since the decision of the deputy was a "new determination" rather than a decision affecting a pre-existing right. The court flatly rejected this argument, holding that the quoted amendment was a curative statute, which would be liberally construed and applied to situations involving interruption of benefits as well as disputes involving initial determination of eligibility.[77] Thus, the case was ultimately decided by reliance on the clear language of the legislative amendment expressly authorizing a pre-termination due process hearing, rather than on a constitutional basis.

Nevertheless, *Wilson* is an excellent review of procedural due process considerations, and is highly recommended to both the student and practitioner of administrative law. It is especially interesting because, although the decision was eventually anchored in statutory construction, the court actually structured, in the course of its opinion, a constitutional argument which supports the results achieved.

III. Civil Procedure and Jurisdiction

*William F. Harvey**

A. Jurisdiction and Service of Process

1. Waiver of Change of Venue.—In *Pruden v. Trabits*,[1] both the complaint and a motion for change of venue from the county were filed on the same day. The court granted the motion for change of venue and named five counties from which the plaintiff struck one. The defendants did not, however, strike any counties within the time limits in Trial Rule 76(9).[2]

The court of appeals held that Trial Rule 76(9) requires that the moving party inquire whether the other parties have struck any county,[3] and if they have not, then the moving party must timely re-

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[77]373 N.E.2d at 343-44.

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The author wishes to extend his appreciation to Roger D. Erwin for his assistance in the preparation of this discussion.

[1]370 N.E.2d 959 (Ind. Ct. App. 1977).

[2]IND. R. TR. P. 76(9) provides in part: "[T]he parties within seven [7] days thereafter, or within such time, not to exceed fourteen [14] days, as the court shall fix, shall each alternatively strike off the names of such counties."

[3]IND. R. TR. P. 76(9) also provides in part:

> If a moving party fails to so strike within said time, he shall not be entitled to a change of venue, and the court shall resume general jurisdiction of the

quest the clerk to strike for the nonmoving parties.[4] Absent a timely request, the moving party has waived the opportunity for a change of venue.[5]

2. Attorney's Duty to Examine Court Records. — An attorney is not expected to be aware of last minute changes to court records, if it would be unreasonable to expect him to know of the changes. In *Ed Martin Ford, Inc. v. Martin*,[6] the trial court did not set the date for the trial until the day on which the trial was to be held. The Indiana Court of Appeals held that, if an attorney is not aware of changes in the court record that "a careful and diligent lawyer would not reasonably have been expected to discover,"[7] as in the present case, then the attorney should not be prejudiced by a failure to examine the court records.[8] Thus, the appellate court ruled that the trial court had abused its discretion in not granting a motion for relief from judgment pursuant to Trial Rule 60.[9]

3. Service of Process on City Attorneys. — Trial Rule 4.6(A)(4),[10] on its face, could be interpreted to mean that, if any statute provides for an attorney to represent a local government organization, the attorney must be served with notice of any action brought against the organization. The court of appeals rejected this interpretation in *Antz v. City of Jeffersonville*.[11] In that case, the plaintiff had brought an action to obtain reinstatement and back pay from the Jeffersonville Fire Department. The trial court dismissed the action because no summons had been issued or served upon the Jeffersonville City Attorney, which the trial court held to be required by Trial Rule 4.6(A)(4).

The Indiana statute governing the dismissal of firemen provides: "Such city shall be named as the sole defendant and the plaintiff shall cause summons to issue as in other cases against such city."[12] Service in a suit against a city "may be had upon the mayor, and, in his absence, upon the city clerk . . . ."[13]

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cause. If a nonmoving party fails to strike off the names of such counties within the time limited, then the clerk shall strike off such names for such party.

[4]370 N.E.2d at 962.

[5]*Id.*

[6]363 N.E.2d 1292 (Ind. Ct. App. 1977).

[7]*Id.* at 1295.

[8]*Id.*

[9]*Id.*

[10]IND. R. TR. P. 4.6(A)(4) provides for service upon an organization as follows: "In the case of a local governmental organization upon the executive thereof, and if a statute provides for an attorney to represent the local government organization, and an attorney occupies such position, then also upon such attorney."

[11]363 N.E.2d 1014 (Ind. Ct. App. 1977).

[12]IND. CODE § 18-1-11-3 (1976).

[13]*Id.* § 18-1-23-1.

The city argued that Trial Rule 4.6(A)(4) superseded Indiana Code section 18-1-23-1. Further, the city argued that the plaintiff was required to serve or issue process upon the city attorney because Indiana Code section 18-1-6-13 provides that the city attorney "shall have the management, charge and control of the law business of such city and for each branch of its government . . . . He shall conduct all legal proceedings authorized by this act . . . ."[14]

The Indiana Court of Appeals rejected this reasoning. It held that the better interpretation of Trial Rule 4.6(A)(4) is: "[I]f the statute *upon which plaintiff is bringing the action* provides for an attorney to represent the local governmental organization then such attorney should be notified."[15] Such service, however, would not be necessary whenever *any* statute provides for an attorney to represent the local government.[16]

B. Pleadings and Pre-Trial Motions

1. Judicial Admission in Pleadings.—An admission in the pleadings is not always binding upon a party. In *Lamb v. Thieme*[17] the plaintiff claimed that the defendant had accepted thirty shares of stock, instead of 120 shares which were originally agreed upon to secure a promissory note, as discharge of the promissory note. Yet, the plaintiff averred in his complaint that he owned all 120 shares of stock. The defendant denied that the plaintiff owned the stock, and claimed that the plaintiff's admission in the pleadings of full ownership of the stock precluded the plaintiff's assertion that thirty shares of stock were accepted as an accord and satisfaction.

The court of appeals agreed with the trial court's ruling that the defendant's denial put the question of ownership in issue.[18] Hence, an admission in the pleadings is not binding upon a party where the opposing party denies the admission and joins issue upon it.[19]

2. Compulsory Counterclaims.—An attorney must carefully assert all counterclaims which are compulsory, or lose the right to assert them later. *Middelkamp v. Hanewich*[20] presented the question of whether a claim in prior litigation between the parties was a compulsory counterclaim and, thus, subject to the principle of res judicata in a subsequent action.

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[14]363 N.E.2d at 1017 (citing IND. CODE § 18-1-6-13 (1976)).
[15]363 N.E.2d at 1017 (emphasis added).
[16]*Id.*
[17]367 N.E.2d 602 (Ind. Ct. App. 1977).
[18]*Id.* at 603.
[19]*Id.* at 605 (citing Brown v. Grzeskowiak, 230 Ind. 110, 101 N.E.2d 639 (1951)).
[20]364 N.E.2d 1024 (Ind. Ct. App. 1977).

In 1969, Hanewich was successful in a suit against Middelkamp to obtain possession of certain land which had been transferred to Hanewich. In 1973, Middelkamp sued Hanewich, seeking: (1) Specific performance of an alleged 1966 oral agreement, (2) declaration of a trust in his favor as to the property, and (3) damages for breach of an alleged oral agreement to convey. The court of appeals affirmed a trial court ruling that, since these claims were not asserted as a counterclaim in the 1969 action, the claims could not be asserted in the present action.[21]

The Indiana Court of Appeals discussed the relationship of Trial Rule 13(A) to the doctrine of res judicata. Trial Rule 13(A) could be the source of the rule which bars a later counterclaim,[22] or the result of the principle of res judicata.[23] Under either view, it is clear that Trial Rule 13(A) would bar a subsequent assertion of a compulsory counterclaim. To determine whether a counterclaim is compulsory, one must first determine whether the claim "[arose] out of the transaction or occurrence that is the subject-matter of the opposing party's claim . . . ."[24] This is a test of logical relationship, which may include a series of transactions.[25] Also, the test broadly interprets the phrase "transaction or occurrence" to avoid multiplicity of litigation.[26]

In this case, the "same transaction or occurrence" test was met, as well as the other requirements of Trial Rule 13(A).[27]

3. Amended Pleadings.—In *State Farm Mutual Automobile Insurance Co. v. Shuman*[28] suit was brought upon an insurance policy. Two and a half years after the pre-trial conference and two weeks before the scheduled trial, the plaintiff was permitted to amend the complaint by adding a claim for punitive damages. State Farm con-

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[21] *Id.* at 1034-36.

[22] *Id.* at 1034.

[23] *Id.* (citing C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 79, at 347 (2d ed. 1970)).

[24] 364 N.E.2d at 1035 (quoting IND. R. TR. P. 13(A)).

[25] 364 N.E.2d at 1035 (citing Moore v. New York Cotton Exch., 270 U.S. 593 (1926)).

