tion. Under this construction, the indemnification insurance provision would be no more harmful to the public interest than is automobile liability insurance.

IV. Civil Procedure and Jurisdiction

*William F. Harvey**

The following survey of Indiana cases is intended as an overview of significant developments in the area of civil procedure and jurisdiction during the judicial term extending from May, 1973, through May, 1974. Because the discussion is synoptic in nature, it does not purport to provide either exhaustive coverage or extensive analysis of the cases.

A. Jurisdiction and Service of Process

Indiana's long-arm statute[1] has been the subject of interpretation this past year in the federal courts. In *Valdez v. Ford, Bacon & Davis, Texas, Inc.*,[2] Judge Sharp, in a memorandum opinion, espoused a liberal construction of the scope of Trial Rule 4.4. In reviewing historical precedents and scholarly exegeses of the rule, he found that:

> Indiana Trial Rule 4.4 is intended to extend personal jurisdiction of courts sitting in this State, including this one in this case, to the limits permitted under the due process clause of the Fourteenth Amendment.[3]

The question of the scope of Trial Rule 4.4 arose on the motion of Texas Tank, Inc., one of the defendants, to dismiss under Federal Rule of Civil Procedure 12(b)(2) for lack of jurisdiction over the person. In connection with this motion, Texas Tank asserted that the service of process made upon it by certified mail to its office in Dallas, Texas, was impermissible under Federal Rule of Civil Procedure 4 and could only be allowed by incorporating into the federal rule the service of process procedures of Indiana, particularly Trial Rule 4.4.

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The author wishes to extend his appreciation to Susan B. Tabler for her assistance in the preparation of this discussion.

[1] IND. R. TR. P. 4.4.

[2] 62 F.R.D. 7 (N.D. Ind. 1974).

[3] *Id.* at 14.

The motion to dismiss was denied on the facts alleged in the complaint. The diversity suit, based on products liability stemming from an explosion of a sulphur recovery unit in Indiana, named as defendants the out-of-state manufacturer, designers, suppliers, and vendors of the unit. The court suggested that jurisdiction was proper under liberal interpretations of Trial Rule 4.4(A)(1), (3), and (4) and that, regardless of the theory applied, the necessary "minimum contacts" with Indiana were shown.[4] Finding Trial Rule 4.4 sufficiently encompassing to uphold Indiana's interest in the application of its laws to permit recovery for injuries inflicted within its borders, the court sustained jurisdiction over the protesting defendant.

In the case of *Warner Press, Inc. v. Warner Books, Inc.*,[5] Chief Judge Steckler of the United States District Court for the Southern District of Indiana expanded the concept of "causing harm" under Trial Rule 4.4(A)(3) to include the sale of publications infringing the trademark laws. The suit for trademark infringement and unfair competition arose from the sale and distribution in Indiana of the allegedly infringing publications by the defendant's independent contractors. The defendant moved to dismiss for lack of jurisdiction over the person and for improper federal venue. The court denied the motion, holding that, even though all the publications were sold to an independent contractor in another state and the independent contractor was in turn responsible for the distribution of the publications in Indiana, the court had jurisdiction pursuant to the "causing harm" concept of Trial Rule 4.4(A)(3) and therefore the non-resident publisher was amenable to service. Thus, according to the opinion, it was immaterial that the alleged tortious act of the defendant was committed or had occurred outside the state of Indiana. For the purposes of the motion, it was sufficient that the infringing sale caused harm within this jurisdiction.

The concept of "doing business" was also a focus of discussion in the *Warner* case. The district court stated that, since the adoption of Trial Rule 4.4, it is no longer necessary for a foreign corporation to do business in Indiana before it becomes amenable to suit.[6] However, under the federal rules, venue is properly laid in any district in which a corporation is doing business.[7] The court found that, even though for the purposes of affording jurisdiction the defendant was not doing business in Indiana, nevertheless, for venue purposes a corporation found amenable to service of process in a district should also be held to be doing business in that district.

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[4]*See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[5]366 F. Supp. 187 (S.D. Ind. 1973).

[6]Byrd v. Whitestone Publications, Inc., 27 Ind. Dec. 619 (S.D. Ind. 1971).

[7]28 U.S.C. § 1391(c) (1970).

Thus, the court held that the fact that the defendant company relied upon the services of an independent contractor, while precluding jurisdiction under Trial Rule 4.4(A)(1), did not prevent a finding that the company was "doing business" within the meaning of the federal venue statute.

In *Podgorny v. Great Central Insurance Co.*,[8] the Indiana Court of Appeals upheld the right to attack collaterally a judgment rendered in another state on the ground that the court lacked jurisdiction over the person. The plaintiff-appellee sought to enforce in Indiana a previous default judgment obtained in Illinois against the appellant, an Indiana resident. Both parties moved for summary judgment in the Indiana proceeding, the appellant contending that the Illinois decision was void for the reason that he was never served with process. In support of his motion for summary judgment, appellant filed an affidavit asserting that the first notice he received of the action was upon receipt of summons in the Indiana suit and that he had no personal knowledge of the proceedings until after entry of judgment in the Illinois suit. The Indiana trial court denied appellant's motion for summary judgment and granted the motion of plaintiff-appellee.

In reversing, the court of appeals held that summary judgment was improper since the motions for summary judgment and the documents filed in support thereof revealed the existence of a genuine issue as to whether the provisions of the Illinois rules for substituted service had been satisfied. The court noted that, if appellant's affidavit were taken as true and all doubts resolved in his favor, the presumption of validity attaching to judgments of sister states was insufficient to carry the case against appellant:

> His lack of actual notice then supports an inference that the provisions for substituted service were not properly complied with, since the whole concept of substituted service constituting personal rather than constructive service, is that if the provisions for substituted service are met, the party is so reasonably likely to receive actual notice that the requirements of due process are fulfilled.[9]

Finally, two recent cases involving widely diverse circumstances dealt with the trial court's retention of jurisdiction over the case. In *Smith v. Indiana State Board of Health*,[10] a suit was brought seeking an injunction to prevent a rock festival. The defendants filed a motion for a change of judge, which motion was granted. Later on the same day, the plaintiffs presented a petition for a temporary restraining order which the same judge also

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[8]311 N.E.2d 640 (Ind. Ct. App. 1974).

[9]*Id.* at 648.

[10]303 N.E.2d 50 (Ind. Ct. App. 1973).

granted. The issue raised on appeal was whether the judge, who had previously granted a motion for change of judge, had the authority to grant the temporary restraining order.

The court of appeals held that jurisdiction of the case was retained by the judge for emergency matters, even though a change of judge had been granted. The court observed that if the law were otherwise it would contravene policy considerations as well as ruling precedent and would create a problematic situation wherein, for a certain period of time, no court would have jurisdiction to act. Hence, until a new judge qualified, jurisdiction remained in the judge granting the venue change to issue temporary restraining orders and, doubtless, other forms of relief necessitated by an emergency.[11]

The case of *Farley v. Farley*[12] concerned the trial court's retention of jurisdiction in a divorce proceeding after the final decree of divorce had been rendered. The appeal attacked the judge's authority to enter an order for the husband to pay suit money, said order having been issued five months after the decree of divorce for the wife was entered. The husband contended that, because the duty of the husband to support his wife terminates upon entry of a final divorce decree, an order for suit money must be included in the divorce decree or be forever barred.

The court of appeals held that the post-facto granting of attorneys' fees and litigation expenses to the wife was proper under the circumstances of the case. Alternative theories for supporting the continuing jurisdiction of the trial court were proffered. First, although a line of cases supports the proposition that courts are without power to assess suit money after entry of a final divorce decree,[13] an exception exists for obligations specified in the decree. The court found that the divorce decree could be construed as reserving the question of suit money. Alternatively, the assessment of suit money subsequent in time to the entry of the order severing the marital relationship was deemed proper on the basis of the rule of *Alderson v. Alderson*[14] that the various aspects of a divorce decree are divisible. Thus, the granting of a divorce decree does not divest the court of jurisdiction to dispose of matters necessarily

[11] *See also* Gibson v. Miami Valley Milk Producers, Inc., 299 N.E.2d 631 (Ind. Ct. App. 1973), in which the court held that the filing of a Trial Rule 75 motion to transfer the case does not preclude all further action in the forum where the action is pending. In contrast, the court of appeals noted, the filing of a Trial Rule 76 motion for change of venue from judge or county requires that the original court grant the motion and take no further action in the matter.

[12] 300 N.E.2d 375 (Ind. Ct. App. 1973).

[13] *E.g.*, O'Connor v. O'Connor, 253 Ind. 295, 253 N.E.2d 250 (1969).

[14] 281 N.E.2d 82 (Ind. 1972).

incidental to the divorce proceeding. As a further reason for sustaining the ruling of the trial court, the court of appeals found that the appellant had effectively waived his right to assert lack of jurisdiction as a ground for appeal because his motion to correct errors failed to raise that issue with specificity. Although subject-matter jurisdiction may be challenged at any time, jurisdiction over the particular case, the court noted, must be objected to in a timely and specific fashion.

B. Scope of the Trial Rules

During the past term, attention was directed to the applicability of the Indiana Rules of Trial Procedure to administrative and criminal proceedings. Although two recent decisions[15] reaffirmed that the Trial Rules do not pertain to proceedings before administrative agencies,[16] the Indiana Supreme Court, in the case of *City of Mishawaka v. Stewart*,[17] upheld the applicability of the Trial Rules to appeals taken from trial court reviews of administrative rulings. The Board of Public Works and Safety of the City of Mishawaka dismissed petitioner from the fire department following a hearing on charges of misconduct. On judicial review, the decision was reversed. The City then commenced the process of appeal from that decision by filing with the trial court a motion to correct errors. Following the overruling of the motion to correct errors by the trial court, the City perfected an appeal to the court of appeals where the holding below was reversed.[18] In his petition to transfer to the supreme court, petitioner alleged that the City's appeal to the courts of appeals was faulty because the City failed to file a petition for rehearing as required by Indiana Code section 18-1-11-3[19] as a prerequisite to perfecting such an appeal.

The supreme court upheld the decision of the court of appeals to the effect that the Indiana Rules of Trial Procedure have superseded the statutory provisions requiring a petition for rehearing. Thus, a motion to correct errors, rather than a petition for rehearing, is the proper method of perfecting an appeal from a trial court's review of board action.

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[15]King v. City of Gary, 296 N.E.2d 429 (Ind. 1973) (Trial Rule 16 not applicable to hearing before Police Civil Service Commission); Smith v. Review Bd. of Ind. Emp. Sec. Div., 306 N.E.2d 140 (Ind. Ct. App. 1974) (Trial Rule 5(E)(2) not applicable to proceeding before Review Board of Indiana Employment Security Division).

[16]*See* Clary v. National Friction Prods., Inc., 290 N.E.2d 53 (Ind. 1972).

