

IN THE  
INDIANA COURT OF APPEALS

No. 49A02-0410-CV-823

5-5-64  
-2-

MIGUEL VILLEGAS, *et al*, ) Appeal from the Marion Superior  
 ) Court No.3  
Appellants (Plaintiffs below), )  
 )  
v. ) Trial Court No.  
 ) 49D03-0208-PL-1448  
JOE SILVERMAN, in his official capacity )  
as Commissioner of the Indiana Bureau )  
of Motor Vehicles, )  
 ) The Honorable Patrick L. McCarty,  
Appellee (Defendant below). ) Judge

**BRIEF OF APPELLEE**

STEVE CARTER  
Attorney General of Indiana  
Atty. No. 004150-64

DAVID L. STEINER  
Deputy Attorney General  
Atty. No. 701-49  
Office of Attorney General  
Indiana Government Center  
South, Fifth Floor  
302 West Washington Street  
Indianapolis, IN 46204-2770  
Telephone: (317) 232-0169

Attorneys for Appellee

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Attorneys for Appellee

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Appellee (Defendant below).	)	Judge

**BRIEF OF APPELLEE**

**STATEMENT OF THE ISSUES**

The Bureau of Motor Vehicles (“Bureau” or “BMV”) announced that applicants for driver’s licenses and for non-license identification cards would be required to present documentation to establish who they said they were. The Bureau published identification requirements (listings of documents deemed to be sufficient for proof of identity). Thereafter, three illegal aliens (Miquel Villegas, “Mary Smith” and “Betty Doe”), brought this “class” action complaining that they were denied driver’s licenses and/or non-license identification cards because the BMV requires documentation to prove identity that they did not possess, even though such documentation is ordinarily possessed or obtainable by persons lawfully present in the United States. The trial court found that none of the named plaintiffs has a social security card issued by the Social Security Administration, that none of the named plaintiffs previously has been licensed to drive in another jurisdiction and that the named plaintiffs are not currently

eligible to obtain driver's licenses. Consequently, the trial court determined that the Plaintiffs did not have standing to challenge BMV identification requirements relating to driver's licenses.

The issues raised in the Appellants' Brief are condensed and rephrased, as follows.

1. Did the Marion Superior Court properly determine that the named plaintiffs could not challenge the documentation requirements of the BMV relating to driver's licenses because they did not have standing?

2. Should Plaintiffs' claim concerning non-license identification cards be remanded to the trial court for further proceedings because the trial court did not address this claim in its Findings of Fact, Conclusions of Law and Judgment?

3. Should this Court avoid an advisory decision regarding the other matters raised in the Appellants' Brief because the trial court only considered the jurisdictional question of standing in its decision and did not decide any other issue?

### **STATEMENT OF THE CASE**

**A. Nature of the Case.** This is an action brought by undocumented persons or illegal aliens who are challenging the BMV's identification requirements for applicants for Indiana driver's licenses or non-license identification cards.

**B. Course of the Proceedings.** The lawsuit was filed August 26, 2002 (Appellants' Appendix, hereafter "App.," 2). The Plaintiffs were permitted to file a third amended complaint on June 19, 2003, and that complaint was answered on August 14, 2003 (App. 5). The Plaintiffs also filed a renewed motion to certify case as class action on July 7, 2003, and they later filed a memorandum supporting that motion on March 29, 2004 (App. 5). On the same date, the Plaintiffs moved for summary judgment, and the Defendant responded to the Plaintiffs' motions for summary judgment and to certify class action on April 28, 2004, filing a cross motion for



summary judgment (App. 5-6). Following further briefing, the trial court heard argument on the summary judgment motions on June 9, 2004, and permitted the Defendant to file an amended answer on the same date (App. 6)

**C. Disposition.** The Marion Superior Court entered its Findings of Fact, Conclusions of Law and Judgment on September 3, 2004, granting the motion for summary judgment of the Defendant Commission of the BMV (App. 9-17). The trial court determined that the named plaintiffs were not eligible for driver's licenses and that therefore, they did not have standing. Based on detailed factual findings, the trial court entered the following conclusions and disposition:

#### CONCLUSIONS OF LAW

1. When a trial court is confronted with a challenge to its subject matter jurisdiction, it must decide upon the complaint, any affidavits or other evidence submitted whether it possesses the authority to further adjudicate the action.
2. Without a plaintiff with standing presenting the claim, the Court is totally without jurisdiction to decide any issue in the cause.
3. Miguel Villegas is not eligible for an Indiana driver's license because he is currently suspended. Exhibit A and C. This failure to be currently eligible for a driver's license, even with identification, demonstrates that the plaintiff cannot demonstrate the requisite injury to present a justiciable controversy before the court.
4. Neither Betty Doe nor Mary Smith has a valid social security card and are unable to affirm under oath that either of them has never had one issued to them.
5. To obtain an injunction against the Bureau, the applicant must come to court with clean hands. For the doctrine of unclean hands to apply, the misconduct must be intentional, and the wrong that is ordinarily invoked to defeat a claimant by using the unclean hands doctrine must have an immediate and necessary relation to the matter before the court.
6. Doe and Smith intentionally relied on a false social security number when attempting to establish an identity. In Betty Doe's case, she also used a false address when applying for the Matricular Consular identification card issued by the local Mexican consul. Deposition of Betty Doe, p. 14, 15.

