fication provision was added to the Not-for-Profit Corporation Act in 1974 and the language is basically that of the pre-1973 General Corporation Act provision. Similarly, the inconsistencies contained in the provision authorizing the purchase of "director and officer" insurance by not-for-profit corporations were not eliminated.[149]

IV. Civil Procedure and Jurisdiction

*William F. Harvey**

A. Jurisdiction and Service of Process

In *Baker v. Sihsmann*[1] service of process by means of the nonresident motorist statute[2] was challenged on due process grounds. Plaintiff Sihsmann filed suit on May 30, 1973, against Baker for damages arising from an automobile accident. Sihsmann elected to serve Baker through the Indiana secretary of state, who received the summons on June 1, 1973. The secretary of state mailed the summons on June 4 and Baker received it on June 11. Sihsmann defaulted Baker on July 3, 1973, and took judgment against him two days later.

The court of appeals reversed. The summons sent to Baker was a printed form which advised him that he had 20 days, beginning the day after receipt, to respond to the complaint. The court held that this wording was not reasonably calculated to give Baker actual notice of the proceeding and an opportunity to be heard, and so violated fourteenth amendment due process.[3] The court stated that the effect of the summons was to mislead

[149] *Id.* § 23-7-1.1-4(b)(10) (Burns Supp. 1975). For a discussion of the 1973 amendments to the General Corporation Act see Galanti, *Corporations, 1973 Survey of Indiana Law*, 7 IND. L. REV. 77, 103-09 (1973); for discussion of the 1974 amendments to the Not-for-Profit Corporation Act see Galanti, *Business Associations, 1974 Survey of Indiana Law*, 8 IND. L. REV. 24, 54-59 (1974).

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The author wishes to extend his appreciation to Paul F. Lindemann for his assistance in the preparation of this discussion.

[1] 315 N.E.2d 386 (Ind. Ct. App. 1974).

[2] IND. CODE § 9-3-2-1 (Burns 1973). The statute provides that the operation of a motor vehicle by a nonresident or by a resident who thereafter becomes a nonresident shall be deemed equivalent to an appointment by such person of the secretary of state as his attorney for service of process for actions growing out of motor vehicle collisions in which the nonresident is involved.

[3] *See* Milliken v. Meyer, 311 U.S. 457, 463 (1940).

Baker regarding the time that he had to respond to the complaint. The court did not hold that service of process by means of the nonresident motorist statute necessarily violated due process. If the summons had advised Baker that the time to respond would be computed from the date of service upon his agent, the secretary of state, the default judgment would have been affirmed.

Baker also argued that he was entitled to an additional three days because the summons was served by mail,[4] as well as one additional day because the 23rd day would then fall on the Fourth of July.[5] Sihsmann argued that service was complete when the secretary of state was personally served by the Marion County deputy sheriff. The court recognized that both arguments had merit, but allowed the additional time under the facts of the case. The determining factor in allowing the extension of time was that the mails were utilized in serving process.[6]

Ball Stores, Inc. v. State Board of Tax Commissioners[7] also involved the computation of time under Trial Rule 6(A). A taxpayer attempted to appeal to a superior court a final administrative determination of the taxpayer's property assessment. The final determination was issued on May 11, 1972, and the taxpayer's complaint was filed with the trial court on June 7, 1972. The taxpayer sent the summons and complaint by certified mail on June 8, but the board did not receive them until June 12, after the statutory 30-day period for appeal had expired.[8] However, the 30th day was June 10, a Saturday. After one change of venue, the trial court dismissed the complaint as not timely, and the court of appeals reluctantly affirmed.[9]

The supreme court granted a petition for transfer and reversed. The court held that the applicable statute was silent as to when the 30-day period expires when receipt of notice falls on a Saturday, Sunday, or holiday, and that therefore the pro-

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[4]IND. R. TR. P. 6(E).

[5]Trial Rule 6(A) states that the last day of the period will not be included if it is a Saturday, Sunday, legal holiday, or a day the office in which the act is to be done is closed during regular business hours.

[6]*See* State *ex rel.* Sargent & Lundy v. Vigo Superior Court, 296 N.E.2d 785 (Ind. 1973) (Arterburn, J.), where the court held that "Trial Rule 6(E) very clearly provides an additional three (3) days if reliance is placed on the mail to give notice." *Id.* at 786.

[7]316 N.E.2d 674 (Ind. 1974).

[8]The statute provides that "[a]t any time within thirty (30) days after the board gives notice of its determination, an appeal may be taken by filing a written notice with the board asking for such appeal and designating the court to which such appeal is being taken . . . ." IND. CODE § 6-1-31-4 (Burns 1972).

[9]307 N.E.2d 106 (Ind. Ct. App. 1974), *noted in* Taylor, *Administrative Law, 1974 Survey of Indiana Law*, 8 IND. L. REV. 12, 21-22 (1974).

visions of Trial Rule 6(A) would control.[10] Dismissal of the suit, the court stated, would be contrary to the expressed legislative intent that the taxpayer act within the prescribed time limit. The court cited with approval the opinions of two Indiana authors that the provisions of the trial rules regarding computation of time govern unless a statute expressly provides its own procedure.[11]

The rule of *Ball Stores* was followed in *Jenkins v. Yoder*.[12] An automobile accident occurred on December 18, 1971, and a complaint for personal injuries was filed on December 19, 1973. The defendant filed a motion for summary judgment, asserting that the claims was barred by the two year statute of limitations for torts.[13] The trial court granted the motion. The court of appeals affirmed, following the *Ball Stores* rule that the applicable trial rule controls if a statute is silent as to how a time limitation should be computed. Following the provisions of Trial Rule 6(A), the court held that the statute of limitations began to run on December 19, 1971, and expired at midnight on December 18, 1973. As the latter date did not fall on a Saturday, Sunday, holiday, or a day on which the office was closed, the suit was barred by the statute.

The *Ball Stores* rule also did not help the plaintiff in *Wilks v. First National Bank*.[14] The plaintiff was allegedly injured while at her job on April 8, 1970. A two year statute of limitations applies to workmen's compensation suits;[15] thus her claim expired on April 8, 1972, a Saturday. Plaintiff mailed her claim to the Industrial Board on Monday, April 10, 1972, and the board received it on April 12. The board denied her claim as not timely. The court of appeals agreed. It recognized that the rule of *Ball Stores* required an extension of time to the next working day, which was April 10. However, the statute required that the notice be "filed" within two years,[16] which contemplated actual receipt by the board within that period.[17] As the claim was not actually received until April 12, it was not timely.[18]

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[10]*See* note 5 *supra*.

[11]1 A. BOBBITT, WORKS' INDIANA PRACTICE § 1.4, at 15 (5th ed. 1971); 1 W. HARVEY, INDIANA PRACTICE 437 (1969).

[12]324 N.E.2d 520 (Ind. Ct. App. 1975).

[13]IND. CODE § 34-1-2-2 (Burns 1973).

[14]326 N.E.2d 827 (Ind. Ct. App. 1975).

[15]IND. CODE § 22-3-3-3 (Burns 1974).

[16]*Id.*

[17]The court relied primarily on language in a prior Indiana case which defined filing as delivery to the proper officer and receipt by him to be kept on file. Lawless v. Johnson, 232 Ind. 64, 111 N.E.2d 656 (1953).

[18]The court refused to apply the definition of Trial Rule 5(E) to the case. This rule states that filing by registered or certified mail is complete on mail-

Squarcy v. Van Horne[19] raised the question whether a court could dismiss for lack of jurisdiction when a timely change of venue motion had been filed. The will and two codicils of the deceased were admitted to probate on September 1, 1972. On April 3, 1973, seven months and two days later, the contestor filed her complaint to set aside probate of the codicils on various grounds. In response appellees filed a motion to dismiss, asserting that the action was not filed within the statutory 6-month period.[20] Contestor then filed a timely motion for a change of venue. The trial court heard arguments on the motions, considered the jurisdictional motion first, and dismissed the action.

On appeal the contestor argued that at the time the trial court sustained the motion to dismiss, it lacked jurisdiction to do anything but grant the requested venue change. The court of appeals rejected this argument, holding that determination of an alleged lack of jurisdiction takes precedence over ruling on a requested change of venue. The venue rules recognize that there are rulings that must be made between the time of a motion for a change of venue and the time the court rules on the motion.[21] Furthermore, when the court lacks subject matter jurisdiction, the court is without power to do anything in the case except enter an order of dismissal.[22] Therefore, since the 6-month requirement is jurisdictional[23] and no excuse appeared for failure to comply with the statute, the court of appeals held that dismissal of the action was proper.

In *State ex rel. Leffingwell v. Superior Court No. 2*,[24] an original action for a writ of prohibition was brought in the supreme court. In that case a 15-year-old girl and an 18-year-old boy had applied to the Blackford County Court for a waiver of the minimum age for marriage. The girl was not then pregnant, but had already given birth to a child fathered by the boy. The judge ordered the clerk to issue a marriage license to the couple. Upon the clerk's refusal to comply with the order, the judge cited the

ing. The court cautioned that no trial rule besides 6(A) has been held by the supreme court to be applicable to administrative proceedings. 326 N.E.2d at 831.

[19]321 N.E.2d 858 (Ind. Ct. App. 1975).

[20]IND. CODE § 29-1-7-17 (Burns 1972).

[21]Trial Rule 78 states in part:

> Nothing in this rule shall be construed as divesting the original court of its jurisdiction to hear and determine emergency matters between the time that a motion for change of venue to another county is filed and the time that the court grants an order for the change of venue.

[22]321 N.E.2d at 858-59, *citing* State *ex rel.* Ayer v. Ewing, 231 Ind. 1, 106 N.E.2d 441 (1952).