[26] 364 N.E.2d at 1035. *See* Civil Code Study Commission Comments to IND. R. TR. P. 13(A); 2 W. HARVEY, INDIANA PRACTICE 20 (1970); 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1410 (1971).

[27] 364 N.E.2d at 1035. IND. R. TR. P. 13(A) requires that the counterclaim be mature at the time of the claim, that the court be able to acquire jurisdiction over all parties, and that the counterclaim not be the subject of another pending action when the claim is brought.

[28] 370 N.E.2d 941 (Ind. Ct. App. 1977). Other aspects of this case are discussed at notes 45-48, 61-67, & 173-78 *infra* and accompanying text.

tended that the trial court abused its discretion in granting the plaintiff leave to amend.

The court of appeals held that, under Trial Rule 15(A),[29] leave of court is granted "when justice so requires."[30] This means that amendments are to be freely permitted so that all issues will be brought before the court.[31] The court said that the delay in amending the complaint, the burden of further discovery, the death of a witness who was not indispensable, and the increased expense of discovery did not show that prejudice would result if the amendment were allowed.[32]

State Farm also contended that the plaintiff could not amend because defendant's motion to dismiss pursuant to Trial Rule 12(B)(6) was granted, and that Trial Rule 12(B)(8)[33] read in conjunction with Trial Rule 6(C)[34] imposes an absolute deadline of ten days for amendment of the pleadings. The Indiana Court of Appeals held that a motion under Trial Rule 12(B)(6) merely changes the time limits for amendment of pleadings *as of right*, for, if the motion is granted, plaintiff may amend within ten days as of right.[35] After ten days has expired, an amendment is permitted by leave of court or by the con-

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[29]IND. R. TR. P. 15(A) provides in part: "Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be given when justice so requires."

[30]370 N.E.2d at 948 (citing Huff v. Travelers Indem. Co., 363 N.E.2d 985 (Ind. 1977)). *See* Harvey, *Civil Procedure and Jurisdiction, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 51, 66 (1977) [hereinafter cited as Harvey, *1977 Survey*].

[31]370 N.E.2d at 948.

[32]*Id.*

[33]IND. R. TR. P. 12(B) provides in part:

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

[34]*Id.* 6(C) provides in part:

> The service of a motion permitted under Rule 12(B) alters the time for service of responsive pleadings as follows, unless a different time is fixed by the court:
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> . . . .
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> (2) if the court grants the motion and corrective action is allowed to be taken, it shall be taken within ten [10] days, and the responsive pleading shall be served within ten [10] days thereafter.

[35]370 N.E.2d at 949. IND. R. TR. P. 15(A) provides in part:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, and the action has not been placed upon the trial calendar, he may so amend it at any time within thirty [30] days after it is served.

sent of the adverse party.[36] Similarly, Trial Rule 6(C)(2) merely refers to amendments as of right, and does not affect the provisions of Trial Rule 15(A), except as to amendments as of right.

In *State ex rel. Crane Rentals, Inc. v. Madison Superior Court*[37] the Indiana Supreme Court considered the relationship between Trial Rule 15(C)[38] and Trial Rule 76(1), (2).[39] The complaint was amended to bring in four additional defendants, including Crane, nine months after the answer was filed. Crane then filed a motion for change of venue from the county. The trial court denied the motion, and this original proceeding for a writ of mandate was commenced in the supreme court.

Trial Rule 76(2) requires a motion for automatic change of venue to be filed within ten days after the issues are first closed on the merits. The supreme court had already held in *State ex rel. Travelers Insurance Co. v. Madison Superior Court,*[40] however, that parties added after the issues were first closed on the merits would not be barred by the expiration of the ten-day period.[41] The trial court, here, sought to distinguish the present case from *Travelers* on the grounds that Crane had a close relationship with one of the original defendants, and was represented by the same attorney as that defendant. Thus, the trial court argued, the issues as to Crane were closed prior to the amended complaint adding him as a party under the "relation-back" concept in Trial Rule 15(C),[42] or under a "virtual representation" concept.

The supreme court disagreed with this novel approach, holding that it would change the purpose of Trial Rule 76(2) "from one of simply setting a fair time limitation upon the exercise of the right to eliminating the right entirely for some and requiring that the right be exercised jointly by groups of others."[43]

4. Pleading Special Matters.—Trial Rule 9(B) requires: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be specifically averred. Malice, intent, knowledge,

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[36]*See* IND. R. TR. P. 12(B)(8).

[37]365 N.E.2d 1224 (Ind. 1977).

[38]IND. R. TR. P. 15(C) governs the relation back of amendments.

[39]IND. R. TR. P. 76 governs change of venue.

[40]354 N.E.2d 188 (Ind. 1976). *See* Harvey, *1977 Survey, supra* note 30, at 57.

[41]354 N.E.2d at 191.

[42]IND. R. TR. P. 15(C) provides in part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisified . . . .

[43]365 N.E.2d at 1225.

and other conditions of mind may be averred generally."[44] In *State Farm Mutual Automobile Insurance Co. v. Shuman*[45] the defendant argued that the plaintiff's claim for punitive damages, in an action for breach of contract, failed to comply with the provisions of Trial Rule 9(B) because fraud was not specifically averred in the complaint.

The court of appeals held that proof of actionable fraud is not required for an award of punitive damages, since the award may be based on any serious wrong which is tortious in nature.[46] A plaintiff need only allege a fraudulent state of mind, thus requiring a general averment pursuant to Trial Rule 9(B).[47] Consequently, a complaint for breach of contract which demands punitive damages need only allege, generally, a fraudulent state of mind.[48]

5. Res Judicata and Interpleader.—Trial Rule 22, which provides for interpleader, states interpleader requires that the plaintiff "is or may be exposed to double or multiple liability."[49] The question raised in *United Farm Bureau Family Life Insurance Co. v. Fultz*[50] was whether the acquittal in a criminal trial of the beneficiary of a life insurance policy, who was charged with the murder of the insured, obviated the need for interpleader in a civil trial. The insurer alleged that both the beneficiary and the deceased's estate might be entitled to the proceeds of the insurance policy.

The court of appeals noted that the rule in Indiana is that acquittal in a criminal trial is not res judicata to an issue of civil liability.[51] Consequently, the beneficiary might not be entitled to the proceeds of the insurance policy, even though she was acquitted of murdering the insured. Interpleader pursuant to Trial Rule 22 was proper in this case because the insurer "is or may be exposed to double or multiple liability"[52] as required by Trial Rule 22 for an interpleader action.

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[44]IND. R. TR. P. 9(B).

[45]370 N.E.2d 941 (Ind. Ct. App. 1977). Other aspects of this case are discussed in notes 28-36 *supra;* 61-67, & 173-78 *infra* and accompanying text.

[46]370 N.E.2d at 950 (citing Vernon Fire & Cas. Ins. Co. v. Sharp, 264 Ind. 599, 349 N.E.2d 173 (1976); Jones v. Abriani, 350 N.E.2d 635 (Ind. Ct. App. 1976)). *See also* Frandsen, *Insurance, 1975 Survey of Recent Developments in Indiana Law,* 9 IND. L. REV. 260 (1975).

[47]370 N.E.2d at 950 (citing Jerry Alderman Ford Sales, Inc. v. Bailey, 154 Ind. App. 632, 291 N.E.2d 92, *aff'd on rehearing,* 154 Ind. App. 657, 294 N.E.2d 617 (1973)).

[48]370 N.E.2d at 950.

[49]IND. R. TR. P. 22.

[50]375 N.E.2d 601 (Ind. Ct. App. 1978).

[51]*Id.* at 608. *See* National City Bank of Evansville v. Bledsoe, 237 Ind. 130, 144 N.E.2d 710 (1957); Beene v. Gibraltar Indus. Life Ins. Co., 116 Ind. App. 290, 63 N.E.2d 299 (1945).

[52]IND. R. TR. P. 22(A).

C. *Pre-Trial Procedures and Discovery*

1. Pre-Trial Orders.—In *City of Hammond v. Drangmeister*[53] the Indiana Court of Appeals discussed the effect of Trial Rule 16(J)[54] upon the issues raised in the pleadings. The trial court, in the pre-trial order, sustained a motion to strike the city's exception to the appraiser's award in an inverse condemnation action. Yet, the pre-trial order listed the question of damages as the sole issue to be determined by the jury.