[17]310 N.E.2d 65 (Ind. 1974).

[18]City of Mishawaka v. Stewart, 291 N.E.2d 900 (Ind. Ct. App. 1973).

[19]IND. CODE § 18-1-11-3 (IND. ANN. STAT. § 48-6105, Burns Supp. 1974).

In the case of *Julkes v. State*,[20] the issue was whether Trial Rule 53.1 would be operative in regard to a petition for habeas corpus and would thereby cause a trial judge to be relieved after thirty days for failure to rule on the writ within that time. The supreme court held that Trial Rule 53.1 is inapplicable to this situation. A contrary holding, it was suggested, would in effect be a grant of authority to the trial judge to delay as long as thirty days before granting relief, thereby undermining the concept of speedy relief fundamental to the habeas corpus remedy. The court declared that the proper procedure to follow, when a writ of habeas corpus filed in the trial court is not acted upon promptly, is to petition for a writ of mandate from the supreme court.

Two recent cases recognized the inapplicability of certain trial rules to criminal proceedings.[21] In *Neeley v. State*,[22] the court of appeals held that Trial Rule 52(A), requiring the trial court to make findings of fact and conclusions of law at the request of a party, does not pertain to criminal trials. By way of explication of this holding, the court of appeals noted that, whereas the basis of the trial court's decision in a civil matter may require clarification because of complex issues and vague common law precedents, the elements of a crime which must be satisfied at trial are set forth by statute. Thus, findings of fact and conclusions of law are unnecessary and cannot be requested by a criminal defendant.

In *State ex rel. Rodriguez v. Grant Circuit Court*,[23] the supreme court held that Trial Rule 76 is not the appropriate means for requesting a change of venue from a judge in a criminal case. According to the decision, Criminal Rule 12 constitutes the exclusive provision governing such a procedure in criminal matters.[24] On the other hand, in the case of *Crockett v. Vigo County School Corp.*,[25] the supreme court reemphasized that the provisions of Trial Rule 79 for the appointment of a special judge pertain to all proceedings, including criminal. This assertion was made in conjunction with a discussion of Trial Rule 79 as it relates to Indiana Code section 34-4-17-4(b) and (c).[26] The court held that the statutory provisions

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[20]295 N.E.2d 619 (Ind. 1973).

[21]*See* IND. CODE § 35-1-49-1 (IND. ANN. STAT. § 9-2407, Burns Supp. 1973), which provides that "[i]n all criminal cases where no special provision has been made in this act, the rules of pleading and practice in civil actions shall govern, so far as applicable."

[22]297 N.E.2d 847 (Ind. Ct. App. 1973), *aff'd*, 305 N.E.2d 434 (Ind. 1974).

[23]309 N.E.2d 145 (Ind. 1974).

[24]IND. R. CRIM. P. 12.

[25]295 N.E.2d 621 (Ind. 1973).

[26]IND. CODE § 34-4-17-4(b) & (c) (Burns 1973). These provisions, which pertain to public lawsuits, provide in part:

(b) Change of Venue. A change of venue from the judge may be

were abrogated by Trial Rule 79 which provides the exclusive manner for the selection of special judges in all causes, whether civil, statutory, or criminal, and in any court except justice of the peace and magistrate courts.

C. Pleadings and Pretrial Motions

Two recent cases concerned the adequacy of the complaint in actions involving claims of fraud. In the case of *Physicians Mutual Insurance Co. v. Savage*,[27] the court of appeals was presented with an argument that the trial court should have granted a new trial on the ground of unavoidable surprise. The defendant company contended that it was unaware that a claim of fraud had been raised against it because no allegation of fraud appeared in the complaint. Nevertheless, during the course of the trial, reference was made to fraudulent conduct on the part of the defendant and the question of exemplary damages was raised. In addition, the trial brief of plaintiff contained a discussion of fraud and exemplary damages.

The defendant insurance company relied upon Trial Rule 9(B) requiring fraud or mistake to be averred specifically. The court of appeals stated that Trial Rule 9(B) should be read in conjunction with Trial Rule 8, which requires only a "short and plain statement" of the claim. The court held that not only did Trial Rule 8 qualify Trial Rule 9(B) but that, moreover, the pleader was not required to state in his complaint the theory upon which his claim was based.[28] Finally, the court noted that the defendant failed to protect itself from alleged surprise by moving for a continuance under Trial Rule 15(B).

In the case of *Sundstrand Corp. v. Standard Kollsman Industries, Inc.*,[29] the United States Court of Appeals for the Seventh Circuit considered whether a plaintiff should be limited at trial to proof of only the specific acts of fraud alleged in the complaint. The issue arose in the context of a securities suit in which there was a general allegation of wrongdoing in violation of section 78j of the Securities Exchange Act of 1934[30] and of the Rules and Regulations of the Securities and Exchange Commission. At trial, the district court ruled that the general statement of wrongdoing contained in a particular paragraph of the complaint was limited by

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had but no change from the county will be permitted. . . .
(c) Special Judge. The rules regarding the selection of a special judge in civil cases shall not apply . . . .

[27]296 N.E.2d 165 (Ind. Ct. App. 1973).

[28]*See* State v. Rankin, 294 N.E.2d 604 (Ind. 1973).

[29]488 F.2d 807 (7th Cir. 1973).

[30]15 U.S.C. § 78j (1970).

the specific claims of fraud made elsewhere in the complaint; thus, it refused to admit evidence in proof of fraud beyond the specific acts alleged. The court of appeals held that this ruling was erroneous.

The court of appeals stated that pleading is not a procedural game of skill and that, as has often been propounded, the important function of pleading is to inform the opposing parties of the basis of the claim. Further, the court held that, in deciding whether a complaint has fairly notified a defendant of the matters sought to be litigated, *it was entirely proper to look beyond the pleadings to the pretrial conduct and communication of the parties.* In addition, the fruits of discovery may provide important information relevant to discerning the breadth of the complaint. Hence, according to the court of appeals, the trial court erred in restricting the more general allegation of the complaint to the specific acts enumerated elsewhere in the complaint.

The *Sundstrand* opinion also involved another appeal based on the same stock transaction. In the context of this appeal, the court had occasion to consider the relationship of the burden of proof to the requirement under Federal Rule of Civil Procedure 8(c) that the defendant affirmatively plead certain defenses in his answer.[31] Halfway through the trial, the counterclaim defendant asserted that equitable relief was not available on the counterclaim because there existed an adequate remedy at law. The trial court thereupon dismissed the counterclaim and, upon appeal, the counterclaimant argued that the counterclaim defendant was barred from raising the question of an adequate remedy at law because of its failure to plead the point affirmatively in its answer.

The court of appeals held that, since under controlling Illinois law the burden of proving an "inadequate remedy at law" was upon the plaintiff, the defendant was not required to plead an "adequate remedy at law" as an affirmative defense. The court noted that, among federal courts, there is a split of opinion on this question and that, in some courts, the defendant is required to plead as an affirmative defense any issue specifically indicated in rule 8(c) regardless of who has the burden of proof under state law. According to the Seventh Circuit Court of Appeals, however, "in our view the better rule is that a defendant need plead affirmatively only those defenses upon which he carries the burden of proof."[32]

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[31] The provisions of Indiana Rule of Trial Procedure 8(C) largely parallel those of the federal rule.

[32] 488 F.2d at 813. In addition, the Supreme Court of Indiana recently recognized that the defense of sovereign or governmental immunity must be raised as a Trial Rule 8(C) affirmative defense. Miller v. Griesel, 308 N.E.2d 701 (Ind. 1974).

The effect of a failure to reply was reiterated[33] by the Indiana Court of Appeals in the case of *State v. Hladik*.[34] The question of what pleadings require a reply arose in the context of an eminent domain action. Eight months before trial the defendants filed an "Amended Supplemental Pleading" in which they characterized themselves as "third party plaintiffs" and in which they complained that the actions of the "third party defendants" in constructing a sewer and high tension electrical line constituted an additional taking for the purposes of assessing damages. On motion of the State, the third party defendants were struck from the action. The State failed to respond to the allegations of the supplemental pleading, and the trial court ordered that, in the absence of amendment or reply, the State was deemed defaulted as to the issues set forth in the pleading. On appeal, the ruling of the trial court was upheld. The court of appeals declared that, although the supplemental pleading was not a "denominated counterclaim, which is the only counterclaim to which a literal reading of Trial Rule 7(A) requires a reply,"[35] nonetheless, the State was obligated to reply pursuant to the order of the trial court. Its failure to reply, the court held, constituted an admission of the veracity of the allegations made in the supplemental pleading.

A number of recent Indiana cases have interpreted and refined the law relating to amendments of complaints. In *Sekerez v. Gary Redevelopment Commission*,[36] the plaintiff filed an amended complaint after an answer was filed by the defendant. The defendant moved to strike the plaintiff's amended complaint on the ground that it was not filed in compliance with Trial Rule 15(A). In discussing the question on appeal, the appellate court stated that, pursuant to Trial Rule 15(A), an amended complaint may be filed following an answer only with leave of the court or with written consent of the adverse party. An amended complaint may be filed as a matter of right prior to the answer; but, the court held, if the complaint is filed after that time, and if neither condition is satisfied, the amended complaint is properly struck.

Interpretation of Trial Rule 15(C), concerning the relation back of amendments, was rendered in the case of *Simmons v. Fenton*.[37] The complaint, in an action sounding in tort, was filed on the

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[33]See Harvey, *Civil Procedure and Jurisdiction, 1973 Survey of Indiana Law*, 7 IND. L. REV. 24, 34 (1973), for a discussion of Commercial Credit Corp. v. Miller, 280 N.E.2d 856 (Ind. Ct. App. 1972), wherein the problem was also discussed.

[34]302 N.E.2d 544 (Ind. Ct. App. 1973).

[35]*Id.* at 548.

[36]301 N.E.2d 372 (Ind. Ct. App. 1973).

[37]480 F.2d 133 (7th Cir. 1973).

last day of the two-year statute of limitations period. The defendant named in the complaint was, in fact, the daughter of the woman who was driving the car which caused the alleged injury. The plaintiffs, however, first became aware of this error, according to their motion to "correct the misnomer by substituting a proper name," when the daughter filed a motion for summary judgment approximately fourteen months after the statute of limitations had run. The question was whether plaintiffs' motion to substitute the proper name should be granted and whether the original complaint, as amended, would relate back to the time of filing.

The mother argued that the statute of limitations had run and that, pursuant to Trial Rule 15(C), there was no relation back of the complaint as amended. The motion to correct the misnomer was denied by the trial court, and the Seventh Circuit affirmed, holding that under Trial Rule 15(C) the defendant must receive notice of the institution of the action within the period of time provided by law for commencing the action. Such obviously was not the case here.