[23]321 N.E.2d at 860, *citing* Evansville Ice & Cold Storage Co. v. Winsor, 148 Ind. 682, 48 N.E. 592 (1897).

[24]321 N.E.2d 568 (Ind. 1974).

clerk for contempt. The supreme court granted the writ of prohibition and mandated the respondent court to dismiss the charge of contempt against the clerk. The court held that the respondent court had no jurisdiction to issue the order as the girl was not pregnant at the time of application for the license.[25] Since the court had no jurisdiction to issue the order, the clerk could not be held in contempt for failure to obey it.[26]

In *Foster v. County Commissioners*,[27] the court of appeals reaffirmed the principle that a tort claimant of a county must, as a matter of jurisdiction, file his claim with the county auditor prior to commencing suit. Foster filed suit for his personal injuries suffered when his vehicle hit a chuckhole on one of the county highways. After discovery, the trial court entered summary judgment in favor of the county because of Foster's failure to file his claim with the county as required by statute.[28] The court of appeals affirmed the grant of summary judgment. It cited several old Indiana cases holding that notice to the county is required prior to commencing suit against it. The court declined Foster's invitation to overrule those cases.[29] The county's 10-month delay in raising lack of notice could not help Foster since the county could not waive statutory subject matter jurisdiction. The *Foster* decision has been overruled in part by *Thompson v. City of Aurora*,[30] a case which is discussed in the next section.

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[25]IND. CODE § 31-1-1-1 (Burns Supp. 1975) requires that a female who is under 17 years old be pregnant before the judge can authorize issuance of a marriage license, provided the female is at least 15 years old. This section also requires that the putative father and the pregnant female indicate to the judge a desire to marry and that the parents' or guardians' consent be obtained.

[26]The supreme court apparently issued the writ under Appellate Rule 4(A)(5), which states that the supreme court has exclusive jurisdiction of the supervision of the exercise of jurisdiction by the other courts of the state, including the issuance of writs of mandate and prohibition.

[27]325 N.E.2d 223 (Ind. Ct. App. 1975).

[28]IND. CODE § 17-2-1-1 (Burns 1974) provides:

> Whenever any person or corporation shall have any legal claim against any county in the state of Indiana, they shall file such claim with the county auditor, and be by him presented to the board of county commissioners.

Indiana courts are deprived of jurisdiction of claims if this procedure is not followed. *Id.* § 17-2-1-4.

[29]Board of County Comm'rs v. Nichols, 139 Ind. 611, 38 N.E. 526 (1894); Bass Foundry & Mach. Works v. Board of County Comm'rs, 141 Ind. 68, 32 N.E. 1125 (1893); Board of County Comm'rs v. Leggett, 115 Ind. 544, 18 N.E. 53 (1888); Bass Foundry & Mach. Works v. Board of County Comm'rs, 115 Ind. 234, 17 N.E. 593 (1888).

[30]325 N.E.2d 839 (Ind. 1975).

B. Pleadings and Pretrial Motions

In *Barrow v. Weddle Brothers Construction*,[31] the plaintiff brought an action for abuse of process and defamation of character. On appeal from a negative judgment, plaintiff argued that he was entitled to judgment as a matter of law. The defendant responded by contending that the complaint did not accord him notice of the plaintiff's two theories of recovery and that the statute of limitations barred both theories. The court of appeals refused to allow the defense of the statute of limitations since the defendant did not specifically plead it as required by Trial Rule 8(C). The court then decided that the complaint was sufficient to present both theories. *Barrow* demonstrates the need to plead specifically the defenses required by Trial Rule 8(C) if they have any possible application to the plaintiff's claim; otherwise the defenses are waived.

In *Thompson v. City of Aurora*,[32] the Indiana Supreme Court considered whether compliance with the statutory requirements for notice to a city of claims against it[33] need be specifically pleaded by the plaintiff as an element of his claim for relief. The plaintiff sued the city of Aurora for damages resulting from the destruction of the plaintiff's home by a natural gas explosion and fire. At the close of plaintiff's evidence, the defendant moved for a judgment on the evidence on the grounds that the plaintiff had failed to introduce proof that the statutorily required notice had been given to the city. The trial court sustained the defendant's motion, and the court of appeals affirmed,[34] citing *City of Indianapolis v. Evans*[35] as controlling authority for the proposition that plaintiff was required to plead and prove that notice was given.

In reversing, the supreme court held that the notice required by statute was a procedural precedent that need not be specifically averred in the complaint; that the plaintiff's failure to give the required notice was a defense that must be raised either by motion or responsive pleading;[36] and that if the defendant does not raise

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[31]316 N.E.2d 845 (Ind. Ct. App. 1974).

[32]325 N.E.2d 839 (Ind. 1975).

[33]Ch. 80, § 1, [1935] Ind. Acts 235, *as amended* IND. CODE §§ 34-4-16.5-1 to -18 (Burns Supp. 1975). The current notice statute provides that a claim against the state or a political subdivision thereof is barred unless notice is filed with (1) the attorney general and the state agency involved in the case of a claim against the state, or (2) the governing body of the particular political subdivision of the state when the claim is against the subdivision within 180 days after the loss occurred. IND. CODE §§ 34-4-16.5-6, -7 (Burns Supp. 1975).

[34]313 N.E.2d 713 (Ind. Ct. App. 1974).

[35]216 Ind. 555, 24 N.E.2d 776 (1940).

[36]*See* IND. R. TR. P. 12(B).

the issue of notice, the plaintiff does not have to prove that notice was in fact given. The court went on to state that Trial Rule 9(C)[37] controls those cases, such as the present case, in which the giving of a statutorily required notice is a true condition precedent to the action. Thus, in such cases, the plaintiff could aver generally the performance of all conditions precedent, and the defendant would have to specifically deny the performance of the condition precedent by the plaintiff; a general denial would be insufficient to raise the issue of notice. In reaching its decision, the court overruled the series of cases beginning with *Touhey v. City of Decatur*[38] and ending with *City of Indianapolis v. Evans*[39] insofar as the pleading and procedural rules set forth therein were concerned.

The decision in *Thompson* came about 2½ weeks after the decision in *Foster v. County Commissioners,*[40] discussed above. In *Foster* the plaintiff failed to give notice to the defendant county as required by statute.[41] The court of appeals ruled that the county had not waived its right to complain of the lack of notice even though more than 10 months had passed since the suit was filed and the defendant had long since filed its answer. The court of appeals reasoned that the filing of the claim with the county constituted a jurisdictional precondition for the trial court's entertainment of the action. Absent filing of the claim, there was a lack of subject matter jurisdiction which could be raised at any time during the proceeding.[42] *Thompson* clearly overruled the remaining language in *Foster* concerning the prerequisite of notice to the filing of a suit against a municipality, as distinguished from notice requirements which are preconditions to the jurisdiction of a trial court.

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[37]Trial Rule 9(C) provides:

> In pleading the performance or occurrence of promissory or non-promissory conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed, have occurred, or have been excused. A denial of performance or occurrence shall be made specifically and with particularity, and a denial of excuse generally.

[38]175 Ind. 98, 93 N.E. 540 (1911). *Touhey* is typical of the line of cases overruled by *Thompson*. The plaintiff in *Touhey* suffered a demurrer as a consequence of his failure to allege that he had given written notice of his claim to either the clerk, mayor, or a member of the common council of the defendant municipality. The trial court's action in sustaining the demurrer was affirmed on appeal and plaintiff was thus denied recovery for his injuries, allegedly the result of his falling through an opening in a public sidewalk.

[39]216 Ind. 555, 24 N.E.2d 776 (1940).

[40]325 N.E.2d 223 (Ind. Ct. App. 1975).

[41]*See* p. 70 *supra*.

[42]The defense of failure to state a claim upon which relief can be granted can be raised for the first time at trial. IND. R. TR. P. 12(H)(2).

During the past year the court of appeals again considered the standard by which the sufficiency of the pleadings is to be determined when attacked by a motion to dismiss for failure to state a claim upon which relief could be granted. In *Gentry v. United Slate, Tile & Construction Roofers, Local 250,*[43] the plaintiff-subcontractor sued the primary contractor and a labor union claiming damages as a result of the union's attempt to compel the primary contractor to breach its contract with the plaintiff because the plaintiff employed nonunion laborers. The trial court dismissed the complaint pursuant to Trial Rule 12(B)(6) due to the plaintiff's failure to allege that the parties were engaged in industry or activity affecting interstate commerce and to specifically identify the section number of the United States Code under which the plaintiff was proceeding.

The court of appeals reversed, citing the supreme court's decision in *State v. Rankin,*[44] which held that a complaint is not subject to dismissal unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts. The *Gentry* court was unable to say as a matter of law that under no circumstances could the plaintiff show that the parties were engaged in industry or activity affecting interstate commerce. The court also said that to require the plaintiff to specifically set forth in its complaint the sections of the United States Code under which it was proceeding would be tantamount to requiring a statement in the complaint of the theory upon which the claim for damages was based. Under the liberal rules and spirit of notice pleading, such a statement is not required in order to withstand a motion to dismiss under Trial Rule 12(B)(6).

The timeliness of a defendant's demand for a jury trial was the issue in *Houchin v. Wood.*[45] The defendant against whom a paternity declaration was sought filed a request for a jury trial 43 days after receiving notice of the pending action. The court of appeals ruled that the request was not timely because the issues in a paternity action are closed by operation of law with the filing of a petition.[46] According to Trial Rule 38(B), the demand for a jury trial must be filed within 10 days after the first responsive pleading, at which time the issues in a case would normally be closed; if no responsive pleading is required, then demand must be filed within 10 days after such pleading otherwise would have been required. Trial Rule 6(C) requires that a necessary responsive plead-

[43]319 N.E.2d 159 (Ind. Ct. App. 1974).