The appellate court affirmed the trial court's ruling that the pre-trial order preserved the issues of damages for consideration by the jury.[55] Hence, the issues at trial are as stated in the pre-trial order, and the pleadings do not control.[56]

Trial Rule 16(J) states that a pre-trial order controls the matters considered at trial "unless modified thereafter to prevent manifest injustice."[57] The Indiana Court of Appeals in *Fruehauf Trailer Division v. Thornton*[58] affirmed a trial court ruling that a pre-trial order that counsel was instructed to submit one month before trial, and that was not submitted until the day of the trial, was not binding on either party.[59] The opposing party had not complained of the delay until the day of trial. Such dilatory conduct by both parties permitted the trial court to modify the pre-trial order pursuant to Trial Rule 16(J) "to prevent manifest injustice."[60]

In *State Farm Mutual Automobile Insurance Co. v. Shuman*[61] the court of appeals held that Trial Rule 16(A)(6)[62] requires the trial

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[53]364 N.E.2d 157 (Ind. Ct. App. 1977).

[54]IND. R. TR. P. 16(J) provides in part:

> The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleading, 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 . . . .

[55]364 N.E.2d at 161.

[56]*Id.* (citing North Miami Consol. School Dist. v. State, 261 Ind. 17, 300 N.E.2d 59 (1973)). *See generally* Annot., 22 A.L.R.2d 599, § 4 (1952); 62 AM. JUR. 2d *Pretrial Conference* §§ 33-35 (1972).

[57]IND. R. TR. P. 16(J).

[58]366 N.E.2d 21 (Ind. Ct. App. 1977).

[59]*Id.* at 33.

[60]*Id.* at 34. *Accord*, State v. Dwenger, 341 N.E.2d 776, 781 (Ind. Ct. App. 1976).

[61]370 N.E.2d 941 (Ind. Ct. App. 1977). Other aspects of this case are discussed at notes 28-36 & 45-48 *supra* and accompanying text; notes 173-78 *infra* and accompanying text.

[62]IND. R. TR. P. 16(A) provides in part: "In any action except criminal cases, the court may in its discretion and shall upon the motion of any party, direct the attorney for the parties to appear before it for a conference to consider . . . such other matters as may aid in the disposition of the action."

court to enter a pre-trial order where questions of law are raised at the pre-trial conference.[63] Otherwise, it is undoubtedly more difficult for the parties to present their cases at trial. State Farm, however, did not object to the failure of the court to enter a pre-trial order. If a pre-trial order has been entered, an objection is necessary to preserve the issue for appeal.[64] The appellate court held that an objection is also necessary to preserve the issue for appeal if a pre-trial order has not been entered.[65] Thus, State Farm could not raise objection to the failure of the trial court to enter a pre-trial order.

Even if State Farm could have raised the issue on appeal, however, there would have been no reversible error. Trial Rule 16(J) states: "The court shall make an order which recites . . . the agreements made by the parties as to any of the matters considered which limit the issues for trial . . . ."[66] State Farm admitted that no agreement was reached which limited the issues for trial. Hence, the error was harmless.[67]

2. Discovery.—In *State Highway Commission v. Jones*[68] the state requested production of documents, pursuant to Trial Rule 34,[69] which would have produced materials containing the opinions of experts who were hired by Jones. When the materials were not forthcoming, the state moved, under Trial Rule 37,[70] to compel discovery. The trial court denied the motion, and the state appealed from that ruling.

The court of appeals affirmed the ruling and held that until a request is made under Trial Rule 26(B)(3)(b)[71] no request under Trial

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[63]370 N.E.2d at 951.

[64]*Id.* (citing Hodgson v. Humphries, 454 F.2d 1279 (10th Cir. 1972)).

[65]370 N.E.2d at 951.

[66]IND. R. TR. P. 16(J).

[67]370 N.E.2d at 951 (citing Scott County School Dist. One v. Asher, 160 Ind. App. 299, 312 N.E.2d 131 (1974), *aff'd*, 263 Ind. 47, 324 N.E.2d 496 (1975); Burger Man Inc. v. Jordan Paper Prods., Inc., 352 N.E.2d 821 (Ind. App. 1976)).

[68]363 N.E.2d 1018 (Ind. Ct. App. 1977).

[69]IND. R. TR. P. 34 provides, in part, for the discovery of documents.

[70]IND. R. TR. P. 37 provides sanctions for failure to make discovery.

[71]IND. R. TR. P. 26(B)(3)(b) provides:

> As an alternative or in addition to obtaining discovery under subdivision (B)(3)(a) of this rule, a party by means of interrogatories may require any other party
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> (i) to identify each person whom the other party expects to call as an expert witness at trial, and
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> (ii) to state the subject-matter upon which the expert is expected to testify.
>
> Thereafter, any party may discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject-matter. Discovery of the expert's opinions and the grounds therefor is restricted to those previously given or those to be given on direct examination at trial.

Rule 34 will be considered.[72] The court stated that Trial Rule 26(B)(3)(a)[73] applies to experts who *will not* be called as witnesses at trial, and, in that situation, good cause must be shown.[74] Trial Rule 26(B)(3)(b) refers to an expert who *will* be called as a witness at trial. It does not require a showing of good cause, but it does require that interrogatories be the *only* means by which the identity of expert witnesses or the subject matter upon which they will testify can be obtained.[75]

Such an interpretation of Trial Rule 26(B)(3)(b) is necessary, the court said, because the subject matter of future discovery is narrowed, thereby limiting future discovery "to the facts and opinions that the expert witness will give . . . at trial."[76] The court of appeals held that, even though Jones' counsel voluntarily provided the state with the identity of the witnesses and the subject matter upon which they were to testify, Trial Rule 26(B)(3)(b) requires that this information be obtained *only* through interrogatories.[77] Thus, the state's failure to comply with Trial Rule 26(B)(3)(b) precluded the state from futher discovery of expert witnesses.

An extension of the problem just discussed was raised in *Costanzi v. Ryan.*[78] The Indiana Court of Appeals interpreted Trial Rule 26(B)(3)(b) to mean that, although a party can obtain the identity of expert witnesses and the subject matter on which they are expected to testify at trial by interrogatories, the interrogatories cannot also be used to obtain the facts and opinions of the expert witnesses.[79]

In this case, the party seeking discovery argued that he was merely combining the discovery permitted under Trial Rule 26(B)(3)(b) with that permitted under the other rules of discovery. The court rejected this view stating that the facts and opinions may be obtained by the other rules providing for discovery,[80] but not by interrogatories.[81]

In *Colman v. Heidenreich*[82] the Indiana Supreme Court considered the relationship between the attorney-client privilege and

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[72]363 N.E.2d at 1022.

[73]IND. R. TR. P. 26(B)(3)(a) provides for discovery from experts.

[74]363 N.E.2d at 1022.

[75]*Id.*

[76]*Id.*

[77]*Id.*

[78]370 N.E.2d 1333 (Ind. Ct. App. 1978).

[79]*Id.* at 1338. *See* 2 W. HARVEY, INDIANA PRACTICE 474 (1970).

[80]*See, e.g.*, IND. R. TR. P. 30 (Depositions Upon Oral Examination), 31 (Deposition of Witnesses Upon Written Questions), 34 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes).

[81]370 N.E.2d at 1338.

[82]No. 1978 S 221 (Ind. Oct. 13, 1978).

Trial Rule 26(C).[83] A male client told his attorney, Colman, that the client's female friend had driven a car involved in a hit-and-run accident; the female was alleged also to be a client of Colman. The man and woman were not married to one another, and their relationship was not a public one. A criminal and a civil suit were pending against Tabereaux for the injuries to Heidenreich in the accident. This information, held to have been unrelated to the legal problem for which the male client had sought advice,[84] was related by Colman to the Monroe County Prosecutor without identification of the clients. Subsequently, an attorney representing Tabereaux attempted to obtain the identify of Colman's clients. Colman then moved for a protective order under Trial Rule 26(C). The trial court's refusal to grant that order was reversed by the court of appeals. The trial court order would have required Colman, if asked to do so, to reveal the name of the male client, the full conversation between Colman and the male client, and the identity of the woman.

The supreme court found a confrontation between the attorney-client privilege and the "need and desire to get to the truth to render justice to those seeking it . . . ."[85] Under Indiana law, the attorney has a duty "[t]o maintain inviolate the confidence, and, at every peril to himself, to preserve the secrets of his client."[86] The court ruled that the attorney had the right not to reveal the male client's identity or the precise conversation with the male client since such revelations would disclose the secret of the clandestine relationship between the man and the woman.[87] However, the attorney had no right to refuse to reveal the woman's identity because there was no confidential relationship between her and Colman on the Heidenreich matter since she had not consulted Colman on it nor was the male client acting as her agent regarding it.[88]

3. Sanctions for Failure to Follow Discovery Rules.—The sanctions for failure to comply with the discovery rules can be severe. In *Finley v. Finley*[89] the court of appeals upheld a trial court order that the husband, in a dissolution of marriage action, pay for the audit of a corporation and pay an additional $50,000 in attorney's fees to his

[83]IND. R. TR. P. 26(C) provides that, when good cause is shown, a variety of measures can be taken by the court to protect a party from embarrassment and oppression.