The import of this holding is that a motion to correct a misnomer can be granted only when the defendant is a proper defendant and already in court and, thus, when the only effect of the motion is to correct the name under which the defendant is sued. However, if a new defendant is to be substituted or added by amendment, then the substitution or amendment must occur prior to the time set by the statute of limitations. A substitution occurring thereafter cannot be saved by the doctrine of relation back. In sum, rule 15(C) is keyed to notice, whereas the commencement of an action and the tolling of the statute of limitations are keyed to the filing of a complaint.[38]

Finally, in the case of *Ayr-Way Stores, Inc. v. Chitwood*,[39] the Indiana Supreme Court was presented with the question of whether pleadings could be amended to conform to the evidence presented at trial. The case arose out of a lawnmower accident, and the trial court granted the plaintiff's motion to amend the complaint to conform to the evidence adduced during the trial. The court of appeals reversed, holding that the defendants had not impliedly litigated the added issues of strict liability and implied warranty and, more-

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[38]The same result was reached by the Indiana Court of Appeals in a recent case involving similar circumstances. *See* Gibson v. Miami Valley Milk Producers, Inc., 299 N.E.2d 631 (Ind. Ct. App. 1973). In *Gibson*, the court stated: "Under the present T.R. 15 and the prior procedure this doctrine [relation back] did not permit the addition of an entirely new party or the stating of an entirely new claim after the statute of limitations has run." *Id.* at 638.

[39]300 N.E.2d 335 (Ind. 1973).

over, that a failure to grant a continuance was prejudicial to the defense.[40]

In the supreme court, the trial court's determination was upheld. The supreme court held that clearly the amendments should have been permitted because the proof at trial sustained either a theory of strict liability or of breach of implied warranty and because the defendants, by failing to object at trial when the evidence was presented, consented to the proof offered. Therefore, they waived the charge of prejudice stemming from the granting of the amendments. In addition, the court held that, when a trial has ended without objection or qualification to the course which it took, the evidence presented is controlling. At that point, neither pleadings, pretrial orders, or theories postulated by either party should operate to frustrate the trier of fact in finding the facts which the preponderance of the evidence permits.

Concerning the question of whether a continuance should have been granted to the defendants, the court noted that the defendants stated only that they would be prejudiced by the amendments. According to the court, the moving party for a continuance must show that allowing the amendments would be prejudicial to his rights in maintaining his action or defense. In this case, the defendants, as the moving parties for continuance, failed to establish their affirmative burden in demonstrating this particular type of prejudice. In conclusion, the court declared that whether a continuance should be granted when pleadings are amended is a matter of discretion for the trial court and, absent a showing of clear and prejudicial abuse of that discretion, the trial court's ruling will not be disturbed.[41]

Pretrial motions relating to change of venue and change of judge were the subject of judicial consideration in a few recent cases. In *State ex rel. Yockey v. Superior Court,*[42] the supreme court gave a definitive interpretation of Trial Rule 76, which provides in part that an application for a change of venue or a change of judge shall be filed not later than ten days after the issues are first closed on the merits. Specifically, the question presented was *when,* for the purposes of Trial Rule 76(2), the issues shall be deemed first closed on the merits in a situation wherein new issues are developed subsequent to the pleadings but before trial.

The supreme court held that, for the purposes of Trial Rule 76(2), issues shall be deemed first closed on the merits upon the filing of the defendant's answer. Filing of the answer, the court stated, shall initiate the ten-day period within which a change of

[40]Ayr-Way Stores, Inc. v. Chitwood, 292 N.E.2d 298 (Ind. Ct. App. 1973).
[41]*Accord,* Hunter v. Milhous, 305 N.E.2d 448 (Ind. Ct. App. 1973).
[42]307 N.E.2d 70 (Ind. 1974).

venue motion must be made. Furthermore, the court declared, for the purposes of Trial Rule 76(2), it is immaterial that an amended or supplemental answer may follow. Likewise, it is immaterial that a counterclaim is filed to which a reply is required under Trial Rule 7(A). Only the *original* answer determines when the issues between adverse parties are first closed.[43]

In the case of *State ex rel. Sedam v. Ripley Circuit Court*,[44] the supreme court recognized an automatic right to a change of judge when a circuit court judge files an information seeking the removal of a member of the Board of Public Welfare. The court justified this holding on the ground that a removal proceeding is adversary in nature. Thus the functioning of the judge as both prosecutor and trier of fact cannot be countenanced. Both Trial Rule 79(11) and Trial Rule 76(1), the court noted, compel a change of venue in this situation.

Motions to dismiss under the various Indiana Rules of Trial Procedure were the subject of considerable judicial comment during the past term. In the case of *Salem Bank & Trust Co. v. Whitcomb*,[45] the supreme court considered the operation of Trial Rule 12(B)(8) in converting a motion to dismiss into a motion for summary judgment. In the trial court, interrogatories had been filed prior to argument and ruling on the motion to dismiss. The trial court sustained the motion to dismiss but failed to follow the procedures for summary judgment set out in Trial Rule 56. The court of appeals held that the motion to dismiss was automatically converted, by the presence of extraneous matters, into a motion for summary judgment under Trial Rule 12(B)(8) and cited the trial court for error in failing to follow the summary judgment procedure.[46] The supreme court affirmed, holding that the mere filing

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[43]*Accord,* State *ex rel.* Katz v. Superior Court, 308 N.E.2d 694 (Ind. 1974). A related problem was raised in Hunter v. Milhous, 305 N.E.2d 448 (Ind. Ct. App. 1973). In *Hunter*, the question of when the issues are deemed first closed for the purposes of Trial Rule 76(2) arose in the context of a multi-defendant suit in which a number of answers were filed. The court of appeals noted that the question of whether the first answer or the last answer filed acts to close the issues on the merits "seems to be a beclouded point in Indiana law." *Id.* at 453. The question was left unresolved by the court, since the denial of defendant's motion for change of venue was upheld on the grounds that under Trial Rule 76(7), the defendant had waived a change of venue by failing to object at the time the case was set for trial. Discretionary relief under Trial Rule 76(8) was similarly rejected for failure to show good cause. According to the court, local prejudice does not establish good cause in an action to be tried without a jury.

[44]301 N.E.2d 185 (Ind. 1973).

[45]308 N.E.2d 707 (Ind. 1974).

[46]Salem Bank & Trust Co. v. Whitcomb, 298 N.E.2d 537 (Ind. Ct. App. 1973).

of the interrogatories with the court, whether or not specifically called to the court's attention by the parties, sufficed to convert the motion to dismiss into a motion for summary judgment.

In the case of *Sundstrand Corp. v. Standard Kollsman Industries, Inc.*,[47] the United States Court of Appeals for the Seventh Circuit found inappropriate the dismissal with prejudice of a counterclaim seeking specific performance. The trial court dismissed the counterclaim for the reason that equitable relief was not appropriate since the counterclaimant had an adequate remedy at law. The question then arose as to whether it was proper to dismiss the case rather than to award damages to the counterclaimant in light of rule 54(c) which states, in essence, that the final judgment shall grant the relief to which the party is entitled even if the party has not demanded such relief in his pleadings.

The court of appeals held that the dismissal with prejudice, in barring a subsequent suit for damages, contravened rule 54(c) and, moreover, thwarted pursuit of the adequate legal remedy given as the reason for dismissing the equitable claim. Hence, the court overruled the dismissal and remanded the case for a hearing on the damages question.

Lack of standing constituted the ground for dismissal in a number of recent court decisions. In the case of *City of Mishawaka v. Mahoney*,[48] the principal issue presented on appeal was whether the City, its mayor, its common council and the city clerk could maintain an action for declaratory judgment in order to determine the validity of a city ordinance which regulated the distribution of pornographic materials in the community. The City contended that the prospect of liability for false arrest for enforcing the ordinance if invalid constituted an interest within the purview of the Uniform Declaratory Judgment Act[49] which was sufficient to warrant declaratory relief. The court of appeals upheld the dismissal by the trial court on the ground that the City lacked standing to maintain this action under the Act. Noting the incongruity inherent in permitting a municipality, which has enacted an ordinance, to implore the court to rule upon its validity, the court of appeals held that

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[47]488 F.2d 807 (7th Cir. 1973). See text accompanying note 32 *supra*.
[48]297 N.E.2d 858 (Ind. Ct. App. 1973).
[49]IND. CODE § 34-4-10-2 (Burns 1973). This provision is as follows: Who may have determination and obtain declaration.—Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question or construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

the City and its officials had shown no right, status, or interest which was adversely affected by enforcement of the ordinance in question.

Similarly, a motion to dismiss was upheld against a municipality for lack of standing to challenge an action of the State Tax Board in the case of *City of Indianapolis v. Indiana State Board of Tax Commissioners*.[50] The City had intervened as an additional party-plaintiff in an action to enjoin the State Tax Board from making further increases in the 1971 county budgets and in the 1970 levies and rates for municipal corporations within Marion County. Upon judgment entered against the plaintiffs, the City alone prosecuted the appeal. The appellate court held that the City of Indianapolis, as a nontaxpaying municipal corporation, was unable to show any injury to a legally protected interest through the Tax Board's action. Furthermore, the City-County Council, on whose behalf the City appeared, lacked a monetary interest in the budgets or levies of other governmental units within the county. Thus, the appeal was properly dismissed for lack of standing.[51]

In *Ruckman v. Pinecrest Marina, Inc.*,[52] the district court, in a wrongful death action, granted a motion to dismiss under rule 12 of the Federal Rules of Civil Procedure. The suit was brought by the administrators of the estates of two unemancipated minors who were killed as a result of the alleged acts of the defendant. Holding that Indiana law was controlling, the court dismissed with leave to amend for the reason that Indiana law requires that the father, not the personal representative, bring a wrongful death action.[53] According to the court, the personal representative of an estate of a

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[50]308 N.E.2d 868 (Ind. 1974).

[51]The question of whether the City had standing as an original plaintiff was not reached by the court. However, the supreme court criticized the court of appeals ruling which had dismissed the appeal on the grounds of mootness. City of Indianapolis v. Indiana State Bd. of Tax Comm'rs, 294 N.E.2d 136 (Ind. Ct. App. 1973). The supreme court noted that this ruling was improper because every taxpayer challenge to the tax-levying process arrives in the appellate courts after taxes have "presumably been paid." 308 N.E.2d at 871. Thus, the effect of holding the appeal "moot" would be to render nugatory the right of aggrieved taxpayers to challenge the actions of the State Tax Board. *Id.*

For recent cases holding that a municipal agency lacks standing as an aggrieved party to seek review of a decision of one of its zoning boards, see Metropolitan Dev. Comm'n v. Newlon, 297 N.E.2d 483 (Ind. Ct. App. 1973), and Metropolitan Dev. Comm'n v. Losche, 295 N.E.2d 836 (Ind. Ct. App. 1973). Both decisions relied upon the earlier case of Metropolitan Dev. Comm'n v. Cullison, 277 N.E.2d 905 (Ind. Ct. App. 1972).