[44]260 Ind. 228, 294 N.E.2d 604 (1973), *noted in* Harvey, *Civil Procedure and Jurisdiction, 1973 Survey of Indiana Law,* 7 IND. L. REV. 24, 25 (1973).

[45]317 N.E.2d 911 (Ind. Ct. App. 1974).

[46]*See* Roe v. Doe, 289 N.E.2d 528 (Ind. Ct. App. 1972).

ing be filed within 20 days after service of the prior pleading. Therefore, the request for a jury trial in a paternity action must be filed within 30 days after service of the complaint; that is, the sum of the 20 days allowed by Trial Rule 6(C) and the 10 days allowed by Trial Rule 38(B).

A void in the application of Trial Rule 79 was judicially filled by the supreme court in *Castle v. Fleenor*.[47] A motion for a change of venue from a regular judge was filed under Trial Rule 76. A special judge was qualified after being selected from the first panel that was named pursuant to the procedure set forth in Trial Rule 79(3). Thereafter that special judge died, and a petition for the appointment of a special judge to replace the deceased judge was filed in the supreme court. In granting the petition, the court observed that the Indiana Rules of Trial Procedure did not provide a procedure for the selection of an alternate judge in the particular situation before the court. Trial Rule 79(3) provides that the regular judge shall appoint a panel from which a special judge shall be selected, and Trial Rule 79(8) provides for this procedure to be repeated if the person selected fails to appear and qualify within 10 days. Trial Rule 79(12) provides for the selection of a new judge to be made by the supreme court when the person selected under Trial Rule 79(8) either fails to qualify or becomes disqualified. There was, observed the court, no provision in the rules covering the situation where the person selected under Trial Rule 79(3) qualifies and subsequently becomes disqualified. Accordingly, the court granted the petitioner's request and appointed an alternative judge to sit in the pending case.

In *State ex rel. Chambers v. Jefferson Circuit Court*,[48] an original mandamus action in the supreme court, the court ruled that a responsive pleading is not required following the filing of the complaint in a condemnation action. Therefore, under Trial Rule 76(3) relators in the case had 30 days from the filing of the complaint in the condemnation proceeding within which to file a motion for a change of venue from the regular judge.[49] The court overruled the decision in *State ex rel. Indianapolis Power & Light Co. v. Daviess Circuit Court*[50] to the extent that it stood for the proposition that the filing of a complaint in an eminent domain action does not close the issues for purpose of a Trial Rule 76 motion.

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[47]318 N.E.2d 567 (Ind. 1974).

[48]316 N.E.2d 353 (Ind. 1974).

[49]Trial Rule 76(3) provides that parties have 30 days from the filing of the case to request a change of venue in all cases when no pleading is required by the defendant to close the issues.

[50]246 Ind. 468, 206 N.E.2d 611 (1965).

State ex rel. Krochta v. Superior Court[51] involved the timeliness of a Trial Rule 76(1) change of venue motion. The case originated as a class action for mandate and damages to require the Lake County Commission on County Redistricting to comply with statutory requirements[52] in conducting the 1974 primary election. The defendant state and county officers filed motions to dismiss, and the trial court scheduled a hearing on the motions. When the hearing date arrived, the defendants withdrew their motions to dismiss. A hearing on the merits was then had as to the state officers, but a continuance was granted as to the county officers. Thereafter the county officers moved pursuant to Trial Rule 76(1) for a change of venue from the judge. The trial judge denied the motion and issued an order of mandate, thereby giving the plaintiffs the relief they sought. After unsuccessfully seeking a stay of the order in the trial court, the defendants filed an original action of mandate and prohibition in the supreme court, seeking to set aside all action taken by the trial court after the motion for a change of venue was made.

The supreme court denied the requested writ and confirmed the propriety of the trial court's denial of the motion for a change of venue. The court ruled that the county officials waived their right to an automatic change of venue by failing to object at the commencement of the initial hearing on the merits that was conducted as to the state officials. The court also grasped the opportunity to reaffirm the disfavor with which original actions for extraordinary writs are judicially viewed. It noted that such writs are not vehicles for circumventing the normal appellate process and that they should be granted only when a denial would result in extreme hardship.[53]

In *Marsh v. Lesh*[54] the plaintiff sued to recover damages for personal injuries sustained in a parking lot collision. The defendant moved for a change of venue from Lake County to Porter County. The original trial court granted the motion with the consent of plaintiff's attorney. Thereafter the plaintiff commenced discovery in the transferree court. Approximately nine days before the scheduled trial, the plaintiff filed a motion to expunge the order of the Lake Superior Court granting the change of venue, alleging that the automatic change of venue provisions of Trial Rule 76 were unconstitutional. This motion was overruled by the Porter Superior Court. On appeal from a negative judgment, the plaintiff again sought to assert the unconstitutionality of the venue provi-

[51] 314 N.E.2d 740 (Ind. 1974).

[52] IND. CODE §§ 17-1-1-1 *et seq.* (Burns 1974).

[53] IND. R. P. ORIG. A. (A).

[54] 326 N.E.2d 626 (Ind. Ct. App. 1975).

sions. The court of appeals cited *Center Township v. Board of Commissioners*[55] as controlling authority in holding that the plaintiff's consent to the change of venue and his subsequent discovery activities in the transferee court estopped him from challenging the propriety of the transferee court's venue.

Marsh establishes the rule that in order to challenge the venue of the court to which a case is transferred pursuant to a Trial Rule 76 motion, a party must do so at the time the motion for the change of venue is before the potential transferror court; otherwise, he will have waived any objection to the transfer. Of course, nothing in the court's opinion precludes a party from asserting a lack of subject matter jurisdiction at any time in the proceedings in either the transferror or transferree court. The decision in *Marsh* is consistent with that of *State ex rel. Hepler v. Superior Court*[56] wherein the relatrix's petition for a writ of mandate and prohibition was denied. The court stated that the relatrix's consent to the trial court's setting of the matter for trial constituted a waiver of the right to an automatic change of venue from such court.

C. Pretrial Procedures and Discovery

In *Scott County School District #1 v. Asher*,[57] the court of appeals dealt with the question of whether a trial court's failure to enter an order pursuant to Trial Rule 16(J)[58] reciting the action taken at a pretrial conference constitutes reversible error. The court of appeals agreed with the appellant that the trial court might have erred in failing to enter a pretrial order. However, the court held that any error was, in this particular case, harmless error as defined in Trial Rule 61.[59] The court observed that the record clearly showed that no agreement existed between the parties concerning the limitation of issues for trial. Absent such an agreement, a failure by the trial court to enter a pretrial order limiting the issues for trial did not substantially prejudice the rights of the parties.

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[55]110 Ind. 579, 10 N.E. 291 (1887).

[56]328 N.E.2d 218 (Ind. 1975).

[57]312 N.E.2d 131 (Ind. Ct. App. 1974).

[58]Trial Rule 16(J) provides in part:

> The court shall make an order which recites the action taken at the [pretrial] conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered which limit the issues for trial to those not disposed of by admissions or agreement of counsel, and such order when entered shall control the subsequent course of action, unless modified thereafter to prevent manifest injustice.

[59]Trial Rule 61 in part provides: "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

In *Bramblett v. Lee*[60] the court of appeals ruled that the client was bound by a stipulation of paternity made orally by counsel in a pretrial conversation with the trial judge. The court stated that the client's redress would come, if at all, from the attorney who made the stipulation. *Bramblett* emphatically demonstrates the very great authority that an attorney has to enter into agreements and to make judicially recorded entries that will be binding on the client.

During the past year, Trial Rule 26 and the other rules concerning discovery procedures that are available in civil actions again provided a fertile field for litigation. In *State v. Frye*[61] the court of appeals considered whether a party seeking to compel discovery in an administrative proceeding must first seek the aid of the administrative agency before resorting to the enforcement mechanisms provided by a court of law under Trial Rule 37. The appellee, a chaplain at the Rockville Training Center in Parke County, filed a grievance appeal with the State Employees' Appeals Commission. In pursuing the appeal, the plaintiff's attorney submitted questions to the officials at the Center that were deemed by the parties to be "interrogatories." The state agency refused to order the Center officials to furnish answers to the interrogatories. The plaintiff then requested the Parke County Circuit Court to order under Trial Rule 37(A)(2)[62] that the officials respond to the interrogatories. The circuit court decreed that the officials should furnish the information.

The court of appeals reversed. It ruled that the trial court could not properly entertain the action to compel discovery until such time as the state administrative agency had ordered that the interrogatories be answered and such order had not been obeyed by the party against whom discovery was sought. At that point the party filing the interrogatories could go before the appropriate court and seek the relief provided by Trial Rules 28(F)[63] and 37(A)(2). However, it was incumbent upon the appellee in this case to exhaust his administrative remedies prior to seeking the

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[60]320 N.E.2d 778 (Ind. Ct. App. 1974).

[61]315 N.E.2d 399 (Ind. Ct. App. 1974).

[62]Trial Rule 37(A)(2) provides in part: "If . . . a party fails to answer an interrogatory submitted under Rule 33 . . . the discovering party may apply for an order compelling an answer . . . ."

[63]Trial Rule 28(F) provides:

> Whenever a hearing before an administrative agency is required parties shall be entitled to all discovery provisions of Rules 26 through 37. Protective and enforcement orders shall be issued by a court of the county where discovery is being made or where the hearing is to be held. Leave of court shall not be required as provided in Rule 30, and the agency shall make the determinations provided in Rule 36(B).

aid of the trial court. In short, the court ruled that if it is within the competency of the state agency to enforce the discovery that is sought between the parties before it, then enforcement must first be sought there. If the aggrieved party does not receive satisfaction, then he may proceed to the appropriate court for enforcement pursuant to Trial Rule 37.