7. In addition to protecting the public highways from incompetent drivers, the State also has a legitimate interest in not allowing its governmental machinery to be a facilitator for the concealment of illegal aliens. This interest is one that weighs heavily on the Courts due to their role in the administration of the nation's legal system.

8. Illegal aliens, such as plaintiffs, are not a suspect class implicating constitutional scrutiny under the complementary equal protection clause of the United States Constitution and privileges and immunities clause of the Indiana Constitution. Illegal, or undocumented, aliens do not have the immutable characteristic of a truly suspect class because their status is the product of conscious, indeed, unlawful action.

9. The plaintiffs cannot demonstrate any injury recognized by the abovesaid Constitutional provisions based on their illegal status in this country

10. Where there is no recognized injury, there is no standing and that denies subject matter jurisdiction in this Court; in such a situation, the Court can go no further than to deny relief and dismiss this action.

11. For further grounds, if the Court would invalidate the identification requirements for applications for driving licenses, it would have no conclusive effect on the BMV's administration of the application process. Ind. Code § 9-24-11-2 directs the Bureau to be "prudent" when issuing licenses.

12. Being prudent in the issuance of licenses is a power bestowed on the BMV by statute and is incapable of being reviewed by this Court due to its discretionary characteristic.

IT IS THEREFORE ORDERED that plaintiffs shall take nothing by way of their complaint, and this case be, and is hereby, dismissed.

ALL OF WHICH IS ORDERED, ADJUDGED AND DECREED THIS 3rd DAY OF SEPTEMBER, 2004.

/s/ Patrick L. McCarty  
Judge, Marion Superior Court  
Civil Division, Room 3

Following the entry of judgment, the trial court certified a class action at the request of the Plaintiffs, *nunc pro tunc*, on October 12, 2004 (App. 7). This appeal ensued.

## STATEMENT OF THE FACTS

The Marion Superior Court entered the following relevant Findings of Fact, which have not been challenged by Appellants:

1. In the 2003, the Bureau of Motor Vehicles (“BMV”) announced that applicants for driver’s licenses and identification cards would be required to present certain documents to establish that the applicants were who they say they were. Exhibit G, Deposition of Karen Cothron, p. 27; see also. Id , p. 5.
2. This announcement was made by publication and inclusion on the BMV website. The announcements (Exhibit F, Cothron depositions Exhibits I-9) published by the Bureau listing various documents that are deemed sufficient to establish the identity of the applicant made no changes in the statutory requirements for driving licenses.
3. Although the public was notified of the BMV’s identification requirements, no formal notice of public hearing or promulgation pursuant to Ind. Code § 4-22-2 took place.
4. Prior to this announcement, the BMV experienced widespread attempts by non-residents to obtain Indiana Driver’s Licenses; in one incident, an entire busload of non-residents arrived at a branch to apply for driver’s licenses Exhibit G, Deposition of Karen Cothron, p. 10.
5. An official government issued Driver’s License has become a necessary fixture in the commercial world for various activities, including cashing checks, job applications, and purchasing airline tickets.
6. The media has reported the pervasiveness of identity theft. Exhibit K.
7. Ind. Code § 9-24-9-2 requires certain information in the application: the applicants name, age, sex, address, Social Security number, any previous licensure in another state, whether the previous license was ever suspended, whether there was a previous felony committed while using a motor vehicle, and any mental or physical disability.
8. New applicants for Indiana Driver’s licenses now must establish their identity by presenting the following documents:
  - One (1) Primary Document
  - One (1) Proof of Social Security Number (SSN)
  - One (1) Secondary Document
  - One (1) Proof of Indiana Residency Document
  - A Primary or Secondary Document may also meet the Indiana residency requirement as long as the applicant’s name and correct address are shown on

the document.

**OR**

- Two (2) Primary Documents
- One (1) Proof of Social Security Number
- One (1) Proof of Indiana Residency Document

Primary documents are the following.

United States Birth Certificate with stamp or seal issued from:

- County Department or County Board of Health Vital Records/Statistics Division from the applicant's State of birth.
- State Department or State Board of Health Vital Records/Statistics Division from the applicant's State of birth.
- U.S. State Department
- United States Territories - American Samoa, Guam, Puerto Rico, and Virgin Islands (translation may be required)

Valid U.S. Military/Merchant Marine Photo ID

Valid U.S. Passport

Acceptable INS Documentation:

- Valid foreign passport with a Visa that includes a valid I-94 in the passport indicating the duration of stay in the U.S. (Canadian passports are not required to have a Visa when entering the U.S. and are exempt from this requirement)
- Certificate of Naturalization/Citizenship
- Employment Authorization Card I-688B
- Employment Authorization Card I-766
- I-94 Stamped with "Section 207" Refugee Status
- I-94 Stamped with "Section 208" Asylum Status
- Permanent Resident Card I-551
- Temporary I-551 stamp
- Temporary Resident card I-688
- Re-Entry Permit I-327
- Refugee Travel Document I-571
- Other INS documentation subject to BMV Driver Services approval

Secondary Documents are the following:

Must present one (1) document

In addition, any document from the list of Primary documentation may be used as a Secondary document.