[52]367 F. Supp. 25 (N.D. Ind. 1973).

[53]*See* IND. CODE § 34-1-1-8 (Burns 1973).

minor can sue for the death of the child only if the child's parents are dead or if the child has been emancipated.[54]

A motion to dismiss under Trial Rule 12(B)(7) for failure to join an indispensible party was the subject of consideration in the case of *County Department of Public Welfare v. Morrow*.[55] The action was brought against the county board to prevent a man named Kelley, who had been appointed director of the board, from assuming that position. Kelley was not joined as a party defendant. Following the court's issuance of a temporary restraining order, the county board moved to dismiss on the ground of a failure to join an indispensible party. The court of appeals held that Kelley was an indispensible party in that the decree expressly prevented him from ever assuming the duties of director and thereby restrained his employment. According to the court, because Kelley's rights were adjudicated in the action, his presence as a party defendant was necessary.

The grounds for dismissal under Trial Rule 41(E) received interpretation in the case of *State v. McClaine*.[56] Trial Rule 41(E) provides, generally, that whenever there has been a failure to comply with the trial rules and no action has been taken in a civil case for a period of sixty days, the court, on its own motion or on the motion of a party, shall order a hearing for the purpose of dismissing the case. In the *McClaine* case, there were two lengthy periods of time during which the State, as plaintiff, took no affirmative steps in the prosecution of its case. The first time period ran from 1958 to 1967; the second time period extended from 1968 to February 17, 1971, on which day the State filed a request for trial. On February 26, 1971, the defendants moved to dismiss under Trial Rule 41(E). The supreme court held that the defendants' motion was not timely made. According to the court, the motion must be filed *after* the sixty-day period has expired but *before* the plaintiff resumes prosecution of the case. Since the defendants here moved to dismiss after the plaintiff had filed its request for trial, they failed to satisfy the requirements of Trial Rule 41(E), as construed in this opinion.

The other aspect of Trial Rule 41(E), dismissal for failure to comply with the trial rules, received interpretation in the case of *Webb v. City of Bloomington*.[57] The action was in the form of a remonstrance against an ordinance adopted by the City which

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[54]367 F. Supp. at 26-27. The court cited for this proposition the cases of Berry v. Louisville, E. & St. L.R.R., 128 Ind. 484, 28 N.E. 182 (1891), and Pere Marquette R.R. v. Chadwick, 65 Ind. App. 95, 115 N.E. 678 (1917).

[55]301 N.E.2d 787 (Ind. Ct. App. 1973).

[56]300 N.E.2d 342 (Ind. 1973).

[57]306 N.E.2d 382 (Ind. Ct. App. 1974).

would have effected an annexation of certain property. The litigation was terminated when the City's motion to dismiss pursuant to Trial Rule 41 was granted by the trial judge after the ordinance had been repealed.

One question raised on appeal was whether it was within the competency of the trial court to dismiss the action pursuant to Trial Rule 41 after the ordinance was withdrawn. The argument advanced was that only the plaintiff can move for dismissal under the rule. The court of appeals held that a dismissal pursuant to Trial Rule 41(E) for failure to comply with "these rules" would embrace Trial Rule 8 as well as Trial Rule 12, and that, therefore, the motion was properly asserted by the defendant.[58] The reasoning underlying the court's holding was that the absence of a litigable claim, an integral part of every action, means there is no claim for relief stated under Trial Rule 8. Because there was no claim for relief stated pursuant to Trial Rule 8, there was a failure to follow the rules. Hence, the dismissal under Trial Rule 41(E) was proper.

A further question raised on appeal in the case concerned the propriety of the trial court's denial of the remonstrator's motion for summary judgment. The court of appeals held that the motion for summary judgment pursuant to Trial Rule 56 was not appropriate from a legal standpoint given the absence of a justiciable issue.

Further exposition of the requirements for obtaining a summary judgment pursuant to Trial Rule 56 was provided in the case of *Renn v. Davidson's Southport Lumber Co.*[59] In that case, the motion for summary judgment was filed by the counterclaimant, a seller of building materials furnished for the construction of a house. The court of appeals, in reversing the trial court which had granted the motion, observed that the affidavit supporting the motion did not show affirmatively that it was made on personal knowledge or that the affiant was competent to testify regarding the matters stated therein. Furthermore, the affidavit set forth no facts which would support any of the conclusory statements made and, in particular, it failed to set forth facts which would establish an agency relationship between the homeowners and the contractor who purchased the building materials.

The court of appeals asserted that for the seller to be entitled to summary judgment he must make a prima facie case. A determination of whether a prima facie showing has been made is based upon affidavits offered, pursuant to Trial Rule 56(E), concerning matters placed in issue by the pleadings. Thus, according to the court, to be entitled to that initial determination the moving party

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[58] *Id.* at 386.

[59] 300 N.E.2d 682 (Ind. Ct. App. 1973).

must comply with the affidavit requirements found in Trial Rule 56(E). The court of appeals held that, absent compliance with that rule by the moving party, a summary judgment in his favor is incorrect, even if the opposing party fails to respond to the motion.[60]

Finally, in the case of *State v. Smith*,[61] the relationship of Trial Rule 63 to a summary judgment proceeding was considered by the supreme court.[62] The case, an eminent domain proceeding, was originally docketed to a certain judge who presided over all pretrial motions and hearings in the case, including a motion for summary judgment. Summary judgment was granted to the defendant and the State then filed a motion to set aside the summary judgment. In the interim between the judgment and the motion, however, the original judge had been succeeded by another judge. The new sitting judge transferred the hearing on the motion to set aside to his predecessor who was, at that time, a private attorney. He overruled the State's objection to the transfer and the state appealed. The supreme court held that, pursuant to Trial Rule 63, it was entirely proper to transfer the cause to the person who once sat on the case. A summary judgment hearing, the court asserted, is part of a "trial of a cause" as those words are used in the context of Trial Rule 63.

D. Pretrial Procedures and Discovery

Further refinement was given this year to the motion in limine,[63] a procedure for obtaining a protective order to prevent the introduction of certain evidence at trial. In the case of *Baldwin v. Inter City Contractors Service, Inc.*,[64] the court of appeals discussed the use of this motion in the context of a court trial. The motion, which sought to exclude expert testimony as irrelevant, was granted by the trial court. The court of appeals stated that the trial court's ruling on this motion was improper. According to the appellate court, the motion in limine is inappropriate in a trial to the court; its use is limited to trials by jury. Also, the court held that the motion has a restricted purpose in that it is designed to exclude

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[60]*Accord*, Podgorny v. Great Cent. Ins. Co., 311 N.E.2d 640 (Ind. Ct. App. 1974); Newell v. Standard Land Corp., 297 N.E.2d 842 (Ind. Ct. App. 1973).

[61]297 N.E.2d 809 (Ind. 1973).

[62]IND. R. TR. P. 63(A) provides:

> The judge who presides at the trial of a cause or a hearing at which evidence is received shall, if available, hear motions and make all decisions and rulings required to be made by the court relating to the evidence and the conduct of the trial or hearing after the trial or hearing is concluded.

[63]*See* Harvey, *Civil Procedure and Jurisdiction, 1973 Survey of Indiana Law*, 7 IND. L. REV. 24, 38 (1973).

[64]297 N.E.2d 831 (Ind. Ct. App. 1973).

only prejudicial matter. Its scope cannot be extended to exclude items of evidence which may merely be irrelevant. Thus, unless prejudice to the cause is demonstrated, the motion in limine must be denied.

Notable in the area of discovery procedures is the case of *Richmond Gas Corp. v. Reeves.*[65] One of the issues raised on appeal in this case was whether the trial court erred in permitting a party to read into evidence a portion of a deposition which contained an expert's opinion concerning the cause of an explosion. Specifically, an argument raised on appeal was that the expert's testimony was inadmissible because it was not given in response to a proper hypothetical question. The court of appeals referred to Trial Rule 32(D) (3) (b), concerning errors and irregularities occurring at an oral examination upon deposition. This rule specifies that any objection to the form of questions or answers is waived unless it is seasonably made at the taking of the deposition. Noting that here no objection was made when the deposition was taken, the court held that, therefore, the opponent of the evidence waived any error arising from the failure to question the expert witness in the proper hypothetical form. Thus, on this point, the court concluded that error was not committed by the trial court in allowing the deposition to be read into evidence.

E. Trial and Judgment

In the case of *Robinson v. State,*[66] the supreme court issued forceful guidelines concerning the use of attorneys' questions on voir dire examination. The court reproved the long-standing practice of lawyers in Indiana to try their cases during the voir dire examination. Such practice, the court observed, fosters bias and prejudice advantageous to the litigant instead of avoiding bias and prejudice in the selection of the jury. To eliminate this evil, the supreme court suggested that proper voir dire examination

> can be best accomplished by the trial judge's assumption of a more active role in the voir dire proceedings and by exercising, rather than abdicating, his broad discretionary power to restrict interrogation to that which is pertinent and proper for testing the capacity and competence of jurors.[67]

Thus, the supreme court admonished judges to supervise more closely the conduct of attorneys during the voir dire examination.

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[65]302 N.E.2d 795 (Ind. Ct. App. 1973).

[66]297 N.E.2d 409 (Ind. 1973).

[67]*Id.* at 412.

A number of recent cases enunciated the standard to be applied by the trial court in considering a motion for a judgment on the evidence (directed verdict) under Trial Rule 50. In the case of *Johnson v. Mills*,[68] the court of appeals stated that a directed verdict on a specific issue depends upon the total absence of evidence on an essential element of the plaintiff's case. The evidence on the issue, the court noted, must be without conflict and susceptible of but one ruling in favor of the moving party. The principle was reaffirmed in the recent cases of *Smith v. Chesapeake & Ohio Railroad*,[69] *Miller v. Griesel*,[70] *Lake Mortgage Co. v. Federal National Mortgage Association*,[71] and *Powell v. Powell*.[72] In the latter case, the court of appeals held that a directed verdict is proper only in cases tried before a jury or an advisory jury.[73] In actions tried by the court without a jury, the court observed, a motion for involuntary dismissal under Trial Rule 41(B) may be the appropriate way to raise the same question as would be presented by a motion for judgment on the evidence in a jury trial.

Another aspect of Trial Rule 50 was considered in the case of *Hess v. Bob Phillips West Side Ford, Inc.*[74] The question raised on review was whether a trial judge may, pursuant to its own motion

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[68]301 N.E.2d 205 (Ind. Ct. App. 1973).