Indiana & Michigan Electric Co. v. Whitley County Rural Electric Membership Corp.[64] involved a dispute concerning the relevancy of certain interrogatories that were directed by the defendant Indiana & Michigan Electric Company to the Rural Electric Membership Corporation. The plaintiff contended that the interrogatories were improper because they sought to discover a party's contention regarding a factual matter that was to be decided by the court. In reversing the trial court's grant of summary judgment for the plaintiff, the court of appeals held, pursuant to Trial Rules 26(B)(1)[65] and 33(B), that it was proper to seek discovery of an opinion, contention, or legal conclusion. Hence, since the challenged interrogatories fell within the broad scope of discovery, the trial court erred in sustaining plaintiff's objections to them.

The scope of discoverable information under Trial Rule 26(B)(1) was again considered by the court of appeals in *Chambers v. Public Service Co.*[66] The defendant-landowners sought to discover, by use of interrogatories and requests for the production of documents, certain information which they contended was relevant to their defense of the plaintiff's condemnation action. The condemnor intended to use defendant's land for the planned construction of a nuclear power plant. The defendant sought various information on the other land involved in the project and on permits the condemnor was required to obtain from the government. The condemnor objected to this line of discovery on the ground that the desired information was beyond the scope of discovery set forth in Trial Rule 26(B). The trial court sustained the objection.

The court of appeals reversed the trial court's ruling and remanded the case with instructions that the trial court overrule the condemnor's objection. In so doing, the court reaffirmed the broad construction that is to be given Trial Rule 26(B)(1) in furthering

[64]316 N.E.2d 584 (Ind. Ct. App. 1974).

[65]Trial Rule 26(B)(1) in part provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action .... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

[66]328 N.E.2d 478 (Ind. Ct. App. 1975).

pretrial discovery in civil actions.[67] The court noted that the trial rules require only that the information sought be loosely relevant to the subject matter of the litigation and "be either (1) admissible, or (2) reasonably calculated to lead to other evidence which will be admissible."[68] The court thought that the information requested by the defendants was relevant to the issue of whether the condemnor had put forth a good-faith offer for the realty; the trial court thus erred in not directing the condemnor to respond to the interrogatories.

D. Trial and Judgment

In the past year, the Indiana appellate courts have considered many issues surrounding jury instructions. In *Birdsong v. ITT Continental Baking Co.*,[69] the trial court had permitted a jury instruction that the plaintiff's failure to have his seatbelt fastened, while not contributing to the cause of the accident, could have contributed to cause his injuries; therefore, as to the extent of the injuries caused, the plaintiff's failure to use his seatbelt could be viewed as contributory negligence.

The court of appeals reversed in a divided opinion and granted the plaintiff a new trial. Judge Staton's opinion stated that the instruction permitted the jury to consider degrees of negligence, a principle not recognized in Indiana.[70] Where the instruction given does not conform to the substantive law of Indiana, the appellate court must assume that it influenced the result in the trial court unless it appears from the evidence or the record that the verdict under proper instruction could not have been different. Judge Staton also stated that the combined effect of the instructions was to mislead the jury, since two other of the plaintiff's instructions informed the jury of the definition and effect of contributory negligence in Indiana. Judge Lybrook concurred in the result, stating that the instruction invited the jury to engage in pure speculation as to what injuries would have been prevented had the seatbelt been used.

Easley v. Williams[71] raised the issue of the combined effect of jury instructions. In the trial court the defendant was permitted to have six instructions which dealt with contributory negligence tendered to the jury. Following a verdict for the defendant, the trial court, pursuant to Trial Rule 59, granted the plaintiff a new

[67] *See* Tobe Deutschmann Corp. v. United Aircraft Prods., Inc., 15 F.R.D. 363 (S.D.N.Y. 1953).

[68] 328 N.E.2d at 482.

[69] 312 N.E.2d 104 (Ind. Ct. App. 1974).

[70] *See* Pawlisch v. Atkins, 96 Ind. App. 132, 182 N.E. 636 (1932).

[71] 321 N.E.2d 752 (Ind. Ct. App. 1975).

trial on the ground that the issue of contributory negligence had been overemphasized. Over a strong dissent, the court of appeals affirmed the trial court's grant of a new trial. The majority explained its decision as follows:

> Our reading of those instructions reveals that they were in fact repetitious each repeating, although in somewhat different language, the elements of contributory negligence. When those instructions are read in light of the instructions as a whole we agree that the issue of contributory negligence was unduly emphasized such that the giving of those instructions was error.[72]

Other issues concerning jury instructions were raised in *Hobby Shops, Inc. v. Drudy*.[73] In this case two actions were consolidated for trial and defendant tendered a list of twenty-two proposed instructions. The trial court refused to give all of the proffered instructions. In affirming the trial court, the court of appeals, pointing to the language of Trial Rule 51(D) which gives each party the right to tender no more than ten instructions, held that the consolidation of two actions does not double that number. The defendant contended that the plaintiff waived the limit of ten instructions by failing to object to the excessive instructions when they were offered. Again relying on Trial Rule 51(D), the court quoted the language in the rule which states that "[n]o party shall be entitled to predicate error upon the refusal of a trial court to give any tendered instruction in excess of the number fixed by this rule."[74] Since the mandate of the rule controls, the failure of the plaintiff to object was irrelevant.

Wolff v. Slusher[75] brought into focus the duty of the trial judge to instruct the jury properly. The plaintiff and one defendant had entered into an oral contract for the clearing of timber on that defendant's land. A second defendant, the lessee of the owner-defendant, used part of the property for farming. The plaintiff brought an action seeking damages and a writ of replevin to recover his equipment after the defendants had barred his access to the farm. The defendants then counterclaimed alleging that the plaintiff had cut trees other than those authorized and that the plaintiff had failed to clean up the property after removing the timber. The lessee also counterclaimed for destruction of crops and fences and for failure to clean up the premises. The trial judge gave the jury five verdict forms to use; the first form allowed them to find for the plaintiff against both defendants, the next two forms

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[72] *Id.* at 754.

[73] 317 N.E.2d 473 (Ind. Ct. App. 1974).

[74] *Id.* at 477.

[75] 314 N.E.2d 758 (Ind. Ct. App. 1974).

provided for recovery by the plaintiff against either defendant, and the final two forms dealt with the recovery by the defendants against the plaintiff on their separate counterclaims. The jury returned two verdicts for plaintiff, one against both defendants and another for the plaintiff against the defendant-owner individually. The jury made no findings with respect to the defendants' counterclaims.

On appeal, the court reversed on the issue of improper inclusion of gross profits in the damages awarded.[76] The court then commented in dictum on the verdict forms used and the resulting confusion of the jury. The plaintiff contended that since the defendants had not objected to the verdict forms, they had waived any alleged error. The court stated that although failure to object to the verdict forms may have waived the error, the trial court's fundamental responsibility to properly instruct the jury cannot be ignored.[77] The court left the impression that if it felt that the jury was unable to understand the issues, failure of a party to object to jury instructions would not prevent the court from reversing.

Trial Rule 60 received considerable attention at the appellate level in the past year. In *Hooker v. Terre Haute Gas Corp.*,[78] a suit filed in 1966 was dismissed with prejudice in 1972, pursuant to Trial Rule 41(E), for failure to prosecute the action. The plaintiff filed a motion to reinstate the cause of action, which was denied. The plaintiff then filed a motion under Trial Rule 60(B)(1) to set aside the judgment on the ground of excusable neglect. The court of appeals noted that a dismissal with prejudice may be set aside only in accordance with Trial Rule 60(B).[79] Thus, plaintiff's motion to reinstate the cause was held to be a Trial Rule 60 motion, and its denial was a final judgment, which was appealable.[80] To perfect the appeal, the plaintiff was required by Trial Rule 59(C) to file a motion to correct errors within 60 days of the ruling on the motion; since no timely motion to correct errors had been filed, the plaintiff had lost his right to appeal. The court added that the plaintiff's subsequent Trial Rule 60(B) motion, which relied on the same basic ground as the original motion, could not be used to extend the time period in which to perfect plaintiff's appeal.[81] The

[76]The court of appeals noted that even though there had been no final judgment on the counterclaims, the court could review those issues which were decided.

[77]*See* Board of Comm'rs v. Flowers, 136 Ind. App. 579, 201 N.E.2d 571 (1964).

[78]317 N.E.2d 878 (Ind. Ct. App. 1974).

[79]IND. R. TR. P. 41(F).

[80]IND. R. TR. P. 60(C).

[81]317 N.E.2d at 881, *citing* Davis v. Davis, 306 N.E.2d 377 (Ind. Ct. App. 1974).

plaintiff also attempted to raise the failure to hold a hearing on the original dismissal, but the court found no authority under Trial Rule 60 for this procedure.

In *McFarland v. Phend & Brown, Inc.*,[82] the plaintiffs moved under Trial Rule 60(B)(3) to set aside a judgment on the ground that an affiant had made a material misrepresentation in his affidavit in support of the defendant's motion for summary judgment. The case arose out of an automobile accident in which the plaintiffs' car struck a state-owned crane at an unmarked curve in the road. The plaintiffs sued the contractor who had been working on the road. The defendant subsequently filed a motion for summary judgment, attaching to it an affidavit signed by the secretary of the defendant-corporation in which the secretary asserted that all of the defendant's equipment had been removed from the site before the accident occurred. The plaintiffs filed no counter affidavits nor did they appear at the summary judgment hearing. The court granted the motion. One year later plaintiffs filed a motion under Trial Rule 60(B)(3) asserting that depositions taken after the judgment showed that there was a genuine issue of material fact as to whether defendants had been released under the contract and had been authorized to remove the warning signs. The trial court denied the motion.