- Certified Academic Transcript

- Confirmation of Registration Letter from an Educational Institution
- Court documentation with stamp or seal in applicant's name
- Foreign Consulate-Issued ID Card
- Government-Issued License or ID Card
- Hoosier RX Plan Card
- Indiana County Pre-sentence Investigation Report with clerk stamp or seal
- Indiana Gun Permit (Valid)
- Indiana Probation Photo ID Card
- Indiana Professional/Occupational license (Valid)
- Indiana BMV Title Application w/BMV Valid Stamp
- Indiana BMV Title or Registration (Valid)
- ITIN Card/Letter
- Letter from Probation Officer on letterhead stationary, certified with stamp or seal with the applicant's name, and signature of the probation officer
- Major Credit or Bank Card (MC, VISA, AE, and Discovery ONLY) (Valid)
- Medicare, Medicaid or Hoosier Works Card
- Original Out-of-State Driving Record
- Out-of-State Driving Record
- Out-of-State Driver License, Identification Card or Permit with photograph
- Pay Check Stub-Computer generate with name and SSN
- Prison Release Documentation/Photo ID
- School Report Card (dated within 12 mos.)
- School Photo ID Card
- U.S. Divorce Decree certified by court of law with stamp or seal
- U.S. Application of Marriage/Record of Marriage (Certified copy). Must contain the stamped seal and be signed by the Clerk.
- U.S. District Court Pre-Sentence Investigation Report with clerk stamp or seal
- U.S. Military Discharge or DD214 Separation papers
- U S Veterans Universal Access ID card with photo
- W-2 Form (Federal or State) or 1099 Federal tax form

[App. 11-12, 387-90].

9. Ind. Code § 9-24-3-1 directs the Bureau to issue a driver's license to an individual who meets the age requirements, who has made proper application on the Bureau's form, has passed the examination and test, and paid the required fee.

10. There is no statute that specifically states that an applicant must actually be the person being licensed, but Ind. Code § 9-24-11-2 provides:

The Bureau may issue all permits and licenses required by law for the operation of a motor vehicle in a manner the Bureau considers necessary and prudent.

11. An applicant for license must also submit the social security number

assigned to the applicant as required of the States by 42 U.S.C. § 666(a)(13). Indiana met this requirement by amending Ind. Code §9-24-9-2 (Burns 2003 Cum.Suppl.).

12. In cases where a license is “lost or destroyed” the individual to whom a license was issued may obtain a replacement upon “proof satisfactory to the bureau” that it was indeed lost or destroyed and pays the required fee Indiana Code § 9-24-14-1.

13. Indiana Code § 9-25-4-1 states that no person may register a motor vehicle or operate one on a public highway in Indiana unless financial responsibility is in effect with respect to the motor vehicle. Minimum financial responsibility requires amounts of \$25,000 for bodily injury or death of one individual, \$50,000 for two more individuals in one accident, and \$10,000 for property damage. Id. Upon receiving a traffic accident report, Indiana Code § 9-25-5-2 requires the Bureau to contact each person identified in the accident report to file proof of financial responsibility; the request must be mailed by first class mail to the address of the individual as it appears on the records of the Bureau. IC § 9-25-5-3(b). A driver’s failure to file the report results in the suspension of driving privileges. IC § 9-25- 5-1.

14. The current plaintiffs in this case have alleged that the new BMV identification requirements prevent them from obtaining Indiana driver’s licenses.

[Findings of Fact, Conclusions of Law and Judgment, App. 9-13].

Each plaintiff is an undocumented or illegal alien <sup>1</sup> Third Amended Complaint, ¶¶ 33, 39, 45 (App. 53-54). “Mary Smith” entered the United States from Mexico at Mexicali under another person’s identity card. Deposition of Mary Smith, p. 27 (App. 359). “Betty Doe” bypassed a border control crossing and entered the United States in Arizona Deposition of Betty Doe, pp. 30-31 (App. 348). The circumstance of Miguel Villegas’ entry into the United States is unclear, but he also entered the United States illegally. Third Amended Complaint, ¶ 33 (App. 53).

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<sup>1</sup> Mary Roe and Lucia Arteaga, original plaintiffs who had valid immigration status, have withdrawn from this case. The remaining plaintiffs, except for Villegas, have been granted leave to proceed anonymously in this action. Joel Silverman is now the Commissioner of the Bureau of Motor Vehicles

Villegas and Betty Doe previously have been licensed by the State of Indiana to drive an automobile (Findings of Fact, Nos. 19 and 20, App 14). Villegas is a suspended driver. Exhibit A, Certified copy of Driving Record (App. 236-45). Villegas also has two driving records under different license numbers. Certified copy of Driving Record, Exhibit C (App 249-54). Betty Doe lost her driving license, but has a photocopy (Deposition of Betty Doe, p. 17, App. 345).

None of the plaintiffs has a social security number or card issued by the Social Security Administration (Affidavits of named plaintiffs, App. 22, 38, and 44). Although Betty Doe supplied a social security number on employment documents and her driver's license application, she has stated under oath that she does not have a social security number (Doe deposition, p. 29, App. 348). Mary Smith has never had a number issued to her by the Social Security Administration. Deposition of Mary Smith, p. 22, App 358, upon advice of counsel, she declined to state whether she had ever given a social security number to an employer. *Id.*, p.18 (App. 357). Betty Doe, however, has submitted a social security number registered to two other persons, one of whom is ten years older than she is Affidavit and attachment of Michael Ward, Exhibit E, App. 259-61. Villegas does not have a social security card. Third Amended Complaint, ¶ 37 (App. 53-54).