[84]No. 1978 S 221, slip op. at 12.

[85]*Id.*, slip op. at 3.

[86]IND. CODE § 34-1-60-4 (1976).

[87]No. 1078 S 221, slip op. at 11.

[88]*Id.*, slip op. at 9. The author believes that the court should have protected the secrecy of the names of both the male and female clients, as the court of appeals had held. Colman v. Heidenreich, 366 N.E.2d 686 (Ind. Ct. App. 1977).

[89]367 N.E.2d 1126 (Ind. Ct. App. 1977). For another discussion of this case, see Garfield, *Domestic Relations, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 157, 187 (1978).

former wife's attorney. The additional attorney's fees were caused by the husband's failure to adequately respond to discovery.

The appellate court said that sanctions, pursuant to Trial Rule 37(B)(2)(c),[90] were not limited to expenses for the enforcement of the discovery order.[91] The Indiana Rules do not specifically permit the court to make orders "as are just."[92] Notwithstanding the absence of such express language in the Indiana Rules, the intent and purpose of the rules would best be served by permitting orders "as are just."[93] The inherent power of the court to promote a speedy adjudication of the issues is another source of judicial power which would support a finding that the trial court did not abuse its discretion in ordering the sanctions.[94]

Failure to comply with the discovery rules may result in dismissal of the action. In *Logal v. Cruse*[95] the Indiana Supreme Court upheld a trial court ruling which dismissed the action pursuant to Trial Rule 37(B)(4).[96] The plaintiff, his attorney, and his physician all failed to appear for depositions. The trial court dismissed the action when the plaintiff failed to pay $1,200 in costs of depositions to the defendants as ordered by the court.

The plaintiff argued that he had no notice of the deposition, but the supreme court stated that notice was given to the plaintiff's attorney as required by Trial Rule 5 and that dismissal of the action was not an abuse of the trial court's discretion.[97]

D. Trial and Judgment

1. Amendment to Conform to the Evidence.—If a motion to conform the pleadings to the evidence is improperly denied, the court may correct the error in the entry of judgment. The court of appeals, in *Urbanational Developers, Inc. v. Shamrock Engineering, Inc.*,[98] noted that the purpose of Trial Rule 15(B)[99] is to encourage

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[90]IND. R. TR. P. 37(B)(2) provides in part: "The court may allow expenses, including reasonable attorney's fees, incurred by a party, witness or person, against a party, witness or person, responsible for unexcused conduct that is: . . . in bad faith and abusively resisting or obstructing a deposition . . . ."

[91]367 N.E.2d at 1127.

[92]*Cf.* FED. R. CIV. P. 37(b) (providing for orders "as are just").

[93]367 N.E.2d at 1127 (citing 2 W. HARVEY, INDIANA PRACTICE 522-23 (1970)).

[94]367 N.E.2d at 1127.

[95]368 N.E.2d 235 (Ind. 1977), *cert. denied*, 98 S.Ct. 1523 (1978). Other aspects of this case are discussed in notes 223-26 *infra* and accompanying text.

[96]*Id.* at 238. IND. R. TR. P. 37(B) provides in part:

> To avoid abuse of discovery proceedings . . . (4) The court may enter total or partial judgment by default or dismissal with prejudice against a party who is responsible under subdivision (B)(2) of this rule if the court determines that the party's conduct has or threatens to delay or obstruct the rights of the opposing party that any other relief would be inadequate.

[97]368 N.E.2d at 238.

[98]372 N.E.2d 742 (Ind. Ct. App. 1978).

[99]IND. R. TR. P. 15(B) provides:

relief to the parties based upon the evidence presented at trial, even though the pleadings differ from the evidence presented.[100] In this case, evidence was admitted at trial without objection, but the trial court erred in denying a motion to conform the pleadings to the evidence pursuant to Trial Rule 15(B).[101]

The trial court, however, corrected the error by entering a judgment which conformed to the evidence, in effect "implicitly rescind[ing] the order without resulting in prejudice" to the opposing parties.[102]

2. Involuntary Dismissal.—In *Fielitz v. Allred*[103] the Indiana Court of Appeals held that the standard for involuntary dismissal under Trial Rule 41(B)[104] requires the court to "consider only the evidence most favorable to the nonmoving party in ruling upon such a motion. The trial court may not weigh the testimony of one witness against the conflicting testimony of another witness, nor may it weigh conflicting portions of the testimony of the same witness."[105] This case was incorrectly decided in this writer's opinion. The standard under Trial Rule 41(B), where trial is by the court and where the court may make findings of fact, should allow the trial court to weigh the evidence.[106] The standard which the court used is applicable under Trial Rule 50,[107] where trial is by jury. The standard

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When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

[100]372 N.E.2d at 751 (citing Ayr-Way Stores, Inc. v. Chitwood, 261 Ind. 86, 300 N.E.2d 335 (1973)).

[101]372 N.E.2d at 751. *See also* 2 W. HARVEY, INDIANA PRACTICE 122 (1970).

[102]372 N.E.2d at 752.

[103]364 N.E.2d 786 (Ind. Ct. App. 1977).

[104]IND. R. TR. P. 41(B) provides in part that a party may move for dismissal, where trial is by court, "on the ground that considering all the evidence and reasonable inferences therefrom" the allegations of the nonmoving party cannot be sustained.

[105]364 N.E.2d at 787 (quoting Building Syss., Inc. v. Rochester Metal Prod., Inc., 340 N.E.2d 791, 793 (Ind. Ct. App. 1976)). *See also* 3 W. HARVEY, INDIANA PRACTICE 212 (1970) (Civil Code Study Commission Comments).

[106]*See* 3 W. HARVEY, INDIANA PRACTICE 217 (1970) (author's comments).

[107]IND. R. TR. P. 50 provides for judgment on the evidence.

under Trial Rule 50 should have no application to a motion made under Trial Rule 41(B).

An interesting variation of the problem just discussed was presented in *Board of Aviation Commissioners v. Schafer.*[108] The plaintiff agreed with the trial court that the standard under Trial Rule 41(B) for involuntary dismissal is that the court must consider only the evidence and reasonable inferences most favorable to the nonmoving party.[109] The plaintiff, however, claimed that when special findings of fact are requested, as provided by Trial Rule 52(A) and Trial Rule 41(B), the court must weigh the evidence. The court of appeals rejected this argument, and stated: "[E]ven where a motion for special findings of fact has been made, the trial court must view the evidence in a light most favorable to the plaintiff or party with the burden of proof."[110] This case was incorrectly decided, in this writer's opinion, for the same reasons as *Fielitz.*

Trial Rule 41(A)(2) provides, in part: "[A]n action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."[111] In *City of Indianapolis v. Central Railroad,*[112] the court of appeals interpreted this language to mean that attorney's fees may not be awarded pursuant to Trial Rule 41(A)(2).[113] While noting that federal courts have awarded attorney's fees under Federal Rule of Civil Procedure 41(b), the court found no Indiana cases in which the court awarded attorney's fees under Trial Rule 41(A)(2).[114] The only Indiana cases which had interpreted this language in Trial Rule 41(B) were *State v. Holder*[115] and *State v. Rentchler,*[116] in which one judge specifically rejected the argument that "terms and conditions" could include an award of attorney's fees.[117] Consequently, the court of appeals denied an award of attorney's fees under Trial Rule 41.[118]

3. Judgment on the Evidence.—In *American Turners of South Bend v. Rodefer*[119] the court of appeals stated that, when a party

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[108]366 N.E.2d 195 (Ind. Ct. App. 1977).

[109]*Contra,* 3 W. HARVEY, INDIANA PRACTICE 217 (1970) (author's comments).

[110]366 N.E.2d at 197. *Compare Schafer with* the supreme court's opinion in State *ex rel.* Peters v. Bedwell, 371 N.E.2d 709 (Ind. 1973), *and* the discussion at notes 149-52 *infra* and accompanying text.

[111]IND. R. TR. P. 41(A)(2).

[112]369 N.E.2d 1109 (Ind. Ct. App. 1977).

[113]*Id.* at 1114.

[114]*Id. See also* Wilson v. Jolly, 7 F.R.D. 649 (D.C. Tex. 1948).

[115]260 Ind. 336, 295 N.E.2d 799 (1973).

[116]*Id.*

[117]*Id.* at 336, 348-49, 295 N.E.2d at 799, 801-02 (Prentice, J., concurring).

[118]369 N.E.2d at 1114.