The court of appeals affirmed. The court first noted that this was a case of first impression in Indiana. Holding that relief under Trial Rule 60(B)(3)[83] requires that the affiant knew or should have known that the representation made in the affidavit was false and that the misrepresentation must be made as to a material fact which would change the court's judgment, the court found that the representation made was not false. It was a conclusory representation based upon facts and inferences which the affiant placed in the best possible light. This was not the kind of misrepresentation meant to be covered by Trial Rule 60.

In *Warner v. Young America Volunteer Fire Department*,[84] the court of appeals stated that Trial Rule 60 is not a substitute for appeal and that the grounds for granting a Trial Rule 60 motion are limited to errors which could not have been discovered in time to be included in a timely motion to correct errors.[85] The defendant in answer to the plaintiff's complaint had alleged that plaintiff, as

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[82]317 N.E.2d 460 (Ind. Ct. App. 1974).

[83]Trial Rule 60(B)(3) provides for relief from a final judgment for "fraud . . . misrepresentation, or other misconduct of an adverse party."

[84]326 N.E.2d 831 (Ind. Ct. App. 1975).

[85]*Id.* at 834 n.4, *citing* 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 222 (1971).

denominated, lacked capacity to sue.[86] The plaintiff thereafter amended its complaint without curing the alleged defect, but the defendant did not renew his allegation in the answer to the amended complaint. Following judgment for the plaintiff, from which the defendant took no appeal although he filed a motion to correct errors, the defendant sought to have the judgment set aside under Trial Rule 60 on the grounds that the judgment was void and that it was no longer equitable that the judgment should have prospective application.[87]

The court of appeals, relying on federal cases interpreting the corresponding federal rule, held that Trial Rule 60(B)(6) affords a means only for extraordinary relief, to be granted only on a showing of exceptional circumstances. A party cannot allow his time for appeal to lapse and then renew his remedy of appeal by a Trial Rule 60(B) motion. Accordingly, all alleged errors which were not included in the original motion to correct errors had been waived. As to the alleged errors that were included in the motion to correct errors, the court held that the defendant waived the defense of lack of capacity to sue by his failure to raise the defense in the answer to plaintiff's amended complaint. Consequently, the judgment was not void. The defendant also argued under Trial Rule 60(B)(7) that it was no longer equitable to permit the judgment to have prospective effect since the judgment could be used to deprive the defendant of his home and livelihood. The court held that there must be some change of circumstance since the entry of the original judgment and that the change of circumstance must not be reasonably foreseeable at the time of the entry of judgment, in order for a Trial Rule 60(B)(7) motion to succeed.

In *Yerkes v. Washington Manufacturing Co.*,[88] the trial court, in an action for malicious prosecution, granted defendant's motion for summary judgment. In addition, the trial court granted defendant's motion for judgment by default on its counterclaim. The plaintiff sought relief from the default judgment in his motion to correct errors, which was denied. In reversing in part and dismissing in part, the court of appeals held that the trial court erred in granting defendant's motion for summary judgment since a material issue of fact existed as to whether or not defendant had probable cause to initiate the prosecution.[89] In dismissing the attack on the default judgment on defendant's counterclaim, the court held that a default judgment can be set

[86]Trial Rule 9(A) provides that lack of capacity to sue must be pleaded as an affirmative defense.

[87]IND. R. TR. P. 60(B)(6), (7).

[88]326 N.E.2d 629 (Ind. Ct. App. 1975).

[89]*See* Tapp v. Haskins, 310 N.E.2d 288 (Ind. Ct. App. 1974).

aside only in accordance with Trial Rule 60(B)[90] and that the allegations in plaintiff's motion to correct errors seeking to set aside the default thus must be treated as a Trial Rule 60 motion. Furthermore, the denial of the motion to correct errors constituted a final judgment pursuant to Trial Rule 60(C); therefore, the plaintiff was required to file an additional motion to correct errors to perfect his appeal. By his failure to do this, the plaintiff waived his right to appeal the default judgment on the counterclaim,[91] and the court dismissed that part of the appeal.

With respect to Federal Rule of Civil Procedure 60(b), the Seventh Circuit Court of Appeals in the case of *Washington v. Board of Education*[92] stated that the district court may consider a rule 60(b) motion during the pendency of an appeal. If the district court is inclined to grant that motion, then application can be made to the appellate court for a remand of the appeal.

Gumz v. Bejes[93] involved the right to trial by jury. Defendant Gumz had built dikes and ditches equipped with water pumps to prevent the flooding of his farm. Since the equipment also benefited his neighbors' property, Gumz asked them to help pay the cost of his dikes and pumps. When the neighbors did not contribute, Gumz changed his flood control system; as a result, the neighbors' lands were flooded. The neighbors filed suit for an injunction and damages. Gumz counterclaimed for an injunction to require removal of the neighbors' alleged obstructions in his drainage ditch and for damages. The trial court refused Gumz's request for a jury trial and granted an injunction and nominal damages to the neighbors.

On the basis of *Hiatt v. Yergin*,[94] the court of appeals affirmed the trial court's refusal to grant a jury trial. Gumz attempted to avoid the *Hiatt* rule that a jury trial is not required if the essential character of the claim is equitable by arguing that the essential nature of his claim was altered by a pretrial order of the court. The pretrial order had recognized that a portion of the damages claimed by Gumz was based on the legal theory of trespass. However, the court of appeals found that this was merely recognition of one issue in the case; the essential character of the claim was not altered.

Vernon Fire & Casualty Insurance Co. v. Sharp[95] raised the issue of whether the trial judge or the jury should construe an

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[90] IND. R. TR. P. 55(C). *See* 3 W. HARVEY, INDIANA PRACTICE 521 (1970).

[91] *See* Renfroe v. State, 316 N.E.2d 405 (Ind. Ct. App. 1974).

[92] 498 F.2d 11 (7th Cir. 1974).

[93] 321 N.E.2d 851 (Ind. Ct. App. 1975).

[94] 152 Ind. App. 497, 284 N.E.2d 834 (1972).

[95] 316 N.E.2d 381 (Ind. Ct. App. 1974).

unambiguous contract. The court of appeals, citing a prior case,[96] held that the trial judge should construe an unambiguous contract. However, it was not error to allow the jury to construe the contract if it appeared from the record that they placed a correct construction on it.[97] The court found that the jury properly construed the contract.

Stephens v. Shelbyville Central Schools[98] concerned the amount of time allowed for final argument. The trial court had permitted the defendant four additional minutes of argument to counter new matters brought out in plaintiff's rebuttal. The court of appeals, relying on an Indiana statute,[99] held that the party with the burden of proof generally opens and closes final argument; however, an exception is recognized when new matters are raised in the rebuttal. When this occurs, the adverse party has the right of reply. The court, in affirming the trial court, referred to the broad discretion that is granted to a trial court and the fact that a trial judge often is faced with a difficult question requiring an immediate decision. Even if the trial court's decision was erroneous, the court of appeals was unable to say that the grant of four additional minutes of argument constituted reversible error.

Ingmire v. Butts[100] raised the issue of the power of a master commissioner to enter judgment. The plaintiffs filed an action seeking rent and damages for alleged breaches of a lease. Subsequently, plaintiffs filed an action for possession, and a writ of ejectment was issued. During pretrial proceedings all matters were conducted before the circuit court judge. However, trial was held before and judgment rendered by a master commissioner. Four months after judgment was rendered, the circuit court judge certified the appointment of the master commissioner as being duly appointed and authorized during the hearing of evidence. The court of appeals refused to hear the appeal. It held that there was no judgment in the case rendered by a judicial officer, and therefore there was no appeal. The court held that both the statute[101] and Trial Rules 53(E)(1) and (2) limit a master commissioner to hearing the evidence and preparing a report for the trial court. Only a judge has the power to enter a judgment. The court

[96]United States Fidelity & Guar. Co. v. Baugh, 146 Ind. App. 583, 257 N.E.2d 699 (1970).

[97]*See* Vulcan Iron Works Co. v. Electric Magnetic Gold Mining Co., 54 Ind. App. 28, 99 N.E. 429 (1912).

[98]318 N.E.2d 590 (Ind. Ct. App. 1974).

[99]IND. CODE § 34-1-21-1 (Burns 1973).

[100]312 N.E.2d 885 (Ind. Ct. App. 1974).

[101]IND. CODE § 43-1-25-3 (Burns 1973).

did not dismiss the appeal but suspended consideration of it until such time as a final judgment was rendered.

In *Sekerez v. Board of Sanitary Commissioners*,[102] the court of appeals had an opportunity to correct a statement made in an earlier opinion.[103] In the first opinion the court had taken the position that facts not found by the trial court are taken as not proved. Noting the mandate of Trial Rule 52(D),[104] the court of appeals corrected their earlier position, holding that the failure of a trial court to enter a finding of fact which is requested by the party who has the burden of producing evidence to show that fact does not create a presumption against that party that the fact was not found or that the evidence was insufficient to support the finding.

In *Jacob Weinburg News Agency, Inc. v. City of Marion*,[105] the plaintiff news agency, a distributor of magazines, brought a declaratory judgment action under Trial Rule 57 seeking to declare a city ordinance unconstitutional as a abridgment of freedom of the press and of various property rights. The trial court dismissed the action because, *inter alia*, "declaratory relief has been denied in Indiana where it involves determination of serious criminal liability."[106] The court of appeals reversed, holding that the supreme court's adoption of Trial Rule 57 had enlarged the classes of people entitled to obtain declaratory relief. The court noted that Trial Rule 57 was almost a verbatim duplicate of rule 57 of the Federal Rules of Civil Procedure,[107] and that federal decisions would grant standing to the plaintiffs under the federal rule.[108] The court stated that adoption of Trial Rule 57 had the effect of overruling *Department of State v. Kroger Grocery & Baking Co.*[109] and deeply eroding the authority of *Bryarly v.*

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[102]312 N.E.2d 98 (Ind. Ct. App. 1974).