[69]311 N.E.2d 462 (Ind. Ct. App. 1974). The trial court in the *Smith* case, at the close of all the evidence, granted a motion for judgment on the evidence and directed the jury to return a verdict for the defendant. The court of appeals, in reversing, cited with approval the case of Swearngin v. Sears Roebuck & Co., 376 F.2d 637 (10th Cir. 1967). There, and in the discussion in *Smith*, the point was made that, in determining whether to grant or deny a Trial Rule 50 motion, the entire body of evidence must be examined, in addition to all inferences favorable to the party against whom the motion is made. In short, the evidentiary review which the trial court conducts is not limited to a review of only the evidence of the non-moving party, but must encompass all the evidence which is before the court when the motion is made. The same standard, the court stated, would apply when the motion was made in a post-verdict setting.

[70]297 N.E.2d 463 (Ind. Ct. App. 1973), *aff'd*, 308 N.E.2d 701 (Ind. 1974). In this case, the standards were held applicable to a motion granted at the close of plaintiff's case.

[71]308 N.E.2d 739 (Ind. Ct. App. 1974). In this case, the motion for judgment on the evidence was granted at the close of all the evidence. Accordingly, the jury verdict for cross-plaintiffs was set aside. The court of appeals, on review, noted that the judgment on the evidence would have been improper if there were any probative evidence or reasonable inferences to be drawn from the evidence or if, in considering the evidence, reasonable men might differ in their conclusions.

[72]310 N.E.2d 898 (Ind. Ct. App. 1974).

[73]*See* Hoosier Ins. Co. v. Ogle, 276 N.E.2d 876 (Ind. Ct. App. 1971); Clark v. Melody Bar, Inc., 149 Ind. App. 245, 271 N.E.2d 481 (1971).

[74]304 N.E.2d 814 (Ind. Ct. App. 1973).

under Trial Rule 50, set aside a judgment entered on a jury verdict and, prior to hearing argument and ruling on a motion to correct errors, enter judgment for the other party. In this case, the trial to a jury resulted in a verdict for the plaintiff; judgment was entered on the same day that the verdict was returned. The defendant filed a motion to correct errors and, on the day the parties appeared for a hearing on that motion, the trial court on its own motion set aside the judgment pursuant to Trial Rule 50(A)(6) and entered a judgment notwithstanding the verdict. On appeal, the plaintiff contended that the court could act to set aside a judgment only in response to a motion by one of the parties. The court of appeals held that the trial court had the authority under Trial Rule 50 to act sua sponte to set aside a judgment and enter a new judgment prior to ruling upon the motion to correct errors. In effect, then, a trial court may enter judgment on the evidence on its own motion at any time prior to ruling upon a motion to correct errors.

The question of whether attorneys' fees and other fees can appropriately be included in costs awarded upon judgment received attention in recent judicial opinions. In the case of *State v. Holder*,[75] the State's appeals in eminent domain proceedings raised the questions of whether fees for attorneys, professional witnesses, and trial preparation could be awarded to the appellee land-owner. The trial court granted the fees. The supreme court reversed, holding that the principle had long been established in Indiana law that the word "costs" does not encompass attorneys' fees[76] and that, therefore, the power granted to the judge to award "costs" under the Eminent Domain Act[77] does not include authority to order the payment of attorneys' fees.

The State further argued that money awarded to the appellee for trial preparation and professional witness fees should not be sustained and that, again, such expenses were not encompassed in the term "costs." The supreme court agreed. The court stated that it did not believe that the word "costs" was intended to cover every conceivable expense incurred by a landowner in that type of action. Citing cases from other jurisdictions as authority,[78] the supreme court held that the expenses of retaining an expert witness to testify and other trial preparation expenses, such as mailing costs, travel, telephone, and photographic fees, are not contemplated

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[75]295 N.E.2d 799 (Ind. 1973) (Prentice, J., concurring; Arterburn, C.J. & Hunter, J., dissenting).

[76]*See, e.g.*, Hutts v. Martin, 134 Ind. 587, 33 N.E. 676 (1893).

[77]IND. CODE § 32-11-1-10 (Burns 1973).

[78]Frustuck v. Fairfax, 230 Cal. App. 2d 412, 41 Cal. Rptr. 56 (1964); Manchester Housing Authority v. Belcourt, 285 A.2d 364 (N.H. 1971); State v. Mandes, 119 N.J. Super. 59, 290 A.2d 154 (1972).

in the use of the term "costs." Accordingly, that part of the trial court's order which directed the State to pay the appellee's fees for attorneys, trial preparation, and expert witnesses was vacated on appeal.

In a concurring opinion, Justice Prentice expressed his belief that fees for trial preparation and professional services were similarly improper under Trial Rule 41(A)(2), which authorizes a plaintiff to withdraw his action under voluntary dismissal.[79] Justice Prentice opined that the "terms and conditions" established by the court for voluntary dismissal, which terms and conditions ordinarily include the costs of the action, would not encompass attorneys' fees and the expenses of trial preparation.[80] A lengthy dissenting opinion by Justice Arterburn expressed the view that such expenses could properly be awarded at the trial court's discretion in appropriate cases under Trial Rule 41(A)(2).[81]

In the case of *Perry County Council v. State ex rel. Baertich*,[82] the court of appeals was presented with the question of whether attorneys' fees are recoverable in a mandate action. The plaintiff-appellee, a public nurse, brought the action in mandate against the Board of County Commissioners to obtain her salary from appropriated public monies. The question raised on appeal was the appropriateness of the award of attorneys' fees by the trial court. The appellate court held that the general rule in Indiana, to the effect that attorneys' fees are not recoverable as damages in the absence of a statute or contract permitting recovery of those fees, applies to mandate actions. According to the court, mandate is an extraordinary legal, rather than equitable, remedy. By way of dicta, the court observed that "if the case had been in equity the attorney fees would have been proper."[83]

Modification of judgments in the context of divorce actions came under judicial scrutiny in three recent cases. In the case of

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[79] 295 N.E.2d at 801 (Prentice, J., concurring).

[80] *Id.*

[81] *Id.* at 802 (Arterburn, C.J., dissenting). In the case of State v. Palmwic Indiana Realty, Inc., 297 N.E.2d 479 (Ind. Ct. App. 1973), wherein the holding of *Holder* was applied to disallow the award of attorneys' fees, appraisers' fees and other expenses in an eminent domain proceeding, Judge Sullivan, in a concurring opinion, found the *Holder* dissent "extremely persuasive." *Id.*

[82] 301 N.E.2d 219 (Ind. Ct. App. 1973).

[83] *Id.* at 222, *citing* Gavin v. Miller, 222 Ind. 459, 54 N.E.2d 277 (1944). In *Gavin*, the court stated that the "right to recover attorneys' fees from one's opponent does not exist in the absence of a statute or some agreement, though a court of equity may, under some circumstances, allow attorneys' fees to be paid out of a fund brought under its control." *Id.* at 465, 54 N.E.2d at 280.

Jackman v. Jackman,[84] the court of appeals considered the question of whether a trial court may enter a judgment different from that first entered if the change of judgment occurs within ninety days after the first judgment and entry. Following a hearing on the evidence, the trial court, on January 6, 1972, entered its decree awarding a divorce to each party. On February 18, 1972, the trial court changed its judgment and entered judgment for the plaintiff on her complaint and against the defendant on his cross-complaint. Responding to defendant-appellant's contention that the trial court lacked continuing authority to effect the change of result, the court of appeals asserted that Trial Rule 52(B) and Trial Rule 59, as well as Indiana Code section 31-1-6-3,[85] empower the trial court to effect the change of result. Thus, the court held, the trial court retained authority and did not commit error by changing the judgment within a period of less than ninety days after the rendition of the original judgment.[86]

In the case of *Wilms v. Wilms*,[87] the trial court, in 1967, entered a final decree of divorce between the parties. This decree set out the total sum to be paid to the former wife, with payments to be made on a monthly installment basis. Five years later, the husband filed a petition to modify the support payments on the basis of a change in circumstances. The wife filed a motion to dismiss for failure to state a claim upon which relief could be granted, which motion was granted by the trial court. On appeal, challenge was made against the dismissal of the petition to modify support. The court of appeals upheld the ruling below, holding that, under the general rule and prior Indiana precedent, a judgment rendered for a sum in gross, even though payable in installments, is not subject to modification. The court observed that the legislature did not accord express power to a trial court to modify such alimony judgments on a showing of changed circumstances.

Also, the question of the trial court's authority to modify its order was raised in the case of *State ex rel. Dale v. Superior Court*.[88] In an original action to the supreme court for a writ of prohibition, the question was raised whether the respondent court had the authority to modify a divorce decree on its own motion under Trial Rule 60. In this case, the modified decree awarded an alimony

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[84]294 N.E.2d 620 (Ind. Ct. App. 1973).

[85]IND. CODE § 31-1-6-3 (Burns 1973).

[86]Also, in the case of Inkoff v. Inkoff, 306 N.E.2d 132 (Ind. Ct. App. 1974), the court held that the trial court has continuing jurisdiction to award attorneys' fees even after an appeal of the case has been perfected. For a discussion of another aspect of this case, see text accompanying note 128 *infra*.

[87]301 N.E.2d 249 (Ind. Ct. App. 1973).

[88]299 N.E.2d 611 (Ind. 1973).

judgment to the plaintiff in lieu of the transfer of personal property ordered under the original decree. The realtor argued that the court lacked the power or authority to modify its judgment on its own motion. The supreme court agreed. The court stated that Trial Rule 60, paragraph A, permits a modification without motion of the parties only for clerical mistakes. However, if the grounds for modification are among those cited in paragraph B, then they must be presented by a motion of the parties. In this case, because the error was not of a clerical nature and because no motion was made by the parties on other grounds, the supreme court held that the trial court had no power or authority to modify its judgment.

Further exposition of Trial Rule 60, allowing for relief from judgment or order, was rendered in a number of recent decisions. In the case of *Public Service Commission v. Schaller*,[89] one of the several questions raised under Trial Rule 60(B) was whether the relief sought was pursued within a reasonable time. The requirements explicit in this rule are that a motion for relief from judgment must qualify under one of the enumerated reasons for relief and it must be made within a reasonable time. The court of appeals observed that the motion in this cause was made some twenty-one years after entry of the judgment from which relief was sought. In addition, more than ten years had expired since the discovery of the conditions which allegedly altered the equities of the original judgment. Furthermore, the court noted, the moving party failed either to allege that the motion was filed within a reasonable time or to set out extenuating circumstances which would explain such time gaps as were found in the case. This failure was regarded as fatal to the motion and, consequently, the court found that under the facts the motion was not filed within a reasonable time.

Another case involving Trial Rule 60 was *School City of Gary v. Continental Electric Co.*[90] After successfully defending an appeal in the court of appeals,[91] the plaintiff then filed with the trial court a motion pursuant to Trial Rule 60(B) (8) for the purpose of filing an amended complaint. In the original action, the plaintiff obtained injunctive relief compelling the school to accept its bid for electrical work on a new school construction project. Thereafter, the school construction project fell through and plaintiff sought to reopen the case to seek a remedy at law—namely, damages for expenses in preparing the bid and prosecuting its claim. The trial

[89]299 N.E.2d 625 (Ind. Ct. App. 1973).