[119]372 N.E.2d 516 (Ind. Ct. App. 1978).

moves for judgment on the evidence under Trial Rule 50(A),[120] the trial court must

> consider only the evidence and reasonable inferences most favorable to the nonmoving party. The motion may be granted only if there is no substantial evidence or reasonable inference to be drawn therefrom to support an essential element of the claim. If there is any evidence or reasonable inferences to be drawn from the evidence, or if reasonable men might differ, then judgment on the evidence is improper.[121]

In this case, Rodefer argued that, where both parties have moved for judgment on the evidence, the case is withdrawn from the jury. Thus, the court would be the trier of fact, and would have to weigh the evidence. The court disagreed with Rodefer and held that Trial Rule 50(A) was intended to supersede the law prior to Trial Rule 50 which was that a motion for a directed verdict by both parties waived the right to jury trial.[122]

4. Summary Judgment.—In *Randolph v. Wolff*[123] the plaintiff brought an action for breach of contract for the sale of certain land. The dispute centered around the interpretation of a document which described the boundaries of the land to be sold. In support of his motion for summary judgment, the defendant presented a survey which contained his interpretation of the document and another survey which purported to contain the plaintiff's interpretation of the document. The defendant then claimed that the plaintiff's interpretation would not be admissible due to the Statute of Frauds.

The Indiana Court of Appeals reversed the trial court's grant of the motion for summary judgment.[124] The appellate court held that the trial court may not speculate on what evidence the plaintiff will present at trial.[125] Trial Rule 56(C) states that summary judgment is

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[120]IND. R. TR. P. 50(A) provides in part:

> Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict.

[121]372 N.E.2d at 517 (citing Huff v. Travelers Indem. Co., 363 N.E.2d 985 (Ind. 1977). *See* Vernon Fire & Cas. Ins. Co. v. Sharp, 349 N.E.2d 173 (Ind. 1976); Lake Mortgage Co. v. Federal Nat'l Mortgage Ass'n, 159 Ind. App. 605, 308 N.E.2d 739 (1974), *transfer denied*, 262 Ind. 601, 321 N.E.2d 556 (1975); Harvey, *1977 Survey*, *supra* note 30, at 66.

[122]372 N.E.2d at 518 (citing 3 W. HARVEY, INDIANA PRACTICE 365 (1970)).

[123]374 N.E.2d 533 (Ind. Ct. App. 1978).

[124]*Id.* at 536.

[125]*Id.* at 535.

proper only if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[126] Since boundaries of land were in question, a material fact was in issue, making summary judgment improper. The plaintiff was entitled to an attempt to introduce whatever evidence he might have to support his claim.

A court may grant summary judgment in response to a defense raised in the pleadings under Trial Rule 12(B)(6),[127] in response to a motion under Trial Rule 12(B)(6), or in response to a motion for summary judgment under Trial Rule 56. In *Middelkamp v. Hanewich*,[128] the defendants, in their answer to the complaint, asserted the defense of failure to state a claim upon which relief can be granted. The trial court then granted summary judgment from which the plaintiffs appealed.

In affirming the trial court ruling, the court of appeals interpreted Trial Rule 12(B), which provides in part: "If, on a motion, asserting the defense number (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . ."[129] The court held that Trial Rule 12(B) does not distinguish between defenses raised pursuant to Trial Rule 12(B)(6) which are raised by motion, and those which are raised in a responsive pleading.[130] Consequently, where one asserts a defense under Trial Rule 12(B)(6) in a responsive pleading, it will be treated as a motion to dismiss.[131] If matters outside the pleadings are presented to and not excluded by the court, then the "motion to dismiss" will be treated as a motion for summary judgment.[132]

The defense of lack of jurisdiction, pursuant to Trial Rule 12(B)(1),[133] should not be asserted by a motion for summary judgment. In *Department of Revenue v. Mumma Brothers Drilling Co.*[134]

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[126]IND. R. TR. P. 56(C).

[127]IND. R. TR. P. 12(B)(6) is the defense of failure to state a claim upon which relief can be granted.

[128]364 N.E.2d 1024 (Ind. Ct. App. 1977).

[129]*Id.* at 1028 (quoting IND. R. TR. P. 12(B)).

[130]*Id.* IND. R. TR. P. 12(B) provides in part: "Every defense . . . shall be asserted in the responsive pleading . . . if one is required; except that at the option of the pleader, the following defenses may be made by motion; . . . (6) Failure to state a claim upon which relief can be granted . . . ."

[131]364 N.E.2d at 1028.

[132]*Id. Accord*, Alabama State Fed'n of Labor v. Kurn, 46 F. Supp. 385 (D. Ala. 1974).

[133]IND. R. TR. P. 12(B) provides in part that the defense of lack of jurisdiction of the subject matter may be made by a responsive pleading or by a motion.

[134]364 N.E.2d 167 (Ind. Ct. App. 1977).

the court of appeals held that, if the defense of lack of jurisdiction is raised by a motion for summary judgment, the court should merely treat it as a motion to dismiss under Trial Rule 12(B)(1).[135] Thus, if one alleges lack of jurisdiction in a motion for summary judgment, the *effect* will be the same as if he had made a motion to dismiss for lack of jurisdiction.

5. Default Judgment.—The court of appeals, in *Protective Insurance Co. v. Steuber*,[136] held that the notice requirement of Trial Rule 55(B)[137] does not apply to a defaulting party who has failed to appear in the action.[138] If the party against whom a default judgment is sought has appeared, however, written notice of the application for judgment must be given to the party at least three days before the hearing.[139]

If a default judgment is entered on the issue of a party's liability, the party may still be entitled to a jury trial on the issue of damages. In *Kirk v. Harris*[140] a default judgment was entered against the defendant, Harris, who subsequently appeared by counsel and demanded a jury trial on the issue of damages. Kirk appealed the trial court ruling which granted Harris' demand for a jury trial, even though Kirk had previously requested a jury trial.

The Indiana Court of Appeals noted that Trial Rule 55(B) provides, in part: "If . . . it is necessary to take an account or to determine the amount of damages . . . the court . . . shall accord a right of trial by jury to the parties when and as required."[141] Also, the defendant pointed out that, since the plaintiff had previously demanded a jury trial, Trial Rule 38(D) prevented the court from withdrawing the right to trial by jury without the permission of all parties.[142] Further, the court said that, under Trial Rule 39(A)(2), the trial court must grant a jury trial on any issue to which a party is entitled to a jury trial as of right, provided that the party has made a demand

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[135]364 N.E.2d at 170 (citing Marhoefer Packing Co. v. Ind. Dep't of State Revenue, 157 Ind. App. 505, 301 N.E.2d 209 (1973)).

[136]370 N.E.2d 406 (Ind. Ct. App. 1977). Other aspects of this case are discussed in notes 215-22 *infra* and accompanying text.

[137]IND. R. TR. P. 55(B) provides in part: "If the party against whom judgment by default is sought has appeared in the action, he . . . shall be served with written notice of the application for judgment at least three [3] days prior to the hearing on such application."

[138]370 N.E.2d at 410.

[139]*Id.* at 409 (citing Northside Cab Co. v. Penman, 156 Ind. App. 577, 297 N.E.2d 838 (1973); Hiatt v. Yergin, 152 Ind. App. 497, 284 N.E.2d 834 (1972)).

[140]364 N.E.2d 145 (Ind. Ct. App. 1977).

[141]*Id.* at 147 (quoting IND. R. TR. P. 55(B)).

[142]IND. R. TR. P. 38(D) provides in part: "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the other party or parties."

for a jury trial.[143] Consequently, the trial order which granted a jury trial was affirmed.[144]

6. Relief from Verdict.—If a trial court vacates a prior judgment pursuant to Trial Rule 59(E)(7), the court must state the reasons for its action. In *Reynolds v. Meehan*[145] the trial court vacated the judgment against one defendant, but ordered the judgment against two other defendants to remain in full force. Trial Rule 59(E)(7) provides, in part: "If corrective relief is granted, the court shall specify the general reasons therefor."[146] The court of appeals wrote that Trial Rule 59(E)(7) "affords the litigants a statement of why the court has acted and makes a record sufficient for the court to review on appeal."[147] To ensure that the action which the trial court took was proper, the court of appeals reversed and remanded the case to the trial court, with instructions for the trial court to comply with Trial Rule 59(E)(7).[148]

In *State ex rel. Peters v. Bedwell*[149] the Indiana Supreme Court discussed the standard for entry of judgment by the court pursuant to Trial Rule 50(A)[150] and Trial Rule 59(E)(7).[151] The court noted that the identical language in these rules, that the verdict is "clearly erroneous as contrary to . . . the evidence,"[152] is new legal language which must be interpreted consistently with the right to jury trial under the Indiana Constitution.[153] Thus, the jury may find against a party who has the burden of proof, even if that party has established a prima facie case. The court stated: "It is only where there is no reasonable dispute as to the facts, where the evidence for the party bearing the burden of proof is uncontradicted and unimpeached, that the trial court may enter judgment in favor of a party having the burden of proof."[154]

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[143]364 N.E.2d at 147. *Accord*, Bash v. Van Osdol, 75 Ind. 186 (1881); Briggs v. Sneghan, 45 Ind. 14 (1873).