[103]Sekerez v. Board of Sanitary Comm'rs, 309 N.E.2d 460 (Ind. Ct. App. 1974).

[104]Trial Rule 52(D)(2) provides that "[t]he court's failure to find upon a material issue . . . shall not be resolved by any presumption."

[105]322 N.E.2d 730 (Ind. Ct. App. 1975).

[106]*Id.* at 732, *citing* Bryarly v. State, 232 Ind. 47, 111 N.E.2d 277 (1953).

[107]The two exceptions are a deletion in the Indiana rule of the citation to the federal declaratory judgment statute and the addition of the sentence: "Declaratory relief shall be allowed even though a property right is not involved." IND. R. TR. P. 57.

[108]Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 690 n.22 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64 n.6 (1963).

[109]221 Ind. 44, 46 N.E.2d 237 (1943). *Kroger* held that equity cannot restrain criminal prosecutions or the operation of criminal statutes, although injunctive relief would not be denied if there was a property right at stake and the operation of the criminal statute was only incidental thereto. *Id.* at 46, 46 N.E.2d at 238.

State.[110] Thus it would seem clear that as a result of this decision, the availability of declaratory relief is considerably expanded in Indiana.

The court of appeals reviewed the standards applicable to a motion for judgment on the evidence[111] in *Huff v. Traveler's Indemnity Co.*[112] The case involved a suit for damages based on a homeowner's insurance policy. After the jury returned a verdict for the plaintiff, the defendant filed a Trial Rule 59 motion to correct errors, which included a motion for judgment on the evidence pursuant to Trial Rule 50(A)(4). The trial court granted the motion and entered judgment for the defendant.

In affirming the trial court, the court of appeals distinguished the standard of review which should be applied by the trial court under Trial Rule 50 before the verdict from that which should be applied after the verdict. Before the jury's verdict, the settled rule is that the trial court should not grant a motion for judgment on the evidence unless it finds a total absence of evidence or reasonable inference from the evidence on one or more essential elements of the nonmoving party's case.[113] After the verdict has been rendered, a further consideration by the trial court is required, as the Trial Rule 59 " 'clearly erroneous as contrary to or not supported by the evidence' standard of review goes a step beyond the Trial Rule 50 'clearly erroneous as contrary to the evidence because the evidence is insufficient to support it' standard of review."[114] If, after the verdict, the trial court finds that there is substantial evidence of probative value on each essential element of the claim or defense, the court must weigh the evidence to see if the jury's verdict is against the weight of the evidence. If it is, the court must grant a new trial. Of course, if there is insufficient evidence to support the verdict, the court must enter judgment for the moving party, the same as it would have done before the verdict.

In *Lake Mortgage Co. v. Federal National Mortgage Association,*[115] the supreme court gave a definitive interpretation to Trial Rule 59. The plaintiff filed a complaint of foreclosure against real estate owned by two defendants and in possession of two other

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[110]232 Ind. 47, 111 N.E.2d 277 (1953). The court of appeals in *Weinburg* took note that it was not overruling the specific holding of the *Bryarly* case that a defendant, after receiving an adverse decision on a motion to quash the charge against him, cannot bring an action for a declaratory judgment to have the court again pass on the constitutionality of a statute. 322 N.E.2d at 735 n.3.

[111]IND. R. TR. P. 50(A).

[112]328 N.E.2d 430 (Ind. Ct. App. 1975).

[113]*See, e.g.*, Miller v. Griesel, 308 N.E.2d 701 (Ind. 1974).

[114]328 N.E.2d at 433.

[115]321 N.E.2d 556 (Ind. 1975).

defendants. A receiver was appointed for the property, and the receiver was named in a third party complaint. Lake Mortgage Company, the receiver's employer and the local servicing agent on the plaintiff's mortgages, was also named as a third party defendant. Various cross-claims were filed among all the parties. After the jury returned a verdict, the trial court granted a new trial because, due to the number of claims and cross-claims, the jury may have been confused by the complexity of the issues. The court of appeals affirmed, holding that the trial court's action in granting a new trial was accorded a strong presumption of correctness.[116]

The supreme court reversed, holding that the presumption of correctness obtains only when the trial court grants a new trial because the verdict is against the preponderance of the evidence and supports its decision with special findings of fact.[117] The court also held that the language "prejudicial or harmful error" found in Trial Rule 59(E) is not an "overbroad substantive category which shelters any reason advanced by a trial court in support of relief granted. The words 'prejudicial or harmful error' in [Trial Rule] 59(E) merely refer to the grounds for relief specified in [Trial Rule] 59(A)."[118] Finally, the court held that when a trial court grants relief on its own motion,[119] it must support its decision with a statement of facts and grounds upon which its decision is based, as required by Trial Rule 59(B). Otherwise, the party aggrieved by the court's action would not be able to properly formulate his appeal.

In *Pinkston v. State*[120] the court of appeals held that Trial Rule 41(B) was applicable to a criminal trial. The rule permits a motion for involuntary dismissal in nonjury trials. The motion is based upon the plaintiff's failure of proof and is made at the close of plaintiff's case-in-chief. In this case the trial court denied defendant's motion, and the defendant elected to proceed with the presentation of her evidence. By proceeding, the defendant waived any error in the ruling on the motion.[121]

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[116]Ernst v. Schmal, 308 N.E.2d 732 (Ind. Ct. App. 1974).

[117]321 N.E.2d at 560. Trial Rule 59(E)(7) requires that when a new trial is granted because the verdict is not in accord with the evidence "the court shall make special findings of fact upon each material issue or element of the claim or defense upon which a new trial is granted."

[118]321 N.E.2d at 560.

[119]IND. R. TR. P. 59(A).

[120]325 N.E.2d 497 (Ind. Ct. App. 1975).

[121]*See* Hoosier Ins. Co. v. Ogle, 150 Ind. App. 590, 276 N.E.2d 876 (1971).

E. Appeals

Greyhound Lines, Inc. v. Vanover[122] is a leading decision on the appeal of interlocutory orders, especially because it concerned the appeal of an order entered in a dispute over discovery. The trial court overruled the defendant's objections to the plaintiff's request for production of documents. The defendant then filed an assignment of error in the court of appeals, praying that the court reverse the trial court's order. The gist of the defendant's petition was that the request for production and the ruling of the trial court were contrary to the scope of discovery allowed by Trial Rule 26(B)(1) and (2), and hence the trial court could not order the production of the items requested without evidence of good cause being shown. The court of appeals, holding that the defendant was seeking review of a nonappealable order, sustained the plaintiff's motion to dismiss the appeal. The court said that the interlocutory appeal provisions were to be strictly construed and that any attempt to perfect an appeal which the rules do not authorize requires a dismissal. Hence, orders which are entered in discovery disputes will not be appealable as interlocutory orders, except upon one condition discussed below.

In Indiana, there are two bases for an appeal of an interlocutory order: Indiana Code section 34-5-1-1 Rule 72(b)[123] and Appellate Rule 4(B). The former was enacted by the General Assembly but was not dealt with by the Indiana Supreme Court when it adopted the Trial and Appellate Rules of Procedure. It authorizes an appeal to the supreme court of interlocutory orders for substantially the same grounds as those listed in Appellate Rule 4.[124] In addition, the statute states than an interlocutory order is appealable if the trial court certifies and the court on appeal or a judge thereof finds any of the following: (1) The appellant will suffer substantial expense, damage, or injury if the order is erroneous and the determination thereof is withheld until after judgment; (2) the order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case; or (3) the remedy by appeal after judgment is otherwise inadequate.

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[122]311 N.E.2d 632 (Ind. Ct. App. 1974).

[123]*See* IND. CODE § 34-5-1-1 (Burns 1973). The statute can be found as a note to Appellate Rule 4 in the Court Rules volume of Burns Code edition.

[124]Appellate Rule 4(B), unlike the statute, authorizes an appeal for the appointment of receivers. It also adds the words "not otherwise authorized to be taken to the Supreme Court" in the provision allowing appeals from orders and judgments upon writs of habeas corpus. IND. R. APP. P. 4(B)(4).

Richards v. Crown Point Community School Corp.[125] was the first case to comment on the effect on the statute of the adoption of the Rules of Appellate Procedure. The case reached the supreme court on an attempted appeal of an order granting a partial summary judgment. The court held that the order constituted a final judgment and, therefore, was not appealable as an interlocutory order. The court noted that its failure to deal with Rule 72(b) was an inadvertent omission and that it should be considered a part of the statutory provisions relating to appeals to the supreme court. Therefore, after the *Richards* decision, Rule 72(b) appeared to present an avenue of appeal to the supreme court not found in Appellate Rule 4(B). This distinction was removed, however, in *Sekerez v. Board of Sanitary Commissioners,*[126] in which the supreme court held that all interlocutory appeals were to be taken to the court of appeals. The supreme court thus overruled in part its decision in *Richards* without specific reference to it.

In summary, then, the following observations are applicable to interlocutory appeals:

(1) All interlocutory appeals are to be taken to the Indiana Court of Appeals.

(2) There are two provisions for interlocutory appeals. The first and latest is Appellate Rule 4(B). The other was enacted by the General Assembly and adopted in the *Richards* decision.

(3) The two provisions are almost identical except for the certification language which is found in the statute but not in the appellate rule.

(4) Discovery orders are interlocutory and not appealable because they do not come within the strictly construed language of Appellate Rule 4(B).