[90]301 N.E.2d 803 (Ind. Ct. App. 1973). See note 120 *infra*.

[91]School City of Gary v. Continental Elec. Co., 149 Ind. App. 416, 273 N.E.2d 293 (1971).

court granted the plaintiff's motion and permitted the plaintiff leave to file an amended complaint. The defendants appealed.[92]

The court of appeals held, on the preliminary question raised by the appeal, that the defendants' appeal was proper, since the granting or denying of relief under Trial Rule 60 was deemed a final judgment from which an appeal lies.[93] Thus, the court of appeals held that, although the defendant-appellants were yet to plead and respond to the amended complaint, and although the trial court had made no determination concerning the plaintiff's entitlement to relief under rule 60(B)(8), the determination that the motion should be granted was itself appealable.

A further question raised in the case in regard to Trial Rule 60 was whether, under the rule, a successful party could move to amend after an initial appeal. In an extensive opinion, drawing heavily upon treatise comments and federal cases, the court held that the motion was proper and stated that "[a]lthough it is rare, the provisions of TR.60(B)(8) are available to a prevailing party."[94]

The scope of the trial court's equitable discretion under Trial Rule 60 formed the basis of the supreme court's discussion in *Soft Water Utilities, Inc. v. LeFevre.*[95] Specifically, the court was presented with the question of whether a trial court has the power under Trial Rule 60(B) to change the date of its ruling on petitioner's motion to correct errors. The applicable facts of the case were that the plaintiff, upon judgment rendered for the defendant, filed its motion to correct errors with the trial court on June 30, 1972. Following a series of attempts to ascertain whether the court had acted on the motion, plaintiff was informed on July 10, 1972, by the clerk of the court, that its motion had never been received. Thereupon, on July 12, 1972, plaintiff filed another copy of the motion to correct errors. On August 11, 1972, plaintiff received notice from the judge that its motion to correct errors had been overruled on July 10th. Therefore, the thirty-day time limit for filing the praecipe under Appellate Rule 2 had expired.

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[92]The defendant also filed a motion to dismiss plaintiff's motion for relief from judgment for the reason that plaintiff's motion failed to state a claim. The trial court overruled defendant's motion, and the court of appeals held that the denial of a motion to dismiss was not a final appealable order.

[93]*See* IND. R. TR. P. 60(C). Also, in the case of Northside Cab Co. v. Penman, 297 N.E.2d 838 (Ind. Ct. App. 1973), it was noted that, because a decision under Trial Rule 60 is a final and appealable judgment, it is a judgment which requires the filing of a motion to correct errors, pursuant to Trial Rule 59, before appeal.

[94]301 N.E.2d at 810. *See* 4 W. HARVEY, INDIANA PRACTICE 222 (1971); 7 J. MOORE, FEDERAL PRACTICE ¶¶ 60.18[8], 60.22[1] (2d ed. 1972). *See also* Ferraro v. Arthur M. Rosenberg Co., 156 F.2d 212 (2d Cir. 1946).

[95]301 N.E.2d 745 (Ind. 1973).

The plaintiff then filed with the trial court, pursuant to Trial Rule 60(B), a motion seeking relief from the order of July 10th for the reason that it had not received notice of the entry of judgment in time to prosecute its appeal. The court granted the relief requested and ordered, nunc pro tunc, that the date of overruling the motion to correct errors be changed to August 14, 1972. On appeal, perfected by the plaintiff, the court of appeals granted the defendant's motion to dismiss the appeal because the praecipe was not filed within thirty days of the ruling on the motion to correct errors.[96]

The supreme court overruled the decision of the appellate court[97] and held that, under the circumstances, it was within the province of the trial court to change the date of its ruling on the motion to correct errors. According to the supreme court:

> A motion under TR.60(B) is addressed to the equitable discretion of the trial court. The burden is properly upon the movant to affirmatively demonstrate that relief is necessary and just. The trial court was so satisfied in this case.[98]

The import of the court's ruling is that a trial court has the authority under Trial Rule 60(B)(8) to change the date on its ruling if the situation warrants. The supreme court noted that the better procedure for effecting this authority under the rule would be for a trial court to vacate the order previously entered and re-enter the order on a subsequent date. The praecipe would then have to be filed, under Appellate Rule 2(A), within thirty days after the re-entry of the court's ruling on the motion to correct errors.

The usage of Trial Rule 59 in seeking a new trial was considered in the cases of *Austin v. Durbin*[99] and *Ernst v. Schmal.*[100] In the *Austin* case, the appellant filed a motion to correct errors seeking a new trial on the basis of newly discovered evidence. The trial court denied the motion and the court of appeals affirmed. The appellate court based its decision on appellant's failure to overcome the strong presumption inherent in Trial Rule 59 that the alleged evidence could, with the exercise of due diligence, have been discovered in time to use at trial.

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[96]293 N.E.2d 788 (Ind. Ct. App. 1973). *See* Harvey, *Civil Procedure and Jurisdiction, 1973 Survey of Indiana Law*, 7 IND. L. REV. 24, 48 (1973).

[97]Presumably, the supreme court's ruling will also control in the case of Hendrickson v. American Fletcher Nat'l Bank & Trust Co., 301 N.E.2d 530 (Ind. Ct. App. 1973), which was decided on the basis of the earlier court of appeals decision.

[98]301 N.E.2d at 749. *Accord*, Cazarus v. Blevins, 308 N.E.2d 412 (Ind. Ct. App. 1974).

[99]310 N.E.2d 893 (Ind. Ct. App. 1974).

[100]308 N.E.2d 732 (Ind. Ct. App. 1974).

In the *Ernst* case, a new trial was granted pursuant to Trial Rule 59(E)(1) because the trial court believed that, owing to the complexity of the issues in the case, the jury may have been confused in reaching its verdict. That is, the trial court granted the new trial because it came to the conclusion that, overall, there was error involved in the verdict, even if not specifically assigned to irregularity injected into the trial by the parties in the proceeding. The court of appeals, stressing the discretionary nature of the use of Trial Rule 59, upheld the trial court's ruling on the motion to correct errors and found the reason given sufficient.

A further question was raised as to whether the trial court was required under Trial Rule 59(E)(7) to make special findings of fact regarding the issues in the case. The court of appeals noted that special findings are required under the rule only when a new trial is granted for the reason that "the verdict, findings or judgment do not accord with the evidence."[101] Although it was unclear from the vague reason supplied by the trial court whether its ruling was based on the failure of the verdict to accord with the evidence, the court of appeals held that the strong presumption in favor of the trial court's action in granting a new trial would operate to exclude its decision from the ambit of Trial Rule 59(E)(7). Thus, special findings were not necessary.

Another aspect of Trial Rule 59 received consideration in the case of *Baker v. American Metal Climax Corp.*[102] In an action to withdraw a submission from the judge pursuant to Trial Rule 53.1,[103] the question was presented whether Trial Rule 59(D) operated to extend the time in which a judge may rule on a motion to correct errors on affidavits. Trial Rule 59(D) provides, in part, that an opposing party has fifteen days after the service of affidavits in which to serve opposing affidavits. The judge contended that the thirty-day period provided by Trial Rule 53.1 did not commence to run until the time had expired for the filing of a counter-affidavit under the Trial Rule 59(D) provision.

The supreme court disagreed, holding that the provision of Trial Rule 59(D) did not extend the time allotted for ruling on motions under Trial Rule 53.1. The court noted that, if under the circumstances of the case, thirty days proved an insufficient period

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[101] *Id.* at 736.

[102] 307 N.E.2d 49 (Ind. 1974).

[103] Trial Rule 53.1 provides in part:

> Upon failure of a court to enter a ruling upon a motion within thirty (30) days after it was heard or thirty (30) days after it was filed, if no hearing is required, the submission of such motion may be withdrawn, and the judge before whom the cause is pending may be disqualified therein . . . .

for ruling on the motion, the time could have been extended by agreement of the parties or by order of the court. Since neither procedure was followed and since the thirty days had expired without a ruling on the motion, the judge lost jurisdiction of the case.

The case of *Hendrixson v. State*[104] involved a belated assertion of error to a decision denying post-conviction relief pursuant to Indiana Post-Conviction Rule 1. Post-conviction relief was denied on July 21, 1972, and on August 9, 1972, petitioner filed a motion to correct errors addressed to the denial of post-conviction relief. On October 9 of the same year, a petition to file a "belated supplemental motion to correct errors" was filed. The court of appeals held that Trial Rule 59(G) governed the situation because a post-conviction proceeding "is in the nature of a civil action."[105] Since Trial Rule 59(G) requires that the motion be filed sixty days after the entry of judgment, amendments or additions after the sixty-day period are disallowed and discounted by the reviewing court.[106] Thus, the court of appeals held, the motion to correct errors in response to a denial of post-conviction relief must be filed within sixty days of that denial and cannot be amended thereafter.

Finally, the nature of proceedings supplemental to execution under Trial Rule 69(E) was the topic of examination in the case of *Myers v. Hoover*.[107] In July, 1961, the plaintiff was awarded a money judgment against defendant by the Industrial Board and in July, 1971, one decade later, the plaintiff caused an execution to be issued against the defendant. The execution having been returned unsatisfied, the plaintiff then initiated proceedings supplemental to execution. The defendant filed a motion to dismiss based on the bar of the statute of limitations. The trial court originally granted the dismissal but thereafter altered its ruling pursuant to the plaintiff's motion to correct errors.

The court of appeals affirmed this latter ruling of the trial court. The appellate court held that proceedings supplemental to execution are not subject to the defense of the statute of limitations for the following reason:

> Given the terms of Trial Rule 69(E) and the procedure thereunder, we are compelled to the conclusion that in adopting the new rule, our Supreme Court intended

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[104]310 N.E.2d 569 (Ind. Ct. App. 1974).

[105]*Id.* at 570, *quoting* Hoskins v. State, 302 N.E.2d 499, 501 (Ind. 1973). *Accord*, Pettit v. State, 310 N.E.2d 81 (Ind. Ct. App. 1974).

[106]*See* Ver Hulst v. Hoffman, 286 N.E.2d 214 (Ind. Ct. App. 1972). *See also* Harvey, *Civil Procedure and Jurisdiction, 1973 Survey of Indiana Law*, 7 IND. L. REV. 24, 46 (1973).

[107]300 N.E.2d 110 (Ind. Ct. App. 1973).

> that proceedings supplemental to execution no longer be considered new and independent civil actions. Rather, they appear to be a mere continuation of the original cause.[108]

The court of appeals also noted that, although in proceedings supplemental to execution a motion to correct errors is not required under Trial Rule 59(G) as a condition precedent to appeal, it was not error for the trial court to entertain the motion to correct errors in such a case.