None of the plaintiffs has ever been licensed to drive an automobile by another jurisdiction. Deposition of Mary Smith, p. 16; Deposition of Betty Doe, p. 7. Villegas' driving record indicates no previous licensure (Exhibit A & C, App. 236-45, 249-54). Betty Doe does not carry auto insurance (Deposition of Betty Doe, p. 22, App. 346). Miguel Villegas has had his license suspended for failure to file proof of financial responsibility and is currently suspended for another reason (Exhibit A and C, App. 236-45, 249-54). Mary Smith does not own an automobile (Deposition of Mary Smith, p. 22, App. 358).

All of the Plaintiffs have been present in the State of Indiana longer than 60 days. Betty Doe has lived in Indiana for four years, as of the date of her deposition (Deposition of Betty Doe, p. 6, App. 342). Mary Smith has lived at an address in Indianapolis since September 2000 (Deposition of Mary Smith, p. 20, App. 357). Villegas has been present in Indiana since at least 2002 when he applied for a learner's permit. Third Amended Complaint, ¶ 35, App. 53).

### **SUMMARY OF THE ARGUMENT**

1. The Marion Superior Court correctly determined that the named plaintiffs did not have standing to challenge BMV's identification requirements for applicants for driver's licenses. An Indiana statute not being challenged in this action requires that applicants for driver's licenses provide a social security number on the application, and the named plaintiffs did not have social security numbers. Consequently, regardless of the validity of the BMV's driver's license identification requirements, the named plaintiffs are not eligible to apply for driver's licenses. In these circumstances, the trial court correctly determined that they have no standing to challenge the Bureau's identification requirements relating to driver's licenses because implementation of those requirements causes no injury to them. Accordingly, the trial court properly dismissed the class action with respect to the driver's license claim because such an action cannot continue if the claims of the named plaintiffs are dismissed. Dismissal of the claims of Doe and Smith was also appropriate under the "unclean hands" doctrine.

2. The Plaintiffs' identification card claim should be remanded to the trial court for further proceedings and disposition because the trial court did not address whether the named plaintiffs have standing to assert this claim in its Findings of Fact, Conclusions of Law and Judgment



3. In the event that this Court disagrees with the determination of the trial court regarding standing on the driver's license claim, the entire matter should be remanded to the trial court for further proceedings. Because the trial court did not address any of the Plaintiffs' issues on the merits, this court should not enter an advisory opinion on the merits of the Plaintiffs' claims.

## ARGUMENT

### Standard of Review

#### A.

#### Summary Judgment Standard

“The party appealing from the grant of summary judgment has the burden of persuading the appellate tribunal that the trial court erroneously determined that there is no material issue of fact and the movant was entitled to summary judgment as a matter of law.” *Ind. Bd. of Public Welfare v. Tioga Pines*, 622 N.E.2d 935, 940 (Ind. 1993), citing *Jordan v. Deery*, 609 N.E.2d 1104 (Ind. 1993). When reviewing a grant or denial of summary judgment, the appellate court applies the same standard as the trial court. *Allen v. Great American Reserve Ins. Co.*, 766 N.E.2d 1157, 1161 (Ind. 2002), *Town of Syracuse v. Abbs*, 694 N.E.2d 284, 286 (Ind. Ct. App. 1998).

Summary judgment is appropriate only where the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C); *Allen, supra*, citing *Bemenderfer v. Williams*, 745 N.E.2d 212, 215 (Ind. 2001). “The movant bears the burden of establishing the propriety of summary judgment, and all facts and inferences to be drawn therefrom are viewed in a light most favorable to the non-movant.” *Town of Syracuse v. Abbs*, 694 N.E.2d at 286. All facts and reasonable inferences drawn from those facts are construed in favor of the nonmoving party. *Id.* The trial court's judgment,

however, will be sustained on appeal “if sustainable on any basis.” *Ind. Bd. of Public Welfare v. Tioga Pines*, 622 N.E.2d at 940, citing *Havert v Caldwell*, 452 N.E.2d 154 (Ind. 1983).

In this case, however, the trial court essentially dismissed this action based on a Trial Rule 12(B)(1) theory. “The standard of appellate review of a trial court’s grant or denial of a motion to dismiss pursuant to Trial Rule 12(B)(1) is a function of what occurred in the trial court.” *Turner v. Richmond Power and Light Co.*, 763 N.E.2d 1005, 1007 (Ind. Ct App. 2002), citing *GKN Co. v. Magness*, 744 N.E.2d 397, 401 (Ind. 2001). If the trial court found facts upon ruling on the motion to dismiss for lack of subject matter jurisdiction, those factual findings may be entitled to some deference. *Id.* Here, the trial court found facts that have not been disputed by the Plaintiffs.