(5) Interlocutory discovery orders can be appealed if the certification language of the statute is followed and allowed.

Two recent cases have dealt with the appealability of decisions on motions for summary judgment. In *Pitts v. Wooldridge*[127] an appeal was taken from an order denying the defendant's motion for summary judgment. Defendant filed a motion to correct errors directed to that order, which the trial court overruled. The defendant appealed, and plaintiff moved to dismiss the appeal on the ground that a denial of a motion for summary judgment was neither a final judgment nor an appealable interlocutory order. The court of appeals agreed with the plaintiff. It held that an

[125] 256 Ind. 347, 269 N.E.2d 5 (1971).

[126] 304 N.E.2d 533 (Ind. 1973).

[127] 315 N.E.2d 736 (Ind. Ct. App. 1974).

order denying a motion for summary judgment is not an appealable interlocutory order as defined pursuant to prior supreme court decisions.[128] The denial of a summary judgment motion indicates that there are issues of fact to be resolved by a trial; therefore, denial of the motion is interlocutory in character.

Federal Insurance Co. v. Liberty Mutual Insurance Co.[129] presented slightly different issues. Suit was brought by the plaintiff for damages on a bond. After the issues were joined and some discovery was had, the plaintiff filed a motion for summary judgment as to all issues of liability but reserved the issues of damages. The trial court granted the plaintiff's motion and denied a similar motion made by the defendant. The defendant then took an appeal, which the court of appeals dismissed. It held, relying on Trial Rule 56(C), that when summary judgment is rendered upon less than all of the issues or claims in the case, then judgment upon less than all the issues involved shall be interlocutory unless the trial court in writing expressly determines that there is no just reason for delay, and, in writing, expressly directs the entry of judgment as to less than all issues, claims, or parties. The court noted that such an entry had not been made, and, accordingly, the trial court's entry was regarded as interlocutory and not appealable as a final judgment.[130]

The degree of specificity required in a motion to correct errors to preserve an issue for appeal was considered in *Leist v. Auto Owners Insurance Co.*[131] The insurance company filed a complaint for a declaratory judgment and an injunction seeking to restrain Leist from pursuing arbitration of his claim against the company. The trial court granted the injunction and found that Leist was entitled to recover $10,000 under an automobile insurance policy. However, the court further found that the insurance company was entitled to a right of subrogation for $11,976.12 paid to Leist under a workmen's compensation policy. The insurance company had issued both policies to Leist's employer. Leist's motion to correct errors recited that the decision of the trial court regarding the right to subrogation was contrary to law.

On appeal the insurance company contended that Leist had not preserved the issue of the legality of a setoff clause in the insurance policy in his motion to correct errors and thus could not argue it on appeal. The court of appeals rejected this argument,

[128] *See* Anthrop v. Tippecanoe School Corp., 257 Ind. 578, 277 N.E.2d 169 (1972); Richards v. Crown Point Community School Corp., 256 Ind. 347, 269 N.E.2d 5 (1971).

[129] 319 N.E.2d 171 (Ind. Ct. App. 1974).

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

[131] 311 N.E.2d 828 (Ind. Ct. App. 1974).

holding that Leist's motion was sufficiently specific to preserve the issue. The court stated that, in ascertaining whether an alleged error has been preserved, it is necessary to look also at the supporting memorandum to the motion to correct errors. If both the motion and supporting memorandum, considered together, substantially comply with the Trial Rule 59(B) requirement of specificity, the issue has been preserved for appeal. To consider only the motion itself, the court stated, "would inject a rigidity not contemplated by the framers of the Rules."[132] The court noted that the issues of subrogation and setoff were closely related, that Leist appeared to have used the words interchangeably, and that the supporting memorandum specifically referred to setoff. Thus there was no waiver of the issue.

In *Hubbard v. State*,[133] a criminal appeal, the State did not argue the merits on five out of six issues presented in the defendant's brief. The State instead argued, relying on Appellate Rule 8.3(A)(7), that the defendant had waived these issues because of his failure to cite authorities in support of his contentions.[134] The supreme court chastised the State for not meeting the merits, stating that Appellate Rule 8.3(A)(7) is not a technicality to be used to preclude a party from raising a novel issue or from suggesting a reconsideration of a settled rule of law. The function of the rule is to secure a convenient and uniform mode for presentation of issues to an appellate court. The court held that the issues before it were clearly presented, and it proceeded to consider them.

In *Collins v. Dunifon*[135] the plaintiff attempted to rely on his own incompetence as justification for tolling the statute of limitations. He filed seven affidavits in support of his position in opposition to the defendant's motion for summary judgment. The trial court granted the defendant's motion, and the plaintiff filed a motion to correct errors, attaching with it an eighth affidavit—one not filed in opposition to the motion for summary judgment. The court of appeals held that the eighth affidavit was not properly before it. The court recognized that Trial Rule 59(D) does provide a basis for filing affidavits with a motion to correct errors,[136] but it held that this rule cannot be used as a basis for

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[132]*Id.* at 833.

[133]313 N.E.2d 346 (Ind. 1974).

[134]Appellate Rule 8.3(A)(7) provides in part: "The argument shall contain the contentions of the appellant with respect to the issues presented, the reasons in support of the contentions along with citations to the authorities, statutes, and parts of the record relied upon . . . ."

[135]323 N.E.2d 264 (Ind. Ct. App. 1975).

[136]Trial Rule 59(D) provides that "[w]hen a motion to correct errors is based upon evidence outside the record, the cause must be sustained by affidavits showing the truth thereof served with the motion."

presentation of evidence which the party neglected to present at a prior proceeding.[137] Rather, Trial Rule 59(D) "provides a basis for disclosing on the record matters constituting a basis for correction of error which occurred during the prior proceedings, but were not reflected in the record."[138] The court then reversed the grant of summary judgment because the remaining seven affidavits did create a genuine factual issue of plaintiff's alleged unsoundness of mind.

In a number of cases decided this year the courts have made it clear that a motion to correct errors must follow the last judgment of the trial court in order to perfect an appeal. In the first case of this type to arise this year, *Wyss v. Wyss*,[139] the trial court sustained the defendant's motion for summary judgment and entered judgment for the defendants. Thereafter, the plaintiffs moved to correct error. After a hearing on the motion, the trial court took the motion under advisement. Subsequently, the court entered its findings of fact and overruled the motion to correct errors. The court of appeals observed that, in comparing the findings of the original judgment with those in the ruling on the motion to correct errors, it was readily apparent that the trial court amended its original findings in the new entry. The court held that it therefore was necessary to file a second motion to correct errors directed against the entry which the trial court made as a result of the first motion to correct errors. As no second motion was filed, the court dismissed the appeal.

In *Hansbrough v. Indiana Revenue Board*,[140] the defendant board filed a motion to dismiss contending that Hansbrough failed to state a claim upon which relief could be granted.[141] The trial court sustained the motion, and the plaintiff timely filed a motion to correct errors. The trial court overruled the motion to correct errors and in so doing made findings of fact and conclusions of law. No motion to correct errors was filed to the later decision. The court of appeals, sua sponte, dismissed the appeal for lack of appellate jurisdiction. It held that the later findings constituted the entry that finally determined the rights of the parties, leaving no further questions for future determination by the court. As such, it was the court's final judgment to which a motion to correct errors should have been directed. Judge Sullivan concurred, stating that the later entry was not a judgment at all but was merely

[137]There was no showing in *Collins* that the affidavit was newly discovered evidence which could not have been discovered in time for the prior proceeding. *See* IND. R. TR. P. 59(A)(6).

[138]323 N.E.2d at 268.

[139]311 N.E.2d 621 (Ind. Ct. App. 1974).

[140]326 N.E.2d 599 (Ind. Ct. App. 1975).

[141]IND. R. TR. P. 12(B)(6).

a ruling on a motion to dismiss. Such a ruling cannot be a judgment since the pleadings can be amended once as a matter of right within 10 days after service of notice of the court's ruling.[142] In Judge Sullivan's opinion, had Hansbrough filed a motion to correct errors to the later entry, it still would not have been appealable.

In *Koziol v. Lake County Plan Commission,*[143] the court of appeals again dismissed an appeal in which a required second motion to correct errors was not filed. In this case findings of fact and conclusions of law and a judgment thereon were entered in the trial court. Thereafter, the appellants filed a motion to correct errors. The trial court overruled the motion and, in so doing, made new and additional findings of fact and conclusions of law. Appellants filed their praecipe and perfected their appeal on the basis of their prior motion. The court of appeals dismised the appeal on the appellee's motion. It pointed out that, consistent with several recent decisions,[144] when the trial court modifies or changes the prior entry against which a motion to correct errors was directed, the appellant must file a second motion to correct errors prior to taking the appeal.

Weber v. Penn-Harris-Madison School Corp.[145] involved not only new findings by the trial court but also a vacating of its earlier judgment. The court of appeals held that with the vacating of the prior judgment, the motion to correct errors became a nullity; therefore, since a condition precedent to appeal had not been fulfilled, the court sustained appellee's motion to dismiss. *Easley v. Williams*[146] was a similar case with dissimilar results. A jury verdict was returned for the defendants, and judgment was entered accordingly. Thereafter, the plaintiff filed a motion to correct errors setting out several specifications of error. The court granted the motion and entered an order granting a new trial; no new judgment was entered. The defendant appealed from the order granting a new trial. The plaintiff filed a motion to dismiss the appeal, alleging that the trial court's ruling on the motion to correct errors constituted a new judgment which required that a second motion to correct errors be filed. The court of appeals denied the motion, holding that the trial court's grant of a new trial abolished the original judgment and that no new judgment resulted. Consequently, no new motion to correct errors was re-

[142] IND. R. TR. P. 12(B)(8).

