and this case is the perfect vehicle in which to do so.

B. Proper Appellate Function and Due Process Requires a Determination on all Issues

"As a general rule, a final judgment which is appealable is one which disposes of all of the issues as to all of the parties and puts an end to the particular case." *Thompson v. Thompson*, 286 N.E.2d 657, 659 (Ind. 1972) (citations omitted). The Indiana court did not make a determination on all issues and thereby did not fulfill its appellate function. It determined there was no oral agreement, albeit the trial court judgment did not indicate this, nor was this judgment supported by any trial court findings as required. However, most importantly it **did not** make a determination in regard to Graham's entitlement to *quantum meruit*/unjust enrichment damages. "[W]here one accepts valuable services from another the law implies a promise to pay for them." *Estate of Prickett v. Womersley*, 905 N.E.2d 1008, 1012 (Ind. 2009) (quoting *Schwartz v. Schwartz*, 773 N.E.2d 348, 354 (Ind. Ct. App. 2002)). Consequently, Graham's claims have not been fully adjudicated and, as a result, Graham has been denied the required due process.

"To prevail on a claim of unjust enrichment, a plaintiff must establish that a measurable benefit has been conferred on the defendant under such circumstances that

the defendant's retention of the benefit without payment would be unjust." *Bayh v. Sonnenburg*, 573 N.E.2d 398, 408 (Ind. 1991) (citation omitted). That is precisely the situation in the case at bar.

Because of this failure, the Indiana court kicked Graham's constitutional due process rights to the curb. Fundamental fairness compels this Court to accept this case for review.

C. Due Process Requires an Impartial and Unbiased Trier of Fact

The due process clause of the Fourteenth Amendment required an impartial and unbiased judge, which Graham was denied.

Courts have repeatedly held that positive proof of the partiality of a judge is not a requirement, only the appearance of partiality. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194 (1988) (what matters is not the reality of bias or prejudice but its appearance); *United States v. Balistrieri*, 779 F.2d 1191 (7th Cir. 1985) (Judicial Code "is directed against the appearance of partiality, whether or not the judge is actually biased.") ("Section 455(a) of the Judicial Code, 28 U.S.C. §455(a), is not intended to protect litigants from actual bias in their judge but rather to promote public confidence in the impartiality of the judicial process.").

Judicial Code "requires a judge to recuse himself in any proceeding in which her impartiality might reasonably be questioned." *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989). In *Pfizer Inc. v. Lord*, 456 F.2d 532 (8th Cir. 1972), the Court stated that "It is important that the litigant not only actually receive justice, but that he believes that he has received justice."

Graham had requested certification of orders for interlocutory appeal, one question was whether the trial court judge was bias and failed to remain impartial, but the trial court denied her request.

Bias—Assumed facts not in evidence

The trial court made multiple unsupported comments, which inferred that Wininger could not enter into a contact agreement because he was insane (which belief was unsupported by the facts in evidence), which belief, Graham submits was prejudicial against her case and affected her substantial rights. In *Berger v. United States*, 295 U.S. 78 (1935) the prosecutor pretended to understand that a witness had said something which he had not said and he persistently cross-examined the witness upon that basis: of assumed prejudicial facts not in evidence. This Court granted certiorari because of a conflict with other circuit courts of appeals in respect of the effect of the alleged variance. *Id.* at 80-81.

On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to affect the substantial rights of the party.

Id. at 81-82 (citations and quotation marks omitted) It is undisputed that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). In order to reverse a judgment based upon a claim of prejudicial misconduct, a party must show that the remarks or conduct were improper and that such remarks or conduct prejudicially affected her substantial rights so as to deprive her of a fair trial. *United States v. Caro*, 597 F.3d 608, 624-25 (4th Cir. 2010) (*citing United States v. Scheetz*, 293 F.3d 175, 185 (4th Cir. 2002)).

The trial court's assumption of facts not in evidence shows bias and violated Graham's right to due process. *See*

Ware v. State, 560 N.E.2d 536, 545 (Ind. Ct. App. 1990) (Conover, J. dissenting opinion).

Bias—Failure to issue required findings and conclusions

The trial court's total disregard for procedure in this case creates the appearance of unfairness. This is cause for reversal. *See State v. McCrorey*, 70 Wash. App. 103, 115-116, 851 P.2d 1234 (1993) (the court was unable to review the issue because the trial court did not provide written findings and conclusions in compliance with procedural requirements, leaving an inadequate record on which to review; the case was reversed for total disregard for procedure) (*citing State v. Charlie*, 62 Wn. App. 729, 733, 815 P.2d 819 (1991); *State v. Witherspoon*, 60 Wn. App. 569, 572, 805 P.2d 248 (1991))

The purpose of the procedural requirement of written findings of fact and conclusions of law is to enable an appellate court to review the questions raised on appeal. *See State v. Head* 136 Wash.2d 619, 622, 964 P.2d 1187, 1188-89 (1998) (the judgment and sentence was vacated and the case was remanded for entry of findings and conclusions) *Id.* at 1191

The trial court's failure to follow the required procedure violated Graham's right to fundamental due process and fair treatment. *See Kent v. United States*, 383 U.S. 541, 86 S. Ct. 1045, 16 L.Ed.2d 84 (1966) (because the juvenile court's waiver of jurisdiction did not comply with required procedures, the case was remanded to the trial court holding a juvenile is entitled to the fundamental due process right to fair treatment).

The trial court made no attempt at issuing findings and conclusions of law despite requests to do so. Graham argued the reason for this failure was judicial bias. (Reply Br. 8) Furthermore, remanding for findings at this stage would be inherently prejudicial and would violate Graham's right to due process. *See State v. Naranjo*, 83 Wash. App. 300, 921 P.2d 588, 590 (1996) (the court reasoned that an appearance of unfairness was created by noncompliance

with the rule, and that remanding for entry of findings after an appeal had been briefed is inherently prejudicial.)

Reversal of a judgment, as opposed to a remand for findings, may be appropriate where a party can show actual prejudice resulting from the absence of findings and conclusions or following remand for entry of the same. *State v. Head*, 136 Wash.2d 619, 624, 964 P.2d 1187, 1190 (1998) (citing E.g., *State v. Wilks*, 70 Wash.2d 626, 424 P.2d 663; *State v. Wood*, 68 Wash.2d 303, 412 P.2d 779 (1966); *State v. Russell*, 68 Wash.2d 748, 415 P.2d 503 (1966); *State v. Marchand*, 62 Wash.2d 767, 384 P.2d 865 (1963); *State v. Helsel*, 61 Wash.2d 81, 377 P.2d 408 (1962); *City of Seattle v. Silverman*, 35 Wash.2d 574, 214 P.2d 180 (1950).

Because of the perceived bias and lack of partiality by the trial court, this Court should accept this case for review of the Indiana Court of Appeals decision.

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Sabina Graham, *pro se*
Plaintiff
7210 E County Rd 700 N
Brownsburg, IN 46112
(812)583-0129
samanthaiamnot@yahoo.com