#### **B. Applicable Statutory Provisions**

The Indiana General Assembly has enacted numerous requirements relating to driver’s licenses because, in addition to the driving privilege, the documents are often used to identify whether a person is who he says he is. For example, Indiana Code § 9-24-1-1 provides that

[A]n individual must have a valid Indiana. (1) Operator’s license, . . . issued to the individual by the Bureau under this article to drive upon an Indiana highway the type of motor vehicle for which the license or permit was issued

The only exceptions to the above universal requirement are found in Indiana Code § 9-24-1-7, which exempts those serving in the armed forces, those operating heavy equipment in construction, a non-resident with a license issued by the non-resident’s home state or country, and a new resident who possesses an unexpired license issued by the former state of residence for a period of sixty days after becoming a resident of Indiana. In other words, a person who moves to Indiana must obtain an Indiana license no later than sixty days after arrival. More

specifically, Indiana Code § 9-24-9-2<sup>2</sup> requires certain information in the application: the applicant's name, age, sex, address, Social Security number, any previous licensure in another state, whether the previous license was ever suspended, whether there was a previous felony committed while using a motor vehicle, and any mental or physical disability

Several statutes address the issuance of an operator's license. Indiana Code § 9-24-3-1 directs the Bureau to issue a driver's license to an individual who meets the age requirements, who has made proper application on the Bureau's form, has passed the examination and test, and paid the required fee. Indiana Code § 9-24-11-1 echoes the preceding statute's requirements on these conditions: 1) qualifies as required, makes the proper application, and pays the required fee.

Further, the statute states:

The Bureau may issue all permits and licenses required by law for the operation of a motor vehicle in a manner the Bureau considers necessary and prudent.

Ind. Code § 9-24-11-2.

Beyond regulating the issuance of new licenses, Indiana Code § 9-24-14-1 governs the issuance of replacement licenses. In cases where a license is "lost or destroyed" the individual to whom a license was issued may obtain a replacement upon "proof satisfactory to the bureau" that it was indeed lost or destroyed and pays the required fee. *Id.*

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<sup>2</sup> Indiana Code § 9-24-9-2(1) provides that:

Each application for a license or permit under this chapter must require the following information:

(1) The name, date of birth, sex, *Social Security number*, and mailing address and, if different from the mailing address, the residence address of the applicant. The applicant shall indicate to the bureau which address the license or permit shall contain. [Emphasis added].

1.

**The Marion Superior Court correctly determined that the named plaintiffs did not have standing to challenge the BMV's identification requirements relating to driver's licenses.**

This case presents the remarkable circumstance where three persons who are apparently illegally residing in the United States and the State of Indiana are challenging BMV procedures for establishing identity in connection with driver's licenses, even though by virtue of laws they are not challenging they are ineligible for the Indiana driver's licenses that they desire. They contend that the Bureau should have adopted a formal rule in which the BMV identified specific documents needed to establish identity, but they also contend that even if the Bureau had adopted such a rule, the identification documents required by the BMV are too restrictive as they exclude undocumented or illegal aliens from obtaining Indiana driver's licenses. They claim that their rights to equal protection under the law have been denied because they do not have the identification documents required by the BMV, even though any citizen or any person legally residing in this nation could obtain the documents in question.

The Marion Superior Court correctly determined that the named plaintiffs are without standing to prosecute the lawsuit with respect to driver's licenses because they do not have valid social security numbers required by Indiana statutory law for applicants for such licenses, and because they do not challenge the validity of that statutory requirement. The trial court also recognized that named plaintiffs Doe and Smith did not have clean hands as a result of their failures to disclose information relating to their previous misuse of social security numbers that did not belong to them.

A.

**Because the named plaintiffs do not have social security numbers, they lack standing to challenge the Bureau's identification requirements to the extent such requirements relate to driver's licenses.**

The Third Amended Complaint shows that Miquel Villegas, Betty Doe and Mary Smith primarily became involved in this lawsuit because they wanted to obtain Indiana driver's licenses (App. 22, 38 and 44), but they are ineligible for Indiana driver's licenses because they do not have a social security number as required by Indiana Code § 9-24-9-2. Significantly, the Plaintiffs do not challenge any Indiana licensure statutes - including the social security number requirement - in this lawsuit. Instead, they have challenged only the BMV's identification requirements that are intended to ensure that applicants are who they say they are. Accordingly, the validity of any statutory requirements is not at issue, and if the named plaintiffs do not meet those requirements, they do not have standing.

As it happens, Villegas, Doe and Smith are ineligible for an Indiana driver's license because they do not have a social security number as required by Indiana Code § 9-24-9-2 (Third Amended Complaint, ¶ 37, App. 53; Deposition of Betty Doe, p 26, 27, App. 347, Affidavit of Mary Smith, ¶ 4, App. 44).<sup>3</sup> Therefore, they lack standing to challenge the validity of the BMV's identification prerequisites, which are unrelated to the plaintiffs' threshold inability to obtain Indiana driver licenses.<sup>4</sup>

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<sup>3</sup> It is established that the Bureau is within its power to obtain the social security number from license applicants. *Terpstra II v. Indiana*, 529 N.E.2d 839 (Ind. Ct. App. 1988).