[143] 315 N.E.2d 374 (Ind. Ct. App. 1974).

[144] *See* State v. Kushner, 312 N.E.2d 523 (Ind. Ct. App. 1974); Wyss v. Wyss, 311 N.E.2d 621 (Ind. Ct. App. 1974); Davis v. Davis, 306 N.E.2d 377 (Ind. Ct. App. 1974).

[145] 317 N.E.2d 811 (Ind. Ct. App. 1974).

[146] 314 N.E.2d 105 (Ind. Ct. App. 1974).

quired. The court deemed the grant of a new trial to be a final judgment from which an appeal could be taken pursuant to Appellate Rule 4(A). The court relied on the statement of Justice Arterburn in *State v. DePrez*[147] that the simple grant of a motion to correct errors is a final judgment from which an appeal can be taken without further ado.

Easley is the only case subsequent to *DePrez* which relieved a party from the requirement of filing a second motion to correct errors after the original judgment had been modified to any extent by the trial court. Notwithstanding the *Easley* court's reliance on *DePrez,* it is difficult to reconcile the two cases. If one of the purposes of the motion to correct errors is to allow the trial court an opportunity to rectify its mistakes, then the losing party on the trial court's grant of a new trial should be required to file a motion to correct errors to allow the court a chance to correct its mistake in granting the new trial. The theory behind *DePrez* was that if the court modifies its original judgment, it should be given the chance to correct any error in that modification before an appeal is taken.

In *Jackson v. Jackson*[148] and *State ex rel. Jackson v. Owen Circuit Court,*[149] appeals were taken in which the sufficiency of the evidence to support a trial court's determination was questioned. In both cases, however, the transcript of evidence and the proceedings at trial were not filed with the clerk of the trial court and made a part of the record. After the record of the proceedings and the appellant's brief were filed, the appellee moved to affirm the judgment of the trial court. The appellee argued that because the transcript was not filed, it was not properly before the court of appeals. The appellant then sought an order from the trial court making a *nunc pro tunc* entry of the trial court's certificate ordering the filing of the transcript of evidence. This was granted by the trial court in April, with a *nunc pro tunc* entry as of January 1974. The court of appeals held that the order of the trial court should be expunged from the record of the trial court since that court no longer had sufficient jurisdiction to make such an entry absent a written note, minute, or memorial in the record upon which to base the order. In short, when the record of proceedings was filed in the appellate court, jurisdiction of the case immediately passed to the appellate court. Since all questions raised in the appeal depended on a consideration of the evidence and since the evidence was not part of the record, there was nothing for the court of appeals to consider.

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[147] 296 N.E.2d 120, 124 (Ind. 1973).

[148] 314 N.E.2d 70 (Ind. Ct. App. 1974).

[149] 314 N.E.2d 73 (Ind. Ct. App. 1974).

A number of cases in the last year dealt with the question of what constitutes an adequate appellate brief. In *City of Indianapolis v. Festival Theater Corp.*,[150] the appellee filed a motion to dismiss the appeal asserting that the appellant's brief did not contain a verbatim statement of the trial court's judgment. The court found that the allegations were true. However, the court stated that the defect was not a cause for dismissal but rather a cause for deferment. The court of appeals gave the appellants 10 days from the date of the order to amend their briefs to include a verbatim statement of the judgment; if they did not do so within that time, the judgment of the trial court would be affirmed.

In *Yerkes v. Washington Manufacturing Co.*,[151] the plaintiff was employed by the defendant as a distributor of the company's goods. The defendants caused a criminal action to be brought against the plaintiff for the felony of falsely and fraudulently issuing a check to defendants. However, on the date of trial, the State dismissed the charge. Thereafter, the plaintiff initiated this action seeking damages on the theory of malicious prosecution. The defendants counterclaimed seeking judgment for the amount alleged to be due and owing by the plaintiff to the defendant company. Prior to trial, the court granted the defendants' motion for summary judgment on the plaintiff's claim and entered judgment for the defendants. Further, the court granted the defendants' motion for judgment by default on their counterclaim. Following a hearing on the issue of damages, the court entered judgment against the plaintiff and in favor of the defendants in the sum of $2,497.90. Plaintiff's motion to correct errors was overruled. On appeal, plaintiff's brief failed to specifically set forth the applicable errors assigned in his motion to correct errors but rather made numerical reference to the appropriate sections of his motion. The defendants moved for dismissal, alleging that this violation of Appellate Rule 8.3(A)(7) amounted to a waiver of all these issues. The court of appeals, in overruling the defendants' motion, stated that it "prefers to decide cases on their merits whenever possible, and where a brief is in substantial compliance with the rules, waiver of error will not result from the failure to include all that [Appellate Rule 8.3] technically requires."[152]

In *Chicago South Shore & South Bend Railroad v. Brown*,[153] the appellant petitioned for a rehearing. The petition included the assertion that the court of appeal's opinion failed to give a statement in writing upon each substantial question which arose in the

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[150]317 N.E.2d 463 (Ind. Ct. App. 1974).

[151]326 N.E.2d 629 (Ind. Ct. App. 1975).

[152]*Id.* at 631.

[153]323 N.E.2d 681 (Ind. Ct. App. 1975).

record. In considering the assertion, the court of appeals discussed Appellate Rule 11(B)(2), noting that four elements must be present for a rehearing to be granted: (1) A substantial question; (2) the appearance of the question both on the record and in the argument on appeal; (3) a petition setting forth portions of the record affirmatively establishing (1) and (2); and (4) a showing in the petition of prejudice resulting from the court's failure to give a statement in writing upon the question. The court then stated that the appellant's failure to object to the instructions of the trial court judge not only waived any potential error but also resulted in a failure to satisfy the "substantial question" element. Thus, it was unnecessary to order a rehearing.

In *Marshall v. Reeves*,[154] the appellant obtained a reversal of the trial court decision granting custody to the father. On transfer to the supreme court, the trial court was upheld. Subsequently, a motion to tax costs on appeal was filed. The motion included a request for attorney fees and discretionary damages. The supreme court, after noting that Appellate Rule 15(G), which concerns the costs of appeal, does not contain a right to attorney fees, went on to discuss the viability of Appellate Rule 15(F).[155] The court stated that a discretionary award of damages is proper where the appeal is frivolous or without substance or merit. The damages serve as a curb for frivolous appeals. Here, since the court of appeals and one of the supreme court justices felt that the appeal had merit, the appeal was not frivolous. In dicta the court restated the holding of *Vandalia Railroad Co. v. Walsh*[156] that a penalty may be assessed where an appeal is taken merely to harass or delay.

In *J.M. Foster Co. v. Northern Indiana Public Service Co.*,[157] the defendant appealed from the overruling of his amended objection to the taking of property by eminent domain. The same order also condemned to the use of the plaintiff an easement and right-of-way through defendant's property and appointed appraisers to determine its value. The defendant filed a motion to correct errors to that order and subsequently filed an assignment of errors in the court of appeals. The court of appeals held that the filing of an assignment of errors was the proper procedure to be followed on an appeal from an order overruling objections to condemnation. The order is by statute an interlocutory order[158] to

[154]316 N.E.2d 828 (Ind. 1974).

[155]Appellate Rule 15(F) allows a discretionary award of damages against the appellant if the judgment is affirmed. The damages cannot exceed 10% of a money judgment.

[156]44 Ind. App. 297, 89 N.E. 320 (1909).

[157]326 N.E.2d 584 (Ind. Ct. App. 1975).

[158]IND. CODE § 32-11-1-5 (Burns 1973).

which no motion to correct errors need be filed.[159] The court also noted that the sustaining of objections to condemnation by a trial court is by stataute[160] a final judgment, to which a motion to correct errors must be directed.

In *Berry v. State*[161] the court of appeals discussed extensively the question of whether a change in the law would be retroactively applied. In a previous case Berry had taken an appeal in which part of the alleged error was the correctness of a jury instruction on the burden of producing evidence to show sanity at the time the offense was committed.[162] In upholding Berry's conviction, the court held that the instruction given was not reversible error. Four years later the supreme court in another case overruled the *Berry* decision, holding that the jury instruction given in *Berry* was reversible error.[163] Berry then applied for post-conviction relief on the basis of the later decision. The trial court denied Berry's petition.

The question on appeal was whether the later decision would be retroactively applied to Berry. The court of appeals set out a three-pronged test by which retroactivity is determined: (1) The purpose of the new rule of law, (2) reliance on the old rule by the courts for authority, and (3) the effect of retroactive application on the system of criminal justice.[164] In discussing these criteria, the court pointed out that the tests have a rather intense practical application. The court stated that the reliance aspect is examined by attempting to determine whether law enforcement officers, as well as the judicial system, have relied on the operational finality of the old rule. The same type of approach was made by the court in determining the purpose of the new rule, and then in ascertaining whether applying it retroactively would operate to correct a prior infringement of an individual's freedom. Although this decision arose in a criminal context, the same type of analysis would clearly be applicable across the entire spectrum of the law.

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[159]Trial Rule 59(G) provides in part that "[a] motion to correct errors shall not be required in the case of appeals from interlocutory orders . . . ."

[160]IND. CODE § 32-11-1-5 (Burns 1973).

[161]321 N.E.2d 207 (Ind. Ct. App. 1974).

[162]Berry v. State, 251 Ind. 494, 242 N.E.2d 355 (1968).

[163]Young v. State, 258 Ind. 246, 280 N.E.2d 595 (1972).

[164]The court stated that these criteria come from two cases in the United States Supreme Court. Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966); Linkletter v. Walker, 381 U.S. 618 (1965). The criteria are known as the *Linkletter-Tehan* test.