F. Appeal

The role of the motion to correct errors in appellate practice also received a significant amount of attention this past term. In the case of *Moore v. Spann*,[109] on a petition for rehearing, the appellants argued that Appellate Rule 7.3 provided an alternative method of determining what shall be included in the record and that, in fact, Appellate Rule 7.3 was complete in itself and independent of the requirements of Appellate Rule 7.2.

The argument was advanced that Appellate Rule 7.3, governing an appeal based upon an agreed statement, had the effect of eliminating the requirement of filing a motion to correct errors. The court of appeals indicated that, whereas this argument might have merit under federal practice procedure, the result is otherwise in Indiana state practice. That is, a certified copy of a motion to correct errors (or an assignment of errors, as the case may be) is a prerequisite to an appeal and serves the function of an "appellant's complaint" on appeal. Thus, the court of appeals held that the inclusion of the motion to correct errors is a jurisdictional act and, hence, is required in all cases, even when there is an agreed record on appeal.

In addition, in the case of *John Dehner, Inc. v. Northern Indiana Public Service Co.*,[110] the defendant filed a motion to dismiss the plaintiff's complaint, which motion was granted by the trial court. The plaintiff did not file a motion to correct errors in the trial court, but rather assigned error in the appellate court. The court of appeals dismissed the appeal for failure to file the motion to correct errors and stated that, even in this case, as in the case of a final judgment upon an agreed record, the appealing party must file with the trial court a motion to correct errors as a condition precedent to an appeal. The only exceptions to

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[108] *Id.* at 113.

[109] 302 N.E.2d 825 (Ind. Ct. App. 1973). The original opinion appeared at 298 N.E.2d 490 (Ind. Ct. App. 1973).

[110] 297 N.E.2d 481 (Ind. Ct. App. 1973).

this requirement, the court noted, are enumerated in Trial Rule 59(G) and none of the exceptions were applicable in this case.

In the case of *City of Gary v. Archer*,[111] a punitive damage award was entered against the City. After closing argument, instructions were given which related to those damages; no objection was made at that time by the City. The first objection to the punitive damage award was raised in the City's motion to correct errors. Hence, according to the court of appeals, the objection was first raised on appeal. The appellate court held that it was without jurisdiction to consider an objection made for the first time on appeal.[112] Thus, no timely objection having been made during the trial, the point was not preserved by raising it initially in the motion to correct errors.

Davis v. Davis[113] involved the question of whether a party who is adversely affected by the granting of a motion to correct errors in the trial court must, as a condition precedent to appeal of that ruling, file an additional motion to correct errors alleging as error the trial court's sustaining of the prior motion. In this case, the trial court entered a judgment granting the wife a divorce, and she filed a motion to correct errors. The trial court subsequently granted her motion and entered an amended judgment which adjusted the property division previously ordered by the court. The husband filed his praecipe for appeal from the trial court's granting of the wife's motion to correct errors. The wife moved to dismiss or affirm on the ground that jurisdiction was lacking in the appellate court because no second motion to correct had been filed.

Originally, the court of appeals held that it was unnecessary to interpose a second motion to correct errors.[114] The court based its conclusion on the language of Appellate Rule 2(A), which requires only that the praecipe follow a "ruling on" the motion, and upon Appellate Rule 4(A), which permits an appeal from a ruling either granting or denying the motion to correct errors. Thus, the court asserted that the party against whom the motion is granted is sufficiently aggrieved by the ruling to appeal from the decision on the original motion.[115]

However, on rehearing, the court of appeals overruled its earlier decision and held that the second motion to correct errors is a prerequisite to appeal when the first motion to correct errors

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[111]300 N.E.2d 687 (Ind. Ct. App. 1973).

[112]*See* Aocker v. Buell, 147 Ind. App. 422, 261 N.E.2d 894 (1970); Monon R.R. v. New York Central R.R., 141 Ind. App. 277, 227 N.E.2d 450 (1967).

[113]306 N.E.2d 377 (Ind. Ct. App. 1974).

[114]Davis v. Davis, 295 N.E.2d 837 (Ind. Ct. App. 1973).

[115]*Id.* at 839.

is accompanied by a new entry or judgment.[116] The court relied heavily upon the supreme court's holding in *State v. Deprez*,[117] a case decided in the interim between the husband's first appeal and the rehearing. In *Deprez*, in similar circumstances, the court found the second motion necessary, focusing on the fact that Appellate Rule 4(A) requires that appeals be taken only from *final* judgments. Thus, following the *Deprez* rationale, the court of appeals held that, when the granting or denial of a motion to correct errors is accompanied by a new entry or judgment consisting of additional findings, amendments, or other alterations of the prior judgment, the new entry constitutes the final judgment from which appeal is taken. Therefore, a motion to correct errors in response to the new entry must be filed as a prerequisite to appeal.[118] Otherwise, the court observed, the appellate court is uninformed as to the alleged errors in the trial court's ruling on the original motion, and the trial court is denied the opportunity to correct those alleged errors.

In the case of *Hendrickson v. American Fletcher National Bank & Trust Co.*,[119] the question was whether an order which sustained a motion to dismiss was an appealable order when no judgment was entered thereon.[120] In this case, the defendant moved to dismiss for the following reasons: (1) there was no jurisdiction over the subject matter, (2) the complaint was barred by the statute of limitations, and (3) there was a failure to state a claim upon which relief could be granted. The trial court's order granting the motion did not specify which of the bases of the defendant's motion justified dismissal. The court of appeals therefore assumed for purposes of review that the trial court based its ruling on all three points. One of those was the failure to state a claim upon which relief could be granted. Thus, under a Trial Rule 12(B)(6) motion, the court noted, the plaintiff had ten days during which, as a matter of right, he could plead over

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[116] 306 N.E.2d at 379.

[117] 296 N.E.2d 120 (Ind. 1973). In fact, the *Deprez* case involved an amended judgment under Trial Rules 52(B) and 59(E). Although the plaintiffs filed a motion to correct errors after the original judgment dismissing the case, they failed to file a second motion after the amended judgment was entered. Therefore, the supreme court dismissed the appeal.

[118] *Accord*, Wyss v. Wyss, 311 N.E.2d 621 (Ind. Ct. App. 1974).

[119] 301 N.E.2d 530 (Ind. Ct. App. 1973).

[120] *Cf.* School City of Gary v. Continental Elec. Co., Inc., 301 N.E.2d 803 (Ind. Ct. App. 1973), wherein the court held that the *denial* of a motion to dismiss pursuant to Trial Rule 12(B)(6) was not in itself a final appealable order. The case is discussed further at the text accompanying notes 90-92 *supra*.

before judgment was entered.[121] According to the court of appeals, the granting of the motion to dismiss would become a final appealable judgment only if, after the expiration of the ten days, the trial court had made an entry showing that "the plaintiff having failed to plead over, the cause is dismissed."[122]

Here, the trial court made no such entry. The defendant's motion to dismiss was granted on May 13, 1970. On March 1, 1972, the trial court entered an order which confirmed the action of May, 1970, and the case was again adjudged dismissed. The critical distinction in the case was that the May, 1970, entry in the order book indicated only that the defendant's motion to dismiss was sustained. The March, 1972, entry constituted the judgment of dismissal. Therefore, the plaintiff's motion to correct errors filed on April 28, 1972, was held by the court of appeals to be a timely motion in view of the fact that no judgment of dismissal was actually entered until March, 1972.

Two recent cases, *Sears Roebuck & Co. v. Hutchens*[123] and *Spencer v. Miller*,[124] underscored the importance of complying with the time restrictions for filing a praecipe pursuant to Appellate Rule 2. The praecipe, designating what is to be included in the record of proceedings, must be filed with the trial court, according to Appellate Rule 2(A), within thirty days after the court's ruling on the motion to correct errors.

In the *Sears* case, the praecipe for the record was filed by appellant on the eighty-ninth day following the ruling on the motion to correct errors. The court of appeals, pursuant to Appellate Rule 14(B), denied the appellant's petition for extension of time to prepare the record, and the supreme court accordingly dismissed appellant's petition for transfer. In its opinion, the supreme court emphasized that, although the praecipe may be simple and brief—often amounting to nothing more than a one sentence request—it is essential in all cases that the praecipe be filed within the thirty-day period. Similarly, stringent adherence to time restrictions was endorsed in the *Spencer* case, wherein the praecipe was filed approximately twelve days after the expiration of the thirty-day period. The court of appeals sustained the appellee's motion to dismiss the appeal.

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[121]Trial Rule 12(B)(8) provides in part:
When a motion to dismiss is sustained for failure to state a claim under subdivision (B)(6) of this rule the pleading may be amended once as of right pursuant to Rule 15(A) within ten (10) days after service of notice of the court's order sustaining the motion and thereafter with permission of the court pursuant to such rule.

[122]301 N.E.2d at 531-32.

[123]297 N.E.2d 807 (Ind. 1973).

[124]297 N.E.2d 491 (Ind. Ct. App. 1973).

In a related context, the court of appeals upheld the time restrictions for filing an assignment of errors. In the case of *Means v. Seif Material Handling Co.*,[125] review of an Industrial Board award was sought in the court of appeals. The appellant on three occasions was successful in obtaining extensions of the ninety-day period required under Appellate Rule 3(B) for filing the record. The last petition extended the time to November 10, 1972. Although the record of the proceedings before the Board was timely filed with the appellate court on that date, the record did not include an assignment of errors. On March 14, 1973, appellant filed a petition to "File Omitted Assignment of Errors."

The appeal was dismissed for the reason that the record was not complete in that it did not contain an assignment of errors and, therefore, the record was not filed within the time allotted. The court declared that, absent timely filing of an assignment of errors, the court has no jurisdiction to review an award of the Industrial Board.[126] In a concurring opinion, however, Judge Sullivan argued for recognition of the court's inherent power to permit belated civil appeals for good cause shown. His discussion includes a comprehensive summary of Indiana case law supporting this proposition.[127]

A new application of the assignment of errors was established in the case of *Inkoff v. Inkoff*.[128] In this divorce action, the trial court entered an award of attorneys' fees in order to enable the appellee to defend the appeal. This entry was effected after the court had ruled upon a motion to correct errors and after the appeal was perfected. In the appellate court opinion, attention was directed to the method by which that entry could be reviewed. The court of appeals stated that, under Appellate Rule 7.2, a motion to correct errors is required in all appeals from final judgments, and a specific assignment of errors is required in all appeals from interlocutory orders. Neither procedure was directly applicable in the present situation because the award of attorneys' fees came after the final judgment and was neither final nor interlocutory in nature. The court proposed that the gap in the rules be resolved by requiring the assignment of errors to include the record of any post-judgment proceedings

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[125]300 N.E.2d 895 (Ind. Ct. App. 1973).