<sup>4</sup> In addition, Villegas is ineligible for an Indiana driver's license because he was suspended when this case commenced and is currently suspended. Exhibit A and C, App. 236-46, 249-55. This exhibit, a certified copy of the driver's computer-generated driving record, is admissible to show the driving record. Ind. Code 9-14-3-4, *Coates v. State*, 650 N.E.2d 58 (Ind. Ct. App. 1995). See also Exhibit B, Affidavit of Michael Ward, App. 247-48. The first suspension for failure to file proof of financial responsibility implicated the Bureau's responsibility to keep

Because none of the named plaintiffs is currently eligible for a driver's license, even with identification, they cannot demonstrate the requisite injury to present a justiciable controversy before the court on the driver's license claim. *Pence v State*, 652 N.E.2d 486, 488 (Ind. 1995) The concept of standing derives from the separation of powers provisions of the Indiana Constitution. *Id.*, 652 N.E.2d 486, 488 (Ind. 1995) The issue of a party's standing to bring an action bears on the Court's power to hear a case and, thus, its jurisdiction. "The standing requirement is a limit on the court's jurisdiction which restrains the judiciary to resolving real controversies in which the complaining party has a demonstrable injury." *Id.*; *See also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S Ct. 1003, 1016 (1998) (holding that standing under the U.S. Constitution is jurisdictional).

When a trial court is confronted with a challenge to its jurisdiction, it must decide upon the complaint, any affidavits or other evidence submitted whether it possesses the authority to further adjudicate the action. *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1286 (Ind. 1994); *Cooper v. County Bd. of Review of Grant County*, 276 N E 2d 533, 536 (1971). In reaching its decision, the trial court may weigh the evidence *Indiana Dept of Highways v Dixon*, 541 N.E.2d 877, 884 (Ind. 1989). Before any other determination in a case, a court must first determine that a party with standing has brought the case and brings a justiciable issue before the court. Without a plaintiff with standing, the Court is totally without jurisdiction to decide any issue in the cause. *Town of New Haven v. City of Fort Wayne*, 268 Ind. 415, 375 N.E.2d 1112, 1117 (1978); *City of Indianapolis v. Indiana State Board of Tax Commissioners*, 261 Ind. 635, 308 N.E.2d 868 (1974); *Fadell v. Kovacik*, 181 N E.2d 228 (1962)

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financially irresponsible people off the road and the second resulted from Villegas' failure to participate in a driver improvement course *Id.*

In this case, the named plaintiffs do not have standing with respect to their desire for driver's licenses as they cannot show direct injury to themselves. They are unquestionably ineligible for driver's licenses because they do not have social security numbers. As stated in *Schloss v. City of Indianapolis*, 553 N.E.2d 1204 (Ind. 1990), the standing requirement in Indiana requires a showing that a person is sufficiently aggrieved or adversely affected to permit prosecution of the matter. In *Schloss*, the Indiana Supreme Court held. "[i]n order to invoke a court's jurisdiction, a plaintiff must demonstrate a personal stake in the outcome of the lawsuit and must show that he or she had sustained or was in immediate danger of sustaining, some direct injury as a result of the conduct at issue." *Schloss*, 553 N.E.2d at 1206. Because Villegas, Doe and Smith are ineligible to obtain driver's licenses because of their lack of social security numbers and because that fact is not in dispute, the BMV's other documentation requirements are of no consequence to them at least with respect to driver's licenses. They are not injured by those requirements.

In addition, the argument of the named plaintiffs that Indiana law did not require them to produce a valid social security number or social security card is specious and is contrary to the plain language of the statute. As noted previously, Indiana Code § 9-24-9-2 relevantly provides.

Each application for a license or permit under this chapter must require the following information:

(1) The name, date of birth, sex, *Social Security number*, and mailing address and, if different from the mailing address, the residence address of the applicant. The applicant shall indicate to the bureau which address the license or permit shall contain.

[Emphasis added].

In this case, the trial court also wisely observed that:

In addition to protecting the public highways from incompetent drivers, the State also has a legitimate interest in not allowing its governmental machinery to be a facilitator for the concealment of illegal aliens. This interest is one that weighs

heavily on the Courts due to their role in the administration of the nation's legal system.

[Conclusion of Law, No. 7, App 16]

Contrary to the argument of the named plaintiffs, the statute does not say that the applicant only need submit a social security number, if they happen to have one. Appellants' Brief, p. 18. If the clear statutory requirement for a social security number can be ignored simply by arguing that it applies only if the applicant has a social security number, then every statute can be reduced to a worthless exercise by the legislature. Where statutes are clear on their face, no further interpretation is necessary; the courts must enforce the plain meaning. *Indiana State Bd of Health v. Journal-Gazette Co.*, 608 N.E.2d 989 (Ind Ct. App. 1993) Moreover, the reference of the named plaintiffs to BMV documentation (App. 383-85, 390) is misplaced. These provisions do not override state law or determine that applicants for driver's licenses will receive such licenses without a social security number.

Because the named plaintiffs are without standing and have no proper basis for challenging BMV documentation requirements, the trial court was correct to dismiss the "class action" with respect to the driver's license claim.<sup>5</sup> This is important because the Plaintiffs direct much of their argument in this appeal to speculation about possible injuries to persons in the class other than the named plaintiffs. In *Vandiver v. Marion County*, 555 N.E.2d 839, 843 (Ind. Ct. App. 1990), this Court stated the well-established rule, as follows:

The right of a class to recover is contingent upon the right of action in the named plaintiff. If his action fails, the class action fails also. *Warram v. Stanton* (1981), Ind. App., 415 N.E.2d 114, 116, 117 *Accord Spencer v. State* (1988), Ind. App.,

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<sup>5</sup> The trial court did not certify the case as a class action until after the court granted judgment in favor of the Commissioner of the BMV because the Plaintiffs did not have standing. This belated ruling does not change the fact that prosecution of the case, even as a class action, depended on the viability of the claims of the named plaintiffs.