[144]364 N.E.2d at 147.

[145]375 N.E.2d 1119 (Ind. Ct. App. 1978).

[146]IND. R. TR. P. 59(E)(7).

[147]375 N.E.2d at 1123.

[148]*Id.*

[149]371 N.E.2d 709 (Ind. 1978).

[150]*See* note 120 *supra.*

[151]IND. R. TR. P. 59(E)(7) provides in part:

> In reviewing the evidence, the court shall grant a new trial if it determines that the verdict of a non-advisory jury is against the weight of the evidence; and shall enter judgment, subject to the provisions herein, if the court determines that the verdict of a nonadvisory jury is clearly erroneous as contrary to or not supported by the evidence . . . .

[152]371 N.E.2d at 712.

[153]IND. CONST. art. 1, § 20.

[154]371 N.E.2d at 712 (citing Chesapeake & O. Ry. v. Martin, 283 U.S. 209 (1930); Federal Ins. Co. v. Summers, 403 F.2d 971 (1st Cir. 1968); Friedline v. State, 93 Ind. 366

In *Peters*, a jury had found in favor of the defendants in a medical malpractice action. The supreme court held that the trial court could not substitute a judgment in favor of the plaintiff, for the evidence was subject to reasonable dispute.[155]

7. Relief from Judgment.—In *Irmiger v. Irmiger*[156] the trial court denied a motion by the defendant to correct errors. Instead of appealing that ruling, the defendant moved under Trial Rule 60 for relief from judgment, alleging excusable neglect and surprise. Appeal was taken from the denial of the motion for relief from judgment. The court of appeals dismissed the appeal, stating that Trial Rule 59(A)(9)[157] is a "catch all" provision which includes the grounds of surprise and excusable neglect.[158] Further, *any* error which can be corrected under Trial Rule 60 may be asserted in a motion to correct errors.[159] Thus, since the defendant attempted to raise errors in a motion pursuant to Trial Rule 60 that could have been raised in a motion to correct errors, the motion for relief from judgment was properly denied.[160]

In *Sheraton Corp. of America v. Korte Paper Co.*[161] the trial court had entered judgment against Korte and no appeal was taken after denial of the motion to correct errors. Subsequently, in *Sheraton Corp. of America v. Kingsford Packing Co.*,[162] an unrelated case with allegedly identical facts, the Indiana Court of Appeals held the law to be contrary to the law applied by the trial court in *Korte*. Korte then sought to obtain relief from judgment pursuant to Trial Rule 60(B)(8),[163] claiming that the decision in *Kingsford* demonstrated that the trial court was in error. The court of appeals held that, indeed, the subsequent decision in *Kingsford* demonstrated that if Korte had appealed his case, he would have been successful.[164]

(1884); Gaff v. Greer, 88 Ind. 122 (1882); Fowler Utils. Co. v. Chaffin Coal Co., 43 Ind. App. 438, 87 N.E. 689 (1909); Stephens v. American Car & Foundry Co., 38 Ind. App. 414, 78 N.E. 335 (1906)).

[155]371 N.E.2d at 712.

[156]364 N.E.2d 778 (Ind. Ct. App. 1977).

[157]IND. R. TR. P. 59(A) provides: "The Court . . . shall enter an order for the correction of errors . . ., including . . . the following: . . . (9) For any reason allowed by these rules, statute or other law."

[158]364 N.E.2d at 780.

[159]*Id.*

[160]*Id.* (citing Warner v. Young America Volunteer Fire Dept., 326 N.E.2d 831 (Ind. Ct. App. 1975)).

[161]363 N.E.2d 1263 (Ind. Ct. App. 1977).

[162]319 N.E.2d 852 (Ind. Ct. App. 1974).

[163]IND. R. TR. P. 60(B)(8) provides in part that the court may grant relief from a final judgment, order, default or proceeding for "any . . . reason justifying relief from the operation of the judgment."

[164]363 N.E.2d at 1265. *See, e.g.*, Martin v. Ben Davis Conservancy Dist., 238 Ind. 502, 153 N.E.2d 125 (1958).

However, it is only where *additional facts* invoke "the court's equity power to do justice that a party under the auspices of TR 60 may seek relief *on equitable grounds* from a prior judgment which has become final . . . ."[165] Accordingly, the trial court abused its discretion in granting relief under Trial Rule 60.

In *State v. Martinsville Development Co.*,[166] the defendant moved under Trial Rule 60(B)(7)[167] for an award of additional damages, ten years after judgment was originally entered. The court of appeals pointed out that under Trial Rule 60(B)(7) the judgment must have *prospective application* for the rule to apply.[168] Since no Indiana case had interpreted this language, the court turned to the federal cases which had interpreted identical language in Federal Rule 60(b)(5). Most of the federal cases dealt with injunctions,[169] but the court stressed that relief pursuant to Trial Rule 60(B)(7) is not limited to relief from the effect of an injunction.[170] The court said that a judgment has prospective application under Trial Rule 60(B)(7)

> when a person's right to do or not to do some act is continuously affected by the operation of the judgment in the future; or, the judgment is specifically directed toward some event which is to take place in the future and does not simply serve to remedy *past* wrongs.[171]

The court found that money judgments do not have prospective application, and reversed the trial court judgment which had granted relief pursuant to Trial Rule 60(B)(7).[172]

E. Appeals

1. Instructions.—The court of appeals, in *State Farm Mutual Automobile Insurance Co. v. Shuman*[173] held that Trial Rule 51(C)[174]

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[165]363 N.E.2d at 1265.

[166]366 N.E.2d 681 (Ind. Ct. App. 1977).

[167]IND. R. TR. P. 60(B)(7) provides that the court may grant relief from a final judgment, order, default, or proceeding when "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application . . . ."

[168]366 N.E.2d at 684 (citing 7 J. MOORE, FEDERAL PRACTICE § 60.26[4] (2d ed. 1948); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2863 (1973)).

[169]*See, e.g.*, United States v. Swift & Co., 286 U.S. 106 (1932); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855); Coca-Cola Co. v. Standard Bottling Co., 138 F.2d 788 (10th Cir. 1943).

[170]366 N.E.2d at 684. *See* Equitable Life Assurance Soc'y of United States v. MacGill, 551 F.2d 978 (5th Cir. 1977) (declaratory judgment awarding attorney's fees modified pursuant to FED. R. CIV. P. 60(b)(5)-(6)).

[171]366 N.E.2d at 685.

[172]*Id.*

[173]370 N.E.2d 941 (Ind. Ct. App. 1977). Other aspects of this case are discussed in notes 28-36; 45-48, & 61-67 *supra* and accompanying text.

[174]IND. R. TR. P. 51(C) provides in part: "No party may claim as error the giving of

requires a party to object to an instruction which was given to the jury, but not to a requested instruction that was refused.

If a court commits a fundamental or plain error in giving an instruction, a party is not required to object to preserve the issue for appeal. The rationale is that fundamental error denies the injured party "fundamental due process."[175] In *United Farm Bureau Family Life Insurance Co. v. Fultz*[176] the appellate court held that fundamental error is not equivalent to prejudicial error.[177] Rather, "[f]undamental . . . error results only where a statement is made or an act is done which results in prejudicial error that goes to the very heart of a party's case and where that statement or act is wholly outside of the preventive or corrective powers of that party."[178] Thus, an instruction which shifted the burden of proof was not fundamental error because the error could have been corrected by a timely motion.

2. Record of Proceedings.—In *Dahlberg v. Ogle*[179] the judge's certificate stated that the transcript of the proceedings had been filed, but the transcript did not show a file stamp, the clerk's certificate did not state that the transcript had been filed, and the order book did not state that the transcript had been filed with the court. The Indiana Supreme Court held that, notwithstanding the requirements of Appellate Rule 7.2(A)(4),[180] the trial judge's certificate sufficiently evidenced the filing of the record.[181]

The court of appeals, in *Crown Aluminum Industries v. Wabash Co.*,[182] held that it was error for the trial judge to refuse a request pursuant to Appellate Rule 7.2(D)[183] for a transcript of the record.[184]

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an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

[175]Malo v. State, 361 N.E.2d 1201 (Ind. 1977).