[126]In dicta, the court suggested that the requirement for the filing of an assignment of errors from an award by the Industrial Board be abolished altogether, since the assignment is merely perfunctory and serves no useful purpose. *Id.* at 896.

[127]*Id.* at 897.

[128]306 N.E.2d 132 (Ind. Ct. App. 1974).

from which an appeal is taken and for which a motion to correct errors is not required.

Appeals from interlocutory orders were considered in a number of recent cases. In *Sekerez v. Board of Sanitary Commissioners,*[129] the appellant filed an appeal from an interlocutory order entered by the trial court. This order stipulated that the suit would be dismissed unless the appellant posted a bond in the amount of $5,000,000 payable to the defendant Board in the event the defendant prevailed. The appellant failed to post the bond, and the trial court entered a final judgment dismissing the action. The appeal was taken solely from the interlocutory order previously entered.

The court of appeals asserted that it lacked jurisdiction to entertain the appeal because the interlocutory order did not fall within any category of interlocutory order set forth in Appellate Rule 4(B).[130] However, the court decided that jurisdiction over the appeal would have been proper in the supreme court, which is empowered to hear appeals from "any other interlocutory order" under rule 72(b) as adopted by the Indiana General Assembly.[131] This rule, which was not incorporated into the Indiana Rules of Procedure as adopted by the supreme court, has been held nonetheless effective in furnishing jurisdiction to the supreme court in such cases.[132] Thus, the appellate court ordered the appeal transferred to the Indiana Supreme Court pursuant to Appellate Rule 15(L). This interpretation was overturned in the supreme court.[133] The court there held that it was the intent of Appellate Rule 4(B) that *all* interlocutory appeals should go to the court of appeals. Therefore, interlocutory appeals, whether taken under "rule 72(b)" or Appellate Rule 4, go to the court of appeals.

In the case of *Murray v. Murray,*[134] the court of appeals decision illustrates the distinction between an appeal of a final order and an appeal of an interlocutory order, and the relationship of both to the motion to correct errors. In this case, a motion was filed to modify a custody and support provision of a previous divorce decree. On June 29, 1973, the trial court issued its order that custody and care of minor children be awarded the

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[129]302 N.E.2d 536 (Ind. Ct. App. 1973).

[130]*Id.* at 537. *Cf.* Sekerez v. Gary Redev. Comm'n, 301 N.E.2d 372 (Ind. Ct. App. 1973), wherein, only one month earlier, another district of the court of appeals took jurisdiction of an interlocutory appeal in a similar case. See text accompanying note 32 *supra.*

[131]IND. CODE § 34-5-1-1 (Burns 1973).

[132]*See, e.g.*, Richards v. Crown Point Community School Corp., 256 Ind. 347, 269 N.E.2d 5 (Ind. 1971).

[133]Sekerez v. Board of Sanitary Comm'rs, 304 N.E.2d 533 (Ind. 1973).

[134]309 N.E.2d 831 (Ind. Ct. App. 1974).

husband until further order of the court or until modified by the hearing on the petition for modification to be held approximately two months later. On August 21, 1973, the appellant filed a motion to correct errors directed at the June 29 order. Thereafter, the matter came to hearing on September 26, 1973, at which time the trial court denied the motion to correct errors and granted the petition for modification. Judgment was entered the following day. The wife did not file a motion to correct errors addressed to this judgment but, instead, filed a praecipe with the appellate court.

The court of appeals dismissed the appeal. In so doing, it pointed out that a motion to correct errors, pursuant to Trial Rule 59(C), must be filed not later than sixty days *after judgment.* Here, no motion to correct errors was filed at any time after judgment. Further, the court indicated that the appeal from the interlocutory order of June 29 was not properly taken since the wife treated that appeal as an appeal from a final judgment. The court noted that appeals from interlocutory orders have different requirements from those established for appeals from final judgments. For instance, in an interlocutory appeal, no motion to correct errors is required,[135] the appeal must be perfected within thirty days instead of ninety,[136] and a brief must be filed within ten days after the filing of the record.[137] Thus, the motion to correct errors addressed to the interlocutory order was ineffective and raised no question for appeal.

The types of interlocutory orders which may be appealed were considered in two recent cases. In *Greyhound Lines, Inc. v. Vanover,*[138] an appeal from an order granting an amended request for production of documents was dismissed. In the case of *Bell v. Wabash Valley Trust Co.,*[139] an order denying a partial distribution of funds from a trust was held to be a nonappealable interlocutory order.[140] Both cases emphasized that appeals from

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[135]*See* IND. R. TR. P 59(G).

[136]*See* IND. R. APP. P. 3.

[137]*See* IND. R. APP. P. 8.1.

[138]311 N.E.2d 632 (Ind. Ct. App. 1974).

[139]297 N.E.2d 924 (Ind. Ct. App. 1973).

[140]*Cf.* Hawkins v. Hawkins, 309 N.E.2d 177 (Ind. Ct. App. 1974), wherein it was held that a sale order in a partition proceeding, although denominated "interlocutory" under IND. CODE § 32-4-5-4 (Burns 1973), was in fact a final appealable order. However, the case of *In re* Estate of Barnett, 307 N.E.2d 490 (Ind. Ct. App. 1974), qualified such a holding to the effect that an order of partition is not an appealable final judgment if the order specifies that a further order making final distribution is to be forthcoming. The court noted that "[a]s 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

interlocutory orders must be authorized specifically by the Indiana Constitution, the statutes, or the court rules.[141] Moreover, any authorization is to be strictly construed.[142] Since, in neither case, was the order appealed from among the genre of interlocutory orders authorized by Appellate Rule 4(B), the appeals were held improper.

The requirements for a petition to transfer pursuant to Appellate Rule 11(B) were discussed in the case of *Baker v. Fisher*.[143] The supreme court, noting that the petition for transfer in this case did not meet any of the grounds contained in the rule, denied the transfer. The court stated that a petitioner must allege facts with ample particularity in order to bring his petition within one of the stipulated grounds for transfer. The petition in this case merely asserted, in general terms, that the court of appeals erred in its determination of the facts. This assertion was found insufficient. The supreme court noted that it, nonetheless, has the power to consider a petition for transfer which does not fall within the categories established by Appellate Rule 11(B). However, the court went on, the granting of such a petition is a rare occurrence and special need must be amply demonstrated to warrant this unusual dispensation.

In conclusion, mention must be made of a common error which recurred in numerous cases this past term.[144] Succinctly stated, the rule is firmly established that a negative judgment against the party bearing the burden of proof below cannot be attacked on appeal on the ground that the evidence is insufficient

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particular case." *Id.* at 494, *quoting* Thompson v. Thompson, 286 N.E.2d 657, 659 (Ind. 1972).

[141]Anthrop v. Tippecanoe School Corp., 257 Ind. 578, 277 N.E.2d 169 (1972); Neal v. Hamilton Circuit Court, 248 Ind. 130, 224 N.E.2d 55 (1967); State *ex rel.* Sanders v. Circuit Court, 243 Ind. 343, 182 N.E.2d 781 (1962); Haag v. Haag, 240 Ind. 291, 163 N.E.2d 243 (1959); Seaney v. Ayres, 238 Ind. 493, 151 N.E.2d 295 (1958); Chapman v. Chapman, 231 Ind. 556, 109 N.E.2d 724 (1953).

[142]Seaney v. Ayres, 238 Ind. 493, 151 N.E.2d 295 (1958); Chapman v. Chapman, 231 Ind. 556, 109 N.E.2d 724 (1953).

[143]296 N.E.2d 882 (Ind. 1973).

[144]*See, e.g.*, Pettit v. State, 310 N.E.2d 81 (Ind. Ct. App. 1974); Danes v. Automobile Underwriters, Inc., 307 N.E.2d 902 (Ind. Ct. App. 1974); Hays v. Hartfield L-P Gas, 306 N.E.2d 373 (Ind. Ct. App. 1974); Inkoff v. Inkoff, 306 N.E.2d 132 (Ind. Ct. App. 1974); Hippensteel v. Karol, 304 N.E.2d 796 (Ind. Ct. App. 1973); Yellow Mfg. Acceptance Corp. v. Voss, 303 N.E.2d 281 (Ind. Ct. App. 1973); Lindenborg v. M & L Builders & Brokers, Inc., 302 N.E.2d 816 (Ind. Ct. App. 1973); Apple v. Apple, 301 N.E.2d 534 (Ind. Ct. App. 1973).

to sustain the decision of the trial court.[145] An appeal from a negative verdict or judgment may, on the other hand, be raised on the ground that the decision is contrary to law, but here too the standard of review is rigid—only if the evidence is without conflict and leads to only one conclusion, and the trial court reached a contrary conclusion, will the decision be disturbed as contrary to law.[146] Upon such review, the appellate court must consider only the evidence most favorable to the decision of the trial court.[147] Thus, the bases of review of a negative judgment are limited and the standards applied are stringent. Indiana practitioners are reminded, however, that appeal of a negative judgment is unavailing on the ground of insufficiency of the evidence.

V. Constitutional Law

*James W. Torke**

The following discussion attempts to highlight court decisions, both federal and state, which have involved both constitutional issues and Indiana law. As could have been expected, the cases reflect a general concentration on problems of free speech, free press and equal protection.

A. The First Amendment

For a few years now, the general public has been acquainted with the controversy involving an unofficial student newspaper, the *Corn Cob Curtain*. During the 1971-1972 school year, four issues of the paper were published in various Indianapolis high schools. The distribution of a fifth issue was blocked by school authorities upon the grounds that the *Corn Cob Curtain* was obscene. Plaintiffs, as representatives of a class of high school students under the jurisdiction of the Indianapolis school system,

[145]Houser v. Board of Comm'rs, 252 Ind. 312, 247 N.E.2d 675 (1969); State Farm Life Ins. Co. v. Spidel, 246 Ind. 458, 202 N.E.2d 886 (1964); Engelbrecht v. Property Developers, Inc., 296 N.E.2d 798 (Ind. Ct. App. 1973); Columbia Realty Co. v. Harrelson, 293 N.E.2d 804 (Ind. Ct. App. 1973); Hiatt v. Yergin, 284 N.E.2d 834 (Ind. Ct. App. 1972).

[146]Senst v. Bradley, 275 N.E.2d 573 (Ind. Ct. App. 1971). *Accord*, Edwards v. Wyllie, 246 Ind. 261, 203 N.E.2d 200 (1964); Jones v. Greiger, 130 Ind. App. 526, 166 N.E.2d 868 (1960).

[147]Jones v. State, 244 Ind. 682, 195 N.E.2d 460 (1964); Senst v. Bradley, 275 N.E.2d 573 (Ind. Ct. App. 1971); Walting v. Brown, 139 Ind. App. 18, 211 N.E.2d 803 (1965).

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