520 N.E.2d 106, 110, *trans. Denied*; *May v. Blinzinger* (1984), Ind. App., 460 N.E.2d 546, 551, *trans denied*

Class certification rules under federal and state practice parallel each other. *See, Rene v. Reed*, 726 N.E.2d 808, 816 (Ind. Ct. App. 2000), n.6. In *Sosna v Iowa*, 419 U.S. 393, 403 (1975), the Supreme Court held that the named plaintiff must demonstrate “real and immediate” injury and be a member of the class purported to be represented. Also under Indiana law, the plaintiff class representative must show standing. The class action in *Hibler v. Conseco* 744 N.E.2d 1012 (Ind. Ct. App. 2001) was also dismissed for lack of standing, the plaintiff failed to show a “direct injury as a result of the conduct in issue” 744 N.E.2d at 1023. The request for class certification does not bestow jurisdiction on the Court where the named plaintiffs have failed to show an injury flowing from the Bureau’s conduct. As the named plaintiffs have no basis for relief, dismissal of the case with respect to the driver’s license claim, even as a class action, was proper.

**B.**

**As an alternative, the trial court correctly recognized that the “unclean hands” doctrine had application to Doe and Smith.**

The fact that Villegas, Doe and Smith do not have social security numbers, as required by Indiana Code § 9-24-9-2, clearly precludes them from recovery in this action regarding driver’s licenses, but the trial court also correctly recognized that the “unclean hands” doctrine applies to Doe and Smith. Indeed, Doe and Smith admitted in their depositions, or exercised the Fifth Amendment privilege not to answer, that a false social security number was used in an employment and/or license application. Deposition of Betty Doe, p. 26, App. 347 and Deposition of Mary Smith, p.18, App. 357.

Although Betty Doe supplied a social security number on employment documents and her driver’s license application, she has stated under oath that she does not have a social security

number Doe deposition, p 29, App. 348. Indeed, Betty Doe has submitted a social security number registered to two other persons, one of whom is ten years older than she is. Affidavit and attachment of Michael Ward, Exhibit E, App 259-62 Mary Smith has never had a number issued to her by the Social Security Administration. Deposition of Mary Smith, p. 22, App 358, and upon advice of counsel, she declined to state whether she had ever given a social security number to an employer. *Id.*, p.18 (App. 357).

Smith's refusal to state whether she had provided a social security number to an employer during her deposition can be used against her in this civil case, as "the privilege against self-incrimination does not prohibit the trier of fact in a civil case from drawing adverse inferences from a witness' refusal to testify." *Gash v. Kohm*, 176 N.E.2d 910, 913 (Ind Ct App. 1985). Thus, Smith's invocation of the Fifth Amendment ought to be considered as an admission that she has submitted a false social security number to an employer. In Betty Doe's case, she also used a false address when applying for the Matricular Consular identification card.<sup>6</sup> Deposition of Betty Doe, p. 14, 15. Each of these actions directly relate to the issue in this case because they relate to the history of Doe and Smith using false social security numbers, which is a licensing requirement, as discussed above.

To obtain an injunction against the Bureau, the applicant must come to court with clean hands. *Wedgewood Community Ass'n, Inc. v. Nash*, 781 N.E.2d 1172 (Ind. Ct. App. 2003). For the doctrine of unclean hands to apply, the misconduct must be intentional, and the wrong that is ordinarily invoked to defeat a claimant by using the unclean hands doctrine must have an "immediate and necessary relation to the matter before the court." *Id.*, 781 N.E.2d at 1178

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<sup>6</sup> Although some businesses have accepted the Matricular Consular card issued by the local Mexican Consul, based on Doe's testimony under oath, its reliability and accuracy leaves much to doubt.

The record indicates that Doe and Smith intentionally relied on false social security numbers when attempting to establish an identity. This is directly relevant to the inquiry in this case because making sure a person is who she claims to be is an important aspect of determining whether the person is eligible for a license. In addition to protecting the public highways from incompetent drivers, the State also has “a legitimate interest in not allowing its governmental machinery to be a facilitator for the concealment of illegal aliens.” *John Doe No. 1 v Ga Dept of Public Safety*, 147 F.Supp.2d 1369, 1374-76 (N D. Ga. 2001) <sup>7</sup> Doe’s and Smith’s actions properly disqualified them for the equitable relief sought from this Court.