[176]375 N.E.2d 601 (Ind. Ct. App. 1978).

[177]*Id.* at 610.

[178]*Id.* at 611.

[179]364 N.E.2d 1174 (Ind. 1977).

[180]IND. R. APP. P. 7.2(A)(4) provides:

> The transcript of the proceedings at the trial, including all papers, objections and other matters referred to above shall be presented to the judge who presided at the trial, who shall examine the same and if not true, correct the same without delay, and as finally settled by the court, shall sign the same, certifying to the same as being true and correct in said proceedings, and order the same filed and made a part of the record in the clerk's office.

[181]364 N.E.2d at 1175.

[182]369 N.E.2d 945 (Ind. Ct. App. 1977).

[183]IND. R. APP. P. 7.2(D) provides in part: "In all appeals from judgments determining the nomination or relation by the voters of any public officer, the original controverted ballots, papers, or other documents material to the determination of the nomination or election shall be made a part of the record on appeal . . . ."

[184]369 N.E.2d at 947.

Here, the appellant had failed to make a timely appeal after the denial of his motion to correct errors. Thus, even though the trial judge may believe that the appellant is not entitled to relief upon appeal, the trial court may not withhold the record.[185]

3. Briefs.—Attorneys must insure that their briefs meet the requirements in Appellate Rule 8.3(A)(7).[186] In *Hyatte v. Lopez*[187] the court of appeals held that an appellant's brief which neither cited authority nor argued in support of the contentions raised in the brief was not adequate for appeal.[188] Thus, the contentions raised in the brief without support were waived.

On the other hand, substantial compliance with Appellate Rule 8.3(A)(7) may be sufficient. In *Dahlberg* the supreme court held that, where the brief paraphrased the error assigned in the motion to correct errors and the opposing parties could respond without undue hardship or extraordinary expense, substantial compliance with Appellate Rule 8.3(A)(7) would suffice.[189] Hence, even though the brief did not point out verbatim objections to the instructions which were allegedly in error, the purpose of Appellate Rule 8.3(A)(7) had been met.

4. Interlocutory Appeals.—In *Indiana Bell Telephone Co. v. Friedland*[190] the trial court had certified an action as a class action pursuant to Trial Rule 23(A) and (B)(3). The court of appeals held that, on review of an interlocutory order certifying a class action, the appellate court can decide whether the trial court had subject matter jurisdiction to hear the case.[191] The court stated that lack of jurisdiction over the subject matter can be raised at any time before final decision, in the trial court or on appeal.[192] Also, under Trial Rule 23(B)(3), the court must determine whether the class action is "superior to other available methods for the fair and efficient adjudication of the controversy."[193] If the trial court does not have sub-

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[185] *Id.*

[186] IND. R. TR. P. 8.3(A)(7) provides in part:

> Each error assigned in the motion to correct errors that appellant intends to raise on appeal shall be set forth specifically and followed by the argument applicable thereto . . . . 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, and a clear showing of how the issues and contentions in support thereof related to the facts of the case under review.

[187] 366 N.E.2d 676 (Ind. Ct. App. 1977).

[188] *Id.* at 679.

[189] 364 N.E. 2d at 1175.

[190] 373 N.E.2d 344 (Ind. Ct. App. 1978).

[191] *Id.* at 346-47.

[192] *Id.* (citing Decatur REMC v. PSC, 150 Ind. App. 193, 197, 275 N.E.2d 857, 860 (1971)).

[193] 373 N.E.2d at 347 (quoting IND. R. TR. P. 23(B)(3)).

ject matter jurisdiction, then, certainly, the class action is not a "superior" method of adjudication of the controversy.[194] Thus, the appellate court reversed the class certification due to the lack of subject matter jurisdiction at the trial court level.[195]

The court of appeals, in *U.S. Aircraft Financing, Inc. v. Jankovich*,[196] determined that the granting of a motion to intervene is a nonappealable interlocutory order.[197] It had been decided, in *Weldon v. State*,[198] that an order denying intervention was appealable as a final order.[199] The court of appeals distinguished that case, however, by reasoning that a denial of intervention determines the outcome of a party's interest in the litigation, whereas an order granting intervention does not.[200] Thus, since an order granting intervention is not a final order, it is not appealable under Appellate Rule 4(B).[201] Further, Trial Rule 24(C) provides, in part: "The court's determination upon a motion to intervene may be challenged only by appeal from the final judgment or order in the cause."[202] Accordingly, the appellate court did not decide whether the intervention order was proper.

In *In re Newman*[203] the Indiana Court of Appeals interpreted Appellate Rule 4(B)(1)[204] to mean that an award of attorney fees is an appealable interlocutory order.[205] Also, the court held that the failure to take an interlocutory appeal would not preclude the availability of appeal after final judgment unless the trial court had entered final judgment under Trial Rule 54(B).[206] Interlocutory

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[194]373 N.E.2d at 347.

[195]*Id.* at 352.

[196]365 N.E.2d 783 (Ind. Ct. App. 1977).

[197]*Id.* at 785.

[198]258 Ind. 143, 279 N.E.2d 554 (1972).

[199]*Id.* at 145-46, 279 N.E.2d at 555-56.

[200]365 N.E.2d at 785.

[201]*Id.* at 785. IND. R. APP. P. 4(B) describes specific circumstances under which an interlocutory order may be appealed. Apparently, the court of appeals determined that the granting of a motion to intervene does not fall within any of the circumstances described in 4(B).

[202]IND. R. TR. P. 24(C).

[203]369 N.E.2d 427 (Ind. Ct. App. 1977).

[204]IND. R. APP. P. 4(B) provides in part: "[A]ppeal from interlocutory orders shall be taken to the Court of Appeals in the following cases:

(1) For the payment of money . . . ."

[205]369 N.E.2d at 432.

[206]*Id.* at 431. IND. R. TR. P. 54(B) provides in part:

> A judgment as to one or more but fewer than all of the claims or parties is final when the court in writing expressly determines that there is no just reason for delay, and in writing expressly directs entry of judgment, and an appeal may be taken upon this or other issues resolved by the judgment; but in other cases a judgment, decision or order as to less than all the claims and parties is not final.

orders which would no longer be in effect after final judgment, such as preliminary injunctions, however, would not be subject to review after final judgment. The court stated that it would be a waste of time to consider an order which no longer had any practical effect, such as a temporary restraining order.[207]

In *Costanzi v. Ryan*[208] the appellant failed, initially, to include an assignment of errors in the record for appeal as required by Appellate Rule 7.2(A)(1) and failed to file the record within thirty days of the ruling as required by Appellate Rule 3. The appellant, however, eventually placed an assignment of error and an amended table of contents in the record when the brief was filed. On appeal of the interlocutory order requiring the appellant to answer certain interrogatories, the court of appeals stated that the supreme court has inherent power to permit appeals after the time provided in the rules,[209] and that the court of appeals, as a court created by the Indiana Constitution,[210] also has this inherent power.[211] In addition, the appeals court said that the supreme court has granted the court of appeals a broad power to provide procedural steps for an appeal under Appellate Rule 4(B)(5).[212] Consequently, where the other party will not be prejudiced by an appeal under Appellate Rule 4(B)(5), the appellate court can permit the appeal, notwithstanding any procedural errors by the appellant.[213] The appellee's motion to dismiss the appeal was dismissed.[214] Thus, the court distinguished the procedural requirements mandated by the Appellate Rules where an interlocutory appeal is taken of right from those where the appeal is taken pursuant to Appellate Rule 4(B)(5).

5. Default Judgment on Appeal.—The Indiana Court of Appeals, in *Protective Insurance Co. v. Steuber*,[215] modified an earlier opinion in *Yerkes v. Washington Manufacturing Co.*[216] In *Yerkes* the court had said that the only way to appeal a default judgment was to file a motion under Trial Rule 60(B)[217] and to then appeal from the

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[207]369 N.E.2d at 432.

[208]368 N.E.2d 12 (Ind. Ct. App. 1977).

[209]*Id.* at 16 (citing State *ex rel.* Thomas v. Elkhart Cir. Ct., 228 Ind. 572, 94 N.E.2d 485, *cert. denied*, 340 U.S. 922 (1950)).

[210]IND. CONST. art. 7, § 5.

[211]368 N.E.2d at 16.

[212]*Id.*

[213]*Id.* at 17.

[214]*Id.* at 18.

[215]370 N.E.2d 406 (Ind. Ct. App. 1977). Other aspects of this case are discussed at notes 136-39 *supra* and accompanying text.

[216]326 N.E.2d 629 (Ind. Ct. App. 1975), *modified by* Protective Ins. Co. v. Steuber, 370 N.E.2d 406, 408-09.