## II.

**The Plaintiffs’ claim concerning identification cards should be remanded to the trial court for further proceedings because the trial court did not address this claim in its Findings of Fact, Conclusions of Law and Judgment.**

The Marion Superior Court did not address the question whether the Plaintiffs had standing to challenge the BMV’s identification requirements relating to identification cards. *See Findings of Fact, Conclusions of Law and Judgment, App. 9-17.*<sup>8</sup> In fact, the trial court only considered the jurisdictional question of standing in connection with the Plaintiffs’ desire for

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<sup>7</sup> Citing *Edwards v. California*, 314 U.S. 160 (1941), (recognizing a right to travel), the court in *John Doe* stated:

Justice Jackson’s eloquent statement recognizes that the right to travel is derived from federal citizenship. Regardless of which passage in the Constitution the right to travel emanates from, the obvious correlation to national citizenship is fatal to Plaintiff’s argument that a fundamental right is at stake in his entitlement to a Georgia driver’s license. Plaintiff’s presence in this country is unlawful. In fact, it would be a federal crime for someone knowingly to transport Plaintiff within the United States. 8 U.S.C §1324(a)(1)(A)(ii). It is contrary to logic to argue that Plaintiff possesses a fundamental constitutional right to move freely throughout the United States, but that criminal sanctions could be imposed on a person in whose car Plaintiff was a passenger.

[147 F.Supp.2d at 1374].

<sup>8</sup> Villegas and Smith are the named plaintiffs who have expressed an interest in obtaining identification cards (App. 38, 44).

driver's licenses. *Id.* The trial court apparently overlooked the identification card issue and should be given an opportunity to address any matters relating to this claim of the Plaintiffs, including standing and the merits of the identification card claim, if necessary.

In these circumstances, the Plaintiffs' claim concerning identification cards should be remanded to the trial court for full consideration of the issue by the trial court so that this appellate court may avoid rendering an advisory opinion. See *Community Hospitals of Indiana v. Estate of North*, 661 N.E.2d 1235, 1238-39 (Ind. Ct. App. 1996) (Court of Appeals does not render advisory opinions on issues not decided by the trial court). The Court of Appeals generally considers only those issues that were briefed and argued by the parties before the trial court *and that the trial court considered and ruled upon*. In *re Guardianship of Hickman*, 811 N.E.2d 843, 849 (Ind. Ct. App. 2004); *Richardson v Calderon*, 713 N.E.2d 856, 863 (Ind. Ct. App. 1999), *trans. denied*; *INS Investigations Bureau, Inc v. Lee*, 709 N.E.2d 736 742 (Ind. Ct. App. 1999), *trans. denied*, ("This court may not issue advisory opinions"). In this case, the trial court did not consider and certainly did not specifically address the identification card claim. Courts on review neither engage in speculation nor render advisory opinions. See *Collard v. Enyeart*, 718 N.E.2d 1156, 1161 (Ind. Ct. App. 1999); *State ex rel Goldsmith v. Superior Court of Marion County*, 463 N.E.2d 273 (Ind. 1984); *Armstrong v. Federated Mut Ins Co*, 785 N.E.2d 284, 294 (Ind. Ct. App. 2003). The proper course of action is to remand the identification card claim to the trial court.

### III.

**This Court should avoid an advisory decision regarding the other issues raised in the Appellants' Brief because the trial court did not reach the merits of the claims.**

The trial court did not decide any of the questions raised by the Plaintiffs concerning the merits of their challenge to the documentation procedures used by BMV to ensure identity. The

trial court simply decided that the Plaintiffs did not have standing and that the court did not have jurisdiction. Accordingly, as discussed above, this Court should decline the invitation of the Plaintiffs to render an advisory opinion and address any of the issues on their merits, even in the event that the appellate court disagrees with the trial court on the standing issue with respect to driver's licenses. *Community Hospitals of Indiana v Estate of North*, 661 N E 2d at 1238-39 and other cases cited in Argument II of this brief. Even if the Plaintiffs were to prevail on the jurisdictional standing issue relating to driver's licenses that was decided by the trial court, the appropriate course is a remand for further proceedings on the merits of the underlying issues. Accordingly, the Commissioner of the BMV does not address the arguments advanced by the Plaintiffs on the merits in this brief.


### CONCLUSION

The Findings of Fact, Conclusions of Law and Judgment of the Marion Superior Court, dated September 3, 2004, relating to the driver's license claim should be affirmed. The Court should remand the case to the trial court for further proceedings and disposition with respect to the Plaintiffs' claim concerning identification cards.

Respectfully submitted,

STEVE CARTER  
Attorney General of Indiana  
Atty. No 4150-64

By.



David L. Steiner  
Deputy Attorney General  
Atty. No. 701-49

Attorneys for Appellee

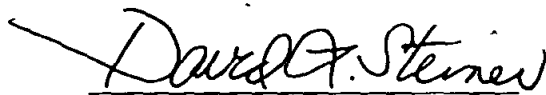
**CERTIFICATE OF SERVICE**

I do certify that on the 5th day of May, 2005, I served upon counsel in the above-entitled cause two (2) copies of the Brief of Appellee by depositing the same in the United States mail, first-class postage prepaid, addressed as follows:

Kenneth J. Falk  
Attorney at Law  
Indiana Civil Liberties Union  
1031 E. Washington St.  
Indianapolis, IN 46202

Richard Shevitz  
Scott Gilchrist  
Cohen and Malad LLP  
One Indiana Square  
Suite 1400  
Indianapolis, IN 46204

Rafael Ramirez  
Attorney at Law  
42 Virginia Ave.  
Third Floor  
Indianapolis, IN 46204



David L. Steiner  
Deputy Attorney General

Office of Attorney General  
Indiana Government Center South, Fifth Floor  
302 West Washington Street  
Indianapolis, IN 46204-2770  
317-232-0169  
Scdatabase/226659