[217]IND. R. TR. P. 60(B)(5) provides for relief from judgment, order, default, or proceeding.

trial court ruling on the 60(B) motion.[218] The first district court modified *Yerkes* to conform with the rules in the other districts of the court of appeals. The second[219] and the third districts[220] of the court of appeals had held that appeal of a default judgment could be taken under Trial Rule 59[221] where an error of law was alleged. Thus, *Steuber* modified *Yerkes* to the extent that *Yerkes* did not permit an appeal of a default judgment under Trial Rule 59 where an error of *law* was alleged.[222]

6. Appeal of Relief from Judgment.—In *Logal v. Cruse*[223] the Indiana Supreme Court adopted new procedures for disposition of a motion for relief from judgment while the judgment is on appeal.[224] The supreme court noted that the time limit for the assertion of a Trial Rule 60(B) motion is significantly longer under the Indiana rules than the federal rules, and, thus, sufficient grounds for a 60(B) motion during appeal will probably be less frequent under the

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[218]326 N.E.2d at 633.

[219]Kelly v. Bank of Reynolds, 358 N.E.2d 146 (Ind. Ct. App. 1976).

[220]*In re* Marriage of Robbins, 358 N.E.2d 153, 155 (Ind. Ct. App. 1976).

[221]IND. R. TR. P. 59 provides for a motion to correct errors.

[222]370 N.E.2d at 408-09.

[223]368 N.E.2d 235 (Ind. 1977), *cert. denied*, 98 S.Ct. 1523 (1978). Other aspects of this case are discussed in notes 95-97 *supra* and accompanying text.

[224]*Id.* at 237. The procedures adopted were:

> (1) The moving party files with the *appellate court* an application for leave to file his 60(B) motion. This application should be *verified* and should set forth the grounds relied upon in a *specific and nonconclusory manner.*
>
> (2) The appellate court will make a preliminary determination of the merits of the movant's 60(B) grounds. In so doing the appellate court will determine whether, accepting appellant's specific, non-conclusory factual allegations as true there is a substantial likelihood that the trial court would grant the relief sought. Inasmuch as an appellate court is not an appropriate tribunal for the resolution of factual issues, the opposing party will not be allowed to dispute the movant's factual allegations in the appellate court.
>
> (3) If the appellate court determines that the motion has sufficient merit, as described in the preceding paragraph, it will remand the entire case to the trial court for plenary consideration of the 60(B) grounds. Such remand order will terminate the appeal and the costs in the appellate court will be ordered taxed against the party procuring the remand. The decision to remand does not require the trial court to grant the motion. If the trial court denies the motion, the movant should file a motion to correct errors addressed to this denial, and appeal the denial. In this new appeal any of the issues raised in the original appeal may be incorporated, without being included in the second motion to correct errors.
>
> (4) If the trial court grants the motion, the opposing party may appeal that ruling under the same terms as described in paragraph (3). The original appeal shall be deemed moot.
>
> (5) If the appellate court denies the application for remand, that ruling may be assigned as grounds for rehearing and, where appropriate, transfer.

Id. (citations omitted).

Indiana Rules than the federal rules.[225] Hence, the supreme court adopted the procedures of a minority of the federal courts which minimize disruption of the appellate process when a 60(B) motion is made while the judgment is on appeal.[226]

7. Motion to Correct Errors.—In the important case of *P-M Gas & Wash Co. v. Smith*,[227] the Indiana Supreme Court approached a case which Justice Hunter called a "procedural nightmare."[228] Because of the confusion about the proper procedure at the trial and appellate court level, the court clarified the procedure to be followed in perfecting an appeal. The decision, the court said, was not dictum, but will control all future cases dealing with motion to correct errors.[229]

First, the court held that Trial Rule 59(D)[230] applies *only* where a motion to correct errors is based upon evidence outside the record.[231] Trial Rule 59(D) is, thus, limited strictly to that situation.

The court also held that cross-appeals are governed by Trial Rule 59(G)[232] which considers a party to be a cross-appellant even though the party has not filed a motion to correct errors.[233] If a party wishes to become a cross-appellant, he need only make that decision within sixty days after the entry of judgment as provided in Trial rule 59(C).[234] The ruling on the motion to correct errors would then be his "complaint on the cross-appeals."[235]

In addition, the court said that under Appellate Rule 4(A)[236] a

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[225]368 N.E.2d at 236-37.

[226]*Id.* at 236. *See* Weiss v. Hunna, 312 F.2d 711 (2d Cir. 1963), *cert. denied*, 374 U.S. 853 (1963).

[227]375 N.E.2d 592 (Ind. 1978).

[228]*Id.* at 593.

[229]*Id.* at 597-98.

[230]IND. R. TR. P. 59(D) provides in part: "When 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."

[231]375 N.E.2d at 596 (citing 4 R. TOWNSEND & W. HARVEY, INDIANA PRACTICE 131 (1971)).

[232]IND. R. TR. P. 59(G) provides in part:

> In all cases in which a motion to correct errors is the appropriate procedure preliminary to an appeal, such motion shall separately specify as grounds therefor each error relied upon however and whenever arising up to the time of filing such motion. Issues which could be raised upon a motion to correct errors may be considered upon appeal only when included in the motion to correct errors filed with the trial court.

[233]375 N.E.2d at 596.

[234]IND. R. TR. P. 59(C) provides: "A motion to correct errors shall be filed not later than sixty [60] days after the entry of judgment."

[235]375 N.E.2d at 596.

[236]IND. R. APP. P. 4(A) provides in part: "Appeals may be taken by either party from all final judgments . . . . A ruling or order by the trial court granting or denying a motion to correct errors shall be deemed a final judgment, and an appeal may be taken therefrom."

motion to correct errors is a final order, and that 4(A) is not inconsistent with Appellate Rule 2(A) or 7.2(A)(1).[237] Thus, *either* party could appeal the ruling on a motion to correct errors. The court pointed out that Trial Rule 59(C) and 59(G) might suggest otherwise, but that they will be construed consistently with Appellate Rule 4(A).[238] In so ruling, the Indiana Supreme Court overruled in whole or in part twelve opinions which held that a second motion to correct errors was required to appeal the ruling on a previous motion to correct errors.[239]

However, if a party wishes to raise an error which occurred at *trial*, or subsequently in a *verdict* or *judgment* (but not an error that was alleged in any motion to correct errors), then Trial Rule 59(C) would require the party to make a motion to correct errors.[240] In essence, a party would be required to make no more than one motion to correct errors. If a motion to correct errors is required of a party, it could only be when that party is asserting an error that was not raised in a motion to correct errors.

In *Unishops, Inc. v. May's Family Centers, Inc.*[241] the court of appeals interpreted Trial Rule 53.1(A). Trial Rule 53.1(A) provides that a copy of the motion to correct errors shall be personally served upon the judge. The court of appeals held that a copy of the motion to correct errors must be served on the judge to "invoke a disqualification of the judge pursuant to TR 53.1(A), [but] it is not necessary to perfect filing of the motion to correct errors."[242]

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[237]375 N.E.2d at 594 (citing Grove, *The Requirements of a Second Motion to Correct Errors as a Prerequisite to Appeal*, 10 IND. L. REV. 462 (1977)).

[238]375 N.E.2d at 594-95.

[239]*Id.* at 594 (overruling State v. Deprez, 260 Ind. 413, 296 N.E.2d 120, 300 N.E.2d 341 (1973); Campbell v. Mattingly, 344 N.E.2d 858 (Ind. Ct. App. 1976); Lake County Title Co. v. Root Enter., Inc., 339 N.E.2d 103 (Ind. Ct. App. 1975); Minnette v. Lloyd, 333 N.E.2d 791 (Ind. Ct. App. 1975); Miller v. Mansfield, 330 N.E.2d 113 (Ind. Ct. App. 1975); Hansbrough v. Indiana Revenue Bd., 326 N.E.2d 599 (Ind. Ct. App. 1975); Weber v. Penn-Harris-Madison School Corp., 317 N.E.2d 811 (Ind. Ct. App. 1974); Wyss v. Wyss, 160 Ind. App. 281, 311 N.E.2d 621 (1974); Koziol v. Lake County Planning Comm'n, 262 Ind. App. 343, 425 N.E.2d 374 (1974); Easley v. William, 161 Ind. App. 24, 314 N.E.2d 105 (1974); State v. Kushner, 160 Ind. App. 464, 312 N.E.2d 523 (1974); Davis v. Davis, 159 Ind. App. 290, 306 N.E.2d 377 (1974)).

[240]375 N.E.2d at 596.

[241]375 N.E.2d 1135 (Ind. Ct. App. 1978).

[242]*Id.* at 1137-38.